Pro Se Defendants in Child Sexual Abuse Cases

INTRODUCTION

Society has become increasingly aware of the need to protect child victims who must testify in court.[1] In 1982 California responded to this need by allowing certain sexually abused children to have their preliminary-hearing testimony videotaped for use at trial.[2] The California legislature later strengthened witness-protection laws to allow some sexually abused minors to testify via closed-circuit television.[3]

Commentators throughout the country have given mixed reviews to statutes protecting child sexual abuse victims.[4] Many commentators encourage courts and legislatures to provide special treatment to child witnesses.[5] Other commentators believe that these protective statutes and court rules wrongly sacrifice defendants' statutory and constitutional rights for the convenience of witnesses.[6] Legislation that shields

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[1] Many states permit victims of child sexual abuse to testify on videotape. *See, e.g.*, CAL. PENAL CODE § 1346 (West Supp. 1988); FLA. STAT. § 92.53 (Supp. 1988); N.Y. CRIM. PROC. LAW § 190.32 (McKinney Supp. 1988); TEX. CRIM. PROC. CODE ANN. § 38.071 (Vernon Supp. 1989); *see also* Miller v. State, 517 N.E.2d 64, 69 & n.4 (Ind. 1987) (listing 34 state statutes). Some states also allow child victims to testify via closed-circuit television. *See, e.g.*, CAL. PENAL CODE § 1347 (West Supp. 1988); FLA. STAT. § 92.54 (Supp. 1988); ILL. ANN. STAT. ch. 38, para. 106A-3 (Smith-Hurd. Supp. 1988); N.Y. CRIM. PROC. LAW § 65.10 (McKinney Supp. 1988); TEX. CRIM. PROC. CODE ANN. § 38.071 (Vernon Supp. 1989); *see also Miller*, 517 N.E.2d at 69-70 & n.5 (listing 23 state statutes).

[2] The prosecution may move to videotape the preliminary testimony of certain sex-crime victims. CAL. PENAL CODE § 1346 (West Supp. 1988). The victim must be 15 years or younger or developmentally disabled. *Id.* The court may use the videotape at trial if the victim's emotional trauma prevents her from testifying. *Id.* § 1346(d).

[3] *See id.* § 1347; *see also infra* notes 104-109 and accompanying text.

[4] *See infra* notes 5-6 and accompanying text.

[5] *See* D. WEST, SEXUAL CRIMES AND CONFRONTATIONS: A STUDY OF VICTIMS AND OFFENDERS 236 (1987) (calling for alternative procedures when children testify); Ginkowski, *The Abused Child: The Prosecutor's Terrifying Nightmare*, CRIM. JUST., Spring 1986, at 31, 35, 45 (encouraging courts to avoid face-to-face meetings between victim and defendant).

[6] *See* M. PAGELOW, FAMILY VIOLENCE 398 (1984) (citing authorities who advocate integrating, not diverting, child victims from court proceedings); Comment, *Preparing*

witnesses from a defendant may threaten or impair a defendant's constitutional right to confront witnesses.[7] Similarly, when a legislature or court protects child witnesses, it may overlook a defendant's constitutional right to self-representation.[8]

Pro se representation, or self-representation,[9] poses a unique dilemma in child sexual abuse cases. The court must balance the defendant's constitutional rights[10] against both the child's emotional needs[11] and the state's compelling interest in protecting children.[12] A defendant in a child sexual abuse case may find it strategically advantageous to elect self-representation.[13] The defendant's presence and interrogation could terrify the child and undermine the child's ability to testify effectively.[14]

This Comment explores the tension existing in child sexual abuse cases between a defendant's right to self-representation and a state's right to meet the needs of a child victim. Part I discusses the special needs of child victims who testify and the methods courts and prosecutors use to meet these needs. Part II examines the constitutional right to self-representation. Part III explains how a defendant in a child sexual abuse case could unfairly take advantage of the right to self-representation. Part IV argues that California legislation protecting child victims fails to accommodate the defendant's right to self-representation. Part V proposes balancing the needs of child victims and the rights of *pro se* defendants. This Comment concludes that courts should appoint standby counsel to *pro se* defendants in child sexual abuse cases.

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the World for the Child: California's New Child Sexual Abuse Law, 23 CAL. W.L. REV. 52, 53 (1986) (noting strong pretrial prejudice against defendants in child sexual abuse cases).

[7] U.S. CONST. amend. VI states: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ." *Id.* CAL. CONST. art. I, § 15 states: "The defendant in a criminal cause has the right to . . . be confronted with the witnesses against [her]." *Id.*

[8] *See* Faretta v. California, 422 U.S. 806, 817-18 (1974) (finding right to self-representation rooted in sixth amendment and common law); *see also infra* notes 48-58 and accompanying text. This right has been codified at 28 U.S.C. § 1654 (1982) ("[P]arties may plead and conduct their own cases personally or by counsel. . . .").

[9] *Pro se* representation means to represent oneself. BLACK'S LAW DICTIONARY 1099 (5th ed. 1979). Proceeding in propria persona also means to represent oneself. *Id.* at 712.

[10] *See infra* notes 48-49 and accompanying text.

[11] *See infra* notes 15-18 and accompanying text.

[12] *See infra* notes 142-45 and accompanying text.

[13] *See infra* notes 81-93 and accompanying text.

[14] *See infra* notes 23-27 and accompanying text.

Standby counsel would represent the defendant in interactions with the child victim.

I. Special Problems in Prosecuting Child Sexual Abuse Cases

Prosecuting a child sexual abuse case presents special problems. Without special treatment, a child probably will feel uncomfortable and intimidated by court proceedings.[15] The presence of the judge, jury, attorneys, defendant, and courtroom audience can overwhelm a child.[16] Children, more than adults, fear repeating their story and being cross-examined.[17] They also fear that the defendant will retaliate, especially if the defendant previously threatened the child.[18]

Courts recognize that safeguarding the physical and psychological health of a minor is a compelling state interest.[19] However, without express statutory authority, a court may hesitate to use unusual trial procedures such as closed-circuit television.[20] The California Supreme Court discourages lower courts from creating criminal-procedure rules

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[15] *See* Vartabedian & Vartabedian, *Striking a Delicate Balance in Sex Abuse Cases*, Judges J., Fall 1985, at 16, 18.

[16] *Id.*

[17] *See* D. Whitcomb, E. Shapiro & L. Stellwagen, When the Victim is a Child: Issues for Judges and Prosecutors 18 (1985) [hereafter D. Whitcomb].

[18] *Id.*

[19] *See* Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 607 (1982) (acknowledging that protecting the physical and psychological well-being of a minor is a compelling state interest); Hochheiser v. Superior Court, 161 Cal. App. 3d 777, 793, 208 Cal. Rptr. 273, 283 (1984) (noting that state has compelling interest in safeguarding children's physical and mental health); Wildermuth v. Maryland, 310 Md. 496, 530 A.2d 275 (1987) (stating that protecting sexually abused children from further trauma and embarrassment is a compelling government interest); *see also* Cal. Penal Code § 288(c) (West 1988) (stating that the court "shall do whatever is necessary and constitutionally permissible to prevent psychological harm to the child victim [of sexual abuse]").

