

## Federalization Table

First District Appellate Project  
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The tables below list several categories of common appellate issues (e.g., jury instructions, evidentiary error, etc.) and corresponding federal constitutional claims. This does not, by any means, represent a comprehensive catalogue of all the opportunities for “federalizing” traditional state law claims. The cited cases are intended simply as entry points to relevant federal case law in the field. Some identify the leading U.S. Supreme Court cases; others simply listed one or more handy examples of federal circuit cases.

Explicitly present a claim as a federal claim by reference to federal constitutional provisions or federal case law. Relying only on state law may not be sufficient to preserve a federal claim, based on the same error as the state law claim, for state appellate court review (e.g., *People v. Barnett* (1998) 17 Cal.4th 1044, 1119 fn. 54) and to prevent a default of the federal claim in federal habeas proceedings (see *Peterson v. Lampert* (9th Cir. 2002) 277 F.3d 1073).

### A. Jury Instructions

Most potential federal constitutional claims involving jury instructions rest upon a combination of the **right to jury trial** (6th Amend.) and **due process** (5th & 14th Amends.) The federal constitutional magnitude of an instructional defect is most clear where it concerns the elements of the offense, the theories of criminal liability, or *defense* theories such as affirmative defenses and lesser included offenses.

Error	Federal Claim
<b>Errors and omissions in elements of the offense or theories of liability.</b>	<i>Neder v. United States</i> (1999) 527 U.S. 1; <i>United States v. Gaudin</i> (1995) 515 U.S. 506.
<b>Other errors that remove elements from the jury</b> , including instructions or judicial comments that a particular element is established “as a matter of law.”	<i>Powell v. Galaza</i> (9th Cir. 2003) 328 F.3d 558 (judge’s comment that defendant’s testimony established an element of offense tantamount to a directed verdict or “mandatory presumption”).
<b>Submission of unauthorized theories of liability</b> (e.g., improper predicate offense for felony-murder liability).	E.g., <i>Suniga v. Bunnell</i> (9th Cir. 1993) 998 F.2d 664; <i>Keating v. Hood</i> (9th Cir. 1999) 191 F.3d 1053.
<b>Errors in the definition of the “reasonable doubt” standard</b> or other instructions that dilute the “reasonable doubt” requirement.	<i>Sullivan v. Louisiana</i> (1993) 508 U.S. 275.
<b>Improper “presumptions”</b> and other errors that relax the prosecution’s burden to establish each element beyond a reasonable doubt.	<i>Yates v. Evatt</i> (1991) 500 U.S. 391.

<p><b>Erroneous omission of lesser included offense instructions or misstatement of the grounds for lesser offenses.</b></p>	<p><b>Theory (1):</b> denial of adequate instructions on elements of <i>charged offense</i>. E.g. failure to instruct on a ground that negates malice or some other element of the charged offense (e.g., heat-of-passion, imperfect self-defense). <i>Mullaney v. Wilbur</i> (1975) 421 U.S. 684; see Justice Kennard’s dissent in <i>People v. Breverman</i> (1998) 19 Cal.4th 142 (note: <i>Breverman</i> majority did not reach <i>Mullaney</i> issue).</p> <p><b>Theory (2):</b> as denial of instructions on defense theory. <i>Conde v. Henry</i> (9th Cir. 1999) 198 F.3d 734.</p>
<p><b>Denial of instructions on affirmative defenses</b> (e.g., self-defense) or misstatement of those defenses.</p>	<p>Right to adequate instructions on the “defense theory” of the case. <i>Mathews v. United States</i> 485 U.S. 58; <i>Bradley v. Duncan</i> (9th Cir. 2002) 315 F.3d 1091; e.g., <i>Barker v. Yukins</i> (6th Cir. 1999) 199 F.3d 867.</p>
<p><b>Other “defense theories”?</b></p>	<p>Right to instructions on “defense theory” is not restricted to formal “affirmative defenses,” but should also apply to other theories, like third-party culpability, alibi, etc. But see <i>Duckett v. Godinez</i> (9th Cir. 1995) 67 F.3d 734 (though 9th Cir. requires specific alibi instructions in <i>federal criminal trials</i>, denial of alibi instruction in state trial didn’t violate due process, where overall instructions adequately communicated prosecution’s duty to prove defendant’s presence at the scene).</p>
<p><b>Instructions on “other offenses” evidence.</b></p>	<p>Due process. See <i>Garceau v. Woodford</i> (9th Cir. 2001) 275 F.3d 769, 775-776, rev’d on other grounds (2003) 538 U.S. 202 (remand pending); (use of “other offenses” evidence as proof of criminal propensity violated due process).</p>

