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CRIMINAL PROCEDURE Crime Victims' Bill of Rights

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CRIMINAL PROCEDURE

Crime Victims' Bill of Rights: Amend Chapter 11 of Title 15, Title 17, and Article 3 of Chapter 9 of Title 24 of the Official Code of Georgia Annotated, Relating to Juvenile Proceedings, Criminal Procedure, and Examination of Witnesses, Respectively, so as to Expand Provisions Relative to Victims' Participation in the Court System in Juvenile and State Courts; Change Provisions Relating to Victim Impact Statements in Delinquency Proceedings; Provide That Victims May Be Present in Juvenile Court Hearings; Require Courts to Hear Victim Impact Testimony; Require the Court to Make a Finding Regarding Restitution in Sentencing Every Accused Person; Add Legislative Findings to the "Crime Victims' Bill of Rights"; Define Certain Terms; Expand the List of Crimes Covered by the "Crime Victims' Bill of Rights"; Change Provisions Relating to Victim Notification to the Victim of Matters Relative to a Criminal Case; Provide for Victim Notification of Events When an Accused Is Committed to the Department of Behavioral Health and Developmental Disabilities; Change Provisions Relating to the Prosecuting Attorney's Duties Relative to Victim Notification and Provide for Notice to Victims Relating to Restitution; Provide for Procedures for a Victim to be Interviewed by an Accused or His or Her Attorney or Agent; Require That Victims of Crimes be Present in the Courtroom Except Under Limited Circumstances; Change Provisions Relative to the Rule of Sequestration; Provide Privilege Protections to Communications between Victim Assistance Personnel and Victims; Require the Attorney General to Notify Prosecuting Attorneys of Certain Matters in Death Penalty Cases; Provide for Victims to Prevent an Accused from Sending Any Form of Written, Text, or Electronic Communication to Such Victim, the Victim's Family, or the Victim's Household; Article 3 of Chapter 5 of Title 42 of the Official Code of Georgia Annotated, Relating to Conditions of Detention, so as to Change Certain Provisions Relating to Transmittal of Information on Convicted Persons and Place of Detention; Change the provision that Allows Convicted Persons to Remain in Local Jails under Certain Circumstances; Provide for Related Matters; Repeal Conflicting Laws; and for Other Purposes.

CODE SECTION:	O.C.G.A. §§ 15-11-64.2, -78, -155 (amended); 17-10-1.2 (amended); 17-14-3 (amended); 17-17-1, -3, -5 (amended); 17-17-5.1 (new); 17-17-8 (amended); 17-17-8.1 (new); 17-17-9 (amended); 17-17-9.1 (new); 17-17-12 (amended); 17-17-12.1 (new); 24-9-61.1 (amended); 42-5-50 (amended)
BILL NUMBER:	HB 567
ACT NUMBER:	403
GEORGIA LAWS:	2010 Ga. Laws 214
SUMMARY:	The Act provides for crime victims' rights in Georgia and creates substantive mechanisms for directing agencies to carry out these rights. It establishes comprehensive reform providing nine basic victims' rights. These include the right to be present and heard in the sentencing phase of a criminal proceeding against the accused, including proceedings in juvenile court. The Act also provides that victims must be notified regarding the disposition of criminal proceedings or the status of the accused, such as release or escape, and requires the prosecuting attorney or the corrections department to provide such notice. Judges are also required to make a finding in every case as to whether restitution to the victim from the accused is appropriate. Further, it provides that the victim may refuse an interview from an agent (such as an attorney) of the accused and that such an agent must clearly identify that he represents the accused. Victims and families are also protected against contact from the accused. Finally, the

Act provides for changes relating to the transportation of convicted persons to correctional institutions.

EFFECTIVE DATE: July 1, 2010

History

The Crime Victims' Bill of Rights provides that victims of crime and their families have rights including the following: to be heard in court; to have a hearing on restitution where appropriate; and to be notified regarding the status of the accused or convicted offender.[1] Additionally, the Act, for the first time, expands the victims' right to be heard during juvenile proceedings.[2] In its final form, House Bill (HB) 567 passed with little opposition in the House by 158 "yeas" to 1 "nay"[3] and passed unanimously in the Senate.[4] The bill, however, went through numerous changes and faced stiff opposition, primarily based on a controversial version of Section 11 included in the bill's earlier versions.[5] Work on crafting legislation covering victims' rights actually began sometime in June 2009, when a group of legislators were instructed to create a draft of the potential bill to be introduced.[6]

Victim impact statements previously were disfavored at law. Prior to the 1990s, victim impact statements were not allowed to influence sentencing in Georgia courts. In the 1974 *Muckle v. State* decision, the Georgia Supreme Court reversed a life imprisonment sentence

1. O.C.G.A. § 17-17-1 (Supp. 2010).

2. *Id.* § 15-11-64.2(d); s*ee also* Video Recording of House of Representatives Judiciary Non-Civil Committee Proceedings, Jan. 5, 2010 at 26 min., 39 sec. (remarks by Spencer Lawton, Prosecuting Attorneys' Council), http://media.legis.ga.gov/hav/09/comm/judynon/judynon010509.wmv [hereinafter House Comm. Jan. 5 Video]. Code section 17-17-1 does not apply to juvenile court proceedings. *See* 1996 Ga. Op. Att'y Gen. U96-1.

3. Georgia House of Representatives Voting Record, HB 567 (Mar. 26, 2010).

4. Georgia Senate Voting Record, HB 567 (Apr. 14, 2010).

5. *See* Telephone Interview with Don Samuel, Partner, Garland, Samuel and Loeb, Member, Georgia Association of Defense Attorneys (Apr. 1, 2010) (on file with the Georgia State University Law Review) [hereinafter Samuel Interview]; *see also* HB 567 (LC 29 4112ERS), § 11, p. 10–11, ln. 337–60, 2009 Ga. Gen. Assem. (deleted subsection Section 11(f) which provided for contempt of court for attorneys who violated this Act).

6. House Comm. Jan. 5 Video, *supra* note 2, at 15 min., 6 sec. (remarks by Subcomm. Chairman Rep. Rich Golick (R-34th)).

imposed on a rapist and remanded for a new sentencing.[7] The rape victim's husband and her university professor were allowed to testify as to her change in personality and decreased academic performance following the attack.[8] Accordingly, the Georgia Supreme Court held that current Georgia law did not allow the "severity of the punishment [to] depend on the emotional state of the unfortunate victim."[9]

Additionally, the Eighth Amendment to the United States Constitution was once construed to disallow victim impact statements in capital murder trials.[10] In *Booth v. Maryland*, the Supreme Court reasoned that allowing victim impact statements would cause the death penalty to be imposed in an arbitrary manner: some victims either would not leave behind a family or be less articulate in describing their loss even if it was equally severe to the loss of others.[11] Likewise, the Court was concerned that such evidence shifted focus away from the defendant and what he knew when he committed the crime.[12] Relying on *Booth*, the Supreme Court in *South Carolina v. Gathers* affirmed that a prosecutor engaged in improper conduct during a capital murder prosecution, when he read from the religious literature a murder victim carried at the time of his death and inferred positive qualities about him.[13]

The Supreme Court reversed itself a short time later in *Payne v. Tennessee*.[14] The majority held that "the Eight Amendment erects no per se bar" to victim impact statements.[15] The Court reasoned that it was unfair to allow the defendant to put on mitigating evidence about

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7. Muckle v. State, 233 Ga. 337, 338, 211 S.E.2d 361, 363 (1974).

