Summaries of Successful Federal Habeas Cases in the Ninth Circuit Court of Appeals 2000 - 2018

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For the past several years, law clerks with the Federal Public Defender in Oregon have researched, prepared and updated this outline of winning habeas corpus cases. The outline summarizes cases in which the Ninth Circuit granted relief on the merits of the petition. It does not discuss procedural issues, but rather focuses on the constitutional challenge at the heart of the case. Moreover, the focus is on challenges to state convictions and sentences. To find winning cases from other federal courts of appeal, as well as earlier Ninth Circuit cases, consult Randy Hertz and James Liebman, *Federal Habeas Corpus Practice and Procedure* (7th Ed. 2016).

Most of the cases in this outline are published decisions. Unpublished decisions since January 1, 2007, are included as well. Under Federal Rule of Appellate Procedure 32.1, and Ninth Circuit Rule 36-3, unpublished decisions from January 1, 2007, and after can be cited "in accordance with FRAP 32.1." Unpublished dispositions issued before January 1, 2007, may not be cited "to the courts of this circuit" except in certain circumstances discussed in Ninth Circuit Rule 36-3.

The newest cases included in the outline may be the subject of rehearing or certiorari petitions. Accordingly, check the status of a case before citing it. Also, cert denials are not noted in the case citations.

Lastly, thank you Jon Sands, Stephen Sady, Keith Hilzendeger, and Jonathan Kirshbaum for keeping me up to date on the latest Ninth Circuit rulings.

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I. Ineffective assistance of counsel

A. Capital cases

White v. Ryan, 895 F.3d 641 (9th Cir. 2018)

- Trial counsel failed to challenge the sole aggravating factor that made petitioner eligible for the death penalty: that he allegedly committed the murder for pecuniary gain. Counsel also failed to investigate mitigating circumstances including petitioner's background and mental health which would have likely resulted in a different sentence based on mitigating evidence.

Hernandez v. Chappell, 878 F.3d 843 (9th Cir. 2017)

- Trial counsel failed to present a diminished capacity defense based on mental impairment. Counsel did not "present this defense because he was ignorant of the law." If the jury was aware of petitioner's serious mental impairments and abusive family history, at least one juror would have declined to convict petitioner of first degree murder. Relief granted as to first-degree murder conviction.

Browning v. Baker, 875 F.3d 444 (9th Cir. 2017)

- Trial counsel failed to investigate, and prosecution improperly withheld, exculpatory evidence including bloody shoeprints that did not match petitioner's shoes, the fact that testimony from a major witness was in exchange for a lesser charge in an unrelated case, and discrepancies in witness-description of the killer's hair sytle. Relief granted as to most convictions.

Bemore v. Chappell, 788 F.3d 1151 (9th Cir. 2015)

- Trial counsel failed to investigate or prepare a sufficient alibi defense or present evidence of petitioner's mental impairments. Counsel refused to pursue a valid mental health mitigation strategy in favor of counsel's original "good guy" mitigation strategy.

Doe v. Ayers, 782 F.3d 425 (9th Cir. 2015)

- Trial counsel's deficient performance in the penalty phase constituted ineffective assistance. Counsel failed to review petitioner's interviews, request petitioner's prison records, follow up on information presented to him by an investigator, interview witnesses and family members effectively, retain a psychological expert,

prepare penalty-phase witnesses effectively, and present certain mitigating information at trial.

Mann v. Ryan, 774 F.3d 1203 (9th Cir. 2014)

- Trial counsel's failure to investigate mitigating evidence at the sentencing phase, constituted ineffective assistance. Counsel did not prepare any mitigating evidence prior to conviction. When given extra time, counsel did not obtain petitioner's school, prison, or medical records, and failed to sufficiently investigate petitioner's prior head injury and possible organic brain damage, all without explanation.

Thomas v. Chappell, 678 F.3d 1086 (9th Cir. 2012)

- Trial counsel failed to sufficiently investigate a defense witness' story that someone else committed the murders, constituting ineffective assistance. An investigation would have produced witness testimony corroborating the theory, which could have created a reasonable doubt as to petitioner's guilt.

Hamilton v. Ayers, 583 F.3d 1100 (9th Cir. 2009) (Pre-AEDPA)

- Counsel, who had never before tried a capital case, failed to investigate and present available mitigating evidence. "Defense counsel did not even exhaust the few sources of information of which he was aware. Rather, he effectively abandoned his investigation 'after having acquired only rudimentary knowledge of [the defendant's] history from a narrow set of sources.'"

Libberton v. Ryan, 583 F.3d 1147 (9th Cir. 2009)

- Trial counsel failed to investigate and admit easily discoverable mitigating evidence during the penalty phase, constituting ineffective assistance. Counsel called only two witnesses: someone whom petitioner had not seen in ten years, and the mother of petitioner's ex-girlfriend.

Duncan v. Ornoski, 528 F.3d 1222 (9th Cir. 2008) (Pre-AEDPA)

- Trial counsel failed to investigate or present serological evidence that blood found at the crime scene did not belong to either the victim or the petitioner, constituting ineffective assistance. Such evidence would have raised significant doubt about the special circumstance allegation that triggers the penalty phase and allows the jury to impose the death penalty.

Correll v. Ryan, 539 F.3d 938 (9th Cir. 2008) (Pre-AEDPA)

- Trial counsel failed to investigate or present mitigation evidence during penalty phase, constituting ineffective assistance. Counsel called no defense witnesses, presented no mitigation evidence, and failed to rebut aggravating factors. Such conduct could not have been the result of a strategic decision absent reasonable investigation. Relief granted as to death sentence.

Lambright v. Schriro, 490 F.3d 1103 (9th Cir. 2007)

- Counsel failed to conduct a reasonable investigation of mitigation evidence, constituting ineffective assistance. Counsel knew that ample mitigating evidence existed, including evidence of mental health issues. Relief granted as to death sentence.

Lankford v. Arave, 468 F.3d 578 (9th Cir. 2006) (Pre-AEDPA)

- Trial counsel requested jury instructions that omitted a critical element of state law regarding accomplice testimony, constituting ineffective assistance. Idaho law required corroborating evidence for a conviction as an accomplice.

Frierson v. Woodford, 463 F.3d 982 (9th Cir. 2006)

- Trial counsel was ineffective in failing to investigate or present mitigating evidence of petitioner's history of drug abuse and early childhood head trauma and abuse. In addition, counsel encouraged a defense witness to invoke the Fifth Amendment privilege against self-incrimination and did not challenge that invocation regarding the witness' immunity from prosecution for the crime. Relief granted as to death sentence.

Hovey v. Ayers, 458 F.3d 892 (9th Cir. 2006)

- Trial counsel was ineffective in failing to adequately prepare medical expert regarding petitioner's mental illness. Medical records showed the severity of petitioner's mental illness, and counsel's failure led to a disastrous cross-examination. Relief granted as to death sentence.

Nelson v. State of Washington, 172 F. App'x 478 (9th Cir. 2006)

- Counsel was ineffective in failing to investigate whether complainant's claim of sexual abuse was fabricated or, even if crime had occurred, whether perpetrator was someone other than petitioner.

Summerlin v. Schriro, 427 F.3d 623 (9th Cir. 2005), *cert. denied,* 547 U.S. 1097 (2006)

- Trial counsel was ineffective when it failed to investigate and present mitigating evidence during sentencing phase of capital trial. The evidence included petitioner's cognitive impairment and diagnosis of paranoid schizophrenia.

Douglas v. Woodford, 316 F.3d 1079 (9th Cir. 2003) (Pre-AEDPA), *cert. denied*, 540 U.S. 810 (2003)

- Counsel was ineffective in presenting only "minimal" mitigating evidence and suggesting "in very general terms" that petitioner had difficult childhood; counsel's failure to develop and present mitigating evidence could not be justified by petitioner's refusal to cooperate with counsel's investigation and could not be attributed to strategic decision given counsel's lack of information needed for evaluating strategy.

Pirtle v. Morgan, 313 F.3d 1160 (9th Cir. 2002)

- Trial counsel's failure to request a jury instruction regarding petitioner's diminished capacity at the time of the murders constituted ineffective assistance. Counsel had presented substantial evidence that petitioner's diminished capacity had rendered him unable to form the required intent to commit the crime charged.

Jennings v. Woodford, 290 F.3d 1006 (9th Cir. 2002)

- Trial counsel was ineffective in failing to investigate meritorious mental health defense. Counsel settled on an uncorroborated alibi defense rather than investigating petitioner's severe mental health issues and drug problems. Mental health mitigation may have resulted in a second-degree murder or manslaughter conviction, rendering a penalty phase unnecessary such that petitioner would not face the death penalty.

Karis v. Calderon, 283 F.3d 1117 (9th Cir. 2002)

- Trial counsel's failure to adequately investigate and present significant mitigating evidence of petitioner's childhood poverty, abuse and family dynamics amounted to ineffective assistance. The jury could not "fairly make the vital determination of whether the defendant will live or die." Relief granted as to death sentence.

Silva v. Woodford, 279 F.3d 825 (9th Cir. 2002) (Pre-AEDPA)

- Trial counsel's investigation into petitioner's background constituted ineffective assistance. Counsel abandoned proper investigation because petitioner requested

that his parents not be called as witnesses. Counsel did not seek alternate sources of information. A detailed background investigation would have yielded information regarding petitioner's family history, criminal record, substance abuse problems, and mental health which would have been valuable during capital sentencing phase.

Mayfield v. Woodford, 270 F.3d 915 (9th Cir. 2001)

- Trial counsel's failure to present mitigating evidence during the penalty phase constituted ineffective assistance. The jury may not have imposed the death penalty if it had heard testimony of petitioner's friends and family members. Relief granted as to death sentence.

Ainsworth v. Woodford, 268 F.3d 868 (9th Cir. 2001)

- Trial counsel's failure to investigate or present mitigating evidence during penalty phase constituted ineffective assistance. A reasonable investigation would have revealed an ample amount of readily available mitigating evidence regarding petitioner's troubled life. Relief granted as to death sentence.

Jackson v. Calderon, 211 F.3d 1148 (9th Cir. 2000)

- Trial counsel's deficient performance in the penalty phase constituted ineffective assistance. Counsel spent only two hours investigating before the first and only penalty phase he had tried. Counsel also failed to ask for a continuance, present any medical testimony regarding mental condition, or investigate an aggravating factor that had been presented to him.

