MAKING A FEDERAL CASE OUT OF IT

"Federalization" Reminders, Tips, & Exhortations

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I. HOW TO DO IT--BASICS OF RAISING, PRESERVING & EXHAUSTING FEDERAL CLAIMS

- **Must raise federal claim in the state proceedings** in order to "exhaust" it for any future federal habeas petition. *Duncan v. Henry* (1995) 513 U.S. 364 (summarily reversing 9th Cir. grant of habeas relief; state appeal which had framed "other offenses" issue in traditional Cal. law terms (Evid. Code §§ 352, 1101, etc.) did *not* exhaust claim that the evidence violated due process).

- **Must explicitly present it as a federal claim, by explicit reference to federal constitutional provisions or federal case law**. **STATE BRIEFING WHICH RELIES ONLY ON STATE CASES APPLYING FEDERAL CONSTITUTIONAL PROVISIONS IS NOT ENOUGH TO EXHAUST THE FEDERAL CLAIM.** *Peterson v. Lampert* (9th Cir. 2002) 277 F.3d 1073 (petition for review to Oregon Supreme Court did not exhaust 6th Amen. ineffective assistance claim, where the petition only cited leading Oregon ineffective assistance case (Oregon equivalent of *Pope*), but not *Strickland* or 6th Amen.)
  - "We simply do not agree that ... the citation of state law cases in which federal law is applied to a state law claim fairly presents a federal claim to a state supreme court. Simply and clearly identifying the federal nature of a claim does not seem to be too much to ask of petitioners." *Peterson*, *supra*, at p. 1079.
  - Having been slapped down by the Supreme Court in *Duncan v. Henry*, the 9th Cir. is now taking a *more* restrictive view of exhaustion than other federal circuits. Compare *Ramirez v. Attorney General of New York* (2nd Cir. 2001) 280 F.3d 87, 94-96.
  - This means **no more "*Pope* claims," "*Marsden* errors," "*Wheeler* motions," "*Aranda* severance," " 1368/competency hearings," etc!** Though it's fine to refer to the corresponding

state case law or statutes, the state briefing must also explicitly refer to federal case law (e.g., *Strickland*, *Batson*, *Bruton*, etc.) or to the specific federal constitutional right underlying the state cases or statutes (e.g., 6th Amen. right to conflict-free counsel underlying *Marsden*; federal due process underlying § 1368).

- Note that this is similar too, but not quite the same, as question of whether *trial counsel* must expressly "federalize" objections (e.g., couple every "hearsay" objection w/ a reference to 6th Amen. confrontation). But trial "federalization" is more of a "procedural default," than an "exhaustion" question. As long as appellate briefs and pet. for review expressly raise federal claim and state appellate court considers it (as many state appellate decisions still do), there's no problem. "Procedural default" (and dilemma of how to overcome it) arise when state appellate court expressly refuses to consider federal claim because it wasn't properly presented below. E.g., *People* v. *Barnett* (1998) 17 Cal.4th 1044, 1119 fn. 54; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1116 fn. 20; *People v. Ashmus* (1991) 54 Cal.3d 932, 972 fn. 10.

- **Must exhaust both the "factual" and "legal" aspects of the federal claim.** See *Vasquez v. Hillery* (1986) 474 U.S. 254, 258-260; see, e.g., *Aiken v. Spalding* (9th Cir. 1988) 841 F.2d 881 (finding lack of exhaustion where new evidence re audibility of request for counsel had not been presented to state courts).
  - E.g., if *Wheeler-Batson* motion concerns 6 jurors, *Batson* will be "exhausted" only as to those specific jurors, whose exclusion is addressed in both the state appeal and the petition for review. Similarly, if state appeal frames issue solely in terms of racial bias, any <u>other</u> form of bias concerning those jurors' exclusion (e.g., gender, religion) would likely not be considered exhausted.
  - Note that this also goes for state appellate rulings that <u>frustrate adequate presentation of a federal claim</u>--e.g., state appellate court's <u>refusal to augment record</u> with voir dire of unchallenged jurors. In that situation, the federal error in the augmentation denial should itself be "exhausted" (& included in any pet. for review) as a denial of rights to due process, equal protection, and effective assistance of counsel on appeal. See *Enstminger* v. *Iowa* (1967) 386 U.S. 748, & other cases cited in Part IV-H,

infra ("Appellate Process Issues")..

