"An Opportunity for Effective Cross-Examination": Limits on the Confrontation Right of the Pro Se Defendant

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The rights of a defendant to confront his accusers and conduct his defense without the assistance of counsel are sacrosanct in the American judicial system. The rights of the defendant are even sometimes exalted at the expense of the rights of the public or of victims of crime. This Note examines the problem of a pro se defendant using his confrontation right to intimidate or harass his alleged victims testifying against him. It is well-established that the confrontation right is not unconditional. The problem comes in determining whether the courts can place limits on the confrontation right of a pro se defendant in order to preserve the integrity of the trial process. This Note advocates the appointment of standby counsel to supplant the pro se defendant's cross-examination of a witness or victim who may be unlawfully intimidated into testifying falsely if cross-examined personally by the defendant.

**INTRODUCTION**

The Sixth Amendment guarantees a criminal defendant two critical trial rights, among others: the right to represent himself and the right to confront his accusers. Neither right, however, is absolute. Even the confrontation right, a tradition carried down through the "ancient roots" of Anglo-American legal history, is subject to limitations when the interests of justice so require. This Note is concerned with the judicial system's interest in ensuring truthful and uncoerced testimony from its witnesses. Here, the author envisions a situation in which a criminal defendant—likely accused of rape, assault, kidnapping, or another violent and invasive crime against a surviving victim—elects to represent himself at trial so that he may terrorize the victim testifying against him. This could induce the victim to testify falsely or refuse to testify outright.

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1. U.S. Const. amend. VI.
3. Intimidation includes both inducing a witness to perjure himself and compelling a witness to refuse to take the stand.
Although the American criminal trial has been referred to as a "theater of perceptions," there is a very real and constant tension between honoring the defendant's rights and protecting the interests of the public. The Supreme Court has already recognized the susceptibility of certain kinds of witnesses by limiting the protections of the Confrontation Clause.\(^4\) Therefore, it is not unconstitutional for these restrictions, typically specific to cases involving child witnesses, to be placed on the self-represented defendant. The Supreme Court has written that the "right to cross-examination, protected by the Confrontation Clause, . . . is essentially a ‘functional’ right designed to promote reliability in the truth-finding functions of a criminal trial."\(^5\) The trial's truth-finding functions are seriously hindered when a criminal defendant improperly takes advantage of his right to represent himself in order to pressure his alleged victims into testifying untruthfully or refusing to take the stand.

Nonetheless, it is critical that the defendant's confrontation right be preserved, even in the face of intimidation tactics used by the defendant. The cross-examination of a witness, central to preserving the confrontation right, however, should occur without unlawful intimidation of the witness. A procedure employing standby counsel to conduct the defendant's cross-examination, rather than the defendant himself, preserves open courts and testimony, "the most critical characteristic of the common law trial" in the Anglo-American tradition.\(^7\)

This Note submits that a judge should limit a defendant conducting his own cross-examination of an accusing witness, and could do so without running afoul of the Confrontation Clause or the defendant's right to proceed pro se. Part I of this Note examines the right to represent oneself at trial and the subsequent limitations to that right imposed by the courts. Part II traces the history of the confrontation right and its dual purpose of ensuring thorough cross-examination and a true determination of guilt or


\(^5\) *See* Maryland v. Craig, 497 U.S. 836 (1990). Craig is still good law and has not been expressly overruled by the Supreme Court. It should be noted, though, that it may be limited by the constraints of Crawford v. Washington, 541 U.S. 36 (2004).

\(^6\) *Kentucky v. Stincer*, 482 U.S. 730, 737 (1987). This does not mean, however, that a court need engage in a case-by-case determination of whether each cross-examination it oversees will assist in "truth-determination." Rather, when considering how the confrontation right may be limited, a court should consider the truth-seeking function of a trial and, in particular, cross-examination.

innocence at trial. Part II further describes the justifications courts have employed when limiting the confrontation right, namely with regard to child witnesses and forfeiture. Finally, Part III analyzes the requirements of the Sixth Amendment and concludes that a judge would not violate the Constitution by appointing standby counsel to perform a cross-examination that might otherwise intimidate an accusing witness into committing perjury.

I. THE RIGHT TO SELF-REPRESENTATION

A. The Importance of the Right to Self-Representation

The constitutional right to self-representation was established in Faretta v. California and derived from the text of the Sixth Amendment. In fact, "the right of self-representation finds support in the structure of the Sixth Amendment, as well as in the English and colonial jurisprudence from which the Amendment emerged." The Sixth Amendment also affords all criminal defendants certain trial rights: "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence." The Sixth Amendment has been read, therefore, as "constitutionaliz[ing] the right in an adversary criminal trial to make a defense as we know it. The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense." Since the Sixth Amendment grants the defendant the assistance of counsel, the Court has noted that "[t]he right to defend is given directly to the accused [as opposed to his counsel]; for it is he who suffers the consequences if the defense fails." The defendant who

8. The author uses this term interchangeably with the "right to represent oneself" and the "right to proceed pro se." Each term refers to the Sixth Amendment right of a criminal accused to forego the assistance of counsel.
9. 422 U.S. 806 (1975). Anthony Faretta was a criminal defendant who requested to represent himself at his trial for grand theft. Id. at 807. He was found guilty by a jury after the judge refused Faretta's request and assigned a public defender to represent him. Id. at 809-11. The Supreme Court overturned Faretta's conviction and held that a criminal defendant has the constitutional right to refuse state-provided counsel and represent himself, as long as he does so intelligently and knowingly. Id. at 835-36.
10. Id. at 818.
11. U.S. CONST. amend. VI.
12. Faretta, 422 U.S. at 818-19 (internal citations omitted).
13. Id. at 819-20.
waives counsel may be at a disadvantage compared to the defendant who retains the right, but “[t]he primary notion of waiver protected by Faretta is the right to err. The primary benefit waived is a competent spokesman.”

Although the pro se defendant may be said to have a fool for a client, the Sixth Amendment jurisprudence underscores the importance of a defendant being ultimately responsible for directing his own defense in spite of the potential pitfalls. As discussed below, though, the right to self-representation is hardly absolute.

B. Constitutional Limitations Upon the Right to Self-Representation

The right to represent oneself in criminal proceedings has been curbed for a host of reasons, ranging from the procedural to the substantive. Among the former, courts may refuse requests to proceed pro se that are made in an untimely manner. Even when the defendant is himself an attorney, a court may be justified in denying him the right to represent himself where granting the defendant’s motion could potentially result in undue delay and jury confusion.

A judge can also limit self-representation due to a defendant’s actions during his own trial. Where the defendant’s courtroom behavior is obstructive, he may not be allowed to represent himself. Once the trial has gotten underway, any motions for self-representation are considered disruptive and are left to the trial

15. See, e.g., Faretta, 422 U.S. at 835 (“[A pro se defendant] relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel. For this reason ... [he] should be made aware of the dangers and disadvantages of self-representation.”)
16. See infra Part II.B for a discussion of how the confrontation right is similarly subject to some constitutional limitations.
17. See, e.g., United States v. Edouard, 253 F. App’x 905 (11th Cir. 2007) (holding that defendant was not entitled to proceed pro se where he first alerted the court he wished to proceed pro se after the government began its closing statement); Wood v. Quarterman, 491 F.3d 196, 202 (5th Cir. 2007) (trial court need not permit defendant to proceed pro se where defendant’s motion was untimely); United States v. Bennett, 539 F.2d 45, 49–51 (10th Cir. 1976); Sapienza v. Vincent, 534 F.2d 1007, 1010 (2d Cir. 1976).
19. This is similar to the way in which courts have deemed a defendant to have “forfeited” his confrontation right. Forfeiture of the confrontation right is discussed infra Part II.B.2.
judge’s discretion. A judge can even rescind his order allowing the defendant to represent himself where the defendant is unruly and unresponsive to the judge’s rulings. It follows that “disruptive activities” would, and should, include using the right to represent oneself in order to intimidate a witness. Such action would surely be subject to substantive limitation, even of the pro se right.

