Chapter 10

Federal Constitutional Issues in Criminal Defense: Beyond the Fourth, Fifth and Even the Sixth Amendments

Anthony Bornstein
Federal Public Defender
101 SW Main St Ste 1700
Portland, Oregon 97204-3225
(503) 326-2123
tony_bornstein@fd.org

Table of Contents

I. General Principles 1
II. The Due Process Guarantee Governs the Entire Span of the Case 2

Available in the Chapter 10 supplemental folder in the material Dropbox:

- Summaries of Successful Federal Habeas Cases in the Ninth Circuit Court of Appeals 2000–2018 (Tony Bornstein)
- Court Strikes a Blow Against Racial Discrimination in Jury Decision-Making (Tony Bornstein)
- Ensuring Federal Review of Wrongful Convictions: The Exhaustion of Remedies Requirement (Tony Bornstein)
- Oregon D.A.'s Testimony Shows Disparity in Charging Policy (The Bureau of National Affairs, Inc.)
- Motion Challenges Warrant on Grounds of Judge Shopping (The Bureau of National Affairs, Inc.)
- Improper Vouching Prompts Due Process Reversal (The Bureau of National Affairs, Inc.)
- A *Brady* Primer, John Leo Brady, The Defense Lawyer's Best Friend (Denis M. Devlaming)
- Trespassing on Due Process, Constitutional Objections to Improper Closing Argument (Tony Bornstein)
- *Peña-Rodriguez v. Colorado*: The Supreme Court Strikes a Blow Against Racial Discrimination in Jury Decision-Making

The Supreme Court's Due Process Case Law Governing Criminal Trials

Anthony Bornstein
Assistant Federal Public Defender

I. General Principles.

This outline begins with the Supreme Court's most general statements on the due process guarantee at criminal trials:

> In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process. "A fair trial in a fair tribunal is a basic requirement of due process."

Groppi v. Wisconsin, 400 U.S. 505, 509 (1971) (internal citations omitted) (quoting *In Re Murchison*, 349 U.S. 133, 136 (1955)). Moreover:

> Due process guarantees that a criminal defendant will be treated with "that fundamental fairness essential to the very concept of justice. In order to declare a denial of it we must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevents a fair trial."

United States v. Valenzuela-Bernal, 458 U.S. 858, 872 (1982) (quoting *Lisenba v. California*, 314 U.S. 219, 236 (1941)).

With respect to the trial itself, "[d]ue process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen." *Smith v. Phillips*, 455 U.S. 209, 217 (1982). "T]he Due Process Clause of the Fourteenth Amendment must be held to safeguard 'against dilution of the principle that guilt is to be determined by probative evidence and beyond a reasonable doubt." *Taylor v. Kentucky*, 436 U.S. 478, 486-87 (1978) (quoting *Estelle v. Williams*, 426 U.S. 501, 503 (1976)).

Due Process also "speak[s] to the balance of forces between the accused and his accuser." *Wardius v. Oregon*, 412 U.S. 470, 474 (1973). The Court is thus "suspicious of . . . rules which provide nonreciprocal benefits to the State when the lack of reciprocity interferes with the defendant's ability to secure a fair trial." *Id*. n.6.

II. The Due Process Guarantee Governs the Entire Span of the Case.

1. Law Enforcement Techniques and Government Actions Before Trial. Law enforcement action in criminal investigation that "shocks the conscience" violates due process. *Rochin v. California*, 342 U.S. 165, 172 (1952) (stomach pumping to secure evidence to obtain the conviction for illegal possession of morphine violated due process). *But see Chavez v. Martinez*, 538 U.S. 760, 774-75 (2003) (citing *Rochin*, but finding that aggressive police interviewing during hospitalization was neither "egregious" nor "conscience shocking"); *Sacramento v. Lewis*, 523 U.S. 833, 854-55 (1998) (finding that a high speed chase by police of a motorcycle, resulting in the death of the motorcycle passenger, did not violate due process under the "shock-the-conscience" test).[1]

In addition, "[t]he Supreme Court has indicated that outrageous government conduct outside the grand jury process could result in dismissal on due process grounds if such conduct is so outrageous that it violates 'fundamental fairness' or is 'shocking to the universal sense of justice.'" *United States v. Allen*, 619 F.3d 518, 525 (6th Cir. 2010) (quoting *United States v. Russell*, 411 U.S. 423, 432 (1973)). In *Russell*, the Court found that an undercover officer supplying a legal ingredient for the production of methamphetamine fell "far short" of violating due process. *Russell*, 411 U.S. at 432.[2]

Unreliable and suggestive identification procedures can violate due process. Due process requires the pretrial exclusion of an unreliable eyewitness identification only if the identification results from police suggestion. *Perry v. New Hampshire*, 132 S. Ct. 716 (2012); *Manson v. Brathwaite*, 432 U.S. 98, 113 (1977) ("The standard . . . is that of fairness as required by the Due Process Clause of the Fourteenth Amendment.").

