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Update

Unsafe Havens II: Prosecuting Technology-Facilitated Crimes Against Children
March 5 – 9, 2012

Held at AOL in Sterling, Virginia This is an advanced trial advocacy courts focusing on the prosecution of technology facilitated child sexual exploitation cases. In addition to presentations on related topics, students will conduct a trial from opening statements to presenting the state's case to cross-examining a defense expert to closing statements.

Please contact NCPCA Senior Attorney Justin Fitzsimmons at jfitzsimmons@ndaa.org or (703) 519-1695 for additional information about these courses.

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A Secondary Offense Worth Preventing: Restricting the *Pro Se* Defendant's Ability to Personally Question Child Abuse Victims

By David Pendle and Amanda Appelbaum[1]

She stayed on the roof of the courthouse for three hours. Threatening to jump, her legs dangled over the edge while observers 12 stories below begged her to reconsider. But this precarious position, flirting with near certain death, provided the woman more comfort than her immediate alternative, the courtroom.

The 21 year-old woman was scheduled to testify and confront her alleged childhood abuser, Salvador Aleman Cruz. The woman was only a toddler when Cruz started dating her mother. The molestations soon followed and continued for four years. Cruz was now charged with multiple counts of child molestation and rape of a child. But the thought of him directly questioning her about the events of her childhood was too much to bear.

Cruz had elected to proceed without an attorney. Although he was assigned stand-by counsel, Cruz was personally conducting the cross-examination of witnesses. The woman's mother was on the stand for much of the morning and the woman was scheduled to testify next. Instead, she made her way to the top floor of the King County Courthouse in Seattle, found a rooftop door that was inadvertently left unsecured, and texted the assigned deputy prosecutor that she was going to jump. She reportedly told prosecutors that she would rather die than face Cruz.[2] After hours of anxious negotiations, Seattle police officers were finally able to secure the woman's safety.

Coincidentally, only months prior the Washington State legislature considered a bill that could restrict a *pro se* defendant's ability to personally question witnesses.[3] The bill was in response to another *pro se* defendant who further traumatized his alleged rape victim through his cross-examination. This defendant took full advantage of his unfettered access to the victim, interrogating her for two full days, smirking as she recounted the painful details of the rape, and repeatedly disregarding pretrial orders and any notions of decency.[4] The prosecutor described it as the most of-

fensive line of questioning she had witnessed in 10 years of practice.[5] The bill unanimously passed in the State House, but stalled in the Senate's Judiciary Committee over concerns that any restrictions on a *pro se* defendant's ability to question victims would violate his Sixth Amendment right to confront witnesses.

This article examines the extent of a *pro se* defendant's right to directly cross-examine his alleged victims, particularly victims of child sexual abuse. The article explores the intersection between the defendant's right to proceed *pro se*, right to confront witnesses, and any rights afforded to victims through state statutes or constitutions. The article then outlines potential avenues that prosecutors can use to prevent abusive *pro se* defendants from exploiting the process to further terrorize their victims.

Proceeding *pro se:* the reasons and the right

While no national level statistics are maintained on the number of defendants that proceed *pro se*, many states report that the proportion of defendants that chose to do so is increasing.[6] The motivations for waiving the right to counsel likely run the gamut. Defendants may lack confidence in or have a personal dislike for their attorney; they may be egotistical or mentally unstable; or they may perceive a tactical advantage — the ability to personally address the jury, potentially garner sympathy, and directly cross-examine their accusers.

