



August 11, 2022

The Honorable Chief Justice Tani Cantil-Sakauye
The Honorable Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797

RE: *Amicus Letter in Support of Petition for Review in George Gascón, as District Attorney, etc. et al. v. The Association of Deputy District Attorneys for Los Angeles County*

Dear Chief Justice Cantil-Sakauye and Honorable Justices of the California Supreme Court:

The American Civil Liberties Union of Southern California and of Northern California, (hereinafter, “*Amicus*”), write pursuant to Rule 8.500, subd. (g) of the California Rules of Court to ask this Court to grant the Petition for Review of the decision in *The Association of Deputy District Attorneys for Los Angeles County v. George Gascón, as District Attorney, etc. et al.* (2022) 79 Cal.App.5th 503 (“*Gascón*”) and reverse the Court of Appeal’s decision below.

Gascón concerns the District Attorney of Los Angeles County’s exercise of prosecutorial discretion in directing prosecutors to decline to plead and prove sentencing enhancements, including enhancements under California’s Three Strikes Law. Two special directives implemented by District Attorney Gascón are at issue, each reflecting his fulfillment of a promise to Los Angeles County voters to reduce mass incarceration and increase public safety. Special Directive 20-08 and Special Directive 20-14 (“Special Directives”), respectively, preclude the filing of sentencing enhancements or allegations in new cases and direct prosecutors with pending cases to join defense motions or independently move to dismiss sentencing enhancements. The Association of Deputy District Attorneys for Los Angeles County filed suit, challenging the Special Directives and seeking a writ of mandate and preliminary injunction to enjoin their implementation. The Superior Court granted an injunction, in relevant part, enjoining most aspects of the Special Directives. (Super. Ct. Op. at pp. 27-28.) The Court of Appeal subsequently affirmed, in relevant part, concluding that prosecutors must plead prior felony convictions and “endeavor to prove” prior strikes under the Three Strikes Law. (Cal.App.5th 503 at pp. 533-37, 548.) Based on its statutory interpretation of the Three Strikes Law, the Court of Appeal determined that the word “shall,” as used within the statute, strips prosecutors of their discretion not to plead or attempt to prove a three strikes enhancement.

As the *Gascón* Petition for Review provides, the Court of Appeal’s decision would render the Three Strikes statute unconstitutional in at least two respects:

First, contrary to the Court of Appeal’s holding, requiring the District Attorney to “plead” prior strikes impinges [District Attorney Gascón’s] constitutionally protected prosecutorial discretion. Second, even if the Court of Appeal is correct that the Three

Strikes law can constitutionally require that prosecutors plead all prior strikes, the court’s interpretation of “shall prove” likewise violates the separation of powers by functionally requiring prosecutors to prove all prior strikes once pleaded.¹

Accordingly, the Court of Appeal should have applied the canon of constitutional avoidance and adopted a reading of the Three Strikes Law that preserves prosecutorial discretion in declining to plead and prove prior convictions.

In this letter, *Amici* do not reiterate the unconstitutionality of the Three Strikes Law as interpreted by the Court of Appeal, nor do we argue the propriety of applying the constitutional avoidance canon—those arguments are comprehensively addressed by the Petition for Review, and *Amici* adopt them unequivocally. Instead, this *amicus* letter underscores why, under established precedent, prosecutorial discretion is essential, particularly in the context of the Three Strikes Law. Thus, this Court should grant the *Gascón* Petition for Review and preserve prosecutorial discretion under the separation of powers because the Court of Appeal’s decision would intrude on the prosecutor’s ability to perform his core functions, namely: (1) to promote public safety, by greatly increasing rates of incarceration with proven, paradoxical crime-enhancing effects; (2) to seek justice for survivors of crime, insofar as many survivors do not equate justice with the maximum obtainable sentence; and (3) to seek equality under the law, since mandatory enforcement of three strike enhancements will disproportionately harm Black and brown communities. *Amici*, therefore, respectfully request that the Court grant the Petition for Review and reverse the Court of Appeal’s decision below.

INTEREST OF AMICI CURIAE

The American Civil Liberties Union (“ACLU”) is a nationwide, nonprofit, and nonpartisan membership organization. The ACLU is dedicated to furthering the principles of liberty and equality embodied in the United States Constitution and this nation’s civil rights laws.

ACLU of Southern California and of Northern California are California affiliates of the national ACLU. *Amici* work to advance the civil rights and civil liberties of Californians in the courts, in legislative and policy arenas, and in the community. *Amici* have participated in cases, both as direct counsel and as *amicus*, challenging harsh sentencing practices and have represented people in custody in California prisons and jails. Notably, in *Lockyer v. Andrade* (2003) 583 U.S. 63, ACLU of Southern California presented the first United States Supreme Court challenge to the application of California’s Three Strikes Law.

