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Appeal or Certiorari by State in Criminal Cases HB 349

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APPEAL AND ERROR

Appeal or Certiorari by State in Criminal Cases: Amend Chapter 7 of Title 5 of the Official Code of Georgia Annotated, Relating to Appeal or Certiorari by the State in Criminal Cases, so as to Provide the State with More Direct Appeal Rights; Provide the State with Cross Appeal Rights; Provide for Cross-References; Provide for Liberal Construction of the Chapter; Amend Part 1 of Article 2 of Chapter 13 of Title 16, Title 17, Article 3A of Chapter 5 of Title 40, and Title 42 of the Official Code of Georgia Annotated, Relating to Schedules, Offenses, and Penalties for Controlled Substances, Criminal Procedure, Suspension of Driver's License for Certain Drug Offenses, and Penal Institutions, Respectively, so as to Enact Provisions Recommended by the Governor's Special Council on Criminal Justice Reform in Georgia; Change Provisions Relating to Sentencing for Trafficking in Certain Drugs; Provide for Definitions; Clarify Provisions Relating to the Weight or Quantity of Controlled Substances and Marijuana; Change Provisions Relating to Sentencing Serious Violent Offenders, Certain Sexual Offenders, and Repeat Offenders; Create the Georgia Council on Criminal Justice Reform and Provide for its Members, Chairperson, Other Officers, Committees, Staff, and Funding; Allow a Drug Court or Mental Health Court Division Judge to Order the Department of Driver's Services to Change a Defendant's Driving Privileges for Participants in Their Court Programs Under Certain Circumstances; Delete Definitions; Change Terms of a Probated Sentence; Amend Part 7 of Article 7 of Chapter 3 of Title 20 of the Official Code of Georgia Annotated, Relating to HOPE Scholarships and Grants, so as to Provide that Incarcerated Individuals who Qualify for HOPE GED Vouchers May Use Such Vouchers Within 24 Months of Release; Amend Article 2 of Chapter 8 of Title 24 of the Official Code of Georgia Annotated, Relating to Admissions and Confessions, so as to Change Provisions Relating to a Child's Description of Sexual Contact or Physical Abuse; Amend Code Section 37 of Article 1 of Chapter 3 of Title 35 of the Official Code of Georgia Annotated, Relating to Review of Individual's Criminal History Record

Information, Definitions, and Privacy Considerations, so as to Clarify Provisions Relating to Record Restriction Involving Certain Felony Offenses; Change Provisions Relating to the Application of the Code Section to Arrests Occurring Prior to July 1, 2013; Amend Code Section 43 of Article 2 of Chapter 9 of Title 42 of the Official Code of Georgia Annotated, Relating to Information to be Considered by the State Board of Pardons and Paroles Generally, so as to Define Terms Applicable to Issuing Medical Reprieves to Entirely Incapacitated Persons Suffering a Progressively Debilitating Terminal Illness; Amend Code Section 183.1 of Article 8 of Chapter 5 of Title 49 of the Official Code of Georgia Annotated, Relating to Notice to Alleged Child Abuser of Classification, Procedures, Notification to Division, and Children Under 14 Years of Age Not Required to Testify, so as to Correct a Cross-Reference; Provide for Related Matters; Provide for an Effective Date and Applicability; Repeal Conflicting Laws; and for Other Purposes

CODE SECTIONS:	O.C.G.A. §§ 5-7-1, -2 (amended); 5-7-6 (new); 16-13-31, -31.1 (amended); 16-13-54.1(new); 17-10-1, -6.1, -6.2, -7 (amended); 17-19-1, -2, -3, -4, -5 (new); 20-3-519.6 (amended); 24-8-820 (amended); 35-3-37 (amended); 40-5-75 (amended); 40-5-76 (new); 42-1-1 (amended); 42-8-35 (amended); 42-9-43 (amended); 49-5-183.1 (amended)
BILL NUMBER:	HB 349
ACT NUMBER:	84
GEORGIA LAWS:	2013 Ga. Laws 222
SUMMARY:	The Act creates a Council on Criminal Justice Reform, which will provide criminal justice reform for juveniles and adults by awarding the State more appeal rights. The Act also allows judicial discretion regarding waiver of mandatory minimum sentences,

provides incentives for a defendant's compliance with terms of a court program, provides medical reprieve for an incapacitated person, and restores the child hearsay exception to non-victim children who witnessed sexual contact or abuse of another child.

EFFECTIVE DATE: July 1, 2013

History

When Governor Nathan Deal (R) first took office, the State of Georgia was the tenth largest state in the United States by population.[1] However, Georgia had the fourth largest prison population.[2] In 2010, one in every thirteen adults in Georgia was "under some form of correctional control."[3] This represented "the highest rate in the nation."[4] In 2010 one in seventy adults was behind bars in Georgia and the State was spending upwards of one billion dollars per year simply to house inmates.[5] Governor Deal (R) realized that Georgia's "tough on crime" stance was not as effective as it needed to be, which led him to take steps to begin reforming both the adult and juvenile criminal justice systems in Georgia.[6]

In 2011, Governor Deal and the General Assembly authorized the Special Council on Criminal Justice Reform to focus on overhauling the criminal justice system and implementing new policies regarding the criminal justice system for adults and juveniles.[7] Among the policy concerns leading to the formation of the Special Council was a concern that non-violent criminals were moving through the prison system and returning to prison—the "cycle of crime" was not being

1. Mike Klein, *Second Adult Criminal Justice Reform Bill Becomes Law*, GA. PUB. POLICY FOUND., Apr. 25, 2013, http://www.georgiapolicy.org/second-adult-criminal-justice-reform-bill-becomes-law/.

2. *Id.*

3. Marc A. Levin, *New Deal for Georgia Criminal Justice*, GA. PUB. POLICY FOUND., Nov. 19, 2010, http://www.georgiapolicy.org/new-deal-for-georgia-criminal-justice/.

