

## SELECTED HOUSE BILLS

### HOUSE BILL 37:<sup>1</sup> PRE-TRIAL PLACEMENT IN MENTAL HEALTH FACILITY *Amending O.C.G.A. § 42-4-6.1*

**FIRST SIGNATURE:** Rep. Bobby Parham (141<sup>st</sup>).

**SUMMARY:** House Bill 37 sought to amend O.C.G.A. § 42-4-6.1 to require that persons receiving mental health care from the Department of Human Resources must be removed from local jails within fifteen days of their being admitted to jail and placed in a DHR mental health facility until trial, or until found competent. Time in the mental health facility would be treated as time served and credited to any sentence.

**STATUS:** Not enacted.

#### TEXT OF HOUSE BILL 37

##### § 1.

Chapter 4 of Title 42 of the Official Code of Georgia Annotated, relating to jails, is amended by adding a new Code section to read as follows:

“42-4-6.1.

(a) When any person in the custody or under the care and supervision for mental health reasons of the Department of Human Resources or one of its mental health facilities is confined in the common jail awaiting trial for any offense against the penal laws of this state, the Department of Human Resources shall provide for the person’s delivery to an institution or mental health facility as may be approved and supported by the Department of Human Resources within 15 days of confinement in the common jail. He or she shall be delivered and received in such institution or facility until a competency determination is made pursuant to Part 2 of Article 6 of Chapter 7 of Title 17 or until a trial, as applicable.

(b) The period of time a person is confined in a hospital or institution pursuant to subsection (a) of this Code section shall be credited upon any jail sentence being served by him or her, in the same manner as though he or she had remained in jail. Any person committed for any civil or criminal contempt shall remain for all purposes under the orders, jurisdiction, and authority of the court committing him or her for contempt while in the hospital or institution, in the same manner as though he or she had remained in the common jail.”

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1. H.R. 37, 149th Gen. Assem., Reg. Sess. (Ga. 2007).

## § 2.

All laws and parts of laws in conflict with this Act are repealed.

**FIRST SIGNATURE'S RATIONALE**

Rep. Bobby Parham, of the 141<sup>st</sup>, introduced House Bill 37 to ensure mentally ill inmates receive treatment necessary for them to lead productive lives and avoid reincarceration.<sup>2</sup> Rep. Parham said he introduced the Bill because it would ensure mentally ill inmates receive the treatment necessary for them to function in society and avoid reincarceration.<sup>3</sup> He said local jails commonly house inmates with mental health problems, and urban jails particularly have large numbers of mentally ill inmates.<sup>4</sup>

Rep. Parham said the Bill stalled in 2007 because its subject matter fell within the scope of a Senate Resolution that was ultimately vetoed by Governor Sonny Perdue.<sup>5</sup> Senate Resolution 363 sought to create a task force to review and recommend improvements for how the state provides mental health services to citizens, including inmates.<sup>6</sup> Governor Perdue vetoed Senate Resolution 363 because it did not provide for the appointment of task force members by the executive branch.<sup>7</sup> Afterwards, Governor Perdue, by executive order, created a similar task force charged with studying the state mental health system.<sup>8</sup> The task force is to report its findings to the Governor and General Assembly before June 2, 2008.<sup>9</sup> Rep. Parham said if any task force recommendation addresses the concerns that led him to propose the Bill, he might drop House Bill 37 and

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2. Telephone Interview with Rep. Bobby Parham, H. District No. 141 (Oct. 24, 2007) [hereinafter *Parham October Interview*].

3. *Id.*

4. *Id.*

5. *Id.*

6. Ga. Gen. Assem., S. Res. 363, available at [http://www.legis.ga.gov/legis/2007\\_08/sum/sr\\_363.htm](http://www.legis.ga.gov/legis/2007_08/sum/sr_363.htm) (last visited Mar. 30, 2008).

7. See Press Release from Gov. Sonny Perdue's office (May 30, 2007) (on file with the John Marshall Law Journal).

8. *Parham October Interview*, *supra* note 2.

9. *Id.*

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support the recommendation.<sup>10</sup>

### LEGISLATIVE GENEALOGY

The first reading of the Bill in the House occurred on January 10, 2007, and a second reading occurred on January 11, 2007.<sup>11</sup> The Bill was assigned to the State Institutions and Property Committee, which in turn assigned the Bill to a subcommittee.<sup>12</sup> The Subcommittee on Inmate Issues considered the Bill on February 22, 2007, but took no action on it.<sup>13</sup> The subcommittee considered the Bill again on February 21, 2008, and forwarded the Bill to the full committee without a recommendation, but no action was taken.<sup>14</sup>

**PREPARED BY:** Bryan Brooks

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10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. Telephone Interview with Rep. Bobby Parham, H. District No. 141 (Feb. 23, 2008).

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**HOUSE BILL 149:<sup>1</sup> RACIAL PROFILING**  
***Amending O.C.G.A. § 40-1-8***

**FIRST SIGNATURE:** Rep. Tyrone Brooks (63<sup>rd</sup>).

**CO-SPONSORS:** Rep. Al Williams (165<sup>th</sup>), Rep. Carolyn Hugley (133<sup>rd</sup>), Rep. Calvin Smyre (132<sup>nd</sup>), Rep. Bob Holmes (61<sup>st</sup>) & Rep. David Lucas (139<sup>th</sup>).

**SUMMARY:** House Bill 149 sought to prohibit law enforcement officials from being able to use race or ethnicity as a basis for probable cause while engaged in law enforcement duties. The legislation required officers to document the ethnicity of each person they stop and reasons for any search they conduct.

**STATUS:** Not enacted.

**TEXT OF HOUSE BILL 149**

**§ 1**

Chapter 1 of Title 40 of the Official Code of Georgia Annotated, relating to general provisions relative to motor vehicles and traffic, is amended by inserting at the end thereof a new Code Section 40-1-8 to read as follows:

“40-1-8.

(a) Law enforcement officers shall not use a person’s race or ethnicity to form probable cause or reasonable suspicion to stop a vehicle but may use a person’s race or ethnicity to confirm a 40previously obtained description of a suspect.

(b)(1) Each state and local law enforcement agency shall adopt a policy and implement an annual training program regarding racial profiling that provides and instructs that a law enforcement officer shall not use a person’s race or ethnicity to form probable cause or reasonable suspicion to stop a vehicle but may use a person’s race or ethnicity to confirm a previously obtained description of a suspect.

(2) Except in instances where a vehicle is stopped in a fixed road block, each time a state or local law enforcement officer stops a motor vehicle to issue a citation or to make an arrest, that officer shall document the following information in a public record whose format shall be determined by the Department of Motor Vehicle Safety:

(A) The gender of the driver;

(B) The race or ethnicity of the driver;

(C) The suspected violation that led to the stop;

(D) Whether the vehicle, personal effects, driver, or any passenger was searched and, if any passenger or his or her effects were searched, the passenger’s gender and the passenger’s race or ethnicity;

(E) Whether a search was conducted pursuant to consent, probable cause, or reasonable suspicion to suspect a crime, including the approximate duration of the search and the basis for the request for consent or the circumstances establishing probable cause or reasonable suspicion;

(F) Whether contraband was found, the type and approximate amount of contraband, and

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1. H.R. 149, 149th Gen. Assem., Reg. Sess. (Ga. 2007).

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whether contraband was seized;

(G) Whether any arrest, citation, or any oral or written warning was issued as a result of the stop;

(H) Whether the officer making the stop encountered any physical resistance, whether the officer engaged in the use of force, and whether injuries resulted;

(I) Whether the circumstances surrounding the stop were the subject of any investigation and the results of that investigation; and

(J) The location of the stop.

(3) If a law enforcement officer stops a motor vehicle and no citation or written warning is issued to the motorist, then the officer shall provide the motorist with a card showing the officer's name, badge number, and the name of the officer's law enforcement agency.

(4) Law enforcement agencies shall maintain the data required to be collected under paragraph (2) of this subsection for not less than seven years.

(5) As part of its personnel review or evaluation procedures provisions, each law enforcement agency shall include complaints filed and other information designed to evaluate whether or not each law enforcement officer employed by such agency is complying with the provisions of paragraph (2) of this subsection. Any officer found not to be complying with the provisions of paragraph (2) of this subsection shall be required to undergo further training that meets the requirements of paragraph (1) of this subsection.

(6) Nothing in this Code section shall be construed to alter the requirements for determining probable cause or reasonable suspicion under the Constitution of the United States or the Constitution of the State of Georgia."

§ 2

All laws and parts of laws in conflict with this Act are repealed.

### FIRST SIGNATURE'S RATIONALE

Rep. Tyrone Brooks, of the 63<sup>rd</sup>, introduced House Bill 149, a racial profiling Bill, in response to what many perceive as disparate treatment of people of color by law enforcement officers.<sup>2</sup> Rep. Brooks, an African American male, has personally been stopped and harassed by police due to his ethnicity.<sup>3</sup> Additionally, the death of Kenneth Walker in Columbus, Georgia in 2003, played a role in his decision to push the Bill forward.<sup>4</sup> Walker was a 39 year-old unarmed African American man who was shot in the head by two white Muscogee County sheriff's deputies for no apparent reason.<sup>5</sup>

Sen. Gloria Butler, of the 55<sup>th</sup>, introduced similar legislation in 2000.<sup>6</sup> The Bill passed in the Senate but was not voted on in the House of Representatives, as the session ended before the

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2. Telephone Interview with Rep. Tyrone Brooks, H. District No. 63 (Sept. 25, 2007) [hereinafter *Brooks Interview*].

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

Bill could be brought to the floor.<sup>7</sup>

The following year the terrorist attacks of September 11 occurred and the proponents of the Bill felt as though the timing was not right for a vote on the issue.<sup>8</sup> Rep. Brooks decided in 2004 to reintroduce the Bill.<sup>9</sup> It was co-sponsored by Rep. Warren Massey, of the 24<sup>th</sup>, a white male, who gave a passionate speech on the floor of the House urging his fellow Republicans to adopt the legislation.<sup>10</sup> The Bill subsequently passed with 167 votes, but the Senate did not act.<sup>11</sup> Representative Brooks plans to continue introducing the legislation each year until it is passed into law.<sup>12</sup>

### LEGISLATIVE GENEALOGY

The Bill was reviewed by the House Judiciary (Non-Civil) Committee on January 26, 2007, but was not favorably reported.<sup>13</sup> The most influential opposition came from the Georgia Sheriff's Association and the Georgia State Patrol.<sup>14</sup> These agencies feel that racial profiling legislation creates significant legal obstacles for officers in pursuit of criminals.<sup>15</sup> Alternatively, the Georgia Association of Chiefs of Police supports the legislation.<sup>16</sup> Chief Jim Murray of Peachtree City has been particularly active, voicing his support by testifying in committee meetings.<sup>17</sup>

**PREPARED BY:** Daniel Stafford

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7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. Ga. H. Judy. Comm., Voting Record, H.R. 149 (Jan. 26, 2007).

14. *Brooks Interview*, *supra* note 2.

15. *Id.*

16. *Id.*

17. *Id.*

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**HOUSE BILL 185:<sup>1</sup> DEATH SENTENCE BY  
NON-UNANIMOUS JURY  
Amending O.C.G.A. § 17-10-2**

**FIRST SIGNATURE:** Rep. Barry Fleming (117<sup>th</sup>).

**CO-SPONSORS:** Rep. Willie Talton (145<sup>th</sup>), Rep. Melvin Everson (106<sup>th</sup>), Rep. Timothy Bearden (68<sup>th</sup>), Rep. Jerry Keen (179<sup>th</sup>) & Rep. Mark Burkhalter (50<sup>th</sup>).

**SUMMARY:** House Bill 185 sought to amend O.C.G.A. § 17-10-2 by giving the judge the discretion to impose a sentence of death, life without parole, or life if after finding the existence of at least one aggravating circumstance and at least ten jurors voted to impose a sentence of death.

**STATUS:** Not enacted.

**TEXT OF HOUSE BILL 185**

**§ 1.**

Article 2 of Chapter 10 of Title 17 of the Official Code of Georgia Annotated, relating to the death penalty generally, is amended by revising Code Section 17-10-31, relating to requirement of a jury finding of aggravating circumstance and recommendation of death penalty, as follows: "17-10-31.

Except as provided in this Code section or Code Section 17-10-31.1, where, upon a trial by jury, a person is convicted of an offense which may be punishable by death, a sentence of death shall not be imposed unless the jury verdict includes a finding of at least one statutory aggravating circumstance and a recommendation that such sentence be imposed. Where a statutory aggravating circumstance is found and a recommendation of death is made, the court shall sentence the defendant to death. Where a sentence of death is not recommended by the jury, the court shall sentence the defendant ~~to it~~ as provided in Code Section 17-10-31.1. Unless the jury trying the case makes a finding of at least one statutory aggravating circumstance in its verdict, the court shall not sentence the defendant to death, provided that no such finding of statutory aggravating circumstance shall be necessary in offenses of treason or aircraft hijacking. This Code section shall not affect a sentence when the case is tried without a jury or when the judge accepts a plea of guilty."

**§ 2.**

Said article is further amended by revising Code Section 17-10-31.1, relating to requirement of a jury finding aggravating circumstances and recommendation of sentence of death or life without parole, as follows:

"17-10-31.1.

(a) Where, upon a trial by jury, a person is convicted of murder, a sentence of death or life without parole shall not be imposed unless the jury verdict includes a finding of at least one statutory aggravating.

(b) Where a statutory aggravating circumstance is found and a recommendation of life without

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1. H.R. 185, 149th Gen. Assem., Reg. Sess. (Ga. 2007).

parole is made, the shall sentence the defendant to imprisonment for life without parole as provided in Code Section 17-10-16.

(c) Where a statutory aggravating circumstance is found and the jury impaneled to determine the sentence is unable to reach a unanimous verdict as to sentence, the judge shall dismiss the jury and shall impose a sentence of life imprisonment, ~~or~~ imprisonment for life without parole, or death.

(d) In imposing sentence, if the jury finds beyond a reasonable doubt that the defendant committed at least one statutory aggravating circumstance, the judge may sentence the defendant to:

(1) Imprisonment ~~+~~ for life without parole if the judge has been informed by the jury foreperson that upon their last vote, a majority of the jurors cast their vote for a sentence of death or for a sentence of life imprisonment without parole; or

(2) Death if the judge has been informed by the jury foreperson that upon their last vote, at least ten of the jurors cast their vote for a sentence of death;

provided, however, that the judge may impose a sentence of life imprisonment or imprisonment for life without parole as provided by law.

(e) Notwithstanding any other provision of law, during the sentencing phase before a jury, counsel for the state and the accused may present argument and the judge may instruct the jury:

(1) That 'life without parole' means that the defendant shall be incarcerated for the remainder of his or her natural life and shall not be eligible for parole unless such person is subsequently adjudicated to be innocent of the offense for which he or she was sentenced; and

(2) That 'life imprisonment' means that the defendant will be incarcerated for the remainder of his or her natural life but will be eligible for parole during the term of such sentence."

**§ 3.**

This Act shall become effective on July 1, 2007, and shall apply to all offenses which occur on or after July 1, 2007.

**§ 4.**

All laws and parts of laws in conflict with this Act are repealed.

### FIRST SIGNATURE'S RATIONALE

Rep. Barry Fleming, of the 117<sup>th</sup>, introduced House Bill 185 as a response to the aberrant juror problem.<sup>2</sup> Currently, Georgia law requires a unanimous jury during the penalty phase to impose a death sentence.<sup>3</sup> In many cases, the unanimity requirement resulted in the prosecution's inability to get a verdict imposing the death penalty. In some instances, the holdout juror refused to deliberate on the subject. This Bill would solve this problem by giving the judge the discretion to determine the sentence in certain circumstances.<sup>4</sup>

### LEGISLATIVE GENEALOGY

The Bill was first read in the House on January 29, 2007, and

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2. Telephone Interview with Rep. Doug Collins, H. District No. 27 (Sept. 6, 2007) [hereinafter *Collins Interview*].

3. *Id.*; O.C.G.A. §§ 17-10-31, 17-10-31.1 (2007).

4. *Collins Interview*, *supra* note 2.

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read for the second time on January 30, 2007.<sup>5</sup> The Bill received a favorable report from committee on March 19, 2007 and was read for the third time on March 20, 2007.<sup>6</sup> After lengthy floor debates, the Bill was passed by the House on March 20, 2007. House Bill 185 was read and referred in the Senate on March 27, 2007.<sup>7</sup>

House Bill 185 was vigorously debated in committee. Proponents of the Bill argued that giving the judge the discretion to impose the death penalty in certain circumstances is an adequate solution to the aberrant juror problem.<sup>8</sup> Currently, one or two votes can override the will of the supermajority to impose a death sentence.<sup>9</sup> Rep. Fleming observed that the proper avenue for those who are opposed to the death penalty is through the legislative process, not through their vote while on a jury.<sup>10</sup>

Proponents of this Bill argue that it would help to protect victims' rights. The committee heard Sheila Howell speak about how she felt when the man who brutally killed her daughter and granddaughter was not sentenced to death because two jurors refused to vote for the death penalty.<sup>11</sup> She felt that two people, not ten or twelve, made the decision to spare Wesley Harris's life.<sup>12</sup> Feeling as if the victims are not on equal footing with the murderers, she urged the representatives to look at the Bill from a victim's point of view.<sup>13</sup>

Opponents of the Bill were concerned that lowering the standard to impose a death sentence will increase already existing problems with how the death penalty is administered.<sup>14</sup> Another concern was the constitutionality of a non-unanimous

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5. H.R. 185; see also Ga. Gen. Assem., H.R. 185, *available at* [http://www.legis.gov/legis/2007\\_\\_08/sum/hb185.htm](http://www.legis.gov/legis/2007__08/sum/hb185.htm).

6. *Id.*

7. *Id.*

8. Video Recording of H. Judy. (Non-Civil) Comm. Meeting, Mar. 13, 2007, *available at* [http://www.legis.ga.gov/legis/2007\\_08/house/Committees/judiciaryNonCivil/judyncArchives.htm](http://www.legis.ga.gov/legis/2007_08/house/Committees/judiciaryNonCivil/judyncArchives.htm).

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

jury to recommend the death penalty.<sup>15</sup> Several representatives voiced concerns about the impact of the death penalty on minorities and how this Bill would exacerbate those problems.<sup>16</sup> Rep. Jack Martin, of the 47<sup>th</sup>, stated that *Ring v. Arizona*<sup>17</sup> left open the question of jury unanimity, and because of *Ring*, other states' death penalty statutes may come under attack.<sup>18</sup>

Rep. Kevin Levitas, of the 82<sup>nd</sup>, moved to amend the Bill to require a jury of eleven, instead of nine, to make the recommendation to the judge.<sup>19</sup> He said that he did not want to recommend a Bill that would not pass constitutional muster.<sup>20</sup> The motion passed.<sup>21</sup> Rep. Levitas also proposed that the Bill be amended to change the effective date to January 1, 2009 to allow more time to analyze the issue more closely, but the motion was defeated.<sup>22</sup> House Bill 185 was forwarded, as amended, with a due pass recommendation.<sup>23</sup>

House Bill 185 was strongly debated on the House floor. Rep. Fleming, the sponsor of the Bill, described the mechanics of the Bill and why the Bill was necessary.<sup>24</sup> He explained that the Bill does not change the requirement of unanimity during the guilt/innocence phase, nor does it change the requirement of unanimity with regard to the jury's finding of the existence of aggravating circumstances.<sup>25</sup> It is only after the jury has unanimously found the defendant guilty, unanimously found the existence of at least one aggravating circumstance, and at least ten jurors have recommended the death penalty that the judge will have an opportunity to impose the sentence.<sup>26</sup> In addressing the constitutionality concerns, Rep. Fleming

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15. *Id.*

16. *Id.*

17. 536 U.S. 584 (2002).

18. *Committee Video Recording, supra* note 8.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Multimedia: Session Archives, 2007 H. Sess., available at* [http://www.georgia.gov/00/article/0,2086,4802\\_6107103\\_72682804,00.html](http://www.georgia.gov/00/article/0,2086,4802_6107103_72682804,00.html), (Mar. 20, 2007) (remarks by Rep. Barry Fleming beginning at 1:55).

25. *Id.*

26. *Id.*

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observed that Florida's system, which gives the judge more discretion in imposing a death sentence than House Bill 185, has not been overturned, despite challenges.<sup>27</sup>

Rep. Levitas voiced his concern that changing to a 9-3 or a 10-2 scheme might not pass constitutional muster.<sup>28</sup> Rep. David Ralston, of the 7<sup>th</sup>, chairman of the House Judiciary (Non-Civil) Committee, also supported the Bill.<sup>29</sup> He stated that, in theory, a capital case should move forward with a panel of people who could consider the evidence and who could impose the death penalty.<sup>30</sup>

Many representatives spoke in opposition to the Bill. Rep. Robert Mumford, of the 95<sup>th</sup>, argued that the unanimity requirement is of ancient origin and changing that would be contrary to hundreds of years of jurisprudence.<sup>31</sup> Other representatives argued that this Bill was not a narrow solution to solve the problem.<sup>32</sup> Rep. Mark Hatfield, of the 177<sup>th</sup>, while agreeing with the death penalty, also opposed this Bill.<sup>33</sup> He said that this Bill is not addressing a pervasive problem in this state and it is really a question of who society trusts to make these decisions.<sup>34</sup> The Bill's effects on minorities were another reason given in opposition of the Bill.<sup>35</sup> Rep. Roberta Abdul-Salaam, of the 74<sup>th</sup>, pointed out that everything is relevant, including race.<sup>36</sup> She also voiced concerns that this Bill might lead to getting rid of the jury altogether.<sup>37</sup> She posited that if the prosecutor has done their job, then there should not be the problem of the holdout juror.<sup>38</sup> If prosecutors need more help prosecuting their cases, then this is the area where the problem should be addressed.<sup>39</sup>

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27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

Rep. Jerry Keen, of the 179<sup>th</sup>, proposed a floor amendment which would change the number of jurors from 9-3 to 10-2.<sup>40</sup> This amendment was adopted by a 100 to 69 vote.<sup>41</sup> The Bill passed the House with a 106 to 65 vote.<sup>42</sup>

**PREPARED BY:** Diona M. Potter

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40. *Id.*

41. Ga. Gen. Assem., H.R. 185 House Vote #167, *available at* [http://www.legis.ga.gov/legis/2007\\_08/votes/hv0167.htm](http://www.legis.ga.gov/legis/2007_08/votes/hv0167.htm) (last visited March 22, 2008).

42. Ga. Gen. Assem., H.R. 185 House Vote #168, *available at* [http://www.legis.ga.gov/legis/2007\\_08/votes/hv0168.htm](http://www.legis.ga.gov/legis/2007_08/votes/hv0168.htm) (last visited March 22, 2008). Rep. Fleming attached, as an amendment, the language of House Bill 185 to Senate Bill 145 on March 19, 2008; the amended Senate Bill 145 passed the House, however, the non-unanimous death sentence language was altered by the Senate. Ga. Gen. Assem., S. 145, *available at* [http://www.legis.state.ga.us/legis/2007\\_08/sum/sb145.htm](http://www.legis.state.ga.us/legis/2007_08/sum/sb145.htm).

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**HOUSE BILL 197:<sup>1</sup> THREE-JUDGE REVIEW PANELS**  
***Amending O.C.G.A. § 17-8-58 and O.C.G.A. § 17-10-6.3***

**FIRST SIGNATURE:** Rep. Barry Fleming (117<sup>th</sup>).

**CO-SPONSORS:** Rep. Edward Lindsey (54<sup>th</sup>) & Rep. Mark Hatfield (127<sup>th</sup>).

**SUMMARY:** House Bill 197 repealed the three-judge sentence review panel, formerly codified at O.C.G.A. § 17-10-6. The Bill also incorporated Senate Bill 97, which provides that a party must object to any portion of a jury charge or a failure to charge the jury, by informing the court of the specific objection before the jury retires to deliberate. The failure to do so will preclude appellate review of such portion of the jury charge that the party finds objectionable.

