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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 **PETITIONER'S REPLY IN SUPPORT OF ORDER TO SHOW CAUSE RE: PRELIMINARY INJUNCTION; SUPPLEMENTAL DECLARATION OF ERIC M. GEORGE; SUPPLEMENTAL DECLARATION OF MICHELE HANISEE** Date: February 2, 2021 Time: 8:30 a.m. Dept.: 85 Action Filed: December 30, 2020 Trial Date: None Set

Plaintiff and Petitioner The Association of Deputy District Attorneys for Los Angeles County hereby submits this Reply in Support of Order to Show Cause Re: Preliminary Injunction.

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I. INTRODUCTION

Respondents' opposition turns on the alarming proposition that local district attorneys are vested with an unbounded executive power that is immune from judicial review, including the power to override legislative enactments and statewide voter initiatives. Nothing in the Constitution, state statutes, or case law supports such an extraordinarily expansive view of a district attorney's authority. Respondent Gascón, like all executive branch officials in this state, is bound by legal duties that he is not free to cast aside at will – and certainly not because he perceives the social values reflected in his office policies to be more enlightened than the social values millions of California voters and the elected representatives of a co-equal branch of government enacted into law.

II. SUMMARY OF ARGUMENT

First, Respondents simply misread case law interpreting California's Three Strikes Law. The Court of Appeal cases cited by Petitioner plainly hold that the Three Strikes Law limits prosecutorial discretion by requiring that prosecutors plead and prove prior strikes in every case where such prior strikes exist; the cases do not, as Respondents contend, merely address the procedure for presenting prior strikes to the court. Indeed, after Petitioner filed its moving papers, the Second District Court of Appeal issued yet another precedential opinion reiterating this precise limitation on prosecutorial discretion. Nor can Respondents override these cases by submitting declarations they contend show prosecutorial practices at odds with those cases' holdings; that would be the equivalent of claiming that the speed limit on the freeway is not actually 65 miles per hour because drivers often exceed that speed. Typically inapposite is Respondents' repeated reliance on an isolated quote from *In re Coley*, 55 Cal. 4th 524 (2012); as the context of the quote shows, *In re Coley* addressed the discretionary *dismissal* of prior strikes, not the mandatory obligation to plead them in the first instance.

Second, the touchstone of prosecutorial discretion is the exercise of *case-by-case* discretion, which Respondents' Special Directives expressly, intentionally, and undisputedly prohibit. Those directives are thus unlawful. Respondents' contention that they exercised

"discretion" by adopting those directives in the first place is unconvincing sophistry. One does not exercise case-by-case discretion with a wholesale disavowal of such discretion. Nor have Respondents mustered any rejoinder to the Washington and Arizona Supreme Court cases directly holding that blanket prosecutorial directives that admit of no case-by-case discretion are unlawful. Respondents also fail to demonstrate that *judicial* discretion in dismissing sentencing enhancements is irrelevant to a *prosecutor's* discretion in seeking such dismissals. These separate institutional checks reflect two sides of the same coin and turn on one identical consideration: whether, in any particular case, dismissal serves the interests of justice.

Third, this proceeding implicates two mandatory duties that favor mandamus: (1) Respondents' mandatory obligation to plead and prove prior strikes; and (2) Respondents' mandatory duty to otherwise exercise case-by-case discretion in deciding what sentencing enhancements to dismiss. Restraining Respondents from enforcing policies that violate these two narrow duties is qualitatively different from compelling a particular exercise of prosecutorial discretion in a particular case. This proceeding does not seek to substitute the discretion of Petitioner or this Court for that of the District Attorney in any particular case. To the contrary, this proceeding seeks to remove an obstacle imposed by the District Attorney himself that impedes his Office from exercising its own discretion. Thus, none of Respondents' cases is on point.

Last, Respondents callously disregard the serious ethical quandary in which they have placed their line prosecutors: comply with the Special Directives or comply with the law. Their half-hearted argument against standing falls flat, too, since workplace unions, such as Petitioner, undeniably have standing to assert their members' interests—which, in turn, unquestionably includes challenging employer policies that force employees to act unlawfully. In sum, only the issuance of the preliminary injunction sought here will prevent Respondents from continuing to force this county's prosecutors to violate the law, their oath, and their ethical obligations.

III. ARGUMENT

A. The Three Strikes Law Eliminates Prosecutorial Discretion to Plead and Prove Prior Strikes

As Petitioner pointed out in its moving papers, the Court of Appeal has repeatedly held

that while "the selection of criminal charges is [generally] a matter subject to prosecutorial discretion[,] the Three Strikes Law limits that discretion and requires the prosecutor to plead and prove each prior serious felony conviction." *People v. Roman*, 92 Cal. App. 4th 141, 145 (2001). Indeed, after Petitioner filed its moving papers, the Second District Court of Appeal published an opinion reiterating this mandatory obligation. *People v. Laanui*, --- Cal. App. 5th ----, No. B297581, 2021 WL 71151 (Cal. Ct. App. Jan. 8, 2021). There, the defendant argued that because the prosecutor alleged prior strikes only as to counts 1 through 3, but not as to count 6, due process prohibited the prosecutor from seeking an enhanced sentence as to count 6. *Id.* at *12. In rejecting that argument, the court again observed that the Three Strikes Law "'limits [prosecutorial] discretion and requires the prosecutor to plead and prove each prior serious felony conviction.'" *Id.* (quoting *Roman*, 92 Cal. App. 4th at 145). As a result, the court reasoned, the Three Strikes Law itself would have put the defendant on notice that the prior strike allegations applied to count 6 even if they were not specifically pleaded as to that count, because "the plain language of the Three Strikes law makes clear that the prosecution lacks discretion to allege prior strikes on some counts but not others." *Id.* at *15. It was also on this basis that the court distinguished a Supreme Court case holding that a *non*-mandatory firearm enhancement must be affirmatively pleaded as to each count to which the enhancement was sought:

> [The firearm enhancement under] Section 12022.53 . . . contains no language limiting the prosecution's discretion to plead or not plead the enhancement. Thus, it is permissible for the prosecution to plead a section 12022.53 firearm enhancement on one count but not another, and a defendant reading an information that does so has no reason to think the enhancement might apply to a count to which it is not pleaded. . . . [¶] A defendant has no basis to make such an assumption, however, when an information alleges a prior strike as to some eligible counts but not others. This is because, **under the plain language of the Three Strikes law, it applies 'in every case' in which a defendant has suffered a prior strike conviction, and, to borrow *Anderson*'s language, the prosecution expressly *cannot* 'ma[k]e a discretionary choice not to pursue' the Three Strikes alternative sentencing regime on all eligible counts.**

Id. at *15 (bolded emphasis added).

Respondents offer nothing but analytically-irrelevant distinctions to this line of cases. They barely mention *Roman* at all, except to puzzlingly assert in one parenthetical that the case did "not analyz[e] the effect of the Three Strikes Law on the ability of a prosecutor to opt to

pleading sentencing enhancements in the first place." Opp. at 15. Not so. *Roman* squarely holds that the "Three Strikes Law limits" the traditional prosecutorial discretion to "select[] . . . criminal charges" by "*requir[ing]* the prosecutor to plead and prove each prior serious felony conviction." 92 Cal. App. 4th at 145 (emphasis added).