- **Federal claim must be <u>properly</u> presented in state proceedings.** Presenting federal claim only belatedly or in a way that state court isn't required to consider it doesn't exhaust the claim. E.g., *Castille v. Peoples* (1989) 489 U.S. 346 (presentation of federal claim for first time in discretionary petition to state supreme court didn't exhaust it). In that situation, claim will only be considered exhausted if, despite the late or improper presentation, state court actually considered it on the merits. E.g., *Greene v. Lambert* (9th Cir. March 26, 2002) __ F.3d __, 02 C.D.O.S. 2689 (federal claim first raised in pet. for rehearing deemed exhausted, but only because Oregon Supreme Court amended its opinion to take note of claim).
  - **Important lesson for "fallback" ineffective assistance claims.** Numerous Cal. cases make clear that an **appellate court needn't consider any claim (including an IAC claim) raised for first time in a reply brief.** E.g., *In re Ricky H.* (1992) 10 Cal.App.4th 552, 562; *People v. Dunn* (1995) 40 Cal.App.4th 1039, 1055. Hence, the practice of replying to Atty Gen's "waiver" argument by adding an IAC claim to reply brief does little good. If state appellate court finds underlying substantive claim (e.g., evidentiary or instructional error, prosecutorial misconduct) waived and declines to reach IAC claim, *neither issue is adequately preserved for later federal habeas review.*
  - Though it might seem more "safe" just to sneak the new IAC argument into the reply, it really isn't. Instead, choice really comes down to: (1) toughing it out on the merits <u>without an IAC claim</u> and disputing the Atty Gen's waiver argument; (2) arguing the merits in the reply brief <u>and also seeking leave to file a short supplemental brief with an alternative IAC argument</u>; and/or (3) raising the IAC claim in a state habeas petition.

- **Must present federal claim to California Supreme Court.** *O'Sullivan v. Boerckel* (1999) 526 U.S. 838. As to any claim based on the appellate record, exhaustion usually requires (1) explicitly raising the federal claim in the state appellate briefs; and (2) explicitly renewing that federal claim in a timely petition for review.

II. WAIVER, PROCEDURAL DEFAULT, AND STATE HABEAS CONSIDERATIONS.

- **Disclaimer:** These materials are designed to assist counsel in raising and "exhausting" federal claims on direct appeal. They are not designed as a guide to either federal habeas rules and limitations ("procedural default," "cause and prejudice," AEDPA standards, etc.) or to state habeas practice. (For the author's views on the latter subject, see O'Connell, "The Uncharted World of Non-Capital State Habeas Corpus Practice" (Oct. 1998) Cal. Crim. Defense Practice Rptr. p. 637. For comprehensive guide to federal habeas procedure, see Hertz & Liebman (4th ed. 2001) Federal Habeas Corpus Practice & Procedure.)

- Even if appellate counsel properly "federalizes" a claim in appellate briefs and petition for review, state appellate court may refuse to consider it on ground that it wasn't properly preserved *at trial*. That "procedural default" ruling may or may not block federal habeas review, depending upon whether the federal court concludes the state procedural rule is an "adequate and independent" ground. See generally *Coleman v. Thompson* (1991) 501 U.S. 772, and cases discussed there. Assuming that the procedural default is "adequate and independent," what can a defendant do to get a state appellate ruling that a claim (or the federal dimension of claim) has been waived due to the inadequate presentation below?

- One option, of course, is simply to raise an alternative IAC claim (citing *Strickland*, etc.) in the direct appeal on the theory that there could be no tactical reason for not adequately preserving the objection. That will, at least, ensure "exhaustion" of the underlying claim, in the "envelope" of an IAC claim. But, except in the most extreme situations, a California appellate court is likely to reject any IAC claim on direct appeal on the theory that there could have been some tactical reason for the omission.
    - Ironically, that means that the IAC claims most suitable for direct appeal may be those in which counsel dutifully tried to raise an issue, but failed to do so on the strongest ground. (E.g., where counsel raised a state law objection, but failed to assert the corresponding federal ground.) In that situation, counsel plainly wants to challenge certain evidence or prosecutorial

tactic, so there's no conceivable tactical ground for not doing so on the strongest available legal basis. But, where counsel completely missed the boat and neglected to challenge something at all, it may be more difficult to raise the claim on direct appeal, because the appellate court may speculate that counsel had some reason for not opposing that evidence.

- In situations where it's impossible to raise an issue adequately on appeal due to "waiver" obstacles, it may be possible to exhaust it via a state habeas petition. As with direct appeal issues, "exhaustion" of a federal claim via state habeas proceedings requires presentation of that claim to the California Supreme Court--via either a habeas petition within the California Supreme Court's original jurisdiction or a petition for review from the appellate court's denial of a habeas petition.

- **Staying clear of state habeas "procedural defaults."**
  - A "procedural default" is found only where the state court explicitly relies on an "adequate and independent" state law ground. See generally *Harris v. Reed* (1989) 489 U.S. 255. An ordinary "postcard denial" of a state habeas petition, without any citations or other references to procedural limitations, is considered a decision on the merits and will fully exhaust a claim. (So, if the state habeas court is lazy and denies the petition without any explanation or citation, there should be no difficulty raising that claim in federal court.)
    - Note, however, that if a lower state court denies a habeas petition on a "procedural default" ground, a subsequent no-citations postcard denial from the California Supreme Court will not be deemed on the merits. The federal court will "look through" that "silent" denial to any previous state decision stating reasons for the denial. See *Ylst v. Nunnemaker* (1991) 501 U.S. 797.
  - The primary state "procedural defaults" are these: (1) the claim was raised and rejected in a prior appeal (*Waltreus*); (2) it could have been raised on appeal but wasn't (*Dixon*); (3) there was unreasonable delay in presentation of the claim (*Clark*); and (4) the claim was or should have been raised in a previous habeas petition (also *Clark*) . See *In re Harris* (1993) 5 Cal.4th 813 (discussing both the *Dixon* and *Waltreus* rules and their exceptions); *In re Clark* (1993) 5 Cal.4th 750 (discussing

unreasonable delay and "successive petition" bars and their exceptions).

