FEDERALIZATION TABLE

Gail R. Weinheimer
862 Sir Francis Drake Boulevard, No. 245
San Anselmo, California
415-256-1341
415-256-1342
weinheimer@earthlink.net

The following is a list of case authority showing how "garden variety" errors may violate the federal Constitution. Because a federal court will not consider on habeas corpus a federal constitutional claim which has not been preserved in state court, it is essential that all potential federal issues be so characterized and argued at trial, on direct appeal, and in state habeas proceedings. See, e.g., Gray v. Netherland (1996) 518 U.S. 152; Coleman v. Thompson (1991) 501 U.S. 722. In addition, the 1996 amendments to the federal habeas corpus statute, including the standard of adjudication set forth in 28 U.S.C. §2254(d) may affect counsel's obligation to raise federal law in general, and Supreme Court precedent in particular, during state court proceedings.

The federal habeas corpus statutes also authorize a federal court to grant relief where there has been a violation of a federal statute or treaty during the state court proceedings. Like violations of the federal Constitution, violations of statutes and treaties should also be preserved in state court. See, e.g., Breard v. Greene (1998) 523 U.S. 371 (alleged violation of Vienna Convention was procedurally defaulted by failure to raise in state court).

The cases included in this section identify violations of specific constitutional rights (e.g., denial of the right of confrontation guaranteed by the Sixth Amendment), as well as due process violations based on a denial of fundamental fairness. In determining whether a specific error in a case violates federal law, counsel should also keep in mind that the arbitrary deprivation of a purely state law entitlement may also violate the Due Process Clause of the Fourteenth Amendment. Hicks v. Oklahoma (1980) 447 U.S. 343; Hewitt v. Helms (1983) 459 U.S. 460, 466 (liberty interests protected by the Due Process Clause arise from two sources, the Due Process Clause itself and the laws of the States). "Where a statute indicates 'with language of unmistakable mandatory character' [e.g., by use of the word 'shall'] that state conduct injurious to an individual will not occur 'absent specified substantive predicates,' the statute creates an expectation protected by the Due Process Clause." Ford v. Wainwright (1986) 447 U.S. 399, 428 (conc. opn. of O'Connor, J.) This principle may also apply to judicial holdings. Green v. Catoe (4th Cir. 2000) 220 F.3d 220 (state supreme court effectively denied petitioner of a previously guaranteed right when it added a new element to the test for determining whether a new trial is required where a defendant is forced to utilize a peremptory challenge to excuse a venireperson who should have been removed for cause).

In addition, counsel should keep in mind that the disparate treatment of identically or similarly situated defendants may violate the Equal Protection Clause of the Fourteenth Amendment. Myers v. Ylst (9th Cir. 1990) 897 F.2d 417.

Finally, a cautionary note: in a rapidly changing legal world, counsel should shephardize the cases cited below before presenting them to a court.

Pretrial Issues

Defective Information

1. A variance between the offense as alleged in the charging document and the evidence and instructions at trial violates the Sixth Amendment right to notice and the Due Process Clauses of the Fifth and Fourteenth Amendments if it deprives defendant of notice of the offense against which he must defend. See, for example:

Forgy v. Norris (8th Cir. 1995) 64 F.3d 399, 403 (failure of information to specify basis of burglary charge prejudiced defendant and deprived him of his Sixth Amendment right to be informed of the nature and cause of the accusations);

Cokely v. Lockhart (8th Cir. 1991) 951 F.2d 916 (variance between information alleging rape by sexual intercourse and jury instruction permitting conviction based on intercourse or deviate sexual activity violated due process when state law at the time of trial treated latter as a separate offense);

Thomas v. Harrelson (11th Cir. 1991) 942 F.2d 1530, 1531, citing Russell v. United States (1962) 369 U.S. 749, 763-764 (the constructive amendment of an indictment that occurs when the jury is permitted to convict a defendant upon a factual basis that effectively modifies an essential element of the charged crime, violates the Fifth and Sixth Amendments); United States v. Shipsey (9th Cir. 1999) 190 F.3d 1081 (instructions that effectively amended the indictment violated the Fifth Amendment's grand jury clause);

Sheppard v. Rees (9th Cir. 1990) 909 F.2d 1234 (instructing the jury on felony murder, over defendant's objection, violated defendant's Sixth Amendment right to notice where the information alleged that he had violated Penal Code section 187 but did not allege felony-murder or the commission of the underlying felony, and where the concept of felony-murder was never raised prior to trial, during opening statements or by the testimony of witnesses); in accord, Tamapua v. Shimoda (9th Cir. 1986) 796 F.2d 261; Givens v. Housewright (9th Cir. 1986) 786 F.2d 1378, 1380; Lincoln v. Sunn (9th Cir. 1987) 807 F.2d 805, 811-814.

Denial of Continuance

2. The erroneous denial of a continuance may violate defendant's Sixth Amendment right to counsel, and his Fifth, Sixth and Fourteenth Amendment rights to present a defense. (Gardner v. Barnett (7th Cir. 1999) 175 F.3d 580; United States v. Gallo (6th Cir. 1985) 763 F.2d 1504; Bennett v. Scroggy (6th Cir. 1986) 793 F.2d 772).

Denial of Funding and Other Resources

3. The erroneous denial of a request for funds for expert or investigative assistance or for other types of assistance reasonably necessary to present a defense may violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment, the Sixth Amendment right to counsel, and the Fifth, Sixth and Fourteenth Amendment rights to present a defense. (Britt v. North Carolina (1971) 404 U.S. 226, 227 (indigent defendant is

entitled to "the basic tools of an adequate defense"); Ake v. Oklahoma (1985) 470 U.S. 68; Corenevsky v. Superior Court (1984) 36 Cal.3d 307, 319-320.) See, for example:

Wallace v. Stewart (9th Cir. 1999) 184 F.3d 1112 (the failure of a psychologist retained by the defense for penalty phase purposes to make a proper inquiry into the defendant's background may constitute a failure to provide competent psychiatric assistance in violation of Ake v. Oklahoma (1985) 470 U.S. 68);

Terry v. Rees (6th Cir. 1993) 985 F.2d 283 (trial court's denial of petitioner's request for an independent pathologist to challenge state's evidence regarding nature of death violated his right to present a defense);

Dunn v. Roberts (10th Cir. 1992) 963 F.2d 308 (trial court's denial of funds to retain expert to assist in explaining the nature and effect of battered wife syndrome violated due process and right to present a defense);

Little v. Armontrout (8th Cir. 1987) 819 F.2d 1425 (where state's case rested on posthypnotic identification testimony, defendant was entitled to an expert on hypnosis);

Starr v. Lockhart (8th Cir. 1994) 23 F.3d 1280, 1289-1290 ("[D]ue process requires access to an expert who will conduct not just any, but an appropriate examination," and the right to experts who will "assist in evaluating the preparation and presentation of the defense.")

Cowley v. Stricklin (5th Cir. 1991) 929 F.2d 640 (where defendant presented ample evidence that insanity would be a significant issue at trial, refusal to grant request for a defense psychiatrist violated due process; neither the services of a psychiatrist employed by the state whose report was submitted to the court, nor the services of a psychologist who testified for defendant without charge, were adequate substitutes for a defense psychiatrist);

Smith v. McCormick (9th Cir. 1990) 914 F.2d 1153 (examination by neutral psychiatrist whose report was submitted to the court did not satisfy Ake); accord, Schultz v. Page (7th Cir.2002) 313 F.3d 1010 (appointment of psychiatrist to examine for fitness to stand trial not an adequate substitute for insanity evaluation);

Doe v. Superior Court (1995) 39 Cal.App.4th 538 (under Ake, the right to a competent expert means access to someone with expertise in the relevant specialty).

Riggins v. Reece (6th Cir. 1999) 74 F.3d 732 (denial of request for the transcripts of two prior mistrials violated due process and equal protection where the reporter's tapes were not an adequate substitute for transcripts).

Suggestive Identification Procedures

4. Suggestive pretrial identification procedures may violate the Due Process Clause. See, for example:

Simmons v. United States (1968) 390 U.S. 377, 384 (A conviction violates due process and must be set aside if a witness bases an in-court identification on a pretrial identification procedure that is "so impermissibly suggestive as to give rise to a substantial likelihood of irreparable misidentification");

Thigpen v. Cory (6th Cir. 1986) 804 F.2d 893 (although not all caused by the state, pre-identification confrontations between witness and defendant were unduly suggestive, and resulting in-court identification violated due process).

Severance

5. Misjoinder of counts may violate the Due Process Clause. (Bean v.Calderon (9th Cir. 1998) 163 F.3d 1073 (joinder of strong and weak murder charges made trial fundamentally unfair); Panzavecchia v. Wainwright (5th Cir. Unit B 1981) 658 F.2d 337; Breeland v. Blackburn (5th Cir. 1986) 786 F.2d 1239; Proctor v. Butler (11th Cir. 1987) 831 F.2d 1251, 1256-1257.)

