CONSTITUTIONAL RIGHTS AVAILABLE IN PROCEEDINGS OTHER THAN CRIMINAL TRIALS

By: Jonathan Grossman

The Bill of Rights generally applies only in criminal proceedings. By its terms, the Sixth Amendment only applies to criminal prosecutions and does not generally include appeals, for example. Some of the rights found in the Bill of Rights do apply in other situations, either directly or as a matter of due process or equal protection. Proper federalization depends on understanding which clause of the United States Constitution applies to claims of error that do not pertain to a criminal trial. This is because exhausting a constitutional claim requires an expressed reference to the correct federal constitutional guarantee as well as a statement of fact which entitles the defendant to relief. For example, asserting the right to effective assistance of counsel on appeal as being under the Sixth Amendment would lead to a procedural default because the right falls under the due process clause. (*Tamalini v. Stewart* (9th Cir. 2001) 249 F.3d 895, 899.) Practitioners should also be aware that the California Constitution might provide broader protection than the United States Constitution in some situations.

It is also important to understand how to properly argue prejudice in the noncriminal context. Most civil errors do not require reversal unless they amount to a miscarriage of justice. (Cal. Const., art. VI, § 13; *Cassim v. All-State Ins. Co.* (2004) 33 Cal.4th 780, 800-801; *People v. Watson* (1956) 46 Cal.2d 818, 836-837.) Nonetheless, a violation of a substantive or procedural due process right under the Fourteenth Amendment should be reviewed under *Chapman v. California* (1967) 386 U.S. 18, 24. (See, e.g., *In re Vanessa M.* (2006) 138 Cal.App.4th 1121, 1132 [preventing a parent from testifying in a dependency case]; *In re Joann E.* (2002) 104 Cal.App.4th 347, 359 [appointment of guardian-ad-litem without an adequate hearing].) But courts sometimes hold that a violation of due process requires reversal only if procedures were fundamentally unfair. (See, e.g., *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 643; *Lassiter v. Dept. of Social Srvs* (1981) 452 U.S. 18, 32-33; *In re Meranda P.* (1997) 56 Cal.App.4th 1143, 1153; *In re Malcolm D.* (1996) 42 Cal.App.4th 904, 919.)

A. SECOND AMENDMENT

> "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." (U.S. Const., 2d Amend.)

The Second Amendment guarantees individuals the right to possess and carry weapons in case of a confrontation. (*District of Columbia v. Heller* (2008) 554 U.S. 570, 592-595, 628-635.) The Second Amendment applies to the states. (*McDonald v. City of Chicago* (2010) 561 U.S. 742, 767-780.) The government can ban possession of concealed weapons, by felons or the mentally ill, in sensitive areas, of exotic weapons or when there is a countervailing government interest. (*Heller,* at pp. 626-628.)

B. FOURTH AMENDMENT

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." (U.S. Const., 4th Amend.)

While the Fourth Amendment applies to the states, even in a non-criminal context (*Wolf v. Colorado* (1949) 338 U.S. 25), application of the exclusionary rule is more limited. This is important because a criminal defendant is entitled to exclusion of evidence from an illegal search only if it is required by the United States Constitution. (Cal. Const., art. I, § 28, subd. (f)(2); *In re Lance W.* (1985) 37 Cal.3d 873, 884-893.)

The takings clause of the Fifth Amendment applies to the states. (*Chicago B. & Q. Rail Company v. Chicago* (1897) 166 U.S. 226.) In a non-criminal context, the takings and due process clause might apply to the seizure of property. (See, e.g., *People v. Resendez* (1993) 12 Cal.App.4th 98, 113 [must have a contested restitution hearing upon timely demand].)

The exclusionary rule of the Fourth amendment applies to the states. (*Mapp v. Ohio* (1961) 367 U.S. 643.) It does not directly apply to officers of Indian tribes. (*United States v. Becerra-Garcia* (9th Cir. 2005) 397 F.3d 1167, 1171; *United States v. Manuel* (9th Cir. 1983) 706 F.2d 908, 911, fn. 3.) The Indian Civil Rights Act (25 U.S.C. § 1302(2)) incorporates the Fourth Amendment by statute. (*People v. Ramirez* (2007) 148 Cal.App.4th 1464, 1469-1477; *United States v. Becerra-Garcia* (9th Cir. 2005) 397 F.3d 1167, 1171.)

The exclusionary rule, however, often does not apply outside the context of the criminal trials. It applies to juvenile cases. (See, e.g., *Lance W., supra,* 37 Cal.3d 873.) It does not apply to violation of probation or parole hearings. (*Pennsylvania v. Scott* (1998) 527 U.S. 357; *In re Martinez* (1970) 1 Cal.3d 641, 650-651; *People v. Harrison* (1988) 199 Cal.App.3d 803, 808-812.) However, evidence can be excluded if the

officer's actions was so egregious that it violated due process. (*People v. Washington* (1987) 192 Cal.App.3d 1120, 1127-1128, overruled on other grounds as discussed in *People v. Aranguire* (1991) 230 Cal.App.3d 1302, 1308; see *People v. Howard* (1984) 162 Cal.App.3d 8; 21-22.) The exclusionary rule normally does not apply in administrative hearings. (*United States v. Caseres* (1979) 440 U.S. 741; *Immigration & Naturalization Srv. v. Lopez-Mendoza* (1984) 468 U.S. 1032.) Again, if the Fourth Amendment violation is egregious, exclusion may be compelled as a matter of due process. (*Orhorhaghe v. Immigration & Naturalization Srv.* (9th Cir. 1994) 38 F.3d 488, 501-504; *Gonzalez-Rivera v. Immigration & Naturalization Srv.* (9th Cir. 1994) 22 F.3d 1441, 1448-1452.)

While an arrest or detention of an individual is a classic Fourth Amendment situation, the Fourth Amendment ceases to apply to an individual's detention once a court finds probable cause. (See *Wallace v. Kato* (2007) 549 U.S. 384, 389-390; *Graham v. Connor* (1989) 490 U.S. 386, 395, fn. 10 [the Fourth Amendment does not apply to the punishment of convicted defendants].) At this point, individual might turn to the excessive bail clause of the California Constitution, or to the due process clause and speedy trial clauses of the state and federal constitutions.

C. FIFTH AMENDMENT

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." (U.S. Const., 5th Amend.)

1. Self-incrimination

The Fifth Amendment right not to incriminate oneself applies to the states. (*Malloy v. Hogan* (1964) 378 U.S. 1, 11.) It applies to minors. (*In re Gault* (1966) 387 U.S. 1, 44-56.) "Under cases of the United States Supreme Court, there are four requirements that together trigger this privilege: the information must be (i) 'incriminating'; (ii) 'personal to the defendant'; (iii) obtained by 'compulsion'; and (iv) 'testimonial or communicative in nature.' " (*Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 366.)

