IN THE COURT OF APPEALS

STATE OF GEORGIA

STATE OF GEORGIA,	)	
Appellant,	)	
v.	)	
	)	**CASE NO.**
JERRION MCKINNEY,	)	**A22A1509**
Appellee.	)	

STATE'S BRIEF OF APPELLANT BY THE DISTRICT ATTORNEY

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STATE'S BRIEF OF APPELLANT BY THE DISTRICT ATTORNEY

COMES NOW Appellant, the State of Georgia, through the Fulton County District Attorney, and submits the State's Brief of Appellant.

INTRODUCTION

The trial court abused its discretion in a case involving violent gang-related crimes by excluding evidence of McKinney's prior criminal gang activity. The trial court so erred by *sua sponte* demanding requirements not found in the text of O.C.G.A. § 24-4-418. Pursuant to this misapplication of unequivocal statutory law, the trial court improperly denied the State's introduction of other acts of criminal gang activity committed by McKinney despite a clear statutory mandate for their introduction. A defendant's prior acts are admissible pursuant to O.C.G.A. § 24-4-418 where a case is indicated under O.C.G.A. § 16-15-4, the other acts fall within the definition of "criminal gang activity" as defined in O.C.G.A. § 16-15-3, and the

State provides notice. The State met all the requirements in this case. The decision of the trial court should, therefore, be reversed.

STATEMENT OF JURISDICTION

This Court has jurisdiction over the instant appeal because it concerns the State's appeal from an order denying the State's motion to introduce evidence in a case in which McKinney is not charged with a capital felony.[1]

STANDARD OF REVIEW

The trial court's ruling is reviewed for an abuse of discretion.[2] The trial court abused its discretion, and this Court should therefore reverse the trial court's ruling excluding evidence of two prior acts of criminal gang activity committed by McKinney.[3]

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[1] O.C.G.A. § 5-7-1 (a) (4); Ga. Const. of 1983, Art. VI, Section V, Para. III; Ga. Const. Art. VI, Section VI, Para. III (8).

[2] *E.g., Overstreet v. State,* 312 Ga. 565, 575 (2021) ("Trial court decisions . . . regarding the admission of evidence of gang activity and membership are reviewed for an abuse of discretion."); *Hood v. State*, 299 Ga. 95, 101 (2016) ("We will overturn a trial court's decision to admit other acts evidence only where it was a clear abuse of discretion.") (citing *State v. Jones*, 297 Ga. 156, 159 (2015)).

[3] This Court has previously reversed trial court orders excluding evidence on direct appeal by the State, as the State urges this Court to do in the present case. *See, e.g., State v. Williams,* 354 Ga. App. 418, 423 (2020); *State v. Preston,* 348 Ga. App. 662, 662 (2019); *State v. LeJeune*, 327 Ga. App. 327, 327 (2014); *State v. Loechinger*, 357 Ga. App. 852, 852 (2020).

COURSE OF PROCEEDINGS AND STATEMENT OF FACTS

Effectively "litigating from the bench," the trial court added requirements to O.C.G.A. § 24-4-418 that do not exist in the text of the statute. As a result, the trial court improperly excluded evidence of McKinney's past acts of criminal gang activity. In doing so, the trial court ran afoul of the clear language of O.C.G.A. § 24-4-418, as well as its unmistakable intent. Confusing the definitions in O.C.G.A. § 16-15-3 with the elements of proof in O.C.G.A. § 16-15-4, the trial court required the State to show a "nexus" (connecting the gang, crime, and defendant) to admit prior acts under O.C.G.A. § 24-4-418. No such a requirement appears in the text of the statute.

The State satisfied the requirements of O.C.G.A. § 24-4-418 in the lower court. McKinney committed three acts of past gang activity as defined by the General Assembly in O.C.G.A. § 16-15-3(1)(A)-(J) in a case indicted under O.C.G.A. § 16-15-4. Therefore, by denying admission of McKinney's prior acts on the basis of a "nexus" requirement that does not exist in O.C.G.A. § 24-4-418, the trial court abused its discretion. The State therefore appeals this ruling to this Court, and urges this Court to overturn the trial court's order excluding McKinney's two prior acts of criminal gang activity, which are admissible pursuant to O.C.G.A. § 24-4-418.

I. Facts of the Case and Proceedings in the Court Below.

A. The Underlying Facts: A Piru Bloods Gang Uprising in Atlanta.

On July 4, 2020, McKinney and his co-defendant, Julian Conley, participated in a gang-motivated armed takeover of a public street located at 135 Pryor Road and 99 University Avenue in Atlanta.[4] This violent insurgency was motivated by the June 12, 2020 shooting of Rayshard Brooks by Atlanta Police Department officers at the Wendy's restaurant at 125 University Avenue.[5]

Mr. Brooks was a member of the Piru Bloods criminal street gang.[6] As a result of Mr. Brooks' death, between June 12, 2020 and July 5, 2020, armed Piru Bloods gang members unlawfully seized control of the location and placed blockades preventing peaceful civilians from passing through the area.[7] These dangerous Piru Bloods gang members enforced their barricades with threats of violence, assault rifles, shotguns, and handguns.[8]

On July 4, 2020, the first innocent civilians that Bloods gang members McKinney and Conley confronted were Christopher and Samantha McCord, who

[4] R. 225. The facts in this brief are adopted from the State's brief in support of the State's Motion to Admit Evidence Pursuant to O.C.G.A. §§ 24-4-418 and 16-15-9.
[5] R. 225.
[6] R. 230.
[7] R. 225.
[8] R. 225.

were attempting to pass through the barricade.[9] McKinney and Conley pointed rifles in the direction of the McCords.[10]

Shortly thereafter, co-defendant Conley opened fire on another vehicle attempting to peacefully pass through the barricade.[11] In doing so, Conley shot eight-year-old Secoria Turner in her family's vehicle, killing her.[12] McKinney then attempted to pursue the victim's family's vehicle through traffic as her family rushed her to the hospital.[13] McKinney later identified himself on video surveillance at the scene immediately prior to the incident, and McKinney further admitted he had a loaded weapon at the time.[14]

B. McKinney's Bloods Gang Membership.

McKinney is a member of the Knot Boyz Gang.[15] This gang is a hybrid street gang from the St. Louis, Missouri, area led by McKinney's older brother, Ryan McKinney.[16] This hybrid gang includes individuals from various Bloods gangs.[17] McKinney's social media showed numerous indicators of McKinney's gang

[9] R. 225-226.
[10] R. 226.
[11] R. 228.
[12] R. 228.
[13] R. 228.
[14] R. 229.
[15] R. 232.
[16] R. 232.
[17] R. 232.

membership, including the display of Bloods hand signals while wearing red apparel and while possessing a firearm.[18]

C. The State's O.C.G.A. § 16-15-4 Anti-Gang Indictment.

On August 13, 2021, a Fulton County jury indicted McKinney and co-defendant Conley for the above-described acts in a thirty-seven count indictment.[19] McKinney was indicted in counts 12, 13, 22, 23, 25-31, and 33-37 for multiple counts of participation in criminal street gang activity under O.C.G.A. § 16-15-4, multiple counts of aggravated assault, one count possession of a firearm during a felony, and one count of possession of a firearm by a convicted felon.[20]

D. The State's O.C.G.A. § 24-4-418 Motion and McKinney's Prior Criminal Gang Activity.

On December 20, 2021, the State filed its notice of intent to introduce McKinney and Conley's prior acts of criminal gang activity pursuant to O.C.G.A. § 24-4-418 and § 16-15-1, et. seq.[21] The State sought to introduce four prior acts of criminal gang activity by McKinney, all of which occurred while McKinney was a gang member and each of which falls within the definition of criminal gang activity housed in O.C.G.A. § 16-15-3:

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[18] R. 233.
[19] R. 52-64.
[20] R. 52-64.
[21] R. 170.