8. *Id.* at 337, 362.

9. *Id.* at 339, 363.

10. Booth v. Maryland, 482 U.S. 496, 509 (1987), *overruled by* Payne v. Tennessee, 501 U.S. 808 (1991). The *Booth* Court relied on the Eight Amendment of the United States Constitution, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

11. *Booth*, 482 U.S. at 505–06.

12. *Id.* at 505.

13. South Carolina v. Gathers, 490 U.S. 805, 811–12 (1989), *overruled by* Payne v. Tennessee, 501 U.S. 808 (1991). Moreover, the Court held that it was also misconduct to infer positive qualities based on the voter registration card that the victim had in his papers at the time of his murder. *Id.*

14. Payne v. Tennessee, 501 U.S. 808 (1991).

15. *Id.* at 827. Justice O'Connor's concurring opinion was joined by two other Justices and stated that *Booth* both "significantly harms our criminal justice system and is egregiously wrong" and had "plainly inadequate rational support." *Id.* at 834 (O'Connor, J., concurring).

his good character while denying victims or their survivors a chance to express the impact or loss caused by the defendant's actions.[16] The Court expressed the need to right the unfairness caused by *Booth* by quoting Justice Cardozo: "[J]ustice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true."[17]

Georgia law, nevertheless, continued to disallow victim impact statements as late as 1992.[18] The Georgia Supreme Court agreed with the Supreme Court's reasoning in *Payne* that the Eighth Amendment was no "per se bar" to victim impact statements, but still found that then-codified Georgia law did not allow evidence of the psychological impact of the crime on the victim.[19] The Georgia high court noted that *Muckle v. State* was "intended to avoid confusion and prejudicial digression in sentencing."[20] The next year, the Georgia legislature changed the law, specifically allowing for victim impact statements in death penalty cases at the discretion of the trial judge so long as they did not "inflame or unduly prejudice the jury."[21] The law, nonetheless, was not applicable to juvenile court proceedings.[22]

In terms of providing rights beyond victim impact statements, Georgia's previous Crime Victims' Bill of Rights has been described by Spencer Lawton from the Prosecuting Attorneys' Council as "a triumph of sentiment over substance."[23] While it pointed to the various rights that crime victims have, the previous Code did little to nothing in the way of directing the different agencies in how to provide those rights.[24] This rendered the legislation ineffective in living up to its promise.

HB 567 was introduced by Representatives Don Parsons (R-42nd) and Wendell Willard (R-49th) in the 2009 legislative session.[25]

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16. *See id.* at 825–27 (majority opinion).
17. *Id.* at 827 (quoting Snyder v. Massachusetts, 291 U.S. 97, 122 (1934)).
18. Sermons v. State, 262 Ga. 286, 417 S.E.2d 144 (1992).
19. *Id.* at 287–88.
20. *Id.*
21. O.C.G.A. § 17-10-1.2(a)(2) (Supp. 2009).
22. 1996 Op. Ga. Att'y Gen. U96-1, *available at* http://law.ga.gov/00/opinion_print/0,2669,87670814_90686057_109614944,00.html.
23. House Comm. Jan. 5 Video, *supra* note 2, at 23 min., 51 sec. (remarks by Spencer Lawton, Prosecuting Attorneys' Council).
24. *Id.* at 23 min., 51 sec.
25. HB 567 Bill Tracking, *supra* note 4.

Representative Parsons introduced the bill after receiving a call from a Cobb County constituent who was the father of a homicide victim.[26] Dr. Bruce Cook and Mr. Gordon Rondo, members of the Georgia Crime Victim's Advocacy Council, wanted Georgia to have a victims' bill of rights modeled after similar legislation in other states and at the federal level.[27]

The Georgia bill is modeled heavily after the federal crime victims' rights statute passed in 2004.[28] The federal legislation itself appears to be based on a series of amendments made to state constitutions, including Arizona, Illinois, Michigan, and Texas, starting in 1988.[29] Many states, however, provide rights by statute to crime victims. For example, in 1994, Kentucky was the first to provide automated telephone information to crime victims regarding the status of the offender.[30]

After agreeing to take up the bill on behalf of his constituents, Representative Parsons decided he needed to work with a lawyer who had experience on the Judiciary Non-Civil Committee, where this type of legislation is written.[31] He then took the idea of a crime victims' bill to Representative Willard, who was very supportive.[32] Willard encouraged Representative Parsons to proceed with the legislation saying, "I think we can probably do some things to strengthen victims' rights."[33] Both agreed that the central thrust of the

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26. *See* Interview with Rep. Don Parsons, in Atlanta, Ga. (R-42nd) (Mar. 3, 2010) [hereinafter Parsons Interview].

27. *See id.*; Telephone Interview with Dr. Bruce Cook, Crime Victim's Advocacy Council (May 5, 2010) [hereinafter Cook Interview]; *see also* Video Recording of House Judiciary Non-Civil Committee Proceedings, Mar. 17, 2010 at 21 min., 23 sec. (remarks by Spencer Lawton, Prosecuting Attorneys' Council), http://media.legis.ga.gov/hav/09/ comm/judynon/judynon031710.wmv [hereinafter House Comm. Mar. 17 Video].

28. *See* Parsons Interview, *supra* note 26; *see also* 18 U.S.C. § 3771 (Supp. 2009).

29. Michigan was the first to ratify the language into their constitution in 1988. MICH CONST. art. I, § 24. Arizona ratified very similar language into their state constitution in 1990. ARIZ . CONST. art. II, § 2.1. Illinois followed suit in 1992. ILL CONST. art. I, § 8.1. Around the same time period, many states were adopting constitutional amendments to protect the rights of crime victims, though not necessarily based on similar wording. *See* Maryland Crime Victims' Resource Center, Inc., *The History of Crime Victims' Rights In America*, http://www.mdcrimevictims.org/_pages/e_legislation_policy/ e2_legis_federal.htm (last visited Jun. 26, 2010); *see also* Parsons Interview, *supra* note 26.

30. National Center for Victims of Crime, *Crime Victims' Rights in America: A Historical Overview*, http://www.ojp.usdoj.gov/ovc/ncvrw/1999/histr.htm; *see also* Maryland Crime Victims' Resource Center, Inc., *supra* note 29.

31. *See* Parsons Interview, *supra* note 26.

32. *Id.*

33. *Id.*

bill would be to increase the role of victims in the criminal justice system in proceedings that affect them.[34]

Bill Tracking

Consideration and Passage by the House

Representatives Don Parsons (R-42nd) and Wendell Willard (R-49th), respectively, sponsored HB 567.[35] The House of Representatives read the bill for the first time on February 26, 2009,[36] and for the second time on March 3, 2009.[37] After Speaker of the House David Ralston (R-7th) assigned it to the Ramsey Subcommittee of the Judiciary Non-Civil Committee, the bill was favorably reported on March 18, 2009.[38]

The bill, as introduced, focused on clarifying the rights of victims in the criminal justice system.[39] In the original Code section 17-17-1 (1995), the legislature set out the policy that victims "should be accorded certain basic rights just as the accused are accorded certain basic rights,"[40] but did not specifically enumerate those rights.[41]

Victims' Rights and Assertion Issues

Code section 17-17-1 went through several changes in the House. In the first version of the bill, eight specific rights of victims' were added to the Code section:[42]

> the right to be reasonably protected from the accused,[43] the right to reasonable, accurate, and timely notice of any public