The Fifth Amendment privilege encompasses "two separate and distinct testimonial privileges . . . In a criminal matter a defendant has an absolute right not to be called as a witness and not to testify. [Citation.] Further, in any proceeding, civil or criminal, a witness has the right to decline to answer questions which may tend to incriminate him in criminal activity [citation]." (*Cramer v. Tyars* (1979) 23 Cal.3d 131, 137.) The right not to incriminate oneself can be invoked in civil cases. (*Daly v. Superior Court* (1977) 19 Cal.3d 132, 142; see *People v. Holloway* (2004) 33 Cal.4th 96, 130-132.) However, the trier of fact may draw negative inferences in civil cases from the invocation of the privilege not to incriminate oneself. (*Baxter v. Palmigiano* (1976) 425 U.S. 308, 317-318.)

The right not to testify applies only in criminal cases. Thus, in commitment proceedings, the defendant generally can be compelled to testify. (*Allen v. Illinois* (1986) 478 U.S. 364, 369-372; *Cramer, supra,* 23 Cal.3d at pp. 137-138 [mentally disabled commitment].) For some civil commitment schemes, there is a statutory right not to be compelled to testify. (*Hudec v. Superior Court* (2015) 60 Cal.4th 815, 826 [NGI extension]; *Joshua D. v. Superior Court* (2007) 157 Cal.App.4th 549, 558-560 [juvenile extension].) The Supreme Court in *Baxstrom v. Herold* (1966) 383 U.S. 107 considered a prisoner, committed at the expiration of his prison sentence, to be similarly situated as those committed under other statutory schemes within the state. In commitment proceedings, there can be an equal protection right not to deprive certain civil commitment defendants rights the state grants other civil commitment defendants. (*Id.* at p. 112 ["There is no conceivable basis for distinguishing the commitment of a person who is nearing the end of a penal term from all other civil commitments."]; *Jackson v. Indiana* (1972) 406 U.S. 715, 728-730.) Under the equal protection clause, the same right to refuse to testify has been extended to some other civil commitment schemes. (See, e.g., *People v. Dunley* (2016) 247 Cal.App.4th 1438, 1447-1453 [MDO]; see *People v. Field* (2016) 1 Cal.5th 174, 192-197 [SVP defendants are equally situated but the matter was remanded to determine if there is a compelling reason to compel a defendant to testify].) The right has not been extended to other civil commitment schemes. (See, e.g., *Cramer, supra,* at pp. 137-138 [mentally disabled]; *Baqlah v. Superior Court* (2002) 100 Cal.App.4th 478, 495, 501-502 [competency]; *Conservatorship of E.B.* (2020) 45 Cal.App.5th 986 [creating a conflict of authority in LPS proceedings].)

The Fifth Amendment right not to incriminate oneself applies at the penalty phase, sentencing hearings, and the preparation of the presentence report. (*Mitchell v. United States* (1999) 526 U.S. 314, 325-327; *Estelle v. Smith* (1981) 451 U.S. 454, 461-469 (plur. opn. of Kennedy, J.); see *People v. Woods* (2004) 120 Cal.App.4th 929, 939.)

Involuntary or coerced admissions are inadmissible at trial (*Lego v. Twomey* (1972) 404 U.S. 477, 478), because their admission is a violation of a defendant's right to due process under the Fourteenth Amendment (*Jackson v. Denno* (1964) 378 U.S. 368, 385-386). To protect against coerced statements from a custodial interrogation, the police is required to first warn the defendant that he or she has the right to remain silent, any statement will be used in court, he or she has a right to an attorney, and an attorney will be appointed if one cannot be afforded. (*Miranda v. Arizona* (1966) 384 U.S. 436.) Again, the *Miranda* rights come from the due process clause of the Fourteenth Amendment. Because the right to counsel under the Sixth Amendment attaches only once criminal proceedings have begun, the right to counsel at an interrogation before there are court proceedings is under the due process clause. (*McNeil v. Wisconsin* (1991) 501 U.S. 171.)

2. The Double Jeopardy and Ex Post Facto Clauses

"No state shall . . . pass any . . . ex post facto law . . . . " (U.S. Const., art. I, § 10, ¶ 1.) By its own terms, the ex post facto clause applies to the states. The ex post facto clause applies to the following situations: "1st. Every law that makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action. 2d. Every law that *aggravates* a *crime*, or makes it *greater* than it was, when committed. 3d. Every law that *changes the punishment*, and inflicts a *greater punishment*, than the law annexed to the crime, when committed. 4th. Every law that alters the *legal* rules of *evidence*, and receives less, or different, testimony, than the law required at the time of the commission of the offence, *in order to convict the offender*." (Calder v. Bull (1798) 3 U.S. (3 Dall.) 386, 390 (opn. of Chase, J.), emphasis in original; *Stogner v. California* (2003) 539 U.S. 607, 612.)

The Double Jeopardy Clause "consist[s] of three separate constitutional protections. It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." (*North Carolina v Pearce* (1969) 395 U.S. 711, 717, fns. omitted, overruled on other grounds by *Alabama v Smith* (1989) 490 U.S. 794, 802.) Fifth Amendment double jeopardy clause applies to the states. (*Benton v. Maryland* (1969) 395 U.S. 784, 794-795; *Crist v. Bretz* (1977) 437 U.S. 28, 35, 37-38.) The right against double jeopardy applies in delinquency cases. (*Breed v. Jones* (1975) 421 U.S. 519, 531.)

Both the ex post facto and double jeopardy clauses apply only to punishment. (*Kansas v. Hendricks* (1997) 521 U.S. 346, 370; see also *Smith v. Doe* (2003) 538 U.S. 84, 97; *United States v. Usery* (1996) 518 U.S. 242, 248-249.) Whether a statute is

punitive involves a two-step inquiry. First one must determine if the legislature expressly or impliedly determined it is punitive. If not, the effect of the statute may be punitive in purpose or in effect. (*Allen v. Illinois* (1986) 478 U.S. 364, 368-369; *United States v. Ward* (1980) 448 U.S. 242, 248; see *United States v. Usery* (1996) 518 U.S. 267, 270; *People v. Castellanos* (1999) 21 Cal.4th 785, 794 (lead opn.).) Despite no punitive intent, a scheme can can be labeled punitive when considering: "(1) whether the sanction involves an affirmative disability or restraint; (2) whether it has historically been regarded as a punishment; (3) whether it comes into play only on a finding of *scienter*; (4) whether its operation will promote the traditional aims of punishment – retribution and deterrence; (5) whether the behavior to which it applies is already a crime; (6) whether an alternative purpose to which it may rationally be connected is assignable for it; and (7) whether it appears excessive in relation to the alternative purpose assigned." (*Hudson v. United States* (1997) 522 U.S. 93, 99-100, quotation marks omitted; *Hendricks, supra,* at p. 361; *People v. Ansell* (2001) 25 Cal.4th 868, 885-886.)

Examples:

Driver's license suspension is not punitive. (*People v. Superior Court (Moore)* (1996) 50 Cal.App.4th 1202; *Moomjian v. Zolin* (1993) 12 Cal.App.4th 1606.1612; *Rivera v. Pugh* (9th Cir. 1999) 194 F.3d 1064.)

Most fines are criminal. (*Southern Union Co. v. United States* (2012) 567 U.S. 343, 349-350 ["Criminal fines, like these other forms of punishment, are penalties inflicted by the sovereign for the commission of offenses."]; *People v. Hanson* (2000) 23 Cal.4th 355, 362 [restitution fine]; *People v. Walker* (1991) 54 Cal.3d 1013, 1024 [restitution fine]; but see *People v. Vega* (2005) 130 Cal.App.4th 183, 195 [drug lab fee is not punishment].)

