Case No. B310845

IN THE SECOND DISTRICT COURT OF APPEAL, DIVISION SEVEN,

OF THE STATE OF CALIFORNIA

The Association of Deputy District Attorneys
for Los Angeles County,

Petitioner and Respondent,

v.

George Gascón, et al.,

Appellants.

On Appeal from the Superior Court of Los Angeles, Case Number 20STCP04250, The Honorable James Chalfant, Presiding

PROPOSED BRIEF OF AMICUS CURIAE CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION IN SUPPORT OF RESPONDENT

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(Served on the Attorney General pursuant to rule 8.29 of the California Rules of Court)

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I

INTRODUCTION

Remarkably, Appellant, the District Attorney of Los Angeles County (District Attorney), misses a basic concept known to every trial prosecutor in the state. To be a trial prosecutor means to put justice, commitment to the rule of law, and dedication to the victims of crime above personal considerations. This results in difficult and complex decisions that are unique to every case, often contrary to popular opinion, can create animosity in many quarters, and offer as reward nothing greater than the peace that comes with doing the right thing despite continued critical scrutiny. In sum, the role of a deputy district attorney is no mere job. It is a calling.

Prosecutors must weather many storms to pursue a just outcome. Their "working conditions" go far beyond wages, meal breaks and benefits, for every trial prosecutor makes immense personal sacrifices to make our communities safer and ensure that victims are not abandoned. Understanding legal and ethical responsibilities are among the foremost of a deputy district attorney's duties, and creating an environment that deprives that deputy district attorney of the ability to fulfill those responsibilities speaks to the very core of the conditions under which he or she labors.

Characterizing each of his prosecutors as "unelected subordinates" and "unelected employees" demonstrates a complete failure on the part of the District Attorney to grasp the nature of self-sacrifice and personal peril exhibited and experienced by every trial attorney in his office. They deserve better.

Unrecognized by the District Attorney or his supporting amici is that their arguments attempt to elevate the District Attorney to a super-executive state position. It matters not that the Legislature and

Electorate have enacted laws applicable to all people in California. Through a perceived moral imperative, he may reject the laws with which he disagrees in order to remake the world to his liking. He may cast a veto where even the Governor may not, selecting the laws that he believes should apply in his county. Equal protection does not cloud the clarity of his vision, and his attorneys who took an oath to uphold the laws of the state should instead pledge their fealty to his wisdom.

Victims of crime, upon whom California has placed constitutional importance and who are protected from repeated victimization by recidivist statutes, serve as nothing greater than chaff to be cast off from his vision. But a true exercise of discretion in a case cannot discount those victims wholesale. Every victim is a story of pain and apprehension, learned by trial prosecutors through years of personal interaction and which is unique to each case. "Discretion" must consider every story before deciding on a just course of action.

The District Attorney's Special Directives amounted to conscription in the name of reform, treating the deputy district attorneys of Los Angeles County as nothing more than soulless automatons. Our societal expectations of each prosecutor are far greater than that, as they should be, for it is only with the dedicated application of the heart and mind of a prosecutor *in each case* will the rule of law be upheld. The Superior Court's ruling reflects that and should not be set aside in accession to executive caprice.

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II

THE "WORKING CONDITIONS" OF A PROSECUTOR

As more fully described below, the daily tasks of a prosecutor include decisions that must be made with care and reflection, and which require the support of the prosecutor's office. In entrusting deputy district attorneys with decision making that greatly impacts both the lives of those involved in criminal cases and the welfare of the community at large, California also places significant duties on prosecutors that play a role in each case.

Many of these duties focus on ensuring a fair trial by proper discovery in a case. Whether the origin of this duty is through the Constitution of the United States via *Brady v. Maryland* (1963) 373 U.S. 83 and *Giglio v. United States* (1972) 405 U.S. 150 (addressing exculpatory information and impeachment evidence) or through California discovery statutes such as Penal Code section 1054.1, a prosecutor must be vigilant in her or his cognizance of the universe of information connected to a case. For no other attorney has significant consequences at so many junctures for failing in those duties while still working to advocate for justice.