6. Misjoinder of defendants may violate the Due Process Clause. (Smith v. Kelso (11th Cir. 1989) 863 F.2d 1564 (refusal to grant motion to sever may render trial fundamentally unfair where conflict between codefendants arising from antagonistic defenses is substantial); United States v. Tootick (9th Cir. 1991) 952 F.2d 1078 (same); Abbott v. Wainwright (5th Cir. 1980) 616 F.2d 889; Bird v. Wainwright (5th Cir. 1970) 428 F.2d 1017.)

7. Where separate trials are ordered, the denial of a request to be tried after a codefendant may violate due process or infringe upon the defendant's Fifth and Sixth Amendment rights to present material and exculpatory testimony; in determining the sequence of trials, "judicial economy must yield to a defendant's right to a fair trial." (Taylor v. Singletary (11th Cir. 1997) 122 F.3d 1390.)

Brady Error & Discovery Violations

8. The suppression by the prosecution of material evidence favorable to the accused, including evidence bearing on the credibility of a prosecution witness, violates due process irrespective of the good or bad faith of the state and irrespective of the prosecutor's personal knowledge of the withheld evidence. (Kyles v. Whitley (1995) 514 U.S.419; Brady v. Maryland (1963) 373 U.S. 83; In re Brown (1998) 17 Cal.4th 873; People v. Morris (1988) 46 Cal.3d 1.) See, for example:

Bailey v. Rae (9th Cir. 2003) 339 F.3d 1107 (failure to disclose therapy reports regarding victim's capacity to consent to sexual activity violated due process);

People v. Salazar (2003) 110 Cal.App.4th 1616 (failure to disclose information known by members of the Los Angeles District Attorney's Office raising questions about the

credibility of a forensic pathologist who frequently testified for the prosecution and was a key witness against defendant, violated Brady);

Benn v. Lambert (9th Cir. 2002) 283 F.3d 1040 (failure to disclose evidence of informant's persistent misconduct when acting as an informant in other cases, including stealing money and drugs and smuggling drugs into prison, the informant's false accusation that defendant committed another murder and the benefits the informant received for his testimony, violated due process, particularly where the state failed to inform the defense that the informant would be a witness until the day before trial; state's failure to disclose that experts concluded that a fire at defendant's home was accidental, instead disclosing only a report that was misleading, also violated Brady);

Silva v. Woodford (9th Cir. 2002) 279 F.3d 825 (if true, prosecution's failure to disclose that a deal had been struck with counsel for the chief prosecution witness to delay his psychiatric exam until after defendant's trial violated Brady);

Crivens v. Roth (7th Cir. 1999) 172 F.3d 991 (failure to disclose criminal records of prosecution's witnesses for impeachment, as requested by defendant, violated Brady);

Carriger v. Stewart (9th Cir.1997)(*en banc*) 132 F.3d 463 (prosecution deprived defendant of due process by failing to disclose a Department of Corrections file indicating that the state's star witness (who later confessed to the murder) had a long history of lying to the police and blaming his crimes on other people); Singh v. Prunty (9th Cir. 1998) 142 F.3d 1157 (prosecution's failure to disclose agreement of substantial benefits in exchange for testimony of heroin-addicted informant was material, notwithstanding the existence of significant independent evidence incriminating Singh);

United States v. Kojayan (9th Cir. 1993) 8 F.3d 1315 (government's refusal to disclose whether uncharged codefendant had agreed to cooperate, and prosecutor's false argument at trial that he could not call the codefendant as a witness because of his right to remain silent, violated due process and required, at a minimum, a new trial); United States v. Brumel-Alvarez (9th Cir. 1992) 991 F.2d 1452 (government's withholding of DEA agent's memo criticizing informant's credibility and role in undercover operation leading to defendant's prosecution violated due process and required a new trial);

Jacobs v. Singletary (11th Cir. 1992) 952 F.2d 1282 (failure to disclose statements of accomplice made during a lie detector test administered by police, which statements contradicted witness' testimony at trial and supported petitioner's defense, violated Brady and compels habeas relief); see also Carter v. Rafferty (3rd Cir. 1987) 826 F.2d 1299;

Brown v. Borg (9th Cir. 1991) 951 F.2d 1011 (prosecutor's failure to disclose that victim's personal property had been returned to victim's family violated due process and, coupled with state's reliance on theory that property was stolen, compels habeas relief);

Sanchez v. United States (9th Cir. 1995) 50 F.3d 1448, 1453 (Brady violation supports challenge to voluntariness of guilty plea).

Miller v. Angliker (2nd Cir. 1988) 848 F.2d 1312 (Brady applies even where defendant pleads not guilty by reason of insanity; failure to disclose evidence that another person may have perpetrated the offense violated due process);

Bagley v. Lumpkin (9th Cir. 1986) 798 F.2d 1297 (government's suppression of material evidence regarding an agreement for compensation between government and chief prosecution witnesses violated due process and undermined confidence in the outcome of the trial).

9. The trial court's denial of a request for access to confidential records prior to or during trial may violate the Compulsory Process and Confrontation Clauses of the Sixth Amendment, and the Due Process Clause. (Pennsylvania v. Ritchie (1987) 480 U.S. 39, 57-58; People v. Harmon (1997) 15 Cal.4th 1117.)

10. Although a defendant does not have a federal constitutional right to the discovery of inculpatory evidence, the late disclosure of inculpatory evidence can render a trial so fundamentally unfair as to violate due process; "[f]or example, a trial could be rendered fundamentally unfair if a defendant justifiably relies on a prosecutor's assurances that certain inculpatory evidence does not exist and, as a consequence, is unable effectively to counter that evidence upon its subsequent introduction at trial." (Lindsay v. Smith (11th Cir. 1987) 820 F.2d 1137, 1151.) See, for example:

Grey v. Netherland (1996) 518 U.S. 152, 164 (the prosecutor's deliberate misleading of the defense about the evidence it intends to produce violates the Due Process Clause).

Mauricio v. Duckworth (7th Cir. 1988) 840 F.2d 454 (failure of state to disclose identity of its rebuttal witness, despite court order to do so, deprived petitioner of due process; the fact that accused did not seek a continuance to investigate the credibility of the surprise witness did not preclude a finding of a due process violation, because accused was entitled to an opportunity pretrial to make a fully informed decision as to whether or not to present an alibi defense);

Coleman v. Calderon (9th Cir. 2000) 210 F.3d 1047, 1052 (panel assumes without deciding that prosecutor's failure to comply with discovery order concerning the testing of physical evidence violated due process, but holds that petitioner was not prejudiced).

11. The prosecution's violation of its reciprocal discovery duties under state law may violate the Due Process Clause. (Fox v. Mann (2nd Cir. 1995) 71 F.3d 66, 70; Thompkins v. Cohen (7th Cir. 1992) 965 F.2d 330, 333.)

Destruction or Failure to Preserve Evidence

12. The state's bad faith failure to collect potentially exculpatory evidence, like the bad faith failure to preserve such evidence, violates due process. (Arizona v. Youngblood (1988) 488 U.S. 51, 58; Miller v. Vasquez (9th Cir. 1989) 868 F.2d 1116.)

See, for example, Commonwealth of the Northern Mariana Islands v. Bowie, 236 F.3d 1083 (9th Cir. 2001) (By failing to investigate the authorship of a letter found in the possession of the codefendant after his arrest, suggesting the existence of a conspiracy to present false testimony to implicate defendant, and presenting the testimony of the accomplices at trial, the prosecution violated its federal due process obligation to collect potentially exculpatory evidence, to prevent fraud on the court and to elicit the truth, and interfered with defendant's Sixth Amendment right to present witnesses in his behalf.)

Errors in Jury Selection

13. Although a trial judge has broad latitude in structuring and conducting voir dire, a defendant's Sixth Amendment right to an impartial jury and Fourteenth Amendment right to due process requires that the court ask sufficient questions during voir dire so that "fundamental fairness" is guaranteed. [Mu'min v. Virginia (1991) 500 U.S. 415, 114 L.Ed.2d 493 (judge's refusal to voir dire about contents of news reports concerning accused did not violate Sixth and Fourteenth Amendments under the circumstances of this case); Turner v. Murray (1986) 476 U.S. 28, 36, n. 9 (in an inter-racial case, trial court's refusal to voir dire the jury on racial prejudice violated petitioner's right to an impartial jury, guaranteed by the Sixth Amendment, as well as the due process clause, and required reversal of the death judgment but not the underlying conviction); People v. Wilborn (1999) 70 Cal.App.4th 339 (where a black defendant was arrested by a white police officer for possession of cocaine, and the defense argued that the police had fabricated a reason to stop and detain him, trial court's refusal to question on racial bias deprived defendant of a fair and impartial jury); Britz v. Thieret (7th Cir. 1991) 940 F.2d 226, 232).]

Comments by the trial court during jury selection may violate a defendant's rights to a fair and impartial jury and due process of law as well. See, e.g., People v. Mello (2002) 97 Cal.App.4th 511 (direction to prospective jurors that, if they harbored racial bias against the African American defendant, they should lie under oath and make up some other reason to be excused, was grave error and violated due process).