2. Vindictive Prosecutions Violate Due Process. *Blackledge v. Perry*, 417 U.S. 21 (1974). For example, when a person appeals a misdemeanor, the state may not substitute a more serious felony charge in retaliation. "A person convicted of an offense is entitled to pursue his statutory right to a trial de novo, without

---

[1] "Where a particular Amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, 'that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims.'" *Albright v. Oliver*, 510 U.S. 266, 273 (1994) (quoting *Graham v. Connor*, 490 U.S. 386, 395 (1989)).

[2] *See also Hamption v. United States*, 425 U.S. 484, 495 (1976) ("Police overinvolvement in crime would have to reach a demonstrable level of outrageousness before it could bar conviction.") (Powell, J., concurring).

apprehension that the State will retaliate by substituting a more serious charge for the original one, thus subjecting him to a significantly increased potential period of incarceration." *Id.* at 28. "The very initiation of proceedings against him . . . thus operated to deny him due process of law." 417 U.S. at 30-31. *See also Thigpen v. Roberts*, 468 U.S. 27 (1984) (applying *Blackledge* to nearly identical facts). *But see United States v. Goodwin*, 457 U.S. 368 (1982) (declining to find a *Blackledge*-like presumption of vindictiveness when a defendant declines a misdemeanor plea, asks for trial, and is subsequently charged with a felony and convicted); *Bordenkircher v. Hayes*, 434 U.S. 357 (1978) (finding no vindictiveness when a prosecutor follows through on a threat to bring a more serious charge during plea bargaining if defendant does not plead guilty to original charge).

3. Pre-Indictment Delay in Charging Can Violate Due Process. *United States v. Lovasco*, 431 U.S. 783, 789-96 (1977) (discussing elements necessary to prove the claim and holding that "investigative delay" does not violate due process but delay to gain "tactical advantage" does); *United States v. Marion*, 404 U.S. 307 (1971).

4. Due Process Prohibits Punishing Pre-Trial Detainees. *Bell v. Wolfish*, 441 U.S. 520, 535-36 (1979) ("[U]nder the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law.") (citing *Ingraham v. Wright*, 430 U.S. 651, 671-72 n.40, 674 (1977); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 165-67, 186 (1963); *Wong Wing v. United States*, 163 U.S. 228, 237 (1896)). *Bell* held that if a condition or restriction of pre-trial detention was reasonably related to a legitimate government objective, it does not, without more, amount to "punishment." *Bell*, 441 U.S. at 539. But an "arbitrary or purposeless" condition is unconstitutional. *Id. See also Schall v. Martin*, 467 U.S. 253 (1984) (holding that juvenile pretrial detention upon a finding of a "serious risk" that the juvenile may commit an act that would constitute a crime if committed by an adult does not violate due process).

5. The Grand Jury Process. In *Peters v. Kiff*, 407 U.S. 493, 496 (1972), the Court stated that "both the grand jury and the petit jury . . . must be measured solely by the general Fourteenth Amendment guarantees of due process and equal protection." The Court added that "a State cannot, consistent with due process, subject a defendant to indictment or trial by a jury that has been selected in an arbitrary and discriminatory

manner, in violation of the Constitution and laws of the United States." *Id*. at 502.[3] The Fifth Amendment right to indictment by grand jury has not been incorporated to the States. *See Hurtado v. California*, 110 U.S. 516, 538 (1884); *Woon v. Oregon*, 229 U.S. 586, 590 (1913).

Of significance, certain errors in the Grand Jury can shape and therefore affect the trial, causing an unfair trial. *Vasquez v. Hillery*, 474 U.S. 254, 263 (1986) stands for this proposition, although the case was decided on equal protection grounds.

6. Notice of the Charges. In *Cole v. Arkansas*, 333 U.S. 196, 201 (1948) the Court stated: "No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal." The Court added: "It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made." *Id*. at 201; *see also Russell v. United States*, 369 U.S. 749 (1962) (discussing the criteria by which the sufficiency of an indictment is measured); *Lambert v. People of the State of California*, 355 U.S. 225, 228 (1957) ("Engrained in our concept of due process is the requirement of notice."); *Jackson v. Virginia*, 443 U.S. 307, 314 (1979) ("a person cannot incur the loss of liberty for an offense without notice and a meaningful opportunity to defend.")

"[U]under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Jones v. United States*, 526 U.S. 227, 243 n. 6 (1999); *see also Id*., at 232.

Vague criminal statutes violate due process. *Kolendar v. Lawson*, 461 U.S. 352 (1983), as they encourage discriminatory enforcement of the law. In addition, *Bouie v. City of Columbia*, 378 U.S. 347 (1964) holds that the retroactive application of a new construction of a criminal statute can violate due process.

---

[3] Lower courts have identified additional Supreme Court authority for this point: "We will assume, *arguendo*, that the grand jury procedures selected by the state must comport with due process of law." *United States ex rel. Curtis v. Warden of Green Haven Prison* 463 F.2d 84, 87 (2nd Cir. 1972) (citing *Beck v. Washington*, 369 U.S. 541, 546 (1962)).

7. Arraignment. *Hamilton v. Alabama*, 368 U.S. 52, 55 (1961) holds that the absence of counsel at the time of arraignment violates the right to due process where the arraignment is a critical stage of the state criminal proceedings because of state procedural rules. *See id.* at 53, 54 (explaining that under Alabama law, insanity pleas, pleas of abatement, and motions to quash based on grand jury racial composition must all be raised at arraignment or otherwise forfeited).