Even a simple error[1] by a prosecutor can jeopardize a case. In some cases neglectful discovery can lead to sanctions detrimental to the prosecution's case, even where the prosecutor was not at fault. (Pen. Code, § 1054.5, subd. (b).) More serious transgressions can reverse a conviction. (See, e.g., *In re Bacigalupo* (2012) 55 Cal.4th 312, 334.)

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[1] And there most certainly is a distinction between error and misconduct, although it is far too often overlooked in rulings. (See *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1 (*Hill*).)

The gravity of discovery extends beyond the universe of individual cases, however. California's governing requirements of ethical standards for attorneys, the Rules of Professional Conduct, addresses prosecutors specifically in a way that applies to no other lawyer. Prosecutors are required to "make timely disclosure to the defense of all evidence or information known to the prosecutor that the prosecutor knows or reasonably should know tends to negate the guilt of the accused, mitigate the offense, or mitigate the sentence," unless there is a court order to the contrary. (Rules Prof. Conduct, rule 3.8(d).) The discovery obligations specific to a prosecutor extend beyond jury verdict and judgment in a case, continuing indefinitely into the future if the prosecutor learns of "new, credible and material evidence creating a reasonable likelihood that the convicted defendant did not commit an offense . . ." (Rules Prof. Conduct, rule 3.8(f).) And where such evidence arises, a prosecutor must do more than disclose the information, he or she must act affirmatively to remedy the conviction. (Rules Prof. Conduct, rule 3.8(g).) Even criminal consequence can befall a prosecutor who is derelict in discovery duties. (See Pen. Code, § 141, subd. (d).)

The duties incumbent on every prosecutor extend well beyond discovery obligations. "Prosecutors are held to a standard higher than that imposed on other attorneys because of the unique function they perform in representing the interests, and in exercising the sovereign power, of the state." (*People v. Sanchez* (2014) 228 Cal.App.4th 1517, 1529.) While every attorney has solemn obligations in the practice of law, (Bus. & Prof. Code, § 6068), only prosecutors are charge with extra care in case initiation,[2] and in looking out for the

[2] Rules Prof. Conduct, rule 3.8(a).

rights of the opposing party.[3] Moreover, prosecutors are charged with oversight of subordinates *and* law enforcement in the fulfillment of ethical obligations. (Rules Prof. Conduct, rule 3.8(e).) Most significantly, the obligations are personal to the prosecutor. (See, e.g., *Kyles v. Whitley* (1995) 514 U.S. 419, 437 (describing how *Brady* obligations apply to the individual prosecutor).)

The point of this recitation of *some* of the grave obligations carried by prosecutors is not to bemoan them. Every deputy district attorney goes into the fray willingly and knowingly, taking the charge placed upon her or him in an effort to make our world a better one. These duties, however, exemplify the folly of suggesting that a prosecutor's "working conditions" can be reduced to benefits, wages and commute times.[4] Stripping a prosecutor's exercise of individualized discretion from a prosecutor's working conditions offends the dignity of the office.

III

PROSECUTORIAL DISCRETION

The District Attorney and supporting amici point to a prosecutor's historical charging discretion in defense of the District Attorney's Special Directives. That not-inconsequential power provides the prosecutor with the ability to "choose, *for each particular*

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[3] Rules Prof. Conduct, rule 3.8(b) & (c).

[4] The District Attorney argues that no cases dealing with associational standing support Respondent. Perhaps the authority in this area does not squarely address the issues before this Court because other elected district attorneys have never before expressed such contempt for the commitment to justice and discretion of their subordinates via "policy," or have so completely disregarded the victims of crime.

case, the actual charges from among those potentially available aris[ing] from the complex considerations necessary for the effective and efficient administration of law enforcement." (*People v. Birks* (1998) 19 Cal.4th 108, 134, emphasis added, internal quotations and citations omitted.) But how could that discretion be exercised in a blanket proclamation?

The Supreme Court of California summed up the considerations for an exercise of prosecutorial discretion under the most crucial of circumstances: that which accompanies the decisions in a capital case. "Many circumstances may affect the litigation of a case chargeable under the death penalty law. These include factual nuances, strength of evidence, and in particular, the broad discretion to show leniency." (*People v. Keenan* (1988) 46 Cal.3d 478, 506.) With the District Attorney, factual nuance and strength of evidence have been discarded in favor of legislative usurpation.