4. *Id.*

5. *Id.*

6. Klein, *supra* note 1.

7. *Id.* The Council was kept intact by Governor Nathan Deal to broaden their focus to juveniles. *Id.*

broken.[8] Thirty-five percent of those released from prison were back in prison within three years of being initially released.[9]

Prior to the reformation of the criminal justice system in Georgia, other states had been successful with their own reforms.[10] Specifically, Texas began reforming its criminal justice system in the mid-2000's and has enjoyed great success.[11] Instead of adding approximately seventeen thousand beds to its prisons in order to meet the needs of future projections, Texas chose to pursue probation programs and other supervisory programs focused on rehabilitation for non-violent criminals.[12] In 2007, Texas Governor Rick Perry summed up the goal of Texas criminal justice reform in his State of the State Address by saying, "'we can take an approach to crime that is both tough and smart . . . [T]here are thousands of non-violent offenders in the system whose future we cannot ignore. Let's focus more resources on rehabilitating those offenders so we can ultimately spend less money locking them up again.'"[13] This strategy has proven successful for Texas, as it has seen a significant drop in crime and has realized a cost savings of over $2 billion.[14] Based on Texas's success, other states, such as Kentucky and South Carolina, have followed its lead in adopting their own criminal justice reforms and focusing on rehabilitating non-violent offenders instead of locking them up.[15]

Kentucky implemented criminal justice reform in 2011.[16] Its "prison population had jumped more than 260 percent since 1985 and

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8. Kelly McCutchen, *Tough on Crime, Smart on Criminal Justice Spending*, GA. PUB. POLICY FOUND., Sept. 30, 2011, http://www.georgiapolicy.org/tough-on-crime-smart-on-criminal-justice-spending/.

9. *Id.*

10. AM. CIVIL LIBERTIES UNION, SMART REFORM IS POSSIBLE: STATES REDUCING INCARCERATION RATES AND COSTS WHILE PROTECTING COMMUNITIES 17–47 (2011). At the time of this report, Texas, South Carolina, Kentucky, and other states had successfully implemented bipartisan criminal justice reform. *Id.*

11. Marc Levin, *Texas Criminal Justice Reforms: Lower Crime, Lower Cost*, TEX. PUB. POLICY FOUND., Jan. 26, 2010, http://www.texaspolicy.com/center/effective-justice/reports/texas-criminal-justice-reforms.

12. *Id.*

13. Marc Levin, *What Conservatives Are Saying About Criminal Justice Reform*, TEX. PUB. POLICY FOUND., Jan. 14, 2010, http://www.texaspolicy.com/center/effective-justice/reports/what-conservatives-are-saying-about-criminal-justice-reform-0.

14. Levin, *supra* note 11.

15. McCutchen, *supra* note 8.

16. PEW CTR. ON THE STATES, 2011 KENTUCKY REFORMS CUT RECIDIVISM, COSTS 1 (2011).

costs had risen more than 200 percent.[17] Kentucky created a task force to investigate criminal justice reform and the council presented recommendations for change.[18] The recommended changes were similar to those adopted by Texas, and to those in House Bill (HB) 349.[19]

HB 349 is really the start of Governor Deal's vision for criminal justice reform in Georgia.[20] More than a generation ago, states began the tough on crime approach, which has generally been viewed as a good thing.[21] However, with this approach, differentiation between drug offenses stopped, and many offenses were grouped together under the law.[22] While this approach seemed like it would be successful in terms of public safety, it is apparent now that the approach may have lacked sufficient vision, and a new approach is necessary.[23] Two years ago, HB 265 was introduced to set up the Special Council on Criminal Justice Reform.[24] Throughout 2011, the council created a set of recommendations that became the core of HB 1176, which pertained to appeal rights of the state in criminal cases, enacted provisions of the Special Council on Criminal Justice Reform for Georgians, and changed provisions in several criminal statutes, and the General Assembly enacted it.[25] The first set of recommendations pertained to the juvenile justice code, which was presented during the 2013 legislative session in HB 242 and

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17. *Id.* at 2.

18. *Id.* at 3.

19. Kentucky focused on ensuring that violent criminals were taking up the beds in prisons and looked at ways to help rehabilitate some offenders. *Id.* at 6–7.

20. Telephone Interview with Rep. Rich Golick (R-40th) (May 26, 2013) [hereinafter Golick Interview].

21. *See id.*

22. *See id.*

23. *See id.*

24. Video Recording of House Proceedings, Mar. 1, 2013 at 1 hr., 55 min., 10 sec. (remarks by Rep. Rich Golick (R-40th)), http://www.gpb.org/lawmakers/2013/day-27 [hereinafter House Video 1].

25. *Id. See generally* 2012 Ga. Laws 709 (codified at O.C.G.A. §§ 5-7-1,-2 (2013); § 15-1-15, -16 (2012); §§ 15-21-100, -101 (2012); § 16-7-1 (Supp. 2013); §§ 16-8-12, -13, -14, -15, -16, -17 (Supp. 2013); §§ 16-9-1, -2, -3 (Supp. 2013); §§ 16-13-30, -31 (Supp. 2013); §§ 17-3-1, -2.1 (2013); §§ 17-10-1, -7 (2013); § 19-7-5 (Supp. 2013); §§ 35-3-34, -37 (Supp. 2013); §§ 42-1-1, -11, -11.2 (Supp. 2013); § 42-5-50 (Supp. 2013); §§ 42-8-21, -23, -35, -37, -38 (Supp. 2013); § 15-10-260 (Supp. 2013); §§ 15-11-30.3, -83 (Supp. 2013); § 16-11-131 (Supp. 2013); § 16-14-3 (Supp. 2013); § 16-16-1 (Supp. 2013); § 17-6-1 (2013); § 17-7-70.1 (2013); §§ 17-10-9.1, -30 (2013); §§ 31-7-250, -350 (2012); § 36-32-9 (2012); § 42-5-85 (Supp. 2013)).

