AEDPA: WHY BOTHER FEDERALIZING?

A. INTRODUCTION

In 1996 Congress passed the Anti-Terrorist and Effective Death Penalty Act ("AEDPA"). The stated purpose of the parts of the bill relevant to our practice was to stop convicted criminals from thwarting justice and avoiding punishment by filing endless frivolous appeals in federal court.[1] In the years since 1996 the Supreme Court has issued opinions which have progressively narrowed the scope of federal review of state court decisions. Increasingly, one may wonder what purpose is served by federalizing issues we argue in state court. Despite the difficulty of obtaining any relief in federal court after a state court rejects meritorious arguments and affirms convictions and sentences, we should continue to make every effort to federalize our claims. It gives our clients another chance to obtain relief, and it provides them some hope while serving long sentences.

B. THE HABEAS LIMITATION IN AEDPA

The AEDPA bill was introduced by former Senate Majority Leader Bob Dole following the 1990s World Trade Center and Oklahoma City bombings. It passed with broad bipartisan support by Congress (91-8-1 in the United States Senate, 293-133-7 in the House of Representatives), and was signed into law by President Bill Clinton. The act did address restitution for victims of terrorism, prohibited any assistance to terrorist states, excluded all terrorists from entry into the United States, added restrictions to nuclear materials and biological and chemical weapons, and other matters. However, what's important to us is the provision found in 28 U.S.C § 2254(d), which states:

> "An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

[1] Since our clients are in prison while pursuing these appeals, it's not clear how filing a federal habeas thwarts justice or avoids punishment.

> "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> "(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

According to Senator Arlen Specter, one of the bill's sponsors, "Under the bill deference will be owed to State courts' decisions on the application of Federal law to the facts. Unless it is unreasonable, a State court's decision applying the law to the facts will be upheld." (141 CONG. REC. S7847 (daily ed. June 7, 1995) (statement of Sen. Specter).)

C. THE AEDPA STANDARD

Under AEDPA, federal habeas corpus functions as a "'"guard against extreme malfunctions in the state criminal justice systems"' and not as a means of error correction." (*Greene v. Fisher* (2011) 132 S. Ct. 38, 43; 181 L. Ed. 2d 336, 341.)

The AEDPA standard is "difficult to meet," (*Harrington v. Richter* (2011) 562 U.S. ___, ___, [131 S. Ct. 770, 178 L. Ed. 2d 624, 641].) It is a "highly deferential standard" which "demands that state-court decisions be given the benefit of the doubt." (*Woodford v. Visciotti* (2002) 537 U.S. 19, 24.) A habeas petitioner must show "there was no reasonable basis for the state court to deny relief." (*Harrington v. Richter*, *supra*, ___ U.S. ___, ___, [131 S. Ct. 770, 784; 178 L. Ed. 2d 624.)

D. LIMITATIONS ON HABEAS REVIEW UNDER AEDPA

Since AEDPA was passed, and particularly since 2000, the Supreme Court has interpreted § 2254(d) to increasingly limit the scope of federal review in cases involving state convictions. Year after year, the hope of obtaining federal habeas relief dims. As described in the following 8 sections, the Supreme Court takes every chance it gets to further limit federal review of state court convictions.

1. "CONTRARY TO" IS VERY LIMITED

"The word 'contrary' is commonly understood to mean 'diametrically different,' 'opposite in character or nature,' or 'mutually opposed.'" (*Williams v. Taylor* (2000), 529 U.S. 362, 405.) A state-court decision is contrary to clearly established Supreme Court precedent if "the state court applies a rule that contradicts the governing law set forth in [those] cases." (*Ibid*.)

For example, if a state court rejects an IAC claim on the basis the petitioner had not established *by a preponderance of the evidence* that the result of his trial would have been different, "that decision would be 'diametrically different,' 'opposite in character or nature,' and 'mutually opposed' to our clearly established precedent" because *Strickland v. Washington* (1984) 466 U.S. 668 held a person claiming IAC only needs to establish a "reasonable probability that . . . the result of the proceeding would have been different." (*Id*. at pp. 405-406.)

A state decision is also "contrary to" controlling precedent "if the state court confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent." (*Id*. at p. 406.)

2. "UNREASONABLE" MEANS NO FAIRMINDED JURIST COULD DISAGREE

Since "contrary to" has such a limited meaning, most federal habeas claims are based on the contention the state court decision is an unreasonable application of controlling precedent. However, the Supreme Court's interpretation of "unreasonable" makes it difficult, though not impossible, to obtain federal habeas relief. A state court decision is "unreasonable" under AEDPA only if "there is no possibility fairminded jurists could disagree that the state court's decision conflicts with this Court's precedents." (*Harrington v. Richter* (2011) ___ U.S. ___, ___ [131 S.Ct. 770, 786].)

