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 10 The Association of Deputy District Attorneys for  
 Los Angeles County

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
 12 COUNTY OF LOS ANGELES  
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14 THE ASSOCIATION OF DEPUTY  
 15 DISTRICT ATTORNEYS FOR LOS  
 ANGELES COUNTY,  
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 Plaintiff and Petitioner,  
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 vs.  
 18 GEORGE GASCÓN, in his official capacity  
 19 as District Attorney for the County of Los  
 Angeles; LOS ANGELES COUNTY  
 20 DISTRICT ATTORNEY'S OFFICE; and  
 DOES 1 through 50, inclusive,  
 21  
 Defendants and Respondents.  
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Case No. 20STCP04250  
 Assigned for All Purposes to:  
 Hon. James C. Chalfant, Dept. 85  
**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

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1 Petitioner The Association of Deputy District Attorneys for Los Angeles County submits  
 2 the following evidentiary objections to the Declaration of Monnica Thelen, the Declaration of  
 3 Shelan Joseph, the Declaration of Stephen Munkelt, and the Declaration of Marshall Khine.

4 **DECLARATION OF MONNICA L. THELEN**

No.	EVIDENCE	OBJECTION
1.	<p data-bbox="358 485 769 514"><u>Page 9, ln. 20 to Page 10, ln. 21</u></p> <p data-bbox="358 562 1084 1140">“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 1182 1084 1543">“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="358 1585 1084 1900">“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</p>	<p data-bbox="1114 485 1500 514"><u>Irrelevant</u> (Evid. Code § 201)</p> <p data-bbox="1114 562 1511 808">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>

1	informed me that if I want to provide a counter-offer, I	
2	must make an appointment with their manager to discuss	
3	it.”	
4	2. <u>Page 10, ln. 22 to Page 11, ln. 15</u>	<u>Irrelevant</u> (Evid. Code § 201)
5	“As part of the plea negotiation process, I have on	The matters stated do not
6	multiple occasions requested that prosecutors strike	relate to whether pleading
7	priors alleged under the Three Strikes Law and strike	strikes is mandatory, or
8	other enhancements such as gang and gun	whether a prosecutor must
9	enhancements. The plea negotiation process occurs	exercise case-by-case
10	between the prosecution and the defense. I advise my	discretion in seeking to
11	clients of the proposed settlement, and if my client is in	dismiss strikes or other
12	agreement, I advise him or her of their constitutional	enhancements.
13	rights and the consequences of their plea. Most clients	
14	then read and sign a <i>Tahl</i> waiver, which I then submit to	
15	the clerk. The court is not notified until we have reached	
16	a settlement agreement. The prosecutor or I will state the	
17	disposition on the record, the judge or the prosecutor	
18	takes the waiver of rights from the defendant, counsel	
19	joins, and the defendant is either immediately sentenced	
20	on that date or soon thereafter. The prosecution then	
21	moves to dismiss the strikes or other enhancements that	
22	are not part of the plea bargain. In cases where the	
23	prosecutors move to dismiss the strike enhancement or	
24	special allegations, they are rarely, if ever, asked by the	
25	court to state whether doing so is in the interests of	
26	justice; rather the court simply accepts the plea, and	
27	sentences the defendant.	
28	“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.”	

**DECLARATION OF SHELAN JOSEPH**

<b>NO.</b>	<b>EVIDENCE</b>	<b>OBJECTION</b>
3.	<u>Page 1, ln. 15 to ln. 16</u>  “It has been my experience that prosecutors do not always file all strikes and enhancements.”	<u>Irrelevant</u> (Evid. Code § 201); <u>Improper Legal Opinion</u> (Evid. Code §§ 801, 803)  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.
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>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>
5.	<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><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>

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	<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 use their discretion to penalize clients who have chosen to exercise their trial rights.</p> <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**

