

B310806

Los Angeles County Superior Court No. VA151320

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

REHAN NAZIR,
Petitioner,

vs.

THE LOS ANGELES COUNTY SUPERIOR COURT,
Respondent,

and

THE PEOPLE OF THE STATE OF CALIFORNIA,
Real Party in Interest.

On petition for writ of mandamus/prohibition to the Superior Court for the
County of Los Angeles, The Honorable Lee W. Tsao, Judge

**BRIEF AMICUS CURIAE OF THE
CRIMINAL JUSTICE LEGAL FOUNDATION
IN SUPPORT OF RESPONDENT**

KENT S. SCHEIDEGGER
State Bar No. 105178
*KYMBERLEE C. STAPLETON
State Bar No. 213463
Criminal Justice Legal Foundation
2131 L Street
Sacramento, California 95816
(916) 446-0345

*Attorneys for Amicus Curiae
Criminal Justice Legal Foundation*

TABLE OF CONTENTS

Table of authorities. 3

Summary of Facts and Case. 5

Summary of Argument. 8

Argument. 9

I. Special Directive 20-08’s blanket mandate to dismiss previously alleged sentencing enhancements in pending cases is a de facto nolle prosequi and is prohibited in California. 9

 A. Prosecutorial discretion is broad, but it is not unfettered. 9

 B. Penal Code sections 1385 and 1386. 11

II. A court’s exercise of its broad discretion pursuant to Penal Code section 1385 does not violate defendant’s Equal Protection rights. 18

Conclusion. 22

TABLE OF AUTHORITIES

Cases

<i>In re Large</i> (2007) 41 Cal.4th 538.....	17
<i>In re Varnell</i> (2003) 30 Cal.4th 1132.....	12
<i>Manduley v. Superior Court</i> (2002) 27 Cal.4th 537.	11, 20, 21
<i>People v. Birks</i> (1998) 19 Cal.4th 108.....	9, 11
<i>People v. Bonnetta</i> (2009) 46 Cal.4th 143.....	12, 13
<i>People v. Carmony</i> (2004) 33 Cal.4th 367.....	15, 16, 17, 21
<i>People v. Eubanks</i> (1996) 14 Cal.4th 580.	9
<i>People v. Gillispie</i> (1997) 60 Cal.App.4th 429.	17
<i>People v. Lee</i> (2008) 161 Cal.App.4th 124.	15
<i>People v. Levins</i> (1978) 22 Cal.3d 620.	14
<i>People v. Mack</i> (1986) 178 Cal.App.3d 1026.	17
<i>People v. More</i> (1887) 71 Cal. 546.	16
<i>People v. Orin</i> (1975) 13 Cal.3d 937.....	11, 14, 16, 17
<i>People v. Ritchie</i> (1971) 17 Cal.App.3d 1098.	15
<i>People v. Romero</i> (1936) 13 Cal.App.2d 667.	13
<i>People v. Superior Court (Greer)</i> (1977) 19 Cal.3d 255.....	10, 11
<i>People v. Superior Court (Howard)</i> (1968) 69 Cal.2d 491.	14, 15, 16
<i>People v. Superior Court (On Tai Ho)</i> (1974) 11 Cal.3d 59.	11
<i>People v. Superior Court (Romero)</i> (1996) 13 Cal.4th 497.	11, 12, 13, 15, 16
<i>People v. Tenorio</i> (1970) 3 Cal.3d 89.	11, 13
<i>People v. Thomas</i> (1992) 4 Cal.4th 206.....	12
<i>People v. Wilkinson</i> (2004) 33 Cal.4th 821.	20

<i>People v. Williams</i> (1998) 17 Cal.4th 148.	14, 16, 21
<i>The Association of Deputy District Attorneys for Los Angeles County v. George Gascón</i> (20STCP04250).	10

Rules

Cal. Rules of Court, Rule 4.406(b)(8).	17
--	----

State Statutes

Pen. Code, § 1386.	12
----------------------------	----

Secondary Authorities

8 Witkin, Summary of Cal. Law (11th ed. 2017) Constitutional Law.	19
Altman, <i>Family Fears Former Torrance Cop Involved in Shootings, Documents Show</i> , Daily Breeze (Apr. 22, 2017), < https://www.dailybreeze.com/2017/04/22/family-fears-former-torrance-cop-involved-in-shootings-documents-show/ >.	17
Corrigan, <i>On Prosecutorial Ethics</i> (1986) 13 Hastings Const. L.Q. 537.	16
Krauss, <i>The Theory of Prosecutorial Discretion in Federal Law: Origins and Developments</i> (2009) 6 Seton Hall Circuit Review 1.	12

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

REHAN NAZIR,
Petitioner,

vs.

THE LOS ANGELES COUNTY SUPERIOR COURT,
Respondent,

and

THE PEOPLE OF THE STATE OF CALIFORNIA,
Real Party in Interest.

