

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.

No. S275746

(Court of Appeal
No. E075532)

(Riverside County
Superior Court No.
RIF1503800)

Review of the Decision by the Court of Appeal,
Fourth Appellate District, Division Two,
on Appeal from the Superior Court of Riverside County,
Honorable Bambi J. Moyer, Judge

**BRIEF OF *AMICUS CURIAE* PACIFIC JUVENILE DEFENDER
CENTER IN SUPPORT OF DEFENDANT AND APPELLANT CLARK**

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INTEREST OF AMICUS

The Pacific Juvenile Defender Center (“PJDC”) comes before the court to support the requirement in California Penal Code section 186.22¹ that predicate offenses be committed collectively, as advanced by Appellant Kejuan Clark. We write to highlight the significant impact of the statute as amended by the STEP Forward Act on the youth in California that PJDC members serve. (See Assem. Bill No. 333 (2021-2022 Reg. Sess.)).

PJDC is a statewide public interest, nonprofit organization that works to improve the quality of legal representation for youth in the justice system and to address important juvenile and criminal justice policy issues. We provide support to more than 1,600 juvenile court lawyers, appellate counsel, law school clinical programs, and non-profit law centers to ensure quality representation for young people throughout California. Our members serve as counsel of record in thousands of juvenile court delinquency cases and have daily direct experience with representing youth in juvenile court.

The issue in this case—whether the court will accept a lowered threshold for finding a pattern of criminal gang activity under section 186.22—has particular significance for the youth involved in the delinquency system whom PJDC’s members represent. Young people are more susceptible than adults to

¹ All further statutory references are to the California Penal Code unless otherwise indicated.

social influences towards criminality and are thus likely to be acutely impacted by the statute at issue. An overinclusive definition of gang activity is also likely to put young people in poor and troubled neighborhoods at risk of being wrongly classified as part of a gang. PJDC writes to emphasize these risks which work against the rehabilitative purpose of the youth justice system.

INTRODUCTION

Young people in California occupy a special place in our criminal justice system. “[C]hildren are constitutionally different from adults for sentencing purposes.” (*Miller v. Alabama* (2012) 567 U.S. 460, 461 (hereafter *Miller*)).

In many ways, they are particularly susceptible to criminal activity. Their neurological differences make them more reckless, more impulsive, and more headless of risks than adults. (*Roper v. Simmons* (2005) 543 U.S. 551, 569 (hereafter *Roper*)). Furthermore, researchers have found that these risk assessment deficiencies are magnified by the presence of peers. (Albert et al., *The Teenage Brain: Peer Influences on Adolescent Decision-Making* (2013) 22 *Current Directions Psych. Sci.* 114).

Youth are also more vulnerable to criminogenic factors in their environments. They lack control over where and with whom they live and may have no choice in remaining in a dysfunctional family or turbulent neighborhood. (De Marco & Berzin, *The Influence of Family Economic Status on Home-Leaving Patterns During Emerging Adulthood* (2008) 89 *Families in Society* 208, 208-218). Environmental stressors, including poverty, lack of access to resources and education, and unstable housing can all negatively affect a young person’s behavior, brain development, and future life outcomes. (Center for Law, Brain & Behavior at Massachusetts General Hospital, *White Paper on the Science of Late Adolescence: A Guide for Judges, Attorneys and Policy*

Makers (2022) <<https://clbb.mgh.harvard.edu/white-paper-on-the-science-of-late-adolescence/>> [as of July 20, 2023]).

But youth are also incredibly resilient. Despite these stressors, young people are able to, and often do, overcome adversity as they move into young adulthood. (Casey et al., *Making The Sentencing Case: Psychological and Neuroscientific Evidence for Expanding the Age of Youthful Offenders* (2022) 5 Ann. Rev. Criminology). Personality traits developed in youth are not fixed and are subject to change as they mature. Even antisocial youth are able to mature out of these traits in adulthood if given proper support. (Moffit, *Male Antisocial Behaviour in Adolescence and Beyond* (2018) 2 Nature Human Behaviour 177). Consistent interpersonal relationships that support positive prosocial activities are crucial to this maturation. (Moore, *Why Positive Youth Development Works* (2016) Child Trends). Because of this propensity for growth, the youth justice system is *sui generis*, focused on the rehabilitation of young people. (*In re Dennis M.* (1969) 70 Cal.2d 444, 456).

