IN THE ARIZONA COURT OF APPEALS,

DIVISION ONE

STATE OF ARIZONA ex rel. WILLIAM G. MONTGOMERY, Maricopa County Attorney	)	Court of Appeals, Division One 1 CA-SA 2012-0283
Plaintiff/Petitioner,	)	
vs.	)	Maricopa County Superior Court No. CR 2011-008083-001
SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of MARICOPA, THE HONORABLE EDWARD BASSETT, a judge thereof,	)	
Respondent Judge,	)	
JOE CUEN, Pro Per Defendant;	)	
Real Party in Interest.	)	

AMICUS CURIAE BRIEF OF THE ARIZONA PROSECUTING ATTORNEYS' ADVISORY COUNCIL IN SUPPORT OF PETITIONER, STATE OF ARIZONA

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I. INTRODUCTION

The Arizona Prosecuting Attorneys' Advisory Council (APAAC) is a state agency established pursuant to A.R.S. § 41-1830 *et seq*. and therefore, need not submit a motion for leave to file an amicus brief pursuant to Rule 16(a), Ariz. R. Civ. App.

APAAC represents more than 800 state, county, and municipal prosecutors. APAAC's primary mission is to provide training to Arizona's prosecutors. APAAC also provides a variety of other services to and on behalf of prosecutors. For instance, APAAC acts as a liaison for prosecutors with the legislature and the courts. In this role, APAAC may advocate prosecutorial interests before the legislature or proposes changes to this Court's procedural rules. On occasion, APAAC submits amicus curiae briefs in state or federal appellate courts on issues of significant concern. This is one of those occasions.

The state's petition for special action raises an issue of first impression involving the constitutional rights afforded to defendants and victims. The issue is one that is likely to recur whenever a defendant charged with a crime committed against a victim is permitted to represent himself at trial. Therefore, APAAC joins with the petitioner in asking this Court to accept jurisdiction of the pending petition for review to resolve this matter of statewide importance.

…

II. ISSUE AND ARGUMENT

ISSUE: THE TRIAL COURT ERRED WHEN IT DENIED THE VICTIMS' RIGHT TO BE FREE FROM INTIMIDATION, HARASSMENT, AND ABUSE WHEN IT REFUSED TO ISSUE AN ORDER PROHIBITING A PRO PER DEFENDANT FROM PERSONALLY CROSS EXAMINING HIS CRIME VICTIMS.

A. This Court must balance the victims' rights to be free from intimidation, harassment, or abuse against the defendant's right to due process.

In order to preserve and protect a victim's right to due process and justice, crime victims have a right "to be free from intimidation, harassment, or abuse throughout the criminal justice process." Ariz. Const. art. II, § 2.1(A)(1). "[C]oncomitant with the Arizona Victim's Bill of Rights … the defendant has a due process right … to effective cross-examination." *State ex rel. Romley v. Superior Court In and For County of Maricopa (Roper, Real Party in Interest)*, 172 Ariz. 232, 236, 836 P.2d 445, 449 (App. 1992).

In *Roper*, this Court set forth a procedure by which courts should balance the constitutional rights of the victim and the defendant. Roper was charged with aggravated assault on her husband. *Id*. at 234, 836 P.2d at 447. She claimed that that the victim suffered from multiple personality disorder and that she stabbed him in self-defense while he manifested one of his violent personalities. *Id*. In support of that claim, she sought access to her husband's medical records. *Id.* The trial court granted the motion, ordering that the records be forwarded to the court

for *in camera* inspection. *Id.* at 235, 836 P.2d at 448. The state sought special action relief, arguing that the Victim's Bill of Rights precluded the trial court from compelling disclosure from the victim. *Id*. The Court of Appeals found that the medical records' potential for *Brady* material essential to Roper's defense compelled a limitation on the victim's right to refuse a discovery request. *Id.* at 236, 836 P.2d at 449.