**STATUS:** Enacted.

**TEXT OF HOUSE BILL 197**

**§ 1**

Title 17 of the Official Code of Georgia Annotated, relating to criminal procedure, is amended by adding a new Code section to read as follows:

“17-8-58.

(a) Any party who objects to any portion of the charge to the jury or the failure to charge the jury shall inform the court of the specific objection and the grounds for such objection before the jury retires to deliberate. Such objections shall be done outside of the jury’s hearing and presence.

(b) Failure to object in accordance with subsection (a) of this Code section shall preclude appellate review of such portion of the jury charge, unless such portion of the jury charge constitutes plain error which affects substantial rights of the parties. Such plain error may be considered on appeal even if it was not brought to the court’s attention as provided in subsection (a) of this Code section.”

**§ 2**

Said title is further amended by repealing and reserving Code Section 17-10-6, relating to review of sentences of imprisonment for a period exceeding 12 years by a three-judge panel.

**§ 3**

Said title is further amended by adding a new Code section to read as follows:

“17-10-6.3.

(a) As used in this Code section, the term ‘three-judge panel’ means the three-judge panel that was created and existed pursuant to the former provisions of Code Section 17-10-6 as it existed on June 30, 2007, which reviewed certain sentences to determine if a sentence was excessively harsh and what relief, if any, should be given.

(b) The right of a defendant to have a sentence reviewed by a three-judge panel shall be terminated for sentences imposed by a trial or appellate court on or after July 1, 2007. No new

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1. H.R. 197, 149th Ga. Gen. Assem., Reg. Sess. (Ga. 2007).

application for review of a sentence shall be transmitted to the three-judge panel on or after July 1, 2007, except for cases in which a sentence was imposed prior to July 1, 2007.

(c) No new application for review of a sentence shall be accepted by the three-judge panel unless such application has been received by the three-judge panel on or before September 1, 2007. Any sentence that has an application for review with the three-judge panel pending on September 1, 2007, shall have such review completed by the three-judge panel by November 1, 2008.

(d) It shall be the duty of the president of The Council of Superior Court Judges of Georgia to cause all administrative measures which may be necessary to conclude the business of the three-judge panel to be completed no later than January 1, 2009. Such administrative, clerical, or secretarial personnel as may be assigned to provide support for the three-judge panel may continue to be employed for the purpose of providing support to the president of The Council of Superior Court Judges of Georgia until January 1, 2009.

(e) No later than January 1, 2009, all records and documents relating to the activities of the three-judge panels during the period July 1, 1974, through November 1, 2008, shall be transmitted to the Department of Archives and History for retention in accordance with Article 5 of Chapter 18 of Title 50, the 'Georgia Records Act.' All equipment, supplies, and materials which the president of The Council of Superior Court Judges of Georgia determines are excess or surplus shall be distributed by the president to the judges of the superior courts for use in the performance of their official duties. Any fees or expenses due to any clerk, superior court judge, or other person as a result of the three-judge panel shall be paid out of such funds as are appropriated for the operation of the superior courts during fiscal year 2009."

**§ 4**

Code Section 15-6-77 of the Official Code of Georgia Annotated, relating to superior court fees, is amended by revising paragraph (5) of subsection (h).

**§ 5**

This Act shall become effective on July 1, 2007, and shall apply to all trials which occur on or after July 1, 2007.

**§ 6**

All laws and parts of laws in conflict with this Act are repealed.

### FIRST SIGNATURE'S RATIONALE

Rep. Barry Fleming, of the 117<sup>th</sup>, introduced House Bill 197 in response to concerns raised by members of the Georgia District Attorneys Association over three-judge sentence review panel.<sup>2</sup> The problem with the sentence review panel was that it overturned plea agreements, which were entered into through negotiation and agreement.<sup>3</sup> Furthermore, the sentence review panel is duplicative of other parts of the criminal justice system, such as the parole board and the appellate courts.<sup>4</sup> Finally, Rep. Fleming explained that the Supreme Court of Georgia has

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2. Telephone Interview with Rep. Barry Fleming, H. District No. 117 (Nov. 4, 2007) [hereinafter *Fleming Interview*].

3. Video Recording of H. Judy. (Non-Civil) Comm. Meeting, Mar. 7, 2007 (remarks by Rep. Barry Fleming), available at <http://media.legis.ga.gov/hav/judynon/judynon30707.wmv> [hereinafter *Judy NC Video*].

4. *Id.*

questioned the constitutionality of the sentence review panel.<sup>5</sup>

### LEGISLATIVE GENEALOGY

The first reading occurred on January 30, 2007.<sup>6</sup> The House Judiciary (Non-Civil) Committee considered the Bill on March 7, 2007, and reported the Bill favorably on March 19, 2007.<sup>7</sup> The Committee substituted the Bill to modify the time frame for implementation.<sup>8</sup> The substitute allowed the right to apply for sentence review in cases where the sentence was imposed prior to July 1, 2007.<sup>9</sup> The substitute further allowed that any defendant that applied for review by September 1, 2007, should have the review completed by November 1, 2008.<sup>10</sup>

House Bill 197 was read again in the House and debated on March 27, 2007.<sup>11</sup> Rep. Fleming presented the Bill and discussed the problems with the three-judge sentence review panel.<sup>12</sup> Opponents expressed concern about ineffective counsel as well as the fact that no court had found any constitutional issues with the review panel. Rep. Fleming stated that what Rep. Holmes, of the 61<sup>st</sup>, described was an insufficient counsel problem and is available for appeal to the appellate courts. The House adopted the Committee Substitute to House Bill 197.<sup>13</sup> No amendments were offered, and the House passed House Bill 197 by a vote of 102 to 62.<sup>14</sup>

The Senate read and referred House Bill 197 to the Senate

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5. Fleming Interview, *supra* note 2; *Moseley v. Sentence Review Panel*, 631 S.E.2d 704, 707 (Ga. 2006).

6. Ga. Gen. Assem., H.R. 197, <http://www.legis.state.ga.us/legis/200708/sum/hb197.htm> [hereinafter *H.R. 197 Status*].

7. *Id.*

8. *Id.*

9. *Id.* (Defendants with sentences imposed prior to July 1, 2007, had until September 1, 2007 to apply for review.).

10. *Id.*

11. *Id.*

12. Video Recording of H. of Rep. Proceedings, Mar. 27, 2007 (remarks by Rep. Barry Fleming), *available at* [http://www.georgia.gov/00/article/0,2086,4802\\_6107103\\_72682804,00.html](http://www.georgia.gov/00/article/0,2086,4802_6107103_72682804,00.html) [hereinafter *House Video 3/27*].

13. *H.R. 197 Status*, *supra* note 6.

14. *Id.*

Judiciary Committee on March 27, 2007.<sup>15</sup> The Committee favorably reported the Bill and recommended the Bill to pass by substitute.<sup>16</sup> The Committee Substitute added a section to the Bill relating to objections to jury charges in criminal trials.<sup>17</sup> The substitute added a new code section, O.C.G.A. § 17-8-58, which requires a party to object to any portion of a jury charge, or failure to charge the jury, by making a specific objection and the grounds for such objection before the jury retires to deliberate.<sup>18</sup> The substitute also provided that failure to object to the jury charge in such fashion would preclude appellate review of the objectionable jury charge, unless the jury charge constitutes plain error.<sup>19</sup> The substitute was actually a Bill that the Senate passed earlier in the 2007 legislative session, Senate Bill 97, which did not make it through the subcommittee in the House.<sup>20</sup> The Senate adopted the Committee Substitute to House Bill 197 and passed the Bill by a vote of 38 to 13.<sup>21</sup>

Sen. Preston Smith, of the 52<sup>nd</sup>, presented House Bill 197 to the Senate on April 17, 2007, voicing his support for the Bill by stating that the three-judge panel should be abolished because: (1) we now have a statewide indigent defense system to provide all criminal defendants with competent counsel; (2) we have judges that are required to make sentences within a framework prescribed by the legislature; and (3) it is inequitable for an unelected three-judge panel—sitting outside the jurisdiction where the case was heard that did not hear the evidence of the case—to second guess the trial judge and substitute their judgment for either a sentence imposed by the trial judge or through a negotiated plea.<sup>22</sup> This would also bring Georgia in

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15. *Id.*

16. Video Recording of Sen. Proceedings, April 17, 2007, available at [http://www.georgia.gov/00/article/0,2086,4802\\_6107103\\_72682316,00.html](http://www.georgia.gov/00/article/0,2086,4802_6107103_72682316,00.html) [hereinafter *Senate Video*].

17. See *H.R. 197 Status*, *supra* note 6.

18. *Id.*

19. *Id.*

20. S. 97, 149th Ga. Gen. Assem., Reg. Sess. (Ga. 2007) (Senator Hamrick introduced the bill to eliminate the problems that arise when objections to jury charges are made after the jury has left to deliberate).

21. Ga. Gen. Assem., S. 97, [http://www.legis.state.ga.us/legis/2007\\_08/sum/sb97.htm](http://www.legis.state.ga.us/legis/2007_08/sum/sb97.htm).

22. See *Senate Video*, *supra* note 16.

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line with the Federal Rules of Criminal Procedure, and the majority of States, with regard to objections to jury charges.<sup>23</sup>

Sen. Emanuel Jones, of the 10<sup>th</sup>, offered an amendment to the Bill, which would allow for an exception for those persons convicted prior to July 1, 2006, and after July 1, 2001, under the “Youthful Offender Act,”<sup>24</sup> known as the “Romeo and Juliet” provision.<sup>25</sup> This Amendment failed by a vote of 21 to 30.<sup>26</sup>

On April 19, 2007, Rep. Fleming moved the House to agree to the Senate Committee Substitute to House Bill 197.<sup>27</sup> Rep. Fleming explained that the underlying Bill regarding abolition of the sentence review panel was not changed.<sup>28</sup> Rep. Fleming further explained that the Senate’s addition would align Georgia with the Federal Rules of Criminal Procedure, and the practice in 45 other states, which require specific objections to jury charges to be made before the jury retires to deliberate.<sup>29</sup>

Rep. Randal Mangham, of the 94<sup>th</sup>, was concerned that the Senate Committee Substitute would shift the burden back onto the defense, in that if the defendant has an incompetent lawyer who fails to object to an incorrect jury charge, the objection is lost forever.<sup>30</sup> Rep. Fleming responded that such a case could give rise to an appeal on ineffective counsel grounds.<sup>31</sup> Rep. Fleming further stated that this Bill merely requires the lawyer, when objecting to the judge’s jury instruction, to tell the judge why he is objecting, so the judge can have an opportunity to correct it.<sup>32</sup> Rep. Fleming also stated that proponents of the Bill believe that it will lessen the number of appeals that come out of criminal cases.<sup>33</sup>

The House adopted the Senate Committee Substitute by a

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23. *Id.* (remarks by Sen. Bill Hamrick); FED. R. CRIM. P. 30(d).

24. *See Senate Video, supra* note 16.

25. *Id.* (remarks by Sen. Emanuel Jones).

26. *H.R. 197 Status, supra* note 6.

27. Video Recording of H. of Rep. Proceedings, April 19, 2007 (remarks by Rep. Barry Fleming), *available at* [http://www.georgia.gov/00/article/0,2086,4802\\_6107103\\_72682804,00.html](http://www.georgia.gov/00/article/0,2086,4802_6107103_72682804,00.html) [hereinafter *House Video 4/19*].

28. *Id.*

29. *Id.*

30. *Id.* (remarks by Rep. Mangham).

31. *Id.* (remarks by Rep. Fleming).

32. *Id.*

33. *Id.*

vote of 92 to 68.<sup>34</sup> Rep. Stephanie Benfield, of the 85<sup>th</sup>, moved to have the House reconsider the vote on House Bill 197.<sup>35</sup> The House voted 71 to 96, declining to reconsider their action on House Bill 197.<sup>36</sup> The House sent House Bill 197 to the Governor on April 30, 2007.<sup>37</sup>

**PREPARED BY:** Nicholas Utley

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34. *H.R. 197 Status*, *supra* note 6.

35. *House Video 4/19*, *supra* note 27.

36. *H.R. 197 Status*, *supra* note 6.

37. *Id.*

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**HOUSE BILL 226:<sup>1</sup> DISTRIBUTING OBSCENE MATERIAL**  
***Amending O.C.G.A. § 16-12-80***

**FIRST SIGNATURE:** Rep. David Ralston (7<sup>th</sup>).

**CO-SPONSORS:** Rep. Wendell Willard (49<sup>th</sup>) & Rep. Mark Burkhalter (50<sup>th</sup>).

**SUMMARY:** House Bill 226 specifically defined the broad term “dissemination” in the affirmative defense section of O.C.G.A. § 16-12-80 to specify that “selling, lending, renting, leasing, giving, advertising, publishing, exhibiting, or otherwise disseminating” material to institutions of higher learning, or a person for whom the material had been medically prescribed shall be an affirmative defense.

**Status:** Not Enacted.

**TEXT OF HOUSE BILL 226**

**§ 1.**

Article 3 of Chapter 12 of Title 16 of the Official Code of Georgia Annotated, relating to crimes involving obscenity in general, is amended by striking in its entirety Code Section 16-12-80, relating to criminal distribution and dissemination of obscene materials, and inserting in its place a new Code Section 16-12-80 to read as follows:

“16-12-80.

(a) A person commits the offense of distributing obscene material when he or she sells, lends, rents, leases, gives, advertises, publishes, exhibits, or otherwise disseminates to any person any obscene material of any description, knowing the obscene nature thereof, or offers to do so, or possesses such material with the intent to do so, provided that the word ‘knowing,’ as used in this Code section, shall be deemed to be either actual or constructive knowledge of the obscene contents of the subject matter; and a person has constructive knowledge of the obscene contents if he or she has knowledge of facts which would put a reasonable and prudent person on notice as to the suspect nature of the material; provided, however, that the character and reputation of the individual charged with an offense under this law, and, if a commercial dissemination of obscene material is involved, the character and reputation of the business establishment involved may be placed in evidence by the defendant on the question of intent to violate this law. Undeveloped photographs, molds, printing plates, and the like shall be deemed obscene notwithstanding that processing or other acts may be required to make the obscenity patent or to disseminate it.

(b) Material is obscene if:

- (1) To the average person, applying contemporary community standards, taken as a whole, it predominantly appeals to the prurient interest, that is, a shameful or morbid interest in nudity, sex, or excretion;
- (2) The material taken as a whole lacks serious literary, artistic, political, or scientific value; and
- (3) The material depicts or describes, in a patently offensive way, sexual conduct specifically

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1. H.R. 226, 149th Gen. Assem., Reg. Sess. (Ga. 2007).

defined in subparagraphs (A) through (E) of this paragraph:

- (A) Acts of sexual intercourse, heterosexual or homosexual, normal or perverted, actual or simulated;
  - (B) Acts of masturbation;
  - (C) Acts involving excretory functions or lewd exhibition of the genitals;
  - (D) Acts of bestiality or the fondling of sex organs of animals; or
  - (E) Sexual acts of flagellation, torture, or other violence indicating a sadomasochistic sexual relationship.
- (c) Any device designed or marketed as useful primarily for the stimulation of human genital organs is obscene material under this Code section.
- (d) Material not otherwise obscene may be obscene under this Code section if the distribution thereof, the offer to do so, or the possession with the intent to do so is a commercial exploitation of erotica solely for the sake of their prurient appeal.
- (e) It is an affirmative defense under this Code section that selling, lending, renting, leasing, advertising, publishing, exhibiting, or otherwise disseminating the material was restricted to:
- (1) A person associated with an institution of higher learning, either as a member of the faculty or a matriculated student, teaching or pursuing a course of study related to such material; or
  - (2) A person whose receipt of such material was authorized in writing by a licensed medical practitioner or psychiatrist.
- (f) A person who commits the offense of distributing obscene material shall be guilty of a misdemeanor of a high and aggravated nature.”

§ 2.

This Act shall become effective upon its approval by the Governor or upon its becoming law without such approval and shall apply only with respect to offenses committed on or after that effective date.

§ 3.

All laws and parts of laws in conflict with this Act are repealed

### FIRST SIGNATURE’S RATIONALE

Rep. David Ralston, of the 7<sup>th</sup>, introduced House Bill 226 because the Eleventh Circuit U.S. Court of Appeals in *This That And The Other Gift And Tobacco, Inc. v. Cobb County, Ga.*,<sup>2</sup> found that O.C.G.A. § 16-12-80 contained a per se ban on advertising that was more extensive than necessary, thus making the statute unconstitutional.<sup>3</sup> In committee, Rep. Ralston stated that he introduced House Bill 226 because the Federal Court in *This That And the Other Gift And Tobacco, Inc.*, struck down the current obscenity statute, finding that the statute was overbroad in terms of restrictions on advertising the sale of certain merchandise.<sup>4</sup> Rep. Ralston noted that certain

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2. *This That And The Other Gift And Tobacco, Inc. v. Cobb County*, 439 F.3d 1275 (11th Cir. 2006).

3. Video Recording of Ga. H. Judy. (Non-Civil) Comm. Meeting, Mar. 14, 2007 (remarks by Rep. David Ralston), *available at* [http://www.legis.state.ga.us/legis/2007\\_08/house/Committees/judiciaryNonCivil/judyncArchives.htm](http://www.legis.state.ga.us/legis/2007_08/house/Committees/judiciaryNonCivil/judyncArchives.htm). [hereinafter *Committee Recording*].

4. Ga. Gen. Assem., H.R. 226, [http://www.legis.ga.gov/legis/2007\\_08/](http://www.legis.ga.gov/legis/2007_08/)

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metro areas wanted to resuscitate Georgia's obscenity statute with a Bill that upholds the traditional family values of our state.<sup>5</sup> In addition to defining dissemination, House Bill 226 provides an exemption for employees of higher education, and includes an exemption for employees of public libraries.<sup>6</sup>

### LEGISLATIVE GENEALOGY

The first reading occurred on January 31, 2007. A second reading occurred on February 1, 2007, where the House recommitted the Bill to committee on rules.<sup>7</sup> On March 14, 2007, the House Judiciary (Non-Civil) Committee reviewed and debated the Bill.<sup>8</sup> The committee heard testimony from representatives from the Georgia Council of Public Libraries regarding concerns that librarians could be punished for material contained in books already shelved in the libraries, such as science books that include pictures of the anatomy of the human body.<sup>9</sup> Additionally, representatives on behalf of the Georgia Council of Public Libraries noted that the current law provides an exemption for higher education and that public libraries contribute to education and, therefore, libraries should have an exemption under the new law.<sup>10</sup>

Rep. Bobby Franklin, of the 43<sup>rd</sup>, moved to delete the librarian exemption because librarians are not elected officials and, therefore, are not held accountable for material they select for the library, even though tax dollars are used to purchase these materials.<sup>11</sup> In response to Rep. Franklin, Rep. Robert Mumford, of the 95<sup>th</sup>, stated that librarians are very selective about the material they choose for the library, and without the exemption, someone who believes a book is obscene could pursue a warrant and have a librarian arrested.<sup>12</sup> After these discussions, the committee voted and did not pass Rep.

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sum/hb226.htm (last visited Mar. 23, 2008) [hereinafter *H.R. 226 Status*].

5. *Committee Recording*, *supra* note 3.

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

Franklin's motion to amend the Bill, and the committee favorably reported House Bill 226.<sup>13</sup>

On March 27, 2007, the Bill was read in the House.<sup>14</sup> Rep. Ralston explained to the floor that this Bill would reenact Georgia's obscenity statute and get the law back on the books.<sup>15</sup> Rep. Ralston also stated that the exemption for public libraries does not change the oversight of public libraries by local enforcement officials.<sup>16</sup> Rep. Stephanie Benfield, of the 85<sup>th</sup>, reiterated that librarians from several districts had contacted their Representatives in support of the Bill.<sup>17</sup> Rep. Franklin spoke on the Bill and stated that the court instructed the legislature to define dissemination in the obscenity statute and did not mention anything about an exemption for librarians.<sup>18</sup> Therefore, Rep. Franklin stated that House Bill 226 should be passed as introduced, without the exemption for public libraries due to multiple concerns including allowing tax dollars to be spent by libraries to purchase obscene material.<sup>19</sup> Due to these concerns, Rep. Franklin proposed an amendment to the Bill, which struck the exemption for librarians.<sup>20</sup> The House voted on the amendment, resulting in a tie. Rep. Franklin moved to reconsider the Amendment, resulting in its passage.<sup>21</sup> The House passed House Bill 226 without the public library defense.<sup>22</sup>

Sen. John Wiles, of the 37<sup>th</sup>, sponsored the Bill in the Senate.<sup>23</sup> On March 27, 2007, the Bill was read and referred.<sup>24</sup> On April 13, 2007, the Senate Committee favorably reported

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13. *Id.*

14. Video Recording of Ga. H. Proceedings, Mar. 27, 2007 (remarks by Rep. David Ralston), available at [http://www.georgia.gov/00/article/0,2086,4802\\_6107103\\_72682804,00.html](http://www.georgia.gov/00/article/0,2086,4802_6107103_72682804,00.html).

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *H.R. 226 Status*, *supra* note 4.

24. *Id.*

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and recommended the Bill to pass by substitute.<sup>25</sup> The Senate added back the defense for a person associated with a public library and read the Bill a second time.<sup>26</sup> The Bill did not make it to the floor for a vote in the Senate in the 2007 session. During the 2008 Session, the Senate recommitted House Bill 226.<sup>27</sup>

**PREPARED BY:** Jerry B. Thames

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25. *Id.*

26. *Id.*

27. *Id.*

**HOUSE BILL 251:<sup>1</sup> DISCIPLINE OF PROSECUTORIAL  
MISCONDUCT**  
*Amending O.C.G.A. § 15-18-90*

**FIRST SIGNATURE:** Rep. Austin Scott (153<sup>rd</sup>).

**SUMMARY:** House Bill 251 enlarged the authority of the Judicial Qualifications Commission (“JQC”) by allowing the Commission to discipline Georgia prosecuting attorneys for prosecutorial misconduct.

**STATUS:** Not enacted.

**TEXT OF HOUSE BILL 251**

**§ 1.**

Chapter 18 of Title 15 of the Official Code of Georgia Annotated, relating to prosecuting attorneys, is amended by adding a new Article 5 to read as follows:

“ARTICLE 5

15-18-90.

As used in this article, the term:

(1) ‘Commission’ means the Judicial Qualifications Commission created by Article VI, Section VII, Paragraph VI of the Constitution of the State of Georgia.

(2) ‘Invidious discrimination’ means any action by an organization that characterizes some immutable individual trait such as a person’s race, gender, or national origin, as well as religion, as odious or as signifying inferiority, which therefore is used to justify arbitrary exclusion of persons possessing those traits from membership, position, or participation in the organization.

(3) ‘Knowingly,’ ‘knowledge,’ ‘known,’ or ‘knows’ denotes actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances.

(4) ‘Law’ denotes court rules as well as statutes, constitutional provisions, and decisional law.

(5) ‘Prosecuting attorney’ means the individual responsible for prosecuting cases in superior courts, state courts, probate courts, magistrate courts, municipal courts, and any other court that hears cases involving a violation of the criminal laws of this state or ordinance violations.

(6) ‘Third degree of relationship’ means the following relatives: great-grandparent, grandparent, parent, uncle, aunt, brother, sister, child, grandchild, great-grandchild, nephew, and niece.

15-18-91.

(a) Any prosecuting attorney may be removed, suspended, or otherwise disciplined by the commission for willful misconduct in office, for willful and persistent failure to perform the duties of office, for habitual intemperance, for conviction of a crime involving moral turpitude, or for conduct prejudicial to the administration of justice which brings the office of the prosecuting attorney into disrepute. Any prosecuting attorney may be retired for disability, which constitutes a serious and likely permanent interference with the performance of the duties of office. The commission shall adopt such rules and regulations as necessary for the implementation of this article.

(b) No action shall be taken against a prosecuting attorney except after a hearing and in accordance with due process of law. No removal or involuntary retirement shall occur except upon order of the Supreme Court after review.

15-18-92.

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1. H.R. 251, 149th Gen. Assem., Reg. Sess. (Ga. 2007).

