IN THE COURT OF APPEALS

STATE OF GEORGIA

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

STATE'S REPLY BRIEF OF APPELLANT BY THE DISTRICT ATTORNEY

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

INTRODUCTION

To admit evidence under O.C.G.A. § 24-4-418, all that is required is (1) a charge under *any subsection of* O.C.G.A. § 16-15-4; (2) a prior offense defined as "criminal gang activity" under O.C.G.A. § 16-15-3; and (3) proper notice to the opposing party. In the court below, the State met all three requirements. The trial court, however, erroneously denied the admission of clearly qualified evidence on the basis of grounds that do *not* appear in the statute.

The trial court should, therefore, be reversed.

DE NOVO STANDARD OF REVIEW

As this case presents an issue of statutory construction, the decision of the trial court misinterpreting and misapplying O.C.G.A. § 24-4-418 is subject to *de novo* review.[1] In cases involving the *de novo* review of a lower court's interpretation of a statute, this court has observed, "the trial court's ruling on a legal question is not due any deference" on appeal.[2]

The State concedes that its opening brief stated that this case was to be reviewed under an abuse of discretion standard. Upon further research and consideration, the State recognizes and hereby corrects its initial misimpression.

[1] *Williams v. State*, 299 Ga. 632, 633, 791 SE2d 55 (2016) ("As in all appeals involving the construction of statutes, our review is conducted under a de novo standard.").

[2] *State v. Rich*, 348 Ga. App. 467, 468, 823 SE2d 563 (2019); *see also Huggins v. State*, 362 Ga. App. 450, 451, 868 SE2d 840 (2022) ("The interpretation of a statute is a question of law, which is reviewed de novo on appeal . . . a trial court's legal conclusions in this regard are reviewed de novo.").

ARGUMENT AND CITATION TO AUTHORITY

McKinney's brief fails to properly address the constitutional, statutory, and interpretive principles that demand reversal in this case. Exemplary are the following:

- The Doctrine of Separation of Powers requires reversal of the trial court;
- Application of O.C.G.A. § 1-3-1(a) requires reversal of the trial court;
- Applying legislative intent of the Georgia Gang Act and O.C.G.A. § 24-4-418 requires reversal of the trial court;
- The established rule that statutes must be read through their plain language requires reversal of the trial court;
- The Georgia Supreme Court's decision in *State v. Atkins*[3] requires reversal of the trial court;
- The Georgia Supreme Court's decision in in *Haley v. State*[4] requires reversal of the trial court;
- The mandate in O.C.G.A. § 24-4-402 requires reversal of the trial court;
- The doctrine of *expressio unius est exclusio alterius* requires reversal of the trial court;
- The doctrine of *in pari materia* requires reversal of the trial court;

[3] *State v. Atkins*, 304 Ga. 413, 819 SE2d 28 (2018).
[4] *Haley v. State*, 289 Ga. 515, 523, 712 SE2d 838 (2011).

- The trial court committed reversible error by misreading the Georgia Supreme Court's decision in *Rodriguez v. State*[5];
- The trial court's order erred by focusing on a single charging provision of O.C.G.A. § 16-15-4;
- McKinney's argument calls for a concerning methodology that occasionally appears in Georgia evidence jurisprudence;
- The doctrine of *reductio ad absurdum* and the related concept of "the absurd result rule," require reversal of the trial court; and
- McKinney's brief, moreover, improperly claims the State's factual summary in its opening brief was impermissible.

Significantly, any *one* of these articulated failings of the trial court mandate reversal. Combined, these errors and omissions *compel* it.

1. The Trial Court's Order Violated Separation of Powers.

The Doctrine of Separation of Powers is embedded in Georgia's constitution:

> ***The legislative, judicial, and executive powers shall forever remain separate and distinct***; and no person discharging the duties of one shall at the same time exercise the functions of either of the others except as herein provided.[6]

[5] *Rodriguez v. State*, 284 Ga. 803, 671 SE2d 497 (2009).
[6] Ga. Const. Art. I, § II, Para. III (emphasis added); *see also* James Lanashe, *Morality and the Rule of Law in American Jurisprudence*, 11 Rutgers J. Law & Relig. 1 (Fall 2009) ("The Framers' envisioned the judiciary as a purely adjudicative body, tempered by historical antecedents.").

"The doctrine of separation of powers is an immutable constitutional principle which must be strictly enforced."[7] "Under our system of separation of powers, [a] [c]ourt does not have the authority to rewrite statutes."[8] Additionally, "as members of this State's judicial branch, it is [a court's] duty to interpret the laws as they are written."[9]

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

> **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**.[10]

The Doctrine of Separation of Powers precludes judicial rewriting of legislatively enacted provisions, like Georgia's new Evidence Code.[11] In fact, adherence to the Doctrine of Separation of Powers is particularly critical when it comes to the interpretation of evidence law statutes: "**Rules of evidence, being**

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[7] *Mason v. Home Depot U.S.A., Inc.*, 283 Ga. 271, 276, 658 SE2d 693 (2008).
[8] *Star Residential, LLC v. Hernandez*, 311 Ga. 784, 860 SE2d 726 (2021) (citing *State v. Fielden*, 280 Ga. 444, 448, 629 SE2d 252 (2006)).
[9] *Id*. (citing *You v. J.P. Morgan Chase Bank*, 293 Ga. 67, 75, 743 SE2d 428 (2013)).
[10] *Moral Duty and the Rule of Law*, 31 Har. J.L. & Pub. Pol'y 153, 161 (2008) (emphasis added).
[11] *See State v. Riggs*, 301 Ga. 63, 67, 799 SE2d 770 (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, 793 SE2d 57 (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.").

procedural in their nature, are *peculiarly discretionary with the law-making authority*[.]"[12]

This appeal centers on the definition of "criminal gang activity" as it appears in O.C.G.A. § 16-15-3, which is referenced in O.C.G.A. § 24-4-418. Neither statute requires a conviction under *any* subsection of O.C.G.A. § 16-15-4.[13] As such, the plain text of O.C.G.A. §§ 16-15-3 and 24-4-418 precludes McKinney's argument that either contains a "nexus requirement," which would require a rewrite to include such a requirement in one or both statutes.

