

The fairness of a particular rule of procedure may also be the basis for due process claims, but such decisions must be based on the totality of the circumstances surrounding such procedures.<sup>1076</sup> For instance, a court may not restrict the basic due process right to testify in one's own defense by automatically excluding all hypnotically refreshed testimony.<sup>1077</sup> Or, though a state may require a defendant to give pretrial notice of an intention to rely on an alibi defense and to furnish the names of supporting witnesses, due process requires reciprocal discovery in such circumstances, necessitating that the state give the defendant pretrial notice of its rebuttal evidence on the alibi issue.<sup>1078</sup> Due process is also violated when the accused is compelled to stand trial before a jury while dressed

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the lack of empirical data showing that the mere presence of the broadcast media in the courtroom necessarily has an adverse effect on the process, the Court has held that due process does not altogether preclude the televising of state criminal trials. *Chandler v. Florida*, 449 U.S. 560 (1981). The decision was unanimous but Justices Stewart and White concurred on the basis that *Estes* had established a *per se* constitutional rule which had to be overruled, *id.* at 583, 586, contrary to the Court's position. *Id.* at 570–74.

<sup>1076</sup> For instance, the presumption of innocence has been central to a number of Supreme Court cases. Under some circumstances it is a violation of due process and reversible error to fail to instruct the jury that the defendant is entitled to a presumption of innocence, although the burden on the defendant is heavy to show that an erroneous instruction or the failure to give a requested instruction tainted his conviction. *Taylor v. Kentucky*, 436 U.S. 478 (1978). However, an instruction on the presumption of innocence need not be given in every case. *Kentucky v. Whorton*, 441 U.S. 786 (1979) (reiterating that the totality of the circumstances must be looked to in order to determine if failure to so instruct denied due process). The circumstances emphasized in *Taylor* included skeletal instructions on burden of proof combined with the prosecutor's remarks in his opening and closing statements inviting the jury to consider the defendant's prior record and his indictment in the present case as indicating guilt. *See also* *Sandstrom v. Montana*, 442 U.S. 510 (1979) (instructing jury trying person charged with "purposely or knowingly" causing victim's death that "law presumes that a person intends the ordinary consequences of his voluntary acts" denied due process because jury could have treated the presumption as conclusive or as shifting burden of persuasion and in either event state would not have carried its burden of proving guilt). *See also* *Cupp v. Naughten*, 414 U.S. 141 (1973); *Henderson v. Kibbe*, 431 U.S. 145, 154–55 (1973). For other cases applying *Sandstrom*, *see* *Francis v. Franklin*, 471 U.S. 307 (1985) (contradictory but ambiguous instruction not clearly explaining state's burden of persuasion on intent does not erase *Sandstrom* error in earlier part of charge); *Rose v. Clark*, 478 U.S. 570 (1986) (*Sandstrom* error can in some circumstances constitute harmless error under principles of *Chapman v. California*, 386 U.S. 18 (1967)); *Middleton v. McNeil*, 541 U.S. 433 (2004) (state courts could assume that an erroneous jury instruction was not reasonably likely to have misled a jury where other instructions made correct standard clear). Similarly, improper arguments by a prosecutor do not necessarily constitute "plain error," and a reviewing court may consider in the context of the entire record of the trial the trial court's failure to redress such error in the absence of contemporaneous objection. *United States v. Young*, 470 U.S. 1 (1985).

<sup>1077</sup> *Rock v. Arkansas*, 483 U.S. 44 (1987).

<sup>1078</sup> *Wardius v. Oregon*, 412 U.S. 470 (1973).