No. S275746

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

v.

KEJUAN CLARK,
Defendant and Appellant.

FOURTH APPELLATE DISTRICT, DIVISION TWO, CASE NO. E075532
RIVERSIDE COUNTY SUPERIOR COURT, CASE NO. RIF1503800
HON. BAMBI J. MOYER, JUDGE

BRIEF OF *AMICUS CURIAE* PEACE AND JUSTICE LAW CENTER IN SUPPORT OF APPELLANT, KEJUAN CLARK

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INTRODUCTION

The issue presented is whether the People can meet their burden of establishing a "pattern of criminal gang activity" under Penal Code section 186.22 as amended by Assembly Bill No. 333 (Stats. 2021, ch. 699 [hereafter "AB 333"]) by presenting evidence of individual gang members committing separate predicate offenses, or must the People provide evidence of two or more gang members working in concert with each other during each predicate offense?

The issue arises because, in AB 333, the Legislature removed the word "individually" from subdivision (f) of Penal Code section 186.22 but failed to change a related "or" to "and" in subdivision (e) of that same statute. (See AB 333, Stats. 2021. ch. 699.) The result of this drafting error is that some have read subdivision (e) as continuing to allow for predicate crimes committed individually despite changes to language in subdivision (f). This reading of subdivision (e) is inconsistent and incompatible with AB 333's amendment to subdivision (f). The Court should resolve this inconsistency by holding that the interpretation of the statute must be consistent with AB 333's legislative intent and so the "or" in paragraph (e) should be read as an "and." (See *People v. Skinner* (1985) 39 Cal. 3d 765, 775 [when the Legislature uses a word erroneously, the Court should correct the statute to carry out the Legislature's intent; the inadvertent use of the words "and" and "or" is a familiar example of such an error].)

INTEREST OF *AMICUS*

The Peace and Justice Law Center ("PJLC") is a non-profit organization, formed in 2021, whose mission includes the development of public policies that make communities safer while advancing the cause of equal protection under the law, and who also provides pro bono legal services to individuals desisting from gang involvement. We are interested

in Mr. Clark's appeal because it raises a question of law relevant to gang prosecutions. Specifically, the lower court's reading of Penal Code section 186.22 will contribute to prosecutors' overbroad and racially discriminatory use of gang charges. Because we find that the overbroad and racially discriminatory use of gang charges is particularly offensive to people in communities targeted for gang suppression, it undermines these community members' trust in the criminal justice system. The result is that witnesses most important to criminal investigations refrain from engaging with police and gang-involved crime victims feel they must punish offenders themselves, leading to cycles of retaliatory violence. These consequences directly impact our mission to support public safety.

Additionally, the PJLC and our founder, Sean Garcia-Leys, were instrumental in the process of drafting and enacting AB 333. The Committee for Revision of the Penal Code, whose recommendations initiated AB 333, invited Mr. Garcia-Leys to provide testimony on gangs, gang policing, and the prosecution of gang members to the Committee before making its recommendations. AB 333's legislative findings cite Mr. Garcia-Leys' research and its publication. When the author of AB 333, a member of the Committee for Revision of the Penal Code, introduced the bill to implement the Committee's recommendations, the bill's author invited Mr. Garcia-Leys to be part of the team of attorneys who provided technical assistance to her and who drafted the actual language of the bill. Accordingly, the PJLC has an interest in seeing that the organizations' investment of time and resources into revising the state's anti-gang laws results in a safer public and a more equitable criminal justice system.

ARGUMENT

I. Substituting "And" for "Or" in Subdivision (e) Will Achieve the Legislature's Intent of Mitigating Law Enforcement Agents' Tendency to Misrepresent Individual Crimes Committed for Personal Gain as Gang Crimes.

Whether the "Or" in subdivision (e) should be read as permitting predicate crimes committed by individuals, or should be corrected to prohibit that reading, is determined by reference to the Legislature's intent. (See *People v. Skinner*, *supra*, 39 Cal. 3d at 776 [Whether the use of "and"… is, in fact, a drafting error can only be determined by reference to the purpose of the section and the intent of the electorate in adopting it"].) Respondent concedes that "the Legislature unquestionably intended to narrow the scope of the gang enhancement in several respects." (Respondent's Answer Brief on the Merits at p. 23.) But, more specifically, the legislative history and the revised language of subdivision (f) unquestionably show that the Legislature intended to narrow the scope of gang enhancements by narrowing the category of predicate crimes.

