

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