Courts have recognized some acts by pro se defendants as akin to traditional forfeiture of constitutional rights. Whenever a defendant’s deliberate dilatory or obstructive behavior threatens to subvert the core concept of a trial or compromise the court’s ability to conduct a fair trial, the defendant’s self-representation rights are subject to forfeiture. The court’s ability to conduct a fair trial is obviously compromised where a defendant chooses to cross-examine a witness himself in order to intimidate her into perjuring herself or refusing to testify altogether. Although such forfeiture would have to result from a case-by-case analysis, it is clear that the self-representation right can be limited, especially where the defendant’s conduct as his own counsel can undermine the justice system’s truth-seeking goals. The analysis does not end there; judges still must be able to ensure that a trial is not interrupted by a defendant acting inappropriately in pursuit of his own defense.

Once the right to counsel is properly waived, trial courts are permitted to appoint standby counsel to assist the otherwise pro se defendant. It is the defendant’s prerogative to determine how his case will be fashioned, but “[w]hen an accused waives the right to assistance of counsel, he must also, of course, relinquish many of

21. People v. Dent, 65 P.3d 1286, 1290-91 (Cal. 2003); see also Allen, 397 U.S. at 350 (“To allow the disruptive activities of a defendant . . . to prevent his trial is to allow him to profit from his own wrong.”)

22. United States v. Brock, 159 F.3d 1077, 1080 (7th Cir. 1998) (judge’s decision to terminate defendant’s self-representation was not an abuse of discretion where the defendant made requests that were denied by the district judge and defendant expressed his dissatisfaction with the judge’s rulings and explanations by refusing to proceed, even after several contempt citations); see also Clark v. Perez, 510 F.3d 382, 395 (2d Cir. 2008) (recognizing that a court may deny the defendant the right to represent himself where the defendant deliberately engages in obstructionist misconduct or is unwilling to abide by courtroom protocol); Wood, 491 F.3d at 202 (the trial court may terminate the defendant’s right to self-representation where defendant fails to abide by courtroom rules and/or engages in obstructionist conduct); United States v. Edelmann, 458 F.3d 791, 808-09 (8th Cir. 2006) (the defendant may not operate pro se in order to delay, disrupt, distort the system, or manipulate the trial process); United States v. Frazier-EI, 204 F.3d 553, 560 (4th Cir. 2000) (“The right [to represent oneself] does not exist . . . to be used as a tactic for delay, for disruption, for distortion of the system, or for manipulation of the trial process.”) (internal citations omitted).

23. See infra note 29.

24. See supra note 21; see also infra notes 28-29.

the collateral benefits traditionally associated with representation."26 Trial judges often decide to appoint standby counsel "when they fear that a pro se defendant's disruptive conduct may force termination of his self-representation."27

In Mayberry v. Pennsylvania, the Supreme Court held that due process required criminal contempt proceedings be before a neutral judge, someone "other than the one reviled by the contemnor."28 The Court noted that the trial judge does have some latitude, however, in dealing with outbursts from pro se defendants: "Laymen, foolishly trying to defend themselves, may understandably create awkward and embarrassing scenes."29 Chief Justice Burger concurred to emphasize why it aids the efficiency of courtroom procedure to sometimes limit the self-representation right by appointing standby counsel: "Certain aspects of the problem of maintaining in courtrooms the indispensable atmosphere of quiet orderliness are crucial. Without order and quiet, the adversary process must fail."30

Although the proposal at hand is aimed at defendants who act to intimidate the witnesses testifying against them, rather than just creating awkward scenes, the logic in support of the conclusion is the same. Since a judge can overrule the defendant's objections and appoint standby counsel, "a categorical bar on participation by standby counsel in the presence of the jury is unnecessary."31 Faretta gives the defendant the right to proceed pro se; however, the "core of the Faretta right" is the defendant's ability to shape the case he presents.32 Participation by counsel to steer the defendant through basic procedures of trial is permissible even in the unlikely event that it may undermine the pro se defendant's appearance of control over his own defense. The defendant can still have substantial input into the case he presents to the jury even where his standby counsel conducts a cross-examination. Where there are disagreements between the counsel and the defendant, the disagreements should be resolved in favor of the defendant wherever the matter is one that would normally be left to counsel's discretion.33

28. Mayberry, 400 U.S. at 466 (citation omitted).
29. Id. at 462.
30. Id. at 466 (Burger, J., concurring).
32. Id. at 178.
33. Id. at 179.
Most pro se defendants are appointed standby counsel, regardless of whether they have engaged in any acts of intimidation. These representatives can effectively protect the defendant's confrontation right and cross-examine any witnesses unavailable to the defendant. The standby counsel usually advises the defendant on strategy and the law, with ultimate decisions on the case left to the defendant. Here, where the witness may perjure herself when confronted by her alleged attacker, the standby counsel would temporarily take the reins of the case for the purposes of cross-examination. Even though *Faretta* does not require hybrid representation, this Note submits that the defendant can guide his standby counsel in the subjects upon which to cross-examine the witness while enjoying the rights the Sixth Amendment protects.

### III. THE CONFRONTATION RIGHT

#### A. The Importance of the Confrontation Right

The concerns addressed by the Confrontation Clause have a long history in the Anglo-American legal tradition. The New Testament of the Bible quotes a man delivering a prisoner to the Romans as saying: "It is not the manner of the Romans to deliver any man to die, before that he which is accused have the accusers face to face, and have license to answer for himself concerning the crime laid against him." The trial of Sir Walter Raleigh in the sixteenth century also underscores the importance of confrontation. During Raleigh’s trial, he objected to the admission of another’s

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34. Hybrid representation is where standby counsel and the pro se defendant act as true co-counsel and teammates. See Wayne R. LaFave & Jerold H. Israel, Criminal Procedure 556 (2d ed. 1992) (defining hybrid representation as when “defendant and counsel act, in effect, as co-counsel, with each speaking for the defense during different phases of the trial”); Lockhart v. State, 671 N.E.2d 893, 898 (Ind. App. 1996) (defining hybrid representation as “the right to proceed pro se and to be represented by counsel at the time”). There is no federal constitutional right to hybrid representation, but hybrid representation can be available to the defendant at the district court’s discretion. See, e.g., United States v. Einfeldt, 138 F.3d 373, 378 (8th Cir. 1998); United States v. Tutino, 883 F.2d 1125, 1141 (2d Cir. 1989); United States v. LaChance, 817 F.2d 1491, 1498 (11th Cir. 1987); United States v. Mosely, 810 F.2d 93, 97-98 (6th Cir. 1987); United States v. Halbert, 640 F.2d 1000, 1009 (9th Cir. 1981).

