INDEPENDENT STATE GROUNDS

By: Dallas Sacher

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INDEPENDENT STATE GROUNDS

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INTRODUCTION

The current version of the California Constitution was enacted in 1879. The delegates to the drafting convention "emphasized their belief that the California Constitution was and should continue to be a document of independent force and effect particularly in the area of individual liberties." (*People v. Hannon* (1979) 19 Cal.3d 588, 607, fn. 8.)

As part of the due process revolution of the 1960's, the Warren court expressly recognized that a state was free to impose "higher standards" under its own Constitution than was otherwise required by the federal Constitution. (*Cooper v. California* (1967) 386 U.S. 58, 62.) The California Supreme Court took this suggestion to heart and repeatedly issued decisions under the state Constitution that provided broader protection to criminal defendants. In so doing, the court emphatically rejected the Attorney General's contention that the court should invoke independent state grounds in only "limited circumstances."

> "This argument presupposes that on issues of individual rights we sit as no more than an intermediate appellate tribunal, and that the presumption of further review there is but a 'limited' exception which must be 'clearly delineated.' On the contrary, in the area of fundamental civil liberties – which includes not only freedom from unlawful search and seizure but all protections of the California Declaration of Rights – we sit

> as a court of last resort, subject only to the qualification that our interpretations may not restrict the guarantees accorded the national citizenry under the federal charter. In such constitutional adjudication, our first referent is California law and the full panoply of rights Californians have come to expect as their due. Accordingly, decisions of the United States Supreme Court defining fundamental civil rights are persuasive authority to be afforded respectful consideration, but are to be followed by California courts only when they provide no less individual protection than is guaranteed by California law."

(*People v. Longwill* (1975) 14 Cal.3d 943, 951, fn. 4.)

Unfortunately, the electorate decided to impose a substantial restriction on the Supreme Court's authority to more broadly interpret the California Constitution. In 1982, Proposition 8 was enacted. The Proposition added the "Right to Truth-in-Evidence" provision to the Constitution to provide that "relevant evidence shall not be excluded in any criminal proceeding..." As a consequence of the constitutional amendment, the Supreme Court was precluded from relying on independent state grounds with respect to fundamental questions involving search and seizure and the admission of a defendant's statements made to the police. (*In re Lance W.* (1985) 37 Cal.3d 873, 885-890.)

In 1986, the electorate struck a second blow against an independent state judiciary when it voted against the retention of three liberal Supreme Court justices (Chief Justice Bird and Associate Justices Grodin and Reynoso). The "new" Supreme Court got the message. The doctrine of independent state

grounds all but disappeared. By 2006, Chief Justice George stated that the court would not expand a criminal defendant's protections "[u]nless and until the high court directs otherwise . . ." (*People v. McGee* (2006) 38 Cal.4th 682, 686, disapproved in *People v. Gallardo* (2017) 4 Cal.5th 120, 125.)

Although it is far too early to celebrate, it appears that a new day is dawning in California with regard to the criminal justice system. The electorate has recently passed a series of propositions to ameliorate punishment. In addition, the state Supreme Court has several new members who are not averse to a broad interpretation of constitutional protections. In this vein, Associate Justice Liu stated at the 2017 SDAP seminar that counsel should not hesitate to advance arguments under the California Constitution. This suggestion is now creeping into the court's decisions. (*People v. Contreras* (2018) 4 Cal.5th 349, 382 [noting the "colorable claim" that LWOP sentences for juvenile sex offenders may constitute unconstitutional punishment under the state Constitution].)

The thesis of this article is simple. Aside from the areas foreclosed by Proposition 8, defense counsel should vigorously raise arguments under the California Constitution in order to avoid the more restrictive standards found in federal jurisprudence. While counsel must be able to posit " ' "cogent reasons" ' " as to why the state should provide greater protection than the U.S. Supreme Court (*People v. Monge* (1997) 16 Cal.4th 826, 844), those reasons

will often exist.

In the pages that follow, I have listed a few examples where independent state grounds might be argued. This list is not intended to be exhaustive. Counsel should be creative and bold. By repeatedly and vigorously relying on the state Constitution, we can hopefully reinvigorate California's historically strong jurisprudence on independent state grounds.

I.

INDEPENDENT STATE GROUNDS CANNOT BE INVOKED WITH REGARD TO ISSUES INVOLVING THE EXCLUSION OF EVIDENCE.