The right of a defendant to proceed *pro se* was only firmly established by the United States Supreme Court in 1975 in *Faretta v. California*.[7] The right was found implicit in the fundamental Sixth Amendment right to present a defense.[8] As the *Faretta* Court stated, "[t]he right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails."[9]

Unlike the explicit Sixth Amendment right to counsel, which is in effect until waived, the right to self-representation must be asserted.[10] Given the liberty interest at stake for a defendant, as well as the inherent complexities of trial, this right can only be exercised after a defendant voluntarily and intelligently elects to proceed without counsel.[11] *Pro se* defendants are generally expected to be self-sufficient in navigating courtroom procedure, filing relevant motions, making timely objections, and otherwise complying with evidentiary and ethical standards. A trial judge "is under no duty to provide personal instruction on courtroom procedure or to perform any legal 'chores' for the defendant that counsel would normally carry out."[12]

The trial judge may, however, either terminate self-representation or appoint "standby counsel" over the defendant's objection as long as that participation does not deny the defendant "a fair chance to present his case in his own way."[13] The Supreme Court has explained that a *pro se* defendant is "entitled to preserve actual control over the case he chooses to present to the jury," and that "participation by standby counsel without the defendant's consent should not be allowed to destroy the jury's perception that the defendant is representing himself."[14] Nonetheless, it is clear the right to self-representation is not absolute: "[T]he government's interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer."[15]

Where self-representation and confrontation rights converge

Any restrictions on a *pro se* defendant's ability to personally cross-examine his victims necessarily implicates several constitutionally protected rights, including self-representation, confrontation, and any rights afforded to victims or protecting the dignity of the process. The seminal case on point is *Fields v. Murray*, in which the Fourth Circuit held that the trial court indeed had the discretion to preclude a defendant from personally cross-examining the young girls that had accused him of sexual abuse.[16]

Fields lived in a trailer home with his mother and 12 year-old daughter.[17] His daughter's friends frequented the Fields' home, and would often stay the night. As the girls prepared for bed, Fields developed a routine where he would give each girl a handful of sleeping pills, claiming they were vitamins. Fields then gave the girls backrubs as they fell asleep, which devolved into fondling their private areas; he would often lead one of the girls into his bedroom and rape her.[18]

This routine was only interrupted when a child refused to take the "vitamins," was awake for the abuse, and then reported it to an adult.[19] At trial, Fields insisted upon representing himself, claiming that the children were lying but would not lie to his face.[20] The trial court denied his request to personally examine his accusers, instead allowing Fields to write his questions for his standby counsel to read. In response, Fields claimed, "Well, then, there won't be any justice in this courtroom."[21]

The "State's interest in the physical and psychological well-being of child abuse victims" could be a "sufficiently important" public policy to curtail the defendant's confrontation rights.

On appeal, the Fourth Circuit first looked to *Maryland v. Craig*, in which the U.S. Supreme Court analyzed whether a state statute providing for child victims of sexual abuse to testify via one-way closed circuit television violated a defendant's right to confrontation.[22] The Court in *Craig* held that, so long as the "reliability of the testimony was otherwise assured" and the denial of face-to-face confrontation was "necessary to further an important public policy," the confrontation right could be restricted in such a manner.[23] The Court reasoned that the core elements of confrontation — oath, cross-examination, and observation of the witness' demeanor — were fully preserved.[24] And the "State's interest in the physical and psychological well-being of child abuse victims" could be a "sufficiently important" public policy to curtail the defendant's confrontation rights.[25]

The Fourth Circuit reasoned that if a defendant's confrontation right could be limited in the manner provided in *Craig*, his self-representation right could likewise be limited.[26] The court noted that the while the confrontation right has always been guaranteed explicitly in the Sixth Amendment, the self-representation right was only found implicitly in 1975 (and then with the dissent of three justices) and has been universally recognized as not absolute.[27] In applying *Craig's* analysis, the Fourth Circuit concluded that the right to self-representation could be restricted as long as the purposes of the right were "otherwise assured" and the restriction was "necessary to further an important public policy."[28]

As to the first prong, although Fields was denied the ability to personally conduct the cross-examination of the young girls, his right to control the case and present his chosen defense would have been "otherwise assured" because he could have specified the questions to be asked of the girls and controlled every other aspect of his defense.[29] Similarly, the perception that Fields was representing himself would have been "otherwise assured" because he could have conducted every other aspect of the trial, preserving his "dignity and autonomy."[30]

