Case No. S275746

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. KEJUAN DARCELL CLARK, Defendant and Appellant.	Case No. S275746 Court of Appeal Case No. E075532 Riverside County Superior Court No. RIF1503800

APPEAL FROM THE RIVERSIDE COUNTY SUPERIOR COURT

Honorable Bambi J. Moyer, Judge

APPELLANT'S REPLY BRIEF

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Under Appointment of the
California Supreme Court

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INTRODUCTION

Simply stated, "collective" engagement in criminal activity by gang members, whether taking place on one or multiple occasions, cannot encompass "individual" engagement in a crime by a single gang member. This is particularly clear because the Legislature intentionally removed the word "individually," while leaving "collectively" in place, to signal a substantial change in the law.

ARGUMENT

I. A predicate offense cannot be based on conduct committed individually by a lone gang member because the Legislature deliberately removed the word "individually" but left the word "collectively," to describe the manner in which such predicate offenses must have been committed.

Respondent argues there is no dissonance between a natural reading of Penal Code section 186.22[1], subdivisions (f) and (e), and that these subdivisions can "readily be harmonized." (Respondent's Brief (RB) 31.) However, respondent's efforts at harmonization only serve to make the Legislature's removal of "individually" meaningless and render the word "collectively" surplusage. Respondent's position is contrary to both the intent of the Legislature and the principles of statutory construction.

A. The language of subdivision (e) is not clear and unambiguous.

Respondent first argues that subdivision (e) is "unambiguous" and "nothing in subdivision (f) conflicts with [its] clear language." (RB 23.) To the contrary, the Legislature's removal of the word "individually," in subdivision (f), renders the remaining word "collective" in conflict with

[1] All further references will be to the California Penal Code unless otherwise specified.

respondent's assertion that subdivision (e) refers to acts *individually* committed by gang members. Respondent's interpretation of subdivision (e)—that a pattern of criminal gang activity may be established by "two or more gang members who separately committed crimes on different occasions"—is another way of saying that gang members who "separately *and individually*" engage in the enumerated criminal acts satisfies the statute's predicate offense requirements. This reading reactivates the word "individually," which the Legislature intentionally excised, it also makes such individual acts again susceptible to the danger of being mischaracterized as undertaken for a common gang purpose even when committed for an individual purpose. The interpretation by the *Delgado* and *Lopez* courts avoids this outcome as it would be clearly inconsistent with AB 333's legislative purpose. (*People v. Delgado* (2022) 74 Cal.App.5th 1067, 1088-1089; see also *People v. Lopez* (2021) 73 Cal.App.5th 327, 344-345.)

Respondent asserts this court's 1997 opinion in *People v. Loeun* held subdivision (e)'s language to be "unambiguous in providing two alternative paths to proving gang predicates: either the predicates must have been committed on separate occasions or they must have been committed by two or more gang members." (See *People v. Loeun*

(1997) 17 Cal.4th 1, 9-10.) The *Loeun* court did not evaluate the clarity and meaning of the language of subdivision (e) in a vacuum; it read it together with the pre-AB 333 language of subdivision (f) which, at the time, encompassed both individual and collective acts committed by gang members. (*Id.* at p. 8.) Thus, there was no tension between the language in these two subdivisions at that time. In the absence of such tension, the *Loeun* court was not faced with resolving, and cannot be found to have resolved, the question of whether subdivision (e) clearly permits use of criminal acts by individual, rather than two or more, gang members to establish a predicate offense. (Accord *Santa Monica Hospital Medical Center v. Superior Court* (1988) 203 Cal.App.3d 1026, 1033 [determining precedential force and applicability of a case is based on its true holding or ground of the decision].) The *Loeun* court's holding credited subdivision (e)'s language with clarity only in the absence of language newly inserted by AB 333. This is reflected in that court's finding subdivision (e) unambiguous as to the very thing that AB 333 now specifically prohibits, that is, use of the defendant's currently charged offense to establish a pattern of criminal gang activity. (§ 186.22, subd. (e)(2); see also Assem. Com. on Pub. Saf., Analysis of AB 333 (2021–2022 Reg. Sess.) as amended March 30, 2021,

p. 4 [expressing disagreement with *Loeun* for its definition of "pattern of criminal gang activity"].)

B. Nothing in the language of subdivisions (e) and (f), read together, suggests a single gang member's criminal act amounts to "collective engagement" in a pattern of criminal activity.

