

Ct. App. No. B310845

**IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SEVEN**

THE ASSOCIATION OF DEPUTY DISTRICT ATTORNEYS FOR LOS ANGELES COUNTY,
Petitioner and Respondent,

v.

GEORGE GASCÓN, AS DISTRICT ATTORNEY, ETC. ET AL.,
Appellants.

After Grant of Motion for Preliminary Injunction on February 8, 2021, by the
Hon. James C. Chalfant, Judge of the
Superior Court of California for the County of Los Angeles,
Case No. 20STCP04250

**APPELLANTS' APPENDIX
VOLUME NO. 2 OF 2 (A291-A533)**

STEPHANIE YONEKURA
(Bar No. 187131)
HOGAN LOVELLS US LLP
1999 Avenue of the Stars
Suite 1400
Los Angeles, CA 90067
Telephone: (310) 785-4600
Facsimile: (310) 785-4601
stephanie.yonekura
@hoganlovells.com

** Admitted only in New York.
Supervised by principals of the
firm admitted in D.C.*

NEAL KUMAR KATYAL
(admitted pro hac vice)
JO-ANN TAMILA SAGAR*
(admitted pro hac vice)
DANIELLE DESAULNIERS STEMPEL
(admitted pro hac vice)
HOGAN LOVELLS US LLP
555 Thirteenth St., NW
Washington, DC 20004
Telephone: (202) 637-5600
Facsimile: (202) 637-5910
neal.katyal@hoganlovells.com
jo-ann.sagar@hoganlovells.com
danielle.stempel@hoganlovells.com

*Attorneys for Appellants George Gascón
and Los Angeles District Attorney's Office
Additional counsel on inside cover*

RODRIGO A. CASTRO
(Bar No. 185251)
ADRIAN G. GRAGAS
(Bar No. 150698)
JONATHAN C. MCCAVERY
(Bar No. 210922)
OFFICE OF COUNTY COUNSEL
500 West Temple St.
Floor 6
Los Angeles, CA 90012
Telephone: (213) 974-1828
Facsimile: (213) 687-8822
rcastro-silva@counsel.
lacounty.gov
agragas@counsel.lacounty.gov
jmccavery@counsel.
lacounty.gov

ROBERT E. DUGDALE
(Bar No. 167258)
LAURA W. BRILL
(Bar No. 195889)
KENDALL BRILL & KELLY LLP
10100 Santa Monica Blvd.
Suite 1725
Los Angeles, CA 90067
Telephone: (310) 556-2700
Facsimile: (310) 556-2705
rdugale@kbbkfirm.com
lbrill@kbbkfirm.com

*Attorneys for Appellants George Gascón
and Los Angeles District Attorney's Office*

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KENDALL BRILL & KELLY LLP
Robert E. Dugdale (167258)
rdugdale@kbfkfirm.com
10100 Santa Monica Blvd., Suite 1725
Los Angeles, California 90067
Telephone: 310.556.2700
Facsimile: 310.556.2705

Attorneys for Defendants and Respondents
George Gascón, in his official capacity as District
Attorney for the County of Los Angeles, and Los
Angeles County District Attorney's Office

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES, CENTRAL DISTRICT

ASSOCIATION OF DEPUTY DISTRICT
ATTORNEYS FOR LOS ANGELES
COUNTY,

Plaintiff and Petitioner,

v.

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. _____

OPPOSITION TO *EX PARTE*
APPLICATION FOR TRO/OSC RE:
PRELIMINARY INJUNCTION

*Accompanying Documents: Declaration of
Robert E. Dugdale and [Proposed] Order*

Date: December 30, 2020

Time: 8:30 a.m.

Dept.: TBD (82/85/86)

1 **I. INTRODUCTION**

2 Approximately 12 hours before today’s hearing, at 7:43 p.m. on December 29, 2020, Petitioner
3 Association of Deputy District Attorneys for Los Angeles County (“Petitioner”) purported to serve on
4 Respondents George Gascón and the Los Angeles County District Attorney’s Office (“Respondents”)
5 a copy of its *ex parte* application for a Temporary Restraining Order and an OSC re preliminary
6 injunction. Petitioner was required to and easily could have served the application on Respondents
7 sooner. But it declined to do so, in an apparent effort to hinder this opposition.

8 Despite Petitioner’s efforts to steamroll Respondents and this Court with its untimely and
9 overwrought papers, one thing is very clear: there is no possible basis for granting a TRO application
10 on an emergency, *ex parte* basis. The application—on its face—seeks to enjoin actions that arose
11 more than **22 days ago**. On December 7, 2020, newly sworn-in District Attorney Gascón announced
12 sweeping reform directives to remove certain sentencing enhancements in County prosecutions—
13 directives that he had long-ago previewed during his campaign trail and issued, as promised, upon his
14 election. Petitioner now demands that this Court enjoin Respondents from enforcing these weeks-old
15 directives, right this instance.

16 Plainly, there is no “irreparable harm, “immediate danger,” or other emergency to justify the
17 requested *ex parte* relief, when Petitioner seeks to enjoin the enforcement of directives that have been
18 in effect for more than three weeks. *See* CAL. R. CT. 3.1202(c). There is no reason why Petitioner
19 could not have brought an application on regular notice weeks ago, or why it cannot bring its
20 application on regular time now, to give the Court and Respondents a chance to reasonably consider
21 its arguments. Indeed, the application presents exactly the type of complex and far-reaching factual
22 and legal issues that the parties must be permitted to fully brief, including the constitutionality of the
23 directives.

24 No other consideration—including Petitioner’s probability of success on the merits or the
25 balance of interim harms—matters, absent this threshold showing by Petitioner of imminent harm.
26 *See Newsom v. Superior Court of Sutter Cty.*, 51 Cal. App. 5th 1093, 1097 (2020) (holding that a trial
27 court should simply “deny an *ex parte* application absent the requisite showing” of imminent harm).
28 *O’Connell v. Superior Court*, 141 Cal. App. 4th 1452, 1481 (2006) (reversing grant of preliminary

1 injunction in absence of “imminent irreparable injury”). But even if it did, Petitioner has failed to
2 meet its burden as to any such additional considerations.

3 Petitioner has brought a meritless application for a TRO, has done so needlessly on an *ex parte*
4 basis, and has failed to timely or properly serve or file the application in an effort to deprive
5 Respondents of an opportunity to respond. The Court should not countenance these tactics. It should
6 deny *ex parte* relief.

7 **II. BRIEF SUMMARY OF FACTS**

8 On November 3, 2020, Respondent George Gascón was elected to the office of District
9 Attorney for the County of Los Angeles by an overwhelming majority of the Los Angeles County
10 electorate. One of the central tenets of his election platform was criminal justice reform, including
11 reform of California’s controversial “three strikes” sentencing law.

12 When he assumed office on December 7, 2020, Gascón issued a number of special directives
13 implementing the policies that he had long championed throughout his campaign, including special
14 directives directed at sentencing enhancements that have been shown to cause more recidivism and
15 criminal conduct. Each of the reforms instituted through the special directives will impact the
16 sentencing of thousands of criminal defendants throughout Los Angeles County.

17 Specifically, on December 7, 2020, Gascón issued Special Directive 20-08, which addressed
18 the application of certain sentencing enhancements, including the “three strikes” enhancement, citing
19 studies confirming “each additional sentence year causes a 4 to 7 percent increase in recidivism that
20 eventually outweighs the incapacitation benefit.” Special Directive 20-08 has been clarified and
21 amended on December 15, 2020 and December 18, 2020, respectively. Also on December 7, 2020,
22 Gascón issued Special Directive 20-14, directed at the length of sentences. These two directives—
23 issued on December 7, 2020—are the subject of Petitioner’s application.

24 **III. THE COURT SHOULD DENY THE *EX PARTE* APPLICATION**

25 **A. Petitioner Failed To Timely File Or Serve The Application**

26 As an initial matter, Petitioner’s deficient filing and service of the *ex parte* application
27 forecloses any relief. Petitioner has purported to bypass all mandatory e-filing and service rules that
28 required it to file the application by “no later than 10:00 a.m. the day before the *ex parte* hearing” and

1 serve the application on Respondents at “the first reasonable opportunity.” *See* Los Angeles Super
2 Court First Amended General Order (May 3, 2019);¹ Cal. R. Ct. 3.1206.

3 Petitioner served the application on Respondents’ counsel at 7:43 p.m.—*i.e.*, barely twelve
4 hours before the Court is scheduled to hear the application. *See* Dugdale Decl. at ¶ 3 & Ex. 2.
5 Petitioner apparently has yet to even file the application and is waiting to do so until the day of the *ex*
6 *parte* hearing. Petitioner maintains that it is exempt from any and all governing deadlines for filing
7 and service because the First Amended General Order provides that an “*ex parte* application filed
8 concurrently with a new complaint” need not be filed electronically. *Id.* at ¶ 5 & Ex. 2. Petitioner’s
9 argument is unavailing for a number of reasons.

10 First, nothing in the Order exempting certain *ex parte* filings from electronic filing purports to
11 alter the **deadline** for filing. Rather, the Order only appears to alter the **manner** in which the papers
12 must be filed—*i.e.*, to allow certain types of *ex parte* applications to be filed in person and during the
13 Court’s business hours, rather than electronically. Petitioner has not pointed to any rule exempting *ex*
14 *parte* filings from the deadline to file by 10:00 a.m. on the day before the hearing, which applies
15 regardless of the manner of filing.

16 Second, Petitioner did not serve the *ex parte* application at the first reasonable opportunity, as
17 required by the California Rules of Court. Cal. R. Ct. 3.1206. Instead, Petitioner waited until hours
18 after close of business on December 29, 2020 to serve the papers, at 7:43 p.m., despite having ample
19 opportunity to do so earlier in the day. *See* Dugdale Decl. at ¶ 3.

20 Moreover, even if there was some technical loophole permitting Petitioner’s late filing and
21 service here, Petitioner clearly violated the spirit of the *ex parte* procedures by filing and serving the
22 application at a time and in a manner designed to minimize Respondent’s opportunity to meaningfully
23 respond. *See Newsom*, 51 Cal. App. 5th at 1099 (“The goal of *ex parte* procedure may be expedited
24 relief, but the procedures are designed to ensure the participation, if possible, of the opposing party.”)

25 The unfairness of Petitioner’s gamesmanship is underscored by the fact that California, and
26 Los Angeles, specifically, is the epicenter of the COVID-19 pandemic. Yet, instead of working with

27
28 ¹ Available at <http://www.lacourt.org/division/efiling/pdf/GenOrdCivilEfiling.pdf>

1 Respondents’ counsel to discuss a reasonable briefing and hearing schedule for Petitioner’s
2 application, including safer ways to proceed by videoconference, Petitioner delayed serving its
3 application until the night before the *ex parte* hearing, long after the Court was closed, eliminating any
4 opportunity for Respondent’s counsel to set up a remote appearance by video or telephone and forcing
5 counsel to put himself and his family at risk for contracting COVID-19 during the holiday season by
6 appearing to oppose the application in person. These sharp tactics speak volumes about the bad faith
7 with which Petitioner is pursuing its *ex parte* application. Petitioner’s needless bringing of its
8 application on an *ex parte* basis and failure to comport with the governing filing and service
9 guidelines provide a reason—right at the outset—for the Court to deny it.

10 **B. There Is No Emergency Or Imminent Harm Justifying *Ex Parte* Relief**

11 Even if its application were timely, Petitioner has failed to meet any of the other hard-and-fast
12 requirements for its TRO application to be heard on an emergency, *ex parte* basis.

13 On an *ex parte* application for TRO, the primary consideration for the Court is whether
14 Petitioner would have been able to file a noticed preliminary injunction motion had it acted diligently
15 and without delay. If the Court so finds, it should deny the requested *ex parte* relief on those grounds
16 alone. As the Court of Appeal has put it, an application for a TRO “does not ... require this court to
17 weigh in on the scope or breadth” of the District Attorney’s powers or the substance of his directives.
18 *See Newsom*, 51 Cal. App. 5th at 1095. **“Rather, it raises narrow issues concerning an expedited**
19 **‘ex parte’ proceeding for interim declaratory relief and a temporary restraining order”** and
20 whether Petitioner made “the requisite substantive showing for use of an *ex parte* proceeding” by
21 presenting “competent evidence establishing imminent harm from the [District Attorney’s directive
22 requiring immediate action.” *Id.* (emphasis added).

23 In making this determination, the Court must heed that the “entry of any type of injunctive
24 relief has been described as a delicate judicial power, to be exercised with great caution” and “[t]his is
25 **doubly true** when granting relief on an expedited basis using an *ex parte* request for a temporary
26 restraining order rather than a properly noticed preliminary injunction.” *Newsom*, 51 Cal. App. 5th at
27 1097 (emphasis added). Specifically, where—as here—Petitioner seeks a TRO on an emergency, *ex*
28 *parte* basis, it must demonstrate that it will suffer “irreparable harm” or “immediate danger” **withi**

1 the next 15 days in order to be excused from filing a regularly-noticed motion. *See* Cal. Code Civ. P.
2 § 527(c); *see also Brewster v. S. Pac. Transp. Co.*, 235 Cal. App. 3d 701, 714 (1991) (affirming
3 finding that plaintiffs’ attorney had filed a meritless TRO application without evidence that “great and
4 irreparable injury has resulted and will continue to present grave danger to these applicants before this
5 matter can be heard on [] noticed motion”); April 22, 2020 COVID-19 Update (“during this
6 emergency period [o]nly emergencies are being handled by way of ex parte applications”
7 [emphasis added])).²

8 Petitioner’s application fails because there is no emergency basis whatsoever for a TRO. Each
9 of the directives that Petitioner seeks to enjoin the enforcement of were issued on December 7, 2020
10 and went into effect on December 8, 2020. Petitioner offers no explanation at all for why it did not
11 seek to enjoin their enforcement, through a regularly-noticed motion, weeks ago. Nor does it explain
12 why it could not proceed on a regularly-noticed motion now. Plainly, there is no emergency meriting
13 the requested *ex parte* relief. *See, e.g., O’Connell*, 141 Cal. App. 4th at 1481 (weighing delay is
14 seeking injunctive relief as factor in denial); *Schwartz v. Arata*, 45 Cal. App. 596, 602 (1920) (denying
15 TRO when plaintiff delayed seeking relief for months and then sought TRO); *Occupy Sacramento v.*
16 *City of Sacramento*, 2011 WL 5374748, at *4 (E.D. Cal. Nov. 4, 2011) (denying application for TRO
17 for 25-day delay from initial threat of harm); *Lydo Enters., Inc. v. City of Las Vegas*, 745 F.2d 1211
18 1213 (9th Cir. 1984) (“A delay in seeking a preliminary injunction is a factor to be considered in
19 weighing the propriety of relief.”).

20 **C. Petitioner Cannot Show A Likelihood Of Success On The Merits Or That The**
21 **Interim Harms Tip In Its Favor**

22 Even if Petitioner makes that requisite showing of imminent harm, its burden is far from
23 complete. It still must show (1) a likelihood that it “will ultimately prevail on the merits”; and (2) that
24 “the relative interim harm to the parties from issuance or non-issuance of the injunction” tips in its
25 favor. *Costa Mesa City Emp’rs Ass’n v. City of Costa Mesa*, 209 Cal. App. 4th 298, 306 (2012). The
26 burden is on Petitioner to show that each one of these elements weighs in its favor with admissibility.

27 _____
28 ² Available at <http://www.lacourt.org/pdf/COVID-19FAQsCivilLitigation-04222020.pdf>

1 evidence. *Loder v. City of Glendale*, 216 Cal. App. 3d 777, 783 (1989) (reversing grant of injunction
2 due to absence of admissible evidence); *see also Ancora-Citronelle Corp. v. Green*, 41 Cal. App. 3d
3 146, 150 (1974) (“It is the clear policy of the law that the drastic remedy of an injunction *pendente lite*
4 may not be permitted except upon a sufficient factual showing, by someone having knowledge
5 thereof, made under oath or by declaration under penalty of perjury.”).

6 There is no question here that the equities do not favor Petitioner. There is no harm to
7 Petitioner that could possibly justify a TRO. Meanwhile, the harm that would result if a TRO were to
8 prematurely issue is grave. There is serious and obvious harm that will befall a criminal defendant
9 who loses the benefit of the directives as the result of a hastily-granted TRO, even if the injunction
10 lasts for a short period of time. Such criminal defendants could be sentenced to longer terms in the
11 absence of the policies. That is severe and irreversible interim harm. At a minimum, this Court must
12 allow for full briefing on the merits, on regular time, to guard against this grave risk.

13 **IV. CONCLUSION**

14 For the foregoing reasons, the Court should deny the *ex parte* application for a TRO and OSC Appeal.
15

16 DATED: December 30, 2020

KENDALL BRILL & KELLY LLP

17
18 By:



19 Robert E. Dugdale
20 Attorneys for Defendants and Respondents
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KENDALL BRILL & KELLY LLP
Robert E. Dugdale (167258)
rdugdale@kbfkfirm.com
10100 Santa Monica Blvd., Suite 1725
Los Angeles, California 90067
Telephone: 310.556.2700
Facsimile: 310.556.2705

Attorneys for Defendants and Respondents
George Gascón, in his official capacity as District
Attorney for the County of Los Angeles, and Los
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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES, CENTRAL DISTRICT

ASSOCIATION OF DEPUTY DISTRICT
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Angeles; LOS ANGELES COUNTY
DISTRICT ATTORNEY'S OFFICE; and
DOES 1 through 50, inclusive,

Defendants and Respondents.

Case No. _____

**DECLARATION OF ROBERT E.
DUGDALE IN OPPOSITION TO *EX*
PORTE APPLICATION FOR TRO/OSC
RE: PRELIMINARY INJUNCTION**

Date: December 30, 2020

Time: 8:30 a.m.

Dept.: TBD (82/85/86)

Action Filed: December 30, 2020

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1 we find a reasonable time when I may be able to appear remotely. Petitioner's counsel declined my
2 proposal.

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

5 Executed on this 30th day of December, 2020, at Los Angeles, California.

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8 Robert E. Dugdale

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Document received by the CA 2nd District Court of Appeal.

Exhibit 1

Document received by the CA 2nd District Court of Appeal.

[REDACTED]

[REDACTED]

[REDACTED]

From: "David J. Carroll" <sftp@bgrfirm.com>
Date: December 29, 2020 at 7:43:37 PM PST
To: Robert Dugdale <rdugdale@kbkfirm.com>
Subject: Access Pass: sftp.bgrfirm.com
Reply-To: dcarroll@bgrfirm.com

BGR Secure File Transfer — Access Pass

You have recently received a Secure Message:

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- Subject: Ass'n of Deputy District Attorneys of LA County v. Gascon
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Exhibit 2

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To: [David J. Carroll](#)
Cc: [Thomas P. O'Brien](#); [Eric M. George](#); [Matthew O. Kussman](#); [Claudia Bonilla](#); [Nicole Cambeiro](#); [Nary Kim](#); [Laura W. Brill](#); [Katelyn Kuwata](#)
Subject: RE: Ass'n of Deputy District Attorneys for LA County v. George Gascon, et al.
Date: Tuesday, December 29, 2020 11:17:18 PM
Attachments: [image003.png](#)
[image004.png](#)
[image005.png](#)

David,

Honestly, this is silly. I assume we can consent to everyone appearing on video conference or by phone, but we need to know how to set it up and which court to dial into. In any event, the court staff can likely help direct us on this. The following is from Judge Strobel's courtroom information on the court's website, as just one example:

TELEPHONIC APPEARANCES The court STRONGLY DISCOURAGES personal appearances in the courtroom and STRONGLY ENCOURAGES all counsel and parties to appear remotely for any scheduled appearance, including ex parte applications.

Last time my colleagues were before Judge Strobel, she specifically mentioned how much she appreciated that counsel and the court reporter were appearing remotely. This gamesmanship in the middle of a health crisis is not how you should be leading off on this.

Bob



Robert Dugdale
Tel: (310) 556-2700
Direct: (310) 272-7904
E-mail: rdugdale@kbkfirm.com

From: David J. Carroll <dcarroll@bgrfirm.com>
Sent: Tuesday, December 29, 2020 11:05 PM
To: Robert Dugdale <rdugdale@kbkfirm.com>
Cc: Thomas P. O'Brien <tobrien@bgrfirm.com>; Eric M. George <egeorge@bgrfirm.com>; Matthew O. Kussman <mkussman@bgrfirm.com>; Claudia Bonilla <CBonilla@bgrfirm.com>; Nicole Cambeiro <ncambeiro@kbkfirm.com>; Nary Kim <nkim@kbkfirm.com>; Laura W. Brill <lbrill@kbkfirm.com>; Katelyn Kuwata <KKuwata@kbkfirm.com>
Subject: RE: Ass'n of Deputy District Attorneys for LA County v. George Gascon, et al.

Bob:

We appreciate the severity of the COVID situation at this time, and we of course don't object in principle to a telephonic hearing. However, under CRC 3.1150(d), counsel must personally appear at any TRO application, and I am unaware of any COVID-specific rule that overrides this rule. We will

Document received by the CA 2nd District Court of Appeal.

therefore need to appear in person whether the hearing goes forward tomorrow morning or later. We will certainly not object to you appearing by telephone tomorrow morning if you wish to do so, and we will inquire with the Court clerk if he or she can patch you into any hearing that goes forward.

We disagree with your position that our application is in any sense untimely based on the date of the original special directives. Special Directive 20-08.2, which substantially amended the prior directives, was issued only on the night of Friday, 12/18, the week before Christmas. As our application makes clear, the DDAs that our client represents are regularly having to make motions and take other actions pursuant to the special directives that are unlawful and unethical, which is why we feel that immediate relief is necessary.

David

From: Robert Dugdale <rdugdale@kbkfirm.com>
Sent: Tuesday, December 29, 2020 10:19 PM
To: David J. Carroll <dcarroll@bgrfirm.com>
Cc: Thomas P. O'Brien <tobrien@bgrfirm.com>; Eric M. George <egeorge@bgrfirm.com>; Matthew O. Kussman <mkussman@bgrfirm.com>; Claudia Bonilla <CBonilla@bgrfirm.com>; Nicole Cambeiro <ncambeiro@kbkfirm.com>; Nary Kim <nkim@kbkfirm.com>; Laura W. Brill <lbrill@kbkfirm.com>; Katelyn Kuwata <KKuwata@kbkfirm.com>
Subject: RE: Ass'n of Deputy District Attorneys for LA County v. George Gascon, et al.

David:

You are no doubt aware that we are in the midst of a global pandemic. ICUs are overflowing. The judges do not want to get sick or to be placed at unnecessary risk. They do not want this for their staff, and they do not want this for the attorneys who appear before them. The first of the special directives at issue in your application was issued on December 7, three weeks ago. There is no urgency at all that would require an in-person appearance here tomorrow morning. Whether or not you are technically timely, a point on which we disagree, there is no reason at all in a case such as this, given your client's delay, to expose us all. I do not think the court will appreciate your tactics, and my family and I also do not appreciate this, particularly since I am in a high-risk category for bad outcomes if I contract the virus. Why not get your complaint on file, find out who the judge is, and we will schedule a reasonable time when we can appear remotely tomorrow afternoon or Thursday? Why is this an unreasonable request?

Bob



Robert Dugdale
Tel: (310) 556-2700
Direct: (310) 272-7904
E-mail: rdugdale@kbkfirm.com

From: David J. Carroll <dcarroll@bgrfirm.com>
Sent: Tuesday, December 29, 2020 9:25 PM
To: Robert Dugdale <rdugdale@kbkfirm.com>
Cc: Thomas P. O'Brien <tobrien@bgrfirm.com>; Eric M. George <egeorge@bgrfirm.com>; Matthew O. Kussman <mkussman@bgrfirm.com>; Claudia Bonilla <CBonilla@bgrfirm.com>; Nicole Cambeiro <ncambeiro@kbkfirm.com>; Nary Kim <nkim@kbkfirm.com>; Laura W. Brill <lbrill@kbkfirm.com>; Katelyn Kuwata <KKuwata@kbkfirm.com>
Subject: RE: Ass'n of Deputy District Attorneys for LA County v. George Gascon, et al.

Bob:

We intend to appear tomorrow to proceed with our *ex parte* application.

Please see attached LASC's First Amended General Order regarding electronic filing, which states under paragraph 4(iv) that a new complaint or writ petition accompanied by an *ex parte* application is exempt from electronic filing. Therefore, the 10:00 a.m. electronic filing and service deadline that generally applies to civil *ex parte* applications does not apply here. Rather, under CRC 3.1206, we are simply required to serve our papers at the "first reasonable opportunity", which we have done. Indeed, it is typical practice in manually filed *ex parte* applications to serve the papers on the day of the hearing.

As the *ex parte* application and our notice earlier today indicates, the application will be heard in either Department 82, 85, or 86 – the only three writs and receivers departments in Stanley Mosk. Once we receive a department number tomorrow morning, we will let you know immediately. We do not see this as an obstacle to you being able to appear and oppose our application.

Thanks,
David

From: Robert Dugdale <rdugdale@kbkfirm.com>
Sent: Tuesday, December 29, 2020 8:52 PM
To: David J. Carroll <dcarroll@bgrfirm.com>
Cc: Thomas P. O'Brien <tobrien@bgrfirm.com>; Eric M. George <egeorge@bgrfirm.com>; Matthew O. Kussman <mkussman@bgrfirm.com>; Claudia Bonilla <CBonilla@bgrfirm.com>; Nicole Cambeiro <ncambeiro@kbkfirm.com>; Nary Kim <nkim@kbkfirm.com>; Laura W. Brill <lbrill@kbkfirm.com>; Katelyn Kuwata <KKuwata@kbkfirm.com>
Subject: RE: Ass'n of Deputy District Attorneys for LA County v. George Gascon, et al.

Counsel,

We are in receipt of your client's moving papers, including the writ and *ex parte* application for a TRO, which indicate your intention to appear before the court tomorrow, December 30, 2020. However, it is clear you have not complied with LASC's General Order, a copy of which is attached hereto, requiring that "ex parte applications and all documents in support thereof must be

electronically filed **no later than 10:00 a.m. the court day before the ex parte hearing.**” See Nov. 5, 2018 General Order Re Mandatory Electronic Filing for Civil ¶ d.3 (emphasis added); *see also* Nov. 8, 2018 Civil eFiling FAQs at #55 (“ex parte applications must be efiled no later than 10:00 a.m. the day before the ex parte hearing”). Moreover, service of the ex parte application must be served “**at the first reasonable opportunity,**” and absent exception circumstances (not present here), “**no hearing may be conducted unless such service has been made.**” Cal. R. Court 3.1206. Thus, in order for an ex parte hearing to proceed tomorrow, these papers were required to be filed with the court roughly 11 hours ago and served immediately thereafter.

In fact, the papers served this evening do not indicate a case number, a judge, a courtroom, or even that the papers were accepted by the court—each of which is necessary in order for Respondents to file an opposition and appear by tomorrow morning. Accordingly, please confirm and acknowledge that no hearing can proceed and that Petitioner will withdraw this ex parte application immediately.

Best,

Bob



Robert Dugdale

Tel: (310) 556-2700

Direct: (310) 272-7904

E-mail: rdugdale@kbkfirm.com

From: David J. Carroll <dcarroll@bgrfirm.com>

Sent: Tuesday, December 29, 2020 7:46 PM

To: Robert Dugdale <rdugdale@kbkfirm.com>

Cc: Thomas P. O'Brien <tobrien@bgrfirm.com>; Eric M. George <egeorge@bgrfirm.com>; Matthew O. Kussman <mkussman@bgrfirm.com>; Claudia Bonilla <CBonilla@bgrfirm.com>

Subject: Ass'n of Deputy District Attorneys for LA County v. George Gascon, et al.

Bob:

I hope you are doing well. I just sent you a File Share link containing the writ petition, *ex parte* application, and supporting documents that were referenced in our *ex parte* notice this morning. Please let me know if you did not receive it. Thank you.

David

David J. Carroll

BGR | **BROWNE GEORGE ROSS**
O'BRIEN ANNAGUEY & ELLIS LLP

801 S. Figueroa Street, Suite 2000

Los Angeles, California 90017

Main 213.725.9800 | Fax 213.725.9808

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SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

Civil Division

Central District, Stanley Mosk Courthouse, Department 1

20STCP04250

December 30, 2020

**THE ASSOCIATION OF DEPUTY DISTRICT ATTORNEYS
FOR LOS ANGELES COUNTY vs GEORGE GASCON, et al.**

8:30 AM

Judge: Honorable David J. Cowan

CSR: REPORTER PRO TEMPORE: Suzanne
Onuki/CSR 13734

Judicial Assistant: N DiGiambattista

ERM: None

Courtroom Assistant: None

Deputy Sheriff: None

APPEARANCES:

For Petitioner(s): David Junxiong Carroll and Matthew O. Kussman (x)

For Respondent(s): Robert Edward Dugdale (x)

**NATURE OF PROCEEDINGS: EX PARTE APPLICATION OF PETITIONER,
ASSOCIATION OF DEPUTY DISTRICT ATTORNEYS FOR LOS ANGELES COUNTY,
FOR TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE RE
PRELIMINARY INJUNCTION**

Pursuant to Government Code Sections 68086, 70044 and California Rules of Court Rule 2.956, Suzanne Onuki CSR 13734, certified shorthand reporter is appointed as an official court reporter pro tempore in these proceedings and is ordered to comply with the terms of the court reporter agreement. Order is signed and filed this date.

Department 85 being dark this date, matter is called for hearing in Department One and argued. Thereafter, petitioner elects to withdraw its application for a temporary restraining order.

An order to show cause re preliminary injunction is scheduled for February 2, 2021, at 1:30 p.m. in Department 85.

.
Any opposition is to be filed and served by January 15, 2021, and any reply is to be filed and served by January 26, 2021.

.
Counsel stipulate to service by e-mail. All documents are to be e-filed in accordance with the court's general order and courtesy copies are to be lodged directly in Department 85 on the date they are e-filed.

.
Order is signed and filed this date.

OFFICE OF COUNTY COUNSEL
Rodrigo A. Castro-Silva (185251)
RCastro-Silva@counsel.lacounty.gov
Adrian G. Gragas (150698)
AGragas@counsel.lacounty.gov
Jonathan C. McCaverty (210922)
jmccaverty@counsel.lacounty.gov
500 West Temple St., Floor 6
Los Angeles, California 90012
Telephone: 213.974.1828
Facsimile: 213.687.8822

Exempt From Filing Fee
Government Code § 6103

KENDALL BRILL & KELLY LLP
Robert E. Dugdale (167258)
rdugdale@kbbkfirm.com
Laura W. Brill (195889)
lbrill@kbbkfirm.com
Nicholas F. Daum (236155)
ndaum@kbbkfirm.com
Nary Kim (293639)
nkim@kbbkfirm.com
10100 Santa Monica Blvd., Suite 1725
Los Angeles, California 90067
Telephone: 310.556.2700
Facsimile: 310.556.2705

Attorneys for Defendants and Respondents George
Gascón, in his official capacity as District Attorney for
the County of Los Angeles, and the Los Angeles
County District Attorney's Office

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES, CENTRAL DISTRICT**

ASSOCIATION OF DEPUTY DISTRICT
ATTORNEYS FOR LOS ANGELES
COUNTY,

Plaintiff and Petitioner,

v.

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

**RESPONDENTS' OPPOSITION TO
PETITIONER'S APPLICATION FOR
PRELIMINARY INJUNCTION**

*Filed concurrently with the Declarations of
Shelan Y. Joseph, Monnica L. Thelen,
Marshall Khine, and Stephan A. Munkelt;
Request for Judicial Notice; Evidentiary
Objections to Michele Hanisee Declaration
and [Proposed] Rulings*

Date: February 2, 2021

Time: 1:30 p.m.

Dept.: 85

Judge: Hon. James C. Chalfant

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1 **I. INTRODUCTION**

2 The Petitioner (“Union”) is the labor union for a subset of Los Angeles County Deputy District
3 Attorneys (“DDAs”), some of whom are alleged to have views about criminal justice policy that differ
4 from those of their supervisor and the head of their office, the recently-elected District Attorney. The
5 Union seeks extraordinary judicial intervention—an order that would, in effect, *compel* the District
6 Attorney’s office, contrary to its current policy, to plead sentencing enhancements to dramatically increase
7 sentences against certain criminal defendants. This is in spite of the fact that the District Attorney, the
8 representative duly-elected by the People, has implemented these policies in the wake of significant
9 research showing excessive sentencing practices yield no public safety benefit and do not promote the
10 interests of justice. The Union asks for something no California court has ever ordered, as no California
11 court has ever deemed itself to have the power to require, via mandamus, a District Attorney to plead any
12 particular criminal charge or sentencing enhancement. To the contrary, courts have long held that such
13 charging power is almost entirely unreviewable and is uniquely within the District Attorney’s discretion.

14 The Union’s basic argument is that: (a) the District Attorney has an absolute, “ministerial” duty
15 under the “Three Strikes Law” to plead certain sentencing enhancements, including prior serious-felon
16 “strikes,” and lacks any discretionary authority to choose not to plead these “enhancements” in every case;
17 (b) the District Attorney is forbidden from setting policies instructing his subordinate DDAs to move to
18 dismiss certain sentencing enhancements; (c) this Court has the power to compel the District Attorney to
19 comply with this supposed ministerial duty to plead and avoid dismissing sentencing enhancements; and
20 (d) if the Court does not so compel the District Attorney, the DDAs would be violating their ethical
21 obligations as attorneys, warranting a preliminary injunction. Each part of that argument is wrong.

22 ***There is no “ministerial” duty to plead the relevant sentencing enhancements under the Three***
23 ***Strikes Law.*** The Three-Strikes Law states that a prosecutor “shall plead and prove” “each” relevant prior
24 felony that could serve as a “strike” and a sentencing enhancement, language on which the Union pins its
25 case. Pen. Code §§ 667(f)(1) and (2), 1170.12(d)(2). But the Union’s position that this provision creates
26 an automatic, ministerial duty for a prosecutor to plead *every* strike, in *every* case, no matter what, and in
27 a manner that may be enforceable by writ, has long been rejected by California courts. As the California
28 Supreme Court has explained: “Under California’s Three Strikes law, the sentence that is actually

1 imposed upon a defendant in a particular case is dependent not only upon the nature and number of the
2 defendant's prior criminal convictions and whether he or she is convicted in the current prosecution of a
3 felony offense, but also upon *the prosecutor's exercise of prosecutorial discretion in determining how*
4 *many prior convictions to charge in the case.*" *In re Coley*, 55 Cal.4th 524, 559 (2012) (emphasis added).
5 As shown below, no published case holds that there is an enforceable or ministerial duty that would require
6 every District Attorney's office in California to plead each "strike" or that a court can compel a District
7 Attorney's office to do so.

8 In practice, and consistent with the law, prosecutors have long exercised these avenues of
9 discretion when alleging sentencing enhancements under the Three Strikes Law. Indeed, different District
10 Attorneys in different California counties, as well as different prosecutors, have long had widely varying
11 pleading practices, defeating any claim that such pleading is "ministerial."

12 *There is no "ministerial" duty to forego moving to dismiss already-pled sentencing*
13 *enhancements as a matter of policy.* The Union also argues that this Court can control the discretion that
14 the District Attorney exercises in deciding when to move a court to dismiss sentencing allegations under
15 the Three Strikes Law and certain other criminal statutes, after those allegations have been pled. Not so.
16 There is nothing wrong with the elected District Attorney (as opposed to individual line prosecutors
17 setting policies predicated on how that District Attorney believes his office's prosecutorial discretion
18 should be exercised when it comes to seeking the dismissal of sentencing enhancements.

19 *The judiciary may not act by writ to compel pleading sentencing enhancements.* Under basic
20 principles of separation-of-powers, California courts have long held that a District Attorney's decision to
21 charge crimes and sentencing enhancements is *not* a "ministerial" duty appropriate for writ review. The
22 Three Strikes Law is no exception.

23 *There is no legal-ethical issue for the DDAs.* There is no "ethical" issue in having the District
24 Attorney, not line prosecutors, set general policies that reflect the District Attorney's assessment of the
25 interests of justice and the wise use of office resources through his exercise of prosecutorial discretion.
26 That is the District Attorney's role, and nothing in his utilization of his prosecutorial discretion here (as
27 noted above) is at odds with California law or legal ethics.

28 *A preliminary injunction is inappropriate.* The balance of harms strongly weighs against

preliminary injunction, which would upset the status quo in this instance and interfere severely with the operations of the District Attorney's office, while the DDAs will suffer no irreparable, non-speculative harm from conforming to the policies enacted by the elected leader of the District Attorney's office.

The Union has not established its standing to bring its claims. Finally, the Union has not alleged proper standing to bring its petition.

II. BACKGROUND

On November 3, 2020, George Gascón (the "District Attorney") was elected as the District Attorney for the County of Los Angeles with the backing of over two million voters. The District Attorney campaigned as someone who, upon assuming office, would institute criminal justice reforms designed to reduce violent crime, while at the same time addressing the problems of mass incarceration and racial disparities currently present in the criminal justice system. True to the election mandate he received, the District Attorney issued several new office policies now challenged by some of his unelected subordinates:

Special Directive 20-08. On December 7, 2020, the District Attorney issued Special Directive 20-08, which addresses the charging of sentencing enhancements and allegations in criminal cases. It reflects the District Attorney's view that "current statutory ranges for criminal offenses alone, without enhancements, are sufficient to both hold people accountable and also to protect public safety"—a view supported by studies that show, while initial periods of incarceration prevent crime through incapacitation, each additional sentence year causes a 4 to 7 percent increase in recidivism that outweighs the benefit of such incapacitation. Pet., Ex. A at 1. Consistent with the District Attorney's judgment that public safety would be enhanced by eliminating the unreasonably lengthy sentences wrought by sentencing enhancements and allegations lumped on top of sentences otherwise available to punish individuals who commit crimes, the District Attorney, through Directive 20-08, directed his prosecutors not to file "sentence enhancements or other sentencing allegations, including under the Three Strikes law" and withdraw such sentencing enhancements and allegations in pending matters being prosecuted. *Id.*

Special Directive 20-14. On December 7, 2020, the District Attorney also issued Special Directive 20-14, which instructed DDAs to join in defense motions to strike, or to move independently to strike, all alleged sentencing enhancements in any currently pending cases. *Id.*, Ex. B.

Special Directive 20-08.1. On December 15, 2020, the District Attorney issued Special Directive

20-08.1, to provide direction on how to seek the dismissal of alleged strikes and sentencing enhancements in pending criminal cases in which they had been alleged. *Id.*, Ex. C.

Amendment to Special Directive 20-08. On December 18, 2020, the District Attorney issued an amendment to Special Directive 20-08 permitting his prosecutors to file sentencing enhancements in various cases involving offenses committed against vulnerable victims and other cases involving extraordinary circumstances, specifically providing that sentencing enhancements and sentencing schemes different from those spelled out in Special Directive 20-08, as initially drafted, could be pursued in certain cases involving hate crimes allegations, elder and dependent abuse allegations, child physical abuse allegations, sex trafficking cases, and financial crimes. *Id.*, Ex. D. In addition, this amendment to Directive 20-08 provides that sentencing enhancements or allegations may be filed in other cases involving other extraordinary circumstances, with Bureau Director approval upon written recommendation by the Head Deputy, namely, (1) “[w]here the physical injury personally inflicted upon the victim is extensive”; or (2) “[w]here the type of weapon or manner in which a deadly or dangerous weapon including firearms is used exhibited an extreme and immediate threat to human life.” *Id.* at 2.

The Union brought this writ proceeding, even as the implementation of these policies continues.

III. ARGUMENT

A. General Standards

The Court weighs two factors in deciding whether to grant a preliminary injunction: “the likelihood that the plaintiff will prevail on the merits and “the relative interim harm to the parties.” *SB Liberty, LLC v. Isla Verde Ass’n*, 217 Cal.App.4th 272, 280 (2013). The Union has failed to meet its burden on both.

B. A District Attorney’s Discretion To Plead (Or Move To Dismiss) Sentencing Enhancements Is Not Susceptible To Judicial Supervision

California law has long held that District Attorneys may set the policies for pleading (or moving to dismiss) sentencing enhancements, and that courts may *not*—particularly via mandamus—compel District Attorneys to plead particular sentencing enhancements. The district attorney’s power to select which charges and enhancements to plead “is founded ... on the principle of separation of powers, and generally is not subject to supervision by the judicial branch.” *People v. Birks*, 19 Cal.4th 108, 134 (1998) *see also Stenback v. Mun. Ct.*, 272 Cal.App.2d 27, 30 (1969) (a district attorney “is not generally subject

1 to judicial supervision in determining what charges to bring and how to draft accusatory pleadings”).
2 Because the district attorney is “the people’s choice of an attorney to represent them in their public affairs,”
3 he is “primarily responsible to the electorate,” and “[t]here is ordinarily no review of his power to
4 prosecute nor can a court control this statutory power by mandamus.” *People v. Super. Ct. (Martin)*, 98
5 Cal.App.3d 515, 519 (1979) (citations and brackets omitted).

6 “California district attorneys ‘are given complete authority to enforce the state criminal law in
7 their counties.’” *Pitts v. Cty. of Kern*, 17 Cal.4th 340, 358 (1998). And a district attorney’s authority is
8 at its **strongest** “when it comes to alleging sentencing enhancements.” *See People v. Garcia*, 46
9 Cal.App.5th 786, 792 (2020). Indeed, a district attorney’s discretion in alleging sentencing enhancements
10 is so great that “absent a constitutional violation, the prosecutor’s decision not to charge a particular
11 enhancement ‘generally is not subject to supervision’—or second guessing—‘by the judicial branch.’”
12 *Id.*; *People v. Yanez*, 44 Cal.App.5th 452, 459-60 (2020) (declining “to adopt an interpretation of
13 [sentencing law] which would vest the trial court with discretionary power”).

14 Thus, it has long been California law that a writ of mandamus will **not** issue to compel a prosecutor
15 to plead (or not plead) any charge, or to move to dismiss a particular sentencing enhancement. Generally
16 a writ of mandamus is **only** “available to compel a public agency’s performance or to correct an agency’s
17 abuse of discretion **when the action being compelled or corrected is ministerial.**” *See AIDS Healthcare
18 Found. v. Los Angeles Cty. Dep’t of Public Health*, 197 Cal.App.4th 693, 700 (2011) (emphasis added).
19 “‘A ministerial duty is one that is required to be performed in a prescribed manner under the mandate
20 legal authority **without the exercise of discretion or judgment.**’” *Cal. School Bds. Ass’n v. State of Cal.*,
21 192 Cal.App.4th 770, 797 (2011) (emphasis added). Whether a duty is “ministerial”—rather than
22 “discretionary”—turns on whether a public officer is required to perform it in a prescribed manner without
23 **any** regard at all to his own judgment or discretion. *Hudson v. Cty. of Los Angeles*, 232 Cal.App.4th 392,
24 408 (2014). Prosecutorial decisions to plead criminal charges and sentencing enhancements are the
25 **essence** of a duty that is **not**—because of both the level of discretion involved and separation-of-powers
26 concerns—ministerial. *Boyne v. Ryan*, 100 Cal. 265, 267 (1893) (“we think that the district attorney in
27 determining whether or not, in any particular instance, he should bring an action under said section, is
28 vested with a discretion which a court cannot control by *mandamus*”); *Taliaferro v. Locke*, 182 Cal.App.2d

752, 757 (1960) (“the matters of investigation and prosecution were matters in which the district attorney is vested with discretionary power as to which mandamus will not lie”). The District Attorney is unaware of a single case, from anywhere in California at any time, in which a court has ever used its mandamus power to compel a District Attorney to plead a criminal charge or sentencing enhancement.¹

C. The Three Strikes Law Did Not Create An Exception To The General Rule

The Union claims that the Three Strikes Law creates an exception to this general rule, and it imposes a ministerial duty on District Attorneys’ offices to plead each prior-serious-felony “strike” as a sentencing enhancement every time the District Attorney’s office brings a prosecution where the Three Strikes Law might apply. The Union is wrong.

1. The “shall plead” language does not create a ministerial duty

The Three Strikes Law reads in pertinent part:

(f)(1) Notwithstanding any other law ... The prosecuting attorney shall plead and prove each prior serious or violent felony conviction except as provided in paragraph (2).

(2) The prosecuting attorney may move to dismiss or strike a serious or violent felony conviction allegation in the furtherance of justice pursuant to Section 1385, or if there is insufficient evidence to prove the prior serious or violent felony conviction

Pen. Code §§ 667(f)(1) and (2), 1170.12(d)(1) and (2). The Union claims that this provision creates “ministerial,” mechanical duty to plead each and every prior serious felony conviction as a “strike,” and eliminates any room for prosecutorial discretion in so pleading. Pet. ¶ 21. Specifically, the Union relies on the use of the word “shall” in the statute, and argues the word “shall” “is ordinarily construed as

¹ The few cases in which courts have applied the mandamus power to compel a District Attorney to institute proceedings all involve *non-criminal* proceedings in which the District Attorney was compelled by statute to commence an action based on the directives *of another executive branch officer but failed to do so*. *Bd. of Supervisors v. Simpson*, 36 Cal.2d 671, 673, 676 (1951) (Board of Supervisors of Los Angeles County sought a writ to compel the district attorney to institute a public nuisance proceeding based on a statute that provided that the district attorney “must bring such action whenever directed by the board of supervisors of such county....”; Supreme Court recognized that “[o]rdinarily a district attorney cannot be compelled by mandamus to prosecute a criminal case,” but found mandamus appropriate because action only involved whether nuisance actions should be brought by the County Counsel or the District Attorney); *Bradley v. Lacy*, 53 Cal.App.4th 883, 886, 887 (1997) (non-criminal statute requiring that after a *grand jury* has found an accusation, “[t]he district attorney shall have a copy of the accusation served upon the defendant, and ... shall require the accused to appear before the superior court of the county”; court found that the issue was whether this statute “imposes mandatory duties on the district attorney or whether, instead, the district attorney has discretion to refuse to comply and thereby effectively abort the prosecution of an accusation found by the grand jury against a public officer”).

1 mandatory.” *Id.*

2 But—given the important mandamus and separation-of-powers concerns—statutory interpretation
3 cannot end with a simple facial reading of the statute and focus on the word “shall” in a statute. The Penal
4 Code must be construed against the Constitutional importance of the separation of powers and the
5 backdrop of statutes—including many which use the word “shall”—that preserve prosecutorial discretion.
6 The word “shall” does not, in and of itself, make a duty ministerial. Notwithstanding its “ordinary”
7 connotation, “[t]he use of the word ‘shall’ in a statute is not dispositive of legislative intent. ‘[Not] every
8 statute which uses the word “shall” is obligatory rather than permissive.’” *Gananian v. Wagstaffe*, 199
9 Cal.App.4th 1532, 1540 (2011). To the contrary, ““there are unquestionably instances in which other
10 factors will indicate that apparently obligatory language was not intended to foreclose a governmental
11 entity’s or officer’s exercise of discretion.”” *Id.*

12 Indeed, courts have consistently held that various criminal statutes that use the word “shall” do *not*
13 impose on prosecutors a mandatory duty to charge a particular crime. *E.g.*, *Ascherman v. Bales*, 27
14 Cal.App.2d 707, 708 (1969) (Gov’t Code § 26501, which provides a “district attorney *shall* institute
15 proceedings before magistrates for the arrest of persons charged with or reasonably suspected of public
16 offenses when he has information that such offenses have been committed,” held to be discretionary).
17 *Wilson v. Sharp*, 42 Cal.2d 675, 678-79 (1954) (Gov’t Code § 26525, which states that if county funds are
18 illegally paid, the district attorney *shall* institute a suit for recovery without any order of the board of
19 supervisors, called for consideration of law and facts and required the exercise of discretion).

20 Critically, no published decision has ever concluded the Three Strikes Law imposes purely
21 “ministerial” duties on prosecutors to “plead and prove” every single potentially available prior felony
22 conviction as a sentencing enhancement. To the contrary, several courts—including the California
23 Supreme Court—have confirmed that the Three Strikes Law permits prosecutors to exercise their
24 discretion in regard to a variety of critical decisions:

25 • **How many prior convictions to allege.** As explained by the Supreme Court, “Under
26 California’s Three Strikes law, the sentence that is actually imposed upon a defendant in a particular case
27 is dependent not only upon the nature and number of the defendant’s prior criminal convictions and
28 whether he or she is convicted in the current prosecution of a felony offense, *but also upon the*

1 *prosecutor’s exercise of prosecutorial discretion in determining how many prior convictions to charge*
2 *in the case.” In re Coley*, 55 Cal.4th at 559 (emphasis added). In other words, there is **no** mandatory duty
3 to allege every single eligible prior conviction in the charging instrument. The prosecutor has discretion
4 to choose how many—if any—prior convictions to allege.

5 • **Whether to plead a prior conviction as a sentencing enhancement.** Nor is it mandatory
6 for a prosecutor to allege a prior felony conviction as a sentencing enhancement. While “the three strikes
7 law states that ... ‘[t]he prosecuting attorney shall plead and prove each prior serious and/or violent felony
8 conviction,’ ... [a]s far as our research reveals, these provisions of the three strike law have never been
9 interpreted as requiring the prosecution to plead and prove a prior conviction *as a prior serious felony*
10 *conviction enhancement.*” *People v. Nguyen*, 18 Cal.App.5th 260, 267 n.1 (2017) (italics in original). In
11 other words, a prosecutor may make “a discretionary charging decision” to allege in the charging paper
12 the *fact* of a prior conviction, but **not** allege it as a sentencing enhancement. *Id.* at 267-69.

13 And, of course, prosecutors retain complete discretion to decide whether to charge a case at all, or
14 whether to charge a crime that triggers the Three Strikes law, facts further favoring the position that when
15 the prosecution charges a case it has discretion as to what penalties are triggered by its charging decision.

