1. MEMORANDUM

To: KELLYJEAN CHUN
Director, Bureau of Prosecution Support Operations

From: Appellate Division

Re: Mandatory Charging of Strike Priors

Date: December 9, 2020

2. ISSUE PRESENTED

Do Penal Code[1] section 1170.12, subdivision (d)(1), and section 667, subdivision (f)(1), require the prosecutor to plead and prove all known strike priors?

3. SUMMARY OF ANSWER

Yes, those sections require the prosecution to plead and prove all known strike priors by their plain terms. The Court of Appeal has held that this limitation does not violate the separation of powers by infringing on the prosecutor's charging discretion. Thus, absent a legislative change or intervening case law, the prosecutor must charge all known strikes.

4. ANALYSIS

Subdivision (d) of section 1170.12 reads:

> (d)(1) Notwithstanding any other law, this section shall be applied in every case in which a defendant has one or more prior serious and/or violent felony convictions as defined in this section. 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 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 conviction. If upon

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[1] Further statutory references are to the Penal Code.

> 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. This section shall not be read to alter a court's authority under Section 1385.

Section 667 contains similar language. (§ 667, subd. (f).)[2] For simplicity, we will refer to subdivision (d)(1) with the understanding that any argument would also apply to subdivision (f)(1) of section 667 as well.

The language of subdivision (d)(1) is clear an unambiguous: Notwithstanding that the selection of criminal charges (and, by extension, enhancement allegations) is usually within the prosecutor's exclusive discretion (*People v. Birks* (1998) 19 Cal.4th 108, 134), under the Three Strikes law, the statute mandates that prosecutor plead all known prior felony convictions that would bring the defendant under the provisions of that law. It further obligates the prosecutor to prove them to the trier of fact. The intent of these provisions were obviously to prevent the prosecution from avoiding the effects of the Three Strikes law on a defendant simply by declining to plead the necessary prior convictions, or once having done so, declining to prove them to the trier of fact.

The strongest attack on subdivision (d)(1) is that it violates the separation of powers by infringing on the executive's charging discretion. But this argument was addressed, and rejected, by the Court of Appeal in *People v. Kilborn* (1996) 41 Cal.App.4th 1325, 1333. The court noted that since district attorney is a state officer when prosecuting crimes, and that the authority of the office derives from statute. (*Ibid.*) Analogizing to other statutes requiring the district attorney to act, and further reasoning that the Three Strikes law did not change the primary duties of the office, the court held it was constitutional. (*Ibid.*) Two other published cases adopted the reasoning of *Kilborn*, albeit without

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[2] These provisions of subdivision 667 expressly apply to only its subdivisions (b) through (i), i.e., its Three Strikes law provisions, not the five-year enhancement in subdivision (a).

independent analysis. (*People v. Gray* (1998) 66 Cal.App.4th 973, 994–995; *People v. Butler* (1996) 43 Cal.App.4th 1224, 1247.)

Since the language of subdivision (d)(1) is clear, unambiguous, and currently held to be constitutional, the office has a statutory obligation to allege all of a defendant's known convictions for serious or violent felonies that would bring him or her under the provisions of the Three Strikes law. The statute does not restrict the prosecutor from thereafter moving to dismiss any of those prior-conviction allegations "in the furtherance of justice." (See § 1170.12, subd. (d)(2).) But this is subject to the court's discretion: the dismissal of charges after filing is purely a judicial function. (*People v. Tenorio* (1970) 3 Cal.3d 89, 94.) The court may therefore deny our request. The denial of a motion to dismiss a strike prior is reviewable only for abuse of discretion.

Beyond sections 667 and 1170.12, section 969 may also require the prosecutor to file any known felony convictions. That section reads (italics added):

> In charging the fact of a previous conviction of felony, or of an attempt to commit an offense which, if perpetrated, would have been a felony, or of theft, it is sufficient to state, "That the defendant, before the commission of the offense charged herein, was in (giving the title of the court in which the conviction was had) convicted of a felony (or attempt, etc., or of theft)." If more than one previous conviction is charged, the date of the judgment upon each conviction may be stated, and *all known previous convictions, whether in this State or elsewhere, must be charged*.

