

PROTECTING OUR MOST VULNERABLE: PLACING LIMITS ON PRO SE RAPE DEFENDANTS

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On November 1, 2010, a woman made her way to the roof of the King County Courthouse in Seattle, Washington and threatened to jump to her death. The woman, a victim of child rape, had been scheduled to confront her alleged attacker, Salvador Cruz, on the stand later that afternoon.¹ Although the woman had been allegedly sexually assaulted as a child by Cruz—her mother’s former boyfriend—his abuse was not brought to light until the woman was an adult. Because of the delay in reporting, she did not have access to many of the protections afforded to victims of child rape. The woman was legally protected from Cruz by a no-contact order when outside the courthouse, but Cruz, who had elected to act as his own attorney during the trial, would have a right to approach her and ask her questions during his cross examination of her testimony.

States have long struggled with how to balance protecting the rights of pro se defendants while protecting the physical and psychological well-being of victims of sexual assault. Less than a month before the woman threatened to jump from the top of the King County Courthouse, the Washington State Legislature considered, yet ultimately rejected, a bill that would have limited Cruz’s ability to question his alleged victim. That bill was itself drafted in the aftermath of a two-day cross-examination of a victim by her pro se attacker that, according to the prosecutor in the case, was the “most offensive line of questioning she had witnessed in ten years of practice.”²

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¹ Jennifer Sullivan, *Rape Victim’s Threat to Jump off Courthouse Roof May Derail Case*, SEATTLE TIMES (Nov. 04, 2010), <https://www.seattletimes.com/seattle-news/rape-victims-threat-to-jump-off-courthouse-roof-may-derail-case/>.

² *A Secondary Offense Worth Preventing: Restricting the Pro Se Defendant’s Ability to Personally Question Child Abuse Victims*, Nat’l. Ctr. For Prosecution of Child Abuse (National District Attorney’s Association Center for Prosecution of Child Abuse), Nov. 3, 2012. (hereinafter *Secondary Offense*). The Prosecutor repeatedly objected to the line of questioning pursued by the defendant over the course of two days. During the two-day cross-examination, defendant repeatedly smirked while the victim recounted details of her rape, which was committed at knifepoint in her house while her children were in the next room. Levi Pulkkinen, *Accused Wallingford Rapist Questions Victim*, SEATTLE POST INTELLIGENCER (June 22, 2009), <http://www.seattlepi.com/local/article/Accused-Wallingford-rapist-questions-victim-1304688.php> (hereinafter *Wallingford Rapist*).

The constitutional right for defendants to represent themselves was formally recognized by the United States Supreme Court in the 1978 case *Faretta v. California*.³ While the right of self-representation has remained intact, the Court has recognized several important limitations, including the ability of the trial judge to appoint standby counsel or, in extreme cases, terminate a defendant's right to self-representation.⁴ Additionally, trial judges may exert control over the cross-examination and impose limitations based on their observations of defendants' harassment of the witness or fears for witness safety.

While there are many legitimate reasons for a defendant to wish to proceed pro se—including a desire to address a jury without taking the stand, a distrust of the legal system, or a belief that their attorney is not adequately representing their case—a defendant's choice to represent themselves may also be triggered by a desire to intimidate or punish their victims. Especially in cases of domestic violence and sexual assault, the prospect of facing a pro se defendant who has the right to conduct cross-examination can act as a deterrent for victims who would otherwise be willing to cooperate with prosecutors bringing charges. This can place prosecutors in the difficult situation of choosing between bringing a weakened case to trial, compelling an unwilling victim of sexual assault to testify and face cross-examination by her alleged attacker, or dropping charges against a potentially dangerous defendant.⁵

To combat these potential evils, judges must be consistent and proactive in extending protections to victims of sexual assault who are facing pro se defendants. These protections should include multiple options to physically separate the defendant from the victim, and should also include holding pro se defendants in contempt when their line of questioning takes on a distinctly predatory or intimidating tone.⁶

One of the most important changes that could come to the justice system is a commitment to engage those defendants who wish to represent themselves in a discussion of the realities of pro se trials. Currently, pro se defendants must affirmatively assert their right to proceed pro se, but trial court judges are not obligated to discuss the decision to waive the

³ 422 U.S. 806.

⁴ See *Secondary Offense* at 3.

