

4.33.1. Ex Post Facto—Evidence

- (1) An ex post facto law violates the U.S. Constitution.
- (2) (a) Except as provided in paragraph (b), a statute authorizing the use of previously inadmissible evidence is not an ex post facto law.

(b) A statute that changes the rules of evidence to require a lesser amount of evidence or evidence of different facts in order to convict is an ex post facto law.

Note

This rule is limited to the application of the ex post facto doctrine to the rules of evidence.

Subdivision (1) recites the U.S. Constitution’s prohibition on a state passing any “ex post facto Law.” (US Const, art I, § 10, cl 1.)

In *Calder v Bull* (3 Dallas [3 US] 386, 390 [1798]) the U.S. Supreme Court held that an ex post facto law is: “1st. Every law that makes an action, done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender” (some emphasis added and some omitted). (See *Collins v Youngblood*, 497 US 37, 52 [1990] [the state statute in issue was not ex post facto; it “does not punish as a crime an act previously committed, which was innocent when done; nor make more burdensome the punishment for a crime, after its commission; nor deprive one charged with crime of any defense available according to law at the time when the act was committed”].)

Subdivision (2) states the ex post facto rule set forth in *People v Nival* (33 NY2d 391 [1974]) as it applies to the rules of evidence. (See *Nival* at 396 [“It is well settled that a statute authorizing the use of evidence not previously admissible is not an ex post facto law. (*Calder v. Bull*, 3 Dallas [3 U. S.] 386) Statutes that change the rules of evidence so as to require a lesser amount of evidence or evidence of different facts in order to convict are ex post facto”].)

Nival is derived from *Calder*'s statement that "[e]very law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender" violates the ex post facto rule. (*Calder* at 390 [emphasis omitted].) In *Carmell v Texas* (529 US 513, 516 [2000]) the Court declined to abrogate *Calder*'s application of the ex post facto doctrine to a rule of evidence; and, accordingly, held that a state statute that repealed the requirement for corroboration of a sexual offense was an ex post facto statute when applied to the commission of a sexual offense before enactment of the statute. *Carmell* abrogated *People v Hudy* (73 NY2d 40 [1988]).

On its facts, *Nival* held that the retroactive use of a statute overruling case law and permitting testimony of a prior identification by a witness when the witness is unable to make an identification at trial did not violate the ex post facto rule.

By contrast, in *People v Lourido* (70 NY2d 428, 432 [1987]) the Court held that the ex post facto rule was violated when the trial court in a rape case instructed the jury on a definition of "forcible compulsion" that was enacted after the commission of the crime when the definition "at the time of the offense [was] more favorable to the defendant."