35. The author uses this term interchangeably with the “right to confront one’s accuser.” These terms all refer to the Sixth Amendment right, under the Confrontation Clause, to confront adverse witnesses at trial.


37. Acts 25:16 (King James); see also Greene v. McElroy, 360 U.S. 474, 496 n.25 (1959).
confession where he had no opportunity to cross-examine the witness producing the confession: "But it is strange to see how you press me still with [this witness], and yet will not produce him . . . . [L]et him be produced, and if he will yet accuse me or avow this Confession of his, it shall convict me and ease you of further proof."38 This time period "brings to mind pictures of trial by affidavit, condemnation by faceless witnesses, and proof of guilt by mere recital of charges"39—a situation the Confrontation Clause was designed to prevent.

The Supreme Court "has been zealous to protect these rights [of confrontation and cross-examination] from erosion."40 In the last few years, the Court has gone through a massive transformation in ensuring that the right to confront one's accusers remains protected and retains its constitutional significance.41 The Court's holdings in Crawford v. Washington and in Davis v. Washington represent the renewed emphasis on the confrontation right and its centrality to the trial process through a more originalist reading of the Confrontation Clause.42 The right to confrontation need not necessarily guarantee the defendant a chance for verbal combat with his accuser; however, the right at least ensures that the defendant will not be tried by a secret court with unknown witnesses.43

38. Trial of Sir Walter Raleigh, 1 CRIMINAL TRIALS 400, 427 (David Jardine ed., Charles Knight 1832), quoted in Nesson & Benkler, supra note 4, at 149.
40. Greene, 360 U.S. at 497.
41. In Crawford v. Washington, 541 U.S. 36 (2004), the Supreme Court rejected the previous standard for admission of hearsay evidence ("adequate indicia of reliability") in favor of a more originalist reading of the Sixth Amendment Confrontation Clause. Crawford held that "[w]here testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability [of the witness] and a prior opportunity for cross-examination." Id. at 68. While the Crawford Court did not expressly define which statements would be considered "testimonial," in 2006 the Court found that hearsay statements made during the course of a 911 emergency call were not "testimonial" and therefore were admissible against the defendant. See Davis v. Washington, 547 U.S. 813, 826-29 (2006).
42. Crawford, 541 U.S. at 50 ("It was these practices [of ex parte examinations] that the Crown deployed in notorious treason cases like Raleigh's; that the Marian statutes invited; that English law's assertion of a right to confrontation was meant to prohibit; and that the founding-era rhetoric decried. The Sixth Amendment must be interpreted with this focus in mind."); id. at 59 ("Our cases have thus remained faithful to the Framers' understanding: Testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine."); id. at 61 ("Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of 'reliability.'"); Davis, 547 U.S. at 824 (explaining the definition of "testimony" in the context of "early American case[s] invoking the Confrontation Clause common-law right to confrontation").
43. See Friedman & McCormack, supra note 7, at 1203; see also Kirby v. United States, 174 U.S. 47, 55 (1899) ("But a fact which can be primarily established only by witnesses
Crawford and Davis each represent the Court's movement back toward the originalist understanding of the confrontation right. To understand the significance of these recent decisions, we must also understand the historically-recognized interests guarded by the confrontation right. As traditionally understood, the Sixth Amendment protects the defendant's "interest in securing full and fair opportunity to test the evidence." Crawford emphasized that "the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of ex parte examinations as evidence against the accused." The courts may be reluctant to impede upon the confrontation right as it is considered "[o]ne of the fundamental guarantees of life and liberty."

Despite such broad proclamations of the right's importance, scholars and jurists alike have recognized that the exact "meaning of the Confrontation Clause is an enigma." Despite the Court's renewed emphasis on the Confrontation Right's importance in this decade, several questions about the extent of the confrontation right remain unanswered. While the confrontation right is essential to a fair trial, it "is by no means free from ambiguity, for the words could be read as simply insuring to the accused the right to be present when a witness is giving damaging testimony." Although these theories on the meaning of the Confrontation Clause were written pre-Crawford, the fact remains that while recent Supreme Court jurisprudence has adopted an originalist reading of
cannot be proved against an accused . . . except by witnesses who confront him at the trial, upon whom he can look while being tried, whom he is entitled to cross-examine, and whose testimony he may impeach in every mode authorized by the established rules governing the trial or conduct of criminal cases."; Kentucky v. Stincer, 482 U.S. 730, 748 (1987) (Marshall, J., dissenting) ("The text [of the Sixth Amendment] plainly envisions that witnesses against the accused shall, as a rule, testify in his presence.").

44. Nesson & Benkler, supra note 4, at 163.
45. Crawford, 541 U.S. at 50.
46. Kirby, 174 U.S. at 55.
47. Richard D. Friedman, Confrontation and the Definition of Chutzpa, 31 ISR. L. REV. 506, 509 (1997); see infra notes 49, 77.
48. These questions may include: What statements are testimonial? Does the Confrontation Clause forbid the use of state lab reports? As of this writing, the Supreme Court is currently examining how the Confrontation Clause impacts the use of state lab reports in criminal trials. Massachusetts v. Melendez-Diaz, 80 N.E.2d 676 (Mass. App. Ct. 2007), cert. granted, 128 S.Ct. 1647 (U.S. Mar. 17, 2008) (No. 07-591).
49. James W. Jennings, Note, Preserving the Right to Confrontation—A New Approach to Hearsay Evidence in Criminal Trials, 113 U. PA. L. REV. 741, 742 (1965); see also Snyder v. Massachusetts, 291 U.S. 97, 107 (1934) (discussing "the privilege of presence" at one's own trial); Dowdell v. United States, 221 U.S. 325, 330 (1911) (comparing a Philippine statute to the American guarantee of witnesses "who give their testimony in [the accused's] presence"); Mattox v. United States, 156 U.S. 257, 242 (1895) (emphasizing that adverse witnesses should testify in defendant's and jury's presence).
the text of the Sixth Amendment, the Court has not yet fully explored the contours of the confrontation right. There are certain conditions, though, that most accept as requisite under the Confrontation Clause. These include the defendant's presence during all witness testimony being given in open court, subject to cross-examination.\(^{50}\)

However ambiguous the boundaries of the Confrontation Clause may be, enforcement of the right involves at least two main concerns: cross-examination and accurate fact-finding. The confrontation right as a whole is composed of several factors, including a prohibition against secret hearings and nameless witnesses.\(^{51}\) These protections are most often enforced through vigorous cross-examination. This cross-examination is the "functional purpose" of the Confrontation Clause.\(^{52}\) In fact, "a major reason underlying the constitutional confrontation rule is to give a defendant charged with a crime an opportunity to cross-examine the witnesses against him."\(^{53}\) Wigmore's classic treatise on evidence notes that "[t]he main and essential purpose of confrontation is to secure the opportunity of cross-examination."\(^{54}\) Modern scholars of this subject agree that thorough cross-examination is the crux of the confrontation right.\(^{55}\) Further, Justice Scalia has noted that the confrontation right "has long been read as securing an adequate opportunity to cross-examine adverse witnesses."\(^{56}\)

The text of the Sixth Amendment does not specifically address the requirements of sufficient cross-examination. Cross-examination that meets the constitutional requirements of confrontation, however, typically consists of a witness "placed on the stand, under oath, and respond[ing] willingly to questions."\(^{57}\) The Court has expanded on this bare bones definition, recognizing


\(^{54}\) 5 Wigmore, Evidence § 1395. (Chadbourn rev. 1974)

\(^{55}\) Kenneth H. Hanson, Waiver of Constitutional Right of Confrontation, 39 J. Crim. L. & Criminology 55 (1948) ("If the opportunity for cross-examination has once been given, the right of confrontation has been satisfied"); Nesson & Benkler, supra note 4, at 173 ("In the absence of cross-examination, our confrontation is incomplete . . ."); Jennings, supra note 47, at 745 ("If any federal standard can profitably be distilled . . ., that standard would be that the right to confrontation gives a criminal defendant the opportunity to face and effectively cross-examine the witnesses who are testifying against him.").