unanimously approved on February 28, 2013.[26] The second set of the 2012 recommendations is embodied in HB 349, regarding criminal justice reform relating to adults.[27] HB 349 will provide judges with more sentencing options for certain cases, will alter some of the state's appeal rights, and will ensure that criminal justice reform remains a priority by creating a new Georgia Council on Criminal Justice Reform that will exist for ten years, through June 2023.[28]

Bill tracking of HB 349

Consideration and Passage by the House

Representatives Rich Golick (R-40th), Matt Hatchett (R-150th), Christian Coomer (R-14th), B.J. Pak (R-108th), Mary Margaret Oliver (D-82nd), and Chad Nimmer (R-178th) sponsored HB 349 in the House.[29] The House read the bill for the first time on February 14, 2013 and for a second time on February 18, 2013.[30] Speaker of the House David Ralston (R-7th) assigned it to the House Judiciary Non-Civil Committee, which favorably reported a Committee substitute on February 21, 2013.[31] Differing only slightly from the bill as introduced, the Committee made three changes.[32] First, language in the original bill allowed a proponent to directly appeal an adverse ruling on a pre-trial evidentiary hearing, which would disrupt the judge's docket.[33] The changes, however, allow for an imposed limitation on when the direct appeal could occur, which gives the judge discretion as to when to rule on the issue and more control of their docket.[34] Second, language in the original bill restored the law

26. House Video 1, *supra* note 24, at 1 hr., 55 min., 10 sec. (remarks by Rep. Rich Golick (R-40th)).

27. *Id.*

28. Mike Klein, *New Criminal Justice Reform Council Proposed Through 2023*, GA. PUB. POLICY FOUND., Feb. 20, 2013, http://www.georgiapolicy.org/new-criminal-justice-reform-council-proposed-through-2023/.

29. *See* Georgia General Assembly, HB 340, Bill Tracking, http://www.legis.ga.gov/legislation/en-US/Display/20132014/HB/349.

30. State of Georgia Final Composite Status Sheet, HB 349, May 9, 2013.

31. *Id.*

32. Video Recording of House Judiciary Non-Civil Committee Meeting, Feb. 21, 2013 at 1 sec. (remarks by Rep. Rich Golick (R-40th)), http://www.house.ga.gov/Committees/en-US/Committee Archives146.aspx [hereinafter House Committee Video].

33. *Id.* at 2 min., 19 sec. (remarks by David McDade, District Attorney for Douglas County).

34. *Id.*

that a non-victim child's statements, in a molestation or abuse case, could be an exception to the hearsay statute, and proposed a number of criteria for a court to look at to introduce a child hearsay statement.[35] The substitute struck the criteria entirely from the bill so as to not potentially hinder the restoration of the non-victim child's testimony as an exception to the hearsay statute.[36] Finally, language in the original bill required a prosecutor to prove the defendant knew the exact amount of drugs he possessed, but the substitute bill eliminated the burden of proof regarding the exact amount.[37] All three substitutes were adopted.[38] The House read the Committee substitute as amended on March 1, 2013.[39] During the floor debate, Representative Golick (R-40th) offered an amendment that made some minor technical changes to the bill, which was adopted without objection.[40] Furthermore, because the language in the original bill left the possibility that the child hearsay exception could be used in civil contexts, Representative Golick (R-40th) decided to strike the section out of an "abundance of caution" and to continue to work on the issue in the Senate.[41] The House adopted the Committee substitute on March 1, 2013 with the floor amendments by a vote of 163 to 0.[42]

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35. *Id.* at 4 min., 14 sec. (remarks by David McDade, District Attorney for Douglas County). A 1998 Georgia Supreme Court case made the statements of a child who witnessed sexual or physical abuse inadmissible. Woodward v. State, 269 Ga. 317, 323, 496 S.E.2d 896, 901 (1998). In 2012, the Georgia Supreme Court overruled their previous decision in *Woodward*. Bunn v. State, 291 Ga. 183, 188–89, 728 S.E.2d 569, 573 (2012).

36. House Committee Video, *supra* note 32, at 4 min., 14 sec. (remarks by David McDade, District Attorney for Douglas County).

37. *Id.* at 7 min., 34 sec. (remarks by Rep. Rich Golick (R-40th)).

38. *Id.* at 10 min., 8 sec.

39. House Video 1, *supra* note 24, at 1 hr., 54 min., 38 sec. (remarks by Robert Rivers, Clerk of the Georgia House of Representatives).

40. *Id.* at 2 hr., 13 min., 31 sec. (remarks by Speaker David Ralston (R-7th)). The amendments were "all clean up, technical amendments that clarif[ied] and frankly artfully word[ed] the intent of the bill. There [were] no substantive changes, in that they simply just clean[ed] up and [made] for a better presentation of the substantive points of the legislation." *Id.* at 2 hr., 2 min., 2 sec. (remarks by Rep. Rich Golick (R-40th)).

41. *Id.* at 2 hr., 3 min., 20 sec. (remarks by Rep. Rich Golick (R-40th)).

42. *See* Georgia General Assembly, HB 340, Bill Tracking, http://www.legis.ga.gov/legislation/en-US/Display/20132014/HB/349; Georgia House of Representatives Voting Record, HB 349 (Mar. 1, 2013).

