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## Filing Decisions for Juvenile Gang Offenses: How to Make Gang Charges Stick

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# Filing Decisions for Juvenile Gang Offenses: How to Make Gang Charges Stick

*Kimberly R. Dittrich\**

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## I. INTRODUCTION

Prosecutors are often asked by law enforcement, "Why should I put in all the work into a gang enhancement if the minor does not go to prison?" Here are some reasons why:

- Search terms.
- Weapons terms.
- Gang terms.
- Graffiti terms.
- Probation officer will be assigned.
- Establishes up and coming gangs.
- Establishes gang history on minor.
- Minor with gang enhancement will likely remain in custody.<sup>1</sup>
- Some minors with gang enhancements may be prosecuted as adults.<sup>2</sup>

Some minors are in situations where they have been previously documented, have a self-admission, or have sustained a prior adjudication for a gang crime. Well documented minors, when involved in gang related offenses, will likely be charged with a gang enhancement. However, minors who have never been contacted by law

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\* The author is a Deputy District Attorney in Riverside County, and was Editor-in-Chief of Western State Law Review from 2005 until 2007. The Author especially thanks Riverside Deputy District Attorney Tim Cross for his contribution to the legal analysis and case citations in this article.

1. Juvenile crimes are not entitled to bail.

2. See CAL. WELF. & INST. CODE § 707 (West 2012) (indicating that a minor gang member who commits a violent felony can, in certain circumstances, be directly filed in adult court).

enforcement may also suffer a gang enhancement because of *other* articulable factors identified on a case-by-case basis.

Even though recent case law has made it more difficult to charge a minor with active gang participation,<sup>3</sup> if the gang expert can articulate factors showing the minor committed the crime for the benefit of, at the direction of, or in association with a criminal street gang, then a gang enhancement should be considered. Although at first glance filing gang charges on a juvenile may appear challenging for a gang expert and the filing prosecutor, gang charges should not go ignored because securing gang convictions early in the minor's criminal career can provide several benefits for law enforcement and additional consequences for the minor.<sup>4</sup>

This article reviews some of the general legal requirements of a gang enhancement and provides potential investigative approaches to obtain the necessary gang evidence when a minor is otherwise undocumented as a gang member.

## II. THE GANG ENHANCEMENT (PC 186.22(B) AND PC 186.22(D))<sup>5</sup>

In order to sustain a gang enhancement the People must prove two elements.<sup>6</sup> The first element is the defendant committed or attempted to commit the crime for the benefit of, at the direction of, or in association with a criminal street gang.<sup>7</sup> The

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3. See *People v. Rodriguez*, 290 P.3d 1143 (Cal. 2012). Because of the recent Supreme Court decision in *People v. Rodriguez*, the gang charge in subdivision (a) of Penal Code section 186.22 has lost almost all utility. *Rodriguez* requires a gang member commit the crime in concert with at least one other gang member to prove active participation. *Id.* at 1146. Hence, in any case where active participation can be proven, the enhancement provision of subdivision (b) "in association with" will almost always be satisfied as well. The only purpose of the gang charge then would be to perhaps prevent bifurcation of the gang enhancement and ensure the admission of all relevant gang evidence. As a result, the gang enhancement under subdivision (b) of section 186.22 should be considered the primary charging section unless a legislative remedy is found to the (a) section.
  4. A minor gang member who commits a violent felony can, in certain circumstances, be directly filed in adult court. See WELF. & INST. § 707. In addition, Welfare and Institutions Code section 707 provides for other situations where juvenile gang members may be directly filed to adult court depending on prior juvenile court findings. See *id.* A gang enhancement and/or gang charge also provides for a powerful argument that a minor is unfit to be treated as a juvenile under various sections of Welfare and Institutions Code section 707. See *id.* A felony conviction with a gang enhancement in adult court will be a strike, whereas in juvenile court it may not. See *People v. Briceno*, 99 P.3d 1007 (Cal. 2004). In addition, the mere potential of a case being transferred to adult court provides for leverage in getting the minor to agree to a disposition that will keep him off of the streets for a period of time. Finally, when the minor has committed a qualifying "pattern of criminal activity" offense, his admission of a gang charge or enhancement makes his own adjudication a very useful predicate crime for any future gang related crimes they or other members of their gang commit. Consider the Supreme Court language in *People v. Quang Minh Tran*: "In prosecutions for active participation in a criminal street gang, the probative value of evidence of a defendant's gang-related separate offense generally is greater because it provides direct proof of several *ultimate facts* necessary to a conviction. Thus, that the defendant committed a gang-related offense on a separate occasion provides direct evidence of a predicate offense, that the defendant actively participated in the criminal street gang, and that the defendant knew the gang engaged in a pattern of criminal gang activity." *People v. Quang Minh Tran*, 253 P.3d 239, 244-45 (Cal. 2011).
  5. CAL. PENAL CODE § 186.22(b), (d) (West 2014). The elements of subsection (d) of Penal Code section 186.22 are identical to subsection (b). See *id.* The distinction is subsection (d) applies to misdemeanor gang offenses and subsection (b) applies to felony gang offenses. See *id.*
  6. See Judicial Council of California Criminal Jury Instruction 1401.
  7. *Id.*