8. Pre-Trial Publicity can be so prejudicial as to violate due process. *Sheppard v. Maxwell*, 384 U.S. 333, 362-63 (1966) ("due process requires that the accused receive a trial by an impartial jury free from outside influences. . . . [W]here there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity."); *Irvin v. Dowd*, 366 U.S. 723 (1963). These cases held that the trial setting can be inherently prejudicial. *See also Rideau v. Louisiana*, 373 U.S. 723 (1963) and *Estes v. Texas*, 381 U.S. 532 (1965).

In addition, the Supreme Court has held that a statute preventing the change of venue for a criminal jury trial, regardless of the extent of the local prejudice against the accused, on the sole ground that the charge against him is labeled a misdemeanor, violates the Fourteenth Amendment right to trial by impartial jury. *Groppi v. Wisconsin*, 400 U.S. 505 (1971).

9. The Trial Judge Must be Impartial (and Mentally Competent). A biased judge violates due process. *In Re Murchison*, 349 U.S. 133 (1955) ("no matter what the evidence was against him, he had the right to have an impartial judge."); *Tumey v. Ohio*, 273 U.S. 510 (1927). The defendant "is entitled to a neutral and detached judge in the first instance." *Ward v. Village of Monroeville*, 409 U.S. 57, 62 (1972). Due process requires recusal of a judge who "has a direct, personal, substantial pecuniary interest in reaching a conclusion against [one of the litigants]." *Tumey v. Ohio*, 273 U.S. 510, 523 (1927). Due process is also violated if the judge becomes "embroiled in a running, bitter controversy" with one of the litigants. *Mayberry v. Pennsylvania*, 400 U.S. 455, 465 (1971). Due process is also violated if the judge acts as "part of the accusatory process. . . ." *Murchison*, 349 U.S. at 137. "[T]he inquiry must be not only whether there was actual bias on [the judge's] part, but also whether there was such a likelihood of bias or appearance of bias that the judge was unable to hold the balance between vindicating the interests of the court and the interests of the accused." *Taylor v. Hayes*, 418 U.S. 488, 501 (1974).

The Due Process Clause requires that the trial judge is "mentally competent to afford a hearing." *Jordan v. Massachusetts*, 225 U.S. 167, 176 (1912).

10. The Defendant's Right to Be Present. The "Due Process Clause [protects this right] in some situations where the defendant is not actually confronting witnesses or evidence against him." *United States v. Gagnon*, 470 U.S. 522, 526 (1985). In *Snyder v. Massachusetts*, 291 U.S. 97, 105-06 (1934), the Court explained that a defendant has a due process right to be present at a proceeding "whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge." "[T]he presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only." *Id*. at 107-08. *See also Rushen v. Spain*, 464 U.S. 114, 117-18 (1983) ("our cases recognize that the right to personal presence at all critical stages of the trial and the right to counsel are fundamental rights of each criminal defendant.").

11. Ensuring Competency of the Defendant. "[T]he criminal trial of an incompetent defendant violates due process." *Cooper v. Oklahoma*. 517 U.S. 348, 354 (1996) (quoting *Medina v. California*, 505 U.S. 437, 453 (1992); *Drope v. Missouri*, 420 U.S. 162, 171-72 (1975)). In addition, the trial court's failure to conduct a competency hearing when there is a bona fide doubt as to the competency of the accused violates due process. *Pate v. Robinson*, 383 U.S. 376 (1967); *Drope*, 420 U.S. at 179. In addition, a state law presuming that a defendant is competent to stand trial unless he proves incompetence by clear and convincing evidence violates due process. *Cooper v. Oklahoma*, *supra*.

12. Forcible Administration Of Antipsychotic Medication violates due process, absent an overriding state justification. *Riggins v. Nevada*, 504 U.S. 127 (1992). *Riggins* held that this justification can be met if the government shows that medication is medically appropriate and essential for the safety of the defendant and others. *Id.* at 135-36. *See also Washington v. Harper*, 494 U.S. 210 (1990) (holding that a pretrial detainee has a due process interest in avoiding the involuntary administration of antipsychotic drugs). In *Sell v. United States*, 539 U.S. 166 (2003), the Court clarified that involuntary medication to make a defendant competent to stand trial can only be administered under very limited and rare circumstances such as: (1) when an important governmental interest is at stake, (2) when involuntary medication will significantly further those interests, (3) when involuntary medication is necessary to further those interests, and (4) when administration of the drugs is medically appropriate. *Id.* at 180-82.

13. Prosecutorial Suppression and Destruction of Exculpatory Evidence. Prosecutorial suppression of exculpatory evidence violates due process. *Brady v. Maryland*, 373 U.S. 83 (1963). The state's disclosure obligation encompasses impeachment material. *Giglio v. United States*, 405 U.S. 150 (1972); *United States v. Bagley*, 473 U.S. 667, 676 (1985) (and other cases). *Brady* violations can occur even

when the failure to disclose is inadvertent. *Strickler v. Greene*, 527 U.S. 263, 282 (1999); *United States v. Agurs*, 427 U.S. 97, 100 (1976). In addition, *Kyles v. Whitley*, 514 U.S. 419, 437 (1995) holds that "the individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf n the case, including the police."