ARGUMENT

I. Established Law Recognizes the Sanctity of Prosecutorial Discretion, and the Prosecutor’s Duty to Promote Public Safety, Seek Justice for Victims, and Achieve Equality Under the Law.

Prosecutorial discretion is “basic to the framework of the California criminal justice system.” (*Ganavian v. Wagstaffe* (2011) 199 Cal.App.4th 1532, 1543 [quoting *People v. Valli* (2010) 187 Cal.App. 4th 786, 801, italics omitted].) Deriving from the doctrine of separation of powers, prosecutorial discretion has been codified in the California Constitution and laws of the state. (See Cal. Const., art.

¹ (Petition for Review at p. 21.)

III, § 3; Gov. Code, §§ 26500, 26501.) Courts have “uniformly recognized” the “unlimited discretion in the crime-charging function” as the province of the prosecutor. (*People v. Wallace* (1985) 169 Cal.App.3d 406, 409.)

There are two core inflection points for the exercise of prosecutorial discretion in relation to charging decisions: the charging of the instant offense and the pleading of sentencing enhancements. Courts have long upheld prosecutorial discretion at each inflection point. (See, e.g., *People v. Birks* (1998) 19 Cal.4th 108, 134, citing *People v. Eubanks* (1996) 14 Cal.4th 580, 588-589 [explaining that the prosecutor “ordinarily [has] the sole discretion to determine whom to charge with public offenses and what charges to bring”]; *Dix v. Superior Court* (1991) 53 Cal.3d 442, 451 [same]; *People v. Tirado* (2022) 12 Cal.5th 688, 702 “[I]t is the prosecution that determines what charges should be brought and against whom [and] [t]hat authority includes the power to charge specific enhancements . . . free from judicial supervision or interference.”.) It is thus well-established that “[p]rosecutors enjoy more unreviewable discretion than any other actor in the criminal legal system” and wield their immense discretion at all stages of the criminal legal process, from charging decisions to plea offers to declining to plead sentencing enhancements.² There are myriad reasons for treating sentencing discretion as sacrosanct, which reflect the several ways that prosecutors serve their core function of seeking justice for the community at large.³ Chief among these are the duties to effectuate policies that promote public safety, seek justice for victims, and ensure equality under the law. Each is jeopardized by the Court of Appeal’s interpretation of the Three Strike Law.

A. The Court of Appeal’s Decision Will Likely Increase the Number of People Sentenced Under the Three Strikes Law, Resulting in Excessive Sentences that Put the Greater Community at Risk.

Given their responsibility to seek justice for the community at large, prosecutors maintain “a considerable interest in the protection of public safety.” (*People v. VonWahlde* (2016) 3 Cal.App.5th 1187, 1194.) However, to fulfill their public safety role, prosecutors must retain discretion in declining to plead sentencing enhancements. By reducing excessive sentences through the exercise of prosecutorial discretion, District Attorney Gascón’s Special Directives combat the mass incarceration crisis and increase public safety in the process.

Research has shown that mass incarceration jeopardizes public safety.⁴ Studies have found that in states with high incarceration rates, like California, an increase in incarceration is associated with higher resulting crime rates.⁵ This phenomenon, known to academics as the “tipping point,” highlights some of the most lasting effects of incarceration, including the breakdown of social and family bonds that guide individuals away from crime, the removal of adults who would otherwise nurture children, the deprivation of income, and the reduction of future income potential.⁶ Excessive

² (Smith & Levinson, *The Impact of Racial Bias on the Exercise of Prosecutorial Discretion* (2012) 35 Seattle Univ. L.Rev. 795, 805 <<https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=2082&context=sulr>>)

³ (Griffin & Yaroshefsky, *Ministers of Justice and Mass Incarceration* (2017) 30 Geo. J. Legal Ethics 301, 304 <https://scholarlycommons.law.hofstra.edu/faculty_scholarship/1230> [discussing the prosecutor’s role as a minister of justice for “the sovereign and [who] must make decisions for society at large”].)

⁴ (Stemen, *The Prison Paradox: More Incarceration Will Not Make Us Safer*, Vera Inst. Of Just. Evidence Brief (July 2017) p. 2 <https://www.vera.org/downloads/publications/for-the-record-prison-paradox_02.pdf>)

⁵ (*Ibid.*)

⁶ (*Ibid.*)

sentences, in particular, do little to deter crime and extract lofty social and economic costs.⁷ It has been found that the severity of a potential punishment has no significant impact on an individual's decision to engage in criminal activity.⁸ Excessive sentences have also been deemed counterproductive because individuals often “age out” of criminal behavior and the cost necessary to incarcerate someone year after year diverts resources from restorative programs and initiatives that are more likely to increase public safety.⁹ In effect, excessive sentences not only destabilize and economically debilitate the lives of those most impacted, they hinder the safety of all residents.