\(^{56}\) United States v. Owens, 484 U.S. 554, 558 (1988). But see Maryland v. Craig, 497 U.S. 836, 861 (1990) (Scalia, J., dissenting) ("[N]one of the many policy interests from time to time pursued by statutory law could overcome a defendant's right to face his or her accusers in court.").

\(^{57}\) Owens, 484 U.S. at 561.
that the cross-examination of adverse witnesses is crucial to maintaining the fundamental fairness of the criminal justice system.\textsuperscript{58} The Court has further stated that "a primary interest secured by [the Confrontation Clause] is the right of cross-examination."\textsuperscript{59} While cross-examination is not the only requirement of the confrontation right, it is the practice through which the right is most consistently enforced and protected. Judge-issued orders and rules of procedure that infringe upon the defendant's ability to cross-examine the witnesses against him are most suspect and vulnerable to challenge.

While cross-examination is the means through which the confrontation right is most often satisfied, there may be an additional underlying purpose in guaranteeing thorough cross-examination: accurate fact-finding in the trial process.\textsuperscript{60} This truth-seeking purpose is often linked to the cross-examination requirement.\textsuperscript{61} In fact, cross-examination is considered "the principal means by which the believability of a witness and the truth of his testimony are tested."\textsuperscript{62} Without cross-examination of the state's witnesses, the jury hears only the state's theory of the facts, a practice that would be unfairly prejudicial to the defendant. Therefore, "all testimonial evidence must be produced through live witnesses who are subject to cross-examination as to the truth of their testimony."\textsuperscript{63} Without this cross-examination, the facts presented to the jury would only be testimony in favor of the prosecution, sealed with the stamp of government approval. The confrontation right aims to avoid such a one-sided trial: "[T]he mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials."\textsuperscript{64}

This is not to say that the Confrontation Clause requires indicia of reliability in the testimony against the defendant, which was a requirement that \textit{Crawford v. Washington} expressly overruled.\textsuperscript{65}

\textsuperscript{58} Faretta v. California, 422 U.S. 806, 818 (1975) ("The rights to notice, confrontation, and compulsory process, when taken together, guarantee that a criminal charge may be answered in a manner now considered fundamental to the fair administration of American justice—through the calling and interrogation of favorable witnesses, the cross-examination of adverse witnesses, and the orderly introduction of evidence.").
\textsuperscript{60} Bourjaily v. United States, 483 U.S. 171, 182 (1987).
\textsuperscript{61} \textit{Stincer}, 482 U.S. at 736 ("[C]ross-examination is the "greatest legal engine ever invented for the discovery of truth."" (citing California v. Green, 399 U.S. 149, 158 (1970) (quoting 5 J. Wigmore, Evidence § 1367))).
\textsuperscript{63} Griswold, \textit{supra} note 39, at 717.
\textsuperscript{64} Dutton v. Evans, 400 U.S. 74, 89 (1970).
\textsuperscript{65} 541 U.S. at 68–69, overruling Ohio v. Roberts, 448 U.S. 56 (1980).
However, the Confrontation Clause does require truth-seeking by means of effective cross-examination, since this can have a "significant effect on the integrity of the fact-finding process." While Crawford rejects the idea of limiting the confrontation right in the face of reliable testimony, it still recognizes the importance of the confrontation right in eliciting a factually complete record at trial:

[The Confrontation Clause] commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined.67

This Note sets forth a proposal that maintains the dual requirements of the confrontation right: cross-examination and developing a thorough record of facts at trial.68

B. Constitutional Limitations Upon the Confrontation Right

Although the right to confront one's accusers is fundamental, it is not absolute. Courts have limited the scope of the defendant's protections under the Confrontation Clause. The confrontation right is considered a trial right,69 so practically, "[f]ace-to-face confrontation is not always possible or necessary."70

The Sixth Amendment proscribes the "denial of significant diminution" of the confrontation right, but "may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process."71

A court typically cannot exclude a defendant from his own trial because his mere presence intimidates a testifying witness or victim. It should still be noted that there are some restrictions on cross-examination, untouched by Crawford, which "reflect a belief that the proposed cross-examination will impede the search for

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66. Berger v. California, 393 U.S. 314, 315 (1969) (internal citations omitted); see also Kentucky v. Stincer, 482 U.S. 730, 736 (1987) ("The opportunity for cross-examination, protected by the Confrontation Clause, is critical for ensuring the integrity of the fact-finding process.").
68. See infra Part III for a discussion of how a judge could limit the pro se and confrontation rights but still preserve the essence of the Sixth Amendment protections.
70. Nesson & Benkler, supra note 4, at 169.
The primary reasons for limiting the confrontation right can be distilled into two categories: (1) the susceptibility of the testifying witness (typically a child or other vulnerable person) and (2) the defendant forfeiting the right by his own conduct.

1. Child Victims and Other Susceptible Witnesses

Limitations on the confrontation right sometimes involve child victims or witnesses. As discussed herein, courts have expressed the concern that such vulnerable witnesses may testify untruthfully or not testify at all if the defendant enjoys the full protections of the Confrontation Clause. Several courts have upheld practices that would likely violate a literal reading of the Confrontation Clause, including permitting the child to testify via close-circuit television and allowing a child witness to testify in the courtroom but outside of the defendant's line of sight. These decisions hearken back to the Supreme Court's edict that "[t]he right to cross-examination, protected by the Confrontation Clause, thus is essentially a 'functional' right designed to promote reliability in the truth-finding functions of a criminal trial." The substantial weight of legal authority dictates, then, that a court could infringe upon the confrontation right in order to ensure unperjured testimony from a sensitive victim.


73. This Note's proposal reflects a combination of these two established justifications for limiting the confrontation right: where the defendant acts to intimidate a vulnerable witness, he forfoirs his pro se right and limits his confrontation right.

74. See, e.g., Maryland v. Craig, 497 U.S. 836, 851-52 (1990); Danner v. Motley, 448 F.3d 372, 378-80 (6th Cir. 2006) (holding that the trial court was entitled to rely on state's interest in eliciting truthful testimony from a 15-year-old victim allowed to testify via closed circuit television); United States v. Giordano, 172 F. App'x 340, 343 (2d Cir. 2006) (holding expert testimony not required in order for the district court to find that a child victim could not testify in person due to fear); Fuster-Escalona v. Fla. Dept. of Corr., 170 F. App'x 627, 629 (11th Cir. 2006) (allowing four children to testify via two-way closed circuit television at defendant's trial for sexual battery where the witnesses could see the defendant on a monitor in judge's chambers and witnesses were contemporaneously cross-examined by defense attorney); Marx v. State, 987 S.W.2d 577, 580-81 (Tex. Crim. App. 1999) (affirming the allowance of child victims to testify via two-way closed circuit television where district court explicitly found said procedure would protect victims from further trauma).