Further, in comparing the harm at issue to that in *Craig*, the court found that the State had an "extremely important interest" in protecting the young witnesses by preventing Fields from personally cross-examining them.[31] The court held that the State's interest here was "at least as great as, and likely greater" than that in *Craig*, where the interest was simply protecting children from the emotional trauma of having to testify in their alleged abuser's presence.[32] Therefore, the court determined that the interest in protecting the psychological well-being of the girls was sufficiently important to outweigh Fields' right to personally cross-examine them.[33]

The victim's rights — yes, they have some

Several other courts have used the *Fields* analysis, or one analogous to it, to reach similar holdings protecting and validating the rights of crime victims.[34] State statutes and many state constitutions already afford victims certain rights throughout the criminal process.[35] Often these rights relate to notice or participation, but many also include the right to be treated with fairness, dignity, and respect, and to be protected from intimidation or harassment.[36] Because this is an especially difficult process for child victims, it is important that prosecutors inform courts of these basic rights through

pre-trial motions.[37] These rights include "child friendly" language accommodations such as using a "child friendly" oath, prohibiting intimidating questioning, and mandating attorneys to ask questions in a "developmentally and linguistically appropriate manner."[38] Other accommodations involve allowing the child to bring a "comfort item," therapy animal, or support person to court; or to have the courtroom adjusted to fit the needs of the child (e.g., sit on a pillow or in front of the witness box if the child can not see over it).[39]

Prosecutors commonly feel these rights are neglected, or even trampled upon, by trial judges who may seem more concerned with the potential of reversal associated with violating a defendant's rights. Nonetheless, it is important to remind judges that these important rights exist and must be balanced with the rights of the defendant. In states that afford crime victims constitutional rights, this balance can be achieved more easily, as the rights are to be protected and enforced in the same manner as a defendant's rights would be protected and enforced.[40]

Assessing and establishing the need for accommodation

Not every victim will need shielding from a *pro se* defendant. There may be cases where the defendant's personal questioning of the victim will do him considerable harm in the eyes of the jury. And older victims, or victims not well-known to the defendant, may be less traumatized by such confrontation. The strategic decision of whether to protect the victim, and to what extent, is of course best left to the assigned prosecutor, who should consult with the victim, victim's advocate, and others close to the victim where appropriate.

If it is decided that some measures are likely necessary to protect the victim from further trauma, a pretrial hearing to establish the victim's specific need is generally required for the victim to be questioned in a specialized manner. Although the Fourth Circuit in *Fields* did not require a separate necessity hearing, the court noted that there was ample evidence of necessity from the defendant's own statements, the facts of the case, and the record, which revealed in part that one of the young victims had cried on the stand during a preliminary hearing due to her embarrassment. Conversely, however, the Supreme Judicial Court of Massachusetts, addressing the same issue, held that the trial court had insufficient facts to support necessity where it only considered that the child was eleven, was the *pro se* defendant's daughter, and the defendant was charged with indecent assault and battery.[42] While jurisdictions have differed on whether and to what extent a hearing is necessary, considering what is at stake on appeal, a pretrial hearing to flesh out the need for the accommodation is the best practice.[43]

The need should be based on psychological evidence of the probable emotional harm to the victim. In *Craig*, the U.S. Supreme Court did not define necessity, but held that it was more than mere nervousness or fear of testifying generally; instead the trauma must stem from the victim's personal fear of the defendant.[44] Such necessity is best demonstrated by the victim's therapist, counselor, or a licensed psychologist or psychiatrist, but even a parent or teacher may be permitted to lay the foundation depending on the jurisdiction.[45] The need may also be justified by the facts of the underlying incident or the defendant's aggressive or manipulative behavior since the incident. For the latter, look to the defendant's behavior during court proceedings or as captured on jail phone recordings or other communications. Statutes permitting the use of closed circuit television (CCTV) for child witnesses can be used as a guide, as they similarly require a hearing to establish necessity.