Most penalty assessments are punishment. (*People v. Voit* (2011) 200 Cal.App.4th 1353 1375; *People v. High* (2004) 119 Cal.App.4th 1192, 1197.)

Costs and fees generally are not criminal. (*People v. Alford* (2008) 42 Cal.4th 749, 755-759 [court security fee]; *People v. Cortez* (2010) 189 Cal.App.4th 1436, 1443-1444 [court facility fee]; *People v. High* (2004) 119 Cal.App.4th 1192, 1199.)

Some courts have said "[v]ictim restitution is not punishment. [Citation.] It is akin to a civil judgment, and may be enforced by similar means . . . . " (*People v. Kluntz* (2004) 122 Cal.App.4th 652, 657; accord, *People v. Moreno* (2003) 108 Cal.App.4th 1, 11; *People v. Harvest* (2000) 84 Cal.App.4th 641, 649.) But it has been described as criminal in nature, in that it is aimed at rehabilitation and deterrence. (*Kelly v. Robinson* (1986) 479 U.S. 36, 50-53 [therefore not discharged with defendant's bankruptcy];

People v. Carbajal (1995) 10 Cal.4th 1114, 1123-1124 [the amount of restitution can be greater than one's civil liability]; *People v. Crow* (1993) 6 Cal.4th 952, 957; *People v. Richards* (1976) 17 Cal.3d 614 [purpose is rehabilitation]; *People v. Rugamas* (2001) 93 Cal.App.4th 518, 523 [thus, can order victim restitution not authorized by statute as a condition of probation].) The courts should apply the restitution law that was in effect when the crime was committed. (See, e.g., *People v. Birkett* (1999) 21 Cal.4th 226, 247, fn. 21.)

An order to take a test for the HIV virus is not punitive. (*People v. Stowell* (2003) 31 Cal.4th 1107, 1113.)

A DNA test is not punitive. (*People v. Travis* (2006) 139 Cal.App.4th 1271, 1295; *People v. Espana* (2006) 137 Cal.App.4th 549, 553-556; see *Rise v. Oregon* (9th Cir. 1995) 59 F.3d 1556, 1562, overruled on other grounds in *Ferguson v. City of Charleston* (2001) 532 U.S. 67 and *City of Indianapolis v. Edmund* (2000) 531 U.S. 32.)

Registration is civil. (*Smith v. Doe* (2003) 538 U.S. 84, 94-105; *In re Avila* (2004) 33 Cal.4th 254, 289; *In re Jorge G.* (2004) 117 Cal.App.4th 931, 953-954; *United States v. Gementera* (9th Cir. 2004) 379 F.3d 596, 608-610.)

Changes in the law concerning mandatory probation conditions enacted before sentencing but after the commission of the crime can violate the ex post facto clause. (*People v. Delgado* (2006) 140 Cal.App.4th 1157, 1166-1171 [Pen. Code, § 1203.097].)

Forfeiture is often civil. (*United States v. Usery* (1996) 518 U.S. 267, 270 [no double jeopardy from in rem proceedings]; *People v. Madeyski* (2001) 94 Cal.App.4th 659, 644 [forfeiture of computer under Pen. Code, § 502.01]; *People v. Blue Chevrolet Astro* (2000) 83 Cal.App.4th 322, 324 [animal fighting forfeiture under Pen. Code, § 599aa]; *People v. 4,413 Dollars in U.S. Currency* (1996) 47 Cal.App.4th 1631, 1638 [former Health & Saf. Code, § 11488.4 drug forfeiture was an in rem proceeding].)

A civil commitment is not punitive. (*Kansas v. Hendricks* (1997) 521 U.S. 346, 361 [Kan. SVP]; *Selig v. Young* (2001) 531 U.S. 250, 261 [Wash. SVP]; *Allen v. Illinois* (1986) 478 U.S. 364, 369; *Hubbart v. Superior Court* (1999) 19 Cal.4th 1138, 1171-1172 [SVP]; *Conservatorship of Susan T.* (1994) 8 Cal.4th 1005, 1015 [LPS conservatorship]; *People v. Francis* (2002) 98 Cal.App.4th 873, 877 [MDO]; *People v. Henderson* (1981) 117 Cal.App.3d 740, 748 [NGI extension].)

Expungement is civil. (*People v. Ansell* (2000) 25 Cal.4th 868, 873.)

The sealing of a juvenile record is civil; the retroactive effect of a statute limiting the sealing of a juvenile record did not violate the ex post facto clause. (*People v. Superior Court (Manuel G.)* (2002) 104 Cal.App.4th 915, 929-930.)

Dependency is civil, and double jeopardy does not apply. (*In re Roderick U.* (1993) 14 Cal.App.4th 1543, 1551, fn. 4; *In re Carina C.* (1990) 218 Cal.App.3d 617, 624.)

California's ex post facto clause (Cal. Const., art. I, § 9) is not broader than the federal provision. (*People v. Frazer* (1999) 21 Cal.4th 737, 754, fn. 15; see also *In re Rosenkrantz* (2002) 29 Cal.4th 616, 640, fn. 6.) California's double jeopardy clause (Cal. Const., art. I, § 15) is sometimes construed more broadly than the federal provision. (See, e.g., *People v. Hanson* (2000) 23 Cal.4th 355, 356.)

3. Other Provisions

The due process clause of the Fifth Amendment does not apply directly to the states; instead, the due process clause of the Fourteenth Amendment does. However, the clauses mean the same thing. (*Plyler v. Doe* (1982) 457 U.S. 202, 210; *Bolling v. Sharpe* (1954) 347 U.S. 497, 498-499; *United States v. Navarro-Vargas* (9th Cir. 2005) 408 F.3d 1184, 1189.)

The Fifth Amendment right to a grand jury does not apply to the states. (*Hurtado v. California* (1884) 110 U.S. 516, 538.) But the state must provide for a probable cause hearing in criminal cases. (*Coleman v. Alabama* (1970) 399 U.S. 1; *Gerstein v. Pugh* (1975) 420 U.S. 103, 119-126.) The grand jury clause does not apply to delinquency proceedings. (*Kent v. United States* (1966) 383 U.S. 541, 555.) There is not a right to a probable cause hearing in delinquency cases, but the state must provide a mechanism for the state to show probable cause upon demand. (*Alfredo A. v. Superior Court* (1994) 6 Cal.4th 1212; *Edsel P. v. Superior Court* (1986) 165 Cal.App.3d 763.)

D. SIXTH AMENDMENT

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have

compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

1. Right to Effective Assistance of Counsel

The Sixth Amendment right to counsel applies to the states. (*Powell v. Alabama* (1932) 287 U.S. 45 [death penalty cases]; *Gideon v. Wainwright* (1963) 372 U.S. 335, 340-345 [criminal cases generally].) There is a Sixth Amendment violation only if the defendant is sentenced to jail without having the opportunity to have an attorney. (*Scott v. Illinois* (1979) 440 U.S. 367, 373-374; *Argersinger v. Hamlin* (1972) 407 U.S. 25, 37.)