75. See, e.g., United States v. Etimani, 328 F.3d 493, 500-01 (9th Cir. 2003) (placement behind victim of television monitor showing defendant, rather than in her direct field of vision as she testified, did not violate Confrontation Clause); Lucas v. McBride, 505 F.Supp.2d 329, 353 (N.D. W. Va. 2007) (defendant's confrontation rights were not violated where a child victim was positioned so that she did not have to look directly at defendant); Smith v. State, 8 S.W.3d 534, 537 (Ark. 2000).

The limitations on a defendant’s strict constitutional right to confront his accusers are most often justified by the court’s desire to ensure truthful and unencumbered testimony. For example, there may be psychological reasons that a vulnerable witness would lie on the stand when directly confronted by the defendant. The amicus brief submitted by the American Psychological Association in support of the result ultimately reached in *Maryland v. Craig* said just that: “Requiring child witnesses to undergo face-to-face confrontation, therefore, may in some cases actually disserve the truth-seeking rationale that underlies the Confrontation Clause.” Justice O’Connor mirrored this language in her *Craig* opinion, which allowed a child witness to testify by means of closed-circuit television: “Indeed, where face-to-face confrontation causes significant emotional distress in a child witness, there is evidence that such confrontation would in fact disserve the Confrontation Clause’s truth seeking goal.” In *Craig*, the thought was that the defendant’s presence before a susceptible child witness was intimidating and impeded the child’s ability to testify truthfully.

It should be noted that witness vulnerability is not a blank check to allow excessive limitations on the confrontation right. There must be some form of confrontation. Although removing the witness through closed-circuit television may be allowable under certain circumstances, some state courts have held that the use of one-way glass during an adult victim’s testimony violated the defendant’s Sixth Amendment rights. However, using one-way glass with an adult victim can be unconstitutional not because the witness was removed from the defendant’s line of sight, but because of a due process problem. The trial court should not allow the use of one-way glass without holding an evidentiary hearing on whether, and to what degree, the witness was intimidated by the defendant. By holding such a hearing or investigation pre-trial, any due process concerns regarding the limits on the defendant’s Sixth Amendment rights are relieved.

Although *Craig* and its ilk have been criticized by some authors as imposing unconstitutional limitations upon the Sixth Amendment, the important (and still lawful) point is that there may be some essence of fact-finding lost when a vulnerable victim is faced with his attacker. This is especially so when the defendant’s affirma-

78. *Craig*, 497 U.S. at 857.
79. See, e.g., People v. Murphy, 132 Cal. Rptr. 2d 688 (Cal. App. 2003).
80. *Id.* at 694.
tive act—that is, conducting the cross-examination—causes the witness to be so intimidated as to be unable to testify. The solution proposed here avoids Craig's pitfalls in that the confrontation right here is still nearly entirely preserved; the only limitation comes in the way the courts protect a vulnerable victim or witness from being intimidated into perjury by his attacker. The defendant's standby counsel can still ensure that the testimony favorable to the defendant's case is elicited on cross-examination. The strengths of the confrontation right are upheld at only the expense of the right to conduct one's own defense. This is discussed further in the next section.

When a criminal case arises involving a child witness to a sensitive or violent crime, the court often conducts an in camera examination of the witness or a hearing to determine whether her ability to testify truthfully (or to testify at all) would be negatively affected by the defendant's presence. Usually, there must be a case-specific finding that a child witness would suffer greater than de minimis trauma with more than a simple reluctance to testify stemming not from the general stresses of the courtroom but from the involvement of the defendant.

In many states, once a prosecutor proves by a preponderance of the evidence that a child witness would be unlawfully intimidated by the defendant's presence, the court may limit the defendant's confrontation right. Typically, though, courts have been quite

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81. See Friedman, supra note 50, at 247 n.20. This involves the concept of forfeiture, discussed infra Part II.B.2.

82. See VA. CODE ANN. § 18.2-67.9 (2003) (requiring an attorney to apply for an order, pre-trial, to determine whether a child witness testifying by closed-circuit television would aid in the search for truth and serve the interests of justice). But see United States v. Turning Bear, 357 F.3d 730, 736-37 (8th Cir. 2004) (use of closed-circuit television violated confrontation right where child's fear was from a combination of factors, and not just the defendant).

83. Lomholt v. Iowa, 327 F.3d 748, 752 (8th Cir. 2003) (citing Craig, 497 U.S. at 855-56 (1990)).

84. The constitutional rule regarding treatment of child witnesses, of course, is a national standard to which states may choose to adhere. E.g., FLA. STAT. § 92.53(1) (stating that after a finding that there is a substantial likelihood that a victim or witness under the age of 16 would suffer "at least moderate emotional or mental harm due to the presence of the defendant," the witness is unavailable and may testify via videotape); NEB. REV. STAT. § 29-1926(1)(a) (2008) ("Upon request of the prosecuting or defense attorney and upon a showing of compelling need, the court shall order the taking of a videotape deposition of a child victim of or child witness to any offense punishable as a felony."); VA. CODE ANN. § 18.2-67.9 (2003) (allowing a child to testify by closed-circuit television if the trial judge finds that the child is unavailable because of: (1) the child's persistent refusal to testify despite judicial requests to do so; (2) the child's substantial inability to communicate about the offense; and/or (3) the substantial likelihood, based upon expert opinion testimony, that the child will suffer severe emotional trauma from so testifying).
friendly to the cause of the defendants in their treatment of the confrontation right.

2. Forfeiture

While courts have protected vulnerable witnesses by restricting the defendant's confrontation right in appropriate circumstances, courts have also limited the confrontation right where the defendant has acted inappropriately. This restriction, known as the doctrine of forfeiture, occurs when the defendant has intimidated, harmed, or somehow prevented a witness from giving testimony. Affirmative misconduct by the defendant leads to him "forfeiting" otherwise-guaranteed rights. Here, the defendant may have forfeited his right to proceed pro se and to conduct his own cross-examination where his aggressive tactics or purpose in appearing pro se results in a witness too intimidated to testify truthfully or at all.85

The doctrine of forfeiture ensures that the confrontation right will not be substantially affected in the absence of some "bad act" on the part of the defendant.86 Indeed, "[l]ike almost any right . . . the confrontation right should be considered subject to forfeiture by misconduct. If wrongdoing of the accused accounts for the unavailability of the witness, then the accused cannot complain that his confrontation right renders improper use of a statement made by the witness."87 In order to infringe upon a criminal defendant's confrontation right under the present proposal, there must be more than just a nervous witness, there must be evidence of coercion. An examination of the courts' treatment of the doctrine of forfeiture illuminates the proper use of this doctrine against some pro se defendants.