14. The erroneous limitation or impairment of the exercise of peremptory challenges or challenges for cause may violate the Sixth Amendment right to an impartial trial and/or the Due Process Clause of the Fourteenth Amendment. "Although peremptory challenges are not constitutionally required, due process may be violated by a sytem of challenges that is skewed towartd the prosecution if it destroys the balance needed for a fair trial." United States v.Harbin (7th Cir. 2001) 250 F.3d 532 (trial court's allowance of prosecution's mid-trial peremptory challenge violated due process). See, for example:

United States v. Nelson (2nd Cir. 2002) 277 F.3d 164 (district court's open manipulation of the jury selection process, including its denial of defendant's for-cause challenge to a juror and its out-of-order selection of alternates to replace sitting jurors, done for the

stated purpose of achieving a racially and religiously balanced jury, resulted in the empanelling of a biased juror, and violated defendant's Sixth and Fourteenth Amendment right to an impartial jury);

VanSickel v. White (9th Cir. 1999) 166 F.3d 953 (depriving defendant of half the challenges allowed under California law violated due process);

United States v. Underwood (7th Cir. 1997) 122 F.3d 389 (court's unintentional misleading description about jury selection procedures, and the failure to clear up the confusion when it surfaced, interfered with defendant's intelligent exercise of peremptory challenges, in violation of Due Process);

Ross v. Oklahoma (1988) 487 U.S. 81 (although the erroneous refusal to excuse a pro-death juror for cause did not, under the circumstances of this case, violate due process, depriving a defendant of his full allotment of peremptory challenges under state law may violate due process).

15. The failure to excuse biased jurors for cause violates the Due Process Clause and the Sixth Amendment right to a fair trial before an impartial jury. See, for example:

Dyer v. Calderon (9th Cir.1998) (*en banc)*151 F.3d 970 (Juror's false answers on voir dire and her subsequent lies to cover up her false answers violated due process).

Mach v. Stewart (9th Cir. 1997) 129 F.3d 495 (trial court's refusal to grant a mistrial or conduct further voir dire after a prospective juror made repeated expert-like statements concerning the veracity of a child's accusations of sexual abuse violated petitioner's right to an unbiased jury);

Johnson v. Armontrout (8th Cir. 1992) 961 F.2d 748 (failure to remove two jurors who had previously convicted another person for the same robbery charged against Johnson, where those jurors formed the opinion that Johnson was guilty before his trial began, violated his Sixth and Fourteenth Amendment rights to be tried by an impartial jury);

Burton v. Johnson (10th Cir. 1991) 948 F.2d 1150 (where petitioner's defense to the murder of her husband was that she suffered from battered woman's syndrome, a juror's failure to disclose on voir dire her own abuse and family situation deprived petitioner of her due process right to a fair trial by an impartial jury).

16. The Equal Protection and Due Process Clauses prohibit a prosecutor from excluding qualified and unbiased persons from the jury on the grounds of race or sex, regardless of defendant's race and sex. (Batson v. Kentucky (1986) 476 U.S. 79; Powers v. Ohio (1991) 499 U.S. 400; J.E.B. v. Alabama (1994) 511 U.S. 127; McClain v. Prunty (9th Cir. 2000) 217 F.3d 1209; Turner v. Marshall (9th Cir. 1997) 121 F.3d 1248).

17. The use of a dual jury in a case resulting in a death judgment may violate a defendant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments, even without a showing of specific prejudice. [Beam v. Paskett (9th Cir. 1993) 3 F.3d 1301, 1303-1304,

overruled in part in Lambright v. Stewart (9th Cir.1999)(*en banc*) 191 F.3d 1181 (the use of dual juries in a capital case is not per se constitutional error, either in general or under the particular circumstances in this case).

Trial Rights

Errors Affecting the Admission of Prosecution Evidence

18. Although a state court's erroneous application of state law does not, standing alone, violate the federal constitution, state law errors that render a trial fundamentally unfair violate the Due Process Clause. (Estelle v. McGuire (1991) 502 U.S. 62.)

Even correct applications of state law by state courts may violate the Due Process Clause, or some other federal constitutional guarantee:

> "While adherence to state evidentiary rules suggests that the trial was conducted in a procedurally fair manner, it is certainly possible to have a fair trial even when state standards are violated; conversely, state procedural rules and evidentiary rules may countenance processes that do not comport with fundamental fairness. The issue . . . is whether the state proceedings satisfied due process." (Jamal v. VanDeKamp (9th 1991) 926 F.2d 918, 919.)

State court procedural or evidentiary rulings can violate federal law "either by infringing upon a specific federal constitutional or statutory provision or by depriving the defendant of the fundamentally fair trial guaranteed by due process." (Walters v. Maass (9th Cir. 1995) 45 F.3d 1355, 1357.) See, for example:

People v. Wood (2002) 103 Cal.App.4th 803 (prosecution witness' testimony that defendant refused to allow him to enter his property without a warrant violated defendant's Fourth and Fifth Amendment rights);

Snowden v. Singletary (11th Cir. 1998) 135 F.3d 732, 738 (allowing expert testimony that 99% of child sexual abuse victims tell the truth usurped the jury's fact-finding role and made the trial fundamentally unfair);

McKinney v. Rees (9th Cir. 1993) 993 F.2d 1378 (character evidence of propensity-- defendant's possession of and fascination with knives-- did not support any permissible inference relevant to defendant's prosecution for the stabbing-murder of his mother, and violated due process);

Dudley v. Duckworth (7th Cir. 1988) 854 F.2d 967 (admission of evidence that witness for state received threats that were not connected to the defendant, sanctioned by state court on the theory that it was relevant to explain witness' nervousness, violated due process under the circumstances of this case);

Ferrier v. Duckworth (7th Cir. 1990) 902 F.2d 545 (admission of irrelevant photos of blood-spattered scene of the crime, enlarged to twelve feet square, did not render trial

fundamentally unfair "if only because defendant mysteriously failed to object -- and continues not to object -- to the introduction . . . of even more lurid and disgusting photographs: those of the corpse and wound," which rendered incremental effect of crime scene photos insignificant).

In addition, state law errors that might not be so prejudicial as to amount to a deprivation of due process when considered alone, may cumulatively produce a trial setting that is fundamentally unfair. (Mak v. Blodgett (9th Cir.1992) 970 F.2d 614, 622; People v. Hill (1998) 17 Cal.4th 8000, 844-845.)

19. Insufficient admissible evidence to support the jury's verdicts and findings violates the due process clause of the Fourteenth Amendment. (Piaskowski v.Bett (7th Cir. 2001) 256 F.3d 687 (petitioner's presence at the scene of the crime and his reference to "shit going down" was constitutionally insufficient to sustain murder conviction based on conspiracy theory); Moore v. Parke (7th Cir. 1998)148 F.3d 705 (evidence insufficient to support finding that petitioner was a habitual offender, as defined by state law); Mikes v. Borg (9th Cir. 1991) 947 F.2d 353; Summit v. Blackburn (5th Cir. 1986) 795 F.2d 1237, 1244; Jackson v. Virginia (1979) 443 U.S. 307.)

20. The retroactive application of a statute or judicial decision reducing the quantum of evidence necessary to convict violates the Ex Post Facto or Due Process Clauses. See, for example:

Carmell v. Texas (2000) 529 U.S. 513, 120 S.Ct. 1620, 146 L.Ed.2d 577 (retrospective application of statute repealing a corroboration requirement violated the Ex Post Facto Clause).]

People v. Blakely (2000) 23 Cal.4th 82, 999 P.2d 675, 96 Cal.Rptr. 2d 451 (state supreme court's holding that a person who kills unintentionally in unreasonable self defense is guilty of voluntary manslaughter rather than the less serious offense of involuntary manslaughter is an unforeseeable judicial enlargement of the crime of voluntary manslaugher, and cannot be applied retroactively under the Due Process Clause).

The retroactive application of a procedural change that makes a defendant liable to punishment when none had been available also violates ex post facto principles. Stogner v California (2003) ___ U.S. ___, 123 S.Ct. 2446, 156 L.Ed.2d 544 (retroactive application of statute reviving a previously expired statute of limitations violated ex post facto clause).

21. Evidence which state court finds properly admitted under state exception to hearsay rule may nonetheless violate the Confrontation Clause of the Sixth Amendment. (Dutton v.Evans (1970) 400 U.S. 74.) See, for example:

Thomas v. Hubbard (9th Cir. 2001) 273 F.3d 1164, overruled on other grounds in Payton v. Woodford, ___ F.3d ___ (9th Cir. 2003)(en banc) (admission of triple hearsay statements suggesting that defendant had motive to murder victim and access to weapon violated Confrontation Clause; even if the hearsay was received for a non-hearsay purpose,

defendant's confrontation right was violated because the evidence was so prejudicial that the jury would be unable to follow a limiting instruction but would have considered the statements for their truth);

People v. Kons (2003) 108 Cal.App.4th 514 (admission of hearsay staement identifyinmg defendant as the perpetrator under Cal.Evid.C. §1370 violated Sixth Amendment where statement lacked sufficient indicia of reliability; Section 1370, enacted in 1995, is not a firmly rooted hearsay exception for Confrontation Clause purposes);

Whelchel v. State of Washington (9th Cir. 2000) 232 F.3d 1197 (unavailable codefendants' tape-recorded statements to the police in which they attempted to minimize their own culpability were "textbook examples" of codefendant statements that are presumptively unreliable, and their admission violated petitioner's rights under the Confrontation Clause);

Lilly v. Virginia (1999) 527 U.S. 116, 119 S.Ct. 1887, 144 L.Ed.2d 117 [admission of the untested confession of an accomplice incriminating petitioner as a declaration against interest under state law violated the Confrontation Clause, where neither the accomplice's words nor the setting in which he was interrogated "provide any basis for concluding that his comments about petitioner's guilt were so reliable that there was no need to subject them to adversarial testing in a trial setting." (119 S.Ct. at 1900.)]