Realizing the difficulty in establishing the unambiguousness of subdivision (e), respondent next claims the language of subdivision (e) can be easily "harmonized" with subdivision (f), by simply adding a new definition of "gang" to subdivision (f), that is, a "collective enterprise." (RB 24, 26, 31.) Had the Legislature intended to use this definition, it could have done so. Instead, AB 333 modified the definition of a "criminal street gang" to "an ongoing, *organized association or group* of three or more *members*" leaving the word "collective" to describe the manner in which the "members" of that organization, association or group "engage in, or have engaged in a pattern of criminal activity." (§ 186.22, subd. (f).) Respondent's "easy" harmonization leads to a strained analysis of the meaning of "engage" as a "intransitive verb" to "be understood in conjunction with the preposition 'in'" and "construed together with the prepositional phrase that modifies it as an adverb." (RB 32.) This is contrary to the basic principle of statutory construction

requiring application of a plain and common sense meaning. More simply, "collectively" applies to the manner in which qualifying predicate acts are committed, and since members cannot collectively commit a crime if only a single person is implicated, the more natural and common sense interpretation of "members collectively engage in, or have engaged in, a pattern of criminal activity" is that more than one member must have participated in the criminal activity.

Respondent contends "'collectively' is best understood as referring to the actions of gang members, undertaken as lone actors or in concert." (RB 33.) That cannot be true as to the actions of lone actors in the face of the Legislature's clear and express intent to exclude such actions by removing the word "individually" from the statute. There is no need to study "[t]he different shades of meaning" attached to "collectively" (RB 34), because no matter which pre-AB 333 case or which publication's definition of the word respondent believes supports its argument, it is clear that in the Legislature's current view, it does not encompass *individual* acts.

Respondent further argues that under subdivision (f) "predicate offenses committed by gang members for the common benefit of the gang" can be viewed "'collectively' to determine whether a pattern of

criminal gang activity is shown," even "in the absence of a common plan or the direct participation of more than one member." (RB 37-38.) To illustrate its point, respondent posits a hypothetical in which "gang member A sells drugs to make money for the gang, gang member B, [unbeknownst to gang member A], murders a competing drug salesman [leading to increased sales for A], and gang member C takes possession of the firearm [for the benefit of the gang without knowing it was used after the murder]." (RB 37.) Respondent states if gang member C is later arrested for illegally possessing the gun, his crime is gang-related because all the above crimes benefitted the gang, regardless of the absence of a common plan or participation of more than one member in the crimes. (RB 37.) The problem with this hypothetical is it assumes that because a certain gang ostensibly benefits from these crimes, individuals A, B, and C must be members of that gang and their crimes must have been committed for the gang's benefit. This type of assumption has led to outcomes AB 333 sought to remedy, such as guilt by association. As stated in the legislative findings and declarations, the Legislature enacted Assembly Bill No. 333 in the context, and necessarily to ameliorate the fact, that "[c]urrent gang enhancement statutes criminalize entire neighborhoods historically impacted by

poverty, racial inequality, and mass incarceration as they punish people based on their cultural identity, who they know, and where they live." (Stats. 2021, ch. 699, § 2(a).) The legislative findings and declarations also note that "[p]eople frequently receive gang enhancements based on the conduct of other people whom they have never even met." (Stats. 2021, ch. 699, § 2(d)(7).)

Respondent's theory of "collective engagement" is contrary to legislative intent as expressed in AB 333, and it should be rejected.

C. A reading of subdivision (e) consistent with respondent's and the Court of Appeal's reasoning would render the deletion of "individually or" in subdivision (f) meaningless and the remaining word "collectively" surplusage.

Respondent claims the Legislature's "remov[al] of the term 'individually or' from subdivision (f) does not change the analysis" of subdivision (e)'s language as inclusive of lone actor criminal acts. (RB 38.) In addition, respondent asserts that "[h]ad the Legislature intended the more specific definition of a pattern of gang activity to require evidence of crimes committed *in concert*, it likely would have added language to subdivision (e) requiring evidence that gang members engage in a pattern of criminal gang activity *in concert*. (RB 38-39.) These arguments are again contrary to the principles of

statutory construction.

