The Association of Deputy District Attorneys for Los Angeles County v. George Gascón, et al., 20STCP04250

Decision on application for preliminary injunction: granted in large part

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

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

A. Statement of the Case

1. Petition

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

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 Legislating by fiat, Respondent Gascón issued a series of special directives that all but repealed California's sentencing enhancement laws and commanded his employees—Los Angeles County ("County") prosecutors sworn to uphold and enforce the law—to violate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

Special Directive 20-08 provided, among other things, that all sentence enhancements or other sentencing allegations, including under the Three Strikes law, shall not be filed in any cases and shall be withdrawn in pending matters. Special Directive 20-08 also required all prior enhancements to be dismissed or withdrawn.

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

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

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

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

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

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

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

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

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

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

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

2. Course of Proceedings

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

B. The Pertinent Sentencing Enhancements

1. The Three Strikes Law

It is the intent of the legislature in enacting the following provisions to ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of one or more serious or violent felony offenses. Penal Code[1] §667(b).[2]

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

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

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

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

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

---

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

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

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

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

2. Other Sentencing Enhancements

a. Three-Year Prior

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

b. Five-Year Prior

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

c. LWOP

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

d. Others

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

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

C. Preliminary Injunction

An injunction is a writ or order requiring a person to refrain from a particular act; it may be granted by the court in which the action is brought, or by a judge thereof; and when granted by a judge, it may be enforced as an order of the court. CCP §525. An injunction may be more completely defined as a writ or order commanding a person either to perform or to refrain from performing a particular act. *See* Comfort v. Comfort, (1941) 17 Cal.2d 736, 741. McDowell v. Watson, (1997) 59 Cal.App.4th 1155, 1160.[4] It is an equitable remedy available generally in the protection or to prevent the invasion of a legal right. Meridian, Ltd. v. City and County of San Francisco, et al., (1939) 13 Cal.2d 424.

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

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

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

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

---

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

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

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

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

D. Amicus Curiae Briefs

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

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

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

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

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

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

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

The *amicus* brief of current and former elected local prosecutors and attorneys general (hereinafter, "Former Pros.") explains their interest and how it will assist the court, although it fails to identify the necessary information required by CRC 8882(d)(3). The brief also purports to be authored by an attorney, Erwin Chemerinsky, Esq., who is not admitted to practice in California and no *pro hac vice* application was filed for him. As his co-counsel Michael Romano, Esq. is admitted in California, the court has considered the Former Pros. brief, but not its footnotes which do not comply with CRC 2.104.

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

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

E. Statement of Facts[8]

1. The Special Directives

a. Special Directive 20-08

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

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

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

also to protect public safety. While initial incarceration prevents crime through incapacitation, studies show that each additional sentence year causes a four to seven percent increase in recidivism that eventually outweighs the incapacitation benefit. Therefore, sentence enhancements or other sentencing allegations, including under the Three Strikes law, shall not be filed in any cases and shall be withdrawn in pending matters. Hanisee Decl., Ex. 2.

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

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

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

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

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

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

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

b. Special Directive 20-14

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

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

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

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

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

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

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

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

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

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

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

c. Special Directive 20-08.1

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

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

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

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

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

d. Special Directive 20-08.2

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

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

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

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

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

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

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

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

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

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

Where the type of weapon or manner in which a deadly or dangerous weapon including firearms is used exhibited an extreme and immediate threat to human life;

Facts or circumstances that are sufficient to meet the legal definition of great bodily injury or use of a deadly or dangerous weapon alone are insufficient to warrant extraordinary circumstances. The written request and approval must be placed in the case file. Id.

2. ADDA's Evidence

On December 7, 2020, Gascón took office as District Attorney. That same day he issued

Special Directives 20-08 and 20-14, which claimed that sentencing enhancements are a "legacy of California's 'tough on crime' era" and claimed that current statutory sentencing ranges are sufficient for criminal sentencing without enhancements. Hanissee Decl., ¶3, Ex. 2. Gascón ordered that sentence enhancements or other sentencing allegations, including under the Three Strikes law, shall not be filed in any cases and shall be withdrawn in pending matters. Ex. 2.

Special Directive 20-14 instructed deputy district attorneys how to apply and carry out the District Attorney's new enhancements and sentencing policies. Hanisee Decl., ¶3, Ex. 5. Special Directive 20-14 provides that for any pending case, the deputy district attorney shall inform the court that, at the direction of the District Attorney, the People (a) join in the defendant's motion to strike all alleged enhancement(s) or (2) move to dismiss all alleged sentence enhancement(s) named in the information for all counts. Ex. 5.

On December 15, 2020, Gascón issued Special Directive 20-08.1, which imposed additional requirements on deputy district attorneys for sentencing enhancements. Hanisee Decl. ¶3, Ex. 3. The Special Directive requires deputy district attorneys to move to dismiss and withdraw all pre-existing enhancement allegations in all cases under section 1385 (interests of justice). The Special Directive includes a script for the deputy district attorney to follow verbatim, asserting that mandatory sentencing enhancements under the Three Strikes Law unconstitutionally usurp prosecutorial discretion. Id., Ex. 3.

The Special Directive does not instruct deputy district attorneys to cite to the court adverse case authority in accordance with an attorney's ethical duty of candor to the tribunal. Rules of Professional Conduct ("RPC") 3.3(a)(2) ("A lawyer shall not fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.") In the event that the court refuses to dismiss the allegation, the Special Directive requires deputy district attorneys to seek leave to file an amended charging document, ostensibly to eliminate the enhancement allegations the court had already refused to dismiss. Id., Ex. 3. Where the court does not grant such leave, the Special Directive requires deputy district attorneys to provide to their head deputy the "[c]ase number, date of hearing, name of the bench officer and the court's justification for denying the motion (if any)." Id., Ex. 3.

These Special Directives elicited an immediate backlash from the public, prosecutors, and judges. Petition ¶ 18. Judges have scolded deputy district attorneys for following Gascón's Special Directives instead of their obligations under the law, opining that it is unethical or improper to comply with the Special Directives and refuse to prosecute. Hanisee Decl., ¶¶ 6-9, Exs. 6-9. Gascón has publicly, but incorrectly, claimed that prosecutors are sworn to follow his directives as the elected District Attorney so long as they are within the law. Hanisee Decl., ¶10, Ex. 10.

On December 17, 2020, the District Attorney issued Special Directive 20-08.2, which partially withdrew some of the restrictions of Special Directive 20-08. Hanisee Decl., ¶3, Ex. 4. Therein, deputy district attorneys may allege certain enumerated sentencing enhancements— such as hate crime enhancements, elder abuse enhancements, and others—and seek their head deputy's approval to assert any other unenumerated enhancement. Id. But Gascón maintained that the following six enhancements "shall not be pursued in any case and shall be withdrawn in pending matters": (1) prior strike enhancements (§§ 667(d), 667(e)); (2) five-year prior enhancements (§667(a)(1)) and three-year prior enhancements (§667.5(a)); (3) gang enhancements (§186.22), (4) special circumstances allegations resulting in an LWOP sentence, (5) violations of bail or O.R.

release (§12022.1) and (6) use of a firearm allegations (§12022.53). Hanisee Decl. ¶ 3, Ex. 4.

Portions of the Special Directives prohibit deputy district attorneys from complying with their ministerial prosecutorial duties in violation of the law, their oaths of office, and their ethical responsibilities as officers of the court. Hanisee Decl., ¶5. The unlawful conduct includes barring deputy district attorneys from charging enhancements they statutorily are obligated to charge, barring deputy district attorneys from complying with their ministerial duty to exercise case-by-case discretion to maintain or move to dismiss charges, mandating that deputy district attorneys move to dismiss special circumstance allegations that cannot be dismissed by law, and mandating that deputy district attorneys attempt to unilaterally abandon a prosecution where a judge denied a motion to dismiss. Id. Deputy district attorneys risk contempt of court or discipline by the State Bar each time they undertake this conduct. Id.

3. District Attorney's Evidence[10]

In the experience of Monnica L. Thelen, Esq. ("Thelen"), a deputy public defender since 2005, the defense sometimes will make a counteroffer to the prosecution's plea offer. Defense counsel may point out weaknesses in the prosecution's case or may present mitigating circumstances that support the counteroffer. Thelen Decl., ¶6.[11] On many occasions, prosecutors have informed Thelen that while he or she would be inclined to accept the counteroffer the prosecutor cannot do so because the prosecutor's manager will not allow it. Id. In other cases, prosecutors have informed Thelen that if she wanted to provide a counteroffer, she must make an appointment with their manager to discuss it. Id.

In cases where the prosecutors move to dismiss the strike enhancement or special allegations, they are rarely, if ever, asked by the court to state whether doing so is in the interests of justice. Rather, the court simply accepts the plea and sentences the defendant. Thelen Decl., ¶7. The court is involved in plea bargaining only when Thelen cannot reach an agreement with the prosecutor and asks to plead open to the court. Thelen Decl., ¶8. Only on those rare occasions does Thelen state to the court why such a plea bargain is in the interests of justice. Id.

Shelan Y. Joseph, Esq. ("Joseph") is as a deputy public defender who for the last two years has overseen all cases where the death penalty may be imposed, and all special circumstances cases. Joseph Decl., ¶3. In Joseph's experience, prosecutors do not always file all strikes and enhancements. Joseph Decl., ¶4. They do not file all cases as felonies. Id. Instead they exercise discretion to determine whether a case should be filed, whether a "wobbler" crime should be filed as a felony or misdemeanor, and whether strikes should be filed and enhancements alleged. Id. In

[10] The District Attorney requests judicial notice of the Memorandum of Understanding for Joint Submission Regarding the Deputy District Attorneys" ("MOU") entered into by and between the Authorized Management Representatives of the County of Los Angeles and ADDA (Ex. 1). As the court explained at the February 2, 2012 hearing, while a MOU may be judicially noticed as an official act under Evid. Code section 452(c) when it has been adopted by the governing legislative body (Ass'n for Los Angeles Deputy Sheriffs v. County of Los Angeles, (2019) 42 Cal.App.5th 918, 924, n. 2), the District Attorney fails to show that the MOU was adopted by the County's Board of Supervisors. As a result, the MOU is merely a public agency contract not subject to judicial notice. The request is denied.

[11] The paragraphs in the Thelen and Joseph declarations are unnumbered.

some instances, prosecutors have used their discretion to reduce felony charges to misdemeanor charges to effectuate a disposition. Id.

In cases where special circumstances have been alleged, upon a showing by the defense prosecutors have dismissed the special circumstance allegation to accept a defense offer of less than life without the possibility of parole. Prosecutors have exercised their discretion to dismiss the special circumstances in those instances. Joseph Decl., ¶5.

Although most prosecutors review their cases and exercise their discretion to charge only the appropriate charges and enhancements, some overcharge their cases, piling on counts and enhancements. Joseph Decl., ¶6. This overcharging serves to force defendants to choose between risking a very long prison sentence or taking a deal for a much-reduced sentence with the overcharged counts being dismissed. Id. For example, prosecutors routinely file gang enhancements for the most mundane crimes committed by gang members even though the crime was not committed for the gang's benefit. Id. This practice of overcharging and routinely filing felonies is particularly prevalent in juvenile cases. Prosecutors routinely choose to charge the most egregious of charges that impact the most vulnerable of clients. Joseph Decl., ¶7.

In Joseph's practice, there have been instances where defense counsel will make a counteroffer to the prosecution's plea offer. Joseph Decl., ¶8. The defense might point out that the prosecution's case is factually weak and/or there is a viable defense. Id. The prosecutor might agree that there are evidentiary issues. Id. However, the prosecutor will explain that while he or she would like to accept the defense counteroffer or even make a lower offer, he or she cannot do so because the prosecutor's manager will not allow it. Id. Since the manager -- who has no involvement in the actual trial proceedings -- will not authorize the plea, the prosecutor is bound by that decision despite the problems of proof. Id.

Marshall Khine, Esq. ("Khine") has been an assistant district attorney for the District Attorney's Office for the City and County of San Francisco since November 1998. Khine Decl., ¶1. Khine is not aware of any policy that required prosecutors to allege every available qualifying serious or violent conviction as a strike enhancement. Khine Decl., ¶3. Prior to Prop 36, the "Three Strikes Reform Act" if 2012, San Francisco District Attorneys discouraged prior strike conviction enhancements on non-serious and non-violent new offenses and generally and did not pursue life in prison sentences under the Three Strikes law for new low-level felony convictions. Id. Some of these offenses eligible for life sentences prior to Prop 36 are no longer felonies after Prop 47, "The Safe Neighborhood and Schools Act" of 2014, and some are not crimes anymore pursuant to Prop 64, "The Adult Use of Marijuana Act" of 2016. Id.

The current policy of the San Francisco District Attorney is to allege status enhancements such as prior strike convictions only as warranted by extraordinary circumstances subject to the approval of the district attorney or his designee. Khine Decl., ¶4. The decision to allege prior convictions as strikes under the Three Strikes law has always been subject to sound judgment and discretion to achieve a proportionate and appropriate sentence for the offense. Khine Decl., ¶5.

Stephan A. Munkelt, Esq. ("Munkelt") is the Executive Director of the California Attorneys for Criminal Justice (the "CACJ"), an association of criminal defense lawyers, including both retained counsel and public defenders. Munkelt Decl., ¶1. Munkelt has never had a district attorney or deputy district attorney suggest that the law imposes a mandatory duty to file every known prior strike in each new felony prosecution. Munkelt Decl., ¶4. In numerous felony cases where Munkelt's client had one or more serious or violent prior felony convictions, the initial

pleading did not allege those enhancements. Munkelt Decl., ¶6. In many the available strike enhancements were never filed. Id.

c. Reply Evidence[12]

ADDA's operative Bylaws identify its purposes, *inter alia,* as follows: (1) to promote the welfare of the membership and to provide a voice in the determination of the terms and conditions of employment particularly through the collective bargaining process (§1.3.2); (2) to promote legislation beneficial to ADDA, the deputies that it represents and other organizations consistent with the goals of ADDA and the furtherance of the administration of justice and public safety (§1.3.3); (3) to promote career service in government (§1.3.4); and (4) to provide research and educational services and activities designed to assist members and other organizations consistent with the goals of ADDA (§1.3.5). Hanisee Reply Decl., ¶2, Ex. 14. The Bylaws specifically contemplate litigation. Hanisee Reply Decl., ¶3, Ex. 14 (Art.VI, §3, §6.3).

