

2023

SB 44 - Expanding the Street Gang Terrorism and Prevention Act

Aaron L. Brown

Georgia State University College of Law, abrown210@student.gsu.edu

Anna C. Dillon

Georgia State University College of Law, adillon6@student.gsu.edu

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CRIMES AND OFFENSES

Street Gang Terrorism and Prevention: Amend Section 1 of Chapter 7 of Title 5 of the Official Code of Georgia Annotated, Relating to Orders, Decisions, or Judgments Appealable and Defendant's Right to Cross Appeal, so as to Provide for the State's Right to Appeal the Court's Deviation from Mandatory Minimum Sentencing Regarding Certain Offenses; Amend Title 16 of the Official Code of Georgia Annotated, Relating to Crimes and Offenses, so as to Provide for Mandatory Minimum Penalties for Violations of the Street Gang Terrorism and Prevention Act; Provide for an Exception for Imposing such Mandatory Penalties in Certain Circumstances; Amend Section 12 of Article 1 of Chapter 6 of Title 17 of the Official Code of Georgia Annotated, Relating to Unsecured Judicial Release, Requirement, and Effect of Failure of Person Charged to Appear for Trial, so as to Provide for the Limitation of Unsecured Judicial Release in Certain Circumstances where the Accused has a Prior Conviction for the Offense of Bail Jumping or Failure to Appear; Provide for the Requirement that an Accused's Criminal History be Considered prior to Issuing an Unsecured Judicial Release; to Provide for Reconsideration of Eligibility; Amend Section 26 of Article 1 of Chapter 7 of Title 52 of the Official Code of Georgia Annotated, Relating to Penalty Regarding General Provisions for Registration, Operation, and Sale of Watercraft, so as to Provide for a Conforming Cross Reference; Provide for Related Matters; Provide for an Effective Date and Applicability; Repeal Conflicting Laws; and for Other Purposes

CODE SECTIONS: O.C.G.A. §§ 5-7-1 (amended); 16-15-4 (amended); 17-6-12 (amended); 52-7-26 (amended)

BILL NUMBER:	SB 44
ACT NUMBER:	29
GEORGIA LAWS:	2023 Ga. Laws 64
EFFECTIVE DATES:	July 1, 2023
SUMMARY:	The Act primarily functions to enhance penalties for violations of the Street Gang Terrorism and Prevention Act. The Act imposes mandatory minimum sentences for those convicted of criminal gang activity and also carves out specific exceptions from the mandatory minimum sentences. Additionally, this Act preserves the State's right to appeal a court's deviation from these mandatory minimum sentencing guidelines. Finally, this Act imposes limits on the use of unsecured judicial release.

History

“[C]ome after our children, and we will come after you.”¹ This is the rallying cry raised by Governor Brian Kemp (R) while continuing the effort to crack down on gang activity in Georgia.² As Governor Kemp and legislators pushed Senate Bill (SB) 44 through the Georgia General Assembly, proponents of the bill sought to target gang recruitment and eliminate recruitment of minors into criminal street gangs.³ The Georgia Office of the Attorney General estimates that there are 71,000 validated gang affiliates and over 1,500 suspected

1. Press Release, Office of the Governor, Gov. Kemp Signs Public Safety and Anti-Gang Legislation (Apr. 26, 2023) [hereinafter Gov. Brian Kemp Legislation Press Release], <https://gov.georgia.gov/press-releases/2023-04-26/gov-kemp-signs-public-safety-and-anti-gang-legislation> [https://perma.cc/M7PX-YTQD].

2. *Id.*

3. Video Recording of Senate Judiciary Committee Meeting at 23 min., 4 sec. (Feb. 6, 2023) [hereinafter Senate Judiciary Meeting Video] (remarks by Sen. Bo Hatchett (R-50th)), <https://vimeo.com/showcase/8821960/video/796392139> [https://perma.cc/ZL6R-SL84] (“More must be done to keep our children away from a life of crime and keep our community safe.”).

gangs across the state.⁴ Furthermore, in 2018, the Georgia Gang Investigators Association (GGIA) documented that “157 counties reported a rise in gang activity and 155 school districts reported suspected gang activity.”⁵ According to both the GGIA and the Fulton County District Attorney Fani Willis, those gangs are responsible for between seventy-five and eighty percent of all violent crimes and between seventy and eighty percent of all property crimes.⁶ In 2011, the National Gang Center estimated that thirty-five percent of gang members were juveniles.⁷

Governor Kemp included “[c]rack[ing] down on gang activity and human trafficking affecting every community across Georgia” in his list of priorities for his second term in office.⁸ The Governor reiterated these objectives in the 2023 State of the State address.⁹ In the address, Governor Kemp specifically called out the recruitment of minors as a target stating, “In communities across our state, gangs are actively recruiting children as young as elementary school students into a life of crime. They are targeting the most innocent among us, pulling them down a dark path that too often leads to either a prison cell or the cemetery.”¹⁰

Georgia already has extensive anti-street gang laws, but SB 44 makes the punishments under those laws harsher. Whereas those previously convicted for participation in criminal gang activity under Code section 16-15-4 faced a five- to twenty-year sentence with possible probation, SB 44 removes the ability to offer probation or

4. *Gang Activity*, OFF. OF THE ATT’Y GEN., <https://law.georgia.gov/key-issues/gang-activity> [<https://perma.cc/28UP-CCCS>].