[20] *See Hochheiser*, 161 Cal. App. 3d at 791-92, 208 Cal. Rptr. at 282. The *Hochheiser* court refused to allow a child victim to testify via closed-circuit television without express statutory authority. *Id.* at 787, 208 Cal. Rptr. at 279. Within a month of *Hochheiser*, the California legislature introduced Senate Bill 46, which proposed allowing two-way closed-circuit televisions in any criminal proceedings with certain child witnesses. Within five months, the bill became section 1347 of the California Penal Code. *See* Vartabedian & Vartabedian, *supra* note 15, at 16, 19. Cal. Penal Code § 1347 (West Supp. 1989) begins, "It is the intent of the Legislature in enacting this section to provide the court with discretion to employ unusual court procedures to protect the rights of a child witness, the rights of the defendant, and the integrity of the judicial process." *Id.* § 1347(a).

that the United States and California constitutions may permit, but do not require.[21] Further, many courts place a premium on cross-examination and refuse to restrict it without express legislative consent.[22]

A child's age also presents problems during trial examinations. Children generally frighten more easily than adults.[23] A witness' fear reduces the impact of that witness' testimony.[24] Accuracy and recall abilities decrease in situations that a witness perceives as hostile.[25] A child's undeveloped verbal skills may also weaken the testimony's force.[26] Therefore, the jury may discredit an intimidated child's testimony.[27]

Children's fear of testifying forces prosecutors to grapple with the problem of whether to bring a case to trial.[28] The prosecutor's decision must balance the sufficiency of the evidence against the child's ability to withstand the rigors of the criminal-justice process.[29] Prosecutors may welcome a guilty plea to a lesser offense because it saves the child from a traumatic trial.[30]

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[21] *See* People v. Collie, 30 Cal. 3d 43, 54, 634 P.2d 534, 540, 177 Cal. Rptr. 458, 468 (1981) (recognizing that the legislature has primary authority to create criminal procedure rules); Reynolds v. Superior Court, 12 Cal. 3d 834, 837, 528 P.2d 45, 46, 117 Cal. Rptr. 437, 441 (1974) (stating that legislature, not courts, should introduce procedural innovations such as requiring defendants to give advance notices of alibis); *Hochheiser*, 161 Cal. App. 3d at 787, 208 Cal. Rptr. at 279 (holding that trial court should have statutory authority before employing innovative trial procedure such as closed-circuit television).

[22] Courts have often described cross-examination as "the greatest legal engine ever invented for the discovery of truth." California v. Green, 399 U.S. 149, 158 (1970); *Hochheiser*, 161 Cal. App. 3d at 794, 208 Cal. Rptr. at 284; Herbert v. Superior Court, 117 Cal. App. 3d 661, 667, 172 Cal. Rptr. 850, 852 (1981). Therefore, a court should proceed cautiously when limiting cross-examination and should make any changes, "if at all, only upon the considered judgment of the Legislature." *Hochheiser*, 161 Cal. App. 3d at 794, 208 Cal. Rptr. at 284.

[23] *See* W. HOMAN, CHILD SENSE 136-37 (1969) (stating that children's fears often are founded on misinformation; these fears disappear with time and positive life-experiences).

[24] *See* D. WHITCOMB, *supra* note 17, at 37.

[25] *See id.*

[26] *See* Ginkowski, *supra* note 5, at 33.

[27] Although the jury may realize the child is too frightened to testify fully, the child's weakened testimony may not be strong enough to carry a conviction.

[28] *See* Ginkowski, *supra* note 5, at 31. The prosecutor not only must protect the victim and the community, but also must seek justice rather than mere convictions. *Id.*; *see also* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-13 (1981).

[29] Ginkowski, *supra* note 5, at 31. (noting that establishing probable cause may not sustain a conviction).

[30] *See id.* Child sexual abuse cases, like other criminal cases, are usually settled by a

If a case goes to trial, prosecutors often use ad hoc techniques to alleviate a child's trauma.[31] Prosecutors may familiarize the child with the courtroom and trial procedure beforehand.[32] Some use their bodies to block the child's view of the defendant during direct examination.[33] Others instruct the child to look at a supportive person or to notify the court if the defendant is "making faces."[34] Prosecutors may explain to a child that a witness only has to look at the defendant once for identification.[35] Anatomically correct dolls, drawings, emotionally supportive persons, child-sized chairs, and testifying from places other than the witness chair make testifying easier for some children.[36]

Empirical evidence on children's reaction to testifying is inconclusive.[37] Each child reacts differently to the judicial process.[38] Testifying benefits those children who learn that they are important and have rights that others will defend.[39] Testifying traumatizes other children because it forces them to re-live the assault.[40] A conviction may reinforce the child's belief that the defendant was wrong and that the child

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guilty plea. *See* D. WHITCOMB, *supra* note 17, at 7-8.

[31] *See infra* notes 32-36 and accompanying text.

[32] *See* Ginkowski, *supra* note 5, at 32 (prosecutors should be honest with child and explain what is expected of witnesses); Vartabedian & Vartabedian, *supra* note 15, at 18. The child may feel more comfortable and secure during the trial after practicing answering questions in the courtroom. *Id.* Introducing the child to the court personnel and explaining that the bailiff or police will protect the child in court may also help. *Id.*; *see also* S. SMITH, CHILDREN'S STORY: CHILDREN IN CRIMINAL COURT 15 (1985) (former child abuse victim recommending that prosecutors familiarize children with court).

[33] D. WHITCOMB, *supra* note 17, at 54.

[34] *Id.*

[35] Vartabedian & Vartabedian, *supra* note 15, at 18.

[36] *See* Ginkowski, *supra* note 5, at 32-33.

[37] "Some studies have found that child sex victims who participate in judicial proceedings suffer more deleterious effects and psychological harm than children who do not go to court." D. WHITCOMB, *supra* note 17, at 17. Other evidence indicates that some children appear unharmed by the criminal justice system. *Id.*; *see* Bulkley, *Evidentiary and Procedural Trends in State Legislation and Other Emerging Legal Issues in Child Sexual Abuse Cases*, 89 DICK. L. REV. 645, 646-47 (1984-85) (calling for research on how trial and pretrial investigation affects child witnesses).

[38] *See* Ginkowski, *supra* note 5, at 32 (stating that court's attitude toward child witness influences child's reaction to testifying).

[39] *See id.* Court appearances can be quite therapeutic if they allow a victim to feel like a person with rights others will defend. *Id.*

[40] *See* Note, *Defendants' Rights in Child Witness Competency Hearings: Establishing Constitutional Procedures for Sexual Abuse Cases*, 69 MINN. L. REV. 1377, 1384-85 (1985).

was not at fault.[41] However, an acquittal can devastate a child who discovers that truth does not always prevail.[42]

Children's fear of testifying[43] and of confronting the defendant[44] make child sexual abuse cases difficult to prosecute.[45] Some legislatures have sought to insulate child victims with protective legislation.[46] However, insulating a child from the defendant may conflict with the defendant's sixth amendment rights.[47]

II. THE SIXTH AMENDMENT RIGHT TO SELF-REPRESENTATION

The United States Supreme Court held that a criminal defendant has a constitutional right to self-representation in *Faretta v. California*.[48] The Court decided that the structure of the sixth amendment implies the right to self-representation[49] and reinforced the implication by ex-

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[41] *See id.* at 1385.

