

## **Victims Not Being Told of Their Constitutional Right to Counsel**

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*People v. Smith*, 198 Cal. App. 4th 415,439 (2011), held that Marsy's Law added a constitutional right to counsel for victims. "[Victim] Doe had a right to not only be notified of the restitution and to be present, but also to be heard. She was also entitled to have counsel represent her in being heard." The court cited Article 1, Section 28(c)(1) of the state constitution, which Marsy's law added. California law already establishes that victims have a right to be informed of their right to counsel. Penal Code Section 679.026 (b) states "[e]very victim of crime has the right to receive without cost or charge a list of the rights of victims of crime recognized in Section 28 of Article I of the California Constitution. These rights shall be known as 'Marsy Rights.'" In California, victims have both the right to counsel and the right to be notified of that right.

Penal Code Section 679.026(c) requires law enforcement agencies to notify victims of their rights under Marsy's Law. Subsections (c)(1) and (3) specify that victims are to be advised of their rights in Article 1, section 28(b). Penal Code Section 679.026(c) does not specify that victims must be notified of their rights under in Article 1, Section 28(c) of the constitution - the section which establishes the constitutional right to counsel. To recap, the state constitution establishes the right of victims to counsel (for which the victim must pay or find pro bono assistance) and the Penal Code establishes that victims have a right to be notified of this right. Would anybody imagine

that most law enforcement agencies would take the position that they do not have to notify victims of the right to counsel? That is what is happening on the streets and in the courtrooms across the state - the rapist is advised of his right to counsel, but the rape victim is not. In other words, when it comes to the right to counsel, police and prosecutors give better advice to defendants than they do to victims.

Restitution is part of sentencing, so it is helpful to look at cases which involved the right to counsel and sentencing to determine what impact this failure to notify victims of their right to counsel will have. In *People v. Burgener*, 46 Cal. 4th 231 2009, the defendant represented himself at a hearing to modify the verdict, not a trial on the merits. The trial court advised the defendant that he was entitled to counsel or to represent himself. The state Supreme Court held that this was insufficient notification of the right to counsel and the risks and benefits of self representation.

In *People v. Hall*, 218 Cal. App. 3d 1102 (1990), the defendant appealed because he was not told of his right to counsel at a sentencing proceeding. Hall pointed out that there is a right to counsel whenever a fundamental right of a defendant is involved. The waiver of the right to counsel must be knowing and intelligent. The fact that the defendant had been advised of his right to counsel in an earlier part of the case was insufficient. Hall concluded: "[i]f, at a deferred sentencing hearing where the defendant represents himself or herself, there is a complete absence of a waiver of the right to counsel and of any self-representation warnings, reversal is required." Like [*Hall*], restitution hearings are sentencing proceedings. Restitution hearings involve the

fundamental constitutional right of victims to restitution. Unlike *Hall*, victims have not been previously advised of their right to counsel - they generally have never been told about it at all.

A skeptic might argue that defendants have to be notified of their right to counsel to avoid reversal of convictions, but the same does not apply to victims, so there is no need to notify them. But a similar risk applies to restitution hearings and convictions when a victim is not notified of the right to counsel. If a victim were not told of his or her right to counsel prior to a restitution hearing, it is very likely that the victim could successfully move to set aside the restitution order on the grounds that they were never told of their right to counsel under the state constitution and *Smith*. It is hard to imagine a Court of Appeal rejecting such an argument based on denial of a fundamental and key right. The result would be a new restitution hearing, resulting in additional work for judges, prosecutors and defense counsel, an important economic consideration in this time of budget constraints. If a restitution order were set aside, that might also jeopardize a plea agreement.

For example, in *People v. Brown*, 147 Cal. App. 4th 1213 (2007), the defendant agreed to pay \$280 in restitution. Later the amount was changed to over \$34,000. On appeal defendant Brown sought specific performance of her plea agreement. The *Brown* court held that specific performance could not be ordered because that would adversely affect the constitutional right of the victim to full restitution. The court held that Brown could withdraw her guilty plea. The failure to advise victims of their right to

counsel will allow them to challenge any restitution order and, in turn, allow defendants to withdraw from plea deals.

The best approach is for those required to inform victims of their Marsy's Law rights - prosecutors - to include the most important Marsy's Law right of all - the right to counsel. This is not only fair for victims; it puts an end to favoring defendants over victims, and favoring wealthy victims over poor. It will also reduce the number of restitution hearings which must be repeated and plea agreements that must be re-negotiated. In other words, proper notice of the right to counsel to victims will reduce the cases which must be re-litigated - certainly an important goal in this time of severe court budgets.