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Agreements for Probation Services HB 837

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PENAL INSTITUTIONS

Agreements for Probation Services: Amend Article 6 of Chapter 8 of Title 42 of the Official Code of Georgia Annotated, Relating to Agreements for Probation Services, so as to Provide for Legislative Findings and Intent; Provide for the Supervision of Misdemeanor and County and City Ordinance Offenders by County and Municipal Probation Officers and Private Probation Services Providers; Provide for the Revocation, Modification, and Tolling of Sentences Under Certain Circumstances by County and Municipal Courts; Provide for the Conditions of Probation; Provide for the Assessment and Collection of Costs of Probation; Revise Certain Standards for Private Corporations, Private Enterprises, and Private Agencies who Enter into Written Contracts for Probation Services; Change Provisions Relating to Confidentiality of Records; Revise Certain Standards for Counties, Municipalities, or Consolidated Governments who Enter into Written Agreements to Provide Probation Services; Provide for Related Matters; Provide for an Effective Date; Repeal Conflicting Laws; and for Other Purposes.

CODE SECTIONS:	O.C.G.A. §§ 42-8-100 (amended), -100.1 (new), -103, -106, -108 (amended)
BILL NUMBER:	HB 837
ACT NUMBER:	N/A
GEORGIA LAWS:	N/A
SUMMARY:	The bill would have authorized private probation companies to contract with county and municipal judges to oversee misdemeanor probationers. Private probation companies would have been able to exercise the full range of powers of a public probation officer to monitor a probationer, including electronic tracking, drug and alcohol testing, and assessing fees for the

expense of supervising the probationer. The Act would have allowed the private probation company to appeal to a judge to toll the probationer's sentence if the probationer failed to comply with any of the terms of the probation, including paying fees.

EFFECTIVE DATE: N/A

History

In 1991, the Georgia General Assembly passed an Act allowing county and municipal court judges to “enter into written contracts with corporations, enterprises, or agencies to provide probation supervision, counseling, [and] collection services.”¹ Georgia is one of at least ten states that allows for private probation services, many of them concentrated in the South.² In 2000, the General Assembly entirely divested the Georgia Department of Corrections of jurisdiction over the supervision of misdemeanants except when the sentence runs concurrently with a felony, transferring misdemeanants to the counties.³

1. 2006 Ga. Laws 743 § 2 (codified at O.C.G.A. § 42-8-100). In 2006, the Georgia General Assembly amended the Act to include definitions of private and public probation officers. *Id.* Private probation officer is defined as “a probation officer employed by a private corporation, private enterprise, private agency, or other private entity that provides probation services,” whereas public probation officers “supervise defendants placed on probation by a county or municipal court.” *Id.*

2. Lauren-Brooke Eisen, *Georgia Governor Vetoes Private Probation Bill*, BRENNAN CENTER FOR JUSTICE (May 1, 2014), <http://www.brennancenter.org/blog/georgia-governor-vetoes-private-probation-bill>. See also HUMAN RIGHTS WATCH, PROFITING FROM PROBATION: AMERICA'S “OFFENDER-FUNDED” PROBATION INDUSTRY (2014) [hereinafter Human Rights Watch Report], available at http://www.hrw.org/sites/default/files/reports/us0214_ForUpload_0.pdf (detailing the issues with private probation in Georgia, Mississippi, and Alabama and including notes on Tennessee, Montana, Florida, Michigan, Utah, and Washington).

3. 2000 Ga. Laws § 1, p. 143 (codified at O.C.G.A. § 17-10-3 (f) (2013)). Bobby Whitworth, the former state prisons chief, played a major role in the passage of the legislation. He became the first person ever prosecuted in Georgia under its corruption statute. Beth Warren, *'Untouchable' Is Convicted: Ex-Prison Official Sold Influence*, ATLANTA J.-CONST., Dec. 18, 2003, at A1, available at 2003 WLN 6210358. Whitworth was convicted of accepting \$75,000 from private probation companies to initiate the legislation and spent six months in a Florida federal prison. Carlos Campos, *Ex-Corrections Chief Starts Jail Term in Florida*, ATLANTA J.-CONST., June 14, 2006, at B5, available at 2006 WLN 10157788.

In the following years, this legislation faced a number of legal challenges⁴ and drew heavy media criticism locally⁵ and nationally.⁶ For example, Lisa W. Borden, a partner at Baker, Donelson, Bearman, Caldwell & Berkowitz in Birmingham, said, “[w]ith so many towns economically strapped, there is growing pressure on the courts to bring in money rather than mete out justice.”⁷ Georgia lawyer John B. Long accused private probation companies of being little more than “bill collectors” who have the ability affect someone’s liberty.⁸

In the 2013 Georgia case *Cash v. Sentinel Offender Services*, the plaintiffs argued that the statute was unconstitutional on its face and as applied.⁹ Richmond County Superior Court Judge Daniel Craig held that the statute was not unconstitutional on its face and did not offend due process or equal protection.¹⁰ However, Judge Craig ruled

4. *Sentinel Offender Serv.s v. Harrelson*, 286 Ga. 665, 669, 690 S.E.2d 831, 834 (2010) (refusing to rule on the constitutionality of O.C.G.A. § 42-8-100 because the Superior Court had not “distinctly ruled on the point.”); *Ward v. City of Cairo*, 276 Ga. 391, 583 S.E.2d 821 (2003) (holding O.C.G.A. §§ 42-8-100(f)(1) and (g)(1) do not violate the separate powers doctrine of the Georgia constitution); *McGee v. Sentinel Offender Serv.s*, No. CV 110-054, 2010 WL 4929951 (S.D. Ga. Nov. 30, 2010) (holding that the court lacked subject matter jurisdiction to consider the constitutionality of O.C.G.A. § 42-8-100(f)).

