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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

THE ASSOCIATION OF DEPUTY
DISTRICT ATTORNEYS FOR LOS
ANGELES COUNTY,

Plaintiff and Petitioner,

vs.

GEORGE GASCÓN, in his official capacity
as District Attorney for the County of Los
Angeles; LOS ANGELES COUNTY
DISTRICT ATTORNEY'S OFFICE; and
DOES 1 through 50, inclusive,

Defendants and Respondents.

Case No. 20STCP04250

Assigned for All Purposes to:
Hon. James C. Chalfant, Dept. 85

**[PROPOSED] ORDER ON
PETITIONER'S EVIDENTIARY
OBJECTIONS IN SUPPORT OF OSC RE:
PRELIMINARY INJUNCTION**

Judge: Hon. James C. Chalfant
Date: February 2, 2021
Time: 1:30 p.m.
Dept.: 85

Action Filed: December 30, 2020
Trial Date: None Set

1 The Court hereby sustains and/or overrules Petitioner’s evidentiary objections to the
 2 Declaration of Monnica Thelen, the Declaration of Shelan Joseph, the Declaration of Stephen
 3 Munkelt, and the Declaration of Marshall Khine as follows.

4 **DECLARATION OF MONNICA L. THELEN**

No.	EVIDENCE	OBJECTION	RULING
1.	<p data-bbox="358 485 764 520"><u>Page 9, ln. 20 to Page 10, ln. 21</u></p> <p data-bbox="358 558 886 1398">“In many cases, the filing deputy’s election to allege an enhancement or multiple enhancements that could apply to a case results in a maximum confinement exposure that is excessively punitive in light of the underlying conduct that gave rise to the offense. This overcharging results in dissuading defendants from exercising their constitutional right to trial because the risk of the sentence the defendant would receive if convicted is far too great. In those situations, most defendants will choose to accept a plea bargain for a reduced sentence with the overcharged enhancements being dismissed if they can get it. For example, prosecutors will often file gang enhancements to crimes committed by gang members even when there is little or no nexus of the enhancement to the underlying offense, or where the offense does not involve egregious conduct.</p> <p data-bbox="358 1436 881 1906">“Prosecutors regularly extend plea bargain offers that are only available for a limited time referred to as ‘pre-prelim-only offers.’ Should a defendant choose to exercise their constitutional right to a preliminary hearing, the offer will be withdrawn and the punishment will be increased in any future plea bargain negotiations. This occurs routinely and rarely has to do with any change in circumstances, but more so results in the defendant being punished merely for exercising their constitutional right.</p>	<p data-bbox="915 485 1211 558"><u>Irrelevant</u> (Evid. Code § 201)</p> <p data-bbox="915 596 1239 884">The matters stated relate only to the declarant’s perception of general prosecutorial unfairness in charging crimes and resolving cases, which is irrelevant to the duties at issue in this action.</p>	<p data-bbox="1261 522 1458 558">___ Sustained</p> <p data-bbox="1261 632 1463 667">___ Overruled</p>

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	<p>“Sometimes the defense will make a counter-offer to the prosecution's plea offer. On these occasions, counsel for the defendant may point out weaknesses in the prosecution's case or may present mitigating circumstances that support the counter-offer. On many occasions, prosecutors have informed me that while he or she would be inclined to accept the counter-offer he or she cannot do so because the prosecutor's manager will not allow it. In other cases, prosecutors have informed me that if I want to provide a counter-offer, I must make an appointment with their manager to discuss it.”</p>		
<p>2.</p>	<p><u>Page 10, ln. 22 to Page 11, ln. 15</u></p> <p>“As part of the plea negotiation process, I have on multiple occasions requested that prosecutors strike priors alleged under the Three Strikes Law and strike other enhancements such as gang and gun enhancements. The plea negotiation process occurs between the prosecution and the defense. I advise my clients of the proposed settlement, and if my client is in agreement, I advise him or her of their constitutional rights and the consequences of their plea. Most clients then read and sign a <i>Tahl</i> waiver, which I then submit to the clerk. The court is not notified until we have reached a settlement agreement. The prosecutor or I will state the disposition on the record, the judge or the prosecutor takes the waiver of rights from the defendant, counsel joins, and the defendant is either immediately sentenced on that date or soon thereafter. The prosecution then moves to dismiss the strikes or other enhancements that are not part of the plea bargain. In cases where the prosecutors move to dismiss the strike enhancement or special allegations, they are rarely, if</p>	<p><u>Irrelevant</u> (Evid. Code § 201)</p> <p>The matters stated do not relate to whether pleading strikes is mandatory, or whether a prosecutor must exercise case-by-case discretion in seeking to dismiss strikes or other enhancements.</p>	<p>___ Sustained</p> <p>___ Overruled</p>