- The good news: The *Waltreus* and *Dixon* rules don't apply to IAC claims. An IAC claim is cognizable in a state habeas petition even where the claim rests on the appellate record and could have been presented on direct appeal (or was raised and rejected on appeal). *In re Robbins* (1998) 18 Cal.4th 770, 814 fn. 34.
- But the *Clark* rules on unreasonably delayed or successive petitions do apply to IAC claims. The Cal. Supreme Court has promulgated specific rules for assessing the timeliness of habeas petitions in capital cases (including a "safe harbor" provision deeming a petition presumptively timely if filed within 90 days of the reply brief on direct appeal). But there are no comparable benchmarks for applying the "unreasonable delay" principle to non-capital cases (and virtually no published case law applying *Clark* in non-capital contexts). In practice, California appellate courts seldom seem to invoke *Clark* as long as the state habeas petition is filed during the briefing of the direct appeal. But since post-affirmance habeas denials are generally unpublished minute orders (and aren't served on the appellate projects), it's not clear how often the California courts are invoking the *Clark*/laches procedural bar in non-capital cases. Nor is it clear whether the California courts have any consistent view as to how much delay will be considered "unreasonable" in a non-capital case.

- **Federal views of Cal. "procedural defaults."**
  - Federal courts will usually respect a California appellate ruling that a claim was "waived" for direct appeal, due to inadequate presentation below. California's "contemporaneous objection" requirement (Evid. Code § 353, etc.) is generally considered an "adequate and independent" ground for "procedural default" purposes, especially where there was no objection to the evidence, argument, or other event later challenged on appeal. See, e.g., *Garrison v. McCarthy* (9th Cir. 1981) 635 F.2d 374, 377; *Vansickel v. White* (9th Cir. 1998) 166 F.3d 953, 957; *Contreras v. Rice* (C.D. Cal. 1998) 5 F.Supp.2d 854, 869-870.
    - There may be some cause for hope in extreme cases. The 9th Cir. recently found no "adequate and

independent" procedural bar where trial counsel had persistently raised *Bruton* objections, but the state trial and appellate courts found she had not adequately preserved the issue. *Melendez v. Pliler* (9th Cir. Apr. 24, 2002) __ F.3d __, 02 C.D.O.S. 3534. The 9th Cir. was not convinced that the California courts *consistently* applied a procedural bar in such situations in which counsel did attempt to raise objections..

- Until recently, 9th Cir. position was that California's various habeas "procedural default" rules (*Dixon*, *Waltreus*, *Clark*) were not "adequate and independent" grounds and did not limit federal habeas review--at least where the state habeas denial pre-dated the Cal. Supreme Court's *Robbins* opinion (*In re Robbins* (1998) 18 Cal.4th 770). See, e.g., *Park v. California* (9th Cir. 2000) 202 F.3d 1146; *Morales v. Calderon* (9th Cir. 1996) 85 F.3d 1387.
- But the 9th Cir. has now held that, since the refinement of those rules in the *Robbins* opinion (filed Aug. 3, 1998), California's *Clark* rule on unreasonable delay is an "adequate and independent" ground for procedural default purposes. *Bennett v. Mueller* (9th Cir. 2001) 273 F.3d 895. Moreover, a post-*Robbins* habeas denial referring to unreasonable delay or lack of diligence will be deemed an invocation of the *Clark* rule, even if it doesn't expressly cite *Clark* or *Robbins*.
- Although *Bennett* concerned the *Clark*/unreasonable delay rule, much of *Bennett's* reasoning would also likely apply to post-*Robbins* habeas denials on *Dixon* and *Waltreus* grounds (i.e., that the claim was or could have been raised on direct appeal).

III. CREATIVE FEDERALIZING (HELPFUL GENERAL DOCTRINES FOR POSSIBLE FEDERAL BASES FOR HARD-TO-CHARACTERIZE CLAIMS).

Part IV of these materials will address correlations between specific categories of issues (jury instructions, evidentiary error, etc.) and corresponding constitutional rights and case law. But, before getting to that specific catalogue of common federal claims, this section will note some *general* federal constitutional principles (including several branches of due process jurisprudence) which may provide "hooks" for federalizing hard-to-characterize errors. Appellate counsel should

bear these doctrines in mind when something is erroneous under state law or looks grossly unfair, but the federal constitutional implications aren't readily apparent.

- **Sufficiency of evidence/due process.** *Jackson v. Virginia* (1979) 443 U.S. 307. Don't forget that state law arguments that the defendant's conduct doesn't satisfy all the technical requirements for a certain offense are also sufficiency-of-evidence arguments. (And, of course, per the 9th Circuit's strict requirement of explicit identification of a claim as a federal one, any such argument must cite *Jackson v. Virginia*, not just Cal. cases (*People v. Johnson* (1980) 26 Cal.3d 557, etc.) applying the identical standard.)