Respondents also, implausibly, suggest *People v. Kilborn*, 41 Cal. App. 4th 1325 (1996), never considered the Three Strikes Law's limit on discretionary charging decisions. Wrong again. *Kilborn* plainly holds that the Three Strikes Law limits prosecutorial discretion on charging decisions, rejecting a defendant's argument that this limitation unlawfully "usurps the discretion of prosecutors to decide what to prosecute" by analogizing that limitation to other similar (and permissible) limitations on prosecutorial discretion. *Id.* at 1332.

Finally, despite Respondents' contention that *Laanui* addresses only the procedure for pleading strikes, as the quoted language above makes clear, *Laanui* held that the failure to plead a prior strike as to a particular count was immaterial precisely because the defendant should have known that the prosecutor *had no discretion* to seek a strike enhancement only as to a subset of eligible counts; rather, the prosecutor must seek a strike enhancement on all eligible counts.[1]

The two cases on which Respondents rely do not show otherwise. In citing *People v. Nguyen*, 18 Cal. App. 5th 260, 267 n.1 (2017), Respondents conflate two different enhancements: the serious felony conviction enhancement under Penal Code section 667(a), which is *not* mandatory, and the prior strike enhancement under the Three Strikes Law (Penal Code § 667(b)–(i)), which *is* mandatory.[2] *Nguyen* thus does not suggest, as Respondents contend, that charging strikes is not mandatory; to the contrary, the court contrasted the two enhancements on this very basis. *Id.* at 267 n.1. Next, Respondents erroneously rely on *In re Coley*, 55 Cal. 4th 524 (2012), for the proposition that pleading strikes is discretionary. There, in briefly referencing a

[1] According to media sources, Respondents have also internally concluded that pleading and proving prior strikes is mandatory. Suppl. George Decl. ¶ 2, Ex. 11. When Petitioner's counsel submitted a Public Records Act request for the memoranda containing these conclusions, Respondents refused to produce them. *Id.* ¶¶ 3–4, Ex. 12–13.

[2] The former enhancement is also known as a "five year prior" enhancement, and Special Directives 20-08 and 20-08.2 specifically distinguish this "five year prior" enhancement from the Three Strike enhancement.

prosecutor's "discretion in determining how many prior convictions to charge in the case," the court relied on Penal Code sections 667(f)(2) and 1170.12(d)(2) – both of which concern only the discretionary decision to *dismiss* prior strikes once they have been pleaded. *Id.* at 559. As the Court of Appeal has made clear, that discretionary decision to move to dismiss is wholly different from the mandatory obligation to plead those strikes in the first place. *See, e.g.*, *Roman*, 92 Cal. App. 4th at 145 ("[T]he Three Strikes law limits that discretion and requires the prosecutor to plead and prove each prior serious felony conviction. (Pen. Code, § 1170.12, subd. (d)(1).) . . . The only discretion remaining in the prosecution is the ability to move to strike a prior serious felony conviction allegation in the furtherance of justice. (Pen. Code, § 1170.12, subd. (d)(2).)"). Tellingly, *Coley* did not discuss, let alone overrule, the myriad Court of Appeal cases holding that pleading prior strikes is mandatory, and no court has ever cited *Coley* for the proposition that pleading and proving prior strikes is actually discretionary.

Finally, Respondents' declarations are not merely inaccurate, Suppl. Hanisee Decl. ¶ 4, Ex. 15, but legally irrelevant since it is axiomatic that Respondents cannot overrule case law by citing the perceptions held by several prosecutors and public defenders as to how prior strikes have been pleaded. In any event, Respondents' Special Directives do not seek to have prosecutors exercise discretion in pleading prior strikes, but to outright bar them from ever alleging strikes; thus, Respondents' reliance on what they believe to be discretionary practices does not help them.

B. Prosecutors Must Exercise Case-by-Case Discretion in Moving to Dismiss Sentencing Enhancements

Respondents make the sweeping assertion, with virtually no authority, that "there is nothing whatsoever wrong" with blanket policies that mandate dismissal of sentencing enhancements in all cases without any case-by-case exercise of discretion. Opp. at 15–16. This is not argument but assertion. And the assertion is dead wrong. The Supreme Courts of Washington and Arizona have deemed unlawful such blanket prosecutorial policies that prohibit case-by-case discretion. *State v. Pettitt*, 93 Wash. 2d 288, 290 (1980) ("[T]his fixed formula which requires a particular action in every case upon the happening of a specific series of events constitutes an abuse of the discretionary power lodged in the prosecuting attorney."); *State v. City Court of City*

of Tucson, 150 Ariz. 99, 102 (1986) (holding that a blanket office policy unlawfully "infringed upon the obligation of each Deputy City Prosecutor to exercise his or her individual professional judgment on a case by case basis").[3] There can be no serious doubt that California's appellate courts will follow the approach – and reach the same holding – as did the highest courts of Washington and Arizona. The sole case Respondents cite on this point – *Davis v. Municipal Court*, 46 Cal. 3d 64, 77 (1988) – addresses the unremarkable proposition that district attorneys may establish general standards "to guide the exercise of such [prosecutorial] discretion by all deputies under his direction"; here, the Special Directives here do not guide deputy district attorneys' exercise of discretion, but categorically bar them from exercising *any* discretion.

Nor can Respondents simply cast aside the abundant case law discussing the limits of *judicial* discretion in dismissing sentencing enhancements. Such discretion mirrors a prosecutor's discretion on this issue, and thus the cases interpreting a court's discretion in this area can substantially aid the Court here. To that end, *People v. Dent*, 38 Cal. App. 4th 1726 (1995), squarely distinguishes between a permissible exercise of discretion – one based on individualized, case-by-case factors – and an impermissible "failure to exercise discretion as required by the law," such as dismissing an enhancement based on "a personal antipathy for the effect that the [enhancement] would have on [the] defendant." 38 Cal. App. 4th at 1731. Respondents cite no authority for their bold assertion that judges and prosecutors have diametrically opposed interests in dismissing enhancements, Opp. at 19; to the contrary, the cases uniformly suggest the opposite. *See People v. Arredondo*, 21 Cal. App. 5th 493, 505 (2018) ("[The Prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done."); Cal. Rules Prof. Conduct, rule 3.8 cmt. 1 ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.").

[3] *Pettitt* is particularly on point, as that case concerned a district attorney's blanket policy with respect to seeking sentencing enhancements. Respondents offer no distinction whatsoever of these cases, and there is none to be made.

C. The District Attorney's Abdication of His Mandatory Duties Demands Mandamus Relief

Respondents fundamentally misunderstand the relief that Petitioner seeks here. Petitioner does not seek to compel the district attorney to exercise his legitimate discretion in a particular manner, such as to prosecute a particular individual or file a particular charge in a particular case. Instead, Petitioner seeks to prohibit Respondents from enforcing office policies that (1) unlawfully bar prosecutors from complying with their mandatory, non-discretionary obligation to plead and prove prior strikes; and (2) unlawfully bar prosecutors from exercising *any* discretion in moving to dismiss six enumerated sentencing enhancements.