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	<p>ever, asked by the court to state whether doing so is in the interests of justice; rather the court simply accepts the plea, and sentences the defendant.</p> <p>“The only time the court is involved in the plea bargaining process is when I cannot reach an agreement with the prosecutor, and I ask to plead open to the court. Only on those rare occasions do I state to the court why such a plea bargain is in the interests of justice.”</p>		
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DECLARATION OF SHELAN JOSEPH

NO.	EVIDENCE	OBJECTION	RULING
3.	<p><u>Page 1, ln. 15 to ln. 16</u></p> <p>“It has been my experience that prosecutors do not always file all strikes and enhancements.”</p>	<p><u>Irrelevant</u> (Evid. Code § 201); <u>Improper Legal Opinion</u> (Evid. Code §§ 801, 803)</p> <p>A public defender’s perception of whether prosecutors in practice consider certain enhancements as mandatory or discretionary is irrelevant to whether those enhancements are actually mandatory under the law.</p>	<p>___ Sustained</p> <p>___ Overruled</p>
4.	<p><u>Page 1 ln. 16 to 21</u></p> <p>“They do not file all cases as felonies. Instead they exercise discretion to determine whether a case should be filed, whether a ‘wobbler’ crime should be filed as a felony or misdemeanor, and whether strikes should be filed and enhancements alleged. In some instances, prosecutors have used their discretion to reduce felony charges to misdemeanor charges in order to effectuate a disposition.”</p>	<p><u>Irrelevant</u> (Evid. Code § 201)</p> <p>This action does not concern whether criminal cases are filed as felonies or misdemeanors, and thus it is irrelevant the extent to which prosecutors use such discretion.</p> <p><u>Lack of Personal Knowledge/Speculation</u> (Evid. Code § 702(a))</p>	<p>___ Sustained</p> <p>___ Overruled</p>

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		<p>The declarant fails to establish personal knowledge of the considerations a particular prosecutor subjectively considered in making a particular charging decision in a particular case.</p>	
<p>5.</p>	<p><u>Page 1 ln. 27 to Page 3 ln. 2</u></p> <p>“Although most prosecutors review their cases and exercise their discretion to charge only the appropriate charges and enhancements, some overcharge their cases, piling on counts and enhancements. This overcharging serves to force defendants to choose between risking a very long prison sentence or taking a deal for a much-reduced sentence with the overcharged counts being dismissed. Prosecutors, for example, routinely file gang enhancements for the most mundane crimes committed by gang members even though the truth is that the crime was not committed for the benefit of the gang.</p> <p>“This practice of overcharging and routinely filing felonies is particularly prevalent in juvenile cases. Prosecutors routinely choose to charge the most egregious of charges that impact the most vulnerable of clients.</p> <p>“Prosecutors sometimes extend plea bargain offers that are only available for a limited time. Should a defendant choose to run a motion or go to trial, the offer is then taken off the table and the punishment is increased. The facts of the case have not changed. What has changed is that the defendant chose to exercise her Constitutional right to a trial or motion. As such, prosecutors</p>	<p><u>Irrelevant</u> (Evid. Code § 201)</p> <p>The matters stated herein relate only to declarant’s perception of general prosecutorial unfairness in charging crimes and resolving cases, which is irrelevant to the duties at issue in this action.</p>	<p>___ Sustained</p> <p>___ Overruled</p>

1	<p>use their discretion to penalize clients who have chosen to exercise their trial rights.</p>		
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3	<p>“In my practice, there have been instances where defense counsel will make a counter-offer to the prosecution’s plea offer. The defense might point out that the prosecution’s case is factually weak and/or there is a viable defense. The prosecutor might agree that there are evidentiary issues. However, the prosecutor will explain that while he or she would like to accept the defense counter-offer or even make a lower offer, he or she cannot do so because the prosecutor’s manager will not allow it. Since the manager who has no involvement with the actual trial proceedings or case will not authorize the plea the prosecutor is bound by that decision despite there being problems of proof.”</p>		
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DECLARATION OF STEPHEN MUNKELT