- **"Fair warning," retroactivity, and other due process implications of expansive or unforeseen statutory constructions.** See generally *Bouie v. City of Columbia* (1964) 378 U.S. 347; *Marks v. United States* (1977) 403 U.S. 188; *Douglas v. Bruder* (1973) 412 U.S. 430. "[D]ue process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope [citations]." *United States. v. Lanier* (1997) 520 U.S. 259, 266. The *Bouie* doctrine has barred retroactive application of numerous recent California Supreme Court decisions which broke from prior case law in expanding the scope of criminal offenses or enhancements (or curtailing defenses). E.g., *People* v. *Blakeley* (2000) 23 Cal.4th 82, 91; *People* v. *Martinez* (1999) 20 Cal.4th 225, 238-241.) But don't think of *Bouie* as limited to issues of retroactive application of other recent opinions to your case. Also consider whether your case itself presents such a due process problem. That is, if the state's argument in your case would require a significant departure from the statutory and case law on the books at the time of the offense, then application of such an expanded theory of liability to your client's case could present a due process issue. Such a due process argument is especially apt in any case where the Attorney General is asking the appellate court to disagree with a prior appellate opinion.
  - For U.S. Supreme Court's most recent refinement of *Bouie*/due process doctrine, see *Rogers v. Tennessee* (2001) 532 U.S. 451. (*Rogers* emphasizes that the due process analysis governing retroactivity of *judicial* decisions is not identical to the ex post facto doctrine, which is limited to legislation. The due process

analysis is somewhat more narrow and focuses on whether there was "fair warning.")

- **"It just isn't fair!" "Fundamental fairness" is "the touchstone of due process."** *Gagnon v. Scarpelli* (1973) 411 U.S. 778, 790; see also, e.g., *United States v. Valenzuela-Bernal* (1982) 458 U.S. 858, 872; *Spencer v. Texas* (1967) 385 U.S. 554, 563-564 (& cases cited there). Numerous unfair procedures and events which today are subjects of well-established constitutional protections (e.g., shackling, prejudicial pre-trial publicity, etc.) received judicial redress only because creative counsel fashioned those grievances into viable due process claims, based on violations of "fundamental fairness."

- **Due process--history as a guide to "fundamental fairness."** Due process analysis looks to whether the challenged procedure "'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' [Citation]" *Patterson v. New York* (1977) 432 U.S. 197, 201-202; *Medina v. California* (1992) 505 U.S. 437, 445; 43. "Our primary guide in determining whether the principle in question is fundamental is, of course, *historical practice*. [Citation]" *Montana v. Egelhoff* (1996) 518 U.S. 37, 43-44, emphasis added. This was the approach underlying the 9th Circuit's cases finding due process violations in the use of "other offenses" as evidence of criminal propensity. *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378; see also *Garceau v. Woodford* (9th Cir. 2001) 275 F.3d 769, 775-776. Counsel should consider a similar historical approach when confronting other departures from traditional criminal procedure (e.g., instructions re accomplice testimony).

- **Due process--arbitrary deprivation of a <u>state-created liberty interest</u>.** *Hicks v. Oklahoma* (1980) 447 U.S. 343. See, e.g., *Vansickel v. White* (9th Cir. 1999) 166 F.3d 955 (denial of number of peremptory challenges guaranteed by <u>state</u> statue); *Walker v. Deeds* (9th Cir. 1995) 50 F.3d 670 (failure to comply with <u>state</u> procedure for determination of "habitual offender" status and penalty).

- ***Apprendi* Issues!** *Apprendi v. New Jersey* (2000) 530 U.S. 466.
  - In the breadth of its implications for criminal trials and sentencing, *Apprendi* is possibly the only true "landmark" defense victory to emerge from the Rehnquist Court. This is not

an *Apprendi* outline, and it's impossible here to explore all the potential applications of *Apprendi* to California cases. But here are a few areas to watch for *Apprendi* issues.

- Obviously, *Apprendi* is directly applicable to the adjudication of *current conduct* sentence enhancements (GBI, weapon use, etc.) which increase the sentence above the *maximum term* otherwise allowed for the underlying substantive offense.
- The U.S. Supreme Court is currently considering whether the same cluster of criminal trial rights (jury trial, proof beyond a reasonable doubt, charging in accusatory pleading, etc.) also apply to "mandatory minimums" (which would likely entail overruling *McMillan v. Pennsylvania* (1986) 477 U.S. 79). *Harris v. United States*, No. 00-10666 {argued March 18, 2002}. Note that this issue affects not only probation-preclusion statutes and the like, *but also statutes which increase the minimum terms for life sentences*. For a dramatic example of the current anomalous state of affairs, see *People v. Sengpadychith* (2002) 26 Cal.4th 316 (finding that Pen. Code § 186.22's determinate sentence enhancements implicated federal constitutional trial rights (per *Apprendi*), but that it's indeterminate enhancing provisions did not (per *McMillan*)).
- Current case law draws a sharp distinction between current conduct enhancements and prior conviction allegations. Compare *Apprendi v. New Jersey* with *Almendarez-Torres v. United States* (1998) 523 U.S. 224. But *Apprendi* itself reveals that there are now 5 votes to overrule *Almendarez-Torres*. (See Justice Thomas' concurring opn. in *Apprendi*.) Despite taking up several other *Apprendi* issues, the U.S. Supreme Court has not yet granted cert. on the continuing viability of *Almendarez-Torres*. But it may well do so within the next year or two. So, despite the current second-class status of recidivist enhancements, consider raising *Apprendi*-type challenges in any case in which a defendant was denied the full panoply of criminal trial rights on those allegations.
- The same goes for double jeopardy issues concerning prior conviction enhancements--including the prosecution's ability to retry a "strike" or other enhancement following a reversal for insufficient evidence. Justice Thomas' change of heart in *Apprendi* provides hope for reconsideration of *Monge v. California* (1998) 524 U.S. 721, as well as *Almendarez-Torres*.