Lord v. Wood, 184 F.3d 1083 (9th Cir. 1999), *cert. denied*, 528 U.S. 1198 (2000)

- Trial counsel's performance constituted ineffective assistance. Counsel failed to present testimony that could have potentially exculpated petitioner. Counsel decided on not calling three witnesses without interviewing them first. All three witnesses claimed to have seen the victim alive after petitioner allegedly killed her.

Smith v. Stewart, 198 F.3d 1004 (9th Cir. 1999), *cert denied*, 531 U.S. 952 (2000)

- Counsel's performance at resentencing constituted ineffective assistance. Counsel, who had never tried a capital case before, did not investigate petitioner's background or mental history, and counsel relied entirely on mitigating evidence from a prior sentencing which had resulted in a death sentence.

B. Non-capital cases

Pearce v. Nooth, 2018 WL 3639534 (9th Cir. August 1, 2018)

- Trial counsel erred by not objecting to child hearsay statements that were introduced at trial and lacked particularity. If the statements had been excluded, there is a reasonable likelihood that the outcome of the trial would have been different as there was no physical evidence of the alleged abuse and no eyewitnesses.

York v. Ducart, 2018 WL 2453858 (9th Cir. June 1, 2018)

- Trial counsel was ineffective in failing to review evidence in his possession , obtained by law enforcement, and provided by the prosecution. The evidence included exculpatory cell phone records that would have undermined testimony of the prosecution's main witness and would have also bolstered the defense theory.

Weeden v. Johnson, 854 F.3d 1063 (9th Cir. 2017)

- Trial counsel was ineffective in refusing to investigate psychological testimony. Petitioner's mental condition was an essential element for establishing his mental state during the alleged crime. Petitioner was prejudiced because proper psychological evidence could have resulted in the jury reaching a different result.

Liao v. Junious, 817 F.3d 678 (9th Cir. 2016)

- Trial counsel performed deficiently by failing to secure medical evidence and testimony that petitioner suffered from sleepwalking. This deficient performance was prejudicial as it deprived petitioner of the ability to establish that he lacked the intent to attempt murder.

Daire v. Lattimore, 812 F.3d 766 (9th Cir. 2016) (en banc) (per curiam), *opinion superseded in part by Daire v. Lattimore*, 818 F.3d 454 (9th Cir. 2016)

- The *Strickland* test applies in noncapital sentencing context. Trial counsel did not present evidence of mental illness at sentencing. This *en banc* decision returned the case to Panel. Ultimately, relief was not granted; however, the holding is significant.

Sampson v. Palmer, 628 F. App'x 477 (9th Cir. 2015)

- Trial counsel performed deficiently by failing to present medical testimony that established petitioner as having Oppositional Defiant Disorder. This testimony would have cast doubt on two witnesses' testimony and strengthened the likelihood of acquittal.

Crace v. Herzog, 798 F.3d 840 (9th Cir. 2015)

- Trial counsel performed deficiently in failing to request a jury instruction on a lesser offense. Counsel's failure was neither strategic nor deliberate. Counsel failed to consider requesting the lesser offense instruction. This was prejudicial because petitioner could have avoided a third strike under Washington's three-strikes law and would likely not have received a life without parole sentence.

Zapata v. Vasquez, 788 F.3d 1106 (9th Cir. 2015)

- Trial counsel's deficient performance during prosecutor's closing argument constituted ineffective assistance and was prejudicial to petitioner. Counsel failed to object to prosecutor's fictional and inflammatory statements that were wholly extraneous to any issue properly before the jury. Nor did counsel ask the trial court to issue a curative instruction.

Vega v. Ryan, 757 F.3d 960 (9th Cir. 2014)

- Trial counsel's deficient performance constituted ineffective assistance. Counsel failed to review petitioner's client file and, as a result, failed to call as a witness a Catholic priest to whom the alleged victim had recanted her allegations of petitioner's sexual abuse.

Larsen v. Soto, 742 F.3d 1083 (9th Cir. 2013)

- Trial counsel was ineffective for failing to call multiple witnesses who would have testified that someone other than petitioner threw the knife that was later attributed to petitioner and led to his possession with a deadly weapon conviction. This was the case despite the fact some of these witnesses had prior convictions and their testimony contained discrepancies (as the testimony related to an event occurring eleven years prior).

Griffin v. Harrington, 727 F.3d 940 (9th Cir. 2013)

- Ineffective assistance found where trial counsel failed to object after a witness took the stand and answered questions on direct and cross examination without taking an oath. Counsel's failure to object was not tactical.

Cannedy v. Adams, 706 F.3d 1148 (9th Cir. 2013)

- Trial counsel's failure to introduce statements (that were on an internet messaging service) made by the victim of an alleged child molestation suggesting that she had fabricated her allegations constituted ineffective assistance of counsel.

Jones v. Henry, 460 F. App'x 717 (9th Cir. 2011)

- Appellate counsel's failure to follow petitioner's request to file statement of reasonable grounds for appeal constituted ineffective assistance where that failure forfeited petitioner's appeal.

Aust v. Seeley, 404 F. App'x 245 (9th Cir. 2010)

- Trial counsel's failure to provide the trial court with a transcript of petitioner's post-Miranda interrogation constituted ineffective assistance. During the interrogation, petitioner selectively invoked his right to remain silent, and the prosecutor's repeated comments on petitioner's silence "impugned [petitioner's] credibility." *Id*. at 247.

Briseno v. Woodford, 413 F. App'x 2 (9th Cir. 2010)

- Trial counsel's failure to request a certificate of probable cause allowing petitioner to appeal the issue of whether he was adequately informed of the consequences of pleading guilty constituted ineffective assistance. Petitioner did not know that the mandatory minimum sentence for each of the 32 counts to which he pled guilty was 15 years, and petitioner actually received 210 years imprisonment (14 consecutive terms).

Bennett v. Cate, 407 F. App'x 213 (9th Cir. 2010)

- Trial counsel's failure to notice blood evidence in several police reports that would have supported petitioner's version of events constituted ineffective assistance. Counsel failed to cross-examine police officers about such evidence, and the jury's inquiry regarding it revealed that the evidence was critical to the jury's determination.

Heath v. Hill, 397 F. App'x 308 (9th Cir. 2010)

- Trial counsel's failure to move to suppress the victim's testimony about a suggestive identification procedure constituted ineffective assistance. The detective had told the victim to pick the suspect from an array of photos, but did not also caution that

the suspect's photo may not be present. Furthermore, the detective had no training in non-suggestive identification procedures, and police conducted the photo array five months after the robbery. A motion to suppress would have succeeded, had counsel filed one.

Pineda Oliva v. Hedgpeth, 375 F. App'x 697 (9th Cir. 2010)

- Trial counsel's failure to move to suppress an identification obtained through a suggestive photographic array presented to a six-year-old eyewitness constituted ineffective assistance. The child eyewitness believed that she had to select one of the photos, and detectives hinted that her first choice was incorrect but later praised her final choice of petitioner's photo. A motion to suppress would have succeeded, had counsel filed one.

Burdge v. Belleque, 290 F. App'x 73 (9th Cir. 2008)

- Trial counsel's failure to object to the application of Oregon's habitual offender sentencing statute constituted ineffective assistance. The convictions that increased petitioner's sentence were arguably not "prior" to the commission of the crime at issue.

Hutchinson v. Hamlet, 243 F. App'x 238 (9th Cir. 2007)

- Trial counsel's failure to present a defense theory supported by witness testimony that corroborated petitioner's testimony and undermined the state's theory constituted ineffective assistance. Petitioner's height made it unlikely that he was the suspect on the videotape of the crime scene, and the state did not present any other evidence to corroborate the tape.

Sanders v. Ryder, 183 F. App'x 666 (9th Cir. 2006)

- Counsel was ineffective in child molestation case for failing "to consult or hire a child abuse interview expert regarding proper interview techniques or a DNA expert," failing "to interview the state's DNA forensic expert," and in failing to use pretrial hearing on child's competency as witness to challenge admissibility of child's hearsay statements to parent.

Reynoso v. Giurbino, 462 F.3d 1099 (9th Cir. 2006)

- Trial counsel's failure to investigate prosecution witnesses' knowledge and expectation of financial reward for providing inculpatory testimony constituted

ineffective assistance. Counsel also failed to cross-examine those witnesses regarding bias and financial motivation for testifying.

Alcala v. Woodford, 334 F.3d 862 (9th Cir. 2003)

- Trial counsel's failure to reasonably and competently present an alibi defense constituted ineffective assistance. Counsel failed to call an alibi witness or to admit records supporting petitioner's alibi in a case where the prosecution proffered entirely circumstantial evidence.

Nunes v. Mueller, 350 F.3d 1045 (9th Cir. 2003)

- Trial counsel's failure to provide petitioner with correct information and advice regarding the state's plea offer constituted ineffective assistance. Petitioner would have expressly accepted the offer, had he been correctly informed of its terms.

Riley v. Payne, 352 F.3d 1313 (9th Cir. 2003)

- Trial counsel's failure to interview associate who was present at the commission of charged offense constituted ineffective assistance. Counsel could not have fully assessed the associate's version of events or his credibility without interviewing him, and counsel provided no reason for failing to do so.

United States v. Skurdal, 341 F.3d 921 (9th Cir. 2003)

- Appellate counsel's failure to file an *Anders* brief with the court, stating client's claims on appeal, before asking to withdraw from the case, constituted ineffective assistance. Petitioner had several non-frivolous claims, including a possible *Faretta* violation because the district court held that petitioner lacked "technical legal knowledge" and was thus incapable of self-representation.

Silvia v. Woodford, 279 F.3d 825 (9th Cir.), *cert. denied*, 539 U.S. 958 (2003)

- Counsel ineffectively elected to "abandon[] . . . the investigation into [petitioner's] background—including his family, criminal, substance abuse, and mental health history "based entirely on an overbroad acquiescence in his client's demand that he refrain from calling his parents as witnesses" [1] "if a client forecloses certain avenues of investigation, it arguably becomes even more incumbent upon trial counsel to seek out and find alternative sources of information and evidence, especially in the context of a capital murder trial . . . [and] a concomitant duty to try to educate or dissuade [petitioner] about the consequences of his actions."