First, if deleting "individually" makes no difference, why would the Legislature have bothered to delete it? This type of deletion of an express provision is presumed to evince "a substantial change in law." (*People v. Valentine* (1946) 28 Cal.2d 121, 142 ["It is ordinarily to be presumed that the Legislature by deleting an express provision of a statute intended a substantial change in the law"].) Second, there was no need to insert "in concert" into the language of subdivision (e) because the plain meaning of "collectively" necessarily incorporates the meaning of acts done "in concert" with others to describe *the manner in which* the "members" of a criminal street gang "engage in, or have engaged in a pattern of criminal activity." (§ 186.22, subd. (f).)

Respondent claims appellant's interpretation of subdivisions (e) and (f) would "nullify" subdivision (e)'s phrase "on separate occasions or." (RB 26, 38.) That is not so. The phrase addresses the number of occasions, not the number of members, that constitute a pattern of criminal gang activity. Thus, it can be easily harmonized with subdivision (f) to require that gang members "collectively engage" in the enumerated offenses on those occasions. Subdivision (e) was intended to explain what constitutes a "pattern" of criminal activity. A

pattern is a "recurring characteristic."[2] To that end, subdivision (e)'s language could simply mean establishment of a pattern does not necessarily require recurrence of collective criminal activity *on multiple occasions*, but that collective criminal activity on *only one occasion* will suffice. This reading not only comports with the language of subdivision (f), but it aligns with the committee report on AB 333 that respondent concedes noted the bill would require that gang predicates "were committed by two or more members." (Sen. Floor Analysis of AB 333 (2021-2022 Reg. Sess.) as amended July 13, 2021, p. 4; see also *Delgado, supra*, 74 Cal.App.5th at p. 1089.) Similarly, the analysis of the Assembly Committee on Public Safety noted that section 186.22 as amended by Assembly Bill No. 333 "would also require the prosecution to prove the members collectively, rather than individually, engage in, or have engaged in a 'pattern of criminal gang activity.'" (Assem. Com. on Pub. Safety, Rep. on Assem. Bill No. 333 (2021-2022 Reg. Sess.) as amended Mar. 30, 2021, p. 8.)

Respondent cites *People v. Renteria* (2022) 13 Cal.5th 951 to argue that because a defendant's individual crime can support a gang enhancement, "it would be odd" for the Legislature to contemplate

[2] Black's Law Dictionary online: https://thelawdictionary.org/pattern/

"lone-actor crimes could not qualify as gang predicates." (RB 43.) However, the Legislature did contemplate a difference between the two; it specifically distinguished between a defendant's current crime and crimes that would qualify as predicates, by stating "[t]he currently charged offense shall not be used to establish the pattern of criminal gang activity." (Section 186.22, subd.(e)(2).)

Respondent's reading of subdivision (e) renders the deletion of "individually or" meaningless and the language "collectively engage in, or have engaged in, a pattern of criminal gang activity" surplusage. Appellant's position, and the *Delgado* and *Lopez* courts' reasoning avoids this outcome and accords with legislative intent. Appellant's position is also consistent with this court's recent decision in *People v. Tran* (2022) 13 Cal.5th 1169, 1207, finding "Assembly Bill 333 requires that any [pattern of criminal activity] have been 'collectively engage[d] in' by members of the gang" and "narrowed the definition of a 'pattern of criminal activity' by requiring that … the offenses were committed by two or more gang 'members,' as opposed to just 'persons.'"

In summary, because appellant's jury "was not presented with any discernible theory as to how [gang] members 'collectively engage[d] in' [the] predicate crimes" in accordance with the changes made by AB

333, appellant's gang enhancement should be reversed. (*People v. Tran, supra,* 13 Cal.5th at p. 1208.)

CONCLUSION

For the reasons set forth above, appellant respectfully requests that this Court find the prosecution failed to prove members of SCM collectively engaged in a pattern of gang activity for purposes of section 186.22, subdivision (f), and reverse the decision of the Court of Appeal.

Dated: June 6, 2023

Respectfully submitted,

s/Patrick Morgan Ford
PATRICK MORGAN FORD,
Attorney for Appellant
KEJUAN DARCELL CLARK

Certificate of Compliance

I, Patrick Morgan, certify that the within brief consists of 2,491 words, as determined by the word count feature of the program used to produce the brief.

Dated: June 6, 2023

s/Patrick Morgan Ford
PATRICK MORGAN FORD

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