5. Sandy Hodson, *Sentinel Offender Services Must Repay People Held on Probation Illegally*, AUGUSTA CHRONICLE (Sept. 16, 2013, 9:23 PM), <http://chronicle.augusta.com/news/crime-courts/2013-09-16/private-probation-company-dealt-costly-blows-judges-ruling>; Sandy Hodson, *Sentinel Offender Services Cuts Ties with Richmond, Columbia County Superior Court*, AUGUSTA CHRONICLE (Dec. 20, 2012), <http://chronicle.augusta.com/news/crime-courts/2012-12-20/sentinel-offender-services-cuts-ties-richmond-columbia-county-superior>; Video Recording of House Floor Debate, Feb. 7, 2014 at 1 hr., 41 min., 5 sec. (remarks by Rep. Chuck Sims (R-169th)) [hereinafter House Floor Debate], <http://www.gpb.org/lawmakers/2014/day-19> (“[I]s it not true that once they revoke the probation and put somebody in jail . . . you owe the private probation company other monies even though you’re sitting in jail? That’s absolutely unfounded. This thing needs to go back to committee and fix that, because you’ve got it open record.”).

6. HUMAN RIGHTS WATCH REPORT, *supra* note 2; Ethan Bronner, *Poor Land in Jail as Companies Add Huge Fees for Probation*, NY TIMES, July 3, 2012, at A1, available at 2012 WLNR 13842225; Celia Perry, *Probation for Profit: In Georgia’s Outsourced Justice System, a Traffic Ticket Can Land You Deep in the Hole*, MOTHER JONES, July 1, 2008, available at 2008 WLNR 25603164.

7. Ethan Bronner, *Poor Land in Jail as Companies Add Huge Fees for Probation*, NY Times, July 3, 2012, at A1, available at 2012 WLNR 13842225.

8. *Id.*

9. *Cash v. Sentinel Offender Serv.s*, No. 2013-RCHM-001, slip op. at 10 (Richmond Cty. Super. Ct. Sept. 16, 2013) (Order permanently enjoining private probation services from requiring any probationer to submit to any conditions of probation which are reserved to the Department of Corrections) (“[P]rivatization of probation services systematically denies due process of law and equal protection to probationers, and systematically provides for imprisonment for debt.”).

10. *Id.* at 11. Imprisonment for debt is different from imprisonment for criminal conduct, and the statutory authority granted to private probation services is “limited, clear and unambiguous.” *Id.* However, Judge Craig noted that Sentinel’s practice of securing warrants then failing to pursue timely

that the statutory framework prohibited private probation services from tolling any sentence and excludes private probation services from using drug and alcohol screening, mental health screening, and electronic surveillance.¹¹

As a result of Judge Craig's ruling, private probation companies in Richmond County argue they can no longer adequately enforce orders of the court against misdemeanor probationers.¹² Although the ruling does not directly restrain courts outside of Richmond County, the injunction significantly impacts state court judges, who routinely preside over misdemeanor cases.¹³ According to Representative Mark Hamilton (R-24th), the ruling allows misdemeanor probationers to abscond or hide until the end of their probation without complying with the terms of probation.¹⁴ To ensure private probation companies have the statutory authority to exercise the powers they have been since 2000, Representative Hamilton introduced House Bill (HB) 837 during the 2014 General Assembly session.¹⁵

Bill Tracking of HB 837

Consideration and Passage by the House

Representatives Hamilton, Alan Powell (R-32nd), Rick Golick (R-40th), Howard Maxwell (R-17th), Jay Powell (R-171st), and Mandi Ballinger (R-23rd) sponsored HB 837.¹⁶ The House read the bill for

arrest was not consistent with the concept of due process. *Id.* at 11–12.

11. *Id.* at 12.

12. House Floor Debate, *supra* note 5, at 1 hr., 21 min., 1 sec. (remarks by Rep. Mark Hamilton (R-24th)).

13. Brief for Council of State Court Judges as Amicus Curiae in Support of Cross-Appellee, Hucks v. Sentinel Offender Serv.s, No. 2012-RCCV-578 (Richmond Cty. Super. Ct. 2014) (No. S14X1270), 2014 WL 3742054 (“The Council files this amicus brief because the Order undermines and impedes the ability of its members to make and enforce probation orders in misdemeanor cases in accordance with legislative dictate and on fair and reasonable terms.”).

14. House Floor Debate, *supra* note 5, at 1 hr., 20 min., 12 sec. “[Y]ou vote no on this bill, what you are saying is that we agree that those 321,000 convicted or pled guilty misdemeanor probationers around the state should not have to go and report and follow the order that the court has duly adjudicated towards them, and it’s ok to go to a different state; to go to your mother’s cellar; to go wherever it is so that the probation officer cannot find you, but yet your probation sentence continues.” *Id.* at 1 hr., 32 min., 42 sec.