No evidence from California's experience with Three Strikes contradicts this established research. A study analyzing California's crime rate before and after the passage of the law found that crime rates were declining before the Three Strikes Law was passed and that the rate of decline continued consistently after its passage, suggesting the law had no salutary effect.¹⁰

Meanwhile, where excessive sentencing, and specifically the Three Strikes Law, have failed, community-based alternatives have succeeded. Research has shown that community-based alternatives to incarceration, such as community service, housing support, and treatment or training, are more effective than incarceration. A systematic review of hundreds of studies on community-based alternatives found that the “rate of re-offending after a non-custodial sanction is lower than after a custodial sanction in most comparisons.”¹¹

Currently, California has over 33,000 people serving a sentence that was lengthened by the Three Strikes Law, a number that comprises over one-third of the state's prison population.¹² Of the number of people serving a sentence under the law, more than 7,400 received a third strike for an offense that was neither serious nor violent.¹³ California also currently has the highest number of individuals serving life sentences of any state in the nation,¹⁴ with 72% of the lifer population representing Black and brown communities.¹⁵ If the Court of Appeal's decision is not reversed, these already unacceptable numbers will likely increase, furthering mass incarceration, compromising public

⁷ (U.S. Dep't of Just., Off. of Just. Programs, National Institute of Justice, Five Things About Deterrence (2016) pp. 1-2 <<https://www.ojp.gov/pdffiles1/nij/247350.pdf>>)

⁸ (Nellis, Ph.D., The Sentencing Project, No End in Sight: America's Enduring Reliance on Life Imprisonment (2021) p. 8 <<https://www.sentencingproject.org/publications/no-end-in-sight-americas-enduring-reliance-on-life-imprisonment/>>)

⁹ (Mauer, *Long-Term Sentences: Time to Reconsider the Scale of Punishment* (2018) 87 UMKC L.Rev. 113, 121-125 <<https://www.sentencingproject.org/wp-content/uploads/2018/11/UMKC-Law-Review-Scale-of-Punishment.pdf>> [discussing literature showing that people “age out” of crime, there is a limited deterrent effect of lengthy sentences, and the erroneous nature of diverting resources to imprisonment and away from other social interventions that have been proven to improve public safety]; Petrich et al., *Custodial Sanctions and Reoffending: A Meta-Analytic Review* (2021) The Univ. of Chi. Press <<https://www.journals.uchicago.edu/doi/pdf/10.1086/715100>> [finding that “custodial sanctions have no effect on reoffending or slightly increase it when compared with the effects of noncustodial sanctions such as probation”].)

¹⁰ (Zimring et al., Punishment and Democracy: Three Strikes and You're Out in California (2001).)

¹¹ (Villetaz et al., *The Effects on Re-offending of Custodial vs. Noncustodial Sanctions: An Updated Systematic Review of the State of Knowledge* (2015) The Campbell Collaboration p. 7 <<https://onlinelibrary.wiley.com/doi/epdf/10.4073/csr.2015.1>>)

¹² (Cal. Com. on Revision of the Penal Code, Annual Report and Recommendations (Dec. 2021) p. 41 <http://www.clrc.ca.gov/CRPC/Pub/Reports/CRPC_AR2021.pdf>)

¹³ (*Ibid.*)

¹⁴ (Nellis, No End in Sight: America's Enduring Reliance on Life Imprisonment, *supra*, fn. 8, at p. 10.)

¹⁵ (*Id.* at p. 19.)

safety, and preventing the District Attorney from taking action to reduce crime in the community in breach of his constitutional role.