Luna v. Cambra, 306 F.3d 954 (9th Cir.), *amended*, 311 F.3d 9285 (9th Cir. 2002)

- Trial counsel's performance constituted ineffective assistance. Counsel failed to investigate or present evidence in connection with petitioner's alibi. Counsel also failed to interview suspect who eventually confessed to the crime.

Rios v. Rocha, 299 F.3d 796 (9th Cir. 2002)

- Trial counsel's failure to interview more than one of potentially 50-200 witnesses to the offense, before deciding to abandon a potentially meritorious misidentification defense and to solely rely on a weak unconsciousness defense, constituted ineffective assistance. Many witnesses, including the state's witnesses, disagreed as to the identity of the shooter. Furthermore, counsel knew of at least fifteen other witnesses, one of whom stated petitioner was not the shooter.

Avila v. Galaza, 297 F.3d 911 (9th Cir. 2002)

- Trial counsel's failure to investigate or present evidence to prove theory that petitioner's brother had committed the shooting of which petitioner stood accused constituted ineffective assistance. Counsel did not attempt to question either petitioner's mother or prior counsel, both of whom implicated petitioner's brother.

Delgado v. Lewis, 223 F.3d 976 (9th Cir. 2000) (AEDPA standard of review interpretation overruled by *Lockyer v. Andrade*, 538 U.S. 63 [2003])

- Trial counsel's absence from nearly every critical court proceeding, and appellate counsel's failure to pursue issues certified for appeal, constituted ineffective assistance. "Much of Delgado's sojourn through the criminal justice system was unaccompanied by even a lukewarm body."

Lord v. Wood, 184 F.3d 1083 (9th Cir. 2000), *cert. denied*, 528 U.S. 1198 (2000)

- Defense counsel failed to present testimony of three witnesses with highly exculpatory information and decided against calling them as witnesses without first personally interviewing them.

C. Conflict-free assistance of counsel

Daniels v. Woodford, 428 F.3d 1181 (9th Cir. 2005)

- Irreconcilable conflict between attorney and client constituted a constructive denial of the right to counsel. Attorney and petitioner shared a complete lack of trust and communication which resulted in counsel failing to investigate a mental health

defense at guilt phase or mitigation evidence at penalty phase. In addition, trial court's denial of change of venue violated due process where enormous amount of pre-trial publicity had taken place.

Lewis v. Mayle, 391 F.3d 989 (9th Cir. 2004)

- Trial court's allowance of an attorney to represent petitioner who was retained and paid by petitioner's nephew violated petitioner's right to conflict-free assistance of counsel. Petitioner's nephew was the only other person who could have committed the crime.

Lockhart v. Terhune, 250 F.3d 1223 (9th Cir. 2001)

- Trial counsel had actual conflict of interest by representing another client who was implicated in the same uncharged murder. Counsel's conflict negatively impacted petitioner's defense, and petitioner did not knowingly and intelligently waive his right to conflict-free counsel as counsel misled both him and the court regarding the extent of the conflict.

D. Plea negotiations and advice concerning guilty pleas

Johnson v. Uribe, 700 F.3d 413 (9th Cir. 2012)

- Trial counsel's failure to adequately advise petitioner during plea negotiations, or to object to the sentence imposed by the trial court constituted ineffective assistance of counsel. Petitioner's Sixth Amendment rights were violated when his trial counsel failed to advise petitioner that he was going to plead to an incorrectly calculated sentence.

Ritchie v. Blacketter, 371 F. App'x 798 (9th Cir. 2010)

- Trial counsel's inability to answer petitioner's question about the elements of the offense of compelling prostitution constituted ineffective assistance. Counsel's failure prevented petitioner from making an informed decision about whether or not to go to trial on the offense charged. Relief granted as to a guilty plea.

Riggs v. Fairman, 399 F.3d 1179 (9th Cir. 2005), rehearing *en banc* granted by 430 F.3d 1222 (9th Cir. 2005). *Riggs* was settled after rehearing was granted and its precedential value is unclear. However, Supreme Court decisions from 2012 affirm its holding.

- Trial counsel's failure to inform petitioner that California's "three strikes" law could apply to his case constituted ineffective assistance. Counsel advised petitioner to

reject a five-year plea offer on the ground that the maximum possible sentence was only nine years imprisonment, when it was actually twenty-five years to life.

United States v. Kwan, 407 F.3d 1005 (9th Cir. 2005)

- Granting *coram nobis* relief to resident alien who challenged conviction—which was basis for pending deportation—on ground that "Kwan's counsel was constitutionally ineffective in affirmatively misleading him as to the immigration consequences of his conviction."

II. Denial of the assistance of counsel & *Faretta* violations

Tamplin v. Muniz, 894 F.3d 1076 (9th Cir. July 6, 2018)

- Petitioner's Sixth Amendment right was violated under *Faretta* when the trial court denied his request to represent himself and then imposed a previously discharged attorney to represent him. Petitioner unequivocally invoked his right to represent himself and did not voluntarily waive his right to represent himself.

Gonzalez v. Pliler, 395 F. App'x 453 (9th Cir. 2010)

- Petitioner was deprived of assistance of counsel because he was required to wear a stun belt during trial that would shock him if he communicated with anyone in the vicinity. He did not communicate with his lawyer at all during trial.

Bradley v. Henry, 510 F.3d 1093 (9th Cir. 2007) (en banc) (concurring opinion amended by 518 F.3d 657 (9th Cir. 2008))

- Trial court's refusal to replace defense counsel or have counsel assisted when the attorney-client relationship broke down constituted a denial of assistance of counsel. Trial court excluded petitioner from in camera proceeding regarding his attorney's motion to withdraw and refused to allow petitioner to address the issue in open court.

Pruitt v. Pliler, 178 F. App'x 752 (9th Cir. 2006)

- Trial court's denial of request for self-representation on ground of untimeliness of request was improper given that "request appears to have been asserted in good faith," "delay in the trial proceedings would not have prejudiced the court or the prosecution," and "request could not have reasonably been made earlier in the proceedings."

Hirschfield v. Payne, 420 F.3d 922 (9th Cir. 2005)

- Trial court violated petitioner's right to self-representation by denying his request for self-representation on grounds that petitioner lacked adequate understanding of legal procedures. Denial was in violation of *Faretta*.

Robinson v. Ignacio, 360 F.3d 1044 (9th Cir. 2004)

- Trial court violated petitioner's Sixth Amendment right to counsel at sentencing. Court denied petitioner's request for representation at sentencing based on the incorrect notion that one cannot reassert right to counsel if one waives that right prior to trial.

Cordova v. Baca, 346 F.3d 924 (9th Cir. 2003)

- Trial court's failure to advise petitioner of the disadvantages of self-representation deprived him of his right to counsel under *Faretta*.

Van Lynn v. Farmon, 347 F.3d 735 (9th Cir. 2003)

- Trial court's denial of petitioner's motion to represent herself on the basis that the petitioner did not have adequate legal experience violated *Faretta* and Sixth Amendment right to self-representation. *Faretta* requires only a rational understanding of the case.

Bribiesca v. Galaza, 215 F.3d 1015 (9th Cir. 2000)

- Trials court's denial of petitioner's request to represent himself violated his Sixth Amendment right to self-representation. Petitioner acted obstructively only after his request was denied, and petitioner had the right to access law books and other tools to prepare his defense.

Bell v. Hill, 190 F.3d 1089 (9th Cir. 1999)

- Trial court violated petitioner's right to counsel by refusing to appoint counsel to assist him in filing new trial motion.

III. *Brady* violations

Browning v. Baker, 875 F.3d 444 (9th Cir. 2017)

- Trial counsel failed to investigate, and prosecution improperly withheld, exculpatory evidence including bloody shoeprints that did not match petitioner's

shoes, that testimony from a major witness was in exchange for a lesser charge in an unrelated case, and discrepancies with a witness' description of the killer's hair style. Habeas granted in part.

Comstock v. Humphries, 786 F.3d 701 (9th Cir. 2015)

- Prosecutor's suppression of the victim's prior statement which would have substantially diminished the State's ability to prove beyond a reasonable doubt that a ring was stolen violated *Brady*.

Amado v. Gonzalez, 758 F.3d 1119 (9th Cir. 2014)

- Petitioner's due process rights were violated when prosecution withheld *Brady* information on a witness who provided critical evidence at trial. Petitioner was accused of aiding and abetting a gang shooting by running with gang members to the shooting location and carrying a gun to the scene. The prosecutor withheld evidence that the only witness who testified that petitioner was carrying a gun had himself committed a robbery, was on probation for that offense, and was a gang member.

Aguilar v. Woodford, 725 F.3d 970 (9th Cir. 2013), *cert. denied*, 134 S.Ct. 1869 (2014)

- Prosecution violated *Brady* when it failed to provide to the petitioner the police dog's history of mistaken scent identifications where the petitioner's scent was allegedly present at the scene of the crime. The state court unreasonably applied Brady because the dog's scent evidence was the only evidence linking petitioner to get the getaway car, corroborating the weak eye witness identifications.

Milke v. Ryan, 711 F.3d 998 (9th Cir. 2013)

- Petitioner's right to a fair trial was violated when the state failed to provide, and the trial court quashed a subpoena for, the personnel file of the state's main witness, a police officer with a history of lying under oath and violating constitutional rights during interrogations. The state's failure to provide exculpatory evidence to petitioner violated *Brady* and *Giglio*.

Phillips v. Ornoski, 673 F.3d 1168 (9th Cir. 2012) (Pre-AEDPA)

- In capital murder trial, prosecutor deprived petitioner of critical evidence that was material to the special circumstance finding that the murder was committed during the course of a robbery (rather than vice versa). Prosecutor's failure to disclose such

evidence also willfully misled the jury on this issue. Relief granted as to death sentence.

Valdovions v. McGrath, 598 F.3d 568 (9th Cir. 2010)

- Prosecution suppressed evidence that (1) police photographs of "witnesses police interviewed at the nightclub on the night of the shooting" included photograph of individual who was "wearing a black cowboy hat and a black leather jacket, the same items allegedly worn by the shooter"; (2) anonymous letter sent to decedent's relative stated that "murder was a contract killing over a debt" and that hired assassin had been paid with money and drugs; and (3) prosecution witness, whose Grand Jury testimony identifying accused was read to jury because witness "could not be located," had in fact been arrested since alleged crime for possession of drugs and firearm.