16 **2. Prosecutors have for decades routinely exercised discretion under the Three**
17 **Strikes Law to avoid pleading strikes**

18 Put simply, the Three Strikes Law does not preclude prosecutors from exercising their
19 constitutional authority to avoid, for policy reasons, pleading strikes. And the law has long been so
20 interpreted by prosecutorial offices throughout California. *The use of prosecutorial discretion to plead*
21 *sentencing enhancements—under the Three Strikes Law and otherwise—is routine throughout*
22 *California and commonly directed by District Attorneys’ offices.* Prosecutors throughout California—
23 following policies set by their offices—have routinely exercised their discretion in determining (a) how
24 many eligible prior convictions to allege in a Three Strikes case; (b) whether to plead every eligible
25 conviction as a sentencing enhancement in a three strikes case; and (c) whether to even pursue a matter as
26 a Three Strikes case. This fact has been attested to by counsel knowledgeable of charging practices
27 relevant to potential Three Strikes cases in Los Angeles County and elsewhere in California;² it is reflected

28 ² See Declarations of Shelan Y. Joseph, Monnica L. Thelen, Marshall Khine, and Stephan A. Munkelt.

1 in studies showing that prosecutors throughout California routinely exercise discretion not to allege
2 available strikes that could be pled in a potential Three Strikes case;³ and it is reflected in cases in which
3 courts have noted that prosecutors declined to allege available strikes in Three Strikes cases but
4 nevertheless found such sentences lawful.⁴ Accordingly, nothing about the Directives is entirely novel.

5 **3. The Union’s Three Strikes cases do not address the issue before the Court**

6 Faced with decades of law and practice, the Union relies on cases that do *not* hold that there is a
7 ministerial “must plead” duty, enforceable by courts via mandamus, to mechanically plead strikes as
8 sentencing enhancements in every case. Instead, these cases suggest only that the Three Strikes Law
9 places *some limits* on prosecutorial discretion *after a strike has been pled* (e.g., on the specific procedure
10 that should be used to dismiss a strike, or on a prosecutor’s options for pleading strikes once the prosecutor
11 has made the unreviewable decision to do so, a point that the District Attorney does not contest for
12 purposes of this application), and hold that *criminal defendants* may not invoke a general separation-of-
13 powers claim concerning the Three Strikes Law to assert a constitutional problem with their own sentence.
14 To be clear, the proposition that the Three Strikes Law places some limits on prosecutorial discretion is
15 uncontroversial—just as there is no doubt that many statutes, including the Three Strikes Law, limit
16 prosecutor’s discretion as to how matters should be pled *once the District Attorney has opted to do so*.
17 E.g., *People v. Murphy*, 52 Cal.4th 81, 86 (2011) (discussing so-called *Williamson* rule requiring
18 prosecutors to plead violations under a special law instead of a general law when both would apply to
19 perpetrator’s conduct). However, none of these cases suggest, let alone hold, that the District Attorney
20 has a ministerial duty to *opt to plead sentencing enhancements in the first place*, which is the issue here.

22 ³ See e.g., Chen, Elsa Y. “In Furtherance of Justice, Injustice, or Both? A Multilevel Analysis of
23 Courtroom Context and the Implementation of Three Strikes,” 31(2) Just. Q. 257 (Apr. 2014), at 4–5
24 (noting “the elected District Attorneys in California’s counties retain the legal authority to establish
25 internal guidelines regarding the circumstances under which the prosecutors who work under them will
26 charge eligible cases as third or second strikes or petition the court to waive prior offenses” and citing to
27 variances in counties in California as to how eligible strike allegations are charged depending upon how
28 District Attorneys utilize their discretion to seek “[l]ess-than-full application of the Three Strikes Law”).

⁴ See e.g., *People v. Porter*, 2002 WL 31840800, at * 2 (Cal. Ct. App. Dec. 19, 2002) (affirming sentence
where LA DA’s Office did not plead each available “strike,” reasoning, “[l]ogically, if the prosecutor may
plead a prior ‘strike’ and then move to dismiss or strike the allegation, then the prosecutor may determine
at the onset that the interests of justice will be served by not pleading the prior ‘strike’”).

1 In *People v. Kilborn*, 41 Cal.App.4th 1325, 1332 (1996), the court faced a claim by a criminal
2 defendant (who *had* been charged by a prosecutor with prior strikes under the Three Strikes Law) that the
3 Three Strikes Law was unconstitutional, where the defendant noted the “shall” language in the Three
4 Strikes Law and contended “that the charging discretion of prosecutors cannot be limited by law” without
5 violating the constitutional separation of powers. The *Kilborn* court rejected as a general proposition the
6 notion that a prosecutor’s discretion “cannot” be limited by statute. But in doing so it relied on the
7 existence of statutes requiring specific forms of pleading once a charge is pled (*id.* at 1333, citing Pen.
8 Code § 969, which requires that specific prior felonies “must be” pled by the prosecutor when the
9 prosecutor opts to rely upon those prior felonies for certain purposes) and on “provisions restricting the
10 discretionary authority of prosecutors (and courts) to enter plea bargains.” *Id.* *Kilborn* found (correctly)
11 that the Three Strikes Law could constitutionally “limit” prosecutorial discretion, but it never addressed,
12 at all, the issue of whether the Three Strikes Law had to be interpreted as the Union urges here, to remove
13 *all* prosecutorial discretion from the decision to plead Three Strikes Law sentencing enhancements in the
14 first place. *See id.*; *see also People v. Roman*, 92 Cal.App.4th 141, 145 & n.2 (2001) (mentioning *Kilborn*
15 but not analyzing the effect of the Three Strikes Law on the ability of a prosecutor to opt to plead
16 sentencing enhancements in the first place). In *People v. Laanui*, No. B297581, 2021 WL 71151, at *1
17 (Cal. Ct. App. Jan. 8, 2021), the Court of Appeal relied on the “shall plead” language in the Three Strikes
18 Law to hold that a criminal defendant was put on adequate notice that strikes that were pled by the
19 prosecutor in the information as to one count would apply to each count alleged in the information. *Id.*
20 Again, the court noted that the Three Strikes Law could be read to imply conclusions about procedure
21 *once a sentencing enhancement was pled*, but it said nothing about the prosecutor’s discretion to choose
22 to allege a strike as a sentencing enhancement in the first place. *See id.* at *15.

23 **D. The District Attorney Also Does Not Have A Ministerial Duty To Avoid Moving To**
24 **Dismiss Already-Pled Sentencing Enhancements**

25 The Union also argues that the District Attorney lacks prosecutorial discretion to move to dismiss
26 strikes pled under the Three Strikes Law and other criminal statutes. App. at 10-13. Wrong again.

27 *First*, there is nothing whatsoever wrong with the District Attorney making a determination that
28 is appropriate, based on considerations of public safety and the public good, to move to dismiss such

1 sentencing enhancements as a matter of policy, even a so-called blanket policy. The Union concedes (as
2 it must) that decisions to move to dismiss sentencing enhancements are in most cases discretionary, but
3 contends a “blanket” policy set by the District Attorney, directing his line prosecutors to exercise
4 discretion in a uniform way, transforms the discretionary act into a ministerial one. Not so. The issuance
5 of such Directives is itself an exercise of the District Attorney’s prosecutorial discretion. The California
6 Supreme Court has held that the District Attorney’s “inherent executive authority includes not only the
7 power to authorize diversion on a case-by-case basis, but extends also to *the establishment or approval*
8 *of general eligibility standards to guide the exercise of such discretion by all deputies under his*
9 *direction.”* *Davis v. Mun. Ct.*, 46 Cal.3d 64, 77 (1988) (emphasis added). Any other rule—and in
10 particular one requiring individual DDAs to make these decisions unguided and *ad hoc*—would provoke
11 chaos and widely disparate treatment of defendants prosecuted by the District Attorney’s Office.

12 This is not even close to a situation in which the District Attorney has “failed and refused to
13 prosecute any crimes whatsoever.” *People ex rel. Becerra v. Super. Ct.*, 29 Cal.App.5th 486, 504 (2018).
14 Instead, the District Attorney has opted to exercise his discretion *in prosecuting crimes* to not see
15 sentencing enhancements as a policy matter in certain cases because of the District Attorney’s view of the
16 overall benefits to public safety from these enhancements, a decision at the core of prosecutorial
17 discretion. A district attorney’s decisions about how to exercise such discretion, as the Union’s own cases
18 admit, is unreviewable. *Id.*⁵

19 Other cases the Union cites for its “no blanket policy” argument have nothing to do with a *District*
20 *Attorney’s* decision to decide, as a matter of policy, to move for dismissal. Rather, they deal with a
21 separate issue—whether a *court* can decide under Penal Code section 1385, *after* having received a motion
22 or on its own decision *sua sponte*, to make a blanket decision to dismiss sentencing enhancements based
23 a judge’s “personal antipathy” to the effects of an underlying sentencing law. *People v. Williams*, 17
24 Cal.4th 148, 159 (1998); *People v. Dent*, 38 Cal.App.4th 1726, 1731 (1995). But prosecutors are in
25 fundamentally different position from judges. Prosecutors are supposed to make decisions about pleading
26

27 ⁵ That the Governor is prohibited by law from refusing in all cases to grant parole has nothing to do with
28 this case. *In re Morrall*, 102 Cal.App.4th 280, 291 (2002). Parole is governed by an entirely separate
legal regime, and the District Attorney has not implemented a “blanket” refusal to prosecute crimes.

1 or dismissing charges based on policy concerns about the administration of justice. Judges, on the other
2 hand, are not supposed to act based on such policy concerns. Nothing suggests a District Attorney is
3 forbidden from concluding that the interests of justice compel moving to dismiss already-pled
4 enhancements based on policy concerns—that is the essence of prosecutorial discretion.

5 **Second**, as to motions to dismiss “strikes,” the Three Strikes Laws itself expressly states that “[t]he
6 prosecuting attorney *may* move to dismiss or strike a prior felony conviction allegation in the furtherance
7 of justice.” The Union suggests that this language also creates a “ministerial and mandatory” duty of
8 some kind. Obviously it does not. The District Attorney, as the representative of the People, is allowed
9 to (and has) reached conclusions about what actions should be taken in “furtherance of justice.”

10 **Third**, the Union’s argument about Penal Code section 1385.1 is based on a false premise. Section
11 1385.1 prohibits courts from dismissing certain special circumstances after a jury finding of guilt or a plea
12 of guilty or *nolo contendere*. Nothing in the Directives would require DDAs to move to dismiss special
13 circumstances in those circumstances or when such a motion would be futile under the law.

14 **Fourth**, contrary to the Union’s argument, the Directives also do nothing to interfere with the
15 judiciary’s role in the implementation of the Three Strikes Law. When the District Attorney’s office
16 moves to dismiss strike allegations, such motions to dismiss still must be approved or denied by the courts.
17 In fact, the Union’s own application cites instances of courts refusing to dismiss motions brought under
18 the Directives. *See, e.g.*, App. at 6. To the extent the Union contends that there is something wrong with
19 the DDAs repleading (as opposed to moving to dismiss) strikes, the judiciary never had a right to dismiss
20 anything more than the allegations that the prosecutor put in a charging instrument. *Manduley v. Superior*
21 *Ct.*, 27 Cal.4th 537, 553 (2002) (charging decisions “not invalid simply because the prosecutor’s exercise
22 of such charging discretion necessarily affects the dispositional options available to the court”).

23 **E. The Directives Do Not Force DDAs To Violate Any Ethical Obligations**

24 In light of the foregoing, the Union’s argument that the District Attorney’s Directives would force
25 DDAs to violate supposed “ethical” obligations fails. Acting to implement the District Attorney’s view
26 of prosecutorial discretion is not a legal ethical dilemma for a DDA—it is a DDA’s *job*. Allowing DDAs
27 to challenge policy directives of District Attorneys under the guise of “legal ethics” complaints would
28 substitute the policy views of line prosecutors for the view of the District Attorney, the official million

1 of County residents elected to implement criminal justice policies in their community.

2 The Union claims Directive 20-08.1 contains “a script for the DDA to follow verbatim, pursuant
3 to which the DDA is to assert that mandatory sentencing enhancements under the Three Strikes Law
4 unconstitutionally usurp prosecutorial discretion – even though the California Court of Appeal has rejected
5 this position at least four times.” App. at 3. Not so. The supposedly offending portion of Directive 20-
6 08.1 requires DDAs, when moving to dismiss or withdraw prior strike allegations, to state that the Three
7 Strikes Law, *if* it were interpreted as stripping from the District Attorney discretion regarding pleading
8 sentencing enhancements in the first place, would be unconstitutional. As shown above, the Court of
9 Appeal cases on this issue deal with a separate question—and the statement about the constitutionality of
10 the law in that circumstance is both likely correct and preserves the issue for appeal. Nor does anything
11 in the policy prohibit DDAs from citing any other pertinent authority to a court.

12 The Rules of Professional Conduct also permit a DDA to advance a position contrary to current
13 law, as long as it is supported by “a good faith argument for an extension, modification or reversal of
14 existing law.” Cal. R. Prof. Conduct 3.1. Thus, even if a DDA believed that the Directive’s statement
15 about the constitutionality of the Three Strikes Law did not comport with Court of Appeal decisions, he
16 may nonetheless repeat the Directive’s statement—and do so ethically—as long as there is a reasonable
17 argument that there should be a change in the existing law. Here, there is a very clear opening for a new
18 development in the law. The California Supreme Court has expressly reserved its view on whether
19 interpreting the Three Strikes Law as imposing a ministerial duty to “plead and prove” every single
20 applicable conviction as a sentencing enhancement violates the separation of powers between the
21 legislative and executive branches. *People v. Super. Ct. (Romero)*, 13 Cal.4th 497, 515 n.7 (1996). Given
22 that reservation (as well as the law cited above), it is certainly reasonable to believe that the California
23 Supreme Court—or another appellate court—would conclude that an interpretation of the Three Strikes
24 Law that makes decisions to plead sentencing enhancements mechanical and mandated would be
25 unconstitutional if the question were presented to it (which it has not been to date).⁶

26 _____
27 ⁶ The Rules of Professional Conduct also specifically provide that “[a] subordinate lawyer does not
28 violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer’s
reasonable resolution of an arguable question of professional duty.” Cal. R. Prof. Conduct 5.2(b). This

1 **F. In No Event Is A Preliminary Injunction Warranted**

2 There also is no reason for a *preliminary* injunction to issue. The balance of interim harms favors
3 the District Attorney, not the Union. Balancing relative harms in a preliminary injunction proceeding
4 involves consideration of “the status quo,” “the degree of irreparable injury the denial of the injunction
5 will cause,” and “the degree of adverse effect on the public interest or interests of third parties.” *Vo v.*
6 *City of Garden Grove*, 115 Cal.App.4th 425, 435 (2004). Here, the Union fails all three prongs. As shown
7 above, a preliminary injunction would upset the status quo, since under long-standing law and practice,
8 the District Attorney and other district attorneys throughout California have exercised enormous discretion
9 in charging or not charging sentencing enhancements, including under the Three Strikes Law.

10 Nor can the Union show that complying with the Directives is likely to cause an irreparable injury.
11 The Union claims DDAs will suffer “irreparable” harm because a few DDAs have been “scolded” by
12 courts for moving to dismiss strike allegations and speculates this supposed “scolding” by courts portends
13 a future risk DDAs may be held in contempt or subject to State Bar discipline. App. at 6. This is both
14 incorrect and entirely speculative. See Decl. of Michele Hanisee ¶¶ 6-9 (describing “scolding” by courts
15 but not suggesting any court has held a prosecutor in contempt or there has been any threat or action by
16 the State Bar); *Keel v. Hedgpeth*, 2009 WL 4052707, at *1 (E.D. Cal. Nov. 19, 2009) (“Plaintiff is not
17 entitled to a preliminary injunction based on a hypothetical future injury”). In any event, enduring such
18 “scolding” is not an irreparable injury, as judges disagreeing with positions taken by a District Attorney
19 office is an ordinary circumstance of a prosecutor’s job—not a cognizable “irreparable” injury.

20 A preliminary injunction further would not be in the public interest, since it would interfere with
21 the will of the more than two million County voters who recently elected the District Attorney, and
22 would impose undue and unwarranted costs on the administration of justice and criminal defendants.

23 **G. The Union Has Not Established It Has Standing To Bring Its Claim**

24 Finally, the party bringing a mandamus petition has the burden of establishing it has standing to
25 so. *Am. Fed. of State, Country & Mun. Employees v. Metro. Water Dist.*, 126 Cal.App.4th 247, 262 (2005).
26 Here, the Union fails to allege any basis for standing, asserting only that it is the “bargaining unit” for the
27

28 _____ also resolves any purported ethical dilemma some DDAs supposedly feel about following the Directive

DDAs and thus has “organizational” standing. But the Union neither identifies the requirements for organizational standing nor provides any evidence or argument about the scope of its “bargaining” authority. *See* App. at 6 n.2 & Pet. ¶ 5. Associational standing does not exist unless “the interests [the association] seeks to protect are germane to the organization’s purpose.” *Amalgamated Transit Union, Local 1756, AFL-CIO v. Super. Ct.*, 46 Cal.4th 993, 1004 (2009). That a union may have the status of a “bargaining unit” does **not** mean it may challenge policy determinations like the Directives. By law, the Union’s scope of representation is limited to matters such as wages, hours, and terms and conditions of employment—**not** policies. Gov’t Code § 3504.⁷ The Union’s collective-bargaining agreement (the “MOU”) recognizes this. RJN, Ex. 1 at p. 41 (MOU, Art. 15 (Mgmt. Rights)). Nothing in the MOU suggests the Union represents DDAs for purpose of challenging policy decisions like the Directives. Thus, by law and under the collective bargaining agreement, this Petition is not “germane” to the Union’s representation of DDAs.

Indeed, if this writ petition **did** fall within the union’s scope of representation, it would fail for a different reason, as the Union’s MOU contains a grievance procedure, *id.*, Ex. 1 at p. 10 (Art. 9, § 2) requiring a grievance to be initiated within 10 days of occurrence, but no grievance was pursued here. The failure of County employees exhaust this administrative remedy before filing a lawsuit, including lawsuits that raise “questions of law,” divests a court of its subject-matter jurisdiction. *See Morton v. Super. Ct.*, 9 Cal.App.3d 977, 982-84 (1970). Thus, the Union has not shown it may pursue its petition.


IV. CONCLUSION

For each of the foregoing reasons, the application for a preliminary injunction should be denied.

DATED: January 15, 2021

KENDALL BRILL & KELLY LLP

By:



Robert E. Dugdale

Attorneys for Defendants and Respondents George Gascón, in his official capacity as District Attorney for the County of Los Angeles, and the Los Angeles County District Attorney’s Office

⁷ This “exclusionary language” was added to prevent “expansion of the language of ‘wages, hours and working condition’ to include more general managerial policy decisions.” *Claremont Police Officers Ass’n v. City of Claremont*, 39 Cal.4th 623, 631-32 (2006).

1 OFFICE OF COUNTY COUNSEL
Rodrigo A. Castro-Silva (185251)
2 *RCastro-Silva@counsel.lacounty.gov*
Adrian G. Gragas (150698)
3 *AGragas@counsel.lacounty.gov*
Jonathan C. McCaverty (210922)
4 *jmccaverty@counsel.lacounty.gov*
500 West Temple St., Floor 6
5 Los Angeles, California 90012
Telephone: 213.974.1828
6 Facsimile: 213.687.8822

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Government Code § 6103**

7 KENDALL BRILL & KELLY LLP
Robert E. Dugdale (167258)
8 *rdugdale@kbbfirm.com*
Laura W. Brill (195889)
9 *lbrill@kbbfirm.com*
Nicholas F. Daum (236155)
10 *ndaum@kbbfirm.com*
Nary Kim (293639)
11 *nkim@kbbfirm.com*
10100 Santa Monica Blvd., Suite 1725
12 Los Angeles, California 90067
Telephone: 310.556.2700
13 Facsimile: 310.556.2705

14 Attorneys for Defendants and Respondents George Gascón, in
his official capacity as District Attorney for the County of Los
15 Angeles, and the Los Angeles County District Attorney's Office

16 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
17 **COUNTY OF LOS ANGELES, CENTRAL DISTRICT**

18 ASSOCIATION OF DEPUTY DISTRICT
19 ATTORNEYS FOR LOS ANGELES
COUNTY,

20 Plaintiff and Petitioner,

21 v.

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

25 Defendants and Respondents.
26
27
28

Case No. 20STCP04250

**DECLARATION OF SHELAN Y. JOSEPH
IN SUPPORT OF RESPONDENTS'
OPPOSITION TO PETITIONER'S
APPLICATION FOR PRELIMINARY
INJUNCTION**

*Filed concurrently with Opposition;
Declarations of Monnica I. Thelen, Marshall
Khine, and Stephan A. Munkelt; Request for
Judicial Notice; Evidentiary Objections to
Michele Hanisee Declaration and [Proposed]
Rulings*

Date: February 2, 2021

Time: 1:30 p.m.

Dept.: 85

Judge: Hon. James C. Chalfant

1
2 **DECLARATION OF SHELAN Y. JOSEPH**

3 I am an attorney duly authorized to practice law in the State
4 of California.

5 I am an attorney with the Los Angeles County Public Defender's Office.
6 I have served in that capacity for over 24 years.

7 During my 24 years as a Deputy Public Defender I have served as
8 a misdemeanor lawyer, a juvenile lawyer, a juvenile resource lawyer, a felony
9 lawyer and a capital lawyer.

10 For the last two years I have been assigned as the Assistant Special
11 Circumstance coordinator. In that capacity, I oversaw all cases where the
12 death penalty may be imposed. As such, all cases had special circumstances
13 filed.

14 It has been my experience that prosecutors do not always file all strikes
15 and enhancements. They do not file all cases as felonies. Instead they
16 exercise discretion to determine whether a case should be filed, whether a
17 "wobbler" crime should be filed as a felony or misdemeanor, and whether
18 strikes should be filed and enhancements alleged. In some instances,
19 prosecutors have used their discretion to reduce felony charges to
20 misdemeanor charges in order to effectuate a disposition.

21 In cases where special circumstances have been alleged, upon a
22 showing by the defense, prosecutors have dismissed the special circumstance
23 in order to accept a defense offer of less than life without the possibility of
24 parole. Prosecutors have exercised their discretion to dismiss the special
25 circumstances in those instances.

26 Although most prosecutors review their cases and exercise their
27 discretion to charge only the appropriate charges and enhancements, some
28

1 overcharge their cases, piling on counts and enhancements. This
2 overcharging serves to force defendants to choose between risking a very long
3 prison sentence or taking a deal for a much-reduced sentence with the
4 overcharged counts being dismissed. Prosecutors, for example, routinely file
5 gang enhancements for the most mundane crimes committed by gang
6 members even though the truth is that the crime was not committed for the
7 benefit of the gang.


8 This practice of overcharging and routinely filing felonies is
9 particularly prevalent in juvenile cases. Prosecutors routinely choose to
10 charge the most egregious of charges that impact the most vulnerable of
11 clients.

12 Prosecutors sometimes extend plea bargain offers that are only
13 available for a limited time. Should a defendant choose to run a motion or go
14 to trial, the offer is then taken off the table and the punishment is
15 increased. The facts of the case have not changed. What has changed is that
16 the defendant chose to exercise her Constitutional right to a trial or
17 motion. As such, prosecutors use their discretion to penalize clients who
18 have chosen to exercise their trial rights.

19 In my practice, there have been instances where defense counsel will
20 make a counter-offer to the prosecution's plea offer. The defense might point
21 out that the prosecution's case is factually weak and/or there is a viable
22 defense. The prosecutor might agree that there are evidentiary
23 issues. However, the prosecutor will explain that while he or she would like
24 to accept the defense counter-offer or even make a lower offer, he or she
25 cannot do so because the prosecutor's manager will not allow it. Since the
26 manager who has no involvement with the actual trial proceedings or case
27
28

1 will not authorize the plea the prosecutor is bound by that decision despite
2 there being problems of proof.

3 I declare the above to be true and correct under penalty of perjury.
4 Executed this 15th day of January, 2021, at Los Angeles, California.

5 

6 /s/ SHELAN JOSEPH

7 Shelan Joseph

8 Declarant
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**Exempt From Filing Fee
Government Code § 6103**

OFFICE OF COUNTY COUNSEL
Rodrigo A. Castro-Silva (185251)
RCastro-Silva@counsel.lacounty.gov
Adrian G. Gragas (150698)
AGragas@counsel.lacounty.gov
Jonathan C. McCaverty (210922)
jmccaverty@counsel.lacounty.gov
500 West Temple St., Floor 6
Los Angeles, California 90012
Telephone: 213.974.1828
Facsimile: 213.687.8822

KENDALL BRILL & KELLY LLP
Robert E. Dugdale (167258)
rdugdale@kbbfirm.com
Laura W. Brill (195889)
lbrill@kbbfirm.com
Nicholas F. Daum (236155)
ndaum@kbbfirm.com
Nary Kim (293639)
nkim@kbbfirm.com
10100 Santa Monica Blvd., Suite 1725
Los Angeles, California 90067
Telephone: 310.556.2700
Facsimile: 310.556.2705

Attorneys for Defendants and Respondents George Gascón, in
his official capacity as District Attorney for the County of Los
Angeles, and the Los Angeles County District Attorney's Office

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES, CENTRAL DISTRICT**

ASSOCIATION OF DEPUTY DISTRICT
ATTORNEYS FOR LOS ANGELES
COUNTY,

Plaintiff and Petitioner,

v.

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

**DECLARATION OF MARSHALL KHINE
IN SUPPORT OF RESPONDENTS'
OPPOSITION TO PETITIONER'S
APPLICATION FOR PRELIMINARY
INJUNCTION**

*Filed concurrently with Opposition;
Declarations of Shelan Y. Joseph, Monnica L.
Thelen, and Stephan A. Munkelt; Request for
Judicial Notice; Evidentiary Objections to
Michele Hanisee Declaration and [Proposed]
Rulings*

Date: February 2, 2021

Time: 1:30 p.m.

Dept.: 85

Judge: Hon. James C. Chalfant

DECLARATION OF MARSHALL KHINE

I, the undersigned declares:

1. I am employed by the District Attorney's Office for the City and County of San Francisco as an Assistant District Attorney and have been so employed since November 1998. I am currently a Chief of the Criminal Division, a management role at the District Attorney's Office, and have served in this capacity since March 2014. I have also been assigned to many units within the office as a unit manager and as a trial prosecutor. Except where otherwise stated, I have personal knowledge of the facts set forth herein, and, if called as a witness, I believe I could testify competently to such facts under oath.

2. I have served as an Assistant District Attorney under four different San Francisco District Attorneys. From this experience, I have become familiar with the office's charging policies and practices through multiple administrations. I am also specifically familiar with the office's charging, prosecution, and resolution policies and practices in cases eligible for indeterminate life sentences under California's Three Strikes law pursuant to Penal Code Sections 667 and 1170.12. Subject to case by case management oversight and approval, each administration had policies that encouraged pursuing appropriate criminal charges of appropriate severity, and exercising discretion to not pursue criminal charges and allegations in appropriate circumstances. That included exercising discretion on whether to allege prior serious felony convictions as defined by 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 to reach fair and just resolutions.

3. During my career in the San Francisco District Attorney's Office, I am not aware of any policy that required prosecutors to allege every available qualifying serious or violent conviction as a strike enhancement. On the contrary, prior to Proposition 36, the "Three Strikes Reform Act" (2012), San Francisco District Attorneys discouraged alleging prior strike conviction enhancements on non-serious and non-violent new offenses and generally, did not pursue life in prison sentences under the Three Strikes law for new low level felony convictions. Additionally, some of these

1 offenses eligible for life sentences prior to Proposition 36, are no longer felonies after Proposition 47,
2 “The Safe Neighborhood and Schools Act” (2014), and some are not even crimes anymore pursuant
3 to Proposition 64, “The Adult Use of Marijuana Act” (2016).

4 4. The current policy of the San Francisco District Attorney is to allege status
5 enhancements such as prior strike convictions only as warranted by extraordinary circumstances
6 subject to the approval of the District Attorney or his designee.

7 5. In my experience, the decision to allege prior convictions as strikes under the Three
8 Strikes law has always been subject to sound judgment and discretion to achieve a proportionate and
9 appropriate sentence for the offense.

10
11 I declare under penalty of perjury under the laws of the State of California that the foregoing
12 is true and correct, based upon my personal knowledge, except to those items stated on information
13 and belief and as to those items, I believe them to be true. Executed on this 14th day of January 2021
14 in San Francisco, California.

15
16 
17 Marshall Khine

OFFICE OF COUNTY COUNSEL
Rodrigo A. Castro-Silva (185251)
RCastro-Silva@counsel.lacounty.gov
Adrian G. Gragas (150698)
AGragas@counsel.lacounty.gov
Jonathan C. McCaverty (210922)
jmccaverty@counsel.lacounty.gov
500 West Temple St., Floor 6
Los Angeles, California 90012
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Laura W. Brill (195889)
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Nicholas F. Daum (236155)
ndaum@kbbfirm.com
Nary Kim (293639)
nkim@kbbfirm.com
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Los Angeles, California 90067
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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES, CENTRAL DISTRICT**

ASSOCIATION OF DEPUTY DISTRICT
ATTORNEYS FOR LOS ANGELES
COUNTY,

Plaintiff and Petitioner,

v.

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

**DECLARATION OF STEPHAN A.
MUNKELT IN SUPPORT OF
RESPONDENTS' OPPOSITION TO
PETITIONER'S APPLICATION FOR
PRELIMINARY INJUNCTION**

*Filed concurrently with Opposition;
Declarations of Shelan Y. Joseph, Monnica I.
Thelen, and Marshall Khine; Request for
Judicial Notice; Evidentiary Objections to
Michele Hanisee Declaration and [Proposed]
Rulings*

Date: February 2, 2021

Time: 1:30 p.m.

Dept.: 85

Judge: Hon. James C. Chalfant

DECLARATION OF STEPHAN A. MUNKELT

1
2 1. I am the Executive Director of the California Attorneys for Criminal Justice (the
3 “CACJ”). The CACJ is the California association of criminal defense lawyers, including both retained
4 counsel and public defenders, and it has over 1,200 members. I am also a certified specialist in criminal
5 law, and have practiced primarily in criminal defense since my admission to the California Bar in 1978.
6 Except where otherwise stated, I have personal knowledge of the facts set forth below, and, if called as
7 a witness, could and would testify competently to such facts under oath.

8 2. I have been informed that in the writ proceeding before this court Petitioners have
9 asserted that charging policies on Three Strikes cases announced by District Attorney George Gascon
10 are in violation of the law, because the Three Strikes law imposes a ministerial duty to “plead and
11 prove” every prior serious or violent felony conviction.

12 3. Since 1987 my office has been located in Nevada County. During these 33 years I
13 have represented defendants with serious or violent priors in Nevada, Placer, Sacramento, Sutter,
14 Yuba, Butte, and Plumas counties. In several of these jurisdictions, there have been multiple elected
15 District Attorneys during that time.

16 4. I have never had a District Attorney or Deputy District Attorney in any of these cases
17 suggest that the law imposes a mandatory duty to file every known prior strike in each new felony
18 prosecution.

19 5. It is my understanding that in these offices and counties the “plead and prove”
20 requirement is viewed as a protection of due process and the right to confrontation, by requiring that
21 no defendant can be sentenced under the Three Strikes law unless the necessary allegations have been
22 pled and proven beyond a reasonable doubt. (See *e.g. Apprendi v. New Jersey* (2000) 530 U.S. 466,
23 147 L. Ed. 2d 435.) It is not read as a requirement to file every possible strike.

24 6. In numerous felony cases where my client had one or more serious or violent prior
25 felony convictions, the initial pleading did not allege those enhancements. In many of them available
26 Strike enhancements were never filed.

27 7. The prosecutors in these cases have given a number of explanations why this has
28 occurred. One is that “office policy” was not to file a strike unless the current offense was serious or

1 violent. A second was that office policy required approval of a supervising attorney before filing a
2 strike enhancement. A third, and perhaps most common, was to have the Deputy District Attorney
3 say that, if my client did not accept an offer to settle the case, the Strike enhancements would be
4 filed.

5 8. I am informed and believe that the same practices can be found in most other
6 jurisdictions across California. Conversations and electronic communications with members of
7 CACJ have confirmed the use of similar policies, though the concept of mandatory filing has not
8 been raised until this writ proceeding, to my knowledge.

9 I declare under penalty of perjury under the laws of the State of California that the foregoing
10 is true and correct. Executed on this 14th day of January, 2021, in Nevada City, California.

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13 _____
14 Stephen A. Munkelt
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1 OFFICE OF COUNTY COUNSEL
Rodrigo A. Castro-Silva (185251)
2 *RCastro-Silva@counsel.lacounty.gov*
Adrian G. Gragas (150698)
3 *AGragas@counsel.lacounty.gov*
Jonathan C. McCaverty (210922)
4 *jmccaverty@counsel.lacounty.gov*
500 West Temple St., Floor 6
5 Los Angeles, California 90012
Telephone: 213.974.1828
6 Facsimile: 213.687.8822

**Exempt From Filing Fee
Government Code § 6103**

7 KENDALL BRILL & KELLY LLP
Robert E. Dugdale (167258)
8 *rdugdale@kbbfirm.com*
Laura W. Brill (195889)
9 *lbrill@kbbfirm.com*
Nicholas F. Daum (236155)
10 *ndaum@kbbfirm.com*
Nary Kim (293639)
11 *nkim@kbbfirm.com*
10100 Santa Monica Blvd., Suite 1725
12 Los Angeles, California 90067
Telephone: 310.556.2700
13 Facsimile: 310.556.2705

14 Attorneys for Defendants and Respondents George Gascón, in
his official capacity as District Attorney for the County of Los
15 Angeles, and the Los Angeles County District Attorney's Office

16 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
17 **COUNTY OF LOS ANGELES, CENTRAL DISTRICT**

18 ASSOCIATION OF DEPUTY DISTRICT
19 ATTORNEYS FOR LOS ANGELES
COUNTY,

20 Plaintiff and Petitioner,

21 v.

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

25 Defendants and Respondents.
26
27
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Case No. 20STCP04250

**DECLARATION OF MONNICA I.
THELEN IN SUPPORT OF
RESPONDENTS' OPPOSITION TO
PETITIONER'S APPLICATION FOR
PRELIMINARY INJUNCTION**

*Filed concurrently with Opposition;
Declarations of Shelan Y. Joseph, Marshall
Khine, and Stephan A. Munkelt; Request for
Judicial Notice; Evidentiary Objections to
Michele Hanisee Declaration and [Proposed]
Rulings*

Date: February 2, 2021

Time: 1:30 p.m.

Dept.: 85

Judge: Hon. James C. Chalfant

1 **DECLARATION OF MONNICA L. THELEN**

2 I, Monnica L. Thelen, declare as follows:

3 I am a lawyer licensed to practice law in California. I was admitted to
4 the California Bar in 1995. I have remained a member in good standing and
5 have practiced criminal law in California continuously since joining the Los
6 Angeles Office of the Public Defender in 1996.

7 I have been a Deputy Public Defender, Grade IV, which is the highest
8 level of trial lawyer, since 2005. I have been assigned felony trial matters
9 since 2000. In that capacity, I have handled hundreds of felony cases
10 throughout Los Angeles County, in the Central, North Central (Glendale),
11 Northeast, Northwest, North Valley and South Judicial Districts. Each of
12 these cases was prosecuted by the Los Angeles Office of the District Attorney.

13 The vast majority of my cases have been resolved via plea bargain.
14 Many of my cases have involved special allegations and enhancements,
15 including, but not limited to Three Strikes Law enhancements, gun
16 enhancements, gang enhancements and other enhancements. I have also
17 been in court and have witnessed cases being resolved via plea bargain on
18 numerous occasions.

19 In many cases, the filing deputy's election to allege an enhancement or
20 multiple enhancements that could apply to a case results in a maximum
21 confinement exposure that is excessively punitive in light of the underlying
22 conduct that gave rise to the offense. This overcharging results in dissuading
23 defendants from exercising their constitutional right to trial because the risk
24 of the sentence the defendant would receive if convicted is far too great. In
25 those situations, most defendants will choose to accept a plea bargain for a
26 reduced sentence with the overcharged enhancements being dismissed if they
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1 can get it. For example, prosecutors will often file gang enhancements to
2 crimes committed by gang members even when there is little or no nexus of
3 the enhancement to the underlying offense, or where the offense does not
4 involve egregious conduct.

5 Prosecutors regularly extend plea bargain offers that are only available
6 for a limited time referred to as “pre-prelim-only offers.” Should a defendant
7 choose to exercise their constitutional right to a preliminary hearing, the
8 offer will be withdrawn and the punishment will be increased in any future
9 plea bargain negotiations. This occurs routinely and rarely has to do with
10 any change in circumstances, but more so results in the defendant being
11 punished merely for exercising their constitutional right.

12 Sometimes the defense will make a counter-offer to the prosecution’s
13 plea offer. On these occasions, counsel for the defendant may point out
14 weaknesses in the prosecution’s case or may present mitigating
15 circumstances that support the counter-offer. On many occasions, prosecutors
16 have informed me that while he or she would be inclined to accept the
17 counter-offer he or she cannot do so because the prosecutor’s manager will
18 not allow it. In other cases, prosecutors have informed me that if I want to
19 provide a counter-offer, I must make an appointment with their manager to
20 discuss it.

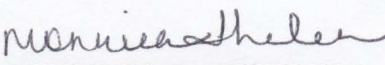
21 As part of the plea negotiation process, I have on multiple occasions
22 requested that prosecutors strike priors alleged under the Three Strikes Law
23 and strike other enhancements such as gang and gun enhancements. The
24 plea negotiation process occurs between the prosecution and the defense. I
25 advise my clients of the proposed settlement, and if my client is in
26 agreement, I advise him or her of their constitutional rights and the
27 consequences of their plea. Most clients then read and sign a *Tahl* waiver,
28

1 which I then submit to the clerk. The court is not notified until we have
2 reached a settlement agreement. The prosecutor or I will state the disposition
3 on the record, the judge or the prosecutor takes the waiver of rights from the
4 defendant, counsel joins, and the defendant is either immediately sentenced
5 on that date or soon thereafter. The prosecution then moves to dismiss the
6 strikes or other enhancements that are not part of the plea bargain. In cases
7 where the prosecutors move to dismiss the strike enhancement or special
8 allegations, they are rarely, if ever, asked by the court to state whether doing
9 so is in the interests of justice; rather the court simply accepts the plea, and
10 sentences the defendant.

11 The only time the court is involved in the plea bargaining process is
12 when I cannot reach an agreement with the prosecutor, and I ask to plead
13 open to the court. Only on those rare occasions do I state to the court why
14 such a plea bargain is in the interests of justice.

15 I declare under penalty of perjury under the laws of the State of
16 California and the United States that the foregoing is true and correct.
17

18
19 Dated: January 14, 2021

20 
21 /s/ MONNICA L. THELEN
22 Monnica L. Thelen
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1 BROWNE GEORGE ROSS
O'BRIEN ANNAGUEY & ELLIS LLP
2 Eric M. George (State Bar No. 166403)
egeorge@bgrfirm.com
3 Thomas P. O'Brien (State Bar No. 166369)
tobrien@bgrfirm.com
4 Nathan J. Hochman (State Bar No. 139137)
nhochman@bgrfirm.com
5 David J. Carroll (State Bar No. 291665)
dcarroll@bgrfirm.com
6 Matthew O. Kussman (State Bar No. 313669)
mkussman@bgrfirm.com
7 801 S. Figueroa Street, Suite 2000
Los Angeles, California 90017
8 Telephone: (213) 725-9800
Facsimile: (213) 725-9808
9

Attorneys for Plaintiff and Petitioner
10 The Association of Deputy District Attorneys for
Los Angeles County
11

12 SUPERIOR COURT OF THE STATE OF CALIFORNIA
13 COUNTY OF LOS ANGELES
14

15 THE ASSOCIATION OF DEPUTY
DISTRICT ATTORNEYS FOR LOS
ANGELES COUNTY,
16

Plaintiff and Petitioner,
17

vs.
18

19 GEORGE GASCÓN, in his official capacity
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.
22
23
24

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

25 Plaintiff and Petitioner The Association of Deputy District Attorneys for Los Angeles
26 County hereby submits this Reply in Support of Order to Show Cause Re: Preliminary Injunction.
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Document received by the CA 2nd District Court of Appeal.

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

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

12 **II. SUMMARY OF ARGUMENT**

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

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

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

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

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

25 **III. ARGUMENT**

26 **A. The Three Strikes Law Eliminates Prosecutorial Discretion to Plead and** 27 **Prove Prior Strikes**

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

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

18 [The firearm enhancement under] Section 12022.53 . . . contains no language
19 limiting the prosecution’s discretion to plead or not plead the enhancement. Thus,
20 it is permissible for the prosecution to plead a section 12022.53 firearm
21 enhancement on one count but not another, and a defendant reading an information
22 that does so has no reason to think the enhancement might apply to a count to
23 which it is not pleaded. . . . [¶] A defendant has no basis to make such an
24 assumption, however, when an information alleges a prior strike as to some eligible
25 counts but not others. This is because, **under the plain language of the Three
26 Strikes law, it applies ‘in every case’ in which a defendant has suffered a prior
27 strike conviction, and, to borrow *Anderson*’s language, the prosecution
28 expressly *cannot* ‘ma[k]e a discretionary choice not to pursue’ the Three
29 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

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

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

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

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

24 _____
25 ¹ According to media sources, Respondents have also internally concluded that pleading
26 and proving prior strikes is mandatory. Suppl. George Decl. ¶ 2, Ex. 11. When Petitioner’s
27 counsel submitted a Public Records Act request for the memoranda containing these conclusions,
28 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.

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

13 Finally, Respondents' declarations are not merely inaccurate, Suppl. Hanisee Decl. ¶ 4, Exh.
14 15, but legally irrelevant since it is axiomatic that Respondents cannot overrule case law by citing
15 the perceptions held by several prosecutors and public defenders as to how prior strikes have been
16 pleaded. In any event, Respondents' Special Directives do not seek to have prosecutors exercise
17 discretion in pleading prior strikes, but to outright bar them from ever alleging strikes; thus,
18 Respondents' reliance on what they believe to be discretionary practices does not help them.

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

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

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

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

26
27 ³ *Pettitt* is particularly on point, as that case concerned a district attorney’s blanket policy
28 with respect to seeking sentencing enhancements. Respondents offer no distinction whatsoever of
these cases, and there is none to be made.

1 **C. The District Attorney’s Abdication of His Mandatory Duties Demands**
2 **Mandamus Relief**

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

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

18 Similarly, although mandate cannot compel a particular exercise of discretion, mandate
19 “does lie to command the exercise of discretion [in *some* manner]—to compel some action upon
20 the subject involved.” *State Comp. Ins. Fund v. Workers’ Comp. Appeals Bd.*, 248 Cal. App. 4th
21 349, 370 (2016); *Ellena v. Dep’t of Ins.*, 230 Cal. App. 4th 198, 208 (2014) (affirming writ of
22 mandate to compel Department of Insurance to review a proposal to determine whether to accept
23 or reject it); *see also* Mot. at 5, 10. Here, of course, “a district attorney’s ‘mandatory’ duty is to
24 exercise his or her *discretion* to prosecute crimes,” *People ex rel. Becerra v. Superior Court*, 29
25 Cal. App. 5th 486, 504 (2018)—which, as shown above, refers to the exercise of case-by-case
26 discretion. *See Pettitt*, 93 Wash. 2d at 290; *City Court of City of Tucson*, 150 Ariz. at 102; *Dent*,

27 ⁴ Respondents’ persistent emphasis on the word “ministerial” is nothing more than
28 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.

1 38 Cal. App. 4th at 1731. There is no dispute that the Special Directives eliminate all case-by-case
2 discretion in seeking dismissal of six enumerated enhancements and thus, too, are unlawful.

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

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

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

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

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

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

23 **E. Petitioner Has Standing**

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

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

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

21 **IV. CONCLUSION**

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

24
25 _____
26 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.

27 ⁶ And as Respondents agree that legal disputes over district attorney policy are not subject
28 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).

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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

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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.

Yin Chen

Eric M. George

1 **SUPPLEMENTAL DECLARATION OF MICHELE HANISEE**

2 I, Michele Hanisee, declare and state as follows:

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

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

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

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

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

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

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

25 4. Attached hereto as **Exhibit 15** is the written policy of the Los Angeles County
26 District Attorney's Office regarding the charging and disposition of prior strikes under the Three
27 Strikes Law that was in effect prior to Respondents' adoption of the Special Directives. Section
28 12.05 provides as follows and is highlighted in yellow in the attachment: "*All qualifying prior*

1734711.8

1 *felony convictions shall be alleged in the pleadings pursuant to Penal Code § 1170.12(d)(1).*

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

10
11 I declare under penalty of perjury under the laws of the State of California that the
12 foregoing is true and correct. Executed on January 26, 2021, at Los Angeles, California.

13
14 
15 Michele Hanisee

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EXHIBIT 11

Metropolitan News-Enterprise

Monday, December 28, 2020

Page 1

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 Obligated 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.

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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."

However, the memo also notes the Aug. 12 Court of Appeal opinion in *People for Ethical Operation of Prosecutors & Law Enforcement v. Spitzer*, by Justice Raymond J. Ikola of the Fourth District's Div. Three, which declares:

"Plaintiffs allege that defendants have systematically employed unconstitutional methods of investigating crimes. An injunction against unlawful investigative methods cannot, by definition, interfere with the lawful exercise of defendants' duties."

The memo concludes that because Gascón's policy "is a blanket policy, it is not the kind of 'intervention' in a criminal case that was found improper in *Dix*." It says that although "the present situation involves crime charging, which is more closely connected to the prosecutorial function than the investigative methods at issue" in the Fourth District case, "it is at least plausible that the office would have to defend its policy in a civil case."

Judge's Authority

In a memo supplied on Dec. 10 to Joseph Iniguez, who has been designated by Gascón as his interim chief deputy, Deputy District Attorney Matthew A. Brown disputed the district attorney's assertion that it's up to him to determine what is charged and that judges are powerless to defy his determination that strikes not be alleged.

Brown wrote:

"The court has the ultimate power to dismiss a strike allegation under Penal Code section 1385. That power is not conditioned on the consent of the prosecutor. Similarly, if the prosecutor moves for the court to dismiss a strike allegation, the court is not bound to grant the motion.

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“It is true that in considering whether to grant or deny the motion, the court must consider the interest of ‘the People,’ but this is not limited to the prosecutor’s opinion. While the prosecutor acts in the name of ‘the People’ as sovereign in all criminal actions, ‘the People’ also enacted the Three Strikes law, and within it constrained the discretion of the prosecutor and the court. Thus, from the court’s perspective, it makes no difference whether the prosecutor is the one moving to dismiss, or whether it is considering such action on its own motion—its decision to grant or deny the motion must be based on a valid judicial reason within the limits of the Three Strikes law.

“In light of this, the prosecutor’s general belief that the Three Strikes law should not be enforced would probably not provide a valid judicial reason to strike a strike.”

Chances on Appeal

Turning to the prospect of appellate review, Brown said that if a judge denied a motion to dismiss an enhancement allegation, “that decision is likely not reviewable at all, but even if it were, it would be reviewed under a deferential abuse-of-discretion standard.”

He prognosticated:

“We would not be able to prevail under that standard solely by citing our disagreement with the current law.”

The memo adds:

“Absent intervening case law holding that these mandatory plead-and-prove aspects of the Three Strikes law are invalid, any change must come from the Legislature or the voters.”

Notwithstanding that advice, Gascón on Dec. 15 issued an “amendment” to Special Directive 20-08 containing a script for deputies to read when moving to have enhancement allegations deleted from charging pleadings. It includes this assertion:

“The California Constitution and State Supreme Court precedent further vest the District Attorney with sole authority to determine whom to charge, what charges to file and pursue, and what punishment to seek. That power cannot be stripped from the District Attorney by the Legislature, Judiciary, or voter initiative without amending the California Constitution. It is the position of this office that Penal Code section 1170.12(d)(2) and Penal Code 667(f)(1) are unconstitutional and infringe on this authority.”

There was widespread concern among deputies that if they complied with the directive, they would be violating the command in Business and Profession Code § 6068(d) not to lie to the court. They would be doing so, they discerned, if they represented that the facts warrant leniency, where they did not believe this to be so, and that case law establishes sole discretion in the prosecuting office as to whether enhancements are to be alleged.

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Memo on Ethics

In a memo of Dec. 18 to Iniguez, Brown noted that the Dec. 15 directive “does not mention cases that are directly contrary to this position,” pointing to Epstein’s opinion *Kilborn*. He reminded Iniguez that California Rules of Professional Conduct, rule 3.3, “requires attorneys to cite any known, adverse authority.”

While it is consistent with the rule to argue that Kilborn was incorrectly decided, Brown wrote, “deputies that are aware of Kilborn may, indeed must, cite it to the superior court if the constitutionality of the Three Strike law is at issue.”

He acknowledged that Rule 3.3 does permit “a good faith argument for an extension, modification, or reversal of the existing law,” but noted that any Superior Court judge would be bound by *Kilborn* and that redress would have to be made to the Court of Appeal in pursuit of a contrary holding.

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EXHIBIT 12

January 7, 2021

File No. 9995-970

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

Re: Public Records Act Request

Dear Ms. Low & Ms. Fox:

Pursuant to the California Public Records Act (Government Code Section 6250, *et seq.*), I request a copy of the documents sent forth below:

- 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.