[42] *Id.* at 1385 n.16 (citing Berliner & Barbieri, *The Testimony of the Child Victim of Sexual Assault*, J. SOC. ISSUES, Summer 1984, at 125, 135). Conversely, truth does prevail when an innocent defendant is acquitted. Authorities disagree on how many reports of child sexual abuse are false. *See* Ginkowski, *supra* note 5, at 33 (citing research that sexual abuse reports are as reliable as other crime reports); Comment, *supra* note 6, at 67 n.109 (stating less than 10% of reports are false); *see also* S. BUTLER, A CONSPIRACY OF SILENCE 161 (1978) (interviewee stating that children may lie by denying incest to protect loved ones); M. PAGELOW, *supra* note 6, at 397-98 (noting that children usually lie to minimize the abuse); D. WEST, *supra* note 5, at 228 (stating that children rarely make false accusations, but a parent in marital or custody dispute may pressure child to lie).

[43] *See supra* notes 15-18 and accompanying text.

[44] *See* D. WHITCOMB, *supra* note 17, at 17-18 (stating virtually all professionals working with children mentioned children's fear of confronting the defendant).

[45] *See supra* notes 28-30 and accompanying text.

[46] *See supra* notes 1-2.

[47] *See supra* notes 7-8.

[48] 422 U.S. 806 (1975). Justices Stewart, Douglas, Brennan, White, Marshall, and Powell formed the majority. *Id.* Chief Justice Burger and Justices Blackmun and Rehnquist dissented. *Id.*

A few years before *Faretta*, the California Supreme Court held that neither the United States nor the California Constitution granted a right to *pro se* representation. People v. Sharp, 7 Cal. 3d 448, 499 P.2d 489, 103 Cal. Rptr. 233 (1972) *cert. denied*, 410 U.S. 944 (1973). Subsequently, California courts have reluctantly accepted *Faretta*'s holding. *See* People v. Cervantes, 87 Cal. App. 3d 281, 291, 150 Cal. Rptr. 819, 825 (1978) (stating that *Faretta* opened a "pandora's box"); Thomas v. Superior Court, 54 Cal. App. 3d 1054, 1060-61, 126 Cal. Rptr. 830, 834 (1976) ("[*Faretta*] need not be accepted without protest. . . . [It is] totally inconsistent with the realities of modern life.").

[49] *See Faretta*, 422 U.S. at 818-21. The sixth amendment provides that the accused, not counsel, "shall enjoy the right . . . to be informed of the nature and cause of the

amining English and colonial common law.[50]

The *Faretta* majority explained that the colonists cherished self-representation as a basic right.[51] Most colonists represented themselves in court.[52] Further, the sixth amendment was proposed the day after Congress enacted a statute guaranteeing the right of self-representation in federal criminal trials.[53] The Framers and citizens never discussed whether the sixth amendment also guaranteed the right to self-representation.[54] Therefore, the majority reasoned, the Framers and citizens must have assumed that the sixth amendment protected the right to self-representation.[55]

A defendant also has a right to retain counsel as an aid or assistant.[56] However, unless a defendant consents to representation by counsel, the

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accusation; to be confronted with the witnesses against him; [and] to have compulsory process for obtaining witnesses in his favor. . . ." *Id.* at 819; U.S. CONST. amend. VI.

[50] *See Faretta*, 422 U.S. at 821.

[51] *See id.* at 826. The colonists were self-reliant and distrusted lawyers. *See id.* Some colonies in the seventeenth century prohibited pleading for hire. *Id.* at 827.

[52] *See id.* at 828. Even when the courts allowed hired counsel, most parties still opted for self-representation. *Id.*

[53] *See id.* at 831. Section 35 of the Judiciary Act of 1789 guaranteed the right of all parties in federal courts to "plead and manage their own causes personally or by the assistance of . . . counsel." *Id.*; *see also* 28 U.S.C. § 1654 (1982) ("[P]arties may plead and conduct their own cases personally or by counsel. . . .").

[54] *See Faretta*, 422 U.S. at 832.

[55] *See id.* The dissenting justices forcefully argued that if the Framers truly cherished the right to self-representation, they would have expressly included it in the sixth amendment. *Id.* at 844, 850. The Framers' conspicuous silence indicates exclusion of the right from the sixth amendment rather than inclusion. *Id.* Further, if the sixth amendment embodied the right to self-representation, codifying the right would be unnecessary. *See id.* at 844.

Blackmun also criticized "[t]he paucity of historical support for the Court's position." *Id.* at 850. He felt the majority failed to consider two important developments in recent criminal procedure. *Id.* First, until the middle of the nineteenth century, criminal defendants could not testify because of their interest in the trial's outcome. *Id.* at 850-51. Thus, only *pro se* defendants could personally speak before the court. *Id.* at 851. Second, the right to counsel stems from the premise that representation by counsel is essential to ensure a fair trial. *Id.* Thus, allowing a defendant to proceed without representation by counsel confounds the state's interest in preventing unjust convictions. *Id.*

[56] *See id.* at 820-21. The Court explained:

> [The sixth amendment] speaks of the "assistance" of counsel, and an assistant, however expert, is still an assistant. The language and spirit of the [s]ixth [a]mendment contemplate that counsel, like the other defense tools guaranteed by the [a]mendment, shall be an aid to a willing defendant — not an organ of the State interposed between an unwilling defendant and his right to defend himself personally.

Id. at 820.

defendant has a right to control the defense presented.[57] Foisting unwanted counsel on the accused allows counsel, rather than the defendant, to control the defense.[58]

Nevertheless, a court may appoint standby counsel, even over the defendant's objections.[59] Participation by standby counsel will not impermissibly undermine a defendant's right to self-representation if the defendant retains control over the case presented to the jury.[60] The court should insure that the jury realizes that the defendant is controlling the defense.[61]

The right to self-representation is analogous to other sixth amendment rights such as the right to confront witnesses[62] and the right to a public trial.[63] These rights are important for a full and fair defense,[64] but are not absolute.[65] For instance, a court may admit out-of-court statements into evidence, even though doing so abridges a defendant's confrontation rights.[66] Additionally, a court may exclude the public

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[57] *See id.* at 820-21.

[58] *Id.* at 820. "An unwanted counsel 'represents' the defendant only through a tenuous and unacceptable legal fiction. . . . [T]he defense presented is not the defense guaranteed him by the Constitution." *Id.* at 821. ***But see*** People v. Salazar, 74 Cal. App. 3d 875, 888, 141 Cal. Rptr. 753, 761 (1977) ("Unlike the right to the *assistance* of counsel, the right to dispense with such assistance and to represent oneself is guaranteed not because it is essential to a fair trial but because the defendant has a personal right to be a fool.") (emphasis in original).