The sentencing enhancements in California Penal Code section 186.22 interact with these principles of youth development to create risks of overincarceration and separating youth from their communities. Because of their cognitive biases towards risk taking, particularly in the presence of peers, young people are likely to engage in group criminal behavior that could be misclassified as gang activity. (See Albert et al., *supra*). This is the case even where the group lacks the organization and structure necessary to be classified as a gang. (See Pen. Code,

§ 186.22, subd. (f) [defining gangs as an “organized association or group . . . having a common name or common identifying sign or symbol”]). Young people’s lack of control over their environments, and the concentrated application of gang enhancement to specific communities mean that youth in these communities are vulnerable to being classified as gang members due to benign community associations. (See Assem. Bill No. 333 (2021-2022 Reg. Sess.) § 2, subd. (d) [explaining the legislature’s concern with the overapplication of enhancements, particularly in communities of color]). This is so despite the crucial role of community connections in promoting positive prosocial development. (See Moore, *supra*). Finally, this potential for overapplication of sentence enhancements to youth is particularly concerning in its lack of connection to the core rehabilitative purposes of the youth justice system.

ARGUMENT

This case presents an opportunity for the court to resolve the interpretative split amongst the appellate courts in favor of the goals of the STEP Forward Act of 2021. The STEP Forward Act noted one of its explicit goals as preventing overinclusive measures of gang involvement in California. (Assem. Bill No. 333 (2021-2022 Reg. Sess.) § 2, subd. (d)). It noted that, “[p]eople frequently receive gang enhancements based on the conduct of other people whom they have never even met,” and, “[p]eople are also frequently automatically lumped into a gang social network simply because of their family members or their neighborhood.” (*Id.* at § 2, subd. (d)(7), (d)(9)).

The issue here is the meaning of “pattern of criminal gang activity” in Penal Code section 186.22, as modified by the STEP Forward Act. The statute states that a “pattern of criminal gang activity” refers to two or more offenses where “the offenses were committed on separate occasions or by two or more members, the offenses commonly benefited a criminal street gang, and the common benefit of the offense is more than reputational.” (Pen. Code, § 186.22, subd. (e)). A “criminal street gang” under this provision refers to “an ongoing, organized association or group of three or more persons, . . . whose members collectively engage in, or have engaged in, a pattern of criminal gang activity.” (*Id.* at subd. (f)).

The Second District Court of Appeal in *People v. Delgado* (2022) 74 Cal.App.5th 1067 and *People v. Lopez* (2021) 73

Cal.App.5th 327, held that the requirement that members “collectively engage” in criminal activity means that predicate offenses must have been committed by two or more members of the gang. In this case, the Fourth District Court of Appeal broke with that interpretation based on its view of the “plain meaning” of the statute. (*People v. Clark* (2022) 81 Cal.App.5th 133). Instead, the court insists that two or more offenses, committed individually by separate members, would satisfy the statute. (*Ibid.*).

This interpretation effectively lowers the threshold for finding a pattern of criminal activity and would therefore increase the applicability of the enhancements. PJDC writes as *amicus* to highlight the impacts of this decision on young people in California. First, modern scientific findings on brain development show that young people are at high risk for social influence toward criminality and therefore are particularly threatened by overinclusive gang enhancements. Second, as noted in the STEP Forward Act, this overinclusion is highly prevalent in communities of color and puts the young people living there at risk for gang enhancements, despite their inability to change their situations. Finally, these risks of overinclusion and subsequent increased incarceration are completely divorced from the youth justice system’s goal of rehabilitating young people.

I. THE EXPANSION OF SECTION 186.22 ENDANGERS YOUNG PEOPLE WHO ARE AT HIGHER RISK FOR GROUP CRIMINAL ACTIVITY.

Reducing the threshold for finding a pattern of criminal activity is contrary to the goals of the STEP Forward Act and endangers young people in California. (See Assem. Bill No. 333 (2021-2022 Reg. Sess.) § 2). Fundamental developmental differences in youth make young people particularly susceptible to peer pressure towards criminality. An overinclusive definition of gang membership under section 186.22 has the potential to change normal youth misbehavior and peer pressure into years of harmful incarceration. These differences in youth are well supported by case law and social science literature.