In *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987), the Court held that although the defendant did not have a right to have his attorney examine child abuse records, his interest, along with the state's interest, in ensuring a fair trial required that the trial court examine the file to determine what was material to the case. The Court also ruled that the judge's duty to disclose material information from the records was ongoing as the proceedings progressed. *Id*. at 60.

In addition, the bad faith destruction of potentially exculpatory evidence violates due process. *Arizona v. Youngblood*, 488 U.S. 51 (1988).

14. Disclosure of Informant's Identity. The Due Process Clause has been held to require the government to disclose the identity of an informant at trial, provided the identity is shown to be relevant and helpful to the defense; *Roviaro v. United States*, 353 U.S. 53, 60-61 (1957); *see also Banks v. Dretke*, 540 U.S. 668, 697-98 (2004) (holding the same for an informant that the government *does* call at trial). There is no comparable requirement for disclosure of an informant's identity at a suppression hearing. *McCray v. Illinois*, 386 U.S. 300 (1967).[4]

15. Deportation of Defense Witness. In *Valenzuela-Bernal*, *supra*, the Supreme Court held that deportation of witnesses violates a defendant's due process rights when "the evidence lost [by their deportation] would be both material and favorable to the defense." 458 U.S. at 873.

16. The Tools Necessary for the Defense. *Ake v. Oklahoma*, 470 U.S. 68, 74 (1985) holds that "when a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the Constitution [specifically, due process] requires that a State provide access to a psychiatrist's assistance on this issue if the defendant cannot otherwise afford [a psychiatric expert]."

[4] *Roviaro* was not decided on constitutional grounds, but subsequent cases make clear that due process concerns underpin its requirement. *See United States v. Valenzuela-Bernal*, 458 U.S. at 870 and *United States v. Raddatz*, 447 U.S. 667, 679 (1980) (the Due Process Clause has been held to require the Government to disclose the identity of an informant at trial).

17. Denying a Justifiable Request for a Continuance. "[A] myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend . . . an empty formality . . . . There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case . . . ." *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964). "[T]he focus must be on the need for the continuance and the prejudice resulting from its denial." *Id.; see also Chandler v. Fretag*, 348 U.S. 3 (1954).

18. The Right to an Impartial Jury. "Long before this Court held that the Constitution imposes the requirement of jury trial on the States, it was well established that the Due Process Clause protects a defendant from jurors who are actually incapable of rendering an impartial verdict based on the evidence and the law." *Peters v. Kiff*, 407 U.S. 493, 501 (1972) (plurality opinion) (citing cases, including *Irvin v. Dowd*, *supra*, involving jurors who have formed fixed opinions about the case from pre-trial publicity). *See also Deitz v. Bouldin*, 136 S. Ct. 1885, 1893 (2016) "(the guarantee of an impartial jury . . . is vital to the fair administration of justice.")

This right can be impinged by a variety of actions. For example, the Court has held that "[a] trial dominated by mob violence in the courtroom is not such as due process demands." *Lisenba v. People of State of California*, 314 U.S. 219, 237 (1941) (citing *Moore v. Dempsey*, 261 U.S. 86 (1923)). "It is vital in capital cases that the jury should pass upon the case free from external causes tending to disturb the exercise of deliberate and unbiased judgment. Nor can any ground of suspicion that the administration of justice has been interfered with be tolerated." *Mattox v. United States*, *called into doubt on other grounds by Warger v. Shauers*, 135 S. Ct. 521 526-27 (2014).

19. Courtroom Practices. The trial court may not force the accused to wear obvious jail clothes in front of the jury. *Estelle v. Williams*, 425 U.S. 501 (1976); *see also Illinois v. Allen*, 397 U.S. 337, 344 (1970) (explaining that "the sight of shackles and gags might have a significant effect on the jury's feelings about the defendant" and may be an "affront to the very dignity and decorum of judicial proceedings that the judge is seeking to uphold."). Such conduct undermines the presumption of innocence, which is a "basic component of a fair trial under our system of criminal justice." *Estelle*, 425 U.S. at 503 (citing *Coffin v. United States*, 156 U.S. 432, 453 (1895) ("The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.")).

20. Courtroom Occurrences. The Supreme Court has found various types of occurrences during the criminal trial can violate due process. For example, in *Webb*

v. Texas, 409 U.S. 95 (1972) the Court held that due process was violated when trial judge gratuitously singled out a defense witness for a lengthy admonition and threats about perjury. The witness subsequently refused to testify. *See also Turner v. State of Louisiana*, 379 U.S. 466 (1965) (holding that the defendant was denied his right to a fair trial by an impartial jury when the two deputy sheriffs who gave key testimony leading to the defendant's conviction had charge of the jury during the three-day trial and had fraternized with them outside the courtroom during the performance of their duties). Then, in *Taylor v. Kentucky*, 436 U.S. 478, 487 n.15 (1978), the Court found that "the cumulative effect of potentially damaging circumstances of this case violated the due process guarantee of fundamental fairness."