Maxwell v. Roe, 628 F.3d 486 (9th Cir. 2010)

- Prosecutor's failure to disclose impeachment evidence about the jailhouse informant whose testimony provided the primary source of evidence violated *Brady*.

Jackson v. Brown, 513 F.3d 1057 (9th Cir. 2008) (Pre-AEDPA)

- Prosecutor violated *Brady* by failing to disclose details of agreement made with jailhouse informant to secure informant's testimony. Prosecutor also violated *Napue v. Illinois*, 360 U.S. 264 (1959) by failing to correct informant's testimony that the prosecutor had not promised any benefits in exchange for testimony.

Silva v. Brown, 416 F.3d 980 (9th Cir. 2005)

- Prosecutor's failure to disclose agreements between co-defendant and government violated *Brady*. Government agreed to dismiss one co-defendant's murder charge in return for his testimony against petitioner, and co-defendant agreed to forego psychiatric evaluation so as prevent the defense from using the evaluation to discredit him.

Gantt v. Roe, 389 F.3d 908 (9th Cir. 2004)

- Prosecutor's failure to disclose that a telephone number written on a matchbox found on petitioner's person during his arrest did not actually link petitioner to the victim violated *Brady*.

Bailey v. Rae, 339 F.3d 1107 (9th Cir. 2003)

- Prosecutor's failure to reveal psychological evaluations showing that the victim of sexual abuse was capable of consent violated *Brady*. Such evidence negated an element of the charged offense.

Goldstein v. Harris, 82 F. App'x 592 (9th Cir. 2003)

- Prosecutor's failure to disclose impeachment evidence concerning the only two witnesses linking petitioner to the murder violated *Brady*. The prosecution also failed to disclose to the defense that the jailhouse informant received a reduced sentence in exchange for testimony, and that the eyewitness' identification of petitioner in a photo array was impermissibly suggestive.

Benn v. Lambert, 283 F.3d 1040 (9th Cir. 2002)

- Prosecutor's failure to disclose impeachment evidence pertaining to an important prosecution witness or an arson expert's report that concluded that the fire was accidental violated *Brady*. Such evidence undermined the prosecution's theory of motive. Relief granted as to death sentence.

Killian v. Poole, 282 F.3d 1204 (9th Cir. 2002)

- Prosecutor's failure to disclose new evidence that showed that a key witness had perjured himself violated *Brady*. Also, trial judge erroneously allowed the prosecutor to argue that petitioner's silence at arrest was proof of guilt.

Paradis v. Arave, 240 F.3d 1169 (9th Cir. 2001)

- Prosecutor's failure to disclose notes describing medical examiner's opinions regarding time and location of victim's death violated *Brady*. The notes were material to the issue of whether the victim died in the state where body was found, bearing on whether jurisdiction existed.

IV. *Batson* violations and jury selection

Currie v. McDowell, 825 F.3d 603 (9th Cir. 2016)

- Prosecutor violated *Batson* by excluding a black juror with a preemptory strike. Prosecutor had a history of *Batson* violations and could not provide a reasonable race-neutral explanation for exclusion.

Shirley v. Yates, 807 F.3d 1090 (9th Cir. 2015)

- Finding that the California prosecutor, in his burglary robbery case, committed purposeful discrimination in striking African-American jurors. While the prosecutor could not recall why he struck the prospective jurors, his statement that he was confident there was a race neutral reason could not, without corroboration, overcome *Batson's* third step.

Crittendon v. Chappell, 804 F.3d 998 (2015)

- Finding that the California prosecutor, in this capital murder case, committed purposeful discrimination, in violation of *Batson*, by striking an African-American juror on account of her race.

Castellanos v. Small, 766 F.3d 1137 (9th Cir. 2014)

- Prosecutor's explanation for striking a Hispanic juror was pretextual when he claimed to have struck her because she did not have children, but the juror did have children and the prosecutor did not strike Caucasian individuals without children.

Love v. Cate, 449 F. App'x 570 (9th Cir. 2011)

- Prosecutor failed to provide a race-neutral explanation for peremptory strike of black juror as required by *Batson*.

Reynoso v. Hall, 395 F. App'x 344 (9th Cir. 2010)

- Prosecutor's peremptory challenges excluding two Hispanic jurors with similar characteristics to white jurors who were selected violated *Batson* principle that any purposeful discrimination is unconstitutional.

Ali v. Hickman, 584 F.3d 1174 (9th Cir. 2009)

- Prosecutor's strike of the only two African American members of the jury pool violated *Batson*. The prosecutor's asserted reasons for striking the first juror were weak enough to constitute pretexts for purposeful racial discrimination.

Green v. LaMarque, 532 F.3d 1028 (9th Cir. 2008)

- Prosecutor's race-neutral explanations for peremptory challenges against all six African-Americans on jury panel were pretexts as the explanations also applied to unchallenged white jurors.

Paulino v. Harrison, 542 F.3d 692 (9th Cir. 2008)

- Prosecutor's after-the-fact speculations for striking five of the six African-Americans from the jury panel were insufficient to meet the state's burden to prove actual race-neutral reasons for the peremptory challenges.

Boyd v. Newland, 455 F.3d 897 (9th Cir. 2006), *amended*, 467 F.3d 1139 (9th Cir. 2006)

- Trial court erred in denying African-American petitioner's request to include the entire voir dire transcript in the record to support a *Batson* challenge when prosecutor used a peremptory strike to excuse an African-American prospective juror. Without the entire transcript, courts could not properly evaluate the circumstances surrounding the contested strike.

Brown v. Del Papa, 317 F. App'x 589 (9th Cir. 2006)

- State courts "applied *Batson v. Kentucky*, in an objectively unreasonable fashion by failing to engage in 'a sensitive inquiry into such circumstantial and direct evidence of [discriminatory] intent as may be available,' which *Batson*'s third step clearly requires": prosecution's assertion that it removed venireperson because "she did not seem to understand or respond appropriately to certain *voir dire* questions" was "simply implausible" and was inconsistent with prosecution's treatment of "white jurors whose answers were far more inappropriate or unresponsive."

Kesser v. Cambra, 465 F.3d 351 (9th Cir. 2006)

- Prosecutor's "ostensibly 'race-neutral' reasons" for striking jurors proved "to be only a veneer, a pleasing moss having no depth."

Lewis v. Lewis, 321 F.3d 824 (9th Cir. 2003)

- Prosecutor's use of peremptory challenges violated *Batson* where prosecutor's alternative explanations for the peremptory challenge were not credible.

McClain v. Prunty, 217 F.3d 1209 (9th Cir. 2000)

- Prosecutor's peremptory challenges excluding all African-Americans from jury violated *Batson*. Petitioner was African-American and prosecutor's reasons to exclude were either objectively contrary to the facts or pretextual.

V. Speedy trial violations

McNeely v. Blanas, 336 F.3d 822 (9th Cir. 2003)

- Petitioner's right to a speedy trial was violated when petitioner had not received even a preliminary hearing over five years after being charged. Petitioner asserted his right to a speedy trial, and the state did not adequately explain the reasons for delay. State "utterly failed to provide a comprehensible record and even failed to comply with the magistrate's order to file transcripts of relevant hearings." *Id*. at 826.

VI. Due process violations (apart from instructional errors)

A. Mental competency issues

Watts v. Yates, 387 F. App'x 772 (9th Cir. 2010)

- Trial court's failure to conduct a second competency hearing where petitioner refused an insanity plea and testified to his own guilt violated due process. The trial court itself questioned petitioner's competency after his testimony, and a retrospective competency hearing would not cure the error.

Maxwell v. Roe, 606 F.3d 561 (9th Cir. 2010)

- Trial court's failure to order a competency hearing where petitioner's behavior pretrial and during trial indicated incompetency violated due process. While defense counsel failed to move for a competency hearing, and while petitioner's behavior was voluntary, the court should have held the hearing on its own motion.

McMurtrey v. Ryan, 539 F.3d 1112 (9th Cir. 2008)

- Trial court's failure to conduct a competency hearing violated due process where there was evidence sufficient to raise a reasonable doubt as to petitioner's competency to stand trial. While a report from the state's psychiatric expert concluded that petitioner was competent, there was significant evidence regarding petitioner's memory problems, prescribed medications, erratic behavior, and lack of expert evaluation at the time of trial. A later evidentiary hearing did not correct the due process violation.

Odle v. Woodford, 238 F.3d 1084 (9th Cir. 2001)

- Trial court's failure to conduct competency hearing violated due process where there was evidence before the court that petitioner had suffered massive head

trauma, was missing a piece of his brain the size of grapefruit, and had exhibited psychotic behavior while awaiting trial.

Torres v. Prunty, 223 F.3d 1103 (9th Cir. 2000)

- Trial court's failure to conduct competency hearing violated due process where the court unreasonably determined that petitioner was not credible when he stated to his counsel that he believed she was part of conspiracy against him. The trial court should have more fully inquired into petitioner's competency because his previous medical evaluation and insistence on being handcuffed in court suggested that a hearing was necessary.

B. Prosecutorial misconduct

Deck v. Jenkins, 814 F.3d 954 (9th Cir. 2016)

- Prosecutor committed misconduct and violated due process by misstating the law during closing argument, saying that intent to commit a lewd act anytime in the future was adequate for a conviction of attempted lewd act on a minor. The actual intent needed is intent to commit a lewd act at the time of the act in question. The improper argument encouraged the jury to convict without finding that petitioner had moved beyond preparation.

Dow v. Virga, 729 F.3d 1041 (9th Cir. 2013)

- Prosecutor committed misconduct when she knowingly elicited false testimony that petitioner, rather than his attorney, requested a band-aid be used on all line-up suspects that otherwise would have presented only one person with a facial mark. Prosecutor classified petitioner's alleged conduct as evidence of guilt in attempting to prevent a positive eye witness identification.

Zambrano v. Prosper, 481 F. App'x 300 (9th Cir. 2012)

- Where the heart of the case revolved around the police officers' credibility, prosecutor's line of questioning and subsequent argument inviting the jury to decide the case on personal sympathy for the police officers who might lose their jobs if they were found to have lied, constituted prosecutorial misconduct in violation of petitioner's due process rights.