I ask that you produce by e-mail these documents to me within 10 days of your receipt of this request. Gov. Code § 6253. Given both the nature of the memoranda and their disclosure to the media, there plainly is no basis for claiming the documents are exempt from production.

Thank you for your time and attention to this matter. If I can provide any clarification that will help expedite your attention to my request, please contact me.

Sincerely,


Eric M. George

EMG
Attachment

cc: Robert Dugdale
E-Mail: rdugdale@kbkfirm.com

EXHIBIT A

Document received by the CA 2nd District Court of Appeal.

Metropolitan News-Enterprise

Monday, December 28, 2020

Page 1

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 Obligated 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.

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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):

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"Plaintiffs allege that defendants have systematically employed unconstitutional methods of investigating crimes. An injunction against unlawful investigative methods cannot, by definition, interfere with the lawful exercise of defendants' duties."

The memo concludes that because Gascón's policy "is a blanket policy, it is not the kind of 'intervention' in a criminal case that was found improper in *Dix*." It says that although "the present situation involves crime charging, which is more closely connected to the prosecutorial function than the investigative methods at issue" in the Fourth District case, "it is at least plausible that the office would have to defend its policy in a civil case."

Judge's Authority

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Brown wrote:

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“It is true that in considering whether to grant or deny the motion, the court must consider the interest of ‘the People,’ but this is not limited to the prosecutor’s opinion. While the prosecutor acts in the name of ‘the People’ as sovereign in all criminal actions, ‘the People’ also enacted the Three Strikes law, and within it constrained the discretion of the prosecutor and the court. Thus, from the court’s perspective, it makes no difference whether the prosecutor is the one moving to dismiss, or whether it is considering such action on its own motion—its decision to grant or deny the motion must be based on a valid judicial reason within the limits of the Three Strikes law.

“In light of this, the prosecutor’s general belief that the Three Strikes law should not be enforced would probably not provide a valid judicial reason to strike a strike.”

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Turning to the prospect of appellate review, Brown said that if a judge denied a motion to dismiss an enhancement allegation, “that decision is likely not reviewable at all, but even if it were, it would be reviewed under a deferential abuse-of-discretion standard.”

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“We would not be able to prevail under that standard solely by citing our disagreement with the current law.”

The memo adds:

“Absent intervening case law holding that these mandatory plead-and-prove aspects of the Three Strikes law are invalid, any change must come from the Legislature or the voters.”

Notwithstanding that advice, Gascón on Dec. 15 issued an “amendment” to Special Directive 20-08 containing a script for deputies to read when moving to have enhancement allegations deleted from charging pleadings. It includes this assertion:

“The California Constitution and State Supreme Court precedent further vest the District Attorney with sole authority to determine whom to charge, what charges to file and pursue, and what punishment to seek. That power cannot be stripped from the District Attorney by the Legislature, Judiciary, or voter initiative without amending the California Constitution. It is the position of this office that Penal Code section 1170.12(d)(2) and Penal Code 667(f)(1) are unconstitutional and infringe on this authority.”

There was widespread concern among deputies that if they complied with the directive, they would be violating the command in Business and Profession Code § 6068(d) not to lie to the court. They would be doing so, they discerned, if they represented that the facts warrant leniency, where they did not believe this to be so, and that case law establishes sole discretion in the prosecuting office as to whether enhancements are to be alleged.

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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

RODRIGO A. CASTRO-SILVA
County Counsel

January 19, 2021

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

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

RECEIVED
JAN 22 2021

Browne George Ross LLP

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.

Mr. Eric M. George, Esq.
January 19, 2021
Page 2

(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

January 7, 2021

File No. 9995-970

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.
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E-Mail: rlow@da.lacounty.gov
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Document received by the CA 2nd District Court of Appeal.

EXHIBIT 14

**BYLAWS
OF THE ASSOCIATION OF DEPUTY DISTRICT
ATTORNEYS** A-22

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

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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.

Document received by the CA 2nd District Court of Appeal.

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.

Document received by the CA 2nd District Court of Appeal.

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.

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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 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

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

KENDALL BRILL & KELLY LLP
Robert E. Dugdale
10100 Santa Monica Blvd., Suite 1725
Los Angeles, CA 90067
rdugdale@kbkfirm.com
Telephone: 310-556-2700
Facsimile: 310-556-2705

Attorneys for Defendants and Respondents
George Gascon, in his official capacity as
District Attorney for the County of Los Angeles
and Los Angeles County District Attorney's
Office

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COURT OF APPEAL FOR THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

THE ASSOCIATION OF DEPUTY DISTRICT)	
ATTORNEY'S FOR LOS ANGELES COUNTY,)	
)	CASE NO.
PLAINTIFF/RESPONDENT,)	20STCP04250
)	
VS.)	
)	DCA NO.
GEORGE GASCON, ET AL.,)	B310845
)	
DEFENDANTS/APPELLANTS.)	
<hr/>		

APPEAL FROM THE SUPERIOR COURT OF LOS ANGELES COUNTY

HONORABLE JAMES C. CHALFANT, JUDGE PRESIDING

REPORTER'S TRANSCRIPT OF PROCEEDINGS ON APPEAL

FEBRUARY 2, 2021

APPEARANCES:

FOR THE PLAINTIFF/ RESPONDENT:	BROWNE, GEORGE, ROSS, O'BRIEN, ANNAGUEY & ELLIS, L.L.P. BY: DAVID J. CARROLL, ESQ. BY: ERIC M. GEORGE, ESQ. BY: THOMAS P. O'BRIEN, ESQ. BY: MATTHEW O. KUSSMAN, ESQ. 2121 AVENUE OF THE STARTS, STE. 2800 LOS ANGELES, CALIFORNIA 90067
-----------------------------------	--

FOR THE DEFENDANTS/ APPELLANTS:	KENDALL, BRILL & KELLY, L.L.P. BY: ROBERT E. DUGDALE, ESQ. BY: LAURA W. BRILL, ESQ. 10100 SANTA MONICA BLVD., STE 1725 LOS ANGELES, CALIFORNIA 90067
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PAGES 1-59

CINDY CAMERON, CSR NO. 10315
OFFICIAL COURT REPORTER

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES - SOUTHERN DISTRICT
DEPARTMENT 85 HON. JAMES C. CHALFANT, JUDGE

THE ASSOCIATION OF DEPUTY DISTRICT)
ATTORNEY'S FOR LOS ANGELES COUNTY,)
PETITIONER,) CASE NO.
VS.) 20STCP04250
GEORGE GASCON, ET AL.,)
RESPONDENTS.)
_____)

REPORTER'S TRANSCRIPT OF PROCEEDINGS
TUESDAY, FEBRUARY 2, 2021

APPEARANCES:

FOR PETITIONER: BROWNE, GEORGE, ROSS, O'BRIEN,
ANNAGUEY & ELLIS, L.L.P.
BY: DAVID J. CARROLL, ESQ.
BY: ERIC M. GEORGE, ESQ.
BY: THOMAS P. O'BRIEN, ESQ.
BY: MATTHEW O. KUSSMAN, ESQ.
2121 AVENUE OF THE STARTS, STE. 2800
LOS ANGELES, CALIFORNIA 90067

FOR RESPONDENTS: KENDALL, BRILL & KELLY, L.L.P.
BY: ROBERT E. DUGDALE, ESQ.
10100 SANTA MONICA BLVD., STE 1725
LOS ANGELES, CALIFORNIA 90067

CINDY CAMERON, CSR NO. 10315
OFFICIAL COURT REPORTER

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M A S T E R I N D E X

FEBRUARY 2, 2021

CHRONOLOGICAL INDEX OF WITNESSES

PAGE

(NONE.)

EXHIBITS

<u>EXHIBIT</u>	<u>FOR I.D. IN EVD.</u>	<u>WITHDRAWN OR REJECTED</u>
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(NONE.)

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1 CASE NO: 20STCP04250
 2 CASE NAME: ASSOCIATION OF DEPUTY DISTRICT
 3 ATTORNEYS FOR LOS ANGELES COUNTY
 VS. GASCON
 4 LOS ANGELES, CALIFORNIA TUESDAY, FEBRUARY 2, 2021
 5 DEPARTMENT 85 HON. JAMES C. CHALFANT, JUDGE
 6 APPEARANCES: (AS HERETOFORE NOTED)
 7 REPORTER: CINDY CAMERON, CSR NO. 10315
 8 TIME: P.M. SESSION (1:56 P.M.)
 9

10 THE COURT: OKAY. ASSOCIATION OF THE DEPUTY
 11 DISTRICT ATTORNEYS OF LOS ANGELES COUNTY VERSUS GEORGE
 12 GASCON, 20STCP04250, NUMBER 4 ON CALENDAR.

13 COUNSEL YOUR APPEARANCES, PLEASE.

14 MR. GEORGE: GOOD AFTERNOON, YOUR HONOR. THIS IS
 15 ERIC GEORGE ON BEHALF OF PETITIONER AND WITH ME ARE MY
 16 COLLEAGUES DAVID CARROLL AND MATTHEW KUSSMAN, WHO WILL BE
 17 MAKING ANY ARGUMENT TODAY. AND ALSO MY COLLEAGUES TOM
 18 O'BRIEN AND NATHAN HOFFMAN. WE'RE ASSISTED BY ERIC OPITZ,
 19 WHO IS HERE WITH US, AND THEN ALSO FROM OUR CLIENT,
 20 MICHELLE HANISEE IS HERE AS WELL AS ERIC SIDDALL.

21 THE COURT: YEAH. I WANT TO KNOW WHO'S ARGUING.
 22 WHO'S ARGUING?

23 MR. GEORGE: IT'S GOING TO BE DAVID CARROLL, AND
 24 IF YOUR HONOR WILL PERMIT, ALSO MATTHEW KUSSMAN.

25 THE COURT: ALL RIGHT. I DON'T KNOW IF THE CLERK
 26 HAS THOSE NAMES. CAN YOU SPELL KUSSMAN?

27 MR. GEORGE: YES. K-U-S-S-M-A-N, IT IS MATTHEW,
 28 AND DAVID CARROLL IS C-A-R-R-O-L-L.

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1 THE COURT: OKAY. THANK YOU.

2 MR. GEORGE: THANK YOU, YOUR HONOR.

3 THE COURT: FOR RESPONDENT?

4 MR. DUGDALE: GOOD AFTERNOON, YOUR HONOR. ROBERT
5 DUGDALE FROM KENDALL, BRILL & KELLY ON BEHALF OF
6 RESPONDENTS DEPUTY DISTRICT -- I'M SORRY, DISTRICT
7 ATTORNEY --

8 THE COURT: I'M NOT HEARING YOU. I KNOW SOMETHING
9 IS BEING SAID.

10 MR. DUGDALE: I'M SO SORRY. I WAS MUTED, YOUR
11 HONOR.

12 YOUR HONOR, THIS WAS ROBERT DUGDALE ON BEHALF OF
13 RESPONDENT DISTRICT ATTORNEY GEORGE GASCON AS WELL AS THE
14 DISTRICT ATTORNEY'S OFFICE OF LOS ANGELES COUNTY.

15 THE COURT: OKAY. GOOD AFTERNOON.

16 MR. DUGDALE: GOOD AFTERNOON, YOUR HONOR.

17 THE COURT: THANK YOU.

18 OKAY. SO WE'RE HERE ON A O.S.C. RE: PRELIMINARY
19 INJUNCTION. IT IS ACTUALLY MY FIRST CONNECTION TO THE CASE
20 BECAUSE THE EX-PARTE APPLICATION WAS HEARD OVER THE
21 HOLIDAYS WHEN I WAS NOT HERE.

22 SO I DID NOT -- I NORMALLY ISSUE A TENTATIVE
23 DECISION, BUT I'M HERE THERE YET. HERE'S WHERE I AM: I
24 HAVE READ THE BRIEFS, I HAVE READ THE EVIDENCE, I HAVE MADE
25 RULINGS ON OBJECTIONS. I HAVE READ ALMOST EVERY CASE, IF
26 NOT EVERY CASE, OF SIGNIFICANCE CITED BY THE PARTIES, I
27 HAVE READ THE PERTINENT PENAL CODE PROVISIONS. I TRIED TO
28 REFRESH MY MEMORY FROM DAYS GONE BY WHEN I DID THIS KIND OF

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1 THING.

2 SO I'M READY TO HEAR ARGUMENT. I WILL TAKE THE
3 MATTER UNDER SUBMISSION AT THE END AND I WILL GENERATE A
4 DECISION. NO GUARANTEE, BUT PROBABLY BY THE END OF THE
5 WEEK.

6 I HAVE A COUPLE OF TECHNICAL QUESTIONS BEFORE YOU
7 ARGUE AND THE FIRST TECHNICAL QUESTION IS THERE'S A
8 REFERENCE -- THE CASE CONCERNS FOUR SPECIAL DIRECTIVES OF
9 THE DISTRICT ATTORNEY -- ACTUALLY THREE; THE FOURTH ONE IS
10 REALLY NOT AT ISSUE -- AND ONE OF THE DIRECTIVES REFERS TO
11 PROP 8 OR FIVE-YEAR ENHANCEMENT UNDER 667(A) OR -- UNDER
12 667(A) IT SAYS. AND I DON'T KNOW WHAT THAT MEANS, "OR."
13 IS A FIVE-YEAR ENHANCEMENT THE SAME AS A PROP 8
14 ENHANCEMENT? ANYBODY?

15 I HAVEN'T STUMPED YOU ALREADY, HAVE I?

16 MR. DUGDALE: YOUR HONOR, I'M WAITING ON
17 PETITIONERS HERE. IT'S THEIR PETITION.

18 THE COURT: OKAY. AND I FORGOT TO SAY, EVERY TIME
19 YOU SPEAK, YOU NEED TO STATE YOUR NAME OR THE REPORTER WILL
20 HAVE NO WAY OF KNOWING WHO WAS TALKING.

21 MR. DUGDALE: THAT WAS ROBERT DUGDALE, YOUR HONOR.

22 THE COURT: I THINK THAT WAS MR. DUGDALE.

23 MR. GEORGE: YOUR HONOR, THIS IS ERIC GEORGE FOR
24 PETITIONER. AND IF THE COURT WILL INDULGE US, WE ARE
25 CONFIRMING WHAT WE THINK IS THE CASE, BUT AS YOUR HONOR
26 KNOWS, WE DON'T WANT TO SAY A WORD UNTIL WE HAVE A TRUE
27 ASSURANCE THAT WE CAN STAND BY WHAT WE'RE SAYING.

28 THE COURT: OKAY. I'LL LET YOU WORK ON IT. I'M

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1 GLAD I STUMPED YOU.

2 THE NEXT QUESTION IS THE SCOPE OF THE REQUEST
3 ISSUE. SO, MR. GEORGE, THIS AGAIN GOES TO YOU. THE SECOND
4 INJUNCTION YOU'RE SEEKING IS ONE TO PROHIBIT THE DISTRICT
5 ATTORNEY FROM REQUIRING DEPUTIES FROM MOVING TO DISMISS ON
6 A PENDING CRIMINAL ACTION;

7 ANY PRIOR STRIKE ENHANCEMENTS ACTION, INCLUDING
8 SECOND STRIKES AND STRIKES ARISING FROM A JUVENILE
9 ADJUDICATION; OKAY, THAT'S A THREE STRIKES ISSUE;

10 ANY PROP 8 OR FIVE-YEAR PRIOR ENHANCEMENT; THAT IS
11 667, THAT'S THE ONE I JUST MENTIONED;

12 AND ANY THREE-YEAR PRIOR ENHANCEMENTS; THAT'S
13 667.5(A);

14 ANY S.T.E.P. ACT GANG ENHANCEMENTS, 186.22;

15 ANY SPECIAL CIRCUMSTANCES ALLEGATIONS RESULTING IN
16 WHAT IS CALLED AN L.W.O.P. SENTENCE, MEANING LIFE WITHOUT
17 PAROLE;

18 ANY VIOLATIONS OF BAIL OR O.R. RELEASE, THAT'S
19 12022.1;

20 AND ANY USE OF A FIREARM ALLEGATION, THAT'S
21 12022.53.

22 SO WHAT I WANT TO KNOW, IS THAT SPECIFIC REQUEST
23 FOR PRELIMINARY INJUNCTION, LEAVING OUT THE THREE STRIKES
24 ISSUE WHICH IS A SEPARATE ISSUE -- IN OTHER WORDS, YOU ARE
25 SEEKING TO PREVENT THE DISTRICT ATTORNEY FROM COMPELLING
26 HIS SUBORDINATES TO MOVE TO DISMISS FROM A PENDING ACTION
27 ANY ENHANCEMENT ALLEGATIONS; IS THAT CORRECT?

28 MR. CARROLL: YOUR HONOR, THIS IS DAVID CARROLL

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1 FOR THE PETITIONER.

2 WHAT PETITIONER IS SEEKING IS FOR THE DISTRICT
3 ATTORNEY'S OFFICE SIMPLY TO EXERCISE THEIR DISCRETION ON A
4 CASE BY CASE BASIS IN DETERMINING WHETHER OR NOT THESE
5 ENHANCEMENTS SHOULD BE DISMISSED. AND THE ISSUE THAT WE
6 TAKE WITH THE SPECIAL DIRECTIVES IS THEY ACROSS THE BOARD
7 REQUIRE IN EVERY SINGLE CASE WITH NO EXERCISE OF THIS
8 CASE-BY-CASE DISCRETION TO DISMISS ALL THESE ENHANCEMENTS
9 ACROSS THE BOARD. AND THAT'S THE ISSUE THAT WE TAKE.

10 THE COURT: OKAY. FIRST OF ALL, YOU DON'T NEED TO
11 STAND UP WHEN IN YOUR OWN OFFICE. YOU CAN SIT DOWN.

12 SECOND OF ALL, THAT'S MY UNDERSTANDING, THAT IS
13 THE ONLY BASIS ON WHICH YOU ARE COMPLAINING ABOUT FIREARM
14 USE, BAIL OR O.R. RELEASE ALLEGATIONS, GANG ALLEGATIONS,
15 AND MOST IMPORTANTLY THE FIVE-YEAR PRIOR ENHANCEMENT, IT IS
16 A BLANKET DECISION AND NOT A CASE-BY-CASE DECISION; IS THAT
17 CORRECT, MR. CARROLL?

18 MR. CARROLL: THAT IS CORRECT, YOUR HONOR.

19 THE COURT: AND I DO KNOW THAT FOR THE L.W.O.P.
20 SENTENCE YOU ARE CONTENDING THAT ANY DISMISSAL IS ILLEGAL
21 FROM A PENDING CASE AND THE THREE STRIKES IS A SEPARATE
22 ISSUE STANDING ON ITS OWN; IS THAT ALSO CORRECT,
23 MR. CARROLL?

24 MR. CARROLL: YES, YOUR HONOR, WITH ONE
25 CLARIFICATION WITH RESPECT TO THE SPECIAL CIRCUMSTANCES.
26 THEY ARE ONLY PROHIBITED FROM BEING DISMISSED ONCE THEY
27 HAVE BEEN ESTABLISHED EITHER BY A JURY TRIAL OR THROUGH A
28 GUILTY PLEA. AFTER THAT POINT THEY CANNOT BE DISMISSED,

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1 BUT PRIOR TO THAT POINT THAT ARGUMENT WOULD NOT APPLY.

2 THE COURT: RIGHT. SO THAT'S POST GUILTY
3 DECISION. LET'S CALL IT THAT.

4 MR. DUGDALE: YOUR HONOR, THIS IS ROBERT DUGDALE.
5 I DON'T MEAN TO INTERRUPT, BUT THAT IS NOT GOING TO BE A
6 POINT OF CONTENTION, AS WE INDICATED IN OUR PAPERS.

7 THE COURT: I WAS GOING TO ASK YOU, SO ARE YOU
8 CONCEDING THAT POINT?

9 MR. DUGDALE: THAT IS THE ONE POINT WE ARE
10 CONCEDING, YOUR HONOR, YES, THAT FOLLOWING A FINDING OF
11 GUILT, YES, THAT THOSE CANNOT BE DISMISSED BY OPERATION OF
12 LAW. THAT IS CORRECT.

13 THE COURT: OKAY. GOT IT.

14 SO MY NEXT QUESTION IS ONE WHERE HOPEFULLY YOU CAN
15 TELL ME, LIKE I SAID I LOOKED UP MOST, IF NOT ALL, THE
16 PENAL CODE SECTIONS THAT ARE AT ISSUE.

17 BY THE WAY, SINCE I SAT IN CRIMINAL, THE PENAL
18 CODE HAS ABOUT DOUBLED IN SIZE.

19 BUT UNDER 969 OF THE PENAL CODE, ANY PRIOR
20 CONVICTIONS IT SAYS -- IN CHARGING THE DEFENDANT WITH A
21 PREVIOUS CONVICTION OF A FELONY, IT SAY WHAT'S SUFFICIENT
22 TO STATE IT AND THEN IT SAYS UNDER THAT, "IF MORE THAN ONE
23 PREVIOUS CONVICTED IS CHARGED, THE DAY OF THE JUDGMENT ON
24 WHICH THE CONVICTION MAY BE STATED AND ALL KNOWN PREVIOUS
25 CONVICTIONS, WHETHER IN THIS STATE OR NOT, MUST BE
26 CHARGED."

27 SO I THINK IT'S THE DISTRICT ATTORNEY'S POSITION
28 THAT THAT LANGUAGE IS NOT MANDATORY, "MUST BE CHARGED."

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1 IS IT PETITIONER'S POSITION THAT THE DISTRICT
2 ATTORNEY MUST CHARGE ALL PRIOR FELONIES THAT AT LEAST THAT
3 CONSTITUTE A SENTENCE ENHANCEMENT?

4 MR. CARROLL: THIS IS DAVID CARROLL FOR
5 PETITIONER, YOUR HONOR.

6 WE DON'T TAKE THE POSITION THAT 969 COMPELS THE
7 DISTRICT ATTORNEY TO CHARGE PRIOR FELONY SENTENCING
8 ENHANCEMENTS IN ALL CASES.

9 THE COURT: AND IS THERE A CASE THAT SAYS THAT
10 ALTHOUGH IT SAYS "MUST," IT IS, IN FACT, DISCRETIONARY?

11 MR. CARROLL: I AM UNAWARE OF ANY SUCH CASE, YOUR
12 HONOR, WITH RESPECT TO SECTION 969.

13 THE COURT: BUT YOUR CONCESSION, IF YOU WANT TO
14 CALL IT THAT, IS THAT THE "MUST" LANGUAGE IS NOT MANDATORY?

15 MR. CARROLL: YOUR HONOR, THIS IS DAVID CARROLL
16 AGAIN FOR THE PETITIONER.

17 WE HADN'T BASED OUR ARGUMENT ON SECTION 969. I
18 WOULD SAY IN GENERAL THE LANGUAGE "MUST" OR "SHALL" DENOTES
19 A MANDATORY OBLIGATION. IN THE CONTEXT OF SECTION 969
20 SPECIFICALLY, TO BE CANDID, WE HAVEN'T FULLY REVIEWED THE
21 CASE LAW TO DETERMINE WHETHER OR NOT IN THAT PARTICULAR
22 INSTANCE THE LANGUAGE UNDER THAT SPECIFIC SUBSECTION
23 DENOTES A MANDATORY DUTY TO PLEAD AND PROVE.

24 THE COURT: SO OBVIOUSLY WE'RE NOT TALKING ABOUT
25 STRIKES HERE, WE'RE TALKING ABOUT FELONIES THAT COULD BE A
26 BASIS FOR ENHANCEMENT. I GUESS THAT MAY BE ONLY 667(A)(1),
27 BUT IT CERTAINLY IS MENTIONED IN -- 969 IS MENTIONED IN A
28 COUPLE OF THE CASES THAT I READ AND I KNOW THE DISTRICT

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1 ATTORNEY REFERS TO IT.

2 AND I TAKE IT, MR. DUGDALE, YOUR POSITION IS IT IS
3 NOT MANDATORY TO PLEAD FELONIES THAT ARE NOT STRIKES; IS
4 THAT CORRECT?

5 MR. DUGDALE: THAT IS CORRECT. AND PETITIONERS
6 HAVE NOT TAKEN A DIFFERENT POSITION IN THEIR CLAIMS.

7 THE COURT: DO YOU HAVE A CASE THAT SAYS THAT?

8 MR. DUGDALE: YOUR HONOR, SINCE THIS WAS NOT
9 RAISED BY PETITIONERS, WE HAVE NOT RESEARCHED THIS
10 PARTICULAR ISSUE. IF THE COURT WANTS SOME SUPPLEMENTAL
11 BRIEFING, I WOULD BE HAPPY TO DO IT, BUT THEY HAVE ONLY IN
12 ONE INSTANCE, AS THE COURT KNOWS, HAVE RAISED THE CLAIM
13 THAT CHARGING A SENTENCING ENHANCEMENT IS PURPORTEDLY
14 MANDATORY AND THAT'S IN THE CASE OF STRIKES. THEY RAISE NO
15 OTHER CLAIM TO INDICATE THAT CHARGING A SENTENCING
16 ENHANCEMENT IS MANDATORY.

17 THE COURT: GOT IT.

18 SO THEN NOW, MR. DUGDALE, I'M GOING TO PUT YOU ON
19 THE SPOT. WOULD YOU AGREE WITH THE FOLLOWING STATEMENT,
20 AND IF YOU DON'T, TELL ME WHY: THE DISTRICT ATTORNEY'S
21 ESSENTIAL DIRECTIVES ABANDON THE THREE STRIKES LAW?

22 MR. DUGDALE: ABANDON THE THREE STRIKES LAW. I
23 WOULD NOT AGREE WITH THAT, YOUR HONOR. WHAT THE SPECIAL
24 DIRECTIVES DO IS, THEY ARE A LAWFUL EXERCISE OF THE
25 DISTRICT ATTORNEY'S DISCRETION AND HE HAS DETERMINED --

26 THE COURT: IS THERE ANY PORTION -- HOLD ON.

27 IS THERE ANY PORTION OF THE THREE STRIKES LAW THAT
28 THE DISTRICT ATTORNEY INTENDS TO ENFORCE?

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1 MR. DUGDALE: NO. AS YOUR HONOR NOTES, THE
2 SPECIAL DIRECTIVES SAY WE ARE GOING TO MOVE TO DISMISS
3 THOSE CASES WITH EXISTING STRIKES AND WE ARE NOT GOING TO
4 CHARGE STRIKES IN CASES GOING FORWARD. SO THAT IS CORRECT,
5 YOUR HONOR. THAT IS A CORRECT READING OF THE DIRECTIVE.

6 THE COURT: SO YOU'RE NOT GOING TO ENFORCE THE
7 THREE STRIKES LAW, BUT YOU DON'T CALL THAT AN ABANDONMENT
8 OF THE THREE STRIKES LAW?

9 MR. DUGDALE: IT'S AN -- WELL, THERE'S SOME DEGREE
10 OF SEMANTICS THERE, BUT IT IS A CHOICE BY THE DISTRICT
11 ATTORNEY. IT IS THE EXERCISE OF HIS DISCRETION. THAT IS
12 CORRECT, YOUR HONOR.

13 THE COURT: I UNDERSTAND. I UNDERSTAND. I
14 JUST -- I THINK I HEARD OR READ OR SOMETHING THAT THE
15 DISTRICT ATTORNEY WAS NOT ABANDONING THE THREE STRIKES LAW
16 AND IT SEEMS TO ME THAT HE IS. SO OKAY.

17 ALL RIGHT. SO THOSE ARE MY QUESTIONS. I'M TRYING
18 TO THINK OF ANY CASES I NEED -- WELL, OKAY.

19 SO IN TERMS OF YOUR ARGUMENT, I MEAN, YOU'RE FREE
20 TO ARGUE WHAT YOU WANT. I'M WELL VERSED IN WHAT YOUR
21 BRIEFS SAY. SO IF YOU WANT TO SUPPLEMENT THE BRIEFS,
22 PLEASE DO. IF YOU WANT TO EDUCATE ME ON THE NUANCES OF
23 CRIMINAL LAW, PLEASE DO, BECAUSE AS I SAID, I USED TO KNOW
24 THAT REALLY WELL. IT'S BEEN A LONG TIME AND THERE HAVE
25 BEEN A LOT OF CHANGES SINCE I SAT ON THE BENCH IN CRIMINAL.

26 WITH THAT SORT OF ADMONITION, LET ME GO TO THE
27 PETITIONER. I GUESS, MR. CARROLL, YOU'RE GOING TO BE
28 ARGUING?

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1 MR. CARROLL: THANK YOU, YOUR HONOR. AND THIS IS
2 DAVID CARROLL FOR THE PETITIONER.

3 IF I CAN JUST CLARIFY IN RESPONSE TO THE COURT'S
4 INITIAL QUESTION REGARDING THE PROP 8 ENHANCEMENT VERSUS
5 THE FIVE-YEAR PRIOR ENHANCEMENT.

6 MY UNDERSTANDING IS THAT PROP 8 WAS PASSED IN
7 1982, WAS CODIFIED AT SECTION 667(A) AND CHANGED THE
8 THREE-YEAR ENHANCEMENT TO A FIVE-YEAR ENHANCEMENT.

9 THE COURT: SO THE PROP 8 ENHANCEMENT IS THE SAME
10 AS THE FIVE-YEAR ENHANCEMENT?

11 MR. CARROLL: THAT IS CORRECT, YOUR HONOR.

12 THE COURT: OKAY. AND ALTHOUGH -- JUST SO I'M
13 CLEAR, THE 667(A) FIRE IS NECESSARILY A SERIOUS CRIME, BUT
14 IT IS NOT NECESSARILY A STRIKE.

15 MR. CARROLL: THAT IS CORRECT, YOUR HONOR.

16 THE COURT: OKAY. GOT IT.

17 ALL RIGHT. GO AHEAD.

18 MR. CARROLL: THANK YOU, YOUR HONOR.

19 YOUR HONOR, I'LL TRY AS MUCH AS I CAN NOT TO
20 REPEAT WHAT IS IN OUR BRIEFS. I'LL SAY PROBABLY SPEAKING
21 KEY RELIEF THAT THE PETITIONER IS SEEKING IN THIS CASE IS
22 TO COMPEL COMPLIANCE WITH TWO NARROW MANDATORY DUTIES THAT
23 ARE IMPOSED ON THE DISTRICT ATTORNEY.

24 THE FIRST IN WHICH IS A LEGAL DUTY TO PLEAD AND
25 PROVE PRIOR STRIKES, WHICH IT IS A MANDATORY DUTY AS THE
26 COURT HELD IN PEOPLE VERSUS ROMAN, PEOPLE VERSUS KILBOURNE,
27 AND MOST RECENTLY A SECOND DISTRICT COURT OF APPEAL CASE
28 THAT CAME OUT EARLIER THIS YEAR.

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1 IT ALSO HELD THAT THOSE PLEADING AND PROVING PRIOR
2 STRIKES IS NOT AN UNCONSTITUTIONAL INVITATION OF
3 PROSECUTORIAL DISCRETION. AND IN ANY EVENT, THE DISTRICT
4 ATTORNEY DOES NOT HAVE THE AUTHORITY EVEN IF HE PERCEIVES
5 IT TO BE UNCONSTITUTIONAL TO SIMPLY NOT FOLLOW IT ON THAT
6 BASIS.

7 AND FOR THOSE REASONS WE BELIEVE THAT THE COURT
8 SHOULD -- THE COURT SHOULD COMPEL THE DISTRICT ATTORNEY TO
9 COMPLY WITH THAT MANDATORY DUTY.

10 WITH RESPECT TO THE DISMISSAL OF ENHANCEMENTS,
11 YOUR HONOR, THE TOUCHSTONE OF PROSECUTORIAL DISCRETION IS
12 THE EXERCISE OF CASE BY CASE DISCRETION, AND I THINK THAT
13 IS MADE PARTICULARLY CLEAR IN THE WASHINGTON SUPREME COURT
14 AND ARIZONA SUPREME COURT CASES THAT WE CITED IN OUR BRIEF
15 AND THAT RESPONDENTS DID NOT DISTINGUISH.

16 BLANKET PROSECUTORIAL POLICIES THAT SIMPLY
17 AGGREGATE ALL CASE-BY-CASE DISCRETION ARE NOT PERMISSIBLE.
18 AND ON THAT BASIS -- AND SORRY, TO CLARIFY, YOUR HONOR --
19 AND MANDATE IS EVIDENTLY APPROPRIATE TO COMPEL THE EXERCISE
20 OF DISCRETION, NOT NECESSARILY EXERCISE A PARTICULAR
21 EXERCISE OF DISCRETION, BUT SIMPLY TO MEET SOME SORT OF
22 DISCRETIONARY DECISION. AND THAT'S EXACTLY WHAT I BELIEVE
23 PETITIONERS ARE SEEKING IN THIS CASE, YOUR HONOR.

24 UNLESS THE COURT HAS ANY OTHER QUESTIONS, YOUR
25 HONOR.

26 THE COURT: OH, I DO.

27 SO YOU WOULD -- WITH RESPECT TO THE DISCRETION
28 ISSUE, WHICH I UNDERSTAND YOUR ARGUMENT IS A BLANKET POLICY

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1 THAT WE WILL NEVER CHARGE STRIKES OR WE WILL NEVER SEEK
2 ENHANCEMENT UNDER THE FIVE-YEAR ENHANCEMENT OR WE WILL
3 NEVER SEEK A GANG ENHANCEMENT IS NOT AN EXERCISE OF
4 DISCRETION BECAUSE IT HAS TO OCCUR ON A CASE-BY-CASE BASIS;
5 CORRECT?

6 MR. CARROLL: YES, YOUR HONOR, THAT IS CORRECT.

7 THE COURT: WOULD YOU AGREE THAT THE DISTRICT
8 ATTORNEY COULD ADOPT THE POLICY THAT SAID WE WILL ONLY, IN
9 RARE CIRCUMSTANCES AND ONLY WITH APPROVAL FROM THE HIGHEST
10 LEVEL OF THE OFFICE, CHARGE FIVE-YEAR ENHANCEMENTS, GANG
11 ENHANCEMENTS, BAIL VIOLATIONS, USE OF FIREARM ALLEGATIONS,
12 ET CETERA?

13 MR. CARROLL: YOUR HONOR, WE PROBABLY NEED TO
14 INVESTIGATE THE SPECIFICS OF SUCH A POLICY, BUT I THINK AS
15 A GENERAL MATTER, YOUR HONOR, AS LONG AS THERE IS
16 DISCRETION REMAINING AND NOT JUST A SORT OF FACADE OF
17 DISCRETION, ACTUAL DISCRETION GOING ON ON A CASE-BY-CASE
18 BASIS, I THINK THAT WOULD PROBABLY BE ACCEPTABLE.

19 THE COURT: OKAY. SO NOW, ONE OF THE TECHNICAL
20 QUESTIONS I FORGOT TO ASK YOU IN THE BEGINNING, WHICH IS --
21 AND I'VE ALWAYS WONDERED THIS -- SO WE HAVE THE VOTERS
22 PASSING THE THREE STRIKES LAW IN 1986, WAS IT, BY
23 70 PERCENT AND THEN THE SAME YEAR WE HAVE THE LEGISLATURE
24 PASSING THE THREE STRIKES LAW. I CAN'T REMEMBER WHICH CAME
25 FIRST. I THINK THE LEGISLATURE PASSED IT FIRST. WHY DO WE
26 HAVE TWO SEPARATE THREE STRIKES LAWS IN THE PENAL CODE THAT
27 APPEAR -- AND I HAVEN'T READ IT WORD FOR WORD -- APPEAR TO
28 BE IDENTICAL?

Document received by the CA 2nd District Court of Appeal.

1 MR. CARROLL: YOUR HONOR, MY UNDERSTANDING IS THAT
2 IT WAS PASSED BOTH BY THE LEGISLATURE AND BY THE VOTERS, SO
3 AS TO ENSURE THAT THE LEGISLATURE COULD NOT THEREAFTER
4 REPEAL IT EXCEPT WITH THE SUPER MAJORITY OF VOTE OF THE
5 LEGISLATURE. AND THAT'S WHY IT WAS THEREAFTER PUT TO A
6 VOTER INITIATIVE.

7 THE COURT: ARE THEY IDENTICAL?

8 MR. CARROLL: I BELIEVE IN ALL MATERIAL RESPECTS,
9 YOUR HONOR, THAT THEY ARE IDENTICAL.

10 THE COURT: WHICH ONE IS THE VOTER INITIATIVE?

11 MR. CARROLL: I AM UNSURE WHICH ONE IS THE VOTER
12 INITIATIVE, YOUR HONOR. WE CAN SUBMIT A SUPPLEMENTAL BRIEF
13 TO THE COURT.

14 THE COURT: NO, NO. ALL YOU HAVE TO DO IS LOOK AT
15 THE END OF THE STATUTE. 667 IS THE VOTER INITIATIVE.

16 OKAY. SO LET'S SEE. I HAD ANOTHER QUESTION FOR
17 YOU. OH, SO LOOKING AT LET'S JUST TAKE THE VOTER
18 LEGISLATION, 667(F)(2)-- NO (F)(1), SORRY, "THE PROSECUTING
19 ATTORNEY SHALL PLEAD AND PROVE EACH PRIOR SERIES OF VIOLENT
20 FELONY CONVICTIONS EXCEPT AS PROVIDED IN PARAGRAPH 2."

21 NOW, IF I WERE WRITING ON A BLANK SLATE, I COULD
22 SEE A GOOD ARGUMENT THAT "THE PROSECUTING ATTORNEY SHALL
23 PLEAD AND PROVE" IS A DUE PROCESS POINT. THAT IS, WE'RE
24 NOT GOING TO ENHANCE THE SENTENCE OF A CRIMINAL DEFENDANT
25 UNLESS THE PROSECUTOR HAS PLED IT SO THAT THE DEFENDANT HAS
26 BEEN GIVEN NOTICE AND HAS PROVED IT BEYOND A REASONABLE
27 DOUBT. ONCE THAT HAPPENS, THEN WE'RE GOING TO ENHANCE IT
28 THEN.

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1 SO IT SEEMS TO ME YOU CAN ARGUE THAT THAT PLAIN
2 LANGUAGE, "SHALL," SIMPLY MEANS YOU DON'T GET TO THE
3 SENTENCING UNLESS YOU PLEAD AND PROVE THE STRIKE PRIOR. I
4 UNDERSTAND THAT IS NOT WHAT THE CASES YOU CITE SAY, BUT IT
5 IS A -- IF YOU DON'T THINK IT'S A REASONABLE
6 INTERPRETATION, IT IS AN INTERPRETATION THAT CREATES SOME
7 AMBIGUITY, DOES IT NOT?

8 MR. CARROLL: WELL, YOUR HONOR, I THINK IN THE
9 CONTEXT OF THE THREE STRIKES LAW AND SPECIFICALLY THIS
10 PARTICULAR SUBSECTION -- AND IF THE COURT LOOKS TO THE
11 SECOND SENTENCE WHERE IT SAYS, "THE PROSECUTING ATTORNEY
12 SHALL PLEAD AND PROVE EACH PRIOR SERIOUS FELONY
13 CONVICTION," I BELIEVE IN ALL CASES WHERE IT APPLIES --
14 YES, "SHALL BE APPLIED IN EVERY CASE IN WHICH THE DEFENDANT
15 HAS ONE OR MORE SERIOUS VIOLENT FELONY CONVICTIONS."

16 THE COURT OF APPEAL HAS INTERPRETED THAT LANGUAGE
17 AS A LIMITATION ON PROSECUTORIAL DISCRETION RATHER THAN A
18 DUE PROCESS REQUIREMENT FOR PLEADING AND PROVING AND GIVING
19 NOTICE TO THE DEFENDANT OF WHAT CHARGES THAT HE IS FACING
20 IN THE PLEADING DOCUMENT.

21 THE COURT: I UNDERSTAND THE CASES DON'T SAY THAT,
22 ACTUALLY, BUT I DON'T THINK THE CASES ADDRESS THE DUE
23 PROCESS INTERPRETATION EITHER. AND WHAT WOULD SUPPORT IT
24 IS, YOU KNOW, OKAY, YOU CAN MAKE A PROSECUTING ATTORNEY
25 PLEAD THE PRIOR CONVICTION, STRIKE PRIOR, AND YOU CAN MAKE
26 THE PROSECUTING ATTORNEY TRY TO PROVE IT, BUT YOU CAN'T
27 ACTUALLY MAKE THEM PROVE IT IF IT CAN'T BE PROVED OR, YOU
28 KNOW, THERE ISN'T THE EVIDENCE.

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1 SO THAT'S WHY, YOU KNOW, YOU CAN ARGUE ANYWAY THAT
2 THAT IS A DUE PROCESS PROVISION AND MORE. I MEAN, I DON'T
3 MEAN TO MISLEAD YOU, THERE ARE PARTS OF (F) (1) AND
4 PARTICULARLY (F) (2) THAT LEAD TO THE OTHER, THE
5 INTERPRETATION THAT THE APPELLATE COURTS HAVE REACHED.

6 SO I WAS JUST CURIOUS WHETHER YOU HAD CONTEMPLATED
7 THAT INTERPRETATION.

8 MR. CARROLL: THANK YOU, YOUR HONOR. DAVID
9 CARROLL AGAIN.

10 WE HAD CONTEMPLATED THAT INTERPRETATION, AND THERE
11 ARE OTHER STATUTES THAT CONTAIN SOMEWHAT SIMILAR, ALTHOUGH
12 MAYBE NOT DIRECTLY ANALOGOUS, LANGUAGE THAT SUGGEST THAT IT
13 IS A PLEADING REQUIREMENT.

14 BUT, AGAIN, I THINK IN THE CONTEXT OF THE THREE
15 STRIKES LAW WHEN YOU DO HAVE THE NUMBER OF CASES THAT ARE
16 OUT THERE EMPHASIZING THAT THIS IS A LIMITATION ON
17 DISCRETION AS OPPOSED TO A DUE PROCESS ISSUE, I THINK
18 THAT'S WHERE WE SORT OF BASE OUR ARGUMENT THAT THIS IS A
19 MANDATORY OBLIGATION AS OPPOSED TO A DUE PROCESS SAFEGUARD
20 FOR THE DEFENDANT.

21 THE COURT: YEAH. WELL, THAT'S THE NICE THING
22 ABOUT CRIMINAL LAW, YOU GET AN APPELLATE CASE ON ALMOST
23 EVERYTHING. THERE IS VERY LITTLE THAT HASN'T BEEN
24 ADDRESSED BY THE APPELLATE COURT.

25 LET'S SEE. WHAT ELSE WAS I GOING TO ASK YOU? OH,
26 YEAH, SO THE OPPOSITION SAYS, LOOK, THIS IS NOT APPROPRIATE
27 FOR PRELIMINARY INJUNCTION, IT'S NOT APPROPRIATE FOR A WRIT
28 OF MANDATE. I'M NOT REALLY CLEAR WHY THE DEFENSE SAYS IT'S

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1 NOT APPROPRIATE FOR WRIT OF MANDATE, BUT I'LL ASK
2 MR. DUGDALE ON THAT.

3 SO WHAT IS YOUR POSITION ON PRELIMINARY INJUNCTION
4 AS OPPOSED TO, YOU KNOW, INJUNCTION AFTER TRIAL AND THE
5 FINAL MATTER?

6 MR. CARROLL: WELL, I THINK PRELIMINARY INJUNCTION
7 HERE IS APPROPRIATE, YOUR HONOR, IN PARTICULAR BECAUSE AS A
8 RESULT OF THE SPECIAL DIRECTIVES, THE DEPUTY DISTRICT
9 ATTORNEYS IN THIS COUNTY ARE PUT IN THE ENFORCEMENT
10 POSITION OF HAVING TO VIOLATE THE LAW IN CARRYING OUT THEIR
11 DUTIES IN PROSECUTING THESE CASES.

12 AND I THINK THE THREE STRIKES LAW IS A TERRIFIC
13 EXAMPLE OF THAT. YOU KNOW, THERE IS CASE LAW SAYING THAT
14 THE THREE STRIKES LAW IS A MANDATORY OBLIGATION TO PLEAD
15 AND PROVE. THAT LIMITATION HAS BEEN UPHELD AS
16 CONSTITUTIONAL. AND IN ANY EVENT, THAT THE DISTRICT
17 ATTORNEY CANNOT IGNORE -- HE CANNOT IGNORE MANDATORY DUTIES
18 IMPOSED ON HIM SIMPLY BECAUSE HE FEELS IT IS
19 UNCONSTITUTIONAL. YOU HAVE TO WAIT UNTIL A COURT FINDS IT
20 TO BE UNCONSTITUTIONAL.

21 SO I THINK BY THE SPECIAL DIRECTIVES TELLING THE
22 DEPUTY DISTRICT ATTORNEYS, IT DOESN'T MATTER, YOU CAN'T
23 PLEAD THESE ANYWAY, YOU MUST DISMISS ALL OF THEM, I THINK
24 THE DEPUTY DISTRICT ATTORNEYS ARE LITERALLY HAVING TO
25 VIOLATE THESE LAWS AND THESE STATUTE DUTIES. AND I THINK
26 FOR THAT REASON, PRELIMINARY INJUNCTION IS APPROPRIATE TO
27 PREVENT THAT.

28 THE COURT: OKAY. AND THE ETHICAL OBLIGATIONS OF

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1 YOUR MEMBERS, THEY ARE SIMPLY -- WELL, I'LL LET YOU TELL ME
2 WHAT ETHICAL -- NOT THE SOURCE OF THE ETHICAL OBLIGATION,
3 BUT WHAT IT IS THAT IT'S BEING COMPELLED TO DO THAT IS
4 UNETHICAL.

5 MR. CARROLL: SO I THINK FIRST, YOUR HONOR, JUST
6 THE BARE FACT THAT THEY MUST VIOLATE THE LAW IN PROSECUTION
7 OF THESE CASES IS ITSELF AN ETHICAL VIOLATION.

8 NUMBER TWO, YOUR HONOR, THAT THE SPECIAL
9 DIRECTIVES DO REQUIRE THESE DEPUTY DISTRICT ATTORNEYS TO
10 TAKE POSITIONS THAT ARE PART OF BINDING AUTHORITY, SUCH AS
11 TAKING A POSITION THAT THE THREE STRIKES LAW IS
12 UNCONSTITUTIONAL AND HAS BEEN REPEATEDLY UPHELD AS
13 CONSTITUTIONAL.

14 AND, YOU KNOW, ONE OF THE ENFORCEMENT POINTS TO
15 SPECIAL DIRECTIVE 20-08.1 IN PARTICULAR IS IT PROVIDES A
16 VERBATIM SCRIPT FOR DEPUTY DISTRICT ATTORNEYS TO GIVE TO
17 THE COURT, YET IT OMITTS THE FOUR CASES, THE FOUR BINDING
18 CASES THAT ARE ALREADY FOUND IN THE OFFSETS. AND THAT'S
19 EXTREMELY TROUBLING FOR OUR CLIENTS AS WELL.

20 AND TO THE EXTENT THAT THE REQUIREMENT TO FILE AN
21 AMENDED CHARGING DOCUMENT AFTER THE COURT HAS ALREADY
22 DENIED THE DISMISSAL OF THE PARTICULAR ENHANCEMENT CAN BE
23 CONSTRUED AS A VIOLATION OF A COURT ORDER, THAT TOO WOULD
24 BE EXTREMELY TROUBLING FOR THE DEPUTY DISTRICT ATTORNEYS
25 WHO MIGHT FACE CONTEMPT SANCTIONS AS A RESULT.

26 THE COURT: THEY CAN'T DO THAT; RIGHT? THEY CAN'T
27 FILE AN AMENDING CHARGING DOCUMENT AFTER THE DEMURRER HAS
28 BEEN OVERRULED AND/OR -- WHAT'S THE OTHER BASIS -- IS IT

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1 1009 OF THE PENAL CODE?

2 I MEAN, THAT'S THE PROBLEM, MR. DUGDALE -- I'LL
3 GIVE YOU A MINUTE -- YOU CAN'T BE FILING AMENDED PLEADINGS
4 ANYTIME YOU FEEL LIKE IT. 1009 MAY BE AMENDED WITHOUT
5 LEAVE OF COURT BEFORE THE DEFENDANT PLEADS OR AFTER
6 DEMURRER TO THE ORIGINAL PLEADING IS SUSTAINED. THOSE ARE
7 THE ONLY BASIS FOR AMENDMENT. ONCE THE DEFENDANT HAS PLED
8 NOT GUILTY AND THE DEMURRER HAS BEEN OVERRULED, NO
9 AMENDMENT IS PERMITTED WITHOUT LEAVE OF COURT. SO THAT IS,
10 WHAT IS IT, 20.08-1?

11 MR. CARROLL: I'M SORRY?

12 THE COURT: WHY DON'T WE START THERE, MR. DUGDALE.
13 HOW IS THAT LAWFUL?

14 MR. DUGDALE: YOU'RE ASKING AMENDMENT UNDER
15 20-08.1, YOUR HONOR?

16 THE COURT: YES. SPECIAL DIRECTIVE 20-08.1
17 SAYS -- I'M NOT QUOTING IT, I DON'T THINK, MAYBE I AM -- IF
18 A COURT FURTHER REFUSES TO ACCEPT AN AMENDED CHARGING
19 DOCUMENT PURSUANT TO SECTION 1009 -- NO, THAT'S NOT IT.
20 NO, I GUESS THIS IS LAWFUL.

21 "IF THE COURT REFUSES TO DISMISS THE PRIOR STRIKE
22 ALLEGATIONS OR OTHER ENHANCEMENT ALLEGATIONS BASED ON
23 PEOPLE'S ORAL REQUEST, THE DEPUTY DISTRICT ATTORNEY SHALL
24 SEEK LEAVE OF COURT TO FILE AN AMENDED CHARGING DOCUMENT."
25 OKAY. YOU CAN DO THAT.