Furthermore, the trial court's order imposes limits the trial court perceives pursuant to from O.C.G.A. § 16-15-4(a), when the other charging provisions of O.C.G.A. § 16-15-4 do not contain a "nexus requirement." Neither do O.C.G.A. §§ 16-15-3 or 24-4-418.

Unassuaged by this plain language, McKinney implores this Court to authorize a reversible violation of the Doctrine of Separation of Powers committed by the trial court. Namely, the trial court's supposition, advocated by McKinney,

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[12] *Bunn v. State*, 291 Ga. 183, 191, 728 SE2d 569 (2012) (emphasis supplied) (citing *Salsburg v. Maryland*, 346 U. S. 545, 550 (1954)).

[13] Importantly, the trial court's order focuses on "nexus requirement" of from O.C.G.A. § 16-15-4(a). There are nine (9) additional charging provisions housed in O.C.G.A. § 16-15-4. O.C.G.A. §§ 16-15-4(b) to (j) all contain different elements from O.C.G.A. § 16-15-4(a) and each other. Furthermore, none of O.C.G.A. §§ 16-15-4(b) to (j) contain a "nexus requirement" akin to that set forth in O.C.G.A. § 16-15-4(a). The indictment in the instant case charges subsections (a), (b), and (e). These distinctions were not specifically addressed in the trial court's order.

that the term "criminal gang activity" in O.C.G.A. § 16-15-3 contains "nexus language" is not supported by the text of the statute.[14] McKinney's call for judicial activism[15] is barred by the Doctrine of Separation of Powers.

Amending O.C.G.A. §§ 16-15-3 or 24-4-418 to include such an added element is in the sole province of the General Assembly, not the Superior Court. Because the trial court's order judicially created requirements and limitations not found in the text of either O.C.G.A. §§ 16-15-3 or 24-4-418, it violated the Doctrine of Separation of Powers and should be reversed.

This holding plainly violates the Doctrine of Separation of Powers by rewriting the statute to include requirement and limitations not found in the statute. This Court should reverse the trial court's order.

2. The Trial Court's Order Violated O.C.G.A. § 1-3-1(a).

O.C.G.A. § 1-3-1(a) mandates: "In all interpretations of statutes, the courts shall look diligently for the intention of the General Assembly, keeping in view at all times the old law, the evil, and the remedy."[16] This rule has been in place for over

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[14] The trial court apparently conflated, at McKinney's insistence, the definitions in O.C.G.A. § 16-15-3 with the elements of proof in O.C.G.A. § 16-15-4, and thus improperly required the State to show a "nexus" connecting the gang, crime, and defendant under O.C.G.A. § 24-4-418.

[15] *See* Lino A. Graglia, *The Myth of a Conservative Supreme Court: The October 2000 Term,* 26 Harv. J.L. & Pub. Pol'y 281 (Winter 2003) (defining judicial activism as "judges making rather than following the law").

[16] O.C.G.A. 1-3-1(a); *see also, e.g.,* Austin Martin Williams, *Researching Georgia Law*, 34 Ga. St. U.L. Rev. 741 (Summer 2015) at 785-786.

a century: "There is not a more universally fixed and accepted rule than that, in the construction of statutes, the intention of the Legislature, when discovered, shall prevail."[17]

The Georgia General Assembly enacted the Street Gang Act (O.C.G.A. § 16-15-2) "to seek the eradication of criminal activity by criminal street gangs," and to address the "state of crisis" caused by criminal street gangs in this State.[18] Commensurate with these purposes, the General Assembly enacted O.C.G.A. § 24-4-418 to "improve the ability to prosecute street gang terrorism . . . [by] chang[ing] 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."[19] Patterned after O.C.G.A. §§ 24-4-413 to 24-4-415, O.C.G.A. § 24-4-418 allows for presumptive admissibility of prior criminal gang activity for all relevant purposes, to include criminal propensity.[20]

The legislative purpose of the Georgia Gang Act and O.C.G.A. § 24-4-418 was, plainly stated, to "improve the ability to prosecute street gang terrorism" by allowing for additional similar transaction evidence in those prosecutions.[21]

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[17] *Akin v. Freeman*, 49 Ga. 51 (1873).
[18] O.C.G.A. § 16-15-2(b) – (c).
[19] 2016 Ga. ALS 606, 2016 Ga. Laws 606, 2016 Ga. Act. 606, 2015 Ga. HB 874, Section 6 ("2015 Ga. HB. 874").
[20] O.C.G.A. § 24-4-418; *see also Carlson on Evidence*, 7th Ed., p. 201.
[21] 2016 Ga. ALS 606, 2016 Ga. Laws 606, 2016 Ga. Act. 606, 2015 Ga. HB 874, Section 6 ("2015 Ga. HB. 874").

McKinney's argument in favor of judicially authored, non-textual *limitations on* the scope of O.C.G.A. § 24-4-418 directly clashes with the legislature's stated purpose.

Because the trial court's order conflicts with O.C.G.A. § 1-3-1(a), this Court should, therefore, reverse.

3. The Trial Court's Order Deviated from the Legislature's Intent.

The Street Gang Act serves to combat the "state of crisis" caused by criminal street gangs in Georgia. O.C.G.A. § 24-4-418 was created as an interlocking evidence statute to "improve the ability to prosecute street gang terrorism" by relaxing the standard for admissibility of prior criminal acts in gang prosecutions.[22]

This Court has previously held:

> The cardinal rule in construing a legislative act is to ascertain the legislative intent and purpose in enacting the law, and then to give it that construction which will effectuate that intent and purpose. A court is usually able to determine legislative intent by reading the statute literally – i.e., by affording the language used its plain and ordinary meaning.[23]

By *adding* additional, judicially-constructed impediments to the introduction of gang evidence, the order of the trial court is antipodal to the General Assembly's purposes in passing O.C.G.A. § 24-4-418.