Although one could read the concluding language as mandating that the prosecution file all known priors in all cases, this is not the only reasonable interpretation. Since the statute deals with pleading language, not charging discretion, the concluding section may only describe a means of providing notice, not a duty of the district attorney. (See *People v. Bailey* (1995) 46 Cal.App.4th 743, 754, fn. 9.) Also, by its own terms, the concluding language of section 969 applies only if there is a separate duty to charge priors, at which point the prosecutor must then charge *all* known

priors. (See *In re Varnell* (2003) 30 Cal.4th 1132, 1141, fn. 6.) It therefore does not create duty to charge any priors in the first instance. Finally, even if section 969 requires "charging" all previous convictions, it does not state for what purpose. It therefore does not independently mandate that we charge all statutory enhancements that might apply. Thus, while some might argue that section 969 independently requires the prosecution to allege all known felony convictions in all cases, this is probably not so.

But even if the office does have a mandatory duty to charge all priors, how could this be enforced? It is true that no defendant is likely to object to the non-filing of a prior strike. Still, the office's mandatory duty is likely to come up in two ways.

First, a judge aware of the duty may order a deputy to review the file and allege all applicable strike priors. The deputy would then be faced with the choice of either being held in contempt or violating office policy. And since the court's order would be lawful under the applicable statutes and binding precedent, the deputy would be ethically bound to follow it.

Second, recently a Court of Appeal held that a taxpayer had standing to bring a civil action against a district attorney to enjoin an unlawful practice, there the Orange County District Attorney's operation of a confidential informant program in the jails. (*People for Ethical Operation of Prosecutors etc. v. Spitzer* (2020) 53 Cal.App.5th 391, 395–396 ("PEOP").) It is true that normally citizens may not intervene in a particular criminal prosecution because the public prosecutor has exclusive control over the commencement and conduct of the case. (See *Dix v. Superior Court* (1991) 53 Cal.3d 442, 453–454.) The court in *PEOP* distinguished that case there from the rationale of *Dix*:

> Plaintiffs allege that defendants have systematically employed unconstitutional methods of investigating crimes. An injunction against unlawful investigative methods cannot, by definition, interfere with the lawful exercise of defendants' duties. "It is elementary that public officials must themselves obey the law." [Citation.] As a result, we have no concerns about this lawsuit interfering with legitimate

> operations of the Sheriff's and District Attorney's offices.

(*PEOP*, at pp. 404–405.) The same could be said here: The district attorney's office has no legitimate interest in having a policy directly contrary to law. And since it is a blanket policy, it is not the kind of "intervention" in a criminal case that was found improper in *Dix*. True, the present situation involves crime charging, which is more closely connected to the prosecutorial function than the investigative methods at issue in *PEOP*. Still, it is at least plausible that the office would have to defend its policy in a civil case.

The only means of avoiding sections 1170.12 or 667 would be if another Court of Appeal (or, of course, the California Supreme Court) issues an opinion contrary to *Kilborn*. While not likely to succeed, it is not implausible. For example, the Supreme Court in Romero noted (albeit in a different context) that the Three Strikes law was not intended to give the court's oversight of the prosecutor's charging decisions:

> The statute does not purport to require the court to oversee the prosecutor's charging decisions. Nor does the court, in reality, exercise any power over the prosecutor's charging decisions. Any decision to dismiss is necessarily made *after* the prosecutor has invoked the court's jurisdiction by filing criminal charges.

(*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 514.) It further noted the separation-of-powers issue, but declined to express any view on the issue:

> Amicus curiae California Appellate Defense Counsel suggests that section 667(f)(1), which requires the prosecutor to "plead and prove" all prior felony convictions, may violate separation of powers as between the legislative and the executive branch, since the latter has traditionally retained broad discretion to determine whom, and for what offenses, to prosecute. [Citations.] The district attorney notes the issue but does not advance it "[i]n this case." We intimate no view on the issue.

(*Id.* at p. 515, fn. 7.) Thus, at the Supreme Court level, the issue remains open.

Absent new intervening case law, the only remedy is a legislative change. Since the Three Strikes law is, in part, a voter initiative, it would require a two-thirds vote in the Legislature. (§ 1170.12, subd. (g).)

5. CONCLUSION

Under current law, section 1170.12, subdivision (d)(1), and section 667, subdivision (f)(1), require the prosecutor to plead and prove all known strike priors. These sections have been held to not infringe upon the prosecutor's charging discretion. Thus, absent a change in the law, they require us to comply with their terms.