A. McKinney's robbery and stealing of a motor vehicle on January 16, 2016;[22]

B. McKinney's unlawful use of a weapon on February 13, 2016, where McKinney shot himself in the foot with a firearm on a public roadway when he was showing the firearm to an associate;

C. McKinney's robbery on April 3, 2017, when McKinney robbed two victims at gunpoint in Florissant, Missouri; and

D. McKinney's assault with a firearm, unlawful use of a weapon, and receiving of stolen property on May 5, 2015, in which McKinney took a stolen firearm to his school in Hazelwood, Missouri (St. Louis County) and he pointed the stolen firearm at a classmate's head.[23]

E. The Hearing to Admit McKinney's Prior Gang Activity Pursuant to O.C.G.A. § 24-4-418.

On February 11, 2022, this matter came before the trial court for a hearing.[24] The State withdrew its request to introduce evidence of the January 16, 2016, incident, but again moved to introduce evidence of the three remaining incidents pursuant to O.C.G.A. § § 24-4-418 and 16-15-1, et seq.[25]

In essence advocating that evidence under O.C.G.A. § 24-4-418 must satisfy O.C.G.A. § 16-15-4 to be admitted, McKinney's counsel incorrectly advanced an

[22] The State withdrew its request to introduce this act at the hearing. T. 18-19.
[23] R. 171.
[24] R. 224.
[25] T. 18-19.

argument that McKinney's prior criminal gang activity was not admissible because the prior incidents were not committed in furtherance of a gang.[26]

However, the State then accurately explained to the trial court that the plain language of O.C.G.A. § 24-4-418 does *not* require the State to show any of the prior acts were committed in furtherance of the gang.[27] Counsel for McKinney implicitly conceded that the prosecutor's summary of the statute was proper – and thus, that O.C.G.A. § 24-4-418 does *not* impose the "nexus" requirement found in O.C.G.A. § 16-15-4 – arguing: "Just because a statute is enacted doesn't mean it's right."[28]

On February 18, 2022, the State filed its brief in support of its motion to admit evidence pursuant to O.C.G.A. § 24-4-418 and § 16-15-9.[29] On February 28, 2022, McKinney filed his response in opposition.[30]

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[26] T. 36-39. "In furtherance" does not appear in *any* part of the Georgia Gang Act. This reference is perhaps to the "nexus" requirement created by the use of the preposition "through" in O.C.G.A. § 16-15-4. *See Rodriguez v. State*, 284 Ga. 803, 807 (2009). The "through" language does not appear in O.C.G.A. §§ 24-4-418 or 16-15-3(1)(A)-(J) (statute defining criminal gang activity).
[27] T. 43. Also, as noted in the previous footnote, "in furtherance" does not appear in *any* statutes under Georgia's Gang Act.
[28] T. 47.
[29] R. 224.
[30] R. 248.

F. The Trial Court's Order Improperly Excluded McKinney's Criminal Gang Activity Despite the Clear Language of O.C.G.A. § 24-4-418.

On March 15, 2022, the trial court issued its order on the State's request to introduce the prior acts evidence.[31] In that order, the trial court granted the State's motion to introduce evidence of Conley's prior gang activity and granted the State's motion to introduce McKinney's prior act of committing the April 3, 2017 robbery, but the trial court denied the State's request to use the 2015 and 2016 incidents against McKinney pursuant to O.C.G.A. § 24-4-418.[32]

The trial court permitted the State to introduce evidence of *one* prior act of criminal gang activity committed by McKinney, but excluded the two other acts.[33] In so ruling, the trial court *sua sponte* added requirements into O.C.G.A. § 24-4-418 that do not appear in the plain language of the statute.[34] The trial court held that it found a "nexus" between the 2017 robbery and McKinney's gang activity, but did not find a "nexus" for the 2016 shooting or the 2015 aggravated assault and possession of a stolen firearm.[35]

The trial court explained: "The central dispute is whether the State must prove the prior acts were related to gang activity to be admissible under O.C.G.A. § 24-4-

[31] R. 254.
[32] R. 259-260.
[33] R. 259-260.
[34] R. 261.
[35] R. 261.

418."[36] The trial court revealed its challenges in reaching a decision that deviated from the clear language of the statute, explaining: "The Court has not located an appellate decision that addresses the issue of whether O.C.G.A. § 24-4-418 evidence requires proof that the prior acts were related to gang activity in order to be admissible."[37] Unfortunately, the trial court then incorrectly concluded:

> The Court finds in reading O.C.G.A. § 24-4-418 and its reference to O.C.G.A. § 16-15-3 and 16-15-4 and those statutes in conjunction with one another that a nexus between the prior act and an intent to further gang activity must be established for the evidence to be admissible under O.C.G.A. § 24-4-418.[38]

As a result of its "judicial rewrite" of O.C.G.A. § 24-4-418, the trial court then excluded evidence of the May 5, 2015 and February 13, 2016 incidents of McKinney's prior criminal gang activity.[39]

The trial court's order confuses the definitions of criminal gang activity (O.C.G.A. § 16-15-3) and the elements of proof of the crime of participation in criminal street gang activity (O.C.G.A. § 16-15-4). As a result of this confusion, the trial court required the State to prove the elements of proof under O.C.G.A. § 16-15-4 to admit prior evidence of gang activity, even though that is not the standard. The State now appeals this erroneous finding.

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[36] R. 258.
[37] R. 259.
[38] R. 259.
[39] R. 261.

G. The Instant Appeal.

On March 17, 2022, the State filed its notice of appeal to the Georgia Supreme Court.[40] This case was docketed in the Georgia Supreme Court on April 5, 2022. On May 3, 2022, the Georgia Supreme Court transferred McKinney's appeal to this Court.

On May 24, 2022, this case was docketed in this Court. On May 31, 2022, the undersigned filed a request for an extension of time, which this Court granted. On June 8, 2022, the State filed its request for oral argument.

H. Statutes at Issue.

Explicitly responding to a "state of crisis which has been caused by violent street gangs," the Georgia General Assembly enacted "The Georgia Street Gang Terrorism and Prevention Act" ("The Georgia Gang Act").[41] In terms of its criminal proscriptions, the Gang Act applies to individuals who commit particularized, enumerated offenses while associated with or employed by a "criminal street gang."[42] O.C.G.A. § 24-4-418 only applies in cases indicted under Georgia's Gang Act.

1) Definitions Under Georgia's Gang Act

[40] R. 1-2.
[41] O.C.G.A. § 16-15-1, et. seq.
[42] O.C.G.A. § 16-15-4.

The Gang Act defines "criminal street gang" as a group of three or more individuals, associated in fact, who commit criminal gang activity.[43] The Gang Act expressly excludes from the classification of "criminal street gang" groups of three or more who are not involved in criminal gang activity. O.C.G.A. § 16-15-3(2). **"Criminal gang activity" is defined as involvement in certain, specified offenses.** See O.C.G.A. § 16-15-3(1).

Specifically, O.C.G.A. § 16-15-3 defines criminal gang activity as:

> (1) [T]he commission, attempted commission, conspiracy to commit, or the solicitation, coercion, or intimidation of another person to commit any of the following offenses on or after July 1, 2006:
>
> (a) Any offense defined as racketeering activity by Code Section 16-14-3;
>
> (b) Any offense defined in Article 7 of Chapter 5 of this title, relating to stalking;
>
> (c) Any offense defined in Code Section 16-6-1 as rape, 16-6-2 as aggravated sodomy, 16-6-3 as statutory rape, or 16-6-22.2 as aggravated sexual battery;
>
> (d) Any offense defined in Article 3 of Chapter 10 of this title relating to escape and other offenses related to confinement;
>
> (e) Any offense defined in Article 4 of Chapter 11 of this title, relating to dangerous instrumentalities and practices;
>
> (f) Any offense defined in Code Section 42-5-15, 42-5-16, 42-5-17, 42-5-18, or 42-5-19, relating to the security of state or county correctional facilities;
>
> (g) Any offense defined in Code Section 49-4A-11, relating to aiding or encouraging a child to escape from custody;
>
> (h) Any offense of criminal trespass or criminal damage to property resulting from any act of gang-related painting on, tagging, marking on, writing on, or creating any form of graffiti on the property of another;
>
> (i) Any criminal offense committed in violation of the laws of the United States and its territories, dominions, or possessions, any of the

[43] O.C.G.A. § 16-15-3 (3).

