

# Appellate Practice

American Bar Association Litigation Section

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## Standards of Appellate Review of Mixed Questions of Federal Constitutional Law and Fact: Follow the SCOTUS

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The Supreme Court of the United States (SCOTUS) ensures the uniformity and supremacy of federal law. *See, e.g., Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 326, 135 S. Ct. 1378, 1384, 191 L. Ed. 2d 471 (2015). Standards of appellate review, when they implicate remedies for federal constitutional violations, fall squarely within this purview. States have recognized this. Practitioners therefore can rely on a considerable body of federal and state law to call on state appellate courts to apply a de novo standard of appellate review in cases presenting mixed issues of federal constitutional law and fact, keeping in mind that a state may provide more protections than the federal constitution but may not provide less. *See, e.g., Cooper v. California*, 386 U.S. 58, 62, 87 S. Ct. 788, 17 L. Ed. 2d 730 (1967).

### Supreme Court: De Novo Standard

For decades, the U.S. Supreme Court has applied the de novo standard to review mixed questions of federal constitutional law and fact.

In 1967, the Court, in *Chapman v. California*, required state appellate courts to replace their own less rigorous standards of harmlessness of federal constitutional error with the “harmless beyond a reasonable doubt” appellate standard of review. 386 U.S. 18 (1967).

In 1984, in *Bose Corp. v. Consumers Union of United States, Inc.*, the Court made it abundantly clear that it requires de novo review of decisions of mixed questions of federal constitutional law and fact and held “that judges—and particularly Members of this Court—must exercise” an independent appellate “review in order to preserve the precious liberties established and ordained by the Constitution.” 466 U.S. 485, 510–11, 104 S. Ct. 1949, 1965, 80 L. Ed. 2d 502 (1984) (“The requirement of independent appellate review reiterated in *New York Times Co. v. Sullivan* is a rule of federal constitutional law. It emerged from the exigency of deciding concrete cases; it is law in its purest form under our

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common-law heritage.”); *see also* Harry T. Edwards & Linda A. Elliott, *Federal Standards of Review: Review of District Court Decisions and Agency Actions* 8 (3d ed. 2018) (noting de novo review is required “when the interests at issue are deemed too important to trust to the judgment of a single district judge constrained by ‘the logistical burdens’ of the trial process, . . . but rather are thought better addressed through the ‘reflective dialogue’ and ‘collective judgment’ characteristic of appellate courts” (quoting *Salve Regina Coll. v. Russell*, 499 U.S. 225, 231–32, 111 S. Ct. 1217, 113 L. Ed. 2d 190 (1991))).

For decades now since *Bose*, the Court has continued to conduct independent review of mixed questions of constitutional law and fact in civil and criminal cases addressing different federal constitutional questions and has continued to require the states to apply the federal appellate standard of review.

In *Miller v. Fenton*, the Court addressed the voluntariness of confession under the Due Process Clause of the Fourteenth Amendment. 474 U.S. 104, 106 S. Ct. 445, 88 L. Ed. 2d 405 (1985). It held that, “as we now reaffirm, the ultimate question whether, under the totality of the circumstances, the challenged confession was obtained in a manner compatible with the requirements of the Constitution is a matter for independent federal determination.” *Id.* at 112.

In *Brecht v. Abrahamson*, addressing whether “the same harmless-error standard that the state courts applied on direct review of petitioner’s claim also applies in this habeas proceeding,” the Court reiterated that *Chapman* requires state courts to engage in de novo review on direct appeal. 507 U.S. 619, 636, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993).

Similarly, in *Powell v. Nevada*, 511 U.S. 79, 84 (1994), the Court reiterated that its decision in *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987) (holding “a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final”) requires state courts, in addition to federal courts, to retroactively apply its new federal-constitutional rules.

In *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, the Court held “our review of petitioners’ claim that their activity is indeed in the nature of protected speech carries with it a constitutional duty to conduct an independent examination of the record as a whole, without deference to the trial court.” 515 U.S. 557, 567, 115 S. Ct. 2338, 132 L. Ed. 2d 487 (1995).