As a reminder, Proposition 8 removes the possibility of relying on independent grounds with respect to issues involving the exclusion of evidence. Article I, section 28, subdivision (f)(2) of the California Constitution provides that "relevant evidence shall not be excluded in any criminal proceeding . . ." As interpreted by the California Supreme Court, the provision precludes the use of independent state grounds for the purpose of raising search and seizure claims and issues involving statements made to the police. (*People v. Parker* (2017) 2 Cal.5th 1184, 1214, fn. 13; *In re Lance W.*, supra, 37 Cal.3d 873, 885-890.)

II.

CALIFORNIA IS NOT LIMITED BY THE U.S. SUPREME COURT'S LIST OF THOSE ERRORS THAT REQUIRE PER SE REVERSAL.

In the landmark case of *Rose v. Clark* (1986) 478 U.S. 570, the U.S. Supreme Court announced that virtually all constitutional errors are subject to harmless error analysis. (*Id*. at pp. 576-578.) The sole exception to this rule are those errors which are termed "structural" in nature. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 310.) In order to qualify as a "structural" error, a constitutional deprivation must affect "the framework within which the trial proceeds, rather than simply an error in the trial process itself." (*Ibid*.)

The U.S. Supreme Court has maintained a fairly restrictive list of "structural" errors. (See *United States v. Gonzalez-Lopez* (2006) 548 U.S. 140, 149-150 and fn. 4 [cataloguing errors that are reversible per se].) However, there is no reason why California cannot adopt a more expansive list when a state constitutional error is found.

Ordinarily, Article VI, section 13 of the California Constitution requires a showing of prejudice in order to obtain a reversal. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) However, the state Supreme Court has indicated that some errors arising under the state Constitution remain reversible per se. (*People v. Blackburn* (2015) 61 Cal.4th 1113, 1132-1137; *People v. Cahill* (1993) 5 Cal.4th 478, 493.) There are at least three important types of error

that should be deemed reversible per se.

First, the U.S. Supreme Court has held that the omission to instruct on an element of the offense charged is not a structural error. (*Neder v. United States* (1999) 527 U.S. 1, 4.) To date, the California Supreme Court has accepted this rule. (*People v. Merritt* (2017) 2 Cal.5th 819, 822.) However, there is a persuasive argument for a contrary conclusion.

In his dissenting opinion in *Neder*, Justice Scalia demonstrated that the Sixth Amendment requires the jury, not a court, to make a factual determination as to whether the charged offense was committed. (*Neder,* supra, 527 U.S. 1, 32 (dis. opn. of Scalia, J.).) Absent instruction on all of the elements of the charge, it necessarily follows that the error cannot be cured when an entity other than the jury (i.e. the court) passes on the element. (*Ibid.*) Insofar as the California Constitution includes the right to a jury trial, our Supreme Court should adopt Justice Scalia's irrefutable analysis.

Second, the U.S. Supreme Court has held that the trial court's error in instructing on an invalid theory of liability is subject to harmless error review. (*Hedgpeth v. Pulido* (2008) 555 U.S. 57, 58.) Once again, the California Supreme Court is in agreement. (*People v. Chun* (2009) 45 Cal.4th 1172, 1201.) However, this rule is subject to challenge for the same reasons as Justice Scalia stated in *Neder*. Insofar as the Constitution provides that only the jury can adjudicate the question of guilt or innocence, the appellate court

cannot itself conclude that a properly instructed jury would necessarily have found the defendant guilty.

Third, the U.S. Supreme Court has yet to hold that there is a federal constitutional right to a jury instruction on the defense theory of the case. While the California Supreme Court has held that there is a state law right to such an instruction, the court has "not yet determined what test of prejudice applies to the failure to instruct on an affirmative defense. [Citation.]" (*People v. Salas* (2006) 37 Cal.4th 967, 984.) However, earlier cases demonstrate that the error should be deemed reversible per se.

Long before *Salas* declared that the issue was unsettled, the court actually settled the issue. The court construed Article VI, section 13 of the California Constitution and held that the failure to instruct on an affirmative defense cannot be deemed harmless unless the defense posed by the omitted instruction was "necessarily resolved" by the jury under other properly given instructions. (*People v. Mayberry* (1975) 15 Cal.3d 143, 157-158; accord, *People v. Lee* (1987) 43 Cal.3d 666, 675, fn. 1 [omission to instruct on a defense theory is reversible per se].) As has already been discussed, this conclusion rests on the thesis that the jury, not a court, must render judgment on the defendant's guilt or innocence. The California Supreme Court should be reminded of the correct rule.