5. *Id.*

6. *Gang Unit*, S. FULTON POLICE DEP’T, <https://www.cityofsouthfultonga.gov/2721/Gangs-Unit> [<https://perma.cc/JLW8-BHQR>]; *Gang Violence Is Responsible for Nearly 75%-80% Percent of Crime in Atlanta, Fulton County DA Says*, WSB-TV (May 11, 2022, 1:10 AM), <https://www.wsbtv.com/news/local/atlanta/gang-violence-is-responsible-nearly-75-80-percent-crime-atlanta-fulton-county-da-says/NALC6JVLABHSPFYTEH4TII2WQI/> [<https://perma.cc/83BY-23TZ>].

7. *National Youth Gang Survey Analysis: Demographics*, NAT’L GANG CTR., <https://nationalgangcenter.ojp.gov/survey-analysis/demographics> [<https://perma.cc/LT2N-Q9CF>].

8. *Initiatives and Priorities*, GOV. BRIAN P. KEMP, OFF. OF THE GOV., <https://gov.georgia.gov/about-us/initiatives-and-priorities> [<https://perma.cc/GN5P-35P9>].

9. Press Release, Office of the Governor, Gov. Brian P. Kemp’s 2023 State of the State Address (Jan. 25, 2023) [hereinafter Gov. Brian Kemp State of the State Address Press Release], <https://gov.georgia.gov/press-releases/2023-01-25/governor-brian-p-kemps-2023-state-state-address> [<https://perma.cc/C3NF-SFEC>].

10. *Id.*

parole.¹¹ Additionally, SB 44 requires that anyone convicted of recruiting an individual under the age of seventeen must be sentenced to an elevated ten- to twenty-year sentence with no possibility for probation or parole.¹²

Some have claimed that the Governor's criminal justice efforts are a departure from his predecessor's work.¹³ Former Governor Nathan Deal (R), who left a legacy of criminal justice reform, took steps to reduce long-term incarceration, especially for nonviolent crimes and misdemeanors.¹⁴ Governor Kemp, however, believes SB 44 will "help us stop the spread of gangs, hold offenders accountable, and keep our communities safe."¹⁵

Bill Tracking of SB 44

Consideration and Passage by the Senate

SB 44 began in the Georgia Senate sponsored by Senator Bo Hatchett (R-50th), Senator John F. Kennedy (R-18th), Senator Steve Gooch (R-51st), Senator Randy Robertson (R-29th), Senator Lee Anderson (R-24th), Senator John Albers (R-56th), Senator Jason Anavitarte (R-31st), Senator Matt Brass (R-28th), Senator Brandon Beach (R-21st), Senator Carden Summers (R-13th), Senator Billy Hickman (R-4th), Senator Rick Williams (R-25th), Senator Max Burns (R-23rd), Senator Bill Cowsert (R-46th), Senator Mike Hodges (R-3rd), Senator Kay Kirkpatrick (R-32nd), Senator Frank Ginn (R-47th), Senator Larry Walker, III (R-20th), Senator Clint Dixon (R-45th), Senator Blake Tillery (R-19th), Senator Ben Watson (R-1st), Senator Marty Harbin (R-16th), and Senator Russ Goodman (R-8th).¹⁶ After placing the bill in the Senate hopper on January 30, 2023, the

11. O.C.G.A. § 16-15-4 (2022); SB 44, as introduced, § 1, p. 2, ll. 30–33, 2023 Ga. Gen. Assemb.; 2023 Ga. Laws 64, § 2, at 65 (codified at O.C.G.A. § 16-15-4(k)(2) (2023)).

12. O.C.G.A. § 16-15-4(k)(2) (2023).

13. Greg Bluestein, *Kemp's Tough-on-Crime Plan Veers Sharply from Deal's Approach*, ATLANTA J.-CONST. (Jan. 20, 2022), <https://www.ajc.com/politics/kemps-tough-on-crime-plan-veers-sharply-from-deals-approach/XWGDNK7UPFBIBJSQS4HMQCEOU/> [https://perma.cc/LL5Y-LV9B].

14. *Id.*

15. Gov. Brian Kemp Legislation Press Release, *supra* note 1.

16. Georgia General Assembly, SB 44, Bill Tracking [hereinafter SB 44, Bill Tracking], <https://www.legis.ga.gov/legislation/63781> [https://perma.cc/QP6L-3U96].

Senate first read the bill on January 31, 2023, and committed the bill to the Senate Judiciary Committee.¹⁷

The Senate Judiciary Committee met to discuss SB 44 on February 6, 2023, and after recording a 6 to 3 vote, the Committee favorably reported the bill by substitute on February 7, 2023.¹⁸ The substitute added the Attorney General as a party who may move the sentencing court to reduce or suspend a sentence for a person convicted under Code section 16-15-4.¹⁹ The Senate read SB 44 for the second time on February 8, 2023.²⁰ On February 13, 2023, the Senate read the bill for a third time.²¹ Following floor debate, senators presented two amendments to the bill. The first amendment, offered by Senator Kim Jackson (D-41st) and Senator Josh McLaurin (D-14th), suggested carving out an exception to the mandatory minimums for individuals under the age of eighteen who were also victims of sexual exploitation and trafficking.²² With a final vote of 25 to 28, the amendment did not pass.²³ The second amendment, offered by Senator Derek Mallow (D-2nd) and Senator Emanuel Jones (D-10th), would have altered when a judge may depart from the mandatory minimum by allowing a lesser sentence if the convicted individual met any one of the conditions listed in the bill rather than requiring all five.²⁴ With a final vote of 23 to 30, the amendment did not pass.²⁵ The bill passed in the Senate by a vote of 31 to 22 on February 13, 2023.²⁶

17. *Id.*; State of Georgia Final Composite Status Sheet, SB 44, May 9, 2023.