The Office's written policy regarding the charging and disposition of prior strikes under the Three Strikes law in effect prior to Gascón's adoption of the Special Directive provided that all qualifying prior felony convictions shall be alleged in the pleadings pursuant to section (667(f)(1). Hanisee Reply Decl., ¶4, Ex. 15. Prior to seeking dismissal of any strike, the prior strike case files shall be reviewed, if available, to fairly evaluate mitigating and aggravating factors. Id. If it is determined that proof of a prior strike cannot be obtained or that the alleged strike is inapplicable, dismissal of the strike shall be sought after obtaining head deputy approval. Id.

Under this former policy, deputy district attorneys were required to plead and prove prior strikes where they determine that such strikes exist. Hanisee Reply Decl., ¶4. A deputy district attorney may then move to dismiss the prior strike if he or she is subsequently unable to obtain sufficient proof of the strike, or if the interests of justice otherwise require dismissal of the strikes. Id.

On January 7, 2021, ADDA's counsel sent a Public Records Act request to the Office requesting that it produce all memoranda regarding the lawfulness or ethical implications of any of the Special Directives issued on or after December 7, 2020. George Decl., ¶3, Ex. 12. On January 22, 2021, ADDA's counsel received a letter from County Counsel refusing to produce the memoranda as privileged and as preliminary drafts not retained by the public agency in the ordinary course of business. George Decl., ¶4, Ex. 13.

F. Analysis

Petitioner ADDA applies for a preliminary injunction enjoining the District Attorney from compelling his deputy district attorneys to comply with his Special Directives insofar as they:

---

[12] In reply, ADDA requests judicial notice of the following: (1) ADDA's Bylaws (Ex. 14); and (2) the District Attorney's written policy manual in effect prior to the Special Directives (Ex. 15). Although ADDA admittedly presents contrary authority (*see, e.g.,* El-Attar v. Hollywood Presbyterian Medical Center, (2013) 56 Cal. 4th 976, 989), the Bylaws are not subject to judicial notice and the request is denied for Exhibit 14. However, Exhibit 14 is separately authenticated by the Hanisee reply declaration. The District Attorney's policy manual is judicially noticed. Evid. Code §452(c).

(1) prohibit deputy district attorneys from pleading and proving strike priors under the Three Strikes law;

(2) require deputy district attorneys to move to dismiss from a pending criminal action (i) any prior strike enhancements, including second strikes and strikes arising from a juvenile adjudication, (ii) any five-year prior enhancements (§667(a)(1)) and three-year prior enhancements (§667.5(a)); (iii) STEP Act gang enhancements (§186.22); (iv) special circumstances allegations that would result in an LWOP sentence (§§ 190.1 to 190.5); (v) violations of bail or O.R. release (§12022.1); and (vi) use of a firearm allegations (§12022.53);

(3) require deputy district attorneys to make a post-conviction motion to dismiss any special circumstances allegations (§§ 190.1-190.5); and

(4) require deputy district attorneys to move for leave to amend the charging document in any pending criminal action for the purpose of removing an allegation that they are restrained and enjoined from moving to dismiss.

Petitioner ADDA contends that issuance of mandamus or a writ of prohibition[13] is appropriate because the District Attorney's Special Directives prohibit deputy district attorneys from complying with their ministerial prosecutorial duties in violation of the law, their oaths of office, and their ethical responsibilities as officers of the court. App. at 6. The unlawful directives purport to bar deputy district attorneys from charging statutorily-mandated enhancements and from complying with their ministerial duty to exercise case-by-case discretion as to appropriate charges to maintain or dismiss. Id. No permissible justification exists for the unlawful directives. It is no answer for the District Attorney to claim publicly that "[p]rosecutors are sworn to follow the directives of the elected D.A." *See* Hanisee Decl. ¶ 10, Ex. 10. The County has not vested its district attorney with such power. Deputy district attorneys, like all county prosecutors within the state, swear an oath only to defend and uphold the Constitution, not the district attorney. *See* Cal. Const. Art. XX, §3. App. at 6.

Gascón responds that he has implemented the Special Directives as the duly elected District Attorney "in the wake of significant research showing excessive sentencing practices yield no public safety benefit and do not promote the interests of justice". Opp. at 6. He has concluded that there is no ministerial duty to plead the relevant sentencing enhancements under the Three Strikes law. The California Supreme Court explained: "Under California's Three Strikes law, the sentence that is actually imposed upon a defendant in a particular case is dependent [in part]... upon the prosecutor's exercise of prosecutorial discretion in determining how many prior convictions to charge in the case." In re Coley, (2012) 55 Cal.4th 524, 559 (emphasis added). Opp. at 6.

The District Attorney adds that there is no ministerial duty to forego directing his deputies to move to dismiss existing sentencing enhancements as a matter of policy. There is nothing wrong with the elected district attorney -- as opposed to line prosecutors -- setting policies predicated on how that district attorney believes his office's prosecutorial discretion should be exercised in seeking the dismissal of sentencing enhancements. There further is no ethical issue for the County's deputy district attorneys in following these directives**.** The district attorney's role is to

[13] This case is not appropriate for a writ of prohibition, which exists only to restrain an act involving the exercise of judicial functions. Dunn v. Justice's Court of Sixth Township, (1934) 136 Cal.App. 269, 270. The District Attorney does not exercise a judicial function.

assess the interests of justice and the wise use of resources through the exercise of prosecutorial discretion and there is no ethical issue when the district attorney, not line prosecutors, sets general policies that reflect this assessment. Opp. at 7.

Although neither party addresses this issue, an injunction generally is not available to prevent the execution of a public statute by officers of the law for the public benefit. *See* Szold v. Medical Board, (2005) 127 Cal.App.4th 591, 596. This prohibition does not apply, however, where the public officials are acting contrary to a constitutional or statutory duty. People for the Ethical Operation of Prosecutors and Law Enforcement v. Spitzer, ("PEOP") (2020) 53 Cal.App.5th 391, 410 (unconstitutional use of jail confidential informant practice could be enjoined because it would not interfere with agencies' lawful exercise of duties). As an example, an injunction may issue to prevent a city from interfering with the exercise of a plaintiff's First Amendment rights. *See* Ketchens v. Reiner, (1987) 194 Cal.App.3d 470, 480.

1. Standing

a. Associational Standing

Standing is a threshold issue necessary to maintain a cause of action, and the burden to allege and establish standing lies with the plaintiff. Mendoza v. JPMorgan Chase Bank, N.A., ("Mendoza") (2016) 6 Cal.App.5th 802, 810. As a general rule, a party must be "beneficially interested" to seek a writ of mandate. Friends of Oceano Dunes, Inc. v. San Luis Obispo County Air Pollution Control Dist., (2015) 235 Cal.App.4th 957, 962 (citing CCP §1086). Likewise, to seek declaratory relief, a party must be an "interested person." CCP §1060. An "interested person" means the same thing as a "beneficially interested" person in mandamus cases. Asimow, et al., Administrative Law (2018), Ch. 14, §14:6. "Beneficially interested" has been generally interpreted to mean that one may obtain a mandamus writ only if the person has some special interest to be served or some particular right to be preserved or protected over and above the interest held in common with the public at large. SJJC Aviation Services, LLC v. City of San Jose, ("SJJC") (2017) 12 Cal.App.5th 1043, 1053. The beneficial interest must be direct and substantial. Ibid. A petitioner has no beneficial interest if he or she will gain no direct benefit from the writ's issuance and suffer no direct detriment if it is denied. Ibid.

Under the doctrine of associational standing, an association that does not have standing in its own right may bring suit on behalf of its members. Amalgamated Transit Union, Local 1756, AFL-CIO v. Super. Ct., (2009) 46 Cal.4th 993, 1003. An association has standing to bring suit on behalf of its members when (a) its members would have standing to sue, (b) the interests the association seeks to protect are germane to the organization's purpose, and (c) neither the claim nor the relief requested requires the participation of individual association members. Prop. Owners of Whispering Palms, Inc. v. Newport Pac., Inc., (2005) 132 Cal. App. 4th 666, 672–73.[14] The first prong of this test is met if any one or more member would have standing to sue. Id.

Petitioner ADDA states that it is the certified exclusive bargaining representative for Bargaining Unit 801, which consists of deputy district attorneys I, II, III, and IV pursuant to the County's Employee Relations Ordinance. Bargaining Unit 801 consists of approximately 800

[14] State law on associational standing derives from, and is co-extensive with, federal constitutional law. Bd. of Teamsters & Auto Truck Drivers v. Unemployment Ins. Appeals Bd., ("Teamsters") (1987) 190 Cal.App.3d 1515, 1522, n. 3.

deputy district attorneys. ADDA asserts that it has organizational standing to assert the interests of its members in this action.

The District Attorney challenges ADDA's associational standing. He notes that a petitioner has the burden of establishing standing and yet ADDA asserts only that it is the bargaining unit for the County's deputy district attorneys and thus has "organizational" standing. But ADDA neither identifies the requirements for organizational standing nor provides any evidence or argument about the scope of its bargaining authority. Opp. at 19-20.

The District Attorney notes that associational standing does not exist unless "the interests [the association] seeks to protect are germane to the organization's purpose." Amalgamated Transit Union, Local 1756, AFL-CIO v. Super. Ct., (2009) 46 Cal.4th 993, 1004 (unfair competition law requires injury-in-fact and PAGA requires "aggrieved employee", and both are inconsistent with associational standing). The mere fact that a union may have bargaining unit status does not mean that it may challenge management policy determinations like the Special Directives. Opp. at 19-20.

By law, ADDA's scope of representation includes "all matters relating to employment conditions and employer-employee relations, including wages, hours, and terms and conditions of employment". Gov't Code §3504. As an exception, the scope of representation "shall not include consideration of the merits, necessity, or organization of any service or activity provided by law or executive order." Id. This statutory exception was added to prevent "expansion of the language of 'wages, hours and working condition' to include more general managerial policy decisions.'" Claremont Police Officers' Ass'n v. City of Claremont, (2006) 39 Cal.4th 623, 631-32. As such, the language recognizes the rights of employers to make unconstrained fundamental management or policy choices. Id.

ADDA correctly replies (Reply at 14-15) that Govt. Code section 3504 does not circumscribe its right to associational standing for mandamus. ADDA is a union organized for the purpose of protecting the wages and working conditions of over 800 deputy district attorneys in the County. Hanisee Decl. ¶2; Suppl. Hanisee Decl. ¶¶ 2–3, Ex. 15.[15] The District Attorney's Special Directives require deputy district attorneys to follow his policies on the Three Strikes law and sentence enhancements. ADDA contends that these directions are unlawful and expose its members to court sanctions, contempt of court, and ethical violations. It is germane to ADDA's mission of protecting its members' working conditions to prevent them from facing the Hobson's choice of either complying with the Special Directives and violating the law, their oath, and their ethics, or complying with the law and risking internal discipline for violating the Special Directives.

Courts have concluded, without reference to Govt. Code section 3504, that labor unions have standing to challenge various employee working conditions. *See, e.g.*, Teamsters, *supra,* 190 Cal.App.3d at 1522 (union had mandamus standing to challenge denial of unemployment insurance benefits to its members after collective bargaining broke down with employer). *See* Nat'l Weather Serv. Emps. Org., Branch 1-18 v. Brown, (2d Cir. 1994) 18 F.3d 986, 989 (union had standing to challenge relocation of weather forecasting station because it would force

[15] There is no dispute that ADDA is authorized to file lawsuits on behalf of its members. ADDA's Bylaws are in evidence and they refer litigation. Hanisee Reply Decl., ¶3, Ex. 14, (Art. VI, §3. ¶6.3).

employees to commute further). Reply at 14-15.[16]

ADDA's challenge is not to the District Attorney's managerial policies, but to the working conditions for its members resulting from those policies. Many or all of ADDA's members would have individual standing to raise these issues and ADDA therefore has associational standing.

b. Public Interest Standing

If *arguendo* ADDA does not have associational standing, it has public interest standing. Where a plaintiff cannot satisfy the "over and above" test for private interest standing, California cases still treat a plaintiff as beneficially interested for the purpose of mandamus standing if the plaintiff satisfies the criteria for public interest standing. Asimow, et al., Administrative Law (2018), Ch. 14, §14:5. Public interest standing may be conferred "where the question is one of public right and the object of the mandamus is to procure the enforcement of a public duty." Save the Plastic Bag Coalition v. City of Manhattan Beach, (2011) 52 Cal.4th 155, 166. This type of standing "promotes the policy of guaranteeing citizens the opportunity to ensure that no governmental body impairs or defeats the purpose of legislation establishing a public right." Green v. Obledo, (1981) 29 Cal.3d 126, 144. In determining whether public interest standing

[16] The District Attorney's opposition argues, and his counsel repeated at the February 2 hearing, that the MOU between the County and ADDA has a grievance procedure for deputy district attorneys to follow if they have a complaint about their required duties and ADDA has not shown that the grievance procedure has been exhausted. *See* Opp. at 20. As explained at the hearing, the MOU has not been judicially noticed and is not in evidence. Therefore, the court need not address the internal exhaustion issue.

The District Attorney tries to cure this defect by filing a Supplemental Request for Judicial Notice that authenticates the MOU as adopted by the County's Board of Supervisors. This post-hearing request is unauthorized; a party is not entitled to learn about an evidentiary defect at hearing and then cure the defect post-hearing without leave of court. For this reason, the Supplemental Request for Judicial Notice is denied.