second element is the defendant must have the specific intent to assist, further, or promote criminal conduct by gang members.<sup>8</sup>

In *People v. Valdez*, the court explained a gang expert can testify on the ultimate issue of whether a crime is for the benefit of a criminal street gang.<sup>9</sup> However, there must be a substantial factual evidentiary basis supporting the gang expert's opinion.<sup>10</sup> In *People v. Ochoa*, the defendant performed a carjacking, while he was alone, outside of gang territory, without tattoos or gang clothing on, and without saying anything gang related.<sup>11</sup> The gang expert testified that vehicle theft is a primary activity of the gang and that carjacking is a "signature" gang crime.<sup>12</sup> The gang enhancement was overturned because the court of appeal found that the crime lacked factual details to support the gang expert's opinion.<sup>13</sup>

The criminal conduct required for the second element of the gang enhancement can be the current offense. There is "no requirement that the conduct be 'apart from' the criminal conduct underlying the offense of conviction sought to be enhanced."<sup>14</sup> In *In re Cesar V.*, a juvenile court found that two minors displaying gang signs had the "specific intent to promote, further, or assist in any criminal conduct by gang members."<sup>15</sup> This finding was based on the minors' admissions that the purpose of their conduct was to signal their association with the gang, one minor's admission that he was motivated by his desire to "stand up for" his friends in the gang, and gang expert testimony that the gang would benefit from a challenge such as that made by the minors because "[it] would further the violent reputation" of the gang "within the community."<sup>16</sup>

If the minor's conduct meets the two elements required in Penal Code section 186(b) and (d), the gang enhancement does not require the minor actually be a gang member.<sup>17</sup> In other words, a non-gang member, an undocumented gang member, a hang-around or an associate of a criminal street gang can also be subject to a gang enhancement. So, how does one make such a minor described above subject to a gang enhancement? Below is a suggested list of ideas that are unique to juveniles that law enforcement may investigate and which may yield substantial factual evidence to get a gang charge to stick.

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8. *Id.* There is a question, given the emphasis the California Supreme Court put on the plural word "members" in *People v. Rodriguez*, whether the requirement in Penal Code section 186.22 subdivision (b) that the defendant "specifically intend to promote, further, or assist in any criminal conduct by gang members" now requires two or more gang members be involved in any enhancement case in some way. *See generally* *People v. Rodriguez*, 290 P.3d 1143 (Cal. 2012).
  9. *People v. Valdez*, 68 Cal. Rptr. 2d 135, 148-50 (Ct. App. 1997).
  10. *See generally* *People v. Ochoa*, 102 Cal. Rptr. 3d 108 (Ct. App. 2009).
  11. *Id.* at 108.
  12. *Id.* at 110.
  13. *Id.* at 111.
  14. *People v. Albillar*, 244 P.3d 1062, 1075 (Cal. 2010).
  15. *See In re Cesar V.*, 122 Cal. Rptr. 3d 206, 215 (Ct. App. 2011).
  16. *Id.* at 215-16.
  17. *See In re Ramon T.*, 66 Cal. Rptr. 2d 816, 822 (Ct. App. 1997).