The process that shaped the legislative intent behind AB 333 began with the Committee for Revision of the Penal Code. (See Govt. Code § 8280 ["Commencing January 1, 2020, there exists within the California Law Revision Commission the Committee on Revision of the Penal Code"]; Assem. Public Safety Com., Analysis of AB 333 (2021-2022 Reg. Sess.) at pp. 6-8 [summarizing Com. on Revision of the Pen. Code's 2020 Annual Report and Recommendations in detail].) As its initial task, the Committee set out to consider reforms to limit sentence enhancements, which included a critical look at gang enhancements. (Com. on Revision of the Pen. Code, 2020 Annual Report and Recommendations (2021).) The Committee invited testimony from prosecutors, the defense bar, and our

founding executive director, Sean Garcia-Leys, who testified as an independent gang expert. (Id. at p. 74.)

Of particular concern to the Committee was testimony regarding law enforcement's engrained practice of identifying neighborhoods whose residents are primarily people of color as "gang locations," approaching all young men of color in that neighborhood through a lens of gang suppression, and investigating and prosecuting all crimes by those young men as gang crimes. The Committee stated:

> "The racially disproportionate application of gang enhancements is particularly concerning. Director of Systemic Issues Litigation at the Office of the State Public Defender Lisa Romo explained to the Committee in September 2020: 'Although social science tells us [gang] members come in all races and all ethnicities, law enforcement officers are taught that gang members are people of color. This means that communities of color are overpoliced, and white gang members can pass.' Civil Rights attorney Sean Garcia-Leys testified to the Committee that police often have difficulties knowing the difference between active gang members, former gang members, and people who are non-members but are "meshed in a gang social network by virtue of family and neighborhood."

(Com. on Revision of the Pen. Code, 2020 Annual Report and Recommendations, *supra*, at p. 46.)

In addition to identifying the problems underlying the racially disparate use of gang enhancements, the Committee made six recommendations for changes to the law, including "Focus the definition of 'criminal street gang' to target organized, violent enterprises" and "Require the defendant to know the person responsible for any predicate gang-related offense." (Com. on Revision of the Pen. Code, 2020 Annual Report and Recommendations, *supra*, at p. 44.) However, the Committee did not propose any statutory language to achieve those goals.

Following the publication of the Committee's report, one of its members, Congresswoman Kamlager,[1] introduced AB 333 to implement the Committee's recommendations. (Assem. Public Safety Com., Analysis of AB 333 (2021-2022 Reg. Sess.), *supra*, at pp. 4.) Since the Committee proposed no specific changes to the statutory language of Penal Code section 186.22, drafting the bill became the task of a team of attorneys and community advocates assembled by Congresswoman Kamlager. The team included both Lisa Romo, and Sean Garcia-Leys, whose testimony was quoted in the Committee on Revision of the Penal Code's report.

One immediate challenge was writing statutory language that would implement the Committee on Revision of the Penal Code's recommendations to prevent law enforcement from viewing all crime in certain neighborhoods as gang crime, prevent guilt by association, and limit predicate crimes to only crimes committed by people whom the defendant "knows." To a significant degree, each of these goals is vague or involves the subjective intent or unconscious bias of law enforcement agents and so they do not lend themselves easily to the rigors of statutory drafting. Ultimately, as demonstrated by the bill introduced, the drafters chose to achieve these objectives by limiting the specific elements of the law that allowed law enforcement to treat ordinary crimes as gang crimes – the overbroad category of predicate crimes and the overbroad definition of "benefit" to the gang.

Respondent acknowledges the Legislature's intent to narrow the definition of benefit to the gang but gives short shrift to the bill's objective of narrowing the overbroad category of predicate crimes. It is for this

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[1] Congresswoman Kamlager was a member of the State Assembly when she introduced AB 333, was elected to the State Senate while the Legislature was considering AB 333, and has since been elected to the United States House of Representatives.

purpose that the Legislature narrowed the timeframe for predicate crimes, required that predicate crimes benefit the gang under the newly narrowed definition of "benefit," narrowed the list of charges that qualify as predicate crimes, ensured the predicate crimes could not include a currently charged offense, and importantly, required that gang members collectively and not individually engage in the pattern of gang activity proved by the predicate crimes. (See AB 333, Stats. 2021, ch. 699.)