**BRIEF AMICUS CURIAE OF THE
CRIMINAL JUSTICE LEGAL FOUNDATION
IN SUPPORT OF RESPONDENT**

SUMMARY OF FACTS AND CASE

In May 2020, former Los Angeles County District Attorney Jackie Lacey filed a Fourth Amended Felony Complaint against defendant charging him with 35 counts of various violent and serious offenses against several victims. (Petition for Writ of Mandamus, Appendix (“Writ Petition”), Exh. A.) The charges included, but were not limited to, multiple counts of kidnapping, assault with a firearm, extortion, false imprisonment, criminal threats, and burglary. (*Ibid.*) In addition, the People further alleged numerous firearm enhancements. (*Id.* at pp. 14-15.)

On December 7, 2020, Lacey was replaced by George Gascón as the District Attorney of Los Angeles County. On the day he took office, Gascón issued a series of Special Directives (“SD”). SD 20-08, entitled “Sentencing

Enhancements/Allegations,” stated 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.” (Writ Petition, Appendix, Exh. B, p. 1.) The Directive further instructed all Deputy District Attorneys (“DDAs”) to “orally amend the charging document to dismiss or withdraw any enhancement or allegation as outlined in” the new policy. (*Id.* at p. 2.)

At a hearing held on December 11, 2020, the People orally moved to dismiss the firearm enhancements that had been previously alleged in defendant’s case. (Writ Petition, Appendix, Exh. C, p. 3.) In the trial court’s opinion, dismissal was unwarranted because the statute requires “individualized consideration of the offense and the offender.” (*Id.* at p. 6.) Because the People’s sole basis in seeking dismissal was SD 20-08, rather than on the individual circumstances of defendant’s case, the court denied the oral motion pursuant to Penal Code section 1385. (*Ibid.*) The court further informed the People that they had the option to file an amended information without the enhancement allegations added, and if so done, “we can proceed.” (*Ibid.*)

At a hearing held on December 18, 2020, the People renewed their motion to dismiss the firearm enhancement allegations. (Writ Petition, Appendix, Exh. D, pp. 3-4.) The People also notified the court that they had filed a Fifth Amended Information that eliminated the firearm enhancement allegations prior to the hearing that morning. (*Ibid.*)

The court addressed the renewed motion to dismiss first. In so doing, the court reiterated its previous stance that the SD alone was not a permissible basis for the court to dismiss the enhancement allegations under section 1385. (*Id.* at pp. 17-18). The court then considered the preliminary hearing transcript, the information, and the probation report, and “clearly” found “that based on the nature of the offense and the background and character of [defendant], that the motion to dismiss the enhancements is not in the interest of justice.” (*Id.* at p. 18.)

After denying the renewed motion, the court asked the People if they were “asking for leave of court to . . . proceed on the amended information.” (*Id.* at p. 19.) The People responded that they were because of “the Special Directive.” (*Ibid.*)¹ The court denied leave to amend because it did not “think it would be proper . . . to proceed on an amended information which does not allege the very enhancements. . . that was the subject of the motion to dismiss under 1385.” (*Ibid.*)²

Defendant then filed a Petition for Writ of Mandamus in the Court of Appeal, which was summarily denied. On May 26, 2021, the California Supreme Court granted defendant’s petition for review, which was joined by the People, and transferred the matter back to this court with directions to vacate the order denying the mandate and to issue an order to the superior court to show cause why the requested relief should not be granted.

-
1. Special Directive 20-08.1, issued on December 15, 2020, provided “further clarification” and was “intended to further supplement the language provided in SD 20-08, Section II concerning Pending Cases.” SD 20-08.1 outlined a three-step process for the People to follow in pending cases: (1) move to dismiss and withdraw enhancements pursuant to Penal Code section 1385; (2) if the motion is denied by the court, the People must seek leave of court to file an amended charging document pursuant to Penal Code section 1009; and (3) if the court refuses to accept an amended charging document, the DDA must inform his or her head deputy. SD 20-08.1 can be found at: <https://da.lacounty.gov/sites/default/files/policies/SD-20-08-1.pdf>.
 2. At the December 11, 2020 hearing, the court informed the People that they had the option to file an amended information without the enhancements. (Writ Petition, Exh. C, p.6.) The People took heed of this option and filed a Fifth Amended Information without the firearm enhancement allegations before court convened for another hearing on December 18, 2020. (Writ Petition, Exh. D, pp. 3-4.) At the December 18 hearing, the court announced that it “rethought [the] position” it took at the December 11 hearing and would instead “hear arguments from counsel on that issue.” (*Id.* at p. 2.)

This court issued the order to show cause and further ordered the People, as Real Party in Interest, to file a written return. This court also invited CJLF and others to submit *amicus curiae* briefs “in order to have the benefit of a full exposition of the issues.”

