Georgia State University Law Review

Volume 28
Issue 1 *Fall 2011*

Article 8

2-1-2012

# Crimes and Offenses HB 200

Georgia State University Law Review

Follow this and additional works at: http://scholarworks.gsu.edu/gsulr

Part of the Law Commons

Recommended Citation
Georgia State University Law Review (2011) "Crimes and Offenses HB 200," *Georgia State University Law Review*: Vol. 28: Iss. 1, Article 8.
Available at: http://scholarworks.gsu.edu/gsulr/vol28/iss1/8

This Peach Sheet is brought to you for free and open access by the College of Law Publications at ScholarWorks @ Georgia State University. It has been accepted for inclusion in Georgia State University Law Review by an authorized administrator of ScholarWorks @ Georgia State University. For more information, please contact scholarworks@gsu.edu.

# CRIMES AND OFFENSES

***Crimes against the Person: Amend Titles 16, 17, and 35 of the Official Code of Georgia Annotated, Relating to Crimes and Offenses, Criminal Procedure, and Law Enforcement, Respectively, so as to Discourage Trafficking of Persons for Labor or Sexual Servitude and Provide Greater Protections to Persons Subject to Such Crimes; Increase the Penalties for Trafficking of Persons for Labor or Sexual Servitude; Provide that Certain Facts or Circumstances Shall Not Constitute a Defense to the Crime of Trafficking of Persons for Labor or Sexual Servitude; Increase Penalties for the Crimes of Keeping a Place of Prostitution, Pimping, and Pandering when the Crimes Involve Certain Youth; Provide for Definitions; Provide for an Affirmative Defense to Certain Sexual Crimes under Certain Circumstances; Change Provisions Relating to Compensation from the Georgia Crime Victims Compensation Board; Provide for Notification of Federal Assistance for Certain Persons under the Crime Victims' Bill of Rights; Provide for Training for Law Enforcement Investigating Crimes Involving Trafficking Persons for Labor or Sexual Servitude; Provide that the Georgia Bureau of Investigation Shall Have the Duty to Investigate Violations of Section 46 of Article 3 of Chapter 5 of Title 16.***

| | |
|---|---|
| CODE SECTIONS: | O.C.G.A. §§ 16-3-6 (new); 16-5-46 (amended); 16-6-13 (amended); 17-15-2, -7, -8 (amended); 17-17-6 (amended); 35-1-16 (new); 35-3-4 (amended); 35-3-4.3 (new) |
| BILL NUMBER: | HB 200 |
| ACT NUMBER: | 54 |
| GEORGIA LAWS: | 2011 Ga. Laws 217 |
| SUMMARY: | The Act discourages trafficking of persons for labor and sexual servitude by providing greater protections for victims, increasing penalties for the |

accused, providing greater definitional guidance, and providing training and duties to law enforcement agents.

EFFECTIVE DATE: July 1, 2011

*History*

Human trafficking for sexual servitude is a $13 billion a year industry in the United States and almost 300,000 people a year are trafficked for sex.[1] Officials say Georgia has one of the worst reputations for sex trafficking in the country.[2] In fact, Atlanta is considered a hub for human trafficking.[3] According to the Juvenile Justice Fund, an estimated 353 girls are prostituted in Georgia each month.[4] Although the economic impact of human trafficking rivals that of narcotics trafficking, human trafficking is punished less harshly in Georgia than drug trafficking.[5]

For many years, Georgia laws did not reflect a strong effort to end child prostitution.[6] In 1943, the Georgia General Assembly first established the crime of prostitution and made it punishable as a misdemeanor for a first offense and a felony for repeated offenses.[7] The law also allowed evidence of previous relationships to be brought up in court. For example, in one case where a man was accused of pimping a twelve-year-old girl, his twenty-three-year-old co-defendant was acquitted of false imprisonment of the girl because there existed evidence that showed he had previously been the

1. Video Recording of House Proceedings, Feb. 21, 2011 at 27 min., 24 sec. (remarks by Rep. Matt Ramsey (R-72nd)), http://media.legis.ga.gov/hav/11_12/2011/committees/judiNon/judiNon022311EDITED.wmv [hereinafter 2/21 House Video].

2. April Hunt, *Child Sex-Trafficking Bill Easily Clears House*, ATLANTA J. -CONST. Mar. 3, 2011, at B3, *available at* http://www.ajc.com/news/georgia-politics-elections/sex-trafficking-bill-passes-858231.html.

3. 2/21 House Video, *supra* note 1, at 28 min., 24 sec. (remarks by Rep. Matt Ramsey (R-72nd)).

