

How Much Do You Know About Victims' Rights?

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Marsy's Law, last year's Proposition 9, received quite a bit of publicity before and after it passed. Marsy's Law converted some victim's rights from statutory rights to constitutional rights. It also added some new state constitutional rights for victims.

One feature of Marsy's Law requires that victims be advised of specific listed rights. The law also created another constitutional right not on the list. On list and off list makes a big difference. Most people have had the grocery store list experience: you're told about one more item on your way out the door. But once at the store, it is very easy to forget that item not on the list. Unfortunately, this is what has happened with Marsy's Law — a new constitutional right not on the list is being ignored in most criminal cases.

This new right is the victim's right to counsel, now in Article 1, 28(c)(1) of the California Constitution. The constitution authorizes a victim to have an attorney to enforce his or her rights: "[a] victim, the retained attorney of a victim, a lawful representative of the victim, or the prosecuting attorney upon request of the victim...may enforce the rights enumerated...in any trial or appellate court...."

The victim's right to counsel is not the same constitutional right to counsel as that of a criminal defendant. The criminal defendant's right applies whether or not the defendant can afford an attorney. There is no obligation of the state or county to pay for a victim's attorney. To make this clear, the constitution refers to the "the retained attorney of a victim." In other words, an attorney paid for by the victim.

Nevertheless, the constitution says the victim has choices: assert his or her rights by himself or herself, or through an attorney or by working with the prosecutor or another lawful representative. But most victims don't have a choice for the simple reason they are not aware of their choices.

When it came to the rights on the list, Marsy's Law was very clear: it required the attorney general to design a card listing those rights and required the police to distribute these cards to victims. But since the right to counsel, although a constitutional right, was not on the list — no one has to advise victims of this right. The typical victim has no idea that he or she may have the right to counsel.

While it is true that many victims cannot afford counsel and many would not want independent counsel, these points are no basis for failing to advise one of a constitutional right. Even poor victims should have the opportunity to call Legal Aid about representation. But since victims are kept in the dark about this right, they do not have this opportunity.

This failure impacts restitution cases. In the absence of advice about their right to counsel, it is likely that any victim who received restitution could return to court, months or years later to have that restitution order set aside on the grounds that they were not told of their right to counsel. Looking at it this way, the huge majority of restitution orders entered since Marsy's Law is readily voidable by the victim. It would seem that both the bench and the prosecution should have a keen interest in

avoiding this outcome, with its potential to generate more hearings and prevent closure of restitution. Yet neither is taking steps to add a sentence or two to their admonitions, which would prevent this.

Another constitutional right in Marsy's Law, however, is on the list: the right of a victim to a speedy outcome. Article I Section 28(b)(9) gives victims the right to "a speedy trial and a prompt and final conclusion of the case and any related post-judgment proceedings." To determine how this right works, it is helpful to consider the law of defendants' constitutional right to a speedy trial.

The right to a speedy trial is a right to avoid harm caused by excessive delay. Cases have identified three specific kinds of harm: prolonged imprisonment; anxiety of prolonged legal proceedings; and loss of evidence caused by the delay. *People v. Lowe* (2007) 40 Cal. 4th 937, 943-944. The second category applies to victims — the right to be free of the anxiety of prolonged legal proceedings.

To analyze speedy trial claims, a court balances harm against the reason for delay: "any prejudice to the defendant resulting from the delay must be weighed against justification for the delay." *People v. Contreras* (2009) 177 Cal. App. 4th 1296, 1305. How much harm or prejudice must be proved is closely linked to the reason for the delay. "Purposeful delay to gain an advantage is totally unjustified, and a relatively weak showing of prejudice would suffice to tip the scales towards finding a due process violation. If the delay was merely negligent, a greater showing of prejudice would be required to establish a due process violation." *People v. Nelson* (2008) 43 Cal. 4th 1242, 1255-1256.

When it comes to victims, the prosecution or the defendant could cause the delay. During criminal proceedings there are many legitimate reasons for delays. It is difficult to determine in the abstract whether any pre-trial delay offends the speedy process right of a victim. An appeal of the conviction is a different situation. If a restitution order has been entered and the defendant appeals his conviction, the defendant will generally want a stay of payment of restitution. Applying the speedy resolution analysis, appeal is an intentional act by the defendant that prejudices the victim. This analysis suggests that a stay of payment of restitution should not be granted because it would violate the constitutional right of the victim.

In re Fishman (1952) 109 Cal. App. 2d 634, used a different analysis to reach a similar result. The trial court refused to stay payment of a fine pending appeal. The Court of Appeal agreed, reasoning that the financial convenience of a convicted defendant was not a reason to grant a stay of payment of the fine. Similarly, the financial convenience of an appeal-



ing defendant should not be a basis for staying a restitution order.

A third analysis leads to the same result. A defendant's right to appeal or to challenge a conviction is a product of case law or statute. But the right to prompt payment of restitution is a constitutional right. What is a court to do when faced with a possible conflict between a statutory right and a constitutional right? "In a situation such as this where a constitutional right comes into conflict with a statutory right, the former prevails." *Gray v. Mississippi* (1987) 481 U.S. 648. *Gray* was the appeal of a criminal case that involved a conflict between a state statute granting peremptory challenges to the prosecution and the constitutional rights of the defendant. The Supreme Court held that the statutory rights must give way to the constitutional rights. Under this analysis as well, victims should not have to wait for the decision on a defendant's appeal to collect their restitution.

Now that victims are armed with both a constitutional right to restitution and a right to prompt payment of that restitution, a stay of payment of restitution should not be granted pending appeal.