18. State of Georgia Final Composite Status Sheet, SB 44, May 9, 2023; *see also* Senate Judiciary Meeting Video, *supra* note 3, at 1 hr., 30 min., 27 sec. (moving to pass SB 44).

19. *Compare* SB 44, as introduced, § 1, p. 3, l. 68, 2023 Ga. Gen. Assemb., *with* SB 44 (SCS), § 1, p. 3, l. 68, 2023 Ga. Gen. Assemb.

20. State of Georgia Final Composite Status Sheet, SB 44, May 9, 2023.

21. *Id.*

22. Failed Senate Floor Amendment to SB 44, introduced by Sen. Kim Jackson (D-41st) and Sen. Josh McLaurin (D-14th), Feb. 13, 2023.

23. Georgia Senate Voting Record, SB 44, #33 (Feb. 13, 2023).

24. Failed Senate Floor Amendment to SB 44, introduced by Sen. Derek Mallow (D-2nd) and Sen. Emanuel Jones (D-10th), Feb. 13, 2023.

25. Georgia Senate Voting Record, SB 44, #34 (Feb. 13, 2023).

26. Georgia Senate Voting Record, SB 44, #35 (Feb. 13, 2023).

Consideration and Passage by the House of Representatives

Representative Soo Hong (R-103rd) sponsored SB 44 in the House of Representatives.²⁷ The House first read the bill on February 14, 2023, and committed the bill to the House Judiciary Non-Civil Committee.²⁸ On February 15, 2023, the House read SB 44 for a second time.²⁹ The Committee amended the bill to add provisions limiting the availability of unsecured judicial release.³⁰ The Committee favorably reported SB 44 by substitute on March 14, 2023.³¹ The House conducted a third read on March 20, 2023, and the House passed SB 44, as amended, by a vote of 99 to 74.³²

Final Passage by the Senate and the Governor's Signature

The Senate agreed to the House amendments on March 29, 2023, by a vote of 30 to 20.³³ On April 5, 2023, the Senate sent the bill to the desk of Governor Brian Kemp (R).³⁴ Governor Kemp signed SB 44 into law as Act 29 on April 26, 2023.³⁵ The Act's effective date is July 1, 2023.³⁶

The Act

The Act amends the following portions of the Official Code of Georgia Annotated: Code section 5-7-1, "relating to orders, decisions, or judgments appealable and defendant's right to cross appeal"; Title 16, "relating to crimes and offenses"; Code section 17-6-12, "relating to unsecured judicial release, requirement, and effect of failure of person charged to appear for trial"; and Code section 52-7-26, "relating

27. SB 44, Bill Tracking, *supra* note 16.

28. *Id.*; State of Georgia Final Composite Status Sheet, SB 44, May 9, 2023.

29. State of Georgia Final Composite Status Sheet, SB 44, May 9, 2023.

30. SB 44 (HCS), § 3, pp. 5–8, ll. 108–92, 2023 Ga. Gen. Assemb.; *id.* § 4, p. 8, ll. 193–99.

31. State of Georgia Final Composite Status Sheet, SB 44, May 9, 2023.

32. *Id.*; Georgia House of Representatives Voting Record, SB 44, #258 (Mar. 20, 2023).

33. State of Georgia Final Composite Status Sheet, SB 44, May 9, 2023; Georgia Senate Voting Record, SB 44, #368 (Mar. 29, 2023).

34. State of Georgia Final Composite Status Sheet, SB 44, May 9, 2023.

35. *Id.*

36. SB 44, Bill Tracking, *supra* note 16.

to penalty regarding general provisions for registration, operation, and sale of watercraft.”³⁷ The overall purpose of the Act is to increase the penalties for “violation[s] of the criminal street gang statute, in order to crack down on individuals that perpetuate these crimes.”³⁸

Section 1

Section 1 of the Act amends subsection (a) of Code section 5-7-1.³⁹ Code section 5-7-1 relates to “[o]rders, decisions, or judgements appealable” and “defendant’s right to cross appeal.”⁴⁰ The Act adds paragraph (11) to subsection (a) to extend the state’s power to appeal a judgement “[f]rom an order, decision, or judgment that reduces the mandatory minimum sentence as provided in subsection (k) of Code [s]ection 16-15-4.”⁴¹

Section 2

Section 2 of the Act amends subsection (e) and subsection (k) of Code section 16-15-4.⁴² Code section 16-15-4 relates to “[p]articipation in prohibited criminal gang activity” and prosecution.⁴³ The Act modifies subsection (e) to make both recruiting another person “directly, or through another acting upon such person’s direction” illegal, thus broadening the scope of who is considered to be recruiting for a criminal street gang.⁴⁴

Paragraph (1) of subsection (k) is changed to clarify the meaning of “dangerous weapon,” “firearm,” “hazardous object,” and “leader” as used in Code section 16-15-4.⁴⁵ For the purposes of this Code section, dangerous weapon refers to the definition provided in Code section

37. 2023 Ga. Laws 64, §§ 1–4, at 64–68.