26 MR. DUGDALE: CORRECT. WE'RE SEEKING LEAVE OF THE
27 COURT, YOUR HONOR. THAT'S RIGHT.

28 THE COURT: RIGHT; RIGHT. OKAY, FINE. THANK YOU.

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1 MR. DUGDALE: YOU'RE WELCOME.

2 THE COURT: OKAY. MR. DUGDALE, YOU'RE UP.

3 MR. DUGDALE: THANK YOU VERY MUCH, YOUR HONOR. I
4 APPRECIATE IT.

5 I MIGHT BE A LITTLE LONGER BECAUSE OF COURSE I'M
6 RESPONDING TO THE REPLY BRIEF THAT WAS FILED HERE, BUT I
7 WILL TRY AND BE CONCISE. I WILL TRY NOT TO REPEAT WHAT IS
8 IN OUR PAPERS.

9 BUT WHERE I AM GOING TO START IS WHERE WE ENDED
10 OUR BRIEF, WHICH IS ON THE ISSUE OF STANDING. THIS WAS AN
11 ISSUE JUDGE COWELL RAISED IN THE T.R.O. WHEN WE FIRST
12 SHOWED UP IN THE CASE ON DECEMBER 30TH OF LAST YEAR. AND
13 IT'S IMPORTANT BECAUSE IT DETERMINES WHETHER THEY GET THEIR
14 FOOT IN THE DOOR HERE AT ALL, OBVIOUSLY.

15 AND I'M SURE THE COURT IS AWARE OF THE STANDING
16 REQUIREMENTS HERE. THE UNION HERE HAS THE BURDEN TO
17 ESTABLISH STANDING. STANDING IS JURISDICTIONAL. AND THAT
18 MEANS THE UNION HAS TO DO MORE THAN MERELY ALLEGE STANDING,
19 THEY HAVE TO PROVE IT. AND THE UNION HERE HAS NOT COME
20 CLOSE TO ESTABLISHING THAT IT HAS STANDING TO BRING THESE
21 CLAIMS ON BEHALF OF ITS MEMBERS.

22 THE ONLY BASIS FOR STANDING IT ALLEGED IN ITS WRIT
23 AND MOVING PAPERS WAS IN A FOOTNOTE WHERE THEY SAID THAT
24 THEY HAD ASSOCIATIONAL STANDING OR ORGANIZATIONAL STANDING
25 BECAUSE THEY WERE THE COLLECTIVE BARGAINING UNIT FOR THE
26 DEPUTY DISTRICT ATTORNEYS.

27 WELL, YOUR HONOR --

28 THE COURT: RIGHT.

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1 MR. DUGDALE: -- IT'S CLEAR THAT IS NOT ENOUGH.
2 RECOGNITION AS A COLLECTIVE BARGAINING UNIT DOES NOT GIVE
3 THE UNION ANY RIGHTS AT ALL WITH RESPECT TO AN EMPLOYER'S
4 SUBSEQUENT POLICY DECISIONS. STATE LAW AND THE MEMORANDUM
5 OF UNDERSTANDING THAT WAS ENTERED BETWEEN THE UNION AND THE
6 COUNTY BOTH SAY THAT SUBSEQUENT POLICY DECISIONS, WHICH IS
7 WHAT WE'RE TALKING ABOUT HERE AS OPPOSED TO EMPLOYMENT
8 MATTERS, ARE NOT SUBJECT TO BARGAINING.

9 AND OF COURSE IF THEY WERE HERE AND THIS WAS THE
10 SAME AS SOME RUN-OF-THE-MILL GRIEVANCE WITH AN EMPLOYEE
11 AGAINST AN EMPLOYER, THERE'S A GRIEVANCE PROCESS FOR THAT
12 IN THE MEMORANDUM OF UNDERSTANDING AS WELL, WHICH THE
13 PETITIONERS HAVE FAILED TO EXHAUST IN ANY WAY. SO THAT'S
14 ANOTHER JURISDICTIONAL BAR.

15 BUT EVEN, YOUR HONOR, THOUGH WE DIDN'T HAVE THE
16 BURDEN AT ALL TO PROVE A LACK OF STANDING HERE, WE DID. WE
17 SUBMITTED THE MEMORANDUM OF UNDERSTANDING, WHICH SET FORTH
18 THE PARTIES' RIGHTS HERE. IN ARTICLE 15 IT SETS FORTH
19 MANAGEMENT RIGHTS, WHICH MAKES IT VERY CLEAR THAT THE
20 EMPLOYER HERE, THE COUNTY, IS THE EXCLUSIVE ARBITRATOR OF
21 POLICY, IN ARTICLE 27, WHICH LISTS THE ASSOCIATION'S
22 RIGHTS, WHICH ARE LIMITED TO WAGE, HOUR, AND WORK
23 CONDITIONS.

24 AND NEITHER THE PETITION NOR THE ORIGINAL T.R.O.
25 APPLICATION, THE PRELIMINARY INJUNCTION MOTION APPLICATION
26 RIGHT NOW, HAVE ANY EVIDENCE AT ALL BEYOND JUST REFERRING
27 TO THE UNION'S STATUS AS A BARGAINING UNIT.

28 AND WE KNOW FROM THE CITY OF CLAREMONT CASE THAT

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1 WE CITED THAT THE UNION DOESN'T HAVE A RIGHT TO BARGAIN
2 OVER CRIMINAL JUSTICE POLICY ISSUES, LIKE AT ISSUE IN THIS
3 CASE. THAT'S WHAT THE CALIFORNIA SUPREME COURT SAYS. SO
4 WHAT ELSE IS THERE? AND THE ANSWER IS PRIOR TO FILING
5 THEIR REPLY BRIEF, THEY HAD ABSOLUTELY NOTHING. AND IN
6 REPLY THEY PUT THEIR BYLAWS.

7 BUT, YOUR HONOR, WE WOULD SUBMIT THAT THAT'S TOO
8 LITTLE TOO LATE. IT'S TOO LITTLE BECAUSE THERE'S NOTHING
9 IN THE BYLAWS THAT SAYS THAT THE UNION MEMBERS AUTHORIZE
10 THIS UNION TO BRING LITIGATION ON THEIR BEHALF ATTACKING
11 CRIMINAL JUSTICE POLICIES OF THE ELECTED DISTRICT ATTORNEY,
12 AND IT'S TOO LATE BECAUSE IT'S IN A REPLY BRIEF AND IT'S
13 UNCLEAR BECAUSE THESE BYLAWS ON THIS ISSUE ARE COMPLETELY
14 AMBIGUOUS.

15 THERE IS NOTHING THAT SPELLS OUT IN THESE BYLAWS
16 SAYING THAT THIS UNION CAN BRING A CLAIM ON BEHALF OF ITS
17 MEMBERS TO CONTEST POLICY ISSUES OF ITS EMPLOYER. THERE'S
18 NOTHING AT ALL ON THAT POINT.

19 SO IF THEY'RE CLAIMING THERE IS BASED ON THE
20 AMBIGUOUS BYLAWS THAT THEY CLAIM THEY'RE RELYING UPON FOR
21 THAT POINT, SOME OF WHICH CLEARLY HAVE NOTHING TO DO WITH
22 AT ALL, WE SHOULD BE ALLOWED TO TAKE SOME DISCOVERY ON THAT
23 ISSUE TO DISPROVE THEIR STANDING, SO TO SPEAK.

24 IN THE CASES THAT THEY REPLY ON --

25 THE COURT: WELL, I MEAN --

26 MR. DUGDALE: I'M SORRY, YOUR HONOR?

27 THE COURT: I'M NOT -- THIS IS FOR PRELIMINARY
28 INJUNCTION, IT'S NOT A FINAL DECISION, SO YOU DON'T GET TO

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1 TAKE DISCOVERY.

2 MR. DUGDALE: I UNDERSTAND, YOUR HONOR.

3 THE COURT: THIS IS MY POINT; THIS IS MY POINT:
4 THEY SAY IN THEIR MOVING PAPERS WE HAVE STANDING, YOU SAY
5 IN YOUR OPPOSITION, NO, YOU DON'T, AND THEY SAY IN THEIR
6 REPLY, OH, YES, WE DO.

7 I DON'T SEE ANYTHING IMPROPER ABOUT THEIR
8 APPROACH. YOU KNOW, THEY DIDN'T KNOW YOU WERE GOING TO
9 ATTACK THEIR STANDING. I THINK WHAT THEY DID WAS OKAY.
10 AND THE CASES SAY THAT THE LABOR UNION HAS STANDING TO
11 CHALLENGE EMPLOYEE WORK CONDITIONS. WELL, ISN'T THAT AN
12 EMPLOYEE WORK CONDITION TO COMPEL A DEPUTY DISTRICT
13 ATTORNEY TO GO DOWN AND DISMISS STRIKE PRIORS? ISN'T THAT
14 A WORKING CONDITION? IS IT ILLEGAL?

15 MR. DUGDALE: YOUR HONOR, IT'S NOT. WHAT THEY'RE
16 CONTESTING HERE IS A POLICY DECISION THAT'S BEEN MADE BY
17 THE DISTRICT ATTORNEY, WHICH, AGAIN, IS EXCLUSIVELY WITHIN
18 THE PROVINCE OF THE COUNTY AND ITS LEADERS PURSUANT TO THE
19 MEMORANDUM OF UNDERSTANDING.

20 I THINK THE COURT -- AGAIN, THIS IS AN ISSUE THAT
21 DEMANDS SOME FOCUS BECAUSE, AGAIN, THEY DON'T EVEN GET IN
22 THE DOOR UNLESS THEY CAN PROVE THAT THEY HAVE STANDING. IN
23 THE MEMORANDUM OF UNDERSTANDING, IT'S VERY CLEAR HERE WHO
24 HAS IN THIS CASE UNILATERAL DISCRETION TO DEAL WITH POLICY
25 ISSUES, AND IT'S THE DISTRICT ATTORNEY, IT'S THE COUNTY.
26 IT IS NOT THEIR EMPLOYEES.

27 AND THE CASES THAT THEY CITE, BY THE WAY, YOUR
28 HONOR, THEY DON'T DEAL WITH WORK CONDITIONS OR AT LEAST

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1 WHAT THEY'RE DEALING WITH ARE CLEAR EMPLOYMENT ISSUES THAT
2 HAVE NOTHING TO DO WITH POLICY OR ANYTHING LIKE THAT, AT
3 LEAST THE TWO CALIFORNIA CASES THEY RELY ON. THE TEAMSTERS
4 CASE IS ABOUT UNEMPLOYMENT INSURANCE RELATED TO A LOCKOUT,
5 THE MONTEREY, SANTA CRUZ, ET CETERA, CASE IS ABOUT
6 PREVAILING WAGE LAW. I MEAN, THESE ARE ISSUES WHICH A
7 UNION FOR PUBLIC EMPLOYEES CAN REPRESENT THEIR MEMBERS ON.

8 BUT IN THIS CASE, GIVEN THE CLARITY OF THE
9 MEMORANDUM OF UNDERSTANDING, THEY DON'T HAVE -- THIS IS NOT
10 WITHIN THE PURVIEW OF WHAT THE UNION DOES HERE TO BE ABLE
11 TO CONTEST POLICY ISSUES BY THE DISTRICT ATTORNEY. IT'S
12 SPELLED OUT IN THE MEMORANDUM OF UNDERSTANDING. AND NONE
13 OF THESE DIRECTIVES --

14 THE COURT: IF THE POLICY -- HOLD ON.

15 MR. DUGDALE: SURE.

16 THE COURT: IF THE POLICY DIDN'T AFFECT A DEPUTY
17 DISTRICT ATTORNEY, THAT WOULD PROBABLY BE TRUE, BUT YOUR
18 POLICY FORCES THEM, ACCORDING TO THEM, TO GO DOWN INTO THE
19 COURTROOM, SAY THINGS THAT ARE ILLEGAL AND UNETHICAL, AND
20 IT'S GOT TO BE TRUE THAT THE UNION CAN REPRESENT THEM IN
21 SEEKING TO PREVENT THAT. IT HAS TO BE TRUE.

22 MR. DUGDALE: WELL, THERE IS NOTHING IN THE BYLAWS
23 THEY'VE SUBMITTED, WHICH INDICATES THAT, YOUR HONOR, THAT
24 THEY CONTEST POLICY ISSUES. AND, LOOK, OBVIOUSLY WE'RE
25 TAKING ISSUE WITH WHETHER THE DISTRICT ATTORNEY IS MAKING
26 THEM GO INTO COURT AND DO THINGS THAT ARE ILLEGAL OR
27 UNETHICAL OR ANYTHING OF THE SORT.

28 AND YOU CAN'T REALLY WORK BACKWARDS FROM THE

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1 MERITS TO DECIDE A STANDING QUESTION LIKE THIS. THERE IS
2 AGAIN A GRIEVANCE PROCESS, IF THEY HAVE AN ISSUE WITH THIS,
3 THAT IS SET UP IN THE MEMORANDUM OF UNDERSTANDING AS WELL.
4 AND INSTEAD OF UTILIZING THAT GRIEVANCE PROCESS, YOUR
5 HONOR -- THERE'S NO DEBATE ABOUT THIS -- THEY RAN TO COURT.
6 SO --

7 THE COURT: THAT'S TRUE; THAT'S TRUE. HOLD ON.
8 LET ME TURN TO MR. CARROLL.

9 SO WHAT ABOUT THE GRIEVANCE PROCESS? WELL,
10 THERE'S A PROBLEM WITH THAT, BUT I'LL GET TO THAT IN A
11 SECOND.

12 WHAT ABOUT THE GRIEVANCE PROCESS, MR. CARROLL?

13 MR. CARROLL: THANK YOU, YOUR HONOR.

14 WITH RESPECT TO THE GRIEVANCE PROCESS, YOU KNOW,
15 ONE THING I WOULD NOTE IS THAT THE RESPONDENTS DON'T CARE
16 TO TAKE THE POSITION THAT THIS DOES FALL WITHIN THE M.O.U.,
17 AT LEAST NOT WITHIN THEIR BRIEF. THEY'RE JUST SAYING,
18 WELL, IF IT DOES, THEN YOU NEEDED TO EXHAUST; AND
19 THEREFORE, YOU DON'T HAVE STANDING. SO I DIDN'T INTERPRET
20 RESPONDENTS TO BE AFFIRMATIVELY CLAIMING OR SHOWING THAT
21 THOSE FALL WITHIN A PARTICULAR PROVISION OF THE M.O.U.

22 AND SECOND, YOUR HONOR, THE CHALLENGE TO THE
23 DISTRICT ATTORNEY'S POLICY IS NOT AN ISSUE THAT FALLS
24 WITHIN THE M.O.U. IT'S NOT PART OF THE GRIEVANCE
25 PROCEDURE; AND THEREFORE, WE DON'T THINK THERE IS ANY
26 OBLIGATION TO GO THROUGH THE GRIEVANCE PROCESS THAT IS
27 OUTLINED IN THE M.O.U.

28 THE COURT: YEAH. I'LL TELL YOU -- I'LL TELL YOU,

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1 MR. DUGDALE, WHY I HAVEN'T FOCUSED ON THE M.O.U., BECAUSE
2 IT'S NOT IN EVIDENCE. YOU PURPORT TO RELY ON IT AND YOU
3 ASKED ME TO JUDICIALLY NOTICE IT AND I'M REFUSING TO
4 JUDICIALLY NOTICE IT BECAUSE AN M.O.U. CAN BE JUDICIALLY
5 NOTICED IF IT IS APPROVED BY THE LEGISLATIVE BODY OF THE
6 AGENCY ENTERING INTO THE M.O.U.

7 I HAVE NO EVIDENCE THAT THE BOARD OF SUPERVISORS
8 APPROVED THE DEPUTY DISTRICT ATTORNEY ASSOCIATION'S M.O.U.
9 WITH THE COUNTY. SO I DECLINE TO JUDICIALLY NOTICE IT; AND
10 THEREFORE, I'M NOT LOOKING AT THE GRIEVANCE PROCESS.

11 MR. DUGDALE: YOUR HONOR, I UNDERSTAND THAT. I
12 MEAN, WE MAY SEEK RECONSIDERATION FOR THAT.

13 I'M PRETTY SURE WE HAVE A SITUATION WHERE THE
14 BOARD OF SUPERVISORS WOULD HAVE APPROVED THIS, BUT WE WILL
15 GO BACK AND CHECK AND SEE -- IN LIGHT OF THE COURT'S
16 COMMENTS ON THIS, WHICH I APPRECIATE -- WE WILL GO BACK AND
17 SEE IF THAT IS -- SINCE THE COURT HAS ARTICULATED THAT AS A
18 BASIS FOR ADMISSIBILITY, WE WILL SEE IF THAT EXISTS AND WE
19 WILL DO THAT IMMEDIATELY.

20 THE COURT: YEAH, LET ME EMBELLISH FOR A SECOND;
21 OKAY? BECAUSE I'M DOING ADMINISTRATIVE LAW, I GET THE
22 PARTIES CONSTANTLY ASKING ME TO JUDICIALLY NOTICE
23 EVERYTHING THAT IS IN AN AGENCY FILE. AND I AM VERY
24 PARTICULAR ABOUT JUDICIAL NOTICE BECAUSE I DON'T WANT TO DO
25 IT. YOU HAVE TO REALLY SHOW ME THAT IT'S AN OFFICIAL ACT
26 UNDER 452(C) IN THE EVIDENCE CODE OR LEGISLATIVE ENACTMENT
27 UNDER 452(B) OR SOME OTHER REASON WHY I HAVE TO JUDICIALLY
28 NOTICE SOMETHING.

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1 I ABSOLUTELY LOOKED AT YOUR CASE. I KNOW THAT AN
2 M.O.U. CAN BE JUDICIALLY NOTICED IF APPROVED BY THE
3 LEGISLATIVE BODY. I LOOKED AT THE M.O.U. I DIDN'T SEE
4 ANYTHING THERE THAT SAID THAT THE BOARD OF SUPERVISORS
5 ENDORSED IT OR APPROVED IT OR CERTIFIED IT OR WHATEVER, SO
6 I DIDN'T JUDICIALLY NOTICE IT. YOU MAY THINK THAT IS A
7 TECHNICAL RULING, BUT I GUESS I AM THE GATEKEEPER FOR
8 JUDICIAL NOTICE AND I'M PRETTY CAREFUL ABOUT IT.

9 MR. DUGDALE: AND THAT CERTAINLY IS THE COURT'S
10 PREROGATIVE, WHICH I DO NOT DISPUTE. AND WE WILL GO BACK,
11 WE WILL SEE IF WE CAN MEET THAT HURDLE FOR THE COURT AND WE
12 WILL DO SO IMMEDIATELY.

13 BUT BASICALLY, THIS ISSUE OF STANDING IS REALLY
14 IMPORTANT IN THIS PARTICULAR ISSUE -- IN THIS PARTICULAR
15 CASE TO FIGURE OUT HOW THIS UNION CAN SPEAK FOR ITS
16 MEMBERS. THIS IS THE BIG POINT I WANT TO MAKE HERE.

17 IF THE UNION HAD ASSOCIATIONAL STANDING, WHAT ARE
18 THE RIGHTS OF THE MEMBERS, THESE 800 MEMBERS WHO AGREE WITH
19 THE DISTRICT ATTORNEY AND NOT WITH THE UNION? WE DON'T
20 KNOW MUCH OF ANYTHING. WE DON'T KNOW REALLY ANYTHING ABOUT
21 THAT.

22 WERE THEY GIVEN NOTICE AND AN OPPORTUNITY TO
23 OBJECT TO THE UNION TAKING THE POSITION IT HAS IN THIS
24 CASE? WERE THEY ALLOWED TO OPT OUT? WERE THEIR DUES USED
25 FOR THIS? BECAUSE THE UNION IS PURSUING RELIEF THAT THEY
26 WANT TO APPLY TO THE OFFICE AS A WHOLE, NOT JUST TO THE
27 DEPUTY DISTRICT ATTORNEYS WHO DON'T LIKE THE POLICY.

28 AND SO THE REAL QUESTION HERE IS HOW THIS UNION

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1 GETS TO PICK SIDES ON SUBSTANTIVE CRIMINAL JUSTICE ISSUES
2 LIKE WE HAVE AT ISSUE HERE. AND, AGAIN, IF THE UNIONS WANT
3 TO RADICALLY EXPAND THEIR MISSION IN A WAY THAT IS NOVEL
4 LIKE THIS, THEN THEY SHOULD HAVE TO BE ABLE TO PRODUCE SOME
5 VERY COMPELLING EVIDENCE THAT THEIR MEMBERS GAVE THEM RIGHT
6 TO LITIGATE OVER MATTERS THAT ARE EXPRESSLY EXCLUDED FROM
7 THEIR BARGAINING RIGHTS PER --

8 THE COURT: HOLD ON. THAT'S A GOOD POINT.

9 MR. CARROLL, WHO AUTHORIZED THE UNION TO FILE THIS
10 ACTION? THERE'S NO EVIDENCE THAT THE MEMBERS TOOK A VOTE
11 AND THAT, YOU KNOW, 80 PERCENT OF THEM WANTED TO FILE THE
12 LAWSUIT. WHO AUTHORIZED THIS?

13 MR. CARROLL: YOUR HONOR, MY UNDERSTANDING IS THE
14 EXECUTIVE OFFICERS AND THE BOARD OF DIRECTORS AUTHORIZED
15 THIS PARTICULAR LAWSUIT.

16 AND IN RESPONSE TO THE RESPONDENT'S CONTENTION
17 THAT THERE NEEDS TO BE, YOU KNOW, AUTHORIZATION FROM ALL
18 THE MEMBERS, I MEAN, THERE ISN'T ANY CASE LAW SUPPORTING
19 THAT POSITION. I THINK A NUMBER OF THESE FACTUAL ISSUES
20 THAT THE RESPONDENTS ARE RAISING ARE SIMPLY IMMATERIAL.

21 THE ONLY REQUIREMENT FOR ORGANIZATIONAL STANDING
22 IS THAT THE INTEREST TO BE ASSERTED IS GERMANE TO THE
23 ORGANIZATION'S PURPOSE. AND I THINK AS THE COURT OBSERVED
24 EARLIER, IT SURELY HAS TO BE GERMANE TO A WORKPLACE UNION'S
25 PURPOSES TO ADVOCATE FOR THE WORKING CONDITIONS ON BEHALF
26 OF THEIR EMPLOYEES. AND I THINK THAT IS REALLY THE END OF
27 THE INQUIRY.

28 YOU KNOW, NO CASE THAT I AM AWARE OF CITES

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1 SECTION 13 -- SORRY, GOVERNMENT CODE SECTION 3504 AS
2 CIRCUMSCRIBING THE GERMANENESS INQUIRY. AND THE CITY OF
3 CLAREMONT CASE THAT RESPONDENTS OFFERED IN THEIR OPPOSITION
4 BRIEF TOO WAS NOT A CASE ON STANDING. THERE SIMPLY ISN'T
5 ANY LAW TO SAY THAT THE SPECIFIC MEMBERS OR SOME ARBITRARY
6 NUMBER OF MEMBERS NEED TO AUTHORIZE A PARTICULAR ACTION IN
7 ORDER FOR THERE TO BE ORGANIZATIONAL STANDING.

8 THE COURT: YOU KNOW, USUALLY WHEN A UNION FILES A
9 LAWSUIT, ONE MEMBER -- ONE INDIVIDUAL MEMBER OF THE UNION,
10 ONE OR MORE, JOIN AS PETITIONERS AND THAT DIDN'T HAPPEN
11 HERE. IS THAT TO AVOID REPERCUSSIONS OR WHAT?

12 MR. GEORGE: YES, YOUR HONOR.

13 THE COURT: OKAY. BACK TO MR. DUGDALE.

14 MR. DUGDALE: THANK YOU, YOUR HONOR.

15 SO AGAIN, WHAT THEY CLAIM THEIR PURPOSES ARE, THE
16 UNION REPRESENTING ITS MEMBERS, ARE IN 1.3, DIFFERENT
17 SECTIONS OF 1.3. AND IF THE COURT DIVES INTO THAT, THERE
18 IS NOTHING THERE THAT COVERS THIS SUPPOSEDLY BROAD PURPOSE
19 TO CHALLENGE POLICY DECISIONS BY THE DISTRICT ATTORNEY.
20 NOTHING AT ALL. IN FACT, 1.3 DOESN'T EVEN TALK ABOUT
21 LITIGATING ANYTHING ON BEHALF OF THE UNION'S MEMBERS.

22 SO, AGAIN, THIS IS IMPORTANT BECAUSE I'M SURE
23 DEPUTY DISTRICT ATTORNEYS HAVE A LOT OF DIFFERENT VIEWS
24 ABOUT THINGS LIKE THAT AND THERE'S JUST NO WAY THAT A
25 PUBLIC UNION CAN MAINTAIN COHESION AND NEGOTIATE
26 EFFECTIVELY OVER THINGS THAT ARE CLEARLY COVERED, LIKE WAGE
27 AND HOUR ISSUES, IF IT'S ALWAYS BEING CALLED UPON BY ITS
28 MEMBERS TO SUE OVER ONE CONTROVERSIAL SUBSTANTIVE POLICY OR

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1 ANOTHER.

2 SO STANDING -- AND I'LL CLOSE ON THAT -- STANDING
3 IS AN IMPORTANT ISSUE HERE. IT'S ONE WHERE THE PETITIONERS
4 BEAR THE BURDEN AND THEY HAVE NOT MET THAT BURDEN.

5 THE COURT: LET ME ASK YOU, WHAT ABOUT PUBLIC
6 INTEREST STANDING, WHICH THEY RAISED IN REPLY AND YOU NEVER
7 HAD AN OPPORTUNITY TO RESPOND TO, SO I'M GIVING YOU A
8 CHANCE NOW.

9 MR. DUGDALE: AND I APPRECIATE THAT, YOUR HONOR.
10 IT WASN'T RAISED UNTIL THE REPLY, OBVIOUSLY.

11 THE ISSUE IS PUBLIC INTEREST STANDING CAN'T BE
12 ASSERTED AGAINST THE PUBLIC PROSECUTOR IN A CRIMINAL
13 MATTER. THERE ARE CASES FROM THE SUPREME COURT ON THIS,
14 DIX VERSUS SUPERIOR COURT, WHICH IS 53 CAL.3D 442 AND
15 WEATHERFORD VERSUS CITY OF SAN RAFAEL, WHICH IS 2 CAL.5TH
16 1241.

17 AND YOU CAN IMAGINE WHY THAT'S SO. YOU DON'T WANT
18 INTERLOPERS TO COME IN IN A CRIMINAL MATTER WHERE THEY CAN
19 CHALLENGE, FOR INSTANCE, PROSECUTORIAL DISCRETION, WHICH
20 I'M GOING TO BE TALKING ABOUT A LOT IN A MINUTE. SO --

21 THE COURT: GIVE ME THAT FIRST CITE AGAIN. GIVE
22 ME THAT FIRST CITE AGAIN.

23 MR. DUGDALE: SURE. IT WAS DIX VERSUS SUPERIOR
24 COURT, WHICH IS 53 CAL.3D 442.

25 THE COURT: OKAY.

26 MR. DUGDALE: THANK YOU, YOUR HONOR.

27 SO I WANT TO MOVE ON TO THE MERITS. I DON'T WANT
28 TO TAKE ALL DAY FOR THE COURT ON THIS, BUT THIS IS

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1 OBVIOUSLY REALLY IMPORTANT HERE.

2 THE RELIEF BEING SOUGHT IN THIS WORKPLACE DISPUTE,
3 YOUR HONOR, I DON'T THINK ANYBODY CAN DISPUTE IT'S
4 UNPRECEDENTED. THERE'S NEVER BEEN A CALIFORNIA COURT WHO
5 HAS EVER ORDERED -- AND INDEED NO CALIFORNIA COURT HAS EVER
6 DEEMED ITSELF TO HAVE THE POWER TO ORDER BY A MANDAMUS
7 NONETHELESS -- THAT A DISTRICT ATTORNEY MUST BRING ANY
8 PARTICULAR CHARGE OR PURSUE ANY PARTICULAR SENTENCING
9 ENHANCEMENT THAT THE DISTRICT ATTORNEY DOESN'T WANT HIS
10 PROSECUTORS TO PURSUE.

11 TO THE CONTRARY, COURTS HAVE LONG HELD THAT SUCH
12 DECISIONS MADE BY THE DISTRICT ATTORNEY ARE ALMOST ALWAYS
13 ENTIRELY UNREVIEWABLE AND ARE DECISIONS UNIQUELY WITHIN THE
14 DISTRICT ATTORNEY'S DISCRETION TO MAKE.

15 MOREOVER, UNDER BASIC SEPARATION OF POWERS
16 PRINCIPLES, CALIFORNIA COURTS HAVE LONG HELD THAT THE
17 MANNER IN WHICH A DISTRICT ATTORNEY EXERCISES ITS
18 DISCRETION WHEN THIS COMES TO HOW CRIMINAL CASES UNDER HIS
19 PURVIEW ARE CHARGED IS NOT ADMINISTERIAL, IT'S SOMETHING
20 THAT IS NOT AUTOMATIC OR LACKS DISCRETION COMPLETELY AND
21 APPROPRIATE FOR WRIT REVIEW.

22 AND I JUST WANT TO BE VERY CLEAR HERE, THE
23 DISTRICT ATTORNEY HERE DOESN'T BELIEVE HE'S ABOVE THE LAW,
24 NOR DO HIS DIRECTIVES SIT OUTSIDE THE WIDE BOUNDARIES OF
25 HOW HE'S ALLOWED TO ACT IN LEADING HIS OFFICE IN EXERCISING
26 HIS ENORMOUS PROSECUTORIAL DISCRETION.

27 SO I THINK THE COURT NEAR THE BEGINNING WAS REALLY
28 INSIGHTFUL ABOUT A PARTICULAR POINT AND THAT'S THAT THESE

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1 DIRECTIVES ARE NOT SORT OF ONE SIZE FITS ALL. THERE'S
2 DIFFERENT CONSIDERATIONS HERE. THERE'S ONLY ONE AND THAT'S
3 THE DIRECTIVE NOT TO CHARGE A THREE STRIKES -- STRIKES IN A
4 THREE STRIKES CASE WHERE THE OTHER SIDE IS CONTENDING THAT
5 THAT IS A MANDATORY DUTY.

6 THE OTHERS INVOLVING, FOR INSTANCE, A DECISION NOT
7 TO CHARGE THINGS LIKE FIREARMS ENHANCEMENTS OR GANG
8 ENHANCEMENTS, THOSE ARE MATTERS OF DISCRETION. THERE'S NO
9 QUESTION ABOUT THAT. THERE'S NO LAW, THERE'S NO -- THERE'S
10 NO CASE LAW, THERE'S NO STATUTE THAT WOULD REQUIRE A
11 PROSECUTOR TO CHARGE ANY OF THOSE ENHANCEMENTS. THAT'S A
12 MATTER OF DISCRETION. SO IT'S PARTICULARLY INAPPROPRIATE
13 IN THAT CASE TO ASK A COURT TO IMPINGE UPON THAT
14 DISCRETION.

15 THEIR ONE CLAIM, OF COURSE, SORT OF OVERALL IS
16 THAT THERE'S SOMETHING WRONG WITH BLANKET POLICIES AND I'LL
17 GET TO THAT IN A MINUTE. I'M SURE THE COURT IS GOING TO
18 ASK ABOUT THAT.

19 BUT I WANT TO FOCUS --

20 THE COURT: BUT BEFORE WE GET THERE, LET ME
21 INTERRUPT YOU BECAUSE THAT'S WHAT I DO, I INTERRUPT.

22 MR. DUGDALE: THAT'S FINE, YOUR HONOR.

23 THE COURT: I'M A LITTLE UNCLEAR ON YOUR POSITION.
24 IS IT YOUR POSITION THAT EVEN IF THE THREE STRIKES LAW
25 REQUIRES YOU TO PLEAD AND PROVE STRIKE PRIORS, MANDAMUS
26 RELIEF IS NOT AVAILABLE FOR THAT?

27 MR. DUGDALE: WELL, NO, I DON'T THINK THAT'S OUR
28 POSITION. OUR POSITION IS THAT THE THREE STRIKES LAW CAN'T

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1 REQUIRE US TO DO THIS. THAT WOULD IMPINGE UPON THE
2 AUTHORITY OF THE EXECUTIVE.

3 THE COURT: OKAY.

4 MR. DUGDALE: OUR POINT ON THE WRIT OF MANDAMUS,
5 YOUR HONOR, AND I DON'T MEAN TO INTERRUPT --

6 THE COURT: WAIT A MINUTE. I HAVE A SECOND PART
7 TO MY QUESTION.

8 OKAY. IF IT'S NOT YOUR POSITION, IS IT YOUR
9 POSITION THAT THE THREE STRIKES LAW IS UNCONSTITUTIONAL?

10 MR. DUGDALE: NO. THAT'S NOT WHAT -- A POSITION
11 THAT WE HAVE TO TAKE IN THIS CASE BECAUSE WHAT WE'RE GOING
12 TO ASK -- WHAT WE'VE ASKED THIS COURT TO DO IS TO READ IT
13 IN A CONSTITUTIONAL WAY. WHAT WE'RE SAYING IS IT WOULD BE
14 UNCONSTITUTIONAL IF A COURT LOOKED AT IT AND SAID THAT THE
15 LEGISLATURE IS DEMANDING, IT IS FORECLOSING ANY DISCRETION
16 WHEN IT COMES TO CHARGING STRIKES. THAT WOULD BE
17 UNCONSTITUTIONAL AS OPPOSED TO LIMITING.

18 SO FOR INSTANCE, THE COURT BROUGHT UP THAT
19 EXAMPLE, WHICH IS EXACTLY WHAT WE GO TO IN OUR PAPERS, AT
20 LEAST ONE POSSIBLE WAY TO READ THIS AS CONSTITUTIONAL, TO
21 AVOID AN UNCONSTITUTIONAL RESULT IN THE WAY THAT YOU READ
22 AND INTERPRET THE STATUTE WOULD BE TO MAKE THE POINT THAT
23 THE COURT MADE HERE, WHICH IS THAT THIS IS A DUE PROCESS
24 ISSUE, THAT ONCE A PROSECUTOR HAS EXERCISED HIS DISCRETION
25 TO BRING A STRIKE, WHAT PLEAD AND PROVE MEANS IS THEY HAVE
26 TO GIVE NOTICE; THEY HAVE TO GIVE NOTICE.

27 AND THAT ACTUALLY FITS WITH ALL THESE CASES. ALL
28 THREE CASES THEY TALK ABOUT, KILBOURNE, LAANUI, AND ROMAN,

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1 ALL DEAL WITH CASES WHERE THE PROSECUTOR MADE THE DECISION
2 TO BRING A STRIKE, NOT WHERE SOMEBODY WAS CHALLENGING THAT
3 THE PROSECUTOR DIDN'T DECIDE TO DO IT AND THERE WAS
4 SOMETHING WRONG WITH THAT BECAUSE IT WAS A MANDATORY
5 OBLIGATION.

6 SO THIS GETS TO THE POINT THAT I WANT TO MAKE ON
7 THIS ISSUE HERE, AND I'LL TRY AND BE AS CLEAR AS POSSIBLE,
8 IS WHAT WE NEED -- WHAT IS NECESSARY HERE, WHAT THE COURT
9 HAS TO DO AS A MATTER OF REVIEWING THE STATUTE AND THE
10 INTERPRETATION OF THE STATUTE TO MAKE IT LAWFUL, TO MAKE IT
11 CONSTITUTIONAL AND NOT HAVE A CONSTITUTIONAL SEPARATION OF
12 POWERS PROBLEM, TO HAVE CONSTITUTIONAL AVOIDANCE OF THAT
13 ISSUE, IS WHAT WE ASK IN OUR BRIEF.

14 FIRST OF ALL, THE "SHALL" LANGUAGE IS NOT
15 DISPOSITIVE. AND WE CITED THE GREGORIAN CASE FOR THAT
16 POINT WHERE THERE WAS ANOTHER SIMILAR STATUTE WHERE THE
17 WORD "SHALL" WAS USED, BUT THE COURT SAID TO READ "SHALL"
18 INTO THE STATUTE WOULD MAKE THE STATUTE RIDICULOUS AND
19 UNCONSTITUTIONAL. SO WE ARE GOING TO AVOID THE
20 CONSTITUTIONAL PROBLEM, WE'RE GOING TO AVOID THE PROBLEM
21 WITH IMPINGING ON PROSECUTORIAL DISCRETION BY READING
22 "SHALL" AS PERMISSIVE RATHER THAN MANDATORY.

23 AND IN THIS PARTICULAR CASE --

24 THE COURT: LET ME INTERRUPT -- HOLD ON. LET ME
25 INTERRUPT AGAIN.

26 MR. DUGDALE: SURE.

27 THE COURT: CAN THE LEGISLATURE LIMIT OR EVEN
28 EXCLUDE PROSECUTORIAL DISCRETION? CAN THEY DO IT?

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1 MR. DUGDALE: YOUR HONOR, THE LEGISLATURE CAN
2 LIMIT PROSECUTORIAL DISCRETION AND WE'RE NOT CONTESTING
3 THAT THEY CAN. WHAT WE'RE SAYING IS THEY CAN'T ELIMINATE
4 THAT DISCRETION. THE LEGISLATURE CANNOT FORCE A PROSECUTOR
5 TO MAKE A CHARGING DECISION. THAT IS WITHIN THE PURVIEW OF
6 WHAT PROSECUTORS DO UNDER THE CALIFORNIA STATE
7 PROSECUTION -- CONSTITUTION. UNDER ARTICLE 3, SECTION 3,
8 THAT'S A JOB OF PROSECUTORS, NOT THE LEGISLATURE.

9 SO THE COURT IS ON THE TRACK THAT I'M TALKING
10 ABOUT HERE, IS WHEN YOU APPLY THE ROLE OF CONSTITUTIONAL
11 AVOIDANCE, AVOIDING A CONSTITUTIONAL PROBLEM HERE AND
12 LOOKING AT THE "SHALL" LANGUAGE, YOU HAVE TO READ IT IN A
13 WAY THAT IS PERMISSIVE RATHER THAN RESTRICTIVE BECAUSE
14 READING IT IN A WAY THAT IS RESTRICTIVE CREATES A
15 SEPARATION OF POWERS ISSUE THAT WOULD MAKE IT A READING
16 UNCONSTITUTIONAL. SO TO AVOID THAT RESULT, "SHALL" SHOULD
17 BE READ AS RESTRICTIVE RATHER THAN -- I'M SORRY, PERMISSIVE
18 RATHER THAN RESTRICTIVE.

19 THERE'S ALSO SOME OTHER THINGS, YOUR HONOR, HERE.
20 IT REALLY MAKES NO SENSE -- THE INTERPRETATION THE COURT
21 HAD EARLIER ABOUT HOW THIS IS A DUE PROCESS POINT, IT MAKES
22 SENSE, A GOOD OBSERVATION BY THE COURT. BUT IF YOU READ
23 THE "SHALL" LANGUAGE, IT DOES NOT MAKE ANY SENSE HERE.

24 FIRST OF ALL, YOU WOULD HAVE THE SITUATION WHERE
25 IF IT WAS MANDATORY, THE LEGISLATURE SAID IT WAS MANDATORY
26 TO CHARGE STRIKES, THAT YOU WOULD HAVE TO CHARGE STRIKES
27 WHERE YOU DIDN'T HAVE THE PROOF FOR IT; AND THEN IN PART 2
28 OR SUBSECTION 2 OF EITHER ONE OF THE STATUTES, HAVE TO MOVE

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1 TO DISMISS. THAT DOESN'T MAKE ANY SENSE AT ALL.

2 AND THE OTHER WAY IT MAKES NO SENSE IS THAT IF
3 PROSECUTORS HAVE THE DISCRETION NOT TO CHARGE A CASE AT ALL
4 BUT THEN THEY DO CHARGE A CASE, HOW CAN THEY BE MANDATED TO
5 SEEK A PARTICULAR SENTENCE? IT'S CONSISTENT WITH HOW THE
6 COURT -- AND I KNOW THE COURT IS FAMILIAR WITH ROMERO; THE
7 COURT WAS ON THE CRIMINAL BENCH AFTER ROMERO CAME DOWN --
8 IT'S REALLY THE SAME PRINCIPLE TO READ IN A
9 CONSTITUTIONAL -- A WAY TO READ INTO THE STATUTE THE WAY
10 THAT MAKES IT CONSTITUTIONAL.

11 IN ROMERO, YOU HAD A SITUATION WHERE THE JUDICIARY
12 HAD THE POWER TO DISMISS A CASE INCLUDING THE LESSER POWER
13 TO STRIKE SENTENCING ENHANCEMENTS. AND ONE READING OF THE
14 LAW WAS TO CREATE THE JUDICIARY'S ABILITY TO STRIKE A
15 STRIKE INDEPENDENTLY WHERE THEY'RE NOT HELD HOSTAGE TO THE
16 PROSECUTOR MAKING A MOTION BECAUSE BEING HELD HOSTAGE TO
17 THE PROSECUTOR MAKING A MOTION WOULD CREATE A SEPARATE OF
18 POWERS ISSUE. SO TO AVOID THAT CONSTITUTIONAL PROBLEM,
19 ROMERO CAME UP WITH THE RESULT THAT IT DID.

20 HERE IS THE SAME SITUATION, PROSECUTORS HAVE THE
21 POWER NOT TO CHARGE A CASE AND THAT INCLUDES THE LESSER
22 POWER OF HOW TO CHARGE SENTENCING ENHANCEMENTS. SO IF YOU
23 READ THE "SHALL LANGUAGE AS MANDATORY RATHER THAN
24 PERMISSIVE, IN THAT SITUATION THE LEGISLATURE HAS
25 UNCONSTITUTIONALLY IMPINGED ON THAT POWER, THE LESSER POWER
26 OF HOW TO CHARGE SENTENCE ENHANCEMENTS.

27 THE COURT: OKAY. LET ME INTERRUPT AGAIN.

28 IS THERE NOT A DISTINCTION BETWEEN A CHARGE -- AND

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1 I THINK EVERYONE AGREES INCLUDING ME THAT THE PROSECUTOR
2 HAS UNFETTERED DISCRETION ON WHAT CHARGE TO BRING. I'M NOT
3 AWARE OF ANY LAW THAT PURPORTS TO LIMIT THE PROSECUTOR IN
4 DECIDING WHAT THE CHARGE IS.

5 ISN'T THAT A DISTINCTION BETWEEN THE CHARGE OR AN
6 OFFENSE AND A SENTENCING ENHANCEMENT? SENTENCING IS FOR
7 JUDGES, NOT FOR ANYBODY, BUT SOMETIMES JURIES IN A DEATH
8 PENALTY CASE, BUT BASICALLY SENTENCING IS FOR JUDGES.

9 AND I CAN CERTAINLY SEE A BRIGHT-LINE DISTINCTION,
10 WELL, A PROSECUTOR GETS TO CHARGE THE CASE, BUT IF THEY DO
11 CHARGE THE CASE, FOR SENTENCING PURPOSES THEY MUST ALLEGE
12 WHATEVER, THEIR PART. I CAN SEE THAT DISTINCTION.

13 MR. DUGDALE: BUT, YOUR HONOR, THERE'S NO DOUBT
14 THAT JUDGES SENTENCE AND PROSECUTORS CHARGE. BUT, IN FACT,
15 WHAT THE CASE LAW HAS RECOGNIZED IS THAT WHEN THE DECISIONS
16 COME TO -- COME TO MAKING CHARGING DECISIONS ON SENTENCING
17 ENHANCEMENTS, THAT'S ONE OF THE AREAS WHERE THE PROSECUTOR
18 HAS THE MOST DISCRETION, WHERE ITS DISCRETION -- ABILITY TO
19 BRING SUCH THINGS AS THE STRONGEST UTILIZATION OF HIS
20 DISCRETION OF THE CASE FROM LAST YEAR CALLED PEOPLE VERSUS
21 GARCIA, WHICH WE CITE IN OUR BRIEF ON THAT POINT.

22 SO, AGAIN, I DON'T MEAN TO QUIBBLE WITH THE COURT
23 ON THAT, BUT I THINK THAT IT'S VERY CLEAR UNDER PEOPLE
24 VERSUS GARCIA THAT THIS IS ACTUALLY ONE OF THE AREAS WHERE
25 PROSECUTORIAL DISCRETION IS AT ITS HEIGHT AT A MINIMUM.
26 NOBODY IS GOING TO SAY THE JUDICIARY DOESN'T HAVE A ROLE
27 HERE.

28 ONCE A SENTENCING ENHANCEMENT IS PLED, IF IT'S

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1 FOLLOWED THROUGH ON AND HAS TO BE IMPOSED AFTER A FINDING
2 OF GUILT, THERE'S NO DOUBT THAT THE JUDICIARY HAS
3 DISCRETION TO HANDLE THAT. BUT WHAT WE'RE TALKING ABOUT IS
4 BRINGING IT TO THE BEGINNING, WHICH IS SOMETHING THAT IS
5 EXCLUSIVELY WITHIN THE PROVIDENCE OF THE PROSECUTOR.

6 THE COURT: WELL, I THINK WE ALL AGREE ON THAT. I
7 DO THINK THERE'S A DIFFERENCE BETWEEN A CHARGE AND AN
8 ENHANCEMENT. THEY ARE TWO DIFFERENT THINGS, BUT GO AHEAD.

9 MR. DUGDALE: RIGHT. BUT OUR POINT IS THAT,
10 AGAIN, IT MAKES NO SENSE TO TELL A PROSECUTOR YOU HAVE
11 UNFETTERED DISCRETION WHEN IT COMES TO BRINGING A CHARGE OR
12 NOT BRINGING A CHARGE, BUT WE CAN TAKE AWAY YOUR DISCRETION
13 IN ITS ENTIRETY; NOT JUST LIMIT IT, BUT REMOVE IT
14 ALTOGETHER WHEN IT COMES TO WHAT SENTENCE YOU'RE GOING TO
15 SEEK THROUGH THE CHARGING DECISIONS THAT YOU MAKE.

16 THAT JUST DOESN'T MAKE ANY SENTENCE. AND THAT'S A
17 READING OF THE THREE STRIKES LAW THAT DOESN'T MAKE ANY
18 SENSE. IT WOULD MAKE IT AN UNCONSTITUTIONAL IMPINGEMENT OF
19 THE LEGISLATURE ON THE EXECUTIVE IF THAT'S THE READING THAT
20 HAPPENED HERE.

21 AND, YOUR HONOR, I WANT TO BE QUICK WITH THIS, BUT
22 IT'S IMPORTANT HERE BECAUSE OBVIOUSLY THE COURT HAS THE
23 CASES THAT WERE CITED BY PETITIONER'S COUNSEL AND I WANT TO
24 CONFRONT THEM HEAD ON. AND THAT'S THE CASE OF THE LAANUI,
25 KILBOURNE, AND ROMAN.

26 AND WE UNDERSTAND THERE'S SOME STRONG LANGUAGE IN
27 SOME OF THOSE CASES THAT THE UNION HAS CITED, BUT WHEN YOU
28 GO DIG INTO IT, THERE IS NOTHING THERE IN THOSE CASES.

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1 BECAUSE NONE OF THOSE CASES DEALS WITH THE QUESTION BEFORE
2 THIS COURT, WHICH IS WHETHER THIS COURT HAS SUPERVISORIAL
3 AUTHORITY OVER AN ELECTED DISTRICT ATTORNEY TO COMPEL HIM
4 TO CHARGE CASES IN A PARTICULAR WAY.

5 AND WHEN YOU THINK ABOUT IT THAT WAY, IT'S OBVIOUS
6 HOW PROBLEMATIC THIS WOULD BE AND THAT THE CASES THAT THE
7 UNION RELIES ON DON'T ADDRESS THAT ISSUE AT ALL. SO
8 THERE'S LAANUI, WHICH CAME OUT LAST MONTH. THAT'S NOT
9 ABOUT THIS SUBJECT AT ALL, IT'S NOT ABOUT THE ISSUE IN
10 FRONT OF THIS COURT AT ALL. IT INVOLVED A PROSECUTOR WHO
11 HAD PLED A STRIKE TO SOME COUNTS BUT NOT OTHERS.

12 IT WAS REALLY A HOLDING THAT HAD TO DO WITH A
13 NOTICE ISSUE. NOTHING TO DO WITH THE IDEA THAT A COURT
14 COULD COME IN AND FORCE A PROSECUTOR TO PLEAD STRIKES OR
15 OVERRIDE THE CRIMINAL JUSTICE DETERMINATIONS OF AN ELECTED
16 PROSECUTOR WHO IS HELD ACCOUNTABLE TO THE PEOPLE OF LOS
17 ANGELES COUNTY.

18 AND, IN FACT, LIKE THE OTHER CASES CITED BY THE
19 PETITIONER, THE ATTORNEY GENERAL IN THAT CASE WANTED THE
20 STRIKE TO APPLY. SO THERE'S NO QUESTION ABOUT SEPARATION
21 OF POWERS IN THAT CASE REGARDING WHETHER A COURT COULD
22 FORCE THE EXECUTIVE BRANCH ON HOW TO CHARGE A CRIMINAL
23 CASE. IT WASN'T AT ISSUE. THE ATTORNEY GENERAL IN THAT
24 CASE MADE THE DECISION TO CHARGE THE STRIKE.

25 BUT THAT'S COMPLETELY DIFFERENT FROM WHAT'S AT
26 ISSUE HERE, WHERE THE PROSECUTOR -- WHERE THEY'RE ASKING
27 YOU TO COMPEL A PROSECUTOR TO PLEAD A STRIKE WHEN HE'S
28 DETERMINED THAT SO DOING WOULD BE CONTRARY TO THE CRIMINAL

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1 JUSTICE POLICIES THAT HE WAS ELECTED TO ENFORCE. SO
2 OBVIOUSLY THAT CASE HAS NO SEPARATION OF POWERS ISSUE AT
3 ALL.