SUMMARY OF ARGUMENT

Prosecuting attorneys traditionally possess considerable discretionary power throughout the criminal justice process. Deciding who to charge and what charges to file is a closely protected prosecutorial function. However, once prosecutors invoke the jurisdiction of the court by filing the charging documents, California law prohibits them from unilaterally dismissing those charges. Rather, the decision whether to dispose of previously alleged charges and/or enhancements is purely a matter of judicial discretion.

Over a century ago, California lawmakers vested the power to dismiss an action “in furtherance of justice” solely with the judiciary. SD 20-08 directs DDAs to withdraw previously alleged enhancements in pending cases. Gascón’s Special Directives cannot unilaterally authorize what is expressly prohibited under California law. Furthermore, a radical change of countywide policy between elected DA’s does not affect or change how the judiciary exercises its independent decision making authority.

Courts have broad discretion to decide whether or not to dismiss an action “in furtherance of justice.” The sole basis given by the prosecuting attorneys was SD 20-08. The court properly utilized its statutory discretion when it denied their motion due to a lack of case specific reasons that would justify such a dismissal.

Moreover, a court’s exercise of its broad discretion does not deprive defendant of the equal protection of the laws. The judge looked beyond the SD and based his decision on an individual consideration of defendant’s case. Such discretion does not violate the Equal Protection Clause.

ARGUMENT

I. Special Directive 20-08’s blanket mandate to dismiss previously alleged sentencing enhancements in pending cases is a de facto nolle prosequi and is prohibited in California.

Real Party in Interest, the District Attorney, sets forth several arguments why his office should have the unrestrained ability to dismiss defendant’s pending sentencing enhancement allegations without court intervention despite the legions of direct authority that instructs otherwise. Real Party in Interest contends that prosecutorial discretion encompasses the “plenary authority” to determine whether or not to allege sentencing enhancements and that discretion cannot be disturbed by the judicial branch. (Brief of Real Party in Interest 23-24) (“RPI Brief.”) *Amicus* CJLF does not disagree with this contention. Deciding who to charge and what charge(s) and enhancements to allege is one of the most important and closely protected prosecutorial functions. (*People v. Birks* (1998) 19 Cal.4th 108, 134-135; *People v. Eubanks* (1996) 14 Cal.4th 580, 589.) However, the issue in this case does not center around the People’s “plenary authority” to allege sentencing enhancements. Rather, the issue is whether those enhancement allegations can be unilaterally withdrawn by the People *after* the charging documents have been filed with the court.

A. Prosecutorial discretion is broad, but it is not unfettered.

In May 2020, former District Attorney Lacey made the discretionary decision to include firearm use enhancement allegations alongside the laundry list of violent crimes defendant was accused of committing. Lacey believed that based on the specific facts and circumstances of defendant’s crimes, including firearm use enhancement allegations furthered the interests of justice and would better protect public safety. Current District Attorney Gascón does not share that same view. In his opinion, “criminal offenses alone, without enhancements, are sufficient to hold people accountable and also to protect public safety.” (Writ Petition, Appendix, Exh. B, p. 1.)

Gascón, as the duly elected District Attorney of Los Angeles County, has the discretionary (albeit misguided) authority to enact and enforce this blanket office-wide policy with respect to crimes that occurred *after* he took office.³ This is the same discretionary authority that former District Attorney Lacey possessed when she was in office. Defendant committed his crimes when Lacey was District Attorney, and she alleged firearm use enhancements in defendant’s charging documents that were filed with the court *before* Gascón took office. Gascón cannot now unilaterally withdraw the pending firearm enhancements that Lacey believed were necessary to allege when she was in office.

Real Party in Interest further argues that “[t]he separation of powers prevents the superior court from supervising the prosecutor’s discretion to dismiss previously-charged sentencing enhancements.” (RPI Brief 19.) There is no question that prosecuting attorneys possess tremendous discretionary power throughout the criminal justice process. Even after charges are filed, prosecuting attorneys continue to retain considerable discretion on how to best conduct the case in the manner they see fit. (See *People v. Superior Court (Greer)* (1977) 19 Cal.3d 255, 267, superseded by statute on other grounds as stated in *Stark v. Superior Court* (2011) 52 Cal.4th 368, 416.) They, for example, decide what theory or theories to pursue, what arguments to make, and what witnesses to call. (See *ibid.* and cases cited.) They also retain the

3. See *The Association of Deputy District Attorneys for Los Angeles County v. George Gascón* (20STCP04250) in which a Los Angeles Superior Court granted in large part a preliminary injunction in favor of the petitioners in a case raising nearly identical issues to this one. An appeal of that order is currently pending (B310845) in the Court of Appeal, Second Appellate District. The appellants to that matter filed a motion to consolidate the two appeals for purposes of oral argument. On July 13, 2021, the Court of Appeal ordered that the cases may be considered concurrently for purposes of oral argument, but deferred ruling on the motion until after briefing has been completed and reviewed. The order granting the preliminary injunction in large part can be found here: <https://www.laadda.com/wp-content/uploads/2021/02/20STCP04250-Gascon-prelim-inj.pdf>.

power to negotiate plea bargains with the defendant (*People v. Orin* (1975) 13 Cal.3d 937, 942-943).