> several states, or any foreign nation which, if committed in this State, would be considered criminal gang activity under this Code section; [and]
> (j) **Any criminal offense, in the State of Georgia, any other State, or the United States that involves violence, possession of a weapon, or use of a weapon,** whether designated as a felony or not, and regardless of whether the maximum sentence could be imposed or actually was imposed.[44]

After April 18, 2019, criminal gang activity *also* includes "any offense defined in Code Section 16-5-46 as trafficking persons for labor servitude, 16-6-10 as keeping a place of prostitution, 16-6-11 as pimping, or 16-6-12 as pandering."[45]

Notably, there is no "nexus" or "in furtherance" language or requirement in O.C.G.A. § 16-15-3.

2) Charging Provisions Under Georgia's Gang Act

Separately, O.C.G.A. § 16-15-4 prohibits the *participation in* criminal gang activity.[46] O.C.G.A. § 16-15-4(a) mandates:

> It shall be unlawful for any person employed by or associated with a criminal street gang to conduct or participate in criminal gang activity through the commission of any offense enumerated in paragraph (1) of Code Section 16-15-3.

3) The Operation of Georgia's Gang Act

These code sections are separate and distinct and complement each other. Code Section § 16-15-3 *defines* criminal gang activity, and § 16-15-4(a) *prohibits*

[44] O.C.G.A. § 16-15-3(1)(a)-(j) (emphasis supplied)
[45] O.C.G.A. § 16-15-3(2).
[46] O.C.G.A. § 16-15-4.

the participation in criminal gang activity *through* acts of criminal gang activity as defined in § 16-15-3.

4) The Introduction of Gang Evidence

The other statute at issue in this appeal is O.C.G.A. § 24-4-418. This code section provides:

> In a criminal proceeding in which the accused is accused of conducting or participating in criminal gang activity in violation of Code Section 16-15-4, evidence of the accused's commission of criminal gang activity, as such term is defined in Code Section 16-15-3, shall be admissible and may be considered for its bearing on any matter to which it is relevant.[47]

The plain language of O.C.G.A. § 24-4-418 specifically notes that evidence of prior "criminal gang activity" *as such term is defined* by O.C.G.A. § 16-15-**3** – *not* O.C.G.A. § 16-15-**4** – *shall* be admissible.[48]

Accordingly, proof of a defendant's uncharged misconduct is presumptively admissible pursuant to O.C.G.A. § 24-4-418 where:

1. The case is indicted under O.C.G.A. § 16-15-4;
2. The other act falls within in the terms of O.C.G.A. § 16-15-3; and
3. The State provides notice.[49]

I. The Gang Act Supports the State's Construction of 24-4-418, and Any Ruling to the Contrary Constitutes Judicial Overreach.

[47] O.C.G.A. § 24-4-418(a).
[48] O.C.G.A. § 24-4-418(a).
[49] There is no issue as to whether the State provided notice to the Defense in this case.

O.C.G.A. § 24-4-418 "is unique to Georgia's New Evidence Code. It does not appear in prior Georgia law or in the Federal Rules of Evidence."[50] Additionally, this Code section has only been referenced by appellate Courts in this State in eight cases.[51] None of these prior rulings address any potential "nexus" requirement for O.C.G.A. § 24-4-418(a) like the requirement *sua sponte* devised by the trial court here.[52]

Further, the legislative history of this provision, especially in consideration with the legislative history of the Georgia Gang Act, shows that the General Assembly intended courts to apply this provision as a rule of inclusion.

In 2015, Georgia House Bill 874 created this Code section.[53] The purpose of this bill was:

> [T]o . . . improve the ability to prosecute street gang terrorism . . . to change provisions relating to the admissibility of evidence of the existence of criminal street gangs; [and] to provide for the admissibility of similar transaction evidence in prosecutions for criminal street gang activity.

This Code section went into effect on May 3, 2016.[54]

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[50] *Carlson on Evidence*, 7th Ed., p. 201.
[51] *Overstreet v. State*, 312 Ga. 565 (2021); *Dunn v. State*, 312 Ga. 471 (2021); *Bullard v. State*, 307 Ga. 482 (2019); *State v. Orr*, 305 Ga. 726 (2019); *Anglin v. State*, 302 Ga. 333 (2017); *Davis v. State*, 301 Ga. 397 (2017); *Hines v. State*, 350 Ga. App. 752 (2019); *State v. Thomas*, 2022 Ga. App. LEXIS 276 (June 7, 2022).
[52] *Id.*
[53] 2016 Ga. ALS 606, 2016 Ga. Laws 606, 2016 Ga. Act 606, 2015 Ga. HB 874, Section 6 ("2015 Ga. HB 874").
[54] O.C.G.A. § 24-4-418.

Similarly, the Georgia Gang Act was created "to seek the eradication of criminal activity by criminal street gangs."[55] The General Assembly recognized that this State was in a "state of crisis" caused by criminal street gangs, and passed the Georgia Gang Act to respond to that crisis.[56]

As previously addressed, O.C.G.A. § 24-4-418 is unique to Georgia's Evidence Code.[57] However, this provision mirrors the rules of admissibility created by the Federal Rules of Evidence 413, 414, and 415 and mirrors their Georgia counterparts: O.C.G.A. §§ 24-4-413, 24-4-414, and 24-4-415.

Federal Rules 413-415 (and their Georgia counterparts) "are exceptions to the general rule that evidence of past crimes may not be used to prove the character of a person in order to show action in conformity therewith."[58] These rules "create presumptions in favor of admission of the defendant's other sexual offenses in sex

[55] O.C.G.A. § 16-15-2(c).
[56] O.C.G.A. § 16-15-2(b).
[57] *Carlson on Evidence,* 7th Ed., p. 201.
[58] *Carlson on Evidence,* 7th Ed., p. 190 (citing *U.S. v. Bentley,* 561 F.3d 803 (8th Cir. 2009); *Johnson v. Elk Lake Sch. Dist*, 283 F.3d 138 (3d. Cir. 2002)).

crimes prosecutions."[59] The language of these statutes mirror that of O.C.G.A. § 24-4-418.[60]

In conclusion, as will be addressed in the argument and statement of authority, the trial court neglected the history and plain meaning of the Gang Act and O.C.G.A. § 24-4-418 when it denied the State's motion to introduce all of McKinney's prior acts of criminal gang activity and instead, *sua sponte* created new statutory requirements and improperly imposed those requirements on the State.

Construing the statutes in conjunction, it is clear that the Georgia General Assembly enacted O.C.G.A. § 24-4-418 to "*improve the ability* to prosecute criminal street gangs," in hopes of achieving the purpose of the Georgia Gang Act, which is "to seek the eradication of criminal activity by criminal street gangs."[61]

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[59] *Id.* (citing *U.S. v Stamper*, 106 Fed. Appx. 833 (4th Cir. 2004); *U.S. v. Bentley*, 475 F. Supp. 2d 852 (N.D. Iowa 2007); *U.S. v. Enjady*, 134 F.3d 1427 (10th Cir. 1998)).
[60] O.C.G.A. § 24-4-413(a) reads: "In a criminal proceeding in which the accused is accused of an offense of sexual assault, evidence of the accused's commission of another offense of sexual assault shall be admissible and may be considered for its bearing on any matter to which it is relevant." O.C.G.A. § 24-4-414(a) reads: "In a criminal proceeding in which the accused is accused of an offense of child molestation, evidence of the accused's commission of another offense of child molestation shall be admissible and may be considered for its bearing on any matter to which it is relevant." O.C.G.A. § 24-4-415(a) reads: "In a civil or administrative proceeding in which a claim for damages or other relief is predicated on a party's alleged commission of conduct constituting an offense of sexual assault or an offense of child molestation, evidence of that party's commission of another offense of sexual assault or another offense of child molestation shall be admissible and may be considered as provided in Code Sections 24-4-413 and 24-4-414."
[61] 2015 Ga. HB. 874, section 6; O.C.G.A. § 16-15-2(c).