34. *Id.*
35. *Id.*
36. State of Georgia Final Composite Status Sheet, HB 567, Apr. 29, 2010.
37. *Id.*
38. *Id.*
39. *See* HB 567 (LC35 1317), Preamble, 2009 Ga. Gen. Assem.
40. 1995 Ga. Laws 385, § 2, at 385 (formerly codified at O.C.G.A. § 17-17-1 (Supp. 2009)).
41. *Id.*
42. HB 567 (LC35 1317), § 1, p.1, ln. 16–41, 2009 Ga. Gen. Assem.
43. There was a brief discussion about using the term 'accused' to refer to the criminal defendant, while using the more definite term 'victim' to refer to the citizen who is believed to have suffered the criminal conduct. House Comm. Jan. 5 Video, *supra* note 2, at 55 min., 10 sec. (remarks by Rep. Bobby

> proceeding involving the crime perpetuated against them or of any release or escape of the accused; the right not to be excluded from any such public proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard testimony from a witness; the right to be heard at any public proceeding involving the release, plea, sentencing, or parole of the accused; the right to confer with the attorney for the state in any criminal prosecution related to the state; the right to restitution as provided by law; the right to proceedings free from unreasonable delay; and the right to be treated fairly and with respect for the victim's dignity.[44]

The next portion of amendments to Code section 17-17-1 in the bill, as introduced, addressed who could assert these rights. They could be asserted by victims, their agents, or prosecutors.[45] The court to address these claims would be the one in which the accused was being prosecuted, or if no prosecution was currently under way, then the court with jurisdiction over the location of the crime would address the issues.[46] The remaining portion of this section granted victims a fairly broad power to challenge a denial of their rights under this section by the court.[47] The victim was able to petition the Court of Appeals to issue a writ of mandamus contesting the decision.[48] If the writ issued, the court would be required to decide its application within seventy-two hours.[49]

This entire portion of changes to Code section 17-17-1 was deleted in the next version of the bill, partly due to concerns that the victims

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Franklin (R-43rd), Subcomm. Chairman Rep. Rich Golick (R-34th), and Spencer Lawton, Prosecuting Attorneys' Council). Both terms were kept as consistent with proper technical legal structure. *Id.* Representative Franklin subsequently sponsored HB 1181 along with Representative Charlice Byrd (R-20th), Representative Mark Hatfield (R-177th), Representative Tom Knox (R-24th), and Representative Randal Mangham (D-94th). State of Georgia Final Composite Status Sheet, HB 1181, Apr. 29, 2010. HB 1181 sought to change the word 'victim' to 'accuser' throughout the Georgia criminal code in situations where a criminal conviction had not been returned against the defendant; however, the bill only made it to a second reading on February 17, 2010, and did not survive Cross-Over Day. *Id.*

44. HB 567 (LC35 1317), § 1, p.1, ln. 16–41, 2009 Ga. Gen. Assem.
45. *Id.* § 1, p.1, ln. 42–43.
46. *Id.* § 1, p.1, ln. 29–34.
47. *Id.* § 1, p.2, ln. 37–41.
48. *Id.* § 1, p.1, ln. 47–49.
49. *Id.* § 1, p.2, ln. 49–51.

would be "transformed into a party to the criminal action and have an independent right to sue the judges or any other actors in the criminal justice system, where they feel their rights have been abused."[50]

The original bill also amended Code section 17-17-15, which curtailed the right granted in the introduced version of Code section 17-17-1 for victims to challenge a decision that denied them their rights:[51]

> [I]n no case shall a failure to afford a right under this chapter provide grounds for a new trial; provided, however, that in any appeal in a criminal case, the prosecutor may assert as error the court's denial of any crime victim's right in the [case] to which the appeal relates.[52]

The rest of this section stated that although the victim does not have standing to participate as a party to the criminal action, they may file a motion contesting the plea or sentence if these requirements are met:

> (1) The victim has asserted the right to be heard before or during the proceeding at issue and such right was denied;
> (2) The victim petitions the Court of Appeals for a writ of mandamus within ten days; and
> (3) In the case of a plea, the accused has not pled to the highest offense charged.[53]

All of the revisions made to Code section 17-17-15 were deleted in the next version of HB 567.[54]

The Committee was also concerned about victims being granted the right to file complaints, which it addressed in the amendments to Code section 15-11-64.2 regarding juvenile proceedings[55] and Code

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50. House Comm. Jan. 5 Video, *supra* note 2, at 29 min., 25 sec. (remarks by Spencer Lawton, Prosecuting Attorneys' Council).
51. HB 567 (LC35 1317), § 6, p.5, ln. 138–57, 2009 Ga. Gen. Assem.
52. *Id.* § 6, p.5, ln. 143–46.
53. *Id.* § 6, p.5, ln. 149–53.
54. *Compare id. with* HB 567 (LC29 4284S), 2010 Ga. Gen. Assem.
55. HB 567 (LC35 1317), § 1, p.2, ln. 37–41, 2009 Ga. Gen. Assem.

section 17-10-1.2 regarding adult proceedings.[56] There was debate during the January 5, 2010 meeting of the House Judiciary Non-Civil Committee about whether the legislature has the authority to permit such complaints to be filed. Representative Kevin Levitas (D-82nd) expressed concern about potential separation of powers issues created by the provision:

> I don't know that the legislature can declare to the court what a violation of a judicial canon is. [T]here might be a way to reword that, but I do not believe we have the power, the legislature, to declare [whether] a judicial canon . . . [has] been violated . . . . [M]y concern is obviously we need to have a constitutional amendment for doing that. . . . [I]t definitely seems that sometimes judges need a little guiding hand to make sure they stick to the law, but the question is how we do that. What I don't want to do is pass this bill only to have somebody bring a constitutional objection to it and have it overturned.[57]

Chairman Golick expressed similar concerns, noting that "[the judges will] probably bristle at the audacity of us to say something is a violation."[58] Lawton assured the committee that there have been instances in the past where the legislature established violations, so this provision should not be objectionable.[59]

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56. HB 567 (LC29 4284S), § 4, p.4, ln. 155–57, 2010 Ga. Gen. Assem.

57. House Comm. Jan. 5 Video, *supra* note 2, at 27 min., 56 sec (remarks by Rep. Kevin Levitas (D-82nd)).

58. *Id.* at 32 min., 10 sec (remarks by Subcomm. Chairman Rep. Rich Golick (R-34th)). Representative Bob Franklin (R-43rd) questioned the level of deference granted to judges, saying, "[I]f a judge violates a right, why should the judge be immune simply because he wears a state-issued costume?" *Id.* at 35 min., 23 sec.

59. *Id.* at 27 min., 56 sec (remarks by Spencer Lawton, Prosecuting Attorneys' Council). *But see id.* at 52 min., 12 sec (remarks by Jill Travis, House Legislative Counsel) ("I just wanted to add . . . that [on the] concern about the code of judicial conduct, I did search the code and violating the canons is in fact nowhere else in the code; this would be new. And because the [Georgia] Supreme Court issues the judicial canon[s] . . . I do have concerns about this provision.").

Golick stated that this issue would be discussed in more detail later in the committee meeting, but this problem was in fact never addressed again during the January 5, 2010 meeting. *Id.* at 53 min., 10 sec. (remarks by Subcomm. Chairman Rep. Rich Golick (R-34th)).