[59] *See* McKaskle v. Wiggins, 465 U.S. 168, *reh'g denied*, 465 U.S. 112 (1984); Faretta v. California, 422 U.S. 806, 834 n.6 (1975).

[60] *See McKaskle*, 465 U.S. at 176-77. The Supreme Court noted that *Faretta* did not require an absolute bar on standby counsel's unsolicited participation. *Id.* at 176. "In determining whether a defendant's *Faretta* rights have been respected, the primary focus must be on whether the defendant had a fair chance to present his case in his own way." *Id.* at 177.

[61] *Id.* at 178-79. "[P]articipation by standby counsel without the defendant's consent should not be allowed to destroy the jury's perception that the defendant is representing himself." *Id.* at 178.

[62] *See Faretta*, 422 U.S. at 818-19; *see also* Pointer v. Texas, 380 U.S. 400 (1965) (holding that sixth and fourteenth amendments embody right to confrontation).

[63] *See In re* Oliver, 333 U.S. 257 (1948) (holding that right to a public trial applies to states through fourteenth amendment); U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. . . .").

[64] *See Faretta*, 422 U.S. at 818.

[65] *See id.* at 834 n.46 (stating that judge may terminate self-representation by a disruptive defendant); United States v. Carlson, 547 F.2d 1346, 1356-57 (8th Cir. 1976) (stating that neither right to cross-examine nor to confront is absolute), *cert. denied*, 431 U.S. 914 (1977).

[66] *See* Ohio v. Roberts, 448 U.S. 56 (1980) (admitting hearsay over defendant's confrontation clause objections). If applied strictly, the confrontation clause "would abro-

from a trial if other interests outweigh the defendant's right to a public trial.[67]

A defendant's conduct may constitute a constructive waiver of sixth amendment rights.[68] For example, a defendant may waive the constitutional right to be present at trial by using it to delay the trial.[69] Likewise, a defendant may surrender the right to confrontation by misconduct outside the courtroom.[70]

Similarly, the right to self-representation is qualified.[71] The defendant must initiate the right to self-representation with a timely and unequivocal assertion.[72] The defendant must voluntarily and intelligently

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gate virtually every hearsay exception, a result long rejected as unintended and too extreme." *Id.* at 63. After closely examining competing interests, a trial court may be able to dispense with the defendant's confrontation rights. *Id.* at 64. However, the court must substantially comply with the purposes behind the confrontation requirement. *Id.* at 69.

[67] *See* Waller v. Georgia, 467 U.S. 39 (1984). Other interests may override a defendant's right to a public trial. *Id.* at 48. The Supreme Court gave the following restrictions on closure:

> [T]he party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure.

Id.; *see also* United States *ex rel.* Latimore v. Sielaff, 561 F.2d 691 (7th Cir. 1977) (holding that court may protect rape victim's personal dignity by excluding public during her testimony), *cert. denied*, 434 U.S. 1076 (1978).

[68] *See infra* notes 69-70 and accompanying text.

[69] *See* Illinois v. Allen, 397 U.S. 337, 343 (1970). The majority succinctly stated its holding:

> [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.

Id.

[70] *See* United States v. Carlson, 547 F.2d 1346, 1359 (8th Cir. 1976) (defendant intimidated witness into not testifying), *cert. denied*, 431 U.S. 914 (1977).

[71] *See infra* notes 72-77 and accompanying text.

[72] *See* People v. Windham, 19 Cal. 3d 121, 127-28, 560 P.2d 1187, 1191, 137 Cal. Rptr. 8, 12 (holding that defendant must unequivocally assert right within reasonable time before trial), *cert. denied*, 434 U.S. 848 (1977); People v. Hill, 148 Cal. App. 3d 744, 756, 196 Cal. Rptr. 382, 389 (1983) (holding that right must be timely asserted to be unconditional); People v. Salazar, 74 Cal. App. 3d 875, 888-89, 141 Cal. Rptr. 753, 761 (1977) (stating that defendant must timely assert right to self-representation). However, a defendant who justifies the untimely request may proceed *pro se*. *Windham*, 19 Cal. 3d at 128 n.5, 560 P.2d at 1191 n.5, 137 Cal. Rptr. at 12 n.5. If the

elect self-representation.[73] The court may terminate the defendant's right to self-representation if the defendant uses it to delay or to obstruct the trial.[74]

Further, the court may appoint standby counsel over the defendant's objections either to assist the defendant if necessary or to take over the defense if the court has to terminate the defendant's *pro se* status.[75] Standby counsel may participate over the defendant's objection.[76] Also, a judge generally may call and question witnesses without regard to a *pro se* defendant's wishes.[77]

Only a few defendants exercise their constitutional right to self-representation.[78] Probably less than five percent of the *pro se* defendants

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defendant first asserts the right during trial, the court has discretion to grant the motion. *Id.* at 121, 560 P.2d at 1190, 137 Cal. Rptr. at 10.

[73] *See* Faretta v. California, 422 U.S. 806, 807 (1975). An intelligent election may be unwise and strategically unsound. *See* Ferrel v. Superior Court, 20 Cal. 3d 888, 891, 576 P.2d 93, 95, 144 Cal. Rptr. 610, 612 (1978). An intelligent election turns on whether the defendant knows of the constitutional right to counsel and realizes the risks and consequences of self-representation. *See* People v. Brownlee, 74 Cal. App. 3d 921, 934, 141 Cal. Rptr. 685, 693 (1977). The defendant's competence as an attorney is irrelevant. *See id.* A trial court should establish the defendant's knowing and intelligent waiver of the right to counsel by showing in the record that the defendant (a) was aware of the dangers and disadvantages of self-representation, (b) had the intellectual capacity to make the decision, and (c) understood inadequate representation would not be grounds for reversal. *See* People v. Lopez, 71 Cal. App. 3d 568, 572-74, 138 Cal. Rptr. 36, 38-40 (1977).

[74] *See Faretta*, 422 U.S. at 834 n.46. "[T]he trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct." *Id.*; *see also* United States v. Dougherty, 473 F.2d 1113, 1124 (D.C. Cir. 1972). "The right to self-representation, though asserted before trial, can be lost by disruptive behavior during trial, constituting constructive waiver." *Id.*

[75] *Faretta*, 422 U.S. at 834 n.46. "Of course, a State may — even over objection by the accused — appoint a 'standby counsel' to aid the accused if and when the accused requests help, and to be available to represent the accused in the event that termination of the defendant's self-representation is necessary." *Id.*

[76] *See* McKaskle v. Wiggins, 465 U.S. 168, 176-77, *reh'g denied*, 465 U.S. 112 (1984). The purpose of the right to self-representation is to "affirm the dignity and autonomy of the accused" and to allow the defendant what might be the best possible defense. *Id.* Courts can comply with this dual purpose without prohibiting standby counsel's unrequested involvement. *Id.* at 177.

[77] *See id.* at 177 n.7.