Therefore, the trial court's ruling constituted improper judicial overreach and directly circumvented the clearly-stated intent of the legislature in enacting these provisions.

J. Georgia's New Evidence Code: Paralleling the Federal Approach.

The Georgia General Assembly adopted the Federal Rules of Evidence on January 1, 2013.[62] In passing the legislation adopting these rules, the Georgia General Assembly explained: "It is the intent of the General Assembly to revise, modernize, and reenact the general laws of this state relating to evidence while adopting, in large measure, the Federal Rules of Evidence."[63]

The Georgia Supreme Court provided further guidance on the adoption of the Federal Rules in *Parker v. State*, stating: "where the new Georgia rules mirror their federal counterparts, it is clear that the General Assembly intended for Georgia courts to look to the federal rules and how federal appellate courts have interpreted those rules for guidance."[64]

Additionally, where a new rule – like O.C.G.A. § 24-4-418 – is created, to interpret that provision, a court "must fall back upon the usual principles that inform our consideration of statutory meaning."[65]

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[62] *Carlson on Evidence,* 7th Ed., p. xxxiii (citing Ga. L. 2011).
[63] *Id.*
[64] *Id.* (citing *Parker v. State*, 296 Ga. 586 (2015)).
[65] *Id.* (citing *State v. Frost,* 297 Ga. 296 (2015)).

ARGUMENT AND CITATION OF AUTHORITY

"[T]he State of Georgia is in a state of crisis which has been caused by violent criminal street gangs whose members threaten, terrorize, and commit a multitude of crimes against the peaceful citizens of their neighborhoods."[66] The terror committed by McKinney and his fellow gang members upon the peaceful citizens of Atlanta is exactly the type of harm that the Georgia General Assembly sought to prevent by enacting the Georgia Gang Act, and which it intended to assist in prosecuting by enacting O.C.G.A. § 24-4-418. The trial court's ruling circumvents that intent and constitutes an abuse of discretion.

By overriding the text and stated intentions of Georgia's new Evidence Code, the trial court violated the doctrine of separation of powers, the plain text of the statute, a host of rules of statutory construction, and other rules of evidence. Any one of these factors calls for reversal in this case. Together, they compel an overwhelming imperative to do so. The trial court's decision should, therefore, be reversed.

I. The Trial Court's Decision Violated the Doctrine of Separation of Powers.

The Doctrine of Separation of Powers precludes judicial rewriting of legislatively enacted provisions, like Georgia's Gang Act and O.C.G.A. § 24-4-

[66] O.C.G.A. § 16-15-2(b).

418.[67] Adherence to the Doctrine of Separation of Powers inoculates against the claims of "judicial activism," which has been defined in terms similar to those used to describe separation of powers violations:

> Most generally, it means ***judges making rather than following the law***. In the constitutional context, where it is most important because the decisions are hardest to change, it can most usefully be defined as judges disallowing as unconstitutional policy choices made in the ordinary political process that the Constitution does not clearly disallow—"clearly" because in a democracy the judgment of elected representatives should prevail in cases of doubt.[68]

The Honorable William H. Pryor, Jr., of the Eleventh Circuit Court of Appeals eloquently explained:

> **The changing of laws enacted by political authorities is not a judge's task; the duty of a judge is the application of those laws in controversies within the jurisdiction of the courts**.[69]

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[67] *See State v. Riggs*, 301 Ga. 63, 67 (2017) ("The separation of powers prohibits us from 'add[ing] a line to [a] law [enacted by the legislature].'"); *West v. State*, 300 Ga 39, 44 (2016) ("this Court does not have the authority to rewrite statutes"). *See also United States v. Davis*, 785 F.3d 498, 520 (11th Cir. 2015) ("Simply put, we must apply the law and leave the task of developing new rules for rapidly changing technologies to the branch most capable of weighing the costs and benefits of doing so.").

[68] Lino A. Graglia, *The Myth of a Conservative Supreme Court: The October 2000 Term*, 26 Harv. J.L. & Pub. Pol'y 281 (Winter 2003) (emphasis added).

[69] *Moral Duty and the Rule of Law*, 31 Har. J.L. & Pub. Pol'y 153, 161 (2008) (emphasis added). *See also Confirmation Hearing on the Nominations of William H. Pryor, Jr. to be the Circuit Judge for the Eleventh Circuit and Diane M. Stuart to be Director, Violence Against Women Office, Department of Justice*, 108th Cong. 75 (2003) (statement of Judge William H. Pryor) ("The judiciary has a profound and humble, but vitally important role in interpreting the law and following the law, and putting aside personal beliefs and ensuring that the law has been faithfully executed, according to the real lawmaker, which is the legislature, or in the event of an interpretation of our highest law, the Constitution, by virtue of the people themselves.").

As this brief has and will explain, the expressed and implied purposes of Georgia's new Evidence Code was to adopt the Federal Rules of Evidence. This Court has repeatedly and unambiguously commanded that federalized provisions of Georgia's new Evidence Code should be interpreted in accord with federal jurisprudence, with an emphasis of that of the Eleventh Circuit Court of Appeals.[70]

Eschewing the foregoing, and its undeniable import, the trial court took a series of interconnected new Georgia Evidence Rules—*all which are federal in form*—and nullified them. By autonomously sweeping away the text of Georgia's new evidence statutes, annulling the intent of the General Assembly, and circumventing the direction of Georgia Courts, the trial court violated the Doctrine of Separation of Powers. The decision below should, therefore, be reversed.

II. The Trial Court's Decision Violated the Plain Text of O.C.G.A. § 24-4-418.

The trial court's order constitutes a misreading and misunderstanding of the plain text of O.C.G.A. § 24-4-418. "Georgia's new Evidence Code was modeled in large part on the Federal Rules of Evidence[.]"[71] Under the Federal and new Georgia

[70] *See, e.g, Chrysler Group LLC v. Walden*, 303 Ga. 358, 367 (2018).

[71] *Chrysler Group LLC*, 303 Ga. at 361. Georgia's new Evidence Code's essential federal nature has even been recognized by the Eleventh Circuit Court of Appeals: "**[T]he evidentiary relevance and prejudice provisions in the Georgia Evidence Code 'track their federal counterparts' and are interpreted similarly.**" *ML Healthcare Servs., LLC v. Publix Super Mkts., Inc*., 881 F.3d 1293, n.3 (11th Cir. 2018) (emphasis added).

Rules of Evidence: "A code, rather than case law, is now the initial point of inquiry."[72]

A textualist approach to the Federal Rules of Evidence is favored by the federal courts.[73] As explained by United States Supreme Court Justice Clarence Thomas, joined by Justice Ruth Bader Ginsburg, when both presided on the United States Court of Appeals for the District of Columbia Circuit:

> **We do so bearing in mind, as the Supreme Court has noted, that the Federal Rules of Evidence are creatures of statute [cit.] and that we thus should construe them using "traditional tools" [cit.]. We begin, as we do with any statute, with the language of the rules themselves**.[74]

[72] Margaret A. Berger, *The Federal Rules of Evidence: Defining and Refining the Goals of Codification*, 12 Hofstra L. Rev. 255 (1984).
[73] Edward J. Imwinkelried, *The Golden Anniversary of the "Preliminary Study of the Advisability and Feasibility of Developing Uniform Rules of Evidence for the Federal Courts": Mission Accomplished?*, 57 Wayne L. Rev. 1367, 1379 (Winter 2011); Randolph N. Jonakait, *The Supreme Court, Plain Meaning, and the Changed Rules of Evidence*, 68 Tex. L. Rev. 745, 745 (1990).
[74] *United States v. Rogers*, 918 F.2d 207, 209 (D.C. Cir. 1990) (internal citations omitted, emphasis added) ("Each of the three rules [401, 402, and 403] by its terms applies without limitation, to all evidence in all circumstances.").

