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CRIMES AND OFFENSES

Georgia Street Gang Terrorism and Prevention Act: Punish and Deter Street Gangs

CODE SECTIONS: O.C.G.A. §§ 16-15-1 to -7 (new)
BILL NUMBER: SB 735
ACT NUMBER: 1424
SUMMARY: The Act makes it a misdemeanor offense to actively participate in a criminal street gang and provides sentence enhancements for crimes committed in connection with membership in a street gang.
EFFECTIVE DATE: July 1, 1992

History

Law enforcement officials, concerned about street gang activity in Georgia, lobbied for passage of legislation which would deter gang-related criminal activity.¹ Although gang activity in Georgia has not reached crisis proportions, law enforcement officials feel that it is increasing.²

SB 735

Atlanta's Chief of Police approached the bill's sponsor and asked her to introduce anti gang legislation.³ Proponents of the bill saw it as a means of preventing an increase in gang activity in Georgia.⁴ Opponents viewed it as an unconstitutional limit on the right to associate which had the potential of being arbitrarily enforced.⁵

1. Telephone Interview with Sen. Judy Moyer, Senate District 34 (Apr. 6, 1992) [hereinafter Moyer Interview].

2. See Richard Greer, *Wannabe Toughs Threaten Suburbia, Imitation of Inner City Gangs Includes Violence*, ATLANTA CONST., Jan. 12, 1992, at D1. Police state that two elements necessary for existing groups to "cross the line" into hardened criminal organizations are still missing—longevity and size. *Id.*

3. Moyer Interview, *supra* note 1. Sen. Moyer is a member of the Senate Public Safety Committee and has sponsored a good deal of law enforcement legislation. *Id.*

4. Telephone Interview with Atlanta Chief of Police Eldrin Bell (Apr. 9, 1992) [hereinafter Bell Interview]. Chief Bell said that the police, along with the U.S. Attorney, FBI, and Bureau of Alcohol, Tobacco and Firearms, have been able to keep a "cap" on gang activity in Georgia. *Id.* He sees the Act as a tool police can use to prevent the problem from worsening rather than waiting for the day when there are an overwhelming number of gangs to control. *Id.*

5. See 1992: *The Georgia Legislature*, ATLANTA CONST., Apr. 1, 1992 at D4. Rep. Henrietta Turnquest spoke against the bill during House floor debate. *Lawmakers '92*

SB 735, the Georgia Street Gang Terrorism and Prevention Act, is based in large part on the California Street Terrorism Enforcement and Prevention Act.⁶ Few changes were made in the bill from its introduction until its passage on the final day of the 1992 session.⁷

The Act begins by declaring the right of every person to be secure and protected from fear, intimidation, and physical harm.⁸ The Act further declares that the State of Georgia is in a state of crisis caused by street gangs.⁹ The Act declares the intent of the General Assembly to seek eradication of street gang crime by focusing on "patterns of criminal gang activity" and the organized nature of street gangs.¹⁰ The Act also declares that an effective means of punishing and deterring street gang activity is through forfeiture of profits and proceeds used and acquired by street gangs.¹¹

(WGTV television broadcast, Mar. 31, 1992) (videotape available in Georgia State University College of Law Library). She expressed concern that the bill would encourage law enforcement officials to gather up youths and that the bill could be used in a selective manner. *Id.*

6. Moye Interview, *supra* note 1. The text of the Georgia Act is almost identical to that of the California Act. Compare CAL. PENAL CODE §§ 186.21 to -27 (West 1988 & Supp. 1992) with O.C.G.A. §§ 16-15-1 to -7 (1992).

7. Moye Interview, *supra* note 1. The bill passed the Senate Judiciary Committee with only one change—a correction in the numbering. *Id.* The bill then passed the Senate unanimously without amendment. *Id.*; SB 735 (SCS), 1992 Ga. Gen. Assem. The House Committee on Public Safety amended the bill, which passed the House after two and one-half hours of debate on the last day of the session. Moye Interview, *supra* note 1; see SB 735 (SCS), 1992 Ga. Gen. Assem. Fifteen amendments were offered and rejected during the House debate. Moye Interview, *supra* note 1. The Senate then refused to accept the House changes and a conference committee was appointed. *Id.* The Conference Committee substitute deleted all of the House amendments. SB 735 (HSCCS), 1992 Ga. Gen. Assem.