Procedures and Process

The bill, as introduced, amended Code section 17-17-6 to add that during law enforcement or court personnel's initial contact with the victim, the victim should be given information about the potential availability of restitution where applicable.[60] This emphasis on restitution corresponds with the original inclusion of restitution as a victim's right in the amended Code section 17-17-1[61] and with a section added by the House Subcommittee in a later version of the bill, which requires the court to set a specific dollar amount when ordering the restitution owed to the victim.[62] All of the revisions made to Code section 17-17-6 in this section were deleted in the next version of HB 567.[63]

Victim Notification

The bill, as introduced, amended Code section 17-17-13 to provide that when an accused is convicted, the prosecutor is required to notify victims of their right to be notified of any impending clemency or release proceedings related to the accused.[64] These revisions to Code section 17-17-13 were deleted in the Act.[65]

Concerns about efficiency with notification were expressed in response to the language in the introduced amendments to Code section 17-17-5.[66] The existing Code section 17-17-12 provided that victims only needed to be notified of appellate proceedings handled by the Attorney General in death penalty cases,[67] but the original bill language would have expanded the duty to include, in addition to capital cases, "other violent offense[s] against the victim, including, but not limited to, assault, battery, child molestation, rape, or other

60. HB 567 (LC35 1317), § 3, p. 3, ln. 72, 2009 Ga. Gen. Assem.
61. *Id.* § 1, p.1, ln. 39.
62. O.C.G.A. § 17-14-3(a) (Supp. 2010).
63. *Compare* HB 567 (LC35 1317), § 3, p. 3, ln. 72, 2009 Ga. Gen. Assem. *with* HB 567 (LC29 4284S), 2010 Ga. Gen. Assem.
64. HB 567 (LC35 1317), § 4, p.4, ln. 129–30, 2009 Ga. Gen. Assem.
65. *Compare id. with* HB 567 (LC35 1866S), 2010 Ga. Gen. Assem.
66. House Comm. Jan. 5 Video, *supra* note 2, at 1 hr., 41 min., 3 sec. (remarks by unnamed Parole Board representative).
67. O.C.G.A. § 17-17-12 (Supp. 2009).

sexual assault,"[68] no matter what sentence was given.[69] The Parole Board voiced concerns as to the potential ramifications of this language during the January 5, 2010 House Judiciary Non-Civil Committee proceedings:

> That's very broad language . . . . [and] difficult because we have a lot of situations where the person has technically violated the terms of the electronic monitoring if they get home from work . . . late, and I don't think that would . . . make sense . . . [to] notif[y] in those circumstances. Another instance would be if they're on parole [for] br[eaking] into [a] shed and st[ealing] a lawnmower then . . . . we would be notifying . . . [the victim]. [W]e recommend[] . . . refined language to narrow it . . . to where there is a victim, and it is a serious violation of their electronic monitoring requirements.[70]

In response, the committee added language requiring notification of when the defendant violates the terms of the monitoring program only when the violations "trigger the issuance of a[n] [arrest] warrant"[71] and contact between the defendant and the victim is prohibited.[72]

Victims and Defense Counsel Interaction

An elusive early version of HB 567 (not on file in the clerk's office) sparked a battle in the Judiciary Committee.[73] This version created Code section 17-17-8.1.[74] Prosecutors and defense attorneys circulated dueling memos before the March 11, 2010 hearing between the Georgia Association of Criminal Defense Lawyers and

68. HB 567 (LC35 1317), § 4, p.4, ln. 97–99, 2009 Ga. Gen. Assem.
69. *Id.* § 4, p.4, ln. 110–14.
70. House Comm. Jan. 5 Video, *supra* note 2, at 1 hr., 41 min., 3 sec. (remarks by unnamed Parole Board representative).
71. *Id.*; HB 567 (LC29 4284S), § 8, p.8, ln. 255, 2010 Ga. Gen. Assem.
72. HB 567 (LC29 4284S), § 8, p.8, ln. 253–56, 2010 Ga. Gen. Assem.
73. *See* Samuel Interview, *supra* note 5.
74. HB 567 (LC29 4112ERS), § 1, p.10–11, ln. 336–60, 2010, Ga. Gen. Assem. (on file with Georgia State University Law Review).

the Prosecuting Attorneys' Council.[75] The heavily disputed Code section 17-17-8.1 provides specifically for the right of the victim to refuse or limit the scope of an interview by the accused or the agent/attorney of the accused.[76] Subsection (c) provided for an attorney-client-like relationship between the victim and the prosecutor:[77]

> (c) If specifically requested by the victim, the prosecuting attorney shall advise the accused or the accused's attorney in writing that the victim has directed that they shall communicate with the victim only through the prosecuting attorney or his or her designee. Once the accused has been so notified, the prosecuting attorney shall promptly inform the victim of the accused's request for an interview.[78]

Additionally, subsection (f) provided for criminal contempt of court punishment for any violation of this section.[79]

The Georgia Association of Criminal Defense Lawyers (GACDL) vigorously objected to the aforementioned subsections.[80] Members Don Samuel, Sandra Michaels, and Jack Martin wrote a memo to the Judiciary Committee after this section found its way into this early version of the bill.[81] They argued that it was the duty of a defense attorney to attempt to interview any witness who may have information about the facts of the case, and that empowering the

75. *See generally id*. The version of the bill with the controversial language referenced was circulated in part with the aforementioned memorandum before the March 11, 2010 hearing. *Id.* § 1, p.10–11, ln. 348–52, 2010, Ga. Gen. Assem. (on file with Georgia State University Law Review).

76. O.C.G.A. § 17-17-18.1 (Supp. 2010).

77. *See* Memorandum from Ga. Assoc. of Criminal Def. Lawyers on Crime Victim's Bill of Rights Section 11 to the Ga. House Judiciary Comm. (Feb. 3, 2010) (on file with Ga. State Law Review). *See generally* Samuel Interview, *supra* note 5.

78. HB 567 (LC29 4112ERS), § 11, p. 10–11, ln. 348–52, p. 10–11, 2009 Ga. Gen. Assem. (on file with Georgia State University Law Review).

79. *Id.* § 11, p. 10–11, ln. 359–60 (on file with Georgia State University Law Review); Memorandum from Ga. Assoc. of Criminal Def. Lawyers on Crime Victim's Bill of Rights Section 11 to the Ga. House Judiciary Comm. (Feb. 3, 2010) (on file with Ga. State Law Review).

80. Memorandum from Ga. Assoc. of Criminal Def. Lawyers on Crime Victim's Bill of Rights Section 11 to the Ga. House Judiciary Comm. (Feb. 3, 2010) (on file with Ga. State Law Review).

81. *Id.*

District Attorney to advise the victim of his rights "skews the role of counsel in the pretrial stage of a trial."[82]

Additionally, the GACDL members argued that it was unconstitutional to hold defense counsel in contempt based on a letter from the District Attorney.[83] Such a procedure interferes with the Sixth Amendment rights of criminal defendants to zealous representation and the ethical duty of an attorney to provide it.[84] Moreover, they argued, a prosecutor is prohibited from interfering with a defense attorney's right to interview witnesses.[85]

In response to the GACDL, Spencer Lawton stated that a compromise between prosecutors and defense attorneys was "beyond reach" with regards to section 11 and insisted that the purpose of the section was to protect victims from unwanted contact by the defense.[86] Lawton argued that the bill merely codified existing rights victims already have (to refuse an interview) and powers prosecutors already have (to advise victims of their rights).[87] While agreeing that victims are not an actual party to a criminal action, he said that the relationship between a prosecutor and a victim "demands that the prosecutor be able to protect the victim from assault."[88]

The House subcommittee later removed the language that the defense attorney "shall communicate with the victim only through the prosecutor attorney or his or her designee."[89] Moreover, the provision providing for criminal contempt penalties was deleted.[90] In place of the old language, the bill provides that the victim may refuse an

82. *Id.*

83. *Id.*

84. U.S. CONST. amend. VI; *see also, e.g.,* Rompilla v. Beard, 545 U.S. 374 (2005) (holding that failure to examine the defendant's criminal history and uncover relevant mitigating circumstances constituted ineffective assistance of counsel).