Consideration and Passage by the Senate

Senator Charlie Bethel (R-54th) sponsored HB 349 in the Senate, and the bill was first read on March 4, 2013.[43] Lieutenant Governor Casey Cagle (R) assigned it to the Senate Judiciary Non-Civil Committee.[44] While in Committee, two amendments to the bill were offered: the first changed the phrase "is clearly outweighed by" on line 637 with "clearly outweighs" and the second added "to revise eligibility for a HOPE grant at a technical college or university institution and for other purposes" after the semicolon on line 20.[45] The Committee favorably reported the Committee substitute on March 14, 2013.[46] The bill was read a second time in the Senate on March 20, 2013, and a third time on March 21, 2013.[47] During the third reading of the bill, it was mentioned that the "clearly outweighs" language was changed mainly to clarify what Senator Bethel (R-54th) perceived to be a typographical error.[48] Some concerns were raised by Senator Fran Millar (R-40th) over provisions in the bill regarding the ability to access criminal histories, even of those who were ultimately found to be innocent, when having the information would be in the public interest; however, he simply expressed his disagreement with the concept, and the discussion moved away from the subject.[49] The first amendment to the bill passed by a 22 to 15 vote, and there were no objections to the second amendment.[50] On March 21, 2013, following the passage of the amendments, the Senate passed the substitute to the bill by a vote of 46 to 1 and transmitted it back to the House of Representatives, where the House agreed to the Senate substitute on March 25, 2013

43. State of Georgia Final Composite Status Sheet, HB 349, May 9 2013.

44. Video Recording of Senate Proceedings, Mar. 4, 2013 at 2 min., 15 sec. (remarks by Lieutenant Governor Casey Cagle (R)), http://www.gpb.org/lawmakers/2013/day-28 [hereinafter Senate Video 1].

45. *Compare* HB 349 (CSFA), 2013 Ga. Gen. Assem., *with* HB 349 (SCSFA), 2013 Ga. Gen. Assem.; *see also* Video Recording of Senate Proceedings, March 21, 2013 at 1 hr., 3 min., and 46 sec. (remarks by Bob Ewing, Secretary of the Georgia Senate) (summarizing the changes made in the substitute), http://www.gpb.org/lawmakers/2013/day-36 [hereinafter Senate Video 2].

46. State of Georgia Final Composite Status Sheet, HB 349, May 9, 2013.

47. *Id.*

48. Senate Video 2, *supra* note 45, at 1 hour, 4 min. and 49 sec. (remarks by Sen. Charlie Bethel (R-54th)).

49. *Id.* at 1 hr., 10 min. and 4 sec. (remarks by Sen. Fran Millar (R-40th).

50. *Id.* at 1 hr., 18 min. and 37 sec. (remarks by Lieutenant Governor Casey Cagle (R)).

at a vote of 166 to 1.[51] The House sent the Bill to the Governor on April 8, 2013, and the Governor Deal (R) signed the Bill on April 25, 2013.[52]

The Act

The Act affects nine titles of the Official Code of Georgia Annotated with the purpose of furthering the goals of the Special Counsel on Criminal Justice Reform for Georgians. The Act amends current statutes and provides new statutes to refine the current criminal justice system, thereby attempting to conserve state resources and increase the efficiency of Georgia's criminal justice system.[53]

Section 11 of the Act creates Chapter 19 of Title 17 of the Code, codified as sections 17-19-1 through 17-19-5. Code section 17-19-1 creates

> the Georgia Council on Criminal Justice Reform for the purpose of conducting periodic comprehensive reviews of criminal laws, criminal procedure, sentencing laws [as well as] adult correctional issues, juvenile justice issues, enhancement of probation and parole supervision, better management of the prison population and of the population in the custody of the Department of Juvenile Justice, and other issues related to criminal and accountability courts.[54]

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51. Georgia State Senate Voting Record, HB 349 (Mar. 21, 2013); Georgia House of Representatives Voting Record, HB 349 (Mar. 25, 2013); State of Georgia Final Composite Status Sheet, HB 349, May 9, 2013.

52. State of Georgia Final Composite Status Sheet, HB 349, May 9, 2013.

53. *See generally* O.C.G.A. § 5-7-1,-2 (2013); § 5-7-6 (2013); §§ 16-13-31,-31.1 (Supp. 2013); § 16-13-54.1 (Supp. 2013); §§ 17-10-1, -6.1, -6.2, -7 (2013); §§ 17-19-1, -2, -3, -4, -5 (2013); § 20-3-519.6 (Supp. 2013); § 24-8-820 (2013); § 35-3-37 (Supp. 2013); § 40-5-75 (Supp. 2013); § 40-5-76 (Supp. 2013); § 42-1-1 (Supp. 2013); § 42-8-35 (Supp. 2013); § 42-9-43 (Supp. 2013); § 49-5-183.1 (2013).

54. O.C.G.A. § 17-19-1(a) (2013).

Code sections 17-19-2 through 17-19-5 set out the composition, authority, and responsibilities of the Georgia Council on Criminal Justice Reform.[55]

Sections 1, 2, and 3 of the Act amend Chapter 7 of Title 5 to provide more direct and cross appeal rights to the state, and allows for "liberal construction of the chapter."[56] Sections 4 and 5 amend Chapter 13 of Title 16 by striking the element of "knowingly" from the precise amount of substance possessed, sold, manufactured, or delivered.[57] Section 6 of the Act adds a new Chapter 13 to Title 16 of the Code, codified as section 16-13-54.1. This Code section removes the prosecution's burden of proving that a defendant knew the exact amount of substance he was in possession of, explicitly stating the defendant's knowledge of the weight of the substance is not an "essential element of the offense" and that "the state shall not have the burden of proving that a defendant knew the weight or quantity of the controlled substance . . . to be convicted of an offense."[58] Additionally, under sections 4 and 5, judges are provided the discretion to depart from the court's mandatory minimum sentence if the defendant meets a specific set of criteria.[59]

Sections 7 through 10 of the Act amend Chapter 10 of Title 17 by refining the application of "active probation supervision" and "unsupervised probation" as they relate to criminal procedure, and providing judges discretion in sentencing.[60] Section 17 amends Chapter 1 of Title 42 by repealing the first two paragraphs and designating the others accordingly.[61] Section 18 amends Chapter 8 of Title 42 by adding, "[t]he Department of Corrections shall assess and collect fees from the probationer for such screening at levels set by regulation of the Department of Corrections."[62] Furthermore, section 19 of the Act amends Chapter 9 of Title 42 by refining definitions pertaining to the State Board of Pardons and Paroles, clarifies when

