

NOTE

SEXUAL ASSAULT VICTIMS V. PRO SE DEFENDANTS: DOES WASHINGTON'S PROPOSED LEGISLATION SUFFICIENTLY PROTECT BOTH SIDES?

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Although most states have enacted statutes to protect child sexual assault victims from the trauma associated with testifying before their alleged attackers, no state, as of yet, has passed an equivalent statute for adult victims. Washington, however, may be the first state to do so. Washington's legislature has proposed a unique bill to protect all sexual assault victims, be they children or adults, in sexual assault cases where defendants choose to enact their Sixth Amendment right to self-representation.

Washington's proposed legislation offers two significant remedies for assault victims: court-appointed standby counsel and the use of closed-circuit television. Both proposals raise questions concerning their constitutionality in light of the Sixth Amendment rights to self-representation and confrontation.

This Note suggests that although the proposed legislation limits both Sixth Amendment rights, it can do so due to public policy concerns of preventing sexual assault victims from suffering further psychological harm. Furthermore, both proposed remedies limit the restrictions on the defendant's rights. The proposed legislation therefore provides a balance between concern for the alleged victims and the rights of defendants.

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INTRODUCTION

The Sixth Amendment guarantees criminal defendants the right to self-representation and the right to confront their accuser.¹ These rights, however, are not absolute² and must be weighed against prevailing public policy concerns. Such concerns are especially prevalent during the cross-examination of sexual assault victims; victims of such crimes already suffer psychological harm when compelled to retell their experiences in an open courtroom, but being questioned by their alleged attacker places an additional burden on victims that may prevent them from testifying.³ Given these concerns, Washington has proposed legislation that seeks to advance the public policy goals of minimizing trauma

¹ U.S. CONST. amend. VI.

² The United States Supreme Court has found instances where the need to ascertain the truth, maintain order in the courtroom, or prevent the harassment of witnesses outweigh a defendant's right to self-representation. See discussion *infra* Part I.B. Likewise, strong public policy concerns have spurred the Court to limit a defendant's right to cross-examination under the Confrontation Clause. See discussion *infra* Part II.C.

³ Tom Lininger, *Bearing the Cross*, 74 FORDHAM L. REV. 1353, 1412 (2005).

to victims, encouraging future reporting of crime, and maintaining a defendant's Constitutional rights.⁴

Throughout judicial proceedings there is an ever-present struggle between honoring a defendant's rights and protecting the public. The United States Supreme Court (Supreme Court) has recognized the effectiveness of the right of confrontation in ensuring that accusers will testify truthfully,⁵ yet the Court has also acknowledged that this right may be limited in order to protect special victims.⁶ This need for limiting a defendant's rights becomes even more prevalent when defendants waive their right to counsel in order to represent themselves. Although cross-examination allows defendants to confront their accusers, it also causes "revictimization" because it requires the victim to relive the event.⁷ To be questioned by one's assailant further exacerbates the stress of cross-examination for victims.⁸ Furthermore, the percentage of victims who report their assaults is minimal.⁹ Add the possibility that their alleged attacker may question them, and victims are even less likely to come forward than they would be otherwise.¹⁰

In January 2011, a King County, Washington court convicted Salvador Cruz of sexually assaulting at least five children, now adults, and sentenced him to fifty-three years in prison.¹¹ At trial, Cruz elected to exercise his Sixth Amendment right to represent himself and to confront his accusers via cross-examination.¹² Although four of his victims took the stand during trial, one woman refused to do so.¹³ Instead, she paced the rooftops of the courthouse for hours, contemplating suicide in order to avoid being cross-examined by her attacker.¹⁴ In light of this event, the Washington legislature proposed House Bill 1001 to place restric-

⁴ See H.B. 1001, 62d Leg., Reg. Sess. (Wash. 2011) (reintroduced in the House on April 26, 2011).

⁵ *Davis v. Alaska*, 415 U.S. 308, 315–16 (1974).

⁶ See *Maryland v. Craig*, 497 U.S. 836, 844–45 (1990).

⁷ See generally *State v. Sheline*, 955 S.W.2d 42, 44 (Tenn. 1997) ("It has been said that the victim of a sexual assault is actually assaulted twice—once by the offender and once by the criminal justice system."); Ann Althouse, *The Lying Woman, The Devious Prostitute, and Other Stories from the Evidence Casebook*, 88 Nw. U. L. REV. 914, 955–56 (1994) (decrying the character assassination by defense attorneys in rape trials).

⁸ See Lininger, *supra* note 3, at 1412.

⁹ See JENNIFER L. TRUMAN, U.S. DEP'T OF JUSTICE NATIONAL CRIME VICTIMIZATION SURVEY, CRIMINAL VICTIMIZATION, 2010, tbl. 1, at 2 (2011).

¹⁰ See Lininger, *supra* note 3, at 1412.

¹¹ Levi Pulkkinen, *Rapist Sentenced in Case That Prompted Witness Suicide Attempt*, SEATTLE POST-INTELLIGENCER (Jan. 20, 2011, 10:00 PM), <http://www.seattlepi.com/local/article/Rapist-sentenced-in-case-that-prompted-witness-970741.php>.

¹² See *id.*

¹³ See Jennifer Sullivan, *Rape Victim's Threat to Jump Off Courthouse Roof May Derail Case*, THE SEATTLE TIMES (Nov. 4, 2010, 9:14 PM), http://seattletimes.nwsources.com/html/localnews/2013350378_trial05m.html.

¹⁴ See *id.*

tions on pro se defendants questioning their alleged sexual assault victims.¹⁵ This was not, in fact, the first time that Washington had proposed such legislation.¹⁶ A year before *Cruz*, another defendant also chose to represent himself and, in so doing, abused his cross-examination power by badgering the alleged victim.¹⁷ However, before the Senate had a chance to vote on the proposed legislation and before the jury reached a verdict, the defendant committed suicide, and the Washington legislature abandoned the bill.¹⁸

The current bill before the Washington legislature proposes that, in instances where a defendant waives his right to counsel and instead opts to represent himself, restrictions can be placed on how the defendant questions the victim.¹⁹ Should the court find that the victim would suffer serious emotional distress, thereby preventing her from reasonably communicating at trial if questioned directly by the defendant, the court may enact reasonable procedures to protect the victim.²⁰ This may include having someone else ask the defendant's cross-examination questions or utilizing remote audio-video questioning.²¹ If such measures are taken, the court must instruct the jury that it cannot draw inferences about the defendant's guilt or innocence based on the procedure used to question the alleged victim.²²

No other state, thus far, has passed a statute that would directly address these issues. Courts, however, have on occasion exercised their discretion by allowing special victims to be questioned by a pro se defendant's standby counsel via closed-circuit television.²³ The majority of such cases, however, involve child victims, as they are often perceived as more susceptible to extreme stress under such situations.²⁴ Washington's proposed legislation, however, not only protects children, but also adult victims of sexual assault.²⁵ Thus, the bill effectively upholds the policy goal of protecting all sexual assault victims, yet it does so in a manner that could potentially deprive defendants of their rights.

This Note argues that the proposed Washington legislation and its remedies are constitutional and will not greatly interfere with a defendant's rights of self-representation and confrontation. Part I of this Note will examine a defendant's right to self-representation. Part II will ana-

¹⁵ Pulkkinen, *supra* note 11.

¹⁶ *Id.*

¹⁷ *See id.*

¹⁸ *Id.*

¹⁹ H.B. 1001, 62d Leg., Reg. Sess. (Wash. 2011).