85. Memorandum from the Ga. Assoc. of Criminal Def. Lawyers on Crime Victim's Bill of Rights Section 11 to the Ga. House Judiciary Comm. (Feb. 3, 2010) (on file with Georgia State University Law Review); *see* Sosebee v. State, 190 Ga. App. 746, 748, 380 S.E.2d 464, 466 (Ct. App. 1989) (citing Rutledge v. State, 245 Ga. 768, 267 S.E.2d 199 (1980)).

86. Memorandum from the Prosecuting Attorney's Council on HB 567 – Crime Victims' Bill of Rights (Section 11) to the House Judiciary Comm. (non-Civil) Ramsey Subcomm. (Mar. 10, 2010) (on file with Georgia State University Law Review).

87. *Id.*

88. *Id.*

89. *Compare* HB 567 (LC29 4112ERS), § 11, p.10–11, ln. 348–52, 2010 Ga. Gen. Assem. *with* HB 567 (LC29 4284S), § 1, p.10–11, ln. 324–46, 2009 Ga. Gen. Assem.

90. HB 567 (LC29 4284S), § 1, p.1, ln. 324–46, 2010 Ga. Gen. Assem.

interview and a defense attorney may not contact a victim in an "unreasonable manner."[91]

Passage by the House

On March 26, 2010, the final version of HB 567 was presented to the House by Representative Don Parsons (R-47th).[92] Representative Stephanie Benfield (D-85th) thanked the members of the Judiciary Non-Civil Committee for resolving the controversy with regards to section 11 and a defense attorney's access to the victim.[93] She was pleased with the final result.[94] Representative Bobby Reese (R-98th) asked why a social security number would need to be provided and wondered why the bill did not provide for email contact as a cost-saving measure.[95] Representative Parsons replied that the social security number would be necessary for restitution purposes and that it was a big step for Georgia to expand contact methods beyond a land telephone.[96] Representative Reese agreed to the change in the victim contact method, commenting, "Sometimes you gotta [sic] take what you can get," and remarked that he wished this bill would have been passed several years ago.[97]

Finally, Representative Bobby Franklin (R-43rd) rose to speak against the bill.[98] He warned members of the house against "assert[ing] this body is God" by suggesting that rights come from civil government.[99] While he agreed with the bill's intentions, he was very concerned about referring to the newly mandated procedures as

91. *See id.* § 1, p.1, ln. 337, 2010 Ga. Gen. Assem.

92. Video Recording of Georgia House of Representatives House Session Mar. 26, 2010 at 1 min. [hereinafter House Session].

93. *Id.* at 9 min., 36 sec.; *see also supra* notes 74–93 and accompanying text.

94. House Session, *supra* note 92, at 9 min., 36 sec.

95. *Id.* at 10 min., 10 sec.

96. *Id.* at 11 min.

97. *Id.* at 12 min., 10 sec. However, Representative Reese later voted "nay" on the Senate substitute version, even though it retained the unchanged and completely identical provisions and wording regarding victim rights. Georgia House of Representatives Voting Record, HB 567 (Apr. 21, 2001); *see also infra* note 107.

98. House Session, *supra* note 92, at 13 min.

99. *Id.* at 15 min.

"rights" entitled to the victim.[100] Subsequently, voting commenced and the bill passed 158 to 1.[101]

Consideration and Passage by the Senate

HB 567 was sponsored in the Senate by Senator John Wiles (R-37th) and was read for the first time on March 30, 2010.[102] Senate President Pro Tempore Tommie Williams (R-19th) assigned it to the Senate Special Judiciary Committee, which favorably reported on April 1, 2010.[103] The committee drafted a substitute to the House version of HB 567, but changed none of the existing bill language.[104]

The only addition to HB 567 made in the Senate substitute is the addition of amendments to Code section 42-5-50, deleting a provision that allowed convicted defendants to be housed in local jails during the appellate process instead of being processed into the state prison system immediately.[105] The addition of this Code section does not appear related to the overall theme of crime victims' rights that otherwise unifies the Act. In the end, the Senate passed the bill unanimously on April 14, 2010, with no objections or debate.[106]

Passage of the Senate Substitute by the House

On April 21, 2010, the House agreed to the Senate substitute by a vote of 151 to 2.[107] The bill was then sent to the Governor on May 10, 2010.[108] HB 567 became Act 403 upon being signed into law by Governor Sonny Perdue on May 20, 2010.[109]

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100. *Id.*

101. *Id.* at 16 min., 15 sec. The single "nay" vote was from Representative Bobby Franklin (R-43rd). Georgia House of Representatives Voting Record, HB 567 (Mar. 26, 2001).

102. *See* State of Georgia Final Composite Status Sheet, HB 567, Apr. 29, 2010.

103. *See id.*

104. *See generally* HB 567 (LC35 1866S), 2010 Ga. Gen. Assem. (all sections are identical to HB 567 (LC29 4284S) except for Section 17).

105. *Id.* § 17, p. 15, ln. 488–500, 2010 Ga. Gen. Assem.

106. *See* State of Georgia Final Composite Status Sheet, HB 567, Apr. 29, 2010.

107. The two "nay" votes were cast by Representative Bobby Franklin and Representative Bobby Reese. Georgia House of Representatives Voting Record, HB 567 (Apr. 21, 2001).

108. *See* Georgia General Assembly, HB 567, Bill Tracking, http://www.legis.ga.gov/legis/2009_10/sum/hb567.htm.

109. *Id.*

The Act

Sections 1, 2, and 3 of the Act deal with juvenile court proceedings.[110] The most significant part of the revisions to the existing juvenile Code sections is section 1, which gives victims the right to address the court prior to the entry of a dispositional order in juvenile court,[111] aligning with the procedure in adult proceedings.[112] The original Code section 15-11-64.2 provided for submission of victim impact statements but made no mention of whether victims were allowed to give oral testimony about their experience related to the case in juvenile court.[113] This change was made to ensure consistency and "simply to conform juvenile procedure, with regard to victim impact evidence, to the procedures that prevail in the adult system."[114] For victim advocates a key feature of HB 567 is being allowed to speak to the court instead of being limited to a paper impact statement.

The amended Code section 15-11-64.2 permits a victim to speak to the court, if the victim chooses, about the impact of the delinquent act on themselves or their family, the need for restitution, or the terms of the disposition order.[115] Any statement presented by the victim has to be given in the presence of the allegedly delinquent child, and the victim must be subject to cross examination.[116] The prosecuting attorney and the allegedly delinquent child also have the opportunity to explain, support, or deny the victim's statement.[117]

The amended Code section also charges the juvenile court with telling the victim of their right to address the court.[118] If the victim

110. Although the first three sections of the Act make major changes to juvenile court proceedings, the sponsors of HB 567 reported that no one from the juvenile justice reform project or any juvenile court judges or defense attorneys were contacted when this provision was drafted, so the impact of this language is uncertain. House Comm. Jan. 5 Video, *supra* note 2, at 48 min., 13 sec.

111. O.C.G.A. § 15-11-64.2(d) (Supp. 2010).

112. The right to address the court in adult proceedings was established in 2009. O.C.G.A. § 17-10-1.2 (Supp. 2009); House Comm. Jan. 5 Video, *supra* note 2, at 38 min., 22 sec (remarks by Charles Olson, Prosecuting Attorneys' Council).