**B. Evidentiary Errors**

Error	Federal Claim
<p><b>Admission of non-testimonial hearsay</b> not satisfying a well-established hearsay exception.</p>	<p>Confrontation clause. <i>Idaho v. Wright</i> (1990) 497 U.S. 805.</p>
<p>Admission of testimonial hearsay where no adequate opp. for cross.</p>	<p>Confrontation clause. <i>Crawford v. Washington</i> (2004) 124 S.Ct. 1354.</p>
<p><b>Limits on cross-examination;</b> exclusion of impeachment evidence.</p>	<p>Confrontation clause. <i>Delaware v. Van Arsdell</i> (1986) 475 U.S. 673; <i>Olden v. Kentucky</i> (1988) 488 U.S. 227.</p>
<p><b>Other offenses and uncharged misconduct.</b></p>	<p>Due process/fundamental fairness. <i>McKinney v. Rees</i> (9th Cir. 1993) 993 F.2d 1378; <i>Garceau v. Woodford</i> (9th Cir. 2001) 275 F.3d 769, 775-776, rev’d on other grounds (2003) 538 U.S. 202 (remand pending).</p>
<p><b>Exclusion of defense evidence.</b></p>	<p>Due process right to put on a defense and/or 6th Amend. right to compulsory process. <i>Chambers v. Mississippi</i> (1973) 410 U.S. 284, 302-303; <i>Washington v. Texas</i> (1967) 388 U.S. 14, 23; <i>Crane v. Kentucky</i> (1986) 476 U.S. 683.</p>

**C. Confessions**

<b>Error</b>	<b>Federal Claim</b>
Traditional <i>Miranda</i> issues.	5th Amen. self-incrimination priv. See <i>Dickerson v. United States</i> (2000) 530 U.S. 428.
<i>Massiah</i> (interrogation after right to counsel has attached).	6th Amen. right to counsel. <i>Massiah v. United States</i> (1964) 377 U.S. 201; <i>Maine v. Moulton</i> (1985) 474 U.S. 159 (jailhouse confessions to police agents)
<b>Voluntariness</b> (promises of leniency, threats, etc.).	Due process. E.g., <i>Arizona v. Fulminante</i> (1991) 499 U.S. 279.
<b>Voluntariness of another witness' statement.</b>	Due process. E.g. <i>People v. Lee</i> (2002) 95 Cal.App.4th 772. D lacks standing to assert violation of 3d party's 5th Amend. rts, but can challenge admission as unreliable, on due process grounds. (But standards are not identical; see <i>People v. Badgett</i> (1995) 10 Cal.4th 330.)
<b>Confessions and other inculpatory statements of co-defendants &amp; other co-principals.</b>	6th Amen./Confrontation. <i>Bruton v. United States</i> (1968) 391 U.S. 123; <i>Gray v. Maryland</i> (1998) 523 U.S. 185 (redaction insufficient where blanks/neutral pronouns let jurors infer references are to D); <i>Lilly v. Virginia</i> (1999) 527 U.S. 116 (admission of co-principal's inculpatory statement as declaration against interest violated confrontation clause).