Offor v. Scott (5th Cir. 1999) 72 F.3d 30 (admission of videotaped police interview of child at which no representative of defendant was present violated the Confrontation Clause);

Webb v. Lewis (9th 1994) 44 F.3d 1387 (admission of videotaped interview of victim violated Confrontation Clause where the tape did not fall within any recognized exception to the hearsay rule and did not otherwise carry guaranties of trustworthiness);

Ring v. Erikson (8th Cir. 1992) 983 F.2d 818 (child-victim's videotaped statement to doctor admitted under state law medical-diagnosis-or-treatment exception violated Confrontation Clause where the traditional basis for assuming reliability of such a statement was not present; child-victim's hearsay statement to a social worker, admitted under a newly-adopted exception for the statements of a child describing a sexual act, also violated Sixth Amendment where there were insufficient indicia of reliability as defined in Idaho v. Wright (1990) 497 U.S. 805);

Reed v. Thalacker (8th Cir. 1999) 198 F.3d 1058 (child-victim's statements to her mother and babysitter accusing her father of molesting her, admitted under state law excited utterance exception, without a showing of how muct time elapsed betwen the alleged assaults and the statement, violated defendant's Sixth Amendment rights).

22. Hearsay evidence improperly admitted under state rules of evidence may also violate the Confrontation Clause. See, for example:

Bains v. Cambra (9th Cir. 2000) 204 F.3d 964, 973-974 (evidence improperly admitted under California's state-of-mind and coconspirator exceptions to hearsay rule violated Bains' Sixth Amendment right to confront witnesses against him);

Sherley v. Seabold (6th Cir. 1991) 929 F.2d 272 (defendant's right of confrontation violated where prosecutor's efforts to secure victim's attendance at trial were inadequate, and hearsay statements identifying defendant as her attacker were insufficiently trustworthy to justify admission because victim suffered memory loss prior to crime, her condition worsened after crime, and she was sometimes incoherent and described the crime inconsistently);

Ferrier v. Duckworth (7th Cir. 1990) 902 F.2d 545, 548 (although an error in the application of the hearsay rule is not automatically a violation of the Confrontation Clause, a "particularly gross error in the application of the rule or a cascade of such errors that transformed the defendant's trial into one in which the only witnesses were policemen, prosecutors and informants -- so that the trial resembled the trial by affidavit that it was the particular historical purpose of the confrontation clause to end . . . would violate the clause");

Gaines v. Thieret (7th Cir. 1988) 846 F.2d 402, 405 ("The introduction of hearsay evidence . . . may, if it does not fall within 'a firmly rooted hearsay exception' [citation omitted] violate a defendant's right of confrontation even if the evidence is not so damaging that a limiting instruction would be futile");

Ellison v. Sachs (4th Cir. 1985) 769 F.2d 955 (admission of testimony re child victim's out-of-court statements violated right of confrontation where victim was not available to testify as a result of state court's finding of incompetency and discrepancies indicated hearsay was not reliable); in accord, Gregory v. State of North Carolina (4th Cir. 1990) 900 F.2d 705.

United States v. Chu Kong (9th Cir. 1991) 935 F.2d 990 (use of public records from Hong Kong to prove prior convictions violated Confrontation Clause; although the records were authenticated, hearsay contained therein did not fall within any established exception to the hearsay rule and were not sufficiently trustworthy to fall within the residual exception to the hearsay rule where, inter alia, there was no evidence as to who provided the information, or whether they had personal knowledge of the convictions).

23. The admission of evidence of the nature of a prior felony conviction, where the nature of the prior conviction is irrelevant to any disputed issue at trial, may violate due process. (People v. Valentine (1986) 42 Cal.3d 170, 177; see also Bryson v. State of Alabama (5th Cir. 1981) 634 F.2d 862, where the fact of the prior conviction was irrelevant.)

The Due Process Clause may also be violated where the state permits proof of a prior conviction to enhance or aggravate the offense, but the trial court fails to advise the jury of the limited purpose for which that evidence may be considered. (Julius v. Johnson (11th Cir. 1988) 840 F.2d 1533, amd. 854 F.2d 400.)

24. The admission of bad act testimony violates due process where "the 'admission of the testimony was arbitrary or fundamentally unfair.' Colley v. Sumner, 784 F.2d 984, 990 . . ." (Terrovona v. Kincheloe (9th Cir. 1988) 852 F.2d 424, 428-429);

25. The state's use of hypnotically refreshed testimony may violate a defendant's Sixth and Fourteenth Amendment rights of confrontation and a fair trial based on reliable evidence. (Bundy v. Wainwright (11th Cir. 1988) 850 F.2d 1402, 1414-1420.)

26. Ordering a nontestifying defendant to speak the words uttered during a robbery where the witnesses' ability to identify the perpetrator's voice was not in issue violates due process. (United States v. Olvera (9th Cir. 1994) 30 F.3d 1195.)

27. Prosecutor's knowing use of perjured testimony violates due process. (Mooney v. Holohan (1935) 294 U.S. 103, Pyle v. Kansas (1942) 317 U.S. 213; United States v. Agurs (1976) 427 U.S. 97.) This includes failure to correct false testimony (Alcorta v. Texas (1957) 355 U.S. 28), including false testimony concerning a witness' plea bargain agreement (Napue v. Illinois (1959) 360 U.S. 264), failure to correct misleading testimony, and the pursuit of fundamentally inconsistent theories in separate trials against separate codefendants charged with the same crime. See, for example:

Hayes v. Woodford (9th Cir. 2002) 301 F.3d 1054 (Prosecutor's failure to correct witness' false testimony that he had not been offered leniency violated due process, even though the witness was not aware of the offer of leniency because the offer had been communicated only to the witness' attorney; although the witness did not commit perjury, his testimony was false and the prosecutor knew it);

United States v. LaPage (9th Cir. 2000) 231 F.3d 438 (Conviction reversed where prosecutor failed to immediately correct the testimony of a prosecution witness known to be false; the government's "duty to correct perjury is not discharged merely because the defense counsel knows, and the jury may figure out, that the testimony is false," nor by the prosecutor's acknowledgement of the lie in rebuttal argument, when it was too late for the defense to explain why the lie was important);

Brown v. Borg (9th Cir. 1991) 951 F.2d 1011 (prosecutor's knowing introduction and reliance on false evidence suggesting that murder had occurred during course of robbery violated due process, and required that Brown's murder conviction be reversed, rather than merely reduced from first to second degree murder).

United States v. Foster (8th Cir.1988) 874 F.2d 491 (due process is violated even if defendant's counsel was aware of the false and misleading testimony but failed to correct it).

Smith v. Groose (8th Cir. 2000) 205 F.3d 1045 (due process is violated where2, in two separate trials, the prosecutor utilized mutually inconsistent statements by a witness as to the timing of the murder).

Nguyen v. Lindsay (9th Cir. 2000) 232 F.3d 1236 (prosecutor's pursuit of fundamentally inconsistent theories against separately-tried codefendants may violate due process if the prosecutor kowingly uses false evidence or otherwise acts in bad faith).

28. Perjured testimony given by a prosecution witness may violate due process even where the prosecution neither knew or should have known about it. Killian v. Poole (9th Cir. 2002) 282 F.3d 1204. Whether or not the prosecution knew at the time of trial that evidence used against the defendant was false, allowing a conviction to stand despite present knowledge that material evidence was false violates due process. Hall v. Department of Corrections (9th Cir. 2003) 343 F.3d 976; accord, Sanders v. Sullivan (I) (2nd Cir. 1988) 863 F.2d 218, 222; Sanders v. Sullivan (II) (2nd Cir. 1990) 900 F.2d 601 (due process is violated when, despite the absence of state involvement, "a credible recantation . . . would most likely change the outcome of the trial and a state leaves the conviction in place.")

29. The state's use of the judge presiding at trial as a witness to establish the essential elements of the charged crime violates due process. (Brown v. Lynaugh (5th Cir. 1988) 843 F.2d 849.)

30. The state's reliance on the testimony of the district attorney prosecuting the case, or on the testimony of a juror who was sworn but subsequently excused because of his personal knowledge regarding the case, may also violate due process or the Sixth Amendment right to an impartial jury. (Walker v. Davis (11th Cir. 1988) 840 F.2d 834; People v. Sanders (1988) 203 Cal.App.3d 1510.)

31. The prosecution's use of the testimony of a bailiff who attended the jury during the trial violates a defendant's Sixth and Fourteenth Amendment rights to a fair trial before an impartial tribunal. Agnew v. Leibach (7th Cir. 2001) 250 F.3d 1123; Turner v. Louisiana (1969) 379 U.S. 466.

