

CONSTITUTIONAL RIGHTS AVAILABLE IN PROCEEDINGS
OTHER THAN CRIMINAL TRIALS

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Does the Bill of Rights apply?

THE UNITED STATES CONSTITUTION

Article I, section 10, 1st paragraph

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

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.

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.

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.

Eighth Amendment

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Fourteenth Amendment, section 1

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.

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.)

Exhausting a constitutional claim requires an expressed reference to a specific federal constitutional guarantee as well as a statement of fact which entitles the defendant to relief. “Where a particular Amendment ‘provides an explicit textual source of constitutional protection’ against a particular sort of government behavior, ‘that Amendment, not the more generalized notion of substantive due process,’ must be the guide for analyzing these claims.” (*Albright v. Oliver* (1994) 510 U.S. 266, 273 (plur. opn.), quoting *Graham v. Connor* (1989) 490 U.S. 386, 395; *Gray v. Netherland* (1996) 518 U.S. 152, 162-163.)

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].)

Most civil errors do not require reversal unless they amounted 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.) A violation of a substantive or procedural due process right under the Fourteenth Amendment should be reviewed under *Chapman*. (See, e.g., *United States v. Bagley* (1985) 473 U.S. 667, 680 [intentional *Brady* error]; *In re Vanessa M.* (2006) 138 Cal.App.4th 1121, 1132 [preventing a parent from testifying]; *In re Joann E.* (2002) 104 Cal.App.4th 347, 359 [appointment of guardian-ad-litem without adequate hearing]; *In re Angela C.* (2002) 99 Cal.App.4th 389, 394 [notice]; *In re Stacy T.* (1997) 52 Cal.App.4th 1415, 1426 & fn. 9 [denied right to cross-examination and notice of appeal rights]; *In re Dolly D.* (1995) 41 Cal.App.4th 440, 446-447 [cross-examination]; *In re Andrew S.* (1994) 27 Cal.App.4th 541, 547; *In re Monique T.* (1992) 2 Cal.App.4th 1372, 1377; *In re Amy M.* (1991) 232 Cal.App.3d 849, 867-868 [present witnesses].) 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. DSS* (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.)

The most basic due process rights are the right to notice, an opportunity to be heard, and 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. (*Ibid.*) “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.*; *David B. Superior Court* (1993) 21 Cal.App.4th 1010, 1018; 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; *People v. Superior Court (Howard)* (1999) 70 Cal.App.4th 136, 154.)

“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.

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)].)

RIGHT TO 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 [all criminal cases generally].) 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.)

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.)

A person in a civil commitment proceeding has a due process right, not a Sixth Amendment right, to counsel. (*Vitek v. Jones* (1980) 445 U.S. 480, 494-497.) 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].)

The *Wende* procedure does not fully apply in an appeal from an LPS commitment. (*Conservatorship of Ben C.* (2007) 40 Cal.4th 529, 538 [for the correct procedure, see *id.* at p. 544].) It does not fully 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.)

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 sometimes a due process right to effective assistance of counsel when it is required by statute, but it is a more difficult standard. “(1) the alleged ineffective assistance of counsel rendered ‘the proceeding . . . so fundamentally unfair that [the defendant] was prevented from reasonably presenting [the] case’ [citation] and (2) ‘substantial prejudice,’ which ‘is essentially a demonstration that the alleged violation affected the outcome of the proceeding’ [citation].” (*Lara-Torres v. Ashcroft* (9th Cir. 2004) 383 F.3d 968, 973.) 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 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. (See *In re Kristin H.* (1996) 46 Cal.App.4th 1635, 1668.) It is not clear of 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 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 Fifth Amendment. Technically, there is no due process right to counsel at interrogations; the right to counsel is a prophylactic rule in order to protect the Fifth Amendment privilege against self-incrimination. (*McNeil v. Wisconsin* (1991) 501 U.S. 171, 176-177; *People v. Avila* (1999) 75 Cal.App.4th 416, 421.)

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.) 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 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.) But describing it as a Sixth Amendment right will lead to a procedural default when the defendant tries to file a federal habeas corpus petition. (*Tamalini v. Stewart* (9th Cir. 2001) 249 F.3d 895, 899.) Because a *Faretta* right is a Sixth Amendment right, there is no right to self-representation on appeal. (*Martinez, supra*, 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 no such thing as ineffective assistance of habeas counsel. (*Smith v. Idaho* (9th Cir. 2004) 392 F.3d 350, 357.) Nor would the *Wende* or *Anders* procedure apply. (*Pennsylvania v. Finley* (1987) 481 U.S. 551, 557.) 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.)