Even if *arguendo* the court is required to judicially notice the MOU, exhaustion of the internal grievance procedure is not required. The District Attorney's argument is that individual deputy district attorneys failed to pursue a grievance and therefore ADDA does not have associational standing. The MOU provides for a lengthy four-level grievance procedure for "rules and regulations governing personnel practices or working conditions", culminating in an arbitration binding on the employee and upon the County to the extent it does not require legislative action by the Board of Supervisors. In the arbitration, the arbitrator will interpret state law only if he or she finds it necessary. Supp. RJN Ex. 1, p. 201-12. This grievance procedure appears identical to the procedure which two appellate courts have held need not be exhausted in a union representative action for the County's deputy sheriffs because requiring each individual deputy to grieve through arbitration would be an ineffectual remedy. Ass'n for Los Angeles Deputy Sheriffs v. County of Los Angeles, *supra*, 42 Cal.App.5th at, 930; Ass'n for Los Angeles Deputy Sheriffs v. County of Los Angeles, (Jan. 29, 2021) __ Cal.App.5th __, 2021 DJDAR 1106, 1108-09 (requiring grievance by 107 affected employees was ineffectual remedy). Plainly, requiring the more than 800 deputy district attorneys to grieve this complex matter concerning the lawfulness of the District Attorney's policies would be an ineffective remedy.

applies, the court considers (1) whether "the public duty is sharp and the public need weighty" (SJJC Aviation Services, LLC v. City of San Jose, ("SJJC") (2017) 12 Cal.App.5th 1043, 1058), (2) whether the policy supporting public interest standing is outweighed by competing considerations of a more urgent nature (Reynolds v. City of Calistoga, (2014) 223 Cal.App.4th 865, 873), and (3) whether the claim of public interest standing is driven by personal objectives rather than broader public concerns (SJJC, *supra*, 12 Cal.App.5th at 1057).

In PEOP, the plaintiff organization alleged that the defendant sheriff's department and district attorney's office breached their duties to conduct lawful investigations by moving confidential jail informants near the criminal defendant to elicit confessions even though represented by counsel, permitting the informants to use threats of violence, and even permitting the informant to threaten to kill the criminal defendant if he did not confess to the crime. 53 Cal.App.5th at 396-97. The court upheld public interest standing because this allegation involved outrageous constitutional violations and the systematic violation of the constitutional rights of due process and assistance of counsel. Id. at 410.

Obviously, the public had PEOP had a strong interest in deterring the allegedly constitutionally unlawful surveillance conduct and law enforcement's duty was sharp. Here, the public has an equally strong interest in the District Attorney's alleged statutory and constitutional violations.[17] The District Attorney's duty, if it exists, also is sharp. Finally, ADDA's claim is driven more by public concern than personal objective, a basis which the PEOP court noted is important to public interest standing. 53 Cal.App.5th at 408 (citation omitted).

Because ADDA raised public interest standing in reply to the District Attorney's standing argument, he had no opportunity to brief it. At the February 2 hearing, the District Attorney's counsel relied on two cases that he contends support denial of public interest standing: Dix v. Superior Court, ("Dix") (1991) 53 Cal.3d 442 and Weatherford v. City of San Raphael, ("Weatherford") (2017) 2 Cal.5th 1241.

In Dix, the father of a victim challenged by mandamus the recall of a criminal defendant's sentence for purposes of reducing it as the result of his cooperation against a drug kingpin. 53 Cal.3d at 447-50. The court concluded that the father lacked beneficial interest mandamus standing because neither a crime victim nor a citizen has a legally enforceable interest in the conduct of criminal proceedings. Id. at 450. With respect to public interest standing, the court held that the father had no such standing because (a) a prosecutor has no duty to conduct criminal proceedings in a particular manner and (b) public interest standing must yield to public policy, and public intervention into criminal proceedings would have ominous implications. Id. at 453-54.

In Weatherford, the court held that the plaintiff did not have taxpayer standing to challenge a city's practice of impounding vehicles unless she paid a tax to the city assessed by that locality. 2 Cal.5th at 1252. The court remanded for a determination of what kind of tax would suffice. Id. With respect to public interest standing, the court held that Dix and other cases have recognized the need for limits in light of a larger statutory and policy context. Id. at 1248. The court noted that there is sometimes a competing interest at issue when a party seeks a judicial remedy against government officials. Id. at 1249.

Neither Dix nor Weatherford affects ADDA's public interest standing. Both cases indicate

[17] With respect to public interest, it is worth noting that the clerk has informed the court that 790 members of the public listened to the February 2, 2021 hearing.

that public interest standing for mandamus should be denied where there is a bigger statutory and policy picture, including the public policy surrounding criminal proceedings and the prosecutor's discretion in conducting them. In this case, the bigger picture is directly at issue: the District Attorney's right to compel his deputies to conduct criminal proceedings, particularly Three Strike cases, in a certain way. Because ADDA is seeking to prevent the District Attorney from forcing his deputy district attorneys from violating the law, this case fits squarely within PEOP and outside the policy concerns of Dix and Weatherford.

Indeed, PEOP distinguished both Dix and Weatherford. The PEOP court noted that Weatherford was a taxpayer suit, not a mandamus claim. Id. at 404. Nor were there any ominous consequences to the criminal justice system in permitting the plaintiffs to proceed. Id. "An injunction against unlawful investigative methods cannot, by definition, interfere with the lawful exercise of defendants' duties." Id. Public officials must obey the law and the PEOP court had no concerns that the lawsuit would interfere in the legitimate operations of the sheriff's and district attorney's offices. Id. at 405.

The same is true here. ADDA has public interest standing.

2. Probability of Success

a. Prosecutorial Discretion

Any discussion of a prosecutor's duties begins with the United States Supreme Court's comments about United States Attorneys in Berger v. United States, ("Berger") (1935) 295 U.S. 78, 88. A United States Attorney is the representative of a sovereignty whose obligation is to govern impartially, which is a compelling obligation. *See* id. The prosecutor's interest in a criminal prosecution is not that he shall win a case, but that justice be done. Id. The prosecutor should prosecute with "earnestness and vigor". Id. While he may strike "hard blows," he is not at liberty to strike foul ones. Id. It is as much the prosecutor's duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. Id. These comments apply equally to any prosecutor in any jurisdiction of this country, including California. *See* People v. Hill, (1998) 17 Cal.4th 800, 820 (quoting Berger).

In fulfilling these duties, prosecutors in every jurisdiction of the United States have considerable discretion. "The capacity of prosecutorial discretion to provide individualized justice is firmly entrenched in American law." McCleskey v. Kemp, (1987) 481 U.S. 279, 311–12 (internal quotations omitted). In California, prosecutorial discretion is "basic to the framework of the California criminal justice system." Gananian v. Wagstaffe, ("Gananian") (2011) 199 Cal. App. 4th 1532, 1543 (2011) (quoting People v. Valli, (2010) 187 Cal. App. 4th 786, 801). Prosecutorial discretion is derived from the doctrine of separation of powers codified in Cal. Const. Art. III, section 3.[18] People v. Birks, (1998) 19 Cal.4th 108, 134. "California district attorneys 'are given complete authority to enforce the state criminal law in their counties.'" Pitts v. Cty. of Kern, (1998) 17 Cal.4th 340, 358.

Prosecutors exercise discretion on whom to charge with a criminal offense, what charges to bring, and what plea bargains to offer. A prosecutor has "unlimited discretion in the crime-

[18] Cal. Const. Art. III, section 3 provides: "The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the other two except as permitted by this Constitution."

charging function" (People v. Wallace, (1985) 169 Cal. App. 3d 406, 407) and "ordinarily [has] the sole discretion to determine whom to charge with public offenses and what charges to bring." People v. Birks, *supra,* 19 Cal. 4th at 134 (citing People v. Eubanks, (1996) 14 Cal. 4th 580, 588-89 and Dix, *supra,* 53 Cal. 3d at 451). The district attorney's power to select what charges to bring against a criminal defendant "generally is not subject to supervision by the judicial branch." People v. Birks, *supra,* 19 Cal.4th at 134. (citations omitted). Because the district attorney is "the people's choice of an attorney to represent them in their public affairs," he is "primarily responsible to the electorate," and "[t]here is ordinarily no review of his power to prosecute nor can a court control this statutory power by mandamus." People v. Super. Ct. (Martin), (1979) 98 Cal.App.3d 515, 519 (1979) (citations and brackets omitted). Opp. at 9.

A district attorney's authority includes choosing among the various punishments to seek: "The decision of what charges to bring (or not to bring) – and, more to the point here, which sentencing enhancement to allege (or not to allege) – ordinarily belongs to the prosecutors who are charged with executing our state's criminal law." People v. Garcia, (2020) 46 Cal. App. 5th 786, 791. *See* People v. Tirado, (2019) 38 Cal. App. 5th 637, 644 (noting that prosecution exercised its discretion in charging fewer enhancements than were available). "[T]he prosecutor's decision not to charge a particular enhancement 'generally is not subject to supervision[.]" People v. Garcia, *supra,* 46 Cal.App.5th at 791. "[A]bsent a constitutional violation, the prosecutor's decision not to charge a particular enhancement 'generally is not subject to supervision' -- or second guessing -- 'by the judicial branch.'" Id. at 792. Opp. at 10; Former Pros. Br. at 10; ACLU Br. at 10.

A district attorney's discretion is not unlimited. He or she must work within the framework of the criminal system. The legislature also is entitled to enact laws intruding on the executive or judicial branches of government so long as they do not defeat or materially impair that branch's core function. *See* People v. Bunn, (2002) 27 Cal.4th 1, 16 (prosecutor's refiling of dismissed charges did not intrude on core function of judiciary).

In exercising prosecutorial discretion, a district attorney's core function is to ensure that the guilty are prosecuted. "[The prosecutor] is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer." People v. Superior Court (Greer), (1977) 19 Cal.3d 255, 266. A prosecutor has a duty to be fair to criminal defendants, but he must protect the public and crime victims by prosecuting the guilty. Indeed, a prosecutor has a mandatory duty to exercise discretion in favor of prosecuting crimes; a district attorney who refuses to prosecute crimes indisputably would be subject to mandamus. People ex rel. Becerra v. Superior Court, ("Becerra") (2018) 29 Cal. App. 5th 486, 504.

Conceptually, the criminal sanction has four purposes: (a) retribution, (b) special deterrence (deterrence of the defendant), (c) general deterrence (deterrence of other criminals), and (d) rehabilitation. In 1977, the legislature changed the emphasis of California's criminal law system by making a major revision of the sentencing laws to require determinate sentencing. Greater importance in California now is placed on punishment as the reason for imprisonment. In re Morrall, (2002) 102 Cal. App. 4th 280, 292. The legislature has codified the importance of imprisonment in criminal sentencing:

> " The Legislature finds and declares that the purpose of sentencing is public safety achieved through punishment, rehabilitation, and restorative justice. When a

> sentence includes incarceration, this purpose is best served by terms that are proportionate to the seriousness of the offense with provision for uniformity in the sentences of offenders committing the same offense under similar circumstances." (emphasis added).

Justice for victims is a significant component of the imprisonment purpose of the criminal sanction. This means justice for individual victims and their families, as well as justice for the public. In 1982, public concern that prosecutors were not giving sufficient attention to the interests of victims led to the federal Victim and Witness Protection Act (18 U.S.C. §3771). That same year California voters passed by initiative "The Victim's Bill of Rights" embodied in Art. I, section 28 of the California Constitution. People v. Hannon, (2016) 5 Cal.App.5th 94, 99-100. This constitutional provision declares that "[c]riminal activity has a serious impact on the citizens of California. The rights of victims of crime and their families in criminal prosecutions are a subject of grave statewide concern." Cal. Const., art. I, §28(a)(1). In 2008, voters amended and expanded the constitutional rights of victims with the passage of "Marsy's Law." Id. at 99.

The California Constitution explains the need for prosecutors to seriously consider the interests of victims in criminal sentencing: "California's victims of crimes are largely dependent…upon the criminal justice system and upon the expeditious enforcement of the rights of victims of crime...in order to protect the public safety and to secure justice when the public safety has been compromised by criminal activity." Cal. Const., art. I, § 28, subd. (a)(2) (emphasis added). "Victims of crime have a collectively shared right to expect that persons convicted of committing criminal acts are sufficiently punished in both the manner and the length of the sentences imposed by the Courts of the State of California." Cal. Const., art. I, §28(a)(5) (emphasis added). CDAA Br. at 7-8.[19]

The prosecutor plays a special role in protecting the victims of crime by ensuring that their interests and constitutional rights are protected. Otherwise, the prosecutor's oath and legal duty to "support the Constitution and laws of the United States and of this state" (Business & Professions ("B&P") Code §6068(a)) cannot be reconciled with his constitutional duty to enforce crime victims' constitutional rights. Cal. Const., art. I, §28(c)(1) ("[T]he prosecuting attorney upon request of the victim . . . may enforce the rights enumerated in subdivision (b) in any trial or appellate court with jurisdiction over the case as a matter of right.").) CDAA Br. at 8-9.

The District Attorney's opposition to ADDA's application for a preliminary injunction fails to mention victims; there is not a single reference to a concern for victims in the sentencing process. The first three Special Directives also fail to mention victims. Special Directive 20-08.2 does mention victims by allowing enhanced sentences for (a) specified cases involving the most vulnerable victims, (b) where the victim's physical injury is extensive, and (c) financial crimes where the financial loss or impact to the victim is significant. However, Special Directive 20-08.2

[19] Article 28 provides a litany of rights afforded to victims of crime, including the rights for the victim to be protected, (subd. (b)(2)), the right to have victim safety considered in the setting of bail, (subd. (b)(3)), the rights of the victim to be apprised of the proceedings and how the prosecution intends to proceed, (subds. (b)(6) – (8), (10) – (12)), and the right to restitution (subd. (b)(13)). CDAA Br. at 8.

continues to maintain that three strikes and five other sentencing enhancements "shall not be pursued in any case and shall be withdrawn in pending matters". Hanisee Decl. ¶ 3, Ex. 4. As a result, a*micus* CDAA believes that the Special Directives wrongly protect the convicted criminal defendant, not his victims and the public. CDAA Br. at 13.

Still, Gascón's Special Directives cannot come as a surprise. He was elected with more than 1.6 million votes on a platform of reform-minded and less punitive approaches to a variety of conduct, including serious offenses previously punished with extreme prison terms. During the campaign, Gascón specifically noted his reluctance to use sentencing enhancements or regularly to seek prison sentences in excess of 15 years. The County's voters embraced those goals. *Amicus* Former Prosecutors argue that, although presented as issues of legality and prosecutorial ethics, the instant action is at bottom an attempt by ADDA to prevent the District Attorney from making policy decisions with which they do not agree. Yet, district attorneys, not their deputies, are accountable to the people and community they serve. If a district attorney fails to adhere to promises made, or if the public disapproves of them, they will be voted out of office. Former Pros. Br. at 15-16.

b. The Availability of Traditional Mandamus

"A writ of mandate may be issued by any court to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station, or to compel the admission of a party to the use and enjoyment of a right or office to which the party is entitled, and from which the party is unlawfully precluded by such inferior tribunal, corporation, board, or person." CCP §1085(a).