The Sixth Amendment applies only in criminal cases. (*People v. Madeyski* (2001) 94 Cal.App.4th 659, 664 [no right to appointed counsel in civil forfeiture proceeding]; *Archeta v. Superior Court* (1999) 70 Cal.App.4th 1500, 1514-1515 [no right to appointed counsel to oppose anti-gang injunction].) A minor has a due process right to counsel in delinquency cases. (*In re Gault* (1966) 387 U.S. 1, 34-35.)

The defendant has the right under the Sixth Amendment to waive counsel in the trial court. (*Faretta v. California* (1975) 422 U.S. 806, 818.) California recognizes that a defendant has a right to a hearing whether he has competent counsel. (*People v. Marsden* (1970) 2 Cal.3d 118.) The United States Supreme Court has never considered a *Marsden* hearing or anything similar to it. Nonetheless, the claim can be federalized. As the California Supreme Court noted: " 'The denial of a motion to substitute counsel implicates the defendant's Sixth Amendment right to counsel . . . . ' (*Bland v. California Dept. of Corrections* (9th Cir. 1994) 20 F.3d 1469, 1475, overruled on other grounds in *Schell v. Witek* (9th Cir. 2000) 218 F.3d 1017, 1024-1025 (en banc); see *People v. Hart* [(1999)] 20 Cal.4th [546,] 603.) On direct review of the refusal to substitute counsel, the Ninth Circuit Court of Appeals considers 'the following three factors: "(1) timeliness of the motion; (2) adequacy of the court's inquiry into the defendant's complaint; and (3) whether the conflict between the defendant and his attorney was so great that it resulted in a total lack of communication preventing an adequate defense." ' (*Bland v. California Dept. of Corrections, supra*, at p. 1275; see *Schell v. Witek, supra,* at pp. 1024-1025.) It found, and we agree, that these elements are consistent with California law under *People v. Marsden* [(1970)] 2 Cal.3d 118 and its progeny. (*Bland v. California Dept. of Corrections, supra*, at pp. 1475-1476.)" (*People v. Smith* (2003) 30 Cal.4th 581, 606, emphasis omitted.)

The Sixth Amendment only applies "at or after the time that judicial proceedings have been initiated . . . 'whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.' " (*Brewer v. Williams* (1977) 430 U.S. 391,

398, quoting *Kirby v. Illinois* (1972) 406 U.S. 682, 689; *United States v. Gouveia* (1974) 467 U.S. 180, 188; *People v. Slayton* (2001) 26 Cal.4th 1076, 1079.) Thus, there is no Sixth Amendment right to counsel at a custodial interrogation before charges have been filed; this is analyzed under the due process clause.

Once charges have been filed, the Sixth Amendment right to counsel does not apply to every event. A defendant has a federal constitutional right to counsel at a critical stage in a criminal proceeding where substantial rights of the accused may be at stake. (*Kirby v. Illinois* (1972) 406 U.S. 682, 690.)

The Sixth Amendment ceases to apply when the criminal case in the trial court ends. Thus, there is not a Sixth Amendment right to counsel on appeal. (*Martinez v. State of California* (2000) 528 U.S. 152, 155.) On appeal, there is a due process and equal protection right to counsel, which is almost the same as the Sixth Amendment right. (*Halbert v. Michigan* (2005) 545 U.S. 605, 617-624; *Ross v. Moffitt* (1974) 417 U.S. 600, 608-609; *Douglas v. California* (1963) 372 U.S. 349, 358.) Under the due process clause, there is a right to effective assistance of appellate counsel. (*Evitts v. Lucey* (1985) 469 U.S. 387, 396.) The standard is still the *Strickland* test. (*Smith v. Robbins* (2000) 528 U.S. 259, 285-289.) And the complete denial of appellate counsel will automatically lead to reversal. (*Penson v. Ohio* (1988) 488 U.S. 75, 82.) Because a *Faretta* right is a Sixth Amendment right, there is no right to self-representation on appeal. (*Martinez,* at p. 155.)

There is no federal constitutional right to counsel on collateral review. (*Ross v. Moffitt* (1974) 417 U.S. 600, 616.) Thus, there is generally no such thing as ineffective assistance of habeas counsel. (*Smith v. Idaho* (9th Cir. 2004) 392 F.3d 350, 357.) However, there is a constitutional right to effective assistance of counsel on collateral review if the only means of bringing a claim is by collateral review. (*Martinez v. Ryan* (2012) 565 U.S. 1, 16; see also *Trevino v. Thaler* (2013) 569 U.S. 413, 424-428; *Detrich v. Ryan* (9th Cir. 2013) 740 F.3d 1237, 1244 (en banc plur opn.).) State law provides an indigent petitioner is entitled to appointed counsel on a state habeas petition if the court grants an order to show cause. (See *In re Clark* (1993) 5 Cal.4th 750, 780, superseded by statute on other grounds as stated in *Briggs v. Brown* (2017) 3 Cal.5th 808, 842.) There is also a statutory right to counsel in capital habeas proceedings. (Pen. Code, § 1509, subd. (b).)

A person in a civil commitment proceeding has a due process right to counsel. (*Vitek v. Jones* (1980) 445 U.S. 480, 497.) Thus, there is not a Sixth Amendment right to self-representation. (*People v. Fraser* (2006) 138 Cal.App.4th 1430, 1466 [no constitutional right to self-representation in SVP cases]; *People v. Williams* (2003) 110

Cal.App.4th 1577, 1590, 1592-1593 [only a statutory right, so review denial of motion for self-representation for abuse of discretion for prejudice under *Watson*]; see *Conservatorship of Joel E.* (2005) 132 Cal.App.4th 429, 435 [Sixth Amendment does not apply to LPS proceedings].) Other courts have assumed without discussion there is a right to self-representation in civil commitment proceedings. (*People v. Wolozon* (1982) 138 Cal.App.3d 456, 460 [NGI extension].) It is not clear if the defendant has the same right to effective assistance of counsel. (See *People v. Leonard* (2000) 78 Cal.App.4th 776, 784 [assumed in SVP case]; *Woodward v. Mayberg* (N.D. Cal. 2003) 242 F.Supp.2d 695, 707 [assuming without analysis the right to effective assistance of counsel at an SVP commitment].)

There might be a due process right to counsel when the patient is allegedly so incompetent as to not be able to look after his or her legal interests. (See, e.g., *People v. Jenan* (2007) 148 Cal.App.4th 1144, 1164-1165 [the court was required to appoint counsel and begin competency proceeding when it expressed doubt whether a pro per defendant was competent]; *Conservatorship of Joel E., supra,* 132 Cal.App.4th at p. 439 [due process right to appointed counsel in conservatorship proceedings]; cf. *Godinez v. Moran* (1993) 509 U.S. 389, 400-401 [a criminal defendant would cease to have a right to represent himself in criminal cases if found incompetent].)