55. O.C.G.A. §§ 17-19-2, -3, -4, -5 (2013).
56. O.C.G.A. §§ 5-7-1, -2, -3, -6 (2013).
57. O.C.G.A. §§ 16-13-31(a)(1), -31.1(a) (Supp. 2013).
58. O.C.G.A. § 16-13-54.1 (Supp. 2013).
59. O.C.G.A. §§ 16-13-31, -31.1 (Supp. 2013).
60. O.C.G.A. §§ 17-10-1(a)(7), -6.1, -6.2, -7 (2013).
61. O.C.G.A. § 42-1-1 (Supp. 2013).
62. O.C.G.A. § 42-8-35(a)(17) (Supp. 2013).

medical reprieve may be issued, and provides medical reprieve to incapacitated persons.[63]

Section 13 of the Act amends Chapter 8 of Title 24 by allowing a non-victim child's statements regarding physical or sexual abuse as admissible hearsay under certain circumstances.[64] Section 20 amends Chapter 5 of Section 49 by changing the age of a child for an admissible out-of-court statement from fourteen to sixteen.[65]

Regarding criminal defendants, section 12 of the Act amends Chapter 3 of Title 20 by allowing an incarcerated individual to use HOPE GED vouchers received while incarcerated within twenty-four months from being released.[66] This voucher "shall be available once to each student receiving a general educational development (GED) diploma awarded by the . . . Technical College System of Georgia."[67] Section 14 of the Act amends Chapter 3 of Title 35 by clarifying language which allows an individual to petition the superior court to "restrict access to criminal history record information for [a] felony charge within four years of the arrest" provided that the individual making the request was found not guilty of the felony, or the felony charge was dismissed or nolle prossed.[68] Section 15 amends Chapter 3 of Title 35 by revising subsections pertaining to the suspension of a defendant's driver's license, contingent upon variables ranging from number of convictions to participation in a court program.[69] Section 16 of the Act adds Chapter 5 to Title 40 of the Code, codified as 40-5-76. Code section 40-5-76 provides judges with discretion to restore a defendant's driver's license or issue a limiting driving permit.[70]

63. O.C.G.A. § 42-9-42 (Supp. 2013).
64. O.C.G.A. § 24-8-820 (2013).
65. O.C.G.A. § 49-5-183.1(i) (2013).
66. O.C.G.A. § 20-3-519.6 (Supp. 2013).
67. *Id.*
68. O.C.G.A. § 35-3-37(j)(1) (Supp. 2013).
69. O.C.G.A. § 40-5-75 (Supp. 2013).
70. O.C.G.A. § 40-5-76 (Supp. 2013).

Analysis

Function of Criminal Justice Reform

The Act creates the Georgia Council on Criminal Justice Reform.[71] Criminal justice reform serves a much-needed function in society and the creation of the Council ensures that the criminal justice system will continually improve. According to the Office of National Drug Control Policy (ONDCP), "the U.S. prison and jail population reached an all-time high and the number of people on probation and parole doubled" in the last twenty-five years.[72] When the prison, probation, and parolee numbers increased, so did state spending. For instance, state corrections spending from 1988 to 1999 increased anywhere from "$12 billion to $52 billion *per year*."[73] Despite the increased amount of spending, many of the defendants were not reintegrated into society as reformed citizens.[74] Instead, they often fell back into the drug and crime patterns that landed them in prison the first time.[75]

Regarding the current model for criminal justice in Georgia, there is "no doubt the model pursued is not sustainable."[76] It is like "wrestling in a sand pit—you're going to keep sinking."[77] Therefore, the entire system needs to be continually reformed. In doing so, the system must be tackled at the front end in prosecution and sentencing, all the way through to rehabilitation and reintegration into society.[78] Currently, there are "individuals with obvious drug

71. O.C.G.A. § 17-19-1 (2013).

72. *Criminal Justice Reform: Breaking the Cycle of Drug Use and Crime*, OFFICE OF NAT'L DRUG CONTROL POLICY, http://www.whitehouse.gov/ondcp/criminal-justice-reform (last visited June 22, 2013). "In 2009, nearly seven million individuals were under supervision of the state and Federal criminal justice systems. Nearly two million of these individuals were incarcerated for their crimes, while the remaining five million were on probation or parole being supervised in the community." *Id.*

73. *Id.* (emphasis added).

74. *Id.*

75. *Id.* ("In 2009, parole and other conditional release violators accounted for 33.1 percent of all prison admissions, 35.2 percent of state admissions, and 8.2 percent of Federal admissions. Twenty-four percent of parolees ending supervision in 2009 (approximately 132,000 of 553,000) returned to prison as a result of violating their terms of supervision, and 9 percent of adults ending parole returned to prison as a result of a new conviction.").

76. *See* Telephone Interview with Sen. Charlie Bethel (R-54th) (May 26, 2013) [hereinafter Bethel Interview].

77. *Id.*

78. *Id.*

addictions" that are arrested, go to jail, and receive no treatment for their addictions.[79] These individuals go in with an addiction and leave with an addiction.[80] "They get paroled and . . . shoplift, or knock over a convenience store to get money to get drugs. It's only a matter of time until they're arrested again."[81] At that point, these individuals begin to cycle through the system, in and out of prison, with no end in sight.[82] This costs "tens of thousands of dollars" per year.[83] Some of these offenders are non-violent and may benefit from treatment and other options to help them become productive members of society.[84] The Act creates an infrastructure to give some offenders an opportunity to be rehabilitated.[85]

Addressing critical policy issues is instrumental in further creating an "effective and efficient criminal justice system."[86] "The idea is certainly aspirational. In some cases it will work and in some it won't," but the infrastructure needs to be in place.[87] This will allow Georgia to keep "the worst of the worst" in prison, while non-violent offenders have the opportunity to seek treatment and rehabilitation.[88]

For continued "comprehensive change," the ONDCP supports an interventional approach from every aspect of the criminal process—"arrest, jail and pre-trial to sentencing, incarceration, and release"—to meet the offender's needs to change his criminal behavior.[89] The United Nations Office on Drugs and Crime (UNODC) stated that to make the "world safer from crime, drugs, and terrorism," on an effective and sustainable level, three strategies must be implemented: 1) crime prevention, 2) criminal justice reform, and 3) justice for children.[90] The Act addresses the Georgia criminal justice system with proposed ideas from both the ONDCP and UNODC, and