²⁰ *See id.*

²¹ *See id.*

²² *Id.*

²³ *See, e.g.*, State v. Folk, 256 P.3d 735, 744–45 (Idaho 2011).

²⁴ Maryland v. Craig, 497 U.S. 836, 852 (1990).

²⁵ *See* H.B. 1001, 62d Leg., Reg. Sess. (Wash. 2011).

lyze the Confrontation Clause and acceptable limitations to cross-examination. Finally, Part III will address the rationale behind the proposed Washington statute, the public policy concerns, the constitutionality of the statute, and the potential effects that the proposed remedies may have on jurors' perceptions of both defendants and victims.

I. THE RIGHT TO SELF-REPRESENTATION

A. *Origin of the Right to Self-Representation*

The right to self-representation "finds support in the structure of the Sixth Amendment," as established by the Supreme Court in *Faretta v. California*.²⁶ The Sixth Amendment specifically provides that:

[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence [sic].²⁷

Not only does the Sixth Amendment entitle the defendant to a defense, but it also "grants to the accused personally the right to make his defense."²⁸ Thus, while not explicitly stated in the Sixth Amendment, the Amendment's structure implies the right to self-representation.²⁹

Although in most criminal prosecutions the defendant would benefit from the assistance of counsel, it is the defendant who bears the consequences of a conviction, not his attorney.³⁰ As the *Faretta* Court reasoned, "[t]he right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails."³¹ In order to proceed pro se, a defendant must relinquish a number of benefits associated with the right to counsel, and so the Court requires that the defendant knowingly and intelligently waive these benefits.³² Although the Sixth Amendment grants defendants the right to self-representation, this right is not absolute.³³

²⁶ 422 U.S. 806, 818 (1975) (holding that a defendant is entitled to proceed pro se so long as he knowingly and intelligently waives his right to counsel because the right to self-representation is implicit in the Sixth Amendment).

²⁷ U.S. CONST. amend. VI.

²⁸ *Faretta*, 422 U.S. at 819.

²⁹ See *id.* at 819–20.

³⁰ See *id.* at 834.

³¹ *Id.* at 820.

³² See *id.* at 835.

³³ See *United States v. Brock*, 159 F.3d 1077, 1079 (7th Cir. 1998) (holding that the trial judge did not abuse her discretion in denying the defendant his right to self-representation where the defendant deliberately engaged in obstructionist conduct by refusing to answer the court's questions).

B. *Limitations on the Right to Self-Representation*

Courts have provided numerous reasons for limiting one's right to self-representation. One common reason courts refuse a defendant's request to proceed pro se is because the defendant did not timely assert the right.³⁴ A judge can also limit self-representation if a pro se defendant acts in an obstructive or disruptive manner during trial.³⁵ In some instances, a defendant may choose to represent himself in order to disrupt his own trial.³⁶ In fact, some defendants may choose to proceed pro se in order to torment their victims.³⁷ Whenever a defendant deliberately acts in a manner to compromise a court's ability to conduct a fair trial, "the defendant's self-representation rights are subject to forfeiture."³⁸ As such, when a defendant chooses to cross-examine his alleged victim in order to torment her, the court is unable to conduct a fair trial, and the defendant's self-representation rights are subject to forfeiture. Therefore, it is evident that self-representation rights can be limited, especially in instances where a defendant's own conduct undermines the efficiency of the justice system.

While some defendants may opt to proceed pro se simply to intimidate their alleged victims, that is not true of all defendants.³⁹ Even if a defendant does not intend to disrupt the trial, however, the courts are still permitted to appoint standby counsel to assist the pro se defendant.⁴⁰ Although "[t]he pro se defendant must be allowed to control the organization and content of his own defense,"⁴¹ a trial judge may appoint counsel, over a defendant's objections, in order to "relieve the judge of the need to explain and enforce basic rules of courtroom protocol or to assist the defendant in overcoming routine obstacles that stand in the way of the defendant's achievement of his own clearly indicated goals."⁴² In addition, because of their unfamiliarity with cross-examination, pro se

³⁴ See, e.g., *United States v. Noah*, 130 F.3d 490, 498 (1st Cir. 1997); *Sapienza v. Vincent*, 534 F.2d 1007, 1010 (2d Cir. 1976).

³⁵ See *Illinois v. Allen*, 397 U.S. 337, 343 (1970) (holding that it is within a trial judge's discretion to terminate a defendant's right to self-representation when he engages in disruptive conduct during trial).

³⁶ *Faretta*, 422 U.S. at 834 n.46.

³⁷ See *Lininger*, *supra* note 3, at 1412.

³⁸ Alanna Clair, "An Opportunity for Effective Cross-Examination": *Limits on the Confrontation Right of the Pro Se Defendant*, 42 U. MICH. J.L. REFORM 719, 723 (2009).

³⁹ Some defendants choose to represent themselves because they believe that their attorney is incompetent, that they can do a better job representing themselves, that lawyers are part of an overall oppressive system; and some defendants represent themselves so that they can have access to a jail's law library. See *Does Self-Representation in a Criminal Case Ever Make Sense?*, Nolo, <http://www.nolo.com/legal-encyclopedia/does-self-representation-criminal-case-29971.html> (last visited Oct. 5, 2012).

⁴⁰ See *McKaskle v. Wiggins*, 465 U.S. 168, 184 (1984).

⁴¹ *Id.* at 174.

⁴² *Id.* at 184.

defendants may unknowingly badger vulnerable witnesses, so courts may appoint standby counsel to avoid such harms.⁴³

To ensure that a defendant's Sixth Amendment right to self-representation is not violated by the presence of court-appointed standby counsel, courts must consider two factors.⁴⁴ First, the pro se defendant must maintain "actual control over the case he chooses to present to the jury."⁴⁵ Second, the participation of court-appointed standby counsel cannot "destroy the jury's perception that the defendant is representing himself."⁴⁶ Court-appointed standby counsel may, however, "steer a defendant through the basic procedures of trial . . . even in the unlikely event that it somewhat undermines the *pro se* defendant's appearance of control over his own defense."⁴⁷

Furthermore, the presence of court-appointed standby counsel ensures not only the defendant's Sixth Amendment right to self-representation but also his right to confrontation. The presence of court-appointed standby counsel can thus be especially effective when pro se defendants cross-examine their alleged sexual assault victims. Although Washington's proposed legislation does not explicitly call for the appointment of standby counsel when pro se defendants cross-examine their alleged sexual assault victims, the proposed legislation does call for a court-approved individual to cross-examine the victim by using questions prepared by the defendant.⁴⁸ This Note therefore argues that, at least for purposes of cross-examination of sexual assault victims, courts should appoint standby counsel in order to uphold the defendant's Sixth Amendment rights to both self-representation and, as discussed in Part II *infra*, confrontation.

II. THE RIGHT TO CONFRONTATION

A. *The History of the Confrontation Clause*

The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."⁴⁹ The right of an accused to confront the witnesses against him applies not only in federal court but also in state court

⁴³ See Christopher G. Frey, *The State v. the Self-Represented: A Florida Prosecutor's Concerns When Litigating Against a Pro Se Defendant in a Criminal Trial*, 29 STETSON L. REV. 181, 191 (1999).

⁴⁴ See *McKaskle*, 465 U.S. at 178.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at 184.

⁴⁸ See H.B. 1001, 62d Leg., Reg. Sess. (Wash. 2011).