However, the California Supreme Court has made it abundantly clear on several occasions that once the District Attorney invokes the jurisdiction of the court by filing charges, “the disposition of that charge becomes a judicial responsibility.” (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 517; *Manduley v. Superior Court* (2002) 27 Cal.4th 537, 552, 554; *People v. Tenorio* (1970) 3 Cal.3d 89, 94.) Thus, after charges are filed, “the discretion of the executive . . . becomes subject to the supervision of the trial court.” (*Greer, supra*, 19 Cal.3d at p. 265.) Here, Real Party in Interest has the absolute discretion to *seek* dismissal of defendant’s previously alleged firearm enhancements, but the ultimate decision of whether to actually *dispose* of them lies exclusively within the discretion of a judge. (*Birks, supra*, 19 Cal.4th at p. 136; see also *People v. Superior Court (On Tai Ho)* (1974) 11 Cal.3d 59, 65.)

B. Penal Code sections 1385 and 1386.

At the court hearing on December 11, 2020, the People orally moved to dismiss defendant’s pending firearm enhancement allegations based solely on the language of SD 20-08. (Writ Petition, Exh. C, p. 3). The court denied the request to dismiss under Penal Code section 1385, finding the motion was “without legal justification.” (*Id.* at p. 6). The People then renewed their motion to dismiss at the December 18, 2020 hearing based on updated SD 20-08.1.⁴

The court again denied the People’s motion to dismiss stating,

“I’m not expressing any antipathy towards the law, but the only justification for the motion to dismiss that’s been offered to this court is the special directive. There has been no discussion of the circumstances of the offense, the background and character of [defendant]. The exclusive basis for this motion to dismiss is this special directive, and in order to grant it on that basis, I would have to adopt his rationale, and that’s not

4. See *supra*, fn. 1, page 7.

a permissible basis for . . . this court to dismiss under 1385.” (Writ Petition, Exh. D, pp. 17-18.)

Penal Code section 1385(a) provides, a “judge . . . may, either of his or her own motion or upon application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed. The reasons for the dismissal shall be stated orally on the record.” An “action” under this section includes sentencing enhancements. (*In re Varnell* (2003) 30 Cal.4th 1132, 1134; *People v. Thomas* (1992) 4 Cal.4th 206, 209-210.) Real Party in Interest argues that section 1385 works only to limit a judge’s decision to order a dismissal on his or her own motion and not a “prosecutor’s request for one.” (RPI Brief 26)

If Gascón had been the Attorney General of England at the turn of the 16th Century, he would have had the power he is now seeking. The common law rule of *nolle prosequi* gave prosecutors the power over all prosecutions from start to finish, which included the power to dismiss all or part of a case without any judicial inquiry at any time and for any reason. (Krauss, *The Theory of Prosecutorial Discretion in Federal Law: Origins and Developments* (2009) 6 Seton Hall Circuit Review 1, 16.) “The *nolle* was an executive procedure, available only to the Attorney General. . . . No form of judicial review was available if a party contested the propriety of the procedure: when the Attorney General issued a *nolle*, the court would terminate the prosecution without any inquiry.” (*Ibid.*)

But, this is not 16th Century England. This is 21st Century California, and public prosecutors here have not had this unilateral and unbridled power since 1850, if ever. (Pen. Code, § 1386⁵; *People v. Bonnetta* (2009) 46 Cal.4th 143, 148-149; *Romero, supra*, 13 Cal.4th at p. 511, quoting *Tenorio, supra*, 3 Cal.3d at p. 89.) “Penal Code sections 1385 and 1386, enacted in 1872, codify California’s rejection of the English rule of *nolle prosequi*, under which the

5. Penal Code section 1386 provides: “The entry of a *nolle prosequi* is abolished, and neither the Attorney General nor the district attorney can discontinue or abandon a prosecution for a public offense, except as provided in Section 1385.”

prosecutor alone had authority to discontinue a prosecution, in favor of granting sole authority to the courts to dismiss actions in furtherance of justice.” (*Bonnetta, supra*, 46 Cal.4th at pp. 148-149; *Romero, supra*, 13 Cal.4th at p. 510, citing Crim. Prac. Act of 1850; Stats. 1850, ch. 119, § 630, p. 323.)

California prohibited the use of the executive *nolle prosequi* during the state’s first legislative session. (*Romero, supra*, 13 Cal.4th at p. 510.) In 1872, California lawmakers instead vested this unilateral power to dismiss with the courts. (*Bonnetta, supra*, 46 Cal.4th at pp. 148-149; *People v. Romero* (1936) 13 Cal.App.2d 667, 670.) However, unlike the unrestrained power of the English *nolle prosequi*, a California court’s unilateral authority to dismiss has both a limitation and a condition. (*People v. Romero, supra*, 13 Cal.App.2d at p. 670.) The limitation being that dismissal can only be ordered “in furtherance of justice” and the condition being that the court’s reasons for dismissal must be given on the record. (*Id.* at pp. 670-671; see also *Bonnetta, supra*, 46 Cal.4th at pp. 149-150.)