Accommodations available

There are numerous accommodations that should be considered to protect sexual assault victims from *pro se* defendants. Some accommodations, such as utilizing CCTV and videotaped depositions, have long been codified and have survived constitutional challenge.[46] Others, such as appointing standby counsel to conduct the cross-examination, have long been utilized and relied upon by courts.[47]

Where standby counsel is appointed, the defendant is usually allowed to write out questions for counsel to

ask so as to preserve his right to represent himself. Sometimes defendants will have a choice between sitting next to standby counsel and providing the questions directly, or communicating the questions to standby counsel through headphones.[48] A special jury instruction regarding the standby counsel's role may be warranted. For example, an appropriate instruction may state that the victim's questioning was conducted by stand-by counsel as a convenience to the defendant and not as a result of the victim fearing the defendant or the court believing the defendant was guilty. Alternatively, a *pro se* defendant may opt to have the judge directly read the questions. Because this method would allow the defendant to ask every question he wanted, a defendant's right to control the case would be assured.

Child-specific accommodations are especially important, even where other accommodations like CCTV or standby counsel are utilized. Language-oriented protections would provide the court control over the tone and nature of the cross-examination (no matter who is asking the questions) and would help minimize any fear or intimidation the child is feeling. Other special procedures to consider include installing a one-way screen or other barrier between the defendant and the witnesses, conducting closed sessions out of the courtroom, and placing the defendant and the witnesses in separate rooms.[49]

To deter a defendant from proceeding *pro se* to begin with, some judges suggest advising the defendant in advance that his standby attorney will not be permitted to take over the case after cross-examination.[50] At a minimum, the defendant should be required to submit questions in advance and to remain at the table or behind a podium while questioning the victim. These types of accommodations — in addition to the basic treatment of child victims[51] — may prove beneficial.

Importantly, in terms of the ability of the defendant to actually confront and question a witness, these accommodations leave him in no worse position than the typical defendant, fully assisted by an attorney that conducts the cross-examination. In that sense, such accommodations do not even implicate the confrontation clause.

Moving forward — striking a balance

The 21 year-old victim who threatened to jump off a roof rather than be cross-examined by the defendant never ended up testifying. Rather than force her to be re-traumatized by personal confrontation, prosecutors chose to dismiss the charges against Cruz that pertained to her. While there were other victims who testified against Cruz, and he was thankfully convicted, the 21 year-old found no redemption in the courtroom.[52] She lost her day in court because the defendant attempted to victimize her through a court-sanctioned exploitation of his *pro se* rights — a preventable secondary offense.

If Washington State's bill had become law, perhaps the judge would have restricted the manner and means by which the defendant could cross-examine the victim. As of September 2011, the bill is still pending in the State House.[53] It is the first of its kind in the United States, although British courts already prohibit defendants from personally cross-examining the victim in a sexual assault case.[54] Both federal and state legislatures should enact statutes allowing the judge, upon motion or at his own discretion, to either prohibit or set clear boundaries on the *pro se* defendant's cross-examination of sexual assault victims. Until then, whenever a sexual assault defendant proceeds *pro se*, especially where the victim is a child, prosecutors should immediately assess the victim's needs and be prepared to file motions requesting appropriate accommodations. Judges have broad discretion when it comes to assuring a defendant's right to self-representation and a fair trial. What better reason to exercise that discretion than to protect a victim's right to testify free from secondary exploitation at the hands of her abuser.

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[2] Clarridge, C., *Rape victim empathizes with woman who fled from testifying*, The Seattle Times, Nov. 8, 2010.

[3] House Bill 2457 would have provided judges with discretion to protect sexual assault victims from direct questioning from their alleged abusers. H.B. 2457, 2009 Leg., Special Sess. (Wash. 2009).