⁴⁹ U.S. CONST. amend. VI.

under the Fourteenth Amendment.⁵⁰ Included in this right to confront witnesses is the right to cross-examination.⁵¹

The right to confront one's accusers dates back to the Romans.⁵² The trial of Sir Walter Raleigh in the sixteenth century, however, remains one of the pivotal cases in Confrontation Clause history.⁵³ During his trial, Raleigh objected to the admission of an alleged co-conspirator's confession where Raleigh had no opportunity to cross-examine the witness, but his objection was overruled.⁵⁴ Following the trial, English law underwent a series of reforms to limit such abuses, thus developing the right to confrontation.⁵⁵

B. *The Importance of Cross-Examination in the Right to Confrontation*

That the right to confrontation appears in the Bill of Rights indicates that it is a fundamental right that is essential to a fair trial.⁵⁶ Many courts are reluctant to hinder the confrontation right because it is considered "[o]ne of the fundamental guarantees of life and liberty."⁵⁷ Indeed, the Supreme Court is a strong advocate for the protection and expansion of the scope of the Confrontation Clause to ensure that the right to confront one's accusers remains protected.⁵⁸ Although the Court has not explored all aspects of the Confrontation Clause, it is understood that a defendant should be present during all witness testimonies given in open court, subject to cross-examination.⁵⁹ In addition to serving as the primary method by which confrontation is satisfied, cross-examination also promotes accurate fact-finding.⁶⁰

Cross-examination is the "functional purpose" of the Confrontation Clause,⁶¹ and, as Justice Scalia noted in *Crawford v. Washington*, it is the best tool for testing the veracity of witnesses.⁶² In fact, a defendant's

⁵⁰ See *Pointer v. Texas*, 380 U.S. 400, 403 (1965).

⁵¹ *Id.* at 404.

⁵² See *Crawford v. Washington*, 541 U.S. 36, 43–49 (2004) (discussing the history of the Confrontation Clause through Roman, early English, and colonial times).

⁵³ See *id.* at 44. Charged with treason on the basis of an alleged accomplice's confession, Sir Walter Raleigh repeatedly demanded to confront his accuser in court, but the judge refused. The jury subsequently convicted Raleigh and sentenced him to death. See *id.*

⁵⁴ See *id.*

⁵⁵ *Id.*

⁵⁶ *Pointer*, 380 U.S. at 404.

⁵⁷ *Kirby v. United States*, 174 U.S. 47, 55 (1899).

⁵⁸ See *Crawford*, 541 U.S. at 50–51.

⁵⁹ See Richard D. Friedman, *The Conundrum of Children, Confrontation, and Hearsay*, 65 LAW & CONTEMP. PROBS. 243, 247 (2002).

⁶⁰ See *Bourjaily v. United States*, 483 U.S. 171, 182 (1987).

⁶¹ *Kentucky v. Stincer*, 482 U.S. 730, 739 (1987).

⁶² *Crawford*, 541 U.S. at 61–62 (quoting MATTHEW HALE, HISTORY AND ANALYSIS OF THE COMMON LAW OF ENGLAND 258 (1713)).

right to confront witnesses against him includes the right to cross-examine those witnesses.⁶³ Cross-examining adverse witnesses is crucial to maintaining the fundamental fairness of the criminal justice system.⁶⁴ Ultimately, “the mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials.”⁶⁵

C. *Rationale for Limitations to the Right to Confrontation*

The right to confrontation is not absolute.⁶⁶ A defendant has the right to full cross-examination, and, thus, restrictions to cross-examination should be considered in light of this right.⁶⁷ Although cross-examination “forms ‘the core of the values furthered by the Confrontation Clause,’” the Supreme Court has never recognized it as indispensable to the confrontation right.⁶⁸ As such, courts have the discretion to limit cross-examination so long as the restriction does not interfere with a defendant’s right to confrontation.⁶⁹ This discretion is evident in both the Federal Rules of Evidence and case law.

Under the Federal Rules of Evidence, “[t]he court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to: (1) make those procedures effective for the ascertainment of the truth; (2) avoid wasting time; and (3) protect witnesses from harassment or undue embarrassment.”⁷⁰ This rule thereby grants judges the authority to control the method of cross-examination while also ensuring that the defendant retains his right to confrontation. Furthermore, Rule 611(a)(3) of the Federal Rules of Evidence suggests a public policy concern of protecting witnesses from potential harassment during confrontation.⁷¹

Although the Supreme Court in *Coy v. Iowa* held that face-to-face confrontation between the accused and the accuser is “essential to a fair trial in a criminal prosecution,”⁷² the Court in *Maryland v. Craig* specifi-

⁶³ *Pointer v. Texas*, 380 U.S. 400, 406–07 (1965).

⁶⁴ *Faretta v. California*, 422 U.S. 806, 818 (1975).

⁶⁵ *Dutton v. Evans*, 400 U.S. 74, 89 (1970).

⁶⁶ See *Maryland v. Craig*, 497 U.S. 836, 844, 853 (1990) (holding that the state’s interest in protecting the psychological well-being of a child abuse victim was sufficiently important to outweigh a defendant’s right to face his accuser in court).

⁶⁷ See *United States v. Mosley*, 496 F.2d 1012, 1016 n.5 (5th Cir. 1974).

⁶⁸ *Craig*, 497 U.S. at 847 (citing *California v. Green*, 399 U.S. 149, 157 (1970)).

⁶⁹ *United States v. Carter*, 760 F.2d 1568, 1581 (11th Cir. 1985) (citing *United States v. Alonzo*, 740 F.2d 862, 876 (11th Cir. 1984), cert. denied, 469 U.S. 1166 (1985)).

⁷⁰ FED. R. EVID. 611(a).

⁷¹ See FED. R. EVID. 611(a)(3).

⁷² 487 U.S. 1012, 1017 (1988) (quoting *Pointer v. Texas*, 380 U.S. 400, 404 (1965)) (holding that the defendant’s right to confrontation was violated because a screen was placed between him and the child victim that blocked the defendant from the child’s sight).

cally limited the scope of the method of confrontation in order to uphold the public policy goal of reducing trauma to vulnerable witnesses.⁷³ The critical inquiry, therefore, is whether limiting confrontation is necessary to further an important state interest.⁷⁴ Supreme Court precedent establishes that, while the Confrontation Clause promotes the use of cross-examination, the right to confrontation must sometimes give way to public policy considerations.⁷⁵

“The limitations on a defendant’s strict constitutional right to confront his accusers are most often justified by the court’s desire to ensure truthful and unencumbered testimony.”⁷⁶ According to the American Psychological Association’s amicus brief in support of limiting cross-examination in *Maryland v. Craig*, “[r]equiring child witnesses to undergo face-to-face confrontation . . . may in some cases actually disserve the truth-seeking rationale that underlies the Confrontation Clause.”⁷⁷

D. Methods of Limiting Confrontation

1. One-Way Closed-Circuit Television (CCTV)

The Supreme Court has upheld a state statute allowing the use of a one-way CCTV when the testimony given over the circuit is by an alleged child abuse victim.⁷⁸ “To invoke the procedure, the trial judge must first ‘determin[e] that testimony by the child victim in the courtroom will result in the child suffering serious emotional distress such that the child cannot reasonably communicate.’”⁷⁹ Once the trial judge invokes this procedure, the prosecutor and defense counsel may examine and cross-examine the child in a separate room while those in the courtroom observe the testimony via a video monitor.⁸⁰ Although the child

⁷³ *Craig*, 497 U.S. at 853.