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[22] 2016 Ga. ALS 606, 2016 Ga. Laws 606, 2016 Ga. Act. 606, 2015 Ga. HB 874, Section 6 ("2015 Ga. HB. 874").

[23] *Reed v. Lindsey*, 348 Ga. App. 425, 437, 823 SE2d 359 (2019) (citing *State of Ga. v. Free at Last Bail Bonds*, 285 Ga. App. 734, 647 SE2d 402 (2007)).

Unable to legally justify the trial court's order, McKinney levels invective and derogatorily characterizes the State's asking this Court to adhere to the plain text of O.C.G.A. § 24-4-418 as an entreaty to "rubber stamp." Rather, the State asks this Court to reverse a trial court's holding that *directly contradicts* the legislature's stated intent embodied in statutory text. This Court should reverse.

4. The Trial Court's Order Deviated from Statute's Plain Language.

"A departure from the plain language of [a] statute runs contrary to the basic rules of statutory construction."[24] When interpreting a statute, a court must "look to the plain language of the statute and, under the rules of statutory construction . . . presume that the General Assembly means what it says and says what it means."[25] This Court explained:

> [W]e must afford the statutory text its plain and ordinary meaning, we must view the statutory text in the context in which it appears, and we must read the statutory text in its most natural and reasonable way, as an ordinary speaker of the English language would.[26]

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[24] *O'Neal v. State*, 288 Ga. 219, 222 n. 2, 702 SE2d 288 (2010); *see also, e.g.*, Maxine D. Goodman, *Reconstructing the Plain Language Rule of Statutory Construction: How and Why*, 65 Mont. L. Rev. 229 (Summer 2004) (explaining the "new textualism" approach as "When construing statutes, consider the text, the whole text, and nothing but the text. Period.") (citing William N. Eskridge, Jr., *A Matter of Interpretation: Federal Courts and the Law by Antonin Scalia*, 96 Mich. L. Rev. 1509, 1511 (1998)).

[25] *Akintoye v. State*, 340 Ga. App. 777, 782, 798 SE2d 720 (2017) (citing *Williams v. State*, 299 Ga. 632, 633, 791 SE2d 55 (2016)).

[26] *Id.*

McKinney's brief calls for violating this canon of statutory construction by substituting his preferred "nexus" language for that of the legislature.

O.C.G.A. § 24-4-418 mandates that where a defendant is charged with violating *any* subsection of O.C.G.A. § 16-15-4,[27] "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."[28]

O.C.G.A. § 16-15-3 defines criminal gang activity, and includes in that definition:

> Any criminal offense, in the State or 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 was actually imposed.[29]

Reading the *plain language* of the statute, evidence than an individual accused of violating the Georgia Gang Act had previously committed "any criminal offense" in *any* State in the United States that involved "violence, possession of a weapon, or

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[27] Once again, the trial court's order does not factor in that O.C.G.A. § 16-15-4(a), which alone contains the "nexus requirement" mentioned by the trial court is one of ten offenses involving criminal gang activity under O.C.G.A. § 16-15-4. Most of these offenses do not even contain the word "through." Neither O.C.G.A. § 16-15-3 nor O.C.G.A. § 24-4-418 differentiate between the various provisions of O.C.G.A. § 16-15-4.

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

[29] O.C.G.A. § 16-15-3(1)(j).

use of a weapon" **constitutes criminal gang activity and "shall be admissible"** in that prosecution.[30]

Therefore, by excluding McKinney's prior weapons offenses (thus, acts constituting criminal gang activity **for the purposes of O.C.G.A. § 24-4-418**),[31] the trial court violated the plain language of the statute. Furthermore, the trial court's flawed analysis led to a blanket exclusion of evidence based upon a truncated interpretation of O.C.G.A. § 16-15-4, which did not include consideration—*or even reference*—to nine of the ten charging provisions of O.C.G.A. § 16-15-4— three of which were brought against McKinney himself.[32]

The trial court should, therefore, be reversed.

5. The Trial Court's Order Violates *State v. Atkins*.[33]

The Supreme Court of Georgia has made it clear that a trial court's decision excluding evidence on grounds that do not appear in the statute *must* be reversed.[34] In *State v. Atkins*, the Georgia Supreme Court reversed a trial court's decision to exclude evidence on grounds that did not appear in the statute, but rather on terms added from the bench.[35]

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[30] O.C.G.A. § 24-4-418.
[31] O.C.G.A. § 24-4-418; O.C.G.A. § 16-15-3(1)(J).
[32] McKinney was charged under three sections of O.C.G.A. 16-15-4: sections (a), (b), and (e). (R. 91-103).
[33] *State v. Atkins*, 304 Ga. 413, 819 SE2d 28 (2018).
[34] *Atkins*, 304 Ga. at 423.
[35] *Id.*

The *Atkins* trial court excluded evidence under O.C.G.A. § 24-4-403, stating that the reason for exclusion was "out of an abundance of caution."[36] The Georgia Supreme Court *reversed* the trial court's decision, explaining:

> Rule 403 provides a list of reasons authorizing a trial court to exclude otherwise admissible and relevant reasons. "An abundance of caution" is not one of those enumerated grounds.[37]

The trial judge's actions in *Atkins* are analogous to the trial court's order in McKinney's case. In both cases, admissible evidence was excluded on grounds that *do not appear in the statute.*

Instead of requiring the State to show that McKinney's past crimes constituted "criminal gang activity" as defined under O.C.G.A. § 16-15-3, the trial court added a "nexus" requirement, and improperly excluded admissible evidence on ersatz grounds. Therefore, the trial court violated the rule of *Atkins* by excluding evidence on grounds that are wholly absent from the text of the statute.

This Court – as the Supreme Court in *Atkins* did – should reverse the trial court's order on this ground.

6. The Trial Court's Order Violated *Haley v. State*.[38]

In *Haley*, the Georgia Supreme Court held:

> Where the General Assembly selects statutory language not from a Georgia statute that our own courts have previously interpreted but

[36] *Atkins*, 304 Ga. at 423.
[37] *Atkins*, 304 Ga. at 423.
[38] *Haley v. State*, 289 Ga. 515, 523, 712 SE2d 838 (2011).

