

No. S275478

**IN THE SUPREME COURT OF THE STATE OF CALIFORNIA**

---

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

v.

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

---

AFTER PARTIAL AFFIRMANCE OF A GRANT OF A MOTION FOR PRELIMINARY  
INJUNCTION BY THE COURT OF APPEAL, SECOND APPELLATE DISTRICT,  
DIVISION SEVEN,  
CASE NO. B310845

THE SUPERIOR COURT OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES  
CASE No. 20STCP04250

---

**APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF  
AND PROPOSED BRIEF OF AMICI CURIAE  
IN SUPPORT OF APPELLANTS**

---

SUMMER LACEY (SBN 308614)  
SLACEY@ACLUSOCAL.ORG  
TIFFANY M. BAILEY (SBN 319886)  
TBAILEY@ACLUSOCAL.ORG  
ACLU FOUNDATION OF SOUTHERN  
CALIFORNIA  
1313 WEST EIGHTH STREET  
LOS ANGELES, CA 90017  
(213) 977-5224

AVRAM FREY (SBN 347885)  
AFREY@ACLUNC.ORG  
ACLU FOUNDATION OF NORTHERN  
CALIFORNIA  
39 DRUMM STREET  
SAN FRANCISCO, CA 94111  
(646) 229-4385

*Attorneys for Amici Curiae*

**CERTIFICATE OF INTERESTED PARTIES**

Pursuant to Rules 8.208(e) and 8.488 of the California Rules of Court, Amici Curiae certify that they know of no other person or entity that has a financial or other interest in this case.

Dated: April 24, 2023

/s/ Summer Lacey  
Summer Lacey  
ACLU FOUNDATION OF  
SOUTHERN CALIFORNIA

*Attorney for Amici Curiae*

Document received by the CA Supreme Court.

**TABLE OF CONTENTS**

	<b>Page</b>
TABLE OF CONTENTS .....	3
TABLE OF AUTHORITIES.....	4
APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF .....	7
INTRODUCTION .....	9
ARGUMENT .....	11
I.    The Court of Appeal’s Decision Will Jeopardize Public Safety, Deny Crime Survivors Restorative Justice, and Disproportionately Harm Black and Brown Communities. ....	11
A.    The Court of Appeal’s Decision Will Likely Increase Excessive Sentences that Put the Greater Community at Risk. ....	11
B.    The Court of Appeal’s Decision Eliminates Prosecutorial Discretion to Seek Restorative Justice for Crime Survivors. ....	14
C.    The Court of Appeal’s Decision Will Disproportionately Impact Black and Brown Communities .....	17
II.   The Special Directives Advance an Expansive View of Justice that Angelenos Have Been Striving to Achieve. ....	20
CONCLUSION .....	22
CERTIFICATE OF COMPLIANCE .....	23
PROOF OF SERVICE .....	24

Document received by the CA Supreme Court.

**TABLE OF AUTHORITIES**

	<b>Page(s)</b>
<b>Cases</b>	
<i>Lockyer v. Andrade</i> (2003) 583 U.S. 63 .....	7
<b>Other Authorities</b>	
Alliance for Safety and Justice, <i>Crime Survivors Speak: The First-Ever National Survey of Victims’ Views on Safety and Justice</i> pp. 5, 13, 15-16, < <a href="https://allianceforsafetyandjustice.org/wp-content/uploads/documents/Crime%20Survivors%20Speak%20Report.pdf">https://allianceforsafetyandjustice.org/wp-content/uploads/documents/Crime%20Survivors%20Speak%20Report.pdf</a> > .....	14
America Counts Staff, <i>California: 2020 Census: California Remained Most Populous State but Growth Slowed Last Decade</i> (Aug. 25, 2021) < <a href="https://www.census.gov/library/stories/state-by-state/california-population-change-between-census-decade.html">https://www.census.gov/library/stories/state-by-state/california-population-change-between-census-decade.html</a> > .....	19
Bird et al., <i>Com. on Revision of the Penal Code &amp; Cal. Policy Lab, Three Strikes in California</i> (Aug. 2022) p. 26, < <a href="https://www.capolicylab.org/wp-content/uploads/2022/08/Three-Strikes-in-California.pdf">https://www.capolicylab.org/wp-content/uploads/2022/08/Three-Strikes-in-California.pdf</a> > .....	9, 12, 21
Cal. Com. on Revision of the Penal Code, <i>Annual Report and Recommendations</i> (Dec. 2021) p. 41, < <a href="http://www.clrc.ca.gov/CRPC/Pub/Reports/CRPC_AR2021.pdf">http://www.clrc.ca.gov/CRPC/Pub/Reports/CRPC_AR2021.pdf</a> > .....	19, 20
David Binder Research, <i>Los Angeles County Survey: Victims of Violent Crime</i> (2021) p. 1, < <a href="https://safeandjust.org/wp-content/uploads/February-2021-LA-Survivor-Survey.pdf">https://safeandjust.org/wp-content/uploads/February-2021-LA-Survivor-Survey.pdf</a> > .....	15
Dichter & Osthoff, <i>Women’s Experiences of Abuse as a Risk Factor for Incarceration: A Research Update</i> (July 2015) p. 1, < <a href="https://vawnet.org/sites/default/files/materials/files/2016-09/AR_IncarcerationUpdate.pdf">https://vawnet.org/sites/default/files/materials/files/2016-09/AR_IncarcerationUpdate.pdf</a> > .....	16
Hinton et al., <i>Vera Inst. of Just., An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Legal System</i> (May 2018) pp. 1, 7, < <a href="https://www.vera.org/downloads/publications/for-the-record-unjust-burden-racial-disparities.pdf">https://www.vera.org/downloads/publications/for-the-record-unjust-burden-racial-disparities.pdf</a> > .....	17