8. O.C.G.A. § 16-15-2(a) (1992). The Code lists various factors such as race, color, creed, and religion which do not affect this right. *Id.* The final version of the bill, a Conference Committee substitute, eliminated the term "sexual orientation" from the list. SB 735 (HSCCS), 1992 Ga. Gen. Assem. The bill's sponsor said that while the bill was pending in the House, word spread that it was a gay rights bill, which generated opposition from conservative members. Moye Interview, *supra* note 1. The Conference Committee removed the sexual orientation language to neutralize the opposition. *Id.* See SB 735 (HSCCS), 1992 Ga. Gen. Assem.

9. O.C.G.A. § 16-15-2(b) (1992). Police Chief Bell stated that the situation in Georgia was not yet a crisis nor were gangs yet considered a statewide problem, but that police did not want to wait until they had to react to an extreme situation as alarmists. Bell Interview, *supra* note 4; see Greer, *supra* note 2 (gang activity in metro Atlanta "growing" but not yet "hardened and entrenched"). The California Act contains similar language suggesting a crisis, as well as statistics indicating that there were 600 street gangs operating in California in 1988. CAL. PENAL CODE § 186.21 (West 1988 & Supp. 1992). The Georgia Act contains no such statistics. See O.C.G.A. §§ 16-5-1 to -7 (1992).

10. O.C.G.A. § 16-15-2(c) (1992).

11. *Id.* § 16-15-2(d) (1992). There are, however, no provisions in the Act which address forfeiture. See O.C.G.A. §§ 16-15-1 to -7 (1992). The California Act was

The Act also defines the phrases "criminal street gang"¹² and "pattern of criminal gang activity."¹³ The Act provides that a person who "actively participates" in a criminal street gang, who has knowledge that its members engage in or have engaged in a "pattern of criminal activity," and who "willfully promotes, furthers, or assists in any felonious criminal conduct by members" shall be guilty of a misdemeanor.¹⁴ The House amended the bill and made violation of this section a felony.¹⁵ The final Conference Committee substitute returned the offense to the status of misdemeanor.¹⁶

originally designed to include forfeiture provisions, but these were not included in the Act as passed. See *In re Alberto R.*, 1 Cal. Rptr.2d 348, 353 (Cal. Ct. App. 1991).

12. A "criminal street gang" is defined as

[A]ny ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts enumerated in subparagraphs (A) through (K) of paragraph (2) of this Code section and which has a common name or common identifying sign or symbol and the members of which, individually or collectively, engage in or have engaged in a pattern of criminal gang activity.

O.C.G.A. § 16-15-3(1) (1992). The criminal acts enumerated are: aggravated assault, aggravated battery, robbery, armed robbery, murder or felony murder, voluntary manslaughter, involuntary manslaughter, sale of controlled substances or other violation of the Georgia Controlled Substances Act, terroristic threats and acts, arson, and influencing witnesses. *Id.* § 16-15-3(2)(A)-(K) (1992). The House Public Safety Committee added at the end of the definition "by willfully promoting, furthering, or assisting in any felonious criminal conduct by members of the gang." SB 735 (HCAFA), 1992 Ga. Gen. Assem. This language was deleted in the Conference Committee Substitute. SB 735 (HSCCS), 1992 Ga. Gen. Assem. The bill's sponsor stated that this language was contradictory since "pattern of criminal gang activity" was defined elsewhere in the Act. Moyer Interview, *supra* note 1; see O.C.G.A. § 16-15-3(2) (1992).

13. A "pattern of criminal gang activity" is defined as

[T]he commission, attempted commission, or solicitation of two or more of the following offenses, provided at least one of those offenses occurred after July 1, 1992, the last of those offenses occurred within three years after a prior offense, and the offenses are committed on separate occasions or by two or more persons

O.C.G.A. § 16-15-3(2) (1992). The House added language requiring convictions for the two or more offenses and requiring that both offenses occur after the effective date of the Act. SB 735, (HCAFA), 1992 Ga. Gen. Assem. These amendments were deleted in the Conference Committee substitute. SB 735 (HSCCS), 1992 Ga. Gen. Assem.; O.C.G.A. § 16-15-3(2) (1992).

14. O.C.G.A. § 16-15-4(a) (1992). The California Act provides for a one-year sentence in a county jail or one to three years in the state prison if convicted of this offense. CAL. PENAL CODE § 186.22(a) (West 1988 & Supp. 1992).

15. SB 735 (HCAFA), 1992 Ga. Gen. Assem.

16. The House version of the bill was not accepted by the Senate and a conference committee was appointed. Moyer Interview, *supra* note 1. The Conference Committee dropped all of the changes made in the House. SB 735 (HSCCS), 1992 Ga. Gen. Assem.; O.C.G.A. § 16-5-4(a) (1992).