A traditional writ of mandate under CCP section 1085 is the method of compelling the performance of a legal, ministerial duty. Pomona Police Officers' Assn. v. City of Pomona, (1997) 58 Cal.App.4th 578, 583-84. Generally, mandamus will lie when (1) there is no plain, speedy, and adequate alternative remedy, (2) the respondent has a duty to perform, and (3) the petitioner has a clear and beneficial right to performance. Id. at 584 (internal citations omitted). Whether a statute imposes a ministerial duty for which mandamus is available, or a mere obligation to perform a discretionary function, is a question of statutory interpretation. AIDS Healthcare Foundation v. Los Angeles County Dept. of Public Health, (2011) 197 Cal.App.4th 693, 701.

Where a duty is not ministerial and the official has discretion, mandamus relief is unavailable unless the petitioner can demonstrate an abuse of that discretion. Mandamus will not lie to compel the exercise of a public agency's discretion in a particular manner. American Federation of State, County and Municipal Employees v. Metropolitan Water District of Southern California, (2005) 126 Cal.App.4th 247, 261. It is available to compel an agency to exercise discretion where it has not done so (Los Angeles County Employees Assn. v. County of Los Angeles, (1973) 33 Cal.App.3d 1, 8), and to correct an abuse of discretion actually exercised. Manjares v. Newton, (1966) 64 Cal.2d 365, 370-71. In making this determination, the court may not substitute its judgment for that of the public official, whose decision must be upheld if reasonable minds may disagree as to its wisdom. Id. at 371. An official's decision is an abuse of discretion only if it is "arbitrary, capricious, entirely lacking in evidentiary support, unlawful, or procedurally unfair." Kahn v. Los Angeles City Employees' Retirement System, (2010) 187 Cal.App.4th 98, 106. A writ will lie where the official's discretion can be exercised only in one way. Hurtado v. Superior Court, (1974) 11 Cal.3d 574, 579.

The District Attorney is correct that a writ of mandamus ordinarily will not issue to compel a prosecutor to plead (or not plead) any charge, or to move to dismiss a sentencing enhancement. Prosecutorial decisions to plead criminal charges and sentencing enhancements are discretionary, not ministerial. Boyne v. Ryan, (1893) 100 Cal. 265, 266-67 ("we think that the district attorney in determining whether or not, in any particular instance, he should bring an action under said section, is vested with a discretion which a court cannot control by *mandamus*"); Taliaferro v. Locke, (1960) 182 Cal.App.2d 752, 757 ("the matters of investigation and prosecution were matters in which the district attorney is vested with discretionary power as to which mandamus will not lie"). Opp. at 10-11.

ADDA replies that the District Attorney and his supporting *amici* misunderstand the relief it seeks. ADDA does not seek to compel the District Attorney to exercise his discretion in a particular manner, such as to prosecute a particular individual or file a particular charge. Instead, ADDA seeks to prohibit the District Attorney from enforcing policies that (1) unlawfully bar prosecutors from complying with their mandatory, non-discretionary obligation to plead and prove prior strikes; and (2) unlawfully bar prosecutors from exercising any discretion in moving to dismiss six enumerated sentencing enhancements. Reply at 12.

As ADDA correctly argues, the essence of mandamus is to compel a public officer's compliance with his or her mandatory duty. *See, e.g.*, Collins v. Thurmond, (2019) 41 Cal. App. 5th 879, 914. The Special Directives categorically bar prosecutors from pleading and proving prior strikes and ADDA contends that this violates a mandatory duty. Reply at 12. Similarly, although mandate cannot compel a particular exercise of discretion, mandate "does lie to command the exercise of discretion [in some manner]—to compel some action upon the subject involved." State Comp. Ins. Fund v. Workers' Comp. Appeals Bd., (2014) 248 Cal. App. 4th 349, 370.

According to ADDA, the Special Directives unlawfully eliminate all case-by-case discretion in seeking dismissal of six enumerated enhancements. This lawsuit does not concern discretionary charging decisions; the only charging policy at issue is the Three Strikes law which ADDA contends is mandatory, not discretionary. The remaining relief concerns policies governing the dismissal of charges once pled, which is never solely a matter of prosecutorial discretion. People v. Superior Court (Romero), ("Romero") (1996) 13 Cal. 4th 497, 515. Gascón cannot insulate from judicial scrutiny countywide policies that violate his legal duties and which nullify laws adopted by statewide voter initiatives and enacted by the Legislature. Reply at 13.

Thus, the issue for the court is whether the District Attorney has acted unlawfully in his Special Directives by directing his deputy district attorneys not to file strike priors for Three Strikes law cases, by compelling them to move to dismiss or otherwise delete strike priors and other sentencing enhancements from existing cases, and by failing to exercise discretion in individual cases by issuing blanket policies for dismissal of sentencing enhancements. If ADDA is correct, mandamus may issue to remedy these unlawful acts.

c. The Three Strikes Law

In 1982, the People of California adopted the Three Strikes law by a 70% majority to increase punishment for repeat offenders to effectuate the goals of sentencing and to protect the public from violent criminals. The Three Strikes Law reads in pertinent part:

"(f)(1) Notwithstanding any other law ... The prosecuting attorney shall plead and

prove each prior serious or violent felony conviction except as provided in paragraph (2).

(2) The prosecuting attorney may move to dismiss or strike a serious or violent felony conviction allegation in the furtherance of justice pursuant to Section 1385, or if there is insufficient evidence to prove the prior serious or violent felony conviction ...." §§ 667(f)(1), (2), 1170.12(d)(1), (2) (emphasis added).

The Three Strikes law involves a two-step process: First, "[t]he prosecuting attorney shall plead and prove each prior serious or violent felony conviction." §§ 667(f)(1). Second, "[t]he prosecuting attorney may move to dismiss or strike a prior serious or violent felony conviction allegation in the furtherance of justice pursuant to section 1385, or if there is insufficient evidence to prove the prior serious or violent felony conviction." Id. Upon a prosecutor's motion, the judge or magistrate may order an action to be dismissed in furtherance of justice. §1385(a). App. at 7.

In construing a statute, a court must ascertain the intent of the legislature so as to effectuate the purpose of the law. Brown v. Kelly Broadcasting Co., (1989) 48 Cal.3d 711, 724; Orange County Employees Assn. v. County of Orange, ("Orange County") (1991) 234 Cal.App.3d 833, 841. The court first looks to the language of the statute, attempting to give effect to the usual, ordinary import of the language and seeking to avoid making any words mere surplusage. Brown v. Kelly Broadcasting Co., (1989) 48 Cal 3d 711, 724. Significance, if possible, is attributed to every word, phrase, sentence and part of an act in pursuance of the legislative purpose. Orange County, *supra*, 234 Cal.App.3d at 841. "'The statute's words generally provide the most reliable indicator of legislative intent; if they are clear and unambiguous, '[t]here is no need for judicial construction and a court may not indulge in it. [Citation.]'" MCI Communications Services, Inc. v. California Dept. of Tax & Fee Administration, (2018) 28 Cal. App. 5th 635, 643. If a statute is ambiguous and susceptible to more than one reasonable interpretation, the court may resort to extrinsic aids, including principles of construction and legislative history. MacIsaac v. Waste Management Collection & Recycling, Inc., (2005) 134 Cal.App.4th 1076, 1082 (*quoting* Riverview Fire Protection Dist. v. Workers' Comp. Appeals Bd., (1994) 23 Cal.App.4th 1120, 1126).

(i). Plain Meaning

The Three Strikes law provides that the district attorney must "plead and prove" strike priors. §667(f)(1). What does this mean?

ADDA contends that the plain language obligates the prosecuting attorney to plead and prove prior felonies. "Notwithstanding any other law, subdivisions (b) to (i), inclusive, shall be applied in every case in which a defendant has one or more prior serious or violent felony convictions as defined in subdivision (d). The prosecuting attorney shall plead and prove each prior serious or violent felony conviction except as provided in paragraph (2)." §§ 667(f)(1) (emphasis added). "It is a well-settled principle of statutory construction that the word . . . 'shall' is ordinarily construed as mandatory." Doe v. Albany Unified Sch. Dist., (2010) 190 Cal. App. 4th 668, 676. Thus, while "the selection of criminal charges is [generally] a matter subject to prosecutorial discretion[,] the Three Strikes Law limits that discretion and requires the prosecutor to plead and prove each prior serious felony conviction." People v. Roman, ("Roman" (2001) 92 Cal. App. 4th 141, 145; *see also, e.g.*, People v. Vera, (2004) 122 Cal. App. 4th 970, 982 ("The

Three Strikes statutes, enacted in 1994, require prosecutors to plead and prove each prior felony conviction."); People v. Kilborn, ("Kilborn") (1996) 41 Cal. App. 4th 1325, 1332 ("The Three Strikes law requires the prosecutor to plead and prove all prior serious and violent felony convictions."). App. at 7-8.

ADDA argues that, notwithstanding this plain requirement, the Special Directives abandon the Three Strikes law and mandate that deputy district attorneys – regardless of the evidence or considerations about the defendant – "shall not...pursue in any case" any sentencing enhancements under the Three Strikes law. By directing deputy district attorneys not to pursue strike priors, Gascón is forcing them to violate the law as well as the oath required of all prosecutors to "bear true faith and allegiance to the Constitution of the United States and of the State of California," and to "well and faithfully discharge the duties" of their office. *See* Cal. Const. art. XX, §3. As attorneys, deputy district attorneys also are statutorily bound to follow the law: "It is the duty of an attorney to....support the Constitution and laws of the United States and of this state." B&P Code §6068(a). ADDA argues that the Special Directives require deputy district attorneys to violate the law. App. at 8.

The District Attorney points out that the word "shall" in the Three Strikes law is not necessarily mandatory. Notwithstanding its ordinary connotation, the word "shall" in a statute is not always obligatory rather than permissive, and this is particularly true on issues of prosecutorial discretion. Gananian, *supra,* 199 Cal.App.4th at 1540 (despite Education Code's statement that "law enforcement officials shall expeditiously pursue the investigation and prosecution of any violation", district attorney did not have mandatory duty to investigate violations of school bond act). "[T]here are unquestionably instances in which other factors will indicate that apparently obligatory language was not intended to foreclose a governmental entity's or officer's exercise of discretion.'" Id.[20]

The District Attorney notes that courts previously have held that criminal statutes using the word "shall" do not impose a mandatory duty for prosecutors to charge a particular crime. *See* Taliaferro v. Locke, *supra,* 182 Cal.App.2d at 752 ("shall" in Govt. Code section 26501 is permissive and prosecutors retain discretion in charging crimes); Ascherman v. Bales, (1969) 273 Cal.App.2d 707, 708 (same). The same is true for a district attorney's civil duties. Wilson v. Sharp, (1954) 42 Cal.2d 675, 678-79 (Govt. Code section 26525's statement that the district attorney "shall" institute suit for recovery of county funds illegally paid required exercise of discretion). The District Attorney argues that, given the separation of powers concerns involved, the court's interpretation of the Three Strikes law cannot end with a facial reading of the word "shall". Rather section 667(f)(1)'s language must be construed against the constitutional

[20] The Gananian court reasoned that the Education Code provision at issue was "uniquely word[ed]" and its vagueness suggested that it should be construed as an expression of policy rather than mandate. Id. at 1541. An interpretation of the language as compulsory would encroach on executive branch functions and violate the basic precept that "the district attorney of each county independently exercises all the executive branch's discretionary powers in the initiation and conduct of criminal proceedings." Id. at 1542-43 (citation omitted). Gananian declined to "impute to the Legislature an intent to overthrow long-established principles of law, such as prosecutorial discretion, unless such intention is made clearly to appear either by express declaration or by necessary implication." Id. at 1543 (citation omitted). ACLU Br. at 11.

importance of the separation of powers and the backdrop of statutes using the word "shall" that still preserve prosecutorial discretion. Opp. at 12. *See* ACLU Br. at 10-11.

Amicus ACLU adds that, as in Gananian, this court should presume that the legislature understood the constitutional constraints of the separation of powers doctrine and intended "shall" to be read as a permissive expression of legislative policy. *Amicus* ACLU explains that the doctrine of constitutional avoidance supports this statutory interpretation:

> "If a statute is susceptible of two constructions, one of which will render it constitutional and the other unconstitutional in whole or in part, or raise serious and doubtful constitutional questions, the court will adopt the construction which, without doing violence to the reasonable meaning of the language used, will render it valid in its entirety, or free from doubt as to its constitutionality, even though the other construction is equally reasonable. The basis of this rule is the presumption that the Legislature intended, not to violate the Constitution, but to enact a valid statute within the scope of its constitutional powers." Romero, *supra*, 13 Cal. 4th at 509 (emphasis added) (citation omitted). ACLU Br. at 11-12.

Amicus ACLU contends that Romero is instructive. There, the California Supreme Court considered whether the trial court may strike, pursuant to section 1385, felony convictions pled as prior strikes pursuant to the Three Strikes law without the prosecutor's involvement. 13 Cal. 4th at 504. Romero began by reaffirming the principle that "the [judicial] power to dismiss an action includes the lesser power to strike factual allegations relevant to sentencing, such as the allegation that a defendant has prior felony convictions." Id. The court first noted that the legislature may completely eliminate a trial court's power to strike felony allegations. Id. at 513, 516. The court then considered the language of the Three Strikes law to decide whether the legislature intended to give prosecuting attorneys the power to veto judicial decisions to strike prior convictions qualifying as strike priors. Id. at 517-18. The court concluded that section 1385's judicial power to dismiss has long existed in conjunction with statutes defining punishment and therefore "a clear legislative direction" would be required to eliminate the court's power. Id. at 518. The Romero court found no such clear direction in the Three Strikes law. Id. at 527-28. The court held that a trial court has the power to *sua sponte* dismiss a strike prior so long as it acts in the furtherance of justice, which the court explained means consideration of both the rights of the defendant and "the interests of society represented by the People", and not for judicial convenience or reasons of court congestion. Id. at 530-31.