Justice Cardozo noted the impact of the forfeiture doctrine on the defendant's trial rights in Snyder v. Massachusetts when he wrote that: "No doubt the privilege [of confronting witnesses] may be lost by consent or at times even by misconduct."88 The Supreme

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85. The defendant's mere presence is not likely sufficient to warrant forfeiture or limitation of his confrontation right. See supra Part III.B.
86. I propose that a pro se defendant's right to conduct his own case not be limited unless there is both a vulnerable witness and coercive action (or perceived coercive action) from the defendant.
87. Friedman, supra note 50, at 248 (citation omitted).
Court has accepted this as recently as *Crawford v. Washington* and *Davis v. Washington*, and it has been echoed by many of the lower appellate courts. In *Illinois v. Allen*, the Supreme Court allowed the removal of a defendant from the courtroom during witness testimony when the defendant refused to remain silent:

> [W]e explicitly hold today that a defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom.

*Allen* shows the Court's belief that the defendant's behavior during trial can result in his confrontation right being limited by the judge, especially where the defendant is disruptive to court proceedings. Although *Allen* dealt with a boisterous and disruptive defendant, the same logic used by the Court could be readily applied to the matter at hand:

But our courts, palladiums of liberty as they are, cannot be treated disrespectfully with impunity. Nor can the accused be permitted by his disruptive conduct indefinitely to avoid being tried on the charges brought against him. It would degrade our country and our judicial system to permit our courts to be bullied, insulted, and humiliated and their

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89. 541 U.S. 36, 62 (2004) ("For example, the rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds; it does not purport to be an alternative means of determining reliability.").

90. 547 U.S. 813, 833 (2006) ("But when defendants seek to undermine the judicial process by procuring or coercing silence from witnesses and victims, the Sixth Amendment does not require courts to acquiesce. While defendants have no duty to assist the State in proving their guilt, they do have the duty to refrain from acting in ways that destroy the integrity of the criminal-trial system ... [O]ne who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation.").

91. See, e.g., United States v. Cherry, 217 F.3d 811, 820 (10th Cir. 2000) (a criminal defendant may have waived his confrontation rights and hearsay objections if a preponderance of the evidence shows that the defendant directly made or conspired to make the witness unavailable or if the wrongful procurement was in furtherance of an ongoing conspiracy); United States v. Emery, 186 F.3d 921, 926–27 (8th Cir. 1999) (defendant in a prosecution for killing a federal informant forfeited hearsay and confrontation objections to admission of statements by victim by wrongfully procuring victim's absence); United States v. Dhinsa, 245 F.3d 685, 651–52 (2d Cir. 2001) (right of confrontation and hearsay objection waived where the defendant has wrongfully procured the witnesses' silence through threats, actual violence or murder).

orderly progress thwarted and obstructed by defendants brought before them charged with crimes.\textsuperscript{93}

The Court would not tolerate the disrespect to the judicial system inherent in the behavior of any pro se defendant who uses his position to intimidate adverse witnesses.

Even though "one of the defendant's primary advantages of being present at the trial, his ability to communicate with his counsel, is greatly reduced when the defendant is in a condition of total physical restraint," the Allen Court would still permit such a restriction when the defendant's obstructive actions warranted it.\textsuperscript{94} Trial judges have great latitude under Allen to decide how to restrain the defendant, even allowing such restrictive measures as bind-and-gagging the defendant, contempt citations, and removal from the courtroom.\textsuperscript{95} Lower courts have echoed this principle: "Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates."\textsuperscript{96} Justice Brennan even wrote separately in Allen to emphasize the judicial disdain for allowing a defendant to profit from his own wrongs in the courtroom: "The Constitution would protect none of us if it prevented the courts from acting to preserve the very processes that the Constitution itself prescribes."\textsuperscript{97}

The Supreme Court most recently considered the forfeiture doctrine in its 2007-2008 term. In Giles v. California, the Court held that a criminal defendant only forfeits his confrontation right where he intended the result of his actions to prevent an adverse witness from testifying against him.\textsuperscript{98} The Court recognized the old English roots of the forfeiture exception to the confrontation rule, where at common law, a court could "permit[] the introduction of statements of a witness who was 'detained' or 'kept away' by the 'means or procurement' of the defendant."\textsuperscript{99} Relying on this exception as it existed at English common law, the Court found that forfeiture is only available where the defendant procured the ab-
sence of the accusing witness on purpose, or with the intent to prevent the witness from testifying. The Court did not illuminate how the lower courts should determine the defendant's intent in procuring the witness's absence. It is unclear how the Giles decision will play out in practice.

In the case of our pro se defendant, Giles may not make a significant impact. Regardless of what standard lower courts adopt in order to determine whether a criminal defendant intended to prevent a witness from taking the stand, our pro se defendant might not have his right to represent himself limited if he had no intent to intimidate a witness. It is clear that the courts would require intent on the part of the defendant for forfeiture of the confrontation right, but it is unknown whether courts would require intent to limit the pro se right. While the difference in the application of the pro se and confrontation rights is subtle, it is unclear how the courts would handle this issue.

Further, Giles deals largely with situations where a criminal defendant kills the person who may testify against him. Giles, therefore, is not applicable to this Note's focus, because in a murder case, a defendant could not use cross-examination to intimidate or terrorize a (deceased) victim.

The forfeiture principle can also be found in the Federal Rules of Evidence and Criminal Procedure. Federal Rule of Criminal Procedure 43(c)(1)(C) states that a defendant forfeits "the right to be present [at his trial or sentencing] under the following circumstances: (c) when the court warns the defendant that it will remove the defendant from the courtroom for disruptive behavior, but the defendant persists in conduct that justifies removal from the courtroom." Similarly, Rule 804 of the Federal Rules of Evidence makes hearsay admissible if it is "[a] statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness." Rule 804 most likely applies even when the witness is also the victim: "Nothing in the language of Rule 804(b)(6) suggests that it is rendered inapplicable if the declarant is the victim of the crime." These rules reflect the theory underlying the forfeiture doctrine, namely, that the defendant should neither profit from his wrongs nor be able to complain about the loss of certain rights when it is his own behavior that has resulted in that loss.

100. Fed. R. Crim. P. 43(c)(1)(C), quoted in Allen, 397 U.S. at 343 n.2.
102. Friedman, supra note 50, at 252 n.36.
103. See Friedman, supra note 47, at 506.
Where the defendant’s decision to act as his own counsel results in a witness’s intimidation, he may have forfeited his rights to proceed pro se and to personally confront adverse witnesses.

It is well-established that the confrontation right in particular is one that can be forfeited by the defendant’s wrongful conduct: "The authorities are practically uniform on the proposition that this right of confrontation is a personal privilege which the accused can waive. The waiver may be either by express consent . . . or by conduct inconsistent with a purpose to insist on it." The Supreme Court adopted this theory in Davis: "[O]ne who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation." 104

III. THE REFORM PROPOSAL

A. Judges Should Appoint Stand-By Counsel to Cross-Examine a Susceptible Alleged Victim of a Pro Se Defendant

Because the Supreme Court has already limited the scope of the confrontation and pro se rights in certain instances, a trial judge faced with the problem of a witness intimidated into silence or perjury by an overzealous pro se defendant should similarly limit these rights. The theory in this Note is that when a defendant acts pro se to effect such harm to the witness, the trial court may constitutionally limit the defendant’s right to conduct his own representation and to confront his accusers. In such an event, standby counsel should conduct the examination.