“[D]ismissal—for whatever reason—is a judicial rather than an executive function. While the power of *nolle prosequi* might permit a prosecutor to make the unilateral decision to abandon a prosecution, the power does not exist. (§ 1386.) Therefore, the prosecutor may *ask* the court to dismiss pursuant to [Penal Code] § 1385, but ‘neither the Attorney General nor the district attorney can discontinue or abandon a prosecution for a public offense, except as provided in Section 1385.’ (§ 1386.)” (*Romero*, 13 Cal.4th at pp. 515-516, italics added.)

Gascón’s Special Directives cannot authorize what is expressly prohibited under California law. Thus, the only avenue by which Los Angeles County prosecutors can seek dismissal of enhancement allegations in pending cases is “to invite the judicial exercise of that power.” (*Tenorio*, 3 Cal.3d at p. 94.)

Real Party in Interest contends that section 1385 does not prohibit a judge from granting the People’s request for dismissal when it is based on “the prosecutor’s view about how best to exercise his constitutionally-protected prosecutorial discretion.” (RPI Brief at p. 27). According to Real Party in

Interest, a court's evaluation of the "in furtherance of justice" standard differs depending on *who* is seeking the dismissal. (*Ibid.*)

More specifically, if a motion to dismiss is brought by a prosecuting attorney, Real Party in Interest contends that the court need only look at the effect of the dismissal on the defendant's rights. (*Ibid.*) This is because "[t]he prosecutor—as the People's representative—has already determined that it is not within the People's interest to prosecute the defendant for a violation of that legislative scheme." (*Id.* at p. 29) Thus, the court need not independently evaluate the facts and circumstances of the case and it must accept the People's position at face value. If, however, the court seeks dismissal on its own motion (or upon the suggestion of the defendant,) only then must the court engage in a more thorough "individualized" analysis that considers both the interests of society *and* the defendant. (*Id.* at pp. 27-28.)

Real Party in Interest cites to *People v. Orin* (1975) 13 Cal.3d 937 and *People v. Williams* (1998) 17 Cal.4th 148, in support of their position that a court's section 1385 analysis differs depending on who is seeking the dismissal. *Orin* and *Williams* both involved situations where the court ordered a section 1385 dismissal on its own motion over the objection of the People without giving reasons for doing so on the record. (See *Orin, supra*, 13 Cal.3d at pp. 943-944; *Williams, supra*, 17 Cal.4th at p. 156.) Neither of these cases support Real Party in Interest's argument that the court need only analyze prejudice to the defendant when the People move for dismissal.

On the contrary, the "in furtherance of justice" standard by which section 1385 authorizes a court to dismiss "is the same whether the court acts on motion of the prosecution or its own motion." (*People v. Superior Court (Howard)* (1968) 69 Cal.2d 491, 503.) Courts are not required to "dismiss a criminal action upon application of the district attorney; rather, the statutory language clearly indicates the creation of a discretionary power in the court." (*People v. Levins* (1978) 22 Cal.3d 620, 623-624.) Moreover, the statute does not differentiate based on *who* is seeking the dismissal. The California Supreme Court has explained that a judge's right to dismiss on his or her own

motion is “in apposition to” a judge’s right to dismiss on a motion brought by a prosecutor, “and it follows that the discretion conferred upon the judge is the same in either situation.” (*Howard, supra*, 69 Cal.2d, at p. 502.)

Section 1385 speaks only to the ability of the prosecuting attorney and the court to seek dismissal “in furtherance of justice.” This is because a defendant does not have the independent right to make a section 1385 dismissal motion. (*People v. Carmony* (2004) 33 Cal.4th 367, 375.) However, a defendant does have the right to invite the court to exercise its power on its own motion. (*Ibid.*) If a defendant so asks, “ ‘the court must consider evidence offered by the defendant in support of his assertion that the dismissal would be in furtherance of justice.’ ” (*Ibid.*, quoting *Rockwell v. Superior Court* (1976) 18 Cal.3d 420, 441.) The burden is on the defendant to provide facts to the court in support of his or her request. (*People v. Lee* (2008) 161 Cal.App.4th 124, 129.) There is no “sua sponte investigational duty to ferret out facts” by the trial court when relief is requested by a defendant. (*Ibid.*)

If the burden is on the defendant when he or she is asking the court to rule on its own motion, then that same burden applies to a motion brought by the prosecuting attorney. It is nonsensical to require a defendant to explain to the court why dismissal would be in furtherance of justice when he or she seeks dismissal, but not require the same case specific facts from prosecuting attorneys when they seek dismissal.