15. HB 837, as introduced, 2013 Ga. Gen. Assem.; *See also infra* text accompanying notes 94–98.

16. State of Georgia Final Composite Sheet, HB 837, May 1, 2014.

the first time January 27, 2014.¹⁷ The House read the bill for the second time January 28, 2014.¹⁸ Speaker of the House David Ralston (R-7th) assigned it to the House Committee for Public Safety and Homeland Security, which initially favorably reported the bill by Committee substitute on February 4, 2014.¹⁹

The Committee substitute differed only slightly from the bill as originally introduced. There were two substantive changes. First, the Committee added a requirement that the termination of a contract for private probation services must be initiated by the chief judge of the court that entered into the contract and would be subject to approval by the governing local authority.²⁰ Second, the Committee authorized both private and public probation officers to participate in and conduct pretrial diversion programs as directed by the prosecuting agency.²¹

The House read the committee substitute February 7, 2014, and postponed the bill until February 10.²² On February 10, 2014, the House passed four amendments to the committee substitute. The first amendment, which passed 84 to 81,²³ prevented fees charged for private probation from exceeding the rates charged to individuals on felony probation.²⁴ The second amendment passed 98 to 69²⁵ and changed the standard for tolling a sentence from “shall” to “may” to provide courts with greater discretion.²⁶ The third amendment, which passed without objection, requires probation officers to state in an

17. *Id.*

18. *Id.*

19. *Id.*

20. *Compare* HB 837 (LC 28 6949), § 2, p. 4, ln. 108–18, 2014 Ga. Gen. Assem., *with* HB 837 (LC 41 0173S), § 2, p. 4, ln. 109–30, 2014 Ga. Gen. Assem.

21. *Compare* HB 837 (LC 28 6949), § 3, p. 7, ln. 213–15, 2014 Ga. Gen. Assem., *with* HB 837 (LC 41 0173S), § 3, p. 7, ln. 231–35, 2014 Ga. Gen. Assem.

22. State of Georgia Final Composite Status Sheet, HB 837, May 1, 2014.

23. Georgia House of Representatives Voting Record, HB 837 (Feb. 10, 2014).

24. Video Recording of House Proceedings, Feb. 10, 2014 at 27 min., 4 sec. (remarks by Rep. Stacey Abrams (D-89th)) [hereinafter House Video], <http://www.gpb.org/lawmakers/2014/day-20>.

25. Georgia House of Representatives Voting Record, HB 837 (Feb. 10, 2014).

26. House Video, *supra* note 24, at 54 min., 0 sec. (remarks by Rep. Stacey Abrams (D-89th)) (“Under the current language in the bill, the language says that the running of a probation sentence shall be tolled. This simply gives discretion back to judges to say they may toll or they may not. This eliminates automatic tolling, which means that if you fail to pay a fee, if you fail to meet some parameter, it gives the judge discretion so that we no longer have folks who find themselves in prison simply because the tolling order was mandatory as opposed to permissive based on the judge, and I would ask your favorable consideration.”).

evidentiary affidavit all efforts made to contact a probationer who fails to report.²⁷ The fourth amendment, passed 97 to 72,²⁸ added a requirement for courts to issue a rule nisi for a hearing before tolling a sentence.²⁹ The House tabled the bill on February 10, 2014.³⁰ The House then passed the amended committee substitute on February 21, 2014 by a vote of 152 to 9.³¹

Consideration and Passage by the Senate

Senator Hunter Hill (R-6th) sponsored HB 837 in the Senate.³² The Senate's first reading was February 24, 2014, and Lieutenant Governor Casey Cagle (R) assigned to the Senate Public Safety Committee.³³ On March 4, 2014, the bill was withdrawn from the Public Safety Committee and recommitted to the Judiciary Non-Civil Committee.³⁴ The Judiciary Non-Civil Committee favorably reported the bill by a committee substitute on March 13, 2014.³⁵

The committee substitute deleted language in the section detailing the General Assembly's findings, which stated that the bill was a response to recent judicial decisions.³⁶ There were also two substantive changes. First, the Committee added language explicitly authorizing the imposition of a supervision fee for public and private probation.³⁷ Second, the Committee granted courts discretion in cases of hardship and other circumstances to waive supervision fees.³⁸

27. *See id.* at 56 min., 0 sec. (Rep. Stacey Abrams (D-89th)).

28. Georgia House of Representatives Voting Record, HB 837 (Feb. 10, 2014).

29. House Video, *supra* note 24, at 57 min., 9 sec. (remarks by Rep. Stacey Abrams (D-89th)).

30. State of Georgia Final Composite Status Sheet, HB 837, May 1, 2014.

31. Georgia House of Representatives Voting Record, HB 837 (Feb. 21, 2014).

32. State of Georgia Final Composite Status Sheet, HB 837, May 1, 2014.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Compare* HB 837, as passed House, § 2, p. 3, ln. 30–35, 2014 Ga. Gen. Assem., *with* HB 837 (LC 29 6048S), § 2, p. 3, ln. 30–35, 2014 Ga. Gen. Assem.

37. *Compare* HB 837, as passed House, § 2, p. 3, ln. 66–75, 2014 Ga. Gen. Assem., *with* HB 837 (LC 29 6048S), § 2, p. 3, ln. 67–83, 2014 Ga. Gen. Assem.

