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PERSPECTIVE

Gascón asks Supreme Court to decide constitutionality of three strikes law

By Ricardo Pineda

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Los Angeles County DA George Gascón asked the state Supreme Court to reverse an appellate court ruling that allowed prosecutors to continue to seek sentence enhancements over his objection.

In doing so, the district attorney wants the justices to rule that California's three strikes law is unconstitutional.

An interpretation of California's three strikes law that mandates prosecutors file strikes in every available instance violates the separation of powers doctrine and greatly hinders an elected DA from setting policies, reads the petition for review authored by a team from Hogan Lovells that includes Neal K. Katyal, a former acting solicitor general in the Obama administration.

The conflict was present in 1996, when the Supreme Court first reviewed the three strikes law but the justices then refused to answer it, the brief states.

"[T]he constitutionality of the Three Strikes law is a high-stakes issue for many Californians. Yet for more than 25 years, this Court has declined to provide a definitive answer on the question of whether the law violates the separation of powers. The time has come for this court to step in," the brief states.

Eric M. George, the lawyer representing the union of deputy district attorneys who successfully challenged Gascón's policy of not seeking sentencing enhancements in most cases, scoffed at the brief's assertion that 2nd District Court of Appeal decision is "unprecedented" and prevents Gascón from setting policies for the district attorney's office.

"Mr. Gascón now claims last month's appellate ruling was 'an unprecedented decision with untold consequences,' he said. "Compare that to his PR spin last month that the ruling somehow – and I quote – 'affirmed his ability to pursue his



George Gascon appears before a committee of the California Legislature in 2014. | New York Times News Service

policy goals in the furtherance of justice."

"Mr. Gascón is as disingenuous as he is radical when it comes to sound law enforcement," continued George, a partner at Ellis George Cipollone O'Brien Annagney LLP. "Each of the four respected jurists who have considered the matter has validated our client's claims, and we are confident the California Supreme Court will take no action to interfere with the injunction against Mr. Gascón."

The case comes at a perilous time for Gascón. A campaign to recall the district attorney says they have collected enough signatures to get the question on the November ballot. The county is now determining whether recall supporters have enough valid signatures.

Two police officers in El Monte were killed last month by a man with a string of convictions who would have been in prison had the DA charged a strike in 2021 when he was arrested as a felon with a firearm. Gascón has said the man was not charged with a strike in that case because his previous criminal history had been non-violent drug offenses.

And this week, Starbucks said it plans to close six locations in Los Angeles County because it cannot protect its employees from crime

in those neighborhoods. One of the locations is a block from the headquarters of the Los Angeles Police Department and three blocks from Gascón's office.

The company also is closing 10 stores in other cities.

California's three strikes law was enacted by the Legislature in March 1994 and by ballot initiative in November 1994, another period of rising crime.

Gascón's petition to the Supreme Court notes that Mike Reynolds, whose daughter was murdered by a man on parole after a string of violent offenses, pushed for the ballot measure because he was concerned the Legislature might later water down the law.

The dispute raised in the brief filed with the state Supreme Court Tuesday is whether the words "shall plead" requires prosecutors to plead a third strike in every case possible.

Katyal and Stephanie Yonekura, attorneys for Gascón, wrote that such an interpretation not only would prevent him from making policy decisions, it would overwhelm the prison system with predominantly brown and Black inmates.

"If every prosecutor in every county is now required to plead every possible prior strike, the number of defendants charged and sentenced

under the Three Strikes law will increase dramatically," his brief reads. *Gascón et al., v. The Association of Deputy District Attorneys for Los Angeles County*, 20STCP04250 (Sup. Ct. of Cal., filed July 12, 2022).

Concerning the scope of the prosecutorial discretion, Justice John L. Segal of the 2nd District Court of Appeal wrote the appeal raises two questions: "The first is: Can the voters, through the initiative process, or the Legislature, through legislation, require prosecutors to plead and prove prior convictions to qualify a defendant for the alternative sentencing scheme prescribed by the three strikes law? Our answer: Yes for pleading, no for proving.

"The second question is: Can courts require prosecutors, when moving to eliminate (by dismissal or amendment) from a charging document allegations of prior strikes and sentence enhancements, to base the motion on individualized factors concerning the defendant or the alleged crime? Our answer: No, but courts do not have to grant those motions." The Association of Deputy District Attorneys for *Los Angeles County v. Gascón et al.*, 20STCP04250 (L.A. Super. Ct., filed Dec. 30, 2020).

The People of the State of California v. Superior Court (Romero) remains the relevant case on the issue since it was handed down in 1996. Defendant Jesus Romero was charged by the San Diego County district attorney with possession of a narcotic. He had previous convictions for residential burglary and attempted burglary.

The trial judge offered to dismiss one of those priors in exchange for a guilty plea, deciding a 25-years-to-life sentence would be unjust for a .13 grams possession of cocaine. The DA objected and appealed the decision to the California Supreme Court. The high court ruled in the judge's – and defendant's – favor. Ever since, trial court judges have been allowed to dismiss a defendant's prior strike.

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