Reading subdivision (e) as allowing for predicate crimes committed by individuals would contradict the Legislature's many steps towards narrowing the category of predicate crimes. In contrast, limiting predicate crimes to only crimes committed by two or more people would do much to restrict law enforcement agents' tendency to misinterpret most crimes in "gang areas" as gang crimes. Consider the predicate crimes in this case: a robbery with no evidence of accomplices or profit sharing, and two residential burglaries with no evidence of accomplices or profit sharing. On their face, these appear to be exactly the kind of cases that the author and sponsors of AB 333 identified as problematic – crimes committed individually for personal gain but which are misinterpreted as gang crimes solely because the defendant is a person of color from a "gang area."

II. The Failure To Substitute "And" for "Or" in Subdivision (e) Is an Error Easily Understood in the Context of the Legislative Process.

While criminal justice reform is broadly supported in California, authoring or even voting for any specific criminal justice reform bill is politically fraught for elected officials. This is doubly true for bills involving gangs, whose members are often demonized by law enforcement as "the worst of the worst." AB 333 is an example. Among the bill's opponents in law enforcement, some referred to the bill as "The Gang Member Protection Act of 2021." (Cal. Dist. Attys. Assoc., *CDAA Warns of*

Dangerous Public Safety Legislation That Would Protect Gang Members: AB 333 (Sept. 3, 2021), https://www.cdaa.org/wp-content/uploads/AB-333-09.03.2021.pdf [as of July 6, 2023].) The California District Attorneys Association described the bill in a press release as "little more than a gift to violent criminal street gangs." (*Ibid*.)

While this sort of imbecilic attack on criminal justice reform by law enforcement groups is unfortunately routine, in the case of AB 333, law enforcement lobbyists went beyond these typically inane attacks and also openly accused the bill's author of attempting to trick her fellow legislators into voting for a bill that went well beyond what she claimed it would do. Publicly, the California District Attorneys Association's President accused Congresswoman Kamlager, the bill's author, of acting in "bad faith" by failing to tell the Association that she had rejected some of their proposed amendments before the bill advanced to a committee vote. (Cal. Dist. Attys. Assoc., *CDAA Warns of Dangerous Public Safety Legislation, supra*.)

As a result of accusations that the bill's author was trying to sneak radical pro-gang language into the bill, the bill's author and sponsors were strongly incentivized to ensure that the bill appeared to other legislators and their staffs as doing nothing more than what was recommended by the Committee on Revision of the Penal Code. Because many of legislators and staff members are not attorneys, and even those that are would not be confident that they could understand the implications of every minute change to a statute without substantial research, it was important that mark-ups of the bill had as few strike-throughs and additions as possible to avoid the appearance of a radical rewrite of the law.

To illustrate, consider that the bill makes no "clean-up" amendments other than those routinely made by legislative counsel. For example, the bill leaves the definition of a "pattern of criminal gang activity" as subdivision (e), coming before the definition of a "criminal street gang," even though

this language effectuates subdivision (f) and so should logically come after. But imagine what that mark-up would look like to a legislator or committee member. The entirety of subdivision (e) or (f) would be crossed out in red and an entirely new subdivision would appear in the new location underlined in blue. Independently assessing whether these changes were consistent with merely enacting the recommendations of the Committee on Revision of the Penal Code, as the author claimed, or were examples of the author's bad faith attempt to sneak in radical reforms, as the California District Attorneys Association claimed, would require extremely close reading and possibly substantial legal research. This is beyond the capacity of legislators reviewing hundreds of bills per session.

Considering the incentive to the drafters of AB 333 to make as few changes to the language of Penal Code section 186.22 as possible, it is no wonder that the drafters erroneously failed to change the "or" in subdivision (e) to "and." Not that this reflected any bad faith effort to trick legislators into believing proof of a pattern of criminal gang activity would remain unchanged. To the contrary, both the author and the legislative record were perfectly clear on this point. The author's statement in the very first committee analysis states the purpose of AB 333 is to restrict the use of gang enhancements (Assem. Public Safety Com., Analysis of AB 333 (2021-2022 Reg. Sess.) April 5, 2021, p.4) and the committee's analysis states that the bill will require that predicate crimes "were committed by two or more members." (Sen. Floor Analysis of AB 333 (2021-2022 Reg. Sess.) August 30, 2021, p.4.) Rather, this context for the bill's drafting demonstrates how its drafters could make the error of inadvertently using the word "or" when meaning "and." (See *People v. Skinner*, *supra*, 39 Cal. 3d at 775 [the inadvertent substitution of the words "and" and "or" is a familiar error].)