The Supreme Court has discussed the fundamental differences between youth and adult criminality. (See *Miller, supra*, 567 U.S. 460; *Roper, supra*, 543 U.S. 551). The developmental differences the Court discussed lead directly to an increased susceptibility to gang or group criminal involvement. In *Miller*, the Court noted that children have a “lack of maturity and an underdeveloped sense of responsibility.” (*Miller, supra*, at p. 471, quoting *Roper, supra*, at p. 569). This underdevelopment leads children to act in ways that are excessively reckless, impulsive, and heedless of risks. (*Ibid.*). In a 2022 white paper on criminality and adolescent brain development, The Center for Law, Brain & Behavior reinforced that finding. (See Center for Law, Brain & Behavior, *supra*). It noted, “[t]he predisposition for sensation seeking, hypersensitivity to immediate rewards, and

present-focused decision making peaks in middle to late adolescence and then declines in young adulthood.” (*Id.* at p. 9). This proposition supports the conclusion that children are more likely to engage in criminal activity, regardless of deterrents in place, by the simple fact of their uncompleted development and inability to properly assess risks.

The Court in *Miller* also noted that children “are more vulnerable to . . . negative influences and outside pressures.” (*Miller, supra*, 567 U.S. at p. 471, quoting *Roper, supra*, 543 U.S. at p. 569). Modern neuroscientific studies have found that the presence of peers increases activity in reward centers in adolescent brains for normal incentives, e.g., monetary. (See Albert et al., *supra*). This is one of the reasons why adolescents are more likely to engage in risk-taking and criminal behavior in the presence of peers. However, this propensity is dangerous in the context of overinclusive gang enhancements. A lowered threshold for finding a pattern of criminal activity will increase the number of individuals who qualify as gang members. In areas where purported gang members are ubiquitous, young people’s propensity for risk-taking in the presence of peers puts them at great risk for enhancements.

The conclusions in *Miller* were based on reference to social science on developmental immaturity. (See *Miller, supra*, 567 U.S. at p. 471, citing Steinberg & Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 *Am. Psychologist* 1009, 1014 (2003)). More recent scientific studies

emphasize how these fundamental differences in developing brains lead to an increased susceptibility to pressure towards criminal activity.

The immediate and concrete rewards of gang activity play directly into the elevated impulsivity and risk-taking behaviors of young people. Gangs provide positive social feedback for negative, criminal behaviors. They may also provide monetary benefits or increased status, both of which are emphasized by the young person's developmental cognitive biases towards immediate and concrete rewards. Engagement with a gang also creates a positive feedback loop, emphasizing these cognitive deficiencies. (See Alleyne & Wood, *Gang Involvement: Psychological and Behavioral Characteristics of Gang Members, Peripheral Youth, and Nongang Youth* (2010) 36 *Aggressive Behav.* 423, 424 [providing examples of how the gang environment might contribute to juveniles' inability to assess risk]). Social science literature shows that even peripheral involvement with a gang decreases young people's ability to properly evaluate risk. (*Id.* at p. 424). This further erodes young people's ability to engage in considered risk taking and may lead to increased criminal behavior.

These social rewards—approval, money, and status—are particularly effective at overriding decision making processes in youth due to their increased vulnerability to outside social pressures. The cognitive biases inherent in underdeveloped young brains mean that young people are likely to be particularly impacted by any expansion in gang enhancements. (See Kellogg,

Just Grow Up Already: The Diminished Culpability of Juvenile Gang Members After Miller v. Alabama (2014) 55 B.C. L.Rev. 265, 267).

The inherent developmental deficiencies of youth discussed in *Miller* and more recent social science literature combine to put youth at increased risk for both socially pressured criminal behavior and gang involvement. A wider net for classifying gang involvement under section 186.22 will affect them more acutely. Whether young people fall victim to their cognitive biases and actually engage in gang activity or merely interact with individuals in their community who have been labelled gang members, they will be subject to increased sentences under the enhancements laws as construed in the lower court's opinion.