38. *Compare* HB 837, as passed House, § 2, p. 3, ln. 66–75, 2014 Ga. Gen. Assem., *with* HB 837 (LC 29 6048S), § 2, p. 3, ln. 67–83, 2014 Ga. Gen. Assem. *See also* Video Recording of Senate Proceedings, Mar. 18, 2014 at 27 min., 25 sec. (remarks by Sen. Jesse Stone (R-23rd)) [hereinafter Senate Video], <http://www.gpb.org/lawmakers/2014/day-39> (“What we’ve done here is we’ve reinforced what’s already the law. The U.S. Supreme Court in the case involving Georgia stated clearly that states need to consider financial circumstances for probationers before their probations could be revoked. We have directed that in this version of the bill so that courts know going forward that they

The Senate read the bill a second time on March 13, 2014.³⁹ The Senate read the bill a third time on March 18, 2014, and passed the bill by a vote of 35 to 17.⁴⁰ The House agreed to the Senate substitute on March 20, 2014, by a vote of 105 to 62.⁴¹ The House sent HB 837 to Governor Nathan Deal on March 27, 2014.⁴²

Veto

Governor Nathan Deal vetoed the bill on April 29, 2014.⁴³ In his veto statement, Governor Deal explained that he was concerned that the bill does not provide enough transparency over private probation companies and also that the bill seeks to have a preemptive impact on the appeal of *Cash v. Sentinel Offender Services*, which is pending before the Supreme Court of Georgia.⁴⁴

The Bill

The bill would have amended Title 42 of the Official Code of Georgia Annotated, relating to agreements for probation services, to provide for supervision of misdemeanor offenders by county and municipal probation officers and private probation services, to provide for the revocation, modification, and tolling of sentences under certain circumstances by county and municipal courts, to provide for the assessment and collection of costs of probation, and to change provisions relating to confidentiality of records.⁴⁵

In Section One, the General Assembly made four legislative findings.⁴⁶ First, it found that legislation authorizing private probation services was enacted to provide cost savings for the state.⁴⁷

have to take that into account.”).

39. State of Georgia Final Composite Status Sheet, HB 837, May 1, 2014.

40. Georgia Senate Voting Record, HB 837 (Mar. 18, 2014).

41. Georgia House of Representatives Voting Record, HB 837 (Mar. 20, 2014).

42. State of Georgia Final Composite Status Sheet, HB 837, May 1, 2014.

43. Press Release, Ga. Office of the Governor, Deal Issues Veto Statements (Apr. 29, 2014), <http://gov.georgia.gov/press-releases/2014-04-29/deal-issues-veto-statements>.

44. *Id.* For a full discussion of Governor Deal’s veto, see *infra* notes 109–129 and accompanying text.

45. HB 837 (SCSFA/2) p. 1, ln. 1–12, 2014 Ga. Gen Assem.

46. *Id.* § 1, p. 1–2, ln. 15–35.

47. *Id.*

Second, it found that legislation was intended to authorize judges to use county, municipal, and private probation service providers for non-felony offenders in the same manner that judges use state probation services to supervise felony offenders.⁴⁸ Third, the General Assembly found it had no intent to restrict powers of judges to impose, suspend, toll, revoke, or otherwise manage probation when using county, municipal, or private probation service providers.⁴⁹ Fourth, it found that the General Assembly intended county, municipal, and private probation officers to have the same rights, authority, and protections as state probation supervisors.⁵⁰

Section Two of the bill would have amended Code section 42-8-100 relating to jurisdiction of probation matters in ordinance violation cases, costs, and agreements between chief judges of county courts or municipal courts and private probation entities services.⁵¹ The Section that authorizes judges to place defendants under the supervision of a probation officer would have been amended to add “or private probation officer.”⁵² The bill would have added a new subsection authorizing courts to impose a supervision fee and granting discretion to waive the fee in cases of “undue hardship, inability to pay, or any other extenuating factors”⁵³

Code section 42-8-100(h) would have been revised to add procedures for terminating a contract for private probation services.⁵⁴ The amended Section would have required that termination be initiated by the chief judge of the court that entered the contract and be subject to approval by the local governing authority.⁵⁵

In Section Three, the bill would have added a new Code section, 42-8-100.1.⁵⁶ This Section would have governed the terms and conditions of probation sentences.⁵⁷ In the first part, 42-8-100.1(a) would have granted discretion “as the court deems appropriate” to

48. *Id.*

49. *Id.*

50. *Id.*

51. HB 837 (SCSFA/2), § 2, p. 2, ln. 37–41, 2014 Ga. Gen. Assem.

52. *Id.* § 2, p. 2–3, ln. 61–62.

53. *Id.* § 2, p. 3, ln. 67–79.

54. *Id.* § 2, p. 4, ln. 133–144.

55. *Id.*

56. *Id.* § 3, p. 5, ln. 153–55.