- Beyond traditional enhancements, what *other* kinds of determinations in California cases pose possible *Apprendi* issues? Findings that require or allow or multiple indeterminate terms (e.g., Pen. Code § 667.61 ("one strike")) or full-force consecutive determinate terms (e.g., § 667.6(d))? What about judicial (rather than jury) findings that offenses are separate for § 654 purposes?
- Also watch for possible *Apprendi* implications any time the state's argument hinges on putative differences between offenses and mere determinations of the "degree" of an offense.

- ***Bush v. Gore* Equal Protection Arguments!** *Bush v. Gore* (2000) 531 U.S. 98.
  - Who knows exactly what *Bush v. Gore* means? The majority found an equal protection violation in Florida's lack of consistent standards from county to county in the classification of ballots. Like voting rights, the liberty interests at stake in criminal proceedings should require heightened scrutiny of arbitrary or inconsistent state practices. What are the implications of *Bush v. Gore* for intra-state differences in the criminal justice process--e.g., dramatic differences among counties' "three strikes" charging practices, in the availability of non-prison dispositions for certain offenses, in jury selection practices? Warning: Imagination required. *Bush v. Gore* claims are not for the faint of heart.

IV COMMON ISSUE CATEGORIES AND CORRESPONDING FEDERAL CONSTITUTIONAL RIGHTS.

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.

A few cautionary words: The cited cases are intended simply as "starters" or "entry points" to relevant federal case law in the field. Some points identify the leading U.S. Supreme Court cases. For others, we have simply listed one or more handy examples of federal circuit cases. Also, where possible, we have tried to note several possible federal constitutional rights (e.g., due process & 6th Amen. fair jury trial), but the cited case may only discuss one of

those possible bases.

{Portions of this section (including many of the examples of evidentiary error and prosecutorial misconduct) have been adapted and updated from materials originally prepared by FDAP Staff Attorney Jonathan Soglin for a 1999 FDAP seminar.}

A. Jury Instructions

Most potential federal constitutional claims involving jury instructions rest upon a combination of the **right to jury trial** (6th Amen.) 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**
Errors and omissions in elements of the offense or theories of liability.	*Neder v. United States* (1999) 527 U.S. 1; *United States v. Gaudin* (1995) 515 U.S. 506.
Other errors that remove elements from the jury, including instructions or judicial comments that a particular element is established "as a matter of law."	*Powell v. Galaza* (9th Cir. 2002) 282 F.3d 1089 (judge's comment that defendant's testimony established an element of offense tantamount to a directed verdict or "mandatory presumption").
Submission of unauthorized theories of liability (e.g., improper predicate offense for felony-murder liability).	E.g., *Suniga v. Bunnell* (9th Cir. 1993) 998 F.2d 664; *Keating v. Hood* (9th Cir. 1999) 191 F.3d 1053.

Errors in the definition of the "reasonable doubt" standard or other instructions that dilute the "reasonable doubt" requirement.	*Sullivan v. Louisiana* (1993) 508 U.S. 275. Note that many of the current issues concerning the CALJIC "other offenses" instructions (CALJIC 2.50.01) come within this category. See, e.g., *People v. Reilford* (2001) 93 Cal.App.4th 973, review granted Feb. 13, 2002 (S103084).
Improper "presumptions" and other errors that relax the prosecution's burden to establish each element beyond a reasonable doubt.	*Yates v. Evatt* (1991) 500 U.S. 391.
Erroneous omission of lesser included offense instructions or misstatement of the grounds for lesser offenses: 2 possible theories for errors concerning lesser offense instructions: **Lesser offense theory (1)**-- as denial of adequate instructions on elements of *charged offense*.	(1) Failure to instruct on a ground that negates malice or some other element of the charged offense (e.g., heat-of-passion or imperfect self-defense) *Mullaney v. Wilbur* (1975) 421 U.S. 684. See Justice Kennard's dissent in *People v. Breverman* (1998) 19 Cal.4th 142, discussing applicability of *Mullaney* to omission of heat-of-passion instructions. Note that the *Breverman* majority did not reach the *Mullaney* issue (because it wasn't raised in the briefs), so the *Breverman* maj. opn. does not bar a Cal. appellate court from considering this issue.
Lesser offense theory (2)-- as denial of instructions on defense theory.	(2) **Denial of instructions on the "defense theory of the case."** *Conde v. Henry* (9th Cir. 1999) 198 F.3d 734 (holding that refusal of instructions on simple kidnap as lesser offense of kidnap-for-robbery violated "well established" right to instructions on defense theory of case, where defense challenged sufficiency of evidence to satisfy elements of robbery).