There is a due process right to counsel in some dependency cases. (*Lassiter v. Department of Social Services* (1981) 452 U.S. 18, 31-32.) There is also a statutory right to effective assistance of counsel in dependency cases. (Welf. & Inst. Code, § 317.5.) But it is not clear if the court should apply the *Strickland* standard or *Watson* standard of prejudice. (See *In re Kristin H.* (1996) 46 Cal.App.4th 1635, 1668.) It is not clear if the two standards are significantly different. (See *People v. Howard* (1987) 190 Cal.App.3d 41, 47-48 & fn. 4 [discussing how the two tests are similarly worded and might mean the same thing].)

The Supreme Court decided the *Wende* procedure does not apply to conservatorship appeals. (*Conservatorship of Ben C.* (2007) 40 Cal.4th 529, 538 .) The *Ben C.* has been extended to NGI restoration proceedings (*People v. Dobson* (2008) 161 Cal.App.4th 1422, 1437-1438), NGI extension trials (*People v. Martinez* (2016) 246 Cal.App.4th 1226, 1239-1240), MDO appeals (*People v. Taylor* (2008) 162 Cal.App.4th 304, 312-313), SVP appeals (*People v. Kisling* (2015) 239 Cal.App.4th 288, 290-292), and appeals from being found incompetent to stand trial (*People v. Blanchard* (2019) 43 Cal.App.4th 1020, 1025-1026). *Wende* does not apply in dependency cases and in appeals from the termination of parental rights. (*In re Sade C.* (1996) 13 Cal.4th 952, 982; *Ronald S. v. Superior Court* (1995) 34 Cal.App.4th 1467, 1468-1469; *Adoption of*

Chad T. (1995) 39 Cal.App.4th 1107, 1108-1109.) The *Wende* procedure applies in delinquency cases. (*In re Kevin S.* (2003) 113 Cal.App.4th 97, 117-118.)

2. Confrontation

The Sixth Amendment right to confront witnesses applies to the states. (*Pointer v. Texas* (1965) 380 U.S. 400, 403-406; *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 678.) The right to confrontation includes the defendant's right to: (1) face-to-face confrontation, (2) oath, (3) cross-examination, and (4) observation by the jury of the witness's demeanor. (*Maryland v. Craig* (1990) 497 U.S. 836, 845-846; *Coy v. Iowa* (1988) 487 U.S. 1012, 1016; *People v. Johns* (1997) 56 Cal.App.4th 550, 554.)

It applies only in criminal cases. A minor has a due process right to confront witnesses in the jurisdictional hearing of a delinquency case. (See *In re Gault* (1966) 387 U.S. 1, 56-57.) Otherwise, there is at most a due process in civil cases where a liberty interest exists. (*Vitek v. Jones* (1980) 445 U.S. 480, 494-497 [commitment proceedings]; *People v. Otto* (2001) 26 Cal.4th 200, 214 [SVP cases]; *In re Melinda S.* (1990) 51 Cal.3d 368, 383 & fn. 13 [dependency cases].) Some commitment statutes state that the defendant has the same rights as in criminal proceedings. (See, e.g., Pen. Code, § 1026.5, subd. (b)(7) [NGI extension]; Welf. & Inst. Code, § 1801.5 [juvenile commitment extension].) Note that the sanity phase is part of a criminal trial to determine if the defendant is not guilty by reason of insanity. (*People v. Hernandez* (2000) 22 Cal.4th 512, 520-521.)

The Sixth Amendment right to confrontation applies only at trial. (*People v. Miranda* (2000) 23 Cal.4th 340, 352-353.) It does not apply to preliminary hearings (*ibid.*), motions to suppress evidence (*United States v. Matlock* (1974) 415 U.S. 164, 172-173; *People v. Navarro* (2006) 138 Cal.App.4th 146, 161, fn. 10), pretrial hearings (*Kentucky v. Spencer* (1987) 482 U.S. 730, 740), or motions in limine (*People v. Jones* (2003) 29 Cal.4th 1229, 1251). It does not apply at sentencing (*Williams v. Oklahoma* (1958) 358 U.S. 576, 584; *Williams v. New York* (1949) 337 U.S. 211, 246; *People v. Arbuckle* (1978) 22 Cal.3d 749, 754 ["the Sixth Amendment right of confrontation inapplicable at the sentencing stage of a criminal prosecution"]; *United States v. Hall* (9th Cir. 2005) 419 F.3d 980, 985 [*Crawford v. Washington* (2004) 541 U.S. 36 does not apply at sentencing]), but there is a due process right to have the court consider only reliable information (*United States v. Tucker* (1972) 404 U.S. 443, 447). Some courts have commented that there might not be a Sixth Amendment right to confrontation in the penalty phase of a capital trial. (See, e.g., *People v. Sapp* (2003) 31 Cal.4th 240, 291.) The Sixth Amendment right to confrontation does not apply to probation revocation hearings, but there is a weaker due process right. (*Black v. Romano* (1985) 471 U.S. 606,

611-612; *Gagnon v. Scareplli* (1973) 411 U.S. 778, 790; *People v. Arreola* (1994) 7 Cal.4th 1144, 1156-1159.)

In *People v. Sanchez* (2016) 63 Cal.4th 665, the court decided that an expert generally cannot testify about case-specific facts because, in part, it could violate the confrontation clause. (*Id.* at pp. 681-685.) However, even when the evidence is not testimonial or is being admitted in a situation that is not a criminal trial, the testimony is still hearsay. (*Id.* at pp. 676-677.)

In criminal cases, the right to confrontation under the state constitution is no broader than the federal constitutional right. (See Cal. Const., art. I, § 28(f)(2); *People v. Fletcher* (1996) 13 Cal.4th 451, 465.)

3. Right to Present a Defense

The Sixth Amendment right to compel the attendance of witnesses applies to the states. (*Washington v. Texas* (1967) 388 U.S. 14, 19.)

A minor has the due process right to compel the attendance of witnesses in juvenile delinquency proceedings. (See, e.g., *In re Thomas F.* (2003) 113 Cal.App.4th 1249, 1255; see generally *In re Gault* (1966) 387 U.S. 1, 56-57.)

The Sixth Amendment only applies in criminal proceedings. Under the due process clause of the Fourteenth Amendment, there is a right to present a defense in a violation of probation hearing. (*Black v. Romano* (1985) 471 U.S. 606, 611-612.)

Under the due process clause of the Fourteenth Amendment, there is right to be heard, which includes a right to a contested hearing as provided by statute. (*Vitek v. Jones* (1980) 445 U.S. 480, 494-497 [commitment proceedings]; *David B. v. Superior Court* (2006) 140 Cal.App.4th 772, 777-780 [dependency proceedings]; but see *In re Earl L.* (2004) 121 Cal.App.4th 1050, 1053 [the court can deny a hearing on the termination of parental rights if the parent fails to make an adequate offer of proof].)

4. Right to a Speedy Trial

The Sixth Amendment right to a speedy trial applies to the states. (*Klopfer v. North Carolina* (1967) 386 U.S. 213, 222-223.)

The Sixth Amendment right to a speedy trial starts only after criminal proceedings have begun. (*United States v. Marion* (1971) 404 U.S. 307, 320; *People v. Martinez*

(2000) 22 Cal.4th 750, 754-755, 761-764.) California courts interpret the beginning of a felony proceeding with the filing of the indictment or information, not the filing of a felony complaint. (*People v. Horning* (2004) 34 Cal.4th 871, 891-892; *People v. Hannon* (1977) 19 Cal.3d 588, 605-606.)