Although the *Roper* court found that the defendant's right to due process outweighed the victim's rights in that case, it did not hold that the balance of rights would always render the defendant's rights superior to the victims. *Cf. State v. Connor*, 215 Ariz. 553, 558, 161 P.3d 596, 601 (App. 2007) (denying a similar request when the defendant failed to make an adequate showing that the materials were essential to his defense). When a defendant's right to due process conflicts with a victim's right to due process, the reviewing court must first decide whether the trial court's order violates the Victim's Bill of Rights. If it does, the court must then decide whether the defendant has a "superseding federal constitutional right to due process and a fair trial that would mandate upholding the trial court's … order under the facts of th[e] case." *Roper,* 172 Ariz. at 237, 836 P.2d at 450.

Unlike *Roper*, the defendant's ability to present a defense in this case will not be significantly impacted by a requirement that advisory counsel conduct the

cross-examination of the victims. Thus, the balance of competing rights in this case weighs in favor of protecting the victims from potential abuse or harassment.

B. The victims' right to due process and a fair trial requires that trial to be free from the intimidation, harassment, or abuse of the defendant.

Crime victims have standing in criminal cases to assert their constitutional rights. *Id*. at 237, 836 P.2d at 450; A.R.S. § 13-4437(A). The state may exercise those rights on behalf of a victim. A.R.S. § 13-4437(C). The plain language of the Victim's Bill of Rights grants crime victims the right to be free of intimidation, harassment, and abuse. Ariz. Const. art. II, § 2.1(A)(1).

The state's petition correctly notes that the victims in this case may suffer trauma and intimidation from a cross-examination personally conducted by the *pro se* defendant. *Petition for Special Action* at p. 17-18. This is especially true in sexual abuse cases like the one at bar. The trauma suffered by a sex assault victim may be compounded by personal confrontation and interaction with the defendant. *Id*. It is axiomatic that the potential for intimidation is lessened when someone other than the defendant examines the victim.

C. The defendant does not have a superseding right to personally question the victims even though he has invoked his right to self-representation.

Having determined that the victims have a constitutional right to due process that includes the right to be free from intimidation, harassment, or abuse from the

defendant, this Court must next determine whether the victims' rights violate the defendant's right to due process. APAAC submits that it does not.

This Court previously held that "any restrictions on [a] defendant's … cross-examination or impeachment of the victim … imposed pursuant to the Victim's Bill of Rights must be proportionate to the interest of protecting the victim as balanced against the defendant's due process right to a fundamentally fair trial." *Roper*, 172 Ariz. at 237, 836 P.2d at 450. Having advisory counsel conduct the cross-examination of the victims is a proportionate response that would ensure protection of victims' rights while preserving a defendant's right to represent himself and confront the witnesses against him.

1. Requiring advisory counsel to examine the victims does not violate a defendant's right to confront the witnesses against him.

a. The state's request does not violate either the letter or the spirit of the defendant's right to confront the witnesses against him.

In *Roper*, this Court held that the defendant may be entitled to review the victim's medical records in order to invoke his right to confront the witnesses against him. As such, this Court noted that the "main and essential purpose" of the Confrontation Clause is "the ability to effectively cross-examine witnesses." *Roper*, 172 Ariz. at 237, 836 P.2d at 450, citing *Delaware v. Van Arsdall*, 475 U.S. 673, 678, 106 S.Ct. 1431, 1435 (1986). Requiring advisory counsel to conduct the cross-examination of the victims does not violate the purpose of the Clause. In fact,

having counsel conduct the examination of the victims in lieu of a non-lawyer defendant is more likely to enhance its effectiveness.

b. The defendant's right to confront the witnesses against him is not absolute.

Moreover, a defendant's right to confront witnesses against him is not absolute. This Court has previously held that a defendant's right to confront witnesses may be abridged when it conflicts with the Victim's Bill of Rights. In *Roper,* this Court noted that the United States Supreme Court recognized that:

> "[t]rial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witnesses' safety, or interrogation that is repetitive or only marginally relevant." Such limitations are in perfect harmony with the protections accorded to victims through the Victim's Bill of Rights.

