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## CRIMES AND OFFENSES Offenses Against Public Order and Safety: Prohibit Discharge of a Firearm While Intoxicated; Provide for Instant Background Checks When Purchasing a Handgun; Preempt Local Regulation of Firearms

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## CRIMES AND OFFENSES

*Offenses Against Public Order and Safety:  
Prohibit Discharge of Firearm While Intoxicated;  
Provide for Instant Background Checks When Purchasing  
Handgun; Preempt Local Regulation of Firearms*

CODE SECTIONS: O.C.G.A. §§ 15-9-60 (amended), 16-11-134,<sup>1</sup>  
-170 to -184 (new), 35-3-34, -37 (amended)

BILL NUMBER: SB 58

ACT NUMBER: 13

GEORGIA LAWS: 1995 Ga. Laws 139

SUMMARY: The Act makes unlawful the discharge of a  
firearm while under the influence of alcohol  
or other drugs. The Act also provides for a  
statewide system of instant background  
checks of potential handgun purchasers and  
preempts, with some exceptions, local  
regulation of firearms.

EFFECTIVE DATE: March 22, 1995, O.C.G.A. § 16-11-134;<sup>2</sup>  
July 1, 1995, as applied to local ordinances  
not already in effect; January 1, 1996, as  
applied to pre-existing local ordinances in  
the sale or transfer of handguns.

### *History*

The Act consists of two distinct parts with separate histories. The first part addresses the discharge of firearms while intoxicated. The second part addresses instant background checks of handgun purchasers and preemption of local firearms regulation.

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1. "Pursuant to Code Section 28-9-5, in 1995, this Code Section, originally designated as Code Section 16-11-133, was redesignated as Code Section 16-11-134." O.C.G.A. § 16-11-134 Code Commission Notes (Supp. 1995).

2. The Act became effective upon approval by the Governor.

*Discharge of Firearm While Intoxicated*

Prior to the Act, Georgia had no law to deal adequately with situations in which a person was seriously injured by another person improperly handling a firearm while intoxicated.<sup>3</sup> The problem was particularly acute if the injury resulted in death because the lack of an underlying misdemeanor meant the responsible person could not be charged with involuntary manslaughter.<sup>4</sup> Thus, a person causing serious injury or death under these circumstances could escape criminal punishment.<sup>5</sup>

*Instant Background Checks of Potential Handgun Purchasers and Related Provisions*

On November 30, 1993, Congress passed the controversial<sup>6</sup> "Brady Handgun Violence Prevention Act."<sup>7</sup> The Brady law imposes a nationwide mandatory five-day waiting period before a handgun sale may be completed,<sup>8</sup> but allows states to dispense with the waiting period if they verify that possession of the handgun by the proposed buyer would not be in violation of law.<sup>9</sup> During the 1994 session of the Georgia General Assembly, SB 12, which would have implemented an instant background check system and eliminated waiting periods, failed to pass.<sup>10</sup>

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3. Telephone Interview with Sen. Charles C. "Chuck" Clay, Senate District No. 37 (Apr. 11, 1995) [hereinafter Clay Interview].

4. *Id.* Under Georgia law, felony involuntary manslaughter is the unintentional killing of another person "by the commission of an unlawful act other than a felony." 1968 Ga. Laws 1249 (codified at O.C.G.A. § 16-5-3(a) (1992)). Misdemeanor involuntary manslaughter requires the commission of a "lawful act in an unlawful manner." *Id.*

5. *Id.*

6. *See, e.g.,* David Rogers, *Brady Bill's Passage Illustrates Growth of Political Concern Over Violent Crime*, WALL ST. J., Nov. 26, 1993, at A10; David Rogers, *Stalemate Over Brady Bill in Senate Forces Congress to Delay Adjournment*, WALL ST. J., Nov. 24, 1993, at A2.