You can argue a state court decision is an unreasonable application of controlling precedent in two

ways: “First, a state-court decision involves an unreasonable application of this Court's precedent if the state court identifies the correct governing legal rule from this Court's cases but unreasonably applies it to the facts of the particular state prisoner's case. Second, a state-court decision also involves an unreasonable application of this Court's precedent if the state court either unreasonably extends a legal principle from our precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply.” (*Williams v. Taylor, supra,* 529 U.S. at p. 407.)

3. INSUFFICIENT EVIDENCE CLAIMS UNDER AEDPA

The federal test for evaluating insufficient evidence claims is stated in *Jackson v. Virginia* (1979) 443 U.S. 307, 319: “[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.”

However, on federal habeas review you do not apply that test. Rather, the standard is whether the state court’s conclusion a rational trier of fact could have found all elements proven beyond a reasonable doubt was “objectively unreasonable.” (*Cavazos v. Smith* (2011) ___ U.S. ___, ___ [132 S. Ct. 2, 3; 181 L. Ed. 2d 311, 313].)

This could be called the unreasonable^2 (“unreasonable squared”) test.

4. INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS UNDER AEDPA

The federal test for evaluating ineffective assistance of counsel claims is stated in *Strickland* v. *Washington* (1984) 466 U.S. 668. A petitioner must first show that counsel’s representation was deficient in falling below an objective standard of reasonableness under prevailing professional norms. (*Id.* at p. 687.) He must then establish that there is a reasonable probability the outcome would have been different if his attorney had not committed the claimed unprofessional error. (*Id*., at pp. 693-94.) “A reasonable probability is a probability sufficient to undermine confidence in the

outcome." (*Strickland, supra,* at p. 694.)

The Supreme Court has made clear federal courts must guard against the danger of equating unreasonableness under *Strickland* with unreasonableness under § 2254(d). "Surmounting *Strickland*'s high bar is never an easy task." (*Padilla v. Kentucky* (2010) 559 U.S. ___, ___, 559 U.S. 356, 130 S. Ct. 1473, 1485, 176 L. Ed. 2d 284, 297. "Establishing that a state court's application of Strickland was unreasonable under § 2254(d) is all the more difficult." (*Harrington v. Richter*, at p. 788.) When § 2254(d) applies, the question is not whether counsel's actions were unreasonable. The question is whether there is any reasonable argument to reject the finding counsel acted unreasonably. (*Harrington v. Richter*, at 708.)

As with a sufficiency claim, the test is unreasonable[2] ("unreasonable squared").. That is, not only must you prove counsel acted unreasonably, you must establish the state court's rejection of that claim was also unreasonable.

5. REVIEW IS LIMITED TO SUPREME COURT OPINIONS AS OF THE DATE THE STATE COURT REJECTS THE CLAIM

If the U.S. Supreme Court decides a case which supports your claim *after* the state appeal is decided, that new case will not be considered under AEDPA review. This is because "clearly established Federal law, as determined by the Supreme Court of the United States" includes only U.S. Supreme Court decisions as of the time of the state-court adjudication on the merits. (*Greene v. Fisher* (2011) 132 S.Ct. 38, 45, 181 L. Ed. 2d 336.)

Therefore, a Supreme Court opinion issued after review is denied cannot be used to argue the state court's decision was contrary to, or an unreasonable application of, controlling United States Supreme Court precedent.

6. LIMITED TO THE RECORD DEVELOPED IN STATE COURT

In addition to being limited to the cases published before the state appeal is decided, you are limited

to the record in the state court proceedings. You cannot add more evidence to support a claim at an evidentiary hearing in federal court. A claim on federal habeas corpus under § 2254(d)(1) "is limited to the record that was before the state court that adjudicated the claim on the merits. Section 2254(d)(1) refers, in the past tense, to a state-court adjudication that 'resulted in' a decision that was contrary to, or 'involved' an unreasonable application of, established law. This backward-looking language requires an examination of the state-court decision at the time it was made. It follows that the record under review is limited to the record in existence at that same time--i.e., the record before the state court." *Cullen v. Pinholster* (2011) 563 U.S. ___, [131 S.Ct.1388, 1398; 179 L. Ed. 2d 557].)

Any other conclusion would be unfair to the state court. "It would be contrary to [the] purpose [of Section 2254(b)] to allow a petitioner to overcome an adverse state-court decision with new evidence introduced in a federal habeas court and reviewed by that court in the first instance effectively de novo." (*Id*. at p. ___, [131 S. Ct. at p. 1399].)

PRACTICE POINTER: A habeas petition only needs to establish a prima facie case for relief, not prove it. (See *In re Martinez* 92009 46 Cal.4th 945, 955.) If the state court denies a habeas petition without an evidentiary hearing, the federal court will presume the facts alleged are proven in reviewing the denial. Therefore, in any habeas petition filed in state court be sure to allege every fact which is essential to establish the claim you make. New facts cannot be alleged in the federal habeas petition.