Moreover, a radical change of countywide policy between elected district attorneys does not affect or change how the judiciary makes section 1385 decisions in pending cases. Judicial independence remains steady and intact. (See *Romero, supra*, 13 Cal.4th at pp. 512-513 [citing cases on independence of judicial judgment].) The court has the independent authority and obligation to review the entire case when making its decision. (See *id.* at pp. 530-531; see also *Howard, supra*, 69 Cal.2d at p. 505; *People v. Ritchie* (1971) 17 Cal.App.3d 1098, 1105 [detailing factors a court should consider when contemplating dismissal].)

Here, SD 20-08 was the sole basis for the prosecuting attorneys' motion to dismiss the firearm enhancement allegations. Nothing in SD 20-08 speaks specifically to defendant's case. The moving party did not provide any specific facts to the court relating to the defendant, nor did they provide the court with any evidence as to why dismissing the firearm enhancement allegations from defendant's individual case would be "in furtherance of justice."

When a court considers a section 1385 dismissal, it is acting "on behalf of the People *and* upon its official responsibility." (*Howard, supra*, 69 Cal.2d at p. 503, italics added.) "The court, for the purposes of the order of dismissal, takes charge of the prosecution, and acts for the people. It holds the power to dismiss, . . . by virtue of the office and the law; and it is exercised upon official responsibility." (*People v. More* (1887) 71 Cal. 546, 547.) The "People" not only encompass the victim and law enforcement, but also the defendant and his or her family, and "the vast majority of citizens who know nothing about a particular case, but who give over to the prosecutor the authority to seek a just result in their name." (Corrigan, *On Prosecutorial Ethics* (1986) 13 Hastings Const. L.Q. 537, 538-539.)

The "official responsibility" of the court is not to simply "rubber stamp" the reasons given by the prosecuting attorneys without further inquiry. The fact that the prosecuting attorneys moved for dismissal in no way abrogates their burden to provide the court with specific facts relating to the case at hand or the court's obligation to dismiss only in strict compliance with section 1385(a), i.e., in the furtherance of justice. (See *Romero, supra*, 13 Cal.4th at pp. 530-531; see also *Williams, supra*, 17 Cal.4th at pp. 160-161; *Orin, supra*, 13 Cal.3d at p. 945.) Real Party in Interest's argument otherwise ignores the court's role under the plain language of the statute and the vast case law interpreting it.

It is also important to note that a court's discretionary authority to dismiss under section 1385 also encompasses the discretion *not* to dismiss. (*Carmony, supra*, 33 Cal.4th at p. 375.) " 'Discretion is the power to make the decision, one way or the other.' " (*Ibid.*, quoting *People v. Myers* (1999) 69 Cal.App.4th

305, 309.) A court’s decision to dismiss, or not to dismiss, “are flip sides of the same coin.” (*Ibid.*) However, a court need only explain its reasons on the record when it grants relief. (*In re Large* (2007) 41 Cal.4th 538, 550; Cal. Rules of Court, Rule 4.406(b)(8).) There is no similar mandate when a court is unwilling to grant relief under section 1385. (*Large, supra*, 41 Cal.4th at p. 550; *People v. Gillispie* (1997) 60 Cal.App.4th 429, 433; *People v. Mack* (1986) 178 Cal.App.3d 1026, 1032-1033.)

In typical cases it is no doubt true that the district attorney is in a better position to know the facts supporting dismissal. Where the motion is based on the prosecution’s individualized determination that the interests of justice now support dismissal of the charge the same office made initially, the motion should typically be granted. Here, prosecuting attorneys moved to dismiss the firearm enhancement allegations but provided the court with no case specific reasons why such dismissal would be “in furtherance of justice.” If the court had dismissed the enhancement allegations, it would be required to explain its reasoning on the record. (*Orin, supra*, 13 Cal.3d at p. 945.) The only reasons given by the prosecuting attorneys was SD 20-08. Why? Because the prosecuting attorneys would be hard pressed to give case specific reasons why dismissing defendant’s firearm enhancement allegations would further justice.

Before Gascón took office, defendant was charged with 35 separate violent and serious crimes involving multiple victims. Specifically, he is accused of kidnapping, assaulting with a firearm, and falsely imprisoning Nickolas Portune. (Writ Petition, Appendix, Exh. A, p. 3). He is further accused of assaulting with a firearm and extorting Megan Ritchie. (*Id.* at p. 4). Moreover, he is accused of kidnapping, assaulting with a firearm, extorting, and falsely imprisoning Matthew Pacheco. (*Id.* at pp. 5-6.) Defendant is further accused of similar crimes while personally using a firearm against several additional victims, many of whom live in fear of defendant.⁶

6. Altman, *Family Fears Former Torrance Cop Involved in Shootings, Documents Show*, Daily Breeze (Apr. 22, 2017), <<https://www.dailybreeze.com/2017/04/22/family-fears-former-torrance-cop-involve>

Even though the court was under no obligation to explain on the record why it was refusing to dismiss the firearm enhancement allegations, it did so anyway. The court stated that “[h]aving considered the preliminary hearing transcript, information, the probation report, I find, clearly, that based on the nature of the offense and the background and character of [defendant], that the motion to dismiss the enhancements is not in the interests of justice.” (Writ Petition, Appendix, Exh. D, p. 18.)