4. Kyle Wingfield, *Bill Takes Aim at Child Prostitution*, ATLANTA J. -CONST., Feb. 10, 2011, at A18, *available at* http://blogs.ajc.com/kyle-wingfield/2011/02/09/child-prostitution-sex-trafficking-back-on-legislative-agenda/.

5. *See* 2/21 House Video, *supra* note 1, at 28 min., 39 sec. (remarks by Rep. Matt Ramsey (R-72nd)).

6. *See generally*, Paul Menair, Note, *Prostitution: Increase Penalties for Offenses of Pimping and Pandering of a Minor*, 18 GA. ST. U. L. REV. 32 (2001).

7. *See* S. Gray, Note, *Sexual Offenses: Prohibit Solicitation of Persons Under the Age of Seventeen*, 5 GA. ST. U. L. REV. 336, 336 (1988).

"boyfriend" of the twelve-year-old, leading the jury to doubt a lack of consent to prostitution.[8]

Another problem in Georgia is that law enforcement agencies do not always know the best way to handle these cases. Law enforcement agents can mistake trafficking for simple prostitution.[9] Police officers may view the child as a consenting participant.[10] Even when law enforcement officers recognize that the victim is a minor forced into prostitution, there is rarely a safe place to take and keep the victim.[11]

As Georgia lawmakers were made aware of the growing problem of child prostitution, laws were changed to reflect the need to protect children.[12] In 2001, Act 19 was passed into law with the intent to protect children from sexual exploitation.[13] The Act, in part, amended Code section 16-6-13(b), which made pandering a person under the age of seventeen a felony punishable only by a fine of $2,500 to $10,000.[14] The Act added a period of imprisonment of five to twenty years and changed the target age that a victim must be under in order for the trafficker to be subject to the new penalties from seventeen to eighteen.[15]

In 2010, SB 304 was introduced to protect young people being coerced into sexual slavery.[16] The sponsors of the bill sought to treat children under the age of sixteen, who are unable to consent to sex in Georgia, as victims rather than prosecute them as prostitutes.[17] The bill sought to amend Code section 16-6-9 to provide that only a person over the age of sixteen could be prosecuted for prostitution.[18]

---

8. Menair, *supra* note 6, at 37 (citing Steve Visser, *Man Guilty of Pimping 12-Year-Old Co-Defendant is Acquitted in Fulton Case,* ATLANTA J. -CONST., Feb. 9, 2001, at D1).

9. Joy Lukachick, *States Target Human Trafficking*, CHATTANOOGA TIMES, Mar. 19, 2011, *available at* http://timesfreepress.com/news/2011/mar/19/states-target-human-trafficking/.

10. Menair, *supra* note 6, at 38 (citing Jane O. Hansen, *Runaway Girls Lured Into the Sex Trade are Being Jailed for Crimes While Their Adult Pimps Go Free,* ATLANTA J. -CONST., Jan. 7, 2001, at A1).

11. 2/21 House Video, *supra* note 1, at 1 hr., 42 min., 01 sec. (remarks by Kaffie McCullough, The Juvenile Justice Fund, and Rep. Stephanie Benfield (D-85th)).

12. *See generally* Menair, *supra* note 6.

13. *Id.* at 44 (citing 2001 Ga. Laws 92, § 2, at 93).

14. *See id.* (citing 1998 Ga. Laws 1301, § 2, at 1302 (formerly found at O.C.G.A. § 16-6-13(b) (1999))).

15. Menair, *supra* note 6, at 44 (comparing 1998 Ga. Laws 1301, § 2, at 1302 (formerly found at O.C.G.A. § 16-6-13(b) (1999)) with O.C.G.A. § 16-6-13(b) (Supp. 2001)).

16. SB 304, as introduced, 2010 Ga. Gen. Assem.

17. *See* Wingfield, *supra* note 4.

18. SB 304, as introduced, 2010 Ga. Gen. Assem.

The bill was objected to because it was said to decriminalize prostitution for children under the age of sixteen.[19] Critics feared that decriminalization would have made it harder for police officers to intervene when underage children were soliciting prostitution.[20] Due to this opposition, the bill never passed.[21]

Legislators did not give up after the 2010 bill died. HB 200 was developed by Representative Edward Lindsey (R-54th) in order to protect victims of human trafficking and give tougher penalties to offenders.[22] It also aids law enforcement in dealing with trafficking victims.[23] Georgia Attorney General Sam Olens allowed members of his staff to work with Representative Lindsey on HB 200 in order to draft legislation that was legally sound and defensible in court.[24]

