

Navigating the Perils of Pro Se: How to Protect Your Client From Cross-Examination by a Pro Se Defendant*

For the skilled trial attorney, one goal of a successful cross-examination is to establish control over the witness so that the attorney can shape the information that he or she wants the jury to hear. When a criminal defendant chooses to act as his or her own attorney to personally question a victim-witness, cross-examination is also about control, but often for a different purpose; cross-examination “provides one last opportunity for the defendant to torment the victim.”¹ Cross-examination can be unsettling for any witness, but for crime victims the experience can be terrifying. Being subject to personal questioning by a pro se defendant can re-victimize a crime victim by forcing him or her to relive the trauma that thrust the victim into the criminal justice system.

The United States Supreme Court has held that criminal defendants have a constitutional right, under the Sixth Amendment, to act as their own attorney—also referred to as proceeding “pro se” (on one’s own behalf). *See Faretta v. California*, 422 U.S. 806, 820 (1975). This right of self-representation includes the right to cross-examine witnesses. *See McKaskle v. Wiggins*, 465 U.S. 168, 174 (1984). Unfortunately, many defendants abuse that right, using it as a tool to traumatize their victims.² Fortunately, several courts have held that denying a pro se defendant the opportunity to cross-examine his or her victim does not violate defendant’s Sixth Amendment right to self-representation where there is an important public policy or state interest justifying such a denial.³ The most important case in this line of decisions, allowing a prohibition of direct pro se examination of victims, focuses specifically on child-victims. *See Fields v. Murray*, 49 F.3d 1024, 1036 (4th Cir. 1995) (en banc), *cert. denied*, 516 U.S. 88 (1995).

I. Preventing Pro Se Cross-Examination

According to the Fourth Circuit Court of Appeals, protecting child-victims from trauma is an “important state interest” that provides a basis to prohibit a criminal defendant from cross-examining his or her child accusers. *Fields*, 49 F.3d at 1036. In *Fields*, defendant was on trial for multiple counts of sexual abuse stemming from allegations that he sedated and molested his daughter and several of her friends during sleepovers at his trailer. *Id.* at 1025-26. Prior to trial, defendant sought to dismiss his attorneys and to take charge of the case in large part so that he could personally question the girls, stating that “these kids cannot look me in the eye and lie to me.” *Fields*, 49 F.3d at 1026. The trial court denied defendant’s request; instead, requiring him to submit his questions through an attorney. *Id.* at 1027 n.5. Defendant appealed the trial court’s ruling on the grounds that it violated his Sixth Amendment right to self-representation; the Fourth Circuit Court of Appeals disagreed. *Id.* at 1034.

In reaching its conclusion, the Fourth Circuit explained that the core purpose of the Sixth Amendment’s self-representation guarantee was “‘to affirm [defendant’s] dignity and autonomy’ and to present what he believes is his ‘best possible defense.’” *Id.* at 1035 (internal citations omitted). The court observed that the opportunity to personally cross-examine his victims was only one element of defendant’s right to self-representation and, if denied that opportunity, he still could have controlled every other aspect of his defense, including specifying what questions should be asked of the victims. *Id.* The court concluded that by prohibiting defendant from conducting a face-to-face cross-examination of his victims, the trial court did not deny him the right to represent himself; it merely *limited* the right to self-representation, leaving its core purpose intact. That conclusion, however, did not end the inquiry. The court further held that to justify limiting a defendant’s right to self-representation by prohibiting defendant from conducting

his or her own cross-examination, the state must show that there was an “important state interest” that outweighed the right to directly question a witness. *Id.* at 1036. According to the Fourth Circuit, protecting child-victims from emotional trauma qualified as an “important state interest.”⁴ *Id.* The Fourth Circuit’s analysis provides a strong basis for denying a pro se defendant the opportunity to directly question a child-victim.⁵

Only a couple of courts have addressed the constitutionality of preventing a pro se defendant from personally cross-examining an *adult* victim. See *United States v. Pleasant*, 12 F. App’x 262 (6th Cir. 2001) (holding that, under the specific circumstances of this case, it was not an abuse of discretion for the trial court to prohibit defendant from personally cross-examining the adult kidnapping victim); *Partin v. Commonwealth*, 168 S.W.3d 23, 27 (Ky. 2005) (explaining that defendant’s right to self-representation did not include the right to personally cross-examine his adult victim). Nevertheless, a majority of states, pursuant to statute and/or state constitutional provision, provide crime victims with the right to be treated with “fairness, dignity, and respect.”⁶ Because subjecting crime victims to personal cross-examination by the individual charged with harming them is an affront to their right to “fairness, dignity, and respect,” those laws should constitute an “important state interest” that would justify preventing a defendant from directly cross-examining the victim. No court, however, has yet had the opportunity to address this issue.