⁷⁴ *Id.* at 852.

⁷⁵ *Id.* at 849 (quoting *Mattox v. United States*, 156 U.S. 237, 243 (1895)).

⁷⁶ Clair, *supra* note 38, at 732.

⁷⁷ See Gail S. Goodman et al., *Child Witnesses and the Confrontation Clause: The American Psychological Association Brief in Maryland v. Craig*, 15 LAW & HUM. BEHAV. 13, 18 (1991).

⁷⁸ See *Craig*, 497 U.S. at 860; see also *Fuster-Escalona v. Fla. Dep’t. of Corr.*, 170 F. App’x 627, 629 (11th Cir. 2006) (allowing four children to testify via two-way CCTV at defendant’s trial for sexual battery where the witnesses could see the defendant on a monitor in the judge’s chambers and witnesses were contemporaneously cross-examined by the defense attorney); *State v. Smith*, 730 A.2d 311, 317 (N.J. 1999) (finding CCTV testimony appropriate when a face-to-face confrontation may overwhelm the child, thereby preventing effective testimony and undermining the truth-finding function of the trial); *Marx v. State*, 987 S.W.2d 577, 580–81 (Tex. Crim. App. 1999) (affirming a child victim’s ability to testify via two-way CCTV where district court found it would protect victims from further trauma).

⁷⁹ *Craig*, 497 U.S. at 841 (quoting MD. CODE ANN., CTS. & JUD. PROC. § 9-102 (Lexis-Nexis 1989)).

⁸⁰ *Id.*

cannot see the defendant, the defendant can see the child and may communicate with his counsel in order to make objections.⁸¹

Although a one-way CCTV prevents the defendant from facing his accuser, it preserves the other elements of the confrontation right, namely that “[t]he child witness must be competent to testify and must testify under oath; the defendant retains full opportunity for contemporaneous cross-examination; and the judge, jury, and defendant are able to view (albeit by video monitor) the demeanor (and body) of the witness as he or she testifies.”⁸² Furthermore, the state has a substantial interest in protecting child victims of abuse from the trauma of testifying.⁸³ The Supreme Court, however, has not yet addressed whether the use of a one-way CCTV for adult victims of sexual assault is constitutional.

2. One-Way Glass

Although the use of CCTV may be acceptable under certain circumstances, some state courts have held that the use of one-way glass during an adult victim’s testimony violates the defendant’s Sixth Amendment right to confrontation.⁸⁴ In such instances, the glass prevents the victim from seeing the defendant, although the jury and defendant may still observe the victim’s demeanor.⁸⁵

In *People v. Murphy*, a California appellate court reiterated that to deny a defendant the right to face-to-face confrontation, all other elements of the right of confrontation must be preserved: i.e., the witness must testify under oath, there must be an opportunity for contemporaneous cross-examination, and the defendant and trier of fact must have an opportunity to observe the demeanor of the witness while she testifies.⁸⁶ Although the court found that one-way glass preserved these elements,⁸⁷ it did not uphold the use of one-way glass because the prosecution did not provide any authority indicating that there was a compelling interest in protecting adult victims of sex crimes, and the trial court did not hold an evidentiary hearing to determine the extent of the anxiety of the victim.⁸⁸ As such, it is possible that if there had been a proper inquiry into the psychological well-being of the victim, the court may have allowed

⁸¹ *Id.* at 841–42.

⁸² *Id.* at 851.

⁸³ *Id.* at 852.

⁸⁴ *See, e.g.,* *People v. Murphy*, 132 Cal. Rptr. 2d 688, 694 (Cal. App. 6th Dist. 2003).

⁸⁵ *Id.* at 689.

⁸⁶ *Id.* at 692 (citing *Craig*, 497 U.S. at 851).

⁸⁷ *Id.* (citing *Craig*, 497 U.S. at 851–52).

⁸⁸ *Id.* at 693–94.

the use of one-way glass in this context, though the court recognized that one-way glass might raise due process concerns.⁸⁹

3. Witness Testifies in Courtroom But Out of Defendant's Sight

In *Lucas v. McBride*, a child sexual assault victim was present in the courtroom during cross-examination, but the child was positioned so that she did not have to look directly at the defendant.⁹⁰ The court held that this did not violate the defendant's right to confrontation.⁹¹

While face-to-face confrontation ensures reliability and reduces the risk of a witness implicating an innocent person,⁹² "the Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose testimonial infirmities [such as forgetfulness, confusion, or evasion] through cross-examination, thereby calling to the attention of the factfinder [sic] the reasons for giving scant weight to the witness' testimony."⁹³

III. WASHINGTON'S PROPOSED LEGISLATION PROTECTING SEXUAL ASSAULT VICTIMS

A. Concerns of Sexual Assault Victims and Public Policy

According to a survey completed by the Department of Justice, there were approximately 188,380 sexual assaults in 2010.⁹⁴ What is more staggering, however, is that the Department estimates that fewer than 50% of sexual assaults are actually reported, making sexual assault one of the most underreported crimes.⁹⁵

Victims often do not report sexual assaults because of the trauma associated with pursuing a complaint and the inherent difficulties in convicting assailants.⁹⁶ Another reason that women decide not to report rape is their fear of the legal system.⁹⁷ This fear is due to the psychological distress experienced by victims, as "rape is without question one of the most terrifying crimes in which the victim survives [I]ts consequences remain with the victim for many years or perhaps a lifetime,

⁸⁹ *Id.* at 694. The Court chose not to address the due process question and instead came to their decision by analyzing the right of confrontation. *Id.*

⁹⁰ 505 F. Supp. 2d 329, 353 (N.D. W. Va. 2007).

⁹¹ *Id.*

⁹² *Id.* (citing *Craig*, 497 U.S. at 845).

⁹³ *Id.* (quoting *Delaware v. Fensterer*, 474 U.S. 15, 22 (1985)).

⁹⁴ JENNIFER L. TRUMAN, *supra* note 9, tbl. 1, at 2 (2011).

⁹⁵ See *id.* tbl. 7, at 10; LYNN LANGTON, U.S. DEP'T OF JUSTICE NATIONAL CRIME VICTIMIZATION SURVEY, VICTIMIZATIONS NOT REPORTED TO THE POLICE, 2006-2010, at 4 (2012).

⁹⁶ See Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1162 (1986).

⁹⁷ Lisa Hamilton Thielmeyer, Note, *Beyond Maryland v. Craig: Can and Should Adult Rape Victims Be Permitted to Testify by Closed-Circuit Television?*, 67 IND. L.J. 797, 810 (1992).

accounting for deep psychological problems.”⁹⁸ Often these victims experience “fear, anger, and anxiety” that last for several years.⁹⁹ Sexual assault victims, therefore, fear the legal system because the trial often forces the victims, who may already suffer from psychological trauma, to relive the experience of the attack.¹⁰⁰ These concerns become more pronounced when the alleged assailant questions the victim.¹⁰¹ In addition, such trials tend to focus more on the victim rather than the defendant because there are rarely any witnesses to the alleged assault and consent is a key issue.¹⁰² As such, victims fear an attack on their character by defense counsel.