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79. *See* Golick Interview, *supra* note 20.
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.*
84. *See* Golick Interview, *supra* note 20.
85. *See id.*
86. OFFICE OF NAT'L DRUG CONTROL POLICY, *supra* note 72.
87. *See* Golick Interview, *supra* note 20.
88. *See id.*
89. OFFICE OF NAT'L DRUG CONTROL POLICY, *supra* note 72.
90. *Crime Prevention and Criminal Justice*, UNITED NATIONS OFFICE ON DRUGS AND CRIME (UNODC), https://www.unodc.org/unodc/en/justice-and-prison-reform/index.html (last visited Jun. 22, 2013).

policies that are "smart on crime" and will "save tax dollars and promote public safety."[91]

The Act provides an opportunity for offenders, where appropriate.[92] Some offenders will take advantage of the opportunity presented to them and others will not, but in the end, "we will see what happens."[93] Not only does the Act implement multiple changes to the current law, it provides a way, through the creation of the Council on Criminal Justice Reform, to ensure that criminal justice in Georgia is constantly evolving and being reviewed.[94] The effects of HB 349 will not be seen immediately, rather, they will be realized in the next ten years and beyond, and in that time, there will be opportunities to learn and refine the approach.[95] "This was an extremely important first step."[96] Going forward, the Act's changes to the way Georgia handles prosecution, sentencing, appeals, the re-integration into society for offenders, and child hearsay will serve as a starting point for criminal justice reform in Georgia.

Criminal Justice Reform: Lowering Prosecutors Burden of Proof

Prior to HB 349, the law in Georgia stated that, "[a]ny person who knowingly sells, manufactures, delivers, or brings into this state, or who is knowingly in possession of" a prohibited substance of a specified weight or greater "commits the felony offense of trafficking."[97] The word "knowingly" in the statute could be construed to require prosecutors to prove that not only did the offender know he or she possessed a prohibited substance, but also that the offender knew the weight of the substance he or she

91. Andrew Agan, *Deal Signs Second Edition of Criminal Justice Reform*, DOUGLASVILLE PATCH, May 7, 2013, *available at* http://douglasville.patch.com/groups/around-town/p/deal-signs-second-edition-of-criminal-justice-reform.

92. *See* Golick Interview, *supra* note 20.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. O.C.G.A. § 16-13-31(a)(1) (2012). For example, section 16-13-31(a) details the consequences for possession of cocaine in a weight greater than twenty-eight grams, while section 16-13-31(b) details the consequences for possession of morphine, opium, heroin, and other similar substances in weights greater than four grams, and section 16-13-31(c) details the consequences for possession of marijuana in excess of ten pounds.

possessed.[98] Because there is no way to conclusively prove what someone did or did not know, interpreting the statute to mean that offenders had to know the weight of the substance they possessed could prove an insurmountable burden for the State, resulting in the State being unable to convict some drug traffickers.[99]

In 2011, the defendant in *Wilson v. State* challenged an adverse ruling arguing that "the trial court erred in charging the jury that his knowledge of the quantity of marijuana [he possessed] was not an element of the trafficking offense[.]"[100] The Georgia Court of Appeals did "not believe that the legislative intent of the drug trafficking statutory scheme [was] to require proof of the defendant's subjective knowledge as to the precise weight of the drugs in his possession."[101] It was therefore not required "to sustain his drug trafficking conviction."[102] The Act updates the statute to be in accordance with current case law. By deleting the word "knowingly" from the statute, the legislature has taken steps to ensure that the statute is interpreted in the way that the legislature intended for it to be interpreted.[103]

On its surface, this change has both positive and negative public policy implications. It clarifies the State's burden in drug trafficking cases.[104] This clarification eliminates the risk that the Georgia Supreme Court could reverse itself again and require a prosecutor to prove that a drug offender knew the exact weight of the drugs he or she possessed.[105] Preventing drug trafficking is certainly in the best

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98. From time to time, opinions have been issued where generally the dissent has voiced an opinion that the prosecutor should be required to prove that a defendant knew the amount. *See* Telephone Interview with Scott Key, Secretary, Appellate Practice Section, State Bar of Georgia (June 25, 2013) [hereinafter Key Interview]. *See also* Wilson v. State, 312 Ga. App. 166, 168, 718 S.E.2d 31, 32 (2011).

99. In order for a case to succeed, the prosecutor must meet every element of the crime. Without meeting each element, the case fails. *See* Ryan v. State, 277 Ga. App. 490, 493, 627 S.E.2d 128, 129 (2006) The State was unable to meet its burden of proof in asserting that the defendant possessed drugs with an intent to distribute, and the charge failed. *Id*.

100. *Wilson*, 312 Ga. App. at 166, 718 S.E.2d at 32. "The General Assembly was presumably aware of the *Cleveland* decision, which rejected the statutory construction urged regarding the defendant's knowledge as to the weight of the drug substance, but it did not amend O.C.G.A. § 16-13-31 to alter that holding." *Id.* at 170, 718 S.E.2d at 34.

101. *Id.*

102. *Id.*

103. *See* Key Interview, *supra* note 98.