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Prosecuting attorneys shall adhere to the following standards in the conduct of the duties of their office:

- (1) Prosecuting attorneys shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judicial system;
- (2) Prosecuting attorneys shall not allow their family, social, political, or other relationships to influence their conduct or judgment;
- (3) Prosecuting attorneys shall not hold membership in any organization that practices invidious discrimination;
- (4) Prosecuting attorneys shall refrain from manifesting, by words and conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status against parties, witnesses, counsel, or others. This does not preclude legitimate advocacy when race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status, or other similar factors, are issues in the proceeding;
- (5) Prosecuting attorneys shall require their staffs and others subject to their direction and control to observe the standards of fidelity and diligence that apply to the prosecuting attorneys and to refrain from manifesting bias or prejudice in the performance of their official duties;
- (6) Prosecuting attorneys shall disqualify themselves in any proceeding in which their impartiality might reasonably be questioned including, but not limited to, instances where:
  - (A) The prosecuting attorney has a personal bias or prejudice concerning a party or a party's lawyer;
  - (B) The prosecuting attorney served as a lawyer in the matter of controversy, a lawyer with whom the prosecuting attorney previously practiced law served during such association as a lawyer concerning the matter, or the prosecuting attorney has been a material witness concerning it; and
  - (C) The prosecuting attorney or his or her spouse, a person within the third degree of relationship to either of them or the spouse of such a person, or any other member of the prosecuting attorney's family residing in the prosecuting attorney's household:
    - (i) Is a party to the proceeding or an officer, director, or trustee of a party;
    - (ii) Is acting as a lawyer in the proceeding;
    - (iii) Is known by the prosecuting attorney to have a more than de minimis interest that could be substantially affected by the proceeding; or
    - (iv) Is to the prosecuting attorney's knowledge likely to be a material witness in the proceeding or was the victim of the crime alleged in the proceeding;
- (7) Prosecuting attorneys shall refrain from prosecuting a charge that the prosecuting attorney knows is not supported by probable cause;
- (8) Prosecuting attorneys shall refrain from making any effort to prevent an accused person from exercising a reasonable effort to obtain counsel;
- (9) Prosecuting attorneys shall make timely disclosure to the defense of all evidence or information known to the prosecuting attorney that tends to negate the guilt of the accused or that mitigates the offense;
- (10) Prosecuting attorneys shall exercise reasonable care to prevent persons who are under their direct supervision from making an extrajudicial statement that the prosecuting attorney would be prohibited from making under paragraph (12) of this Code section;
- (11) Prosecuting attorneys shall not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecuting attorney reasonably believes:
  - (A) The information sought is not protected from disclosure by any applicable privilege;
  - (B) The evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and
  - (C) There is no other feasible alternative to obtain the information; and
- (12) Except for statements that are necessary to inform the public of the nature and extent of the prosecuting attorney's action and that serve a legitimate law enforcement purpose, prosecuting attorneys shall refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused."

### § 2.

All laws and parts of laws in conflict with this Act are repealed.

**FIRST SIGNATURE'S RATIONALE**

The intent of House Bill 251 was to deal with prosecutorial misconduct, specifically instances of overzealous and harassing indictments.<sup>2</sup> Rep. Austin Scott, of the 153<sup>rd</sup>, drafted the Bill in response to the cases of two Albany men.<sup>3</sup> Each man was indicted three times, but neither was formally charged.<sup>4</sup> Rep. Scott believed that the indictments were without merit and that the local prosecutor pursued them because the men were causing publicity problems for the local hospital.<sup>5</sup>

**LEGISLATIVE GENEALOGY**

The first reading of the Bill in the House occurred on February 1, 2007.<sup>6</sup> The Bill was read for a second time on February 2, 2007.<sup>7</sup> On March 12, 2007, the House Judiciary (Non-Civil) Committee held hearings on House Bill 251.<sup>8</sup> Rep. Scott proffered that House Bill 251 was necessary to address the issue of prosecutorial misconduct.<sup>9</sup> He further stated that he believed such misconduct and ethical violations would best be handled by the JQC, as complaints filed with the commission are handled confidentially.<sup>10</sup>

Rep. Kevin Levitas, of the 82<sup>nd</sup>, voiced concern as to House Bill 251's constitutionality.<sup>11</sup> In particular, Rep. Levitas expressed doubts as to whether the oversight and disciplinary power could be taken away from the Supreme Court, and suggested submitting the issue to the Attorney General's office

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2. Telephone Interview with Rep. Austin Scott, H. District No. 153 (Aug. 5, 2007).

3. *Id.*

4. *Id.*

5. *Id.*

6. Ga. Gen. Assem., H.R. 251, available at [http://www.legis.ga.gov/legis/2007\\_08/sum/hb\\_251.htm](http://www.legis.ga.gov/legis/2007_08/sum/hb_251.htm) (last visited Mar. 23, 2009).

7. *Id.*

8. Daily Report, H. Judy. (Non-Civil) Subcommittee One, available at [http://www.ciclt.net/aoc/main.asp?PT=n\\_detail&Client=aoc&N\\_ID=100034](http://www.ciclt.net/aoc/main.asp?PT=n_detail&Client=aoc&N_ID=100034).

9. *Id.*

10. *Id.*

11. *Id.*

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for a determination of constitutionality.<sup>12</sup> Rep. Levitas further stated that he did not think that prosecutors should hold positions on the JQC; Rep. Scott replied that he was not adamant about any of the language in particular, but that he primarily wanted a non-Bar institution that operates similar to the JQC to act as an oversight committee.<sup>13</sup>

Subsequently, Rep. Tim Bearden, of the 68<sup>th</sup>, made a motion to table the Bill until the Attorney General approves it or Rep. Scott amends the Bill to cure the potential constitutional defect.<sup>14</sup> Consequently, no action was taken on House Bill 251.

**PREPARED BY:** Paul Sieg

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12. *Id.*

13. *Id.*

14. *Id.*

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**House Bill 301:<sup>1</sup> Dog Fighting**  
***Amending O.C.G.A. § 16-12-37***

**FIRST SIGNATURE:** Rep. Bobby Reese (98<sup>th</sup>).

**CO-SPONSORS:** Rep. David Knight (126<sup>th</sup>), Rep. Jay Roberts (154<sup>th</sup>), Rep. Al Williams (165<sup>th</sup>), Rep. Mike Jacobs (80<sup>th</sup>) & Rep. Gene Maddox (172<sup>nd</sup>).

**SUMMARY:** House Bill 301 would substantially strengthen O.C.G.A. § 16-12-37 by making it a crime for dog owners, property owners (where dogfighting occurs), and spectators to engage in dogfighting.

**STATUS:** Passed House and Senate.

**TEXT OF HOUSE BILL 301**

**§ 1-1.**

Part 1 of Article 2 of Chapter 12 of Title 16 of the Official Code of Georgia Annotated, relating to gambling offenses, is amended by revising Code Section 16-12-37, relating to dogfighting, as follows:

“16-12-37.

(a) As used in this Code section, the term ‘dog’ means any domestic canine.

(b) Any person who:

(1) Owns, possesses, trains, transports, or sells any dog with the intent that such dog shall be engaged in fighting with another dog;

(2) For amusement or gain, causes any dog to fight with another dog or for amusement or gain, causes any dogs to injure each other;

(3) Wagers money or anything of value on the result of such dogfighting;

(4) Knowingly permits any act in violation of paragraph (1) or (2) of this subsection on any premises under the ownership or control of such person or knowingly aids or abets any such act;

or

(5) Knowingly promotes or advertises an exhibition of fighting with another dog shall be guilty of a felony and, upon the first conviction thereof, shall be punished by imprisonment of not less than one nor more than five years, a fine of not less than \$5,000.00, or both such fine and imprisonment. On a second or subsequent conviction, such person shall be punished by imprisonment of not less than one nor more than ten years, a fine of not less than \$15,000.00, or both such fine and imprisonment. Each act or omission in violation of this subsection shall constitute a separate offense.

(c) Any person who is knowingly present only as a spectator at any place for the fighting of dogs shall, upon a first conviction thereof, be guilty of a misdemeanor of a high and aggravated nature. On a second conviction, such person shall be guilty of a felony and shall be punished by imprisonment of not less than one nor more than five years, a fine of not less than \$5,000.00, or both such fine and imprisonment. On a third or subsequent conviction, such person shall be punished by imprisonment of not less than one nor more than ten years, a fine of not less than \$15,000.00, or both such fine and imprisonment. Each act in violation of this subsection shall

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1. H.R. 301, 149th Gen. Assem., Reg. Sess. (Ga. 2007).

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constitute a separate offense.

(d) Any dog subject to fighting may be impounded pursuant to the provisions of Code Sections 4-11-9.2 through 4-11-9.6. For purposes of such impoundment of a dog subject to fighting, humane care of such dog while impounded shall include but not be limited to mandatory neutering or spaying if the dog is not sterile. In addition to any punishment imposed under subsection (b) of this Code section, a dog owner convicted of violating any provision of said subsection shall be assessed the costs of neutering or spaying any dog belonging to him or her that has been impounded as a result of such violation.

(e) This Code section shall not prohibit, impede, or otherwise interfere with animal husbandry, training techniques, competition, events, shows, or practices not otherwise specifically prohibited by law and shall not apply to the following activities:

(1) Owning, using, breeding, training, or equipping any animal to pursue, take, hunt, or recover wildlife or any animal lawfully hunted under Title 27 or participating in hunting or fishing in accordance with the provisions of Title 27 and rules and regulations promulgated pursuant thereto as such rules and regulations existed on the date specified in Code Section 27-1-39;

(2) Owning, using, breeding, training, or equipping dogs to work livestock for agricultural purposes in accordance with the rules and regulations of the Commissioner of Agriculture as such rules and regulations existed on January 1, 2008;

(3) Owning, using, breeding, training, or equipping dogs for law enforcement purposes; or

(4) Owning, using, breeding, training, or equipping any animal to control damage from nuisance or pest species in and around structures or agricultural operations.”

**§ 2-1.**

Title 4 of the Official Code of Georgia Annotated, relating to animals, is amended by revising paragraph (6) of Code Section 4-8-41, relating to definitions relative to Chapter 8 of said title, as follows:

“(6) ‘Vicious dog’ means any dog that:

Inflicts a severe injury on a human being without provocation after the owner has notice that the dog has previously bitten or attacked or endangered the safety of a human being;

Such term shall not include a dog that inflicts an injury upon a person when the dog is being used by a law enforcement officer to carry out the law enforcement officer’s official duties. A dog shall not be a vicious dog if the injury inflicted by the dog was sustained by a person who, at the time, was committing a willful trespass or other tort or was tormenting, abusing, or assaulting the dog or had in the past been observed or reported to have tormented, abused, or assaulted the dog or was committing or attempting to commit a crime.”

**§ 2-2.**

Said title is further amended by revising subsection (c) of Code Section 4-11-9.3, relating to caring for an impounded animal, as follows:

“(c) Any person impounding an animal under this article ~~is~~ shall be authorized to return such animal to its owner, upon payment by the owner of all costs of impoundment and care and upon the entry of a consent order, unless such owner, in a prior administrative or legal action in this state or any other state, was found to have failed to provide humane care to an animal, committed cruelty to animals, or committed an act prohibited under Code Section 16-12-37 in violation of the laws of this state or of the United States or any of the several states. Such consent order shall provide conditions relating to the care and treatment of such animal, including, but not limited to, the following, that:

(1) Such animal shall be given humane care and adequate and necessary veterinary services;

(2) Such animal shall not be subjected to cruelty; and

(3) The owner shall comply with this article.”

**§ 2-3.**

Said title is further amended by revising subparagraph (b)(6)(B) of Code Section 4-11-9.5, relating to failure to respond, right to hearing, care, and crime exception, as follows:

“(B) Unless, in a prior administrative or legal action in this state or any other state, the owner has been found to have failed to provide humane care to an animal, committed cruelty to animals, or committed an act prohibited under Code Section 16-12-37 in violation of the laws of this state or of the United States or any of the several states, recommend conditions under which the animal may, upon payment by the owner of all costs of impoundment and care, be returned to the owner. Such conditions shall be reduced to writing and served upon the owner and the

government agency having custody of the animal. Such conditions may include, but are not limited to, the following, that:

- (i) Such animal shall be given humane care and adequate and necessary veterinary services;
- (ii) Such animal shall not be subjected to mistreatment; and
- (iii) The owner shall comply with this article.”

**§ 2-4.**

Said title is further amended by revising subsection (a) of Code Section 4-11-17, relating to filing a report regarding animal cruelty and immunity, as follows:

“(a) Notwithstanding Code Section 24-9-29 or any other provision of law to the contrary, any licensed veterinarian or veterinary technician having reasonable cause to believe that an animal has been subjected to animal cruelty in violation of Code Section 16-12-4 or an act prohibited under Code Section 16-12-37 may make or cause to be made a report of such violation to the Commissioner, his or her designee, an animal control officer, a law enforcement agency, or a prosecuting attorney and may appear and testify in any judicial or administrative proceeding concerning the care of an animal.”

**§ 3-1.**

This Act shall become effective upon its approval by the Governor or upon its becoming law without such approval.

**§ 3-2.**

All laws and parts of laws in conflict with this Act are repealed.

### **FIRST SIGNATURE’S RATIONALE**

Rep. Bobby Reese, of the 98<sup>th</sup>, introduced House Bill 301. The intent of the legislation was to strengthen O.C.G.A. § 16-12-37 by capturing other criminal conduct within the meaning of the statute. Specifically, the proposed bill would include dog owners, property owners (where dogfighting occurs) and spectators that participate in dogfighting, in order to discourage dogfighting in Georgia.<sup>2</sup>

### **LEGISLATIVE GENEALOGY**

The first and second readings of the Bill in the House occurred on February 8, 2007 and February 9, 2007.<sup>3</sup> On March 19, 2007, House Bill 301 was favorably reported by the House Judiciary (Non-Civil) Committee.<sup>4</sup> The version of House Bill 301 that was favorably reported was virtually identical to the original version, except for the modification changing the punishment for spectators to a misdemeanor from

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2. Telephone Interview with Rep. Bobby Reese, H. District No. 98 (July 30, 2007) [hereinafter Reese Interview].

3. H.R. 301; (Ga. 2007), bill text, *available at* [http://www.legis.state.ga.us/legis/2007\\_08/sum/hb301.htm](http://www.legis.state.ga.us/legis/2007_08/sum/hb301.htm).

4. *Id.*

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a felony.<sup>5</sup> This change was made because there were differences of opinion as to how the penalty provision for spectators should be structured.<sup>6</sup> On April 20, 2007, House Bill 301 was withdrawn and recommitted.<sup>7</sup> Rep. Reese reintroduced House Bill 301 early in the 2008 session of the Georgia General Assembly.<sup>8</sup> In January 2008, the Bill was once again favorably reported by the House Judiciary (Non-Civil) Committee and overwhelmingly passed the House with a vote of 165 votes in favor of the bill. Penalty structure issues were resolved by adopting a graduated scheme with respect to spectator offenses. House Bill 301 passed the Senate on March 12, 2008.<sup>9</sup> Final amendments to the Bill were agreed to by the House and Senate on March 27 and March 28, 2008.<sup>10</sup>

**PREPARED BY:** Paul Donahue

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5. *Compare* Georgia Gen. Assem., Legislative Search, Bill Summary [http://www.legis.state.ga.us/legis/2007\\_08/versions/hb301\\_LC\\_28\\_3375\\_a\\_2.htm](http://www.legis.state.ga.us/legis/2007_08/versions/hb301_LC_28_3375_a_2.htm) (last accessed Dec. 17, 2007) and HB 301, Bill Summary, [http://www.legis.state.ga.us/legis/200708/versions/hb301\\_LC292811Shs4.htm](http://www.legis.state.ga.us/legis/200708/versions/hb301_LC292811Shs4.htm) (last accessed Dec. 17, 2007).

6. Telephone Interview with Rep. Doug Collins, H. District No. 27 (Dec. 3, 2007).

7. Georgia Gen. Assem., Legislative Search: HB 301, Bill Summary, [http://www.legis.state.ga.us/legis/2007\\_08/sum/hb301.htm](http://www.legis.state.ga.us/legis/2007_08/sum/hb301.htm) (last accessed Apr. 5, 2008).

8. *Id.*

9. *Id.*

10. *Id.*

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**HOUSE BILL 308:<sup>1</sup> EYEWITNESS IDENTIFICATION**  
***Amending O.C.G.A. § 17-9-1***

**FIRST SIGNATURE:** Rep. Stephanie Benfield (85<sup>th</sup>).

**CO-SPONSORS:** Rep. Pam Stephenson (92<sup>nd</sup>), Rep. Randal Mangham (94<sup>th</sup>), Rep. Roberta Abdul-Salaam (74<sup>th</sup>) & Rep. Mabel Thomas (55<sup>th</sup>).

**SUMMARY:** The Bill would establish procedures for conducting lineups for the purpose of making eyewitness identifications.

**STATUS:** Not enacted.

**TEXT OF HOUSE BILL 308**

**§ 1.**

The General Assembly finds and declares that eyewitness error is the leading cause of mistaken convictions, and cases of mistaken convictions in this state due to eyewitness misidentification have a resulted in actual perpetrators remaining free to commit more crimes. The General Assembly further finds that the goal of a police investigation is to identify accurately and apprehend the true perpetrators of crimes, and scientific studies of eyewitness memory have demonstrated that eyewitness evidence is, like trace physical evidence, susceptible to contamination if not handled properly. The General Assembly further finds that well-intentioned witnesses and authorities acting in good faith may sometimes inadvertently undermine the accuracy of an identification procedure unless appropriate safeguards are in place. Accordingly, the General Assembly, acutely aware that extensive scientific research has shown that alternative methods of conducting identification procedures greatly enhance eyewitness identification accuracy, declares that this state has a compelling interest in assuring that appropriate eyewitness identification procedures are utilized in this state.

**§ 2.**

This Act shall be known and may be cited as the "Eyewitness Identification Accuracy Enhancement Act."

**§ 3.**

Title 17 of the Official Code of Georgia Annotated, relating to criminal procedure, is amended by adding a new chapter to read as follows:

CHAPTER 19

17-19-1.

As used in this chapter, the term:

- (1) 'Filler' means a person, not a suspect in the crime under investigation, who is made part of a live lineup or a photograph of a person, not a suspect in the crime under investigation, that is made part of a photo lineup and presented to a witness.
- (2) 'Live lineup' means a selected group of persons presented to an eyewitness to a crime containing a suspect and several fillers for the purpose of determining whether the eyewitness is able to identify the suspect as the perpetrator.
- (3) 'Neutral blind administrator' means a person who conducts photo lineup or live lineup procedures while unaware of which person in the lineup is the suspect and which are fillers.

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1. H.R. 308, 149th Gen. Assem., Reg. Sess. (Ga. 2007).

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(4) 'Photo lineup' means a selected group of photographs of persons presented to an eyewitness to a crime containing a single suspect and several fillers for the purpose of determining whether the eyewitness is able to identify the suspect as the perpetrator.

(5) 'Suspect' means a person under investigation for participation in a crime.  
17-19-2.

Prior to January 1, 2008, the Georgia Peace Officer Standards and Training Council shall develop and disseminate to all law enforcement jurisdictions in this state comprehensive policies and procedures and associated training materials for law enforcement agencies regarding photo lineup and live lineup eyewitness identification procedures that implement the requirements set forth in this chapter.

17-19-3.

(a) All photo lineup and live lineup eyewitness identification procedures conducted by law enforcement officers shall be administered pursuant to the procedures developed pursuant to Code Section 17-19-2 and consistent with the requirements of this chapter.

(b) Composition of photo lineups and live lineups shall meet the following requirements:

(1) At least five fillers shall be included in a photo lineup, in addition to the suspect, and at least four fillers shall be included in a live lineup, in addition to the suspect;

(2) Only one member of a photo lineup or live lineup shall be a suspect, and the remainder shall be fillers who are not suspects but who fit the eyewitness' description of the suspect;

(3) In photo lineups, the suspect's photo should resemble his or her appearance at the time of the crime and not unduly stand out;

(4) If the eyewitness has previously viewed a photo lineup or live lineup in connection with the investigation of the crime, the fillers in any subsequent lineup shall be different from the fillers used in any prior lineup;

(5) In a photo lineup, no writings or information concerning any previous arrest, indictment, or conviction of the suspect shall be visible or made known to the eyewitness;

(6) In a live lineup, any identifying actions, such as speech, gestures, or other movements, shall be performed by all lineup participants; and

(7) In a live lineup, witnesses shall not be exposed to the members of the lineup before the procedure begins.

(c)(1) Whenever possible, the administrator of photo lineup or live lineup eyewitness identification procedure shall be a neutral blind administrator, and no person familiar with the identity of the suspect shall be present during the identification procedure.

(2) When it is not feasible to have the procedure administered by a neutral blind administrator, a photo lineup eyewitness identification procedure may be conducted using an alternative method specified and approved pursuant to Code Section 17-19-2. Any alternative method shall be carefully structured to achieve neutral blind administration and prevent the administrator from knowing which photograph is being presented to the eyewitness during the identification procedure. Alternative methods may include:

(A) Automated computer programs that can automatically administer the photo lineup directly to an eyewitness and prevent the administrator from seeing which photo the witness is viewing until after the procedure is completed;

(B) A procedure in which photographs are placed in folders, randomly numbered, and shuffled and then presented to an eyewitness such that the administrator cannot see or track which photograph is being presented to the witness until after the procedure is completed; or

(C) Other procedures which achieve neutral blind administration.

(d)(1) Live lineup and photo lineup eyewitness identification procedures shall be presented to eyewitnesses using a sequential method, in which a witness is shown photographs or live lineup participants one at a time and not simultaneously. The eyewitness shall be asked to state for each photograph or person whether the individual shown is the perpetrator of the crime, prior to viewing the next lineup photograph or participant.

(2) The administrator shall not offer any comment or feedback to the eyewitness regarding the witness's responses.

(3) If there are multiple eyewitnesses, witnesses shall be presented with the identification procedure separately, and the suspect shall be placed in a different position in the photo lineup or live lineup for each eyewitness.

(4) Under no circumstances shall a sequential presentation be used unless the procedure

complies fully with neutral blind administration specified in subsection (c) of this Code section. 17-19-4.

Prior to beginning a photo lineup or live lineup identification procedure, the administrator shall instruct the eyewitness that:

- (1) The perpetrator may or may not be among those shown, and the witness should not feel compelled to make an identification;
- (2) The administrator is not aware of which person in the lineup is the suspect;
- (3) The witness will view individuals one at a time and will be requested to state whether the individual shown is the perpetrator of the crime prior to viewing the next lineup photograph or participant; and
- (4) The witness will be presented with the complete lineup, even if the witness makes an identification in the middle of the procedure.

17-19-5.

(a) Each eyewitness shall be given a written copy of the lineup instructions. Each witness shall sign a form indicating that the witness has received, reviewed, and understands the lineup instructions prior to the administration of the identification procedure, and this form shall be kept as part of the law enforcement file.

(b) All eyewitness responses to the lineup participants shall be documented using the witness's own words, either in writing or with audio or video recording.

(c) If the eyewitness makes an identification, after the entire lineup has been presented the administrator shall ask the witness to state in his or her own words how confident he or she is that the person identified is the perpetrator of the crime and make the witness's verbatim response part of the record in the law enforcement file.

(d) The administrator shall refrain from any comment or feedback to the eyewitness regarding the witness's statements.

(e) If no electronic recording is made, the eyewitness will be asked to review and sign the written record of his or her responses to the identification procedure, including any statements regarding an identification, prior to any feedback or comment from the administrator or others involved in the investigation.

17-19-6.

Notwithstanding the directives of this chapter, the failure to strictly comply with the provisions of this chapter shall not, in and of itself, preclude testimony and evidence related to eyewitness identification being admissible into evidence; this matter shall be in the sole discretion of the court. In deciding whether testimony and evidence related to eyewitness identification shall be admissible into evidence, the court shall consider whether the provisions of this chapter were complied with, together with any other relevant circumstance."