In *Thompson v. Keohane*, it held “the issue whether a suspect is ‘in custody,’ and therefore entitled to *Miranda* warnings, presents a mixed question of law and fact qualifying for independent review.” 516 U.S. 99, 102, 116 S. Ct. 457, 133 L. Ed. 2d 383 (1995). And in *Dickerson v. United States*, it reiterated that “*Miranda* announced a constitutional rule”

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and “applied its rule to proceedings in state courts.” 530 U.S. 428, 428–29, 120 S. Ct. 2326, 2328, 147 L. Ed. 2d 405 (2000).

In *Ornelas v. United States*, the Court mandated independent appellate review of trial judges’ ultimate determinations of reasonable suspicion and probable cause under the Fourth Amendment. 517 U.S. 690, 696–97, 116 S. Ct. 1657, 134 L. Ed. 2d 911 (1996).

In *United States v. Bajakajian*, the Court held “the question whether a fine is constitutionally excessive calls for the application of a constitutional standard to the facts of a particular case, and in this context *de novo* review of that question is appropriate.” 524 U.S. 321, 337, 118 S. Ct. 2028, 2038, 141 L. Ed. 2d 314 (1998). And in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, it held that “courts of appeals should apply a *de novo* standard of review when passing on district courts’ determinations of the constitutionality of punitive damages awards.” 532 U.S. 424, 433–36, 121 S. Ct. 1678, 1684–86, 149 L. Ed. 2d 674 (2001).

In *Lilly v. Virginia*, reviewing the state supreme court’s decision, the plurality concluded “as with other fact-intensive, mixed questions of constitutional law, . . . [i]ndependent review is . . . necessary . . . to maintain control of, and to clarify, the legal principles’ governing the factual circumstances necessary to satisfy the protections of the Bill of Rights.” 527 U.S. 116, 136–37, 119 S. Ct. 1887, 1900, 144 L. Ed. 2d 117 (1999) (quoting *Ornelas*).

And in *U.S. Bank National Ass’n ex rel. CW Capital Asset Management LLC v. Village at Lakeridge, LLC*, the Court held, “In the constitutional realm, . . . we have often held that the role of appellate courts ‘in marking out the limits of [a] standard through the process of case-by-case adjudication’ favors *de novo* review *even when answering a mixed question primarily involves plunging into a factual record.*” 138 S. Ct. 960, 967, n.4, 200 L. Ed. 2d 218 (2018) (emphasis added) (citing *Bose*).

## State Courts and De Novo Review

The majority of state courts follow the U.S. Supreme Court and independently review mixed questions of federal constitutional law and fact.

There is some scholarly debate over the source of the Court’s power to mandate application of its appellate standards of review when it is not explicitly stated by the Court. Compare Henry P. Monaghan, *Harmless Error and the Valid Rule Requirement*, 1989 Sup. Ct. Rev. 195, 200 n.30 (arguing that the Court’s authority rests on constitutional common law), and Henry P. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 Harv. L. Rev. 1, 20–21, n.112 (1975) (discussing the

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distinction between true constitutional rules and constitutional common law), *and* Daniel J. Meltzer, *Harmless Error and Constitutional Remedies*, 61 U. Chi. L. Rev. 1, 1–5 (1994) (agreeing with Monaghan on theory of constitutional common law), *with* Russell M. Coombs, *A Third Parallel Primrose Path: The Supreme Court's Repeated, Unexplained, and Still Growing Regulation of State Courts' Criminal Appeals*, 2005 Mich. St. L. Rev. 541, 591–96 (questioning argument that source of power comes from constitutional common law).

Nonetheless, nearly all state courts have agreed that “[i]t is well settled that de novo review is ordinarily appropriate in cases where constitutional rights are implicated.” *State v. Diaz*, 372 N.C. 493, 498, 831 S.E.2d 532, 536 (2019) (citing *Ornelas*). State courts have usually followed the SCOTUS precedent without discussion, either because they found its holdings binding or because they recognized that their own precedents are consistent. While not a comprehensive state-by-state review, the following illustrates the breadth of adoption of de novo review.

**Alaska:** *Matter of Lucy G.*, 448 P.3d 868, 878 (Alaska 2019) (following *Bose*, applying de novo standard of appellate review).

**Arizona:** *State v. Bronson*, 63 P.3d 1058 (Ariz. Ct. App. 2003) (following Court’s precedent in reviewing Confrontation Clause violations); *State v. Prasertphong*, 75 P.3d 675 (Ariz. 2003), *vacated by* 124 S. Ct. 2165 (2004) (same).