Due to these fears and concerns, many victims do not report their sexual assaults. To address this issue, Congress created the Rape Shield laws.¹⁰³ The principal sponsor of this Federal Rule of Evidence noted that “[s]ince rape trials become inquisitions into the victim’s morality, not trials of the defendant’s innocence or guilt, it is not surprising that it is the least reported crime. It is estimated that as few as one in ten rapes is ever reported.”¹⁰⁴ The Rape Shield laws have withstood constitutional scrutiny,¹⁰⁵ suggesting that the purpose of these laws (i.e., to protect sexual assault victims from further embarrassment and to promote reporting of attacks) are sufficiently important to public policy to outweigh the Sixth Amendment rights that may be violated by excluding evidence under such laws. It is these public policy concerns for minimizing trauma to sexual assault victims and encouraging reporting of such crimes that underlie Washington’s proposed legislation limiting the confrontation rights of pro se defendants.

⁹⁸ *Id.* (citing Edward Sagarin, *Forcible Rape and the Problem of the Rights of the Accused*, in *FORCIBLE RAPE: THE CRIME, THE VICTIM, AND THE OFFENDER* 142 (Duncan Chappell, Robley Geis & Gilbert Geis eds. 1977)) (alterations in original); see also J. BARKAS, *VICTIMS* 98 (1978) (“Except for murder, the crime of rape is the ultimate invasion, the one with the most severe physical and psychological consequences for its victim.”).

⁹⁹ Toni M. Massaro, *Experts, Psychology, Credibility, and Rape: The Rape Trauma Syndrome Issue and Its Implications for Expert Psychological Testimony*, 69 *MINN. L. REV.* 395, 425–26 (1985). Rape Trauma Syndrome is defined as “the acute phase and long-term reorganization process that occurs as a result of forcible rape or attempted forcible rape.” *Id.* at 425 n.127.

¹⁰⁰ See Thielmeyer, *supra* note 97, at 811.

¹⁰¹ See, e.g., Sullivan, *supra* note 13 (discussing an adult sexual assault victim who contemplated taking her own life in order to avoid having her alleged attacker cross-examine her in court); Maryland v. Craig, 497 U.S. 836, 853 (1990) (discussing how child victims suffer additional trauma when forced to testify in court in front of their alleged attacker).

¹⁰² See Thielmeyer, *supra* note 97, at 811.

¹⁰³ See *FED. R. EVID.* 412.

¹⁰⁴ 124 Cong. Rec. H34913 (1978).

¹⁰⁵ See, e.g., *Doe v. United States*, 666 F.2d 43, 48 n.9 (4th Cir. 1981).

B. *Constitutionality of and Rationale for Washington's Proposed Legislation*

In *Maryland v. Craig*, the Supreme Court held that the right to face-to-face confrontation is not absolute in light of important public policy considerations.¹⁰⁶ As such, whether adult sexual assault victims who would be emotionally traumatized by being cross-examined by their alleged attacker should be given the same protection as child victims depends on whether protecting adult sexual assault victims is an important public policy.¹⁰⁷

Following in the footsteps of Maryland's legislation,¹⁰⁸ Washington's proposed legislation delineates the steps and findings that must be reached before a court can restrict a pro se defendant's Sixth Amendment rights.¹⁰⁹ Specifically, Washington's legislation would be relevant only in criminal prosecution proceedings for sex offenses when the victim is testifying and the defendant has waived his right to counsel.¹¹⁰ In such proceedings the prosecution may have the court hold a hearing outside the presence of the jury to determine whether the victim would suffer serious emotional or mental distress that would "prevent the victim from reasonably communicating at the trial" if questioned by the defendant.¹¹¹ Such procedures ensure that the court does not arbitrarily limit a defendant's confrontation and self-representation rights, thereby addressing Justice O'Connor's concerns in *Coy v. Iowa* that state interests not supersede a defendant's constitutional rights without a case-specific finding.¹¹²

Furthermore, a defendant's right to self-representation is not infringed so long as the defendant has a fair chance to present his case in his own way and make his voice heard—a fact that Washington's legislature highlights in support of its proposed legislation.¹¹³ As the legislature emphasizes, this right to self-representation is not absolute, as evidenced by the ability of courts to appoint counsel in certain situations.¹¹⁴ Additionally, courts have been able to control the method of cross-examination to ensure that the truth is ascertained and to protect a witness from harassment and undue embarrassment.¹¹⁵ As such, so long

¹⁰⁶ 497 U.S. at 853–54.

¹⁰⁷ See Thielmeyer, *supra* note 97, at 809.

¹⁰⁸ See *Craig*, 497 U.S. at 840–44; see also MD. CODE ANN., CTS. & JUD. PROC. § 9-102 (West 1989) (current version at MD. CODE ANN. CRIM. PROC. § 11-303 (LexisNexis 2008)).

¹⁰⁹ See H.B. 1001, 62d Leg., Reg. Sess. (Wash. 2011).

¹¹⁰ See *id.*

¹¹¹ *Id.*

¹¹² 487 U.S. 1012, 1022 (1988) (O'Connor, J., concurring).

¹¹³ See H.B. 1001; see also *McKaskle v. Wiggins*, 465 U.S. 168, 178 (1984).

¹¹⁴ See H.B. 1001; see also *McKaskle*, 465 U.S. at 184.

¹¹⁵ H.B. 1001; see also *Clair*, *supra* note 38, at 723; FED. R. EVID. 611(a)(3).

as there is a strong state interest, the legislature's proposed bill limiting the rights of pro se defendants to question their sexual assault victims is constitutional.

Given the overwhelming data regarding the psychological harm that sexual assault victims face not only during the assault itself but also in having to relive it during trial,¹¹⁶ it is evident that adult sexual assault victims are just as much in need of protection as child victims.¹¹⁷ Washington's legislature thus proposes that "the state has a compelling interest in the physical and psychological well-being of victims of sex offenses," which outweighs a defendant's Sixth Amendment rights to confrontation and self-representation.¹¹⁸ Washington's legislature thereby provides a specific state interest that it seeks to protect through its legislation and requires a case-specific finding.¹¹⁹ The proposed legislation therefore withstands constitutional scrutiny.

C. *Evaluation of Washington's Proposed Remedies*

The Washington bill proposes two remedies in instances where a defendant represents himself in a sexual assault case and the court finds that the victim will suffer severe psychological harm if cross-examined by the defendant.¹²⁰ One proposed remedy is that the court appoints someone to cross-examine the victim on behalf of the defendant.¹²¹ The second proposal is that the defendant be allowed to question the victim via "remote audio-video means."¹²² These proposed remedies, however, raise potential concerns as to how they will influence jurors' perceptions of the defendant and whether they may unfairly bias the jurors against the defendant.

1. Implications of Using Court-Appointed Standby Counsel

Legally, as long as the defendant maintains "actual control over the case" and the participation of court-appointed standby counsel does not "destroy the jury's perception that the defendant is representing himself," then a court will find that the appointment of standby counsel has not denied the defendant his right to represent himself.¹²³ This legal basis, however, fails to take into consideration the effect that the presence and participation of court-appointed standby counsel can have on a juror's perception of the guilt or innocence of a pro se defendant. Furthermore,

¹¹⁶ See *supra* Part III.A.

¹¹⁷ See Thielmeyer, *supra* note 97, at 813.

¹¹⁸ H.B. 1001.

¹¹⁹ See *Coy v. Iowa*, 487 U.S. 1012, 1022 (1988).

¹²⁰ See H.B. 1001.