### III. HOW TO BUILD THE GANG ENHANCEMENT

#### A. *The School Resource Officer*

Many junior high and high schools have sworn school resource officers or at least security staff assigned to them. Often, these officers can be a gold-mine of information about gang activities occurring on their respective campus.<sup>18</sup> Information these officers can provide includes: who the minor's friends are; who the minor's enemies are; the minor's behavior on a daily basis; the type of clothing worn by the minor; and the minor's nickname or moniker.

#### B. *Obtain School Records - Discipline Referrals*

Local schools do a very good job of documenting a student's behavioral history. Oftentimes school records include: fights at school, bullying, possession of or writing of gang graffiti, being caught with a knife or other weapons, etc. In the case of *In re Jose P.*, the minor's high school records revealed that he was suspended for breaking school rules and was put on a "gang contract" by which he agreed not to wear red or to associate with other known gang members.<sup>19</sup> This information was used at a hearing to help support gang enhancements.

#### C. *Searching the Minor's Locker*

School personnel may search a minor's locker without a warrant based upon reasonable suspicion.<sup>20</sup> In one case, a vice principal searched the locker after being provided information from police that the minor may be in possession of drugs.<sup>21</sup> Because the police did not ask the vice principal to do the search and the vice principal testified that she did it for school safety and not at the officer's request, the evidence was admissible.<sup>22</sup> The key to the court's analysis was that the vice principal made the "independent decision" to search based on reasonable suspicion.<sup>23</sup> This does not mean that police officers can suggest to school personnel to conduct searches. But it does mean that if information related to gang crime is communicated to the school officials, and the school officials decide on their own to search a locker, the school officials can invite police to observe the search. As a result, the evidence will likely be deemed admissible in court. However, if probable cause to search has is developed, a search warrant is always preferable.

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18. A gang officer's job in training other officers is never complete. This extends to the school resource officers who should be taught how to properly document the field identification of a gang member and followed up with ensuring they are properly documenting gang activities.

19. *In re Jose P.*, 130 Cal. Rptr. 2d 810, 817 (Ct. App. 2003).

20. *See New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985).

21. *See In re K.S.*, 108 Cal. Rptr. 3d 32, 33 (Ct. App. 2010).

22. *Id.*

23. *See id.*

#### D. Search the Minor's Home

If the minor has search terms already, a search of his personal property is an essential part of investigating a gang related case. If not, when all of the information is gathered, or at an appropriate time in the process, one should consider whether there is sufficient information to seek a gang indicia search warrant for the minor's home, car, and any other personal property.

#### E. Social Media

Social media has become the online playground where students involved in gangs often post gang related photos and make gang related statements. YouTube videos of gang fights are plentiful. In an ideal situation, a preservation request will be made and a gang indicia search warrant for the online account will be obtained. If not, one must print out the pages, obtain a copy of the videos, and document the findings in a report.<sup>24</sup>

#### F. Interview with the Minor<sup>25</sup>

Before a minor is interviewed, one should gather as much information as possible about the minor and the alleged crime. This will allow one to assess whether the minor is being truthful, and if not, follow up with the appropriate questions. Talk with the minor about family, friends and enemies. Ask the minor about social media accounts and have him/her identify printouts from those accounts.<sup>26</sup> Explore the minor's knowledge of the current members of the gang, the symbols of the gang, the leadership structure of the gang, the rules of the gang, the activities of the gang, and the weapons the gang has currently used or has used in the past.<sup>27</sup>

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24. See generally CAL. EVID. CODE § 1552 (West 2013).