#### § 4.

Title 35 of the Official Code of Georgia Annotated, relating to law enforcement officers and agencies, is amended by adding a new Code section to the end of Chapter 1, relating to general provisions for law enforcement officers and agencies, to read as follows:

"35-1-15.

The Georgia Peace Officer Standards and Training Council and the Georgia Public Safety Training Center shall establish guidelines and procedures for the incorporation of training materials and information in methods for enhancing eyewitness identification accuracy pursuant to Chapter 19 of Title 17 in all courses for which they have responsibility and oversight."

#### § 5.

(a) This section and Sections 1, 2, 4, and 6 of this Act shall become effective on July 1, 2007.

(b) Section 3 of this Act shall become effective on January 1, 2008, and shall apply to all photo lineups and live lineups that occur pursuant to offenses that occur on or after January 1, 2008.

#### § 6.

All laws and parts of laws in conflict with this Act are repealed.

### FIRST SIGNATURE'S RATIONALE

Rep. Stephanie Benfield, of the 85<sup>th</sup>, introduced House Bill

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308 because six men in Georgia were wrongfully convicted based primarily on false eyewitness identifications.<sup>2</sup> The Georgia Innocence Project brought this issue to Rep. Benfield's attention after they aided in the exoneration of those six men. The group's national parent recognized that faulty eyewitness identification is a central factor in the majority of wrongful convictions nationwide.<sup>3</sup>

### LEGISLATIVE GENEALOGY

The first reading of the House Bill 308 in the House occurred on February 8, 2007.<sup>4</sup> The Bill was assigned to the House Judiciary (Non-Civil) Committee on February 9, 2007.<sup>5</sup> While in Committee, Rep. Benfield formed a committee to further study the issue of eyewitness identifications.<sup>6</sup> This committee held several public hearings headlined by various national experts in the field of eyewitness identification, which were attended by prominent members of the law enforcement and legal communities.<sup>7</sup> Rep. Benfield speculated that a possible outcome of the hearings would be the voluntary adoption of these procedures by the legal community, making the passage of any legislation unnecessary.<sup>8</sup>

**PREPARED BY:** Michael A. Albino

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2. Telephone Interview with Georgia Rep. Stephanie Stuckey Benfield, of the 85th District (Aug., 2008) [hereinafter *Benfield Interview*]. Rep. Benfield has subsequently sponsored House Bill 997, which also addressed eyewitness identification procedures. *Id.* That Bill was assigned to the House Judiciary (Non-Civil) Committee, and was favorably reported out of committee on February 6, 2008. *Id.*

3. *Id.*

4. State of Ga. Final Composite Status Sheet, H.R. 308, Feb. 8, 2007 (Feb. 20, 2008).

5. *Id.*

6. *Benfield Interview*, *supra* note 2.

7. *Id.*

8. *Id.*

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**HOUSE BILL 314:<sup>1</sup> DNA ANALYSIS**  
***Amending O.C.G.A. § 24-6-60***

**FIRST SIGNATURE:** Rep. Jay Neal (1<sup>st</sup>).

**CO-SPONSORS:** Rep. David Ralston (7<sup>th</sup>), Rep. Burke Day (163<sup>rd</sup>), Rep. Mike Coan (101<sup>st</sup>), Rep. Barry Fleming (117<sup>th</sup>) & Rep. Billy Mitchell (88<sup>th</sup>).

**SUMMARY:** House Bill 314 amended O.C.G.A. § 24-6-60 by requiring DNA analysis of all persons on probation or incarcerated convicted of certain enumerated felonies and sexual offenses.

**STATUS:** Enacted.

**TEXT OF HOUSE BILL 314**

**§ 1**

Code Section 24-4-60 of the Official Code of Georgia Annotated, relating to requirement for DNA analysis of blood of persons convicted of certain sex offenses or convicted of a felony and incarcerated in a state correctional facility, is revised as follows:

“24-4-60.

(a) As used in subsection (b) of this Code section, the term ‘state correctional facility’ means a penal institution under the

jurisdiction of the Department of Corrections, including inmate work camps and inmate boot camps; provided, however, that such term shall not include a probation detention center, probation diversion center, or probation boot camp under the jurisdiction of the Department of Corrections.

(b) Any person convicted of a criminal offense defined in Code Section 16-6-1, relating to the offense of rape; Code Section 16-6-2, relating to the offense of sodomy or aggravated sodomy; Code Section 16-6-3, relating to the offense of statutory rape; Code Section 16-6-4, relating to the offense of child molestation or aggravated child molestation; Code Section 16-6-5, relating to the offense of enticing a child for indecent purposes; Code Section 16-6-5.1, relating to the offense of sexual assault against persons in custody, sexual assault against a person detained or a patient in a hospital or other institution, or sexual assault by a practitioner of psychotherapy against a patient; Code Section 16-6-6, relating to the offense of bestiality; Code Section 16-6-7, relating to the offense of necrophilia; or Code Section 16-6-22, relating to the offense of incest, shall have a sample of his or her blood, an oral swab, or a sample obtained from a noninvasive procedure taken for DNA (deoxyribonucleic acid) analysis to determine identification characteristics specific to the person. In addition, on and after July 1, 2000, any person convicted of a felony and incarcerated in a state correctional facility shall at the time of entering the prison system have a sample of his or her blood, an oral swab, or a sample obtained from a noninvasive procedure taken for DNA (deoxyribonucleic acid) analysis to determine identification characteristics specific to the person. The provisions and requirements of this Code section shall also apply to any person who has been convicted of a felony prior to July 1, 2000, and who currently is incarcerated in a state correctional facility in this state for such

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1. H.R. 314, 149th Gen. Assem., Reg. Sess. (Ga. 2007).

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offense. The provisions and requirements of this Code section shall also apply to any person who has been convicted of a felony in this state on or after July 1, 2000, and who is incarcerated in a private correctional facility in this state for such offense pursuant to a contract with the Department of Corrections upon entering the facility, and for any person convicted of a felony prior to July 1, 2000, and who is incarcerated in a private correctional facility in this state pursuant to contract with the Department of Corrections. The analysis shall be performed by the Division of Forensic Sciences of the Georgia Bureau of Investigation. The division shall be authorized to contract with individuals or organizations for services to perform such analysis. The identification characteristics of the profile resulting from the DNA analysis shall be stored and maintained by the bureau in a DNA data bank and shall be made available only as provided in Code Section 24-4-63.

(c)(1) On and after July 1, 2007, any person who is placed on probation shall have a sample of his or her blood, an oral swab, or a sample obtained from a noninvasive procedure taken for DNA (deoxyribonucleic acid) analysis to determine identification characteristics specific to the person if such person is convicted of a felony violation of any of the following:

(A) Chapter 5 of Title 16, relating to crimes against persons;

(B) Code Section 16-6-1, relating to the offense of rape;

(C) Code Section 16-6-2, relating to the offense of sodomy or aggravated sodomy;

(D) Code Section 16-6-3, relating to the offense of statutory rape;

(E) Code Section 16-6-4, relating to the offense of child molestation or aggravated child molestation;

(F) Code Section 16-6-5, relating to the offense of enticing a child for indecent purposes;

(G) Code Section 16-6-5.1, relating to the offense of sexual assault against persons in custody, sexual assault against a person detained or a patient in a hospital or other institution, or sexual assault by a practitioner of psychotherapy against a patient;

(H) Code Section 16-6-6, relating to the offense of bestiality;

(I) Code Section 16-6-7, relating to the offense of necrophilia;

(J) Code Section 16-6-22, relating to the offense of incest;

(K) Code Section 16-7-1, relating to the offense of burglary;

(L) Code Section 16-8-40, relating to the offense of robbery;

(M) Code Section 16-8-41, relating to the offense of armed robbery;

(N) Code Section 16-10-23, relating to the offense of impersonating an officer;

(O) Code Section 16-10-24, relating to the offense of obstruction of an officer;

(P) Article 4 of Chapter 11 of Title 16, relating to dangerous instrumentalities and practices; and

(Q) Chapter 13 of Title 16, relating to controlled substances.

(2) The analysis shall be performed by the Division of Forensic Sciences of the Georgia Bureau of Investigation. The division shall be authorized to contract with individuals or organizations for services to perform such analysis. The identification characteristics of the profile resulting from the DNA analysis shall be stored and maintained by the bureau in a DNA data bank and shall be made available only as provided in Code Section 24-4-63. The Department of Corrections shall be responsible for collecting such sample."

**§ 2.**

This Act shall become effective on July 1, 2007.

**§ 3**

All laws and parts of laws in conflict with this Act are repealed.

### FIRST SIGNATURE'S RATIONALE

The purpose of House Bill 314 was to better assist the Georgia Bureau of Investigation ("GBI") in solving cold cases.<sup>2</sup>

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2. Video Recording of H. Comm. Meeting, available at [http://www.legis.ga.gov/legis2007\\_08/house/Committees/judiciaryNonCivil/](http://www.legis.ga.gov/legis2007_08/house/Committees/judiciaryNonCivil/)

In 1998, the GBI created a crime indexing database which included the DNA of incarcerated felons.<sup>3</sup> The database provided DNA evidence that assisted in solving 560 cold cases nationwide.<sup>4</sup>

In 2005, more than 40,000 convicted felons received a sentence of probation rather than incarceration.<sup>5</sup> Thus, 40,000 felons were not required to be indexed in the GBI database.<sup>6</sup> This Bill was introduced to require mandatory DNA collection of individuals convicted of certain felonies and sexual crimes that O.C.G.A. § 24-6-60 did not include.<sup>7</sup>

### LEGISLATIVE GENEALOGY

The first reading of the Bill in the House occurred on February 9, 2007, and for a second time on February 10, 2007.<sup>8</sup> On March 19, 2007, the House Judiciary (Non-Civil) Committee favorably reported the Bill by substitute.<sup>9</sup> On March 27, 2007, a third reading occurred. The House passed House Bill 314 on March 27, 2007 by a vote of 163 to 2.<sup>10</sup>

The Committee Substitute did not provide for a substantive

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judyncArchives.htm (Mar. 1, 2007) (noting the remarks by Rep. Jay Neal) [hereinafter *House Committee Video*].

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. The felonies that were added to the newly amended code section are as follows: Code Section 16-7-1, relating to the offense of burglary; Code Section 16-8-40, relating to the offense of robbery; Code Section 16-8-41, relating to the offense of armed robbery; Code Section 16-10-23, relating to the offense of impersonating an officer; Code Section 16-10-24, relating to the offense of obstruction of an officer; Article 4 of Chapter 11 of a Title 16, relating to dangerous instrumentalities and practices; and Chapter 13 of Title 16, relating to controlled substances.

8. State of Ga. Final Composite Status Sheet, H.R. 314, Feb. 10, 2007 (Nov. 7, 2007).

9. State of Ga. Final Composite Status Sheet, H.R. 314, Mar. 19, 2007 (Nov. 7, 2007).

10. Ga. Gen. Assem., H.R. 314, available at [http://www.legis.ga.gov/legis/2007\\_08/sum/hb314.htm](http://www.legis.ga.gov/legis/2007_08/sum/hb314.htm) (last visited Mar. 22, 2008); H.R. 314; State of Ga. Final Composite Status Sheet, H.R. 314, Mar. 27, 2007 (Nov. 7, 2007); Ga. H. Voting Record, H.R. 314 (March 27, 2007).

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modification of the Bill because it only modified the order of the wording of the Bill—to make the Bill read more clearly.<sup>11</sup>

Although House Bill 314 was not substantively modified, some Representatives in the Committee expressed concern over language contained in the Bill.<sup>12</sup> For example, Rep. Ed Setzler, of the 35<sup>th</sup>, stated that the language contained in subsection (c)(1) of the Bill is prescriptive because it contains the word “shall”. Rep. Setzler was also concerned that the Bill was not restrictive because it did not use the term “only if”. Thus, the Bill would not expressly exclude non-enumerated offenses where probation is used.<sup>13</sup>

Rep. Stacey Abrams, of the 84<sup>th</sup>, expressed a similar concern. She also advocated that the term “only” be added to the language of the Bill to limit its application to only the enumerated crimes.<sup>14</sup> Rep. Abrams stated, “the mandatory collection of DNA invades personal privacy on such a level that it is important and indeed essential that we modify and identify that these are the only circumstances under which this body believes it is appropriate to require a DNA sample to be taken upon conviction of an offense which places an individual on probation.”<sup>15</sup>

Rep. Levitas, of the 82<sup>nd</sup>, disagreed stating that if the term “only” was added to the Bill, the application of any other code section that allowed for the collection of DNA could be in conflict with the language of this Bill because the term “only” would cause the subsection to be read very narrowly.<sup>16</sup> Rep. Levitas asked the sponsor, Rep. Jay Neal, of the 1<sup>st</sup>, whether he intended the Bill to apply “only” to persons convicted of the enumerated offenses, or whether the DNA collection was intended to be mandatory with the enumerated offenses.<sup>17</sup> Rep. Neal replied that the Bill was intended how it was written. Specifically, the words “if convicted” mean that the DNA

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11. See H.R. 314.

12. *House Committee Video*, *supra* note 1 (note remarks by Reps. Ed Setzler, Stacey Abrams, and Kevin Levitas).

13. *Id.*

14. *Id.* (note remarks by Rep. Stacey Abrams).

15. *Id.*

16. *Id.* (note remarks by Rep. Kevin Levitas).

17. *Id.*

sample “shall” be taken from a person “if” they are convicted.<sup>18</sup> Rep. Neal further stated that the Bill was intended for the purpose of obtaining DNA samples from violent offenders so that law enforcement could solve cold cases. Rep. Neal believed the term “if” alone is sufficient to achieve that purpose.<sup>19</sup>

Rep. Levitas raised concerns that the Bill included persons who were previously convicted of an enumerated crime, but who are subsequently placed on probation for a non-enumerated crime.<sup>20</sup> Rep. Levitas put forth a motion to amend the language to read, “has been placed on probation pursuant to a conviction of one of the enumerated offenses.”<sup>21</sup> However, Rep. Neal, stated that the aim of this Bill is to target the profile of an offender that would assist in the resolution of cold cases.<sup>22</sup> So long as the individual in question has ever been convicted of one of the enumerated offenses, the Bill would cover that individual despite the fact that the current sentence of probation may be pursuant to some other offense.<sup>23</sup> Rep. Levitas took his motion off the table, and the Bill left the House Committee with no substantive modification.<sup>24</sup>

The House passed the Committee Substitute to House Bill 314 on March 27, 2007.<sup>25</sup> There was no floor debate with respect to House Bill 314, and the Bill passed by a vote of 163 to 2.<sup>26</sup>

The Senate Public Safety and Homeland Security Committee favorably reported House Bill 314 by substitute on April 16, 2007 with no substantive modifications.<sup>27</sup> After having no floor debate with regard to House Bill 314, the Senate passed the Bill

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18. *Id.* (note remarks by Rep. Jay Neal).

19. *Id.*

20. *Id.* (note remarks by Rep. Kevin Levitas).

21. *Id.*

22. *Id.* (note remarks by Rep. Jay Neal).

23. *Id.*

24. *Id.*; H.R. 314.

25. State of Ga. Final Composite Status Sheet, H.R. 314, Mar. 27, 2007 (Nov. 7, 2007).

26. *Multimedia Sessions Archives*, 2007 H. Sess., [http://www.ga.gov/00/article/0,2086,4802\\_61\\_07103\\_72682804,00.html](http://www.ga.gov/00/article/0,2086,4802_61_07103_72682804,00.html), Mar. 27, 2007 (Ga. H. Voting Record regarding H.R. 314).

27. H.R. 314.

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by substitute on April 19, 2007, by a vote of 48 to 0.<sup>28</sup> The following day, on April 20, 2007, the House disagreed with the Senate's Substitute, and on the same day, the Senate receded from the substitute with a vote of 47 to 0.<sup>29</sup> The Governor signed House Bill 314 on May 24, 2007.<sup>30</sup>

**PREPARED BY:** Ellis R. Faught, III

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28. *Multimedia Sessions Archives*, 2007 Sen. Sess., [http://www.ga.gov/00/article/0,2086,4802\\_6107103\\_72682316,00.html](http://www.ga.gov/00/article/0,2086,4802_6107103_72682316,00.html), Apr. 19, 2007 (Ga. Sen. Voting Record regarding H.R. 314).

29. *Id.*; State of Ga. Final Composite Status Sheet, H.R. 314, Apr. 20, 2007 (Nov. 7, 2007).

30. Ga. Gen. Assem., H.R. 314, *available at* [http://www.legis.ga.gov/legis/2007\\_08/sum/hb\\_314.htm](http://www.legis.ga.gov/legis/2007_08/sum/hb_314.htm) (last visited Mar. 22, 2008).

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**HOUSE BILL 333:<sup>1</sup> AGENCY DISPOSAL OF WEAPONS**  
***Amending O.C.G.A. § 17-8-58***

**FIRST SIGNATURE:** Rep. Wade Starr (78<sup>th</sup>).

**CO-SPONSORS:** Rep. Willie Talton (145<sup>th</sup>), Rep. John Lunsford (110<sup>th</sup>) & Rep. Mike Glanton (76<sup>th</sup>).

**SUMMARY:** House Bill 333 sought to expand O.C.G.A. § 17-5-52 by allowing a greater number of law enforcement agencies to dispose of weapons used in the commission of felonies post judgment. The bill also allowed the proceeds of these transactions to go the treasury of the county or municipality disposing of the weapons.

**STATUS:** Passed House and Senate.

**TEXT OF HOUSE BILL 333**

**§ 1.**

Code Section 17-5-52 of the Official Code of Georgia Annotated, relating to sale or destruction of weapons used in the commission of a crime or delinquent act involving possession, is amended by revising such Code section as follows:

“17-5-52.

(a) When a final judgment is entered finding a defendant guilty of the commission or attempted commission of a crime against any person or guilty of the commission of a crime or delinquent act involving the illegal possession or carrying of a weapon, any device which was used as a weapon in the commission of the crime or delinquent act shall be turned over by the person having custody of the weapon or device to the sheriff, chief of police, or other executive officer of the law enforcement agency that originally confiscated the weapon or device when the weapon or device is no longer needed for evidentiary purposes. Within 90 days after receiving the weapon or device, the sheriff, chief of police, or other executive officer of the law enforcement agency shall retain the weapon or device for use in law enforcement, destroy the same, or sell the weapon or device pursuant to judicial sale as provided in Article 7 of Chapter 13 of Title 9 or by any commercially feasible means, provided that, if the weapon or device used as a weapon in the crime is not the property of the defendant, there shall be no forfeiture of such weapon or device.

(b) The proceeds derived from all sales of such weapons or devices, after deducting the costs of the advertising and the sale, shall be turned in to the treasury of the county, or the municipal corporation that sold the weapon or device. The proceeds derived from the sale of such weapons or devices confiscated by a state law enforcement agency shall be paid into the state treasury.

(c) Any law enforcement agency that retains, destroys, or sells any weapon or device pursuant to this Code section shall maintain records that include an accurate description of each weapon or device along with records of whether each weapon or device was retained, sold, or destroyed.”

**§ 2.**

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1. H.R. 333, 149th Gen. Assem., Reg. Sess. (Ga. 2007).

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This Act shall become effective upon its approval by the Governor or upon its becoming law without such approval.

§ 3.

All laws and parts of laws in conflict with this Act are repealed.

### FIRST SIGNATURE'S RATIONALE

The Bill was introduced by Rep. Wade Starr, of the 78<sup>th</sup>, in order to facilitate the disposal, by sale or destruction, of weapons used in the commission of crimes and to specify where the proceeds of such sales are to be directed.<sup>2</sup> House Bill 333 is intended to give more law enforcement agencies the power to dispose of weapons used in the commission of a crime, after the expiration of their evidentiary value, and to direct the proceeds to the jurisdiction disposing of the weapons.<sup>3</sup> House Bill 333 also provided for instances where state agencies dispose of weapons and direct those proceeds to the state treasury.<sup>4</sup>

### LEGISLATIVE GENEALOGY

The first reading of the bill in the House occurred on February 9, 2007 and a second reading occurred on February 10, 2007.<sup>5</sup> However, by the close of the Legislative Session on April 20, 2007, House Bill 333 did not have enough support to get to a floor vote and was withdrawn and recommitted.<sup>6</sup> On January 30, 2008, House Bill 333 was favorably reported by the House Judiciary (Non-Civil) Committee.<sup>7</sup> The House passed the Bill on February 7, 2008 by a vote of 167 to 1.<sup>8</sup> The first reading of the Bill in the Senate occurred on February 8, 2008.<sup>9</sup>

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2. Telephone Interview with Rep. Wade Starr, House District 78 (July 30, 2007)

3. Ga. Gen. Assem.7-2009 Legislative Session, Bill Summary, [http://www.legis.state.ga.us/legis/2007\\_08/fulltext/hb333.htm](http://www.legis.state.ga.us/legis/2007_08/fulltext/hb333.htm) (last visited Apr. 5, 2008)

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

The bill passed the Senate by vote on April 1, 2008.<sup>1</sup> Sen. Fort of the 39<sup>th</sup>, then offered an amendment to include language restricting the use of search warrants authorizing unannounced entry (“no knock” search warrants) by law enforcement.<sup>2</sup>

**PREPARED BY:** Paul Donahue

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1. *Id.*

2. *Id.*

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**HOUSE BILL 395:<sup>1</sup> FIRST OFFENDERS PROBATION**  
***Amending O.C.G.A. § 35-3-4 and O.C.G.A. § 16-11-131***

**First Signature:** Rep. Jay Shaw (176<sup>th</sup>).

**Co-Sponsors:** Rep. Edward Lindsey (54<sup>th</sup>), Rep. Robert Mumford (95<sup>th</sup>) & Rep. David Lucas (139<sup>th</sup>).

**Summary:** House Bill 395 sought to clarify first offender status relating to the probation of first offenders and provide duties, obligations and responsibilities for the Clerk of Court, probation department, and the Department of Corrections. The Probation Officers would be responsible for notifying the Clerk of Court when the offenders have completed their term; the Clerk of Court would then be responsible for updating the offenders' records. Additionally, House Bill 395 sought to give the courts more control over dissemination of criminal records.

**Status:** Not enacted.

**TEXT OF HOUSE BILL 395**

**§ 1.**

Article 3 of Chapter 8 of Title 42 of the Official Code of Georgia Annotated, relating to probation of first offenders, is amending by revising Code Section 42-8-60, relating to probation prior to adjudication of guilt, violation of probation, and judicial review of a defendant's criminal record, as follows:

"42-8-60.

(a) Upon a verdict or plea of guilty or a plea of nolo contendere, but before an adjudication of guilt, in the case of a defendant who has not been previously convicted of a felony, the court may, without entering a judgment of guilt and with the consent of the defendant, defer further proceeding and:

(1) Place the defendant on probation as provided by law; or

(2) Sentence the defendant to a term of confinement as provided by law.

(b) The court shall not sentence a defendant under the provisions of this unless the court has reviewed the defendant's criminal record as it is on file with the Georgia Crime Information Center.

(c) Upon violation by the defendant of the terms of probation, upon a conviction for another crime during the period of probation, or upon the court determining that the defendant is or was not eligible for sentencing under this article, the court may enter an adjudication of guilt and proceed as otherwise provided by law.

(d) Upon completion by the defendant of the terms of probation which shall include the expiration of the sentence by virtue of the time frame of the sentence passing, upon the release of the defendant by the court prior to the termination of the period of probation, or upon the defendant's release from confinement provided the defendant is not serving a split sentence, the

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1. H.R. 395, 149th Gen. Assem., Reg. Sess. (Ga. 2007).

defendant shall be discharged without court adjudication of guilt.

(e) It shall be the duty of the probation department that is responsible for supervising a first offender probationer to notify the clerk of court for the jurisdiction of the court which imposed the sentence pursuant subsection (a) of this Code section that the first offender probationer has completed the term of probation or that he or she has been released by the court prior to the termination of the period of probation. It shall be the duty of the Department of Corrections to notify the clerk of court for the jurisdiction of the court which imposed the sentence pursuant subsection (a) of this Code section that a defendant has been released from confinement.