Additionally, focusing on the plain meaning and text is associated with adherence to the doctrine of separation of powers.[75]

A. Specific Statutory Language and Application to this Case.

O.C.G.A. § 24-4-418 mandates that when a defendant, like McKinney, is charged with violating O.C.G.A. § 16-15-4, "evidence of the accused's commission of criminal gang activity, **as <u>such term is defined in Code Section 16-15-3</u>, <u>*shall*</u>** be admissible and may be considered for its bearing on any matter to which it is relevant."[76]

The "through" language creating the "nexus" requirement of O.C.G.A. § 16-15-4 does not appear in O.C.G.A. § 24-4-418. Instead, this code section simply states that evidence of criminal gang activity *as such term is defined in 16-15-3*, **shall** be admissible.[77]

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[75] Edward J. Imwinkelried, *An Extended Footnote to 'Statutory Construction: Not for the Timid'*, 30 Champion 36, 41 (May 2006) ("The textualist theory is driven by powerful policy considerations, namely, respect for the constitutional separation of powers and a desire to preserve the private domain by limiting the scope of government intrusion."). Textualism is often associated with the late United States Supreme Court Justice Antonin Scalia. *See* Maxine D. Goodman, *Reconstructing the Plain Language Rule of Statutory Construction: How and Why*, 65 Mont. L. Rev. 229, 234-35 (Summer 2004) ("According to Scalia, judges should deviate from the plain language of the text only where the textual reading leads to an absurd result[.]").

[76] O.C.G.A. § 24-4-418(a) (emphasis supplied).

[77] *Id.*

As previously described, O.C.G.A. § 16-15-3 defines "criminal gang activity" as "the commission . . . of any of the following offenses on or after July 1, 2006," and lists ten categories of offenses, as well an additional category of offenses on or after July 1, 2019.[78]

Particularly relevant to the facts of the case are the acts outlined in subsection (1)(J), which establishes that "criminal gang activity" includes:

> Any criminal offense, in the State of Georgia, or any other State, or the United States that involves violence, possession of a weapon, or use of a weapon, whether designated as a felony or not, and regardless of whether the maximum sentence could be imposed or actually was imposed.[79]

Both of the offenses that the trial court improperly excluded constitute "criminal gang activity" pursuant to O.C.G.A. § 16-15-3(1)(J). First, the May 2015 incident involved McKinney possessing a stolen firearm – (possession of a weapon) – and using said weapon – (use of a weapon) – to threaten his classmate. This crime occurred in "[an]other State," and further it "involves violence." Therefore, the May 2015 offense was criminal gang activity pursuant to the plain language of O.C.G.A. § 16-15-3(1)(J).[80]

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[78] O.C.G.A. § 16-15-3(1)(A)-(J); O.C.G.A. § 16-15-3(2); *See also In re KRS*, 284 Ga. 853, 854 (2009) ("The Act enumerates ten offenses that constitute criminal gang activity.").
[79] O.C.G.A. § 16-15-3(1)(J).
[80] *See Id.*

Secondly, the 2016 incident in which McKinney shot himself in the foot *also* constitutes criminal gang activity pursuant to subsection (J). McKinney *possessed* a firearm that was later recovered from bushes nearby to the crime scene, and *used* that weapon, although accidentally, against himself. That is a criminal offense involving "possession" and "use" of a weapon.[81]

Both of those offenses thus constitute "criminal gang activity" pursuant to the *plain language* of the statute. Further, the plain language in O.C.G.A. § 24-4-418 mandates their inclusion; O.C.G.A. § 24-4-418 states that evidence of prior criminal gang activity shall be admissible.[82]

Had the General Assembly *intended* to include a nexus requirement as created by the trial court, the legislature simply could have used the phrase: "as defined in O.C.G.A. § 16-15-4" instead of "as defined in § 16-15-3." ***It did not do this***. Instead, the legislature *clearly* stated that gang activity, as defined by § 16-15-3 *shall* be admissible.

Therefore, the trial court violated the clear language of the statute by imposing an additional "nexus" requirement that does *not* appear in the statute.

[81] *See Id.*
[82] O.C.G.A. § 24-4-418(a).

III. The Decision of the Trial Court Violated Rules of Statutory Construction.

The decision below violates a host of rules of statutory construction. Therefore, this decision constituted an abuse of discretion.

A. Failure to Consider the Statute in Conjunction with Associated Laws.

First, the trial court erred by misunderstanding how the Georgia Gang Act operates in conjunction with § 24-4-418. "It is an elementary rule of statutory construction that a statute must be construed in relation to other statutes of which it is a part, and all statutes relating to the same subject matter . . . are construed together."[83]

Here, as previously addressed, the plain language of § 24-4-418 explains *how* to employ that statute in conjunction with the Georgia Gang Act. Instead of defining prior criminal gang activity under O.C.G.A. § 16-15-4, O.C.G.A. § 24-4-418 defines criminal gang activity using the definitions in O.C.G.A. § 16-15-3.[84] Therefore, as described in the previous section, the General Assembly clearly intended to *exclude* from O.C.G.A. § 24-4-418 the requirement that the State must show an individual participated in criminal gang activity "through" the commission of an offense of

[83] *Dixon v. State*, 278 Ga. 4, n.2 (2004) (citing *Mathis v. Cannon*, 276 Ga. 16, 26 (2002); *Butterworth v. Butterworth*, 277 Ga. 301, 303-304 (1971)).
[84] O.C.G.A. § 24-4-418.

"criminal gang activity," as "criminal gang activity" is defined in O.C.G.A. § 16-15-3.

Additionally, the trial court's holding fails to consider O.C.G.A. § 16-15-9. O.C.G.A. § 16-15-9 permits the admission of evidence of any offense in O.C.G.A. § 16-15-3 where that offense was committed "*by any member or associate*" of a criminal street gang.[85] Therefore, a statutory provision already exists which requires an act to be committed by a gang member or associate of a gang for it to be admissible as gang evidence.

As a result, if the General Assembly had intended for a similar provision to exist in O.C.G.A. § 24-4-418, it could have included such a provision, as it did in O.C.G.A. § 16-15-9. The absence of such a provision expresses a clear legislative intent to the contrary. Therefore, the trial court failed to evaluate O.C.G.A. § 24-4-418 in context with related statutory provisions.

B. Failure to Apply the Statute's Plain Meaning.

Similarly, "[i]n considering the meaning of a statute, our charge . . . is to presume that the General Assembly meant what it said and said what it meant."[86] Therefore, when interpreting a statute, a court "must afford the statutory text its plain and ordinary meaning, consider the text contextually, read the text 'in its most

[85] O.C.G.A. § 16-15-9 (emphasis supplied).
[86] *Mays v. State*, 345 Ga. App. 562, 564 (citing *Holcomb v. Long*, 329 Ga. App. 515, 517 (2014)).

natural and reasonable way, as an ordinary speaker of the English language would,' and seek to 'avoid a construction that makes some of the language mere surplusage.'"[87] Further, "when the language of a statute is plain and susceptible of only one natural and reasonable construction, courts **must** construe the statute accordingly."[88]

Here, the language of O.C.G.A. § 24-4-418 is "clear and unambiguous." Therefore, the trial court, in adding additional requirements not in the statute, failed to "attribute to the statute its plain meaning."[89]

The language is clear that the criminal gang activity that *must* be admitted pursuant to O.C.G.A. § 24-4-418 is that activity defined in O.C.G.A. § 16-15-3. That statute does *not* include a requirement that a person must conduct or participate in criminal gang activity *through* the commission of such activity; that is, it does not

[87] *Id.* (citing *Holcomb,* 329 Ga. App. at 517-518).
[88] *Id.* (citing *Deal v. Coleman*, 294 Ga. 170, 172 (2013) ("If the statutory text is clear and unambiguous, we attribute to the statute its plain meaning and our search for statutory meaning is at an end.")).
[89] *Id.*

include a "nexus" requirement as found in O.C.G.A. § 16-15-4.[90] Therefore, the plain meaning of both those statutes would allow any offense defined in O.C.G.A. § 16-15-3 to be used as prior evidence of criminal gang activity when a defendant is charged with a violation of O.C.G.A. § 16-15-4.[91]

As described above, the trial court failed to construe the statute according to its plain meaning. Therefore, its decision to exclude two of McKinney's prior acts of gang activity must be reversed.