21. Excessive Courtroom Security. *Holbrook v. Flynn*, 475 U.S. 560, 572 (1986) ("All a federal court may do in such a situation is look at the scene presented to jurors and determine whether what they saw was so inherently prejudicial as to pose an unacceptable threat to defendant's right to a fair trial; if the challenged practice is not found inherently prejudicial and if the defendant fails to show actual prejudice, the inquiry is over."). *Holbrook* adopted a case-by-case approach to whether the sight of excessive courtroom security is prejudicial to the defendant and refused to adopt a presumption of prejudice. *Id.* at 569.

22. Physical Restraints on the Defendant. Due Process prohibits the routine use, during guilt phase of a criminal trial, of physical restraints visible to the jury. The use of restraints requires the trial court's determination, in exercise of its discretion, that they are justified by a state interest specific to the particular trial. *Deck v. Missouri*, 544 U.S. 622 (2005).

23. Improper Allocation of the Burden of Proof. Penal statutes which improperly allocate the burden of proof violate due process. *Mullaney v. Wilbur*, 421 U.S. 684 (1975) (holding a Maine law unconstitutional law that required the defendant to prove an act was "in the heat of passion" to reduce murder to manslaughter). "[A] Jury instruction which shifts to the defendant the burden of proof on a requisite element of mental state violates due process." *Egelhoff*, 518 U.S. at 54 (citing *Sandstrom v. Montana*, 442 U.S. 510, 524 (1979)). *Jones v. United States*, 526 U.S. 227, 243 (1999) ("The seriousness of the due process issue is evident from *Mullaney*'s insistence that a State cannot manipulate its way out of *Winship*."). See the section on jury instructions below.

24. Evidentiary Rulings. *Chambers v. Mississippi*, 410 U.S. 284 (1973) held that "erroneous evidentiary rulings can, in combination, rise to the level of a due process violation." *Montana v. Egelhoff*, 518 U.S. 37, 53 (1996). Also, there are occasions when the admission of challenged evidence would be so unfairly prejudicial

as to implicate a criminal defendant's due process rights. *See, e.g.*, *Payne v. Tennessee*, 501 U.S. 808, 825 (1991) ("[T]he Due Process Clause of the Fourteenth Amendment provides a mechanism for relief" when evidence is introduced "that is so unduly prejudicial that it renders the trial fundamentally unfair."). Moreover, *Dowling v. United States*, 493 U.S. 342 (1990) states that the admission of evidence would violate due process if it rendered the trial "fundamentally unfair." *See id.* at 353-54.

25. Admission of a Coerced Confession. The introduction into evidence of a coerced confession violates due process. *Lisenba v. People of State of California*, 314 U.S. 219, 236-37 (1941); *Ashcraft v. Tennessee*, 322 U.S. 143, 155 ("The Constitution of the United States stands as a bar against the conviction of any individual in an American court by means of a coerced confession."); *see also Arizona v. Fulminante*, 499 U.S. 279 (1991); *Brown v. Mississippi*, 297 U.S. 278 (1936); *Colorado v. Connelly*, 479 U.S. 157, 163 (1986).

26. The Knowing Presentation of, or Failure to Correct, False Testimony Violates Due Process. *Napue v. Illinois*, 360 U.S. 264 (1959) (holding that knowing presentment of false testimony by the government violates due process even when the testimony goes to the credibility of the witness rather than the defendant's guilt); *See also Mooney v. Holohan*, 294 U.S. 103 (1935).

27. The Prosecution's Intentional Misrepresentation of Evidence violates due process. *Miller v. Pate*, 386 U.S. 1, 6 (1967) (finding violation of due process when a prosecutor represented a pair of shorts defendant allegedly wore as covered in blood when in fact—as the prosecutor knew—they were covered in paint). *But see Donnelly v. DeChristoforo*, 416 U.S. 637 (1974) (holding that ambiguous, isolated statements in closing argument by a prosecutor constituted simple trial error and not a due process violation of the type at issue in *Miller*).

28. The Cross Examination of the Accused Concerning Post-arrest (and Post-*Miranda*) Silence violates due process. *Doyle v. Ohio*, 426 U.S. 610 (1976). However, *Brecht v. Abrahamson*, 507 U.S. 619 (1993) held that *Doyle* errors only entitle a petitioner to habeas relief if they had a "substantial and injurious" effect on the jury's verdict. *Id.* at 638. In addition, the use of a defendant's post-arrest, or post-*Miranda* warnings silence as evidence of his sanity violates due process. *Wainwright v. Greenfield*, 474 U.S. 284 (1986).

29. Unreasonable Restrictions on the Defense Case. Restrictions on the right to introduce critical evidence supporting the defense cases, that is, on the right of the accused to present a complete defense, violate due process. *Chambers v. Mississippi*, 410 U.S. 284 (1973). As the *Chambers* Court stated: "The right of an

accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations. *Id*. at 294; *See also Crane v. Kentucky*, 476 U.S. 683, 690 (1986).

> Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.' *Crane v. Kentucky*, 476 U.S. 683, 690 (1986). This right is abridged by evidence rules that "infring[e] upon a weighty interest of the accused" and are "'arbitrary' or 'disproportionate to the purposes they are designed to serve.'" *United States v. Scheffer*, 523 U.S. 303, 308 (1998).

Holmes v. South Carolina, 547 U.S. 319, 324-25 (2006) (citations modified). In *Crane*, the Court held that the exclusion of testimony at trial concerning the circumstances of the defendant's confession deprived him of a fair trial. In addition, the Supreme Court has stated:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

Washington v. Texas, 388 U.S. 14, 18-19 (1967). Note, however, that *Egelhoff*, 518 U.S. at 52, discussed above, explains that *Chambers* was "highly case-specific" and that exclusions even of "critical evidence" do not per se rise to the level of a due process violation, as long as the exclusion was because of a valid state law reason).

30. Restrictions on the Defendant's Right to Testify. "The right to testify on one's own behalf at a criminal trial has sources in several provisions of the Constitution. It is one of the rights that 'are essential to due process of law in a fair adversary process.'" *Rock v. Arkansas*, 483 U.S. 44, 51 (1987) (quoting *Faretta v. California*, 422 U.S. 806, 819 n.15 (1975)). *See also Brooks v. Tennessee*, 406 U.S. 605 (1972) (statute requiring a defendant who desires to testify to do so before any other defense testimony is heard violates due process as it deprives the accused of the guiding hand of counsel in deciding not only whether to testify but, if so, at what stage).

31. Improper Closing Argument. Prosecutorial summation can be so prejudicial as to violate due process. *Darden v. Wainright*, 477 U.S. 168 (1986); *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974). "The relevant question is whether the prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Darden*, 477 U.S. at 181 (quoting *Donnelly*, 416 U.S. at 643).[5] In addition, the trial court's denial of the right to present closing argument violates the Sixth Amendment right to counsel. *Herring v. New York*, 422 U.S. 853 (1975).

32. Jury Instructions can violate due process. Specifically, instructions that dilute the reasonable doubt standard violate due process. *Cool v. United States*, 409 U.S. 100 (1972). Also, in *Sandstrom v. Montana*, 442 U.S. 510 (1979), the Court invalidated, on due process grounds, an instruction that contained an impermissibly mandatory presumption. The instruction created a presumption of malice that had the effect of either eliminating intent as an issue, or shifted the burden of proof regarding intent, to the accused. In *Carella v. California*, 491 U.S. 263 (1989), the Court similarly held that jury instructions imposing mandatory presumptions violated the defendant's due process rights by relieving an element of the burden of proof. The test for "constitutional error" is set out in *Boyde v. California*, 494 U.S. 370, 380 (1990).

In addition, a constitutionally insufficient jury instruction on reasonable doubt violates due process and the Sixth Amendment. *Sullivan v. Louisiana*, 508 U.S. 275 (1993); *Cage v. Louisiana*, 498 U.S. 39 (per curiam), *overruled on another ground, Estelle v. McGuire,* 502 U.S. 62, n. 4 (1991).

Statutes, rules, or jury instructions that shift the burden of proof beyond a reasonable doubt to the defense violate due process. *Mullaney v. Wilbur*, 421 U.S. 684 (1975).

33. A Coercive Supplemental Jury Instruction violates due process. In *Lowenfield v. Phelps*, 484 U.S. 231, 241 (1988), the Supreme Court stated that "Any criminal defendant, and especially any capital defendant, being tried by a jury is entitled to the uncoerced verdict of that body." In *Allen v. United States*, 164 U.S. 492 (1896), the Court approved of a supplemental jury instruction asking minority jurors in a deadlocked jury to reconsider their positions. *Lowenfield* clarified that a reviewing court should use a totality of the circumstances test to determine whether a supplemental jury instruction was so coercive as to violate due process. 484 U.S. at

[5] *See also Frazier v. Cupp*, 394 U.S. 731, 736 (1969) ("[i]t may be that some remarks included in an opening statement could be so prejudicial that a finding of error, or even constitutional error, would be unavoidable.").

237. *Early v. Packer*, 537 U.S. 3 (2002) notes that mere consideration of relevant facts and circumstances by a reviewing court is sufficient. *Id.* at 9.

The clearly established Supreme Court law in this area is sparse, and the *Lowenfield* test provides only vague guidance about when a supplemental jury instruction violates due process. *See Wong v. Smith*, 131 S. Ct. 10, 12 (2010) (Alito, J., dissenting from denial of certiorari).[6]

34. The Refusal to Give Certain Jury Instructions. The inquiry is whether the trial court's refusal to give the instruction, for example, on a particular defense, "so infected the entire trial that the resulting conviction violates due process." *Cupp v. Naughten*, 414 U.S. 141, 147 (1973).

In *Taylor v. Kentucky*, 436 U.S. 478 (1978), the Court held that the refusal to instruct the jury on the presumption of innocence violates due process. However, the charge is not required in all cases. *See Kentucky v. Whorton*, 441 U.S. 786, 788-89 (1979) (limiting *Taylor* to its facts and establishing a totality of the circumstances test for when an instruction on the presumption of innocence is required).