III. A Reading of Subdivision (e) That Allows Predicate Crimes Committed by Individuals To Prove Collective Engagement in a Pattern of Criminal Gang Activity Is Incompatible with Subdivision (f).

Penal Code section 186.22's subdivisions (e) and (f) must be read together because the purpose of subdivision (e) is to effectuate subdivision (f). Subdivision (f) gives the definition of a "criminal street gang." An element of that definition is that a gang's members must "collectively engage in, or have engaged in, a pattern of criminal gang activity." (Pen. Code § 186.22.) Subdivision (e) elaborates on the term "pattern of criminal gang activity" and describes with particularity the burden a prosecution must meet to prove the pattern. (See *Ibid*.) Any inconsistency between subdivisions (e) and (f) will undermine subdivision (e)'s purpose of effectuating subdivision (f).

This current inconsistency between subdivisions (e) and (f) has now been addressed by the Court of Appeal on two occasions: *People v. Delgado*, (2022) 74 Cal.App.5th 1067 (hereafter "*Delgado*"), and the lower court's opinion in this case.[2] While the two courts disagree on how to reconcile this inconsistency, both courts agree that reading subdivision (e) as permitting predicate crimes committed by individuals is incompatible with the elimination of the word "individually" in the revised subdivision (f). (*Delgado*, 74 Cal.App.5th at 1089 [use of predicate crimes committed individually on separate occasions under § 186.22 (e) (1) would not achieve the collective requirement of § 186.22 (f)]; *People v. Clark* (2022) 81 Cal. App. 5th 133, 145 [limiting predicate crimes to crimes committed by two or more people makes the "or" in § 186.22 (e) (1) a surplusage].)

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[2] The changes to subdivisions (e) and (f) were also considered in *People v. Lopez* (2021) 73 Cal. App. 5th 327, 344-346. However, while that case supports Appellant's position generally, the case had no need to consider the inconsistency between subdivisions (e) and (f) and so it is not discussed. (*Ibid*.)

Prosecutors in both this case and *Delgado* attempt to reconcile this inconsistency but fail to do so. In *Delgado*, the prosecution advanced the theory that both subdivisions can be reconciled by allowing predicate crimes that were committed individually so long as they were committed by different individuals. (*Delgado*, *supra*, 74 Cal. App. 5th at 1089). In practice, the prosecutors' argument in *Delgado* is that (e) should be read as if it said, "the offenses were committed ***individually or collectively*** on separate occasions ~~***or***~~ by ~~***two or more***~~ ***different*** members," but that is not what subdivision (e) says. And as the *Delgado* Court points out, this would frustrate the purpose of AB 333.

In this case, Respondent attempts to harmonize subdivisions (e) and (f) by arguing that AB 333's removal of the word "individual" in subdivision (f) merely reinforces the phrase "commonly benefit[ing] a criminal street gang." (Respondent's Answer Brief on the Merits at p.31.) Respondent argues that if multiple gang members benefit from a crime, then those members collectively engaged in the crime, even if the crime was committed by an individual gang member acting alone. (*Ibid*.) But "collective engagement" and "common benefit" are two separate things that do not equate to each other. The word "engage," as used here, refers to the act of committing a crime, while the word "benefit" refers to who profits from the crime after it takes place. Respondent's own definition of "engage" is "to do or take part in something." (Id. at p. 32.) Therefore, if members do not "do" a crime collectively, then they do not "engage" in it collectively, even if they commonly benefit after the crime is complete. Respondent's argument that members "collectively engage" even when acting alone strips the word "engage" of its meaning as "to do or take part in something."

Respondent also argues that, grammatically, the words "collectively engage" in subdivision (f) modifies the whole phrase "pattern of criminal

gang activity," not the individual acts that constitute the gang activity. (Respondent's Answer Brief on the Merits at pp. 32-33.) As a matter of grammar, that is true. But Respondent's argument only reconciles subdivisions (e) and (f) if gang members "collectively engage" in "a pattern of criminal gang activity" when that pattern consists of acts committed by individuals. They do not. Certainly, a series of crimes committed by individual gang members can create a pattern when taken together. However, for members to ***collectively engage*** in that pattern, it would seem that they must "do or take part" in the crimes that make up the pattern through collective acts. How can members collectively "do or take part" in the pattern of criminal activity except by collectively committing the crimes that make up the pattern? As answer, Respondent again offers their theory that a common benefit is collective engagement. But, as discussed above, a common benefit is not collectively "doing or taking part" in a pattern of crime and so is not collective engagement.