C. Disregarding the Stated Intent of the General Assembly.

The trial court also disregarded the stated intent of the General Assembly when it excluded this evidence.

As the Georgia Supreme Court explained, "There is no better source than such a legislative expression of an act's purpose to which a court may go for the purpose of finding the legislature's meaning of an act passed by it. . . ."[92] The decision below

[90] *Compare Rodriguez v. State*, 284 Ga. 803, 807 (2009) ("The trial court correctly found that 'the necessary and required element that Appellants don't mention is that there must be some nexus between the act and an intent to further street gang activity.' That nexus is provided by the use of the preposition 'through.' . . . Therefore, under its most natural reading O.C.G.A. § **16-15-4(a)** requires gang participation by the defendant which is active in any measure.") (emphasis supplied). O.C.G.A. § 24-4-418, by defining criminal gang activity for the purposes of that statute as that outlined in O.C.G.A. § 16-15-3, clearly did *not* intend to include the "nexus" required for a conviction under O.C.G.A. § 16-15-4(a).

[91] *See* O.C.G.A. § 24-4-418.

[92] *Rodriguez*, 284 Ga. at 804.

makes no specific mention of the General Assembly's stated intent and the decision disregards this intent.

In passing the Georgia Gang Act, the General Assembly sought to address a "state of crisis" caused by the explosion of violent criminal street gangs in this State.[93] The legislature recognized that gang activity presents "a clear and present danger to public order and safety."[94] Further, the General Assembly stated that by enacting the Georgia Gang Act, the legislature sought to "eradicat[e] . . . criminal activity by criminal street gangs."[95]

The Georgia Supreme Court recognized this legislative intent in *Rodriguez:* "Our interpretation of O.C.G.A. § 16-15-3 and § 16-15-4(a) is most consistent with the above-quoted legislative statement of intent 'to seek the eradication of criminal activity by street gangs.'"[96]

Similarly, by enacting O.C.G.A. § 24-4-418, the legislature sought to "**improve the ability to prosecute street gang terrorism"** by "provid[ing] for the admissibility of similar transaction evidence in prosecutions for criminal street gang activity."[97]

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[93] O.C.G.A. 16-15-2(b).
[94] O.C.G.A. § 16-15-2(b).
[95] O.C.G.A. § 16-15-2(c).
[96] *Rodriguez,* 284 Ga. at 807.
[97] 2015 Ga. HB 847 (emphasis supplied).

Therefore, by *sua sponte* creating additional barriers to the admission of prior acts of criminal gang activity, the trial court expressly circumvented the stated intent of the General Assembly.

D. Ignoring the Implied Intent of the Georgia General Assembly.

Important principles of Georgia statutory interpretation come to us from the Latin phrases: "*expressio unius est exclusio alterius*" and "*expressum facit cessare tacitum.*"[98] The Georgia Supreme Court has associated these maxims with the principle that courts cannot "force an outcome that the legislature did not expressly authorize."[99] In connection with evidence law:

> The maxim thus points to the conclusion that Rule 402 precludes the courts from enforcing uncodified exclusionary rules of evidence; case law or decisional authority is not a permissible basis for excluding relevant evidence.[100]

Here, the legislature did not authorize the exclusion of evidence admissible pursuant to O.C.G.A. § 24-4-418. Further, as previously described, O.C.G.A. § 24-4-402 prevents trial courts from adding additional exclusionary rules contrary to applicable law. O.C.G.A. § 24-4-418 *mandates* that evidence of prior criminal gang activity shall be admitted.[101] The trial court, however, improperly excluded that

[98] *Hammock v. State*, 277 Ga. 612, 614 (3) (2004).
[99] *Turner v. Ga. River Network*, 297 Ga. 306, 308 (2015).
[100] Imwinkelried, *Brief Defense*, at 275.
[101] O.C.G.A. § 24-4-418 (a).

evidence. Therefore, the trial court's decision was an attempt to "force an outcome that the legislature did not expressly authorize."[102]

E. Refusing to Examine the Statutory History.

The trial court also erred by failing to examine the statutory history of the Georgia Gang Act and O.C.G.A. § 24-4-418 before excluding evidence of McKinney's prior acts of criminal gang activity.

When considering the interpretation of Georgia's new Evidence Code, *Frost v. State* explains: "For context, we may look to other provisions of the same statute, the structure and *history* of the whole statute."[103]

Similarly, in *Mathis v. Cannon*,[104] the Georgia Supreme Court reversed a decision from this Court, stressing that changes made during the legislative process represent proof of the General Assembly's intent.[105]

Here, the Georgia Gang Act was enacted in 2006, and amended several times, including in the present year (2022). O.C.G.A. § 24-4-418 was enacted in 2016 with

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[102] *See Turner*, 297 Ga. at 308.
[103] *Frost*, 297 Ga. at 299 (emphasis supplied).
[104] *Mathis*, 276 Ga. at 27-28.
[105] *Id.* at 27 ("First, [the lower court's interpretation] ignores legislative history showing that the General Assembly adopted the phrase 'other publication' as a substitute for 'magazine or periodical' in the initial statute. ***This change suggests that the legislature intended*** for the retraction statute to apply to more than 'newspaper libel.'") (emphasis supplied). Decisions applying evidence rules have considered the legislative history of the Federal Rules of Evidence. *See, e.g., United States v. Bauzó-Santiago*, 867 F.3d 13, 20 (1st Cir. 2017); *United States v. Green*, 44 M.J. 631, 633-34 (C.G. Ct. Crim. App. 1996).

the express stated purpose to "improve the ability to prosecute street gang terrorism."[106] The trial court clearly failed to consider that legislative intent when it *sua sponte* added barriers to admissibility of a defendant's prior acts of criminal gang activity.

IV. The Trial Court's Decision Violated the Specific Purposes of the Georgia Gang Act.

As addressed above, the trial court violated a previous holding by the Georgia Supreme Court recognizing the legislature's intent in passing the Georgia Gang Act*:* "Our interpretation of O.C.G.A. § 16-15-3 and § 16-15-4(a) is most consistent with the above-quoted legislative statement of intent 'to seek the eradication of criminal activity by street gangs.'"[107]

By making it *more* difficult for the State to prosecute violent gang members like McKinney and his associates, the trial court violated the legislature's stated intent. The trial court's decision is tantamount to advancing the assertion that the General Assembly's actual intent in amending the Gang Act repeatedly, and then adding the provisions of O.C.G.A. § 24-4-418 in 2016 was *to impede and prevent the admission of gang-related evidence, rather than create additional avenues for*

[106] 2015 HB 874.
[107] *Rodriguez*, 284 Ga. at 807.

its inclusion. Such a result would not only conflict with the stated purposes of the Georgia Gang Act and of O.C.G.A. § 24-4-418, but also is patently absurd.[108]

As a result, the trial court clearly abused its discretion in erecting additional barricades to the State's admission of McKinney's previous acts of criminal gang activity.

A. The Decision of the Trial Court Violates the Inclusionary Principles of O.C.G.A. § 24-4-413 through § 24-4-415.

Similarly, the trial court's ruling also violates the inclusionary principles of similar statutes: O.C.G.A. § 24-4-413 through § 24-4-415. As previously addressed, these statutes are premised on the Federal Rules of Evidence Rules 413-415.

These rules "are exceptions to the general rule that evidence of past crimes may not be used to prove the character of a person in order to show action in conformity therewith."[109] "The[se] . . . rules are based on a sound premise. Evidence of a person's past conduct is both relevant and probative of one's likely future behavior."[110] Unlike other character evidence restrictions, Federal Rules 413-415 (and their Georgia counterparts) "allow for the introduction of propensity

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[108] *See Rodriguez v. State,* 284 Ga. at 805 ("The various provisions of a statute should be viewed in harmony and in a manner that will not produce an unreasonable or absurd result.") (quoting *Lindsey v. State,* 277 Ga. 772 774 (2004)).