[78] Only 1.2% of the studied prison population and 3.8% of the studied hospital population had no legal counsel when sentenced. Note, *supra* note 40, at 1392 n.56; *see also* Comment, *The Right to Appear* Pro Se*: The Constitution and the Courts*, 64 J. CRIM. L. & CRIMINOLOGY 240, 248 (1973) (stating that attorneys represent most defendants).

are acquitted.[79] However, neither the numbers nor the success rate alter the accused's right to self-representation.[80] Courts should balance the right to self-representation against the cost of impeding justice.

III. Uses and Abuses of *Pro Se* Representation

The *pro se* defendant poses a unique dilemma in child sexual abuse cases. Given children's fear of confronting their abusers,[81] self-representation may provide a clever strategy for some defendants. However, this "clever" strategy may strain the child victim's mental health and inhibit the court's fact-finding function.[82]

Typically, the child victim's greatest fear is confronting the defendant.[83] The defendant's choice of self-representation forces the child repeatedly to confront the defendant. Consequently, some children may refuse to testify to avoid these extended interactions.[84]

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[79] *See* Comment, *supra* note 78, at 249. Fifty-six out of fifty-eight judges surveyed believed that *pro se* defendants failed because of their obvious guilt. *Id.* Other factors included the defendant's ignorance of the law, general ignorance, and the complexity of the case. *See id.*

[80] The right to self-representation "is afforded the defendant *despite* the fact that its exercise will almost surely result in detriment to both the defendant and the administration of justice." People v. Salazar, 74 Cal. App. 3d 875, 888, 141 Cal. Rptr. 753, 761 (1977) (emphasis in original).

[81] *See supra* note 44 and accompanying text.

[82] *See infra* notes 83-93 and accompanying text.

[83] *See* D. Whitcomb, *supra* note 17, at 17-18 (stating that most professionals working with child victims report children usually fear confronting defendant); Vartabedian & Vartabedian, *supra* note 15, at 18 (stating that a second common fear of children is that someone will harm them); *see also* D. Whitcomb, *supra* note 17, at 45-46 (finding that courtroom audience usually does not worry child witnesses); Comment, *supra* note 6, at 70 (stating that others' reaction to the abuse may traumatize child further).

[84] Children may refuse to testify because of the stresses of trial. *See* Hochheiser v. Superior Court, 161 Cal. App. 3d 777, 781, 208 Cal. Rptr. 273, 277 (1984). In *Hochheiser*, the child's mother testified that her nine-year-old son was so distraught after his preliminary hearing testimony that he was in tears and could not talk. *Id.* He reverted to baby behavior such as wanting to wear diapers. *Id.* When she told him he would have to testify again, he burst into tears and went to his room. *Id.* He said he would not go back to court and if he had to go he would say "I don't know anything." *Id.*

Children may also have ambivalent feelings about testifying if the defendant is someone close to them. D. West, *supra* note 5, at 234. Most child victims are abused by someone they know and trust. *See* V. De Francis, Protecting the Child Victim of Sex Crimes Committed by Adults 69 (1969) (stating that 75% of sexually abused children know their assaulters); K. MacFarlane & J. Waterman, Sexual Abuse of Young Children 8 (1986) (maintaining that 75%-80% of abusers are family, friends or neighbors to the child victim); Comment, *supra* note 6, at 52 n.8. The

A *pro se* defendant could capitalize on the terror of a child who testifies. The defendant, looming over the frightened child in the witness stand, could destroy the child's ability to testify.[85] Asking questions with big words and complex structures would further confuse and frighten the child.[86] High stress levels impair the short-term memory needed to comprehend sentences.[87] Questions concerning peripheral detail often confuse children.[88] The child's testimony may lose credibility because jurors tend to believe confident witnesses who remember peripheral detail.[89]

Thus, a *pro se* defendant could upset the delicate balance between protecting the mental health of the child victim and insuring the defendant's right to self-representation. Granted, any defense attorney could use the same techniques to weaken a child's testimony.[90] However, the child usually perceives the defense attorney as less intimidating than the defendant.[91] Answering the defendant would aggravate the child's confusion about the questions and the child's fear of the defendant.

The defendant's ability to undermine the child's testimony also frus-

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child may feel guilty and ashamed for testifying against the abuser. Comment, *supra* note 6, at 52 n.8. For instance, a 14-year-old girl, who accused her father of sexually abusing her, was found dead after her father visited her. D. WEST, *supra* note 5, at 234. He had asked her not to testify against him. *Id.* A suicide note beside her read, "I am fed up with people picking on me. I told lies about my Dad and I am sorry that I cannot go through with it any more." *Id.*

[85] *See supra* notes 24-26 & 83 and accompanying text.

[86] Goodman & Helgeson, *Child Sexual Assault: Children's Memory and the Law*, in PAPERS FROM A NATIONAL POLICY CONFERENCE ON LEGAL REFORMS IN CHILD SEXUAL ABUSE CASES 53 (1985) [hereafter PAPERS ON CHILD SEXUAL ABUSE].

[87] *Id.* at 54.

[88] *Id.* at 53; *see also* J. HAUGAARD & N. REPPUCCI, THE SEXUAL ABUSE OF CHILDREN: A COMPREHENSIVE GUIDE TO CURRENT KNOWLEDGE AND INTERVENTION STRATEGIES 348-49 (1988) (describing study establishing that three- and seven-year-olds recall more central details of a frightening event and more peripheral details of a nonfrightening event).

[89] *See* Goodman & Helgeson, *supra* note 86, at 54 (even though the detail may be irrelevant); *see also* J. HAUGAARD & N. REPPUCCI, *supra* note 88, at 351-53 (describing experiment indicating that younger children make less credible witnesses than older children; also noting this finding may not extend to child sexual abuse victims).

[90] Cross-examination causes extreme stress to the child. *See* Ginkowski, *supra* note 5, at 33. The defense attorney attacks the child's credibility while the prosecutor may fear frequent objections will appear over-protective. *Id. But see* D. WEST, *supra* note 5, at 236 (challenging child's testimony gives jury a bad impression of defense attorney).

[91] *See supra* note 83.

trates the court's truth-finding function. The child victim is usually the prosecution's only eyewitness.[92] The prosecution's case often turns on the testimony of the child victim.[93] Thus, if the child victim chooses not to testify, the prosecution will probably lose.

The Supreme Court has recognized that a defendant should not profit from that defendant's own wrong by manipulating courtroom procedures.[94] However, a court cannot find a defendant's mere exercise of the right to self-representation disruptive.[95] Therefore, a court probably would not find a defendant's cross-examination impermissible if the defendant maintained proper procedure and respect for the court.[96] The defendant's behavior must be fairly extreme before the court finds a constructive waiver of sixth amendment rights.[97] Merely annoying behavior cannot justify revoking the defendant's *pro se* status.[98] However, no case authority illustrates behavior that justifies terminating a defendant's self-representation.[99]

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[92] Generally, a molester sexually abuses the child in private. *See* V. DE FRANCIS, *supra* note 84, at 40, 42-45; J. HAUGAARD & N. REPPUCCI, *supra* note 88, at 151. Thus, the only eyewitnesses are the victim and the abuser.

[93] *See* V. DE FRANCIS, *supra* note 84, at 189, 223.