Jin & Hidalgo-Wohlleben, *Three Strikes Analysis: Demographic Characteristics of Strike Offenders* (Apr. 2016) Rose Inst. Of State & Local Gov't—Claremont McKenna College p. 6, <<https://s10294.pcdn.co/wp-content/uploads/2016/07/Three-Strikes-Racial-and-Ethnic-Analysis.pdf>> ..... 9, 18

Kamisher, *George Gascón Wins Race for Los Angeles D.A. in Major Victory for Progressive Prosecutor Movement* (Nov. 6, 2020), <<https://theappeal.org/george-gascon-wins-los-angeles-county-district-attorney/>> ..... 20

Mauer, *Long-Term Sentences: Time to Reconsider the Scale of Punishment* (2018) 87 UMKC L.Rev. 113, 121-125 <<https://www.sentencingproject.org/app/uploads/2022/08/UMKC-Law-Review-Scale-of-Punishment.pdf>> ..... 12

Nellis, Ph.D., The Sentencing Project, *No End in Sight: America’s Enduring Reliance on Life Imprisonment* (Feb. 17, 2021) p. 8, <<https://www.sentencingproject.org/reports/no-end-in-sight-americas-enduring-reliance-on-life-sentences/>> ..... 12, 16, 18

Nichol & Nichol, *Op-Ed: Polly Klaas was our sister. We don’t want unjust laws to be her legacy*, LA Times (Oct. 18, 2020) <<https://www.latimes.com/opinion/story/2020-10-18/polly-klass-legacy-unjust-laws/>> ..... 16

Petrich et al., *Custodial Sanctions and Reoffending: A Meta-Analytic Review* (2021) The Univ. of Chi. Press <<https://www.journals.uchicago.edu/doi/pdf/10.1086/715100>> ..... 12, 13

Queally, *George Gascón will be L.A. County’s next district attorney, promises swift changes*, L.A. Times (Nov. 6, 2020), <<https://www.latimes.com/california/story/2020-11-06/george-gascon-la-district-attorney-race-jackie-lacey-concede>> ..... 20

Schiraldi & Godfrey, Ctr. on Juvenile and Crim. Just., *Racial Disparities in the Charging of Los Angeles County Three “Strike” Cases* (Oct. 1, 1994), <<https://www.cjcj.org/reports-publications/publications/racial-disparities-in-the-charging-of-los-angeles-countys-third-strike-cases>> ..... 18

Special Directive 20-14 p. 3,  
 <<https://da.lacounty.gov/sites/default/files/pdf/SPECIAL-DIRECTIVE-20-14.pdf>> ..... 10

Special Directive 20-08 pp.1-2,  
 <<https://da.lacounty.gov/sites/default/files/pdf/SPECIAL-DIRECTIVE-20-08.pdf>> ..... 10

Stemen, *The Prison Paradox: More Incarceration Will Not Make Us Safer*, Vera Inst. Of Just. Evidence Brief (July 2017) p. 2,  
 <[https://www.vera.org/downloads/publications/for-the-record-prison-paradox\\_02.pdf](https://www.vera.org/downloads/publications/for-the-record-prison-paradox_02.pdf)> ..... 11, 12

The Sentencing Project, Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System (Apr. 19, 2018), <<https://www.sentencingproject.org/reports/report-to-the-united-nations-on-racial-disparities-in-the-u-s-criminal-justice-system/>>..... 17