[4] *See* Clarridge, *supra*.

[5] Pulkkinen, L., *Accused Wallingford rapist questions victim*, Seattle PI, June 23, 2009.

[6] Herman, M., *Self-Representation: Pro Se Statistics,* National Center for State Courts, Sept. 25, 2006, accessible at http://www.ncsconline.org/wc/publications/

SafetyNet: Multidisciplinary Investigation and Prosecution of Technology-Facilitated Child Sexual Exploitation
Date: Early Fall 2012, Location: TBD

This intensive five-day course is intended for prosecutors, investigators and computer forensic examiners, investigation and prosecuting technology-facilitated child sexual exploitation cases. This course includes mock trial exercises and a hands-on computer lab.

Unsafe Havens I: Investigation and Prosecution of Technology-Facilitate Child Sexual Exploitation
Date: Summer 2012, Location TBD

This comprehensive five-day course is designed to familiarize prosecutors with the various stages of an investigation, pre-trial and case preparation of a child sexual exploitation case that has been facilitated through technology. This course includes a hands-on computer lab.

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[7] *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975).

[8] *Id.*

[9] *Id.*at 819-20.

[10] *Williams v. Bartlett*, 44 F.3d 95, 100 (2d Cir. 1994).

[11] *Faretta*, 422 U.S. at 818.

[12] *Martinez v. Court of Appeal of California*, 528 U.S. 152, 162 (2000).

[13] *McKaskle v. Wiggins*, 465 U.S. 168, 177, 187 (1984).

[14] *Id.* at 178.

[15] *Martinez*, 528 U.S. at 162; *see also Faretta*, 422 U.S. at 834-35 n. 46; *U.S. v. Frazier-El*, 204 F.3d 553, 559 (4th Cir. 2000).

[16] *Fields v. Murray*, 49 F.3d 1024 (4th Cir. 1995).The preliminary question for the court, not addressed in this article, was whether Fields properly invoked his right to self-representation. *Id.* Because the Fourth Circuit's analysis of the relevant cross-examination issue was expressly made independent of the invocation issue, the invocation issue is not addressed here. *Id.* at 1034 ("Even if Fields did invoke his self-representation right clearly and unequivocally, the state trial court committed error.").

[17] *Id.* at 1025.

[18] *Id.* at 1026.

[19] *Id.*

[20] *Id.* at 1027.

[21] *Id.*

[22] *Maryland v. Craig*, 497 U.S. 836 (1990).

[23] *Id.* at 850.

[24] *Id.* at 851. The U.S. Supreme Court had previously recognized that the right to confrontation does not necessarily mean the right to face-to-face confrontation; rather, it means that a party must have a meaningful opportunity, through the legal process, to cross-examine witnesses. *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985) (Confrontation Clause guarantees the "opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.").

[25] *Craig*, 497 U.S. at 853-55.

[26] *Fields*, 49 F.3d at 1035.

[27] *Id.* (*citing McKaskle*, 465 U.S. at 176-77 ; *Bassette v. Thompson*, 915 F.2d 932, 941 (4th Cir. 1990), *cert. denied*, 499 U.S. 982 (1991)).

[28] *Fields*, 49 F.3d at 1035.

[29] *Id.*

[30] *Id.*, at 1035-36.

[31] *Id.*, at 1036.

[32] *Id.*

[33] *Id.*

[34] *See, e.g., State v. Boyd*, 2008 WL 3287240 (N.J. Super App. Div. Aug. 12, 2008); *Smith v. Smith*, 2007 WL 1585653 (E.D. Mich. 2007); *Partin v. Comonwealth*, 168 S.W.3d 23 (Ky. 2005); *State v. Estabrook*, 842 P.2d 1001, 1006 (Wash. Ct. App. 1993); *Lewine v. State*, 619 So.2d 334, 335-36 (Fla. Ct. App. 1993); *State v. Taylor*, 562 A.2d 554, 454 (R.I. 1989).