NO.	EVIDENCE	OBJECTION	RULING
17	6.	<u>Paragraph 5</u>	
18		“It is my understanding that in these offices and counties the ‘plead and prove’ requirement is viewed as a protection of due process and the right to confrontation, by requiring that no defendant can be sentenced under the Three Strikes law unless the necessary allegations have been pled and proven beyond a reasonable doubt. (See <i>e.g. Apprendi v. New Jersey</i> (2000) 530 U.S. 466, 23 147 L. Ed. 2d 435.) It is not read as a requirement to file every possible strike.”	
19		<u>Hearsay</u> (Evid. Code § 1201); <u>Lack of Personal Knowledge/Speculation</u> (Evid. Code § 702(a))	___ Sustained
20		The declarant, a public defender, does not state the basis for his “understanding” of the policies of prosecutorial offices in multiple different counties.	___ Overruled
21		<u>Irrelevant</u> (Evid. Code § 201);	
22		The practice that a particular district attorney’s office chooses to follow is	
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1		irrelevant to what the law is with respect to pleading and proving prior strikes.	
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3	7.	<u>Paragraphs 6 and 7</u>	
4		“In numerous felony cases where my client had one or more serious or violent prior felony convictions, the initial pleading did not allege those enhancements. In many of them available Strike enhancements were never filed.	___ Sustained
5		“The prosecutors in these cases have given a number of explanations why this has occurred. One is that ‘office policy’ was not to file a strike unless the current offense was serious or violent. A second was that office policy required approval of a supervising attorney before filing a strike enhancement. A third, and perhaps most common, was to have the Deputy District Attorney say that, if my client did not accept an offer to settle the case, the Strike enhancements would be filed.”	___ Overruled
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18	8.	<u>Paragraph 8</u>	
19		“I am informed and believe that the same practices can be found in most other jurisdictions across California. Conversations and electronic communications with members of CACJ have confirmed the use of similar policies, though the concept of mandatory filing has not been raised until this writ proceeding, to my knowledge.”	___ Sustained
20			___ Overruled
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DECLARATION OF MARHSALL KHINE

No.	EVIDENCE	OBJECTION	RULING
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9 10 11 12 13 14 15 16 17 18 19 20 21 22 23	10. <u>Paragraph 3</u> “During my career in the San Francisco District Attorney’s Office, I am not aware of any policy that required prosecutors to allege every available qualifying serious or violent conviction as a strike enhancement. On the contrary, prior to Proposition 36, the ‘Three Strikes Reform Act’ (2012), San Francisco District Attorneys discouraged alleging prior strike conviction enhancements on non-serious and non-violent new offenses and generally, did not pursue life in prison sentences under the Three Strikes law for new low level felony convictions. Additionally, some of these offenses eligible for life sentences prior to Proposition 36, are no longer felonies after Proposition 47, ‘The Safe Neighborhood and Schools Act’ (2014), and some are not even crimes anymore pursuant to Proposition 64, ‘The Adult Use of Marijuana Act’ (2016).”	<u>Irrelevant</u> (Evid. Code § 201) The San Francisco District Attorney’s Office’s policy on pleading and proving prior strikes is irrelevant to whether, under the law, pleading and proving prior strikes is mandatory.	____ Sustained ____ Overruled
24 25 26 27 28	11. <u>Paragraph 4</u> “The current policy of the San Francisco District Attorney is to allege status enhancements such as prior strike convictions only as warranted by extraordinary circumstances subject to the approval of the District Attorney or	<u>Irrelevant</u> (Evid. Code § 201) The San Francisco District Attorney’s Office’s policy on pleading and proving prior strikes is	____ Sustained ____ Overruled

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	his designee.”	irrelevant to whether, under the law, pleading and proving prior strikes is mandatory.	
12.	<u>Paragraph 5</u> “In my experience, the decision to allege prior convictions as strikes under the Three Strikes law has always been subject to sound judgment and discretion to achieve a proportionate and appropriate sentence for the offense.”	<u>Irrelevant</u> (Evid. Code § 201) The experience of a particular prosecutor from the San Francisco District Attorney’s Office on pleading and proving prior strikes is irrelevant to whether, under the law, pleading and proving prior strikes is mandatory.	____ Sustained ____ Overruled

IT IS SO ORDERED.

Date: _____

Hon. James C. Chalfant
Judge of the Superior Court

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PROOF OF SERVICE

**Ass'n of Deputy District Attorneys for L.A. County v. George Gascon, et al.
Case No. 20STCP04250**

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 801 S. Figueroa Street, Suite 2000, Los Angeles, CA 90017.

On January 26, 2021, I served true copies of the following document(s) described as **[PROPOSED] ORDER ON PETITIONER'S EVIDENTIARY OBJECTIONS IN SUPPORT OF OSC RE: PRELIMINARY INJUNCTION** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY E-MAIL OR ELECTRONIC TRANSMISSION: On January 26, 2021, I caused a copy of the document(s) to be sent from e-mail address cubence@bgrfirm.com to the persons at the e-mail addresses listed in the Service List. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on January 26, 2021, at Los Angeles, California.



Corinne Ubence

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SERVICE LIST
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Case No. 20STCP04250

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Attorneys for Defendants and Respondents
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District Attorney for the County of Los Angeles
and Los Angeles County District Attorney's
Office