(f) If the probation department or the Department of Corrections fails to notify the clerk of court as provided in subsection (e) of this Code section or if the probation department does not seek to have a first offender probationer adjudicated guilty due to a violation of the terms of probation during the term of the first offender probation, then the first offender may petition the court for discharge by notifying the clerk of court in writing of such request. Such writing shall contain the first offender's name, date of birth, case number, return address, and a copy of his or her sentence. If the court is satisfied with such petition it shall enter an order discharging the first offender; provided, however, that if the court is not satisfied with the information provided the court shall provide notice to the first offender and state and conduct a hearing to determine if discharge should be granted.

(g) When the clerk of court is notified by the probation department or the Department of Corrections that a defendant has completed his or her first offender sentence, or if the defendant shall stand discharged pursuant to subsection (f) of this Code section, it shall be the duty of the clerk of court to enter on the criminal docket and all other records of the court pertaining thereto the following:

'Discharge filed completely exonerates the defendant of any criminal purpose and shall not affect any of his or her civil rights or liberties, except for registration requirements under the state sexual offender registry and except with regard to employment providing care for minor children or elderly persons as specified in Code Section 42-8-63.1; and the defendant shall not be considered to have a criminal conviction. O.C.G.A. 42-8-60.'

Such entry shall be written or stamped in red ink, dated, and signed by the person making such entry or, if the docket or record is maintained using computer printouts, microfilm, or similar means, such entry shall be underscored, boldface, or made in a similar conspicuous manner and shall be dated and include the name of the person making such entry. The criminal file, docket books, criminal minutes and final record, and all other records of the court relating to the offense of a defendant who has been discharged without court adjudication of guilt pursuant to this article shall not be altered as a result of that discharge, except for the entry of discharge thereon required by this subsection, nor shall the contents thereof be expunged or destroyed as a result of that discharge.

(h) Except for the registration requirements under the state sexual offender registry and except as otherwise provided in Code Section 42-8-63.1, the first offender discharge shall completely exonerate the defendant of any criminal purpose and shall not affect any of his or her civil rights or liberties; and the defendant shall not be considered to have a criminal conviction.

(i) No person may avail himself or herself of this article on more than one occasion.

(j) The court shall not sentence a defendant under the provisions of this article who has been found guilty of or entered a plea of guilty or a plea of nolo contendere for:

- (1) A serious violent felony as such term is defined in Code Section 17-10-6.1;
- (2) A sexual offense as such term is defined in Code Section 17-10-6.2;
- (3) Sexual exploitation of a minor as defined in Code Section 16-12-100;
- (4) Electronically furnishing obscene material to a minor as defined in Code Section 16-12-100.1; or
- (5) Computer pornography and child exploitation, as defined in Code Section 16-12-100.2."

**§ 2.**

Said article is further amended by revising Code Section 42-8-62, relating to the discharge of a defendant without adjudication of guilt, as follows:

"42-8-62.

Should a person be placed on probation or in confinement under this article, a record of the first offender status shall be forwarded by the clerk of court to the Georgia Crime Information Center, and, if the sentence orders confinement within the Department of Corrections, to that

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department. A record of discharge and exoneration, as provided in Code Section 42-8-60, shall in every case be forwarded by the clerk of court to the Georgia Crime Information Center. In every case in which the record of probation or confinement shall have been previously forwarded to the Department of Corrections, to the Georgia Crime Information Center, and to the Identification Division of the Federal Bureau of Investigation and a record of a subsequent discharge and exoneration of the defendant has not been forwarded as provided in this Code section, upon the request of the defendant or his or her attorney or representative, the record of the discharge and exoneration shall be forwarded by the clerk of court to the Georgia Crime Information Center so as to reflect the discharge and exoneration.”

## § 3.

Said article is further amended in Code Section 42-8-65, relating to the use of prior finding of guilt in subsequent prosecutions, the release of records of discharge, the modification of records to reflect conviction, and the effect of confinement sentences where guilt is not adjudicated, by revising subsection (b) as follows:

“(b) The records of the Georgia Crime Information Center showing treatment as a first offender shall be modified only when a court of competent jurisdiction enters an adjudication of guilt for the offense for which the offender has been sentenced as a first offender. Records of first offender disposition shall not be disseminated by the Georgia Crime Information Center, except to law enforcement or court officials or as authorized by paragraph (2) of subsection (a) of Code Section 35-3-34 and subsection (b) of Code Section 35-3-37, and shall not be available to prospective employers or any other person. If, however, a court of competent jurisdiction adjudicates the defendant guilty while such defendant is on first offender probation, such records may be disseminated by the Georgia Crime Information Center in the same manner and subject to the same restrictions as any other records of convictions.”

## § 4.

Code Section 35-3-34 of the Official Code of Georgia Annotated, relating to disclosure and dissemination of criminal records to private persons and businesses, is amended by revising subparagraph (a)(1)(B) as follows:

“(B) The center may not provide records of arrests, charges, and sentences for crimes relating to first offenders when an offender has been sentenced pursuant to Article 3 of Chapter 8 of Title 42 and has been exonerated and discharged without court adjudication of guilt, except as specifically authorized by Code Section 42-8-63.1; and”

## § 5.

Code Section 16-11-131 of the Official Code of Georgia Annotated, relating to possession of firearms by convicted felons and first offender probationers, is amended by revising subsection (f) and inserting in lieu thereof the following:

“(f) Any person placed on probation as a first offender pursuant to Article 3 of Chapter 8 of Title 42 and subsequently discharged without court adjudication of guilt pursuant to Code Section 42-8-60 shall, upon such discharge, be relieved from the disabilities imposed by this Code section.”

## § 6.

All laws and parts of laws in conflict with this Act are repealed.

**FIRST SIGNATURE’S RATIONALE**

Rep. Jay Shaw, of the 176<sup>th</sup>, introduced House Bill 395<sup>2</sup> with the ultimate intention of allowing judges more discretion when a person’s first offender status is in question.<sup>3</sup> Currently, the decision to revoke first offender status from subsequent

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2. *Id.*

3. Interview with Rep. Robert Mumford, H. District No. 95 (Nov. 15, 2007) [hereinafter *Mumford Interview*].

offenders is made by computer.<sup>4</sup> The Bill, if enacted, would allow an opportunity for judicial review.<sup>5</sup> The Bill represents an attempt to combat a clash between the judicial and executive branches of the Georgia state government.<sup>6</sup>

#### LEGISLATIVE GENEALOGY

The first reading of the Bill in the House occurred on February 13, 2007 and the Bill was read for a second time on February 14, 2007.<sup>7</sup> The House Committee favorably reported the Bill on March 19, 2007, however House Bill 395 was withdrawn on April 20, 2007.<sup>8</sup> This Bill was withdrawn because it failed to make it through the rules committee and was not scheduled on the calendar for House vote.<sup>9</sup>

**PREPARED BY:** Adam Rust and Jim Jenkins

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4. *Id.*

5. *Id.*

6. *Id.*

7. H.R. 395.

8. *Id.*

9. *See* Mumford Interview, *supra* note 2.

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**HOUSE BILL 525:<sup>1</sup> JUVENILE CUSTODIAL INTERROGATIONS**  
***Creating O.C.G.A. § 17-19-1 et seq. and O.C.G.A. § 35-1-15***

**FIRST SIGNATURE:** Rep. Timothy Bearden (68<sup>th</sup>).

**SUMMARY:** House Bill 525 required the electronic recording of certain custodial interrogations, including the advisement of Miranda warnings, of accused persons under the age of seventeen, and allowed the admission of the recordings as evidence at trial with parameters. The Bill also required the establishment of guidelines and procedures for the training of law enforcement in methods of electronic recording.

**STATUS:** Not enacted.

**TEXT OF HOUSE BILL 525**

**§ 1.**

Title 17 of the Official Code of Georgia Annotated, relating to criminal procedure, is amended by adding a new chapter to read as follows:

“CHAPTER 19 - 17-19-1. As used in this chapter, the term:

- (1) ‘Accused’ means a person less than 17 years of age.
- (2) ‘Custodial authority’ means a warden, sheriff, jailer, deputy sheriff, police officer, correctional officer, officer or employee of the Department of Corrections or the Department of Juvenile Justice, or any other law enforcement officer having actual custody of the accused.
- (3) ‘Custodial interrogation’ means any interrogation regarding an alleged crime or delinquent act which is conducted in a place of detention by a custodial authority.
- (4) ‘Delinquent act’ shall have the same meaning as set forth in paragraph (6) of Code Section 15-11-2.
- (5) ‘Electronic recording’ means an audiotape, videotape, or digital recording.
- (6) ‘Place of detention’ means a police station, correctional facility, holding facility for prisoners, Department of Juvenile Justice facility, or other government facility where persons are held in detention in connection with criminal charges or delinquent acts which have been or may be filed against the accused. Such term shall not include a motor vehicle.
- (7) ‘Serious violent felony’ shall have the same meaning as set forth in Code Section 17-10-6.1.

“CHAPTER 19 - 17-19-2.

(a) All custodial interrogations of an accused shall be electronically recorded in their entirety and shall include the accused being advised of *Miranda* warnings.

(b) During the prosecution of a crime or delinquent act, an oral, written, or sign language statement of an accused made during a custodial interrogation shall be inadmissible as evidence against the accused unless the electronic recording is made available to the accused ten days prior to any court proceeding.

(c) If the court finds that the accused was subjected to a custodial interrogation in violation of subsection (b) of this Code section, any statement made by the accused during and following such custodial interrogation, even if otherwise in compliance with this Code section, shall be inadmissible as evidence against the accused.

“CHAPTER 19 - 17-19-3.

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1. H.R. 525, 149th Gen. Assem., Reg. Sess. (Ga. 2007).

A custodial interrogation of an accused shall be inadmissible as evidence against the accused unless electronically recorded and:

- (1) The accused parent, legal guardian, or attorney is present at the time the custodial interrogation occurs; or
- (2) In the case of exigent circumstances involving the accused being a suspect in a serious violent felony, an adult to be designated by either the accused, the accused parent, legal guardian, or a child advocate is present at the time of the custodial interrogation.

“CHAPTER 19 - 17-19-4.

Notwithstanding the requirement to electronically record an accused custodial interrogation, nothing contained in this chapter shall preclude the admission into evidence against the accused of:

- (1) An interrogation conducted in a location other than a place of detention which lacks readily available electronic recording equipment;
- (2) A custodial interrogation in which the accused refuses to have his or her custodial interrogation electronically recorded and such refusal is electronically recorded;
- (3) A custodial interrogation which is incomplete due to equipment failure, which failure is unknown to the custodial authority;
- (4) A custodial interrogation which is incomplete due to equipment failure, which failure is known to the custodial authority, but replacement equipment was not readily available;
- (5) An accused spontaneous statement which is not made in response to a custodial interrogation; or
- (6) An accused statement made during his or her processing or booking.

“CHAPTER 19 - 17-19-5.

The state shall not destroy or alter any electronic recording made of a custodial interrogation until such time a conviction for any offense relating to the interrogation becomes final and all direct and habeas corpus appeals are exhausted, or the prosecution of the offense is barred by law.”

**§ 2.**

Title 35 of the Official Code of Georgia Annotated, relating to law enforcement officers and agencies, is amended by adding a new Code section to the end of Chapter 1, relating to general provisions for law enforcement officers and agencies, to read as follows:

“35-1-15.

The Georgia Peace Officer Standards and Training Council and the Georgia Public Safety Training Center shall establish guidelines and procedures for the incorporation of training materials and information in methods for electronically recording a suspect’s statement pursuant to Chapter 19 of Title 17 in all relevant courses for which they have responsibility and oversight.”

**§ 3.**

This Act shall become effective on July 1, 2007.

**§ 4.**

All laws and parts of laws in conflict with this Act are repealed.

## FIRST SIGNATURE’S RATIONALE

Rep. Timothy Bearden, of the 68<sup>th</sup>, introduced House Bill 525 because he wanted the justice system to be fair for the accused, but he also sought to help law enforcement catch and prosecute offenders.<sup>2</sup> As a former law enforcement officer, he had seen many cases “slip through the cracks” due to technicalities.

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2. Telephone Interview with Georgia Rep. Timothy Bearden, H. District No. 68 (Oct. 9, 2007) [hereinafter *Bearden Interview*].

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During his time as a police officer, Rep. Bearden often voluntarily recorded his interrogations to protect himself and to provide an accurate record of what was said and in what manner it was said.<sup>3</sup> He calls this a “common sense Bill” that “would protect youthful offenders and would protect the police.”<sup>4</sup>

Rep. Bearden stated that this Bill “takes out much of the guesswork” during the investigation and prosecution of various offenses.<sup>5</sup> It sought to prevent false accusations, made by some defendants, of coercion and overreaching by the police just to secure delays or reasonable doubt.<sup>6</sup> The Bill would require recording of the interrogation, including reading of Miranda and any waivers.<sup>7</sup>

In some cases, tactics by defense counsel shift the focus from the actions and guilt of the accused to the supposed acts by the police during the investigation.<sup>8</sup> Many times the focus is on what happens during custodial interrogation. By ensuring that interrogations of persons under the age of 17 would be recorded, this Bill “would likely cut down on the costs of trial because time would not be wasted on determining what was said by which party and in what way.”<sup>9</sup> Furthermore, the recorded interrogations may cause many accused persons to accept a plea bargain, saving any costs of trial.<sup>10</sup>

Rep. Bearden stated that another reason he proposed House Bill 525 was the Amy Yates murder that occurred in Carrollton, Georgia, located in his district.<sup>11</sup> In April of 2004, eight-year-old Amy Yates was found murdered in her Carrollton neighborhood.<sup>12</sup> Within hours, a twelve year old neighborhood

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3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. Ga. Gen. Assem., H.R. 525, available at [http://www.legis.ga.gov/legis/2007\\_08/fulltext/hb525 .htm](http://www.legis.ga.gov/legis/2007_08/fulltext/hb525.htm) (last visited Mar. 26, 2008) [hereinafter *H.R. 525 Status*].

8. *Bearden Interview*, *supra* note 2.

9. *Id.*

10. *Id.*

11. *Id.*

12. Rob Stafford, Correspondent, MSNBC, *DATLINE, A killing in Carrollton*, May 2, 2007, available at <http://www.msnbc.msn.com/id/18428335>. (last visited Oct. 13, 2007).

boy, Johnathon Adams, was arrested.<sup>13</sup> During his interrogation, which occurred without counsel or his parents, the boy confessed to murdering Amy.<sup>14</sup> He was convicted and sentenced to two years in a juvenile treatment center.<sup>15</sup> However, in February of 2006, a mentally challenged, eighteen year old, Chris Gossett, turned himself in to authorities and confessed to the murder of Amy Yates.<sup>16</sup> Gossett's statements to police were electronically recorded; however he later recanted his confession and it is still not clear who killed Amy.<sup>17</sup> Johnathon Adams's statements to police were not electronically recorded and much doubt now overshadows whether there ever was a true confession to Amy's murder.<sup>18</sup> House Bill 525 would have required that Johnathon Adams's statements be recorded, possibly removing the doubt that now persists.<sup>19</sup>

Potential protests may come from some law enforcement organizations that already have countless procedures to follow during any investigation.<sup>20</sup> Rep. Bearden stated that he will consult law enforcement organizations to make sure he passes a reasonable Bill.<sup>21</sup>

In striving to author a Bill that would not impose more procedural requirements on law enforcement officers, Rep. Bearden included exceptions where statements do not have to be recorded. Often, accused persons voluntarily confess to police, without prompting, while in a police car on their way to a station.<sup>22</sup> Other times, the accused person may confess on the scene as soon as law enforcement officers arrive. This is especially true with some minor persons when their parents arrive on the scene.<sup>23</sup> The above mentioned and many other exigencies typically occur and make electronic recording

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13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Bearden Interview, supra note 2.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

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practically impossible. As such, Rep. Bearden excepted those situations from the recoding requirement.<sup>24</sup>

Other pieces of the Bill have already been included upon consideration of various groups; one part was proposed which would allow an accused minor to refuse to have his statements recorded.<sup>25</sup> Another allowed parents to refuse to have their child's statements recorded. These provisions were included at the prompting of defense attorney groups.<sup>26</sup>

### LEGISLATIVE GENEALOGY

The first reading of the Bill occurred on February 22, 2007. The Speaker assigned the Bill to the House Judiciary (Non-Civil) Committee. A second reading occurred on February 27, 2007.<sup>27</sup> House Bill 525 was not addressed in committee hearings, nor debated on the floor during the 2007-2008 Session.<sup>28</sup>

**PREPARED BY:** Amanda K. Kee

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24. *Id.*

25. *Id.*

26. *Id.*

27. *H.R. 525 Status, supra* note 7.

28. *Id.*

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**HOUSE BILL 586:<sup>1</sup> PUBLIC DEFENSE**  
***Amending O.C.G.A. § 15-6-24***

**FIRST SIGNATURE:** Rep. David Ralston (7<sup>th</sup>).

**CO-SPONSOR:** Rep. Barry Fleming (117<sup>th</sup>).

**SUMMARY:** House Bill 586 amended O.C.G.A. § 15-6-24 by limiting the state's responsibility to pay for a maximum of two attorneys for indigent defendants. The county governing authorities may provide supplemental compensation, and the judge may appoint additional attorneys at the county's expense.

**STATUS:** Enacted.

**TEXT OF HOUSE BILL 586**

**§ 1.**

Article I of Chapter 6 of Title 15 of the Official Code of Georgia Annotated, relating to the general provisions of superior courts, is amended by revising Code Section 15-6-24 as follows: "15-6-24.

(a) Any contingent expenses incurred in holding any session of the superior court, including lights, fuel, stationery, rent, publication of grand jury presentments when ordered published, and similar items, such as taking down testimony in felony cases, etc., shall be paid out of the county treasury of such county upon the certificate of the judge of the superior court and without further order.

(b) Any costs incurred in providing defense services pursuant to Chapter 12 of Title 17, the 'Georgia Indigent Defense Act of 2003,' for persons accused of crimes shall not be considered contingent expenses of the superior court for purposes of this Code section."

**§ 2.**

Code Section 17-112-127 of the Official Code of Georgia Annotated, relating to representation and appointment of alternative attorneys, is amended by revising subsection (b) as follows:

"(b) If for any reason the office is unable to defend any indigent person accused of a capital felony for which the death penalty is sought, the presiding judge of the superior court in which the case is pending shall appoint counsel to represent the defendant. A maximum of two attorneys shall be paid by the council at an hourly rate established by the council with state funds appropriated to the council for use by the office. The council with the assistance of the office shall establish guidelines for attorney's fees and expense requests. A county governing authority may provide supplemental compensation to appointed counsel. The presiding judge may appoint not more than one additional attorney to represent the defendant; provided, however, that such attorney shall be paid by the county governing authority with county funds at a rate established by the council."

**§ 3.**

This Act shall become effective on July 1, 2007, and shall apply to all costs and fees incurred or counsel appointed on or after July 1, 2007.

**§ 4.**

All laws and parts of law in conflict with this Act are repealed.

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1. H.R. 586, Ga. Gen. Assem., Reg. Sess. (Ga. 2007).

**FIRST SIGNATURE'S RATIONALE**

Rep. David Ralston, of the 7<sup>th</sup>, introduced House Bill 586<sup>2</sup> as a response to the problems presented by the Brian Nichols multiple murder case.<sup>3</sup> This Bill sought to limit a judge's discretion in granting the amount of state and county funds expended in death penalty case.<sup>4</sup>

As a result of the Brian Nichols multiple murder case, the budget of the Georgia Public Defender Standards Council, which manages the public defender system, was drained.<sup>5</sup> The case has cost the public defender system millions of dollars, and the Council can no longer pay the three private lawyers on Mr. Nichols's defense team.<sup>6</sup> The judge in the Nichols' case appointed four lawyers to defend Nichols.<sup>7</sup> The attorneys are paid \$175.00, \$125.00 and \$95.00 an hour respectively.<sup>8</sup> The fourth attorney is a state employee.<sup>9</sup> Sen. Wiles, of the 37<sup>th</sup>, noted that the Constitution does not require an indigent defendant to receive a three million dollar defense; rather, the Constitution only requires a competent, quality defense.<sup>10</sup>

The Bill addressed the costs of indigent defense in Georgia.<sup>11</sup> House Bill 586 only applied in conflict cases, where the public defender's office was unable to represent an accused person.<sup>12</sup> Additionally, House Bill 586 limited the number of attorneys

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2. *Id.*

3. Brenda Goodman, *Georgia Murder Case's Cost Saps Public Defense System*, N.Y. TIMES, July 31, 2007, available at <http://www.nytimes.com/2007/03/22/us/22atlanta.html>.

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. Video Recording of Sen. Proceedings (Apr. 19, 2007), [http://www.georgia.gov/00/article/0,2086,4802\\_6107103\\_72682316,00.html](http://www.georgia.gov/00/article/0,2086,4802_6107103_72682316,00.html) [hereinafter *Senate Floor Debate*].

11. Video Recording of H. Proceedings (Mar. 27, 2007), [http://www.georgia.gov/00/article/0,2086,4802\\_6107103\\_72682804,00.html](http://www.georgia.gov/00/article/0,2086,4802_6107103_72682804,00.html) [hereinafter *House Floor Debate*].

12. *Id.*

that may be appointed by the court to two.<sup>13</sup> Finally, House Bill 586 limited the hourly rate to \$95.00 per hour for attorneys.<sup>14</sup>

### LEGISLATIVE GENEALOGY

The first reading of the Bill in the House occurred on February 27, 2007, and the Bill was assigned to the House Judiciary (Non-Civil) Committee.<sup>15</sup> On February 28, 2007, the Bill was read for the second time.<sup>16</sup> The House Judiciary (Non-Civil) Committee favorably reported House Bill 586 by committee on March 19, 2007.<sup>17</sup> On March 27, 2007, Rep. Ralston presented the Bill and a third reading of House Bill 586 occurred.<sup>18</sup>

Rep. Carolyn Hugley, of the 133<sup>rd</sup>, questioned how Rep. Ralston and his fellow sponsors determined that two attorneys is the appropriate number and asked how the amount of compensation for attorneys was calculated.<sup>19</sup> Rep. Ralston responded that the Public Defenders Standards Council determined the amount of compensation and that the proposed number of attorneys was a compromise between the Public Defenders Standards Council and the County Commissioner's Association.<sup>20</sup> The House passed and adopted House Bill 586 on March 27, 2007 by a vote of 167 to 0.<sup>21</sup>

The first reading of the Bill in the Senate occurred on March 27, 2007, and the Bill was referred to the Senate Judiciary Committee.<sup>22</sup> On April 16, 2007, House Bill 586 was read for the second time and the Senate Judiciary Committee favorably reported the Bill, recommending a substitute or amendment that would define "contingent expense."<sup>23</sup> On April 19, 2007, Sen.

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13. *Id.*

14. *Id.*

15. State of Ga. Final Composite Status Sheet, H.R. 586, 149th Gen. Assem. Reg. Sess. (Ga. 2007) [hereinafter *Status Sheet*].

16. *Id.*

17. *Id.*

18. *Id.*

19. *House Floor Debate*, *supra* note 11.

20. *Id.*

21. *Status Sheet*, *supra* note 15.

22. *Id.*

23. *Senate Floor Debate*, *supra* note 10.