57. HB 837 (SCSFA/2), § 3, p. 5, ln. 156–159, 2014 Ga. Gen. Assem.

impose certain requirements on probationers.⁵⁸ Some of the permissible terms and conditions include requirements: to avoid certain behavior, to report to a probation officer, to permit home visits, to remain in a specified location, to make restitution for damages, to submit to and pay for evaluations like drug or alcohol screenings, to wear and pay for the cost to a tracking device.⁵⁹

In Part Two, 42-8-100.1(b) would have required a probationer to keep his probation officer informed of his whereabouts and would govern the process to toll sentences for failure to report.⁶⁰ It would have provided that a probation sentence “may be tolled” upon failure to report to a probation officer.⁶¹ Failure to report would have required evidence in the form of an affidavit explaining the failure to report and detailing efforts made by the probation officer to contact the probationer.⁶² Upon receiving this affidavit, a court would have been given discretion to enter an order tolling the probation and to enter a rule nisi requiring the probationer to appear in court for a hearing on whether the probation should be continued or lifted.⁶³ Failure to appear would have allowed the court to continue tolling.⁶⁴ The effective date of tolling would have run from the date the court entered a tolling order and end when the probationer personally reports to his probation officer or is taken into custody.⁶⁵ Any tolled period would not have been credited to time served.⁶⁶ This part would have also provided that any money owed as a condition of probation would be due at the time of arrest.⁶⁷ But it would have also provided that if probation was revoked the monies owed would be negated by imprisonment.⁶⁸ A court would also have had power to waive or reduce amounts owed “after considering all circumstances.”⁶⁹

58. *Id.*

59. *Id.* § 3, p. 7, ln. 160–212.

60. *Id.* § 3, p. 7, ln. 213.

61. *Id.* § 3, p. 7, ln. 219.

62. *Id.* § 3, p. 7, ln. 222–24.

63. HB 837 (SCSFA/2), § 3, p. 7, ln. 225–35, 2014 Ga. Gen Assem.

64. *Id.* § 3, p. 7, ln. 231–232.

65. *Id.* § 3, p. 7, ln. 236.

66. *Id.* § 3, p. 7, ln. 240.

67. *Id.* § 3, p. 7, ln. 242–43.

68. *Id.* § 3, p. 8, ln. 244–45.

69. HB 837 (SCSFA/2), § 3, p. 8, ln. 248–51, 2014 Ga. Gen Assem.

New Code section 42-8-100.1 would have included two other provisions. First, it would have provided for courts to impose additional special conditions of probation unless prohibited by law.⁷⁰ Second, probation officers and private probation officers would have been authorized to participate in and conduct pretrial diversion programs as directed by prosecuting attorneys.⁷¹

Section Four of the bill would have amended Code section 42-8-103, relating to records of reports to judges by private probation entities.⁷² It would have added a new provision that a court may, upon request, demand a report from its private probation services contractor detailing the amount of fees collected and the nature of such fees.⁷³ However, language in the bill would have shielded information in these reports from disclosure under Georgia's Open Records Act.⁷⁴

Section Five would have amended Code section 42-8-106, relating to confidentiality of records.⁷⁵ The bill would have added a new subsection granting individual probationers under the supervision of a private probation entity certain rights to inspect their personal records.⁷⁶ Upon written request, probationers would have been permitted to inspect and copy their own files, including correspondence, payment records, and reporting history.⁷⁷ Supervision case notes would not have been subject to inspection and copying.⁷⁸ The first request for copies in a calendar year would have been required with no charge to the individual.⁷⁹ Reasonable charges would have been permitted for subsequent requests.⁸⁰ Individuals would have been limited to no more than one request per calendar quarter.⁸¹

70. *Id.* § 3, p. 8, ln. 252–54.

71. *Id.* § 3, p. 8, ln. 255–56.

72. *Id.* § 4, p. 8, ln. 258–59.

73. *Id.* § 4, p. 8, ln. 268–77.

74. *Id.* § 4, p. 8, ln. 275–77.

75. HB 837 (SCSFA/2), § 5, p. 9, ln. 279–80, 2014 Ga. Gen. Assem.

76. *Id.* § 5, p. 9, ln. 281–90.

77. *Id.* § 5, p. 9, ln. 281–85.

78. *Id.* § 5, p. 9, ln. 285–86.

79. *Id.* § 5, p. 9, ln. 286–88.

80. *Id.* § 5, p. 9, ln. 288–89.

81. HB 837 (SCSFA/2), § 5, p. 9, ln. 289–90.

Section Six would have amended Code section 42-8-108, relating to contractors for probation services.⁸² Jail officers would have been added to the list of individuals qualified to supervise probation officers.⁸³ The bill would have made this change by amending Code section 42-8-108(a)(3) relating to private probation entities and Code section 42-8-103(b)(3) relating to county and municipal probation entities.⁸⁴

Analysis

Policy Debate

Supporters of HB 837 included “private probation providers, the council that oversees them, and the courts that use them.”⁸⁵ Critics included various human rights groups such as the American Civil Liberties Union (ACLU) and the Southern Center for Human Rights.⁸⁶ These opposing sides debated many aspects of the bill. For some, HB 837 was a referendum for the privatization of criminal justice.⁸⁷ But the debate also addressed issues that were more specific to Georgia’s system like tolling, the fairness of the fees charged, and how much accountability and transparency should be required for private probation companies.⁸⁸

82. *Id.* § 6, p. 9, ln. 292–294.

83. *Id.* § 6, p. 9, ln. 295–304.

84. *Id.*

85. Jesse C. Stone, *Probation Bill Clarified*, AUGUSTA CHRON. (Apr. 2, 2014), <http://chronicle.augusta.com/opinion/letters/2014-04-02/probation-bill-clarified>; Mark Contestabile, *Benefits of Private Probation*, ATLANTA J.-CONST. (May 8, 2014), <http://www.myajc.com/news/news/opinion/benefits-of-private-probation/nfq8P/>.