RIGHT TO 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.)

It applies only in criminal cases. A minor has the due process right to confront witnesses in the jurisdictional hearing in 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 statutes state that the commitment 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 a sanity phase proceeding 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 in 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* does not apply to sentencing]), but there is a due process right to have the court consider only accurate 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 criminal cases, the right to confrontation under the state constitution is no broader than the federal constitutional right. (See Cal. Const., art. I, § 28, subd. (d); *People v. Fletcher* (1996) 13 Cal.4th 451, 465.)

THE 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].)

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 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 are not mandatory in civil commitment schemes. (*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].) There are no statutory deadlines for SVP cases. (*Orozco v. Superior Court* (2004) 117 Cal.App.4th 170, 178-180 [no due process violation when no jury trial in two years]; *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]; *People v. Badura* (2002) 95 Cal.App.4th 1218, 1224-1225 [probable cause hearing held after the prior commitment expired].) Although the court has the inherent power to consolidate recommitment proceedings, trials should occur before the commitment expires and cannot be delayed simply to consolidate the proceedings. (*Litmon v. Superior Court* (2005) 123 Cal.App.4th 1156, 1174-1176.)

THE RIGHT AGAINST 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.)

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 court 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 in criminal cases. Thus, in commitment proceedings, the defendant can be compelled to testify. (*Allen v. Illinois* (1986) 478 U.S. 364, 369-372; *Cramer, supra*, 23 Cal.3d at pp. 137-138 [Lanterman commitment]; *Baqlah v. Superior Court* (2002) 100 Cal.App.4th 478, 495, 501-502 [competency]; *People v. Clark* (2000) 82 Cal.App.4th 1072, 1082 [MDO]; *People v. Leonard* (2000) 78 Cal.App.4th 776, 789-793 [SVP]; *Conservatorship of Bones* (1987) 189 Cal.App.3d 1010, 1015-1016 [LPS]; *People v. Henderson* (1981) 117 Cal.App.3d 740, 748 [MDSO extension]; *People v. Beard* (1985) 173 Cal.App.3d 1113, 1118-1119 [MDO extension]; *In re Welch* (1967) 255 Cal.App.2d 455, 460-461 [CRC]; but see *In re Luis C.* (2004) 116 Cal.App.4th 1397, 1402-1403 [juvenile extension]; *People v. Haynie* (2004) 116 Cal.App.4th 1224, 1228 [NGI extension]; see also *People v. Lopez* (2006) 137 Cal.App.4th 1099, 1110 [MDO case, disagreeing with *Luis C.* and *Haynie*].)

The Fifth Amendment right not to incriminate oneself applies at the penalty phase, sentencing hearing, and probation 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 [Fifth Amendment right continues after

plea but before sentence].)

SEARCHES AND SEIZURES

The Fourth Amendment requires state action. (*Burdeau v. McDowell* (1921) 256 U.S. 465, 475; *Walter v. United States* (1980) 447 U.S. 649; *In re Christopher H.* (1990) 227 Cal.App.3d 1567; *People v. Taylor* (2000) 222 Cal.App.3d 612; *United States v. Miller* (9th Cir. 1982) 688 F.2d 652, 658.)

The Fourth Amendment 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* (Mar. 28, 2007, C048138) __ Cal.App.4th __; *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; *United States v. Strong* (9th Cir. 1985) 778 F.2d 1393, 1397.)

The exclusionary rule, however, often does not apply outside the context of the criminal trials. It applies to juvenile cases. (See, e.g., *In re Lance W.* (1985) 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.) Evidence can be excluded if the officer's actions were so egregious that 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; *INS 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. INS* (9th Cir. 1994) 38 F.3d 488, 501-504; *Gonzalez-Rivera v. INS* (9th Cir. 1994) 22 F.3d 1441, 1448-1452; see generally *Schmerber v. California* (1966) 384 U.S. 757.)