*Bill Tracking of HB 200*

*Consideration and Passage by the House*

Representatives Edward Lindsey (R-54th), Rich Golick (R-34th), Penny Houston (R-170th), Mary Margaret Oliver (D-83rd), Wendell Willard (R-49th), and Judy Manning (R-32nd) sponsored HB 200.[25] The House read the bill for the first time on February 9, 2011.[26] Speaker of the House David Ralston (R-7th) assigned it to the House Judiciary Non-Civil Committee.[27]

The bill, as originally introduced, amended the law governing the "trafficking [of] person for labor or sexual servitude" by providing greater penalties for offenders and greater protection for victims.[28] Specifically, the bill would increase the penalty for trafficking a person from a minimum of one year, to a minimum of ten years and

19. Wingfield, *supra* note 4.
20. *Id.*
21. Hunt, *supra* note 2.
22. Maggie Lee, *Legislative Notebook: House Bill to Attack Human Traffickers*, MACON TELEGRAPH, Feb. 22, 2011, *available at* http://www.macon.com/2011/02/22/1460058/house-bill-to-attack-human-traffickers.html.
23. *Id.*
24. Wingfield, *supra* note 4.
25. HB 200, as introduced, 2011 Ga. Gen. Assem.
26. *Id.*; State of Georgia Final Composite Status Sheet, HB 200, May 24, 2011.
27. State of Georgia Final Composite Status Sheet, HB 200, May 24, 2011.
28. HB 200, as introduced, preamble, p. 1, ln. 3, 2011 Ga. Gen. Assem.

allows for a fine not to exceed $100,000.[29] The bill would raise the penalty for trafficking a person under the age of eighteen years from a minimum of ten years to a minimum of twenty-five years, and from a maximum of twenty years to a maximum of fifty years or life imprisonment.[30] Additionally, the bill would disallow certain defenses, including the sexual history or commercial sexual activity of the victim, the connection by blood or marriage of the victim to the trafficker(s), and a defendant's lack of knowledge of the age of the person being trafficked.[31] Finally, the bill would provide law enforcement with better guidance for how to deal with the crime of human trafficking and allow the victims of trafficking to gain funding through the federal government.[32]

The House Judiciary Non-Civil Committee offered a substitute to HB 200.[33] The substitute first revised Code section 16-5-46(e) to exclude from evidence the sexual history or history of commercial sexual activity of an alleged trafficking victim or the relation by blood or marriage to an accused if the court finds, at a hearing outside the presence of the jury, that the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.[34] The change was made to respond to concerns over the constitutionality of a blanket prohibition of introducing the sexual history and history of commercial sexual activity of a victim.[35] Representative Stephanie Stuckey Benfield (D-85th) suggested that the court make the determination of whether the evidence is admissible outside the presence of a jury.[36] The bill's author, Representative Lindsey, said

29. HB 200, as introduced, § 1, p. 3, ln. 81–88, 2011 Ga. Gen. Assem.

30. *Id.*

31. *Id.* at §1, p. 3, ln. 73–80.

32. *Id.* at § 9, p. 7, ln 223–25; § 10, p. 7–8, ln 232–48.

33. HB 200 (HCS), 2011 Ga. Gen. Assem.

34. *Compare* HB 200 (HCS), § 1, p. 3, ln. 79–84, 2011 Ga. Gen. Assem., *with* HB 200, as introduced, §1, p. 3, ln. 75–76, 2011 Ga. Gen. Assem.

35. 2/21 House Video, *supra* note 1, at 1 hr., 13 min., 00 sec. (remarks by Jack Martin) (stating that the United States Supreme Court has held that legislatures cannot prevent a defendant from putting forward a defense. Whether or not someone has prostituted in the past is relevant to whether she was coerced); Interview with Rep. Edward Lindsey (R-54th) (Apr. 18, 2011) (on file with the Georgia State University Law Review).

36. 2/21 House Video, *supra* note 1, at 1 hr., 19 min., 20 sec. (remarks by Rep. Stephanie Stuckey Benfield (D-85th)).

that the changes to this language were made to comport with the Federal Rules of Evidence and the rape shield law.[37]

The substitute also added Code section 16-3-6 to provide a definition of the words "coercion" and "deception."[38] The addition likely stemmed from concern over whether or not this bill decriminalized prostitution for someone under eighteen who is not being coerced.[39] During his Committee testimony, Judge Bradley J. Boyd noted that during his long tenure as a juvenile court judge he never witnessed a situation where a girl under eighteen accused of prostitution was not at some point coerced into prostitution.[40] Judge Boyd added that this bill does not actually decriminalize prostitution for juveniles.[41] Similarly, the concern over decriminalization sparked deletion of three sections of the bill as introduced that allowed a person to use coercion as an affirmative defense to prostitution.[42]

Finally, the bill was revised to include more guidance for police officers. Code section 35-3-4, which provides for the duties of the Georgia Bureau of Investigation (GBI), was amended to add the duty to identify and investigate human trafficking crimes.[43] The revision also included new Code section 35-3-4.3, which provides subpoena power to compel evidence used in human trafficking.[44] The revisions likely stemmed from concerns about law enforcement's understanding and ability to prosecute these types of crimes.[45]

---

37. Video Recording of House Proceedings, Feb. 23, 2011, at 2 min., 09 sec.; 3 min., 40 sec. (remarks by Rep. Edward Lindsey (R-54th)), http://media.legis.ga.gov/hav/11_12/2011/committees/judiNon/judiNon022311EDITED.wmv [hereinafter 2/23 House Video].