35. A Juror's *Ex Parte* Contact With the Trial Judge. Contact of this type can give rise to a violation of the right to be present and the right to counsel. *Rushen v. Spain*, 464 U.S. 114, 119 n.2 (1983). But it is subject to harmless error analysis; the focus is juror misconduct, third-party influence, or whether the contact is incidental or serious. *See id.* at 119 n.3. The Sixth Amendment right to counsel is also implicated when this occurs, as is the right to confrontation. *See Parker v. Gladden*, 385 U.S. 363 (1966) (statements of bailiff to certain jurors that defendant was a wicked fellow, that he was guilty, and that if there was anything wrong in finding defendant guilty, the Supreme Court would correct it, violated the Sixth Amendment).

36. The Quantum of Proof Necessary to Convict. As a matter of due process, the State must prove all elements of the offense beyond a reasonable doubt (or the verdict cannot stand). *Jackson v. Virginia*, 443 U.S. 307 (1979); *In re Winship*, 397 U.S. 358 (1968); *see also Fiore v. White*, 531 U.S. 225 (2001) (conviction and continued incarceration based on conduct that the state statute, as properly interpreted, did not prohibit, violates due process).

37. The Sentencing Process. "[T]he sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." *Gardner v. Florida*, 430 U.S. 349, 358 (1977) (plurality opinion in capital case). "A defendant has a due

[6] While this outline focuses on Supreme Court cases, a good discussion of the topic is found in *Weaver v. Thompson*, 197 F.3d 359 (9th Cir. 1999).

process right not to be sentenced based on 'misinformation of constitutional magnitude.'" *United States v. Tucker*, 404 U.S. 443, 447 (1972); *Roberts v. United States*, 445 U.S. 552, 556 (1980). Moreover, sentencing cannot be based on "factors that are constitutionally impermissible or totally irrelevant to the sentencing process, such as for example the race, religion, or political affiliation of the defendant." *Zant v. Stephens*, 462 U.S. 862, 885 (1983).

"As we held in *United States v. Tucker*, 404 U.S. 443, 447–449 (1972), even in a noncapital sentencing proceeding, the sentence must be set aside if the trial court relied at least in part on "misinformation of constitutional magnitude" such as prior uncounseled convictions that were unconstitutionally imposed. 334 U.S. 736, 740–741 (1948) (reversing a sentence imposed on uncounseled defendant because it was based on "extensively and materially false" assumptions concerning the defendant's prior criminal record)." *Zant*, 462 U.S. at 888 n.23.

Due process vagueness principles "apply not only to statutes defining elements of crimes, but also to statutes fixing sentences." *Johnson v. United States*, 135 S.Ct. 2551, 2557 (2015) (citing *United States v. Batchelder*, 442 U.S. 114, 123 (1979)).

In addition, a state court's arbitrary disregard of state sentencing law and imposition of an unauthorized sentence may violate the defendant's due process rights. *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980).

38. Due Process Prohibits Vindictive Punishments. *North Carolina v. Pearce*, 395 U.S. 711 (1969) (Establishing a "presumption of vindictiveness" when a judge imposes a greater sentence during a new trial after a defendant successfully challenges his first conviction).[7] "To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort, *see North Carolina v. Pearce*, *supra*, 395 U.S. at 738 (opinion of Black, J.), and for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is 'patently unconstitutional.'" *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978) (citation omitted). *But see Alabama v. Smith*, 490 U.S. 794, 795 (1989) (*Pearce* presumption exists when the first sentence was based on a guilty plea and the second sentence followed a trial).

[7] Much turns on the determination that a fact is an element of an offense rather than a sentencing consideration, given that the elements must be charged in the indictment, submitted to a jury, and proven by the Government beyond a reasonable doubt. *See, e.g., United States v. Gaudin*, 515 U.S. 506, 509-10 (1995); *Hamling v. United States*, 418 U.S. 87 (1974).

39. The Judge Can't Imprison Someone For Their Inability To Pay A Fine. In *Bearden v. Georgia*, 461 U.S. 660 (1983), the Supreme Court held that, "in revocation proceedings for failure to pay a fine," due process requires that "a sentencing court must inquire into the reasons for the failure to pay" and that the judge consider alternatives to imprisonment if he finds that a defendant is unable to pay. 461 U.S. at 672; *see also id.* at 674 (without determination as to the defendant's reasons for failure to pay and lack of alternatives, "fundamental fairness requires that the petitioner remain on probation").

40. Arbitrary Deprivations Of A Right Guaranteed By State Law. A state violates a criminal defendant's due process right to fundamental fairness if it arbitrarily deprives the defendant of a state law entitlement. *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980).

41. Juvenile Court Proceedings. Juvenile delinquency proceedings must conform to the due process guarantees of the Constitution, including adequate written notice, advice as to the right to counsel, confrontation, cross-examination, and the right against self-incrimination. *In re Gault*, 387 U.S. 1 (1966). In *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971), the Court declined to extend the right to jury trial to juvenile court.