[94] *See* Illinois v. Allen, 397 U.S. 337, 346-47 (1970). Allen interrupted his robbery trial by throwing papers and continually shouting. *Id.* at 339-40. After several warnings, the judge removed Allen from the courtroom. *Id.* at 340-41. After his conviction, Allen sought a writ of habeas corpus contending that the trial judge unconstitutionally denied him the right to be present at trial. *Id.* The Supreme Court rejected Allen's argument and noted, "It would degrade our country and our judicial system to permit our courts to be bullied, insulted, and humiliated and their orderly progress thwarted and obstructed by defendants brought before them charged with crimes." *Id.* at 346.

Among the constitutionally permissible ways to deal with an unruly defendant are (a) cite her for contempt; (b) remove her from the courtroom until she promises to behave; (c) bind and gag her, but allow her to remain in court. *Id.* at 343-44.

[95] *See* United States v. Dougherty, 473 F.2d 1113 (D.C. Cir. 1972) (holding that court cannot deny election to proceed *pro se* because defendant may become unruly later). Few judges believe the desire to disrupt the courtroom or the hope of reversible error motivates *pro se* defendants. *See* Comment, *supra* note 78, at 248. Most judges feel *pro se* defendants believe in their innocence and distrust attorneys. *Id.* Other judges believe *pro se* defendants consider themselves intellectually superior. *Id.*

[96] *See Dougherty*, 473 F.2d at 1113.

[97] *See* Faretta v. California, 422 U.S. 806, 834 n.46 (1975) (suggesting that misconduct must be deliberate, serious and obstructionist).

[98] *See* People v. Carroll, 140 Cal. App. 3d 135, 143, 189 Cal. Rptr. 327, 330 (finding that *pro se* defendant's repeated insistence that he was not competent to represent himself was annoying, but did not justify his exclusion), *cert. denied*, 464 U.S. 920 (1983).

[99] No authority sets forth facts sufficient to allow a court to terminate self-representation. Two cases have dealt with this issue, but are not published in the official report-

Although a court will probably not find the defendant's election to proceed in *pro se* as disruptive,[100] courts should recognize that *pro se* representation in a child sexual abuse case threatens the court's fact-finding abilities.[101] The California Legislature recognized that the defendant's mere presence may disturb a child witness.[102] However, the legislature failed to address the problems *pro se* defendants present in child sexual abuse cases.[103]

IV. *Pro Se* Representation in Child Sexual Abuse Cases in California

The California Legislature sought to protect child sexual abuse victims by removing them from the courtroom.[104] Section 1347 of the California Penal Code allows a child victim to testify via closed-circuit television.[105] Courts may use closed-circuit television if the child is otherwise unable to testify.[106] The child's inability to testify in court must stem[107] from one or more of the following factors: (1) threats[108] to

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ers. In People v. Colbert, 192 Cal. Rptr. 836 (1983) (ordered not published), a *pro se* defendant disrupted the court with obscene and abusive language, violent outbursts, whistling, singing, overturning the counsel table, and fighting with the deputies. *Id.* The court ordered the defendant to be quiet, and bound and gagged him. However, his disruptive behavior continued. *Id.* The court eventually removed him to a separate room where he could watch the trial on camera. *Id.* In *In re* Martinez, 192 Cal. Rptr. 542 (1983) (ordered not published), the court revoked defendant's *pro se* status because it was part of defendant's jail break plan. *Id.*

[100] *See supra* note 95.

[101] *See supra* notes 85-93 and accompanying text.

[102] *See infra* notes 104-05 and accompanying text.

[103] *See infra* notes 120-23 and accompanying text.

[104] Cal. Penal Code § 1347 (West Supp. 1989). A child, aged ten years or younger, may testify via closed-circuit television if the testimony relates to sexual abuse. *Id.* § 1347(b)(1). The child's testimony must otherwise be unavailable. *Id.* § 1347(b)(2). The child testifies in a room outside the courtroom. *Id.* § 1347(e). A support person, a nonuniformed bailiff, and a representative of the court must be in the room with the child. *Id.* Both the support person and child are videotaped during the testimony. *Id.* The judge, jury, defendant, and attorneys in the courtroom receive the broadcast of the child's live testimony. *Id.* § 1347(b). Another camera transmits the defendant's image to the child. *Id.* § 1347(h).

[105] *Id.* § 1347(b).

[106] *Id.* § 1347(b)(2).

[107] *See id.* The legislature's guidelines are as follows:

> In making the determination [of unavailability] the court shall consider the age of the minor, the relationship between the minor and the defendant or defendants, any handicap or disability of the minor, and the nature of the acts charged. The minor's refusal to testify shall not alone constitute sufficient evidence that [closed-circuit television] is necessary in order to obtain

deter the child from reporting the abuse; (2) use of a deadly weapon during the crime; (3) infliction of great bodily injury during the crime; or (4) conduct by the defendant or defense counsel during trial.[109]

The judge may question the child to determine if the child qualifies to testify via closed-circuit television.[110] The attorneys and a support person must be present during this questioning[111] and the defendant must be absent.[112]

Once the court authorizes closed-circuit television, the judge and attorneys explain the court process to the child.[113] The attorneys have an opportunity to establish rapport with the child.[114] Ideally this rapport will facilitate the attorneys' examinations of the child by closed-circuit television.[115] However, no one can discuss the defendant or the facts of the case with the child.[116]

Currently, section 1347 makes no provision for a *pro se* defendant.

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the minor's testimony.

Id. § 1347(b)(2)(D).

[108] *Id.* § 1347(b)(2)(A). Threats to the child include:

> Threats of serious bodily injury to be inflicted on the minor or a family member, of incarceration or deportation of the minor or a family member, or of removal of the minor from the family or dissolution of the family, in order to prevent or dissuade the minor from attending or giving testimony at any trial or court proceeding or to prevent the minor from reporting the alleged sexual offense or from assisting in criminal prosecution.

Id.

[109] *Id.* § 1347(b)(2).

[110] *Id.* § 1347(c)(3). "[T]he court may question the minor in chambers, or at some other comfortable place other than the courtroom, on the record for a reasonable period of time with the support person, the prosecutor, and defense counsel present." *Id.*

[111] *Id.*

[112] *Id.* "The defendant or defendants shall not be present. . . . Defense counsel shall be afforded a reasonable opportunity to consult with the defendant or defendants prior to the conclusion of the session in chambers." *Id.*

[113] *Id.* § 1347(f).

> [T]he minor shall be brought into the judge's chambers prior to the taking of his or her testimony to meet for a reasonable period of time with the judge, the prosecutor, and defense counsel. A support person for the minor shall also be present. This meeting shall be for the purpose of explaining the court process to the child and to allow the attorneys an opportunity to establish rapport with the child to facilitate later questioning by closed-circuit television. No participant shall discuss the defendant or any of the facts of the case with the minor during this meeting.

Id.

[114] *Id.*

[115] *Id.*

[116] *Id.*

The procedures of section 1347 are impossible to carry out with a *pro se* defendant.[117] Thus, a request for self-representation could prevent the use of closed-circuit television testimony.