Sechrest v. Ignacio, 549 F.3d 789 (9th Cir. 2008)

- Prosecutor's repeated statements that the Parole Board Commission would commute petitioner's sentence and that petitioner would likely be released from prison on parole if he was sentenced to life without parole instead of the death penalty violated petitioner's due process right to a fair trial.

Hayes v. Brown, 399 F.3d 972 (9th Cir. 2005)

- In capital murder case, prosecutor's knowing presentation of false evidence and failure to correct the record regarding the dismissal of charges against a witness violated due process, even though the witness was unaware of the agreement to dismiss the charges and thus did not commit perjury.

Sandoval v. Calderon, 241 F.3d 765 (9th Cir. 2000)

- Prosecutor improperly invoked religious authority, including the phrases "playing God" and "an eye for an eye, a tooth for a tooth," during closing argument during penalty phase of trial.

C. Denial of the right to present a defense

Ardoin v. Arnold, 653 F. App'x. 532 (9th Cir. 2016)

- Trial court violated due process by refusing to reopen closing arguments after modifying jury instructions to include instructions on felony murder. As a result, defense counsel was unable to address accusation of felony murder, and jury, which had deliberated for days, reached guilty verdict about one hour after receiving modified instructions.

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

- Petitioner's due process right to present a complete defense was violated when trustworthy and material exculpatory evidence was excluded at his capital murder trial. Petitioner had endeavored to develop two grounds of defense: that he did not kill the victim, but than an identifiable person did and had allegedly confessed to the crime. California Supreme Court's decision was contrary to *Chambers v. Mississippi*, 410 U.S. 284 (1973).

Lunbery v. Hornbeak, 605 F.3d 754 (9th Cir. 2010)

- Petitioner's due process right to present a complete defense was violated when the trial court held that a third party's statement assigning guilt to another party was inadmissable hearsay.

Chia v. Cambra, 360 F.3d 997 (9th Cir. 2004), *cert. denied,* 544 U.S. 919 (2005)

- Trial court violated *Chambers v. Mississippi*, 410 U.S. 284 (1973) by excluding four statements of codefendant, which exculpated petitioner while inculpating declarant.

Bradley v. Duncan, 315 F.3d 1091 (9th Cir. 2003)

- State trial court violated petitioner's right to present a complete defense by denying petitioner the opportunity to argue entrapment. Police used an unwitting decoy suffering from cocaine withdrawal to convince petitioner to buy drugs, even though petitioner held no drugs and stated he did not sell them.

Greene v. Lambert, 288 F.3d 1082 (9th Cir. 2002)

- Trial court's exclusion of evidence of petitioner's dissociative identity disorder in the form of his own testimony deprived him of his right to present a complete defense.

DePetris v. Kuykendall, 239 F.3d 1057 (9th Cir. 2001)

- Trial court's exclusion of victim's journal and petitioner's testimony regarding her state of mind from reading the journal violated petitioner's right to present a complete defense. Petitioner was charged in state court with first-degree murder with use of firearm in shooting death of her sleeping husband.

Conde v. Henry, 198 F.3d 734 (9th Cir. 1999) (Pre-AEDPA)

- Trial court violated petitioner's right to counsel when it precluded defense counsel from arguing theory of case in closing argument. Additionally, the judge refused to instruct the jury on the theory of defense and defines the crime in a manner that reduced the prosecution's burden of proof, thereby violating due process.

D. Breach of the plea agreement

Buckley v. Terhune, 441 F.3d 688 (9th Cir. 2006)

- Indeterminate prison term of fifteen years to life violated due process right where petitioner had bargained for a fifteen-year maximum sentence. Petitioner was entitled to have the plea agreement enforced.

Davis v. Woodford, 446 F.3d 957 (9th Cir. 2006)

- Sentencing court violated due process by breaching a plea agreement. In 1986, prosecution had promised to treat petitioner's eight prior robbery convictions as one "strike" for the purposes of California's Three Strikes Law. In 2000, trial court treated robbery convictions as eight strikes and imposed 25 years to life sentence for illegal firearms possession and evading a police officer.

Brown v. Poole, 337 F.3d 1155 (9th Cir. 2003)

- Petitioner was entitled to specific performance of a plea agreement that promised that she would be released when she'd served half of the minimum 15-year term without behavior violations. Petitioner had served 17 years upon release.

Gunn v. Ignacio, 263 F.3d 965 (9th Cir. 2001)

- Government breached plea agreement when it concurred with presentence report that recommended sentence contrary to plea agreement. Pre-sentencing report recommended four consecutive sentences, while plea agreement promised concurrent sentences.

E. Miscellaneous due process challenges

Echavarria v. Filson, 896 F.3d 1118 (2018)

- Petitioner faced intolerable risk of bias because the trial judge who presided over petitioner's trial was previously investigated for criminal conduct by the FBI agent who petitioner was convicted of killing. The risk of bias deprived petitioner of a constitutionally fair trial.

Barrios v. Rackley, 664 F. App'x 625 (9th Cir. 2016)

- Trial court violated due process by accepting an unintelligent guilty plea. Counsel did not review the elements and penalty for robbery with petitioner and led

petitioner to believe that he would receive five-year sentence; he received an indeterminate life sentence.

Camp v. Neven, 606 F. App'x 322 (9th Cir. 2015)

- Petitioner's due process rights were violated when the State was allowed to present expert rebuttal testimony without giving prior notice. However, the court required petitioner to disclose his own expert testimony on the same issues. The nonreciprocal obligations violated *Wardius v. Oregon*, 412 U.S. 470 (1973). Also, the prosecutor's failure to disclose complete medical records violated *Brady*.

Sivak v. Hardison, 658 F.3d 898 (9th Cir. 2011)

- Defendant's due process rights violated when state allowed a jailhouse informant to falsely testify. Absent this violation, Defendant's penalty phase proceedings could have had a different outcome.

Hurles v. Ryan, 650 F.3d 1301 (9th Cir. 2011)

- Trial judge's statements about capital murder case months before she would preside over trial raised the appearance of bias. Judge described nature of the case as "very simple and straightforward," with an overwhelming amount of evidence assembled to demonstrate petitioner's guilt for the "brutal murder." Judge eventually unilaterally sentenced petitioner to death and adjudicated his post-conviction claims for relief.

Joo Heun Lee v. Small, 419 F. App'x 763 (9th Cir. 2011)

- After defendant presented his trial strategy to the court, making clear that his decision to decline challenging the state's expert were dictated by the interpretation of the charge and the impact of available defenses—an interpretation neither the court nor the state disputed—his due process rights were violated when the court endorsed the state's different interpretation after the case went to the jury.

Parle v. Runnels, 505 F.3d 922 (9th Cir. 2007)

- Cumulative effect of evidentiary errors violated petitioner's due process right to a fair trial. Trial court ruled that psychotherapist-patient privilege had been waived and required psychiatrist to testify, which admitted impermissible character evidence. Trial court also improperly excluded evidence of victim's propensity for violence, rebuttal testimony by defense expert, and testimony of petitioner's demeanor immediately before and after the crime.

Kennedy v. Lockyer, 379 F.3d 1041 (9th Cir. 2004)

- Trial court's failure to provide indigent petitioner with complete transcript of first trial before retrial violated due process. The prosecution was permitted to present evidence at the second trial that had been properly excluded during the first trial.

Dyas v. Poole, 317 F.3d 934 (9th Cir. 2003)

- Petitioner's due process rights were violated when petitioner's shackles were visible to the jury. In addition, the trial court erroneously required petitioner to prove prejudice of the unconstitutional shackling, when the prosecution bears the burden of proving that a constitutional error was harmless beyond a reasonable doubt.

Gill v. Ayers, 342 F.3d 911 (9th Cir. 2003)

- Petitioner's right to due process was violated when state trial court did not allow him to testify during sentencing hearing. Petitioner's testimony may have established that his prior conviction for assault did not qualify as a "strike," thus exempting him from California's "three strikes" law.

Hall v. Director of Corr., 343 F.3d 976 (9th Cir. 2003) (per curiam)

- Trial court's admission of falsified notes from a jailhouse informant violated due process. The prosecution's case relied primarily on documents from a jailhouse informant who later admitted to changing the questions from innocuous to incriminating after petitioner wrote his answers.

Campbell v. Rice, 302 F.3d 892 (9th Cir. 2002)

- Petitioner's due process rights were violated when he was excluded from an in-chambers hearing involving the trial court, defense counsel, and prosecutor. During the hearing, the trial court considered, on the record, defense counsel's potential conflict of interest as disclosed by the prosecutor.

Thomas v. Hubbard, 273 F.3d 1164 (9th Cir. 2001), *overruled in part on other grounds*, *Payton v. Woodford*, 299 F.3d 815 (9th Cir. 2002) (en banc), *vac'd and remanded*, 538 U.S. 975 (2003)

- Petitioner's due process rights were violated by the admission of triple hearsay, prosecutorial misconduct for eliciting prior convictions (violating pretrial ruling), and unjustified limitation on cross-examination of investigating officer.

Little v. Kern Cnty. Super. Ct., 294 F.3d 1075 (9th Cir. 2002) (per curiam)

- Trial court's summary hearing for contempt of court violated due process. Court did not adequately notify petitioner of details of charges or time of hearing. The judge that presided over the trial was the subject of petitioner's allegedly contemptuous remarks and could not be expected to be unbiased.

Sassounian v. Roe, 230 F.3d 1097 (9th Cir. 2000)

- Jury's consideration of evidence of a telephone call to the Turkish embassy claiming credit for the assassination of Turkish consul general improperly influenced the special circumstance finding of murder because of nationality. After fifteen days of deliberation, the jury was hung on each of the special circumstances. Then, the improper extrinsic evidence was introduced into the deliberations only after a juror asked about the "reason" for the killing. Within one hour, the jury found the special circumstance of murder because of nationality.

Green v. White, 232 F.3d 671 (9th Cir. 2000)

- Juror's dishonesty in jury questionnaire and during voir dire about his disqualifying criminal history, as well as his inappropriate behavior and attempts to cover up his behavior, introduced "destructive uncertainties" into the fact-finding process. As a result, petitioner's right to a fair trial was violated.