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John Wiles presented the Bill for the third time.<sup>24</sup>

Sen. Regina Thomas, of the 2<sup>nd</sup>, asked how much the supplemental compensation to the county governing authority would be.<sup>25</sup> Sen. Wiles responded by noting that Georgia and its counties spend about \$100 million each year in indigent defense, with the state funding about \$35 million and the counties funding about \$65 million.<sup>26</sup> Sen. Wiles stressed that as the law stood, a judge could order six to eight lawyers, and that this was breaking the state and county budgets.<sup>27</sup> House Bill 586 strikes a balance, providing people with competent, quality counsel without breaking the state and county budgets.<sup>28</sup> Sen. Wiles believes that two attorneys should be sufficient in death penalty cases, and if necessary, the judge may appoint a third.<sup>29</sup>

Sen. David Adelman, of the 42<sup>nd</sup>, questioned Sen. Wiles on the importance of judicial discretion.<sup>30</sup> Sen. Wiles explained that he believes that judicial discretion is important, however, a judge does not need to have unlimited discretion because judges do not raise taxes and judges are not responsible for balancing the state and county budgets.<sup>31</sup> Sen. Adelman questioned whether Sen. Wiles believed that one size fits all when it comes to the effectiveness of counsel and whether Sen. Wiles considered a provision that would address special circumstances that one could not contemplate where a case might be so complex as to justify more than even three lawyers.<sup>32</sup> Sen. Wiles responded that he feels the limitation on the number of attorneys was sensible and pointed out that federal courts have the same limitation.<sup>33</sup> Sen. Wiles further noted that House Bill 586 is not the solution to the indigent defense problem and that a study needs to be conducted to address special circumstances

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24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

that may arise.<sup>34</sup>

The Senate passed and adopted House Bill 586 on April 19, 2007, by a vote of 43 to 7.<sup>35</sup> On April 20, 2007, the House agreed to the Senate's substitute by a vote of 144 to 1.<sup>36</sup> Governor Perdue signed House Bill 586 into law on May 16, 2007.

**PREPARED BY:** Anne Marie Braham

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34. *Id.*

35. *Status Sheet*, *supra* note 15.

36. *Id.*

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**HOUSE BILL 653:<sup>1</sup> HOAX EXPLOSIVE DEVICES**  
***Amending O.C.G.A. § 16-7-85***

**FIRST SIGNATURE:** Rep. David Ralston (7<sup>th</sup>).

**SUMMARY:** House Bill 653 sought to amend O.C.G.A. § 16-7-85 by increasing the allowable penalties for persons convicted of using or planting hoax destructive devices. The Bill increased the maximum imprisonment time from one to five years, and permitted courts to order defendants to pay additional restitution for any financial loss suffered by local, county, or state public safety agencies that provide emergency assistance during an incident or investigation resulting from a violation of the legislation.

**STATUS:** Not enacted.

**TEXT OF HOUSE BILL 653**

**§ 1.**

Article 4 of Chapter 7 of Title 16 of the Official Code of Georgia Annotated, relating to bombs, explosives, and chemical and biological weapons, is amended by revising Code Section 16-7-85, relating to hoax devices, as follows:

“16-7-85.

(a) It shall be unlawful for any person to manufacture, possess, transport, distribute, place, or use a hoax device or replica of a destructive device or detonator with the intent to cause another to believe that such hoax device or replica is or contains a destructive device or detonator.

(b) Any person convicted of a violation of this Code section shall be punished by imprisonment for not less than one nor more than five years or by a fine of not more than \$10,000.00 or both or, if the defendant is a corporation, a fine of not less than \$1,000.00 or not fewer than 500 hours of community service or both for each such hoax device or replica; provided, however, that if such person communicates or transmits to another that such hoax device or replica is a destructive device or detonator with the intent to obtain the property of another person or to interfere with the ability of another person to conduct or carry on the ordinary course of business, trade, education, or government, such violation shall be punished by imprisonment for not less than one year nor more than five years or by a fine of not more than \$25,000.00 or both or, if the defendant is a corporation, a fine of not less than \$50,000.00 or not fewer than 1,000 nor more than 10,000 hours of community service or both for each such hoax device or replica.

(c) For purposes of imposing restitution pursuant to Chapter 14 of Title 17 when a person is convicted pursuant to this Code section, the court shall consider damages to include any reasonable cost incurred or financial loss suffered by local, county, or state public safety agencies, and profit or nonprofit entities, that provide emergency assistance to an incident or investigation resulting from a violation of this Code section. Such damages shall include but not be limited to the provision of police, fire-fighting, rescue, and emergency medical services and the salaries of such persons who respond to such incident.”

**§ 2.**

All laws and parts of laws in conflict with this Act are repealed.

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1. H.R. 653, 149th Gen. Assem., Reg. Sess. (Ga. 2007).

### FIRST SIGNATURE'S RATIONALE

Rep. David Ralston, of the 7<sup>th</sup>, introduced House Bill 653 to increase penalties for persons convicted of perpetrating hoax destructive devices and to establish a restitution condition relating to the use of such devices.<sup>2</sup> The Bill was introduced in response to the January 31, 2007 Boston Mooninite Scare, in which Boston Police officers mistakenly identified small battery-powered LED placards planted throughout Boston and surrounding areas as improvised explosive devices.<sup>3</sup> The discovery of the suspicious devices, featuring a lighted image of a "mooninite" cartoon character, resulted in a massive emergency and media response, leading to temporary closure of three main bridges connecting Cambridge, Mass., to Boston, as well as sections of Boston's Storrow Drive, I-93, and the Massachusetts Turnpike.<sup>4</sup> During the subsequent investigation, The Cartoon Network acknowledged placing the small electronic devices throughout Boston, as well as New York, Los Angeles, Chicago, San Francisco, Philadelphia, Seattle, Portland, Austin, and Atlanta, as part of a national promotional campaign for Cartoon Network's animated show, *Aqua Teen Hunger Force*.<sup>5</sup> The Cartoon Network's parent company, Turner Broadcasting System, eventually paid \$1 million to both the city of Boston and Homeland Security in an effort to make amends.<sup>6</sup>

### LEGISLATIVE GENEALOGY

The first reading of the Bill in the House occurred on March 1, 2007.<sup>7</sup> Rep. Ralston presented the Bill to the House Judiciary

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2. *Id.*

3. Jeremy Redmon, *Bomb Scare Inspires New Bill*, ATLANTA J. CONST., Mar. 12, 2007, at 18.

4. Val Brickates Kennedy, *Cartoon Network Promo Tied to Boston Bomb Scare*, Market Watch.com Financial News, <http://www.marketwatch.com/news/story/cartoon-network-promo-tied-boston/story.aspx>.

5. Jacqui Cheng, *Mooninites, meet the Terrorist Hoax Improvements Act*, ARS TECHNICA, May 8, 2007.

6. *Id.*

7. Video Recording of Ga. H. Judy. (Non-Civil) Subcommittee Two

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(Non-Civil) Subcommittee Two on March 13, 2007.<sup>8</sup> Rep. Ralston stated that the Bill was not only introduced in response to the Boston Mooninite Scare, but also because the current definition of O.C.G.A. § 16-7-85 needed to be expanded.<sup>9</sup>

In the House Judiciary (Non-Civil) Subcommittee Two meeting, held on March 13, 2007, Rep. Ralston justified the additional provisions set forth in House Bill 653 that would amend the Georgia Code to increase maximum prison terms from one to five years.<sup>10</sup> Such additional provisions would also allow for civil suits so that local, county, or state agencies could obtain restitution for expenses incurred during incidents similar to the Boston Mooninite Scare and Covington Bomb incident.<sup>11</sup> In support of the Bill, Rep. Ralston cited the fact that the City of Boston incurred expenses upwards of \$2 million as a result of the Mooninite Scare, and asserted that it is “wrong for anyone to capitalize on people’s fear after 9/11.”<sup>12</sup> Rep. Ralston also referred to the Covington bomb scare in which the perpetrator had to be convicted on federal charges because the state statutes were not sufficient.<sup>13</sup> In the subcommittee, House Bill 653 received a do-pass by Committee Substitute, meaning that the committee approved the Bill following several minimal changes.<sup>14</sup>

On March 14, 2007, Rep. Ralston presented House Bill 653 to the House Judiciary (Non-Civil) full Committee.<sup>15</sup> In the full committee, Chairman Ralston reemphasized that the Boston Mooninite Scare, coupled with the recent “hoax” in Covington served as motivation for the proposal.<sup>16</sup> Rep. Ralston thus

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Meeting (Mar. 13, 2007), [http://www.legis.ga.gov/legis/2007\\_08/house/Committees/judiciaryNonCivil/judyncArchives.htm](http://www.legis.ga.gov/legis/2007_08/house/Committees/judiciaryNonCivil/judyncArchives.htm) [hereinafter *Meeting Video*].

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. Telephone Interview with Dianne Hardin, Administrative Assistant for the Judiciary Non-Civil Committee, Georgia House of Representatives (Oct. 30, 2007) [hereinafter *Hardin Interview*].

15. *Meeting Video*, *supra* note 7.

16. *Id.*

suggested calling the legislation the Covington Pipeline Bill.<sup>17</sup> In the full committee, House Bill 653 also received a do-pass by Committee Substitute.<sup>18</sup> House Bill 653 was officially reported out of committee March 19, 2007.<sup>19</sup>

On March 19, 2007, the Bill was given a second reading, and subsequently reported out of the House Judiciary (Non-Civil) Committee.<sup>20</sup> After House Bill 653 was favorably reported out of the Committee, it went to the Rules Committee for further consideration.<sup>21</sup>

On April 20, 2007, the Georgia House of Representatives withdrew and recommitted House Bill 653.<sup>22</sup> The Bill did not advance to the House floor because it was introduced too late in the 2007 legislative session.<sup>23</sup> Subsequently, House Bill 653 received no consideration during the 2008 Georgia legislative session.<sup>24</sup>

**PREPARED BY:** Charles Snyder III

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17. *Id.*

18. *Id.*

19. Ga. Gen. Assem., H.R. 653, available at [www.legis.ga.gov/legis2007\\_08/sum/hb653.htm](http://www.legis.ga.gov/legis2007_08/sum/hb653.htm) (last visited Mar. 26, 2008) [hereinafter *H.R. 653 Status*].

20. *Id.*

21. *Hardin Interview*, *supra* note 14.

22. *H.R. 653 Status*, *supra* note 19.

23. *Hardin Interview*, *supra* note 14.

24. *Id.*

## SELECTED SENATE BILLS

### SENATE BILL 1:<sup>1</sup> SEXUAL OFFENDERS *Amending O.C.G.A. § 16-12-100.4*

**FIRST SIGNATURE:** Sen. Eric Johnson (1<sup>st</sup>).

**CO-SPONSORS:** Sen. Tommie Williams (19<sup>th</sup>), Sen. William Hamrick (30<sup>th</sup>) & Sen. John Wiles (37<sup>th</sup>).

**SUMMARY:** Senate Bill 1 sought to amend O.C.G.A. § 16-12-100.4 to criminalize the photographing of a minor by registered sex offenders under certain circumstances.

**STATUS:** Not enacted.

#### TEXT OF SENATE BILL 1

##### § 1.

Part 2 of Article 3 of Chapter 12 of Title 16 of the Official Code of Georgia Annotated, relating to offenses related to minors generally, is amended by adding a new Code section to the end of the part to read as follows:

“16-12-100.4

(a) As used in this Code section, the term:

(1) ‘Minor’ means any individual who is under 18 years of age.

(2) ‘Photograph’ means to take any picture, film or digital photograph, motion picture film, videotape, or similar visual representation or image of a person.

(b) It shall be unlawful for any person who is required to register as a sexual offender pursuant to Code Section 42-1-12 to intentionally photograph a minor for indecent purposes.

(c) Any person who violates this Code section shall be guilty of a misdemeanor of a high and aggravated nature.”

##### § 2.

All laws and parts of laws in conflict with this Act are repealed.

#### FIRST SIGNATURE’S RATIONALE

Sen. Eric Johnson, of the 1<sup>st</sup>, introduced Senate Bill 1 in

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1. S. 1, 149th Gen. Assem., Reg. Sess. (Ga. 2007).

response to an incident in his district.<sup>2</sup> While a high school girl was working in a coffee shop, a male customer photographed her with his cell phone camera and made harassing comments that frightened her.<sup>3</sup> The girl contacted her mother, who came to the shop.<sup>4</sup> As the man left, the mother wrote down his license plate number.<sup>5</sup> The man was registered as a sex offender in Massachusetts, however, law enforcement officers reported they could do nothing because taking the girl's photo was not illegal.<sup>6</sup> The mother contacted Sen. Johnson.<sup>7</sup> Sen. Johnson said the Bill would help stop registered sex offenders from taking what could be the first step in stalking a victim, or could prevent the sex offender from posting the photos on the Internet.<sup>8</sup>

### LEGISLATIVE GENEALOGY

The first reading of the Bill occurred on January 22, 2007, and the Bill was referred to the Senate Judiciary Committee.<sup>9</sup> As originally proposed, the Bill would have made it illegal for anyone required to register as a sex offender in Georgia to photograph any minor, including their own child, either intentionally or accidentally.<sup>10</sup> The Senate Judiciary Committee amended the Bill to require that the minor be photographed intentionally and without consent from the minor's parent or guardian.<sup>11</sup> The Judiciary Committee favorably reported the Bill to the Senate by substitute on February 2, 2007, and the

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2. Video Recording of Sen. Proceedings (Feb. 12, 2007), *available at* [http://www.georgia.gov/0/article/0,2086,4802\\_6107103\\_72682316,00.html](http://www.georgia.gov/0/article/0,2086,4802_6107103_72682316,00.html).

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. Georgia General Assembly, S. 1, *available at* [http://www.legis.state.ga.us/legis/2007\\_08/sum/sb1.htm](http://www.legis.state.ga.us/legis/2007_08/sum/sb1.htm). (last visited Mar. 3, 2008) [hereinafter *S. 1 Status*].

10. Video of Ga. H. Judy. (Non-Civil) Comm., *available at* [http://www.legis.state.ga.us/legis/2007\\_08/house/Committees/judiciaryNonCivil/Archives.htm](http://www.legis.state.ga.us/legis/2007_08/house/Committees/judiciaryNonCivil/Archives.htm). April 17, 2007).

11. *S. 1 Status*, *supra* note 9.

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Senate approved the substitute Bill 54-0 on February 12, 2007.<sup>12</sup>

The Bill was read for the first time in the House on February 13, 2007, and for a second time on February 14, 2007.<sup>13</sup> The Bill was then assigned to the House Judiciary (Non-Civil) Committee.<sup>14</sup> The Committee amended the Bill to require that the photographing be done intentionally and for indecent purposes, instead of without the parent or guardian's consent.<sup>15</sup> The Committee favorably reported the Bill on April 17, 2007.<sup>16</sup> The Bill was withdrawn from the House and recommitted to the Senate Judiciary Committee on April 20, 2007, because Sen. Johnson disagreed with the changes and there was insufficient time to address them before the session ended.<sup>17</sup> Sen. Johnson is working this session to get the Committee to switch back to the Senate version of the Bill, after which the Bill would be forwarded again to the House.<sup>18</sup>

**PREPARED BY:** Bryan Brooks

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12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. Telephone Interview with Melanie Stockwell, Chief of Staff for Sen. Johnson (Feb. 26, 2008).

18. *Id.* Senate Bill 1 underwent significant change in the last few days of the 2007-2008 Legislative Session. The text of the Bill was altered; however, the rationale for its implementation remains.

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**Senate Bill 20:<sup>1</sup> Sexual Offenses  
Creating O.C.G.A. § 16-6-26**

**FIRST SIGNATURE:** Sen. Judson Hill (32<sup>nd</sup>).

**CO-SPONSOR:** Sen. Steve Thompson (33<sup>rd</sup>).

**SUMMARY:** Senate Bill 20 sought to create O.C.G.A. § 16-6-26 which would make it unlawful to have carnal knowledge with a disabled person who is incapable of granting consent.

**STATUS:** Not enacted.

**TEXT OF SENATE BILL 20**

**§ 1.**

Chapter 6 of Title 16 of the Official Code of Georgia Annotated, relating to sexual offenses, is amended by adding a new Code section to read as follows: "16-6-26.

(a) As used in this Code section, the term 'disabled person' means any person with a mental or emotional illness, developmental disability, or addictive disease.

(b) It shall be unlawful for any person to have carnal knowledge with a disabled person of the age of majority whom he or she knows or reasonably should know is incapable of giving consent to such activity.

(c) A person convicted of violating the provisions of this Code section shall be punished by imprisonment for not less than ten nor more than 20 years."

**§ 2.**

All laws and parts of laws in conflict with this Act are repealed.

**FIRST SIGNATURE'S RATIONALE**

Sen. Judson Hill, of the 32<sup>nd</sup>, introduced Senate Bill 20 because sexual abuse of disabled persons is on the rise in Georgia. Sen. Hill believed legislation was needed to address the growing threat to the disabled population of Georgia.<sup>2</sup> Sen. Hill presumed that this is the type of Bill that no legislator wants to vote against.<sup>3</sup> However, the science surrounding the mental capacity of disabled individuals is a "soft science" in that the mental thoughts and processes of disabled individuals

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1. S. 20, 149th Gen. Assem., Reg. Sess. (Ga. 2007).

2. Telephone Interview with Sen. Judson Hill, Sen. District No. 32 (January 4, 2008) [hereinafter *Hill Interview*].

3. *Id.*

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cannot be determined with certainty.<sup>4</sup> Therefore, even though the Bill is one that no legislator wants to vote against, there may be problems passing the Bill because whether a specific disabled person is capable of consenting to sexual activity cannot be determined with certainty.<sup>5</sup>

#### LEGISLATIVE GENEALOGY

The first reading of the Bill in the Senate occurred on January 10, 2007.<sup>6</sup> Subsequently, the Bill went before the Senate Judiciary Committee.<sup>7</sup> The Committee's main concern was that the language of the Bill was overly ambiguous in that there were no guideposts with respect to determining whether a potential victim was capable of granting consent.<sup>8</sup> The Bill remained in the Senate Judiciary Committee at the close of the 2007 Session, and no action was taken in 2008.<sup>9</sup>

**PREPARED BY:** Ellis R. Faught, III

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4. *Id.*

5. *Id.*

6. State of Ga. Final Composite Status Sheet, S. 20, Jan. 10, 2007 (Dec. 10, 2007).

7. *Id.*

8. *Hill Interview*, *supra* note 2.

9. *Id.*

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**SENATE BILL 48:<sup>1</sup> CUSTODY OF CONVICTED PERSONS**  
***Amending O.C.G.A. § 42-5-50***

**FIRST SIGNATURE:** Sen. Joseph Carter (13<sup>th</sup>).

**CO-SPONSOR:** Sen. Jim Whitehead (24<sup>th</sup>).

**SUMMARY:** The Bill sought to amend O.C.G.A. § 42-5-50 by removing the provision under which a convicted person may currently, upon written request by his defense attorney, remain in the custody of the local jail during the pendency of an appeal. The Bill also required department or county correctional institutions to provide a state issued personal identification card to inmates upon their discharge.

**STATUS:** Not enacted.

**TEXT OF SENATE BILL 48**

**§ 1.**

Article 3 of Chapter 5 of Title 42 of the Official Code of Georgia Annotated, relating to conditions of detention generally, is amended by revising Code Section 42-5-50, relating to transmittal of information on convicted persons and place of detention, as follows:  
“42-5-50.

(a) The clerk of the court shall notify the commissioner of a sentence within 30 working days following the receipt of the sentence and send other documents set forth in this Code section. Such notice shall be mailed within such time period by first-class mail and shall be accompanied by two complete and certified sentence packages containing the following documents:

- (1) A certified copy of the sentence;
- (2) A complete history of the convicted person, including a certified copy of the indictment, accusation, or both and such other information as the commissioner may require;
- (3) An affidavit of the custodian of such person indicating the total number of days the convicted person was incarcerated prior to the imposition of the sentence. It shall be the duty of the custodian of such person to transmit the affidavit provided for in this paragraph to the clerk of the superior court within ten days following the date on which the sentence is imposed;
- (4) Order of probation revocation or tolling of probation; and
- (5) A copy of the sentencing information report is required in all jurisdictions with an options system day reporting center certified by the Department of Corrections. The failure to provide the sentencing information report shall not cause an increase in the 15 day time period for the department to assign the inmate to a correctional institution as set forth in subsection (b) of this Code section.

Such documents shall be submitted on forms provided by the commissioner. The commissioner shall file one copy of each such document with the State Board of Pardons and Paroles within 30 working days of receipt of such documents from the clerk of the court. Except where the clerk is on a salary, the clerk shall receive from funds of the county the fee prescribed in Code Section 15-6-77 for such service.

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1. S. 48, 149th Gen. Assem., Reg. Sess. (Ga. 2007).

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(b) Within 15 days after the receipt of the information provided for in subsection (a) of this Code section, the commissioner shall assign the convicted person to a correctional institution designated by the commissioner in accordance with subsection (b) of Code Section 42-5-51. It shall be the financial responsibility of the correctional institution to provide for the picking up and transportation, under guard, of the inmate to the inmate's assigned place of detention. If the inmate is assigned to a county correctional institution or other county facility, the county shall assume such duty and responsibility.

(c) The state shall pay for each such inmate not transferred to the custody of the department from a county facility the per diem rate specified by subsection (c) of Code Section 42-5-51 for each day the inmate remains in the custody of the county after the department receives the notice provided by subsection (a) of this Code section-

(d) In the event that the convicted person is free on bond pending the appeal of his or her conviction, the notice provided for in subsection (a) of this Code section shall not be transmitted to the commissioner until all appeals of such conviction have been disposed of or until the bond shall be revoked.”

**§ 2.**

Said article is further amended by revising subsection (a) of Code Section 42-5-61, relating to services and benefits to be furnished inmates discharged by department or county correctional institutions, as follows:

“(a) Except as otherwise provided in this Code section, whenever an inmate is discharged upon pardon or completion of his sentence or is conditionally released or paroled from any place of detention to which he has been assigned under the authority of the department, the department shall provide the inmate the following:

- (1) Transportation to the inmate's home within the United States or to a place chosen by the inmate and authorized by regulations of the board;
- (2) An amount of money of not less than \$25.00 and not more than \$150.00, as determined according to regulations of the board;
- (3) A travel kit, when appropriate, and suitable clothing, each as provided by regulation of the board; and
- (4) A personal identification card, at no charge to the inmate, similar to the identification card authorized under Code Section 40-5-100.”

**§ 3.**

All laws and parts of laws in conflict with this Act are repealed.

**FIRST SIGNATURE'S RATIONALE**

Sen. Joseph Carter, of the 13<sup>th</sup>, introduced Senate Bill 48 because a convicted person may, upon written request by his defense attorney, remain in the custody of the local jail during the pendency of an appeal—which could take up to a year or longer.<sup>2</sup> Sen. Carter believed there is generally no need for the convicted person to be involved in the appeals process because, on appeal, errors of the trial court will likely be at issue and not evidentiary matters.<sup>3</sup> Therefore, Sen. Carter believes it is not

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2. Video Recording of State Institutions & Property (SI&P) H. Comm. Meeting, April 11, 2007 (remarks by Sen. Joseph Carter), *available at* [http://www.legis.state.ga.us/legis/2007\\_08/house/Committees/stateInstitutions/sipArchives.htm](http://www.legis.state.ga.us/legis/2007_08/house/Committees/stateInstitutions/sipArchives.htm).

3. *Id.*

necessary for the convicted person to remain in the custody of the local jail because defense counsel usually has no need to communicate with his client during the appeal.<sup>4</sup> Moreover, local jails face potential liability when they are required to house convicted persons unnecessarily for extended periods of time during their appeal.<sup>5</sup> Additionally, local jails generally have less bed space available than state institutions.<sup>6</sup>

Senate Bill 48 removed language from the current law and removed the discretion of housing, as it relates to the place of detention, of convicted persons from the defense counsel and returned it to the courts.<sup>7</sup> Under the amendment, if defense counsel petitions the court to allow his or her client to remain in the custody of the local jail during the pendency of the appeal, the trial court may have a hearing on the matter to determine the necessity of the stay.<sup>8</sup>

Finally, Senate Bill 48 also required department or county correctional institutions to provide a state issued personal identification card to inmates upon their discharge, because such identification is necessary for seeking employment. Most inmates do not have the required documentation to get an official state identification on their own.<sup>9</sup>

Senate Bill 48 received support from the Sheriff's Association and no opposition from the Georgia Department of Corrections.<sup>10</sup> Deputy General Counsel for the Georgia Sheriff's Association, Oliver Hunter, urged Sen. Carter's support of Senate Bill 48 and pointed out that there have been situations when the law currently in effect has been abused by attorneys who have kept defendants in the county jail when there was no real need or legitimate reason for the defendants to remain there.<sup>11</sup>

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4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.* (remarks by Rep. Austin Scott).

10. *Id.* (remarks by Misty Holcomb, Georgia Department of Corrections).