Except for warrants, the Fourth Amendment generally applies to the executive branch. There is no longer a seizure under the Fourth Amendment once the court finds probable cause after arraignment. (See *Wallace v. Kato* (2007) 549 U.S. __ [127 S.Ct. 1091, 1096] [the statute of limitations for the civil rights action for false imprisonment starts to run once the defendant is arraigned]; *Graham v. Connor* (1989) 490 U.S. 386, 395, fn. 10 [the Fourth Amendment does not apply to the punishment of convicted defendants].)

EIGHTH AMENDMENT

The defendant's right to be free from unreasonable restraint after the court finds probable cause is under the right to a speedy trial (see above) 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 stated it 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].)

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; see also *Cooper Industries, Inc v. Leatherman Tool Group, Inc.* (2001) 532 U.S. 424, 433-434 [excessive fines clause].)

The Eighth Amendment applies only to those who have been 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].)

Because mental health patients are not convicted of crimes, the circumstances of their confinement is 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 *Hyrduck 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].)

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 Eight Amendment applies only to 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]; *In re Avila* (2004) 33 Cal.4th 254, 289 [sex registration not punishment]; *In re Jorge G.* (2004) 117 Cal.App.4th 931, 953-954 [gang registration not punishment].)

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.)

DOUBLE JEOPARDY, EX POST FACTO

By its own terms, the ex post facto clause applies to the states. (U.S. Const., art. I, § 10, ¶ 1.)

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.)

These 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 determine if the legislature expressly or impliedly determined it is punitive. If not, the effect of the statute may still 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.); *People v. Madeyski* (2001) 94 Cal.App.4th 659, 662-663.) Despite no criminal intent or purpose, can be labeled criminal 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. (*Jeffers v. United States* (1977) 432 U.S. 137, 155 (plur. opn.); *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. High* (2004) 119 Cal.App.4th 1192, 1197 [Pen. Code, § 1465.7]; *id.*, at p. 1199 [Gov. Code, § 70372, subd. (a)]; but see *People v. Wallace* (2004) 120 Cal.App.4th 867, 871-878 [\$20 court security fee].)

Costs generally are not criminal. (*People v. Rivera* (1998) 65 Cal.App.4th 705, 710-711 [booking/administrative justice fee under Gov. Code § 29550.2]; *People v. High* (2004) 119 Cal.App.4th 1192, 1199 [same].)

“Victim 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; *People v. White* (1997) 55 Cal.App.4th 914 [taking prisoner wages for victim restitution].) But it has been described as criminal in nature, in that it is aimed at rehabilitation and deterrence. (*Kelly v. Robinson* (1986) 476 U.S. 36; *People v. Carbajal* (1995) 10 Cal.4th 1114, 1123-1124; *People v. Crow* (1993) 6 Cal.4th 952, 957; *People v. Richards* (1976) 16 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]; *People v. Hove* (1999) 76 Cal.App.4th 1266, 1273; *People v. Clifton* (1985) 172 Cal.3d 1165, 1168 [“Aside from compensating an individual for injuries suffered, restitution may also serve the salutary purposes of deterring future criminality and impressing upon a criminal offender that he must accept responsibility for his crime”].)

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; but see *United States v. Grice* (9th Cir. 2003) 319 F.3d 1174, 1177, 1178 [can impose victim restitution for continuing crime for acts which occurred before the statute was enacted]; *United States v. Kubiak* (9th Cir. 1999) 205 F.3d 1117, 1128-1129 [same].)

AIDS test is not punitive. (*People v. Stowell* (2003) 31 Cal.4th 1107, 1113.)

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; *People v. Ansell* (2000) 25 Cal.4th 868, 886; *People v. Bailey* (2002) 101 Cal.App.4th 238, 244 [gang registration is not punishment]; *United States v. Gementera* (9th Cir. 2004) 379 F.3d 596, 608-610.)

Change in 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].)

Civil suit seeking punitive damages after a criminal conviction is still not “punishment.” (*Shore v. Gurnett* (2004) 122 Cal.App.4th 166, 172.)

Forfeiture is often civil. (*United States v. Usery* (1996) 518 U.S. 267, 270 [no double jeopardy from in rem proceeding]; *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 in rem]; *People v. 25651 Minoa Dr.* (1992) 2 Cal.App.4th 787, 790-791 [Health & Saf. Code, § 1140].) Some civil forfeiture can violate excessive fines clause of Eighth Amendment but not double jeopardy. (*Dept. of Revenue v. Kurth Ranch* (1994) 511 U.S. 767, 778; *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.* (2005) 37 Cal.4th 707, 728; *Austin v. United States* (1993) 509 U.S. 602, 609-610.)