86. *Legislative Agenda*, AM. CIVIL LIBERTIES UNION OF GA., <http://www.acluga.org/get-involved/legislative-work/legislative-agenda/> (last visited Jun. 27, 2014); *SCHR Welcomes Governor Deal’s Veto of Private Probation Bill, Hb 837*, S. CTR. FOR HUMAN RIGHTS (Apr. 29, 2014), https://www.schr.org/resources/schr_welcomes_governor_deal_s_veto_of_private_probation_bill_hb_837.

87. *See, e.g.*, Senate Video, *supra* note 38 at 18 min., 12 sec. (remarks by Sen. Vincent Fort (D-39th)) (“Truth in advertising, I’m against privatization almost for everything. But to be honest with you, at the end of the day we should be most concerned about the services that are most important, and privatizing them; and public safety, protecting our citizens, is one of those things.”).

88. *See, e.g.*, Contestabile, *supra* note 85; Stacey Abrams, *Broken System, Oppressive Monitors*, ATLANTA J.-CONST. (May 8, 2014), <http://www.myajc.com/news/news/opinion/broken-system-oppressive-monitors/nfq6Q/>.

Privatization of government services is a divisive issue, and the debate is especially contentious when it comes to privatization within the criminal justice system.⁸⁹ HB 837's supporters favored privatized probation as a way to increase cost-efficiency.⁹⁰ The bill's critics opposed privatizing the administration of justice, arguing that the system creates misguided incentives because private companies are motivated by profit rather than dispensing justice.⁹¹ They believe private probation companies have an incentive to keep individuals on probation for as long as possible, creating what is almost a modern-day debtors' prison.⁹²

A major issue for critics was the fairness of the fees private probation companies charged to probationers. As Representative Chuck Sims (R-169th) explained, "[i]t's about money, folks. It is about M-O-N-E-Y, dollar sign, dollar sign."⁹³ Joining Representative Sims, other critics charged that the bill was a "needless gift"⁹⁴ to the private probation industry and that it would give "freebies to the industry that are really horrible and unjustifiable."⁹⁵ Critics claim that the supervision fees charged by private probation companies are akin to usury.⁹⁶ Representative Sims and others argued that probationers

89. See generally Lauren Gambino, *Georgia Bill Would Protect Controversial For-Profit Probation Industry*, THE GUARDIAN (Apr. 16, 2014), <http://www.theguardian.com/money/2014/apr/16/georgia-probation-private-contractors-court-protection>.

90. See House Floor Debate, *supra* note 5, at 1 hr., 23 min., 28 sec. (remarks by Rep. Mark Hamilton (R-24th)) ("Let me give you some numbers. In 2011, which is 3 years ago, using 3 years ago dollars, the Department of Corrections estimated their costs, and we estimate that it would cost us right now, if we took over probation, it would cost us about 156 million dollars, and that's using 2011 dollars. This present past year, 2 years later, the entire misdemeanor probation world collected \$119 million, and if you take out the \$12 million in fees that are associated with that that they give back to the victims, that represents a minimum savings of \$50 million simply by not doing it in the Department of Corrections, but doing it in the local communities whether it be private or public.")

91. See, e.g., Senate Video, *supra* note 38, at 18 min., 35 sec. ("What is happening in private probation isn't about protecting anyone, isn't about holding anyone accountable. It's about extracting as much as you can from folk you got in a jam."); Editorial, *Involuntary Servitude*, AUGUSTA CHRON. (Feb. 10, 2014), <http://chronicle.augusta.com/opinion/editorials/2014-02-10/involuntary-servitude> ("This page has long been in favor of privatization in appropriate circumstances. Many government services could be delivered less expensively and more effectively by the private sector. However, the privatization of probation services, in its current form, resembles predatory lending at best and criminal extortion at worst.")

92. Abrams, *supra* note 88.

93. House Video, *supra* note 24, at 38 min., 25 sec. (remarks by Rep. Chuck Sims (R-169th)).

94. Editorial, *A Trap for Probationers*, AUGUSTA CHRON. (Apr. 22, 2014), <http://chronicle.augusta.com/opinion/editorials/2014-04-22/trap-probationers>.

95. Gambino, *supra* note 89.

96. S. CTR. FOR HUMAN RIGHTS, *supra* note 86.

are often unable to pay court-ordered fines because in many cases the money that they pay goes first to covering the supervision fees charged by private probation companies.⁹⁷ Supporters pointed to provisions in the bill that would give courts discretion to waive or lower fees in cases of hardship.⁹⁸ But critics countered that judges already have that power and often leave that determination to private probation officers, who have a direct conflict of interest.⁹⁹ Critics also argued that fees for misdemeanor probation should not exceed those charged for felony probation.¹⁰⁰ The bill's supporters countered that felony probation has lower fees because the service is subsidized by the state.¹⁰¹

For supporters, the most important issue was tolling.¹⁰² Supporters argued that the bill's purpose was to protect the ability of a court to toll a probationer's sentence.¹⁰³ They argued that tolling is essential to prevent probationers from absconding or simply waiting out sentences without complying with the conditions of their probation orders.¹⁰⁴ Senator Hill said that "[r]emoving tolling would make misdemeanor probation unenforceable."¹⁰⁵ Critics countered that it is unfair to toll a sentence when a probationer is jailed for inability to pay.¹⁰⁶

97. House Video, *supra* note 24, at 38 min., 45 sec. (remarks by Rep. Chuck Sims (R-169th)) ("But what private probation does is they take the first part, and they only pay the fine just a little bit. So at the end, these folks are working and working and working, trying to pay off the fine and restitution when they should be paying that off first and then private probation gets what's left over. But that's not the way it works. And it's almost, as Mr. Harbin put on your desk, indentured servitude.").