7. INTERMEDIATE APPELLATE DECISIONS ARE NOT CONTROLLING PRECEDENT

While circuit court opinions, particularly those from the Ninth Circuit, may be helpful to your argument, they are not controlling. Opinions from intermediate appellate courts do "not constitute 'clearly established Federal law, as determined by the Supreme Court.' § 2254(d)(1)." (*Renico v. Lett* (2010) 559 U.S. ___, ___ [132 S.Ct. at p. 1866; 176 L. Ed. 2d at p. 683].)

If the facts of a circuit opinion are very close to yours, it could be used effectively to argue the state court's rejection of a claim is an unreasonable application of the controlling U.S. Supreme Court case. However, legal analysis in a federal appellate decision is not controlling.

8. IT DOES NOT MATTER IF THERE IS NO OPINION OR REASONING BY THE STATE COURT

Review on federal habeas is deferential even if there is no analysis from the state court to review. For example, if you file a habeas petition in state court which is summarily denied by the court of appeal and the Supreme Court, the federal court must apply the deferential standard required under AEDPA. It does not matter if there is no reasoned decision to review.

"When a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary." (*Harrington v. Richter*, *supra*, 562 U.S. ___ [131 S.Ct. at pp. 784-785].)

E. UNREASONABLE INTERPRETATION OF THE FACTS

AEDPA also permits federal habeas relief if the state court opinion is "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." The Ninth Circuit has sometimes relied on this prong to grant habeas relief. If you believe the state court opinion omits or skewers the facts in order to deny a federal claim, this prong could prove helpful in federal court. As of yet, the Supreme Court has not limited the meaning of "unreasonable" in this context.

F. IN ADDITION TO AEDPA REQUIREMENTS, ANY FEDERAL CLAIM MUST BE "FAIRLY PRESENTED" IN STATE COURT

In addition to the deferential review standard under AEDPA, you must make sure any federal claim you raise is "fairly presented" in state court. If it was not fairly presented so the state court had the opportunity to decide the issue, the federal court will find you have failed to exhaust state remedies, and will not even consider the merits of the federal claim.

Federal courts will only consider habeas claims which were "fairly presented" in the state court. (*Duncan v. Henry* (1995) 513 U.S. 364, 365.) In other words, a state prisoner must exhaust available state remedies (28 U.S.C. § 2254(b)(1)), thereby giving the State the "'opportunity to pass upon and correct' alleged violations of its prisoners' federal rights." (*Ibid*. quoting *Picard v. Connor* (1971) 404 U.S. 270, 275.)

A review of some cases illustrates the pitfalls of the exhaustion requirement:

In ***Duncan v. Henry,*** *supra,* 513 U.S. 364, the defendant argued on appeal the admission of testimony he had molested someone 20 years in the past violated Evidence Code section 352. In federal court, he argued the admission of that evidence violated federal due process. The Supreme Court held he had failed to exhaust state remedies because he never raised the federal due process claim in state court.

In ***Picard v. Connor****, supra,* 404 U.S. 270, Connor argued in state court the procedure by which he was brought to trial violated Massachussetts law. The state court of appeal mentioned the equal protection clause in rejecting that claim. In federal court, Connor for the first time alleged an equal protection violation. The federal court of appeal agreed the procedure violated equal protection. The Supreme Court reversed because the equal protection claim was never fairly presented in state court.

In ***Anderson v. Harless*** (1982) 459 U.S. 3, a Michigan man convicted of murder argued a jury instruction permitting the jury to imply malice from use of a weapon was "erroneous," and cited a published Michigan case. Even though the cited case referred to the Sixth and Fourteenth Amendments, the claim the instruction unconstitutionally shifted the burden of proof to respondent

and was inconsistent with the presumption of innocence under *Sandstrom v. Montana* (1979) 442 U.S. 510 was not fairly presented to the state court.

In ***Petersen v. Lempert*** (9th Cir. 2002) 319 F.3d 1153, the defendant made the following claim:

> Failure of trial defense counsel to specifically advise a defendant that a letter he proposes to submit to the Court as a part of the sentencing process contains admissions of facts constituting irrefutable evidence of aggravating factors justifying an upward departure sentence is not adequate assistance of counsel, within the meaning of Article 1, Section 11 of the Oregon Constitution, *Chew v. State of Oregon*, 121 Or App 474, 477, 855 P.2d 1120 (1993) and *Krummacher v. Gierloff*, 290 Or 867, 627 P.2d 458 (1981).

His Sixth Amendment claim was rejected in federal court because the federal claim was never fairly presented in state court.

In ***Baldwin v. Reese*** (2004) 541 U.S. 27 Reese filed a habeas petition in an Oregon appellate court raising an ineffective assistance of counsel claim and citing federal law. When the petition was denied, he sought review with the Oregon Supreme Court. The review petition asserted that Reese had received "ineffective assistance of both trial court and appellate court counsel" and added that "his imprisonment is in violation of [Oregon state law]." The U.S. Supreme Court held the federal claim was not fairly presented to the state's highest court.