104. *Id.*

105. The statute will prevent the Georgia Supreme Court from changing its interpretation of the law because this law leaves little room for differing interpretations.

interests of the public. However, the change also increases the likelihood that someone who truly did not intend to traffic drugs may be wrongly accused and convicted of drug trafficking.[106] The potential exists for possession of a specified amount of drugs to become a strict liability crime.[107] For example, someone could be driving a car and truly not know the drugs are there, and be arrested and charged because a judge could interpret the change as making the crime "strict liability in nature."[108] An interpretation along these lines would go too far.[109]

Despite this potential policy conflict, the change should not truly have an adverse effect on public policy. Although the word "knowingly" has been removed from the statute, the prosecution *still* has to prove the element of intent.[110] Based on current case law, nothing in this modification changes current law; instead, it serves to better clarify the intent of the law.[111]

Criminal Justice Reform: Sentencing

Up to seventy-five percent of those in prison in Georgia in 2011 were there because of a drug addiction.[112] In 2010, it cost the State almost $17,000 to house one inmate for one year.[113] The Act provides judges with the discretion to depart from mandatory minimum sentencing requirements in very particular circumstances, allowing non-violent drug offenders a chance at rehabilitation, rather than allowing these offenders to cycle in and out of prison.[114] Departing from mandatory minimum sentences allows judges to give

106. *See* Key Interview, *supra* note 98.
107. *Id.*
108. *Id.*
109. *Id.*
110. House Committee Video, *supra* note 32, at 7 min., 34 sec. (remarks by Rep. Rich Golick (R-40th)). The biggest issue encountered in trying to pass this bill was striking the "knowing element" from the statute, because some people were apprehensive that the bill was trying to eliminate the element of proving the intent of the crime.
111. *Id.*; *Wilson*, 312 Ga. App. at 170, 718 S.E.2d at 34.
112. Joy Lukachick, *Georgia Eyeing Prison Reform for Non-violent Drug Offenders*, TIMES FREE PRESS, Feb. 17, 2011, *available at* http://www.timesfreepress.com/news/2011/feb/17/georgia-eyeing-prison-reform.
113. Carrie Teegardin, *Georgia Prison Population, Costs on Rise*, ATLANTA J.–CONST., Apr. 4, 2010, *available at* http://www.ajc.com/news/local/georgia-prison-population-costs-on-rise/nQdsN.
114. O.C.G.A. §§ 16-13-31, -31.1 (Supp. 2013).

a lighter sentence to a defendant who was not the ringleader of a crime, thus, giving the offender a chance at reform.[115] In regards to HB 349, Governor Nathan Deal (R) said, "'HB 349 is another step in the right direction in making Georgia smarter on crime.'"[116] Governor Deal continued, "'public safety will be improved by . . . ensuring that our prison resources are reserved for the 'kingpins' while the 'mules' are given a chance at reform.'"[117] While determining whether to reduce the sentencing from the mandatory minimum, the judge needs to look at whether the criminal is a violent or a non-violent offender who lost his way.[118] "We need to empower our courts to be able to take [offenders] for whom rehabilitation may be possible" and give them a chance to change their ways and contribute to society.[119]

Criminal Justice Reform: Appeal Rights

Although seemingly a departure from the theme of the Act, HB 349 addresses the ability of the State to appeal decisions made at the trial court level directly to the appellate courts or the Georgia Supreme Court.[120] The Act allows for an automatic appeal in certain situations provided the prosecuting attorney certifies to the court that the appeal is not made for the purpose of causing delay, and that the evidence in question is "a substantial proof of a material fact in the proceeding."[121] This automatic appeal does not allow for any discretion by the court; so long as the prosecutor makes the appropriate certifications to the court, there is a direct appeal.[122]

Arguments exist for both the benefits and detriments of this piece of the Act. A logical and convincing argument in favor of the inclusion of this piece can be found in the concept that if a defense

115. Agan, *supra* note 91.
116. *Id.*
117. *Id.*
118. *See* Bethel Interview, *supra* note 74. The victim also needs to be protected. "There are some violent people that need to be locked up, but it's also expensive." *Id.* The judicial system "need[s] to also look at those who are not inherently violent people and give them a shot at getting reintegrated into society." *Id.*
119. *See* Golick Interview, *supra* note 20.
120. O.C.G.A. §§ 5-7-1, -2, -3 (2013).
121. O.C.G.A. § 5-7-1(a)(5)(B) (2013).
122. *See* Key Interview, *supra* note 98.

attorney were to get an acquittal, there is no appeal.[123] This change would allow prosecutors to appeal certain key evidentiary elements of their cases immediately, potentially greatly strengthening their cases.[124] On the other hand, simply requiring the prosecuting attorney to certify to the court that the claim is material and not made for purposes of delay, knowing that there will be no further review by the court, puts much faith in the idea that an attorney, acting as an advocate, will be able to make an unbiased determination regarding the materiality of evidence.[125] Taking the certification of the prosecuting attorney on blind faith may prevent the court from exercising discretion as to which cases it will hear, potentially leading to more cases being taken.[126] While this change may impact judges, judges were consulted during the development and discussion of HB 349.[127]

While much of HB 349 broadens the discretion of judges, this section of the Act may take away some discretion.[128] An alternative plan with respect to this section of the Act might be to implement a program similar to the Georgia Supreme Court's pilot program for domestic violence cases.[129] This would allow for an automatic appeal, if the court agrees with the prosecuting attorney that the evidence is material and the appeal is not for the purpose of delay.[130] Only time will tell what the effects of this provision will be, but the legislature has the ability to evaluate the changes and make new changes as necessary.[131]

Reintegration into Society: GED Vouchers

In order to live—not merely exist—in our society, people have to have a monetary income. In today's economy and job market, a vast

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123. *See id.*
124. *See id.*
125. *See id.*
126. *See id.*
127. *See* Golick Interview, *supra* note 20.
128. *See* Key Interview, *supra* note 98. Other parts of the Bill broadened judges' discretion by giving them the ability to depart from minimum sentences. *Id.* Here, they have no choice but to hear the case. *Id.*
129. *See id*.
130. *See id.*
131. *See* Golick Interview, *supra* note 20.

majority of jobs require at least some education. In 2010, the percentage of arrestees booked with no degree of education was 35.2%.[132] Further, of all arrestees, only 31.9% had full time employment.[133] While incarcerated, people have the ability to earn a General Educational Development diploma (GED).[134] One benefit of earning a GED is that recipients are eligible for a credit or voucher which can be put towards eligible post-secondary education.[135] The voucher is worth approximately five hundred dollars.[136] The Act permits an individual, who earned a HOPE GED voucher while incarcerated, to use it up to two years after release.[137] Allowing the voucher to be used up to two years after release will allow former inmates time to get back on track and pursue an education. Those who successfully pursue an education have a greater chance of getting jobs and changing the direction of their lives.[138] When given a chance, some people will take advantage of the opportunity and become productive citizens.[139]