113. *See* O.C.G.A. § 15-11-64.2 (Supp. 2009).

114. House Comm. Jan. 5 Video, *supra* note 2, at 26 min., 39 sec. (remarks by Spencer Lawton, Prosecuting Attorneys' Council).

115. O.C.G.A. § 15-11-64.2(d) (Supp. 2010).

116. *Id.*

117. *Id.*

118. *Id.*

chooses not to appear at the dispositional hearing, they are considered to have waived their rights under this section.[119]

Similar to the amended Code section 17-17-10.2 in section 4 of the Act, juvenile court victims are also given the right to file a complaint with the Judicial Qualifications Commission if the court intentionally fails to comply with the amended Code section.[120]

Section 2 amends Code section 15-11-78, adding victims to the parties that are allowed to be present during juvenile court proceedings.[121]

Section 3 of the Act amends Code section 15-11-155, regarding dispositional hearings for mental competency plans in juvenile court.[122] The Act merely replaces the word 'statement' for victim impact 'form.'[123]

Section 4 amends Code section 17-10-1.2, which deals with oral victim impact statements in adult criminal proceedings.[124] The Act adds language giving prosecutors the right to make a proffer of victim impact evidence if the judge chooses to exclude part of the testimony.[125] As in section 1 of the Act, the victim has the right under this Code section to file a complaint with the Judicial Qualifications Commission if the court intentionally fails to comply with this section.[126]

The remainder of this section provides that if the case involves a serious felony[127] and the victim or their representative is not present in court during the presentence hearing, the court must determine whether the prosecutor properly notified the victim.[128] If the prosecutor did not do so, then the proceedings are stopped until the victim is located and to allow the victim to travel to the court.[129]

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119. *Id.*
120. O.C.G.A. § 15-11-64.2(e) (Supp. 2010).
121. *Id.* § 15-11-78(e).
122. *Id.* § 15-11-55(b).
123. *Id.*
124. *Id.* § 17-10-1.2.
125. *Id.* § 17-10-1.2(a)(3).
126. O.C.G.A. § 17-10-1.2(a)(3) (Supp. 2010); *id.* § 15-11-64.2(e).
127. The term 'violent felony' is defined in Code section 17-10-6.1 and includes murder or felony murder, armed robbery, kidnapping, rape, aggravated sodomy, aggravated sexual battery, and aggravated child molestation, unless the offense is charged as a misdemeanor subject to the provisions of paragraph two of subsection (d) of Code Section 16-6-4. O.C.G.A. § 17-10-6.1 (Supp. 2009).
128. O.C.G.A. § 17-10-1.2(a)(5) (Supp. 2010).
129. *Id.*

However, if the accused or the state has witnesses present to testify, then those witnesses will be called before the hearing is recessed.[130]

Section 5 of the Act amends Code section 17-14-3, which deals with restitution.[131] The language added here requires the court to make a specific finding of the amount of restitution owed to the victim when sentencing the defendant.[132] Formerly, the court could simply order that restitution was owed without determining the dollar amount,[133] making collection difficult. For example, the parole board is authorized to enforce restitution orders, but only if the court specified the amount due.[134]

Even if the amount cannot be collected immediately because the defendant is indigent, the judgment remains effective if and when the defendant possesses sufficient resources to pay.[135] The restitution order is treated like a civil judgment and provides the same rights, such as garnishing the defendant's wages.[136]

Section 6 of the Act amends Code section 17-17-1, which collectively lists all of the victims' rights granted by the Code.[137] Most of the language is unchanged from the House Subcommittee version of HB 567, except that the right not to be excluded from the courtroom was strengthened, and one new right was added.[138] The previous version of the bill permitted the judge to exclude the victim if "after receiving clear and convincing evidence [the court] determines that testimony by the victim would be materially altered if

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130. *Id.*

131. *Id.* § 17-14-3(a).

132. *Id.*

133. *See id.*; *see* House Comm. Jan. 5 Video, *supra* note 2, at 1hr., 7 min., 12 sec (remarks by Spencer Lawton, Prosecuting Attorneys' Council) ("[T]he code now says that the court shall impose restitution, but . . . if they don't, nothing comes of it.").

134. S*ee* House Comm. Jan. 5 Video, *supra* note 2, at 1hr., 17 min., 2 sec (remarks by Charles Olson, Prosecuting Attorneys' Council).

135. *Id.* at 1hr., 8 min., 31 sec (remarks by Spencer Lawton, Prosecuting Attorneys' Council).

136. *Id.* at 1 hr., 16 min., 20 sec. (remarks by Representative Matt Ramsey (R-72nd)). However, the granting of broad recovery rights does not signify that the types of restitution damages allowed are similarly expanded. Discussion on this issue was somewhat conflicting, but it appears that damages based on a wrongful death claim would be considered restitution but loss of consortium damages would not. *See id.* at 1 hr., 18 min., 55 sec. (remarks by Representative Doug Collins (R-27); Charles Olson, Prosecuting Attorneys' Council; Representative Ed Setzler (R-35th)).

137. O.C.G.A. § 17-17-1(3) (Supp. 2010).

138. *Compare* HB 567 (LC35 1317), § 1, p.1, ln. 17–21, 2010 Ga. Gen. Assem. *with* O.C.G.A. § 17-17-1(3) (Supp. 2010).

the victim heard testimony from a witness,"[139] while the Act also permits exclusion if it is otherwise required by law.[140] Therefore, the Act eliminates the court's exercise of discretion regarding exclusion of the victim.

Section 7 of this version revises Code section 17-17-3, which provides definitions of terms used in this title. Under the new definition of "victim," a person is considered a victim even if it is not certain that a crime has actually been committed.[141] The new terms added and defined by the subcommittee in this version are "arrest"[142] and "criminal justice agency."[143]

Sections 8 and 9 add new events to provide notification "of changes in a defendant's status, times when a victim might reasonably feel some anxiety about the defendant's status change, and we want them to know what's going on."[144] The new code sections provide extra protection to victims and will increase the victim's safety and sense of well-being.

Section 8 amends Code section 17-17-5, concerning the manner victims would be notified of changes in the case. The existing Code language, which was enacted in 1995, provided that the contact number for the victim could not be a "pocket pager or electronic communication device number."[145] This version was updated to encompass current technology and delete that limitation, permitting cellular phone numbers to be used to contact victims, as well as electronic mail addresses and mailing addresses.[146]

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139. HB 567 (LC35 1317), § 1, p.1, ln. 17–21, 2010 Ga. Gen. Assem.

140. O.C.G.A. § 17-17-1(3) (Supp. 2010). This limitation now applies to immediate family members of a victim. *Id.* § 17-17-9(a).

141. *Id.* § 17-17-3(11)(A).

142. *Id.* § 17-17-3(1.1) ("An actual custodial restraint of a person or the person's submission to custody and includes the taking of a child into custody.").

143. *Id.* § 17-17-3(4.1) ("An arresting law enforcement agency, custodial authority, investigating law enforcement agency, prosecuting attorney, or the State Board of Pardons and Paroles.").

144. House Comm. Jan. 5 Video, *supra* note 2, at 1 hr., 43 min., 2 sec. (remarks by Spencer Lawton, Prosecuting Attorneys' Council).

145. 1995 Ga. Laws 385, § 2, at 385 (codified at O.C.G.A. § 17-17-5 (Supp. 2009)).