Such relief as Petitioner seeks is especially susceptible to mandamus. The very essence of mandate is to compel a public officer's compliance with his or her mandatory duty.[4] *See, e.g.*, *Collins v. Thurmond*, 41 Cal. App. 5th 879, 914 (2019). As discussed above, the Three Strikes Law imposes a mandatory duty on the prosecutor to plead and prove prior strikes; "the prosecution expressly *cannot* 'ma[k]e a discretionary choice not to pursue' the Three Strikes alternative sentencing regime" where it applies. *Laanui*, 2021 WL 71151, at *15 (emphasis in original); *Roman*, 92 Cal. App. 4th at 145. There is no dispute that the Special Directives categorically bar prosecutors from pleading and proving prior strikes and thus violate this mandatory duty.

Similarly, although mandate cannot compel a particular exercise of discretion, mandate "does lie to command the exercise of discretion [in *some* manner]—to compel some action upon the subject involved." *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd.*, 248 Cal. App. 4th 349, 370 (2016); *Ellena v. Dep't of Ins.*, 230 Cal. App. 4th 198, 208 (2014) (affirming writ of mandate to compel Department of Insurance to review a proposal to determine whether to accept or reject it); *see also* Mot. at 5, 10. Here, of course, "a district attorney's 'mandatory' duty is to exercise his or her *discretion* to prosecute crimes," *People ex rel. Becerra v. Superior Court*, 29 Cal. App. 5th 486, 504 (2018)—which, as shown above, refers to the exercise of case-by-case discretion. *See Pettitt*, 93 Wash. 2d at 290; *City Court of City of Tucson*, 150 Ariz. at 102; *Dent*,

[4] Respondents' persistent emphasis on the word "ministerial" is nothing more than semantics. A "ministerial" duty is simply a legal duty that admits of no discretion, *Cal. Assn. of Prof'l Scientists v. Dep't of Fin.*, 195 Cal. App. 4th 1228, 1236 (2011), which is what is at issue.

38 Cal. App. 4th at 1731. There is no dispute that the Special Directives eliminate all case-by-case discretion in seeking dismissal of six enumerated enhancements and thus, too, are unlawful.

Respondents' cited cases are far removed from the relief sought here. First, those cases merely suggest that, in any particular case, courts cannot command a particular exercise of prosecutorial discretion—*e.g.*, compel a particular charge or prosecution. None of those cases stands for the remarkable proposition that a district attorney's unlawful *policies*, which violate mandatory duties and wholly abrogate case-by-case discretion, are immune from judicial review. Second, Respondents' cases concern only discretionary charging decisions, which this action does not concern even at the policy level. The only charging policy implicated here is that relating to the Three Strikes Law, and charging prior strikes is expressly not discretionary. The remaining relief relates only to policies governing the dismissal of charges once pleaded—and the dismissal of charges is *never* a matter within a prosecutor's sole discretion. Mot. at 14; *People v. Superior Court (Romero)*, 13 Cal. 4th 497, 515 (1996). At bottom, Respondents cannot insulate from judicial scrutiny County-wide policies that violate a district attorney's legal duties, and which nullify laws enacted by elected state representatives and adopted by statewide voter initiatives.

D. A Preliminary Injunction is Necessary So That Deputy District Attorneys Are Not Forced to Violate the Law, Their Oath, and Their Ethical Obligations

A preliminary injunction in this action is both appropriate and necessary, and none of Respondents' arguments shows otherwise. First, preservation of the status quo *supports* a preliminary injunction. The relevant "status quo" is "the last actual peaceable, uncontested status which preceded the pending controversy," *People v. Hill*, 66 Cal. App. 3d 320, 331 (1977)—which, here, is the status that existed before Respondents adopted their Special Directives. Petitioner seeks a return to that status quo. Second, Respondents conspicuously fail to identify any harm that would befall *them* from a preliminary injunction. Nor could they, as "a party suffers no grave or irreparable harm by being prohibited from violating the law." *People v. Uber Techs., Inc.*, 56 Cal. App. 5th 266, 270 (2020). The best they can muster are majestic generalities about subverting the "will" of Los Angeles County voters who elected Respondent Gascón, Opp. at 19, all while ignoring the will of (for example) the 5.9 million voters—or 70% of the California

electorate—who adopted the Three Strikes Law. If Respondents cannot articulate their own harm, surely they cannot claim that the *balance* of harms favors their position. In any event, the clarity of the legal violations at issue attenuates the need to balance the harms at all. *See IT Corp. v. Cty. of Imperial*, 35 Cal. 3d 63, 72 n.5 (1983).

Finally, Respondents' derision of the harm facing their prosecutors is deeply unfounded. Violating the law in the litigation of an action is unethical, *see* Cal. Rules of Prof. Conduct, rule 8.4(a), (e); Bus. & Prof. Code § 6068(a), and is exactly what the Special Directives require. Respondents' own prosecutors have been admonished by judges on at least two occasions that the action that they took pursuant to the Special Directives was "unethical," and other courts have more broadly recognized that the Special Directives have no basis in law. Hanisee Decl. ¶¶ 6–9. Nor do these ethical quandaries present a sufficiently close call so as to shield prosecutors from discipline under Rule 5.2(b). With respect to the Three Strikes Law, for example, binding case law holds that pleading and proving strikes is mandatory; that this limitation on prosecutorial discretion is constitutional; and that a local executive official cannot violate the law based on his or her personal assessment that the law is unconstitutional. Mot. at 7–9.

The Special Directives also force prosecutors to disregard court orders, such as by forcing them to remove a sentencing enhancement from a charging document even after the court has already denied a motion to dismiss that very enhancement—thus exposing them to the possibility of contempt. Respondents' belief that injunctive relief must wait until *after* one of their prosecutors has actually been disciplined by the State Bar or even held in contempt is astounding. An employee should not be forced to choose between his or her job and complying with the law. *See Haney v. Aramark Unif. Servs., Inc.*, 121 Cal. App. 4th 623, 643 (2004).

E. Petitioner Has Standing

Although Respondents concede that organizational standing exists where the organization seeks to protect interests germane to the organization's purpose, they veer far afield in suggesting that Government Code section 3504 circumscribes this inquiry. Respondents cite no case supporting that suggestion. Myriad courts have concluded, without any reference to Section 3504, that labor unions have standing to challenge all manner of employee work conditions. *See, e.g.*,

Bhd. of Teamsters & Auto Truck Drivers v. Unemployment Ins. Appeals Bd., 190 Cal. App. 3d 1515, 1522 (1987) (union had standing in a writ petition to challenge denial of unemployment insurance benefits to its members); *Monterey/Santa Cruz etc. Trades Council v. Cypress Marina Heights LP*, 191 Cal. App. 4th 1500, 1521 (2011) (union had standing to seek enforcement of prevailing wage covenant); *Nat'l Weather Serv. Emps. Org., Branch 1-18 v. Brown*, 18 F.3d 986, 989 (2d Cir. 1994) (union had standing to challenge relocation of weather forecasting station because it would force their employees to commute further).[5] Here, Petitioner is a union organized for the purpose of protecting the wage and working conditions of over 800 deputy district attorneys in this County. Hanisee Decl. ¶ 2; Suppl. Hanisee Decl. ¶¶ 2–3, Ex. 15. It is unquestionably germane to its mission to prevent its members from facing the Hobson's choice forced upon them by their employer: comply with the Special Directives and violate the law, their oath, and their ethics, or comply with law and risk internal discipline for violating the directives.[6]

Separately, Petitioner has standing under the public interest exception. In the mandamus context, "[t]he courts have recognized . . . a public interest exception to the requirement of a beneficial interest [for standing]: '[W]here the question is one of public right and the object of the mandamus is to procure the enforcement of a public duty, the relator need not show that he has any legal or special interest in the result." *Driving Sch. Ass. Of Cal. v. San Mateo Union High Sch. Dist.*, 11 Cal. App. 4th 1513, 1518 (1992). Here, Petitioner is seeking enforcement of a public duty and right—to restrain this County's district attorney from violating the law in the enforcement of criminal laws within the County. This is a further basis for standing.