B. The Court of Appeal’s Decision Eliminates Prosecutorial Discretion to Seek Justice for Crime Survivors.

It is also the province of the prosecutor to seek justice for survivors of crime. (*People v. Senmanu* (2015) 61 Cal.4th 1293, 1345 [describing the roles of the prosecutor, which include speaking for the victim of the crime].) Notably, for many survivors of crime, including victims of serious violent crime, justice entails *less* incarceration and more investment in restorative community alternatives.¹⁶ A 2021 survey of survivors of violent crime in Los Angeles County found that “[m]ost violent crime victims want changes to the criminal justice system that emphasize rehabilitation and crime prevention, rather than more incarceration.”¹⁷ More specifically, “at least 8 in 10 support expanding alternatives to incarceration, such as diversion, mental health treatment, restorative justice, and community service, and reducing prison sentences for people who participate in rehabilitation programs.”¹⁸ The vast majority also perceive the prosecutor’s principal goal as resolving neighborhood issues and preventing repeat crimes through prevention and rehabilitation, even if such methods result in fewer criminal convictions.¹⁹ Accordingly, the prosecutor’s ability to exercise prosecutorial discretion in declining to plead sentencing enhancements is integral to effectuating the restorative approach to justice that is preferred by many crime survivors.²⁰

C. The Court of Appeal’s Decision Impedes the Prosecutor’s Duty to Apply the Law Equally and Will Disproportionately Impact Black and Brown Communities.

Prosecutors have a “fiduciary obligation to exercise their discretionary duties fairly and justly— to afford every defendant . . . equal treatment under the law.” (*Hollywood v. Superior Court* (2008) 43 Cal.4th 721, 734.) When the District Attorney’s ability to exercise his discretionary duties is curtailed, specifically his discretion in directing all prosecutors not to plead sentencing enhancements, defendants are not treated equally. The implicit biases of line prosecutors, particularly racial biases,

¹⁶ (Alliance for Safety and Justice, *Crime Survivors Speak: The First-Ever National Survey of Victims’ Views on Safety and Justice* pp. 5, 13 15-16 < <https://allianceforsafetyandjustice.org/wp-content/uploads/documents/Crime%20Survivors%20Speak%20Report.pdf>> [finding that 60% of surveyed victims preferred a criminal system that provided shorter sentences and invested more in prevention and rehabilitation programs and that “the overwhelming majority of crime victims believe that the criminal justice system relies too heavily on incarceration, and strongly prefer investments in prevention and treatment to more spending on prisons and jails”].)

¹⁷ (David Binder Research, *Los Angeles County Survey: Victims of Violent Crime* (2021) p. 1 <<https://safeandjust.org/wp-content/uploads/February-2021-LA-Survivor-Survey.pdf>>)

¹⁸ (*Id.* at p. 3.)

¹⁹ (*Ibid.*)

²⁰ Indeed, the sisters of Polly Klaas, the child whose kidnapping and murder contributed to the passage of California’s Three Strikes Law, have spoken out against the habitual offender law. In an op-ed in the Los Angeles Times, Jess and Annie Nichol reflected that they deeply regret how the Three Strikes Law, and other sentencing regimes, have become their sister’s legacy. In particular, they lament the racial disparities inherent in the implementation of Three Strikes, noting that Black and brown people are disproportionately imprisoned pursuant to the law, and they conclude with a call for systemic change, asking for divestment from mass incarceration and investment in prevention programs and rehabilitative services. Just like countless other crime victims and their families, they believe that prevention programs and rehabilitative services have the capacity to actually reduce crime and make the community safer. (See Nichol & Nichol, *Op-Ed: Polly Klaas was our sister. We don’t want unjust laws to be her legacy*, LA Times (Oct. 18, 2020) <<https://www.latimes.com/opinion/story/2020-10-18/polly-klass-legacy-unjust-laws>>)

lead to differential treatment in sentencing—differential treatment that would have been avoided under District Attorney Gascón’s Special Directives. Curtailing discretion, therefore, in the context of declining to plead sentencing enhancements serves only to perpetuate overly punitive prosecutorial practices, which research has shown disproportionately harm people of color.

Indeed, studies have found that people of color charged with criminal offenses “are more likely to be prosecuted, held in pretrial detention, and to receive other harsh treatment.”²¹ Black people are also significantly more likely to be prosecuted for more severe crimes, receive less favorable plea-bargaining outcomes, and be sentenced to longer prison terms.²² Furthermore, with respect to habitual offender statutes like the Three Strikes Law, another study concluded that “state prosecutors are . . . more likely to charge Black rather than similar white defendants under habitual laws.”²³

These racial disparities in the criminal legal system become strikingly clear when evaluating the history and effect of the Three Strikes Law and illuminate how the Court of Appeal’s decision will perpetuate harm against Black and brown communities. Immediately upon its passage, the disparate impact of the Three Strikes Law on Black and brown people was apparent. In 1994, the Center on Juvenile and Criminal Justice analyzed data obtained during the first six months following the implementation of the Three Strikes Law.²⁴ The data showed that Black individuals made up 57.3% of the people charged with a third strike, as compared to white individuals who accounted for just 12.6% of the same population.²⁵ Further, the report stated that Black individuals in Los Angeles County were “accused of a third ‘strike’ at 17 times the rate of their white counterparts.”²⁶