146. O.C.G.A. § 17-7-5 (Supp. 2010). An earlier version of the bill listed different specific contact methods, HB 567 (LC35 1317), § 2, p. 2, ln. 50–52, 55–58, 2009 Ga. Gen. Assem., but the Act requires instead "[a] current address and telephone number." O.C.G.A. § 17-7-5(b),(c) (Supp. 2010). A previous version of the Act also provided that a victim could be notified via multiple means of communication if that was what they requested. HB 567 (LC35 1317), § 2, p. 2, ln. 52–53, 55–58, 2009 Ga. Gen. Assem.

Section 8 also provides that victims must be notified when the defendant escapes and if and when he is rearrested,[147] as well as when the defendant is released and ordered to participate in an electronic monitoring program.[148]

Section 9 creates new Code section 17-17-5.1, which requires, upon written request, victim notification at least ten days before the defendant is released if the defendant was committed to the Department of Behavioral Health and Developmental Disabilities.[149] Notification is also required if the defendant escapes from that custody.[150] This requirement was added because some victims, unaware that the defendant was no longer in custody, only learned of the defendant's release when the defendant appeared at their home.[151] In addition, under the existing Code section, if the defendant was incompetent to stand trial and released from custody, the victim did not get notified.[152]

Section 10 amends Code section 17-17-8, first by providing a procedural avenue for victims to recover their possessions from the police when the items are no longer needed for evidentiary purposes.[153] This provision was included because there was often confusion and miscommunication between the victim, police department, and the district attorney's office.[154] Second, this section describes the information[155] victims need to supply if restitution is sought and also requires that the prosecuting attorney transmit that information to the relevant agency after informing the victim that they will be doing so.[156]

Section 11 creates Code section 17-17-8.1 detailing procedures involving interaction between the victim and the defendant's

147. HB 567 (LC29 4284S), § 8, p.9, ln. 251, 2010 Ga. Gen. Assem.
148. *Id.* § 8, p.9, ln. 252–53.
149. O.C.G.A. § 17-17-5.1(a) (Supp. 2010).
150. *Id.* § 17-17-5.1(b).
151. House Comm. Jan. 5 Video, *supra* note 2, at 1 hr., 49 min., 42 sec. (remarks by Spencer Lawton, Prosecuting Attorneys' Council).
152. *Id.* at 1 hr., 49 min., 40 sec. (remarks by Spencer Lawton, Prosecuting Attorneys' Council).
153. O.C.G.A. § 17-17-8(a)(5) (Supp. 2010).
154. *See* House Comm. Jan. 5 Video, *supra* note 2, at 53 min., 2 sec. (remarks by Spencer Lawton, Prosecuting Attorneys' Council, and Rep. Doug Collins (R-27th)).
155. O.C.G.A. § 17-17-8(c)(1) (Supp. 2010). All information provided for this purpose is confidential, cannot be used as evidence in any trial, and is not subject to subpoena or discovery. *Id.* § 17-17-8(c)(3).
156. *Id.* § 17-17-8(c)(1), (2).

attorney, which generated significant controversy as discussed earlier in this article.[157] The victim is given the right to terminate, refuse, or set conditions on any interview.[158] Contact initiated by the defendant or the defendant's agent cannot be made in an unreasonable manner, and the victim can request that no contact be attempted.[159] The protection of the victim is tempered by the mandate that prohibits prosecuting attorneys from wrongly obstructing the defendant's access to the victim for interviews.[160]

Section 12 expands the prohibition on exclusion to include victim's family during criminal proceedings by revising Code section 17-17-9,[161] and victim exclusion from proceedings is covered in section 16 amending Code section 24-9-61.1.[162] The theme of encompassing family into the protected relationships is repeated in section 15, which creates Code section 17-17-12.1 and describes the procedure for blocking inmate mail.[163] Another expansion of protection is the application of attorney-work product status to communications between the victim and victim advocate personnel through creation of Code section 17-17-9.1 in section 13.[164]

Section 13 of the Act creates Code section 17-17-19.1, which establishes that any communication between the victim and victim assistance personnel appointed by the prosecuting attorney is considered attorney-work product.[165] This means those communications are only subject to disclosure when it is required by law.[166] The purpose of this provision is to increase the victim's feeling of confidentiality during the court process.

Section 14 of the Act amends Code section 17-17-12 regarding notification of appellate proceedings, the release of the defendant on bail or recognizance, or the defendant's motion for new trial or appeal.[167] It also amends Code section 17-17-12 to require the

157. *Id.* § 17-17-8.1; *see supra* discussion pp. 17–20.
158. O.C.G.A. § 17-17-8.1(a), (b) (Supp. 2010).
159. *Id.* § 17-17-8.1(a), (c).
160. *Id.* § 17-17-8.1(e).
161. *Id.* § 17-17-9(a).
162. *Id.* § 24-9-61.1.
163. *Id.* § 17-17-12.1.
164. O.C.G.A. § 17-17-9.1 (Supp. 2010).
165. *Id.*
166. *Id.*
167. *Id.* § 17-17-12.

prosecuting attorney to tell the victim that they need to request such notification in writing.[168] Once requested, the prosecuting attorney provides notification to the victim.[169] The victim's right to notification continues through any further trial court proceedings ordered by the Court of Appeals.[170]

Section 15 of the Act creates Code section 17-17-12.1, which outlines the procedures used to prevent inmates from contacting victims or the victim's family or household by mail.[171] "Mail" is defined in this Code section as follows:

> any form of written communication, including, but not limited to, letters, cards, postcards, packages, parcels, . . . e-mail, . . . text messaging, and any other form of electronic communication which is knowingly intended to be delivered to or received by a victim, any member of the victim's family, or any member of the victim's household.[172]

The juvenile court, or the prosecuting attorney in adult court, is required to provide information to the victim about the mail blocking process.[173] The Department of Corrections and the Department of Juvenile Justice are required to create a detailed system describing how the victim can block inmate mail.[174] If the victim requests that mail be blocked, the appropriate agency[175] must transmit the victim's contact information[176] to the custodial authority, notify the inmate of the mail block, and implement measures to prevent the inmate violating the mail block.[177]

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168. *Id.*
169. *Id.*
170. O.C.G.A. § 17-17-9.1 (Supp. 2010)..
171. *Id.* § 17-17-12.1.
172. *Id.* § 17-17-12.1(a).
173. *Id.* § 17-17-12.1(b)(3).
174. *Id.* § 17-17-12.1(c).
175. The agency would be either the Department of Corrections in adult superior court cases or the Department of Juvenile Justice in Juvenile cases. *Id.*
176. The victim's information will not be available to the public and is not subject to discovery unless the court decides that the information is material and relevant to the case and provides information not available from any other source. O.C.G.A. § 17-17-12.1(g) (Supp. 2010).
177. *Id.* § 17-17-12.1(d).

Section 16 amending Code section 24-9-61.1 adds a reference to Code section 17-17-9 regarding the victim's right to be present in the courtroom.[178]

Section 17 of the Act amends Code section 42-5-50, regarding inmates—how and when defendants are processed into the penal system.[179] The new language requires convicted defendants to be moved into the state system as soon as the administrative requirements are met and no longer provides for exceptions due to ongoing court proceedings in the same case.[180]

Analysis

In the end, the essential purpose of HB 567 is to provide substance to the sentiment that Georgia should provide basic rights to victims of crime and their families.[181] Accordingly, the bill focuses on providing for the right of victims to be present and heard, to be notified, and to be provided restitution where appropriate.[182] Additionally, the bill provides guidance to various agencies in carrying out the state's long-standing policy to accord basic rights to victims of crime.[183]

Specifically, victims of crime in Georgia (including relatives of victims) now enjoy the following rights: the right to reasonable notice regarding criminal proceedings; the right to reasonable notice regarding the arrest, release, or escape of the accused; the right not to be excluded from court proceedings except as required by law, including juvenile proceedings; the right to be heard in proceedings involving the release, plea, or sentencing of the accused; the right to file a written objection in parole proceedings involving the accused; the right to confer with the prosecuting attorney; the right to

178. *Id.* § 24-9-61.1.