U.S. Dep’t of Just., Off. of Just. Programs, Nat. Inst. of Just., Five Things About Deterrence (May 2016) pp. 1-2,  
 <<https://www.ojp.gov/pdffiles1/nij/247350.pdf>> ..... 12

Villetaz et al., *The Effects on Re-offending of Custodial vs. Noncustodial Sanctions: An Updated Systematic Review of the State of Knowledge* (Jan. 2, 2015) The Campbell Collaboration p. 7, <<https://onlinelibrary.wiley.com/doi/epdf/10.4073/csr.2015.1>> ..... 14

Zimring et al., *Punishment and Democracy: Three Strikes and You’re Out in California* (2001) ..... 13

## **APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF**

Pursuant to Rule 8.520(f) of the California Rules of Court, Amici Curiae respectfully request permission to file the attached brief in support of Appellants.

The American Civil Liberties Union (“ACLU”) is a nationwide, nonprofit, and nonpartisan membership organization. The ACLU is dedicated to furthering the principles of liberty and equality embodied in the United States Constitution and this nation’s civil rights laws.

The ACLU of Southern California and of Northern California are California affiliates of the national ACLU. Amici work to advance the civil rights and civil liberties of Californians in the courts, in legislative and policy arenas, and in the community. Amici have participated in cases, both as direct counsel and as amicus, challenging harsh sentencing practices and have represented people in custody in California prisons and jails. Notably, in *Lockyer v. Andrade* (2003) 583 U.S. 63, the ACLU of Southern California presented the first challenge to the application of California’s Three Strikes Law in the United States Supreme Court.

In accordance with California Rules of Court, Rule 8.520(f)(4), no party or counsel for any party in the pending appeal authored this brief in whole or in part, and no party or counsel for any party in the pending appeal made a monetary contribution intended to fund the brief’s

preparation or submission. No person or entity other than counsel for the proposed Amici made a monetary contribution intended to fund the preparation or submission of this brief.

Dated: April 24, 2023

Respectfully submitted,

/s/ Summer Lacey  
Summer Lacey  
ACLU FOUNDATION OF  
SOUTHERN CALIFORNIA

*Attorney for Amici Curiae*

Document received by the CA Supreme Court.



## INTRODUCTION

The Three Strikes Law has devastated communities across California since it was enacted in 1994. In the nearly four decades that followed, thousands of Californians have been sentenced to indeterminate life sentences under the law, often for nonviolent or nonserious offenses.<sup>1</sup> Currently, 35,000 Californians—more than *one third* of the state’s prison population—are serving a sentence that has been lengthened by the Three Strikes Law.<sup>2</sup> Despite being generally applicable, the impact of the Three Strikes Law is racially discriminatory. People of color, particularly Black individuals, are more likely to be sentenced under the law than their white counterparts.<sup>3</sup>

Recognizing the acute racialized harm of Draconian sentencing regimes like Three Strikes, more than two million Los Angeles County residents elected District Attorney George Gascón. Gascón campaigned on transformative policy ideas to address unjust sentencing practices and end mass incarceration. The Special Directives at issue in this case are but one

---

<sup>1</sup> (Bird et al., Com. on Revision of the Penal Code & Cal. Policy Lab, *Three Strikes in California* (Aug. 2022) p. 26, <<https://www.capolicylab.org/wp-content/uploads/2022/08/Three-Strikes-in-California.pdf>>)

<sup>2</sup> (*Id.* at p. 31.)

<sup>3</sup> (Jin & Hidalgo-Wohlleben, *Three Strikes Analysis: Demographic Characteristics of Strike Offenders* (Apr. 2016) Rose Inst. Of State & Local Gov’t—Claremont McKenna College p. 6, <<https://s10294.pcdn.co/wp-content/uploads/2016/07/Three-Strikes-Racial-and-Ethnic-Analysis.pdf>>; Bird, *supra*, fn. 1 at p. 26.)

element of Gascón’s commitment to effectuating the will of the electorate. By halting the filing of sentencing enhancements, including enhancements under the Three Strikes Law, and instructing prosecutors to join defense motions to dismiss or independently move to dismiss sentencing enhancements in pending cases, the Special Directives represent a meaningful first step in ameliorating the racialized and excessively carceral harms wrought by decades of problematic sentencing practices.<sup>4</sup>