PRACTICE POINTER: To satisfy the exhaustion requirement make sure to expressly cite the applicable federal constitutional provision at stake and controlling United States Supreme Court precedent. Include the same express citations in your petition for review. A useful technique is to cite the applicable federal constitutional provision in your argument heading. By doing so you will never inadvertently fail to exhaust your claim in state court.

G. PRACTICE POINTERS FOR FEDERALIZING YOUR CLAIMS

1. DON'T GIVE UP!!! FEDERALIZE!!!

Given the standards delineated in recent Supreme Court opinions, one might think federalizing issues in state court is a waste of time. Giving up federalizing would be a mistake. You never know what the appellant's chance is in federal court. Much depends on the district court judge or the Ninth Circuit panel assigned to a case. Attached is a list of recent wins in federal court, and the list is far from exhaustive. Despite the highly deferential standard, there are federal judges who will reverse when they believe an injustice has occurred. Even if a reversal is unlikely in your case, the pendency of a further appeal can give our clients hope and help them survive each day in prison.

2. BE CAREFUL TO FULLY PRESENT YOUR FEDERAL CLAIM

When you federalize your claim in your AOB, cite the constitutional amendment which applies, the right violated (e.g., "confrontation," "effective assistance of counsel," "right to present a defense") and cite the controlling U.S. Supreme Court case. A list of cases you can cite in reference to specific federal claims is attached. Don't rely on a federal appellate decision unless the facts of that case are analogous to your case, or it cogently explains the Supreme Court precedent you cite. There is little point in citing federal appellate decisions since the California courts are not bound by them, and they do not preserve any issue for federal habeas review. Do so sparingly, and only if the analysis or facts in the federal appellate decision strongly support your argument.

3. FILE PETITION FOR REVIEW TO EXHAUST ALL ISSUES YOU BOTHERED TO FEDERALIZE

In your review petition, as in your briefs on appeal, you must expressly cite the federal constitutional principle involved and the controlling U.S. Supreme Court precedent. You cannot merely refer to the AOB argument and incorporate it.

3. IF YOU HAVE A STRONG IAC CLAIM, FILE A HABEAS PETITION AND GET A DECLARATION FROM COUNSEL AND OTHER SUPPORTING DOCUMENTATION YOU NEED TO ESTABLISH THE CLAIM

Keep in mind your client will not be allowed to add to the record once he gets to federal court. If

you think you have a strong IAC claim, you should investigate it and file a habeas petition in state court if you have any additional information which will strengthen the claim. If you do not do this, an IAC claim in federal court has virtually no chance. Additional helpful information may include a declaration from the client, a declaration from trial counsel, and declarations from experts.

4. IF THE ISSUE YOU RAISED IS PENDING IN THE UNITED STATES SUPREME COURT, FILE A CERT. PETITION.

Keep in mind Supreme Court cases decided after the appeal is final are inapplicable in your client's federal habeas case. Check to see if there are pending cases relevant to the claim you have made on appeal. If so, file an application for certiorari asking the Supreme Court to grant cert. and hold the case until the primary case is decided.

Check scotusblog.com/case-files/terms for cases not yet decided in which cert. was granted for the most recent two terms. For example, cases currently pending include: 1. review of IAC claim under AEDPA, 2. whether a defendant's claim he would have accepted a deal but for deficient advice from counsel is sufficient, standing alone, to establish prejudice for IAC purposes; 3. Whether the Fifth Amendment right against self-incrimination bars using evidence from a court-ordered mental examination against a defendant who raises a mental defense; 4.Whether a human gene is patentable (interesting question!); 5. Whether the Fourth Amendment allows states to collect and analyze DNA of everyone arrested and charged with a crime; 6. Whether or under what circumstances the Fifth Amendment's Self-Incrimination Clause protects a defendant's refusal to answer law enforcement questioning before he has been arrested or read his Miranda rights.

5. CONSIDER PREPARING A PRO-PER HABEAS PETITION FOR YOUR CLIENT

If in your opinion your client has a strong federal claim, take the time to fill out a pro-per habeas form. A fillable form which you can save as a .pdf file can be found at http://www.uscourts.gov/uscourts/FormsAndFees/Forms/AO241.pdf. It should take less than an

hour to complete this. Send it to your client for his/her signature, along with the application to proceed in forma pauperis which is part of the form. The court might deny the request to proceed in forma pauperis since the filing fee in federal district court is only $5.00. If so, you can afford to pay the $5.00 filing fee. The in forma pauperis application will be in the federal court file and can be cited in support of an application to appoint counsel and/or to seek leave to proceed in forma pauperis in the Ninth Circuit, where the filing fee is $455.00.

Using your "federalized" portion of the AOB or review petition, prepare a brief argument to support the habeas. Just add the following to your argument: "The court of appeal opinion is an unreasonable application of (or contrary to) [the Supreme Court case you cite]." Or, if the opinion ignores or skewers the facts to reject a federal claim, allege the state court opinion is "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

After you mail the pro per habeas petition for your client, ask your client to keep you posted on the status of the federal habeas. When the client sends you a copy of the return filed by the Attorney General, request a continuance on your client's behalf and prepare an application for appointment of counsel. Some federal district judges will appoint counsel in habeas cases, though it is increasingly rare. If you are appointed, prepare the traverse and you will be compensated for your time. If the court refuses to appoint you, send the client a letter to send the district court which says he/she wants the court to treat the habeas petition as the traverse.