Amicus ACLU argues that Romero's reasoning applies to the present case. Just as the judicial power to dismiss an action includes the lesser power to strike sentencing allegations, prosecutorial discretion to decline to bring a criminal charge necessarily includes the lesser power to decline to plead sentencing enhancements connected to a criminal charge. ADDA's interpretation of the Three Strikes law takes away this prosecutorial discretion in a manner that raises serious constitutional questions. The court should avoid these serious questions and adopt a constitutional construction that interprets the term "shall" as permissive and permits the exercise of prosecutorial discretion in declining to plead prior convictions. ACLU Br. at 13.

The court concludes that there is ambiguity in the language of the Three Strikes law that the district attorney must "plead and prove" strike priors. §667(f)(1). One can reasonably

conclude that this "plead and prove" language refers to the prosecutor's due process duty to give notice to the criminal defendant that a prior conviction is alleged as an enhancement, and then to prove that allegation beyond a reasonable doubt. Pursuant to this interpretation and consistent with due process, a criminal defendant may not be sentenced under the Three Strikes law unless the necessary allegations have been pled and proved.

This interpretation is supported by the obvious fact that a prosecutor cannot be compelled to actually prove a strike prior; he or she can only be compelled to attempt to prove the prior conviction. If the prosecutor can only be compelled to attempt to prove a strike prior, then the "plead and prove" language reasonably may be interpreted to mean that these events are a condition to enhanced sentencing under the Three Strikes law.

Despite its reasonableness, this interpretation crops the photograph too closely. The court must interpret section 667(f) pursuant to the entirety of its language. *See* Orange County, *supra,* 234 Cal.App.3d at 841. The interpretation is not supported by the rest of section 667(f)(1), which requires the Three Strikes law to be applied in every case in which the defendant has a prior serious or violent conviction, and that the prosecuting attorney "shall plead and prove" the strike prior "except as provided in paragraph (2)". In turn, paragraph (2) permits a prosecuting attorney to move to dismiss a prior strike conviction pursuant to 1385 or if there is insufficient evidence to prove it. Collectively, paragraphs (1) and (2) require that strike priors must be applied in every pertinent case, the prosecutor must plead and prove the strike prior, and the prosecutor subsequently may seek to dismiss it if there is a legal basis under section 1385. There would be no reason for either the "shall be applied in every case" language or the paragraph (2) exception if the prosecutor had full discretion to ignore prior strikes under the Three Strikes law.

Romero touched on this very issue. Noting that section 667(f)(1) provides that "[t]he prosecuting attorney shall plead and prove each prior felony conviction except as provided in paragraph (2)", the court stated that the "shall plead and prove" language in paragraph one "would seem to bar the prosecutor from moving to strike prior felony conviction allegations, in the absence of section paragraph (2), which "purports to be *an exception* to the prosecutor's duty to prove all prior felony convictions...." 13 Cal.4th at 523 (emphasis in original). "In other words, section 667(f) first purports to remove the prosecutor's charging discretion completely, and then purports to replace that discretion with permission to file a motion to strike 'pursuant to section 1385,' which the court may or may not grant." Id. at 523 (emphasis added).

The Romero court concluded that the plain meaning of section 667(f)(1) requires a prosecutor to plead and prove all qualifying strike priors. The prosecutor then may seek dismissal under section 1385 as part of a plea agreement or other reason in the interest of justice. This is true despite the rules of construction relied upon by the District Attorney and his supporting *amici.* Those rules of construction do not apply where statutory meaning is clear from its language. *See* MacIsaac v. Waste Management Collection & Recycling, Inc., *supra,* 134 Cal.App.4th at 1082. Considering the Three Strikes law's purpose of enhanced sentencing for habitual offenders and Romero's clear statements that the legislature may remove a judge's power to strike sentencing allegations and how the plead and prove provision operates, a prosecutor must plead all priors and has a duty to prove them if he or she can do so. [21]

[21] Several *amicus* briefs rely on advocacy studies and articles about sentencing reform, recidivism, and disparate sentencing to justify the District Attorney's position. Former Pros. Br.

(ii). Case Law

The District Attorney argues that "no published decision has ever concluded the Three Strikes Law imposes purely 'ministerial' duties on prosecutors to "plead and prove" every single potentially available prior felony conviction as a sentencing enhancement." Opp. at 12. At the February 2 hearing, Gascón's attorney agreed that this statement might be an overstatement and explained that his position is that the legislature can limit prosecutorial discretion in alleging sentence enhancements, but cannot eliminate it.

In deciding that the Three Strikes law does require the prosecutor to plead and prove strike priors, the court is bound by Kilborn, *supra,* 41 Cal. App. 4th at 1325, in which the defendant pled to a methamphetamine possession felony and was sentenced under the Three Strikes law. Id. at 1328-29. The defendant argued that the Three Strikes law violates due process and equal protection on the basis that it was irrational. Id. at 1328-29. In holding that the law was a proper exercise of the legislative goal to punish recidivist criminals, the court explained that the Three Strikes law requires a prosecutor to plead and prove all strike priors. Id. at 1332. The defendant complained that this requirement violates separation of powers because it usurps prosecutorial discretion – the same argument raised by Gascón in this case. Id.

The Kilborn court explained that the validity of this argument depended on whether the charging discretion of prosecutors can be limited by law, and there was no authority for that proposition. Id. at 1332. Former Constitution art. XI, section 1(b) provided that "the Legislature shall provide for an elected district attorney" and section 5 of the same article provided that "the Legislature, but general and uniform laws...shall prescribe their duties." Ibid. The Legislature has done so, principally in Govt. Code section 26500 *et seq*. and its predecessor statutes. Ibid. The court noted that, while section 5 of article XI was repealed by the voters in 1970, the pertinent Government Code provisions were not affected by it. Id. Consequently, the district attorney acts as a state officer when prosecuting crimes and the authority of his office derives from statute. Id. at 1333 (citations omitted).

Kilborn concluded that the Three Strikes law's requirement that the prosecutor plead and prove prior strikes is not unlike other statutes requiring the district attorney to act. Id. at 1333 (citing, *inter alia*, §969 ("all known previous convictions, whether in this State or elsewhere, must be charged")). The court noted that the prosecutor retains substantial authority and discretion under the Three Strikes law, including deciding whether the defendant has suffered a qualifying conviction and moving to dismiss a strike prior in the furtherance of justice under section 1385 or if there is insufficient evidence. Id. As a result, the Three Strikes law does not violate the separation of powers provision of the state Constitution. Id.

---

at 12-14, n. 17-35. Apart from their relevance only to the District Attorney's motivation and irrelevance to the legal issues at hand, these views are but one side of the story. As stated *ante,* California law focuses on punishment as the reason for imprisonment. In re Morrall, *supra,* 102 Cal. App. 4th at 292. Moreover, while both the District Attorney and his supporting *amici* argue that recidivism becomes more likely as prison sentences grow longer (Opp. at 8; Former Pros. Br. at 13), that argument has no bearing on the Three Strikes law. By definition, the defendants in three strikes cases have strike priors and are already recidivists. Hence, the title of section 667: "Habitual criminals; enhancement of sentence…" (emphasis added).

Subsequent cases have followed Kilborn. *See* People v. Butler, ("Butler") (1996) 43 Cal. App. 4th 1224, 1247–48 ("Defendant also argues that the three strikes law...violates the princip[le] of separation of powers because it unlawfully usurps prosecutorial discretion. These arguments were rejected in...Kilborn...for reasons we find persuasive."); People v. Gray, ("Gray") (1998) 66 Cal. App. 4th 973, 995 ("adopting the "sound reasoning of Kilborn" and "concluding that the section 1170.12, subdivision (d)(1) does not violate the separation of powers doctrine enactment of the three strikes law.").

Roman, *supra*, 92 Cal. App. 4th 141, addressed former District Attorney Steve Cooley's office policy on three strikes. The defendant had three prior strikes and was charged with possession of a small quantity of methamphetamine. Id. at 144. He was convicted and sentenced under the Three Strikes law to 25 years to life in prison. Id.

The Roman court first noted that, while the general rule is that the selection of criminal charges is a matter of prosecutorial discretion, the Three Strikes law limits that discretion by requiring a prosecutor to plead and prove prior strikes. Id. at 145. Nor can the prosecutor unilaterally strike a prior or abandon a prosecution. Id. (citing section 1386 requirement that a district attorney cannot abandon a prosecution except as provided by section 1385). Id. When the court's jurisdiction has been properly invoked by filing a criminal charge, the disposition of the charge is a judicial responsibility and the prosecution's only discretion is the ability to move to strike a prior serious felony conviction allegation in the interest of justice. Id. "This limitation on prosecutorial discretion does not violate the separation of powers doctrine." Id., n. 2 (citing Kilborn).

The court noted that, while Roman's case was on appeal, then District Attorney Cooley adopted a new policy for the Office. Through a special directive, he ordered that "all qualifying prior felony convictions shall be alleged in the pleadings." Id. at 145 (emphasis added). The directive further provided that the case would be presumed a third strike for a defendant with two prior strikes only if the pending charge is a serious felony or a significant quantity drug charge. Otherwise, the case would be presumed as a second strike and the prosecutor should move to strike all but one prior serious felony conviction. Id. This presumption could be rebutted. Id.

Roman argued that he would not have been charged under the Three Strikes law if this new directive had been in place. Id. at 148. The Roman court held there was no basis for this argument. The directive required all of Kilborn's prior serious felony convictions to be charged as required by the Three Strikes law. Id. (citing §1170.12(d)(1)). The directive addressed only a deputy district attorney's discretion to move to strike, did not categorically require the prosecutor to do so, and the trial judge might deny the motion. Id. Therefore, the new policy did not lessen the penalty to which defendants are exposed and there was no reason for abatement to reduce the defendant's sentence. Id. at 148.

Most recently, in People v. Laanui, (Cal. Ct. App. Jan. 8, 2021) 59 Cal. App. 5th 803 2021 WL 71151, the defendant was convicted of murder, solicitation of murder, and other offenses. After he was sentenced under the Three Strikes law, he argued that because the prosecutor alleged prior strikes only as to counts 1 through 3, but not as to count 6, due process prohibited the prosecutor from seeking an enhanced sentence as to count 6. Id. at *12. In rejecting that argument, the court observed that the Three Strikes law "'limits [prosecutorial] discretion and requires the prosecutor to plead and prove each prior serious felony conviction.'" Id. (quoting Roman, *supra*, 92 Cal. App. 4th at 145). As a result, the court reasoned, the Three Strikes law put the defendant

on notice that the prior strike allegations applied to count 6 even if they were not specifically pled for that count because "the plain language of the Three Strikes law makes clear that the prosecution lacks discretion to allege prior strikes on some counts but not others." Id. at *15. The court distinguished the California Supreme Court's holding in People v. Anderson, (2020) 9 Cal.5th 946, that a non-mandatory firearm enhancement must be affirmatively pled for each count to which the enhancement is sought: "[U]nder the plain language of the Three Strikes law, it applies 'in every case' in which a defendant has suffered a prior strike conviction, and, to borrow Anderson's language, the prosecution expressly cannot 'ma[k]e a discretionary choice not to pursue' the Three Strikes alternative sentencing regime on all eligible counts. Id. at *15.

The District Attorney contends that these cases do not hold that he has a ministerial duty to mechanically plead strike priors in every case. He argues that these cases suggest only that the Three Strikes law places some limits on prosecutorial discretion after a strike has been pled -- *e.g.*, the procedure to dismiss a strike or a prosecutor's options for pleading strikes once the prosecutor has made the unreviewable decision to do so -- and hold only that criminal defendants may not invoke a separation of powers claim concerning the Three Strikes law for their own sentence. The District Attorney admits that the Three Strikes law places limits on prosecutorial discretion, just as there is no doubt that other statutes limit a prosecutor's discretion how matters should be pled once the district attorney has opted to do so. However, these cases do not suggest or hold that the district attorney has a ministerial duty to plead sentencing enhancements in the first place. Opp. at 14.

The District Attorney distinguishes Kilborn as a case in which a criminal defendant who had been charged with prior strikes under the Three Strikes law claimed that the was an unconstitutional violation of separation of powers. The defendant contended "that the charging discretion of prosecutors cannot be limited by law" without violating the separation of powers. Kilborn rejected this notion, but it relied on statutes requiring specific forms of pleading once the prosecutor had pled a charge and "provisions restricting the discretionary authority of prosecutors (and courts) to enter plea bargains." *See* 41 Cal. App. 4th at 1332-33 (citing section 969's requirement that specific prior felonies "must be" pled, Govt. Code §26528, Welf. & Inst. Code §11481, and §1192.7(a)(restricting plea bargaining)).[22] The District Attorney contends that Kilborn correctly found that the Three Strikes law constitutionally limits prosecutorial discretion, but it never addressed whether the Three Strikes law removes all prosecutorial discretion in pleading strikes. Opp. at 14.

The District Attorney distinguishes Roman as mentioning Kilborn but not analyzing the effect of the Three Strikes law on the discretion of a prosecutor to plead sentencing enhancements. He distinguishes Laanui as relying on the "shall plead" language in the Three Strikes law to hold that a criminal defendant received adequate notice that strikes pled by the prosecutor would apply to each count alleged in the information. He argues that Laanui merely noted that the Three Strikes law implies conclusions about procedure once a strike prior is pled and said nothing about the prosecutor's discretion to allege a strike in the first place. Opp. at 15.

The District Attorney's distinctions of these cases are unavailing. It is true that those cases

[22] At the February 2 hearing, both sides agreed that section 969's language that "...all known previous convictions, whether in this State or elsewhere, must be charged" does not require a district attorney to allege prior felonies outside the Three Strikes law.

all involved a criminal offender's separation of powers challenge to the Three Strikes law, but Gascón fails to show why this makes a difference. Contrary to his argument, Kilborn did consider the Three Strikes law's limit on discretionary charging decisions and held that the limits do not violate the separation of powers doctrine. Kilborn did not need to consider the elimination of all prosecutorial discretion because the Three Strikes law did not purport to do so. Roman also squarely held that the "Three Strikes Law limits" the traditional prosecutorial discretion to "select[] . . . criminal charges" by "requir[ing] the prosecutor to plead and prove each prior serious felony conviction." 92 Cal. App. 4th at 145. Finally, contrary to Gascón's contention that Laanui addresses only the procedure for pleading strikes, Laanui held that the prosecutor's failure to plead a prior strike for a particular count was immaterial precisely because the Three Strikes law places a defendant on notice that the prosecutor has no discretion to allege a strike prior for some eligible counts and not others. 2021 WL 71151 at *15.[23]

[23] The District Attorney relies on In re Coley, *supra*, 55 Cal.4th at 559, which stated that the sentence actually imposed in a three strikes case depends "not only upon the number of the defendant's strike priors, but also upon the prosecutor's exercise of prosecutorial discretion in determining how many prior convictions to charge in the case." Gascón concludes that this language means that there is no mandatory duty for a prosecutor to allege every eligible prior conviction in the charging instrument. Opp. at 12-13.