Despairingly, any notion of justice-oriented progress was abruptly halted by the Court of Appeal’s legally flawed decision. This Amici Curiae brief does not reiterate the unconstitutionality of the Three Strikes Law as interpreted by the Court of Appeal—those arguments are comprehensively addressed in Appellants’ briefs, which Amici adopt unequivocally. Instead, Amici stress the further harms that will result from the Court of Appeal’s decision to constrain prosecutorial discretion not to plead or prove Three Strikes enhancements. Specifically, Amici demonstrate through empirical research that the Three Strikes Law (1) jeopardizes public safety, (2) fails to advance restorative justice for survivors of crime, and (3) disproportionately harms Black and brown communities. Finally, Amici

---

<sup>4</sup> (Special Directive 20-08 pp.1-2, <<https://da.lacounty.gov/sites/default/files/pdf/SPECIAL-DIRECTIVE-20-08.pdf>>; Special Directive 20-14 p. 3, <<https://da.lacounty.gov/sites/default/files/pdf/SPECIAL-DIRECTIVE-20-14.pdf>>)

emphasize that Gascón’s policy decision to limit the harms of Three Strikes is neither novel nor cavalier. It reflects an expansive view of justice that community members have been striving to achieve. For these reasons, as well as those raised by Appellants, Amici respectfully request that this Court reverse the decision below.

## ARGUMENT

### **I. The Court of Appeal’s Decision Will Jeopardize Public Safety, Deny Crime Survivors Restorative Justice, and Disproportionately Harm Black and Brown Communities.**

#### **A. The Court of Appeal’s Decision Will Likely Increase Excessive Sentences that Put the Greater Community at Risk.**

Mass incarceration jeopardizes public safety.<sup>5</sup> Studies show that in states with high incarceration rates, like California, an increase in incarceration is associated with higher resulting crime rates.<sup>6</sup> This phenomenon, known to academics as the “tipping point,” reflects the lasting communal effects of incarceration, including the breakdown of social and family bonds that guide individuals away from crime, the

---

<sup>5</sup> (Stemen, *The Prison Paradox: More Incarceration Will Not Make Us Safer*, Vera Inst. Of Just. Evidence Brief (July 2017) p. 2, <[https://www.vera.org/downloads/publications/for-the-record-prison-paradox\\_02.pdf](https://www.vera.org/downloads/publications/for-the-record-prison-paradox_02.pdf)>)

<sup>6</sup> (*Ibid.*)

removal of adults who would otherwise nurture children, the deprivation of income, and the reduction of future income potential.<sup>7</sup>

Excessive sentences offer no countervailing safety benefits.<sup>8</sup>

Research on deterrence demonstrates that the severity of a potential punishment has no significant impact on an individual’s decision to engage in criminal activity.<sup>9</sup> Nor do long sentences serve a rehabilitation rationale, as individuals overwhelmingly “age out” of criminal behavior after relatively short terms of years.<sup>10</sup> Further, the cost of incarcerating thousands of people year after year—particularly an aging population with significant health needs—diverts resources from restorative programs and initiatives that are proven to better enhance public safety.<sup>11</sup> In effect, excessive

---

<sup>7</sup> (*Ibid.*)

<sup>8</sup> (U.S. Dep’t of Just., Off. of Just. Programs, Nat. Inst. of Just., Five Things About Deterrence (May 2016) pp. 1-2, <<https://www.ojp.gov/pdffiles1/nij/247350.pdf>>)

<sup>9</sup> (Nellis, Ph.D., The Sentencing Project, No End in Sight: America’s Enduring Reliance on Life Imprisonment (2021) p. 8, < <https://www.sentencingproject.org/publications/no-end-in-sight-americas-enduring-reliance-on-lifeimprisonment/>>)

<sup>10</sup> (Bird, *supra*, fn. 1, at p. 33.)

<sup>11</sup> (Mauer, *Long-Term Sentences: Time to Reconsider the Scale of Punishment* (2018) 87 UMKC L.Rev. 113, 121-125 <<https://www.sentencingproject.org/app/uploads/2022/08/UMKC-Law-Review-Scale-of-Punishment.pdf> > [discussing literature showing that people “age out” of crime, there is a limited deterrent effect of lengthy sentences, and the erroneous nature of diverting resources to imprisonment and away from other social interventions that have been proven to improve public safety]; Petrich et al., *Custodial Sanctions and Reoffending: A Meta-*

sentences not only destabilize and economically debilitate the lives of those most impacted, they diminish the safety of all residents.

