



Learning Across Movements: The Example of Rape Victim Standing in Rape Shield Procedures

FINAL ARTICLE IN 3 PART SERIES ON CRIME VICTIM STANDING AND CONSTITUTIONAL RIGHTS

Despite healthy differences, the general victims' rights movement and the anti-rape movement share an interest in the enforcement of victims' law reforms. Both movements have been frustrated by the lack of government compliance with, and enforcement of, victims' laws. Both movements have struggled to achieve consistent law reform through prosecutors. For both movements, the enforcement of victims' laws is stymied in similar ways. Government, in the form of police, judges, prosecutors, or other executive branch agencies (such as parole authorities), may neglect or refuse to comply with victims' laws. Despite different emphases, both movements seek to fundamentally reform a criminal process that fails to consider their rights. This article uses current rape shield law as an example of how the two movements can come together, learn from each other, and through shared strategies and efforts, secure enforcement of victims' rights in the criminal process, thereby advancing victims' interests.

RAPE SHIELD LAW – THE LACK OF VICTIM VOICE

Under current rape shield law, rape victims cannot directly protect their individual privacy and confidentiality interests. This is true because, in all but a handful of jurisdictions, rape victims have no explicit right to participate in either trial level rape shield hearings or pretrial appellate review of adverse court rulings on rape shield law. Moreover, while the state can, and often does, object to the introduction of the victim's prior sexual history, from the rape victim's perspective there are concerns over such exclusive prosecutorial authority.

While in the best of circumstances a prosecutor will object and seek to exclude a defendant's introduction of the prior sexual history of the rape victim at pretrial hearings, almost all rape shield laws contemplate that prosecutors may themselves try to introduce evidence of the victim's prior sexual conduct. While prosecutorial introduction of such evidence may be the exception rather than the rule, it points out that when the state takes a position adverse to a victim's interests, no one remains to defend the victim's confidentiality. Moreover, the state may

simply agree with a defendant that certain prior sexual history evidence is admissible, again leaving no one to champion the rape victim's privacy and confidentiality.

Even if prosecutors were always stalwart defenders of rape victims' confidentiality at the trial level, in almost all jurisdictions prosecutors are presently unable to enforce rape shield laws through pretrial appellate review of trial court rulings. Only two states have statutes explicitly allowing the prosecution to bring an interlocutory appeal from a rape shield ruling that is adverse to the victim. *See* ARK. CODE ANN. §16-42-101(b)(3); OR. REV. STAT. § 40.210(4)(c). Neither statute permits an interlocutory appeal by a victim - the person whose privacy and confidentiality interests are actually at stake.

The structure of a legal contest of relevance staged between the prosecution and the defense, parties without a personal interest in the privacy and confidentiality of the materials at issue, is inherently flawed. It is flawed because it marginalizes victims' personal interests in rape shield protections. Only with direct enforcement of victims' privacy interests will the full potential of rape shield laws be realized. The lack of express provisions granting standing for direct enforcement does not necessarily foreclose an interlocutory appeal by a victim. A victim's right to appeal an adverse pretrial rape shield ruling might be implied from a combination of rape shield procedures and rules governing interlocutory appeals, and from non-rape shield strategic avenues, including the collateral order doctrine and general victims' rights.

DIRECT ENFORCEMENT: THE FEDERAL EXAMPLE

The Fourth Circuit Court of Appeals has implied a victim's right of interlocutory appeal from the federal rape shield procedures which expressly allow the victim to participate in the trial level rape shield hearing. In *Doe v. United States*, 666 F.2d 43 (4th Cir. 1981), the court concluded that the rape victim could bring an interlocutory appeal to challenge an adverse pretrial rape shield ruling. Rejecting the defendant's assertion that the court lacked jurisdiction to consider the victim's appeal, the court stated: "The text, purpose, and legislative history of [the rape shield rule] clearly indicate that Congress enacted the rule for the special benefit of the victims of rape." *Id.* at 45, 46. The court observed that the rule made no reference to appeal; nevertheless, the court held that the remedy was "implicit as a necessary corollary of the [rape shield] rule's explicit protection of the privacy interests Congress sought to safeguard." *Id.* at 46. In reaching this conclusion, the court found significant the fact that "[n]o other party in the evidentiary proceeding shares these interests to the extent that they might be viewed as a champion of the victim's rights." *Id.* Further, the court explained, the congressional intent would be "frustrated if rape victims are not allowed to appeal an erroneous evidentiary ruling made at a pre-trial hearing conducted pursuant to the [rape shield] rule." *Id.*

The *Doe* court also rejected any suggestion that inconvenience or delay necessarily renders impermissible the victim's interlocutory appeal. The court stated that the "inconvenience and costs associated with permitting the victim to appeal are minimal . . . [and] are no greater than those resulting from government appeals of suppression orders." *Id.* The court continued, "[b]ecause the [rape shield] rule provides for pre-trial evidentiary hearings, appeals are unlikely

to involve significant postponements of criminal trials.” *Id.* The court noted that in the instant case the appeal was heard with no delay of the criminal trial. *Id.* The court observed that on the other side of the balance was the manifest injustice to the rape victims in delaying an appeal until after final judgment. *Id.* Absent immediate appeal, “victims aggrieved by the court’s order . . . have no opportunity to prevent their privacy from invasions forbidden by the rule.” *Id.* The court opined that appeal following judgment “is no remedy, for the harm that the [rape shield] rule seeks to prevent already will have occurred.” *Id.* Having concluded that appeal was in keeping with Congressional intent to safeguard a rape victim’s privacy interests, that no other party could “champion . . . the victim’s rights,” and that the test of practical finality was met, the court concluded the victim had standing to appeal. *Id.*