He is wrong. The quoted language in In re Coley cites section 667(f)(2), which permits the prosecutor to move to dismiss a strike prior under section 1385 in the furtherance of justice or if there is insufficient evidence to prove it. The discretionary decision to move to dismiss is wholly different from the mandatory obligation to plead strikes in the first place. *See* Roman, *supra,* 92 Cal. App. 4th at 145.

The District Attorney also relies on a footnote in People v. Nguyen, (2017) 18 Cal.App.5th 260, 267, n.1, which states: "the three strikes law states that ... '[t]he prosecuting attorney shall plead and prove each prior serious and/or violent felony conviction,' ... [a]s far as our research reveals, these provisions of the three strike law have never been interpreted as requiring the prosecution to plead and prove a prior conviction as a prior serious felony conviction enhancement." Gascón concludes that this means a prosecutor may make "a discretionary charging decision" to allege in the charging paper the fact of a prior conviction, but not allege it as a sentencing enhancement. Id. at 267-69. Opp. at 13.

As ADDA replies (Reply at 9), the District Attorney is conflating two different enhancements: the five-year enhancement for a prior serious felony conviction (§667(a)), which is not mandatory, and the prior strike enhancement under the Three Strikes law (§667(b)–(i)), which is mandatory. Nguyen concerned the adequacy of an information's allegation of the defendant' prior serious felony conviction. The defendant had a prior burglary conviction which qualified both as a strike prior under the Three Strikes law and as a five-year prior under section 667(a). 18 Cal.App.5th at 262. The information indicated that the prior conviction was being pled solely for purposes of the Three Strikes law and failed to allege it as a serious felony enhancement under section 667(a). Id. at 262, 266-67. The court noted that every prior serious felony is also a strike prior. Id. The court held that when the prosecution alleges a prior serious felony conviction and cites only the Three Strikes law and not the five-year prior statute (§667(a)), it has made a discretionary charging decision to charge only the strike prior. Id. at 267. In the footnote cited by

Amicus ACLU embellishes on the District Attorney's arguments. ACLU argues that Kilborn answered a different question than the one at issue and its reasoning relied on constitutional provisions that are no longer in force and that have been changed in a manner which reaffirms a district attorney's prosecutorial power. ACLU admits that Kilborn held that the Three Strikes law does not violate the principle of separation of powers by requiring prosecutors to plead and prove prior felony convictions and contends that its proffered reasons of constitutionality are unavailing. Id. at 1327-33. ACLU Br. at 13-14. At the February 2 hearing, Gascón's counsel agreed with both of ACLU's points.

According to ACLU, Kilborn began its constitutional inquiry by evaluating whether a prosecutor's charging discretion can be limited by the Three Strikes law, not whether a prosecutor's charging discretion is eliminated by the Three Strikes law, which is the issue in this case. Id. at 1332. Relying solely on repealed provisions of the California Constitution permitting the legislature to prescribe the duties of district attorneys, Kilborn rejected the argument that prosecutorial charging discretion cannot be limited by the Three Strikes law. Id. at 1332.

ACLU finds Kilborn's reasoning for this conclusion unpersuasive. Kilborn relied on language in Cal. Const. Art. XI, section 1(b) that was repealed in 1970. Subsequent revisions to the California Constitution codified the separation of powers doctrine and firmly rejected the notion that the legislature may proscribe the duties of prosecutors. As codified, California Constitution Art. III, section 3 provides that "[t]he powers of state government are legislative, executive, and judicial [and] [p]ersons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution." Art. V, section 13 provides that the investigation and prosecution of crime are executive functions that are supervised solely by the state Attorney General. These California Constitution provisions undermine Kilborn's conclusion that prosecutorial charging discretion can be limited, let alone eliminated, by law. ACLU Br. at 14-15.

Kilborn also relied on Govt. Code section 26500, enacted before the California Constitution was amended, as an exemplar of the legislature proscribing the duties of prosecutors. Id. at 1332. However, section 26500 provides that "[t]he public prosecutor shall attend the courts, and within his or her discretion shall initiate and conduct on behalf of the people all prosecutions for public offenses." (emphasis added). ACLU notes that Govt. Code section 26500 clearly establishes that the prosecutor retains discretion as to whether to initiate and conduct prosecutions by qualifying "shall" in the second clause with the phrase "within his or her discretion." *See* Taliaferro v. Locke, *supra*, 182 Cal.App.2d at 757 ("shall" as used in Govt. Code §26501 is permissive because it is qualified by discretionary language). ACLU Opp. at 15.

ACLU concludes that Kilborn and its progeny which largely adopt its flawed reasoning,[24]

---

the District Attorney, the court noted that no law requires the prosecution to plead and prove a five-year enhancement under section 667(a). Id. at 267, n. 1. The footnote does not suggest that charging strikes is not mandatory; it contrasted the two enhancements on this very basis. Ibid.

[24] ACLU admits that Roman held that "the Three Strikes law limits [prosecutorial] discretion and requires the prosecutor to plead and prove each prior serious felony conviction." 92 Cal. App. 4th at 145. ACLU acknowledges that Butler, *supra*, 43 Cal. App. 4th at 1224 dismissed the separation of powers argument and argues that Butler merely relied on the fact that the separation of powers argument had been made and rejected in Kilborn. Finally, ACLU argues that

fail to grapple with (1) the question of whether a prosecutor can be required to plead prior convictions pursuant to the Three Strikes law and (2) the serious constitutional concerns inherent in the legislature eliminating prosecutorial charging discretion in this context. Thus, the holding in Kilborn does not constrain this court. ACLU Br. at 15-16.

ACLU is wrong on both points. First, section 667(f)(1)'s "plead and prove" requirement does not eliminate prosecutorial discretion. It limits prosecutorial discretion, which both Gascón and ACLU acknowledge is constitutionally permissible. As stated *ante*, the Three Strikes law expressly requires the prosecuting attorney to plead and prove strike priors "except as provided in paragraph (2)." In turn, paragraph (2) permits the prosecuting attorney to move to dismiss a prior strike conviction pursuant to 1385 or if there is insufficient evidence to prove it. Collectively, paragraphs (1) and (2) require the prosecutor to plead and prove a strike prior, but the prosecutor subsequently may seek to dismiss it under section 1385 pursuant to a plea agreement, if warranted, or otherwise.

The California Supreme Court in Romero referred to this "plead and prove" interpretation of section 667(f)(1) in upholding a trial court's authority to strike priors without the prosecution's approval. The Romero court stated that section 667(f)(1) purports to eliminate the prosecutor's charging discretion by stating: "[t]he prosecuting attorney shall plead and prove each prior felony conviction except as provided in paragraph (2)". The court stated that the "shall plead and prove" language "would seem to bar the prosecutor from moving to strike prior felony conviction allegations, in the absence of section paragraph (2), which "purports to be *an exception* to the prosecutor's duty to prove all prior felony convictions...." 13 Cal.4th at 523 (emphasis in original). "In other words, section 667(f) first purports to remove the prosecutor's charging discretion completely, and then purports to replace that discretion with permission to file a motion to strike 'pursuant to section 1385,' which the court may or may not grant." Id. at 523 (emphasis added).[25]

In sum, Romero discusses, and Kilborn expressly adopts, an interpretation of section 667(f)(1) that the prosecutor is required to plead prior convictions pursuant to the Three Strikes law. Kilborn further adopts the question left open by Romero and held that, while prosecutorial discretion is generally unfettered, there is no constitutional concern in requiring a prosecutor to plead and prove strike priors because he or she has discretion to move to strike under section 1385. That is what the voters and the legislature both wanted in adopting the Three Strikes law.

Second, ACLU' s criticism of Kilborn's reasoning as based on repealed language in Cal. Const. Art. XI, section 1(b) is untenable. Kilborn expressly noted the fact of repeal and noted that it was not intended to affect the legislature's ability to enact laws directing the district attorney's conduct. 41 Cal.App.4th at 1332-33. Thus, the 1972 constitutional codification of state government powers (legislative, executive, and judicial) and separation of those powers (Art. III, §3), and the 1974 placement of chief law officer powers in the attorney general, including direct supervision over district attorneys and sheriffs (Art. V, §13) have no bearing on Kilborn's reasoning that Government Code sections 26500-509 remain lawful governing provisions for a district attorney's criminal law duties.

Gray, *supra*, 66 Cal. App. 4th at 995, merely adopted Kilborn's reasoning. ACLU Br. at 15, n. 5.

[25] The Romero court declined to decide whether this interpretation of section 667(f)(1) requiring prosecutors plead and prove all strike priors violates separation of powers. 13 Cal.4th at 515, n. 7. Kilborn decided that it does not.

ACLU's argument that Govt. Code section 26500 invests the district attorney with discretion to initiate and conduct prosecutions is a strawman. It is undisputed that a district attorney has virtually unfettered discretion in initiating criminal charges and Kilborn does not state otherwise. ACLU has admitted that the legislature (and voters) can limit that discretion, and section 667(f)(1)'s "plead and prove" requirement does just that without eliminating it.

In sum, Romero explains, and five appellate cases (Kilborn, Butler, Gray, Roman and Laanui) expressly have held, that prosecutors have a duty to plead and prove strike priors under the Three Strikes law. Three of those appellate cases (Kilborn, Butler, and Gray) also have held that this requirement is not an unconstitutional intrusion into prosecutorial discretion. This case law is binding on this court, which also agrees with it. *See* Auto Equity Sales, Inc. v. Superior Court, (1962) 57 Cal.2d 450, 455.

(iii). The Three Strikes Pleading Practice of Prosecutors

Gascón argues that nothing about his Special Directives concerning the Three Strikes law is entirely novel. The use of prosecutorial discretion to plead sentencing enhancements—under the Three Strikes Law and otherwise—is routine throughout California and commonly directed by district attorney office policy. Prosecutors throughout California have followed their office policies and routinely exercised their discretion in a Three Strikes case to determine (a) how many eligible prior convictions to allege, (b) whether to plead every eligible conviction as a sentencing enhancement, and (c) whether to pursue the matter as a Three Strikes case. *See* Joseph Decl., Khine Decl., ¶3; Munkelt Decl., ¶¶ 4, 6. Opp. at 13-14.

This contention is inconsistent with the Office's policy prior to Gascón's arrival as the District Attorney. When District Attorney Cooley was in office, he was concerned that a third strike could be a minor felony – *e.g.*, theft of a pizza – that would lead to a 25 to life sentence. As the Roman court explained, District Attorney Cooley issued a special directive intended to address this issue while complying with the Three Strikes law. The special directive ordered that "all qualifying prior felony convictions shall be alleged in the pleadings." 92 Cal.App.4th at 145. The directive further provided that the new case would be presumed as a third strike for a defendant with two prior strikes only if the new charge is a serious felony or involved a significant quantity of drugs. Otherwise, the case would be presumed as a second strike and the prosecutor should move to strike all but one prior serious felony conviction. Id. The policy provided that this presumption could be rebutted. Id. [26]

District Attorney Cooley's special directive was entirely consistent with the plead and prove requirement of section 667(f)(1). So was the Office's written policy immediately prior to Gascón's Special Directives, which provided:

> "12.05 THREE STRIKES
>
> "All qualifying prior felony convictions shall be alleged in the pleadings pursuant to Penal Code section 1170.12(d)(1). Prior to seeking dismissal of any strike, the

[26] District Attorney Cooley's policy of treating the defendant as a second striker where the third strike is not a serious or violent felony was adopted by voters in Prop 36, the Three Strikes Reform Act of 2012.

> prior strike case files shall be reviewed, if available, in order to fairly evaluate mitigating and aggravating factors. If it is determined that proof of a prior strike cannot be obtained or that the alleged strike is inapplicable, dismissal of the strike shall be sought after obtaining Head Deputy approval." (emphasis added). Supp. Hanisee Decl., ¶4, Ex. 15.

Thus, the Office policy has been to follow the Three Strikes "plead and prove" requirement until the new Special Directives. Whether or not some prosecutors in the County or in other counties have not always followed the plead and prove requirement of the Three Strikes law is legally irrelevant. The perceptions of two public defenders, a defense attorney, and one prosecutor that some prosecutors do not follow the law cannot demonstrate the law's requirements.

(iv). Pending Three Strikes Cases

(a). The Required Statement

Special Directive 20-08.1 provides that if a pending matter has strike priors alleged, deputy district attorneys shall make the following record:

> "The People move to dismiss and withdraw any strike prior (or other enhancement) in this case. We submit that punishment provided within the sentencing triad of the substantive charge(s) in this case are sufficient to protect public safety and serve justice.....The California Constitution and State Supreme Court precedent further vest the District Attorney with sole authority to determine whom to charge, what charges to file and pursue, and what punishment to seek. That power cannot be stripped from the District Attorney by the Legislature, Judiciary, or voter initiative without amending the California Constitution. It is the position of this office that Penal Code section 1170.12(d)(2) and Penal Code 667(f)(1) are unconstitutional and infringe on this authority.... (emphasis added).

This direction is both inaccurate and inconsistent. As discussed *ante*, the District Attorney does not have sole authority whether to allege a strike prior; he must plead and prove them under section 667(f)(1). The Special Directive is not even consistent with the District Attorney's position in this case. As discussed at the February 2 hearing, Gascón does not contend that the Three Strikes law is unconstitutional. Rather, he contends that it must be interpreted consistently with the separation of powers doctrine to not require him to plead strike priors.

The direction also wrongly requires deputy district attorneys to move to dismiss or otherwise abandon strike priors based on mere antipathy towards the Three Strikes law. A dismissal under section 1385 may be granted only "in the furtherance of justice" and must consider "whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit." People v. Williams, (1998) 17 Cal. 4th 148, 161 (emphases added). The dismissal may not be based on "bare antipathy to the consequences [of not dismissing] for any given defendant." Id.