Studies of California’s Three Strikes Law support this established research. An analysis of California’s crime rate before and after passage of the law reveals that crime has steadily declined at the same trajectory before the enactment of the Three Strikes Law and since its enforcement, suggesting that the law itself was not responsible for any salutary effect.<sup>12</sup> As a report from the Commission on Revision of the Penal Code and the California Policy Lab noted, “[c]rime fell contemporaneously throughout the nation, and comparisons of crime trends in California to states that did not pass Three-Strikes laws reveal very similar trends over the subsequent two decades.”<sup>13</sup>

Meanwhile, where excessive sentencing, and specifically the Three Strikes Law, have failed to reduce crime, community-based alternatives have succeeded. Research has shown that community-based alternatives to incarceration, such as community service, housing support, and treatment

---

*Analytic Review* (2021) The Univ. of Chi. Press <<https://www.journals.uchicago.edu/doi/pdf/10.1086/715100>> [finding that “custodial sanctions have no effect on reoffending or slightly increase it when compared with the effects of noncustodial sanctions such as probation”].)

<sup>12</sup> (Zimring et al., *Punishment and Democracy: Three Strikes and You’re Out in California* (2001).)

<sup>13</sup> (*Ibid.*)

or training, are more effective at reducing crime than incarceration. A systematic review of hundreds of studies on community-based alternatives found that the “rate of re-offending after a non-custodial sanction is lower than after a custodial sanction in most comparisons.”<sup>14</sup>

Thus, by essentially eliminating prosecutorial discretion not to plead or prove Three Strikes enhancements, the Court of Appeal’s decision prevents a duly elected district attorney from implementing research-backed, community-mandated solutions to reduce crime and promote public safety.

**B. The Court of Appeal’s Decision Eliminates Prosecutorial Discretion to Seek Restorative Justice for Crime Survivors.**

Retaining prosecutorial discretion to decline to plead or prove Three Strikes enhancements is not just important for criminal defendants and the community at large, but for crime survivors in particular. For many survivors of crime, including victims of violent crime, justice entails *less* incarceration and more investment in restorative community alternatives.<sup>15</sup>

---

<sup>14</sup> (Villetaz et al., *The Effects on Re-offending of Custodial vs. Noncustodial Sanctions: An Updated Systematic Review of the State of Knowledge* (2015) The Campbell Collaboration p. 7, <<https://onlinelibrary.wiley.com/doi/epdf/10.4073/csr.2015.1>>)

<sup>15</sup> (Alliance for Safety and Justice, *Crime Survivors Speak: The First-Ever National Survey of Victims’ Views on Safety and Justice* pp. 5, 13 15-16, <<https://allianceforsafetyandjustice.org/wp-content/uploads/documents/Crime%20Survivors%20Speak%20Report.pdf>> [finding that 60% of

A 2021 survey of survivors of violent crime in Los Angeles County found that “[m]ost violent crime victims want changes to the criminal justice system that emphasize rehabilitation and crime prevention, rather than more incarceration.”<sup>16</sup> More specifically, “at least 8 in 10 support expanding alternatives to incarceration, such as diversion, mental health treatment, restorative justice, and community service, and reducing prison sentences for people who participate in rehabilitation programs.”<sup>17</sup> The vast majority also believe that the prosecutor’s principal goal should be resolving neighborhood issues and preventing repeat crimes through prevention and rehabilitation, not retribution, even if such methods result in fewer criminal convictions.<sup>18</sup>

Indeed, the sisters of Polly Klaas, the child whose kidnapping and murder contributed to the passage of California’s Three Strikes Law, have spoken out against the statute. In an op-ed in the Los Angeles Times, Jess

---

surveyed victims preferred a criminal system that provided shorter sentences and invested more in prevention and rehabilitation programs and that “the overwhelming majority of crime victims believe that the criminal justice system relies too heavily on incarceration, and strongly prefer investments in prevention and treatment to more spending on prisons and jails”].)

<sup>16</sup> (David Binder Research, Los Angeles County Survey: Victims of Violent Crime (2021) p. 1, <<https://safeandjust.org/wp-content/uploads/February-2021-LA-Survivor-Survey.pdf>>)

<sup>17</sup> (*Id.* at p. 3.)