Rhoden v. Rowland, 172 F.3d 633 (9th Cir. 1999)

- Trial court violated due process by ordering that petitioner be shackled throughout his trial. The shackles were visible to the jury throughout the trial and the court did not provide a compelling reason for the shackling.

VII. Faulty jury instructions

Hall v. Haws, 861 F.3d 977 (9th Cir. 2017)

- Petitioner and his co-defendant filed for habeas relief, challenging his first-degree murder conviction, based on the same flawed jury instructions which contained a permissive inference in violation of due process. Petitioner stopped pursuing his petition because he mistakenly thought he "co-submitted" his with his trial co-defendant. The district court granted the co-defendant relief. When petitioner realized his error and filed his own petition, he was denied for untimely filing. The Circuit granted relief to the petitioner in the context of Rule 60(b)(6) motion.

Dixon v. Williams, 750 F.3d 1027 (9th Cir. 2014)

- Petitioner's conviction of second-degree murder with the use of a deadly weapon was obtained in violation of his due process rights due to inaccurate jury instructions. The instructions stated that it was not a defense if the defendant had an "honest and reasonable" instead of "unreasonable" fear. This error was not harmless because of the evidence presented and the possible lesser offense, manslaughter, of which petitioner could have been convicted.

McKeever v. Allison, 484 F. App'x 97 (9th Cir. 2012)

- Trial court improperly instructed a jury that the mental state for second degree murder was general intent. The lower court abused its discretion by denying petitioner's request to instruct the jury that the correct and requisite mental state for second degree murder is malice. The error was constitutionally prejudicial and qualified for habeas relief under precedent. *Ho v. Carey*, 332 F.3d 587 (2003).

Doe v. Busby, 661 F.3d 1001 (9th Cir. 2011)

- Trial court violated petitioner's right to due process when it issued improper jury instructions on a charge for first degree murder found by a preponderance of the evidence that unadjudicated domestic violence occurred. The instruction violated *Gibson* precedent.

Sherrors v. Woodford, 425 F. App'x 617 (9th Cir. 2011)

- Petitioner's right to due process was violated by jury instructions allowing a presumption that the petitioner murdered the victim from the fact that petitioner possessed the victim's property, plus "slight" corroborating evidence.

Taylor v. Sisto, 606 F.3d 622 (9th Cir. 2010)

- Judge's pre-instruction to jurors to disregard their "own life experience[s]" violated Sixth Amendment by depriving accused of "impartial jury . . . that applies common sense informed by the range of human experience."

Smith v. Curry, 580 F.3d 1071 (9th Cir. 2009)

- Trial judge's instruction to the jury to focus on the "consistencies and inconsistencies" of petitioner and co-defendant's post-arrest statements deprived petitioner of his right to a jury trial under the Sixth Amendment. The judge summarized the statements and relayed what the court thought were the key portions

for the jury to consider. The judge improperly commented on the evidence, took over jury deliberations, and coerced a guilty verdict.

Gibson v. Ortiz, 387 F.3d 812 (9th Cir. 2004), overruled in part on other grounds by *Byrd v. Lewis*, 566 F.3d 855 (9th Cir. 2009)

- Instruction on prior sexual offenses had unconstitutional effect of "allow[ing] the jury find Gibson guilty of the charged offenses by relying on facts found only by a preponderance of the evidence," instead of the beyond a reasonable doubt standard required for all elements of an offense. The instructions diluted the necessary burden of proof and violated petitioner's presumption of innocence.

Chambers v. McDaniels, 549 F.3d 1191 (9th Cir. 2008)

- Premeditation instruction violated due process by collapsing the three separate elements of premeditation into one. Additional instructions failed to correct the error, further confusing the issue by defining second-degree murder ambiguously and failing to include the lesser intent requirement for second-degree murder. Intent is critical to a first-degree murder conviction and there was only weak evidence of deliberation.

Polk v. Sandoval, 503 F.3d 903 (9th Cir. 2007)

- Jury instruction collapsing three elements into one element of premeditation violated due process. The instruction blurred the lines between first and second-degree murder and allowed the jury to convict for first-degree murder without finding all three elements: whether the crime was committed deliberately, with premeditation, and willfully.

Stark v. Hickman, 455 F.3d 1070 (9th Cir. 2006)

- Instruction directing the jury to conclusively presume sanity violated due process when the only issue during the guilt phase was whether petitioner had the requisite mental state.

Clark v. Brown, 450 F.3d 898 (9th Cir. 2006) (Pre-AEDPA)

- Failure to give requested special circumstance jury instruction deprived petitioner of meaningful opportunity to present complete defense, violating due process. Additionally, state supreme court's retroactive application of a new interpretation of the state felony-murder special circumstance statute violated due process.

Bartlett v. Alameida, 366 F.3d 1020 (9th Cir. 2004) (per curium)

- Trial court violated due process, specifically, *Lambert v. California,* 355 U.S. 225 (1957). Court incorrectly and repeatedly instructed jury that knowledge of one's obligation to register as a sex offender was not a necessary element of failure to re-register as a sex offender. These repeated misstatements had a substantial and injurious effect on the verdict, as they ended a jury deadlock and resulted in conviction.

Keating v. Hood, 191 F.3d 1053 (9th Cir. 1999) (Pre-AEDPA), *overruled on other grounds by Payton v. Woodford*, 346 F.3d 1204 (9th Cir. 2003)

- Trial court violated petitioner's right to due process by omitting the mens rea element for a securities charge in jury instructions. The instructions diluted the burden of proof and allowed for a conviction without all necessary elements proven.

Ho v. Carey, 332 F.3d 587 (9th Cir. 2003)

- Trial court violated due process by giving faulty jury instructions. Court instructed jury that second-degree murder was a general intent crime and omitted information about what constituted implied malice needed for conviction. Instruction diluted the burden of proof by allowing jury to convict without proof of necessary mens rea. Instruction allowed jurors to convict petitioner of murder even if they believed his self-defense claim.

Powell v. Galaza, 328 F.3d 558 (9th Cir. 2002)

- Jury instruction that petitioner's own testimony satisfied specific intent element of crime of failure to appear at sentencing hearing denied him his right to due process. Instruction improperly removed the element of specific intent to evade court process from the jury's consideration and effectively commanded a directed verdict of guilty because that element was the sole issue in question at trial.

Morris v. Woodford, 273 F.3d 826 (9th Cir. 2001)

- Typographical error contained in written penalty phase instruction warranted habeas relief. The faulty instruction stated that if jurors had a reasonable doubt as to whether to impose the death sentence, or to impose a sentence of life without the possibility of parole, they must give the defendant the benefit of the doubt and return a verdict of life "with" possibility of parole.

Patterson v. Gomez, 223 F.3d 959 (9th Cir. 2000)

- Instruction that directed jury to presume that petitioner was sane violated due process. Instruction impermissibly relieved the state of its burden to prove beyond a reasonable doubt that petitioner had requisite mental state to commit first-degree murder.

Coleman v. Calderon, 210 F.3d 1047 (9th Cir. 2000)

- Instruction to jury on governor's power to commute death sentence warranted habeas relief. Relief granted as to death sentence because error not harmless.

Weaver v. Thompson, 197 F.3d 359 (9th Cir. 1999)

- Trial court violated due process when the bailiff falsely told the jurors during a night of deliberations that they had to reach a verdict on all four criminal counts that night. These "instructions" coerced the jury into delivering guilty verdicts on all four charges.

VIII. Insufficiency of the evidence

Waggoner v. Hernandez, 393 F. App'x 449 (9th Cir. 2010)

- Insufficient evidence to convict petitioner of possession of pseudoephedrine with intent to manufacture methamphetamine. Record only supported inference that petitioner had intended to trade cold medicine containing pseudoephedrine to methamphetamine manufacturer in return for money or drugs.

Wilson v. Clark, 372 F. App'x 745 (9th Cir. 2010)

- Insufficient evidence that the arresting officer was performing a lawful duty where defendant was charged with resisting an executive officer. The officer did not have enough evidence to detain petitioner pursuant to a reasonable suspicion that he was excessively intoxicated. That the officer was performing a lawful duty was an element of the offense.

Goldyn v. Hayes, 444 F.3d 1062 (9th Cir. 2006)

- Insufficient evidence that petitioner had violated Nevada's bad-check law. While petitioner wrote checks to merchants without sufficient funds in her bank account, she had sufficient credit to cover her checks, including a check guarantee card, which obligated her bank to cover her checks.

Juan H. v. Allen, 408 F.3d 1262 (9th Cir. 2005)

- Insufficient evidence under an aiding and abetting theory that petitioner aided and abetted a murder and attempted murder, as required to support his adjudication of delinquency for first-degree murder and attempted murder.

Garcia v. Carey, 395 F.3d 1099 (9th Cir. 2005)

- Evidence of petitioner's intent was insufficient to support gang sentencing enhancement—requiring specific intent to promote, further, or assist in other criminal activity of gang apart from robbery. The evidence only indicated that petitioner was a gang member who committed the robbery in area regarded as gang's turf. Prosecution never argued a theory of specific intent, and the jury was never asked to infer it.

IX. *Miranda*, *Doyle*, and voluntariness issues

Rodriguez v. McDonald, 872 F.3d 908 (9th Cir. 2017)

- Petitioner's due process and right to an attorney was violated when the detectives questioning the fourteen-year old petitioner ignored his request for counsel and continued accusing him of murder. A written confession was obtained in violation of *Miranda*. Petitioner had "border-line intelligence functioning" and a low I.Q. which made him susceptible to influence and prevented him from making good decisions.

Barrios v. Rackley, 644 F. App'x 625 (9th Cir. 2016)

- State court improperly honored petitioner's guilty plea. Petitioner's plea was not intelligent because counsel never reviewed the elements of the crime charged.

Jones v. Harrington, 829 F.3d 1128 (9th Cir. 2016)

- Police violated *Miranda* by continuing interrogation when petitioner exercised his Fifth Amendment rights and stated "I don't want to talk no more." Statements procured by continued and unconstitutional interrogation were incriminating and prejudicial.

Garcia v. Long, 808 F.3d 771 (9th Cir. 2015)

- Granting relief based on a violation of *Miranda v. Arizona*. The California appellate court's determination that the petitioner's "no" answer, when asked if he wished to speak to the interrogating police officers, was ambiguous, was contrary to and an

unreasonable application of clearly established law. It was also an unreasonable determination of the facts.