IV. CONCLUSION

A preliminary injunction is imperative to prevent Respondents' continued violation of their mandatory duties, which in turn force this County's 800 deputy district attorneys to do the same.

[5] Indeed, state law on associational standing derives from, and is coextensive with, federal constitutional law on the issue, *Bhd. of Teamsters*, 190 Cal. App. 3d at 1522 n.3, and thus it makes no sense to look to a California state statute to determine the metes and bounds of such standing.

[6] And as Respondents agree that legal disputes over district attorney policy are not subject to the MOU, there is no basis for asserting that Petitioner failed to exhaust the administrative remedies therein. *See also Trejo v. Cty. of Los Angeles*, 50 Cal. App. 5th 129, 149 (2020).

DATED: January 26, 2021

BROWNE GEORGE ROSS
O'BRIEN ANNAGUEY & ELLIS LLP

By: _____
Eric M. George
Attorneys for Plaintiff and Petitioner The Association of Deputy District Attorneys for Los Angeles County

SUPPLEMENTAL DECLARATION OF ERIC M. GEORGE

I, Eric M. George, declare and state as follows:

1. I am an attorney admitted to practice law in all courts of the State of California. I am a partner with Browne George Ross O'Brien Annaguey & Ellis LLP, counsel of record for Plaintiff and Petitioner Association of Deputy District Attorneys for Los Angeles County in this matter. I have personal knowledge of the facts set forth below and if called as a witness could competently testify thereto. I make this supplemental declaration in support of Petitioner's Reply in Support of Order to Show Cause Re: Preliminary Injunction.

2. Attached hereto as **Exhibit 11** is a true and correct copy of an article from the Metropolitan News-Enterprise ("MetNews"), dated December 28, 2020, entitled *Gascón Told by Staff That Policies Don't Comport With Law*. In that article, the MetNews quoted extensively from two memoranda circulated within the Los Angeles County District Attorney's Office, which determined that, for example, "the prosecutor must charge all known strikes [under the Three Strikes Law]," and that "[t]he district attorney's office has no legitimate interest in having a policy directly contrary to law."

3. On January 7, 2021, I sent a Public Records Act request to the Los Angeles County District Attorney's Office requesting that they produce all memoranda drafted by the Los Angeles County District Attorney's Office "regarding the lawfulness or ethical implications of any of District Attorney George Gascon's Special Directives issued on or after December 7, 2020." I attached a copy of the MetNews article to my request as a reference. Attached hereto as **Exhibit 12** is a true and correct copy of this Public Records Act request.

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4. On January 22, 2021, I received a letter from the Los Angeles County Counsel in response to my Public Records Act request, wherein they refused to produce the memoranda on the basis that the memoranda constituted "[p]reliminary . . . memoranda that are not retained by the public agency in the ordinary course of business," and that the memoranda were privileged. Attached hereto as **Exhibit 13** is a true and correct copy of this response.

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.

Eric M. George

SUPPLEMENTAL DECLARATION OF MICHELE HANISEE

I, Michele Hanisee, declare and state as follows:

1. I am an attorney admitted to practice law in all courts of the State of California. I am a Los Angeles County Deputy District Attorney, and I am the President of Plaintiff and Petitioner Association of Deputy District Attorneys for Los Angeles County. I have personal knowledge of the facts set forth below and if called as a witness could competently testify thereto. I make this supplemental declaration in support of Petitioner's Reply in Support of Order to Show Cause Re: Preliminary Injunction.

2. Attached hereto as **Exhibit 14** is a true and correct copy of the relevant portions of the operative Bylaws of The Association of Deputy District Attorneys for Los Angeles. Article I, Section 3, identifies the myriad "purpose[s] of the ADDA." The purposes identified include, among others:

a. Paragraph 1.3.2: "To promote the welfare of the membership and to provide a voice in the determination of the terms and conditions of employment particularly through the collective bargaining process";

b. Paragraph 1.3.3: "To promote legislation beneficial to the ADDA, the deputies that it represents and other organizations consistent with the goals of the ADDA and the furtherance of the administration of justice and public safety";

c. Paragraph 1.3.4: "To promote career service in government";

d. Paragraph 1.3.5: "To provide research and educational services and activities designed to assist members and other organizations consistent with the goals of the ADDA."

3. Article VI, Section 3, Paragraph 6.3 of the Bylaws also specifically provide for engaging in matters including "litigation" by the ADDA.

4. Attached hereto as **Exhibit 15** is the written policy of the Los Angeles County District Attorney's Office regarding the charging and disposition of prior strikes under the Three Strikes Law that was in effect prior to Respondents' adoption of the Special Directives. Section 12.05 provides as follows and is highlighted in yellow in the attachment: "***All qualifying prior***

felony convictions shall be alleged in the pleadings pursuant to Penal Code § 1170.12(d)(1). Prior to seeking dismissal of any strike, the prior strike case files shall be reviewed, if available, in order to fairly evaluate mitigating and aggravating factors. If it is determined that proof of a prior strike cannot be obtained or that the alleged strike is inapplicable, dismissal of the strike shall be sought after obtaining Head Deputy approval." (Emphasis added.) Thus, under this policy, deputy district attorneys are required to plead and prove prior strikes where they determine that such strikes exist. A deputy district attorney may then move to dismiss the prior strike if he or she is subsequently unable to obtain sufficient proof of the strike, or if the interests of justice otherwise require dismissal of the strikes.

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.

Michele Hanisee

Michele Hanisee

EXHIBIT 11

Metropolitan News-Enterprise

Monday, December 28, 2020

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Gascón Told by Staff That Policies Don't Comport With Law:

Appellate Division Says Appeals Courts Would Not Agree With D.A. That a Judge Is Obliged to Grant Motion of Prosecution To Delete Enhancement Allegations; Notes Possibility of Lawsuit Over Three-Strikes Policy

By a MetNews Staff Writer

District Attorney George Gascón has been told by his office's Appellate Division that the appeals courts would find no merit in his contention that a judge is obliged to blot out a strike allegation whenever a prosecutor requests it, and has been warned that his effort to thwart the Three-Strikes Law by ordering that no enhancements be sought based on prior strikes could be subject to a challenge in a taxpayer's action, internal documents show.

The advice came in two memos, one on Dec. 9—two days after he took office and immediately proceeded to issue nine "special directives"—and one the following day. One of his orders, Special Directive 20-08, mandated that "sentence enhancements or other sentencing allegations, including under the Three Strikes law, shall not be filed in any cases and shall be withdrawn in pending matters."

On Dec. 18, Gascón backed down to the extent of permitting enhancement allegations to be alleged, and not seeking to withdraw those previously made under the administration of his predecessor, Jackie Lacey, "in cases involving the most vulnerable victims"—such as cases where physical or sexual abuse of children or the elderly is alleged—"and in specified extraordinary circumstances." However, he stuck with his position that his office "will not pursue prior strike enhancements" or certain other enhancements.