III.

CALIFORNIA COURTS SHOULD EMPLOY A MORE GENEROUS TEST THAN THAT FOUND IN *STRICKLAND v. WASHINGTON* (1984) 466 U.S. 668.

California guarantees the right to counsel in criminal cases in Article I, section 15 of its Constitution. This vital provision should be afforded more vitality than is allowed by the U.S. Supreme Court.

In *Strickland v. Washington*, supra, 466 U.S. 668, the court set forth a two part showing that must be made in order to succeed on a claim of ineffective assistance of counsel: (1) counsel's performance fell below the objective standard of prevailing professional norms; and (2) there is a reasonable probability that counsel's error affected the judgment. (*Id*. at pp. 688-695.) Both of these prongs might be more favorably construed under California law.

With regard to prong one, the *Strickland* court determined that there is a "strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance . . ." (*Strickland*, supra, 466 U.S. at p. 689.) Thus, if an attorney identifies a certain decision as having been a tactical choice, a reviewing court is required to defer to that decision unless it is "outside the wide range of professionally competent assistance." (*Id*. at p. 690.) Or, stated otherwise, "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually

unchallengeable. . ." (*Ibid*.)

Like many things in the law, the *Strickland* standard has received little scrutiny. In reality, the standard has no basis in constitutional theory nor does it objectively reflect the manner in which lawyers operate.

Taking the law first, most constitutional issues are subject to a two step appellate analysis: (1) factual findings are reviewed under the substantial evidence test; and (2) the found facts are then measured under a de novo standard. (*People v. Woods* (1999) 21 Cal.4th 668, 673-674.) If the facts are undisputed, a pure issue of law is presented.

It is not at all clear why this mode of analysis should not equally apply to claims of ineffective assistance of counsel. After all, the right to counsel cannot possibly be deemed less vital than other constitutional protections. One is therefore left to wonder why a violation of the right is subject to less scrutiny than other violations.

Presumably, the defenders of the *Strickland* standard would reply that deference is compelled since two reasonable lawyers might defend the same case in entirely different ways. However, is this really true?

In most cases, there is little doubt about the proper strategy. No competent lawyer puts on unreliable witnesses nor does a competent lawyer advance a factually unsupported defense. Rather, a rational lawyer relies on the beyond a reasonable doubt standard in the absence of an affirmative

defense and puts on an affirmative defense when one supported by evidence exists. Of course, this is all done after careful investigation and consultation with necessary experts. Any choice made without investigation or consultation is necessarily below the standard of care.

In short, claims of ineffective assistance of counsel should not be saddled with the unduly burdensome standard of deference found in *Strickland*. While it is surely a longshot that the California Supreme Court will reconsider its adherence to the *Strickland* standard, nothing is lost by asking the court to take a less deferential approach. (*People v. Ledesma* (1987) 43 Cal.3d 171, 217 ["'[D]eference is not abdication.'"].)

The prejudice prong of the *Strickland* test is something of a mystery. As we all know, a finding of federal constitutional error requires reversal unless the government can show that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Since a violation of the Sixth Amendment is no less significant than any other constitutional violation, there is no reason why *Strickland's* "reasonable probability" standard should be employed rather than the more stringent *Chapman* standard.

In his companion article, Bill Robinson has argued that the California Supreme Court is free to apply more stringent prejudice tests than are presently used under the state Constitution. The issue of ineffective assistance

of counsel is one area where an enhanced standard makes sense.

Interestingly, this point was discussed by the Court of Appeal in *People v. Howard* (1987) 190 Cal.App.3d 41. There, the defendant argued that the *Chapman* standard should be used under the California Constitution. Citing *stare decisis,* the court found itself bound to reject the argument. (*Id*. at p. 47.) However, there is nothing to stop the California Supreme Court from adopting a different standard under our state Constitution.

IV.

A CALIFORNIA COURT IS NOT BOUND BY THE U.S. SUPREME COURT'S HOLDING DENYING THE RETROACTIVE APPLICATION OF A NEW RULE TO FINAL JUDGMENTS.