**D. Prosecutorial Misconduct**

<b>Error</b>	<b>Federal Claim</b>
<b>Comment on defendant's failure to testify</b>	5th Amen. <i>Griffin v. Cal.</i> (1965) 380 U.S. 609
<b>Comment on post-arrest post-Miranda silence</b>	Due process. <i>Doyle v. Ohio</i> (1976) 426 U.S. 610.
<b>Use of a defendant's pre-Miranda silence</b> in prosecution case-in-chief	5th Amen. priv. against self-incrimination. <i>United States v. Velarde-Gomez</i> (9th Cir. 2001) 269 F.3d 1023; <i>United States v. Whitehead</i> (9th Cir. 2000) 200 F.3d 634.
<b>Stating facts not in evidence</b> (in closing argument or in form of questions to witness)	6th Amen. confrontation. <i>Douglas v. Alabama</i> (1965) 380 U.S. 415; <i>Hardnett v. Marshall</i> (9th Cir. 1994) 25 F.3d 875; <i>People v. Bell</i> (1989) 49 Cal.3d 502; <i>People v. Gaines</i> (1997) 54 Cal.App.4th 821.
<b>Vouching</b> for credibility of witness	Due process and/or 6th Amen. confrontation. <i>Lambright v. Stewart</i> (9th Cir. 2000) 220 F.3d 1022, 1029; <i>United States v. Young</i> (1985) 470 U.S. 1, 18-19.
Appeals to <b>racial, ethnic or religious prejudices</b>	Equal protection & due process. <i>McCleskey v. Kemp</i> (1987) 481 U.S. 279, 309 n. 30; <i>Bains v. Cambra</i> (9th Cir. 2000) 204 F.3d 964, 974-975; <i>People v. Cudjo</i> (1993) 6 Cal.4th 585, 625-626.
<b>Disparaging</b> defendant's exercise of <b>right to counsel</b> or defense counsel's function.	6th Amend. right to counsel; due process. <i>United States v. Kallin</i> (9th Cir. 1995) 50 F.3d 689; <i>People v. Crandell</i> (1988) 46 Cal.3d 833, 878.

<b>Misleading prosecutorial argument</b> , (e.g., commenting on absence of defense evid. on a point, where <i>prosecution</i> objections/tactics prevented D from introducing such evidence).	Due process. <i>United States v. Kojayan</i> (9th Cir. 1993) 8 F.3d 1315.
<b>Contradictory prosecution factual theories</b> in co-defendants' separate trials (e.g., which defendant fired gun).	Due process. (Pending in <i>Mitchell v. Stumpf</i> , U.S.S.Ct. no. 04-637; <i>In re Sakarias</i> , Cal. Sup. Ct. no. S082299.)
<b>Inflammatory or pervasive prosecution tactics</b> , not implicating specific constitutional rights. E.g., appeals to passion/prejudice, danger to the community, name-calling (including comparing defendant to infamous figures), etc.	Due process. <i>Donnelly v. DeChristoforo</i> (1974) 416 U.S. 637 (test is whether misconduct "infected the trial with unfairness as to make the resulting conviction a denial of due process").
<b>Prosecutorial non-disclosure of exculpatory evidence</b> , including impeachment information re prosecution witnesses.	Due process. <i>Brady v. Maryland</i> (1963) 373 U.S. 83; <i>Kyles v. Whitley</i> (1995) 514 U.S. 419; <i>United States v. Bagley</i> (1985) 473 U.S. 667 .
<b>False testimony.</b>	Due process. <i>United States v. Agurs</i> (1976) 427 U.S. 97 (presentation of testimony prosecutor knew or should have known was false); e.g., <i>People v. Kasim</i> (1997) 56 Cal.App.4th 1360.
<b>Intimidation of defense witnesses</b> (e.g., threats of perjury prosecution if witness testifies for defense).	Due process & 6th Amen. right to compulsory process E.g., <i>In re Martin</i> (1987) 44 Cal.3d 1; <i>United States v. Vavages</i> (9th Cir. 1998) 151 F.3d 1185.

#### E. Defense Counsel

All the counsel-related claims listed below derive from the 6th Amen. right to counsel, unless otherwise indicated.