[109] *Carlson on Evidence,* 7th Ed., p. 190 (citing *U.S. v. Bentley,* 561 F.3d 803 (8th Cir. 2009); *Johnson v. Elk Lake Sch. Dist,* 283 F.3d 138 (3d. Cir. 2002)).

[110] Mary Katherine Danna, *The New Federal Rules of Evidence 413-415: The Prejudice or Politics or Just Plain Common Sense?,* 41 St. Louis L.J. 277, 309 (1996).

evidence."[111]

In Georgia, the corresponding statutes – O.C.G.A. § 24-4-413 through § 24-4-415 – "create a rule of inclusion, with a strong presumption in favor of admissibility, and the State can seek to admit evidence under these provisions for any relevant purpose, including propensity."[112] These statutory provisions also include the language that such prior acts "shall" be admissible.[113] As this Court explained in *McAllister v. State*, "the language of both statutory provisions creates a 'rule of inclusion,' thus providing a strong presumption in favor of admissibility by explaining that such evidence '*shall* be admissible.'"[114]

Similarly, O.C.G.A. § 24-4-418 is *also* written as a "rule of inclusion," and the trial court's erroneous exclusion of McKinney's prior acts of criminal gang activity violates that language. As with O.C.G.A. § 24-4-413 and § 24-4-414, O.C.G.A. § 24-4-418 also uses the "shall" language, mandating the admission of past acts of criminal gang activity.

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[111] *Carlson on Evidence*, 7th Ed., p. 190 (citing *United States v. Levinson*, 504 Fed. Appx. 824 (11th Cir. 2013); *State v. Prine*, 303 P.3d 662 (Kan. 2013) ("These federal rules have been interpreted to allow propensity evidence in sexual assault and child molestation cases.")."

[112] *Wilson v. State*, 354 Ga. App. 64, 66 (2020) (citing *Robinson v. State*, 342 Ga. App. 624, 634, (2017)); *see also, e.g., Dixon v. State*, 350 Ga. App. 211, 213 (2019).

[113] *See* O.C.G.A. § 24-4-413; § 24-4-414.

[114] *McAllister v. State*, 351 Ga. App. 76, 80 (2019) (emphasis in original) (citing *Steele v. State*, 337 Ga. App. 562, 565-66 (2016)).

At least one commentator has noted that violent acts committed by individuals are similar to sexual crimes:

> Crimes of violence, however, require a substantial trespass on the victim, and strongly indicate, particularly when the defendant has committed a string of similar acts, the defendant's view of his relation to society and others. [115]

Additionally, "the universal finding of gang research . . . is that gang members participate in more delinquent or criminal acts than non-gang members, and that crimes committed by gang members are more violent."[116]

Congress determined the need for Federal Rules 413-415 because of the high rates of recidivism among sex offenders.[117] Similarly, O.C.G.A. § 24-4-418 addresses a similar recidivist issue: gang crime and recidivism. Various studies have determined that gang member recidivism is a significant problem.[118] For example,

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[115] Danna, *The New Federal Rules of Evidence,* at 309.

[116] Zachariah D. Fudge, *Comment: Gang Definitions, How Do They Work?: What the Juggalos Teach us about the Inadequacy of Current Anti-Gang Law*, 97 Marq. L. Rev. 979, 992-993 (2014) (citing Scott H. Decker & G. David Curry, Juvenile and Youth Gangs, in Encyclopedia of Crime & Justice 905, 907 (Joshua Dressler et. al. eds., 2002)).

[117] *Carlson on Evidence,* 7th Ed., p. 190 ("The high rates of recidivism for sex crime offenders was one reason for the enactment of these rules.") (citing *U.S. v. Martinez*, CR 09-2439 JB, 2009 U.S. Dist. LEXIS 114193 (D.N.M. 2009)).

[118] Pyrooz, Clark, & Tostlee, et. al, *Gang Affiliation and Prisoner Reentry: Discrete-Time Variation in Recidivism by Current Former, and Non-Gang Status*, J. of Research in Crime and Delinquency (August 24, 2020), available at: https://journals.sagepub.com/doi/10.1177/0022427820949895; Saunders, Sweeten, & Katz, *Post-Release Recidivism among Gang and Non-Gang Prisoners in Arizona from 1985 through 2004* (2009), available at: https://cvpcs.asu.edu/sites/default/files/content/projects/Saunders_Sweeten_Katz122309.pdf

one study found that "current gang members maintained the greatest risk for all recidivism types."[119] The Georgia legislature clearly recognized this high rate of recidivism among gang members who commit gang crimes, and thus recognized the need for this statute.

Therefore, it is clear from the statutory language that the legislature recognized the particularly high rates of recidivism in not only sex crimes,[120] but also in gang crimes, and thus enacted § 24-4-418 to help address Georgia's gang crisis and to improve the ability to prosecute violent gang members. Additionally, although Georgia's § 24-4-418 is unique, other jurisdictions have also created rules of inclusion of prior acts for particular crimes.[121]

In conclusion, O.C.G.A. § 24-4-418 should be construed as a rule of inclusion, and a rule for the purpose of aiding in prosecution of gang crimes. The trial court's holding violates the legislative intent in drafting this rule as one of inclusion. As a

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[119] Pyrooz, Clark, & Tostlee, et. al, *Gang Affiliation and Prisoner Reentry: Discrete-Time Variation in Recidivism by Current Former, and Non-Gang Status*, J. of Research in Crime and Delinquency (August 24, 2020), available at: https://journals.sagepub.com/doi/10.1177/0022427820949895.

[120] *Carlson on Evidence,* 7th Ed., p. 190 ("The high rates of recidivism for sex crime offenders was one reason for the enactment of these rules.") (citing *U.S. v. Martinez*, CR 09-2439 JB, 2009 U.S. Dist. LEXIS 114193 (D.N.M. 2009)).

[121] *See* Cal. Evid. Code 1109. Section 1109 of the California Evidence Code allows for the admission of similar acts of domestic violence in domestic violence prosecutions, as well as for similar acts of elder abuse and child abuse in prosecutions for those crimes; *see also* Thomas J. Reed, *Article: The Re-Birth of the Delaware Rules of Evidence: A Summary of the 2002 Changes in the Delaware Uniform Rules of Evidence,* 5 Del. L. Rev. 155, 169 (2002).

result, this Court should overturn the trial court's decision excluding McKinney's prior acts of criminal gang activity.

V. The Trial Court's Decision Violated O.C.G.A. § 24-4-402.

Similarly, the trial court also violated O.C.G.A. § 24-4-402 by excluding the evidence of McKinney's past gang activity. This Code Section provides in part: "All relevant evidence shall be admissible, except as limited by constitutional requirements or . . . as prescribed pursuant to constitutional or statutory authority."[122] Commensurately, "The obvious purpose of the catchall clause [in Federal Rule 402, upon which O.C.G.A. § 24-4-402 was enacted] was to bar common law rules of evidence or state rules of evidence, if inconsistent."[123]

O.C.G.A. § 24-4-402, then, has a dual jurisprudential effect: (1) Rule 402 precludes judge-made rules of evidence exclusion; and (2) Rule 402 abolishes prior lines of common law that excluded the admission of relevant evidence.[124]

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[122] O.C.G.A. § 24-4-402 provides in full: "All relevant evidence shall be admissible, except as limited by constitutional requirements or as otherwise provided by law or by other rules, as prescribed pursuant to constitutional or statutory authority, applicable in the court in which the matter is pending. Evidence which is not relevant shall not be admissible."; *see also Federal Rule 402:* "Relevant evidence is admissible unless a specific exclusionary rule applies." *United States v. Sumner*, 522 Fed. Appx. 806, 810 (11th Cir. 2013); Imwinkelried, *Brief Defense* at 288 ("Rules 401-02 are ample statutory authorization for the admission of the evidence.").

[123] *United States v. Jacobs*, 547 F.2d 772, 777 (II) (2d. Cir. 1976).