**Arkansas:** *Clark v. State*, 287 S.W.3d 567, 572 (Ark. 2008) (“While this court is not constitutionally bound to apply the *Ornelas* standard of review in determining the voluntariness of a confession, our standard for reviewing a trial court’s determination of voluntariness is consistent with the requirements of *Ornelas*.”).

**California:** *People v. Reneaux*, 50 Cal. App. 5th 852, 863, 264 Cal. Rptr. 3d 459, 467–68 (2020), *reh’g denied* (July 14, 2020), *review denied* (Aug. 26, 2020) (following *U.S. Bank*, applying de novo standard of appellate review).

**Connecticut:** *State v. Merriam*, 826 A.2d 1021, 1040 n.27 (Conn. 2003) (finding the Court’s precedent binding, applying de novo standard in determining whether admission of declarant’s out-of-court statements violates Confrontation Clause).

**Colorado:** *Craig v. Masterpiece Cakeshop, Inc.*, 2015 COA 115, ¶ 46, 370 P.3d 272, 283, *rev’d on other grounds sub nom., Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 138 S. Ct. 1719, 201 L. Ed. 2d 35 (2018) (following *Bose*, applying de novo standard of appellate review).

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**Florida:** *Ortiz v. State*, 763 So. 2d 540, 541 (Fla. Dist. Ct. App. 2000) (following Court's precedent in Fifth Amendment case); *Stephens v. State*, 748 So. 2d 1028, 1031–33 (Fla. 1999) (applying Court's precedent in Sixth Amendment case).

**Illinois:** *People v. Lindsey*, 2020 IL 124289, ¶ 14, *reh'g denied* (Sept. 28, 2020), *cert. denied sub nom., Lindsey, Jonathan v. Illinois*, No. 20-7265, 2021 WL 1240986 (U.S. Apr. 5, 2021) (following *Ornelas*); *People v. Sorenson*, 752 N.E.2d 1078, 1083 (Ill. 2001) (finding Court's precedent binding, applying de novo standard to determination of reasonable suspicion for and the scope of *Terry* frisk); *In re G.O.*, 727 N.E.2d 1003, 1008–10 (Ill. 2000) (following Court's precedent in Fifth Amendment case).

**Indiana:** *J. Gazette Co. v. Bandido's, Inc.*, 712 N.E.2d 446, 455 (Ind. 1999) (applying de novo standard).

**Kentucky:** *Ipina-Garcia v. Commonwealth*, No. 2019-SC-000189-MR, 2020 WL 2091822, at \*3 (Ky. Apr. 30, 2020) (following *Ornelas*); *Ky. Kingdom Amusement Co. v. Belo Ky., Inc.*, 179 S.W.3d 785, 789 (Ky. 2005) (following *Bose*, applying de novo standard of appellate review); *Richardson v. Commonwealth*, 975 S.W.2d 932, 934 (Ky. Ct. App. 1998) (following Court's precedent in determining probable cause for warrantless search); *Commonwealth v. Opell*, 3 S.W.3d 747, 751–52 (Ky. Ct. App. 1999) (following Court's precedent in Fourth Amendment case).

**Maryland:** *Jones v. State*, 681 A.2d 1190 (Md. Ct. Spec. App. 1996) (finding Court's precedent binding, applying de novo standard to probable cause determination).

**Minnesota:** *State v. Lugo*, 887 N.W.2d 476, 484–85 (Minn. 2016) (following *Ornelas*); *State v. Chavarria-Cruz*, 784 N.W.2d 355, 364 (Minn. 2010) (following Court's precedent in reviewing decision to admit confession after defendant attempted to invoke his right to counsel); *State v. Rewitzer*, 617 N.W.2d 407, 412–15 (Minn. 2000) (following Court's precedent in determining whether fines and surcharges violated Excessive Fines Clause of Eighth Amendment).

**Montana:** *State v. Grandchamp*, 2020 MT 103N, ¶ 8, 400 Mont. 557, 461 P.3d 875 (following *Ornelas*).

**Nebraska:** *State v. Burdette*, 611 N.W.2d 615, 626–27 (Neb. 2000) (following Court's precedent in Fifth Amendment case).

**Nevada:** *State v. Konfrst*, 556 N.W.2d 250 (Nev. 1996) (finding Court's precedent binding, applying de novo standard to determinations of reasonable suspicion to conduct investigatory stop and probable cause to perform warrantless search).