4 THERE'S KILBOURNE, WHICH THE PETITIONERS RELY UPON
5 EXTENSIVELY. BUT THERE TOO WAS THE DEFENDANT, WHO WAS
6 BRINGING VARIOUS CONSTITUTIONAL ARGUMENTS AGAINST HIS
7 CONVICTIONS, SO IT WAS THE DEFENDANT WHO WAS CHALLENGING
8 THE THREE STRIKES LAW. IT WASN'T A PROSECUTOR WHO CAME IN
9 AND SAID, NO, THE LEGISLATURE HERE IS IMPINGING UPON MY
10 EXCLUSIVE AUTHORITY AS A PROSECUTOR IN MAKING CHARGING
11 DECISIONS, IT WAS THE DEFENDANT.

12 SO THAT ISSUE HAD NOTHING TO DO WITH THE QUESTION
13 BEFORE THIS COURT AND THE QUESTION OF WHETHER THE UNION,
14 BASED UPON SOME SORT OF IMPLIED PRIVATE RIGHT OF ACTION
15 THAT'S NOT EVEN INCLUDED IN THE THREE STRIKES LAW, CAN COME
16 INTO COURT AND GIVE AN ORDER REQUIRING THE ELECTED DISTRICT
17 ATTORNEY TO CHARGE A CASE IN A PARTICULAR WAY AND SEEK
18 ENHANCEMENTS THAT HE BELIEVES ARE NOT IN THE INTEREST OF
19 JUSTICE.

20 AND, AGAIN, JUST LIKE THE OTHER CASE, THE ELECTED
21 OFFICIAL IN KILBOURNE WANTED THE STRIKES TO APPLY. SO TO
22 THE EXTENT THERE WAS A SEPARATION OF POWERS QUESTION AT ALL
23 WAS TOTALLY ABSTRACT AND HYPOTHETICAL. AND IN HAVING A
24 DEFENDANT, AGAIN, RAISE THESE QUESTIONS IS COMPLETELY
25 DIFFERENT FROM WHAT'S AT ISSUE IN THIS CASE.

26 AND, AGAIN, HERE WE HAVE AN ELECTED EXECUTIVE
27 OFFICER WHO DOESN'T WANT TO CHARGE STRIKES AND IS SAYING IT
28 WOULD BE A HUGE SEPARATION OF POWERS PROBLEM FOR THE COURT

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1 TO COMPEL HIM TO DO SO. NOT AT ISSUE AT ALL IN KILBOURNE.

2 AND THERE'S NOTHING IN THE THREE STRIKES LAW THAT
3 SAYS YOU CAN COMPEL A PROSECUTOR TO DO SO. IN FACT, THE
4 PROBLEM HERE IS THAT ANOTHER IMPORTANT THING ABOUT
5 KILBOURNE IS IT DOESN'T DEAL WITH THE CONSTITUTIONAL
6 PROVISION THAT IS MOST RELEVANT TO THE COURT'S INQUIRY
7 HERE, AND THAT'S ARTICLE 5, SECTION 13, WHICH I'M SURE THE
8 COURT IS FAMILIAR WITH, BUT THAT'S SUPER IMPORTANT IN THIS
9 CASE. IT'S POINTED OUT IN THE A.C.L.U.'S BRIEF.

10 AND WHAT ARTICLE 5, SECTION 13 ESSENTIALLY SAYS IS
11 THAT THE ATTORNEY GENERAL IS THE SUPERVISOR OF THE DISTRICT
12 ATTORNEYS AND THAT THE STANDARD OF SUPERVISION AS TO
13 WHETHER THE LAWS ARE ADEQUATELY ENFORCED FALL IN THE
14 ATTORNEY GENERAL'S LAP. SO THAT'S ENTIRELY A DISCRETIONARY
15 DETERMINATION.

16 AND THE ATTORNEY GENERAL HERE HAS OBVIOUSLY SAID
17 NOTHING HERE TO SUGGEST THAT THE DISTRICT ATTORNEY OF LOS
18 ANGELES COUNTY IS NOT ADEQUATELY ENFORCING THE LAW. AND IT
19 WOULD BE UP TO THE ATTORNEY GENERAL TO COME ADDRESS THAT
20 ISSUE, NOT UNIONS THAT ARE RUNNING TO A JUDICIAL OFFICER,
21 WHO IS NOT ACCOUNTABLE TO THE PEOPLE FOR CRIMINAL JUSTICE
22 OUTCOMES IN THE SAME WAY THAT THE DISTRICT ATTORNEY IS.

23 AND THEN LASTLY, ROMAN, ONLY MENTIONS ANY OF THIS
24 IN A FOOTNOTE. IT'S CLEARLY DICTA. IT CITES KILBOURNE,
25 BUT IT JUST SEEMS LIKE A THROWAWAY STATEMENT ABOUT
26 SEPARATION OF POWERS. AND, AGAIN, IT DOESN'T DEAL WITH THE
27 ESSENTIAL QUESTION BEFORE THIS COURT, WHICH IS WHETHER AN
28 ELECTED -- YOU CAN COMPEL AN ELECTED DISTRICT ATTORNEY TO

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1 CHARGE STRIKES, WHETHER IT'S A MANDATORY THING. AND,
2 AGAIN, IF READ AS A MANDATORY OBLIGATION, IT WOULD CREATE A
3 SEPARATION OF POWERS ISSUE, WHICH I'VE DISCUSSED, WHICH THE
4 COURT SHOULD AVOID THROUGH ITS RULING.

5 THE COURT: OKAY. COUPLE OF QUESTIONS.

6 MR. DUGDALE: SURE.

7 THE COURT: FIRST OF ALL, I HAVE NEVER HEARD
8 BEFORE THAT THE ATTORNEY GENERAL SUPERVISES DISTRICT
9 ATTORNEYS. THAT WOULD -- I'VE NEVER HEARD THAT. THAT IS
10 WHAT THAT CONSTITUTIONAL PROVISION SAID. I DON'T KNOW THAT
11 IT'S EVER BEEN EFFECTUATED. THAT WOULD MAKE DISTRICT
12 ATTORNEYS A HECK OF A LOT LIKE U.S. ATTORNEYS WHO HAVE TO
13 DO WHAT THE ATTORNEY GENERAL WANTS THEM TO DO. I THINK
14 THAT'S ODD. THAT'S ALL I'LL SAY ABOUT THAT.

15 BUT I WANT TO QUOTE YOUR OPPOSITION BECAUSE -- LET
16 ME QUOTE IT. THE DISTRICT ATTORNEY ARGUES THAT, QUOTE, "NO
17 PUBLISHED DECISION HAS EVER CONCLUDED THE THREE STRIKES LAW
18 IMPOSED PURELY ADMINISTERIAL DUTIES ON PROSECUTORS TO,"
19 QUOTE, "PLEAD AND PROVE," QUOTE, "EVERY SINGLE POTENTIALLY
20 AVAILABLE PRIOR FELONY CONVICTION AS A SENTENCING
21 ENHANCEMENT," END QUOTE. THAT'S AT PAGE 12 OF YOUR
22 OPPOSITION.

23 IS THAT NOT AN OVERSTATEMENT IN LIGHT OF
24 KILBOURNE, RAMON, GRAY AND -- WHAT'S THE FOURTH CASE --
25 THERE ARE FIVE CASE, RAMONE, LAANUI, L-A-A-N-U-I, THAT YOU
26 MENTIONED AND THERE'S ANOTHER ONE. ISN'T THAT AN
27 OVERSTATEMENT? I UNDERSTAND YOU'RE TRYING TO DISTINGUISH
28 THEM, BUT DID THEY NOT CONCLUDE EXACTLY THAT?

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1 MR. DUGDALE: WELL, THEY DID SELL -- I MEAN, IN A
2 COMPLETELY DIFFERENT CONTEXT, THEY CONCLUDED THAT THREE
3 STRIKES IN THE SCENARIOS INVOLVED HERE INVOLVE A SEPARATION
4 OF POWERS PROBLEM. AGAIN, I THINK -- WE WEREN'T TRYING TO
5 OVERSTATE ANYTHING, YOUR HONOR. I THINK MAYBE WE
6 INARTFULLY SAID IT.

7 BUT WHAT WE WERE TRYING TO SAY IS THAT THERE WAS
8 NO COURT ANYWHERE THAT HAS EVER SAID THAT THE COURT IS
9 MANDATING THAT THE DISTRICT ATTORNEY MAKE A CHARGING
10 DECISION IN THIS AREA. THAT'S NEVER HAPPENED.

11 NONE OF THESE CASES TOUCHED ON THAT ISSUE
12 WHATSOEVER, TO MANDATE THE DISTRICT ATTORNEY TO CHARGE A
13 STRIKE WHERE HE HAS THE DISCRETION NOT TO DO SO. AND I'LL
14 POINT THE COURT --

15 THE COURT: HOLD ON. I HAVE A FOLLOW-UP QUESTION.

16 OKAY. SO GIVEN WHAT YOU JUST SAID, IS NOT
17 MR. CARROLL CORRECT THAT SPECIAL DIRECTIVE 20.08.1 THAT
18 REQUIRES DEPUTY DISTRICT ATTORNEYS TO SAY, QUOTE, "THE
19 CALIFORNIA CONSTITUTION AND STATE SUPREME COURT PRECEDENT
20 FURTHER VESTS THE DISTRICT ATTORNEY WITH SOLE AUTHORITY TO
21 DETERMINE WHO TO CHARGE, WHAT CHARGES TO FILE AND PURSUE,
22 AND WHAT PUNISHMENT TO SEEK. THAT POWER CANNOT BE STRIPPED
23 BY THE DISTRICT ATTORNEY BY THE LEGISLATURE, JUDICIARY, OR
24 VOTER INITIATIVE WITHOUT AMENDING THE CALIFORNIA
25 CONSTITUTION," IT IS THE POSITION OF THIS OFFICE THAT PENAL
26 CODE SECTION 1170.12(D)(2) AND PENAL CODE SECTION 667(F)(1)
27 ARE UNCONSTITUTIONAL AND INFRINGE ON THIS AUTHORITY?

28 ASIDE FROM THE FACT THAT YOU'RE NOT CONTENDING

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1 THAT THEY ARE UNCONSTITUTIONAL, YOU'RE ARGUING THAT THEY
2 MUST BE INTERPRETED IN A CONSTITUTIONAL WAY. ARE YOU NOT
3 REQUIRED TO INCLUDE IN THERE, KILBOURNE, RAMONE --
4 REFERENCE TO KILBOURNE, RAMONE, WOLFE, BUTLER, AND LAANUI,
5 OR WHATEVER IT IS, ARE YOU NOT REQUIRED AS A MATTER OF
6 ETHICS TO SAY THAT THERE IS CONTRARY AUTHORITY TO THAT
7 STATEMENT?

8 MR. DUGDALE: WELL, TWO THINGS. AGAIN, I BELIEVE
9 WHAT WE'RE TRYING TO SAY IS THAT IF THE LEGISLATURE --
10 THROUGH THAT STATEMENT THERE, IF THE LEGISLATURE IMPINGED
11 UPON THE DISCRETION OF THE DISTRICT ATTORNEY IN SUCH A WAY
12 TO MAKE IT MANDATORY TO CHARGE STRIKES, THAT WOULD CREATE A
13 CONSTITUTIONAL PROBLEM. THAT'S OUR WHOLE ARGUMENT RIGHT
14 HERE.

15 AND SECONDLY, I WOULD SAY AS TO THIS PARTICULAR
16 POINT, THERE IS NOTHING IN THIS DIRECTIVE THAT FORBIDS A
17 DEPUTY DISTRICT ATTORNEY FROM CITING KILBOURNE OR ROMAN OR
18 ANYTHING THEY WANT TO FOR THE COURT IN CONTRARY AUTHORITY.

19 AND ON THE ETHICS ISSUE, AS WE POINTED OUT IN OUR
20 PAPERS, OBVIOUSLY YOU CAN ADVOCATE FOR AN EXTENSION OF THE
21 LAW, REASONABLE EXTENSION OF THE LAW HERE. AND, IN FACT,
22 IN THE ROMERO DECISION IN FOOTNOTE 7, I THINK IT'S ON
23 PAGE 55, THIS ISSUE IS SOMETHING THE CALIFORNIA SUPREME
24 COURT, WHICH HAS NEVER RULED ON THIS ISSUE, HAS LEFT, AT
25 LEAST DIRECTLY, WIDE OPEN.

26 THE ONLY THING THAT THE CALIFORNIA SUPREME COURT
27 HAS SAID THAT WE COULD FIND ON THIS PARTICULAR ISSUE ON
28 DISCRETION AND CHARGING IS WHAT WE CITED IN OUR PAPERS,

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1 WHICH IS THE IN RE: COOLEY DECISION. AND IN RE: COOLEY,
2 WHICH AGAIN, THE COURT SHOULD FOCUS ON THIS QUOTE, IT SAYS,
3 "UNDER CALIFORNIA'S THREE STRIKES LAW, THE SENTENCE THAT IS
4 ACTUALLY IMPOSED ON A PARTICULAR DEFENDANT IN A PARTICULAR
5 CASE IS DEPENDENT NOT ONLY UPON THE NATURE AND NUMBER OF
6 THE DEFENDANT'S PRIOR CRIMINAL CONVICTIONS AND WHETHER HE
7 OR SHE IS CONVICTED IN THE CURRENT PROSECUTION OF A FELONY
8 OFFENSE" -- AND HERE'S THE KEY -- "BUT ALSO UPON THE
9 PROSECUTOR'S EXERCISE OF PROSECUTORIAL DISCRETION IN
10 DETERMINING HOW MANY PRIOR CONVICTIONS TO CHARGE IN A
11 CASE."

12 SO THE CALIFORNIA SUPREME COURT RECOGNIZED IN THAT
13 SENTENCE WHEN IT WAS DISCUSSING THE FRAMEWORK OF HOW THE
14 THREE STRIKES LAW WORKS IS THAT THERE IS DISCRETION BY A
15 PROSECUTOR WHEN IT COMES TO CHARGING.

16 NOW, THE PETITIONERS SAY THAT WHAT THE SENTENCE
17 HAD TO DO WITH WAS IS MOVING TO DISMISS THE CHARGE. THAT'S
18 NOT WHAT THE COURT SAYS. THE COURT SAID WHAT IT SAID. SO
19 THAT'S THE ONE THING WE FOUND THE CALIFORNIA SUPREME COURT
20 TO SAY ON THIS ONE PARTICULAR ISSUE, IS THAT THERE IS
21 DISCRETION WHEN IT COMES TO CHARGING -- AT LEAST WHEN
22 THEY'RE GOING THROUGH THREE STRIKES AND HOW IT WORKS, IS
23 DISCRETION ON CHARGING, HOW MANY PRIOR CONVICTIONS THEY'RE
24 GO TO CHARGE.

25 AND, AGAIN, ROMERO IN FOOTNOTE 7, I BELIEVE,
26 DIRECTLY LEFT OPEN THIS ISSUE OF WHETHER IT'S AN
27 UNCONSTITUTIONAL SEPARATION OF POWERS ISSUE THROUGH THE
28 LEGISLATURE TO IMPINGE ON THE WAY THAT YOU WOULD HAVE TO

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1 READ IT IF YOU WOULD READ IT -- IF YOU READ IT IN A WAY
2 THAT THE UNION ARGUES IT SHOULD BE READ. THEY LEFT OPEN
3 THIS ISSUE WHETHER THIS CREATES A SEPARATION OF POWERS
4 PROBLEM.

5 BUT OUR BOTTOM LINE ON ALL THESE CASES WITH
6 KILBOURNE, WITH ROMAN AND WITH LAANUI -- WHICH I HAVE AS
7 MUCH PROBLEM PRONOUNCING AS THE COURT DOES, I'M SORRY ABOUT
8 THAT -- IS THAT THEY DON'T ADDRESS THE ISSUE BEFORE THIS
9 COURT. THEY DON'T ADDRESS THE ISSUE OF A THIRD PARTY, IN
10 THIS CASE A UNION, RUNNING TO COURT AND SAYING, PROSECUTOR,
11 YOU HAVE TO CHARGE THAT STRIKE AND YOU DON'T HAVE ANY
12 DISCRETION WHEN IT COMES TO THAT.

13 AGAIN, IF THAT'S THE POSITION, THAT THE
14 LEGISLATURE HAS COMPLETELY TAKEN AWAY THAT DISCRETION, THAT
15 CREATES A SEPARATION OF POWERS PROBLEM AND THAT'S THE
16 PROBLEM THAT THE COURT SHOULD AVOID IN HOW IT INTERPRETS
17 THE THREE STRIKES STATUTE IN THIS CASE.

18 THE COURT: OKAY. SO LET ME ASK A FOLLOW-UP
19 QUESTION THEN. SO I UNDERSTAND YOUR POSITION IS THAT IN
20 ALL OF THESE CASES STRIKES WERE ACTUALLY PLED AND IT IS THE
21 CRIMINAL DEFENDANT WHO IS COMPLAINING ABOUT THE SEPARATION
22 OF POWERS ISSUE, NOT A PROSECUTORS' UNION THAT'S DOING SO.
23 AND WHY DOES THAT MAKE A DIFFERENCE? WHY DOES THAT ALTER
24 THE LANGUAGE OF THESE CASES?

25 MR. DUGDALE: WELL, I MEAN, IT MAKES ALL THE
26 DIFFERENCE AS FAR AS WHO THE ADVOCATE IS IN WHAT'S GOING
27 ON. FOR INSTANCE, IT'S QUESTIONABLE IN KILBOURNE WHETHER
28 THE DEFENDANT IN THAT CASE EVEN HAD STANDING TO MAKE THIS

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1 ARGUMENT. BUT AGAIN, THE PROSECUTOR DIDN'T CARE, THEY
2 WANTED TO CHARGE THE STRIKE.

3 SO THEY WEREN'T ADVOCATING AS WE'RE ADVOCATING
4 RIGHT HERE ON THE SEPARATION OF POWERS GROUNDS AND HOW THIS
5 IMPINGES UPON THE DISCRETION THAT PROSECUTORS EXCLUSIVELY
6 HAVE WHEN IT COMES TO CHARGING A SENTENCING ENHANCEMENT
7 LIKE THE SENTENCING ENHANCEMENT OF A THREE STRIKES.

8 AND, AGAIN, IT JUST GOES BACK TO THE BASIC ISSUE
9 HERE IS THAT THOSE CASES, YOUR HONOR, ARE IN A COMPLETELY
10 DIFFERENT CONTEXT. THEY'RE NOT IN A CONTEXT WHERE A COURT
11 IS TELLING A DISTRICT ATTORNEY ELECTED BY 2 MILLION
12 CITIZENS OF THE COUNTY OF LOS ANGELES, THIS IS HOW YOU HAVE
13 TO CHARGE YOUR CASES. THERE IS NO CASE OUT THERE WHERE ANY
14 COURT HAS EVER DIRECTED THE DISTRICT ATTORNEY TO DO THAT,
15 TO ABANDON -- TO OVERRIDE THE DISCRETION OF THE PROSECUTOR
16 AND TO ACT IN THAT WAY.

17 THE COURT: WELL, I THINK THAT'S TRUE. LET ME ASK
18 YOU THIS: HERE'S THE \$64,000 QUESTION -- WHICH I GUESS
19 WITH INFLATION WOULD BE A HALF A MILLION DOLLAR QUESTION AT
20 THIS POINT -- THE \$64,000 QUESTION FOR THE UNION AND ITS
21 MEMBERS IS, WHAT HAPPENS TO A DEPUTY DISTRICT ATTORNEY WHO
22 GOES TO THE DISTRICT ATTORNEY AND SAYS, YOU KNOW, IN GOOD
23 CONSCIENCE AND ETHICALLY I CANNOT DISMISS A
24 CEASE-AND-DESIST TWO-STRIKE PRIOR; I CAN'T DO IT. WHAT
25 HAPPENS TO THEM?

26 MR. DUGDALE: WELL, NOTHING HAS HAPPENED TO THEM.
27 THERE HASN'T BEEN ANYBODY, TO MY KNOWLEDGE -- I ACTUALLY
28 TALKED TO THE DISTRICT ATTORNEY ABOUT THIS YESTERDAY -- WHO

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1 HAS BEEN DISCIPLINED FOR THIS. I MEAN, OBVIOUSLY A
2 PROSECUTOR CAN -- EFFECTIVELY COULD BOW OUT OF A CASE SUCH
3 AS IT IS.

4 I'M NOT TRYING TO MINIMIZE THE ETHICS THAT A
5 PROSECUTOR HAS TO WORK FOR. I WAS LIKE YOUR HONOR, A
6 FORMER ASSISTANT UNITED STATES ATTORNEY. I WAS ONE FOR 20
7 YEARS AND I TOOK MY ETHICS VERY SERIOUSLY. BUT WHAT WE
8 CAN'T HAVE IN THIS CASE IS WHERE, YOU KNOW, THE ETHICS OF
9 THE INDIVIDUAL PROSECUTOR OVERRIDES THE DISCRETION GIVEN TO
10 THE DISTRICT ATTORNEY WHO'S THE ONLY ONE IN THAT OFFICE
11 WHO'S BEEN ELECTED TO DO ANYTHING. AND HERE WITH THE
12 BACKING OF 2 MILLION VOTERS.

13 SO, AGAIN, THERE'S BEEN -- YOU ASKED EARLIER, YOUR
14 HONOR, I BELIEVE, ABOUT THE HARM THAT SUPPOSEDLY HAS COME
15 TO THE UNION'S MEMBERS ON THIS. AGAIN, I DON'T WANT TO
16 MAKE LIGHT OF THIS HERE AT ALL, BUT IT'S ALL -- NOTHING IS
17 CONCRETE THERE.

18 NOBODY HAS BEEN SANCTIONED BY A COURT, NOBODY HAS
19 PUT THEIR BAR CARD AT RISK, NOBODY HAS BEEN DISCIPLINED ON
20 THIS ISSUE. THE UNION IS JUST WRONG ABOUT ANY ALLEGED
21 INJURY IN THIS CASE, WHICH IS ANOTHER REASON WHY
22 PRELIMINARY INJUNCTION SHOULDN'T BE ISSUED IN THIS CASE.
23 THE HARM HERE ON THEIR SIDE IS COMPLETELY SPECULATIVE AND
24 NOT CONCRETE.

25 AND IN FACT, THERE NO DOUBT, AS I'M SURE THE COURT
26 CAN APPRECIATE BEING A FORMER JUDGE ON A CRIMINAL BENCH,
27 THAT WHEN A DEPUTY DISTRICT ATTORNEY WALKS INTO COURT AND
28 ADVOCATES FOR THIS POSITION, THE JUDGE KNOWS WHERE THAT'S

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1 COMING FROM. IT'S NOT COMING FROM A LYING PROSECUTOR, WHO
2 SUDDENLY MADE A DECISION TO DISMISS ALL THE STRIKES IN THIS
3 CASE. EVERYBODY KNOWS, ESPECIALLY THROUGH THAT LITIGATION,
4 WHERE THAT DECISION CAME FROM.

5 SO THE IDEA THAT A DEPUTY DISTRICT ATTORNEY WOULD
6 BE PUT AT RISK, HIS BAR CARD WOULD BE PUT AT RISK OR WOULD
7 BE SANCTIONED OR ANYTHING LIKE THAT, IT'S JUST NOT
8 REALISTIC. IT'S JUST NOT TRUE. AND THAT'S THE HARM THAT
9 THEY'RE BASING THEIR PLEA FOR A PRELIMINARY INJUNCTION ON.
10 AND IT'S WHY, AMONG OTHER REASONS, WHY THAT PLEA SHOULD
11 FAIL.

12 THE COURT: ALL RIGHT. LET'S SWITCH BACK TO
13 MR. CARROLL ABOUT THE HARM ISSUE.

14 I KNOW YOUR POSITION, MR. CARROLL, IS THAT YOU
15 DON'T HAVE TO WAIT UNTIL SOMEBODY GETS DISCIPLINED BEFORE
16 YOU SEEK INJUNCTIVE RELIEF, BUT WHAT ELSE CAN YOU SAY ABOUT
17 THAT?

18 MR. CARROLL: WELL, YOUR HONOR, I THINK THAT IS
19 PROBABLY THE MOST IMPORTANT PART OF OUR ARGUMENT. I MEAN,
20 I THINK IT'S -- WHEN RESPONDENT SAID NOTHING EVER REALLY
21 HAPPENED AND NOTHING IS LIKELY TO HAPPEN, I THINK IT'S -- I
22 DON'T THINK IT'S RIGHT THAT THE DISTRICT ATTORNEY ACTUALLY
23 HAVE TO FACE A DISCIPLINARY PROCEEDING BEFORE THE STATE BAR
24 BEFORE ANY INJUNCTIVE RELIEF IS HELD.

25 AND THAT'S ONE OF THE REASONS WHY THE DISTRICT --
26 I APOLOGIZE, THE DEPUTY DISTRICT ATTORNEYS WOULD NEED SOME
27 CLARIFICATION FROM THE COURT AS SOON AS POSSIBLE SO THAT
28 THEY ARE NOT PUT IN THE POSITION WHERE THEY HAVE TO SAY,

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1 WELL, I HAD TO ACT ACCORDING TO THESE DIRECTIVES EVEN
2 THOUGH I KNEW THEM TO BE UNLAWFUL; AND THEREFORE, IN
3 VIOLATION OF MY ETHICS.

4 AND THAT'S ONE OF THE REASONS WHY I BELIEVE THE
5 PRELIMINARY INJUNCTION IS NECESSARY FROM THE COURT SO AS TO
6 PREVENT THEM FROM HAVING TO DO THAT.

7 THE COURT: ALL RIGHT. BACK TO YOU, MR. DUGDALE.

8 MR. DUGDALE: I'M SORRY. DO YOU WANT ME TO
9 COMMENT ON THAT?

10 SO, YOUR HONOR, I HAVE TAKEN A LOT OF TIME ON THIS
11 ISSUE. OBVIOUSLY THE COURT HAS READ EVERYTHING AND READ
12 EVERY CASE AND HAS ASKED PROBING QUESTIONS ON THIS. I'M
13 PREPARED TO ANSWER ANY OTHER QUESTIONS THE COURT HAS, BUT
14 WE'RE PREPARED TO SUBMIT AND WOULD ASK THE COURT WITH OUR
15 INDULGENCE TO TAKE INTO ACCOUNT MY COMMENTS THIS AFTERNOON.

16 THE COURT: WELL, I HAVE NOT READ THE GARCIA CASE,
17 WHICH I'M GOING TO. AND I THINK I HAVE READ EVERY OTHER
18 CASE YOU'VE MENTIONED TODAY. AND I -- I'M NOT SURE I HAVE
19 ANYTHING ELSE.

20 MR. CARROLL, DO YOU HAVE ANYTHING ELSE?

21 MR. CARROLL: YES, YOUR HONOR. JUST ONE OR TWO
22 POINTS.

23 FIRST, JUST TO SUPPLEMENT MY RESPONSE TO THE
24 COURT'S MOST RECENT QUESTION, I THINK AS THE COURT PROBABLY
25 READ IN SOME OF THE TRANSCRIPTS IN OUR ORIGINAL EX-PARTE
26 APPLICATION THAT COURTS -- CRIMINAL COURTS HAVE ACTUALLY
27 TOLD PROSECUTORS APPEARING BEFORE THEM THAT THEY WERE
28 ACTING UNETHICALLY IN FOLLOWING SPECIAL DIRECTIVES FROM THE

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1 DISTRICT ATTORNEY.

2 AND SO I THINK, YOU KNOW, TO THE EXTENT THAT THE
3 RESPONDENT'S CLAIMING THIS WAS JUST IRRESPECTIVE OF HARM, I
4 THINK THAT REALLY MAKES THE HARM CONCRETE AND IMMINENT AND
5 NOT SIMPLY SPECULATIVE.

6 THE COURT: ONE OF THE THINGS I WANT TO KNOW, AT
7 SOME POINT, YOU KNOW, PART OF YOUR CONTENTION IS GOING TO
8 GO AWAY; RIGHT? I MEAN, ALL PENDING CASES AT SOME POINT --
9 ALTHOUGH C.O.V.I.D. HAS PROBABLY HAD A MAJOR IMPACT ON
10 THAT -- AT SOME POINT ALL PENDING CASES WILL GO AWAY AND
11 THEN WE'RE JUST TALKING ABOUT NEW CASES. I TAKE IT WE'RE
12 NOWHERE NEAR ETHICALLY; IS THAT RIGHT?

13 MR. CARROLL: THAT'S MY UNDERSTANDING, YES, YOUR
14 HONOR.

15 THE COURT: OKAY.

16 MR. DUGDALE: YOUR HONOR, I DON'T WANT TO
17 INTERRUPT TOO MUCH HERE, BUT I THINK MR. CARROLL IN PART
18 PROVED OUR POINT BECAUSE YOU'VE SEEN THOSE TRANSCRIPTS.
19 AND, AGAIN, THEY DON'T BLAME THE DEPUTY DISTRICT ATTORNEY
20 FOR WHAT'S GOING ON HERE, THEY PUT THE BLAME ON THE PERSON
21 WHOSE NAME IS AT THE TOP OF THE CAPTION IN EVERY CRIMINAL
22 CASE, THE DISTRICT ATTORNEY.

23 SO, AGAIN, THERE'S NO JUDGE THAT IS FAULTING THE
24 DEPUTY DISTRICT ATTORNEYS FOR DOING WHAT IS THEIR JOB IN
25 GOING IN AND FULFILLING THE PROSECUTORIAL DISCRETION
26 EXERCISED BY THEIR BOSS, THE PERSON WHO WAS ELECTED TO MAKE
27 THESE TYPES OF DECISIONS.

28 THE COURT: YOU KNOW, I THINK THAT'S PROBABLY

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1 TRUE.

2 WHAT I WAS GOING TO ASK YOU, MR. DUGDALE, IS YOU
3 HAVEN'T COMMENTED ON THIS ISSUE OF EXERCISING DISCRETION ON
4 PARTICULAR CASES AS OPPOSED TO A BLANKET POLICY. WHAT
5 ABOUT IT?

6 AND I THINK PETITIONER CONCEDES THAT THERE IS NO
7 CALIFORNIA CASE ON POINT, BUT THERE'S A WASHINGTON STATE
8 CASE AND AN ARIZONA CASE ON POINT, WHICH I HAVE READ. I
9 THINK I'VE READ THOSE. WHAT ABOUT THAT?

10 MR. DUGDALE: SURE.

11 WELL, I THINK THAT SORT OF EMPHASIZES THE WEAKNESS
12 OF THEIR POSITION THAT THEY CAN'T FIND A CASE THAT IS
13 BINDING ON THIS COURT THAT HOLDS ANYTHING OF A LIKE WHAT
14 THE COURT HAS SAID.

15 BUT OUR POSITION IS THERE'S NOTHING WRONG WITH THE
16 DISTRICT ATTORNEY INSTITUTING A POLICY THAT REQUIRES HIS
17 LINE PROSECUTORS TO EXERCISE DISCRETION IN A UNIFORM WAY.
18 AND, IN FACT, IF YOU HAD SOMETHING DIFFERENT WHERE DEPUTY
19 DISTRICT ATTORNEYS GOT TO DECIDE ON THEIR OWN WITHOUT THE
20 GUIDANCE OF SUCH POLICY, IT WOULD BE CHAOS AND IT WOULD BE
21 A PROBLEM BECAUSE DEFENDANTS MIGHT BE LOOKING AT WILDLY
22 DISPARATE SENTENCES AS A RESULT, WHICH IS OBVIOUSLY
23 SOMETHING THE CRIMINAL JUSTICE SYSTEM COULDN'T TOLERATE.

24 SO OUR POSITION IS THE ISSUANCE OF THE DIRECTIVE
25 ITSELF BY THE DISTRICT ATTORNEY WAS AN EXERCISE OF
26 DISCRETION. AND IT'S WHAT DISTRICT ATTORNEYS ARE ELECTED
27 TO DO, TO UTILIZE THEIR DISCRETION TO PUT IN POLICIES AND
28 PRACTICES THAT GUIDE THEIR PROSECUTORS ON HOW TO CHARGE

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1 CASES.

2 AND IN THIS PARTICULAR CASE, IT WAS DONE BY A
3 DISTRICT ATTORNEY WHO GOT 2 MILLION VOTERS TO BACK THESE
4 POLICIES. IT WASN'T A SECRET BY THE DISTRICT ATTORNEY WHAT
5 HE WAS GOING TO DO WHEN HE TOOK OFFICE. HE EXPLAINED TO
6 THE ELECTORATE WHAT HE WAS GOING TO DO AND HE DID IT.

7 SO TO OVERRIDE THAT DISCRETION HERE IN AN
8 UNPRECEDENTED WAY, AS I MENTIONED, REALLY WOULD
9 DISENFRANCHISE THOSE 2 MILLION VOTERS WHO VOTED FOR THIS
10 AND A DISTRICT ATTORNEY --

11 THE COURT: THE PROBLEM WITH THAT ARGUMENT IS
12 5 MILLION PEOPLE, 6 MILLION PEOPLE VOTED FOR THREE STRIKES.

13 MR. DUGDALE: UNDERSTOOD.

14 THE COURT: SO IF YOU COUNT THE NUMBER OF VOTES,
15 THEN YOUR CLIENT IS NOT FOLLOWING THE WILL OF THE PEOPLE.

16 MR. DUGDALE: YEAH, 25 YEARS AGO, 26 YEARS AGO.
17 THAT'S RIGHT. AND OBVIOUSLY THAT PROPOSITION HAS BEEN
18 CHANGED OVER TIME TOO; SO THAT IS RIGHT. BUT, LOOK, WE'RE
19 TALKING ABOUT TODAY, AT LEAST WHAT HAPPENED TWO MONTHS AGO.
20 AND I DON'T THINK THERE'S ANY DISPUTE ABOUT THAT.

21 SO, AGAIN, I'M NOT SAYING WE EMBRACE THIS ARIZONA
22 CASE OR WASHINGTON CASE, BUT THEY'RE NONBINDING. WHEN YOU
23 LOOK AT THE FACTS OF THE CASE, THEY ARE COMPLETELY
24 DIFFERENT FROM ANYTHING WE'RE TALKING ABOUT HERE AS FAR AS
25 HOW DISCRETION WAS USED.

26 THE ARIZONA CASE, AS THE COURT I'M SURE INDICATED
27 IT READ, INVOLVES A DECISION BY A PROSECUTOR TO DISQUALIFY
28 A PARTICULAR JUDGE IN EVERY INSTANCE A PARTICULAR TYPE OF

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1 CASE CAME BEFORE THAT JUDGE.

2 THE COURT: RIGHT.

3 MR. DUGDALE: AND SO THE PROBLEM WASN'T
4 EXCLUSIVELY THIS IS A BLANKET POLICY SO THAT'S A PROBLEM
5 AND YOU'RE DONE, THE PROBLEM WAS THAT WAS AN ABUSE OF A
6 DISQUALIFICATION RULE IN PLACE AT THE TIME AND THAT THAT
7 WAS AN ACTION TO INTIMIDATE A JUDGE. SO YOU DON'T HAVE ANY
8 SORT OF INDEPENDENT HARM HERE BY THE DISTRICT ATTORNEY
9 EXERCISING HIS DISCRETION IN THE WAY THAT HE HAS.

10 YOU KNOW, THE WASHINGTON CASE, AGAIN, WHICH THEY
11 EMBRACE, NOT BINDING AGAIN, THIS IS A CASE WHERE, AS THE
12 COURT KNOWS, THE PROSECUTOR HAD A POLICY WHERE IF THE
13 DEFENDANT COULD QUALIFY AS A HABITUAL OFFENDER REGARDLESS
14 OF WHETHER THERE WAS ANY MITIGATING CIRCUMSTANCES THAT
15 MIGHT CAUSE THAT DEFENDANT TO AVOID A LIFE SENTENCE AND
16 CREATE POTENTIAL DUE PROCESS PROBLEMS THAT WAY THAT THEY
17 WOULD CHARGE, A POLICY WHICH HAD BEEN FOUND BY THAT EXACT
18 COURT OR ANOTHER COURT IN WASHINGTON TO BE UNLAWFUL FROM
19 ANOTHER COUNTY.

20 SO THESE CASES HAVE NOTHING TO DO WITH THE IDEA
21 THAT PROSECUTORS CAN'T INSTITUTE POLICIES THAT REFLECT
22 THEIR PROSECUTORIAL DISCRETION ON HOW THEY WANT THEIR
23 OFFICE TO OPERATE, HOW THEY WANT RESOURCES ALLOCATED, HOW
24 THEY WANT SENTENCING DECISIONS MADE. THAT HAPPENS ALL THE
25 TIME IN EVERY PROSECUTOR'S OFFICE THAT YOU HAVE
26 PROSECUTORS, DISTRICT ATTORNEYS, EXERCISE DISCRETION.

27 THE COURT: RIGHT.

28 SO, YOU KNOW, THE PROBLEM IS -- AND I'M NOT JUST

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1 TALKING ABOUT PROSECUTORS -- IT IS RARELY A GOOD THING TO
2 SAY "ALWAYS" AND "NEVER"; RIGHT? IT'S RARELY GOOD TO BE
3 CATEGORICAL; YOU ALWAYS WANT TO HEDGE YOUR BETS.

4 AND IF YOUR CLIENT HAD SAID THREE STRIKE
5 ENHANCEMENTS WILL RARELY BE ALLEGED AND IT'S THE OFFICE
6 POLICY THAT YOU MUST, YOU KNOW, SHOW CIRCUMSTANCES THAT
7 JUSTIFY IT IN ORDER TO GET IT, YOU'D BE HOME FREE THERE, AT
8 LEAST ON THE ADMINISTERIAL DUTY WITH RESPECT TO POLICY
9 ISSUE. I SHOULDN'T HAVE USED THREE STRIKES, I SHOULD HAVE
10 SAID THE FIVE-YEAR ENHANCEMENT.

11 IF YOU SAID WE'RE RARELY GOING TO IMPOSE A
12 FIVE-YEAR ENHANCEMENT AND YOU'VE GOT TO CLEAR IT WITH ME
13 BEFORE YOU DO, I THINK THAT WOULD BE LAWFUL. I DON'T KNOW
14 ABOUT SAYING WE'RE NEVER GOING TO FILE A CASE ON THIS OR
15 WE'RE NEVER GOING TO SEEK AN ENHANCEMENT. IS THAT REALLY
16 AN EXERCISE OF DISCRETION? THAT'S THE PROBLEM. I DON'T
17 KNOW.

18 MR. DUGDALE: WELL, AGAIN, AS THE COURT HAS NOTED
19 AND, OBVIOUSLY THROUGH THE WAY THEY BRIEFED THIS CASE THE
20 PETITIONERS HAVE CONCEDED, THERE'S JUST NO CALIFORNIA CASE
21 ON POINT THAT SHOWS THAT THAT'S SOME SORT OF UNLAWFUL
22 EXERCISE OF DISCRETION.

23 AND, AGAIN, THIS TYPE OF THING HAPPENS REALLY ALL
24 THE TIME. WHEN I WAS A PROSECUTOR AT THE UNITED STATES
25 ATTORNEY'S OFFICE, THERE WERE CERTAIN CASES -- WE HAD A
26 POLICY WE JUST NEVER CHARGED FOR A PARTICULAR REASON.
27 OTHER STATES DO AS WELL. I THINK SOMEBODY POINTED OUT THAT
28 IN SOME STATES IT'S ILLEGAL TO COMMIT ADULTERY, BUT

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1 PROSECUTORS HAVE A POLICY THAT SAYS WE NEVER CHARGE THAT.

2 SO, AGAIN, THIS IS FAR DIFFERENT THAN THE ONE
3 CALIFORNIA CASE THAT THEY CITED ON THIS POINT THAT SAYS IF
4 YOU NEVER PROSECUTE ANYBODY, YOU COULD BE DIRECTED TO DO
5 SO, BECAUSE THAT WOULD BE AN ABUSE OF DISCRETION AND THAT
6 WOULD BE SOMETHING YOU CAN CORRECT WITH A MANDATE. WE'RE
7 NOT TALKING ABOUT NOT PROSECUTING PEOPLE HERE, WE'RE
8 TALKING ABOUT RESULTING SENTENCING --

9 THE COURT: HOLD ON.

10 LET ME ASK MR. CARROLL THIS: WHAT IF THERE WAS A
11 POLICY -- TALKING ABOUT MISDEMEANORS, BUT WHAT IF THERE WAS
12 A POLICY WE WILL NOT PROSECUTE PROSTITUTION CASES, PERIOD,
13 OR WE WILL NOT PROSECUTE POSSESSION OF LESS THAN, WHATEVER,
14 A POUND OF MARIJUANA -- NOT MARIJUANA -- LESS THAN A, YOU
15 KNOW, AN OUNCE OF COCAINE -- IS THAT THE RIGHT NUMBER, AN
16 OUNCE? I DON'T KNOW -- BUT LESS THAN A SMALL QUANTITY, WE
17 WILL NOT PROSECUTE, PERIOD. IS THAT UNLAWFUL?

18 MR. CARROLL: WELL, YOUR HONOR, I THINK IT WOULD
19 BE UNLAWFUL PARTICULARLY IF THE BASIS FOR THIS POLICY WAS
20 THAT, WELL, WE JUST DON'T THINK THAT POSSESSION OF LESS
21 THAN ONE OUNCE OF WHATEVER IT HAPPENS TO BE IS REALLY ALL
22 THAT BAD AND THE LEGISLATURE WAS JUST WRONG IN
23 CRIMINALIZING IT. AND I THINK THAT WOULD BE AN UNLAWFUL
24 POLICY AND I DON'T BELIEVE THE PROSECUTORS -- SORRY, THE
25 DISTRICT ATTORNEY CAN HAVE A BLANKET POLICY THAT SAYS THAT.

26 MR. DUGDALE: YOUR HONOR, I DON'T MEAN TO
27 INTERRUPT, BUT --

28 THE COURT: I WISH THERE WAS SOMETHING ELSE OUT

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1 THERE BESIDES -- I AGREE THE ARIZONA CASE IS
2 DISTINGUISHABLE.

3 MR. DUGDALE: COMPLETELY.

4 THE COURT: WE HAVE ONE WASHINGTON STATE CASE ON
5 THIS SUBJECT. I WISH THIS WAS SOMETHING ELSE.

6 MR. DUGDALE: I'M SORRY, YOUR HONOR, BUT --

7 MR. CARROLL: YOUR HONOR, IF I COULD --

8 MR. DUGDALE: AND THAT RESPONSE JUST REFLECTS,
9 FRANKLY, IGNORANCE ON THE PROSECUTOR'S WORK HERE AND THEIR
10 OFFICE IN EXERCISING DISCRETION. OF COURSE YOU CAN HAVE A
11 POLICY THAT SAYS YOU'RE NOT GOING TO PROSECUTE THOSE TYPES
12 OF OFFENSES BECAUSE YOU GET TO DECIDE AS THE DISTRICT
13 ATTORNEY HOW TO ALLOCATE RESOURCES IN YOUR OFFICE.

14 AND, AGAIN, IS NO DIFFERENT. AND, AGAIN, POLICIES
15 LIKE THIS EXIST ALL THE TIME BECAUSE YOU WANT UNIFORMITY ON
16 HOW THINGS ARE DONE WITHIN YOUR OFFICE, WHICH IS ONE THING
17 THAT THESE POLICIES AND DIRECTIVES, WHATEVER YOU MIGHT
18 THINK ABOUT THEM, ACHIEVES IS UNIFORMITY. AND THAT SHOULD
19 BE ONE OF THE MOST IMPORTANT ADMINISTERIAL GOALS.

20 MR. GEORGE: YOUR HONOR, THIS IS ERIC GEORGE.

21 WE HAVE REALLY HELD OUR TONGUE WITH A LOT OF THE
22 THINGS SAID BY OPPOSING COUNSEL, WHETHER IT'S
23 OVERSTATEMENT, DECEPTIVE DESCRIPTIONS OF LAW TO THE COURT.
24 I DON'T BELIEVE IT'S APPROPRIATE TO START NAME CALLING AND
25 REFERRING TO MY CO-COUNSEL AS BEING IGNORANT ABOUT
26 SOMETHING.

27 AND I PARTICULARLY TAKE OFFENSE BECAUSE OF THE WAY
28 IN WHICH MUCH OF THIS ARGUMENT HAS BEEN CONDUCTED BY

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1 OPPOSING COUNSEL, WHO IS FOCUSING ON UTTERLY IRRELEVANT
2 ISSUES, LIKE THE NUMBER OF VOTES RECEIVED BY THE D.A., NOT
3 ANSWERING QUESTIONS DIRECTLY BY THE COURT, IGNORING THE
4 REALITY THAT IT IS NO EXERCISE OF DISCRETION WHEN AN
5 ELECTED OFFICIAL SAYS THERE WILL BE NO PART OF A CERTAIN
6 LAW THAT IS FOLLOWED, DANCING AROUND WHETHER SOMETHING IS
7 ABANDONED OR MERELY NOT FOLLOWED.

8 THANK YOU, YOUR HONOR.

9 MR. DUGDALE: AND, YOUR HONOR, I DON'T BELIEVE
10 I'VE DONE ANY OF THESE THINGS. AND I DON'T MEAN TO CAUSE
11 OFFENSE TO THE OTHER SIDE. I HAVE GREAT RESPECT FOR THE
12 PEOPLE IN THAT ROOM AND I REALIZE THAT WE CAN BE CIVIL TO
13 EACH OTHER AS ADVOCATES. SO TO THE EXTENT MY COMMENT WAS
14 TAKEN IN ANY WAY, I DO APOLOGIZE FOR THAT, YOUR HONOR.

15 I WANT TO MAKE VERY CLEAR, IT IS NOT MY PRACTICE
16 TO NAME CALL OR ANYTHING LIKE THAT. IT'S JUST THAT
17 PARTICULAR COMMENT DID SEEM TO PORTRAY I THINK SOMETHING
18 THE COURT WAS GETTING AT, THAT YOU COULD AGREE THAT YOU
19 COULD HAVE A BLANKET POLICY LIKE THE ONE THE COURT
20 DESCRIBED.

21 THE COURT: THIS IS JUST AT THE PRELIMINARY
22 INJUNCTION STAGE HERE. THIS ISN'T A FINAL DETERMINATION
23 AND -- YEAH. ENOUGH SAID.

24 MR. CARROLL: YOUR HONOR, THIS IS DAVID CARROLL.

25 IF I COULD JUST MAKE ONE MORE POINT WITH RESPECT
26 TO CALIFORNIA CASES THAT MIGHT ASSIST THE COURT WITH
27 RESPECT TO THE NEED TO EXERCISE DISCRETION, AND THAT'S THE
28 ANALOGY THAT I THINK THE COURT CAN DRAW FROM CASES

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1 DISCUSSING THE COURT'S DISCRETION UNDER SECTION 1385, WHICH
2 MAKES VERY CLEAR -- AND I THINK THE CASE WE CITE ON THAT
3 POINT WAS PEOPLE VERSUS DENT, WHICH SAYS THAT DISMISSALS
4 HAVE TO BE BASED ON INDIVIDUALIZED CIRCUMSTANCES AND
5 EMPHATICALLY JUST CANNOT BE BASED ON WHAT I THINK THE COURT
6 DESCRIBES AS A PERSONAL ANTIPATHY FOR THE DEFENDANT THAT,
7 FOR EXAMPLE, THREE STRIKES W.O.P. WOULD HAVE ON ANY
8 PARTICULAR DEFENDANT."

9 SO I THINK THAT REALLY DRAWS A CLEAR DISTINCTION
10 BETWEEN CASE-BY-CASE DISCRETION AND SORT OF BLANKETLY
11 TREATING EVERYONE IN THE SAME MANNER.

12 THE COURT: WELL, THERE IS A DIFFERENCE BETWEEN
13 JUDICIAL DISCRETION AND PROSECUTORIAL DISCRETION, WHICH --
14 I DON'T KNOW. OKAY.

15 ALL RIGHT. ANYTHING ELSE, MR. CARROLL?

16 MR. CARROLL: NOT UNLESS THE COURT HAS ANY FURTHER
17 QUESTIONS, YOUR HONOR.

18 THE COURT: NO. I'VE SORT OF EXHAUSTED MY
19 QUESTIONS.

20 MR. DUGDALE?

21 MR. DUGDALE: NO. THAT YOU VERY MUCH, YOUR HONOR.
22 WE APPRECIATE THE TIME AND THE INDULGENCE GIVEN TO ALL OF
23 US. THANK YOU.

24 THE COURT: OKAY. SO I WILL BE TAKING IT UNDER
25 SUBMISSION AND, YOU KNOW, I'M FAIRLY FAR ALONG IN FILING
26 THROUGH MY DECISION, BUT I DON'T WANT ANY TIME PRESSURE.
27 PROBABLY I'M GOING TO ISSUE IT BY THE END OF THE WEEK, BUT
28 I'M NOT GOING TO GUARANTEE IT.

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1 MR. CARROLL: UNDERSTOOD.

2 THE COURT: SO IS THE MATTER SUBMITTED,

3 MR. CARROLL?

4 MR. CARROLL: SUBMITTED, YOUR HONOR.

5 THE COURT: MR. DUGDALE, SUBMITTED?

6 MR. DUGDALE: IT IS, YOUR HONOR. THANK YOU VERY
7 MUCH.

8 THE COURT: ALL RIGHT. THANK YOU.

9 MR. DUGDALE: THANK YOU.

10

11 (PROCEEDINGS CONCLUDED AT 3:24 P.M.)