38. Video Recording of Senate Proceedings at 1 hr., 18 min., 37 sec. (Feb. 13, 2023) [hereinafter Senate Proceedings Video] (remarks by Sen. Bo Hatchett (R-50th), <https://vimeo.com/showcase/9076378?video=797408921> [<https://perma.cc/DS6J-V3ZK>]).

39. 2023 Ga. Laws 64, § 1, at 64.

40. O.C.G.A. § 5-7-1 (2023).

41. 2023 Ga. Laws 64, § 1, at 64 (codified at § 5-7-1(a)(11)).

42. 2023 Ga. Laws 64, § 2, at 64.

43. O.C.G.A. § 16-15-4 (2023).

44. 2023 Ga. Laws 64, § 2, at 64–65 (codified at § 16-15-4(e)).

45. *Id.* at 65 (codified at § 16-15-4(k)(1)).

16-11-121, and hazardous object refers to the definition provided in Code section 20-2-751.⁴⁶ Firearm refers to “any handgun, rifle, shotgun, or other weapon which will or can be converted to expel a projectile by the action of an explosive or electrical charge and which is not a dangerous weapon.”⁴⁷ Leader refers to “a person who planned and organized others and acted as a guiding force in order to achieve a common goal.”⁴⁸

Paragraph (2) of subsection (k) is amended to impose a “mandatory minimum term of imprisonment of five years but not more than [twenty] years” for those who violate the Code section.⁴⁹ This mandatory minimum sentence must be served consecutively with any other sentences, and no part of the term is permitted to be “suspended, stayed, probated, deferred, or withheld by the sentencing court.”⁵⁰

The amended paragraph (3) of subsection (k) establishes additional specific mandatory minimums for those who violate subsection (e) of Code section 16-15-4 and the violation involves someone under the age of seventeen or someone with a disability.⁵¹ For the first conviction of this kind, this subsection imposes a mandatory minimum prison term of “ten years but not more than [twenty] years.”⁵² With the second violation of this Code section, there is a mandatory minimum term of imprisonment of “[fifteen] years but not more than [twenty-five] years.”⁵³ Both of these mandatory minimum sentences are accompanied by the same conditions established in paragraph (2) of subsection (k): the mandatory minimums must be served consecutively with any other sentences, and no part of the sentence can be

46. § 16-15-4(k)(1)(A), (C); O.C.G.A. § 16-11-21 (2023); O.C.G.A. § 20-2-751 (2023). A dangerous weapon is “any weapon commonly known as a ‘rocket launcher,’ ‘bazooka,’ or ‘recoilless rifle’ which fires explosive or nonexplosive rockets designed to injure or kill personnel or destroy heavy armor, or similar weapon used for such purpose.” § 16-11-121. A hazardous object is any item, including knives, razors, bludgeons, throwing stars, air guns, and stun guns, that poses a potential danger, as defined by specific characteristics and types. § 20-2-751.

47. § 16-15-4(k)(1)(B).

48. *Id.* § 16-15-4(k)(1)(D).

49. 2023 Ga. Laws 64, § 2, at 65 (codified at § 16-15-4(k)(2)).

50. § 16-15-4(k)(2).

51. 2023 Ga. Laws 64, § 2, at 65 (codified at § 16-15-4(k)(3)).

52. § 16-15-4(k)(3)(A)(i).

53. *Id.* § 16-15-4(k)(3)(A)(ii).

“suspended, stayed, probated, deferred, or withheld by the sentencing court.”⁵⁴

Paragraphs (4) and (5) of subsection (k) carve out two available exceptions to the mandatory minimum prison sentences levied in paragraph (2) of subsection (k).⁵⁵ Violations described in paragraph (3) of subsection (k) are ineligible for consideration under subsections paragraphs (4) or (5).⁵⁶ Paragraph (4) of subsection (k) permits the district attorney or the Attorney General to move for the sentencing court to opt for a reduced or suspended sentence on a person who is convicted under this Code section if the person “provides substantial assistance in the identification, arrest, or conviction of any of his or her accomplices, accessories, coconspirators, leaders, or principals.”⁵⁷ Paragraph (5) of subsection (k) permits a judge to use the court’s discretion to diverge from the mandatory minimum terms and opt for a reduced or suspended sentence if the judge determines that the following five factors are met:

- (i) The defendant was not a leader of the criminal conduct;
- (ii) The defendant did not possess or use a firearm, dangerous weapon, or hazardous object during the crime;
- (iii) The criminal conduct did not result in death or serious bodily injury to a person other than to a person who was a party to the crime;
- (iv) The defendant has no prior felony conviction; and
- (v) The interests of justice will not be served by the imposition of the prescribed mandatory minimum sentence.⁵⁸

If a judge chooses this option, the judge must note the considerations behind the decision on the record.⁵⁹

54. *Id.* § 16-15-4(k)(3)(A)(i)-(ii).

55. *Id.* § 16-15-4(k)(4)-(5).

56. *Id.* § 16-15-4(k)(3)(B). (“A mandatory minimum sentence imposed pursuant to this paragraph shall not be reduced, suspended, or otherwise departed from pursuant to paragraph (4) or (5) of this subsection.”).

57. *Id.* § 16-15-4(k)(4).