The Act provides for a one-, two-, or three-year sentence enhancement for a person convicted of a felony committed "for the benefit of, at the direction of, or in association with any criminal street gang"¹⁷ with the "specific intent to promote, further, or assist in any criminal conduct" by gang members.¹⁸ The sentencing court is instructed to order the middle sentence unless there are aggravating or mitigating circumstances, and must state its reasons for its choice of sentence enhancement.¹⁹ The court may strike the enhancement if the interests of justice are so served.²⁰ A person whose sentence is enhanced under this provision and who is convicted of a felony carrying a life sentence will be required to serve a minimum of fifteen years in prison.²¹

The Act also carries a sentence enhancement for a misdemeanor conviction committed for the benefit of, at the direction of, or in association with a criminal street gang.²² The Code section dealing with misdemeanors does not contain the "specific intent" language found in the felony enhancement section.²³ The bill's sponsor stated that the omission was inadvertent.²⁴ The misdemeanor enhancement is a mandatory 180 days in the county jail with a maximum of one year.²⁵ A sentencing court has the discretion not to impose the misdemeanor sentence enhancement.²⁶

The Act does not apply to employees engaged in activities for mutual aid and protection, or to labor organization activities.²⁷

Local governing bodies may adopt and enforce their own gang-related ordinances.²⁸ Where local laws duplicate or supplement the Act, the Act is to be "construed as providing alternative remedies and not as pre-empting the field."²⁹

17. O.C.G.A. § 16-15-4(b)(1) (1992).

18. *Id.*

19. *Id.*

20. *Id.* § 16-15-4(b)(2) (1992).

21. *Id.* § 16-15-4(c) (1992).

22. *Id.* § 16-15-5(a) (1992).

23. *Id.* Compare *id.* § 16-5-4(b)(1) (1992) with *id.* § 16-5-5(a) (1992).

24. Moyer Interview, *supra* note 1. The parallel section in the California statute does contain the "specific intent" language. CAL. PENAL CODE § 186.22(c) (West 1988 & Supp. 1992).

25. O.C.G.A. § 16-15-5(a) (1992). The House approved an amendment striking the phrase "in the county jail." SB 735 (HCAFA), 1992 Ga. Gen. Assem. The phrase was added back in the Conference Committee substitute. See SB 735 (HSCCS), 1992 Ga. Gen. Assem.; O.C.G.A. § 16-15-5(a) (1992).

26. O.C.G.A. § 16-15-5(b) (1992).

27. *Id.* § 16-15-6 (1992). This language was taken directly from the California statute. See CAL. PENAL CODE § 186.23 (West 1988 & Supp. 1992).

28. O.C.G.A. § 16-15-7 (1992).

29. *Id.*

The Act provides that if any part of the Act is declared or adjudged unconstitutional, the rest will remain of full force and effect.³⁰ The bill was presented to the General Assembly by proponents as being constitutionally sound because the related California legislation had been challenged and found constitutional.³¹ Three different divisions of the California Court of Appeals have upheld portions of the California statute.³² Nevertheless, convictions under the California Act have been reversed for insufficient evidence of the various elements necessary to prove both the crimes of active participation in a criminal street gang and those necessary to support the sentence enhancements.³³

The California Act has been criticized as vague and as violating due process by failing to provide fair notice and fair warning of the acts prohibited.³⁴ The statute does not define certain terms³⁵ and may suffer from constitutional overbreadth since innocent persons may be covered under the statute merely because they associate with those who do come within the statute.³⁶

30. See 1992 Ga. Laws 3236, 3240-41.

31. Legislators were given portions of copies of cases where convictions under the California Act had been challenged. Moyer Interview, *supra* note 1. Two of the five cases summarized dealt with the constitutionality of the California Act. Attachment to Solicitation Letter of Support from Chief Eldrin Bell to House Members (Mar. 31, 1992) (available in Georgia State College of Law Library). The two constitutional cases were *In re Alberto R.*, 1 Cal. Rptr.2d 348 (Cal. Ct. App. 1991) and *People v. Gamez*, 286 Cal. Rptr. 894 (Cal. Ct. App. 1991). See *infra* note 32.