If the district court denies the habeas, file a notice of appeal with the district court and ask the district court. Once the appeal is filed, file an application for appointment of counsel with the Ninth Circuit. The Ninth Circuit, unlike the federal district court, will always appoint counsel if it decides issues should be briefed.

NB: you must be admitted to practice in federal district court and the Ninth Circuit to be appointed. Check their web sites for instructions.

6. GIVE YOUR CLIENT'S DETAILED INSTRUCTIONS ON WHAT THEY NEED TO DO TO

If you do not prepare a federal pro per habeas petition for your client, give your client detailed information on how to proceed. Send him/her a pro per habeas form. Advise him of the one-year (and 90 day) time limit for filing a federal habeas petition.

NON-EXHAUSTIVE LIST OF U.S. SUPREME COURT CASES FOR FEDERALIZING ISSUES ON APPEAL

A. MUST CITE TO FEDERAL CONSTITUTIONAL RIGHT AND CONTROLLING UNITED STATES SUPREME COURT PRECEDENT

Federal Constitutional Issues Must Be Explicitly Stated: Mere statement of "due process" is not sufficient to state a federal claim. (*Shumway v. Payne* (9th Cir. 2000) 223 F.3d 982, 987.) Sufficient statement includes the operative facts and the reference to the federal constitutional right at issue.

Federal Constitutional Issues Must Be Fully Exhausted: Constitutional issues must be raised at every level, including in a petition for review to the California Supreme Court. (*O'Sullivan v. Boerckel* (1999) 526 U.S. 838.)

B. LIST OF FEDERAL RIGHTS AND CONTROLLING SUPREME COURT AUTHORITY

1. GENERAL RIGHTS

Right to Counsel Or Self-Representation At Trial And On Appeal: Sixth Amendment guarantees counsel at all critical stages of trial level proceedings. (*Faretta v. California* (1975) 422 U.S. 806; *United States v. Cronic* (1984) 466 U.S. 648, 653-54.) On appeal, Fourteenth Amendment due process. (*Douglas v. California* (1963) 372 U.S. 353.)

Right to Effective Assistance of Counsel. Sixth Amendment. (*Strickland* v. *Washington* (1984) 466 U.S. 668.)

Competency: Fourteenth Amendment Due Process violation to try a criminal defendant who is mentally incompetent. (*Medina v. California* (1992) 505 U.S. 437, 439; *Pate v. Robinson* (1966) 383 U.S. 375.) Failure to adequately inquire when presented with substantial evidence of incompetency is a procedural due process incompetency claim. (*Drope v. Missouri* (1975) 420 U.S. 162.)

Right To Be Present At All Critical Stages: Sixth Amendment confrontation right and Fourteenth Amendment due process. (*Illinois v. Allen* (1970) 397 U.S. 337, 338; *Snyder v. Massachusetts* (1934) 291 U.S. 97; *Kentucky v. Stincer* (1987) 482 U.S. 730, 744-745 and fn. 17.)

Right To A Record Of All Critical Stages: Fourteenth Amendment right to due process and equal protection. (*Mayer v. City of Chicago* (1971) 404 U.S. 189; *Evitts v. Lucey* (1985) 469 U.S. 387

(right to adequate appeal).

Right To A Neutral Arbitrator (Unbiased Judge): Fourteenth Amendment due process. (*Bracy v. Gramley* (1997) 520 U.S. 899; *Smith v. Phillips* (1982) 455 U.S. 209*; Withrow v. Larkin* (1975) 421 U.S. 35, 47.)

Waiver Of Rights: Fourteenth Amendment due process requires a knowing, voluntary and intelligent waiver of all constitutionally protected rights. (*Johnson v. Zerbst* (1938) 304 U.S. 458 ; *Boykin v. Alabama* (1969) 395 U.S. 238.)

2. PRETRIAL ISSUES

Searches Without A Warrant Or Probable Cause: Fourth Amendment. However, Fourth Amendment claims cannot be raised in federal habeas corpus petition absent unusual circumstances. (*Stone v. Powell* (1976) 428 U.S. 465.)

Custodial Interrogation Without Warnings, Or Other Involuntary Statements: Fifth and Fourteenth Amendments. *Miranda v. Arizona* (1966) 384 U.S. 436; *Yarborough v. Alvarado* (2004) 541U.S. 652(discussion of custody standards); *Arizona v. Fulminante* (1991) 499 U.S. 279 (coercion as mental and physical, including false promises).)

Continued Interrogation After Request For Counsel: Sixth Amendment. (*Edwards v. Arizona* (1981) 451 U.S. 477.)