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES - SOUTHERN DISTRICT
DEPARTMENT 85 HON. JAMES C. CHALFANT, JUDGE

THE ASSOCIATION OF DEPUTY DISTRICT)
ATTORNEY'S FOR LOS ANGELES COUNTY,)
) CASE NO.
PETITIONER,) 20STCP04250
)
VS.)
)
GEORGE GASCON, ET AL.,)
)
RESPONDENTS.)
_____)

I, CINDY CAMERON, OFFICIAL COURT REPORTER OF THE
SUPERIOR COURT OF THE STATE OF CALIFORNIA, FOR THE COUNTY
OF LOS ANGELES, DO HEREBY CERTIFY THAT THE FOREGOING PAGES,
1 THROUGH 59, INCLUSIVE, COMPRISE A FULL, TRUE AND CORRECT
TRANSCRIPT OF THE PROCEEDINGS HELD IN THE ABOVE-ENTITLED
MATTER ON FEBRUARY 2, 2021.

DATED THIS 17TH DAY OF JUNE, 2021.

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CINDY CAMERON, CSR NO. 10315
OFFICIAL COURT REPORTER

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Petitioner Association of Deputy District Attorneys for Los Angeles County (“ADDA”) applies for a preliminary injunction enjoining Respondents George Gascón, in his official capacity as District Attorney for the County of Los Angeles (“District Attorney” or “Gascón”) and the Los Angeles County District Attorney’s Office (“Office”) (collectively, “District Attorney”) from enforcing portions of Special Directives 20-08, 20-08.1, 20-08.2, and 20-14 (collectively “Special Directives”).

The court has read and considered the moving application, opposition, and reply, heard oral argument on February 2, 2021, and renders the following decision.

A. Statement of the Case

1. Petition

Petitioner ADDA commenced this proceeding on December 30, 2020, alleging causes of action for traditional mandamus and declaratory relief and seeking the remedy of injunctive relief. The verified Petition alleges in pertinent part as follows.

On December 7, 2020, when Gascón assumed the Office, he attempted to uproot the long-standing system of sentencing enhancements, including the Three Strikes law for prior convictions. Legislating by fiat, Respondent Gascón issued a series of special directives that all but repealed California’s sentencing enhancement laws and commanded his employees—Los Angeles County (“County”) prosecutors sworn to uphold and enforce the law—to violate numerous statutory mandates and refrain from performing their duties under the law.

Special Directive 20-08 provided, among other things, that all 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. Special Directive 20-08 also required all prior enhancements to be dismissed or withdrawn.

Gascón further issued Special Directive 20-14, which provided that, for any case currently pending, the deputy district attorney in charge of the case shall inform the court at the next hearing of the following: “At the direction of the Los Angeles County District Attorney, in accordance with Special Directive 20-08 concerning enhancements and allegations, and in the interest of justice, the People hereby: (1) join in the Defendant’s motion to strike all alleged enhancement(s); or (2) move to dismiss all alleged sentence enhancement(s) named in the information for all counts.”

Special Directive 20-14 also required that, if a defendant or petitioner is serving a sentence higher than he/she would receive today, due to operation of law or of the District Attorney’s new sentencing policy, the deputy district attorney in charge of the case shall withdraw any opposition to resentencing or sentence recall and request a new sentence that complies with current law and/or the District Attorney’s new sentencing policy. On resentencing, the Office will dismiss enhancements inconsistent with current enhancement policies and not seek a sentence inconsistent

with those sentencing policies. In any case where the judgment is final and the defendant received a sentence inconsistent with the Special Directives' charging and sentencing policies, the Office shall use its powers under Penal Code section 1170(d)(1) to recommend recall and resentencing.

On December 15, 2020, Respondent Gascón issued Special Directive 20-08.1 purporting to clarify Special Directive 20-08. Special Directive 20-08.1 explained that it was intended to put an end to the practice of alleging strike priors and all other special allegations. In addition, it commanded deputy district attorneys to dismiss and withdraw any strike or other enhancement in pending cases in which strike priors and/or enhancements had been alleged.

On December 18, 2020, in response to backlash from the public, crime victims, and his own deputy district attorneys, Respondent Gascón issued Special Directive 20-08.2 which rolled back some portions of his policies. Special Directive 20-08.2 allows prosecutors in appropriate and/or extraordinary circumstances to allege sentencing enhancements for (1) hate crimes, (2) elder and dependent adult abuse, (3) child physical abuse, (4) child and adult sexual abuse, (5) human sex trafficking allegations, and (6) financial crimes.

Special Directive 20-08.2 maintained the blanket, non-discretionary prohibition against (1) any prior strike enhancements, (2) any Proposition ("Prop") 8 or "five-year prior" enhancements and "three-year" prior enhancements, (3) STEP Act enhancements (gang enhancements), (4) special circumstances allegations resulting in a life without parole ("LWOP") sentence, (5) violations of bail or own recognizance ("O.R.") release; and (6) firearms allegations. The Special Directives prohibit any case-by-case exercise of discretion with respect to these six enumerated enhancements. None may be alleged or proven by prosecutors regardless of the evidence or circumstances.

The Special Directives require prosecutors to violate California law, their oaths of office, and their ethical and professional obligations. The Special Directives violate the Three Strikes law by prohibiting prosecutors from pleading and proving prior convictions in new cases. Prosecutors have a ministerial duty to allege all prior convictions under the Three Strikes law. Respondents refuse to perform this duty. The Special Directives also require deputy district attorneys to wrongly argue that the mandatory obligation to plead and prove strikes is unconstitutional as violative of the separation of powers.

The Special Directives violate Respondents' duty to prosecute violations of general laws under Government ("Govt.") Code section 26500, which is mandatory, not discretionary. Although a district attorney has discretion to determine what charges to file (if any) in a particular case, the district attorney cannot wholly decline to exercise that discretion by indiscriminately prohibiting the prosecution of all violations of certain offenses. Respondents have a ministerial duty to enforce the law and to exercise their prosecutorial discretion in particular cases.

The Special Directives demand that County prosecutors violate the law by requiring them to bring a motion—and to refuse to oppose a motion at resentencing—to strike prior convictions and special circumstances resulting in a LWOP sentence in all pending cases where they have already been alleged. The striking of these prior convictions and special circumstances is prohibited by law in many cases.

The Special Directives seek to circumvent the court's role by requiring County prosecutors to file an amended charging document abandoning the allegations in the event the motion to strike is denied. This tactic runs afoul of Penal Code section 1386, which provides that once a prosecution has been initiated, neither the Attorney General nor the district attorney can

discontinue or abandon a prosecution for a public offense without permission of the court. Respondents have a ministerial duty to proceed with prosecution once it has been initiated unless the court permits it to be dismissed. Respondents have failed to perform this duty.

2. Course of Proceedings

On December 30, 2020, Department One heard ADDA's *ex parte* application for temporary restraining order ("TRO") and order to show cause ("OSC") re: preliminary injunction. After discussion, ADDA elected to withdraw its application for a TRO and the court issued an OSC re: preliminary injunction on the issues, setting the hearing for February 2, 2021.

B. The Pertinent Sentencing Enhancements

1. The Three Strikes Law

It is the intent of the legislature in enacting the following provisions to ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of one or more serious or violent felony offenses. Penal Code¹ §667(b).²

A prior conviction of a serious or violent felony shall be defined as any offense defined in section 667.5(c) as a violent felony or any offense defined in section 1192.7(c) as a serious felony. §667(d)(1). Such felonies include, but are not limited to, murder or voluntary manslaughter, rape, any robbery, and arson. §§ 667.5(c); 1192.7(c).

In addition to any other enhancement or punishment provisions that may apply, various enhancements may apply if a defendant has one or more prior serious or violent felony convictions. §667(e). If a defendant has one prior serious or violent felony that has been pled and proved, the determinate term or minimum term for an indeterminate term shall be twice the term otherwise provided as punishment for the current felony conviction. §667(e)(1).

If a defendant has two or more prior serious or violent felony convictions that have been pled and proved, the term for the current felony conviction shall be an indeterminate term of life imprisonment with a minimum term of the indeterminate sentence calculated as the greatest of: (1) three times the term otherwise provided as punishment for each current felony conviction subsequent to the two or more prior serious or violent felony convictions; (2) imprisonment in the state prison for 25 years; (3) The term determined by the court pursuant to Section 1170 for the underlying conviction, including any enhancement applicable under Chapter 4.5. §667(e)(2).

If a defendant has two or more prior serious or violent felony convictions, as defined in section 667.5(c) or section 1192.7(c), that have been pled and proved, and the current offense is not a serious or violent felony, the defendant shall be sentenced per subdivision (e)(1) unless the prosecution pleads and proves that, among other things, (i) the current offense is a certain controlled substance charge, (ii) the current offense is a felony sex offense, (iii) the defendant used a firearm, was armed with a firearm or deadly weapon, or intended to cause great bodily injury to another person, or (iv) the defendant suffered a prior serious or violent felony conviction for any of several various felonies. §667(e)(2)(C).

"Notwithstanding any other law,...[the Three Strikes provisions] shall be applied in every

¹ All further statutory references are to the Penal Code unless otherwise stated.

² For convenience, the court will refer to the Three Strikes law codified at section 667 and not also to the parallel statute codified at section 1170.12.

case in which a defendant has one or more prior serious or violent felony convictions. The prosecuting attorney shall plead and prove each prior serious or violent felony conviction except as provided in paragraph (2).” §667(f)(1) (emphasis added).

The prosecuting attorney may move to dismiss or strike a prior serious or violent felony conviction allegation in the furtherance of justice pursuant to section 1385,³ or if there is insufficient evidence to prove the prior serious or violent felony conviction. If upon the satisfaction of the court that there is insufficient evidence to prove the prior serious or violent felony conviction, the court may dismiss or strike the allegation. §667(f)(2).

2. Other Sentencing Enhancements

a. Three-Year Prior

Where one of the new offenses is a specified violent felony as specified in section 667.5(c), in addition to and consecutive to any other prison terms therefor, the court shall impose a three-year term for each prior separate prison term served by the defendant where the prior offense was one of the violent felonies. However, no additional term shall be imposed under this subdivision for any prison term served prior to a period of ten years in which the defendant remained free of both prison custody and the commission of an offense which results in a felony conviction. §667.5(a).

b. Five-Year Prior

Any person convicted of a serious felony who previously has been convicted of a serious felony in this state or of any offense committed in another jurisdiction which includes all of the elements of any serious felony, shall receive, in addition to the sentence imposed by the court for the present offense, a five-year enhancement for each such prior conviction on charges brought and tried separately. The terms of the present offense and each enhancement shall run consecutively. §667(a)(1).

c. LWOP

Sections 190.1 to 190.5 govern special circumstances allegations that would result in a sentence of LWOP. Section 190.2 mandates a sentence of LWOP if one of 22 special circumstance allegations is found to be true. §190.2(a).

d. Others

Sentencing enhancements are also imposed for any person who: (1) actively participates in any criminal street gang with knowledge that its members engage in, or have engaged in, a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang (“STEP Act enhancements” or “gang enhancements”) (§186.22); (2) commits a felony while released on bail or recognizance is subject to a penalty enhancement (§12022.1) or (3) is convicted of enumerated felonies and use a firearm in commission of the crime (§12022.53).

³ Section 1385(a) provides that the judge or magistrate may, either of his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed.

C. Preliminary Injunction

An injunction is a writ or order requiring a person to refrain from a particular act; it may be granted by the court in which the action is brought, or by a judge thereof; and when granted by a judge, it may be enforced as an order of the court. CCP §525. An injunction may be more completely defined as a writ or order commanding a person either to perform or to refrain from performing a particular act. *See Comfort v. Comfort*, (1941) 17 Cal.2d 736, 741. *McDowell v. Watson*, (1997) 59 Cal.App.4th 1155, 1160.⁴ It is an equitable remedy available generally in the protection or to prevent the invasion of a legal right. *Meridian, Ltd. v. City and County of San Francisco, et al.*, (1939) 13 Cal.2d 424.

The purpose of a preliminary injunction is to preserve the *status quo* pending final resolution upon a trial. *See Scaringe v. J.C.C. Enterprises, Inc.*, (1988) 205 Cal.App.3d 1536. *Grothe v. Cortlandt Corp.*, (1992) 11 Cal.App.4th 1313, 1316; *Major v. Miraverde Homeowners Assn.*, (1992) 7 Cal.App.4th 618, 623. The *status quo* has been defined to mean the last actual peaceable, uncontested status which preceded the pending controversy. *Voorhies v. Greene* (1983) 139 Cal.App.3d 989, 995 (quoting *United Railroads v. Superior Court*, (1916) 172 Cal. 80, 87).

A preliminary injunction is issued after hearing on a noticed motion. The complaint normally must plead for a remedy of injunctive relief. CCP §526(a)(1)-(2).⁵ Preliminary injunctive relief requires the use of competent evidence to create a sufficient factual showing on the grounds for relief. *See e.g. Ancora-Citronelle Corp. v. Green*, (1974) 41 Cal.App.3d 146, 150. Injunctive relief may be granted based on a verified complaint only if it contains sufficient evidentiary, not ultimate, facts. *See* CCP §527(a). For this reason, a pleading alone rarely suffices. Weil & Brown, *California Procedure Before Trial*, 9:579, 9(11)-21 (The Rutter Group 2007). The burden of proof is on the plaintiff as moving party. *O'Connell v. Superior Court*, (2006) 141 Cal.App.4th 1452, 1481.

A plaintiff seeking injunctive relief must show the absence of an adequate damages remedy at law. CCP §526(4); *Thayer Plymouth Center, Inc. v. Chrysler Motors*, (1967) 255 Cal.App.2d 300, 307; *Department of Fish & Game v. Anderson-Cottonwood Irrigation Dist.*, (1992) 8 Cal.App.4th 1554, 1565. The concept of “inadequacy of the legal remedy” or “inadequacy of damages” dates from the time of the early courts of chancery, the idea being that an injunction is an unusual or extraordinary equitable remedy which will not be granted if the remedy at law (usually damages) will adequately compensate the injured plaintiff. *Department of Fish & Game v. Anderson-Cottonwood Irrigation Dist.*, (1992) 8 Cal.App.4th 1554, 1565.

In determining whether to issue a preliminary injunction, the trial court considers two factors: (1) the reasonable probability that the plaintiff will prevail on the merits at trial (CCP

⁴ The courts look to the substance of an injunction to determine whether it is prohibitory or mandatory. *Agricultural Labor Relations Bd. v. Superior Court*, (1983) 149 Cal.App.3d 709, 713. A mandatory injunction — one that mandates a party to affirmatively act, carries a heavy burden: “[t]he granting of a mandatory injunction pending trial is not permitted except in extreme cases where the right thereto is clearly established.” *Teachers Ins. & Annuity Assoc. v. Furlotti*, (1999) 70 Cal.App.4th 187, 1493.

⁵ However, a court may issue an injunction to maintain the *status quo* without a cause of action in the complaint. CCP §526(a)(3).

§526(a)(1)), and (2) a balancing of the “irreparable harm” that the plaintiff is likely to sustain if the injunction is denied as compared to the harm that the defendant is likely to suffer if the court grants a preliminary injunction. CCP §526(a)(2); 14859 Moorpark Homeowner’s Assn. v. VRT Corp., (1998) 63 Cal.App.4th 1396, 1402; Pillsbury, Madison & Sutro v. Schectman, (1997) 55 Cal.App.4th 1279, 1283; Davenport v. Blue Cross of California, (1997) 52 Cal.App.4th 435, 446; Abrams v. St. Johns Hospital, (1994) 25 Cal.App.4th 628, 636. Thus, a preliminary injunction may not issue without some showing of potential entitlement to such relief. Doe v. Wilson, (1997) 57 Cal.App.4th 296, 304. The decision to grant a preliminary injunction generally lies within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. Thornton v. Carlson, (1992) 4 Cal.App.4th 1249, 1255.

A preliminary injunction ordinarily cannot take effect unless and until the plaintiff provides an undertaking for damages which the enjoined defendant may sustain by reason of the injunction if the court finally decides that the plaintiff was not entitled to the injunction. See CCP §529(a); City of South San Francisco v. Cypress Lawn Cemetery Assn., (1992) 11 Cal.App.4th 916, 920.

D. Amicus Curiae Briefs

Several applicants filed applications for permission to file *amicus* briefs: (1) a group of current and former elected local prosecutors and attorneys general; (2) the American Civil Liberties Union Foundation of Southern California (“ACLU”); (3) Ricardo D. Garcia, Esq., the County Public Defender, and Erika Anzoategui Esq., the County Alternate Public Defender; and (4) the California District Attorneys Association (“CDAA”).⁶

The role of an *amicus curiae* is to assist the court in cases of general public interest by making suggestions to the court, by providing supplementary assistance to existing counsel, and by insuring a complete and plenary presentation of difficult issues so that the court may reach a proper decision. Mobile County Water, Sewer and Fire Protection Authority, Inc. v. Mobile Area Water and Sewer System, Inc., (2008) 567 F. Supp. 2d 1342. An *amicus curiae* is often a partisan representative of an interest that, while foreign to the litigation by nature or choice, is vitally concerned with influencing a decision favorable to that interest. La Mesa, Lemon Grove & Spring Val. Irr. Dist. v. Halley, (1925) 195 Cal. 739, 743.

Permission for an *amicus curiae* to appear or submit briefs must be sought from the court in which he or she seeks to be heard. In re Pina's Estate, (1896) 112 Cal. 14, 44 P. 332. The application must state the applicant's interest and explain how the proposed *amicus curiae* brief will assist the court in deciding the matter, and also must identify certain information concerning the involvement of any party or counsel for a party or other person or entity contributing to fund the preparation of the *amicus curiae* brief. CRC 8.882(d)(2)-(3). The proposed brief must be served and must accompany the application and may be combined with it. CRC 8.882(d)(4).

The *amicus curiae* must accept the issues and propositions urged by the appealing parties;

⁶ In addition to those listed, the court denied an *amicus curiae* application in opposition to the application for preliminary injunction filed by an Adrian Moon on behalf of unidentified current and former elected prosecutors and attorneys general. The application was denied for several reasons, including failure to identify the represented parties and non-compliance with CRC 8.882.

additional questions presented in a brief filed by an *amicus curiae* will not be considered. In re Conservatorship of Whitley, (2007) 155 Cal.App.4th 1447, 1458. The general rule is that a reviewing court need not address additional arguments raised by an *amicus curiae* and may disregard an *amicus curiae*'s attempts to expand the issues. Bullock v. Philip Morris USA, Inc., (2011) 198 Cal.App.4th 543, 572; Rieger v. Arnold, (2002) 104 Cal.App.4th 451, 461. However, there are occasions where the reviewing court may allow new issues to be raised. California Highway Patrol v. Superior Court, (2006) 135 Cal.App.4th 488, 498. If motions by an *amicus curiae* are denied or his or her views ignored, the *amicus curiae* has no right to take exception or to appeal. In re Veterans' Industries Inc., (1970) 8 Cal.App.3d 902, 916.

The court has read all proposed *amici curiae* briefs. The County Public Defender/Alternate Public Defender's brief fails to explain how it will assist the court (CRC 882(d)(2) and fails to identify the necessary information required by CRC 882(d)(3). Petitioner ADDA's objection to the accompanying declarations also is well taken (although identical declarations support the District Attorney's opposition). The application is denied.

The *amicus* brief of current and former elected local prosecutors and attorneys general (hereinafter, "Former Pros.") explains their interest and how it will assist the court, although it fails to identify the necessary information required by CRC 882(d)(3). The brief also purports to be authored by an attorney, Erwin Chemerinsky, Esq., who is not admitted to practice in California and no *pro hac vice* application was filed for him. As his co-counsel Michael Romano, Esq. is admitted in California, the court has considered the Former Pros. brief, but not its footnotes which do not comply with CRC 2.104.

The *amicus* brief filed by ACLU similarly explains its interest and how it will assist the court. It too fails to comply with CRC 882(d)(3) and its footnotes are non-compliant with CRC 2.104. The court will consider the brief without the footnotes.

The *amicus* brief filed by CDAA (with the exception of the district attorneys in the counties of San Francisco and Contra Costa),⁷ explains its interest and how it will assist the court. As with others, the brief does not provide the information required by CRC 882(d)(3). The court will consider the brief, with the exception of a bail issue not relevant to this application.

E. Statement of Facts⁸

1. The Special Directives

a. Special Directive 20-08

Sentencing enhancements are a legacy of California's "tough on crime" era. It shall be the policy of the Los Angeles County District Attorney's Office that the current statutory ranges for criminal offenses alone, without enhancements, are sufficient to both hold people accountable and

⁷ The San Francisco and Contra Costa district attorneys, who are members of CDAA, do not support the *amicus* brief. For convenience, the court will refer to the *amicus* brief as filed by CDAA.

⁸ The court has ruled on both parties' written objections, sometimes with a comment and once under Fibreboard Paper Products Corp. v. East Bay Union of Machinists, Local 1304, Seelworkers of America, AFL-CIO, (1964) 227 Cal.App.2d 675, 712 (court may overrule objection if any portion of objected to material is admissible). The clerk is directed to scan and file the court's motion notebook copy of its rulings.

also to protect public safety. While initial incarceration prevents crime through incapacitation, studies show that each additional sentence year causes a four to seven percent increase in recidivism that eventually outweighs the incapacitation benefit. Therefore, 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. Hanisee Decl., Ex. 2.

Any prior strike enhancements (§§ 667(d), 667(e)) will not be used for sentencing and shall be dismissed or withdrawn from the charging document. This includes second strikes and any strikes arising from a juvenile adjudication;

Any Prop 8 or five-year prior enhancements (§667(a)(1))⁹ and three-year prior enhancements (§667.5(a)) will not be used for sentencing and shall be dismissed or withdrawn from the charging document;

STEP Act enhancements (gang enhancements) (§186.22 *et. seq.*) will not be used for sentencing and shall be dismissed or withdrawn from the charging document;

Special Circumstances allegations resulting in an LWOP sentence shall not be filed, will not be used for sentencing, and shall be dismissed or withdrawn from the charging document;

Violations of bail or O.R. release (§12022.1) shall not be filed as part of any new offense;

If the charged offense is probation-eligible, probation shall be the presumptive offer absent extraordinary circumstances warranting a state prison commitment. If the charged offense is not probation eligible, the presumptive sentence will be the low term. Extraordinary circumstances must be approved by the appropriate bureau director. Id.

At the first court hearing after this policy takes effect, deputy district attorneys are instructed to orally amend the charging document to dismiss or withdraw any enhancement or allegation outlined in this document. Id.

b. Special Directive 20-14

The new Resentencing Policy is effective immediately and shall apply to all offices, units and attorneys in the Office. Every aspect of existing sentencing or resentencing policy will be subject to examination. The intent of this Resentencing Policy is that it will evolve with time to ensure that it reflects the values of the District Attorney, and by extension, the people of the County. Hanisee Decl., Ex. 5.

For any case that is currently pending, meaning that judgment has not yet been entered, or where the case is pending for resentencing, or on remand from another court, the deputy district attorney in charge of the case shall inform the court at the next hearing of the following:

At the direction of the District Attorney, in accordance with Special Directive 20-08 concerning enhancements and allegations, and in the interest of justice, the People hereby:

(1) join in the defendant's motion to strike all alleged sentence enhancement(s); or

(2) move to dismiss all alleged sentence enhancement(s) named in the information for all counts. Id.

Any deputy district attorney assigned to a case pending resentencing or sentence recall consideration under any valid statute shall comply with the following directives until further notice. Id.

⁹ At the February 2 hearing, ADDA's counsel stated that Prop 8 and a five-year enhancement are one and the same. The court will refer to it as the five-year enhancement.

If the defendant or petitioner is serving a sentence that is higher than what he/she would receive today, due to operation of law or by operation of the District Attorney's new Sentencing Policy, the deputy in charge of the case shall withdraw any opposition to resentencing or sentence recall and request a new sentence that complies with current law and/or the District Attorney's new Sentencing Policy. This policy applies even where enhancements were found true in a prior proceeding. This policy shall be liberally construed to achieve its purposes. Id.

If the defendant or petitioner is seeking relief under section 1170.95, the deputy district attorney may concede that the petitioner qualifies for relief. If the assigned deputy district attorney does not believe that the petitioner qualifies for relief, the deputy district attorney must request a 30-day continuance, during which time the assigned deputy district attorney shall review the case in light of the Office's specific 1170.95 Policy. If the deputy district attorney continues to oppose relief, the deputy district attorney shall submit the reasons in writing to the head deputy. The head deputy shall then seek approval from the District Attorney or his designee in order to determine whether the Office will continue to oppose relief. Id.

If a defendant or petitioner would not qualify for a reduced sentence by operation of law if convicted today or under the Office's new Sentencing Policy, then the deputy district attorney in charge of the case may seek a 30-day continuance. During that time, the deputy shall evaluate whether to support or oppose the resentencing (or sentence recall) request. If the deputy believes that compelling and imminent public safety concerns justify opposition to revisiting the sentence, then the deputy must submit those concerns in writing to her head deputy who shall then seek approval from the District Attorney or his designee. Id.

All laws concerning victim notification and support shall be honored. Id.

c. Special Directive 20-08.1

Special Directive 20-08.1 supplements Special Directive 20-08. Hanisee Decl., Ex. 3. The language is clear that this policy is intended to put an end to the practice of alleging strike priors and all other special allegations in accordance with the constitutional authority granted solely to prosecutors across the state of California. Id.

If a pending matter has strike priors alleged or enhancements/allegations (pursuant to Special Directive 20-08) deputies shall make the following record:

"The People move to dismiss and withdraw any strike prior (or other enhancement) in this case. We submit that punishment provided within the sentencing triad of the substantive charge(s) in this case are sufficient to protect public safety and serve justice. Penal Code section 1385 authorizes the People to seek dismissal of all strike prior(s) (or other enhancements) when in the interests of justice. Supreme Court authority directs this Court to determine those interests by balancing the rights of the defendant and those of society 'as represented by the People.' The California Constitution and State Supreme Court precedent further vest the District Attorney with sole authority to determine whom to charge, what charges to file and pursue, and what punishment to seek. That power cannot be stripped from the District Attorney by the Legislature, Judiciary, or voter initiative without amending the California Constitution. It is the position of this office that Penal Code section 1170.12(d)(2) and Penal Code 667(f)(1) are unconstitutional and infringe on this authority. Additional punishment provided by sentencing enhancements or special allegations provide no deterrent effect or public safety benefit of incapacitation--in fact, the opposite may be true, wasting critical financial state and local resources." Id. (emphasis added).

If a court refuses to dismiss the prior strike allegations or other enhancements/allegations based on the People's oral request, the deputy district attorney shall seek leave of the court to file an amended charging document pursuant to section 1009. Id.

If a court further refuses to accept an amended charging document pursuant to section 1009, the deputy district attorney shall provide the following information to their head deputy: Case number, date of hearing, name of the bench officer and the court's justification for denying the motion (if any). The [deputy district attorney] shall stipulate to any stay of proceedings if requested by the defense. Id.

d. Special Directive 20-08.2

The Office is committed to eliminating mass incarceration and fostering rehabilitation for those charged with crimes. As such, the Office will not pursue prior strike enhancements, gang enhancements, special circumstances enhancements, out on bail/O.R. enhancements, or section 12022:53 enhancements. Special Directive 20-08 is hereby amended to allow enhanced sentences in cases involving the most vulnerable victims and in specified extraordinary circumstances. These exceptions shall be narrowly construed. Hanisee Decl., Ex. 4.

Where appropriate, the following allegations, enhancements and alternative sentencing schemes may be pursued:

Hate Crime allegations, enhancements or alternative sentencing schemes pursuant to sections 422.7 and 422.75;

Elder and Dependent Adult Abuse allegations, enhancements, or alternative sentencing schemes pursuant to sections 667.9, 368(b)(2)/12022.7(c);

Child Physical Abuse allegations, enhancements or alternative sentencing schemes pursuant to sections 12022.7(d), 12022.9, and 12022.95;

Child and Adult Sexual Abuse allegations, enhancements or alternative sentencing schemes pursuant to sections 667.61, 667.8(b), 667.9, 667.10, 667.15, 674, 675, 12022.7(d), 12022.8(b), and 12022.85(b)(2);

Human Sex Trafficking allegations, enhancements or alternative sentencing schemes pursuant to sections 236.4(b) and 236.4(c);

Financial crime allegations, enhancements or alternative sentencing schemes where the amount of financial loss or impact to the victim is significant, the conduct impacts a vulnerable victim population or to effectuate section 186.11;

Other than the enhancement or allegation prohibitions previously listed, enhancements or allegations may be filed in cases involving the following extraordinary circumstances with written Bureau Director approval upon written recommendation by the head deputy:

Where the physical injury personally inflicted upon the victim is extensive; or

Where the type of weapon or manner in which a deadly or dangerous weapon including firearms is used exhibited an extreme and immediate threat to human life;

Facts or circumstances that are sufficient to meet the legal definition of great bodily injury or use of a deadly or dangerous weapon alone are insufficient to warrant extraordinary circumstances. The written request and approval must be placed in the case file. Id.

2. ADDA's Evidence

On December 7, 2020, Gascón took office as District Attorney. That same day he issued

Special Directives 20-08 and 20-14, which claimed that sentencing enhancements are a “legacy of California’s ‘tough on crime’ era” and claimed that current statutory sentencing ranges are sufficient for criminal sentencing without enhancements. Hanisee Decl., ¶3, Ex. 2. Gascón ordered 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. Ex. 2.

Special Directive 20-14 instructed deputy district attorneys how to apply and carry out the District Attorney’s new enhancements and sentencing policies. Hanisee Decl., ¶3, Ex. 5. Special Directive 20-14 provides that for any pending case, the deputy district attorney shall inform the court that, at the direction of the District Attorney, the People (a) join in the defendant’s motion to strike all alleged enhancement(s) or (2) move to dismiss all alleged sentence enhancement(s) named in the information for all counts. Ex. 5.

On December 15, 2020, Gascón issued Special Directive 20-08.1, which imposed additional requirements on deputy district attorneys for sentencing enhancements. Hanisee Decl. ¶3, Ex. 3. The Special Directive requires deputy district attorneys to move to dismiss and withdraw all pre-existing enhancement allegations in all cases under section 1385 (interests of justice). The Special Directive includes a script for the deputy district attorney to follow verbatim, asserting that mandatory sentencing enhancements under the Three Strikes Law unconstitutionally usurp prosecutorial discretion. *Id.*, Ex. 3.

The Special Directive does not instruct deputy district attorneys to cite to the court adverse case authority in accordance with an attorney’s ethical duty of candor to the tribunal. Rules of Professional Conduct (“RPC”) 3.3(a)(2) (“A lawyer shall not fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.”) In the event that the court refuses to dismiss the allegation, the Special Directive requires deputy district attorneys to seek leave to file an amended charging document, ostensibly to eliminate the enhancement allegations the court had already refused to dismiss. *Id.*, Ex. 3. Where the court does not grant such leave, the Special Directive requires deputy district attorneys to provide to their head deputy the “[c]ase number, date of hearing, name of the bench officer and the court’s justification for denying the motion (if any).” *Id.*, Ex. 3.

These Special Directives elicited an immediate backlash from the public, prosecutors, and judges. Petition ¶ 18. Judges have scolded deputy district attorneys for following Gascón’s Special Directives instead of their obligations under the law, opining that it is unethical or improper to comply with the Special Directives and refuse to prosecute. Hanisee Decl., ¶¶ 6-9, Exs. 6-9. Gascón has publicly, but incorrectly, claimed that prosecutors are sworn to follow his directives as the elected District Attorney so long as they are within the law. Hanisee Decl., ¶10, Ex. 10.

On December 17, 2020, the District Attorney issued Special Directive 20-08.2, which partially withdrew some of the restrictions of Special Directive 20-08. Hanisee Decl., ¶3, Ex. 4. Therein, deputy district attorneys may allege certain enumerated sentencing enhancements— such as hate crime enhancements, elder abuse enhancements, and others—and seek their head deputy’s approval to assert any other unenumerated enhancement. *Id.* But Gascón maintained that the following six enhancements “shall not be pursued in any case and shall be withdrawn in pending matters”: (1) prior strike enhancements (§§ 667(d), 667(e)); (2) five-year prior enhancements (§667(a)(1)) and three-year prior enhancements (§667.5(a)); (3) gang enhancements (§186.22), (4) special circumstances allegations resulting in an LWOP sentence, (5) violations of bail or O.R.

release (§12022.1) and (6) use of a firearm allegations (§12022.53). Hanisee Decl. ¶ 3, Ex. 4.

Portions of the Special Directives prohibit deputy district attorneys from complying with their ministerial prosecutorial duties in violation of the law, their oaths of office, and their ethical responsibilities as officers of the court. Hanisee Decl., ¶5. The unlawful conduct includes barring deputy district attorneys from charging enhancements they statutorily are obligated to charge, barring deputy district attorneys from complying with their ministerial duty to exercise case-by-case discretion to maintain or move to dismiss charges, mandating that deputy district attorneys move to dismiss special circumstance allegations that cannot be dismissed by law, and mandating that deputy district attorneys attempt to unilaterally abandon a prosecution where a judge denied a motion to dismiss. *Id.* Deputy district attorneys risk contempt of court or discipline by the State Bar each time they undertake this conduct. *Id.*

3. District Attorney's Evidence¹⁰

In the experience of Monnica L. Thelen, Esq. (“Thelen”), a deputy public defender since 2005, the defense sometimes will make a counteroffer to the prosecution's plea offer. Defense counsel may point out weaknesses in the prosecution's case or may present mitigating circumstances that support the counteroffer. Thelen Decl., ¶6.¹¹ On many occasions, prosecutors have informed Thelen that while he or she would be inclined to accept the counteroffer the prosecutor cannot do so because the prosecutor's manager will not allow it. *Id.* In other cases, prosecutors have informed Thelen that if she wanted to provide a counteroffer, she must make an appointment with their manager to discuss it. *Id.*

In cases where the prosecutors move to dismiss the strike enhancement or special allegations, they are rarely, if ever, asked by the court to state whether doing so is in the interests of justice. Rather, the court simply accepts the plea and sentences the defendant. Thelen Decl., ¶7. The court is involved in plea bargaining only when Thelen cannot reach an agreement with the prosecutor and asks to plead open to the court. Thelen Decl., ¶8. Only on those rare occasions does Thelen state to the court why such a plea bargain is in the interests of justice. *Id.*

Shelan Y. Joseph, Esq. (“Joseph”) is as a deputy public defender who for the last two years has overseen all cases where the death penalty may be imposed, and all special circumstances cases. Joseph Decl., ¶3. In Joseph's experience, prosecutors do not always file all strikes and enhancements. Joseph Decl., ¶4. They do not file all cases as felonies. *Id.* 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. *Id.* In

¹⁰ The District Attorney requests judicial notice of the Memorandum of Understanding for Joint Submission Regarding the Deputy District Attorneys” (“MOU”) entered into by and between the Authorized Management Representatives of the County of Los Angeles and ADDA (Ex. 1). As the court explained at the February 2, 2012 hearing, while a MOU may be judicially noticed as an official act under Evid. Code section 452(c) when it has been adopted by the governing legislative body (*Ass'n for Los Angeles Deputy Sheriffs v. County of Los Angeles*, (2019) 42 Cal.App.5th 918, 924, n. 2), the District Attorney fails to show that the MOU was adopted by the County's Board of Supervisors. As a result, the MOU is merely a public agency contract not subject to judicial notice. The request is denied.

¹¹ The paragraphs in the Thelen and Joseph declarations are unnumbered.

some instances, prosecutors have used their discretion to reduce felony charges to misdemeanor charges to effectuate a disposition. Id.

In cases where special circumstances have been alleged, upon a showing by the defense prosecutors have dismissed the special circumstance allegation to accept a defense offer of less than life without the possibility of parole. Prosecutors have exercised their discretion to dismiss the special circumstances in those instances. Joseph Decl., ¶5.

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. Joseph Decl., ¶6. 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. Id. For example, prosecutors routinely file gang enhancements for the most mundane crimes committed by gang members even though the crime was not committed for the gang's benefit. Id. 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. Joseph Decl., ¶7.

In Joseph's practice, there have been instances where defense counsel will make a counteroffer to the prosecution's plea offer. Joseph Decl., ¶8. The defense might point out that the prosecution's case is factually weak and/or there is a viable defense. Id. The prosecutor might agree that there are evidentiary issues. Id. However, the prosecutor will explain that while he or she would like to accept the defense counteroffer or even make a lower offer, he or she cannot do so because the prosecutor's manager will not allow it. Id. Since the manager -- who has no involvement in the actual trial proceedings -- will not authorize the plea, the prosecutor is bound by that decision despite the problems of proof. Id.

Marshall Khine, Esq. ("Khine") has been an assistant district attorney for the District Attorney's Office for the City and County of San Francisco since November 1998. Khine Decl., ¶1. Khine is not aware of any policy that required prosecutors to allege every available qualifying serious or violent conviction as a strike enhancement. Khine Decl., ¶3. Prior to Prop 36, the "Three Strikes Reform Act" of 2012, San Francisco District Attorneys discouraged prior strike conviction enhancements on non-serious and non-violent new offenses and generally did not pursue life in prison sentences under the Three Strikes law for new low-level felony convictions. Id. Some of these offenses eligible for life sentences prior to Prop 36 are no longer felonies after Prop 47, "The Safe Neighborhood and Schools Act" of 2014, and some are not crimes anymore pursuant to Prop 64, "The Adult Use of Marijuana Act" of 2016. Id.

The current policy of the San Francisco District Attorney is to allege status enhancements such as prior strike convictions only as warranted by extraordinary circumstances subject to the approval of the district attorney or his designee. Khine Decl., ¶4. The decision to allege prior convictions as strikes under the Three Strikes law has always been subject to sound judgment and discretion to achieve a proportionate and appropriate sentence for the offense. Khine Decl., ¶5.

Stephan A. Munkelt, Esq. ("Munkelt") is the Executive Director of the California Attorneys for Criminal Justice (the "CACJ"), an association of criminal defense lawyers, including both retained counsel and public defenders. Munkelt Decl., ¶1. Munkelt has never had a district attorney or deputy district attorney suggest that the law imposes a mandatory duty to file every known prior strike in each new felony prosecution. Munkelt Decl., ¶4. In numerous felony cases where Munkelt's client had one or more serious or violent prior felony convictions, the initial

pleading did not allege those enhancements. Munkelt Decl., ¶6. In many the available strike enhancements were never filed. Id.

c. Reply Evidence¹²

ADDA's operative Bylaws identify its purposes, *inter alia*, as follows: (1) 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 (§1.3.2); (2) to promote legislation beneficial to ADDA, the deputies that it represents and other organizations consistent with the goals of ADDA and the furtherance of the administration of justice and public safety (§1.3.3); (3) to promote career service in government (§1.3.4); and (4) to provide research and educational services and activities designed to assist members and other organizations consistent with the goals of ADDA (§1.3.5). Hanisee Reply Decl., ¶2, Ex. 14. The Bylaws specifically contemplate litigation. Hanisee Reply Decl., ¶3, Ex. 14 (Art.VI, §3, §6.3).

The Office's written policy regarding the charging and disposition of prior strikes under the Three Strikes law in effect prior to Gascón's adoption of the Special Directive provided that all qualifying prior felony convictions shall be alleged in the pleadings pursuant to section (667(f)(1). Hanisee Reply Decl., ¶4, Ex. 15. Prior to seeking dismissal of any strike, the prior strike case files shall be reviewed, if available, to fairly evaluate mitigating and aggravating factors. Id. 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. Id.

Under this former policy, deputy district attorneys were required to plead and prove prior strikes where they determine that such strikes exist. Hanisee Reply Decl., ¶4. 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. Id.

On January 7, 2021, ADDA's counsel sent a Public Records Act request to the Office requesting that it produce all memoranda regarding the lawfulness or ethical implications of any of the Special Directives issued on or after December 7, 2020. George Decl., ¶3, Ex. 12. On January 22, 2021, ADDA's counsel received a letter from County Counsel refusing to produce the memoranda as privileged and as preliminary drafts not retained by the public agency in the ordinary course of business. George Decl., ¶4, Ex. 13.

F. Analysis

Petitioner ADDA applies for a preliminary injunction enjoining the District Attorney from compelling his deputy district attorneys to comply with his Special Directives insofar as they:

¹² In reply, ADDA requests judicial notice of the following: (1) ADDA's Bylaws (Ex. 14); and (2) the District Attorney's written policy manual in effect prior to the Special Directives (Ex. 15). Although ADDA admittedly presents contrary authority (*see, e.g., El-Attar v. Hollywood Presbyterian Medical Center*, (2013) 56 Cal. 4th 976, 989), the Bylaws are not subject to judicial notice and the request is denied for Exhibit 14. However, Exhibit 14 is separately authenticated by the Hanisee reply declaration. The District Attorney's policy manual is judicially noticed. Evid. Code §452(c).

(1) prohibit deputy district attorneys from pleading and proving strike priors under the Three Strikes law;

(2) require deputy district attorneys to move to dismiss from a pending criminal action (i) any prior strike enhancements, including second strikes and strikes arising from a juvenile adjudication, (ii) any five-year prior enhancements (§667(a)(1)) and three-year prior enhancements (§667.5(a)); (iii) STEP Act gang enhancements (§186.22); (iv) special circumstances allegations that would result in an LWOP sentence (§§ 190.1 to 190.5); (v) violations of bail or O.R. release (§12022.1); and (vi) use of a firearm allegations (§12022.53);

(3) require deputy district attorneys to make a post-conviction motion to dismiss any special circumstances allegations (§§ 190.1-190.5); and

(4) require deputy district attorneys to move for leave to amend the charging document in any pending criminal action for the purpose of removing an allegation that they are restrained and enjoined from moving to dismiss.

Petitioner ADDA contends that issuance of mandamus or a writ of prohibition¹³ is appropriate because the District Attorney's Special Directives prohibit deputy district attorneys from complying with their ministerial prosecutorial duties in violation of the law, their oaths of office, and their ethical responsibilities as officers of the court. App. at 6. The unlawful directives purport to bar deputy district attorneys from charging statutorily-mandated enhancements and from complying with their ministerial duty to exercise case-by-case discretion as to appropriate charges to maintain or dismiss. *Id.* No permissible justification exists for the unlawful directives. It is no answer for the District Attorney to claim publicly that "[p]rosecutors are sworn to follow the directives of the elected D.A." *See* Hanisee Decl. ¶ 10, Ex. 10. The County has not vested its district attorney with such power. Deputy district attorneys, like all county prosecutors within the state, swear an oath only to defend and uphold the Constitution, not the district attorney. *See* Cal. Const. Art. XX, §3. App. at 6.

Gascón responds that he has implemented the Special Directives as the duly elected District Attorney "in the wake of significant research showing excessive sentencing practices yield no public safety benefit and do not promote the interests of justice". Opp. at 6. He has concluded that there is no ministerial duty to plead the relevant sentencing enhancements under the Three Strikes law. The California Supreme Court explained: "Under California's Three Strikes law, the sentence that is actually imposed upon a defendant in a particular case is dependent [in part]... upon the prosecutor's exercise of prosecutorial discretion in determining how many prior convictions to charge in the case." *In re Coley*, (2012) 55 Cal.4th 524, 559 (emphasis added). Opp. at 6.

The District Attorney adds that there is no ministerial duty to forego directing his deputies to move to dismiss existing sentencing enhancements as a matter of policy. There is nothing wrong with the elected district attorney -- as opposed to line prosecutors -- setting policies predicated on how that district attorney believes his office's prosecutorial discretion should be exercised in seeking the dismissal of sentencing enhancements. There further is no ethical issue for the County's deputy district attorneys in following these directives. The district attorney's role is to

¹³ This case is not appropriate for a writ of prohibition, which exists only to restrain an act involving the exercise of judicial functions. *Dunn v. Justice's Court of Sixth Township*, (1934) 136 Cal.App. 269, 270. The District Attorney does not exercise a judicial function.

assess the interests of justice and the wise use of resources through the exercise of prosecutorial discretion and there is no ethical issue when the district attorney, not line prosecutors, sets general policies that reflect this assessment. Opp. at 7.

Although neither party addresses this issue, an injunction generally is not available to prevent the execution of a public statute by officers of the law for the public benefit. See Szold v. Medical Board, (2005) 127 Cal.App.4th 591, 596. This prohibition does not apply, however, where the public officials are acting contrary to a constitutional or statutory duty. People for the Ethical Operation of Prosecutors and Law Enforcement v. Spitzer, (“PEOP”) (2020) 53 Cal.App.5th 391, 410 (unconstitutional use of jail confidential informant practice could be enjoined because it would not interfere with agencies’ lawful exercise of duties). As an example, an injunction may issue to prevent a city from interfering with the exercise of a plaintiff’s First Amendment rights. See Ketchens v. Reiner, (1987) 194 Cal.App.3d 470, 480.

1. Standing

a. Associational Standing

Standing is a threshold issue necessary to maintain a cause of action, and the burden to allege and establish standing lies with the plaintiff. Mendoza v. JPMorgan Chase Bank, N.A., (“Mendoza”) (2016) 6 Cal.App.5th 802, 810. As a general rule, a party must be “beneficially interested” to seek a writ of mandate. Friends of Oceano Dunes, Inc. v. San Luis Obispo County Air Pollution Control Dist., (2015) 235 Cal.App.4th 957, 962 (citing CCP §1086). Likewise, to seek declaratory relief, a party must be an “interested person.” CCP §1060. An “interested person” means the same thing as a “beneficially interested” person in mandamus cases. Asimow, et al., Administrative Law (2018), Ch. 14, §14:6. “Beneficially interested” has been generally interpreted to mean that one may obtain a mandamus writ only if the person has some special interest to be served or some particular right to be preserved or protected over and above the interest held in common with the public at large. SJJC Aviation Services, LLC v. City of San Jose, (“SJJC”) (2017) 12 Cal.App.5th 1043, 1053. The beneficial interest must be direct and substantial. Ibid. A petitioner has no beneficial interest if he or she will gain no direct benefit from the writ’s issuance and suffer no direct detriment if it is denied. Ibid.

Under the doctrine of associational standing, an association that does not have standing in its own right may bring suit on behalf of its members. Amalgamated Transit Union, Local 1756, AFL-CIO v. Super. Ct., (2009) 46 Cal.4th 993, 1003. An association has standing to bring suit on behalf of its members when (a) its members would have standing to sue, (b) the interests the association seeks to protect are germane to the organization’s purpose, and (c) neither the claim nor the relief requested requires the participation of individual association members. Prop. Owners of Whispering Palms, Inc. v. Newport Pac., Inc., (2005) 132 Cal. App. 4th 666, 672–73.¹⁴ The first prong of this test is met if any one or more member would have standing to sue. Id.

Petitioner ADDA states that it is the certified exclusive bargaining representative for Bargaining Unit 801, which consists of deputy district attorneys I, II, III, and IV pursuant to the County’s Employee Relations Ordinance. Bargaining Unit 801 consists of approximately 800

¹⁴ State law on associational standing derives from, and is co-extensive with, federal constitutional law. Bd. of Teamsters & Auto Truck Drivers v. Unemployment Ins. Appeals Bd., (“Teamsters”) (1987) 190 Cal.App.3d 1515, 1522, n. 3.

deputy district attorneys. ADDA asserts that it has organizational standing to assert the interests of its members in this action.

The District Attorney challenges ADDA's associational standing. He notes that a petitioner has the burden of establishing standing and yet ADDA asserts only that it is the bargaining unit for the County's deputy district attorneys and thus has "organizational" standing. But ADDA neither identifies the requirements for organizational standing nor provides any evidence or argument about the scope of its bargaining authority. Opp. at 19-20.

The District Attorney notes that associational standing does not exist unless "the interests [the association] seeks to protect are germane to the organization's purpose." Amalgamated Transit Union, Local 1756, AFL-CIO v. Super. Ct., (2009) 46 Cal.4th 993, 1004 (unfair competition law requires injury-in-fact and PAGA requires "aggrieved employee", and both are inconsistent with associational standing). The mere fact that a union may have bargaining unit status does not mean that it may challenge management policy determinations like the Special Directives. Opp. at 19-20.

By law, ADDA's scope of representation includes "all matters relating to employment conditions and employer-employee relations, including wages, hours, and terms and conditions of employment". Gov't Code §3504. As an exception, the scope of representation "shall not include consideration of the merits, necessity, or organization of any service or activity provided by law or executive order." *Id.* This statutory exception was added to prevent "expansion of the language of 'wages, hours and working condition' to include more general managerial policy decisions." Claremont Police Officers' Ass'n v. City of Claremont, (2006) 39 Cal.4th 623, 631-32. As such, the language recognizes the rights of employers to make unconstrained fundamental management or policy choices. *Id.*

ADDA correctly replies (Reply at 14-15) that Govt. Code section 3504 does not circumscribe its right to associational standing for mandamus. ADDA is a union organized for the purpose of protecting the wages and working conditions of over 800 deputy district attorneys in the County. Hanisee Decl. ¶2; Suppl. Hanisee Decl. ¶¶ 2-3, Ex. 15.¹⁵ The District Attorney's Special Directives require deputy district attorneys to follow his policies on the Three Strikes law and sentence enhancements. ADDA contends that these directions are unlawful and expose its members to court sanctions, contempt of court, and ethical violations. It is germane to ADDA's mission of protecting its members' working conditions to prevent them from facing the Hobson's choice of either complying with the Special Directives and violating the law, their oath, and their ethics, or complying with the law and risking internal discipline for violating the Special Directives.