<sup>18</sup> (*Ibid.*)

and Annie Nichol reflected that they deeply regret how the Three Strikes Law, and other sentencing regimes, have become their sister’s legacy. They lamented the racial disparities inherent in the implementation of Three Strikes, noting that Black and brown people are disproportionately imprisoned pursuant to the law. Jess and Annie Nichol concluded their op-ed with a call for systemic change, asking for divestment from mass incarceration and investment in prevention programs and rehabilitative services.<sup>19</sup> Just like countless other crime victims and their families, they believe that prevention programs and rehabilitative services have the capacity to reduce crime and make the community safer.<sup>20</sup>

---

<sup>19</sup> (See Nichol & Nichol, *Op-Ed: Polly Klaas was our sister. We don’t want unjust laws to be her legacy*, LA Times (Oct. 18, 2020) <<https://www.latimes.com/opinion/story/2020-10-18/polly-klass-legacy-unjust-laws>>)

<sup>20</sup> Victim support for crime preventing services over incarceration debunks the resounding contention that the interests and experiences of “victims” and “offenders” are distinct. In truth, many people who have committed crimes are themselves victims of crime and vice versa. (See, e.g., Dichter & Osthoff, *Women’s Experiences of Abuse as a Risk Factor for Incarceration: A Research Update* (July 2015) p. 1, <[https://vawnet.org/sites/default/files/materials/files/2016-09/AR\\_IncarcerationUpdate.pdf](https://vawnet.org/sites/default/files/materials/files/2016-09/AR_IncarcerationUpdate.pdf)> [finding that “women who have experienced abuse in childhood or adulthood, . . . are more likely to become incarcerated than women who have not experienced abuse”].) This reality is especially true for women who are incarcerated, many of whom are serving time for defending themselves from intimate partner violence. (See, e.g., Nellis, *supra*, fn. 9, at pp. 30-31.)



In constraining prosecutorial discretion to limit excessive sentences, the Court of Appeal’s decision upends the prosecutor’s ability to effectuate the restorative approach to justice that is preferred by many crime survivors.

**C. The Court of Appeal’s Decision Will Disproportionately Impact Black and Brown Communities.**

People of color charged with criminal offenses “are [empirically] more likely to be prosecuted, held in pretrial detention, and to receive other harsh treatment.”<sup>21</sup> Black people, in particular, are significantly more likely to be charged with committing serious crimes, receive less favorable plea-bargaining outcomes, and be sentenced to longer prison terms.<sup>22</sup> It is thus no surprise that, with respect to habitual offender statutes like Three Strikes, “state prosecutors are . . . more likely to charge Black rather than similar white defendants under habitual offender laws.”<sup>23</sup>

Indeed, the disparate impact of Three Strikes was apparent immediately. In 1994, the Center on Juvenile and Criminal Justice analyzed

---

<sup>21</sup> (Hinton et al., Vera Inst. of Just., *An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Legal System* (May 2018) pp. 1, 7, <<https://www.vera.org/downloads/publications/for-the-record-unjust-burden-racialdisparities.pdf>>)

<sup>22</sup> (*Id.* at p. 7.)

<sup>23</sup> (The Sentencing Project, *Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System* (2018), <<https://www.sentencingproject.org/reports/report-to-the-united-nations-on-racial-disparities-in-the-u-s-criminal-justice-system/>>)

data obtained during the first six months following the statute's implementation.<sup>24</sup> The data showed that Black individuals made up 57.3% of the people charged with a third strike, as compared to white individuals, who accounted for just 12.6% of the same population.<sup>25</sup> In Los Angeles County, the data was even more galling: Black people were "accused of a third 'strike' at 17 times the rate of their white counterparts."<sup>26</sup> The effect is particularly tragic given California's extreme overreliance on lengthy sentences. California leads the nation in imposition of life sentences,<sup>27</sup> with 72% of the lifer population representing Black and brown communities.<sup>28</sup>

More recently, the Rose Institute conducted a study analyzing the racial composition of California's prison population from 2001 to 2015.<sup>29</sup> The study found that Black individuals consistently made up a higher portion of the "strike" population compared to other racial groups.<sup>30</sup> In 2015, Black individuals represented 46% of the state's third strike

---

<sup>24</sup> (Schiraldi & Godfrey, Ctr. on Juvenile and Crim. Just., Racial Disparities in the Charging of Los Angeles County Three "Strike" Cases (Oct. 1994) <<https://www.cjcj.org/reports-publications/publications/racial-disparities-in-the-charging-of-los-angeles-countys-third-strike-cases>>)

<sup>25</sup> (*Id.* at pp. 1-2.)

<sup>26</sup> (*Ibid.*)

<sup>27</sup> (Nellis, *supra*, fn. 9, at p. 10.)

<sup>28</sup> (*Id.* at p. 19.)

<sup>29</sup> (Jin & Hidalgo-Wohlleben, *supra*, fn. 3.)