¹²¹ See *id.*

¹²² See *id.*

¹²³ *McKaskle v. Wiggins*, 465 U.S. 168, 178 (1984).

the potential for a harmful impact on jurors' perceptions is augmented by Washington's proposal that standby counsel be appointed to the defendant *only* for the purpose of cross-examining the victim.¹²⁴

To protect the Sixth Amendment rights of the defendant, the court must ensure that the defendant maintains control of his own defense,¹²⁵ which the proposed legislation attempts to do. The proposed legislation specifically requires that the defendant be allowed to prepare all questions and follow-up questions asked by the court-appointed standby counsel.¹²⁶ Furthermore, to ensure that the presence of counsel does not "destroy the jury's perception that the defendant is representing himself,"¹²⁷ the proposed legislation requires that if a court-appointed standby counsel cross-examines the alleged victim, then the court must explain to the jury that "the defendant is continuing to represent himself . . . and that the defendant composed the questions."¹²⁸ "The assumption that jurors are able to follow the court's instructions fully applies when rights guaranteed by the Confrontation Clause are at issue."¹²⁹ As such, adequate instructions to the jury ensure that the jury understands that the defendant is still representing himself despite the presence of court-appointed standby counsel.

On its face, it appears that Washington's proposal to use court-appointed standby counsel to cross-examine sexual assault victims satisfies both public policy and Sixth Amendment concerns. Although the victim will still be in the presence of her alleged attacker, the potential for psychological harm is greatly reduced by ensuring that the defendant cannot cross-examine his alleged victim, thereby upholding public policy goals of protecting sexual assault victims. On the other hand, the presence of court-appointed standby counsel also ensures that the defendant's rights to self-representation and confrontation are upheld. Since the jury is instructed that the defendant is still acting *pro se* despite the presence of court-appointed standby counsel, and since the defendant continues to maintain control over the case, the proposed legislation does not violate the defendant's right to self-representation. The defendant is also still able to confront his accuser under the proposed legislation because the victim is still in the courtroom when testifying, she is under oath, the judge, jury, and defendant can observe her demeanor while she testifies, and the defendant has the opportunity to cross-examine the victim with

¹²⁴ See H.B. 1001 (emphasis added).

¹²⁵ *McKaskle*, 465 U.S. at 174.

¹²⁶ H.B. 1001.

¹²⁷ *McKaskle*, 465 U.S. at 178.

¹²⁸ H.B. 1001.

¹²⁹ *Tennessee v. Street*, 471 U.S. 409, 415 n.6 (1985) (citing *Frazier v. Cupp*, 394 U.S. 731, 735 (1969)).

his own questions.¹³⁰ The only concern that remains is whether the presence of a court-appointed standby counsel, solely for cross-examination of the alleged sexual assault victim, will affect how jurors perceive the defendant's guilt or innocence.

There has not yet been any research specifically examining the effect that court-appointed standby counsel has on a jury's perception of a defendant. One possible cause for concern is that jurors may perceive the defendant as more likely to be guilty when they see that he has conducted all aspects of the trial by himself, *except* for the cross-examination of the alleged victim.¹³¹ The potential for such a negative effect on jurors' perceptions raises the need for research to determine if this is a cause for concern. Specifically, future research should examine how jurors perceive pro se defendants without court-appointed standby counsel, how they perceive the defendants when court-appointed standby counsel is present, and how they perceive the defendants when court-appointed standby counsel is required to take part in the trial by cross-examining an alleged victim.

In addition to the effect that the presence of court-appointed standby counsel has on jurors' perceptions, there is also the question of whether the court should give jury instructions as to why court-appointed standby counsel is present, and if so what those instructions should entail. Courts in this situation often explain to the jury that the defendant has a right to cross-examination but that someone else, either the judge or appointed counsel, will be asking the defendant's questions.¹³²

Washington's bill proposes a number of jury instructions. First, the court must tell the jury that although someone else is cross-examining the victim, the defendant composed the questions himself and is still acting pro se.¹³³ Furthermore, the judge must instruct the jurors that they are "not to consider the court procedure for questioning the victim, nor to draw any inference from the procedure, when evaluating the facts of the case and the charges presented against the defendant."¹³⁴ These warnings are similar to those given in *State v. Estabrook*, a case where the defendant was required to submit his cross-examination questions to be read by the judge.¹³⁵ Ultimately, the *Estabrook* court found that the De-

130 See *Maryland v. Craig*, 497 U.S. 836, 851 (1990).

131 See, e.g., *Fields v. Murray*, 49 F.3d 1024, 1047 n.4 (Ervin, C.J., dissenting) (recognizing the potential prejudice against defendants involved in having someone other than the pro se defendant cross-examine alleged victims).

132 See, e.g., *State v. Estabrook*, 842 P.2d 1001, 1004 (Wash. App. Div. 2 1993).

133 See H.B. 1001.

134 *Id.*

135 See *Estabrook*, 842 P.2d at 1004. This case involved a defendant accused of taking indecent liberties with a minor, and, in order to protect the child from further trauma, the court read the defendant's questions to the child victim. *Id.*

defendant's right to self-representation was not violated because he wrote the questions and follow-up questions himself, and, although the judge read the questions to the victim, the jury still perceived the defendant as representing himself because of instructions given by the judge to that effect.¹³⁶

One potential concern with such jury warnings is that they may influence a juror's perception of a defendant. Specifically, such warnings may draw further attention to the presence of court-appointed standby counsel and to the fact that the court-appointed standby counsel is only being used to cross-examine the alleged victim. The mere presence of court-appointed standby counsel for cross-examination purposes already raises potential cause for concern in biasing the jurors against the defendant,¹³⁷ and providing jury instructions on the matter may lead jurors to have a more negative perception of the defendant by drawing their attention to that fact.

On the other hand, if the judge does not provide a jury instruction as to why court-appointed standby counsel, as opposed to the defendant, is cross-examining the victim, this may also negatively affect the jurors' perceptions of the defendant.¹³⁸ Through the jury instruction, the judge can remind the jurors that the defendant is the one who drafted the questions and clarify that the presence of court-appointed standby counsel is in no way indicative of the defendant's guilt or innocence. Without such instructions, it is possible that the jurors would draw their own assumptions as to why the defendant is not cross-examining the alleged victim, and such assumptions may negatively skew jurors' perceptions.

Since there is so much uncertainty as to the role of jury instructions in cases where court-appointed standby counsel plays a prominent role in a trial, research needs to be done to determine exactly how jury instructions affect jurors and their perceptions of defendants. Furthermore, studies need to be conducted to determine the appropriate content of such instructions and the extent to which they remind jurors that defendants are innocent until proven guilty. A mock jury study with multiple jury instructions scenarios would likely reveal the effect of jury instructions on a juror's perceptions of a defendant, and which type of instruction, if any, is least likely to influence jury perception.

¹³⁶ *Id.* at 1006.

¹³⁷ *See, e.g.,* *Fields v. Murray* 49 F.3d 1024, 1047 n.4 (Ervin, C.J., dissenting) (emphasizing the potential for prejudice when someone other than the pro se defendant cross-examines a witness).

¹³⁸ *See, e.g.,* *Estabrook*, 842 P.2d at 1006 (holding that a judge could read the cross-examination questions of a pro se defendant on his behalf, but emphasizing the importance of the court giving jury instructions explaining why the court was conducting the cross-examination); *Fields*, 49 F.3d at 1047 n.4 (Ervin, C.J., dissenting) (recognizing the importance of jury instructions to prevent juror bias).