38. *Compare* HB 200 (HCS) § 3, p. 5, ln. 141–56, 2011 Ga. Gen. Assem., *with* HB 200, as introduced, 2011 Ga. Gen. Assem.

39. 2/21 House Video, *supra* note 1, at 40 min., 20 sec. (remarks by Rep. Setzler (R-35th)).

40. 2/21 House Video, *supra* note 1, at 1 hr., 03 min., 20 sec. (remarks by Judge Bradley J. Boyd) (explaining that even in situations where the victim's long history of prostitution suggests an absence of coercion, a judge's review of the victim's history almost always reveals that she initially got into prostitution through coercion).

41. *Id.*

42. *Compare* HB 200 (HCS), 2011 Ga. Gen. Assem., *with* HB 200, as introduced, §§ 3–5, p. 5, ln. 134–53, 2011 Ga. Gen. Assem.

43. *Compare* HB 200 (HCS), § 9, p. 8, ln. 252–57, 2011 Ga. Gen. Assem., *with* HB 200, as introduced, 2011 Ga. Gen. Assem.

44. *Compare* HB 200 (HCS), § 10, p. 8, ln. 258–72, 2011 Ga. Gen. Assem., *with* HB 200, as introduced, 2011 Ga. Gen. Assem.

45. 2/21 House Video, *supra* note 1, at 1 hr., 36 min., 30 sec. (remarks by Kaffie McCullough, The Juvenile Justice Fund) (stating in training law enforcement with how to deal with trafficking, some law enforcement agents were not aware of Code section 16-5-46 and others did not know how to prosecute

The Committee favorably reported the Committee substitute on February 24, 2011.[46] The bill was read in the House for a third time on March 2, 2011, and the House adopted the bill that day by a vote of 168 yeas to 1 nay.[47]

*Consideration and Passage by the Senate*

The bill was first read in the Senate on March 3, 2011.[48] Lieutenant Governor Casey Cagle (R) assigned it to the Senate Health and Human Services Committee.[49] The bill was favorably reported without changes on March 22, 2011.[50] The bill was read in the Senate a second time on March 23, 2011, and for the third time on March 29, 2011.[51] The bill was discussed on the Senate floor on March 29, 2011, carried by Senator Renee Unterman (R-45th).[52] On the same day, the Senate passed HB 200 by a vote of 54 to 0.[53]

*The Act*

*Purpose*

The Act amends Titles 16, 17 and 35 of the Official Code of Georgia Annotated with the purpose of discouraging and increasing the penalties for the trafficking of persons for labor and sexual servitude, providing greater protections to and defining the victims of these crimes, providing greater definitional guidance and providing training and duties to law enforcement agents.[54]

---

on it. For example, some district attorneys in Macon realized through training that they could have prosecuted some cases, had they been able to properly identify the cases as trafficking).

46. State of Georgia Final Composite Status Sheet, HB 200, May 24, 2011.
47. *Id.*; Georgia House of Representatives Voting Record, HB 200 (Mar. 2, 2011).
48. State of Georgia Final Composite Status Sheet, HB 200, Apr. 14, 2011.
49. *Id.*
50. *Id*.
51. *Id.*
52. *Id.*
53. *Id.*; Georgia Senate Voting Record, HB 200 (Mar. 29, 2011).
54. *See generally* O.C.G.A. §§ 16-5-46; 16-6-10, -11, -12, -13; 16-3-6; 17-15-2, -7, -8; 17-17-6; 35-1-16; 35-3-4, -4.3 (Supp. 2011).