California's constitutional right to a speedy trial (art. I, § 15) is triggered upon the filing of the felony complaint. (*Martinez, supra,* 22 Cal.4th at pp. 754, 765; *Hannon, supra,* 19 Cal.3d at pp. 607-608.)

There is a due process right to a speedy trial under the Fourteenth Amendment that applies before the filing of the information or indictment. (*United States v. Marion* (1971) 404 U.S. 307, 324; *Martinez, supra,* 22 Cal.4th at p. 765.) There are also statutory rights to a speedy trial, and there are the statutes of limitations.

There is arguably no constitutional right to a speedy trial in some civil commitment proceedings. Statutory deadlines generally are not mandatory. (*People v. Noble* (2002) 100 Cal.App.4th 184, 188; *People v. Williams* (1999) 177 Cal.App.4th 436, 451; *People v. Fernandez* (1999) 7 Cal.App.4th 117, 130; but see *Zachary v. Superior Court* (1997) 57 Cal.App.4th 1026 [dismiss MDO action when recommitment petition filed after commitment ended]; *Litmon v. Superior Court* (2005) 123 Cal.App.4th 1156, 1174-1176 [extended delays in SVP trial violated due process].) There are no statutory deadlines for SVP cases. (*People v. Evans* (2005) 132 Cal.App.4th 950, 955-957 [cannot dismiss an SVP for failing to prosecute within time limits set in Code Civ. Proc.].)

5. Right to jury trial

The Sixth Amendment right to a jury trial applies to the states. (*Duncan v. Louisiana* (1968) 391 U.S. 145.) It does not apply to delinquency proceedings. (*McKeiver v. Pennsylvania* (1971) 403 U.S. 528, 545 (plur. opn.).)

The Sixth Amendment does not apply to civil proceedings. The Seventh Amendment right to jury trial in civil law cases does not apply to the states. (*Dohany v. Rogers* (1930) 281 U.S. 363, 369; *Walker v. Sauvinet* (1875) 92 U.S. 90, 92; *R. J. Reynolds Tobacco Co. v. Shewry* (9th Cir. 2004) 384 F.3d 1126, 1141-1142.) And it would not apply to special proceedings in any event. In California, there is a statutory right to a jury trial in LPS cases (Welf. & Inst. Code, § 5350, subd. (d)), MDO cases (Pen. Code, §§ 2966, 2972, subd. (a)), SVP cases (Welf. & Inst. Code, § 6604), NGI extensions (Pen. Code, § 1026.5, subd. (b)(5)) and incompetent to stand trial proceedings (Pen. Code, § 1369). Under the equal protection clause, there is a right to a jury trial in

proceedings to commit a person as mentally disabled. (*In re Hop* (1981) 29 Cal.3d 82, 93.)

Similarly, there is a statutory right in some commitment schemes requiring the defendant to personally waive the right to a jury. (See, e.g., *People v. Blackburn* (2015) 61 Cal.4th 1113, 1125-1131 [MDO]; *People v. Tran* (2015) 61 Cal.4th 1160, 1166-1168 [NGI extension].) However, the attorney can waive jury trial if there is substantial evidence to support a doubt the defendant has the capacity to make the decision. (*Blackburn,* at pp. 1129-1130; *Tran*, at p. 1166-1168.) A similar right has been extended by some courts to LPS proceedings. (*Conservtorship of Heather W.* (2016) 245 Cal.App.4th 378, 382-384; *Conservatorship of Kevin A.* (2015) 240 Cal.App.4th 1241, 1249-1252; but see *Conservatorship of John L.* (2010) 48 Cal.4th 131, 155 [the Supreme Court deciding before *Blackburn* that counsel could waive jury trial].) Because a defendant in a Penal Code section 1368 proceeding is allegedly incompetent, trial counsel retains the authority to waive jury trial without the defendant's approval. (*People v. D'Arcy* (2010) 48 Cal.4th 257, 281-283; *People v. Masterson* (1994) 8 Cal.4th 965, 969.)

Since commitment proceedings are civil, there are only six peremptory challenges of prospective jurors. (*People v. Sanchez* (1995) 10 Cal.4th 764, 807 [competency]; *People v. Calhoun* (2004) 118 Cal.App.4th 519, 523-524 [SVP]; *Conservatorship of Gordon* (1989) 209 Cal.App.3d 364, 368-369 [LPS].)

Penal Code section 1259, preserving certain instructional errors in criminal cases, does not automatically apply in civil cases such a commitment proceedings. It has been applied to MDO commitments and extensions. (*People v. Noble* (2002) 100 Cal.App.4th 184, 189; *People v. Collins* (1992) 1 Cal.App.4th 690, 695.) In civil cases, the defendant is deemed to have excepted to court "giving an instruction, refusing to give an instruction, or modifying an instruction requested . . . . " (Code Civ. Proc, § 647; *Suman v. BMW of North America, Inc.* (1994) 23 Cal.App.4th 1, 9; *Chapman v. Enos* (2004) 116 Cal.App.4th 920, 927-928; *National Medical Transportation Network v. Deloitte & Touche* (1998) 62 Cal.App.4th 412, 428.) This is similar to the language in Penal Code section 1259.

In civil trials, such as commitment proceedings, there is not the same constitutional requirement for the court to instruct sua sponte on certain points of law. There is, however, a sua sponte responsibility to properly instruct on the elements of a civil commitment: " 'Even in the absence of a request, a trial court must instruct on general principles of law and that are . . . necessary to the jury's understanding of the case.' " (*People v. Roberge* (2003) 29 Cal.4th 979, 988.)

The *Chapman* standard of prejudice applies to instructional error in commitment proceedings where the element of the commitment standard is misstated or omitted. (*In re Howard N.* (2005) 35 Cal.4th 117, 137 [omit an element in juvenile commitment]; *People v. Roberg* (2003) 29 Cal.4th 979, 989 [SVP]; *People v. Johnwell* (2004) 121 Cal.App.4th 1267, 1274-1278 [competency trial]; *People v. Noble* (2002) 100 Cal.App.4th 184, 191 [misinstruct on elements and burden of proof of MDO]; *Conservatorship of Buchanan* (1978) 78 Cal.3d 241, 288. disapproved on other grounds in *Conservatorship of Early* (1983) 35 Cal.3d 244, 255; but see *People v. Marks* (2003) 31 Cal.4th 197, 222 [error in competency instruction that was not constitutionally based]; *People v. Cossgrove* (2002) 100 Cal.App.4th 1266, 1273-1276 [directed verdict in MDO trial].)

Juror misconduct in civil cases exists. (See, e.g., *Province v. Center for Women's Health & Family Birth* (1993) 20 Cal.App.4th 1673, 1679-1680 [reversal in civil case from juror reading newspapers and discussing it at deliberations]; *Rinker v. County of Napa* (9th Cir. 1983) 727 F.2d 1352, 1354.) But, at most, it is a due process violation.