Courts have concluded, without reference to Govt. Code section 3504, that labor unions have standing to challenge various employee working conditions. *See, e.g., Teamsters, supra*, 190 Cal.App.3d at 1522 (union had mandamus standing to challenge denial of unemployment insurance benefits to its members after collective bargaining broke down with employer). *See Nat'l Weather Serv. Emps. Org., Branch 1-18 v. Brown*, (2d Cir. 1994) 18 F.3d 986, 989 (union had standing to challenge relocation of weather forecasting station because it would force

¹⁵ There is no dispute that ADDA is authorized to file lawsuits on behalf of its members. ADDA's Bylaws are in evidence and they refer litigation. Hanisee Reply Decl., ¶3, Ex. 14, (Art. VI, §3. ¶6.3).

employees to commute further). Reply at 14-15.¹⁶

ADDA's challenge is not to the District Attorney's managerial policies, but to the working conditions for its members resulting from those policies. Many or all of ADDA's members would have individual standing to raise these issues and ADDA therefore has associational standing.

b. Public Interest Standing

If *arguendo* ADDA does not have associational standing, it has public interest standing. Where a plaintiff cannot satisfy the "over and above" test for private interest standing, California cases still treat a plaintiff as beneficially interested for the purpose of mandamus standing if the plaintiff satisfies the criteria for public interest standing. Asimow, et al., Administrative Law (2018), Ch. 14, §14:5. Public interest standing may be conferred "where the question is one of public right and the object of the mandamus is to procure the enforcement of a public duty." Save the Plastic Bag Coalition v. City of Manhattan Beach, (2011) 52 Cal.4th 155, 166. This type of standing "promotes the policy of guaranteeing citizens the opportunity to ensure that no governmental body impairs or defeats the purpose of legislation establishing a public right." Green v. Obledo, (1981) 29 Cal.3d 126, 144. In determining whether public interest standing

¹⁶ The District Attorney's opposition argues, and his counsel repeated at the February 2 hearing, that the MOU between the County and ADDA has a grievance procedure for deputy district attorneys to follow if they have a complaint about their required duties and ADDA has not shown that the grievance procedure has been exhausted. *See* Opp. at 20. As explained at the hearing, the MOU has not been judicially noticed and is not in evidence. Therefore, the court need not address the internal exhaustion issue.

The District Attorney tries to cure this defect by filing a Supplemental Request for Judicial Notice that authenticates the MOU as adopted by the County's Board of Supervisors. This post-hearing request is unauthorized; a party is not entitled to learn about an evidentiary defect at hearing and then cure the defect post-hearing without leave of court. For this reason, the Supplemental Request for Judicial Notice is denied.

Even if *arguendo* the court is required to judicially notice the MOU, exhaustion of the internal grievance procedure is not required. The District Attorney's argument is that individual deputy district attorneys failed to pursue a grievance and therefore ADDA does not have associational standing. The MOU provides for a lengthy four-level grievance procedure for "rules and regulations governing personnel practices or working conditions", culminating in an arbitration binding on the employee and upon the County to the extent it does not require legislative action by the Board of Supervisors. In the arbitration, the arbitrator will interpret state law only if he or she finds it necessary. Supp. RJN Ex. 1, p. 201-12. This grievance procedure appears identical to the procedure which two appellate courts have held need not be exhausted in a union representative action for the County's deputy sheriffs because requiring each individual deputy to grieve through arbitration would be an ineffectual remedy. Ass'n for Los Angeles Deputy Sheriffs v. County of Los Angeles, *supra*, 42 Cal.App.5th at, 930; Ass'n for Los Angeles Deputy Sheriffs v. County of Los Angeles, (Jan. 29, 2021) __ Cal.App.5th __, 2021 DJDAR 1106, 1108-09 (requiring grievance by 107 affected employees was ineffectual remedy). Plainly, requiring the more than 800 deputy district attorneys to grieve this complex matter concerning the lawfulness of the District Attorney's policies would be an ineffective remedy.

applies, the court considers (1) whether “the public duty is sharp and the public need weighty” (SJJC Aviation Services, LLC v. City of San Jose, (“SJJC”) (2017) 12 Cal.App.5th 1043, 1058), (2) whether the policy supporting public interest standing is outweighed by competing considerations of a more urgent nature (Reynolds v. City of Calistoga, (2014) 223 Cal.App.4th 865, 873), and (3) whether the claim of public interest standing is driven by personal objectives rather than broader public concerns (SJJC, *supra*, 12 Cal.App.5th at 1057).

In PEOP, the plaintiff organization alleged that the defendant sheriff’s department and district attorney’s office breached their duties to conduct lawful investigations by moving confidential jail informants near the criminal defendant to elicit confessions even though represented by counsel, permitting the informants to use threats of violence, and even permitting the informant to threaten to kill the criminal defendant if he did not confess to the crime. 53 Cal.App.5th at 396-97. The court upheld public interest standing because this allegation involved outrageous constitutional violations and the systematic violation of the constitutional rights of due process and assistance of counsel. *Id.* at 410.

Obviously, the public had PEOP had a strong interest in deterring the allegedly constitutionally unlawful surveillance conduct and law enforcement’s duty was sharp. Here, the public has an equally strong interest in the District Attorney’s alleged statutory and constitutional violations.¹⁷ The District Attorney’s duty, if it exists, also is sharp. Finally, ADDA’s claim is driven more by public concern than personal objective, a basis which the PEOP court noted is important to public interest standing. 53 Cal.App.5th at 408 (citation omitted).

Because ADDA raised public interest standing in reply to the District Attorney’s standing argument, he had no opportunity to brief it. At the February 2 hearing, the District Attorney’s counsel relied on two cases that he contends support denial of public interest standing: Dix v. Superior Court, (“Dix”) (1991) 53 Cal.3d 442 and Weatherford v. City of San Raphael, (“Weatherford”) (2017) 2 Cal.5th 1241.

In Dix, the father of a victim challenged by mandamus the recall of a criminal defendant’s sentence for purposes of reducing it as the result of his cooperation against a drug kingpin. 53 Cal.3d at 447-50. The court concluded that the father lacked beneficial interest mandamus standing because neither a crime victim nor a citizen has a legally enforceable interest in the conduct of criminal proceedings. *Id.* at 450. With respect to public interest standing, the court held that the father had no such standing because (a) a prosecutor has no duty to conduct criminal proceedings in a particular manner and (b) public interest standing must yield to public policy, and public intervention into criminal proceedings would have ominous implications. *Id.* at 453-54.

In Weatherford, the court held that the plaintiff did not have taxpayer standing to challenge a city’s practice of impounding vehicles unless she paid a tax to the city assessed by that locality. 2 Cal.5th at 1252. The court remanded for a determination of what kind of tax would suffice. *Id.* With respect to public interest standing, the court held that Dix and other cases have recognized the need for limits in light of a larger statutory and policy context. *Id.* at 1248. The court noted that there is sometimes a competing interest at issue when a party seeks a judicial remedy against government officials. *Id.* at 1249.

Neither Dix nor Weatherford affects ADDA’s public interest standing. Both cases indicate

¹⁷ With respect to public interest, it is worth noting that the clerk has informed the court that 790 members of the public listened to the February 2, 2021 hearing.

that public interest standing for mandamus should be denied where there is a bigger statutory and policy picture, including the public policy surrounding criminal proceedings and the prosecutor's discretion in conducting them. In this case, the bigger picture is directly at issue: the District Attorney's right to compel his deputies to conduct criminal proceedings, particularly Three Strike cases, in a certain way. Because ADDA is seeking to prevent the District Attorney from forcing his deputy district attorneys from violating the law, this case fits squarely within PEOP and outside the policy concerns of Dix and Weatherford.

Indeed, PEOP distinguished both Dix and Weatherford. The PEOP court noted that Weatherford was a taxpayer suit, not a mandamus claim. Id. at 404. Nor were there any ominous consequences to the criminal justice system in permitting the plaintiffs to proceed. Id. "An injunction against unlawful investigative methods cannot, by definition, interfere with the lawful exercise of defendants' duties." Id. Public officials must obey the law and the PEOP court had no concerns that the lawsuit would interfere in the legitimate operations of the sheriff's and district attorney's offices. Id. at 405.

The same is true here. ADDA has public interest standing.

2. Probability of Success

a. Prosecutorial Discretion

Any discussion of a prosecutor's duties begins with the United States Supreme Court's comments about United States Attorneys in Berger v. United States, ("Berger") (1935) 295 U.S. 78, 88. A United States Attorney is the representative of a sovereignty whose obligation is to govern impartially, which is a compelling obligation. *See id.* The prosecutor's interest in a criminal prosecution is not that he shall win a case, but that justice be done. Id. The prosecutor should prosecute with "earnestness and vigor". Id. While he may strike "hard blows," he is not at liberty to strike foul ones. Id. It is as much the prosecutor's duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. Id. These comments apply equally to any prosecutor in any jurisdiction of this country, including California. *See* People v. Hill, (1998) 17 Cal.4th 800, 820 (quoting Berger).

In fulfilling these duties, prosecutors in every jurisdiction of the United States have considerable discretion. "The capacity of prosecutorial discretion to provide individualized justice is firmly entrenched in American law." McCleskey v. Kemp, (1987) 481 U.S. 279, 311-12 (internal quotations omitted). In California, prosecutorial discretion is "basic to the framework of the California criminal justice system." Gananian v. Wagstaffe, ("Gananian") (2011) 199 Cal. App. 4th 1532, 1543 (2011) (quoting People v. Valli, (2010) 187 Cal. App. 4th 786, 801). Prosecutorial discretion is derived from the doctrine of separation of powers codified in Cal. Const. Art. III, section 3.¹⁸ People v. Birks, (1998) 19 Cal.4th 108, 134. "California district attorneys 'are given complete authority to enforce the state criminal law in their counties.'" Pitts v. Cty. of Kern, (1998) 17 Cal.4th 340, 358.

Prosecutors exercise discretion on whom to charge with a criminal offense, what charges to bring, and what plea bargains to offer. A prosecutor has "unlimited discretion in the crime-

¹⁸ Cal. Const. Art. III, section 3 provides: "The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the other two except as permitted by this Constitution."

charging function” (People v. Wallace, (1985) 169 Cal. App. 3d 406, 407) and “ordinarily [has] the sole discretion to determine whom to charge with public offenses and what charges to bring.” People v. Birks, *supra*, 19 Cal. 4th at 134 (citing People v. Eubanks, (1996) 14 Cal. 4th 580, 588-89 and Dix, *supra*, 53 Cal. 3d at 451). The district attorney’s power to select what charges to bring against a criminal defendant “generally is not subject to supervision by the judicial branch.” People v. Birks, *supra*, 19 Cal.4th at 134. (citations omitted). Because the district attorney is “the people’s choice of an attorney to represent them in their public affairs,” he is “primarily responsible to the electorate,” and “[t]here is ordinarily no review of his power to prosecute nor can a court control this statutory power by mandamus.” People v. Super. Ct. (Martin), (1979) 98 Cal.App.3d 515, 519 (1979) (citations and brackets omitted). Opp. at 9.

A district attorney’s authority includes choosing among the various punishments to seek: “The decision of what charges to bring (or not to bring) – and, more to the point here, which sentencing enhancement to allege (or not to allege) – ordinarily belongs to the prosecutors who are charged with executing our state’s criminal law.” People v. Garcia, (2020) 46 Cal. App. 5th 786, 791. See People v. Tirado, (2019) 38 Cal. App. 5th 637, 644 (noting that prosecution exercised its discretion in charging fewer enhancements than were available). “[T]he prosecutor’s decision not to charge a particular enhancement ‘generally is not subject to supervision[.]’” People v. Garcia, *supra*, 46 Cal.App.5th at 791. “[A]bsent a constitutional violation, the prosecutor’s decision not to charge a particular enhancement ‘generally is not subject to supervision’ -- or second guessing -- ‘by the judicial branch.’” Id. at 792. Opp. at 10; Former Pros. Br. at 10; ACLU Br. at 10.

A district attorney’s discretion is not unlimited. He or she must work within the framework of the criminal system. The legislature also is entitled to enact laws intruding on the executive or judicial branches of government so long as they do not defeat or materially impair that branch’s core function. See People v. Bunn, (2002) 27 Cal.4th 1, 16 (prosecutor’s refile of dismissed charges did not intrude on core function of judiciary).

In exercising prosecutorial discretion, a district attorney’s core function is to ensure that the guilty are prosecuted. “[The prosecutor] is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.” People v. Superior Court (Greer), (1977) 19 Cal.3d 255, 266. A prosecutor has a duty to be fair to criminal defendants, but he must protect the public and crime victims by prosecuting the guilty. Indeed, a prosecutor has a mandatory duty to exercise discretion in favor of prosecuting crimes; a district attorney who refuses to prosecute crimes indisputably would be subject to mandamus. People ex rel. Becerra v. Superior Court, (“Becerra”) (2018) 29 Cal. App. 5th 486, 504.

Conceptually, the criminal sanction has four purposes: (a) retribution, (b) special deterrence (deterrence of the defendant), (c) general deterrence (deterrence of other criminals), and (d) rehabilitation. In 1977, the legislature changed the emphasis of California’s criminal law system by making a major revision of the sentencing laws to require determinate sentencing. Greater importance in California now is placed on punishment as the reason for imprisonment. In re Morral, (2002) 102 Cal. App. 4th 280, 292. The legislature has codified the importance of imprisonment in criminal sentencing:

" The Legislature finds and declares that the purpose of sentencing is public safety achieved through punishment, rehabilitation, and restorative justice. When a

sentence includes incarceration, this purpose is best served by terms that are proportionate to the seriousness of the offense with provision for uniformity in the sentences of offenders committing the same offense under similar circumstances." (emphasis added).

Justice for victims is a significant component of the imprisonment purpose of the criminal sanction. This means justice for individual victims and their families, as well as justice for the public. In 1982, public concern that prosecutors were not giving sufficient attention to the interests of victims led to the federal Victim and Witness Protection Act (18 U.S.C. §3771). That same year California voters passed by initiative "The Victim's Bill of Rights" embodied in Art. I, section 28 of the California Constitution. People v. Hannon, (2016) 5 Cal.App.5th 94, 99-100. This constitutional provision declares that "[c]riminal activity has a serious impact on the citizens of California. The rights of victims of crime and their families in criminal prosecutions are a subject of grave statewide concern." Cal. Const., art. I, §28(a)(1). In 2008, voters amended and expanded the constitutional rights of victims with the passage of "Marsy's Law." Id. at 99.

The California Constitution explains the need for prosecutors to seriously consider the interests of victims in criminal sentencing: "California's victims of crimes are largely dependent...upon the criminal justice system and upon the expeditious enforcement of the rights of victims of crime...in order to protect the public safety and to secure justice when the public safety has been compromised by criminal activity." Cal. Const., art. I, § 28, subd. (a)(2) (emphasis added). "Victims of crime have a collectively shared right to expect that persons convicted of committing criminal acts are sufficiently punished in both the manner and the length of the sentences imposed by the Courts of the State of California." Cal. Const., art. I, §28(a)(5) (emphasis added). CDAA Br. at 7-8.¹⁹

The prosecutor plays a special role in protecting the victims of crime by ensuring that their interests and constitutional rights are protected. Otherwise, the prosecutor's oath and legal duty to "support the Constitution and laws of the United States and of this state" (Business & Professions ("B&P") Code §6068(a)) cannot be reconciled with his constitutional duty to enforce crime victims' constitutional rights. Cal. Const., art. I, §28(c)(1) ("[T]he prosecuting attorney upon request of the victim . . . may enforce the rights enumerated in subdivision (b) in any trial or appellate court with jurisdiction over the case as a matter of right.") CDAA Br. at 8-9.

The District Attorney's opposition to ADDA's application for a preliminary injunction fails to mention victims; there is not a single reference to a concern for victims in the sentencing process. The first three Special Directives also fail to mention victims. Special Directive 20-08.2 does mention victims by allowing enhanced sentences for (a) specified cases involving the most vulnerable victims, (b) where the victim's physical injury is extensive, and (c) financial crimes where the financial loss or impact to the victim is significant. However, Special Directive 20-08.2

¹⁹ Article 28 provides a litany of rights afforded to victims of crime, including the rights for the victim to be protected, (subd. (b)(2)), the right to have victim safety considered in the setting of bail, (subd. (b)(3)), the rights of the victim to be apprised of the proceedings and how the prosecution intends to proceed, (subds. (b)(6) – (8), (10) – (12)), and the right to restitution (subd. (b)(13)). CDAA Br. at 8.

continues to maintain that three strikes and five other sentencing enhancements “shall not be pursued in any case and shall be withdrawn in pending matters”. Hanisee Decl. ¶ 3, Ex. 4. As a result, *amicus* CDAA believes that the Special Directives wrongly protect the convicted criminal defendant, not his victims and the public. CDAA Br. at 13.

Still, Gascón’s Special Directives cannot come as a surprise. He was elected with more than 1.6 million votes on a platform of reform-minded and less punitive approaches to a variety of conduct, including serious offenses previously punished with extreme prison terms. During the campaign, Gascón specifically noted his reluctance to use sentencing enhancements or regularly to seek prison sentences in excess of 15 years. The County’s voters embraced those goals. *Amicus* Former Prosecutors argue that, although presented as issues of legality and prosecutorial ethics, the instant action is at bottom an attempt by ADDA to prevent the District Attorney from making policy decisions with which they do not agree. Yet, district attorneys, not their deputies, are accountable to the people and community they serve. If a district attorney fails to adhere to promises made, or if the public disapproves of them, they will be voted out of office. Former Pros. Br. at 15-16.

b. The Availability of Traditional Mandamus

“A writ of mandate may be issued by any court to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station, or to compel the admission of a party to the use and enjoyment of a right or office to which the party is entitled, and from which the party is unlawfully precluded by such inferior tribunal, corporation, board, or person.” CCP §1085(a).

A traditional writ of mandate under CCP section 1085 is the method of compelling the performance of a legal, ministerial duty. Pomona Police Officers’ Assn. v. City of Pomona, (1997) 58 Cal.App.4th 578, 583-84. Generally, mandamus will lie when (1) there is no plain, speedy, and adequate alternative remedy, (2) the respondent has a duty to perform, and (3) the petitioner has a clear and beneficial right to performance. *Id.* at 584 (internal citations omitted). Whether a statute imposes a ministerial duty for which mandamus is available, or a mere obligation to perform a discretionary function, is a question of statutory interpretation. AIDS Healthcare Foundation v. Los Angeles County Dept. of Public Health, (2011) 197 Cal.App.4th 693, 701.

Where a duty is not ministerial and the official has discretion, mandamus relief is unavailable unless the petitioner can demonstrate an abuse of that discretion. Mandamus will not lie to compel the exercise of a public agency’s discretion in a particular manner. American Federation of State, County and Municipal Employees v. Metropolitan Water District of Southern California, (2005) 126 Cal.App.4th 247, 261. It is available to compel an agency to exercise discretion where it has not done so (Los Angeles County Employees Assn. v. County of Los Angeles, (1973) 33 Cal.App.3d 1, 8), and to correct an abuse of discretion actually exercised. Manjares v. Newton, (1966) 64 Cal.2d 365, 370-71. In making this determination, the court may not substitute its judgment for that of the public official, whose decision must be upheld if reasonable minds may disagree as to its wisdom. *Id.* at 371. An official’s decision is an abuse of discretion only if it is “arbitrary, capricious, entirely lacking in evidentiary support, unlawful, or procedurally unfair.” Kahn v. Los Angeles City Employees’ Retirement System, (2010) 187 Cal.App.4th 98, 106. A writ will lie where the official’s discretion can be exercised only in one way. Hurtado v. Superior Court, (1974) 11 Cal.3d 574, 579.

The District Attorney is correct that a writ of mandamus ordinarily will not issue to compel a prosecutor to plead (or not plead) any charge, or to move to dismiss a sentencing enhancement. Prosecutorial decisions to plead criminal charges and sentencing enhancements are discretionary, not ministerial. Boyne v. Ryan, (1893) 100 Cal. 265, 266-67 (“we think that the district attorney in determining whether or not, in any particular instance, he should bring an action under said section, is vested with a discretion which a court cannot control by *mandamus*”); Taliaferro v. Locke, (1960) 182 Cal.App.2d 752, 757 (“the matters of investigation and prosecution were matters in which the district attorney is vested with discretionary power as to which mandamus will not lie”). Opp. at 10-11.

ADDA replies that the District Attorney and his supporting *amici* misunderstand the relief it seeks. ADDA does not seek to compel the District Attorney to exercise his discretion in a particular manner, such as to prosecute a particular individual or file a particular charge. Instead, ADDA seeks to prohibit the District Attorney from enforcing 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. Reply at 12.

As ADDA correctly argues, the essence of mandamus is to compel a public officer’s compliance with his or her mandatory duty. See, e.g., Collins v. Thurmond, (2019) 41 Cal. App. 5th 879, 914. The Special Directives categorically bar prosecutors from pleading and proving prior strikes and ADDA contends that this violates a mandatory duty. Reply at 12. 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., (2014) 248 Cal. App. 4th 349, 370.

According to ADDA, the Special Directives unlawfully eliminate all case-by-case discretion in seeking dismissal of six enumerated enhancements. This lawsuit does not concern discretionary charging decisions; the only charging policy at issue is the Three Strikes law which ADDA contends is mandatory, not discretionary. The remaining relief concerns policies governing the dismissal of charges once pled, which is never solely a matter of prosecutorial discretion. People v. Superior Court (Romero), (“Romero”) (1996) 13 Cal. 4th 497, 515. Gascón cannot insulate from judicial scrutiny countywide policies that violate his legal duties and which nullify laws adopted by statewide voter initiatives and enacted by the Legislature. Reply at 13.

Thus, the issue for the court is whether the District Attorney has acted unlawfully in his Special Directives by directing his deputy district attorneys not to file strike priors for Three Strikes law cases, by compelling them to move to dismiss or otherwise delete strike priors and other sentencing enhancements from existing cases, and by failing to exercise discretion in individual cases by issuing blanket policies for dismissal of sentencing enhancements. If ADDA is correct, mandamus may issue to remedy these unlawful acts.

c. The Three Strikes Law

In 1982, the People of California adopted the Three Strikes law by a 70% majority to increase punishment for repeat offenders to effectuate the goals of sentencing and to protect the public from violent criminals. The Three Strikes Law reads in pertinent part:

“(f)(1) Notwithstanding any other law ... The prosecuting attorney shall plead and

prove each prior serious or violent felony conviction except as provided in paragraph (2).

(2) The prosecuting attorney may move to dismiss or strike a serious or violent felony conviction allegation in the furtherance of justice pursuant to Section 1385, or if there is insufficient evidence to prove the prior serious or violent felony conviction” §§ 667(f)(1), (2), 1170.12(d)(1), (2) (emphasis added).

The Three Strikes law involves a two-step process: First, “[t]he prosecuting attorney shall plead and prove each prior serious or violent felony conviction.” §§ 667(f)(1). Second, “[t]he prosecuting attorney may move to dismiss or strike a prior serious or violent felony conviction allegation in the furtherance of justice pursuant to section 1385, or if there is insufficient evidence to prove the prior serious or violent felony conviction.” *Id.* Upon a prosecutor’s motion, the judge or magistrate may order an action to be dismissed in furtherance of justice. §1385(a). App. at 7.

In construing a statute, a court must ascertain the intent of the legislature so as to effectuate the purpose of the law. Brown v. Kelly Broadcasting Co., (1989) 48 Cal.3d 711, 724; Orange County Employees Assn. v. County of Orange, (“Orange County”) (1991) 234 Cal.App.3d 833, 841. The court first looks to the language of the statute, attempting to give effect to the usual, ordinary import of the language and seeking to avoid making any words mere surplusage. Brown v. Kelly Broadcasting Co., (1989) 48 Cal 3d 711, 724. Significance, if possible, is attributed to every word, phrase, sentence and part of an act in pursuance of the legislative purpose. Orange County, *supra*, 234 Cal.App.3d at 841. “‘The statute’s words generally provide the most reliable indicator of legislative intent; if they are clear and unambiguous, ‘[t]here is no need for judicial construction and a court may not indulge in it. [Citation.]’” MCI Communications Services, Inc. v. California Dept. of Tax & Fee Administration, (2018) 28 Cal. App. 5th 635, 643. If a statute is ambiguous and susceptible to more than one reasonable interpretation, the court may resort to extrinsic aids, including principles of construction and legislative history. MacIsaac v. Waste Management Collection & Recycling, Inc., (2005) 134 Cal.App.4th 1076, 1082 (*quoting* Riverview Fire Protection Dist. v. Workers’ Comp. Appeals Bd., (1994) 23 Cal.App.4th 1120, 1126).

(i). Plain Meaning

The Three Strikes law provides that the district attorney must “plead and prove” strike priors. §667(f)(1). What does this mean?

ADDA contends that the plain language obligates the prosecuting attorney to plead and prove prior felonies. “Notwithstanding any other law, subdivisions (b) to (i), inclusive, shall be applied in every case in which a defendant has one or more prior serious or violent felony convictions as defined in subdivision (d). The prosecuting attorney shall plead and prove each prior serious or violent felony conviction except as provided in paragraph (2).” §§ 667(f)(1) (emphasis added). “It is a well-settled principle of statutory construction that the word . . . ‘shall’ is ordinarily construed as mandatory.” Doe v. Albany Unified Sch. Dist., (2010) 190 Cal. App. 4th 668, 676. Thus, 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, (“Roman”) (2001) 92 Cal. App. 4th 141, 145; *see also, e.g.*, People v. Vera, (2004) 122 Cal. App. 4th 970, 982 (“The

Three Strikes statutes, enacted in 1994, require prosecutors to plead and prove each prior felony conviction.”); People v. Kilborn, (“Kilborn”) (1996) 41 Cal. App. 4th 1325, 1332 (“The Three Strikes law requires the prosecutor to plead and prove all prior serious and violent felony convictions.”). App. at 7-8.

ADDA argues that, notwithstanding this plain requirement, the Special Directives abandon the Three Strikes law and mandate that deputy district attorneys – regardless of the evidence or considerations about the defendant – “shall not...pursue in any case” any sentencing enhancements under the Three Strikes law. By directing deputy district attorneys not to pursue strike priors, Gascón is forcing them to violate the law as well as the oath required of all prosecutors to “bear true faith and allegiance to the Constitution of the United States and of the State of California,” and to “well and faithfully discharge the duties” of their office. *See* Cal. Const. art. XX, §3. As attorneys, deputy district attorneys also are statutorily bound to follow the law: “It is the duty of an attorney to....support the Constitution and laws of the United States and of this state.” B&P Code §6068(a). ADDA argues that the Special Directives require deputy district attorneys to violate the law. App. at 8.

The District Attorney points out that the word “shall” in the Three Strikes law is not necessarily mandatory. Notwithstanding its ordinary connotation, the word “shall” in a statute is not always obligatory rather than permissive, and this is particularly true on issues of prosecutorial discretion. Gananian, *supra*, 199 Cal.App.4th at 1540 (despite Education Code’s statement that “law enforcement officials shall expeditiously pursue the investigation and prosecution of any violation”, district attorney did not have mandatory duty to investigate violations of school bond act). “[T]here are unquestionably instances in which other factors will indicate that apparently obligatory language was not intended to foreclose a governmental entity’s or officer’s exercise of discretion.” *Id.*²⁰

The District Attorney notes that courts previously have held that criminal statutes using the word “shall” do not impose a mandatory duty for prosecutors to charge a particular crime. *See Taliaferro v. Locke*, *supra*, 182 Cal.App.2d at 752 (“shall” in Govt. Code section 26501 is permissive and prosecutors retain discretion in charging crimes); Ascherman v. Bales, (1969) 273 Cal.App.2d 707, 708 (same). The same is true for a district attorney’s civil duties. Wilson v. Sharp, (1954) 42 Cal.2d 675, 678-79 (Govt. Code section 26525’s statement that the district attorney “shall” institute suit for recovery of county funds illegally paid required exercise of discretion). The District Attorney argues that, given the separation of powers concerns involved, the court’s interpretation of the Three Strikes law cannot end with a facial reading of the word “shall”. Rather section 667(f)(1)’s language must be construed against the constitutional

²⁰ The Gananian court reasoned that the Education Code provision at issue was “uniquely word[ed]” and its vagueness suggested that it should be construed as an expression of policy rather than mandate. *Id.* at 1541. An interpretation of the language as compulsory would encroach on executive branch functions and violate the basic precept that “the district attorney of each county independently exercises all the executive branch’s discretionary powers in the initiation and conduct of criminal proceedings.” *Id.* at 1542-43 (citation omitted). Gananian declined to “impute to the Legislature an intent to overthrow long-established principles of law, such as prosecutorial discretion, unless such intention is made clearly to appear either by express declaration or by necessary implication.” *Id.* at 1543 (citation omitted). ACLU Br. at 11.

importance of the separation of powers and the backdrop of statutes using the word “shall” that still preserve prosecutorial discretion. Opp. at 12. See ACLU Br. at 10-11.

Amicus ACLU adds that, as in Gananian, this court should presume that the legislature understood the constitutional constraints of the separation of powers doctrine and intended “shall” to be read as a permissive expression of legislative policy. *Amicus* ACLU explains that the doctrine of constitutional avoidance supports this statutory interpretation:

“If a statute is susceptible of two constructions, one of which will render it constitutional and the other unconstitutional in whole or in part, or raise serious and doubtful constitutional questions, the court will adopt the construction which, without doing violence to the reasonable meaning of the language used, will render it valid in its entirety, or free from doubt as to its constitutionality, even though the other construction is equally reasonable. The basis of this rule is the presumption that the Legislature intended, not to violate the Constitution, but to enact a valid statute within the scope of its constitutional powers.” Romero, *supra*, 13 Cal. 4th at 509 (emphasis added) (citation omitted). ACLU Br. at 11-12.

Amicus ACLU contends that Romero is instructive. There, the California Supreme Court considered whether the trial court may strike, pursuant to section 1385, felony convictions pled as prior strikes pursuant to the Three Strikes law without the prosecutor’s involvement. 13 Cal. 4th at 504. Romero began by reaffirming the principle that “the [judicial] power to dismiss an action includes the lesser power to strike factual allegations relevant to sentencing, such as the allegation that a defendant has prior felony convictions.” *Id.* The court first noted that the legislature may completely eliminate a trial court’s power to strike felony allegations. *Id.* at 513, 516. The court then considered the language of the Three Strikes law to decide whether the legislature intended to give prosecuting attorneys the power to veto judicial decisions to strike prior convictions qualifying as strike priors. *Id.* at 517-18. The court concluded that section 1385’s judicial power to dismiss has long existed in conjunction with statutes defining punishment and therefore “a clear legislative direction” would be required to eliminate the court’s power. *Id.* at 518. The Romero court found no such clear direction in the Three Strikes law. *Id.* at 527-28. The court held that a trial court has the power to *sua sponte* dismiss a strike prior so long as it acts in the furtherance of justice, which the court explained means consideration of both the rights of the defendant and “the interests of society represented by the People”, and not for judicial convenience or reasons of court congestion. *Id.* at 530-31.

Amicus ACLU argues that Romero’s reasoning applies to the present case. Just as the judicial power to dismiss an action includes the lesser power to strike sentencing allegations, prosecutorial discretion to decline to bring a criminal charge necessarily includes the lesser power to decline to plead sentencing enhancements connected to a criminal charge. ADDA’s interpretation of the Three Strikes law takes away this prosecutorial discretion in a manner that raises serious constitutional questions. The court should avoid these serious questions and adopt a constitutional construction that interprets the term “shall” as permissive and permits the exercise of prosecutorial discretion in declining to plead prior convictions. ACLU Br. at 13.

The court concludes that there is ambiguity in the language of the Three Strikes law that the district attorney must “plead and prove” strike priors. §667(f)(1). One can reasonably

conclude that this “plead and prove” language refers to the prosecutor’s due process duty to give notice to the criminal defendant that a prior conviction is alleged as an enhancement, and then to prove that allegation beyond a reasonable doubt. Pursuant to this interpretation and consistent with due process, a criminal defendant may not be sentenced under the Three Strikes law unless the necessary allegations have been pled and proved.

This interpretation is supported by the obvious fact that a prosecutor cannot be compelled to actually prove a strike prior; he or she can only be compelled to attempt to prove the prior conviction. If the prosecutor can only be compelled to attempt to prove a strike prior, then the “plead and prove” language reasonably may be interpreted to mean that these events are a condition to enhanced sentencing under the Three Strikes law.

Despite its reasonableness, this interpretation crops the photograph too closely. The court must interpret section 667(f) pursuant to the entirety of its language. See Orange County, *supra*, 234 Cal.App.3d at 841. The interpretation is not supported by the rest of section 667(f)(1), which requires the Three Strikes law to be applied in every case in which the defendant has a prior serious or violent conviction, and that the prosecuting attorney “shall plead and prove” the strike prior “except as provided in paragraph (2)”. In turn, paragraph (2) permits a prosecuting attorney to move to dismiss a prior strike conviction pursuant to 1385 or if there is insufficient evidence to prove it. Collectively, paragraphs (1) and (2) require that strike priors must be applied in every pertinent case, the prosecutor must plead and prove the strike prior, and the prosecutor subsequently may seek to dismiss it if there is a legal basis under section 1385. There would be no reason for either the “shall be applied in every case” language or the paragraph (2) exception if the prosecutor had full discretion to ignore prior strikes under the Three Strikes law.

Romero touched on this very issue. Noting that section 667(f)(1) provides that “[t]he prosecuting attorney shall plead and prove each prior felony conviction except as provided in paragraph (2)”, the court stated that the “shall plead and prove” language in paragraph one “would seem to bar the prosecutor from moving to strike prior felony conviction allegations, in the absence of section paragraph (2), which “purports to be *an exception* to the prosecutor’s duty to prove all prior felony convictions....” 13 Cal.4th at 523 (emphasis in original). “In other words, section 667(f) first purports to remove the prosecutor’s charging discretion completely, and then purports to replace that discretion with permission to file a motion to strike ‘pursuant to section 1385,’ which the court may or may not grant.” *Id.* at 523 (emphasis added).

The Romero court concluded that the plain meaning of section 667(f)(1) requires a prosecutor to plead and prove all qualifying strike priors. The prosecutor then may seek dismissal under section 1385 as part of a plea agreement or other reason in the interest of justice. This is true despite the rules of construction relied upon by the District Attorney and his supporting *amici*. Those rules of construction do not apply where statutory meaning is clear from its language. See MacIsaac v. Waste Management Collection & Recycling, Inc., *supra*, 134 Cal.App.4th at 1082. Considering the Three Strikes law’s purpose of enhanced sentencing for habitual offenders and Romero’s clear statements that the legislature may remove a judge’s power to strike sentencing allegations and how the plead and prove provision operates, a prosecutor must plead all priors and has a duty to prove them if he or she can do so.²¹

²¹ Several *amicus* briefs rely on advocacy studies and articles about sentencing reform, recidivism, and disparate sentencing to justify the District Attorney’s position. Former Pros. Br.

(ii). Case Law

The District Attorney argues that “no published decision has ever concluded the Three Strikes Law imposes purely ‘ministerial’ duties on prosecutors to “plead and prove” every single potentially available prior felony conviction as a sentencing enhancement.” Opp. at 12. At the February 2 hearing, Gascón’s attorney agreed that this statement might be an overstatement and explained that his position is that the legislature can limit prosecutorial discretion in alleging sentence enhancements, but cannot eliminate it.

In deciding that the Three Strikes law does require the prosecutor to plead and prove strike priors, the court is bound by Kilborn, *supra*, 41 Cal. App. 4th at 1325, in which the defendant pled to a methamphetamine possession felony and was sentenced under the Three Strikes law. *Id.* at 1328-29. The defendant argued that the Three Strikes law violates due process and equal protection on the basis that it was irrational. *Id.* at 1328-29. In holding that the law was a proper exercise of the legislative goal to punish recidivist criminals, the court explained that the Three Strikes law requires a prosecutor to plead and prove all strike priors. *Id.* at 1332. The defendant complained that this requirement violates separation of powers because it usurps prosecutorial discretion – the same argument raised by Gascón in this case. *Id.*

The Kilborn court explained that the validity of this argument depended on whether the charging discretion of prosecutors can be limited by law, and there was no authority for that proposition. *Id.* at 1332. Former Constitution art. XI, section 1(b) provided that “the Legislature shall provide for an elected district attorney” and section 5 of the same article provided that “the Legislature, but general and uniform laws...shall prescribe their duties.” *Ibid.* The Legislature has done so, principally in Govt. Code section 26500 *et seq.* and its predecessor statutes. *Ibid.* The court noted that, while section 5 of article XI was repealed by the voters in 1970, the pertinent Government Code provisions were not affected by it. *Id.* Consequently, the district attorney acts as a state officer when prosecuting crimes and the authority of his office derives from statute. *Id.* at 1333 (citations omitted).

Kilborn concluded that the Three Strikes law’s requirement that the prosecutor plead and prove prior strikes is not unlike other statutes requiring the district attorney to act. *Id.* at 1333 (citing, *inter alia*, §969 (“all known previous convictions, whether in this State or elsewhere, must be charged”)). The court noted that the prosecutor retains substantial authority and discretion under the Three Strikes law, including deciding whether the defendant has suffered a qualifying conviction and moving to dismiss a strike prior in the furtherance of justice under section 1385 or if there is insufficient evidence. *Id.* As a result, the Three Strikes law does not violate the separation of powers provision of the state Constitution. *Id.*

at 12-14, n. 17-35. Apart from their relevance only to the District Attorney’s motivation and irrelevance to the legal issues at hand, these views are but one side of the story. As stated *ante*, California law focuses on punishment as the reason for imprisonment. *In re Morrall*, *supra*, 102 Cal. App. 4th at 292. Moreover, while both the District Attorney and his supporting *amici* argue that recidivism becomes more likely as prison sentences grow longer (Opp. at 8; Former Pros. Br. at 13), that argument has no bearing on the Three Strikes law. By definition, the defendants in three strikes cases have strike priors and are already recidivists. Hence, the title of section 667: “Habitual criminals; enhancement of sentence...” (emphasis added).

Subsequent cases have followed Kilborn. See People v. Butler, (“Butler”) (1996) 43 Cal. App. 4th 1224, 1247–48 (“Defendant also argues that the three strikes law...violates the princip[le] of separation of powers because it unlawfully usurps prosecutorial discretion. These arguments were rejected in...Kilborn...for reasons we find persuasive.”); People v. Gray, (“Gray”) (1998) 66 Cal. App. 4th 973, 995 (“adopting the “sound reasoning of Kilborn” and “concluding that the section 1170.12, subdivision (d)(1) does not violate the separation of powers doctrine enactment of the three strikes law.”).

Roman, *supra*, 92 Cal. App. 4th 141, addressed former District Attorney Steve Cooley’s office policy on three strikes. The defendant had three prior strikes and was charged with possession of a small quantity of methamphetamine. *Id.* at 144. He was convicted and sentenced under the Three Strikes law to 25 years to life in prison. *Id.*

The Roman court first noted that, while the general rule is that the selection of criminal charges is a matter of prosecutorial discretion, the Three Strikes law limits that discretion by requiring a prosecutor to plead and prove prior strikes. *Id.* at 145. Nor can the prosecutor unilaterally strike a prior or abandon a prosecution. *Id.* (citing section 1386 requirement that a district attorney cannot abandon a prosecution except as provided by section 1385). *Id.* When the court’s jurisdiction has been properly invoked by filing a criminal charge, the disposition of the charge is a judicial responsibility and the prosecution’s only discretion is the ability to move to strike a prior serious felony conviction allegation in the interest of justice. *Id.* “This limitation on prosecutorial discretion does not violate the separation of powers doctrine.” *Id.*, n. 2 (citing Kilborn).

The court noted that, while Roman’s case was on appeal, then District Attorney Cooley adopted a new policy for the Office. Through a special directive, he ordered that “all qualifying prior felony convictions shall be alleged in the pleadings.” *Id.* at 145 (emphasis added). The directive further provided that the case would be presumed a third strike for a defendant with two prior strikes only if the pending charge is a serious felony or a significant quantity drug charge. Otherwise, the case would be presumed as a second strike and the prosecutor should move to strike all but one prior serious felony conviction. *Id.* This presumption could be rebutted. *Id.*

Roman argued that he would not have been charged under the Three Strikes law if this new directive had been in place. *Id.* at 148. The Roman court held there was no basis for this argument. The directive required all of Kilborn’s prior serious felony convictions to be charged as required by the Three Strikes law. *Id.* (citing §1170.12(d)(1)). The directive addressed only a deputy district attorney’s discretion to move to strike, did not categorically require the prosecutor to do so, and the trial judge might deny the motion. *Id.* Therefore, the new policy did not lessen the penalty to which defendants are exposed and there was no reason for abatement to reduce the defendant’s sentence. *Id.* at 148.

Most recently, in People v. Laanui, (Cal. Ct. App. Jan. 8, 2021) 59 Cal. App. 5th 803 2021 WL 71151, the defendant was convicted of murder, solicitation of murder, and other offenses. After he was sentenced under the Three Strikes law, he 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 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, *supra*, 92 Cal. App. 4th at 145). As a result, the court reasoned, the Three Strikes law put the defendant

on notice that the prior strike allegations applied to count 6 even if they were not specifically pled for 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. The court distinguished the California Supreme Court’s holding in People v. Anderson, (2020) 9 Cal.5th 946, that a non-mandatory firearm enhancement must be affirmatively pled for each count to which the enhancement is sought: “[U]nder 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.

The District Attorney contends that these cases do not hold that he has a ministerial duty to mechanically plead strike priors in every case. He argues that these cases suggest only that the Three Strikes law places some limits on prosecutorial discretion after a strike has been pled -- *e.g.*, the procedure to dismiss a strike or a prosecutor’s options for pleading strikes once the prosecutor has made the unreviewable decision to do so -- and hold only that criminal defendants may not invoke a separation of powers claim concerning the Three Strikes law for their own sentence. The District Attorney admits that the Three Strikes law places limits on prosecutorial discretion, just as there is no doubt that other statutes limit a prosecutor’s discretion how matters should be pled once the district attorney has opted to do so. However, these cases do not suggest or hold that the district attorney has a ministerial duty to plead sentencing enhancements in the first place. Opp. at 14.

The District Attorney distinguishes Kilborn as a case in which a criminal defendant who had been charged with prior strikes under the Three Strikes law claimed that the was an unconstitutional violation of separation of powers. The defendant contended “that the charging discretion of prosecutors cannot be limited by law” without violating the separation of powers. Kilborn rejected this notion, but it relied on statutes requiring specific forms of pleading once the prosecutor had pled a charge and “provisions restricting the discretionary authority of prosecutors (and courts) to enter plea bargains.” *See* 41 Cal. App. 4th at 1332-33 (citing section 969’s requirement that specific prior felonies “must be” pled, Govt. Code §26528, Welf. & Inst. Code §11481, and §1192.7(a)(restricting plea bargaining)).²² The District Attorney contends that Kilborn correctly found that the Three Strikes law constitutionally limits prosecutorial discretion, but it never addressed whether the Three Strikes law removes all prosecutorial discretion in pleading strikes. Opp. at 14.

The District Attorney distinguishes Roman as mentioning Kilborn but not analyzing the effect of the Three Strikes law on the discretion of a prosecutor to plead sentencing enhancements. He distinguishes Laanui as relying on the “shall plead” language in the Three Strikes law to hold that a criminal defendant received adequate notice that strikes pled by the prosecutor would apply to each count alleged in the information. He argues that Laanui merely noted that the Three Strikes law implies conclusions about procedure once a strike prior is pled and said nothing about the prosecutor’s discretion to allege a strike in the first place. Opp. at 15.

The District Attorney’s distinctions of these cases are unavailing. It is true that those cases

²² At the February 2 hearing, both sides agreed that section 969’s language that “...all known previous convictions, whether in this State or elsewhere, must be charged” does not require a district attorney to allege prior felonies outside the Three Strikes law.

all involved a criminal offender's separation of powers challenge to the Three Strikes law, but Gascón fails to show why this makes a difference. Contrary to his argument, Kilborn did consider the Three Strikes law's limit on discretionary charging decisions and held that the limits do not violate the separation of powers doctrine. Kilborn did not need to consider the elimination of all prosecutorial discretion because the Three Strikes law did not purport to do so. Roman also squarely held 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. Finally, contrary to Gascón's contention that Laanui addresses only the procedure for pleading strikes, Laanui held that the prosecutor's failure to plead a prior strike for a particular count was immaterial precisely because the Three Strikes law places a defendant on notice that the prosecutor has no discretion to allege a strike prior for some eligible counts and not others. 2021 WL 71151 at *15.²³

²³ The District Attorney relies on In re Coley, *supra*, 55 Cal.4th at 559, which stated that the sentence actually imposed in a three strikes case depends "not only upon the number of the defendant's strike priors, but also upon the prosecutor's exercise of prosecutorial discretion in determining how many prior convictions to charge in the case." Gascón concludes that this language means that there is no mandatory duty for a prosecutor to allege every eligible prior conviction in the charging instrument. *Opp.* at 12-13.

He is wrong. The quoted language in In re Coley cites section 667(f)(2), which permits the prosecutor to move to dismiss a strike prior under section 1385 in the furtherance of justice or if there is insufficient evidence to prove it. The discretionary decision to move to dismiss is wholly different from the mandatory obligation to plead strikes in the first place. *See Roman*, *supra*, 92 Cal. App. 4th at 145.

The District Attorney also relies on a footnote in People v. Nguyen, (2017) 18 Cal.App.5th 260, 267, n.1, which states: "the three strikes law states that ... '[t]he prosecuting attorney shall plead and prove each prior serious and/or violent felony conviction,' ... [a]s far as our research reveals, these provisions of the three strike law have never been interpreted as requiring the prosecution to plead and prove a prior conviction as a prior serious felony conviction enhancement." Gascón concludes that this means a prosecutor may make "a discretionary charging decision" to allege in the charging paper the fact of a prior conviction, but not allege it as a sentencing enhancement. *Id.* at 267-69. *Opp.* at 13.

As ADDA replies (Reply at 9), the District Attorney is conflating two different enhancements: the five-year enhancement for a prior serious felony conviction (§667(a)), which is not mandatory, and the prior strike enhancement under the Three Strikes law (§667(b)-(i)), which is mandatory. Nguyen concerned the adequacy of an information's allegation of the defendant's prior serious felony conviction. The defendant had a prior burglary conviction which qualified both as a strike prior under the Three Strikes law and as a five-year prior under section 667(a). 18 Cal.App.5th at 262. The information indicated that the prior conviction was being pled solely for purposes of the Three Strikes law and failed to allege it as a serious felony enhancement under section 667(a). *Id.* at 262, 266-67. The court noted that every prior serious felony is also a strike prior. *Id.* The court held that when the prosecution alleges a prior serious felony conviction and cites only the Three Strikes law and not the five-year prior statute (§667(a)), it has made a discretionary charging decision to charge only the strike prior. *Id.* at 267. In the footnote cited by

Amicus ACLU embellishes on the District Attorney's arguments. ACLU argues that Kilborn answered a different question than the one at issue and its reasoning relied on constitutional provisions that are no longer in force and that have been changed in a manner which reaffirms a district attorney's prosecutorial power. ACLU admits that Kilborn held that the Three Strikes law does not violate the principle of separation of powers by requiring prosecutors to plead and prove prior felony convictions and contends that its proffered reasons of constitutionality are unavailing. *Id.* at 1327-33. ACLU Br. at 13-14. At the February 2 hearing, Gascón's counsel agreed with both of ACLU's points.

According to ACLU, Kilborn began its constitutional inquiry by evaluating whether a prosecutor's charging discretion can be limited by the Three Strikes law, not whether a prosecutor's charging discretion is eliminated by the Three Strikes law, which is the issue in this case. *Id.* at 1332. Relying solely on repealed provisions of the California Constitution permitting the legislature to prescribe the duties of district attorneys, Kilborn rejected the argument that prosecutorial charging discretion cannot be limited by the Three Strikes law. *Id.* at 1332.

ACLU finds Kilborn's reasoning for this conclusion unpersuasive. Kilborn relied on language in Cal. Const. Art. XI, section 1(b) that was repealed in 1970. Subsequent revisions to the California Constitution codified the separation of powers doctrine and firmly rejected the notion that the legislature may proscribe the duties of prosecutors. As codified, California Constitution Art. III, section 3 provides that "[t]he powers of state government are legislative, executive, and judicial [and] [p]ersons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution." Art. V, section 13 provides that the investigation and prosecution of crime are executive functions that are supervised solely by the state Attorney General. These California Constitution provisions undermine Kilborn's conclusion that prosecutorial charging discretion can be limited, let alone eliminated, by law. ACLU Br. at 14-15.

Kilborn also relied on Govt. Code section 26500, enacted before the California Constitution was amended, as an exemplar of the legislature proscribing the duties of prosecutors. *Id.* at 1332. However, section 26500 provides that "[t]he public prosecutor shall attend the courts, and within his or her discretion shall initiate and conduct on behalf of the people all prosecutions for public offenses." (emphasis added). ACLU notes that Govt. Code section 26500 clearly establishes that the prosecutor retains discretion as to whether to initiate and conduct prosecutions by qualifying "shall" in the second clause with the phrase "within his or her discretion." See Taliaferro v. Locke, *supra*, 182 Cal.App.2d at 757 ("shall" as used in Govt. Code §26501 is permissive because it is qualified by discretionary language). ACLU Opp. at 15.