Reyes v. Lewis, 798 F.3d 815 (9th Cir. 2015)

- Admission of the petitioner's confession violated *Missouri v. Seibert*, 542 U.S. 600 (2004) and *Miranda*. Police officers deliberately employed a two-step interrogation technique to obtain a confession and did not take appropriate "curative measures" to ensure that petitioner understood the *Miranda* warning and waiver.

Sessoms v. Grounds, 776 F.3d 615 (9th Cir. 2015) (en banc)

- Detectives violated *Miranda* when, after spending four days in jail, he unequivocally invoked his right to counsel and detectives did not provide an attorney, stop the interview, or even give petitioner his *Miranda* warnings. Detectives instead told petitioner that asking for a lawyer would do him no good.

Lujan v. Garcia, 734 F.3d 917 (9th Cir. 2013)

- Petitioner's statement was procured in violation of *Miranda* because the detective who administered the *Miranda* warnings failed to adequately inform petitioner that he had a right to speak with an attorney present at all times.

Doody v. Ryan, 649 F.3d 986 (9th Cir. 2011)

- Detective gave inadequate *Miranda* warnings when he significantly deviated from the printed *Miranda* form and repeatedly minimized the warnings' significance. Thirteen-hour interrogation of sleep-deprived juvenile petitioner by team of detectives without presence of attorney or proper *Miranda* warnings rendered confession involuntary.

Hurd v. Terhune, 619 F.3d 1080 (9th Cir. 2010)

- Petitioner refused to reenact shooting during interrogation, which constituted an assertion of his right to silence. *Miranda* and *Doyle* violations resulted when the trial court denied petitioner's motion to suppress the confession and allowed the prosecutor to comment on the confession.

Ward ex rel. Crystal M. v. Ortega, 379 F. App'x 687 (9th Cir. 2010)

- Petitioner who was twelve years old at the time of questioning, had no experience with law enforcement, and was confused about her rights did not waive her *Miranda* rights. Officers failed to ensure that her statement was voluntary.

Anderson v. Terhune, 516 F.3d 781 (9th Cir. 2008)

- Petitioner's statement, "I plead the Fifth," was an unequivocal declaration of his *Miranda* rights. Even though he continued to respond to questioning after this declaration, there was no valid waiver.

Arnold v. Runnels, 421 F.3d 859 (9th Cir. 2005)

- Admission of tape-recorded interrogation where petitioner had repeatedly and unequivocally invoked *Miranda* violated Fifth Amendment. While petitioner had previously signed a *Miranda* waiver, his subsequent statements that he did not want to talk on tape invoked his right to remain silent.

Taylor v. Maddox, 366 F.3d 992 (9th Cir. 2004)

- Admission of coerced and involuntary confession violated petitioner's right to due process. Police took 16-year-old petitioner from his bed and interrogated him for three hours in the middle of the night. Petitioner contended he had requested his mother and assistance of counsel, but police claimed otherwise. The interview was not recorded and notes were lost.

Ghent v. Woodford, 279 F.3d 1121 (9th Cir. 2002)

- Trial court violated due process and privilege against self-incrimination by admitting psychiatrist's testimony in violation of Miranda during "special circumstances" retrial. Relief granted as to death penalty. Testimony was the state's only direct evidence on whether murder was premeditated and deliberate.

Henry v. Kernan, 197 F.3d 1021 (9th Cir. 1999)

- Police and prosecution violated due process and privilege against self-incrimination by extracting a confession in violation of *Miranda*. After petitioner exercised request for counsel, detectives assured petitioner that further statements could not be used against him and then continued interrogation. The interrogation resulted in a confession, which was used against petitioner at trial.

Alvarez v. Gomez, 185 F.3d 995 (9th Cir. 1999)

- Police violated petitioner's privilege against self-incrimination by continuing custodial interrogation despite petitioner's repeated requests for an attorney. Improper interrogation resulted in a confession which was used against petitioner.

Petitioner did say that he would speak to detectives without an attorney present, but that was after he had requested a lawyer three times.

X. Confrontation Violations

Palmer v. Davey, 729 Fed. App.'x 573 (2018)

- Trial court violated the Sixth Amendment right to confrontation by improperly admitting an unredacted confession of a non-testifying witness, which indicated the existence of two other participants. The prosecution's case relied heavily on the confession.

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

- Trial court violated defendant's Sixth Amendment right to confront adverse witnesses when the court precluded defendant from cross-examining his wife as to whether she had been threatened by the prosecutor against changing her testimony.

Merolillo v. Yates, 663 F.3d 444 (9th Cir. 2011)

- Admission of non-testifying autopsy pathologist's cause-of-death opinion violated petitioner's right of confrontation. Pathologist's uncorroborated opinion went to the issue of causation, it was the only expert opinion supporting the prosecution's causation argument, and it was not subject to any cross-examination.

Tuite v. Martel, 460 F. App'x 701 (9th Cir. 2011)

- Exclusion of letter impeaching expert witness violated Confrontation Clause. Prosecution presented expert witness in murder trial to rebut federal agent's testimony that crime scene reflected organization uncharacteristic of petitioner, and letter undermined state's repeated statements regarding expert's impartiality.

Ocampo v. Vail, 649 F.3d 1098 (9th Cir. 2011)

- Detectives' hearsay testimony that confirmed petitioner's presence at the scene of the crime and identified petitioner as the shooter constituted introduction of testimonial statements against petitioner in violation of Confrontation Clause.

Holly v. Yarborough, 568 F.3d 1091 (9th Cir. 2009)

- Trial court's limitation of cross-examination of prosecution's key witness in a child molestation case to exclude testimony regarding the witness' prior references to sex

violated Confrontation Clause. The prior statements were relevant, sufficiently probative and petitioner was entitled to impeach the witness.

Slovik v. Yates, 556 F.3d 747 (9th Cir. 2008)

- Trial court's refusal to allow petitioner to cross-examine government's witness with evidence that the witness was currently on probation violated the Confrontation Clause. The witness had denied, under oath, that he was on probation.

Winzer v. Hall, 494 F.3d 1192 (9th Cir. 2007)

- Admission of victim's hearsay statement to police officer, implicating petitioner, violated the Confrontation Clause. The victim did not testify at trial, and the statement was not an excited utterance because it happened over five hours after the alleged offense.

Fowler v. Sacramento County Sheriff's Dep't, 421 F.3d 1027 (9th Cir. 2005)

- Trial court's preclusion of cross-examination of victim for prior accusations she had made violated the Confrontation Clause. The jury was entitled to hear the defense evidence bearing on the validity of the witness' testimony.

Welchel v. Washington, 232 F.3d 1197 (9th Cir. 2000)

- Admission of out-of-court statements of unavailable co-defendants did not have indicia of reliability violated the Confrontation Clause.

LaJoie v. Thompson, 217 F.3d 663 (9th Cir. 2000)

- Trial court's exclusion of evidence regarding victim's past sexual abuse by others as untimely under Oregon rape shield statute was arbitrary and disproportionate to the purposes of the statute's notice requirement, and thus violated Sixth Amendment.

XI. Double jeopardy violations

Wilkinson v. Gingrich, 806 F.3d 511 (9th Cir. 2015)

- Perjury prosecution violated double jeopardy. Here, the California State court's determination that the petitioner's acquittal on a speeding charge in traffic court did not bar his later prosecution for perjury, based on his testimony in the earlier traffic court proceeding that he was not the driver of the car, was an unreasonable

application of *Ashe v. Swenson*, 397 U.S. 436 (1970), which established collateral estoppel as a component of the protection against double jeopardy.

Damian v. Vaughn, 186 F. App'x 775 (9th Cir. 2006)

- Retrial on indictment that included two counts that had resulted in acquittal in previous trial violated Double Jeopardy Clause.

Stow v. Murashige, 389 F.3d 880 (9th Cir. 2004)

- Petitioner's conviction for first-degree murder was overturned for insufficiency of evidence, but he was then retried for attempted second-degree murder in violation of double jeopardy. A jury notation at the first trial found him not guilty of second-degree murder.

Wilcox v. McGee, 241 F.3d 1242 (9th Cir. 2001)

- Second indictment charging petitioner with same burglary offense was barred by double jeopardy. In addition, counsel rendered ineffective assistance when he failed to move to dismiss the second indictment charging the same offense.

XII. Miscellaneous challenges to conviction

Godoy v. Spearman, 861 F.3d 956 (9th Cir. 2017) (en banc)

- Trial court violated petitioner's Sixth Amendment rights by ignoring uncontroverted statements from an alternate juror that one juror contacted a judge-friend throughout the murder trial and shared the judge's responses with the rest of the jury. Remanded for an evidentiary hearing to determine if the juror's contact prejudiced the verdict.

Chaker v. Crogan, 428 F.3d 1215 (9th Cir. 2005)

- Petitioner's conviction under state statute criminalizing filing of knowingly false complaint of peace officer misconduct violated First Amendment's prohibition against viewpoint discrimination. The statute did not also criminalize a knowingly false assertion in support of peace officer.

Caliendo v. Warden of California Mens Colony, 365 F.3d 691 (9th Cir. 2004)

- Failure to apply rebuttable presumption of prejudice to 20-minute conversation between three jurors and crucial prosecution witness, resulting in one juror gaining

a positive view of the witness, and where the state failed to prove error was harmless warranted habeas relief.

McCoy v. Stewart, 282 F.3d 626 (9th Cir. 2002), *cert. denied*, 537 U.S. 993 (2002)

- Conviction for "participating in a criminal street gang," violated First Amendment. Petitioner had advised gang members about how to operate their gang. Because his advice did not advocate imminent criminal activity, it was protected speech.

XIII. Capital sentencing issues

Smith v. Ryan, 813 F.3d 1175 (9th Cir. 2016) (Pre-AEDPA)

- Trial court violated the Eighth Amendment, as interpreted in *Atkins v. Virginia*, 536 U.S. 304 (2002), by sentencing intellectually disabled petitioner to death. State court applied an unreasonable standard, requiring petitioner to prove with a "degree of certainty" that he was intellectually disabled.