179. *Id.* § 42-5-50.

180. *Compare* 2004 Ga. Laws 595, § 2 (formerly codified at O.C.G.A. § 42-5-50) (Supp. 2009)) *with* HB 567 (LC35 1866S), § 17, p. 15, ln. 488–500, 2010 Ga. Gen. Assem.

181. House Comm. Jan. 5 Video, *supra* note 2, at 23 min., 51 sec. (remarks by Spencer Lawton of Prosecuting Attorney's Council).

182. *See* HB 567, as introduced, 2009 Ga. Gen. Assem.

183. *See* O.C.G.A. § 17-17-1 (Supp. 2009); *see, e.g.,* O.C.G.A. § 17-17-5 (Supp. 2010); O.C.G.A. § 17-17-5.1 (Supp. 2010) (providing guidance as to how various agencies are responsible for keeping victims informed about the status of the accused or offender).

restitution; the right to proceedings free of unreasonable delay; and the right to be treated fairly and with dignity.[184]

Crime victims' advocate Drew Crecente recalls from his own experience as the father of a homicide victim that he felt ignored by the criminal justice system.[185] He was kept in the dark by prosecutors about a relatively lenient plea prosecutors negotiated with the offender and was surprised when prosecutors failed to secure the offender's testimony in order to bring an accomplice to justice.[186] Crecente says that it is important for society to recognize that it is not just the state who has suffered a loss, but the loved ones of the victim as well.[187] "Communication, information, and knowledge [are] so important," he remarks.[188]

On the other hand, it is unclear how a victim, under HB 567, can compel a court to comply with the law and force the court to hear from him or her. As the later hearings made clear, the goal of the bill is not to make the victim into a party in a criminal case, which, according to Spencer Lawton of the Prosecuting Attorneys Council, would "have devastating consequences for the system at its root."[189] For example, while the Act was designed to prevent judges from deciding that they do not want to hear from a victim, the Prosecuting Attorneys' Council wants to avoid cases going up on appeal because the victim was not heard from in a given case.[190] Lawton is concerned that giving victims this standing in Georgia's process, where sentencing is not necessarily a separate hearing from the verdict, would be problematic for the system.[191]

While Dr. Bruce Cook from the Crime Victims Advocacy Council feels crime victims are getting "the best we could get" in Georgia, he is disappointed that victims do not have standing, the right to appellate review, and the right to obtain a writ of mandamus if either prosecutors fail to notify them or they are not present to make a

184. *See generally* O.C.G.A. § 17-17-1 (Supp. 2010).

185. *See* Interview with Drew Crecente, Founder of Jennifer Ann's Group, a non-profit organization dedicated to the prevention of teen dating violence (Apr. 2, 2010) [hereinafter Crecente Interview].

186. *Id.*

187. *Id.*

188. *Id.*

189. House Comm. Jan. 5 Video, *supra* note 2, at 32 min. (remarks by Spencer Lawton, Prosecuting Attorneys' Council).

190. *Id.* at 47 min.

191. *Id.* at 29 min., 38 sec.

statement during sentencing.[192] Dr. Cook says, in this sense, the bill essentially has "no teeth" and is "tantamount to a suggestion" if prosecutors fail to notify victims about their rights.[193] Finally, he does not see why, for example, federal courts and Arizona can give victims standing while Georgia cannot. It seems likely that, if prosecutors consistently or egregiously fail to comply with their obligations under HB 567, crime victims may advocate for stronger legislation.[194]

This issue of where victims fit exactly in the criminal justice system model is a continuing problem. Spencer Lawton notes that in other states with similar provisions, and in the federal courts, this type of power given to victims has resulted in appellate courts overturning sentences and remanding for new sentencing hearings at which victims are granted their respective rights concerning the case.[195] Although an early version of the Act tried to constrain this right by stating that a continuance to address the victim's claims could not last longer than five days,[196] it is unclear how that would have actually been executed.

The affected parties seem satisfied with the committee's work in resolving the section 11 controversy. Don Samuel says that he and his colleagues in the Georgia Criminal Defense Lawyer's association (GACDL) are happy with the changes to section 11.[197] Additionally, Don Parsons feels "very good" about the Act and reports that crime victims in Cobb County are pleased with the end result of the legislative push to improve the state of victim's rights in Georgia.[198] He says that the criminal defense lawyers are "okay with it also."[199] He further explains that the Act was never intended to interfere with the constitutional rights of the accused, but only to codify what should be understood, that victims should be left alone if they wish and never contacted in an unreasonable or unprofessional manner by

192. *See* Cook Interview, *supra* note 27.
193. *Id.*
194. *See generally id.*
195. House Comm. Jan. 5 Video, *supra* note 2, at 29 min., 25 sec. (remarks by Spencer Lawton, Prosecuting Attorneys' Council).
196. HB 567 (LC35 1317), § 1, p. 2, ln. 38–40, 2009 Ga. Gen. Assem.
197. Samuel Interview, *supra* note 5.
198. Parsons Interview, *supra* note 26.
199. *See id.*

an attorney representing the accused.[200] As it stands, HB 567 was enacted in a way that aims to avoid a legal challenge by GACDL.[201]

If the Supreme Court were to overrule *Payne*,[202] HB 567 may face an Eighth Amendment challenge, particularly as applied to cases where the death penalty is sought. Georgia law now mandates that judges allow victim impact statements to be offered "in all cases in which the death penalty may be imposed."[203] Likewise, the Maryland law struck down by the Supreme Court in *Booth* mandated that the presentence report in all felony cases include a victim impact statement.[204] Potential challenges to the admissibility of victim impact statements may insist that the harm done to the victim is irrelevant to the "character of the offense and character of the offender."[205] From *Payne*'s dissenting reasoning it follows that victim impact statements are "constitutionally irrelevant" under the Eighth Amendment; thus, allowing them to factor into a sentencing decision increases the likelihood that the death penalty will be applied arbitrarily based on emotion rather than reasoned judgment.[206]

In the end, while all affected parties are generally optimistic that Georgia has taken a significant step in the right direction, only time will tell if the state will live up to its stated policy objective: making the criminal justice system more responsive and helpful to those most affected by crimes, the victims and their survivors.

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200. *Id.*

201. *See, e.g.,* House Session, *supra* note 92, at 3 min. (remarks by Rep. Stephanie Benfield (D-85th), thanking Rep. Parsons for working to eliminate the concerns of criminal defense attorneys).

202. Payne v. Tennessee, 501 U.S. 808 (1991).

203. O.C.G.A. § 17-10-1.2 (Supp. 2010).

204. MD. ANN. CODE of 1957, art. 41, § 4-609(c) (1986). *See generally* Booth v. Maryland, 482 U.S. 496, 498 (1987), *overruled by* Payne v. Tennessee, 501 U.S. 808 (1991).

205. *Payne*, 501 U.S. at 858 (Stevens, J., dissenting).

206. *Id.*