32. The prosecution's use of evidence in breach of an agreement made with and relied on by the defendant violates due process. (People v. Quartermain (1997) 16 Cal.4th 600; Hawkins v. Hannigan (10th Cir. 1999) 185 F.3d 1146.)

33. The prosecution's use of guilt-assuming hypothetical questions undermines the presumption of innocence and violates due process. United States v. Shwayder (9th Cir. 2002) 312 F.3d 1109.

34. Prosecutor's questions asking defense witnesses to comment on the veracity of the government witnesses' testimony may violate due process right. United States v. Geston (9th Cir. 2002) 299 F.3d 1130 (prosecutor's repeated questions to defense witnesses, asking whether, if a government witness had testified to a specific fact, that witness would be lying, impacted defendant's due process rights where defendant's earlier trial, which did not include the improper questions, ended in a hung jury).

Errors Affecting the Introduction of Defense Evidence

35. State evidentiary rulings which deny defendant the right to testify may violate his federal constitutional right to testify in his own behalf, a right which is derived from the Fourteenth Amendment's due process clause, the Sixth Amendment's compulsory process clause, and the Fifth Amendment's privilege against self-incrimination. See, for example:

Greene v. Lambert (9th Cir. 2002) 288 F.3d 1081 (trial court's exclusion of testimony from the victim, a trained psychiatric nurse who was defendant's therapist, about defendant's dissociative identity disorder, and preclusion of defendant's testimony about his own mental condition, violated the Sixth Amendment);

Gill v. Ayers (9th Cir. 2003) 322 F.3d 678 (refusal to permit defendant to testify at a 3 Strikes sentencing hearing violated due process);

Rock v. Arkansas (1987) 483 U.S. 44 (state court's application of per se rule prohibiting the admissibility of criminal defendant's hypnotically refreshed testimony violated defendant's right to testify on her own behalf; "restrictions of a defendant's right to testify may not be arbitrary or disproportionate to the purposes they are designed to serve");

Martinez v. Ylst (9th Cir. 1991) 951 F.2d 1153 (in a pre-Collins California trial, court's refusal to exclude defendant's prior robbery conviction which resulted in a decision not to testify was reversible constitutional error).

36. Where a defendant elects not to testify as a result of the state court's ruling that he will be subject to impeachment with a prior conviction which is subsequently held constitutionally invalid, the conviction obtained at the trial at which defendant did not testify may violate the Fourteenth Amendment. [Biller v. Lopes (2nd Cir. 1987) 834 F.2d 41 (state's use for impeachment purposes of a prior conviction obtained by compelled testimony violated Biller's Fifth and Fourteenth Amendment rights).]

37. Forcing a defendant to stand trial in jail clothing or imposing physical restraints may violate the Due Process and the Sixth Amendment right to trial by jury by undermining the presumption of innocence. (Estelle v. Williams (1976) 425 U.S. 501, 504-505.) See, for example:

Felts v. Estelle (9th Cir. 1989) 875 F.2d 785 (failure to provide indigent pro per defendant with suitable civilian clothing until six days after trial began violated the Due Process Clause and the presumption of innocence);

Spain v. Rushen (9th Cir. 1989) 883 F.2d 712 (trial court's failure to consider or employ less drastic alternatives to shackling violated due process); in accord, Rhoden v. Rowland (9th Cir. 1998) 172 F.3d 633 (unjustified shackling of defendant throughout trial violated due process).

Gonzalez v. Pliler (9th Cir. 2003) 341 F.3d 897 (trial court's requirement that defendant wear a stun belt throughout his trial, including jury selection and his testimony, violated due process).

An excessive number of uniformed guards or other security arrangements may also violate the Sixth and Fourteenth Amendments. [Holbrook v. Flynn (1986) 475 U.S. 560; Morgan v. Aispuro (9th Cir. 1991) 946 F.2d 1462; Young v. Callahan (1st Cir. 1983) 700 F.2d 32 (forcing defendant to sit in the prisoner's dock throughout the trial without justification violates due process).]

38. In the absence of a finding of "overriding justification and a determination of medical appropriateness," the forced administration of antipsychotic medication, violates the Sixth and Fourteenth Amendments. (Riggins v. Nevada (1992) 504 U.S. 127.)

39. The exclusion of evidence proffered by the defense may violate the defendant's Fifth and Sixth Amendment rights to present a defense and the Due Process Clause of the Fourteenth Amendment. See, for example:

Alcala v. Woodford (9th Cir. 2003) 334 F.3d 862 (exclusion of expert testimony regarding whether the key prosecution witness had been hypnotically influenced in various interviews with police investigators violated petitioner's due process right to a fundamentally fair trial and to present witnesses in his defense);

Depetris v. Kuykendall (9th Cir. 2001) 239 F.3d 1057 (state trial court violated petitioner's federal due process right to defend against the charges by excluding evidence of the victim's journal and all references to it, where the petitioner presented evidence at trial of imperfect self-defense and the journal in which the victim had detailed his acts of violence against others provided corroboration for petitioner's belief that she was in imminent danger; "given the subjective element of imperfect self-defense, the erroneous exclusion of this evidence was not mere evidentiary error");

Noble v. Kelly (2nd Cir. 2001) 246 F.3d 93 (trial court violated defendant's rights under the Compulsory Process Clause of the Sixth Amendment in excluding proffered alibi testimony without finding that defense counsel's failure to comply with state notice-of-alibi rules was wilful);

Newman v. Hopkins (8th Cir. 2001) 247 F.3d 848 (8th Cir. 2001) (state court's categorical refusal to permit defendant to present voice exemplar evidence to establish that he does not speak with a Hispanic accent violated his right to present a defense);

Thomas v. Hubbard (9th Cir. 2001) 273 F.3d 1164, overruled on other grounds in Payton v. Woodford (9th Cir. October 20, 2003) (en banc) ___ F.3d ___, fn. 18 (refusal to permit defendant to cross-examine police officer about his difficulty in locating the only "eyewitness" to the crime, whom petitioner maintained was the perpetrator, unconstitutionally interfered with defendant's right to present exculpatory evidence);

LaJoie v. Thompson (9th Cir.2000) 217 F.3d 663 (excluding evidence of the victim's past sexual abuse due to petitioner's failure to comply with notice requirement of state's rape shield law violated LaJoie's Sixth and Fourteenth Amendment rights where his interest in presenting the evidence outweighed the state's interests in enforcing the notice requirement);

Newman v. Hopkins (8th Cir. 1999) 192 F.3d 1132 (erroneous trial court ruling that defendant would waive his privilege against self-incrimination and be subject to cross-examination if he presented evidence of a voice exemplar to the jury violated due process; "because state can compel [defendant] to produce a voice exemplar without violating the

Fifth Amendment, due process principles of reciprocity allow him to present voice exemplars to the jury without waiving his constitutional protections.")

Gonzalez v. Lytle (10th Cir. 1999) 167 F.3d 1318 (trial court's rulings permitting the prosecution to introduce the preliminary hearing testimony of an unavailable witness but refusing to admit her sworn recantation deprived petitioner of his Fourteenth Amendment right to a fundamentally fair trial).

United States v. Sanchez-Lima (9th Cir.1998) 161 F.3d 545 (refusal to admit sworn videotaped statements of eyewitnesses who were deported and the earlier denial of defendant's motion to depose those witnesses violated the Sixth Amendment);

Franklin v. Henry (9th Cir. 1997) 122 F.3d 1270 (trial court violated petitioner's Sixth and Fourteenth Amendment rights by precluding defendant from testifying about prior accusations made by the alleged victim);

Justice v. Hoke (2nd Cir. 1996) 90 F.3d 43, 49 (exclusion of competent evidence that prosecution's only witness had a motive to fabricate violated petitioner's right to present a defense);

United States v. Peters (9th Cir. 1991) 937 F.2d 1422 (Sixth Amendment violated where trial court excluded the testimony of an expert witness because of its erroneous conclusion that defense counsel had violated discovery rules);

Rivera v. Director, Department of Corrections (7th Cir. 1990) 915 F.2d 280 (mechanical application of hearsay rule to exclude separately-tried codefendant's confession exculpating petitioner, which was used by the state against the codefendant at his trial, violates due process);

Crane v. Kentucky (1986) 476 U.S. 683 (trial court's foreclosure of defendant's efforts to introduce evidence concerning the environment in which the police secured his confession, which had been held voluntary at a pretrial hearing, denied defendant a meaningful opportunity to challenge the reliability and credibility of the confession, and therefore abridged his right to present a defense);

Miller v. Angliker (2nd Cir. 1988) 848 F.2d 1312, 1323 ("Given a defendant's Sixth Amendment right to present evidence in his favor, see Taylor v. Illinois, 484 U.S. 400 . . . and his Fifth Amendment right not to be deprived of his liberty without due process of law," evidence that a third party committed the crime would have been admissible if disclosed by the state; although state law here does not appear contrary, "state law could not, in any event, diminish Miller's federal constitutional rights");

Rosario v. Kuhlman (2nd Cir. 1988) 839 F.2d 918 (the right to present a defense encompasses both the right to present direct testimony of live witnesses and, under some circumstances, the right to place before the jury secondary forms of evidence such as hearsay or prior testimony);

Boykins v. Wainwright (11th Cir. 1984) 737 F.2d 1539, 1544 (the right to present witnesses in one's own behalf lies at the core of the Fifth and Fourteenth Amendment guarantees of due process; where insanity was the sole issue in dispute, it was reversible error to exclude the testimony of a doctor who had treated defendant).