Denial of instructions on affirmative defenses (e.g., self-defense) or misstatement of those defenses.	Also a violation of the right to adequate instructions on the "defense theory" of the case. *Mathews v. United States* 485 U.S. 58; e.g., *Barker v. Yukins* (6th Cir. 1999) 199 F.3d 867.
Other "defense theories"?	Arguably, the right to instructions on the "defense theory of the case" is not restricted to formal "affirmative defenses," but also applies to other kinds of "defense theories," like third-party culpability, alibi, etc. But see *Duckett v. Godinez* (9th Cir. 1995) 67 F.3d 734 (though 9th Cir. requires specific alibi instructions in *federal criminal trials*, 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).
Instructions on "other offenses" evidence.	Due process. See *Garceau v. Woodford* (9th Cir. 2001) 275 F.3d 769, 775-776. (instructions allowing use of "other offenses" evidence as proof of criminal propensity violated due process).

B. Evidentiary Errors

Error	**Federal Claim**
admission of hearsay not satisfying a well-established hearsay exception	Confrontation clause. *Idaho v. Wright* (1990) 497 U.S. 805
limits on cross-examination; exclusion of impeachment evidence	Confrontation clause *Delaware v. Van Arsdell* (1986) 475 U.S. 673; *Olden v. Kentucky* (1988) 488 U.S. 227.
other offenses and uncharged misconduct	Due process/fundamental fairness. *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378.

exclusion of defense evidence	Due process right to put on a defense and/or 6th Amen. right to compulsory process. *Chambers v. Mississippi* (1973) 410 U.S. 284, 302-303; *Washington v. Texas* (1967) 388 U.S. 14, 23; *Crane v. Kentucky* (1986) 476 U.S. 683.

C. Confessions

Error	**Federal Claim**
Traditional ***Miranda*** issues.	5th Amen. self-incrimination priv. See *Dickerson v. United States* (2000) 530 U.S. 428 (reaffirming *Miranda*).
Other interrogation issues: *Massiah* (interrogation after right to counsel has attached).	6th Amen. right to counsel. *Massiah v. United States* (1964) 377 U.S. 201
Other interrogation issues: jailhouse confessions to police agents.	6th Amen. right to counsel (another branch of *Massiah* rule). E.g., *Maine v. Moulton* (1985) 474 U.S. 159.
Other interrogation issues: voluntariness of defendant's statement (incl. promises of leniency, threats, etc.)	Due process. E.g., *Arizona v. Fulminante* (1991) 499 U.S. 279.
Voluntariness of another witness' evidence.	Due process. E.g., *People v. Lee* (2002) 95 Cal.App.4th 772. Though a defendant lacks standing to assert a violation of a third party's 5th Amen. rights, he is entitled to challenge the admission of a another person's involuntary statement on due process grounds due to the inherent unreliability of coerced evidence (But standards are not identical; see generally *People v. Badgett* (1995) 10 Cal.4th 330.)

Confessions and other inculpatory statements of co-defendants & other co-principals.	6th Amen. confrontation. *Bruton v. United States* (1968) 391 U.S. 123; see, e.g., *Gray* v. *Maryland* (1998) 523 U.S. 185 [redaction insufficient where blanks or neutral pronouns will let jurors infer that references are to the other defendant]; *Lilly v. Virginia* (1999) 527 U.S. 116 [admission of co-principal's inculpatory statement as "declaration against penal interest" violated confrontation clause].

D. Prosecutorial Misconduct

Error	Federal Claim
Comment on defendant's failure to testify	5th Amen. priv. against self-incrimination. *Griffin v. California* (1965) 380 U.S. 609
Comment on defendant's post-arrest post-*Miranda* silence	Due process. *Doyle v. Ohio* (1976) 426 U.S. 610.
Use of a defendant's *pre-Miranda* silence in prosecution case-in-chief	5th Amen. priv. against self-incrimination. *United States v. Velarde-Gomez* (9th Cir. 2001) 269 F.3d 1023; *United States v. Whitehead* (9th Cir. 2000) 200 F.3d 634.
Stating facts not in evidence (in closing argument or in form of questions to witness)	6th Amen. confrontation. *Douglas v. Alabama* (1965) 380 U.S. 415; *Hardnett v. Marshall* (9th Cir. 1994) 25 F.3d 875; *People v. Bell* (1989) 49 Cal.3d 502; *People* v. *Gaines* (1997) 54 Cal.App.4th 821 *People v. Blackington* (1985) 167 Cal.App.3d 1216.