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**Ohio:** *Puruczky v. Corsi*, 110 N.E.3d 73, 81 (Ohio 2018) (following *Bose*, applying de novo standard of appellate review); *State v. Dockery*, No. C-000316, 2002 WL 63437, at \*2 n.1 (Ohio Ct. App. Jan. 18, 2002) (following Court's precedent in addressing Equal Protection Clause); *State v. Russell*, 713 N.E.2d 56, 57 (Ohio Ct. App. 1998) (following Court's precedent in Fourth Amendment case).

**Oregon:** *State v. Ramos*, 367 Or. 292, 299–300, 478 P.3d 515, 522 (2020) (following *Chapman*, applying de novo standard of review).

**Rhode Island:** *Miguel v. State*, 774 A.2d 19 (R.I. 2001) (following Court's precedent in Sixth Amendment case); *State v. Page*, 709 A.2d 1042, 1044–46 (R.I. 1998) (following Court's precedent in Fifth Amendment case); *State v. Austin*, 742 A.2d 1187, 1193–94 (R.I. 1999) (applying Court's precedent in Sixth Amendment case); *State v. Vanover*, 721 A.2d 430, 432–34 (R.I. 1998) (following Court's precedent in addressing Due Process Clause); *State v. Campbell*, 691 A.2d 564 (R.I. 1997) (finding Court's precedent binding, applying de novo standard to review whether defendant's statements to police were voluntary and thus admissible in evidence consistent with Fifth Amendment).

**South Dakota:** *State v. Hirning*, 592 N.W.2d 600 (S.D. 1999) (finding Court's precedent binding, applying de novo standard in reviewing decisions on warrantless searches and seizures).

**Texas:** *State v. Darrow*, 981 S.W.2d 776, 778–79 (Tex. Ct. App. 1998) (following Court's precedent in Fourth Amendment case); *Arsola v. State*, Nos. 04-96-00963-CR & 04-96-00964-CR, 1998 WL 538125, at \*2 (Tex. App. Aug. 26, 1998) (following Court's precedent in Sixth Amendment case); *State v. Flores*, 951 S.W.2d 134 (Tex. App. 1997) (same).

**Virginia:** *McGee v. Commonwealth*, 487 S.E.2d 259, 261 (Va. Ct. App. 2005) (applying appellate standard of review mandated by *Ornelas*); *Copeland v. Commonwealth*, 592 S.E.2d 391, 395, 397–98 (Va. Ct. App. 2004) (following Court's precedent in Fourth Amendment case); *Cary v. Commonwealth*, 579 S.E.2d 691 (Va. Ct. App. 2003) (following Court's precedent in Fifth Amendment case); *James v. Commonwealth*, 473 S.E.2d 90 (Va. Ct. App. 1996) (following Court's precedent in determining whether reasonable suspicion permitting pat-down search existed).

**Washington:** *Matter of Dependency of E.H.*, 191 Wn.2d 872, 894–95, 427 P.3d 587, 597 (2018) (following *U.S. Bank*, holding that, “on appeal, the determination of whether an attorney was constitutionally required under *Mathews* is performed de novo, with deference given to the factual findings made by the trial court in the first instance, where appropriate”).

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**Wisconsin:** *State v. Martwick*, 604 N.W.2d 552, 556 (Wis. 2000) (following Court's precedent in Fourth Amendment case).

There have been, as is always the case, a few exceptions. *See, e.g., State v. Brockman*, 339 S.C. 57, 528 S.E.2d 661, 665 (S.C. 2000) (finding *Ornelas* not binding); *Guzman v. State*, 955 S.W.2d 85, 93 (Tex. Crim. App. 1997) (same); *State v. Thurman*, 846 P.2d 1256, 1266–67 (Utah 1993) (“We are aware that we must follow federal standards of review when expressly mandated to do so by Congress or the United States Supreme Court as a matter of substantive federal law. However, absent such a mandate, we think that the standard of review is a question to be determined by the law of the forum performing the appellate review.”). Such cases, however, are few and far between. And at least in the Texas case, *Guzman*, the isolated holding is inconsistent with other Texas opinions cited above.

## Conclusion

Practitioners may rely on the overwhelming weight of the authorities reviewed above to argue that state appellate courts should follow the U.S. Supreme Court in applying a *de novo* standard of appellate review in cases presenting mixed issues of federal constitutional law and fact.