11. *Id.* (remarks by Oliver Hunter, Deputy General Counsel for the Georgia Sheriff's Association).

**LEGISLATIVE GENEALOGY**

The Senate first read the Bill on January 25, 2007. The Public Safety and Homeland Security (PS&HS) Committee favorably reported the Bill on February 2, 2007.<sup>12</sup> The Senate Committee Substitute modified the original Bill.<sup>13</sup> It removed the language which was added to the Bill as introduced.<sup>14</sup> However, the Committee then essentially accomplished the same objective by returning to the language of the original statute, O.C.G.A. § 42-5-50, and simply deleting section (c) in its entirety which permits the attorney of a convicted person to file the written request for the convicted person's stay at the local jail in the first place.<sup>15</sup> On February 14, 2007, the Senate passed the Bill by substitute by a 52 to 0 vote.<sup>16</sup>

Senate Bill 48 was first read by the House on February 15, 2007, where the Bill was assigned to the State Institutions & Property (SI&P) Committee.<sup>17</sup> The committee gave the Bill a favorable report on April 13, 2007.<sup>18</sup>

The House Committee did not modify the Bill as passed by the Senate but added sections to the Bill which revised subsection (a) of § 42-5-61 relating to services and benefits to be furnished to inmates discharged by department or county correctional institutions.<sup>19</sup>

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12. Ga. Gen. Assem., S. 48, available at [http://www.legis.state.ga.us/legis/2007\\_08/sum/sb48.htm](http://www.legis.state.ga.us/legis/2007_08/sum/sb48.htm) [hereinafter *S. 48 Status*].

13. *Id.*

14. *Id.*

15. *Id.*

16. Ga. Sen. Voting Record, S. 48 (Feb. 14, 2007).

17. *S. 48 Status*, *supra* note 12.

18. *Id.*

19. O.C.G.A. § 42-5-61(a) (“(a) Except as otherwise provided in this Code section, whenever an inmate is discharged upon pardon or completion of his sentence or is conditionally released or paroled from any place of detention to which he has been assigned under the authority of the department, the department shall provide the inmate the following.(1) Transportation to the inmate’s home within the United States or to a place chosen by the inmate and authorized by regulations of the board;(2) An amount of money of not less than \$25.00 and not more than \$150.00, as determined according to regulations of the board; ~~and~~ (3) A travel kit, when appropriate, and suitable clothing, each as provided by regulation of the board; and (4) A personal identification card, at no charge to the inmate,

Specifically, the House Substitute would revise Code Section 42-5-61(a) by adding subsection (4) which provides for the issuance of a personal identification card to inmates upon their discharge from department or county correctional institutions.<sup>20</sup> On April 20, 2007, Senate Bill 48 was withdrawn by the House to be recommitted.<sup>21</sup> On March 5, 2008, the House Committee reconsidered the Bill and again reported on it favorably.<sup>22</sup>

**PREPARED BY:** Randa Hafez

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similar to the identification card authorized under Code Section 40-5-100.”)

20. *Id.*

21. *S. 48 Status, supra* note 12.

22. *Id.*

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**SENATE BILL 98:<sup>1</sup> ACCESS TO ELECTRONIC  
COMMUNICATIONS**  
***Amending O.C.G.A. § 16-9-109***

**FIRST SIGNATURE:** Sen. William Hamrick (30<sup>th</sup>).

**CO-SPONSORS:** Sen. Jeff Mullis (53<sup>rd</sup>), Sen. Don Thomas (54<sup>th</sup>),  
Sen. Bill Heath (31<sup>st</sup>), Sen. Cecil Staton (18<sup>th</sup>) & Sen. Seth Harp  
(29<sup>th</sup>).

**SUMMARY:** Senate Bill 98 authorized the Attorney General, law enforcement agencies, and district attorneys to obtain communication records of those under investigation for criminal activity pursuant to a court order, subpoena, or consent of the person being investigated. The Bill also revised “The Computer or Electronic Pornography and Child Exploitation Prevention Act of 1999,” which provided for prevention and punishment of those engaged in child pornography and internet predatory acts. The Bill defined the specific conduct that is prohibited, the ages of persons who fall in the protected class, and set forth sentencing guidelines for offenders.

**STATUS:** Enacted.

**TEXT OF SENATE BILL 98**

**§ 1.**

Title 16 of the Official Code of Georgia Annotated, relating to crimes and offenses, is amended by revising Code Section 16-9-109, relating to disclosure by service providers pursuant to investigations, as follows:

“16-9-109.

(a) Any law enforcement unit, the Attorney General, or any district attorney who is conducting an investigation of a violation of this article or an investigation of a violation of Code Section 16-12-100, 16-12-100.1, 16-12-100.2, or 16-5-90 or Article 8 of this chapter involving the use of a computer, cellular telephone, or any other electronic device used in furtherance of the act may require the disclosure by a provider of electronic communication service or remote computing service of the contents of a wire or electronic communication that is in electronic storage in an electronic communications system for 180 days or less pursuant to a search warrant issued under the provisions of Article 2 of Chapter 5 of Title 17 by a court with jurisdiction over the offense under investigation. Such court may require the disclosure by a provider of electronic communication service or remote computing service of the contents of a wire or electronic communication that has been in electronic storage in an electronic communications system for more than 180 days as set forth in subsection (b) of this Code section.

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1. S. 98, 149th Gen. Assem., Reg. Sess. (Ga. 2007).

(b)(1) Any law enforcement unit, the Attorney General, or any district attorney may require a provider of electronic communication service or remote computing service to disclose a record or other information pertaining to a subscriber to or customer of such service, exclusive of the contents of communications, only when any law enforcement unit, the Attorney General, or any district attorney:

- (A) Obtains a search warrant as provided in Article 2 of Chapter 5 of Title 17;
- (B) Obtains a court order for such disclosure under subsection (c) of this Code section; or
- (C) Has the consent of the subscriber or customer to such disclosure.

(2) A provider of electronic communication service or remote computing service shall disclose to any law enforcement unit, the Attorney General, or any district attorney the:

- (A) Name;
- (B) Address;
- (C) Local and long distance telephone connection records, or records of session times and durations;
- (D) Length of service, including the start date, and types of service utilized;
- (E) Telephone or instrument number or other subscriber number or identity, including any temporarily assigned network address; and
- (F) Means and source of payment for such service, including any credit card or bank account number of a subscriber to or customer of such service when any law enforcement unit, the Attorney General, or any district attorney uses a subpoena authorized by Code Section 16-9-108, 35-3-4.1, or 45-15-17 or a grand jury or trial subpoena when any law enforcement unit, the Attorney General, or any district attorney complies with paragraph (1) of this subsection.

(3) Any law enforcement unit, the Attorney General, or any district attorney receiving records or information under this subsection shall not be required to provide notice to a subscriber or customer. A provider of electronic communication service or remote computing service shall not disclose to a subscriber or customer the existence of any search warrant or subpoena issued pursuant to this article nor shall a provider of electronic communication service or remote computing service disclose to a subscriber or customer that any records have been requested by or disclosed to any law enforcement unit, the Attorney General, or any district attorney pursuant to this article.

(c) A court order for disclosure issued pursuant to subsection (b) of this Code section may be issued by any superior court with jurisdiction over the offense under investigation and shall only issue such court order for disclosure if any law enforcement unit, the Attorney General, or any district attorney offers specific and articulable facts showing that there are reasonable grounds to believe that the contents of an electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation. A court issuing an order pursuant to this Code section, on a motion made promptly by a provider of electronic communication service or remote computing service, may quash or modify such order, if compliance with such order would be unduly burdensome or oppressive on such provider.

(d)(1) Any records supplied pursuant to this part shall be accompanied by the affidavit of the custodian or other qualified witness, stating in substance each of the following:

- (A) The affiant is the duly authorized custodian of the records or other qualified witness and has authority to certify the records;
- (B) The copy is a true copy of all the records described in the subpoena, court order, or search warrant and the records were delivered to the attorney, the attorney's representative, or the director of the Georgia Bureau of Investigation or the director's designee;
- (C) The records were prepared by the personnel of the business in the ordinary course of business at or near the time of the act, condition, or event;
- (D) The sources of information and method and time of preparation were such as to indicate its trustworthiness;
- (E) The identity of the records; and
- (F) A description of the mode of preparation of the records.

(2) If the business has none or only part of the records described, the custodian or other qualified witness shall so state in the affidavit.

(3) If the original records would be admissible in evidence if the custodian or other qualified witness had been present and testified to the matters stated in the affidavit, the copy of the records shall be admissible in evidence. When more than one person has knowledge of the facts,

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more than one affidavit shall be attached to the records produced.

(4) No later than 30 days prior to trial, a party intending to offer such evidence produced in compliance with this subsection shall provide written notice of such intentions to the opposing party or parties. A motion opposing the admission of such evidence shall be filed within ten days of the filing of such notice, and the court shall hold a hearing and rule on such motion no later than ten days prior to trial. Failure of a party to file such motion opposing admission prior to trial shall constitute a waiver of objection to such records and affidavit. However, the court, for good cause shown, may grant relief from such waiver.”

§ 2.

Said title is further amended by revising Code Section 16-12-100.2, relating to computer pornography and child exploitation prevention, as follows:

“16-12-100.2.

(a) This Code section shall be known and may be cited as the ‘Computer or Electronic Pornography and Child Exploitation Prevention Act of 2007.’

(b) As used in this Code section, the term:

(1) ‘Child’ means any person under the age of 16 years.

(2) ‘Electronic device’ means any device used for the purpose of communicating with a child for sexual purposes or any device used to visually depict a child engaged in sexually explicit conduct, store any image or audio of a child engaged in sexually explicit conduct, or transmit any audio or visual image of a child for sexual purposes. Such term may include, but shall not be limited to, a computer, cellular phone, thumb drive, video game system, or any other electronic device that can be used in furtherance of exploiting a child for sexual purposes;

(3) ‘Identifiable child’ means a person:

(A) Who was a child at the time the visual depiction was created, adapted, or modified or whose image as a child was used in creating, adapting, or modifying the visual depiction; and

(B) Who is recognizable as an actual person by the person’s face, likeness, or other distinguishing characteristic, such as a unique birthmark or other recognizable feature or by electronic or scientific means as may be available.

The term shall not be construed to require proof of the actual identity of the child.

(4) ‘Sodomasochistic abuse’ has the same meaning as provided in Code Section 16-12-100.1.

(5) ‘Sexual conduct’ has the same meaning as provided in Code Section 16-12-100.1.

(6) ‘Sexual excitement’ has the same meaning as provided in Code Section 16-12-100.1.

(7) ‘Sexually explicit nudity’ has the same meaning as provided in Code Section 16-12-102.

(8) ‘Visual depiction’ means any image and includes undeveloped film and video tape and data stored on computer disk or by electronic means which is capable of conversion into a visual image or which has been created, adapted, or modified to show an identifiable child engaged in sexually explicit conduct.

(c)(1) A person commits the offense of computer or electronic pornography if such person intentionally or willfully:

(A) Compiles, enters into, or transmits by computer or other electronic device;

(B) Makes, prints, publishes, or reproduces by other computer or other electronic device;

(C) Causes or allows to be entered into or transmitted by computer or other electronic device; or

(D) Buys, sells, receives, exchanges, or disseminates

any notice, statement, or advertisement, or any child’s name, telephone number, place of residence, physical characteristics, or other descriptive or identifying information for the purpose of offering or soliciting sexual conduct of or with an identifiable child or the visual depiction of such conduct.

(2) Any person convicted of violating paragraph (1) of this subsection shall be punished by a fine of not more than \$10,000.00 and by imprisonment for not less than one nor more than 20 years.

(d)(1) It shall be unlawful for any person intentionally or willfully to utilize a computer on-line service or Internet service, including but not limited to a local bulletin board service, Internet chat room, e-mail, on-line messaging service, or other electronic device, to seduce, solicit, lure, or entice, or attempt to seduce, solicit, lure, or entice a child or another person believed by such person to be a child to commit any illegal act described in Code Section 16-6-2, relating to the offense of sodomy or aggravated sodomy; Code Section 16-6-4, relating to the offense of child molestation or aggravated child molestation; Code Section 16-6-5, relating to the offense of

enticing a child for indecent purposes; or Code Section 16-6-8, relating to the offense of public indecency or to engage in any conduct that by its nature is an unlawful sexual offense against a child.

(2) Any person who violates paragraph (1) of this subsection shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than one nor more than 20 years and by a fine of not more than \$25,000.00; provided, however, that, if at the time of the offense the victim was 14 or 15 years of age and the defendant was no more than three years older than the victim, then the defendant shall be guilty of a misdemeanor of a high and aggravated nature.

(e)(1) A person commits the offense of obscene Internet contact with a child if he or she has contact with someone he or she knows to be a child or with someone he or she believes to be a child via a computer on-line service or Internet service, including but not limited to a local bulletin board service, Internet chat room, e-mail, or on-line messaging service, and the contact involves any matter containing explicit verbal descriptions or narrative accounts of sexually explicit nudity, sexual conduct, sexual excitement, or sadomasochistic abuse that is intended to arouse or satisfy the sexual desire of either the child or the person, provided that no conviction shall be had for a violation of this subsection on the unsupported testimony of a child.

(2) Any person who violates paragraph (1) of this subsection shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than one nor more than ten years or by a fine of not more than \$10,000.00; provided, however, that, if at the time of the offense the victim was 14 or 15 years of age and the defendant was no more than three years older than the victim, then the defendant shall be guilty of a misdemeanor of a high and aggravated nature.

(f)(1) It shall be unlawful for any owner or operator of a computer on-line service, Internet service, local bulletin board service, or other electronic device that is in the business of providing a service that may be used to sexually exploit a child to intentionally or willfully to permit a subscriber to utilize the service to commit a violation of this Code section, knowing that such person intended to utilize such service to violate this Code section. No owner or operator of a public computer on-line service, Internet service, local bulletin board service, or other electronic device that is in the business of providing a service that may be used to sexually exploit a child shall be held liable on account of any action taken in good faith in providing the aforementioned services.

(2) Any person who violates paragraph (1) of this subsection shall be guilty of a misdemeanor of a high and aggravated nature.

(g) The sole fact that an undercover operative or law enforcement officer was involved in the detection and investigation of an offense under this Code section shall not constitute a defense to prosecution under this Code section.

(h) A person is subject to prosecution in this state pursuant to Code Section 17-2-1, relating to jurisdiction over crimes and persons charged with commission of crimes generally, for any conduct made unlawful by this Code section which the person engages in while:

(1) Either within or outside of this state if, by such conduct, the person commits a violation of this Code section which involves a child who resides in this state or another person believed by such person to be a child residing in this state; or

(2) Within this state if, by such conduct, the person commits a violation of this Code section which involves a child who resides within or outside this state or another person believed by such person to be a child residing within or outside this state.

(i) Any violation of this Code section shall constitute a separate offense.”

### § 3.

Title 35 of the Official Code of Georgia Annotated, relating to law enforcement officers and agencies, is amended in subsection (a) of Code Section 35-3-4, relating to powers and duties of the Georgia Bureau of Investigation, by striking “and” at the end of paragraph (8), by replacing the period with “; or” at the end of paragraph (9), and by adding a new paragraph to read as follows:

“(10) Identify and investigate violations of Part 2 of Article 3 of Chapter 12 of Title 16, relating to offenses related to minors.”

### § 4.

Said title is further amended by revising Article 1 of Chapter 3, relating to general provisions

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relating to the Georgia Bureau of Investigation, by adding a new Code section to read as follows:

“35-3-4.1.

(a)(1) In any investigation of a violation of Code Section 16-12-100, 16-12-100.1, or 16-12-100.2 involving the use of a computer or an electronic device in furtherance of an act related to a minor, the director, assistant director, or deputy director for investigations shall be authorized to issue a subpoena, with the consent of the Attorney General, to compel the production of electronic communication service or remote communication service records or other information pertaining to a subscriber or customer of such service, exclusive of contents of communications.

(2) A provider of electronic communication service or remote computing service shall disclose to the bureau the:

(A) Name;

(B) Address;

(C) Local and long distance telephone connection records, or records of session times and durations;

(D) Length of service, including the start date, and types of service utilized;

(E) Telephone or instrument number or other subscriber number or identity, including any temporarily assigned network address; and

(F) Means and source of payment for such service, including any credit card or bank account number of a subscriber to or customer of such service.

(b) Upon failure of a person without lawful excuse to obey a subpoena, the director, assistant director, or the deputy director for investigations, through the Attorney General or district attorney, may apply to a superior court having jurisdiction for an order compelling compliance. Such person may object to the subpoena on grounds that it fails to comply with this Code section or upon any constitutional or other legal right or privilege of such person. The court may issue an order modifying or setting aside such subpoena or directing compliance with the original subpoena.

(c) The Attorney General may request that a natural person who refuses to produce relevant matter on the ground that the production of records may incriminate such person be ordered by the court to provide such records. With the exception of a prosecution for perjury, a natural person who complies with the court order to provide such records asserting a privilege against self-incrimination to which he or she is entitled by law shall not be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he or she may testify or produce evidence, documentary or otherwise.

(d)(1) Information obtained pursuant to a subpoena enforced by this Code section shall not be made public or, except as authorized in paragraph (2) of this subsection, disclosed by the director, assistant director, deputy director for investigations, or the director's employees beyond the extent necessary for the enforcement of this Code section.

(2) The director, assistant director, deputy director for investigations, or the director's employees shall be authorized to provide to any federal, state, or local law enforcement agency any information acquired under this Code section in furtherance of a criminal investigation in violation of Code Section 16-12-100, 16-12-100.1, or 16-12-100.2.

(e) As used in this Code section, the terms 'electronic communication service' and 'remote communication service' shall have the same meaning as set forth in Code Section 16-9-92.”

§ 5.

This Act shall become effective upon its approval by the Governor or upon its becoming law without such approval.

§ 6.

All laws and parts of laws in conflict with this Act are repealed.

### FIRST SIGNATURE'S RATIONALE

Sen. William Hamrick, of the 30<sup>th</sup>, introduced Senate Bill 98 in response to growing concerns from citizens wishing to deter

predatory conduct that has become prevalent in virtual localities such as chat rooms and networking forums on the internet.<sup>2</sup> The Bill provided for more efficient access to communication records, thereby allowing law enforcement officials to quickly and assuredly pursue and apprehend those engaged in criminal conduct.<sup>3</sup>

Similar legislation has recently been the subject of impassioned debate in the United States Congress due to unconventional methods of obtaining suspected terrorists' communication records.<sup>4</sup> While Congress has approved of such intelligence gathering methods, including granting the executive branch authority to obtain such records without initial judicial oversight, the Georgia General Assembly has preserved the requirement to obtain a search warrant prior to extracting the desired information.<sup>5</sup> The legislation principally applies to counter-terrorism on the federal level, but has been integrated with the "Computer or Electronic Pornography and Child Exploitation Prevention Act of 2007" on the state level to facilitate the monitoring and capture of those engaged in sexual predatory acts over the internet or otherwise.<sup>6</sup>

#### LEGISLATIVE GENEALOGY

Senate Bill 98 was first read and referred to the Senate Judiciary Committee on February 1, 2007.<sup>7</sup> According to Sen. Hamrick, no significant opposition to the Bill was presented in Committee.<sup>8</sup> Major proponents included law enforcement groups such as the Georgia Bureau of Investigations and the Georgia Sheriff's Association.<sup>9</sup> The Committee reported favorably and sent the Bill back to the Senate, where it passed

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2. Telephone Interview with Sen. Bill Hamrick, Senate Dist. No. 30 (Oct. 23, 2007) [hereinafter *Hamrick Interview*].

3. *Id.*

4. *Id.*

5. FOREIGN INTELLIGENCE SURVEILLANCE ACT, 50 U.S.C. § 1802 (2008); O.C.G.A. § 16-9-109 (2007).

6. *Id.*

7. Ga. Gen. Assem., S. 98, available at [http://www.legis.state.ga.us/legis/2007\\_08/sum/sb98.htm](http://www.legis.state.ga.us/legis/2007_08/sum/sb98.htm) [hereinafter *S. 48 Status*].

8. *Hamrick Interview*, *supra* note 2.

9. *Id.*

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and was adopted on March 1, 2007.<sup>10</sup> The House of Representatives then received the Bill and subsequently referred it to the House Judiciary (Non-Civil) Committee, where several minor amendments were made.<sup>11</sup> The House adopted its Committee's version of the Bill on April 17, 2007, which was adopted by the Senate two days later.<sup>12</sup> Notably, the Senate unanimously passed the Bill, with only one vote in opposition in the House.<sup>13</sup>

**PREPARED BY:** Daniel C. Stafford

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10. *S. 48 Status, supra* note 7.

11. *Id.*

12. *S. 48 Status, supra* note 7.

13. *Id.*

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**SENATE BILL 139:<sup>1</sup> GEORGIA PUBLIC DEFENDER STANDARD  
COUNCIL  
*Amending O.C.G.A. § 17-12-1***

**First Signature:** Sen. John Wiles (37<sup>th</sup>).

**Co-Sponsor:** Sen. Preston Smith (52<sup>nd</sup>).

**Summary:** Senate Bill 139 transferred the Georgia Public Defender Standards Council from the judicial branch of government to the executive branch of government as an independent agency.

**Status:** Enacted.

**TEXT OF SENATE BILL 139**

**§ 1.**

Chapter 12 of Title 17 of the Official Code of Georgia Annotated, relating to legal defense for indigents, is amended by revising Code Section 17-12-1, relating to the Georgia Public Defender Standards Council, as follows:

“17-12-1.

(a) This chapter shall be known and may be cited as the ‘Georgia Indigent Defense Act of 2003.’ (b) The Georgia Public Defender Standards Council shall be an independent agency within the executive branch of state government. (c) The council shall be responsible for assuring that adequate and effective legal representation is provided, independently of political considerations or private interests, to indigent persons who are entitled to representation under this chapter.”

**§ 2.**

Said chapter is further amended by revising subsection (e) of Code Section 17-12-10.1, relating to the general oversight committee, as follows:

“(e) The council shall submit its budget estimate to the director of the Office of Planning and Budget in accordance with subsection (a) of Code Section 45-12-78.

**§ 3.**

Said chapter is further amended by revising subsection (a) of Code Section 17-12-26, relating to the budget of the council, as follows:

“(a) The council shall prepare and submit to the Office of Planning and Budget an annual proposed budget necessary for fulfilling the purposes of this article in accordance with Code Section 45-12-78. The budget request shall be based on the previous year’s expenditures and budget requests submitted by each circuit public defender, the Office of the Georgia Capital Defender, and the office of the mental health advocate. The council’s total budget request for funding for the operations of the circuit public defender offices and the council’s programs shall not exceed the amount of funds collected for indigent defense pursuant to Code Sections 15-21-73 and 15-21A-6; provided, however, that the General Assembly shall not be obligated to appropriate such amount for indigent defense. The council is also authorized to seek, solicit, apply for, and utilize funds from any public or private source to use in fulfilling the purposes of this article.”

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1. S. 139, 149<sup>th</sup> Gen. Assem., Reg. Sess. (Ga. 2007).

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## § 4.