Statutory Compulsion

A Dec. 9 unsigned Appellate Division memo to Kellyjean Chun, director of the office's Bureau of Prosecution Support Operations, sets forth that, "by their plain terms," two Penal Code provisions—§1170.12(d)(1) and §667(f)(1)—"require the prosecution to plead and prove all known strike priors." It notes the prospect of a deputy district attorney subsequently moving, pursuant to Penal Code §1385, to scrap the allegation "in the furtherance of justice" or because it can't be proven.

The memo cites a Jan. 19, 1996 opinion by then-Acting Presiding Justice Norman Epstein of this district's Div. Four (later presiding justice, now retired) in *People v. Kilborn* which holds constitutional the limitations on a district attorney's charging discretion."

"Thus, absent a legislative change or intervening case law, the prosecutor must charge all known strikes," the memo says, observing:

"The district attorney's office has no legitimate interest in having a policy directly contrary to law."

Taxpayer Action

Pointing to the prospect of a taxpayer's action to enjoin implementation of that policy, it acknowledges that the California Supreme Court, in its 1991 decision in *Dix v. Superior Court*, reversed a Court of Appeal determination that a crime victim had standing to oppose a resentencing petition by his assaulter, saying, in an opinion by then-Justice Marvin Baxter (now retired):

"Neither a crime victim nor any other member of the public has general standing to intervene in an ongoing criminal proceeding against another person."

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BGR Browne George Ross O'Brien Annaguey & Ellis LLP

2121 Avenue of the Stars, Suite 2800
Los Angeles, California 90067
T (310) 274-7100 F (310) 275-5697

Eric M. George
egeorge@bgrfirm.com
Admitted in California,
New York and District of Columbia

File No. 9995-970

January 7, 2021

Via E-Mail and U.S. Mail

Ruth Low, Special Assistant
Denise Fox, Senior Secretary
Public Records Act Contacts
Los Angeles County District Attorney's Office
211 W. Temple St.
Los Angeles, CA 90012
E-Mail: rlow@da.lacounty.gov
dfox@da.lacounty.gov

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cc: Robert Dugdale
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EXHIBIT A

Metropolitan News-Enterprise

Monday, December 28, 2020

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Gascón Told by Staff That Policies Don't Comport With Law:

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EXHIBIT 13

COUNTY OF LOS ANGELES
OFFICE OF THE COUNTY COUNSEL

648 KENNETH HAHN HALL OF ADMINISTRATION
500 WEST TEMPLE STREET
LOS ANGELES, CALIFORNIA 90012-2713

TELEPHONE
(213) 974-1828
FACSIMILE
(213) 687-8822
TDD
(213) 633-0901
E-MAIL
jmccaverty@counsel.lacounty.gov

RODRIGO A. CASTRO-SILVA
County Counsel

January 19, 2021

Mr. Eric M. George, Esq.
Browne George Ross O'Brien Annaguey & Ellis, LLP
2121 Avenue of the Stars, Suite 2800
Los Angeles, California 90067

Re: Public Records Act Request Dated January 7, 2021

Dear Mr. George:

This letter is in response to your Public Records Act request dated and received by the District Attorney's Office ("DA") on January 7, 2021, requesting the following:

> "The three memoranda regarding the lawfulness or ethical implications of any of District Attorney George Gascón's Special Directives issued on or after December 7,2020, including, but not limited to, the memoranda referenced in the attached Exhibit A regarding the legality of Special Directive 20-08, 20-08.1, and/or 20-08.2, and any subsequent amendments."

Please be advised that records potentially responsive to your request are exempt from disclosure pursuant to Government Code section 6254 under the following subsections:

(a) Preliminary drafts, notes, or interagency or intra agency memoranda that are not retained by the public agency in the ordinary course of business, if the public interest in withholding those records clearly outweighs the public interest in disclosure. (Government Code section 6254(a));

(k) Records protected by federal and State-law, including, but not limited to, provisions of the Evidence Code and Code of Civil Procedure, relating to privilege and common law privileges (Government Code section 6254(k)). Specifically, Government Code section 6254(k) allows an agency to withhold records, pursuant to federal or State law, concerning official information privilege, deliberative process privilege and the work product privilege.

(Evid. Code, § 952 et seq.; Evid. Code, § 1040; Code Civ. Proc., §§ 2018.020 and 2018.030; *Times Mirror Company v. Superior Court of Sacramento County* (1991) 53 Cal.3d 1325; Rogers v. Superior Court (1993) 19 Cal.App.4th 469.) Responsive records that contain attorney work product or show the DA's deliberative process are, therefore, exempt from disclosure.

In addition, Government Code section 6255(a) allows an agency to withhold a record when the public interest served by withholding the record clearly outweighs the public interest in disclosure. Some responsive records contain information that reveals the County's decision-making process. The public interest in protecting the deliberative process of government agencies clearly outweighs the public interest in disclosure. Otherwise responsive records that reveal the County's deliberative process are, therefore, exempt from disclosure.

Based upon the foregoing, the DA is unable to disclose any records responsive to your request. Should you have any further questions, please do not hesitate to contact me.

Very truly yours,

RODRIGO A. CASTRO-SILVA
County Counsel

By
JONATHAN McCAVERTY
Principal Deputy County Counsel
General Litigation Division

APPROVED AND RELEASED:

NICOLE DAVIS TINKHAM
Acting Chief Deputy

JM:el

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EXHIBIT 14

BYLAWS
OF THE ASSOCIATION OF DEPUTY DISTRICT ATTORNEYS A-22

(APPROVED BY THE BOARD OF DIRECTORS 08-28-18)*

TABLE OF CONTENTS

ARTICLE I
NAME, AFFILIATIONS, PLACE OF BUSINESS, AND PURPOSE

Section 1. Name

1.1.1 The organization shall be known as the Association of Deputy District Attorneys (hereinafter, ADDA).

1.1.2 The ADDA is responsible for representing Bargaining Unit 801, certified by The Los Angeles County Employee Relations Committee (ERCOM) on March 24, 2008.

Section 2. Principal Office

1.2 The ADDA's board of directors shall fix the principal place of business of the ADDA at any place within Los Angeles County, California.

Section 3. Purpose

The purpose of the ADDA is:

1.3.1 To meet and confer in good faith with Los Angeles County District Attorney (LADA) management and Los Angeles County on behalf of its members concerning wages, hours, all other terms and conditions of employment, issues arising under the terms and conditions of employment, and matters arising under the Memorandum of Understanding and applicable state law;

1.3.2 To promote the welfare of the membership and to provide a voice in the determination of the terms and conditions of employment particularly through the collective bargaining process;

1.3.3 To promote legislation beneficial to the ADDA, the deputies that it represents and other organizations consistent with the goals of the ADDA and the furtherance of the administration of justice and public safety;

1.3.4 To promote career service in government;

1.3.5 To provide research and educational services and activities designed to assist members and other organizations consistent with the goals of the ADDA;

1.3.6 To foster cooperation among members and organizations consistent with the goals of the ADDA;

1.3.7 To the extent required by law and as provided in the Memorandum of Understanding, provide representation in grievance and disciplinary proceedings

to members of the bargaining unit upon request of the represented class member, as long as the member has no other representative;

1.3.8 To endorse in elections and for offices as the board determines.

ARTICLE II
MEMBERSHIP AND DUES

Section 1. Membership

2.1.1 Membership in the ADDA is limited to Los Angeles County Deputy District Attorneys Grades I through IV.

2.1.2 An applicant for membership will become a member upon commencement of dues payment made in the manner determined by the board of directors. A member in good standing is one whose dues are not more than fifteen (15) days in arrears.