The court properly utilized its section 1385 discretion when it denied the prosecuting attorneys’ motion to dismiss defendant’s pending sentencing enhancement allegations because of a lack of case specific reasons why dismissal would be “in furtherance of justice.”

II. A court’s exercise of its broad discretion pursuant to Penal Code section 1385 does not violate defendant’s Equal Protection rights.

Defendant also filed a separate reply brief in this case in which he agrees with and adopts all of the points and arguments set forth in Real Party in Interest’s brief. In addition, he further argues that the court’s refusal to dismiss the enhancement allegations or accept an amended information without the enhancement allegations denied him equal protection of the law. (Reply Brief 6-10.)

Defendant acknowledges that there is no authority supporting his argument and it is a “case of first impression.” (*Id.* at p. 6.) The gist of his argument, however, is as follows: Because defendant’s case was pending before the superior court when SD 20-08 became effective, he belongs to a class of people that SD 20-08 “was meant to apply to.” (*Id.* at p. 7.) He further contends that “this whole class of people . . . had their enhancements dismissed,” but he did not. (*Ibid.*) Therefore, he “was similarly situated to others within this class yet did not receive like treatment.” (*Ibid.*)

d-in-shootings-documents-show/> [as of Oct. 19, 2021].

Defendant further argues that “sentencing enhancements effect liberty interests which are fundamental rights that trigger strict scrutiny.” (*Ibid.*) Thus, the court’s response to the motion to dismiss and filing must be “narrowly tailored to achieve a compelling government interest.” (*Ibid.*) Defendant concedes that the analysis “gets a little complicated” because the writ of mandamus that is at issue in this appeal is challenging the court’s refusal to apply an executive branch policy based on the application of section 1385. (*Id.* at p. 8.)

Be that as it may, defendant argues that when a court is considering such a motion, it must evaluate the constitutional rights of the defendant and the interests of society when determining if dismissal would be in furtherance of justice. (*Ibid.*) Because the trial court did not specifically engage in this analysis, it did not “make a decision narrowly tailored to [defendant’s] situation” and the court’s refusal to dismiss fails strict scrutiny. (*Id.* at p. 9.)

The 14th Amendment to the U.S. Constitution and article I, section 7 subdivision (a) of the California Constitution prohibit the denial of equal protection of the laws. The equal protection guarantees of both are the same and are analyzed similarly. (8 Witkin, Summary of Cal. Law (11th ed. 2017) Constitutional Law, § 775, pp. 92-94.)

Defendant’s equal protection argument fails for two independent reasons. First, as pointed out by Respondent Superior Court of Los Angeles County in its return brief, defendant provides no specific proof of any similarly situated defendants with cases pending before other Los Angeles County superior court judges who had their enhancement allegations dismissed pursuant to section 1385 based solely on SD 20-08. (Return Brief 19.) Because there is no showing of any alleged “disparate treatment,” there can be no finding of an equal protection violation. (*Ibid.*)

Second, SD 20-08.1, issued on December 15, 2020, further clarified SD 20-08’s application to pending cases.⁷ SD 20-08.1 directs DDAs to make a motion

7. See fn. 1, *supra*, at p. 7

to the court to “dismiss and withdraw” enhancements pursuant to Penal Code section 1385. As discussed in Part I, *supra*, section 1385 gives courts broad discretion to decide whether or not to dismiss an action “in furtherance of justice.” Here defendant is challenging the judge’s refusal to accept the reasons for dismissal as enumerated in the SD to him specifically. He further contends that other Los Angeles County judges are dismissing enhancement allegations based simply on the reasons laid out in the SD to similarly situated defendants and this disparate treatment is an equal protection violation. It is important to note that a criminal defendant “‘does not have a fundamental interest in a specific term of imprisonment or in the designation a particular crime receives.’” (*People v. Wilkinson* (2004) 33 Cal.4th 821, 838, quoting *People v. Flores* (1986) 178 Cal.App.3d 74, 88.)

In *Manduley v. Superior Court* (2002) 27 Cal.4th 537, 544, the California Supreme Court rejected an equal protection challenge to a statute that gave prosecutors the sole discretion to decide whether to file criminal charges against certain juvenile offenders in adult court or in juvenile court. The juvenile offenders argued that the statute in question unconstitutionally authorized individual prosecutors to create two classes of minors who are “affected in an unequal manner” because the decision whether to file in adult court or juvenile court “can give rise to significantly different rights and penalties for similarly situated minors.” (*Id.* at p. 568.)