Courts use closed-circuit television only when the witness would otherwise be unavailable.[118] Thus, if the defendant blocks the use of closed-circuit television by proceeding without counsel, the child may be unable to testify.[119] The prosecution's case would suffer a severe blow if the child did not testify. Further, since many defendants in child sexual abuse cases are not indigent,[120] the defendant could still retain counsel for advice without active hybrid representation. This result violates the judicial policy of preventing a person from taking advantage of that person's wrong.[121] However, current law permits this injustice.[122]

V. Proposal to Balance the Defendant's and the Victim's Rights

Courts and legislatures should balance the constitutional right to *pro se* representation against the needs of child sexual abuse victims. The right to self-representation also may bend to accommodate the state's constitutional interest in protecting children and the state's interest in having witnesses testify effectively. Although a defendant's right to self-representation is not absolute,[123] it cannot be lightly dismissed. A defendant has a right to choose self-representation.[124] If a court erroneously denies a defendant's request for self-representation, the denial will trigger an automatic reversal.[125]

Because of the serious consequences of prohibiting *pro se* representation, statutes shielding victims from defendants should provide an alter-

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[117] *See supra* notes 110-16 and accompanying text.

[118] *See supra* notes 106-07 and accompanying text.

[119] *Id.*

[120] *See* Mlyniec, *Presence, Compulsory Process, and* Pro Se *Representation: Constitutional Ramifications Upon Evidentiary Innovation in Sex Abuse Cases*, in Papers on Child Sexual Abuse, *supra* note 86, at 273; *see also* S. Butler, *supra* note 42, at 11 (estimating most incestuous assaults occur in middle-class families); *cf.* K. MacFarlane & J. Waterman, *supra* note 84, at 155-56 (asserting that data on economic status of abuses is sketchy and unreliable).

[121] *See* Illinois v. Allen, 397 U.S. 337, 350 (1970) (Brennan, J., concurring).

[122] *See supra* note 117 and accompanying text.

[123] *See supra* notes 72-75 and accompanying text.

[124] *See supra* notes 48-49 and accompanying text.

[125] *See* People v. Joseph, 34 Cal. 3d 936, 948, 671 P.2d 843, 850, 196 Cal. Rptr. 339, 346 (1983) (stating that anything other than per se reversal would be unworkable and undermine the *Faretta* doctrine).

nate procedure for *pro se* defendants. Otherwise, these statutes will be powerless against *pro se* defendants. For example, a Maryland statute allows certain child sexual abuse victims to testify via closed-circuit television,[126] but the statute is inoperative if defendants choose self-representation.[127]

However, legislatures need not abandon all attempts to shield child witnesses against *pro se* defendants. A child witness should be able to testify via closed-circuit television even when the defendant proceeds *pro se*. A court can protect the child witness without completely sacrificing the defendant's right to self-representation.[128]

The California legislature can best shield child witnesses by enacting a statute requiring courts to appoint standby counsel to *pro se* defendants in child sexual abuse cases.[129] The statute might read as follows:

> The court shall appoint standby counsel to any *pro se* defendant charged with sexually abusing a child younger than thirteen years or a developmentally disabled person with a mental age of less than thirteen years. The judge shall inform the jury that standby counsel is merely assisting the defendant and that the defendant is controlling his or her own defense. Standby counsel will examine and cross-examine the victim if emotional trauma causes the victim to be unavailable to testify when questioned by the defendant. Standby counsel may also advise the defendant on trial procedure.

Some children[130] may be able to testify when the *pro se* defendant is

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[126] MD. CTS. & JUD. PROC. CODE ANN. § 9-102 (Supp. 1988).

[127] *See id.* The defendant in a recent Maryland case argued that the statute forced him to choose between his right to counsel and his right to confrontation. Wildermuth v. Maryland, 530 A.2d 275, 289 (Md. 1987). However, the court held that the use of live closed-circuit television satisfied the right to confrontation. *See id.* at 287; *accord* Coy v. Iowa, 108 S. Ct. 2798, 2804 (1988) (O'Connor, J., concurring) (stating that closed-circuit television allowing defendant and witness to view each other raises no substantial confrontation clause problem).

[128] This Comment proposes legislation as the most precise method of reconciling the rights of a *pro se* defendant and the rights of a child witness. *See supra* notes 129-34. However, this is not to imply a court needs legislative authority to modify a defendant's right to self-representation. The California legislature expressly grants courts the "discretion to employ unusual court procedures . . . ." CAL. PENAL CODE § 1347(a) (West Supp. 1989); *see also supra* note 20 and accompanying text.

[129] *See* Faretta v. California, 422 U.S. 806, 834 n.46 (1975) (stating that court may appoint standby counsel over defendant's objections); United States v. Dougherty, 473 F.2d 1113, 1125 n.19 (D.C. Cir. 1972) (recommending that a court always appoint standby counsel to *pro se* defendant when the case is long, complex, or involves multiple defendants); *see also* McKaskle v. Wiggins, 465 U.S. 168, 187-88 (noting that standby counsel must generally respect *pro se* defendant's wish "to dance a solo, not a *pas de deux*"), *reh'g denied*, 465 U.S. 112 (1984).

[130] Whether the child can testify with the defendant present is a factual question for

present but not examining the child. In these cases, standby counsel would be responsible for questioning the child both during trial and in pretrial proceedings. The defendant would be present, but barred from examining the child.

Other children[131] may require the additional security of closed-circuit television.[132] If so, the court could still apply the provisions of section 1347 of the California Penal Code.[133] However, the legislature would have to amend section 1347 so that in *pro se* cases the standby attorney, without the defendant, would attend the pretrial meetings with the child. During the trial, the standby attorney would cross-examine the child via closed-circuit television.

The standby attorney would follow the defendant's instructions or general trial plan.[134] To facilitate the proceedings, standby counsel may advise the defendant of procedural matters.[135] Generally, the counsel should not actively plan the defense or advise the defendant on legal matters.[136] Ideally, the attorney would serve as a mere conduit for the defendant during interactions with the child.

The argument against standby counsel is that it unfairly modifies a

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the trial court. The factors enumerated in CAL. PENAL CODE § 1347 (West Supp. 1989) would assist the court's determination. *See supra* notes 106-09 and accompanying text.

[131] The court would determine whether a child required closed-circuit television by adhering to the guidelines of § 1347. *See supra* notes 106-09 and accompanying text.

[132] *Id.*

[133] *Id.*

[134] *Faretta* rights are vindicated if the *pro se* defendant can address the court freely and if the defendant has the final say in disputes with standby counsel. *See* McKaskle v. Wiggins, 465 U.S. 168, 179, *reh'g denied*, 465 U.S. 112 (1984). *McKaskle* held that the right to self-representation entitles the defendant "to preserve actual control over the case he chooses to present to the jury." *Id.* at 178. The right is "eroded" if standby counsel interferes with any significant tactical decision or controls the questioning of witnesses. *Id.* However, there is no absolute bar on standby counsel's participation. *Id.* at 182. The right to self-representation may be eroded, yet still be vindicated. *See id.* at 181-82. *McKaskle* held that the defendant's right to self-representation was vindicated, *id.* at 188, even though standby counsel argued with defendant and intervened without permission well over 50 times during the three-day trial. *See id.* at 191 (White, J., dissenting).