The state constitutional right jury trial (art. I, § 16) is broader than the federal provision. (See, e.g., *People v. Nesler* (1997) 16 Cal.4th 561, 578-582 [under California law, there is a rebuttable presumption of prejudice if juror misconduct has been shown]; *People v. Ernst* (1994) 8 Cal.4th 441, 444, 448 [waiver of right to jury requires personal waiver by a criminal defendant]; *Tracy v. Municipal Court* (1978) 22 Cal.3d 760 [right to jury in misdemeanor cases].) The constitutional ban on removing prospective jurors because of race or gender applies in civil cases. (*Edmonson v. Leesvilee Concrete Co., Inc.* (1991) 500 U.S. 614.)

6. Miscellaneous Provisions

The Sixth Amendment right to public trial applies to the states. (*In re Oliver* (1948) 333 U.S. 257.) It does not apply to juvenile proceedings. (See Welf. & Inst. Code, § 827; *Lorenzo P. v. Superior Court* (1988) 197 Cal.App.3d 607; *T.N.G. v. Superior Court* (1971) 4 Cal.3d 767.) The Sixth Amendment applies to criminal cases. There is a First Amendment right for the public to have access to court proceedings unless there is a need for confidentiality. (*Globe Newspaper Co. v. Superior Court* (1982) 457 U.S. 596, 606-607; *NBC Subsidiary v. Superior Court* (1999) 20 Cal.4th 1178, 1216-1218.)

The Sixth Amendment right to vicinage has not been applied to the states. (*Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069; *Zicarelli v. Dietz* (3d Cir. 1980) 633 F.2d 312, 620-326; see *Stevenson v. Lewis* (9th Cir. 2004) 384 F.3d 1069, 1071.)

E. EIGHTH AMENDMENT

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." (U.S. Const., 8th Amend.)

1. Right to Bail

The defendant's right to be free from unreasonable restraint after the court finds probable cause is under the right to a speedy trial and the right to bail under the state constitution. The United States Supreme Court has never held the right to bail under the Eighth Amendment applied to the states, although the Supreme Court once assumed it did. (See *Scilb v. Kuebel* (1971) 404 U.S. 357, 365.) There is no right to bail in delinquency proceedings. (See *Kent v. United States* (1966) 383 U.S. 541, 555.) It is not clear which constitutional provision applies to pretrial conditions of custody. (Compare *Demery v. Arpaio* (9th Cir. 2004) 378 F.3d 1020, 1028-1029 [use Fourth Amendment] with *Lolli v. County of Orange* (9th Cir. 2003) 351 F.3d 410, 418-419 [failure to provide medical care for inmate before trial is a due process claim though the analysis is the same as an Eighth Amendment claim].)

2. Cruel and Unusual Punishment

After sentencing, the defendant's right to reasonable prison conditions and against excessive punishment is under the Eighth Amendment. The cruel and unusual punishment clause does apply to the states. (*Robinson v. California* (1962) 370 U.S. 660.)

Cases that would grant a defendant relief from cruel and unusual punishment can apply retroactively on collateral attack because the current punishment constitutes a constitutional violation. (*Montgomery v. Louisiana* (2016) __ U.S. __ [136 S.Ct. 718, 729-730].)

When the person remains in custody after the court's judgment of confinement is over, there is a due process claim. "[A] detainee has a 'constitutional right to be free from continued detention after it was or should have been known that the detainee was entitled to release' " (*Lee v. City of Los Angeles* (9th Cir. 2001) 250 F.3d 668, 683.) Thus, "there is a substantial due process right to release within a reasonable amount of time after law enforcement officials learn that a detainee is innocent of the charges on which he was detained." (*Jiminez v. County of Los Angeles* (2005) 130 Cal.App.4th 133, 139; *Pennington v. Hobson* (S.D. Ind. 1989) 719 F.Supp. 760, 779.)

The Eighth Amendment applies only to those being punished after being convicted of a crime. (*Whitley v. Albers* (1986) 475 U.S. 312, 318; *Bell v. Wolfish* (1979) 441 U.S. 520, 535; *Ingraham v. Wright* (1970) 430 U.S. 651, 671-672, fn. 40 [not apply to school corporal punishment].) Punishment under the Eighth Amendment requires the burden of the disability be imposed as a consequence of a law violation and the intent of the legislature is that the burden be punishment or the burden has no other legitimate aim. (*Uphaus v. Wyman* (1959) 360 U.S. 72, 81-82 [civil contempt issued during investigation of subversive activities was not punishment].)

Because mental health patients are not convicted of crimes, the circumstances of their confinement are reviewed under the due process clause of the Fourteenth Amendment, not the cruel and unusual punishment clause of the Eighth Amendment, but the protection is at least as great as the Eighth Amendment right. (*City of Revere v. Mass. Gen. Hosp.* (1983) 463 U.S. 239, 244; *Oregon Advocacy Center v. Mink* (9th Cir. 2003) 322 F.3d 1101, 1120; see also *Hyrdick v. Hunter* (9th Cir. 2006) 466 F.3d 676, 695.) Under the due process clause, the state must release the patient when the commitment ends or the dangerousness ceases. (*McNeil v. Director, Patuxent Institution* (1972) 407 U.S. 245, 246, 252 [commitment expired]; *Jackson v. Indiana* (1972) 406 U.S. 715, 724 [cannot hold an incompetent defendant indefinitely without showing dangerousness from mental illness]; but see *People v. Amonson* (2003) 114 Cal.App.4th 463, 466-467 [can require certain people to have at least 180 days of in-patient treatment].)

California recognizes that a punishment which is disproportionate to the crime may violate the state's constitutional prohibition on "cruel or unusual" punishment. (Cal. Const., art. I, § 17.) Thus, "it is construed separately from the federal prohibition against cruel and unusual punishment." (*People v. Carmony* (2005) 127 Cal.App.4th 1066, 1085; accord, *Raven v. Deukmejian* (1990) 52 Cal.3d 336, 355; *People v. Cartwright* (1995) 39 Cal.App.4th 1123, 1135-1136.)

3. Excessive Fines

"The Excessive Fines Clause limits the government's power to extract payments, whether in cash or in kind, 'as *punishment* for some offense' " (*Austin v. United States* (1993) 500 U.S. 602, 609-610, quoting *Browning-Ferris v. Kelco Disposal* (1989) 492 U.S. 257, 265; accord *Dept. of Revenue v. Kurth Ranch* (1994) 511 U.S. 767, 778.) The Eighth Amendment ban on against excessive fines applies to the states. (*Timbs v. Indiana* (2019) 139 S.Ct. 682, 689.) It also applies to civil forfeitures to the extent that it is "punitive." (*Austin v. United States* (1993) 509 U.S. 602, 309-610; *United States v. Halper* (1989) 490 U.S. 435, 448 ["civil penalties"].) It applies to civil penalties levied

by the state. (*People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.* (2005) 37 Cal.4th 707, 728.)