Subsequent Comment On The Exercise Of Fifth Amendment Rights During Interrogation: Fourteenth Amendment due process– even if client subsequently takes the stand at trial. (*Doyle v. Ohio* (1976) 426 U.S. 610.)

Demurrers/Lack of Notice: Sixth Amendment right "to be informed of the nature and cause of the accusation." (*In re Oliver* (1948) 333 U.S. 257, 273.)

Double Jeopardy: Fifth Amendment. (*Blockburger v. United States* (1932) 284 U.S. 299; *Ashe v. Swenson* (1970) 397 U.S. 436; *Brown v. Ohio* (1977) 432 U.S. 161.)

Vindictive Prosecution: Fourteenth Amendment due process. (*Blackledge v. Perry* (19740 417 .S. 21; *North Carolina v. Pearce* (1969) 395 U.S. 711.)

Ex Post Facto/Bills Of Attainder: U.S. Constitution, art. I, § 10. (*Collins v. Youngblood* (1990) 497 U.S. 37, 42.)

Pre-Indictment Delay: Fourteenth Amendment due process (not speedy trial). *United States v. Lovasco* (1977) 431 U.S. 783.

Post-Indictment Delay: Sixth Amendment right to a speedy trial. U.S. Amend. VI. (*United States v. Marion* (1971) 404 U.S. 307; *Barker v. Wingo* (1972) 407 U.S. 514.)

Discovery Issues: Sixth Amendment rights to notice, confrontation, and to present a defense. Fourteenth Amendment due process precludes prosecutorial misconduct and withholding of exculpatory evidence. (*Brady v. Maryland* (1963) 373 U.S. 83.) Exculpatory evidence is relevant to guilt or sentencing, and includes impeachment. Misconduct does not require bad faith, prosecutors have affirmative duty to obtain information in the custody of all law enforcement agencies assisting prosecution. (*Kyles v. Whitley* (1995) 514 U.S. 419.)

Funding Of Defense: Sixth Amendment right to present a defense. (*Ake v. Oklahoma* (1985) 470 U.S. 68.)

Unduly Suggestive Identifications*:* Fourteenth Amendment due process. (*Manson v. Braithwaite* (1977) 432 U.S. 98; *Neil v. Biggers* (1972) 409 U.S. 188.)

3. PLEA ISSUES

Voluntary, Knowing Intelligent Plea: Fourteenth Amendment due process and equal protection, generally must know the nature of the charges and the potential consequences (including collateral) of the guilty plea. (*Padilla v. Kentucky* (2010) 130 S. Ct. 1473; *Boykin v. Alabama* (1969) 395 U.S. 238.)

Plea Agreements: Fourteenth Amendment due process right to enforce terms of plea agreement. (*Santobello v. New York* (1971) 404 U.S. 257.)

4. TRIAL ISSUES

Sufficient Evidence to Prove Every Element of Crime Beyond Reasonable Doubt. Fourteenth Amendment due process. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319**)**

Denial of a Continuance. Fourteenth Amendment due process. (*Ungar v. Sarafite* (1964) 376 U.S. 575, 590.)

Jury Trial Including Representative Cross-Section And Impartial/Not Impacted By Pre-Trial Publicity Or Outside Influences. Sixth Amendment jury trial and Furteenth Amendment due process. (*Sheppard v. Maxwell* (1966) 384 U.S. 333; *Rideau v. Louisiana* (1963) 373 U.S. 723;

Duren v. Missouri (1979) 439 U.S. 357**.)**

Prosecutorial Exclusion of Class of Jurors by Peremptory Challenge. Equal Protection Clause. (*Batson v. Kentucky* (1986) 476 U.S. 79; *Johnson v. California* (2005) 545 U.S. 162.)

Unanimous Jury: Sixth, and potentially Fifth, Amendment. (*Apprendi v. New Jersey* (2000) 530 U.S. 466; *Blakely v. Washington* (2004) 542 U.S. 296; *McDonald v. City of Chicago, Ill*. (2010) 130 S. Ct. 3020.)

To Be Free Of Restraints Or Excessive Courtroom Security: Fourteenth Amendment due process. (*Holbrook v. Flynn* (1986) 475 U.S. 560; *Deck v. Missouri* (2005) 544 U.S. 622 (even after guilt determination).)

To Appear In Street Clothes: Fourteenth Amendment due process. (*Estelle v. Williams* (1976) 235 U.S. 501.)

To Testify (or Not): Fifth and Sixth Amendment. (*Rock v. Arkansas* (1987) 483 U.S. 44.)

Evidentiary Errors – Improper Admission of Evidence: Sixth Amendment confrontation clause. (*Crawford v. Washington* (2004) 541 U.S. 36.) Fourteenth Amendment due process and fundamental fairness; (Cf. *Estelle v. McGuire* (1991) 502 U.S. 62, 70 [admission of evidence might offend due process if the evidence is so prejudicial as to render the defendant's trial fundamentally unfair]; see also *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.)