58. O.C.G.A. § 16-15-4(k)(5)(A)(i)-(v) (2023).

59. *Id.* § 16-15-4(k)(5)(B).

Section 3

Section 3 of the Act amends subsection (b), subsection (c), and subsection (f) of Code section 17-6-12.⁶⁰ Code section 17-6-12 relates to “[u]nsecured judicial release; requirement; effect of failure of person charged to appear for trial; [and] consideration of criminal record.”⁶¹ The amendments to paragraph (1) of subsection (b) create further requirements for a judge to be able to issue an unsecured judicial release on a person’s own recognizance.⁶² First, the person must not have a bail jumping conviction within the past five years.⁶³ Second, a person may not have a bench warrant issued for failure to appear in court within the past five years.⁶⁴ However, the requirement to have no recent bench warrants will not apply “if such warrant was recalled or issued on the basis of . . . [a] failure to appear for a nonserious traffic offense.”⁶⁵

Paragraph (2) of subsection (b) provides a person who is deemed ineligible for an unsecured judicial release under the previous provision with the ability to dispute their ineligibility on the basis that the “criminal history record information is inaccurate, incomplete, or misleading.”⁶⁶

Subsection (c) allows a judge to issue an unsecured judicial release for the purpose of entering a pretrial release program, a pretrial release and diversion program, or a pretrial intervention and diversion program if “[s]uch unsecured judicial release is noted on the release order; and . . . [t]he person is not charged with a bail restricted offense.”⁶⁷

60. 2023 Ga. Laws 64, § 3, at 66–68.

61. O.C.G.A. § 17-6-12 (2023).

62. 2023 Ga. Laws 64, § 3, at 67 (codified at § 17-6-12(b)). The preexisting requirements for an unsecured judicial release are that the unsecured judicial release must be noted on the release order and the charged offense must not be bail-restricted. § 17-6-12(b)(1)(A)-(B).

63. § 17-6-12(b)(1)(C).

64. *Id.* § 17-6-12(b)(1)(D).

65. *Id.*

66. *Id.* § 17-6-12(b)(2).

67. *Id.* 17-6-12(c).

Subsection (f) instructs a judge to consider the criminal record of the accused prior to granting an unsecured judicial release in addition to the factors provided in Code section 17-6-1.⁶⁸

Section 4

Section 4 of the Act amends subsection (b) of Code section 52-7-26.⁶⁹ Code section 52-7-26 relates to “general provisions for registration, operation, and sale of watercraft.”⁷⁰ Subsection (b) is amended to reflect the change in subsection lettering in the referenced portion of Code section 17-6-12 from subsection (c) to subsection (d).⁷¹

Analysis

Unintended Consequences

Throughout the 2023 legislative session, opponents of the Act have pointed out the potential for unintended consequences. Primarily, opponents argue that although this bill is intended to protect Georgia’s vulnerable youth, the bill will actually do the opposite.⁷² Christina Anderson, a policy fellow at the Barton Child Law and Policy Center at Emory Law School, said SB 44 “intentionally ignor[es] the reality of how gangs operate.”⁷³ She explained that the average age of a child joining a gang is fifteen years old.⁷⁴ Under this Act, a fifteen-year-old could be sentenced to ten years of imprisonment, thus spending a substantial part of their youth and early adulthood in prison.⁷⁵ Anderson argued this will result in these children becoming “the

68. *Id.* § 17-6-12(f).

69. 2023 Ga. Laws 64, § 4, at 68.

70. *Id.* (codified at O.C.G.A. § 52-7-26 (2023)).

71. 2023 Ga. Laws 64, § 4, at 68 (codified at § 52-7-26(b)).

72. Video Recording of House Judiciary Non-Civil Subcommittee Meeting at 1 hr., 39 min., 10 sec. (Mar. 13, 2023) [hereinafter House Subcommittee Meeting Video] (remarks by Christina Anderson, Policy Fellow, Emory Law Barton Child Law and Policy Center), <https://www.youtube.com/watch?v=GgYVAdql0o&t=6509s> [<https://perma.cc/JJV5-3ZFT>].

73. *Id.*

74. *Id.*

75. *Id.*

criminals that we are trying to protect them from in the first place” when they are released.⁷⁶

Mazie Lynn Guertin, from the Georgia Association of Criminal Defense Lawyers, testified that the majority of gang recruitment occurs when “teenagers recruit their friends, their younger siblings, [and] their younger relatives”; thus, the Act will lead to greater levels of prosecution of children and teenagers.⁷⁷ These concerns were echoed by Representative Tanya Miller (D-62nd), stating “the children who are recruited into gangs one week are the folks who are recruiting children into gangs the next week.”⁷⁸ However, supporters of the Act state that the enhanced sentencing scheme will not apply to juveniles unless they are charged with an additional offense falling under the Act.⁷⁹

Additionally, opponents of the Act believe the Act’s substantial assistance provisions would put young gang members in grave danger of retaliation from other gang members. According to James Woodall, a public policy associate for the Southern Center for Human Rights, the Act’s sentencing scheme will “get people killed.”⁸⁰ Under these policies, those that would qualify for a lesser sentence are most likely young, and further down in the hierarchy of the “organization of that structure they’re in.”⁸¹ Because of this, young gang members “are put in greater danger if they turn in older gang members.”⁸² Representative Shea Roberts (D-52nd) also raised this issue in the House

76. *Id.*

77. *Id.* at 1 hr., 57 min., 30 sec. (remarks by Mazie Lynn Guertin, Executive Director and Policy Advocate, Georgia Association of Criminal Defense Lawyers).