More recently, the Rose Institute conducted a study analyzing the racial composition of California’s prison population from 2001 to 2015.²⁷ The study found that over the fifteen-year period, Black individuals consistently made up a higher portion of the “strike” population, compared to other racial groups.²⁸ In 2015, Black individuals represented 46% of the state’s third strike population, but only 29% of the total incarcerated population.²⁹ While the data related to the Three Strikes Law is most troubling in relation to the disproportionate effect on the Black community, the Rose Institute’s analysis concluded that people of color overall are more likely to be convicted of a strike offense than white individuals.³⁰ In 2021, the California Law Revision Commission’s Committee on Revision of the Penal Code issued a report analyzing the Three Strikes Law, including the demographic breakdown

²¹ (Hinton et al., Vera Inst. of Just., *An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Legal System* (2018) pp. 1, 7 <<https://www.vera.org/downloads/publications/for-the-record-unjust-burden-racial-disparities.pdf>>)

²² (*Id.* at p. 7.)

²³ (The Sentencing Project, *Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System* (2018) p. 8 <<https://www.sentencingproject.org/publications/un-report-on-racial-disparities/>>)

²⁴ (Schiraldi & Godfrey, Ctr. on Juvenile and Crim. Just., *Racial Disparities in the Charging of Los Angeles County Three “Strike” Cases* (Oct. 1994) <http://www.cjcj.org/uploads/cjcj/documents/racial_disparities_in_the_charging_of_la_countys_third_strike_cases.pdf>)

²⁵ (*Id.* at pp. 1-2.)

²⁶ (*Ibid.*)

²⁷ (Jin & Hidalgo-Wohlleben, *Three Strikes Analysis: Demographic Characteristics of Strike Offenders* (2016) Rose Inst. Of State & Local Gov’t- Claremont McKenna College <<https://s10294.pcdn.co/wp-content/uploads/2016/07/Three-Strikes-Racial-and-Ethnic-Analysis.pdf>>)

²⁸ (*Id.* at p. 10.)

²⁹ (*Id.* at p. 11.)

³⁰ (*Id.* at p. 6.)

of individuals sentenced under the law. The report concluded that 80% of people sentenced under the Three Strikes Law are people of color.³¹ It also found that 90% of people, who are sentenced under the Three Strikes Law and who are 25 or younger at the time of their offense, are people of color.³² These racial disparities, as well as the law's failure to achieve its purported crime prevention goals, influenced the report's recommendation to have the Three Strikes Law repealed.³³ Ultimately, given the pervasive inequities in prosecutorial charging practices, the discretion not to plead prior convictions is necessary to promote equal application of the law.

CONCLUSION

If unreviewed by this Court, the Court of Appeal's decision could deleteriously alter the constitutional separation of powers, stripping prosecutors of the discretion to fulfill their distinct function by declining to plead prior convictions. Prosecutors must have the authority to curtail excessive sentences that disproportionately harm Black and brown communities, jeopardize public safety, and contravene the wishes of crime survivors. For the aforementioned reasons, as well as the significant questions of law raised, *Amici* respectfully request that this Court grant the *Gascón* Petition for Review and overturn the Court of Appeal's decision.

Respectfully submitted,



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³¹ (Cal. Com. on Revision of the Penal Code, Annual Report and Recommendations, *supra*, fn. 12, at p. 41.)

³² (*Ibid.*)

³³ (*Ibid.*)

PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 765 The City Drive, Suite 360, Orange, CA 92868. I am employed in the office of a member of the bar of this court at whose direction the service was made.

On August 11, 2022, I served the attached document by electronically transmitting a true copy via this Court's TrueFiling system to the recipients listed on the below service list.

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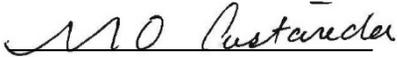
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Also on this date, I mailed a copy of the attached document by causing it to be deposited in a sealed envelope with the U.S. Postal Service, with the postage fully prepaid, to the recipients listed below:

Hon. James C. Chalfant
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I declare under penalty of perjury under the laws of the State of California and the United States of America that the above is true and correct.

Executed on August 11, 2022, at Buena Park, California.


Michelle O. Castaneda

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **THE ASSOCIATION OF DEPUTY DISTRICT ATTORNEYS FOR LOS ANGELES COUNTY v. GASCON**

Case Number: **S275478**

Lower Court Case Number: **B310845**

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8/11/2022

Date

/s/Summer Lacey

Signature

Lacey, Summer (308614)

Last Name, First Name (PNum)

ACLU of Southern CA

Law Firm