> instead from a statute of another jurisdiction, we have explained that "the construction placed upon such statute by the highest court of that jurisdiction will be given such statute by the courts of this State."[39]

Georgia's O.C.G.A. § 24-4-418 is unique to Georgia, but it is modeled after Federal Rules of Evidence 413-415, which are also rules in favor of broad admissibility.[40] The language in O.C.G.A. § 24-4-418 mirrors the permissive language in Federal Rules 413-415, which have Georgia analogs at O.C.G.A. §§ 24-4-413 to 24-4-415.[41] The Federal Rules upon which this now-challenged statute is based "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."[42] These federal rules are unique to specific crimes, and contain presumptions of admissibility and allow for the presentation of propensity evidence

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[39] *Haley*, 289 Ga. at 523 (citing *Wilson v. Pollard*, 190 Ga. 74, 80, 8 SE2d 380 (1940)); *see also Carlson on Evidence*, 7th Ed., p. 11 ("[W]here former rules of evidence admission, exclusion, or procedure *are* impacted by new statutes, either directly or indirectly, they *have* been modified and, as such, the prior Georgia evidence on that issue *will be displaced*.") (emphasis in original) (citing *Haley*, 289 Ga. at 523; *Stratacos v. State*, 293 Ga. 401, 748 SE2d 828 (2013); *Williams Gen. Corp. v. Stone*, 279 Ga. 428, 614 SE2d 758 (2005)).

[40] *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)).

[41] O.C.G.A. § 24-4-418; *Carlson on Evidence*, 7th Ed., p. 201 ("OCGA 24-4-418 provides that prior incidents of criminal gang activity, as defined by OCGA 16-15-3, are presumptively admissible for any relevant purpose, to include propensity . . . Similarly drawn provisions of the Federal Rules of Evidence, Fed. R. Evid. 413, 414, and 415, operate in a comparable manner in connection with prior acts of sexual misconduct in sex offense prosecutions and lawsuits.").

[42] *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)).

against the accused.[43] Importantly, like Federal Rules 413-415 and their counterparts, O.C.G.A. §§ 24-4-413 and 24-4-414, O.C.G.A. § 24-4-418 only requires proof of the *commission* of a prior similar act – not proof of *conviction*. Additionally, these rules each contain language that these prior acts *shall* be admitted.[44]

McKinney's brief does not mention that O.C.G.A. § 24-4-418 should be interpreted, as a general matter, consistently with Fed. R. Evid. 413 to 415. Neither does the erroneous order of the trial court excluding admissible evidence, essentially on the basis that a conviction under O.C.G.A. § 16-15-4(a), or at least its equivalent, is necessary for admission under O.C.G.A. § 24-4-418. *Haley* requires interpreting O.C.G.A. § 24-4-418 through the lens of Fed. R. Evid. 413 to 415. In stark violation of *Haley*, neither McKinney's brief nor the trial court's order make any reference to Fed. R. Evid. 413 to 415, their Georgia counterparts, or any of the associated precedent.

In bypassing Fed. R. Evid. 413 to 415, the trial court violated *Haley*. This Court should reverse.

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[43] *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)).

[44] *Carlson on Evidence,* 7th Ed., p. 190.

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

Consistent with Federal Rule 402, Georgia Rule of Evidence 402[45] represents a clear legislative mandate that: (1) relevant evidence is presumptively admissible; and (2) prior common law evidence decisions on the admissibility of evidence—*particularly where they exclude relevant evidence*—have been abrogated.[46]

The United States Supreme Court has recognized that "Rule 402 provides the baseline" through which "[w]e interpret the legislatively enacted Federal Rules of Evidence."[47]

Rule 402 has a dual jurisprudential effect:

> The impact [of Rule 402] is two-fold. First, Rule 402 has a prospective effect: **it precludes trial judges from future creation of new exclusionary rules** of general applicability. Second, and more importantly, **the Rule impliedly repeals prior decisional admissibility rules that have not been codified**.[48]

Rule 402 represents a "keystone" rule, and eliminates uncodified exclusionary doctrines:

> . . . Properly construed, **Rule 402 abolishes uncodified exclusionary rules of evidence.** Thus, even if the exclusionary rule in question is a

[45] O.C.G.A. § 24-4-402.
[46] *Carlson on Evidence,* 7th Ed., pp. 74-76.
[47] *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 587 (1993).
[48] Edward J. Imwinkelreid, *Federal Rule of Evidence 402: The Second Revolution ("Revolution")*, 6 Rev. Litig. 129, 137 (1987) (emphasis added) ("Rule 402 precludes the courts from enforcing uncodified rules of evidence").

> hoary, well-respected one, the decision overturning the rule is supportable under the Rules.[49]

The language and application of Rule 402 validate the fact that exclusionary common law cannot be constructed and does not survive:

> The exceptive language [in Rule 402] that follows indicates that relevant evidence may be excluded on the basis of one of the listed sources of law. The list, however, omits any mention of case or decisional law. **This omission suggests that rule 402 deprives the judiciary of the common-law power to prescribe exclusionary rules of evidence, and the legislative history of rule 402 confirms that suggestion.**[50]

O.C.G.A. § 24-4-402 closely tracks its federal counterpart and, thus, abolishes prior evidentiary common law, particularly exclusionary lines of authority. In the absence of a specific statutory ground barring the admission of relevant evidence, O.C.G.A. § 24-4-403—*not prior Georgia common law*—provides methods for exclusion.[51] Because Rules 104, 401, 402, and 403 apply code-wide, this principle

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[49] Edward J. Imwinkelried, *A Brief Defense of the Supreme Court's Approach to the Interpretation of the Federal Rules of Evidence ("Brief Defense")*, 27 Ind. L. Rev. 267, 271-282 (1993) (emphasis added) ("Rule 402 is-and should be-the keystone of the structure of the Federal Rules."). *See also Imwinkelried Revolution* at 174 ("Rule 402 is the centerpiece of the Federal Rules of Evidence").