2. Implications of Using CCTV

If a court does not choose to provide a court-appointed standby counsel, the proposed legislation allows a court to instead “impose reasonable procedures upon the parties for conducting the questioning to avoid trauma to [the] victim.”¹³⁹ Such procedures include preventing the defendant from approaching the victim during questioning.¹⁴⁰ The more controversial alternative, however, is the use of audio-video means when the defendant questions the victim,¹⁴¹ including the use of CCTV testimony.¹⁴²

“Proponents of CCTV reason that if children do not have to face the defendant or enter the courtroom, [they] will be less traumatized by testifying.”¹⁴³ On the other hand, opponents of CCTV contend that the use of CCTV violates a defendant’s Sixth Amendment right to confrontation because it impedes the jury’s ability to assess the credibility of the child witness.¹⁴⁴ Defense attorneys further argue that the victim’s lack of presence in the courtroom may impact the jurors’ perceptions of the defendant.¹⁴⁵ They claim that the fact that the victim is not in the courtroom while she testifies potentially implicates the defendant’s guilt due to the jurors’ perception that the victim is not present in the courtroom because she is concerned about being in the same room as the defendant and needs to be protected from him.¹⁴⁶

a) Legal Issues of CCTV

The Supreme Court has held that CCTV testimony—one-way and two-way—is constitutional as a means of protecting child victims as well as ensuring a defendant’s right to confrontation.¹⁴⁷ “So long as a trial court makes such a case-specific finding of necessity, the Confrontation Clause does not prohibit a State from using a one-way closed-circuit television procedure”¹⁴⁸ Thus, CCTV testimony may be used with

¹³⁹ H.B. 1001, 62d Leg., Reg. Sess. (Wash. 2011).

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² See *Maryland v. Craig*, 497 U.S. 836, 853–54 (1990). Thirty-seven states utilize videotaped testimony of sexually abused children; twenty-four states use one-way CCTV testimony; and eight states allow the use of a two-way CCTV testimony whereby the child witness can see the courtroom, and those in the courtroom can see the child witness. *Id.*

¹⁴³ Gail S. Goodman et al., *Face-to-Face Confrontation: Effects of Closed-Circuit Technology on Children’s Eyewitness Testimony and Jurors’ Decisions*, 22 LAW & HUM. BEHAV. 165, 166 (1998).

¹⁴⁴ *Id.*

¹⁴⁵ Natalie Taylor & Jacqueline Joudo, *The Impact of Pre-Recorded Video and Closed Circuit Television Testimony by Adult Sexual Assault Complainants on Jury Decision-Making: An Experimental Study*, 68 RES. & PUB. POL’Y SERIES 1, 5 (2005) [hereinafter *CCTV Study*].

¹⁴⁶ *Id.*

¹⁴⁷ See *Craig*, 497 U.S. at 857.

¹⁴⁸ *Id.* at 860.

child assault victims because it can reduce the psychological harm to children.¹⁴⁹ It therefore stands to reason that adult sexual assault victims who will suffer severe emotional and mental distress from being questioned by their alleged attackers would also benefit from providing testimony via CCTV.

The use of CCTV testimony also ensures that the defendant maintains his rights to confrontation and self-representation. The Court held in *Maryland v. Craig* that a defendant's confrontation rights are not violated through the use of CCTV testimony because, although the defendant cannot confront his accuser face-to-face, the victim is still under oath, can be observed by those in the courtroom as to her demeanor, and can be cross-examined.¹⁵⁰ Furthermore, the proposed legislation does not prohibit the defendant from cross-examining the alleged victim when she testifies by CCTV,¹⁵¹ thereby upholding and not limiting the defendant's right to self-representation.

As such, the use of CCTV testimony with adult victims appears to be constitutional in situations where the sexual assault victims would suffer severe emotional or mental distress, as required by Washington's proposed legislation. Under such conditions, the public policy concerns in protecting adult sexual assault victims from further psychological harm outweigh the Sixth Amendment rights of a defendant. The use of CCTV testimony does not completely negate a pro se defendant's rights, but rather it merely limits his right to confrontation. As such, the Supreme Court would likely find the use of CCTV to be an appropriate remedy in light of public policy concerns.

b) CCTV and Jurors' Perceptions

Despite the arguments in favor of CCTV, there remains a concern as to the effect of CCTV on jurors' perceptions of testimony given by witnesses via CCTV. The use of CCTV has most extensively been studied in cases of child sexual abuse. In Australia, for example, children testifying via CCTV have been perceived by mock jurors to be less distressed and more consistent in their testimony, in contrast to children testifying in the courtroom.¹⁵² Despite this fact, mock jurors judge children who testify via CCTV more negatively.¹⁵³ Furthermore, studies have revealed that whether testimony is given via CCTV has no significant impact on conviction rates.¹⁵⁴ In fact, mock juror studies have shown that

¹⁴⁹ See *id.* at 852.

¹⁵⁰ *Id.* at 851.

¹⁵¹ See H.B. 1001, 62d Leg., Reg. Sess. (Wash. 2011).

¹⁵² Judy Cashmore & Lily Trimboli, *Child Sexual Assault Trials: A Survey of Juror Perceptions*, 102 CRIME & JUST. BULL.: NSW BUREAU OF CRIME STAT. AND RES. 1, 2 (2006).

¹⁵³ *Id.*

¹⁵⁴ *Id.*

jurors are less likely to view a defendant as guilty when the child testifies via videotape.¹⁵⁵ These initial results appear to put to bed any concerns on the part of defense attorneys that their clients may be prejudiced by the use of CCTV, at least in child sexual assault cases.

Although the majority of research regarding the effects of CCTV on juror perceptions has focused on child witnesses, a few countries, such as Australia, allow courts to use CCTV for adult sexual assault victims as well.¹⁵⁶ In a mock jury study in Australia, researchers specifically looked at juror perceptions in cases where the sexual assault victims were adults.¹⁵⁷ In conducting this study, the researchers modified the transcript of an actual sexual assault trial and had actors portray the judge, attorneys, victim, and defendant.¹⁵⁸ The study was designed to determine whether the mode of testimony (face-to-face versus CCTV) affected jurors' perceptions of the victim or the defendant.¹⁵⁹

Ultimately, through the use of pre-deliberation questionnaires, this mock juror study found a number of factors that influenced jurors' perceptions. The mock jurors reported that the mode in which the adult victims testified, whether in the courtroom or via CCTV, did not significantly impact their perceptions of the victim's credibility.¹⁶⁰ Furthermore, the jurors perceived the courtroom procedure as more fair for the victim when she testified via CCTV.¹⁶¹ Overall, the mock juror study revealed that the jurors' perceptions of the guilt of the defendants were not influenced by whether the alleged adult victims testified in the courtroom or via CCTV.¹⁶² As such, while the use of CCTV for children tends to bias the jurors against the alleged victim, it has no impact on how the jurors perceive either the victim or the defendant in adult sexual assault cases.

However, although there was no difference found in the jurors' perceptions between the use of CCTV or in-court testimony in the mock juror study, some jurors in the CCTV condition expressed to the researchers that they would have preferred the victim to be physically present in the courtroom.¹⁶³ Those jurors felt that the use of the CCTV prevented them from accurately assessing the victim's character, demeanor, and truthfulness¹⁶⁴—all equally important factors in ensuring

¹⁵⁵ Janet K. Swim et al., *Videotaped Versus In-Court Witness Testimony: Does Protecting the Child Witness Jeopardize Due Process?*, 23 J. OF APPLIED SOC. PSYCHOL. 603, 620 (1993).

¹⁵⁶ See *CCTV Study*, *supra* note 145, at 2.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 24.