25. Minors have the same rights as adults to *Miranda* warnings. See generally *Miranda v. Arizona*, 384 U.S. 436 (1966). However, it is important to note that a court will look at that totality of circumstances such as age, sophistication, prior contact with law enforcement, number of police officers present, etc. as to whether a minor feels free to leave. See generally *J.D.B. v. North Carolina*, 131 S. Ct. 2394 (2011). Hence, interviews at school may be considered custodial. Therefore, if *Miranda* warnings are not given then police should strongly reinforce that a minor is free to leave and go back to class. In addition, Penal Code section 26 states a minor who is under that age of fourteen is presumed to be incapable of committing a crime. See CAL. PENAL CODE § 26 (West 2012). This presumption can be overcome if it is shown that if at the time the minor engaged in the conduct that the minor knew what he was doing was wrong. See *id.* This is commonly referred to as the *In re Gladys R.* inquiry. See *In re Gladys R.*, 464 P.2d 127, 133 (Cal. 1970).

26. It is error to admit information from an online account that has not been authenticated. See *People v. Beckley*, 110 Cal. Rptr. 3d 362 (Ct. App. 2010). Pictures from online accounts can be conveniently authenticated if the suspect acknowledges that it is his account, and if not, they can also be authenticated by the content that is unlikely to be known by anyone except the suspect. See CAL. EVID. CODE § 1421 (West 2012). The content, coupled with other circumstances showing authenticity can also support the admission. See *People v. Valdez*, 135 Cal. Rptr. 3d 628, 633 (Ct. App. 2011).

27. See, e.g., *People v. Garcia*, 64 Cal. Rptr. 3d 104 (Ct. App. 2007). In *Garcia*, the defendant claimed he had left the gang years earlier but during his interview with the police divulged current information about the gang's activities. See *id.* at 108-09. The gang expert explained that because of

### G. Cell Phone Records

Cell phones will also be a source of social media as described above. Minors keep photos, text messages, contacts, calendars and emails on their phones. Such information will help one establish a minor's involvement in a gang. The U.S. Supreme Court unanimously held that, absent an emergency, the Fourth Amendment requires either consent or a warrant to search the contents of an arrestee's cell phone.<sup>28</sup> Officers should routinely write search warrants to be allowed to review the minor's emails, texts, call logs, etc. to search for evidence of the crime. The minor's cell phone may be the single biggest source of gang indicia.

### H. Graffiti Databases

Many agencies in Riverside County document graffiti. A review of any available graffiti databases will help one determine if the minor's moniker has been tagged recently, who the minor tags with, and may provide current information about the gang's turf and activities.

### I. Other Factors

When preparing a gang enhancement one should also consider:

- Whether the location of the crime has any significance.
- Whether the clothing worn by the minor at the time of the offense has any significance.
- Whether the minor has any tattoos.
- Whether or not words were exchanged during the commission of the crime.
- Whether any victim or witness was aware of the minor's gang affiliation.
- Whether the minor's family is involved in a criminal street gang.
- Whether the minor was with other documented gang members at the time of the crime.
- Whether a firearm or weapon was used.
- The type of crime committed by the minor, and if that crime is a primary activity of the gang.

## IV. CONCLUSION

In summary, anything that may reasonably support an opinion that a crime was committed for the benefit of, in association with, or at the direction of a criminal street gang should be considered and included. This author's hope is that some of these

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the secretive nature of the gang, only a current member would know the information the defendant knew. *Id.* at 109.

28. See *Riley v. California*, 134 S. Ct. 2473, 2494 (2014); *People v. Diaz*, 244 P.3d 501, 506-07 (Cal. 2011).

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suggestions will help an individual or officer in his or her work to secure “the right of every person . . . to be secure and protected from fear, intimidation, and physical harm caused by the activities of violent groups and individuals.”<sup>29</sup>

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29. CAL. PENAL CODE § 186.21 (West 2012) (legislative findings and declarations).