Section 2. Membership Application

2.2 Application for membership shall be made on a standard application form as approved by the board of directors.

Section 3. Dues

2.3.1 Membership dues shall be collected by direct payroll deduction. In the event payroll deduction is precluded by law then the board of directors shall establish an alternate method of collection.

2.3.2 Monthly dues of the ADDA shall be calculated at 0.5% of the top step base salary of each Grade (Grade I, II, III, or IV) per member.

2.3.3 Only a full-service member of the bargaining unit whose dues are current shall be considered “in good standing” and shall be eligible to participate in all activities of the ADDA.

2.3.4 If requested within thirty (30) days of last salary received, a member who has not received a salary for more than twenty (20) days in any calendar month who does not receive unemployment compensation or sick leave pay or other remuneration, may, at the discretion of the board of directors, be entitled to a dues waiver for the period of unemployment.

ARTICLE VI
BOARD MEETINGS

Section 1. Conduct of Meetings

6.1.1 Meetings of the ADDA board shall be generally guided by Robert's Rules of Order.

6.1.2 Officers, directors, and guests shall conduct themselves in conformity with Article IV, Section 4.2 of these bylaws.

6.1.3 Officers and directors may participate in person or telephonically.

6.1.4 The presence in person of four (4) officers and directors shall constitute a quorum for the transaction of business. The quorum shall be established at the beginning of the meeting and business may continue until concluded despite the departure of any officers and directors as long as at least three (3) remain. Unless otherwise specified, any action taken must be approved by at least a majority of those present. In the event the membership of the board of directors falls below four (4) members, a majority of the remaining members may constitute a quorum to conduct business pending filling of vacancies according to these bylaws.

Section 2. Regular Meetings

6.2.1 The board of directors shall meet at least monthly on the third Tuesday of the month. The president shall chair the meeting and establish the agenda for the meeting with the input from board members. The meeting agenda shall be sent at least five (5) days prior to the meeting by certified mail or e-mail to the last known e-mail address of the board member.

6.2.2 Any full-service member who wishes to attend a regular board meeting shall notify the secretary or his/her designee at least seven (7) business days prior to the meeting.

Section 3. Executive Session

6.3 The ADDA board may hold any portion of its meeting as an executive session, upon the request of the president or a majority of the officers and directors present. Executive session shall be used to handle matters of a sensitive nature, including but not limited to personnel matters, litigation, or negotiating strategy. Participants at the executive session shall be limited to the board of directors, its counsel and staff, and any people designated to assist in resolution of the matter. Anyone, including a board member who has a personal interest in the outcome of any subject discussed or voted on during an executive session shall be excluded from the executive session after being given an opportunity to be heard.

THEREFORE, in the event these Bylaws are ratified by the membership:

Article V, Section 1, 5.1.1, of the new Bylaws, which calls for seven (7) directors, consisting of four (4) officers and three (3) directors, shall take precedence over Article I, 5.1.1 of the existing Bylaws.

Those members who stand for election and who receive the seven (7) highest number of votes will be deemed elected as board members.

Officers shall be elected pursuant to Section 5.1.1 of the new Bylaws.

Article V, Section 1, 5.1.2 of the existing Bylaws shall control in the event of a challenge during the nomination process.

Article V, Section 1, 5.1.4 of the existing Bylaws shall fix the minimum qualification period for this election only.

EXHIBIT 15

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3.02 THREE STRIKES

The Three Strikes law, Penal Code §§ 1170.12(a)-(d), provides a powerful tool for obtaining life sentences in cases involving habitual criminal offenders. However, unless used judiciously, it also has the potential for injustice and abuse in the form of disproportionately harsh sentences for relatively minor crimes. The Three Strikes statutory scheme appropriately authorizes the use of prosecutorial discretion in its implementation. Deputies have a legal and ethical obligation to exercise this discretion in a manner that assures proportionality, evenhanded application, predictability and consistency. Moreover, the potential for coercive plea bargaining must be avoided.

3.02.01 CHARGING POLICY

In all instances in which a third strike case is pursued as a second strike case, Penal Code § 667.5(b) priors shall be plead and proved or admitted only when the priors are for sexually violent offenses as defined in Welfare and Institution Code § 6600(b).

For Three Strikes case settlement rules, see the Three Strikes section of Chapter 12, Felony Case Settlement Policy.

3.03 JUVENILE CRIME CHARGING

The Juvenile Division prosecutes all crimes committed by minors countywide. The charging standards and guidelines used in juvenile cases are the same as for adult prosecutions. Deputies should refer to the most recent edition of the *Juvenile Delinquency Practice Manual* published by the Office for detailed descriptions of juvenile law and procedures. In any case where a person under the age of 18 is accused of a crime, and law enforcement is seeking charges, the case shall be presented to the appropriate Juvenile Division Office for filing consideration.

The provisions of Proposition 21 involving the discretionary direct filing of juveniles in adult court under certain circumstances were abrogated by Proposition 57. Pursuant to Proposition 57 (Prop 57), only juvenile offices may consider filing charges in cases in which a minor is accused of a crime.

In order to charge a minor in adult court, the prosecution shall make a "Motion to Transfer Minor from Juvenile Court to a Court of Criminal Jurisdiction" in the appropriate juvenile court. (WIC § 707(a).) The approval of the Head Deputy of the Juvenile Division is required to authorize a Motion to Transfer.

The Juvenile Division Head Deputy shall consider the following factors:

- Degree of criminal sophistication exhibited by the minor;
- Whether the minor can be rehabilitated prior to the expiration of the juvenile court's jurisdiction;
- The minor's previous delinquent history;
- Success of previous attempts by the juvenile court to rehabilitate the minor;

Upon successful completion of pretrial diversion, and dismissal of the case, a disposition report need not be prepared.

Deputies shall obtain *prior* Head Deputy or Deputy-in-Charge approval and provide an explanation in the Disposition Report when:

- A defendant pleads guilty to a charge or charges that could result in less than the maximum sentence;
- A defendant, charged with multiple offenses separately punishable under Penal Code § 654, does not plead guilty to all offenses;
- A deputy strikes a special enhancement, prior conviction or probation ineligibility allegation as part of a case settlement; or
- A defendant is allowed to plead guilty to a misdemeanor.

12.04 SENTENCE COMMITMENTS IN FELONY CASES

The rights of the victim and the public are the most important considerations in making a sentence recommendation. When appropriate, deputies are encouraged to solicit input from the investigating officer regarding a sentence commitment. All sentence commitments must be based on an objective evaluation of the case and not on a particular judge's sentencing practices.

12.04.01 FELONY SENTENCING GUIDELINES - CALIFORNIA RULES OF COURT

The California Rules of Court establish the basic guidelines for any felony sentence commitment. Rule 4.420(b) provides that selection of the lower term is justified only if, after a consideration of all the relevant facts, the circumstances in mitigation outweigh the circumstances in aggravation. Accordingly, no commitment to a low term prison sentence shall be made unless both of the following requirements are met:

- The defendant and the crime(s) committed meet one or more of the circumstances in mitigation as stated in Rule 4.423; and
- The circumstances in mitigation clearly outweigh the circumstances in aggravation as stated in Rule 4.421.