*Section 1—Relating to the Act of Human Trafficking*

Section 1 of the Act amends Code section 16-5-46 relating to the offense of trafficking other persons for labor and sexual servitude by adding and/or changing several subsections.[55] This section provides a more expansive definition of "coercion."[56] Coercion now includes disseminating any fact or information, or threatening to do the same, which could bring about certain state sanctions or societal disapproval, or to use or threaten to use financial harm or control over any person.[57] The section further adds an intent element to the use of controlled substances as a coercive tool, now requiring the coercive actor to have a "purpose of compelling such person to engage in labor or sexual servitude" against their will.[58] The section further clarifies and reorganizes the language in subsections (a) through (c) of Code section 16-5-46.[59]

The Act adds a new subsection (d) to Code section 16-5-46, making it explicit that a lack of knowledge regarding the age of a person being trafficked or the age of consent for this state shall not be a defense.[60] The Act also creates a new subsection (e) relating to evidentiary issues, giving the trial court discretion to allow any prior sexual or commercial sexual activity of the victim into evidence or that person's blood or marital relation to the accused or any other person involved in the alleged trafficking.[61] This subsection excludes this evidence if the trial court finds that the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.[62]

The Act re-designates former subsection (d) as new subsection (f) and further subdivides that subsection into two parts.[63] New subsection (1) provides the general penalty for those accused of trafficking another person and raises that penalty from a minimum of

55. *See* O.C.G.A. § 16-5-46 (Supp. 2011).
56. *See* O.C.G.A. § 16-5-46(a)(1) (Supp. 2011).
57. O.C.G.A. § 16-5-46(a)(1)(B) & (E) (Supp. 2011).
58. O.C.G.A. § 16-5-46(a)(1)(D) (Supp. 2011).
59. *See* O.C.G.A. § 16-5-46(a), (b) & (c) (Supp. 2011).
60. O.C.G.A. § 16-5-46(d) (Supp. 2011).
61. O.C.G.A. § 16-5-46(e) (Supp. 2011).
62. *Id.*
63. *See* O.C.G.A. § 16-5-46(f) (Supp. 2011).

one year in prison to ten years and continues to provide the former maximum penalty of twenty years.[64] The subsection adds a provision that allows a fine of $100,000 dollars to be imposed in lieu of or in addition to the prison term.[65] Subsection (2) provides that an accused person who trafficks a person under eighteen years old will receive the same range of penalties as provided in paragraph one.[66] However, new subsection (2) increases the punishment for offenders who commit the act of trafficking against a person under eighteen years old where that person has been coerced or deceived[67] into being trafficked for labor or sexual servitude.[68] This subsection does not require that the accused be the person who deceived or coerced the underage person into servitude in order for these higher penalties to apply; rather it simply requires the accused to have participated in the trafficking of that underage person who is under the influence of coercion or deception.[69] The subsection also provides the enhanced penalties for this offense be a minimum of twenty-five years and a maximum of either fifty years or life imprisonment, a fine of $100,000 dollars, or both.[70]

A final addition that section 1 of the Act inserts into Code section 16-5-46 is found in new subsection (g).[71] This new subsection provides law enforcement with a powerful forfeiture tool for all real and personal property connected to the crime of human trafficking prohibited under this Code section.[72] Under subsection (g), not only is real and personal property that is *used* in the course of, derived from, or realized through the commission of human trafficking eligible for forfeiture to the state, but all real and personal property that is *intended* for these purposes is also eligible to be reached by the forfeiture arm of the statute.[73] Forfeiture proceedings may be

64. O.C.G.A. § 16-5-46(f)(1) (Supp. 2011).
65. *Id.*
66. O.C.G.A. § 16-5-46(f)(2) (Supp. 2011).
67. Coercion and deception are defined in Code section 16-5-46(a).
68. O.C.G.A. § 16-5-46(f)(2) (Supp. 2011).
69. *See id.* It appears on the face of this paragraph that the trafficking of an underage person who is under the influence of coercion or deception, which would be subject to the increased penalties this paragraph provides, does not appear to require knowledge of that coercion or deception by the accused. *See id.*
70. O.C.G.A. § 16-5-46(f)(2) (Supp. 2011).
71. *See* O.C.G.A. § 16-5-46(g) (Supp. 2011).
72. *See id.*
73. O.C.G.A. § 16-5-46(g) (Supp. 2011).

commenced by the prosecuting attorneys or the Attorney General under this subsection pursuant to the forfeiture proceedings found in Code section 16-14-7.[74]

*Section 2—Relating to Pimping, Prostituting and Pandering Trafficked Children*

Code sections 16-6-10 through 16-6-12 relate to defining persons who keep a place of prostitution, pimp, and pander persons for prostitution.[75] The Act changes nothing in subsection (a) of Code section 16-6-13 relating to the general punishment provided for a conviction of any act defined within Code sections 16-6-10 through 16-6-12, which is punishment of a high and aggravated misdemeanor.[76] However, the Act does split subsection (b) of Code section 16-6-13 into three subsections and, besides cleaning up the language used in the subsection relating to the acts defined in Code sections 16-6-10 through 16-6-12 noted above, it provides for increased penalties for a person convicted of keeping a place of prostitution, pimping, or pandering that involve underage persons.[77]