Nor do Respondent's examples demonstrate that members can "collectively engage" in a "pattern of criminal gang activity" without collectively "doing or taking part" in the crimes that make up the pattern. While several of the examples Respondent gives are the kind of predicate crimes that the Legislature certainly meant to eliminate – merely "hanging out," bringing women around, even drug sales when there is no evidence of a gang benefit, (Respondent's Answer Brief on the Merits at p. 35), the remaining crimes, such as being the driver during a crime, retaliations ordered by a gang leader, extortion rings, and being part of a collective drug operation, are all crimes where more than one gang member participated, even if only through accomplice liability, (id. at p. 35-37.) Even Respondent's hypothetical crimes involve "gang member A" sharing drug profits with other gang members and "gang member C" concealing a weapon used by "gang member B," (id. at pp. 37-38). In both of these

cases, criminal charges could be brought against two or more of the hypothetical gang members, which would allow those crimes to be used as predicate crimes, even under Appellant's proposed reading of Penal Code section 186.22.

Ultimately, the only way for "members" to "collectively engage" in a "pattern of criminal gang activity" is for two or more members to collectively commit the acts that make up the pattern of activity, regardless of any benefit to the gang. For that reason, Respondent's arguments fail to harmonize their reading of subdivision (e) with AB 333's amended subdivision (f). As found by both Courts of Appeal who have considered the issue, and notwithstanding Respondent's arguments, any reading of subdivision (e) that allows predicate crimes committed by individuals to prove collective engagement in a pattern of criminal gang activity remains incompatible with subdivision (f).

IV. If Prosecutors Cannot Prove Two Predicate Crimes Committed by Two or More of a Gang's Members Then the Gang Is Probably Not the Type of Organized and Violent Enterprise the STEP Act Is Meant to Target.

Throughout Respondent's brief, Respondent offers several examples of crimes that might or might not be collective, including a robbery with a gun where a different person subsequently takes possession of the gun, illegal possession of a gun that is collectively owned by the gang, and the killing of a rival or a police officer that benefits the gang but was not planned collectively and was not done under the direction of another gang member. (Respondent's Answer Brief on the Merits at pp. 34-38, 40-44, 48-49.) But to be clear, there is no requirement that the currently charged offense must be committed by two or more individuals. For the currently charged offense, the inquiry will be whether the crime was committed for the benefit of the gang, not whether it was committed collectively. The

parade of horribles offered by Respondent are not individuals who would escape accountability under Appellant's proposed reading of Penal Code section 186.22, they are examples of cases that could not be used as predicate crimes.

In cases of established, organized gangs, prosecutors will have no difficulty identifying predicate crimes collectively committed by two or more gang members. It is only for gangs like the alleged gang here, Cash Money Gang, where Appellant's reading of Penal Code section 186.22 might present an obstacle to imposing a gang enhancement. But that is exactly AB 333's point. A gang that might consists of only a few people acting individually, at least one of whom also claims membership in another gang, is probably not one of the "organized, violent enterprises," (Com. on Revision of the Pen. Code, 2020 Ann. Rep. and Recommendations, *supra*, at p. 44), whose "organized nature" is their "chief source of terror," (Pen. Code § 186.21.) Rather, the record in this case fails to show there is anything to these crimes that makes them different than the crimes our justice system routinely addresses without gang enhancements. Subsequent to AB 333, charging such a crime as a gang crime without further proof is no longer allowed.

CONCLUSION

Amicus respectfully requests that this Court holds that a criminal street gang's members' collective engagement in a pattern of criminal gang activity requires that the gang's members have committed at least two predicate crimes, each committed by two or more members.

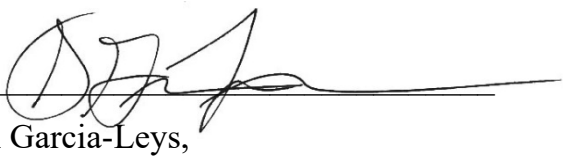
CERTIFICATE OF WORD COUNT AND PREPARATION OF BRIEF

Pursuant to California Rules of Court, rule 8.520, I hereby certify that this filing contains 4,008 words, including footnotes.

I further certify that no party, counsel for a party, or other person or entity, except for the *amicus curiae*, its members, and its counsel in this matter, authored any part of the brief or made a monetary contribution intended to fund the preparation or submission of this brief.

Dated: July 6, 2023

Respectfully submitted,

By: 

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STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

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