<b>Error</b>	<b>Federal Claim</b>
<b>Ineffective assistance of <u>trial</u> counsel.</b>	<i>Strickland v. Washington</i> (1984) 466 U.S. 668.
<b>Ineffective assistance of <u>appellate</u> counsel.</b>	Due process. <i>Evitts v. Lucey</i> (1985) 469 U.S. 387.
<b>Denial or absence of counsel</b> at a critical stage of the proceedings; constructive denial of counsel.	<i>United States v. Cronin</i> (1984) 466 U.S. 648; e.g., <i>People v. Horton</i> (1995) 11 Cal.4th 1068; <i>Delgado v. Lewis</i> (9th Cir. 2000) 223 F.3d 976.
Counsel's <b>conflict of interest.</b>	<i>Cuyler v. Sullivan</i> (1980) 446 U.S. 335; <i>Holloway v. Arkansas</i> (1978) 435 U.S. 475; <i>Mickens v. Taylor</i> (2002) 535 U.S. 162.
<b>Marsden.</b>	Be sure to identify as 6th Amend. violation. See <i>P v. Marsden</i> (1970) 2 Cal.3d 118, 123-126; see also <i>Schell v. Witek</i> (9th Cir. 2000) 218 F.3d 1017 (en banc).
<b>Denial of ancillary services to appointed counsel</b> (experts, investigators, etc.).	Due process. <i>Ake v. Oklahoma</i> (1985) 470 U.S. 68. (Though <i>Ake</i> rests on due process, 6th Amen. right to counsel also implicated. See <i>Corenevsky v. Superior Court</i> (1984) 36 Cal.3d 307.
<b>Denial of ancillary services to pro per D</b> (investigator, process server, library access.).	Due process. <i>Milton v. Morris</i> (9th Cir. 1985) 767 F.2d 1443.

<p>Other <b>self-representation issues</b> (incl. erroneous denial of <i>Faretta</i> motion; inadequate warnings re hazards of self-representation; erroneous failure to relieve a defendant of pro per status &amp; reappoint counsel, etc.).</p>	<p><i>Faretta v. California</i> (1975) 422 U.S. 806; e.g., <i>United States v. Mohawk</i> (9th Cir. 1994) 20 F.3d 1480 [inadequate record to establish knowing &amp; voluntary waiver of counsel]; <i>Snook v. Wood</i> (9th Cir. 1996) 89 F.3d 605 [inadequate warnings]; <i>Menefield v. Borg</i> (9th Cir. 1989) 881 F.2d 696 [erroneous refusal of re-appointment of counsel for <i>post-trial</i> hearings].</p>
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**F. Jury Selection & Misconduct**

<b>Error</b>	<b>Federal Claim</b>
<p>Discriminatory use of <b>peremptory challenges</b> (state <i>Wheeler</i> error).</p>	<p>Equal protection. <i>Batson v. Kentucky</i> (1986) 476 U.S. 79.</p>
<p><b>Denial of adequate voir dire</b> on possible juror bias.</p>	<p>6th Amen. jury trial &amp; due process. <i>Mu'Min v. Virginia</i> (1991) 500 U.S. 415; <i>Ham v. South Carolina</i> (1973) 409 U.S. 524 ; e.g., <i>People v. Wilborn</i> (1999) 70 Cal.App.4th 339 [racial bias]; <i>Gardner v. Barnett</i> (7th Cir. 1999) 175 F.3d 580 [disallowance of voir dire re predispositions about gangs].</p>
<p><b>Denial of peremptory challenges</b> guaranteed by state law.</p>	<p>Due process/denial of state-created liberty interest. <i>Vansickel v. White</i> (9th Cir. 1999) 166 F.3d 955</p>
<p><b>Juror bias &amp; concealment of bias</b> on voir dire.</p>	<p>6th Amend. jury trial &amp; due process. <i>Dyer v. Calderon</i> (9th Cir. 1998) 151 F.3d 970 (en banc); <i>Green v. White</i> (9th Cir. 2000) 232 F.3d 671.</p>
<p>Other <b>prejudicial events during voir dire</b>.</p>	<p>6th Amen. jury trial, confrontation, &amp; due process. E.g. <i>Mach v. Stewart</i> (9th Cir. 1998) 137 F.3d 630 (expert-sounding statement of excused prospective juror (social worker) that children never lie about sexual assault; so intrinsically prejudicial as to compel a mistrial).</p>
<p><b>Juror bias—racial bias during deliberations</b>.</p>	<p>Equal protection. <i>McCleskey v. Kemp</i> (1987) 481 U.S. 279, 292. (Also 6th Amen. fair jury trial &amp; due process.)</p>
<p><b>Juror misconduct, exposing other jurors to matters not in evidence</b> (e.g., defendant's prior criminal record).</p>	<p>6th Amen. jury trial &amp; confrontation. <i>Jeffries v. Wood</i> (9th Cir.1997) 114 F.3d 1484, 1490; <i>Lawson v. Borg</i> (9th Cir.1995) 60 F.3d 608, 612.</p>
<p><b>Misconduct of court personnel</b> (bailiffs, sheriffs, clerks, etc.) exposing jurors to matters outside the record.</p>	<p>6th Amen. fair jury trial, counsel, confrontation &amp; due process. E.g. <i>Dickson v. Sullivan</i> (9th Cir. 1988) 849 F.2d 403.</p>
<p>Other errors resulting in <b>jurors' receipt of information outside the record</b>. E.g., delivery of unadmitted exhibits into jury room.</p>	<p>6th Amen. confrontation. E.g., <i>Eslaminia v. White</i> (9th Cir. 1998) 136 F.3d 1234; <i>United States v. Noushfar</i> (9th Cir. 1996) 78 F.3d 1442.</p>