There is an interesting area where a state court can more vigorously enforce federal law notwithstanding contrary U.S. Supreme Court precedent. Under the rule of *Teague v. Lane* (1989) 489 U.S. 288, the U.S. Supreme Court typically finds that its new precedents are not to be retroactively applied to final judgments. (*Whorton v. Bockting* (2007) 549 U.S. 406, 409 [holding in *Crawford* could not be retroactively applied to final judgments]; but see *Montgomery v. Louisiana* (2016) 136 S.Ct. 718, 732-737 [holding in *Miller* may be retroactively applied].) However, the court has acknowledged that *Teague* does not preclude state courts from giving retroactive effect to a broader set of new constitutional rules than *Teague* itself requires. (*Danforth*

v. Minnesota (2008) 552 U.S. 264, 266.)

The California Supreme Court has taken note of its power to "'give greater retroactive impact to a decision than the federal courts choose to give.' [Citations.]" (*In re Gomez* (2009) 45 Cal.4th 650, 655, fn. 3.) Thus, in a proper case, counsel should not hesitate to rely on new U.S. Supreme Court precedent in seeking state habeas relief with regard to final judgments.

A prime example where relief might be sought is in cases governed by *Descamps v. United States* (2013) 133 S.Ct. 2276 which announced the principle that the Sixth Amendment precludes a court from finding a prior conviction to be true based on facts that were not litigated in the prior case. (*Id*. at p. 2288.) Thus, if you have a former client who is serving a life sentence under the Three Strikes law based on factual findings now precluded by *Descamps*, it might be worthwhile to seek state habeas relief.

V.

NOTWITHSTANDING THE FAVORABLE HOLDING IN *PEOPLE v. GALLARDO,* supra, 4 Cal.5th 120, COUNSEL SHOULD SEEK A BROADER RULE BASED ON THE DUE PROCESS CLAUSE OF THE CALIFORNIA CONSTITUTION.

In *People v. Gallardo,* supra, 4 Cal.5th 120, the California Supreme Court held that the Sixth Amendment right to a jury trial precludes the prosecutor from proving the nature of a prior conviction by going beyond the facts that were "necessarily found by a prior jury in rendering a guilty verdict

or admitted by the defendant in entering a guilty plea . . ." (*Id*. at p. 124.) While *Gallardo* is a great advance for defendants, it still allows prior convictions to be found true based on admissions made during a guilty plea. (*Id*. at pp. 137-140.) California defendants are entitled to a better remedy.

As a matter of state due process, the trial court may not impose punishment for an enhancement that has not been specifically pled in the charging document. (*People v. Mancebo* (2002) 27 Cal.4th 735, 745; *People v. Nguyen* (2017) 18 Cal.App.5th 260, 266.) The underlying principle is that a defendant may not be punished when there has been a lack of notice that a particular fact is at issue. (*Mancebo*, supra, 27 Cal.4th at p. 747.) This principle bars the present use of a prior conviction when the relevant fact was not at issue in the prior litigation. An example of this situation is as follows.

Assume that a defendant suffered a prior conviction in 1990 for evading the police while driving. The offense itself does not qualify as a strike. Nonetheless, the prosecutor charges a prior strike in the new case on the theory that the defendant personally inflicted great bodily injury in the commission of the offense. (Penal Code section 1192.7, subd. (c)(8).) At trial, the prosecutor proves the infliction of great bodily injury by introducing testimony from the preliminary hearing held in 1990. This scenario violates due process.

The determinative point is that the defendant had no notice whatsoever in the prior proceeding that the degree of injury was at issue. Insofar as the defendant had no reason to contest the nature of the injury, it is quite simply unfair to use the belatedly alleged injury to impose additional punishment.

Significantly, the government cannot successfully argue that sufficient notice is given in the *present* case when the charging document alleges the prior infliction of great bodily injury. As the California Supreme Court has made clear, the government may only use the record of conviction to prove the prior conviction in order to avoid constitutional problems like the denial of a speedy trial and double jeopardy. (*People v. Trujillo* (2006) 40 Cal.4th 165, 180.) The limitation on the use of the prior record is expressly intended to preclude "'relitigating the circumstances'" of the prior crime. (*Ibid*.) Plainly, the identical conclusion flows from the application of due process principles. Having been given no notice in the past that a particular fact was at issue, the government cannot cure the problem by seeking belated adjudication.

VI.