Finally, while Special Directive 20-08.1 states that the Three Strikes law is unconstitutional, Gascón cannot unilaterally decide that the plead and prove requirement for strike

priors in the Three Strikes law is unconstitutional as a reason to direct deputy district attorney action. "[A] local executive official, charged with a ministerial duty, generally lacks authority to determine that a statute is unconstitutional and on that basis refuse to apply the statute." Lockyer v. City & Cty. of San Francisco, (2004) 33 Cal. 4th 1055, 1086. "[T]he determination whether a statute is unconstitutional and need not be obeyed is an exercise of judicial power and thus is reserved to those officials or entities that have been granted such power by the California Constitution". Id. at 1093.

(b). Amending the Information

Special Directive 20-08.1 further provides that, "if a court refuses to dismiss the prior strike allegations or other enhancements/allegations based on the People's oral request, the [deputy district attorney] shall seek leave of the court to file an amended charging document pursuant to Penal Code section 1009."

ADDA notes that the court, not the prosecutor, decides whether to strike a prior conviction when the prosecutor makes a motion under section 1385. *See* Roman, *supra*, 92 Cal. App. 4th at 148. Yet, if the court denies the prosecutor's motion to dismiss an enhancement, the Special Directive requires the deputy district attorney to seek leave to file an amended charging document – ostensibly to eliminate the enhancement allegation that the court refused to dismiss. ADDA argues that this tactic runs afoul of both the Three Strikes law's "plead and prove" requirement and section 1386, which provides that "neither the Attorney General nor the district attorney can discontinue or abandon a prosecution for a public offense, except as provided in section 1385." ADDA concludes that Gascón has a ministerial duty to proceed with a prosecution, including the Three Strikes enhancement, once it has been initiated unless the court permits it to be dismissed. App. at 14.

The District Attorney contends that there is nothing wrong with a prosecutor repleading an information without strikes if the court refuses to dismiss because the judiciary does not have a right to dismiss anything more than the allegations in a charging instrument. *See* Manduley v. Super. Ct., ("Manduley") (2002) 27 Cal.4th 537, 553 (charging decisions "not invalid simply because the prosecutor's exercise of such charging discretion necessarily affects the dispositional options available to the court"). Opp. at 17.

The District Attorney is wrong. Once a charge has been filed, the prosecutor cannot abandon it without the trial court's permission. §1386. In upholding a district attorneys' statutory authority to file certain felony charges against minors directly in criminal court and not juvenile court, Manduley stated as much: "[T]he separation of powers doctrine prohibits the legislative branch from granting prosecutors the authority, *after* charges have been filed, to control the legislatively specified sentencing choices available to the court." 27 Cal.4th at 553 (emphasis in original).

A district attorney has a right to amend an indictment or information, but only before the defendant's plea or a demurrer is sustained. §1009. Even then, the prosecutor cannot dismiss a charge without leave of court. Owen v. Superior Court, (1976) 54 Cal. App. 3d 928, 934 (district attorney may not by amendment change the offense charged). Special Directive 20-08.1 appears to recognize this, but its direction for the prosecutor to seek leave to amend to delete the strike prior if the trial court denies its dismissal violates both the Three Strikes law and sections 1385 and 1386.

(c). Ethical Considerations

Apart from its inaccuracy and unlawfulness, ADDA is concerned about its members' ethical responsibilities in reading the Special Directive 20-08.1 statement into the record. ADDA contends that this language will cause deputy district attorneys to violate B&P Code section 6068(d), which provides that an attorney must not mislead a judge by any artifice or false statement. A line prosecutor may feel that dismissal of a strike prior is inappropriate because the facts do not warrant leniency and RPC 3.3 "requires attorneys to cite any known, adverse authority." App. at 3.

At the February 2 hearing, Gascón's counsel argued that everyone in the criminal court system knows that the line prosecutor's required statement on the record comes from the District Attorney's Special Directives. Under RPC 3.1, the District Attorney is permitted ethically to advance a position contrary to current law as long as it is supported by "a good faith argument for an extension, modification or reversal of existing law." The California Supreme Court in Romero expressly reserved its view on whether the "plead and prove" requirement violates the separation of powers. Given that reservation, the District Attorney may reasonably believe that the California Supreme Court would conclude that the requirement violates separation of powers. Opp. at 18.

The District Attorney adds that his view of prosecutorial discretion does not create a legal ethical dilemma for his deputy district attorneys because they are entitled to follow a supervisory lawyer's view of the law. RPC rule 5.2(b) states that "[a] subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty." Opp. at 18, n. 6. Nor does anything in Special Directive 20-08.1 prohibit a deputy district attorney from supplementing the record by citing pertinent case authority to a court. Allowing deputy district attorneys to challenge the District Attorney's policy directives under the guise of legal ethics complaints would substitute the policy views of line prosecutors for the view of the district attorney. Opp. at 17-18.

The court partly agrees. A deputy district attorney generally does not violate his or her ethical responsibilities by following the District Attorney's directive. RPC 5.2(b). However, as Romero reflects, the California Supreme Court has not decided whether the plead and prove requirement violates separation of powers. The District Attorney can make a good faith argument that although Kilborn, Butler, Gray expressly, and Roman and Laanui impliedly, have concluded otherwise, the "plead and prove" requirement of section 667(f)(1) violates separation of powers and that this issue has not been decided by the California Supreme Court. If the Special Directive 20-08.1 statement referred to this case authority, it would not create an ethical dilemma for line prosecutors. But it does not. Plainly, Kilborn and other appellate cases must be cited to the court if the constitutionality of the pleading and prove requirement of the Three Strikes law is at issue. It is insufficient to say that line prosecutors can correct this failure in the required statement by citing adverse authority to satisfy their ethical responsibility.

The District Attorney does not address ADDA's argument that prosecutors may feel that dismissal of a strike prior is ethically inappropriate because the case's facts do not warrant leniency. However, this issue is disposed of for three strikes purposes by the fact that deputy district attorneys have an obligation to follow their superior's direction on case outcome and ethically may rely on that direction. *See* RPC 5.2(b).

(v). Conclusion

The District Attorney has abandoned the Three Strikes law through the Special Directives that prevent deputy district attorneys from pleading and proving strike priors as required by section 667(f)(1). As demonstrated by the plain language of the Three Strikes law and case law, this direction is unlawful. Nor can the Special Directives lawfully compel a deputy district attorney to move to dismiss a strike prior under section 1385 based on antipathy to the Three Strikes law or seek leave to amend to drop a strike prior when a trial court denies a motion to dismiss a strike prior. The Special Directive 20-08.1 statement that prosecutors are required to read in court is legally inaccurate and incomplete and reading this statement in court without correction is unethical.

ADDA has shown a probability of success on its claims that the Special Directives (a) unlawfully compel deputy district attorneys to (a) not plead strike priors in violation of the Three Strikes law, (b) dismiss or withdraw strike priors in violation of the Three Strikes law, section 1385, and section 1386, and (c) read an inaccurate, incomplete, and inconsistent statement to the trial court.

c. The Special Directives' Mandate for Other Existing Enhancement Allegations

(i). The Dismissal of Existing Enhancement Allegations

Apart from the Three Strikes law, ADDA notes that the Special Directives require deputy district attorneys to seek dismissals of all existing enhancement allegations in every pending case. These sentencing enhancements include five-year prior enhancements (§667(a)(1)), three-year prior enhancements (§667.5(a)), gang enhancements (§186.22), special circumstances allegations resulting in an LWOP sentence (§§ 190.1 to 190.5), and enhancements for violations of bail or O.R. release (§12022.1) and use of a firearm (§12022.53). As with Three Strikes law allegations, the Special Directives require that a motion to dismiss these enhancements from pending cases be made under section 1385(a) "in the furtherance of justice." §1385(a). If the trial court denies the motion to dismiss, the deputy district attorney further must move for leave to amend the charging document for the purpose of removing the allegation.

Although the parties mingle them, ADDA raises two separate issues with respect to sentencing enhancements other than strike priors: (a) a prosecutor's duty to pursue and not dismiss existing charges and (b) the lawfulness of a blanket office policy.

(ii). Section 1385

ADDA argues that an existing enhancement cannot be dismissed without the court's approval. ADDA notes that both the District Attorney and his deputy district attorneys have a mandatory duty to prosecute crime. "The district attorney is the public prosecutor, except as otherwise provided by law. The public prosecutor shall attend the courts, and within his or her discretion shall initiate and conduct on behalf of the people all prosecutions for public offenses." Govt. Code §26500 (emphasis added). The district attorney's duty under Govt. Code section 26500 to prosecute crimes is mandatory, not discretionary. City of Merced v. Merced Cty., (1966) 240 Cal. App. 2d 763, 766. App. at 10.

ADDA contends that section 1385 incorporates a prosecutor's obligation to exercise case-by-case discretion rather than operate under blanket policies. A dismissal under section 1385 may be granted only "in the furtherance of justice" and must consider "whether, in light of the nature

and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit." People v. Williams, (1998) 17 Cal. 4th 148, 161 (emphases added). The dismissal may not be based on a judge's "bare antipathy to the consequences [of not dismissing] for any given defendant." Id.

In People v. Dent, (1995) 38 Cal. App. 4th 1726, the court vacated the dismissal of a prior strike precisely because it was "guided solely by a personal antipathy for the effect that the three strikes law would have on defendant." Id. at 1731. The court held that a dismissal cannot simply reason backwards from the lengthy sentence the court wished to avoid because "[a] sentence based on such an approach constitutes a failure to exercise discretion as required by the law." Id. Rather, there must be a consideration of the defendant's individual circumstances. Id. The court remanded to the trial court for it to "resentence defendant on an individualized basis, rather than impose a sentence predicated solely upon a desire to avoid the consequences of the three strikes law." Id. App. at 12.

ADDA concludes that the District Attorney's blanket policy barring the enforcement of six sentencing enhancements in all cases – and requiring their abandonment in all existing cases where they are alleged – squarely contradicts the California Supreme Court's instruction in People v. Williams that section 1385 dismissals must account for a particular defendant's individual circumstances, and not simply "reason backwards" from the enhanced sentences Gascón now unilaterally wishes to eliminate. App. at 12-13.

The District Attorney argues that his Special Directives' requirement that deputy district attorneys move to dismiss sentencing enhancements is based on his right as the representative of the People to reach conclusions about what actions should be taken in the "furtherance of justice." Contrary to ADDA's argument, the Special Directives do nothing to interfere with the judiciary's role. Opp. at 17.

Gascón distinguishes People v. Williams and People v. Dent as cases concerning whether a court can decide under section 1385 to dismiss sentencing enhancements based a judge's "personal antipathy" to the effects of an underlying sentencing law. *See* People v. Williams, *supra,* 17 Cal.4th at 159; People v. Dent, *supra*, 38 Cal.App.4th at 1731. The District Attorney argues that prosecutors are in a fundamentally different position from judges because they make charging decisions based on policy concerns about the administration of justice. Judges are supposed to act on legal bases, not policy, and nothing in these two cases suggests that a district attorney is forbidden from concluding that the interests of justice compel a motion to dismiss already-pled enhancements based on policy concerns. To do so is the essence of prosecutorial discretion. Opp. at 16-17.

The District Attorney's argument may be distilled to contend that, while a judge must consider a section 1385 motion based on the law, his deputy district attorneys do not need a legal ground to make the motion. Rather, a section 1385 motion can be made on policy considerations. Gascón cites no authority to support this conclusion and it would violate a prosecutor's duty to make a motion on anything besides a legal ground. Lawyers do not make motions based on policy. *See* RPC 3.1(a)(2) ("A lawyer shall not present a claim or defense in litigation that is not warranted under existing law...."). *See also* CRC 3.1110(a) (d) (civil notice of motion and motion must state legal ground).

Moreover, a prosecutor's interest in justice is similar, albeit not identical, to the judge's

interest. People v. Dent squarely distinguishes between a judge's permissible exercise of discretion based on individualized, case-by-case factors and an impermissible "failure to exercise discretion as required by the law" such as dismissing an enhancement based on "a personal antipathy for the effect that the [enhancement] would have on [the] defendant." 38 Cal. App. 4th at 1731. ADDA correctly concludes that there is no reason why this same requirement does not apply to the District Attorney's prosecutors. Reply at 11.

Thus, a deputy district attorney may not move to strike an existing prior based on Office policy and must have a legal ground to do so. The Special Directives violate section 1385 and 1386 in requiring otherwise.

(iii). Blanket Policy

ADDA contends that the District Attorney's blanket prosecutorial policy to dismiss all enhancement allegations eschewing any case-by-case assessment impermissibly prevents deputy district attorneys from exercising any discretion. "[A] district attorney's 'mandatory' duty is to exercise his or her *discretion* to prosecute crimes." Becerra, *supra*, 29 Cal. App. 5th at 504 (emphasis in original). While "mandate cannot be used to compel a district attorney to exercise his or her prosecutorial discretion in any particular way," mandate can be employed to compel the district attorney to take action "if a district attorney failed and refused to prosecute any crimes whatsoever." Id. ADDA argues that the mandatory duty to exercise of discretion refers to the exercise of case-by-case discretion. Since deputy district attorneys are duty bound to exercise their discretion, the Special Directives contravene California law. App. at 10-11.

ADDA relies on two out-of-court cases limiting blanket prosecutorial policies that do not allow for the exercise of case-by-case discretion. App. at 10-11.

In State v. Pettitt, ("Pettitt") (1980) 93 Wash. 2d 288, the prosecutor filed an information asserting that the defendant was a "habitual criminal" making him eligible for an enhanced sentence. Id. at 296. At the time, "the Lewis County prosecuting attorney had a mandatory policy of filing habitual criminal complaints against all defendants with three or more prior felonies." Id. at 290. Under the policy, "once the prior convictions were clearly established by the record, [the prosecutor] had no choice but to file a supplemental information." Id. The prosecuting attorney testified that "he did not consider any mitigating circumstances in reaching his decision, and that he could imagine no situation which would provide for an exception to the mandatory policy." Id. at 296. In vacating the criminal sentence, the Washington Supreme Court held that "this fixed formula which requires a particular action in every case upon the happening of a specific series of events constitutes an abuse of the discretionary power lodged in the prosecuting attorney." Id.