[50] Edward J. Imwinkelried, *The Meaning of Probative Value and Prejudice in Federal Rule of Evidence 403: Can Rule 403 be Used to Resurrect the Common Law of Evidence?*, 41 Vand. L Rev. 879, 881-82 (1988) ("The common law of evidence is dead[.]") (emphasis added).

[51] *Carlson on Evidence*, 7th Ed., p. 76 (citing *Reinhart v. E.I. Dupont de Nemours*, 147 N.J. 156, 164 (1996)).

applies regardless of whether the evidence code provision is federalized, circa 1863, otherwise "carried forward," or a unique creation of Georgia's new Evidence Code.[52]

O.C.G.A. § 24-4-402 is **even more restrictive** on judicial rule-making and aggressive in terms of displacing prior common law than its federal counterpart. Federal Rule 402 allows for "other rules prescribed by the Supreme Court" to potentially exclude relevant evidence.[53] O.C.G.A. § 24-4-402, in contrast, does not include this specific language, thus making greater constraints on judicial rule-making than its federal corollary.[54]

Unless codified under a specific rule number of Georgia's new Evidence Code, prior or future exclusionary Georgia common law has been abrogated by O.C.G.A. § 24-4-402.

Here, by judicial fiat, the trial court architected a common law exclusionary rule in violation of Rule 402. McKinney argues in favor of excluding relevant evidence of McKinney's prior criminal gang activity for a reason *not* appearing in O.C.G.A. § 24-4-418. In other words, McKinney requests this Court affirm the trial

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[52] *See* Carlson & Carlson, *Davis Violations Dissected: "New" Georgia Law and the Crisis in Evidence*, 9 J. Marshall L.J. 1, 5-6 (2015-16) ("*Davis Violations*").
[53] Fed. R. Evid. 402.
[54] Similarly, Georgia removed the provision for judicial development of hearsay rules contained in Federal 802 from Georgia O.C.G.A. § 24-8-802. 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").

court's creation of a common law rule of exclusion not contained in Georgia's evidence statutes. This is the "polar opposite" of Rule 402.

The legislature enacted O.C.G.A. § 24-4-402 to prevent such judicial overreach. The trial court's ruling thus runs afoul not only the Georgia Gang Act and § 24-4-418, but also violates O.C.G.A. § 24-4-402. This Court should reverse.

8. The Trial Court's Order Violated the Doctrine of "*expressio unius est exclusio alterius*."

Expressio unius est exclusio alterius" and *"expressum facit cessare tacitum"*[55] are associated with the principle that courts cannot "force an outcome that the legislature did not expressly authorize."[56] In connection with Federal Rule 402:

> 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**.[57]

Under the Federal and Georgia Rules of Evidence, Rule 403/O.C.G.A. 24-4-403 rather than prior common law exclusionary precedent serves as the basis on

[55] *Hammock v. State*, 277 Ga. 612, 614-615, 592 SE2d 415 (2004). *Expressio unius est exclusion alterius* is translated to "expression of one this implies exclusion of another." *Id.* at 615. *Expressum facit cessare tacitum* is translated to "if some things are expressly mentioned, the inference is stronger that those not mentioned were intended to be excluded." *Id.*

[56] *Turner v. Ga. River Network*, 297 Ga. 306, 308, 773 SE2d 706 (2015).

[57] Imwinkelried, *Brief Defense*, at 275 (emphasis added).

which to exclude otherwise relevant proof in the absence of a specific exclusionary statute:

> Logically relevant evidence is presumed admissible under Rules 401-02. **If there is no statutory exclusionary rule barring the evidence and the evidence successfully runs the gauntlet of Rule 403, the evidence is admissible.**[58]

O.C.G.A. § 16-15-3 and § 16-15-4 were initially enacted in 2006. O.C.G.A. § 24-4-418, however, was not enacted by the legislature until 2016.[59] Additionally, *Rodriguez v. State*[60] – the case McKinney cites in support of his proposition that this Court should judicially amend O.C.G.A. § 24-4-418 to include the nexus language – was decided in 2009. Therefore, the legislature, when drafting O.C.G.A. § 24-4-418 **was obviously aware** of the nexus requirement imposed by the use of the word

[58] Imwinkelried, *Brief Defense*, at 288 (emphasis added) ("When an item of evidence passes the muster of that sequence of analysis, Rules 401-02 are ample statutory authorization for the admission of the evidence. A 'doctrine of admissibility' does not need any statutory sanction other than Rules 401 and 402."). The trial court did not exclude this evidence under Rule 403. Courts, however, observe that it is because of the breadth of an exclusionary order that rulings on motions in limine to exclude evidence pursuant to Fed. R. Evid. 403 are often deferred until trial. *See, e.g., Elm Cooper, LLC v. Modular Steel Sys.*, 2020 U.S. Dist. LEXIS 31646 (MD Penn. Feb. 25, 2020) (explaining "These broad principles favoring the admission of relevant evidence also shape and define the scope of this Court's discretion in addressing motions in limine" and citing the Third Circuit Court of Appeals' disapproval of granting motions to exclude evidence on Rule 403 grounds prior to trial).

[58] Ga. L. 2016, p. 793, 6/HB 874.

[59] Ga. L. 2016, p. 793, 6/HB 874.

[60] *Rodriguez v. State*, 284 Ga. 803, 671 SE2d 497 (2009).

"through" in O.C.G.A. § 16-15-4(a) and specifically chose to ***exclude*** that language from O.C.G.A. § 24-4-418.

The legislature did *not* authorize a trial court to exclude evidence under O.C.G.A. § 24-4-418 in the absence of a nexus requirement. Had the legislature desired such an outcome, it would have included such language, as it is articulated in O.C.G.A. § 16-15-4(a), in O.C.G.A. § 24-4-418. The legislature created a rule favoring admissibility when it enacted O.C.G.A. § 24-4-418 and defined "criminal gang activity" for O.C.G.A. § 24-4-418 as that articulated by O.C.G.A. § 16-15-**3, not O.C.G.A. § 16-15-4(a)**.