Appellate decisions are replete with descriptions of the nature of judicial discretion and its confines when addressing the dismissal of charges or allegations. Should prosecutorial discretion operate in a completely different sphere of understanding, or should "discretion" be a uniform concept in decision making?

A foundational framework for the exercise of a court's discretion may be found in *People v. Superior Court (Howard)* (1968) 69 Cal.2d 491. When addressing a decision whether the interests of justice support a dismissal, the Court said that it "involves a balancing of many factors, including the weight of the evidence indicative or guilt or innocence, the nature of the crime involved, . . ." and a number of other factors specific to the defendant and the case. (*Id.* at 505.) In speaking to the nature of judicial discretion within a trial court's statutory ability to dismiss "strike" allegations under Penal Code

section 1385, our Supreme Court again provided guidance as to the types of things that should be considered. "[T]he court in question 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.) A consistent theme may be found here: the exercise of discretion arises from individualized consideration of the case in question.

Is there some reason to believe that a prosecutor's discretion is fundamentally different in charging decisions? Our courts have recognized the difficulty in defining "discretion" when applying the concept to public officials.[5] But at heart, discretion means an "equitable decision of what is just and proper *under the circumstances.*" (*Burgdorf v. Funder* (1966) 246 Cal.App.2d 443, 449, emphasis added [discussing statutory immunity in the context of the denial of a claimed tax refund].) Support for the notion that "discretion" means disregarding a state law in its entirety due personal antipathy cannot be found.

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[5] The Supreme Court of California discussed the semantic difficulty at some length in *Johnson v. State* (1968) 69 Cal.2d 782, 787 – 790, including some consideration of ministerial duties. The discussion appears to be void of the possibility that discretion includes wholesale rejection of a law.

IV

THE DISTRICT ATTORNEY MAY NOT SUPPLANT THE ELECTORATE, LEGISLATURE AND GOVERNOR AND REWRITE STATE LAW

The District Attorney appears to argue that, because he was elected in his county, he has the power to accept or reject statutes as he sees fit, conferring upon himself the ability to unilaterally veto that which was enacted by the Electorate, or through the state's legislative process. A reading of prosecutorial discretion to this end would result in inequity throughout the state, giving one district attorney power above all others. The rule of law and equal protection do not permit this.

"[A] rule of law that binds neither by text nor by any particular, identifiable tradition is no rule of law at all." (*Michael H. v. Gerald D.* (1989) 491 U.S. 110, 127 (lead opn. of Scalia, J.).) The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution "embodies a general rule that States must treat like cases alike but may treat unlike cases accordingly." (*Vacco v. Quill* (1997) 521 U.S. 793, 799.) Equal Protection under article I, section 7 of the California Constitution is "substantially the equivalent of the equal protection clause of the Fourteenth Amendment to the United States Constitution." (*Manduley v. Superior Court* (2002) 27 Cal.4th 537, 571, citations omitted.) If the District Attorney may announce that a law does not apply in his jurisdiction, he effectively creates an imbalance of law in California so that not all like cases will receive the same treatment.

The "Three Strikes" recidivist law, one of the sentencing enhancements ostensibly negated by the District Attorney's Special Directives, arises from both the Legislature and the Electorate. The

former initially enacted it in Penal Code section 667, subdivisions (b) through (i), while the latter used the initiative process to later enact nearly identical provisions in Penal Code section 1170.12. (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 504.) The Electorate later narrowed the scope of the law through the enactment of Proposition 36. (*People v. Johnson* (2015) 61 Cal.4th 674, 679.)

If the Superior Court's injunctive relief is lifted, people throughout California become assured that they will not face the same criminal consequences in Los Angeles County that they might face elsewhere. This disparate treatment would not arise as a result of the individual merits and facts of each case, as discussed above, but instead stand as a per se legislative act by the District Attorney for his county alone. Not only will he have negated the will of the Electorate and the Legislature for his jurisdiction, he will have created an inequitable situation throughout the state that could ultimately grant him his veto statewide.

Equal Protection is a right that belongs to individuals. It is a personal right. (*Parents Involved in Community Schools v. Seattle School District No. 1* (2007) 551 U.S. 701, 742 – 743.) Consequently, it is not a right that directly belongs to Respondent, CDAA or any other interested group of prosecutors. Why then, should CDAA be able to raise the concern before this Court, particularly when the time has not yet arisen for a criminal defendant to object that her or his sentence runs afoul of Equal Protection when a similarly-situated defendant in Los Angeles County does not face the same consequence?