[124] Imwinkelreid, *Revolution,* at 137 ("Rule 402 precludes the courts from enforcing uncodified rules of evidence").

Federal Rule 402 allows for "other rules prescribed by the Supreme Court pursuant to statutory authority" to potentially exclude relevant evidence.[125] O.C.G.A. § 24-4-402, in contrast, does not include this specific language. Georgia law, thus, imposes ***greater*** constraints on judicial rule-making than its federal corollary.[126]

Georgia appellate court jurisprudence is in accordance with that of the United States Supreme Court. This Court and the Georgia Supreme Court have adhered to Rule 402, repeatedly holding that former exclusionary common law authority that was not reduced to statutory form in Georgia's new Evidence Code is no longer precedential.[127]

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[125] Fed. R. Evid. 402.

[126] *Carlson on Evidence*, 7th Ed., pp. 115-16. Similarly, Georgia removed the provision for judicial development of hearsay rules contained in Fed. R. Evid. 802 from Georgia's Rule 802. Dreyer, et. al., *Dancing with the Big Boys: Georgia Adopts (most of) the Federal Rules of Evidence*, 63 Mercer L. Rev. 1, 42 (2011) ("the Georgia rule has eliminated the clause from the Federal Rule that would have extended to the Georgia Supreme Court the authority to supplement the statutory rules of evidence").

[127] *E.g.*, *State v. Almanza*, 304 Ga. 553 (2018) (overruled in part by *Smith v. State*, 309 Ga. 240 (2020)) (holding that Georgia's prior blanket exclusion of offender identification made during medical examinations in child sex abuse cases was abolished by the new evidence code); *Chrysler Group LLC v. Walden*, 303 Ga 358, 362 (2018) (finding that common law rule excluding party-wealth evidence was no longer applicable under the new evidence code); *Glenn v. State*, 302 Ga. 276 (2017) (finding that former exclusionary common law regarding identification testimony did not apply under the new evidence code); *State v. Jones*, 297 Ga. 156 (2015) (finding that use of Georgia's former prejudice standard to exclude other acts evidence was error under Georgia's new Evidence Code).

The decision below conflicts with Georgia Rule of Evidence 402. No statute ***precludes*** the introduction of this relevant evidence; to the contrary, O.C.G.A. § 24-4-418 ***presumes*** introduction. The evidence need not be excluded.

Further, the evidence of McKinney's prior gang activity is *particularly* relevant (and thus, admissible) in this case because the State indicted McKinney under O.C.G.A. § 16-15-4.[128] Because McKinney was charged with violating the Georgia Gang Act under various sub-sections of O.C.G.A. § 16-15-4, each of which requires unique elements of proof, his commission of past gang activity "was direct evidence of an essential part of several of the offenses" for which he is charged.[129] Therefore, this evidence had high probative value, and the trial court erred in excluding it. The trial court's holding should be reversed.

VI. The Trial Court Violated O.C.G.A. § 24-1-1.

The trial court's holding also violated O.C.G.A. § 24-1-1. O.C.G.A. § 24-1-1 announced that the purpose of Georgia's new Evidence Code is to ensure truthful results in trial proceedings:

> The object of all legal investigation is the discovery of truth. Rules of evidence shall be construed to secure fairness in administration, eliminate unjustifiable expense and delay, and promote the growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.[130]

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[128] *Carlson on Evidence,* 7th Ed., p. 71 and 205 (citing *Anthony v. State*, 303 Ga. 399 (2018); *Jordan v. State*, 307 Ga. 450 (2019)).
[129] *Id.* at 205.
[130] O.C.G.A. § 24-1-1.

By *sua sponte* applying O.C.G.A. § 24-4-418 as a rule of exclusion that deprives factfinders of pertinent evidence, the trial court violated O.C.G.A. § 24-1-1 and should be reversed.

VII. The Decision of the Trial Court Violates the Presumption in Favor of Gang Activity Applied in Other States.

Finally, the State urges this Court, in reversing the trial court's order excluding McKinney's prior criminal gang activity, to additionally adopt a presumption of participation in criminal gang activity when an individual commits crimes with gang members.

The State requests this Court extend its analysis of Georgia's Gang Act and *additionally* adopt a presumption used by California courts to further the General Assembly's stated intent of eradicating criminal gang activity in this State. California courts have adopted the following presumption: "Commission of a crime in concert with known gang members is substantial evidence which supports the inference that the defendant acted with specific intent to promote, further, or assist gang members in the commission of the crime."[131]

[131] *People v. Villalobos*, 145 Cal. App. 4th 310, 322 (2006) (citing *People v. Morales*, 112 Cal. App. 4th 1176, 1198 (2003)); *see also People v. White*, 230 Cal App. 4th 305, 320 (2014); *People v. Miranda*, 192 Cal. App. 4th 398, 411-412 (2011); *Ortega v. State*, 2016 U.S. Dist. LEXIS 83236 at 28 (U.S. Dist. Ct. CA. 2016); *Nguyen v. Soto*, 2015 U.S. Dist. LEXIS 106032 at 16 (U.S. Dist. Ct. CA. 2015); *see also People v. Arce*, 47 Cal App. 5th 700 (2020) ("It is difficult to conceive of a situation where a defendant would commit murder to further an 'innocent' gang purpose.").

The presumption is well-established in California law,[132] and the State urges this Court to similarly adopt this presumption to assist in gang prosecutions in this State, and thus further fulfill the legislative intent of the Georgia Gang Act and O.C.G.A. § 24-4-418.

However, the State notes that adopting such a presumption would *not* change the outcome of this case. Present statutory law *as it stands now* clearly allows for the admission of *all* of McKinney's prior acts as criminal gang activity as defined under O.C.G.A. § 16-15-3(1)(J).

Therefore, the trial court's holding must be reversed.

CONCLUSION

Criminal gang activity is clearly and unambiguously defined in O.C.G.A. § 16-15-3. O.C.G.A.§ 24-4-418 plainly states that such evidence **shall be admissible** when a defendant, like Appellee McKinney, is charged under O.C.G.A. § 16-15-4. Both of the prior acts improperly excluded by the trial court constitute criminal gang activity under O.C.G.A. § 16-15-3(1)(J) because they involve violence, possession of a weapon, *and* use of a weapon. There is *no* language *anywhere* in these statutes requiring a "nexus" as articulated by the trial court.

Our legislature seeks to eradicate violent criminal street gangs terrorizing innocent civilians in our society, and the trial court's order blatantly frustrates that

[132] *See Ids.*

legislative intent.[133] The statutes drafted by the Georgia General Assembly "consist of language that was deliberately and carefully chosen by the drafters" to effectuate that intent.[134]

These statutes were designed to protect the public from violent gangs, and to prevent the commission of the heinous crimes against innocent civilians like those described in this case. The trial court's order frustrates this legislative intent and clearly violates the plain meaning of the statute. By creating additional barriers to the prosecution of gang crimes, the trial court *not only* has legislated from the bench, but also has directly circumvented the General Assembly's intent in enacting O.C.G.A. § 24-4-418 to improve prosecution of gang crimes to address the gang crisis in this State.

The State thus strongly urges this Court to reverse the trial court's ruling excluding McKinney's 2015 and 2016 acts of criminal gang activity.

This submission does not exceed the word count limit imposed by Rule 24.

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[133] *See Rodriguez*, 284 Ga. at 807; O.C.G.A. 16-15-2(c).

[134] Robert G. Lawson, *"Interpretation of the Kentucky Rules of Evidence: What Happened to the Common Law?"*, 87 Ky. L.J. 517 (1999) at 555 (citing Edward J. Imwinkelried, *Moving Beyond 'Top Down' Grand Theories of Statutory Construction: A 'Bottom Up' Interpretive Approach to the Federal Rules of Evidence*, 75 Or. L. Rev. 389 (1996)).

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CERTIFICATE OF SERVICE

I do hereby certify that I have this day served the within and foregoing Brief, prior to filing the same, by depositing a copy thereof, postage paid, in the United States Mail, properly addressed, upon:

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This 22nd day of June, 2022.

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