32. See *In re Alberto R.*, 1 Cal. Rptr.2d 348, 357 (Cal. Ct. App. 1991) (sentence enhancement provision not unconstitutionally vague or overbroad); *People v. Gamez*, 286 Cal. Rptr. 894, 902-05 (Cal. Ct. App. 1991) (sentence enhancement provision not unconstitutionally vague or overbroad); *People v. Green*, 278 Cal. Rptr. 140, 144-45 (Cal. Ct. App. 1991) (active participation in criminal street gang offense not unconstitutionally vague under due process clause). One court upholding the California statute made comparisons to provisions of the federal RICO statutes. See *Green*, 278 Cal. Rptr. at 147. A comparison can be made with the Georgia RICO statute's definitions of "racketeering activity" and "pattern of racketeering activity." O.C.G.A. § 16-14-3(8)-(9) (1992). The California statute will eventually be challenged in the federal courts system. Interview with Teresa Nelson, Executive Director, American Civil Liberties Union, in Atlanta, Ga. (Apr. 9, 1992).

33. See *Matter of Jose T.*, 282 Cal. Rptr. 75, 79 (Cal. Ct. App. 1991) (evidence of existence of criminal street gang whose members exhibited pattern of criminal gang activity); *In re Nathaniel C.*, 279 Cal. Rptr. 236, 246 (Cal. Ct. App. 1991) (evidence that primary activity of gang was criminal); *In re Lincoln J.*, 272 Cal. Rptr. 852, 855-57 (Cal. Ct. App. 1990) (evidence of existence of gang and that members engage in pattern of gang activity); *In re Leland D.*, 272 Cal. Rptr. 709, 713 (Cal. Ct. App. 1990) (evidence of predicate offenses to establish existence of criminal street gang engaged in pattern of criminal activity).

34. Susan L. Burrell, *Gang Evidence: Issues for Criminal Defense*, 30 SANTA CLARA L. REV. 739, 774-78 (1990).

35. *Id.* at 776.

36. *Id.* at 776-77.

Opponents of the Georgia Act are also concerned that innocent parties may be arrested, indicted, or convicted under the Act, especially in light of the provision which makes it a crime to "actively participate" in a criminal street gang.³⁷ There was concern that the Act was too broad and that it permitted guilt by association.³⁸ Opponents noted that even if convictions are ultimately overturned for lack of sufficient competent evidence, or if there are difficulties in proving the crimes, the accused has still been arrested, indicted, and possibly detained.³⁹ Opponents also feel that the gang problem in Georgia has been overstated, and that positive programs aimed at discouraging youths from joining gangs would be more productive than spending money defending the constitutionality of the legislation.⁴⁰

Proponents of the Act intend to try to strengthen it next year.⁴¹ They believe that if youths are informed of the possible penalties of participating in street gangs they will be discouraged from doing so.⁴²

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37. Telephone Interview with Rep. Denmark Groover, Jr., House District No. 99 (Apr. 6, 1992). Rep. Groover spoke against the bill on the House floor. *Id.*

38. *Id.* Rep. Groover stated that the bill was a typical example of "stereotype legislation" where a problem is addressed in a hysterical fashion. *Id.* Rep. Groover, commenting on the California legislation, stated that anything coming out of California is presumptively bad. *Id.*

39. *Id.*

40. *Lawmakers '92*, (WGTV television broadcast, Mar. 31, 1992) (videotape available in Georgia State University College of Law Library). Rep. Henrietta Turnquest, speaking against the bill on the House floor, characterized the bill as a product of "law and order hysteria." *Id.* Police in Clarkston, Georgia, note that crime in the Old Plantation apartment complex has recently decreased seventy-five percent and attribute the decrease in part to an activity program aimed at giving youths in the complex something productive to do. See Richard Greer, *Communities Target Causes of Gangs Youths Join to Escape Boredom, Family Woes*, ATLANTA J. & CONST., Jan. 12, 1992, at D8.

41. Police Chief Bell states that he hopes the crime of active participation in a criminal street gang will eventually become designated a felony. Bell Interview, *supra* note 3. He says that he does not believe that the Act gives police the right to arrest a person for "simply being a member of a gang." Solicitation Letter of Support from Chief Eldrin Bell to House Members (Mar. 31, 1992) (available in Georgia State College of Law Library). Chief Bell states that "[n]o one can be arrested off a corner because they have on the same jackets with the same symbols on them. This bill calls for very specific standards to be met before it can operate." *Id.* This letter to House members does not mention the crime of active participation in a street gang. *Id.* Chief Bell states that methods of proving active participation in a gang include wiretaps, videotape, and paper trails. *Id.*

42. Chief Bell plans to go into schools and tell youths about the penalties for participating in criminal street gangs in order to discourage them from joining gangs. Bell Interview, *supra* note 4.