THE CALIFORNIA CONSTITUTION SHOULD PROVIDE BROADER DISCOVERY RIGHTS THAN EXIST UNDER FEDERAL AUTHORITY.

In *People v. Hammon* (1997) 15 Cal.4th 1117, the California Supreme Court considered the situation where the defense sought pretrial discovery of the complaining witness's psychotherapist records. Insofar as the U.S.

Supreme Court had not extended the reach of the Confrontation Clause to pre-trial discovery, the court held that disclosure of the records would have to await the commencement of trial. (*Id*. at pp. 1127-1128.) The rationale for the ruling was that the trial court would be unable to intelligently consider the need for disclosure until the time of trial. (*Id.* at p. 1127.) Thus, at the pre-trial stage, the complainant's right to confidentiality had to be honored.

The problem with the court's reasoning is twofold. First, the effective assistance of counsel requires thorough pretrial investigation and preparation. Counsel cannot be required to defer important tactical decisions until the time of trial. Second, a simple protective order will ensure the right to confidentiality. By ordering defense counsel to maintain the confidentiality of any unused information, the interests of the complainant are protected.

The due process clause of the California Constitution provides a right to pretrial discovery when such discovery is necessary to vindicate the defendant's rights. (*Magallan v. Superior Court* (2011) 192 Cal.App.4th 1444, 1463-1464.) This principle should be advanced in a proper case.

As of this writing, the California Supreme Court is considering a case where it may decide to limit or overrule *Hammon*. (*Facebook v. Superior Court (Hunter*), review granted Dec. 16, 2015, S230051.) However, it does not appear from the briefing that the California Constitution has been advanced as a basis to overrule *Hammon*. Interestingly, the court has asked

for briefing on the effect of Article I, section 15 of the California Constitution in a different case. (*Facebook v. Superior Court (Touchstone*), review granted Jan. 17, 2018, S245203.) Given these developements, counsel should be sure to rely on the state Constitution until such time as the issue is resolved by the court.

VII.

UNDER THE STATE CONSTITUTION, DISMISSAL MAY BE OBTAINED DUE TO OUTRAGEOUS GOVERNMENTAL MISCONDUCT WITHOUT A SHOWING OF PREJUDICE.

Generally speaking, the U.S. Supreme Court has required a showing of prejudice before ordering dismissal of a case due to outrageous governmental misconduct. (See *United States v. Morrison* (1981) 449 U.S. 361, 365 [dismissal was an inappropriate remedy even though two DEA agents privately met with the defendant and disparaged her lawyer].) However, the due process clause of the California Constitution allows for dismissal in certain circumstances without a showing of prejudice.

California courts have recognized that dismissal is proper when the prosecutor has engaged in outrageous conduct. (*People v. Uribe* (2011) 199 Cal.App.4th 836, 866-869 and cases cited therein.) Typically, the misconduct involves intrusion into the defense camp. (*Morrow v. Superior Court* (1994) 30 Cal.App.4th 1252, 1263 [due process violated where the prosecutor

directed her investigator to eavesdrop on a conversation that the defendant and his attorney were conducting in a holding cell adjacent to the courtroom].) However, examples of outrageous behavior come in all forms.

In *People v. Velasco-Palacios* (2015) 235 Cal.App.4th 439, the prosecutor falsified an interview transcript to include an admission that was not made by the defendant. The prosecutor gave the transcript to defense counsel at a time when plea bargaining discussions were underway. Fortunately, defense counsel learned of the fabrication before a deal could be arranged. Notwithstanding the government's argument that no actual harm had been done, dismissal was ordered in order "to deter future misconduct . . ." (*Id*. at p. 451.)

Aside from due process, governmental misconduct can also violate the defendant's state constitutional right to counsel when an officer intrudes into the defense camp. (*Barber v. Municipal Court* (1979) 24 Cal.3d 742, 756 [dismissal ordered where an undercover agent attended attorney-client meetings].) However, the California Supreme Court has indicated that a showing of prejudice will usually be required if the issue is raised on appeal as distinguished from a pretrial writ. (*People v. Alexander* (2010) 49 Cal.4th 846, 896.) Nonetheless, the court left open the possibility that there might be a case where "a violation of the right to counsel resulting from government interference with the attorney-client relationship could be considered a

miscarriage of justice without requiring the defendant to establish a reasonable probability of a more favorable outcome." (*Id*. at p. 896, fn. 28.)