Any commitment for concurrent or consecutive sentences must be based upon the criteria affecting concurrent or consecutive sentences in Rule 4.425. A "no immediate state prison" commitment must be based upon the criteria regarding probation in Rule 4.414 and the criteria affecting probation in unusual cases in Rule 4.413.

12.04.02 APPROVAL FOR FELONY DISPOSITIONS

A Disposition Report shall be prepared at the conclusion of every felony case. Within 10 business days after a case has concluded, the deputy handling the case shall prepare a Disposition Report, sign it, place it in the felony case file and submit the file to the Head Deputy, Head Deputy's designee, or Deputy-in-Charge for review. The Head Deputy, Head Deputy's

designee, or Deputy-in-Charge shall review the file to ensure it is in proper form for closing, sign the Disposition Report and forward the file to support staff for case closing.

Disposition reports are to be completed at the conclusion of every felony case with the following exceptions. Cases in which the defendant receives pretrial diversion, pursuant to Penal Code § 1000 et seq., or is sentenced pursuant to Proposition 36 are exempt from this requirement, except where one or more counts or one or more special allegations are dismissed in order to render a defendant eligible for those programs. Under those circumstances, a disposition report shall be completed. Disposition reports shall be reviewed and signed by the Head Deputy or the Head Deputy's designee.

Upon successful completion of pretrial diversion, and dismissal of the case, a disposition report need not be prepared.

A deputy shall obtain *prior* Head Deputy or Deputy-in-Charge approval and provide an explanation in the Disposition Report when:

- A defendant pleads guilty to an alternative felony charge with a misdemeanor sentence commitment; or
- A defendant pleads guilty to a felony charge with a "no immediate state prison" sentence commitment.

12.04.03 SENTENCING TERMS - EXPLANATION TO DEFENDANT

If a defendant pleads guilty to a felony charge with a sentence commitment, the deputy shall advise the defendant at the time of the plea that the People will urge the court to set aside the plea if the probation report or any other source reveals any facts or circumstances indicating the sentence was contrary to the California Rules of Court and/or Penal Code § 1192.7.

Prosecutors currently have a range of felony sentencing options available to them in criminal cases. A court can impose a grant of formal probation, with or without local jail time or prison time suspended. Alternatively, a court can impose a prison sentence, whether that is served locally or in traditional state prison. A split sentence is an intermediate ground: It is a prison term served locally in which the available time is "split" between a custodial portion (served in the county jail as local prison) and a supervisory portion (referred to as "mandatory supervision").

If a defendant pleads guilty to a felony charge and is placed on probation, the deputy shall advise the defendant, on the record, of the possibility of a subsequent local or state prison commitment, or the imposition of a split sentence, if the defendant violates the terms or conditions of probation. The deputy shall explain the minimum and maximum local or state prison terms, including potential parole terms.

At the time of a plea, deputies shall state the disposition on the record in open court. Deputies shall not make off-the-record dispositions, agreements or understandings unless a matter legitimately requires confidentiality.

12.04.04 RESTITUTION

Deputies are to seek the maximum appropriate restitution fine and penalty assessment. In addition, deputies shall seek restitution for the victim for actual losses or damages.

12.04.05 STIPULATION TO PROBABLE CAUSE

Deputies shall not attempt to obtain a stipulation that there was probable cause to arrest a defendant in exchange for a reduction or dismissal of a criminal charge. The California Rules of Professional Conduct, Rule 3.10 (Threatening Criminal, Administrative, or Disciplinary Charges), prohibit an attorney from threatening to present a criminal charge to obtain an advantage in a civil dispute.

12.04.06 CASE SETTLEMENT - VICTIM IMPACT PROGRAM CASES

Case settlement offers on all felony cases assigned to be vertically prosecuted by the Victim Impact Program (VIP) shall be approved by the VIP Deputy-in-Charge (VIP DIC). All applicable felony case settlement policies contained in the Legal Policies Manual, special directives and general office memoranda shall be followed by the VIP DIC in making such offers. This policy does not supersede any authority given to a Head Deputy District Attorney within the Legal Policies Manual, special directives or general office memoranda, nor does it preclude the Head Deputy District Attorney's authority to make felony case settlement offers.

Before such an offer is communicated to defense counsel, all reasonable efforts shall be made to notify the victim and to provide the victim with an opportunity to be heard.

12.05 THREE STRIKES

All qualifying prior felony convictions shall be alleged in the pleadings pursuant to Penal Code § 1170.12(d)(1). Prior to seeking dismissal of any strike, the prior strike case files shall be reviewed, if available, in order to fairly evaluate mitigating and aggravating factors. If it is determined that proof of a prior strike cannot be obtained or that the alleged strike is inapplicable, dismissal of the strike shall be sought after obtaining Head Deputy approval.

12.05.01 THIRD STRIKE CASES

If a defendant has two or more qualifying prior felony convictions, the case shall be filed as a third strike case when at least one of the new charged offenses is pled as a/an:

- Serious or violent felony;
- Controlled substance offense with an allegation pursuant to Health and Safety Code §§ 11370.4 or 11379.8 after being admitted or found true (weight enhancement);
- Felony offense pursuant to Penal Code § 261.5(d) (sexual intercourse by a person over 21 upon a minor under the age of 16), or pursuant to § 262 (spousal rape);
- Felony offense requiring mandatory sex offender registration pursuant to Penal Code § 290(c), other than the following: § 266 (enticing a minor into prostitution); § 285

(incest); § 286(b)(1) (sodomy with a minor); § 286(e) (sodomy while confined in state prison); § 288a(b)(1) (oral copulation with a minor); 288a(e) (oral copulation while confined in state prison); § 314 (indecent exposure); or § 311.11 (possession of child pornography).
- Offense during which the defendant used a firearm, was armed with a firearm or deadly weapon, or intended to cause great bodily injury to another person.

If the defendant has two or more qualifying prior felony convictions, but none of the new charges offenses are enumerated in 12.05.01, a number of prior convictions will qualify a defendant for three strikes sentencing. These prior convictions include:

- A sexually violent offense, as defined in Welfare and Institutions Code § 6600(b);
- Oral copulation with a child who is under 14 years of age, and who is more than 10 years younger than he or she as defined by Penal Code § 288a; sodomy with another person who is under 14 years of age and more than 10 years younger than he or she as defined by § 286; or sexual penetration with another person who is under 14 years of age, and who is more than 10 years younger than he or she, as defined by § 289;
- A lewd or lascivious act involving a child under 14 years of age, in violation of § 288;
- Homicide and attempted homicide offenses within the meaning of §§ 187 (murder) through 191.5 (vehicular manslaughter while intoxicated);
- Solicitation to commit murder as defined in § 653f;
- Possession of a weapon of mass destruction, as defined in Penal Code § 11418(a)(1);
- Assault upon a peace officer or firefighter with a machine gun as defined in § 245(d)(3);
- Any serious and/or violent felony offense punishable in California by life imprisonment or death.