McKinney's call to circumvent the legislature is misplaced. The trial court's exclusion of evidence where no such exclusionary rule applies violates established rules of statutory construction, was error, and should be revered.

9. The Trial Court's Order Violated the Doctrine of *in pari materia*.

"It is an elementary rule of statutory construction that a statue must be construed in relation to other statutes of which it is a part, and all statutes relating to the same subject-matter, briefly called statutes *'in pari materia*,' are construed together."[61] Contrary to McKinney's argument, and the trial court's erroneous

[61] *Mathis v. Cannon*, 276 Ga. 16, 26, 573 SE2d 376 (2002) (citing *Butterworth v. Butterworth*, 227 Ga. 301, 303-304,180 SE2d 549 (1971)); *see also Ryan v. Commissioners of Chatham County*, 203 Ga. 730, 731-732, 48 SE2d 86 (1948).

findings, when read *in pari materia*, O.C.G.A. § 24-4-418 must be construed *without* a nexus requirement.

When read in conjunction with the Georgia Gang Act (O.C.G.A. § 16-15-2), O.C.G.A. § 24-4-418 effectuates the legislature's intent articulated to address the "state of crisis" in Georgia that "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."[62]

Importantly, the Georgia Gang Act specifically "***seek[s] the eradication*** of **criminal activity** by criminal street gangs by focusing upon **criminal gang activity.**"[63] The code section immediately following that act – O.C.G.A. § 16-15-3 – then states (in relevant part to this appeal):

> As used in this chapter, the term: (1) 'criminal gang activity' means the commission, attempted commission, conspiracy to commit, or the solicitation, coercion, or intimidating of another person to commit any of the following offenses on or after July 1, 2006: . . . (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 the maximum sentence that could be imposed or actually was imposed.[64]

This code section lists a total of eleven categories of crime that constitutes "criminal gang activity."[65] When read together, it is clear that the General Assembly sought to

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[62] O.C.G.A. § 16-15-2(b).
[63] O.C.G.A. § 16-15-2 (c) (emphasis supplied).
[64] O.C.G.A. § 16-15-3 (emphasis supplied).
[65] O.C.G.A. § 16-15-3.

eradicate the criminal gang activity targeted by the Georgia Gang Act (O.C.G.A. § 16-15-2) by "focusing upon" the specific crimes defined as "criminal gang activity" by O.C.G.A. § 16-15-3(1)(A)-(J); (2).

In comparison, O.C.G.A. § 16-15-4(a) prohibits "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."[66] O.C.G.A. § 24-4-418 specifically excludes the "through" language that the legislature used in O.C.G.A. § 16-15-4(a). In drafting O.C.G.A. § 24-4-418, the legislature instead opted to use the language: "evidence of the accused's commission of criminal gang activity, **as such term is defined in Code Section 16-15-3.**"[67]

McKinney asks for a limitation on O.C.G.A. § 24-4-418 that does not appear in the text of the interconnected definitional statute, O.C.G.A. § 16-15-3. Hamstringing the application of Georgia's anti-gang laws, a la McKinney's argument, would run afoul of the purposes of the Street Gang Act. Plus, doing so, as the trial court did in its order, violates the requirement to construe statutes *in pari materia*. This error in statutory analysis demands reversal.

[66] O.C.G.A. § 16-15-4(a).
[67] O.C.G.A. § 24-4-418.

10. The Trial Court's Order Misapplies *Rodriguez v. State*.[68]

The Georgia Supreme Court has provided guidance on how courts must interpret O.C.G.A. §§ 16-15-3 and 16-15-4(a) *in pari materia* with one another, and that holding is dispositive to this case:

> Although the enumeration of offenses of O.C.G.A. § 16-15-3(1) is essentially incorporated into O.C.G.A. § 16-15-4(a) at three different points, that fact does not make the latter statute redundant. . . . [T]he phrase 'criminal gang activity' **is itself broader** than the commission of an enumerated offense and includes the unlawful procurement of the offense. More importantly, the purpose of O.C.G.A. § 16-15-3(1) is to define the "activity" and not the "actor." In the definition of "criminal street gang" in paragraph (2), the actor is the group acting through its members. That phrase is contained in the reference to **"criminal street gang activity" in O.C.G.A. § 16-15-4(a), which is not identical to the phrase "criminal gang activity" as defined in O.C.G.A. § 16-15-3(1).**[69]

[68] *Rodriguez v. State*, 284 Ga. 803, 671 SE2d 497 (2009).
[69] *Rodriguez*, 284 Ga. at 806 (emphasis supplied).

The Georgia Supreme Court thus mandates the same conclusion the State now asserts: "criminal street gang activity"[70] as defined by O.C.G.A. § 16-15-4(a) **is not** the same as "criminal gang activity" as defined by O.C.G.A. § 16-15-3(1).[71]

O.C.G.A. § 24-4-418 does *not* require the State to show "criminal street gang activity as defined by O.C.G.A. § 16-15-4(a)" for those acts to be admissible.[72] Instead, O.C.G.A. § 24-4-418 permits the State to introduce evidence of prior acts of a defendant's "criminal gang activity **as defined by O.C.G.A. § 16-15-3**."[73]

Therefore, the trial court's position that *Rodriguez* supports the finding of a nexus requirement in O.C.G.A. § 24-4-418, and McKinney's brief in support of that position, is facially incorrect.

The trial court's order was based on the trial court's misinterpretation of *Rodriguez*. As such, this Court should reverse.

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[70] In 2010, this statute was amended to exclude the term "street" in O.C.G.A. § 16-15-4(a). Prior to 2010, O.C.G.A. § 16-15-4(a) read: "It shall be unlawful for any person employed by or associated with a criminal street gang to conduct or participate in criminal **street** gang activity through the commission of any offense enumerated in paragraph (1) of Code Section 16-15-3." 2010 Ga. ALS 406, 200 Ga. Laws 206, 2009 HB 1015 (enacted May 20, 2010) (emphasis supplied). Following the 2010 amendment, the code section was specifically changed to: "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." *Id.* This change was made to standardize the charging language in O.C.G.A. § 16-15-4.