40. Limitations imposed on confrontation and cross-examination, as well as the total denial of cross-examination, can violate the Sixth Amendment. See, for example:

United States v. Adamson (9th Cir. 2002) 291 F.3d 606 (trial court violated defendant's Sixth Amendment right of confrontation by precluding impeachment of a prosecution witness with her silence during the portions of defendant's interrogation when he denied criminal activity, which was inconsistent with her trial testimony);

Lindh v. Murphy (7th Cir. 1997) 124 F.3d 899 (trial court's refusal to permit the impeachment of the prosecution's expert with evidence that the psychiatrist had sexually abused some of his patients, was about to lose his license and faculty positions and might be sent to prison violated defendant's Sixth Amendment right of confrontation);

Cumbie v. Singletary (11th Cir. 1993) 991 F.2d 715 (petitioner's Sixth Amendment confrontation rights were violated when child-victim was permitted to testify before a closed circuit television camera outside the courtroom, without sufficient individualized findings that the possibility of harm to the witness made it necessary for her to testify outside the defendant's presence);

Olden v. Kentucky (1988) 488 U.S. 277 (trial court's refusal to permit cross-examination of the victim regarding her motive to lie, and its exclusion of evidence proffered by the defendant on the same issue, violated the Sixth Amendment right of confrontation);

Wealot v. Armontrout (8th Cir. 1992) 948 F.2d 497 (petitioner's confrontation rights were violated by state court's refusal to permit cross-examination of rape victim and her husband on defense theory that victim fabricated the charge out of fear of her jealous and abusive husband);

Smith v. Fairman (7th Cir. 1988) 862 F.2d 630, 638 (exclusion of evidence of prior inconsistent statements, proffered to impeach hearsay statements of absent witness admitted as spontaneous declarations, violated Smith's right of confrontation).

41. Substantial state interference with a defense witness' free and unhampered choice to testify violates defendant's Due Process and Sixth Amendment rights to present witnesses. (In re Hill (1998) 17 Cal.4th 800, 834 (threatening a defense witness with a perjury conviction violates a defendant's Sixth Amendment right to compulsory process); United States v. Vavages (9th Cir. 1998) 151 F.3d 1185; United States v. Goodwin (5th Cir. 1980) 625 F.2d 693, 703; In re Martin (1987) 44 Cal.3d 1.)

42. Defense counsel's interference with a defendant's personal right to testify may also violate due process and the Sixth Amendment. [Nichols v. Butler (11th Cir.1992)(*en banc*) 953 F.2d 1550 (defendant's right to testify was violated when his attorney actively and

forcefully prevented him from testifying, despite defendant's desire to do so, by threatening to withdraw from representation if defendant persisted in his wish to take the stand).]

43. Government's failure to seek immunity for a defense witness may deny defendant a fair trial, in violation of the Due Process Clause. (United States v. Alessio (9th Cir. 1976) 528 F.2d 1079, 1082.)

> "[E]xtraordinary circumstances warranting a directive that the government grant immunity to a defense witness in the interest of fundamental fairness may arise where (a) prosecutorial overreaching, through threats, harassment, or other forms of intimidation, has effectively forced the witness to invoke the Fifth Amendment, or the prosecutor has engaged in discriminatory use of immunity grants to gain a tactical advantage; (b) the witness's testimony is also material, exculpatory and not cumulative; and (c) the defendant has no other way to obtain the evidence." (Blissett v. LeFevre (2nd Cir. 1991) 924 F.2d 434, 442.)

44. "Outrageous governmental conduct" -- e.g., "where government agents engineer and direct the criminal enterprise from start to finish" (United States v. Ramirez (9th Cir. 1983) 710 F.2d 535, 539), or engage in "Rochin-type" physical abuse, may violate due process. See, for example:

United States v. White (6th Cir. 1989) 879 F.2d 1509 (if government extracts from lawyer the secrets of a former client and then uses that information in a criminal trial to the client's detriment, this "might" be the kind of serious misconduct which violates the Fifth Amendment's due process clause);

United States v. Kojayan (9th Cir. 1993) 8 F.3d 1315 (invoking its supervisory power, panel directs district court to determine whether indictment should be dismissed with prejudice as a result of the government's refusal to disclose whether an uncharged codefendant agreed to cooperate with the prosecution, the prosecutor's false argument that he could not call the uncharged codefendant to testify because of the privilege against self-incrimination, and the government's later denials of wrongdoing and down-playing of the error).

Spectator Misconduct

45. Spectator misconduct may violate Sixth Amendment right to a fair trial. See, for example:

Woods v. Dugger (11th Cir. 1991) 923 F.2d 1454 (large number of uniformed spectators in courtroom, combined with pretrial publicity, rose to the level of inherent prejudice, thus depriving petitioner of a fair trial);

Norris v. Risley (9th Cir. 1990) 918 F.2d 828 (presence of 3 women inside and outside the courtroom wearing "WAR" (Women Against Rape) buttons apparent to at least 3 jurors was so inherently prejudicial that it created an unacceptable threat to rape defendant's right to a fair trial because: (1) buttons conveyed that spectators believed defendant's guilt before it was proven, thereby eroding presumption of innocence; (2) it interfered with the right to

cross-examination, since spectators' presence with buttons implied a statement about defendant's guilt not subject to cross-examination; and (3) buttons created a risk that jury's determination of complaining witness' credibility was improperly influenced by courtroom show of support).

Bailiff Misconduct

46. Bailiff misconduct may violate a defendant's right under the Sixth and Fourteenth Amendments. [Dickson v. Sullivan (9th Cir. 1988) 849 F.2d 403 (bailiff's remark to two jurors that "defendant had done it before" deprived defendant of his right of confrontation, cross-examination and counsel with respect to that extra-record information).]

Prosecutorial Misconduct in Argument

47. Prosecutorial misconduct in argument may violate the federal Constitution when it "so infect[s] the trial with unfairness as to make the resulting conviction a denial of due process." (Donnelly v. DeChristoforo (1974) 416 U.S. 637; People v. Hill (1998) 17 Cal.4th 800, 818). See, for example:

Bains v. Cambra (9th Cir. 2000) 204 F.3d 964 (a prosecutor's invitation to consider prejudices and stereotypes concerning the Sikhs violated petitioner's federal constitutional rights; a defendant's due process and equal protection rights are implicated where the prosecutor's arguments relates to race, ethnicity or religious discrimination);

Sandoval v. Calderon (9th Cir. 2000) 231 F.3d 1140 (prosecutor's closing argument invoking divine authority in support of the death penalty denied petitioner a fair trial); Maurer v. Minnesota Department of Corrections (8th Cir. 1994) 32 F.3d 1286, 1290-1291 (prosecutor's vouching in rape case violated due process); see also United States v. Edwards (9th Cir. 1998) 154 F.3d 915 (prosecutor's continued representation of government following his discovery of a key piece of evidence, the circumstances of which were in dispute, was a form of vouching that undermined the fundamental fairness of the trial);

Presnell v. Zant (11th Cir. 1992) 959 F.2d 1524 (prosecutor's quotation from nineteenth century Georgia Supreme Court case suggesting that jury must exclude any consideration of mercy from its sentencing decision rendered petitioner's penalty trial fundamentally unfair, in violation of due process);

United States v. Solivan (6th Cir. 1991) 937 F.2d 1146 (prosecutor's appeal to community conscience in context of war on drugs and suggestion that local drug problem would continue if defendant was not convicted deprived defendant of his right to a fair trial);

Sizemore v. Fletcher (6th Cir. 1990) 921 F.2d 667 (prosecutor's statements during closing argument appealing to wealth and class biases, questioning defendant's motives for consulting counsel, and inviting jury to view with suspicion defendant's ability to hire several attorneys and to produce expensive exhibits violated due process);

Floyd v. Meachum (2nd Cir. 1990) 907 F.2d 347 (cumulative effect of repeated and escalating misconduct in closing argument, including improper references to Fifth Amendment, misstatement of burden of proof and personal vouching for the credibility of state's witness, rendered trial fundamentally unfair);

Bruno v. Rushen (9th Cir. 1983) 721 F.2d 1193 (defendant was denied due process when prosecutor insinuated during closing argument that defendant's hiring of counsel was probative of guilt; prejudice was not cured by trial judge's general admonition to jury to consider evidence in reaching verdict).