II. THE EXPANDED DEFINITION OF GANG ACTIVITY ENDANGERS YOUTH IN COMMUNITIES OF COLOR WHICH ARE ALREADY OVER-INCLUDED IN GANG DATABASES.

Widening the definition of gang activity will also draw more already overrepresented communities of color under the statute, endangering the youth who live within these communities through no choice of their own. (See Assem. Bill No. 333 (2021-2022 Reg. Sess.) §2 subd. (d)(2) ["The current statute disproportionately impacts communities of color, making the statute one of the largest disparate racial impact statutes that imposes criminal punishments."]). The decision below removes the requirement that predicate acts establishing a gang or criminal organization be committed by multiple suspected

members, rather than an individual member. (*People v. Clark, supra*, 81 Cal.App.5th at pp. 145-146). This will expand the already overinclusive definition of gang members. This expansion will make gang enhancements easier to attach to any crime committed by a member of an overpoliced community.

Methods for monitoring gang activity overrepresent those youth involved with gangs, particularly young Black and Latino men who live in environments where gangs are present, even if they are not themselves involved. (See Pintado-Vertner, *How Is Juvenile Justice Served? Racially biased system just sweeps troubled youths under the rug*, S.F. Chron. (Feb. 27, 2000) at 1/Z1). For example, the Los Angeles Police Department classifies 47 percent of all African American youth as gang members. (Strosnider, *Anti-Gang Ordinances After City of Chicago v. Morales: The Intersection of Race, Vagueness Doctrine, and Equal Protection in the Criminal Law* (2002) 39 Am. Crim. L.Rev. 101, 105).

Black and Latine(x) youth are more likely to experience direct contact with law enforcement than White youth. (Racial Identity Profiling Advisory Board, *Annual Report* (2023) <<https://oag.ca.gov/system/files/media/ripa-board-report-2023.pdf>> [as of July 20, 2023] at pp. 14-15). In California, law enforcement completed field interview cards, which are used to provide information to the CalGang Database in 19.1 percent of stops of Black youth aged 10 to 14. (*Id.* at p. 15). For Latine(x) youth, that percentage was 16.4. (*Ibid.*) The 10 to 14 age group was also the most likely overall to have a field interview card

completed during a stop. (*Ibid.*). This disparity in law enforcement contact in communities of color, and amongst the youth in those communities specifically, leads to inaccurate overrepresentation of gang membership and a subsequent overapplication of enhancements.

The legislature was specifically concerned with this issue in passing the STEP Forward Act in 2021. (See Assem. Bill No. 333 (2021-2022 Reg. Sess.) § 2, subd. (d)). The Act references the findings of a 2020 report on the penal code. (*Ibid.*) The report and the Act itself reference the disparate application of gang enhancements to people of color. “In Los Angeles alone . . . over 98 percent of people sentenced to prison for a gang enhancement are people of color. (*Id.* at § 2, subd. (b)(4)). The report also noted that,

(8) The social networks of residents in neighborhoods targeted for gang suppression are often mischaracterized as gangs despite their lack of basic organizational requirements such as leadership, meetings, hierarchical decisionmaking, and a clear distinction between members and nonmembers.

(9) People are also frequently automatically lumped into a gang social network simply because of their family members or their neighborhood.

(*Id.*, § 2, subds. (b)(8) & (b)(9)).

The young people who live in these communities are at risk of being classified as gang members through even their benign association with members of their community. The court in *Miller* noted the role of environment on youth criminality: “the family and home environment that surrounds him—and from which he

cannot usually extricate himself—no matter how brutal or dysfunctional.” (*Miller, supra*, 567 U.S. at p. 477). Young people have no choice in their places of residence and are unable to extricate themselves from social networks that may be, accurately or inaccurately, classified as gang-involved. Even if young people were able to extricate themselves from social networks, this would not be a desired result.