⁵ In the Cruz case where the woman threatened to jump from the top of the courthouse rather than face her alleged attacker, the prosecutors dropped the charges facing the defendant. Defendant was later convicted of crimes against three other victims and sentenced to serve 53 years in prison. See Jennifer Sullivan, *Child Rapist Sentenced to 53 Years*, SEATTLE TIMES (Jan. 21, 2011) <https://www.seattletimes.com/seattle-news/child-rapist-sentenced-to-53-years/>.

⁶ In one case where cross-examination continued for two days and the defendant repeatedly pursued lines of questioning that had been barred in pretrial motions, the Judge refused to hold the defendant in contempt of court in spite of multiple requests by the prosecutor. See *Wallingford Rapist*.

right to counsel with defendants.⁷ While courts should not seek to dissuade defendants wishing to represent themselves for legitimate reasons, a discussion with defendants to make sure they understand the importance of trained counsel, as well as an explanation that courts and prosecutors are not required to make any special exceptions for pro se defendants, may encourage more criminal defendants to reconsider their decision. While this will not dissuade all defendants, it may work to reinforce the serious nature of court proceedings and encourage defendants to make choices based on a desire for a good outcome rather than a desire to re-victimize.

Another important change that would provide more protections to both victims and pro se defendants is the consistent imposition of limits when it comes to cross-examination of victims when there is a longstanding relationship or a history of abuse. Prosecutors, defense counsel, and judges must work together to find a solution that will allow the victim to give truthful testimony without infringing on the rights of the pro-se defendant. Such limits may include the use of standby counsel,⁸ closed-circuit television (CCTV) questioning, podiums behind which a defendant must stand⁹, and the use of questions that have been preapproved by the court. These means have been criticized by defense lawyers as limiting the freedom of pro se defendants to conduct their own cases, but the minor impingement on a defendant's ability to act exactly as he wishes is more than justified by the need to protect the psychological health of victims. Buffers also have the additional benefit of providing protections for pro se defendants who may otherwise question their alleged victims in an overbearing, insulting, or aggressive manner that may prejudice the jury against their case.

The above solutions will only be effective if they are applied consistently in cases where the pro se defendant uses his time in court to re-victimize his victims. Therefore, while judges in courtrooms across the country must be proactive in inquiring into the motives of pro se

⁷ See *Iowa v. Tovar*, 541 U.S. 77, 80–81 (2004) (holding that a trial court must inform defendants wishing to waive their right to counsel of the nature of the charges he is facing, his right to be counseled, and the range of punishments available upon the entry of a guilty plea).

⁸ A standby counsel is an attorney assigned by the court to be a counselor or advisor to a pro se defendant. While the specific duties and ethical responsibilities of standby counsel need to be clarified, standby counsel can provide an invaluable buffer between pro se defendants and victims. Standby counsel may be utilized to deliver cross-examination drafted by the defendant and may also be useful in cases where the defendant has overstepped and the judge wishes for him to stand down. For a general discussion on standby counsel, see Anne Brown Poulin, *The Role of Standby Counsel in Criminal Cases: In the Twilight Zone of the Criminal Justice System*, 75 N.Y.U. L. REV. 676 (2000).

⁹ In many courtrooms, podiums are freely available for use. The judge may require a pro se defendant to remain behind a podium in a predetermined, fixed location in order to prevent the defendant from moving closer to the victim in an attempt to intimidate.

defendants and imposing limits on their actions in the courtroom, legislatures should also consider adopting measures that allow for the automatic separation of victims of certain crimes from pro se defendants. Legislation of this type would provide that in any case of domestic violence or sexual assault where the victim and prosecutor determined that a pro se defendant was likely to intimidate or harass the victim on the stand the judge would automatically grant a motion allowing for some form of separation in the courtroom. Legislation providing for the default approval of separations would have the effect of making the separation of pro se defendants and victims more consistent.

After a defendant chooses to proceed pro se in a case of sexual assault or domestic violence, the prosecutor should speak candidly with the victim and her advocates about the impact this may have on the victim's testimony. If the victim feels she will be unable to face questions from her alleged attacker during cross-examination, then the prosecutor should draft motions to reduce the contact the defendant will be able to have with the defendant.

Not every victim of sexual assault or domestic violence needs the above protections. The victims most likely to require the additional protections in the courtroom are those who have a longstanding relationship and history of abuse from their attacker. Prosecutors and victim advocates must be in communication with victims who will testify at trial to make sure they are prepared for the possibility of a pro se defendant, and must also consider the impact on victims when considering whether to move forward with a trial or settle a case. Additionally, prosecutors and victim advocates should be active in promoting both legislative and cultural shifts necessary to protect the psychological health of victims who will be cross-examined by their alleged attackers.