Vouching for credibility of witness	Due process and/or 6th Amen. confrontation. *Lambright v. Stewart* (9th Cir. 2000) 220 F.3d 1022, 1029; *United States v. Young* (1985) 470 U.S. 1, 18-19.
Appeals to **racial, ethnic or religious prejudices**	Equal protection & due process. *McCleskey v. Kemp* (1987) 481 U.S. 279, 309 n. 30; *Bains v. Cambra* (9th Cir. 2000) 204 F.3d 964, 974-975; *People v. Cudjo* (1993) 6 Cal.4th 585, 625-626.
Disparaging defendant's exercise of **right to counsel** or defense counsel's function.	6th Amend. right to counsel; due process. *United States* v. *Kallin* (9th Cir. 1995) 50 F.3d 689; ; *People* v. *Crandell* (1988) 46 Cal.3d 833, 878.
Misleading prosecutorial argument, (e.g., commenting on absence of defense evidence on a point, where *prosecution* objections or other tactics prevented defense from introducing such evidence).	Due process. *United States v. Kojayan* (9th Cir. 1993) 8 F.3d 1315.
Contradictory prosecution factual theories in co-defendants' separate trials (e.g., which defendant fired gun).	Due process. *Smith v. Groose* (8th Cir. 2000) 205 F.3d 1045; cf. *People v. Sakarias* (2000) 22 Cal.4th 596 [discussing but not resolving].
Other **inflammatory or pervasive prosecution tactics**, not implicating specific constitutional rights. E.g., appeals to passion or prejudice, danger to the community or community reactions, name-calling (including comparing defendant to infamous figures), etc.	Due process. *Donnelly v. DeChristoforo* (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").

Prosecutorial non-disclosure of exculpatory evidence, including impeachment information re prosecution witnesses.	Due process. *Brady v. Maryland* (1963) 373 U.S. 83; *Kyles v. Whitley* (1995) 514 U.S. 419; *United States v. Bagley* (1985) 473 U.S. 667 .
False testimony.	Due process. *United States v. Agurs* (1976) 427 U.S. 97 (presentation of testimony prosecutor knew or should have known was false); e.g., *People v. Kasim* (1997) 56 Cal.App.4th 1360.
Intimidation of defense witnesses (e.g., threats of perjury prosecution if witness testifies for defense).	Due process & 6th Amen. right to compulsory process E.g., *In re Martin* (1987) 44 Cal.3d 1; *United States* v. *Vavages* (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.

Error	**Federal Claim**
Ineffective assistance of <u>trial</u> counsel.	*Strickland* v. *Washington* (1984) 466 U.S. 668.
Ineffective assistance of <u>appellate</u> counsel.	Due process. *Evitts v. Lucey* (1985) 469 U.S. 387.
Denial or absence of counsel at a critical stage of the proceedings; constructive denial of counsel.	*United States v. Cronic* (1984) 466 U.S. 648; e.g., *People v. Horton* (1995) 11 Cal.4th 1068 *Delgado v. Lewis* (9th Cir. 2000) 223 F.3d 976 (denial of counsel where attorney for co-defendant with divergent interest stood in for defendant's own attorney at critical stage).

Counsel's **conflict of interest.**	*Cuyler v. Sullivan* (1980) 446 U.S. 335; *Holloway v. Arkansas* (1978) 435 U.S. 475; *Mickens v. Taylor* (2002) 535 U.S. ___ [122 S.Ct. 1237].
Marsden error–inadequate inquiry by court or abuse of discretion re defendant's motion to replace appointed counsel.	Be sure to identify *Marsden* error as a form of 6th Amen. violation. See *People v. Marsden* (1970) 2 Cal.3d 118, 123-126; see also *Schell v. Witek* (9th Cir. 2000) 218 F.3d 1017 (en banc) (6th Amen. basis for *Marsden*-like rules).
Denial of ancillary services to appointed counsel (experts, investigators, etc.).	Due process. *Ake v. Oklahoma* (1985) 470 U.S. 68. (Though *Ake* rests on due process, denial of necessary ancillary services also implicates 6th Amen. right to counsel. See *Corenevsky v. Superior Court* (1984) 36 Cal.3d 307.
Denial of ancillary services to pro. per. defendant (investigator, process server, library access, etc.).	Due process. *Milton v. Morris* (9th Cir. 1985) 767 F.2d 1443.
Other **self-representation issues** (incl. erroneous denial of *Faretta* motion; inadequate warnings re hazards of self-representation; erroneous failure to relieve a defendant of pro. per. status & reappoint counsel, etc.).	*Faretta v. California* (1975) 422 U.S. 806; e.g, *United States v. Mohawk* (9th Cir. 1994) 20 F.3d 1480 [inadequate record to establish knowing & voluntary waiver of counsel]; *Snook v. Wood* (9th Cir. 1996) 89 F.3d 605 [inadequate warnings]; *Menefield* v. *Borg* (9th Cir. 1989) 881 F.2d 696 [erroneous refusal of re-appointment of counsel for *post-trial* hearings].

