

Protecting a Victim's Right to Counsel

Published in the Los Angeles Daily Journal
November 28, 2014

Attorney General Harris is to be congratulated on her recent re-election. She has been a powerful and effective advocate for crime victims. One of her most important victories is People v. Smith (2011) 198 Cal. App. 4th 415. Smith confirmed that the amendment to the California Constitution (known as Marsy's Law) created a constitutional right to counsel for victims: "Marsy's Law added several provisions relating to victim restitution to the California Constitution As a result of these provisions, [victim] Doe . . . was also entitled to have counsel represent her in being heard. . . ." *Id.* at 439 (citations omitted).

This right is not the same as that of defendants, victims must pay for their counsel. But it is still a big deal. First, the right to counsel is a fundamental right. Powell v. Alabama (1932) 287 U.S. 45, 67 - 68. Second, the right to counsel opens the door to other rights:

[W]ithout the aid of an attorney other protections which the law affords would often avail defendant little since it cannot be assumed that he is sufficiently articulate and adequately conversant with his constitutional and legal rights and his procedural duties to protect himself throughout the course of criminal proceedings.

People v. Mattson (1959) 51 Cal.2d 777, 789, rev'd on other grounds,
People v. Taylor(2009) 47 Cal. 4th 850.

The right to counsel is literally a key right, a right that opens the door to other rights.

Marsy's Law created a system for notifying victims of their rights. Victims are to be given a list of their important rights by law enforcement (including prosecutors). Penal Code §679.026 (a) - (c)(1). The Attorney General has responsibility for drafting this list. Penal Code §679.026 (c)(3). Common sense dictates that one of the most important of the Marsy's rights, the right to counsel, be at the top of the list. Shockingly, it is nowhere on the list.

The Attorney General could respond that victims who ask prosecutors if they have a right to their own counsel will be told at that time. But last century that approach to the right to counsel was discredited by the California Supreme Court:

Finally, we must recognize that the imposition of the requirement for the request [for counsel] would discriminate against the defendant who does not know his rights. The defendant who does not ask for counsel is the very defendant who most needs counsel. We cannot penalize a defendant who, not understanding his constitutional rights, does not make the formal request and by such failure demonstrates his helplessness. To require the request would be to favor the defendant whose sophistication or status had fortuitously prompted him to make it.

People v. Dorado (1965) 62 Cal. 2d 338, 351 (footnote omitted);
overruled on other grounds, People v. Cahill (1993) 5 Cal. 4th 478.

Dorado makes it clear that under California public policy the right to counsel cannot remain hidden in a backroom, known only to the few who are smart or wealthy enough to ask for the right. Participants in the criminal justice system must be advised of this right.

One could take the position that Dorado applies to criminal defendants and not victims. But this is a difficult position for several reasons. First, this position requires arguing that the person accused of rape should be advised of his constitutional right to counsel, but the traumatized and injured victim of the rape should not be advised of her constitutional right to counsel.

Second, it is odd for a prosecutor to tell a defendant - whom the prosecutor opposes - about the right to counsel and not give the same advice to a member of the prosecutor's constituency - victims.

Third, the Penal Code requires that victims be told of all their rights established by Marsy's Law. Penal Code §679.02(a),(b).

A difference between the right of a defendant to counsel and the right of a victim is that a poor defendant has the right to appointed counsel. Poor victims do not have the

right to appointed counsel. But that is not an argument against advising victims of that right. Even a poor victim who knows of his or her right to counsel can consider going to legal aid for representation. But without knowledge of the right to counsel, most victims will not even think about how they might get representation.

This is not just a matter of protecting victims, it is also a matter of protecting sentences and plea agreements. If a victim were not told of the 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 California Constitution and Smith. 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 U.S. Justice Department sends crime victims a letter which notifies them of their federal *statutory* right to counsel. But California, with a more powerful constitutional right to counsel, has not met this standard. Our Attorney General has proved that her litigation sword on behalf of victims is mighty, now she has a chance to prove that her pen on behalf of victims is mightier.

Antonio R. Sarabia II is the principal in IP Business Law, Inc., he specializes in licensing, victim restitution, contracts, trademarks and copyrights. He can be reached at (310) 377-5171 or asarabia@cox.net; www.calrestitution.com.