48. Prosecutorial misconduct may also violate other specific federal constitutional rights. [Darden v. Wainwright (1986) 477 U.S. 168, 181-182 (in rejecting prosecutorial misconduct claim, Court notes that prosecutor "did not manipulate or misstate the evidence, nor did the [misconduct] implicate other specific rights, such as the right to counsel or the right to remain silent").] See, for example:

Bains v. Cambra (9th Cir. 2000) 204 F.3d 964, 974 (prosecutorial argument appealing to racial and ethnic stereotypes violate a defendant's right to due process and equal protection of the law, as do religion-based arguments);

United States v. Santiago (9th Cir. 1995) 46 F.3d 885, 890-891 (prosecutor's racially charged argument may violate the Equal Protection and Due Process Clauses of the Fourteenth Amendment, and the Sixth Amendment right to a fair trial);

Franklin v. Duncan (9th Cir. 1995) 70 F.3d 75, 76 (comment on defendant's post-arrest silence and instruction that jury could construe that silence as an adoptive admission violated petitioner's Fifth Amendment privilege against self-incrimination);

Mahorney v. Wallman (10th Cir. 1990) 917 F.2d 469 (prosecutor's comments that presumption of innocence was designed to protect only the innocent and that it had been removed in this case violated the Fifth Amendment);

United States v. Schuler (9th Cir. 1987) 813 F.2d 978 (prosecutor's comments on nontestifying defendant's demeanor during guilt trial improperly put defendant's character in issue, and violated his Fifth Amendment right not to testify and not to be convicted except upon the basis of evidence introduced at trial);

Rogers v. Lynaugh (5th Cir. 1988) 848 F.2d 606 (prosecutor's argument at sentencing phase of noncapital trial that "each of [defendant's] felony convictions [the robbery in issue and three priors] was worth 10 years" violated the Fifth Amendment guarantee against double jeopardy because it would reasonably be construed as an "exhortation to assess multiple punishments for the same offense," and not as an argument urging a 40 year sentence for the proper reasons of deterrence and rehabilitation).

"Misconduct" by Counsel for Codefendant

49. Actions of counsel for a codefendant may violate a defendant's constitutional rights. See, for example:

United States v. Al-Muqsit (8th Cir. 1999) 191 F.3d 928 (comment by codefendant's counsel regarding defendant's failure to testify violated defendant's right to a fair trial, if not the Fifth Amendment privilege against self incrimination);

United States v. Mayfield (9th Cir. 1999) 189 F.3d 895 (Defendant was denied his Sixth Amendment right to confront the witnesses against him by the codefendant elicitation of a police officer's inculpatory testimony about a reliable police informant and by the introduction of the codefendant's out-of-court statement against defendant);

People v. Estrada (1998) 63 Cal.App.4th 1090 (outrageous and continuous misconduct by codefendant's counsel violated defendant's right to due process).

Defense Closing Argument

50. Limitations on the substance of defendant's closing argument may violate the right to effective assistance of counsel, the right to present a defense and the right to have the prosecution prove its case beyond a reasonable doubt. See, e.g., Conde v. Henry (9th Cir.1999) 198 F.3d 734, 739 (trial court's refusal to permit defense counsel to argue the defense theory of the case--that state failed to prove robbery or intent to rob--violated Conde's rights to the effective assistance of counsel, to present a defense and improperly lightened the prosecution's burden of proof).

Jury Instructions

51. Jury instructions can violate the federal Constitution in a variety of ways:

(a) Jury instructions relieving the prosecution of the burden of proving beyond a reasonable doubt each element of the charged offense, including the total failure to instruct on an element of the offense, or an instruction directing the jury to find an element against the defendant, violate the Sixth Amendment right to a jury trial, as well as the Due Process Clause. (Sullivan v. Louisiana (1993) 508 U.S.275; United States v. Gaudin (1995) 515 U.S. 506, 510; Apprendi v. New Jersey (2000) 530 U.S. 466, 120 S.Ct. 2348; People v.Flood (1998) 18 Cal. 4th 470.)

See, for example, Powell v. Galaza (9th Cir. 2003) 328 F.3d 558 (trial court's mid-trial instruction that defendant's own testimony established criminal intent violated Sixth Amendment right to a jury determination of the elements of the offense).

(b) The prohibition against directed verdicts includes situations in which the judge's instructions fall short of directing a verdict but which have the same effect of so doing by eliminating other relevant factual considerations. (People v. Figueroa (1986) 41 Cal.3d 714, 724.) In accord, United States v. Voss (8th Cir. 1986) 787 F.2d 393, 398 ("When the jury is not given an opportunity to decide a relevant factual question," the

defendant is deprived of his right to a jury trial); United States v. McClain (5th Cir. 1977) 545 F.2d 988, 1003; see also United States v. Rockwell (3rd Cir. 1986) 781 F.2d 985, 991 (instructions which "improperly invaded the province of the jury to determine the facts and assess the credibility of witnesses . . . [were] sufficiently misleading to deprive Rockwell of a fair trial.")

(c) Instructions containing presumptions which lighten the prosecution's burden of proof violate the federal Due Process Clause. (Yates v. Evatt (1991) 500 U.S. 391, 114 L.Ed.2d 432; Carella v. California (1989) 491 U.S. 263; Franklin v. Francis (1985) 471 U.S. 307; People v. Roder (1983) 33 Cal.3d 491, 496; People v. Dyer (1988) 45 Cal.3d 26, 62 (Beeman error); Batiste v. Blackburn (5th Cir. 1986) 786 F.2d 704, 705.) See, for example:

Martinez v. Borg (9th Cir. 1991) 937 F.2d 422, 423 (Beeman error is federal constitutional error because the jury did not have the opportunity to find each element of the crime beyond a reasonable doubt);

Smith v. Horn (3rd Cir. 1997) 120 F.3d 400 (instruction on first degree murder that improperly removed state's burden of proving specific intent to kill violated due process);

Hanna v. Riveland (9th Cir. 1996) 87 F.3d 1034, 1037 (permissive inference instruction that permitted jury to infer recklessness from mere fact of speeding violated due process);

Ulster County Court v. Allen (1979) 442 U.S. 140 (instruction embodying a permissive inference may be unconstitutional "if, under the facts of the case, there is no rational way the trier of fact could make the connection permitted by the inference");

Dickey v. Lewis (9th Cir. 1988) 859 F.2d 1365 (reasonable juror could have construed instruction ("intent to kill may be presumed from use of a deadly weapon") in an unconstitutional burden-shifting manner);

Miller v. Norvell (11th Cir. 1985) 775 F.2d 1572 (instruction in language of statute (that proof of a specified fact "shall constitute prima facie evidence" of intent) created unconstitutional mandatory rebuttable presumption);

(d) Instructions shifting the burden of proof to defendant to negate an element of the offense violate due process. (Patterson v. New York (1977) 432 U.S. 197.)

(e) Erroneous instructions suggesting a higher degree of doubt than is required under the reasonable doubt standard violate due process. (Cage v. Louisiana (1993) 498 U.S. 39; Perez v. Irwin (2nd Cir. 1992) 963 F.2d 499.) See, for example:

Humphrey v. Cain (5th Cir.1998)(*en banc*) 138 F.3d 552 (instruction defining reasonable doubt in terms of "a serious doubt for which you could give a good reason," in conjunction with references to "grave uncertainty," moral certainty, and "actual and substantial doubt" lowered state's burden below the constitutional minimum);

Lanigan v. Maloney (1st Cir. 1988) 853 F.2d 40 (instruction equating proof beyond a reasonable doubt with "proof to a degree of moral certainty," coupled with confusing contrast to civil standard of preponderance, created a significant risk that jury would find guilt based on a level of proof below that required by the Due Process Clause).

(f) Erroneous and contradictory instructions defining the elements of a crime may violate the 6th Amendment and the Due Process Clause. [Ho v. Carey (9th Cir. 2003) 332 F.3d 587 (erroneous jury instruction defining second degree implied malice murder as a general intent crime deprived petitioner of his right to have the jury decide every element of the offense); Conde v. Henry (9th Cir.1999) 198 F.3d 734, 740 (trial court's modification of CALJIC pattern instruction on robbery, defining specific intent required for robbery as the "specific intent to rob [the victim] of money over which she had control" eviscerated the "immediate presence" requirement and violated due process); Suniga v. Bunnell (9th Cir. 1993) 998 F.2d 664 (erroneous instruction on nonexistent theory of felony-murder violated due process); People v. Lee (1987) 43 Cal.3d 666, 674; Baldwin v. Blackburn (5th Cir. 1981) 653 F.2d 942, 949 (misleading and confusing instructions under state law may violate due process where they are "likely to cause an imprecise, arbitrary or insupportable finding of guilt").]

(g) Instructions on a theory of liability of which defendant was not put on notice by the charging papers or other circumstances violate the Sixth and Fourteenth Amendment rights to adequate notice and due process (Sheppard v. Rees (9th Cir. 1990) 909 F.2d 1234; United States v. Sloan (10th Cir. 1987) 811 F.2d 1359), particularly when the lack of notice deprives defendant of an opportunity to prepare a defense. (Calderon v. Prunty (9th Cir. 1995) 59 F.3d 1005, 1009-1010.)

(h) In a capital case, the failure to instruct on a noncapital lesser included offense where supported by the evidence may violate the Due Process Clause and the Eighth Amendment. [Hopkins v. Reeves (1998) 524 U.S. 88; Beck v. Alabama (1980) 447 U.S. 625; Schad v. Arizona (1991) 501 U.S. 624 (under the facts of this case, instruction on second degree murder provided a sufficient "third option" to withstand a Beck challenge to trial court's failure to instruct on other lesser included offenses).]