42. Appellate Review. "[O]nce the state grants the right to appeal it must follow procedures comporting with the Fourteenth Amendment." *Evitts v. Lucey*, 469 U.S. 387, 403 (1985). After deciding that a right to appeal is essential, the State cannot then deny a defendant due process. Due Process claims are implicated when a defendant is denied an adequate opportunity to present his claim and receive an adjudication on the merits, or when defendants are treated differently in such a way that affects their ability to pursue a meaningful appeal. *See also Cole v. Arkansas*, 333 U.S. 196, 202 (1948) ("To conform to due process of law, petitioners were entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined in the trial court.").

"In terms of a trial record . . . the State must afford the indigent a 'record of sufficient completeness' to permit proper consideration of [his] claims." *Mayer v. City of Chicago*, 404 U.S. 189, 193-94 (1971) (quoting prior cases). In Mayer, the Court stated: "*Griffin v. Illinois*, 351 U.S. 12 (1956), is the watershed of our transcript decisions. We held there that '(d)estitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts.' *Id*., at 19 This holding rested on the 'constitutional guaranties of due process and equal protection both (of which) call for procedures in criminal trials which allow no invidious discriminations between persons and different groups of persons.' *Id., at 17*."

43. Cumulative Error. "[T]he Supreme Court has clearly established that the combined effect of multiple trial errors may give rise to a due process violation if it renders a trial fundamentally unfair, even where each error considered individually would not require reversal." *Parle v. Runnels*, 505 F.3d 922, 928 (9th Cir. 2007) (citing *Donnelly*, 416 U.S. at 643; *Chambers*, 410 U.S. at 290 n. 3, 298, 302–03. *See also Taylor v. Kentucky*, 436 U.S. 478, 488 n.15 (1978) ("the cumulative effect of the potentially damaging circumstances of this case violated the due process guarantee of fundamental fairness.").

44. Guilty Pleas Must Satisfy Due Process. To satisfy due process, a guilty plea must be "knowing and voluntary," because it is a waiver of the Fifth Amendment right against compulsory self-incrimination and the Sixth Amendment rights to jury trial and to confront one's accusers. *Boykin v. Alabama*, 295 U.S. 238, 242-43 (1969). A guilty plea must be a "knowing, intelligent act[] done with sufficient awareness of the relevant circumstances and likely consequences." *Brady v. United States*, 397 U.S. 742, 748 (1970). A plea will be "knowing, intelligent, and sufficiently aware" "if the defendant fully understands the nature of the right and how it would likely apply in general in the circumstances." *United States v. Ruiz*, 536 U.S. 622, 629-30 (2002).

In *Ruiz*, the Supreme Court held that the restrictions from *Brady v. Maryland* do not require "preguilty plea disclosure of impeachment information." 536 U.S. at 629 ("We must decide whether the Constitution requires that preguilty plea disclosure of impeachment information. We conclude that it does not."). The Court recognized that "impeachment information is special in relation to the *fairness of a trial*, not in respect to whether a plea is voluntary." 536 U.S. at 632 (emphasis in original). It acknowledged that, "[o]f course, the more information the defendant has, the more aware he is of the likely consequences of a plea, waiver, or decision, and the wiser that decision will likely be," but concluded that "the Constitution does not require the prosecutor to share all useful information with the defendant." *United States v. Harmon*, 871 F.Supp.2d 1125, 1169 (D.N.M. 2012) (quoting *Ruiz*, 536 U.S. at 632).

"[A]n intelligent assessment of the relative advantages of pleading guilty is frequently impossible without the assistance of an attorney," *Brady*, 397 U.S. at 748 n.6, and counsel have a duty to supply criminal defendants with necessary and accurate information. *See McMann v. Richardson*, 397 U.S. 759, 779 (1970); *Padilla v. Kentucky*, 559 U.S. 356 (2010).

In addition, the competency standard for pleading guilty is exactly the same as the competency standard to stand trial. *Godinez v. Moran*, 509 U.S. 389 (1993). The trial competency standard established in *Dusky v. United States*, 362 U.S. 402

(1960)—whether the defendant has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and has "a rational as well as factual understanding of the proceedings against him"—applies in assessing a defendant's competency to plead guilty. *Godinez*, 509 U.S. at 399.

The burden is on the prosecution to make an affirmative showing that the defendant knowingly and voluntarily waived these rights by pleading guilty. *Boykin*, 295 U.S. at 243 (holding that silence in the record is insufficient to show waiver of these rights).

45. Breaches of the Plea Agreement violate Due Process. Prosecutors must uphold their end of the bargain in a plea agreement. Breach of a plea agreement, even if inadvertent, violates due process. *Santobello v. New York*, 404 U.S. 257 (1971) (failure of the prosecution to uphold agreement not to make a sentencing recommendation invalidated plea). The *Santobello* Court held that the government is bound by plea agreements and that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promises must be fulfilled." 404 U.S. at 262. *Mabry v. Johnson* 467 U.S. 504, 509-10 (1984) states that a *Santobello* claim requires the plea to be induced by the State's promise)

Thanks to Fawna Kohlleppel and Bert Ma for their assistance in the preparation of this outline.