Said chapter is further amended by revising Code Section 17-12-30, relating to classification of personnel, responsibilities, compensation, and local supplements, as follows:

“17-12-30. (a) All state paid personnel employed by the circuit public defenders pursuant to this article shall be employees of the executive branch of state government and shall be in the unclassified service of the State Merit System of Personnel Administration. (b) Personnel employed by the circuit public defenders pursuant to this article shall have the authority, duties, powers, and responsibilities as are authorized by law or as assigned by the circuit public defender and shall serve at the pleasure of the circuit public defender. (c)(1) The council shall establish salary ranges for each state paid position authorized by this article or any other provision of law. Salary ranges shall be similar to the state-wide and senior executive ranges adopted by the State Merit System of Personnel Administration and shall provide for minimum, midpoint, and maximum salaries not to exceed the maximum allowable salary. In establishing the salary ranges, all amounts will be rounded off to the nearest whole dollar. The council may, from time to time, revise the salary ranges to include across-the-board increases which the General Assembly may from time to time authorize in the General Appropriations Act. (2) The circuit public defender shall fix the compensation of each state paid employee appointed pursuant to this article in accordance with the job to which the person is appointed and the appropriate salary range. (3) All salary advancements shall be based on quality of work, training, and performance. The salary of state paid personnel appointed pursuant to this article may be increased at the first of the calendar month following the annual anniversary of the person's appointment. No employee's salary shall be advanced beyond the maximum established in the applicable pay range. (4) Any reduction in salary shall be made in accordance with the salary range for the position and the policies, rules, or regulations adopted by the council. (5) The compensation of state paid personnel appointed pursuant to this article shall be paid in equal installments by the council as provided by this subsection from funds appropriated for such purpose. The council may authorize employees compensated pursuant to this Code section to participate in voluntary salary deductions as provided by Article 3 of Chapter 7 of Title 45. (6) The governing authority of the county or counties comprising a judicial circuit may supplement the salary or fringe benefits of any state paid position appointed pursuant to this article. (7) The governing authority of any municipality within the judicial circuit may, with the approval of the circuit public defender, supplement the salary or fringe benefits of any state paid position appointed pursuant to this article.”

## § 5.

This Act shall become effective on July 1, 2007.

## § 6.

All laws and parts of laws in conflict with this Act are repealed.

**FIRST SIGNATURE'S RATIONALE**

The purpose of the Senate Bill 139 was to provide greater review over the budget for the indigent defense system.<sup>2</sup> Sen. Wiles, of the 37<sup>th</sup>, introduced the Bill in light of the problems the Indigent Defense Council is currently experiencing with its budget.<sup>3</sup> Presently there is no oversight over the Council's budget and once the budget is sent to the Governor he is unable

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2. Video Recording of Sen. Proceedings, Mar. 20, 2007 (remarks by Rep. John Wiles), available at [http://www.ga.gov/00/article/0,2086,4802\\_6107103\\_72682316,00.html](http://www.ga.gov/00/article/0,2086,4802_6107103_72682316,00.html).

3. *Id.*

to change it.<sup>4</sup> The legislation will enable the Governor to make amendments to the Council's budget.<sup>5</sup>

### LEGISLATIVE GENEALOGY

The first reading occurred on February 10, 2007.<sup>6</sup> The Senate Judiciary Committee favorably reported the Bill by substitute on February 27, 2007.<sup>7</sup> The Committee Substitute modified the Bill slightly.<sup>8</sup> The Substitute allows the Council to authorize employees to participate in voluntary salary deductions as provided by Article 3 of Chapter 7 of Title 45.<sup>9</sup>

In Committee, Sen. Steve Henson, of the 41<sup>st</sup>, expressed concerns of a conflict of interest when an officer of the executive branch decides to prosecute a case and the same branch cuts off funds for the defense for the same case.<sup>10</sup> Sen. Wiles answered that this conflict always exists in a divided government.<sup>11</sup> Moreover, Sen. Wiles emphasized that the Georgia Constitution and the Constitution of the United States are clear in mandating that indigent defendants are entitled to a constitutionally sufficient defense.<sup>12</sup> Sen. Wiles also added that the Council supported the move to the executive branch.<sup>13</sup> The Committee Substitute was adopted by a vote of 33 to 0.<sup>14</sup> Senate Bill 139 passed the Senate by substitute by a vote of 40 to 7.<sup>15</sup>

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4. *Id.*

5. *Id.*

6. Ga. Gen. Assem., S. 139, available at [http://www.legis.ga.gov/legis/2007\\_08/sum/sb139.htm](http://www.legis.ga.gov/legis/2007_08/sum/sb139.htm) (last visited Mar. 29, 2008).

7. *Id.*

8. *Id.* (The substitute provides, "compensation of state paid personnel appointed pursuant to this article shall be paid in equal installments by the council as provided by this subsection from funds appropriated for such purpose.").

9. S. 139.

10. Video Recording of Sen. Proceedings, Mar. 20, 2007, available at [http://www.ga.gov/00/article/0,2086,4802\\_6107103\\_72682316,00.html](http://www.ga.gov/00/article/0,2086,4802_6107103_72682316,00.html).

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. Ga. Gen. Assem., S. 139, available at <http://www.legis.ga.gov/legis/>

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The first reading in the House occurred on March 27, 2007.<sup>16</sup> The Bill was assigned to the House Judiciary (Non-Civil) Committee.<sup>17</sup> A second reading occurred the following day.<sup>18</sup> On April 10, 2007, the House Committee favorably reported the Bill.<sup>19</sup> The Bill was read a third time on April 17, 2007.<sup>20</sup>

Rep. David Ralston, of the 7<sup>th</sup>, presented the Bill. He reaffirmed that the Bill was introduced to improve the public defender's system by adding flexibility to the budget review process.<sup>21</sup> Rep. DuBose Porter, of the 143<sup>rd</sup>, spoke against the Bill stating that there are two major problems with transferring the Council to the executive branch.<sup>22</sup> First, the separation of powers is eroded, and second, the move will weaken the authority of the legislature because the Governor, not the legislature, will be the first to see the budget.<sup>23</sup> Rep. Porter stated that although the Council is not objecting to the move, they are fearful about the budget.<sup>24</sup> Rep. Porter also noted that the credibility of the Council will be lessened by the move to the executive branch because it will be subject to political whims in high profile cases.<sup>25</sup> The Bill passed the House the same day by a vote of 98 to 58.<sup>26</sup>

The Governor received the Bill from the Senate on April 26, 2007.<sup>27</sup> Senate Bill 139 was signed by the Governor on May 11, 2007.<sup>28</sup>

**PREPARED BY: Quiana Riche**

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2007\_08/votes/sv 0150.htm (last visited Mar. 29, 2008).

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. Video Recording of Sen. Proceedings, Apr. 17, 2007, *available at* [http://www.ga.gov/00/article/0,2086,4802\\_6107103\\_72682804,00.html](http://www.ga.gov/00/article/0,2086,4802_6107103_72682804,00.html).

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. Ga. Gen. Assem., S. 139, *available at* [http://www.legis.ga.gov/legis/2007\\_08/sum/sb139.htm](http://www.legis.ga.gov/legis/2007_08/sum/sb139.htm) (last visited Mar. 29, 2008).

27. *Id.*

28. *Id.*

**SENATE BILL 190:<sup>1</sup> INSANITY/MENTAL INCOMPETENCY**  
***Amending O.C.G.A. § 17-7-30***

**FIRST SIGNATURE:** Sen. Seth Harp (29<sup>th</sup>).

**CO-SPONSORS:** Sen. Michael Myer von Bremen (12<sup>th</sup>), Sen. Dan Moody (56<sup>th</sup>), Sen. Greg Goggans (7<sup>th</sup>), Sen. Don Thomas (54<sup>th</sup>) & Sen. Bill Cowsert (46<sup>th</sup>).

**SUMMARY:** Senate Bill 190 provided definitions for violent acts and gave the committing court the discretion to allow outpatient evaluations of non-violent defendants.

**STATUS:** Enacted.

**TEXT OF SENATE BILL 190**

**§ 1.**

Part 2 of Article 6 of Chapter 7 of Title 17 of the Official Code of Georgia Annotated, relating to issues of insanity and mental incompetency in pretrial proceedings, is amended by revising Code Section 17-7-130, relating to proceedings upon a plea of mental incompetency to stand trial, as follows:

'17-7-130.

(a) As used in this Code section, the term:

(1) 'Committing court' means the court which has jurisdiction over the criminal charges against the defendant.

(2) 'Inpatient' shall have the same meaning as in paragraph (9.1) of Code Section 37-3-1.

(3) 'Nonviolent offense' means any offense other than:

(A)(i) Murder;

(ii) Rape;

(iii) Aggravated sodomy;

(iv) Armed robbery;

(v) Aggravated assault;

(vi) Hijacking of a motor vehicle or an aircraft;

(vii) Aggravated battery;

(viii) Aggravated sexual battery;

(ix) Aggravated child molestation; or (x) Aggravated stalking;

(xi) Arson in the first degree and in the second degree;

(xii) Stalking;

(xiii) Fleeing and attempting to elude a police officer;

(xiv) Any sexual offense against a minor; or (xv) Any offense which involves the use of a deadly weapon or destructive device; and (B) Those felony offenses deemed by the committing court to involve an allegation of actual or potential physical harm to another person.

(4) 'Outpatient' shall have the same meaning as in paragraph (12.1) of Code Section 37-3-1, provided that the court determines that the defendant meets the criteria for release on bail or other pre-trial release pursuant to Code Section 17-6-1.

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1. S. 190, 149th Gen. Assem., Reg. Sess. (Ga. 2007).

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(b) Whenever a plea is filed that a defendant in a criminal case is mentally incompetent to stand trial, it shall be the duty of the court to cause the issue of the defendant's mental competency to stand trial to be tried first by a special jury. If the special jury finds the defendant mentally incompetent to stand trial, the court shall retain jurisdiction over the defendant but shall transfer the defendant to the Department of Human Resources; provided, however, that if the defendant is charged with a misdemeanor offense other than as included in subparagraph (A) of paragraph (3) of subsection (a) of this Code section or a nonviolent offense, the court may, in its discretion, retain jurisdiction over the defendant, and may allow evaluation to be done on an outpatient basis by the Department of Human Resources. If the court allows outpatient evaluation and the defendant is in custody, the court may release the defendant in accordance with the provisions of Code Section 17-6-1, et. seq.

(c) Within 90 days after the Department of Human Resources has received actual custody of a defendant or, in the case of an outpatient, a court order requiring evaluation of a defendant pursuant to subsection (b) of this Code section, the defendant shall be evaluated and a diagnosis made as to whether the defendant is presently mentally incompetent to stand trial and, if so, whether there is a substantial probability that the defendant will attain mental competency to stand trial in the foreseeable future. If the defendant is found to be mentally competent to stand trial, the department shall immediately report that finding and the reasons therefor to the committing court; and the defendant shall be returned to the court as provided for in subsection (f) of this Code section.

(d) If the defendant is found to be mentally incompetent to stand trial by the Department of Human Resources and there is not a substantial probability that the person will attain competency in the foreseeable future, the department shall return the physical custody of the defendant to a law enforcement officer of the jurisdiction of the court which committed the defendant unless in the opinion of the department's attending physician, and with concurrence of the court, such detention by law enforcement would be detrimental to the well-being of the defendant, in which case the defendant may be held by the department until the date of the defendant's hearing. The department shall report to the committing court the finding regarding competency, the reasons therefor, and its opinion as to whether the defendant currently meets criteria for commitment as an inpatient or as an outpatient pursuant to Chapters 3 or 4 of Title 37. The law enforcement officer of the jurisdiction of the court which committed the defendant shall retain custody of the defendant and the committing court may order an independent evaluation of the defendant by a court appointed licensed clinical psychologist or psychiatrist, who shall report to the court in writing as to the current mental and emotional condition of the defendant. Based on consideration of all evidence and all reports, the committing court may:

(1) Refer the case to the probate court for commitment proceedings pursuant to Chapter 3 or 4 of Title 37, if appropriate and if the charges are dismissed for any reason; or (2) Retain jurisdiction of the defendant and conduct a hearing at which it shall hear evidence and consider all psychiatric and psychological reports submitted to the court and determine whether the state has proved by clear and convincing evidence that the defendant meets the criteria for involuntary civil commitment as an inpatient or as an outpatient pursuant to Chapter 3 or 4 of Title 37, whichever is applicable. The burden of proof in such hearings shall be upon the state.

(A) If the defendant does not meet the criteria for inpatient or outpatient civil commitment, the defendant shall be released in accordance with the provisions of Code Section 17-6-1 et. seq.

(B) If the defendant is found to meet the criteria for involuntary civil commitment as an inpatient or outpatient, the judge may issue an order committing the defendant.

(i) If the defendant so committed is charged with a misdemeanor offense, the committing court may civilly commit the defendant for a period not to exceed one year. Following the commitment period, the charges against the defendant shall be dismissed by operation of law.

(ii) A defendant who is so committed and is charged with a felony may only be released from that inpatient or outpatient commitment by order of the committing court in accordance with the procedures specified in paragraphs (1) through (3) of subsection (f) of Code Section 17-7-131 except that the burden of proof in such release hearing shall be on the state and if the committed person cannot afford a physician or licensed clinical psychologist of the defendant's choice, the person may petition the court and the court may order such cost to be paid by the county. The Department of Human Resources shall report annually to the committing court on whether the civilly committed defendant continues to meet criteria for involuntary commitment as an

inpatient or an outpatient pursuant to Chapter 3 or 4 of Title 37. The committing court shall review the case and enter an appropriate order, either to renew the inpatient or outpatient civil commitment, to change the commitment either from inpatient to outpatient or from outpatient to inpatient, or in the event charges are dismissed, transfer the jurisdiction of the case to the probate court for further proceedings pursuant to Title 37, if appropriate.

(e) If the defendant is found to be mentally incompetent to stand trial but there is a substantial probability that the person will attain competency in the foreseeable future, by the end of the 90 day period, or at any prior time, the department shall report that finding and the reasons therefor to the committing court and shall retain custody over the defendant for the purpose of continued treatment for an additional period not to exceed nine months; provided, however, that if the defendant is charged with a misdemeanor offense or a nonviolent offense, the court shall retain jurisdiction over the defendant, but may, in its discretion, allow continued treatment to be done on an outpatient basis by the Department of Human Resources. The department shall monitor the defendant's outpatient treatment for an additional period not to exceed nine months. If, by the end of the nine-month period or at any prior time if the defendant's condition warrants, the defendant is still found not to be competent to stand trial, irrespective of the probability of recovery in the foreseeable future, the department shall report that finding and the reasons therefor to the committing court. The committing court shall then follow the procedures in subsection (d) of this Code section for further commitment or release.

(f)(1) If the defendant found to be mentally incompetent to stand trial is at any time found by the Department of Human Resources to be mentally competent to stand trial, the committing court shall be notified. A defendant who is an inpatient and is found by the Department of Human Resources to be mentally competent to stand trial shall be discharged into the custody of a law enforcement officer of the jurisdiction of the court which committed the defendant to the department unless the charges which led to the commitment have been dismissed, in which case the defendant shall be discharged. In the event a law enforcement officer does not appear and take custody of the defendant within 20 days after notice to the appropriate law enforcement official in the jurisdiction of the committing court, the presiding judge of the committing court, and the prosecuting attorney for the court, the department shall itself return the defendant to one of the committing court's detention facilities; and the cost of returning the defendant shall be paid by the county in which the committing court is located. All notifications shall be sent by certified mail or statutory overnight delivery, return receipt requested. With the concurrence of the appropriate court and upon the recommendation of the department's attending physician, any defendant discharged as competent to stand trial may be held by the department instead of at the court's detention facilities whenever, in the attending physician's opinion, such detention in the court's facilities would be detrimental to the well-being of the defendant so committed. Such alternative detention shall continue only until the date of the defendant's trial.

(2) A defendant who is an outpatient and is found by the Department of Human Resources to be mentally competent to stand trial may remain in the community under conditions of bond or other conditions ordered by the committing court, if any, until the date of the person's trial.

(g) Any person found by the Department of Human Resources to be mentally competent to stand trial returned to the court as provided in subsection (f) of this Code section shall again be entitled to file a special plea as provided for in this Code section.

(h) If a defendant is found to be mentally incompetent to stand trial, whether or not committed pursuant to this Code section, the state may file at any time a motion for rehearing on the issue of the defendant's mental competency. The court shall grant said motion upon a showing by the state that there are reasonable grounds to believe that the defendant's mental condition has changed. If this motion is granted, the case shall proceed as provided in subsection (b) of this Code section.'

§ 2.

All laws and parts of laws in conflict with this Act are repealed.

### FIRST SIGNATURE'S RATIONALE

Sen. Seth Harp, of the 29<sup>th</sup>, believed the maximum security

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over aggressive mentally ill defendants is more adequately provided in the State's mental health facility rather than in a penal institutional setting.<sup>2</sup> Senate Bill 190 was a cooperative effort among the Georgia Public Defender's Standards Council, the Prosecuting Attorney's Council of Georgia, the Mental Health Network, the Mental Health Advocate, and various Superior Court Judges around the State.<sup>3</sup>

The State's mental health agency maintained an eleven million dollar deficit for the past eight years and has been operating at more than 100% capacity since March of 2005.<sup>4</sup> As a result of bed-shortage at the State's mental facility, the "Hannibal Lecter Type" of defendants were not being admitted to the facility for the purposes of long term treatment.<sup>5</sup> Instead, the violent and mentally ill defendants were being held in the county jails, which were not equipped to treat them.<sup>6</sup> The purpose of Senate Bill 190 was to free up bed space at the mental health facilities and to allow committing courts the discretion to order offenders of non-violent offenses to be examined in an outpatient setting that will be more cost efficient for the mental health agencies.<sup>7</sup>

#### LEGISLATIVE GENEALOGY

The Senate passed the Bill by a unanimous vote on March 27, 2007 without question, comment, or amendment.<sup>8</sup> The House Committee reported favorably on the passage of the Bill. The Bill was discussed on the House floor and was passed without

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2. Video Recording of Senate Proceedings, Mar. 27, 2007 (remarks by Sen. Seth Harp), available at [http://www.georgia.gov/00/article/0,2086,4802\\_6107103\\_72682316,00.html](http://www.georgia.gov/00/article/0,2086,4802_6107103_72682316,00.html) [hereinafter *Senate Video*].

3. *Id.*

4. Alan Judd & Andy Miller, *State mental agency says it has \$11 million deficit*, ATLANTA J. CONST., Oct. 31, 2007.

5. See *Senate Video*, supra note 2 (remarks by Sen. Seth Harp).

6. *Id.*

7. See Georgia Public Defender Standards Council, *Legislative Update Changes in 17-7-130 Incompetent to Stand Trial (IST)* [http://www.gpdsc.com/omha-article-legupdate\\_07.htm](http://www.gpdsc.com/omha-article-legupdate_07.htm) (last visited Oct. 2007).

8. *Senate Video*, supra note 2.

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question, comment, or amendment in a 129 to 3 vote.<sup>9</sup>

**PREPARED BY:** Julie Tidmore

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9. *Id.*

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**SENATE BILL 211:<sup>1</sup> HATE CRIMES**  
***Amending O.C.G.A. § 17-10-17***

**FIRST SIGNATURE:** Sen. Vincent Fort (39<sup>th</sup>).

**CO-SPONSORS:** Sen. Robert Brown (26<sup>th</sup>), Sen. Kasim Reed (35<sup>th</sup>), Sen. Nan Orrock (36<sup>th</sup>), Sen. Regina Thomas (2<sup>nd</sup>) & Sen. Gail Davenport (44<sup>th</sup>).

**SUMMARY:** Senate Bill 211 provided increased periods of incarceration for defendants found guilty of crimes that target a victim due to age, religion, gender, national origin, or sexual orientation.

**STATUS:** Not enacted.

**TEXT OF SENATE BILL 211**

**§ 1.**

Article 1 of Chapter 10 of Title 17 of the Official Code of Georgia Annotated, relating to procedure for sentencing and imposition of punishment, is amended by repealing in its entirety Code Section 17-10-17, relating to sentencing of defendants guilty of crimes involving bias or prejudice, circumstances, and parole.

**§ 2.**

Said article is further amended by adding a new Code Section 17-10-17 to read as follows:  
“17-10-17.

(a) Subject to the notice requirement provided in Code Section 17-10-18 and in enhancement of the penalty imposed, if the trier of fact determines beyond a reasonable doubt that the defendant intentionally selected any victim or any property of the victim as the object of the offense because of the victim’s race, religion, gender, gender identity, sexual orientation, or national origin, the judge imposing sentence shall:

(1) If the offense for which the defendant was convicted is a misdemeanor, increase the sentence and the fine normally imposed by the court through court policy or voluntary sentencing guidelines by 50 percent up to the maximum authorized by law;

(2) If the offense for which the defendant was convicted is a misdemeanor of a high and aggravated nature, increase the sentence and fine normally imposed by the court through court policy or voluntary sentencing guidelines by 50 percent up to the maximum authorized by law;  
or

(3) If the offense for which the defendant was convicted is a felony, increase the sentence normally imposed by the court through court policy or voluntary sentencing guidelines by up to five years, not to exceed the maximum authorized by law; provided, however, that if the defendant was less than 18 years of age at the time of the offense, the judge shall have the discretion to reduce the enhanced penalty provided for in this subsection.

(b) When the judge imposes the sentence, the judge shall state the amount of the increase of the sentence based on the application of subsection (a) of this Code section.

(c) Any person convicted of a felony and given an enhanced sentence under this Code section shall not be eligible for any form of parole or early release until such person has served at least

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1. S. 211, 149th Ga. Gen. Assem., Reg. Sess. (Ga. 2007).

90 percent of the sentence imposed by the sentencing court.”

§ 3.

This Act shall not apply to any offense committed before July 1, 2007.

§ 4.

This Act shall become effective on July 1, 2007.

§ 5.

All laws and parts of laws in conflict with this Act are repealed.

### FIRST SIGNATURE’S RATIONALE

Sen. Vincent Fort, of the 39<sup>th</sup>, introduced Senate Bill 211 in response to the increasing number of violent crimes targeting victims due to race, religion, gender, national origin, or sexual orientation.<sup>2</sup> In particular, a gay-friendly nightclub was bombed in the Senator’s district in 1999.<sup>3</sup> The Bill is an amendment to restore enhanced criminal sentencing guidelines set forth in O.C.G.A. § 17-10-17, which was held to be unconstitutionally vague by the Georgia Supreme Court in 2004.<sup>4</sup> The act, labeled “The Anti-Domestic Terror Act,” defined a hate crime as one committed as a result of “bias or prejudice.”<sup>5</sup> The Court ruled that these terms did not give a person of ordinary intelligence adequate warning of the proscribed conduct.<sup>6</sup> The new Bill was modeled after Wisconsin’s hate crime law, which has already passed constitutional muster in the United States Supreme Court.<sup>7</sup> The addition of specific classes of people was the modification that Sen. Fort inserted to cure the defect.<sup>8</sup>

Sen. Bill Cowsert, of the 46<sup>th</sup>, chairman of the Study Committee, commented on the interesting coalition of organizations supporting the Bill, which includes the Anti-Defamation League, the NAACP, GLAD, and the Georgia Bureau of Investigation.<sup>9</sup> Support from such diverse groups has

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2. Telephone Interview with Sen. Vincent Fort, Sen. Dist. No. 39 (Sept. 20, 2007) [hereinafter *Fort Interview*].

3. *Id.*

4. ANTI-DOMESTIC TERROR ACT of 2000, O.C.G.A. § 17-10-17 (2000), *invalidated by* *Botts v. State*, 604 S.E.2d 512 (Ga. 2004).

5. *Id.*

6. *Botts*, 604 S.E.2d at 513.

7. *Fort Interview*, *supra* note 2; *Wisconsin v. Mitchell*, 508 U.S. 476 (1993).

8. *Fort Interview*, *supra* note 2.

9. Telephone Interview with Sen. Bill Cowsert, Sen. Dist. No. 46 (Sept. 21, 2007).

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put Republicans in a delicate position, as they have traditionally voted for regulations supported by law enforcement agencies, but against the interests of groups representing homosexuals and other minority interest groups.<sup>10</sup>

#### LEGISLATIVE GENEALOGY

The first reading of the Bill in the Senate occurred on February 22, 2007; it was subsequently referred to the Judiciary Committee.<sup>11</sup> On March 19, 2007, the Committee favorably reported the Bill with 6 to 2 bipartisan approval vote.<sup>12</sup> On March 20, 2007, the Bill was read for a second time.<sup>13</sup> It has since been reviewed by the Rules Committee and is now in the Study Committee for evaluation.<sup>14</sup>

**PREPARED BY:** Daniel Stafford

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10. *Id.*

11. Ga. Gen. Assem., S. 211, available at [http://www.legis.state.ga.us/legis/2007\\_08/sum/sb211.htm](http://www.legis.state.ga.us/legis/2007_08/sum/sb211.htm).

12. *Id.*

13. *Id.*

14. *Fort Interview, supra* note 2.