The juvenile offenders further alleged that the statute “might result in invidious discrimination because it contains no standards guiding the prosecutor’s discretion whether to file in criminal court.” (*Id.* at p. 569.) The California Supreme Court held that “[s]uch speculation is insufficient to establish a violation of the equal protection clause.” (*Ibid.*) The court pointed out that prosecutors have broad discretionary charging authority and such authority “is subject to constitutional constraints.” (*Id.* at p. 570.) Thus, a prosecutor’s discretion to select which cases in which to file charges directly in adult criminal court that are “based upon permissible factors such as the circumstances of the crime, the background of the minor, or a desire to show

leniency, for example—does not violate the equal protection clause.” (*Id.* at pp. 570-571.)

Manduley is instructive to this case. Here, defendant is challenging the court’s exercise of its statutory discretion. Section 1385 provides judges with very broad discretion to dismiss “in furtherance of justice.” Similar to *Manduley*, this discretion must be based on the court’s consideration of several individualized factors. (See *People v. Williams* (1998) 17 Cal.4th 148, 158-161.) If a judge exercises this discretion to dismiss, he or she must then explain the reasons for doing so on the record, and, the court’s decision either way is reviewable for an abuse of discretion. (*Carmony, supra*, 33 Cal.4th at p. 376.)


Because some judges may exercise their authority based solely on the reasons set out in SD 20-80, whereas other judges may base their decisions on individualized factors that go beyond those stated in the SD does not give rise to an equal protection violation. In this case, the countywide policy change that occurred *after* defendant committed his crimes and *after* charges were filed with the court was the sole reason given by the prosecuting attorneys who moved for dismissal. The judge looked beyond the SD and evaluated the circumstances of defendant’s case and decided it was not in furtherance of justice to dismiss the enhancement allegations. The judge’s discretionary decision in this case did not deprive defendant of the equal protection of the laws.

CONCLUSION

Defendant's petition for a writ of mandamus should be denied.

October 20, 2021

Respectfully Submitted,



KYMBERLEE C. STAPLETON

*Attorney for Amicus Curiae
Criminal Justice Legal Foundation*

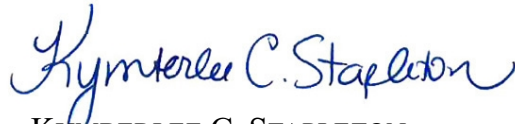
CERTIFICATE OF COMPLIANCE

**Pursuant to California Rules of Court,
Rule 8.520, subd. (c)(1)**

I, Kymberlee C. Stapleton, hereby certify that the attached **BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT** contains 5,586 words, as indicated by the computer program used to prepare the brief, WordPerfect.

Date: October 20, 2021

Respectfully Submitted,

A handwritten signature in blue ink that reads "Kymberlee C. Stapleton". The signature is written in a cursive style with a large initial 'K'.

KYMBERLEE C. STAPLETON

Attorney for Amicus Curiae
Criminal Justice Legal Foundation

PROOF OF SERVICE

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 employed by the Criminal Justice Legal Foundation, with offices at 2131 L Street, Sacramento, California 95816.

On October 20, 2021, I served true copies of the following document described as:

**BRIEF AMICUS CURIAE OF THE
CRIMINAL JUSTICE LEGAL FOUNDATION
IN SUPPORT OF RESPONDENT**

on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY ELECTRONIC SERVICE: I electronically filed the document with the Clerk of the Court by using the TrueFiling system. Participants in the case who are registered TrueFiling users will be served by the TrueFiling system. Participants in the case who are not registered TrueFiling users will be served by U.S. mail as listed in the service list.

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

Executed on October 20, 2021, Sacramento, California.



Kimberlee C. Stapleton

SERVICE LIST

Frederick Bennett Superior Court of Los Angeles County 111 North Hill Street, Room 546 Los Angeles, CA 90012 fbennett@lacourt.org	Attorney for Respondent Via TrueFiling
Bruce Zucker Kravis Graham & Zucker, LLP 401 Wilshire Boulevard 12th Floor, Penthouse Santa Monica, CA 90401 bruce@kgzlaw.net	Attorney for Petitioner Via TrueFiling
Stephanie Yonekura Hogan Lovells US LLP 1999 Avenue Of The Stars, Ste. 1400 Los Angeles, CA 90067 stephanie.yonekura@hoganlovells.com	Attorney for Real Party in Interest Via TrueFiling
Neal Kumar Katyal Hogan Lovells US LLP 555 Thirteenth St., NW Washington, DC 20004 neal.katyal@hoganlovells.com	Attorney for Real Party in Interest Via TrueFiling
Jo-Ann Tamila Sagar Hogan Lovells US LLP 555 Thirteenth St., NW Washington, DC 20004 jo-ann.sagar@hoganlovells.com	Attorney for Real Party in Interest Via TrueFiling
Danielle Desaulniers Stempel Hogan Lovells US LLP 555 Thirteenth St., NW Washington, DC danielle.stempel@hoganlovells.com	Attorney for Real Party in Interest Via TrueFiling
Diana M. Teran Deputy District Attorney LA Office of the District Attorney 211 West Temple Street, 12th Floor Los Angeles, CA 90012	Attorney for Real Party in Interest Via TrueFiling