There is also an important public interest in preventing traumatized victims (regardless of age) from experiencing further trauma as the result of being questioned personally by a criminal defendant. Describing the devastating impact of the trial process on survivors of sexual assault and domestic violence, Dr. Judith Herman stated that “[i]f one set out by design to devise a system for provoking intrusive posttraumatic symptoms, one could not do better than a court of law.”⁷ It stands to reason that a victim’s trauma would be exacerbated if the “psychological attack” of cross-examination is personally mounted by a pro se defendant. Although current law only identifies preventing trauma to children as a justification for prohibiting pro se cross-examination, there is no reason that the same rationale could not be applied to adult victims who have experienced trauma as a result of crime.⁸

II. The Role of Standby Counsel

A trial court is authorized to appoint standby counsel to assist a pro se defendant “even over objection by the accused.” *Wiggins*, 465 U.S. at 176. Victims’ attorneys should request that the court appoint standby counsel as soon as defendant announces his or her intention to pursue self-representation. By doing so, standby counsel will be available to present the pro se defendant’s cross-examination questions, if a victim’s attorney successfully argues to prevent personal cross-examination.⁹

III. Protecting A Crime Victim from Harassment and Intimidation by a Pro Se Defendant

If a victim’s attorney is unsuccessful in persuading the trial court to prevent a pro se defendant from personally cross-examining a victim-witness, the attorney can try to protect his or her client from harassment on the stand by appealing to a trial court’s authority to preserve order in the courtroom. A defendant’s right to self-representation does not include the right to abuse witnesses or disrupt court proceedings because judges have a legitimate interest in maintaining the safety and decorum of their courtrooms, which justifies placing limits on a criminal defendant’s behavior.¹⁰ With regard to a pro se defendant, a trial court can limit self-representation where defendant “deliberately engages in serious and obstructionist misconduct.” *Faretta*, 422 U.S. at 834. The Federal Rules of Evidence also address a court’s obligation where an attorney or pro se defendant behaves abusively towards a witness while conducting cross-examination: “The court shall exercise reasonable control over the mode . . . of interrogating witnesses [including] protect[ing] witnesses from harassment or undue embarrassment.” Fed. R. Evid. 611(a).

These principles provide a basis for limiting a pro se defendant’s cross-examination where defendant is abusing a witness or disrupting the courtroom. Notably, this limitation would apply to abusive questioning of *all witnesses*, not just victims. Where a pro se defendant is harassing or intimidating a witness, a victim or witness’s attorney should move the court to exercise its authority to protect his or her client.

IV. Conclusion

Under *Faretta v. California*, a defendant has a constitutional right to self-representation, but the United States Supreme Court has made clear that this right is not absolute. See *Faretta*, 422 U.S. at 834. Defendants cannot use the Sixth Amendment as a sword to disrupt the courtroom or to intimidate their victims. If a court is unwilling to place appropriate limits on a pro se defendant on its own, it is important for victims' attorneys and prosecutors to request such limits.

Practice Pointers

- Argue that preventing the victim from experiencing trauma is an important state interest that justifies prohibiting pro se defendant from personally cross-examining the victim.
- Argue that state statutory and constitutional rights to be treated with “fairness, dignity, and respect” are important state interests that justify prohibiting pro se defendant from personally cross-examining the victim.
- Request that the trial court appoint standby counsel as soon as defendant notifies the court that he or she is going to exercise the right to self-representation.
- Appeal to the court’s authority to maintain courtroom safety and decorum to keep defendant from personally cross-examining any witness in an abusive manner.

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¹ Tom Lininger, *Bearing the Cross*, 74 *Fordham L. Rev.* 1353, 1412 (2005).

² See *id.*

³ See, e.g., *Fields v. Murray*, 49 F.3d 1024, 1025-26 (4th Cir. 1995) (en banc), *cert. denied*, 516 U.S. 88 (1995) (holding that the trial court’s ruling preventing pro se defendant from cross-examining his child accusers did not violate his Sixth Amendment right to self-representation); *State ex rel. Montgomery v. Padilla*, 349 P.3d 1100, 1102 (Ariz. Ct. App. 2015) (noting that “[a] trial court may exercise its discretion to restrict a self-represented defendant from personally cross-examining a child witness without violating a defendant’s constitutional rights to confrontation and self-representation”); *Lewine v. State*, 619 So. 2d 334, 336 (Fla. Dist. Ct. App. 1993) (upholding the trial court’s “reasonable solution to the problem posed by the juxtaposition of *Faretta* and *Craig*” in which the trial court denied pro se defendant’s request to personally cross-examine child victims, instead requiring standby counsel to ask defendant’s questions for him); *Depp v. Commonwealth*, 278 S.W.3d 615 (Ky. 2009) (holding that there is no constitutional right to personally question the victim); *Partin v. Commonwealth*, 168 S.W.3d 23, 27 (Ky. 2005) (explaining that defendant’s right to self-representation did not include the right to personally cross-examine his victims); *People v. Daniels*, 874 N.W.2d 732, 739 (Mich. Ct. App. 2015) (holding that Michigan Rule of Evidence 611(a) “allows the trial court to prohibit a defendant from personally cross-examining vulnerable witnesses—particularly children who have accused the defendant of committing sexual assault”); *Rhode Island v. Taylor*, 562 A.2d 445, 454 (R.I. 1989) (concluding that defendant could be denied the right to