**G. Other Fair Trial Issues**

<b>Error</b>	<b>Federal Claim</b>
<b>Competency</b> to stand trial (Pen. Code § 1368, etc.).	Due process. <i>Pate v. Robinson</i> (1966) 383 U.S. 375; <i>Cooper v. Oklahoma</i> (1996) 517 U.S. 348.

<b>Presence of defendant</b> at critical stages of trial.	6th Amen. confrontation & due process. See, e.g., <i>United States v. Rosales-Rodriguez</i> (9th Cir. May 8, 2002) ___ F.3d ___, 02 C.D.O.S. 3928 (& prior cases discussed there); see generally <i>Kentucky v. Stincer</i> (1987) 482 U.S. 730.
<b>Severance/joinder:</b> improper joinder of <b>counts</b> .	Due process. E.g., <i>Bean v. Calderon</i> (9th Cir. 1998) 163 F.3d 1073.
<b>Severance/joinder:</b> improper joinder of <b>co-defendants</b> .	Due process and/or 6th Amen. confrontation. E.g., <i>United States v. Mayfield</i> (9th Cir. 1999) 189 F.3d 895; <i>People v. Estrada</i> (1998) 63 Cal.App.4th 1090
<b>Lack of notice</b> of prosecution theory & other “ambush” tactics	6th Amen. & due process rights to notice of charges. <i>Sheppard v. Rees</i> (9th Cir. 1990) 909 F.2d 1234.
<b>Other prejudicial events in courtroom</b> —portrayal of <b>defendant</b> (shackling, jail clothes, viewing defendant in custody, etc.)	Due process. E.g., <i>Spain v. Rushen</i> (9th Cir. 1989) 883 F.2d 712 ; <i>Estelle v. Williams</i> (1976) 425 U.S. 501.
<b>Other prejudicial events in courtroom</b> —outbursts, press & spectator conduct, etc.	Due process and/or 6th Amen. fair trial & confrontation. E.g., <i>Norris v. Risley</i> (9th Cir. 1990) 918 F.2d 828.

#### H. Appellate Process Issues

<b>Error</b>	<b>Federal Claim</b>
<b>Denial of appointed counsel</b> on direct appeal or ineffective assistance of appellate counsel.	Due process & equal protection. <i>Douglas v. California</i> (1963) 372 U.S. 353 <i>Evitts v. Lucey</i> (1985) 469 U.S. 387.
<b>Denial of adequate record</b> for appellate review.	Due process, equal protection, & effective assistance appellate counsel. <i>Enstlinger v. Iowa</i> (1967) 386 U.S. 748; <i>People v. Barton</i> (1978) 21 Cal.3d 513, 518.
<b>Denial of adequate record for Batson claims.</b> See <i>People v. Landry</i> (1996) 47 Cal.App.4th 785 (denying augmentation, based on Cal. Supreme Court opinions disapproving comparisons between challenged and unchallenged jurors).	Because federal opinions regarding jurors comparisons as vital to <i>Batson</i> review (e.g., <i>Turner v. Marshall</i> (9th Cir. 1997) 121 F.3d 1248), augmentation denials like the one in <i>Landry</i> implicate federal constitutional rights to adequate appellate record ( <i>Enstlinger v. Iowa, supra</i> ) and effective assistance of appellate counsel ( <i>Evitts v. Lucey</i> ).