78. Video Recording of House Judiciary Non-Civil Committee Meeting at 32 min., 26 sec. (Mar. 14, 2023) [hereinafter House Judiciary Non-Civil Meeting Video] (remarks by Rep. Tanya Miller (D-62nd)), <https://www.youtube.com/watch?v=Z5xnXwkk8DU&t=3969s> [<https://perma.cc/5U7Q-6ZJF>].

79. *Id.* at 36 min., 38 sec. (remarks by. Cara Convery, Assistant Attorney General); *id.* at 54 min., 38 sec.; Interview with Rep. Soo Hong (R-103rd) (June 1, 2023) [hereinafter Hong Interview] (on file with the Georgia State University Law Review). The relevant offenses are listed in Code section 15-11-560. O.C.G.A. § 15-11-560(b) (2023).

80. House Subcommittee Meeting Video, *supra* note 72, at 1 hr., 44 min., 47 sec. (remarks by James Woodall, Public Policy Analyst, Southern Center for Human Rights).

81. Stanley Dunlap, *Georgia House Panel Advances Kemp-Backed Bill to Toughen Gang Penalties*, GA. RECORDER (Mar. 13, 2023, 7:44 PM), <https://georgiarecorder.com/brief/georgia-house-panel-advances-kemp-backed-bill-to-toughen-gang-penalties/#:~:text=The%20Kemp%20backed%20Senate%20Bill,disabilities%20to%20join%20street%20gangs> [<https://perma.cc/5GDA-JK3M>].

82. *Id.*

Subcommittee, stating that because those who wanted to receive a lower sentence would have to prove they are not the leader of the gang, they would be forced to disclose the leader's identity.⁸³ Representative Roberts argued that this is “dangerous for those kids who are going to have to publicly tell a judge who the leader of the gang is,” especially because all disclosures would be made on the record.⁸⁴

Opponents also foresee vast negative effects resulting from the restrictions on unsecured judicial release and, therefore, expansion of cash bail. Senator Josh McLaurin (D-14th) argued this bill could lead to people being arrested for minor traffic offenses, such as a broken tail light, if they have previously been charged with a failure to appear in court within the last five years.⁸⁵ According to Senator McLaurin, once someone misses court, the judge will “not have discretion for five years to let [them] go on [their] own recognizance,” and instead must assign a cash bail.⁸⁶ Further, Senator McLaurin added that with this Act in effect, a judge “no longer has discretion to show mercy, to show compassion” to someone struggling with work or transportation.⁸⁷

Finally, opponents of the Act believe the Act will hurt the economy by weakening workforce attachments and reducing the available labor population.⁸⁸ According to Ray Khalfani, a policy analyst at the Georgia Budget and Policy Institute, the expansion of mandatory cash

83. House Judiciary Non-Civil Meeting Video, *supra* note 78, at 38 min., 49 sec. (remarks by Rep. Shea Roberts (D-52nd)).

84. *Id.*

85. Stanley Dunlap, *Kemp Signs Crime Crackdown Bills into Law, Including Tough New Penalties for Gangs Recruiting Minors*, GA. RECORDER (Apr. 26, 2023, 6:40 PM), <https://georgiarecorder.com/brief/kemp-signs-crime-crackdown-bills-into-law-including-tough-new-penalties-for-gangs-recruiting-minors/#:~:text=A%20bill%20signed%20by%20Gov,for%20recruiting%20minors%20into%20gangs> [<https://perma.cc/97X7-MLQR>]; Stanley Dunlap, *Georgia GOP Clampdown on Street Gangs Gets Legislature OK*, GA. RECORDER (Mar. 30, 2023, 12:55 AM) [hereinafter *Georgia GOP Clampdown on Street Gangs Gets Legislature OK*], <https://georgiarecorder.com/2023/03/30/georgia-gop-clampdown-on-street-gangs-required-cash-bail-gets-legislature-ok/> [<https://perma.cc/PV2L-G4XU>].

86. Dave Williams, *'We Will Come After You': Bill Meant to Curtail Gang Recruitment Takes Effect Saturday*, ATHENS BANNER-HERALD (June 29, 2023, 4:02 AM), <https://www.onlineathens.com/story/news/crime/2023/06/29/bill-to-slow-gang-recruitment-becomes-georgia-law-july-1/70364878007/> [<https://perma.cc/589R-STT2>].

87. *Georgia GOP Clampdown on Street Gangs Gets Legislature OK*, *supra* note 85.