The bottom line is that outrageous governmental misconduct is a bona fide basis for reversal under the California Constitution. Counsel should not hesitate to raise the argument in a proper case.

VIII.

ALTHOUGH THE CALIFORNIA SUPREME COURT HAS HELD THAT THE STATE STANDARD FOR REVIEW OF THE SUFFICIENCY OF THE EVIDENCE IS IDENTICAL TO THE FEDERAL STANDARD, CALIFORNIA CASE LAW CONTAINS A VITAL AND HELPFUL PRINCIPLE THAT IS MISSING FROM THE FEDERAL STANDARD.

The California Supreme Court has said that the state standard for review of the sufficiency of the evidence is "identical" to the federal standard. (*People v. Johnson* (1980) 26 Cal.3d 557, 576.) However, California case law contains an important principle that does not appear in the federal standard.

The U.S. Supreme Court has said that a judgment survives sufficiency of the evidence review so long as "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. [Citation]." (*Jackson v. Virginia* (1979) 443 U.S. 307, 319.) This standard allows for affirmance when the record discloses "evidence which is reasonable, credible, and of solid value . . ." (*Johnson*, supra, 26 Cal.3d at p. 578.) Significantly, *Johnson* left out a critical nuance of sufficiency of the evidence review.

The evidence is not sufficient unless the jury "reasonably rejected all that undermines confidence." (*People v. Hall* (1964) 62 Cal.2d 104, 112.) The application of this principle is demonstrated in *Hall*. There, the victim was stabbed to death. The defendant Monroe Hall was a friend of the victim. Neighbors heard the victim cry out "Monroe" during the killing. When arrested, the defendant had blood on his shoe and scratches on his face. However, the defendant's shoes did not match the bloody shoe prints found at the scene. The court concluded that the jury had not "reasonably rejected all that undermines confidence" since each "item of evidence against defendant is so weak and inconclusive that together they are insufficient to constitute proof beyond a reasonable doubt." (*Id*. at p. 112.)

Following its announcement in *Johnson* that the state and federal statements are identical, the Supreme Court has continued to rely on the principle that substantial evidence is not shown when the jury could not have "reasonably rejected all that undermines confidence" in the defendant's guilt. (*People v Thompson* (1980) 27 Cal.3d 303, 324, disapproved on other grounds in *People v. Rowland* (1992) 4 Cal.4th 238, 260 [special circumstance of robbery was not supported by substantial evidence]; accord, *People v. Morris* (1988) 46 Cal.3d 1, 19-22 disapproved on other grounds in *In re Sassounian* (1995) 9 Cal.4th 535, 543-544, fn. 5 [robbery and robbery special circumstance reversed].) In a proper case, counsel should rely on the

principle. (See also *People v. Blakeslee* (1969) 2 Cal.App.3d 831, 840 [evidence of the defendant's opportunity to commit a killing combined with a false statement as to her whereabouts at the time of the killing was insufficient to sustain a murder conviction since the evidence "did not reasonably inspire confidence in defendant's guilt. . ."].)

IX.

THE STATE CONSTITUTION PROVIDES GREATER DOUBLE JEOPARDY PROTECTION THAN DOES THE FEDERAL CONSTITUTION.

The California Supreme Court has construed the state double jeopardy clause as providing greater protection than its federal counterpart in at least two respects: (1) a defendant cannot receive a greater sentence after a successful appeal so long as the original sentence was "authorized;" and (2) a retrial cannot be held if a mistrial was declared without the defendant's consent. (*People v. Monge,* supra, 16 Cal.4th 826, 844.) At the moment, there is a key double jeopardy precedent that should be reconsidered by the court.

In *People v. Monge,* supra, 16 Cal.4th 826, the court held that the prosecutor may retry a prior conviction allegation notwithstanding a not true finding. The court reasoned that the federal Constitution allowed for this result since the U.S. Supreme Court had not extended double jeopardy protection to sentencing decisions. (*Id*. at pp. 831-843.) The court also said that the state double jeopardy clause did not preclude this result since "the risk

of an erroneous result [on retrial] is slight." (*Id.* at p. 845.) Given the slender 4-3 vote in *Monge*, the holding is ripe for reconsideration.