[35] The National Center for Victims of Crime (NCVC) reports that every state code includes at least some rights for crime victims; however, there is a national movement to get state legislatures to amend their constitutions to include victims rights. According to NCVC, 32 states have already done so. (See NCVC's Web site for a state-by-state analysis of statutory and constitutional victim rights.). *Issues: Constitutional Amendments*, The National Center for Victims of Crime: Public Policy, *accessible at* http://www.ncvc.org/ncvc/main.aspx?dbID=DB_Amendments128 (viewed Sept. 21, 2011).

[36] For example, the federal Crime Victims' Rights Act, enacted in 2004 and codified as 18 U.S.C. § 3771, provides for the victim to be reasonably protected from the accused, as well as to be treated with fairness and respect.

[37] Vieth, V., *A Children's Courtroom Bill of Rights: Seven Pre-Trial Motions Prosecutors Should Routinely File in Cases of Child Maltreatment*, Center Piece, The Official Newsletter of the National Child Protection Training Center, Vol. 1, Issue 2 (2008).

[38] *Id.* at 1.

[39] *Id.*

[40] *See,* note 36, *supra.*

[41] *Fields*, F.3d at 1036-1037.

[42] *Commonwealth v. Conefrey*, 410 Mass. 1, 570 N.E.2d 1384, 1390-91 (Mass. 1991).

[43] *See e.g. Boyd,* 2008 WL 3287240 at *10 (ordering *pro se* defendant to cross-examine victim by writing down questions for standby counsel to ask was upheld even though "[t]his procedure should not ordinarily be employed in the absence of a hearing."); *But see State v. Folk*, 256 P.3d 735 (Idaho 2011) (requiring defendant to write out questions to be asked of child victim on cross-examination by defendant's standby counsel rather than directly ask victim his questions violated defendant's right of confrontation, in prosecution for lewd conduct, because there was no evidence to support trial court's finding that the child victim would suffer serious emotional trauma by being questioned directly by defendant.)

[44] *Craig*, 497 U.S. at 856.

[45] Many statutes allowing the use of CCTV for child witnesses first require expert psychological or psychiatric testimony to justify the need. *See, e.g.*, the Child Victims' and Child Witnesses' Rights Act, 18 U.S.C. § 3509(b)(1)(B)(ii). However, even in jurisdictions with this requirement for CCTV, it is not known whether a similar requirement would be extended to other accommodations that only impact the defendant's ability to proceed *pro se*, as opposed to the more highly guarded right to confrontation. The Fourth Circuit in *Fields* did not even require a hearing, let alone expert testimony. *Fields*, 49 F.3d at 1036-1037.

[46] *See, e.g.,* 18 U.S.C. § 3509(b). For a complete list of all states and U.S. territories that have CCTV statutes, please visit NDAA's pertinent online statutory compilations at http://www.ndaa.org/ncpca_state_statutes.html.

[47] *See, e.g., Boyd,* 2008 WL 3287240 at *3, 10; *Smith*, 2007 WL 1585653 at *1.

[48] *Boyd,* 2008 WL 3287240 at *10.

[49] *Fields,* 49 F.3d at 1028, n. 5.

[50] National Judicial Education Program, *Judges Tell: What I Wish I Had Known Before I Presided in an Adult Victim Sexual Assault Case,* Legal Momentum (2011).

[51] For example, being generally responsive to the victim, keeping in mind comfort items, support persons and victim advocates, and preventing contact with the defendant or his supporters outside the courtroom.

[52] Rosbach, M., *WA bill would shield rape victims' court testimony,* The Seattle Times, Jan. 12, 2011.

[53] H.B. 1001, 2011 Leg., 1st Special Sess. (Wash. 2011).

[54] *See* note 49, *supra.*