88. Interview with Rep. Shelly Hutchinson (D-106th) (May 24, 2023) [hereinafter Hutchinson Interview] (on file with the Georgia State University Law Review); Interview with Ray Khalfani, Policy Analyst, Georgia Budget & Policy Institute (May 25, 2023) [hereinafter Khalfani Interview] (on file with the Georgia State University Law Review).

bail will cause more people to remain in jail because they are unable to afford their bail.⁸⁹ Therefore, these people cannot go to work, and there will be a negative impact on the workforce population, which is already experiencing worker shortages.⁹⁰

Although opponents of the Act have raised these potential unintended consequences, supporters of the Act maintain that the Act protects Georgia's youth and provides another tool to aid prosecutors in combatting gang activity.⁹¹ Cara Convery, an Assistant Attorney General in the Gang Prosecution Unit, emphasized the Act's utility to prosecutors, describing the Act as a "tool" which prosecutors can use to "consider the circumstances of an investigation of a case and determine whether or not bringing this enhancement is appropriate."⁹² Senator Bo Hatchett (R-50th), a proponent of SB 44, emphasized that "[t]here's no room for street gangs in Georgia," and that the Act aids prosecutors by "provid[ing] serious penalties for someone that tries to recruit a child into a life of crime by asking them to join a street gang."⁹³ Senator Hatchett expressed that the Act was designed to "protect children in the state of Georgia from being recruited into criminal street gangs, and that's what this bill is going to do."⁹⁴

Constitutionality

The Act could face constitutionality challenges based on: (1) freedom of speech and association concerns and (2) potential unconstitutional burden shifting challenges.

Section 1 of the Act grants prosecutors an additional right to appeal based on any deviations from the mandatory minimums listed later in the bill.⁹⁵ Prosecutors may challenge the court's deviation for not meeting the enumerated criteria for deviation listed in Section 2 of the

89. Khalfani Interview, *supra* note 88.

90. Hutchinson Interview, *supra* note 88; Khalfani Interview, *supra* note 88.

91. House Judiciary Non-Civil Meeting Video, *supra* note 78, at 46 min., 25 sec. (remarks by Cara Convery, Assistant Attorney General); *id.* at 33 min., 7 sec. (remarks by Sen. Bo Hatchett (R-50th)).

92. *Id.* at 46 min., 25 sec. (remarks by Cara Convery, Assistant Attorney General).

93. Williams, *supra* note 86.

94. House Judiciary Non-Civil Meeting Video, *supra* note 78, at 33 min., 7 sec. (remarks by Sen. Bo Hatchett (R-50th)).

95. 2023 Ga. Laws 64, § 1, at 64 (codified at O.C.G.A. § 5-7-1(a)(11) (2023)).

Act.⁹⁶ This procedure is like the one established in subsection (c) of Code section 17-10-6.2, which governs mandatory minimums and appeals for certain sexual offenses.⁹⁷ Therefore, the limitations and interpretations of the Act's right to appeal will likely follow along the rulings of the Georgia Court of Appeals in *State v. Crossen*.⁹⁸

In *Crossen*, the court heard the State's appeal of a deviated sentence based on the defendant's failure to establish evidence meeting the statutory justifications for deviation.⁹⁹ The court held that if the trial court determines the requirements of paragraph (1) of subsection (c) of Code section 17-10-6.2 have been satisfied, "then it could consider a downward deviation from the mandatory minimum. [Code section] 17-10-6.2 (c)(1) certainly 'does not require a trial court to procure evidence that is not tendered, and the court certainly cannot force a party to put forth evidence.'"¹⁰⁰ The Act, like paragraph (1) of subsection (c) of Code section 17-10-6.2, "is silent in regard as to who carries the burden of establishing the absence of the factors that would permit a downward departure."¹⁰¹ "This silence creates an ambiguity . . . [that] must be construed in favor of the defendant."¹⁰² Therefore, Section 1 and Section 2 of the Act will likely be interpreted as requiring the State to prove the trial court abused its discretion in departing from the mandatory minimum sentencing. As in *Crossen*, "placing the burden of proof on the defendant 'would be burden shifting and unconstitutional.'"¹⁰³

Another potential constitutional objection comes from the broad language of Section 2. Because Section 2 lacks any specific intent or knowledge elements and does not contain any of the qualifiers adopted by other states, such as requiring use of threats or membership conditioned on criminal activity, the Act could draw constitutional objections on the basis of due process and the freedoms of association and speech. Although Georgia has yet to tackle this particular

96. § 5-7-1(a)(11); O.C.G.A. § 16-15-4(k)(5)(A) (2023).

97. This code section gives prosecutors the right to appeal deviations from mandatory minimums set in place for certain sexual offenses. O.C.G.A. § 17-10-6.2(c)(2) (2023); *see also* § 5-7-1.

98. *See State v. Crossen*, 328 Ga. App. 198, 761 S.E.2d 596 (2014).

99. *Id.* at 200, 761 S.E.2d at 599.

100. *Id.* at 202, 761 S.E.2d at 600.

101. *Id.*

102. *Id.*

103. *Id.* at 200, 761 S.E.2d at 599.

constitutional issue, courts with persuasive authority have dealt with these objections in relation to similar gang recruitment statutes, and Georgia courts have addressed other broader issues in relation to the constitutionality of gang laws.¹⁰⁴

The underlying principle of Georgia's wide-scale gang laws has been that the State must establish a "'nexus between the act and the intent to further street gang activity.' This nexus can be established by proof of the defendant's association with a gang and participation in its activities before and during the crimes charged."¹⁰⁵ "[T]he accused must be shown to have conducted or participated in criminal street gang activity through the commission of 'an actual criminal act. Mere association is insufficient.'"¹⁰⁶ This "comports with . . . due-process requirements . . . because it punishes conduct, not association."¹⁰⁷ Although the language of the Act contains no mention of this nexus between the defendant's membership and criminal street gang activity, the proponents of the Act did express intent that the nexus test still be applied.¹⁰⁸

In *State v. Fielden*, the Georgia Supreme Court addressed subsection (a) of Code section 16-11-34, which prohibited "the knowing or reckless commission of 'any act which may reasonably be expected to prevent or disrupt a lawful meeting, gathering, or procession.'"¹⁰⁹ The court highlighted that "[t]he doctrine of overbreadth is particularly applicable where a statute infringes upon behavior protected by the First Amendment."¹¹⁰ The predominant notion that influenced the court's decision was taken from the United States Supreme Court in *N.A.A.C.P. v. Button*: "Because First Amendment freedoms need breathing space to survive, government

104. See e.g., *Figueroa-Santiago v. State*, 116 So. 3d 585, 587–88 (Fla. Dist. Ct. App. 2013); *Dunn v. State*, 312 Ga. 471, 474, 863 S.E.2d 159, 162 (2021).