If the current offense does not involve the use or possession of a firearm or deadly weapon, injury to a victim, or violence or the threat of violence, a Head Deputy may authorize seeking dismissal of a strike after consideration of all of the following:

- Remoteness of the strikes;
- Whether the strikes involved the use or possession of a weapon, injury to a victim, violence or the threat of violence;
- Whether the strikes arose from one incident or transaction; and
- Any other mitigating or aggravating factors enumerated in the California Rules of Court, Rules 4.421 and 4.423.

12.05.02 SECOND STRIKE CASES

Unless the above criteria in LPM §12.05.01 for charging a third strike case are met, a case against a defendant shall be filed as a second strike case.

In all instances in which a third strike case is pursued as a second strike case, Penal Code § 667.5(b) priors shall be plead and proved or admitted only when the priors are for sexually violent offenses as defined in Welfare and Institution Code § 6600(b).

12.05.03 DISPOSITION REPORT

If a Head Deputy authorizes dismissal of a strike in a third strike case, the Disposition Report shall discuss the applicability of the factors set forth in this case settlement policy.

12.05.04 SECOND STRIKE CASE DISPOSITIONS

When a case is charged as a second strike case, a Head Deputy may authorize the dismissal of strike(s) in the interests of justice and agree to an appropriate prison or probationary sentence only when all of the following factors exist:

- The strike offense occurred more than 10 years ago;
- The strike offense did not involve the use or possession of a firearm or deadly weapon, injury to a victim, violence or the threat of violence;
- There exist mitigating factors enumerated in the California Rules of Court, Rules 4.421 and 4.423.

Whenever a Head Deputy authorizes the dismissal of a strike an explanation shall be included in the Disposition Report.

12.05.05 CASE SETTLEMENT

The decision whether to seek dismissal of a strike shall be made at the earliest practical stage. Once that decision is made, it shall be promptly communicated to the court and defense counsel. This procedure shall be followed even if a defendant chooses to proceed to trial.

12.05.06 EARLY RELEASE OF SECOND STRIKE INMATES

The California Department of Corrections and Rehabilitation (CDCR) is required to lower inmate population by granting early parole to inmates convicted of non-violent offenses who have a prior strike conviction (i.e., second strike inmates). Specifically, CDCR evaluates second strike inmates convicted of non-violent offenses to determine if parole should be granted after the inmate has served 50% of the sentence. The CDCR created a protocol that was implemented by the Board of Parole Hearings (BPH). As part of that protocol, the BPH must request a written letter from the District Attorney's Office in each second strike case where the Office objects to early parole.

The Office must provide the written response within 30 calendar days of the date of the BPH's letter notifying the Office it is considering granting early parole. Upon receipt of any correspondence from the BPH or the CDCR on early parole of second strike inmates, the deputy receiving the notice shall immediately contact the Head Deputy of the Parole Division. The Parole Division shall contact the Bureau of Victim Services to ensure efforts are made to contact any victim(s) impacted by the potential early release of the inmate.

12.08.03 CASE SETTLEMENT NOTIFICATION TO HATE CRIMES UNIT

Deputies shall notify the Hate Crimes Unit of all hate crimes case settlements. Penal Code § 13023 requires local prosecutorial agencies to report all hate crimes statistics to the Attorney General's Office. The Hate Crimes Unit collects, compiles and submits these statistics.

Commentary

Hate crimes have far-reaching social implications. Hate crimes not only harm those who are victims, but also generate concern, fear and anger within vulnerable populations and the general public. Hate crimes are serious offenses; at sentencing deputies shall emphasize the long-term damage to the victim and the community that crimes committed out of hate cause. Deputies shall make every effort to obtain a sentence that is substantial yet appropriate in light of the charges and the facts.

12.09 ARMED OR VIOLENT OFFENDERS

Defendants charged with felonies involving violence and/or weapons listed in Penal Code § 1192.7 must plead guilty to every count and admit every enhancement and special allegation sufficient to expose them to the maximum sentence. The term "maximum sentence" is the maximum sentence that can lawfully be imposed considering the court rules, case law and statutes relating to sentencing. It is Office policy that all prior felony convictions shall be alleged in the pleadings at the earliest possible time.

In any case involving violence and/or weapons in which a judge gives the defendant an "indicated" sentence lower than the maximum sentence, the deputy shall state on the record the People's opposition to the indicated sentence and require the defendant to plead guilty to all charges and admit all enhancements and special allegations.

12.09.01 PRIOR APPROVAL REQUIRED FOR CASE DISPOSITION

A Head Deputy or Deputy-in-Charge must approve any departure from this policy prior to the case disposition and then only for the following reasons:

- There is insufficient evidence to prove the charge, enhancement or special allegation;
- A necessary material witness cannot be located; or
- In exceptional cases, a reduction or dismissal is in the interests of justice.

With the exception of approving a disposition in the interests of justice, a Head Deputy may delegate approval for dispositions outlined above to a Deputy District Attorney IV.

12.10 DOMESTIC VIOLENCE

12.10.01 FELONY SENTENCING

A deputy assigned to vertically prosecute a felony domestic violence case shall vigorously seek a state prison sentence or one year in the county jail if the court grants probation. A Head Deputy

Deputies shall advise defendants who plead guilty to a sexually violent offense that if the defendant is found to meet the criteria set forth in Welfare and Institutions Code §§ 6600-6602, the defendant may be involuntarily committed to state mental hospital for two years following the completion of his or her prison sentence. Moreover, the involuntary commitment may be renewed, in two year increments, for as long as the defendant continues to meet these criteria, and could result in a commitment for life.

12.12 ASSAULTS ON PEACE OFFICERS

A deputy assigned to prosecute a felony assault or battery upon a peace officer shall seek a state prison sentence when the defendant:

- Used a deadly or dangerous weapon to commit the assault or battery;
- Inflicted other than a minor injury regardless of the means used; or
- Has a history of assaultive conduct or other than a minor criminal history.

If probation is appropriate, deputies shall seek a suspended state prison sentence. A Head Deputy must approve any sentencing recommendation that includes less than one year in county jail.

12.13 DEPARTURE FROM POLICY

The Felony Case Settlement Policy shall be strictly adhered to in all cases enumerated in Penal Code § 1192.7. Departure from this policy may be made in cases not enumerated in Penal Code § 1192.7 in two instances:

- When the admissible evidence is legally insufficient to establish the defendant's guilt; or
- When unusual or extraordinary circumstances exist that demand a departure in the interests of justice.

Unusual or extraordinary circumstances include circumstances that will result in indirect or collateral consequences to the defendant in addition to the direct consequences of the conviction.

Commentary

Collateral consequences can, in some instances, have a greater adverse impact on a defendant than the conviction alone. When the potential collateral consequences would result in a "punishment" disproportionate to the punishment other defendants would receive for the same crime, a departure from policy may be warranted.

California Rules of Court Rule 4.414 lists the criteria to be considered when deciding whether to grant probation for a defendant who has suffered a felony conviction. These criteria are divided into factors relating to the crime and factors relating to the defendant. One of the enumerated factors relating to the defendant is: "The adverse collateral consequences on the defendant's life resulting from the felony conviction."

A departure from policy based on collateral consequences may only be made in unusual or extraordinary circumstances that demand a departure in the interest of justice.

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 REPLY IN SUPPORT OF ORDER TO SHOW CAUSE RE: PRELIMINARY INJUNCTION; SUPPLEMENTAL DECLARATION OF ERIC M. GEORGE; SUPPLEMENTAL DECLARATION OF MICHELE HANISEE** 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

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

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