Respondent and CDAA seek, and are tasked with, ensuring that the People of California are treated fairly. "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate." (Rules Prof. Conduct, rule 3.8, Comment [1].) "[T]he

prosecutor represents 'a sovereignty whose obligation is to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.'" (*Hill*, *supra*, 17 Cal.4th at p. 820, citing *Berger v. United States* (1935) 295 U.S. 78, 88 (*Berger*).) While the District Attorney has pointed out that courts should practice the doctrine of constitutional avoidance so as to not read unconstitutionality into a statute, (*People v. Garcia* (2017) 2 Cal.5th 792, 804), so, too should the Court avoid granting executive power to the District Attorney so that he may nullify the Electorate and Legislature statewide by creating Equal Protection violations within the state's criminal laws.

The Superior Court's injunction of the Special Directives serves the purpose of avoiding unconstitutional application of California's laws and should therefore stand.

V

THE DISTRICT ATTORNEY MAY NOT COMMAND LOS ANGELES COUNTY PROSECUTORS TO SET ASIDE CONSITUTIONALLY-COMPELLED VICTIMS' RIGHTS

The purpose of the Three Strikes law, like other sentencing statutes, is to provide for public safety. (*People v. Carabello* (2016) 246 Cal.App.4th 936, 940.) Clearly, the District Attorney disagrees that incarceration of repeat offenders reduces the risk to our communities, but this does not entitle him to forego the interests of victims of crime, or fail to consider the future victims of those to whom he seeks to provide a windfall.

Over the course of more than 35 years, the People of the State of California struggled to have the rights of victims acknowledged and enforced in the state's criminal courts. The genesis of the constitutional provisions collectively known as "The Victim's Bill of Rights" originated in 1982 with the enactment of article I, section 28 of the California Constitution via initiative. (*People v. Hannon* (2016) 5 Cal.App.5th 94, 99 – 100.) The People then amended and expanded the constitutional rights of victims in 2008 with the passage of "Marsy's Law." (*Id.*, at p. 99.)

The importance of governmental focus on public safety and the rights of victims is spelled out clearly within the Constitution. "California's victims of crimes are largely dependent upon the proper functioning of government, 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).) Similarly, the People's expectations were also not left to the imagination of the courts or the executive. "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, subd. (a)(5).)

To effect these essential goals, article 28 provides a litany of rights afforded to victims of crime. These rights include 17 nonexclusive, explicit areas guiding the criminal justice system, 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)).

Article I, section 28 is not the only part of the Constitution in which California prescribed the need to protect victims of crime.[6] Article I, section 12 also lists particular circumstances in which bail may be denied altogether based upon the danger to victims or others. Article 1, section 29 guarantees the rights of due process and speedy trial to the People, from which the same rights may be attributed to crime victims. (*People v. Lynch* (2010) 50 Cal.4th 693, 727, overruled on other grounds, *People v. McKinnon* (2011) 52 Cal.4th 610, 637 – 643.) And article 1, section 30, subdivision (b) permits the use of hearsay testimony at preliminary hearings in order to protect victims and witnesses. Without question, the People of California have taken significant steps to protect victims above the reach of the legislature, the executive, or the judiciary.

As a representative of the sovereign state itself, a prosecutor is bound not to the whims of a client, but rather to a duty of impartial governance and a pursuit of justice in every case. (See *Hill*, *supra*, 17 Cal.4th at p. 820, pointing to the United States Supreme Court's framework of the role of the United States Attorney in *Berger, supra*, 295 U.S. at p. 88.) In California, this means that the prosecutor plays a special role in fairly protecting the victims of crime. For while a criminal defendant has among her or his protections the right to be appointed counsel of her or his own based upon the Sixth Amendment to the United States Constitution and article I, section 15 of the California Constitution, (*Gideon v. Wainwright* (1963) 372 U.S. 335

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[6] Among Californians' inalienable rights is the right to pursue and obtain safety. (Cal. Const. art. 1, § 1.)

and *People v. Chavez* (1980) 26 Cal.3d 334, 344), the victim of crime has no equivalent protection. To provide balance against the voice of defense counsel, who owes primary fealty to the accused,[7] the prosecutor must ensure that the constitutional rights and interests of the victims do not fall from the attention of the judicial process. Otherwise, the prosecutor's oath and legal duty to "support the Constitution and laws of the United States and of this state," (Bus. & Prof. Code, § 6068, subd. (a)), becomes meaningless, particularly when the California Constitution charges prosecutors with enforcement of 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.").)