The federal example is, however, of limited import to the states. Only two states explicitly, and one state implicitly, provide victims with the same procedural trial level participation as the federal rule when conducting a pretrial rape shield hearing. North Dakota requires notice to the victim and “afford[s] the victim and parties a right to attend and be heard.” N.D. R. EVID. 412(c)(2). Utah provides that the court must “afford the alleged victim and the parties a right to attend and be heard.” UTAH R. EVID. 412(c)(2). Louisiana seems to extend victim participation, providing that “[t]he victim, if present, has the right to attend the hearing and may be accompanied by counsel.” LA. CODE EVID. art. 412(E)(2). There is reason to believe that these three states would permit a victim’s interlocutory appeal because, like *Doe*, these states allow for victim participation in the trial level rape shield hearing. In the forty-seven states not providing for victim participation in the trial level hearing, it may be difficult to persuade the courts that a *victim’s own* interlocutory appeal is implicit in rape shield laws.

DIRECT ENFORCEMENT: THE COLLATERAL ORDER DOCTRINE

The collateral order doctrine may provide a separate avenue of review. Some state and federal courts allow for appeal under the collateral order doctrine. To be appealable, the order “must determine claims of right separate from, and collateral to, rights asserted in the action.” 4 AM. JUR. 2D *Appellate Review* § 113 (2003). The order “must be the final disposition of the collateral issue.” *Id.* Finally, the order must “immediately affect the rights of the parties, and if review is deferred” rights will probably be irreparably lost. *Id.*

Relying on the collateral order doctrine, an intermediate appellate court in Pennsylvania held that an order requiring a rape crisis center to produce privileged communications is a final and appealable order. *Commonwealth v. Miller*, 593 A.2d 1308, 1310 (Pa. Super. 1991). Citing United States Supreme Court and Pennsylvania Supreme Court precedent, the *Miller* court ruled that “an order which appears to be interlocutory can be considered final and appealable if: ‘1) it is separate from and collateral to the main cause of action; 2) the right involved is too important to be denied review; and, 3) the question presented is such that if review is postponed until final judgment in the case, the claimed right will be irreparably lost.’” *Id.* at 1309 (quoting *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949)). Applying these factors, the court held that the order requiring the production of privileged communications was separate from and collateral to the underlying criminal action. *Id.* at 1309-10. The court opined that the “victim’s

right to privacy and confidentiality in her relationship with [the rape crisis center] is too important to be denied review” on appeal. *Id.* at 1310. Moreover, if the rape crisis center were denied an interlocutory appeal, the victim’s “claimed right of confidentiality and privacy would be lost irreparably since once the information is divulged, the privilege is lost.” *Id.* While the *Miller* case involved a third party record holder, there is little doubt that appeal under the collateral order doctrine would extend to a victim in Pennsylvania if she possessed her own privileged records.

DIRECT ENFORCEMENT: GENERAL VICTIMS’ RIGHTS

The idea of rape victims directly exercising their rights in trial court and enforcing them on review is increasingly common in contexts other than rape shield hearings. There are many contexts in which rape victims exercise other, more general, victims’ rights. For example, under the Florida Constitution, a sexual assault victim exercised her right to attend the trial of the offender. *Bellamy v. State*, 594 So.2d 337 (Fla. Dist. Ct. App. 1992). In California, a sexual assault victim exercised her right to give a sentencing recommendation. *People v. Jones*, 14 Cal. Rptr. 2d 9 (Cal. Ct. App. 1992). The Massachusetts Supreme Court affirmed that a sexual assault victim can exercise the general victims’ right to a “prompt disposition.” *Hagen v. Manchester Super. Ct.*, 772 N.E.2d 32, 37 (Mass. 2002) (giving victims the ability to address the trial court, but ruling the right to prompt disposition was inapplicable under the facts). In a New Mexico case, a rape victim invoked a broad state constitutional victims’ right to “privacy” in an attempt to prevent disclosure of medical records. *State v. Gonzales*, 912 P.2d 297 (N.M. Ct. App. 1996). Rape victims should similarly be allowed to directly exercise rape shield protections in trial courts and challenge adverse rulings in appellate courts.

CONCLUSION

Rape shield laws were put in place to protect the individual rape victim’s privacy and confidentiality. Despite this, parties not directly invested in the victim’s privacy and confidentiality are charged with enforcement. The anti-rape and victims’ rights movements can change that by joining together to secure individual, direct, victim standing to enforce rape shield laws in trial and appellate courts.

¹Taken in part from Douglas E. Beloof, *Enabling Rape Shield Procedures Under Crime Victims’ Constitutional Privacy Rights*, 38 SUFFOLK L. REV. 291 (2005).