<sup>30</sup> (*Id.* at p. 10.)

population, but only 29% of the total incarcerated population.<sup>31</sup> Both figures are significantly higher than the percentage of Black people in the state population generally, which was 7.1% as of 2020.<sup>32</sup>

While the disproportionate effect of Three Strikes is harshest amongst the Black community, the Rose Institute’s analysis concluded that overall people of color are more likely to be convicted of a strike offense than white individuals.<sup>33</sup> In 2021, the Committee on Revision of the Penal Code reached the same conclusion. In a report analyzing the Three Strikes Law, the Committee concluded that 80% of people sentenced under the Three Strikes Law are people of color.<sup>34</sup> For people in this category who were under age 25 at the time of offense, 90% are people of color.<sup>35</sup>

Finally, the Committee on Revision of the Penal Code and the California Policy Lab released a study in 2022 that analyzed the impact of

---

<sup>31</sup> (*Id.* at p. 11.)

<sup>32</sup> (America Counts Staff, *California: 2020 Census: California Remained Most Populous State but Growth Slowed Last Decade* (Aug. 25, 2021), <<https://www.census.gov/library/stories/state-by-state/california-population-change-between-census-decade.html>> [This is the percentage of the population identified as “Black or African-American alone or in combination [with another racial group].” The percentage identified as “Black or African-American alone” is lower—less than 6%.])

<sup>33</sup> (*Id.* at p. 6.)

<sup>34</sup> (Cal. Com. on Revision of the Penal Code, Annual Report and Recommendations (Dec. 2021), p. 41 <[http://www.clrc.ca.gov/CRPC/Pub/Reports/CRPC\\_AR2021.pdf](http://www.clrc.ca.gov/CRPC/Pub/Reports/CRPC_AR2021.pdf)>)

<sup>35</sup> (*Ibid.*)

Three Strikes on sentence lengths and the composition of California’s prison population. The study showed that Black individuals who were incarcerated in 2022 comprised approximately 45% of all individuals that have received a third-strike enhancement and around 33% of individuals that have had their sentences doubled by a prior strike under the Three Strikes Law.<sup>36</sup> These racial disparities, as well as the law’s failure to achieve its purported crime prevention goals, influenced the Committee on Revision of the Penal Code’s recommendation to repeal Three Strikes entirely.<sup>37</sup> Thus, the discretion not to plead and prove prior convictions is not only necessary to ensure community safety and justice for victims, but to promote equal application of the law.

## **II. The Special Directives Advance an Expansive View of Justice that Angelenos Have Been Striving to Achieve.**

District Attorney Gascón ran for office on a platform that prosecutorial discretion can serve as a mechanism for restoration and societal advancement, not simply an instrument for imprisonment.<sup>38</sup> His victory was historic and decisive.<sup>39</sup> By creating the Special Directives,

---

<sup>36</sup> (*Id.* at p. 26.)

<sup>37</sup> (Cal. Com. on Revision of the Penal Code, *supra*, fn. 34, at p. 41.)

<sup>38</sup> *See, e.g.*, George Gascón Democrat for Los Angeles District Attorney, <<https://georgegascon.org/>> (last visited Dec. 6, 2021).

<sup>39</sup> (See Queally, *George Gascón will be L.A. County’s next district attorney, promises swift changes*, L.A. Times (Nov. 6, 2020),

District Attorney Gascón took the necessary first step to address the inequity and injustice within Los Angeles County’s criminal legal system.

While historic, District Attorney Gascón is not the first elected district attorney—nor the first in Los Angeles—to issue directives that ameliorate the harms of Three Strikes. In 2000, then Los Angeles County District Attorney Steven Cooley issued a special directive that, among other things, narrowed the scope of presumptive Three Strike cases to instances in which the third strike was for a serious or violent felony and the two prior strikes were for severe offenses.<sup>40</sup> Cooley’s directive was codified into law—and approved by a majority of California voters—with the passage of Proposition 36.<sup>41</sup>

The Special Directives at issue in this case heed the community’s demand for a justice system that restores instead of subjugates. They represent an ameliorative approach to justice reform that appreciates the carceral effect on public safety, the community-focused desires of crime survivors, and the disparate impact of excessive sentences on Black and

---

<<https://www.latimes.com/california/story/2020-11-06/george-gascon-la-district-attorney-race-jackie-lacey-concede>>; Kamisher, *George Gascón Wins Race for Los Angeles D.A. in Major Victory for Progressive Prosecutor Movement* (Nov. 6, 2020), <<https://theappeal.org/george-gascon-wins-los-angeles-county-district-attorney/>>

<sup>40</sup> (Bird, *supra*, fn. 1, at p. 10.)

<sup>41</sup> (*Ibid.*)

brown communities. With these Special Directives, Gascón also fulfills a promise that Los Angeles County voters overwhelmingly support—to bring systemic change that reduces the county’s mass incarceration crisis.

