September 29, 2011

Justice Charles W. Johnson
Rules Committee Chair
Washington State Supreme Court
Temple of Justice
P.O. Box 40929
Olympia, WA 98504-0929

Re: *ACLU-WA Comments on Proposed Amendments to CrR 3.1 Regarding Cross-Examination by Pro Se Defendants (Rules Committee Agenda 10/10/11)*

Dear Justice Johnson:

Thank you for inviting our comments on this proposal. On behalf of the American Civil Liberties Union of Washington (ACLU-WA), we are writing to express concerns about the proposed amendment to CrR 3.1. In short, ACLU-WA's position is that 1) the proposed amendment is unnecessarily duplicative of ER 611; and 2) to the extent the proposed amendment seeks to create a specific procedure for the cross-examination of non-child victims by pro se defendants, such exception is not supported by law or public policy.

I. The Protections Granted by ER 611

Evidence Rule 611 vests the trial court with broad discretion in moderating the fact-finding process, making the proposed amendments to CrR 3.1 unnecessary:

(a) Control by Court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.
(b) Scope of Cross Examination. Cross examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

ER 611.

II. The Right to Confrontation

The Sixth Amendment typically requires face-to-face confrontation with the accuser. "[L]ive testimony is preferred because it is believed that face-to-face confrontation enhances the accuracy of fact-finding." State v. Foster, 135 Wn.2d 441, 465 (internal citations omitted). The "preferred right of physical presence, or 'face-to-face' confrontation, may be dispensed with only where denial of such confrontation is

necessary to further an important public policy and only where *the reliability of the testimony is otherwise assured.*" Id. at 457 (citing Maryland v. Craig, 496 U.S. 836, 849-50 (1990)) (emphasis added).

a. Public Policy

The Foster Court denied a constitutional challenge to RCW 9A.44.150, which allows –under certain circumstances- remote cross-examination of child witnesses under the age of ten. The Foster Court found a specific public policy protecting the emotional well-being of young children testifying in child sex cases. Id. at 468. Accord, Craig, 497 U.S. at 853. ACLU-WA is aware of no case in Washington State which 1) concludes that public policy is served by allowing alleged victims over the age of ten to testify outside the presence of the accused; or 2) concludes that the Sixth Amendment rights or state constitutional rights of the accused would be fulfilled in such a scenario.

The policy allowing remote cross-examination of child witnesses is sensible because children under the age of ten are emotionally underdeveloped. They may be unable to face the accused or speak truthfully in the daunting environment of a trial court. Notably, the proposed amendments to CrR 3.1 apply not to a particular class of *witnesses*, but to a class of *criminal charges*. There is no question that victims of sexual assault suffer trauma from the offense and have legitimate fears about the trial process. However, public policy is not served by singling out a class of crimes for special treatment when the victims of other serious crimes, such as attempted murder or felony domestic violence, face similar fears. In fact, ACLU-WA is concerned that a rule limiting the right to cross-examination in sexual assault cases may be expanded in the future to include other classes of criminal charges. CrR 3.1 erodes the constitutional right to cross-examination, and opens the door for future erosion of that essential right.

b. Reliability

With respect to reliability, the Foster Court noted that the complex procedural components of RCW 9A.44.150 were "adequate for ensuring the reliability of the child's testimony." Id. at 470. Notably, those myriad procedural requirements are absent from the proposed amendment to CrR 3.1.

III. There is No Legal Basis to Limit the Rights of Pro Se Defendants

Inherent in the right to counsel is the right to self-representation. A pro se defendant acts as his or her own lawyer, and as such is required to "conform to substantive and procedural rules." State v. Bebb, 108 Wn.2d 515, 524 (1987).

There is no constitutional basis for a rule that limits the right of confrontation on the basis that a defendant has exercised the right to proceed pro se.[1]

The proposed rule not only unfairly limits the rights of defendants to proceed pro se and to effectively cross-examine witnesses, but also interferes with the constitutional presumption of innocence. Prohibiting a defendant from directly cross-examining a witness sends the message to the jury that the defendant is a predator from whom the witness must be protected.

IV. Conclusion

In sum, ACLU-WA believes that the existing protections under ER 611 vest trial courts with sufficient discretion to protect witnesses who testify at trial. There is no public policy that supports additional protections for non-child witnesses, and the proposed amendment to CrR 3.1 would categorically impact the right to confrontation in sexual assault cases. Finally, the suggested rule creates a decreased right to confrontation *specifically* for pro se defendants, and such a rule conflicts with the constitutional right to self-representation.

Very truly yours,

Nancy L. Talner
Staff Attorney

Robert Flennaugh II
Law Office of Robert Flennaugh II, PLLC

For ACLU of Washington Foundation

---

[1] Notably, even the statutory protections for child witnesses do not permit testimony outside the presence of a pro se defendant unless the defendant is assisted by a court-appointed attorney. RCW 9A.44.150(4).