<b>No.</b>	<b>EVIDENCE</b>	<b>OBJECTION</b>
6.	<p><u>Paragraph 5</u></p> <p>“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.”</p>	<p><u>Hearsay</u> (Evid. Code § 1201); <u>Lack of Personal Knowledge/Speculation</u> (Evid. Code § 702(a))</p> <p>The declarant, a public defender, does not state the basis for his “understanding” of the policies of prosecutorial offices in multiple different counties.</p> <p><u>Irrelevant</u> (Evid. Code § 201);</p> <p>The practice that a particular district attorney’s office chooses to follow is irrelevant to what the law is with respect</p>

1		to pleading and proving prior strikes.
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3	7. <u>Paragraphs 6 and 7</u>	<u>Hearsay</u> (Evid. Code § 1201) The declarant cannot testify as to a prosecutor’s office policy based on the out-of-court statement of a prosecutor from that office.
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.	
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7	“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.”	<u>Irrelevant</u> (Evid. Code § 201) The practice that a particular district attorney’s office follows is irrelevant to what the law is with respect to pleading and proving prior strikes.
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14	8. <u>Paragraph 8</u>	<u>Hearsay</u> (Evid. Code § 1201); <u>Lack of Personal Knowledge/Speculation</u> (Evid. Code § 702(a))
15	“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.”	The declarant cannot testify as to the office policy in “most other jurisdictions” based on out-of-court “conversations and electronic communications.”
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**DECLARATION OF MARHSALL KHINE**

<b>NO.</b>	<b>EVIDENCE</b>	<b>OBJECTION</b>
23	9. <u>Paragraph 2</u>	<u>Irrelevant</u> (Evid. Code § 201)
24	“That included exercising discretion on whether to allege prior serious felony convictions as defined in Penal Code Sections 1192.7(c) and 1192.8, and prior violent felony convictions as defined by Penal Code Section 667.5(c), as prior “strikes” and/or under alternative enhancement theories, and to seek the dismissal of filed allegations in the furtherance of justice	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.
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1	to reach fair and just resolutions.”	
2	10. <u>Paragraph 3</u>	<u>Irrelevant</u> (Evid. Code § 201)
3	“During my career in the San Francisco District	The San Francisco District
4	Attorney’s Office, I am not aware of any policy that	Attorney’s Office’s policy on
5	required prosecutors to allege every available qualifying	pleading and proving prior
6	serious or violent conviction as a strike enhancement.	strikes is irrelevant to
7	On the contrary, prior to Proposition 36, the ‘Three	whether, under the law,
8	Strikes Reform Act’ (2012), San Francisco District	pleading and proving prior
9	Attorneys discouraged alleging prior strike conviction	strikes is mandatory.
10	enhancements on non-serious and non-violent new	
11	offenses and generally, did not pursue life in prison	
12	sentences under the Three Strikes law for new low level	
13	felony convictions. Additionally, some of these offenses	
14	eligible for life sentences prior to Proposition 36, are no	
15	longer felonies after Proposition 47, ‘The Safe	
16	Neighborhood and Schools Act’ (2014), and some are	
17	not even crimes anymore pursuant to Proposition 64,	
18	‘The Adult Use of Marijuana Act’ (2016).”	
19	11. <u>Paragraph 4</u>	<u>Irrelevant</u> (Evid. Code § 201)
20	“The current policy of the San Francisco District	The San Francisco District
21	Attorney is to allege status enhancements such as prior	Attorney’s Office’s policy on
22	strike convictions only as warranted by extraordinary	pleading and proving prior
23	circumstances subject to the approval of the District	strikes is irrelevant to
24	Attorney or his designee.”	whether, under the law,
25		pleading and proving prior
26		strikes is mandatory.
27	12. <u>Paragraph 5</u>	<u>Irrelevant</u> (Evid. Code § 201)
28	“In my experience, the decision to allege prior	The experience of a particular
	convictions as strikes under the Three Strikes law has	prosecutor from the San
	always been subject to sound judgment and discretion to	Francisco District Attorney’s
	achieve a proportionate and appropriate sentence for the	Office on pleading and
	offense.”	proving prior strikes is
		irrelevant to whether, under
		the law, pleading and proving
		prior strikes is mandatory.

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DATED: January 26, 2021

Respectfully submitted,

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Eric M. George  
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By:

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Eric M. George

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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 **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.



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Corinne Ubence

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

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