### CONCLUSION

If upheld, the Court of Appeal’s decision will deleteriously impact communities across California by expanding mass incarceration. Prosecutors must have the authority to curtail excessive sentences under the Three Strikes Law that jeopardize public safety, contravene the wishes of crime survivors, and disproportionately harm Black and brown communities. For these reasons, Amici respectfully request that this Court overturn the Court of Appeal’s decision.

Dated: April 24, 2023

Respectfully submitted,

/s/ Summer Lacey  
Summer Lacey  
ACLU FOUNDATION OF  
SOUTHERN CALIFORNIA

*Attorney for Amici Curiae*

Document received by the CA Supreme Court.

## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 8.520 (c) of the California Rules of Court and in reliance on the word count of the computer program used to prepare this Proposed Amici Curiae Brief, counsel certifies that the text of this brief (including footnotes) was produced using 13-point type and contains 2,825 words. This includes footnotes but excludes the tables required under Rule 8.204(a)(1), the cover information required under Rule 8.204(b)(10), the Certificate of Interested Entities or Persons required under Rule 8.208, the Application to File Amici Curiae Brief required under Rule 8.200(c)(1-3), this certificate, and the signature blocks. See Cal. Rule of Court, Rule 8.204(c)(3).

Dated: April 24, 2023

/s/ Summer Lacey  
Summer Lacey  
ACLU FOUNDATION OF  
SOUTHERN CALIFORNIA  
  
*Attorney for Amici Curiae*

Document received by the CA Supreme Court.

**PROOF OF SERVICE**

**STATE OF CALIFORNIA, COUNTY OF LOS ANGELES**

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 1313 West Eighth Street, Los Angeles, California 90017. I am employed in the office of a member of the bar of this court at whose direction the service was made. On April 24, 2023, I served the attached document by electronically transmitting a true copy via this Court’s TrueFiling system to the recipients listed on the below service list.

<b>Party</b>	<b>Attorney/Address Served</b>
The Association of Deputy District Attorneys for Los Angeles County: <i>Petitioner and Respondent</i>	Eric Marc George Thomas Peter O'Brien David Junxiong Carroll Matthew Olaf Kussman ELLIS GEORGE CIPOLLONE O’BRIEN ANNAGUEY LLP 2121 Avenue of the Stars Suite 2800 Los Angeles, CA 90067  Christopher Landau ELLIS GEORGE CIPOLLONE O’BRIEN ANNAGUEY LLP 1155 F. Street NW Suite 750 Washington, DC 20004  Nicholas J. Webster Office of the Attorney General 300 South Spring Street Los Angeles, CA 90013

Document received by the CA Supreme Court.



George Gascon: <i>Appellant</i>	<p>Robert E. Dugdale  Laura W. Brill  Nicholas Frederic Daum  Nary Kim  Kendall Brill &amp; Kelly LLP  10100 Santa Monica Boulevard  Suite 1725  Los Angeles, CA 90067</p> <p>Rodrigo Alejandro Castro-Silva  Adrian Gerard Gragas  Jonathan Crothers McCaverty  Office of the County Counsel  500 West Temple Street, 6th Floor  Los Angeles, CA 90012</p> <p>Stephanie Yonekura  Hogan Lovells US LLP  1999 Avenue Of The Stars  Suite 1400  Los Angeles, CA 90067</p> <p>Neal Kumar Katyal  Danielle Desaulniers Stempel  Jo-Ann Tamila Sagar  Hogan Lovells US LLP  555 Thirteenth Street, NW  Washington, DC 20004</p>
Los Angeles County District Attorney's Office: <i>Appellant</i>	<p>Robert E. Dugdale  Kendall Brill &amp; Kelly LLP  10100 Santa Monica Boulevard  Suite 1725  Los Angeles, CA 90067</p>
California Court of Appeals	<p>Second Appellate District, Div. 7  Ronald Reagan State Building  300 S. Spring Street  2nd Floor, North Tower  Los Angeles, CA 90013</p>

Also on this date, I mailed a copy of the attached document by causing it to be deposited in a sealed envelope with the U.S. Postal Service, with the postage fully prepaid, to the recipients listed below:

Hon. James C. Chalfant  
Los Angeles Superior Court  
Stanley Mosk Courthouse, Dept 85  
111 N. Hill Street  
Los Angeles, CA 90012

I declare under penalty of perjury under the laws of the State of California and the United States of America that the above is true and correct.

Executed on April 24, 2023, at Los Angeles, California.



---

Crista Minneci

Document received by the CA Supreme Court.