F. Jury Selection & Misconduct

Error	Federal Claim
Discriminatory use of **peremptory challenges** (state ***Wheeler*** error).	Equal protection. *Batson v. Kentucky* (1986) 476 U.S. 79.
Denial of adequate voir dire on possible juror bias.	6th Amen. jury trial & due process. *Mu'Min v. Virginia* (1991) 500 U.S. 415; *Ham v. South Carolina* (1973) 409 U.S. 524 ; e.g., *People v. Wilborn* (1999) 70 Cal.App.4th 339 [racial bias]; *Gardner* v. *Barnett* (7th Cir. 1999) 175 F.3d 580 [disallowance of voir dire re presdispositions about gangs].
Denial of peremptory challenges guaranteed by state law.	Due process/denial of state-created liberty interest. *Vansickel v. White* (9th Cir. 1999) 166 F.3d 955
Juror bias & concealment of bias on voir dire.	6th Amen. jury trial & due process. *Dyer v. Calderon* (9th Cir. 1998) 151 F.3d 970 (en banc); *Green v. White* (9th Cir. 2000) 232 F.3d 671.
Other **prejudicial events during voir dire.**	6th Amen. jury trial, confrontation, & due process. E.g. *Mach* v. *Stewart* (9th Cir. 1998) 137 F.3d 630 ["expert"-sounding statement of excused prospective juror (a social worker) that children never lie about a sexual assault charge; so intrinsically prejudicial as to compel a mistrial].
Juror bias–racial bias during deliberations.	Equal protection. *McCleskey v. Kemp* (1987) 481 U.S. 279, 292. (Also 6th Amen. fair jury trial & due process.)

Juror misconduct, exposing other jurors to matters not in evidence (e.g., defendant's prior criminal record).	6th Amen. jury trial & confrontation. *Jeffries v. Wood* (9th Cir.1997) 114 F.3d 1484, 1490. *Lawson v. Borg* (9th Cir.1995) 60 F.3d 608, 612.
Misconduct of court personnel (bailiffs, sheriffs, clerks, etc.) exposing jurors to matters outside the record.	6th Amen. fair jury trial, counsel, confrontation & due process. E.g. *Dickson v. Sullivan* (9th Cir. 1988) 849 F.2d 403.
Other errors resulting in **jurors' receipt of information outside the record**. E.g., delivery of unadmitted exhibits, tapes, etc., into jury room.	6th Amen. confrontation. E.g., *Eslaminia* v. *White* (9th Cir. 1998) 136 F.3d 1234; *United States v. Noushfar* (9th Cir. 1996) 78 F.3d 1442.

G. Other Fair Trial Issues

Error	**Federal Claim**
Competency to stand trial (Pen. Code § 1368, etc.).	Due process. *Pate v. Robinson* (1966) 383 U.S. 375; *Cooper v. Oklahoma* (1996) 517 U.S. 348.
Presence of defendant at critical stages of trial.	6th Amen. confrontation & due process. See, e.g., *United States v. Rosales-Rodriguez* (9th Cir. May 8, 2002) __ F.3d __, 02 C.D.O.S. 3928 (& prior cases discussed there); see generally *Kentucky v. Stincer* (1987) 482 U.S. 730.
Severance/joinder: improper joinder of **counts**.	Due process. E..g., *Bean v. Calderon* (9th Cir. 1998) 163 F.3d 1073 [prejudicial joinder of 2 murder counts; murders weren't cross-admissible, and stronger count bolstered the weaker one].

Severance/joinder: improper joinder of **co-defendants.**	Due process and/or 6th Amen. confrontation. E.g., *United States v. Mayfield* (9th Cir. 1999) 189 F.3d 895; *People v. Estrada* (1998) 63 Cal.App.4th 1090 (prejudicial error from tactics of co-defendant's counsel, incl. presentation of inadmissible evidence).
Lack of notice of prosecution theory & other "ambush" tactics	6th Amen. & due process rights to notice of charges. *Sheppard v. Rees* (9th Cir. 1990) 909 F.2d 1234.
Other prejudicial events in courtroom–portrayal of **defendant** (shackling, jail clothes, viewing defendant in custody, etc.	Due process. E.g., *Spain v. Rushen* (9th Cir. 1989) 883 F.2d 712 ; *Estelle v. Williams* (1976) 425 U.S. 501.
Other prejudicial events in courtroom–outbursts, press & spectator conduct, etc.	Due process and/or 6th Amen. fair trial & confrontation. E.g., *Norris v. Risley* (9th Cir. 1990) 918 F.2d 828 [spectators wearing prominent "Woman Against Rape" buttons].

H. Appellate Process Issues.

Error	**Federal Claim**
Denial of appointed counsel on direct appeal or ineffective assistance of appellate counsel.	Due process & equal protection. *Douglas* v. *California* (1963) 372 U.S. 353 *Evitts v. Lucey* (1985) 469 U.S. 387.
Denial of adequate record for appellate review.	Due process, equal protection, & effective assistance appellate counsel. *Enstminger* v. *Iowa* (1967) 386 U.S. 748; *People* v. *Barton* (1978) 21 Cal.3d 513, 518.

Denial of adequate record for *Batson* claims. See *People v. Landry* (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 *Batson* review (e.g., *Turner v. Marshall* (9th Cir. 1997) 121 F.3d 1248), augmentation denials like the one in *Landry* implicate federal constitutional rights to adequate appellate record (*Enstminger* v. *Iowa, supra*) and effective assistance of appellate counsel (*Evitts v. Lucey*).