Roper, 172 Ariz. at 237, 836 P.2d at 450, citing *Van Arsdall*, 475 U.S. at 679, 106 S.Ct. at 1435 (emphasis added). Accordingly, the trial court has the discretion to limit a defendant's confrontation rights when that right may lead to harassment or intimidation of the victim.

c. The defendant has the burden to demonstrate that the state's request is an unreasonable accommodation to balance the state and defendant's competing interests.

When making this determination, the victims need not demonstrate that the defendant intends to disrupt the proceedings in order to limit the defendant's method of cross-examination. In *State v. Whalen*, 192 Ariz. 103, 108, 961 P.2d 1051, 1056 (App. 1997), the Court of Appeals upheld an order requiring Whalen to

conduct proceedings from the front of the courtroom, finding that his right to self-representation did not outweigh the potential for a negative impact on the court's ability to conduct the trial in an efficient and orderly manner. The Court did not require evidence that Whalen intended to disrupt the proceedings before upholding the trial court's decision, instead holding that "the power to instruct those participating in and observing trials as to the manner in which they comport themselves" is fundamental to the court's ability to control the courtroom. *Id*.

Although in *Whalen*, the Court suggested that the defendant demonstrate an unwillingness to comply with court rules before limiting the defendant's due process rights, the burden to demonstrate a need to limit the defendant's method of cross-examination does not fall on the state when the competing interest is protection of the victims' constitutional rights. Requiring a victim to demonstrate that the defendant intends to deliberately violate victims' rights before imposing any restriction would lead to an absurd result. If victims' rights did not accrue until after a determination that they would be violated, the provisions for victims' rights would be of little value. *See State ex rel. Romley v. Dairman*, 208 Ariz. 484, ¶21, 95 P.3d 548 (App. 2004). Therefore, in the absence of any specific, demonstrative need to have the defendant personally conduct the victims' cross-examination, the state's request to have advisory counsel question the victims should have been granted.

2. Requiring advisory counsel to examine the victims does not violate the defendant's right to self-representation.

a. The defendant's right to represent himself is not absolute.

A defendant undoubtedly has a Sixth Amendment right to waive counsel and represent himself. *Faretta v. California*, 422 U.S. 806, 834, 95 S.Ct. 2525, 2541 (1975). However, even when the competing interest is not a constitutional guarantee, "the *Faretta* right to self-representation is not absolute, and 'the 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.'" *U.S. v. Frazier-El*, 204 F.3d 553, 559 (4th Cir. 2000), citing *Martinez v. Court of Appeal of Cal*., 528 U.S. 152, 120 S.Ct. 684, 691 (2000). "The right [to self-representation] does not exist, however, to be used as a tactic for delay, for disruption, for distortion of the system, or for manipulation of the trial process." *Id*. at 560 (internal citations omitted).

Although a defendant may waive counsel because he believes a personal examination of witnesses will be more effective for his interests, the right to self-representation does not give a defendant license to "abuse the dignity of the courtroom" or refuse to "comply with relevant rules of procedural and substantive law." *Faretta,* at 834 n. 46, 95 S.Ct. at 2541. Both the Victim's Bill of Rights and the Arizona Rules of Evidence give trial courts the authority to limit the mode and order of interrogation to protect victims from harassment or abuse. *See* Ariz. R.

Evid. 611(a)(3) ("The court shall exercise reasonable control over the mode and order of interrogating witnesses … as to protect witnesses from harassment or undue embarrassment.").

b. The limited utilization of advisory counsel to question the victims does not infringe on the defendant's right to self-representation when he continues to maintain control of his defense.

Moreover, a defendant's right to self-representation is not infringed by the appointment of advisory counsel. Ariz. R. Crim. P. 6.1(c), cmt. Here, the court has already appointed advisory counsel to assist the defendant with his defense. An order requiring counsel to conduct the cross-examination of the victims will not infringe on the defendant's right to represent himself.