Adolescents’ brains are highly adaptable and positive external factors, such as strong peer and community relationships support resilience to criminogenic factors. (See Center for Law, Brain & Behavior, *supra*, at p. 17). The importance of community connections for developing youth was one of the factors leading to the closure of the Division of Juvenile Justice in favor of more community connected small Secure Youth Treatment Facilities. (See Sen. Bill No. 823 (2019-2020 Reg. Sess.) §1, subd. (a)-(b) [“Evidence has demonstrated that justice system-involved youth are more successful when they remain connected to their families and communities. . . . To ensure that justice-involved youth are closer to their families and communities and receive age-appropriate treatment, it is necessary to close the Division of Juvenile Justice and move the jurisdiction of these youth to local county jurisdiction.”])).

An expanded definition of gang membership makes youth vulnerable to gang enhancements for simply being a part of their communities. Undermining these communities puts youth at risk.

III. THE EXPANDED SECTION 186.22 SERVES NO REHABILITATIVE PURPOSE AND WILL HINDER THE GOALS OF THE JUVENILE JUSTICE SYSTEM.

The expanded application of these enhancements to youth is particularly concerning in that it does not serve the goals of the juvenile justice system. As the Court noted in *Miller*, young people’s characters are not fixed. (*Miller, supra*, 567 U.S. at p. 471). They have a huge propensity for development and maturation. (See Center for Law, Brain & Behavior, *supra*, at 40 “[B]ehavioral or temperamental traits change significantly through maturation.”]). The application of the criminal justice system to young people should work to “serve the youth’s best interests by providing care, treatment and guidance to rehabilitate and enable him to be a law-abiding and productive member of the community.” (Welf. & Inst. Code, § 202).

The Supreme Court rejected life without parole for youth because it, “forfeits altogether the rehabilitative ideal.” (*Graham v. Florida* (2010) 560 U.S. 48, 74). Sentencing enhancements for gang activity are not connected to any theory of rehabilitation and instead increase incarceration against the recommendations of researchers.

A 2012 meta-analysis of diversion programs found that “diversion is more effective in reducing recidivism than conventional judicial interventions.” (Wilson & Hoge, *The Effect of Youth Diversion Programs on Recidivism: A Meta-Analytic Review* (2013) *Criminal Justice and Behavior* 40:5). The research

shows that longer sentences for young people do not necessarily create better outcomes. This is especially so in the context of gang enhancements where the additional time is untethered from a plan for rehabilitation.

CONCLUSION

In *Miller*, the Supreme Court explained that youth matters in determining criminal consequences. (*Miller, supra*, 567 U.S. at p. 474). It warned that “criminal procedure laws that fail to take defendants’ youthfulness into account at all would be flawed.” (*Ibid.*). The interpretation of section 186.22 in this case will have magnified effects on young people in California. This court should consider the impact on youth of a lower threshold for finding gang membership under the statute.

Respectfully submitted,

By: /s/ Jonathan Grossman
Jonathan Grossman
Chair of PJDC Amicus
and Litigation Committee

CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.520(c)(1), I hereby certify that this filing contains 4,182 words, including footnotes, based on the count provided by Microsoft Word immediately prior to printing of the document. Pursuant to California Rules of Court, rules 8.74(b)(1)-(2) and 8.204(b)(4)-(5), the document has been formatted in a minimum of one-and-a-half line spacing and at least a 13-point font size.

Pursuant to California Rules of Court, rule 8.520(f)(4), I further certify that no party or other entity, except for the *amicus curiae*, and its members, and its counsel in this matter, authored any part of the brief or made a monetary contribution intended to fund its preparation or submission.

Respectfully submitted,

By: /s/ Jonathan Grossman
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DECLARATION OF SERVICE

I declare that I am over the age of 18, not a party to this action and my business address is 95 S. Market Street, Suite 570, San Jose, California 95113. On the date shown below, I served the within Application for Permission to File Late Amicus Curiae Brief in Support of Defendant and Appellant Clark to the following parties hereinafter named by:

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Executed under penalty of perjury, pursuant to the laws of
the State of California, this 20th day of July, 2023.

By: /s/ Jonathan Grossman
Jonathan Grossman

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

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Case Number: **S275746**

Lower Court Case Number: **E075532**

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