The Act amends subsection (b)(1) by defining the penalty to be imposed when a person is convicted of conduct defined in Code sections 16-6-10 through 16-6-12. Subsection (b)(1) now imposes a five-year minimum and twenty-year maximum sentence for an offense defined in Code sections 16-6-10 through 16-6-12 that involves "the conduct" of a person between the ages of sixteen and eighteen years old.[78] The Act makes discretionary the mandatory fine imposed by the previous Code section, allowing it to be imposed in lieu of a sentence or in addition to it.[79] The Act makes subsection (b)(1) only apply when the trafficked victim is at least sixteen years old and less than eighteen years old.[80] This is a change from the previous Code section which applied these additional penalties only

74. *Id.*
75. O.C.G.A. §§ 16-6-10 through 16-6-12 (Supp. 2011).
76. O.C.G.A. § 16-6-13(a) (Supp. 2011).
77. *See* O.C.G.A. § 16-6-13(b) (Supp. 2011).
78. O.C.G.A. § 16-6-13(b)(1) (Supp. 2011).
79. *Compare* O.C.G.A. § 16-6-13(b) (2010) *with* O.C.G.A. § 16-6-13(b)(1) (Supp. 2011).
80. O.C.G.A. § 16-6-13(b)(1) (Supp. 2011).

when the trafficked victim was "under the age of 18 years."[81] Subsection (b)(1) potentially broadens the ability of these increased penalties to be imposed on offenders by generalizing the triggering circumstance to include only "conduct" of the at least sixteen but under eighteen-year-old person rather than the more specific definition found in the previous subsection (b), which required the underage person's conduct to involve an act of prostitution or assembly for purposes of solicitation by others for prostitution.[82]

The Act's biggest change to this subsection is its addition of subsection (b)(2), which defines the penalties for an offense involving the "conduct" of younger underage persons.[83] Much like subsection (1), this subsection involves the broad underage "conduct" as the triggering mechanism for higher penalties; however, under this subsection if the conduct involved is of a person less than sixteen years old, then there is a minimum sentence of ten years and a maximum of thirty years, with a discretionary maximum fine of $100,000 dollars to be imposed in lieu of or in addition to the sentence.[84] Under these two subsections, like in the amendments to Code section 16-5-46(f), the triggering circumstance for higher penalties appears on the face of the law to be one of strict liability.[85]

*Sections 3 through 7—Protecting the Victims of Sex Trafficking*

Section 3 of the Act creates a new Code section, section 16-3-6, which exempts from criminal liability for a sex crime any person who commits the act on which criminal liability is based while under the influence of coercion or deception and while that person was being trafficked for sexual servitude.[86] This Code section refers to several definitions found elsewhere in the Code for "coercion," "deception," "sexual crime," and "sexual servitude."[87] The Act

81. O.C.G.A. § 16-6-13(b) (2010).
82. *Compare* O.C.G.A. § 16-6-13(b) (2010) *with* O.C.G.A. § 16-6-13(b)(1) (Supp. 2011).
83. O.C.G.A. § 16-6-13(b)(2) (Supp. 2011).
84. *Id.*
85. *See* O.C.G.A. § 16-6-13(b)(1) & (2) (Supp. 2011).
86. O.C.G.A. § 16-3-6(b) (Supp. 2011).
87. O.C.G.A. § 16-3-6(a) (Supp. 2011).

requires this exemption from liability to be proven as an affirmative defense.[88]

Section 4 of the Act amends Code section 17-15-2 relating to victim compensation.[89] The Act adds the crime of human trafficking for labor or sexual servitude as a "crime" within the scope of the Georgia Crime Victim's Compensation Fund.[90] Further, the Act adds to the fund's definition of "victim" a person who "[s]uffers a serious mental or emotional trauma as a result of being trafficked for labor or sexual servitude as defined in Code section 16-5-46."[91] Section 5 of the Act makes sure that Code section 17-15-7, which prevents an accomplice or person criminally responsible for the crime on which a claim for compensation is based from receiving an award from the fund, does not exclude a person who is defined as a victim of human trafficking under Code section 17-5-2 from being eligible to obtain compensation from the fund.[92] Section 6 of the Act adds a requirement to subsection (a) of Code section 17-15-8 presuming "good cause" for a delay greater than 72 hours in the reporting of a "crime," as defined in Code section 17-15-2, when the "victim," as defined under the same Code section, making the claim to the fund is one of human trafficking.[93] Section 7 of the Act amends Code section 17-17-6 to require that a victim of human trafficking be given notice by all law enforcement and court personnel, upon initial contact, about the availability of federal compensation for the crime committed against them.[94]