[71] *Rodriguez*, 284 Ga. at 806.

[72] Again, O.C.G.A. § 16-15-4(a) represents only one of ten offenses involving "criminal gang activity" in O.C.G.A. § 16-15-4.

[73] O.C.G.A. § 24-4-418 (emphasis added).

11. The Trial Court's Order Failed to Consider the Multiple Other Charging Sections of O.C.G.A. § 16-15-4.

In addition to the various violations delineated above, the trial court's order makes another error. By focusing on a "nexus" requirement and the *Rodriguez* decision, the trial court's order *only* considers O.C.G.A. § 16-15-4**(a)**. In fact, O.C.G.A. § 16-15-4 contains a host of charging provisions, only one of which, O.C.G.A. § 16-15-4(a), was addressed in *Rodriguez*. Critically, O.C.G.A. § 24-4-418 applies to *any and all* offenses prosecuted under O.C.G.A. § 16-15-4, as do the definitions under O.C.G.A. § 16-15-3.

Rodriguez specifically addressed a challenge to O.C.G.A. § 16-15-4(a).[74] In *Rodriguez*, the Georgia Supreme Court noted how the different charging sections in this statute have different requirements, explaining, for example, that section (c) "expressly require[es] that the defendant have an intent to maintain or increase his or her status or position in the criminal street gang."[75]

The Georgia Supreme Court then applied the "nexus" requirement *only* to section (a) of O.C.G.A. § 16-15-4. The Court explained:

> [T]here must be some nexus between the act and an intent to further street gang activity. **That nexus is provided by use of the preposition "through" in O.C.G.A. § 16-15-4(a).** Furthermore, that last portion of the statute, **beginning with that preposition,** indicates that the means of participation in or management of criminal street gang activity is not

[74] *Rodriguez*, 284 Ga. at 807.
[75] *Id.* This subsection now appears at O.C.G.A. § 16-15-4(b) and is charged in the indictment in this case. (R. 91-103).

> merely the unlawful procurement of an enumerated offense, but rather consists of the actual commission of an enumerated offense by the defendant himself. Therefore, under its most natural reading, O.C.G.A. **§ 16-15-4(a) requires gang participation by the defendant** which is active by any measure.[76]

Accordingly, McKinney's argument is defeated by even a cursory reading of O.C.G.A. § 16-15-4. O.C.G.A. § 16-15-4 outlines *ten* different charging provisions, providing *ten* different ways a defendant may violate this statute.[77] All are viable charges for the admission of evidence under O.C.G.A. § 24-4-418 and most include the phrase "criminal gang activity," which is defined in O.C.G.A. § 16-15-3.

However, ***only*** O.C.G.A. § 16-15-4(a) contains the "nexus" requirement. The other charging provisions **do not** contain the "nexus requirement." That is, sections (b) through (j) do not include the same language as directly addressed by the Georgia Supreme Court in *Rodriguez*.[78] The vast majority of the sections do not even contain the word "through."

Sections (b) through (j) each outline different elements and provide different ways a defendant may violate this statute, which is why the General Assembly has

[76] *Rodriguez*, 284 Ga. at 807.
[77] O.C.G.A. § 16-15-4 (a) – (j).
[78] O.C.G.A. § 16-15-4 (b) – (j).

mandated that "any crime committed in violation of this Code section shall be considered a separate offense."[79]

The trial court's order, then, fails to read the statute "as a whole," as required by the rules of statutory construction.[80] The basis to exclude the evidence in this case was based upon a false premise that O.C.G.A. § 16-15-4(a) is the lone charging provision in O.C.G.A. § 16-15-4. Any review of O.C.G.A. § 16-15-4—*or even the indictment in this case*—shows otherwise.[81] As the trial court's order is based upon this misreading, it should be reversed.

12. Evidence Rules Should be Evenly Applied.

Evidence statutes are designed so that the rules of admissibility operate evenly:

> "**In most cases, whatever the identity of the proponent of the evidence, the foundational requirements for admitting the evidence and the possible objections to admission remain the same**."[82]

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[79] O.C.G.A. § 16-15-4 (m) ("[A]ny crime committed in violation of this Code section shall be considered a separate offense."); *see also Lupoe v. State*, 300 Ga. 233, 239, 794 SE2d 67 (2016) ("Likewise, the gang activity counts did not merge as that crime and malice murder each require proof of an element that the other does not.");

[80] *La Fontaine v. Signature Research Inc.*, 305 Ga. 107, 823 SE2d 791 (2019) ("In construing language in any one part of a statute, a court should consider the statute as a whole.") (citing *Lyman v. Cellchem Intl.*, 300 Ga. 475, 477, 796 SE2d 255 (2017)).

[81] McKinney is charged with *various* violations of O.C.G.A. § 16-15-4, including sections (a), (b), and (e). *Only* section (a) requires the "nexus" requirement as defined in *Rodriguez*. (R. 92-103).

[82] Imwinkelried, *Of Evidence and Equal Protection: The Unconstitutionality of Excluding Government Agents' Statements Offered as Vicarious Admissions Against the Prosecution*, 71 Minn. L. Rev. 269, 313 (1986) (emphasis added).

Running against this principle, scattered evidence decisions that have violated rules of statutory construction did so when adhering to them would lead to the introduction of incriminating evidence.[83] Other evidence law reversals follow this general pattern.[84]

By advocating for a non-textual basis on which to exclude admissible evidence, McKinney appears to argue in favor of a continuation of the foregoing pattern. McKinney's position is belied by modern evidence codes, like Georgia's, which serve as rules of inclusion and adhere to form and philosophies of the Federal Rules of Evidence.[85]

[83] *See State v. Almanza*, 344 Ga. App. 38, 807 SE2d 517 (2017) *reversed at* 304 Ga. 553, 820 SE2d 1 (2018); *Jones v. State*, 326 Ga. App. 658, 757 SE2d 261 (2014), *reversed at* 297 Ga. 156, 773 SE2d 170 (2015).