(i) The refusal or failure to instruct on the defendant's theory of the case, including instructions on lesser offenses, violates the defendant's right under the Sixth and Fourteenth Amendments to adequate instructions on the theory of the defense, and the Sixth Amendment right to a jury trial. [Conde v. Henry (9th Cir. 1999) 198 F.3d 734, 739-740; Barker v. Yukins (6th Cir. 1999) 199 F.3d 867; United States v. Unruh (9th Cir. 1988) 855 F.2d 1363, 1372; in accord, United States v. Escobar de Bright (9th Cir. 1984) 742 F.2d 1196, 1201-1202.) See for example:

McNeil v. Middleton (9th Cir. 2003) 344 F.3d 988 (erroneous self-defense instructions under state law violated due process by preventing petitioner from presenting her defense of unreasonable self-defense as perceived by one suffering from the effects of Battered Woman's Syndrome);

Bradley v. Duncan (9th Cir. 2002) 315 F.3d 1091 (court's failure to instruct on entrapment defense supported by the evidence violated due process);

Taylor v. Withrow (6th Cir. 2002) 288 F.3d 846 (failure to instruct on self defense violated due process);

United States v. Sayetsitty (9th Cir. 1997) 107 F.3d 1405, 1414 (defendant has a due process right to have the jury consider defenses recognized by state law which negate elements of the offense).

(j) Failure to instruct jury orally on the elements of the offense violates the due process right to a record sufficient for appeal because it makes it impossible for the reviewing court to determine whether each juror was aware of the elements of the offense. (People of the Territory of Guam v. Marquez (9th Cir. 1992) 963 F.2d 1311.)

(k) Jury instructions defective for other reasons may violate due process; however, "[i]t is not sufficient that the instruction is erroneous; rather, the petitioner must establish that there was a reasonable likelihood that the jury applied the instruction in a way that violated a constitutional right." (Carriger v. Lewis (9th Cir. 1992) (*en banc*) 971 F.2d 329, 334, citing Estelle v. McGuire (1991) 502 U.S. 62.)

(l) Coercive supplemental instructions to a divided jury violate the Due Process Clause and the defendant's right to a fair trial. See, e.g., Weaver v. Thompson (9th Cir.1999) 197 F.3d 359 (where, after four hours of deliberation following a full day of trial, the jury asked whether it must reach a verdict in all counts and the bailiff responded "yes," and where the jury returned a guilty verdict on all counts five minutes after the bailiff responded, the bailiff's comment amounted to a coercive Allen charge and violated Weaver's due process rights); Smalls v. Batista (2nd Cir. 1999) 191 F.3d 272 (supplemental charge to jury divided 11 to 1 was unconstitutionally coercive because it "both (1) obligated the jurors to convince one another that one view was superior to another, and (2) failed to remind those jurors not to relinquish their own conscientiously held beliefs");

(m) Instruction that jury could imply malice if it concluded that petitioner committed a murder during a robbery violated the Double Jeopardy Clause because petitioner was previously convicted in juvenile court for robbery arising from the same incident. Ficklin v. Hatcher (9th Cir. 1999) 177 F.3d 1147).

Juror Misconduct

52. Juror misconduct implicates the constitutional rights guaranteed by the Sixth and Fourteenth Amendments. (Jeffries v. Wood (9th Cir. 1997)(*en banc*) 114 F.3d 1484, 1490-1492; Marino v. Vasquez (9th Cir. 1987) 812 F.2d 499.)

For example:

> "When a jury considers facts that have not been introduced in evidence, a defendant has effectively lost the rights of confrontation, cross-examination, and the assistance of counsel with regard to jury consideration of the extraneous evidence. In one sense, the violation may be more serious than where these rights are denied at some other stage of the proceedings because the defendant may have no idea what new evidence has been considered. It is impossible to offer evidence to rebut it, to offer a curative instruction, to discuss its significance in argument to the jury, or to take other tactical steps that might ameliorate its impact." (Gibson v. Clannon (9th Cir. 1980) 633 F.2d 851, 853.)

See also Sassounian v. Roe (9th Cir. 2000) 230 F.3d 1097; Eslaminia v. White (9th Cir. 1998) 136 F.3d 1234.

Similarly, unauthorized reference to dictionary definitions of legal terms constitutes constitutional error which the State must prove harmless beyond a reasonable doubt. (United States v. Kupau (9th Cir. 1986) 781 F.2d 740, 744.)

Even if "only one juror was unduly biased or improperly influenced [by exposure to facts not introduced in evidence, defendant] was deprived of his Sixth Amendment right to an impartial panel" of twelve unprejudiced jurors. (Dickson v. Sullivan, supra, 849 F.2d at 406; People v. Nesler (1997) 16 Cal.4th 561.)

A juror's concealment of bias or prejudice, like other forms of juror misconduct, may deny a defendant his Sixth Amendment right to a fair trial by an impartial jury. (Dyer v. Calderon (9th Cir. 1998) (*en banc*)151 F.3d 970 ; United States v. Eubanks (9th Cir. 1979) 591 F.2d 513, 516-517; Burton v. Johnson (10th Cir. 1991) 948 F.2d 1150.)

See, for example, Green v. White (9th Cir. 2000) 232 F.3d 671 (writ granted where juror's intentional concealment of a prior felony conviction which disqualified him from jury service, coupled with his pattern of lies, inappropriate behavior and attempts to cover up his behavior, rose to the level of presumed bias).

Errors During Deliberations

53. Irregularities during jury deliberations may violate the Sixth Amendment right to a fair trial, or the Due Process Clause. See, for example:

Fisher v. Roe (9th Cir. 2001) 263 F.3d 906, overruled on other grounds in Payton v. Woodford (9th Cir. October 20, 2003) (en banc) ___ F.3d ___, fn. 18 (read-back of testimony conducted in the absence of defendant and his counsel and without notifying them of the jury's request violated due process);

United States v. Symington (9th Cir. 1999) 195 F.3d 1080 (defendant's Sixth Amendment rights to an impartial jury and a unanimous verdict were violated when the court dismissed a juror on the eighth day of deliberations for being unwilling or unable to deliberate, despite evidence raising a reasonable possibility that the impetus for the juror's dismissal stemmed from her view of the case);

Riley v. Deeds (9th Cir. 1995) 56 F.3d 1117, 1121 (absence of judge during readback of testimony by judge's law clerk, coupled with judge's unavailability and failure to rule upon the jury's request for readback or to exercise any discretion over what would be reread, violated the "constitutional guarantee of trial by an impartial jury");

Eslaminia v. White (9th Cir. 1998) 136 F.3d 1234 (mistaken receipt of tapes not introduced in evidence violated petitioner's Sixth Amendment rights of confrontation, cross-examination and the assistance of counsel);

United States v. Noufshar (9th Cir. 1996) 78 F.3d 1442 (allowing jury to listen to audiotapes never played in open court, without instructions or supervision by the judge, violated defendant's right to be present under Rule 43 and may also have violated his Sixth Amendment confrontation rights);

People v. Santamaria (1991) 229 Cal.App. 3d 269, 278 (mid-deliberation adjournment of further deliberations for 11 days, without good cause and despite the availability of alternatives, deprived defendant of a fair trial).

Penalty Phase Errors

54. All penalty phase errors potentially implicate the Eighth and Fourteenth Amendments by creating a risk that the jury's death verdict is not a reliable determination that death is the appropriate punishment. [See, e.g., Caldwell v. Mississippi (1985) 472 U.S. 320 (prosecutor's penalty argument that jury's penalty determination not final but subject to appellate review contrary to Eighth Amendment's requirement of reliability; Johnson v. Mississippi (1988) 486 U.S. 578, 587 (a death sentence based upon "materially inaccurate" information may violate the Eighth and Fourteenth Amendments).]

55. "Traditional" constitutional rights -- such as the privilege against self-incrimination, the right to counsel, double jeopardy, due process and equal protection -- also apply to the penalty phase. (Satterwhite v. Texas (1988) 486 U.S. 249, 100 L.Ed.2d 284; Estelle v. Smith (1981) 451 U.S. 430; Arizona v. Rumsey (1984) 467 U.S. 203; Ake v. Oklahoma (1985) 470 U.S. 68; Gardner v. Florida (1979) 430 U.S. 349; Mak v. Blodgett (9th Cir. 1992) 970 F.2d 614, 622-624; Lesko v. Lehman (3rd Cir. 1991) 925 F.2d 1527; Presnell v. Zant (11th Cir. 1992) 959 F.2d 1524; Landry v. Lynaugh (5th Cir. 1988) 844 F.2d 1117, 1121.)

56. The arbitrary deprivation of a purely state law right at penalty phase may violate the Due Process Clause of the Fourteenth Amendment. See, for example:

Fetterly v. Paskett (9th Cir. 1993) 997 F.2d 1295 (state trial court's misapplication of its capital sentencing statute implicates the Eighth Amendment's prohibition against cruel and unusual punishment and the liberty interest protected by the Fourteenth Amendment);

Walker v. Deeds (9th Cir. 1995) 50 F.3d 670, 673 (sentencing court's failure to comply with state statute requiring a finding that habitual offender status is "just and proper" violated due process).