



September 29, 2011

The Honorable Charles W. Johnson
Associate Chief Justice
Washington State Supreme Court
P.O. Box 40929
Olympia, WA 98504-0929

Re: Proposed changes to CrR 3.1 regarding pro se defendants

Dear Justice Johnson:

On behalf of Legal Voice and the Washington State Coalition Against Domestic Violence, we are writing to comment on a proposed change to CrR 3.1 regarding restrictions on pro se defendants in criminal proceedings. We appreciate the Court's invitation to comment on the proposal.

Legal Voice, formerly known as the Northwest Women's Law Center, is a non-profit public interest organization that has worked since 1978 to advance women's rights in the Northwest. Our work has included efforts to improve Washington's response to gender violence and the treatment of gender violence survivors in the criminal justice system.

The Washington State Coalition Against Domestic Violence (WSCADV) is a private non-profit membership organization comprised of seventy-three domestic violence shelter and advocacy organizations in Washington State committed to ending domestic violence.

We recognize and respect the federal and state constitutional rights of defendants to represent themselves in criminal proceedings. However, the right to self-representation is not absolute, and must be balanced against the state's strong interest in protecting the dignity and respect of victims, survivors, and witnesses in such proceedings. *See, e.g.*, Wash. Const. Art. I, § 35; RCW 7.69.010.

In some cases, a defendant's self-representation may be abused as a means to re-traumatize, intimidate, or harass witnesses. This risk is especially acute when witnesses are survivors of

sexual assault or domestic violence. Unfortunately, it appears that courts are often not clear about what steps they may take to protect witnesses in these situations without violating the defendant's self-representation rights.

As a result, we support efforts to clarify the ability of courts to restrict questioning of witnesses by self-represented defendants in criminal cases. However, we believe the proposed rule should be modified in several respects.

In particular, we are concerned about subsection (2) of the proposed rule, which would establish a "good cause" standard for restricting a self-represented defendant's questioning of a witness. As drafted, subsection (2) states:

Good cause is shown when the court finds by substantial evidence, in a hearing conducted outside the presence of the jury, that requiring the witness to be questioned by the defendant without restriction will cause the individual to suffer serious emotional or mental distress that will prevent the witness from reasonably communicating at the trial.

This language is largely modeled on RCW 9A.44.150(1)(c), in which the Legislature defined "good cause" for the purposes of determining whether child witnesses under the age of ten should be permitted to testify by closed-circuit television in certain criminal proceedings.

We believe limiting good cause to circumstances where the witness must suffer such an extreme level of distress so as to prevent her or his reasonable communication strikes an inappropriate balance. Certainly, while we agree that self-representation rights may be restricted if a witness would "suffer serious emotional or mental distress that will prevent the witness from reasonably communicating at the trial," it is not the only situation in which such restrictions may be justified.

The state may also have an interest in preventing the use of the court process as a tool of abuse. In addition, there is a state interest in minimizing the retraumatization of a victim in the courtroom in situations where questioning by a pro se defendant may cause serious emotional injury that may not prevent the witness from testifying, but the effects manifest *after* the testimony is taken.

In *Fields v. Murray*, 49 F.3d 1024, 1035 (4th Cir. 1995) (en banc), the U.S. Court of Appeals for the Fourth Circuit addressed the question of when a defendant's right to self-representation may be restricted and held:

[The Defendant's] self-representation right could have been properly restricted by preventing him from cross-examining personally some of the witnesses against him, which is one "element" of the self-representation right, if, first, the purposes of the self-

representation right would have been otherwise assured and, second, the denial of such personal cross-examination was necessary to further an important public policy.

As a result, the rule should make it clear that a self-represented defendant's questioning of a witness may be restricted when necessary to further an important state interest.

We also believe that the proposed rule should recognize that when a self-represented defendant is restricted from questioning a witness, courts may permit another individual or the court to question the witness on the defendant's behalf, subject to appropriate safeguards. *See Fields*, 49 F.3d at 1035; *State v. Estabrook*, 68 Wn. App. 309, 317-18 (1993); *Partin v. Kentucky*, 168 S.W.3d 23, 27 (Ky. 2005).

Therefore, we support removing subsection (2) of the proposed rule and adopting a revised subsection which provides:

If the court finds by substantial evidence, in a hearing conducted outside the presence of the jury, that an important state interest requires restricting the defendant's questioning of a witness, the court may permit another individual to conduct the questioning of the witness on behalf of the defendant, or the court may itself conduct the questioning of the witness on behalf of the defendant, subject to requirements that:

- (i) The defendant prepares the questions to be asked and any follow-up questions;
- (ii) The court inform the jury that although a third party or the court is conducting the questioning of the witness, the defendant is continuing to represent himself or herself and that the defendant composed the questions; and
- (iii) The court shall instruct the jury not to consider the court procedure for questioning the witness, nor draw any inference from the procedure, when evaluating the facts of the case and the charges presented against the defendant.

This modified language includes the "important state interest" standard for determining whether questioning may be restricted. It also recognizes courts may have another individual or the court itself question witnesses on the pro se defendant's behalf, subject to the safeguards provided in requirements (i) – (iii).

Such a provision would be consistent with *State v. Estabrook*, 68 Wn. App. 309, 842 P.2d 1001, *rev. denied*, 121 Wn.2d 1024 (1993). In *Estabrook*, the trial court refused to permit a self-represented defendant to cross-examine a witness. Instead, the court itself cross-examined the witness using questions prepared by the defendant.

Looking to the U.S. Supreme Court's decision in *McCaskle v. Wiggins*, 465 U.S. 168 (1984), the *Estabrook* court noted that stand-by counsel may be permitted to question witnesses without the consent of a self-represented defendant if: (1) the defendant preserves actual control over the

case he chooses to present to the jury; and (2) participation by stand-by counsel without the defendant's consent is not allowed to destroy the jury's perception that the defendant is representing himself. *Estabrook*, 68 Wn. App. at 318. Applying that two-part test, the court concluded that the trial court's procedure did not violate the defendant's self-representation rights because:

First, it appears that Estabrook was permitted to maintain "actual control over the case he [chose] to present to the jury." He prepared the questions asked of J.H. He had the opportunity to ask followup questions. . . . Secondly, the procedure followed did not "destroy the jury's perception that [Estabrook was] representing himself." The court carefully explained to the jury several times that Estabrook was representing himself, and indeed, that that was the reason why the judge was asking the question prepared by the defendant.

Id.

We recognize that there is not a large body of case law that directly addresses the ability of courts to restrict a self-represented defendant from personally questioning a witness. However, existing case law (including the decisions in *Estabrook*, *Fields*, and *Partin*) does support: (1) limiting a self-represented defendant's questioning of a witness when necessary to further an important state interest; and (2) permitting another individual or the court itself to question witnesses on a self-represented defendant's behalf, subject to appropriate safeguards. As a result, we believe the proposed rule change should include both of these provisions.

Thank you for your consideration of these comments. We look forward to continuing to work with you on this important issue.

Sincerely,



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