The sanctity of this role is further underscored if the Superior Court binds the hands of the victim. (See, e.g., *People v. Subramanyan* (2016) 246 Cal.App.4th Supp 1, 7 (a victim may not step into the shoes of the prosecutor).) As the only truly-empowered advocate in a criminal court with a duty to pursue a complete and just result, the gravity of the attention to the rights of victims shines paramount. "[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, citing *Berger, supra*.) While the second segment of that aim has often been the subject of much commentary, a view to

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[7] See, e.g., Business and Professions Code section 6068, subds. (c), (e)(1), (h); rules 1.2(a), 1.3(a), 1.4, 1.4.1(a), 1.9, 3.1(b), 3.6(c), and 3.7(c) of the Rules of Professional Conduct; and *Strickland v. Washington* (1984) 466 U.S. 668, 688 ("Counsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest.").

the core functions of a prosecutor and her or his duty to be the voice for the victimized must not fade in the twilight. While every California attorney shoulders an obligation not to reject the cause of the defenseless or the oppressed, (Bus. & Prof. Code, § 6068, subd. (h)), few carry that duty through every case like those in government service practicing criminal law. The role of a public defender in fulfilling that duty is quite visible and easy to comprehend at a glance. But the commitment of shepherding the powerless in a hostile system plays no lesser role in the hearts of the deputy district attorneys of Los Angeles County as they walk into court each day. Their ability to individual assess the victims of each case, along with the rights of the defendant, should not be undercut because of the District Attorney's commitment to eliminating penal consequences.

VI

CONCLUSION

The Superior Court correctly recognized the untenable situation into which the District Attorney's Special Directives placed the trial prosecutors of the Los Angeles County District Attorney's Office. While the state of California may someday conclude that crime should not be punished and that the rights of crime victims should go by the wayside, the District Attorney cannot singlehandedly declare the invalidity of statutes contrary to his world view.

Just as a district attorney cannot unilaterally decide that robbery should no longer be a crime, so, too, is the District Attorney obligated to follow the state's enhancement laws where the facts of each case implicate them. While a prosecutor *may* exercise discretion in each case to determine the appropriate charges, that prosecutor is not free to create statewide imbalance by granting complete amnesty to those

who create greater peril for our communities through the use of weapons, or those who repeatedly and violently victimize the helpless.

The most basic of "working conditions" for any prosecutor begins with that prosecutor's oath to uphold the law. This Court should affirm the Superior Court's ruling.

Respectfully submitted,

GREG D. TOTTEN
Chief Executive Officer
California District Attorneys Association

ROBERT P. BROWN
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CERTIFICATE OF COMPLIANCE

I certify that the attached **PROPOSED BRIEF OF AMICUS CURIAE CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION IN SUPPORT OF RESPONDENT** uses a 13-point Arial font, and contains 3,965 words.

Respectfully submitted this 20th day of December, 2021,

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PROOF OF ELECTRONIC SERVICE (RULES OF COURT, RULE 8.78(F))

Pursuant to rule 8.78(f) of the California Rules of Court, the undersigned declares under penalty of perjury that the following is true and correct:

I am over eighteen years of age, not a party to the within cause, and am employed by the San Bernardino County District Attorney's Office, located at 303 W. Third St., San Bernardino, California 92415. My email address is rbrown@sbcda.org.

On December 20, 2021, I served true copies of the foregoing Application of Proposed Amicus Curiae California District Attorneys Association to File Amicus Brief in Support of Respondent on the parties in this action:

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By electronic service: I electronically filed the document with the Clerk of the Court by using the TrueFiling system. The parties to the case are registered TrueFiling users and will be served by the TrueFiling system.

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

Executed on December 20, 2021, San Bernardino, California.

Robert P. Brown