Once it is determined that a civil forfeiture is at least in part "punitive," a court must invalidate it if it is "grossly disproportional to the gravity of [the] defendant's offense." (*United States v. Bajakajian* (1998) 524 U.S. 321, 334.) "The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish." (*Ibid.*) In weighing the gravity of the defendant's offense, the court shall consider (1) the nature and extent of the crime, (2) whether the violation was related to other illegal activities, (3) the other penalties that may be imposed for the violation, and (4) the extent of the harm caused. (*Id.*, at pp. 337-340.) "*Bajakajian* adopted a *gross disproportionality* standard articulated in cruel and unusual punishment clause precedent to hold that a reviewing court 'must compare the amount of the forfeiture to the gravity of the defendant's offense. If the amount of the forfeiture is grossly disproportional to the gravity of the defendant's offense, it is unconstitutional.' " (*City and County of San Francisco v. Sainez* (2000) 77 Cal.App.4th 1302. 1322, quoting *Bajakajian, supra,* at pp. 336-337.)

Levying fines and fees, and collecting a restitution fine when the defendant lacks the ability to pay might violate due process. (*People v. Dueñas* (2019) 30 Cal.App.5th 1157, 1164; but see *People v. Adams* (2020) 44 Cal.App.5th 828, 829.) This matter is currently on review. (*People v. Kopp* (2019) 38 Cal.App.5th 47, review granted Nov. 13, 2019, S257844.)

F. FOURTEENTH AMENDMENT

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (U.S. Const., 14th Amend., § 1)

1. Due Process

The due process clause of the Fifth Amendment does not apply directly to the states; instead, the due process clause of the Fourteenth Amendment does. However, the clauses mean the same thing. (*Plyler v. Doe* (1982) 457 U.S. 202, 210; *Bolling v. Sharpe*

(1954) 347 U.S. 497, 498-499; *United States v. Navarro-Vargas* (9th Cir. 2005) 408 F.3d 1184, 1189.)

A claim that there was not substantial evidence can be raised in a civil appeal without an objection below. (*Tahoe National Bank v. Phillips* (1971) 4 Cal.3d 11, 23, fn. 17; *First Nat. Bank v. Maryland Cas. Co.* (1912) 162 Cal. 61, 72-73; *In re Brian P.* (2002) 99 Cal.App.4th 616, 623 [dependency].)

The most basic due process rights are the right to notice, an opportunity to be heard, and to be judged by a neutral decision-maker. (See, e.g., *Matthews v. Eldridge* (1976) 424 U.S. 319, 335.)

To determine if a procedure is required by due process, the court must balance the private interest, the government interest, and the risk of mistake in the decision-making process. (*Matthews, supra,* 424 U.S. at p. 335.) "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interests through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interests, including the function involved and the fiscal and administrative burdens that the additional or substituted procedural requirements would entail." (*Ibid.*; see also *Ake v. Oklahoma* (1985) 470 U.S. 68, 76-77; *People v. Otto* (2001) 26 Cal.4th 200 210; *In re Malinda S.* (1990) 51 Cal.3d 376, 383.)

"Our state due process constitutional analysis differs from that conducted pursuant to the federal due process clause in that the claimant need not establish a property or liberty interest as a prerequisite in invoking due process protection." It is " 'much more inclusive' and protects a broader range of interests." (*Ryan v. Cal. Interscholastic Federation-San Diego Section* (2001) 94 Cal.App.4th 1048, 1069; see *People v. Cudjo* (1993) 6 Cal.4th 585, 606-608.) Note there are two due process clauses in the state constitution. Article I, section 15 applies only in criminal cases while article I, section 7 applies in all contexts.

2. Equal Protection

The equal protection clause of the Fourteenth Amendment applies only to the states. The requirement that the federal government not discriminate is part of the due process clause of the Fifth Amendment. (*Bolling v. Sharpe* (1954) 347 U.S. 497, 498-499.)

California's equal protection clauses (Cal. Const., art. I, §§ 7, 31, art. IV, § 16) might be broader than the Fourteenth Amendment. (Compare *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 37 [strict scrutiny for gender discrimination] with *Manduley v. Superior Court* (2002) 27 Cal.4th 537, 571 ["equal protection provisions in the California Constitution 'have been generally thought . . . to be substantially equivalent of the equal protection clause of the Fourteenth Amendment to the United States Constitution.' " (fn. omitted)].)

3. Burden of Proof

The beyond a reasonable doubt standard of the due process clause applies to the states. (*In re Winship* (1970) 397 U.S. 358, 365-367.) It applies in delinquency cases. (*Ibid.*)

In involuntary commitment schemes, the federal constitution requires a finding only by clear and convincing evidence. (*Foucha v. Louisiana* (1992) 504 U.S. 71, 86; *Addington v. Texas* (1979) 441 U.S. 418, 431-433.) California's requirement of proof beyond a reasonable doubt is based on statutes and the state's due process and equal protection clauses. (*Conservatorship of Roulet* (1979) 23 Cal.3d 219, 235 [LPS]; *People v. Thomas* (1977) 19 Cal.3d 630, 644 [CRC]; *People v. Feagley* (1975) 14 Cal.3d 338, 376 [unanimity for MDSO]; *People v. Burnick* (1975) 14 Cal.3d 306, 322 [beyond a reasonable doubt for MDSO].)

When the defendant seeks to be found incompetent or otherwise committed, his or her standard of proof can be no greater than the preponderance of the evidence. (*Medina v California* (1992) 505 U.S. 437; *Cooper v. Oklahoma* (1996) 517 U.S. 348, 355; *People v. Rells* (2000) 22 Cal.4th 860, 865.)

4. Other Due Process Rights

As shown above, many rights we think of as coming from the Bill of Rights is properly asserted under the due process or equal protection clause of the Fourteenth Amendment.

There is not a federal constitutional right to discovery. (*Weatherford v. Bursey* (1977) 429 U.S. 545, 559.) But the defendant does have the right to discovery of exculpatory evidence. (*Kyles v. Whitley* (1995) 514 U.S. 419, 437; *Brady v. Maryland* (1963) 373 U.S. 83, 87.) Further, denying a defendant access to critical information that could impeach a key prosecution witness could result in the violation of the right to

confrontation and to due process. (*Pennsylvania v. Ritchie* (1987) 480 U.S. 39, 55-58; *Davis v. Alaska* (1974) 415 U.S. 308, 315-320.)

The Civil Discovery Act (Code Civ. Proc, § 2016 et seq.), not Penal Code section 1054 et seq., applies to discovery in civil commitment cases. (*In re Gary W.* (1971) 5 Cal.3d 296, 302, 309; *Centeno v. Superior Court* (2004) 117 Cal.App.4th 30, 40-46 [competency]; *Baqleh v. Superior Court* (2002) 100 Cal.App.4th 478, 489-493 [competency]; *People v. Superior Court (Cheek)* (2001) 94 Cal.App.4th 980, 987, 996 [SVP]; *Leake v. Superior Court* (2001) 87 Cal.App.4th 675, 679.) By the same token, the truth-in-evidence clause in the California Constitution (art. I, § 28(f)(2)) applies to criminal and juvenile cases and should not be applied to other contexts.

Prosecutorial or attorney misconduct can exist in civil cases, but only to the extent it violates a civil right, such as the right to a fair jury trial. (See, e.g. *Cassim v. All-State Ins. Co.* (2004) 33 Cal.4th 780, 796-798; *Sabella v. So. Pac. Co.* (1969) 70 Cal.2d 311, 319-320.)