Reintegration into Society: Restoration of a Driver's License

The Act will "keep communities safer by breaking the cycle of recidivism" by making limited driving permits available to defendants in a mental or drug court program.[140] Therefore, as long as the defendant meets the program's requirements, they will be able to get to school or work.[141] There are some violent people that need

132. OFFICE OF NAT'L DRUG REVIEW POLICY, EXECUTIVE OFFICE OF THE PRESIDENT, ADAM II 2010 ANNUAL REPORT: ARRESTEE DRUG ABUSE MONITORING PROGRAM II 113 (2010) [hereinafter ADAM II].

133. Or they were on active military status. *Id.* at 132. Those that were: working part-time/seasonal, 17.2%; unemployed but looking for work, 34%; unemployed but not looking for work, 6.3%; in school only, 2%; retired, 0.4%; disabled for work or on leave, 7.4%; other, 0.8%. *Id.*

134. Todd South, *Georgia: Prisoners' GED Success Tops State, Nation*, TIMES FREE PRESS, Sept. 21, 2008, *available at* http://www.timesfreepress.com/news/2008/sep/21/georgia-prisoners-ged-success-tops-state-nation.

135. *It Looks Like a Diploma but Works Like a Passport*, TECHNICAL COLL. SYS. OF GA., https://tcsg.edu/ged.php (last visited June 30, 2013).

136. *Id.*

137. O.C.G.A. § 20-3-519.6 (Supp. 2013).

138. TECHNICAL COLL. SYS. OF GA., *supra* note 135.

139. *See* Golick Interview, *supra* note 20.

140. Agan, *supra* note 91.

141. *Id.*

to be locked up, but it is costly.[142] The criminal justice system needs to also look at those who are not inherently violent people and give them a shot at getting reintegrated into society.[143] Because public transportation or relying on the help of others simply are not options for some people, allowing a judge to restore a defendant's driver's license will help to increase the possibility that the person will be able to get to school or work. By making it easier for people to get to school or work, it is more likely that those who truly want to make a change will be able to. Drug court programs are very tough to get through, "but once [someone] get[s] through that, they turn the corner on the possibility of leading a productive life."[144] "Some [people] have the capability and some don't, but we won't know until we take a chance."[145]

Justice for Children

For years, the courts have strived to apply proper weight to hearsay.[146] Under the child hearsay statute, if a child was the victim of a crime and made statements to a third party, those statements could be admissible in court as an exception to the hearsay statute.[147] The General Assembly amended the statute to include the statements of a non-victim child, who witnessed physical or sexual abuse of another child.[148] In essence, the violation to the non-victim child was experiencing the crime by seeing it.[149] In 1998, however, the Georgia Supreme Court in *Woodard v. State* held that the statements of a child who witnessed sexual or physical abuse were inadmissible under the child hearsay exception.[150] In 2012, the Georgia Supreme

142. *See* Golick Interview, *supra* note 20.
143. *See* Bethel Interview, *supra* note 76.
144. Golick Interview, *supra* note 20.
145. *Id.*
146. *See* Bethel Interview, *supra* note 76. "The court has been trying to decide when hearsay should and should not be admitted. This 'refining' of hearsay admission has been 'honing for centuries.'" *Id.*
147. House Committee Video, *supra* note 32, at 4 min., 14 sec. (remarks by David McDade, District Attorney for Douglas County). This is subject to procedural safeguards. *Id.*
148. *Id.*
149. *Id.*
150. Woodard v. State, 269 Ga. 317, 322, 496 S.E.2d 896, 901 (1998). The Court held that "the Statute creates a disparity in the substantive evidence admissible against criminal defendants charged with identical acts of molestation, based on nothing more than the age of the hearsay declarant." *Id.* The Court reasoned that "[i]f the declarant is under the age of fourteen, more evidence will be admissible

Court in *Bunn v. State* overruled *Woodard*.[151] Justice Nahmias held that the previous decision was wrong and unconstitutional, because the amended child hearsay statute that allowed out-of-court statements by a child under age fourteen who witnessed acts of sexual abuse upon a child victim did not violate equal protection.[152] The Court reasoned that the state has an interest in "protecting children from witnessing crimes involving 'sexual contact or physical abuse' in the first place, much less from re-living that experience in courtroom testimony . . . . "[153] This permitted the Georgia legislature to include language in the child hearsay statute to allow the testimony of a non-victim child to be admissible as a hearsay exception.[154]

HB 349 created the Georgia Criminal Justice Reform Commission, which "will conduct periodic comprehensive reviews of the juvenile justice system and criminal justice system to help ensure that they are effective and efficient in fulfilling their purposes."[155] Periodic review and changes will be required, but HB 349 is seen by many as a step in the right direction.[156]

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against a defendant than if the declarant is over the age of fourteen. The amendment's distinction based upon a declarant's age creates different classes of identically situated defendants, in violation of the Equal Protection Clause." *Id.* at 322–23, 496 S.E.2d at 901.

151. Bunn v. State, 291 Ga. 183, 188–89, 728 S.E.2d 569, 573 (2012).

152. *Id.* at 192, 728 S.E.2d at 574.

153. *Id.* at 189, 728 S.E.2d at 574. This "is reflected in criminal offenses making it a form of cruelty to children to intentionally or knowingly allow a child under the age of 18 to witness a forcible felony, battery, or family violence battery . . . . " *Id.*

154. House Committee Video, *supra* note 32, at 4 min., 14 sec. (remarks by David McDade, District Attorney for Douglas County).

155. Agan, *supra* note 91.

156. *See* Golick Interview, *supra* note 20.