Civil commitment 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. Superior Court (Howard)* (1999) 70 Cal.App.4th 136, 148 [SVP]; *People v. Henderson* (1981) 117 Cal.App.3d 740, 748 [NGI extension]; but see *People v. Lock* (1980) 30 Cal.3d 454, 458 [MDSO].)

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

Sealing juvenile record is civil; retroactive effect of statute limiting sealing record of delinquent does not violate ex post facto. (*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 double jeopardy clause (Cal. Const., art. I, § 15) is not the same as the federal provision. (*People v. Hanson* (2000) 23 Cal.4th 355, 356.) 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;

JURY TRIAL

The Sixth Amendment right to 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. 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. (See *Jackson v. Indiana* (1972) 406 U.S. 715, 728-730; *Baxstrom v. Herold* (1966) 383 U.S. 107, 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.”].)

Since civil commitments are civil, there are only six peremptory challenges. (*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].)

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 a sua sponte responsibility to properly instruct on the elements of a civil commitment: “The rules governing a trial court’s obligation to give jury instructions without request by either party are well established. ‘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; *People v. Putnam* (2004) 115 Cal.App.4th 575, 582-583 [duty to instruct on the elements of civil commitment]; *People v. Grassini* (2003) 113 Cal.App.4th 765, 777-778 [elements to SVP commitment].)

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.)

The *Chapman* standard 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. Hurtado* (2002) 28 Cal.4th 1179, 1194 [misinstruct on elements of 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; see *People v. Mickle* (1991) 54 Cal.3d 140, 198 (conc. opn. of Mosk, J.) [competency]; see *People v. Medina* (1990) 51 Cal.3d 870, 922 (dis. opn. of Broussard, J.) [competency]; 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, if proven actual juror misconduct, there is a rebuttable presumption of prejudice]; *People v. Ernst* (1994) 8 Cal.4th 441, 444, 448 [waiver of right to jury requires personal waiver by the defendant]; *Tracy v. Municipal Court* (1978) 22 Cal.3d 760 [right to jury in any misdemeanor].) The right against the discrimination of jurors under *Wheeler* the same as under *Batson*. (*People v. Yeoman* (2003) 31 Cal.4th 93, 117.)

BEYOND A REASONABLE DOUBT STANDARD

The beyond a reasonable doubt standard 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].) In commitment proceedings, there can be a federal equal protection violation to deprive certain civil commitment defendants rights the state grants other civil commitment defendants. (See *Jackson, supra*, 406 U.S. at pp. 728-730; *Baxstrom, supra*, 383 U.S. at pp. 111-114.)

When the defendant seeks to be 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.)

MISCELLANEOUS PROVISIONS

The Supreme Court has never applied the Second Amendment to the states. (See *Fresno Rifle & Pistol Club v. Van de Kamp* (9th Cir. 1992) 965 F.2d 723; cf. *Nordyke v. King* (9th Cir. 2003) 319 F.3d 1185, 1192.)

The Fifth Amendment right to a grand jury does not apply to the states. (*Hurtado v. California* (1884) 110 U.S. 516, 538.) It does not apply to delinquency proceedings. (*Kent v. United States* (1966) 383 U.S. 541, 555.) But the state must at least 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.) 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.)

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.)

There is not a federal constitutional right to discovery. (*Weatherford v. Bursey* (1977) 429 U.S. 545, 559.) The Civil Discovery Act (Code Civ. Proc, § 2016 et seq.), not Penal Code section 1054 et seq., apply to civil commitments. (*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.)

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; *Beagle v. Vasold* (1966) 65 Cal.2d 166, 182, fn. 11; *Garden Grove School Dist. v. Hendler* (1965) 63 Cal.2d 141, 143; *Loth v. Truck-A-Way Corp.* (1998) 60 Cal.App.4th 757, 764-765; *Du Jardin v. City of Oxnard* (1995) 38 Cal.App.4th 174, 177, 179; *People ex rel. Dept. of Public Works v. Graziadio* (1964) 231 Cal.App.2d 525, 533-534; *Neumann v. Bishop* (1976) 59 Cal.App.3d 451, 484-485.)