[135] *See id.* at 183. "*Faretta* rights are . . . not infringed when standby counsel assists the *pro se* defendant in overcoming routine procedural or evidentiary obstacles . . . ." *Id.*

[136] *See id. Faretta* does not obligate the trial judge to allow "hybrid representation," *i.e.*, self-representation and active, substantive assistance of counsel. *See id.* "A defendant does not have a constitutional right to choreograph special appearances by counsel." *Id.*

defendant's constitutional rights. The court cannot abridge the defendant's right to self-representation unless the defendant waives the right either voluntarily or by misconduct.[137] Further, California courts have allowed *pro se* defendants in rape and murder trials even though the key witnesses were minors.[138]

However, courts have recognized that a defendant's sixth amendment rights may have to yield to other interests. For instance, a strict application of the confrontation clause would preclude admitting any hearsay into evidence.[139] Therefore, a defendant's sixth amendment right to confront witnesses often yields to competing interests.[140] A court also may close as much of a trial as is necessary to protect an interest that overrides the defendant's sixth amendment right to a public trial.[141]

Further, the states have a constitutional interest in safeguarding children.[142] Courts and legislatures often protect children with special laws.[143] However, courts cannot enforce protective procedures that automatically presume the child is traumatized and that impinge on

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[137] *See supra* notes 74-75 and accompanying text.

[138] *See* People v. Carroll, 140 Cal. App. 3d 135, 137, 189 Cal. Rptr. 327, 328 (defendant lived with victim and her two children ages 10 and 11; defendant killed victim and the children discovered her body), *cert. denied*, 464 U.S. 820 (1983); People v. Longwith, 125 Cal. App. 3d 400, 405, 178 Cal. Rptr. 136, 138-39 (1981) (defendant molested his step-daughter since she was 7; he raped her when she was 15, after threatening to kill her friend if she did not comply); People v. Cervantes, 87 Cal. App. 3d 281, 283-84, 150 Cal. Rptr. 819, 820-21 (1978) (defendant raped 17-year-old and threatened to put a contract on her and "shoot up" her house if she told anyone).

[139] *See supra* note 66 and accompanying text.

[140] *See* Coy v. Iowa, 108 S. Ct. 2798, 2802 (1988). In *Coy*, the Supreme Court noted that the confrontation clause implies a right to cross-examine witnesses, to exclude out-of-court statements and to confront witnesses face-to-face at proceedings other than the trial. *Id.* However, these confrontation rights "are not absolute and may give way to other important interests." *Id.* The Court hinted that the right to confront witnesses at trial may be abridged to further an important public policy. *See id.* at 2803; *see also supra* note 66 and accompanying text.

[141] *See supra* note 67 and accompanying text.

[142] *See Coy*, 108 S. Ct. at 2805 (O'Connor, J., concurring) (noting that state has compelling interest in protecting child witnesses); Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 607 (1982) (stating that safeguarding the physical and psychological health of a minor is a compelling state interest); *see also* Ginsberg v. New York, 390 U.S. 629, 640-41 (1968) (explaining that states have interest in safeguarding children so that they can develop into healthy, free and independent citizens).

[143] *See, e.g.*, *Ginsberg*, 390 U.S. at 631 (upholding conviction for selling obscene material to minors even though material may not be obscene to adults); Prince v. Massachusetts, 321 U.S. 158, 170 (1944) (affirming conviction of guardian who violated child labor laws); CAL. BUS. & PROF. CODE § 25658 (West 1985) (prohibiting sale of alcohol to minors).

others' constitutional rights.[144] Nevertheless, the same protective procedure may be constitutional if the court makes an individual, rather than general, finding of trauma.[145]

The California Legislature intended that section 1347 of the California Penal Code would protect the rights of child witnesses as well as the rights of defendants.[146] The legislature expressly recognized that a court must balance the defendant's rights against both the need to protect a child witness and the need to preserve the court's truth-finding function.[147] The right of self-representation, like the right of confrontation, is not absolute.[148] The court may, and should, restrict these rights when a child victim is unable to testify in the defendant's presence.

CONCLUSION

Many laws now protect sexually abused children from further trauma in the courtroom.[149] The California legislature allows certain victims of child sexual abuse to testify via a closed-circuit television.[150] However, any protection granted to the child witness must be balanced

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[144] *See Coy*, 108 S. Ct. at 2798. In *Coy*, the defendant was convicted of sexually assaulting two minors. *Id.* at 2799. A state statute allowed the complaining witnesses to testify behind a screen with special lighting. *Id.* The witnesses could not see the defendant and the defendant could only dimly see the witnesses. *Id.* The trial court never made any finding that the witnesses needed protection. *See id.* at 2803. The Supreme Court held that the statute unconstitutionally attempted to carve out a new exception to the confrontation clause with a "legislatively imposed presumption of trauma." *See id.*; *see also Globe Newspaper Co.*, 457 U.S. at 607-11. In *Globe*, the Supreme Court invalidated a statute that automatically excluded the public from trials for sex crimes against minors. *See id.* The Court held that the statute violated the public's right of access to criminal trials under the first amendment. *Id.* The Court emphasized that a mandatory closure rule was overbroad. *Id.* at 608-09. However, a court can decide on a case-by-case basis whether a minor victim needs the protection and security of a closed trial. *Id.*

[145] *See Coy*, 108 S. Ct. at 2805. In her concurring opinion, Justice O'Connor noted that an individualized finding of necessity would probably allow a state's interest in protecting child witnesses to override a defendant's constitutional right to confrontation. *Id.*

[146] CAL. PENAL CODE § 1347(a) (West Supp. 1989). "It is the intent of the Legislature in enacting this section to provide the court with discretion to employ unusual court procedures to protect the rights of a child witness, the rights of the defendant, and the integrity of the judicial process." *Id.*

[147] *See id.* "In exercising its discretion, the court necessarily will be required to balance the rights of the defendant against the need to protect a child witness and to preserve the integrity of the court's truth-finding function." *Id.*

[148] *See supra* notes 71-75 and accompanying text.

[149] *See supra* notes 1-2 and accompanying text.

[150] *See supra* notes 104-09 and accompanying text.

against the defendant's constitutional rights.[151] Current law allows the defendant to override the child's rights by electing *pro se* representation.[152] The legislature should enact a statute to prevent any possible manipulation of our legal system. The statute would require a court to appoint standby counsel to *pro se* defendants in child sexual abuse cases. The legislature should also amend section 1347 of the California Penal Code so that a child witness can testify via closed-circuit television even when the defendant proceeds *pro se*. The standby counsel can interact with the child witness unable to face the defendant. Thus, a defendant could not manipulate the trial by intimidating the prosecution's key witness, the child. At the same time, the defendant's *Faretta* rights are vindicated by the defendant's major role in presenting the defense. Defendant's rights only need to bend briefly to allow the standby counsel to serve as a conduit during interactions with the child.

Deborah Siri

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[151] *See* CAL. PENAL CODE § 1347(a) (West Supp. 1989).

[152] *See supra* notes 117-22 and accompanying text.