Monge was decided over 20 years ago. In the meantime, the California Supreme Court has recognized that a defendant has a federal constitutional right to a jury trial regarding the nature of a prior conviction which is offered to enhance punishment. (*People v. Gallardo*, supra, 4 Cal.5th 120, 123-125.) Given this dramatic change, it necessarily follows that an acquittal entered by a jury regarding a prior conviction allegation is entitled to the same double jeopardy protection as a substantive offense. (*United States v. Blanton* (9th Cir. 2007) 476 F.3d 767, 772 [double jeopardy required dismissal of the government's appeal of an acquittal regarding a prior conviction allegation]; see also *People v. Marin* (2015) 240 Cal.App.4th 1344, 1366 [court recognized that the rationale of *Monge* had been "undercut" by the Supreme Court's decision in *Descamps v. United States*, supra, 133 S.Ct. 2276].)

In short, *Monge* was decided in a bygone time. The case is ripe for reconsideration.

X.

WHEN THE CHARGED OFFENSE INVOLVES SPEECH, DEFENSE COUNSEL SHOULD ARGUE FOR BOTH PROTECTION UNDER THE STATE CONSTITUTION AND A NON-DEFERENTIAL STANDARD OF REVIEW ON APPEAL.

There are a variety of California criminal offenses that involve speech. Examples include: (1) criminal threats (Penal Code section 422); (2) obstructing the police (Penal Code section 148); (3) providing false information to a police officer who is investigating a driving violation (Vehicle Code section 31); and (4) conspiracy to obstruct justice (Penal Code section 182, subd. (c)(5)). In defending against charges of this nature, defense counsel should make use of California's free speech provision. This can be done in two ways.

First, the California Supreme Court has already recognized that the independent review standard is required for sufficiency of the evidence claims involving speech. (*In re George T.* (2004) 33 Cal.4th 620, 630-632.) Although *George T.* arose in the context of the literary pursuit of poetry, the rationale for applying independent review translates to all forms of speech: Care must be taken to avoid forbidden intrusions into one of our most precious freedoms. (*Id*. at p. 631.) Thus, counsel should always advocate for the independent review test in a case involving speech.

Second, in arguing the merits, counsel should contend that speech cannot be criminalized unless the defendant's statement had a demonstrable effect on a protected interest. (*United States v. Alvarez* (2012) 132 S.Ct. 2537, 2544, 2551-2552 (plur. opn. of Kennedy, J.; conc. opn. of Breyer, J.).) For example, the government may not constitutionally pass a law "that targets falsity and nothing more." (*Id*. at p. 2545 (plur. opn. of Kennedy, J.).)

In light of this principle, the right to free speech under the California Constitution protects defendants who do nothing more than lie to the police. (*People v. Morera-Munoz* (2016) 5 Cal.App.5th 838, 853 [a lie to the police does not violate Vehicle Code section 31 unless it has the potential to materially "corrupt [an] official investigation."].) Counsel should advance this proposition in a proper case.

XI.

THE CALIFORNIA STANDARDS FOR SEEKING DISMISSAL DUE TO A DELAY IN PROSECUTION ARE MORE FAVORABLE THAN THE FEDERAL STANDARDS IN TWO RESPECTS.

The state and federal Constitutions provide for dismissal for undue delay in presenting a case in two contexts. First, a delay in filing a charge is measured under the due process clauses of the Fourteenth Amendment and Article I, section 7 of the California Constitution. (*People v. Cowan* (2010) 50 Cal.4th 401, 430.) Second, a delay following the commencement of a case

is measured under the right to a speedy trial found in the Sixth Amendment and Article I, section 15 of the California Constitution. (*People v. Nelson* (2008) 43 Cal.4th 1242, 1250.) At the moment, California law is more favorable than federal law in two important respects.

With regard to pre-charging delay, a defendant is entitled to dismissal if prejudice can be shown and the government is unable to posit a justification for its delay. (*Nelson*, supra, 43 Cal.4th at p. 1250.) Under federal law, a defendant arguably has to show that "the delay was undertaken to gain a tactical advantage over the defendant. [Citations]." (*People v. Catlin* (2001) 26 Cal.4th 81, 107.) However, there is no such burden under state law. Rather, mere negligent delay will allow for dismissal so long as the prejudice to the defendant outweighs the justification shown by the government. (*Nelson*, supra, 43 Cal.4th at p. 1255.)