This case is analogous to the situation in *State v. Roscoe*, 184 Ariz. 484, 910 P.2d 635 (1996), in which the trial court allowed Roscoe to have self-representation by granting his *Faretta* motion while appointed counsel continued to represent him. The Arizona Supreme Court upheld the decision, finding that the order was within the court's sound discretion, and rejected Roscoe's claim that the decision violated his Sixth Amendment rights, stating:

> [h]aving been afforded the best of all worlds, this competent defendant cannot now claim that granting his *pro se* motion interfered with his Sixth Amendment rights. Those rights were protected to both extremes, allowing competent self-representation and full appointed representation at trial and sentencing.

Id. at 498-99, 910 P.2d at 649-50. Similarly here, the defendant cannot complain that his Sixth Amendment right is violated by a hybrid representation that protects the victims' right to be free from intimidation, harassment, or abuse. Allowing advisory counsel to conduct the cross-examination of the victims will afford the defendant "the best of all worlds" while protecting the victims' rights.

c. The defendant has the burden to demonstrate that the state's request is an unreasonable accommodation to balance the state and defendant's competing interests.

As is the case with the defendant's right to confront witnesses, the state does not carry the burden to demonstrate a need to limit the defendant's self-representation. Instead, the defendant must articulate specific reasons why the state's accommodation is unreasonable. In *State v. Lamar*, 205 Ariz. 431, 72 P.3d 831 (2003), the trial court denied Lamar's motion to represent himself, which was filed in conjunction with a motion to continue the trial date. The Arizona Supreme Court held that a trial court "must consider the defendant's right in conjunction with a victim's constitutional right to a speedy trial and the trial court's prerogative to control its own docket." *Id*. at 436, 72 P.3d at 836. In balancing those rights, the Court noted that Lamar failed to articulate any specific reasons that necessitated a continuance. *See also State v. Connor*, 215 Ariz. 553, 558, 161 P.3d 596, 601 (App. 2007) (upholding trial court's denial of the defendant's request for discovery that would infringe on the victim's constitutional rights because the defendant

failed to make an adequate showing that the information was necessary to fully present his defense or to cross-examine witnesses.)

Similarly here, the defendant must demonstrate specific reasons why he is entitled to abrogate the victims' rights in order to personally cross-examine the victims. Given the fact that advisory counsel can ask the same questions that the defendant would personally ask (subject to the Rules of Evidence and Criminal Procedure) and that the state's proposed accommodation allows him to continue to direct the course of his defense, it is unlikely that he or any defendant would be able to sufficiently demonstrate that the use of advisory counsel in this manner would be a violation of his rights.

Finally, the court need not consider intermediate solutions to a denial of the defendant's personal cross-examination before upholding the victims' rights. The Arizona Supreme Court recently upheld a trial court's revocation of a defendant's self-representation for violating discovery rules, even though Rule 15.2 provided other sanctions for the defendant's misconduct. *State v. Gomez*, __ Ariz. __, __ P.3d __ [2012 WL 6061679] (December 7, 2012). The Court held that the availability of alternate sanctions did not prevent the court from revoking Gomez's *pro se* status altogether. *Id*. at __, ¶ 16. *Gomez* and other Arizona cases demonstrate that the right to self-representation is not a constitutional right that will necessarily supersede a victim's right to due process and justice. When our

courts have repeatedly held that the right to self-representation is secondary to a court's need to uphold the dignity of its courtrooms, it cannot be said that this right must displace a victim's constitutional right to be free from intimidation, harassment, or abuse within the criminal justice system.

III. CONCLUSION

Accordingly, for all the reasons set forth herein, APAAC requests this Court accept jurisdiction of the State's petition for special action and grant the relief requested therein.

RESPECTFULLY SUBMITTED this 21st day of December, 2012.

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