98. See Senate Video, *supra* note 38, at 25 min., sec. (remarks by Sen. Jesse Stone (R-23rd)).

99. Gambino, *supra* note 89.

100. *Id.* ("The cap would have been set at \$23, which is what the state charges offenders for supervising felony probation sentences. Georgia's for-profit probation firms charge a much higher amount, between \$39 and \$44, for monthly supervision for misdemeanor cases, according to the Southern Center for Human Rights.").

101. House Video, *supra* note 24, at 29 min., 50 sec. (remarks by Rep. Mark Hamilton (R-24th)) ("What I have come to understand is that felony probation is subsidized by taxpayers. The misdemeanor probations are not. They're paid for by the probationers. So, in order to keep from shutting down private probation the government is going to have to come up with somewhere between 75 and 150 million dollars to make up that difference. That's what we estimate.").

102. See Senate Video, *supra* note 38, at 7 min., sec. (remarks by Sen. Hunter Hill (R-6th)) ("At the heart of HB 837 is the issue of tolling.").

103. Stone, *supra* note 85.

104. *Id.*

105. Senate Video, *supra* note 38, at 7 min. (remarks by Sen. Hunter Hill (R-6th)).

106. House Video, *supra* note 24, at 39 min., 35 sec. (remarks by Rep. Chuck Sims (R-169th)) ("That means that they're going to keep charging folks that can't pay for this, and they can't pay it back so they end up in prison, so we toll it. While they're in jail, we toll it, so when they get out of jail, they still owe

The two sides also clashed over accountability and transparency. Code section 42-8-103 currently requires private probation companies to make quarterly reports to government authorities summarizing the total number of probationers supervised, the total fees collected, and other information.¹⁰⁷ These reports are not shielded from disclosure under Georgia's Open Records Act.¹⁰⁸ HB 837 would have allowed government authorities to demand additional information from private probation companies, a measure which supporters argued would increase accountability.¹⁰⁹ But critics objected to language in the bill shielding this additional information from disclosure under Georgia's Sunshine Laws.¹¹⁰

Governor Nathan Deal's Veto

The bill was one of ten vetoed by Governor Deal, and, on the same day as the veto, he issued a brief press release explaining his decision.¹¹¹ Deal cited two justifications for his veto: transparency and pending Supreme Court cases.¹¹²

First, Deal said he favors greater transparency in government, and he was concerned that the bill exempted "certain key information about private probation services from the Georgia Open Records Act."¹¹³ The amendment to Code section 42-8-103 would have shielded any information about reports on fees that a court demanded from private probation companies.¹¹⁴

it. Then they pick them up again because they didn't pay it. They go back and back and back and back. And we're still putting them in jail. And it's crazy. Why do they owe money if they're in jail?").

107. O.C.G.A. § 42-8-103(a) (2014).

108. See O.C.G.A. § 42-8-103(b) (2014). The Georgia Open Records Act provides the public with broad access to view, inspect, and copy public records. See O.C.G.A. § 50-18-70 (2013).

109. See Stone, *supra* note 85 ("The Senate did mandate disclosures not previously required . . .").

110. John Gogick, *HB 837—A Measure on Private Probation Companies*, AUGUSTA CHRON. (Mar. 21, 2014), <http://chronicle.augusta.com/news/metro/2014-03-21/john-gogick-hb-837-measure-private-probation-companies> ("Requiring those reports and accountability is a positive step. But then the Legislature tosses out the accountability in the next sentence, hiding the reports being made for your government officials and the information contained within from you. *Information reported pursuant to this paragraph shall not be subject to disclosure.* Sunshine on the actions of these organizations would be in the public interest (and make me happy). But the song can't remain the same, as the chords of *Stormy Weather* take over." (emphasis in original)).

111. Press Release, Ga. Office of the Governor, *supra* note 43.

112. *Id.*

113. *Id.*

114. See discussion *supra* The Bill.

Second, the Georgia Supreme Court has accepted an appeal that could impact the role of private probation services in Georgia.¹¹⁵ On May 7, 2013, the Supreme Court combined and docketed thirteen cases relating to Sentinel Offender Services.¹¹⁶ The Court heard oral arguments on September 22, 2014.¹¹⁷ Plaintiff Kathleen Hucks has been featured widely in the media as an example of the cases.¹¹⁸ Hucks claims she unknowingly failed to pay all of her probation fees stemming from a 2006 conviction for driving under the influence.¹¹⁹ Without the signature of a judge, Sentinel allegedly reinstated Hucks's probation, and she spent twenty days in jail before Judge Daniel Craig ruled she had been illegally incarcerated.¹²⁰ Hucks argued that Section 42-8-100(g)(1) of the Official Code of Georgia Annotated was facially unconstitutional, in violation of the due process clause of the Georgia constitution, and that Section 42-8-30.1 does not allow tolling of any probation.¹²¹

Speaking to the Atlanta Journal-Constitution, Governor Deal said he was also concerned about “red flags” raised in a report by the Georgia Department of Audits and Accounts Performance Audit Division released in April 2014.¹²² The audit identified a number of problems with private probation stemming “from a lack of clear written policies and procedures to guide the actions of probation officers, as well as inadequate quality assurance reviews of case files by management of some providers.”¹²³ Some of the problems

115. *Id.*

116. Daniel Ross, *Modern-Day Debtors' Prison? Judges Push Back Against the South's Privatization Wave*, TRUTH-OUT (June 7, 2014), <http://truth-out.org/news/item/24204-a-modern-day-debtors-prison-judges-push-back-against-the-souths-privatization-wave>.