Evidentiary Errors - Right to Cross-Examine Witnesses to Show Bias. Sixth Amendment confrontation clause. (*Michigan v. Lucas* (1991) 500 U.S. 145, 151; *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 678-679; *Davis V. Alaska* (1974) 415 U.S. 308, 316-317.)

Evidentiary Errors - Admission of Lab Reports Via Testimony of Others. Sixth Amendment Confrontation Clause. (*Williams v. Illinois* (2011) 567 U.S. ___ [132 S.Ct. 2221]; *Bullcoming v. New Mexico* (2011) 564 U.S. ___ [131 S.Ct. 2705]; *Melendez Diaz v. Massachussetts* (009) 557 U.S. 305.)

Right To Present A Defense – Improper Exclusion of Defense Evidence: Sixth Amendment confrontation, compulsory process, and defense clauses of the Sixth Amendment, due process and fundamental fairness provisions of the Fourteenth Amendment. (*Crane v. Kentucky* (1986) 476 U.S. 683; *Chambers v. Mississippi* (1973) 410 U.S. 284 (evidentiary rules may not be mechanistically applied in manner that impugns right to present a defense).).

Prosecutorial Misconduct – Particularly In Argument: Fourteenth Amendment due process and

fundamental fairness. (*Donnelly v. DeChristoforo* (1974) 416 U.S. 637.)

Jury Instructions, Particularly if Essential Element Omitted or Incorrectly Described: Sixth Amendment jury trial and Fourteenth Amendment due process, fundamental fairness. (*Neder v. United States* (1999) 527 U.S. 1, 15; *California v. Roy* (1996) 517 U.S. 2, 5; Yates *v. Evatt* (1991) 500 U.S. 391; *Cage v. Louisiana* (1990) 498 U.S. 39; *Carella v. California* (1989) 491 U.S. 263 (mandatory conclusive presumption); *Pope v. Illinois* (1987) 481 U.S. 497 (misstatement of element); *Rose v. Clark* (1986) 478 US. 570 (mandatory rebuttable presumption).)

5. SENTENCING

Ex-Post Facto Right Against Increased Punishment: The Ex-Post Facto Clause (Art. I, § 10, clause 1; 14th Amendment) bars the government from passing laws that impose new or increased punishment for a crime committed before passage of the law. (*Calder v. Bull* (1798) 3 U.S. (Dall.) 386; *Collins v. Youngblood* (1990) 497 U.S. 37, 43; *Weaver v. Graham* (1981) 450 U.S. 24, 28.)

Sixth Amendment right to confront evidence relied on, possibly right to jury trial on contested facts. (*Blakely v. Washington* (2004) 542 U.S. 296; *Gardner v. Florida* (1979) 430 U.S. 349 (*plurality*).)

Cruel and Unusual Punishment Eighth Amendment right to be free from cruel and unusual punishment or excessive fines. Fourteenth Amendment due process and equal protection, including accurate information. (*Hicks v. Oklahoma* (1980) 447 U.S. 343.)

6. DIRECT APPEAL

Right To Counsel: Fourteenth Amendment due process. (*Douglas v. California* (1963) 372 U.S. 353.)

Right To Complete Record: Fourteenth Amendment due process and equal protection. (*Mayer v. City of Chicago* (1971) 404 U.S. 189, 198.; *Evitts v. Lucey* (1985) 469 U.S. 387 (right to adequate appeal).[2]

[2] This list is based on a list compiled by C. Renée Manes, Assistant Federal Public Defender, Federal Public Defender's Office, Portland, Oregon.

RECENT WINS BY PANEL MEMBERS

GABRIEL BASSAN

Averilla v. Lopez (N.D. Cal. 2012) 862 F.Supp. 987

Confrontation.
Three counts of 288 reversed because trial court violated constitutional right to confrontation by precluding questions of complaining witness and prosecution witness about prior false accusations of sexual assault by the alleged victim. State court opinion was an unreasonable application of *Davis v. Alaska* 415 U.S. 308, 316 and *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 679 (confrontation clause) contrary to *Crane v. Kentucky* (1986) 476 U.S. 683 (right to present a defense).

ERIC WEAVER

Sessoms v. Runnels (9th Cir. 2012) 691 F.3d 1054 en banc

Miranda
Defendant charged with burglary and murder turned himself into police. When police went to question him, he asked if it would be possible to have an attorney present. He said his father "asked me to ask you guys . . . uh, give me a lawyer." Sessoms waived his right to counsel only after being told having a lawyer would only hurt him, and that invoking his right to counsel would be futile since police already knew what happened.

Ninth Circuit found state court's application of *United States v. Davis* (1994) 512 U.S. 452 was unreasonable because the defendant made his allegedly ambiguous request for counsel before *Miranda* warnings were even given.

Panel: Alex Kozinski, Mary M. Schroeder Betty B. Fletcher Barry G. Silverman , Kim McLane Wardlaw , Raymond C. Fisher, Richard A. Paez Consuelo M. Callahan , Milan D. Smith, Jr., Sandra S. Ikuta.