¹⁵⁹ *Id.* at 22.

¹⁶⁰ *Id.* at 35.

¹⁶¹ See *id.* at 36.

¹⁶² *Id.*

¹⁶³ *Id.* at 62.

¹⁶⁴ *Id.*

that a defendant's right to confrontation are not violated by the limitations placed on the proceedings.¹⁶⁵ Despite this concern, which tends to favor defense attorneys' arguments against the use of CCTV, research has consistently shown that adults are "no more likely to detect truth or deception when presented with . . . evidence via CCTV compared with face-to-face testimony."¹⁶⁶ Furthermore, the fact that the researchers found no systemic difference in verdict preferences supports the argument that while jurors may prefer in-court testimony, the mode of testimony does not influence the jury's decision whether to convict the defendant.¹⁶⁷

Given the research that has been done in Australia, it is clear that in cases involving adult sexual assault victims, the use of CCTV in no way biases jurors against a defendant.¹⁶⁸ Although the findings may suggest that there is a preference for in-court testimony, it is not the mode by which the testimony is given but rather the existence of jurors' pre-existing beliefs and expectations regarding sexual assault victims that ultimately lead to biases in perceptions.¹⁶⁹

Indeed, jurors are often biased against victims because of rape myths—stereotypes of sexual assault victims that shift the blame from the defendant to the victim.¹⁷⁰ A rape myth is a "prejudicial, stereotyped, or false belief] about rape, rape victims, and rapists."¹⁷¹ These beliefs and attitudes by jurors about what a sexual assault case should look like and how a sexual assault victim should behave are critical in understanding jury verdicts in sexual assault cases.¹⁷² These beliefs—or rather expectations of how a "real" victim would behave—influence the perception jurors have of the credibility of the victim,¹⁷³ which ultimately determines whether the jurors will find the defendant guilty.¹⁷⁴ As such, so long as these myths regarding sexual assault victims exist,

¹⁶⁵ See *Maryland v. Craig*, 497 U.S. 836, 851 (1990). The purpose of the Confrontation Clause is to ensure that the witness tells the truth by having the witness give statements under oath, be cross-examined, and have the jurors observe the demeanor of the witness while she testifies. *Id.*

¹⁶⁶ *CCTV Study*, *supra* note 145, at 62.

¹⁶⁷ *Id.*

¹⁶⁸ See *id.* at 36.

¹⁶⁹ *Id.* at 66.

¹⁷⁰ See Christopher Mallios & Toolsi Meisner, *Educating Juries in Sexual Assault Cases Part I: Using Voir Dire to Eliminate Jury Bias*, STRATEGIES NEWSLETTER (July 2010), available at <http://www.aequitasresource.org/EducatingJuriesInSexualAssaultCasesPart1.pdf>.

¹⁷¹ Sarah Ben-David & Mira Schneider, *Rape Perceptions, Gender Role Attitudes, and Victim-Perpetrator Acquaintance*, 53 SEX ROLES 385, 385 (2005) (quoting Martha R. Burt, *Cultural Myths and Supports for Rape*, 38 J. OF PERSONALITY AND SOC. PSYCHOL. 217, 217 (1980)).

¹⁷² See Natalie Taylor, *Juror Attitudes and Biases in Sexual Assault Cases*, 344 TRENDS & ISSUES IN CRIME & CRIM. JUST. 1, 2 (2007) [hereinafter *Juror Attitudes*].

¹⁷³ *CCTV Study*, *supra* note 145, at 59.

¹⁷⁴ See *Juror Attitudes*, *supra* note 172, at 4.

they will continue to taint jurors' perceptions and thus taint jury verdicts more so than the use of CCTV testimony will.¹⁷⁵

CONCLUSION

Although there are a number of statutes addressing the psychological distress that child assault victims face when testifying at trial,¹⁷⁶ to date there have been no statutes regarding adult sexual assault victims. The proposed Washington legislation would be the first of its kind. It not only raises the public policy concern of protecting adult sexual assault victims from further psychological harm, but it also offers methods to protect those victims while ensuring that the Sixth Amendment rights of defendants are not unconstitutionally limited.¹⁷⁷

The proposed legislation ensures that the court does not arbitrarily limit a defendant's Sixth Amendment rights by establishing a set of procedures to follow before restricting a defendant's rights. Furthermore, the purpose of the proposed legislation is to reduce the trauma that comes with testifying in court and to encourage more victims of sexual assault to report their attacks, and the remedy of providing court-appointed standby counsel supports this public policy. Although standby counsel is appointed exclusively to cross-examine the victim, this remedy will not violate a defendant's right to self-representation because the proposed legislation enacts methods to ensure that the defendant retains control of his case and uses jury warnings to ensure that jurors perceive the defendant as having remained in control of his case.¹⁷⁸ However, although this remedy may meet legal standards, it may in fact negatively impact jurors' perceptions of defendants. Thus far there has been no research on jurors' perception of pro se defendants, court-appointed standby counsel, or the jury instructions given by judges when court-appointed standby counsel is present. Such research may reveal that the use of court-appointed standby counsel would lead jurors to perceive a defendant as more guilty. As such, it is imperative that research be done analyzing the use of court-appointed standby counsel before it is proposed as a remedy.

Alternatively, the legislation proposes extending the right of CCTV testimony to adult victims of sexual assault as another potential remedy.¹⁷⁹ Because there is a strong public policy in favor of protecting victims from excessive trauma,¹⁸⁰ it is likely that the Supreme Court will uphold the use of CCTV for adult victims. The research conducted on

¹⁷⁵ See *id.* at 4–5.

¹⁷⁶ See *Maryland v. Craig*, 497 U.S. 836, 853 (1990).

¹⁷⁷ See H.B. 1001, 62d Leg., Reg. Sess. (Wash. 2011).

¹⁷⁸ See discussion *supra* Part III.C.1.

¹⁷⁹ See H.B. 1001.

¹⁸⁰ See *Craig*, 497 U.S. at 852.

jurors' perceptions when adult victims testify via CCTV, however, is crucial in determining whether the legislation's proposed remedy is appropriate.¹⁸¹ The CCTV studies have revealed that, although jurors may prefer for victims to testify in court, it has no impact on jurors' perceptions of the victim or the defendant.¹⁸² As such, the use of CCTV does not bias jurors against defendants, as many defense attorneys fear. Instead, what the research has shown is that jurors' preconceived beliefs about sexual assault victims continue to impact jurors' perceptions and decision-making, even when safeguards such as CCTV are employed.¹⁸³ Thus, while it is unlikely that the proposed remedies under the Washington legislation will bias jurors against defendants, it is also unlikely that these remedies will remove the pre-existing biases that jurors have against victims. It is therefore imperative that steps be taken to educate jurors about sexual assault in order to reduce the effect of preconceived beliefs on jurors' perceptions in sexual assault cases.

Some level of discomfort is to be expected when a victim of sexual assault must testify at trial, but where the defendant has direct access to his alleged victim it is not unreasonable to expect the victim's level of distress to become debilitating. Washington's proposed legislation recognizes the potentially devastating effects pro se defendants can have on their alleged sexual assault victims and offers a recourse, ensuring that future victims will continue to come forward without fear of being badgered by their alleged abusers, while upholding a defendant's Sixth Amendment rights to self-representation and confrontation.

¹⁸¹ See discussion *supra* Part III.C.2.

¹⁸² *Id.*

¹⁸³ *CCTV Study*, *supra* note 145, at 66.