117. See *S14A1033-S14X1272 Sentinel Offender Services, LLC v. Glover et al., and Vice Versa*, SUPREME COURT OF GA. (Sept. 22, 2014), <http://www.gasupreme.us/media/oa/092214-S14A1033-S14X1272.php>.

118. *Id.* See also Jordan Melograna, *Threatened with Jail for Being Poor*, HUFFINGTON POST (Aug. 8, 2014), http://www.huffingtonpost.com/jordan-melograna/threatened-with-jail-for-_b_5445973.html; Sandy Hodson, *Augusta Woman Sues Sentinel Offender Services*, AUGUSTA CHRONICLE (Oct. 17, 2012), <http://m.chronicle.augusta.com/news/crime-courts/2012-10-17/augusta-woman-sues-sentinel-offender-services>.

119. Ross, *supra* note 116.

120. *Id.*

121. Brief of Appellant, *Hucks v. Sentinel Offender Serv.s.* (No. S14X1270) 2014 WL 2569436.

122. Greg Bluestein, *Deal to Veto Controversial Private Probation Bill*, ATLANTA J.-CONST. (April 29, 2014), <http://m.ajc.com/news/news/state-regional/deal-to-veto-controversial-private-probation-bill/nkfg/> (“There are a lot of red flags that were raised in the audit,” Deal said. “We need to revisit where the auditors made suggestions . . . I think we can do a better job of that.”).

123. Greg S. Griffin & Leslie McGuire, GEORGIA DEPARTMENT OF AUDITS AND ACCOUNTS,

included probation noncompliance, failure to consider ability to meet financial obligations, and improper extension of probation terms.¹²⁴

Representative Hamilton, the bill's sponsor, and Judge Linda Cowen, President of the Council of State Court Judges, disagreed with Governor Deal's concerns, arguing that critics "paid to fight this bill are falsely contending that it seeks to hide information from the public."¹²⁵ Additionally, they wrote that the bill does not restrict access to information, and "[i]ronically . . . that *additional* transparency provisions were added to HB 837."¹²⁶ Other supporters of the bill, such as Private Probation Association of Georgia, told the Atlanta Journal-Constitution that its companies "provide well-trained, highly regulated probation supervision."¹²⁷ Margie Green, founder of Georgia Corrections Corporation, said that private probation companies have been "demonized."¹²⁸

However, opponents of the bill lauded Governor Deal's veto.¹²⁹ The Southern Center for Human Rights's press release, which said the bill was a step in the wrong direction, noted that Georgia still has the highest rate of people on probation of any state and called

PERFORMANCE AUDIT DIVISION, MISDEMEANOR PROBATION OPERATIONS 12-06 (April 2014), available at http://media.cmgdigital.com/shared/news/documents/2014/09/22/Misdemeanor_Probation_Operations.pdf.

124. *Id.*

125. Sarah Fay Campbell, *Probation, Insurance Bills Vetoed By Governor*, NEWNAN TIMES-HERALD (May 10, 2014), <http://www.times-herald.com/local/20140502-Governor-vetoes-bills>.

126. *Id.* (emphasis in original).

127. Rhonda Cook, *Spotlight Falls on Private Probation Companies over Fees, Supervision*, ATLANTA J.-CONST. (Jan. 18, 2014), http://www.myajc.com/news/news/crime-law/spotlight-falls-on-private-probation-companies-ove/ncrHK/?icid=ajc_internallink_myajcinvitationbox_feb2014_99cdayspass_post-purchase#9448fdaf.3787270.735361.

128. *Id.*

129. Press Release, Southern Center for Human Rights, SCHR Welcomes Governor Deal's Veto of Private Probation Bill, Hb 837 (April 29, 2014), https://www.schr.org/resources/schr_welcomes_governor_deal_s_veto_of_private_probation_bill_hb_837 ("We commend the Governor for his wisdom and integrity in vetoing HB 837, a bill that was a legislative gift to the private probation industry, with no corresponding benefit to the public."); Lauren-Brooke Eisen, *supra* note 2 ("[Private probation] wouldn't be a problem if there weren't concerns that companies' questionable practices primarily focus on collecting fees from probationers instead of helping them complete their supervision terms and successfully reintegrate into society. But that is oftentimes the reality: and that's why Deal's veto was the right call."); Tom Crawford, *The Legislature and Gov. Deal Actually Made Some Good Decisions for Once*, FLAGPOLE (May 7, 2014), <http://flagpole.com/news/capitol-impact/2014/05/07/the-legislature-actually-passed-a-few-good-bills>.

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Georgia's system "not too far removed" from a debtor's prison.¹³⁰ Critics of the bill accused it of being a handout to companies more concerned with making a profit than making the state safer.¹³¹

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130. See Press Release, Southern Center for Human Rights, *supra* note 130; see also Cook, *supra* note 128 ("It's nothing but a collection agency and they are using the jails," said Augusta lawyer Jack Long.').

131. Lauren-Brooke Eisen, *supra* note 2 ("[A] top executive for California-based Sentinel Offender Services testified last year that his company had spent about \$500,000 on lobbyists in Georgia.').