105. *Dunn*, 312 Ga. at 474, 863 S.E.2d at 162 (citation omitted).

106. *Rodriguez v. State*, 284 Ga. 803, 810, 671 S.E.2d 497, 503 (2009) (citation omitted).

107. *Id.* (citation omitted).

108. House Judiciary Non-Civil Meeting Video, *supra* note 78, at 46 min., 10 sec. (remarks by Cara Convery, Assistant Attorney General); House Subcommittee Meeting Video, *supra* note 72, at 1 hr., 30 min., 35 sec. (remarks by Cara Convery, Assistant Attorney General); see also Senate Judiciary Meeting Video, *supra* note 3, at 1 hr., 21 min., 30 sec. (remarks by Jack Winne, Deputy Chief Assistant District Attorney, Coweta Judicial Circuit).

109. *State v. Fielden*, 280 Ga. 444, 445, 629 S.E.2d 252, 255 (2006).

110. *Id.*

may regulate in the area only with narrow specificity.”¹¹¹ Because the statute did not “require proof of a person’s intent to disrupt or prevent a lawful meeting as an element of the offense,” nor did it “require that the committed act substantially impair the ordinary conduct of the meeting,” subsection (a) of Code section 16-11-34 applied to “trivial” acts “regardless where it is committed, how trivial the act, its impact, or the intent of the actor other than the intent to commit the act itself.”¹¹²

In a similar fashion, the Act contains none of the narrowing factors of its peers, such as threats, conditions of criminal participation, or use of force.¹¹³ Thus, the Act is likely not so narrow “as to remove the seeming threat or deterrence to constitutionally protected expression.”¹¹⁴ Courts may not be able to preserve the constitutionality of the Act through statutory interpretation because, as in *Fielden*, “curing the overbreadth . . . would be less a matter of reasonable judicial construction than a matter of substantial legislative revision.”¹¹⁵

The kind of narrowing language necessary to preserve the Act’s constitutionality may be found in cases such as *State v. Manzanares*, where the Supreme Court of Idaho held its state gang recruitment law constitutional because it limited the prohibited conduct to solicitation of individuals who “actively participate” in the criminal street gang.¹¹⁶ Merely soliciting membership, association, or interaction with a gang, or even engaging a per se criminal street gang activity, does not alone amount to criminalized conduct without infringing on First Amendment protections.¹¹⁷ The First District Court of Appeal of Florida in *Enoch v. State* followed this same approach when addressing a portion of Florida’s anti-gang recruitment law which prohibited the use of electronic communication to promote a criminal gang.¹¹⁸ The court in *Enoch* required a narrower construction of the Florida statute

111. *NAACP v. Button*, 371 U.S. 415, 433 (1963).

112. *Fielden*, 280 Ga. at 447, 629 S.E.2d at 256.

113. Compare 2023 Ga. Laws 64, § 2, at 64–65 (codified at O.C.G.A. § 16-15-4(e) (2023)), with ALA. CODE § 13A-6-26 (2023), and FLA. STAT. ANN. § 874.05 (West 2023).

114. *Fielden*, 280 Ga. at 448, 629 S.E.2d at 256.

115. *Id.* at 448, 629 S.E.2d at 257.

116. See *State v. Manzanares*, 152 Idaho 410, 415 (2012).

117. *Id.* at 425.

118. See generally *Enoch v. State*, 95 So. 3d 344 (Fla. Dist. Ct. App. 2012).

to imply, where the express language of the statute did not, that the defendant know of the criminal activity tied to the membership they were encouraging.¹¹⁹

Further, proponents of the Act suggested reading in a requirement that the recruit participate actively in criminal gang activity.¹²⁰ Although the General Assembly never codified this sentiment in the language of the Act, this may give courts the foothold to imply additional requirements.

Conclusion

The main purpose of The Act is to suppress gangs and gang activity in Georgia by deterring gang recruitment. Although the stated objective is to stop children from being recruited into a life of criminal gang activity, the Act criminalizes gang recruitment of all individuals but provides a harsher punishment for the recruitment of minors. Despite concerns about the Act's practical effect, the General Assembly has taken notice of the serious problem gangs have posed in Georgia and believes only serious action will solve these problems.

Aaron L. Brown & Anna C. Dillon

119. *Id.* at 356.

120. Senate Judiciary Meeting Video, *supra* note 3, at 1 hr., 24 min., 54 sec. (remarks by Jack Winne, Deputy Chief Assistant District Attorney, Coweta Judicial Circuit). Winne provided, "I think there would have to be some sort of knowledge and intent to participate in the gang, which would be more than just [] saying they're joining. There must be some way that they are participating in the gang's criminal purposes because it's a criminal street gang." *Id.*