I propose a remedy for the adult witness who may be intimidated by the defendant’s cross-examination that is similar to that adopted by judges post-Craig for child witnesses. Pre-trial, a judge could interview a vulnerable witness in camera to determine

104. Recent Important Decisions, Criminal Law: Waiver of Confrontation, 19 Mich. L. Rev. 432, 439 (1921) (citations omitted). However, it should be noted that forfeiture is not really a waiver of the confrontation or any other constitutional right, although some use the terms "waiver" and "forfeiture" interchangeably. For the purposes of this Note, I will refer to this concept exclusively as "forfeiture." For more on this distinction, see Friedman, supra note 47, at 506 n.2 ("Some courts speak of the defendant as having waived the confrontation right, but this is inaccurate: It is not necessarily so that an accused who has acted in the ways described here has knowingly, intelligently, and deliberately relinquished the right."). See also id. (forfeiture cannot be waiver, as it is hardly done knowingly and intelligently); Wayne R. LaFave & Jerold H. Israel, Criminal Procedure 546 (2d ed. 1992) ("Although commonly described as involving waivers, cases in which defendants have been forced to proceed pro se because they failed to obtain counsel prior to trial are more appropriately characterized as forfeiture cases.").

whether clear and convincing evidence indicates that the witness might perjure herself or refuse to testify under the cross-examination of the defendant. Such a finding would allow the judge to appoint standby counsel to perform the cross-examination of the vulnerable witness. Although this situation would most likely arise when dealing with witnesses to or victims of violent crimes, courts could evaluate the witnesses on a case-by-case basis.

Courts would probably disfavor a low-threshold standard for the removal of defendant as arbiter of his own case. Therefore, I propose that once the state has shown by clear and convincing evidence, pre-trial, that the defendant's cross-examination of a witness would leave that witness so shaken that she would likely commit perjury or refuse to testify, then a court could command the defendant relinquish his pro se right and allow standby counsel to examine the sensitive witness. As in the child witness cases, here there need not be any specific bad intent on the part of the defendant to intimidate the witness. The judge would look at both the impact of the defendant's appearance as his own counsel on the witness's ability to testify truthfully as well as whether the witness's feelings of intimidation were reasonable grounds for limiting the defendant's rights.

While this proposal involves a pre-trial motion regarding a witness's susceptibility, the presiding trial judge still has authority to insist upon a certain level of decorum at trial. Even if the prosecutor fails to make a pre-trial showing that a defendant would unlawfully intimidate a witness, the judge could interrupt the defendant's pro se cross-examination if the defendant were behaving improperly.

Procedurally, the trial judge could instruct the jury that the reason for the substitution of standby counsel on cross-examination is immaterial. Just as the judge would instruct that anything the pro se defendant says as his own counsel is not evidence, the judge could similarly tell the jury about the role of standby counsel. "The assumption that jurors are able to follow a trial judge's instructions fully applies when rights guaranteed by the Confrontation Clause are at issue." The issue is moot once the judge has given adequate instructions to the jury.

106. Although it should be noted that if it could be established that the defendant were acting as his own counsel for the very purpose of intimidating the witnesses against him, then he clearly would be subject to censure, as witness intimidation is against the law.

107. See infra Part I.B for a discussion of appropriate limitations on the pro se right passed down during trial.

This Note’s thesis is only valid, however, if a trial judge could lawfully limit a defendant’s right to proceed pro se in a way that also lawfully limits his right to a face-to-face confrontation with the witnesses against him. The issue may be framed thusly: while this proposal restricts the pro se right, do such restrictions exceed the constitutional limits of the Confrontation Clause?

B. Limiting the Right to Self-Representation Does Not Unconstitutionally Violate the Confrontation Right

Using standby counsel to cross-examine an intimidated/susceptible victim or witness is consistent with Sixth Amendment jurisprudence. Specifically, this proposal safeguards the confrontation right’s core values while still fulfilling its truth-seeking goals. Moreover, the confrontation right is preserved because the defendant still has the opportunity to hear the evidence and participate in his defense, even though he himself is not the conducting cross-examination. Finally, the proposal is consistent with the theory of forfeiture under the Sixth Amendment.

1. Truth and Integrity in the Trial Process

Preventing a pro se defendant from personally cross-examining sensitive witnesses against him is consistent with Sixth Amendment jurisprudence that emphasizes truth-seeking and integrity in the trial process. Any limits upon the defendant’s direction of his own case should be related to the susceptibility of the witness or the sensitive nature of the offense. Practically speaking, the witness testifying would likely have to be the victim of an invasive or violent crime, or witness to the same. There must be clear and convincing evidence that being cross-examined directly by the defendant, instead of by his standby counsel, would likely result in the witness being intimidated into either refusing to testify or testifying falsely. Restricting the defendant’s cross-examination is related to the general concern that a pro se defendant should not circumvent the “truth-seeking” or “fact-finding” processes. In general, “trials are attempts to determine the truth from an aggregation of evidence, some of which may be very unreliable.”109 This proposal recognizes that while standby counsel and the defendant may act to exclude inadmissible evidence, the truth is better sought

from witnesses who are not bullied into perjuring themselves or refusing to testify due to direct contact with the defendant.

Trial judges typically have a great deal of discretion when limiting a defendant's confrontation right. Unless the limits on the confrontation and self-representation rights rise to the level of a constitutional violation, the court can typically use its judgment to protect witnesses and "the decorum and respect inherent in the concept of courts and judicial proceedings." The Supreme Court held that in order to physically restrain the defendant and undermine his appearance before the jury, the trial court must determine that such restraints are justified by a state interest specific to a particular trial. Accordingly, if the trial judge finds specifically that the state's interest in protecting witnesses from coercion is legitimate and directly related to the defendant's appearance as his own counsel, the judge would not violate the Sixth Amendment in allowing the jury to see standby counsel execute the cross-examination.

Though courts may be loath to balance the rights of the adverse witness against the rights of the defendant, here the state interest is quite substantial: preserving the integrity of the trial process and encouraging witnesses to be truthful and candid. Even when the court is swayed in favor of these all-important state interests, the defendant does not lose the core protections of the Sixth Amendment. The fact remains that courts permit limits on both Sixth Amendment rights discussed here: a defendant can be limited in proceeding pro se and can be limited in his confrontation right. Neither right is absolute.

2. The Opportunity for Confrontation is Preserved

The limitations proposed here would remove neither the defendant from his trial nor the witness from the target of her testimony. Because the confrontation right emphasizes the importance of the "presence" of the defendant to hear the evidence presented against him, and because, in practice, the confrontation right is typically enforced through the defendant's counsel, the defendant's confrontation right would not be unlawfully infringed should standby counsel be appointed to save witnesses from intimidation.

111. Deck v. Missouri, 544 U.S. 622, 635 (2005) (finding a due process violation where defendant was shackled at trial without requisite adequate justification).
113. See supra Part II.B.
Even face-to-face confrontation of non-coerced witnesses is preserved by this proposal.114

Lower courts have previously held that a defendant can be excluded from sidebar conferences with the defense counsel and prosecutors without being deprived of his right to be present at trial.115 It follows, then, that his rights are preserved when he is present to observe cross-examination, even if he is not conducting the cross-examination himself. The solution proposed would not even go as far as to remove the defendant from a sidebar conference; here, it would just change the person who does the actual confronting in preserving the confrontation right.