*Sections 8 through 10—Training and Additional Duties of Law Enforcement*

Section 8 of the Act creates new Code section 35-1-16, which requires the Georgia Peace Officer Standards and Training Counsel (Georgia Peace Officer Counsel) and the Georgia Public Safety Training Center (Georgia Public Safety Center) to "establish

88. O.C.G.A. § 16-3-6(c) (Supp. 2011).
89. *See* O.C.G.A. § 17-15-2 (Supp. 2011).
90. *See* O.C.G.A. § 17-15-2(3)(A) (Supp. 2011).
91. O.C.G.A. § 17-15-2(9)(D) (Supp. 2011).
92. O.C.G.A. § 17-15-7(e) (Supp. 2011).
93. O.C.G.A. § 17-15-8(a)(3) (Supp. 2011).
94. O.C.G.A. § 17-17-6(a)(2) (Supp. 2011).

guidelines and procedures" that will be used to train law enforcement in the methods for identifying and combating incidents of human trafficking, providing appropriate detention facilities for persons who have trafficked other persons, and assisting those who have been trafficked.[95] These guidelines and procedures must be used as training guides for law enforcement in all courses for which the Georgia Peace Officer Counsel and the Georgia Public Safety Center have "responsibility and oversight."[96]

Section 9 of the Act amends Code section 35-3-4 dealing with the powers of the GBI by adding the identification of and the investigation of crimes of human trafficking to the duties and powers of the GBI.[97] Section 10 further expands the GBI's powers as it relates to human trafficking by giving the GBI subpoena power in any investigation of a violation of Code section 16-5-46.[98] The subpoena power conferred on the GBI allows it to "compel the production of books, papers, documents, or other tangible things" including records or documents contained in an electronic device.[99] The Act gives enforcement authority over such subpoena to the appropriate superior court having jurisdiction, and allows the objection to such subpoena on any constitutional or other legal ground.[100] Failure to comply with the subpoena can be punished as contempt of court.[101]

*Analysis*

*Constitutional Considerations*

Neither the United States Supreme Court nor the Georgia Supreme Court have been very amiable to constitutional challenges of long prison sentences as constituting cruel and unusual punishment.[102] The

95. O.C.G.A. § 35-1-16(a) (Supp. 2011).
96. O.C.G.A. § 35-1-16(b) (Supp. 2011).
97. O.C.G.A. § 35-3-4(a)(13) (Supp. 2011).
98. O.C.G.A. § 35-3-4.3 (Supp. 2011).
99. O.C.G.A. § 35-3-4.3(a) (Supp. 2011).
100. *See* O.C.G.A. § 35-3-4.3(b) (Supp. 2011).
101. *Id.*
102. *See, e.g.*, Ewing v. California, 538 U.S. 11 (2003); Grant v. State, 258 Ga. 299, 368 S.E.2d 737 (1988).

primary thrust of the Act is to raise penalties on those persons responsible for trafficking underage children, including the imposition of substantial prison terms on the offenders. The federal constitutional standard articulated by the Supreme Court holds that the Eighth Amendment bears a narrow proportionality requirement with regard to the relationship between the crime and the punishment imposed for non-capital crimes.[103] Taking into consideration that the Supreme Court defers to state penalties under this "narrow" construction of proportionality—for example, approving a life sentence for a recidivist that stole $150 worth of videotapes[104] —it would be highly unlikely that the penalties imposed by the Act would be found unconstitutional on the federal level. Furthermore, the Georgia Supreme Court has held that the Georgia Constitution's prohibition on cruel and unusual punishment only encompasses "the standard of the people of Georgia."[105] Because the enactment of legislation in part "represents the standard of the people of Georgia," it appears that a challenge to invalidate a legislatively enacted penalty, which has not been previously banned, would be unsuccessful on the state level.[106]

*Public Policy Concerns*

Representative Bobby Franklin (R-43rd), the sole member of the General Assembly to vote against passage of the Act,[107] articulated concerns regarding the Act's treatment of minors and others who engage in acts of prostitution as "victims" rather than criminals subject to liability under the criminal law.[108] In his view, the Act exempts from legal liability the "fourteen- or fifteen-year-old girl that decides she is going to make some money and treats her as if she is a

103. *See* Harmelin v. Michigan, 501 U.S. 957 (1991).
104. *See* Lockyer v. Andrade, 538 U.S. 63 (2003).
105. Fleming v. Zant, 259 Ga. 687, 690, 386 S.E.2d 339, 342 (1989).
106. *See id.*
107. *See* Georgia House of Representatives Voting Record, HB 200 (Mar. 2, 2011); Georgia Senate Voting Record, HB 200 (Mar. 29, 2011). Representative Franklin's primary objection to HB 200 was a procedural matter dealing with passing bills under the Georgia Constitution. *See* Interview with Rep. Bobby Franklin (R-43rd) (Apr. 14, 2011) [hereinafter Franklin Interview] (on file with the Georgia State University Law Review).
108. *See* Franklin Interview, *supra* note 107.