There is also an important distinction in the application of the right to a speedy trial. Under federal law, the right to a speedy trial does not come into play in a felony case until an indictment or information is filed or a holding order is entered. (*People v. DePriest* (2007) 42 Cal.4th 1, 26.) However, under the California Constitution, the right to a speedy trial accrues as soon as a felony complaint is filed. (*Id*. at p. 27.) In a particular case, the additional time period may be determinative in showing prejudice.

XII.

THE CALIFORNIA CONSTITUTION SHOULD BE CONSTRUED AS PROVIDING GREATER PROTECTION IN THE AREA OF VINDICTIVE PROSECUTION.

Under both state and federal law, a presumption of vindictive prosecution arises whenever the prosecutor seeks to increase the charges following a mistrial. (*People v. Puentes* (2010) 190 Cal.App.4th 1480, 1484.) The due process principle underlying this rule is that the defendant cannot be punished for exercising his fundamental right to a trial. (*Ibid*.) Thus, absent the prosecutor's showing of new information that was unavailable at the time of trial, the presumption of vindictiveness precludes additional charges or greater liability. (*Id*. at p. 1488.)

At present, a different rule applies to a pretrial increase in the charges. In that circumstance, a presumption of vindictiveness does not arise since the prosecutor is entitled to leeway to further develop the government's case before a trial. (*United States v. Goodwin* (1982) 457 U.S. 368, 381.) However, a good argument can be made for broader protection under the state Constitution.

As noted above, the basis for a claim of vindictive prosecution is that the defendant cannot be penalized for exercising a right. Insofar as a California defendant has significant statutory rights in addition to those afforded by the Constitution, it follows that a defendant should not be

punished for asserting a significant statutory right.

For example, a defendant has a statutory right to withdraw a guilty plea based on a showing of good cause. (Penal Code section 1018.) Presumably, the granting of such a motion will irritate the prosecutor since the court's order serves to vacate a conviction. When the prosecutor then adds charges, it is only reasonable to presume that the decision was vindictively motivated. Yet, under existing federal law, a presumption of vindictiveness does not arise. (*People v. Hudson* (1989) 210 Cal.App.3d 784, 788-789 [citing *Goodwin* and holding that the filing of increased charges after the granting of a motion to withdraw a plea is proper since a contrary rule "would significantly abridge prosecutorial charging discretion . . ."].)

As in many other areas, U.S. Supreme Court precedent is unduly parsimonious in protecting defendants against vindictive prosecution. Resort to the California Constitution should be sought in a proper case.

XIII.

WHEN IN DOUBT, DEFENSE COUNSEL CAN ALWAYS ARGUE THAT THE STATE DUE PROCESS CLAUSE PROVIDES GREATER PROTECTION THAN ITS FEDERAL COUNTERPART.

Many of the suggestions in this article rest on specific applications of the due process clause of the California Constitution. Regardless of the issue at hand, defense counsel should not hesitate to advance a broad interpretation

of due process when such an interpretation will be helpful in a particular case.

"Due process 'is a flexible concept which depends upon the circumstances and a balancing of various factors.' [Citations.]" (*In re F.S.* (2016) 243 Cal.App.4th 799, 809.) Oftentimes, defense counsel can point to basic unfairness in a case while being simultaneously faced with adverse U.S. Supreme Court precedent. Given the flexibility and expansiveness of the due process clause, counsel should not be hesitant in making arguments for greater due process protection.

XIV.

EVEN IF A STATE CONSTITUTIONAL ARGUMENT FAILS, THE SUPREME COURT STILL HAS THE POWER TO ESTABLISH A RULE OF CRIMINAL PROCEDURE.

The California Supreme Court has the authority to implement rules of criminal procedure. (*People v. Burgener* (2003) 29 Cal.4th 833, 861.) In a proper case, defense counsel should ask the court to adopt such a rule where it is necessary for the proper and fair administration of justice. (See *People v. Doyle* (2018) 19 Cal.App.5th 954, 966 (opn. of Liu, J., dissenting from dismissal of review [suggesting that the court might adopt a rule specifying the contents of the required colloquy to secure the defendant's waiver of the right to a jury trial.].)

CONCLUSION

The California Constitution should be construed as a living and breathing document that provides broad protection to all state residents including criminal defendants. The vitality of our constitutional rights can only be ensured by a vanguard of zealous and thoughtful advocates. With any luck, the California Supreme Court will once again restore independent state grounds to the prominence that it deserves.