[84] *E.g.*, *State v. Brown*, 333 Ga. App. 643, 777 SE2d 27 (2015).

[85] *Carlson on Evidence*, 7th Ed., p. 70 (citing *Miller v. Poretsky*, 595 F.2d 780 (D.C. Cir. 1978); *Elm Cooper LLC v. Modular Steel Sys.*, 2020 U.S. Dist. LEXIS 31646 (M.D. Pa. 2020)).

13. The Trial Court's Order Violated the Absurd Result Rule.

Courts "must construe a statute so as to avoid an absurd result."[86] Similarly, legal analysis must survive scrutiny under the doctrine of *reductio ad absurdum*.[87]

Simply put, McKinney argues for an absurd result. Reduced to its base elements, McKinney's postulate is that the above-mentioned rules and principles should be violated—or at least ignored—in order for O.C.G.A § 24-4-418 to operate in conjunction with the Street Gang Act to make it more—as opposed to less—difficult to introduce other acts of criminal gang activity in O.C.G.A § 16-15-4 prosecutions. Such a result would represent an absurdity and one at the cost of public safety.

This Court should reverse the decision of the trial court to avoid such an absurd result.

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[86] *Groover v. Johnston*, 277 Ga. App. 12, 14, 625 SE2d 406 (2005) (citing *Mansfield v. Pannell*, 261 Ga. 243, 244, 404 SE2d 104 (1991)); *see generally Haugen v. Henry County*, 277 Ga. 743, 746, 594 SE2d 324 (2004); *Sikes v. State*, 268 Ga. 19, 21, 485 SE2d 206 (1997)*; see also United States v. Ballinger*, 395 F.3d 1218, 1237 (11th Cir. 2005) *cert. denied* at 546 U.S. 1056.

[87] *See Logan v. WMC Mortg. Corp. (In re Gray)*, 410 B.R. 270, 279 (Bankr. S.D. Ohio 2009) (explaining that *reductio ad absurdum* is Latin for "reduction to the absurd" and a shorthand for the logical principle providing for disproof of an argument by showing that it leads to a ridiculous conclusion)*; see also Julian v. State*, 134 Ga. App. 592, 600, 215 SE2d 496 (1975), Evans, J. *concurring specially* ("To reduce this position to an absurdity (*reductio ad absurdum*) which is a well recognized and logical process of reasoning…."); *Peraza v. State*, 467 S.W.3d 508, 515 (Tex. Crim. App. 2015) ("*Reductio ad absurdum* is the technique of reducing an argument or hypothesis to absurdity.").

14. The State was Permitted to Use a Factual Summary.

McKinney complains that he has not yet been convicted of any charges in the indictment and that based upon this, the State was not entitled to proffer its anticipated evidence in the trial court or this Court.

The State was permitted to use a factual summary in its opening brief to this Court. In the related area of O.C.G.A. §§ 24-4-413 and 24-4-414, pretrial evidentiary proffers have been allowed.[88] Also, O.C.G.A. § 24-1-2(c)(1) mandates that the rules of evidence "shall not apply" to pretrial hearings on evidence admissibility, such as the hearing concerning this appeal.[89] O.C.G.A. § 24-1-104 similarly holds that the admissibility of evidence is governed by the court, and "the court shall not be bound by rules of evidence except those with respect to privileges."[90]

Further, "[a]ttorneys are officers of the court and a statement to the court in their place is *prima facie* true and needs no further verification unless the same is required by the court or the opposite party."[91] Here, there was no objection in the lower court to the State providing evidence in the O.C.G.A. § 24-4-418 hearing by proffer.

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[88] *See Wilson v. State*, 312 Ga. 174, 176-177, 860 SE2d 485 (2021); *see also United States v. LeMay*, 260 F.3d 1018 (9th Cir. 2001).
[89] O.C.G.A. § 24-1-2(c)(1).
[90] O.C.G.A. § 24-1-104; *see also Carlson on Evidence*, 7th Ed., p. 34.
[91] *Sherman v. City of Atlanta,* 293 Ga. 169, 173, 744 SE2d 689 (2013).

To the extent these facts in the State's opening brief were gleaned from the pretrial hearings in this case, those facts are permissible and need not be proven beyond a reasonable doubt. Therefore, the State properly established these facts by proffer in the lower court and outlined the facts of this case in the factual summary in its initial brief.

CONCLUSION

Scholarship from University of Georgia School of Law Professor Coenen explains that adhering to the Doctrine of Separation of Powers in-and-of-itself ensures against absurd jurisprudential results:

> There is another reason rooted in background law for concluding that the Framers [of the United States Constitution] embraced an unabridgeable mandate of legislative majoritarianism. ***The reason is that a rejection of that mandate is in tension with the canon of construction that abjures "absurd results***."[92]

The reasons to reverse this case are legion. The trial court's order erred under Georgia's Constitution, controlling case law, statutory law, and established canons of construction.

The Georgia Gang Act was enacted to combat the escalating violence inflicted upon this State's citizens by the "crisis" of dangerous criminal street gangs.

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[92] *See* Dan T. Coenen, *The Originalist Case Against Congressional Supermajority Voting Rules*, 106 NW. U.L. Rev. 1091, 1126-27 (2012) (emphasis added) ("The mandatory norm of legislative majoritarianism that these Framers embraced took hold in large measure because it made good sense.").

O.C.G.A. § 24-4-418 is a necessary component, added to expand the volume and uses of gang evidence, designed to "improve the ability to prosecute street gang terrorism." These statutes were enacted to prevent the exact type of violence shown in this case: the terrorism of innocent civilians at the hands of armed and violent gang members.

By misreading O.C.G.A. § 24-4-418 and imposing judicially-crafted, artificial barriers to the introduction of admissible, relevant evidence, the order of the trial court was issued in error.

For the reason stated herein and in the State's Opening Brief, the State respectfully urges this Court to reverse the trial court's ruling excluding McKinney's 2015 and 2016 acts of armed criminal gang activity.

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

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CERTIFICATE OF SERVICE

I do hereby certify that I have this day served the within and foregoing Reply 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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