CLIFF GARDNER

Richter v. Hickman (9th Cir. 2009) 578 F.3d 944 (unfortunately, reversed by Supreme Court in *Harrington v. Richter* (2011) 562 U.S. ___ [131 S.Ct. 770].

In 187 trial, counsel failed to consult with or call blood splatter experts to counter prosecution expert testimony which was critical to conviction.

California Supreme Court's summary denial of habeas petition was unreasonable application of *Strickland*.
Alex Kozinski, Stephen Reinhardt, Diarmuid F. O'Scannlain, Andrew J. Kleinfeld, Barry G. Silverman, Kim McLane Wardlaw, Raymond C. Fisher, Richard A. Paez, Milan D. Smith, Jr. and Sandra S. Ikuta.

RECENT WINS BY NON-PANEL ATTORNEYS

Ortiz v. Yates (9th Cir. 2012) 704 F.3d 1026

Confrontation Clause
Defendant accused of spousal battery was precluded from asking wife if she was afraid to deviate from story she initially told police because she had been threatened by DA with charge of perjury which would result in her incarceration and loss of custody of her children.

Arizona court's rejection of this claim was unreasonable application of *Michigan v. Lucas* (1991) 500 U.S. 145, 151, *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 678-679 and *Davis V. Alaska* (1974) 415 U.S. 308, 316-317.

David M. Ebel and Marsha S. Berzon in majority

Jackson v. Nevada (9th Cir. 2012) 688 F.3d 1091

Right to present a defense.
Violation of right to present a defense when state court prohibited defendant accused of rape from introducing evidence the victim had previously falsely accused him of rape, including testimony by police officers who did not believe her in the past. State Court violated his constitutional rights even though state counsel had failed to comply with state statute requiring defendant to give written notice of intent to rely on such evidence in rape case.

State court opinion contrary to *Crane v. Kentucky* (1986) 476 U.S. 683, 690 and *Washington v. Texas* (1967) 388 U.S. 14

Stephen Reinhardt and Mary H. Murguia in majority

Cudjo v. Ayers (9th Cir. 2012) 698 F.3d 752

Right to present a defense.
187 and death penalty reversed. Trial court excluded evidence of 3rd party confessing to murder on

basis it was "unreliable." California Supreme Court found it was sufficiently reliable, and should have been admitted as declaration against penal interest, but ruled it was merely error of state law.

State Supreme Court decision was contrary to *Chambers v. Mississippi* (1991) 410 U.S. 284 and *Green v. Georgia* (1979) 442 U.S. 95. Both those cases involved exclusion under state evidentiary rules of third-party confessions to committing the crime.

As for prejudice, since Cal. Ct did not apply the correct standard (*Chapman),* no deference due its decision on prejudice. Ninth Circuit applies *Chapman* and finds prejudice.

Alex Kozinski and N. Randy Smith in majority

Milke v. Ryan, 07-99001 (3/14/2013)

Brady
Only evidence linking Milke to murder of her four-year-old son was her confession. Police officer said she confessed. Confession was not recorded in any way, and there was no written statement. Police officer who said Milke confessed had extensive history of misconduct, including findings he had committed perjury, had obtained unlawful confessions and had failed to provide suspects with *Miranda* warnings. However, none of this information was disclosed to the defense

Murder conviction reversed because state court's holding was based on unreasonable determination of the facts and because its decision was contrary to *Brady v. Maryland* (1963) 373 U.S. 83, and *Giglio v. United States* (1972) 405 U.S. 150.

Alex Kozinski Jerome Farris and Carlos T. Bea

Miles v. Martel (10-15633) September 28, 2012 (published opinion since withdrawn, but relief still granted)

IAC
D alleges in habeas petition his attorney advised him to reject 6 year offer when the information alleged 2 prior strikes without advising him he risked a 25-to-life sentence as a third-striker. California Supreme Court summarily denied the petition raising this claim.

Ninth Circuit applied *Missouri v. Frye* (2012) 132 S.Ct. 1399 and *Lafler v. Cooper* (2012) 132 S.Ct. 1376 and found California Supreme Court's denial of habeas was unreasonable application of *Strickland v. Washington.*

Procter Hug, Jr, Betty B. Fletcher, and Richard A. Paez.

Ayala v. Wong (9th Cir. 2012) 693 F.3d 945
Batson and right to effective appeal.

Prosecution used its peremptory challenges to strike all of the Black and Hispanic jurors available for challenge. Trial court found prima facie case, but allowed prosecutor to give his reasons for excusing jurors in camera. Failure to disclose the stated reasons and give the defense the opportunity to argue they were pretextual violated *Batson*. Furthermore, state court had lost jury questionnaires, which deprived defendant of part of the record necessary to argue the issue on appeal.

State Court decision was contrary to *Batson v. Kentucky* (1986) 476 U.S. 79 (equal protection) and *Evitts v. Lucey* (1985) 469 U.S. 387 (right to adequate appeal).

Stephen Reinhardt, Kim McLane Wardlaw were in majority