ACLU concludes that Kilborn and its progeny which largely adopt its flawed reasoning,²⁴

the District Attorney, the court noted that no law requires the prosecution to plead and prove a five-year enhancement under section 667(a). *Id.* at 267, n. 1. The footnote does not suggest that charging strikes is not mandatory; it contrasted the two enhancements on this very basis. *Ibid.*

²⁴ ACLU admits that Roman held that "the Three Strikes law limits [prosecutorial] discretion and requires the prosecutor to plead and prove each prior serious felony conviction." 92 Cal. App. 4th at 145. ACLU acknowledges that Butler, *supra*, 43 Cal. App. 4th at 1224 dismissed the separation of powers argument and argues that Butler merely relied on the fact that the separation of powers argument had been made and rejected in Kilborn. Finally, ACLU argues that

fail to grapple with (1) the question of whether a prosecutor can be required to plead prior convictions pursuant to the Three Strikes law and (2) the serious constitutional concerns inherent in the legislature eliminating prosecutorial charging discretion in this context. Thus, the holding in Kilborn does not constrain this court. ACLU Br. at 15-16.

ACLU is wrong on both points. First, section 667(f)(1)'s "plead and prove" requirement does not eliminate prosecutorial discretion. It limits prosecutorial discretion, which both Gascón and ACLU acknowledge is constitutionally permissible. As stated *ante*, the Three Strikes law expressly requires the prosecuting attorney to plead and prove strike priors "except as provided in paragraph (2)." In turn, paragraph (2) permits the prosecuting attorney to move to dismiss a prior strike conviction pursuant to 1385 or if there is insufficient evidence to prove it. Collectively, paragraphs (1) and (2) require the prosecutor to plead and prove a strike prior, but the prosecutor subsequently may seek to dismiss it under section 1385 pursuant to a plea agreement, if warranted, or otherwise.

The California Supreme Court in Romero referred to this "plead and prove" interpretation of section 667(f)(1) in upholding a trial court's authority to strike priors without the prosecution's approval. The Romero court stated that section 667(f)(1) purports to eliminate the prosecutor's charging discretion by stating: "[t]he prosecuting attorney shall plead and prove each prior felony conviction except as provided in paragraph (2)". The court stated that the "shall plead and prove" language "would seem to bar the prosecutor from moving to strike prior felony conviction allegations, in the absence of section paragraph (2), which 'purports to be an exception to the prosecutor's duty to prove all prior felony convictions....' 13 Cal.4th at 523 (emphasis in original). 'In other words, section 667(f) first purports to remove the prosecutor's charging discretion completely, and then purports to replace that discretion with permission to file a motion to strike 'pursuant to section 1385,' which the court may or may not grant.'" *Id.* at 523 (emphasis added).²⁵

In sum, Romero discusses, and Kilborn expressly adopts, an interpretation of section 667(f)(1) that the prosecutor is required to plead prior convictions pursuant to the Three Strikes law. Kilborn further adopts the question left open by Romero and held that, while prosecutorial discretion is generally unfettered, there is no constitutional concern in requiring a prosecutor to plead and prove strike priors because he or she has discretion to move to strike under section 1385. That is what the voters and the legislature both wanted in adopting the Three Strikes law.

Second, ACLU's criticism of Kilborn's reasoning as based on repealed language in Cal. Const. Art. XI, section 1(b) is untenable. Kilborn expressly noted the fact of repeal and noted that it was not intended to affect the legislature's ability to enact laws directing the district attorney's conduct. 41 Cal.App.4th at 1332-33. Thus, the 1972 constitutional codification of state government powers (legislative, executive, and judicial) and separation of those powers (Art. III, §3), and the 1974 placement of chief law officer powers in the attorney general, including direct supervision over district attorneys and sheriffs (Art. V, §13) have no bearing on Kilborn's reasoning that Government Code sections 26500-509 remain lawful governing provisions for a district attorney's criminal law duties.

Gray, *supra*, 66 Cal. App. 4th at 995, merely adopted Kilborn's reasoning. ACLU Br. at 15, n. 5.

²⁵ The Romero court declined to decide whether this interpretation of section 667(f)(1) requiring prosecutors plead and prove all strike priors violates separation of powers. 13 Cal.4th at 515, n. 7. Kilborn decided that it does not.

ACLU's argument that Govt. Code section 26500 invests the district attorney with discretion to initiate and conduct prosecutions is a strawman. It is undisputed that a district attorney has virtually unfettered discretion in initiating criminal charges and Kilborn does not state otherwise. ACLU has admitted that the legislature (and voters) can limit that discretion, and section 667(f)(1)'s "plead and prove" requirement does just that without eliminating it.

In sum, Romero explains, and five appellate cases (Kilborn, Butler, Gray, Roman and Laanui) expressly have held, that prosecutors have a duty to plead and prove strike priors under the Three Strikes law. Three of those appellate cases (Kilborn, Butler, and Gray) also have held that this requirement is not an unconstitutional intrusion into prosecutorial discretion. This case law is binding on this court, which also agrees with it. See Auto Equity Sales, Inc. v. Superior Court, (1962) 57 Cal.2d 450, 455.

(iii). The Three Strikes Pleading Practice of Prosecutors

Gascón argues that nothing about his Special Directives concerning the Three Strikes law is entirely novel. The use of prosecutorial discretion to plead sentencing enhancements—under the Three Strikes Law and otherwise—is routine throughout California and commonly directed by district attorney office policy. Prosecutors throughout California have followed their office policies and routinely exercised their discretion in a Three Strikes case to determine (a) how many eligible prior convictions to allege, (b) whether to plead every eligible conviction as a sentencing enhancement, and (c) whether to pursue the matter as a Three Strikes case. See Joseph Decl., Khine Decl., ¶3; Munkelt Decl., ¶¶ 4, 6. Opp. at 13-14.

This contention is inconsistent with the Office's policy prior to Gascón's arrival as the District Attorney. When District Attorney Cooley was in office, he was concerned that a third strike could be a minor felony – e.g., theft of a pizza – that would lead to a 25 to life sentence. As the Roman court explained, District Attorney Cooley issued a special directive intended to address this issue while complying with the Three Strikes law. The special directive ordered that "all qualifying prior felony convictions shall be alleged in the pleadings." 92 Cal.App.4th at 145. The directive further provided that the new case would be presumed as a third strike for a defendant with two prior strikes only if the new charge is a serious felony or involved a significant quantity of drugs. Otherwise, the case would be presumed as a second strike and the prosecutor should move to strike all but one prior serious felony conviction. Id. The policy provided that this presumption could be rebutted. Id.²⁶

District Attorney Cooley's special directive was entirely consistent with the plead and prove requirement of section 667(f)(1). So was the Office's written policy immediately prior to Gascón's Special Directives, which provided:

"12.05 THREE STRIKES

"All qualifying prior felony convictions shall be alleged in the pleadings pursuant to Penal Code section 1170.12(d)(1). Prior to seeking dismissal of any strike, the

²⁶ District Attorney Cooley's policy of treating the defendant as a second striker where the third strike is not a serious or violent felony was adopted by voters in Prop 36, the Three Strikes Reform Act of 2012.

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). Supp. Hanisee Decl., ¶4, Ex. 15.

Thus, the Office policy has been to follow the Three Strikes “plead and prove” requirement until the new Special Directives. Whether or not some prosecutors in the County or in other counties have not always followed the plead and prove requirement of the Three Strikes law is legally irrelevant. The perceptions of two public defenders, a defense attorney, and one prosecutor that some prosecutors do not follow the law cannot demonstrate the law’s requirements.

(iv). Pending Three Strikes Cases

(a). The Required Statement

Special Directive 20-08.1 provides that if a pending matter has strike priors alleged, deputy district attorneys shall make the following record:

“The People move to dismiss and withdraw any strike prior (or other enhancement) in this case. We submit that punishment provided within the sentencing triad of the substantive charge(s) in this case are sufficient to protect public safety and serve justice.....The California Constitution and State Supreme Court precedent further vest the District Attorney with sole authority to determine whom to charge, what charges to file and pursue, and what punishment to seek. That power cannot be stripped from the District Attorney by the Legislature, Judiciary, or voter initiative without amending the California Constitution. It is the position of this office that Penal Code section 1170.12(d)(2) and Penal Code 667(f)(1) are unconstitutional and infringe on this authority.... (emphasis added).

This direction is both inaccurate and inconsistent. As discussed *ante*, the District Attorney does not have sole authority whether to allege a strike prior; he must plead and prove them under section 667(f)(1). The Special Directive is not even consistent with the District Attorney’s position in this case. As discussed at the February 2 hearing, Gascón does not contend that the Three Strikes law is unconstitutional. Rather, he contends that it must be interpreted consistently with the separation of powers doctrine to not require him to plead strike priors.

The direction also wrongly requires deputy district attorneys to move to dismiss or otherwise abandon strike priors based on mere antipathy towards the Three Strikes law. A dismissal under section 1385 may be granted only “in the furtherance of justice” and must consider “whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme’s spirit.” *People v. Williams*, (1998) 17 Cal. 4th 148, 161 (emphases added). The dismissal may not be based on “bare antipathy to the consequences [of not dismissing] for any given defendant.” *Id.*

Finally, while Special Directive 20-08.1 states that the Three Strikes law is unconstitutional, Gascón cannot unilaterally decide that the plead and prove requirement for strike

priors in the Three Strikes law is unconstitutional as a reason to direct deputy district attorney action. “[A] local executive official, charged with a ministerial duty, generally lacks authority to determine that a statute is unconstitutional and on that basis refuse to apply the statute.” Lockyer v. City & Cty. of San Francisco, (2004) 33 Cal. 4th 1055, 1086. “[T]he determination whether a statute is unconstitutional and need not be obeyed is an exercise of judicial power and thus is reserved to those officials or entities that have been granted such power by the California Constitution”. Id. at 1093.

(b). Amending the Information

Special Directive 20-08.1 further provides that, “if a court refuses to dismiss the prior strike allegations or other enhancements/allegations based on the People’s oral request, the [deputy district attorney] shall seek leave of the court to file an amended charging document pursuant to Penal Code section 1009.”

ADDA notes that the court, not the prosecutor, decides whether to strike a prior conviction when the prosecutor makes a motion under section 1385. *See Roman, supra*, 92 Cal. App. 4th at 148. Yet, if the court denies the prosecutor’s motion to dismiss an enhancement, the Special Directive requires the deputy district attorney to seek leave to file an amended charging document – ostensibly to eliminate the enhancement allegation that the court refused to dismiss. ADDA argues that this tactic runs afoul of both the Three Strikes law’s “plead and prove” requirement and section 1386, which provides that “neither the Attorney General nor the district attorney can discontinue or abandon a prosecution for a public offense, except as provided in section 1385.” ADDA concludes that Gascón has a ministerial duty to proceed with a prosecution, including the Three Strikes enhancement, once it has been initiated unless the court permits it to be dismissed. App. at 14.

The District Attorney contends that there is nothing wrong with a prosecutor repleading an information without strikes if the court refuses to dismiss because the judiciary does not have a right to dismiss anything more than the allegations in a charging instrument. *See Manduley v. Super. Ct.*, (“Manduley”) (2002) 27 Cal.4th 537, 553 (charging decisions “not invalid simply because the prosecutor’s exercise of such charging discretion necessarily affects the dispositional options available to the court”). Opp. at 17.

The District Attorney is wrong. Once a charge has been filed, the prosecutor cannot abandon it without the trial court’s permission. §1386. In upholding a district attorneys’ statutory authority to file certain felony charges against minors directly in criminal court and not juvenile court, Manduley stated as much: “[T]he separation of powers doctrine prohibits the legislative branch from granting prosecutors the authority, *after* charges have been filed, to control the legislatively specified sentencing choices available to the court.” 27 Cal.4th at 553 (emphasis in original).

A district attorney has a right to amend an indictment or information, but only before the defendant’s plea or a demurrer is sustained. §1009. Even then, the prosecutor cannot dismiss a charge without leave of court. Owen v. Superior Court, (1976) 54 Cal. App. 3d 928, 934 (district attorney may not by amendment change the offense charged). Special Directive 20-08.1 appears to recognize this, but its direction for the prosecutor to seek leave to amend to delete the strike prior if the trial court denies its dismissal violates both the Three Strikes law and sections 1385 and 1386.

(c). Ethical Considerations

Apart from its inaccuracy and unlawfulness, ADDA is concerned about its members' ethical responsibilities in reading the Special Directive 20-08.1 statement into the record. ADDA contends that this language will cause deputy district attorneys to violate B&P Code section 6068(d), which provides that an attorney must not mislead a judge by any artifice or false statement. A line prosecutor may feel that dismissal of a strike prior is inappropriate because the facts do not warrant leniency and RPC 3.3 "requires attorneys to cite any known, adverse authority." App. at 3.

At the February 2 hearing, Gascón's counsel argued that everyone in the criminal court system knows that the line prosecutor's required statement on the record comes from the District Attorney's Special Directives. Under RPC 3.1, the District Attorney is permitted ethically to advance a position contrary to current law as long as it is supported by "a good faith argument for an extension, modification or reversal of existing law." The California Supreme Court in Romero expressly reserved its view on whether the "plead and prove" requirement violates the separation of powers. Given that reservation, the District Attorney may reasonably believe that the California Supreme Court would conclude that the requirement violates separation of powers. Opp. at 18.

The District Attorney adds that his view of prosecutorial discretion does not create a legal ethical dilemma for his deputy district attorneys because they are entitled to follow a supervisory lawyer's view of the law. RPC rule 5.2(b) states that "[a] subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty." Opp. at 18, n. 6. Nor does anything in Special Directive 20-08.1 prohibit a deputy district attorney from supplementing the record by citing pertinent case authority to a court. Allowing deputy district attorneys to challenge the District Attorney's policy directives under the guise of legal ethics complaints would substitute the policy views of line prosecutors for the view of the district attorney. Opp. at 17-18.

The court partly agrees. A deputy district attorney generally does not violate his or her ethical responsibilities by following the District Attorney's directive. RPC 5.2(b). However, as Romero reflects, the California Supreme Court has not decided whether the plead and prove requirement violates separation of powers. The District Attorney can make a good faith argument that although Kilborn, Butler, Gray expressly, and Roman and Laanui impliedly, have concluded otherwise, the "plead and prove" requirement of section 667(f)(1) violates separation of powers and that this issue has not been decided by the California Supreme Court. If the Special Directive 20-08.1 statement referred to this case authority, it would not create an ethical dilemma for line prosecutors. But it does not. Plainly, Kilborn and other appellate cases must be cited to the court if the constitutionality of the pleading and prove requirement of the Three Strikes law is at issue. It is insufficient to say that line prosecutors can correct this failure in the required statement by citing adverse authority to satisfy their ethical responsibility.

The District Attorney does not address ADDA's argument that prosecutors may feel that dismissal of a strike prior is ethically inappropriate because the case's facts do not warrant leniency. However, this issue is disposed of for three strikes purposes by the fact that deputy district attorneys have an obligation to follow their superior's direction on case outcome and ethically may rely on that direction. See RPC 5.2(b).

(v). Conclusion

The District Attorney has abandoned the Three Strikes law through the Special Directives that prevent deputy district attorneys from pleading and proving strike priors as required by section 667(f)(1). As demonstrated by the plain language of the Three Strikes law and case law, this direction is unlawful. Nor can the Special Directives lawfully compel a deputy district attorney to move to dismiss a strike prior under section 1385 based on antipathy to the Three Strikes law or seek leave to amend to drop a strike prior when a trial court denies a motion to dismiss a strike prior. The Special Directive 20-08.1 statement that prosecutors are required to read in court is legally inaccurate and incomplete and reading this statement in court without correction is unethical.

ADDA has shown a probability of success on its claims that the Special Directives (a) unlawfully compel deputy district attorneys to (a) not plead strike priors in violation of the Three Strikes law, (b) dismiss or withdraw strike priors in violation of the Three Strikes law, section 1385, and section 1386, and (c) read an inaccurate, incomplete, and inconsistent statement to the trial court.

c. The Special Directives' Mandate for Other Existing Enhancement Allegations

(i). The Dismissal of Existing Enhancement Allegations

Apart from the Three Strikes law, ADDA notes that the Special Directives require deputy district attorneys to seek dismissals of all existing enhancement allegations in every pending case. These sentencing enhancements include five-year prior enhancements (§667(a)(1)), three-year prior enhancements (§667.5(a)), gang enhancements (§186.22), special circumstances allegations resulting in an LWOP sentence (§§ 190.1 to 190.5), and enhancements for violations of bail or O.R. release (§12022.1) and use of a firearm (§12022.53). As with Three Strikes law allegations, the Special Directives require that a motion to dismiss these enhancements from pending cases be made under section 1385(a) “in the furtherance of justice.” §1385(a). If the trial court denies the motion to dismiss, the deputy district attorney further must move for leave to amend the charging document for the purpose of removing the allegation.

Although the parties mingle them, ADDA raises two separate issues with respect to sentencing enhancements other than strike priors: (a) a prosecutor’s duty to pursue and not dismiss existing charges and (b) the lawfulness of a blanket office policy.

(ii). Section 1385

ADDA argues that an existing enhancement cannot be dismissed without the court’s approval. ADDA notes that both the District Attorney and his deputy district attorneys have a mandatory duty to prosecute crime. “The district attorney is the public prosecutor, except as otherwise provided by law. The public prosecutor shall attend the courts, and within his or her discretion shall initiate and conduct on behalf of the people all prosecutions for public offenses.” Govt. Code §26500 (emphasis added). The district attorney’s duty under Govt. Code section 26500 to prosecute crimes is mandatory, not discretionary. City of Merced v. Merced Cty., (1966) 240 Cal. App. 2d 763, 766. App. at 10.

ADDA contends that section 1385 incorporates a prosecutor’s obligation to exercise case-by-case discretion rather than operate under blanket policies. A dismissal under section 1385 may be granted only “in the furtherance of justice” and must consider “whether, in light of the nature

and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit." People v. Williams, (1998) 17 Cal. 4th 148, 161 (emphases added). The dismissal may not be based on a judge's "bare antipathy to the consequences [of not dismissing] for any given defendant." Id.

In People v. Dent, (1995) 38 Cal. App. 4th 1726, the court vacated the dismissal of a prior strike precisely because it was "guided solely by a personal antipathy for the effect that the three strikes law would have on defendant." Id. at 1731. The court held that a dismissal cannot simply reason backwards from the lengthy sentence the court wished to avoid because "[a] sentence based on such an approach constitutes a failure to exercise discretion as required by the law." Id. Rather, there must be a consideration of the defendant's individual circumstances. Id. The court remanded to the trial court for it to "resentence defendant on an individualized basis, rather than impose a sentence predicated solely upon a desire to avoid the consequences of the three strikes law." Id. App. at 12.

ADDA concludes that the District Attorney's blanket policy barring the enforcement of six sentencing enhancements in all cases – and requiring their abandonment in all existing cases where they are alleged – squarely contradicts the California Supreme Court's instruction in People v. Williams that section 1385 dismissals must account for a particular defendant's individual circumstances, and not simply "reason backwards" from the enhanced sentences Gascón now unilaterally wishes to eliminate. App. at 12-13.

The District Attorney argues that his Special Directives' requirement that deputy district attorneys move to dismiss sentencing enhancements is based on his right as the representative of the People to reach conclusions about what actions should be taken in the "furtherance of justice." Contrary to ADDA's argument, the Special Directives do nothing to interfere with the judiciary's role. Opp. at 17.

Gascón distinguishes People v. Williams and People v. Dent as cases concerning whether a court can decide under section 1385 to dismiss sentencing enhancements based a judge's "personal antipathy" to the effects of an underlying sentencing law. *See People v. Williams, supra*, 17 Cal.4th at 159; People v. Dent, supra, 38 Cal.App.4th at 1731. The District Attorney argues that prosecutors are in a fundamentally different position from judges because they make charging decisions based on policy concerns about the administration of justice. Judges are supposed to act on legal bases, not policy, and nothing in these two cases suggests that a district attorney is forbidden from concluding that the interests of justice compel a motion to dismiss already-pled enhancements based on policy concerns. To do so is the essence of prosecutorial discretion. Opp. at 16-17.

The District Attorney's argument may be distilled to contend that, while a judge must consider a section 1385 motion based on the law, his deputy district attorneys do not need a legal ground to make the motion. Rather, a section 1385 motion can be made on policy considerations. Gascón cites no authority to support this conclusion and it would violate a prosecutor's duty to make a motion on anything besides a legal ground. Lawyers do not make motions based on policy. *See* RPC 3.1(a)(2) ("A lawyer shall not present a claim or defense in litigation that is not warranted under existing law...."). *See also* CRC 3.1110(a) (d) (civil notice of motion and motion must state legal ground).

Moreover, a prosecutor's interest in justice is similar, albeit not identical, to the judge's

interest. People v. Dent squarely distinguishes between a judge's permissible exercise of discretion 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. ADDA correctly concludes that there is no reason why this same requirement does not apply to the District Attorney's prosecutors. Reply at 11.

Thus, a deputy district attorney may not move to strike an existing prior based on Office policy and must have a legal ground to do so. The Special Directives violate section 1385 and 1386 in requiring otherwise.

(iii). Blanket Policy

ADDA contends that the District Attorney's blanket prosecutorial policy to dismiss all enhancement allegations eschewing any case-by-case assessment impermissibly prevents deputy district attorneys from exercising any discretion. "[A] district attorney's 'mandatory' duty is to exercise his or her *discretion* to prosecute crimes." Becerra, supra, 29 Cal. App. 5th at 504 (emphasis in original). While "mandate cannot be used to compel a district attorney to exercise his or her prosecutorial discretion in any particular way," mandate can be employed to compel the district attorney to take action "if a district attorney failed and refused to prosecute any crimes whatsoever." Id. ADDA argues that the mandatory duty to exercise of discretion refers to the exercise of case-by-case discretion. Since deputy district attorneys are duty bound to exercise their discretion, the Special Directives contravene California law. App. at 10-11.

ADDA relies on two out-of-court cases limiting blanket prosecutorial policies that do not allow for the exercise of case-by-case discretion. App. at 10-11.

In State v. Pettitt, ("Pettitt") (1980) 93 Wash. 2d 288, the prosecutor filed an information asserting that the defendant was a "habitual criminal" making him eligible for an enhanced sentence. Id. at 296. At the time, "the Lewis County prosecuting attorney had a mandatory policy of filing habitual criminal complaints against all defendants with three or more prior felonies." Id. at 290. Under the policy, "once the prior convictions were clearly established by the record, [the prosecutor] had no choice but to file a supplemental information." Id. The prosecuting attorney testified that "he did not consider any mitigating circumstances in reaching his decision, and that he could imagine no situation which would provide for an exception to the mandatory policy." Id. at 296. In vacating the criminal sentence, the Washington Supreme Court held that "this 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." Id.

In State v. City Court of City of Tucson, ("Tucson") (1986) 150 Ariz. 99, the Arizona Supreme Court concluded that blanket prosecutorial policies were unlawful. Id. at 102. There, the city attorney had instituted a policy requiring that all prosecutors file a peremptory challenge in every case against a particular judge. Citing Pettitt, the Arizona Supreme Court held this to be impermissible, reasoning that the policy "infringed upon the obligation of each Deputy City Prosecutor to exercise his or her individual professional judgment on a case by case basis." Id. App. at 10-11.

ADDA argues that California also has held as impermissible an executive branch official's blanket refusal to exercise discretion. In In re Morrall, (2002) 102 Cal. App. 4th 280, the court considered a challenge to the governor's refusal to grant an inmate parole. The court recited the

well-established rules that there is no right to parole before the expiration of the defendant's sentence, the decision whether to grant parole is expressly committed to the executive branch, and that "the discretion of the parole authority has been described as 'great' and 'almost unlimited.'" *Id.* at 287. Nonetheless, the court held that "[i]t is without doubt that a blanket no-parole policy would be contrary to the law" because the governor is required to make an "individualized [determination] of an inmate's suitability for parole." *Id.* at 291 (citing *Roberts v. Duffy*, (1914) 167 Cal. 629, 640–41 and *In re Minnis*, (1972) 7 Cal. 3d 639, 642). Thus, "[a] refusal to consider the particular circumstances relevant to an inmate's individual suitability for parole would be contrary to the law." *Id.* at 292. App. at 11-12.

ADDA concludes that the District Attorney's blanket policy barring the enforcement of six sentencing enhancements in all cases is analytically indistinguishable from the refusal to exercise discretion that these cases have found unlawful. A district attorney owes statutory and ministerial obligations to employ his discretion on a case-by-case basis and the Special Directives plainly violate those obligations. App. at 12-13.

The District Attorney disagrees. He argues there is nothing wrong with a district attorney making a policy determination, based on considerations of public safety and the public good, that it is appropriate to move to dismiss such sentencing enhancements, even as a blanket policy. Gascón argues that his issuance of the Special Directives is itself an exercise of his prosecutorial discretion. The California Supreme Court has held that the district attorney's "inherent executive authority includes not only the power to authorize diversion on a case-by-case basis, but extends also to the establishment or approval of general eligibility standards to guide the exercise of such discretion by all deputies under his direction." *Davis v. Municipal Court*, (1988) 46 Cal.3d 64, 77 (statute authorizing diversion on approval of district attorney was not unconstitutional delegation of legislative power). The District Attorney adds that the Special Directives are not even close to a district attorney's failure "to prosecute any crimes whatsoever." *Becerra, supra*, 29 Cal.App.5th at 504. Instead, he has exercised his discretion in prosecuting crimes not to seek sentencing enhancements as a matter of policy because of his view of the overall benefits to public safety, which he contends is a decision at the core of prosecutorial discretion. Opp. at 15-16.²⁷

ADDA replies that Gascón's assertion -- there is nothing wrong with blanket policies mandating dismissal of sentencing enhancements without any case-by-case exercise of discretion -- does not make it true, and the Supreme Courts of Washington and Arizona disagree. ADDA argues that *Pettitt* is particularly on point because it concerned a district attorney's blanket policy with respect to seeking sentencing enhancements. ADDA concludes that "there can be no serious doubt" that California's appellate courts will follow the same approach as the highest courts of Washington and Arizona. The sole case cited by the District Attorney, *Davis v. Municipal Court, supra*, 46 Cal. 3d at 77, holds only that district attorneys may establish general standards "to guide the exercise of such [prosecutorial] discretion by all deputies under his direction". ADDA argues that the Special Directives do not guide deputy district attorneys' exercise of discretion, but categorically bar them from exercising any discretion. Reply at 10-11.

In essence, ADDA is arguing that there is a difference between a blanket bar of all

²⁷ Gascón argues that *In re Morrall* is distinguishable because parole is governed by a separate statutory scheme. Opp. at 16, n. 5.

sentencing enhancements and an office policy of general standards that restricts pleading them. Pursuant to ADDA's argument, the District Attorney may announce a policy severely limiting the pleading of strike priors and other enhancements -- and may require approval by senior management when a deputy district attorney wants to plead such an enhancement -- but he may not impose a blanket policy preventing penalty enhancement allegations in all cases. To do so is a failure to exercise discretion in an individual case as required.

In support of its position, ADDA has relied on two out-of-court cases (Pettitt and Tucson) and a parole case (In re Morrall). As Gascón's counsel argued at the February 2 hearing, Tucson concerned a blanket peremptory judicial challenge and is factually distinguishable. Moreover, the ADDA has not compared the nature of that statutory scheme to California's peremptory challenge law. In re Morrall is based on a separate statutory scheme from criminal prosecutions and again ADDA has not compared the two schemes. Finally, Pettitt concerned a blanket policy that may implicate a defendant's right to due process, a matter not at issue in the Special Directives.

At the preliminary injunction stage, the court is unwilling to conclude that a blanket policy against sentencing enhancements is not an exercise of discretion because that discretion must be made on a case-by-case basis.²⁸

(iv). The Special Directives Require Deputy District Attorneys to Seek Dismissal of Special Circumstance Allegations that Cannot Be Dismissed

Special Directive 20.08-2 requires that "[s]pecial circumstances allegations resulting in an LWOP [life without possibility of parole] sentence shall not be filed, will not be used for sentencing, and shall be dismissed or withdrawn from the charging document."

ADDA argues that this Special Directive requires deputy district attorneys to move to dismiss allegations that a judge has no discretion to dismiss. While judges generally have discretion to dismiss criminal prosecutions under section 1385, the People in Prop 115 specifically abrogated this discretion for certain special circumstances allegations: "Notwithstanding Section 1385 or any other provision of law, a judge shall not strike or dismiss any special circumstance which is admitted by a plea of guilty or nolo contendere or is found by a jury or court as provided in Sections 190.1 to 190.5, inclusive." §1385.1.²⁹ Sections 190.1 to 190.5 are the special circumstances allegations that would result in a sentence of LWOP. App. at 13.

ADDA concludes that, because of section 1385.1, a judge has no discretion to dismiss post-jury guilty verdict and post-guilty plea special circumstance allegations. ADDA concludes that the Special Directive 20.08-2 violates California law and legal ethics by requiring deputy district attorneys to move to dismiss a special circumstance allegation where there is no legal basis to make such a motion. See RPC 3.1(a)(2). App. at 13.

²⁸ A determination on the blanket policy issue in ADDA's favor would enable prosecutors to file discretionary sentencing enhancements (meaning other than strike priors) for new cases until the District Attorney issued a new policy. Although ADDA's application argues for that remedy (App. at 14), the notice of motion does not do so. Nor did ADDA's counsel propose this relief at the February 2 hearing.

²⁹ Even the legislature cannot repeal section 1385.1 absent a supermajority vote. See People v. Solis, (2020) 46 Cal. App. 5th 762, 773 ("Proposition 115 specifically permitted amendment by the Legislature, but only if approved by a supermajority of both houses.").

The court mostly agrees. Special Directive 20.08-2 has three components. First, it requires deputy district attorneys not to file special circumstance allegations that would result in an LWOP sentence. This is lawful. Special Directive 20.08-2 does not violate section 1385.1 in precluding the initial charging of special circumstances allegations. Second, Special Directive 20.08-2 requires prosecutors to seek to dismiss or withdraw special circumstances allegations from the charging document. This requirement violates sections 1385 and 1386. Third, Special Directive 20.08-2's direction that the special circumstances "will not be used for sentencing" violates section 1385.1 because the allegations will have been proved or admitted and must be used for sentencing.³⁰

(v). Conclusion

ADDA has shown a probability of success on other sentencing enhancements as follows. The Special Directives violate section 1385 and 1386 by requiring deputy district attorneys to move to strike enhancements without a legal ground for doing so. The Special Directive's requirement that special circumstance allegations that would result in a LWOP sentence "be dismissed or withdrawn" violates sections 1385 and 1386 and its direction that the special circumstances "will not be used for sentencing" violates section 1385.1. ADDA has not shown that the District Attorney's blanket policy against prior enhancements is a failure to exercise discretion.

3. Balance of Hardships

In determining whether to issue a preliminary injunction, the second factor which a trial court examines is the interim harm that plaintiff is likely to sustain if the injunction is denied as compared to the harm that the defendant is likely to suffer if the court grants a preliminary injunction. Donahue Schriber Realty Group, Inc. v. Nu Creation Outreach, (2014) 232 Cal.App.4th 1171, 1177. This factor involves consideration of the inadequacy of other remedies, the degree of irreparable harm, and the necessity of preserving the status quo. *Id.*

ADDA argues that its members are being harmed by the fact that judges have scolded them for following the Special Directives instead of their obligations under the law. *See Hanisee Decl.* ¶ 6, Ex. 6 (Hon. Judge Laura F. Priver: "I understand it came from the top. I understand why you're making the motion, but the Court will deny the motion as to each and every one of the other allegations. You have an ethical duty to do your job and proceed with prosecution. You should not be allowed to abandon the prosecution at this juncture."). Deputy district attorneys risk being held in contempt of court or disciplined by the State Bar for following their employer's orders. *Id.* ¶¶ 4-5.

The District Attorney argues that the balancing of relative harms in a preliminary injunction proceeding involves consideration of "the status quo" and "the degree of adverse effect on the public interest or interests of third parties" in addition to irreparable harm. Vo v. City of Garden Grove, (2004) 115 Cal.App.4th 425, 435. He argues that a preliminary injunction would upset the status quo, which is his issuance of the Special Directives. *Opp.* at 19. He disputes that any irreparable injury to deputy district attorneys, who cannot rely on a hypothetical future injury of

³⁰ The District Attorney's counsel conceded the unlawfulness of Special Directive 20.08-2's sentencing component at the February 2 hearing.

contempt. *See Keel v. Hedgpeth*, (E.D. Cal. Nov. 19, 2009) 2009 WL 4052707 at *1. Opp. at 19. Finally, the District Attorney argues that a preliminary injunction would not be in the public interest since it would interfere with the will of the more than two million County voters who elected him and would impose undue and unwarranted costs on the administration of justice and criminal defendants. Opp. at 19.

ADDA correctly replies that the District Attorney wrongly sets forth the status quo. The relevant “status quo” is defined “the last actual peaceable, uncontested status which preceded the pending controversy”. *People v. Hill*, (1977) 66 Cal. App. 3d 320, 331. The last uncontested status before the pending controversy is the prosecutorial procedures that existed before the Special Directives, which is the previous Office policy.

ADDA also correctly notes that the District Attorney fails to identify any harm that would befall him from a preliminary injunction. ADDA points out that Gascón’s argument about the will of the County voters who elected him ignores the will of the 5.9 million voters— 70% of the California electorate—who voted for the Three Strikes law.

In evaluating the harm to ADDA’s members, the court will break apart compliance with Three Strikes law from the other sentencing enhancements. For the Three Strikes law, the court accepts ADDA’s discussion of harm to its members. The Special Directives require unlawful conduct and an attorney’s violation of law during litigation is unethical. *See* RPC 8.4(a), (e); B&P Code §6068(a). There is clear harm to a deputy district attorney from following the Special Directives for strike priors, including possible sanctions, contempt, and State Bar discipline.

For the other sentencing enhancements, the harm is less significant. The Special Directives force prosecutors to move to dismiss an existing enhancement without a legal basis to do so. They also require the deputy district attorney to disregard the denial of a section 1385 by seeking leave to amend a charging document to delete the enhancement, again without a legal basis. This procedure is not legal, but a superior’s direction for a subordinate to act illegally does not necessarily result in harm. At most, it exposes the prosecutor to the possibility of sanctions, but not State Bar discipline.

It is true, as the District Attorney argues, that the trial judge should know that deputy district attorneys are following the direction of their employer, making sanctions less likely. However, ADDA’s members already have incurred trial courts’ ire and need not wait until one of them is sanctioned or disciplined by the State Bar. There is a real prospect of sanctions and 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.*, (2004) 121 Cal. App. 4th 623, 643. Reply at 14.

Finally, while ADDA asks that deputy district attorneys be permitted to file sentencing enhancements in new cases, its members would appear to suffer no personal harm in not doing so. It is less likely that a criminal court will berate a prosecutor for not filing an enhancement that was never charged than for seeking dismissal of one. No sanctions, contempt, or State Bar discipline realistically should result from following Office policy on charging issues.

While the District Attorney will suffer no personal harm, the public interest strongly weighs in his favor. He has almost unfettered discretion to perform his prosecutorial duties and the public expects him to evaluate the benefits and costs of administering justice in prosecuting crimes. He was elected on the very platform he is trying to implement and any intrusion on this prosecutorial discretion is not in the public interest unless clearly warranted.

Nonetheless, the balance of harms works somewhat in favor of the deputy district attorneys.

The District Attorney's disregard of the Three Strikes "plead and prove" requirement is unlawful, as is requiring deputy district attorneys to seek dismissal of pending sentencing enhancements without a lawful basis. An injunction against a public official's unlawful actions cannot, by definition, interfere with the lawful exercise of the official's duties. See PEOP, *supra*, 53 Cal.App.5th at 405.

G. Conclusion

ADDA's application for a preliminary injunction is granted in large part. A preliminary injunction will issue that enjoins the District Attorney, through his Special Directives, from (a) requiring deputy district attorneys not to plead and prove strike priors under the Three Strikes law, (b) requiring deputy district attorneys to read the statement in Special Directive 20-08.1 to trial courts without adding qualifying language concerning Kilborn and other controlling case law and without having legal grounds to seek dismissal under section 1385, (c) compelling deputy district attorneys to move to dismiss strike priors or any existing sentencing enhancement in a pending case without having legal grounds as required by section 1385, (d) compelling deputy district attorneys to move to dismiss or withdraw special circumstance allegations that would result in a LWOP sentence without legal grounds as required by sections 1385 and 1386, and (e) compelling deputy district attorneys not to use proven special circumstances for sentencing in violation of section 1385.1. The preliminary injunction will not enjoin the District Attorney from preventing deputy district attorneys from charging sentencing enhancements in new cases where not required by the Three Strikes law.

Absent inapplicable circumstances, a bond is required for every preliminary injunction. As neither party briefed the issue, a nominal bond of \$250 is required. ADDA must post the bond within five court days and provide evidence to the District Attorney's counsel that it has done so.

Dated: February 8, 2021

Superior Court Judge

**Exempt From Filing Fee
Government Code § 6103**

OFFICE OF COUNTY COUNSEL
Rodrigo A. Castro-Silva (185251)
RCastro-Silva@counsel.lacounty.gov
Adrian G. Gragas (150698)
AGragas@counsel.lacounty.gov
Jonathan C. McCaverty (210922)
jmccaverty@counsel.lacounty.gov
500 West Temple St., Floor 6
Los Angeles, California 90012
Telephone: 213.974.1828
Facsimile: 213.687.8822

KENDALL BRILL & KELLY LLP
Robert E. Dugdale (167258)
rdugdale@kbbkfirm.com
Laura W. Brill (195889)
lbrill@kbbkfirm.com
Nicholas F. Daum (236155)
ndaum@kbbkfirm.com
Nary Kim (293639)
nkim@kbbkfirm.com
10100 Santa Monica Blvd., Suite 1725
Los Angeles, California 90067
Telephone: 310.556.2700
Facsimile: 310.556.2705

Attorneys for Defendants and Respondents George
Gascón, in his official capacity as District Attorney
for the County of Los Angeles, and the Los
Angeles County District Attorney's Office

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES, CENTRAL DISTRICT**

THE ASSOCIATION OF DEPUTY
DISTRICT ATTORNEYS FOR LOS
ANGELES COUNTY,

Plaintiff and Petitioner,

v.

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

NOTICE OF APPEAL

Date: February 2, 2021

Time: 1:30 p.m.

Dept.: 85

Judge: Hon. James C. Chalfant

1 **NOTICE OF APPEAL**

2 Defendants and Respondents (a) George Gascón, in his official capacity as District Attorney
3 for the County of Los Angeles, and (b) Los Angeles County District Attorney's Office, hereby
4 appeal from:

5 (a) The Court's order on a preliminary injunction, dated February 8, 2021 (the "Preliminary
6 Injunction Order") (C.C.P. § 904.1(a)(6));

7 (b) Any and all other orders encompassed in the Preliminary Injunction Order; and

8 (c) Any and all other orders issued in this action that are separately appealable.
9

10 DATED: February 9, 2021

KENDALL BRILL & KELLY LLP

11
12 By: 

Robert E. Dugdale

13 Attorneys for Defendants and Respondents George
14 Gascón and the Los Angeles County District
15 Attorney's Office
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PROOF OF SERVICE

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 10100 Santa Monica Blvd., Suite 1725, Los Angeles, CA 90067.

On February 9, 2021, I served true copies of the following document(s) described as **NOTICE OF APPEAL** on the interested parties in this action as follows:

Eric M. George
Thomas P. O'Brien
David J. Carroll
Matthew O. Kussman
BROWNE GEORGE ROSS O'BRIEN
ANNAGUEY & ELLIS LLP
2121 Avenue of the Stars, Suite 2800
Los Angeles, California 90067
Telephone: (310) 274-7100
Email: egeorge@bgrfirm.com
tobrien@bgrfirm.com
dcarroll@bgrfirm.com
mkussman@bgrfirm.com

Attorneys for Plaintiff and Petitioner The
Association of Deputy District Attorneys for Los
Angeles County

BY E-MAIL OR ELECTRONIC TRANSMISSION: I caused the document(s) to be sent to each interested party at the email addresses listed above or on the attached 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 February 9, 2021, at Los Angeles, California.



Patricia S. Perelló

Form Approved for Optional Use
Judicial Council of California
APP-003 [Rev. January 1, 2019]

Cal. Rules of Court, rules 3.50,
8.121–8.124, 8.128, 8.130, 8.134, 8.137
www.courts.ca.gov

CASE NAME: Gascón v. The Association of Deputy District Attorneys for Los Angeles County	SUPERIOR COURT CASE NUMBER: 20STCP4250
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2. b. ☒ WITH the following record of the oral proceedings in the superior court (you must check (1), (2), or (3) below):
- (1) ☒ A reporter's transcript under rule 8.130. (You must fill out the reporter's transcript section (item 5) on pages 3 and 4 of this form.) I have (check all that apply): **Exempt from payment, Government Code § 6103.**
- (a) ☐ Deposited with the superior court clerk the approximate cost of preparing the transcript by including the deposit with this notice as provided in rule 8.130(b)(1).
- (b) ☐ Attached a copy of a Transcript Reimbursement Fund application filed under rule 8.130(c)(1).
- (c) ☐ Attached the reporter's written waiver of a deposit under rule 8.130(b)(3)(A) for (check either (i) or (ii)):
- (i) ☐ all of the designated proceedings.
- (ii) ☐ part of the designated proceedings.
- (d) ☐ Attached a certified transcript under rule 8.130(b)(3)(C).
- (2) ☐ An agreed statement. (Check and complete either (a) or (b) below.)
- (a) ☐ I have attached an agreed statement to this notice.
- (b) ☐ All the parties have stipulated (agreed) in writing to try to agree on a statement. (You must attach a copy of this stipulation to this notice.) I understand that, within 40 days after I file the notice of appeal, I must file either the agreed statement or a notice indicating the parties were unable to agree on a statement and a new notice designating the record on appeal.
- (3) ☐ A settled statement under rule 8.137. (You must check (a), (b), or (c) below, and fill out the settled statement section (item 6) on page 4.)
- (a) ☐ The oral proceedings in the superior court were not reported by a court reporter.
- (b) ☐ The oral proceedings in the superior court were reported by a court reporter, but I have an order waiving fees and costs.
- (c) ☐ I am asking to use a settled statement for reasons other than those listed in (a) or (b). (You must serve and file the motion required under rule 8.137(b) at the same time that you file this form. You may use form APP-025 to prepare the motion.)

3. RECORD OF AN ADMINISTRATIVE PROCEEDING TO BE TRANSMITTED TO THE COURT OF APPEAL

- ☐ I request that the clerk transmit to the Court of Appeal under rule 8.123 the record of the following administrative proceeding that was admitted into evidence, refused, or lodged in the superior court (give the title and date or dates of the administrative proceeding):

Title of Administrative Proceeding	Date or Dates
------------------------------------	---------------

4. NOTICE DESIGNATING CLERK'S TRANSCRIPT

(You must complete this section if you checked item 1a above indicating that you choose to use a clerk's transcript as the record of the documents filed in the superior court.)

- a. **Required documents.** The clerk will automatically include the following items in the clerk's transcript, but you must provide the date each document was filed, or if that is not available, the date the document was signed.

Document Title and Description	Date of Filing
--------------------------------	----------------

- (1) Notice of appeal
- (2) Notice designating record on appeal (this document)
- (3) Judgment or order appealed from
- (4) Notice of entry of judgment (if any)
- (5) Notice of intention to move for new trial or motion to vacate the judgment, for judgment notwithstanding the verdict, or for reconsideration of an appealed order (if any)
- (6) Ruling on one or more of the items listed in (5)
- (7) Register of actions or docket (if any)

CASE NAME: Gascón v. The Association of Deputy District Attorneys for Los Angeles County	SUPERIOR COURT CASE NUMBER: 20STCP4250
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4. NOTICE DESIGNATING CLERK'S TRANSCRIPT

- b. **Additional documents.** (If you want any documents from the superior court proceeding in addition to the items listed in 4a. above to be included in the clerk's transcript, you must identify those documents here.)

☐ I request that the clerk include in the transcript the following documents that were filed in the superior court proceeding. (You must identify each document you want included by its title and provide the date it was filed or, if that is not available, the date the document was signed.)

	Document Title and Description	Date of Filing
(8)		
(9)		
(10)		
(11)		

☐ See additional pages. (Check here if you need more space to list additional documents. List these documents on a separate page or pages labeled "Attachment 4b," and start with number (12).)

- c. **Exhibits to be included in clerk's transcript**

☐ I request that the clerk include in the transcript the following exhibits that were admitted in evidence, refused, or lodged in the superior court. (For each exhibit, give the exhibit number, such as Plaintiff's #1 or Defendant's A, and a brief description of the exhibit. Indicate whether or not the court admitted the exhibit into evidence. If the superior court has returned a designated exhibit to a party, the party in possession of the exhibit must deliver it to the superior court clerk within 10 days after service of this notice designating the record. (Rule 8.122(a)(3).))

	Exhibit Number	Description	Admitted (Yes/No)
(1)			
(2)			
(3)			
(4)			

☐ See additional pages. (Check here if you need more space to list additional exhibits. List these exhibits on a separate page or pages labeled "Attachment 4c," and start with number (5).)

5. NOTICE DESIGNATING REPORTER'S TRANSCRIPT

You must complete both a and b in this section if you checked item 2b(1) above indicating that you choose to use a reporter's transcript as the record of the oral proceedings in the superior court. Please remember that you must pay for the cost of preparing the reporter's transcript.

- a. **Format of the reporter's transcript**

I request that the reporters provide (check one):

- (1) ☐ My copy of the reporter's transcript in electronic format.
- (2) ☐ My copy of the reporter's transcript in paper format.
- (3) ☒ My copy of the reporter's transcript in electronic format and a second copy in paper format.

(Code Civ. Proc., § 271.)

CASE NAME: Gascón v. The Association of Deputy District Attorneys for Los Angeles County	SUPERIOR COURT CASE NUMBER: 20STCP4250
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5. b. **Proceedings**

I request that the following proceedings in the superior court be included in the reporter's transcript. (You must identify each proceeding you want included by its date, the department in which it took place, a description of the proceedings (for example, the examination of jurors, motions before trial, the taking of testimony, or the giving of jury instructions), the name of the court reporter who recorded the proceedings (if known), and whether a certified transcript of the designated proceeding was previously prepared.)

Date	Department	Full/Partial Day	Description	Reporter's Name	Prev. prepared?
(1) 2/2/2021	85	Partial	Preliminary Injunction Transcript	Cindy Cameron	<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No
(2)					<input type="checkbox"/> Yes <input type="checkbox"/> No
(3)					<input type="checkbox"/> Yes <input type="checkbox"/> No
(4)					<input type="checkbox"/> Yes <input type="checkbox"/> No

☐ See additional pages. (Check here if you need more space to list additional proceedings. List these exhibits on a separate page or pages labeled "Attachment 5b," and start with number (5).)

6. **NOTICE DESIGNATING PROCEEDINGS TO BE INCLUDED IN SETTLED STATEMENT**

(You must complete this section if you checked item 2b(3) above indicating you choose to use a settled statement.) I request that the following proceedings in the superior court be included in the settled statement. (You must identify each proceeding you want included by its date, the department in which it took place, a description of the proceedings (for example, the examination of jurors, motions before trial, the taking of testimony, or the giving of jury instructions), the name of the court reporter who recorded the proceedings (if known), and whether a certified transcript of the designated proceeding was previously prepared.)

Date	Department	Full/Partial Day	Description	Reporter's Name	Prev. prepared?
(1)					<input type="checkbox"/> Yes <input type="checkbox"/> No
(2)					<input type="checkbox"/> Yes <input type="checkbox"/> No
(3)					<input type="checkbox"/> Yes <input type="checkbox"/> No
(4)					<input type="checkbox"/> Yes <input type="checkbox"/> No

☐ See additional pages. (Check here if you need more space to list additional proceedings. List these proceedings on a separate page or pages labeled "Attachment 6," and start with number (5).)

7. a. The proceedings designated in 5b or 6 ☐ include ☐ do not include all of the testimony in the superior court.

b. If the designated proceedings DO NOT include all of the testimony, state the points that you intend to raise on appeal. (Rule 8.130(a)(2) and rule 8.137(d)(1) provide that your appeal will be limited to these points unless the Court of Appeal permits otherwise.) Points are set forth: ☐ Below ☐ On a separate page labeled "Attachment 7."

Date: February 9, 2021

Robert E. Dugdale

(TYPE OR PRINT NAME)



(SIGNATURE OF APPELLANT OR ATTORNEY)

1 **PROOF OF SERVICE**

2 **STATE OF CALIFORNIA, COUNTY OF LOS ANGELES**

3 At the time of service, I was over 18 years of age and not a party to this action. I am
4 employed in the County of Los Angeles, State of California. My business address is 10100 Santa
Monica Blvd., Suite 1725, Los Angeles, CA 90067.

5 On February 9, 2021, I served true copies of the following document(s) described as
6 **APPELLANT'S NOTICE OF DESIGNATING RECORD ON APPEAL (UNLIMITED
CIVIL CASE)** on the interested parties in this action as follows:

7 Eric M. George
8 Thomas P. O'Brien
9 David J. Carroll
10 Matthew O. Kussman
11 BROWNE GEORGE ROSS O'BRIEN
12 ANNAGUEY & ELLIS LLP
2121 Avenue of the Stars, Suite 2800
13 Los Angeles, California 90067
Telephone: (310) 274-7100
14 Email: egeorge@bgrfirm.com
tobrien@bgrfirm.com
dcarroll@bgrfirm.com
mkussman@bgrfirm.com

15 Attorneys for Plaintiff and Petitioner The
Association of Deputy District Attorneys for Los
Angeles County

16 **BY E-MAIL OR ELECTRONIC TRANSMISSION:** I caused the document(s) to be sent
17 to each interested party at the email addresses listed above or on the attached service list. I did not
18 receive, within a reasonable time after the transmission, any electronic message or other indication
that the transmission was unsuccessful.

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

21 Executed on February 9, 2021, at Los Angeles, California.

22 

23 Patricia S. Perelló