victim rather than a willing participant . . . ."[109] Further, while "human trafficking is a terrible thing," as to these children the state now has decriminalized child prostitution.[110] Representative Franklin's objection is similar to the objection that defeated the previous attempt to overhaul the penalties dealing with human trafficking.[111] However, while the Act does make explicit that certain persons are to be considered victims and exempt from prosecution, the Act may not go as far as Representative Franklin suggests. New Code section 16-3-6 makes explicit that the affirmative defense regarding an exemption from liability for commission of a sexual crime only occurs when the alleged act was committed under "coercion or deception."[112] These qualifications were added in the Committee substitute for fear that, without them, child prostitution *would* in fact be decriminalized.[113] Further, the Act *only* labels a trafficked person a "victim" if that person "[s]uffers a serious mental or emotional trauma as a result of being trafficked . . . ."[114] Thus, it flows from the natural language of the Act that those who voluntarily choose to sell sexual services without being under the duress of coercion or deception will not be exempted from prosecution.[115] Similarly, such persons will likely not be labeled a "victim," since their actions will be voluntary and will not result in a "serious mental or emotional trauma as a result of being trafficked."[116]

It is possible that in the application of the Act, however, the concerns of Representative Franklin could be borne out. The purpose of this reform, along with the previous failed attempts, is to protect children.[117] Being guided by the purpose of these laws, state courts may adopt a presumption, or at least a strong tilt toward the belief that a child was acting under the threat of coercion or deception in the alleged human trafficking.[118]

---

109. *Id.*
110. *Id.*
111. Wingfield, *supra* note 4.
112. *See* O.C.G.A. § 16-3-6(b) (Supp. 2011).
113. *See supra* note 39 and accompanying text.
114. *See* O.C.G.A. § 17-15-2(9)(D) (Supp. 2011).
115. *See* O.C.G.A. § 16-3-6(b) (Supp. 2011).
116. *See* O.C.G.A. § 17-15-2(9)(D) (Supp. 2011).
117. *See generally*, Menair, *supra* note 6.
118. *See supra* note 40 and accompanying text; *see also* 2/21 House Video, *supra* note 1, at 1 hr., 03 min., 20 sec (remarks by Judge Bradley J. Boyd); *cf.* O.C.G.A. 15-17-8(a)(3) (Supp. 2011) (providing

*Ambiguities in the Act*

As to the language of the Act itself, there are a few ambiguities that may spark future litigation. Subsection (e) of Code section 16-5-46 deals with the admissibility of evidence of a relationship between the person alleged to have been trafficked and a person involved in the alleged trafficking.[119] As already discussed, this subsection allows this evidence to be brought in where the relationship is marital or blood related, and the probative value is not substantially outweighed by a competing consideration.[120] However, this subsection does not appear to cover an adoptive or similar relationship between the alleged trafficking victim and any person allegedly involved in his or her trafficking.[121] This could become problematic as an evidentiary issue in the future.

It is further unclear how some of the Act's new penalties may be imposed. Subsection (f)(2) of Code section 16-5-46 is unclear on its face whether the maximum penalties for trafficking a coerced or deceived person under the age of eighteen years—fifty years or life imprisonment—create an internal limitation on life imprisonment.[122] In other words, it is unclear whether a life imprisonment term must reasonably be concluded to be within the fifty-year maximum sentence (e.g., the offender is fifty years old and it can reasonably be concluded that he has fifty years of life remaining), or whether a sentence of life imprisonment is separate and apart from a fifty-year sentence (e.g., the offender is twenty-five years old and can be sentenced either to fifty years imprisonment or life, but not fifty-one years imprisonment).[123] No cases in Georgia or in other jurisdictions could be found for guidance in interpreting the application of a similarly worded statutory penalty.

*Brandon Howard & Laurin Nutt*

---

that under the victim's compensation fund, when "the claimant is a victim" of human trafficking then "good cause shall be presumed" for a failure to immediately report a crime of human trafficking). There is a definite leaning in these laws, and within the Act itself, that it is intended to help, not punish, those harmed by trafficking.

119. O.C.G.A. § 16-5-46(e) (Supp. 2011).
120. *Id.*
121. *See id.*
122. *See* O.C.G.A. § 16-5-46(f)(2) (Supp. 2011).
123. *See id.*