personally cross-examine the child-victim of sexual abuse where such cross-examination would traumatize the child); *Washington v. Estabrook*, 842 P.2d 1001, 1006 (Wash. Ct. App. 1993) (holding that defendant’s right to self-representation was not violated where defendant was prohibited from directly cross-examining the victim but his questions were asked by the court, defendant had opportunity to follow up, and the court explained to the jury multiple times that defendant was representing himself). *But see Kentucky v. Stincer*, 482 U.S. 730, 753 (1987) (6-3 decision) (Marshall, J., dissenting) (“Had respondent invoked his Sixth Amendment right of self-representation and appeared pro se, there would be little doubt that he would have been entitled to attend the competency hearing and cross-examine the child witnesses.”); *Nesmith v. State*, 6 So. 3d 93 (Fla. Dist. Ct. App. 2009) (“Under the facts of this case, we find that [defendant’s] Sixth Amendment right to personally conduct his defense was violated by the trial court’s refusal to allow him to cross-examine the victim.”); *Commonwealth v. Spear*, 686 N.E.2d 1037 (Mass. App. Ct. 1997) (without discussing or deciding the issue, pro se defendant was permitted to personally question the child victim).

⁴ The Fourth Circuit borrowed this two-part analysis from an earlier United States Supreme Court case. *See Maryland v. Craig*, 497 U.S. 836, 849-50, 857-58 (1990) (explaining that, in the Confrontation Clause context, “the face-to-face confrontation requirement [of the Sixth Amendment] is not absolute” and protecting child-witnesses from trauma was an “important public policy” that outweighed a defendant’s right to direct, physical confrontation).

⁵ A victim’s attorney should present evidence and ensure that the trial court makes sufficient factual findings on the record to support the conclusion that the child-victim would suffer trauma. *See State v. Folk*, 256 P.3d 735, 747 (Idaho 2011) (“Absent evidence that would justify doing so, preventing Defendant from personally conducting the cross-examination infringed upon his right to represent himself.”); *Commonwealth v. Conefrey*, 570 N.E.2d 1384 (Mass. 1991) (reversing defendant’s convictions for indecent assault and battery on the victim—his minor daughter—because the trial court’s “mere belief” that the child-victim would be harmed or intimidated or testify untruthfully, is insufficient to limit pro se defendant’s right to personally cross-examine the victim).

⁶ *See Nat’l Crime Victim Law Inst., A Review of the American Bar Association’s Guidelines for Fair Treatment of Crime Victims and Witnesses* 8 (2006), available at <http://law.lclark.edu/live/files/6450-a-review-of-abas-guidelines-for-fair-treatment-of>.

⁷ Judith L. Herman M.D., *Trauma & Recovery* 72 (1992).

⁸ Trial courts that have prohibited a pro se defendant from personally cross-examining an adult victim have relied on, *inter alia*, the victim’s fear of defendant, and preventing intimidation, abuse or harassment by defendant. *See Pleasant*, 12 F. App’x at 267 (holding that it was not an abuse of discretion to prohibit pro se defendant from personally cross-examining the victim where case involved alleged abuse and intimidation); *Depp*, 278 S.W.3d at 619 (stating that defendant has “no constitutional right to intimidate a victim by personally questioning him or her”); *Partin*, 168 S.W.3d at 27 (finding that the prohibition was justified based on the victim’s letter stating that she was terrified of defendant, that defendant allegedly held a gun to her head, that she had received threats on her life, and that she was afraid defendant would try to intimidate her during cross-examination).

⁹ In the alternative, a victim’s attorney could request that the trial court ask questions that defendant provides. *See Depp*, 278 S.W.3d at 619 (holding that there is “no constitutional right to intimidate a victim witness by personally questioning him or her. [Defendant’s] interest is sufficiently protected when the judge asks questions that [defendant] has provided”).

¹⁰ *See, e.g., Deck v. Missouri*, 544 U.S. 622, 628 (2005) (explaining that shackling a defendant during the guilt phase of a non-capital trial is constitutionally permissible where there is the need to maintain “security . . . or courtroom decorum”); *Holbrook v. Flynn*, 475 U.S. 560, 571 (1986) (holding that placement of four uniformed troopers around defendant at trial was not prejudicial and was justified given state’s interest in maintaining a secure courtroom).

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