In State v. City Court of City of Tucson, ("Tucson") (1986) 150 Ariz. 99, the Arizona Supreme Court concluded that blanket prosecutorial policies were unlawful. Id. at 102. There, the city attorney had instituted a policy requiring that all prosecutors file a peremptory challenge in every case against a particular judge. Citing Pettitt, the Arizona Supreme Court held this to be impermissible, reasoning that the policy "infringed upon the obligation of each Deputy City Prosecutor to exercise his or her individual professional judgment on a case by case basis." Id. App. at 10-11.

ADDA argues that California also has held as impermissible an executive branch official's blanket refusal to exercise discretion. In In re Morrall, (2002) 102 Cal. App. 4th 280, the court considered a challenge to the governor's refusal to grant an inmate parole. The court recited the

well-established rules that there is no right to parole before the expiration of the defendant's sentence, the decision whether to grant parole is expressly committed to the executive branch, and that "the discretion of the parole authority has been described as 'great' and 'almost unlimited.'" Id. at 287. Nonetheless, the court held that "[i]t is without doubt that a blanket no-parole policy would be contrary to the law" because the governor is required to make an "individualized [determination] of an inmate's suitability for parole." Id. at 291 (citing Roberts v. Duffy, (1914) 167 Cal. 629, 640–41 and In re Minnis, (1972) 7 Cal. 3d 639, 642). Thus, "[a] refusal to consider the particular circumstances relevant to an inmate's individual suitability for parole would be contrary to the law." Id. at 292. App. at 11-12.

ADDA concludes that the District Attorney's blanket policy barring the enforcement of six sentencing enhancements in all cases is analytically indistinguishable from the refusal to exercise discretion that these cases have found unlawful. A district attorney owes statutory and ministerial obligations to employ his discretion on a case-by-case basis and the Special Directives plainly violate those obligations. App. at 12-13.

The District Attorney disagrees. He argues there is nothing wrong with a district attorney making a policy determination, based on considerations of public safety and the public good, that it is appropriate to move to dismiss such sentencing enhancements, even as a blanket policy. Gascón argues that his issuance of the Special Directives is itself an exercise of his prosecutorial discretion. The California Supreme Court has held that the district attorney's "inherent executive authority includes not only the power to authorize diversion on a case-by-case basis, but extends also to the establishment or approval of general eligibility standards to guide the exercise of such discretion by all deputies under his direction." Davis v. Municipal Court, (1988) 46 Cal.3d 64, 77 (statute authorizing diversion on approval of district attorney was not unconstitutional delegation of legislative power). The District Attorney adds that the Special Directives are not even close to a district attorney's failure "to prosecute any crimes whatsoever." Becerra, *supra*, 29 Cal.App.5th at 504. Instead, he has exercised his discretion in prosecuting crimes not to seek sentencing enhancements as a matter of policy because of his view of the overall benefits to public safety, which he contends is a decision at the core of prosecutorial discretion. Opp. at 15-16.[27]

ADDA replies that Gascón's assertion -- there is nothing wrong with blanket policies mandating dismissal of sentencing enhancements without any case-by-case exercise of discretion -- does not make it true, and the Supreme Courts of Washington and Arizona disagree. ADDA argues that Pettitt is particularly on point because it concerned a district attorney's blanket policy with respect to seeking sentencing enhancements. ADDA concludes that "there can be no serious doubt" that California's appellate courts will follow the same approach as the highest courts of Washington and Arizona. The sole case cited by the District Attorney, Davis v. Municipal Court, *supra*, 46 Cal. 3d at 77, holds only that district attorneys may establish general standards "to guide the exercise of such [prosecutorial] discretion by all deputies under his direction". ADDA argues that the Special Directives do not guide deputy district attorneys' exercise of discretion, but categorically bar them from exercising any discretion. Reply at 10-11.

In essence, ADDA is arguing that there is a difference between a blanket bar of all

[27] Gascón argues that In re Morrall is distinguishable because parole is governed by a separate statutory scheme. Opp. at 16, n. 5.

sentencing enhancements and an office policy of general standards that restricts pleading them. Pursuant to ADDA's argument, the District Attorney may announce a policy severely limiting the pleading of strike priors and other enhancements -- and may require approval by senior management when a deputy district attorney wants to plead such an enhancement -- but he may not impose a blanket policy preventing penalty enhancement allegations in all cases. To do so is a failure to exercise discretion in an individual case as required.

In support of its position, ADDA has relied on two out-of-court cases (Pettitt and Tucson) and a parole case (In re Morrall). As Gascón's counsel argued at the February 2 hearing, Tucson concerned a blanket peremptory judicial challenge and is factually distinguishable. Moreover, the ADDA has not compared the nature of that statutory scheme to California's peremptory challenge law. In re Morrall is based on a separate statutory scheme from criminal prosecutions and again ADDA has not compared the two schemes. Finally, Pettitt concerned a blanket policy that may implicate a defendant's right to due process, a matter not at issue in the Special Directives.

At the preliminary injunction stage, the court is unwilling to conclude that a blanket policy against sentencing enhancements is not an exercise of discretion because that discretion must be made on a case-by-case basis.[28]

(iv). The Special Directives Require Deputy District Attorneys to Seek Dismissal of Special Circumstance Allegations that Cannot Be Dismissed

Special Directive 20.08-2 requires that "[s]pecial circumstances allegations resulting in an LWOP [life without possibility of parole] sentence shall not be filed, will not be used for sentencing, and shall be dismissed or withdrawn from the charging document."

ADDA argues that this Special Directive requires deputy district attorneys to move to dismiss allegations that a judge has no discretion to dismiss. While judges generally have discretion to dismiss criminal prosecutions under section 1385, the People in Prop 115 specifically abrogated this discretion for certain special circumstances allegations: "Notwithstanding Section 1385 or any other provision of law, a judge shall not strike or dismiss any special circumstance which is admitted by a plea of guilty or nolo contendere or is found by a jury or court as provided in Sections 190.1 to 190.5, inclusive." §1385.1.[29] Sections 190.1 to 190.5 are the special circumstances allegations that would result in a sentence of LWOP. App. at 13.

ADDA concludes that, because of section 1385.1, a judge has no discretion to dismiss post-jury guilty verdict and post-guilty plea special circumstance allegations. ADDA concludes that the Special Directive 20.08-2 violates California law and legal ethics by requiring deputy district attorneys to move to dismiss a special circumstance allegation where there is no legal basis to make such a motion. *See* RPC 3.1(a)(2). App. at 13.

---

[28] A determination on the blanket policy issue in ADDA's favor would enable prosecutors to file discretionary sentencing enhancements (meaning other than strike priors) for new cases until the District Attorney issued a new policy. Although ADDA's application argues for that remedy (App. at 14), the notice of motion does not do so. Nor did ADDA's counsel propose this relief at the February 2 hearing.

[29] Even the legislature cannot repeal section 1385.1 absent a supermajority vote. *See* People v. Solis, (2020) 46 Cal. App. 5th 762, 773 ("Proposition 115 specifically permitted amendment by the Legislature, but only if approved by a supermajority of both houses.").

The court mostly agrees. Special Directive 20.08-2 has three components. First, it requires deputy district attorneys not to file special circumstance allegations that would result in an LWOP sentence. This is lawful. Special Directive 20.08-2 does not violate section 1385.1 in precluding the initial charging of special circumstances allegations. Second, Special Directive 20.08-2 requires prosecutors to seek to dismiss or withdraw special circumstances allegations from the charging document. This requirement violates sections 1385 and 1386. Third, Special Directive 20.08-2's direction that the special circumstances "will not be used for sentencing" violates section 1385.1 because the allegations will have been proved or admitted and must be used for sentencing.[30]

(v). Conclusion

ADDA has shown a probability of success on other sentencing enhancements as follows. The Special Directives violate section 1385 and 1386 by requiring deputy district attorneys to move to strike enhancements without a legal ground for doing so. The Special Directive's requirement that special circumstance allegations that would result in a LWOP sentence "be dismissed or withdrawn" violates sections 1385 and 1386 and its direction that the special circumstances "will not be used for sentencing" violates section 1385.1. ADDA has not shown that the District Attorney's blanket policy against prior enhancements is a failure to exercise discretion.

3. Balance of Hardships

In determining whether to issue a preliminary injunction, the second factor which a trial court examines is the interim harm that plaintiff is likely to sustain if the injunction is denied as compared to the harm that the defendant is likely to suffer if the court grants a preliminary injunction. Donahue Schriber Realty Group, Inc. v. Nu Creation Outreach, (2014) 232 Cal.App.4th 1171, 1177. This factor involves consideration of the inadequacy of other remedies, the degree of irreparable harm, and the necessity of preserving the status quo. Id.

ADDA argues that its members are being harmed by the fact that judges have scolded them for following the Special Directives instead of their obligations under the law. *See* Hanisee Decl. ¶ 6, Ex. 6 (Hon. Judge Laura F. Priver: "I understand it came from the top. I understand why you're making the motion, but the Court will deny the motion as to each and every one of the other allegations. You have an ethical duty to do your job and proceed with prosecution. You should not be allowed to abandon the prosecution at this juncture."). Deputy district attorneys risk being held in contempt of court or disciplined by the State Bar for following their employer's orders. Id. ¶¶ 4-5.

The District Attorney argues that the balancing of relative harms in a preliminary injunction proceeding involves consideration of "the status quo" and "the degree of adverse effect on the public interest or interests of third parties" in addition to irreparable harm. Vo v. City of Garden Grove, (2004) 115 Cal.App.4th 425, 435. He argues that a preliminary injunction would upset the status quo, which is his issuance of the Special Directives. Opp. at 19. He disputes that any irreparable injury to deputy district attorneys, who cannot rely on a hypothetical future injury of

[30] The District Attorney's counsel conceded the unlawfulness of Special Directive 20.08-2's sentencing component at the February 2 hearing.

contempt. *See* Keel v. Hedgpeth, (E.D. Cal. Nov. 19, 2009) 2009 WL 4052707 at *1. Opp. at 19. Finally, the District Attorney argues that a preliminary injunction would not be in the public interest since it would interfere with the will of the more than two million County voters who elected him and would impose undue and unwarranted costs on the administration of justice and criminal defendants. Opp. at 19.

ADDA correctly replies that the District Attorney wrongly sets forth the status quo. The relevant "status quo" is defined "the last actual peaceable, uncontested status which preceded the pending controversy". People v. Hill, (1977) 66 Cal. App. 3d 320, 331. The last uncontested status before the pending controversy is the prosecutorial procedures that existed before the Special Directives, which is the previous Office policy.

ADDA also correctly notes that the District Attorney fails to identify any harm that would befall him from a preliminary injunction. ADDA points out that Gascón's argument about the will of the County voters who elected him ignores the will of the 5.9 million voters— 70% of the California electorate—who voted for the Three Strikes law.

In evaluating the harm to ADDA's members, the court will break apart compliance with Three Strikes law from the other sentencing enhancements. For the Three Strikes law, the court accepts ADDA's discussion of harm to its members. The Special Directives require unlawful conduct and an attorney's violation of law during litigation is unethical. *See* RPC 8.4(a), (e); B&P Code §6068(a). There is clear harm to a deputy district attorney from following the Special Directives for strike priors, including possible sanctions, contempt, and State Bar discipline.

For the other sentencing enhancements, the harm is less significant. The Special Directives force prosecutors to move to dismiss an existing enhancement without a legal basis to do so. They also require the deputy district attorney to disregard the denial of a section 1385 by seeking leave to amend a charging document to delete the enhancement, again without a legal basis. This procedure is not legal, but a superior's direction for a subordinate to act illegally does not necessarily result in harm. At most, it exposes the prosecutor to the possibility of sanctions, but not State Bar discipline.

It is true, as the District Attorney argues, that the trial judge should know that deputy district attorneys are following the direction of their employer, making sanctions less likely. However, ADDA's members already have incurred trial courts' ire and need not wait until one of them is sanctioned or disciplined by the State Bar. There is a real prospect of sanctions and an employee should not be forced to choose between his or her job and complying with the law. *See* Haney v. Aramark Unif. Servs., Inc., (2004) 121 Cal. App. 4th 623, 643. Reply at 14.

Finally, while ADDA asks that deputy district attorneys be permitted to file sentencing enhancements in new cases, its members would appear to suffer no personal harm in not doing so. It is less likely that a criminal court will berate a prosecutor for not filing an enhancement that was never charged than for seeking dismissal of one. No sanctions, contempt, or State Bar discipline realistically should result from following Office policy on charging issues.

While the District Attorney will suffer no personal harm, the public interest strongly weighs in his favor. He has almost unfettered discretion to perform his prosecutorial duties and the public expects him to evaluate the benefits and costs of administering justice in prosecuting crimes. He was elected on the very platform he is trying to implement and any intrusion on this prosecutorial discretion is not in the public interest unless clearly warranted.

Nonetheless, the balance of harms works somewhat in favor of the deputy district attorneys.

The District Attorney's disregard of the Three Strikes "plead and prove" requirement is unlawful, as is requiring deputy district attorneys to seek dismissal of pending sentencing enhancements without a lawful basis. An injunction against a public official's unlawful actions cannot, by definition, interfere with the lawful exercise of the official's duties. *See* PEOP, *supra*, 53 Cal.App.5th at 405.

G. Conclusion

ADDA's application for a preliminary injunction is granted in large part. A preliminary injunction will issue that enjoins the District Attorney, through his Special Directives, from (a) requiring deputy district attorneys not to plead and prove strike priors under the Three Strikes law, (b) requiring deputy district attorneys to read the statement in Special Directive 20-08.1 to trial courts without adding qualifying language concerning Kilborn and other controlling case law and without having legal grounds to seek dismissal under section 1385, (c) compelling deputy district attorneys to move to dismiss strike priors or any existing sentencing enhancement in a pending case without having legal grounds as required by section 1385, (d) compelling deputy district attorneys to move to dismiss or withdraw special circumstance allegations that would result in a LWOP sentence without legal grounds as required by sections 1385 and 1386, and (e) compelling deputy district attorneys not to use proven special circumstances for sentencing in violation of section 1385.1. The preliminary injunction will not enjoin the District Attorney from preventing deputy district attorneys from charging sentencing enhancements in new cases where not required by the Three Strikes law.

Absent inapplicable circumstances, a bond is required for every preliminary injunction. As neither party briefed the issue, a nominal bond of $250 is required. ADDA must post the bond within five court days and provide evidence to the District Attorney's counsel that it has done so.

Dated: February 8, 2021

_____

Superior Court Judge