Changing the person who does the confronting is a familiar and constitutionally permissible concept that is used in the cross-examination of child victims.116 Courts and scholars have noted that "[t]he particular need for using protective devices with child witnesses stems from the fact that child victims are inherently different from adult victims."117 The use of protective devices in criminal trials for witnesses and victims, however, should not be limited to child witnesses and child victims. An adult victim of a crime of a sensitive, invasive, or violent nature may be just as psychologically compromised as a child witness. Regardless of the victim's or witness's age, the desire to elicit truthful—and comprehensively cross-examined—testimony remains. Accordingly, the limitation proposed by this Note—allowing a defendant to exercise his confrontation right against vulnerable adult witnesses through his standby counsel instead of through pro se representation—does not run afoul of the Constitution. Standby counsel, usually an attorney appointed by the trial judge to aid the pro se defendant in matters of procedure and law, effectively preserves the defendant's opportunity for effective cross-examination.

There is nothing to suggest, then, that the court could not limit the right of self-representation in order to preserve both the fact-finding process at trial and the confrontation right. If one considers "the text of the Confrontation Clause and of the whole of the Sixth Amendment seriously, then, it appears that the Clause sets forth a simple categorical rule that an accused has a right—subject

114. Coy v. Iowa, 487 U.S. 1012, 1016 (1988) ("We have never doubted, therefore, that the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact.") (citation omitted).
116. See supra Part II.B.1.
to waiver or forfeiture—to confront the witnesses against him, whoever they may be. Just as a defendant who enjoys his Sixth Amendment right to counsel and directs his counsel to cross-examine adverse witnesses has exercised his confrontation right, so too would a pro se defendant whose standby counsel conducts the cross-examination of an impressionable witness.

In short, as long as the defendant is physically present at his trial and has counsel zealously representing his interests, the confrontation right is protected. Consequently, the confrontation right may not be implicated at all by appointing standby counsel to conduct cross-examination. That said, courts are becoming more aware of the serious implications of the confrontation right, and a judge would probably consider Sixth Amendment confrontation issues should a scenario like the one proposed here arise.

3. Consistent with the Forfeiture Doctrine

The proposal is also supported by the principles underlying the theory of forfeiture. When the accused uses tactics to intimidate a witness from testifying as a result of his self-representation in court, he has effectively forfeited both the right to proceed pro se in this context and to personally confront the witnesses against him: "If the inability of the witness to testify under these procedures is attributable to wrongdoing by the accused, then the accused may be deemed to have forfeited the confrontation right."  

Wrongful conduct that would cause a criminal defendant to forfeit his personal confrontation right "obviously includes the use of force and threats, but it has also been held to include persuasion and control by a defendant . . . and a defendant's direction to a witness to exercise the fifth amendment privilege." This Note is more concerned with the defendant improperly using his pro se right in order to tacitly or directly intimidate the witnesses against him from testifying truthfully. Once a judge finds pre-trial that either the defendant is using the pro se right purposely to intimidate witnesses, or that the great weight of the evidence suggests that the

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118. Friedman & McCormack, supra note 7, at 1231.
119. See supra Part II.B. It is widely accepted that the guarantees of the confrontation right can be restricted in the face of forfeiture by the defendant.
120. Friedman & McCormack, supra note 7, at 1241.
witness would not be able to testify truthfully under cross-examination from the defendant, standby counsel should then be employed for that specific cross-examination. If there was not evidence pre-trial to prove the defendant's tactics, but a judge finds during trial that the defendant is behaving inappropriately, he would be justified in limiting the defendant's rights.122

Even though "[a] judicial finding of forfeiture results in the admission at trial of out-of-court statements that would otherwise be excluded pursuant to the Confrontation Clause,"123 under the current proposal, the defendant does not forfeit his right to exclude inadmissible statements. His standby counsel can still employ any tactics permissible under the rules of evidence or criminal procedure to cross-examine adverse witnesses and exclude evidence. What the defendant "forfeits," rather, is his right to proceed pro se and to use his confrontation right to improperly intimidate a witness. Essentially, the confrontation right here is still preserved: inadmissible testimony is still excluded and witnesses are still required to testify in open court subject to cross-examination. The defendant's standby counsel can ensure that crucial evidence is properly admitted or excluded. If the witness will be more likely, under a standard of clear and convincing evidence, to give truthful testimony in the absence of any direct intimidation from the defendant (who may, in some instances, be her alleged attacker), the trial court just aids its general truth-seeking goal by enabling a witness to testify under the strict cross-examination of standby counsel without the unlawful intimidation by the defendant.

CONCLUSION

The Confrontation Clause aims to protect cross-examination and to encourage complete and accurate fact-finding at trial. These dual interests are served when an accused defendant is precluded from directly cross-examining and bullying the alleged victim of his crime on the stand. As the Sixth Amendment rights to confrontation and self-representation are not absolute, a trial judge could encourage the truthful testimony of a victim or witness by appointing standby counsel to conduct certain cross-examinations without violating the defendant's rights. It is imperative that the confrontation right for the defendant be preserved. If the defendant has forfeited his right

122. For more on this, see discussion supra Part I.B. This Note's proposal is far less severe than the restrictions the Court permitted in Allen.
123. Tuerkheimer, supra note 113, at 744.
to self-representation, he still is entitled to the right to have his attorney thoroughly cross-examine his accusers. In order to achieve the truth-seeking goals of our criminal justice system, however, a court may lawfully regulate the Sixth Amendment rights of a pro se defendant.

It is true that "the confrontation clause ordinarily disdains limitations upon cross-examination and upon face-to-face confrontation." While limits upon the confrontation right are typically scorned, requiring standby counsel to conduct certain cross-examinations is unlike other limits on the confrontation right. With the use of standby counsel, witness statements are always subject to a rigorous cross-examination. The only limit is on which party conducts the actual cross-examination. Justice Scalia, the architect of the modern Confrontation Clause revolution on the Supreme Court, has noted that "the Confrontation Clause does not guarantee reliable evidence; it guarantees specific trial procedures that were thought to assure reliable evidence." Here, the specific trial procedure, cross-examination, is left intact.

When the nexus of the self-representation and confrontation rights results in a defendant directly cross-examining his alleged victims, this can be tantamount to witness intimidation or coercion. While this Note does not advocate a per se rule that would prohibit defendants from ever directly cross-examining victims or witnesses of violent crime, it does recognize that when the defendant engaging in cross-examination would result in the intimidation of a witness, standby counsel should be appointed. This is not to suggest, however, that the rules of evidence or procedure should be relaxed when dealing with vulnerable witnesses or victims of crime. The confrontation right should always remain unbroken, in this case, through an aggressive cross-examination from stand-by counsel. This Note suggests an alternative in which the confrontation right is largely preserved; the only difference is merely the vessel through which confrontation is satisfied. To avoid the invasive and personal confrontation, standby counsel can represent the defendant's interests. Moreover, even if the witness is made uncomfortable from a cross-examination by the standby counsel, that fact alone should not be enough for the defendant to lose his rights. As a nation of laws, we accept some level of discomfort from the witness in order to preserve the confrontation right. It goes too far, however, to give the defendant

124. Haddad, supra note 72, at 94.
direct access to his alleged victim in a way that is disruptive both to the trial process and the witness’ well-being.