McKinney v. Ryan, 813 F.3d 798 (2015) (en banc) (five judges dissenting)

- Granting sentencing relief as the Arizona Supreme Court applied an unconstitutional standard in reviewing the death sentence. The State court's ruling contravened the Eighth Amendment by requiring a causal nexus between the proffered mitigation (the petitioner's PTSD) and his offense, in violation of *Eddings v. Oklahoma*, 455 U.S. 104 (1982).

Pensinger v. Chappell, 787 F.3d 1014 (9th Cir. 2015) (Pre-AEDPA)

- Trial court violated Eighth Amendment by failing to instruct the jury *sua sponte* in compliance with *People v. Green*, 27 Cal. 3d 1 (1980), that a kidnap-murder special circumstance requires proof that the kidnapping was committed for an independent felonious purpose and was not merely incidental to the murder.

Rogers v. McDaniel, 793 F.3d 1036 (9th Cir. 2015)

- Jury instruction containing an unconstitutionally vague aggravating factor violated due process. Also, the Nevada Supreme Court erred in failing to mention that the prosecution explicitly stated that evidence did not indicate torture, the alleged aggravating factor. The error was prejudicial because petitioner could have avoided the death penalty if the instructions had been correct.

Riley v. McDaniel, 786 F.3d 719 (9th Cir. May 15, 2015)

- Due process violated when, at the guilt-phase of murder prosecution, the trial court advised the jury that if it found "premeditation," it necessarily found "deliberation." This instruction violated due process because it relieved the state of its burden to prove every element of the offense. This error was prejudicial because the jury had heard evidence that petitioner suffered from a cocaine addiction, which could have raised doubt as to whether he had acted "deliberately."

Williams v. Ryan, 623 F.3d 1258 (9th Cir. 2010)

- Trial court's refusal to consider petitioner's drug use as a mitigating factor in penalty phase of capital trial warranted habeas relief as to death sentence. Petitioner should not have been required to present evidence of a causal nexus between the drug use and the crime committed.

Robinson v. Schriro, 595 F.3d 1086 (9th Cir. 2010)

- Trial court's aggravating circumstance finding was arbitrary and violated petitioner's rights under the Eighth Amendment. There was no admissible evidence before the court that petitioner participated in, intended, or reasonably foresaw the murder. In addition, petitioner received ineffective assistance of counsel during the penalty phase because counsel did not adequately investigate mitigating evidence and failed to call any witnesses or introduce any evidence.

Styers v. Schriro, 547 F.3d 1026 (9th Cir. 2008) (per curiam)

- State appellate court, which had found aggravating factor to be invalid, "failed to properly re-weigh the aggravating and mitigating circumstances as required by *Clemons v. Mississippi*, 494 U.S. 738, 748–49 (1990)": state appellate court discounted mitigating evidence of post-traumatic stress disorder (PTSD) on impermissible ground that there was insufficient nexus between PTSD and crime.

Comer v. Schriro, 463 F.3d 934 (9th Cir. 2006)

- Trial court's dehumanizing treatment of petitioner during capital sentencing phase "shocks the conscience." Petitioner was sentenced to death while shackled, wearing nothing but a blanket covering his genitals, bleeding from being beaten, which increased the perception of his dangerousness. Circumstances of sentencing were so inherently prejudicial, petitioner was not required to show actual prejudice. Relief granted as to death sentence.

Valerio v. Crawford, 306 F.3d 742 (9th Cir. 2002) (en banc)

- Trial court violated due process by giving vague jury instructions regarding aggravating factors at capital sentencing hearing. Instructions stating that petitioner could be sentenced to death if the jury found him to have "depravity of mind" were unconstitutionally vague. Nevada Supreme Court failed to cure the error by requiring reweighing the remaining aggravating and mitigating factors on appeal.

Murtishaw v. Woodford, 255 F.3d 926 (9th Cir. 2001)

- Trial court violated due process and the Ex Post Facto Clause by instructing the jury based on the 1978 California death penalty statute, rather than the 1977 statute in effect at the time of the offense.

XIV. Non-capital sentencing issues

Taylor v. Cate, 772 F.3d 842 (9th Cir. 2014)

- Trial court's resentencing of petitioner violated his right to a jury trial. The petitioner was convicted by a jury of being the shooter in an armed robbery and sentenced accordingly. However, the state and the court later determined that petitioner was not the shooter, and the court resentenced petitioner to the lesser offense. The Ninth Circuit held that the determination that the petitioner was not the shooter must be made by a jury.

Calloway v. Grounds, 472 F. App'x 833 (9th Cir. 2012)

- Trial court's determination that it, rather than the jury, had authority to determine whether petitioner actually inflicted great bodily injury upon his prior assault victim so as to constitute second strike under California's "three strikes" law violated petitioner's right to jury trial.

Ward v. Chavez, 678 F.3d 1042 (9th Cir. 2012)

- District court impermissibly delegated its authority to Bureau of Prisons under Mandatory Victims Restitution Act by ordering petitioner to immediately pay restitution without specifying any payment schedule.

Murphy v. Sandor, 447 F. App'x 824 (9th Cir. 2011)

- No rational trier of fact could have found that petitioner was convicted of serious prior offense qualifying him for recidivist sentence enhancement under "three strikes" law. Inference regarding the nature of petitioner's underlying offense was

speculative and insufficient to conclude that he had been convicted of first-degree burglary.

Wilson v. Knowles, 638 F.3d 1213 (9th Cir. 2011)

- Trial judge in petitioner's 2000 conviction found three additional facts about a prior 1993 no contest conviction that increased petitioner's sentence to twenty-five years to life. Because the trial judge in 2000 speculated as to how a jury in 1993 might have evaluated the evidence, it did not fall within *Apprendi*'s prior conviction exception.

Reina-Rodriguez v. United States, 655 F.3d 1182 (9th Cir. 2011)

- Petitioner's prior burglary was not a "crime of violence" supporting sentencing enhancement. Evidence did not establish that the burglary was of a "dwelling" within meaning of the United States Sentencing Guidelines.

Leon v. Kirkland, 403 F. App'x 268 (9th Cir. 2010)

- Petitioner convicted of manslaughter was sentenced to a term beyond the statutory maximum based on facts found by the trial judge, in violation of Apprendi-Cunningham. Grave doubt existed as to whether jury would have found the victim particularly vulnerable under California law.

Briceno v. Scribner, 555 F.3d 1069 (9th Cir. 2009) *overruled in part by Emery v. Clark*, 643 F.3d 1210, 1215 (9th Cir. 2011)

- Prosecution's expert testimony that led to petitioner's sentence enhancement was hypothetical and did not provide direct or circumstantial evidence of petitioner's specific intent. Expert's testimony, which described how robberies benefit and glorify gangs and increase the status of the gang members, only supported the fact that the crimes generally benefit gangs.

Gautt v. Lewis, 489 F.3d 993 (9th Cir. 2007)

- Prosecution's failure to provide petitioner notice of a charge under a state statute that carried a twenty-five year sentence enhancement violated petitioner's Sixth Amendment right to notice.

Medley v. Runnels, 506 F.3d 857 (9th Cir. 2007)

- Trial court's instruction to the jury that a flare gun was a firearm as a matter of law took a critical issue of fact away from the jury, thus violating due process. Relief granted as to sentence enhancement based on the use of a firearm.

Stokes v. Schriro, 465 F.3d 397 (9th Cir. 2006)

- Sentencing court violated *Apprendi* by finding aggravating circumstances not found by jury to enhance sentence for attempted robbery and kidnapping beyond statutory maximum of twenty years. Factors included similarity to prior convictions and physical and emotional harm to the victim.

Williams v. Roe, 421 F.3d 883 (9th Cir. 2005)

- Court resentenced petitioner under a newly amended statute that required it to impose the highest penalty when multiple convictions were based on the same act. Application of the amended statute violated the Ex Post Facto Clause. Statute in effect at the time of the commission of the crime did not require the most severe penalty.

Dillard v. Roe, 244 F.3d 758 (9th Cir. 2001)

- Fact that petitioner "personally used a firearm" in inflicting corporal injury on a cohabitant was an "element" that had to be found by the jury beyond a reasonable doubt. The judge had treated the element as a "sentencing factor" to be found by a preponderance of the evidence. Relief granted as to sentencing enhancement.

XV. Cruel and unusual punishment

Moore v. Biter, 725 F.3d 1184 (9th Cir. 2013)

- Sentence of 254 years and 4 months for a non-homicidal crime violated *Graham v. Florida*'s prohibition against the imposition of life without parole for juvenile offenders under the Eighth Amendment.

Gonzalez v. Duncan, 551 F.3d 875 (9th Cir. 2008)

- Imposition of twenty-eight years to life in prison under California's "three strikes" law for a technical violation of California's sex offender registration law violated the Eighth Amendment. The disparity between the technical violation and the sentence imposed was so extreme to be "grossly disproportionate."

Ramirez v. Castro, 365 F.3d 755 (9th Cir. 2004)

- Petitioner's twenty-five years to life sentence under California's "three strikes" law for his third shoplifting offense was grossly disproportionate to the crimes committed. Sentence violated the Eighth Amendment.

XVI. Challenges to decisions issued by state parole boards

A. *Ex post facto* violations

Brown v. Palmateer, 379 F.3d 1089 (9th Cir. 2004)

- Retroactive application of a more onerous Oregon statute to postpone prisoner's release date violated the Ex Post Facto Clause.

Hunter v. Ayers, 336 F.3d 848 (9th Cir. 2003)

- Parole Board violated Ex Post Facto Clause when it applied more onerous parole regulations than those in force when petitioner committed the offense for which he was sentenced.

Himes v. Thompson, 336 F.3d 848 (9th Cir. 2003)

- Application of Oregon parole regulations that were more onerous than those in place at the time petitioner committed the offense for which he was incarcerated violated Ex Post Facto Clause.

B. Due process violations

Nulph v. Cook, 333 F.3d 1052 (9th Cir. 2003)

- The Oregon Board of Parole acted vindictively in increasing the petitioner's sentence by one hundred and fifty percent after petitioner had prevailed in a habeas challenge to the Board's earlier decision against him.

In light of *Swarthout v. Cooke*, 562 U.S. 216 (2011), successful habeas challenges that were based on the lack of "some evidence" to deny parole have been removed from this outline. *Swarthout* changed the law in this area.