7. Pub. L. No. 103-159, 107 Stat. 1536 (1993).

8. 18 U.S.C.A. § 922(s)(1)(A)(ii) (West Supp. 1993).

9. *Id.* § 922(s)(1)(D).

10. David Pendered, *Legislative Report: McKinney Changes Mind, Decides to Seek Re-election*, ATLANTA CONST., Mar. 24, 1994, at H12.

*SB 58**Introduction*

SB 58, a proposal to make the handling of firearms while intoxicated unlawful, was considered noncontroversial upon its introduction.<sup>11</sup> The bill, as introduced, would have made unlawful the carrying, possession, or discharge of a firearm while under the influence of alcohol or drugs.<sup>12</sup> A Senate floor amendment eliminated the “carrying” and “possession” language and limited the offense to the discharge of a firearm while under the influence of alcohol or drugs.<sup>13</sup> This change was made to ensure that a person who consumed alcohol in a home where firearms were properly kept, or a person who consumed alcohol and was then confronted with circumstances that justified possession of a firearm, could not be charged.<sup>14</sup>

This amendment also lowered the blood alcohol level for presumptive intoxication from 0.10 to 0.08 grams.<sup>15</sup> This change was made to parallel a similar proposal to change Georgia’s DUI law, which failed to pass.<sup>16</sup> The bill was approved unanimously in the Senate and sent to the House on February 3.<sup>17</sup> The House Public Safety Committee gave the bill a favorable recommendation on March 9.<sup>18</sup>

Seven days later, the bill was drastically modified by a House floor substitute, which added eleven pages to the original two-page bill, providing for instant background checks of potential handgun buyers and preempting local firearms regulation.<sup>19</sup> This language was borrowed from HB 513, which after passing the House, had stalled in the Senate Judiciary Committee.<sup>20</sup>

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11. Mark Sherman, *How NRA’s Allies Outflanked Foes*, ATLANTA CONST., Mar. 16, 1995, at B4.

12. SB 58, as introduced, 1995 Ga. Gen. Assem.

13. SB 58 (SFA), 1995 Ga. Gen. Assem.

14. Clay Interview, *supra* note 3.

15. Compare SB 58, as introduced, 1995 Ga. Gen. Assem. with SB 58 (SFA), 1995 Ga. Gen. Assem.

16. Clay Interview, *supra* note 3.

17. *Tracking the Gun Legislation*, ATLANTA CONST., Mar. 16, 1995, at B4 [hereinafter *Tracking Legislation*].

18. *Id.*

19. SB 58 (HFS), 1995 Ga. Gen. Assem.

20. Compare HB 513, as introduced, 1995 Ga. Gen. Assem. with SB 58 (HFS), 1995 Ga. Gen. Assem.; Telephone Interview with Rep. Charlie Watts,

Two floor amendments were added to SB 58.<sup>21</sup> The first provided an exception for the defense of life, health, and property to the prohibition on discharging a firearm while under the influence of alcohol or drugs.<sup>22</sup> The second allowed local governments to require heads of households to own guns as an exception to the general preemption of local firearms regulation<sup>23</sup> and was designed to protect the City of Kennesaw's unique ordinance.<sup>24</sup> This amended bill was approved and sent back to the Senate.<sup>25</sup>

In the Senate, another floor substitute was offered that would have removed the life, health, and property defense to discharging a firearm while under the influence of alcohol or drugs and would have provided for a local three-day waiting period, if approved by referendum.<sup>26</sup> All attempts to modify SB 58 failed, and the House version of the bill was approved by a vote of 34 to 21.<sup>27</sup>

House District No. 26 (Apr. 6, 1995) [hereinafter Watts Interview]. Rep. Watts began looking for a "vehicle" for HB 513 after being told by Sen. Mary Margaret Oliver, Chair of the Senate Judiciary Committee, that HB 513 had a "zero percent chance" of passing her committee. *Id.*; see also *Tracking Legislation*, *supra* note 17; *Lawmakers '95* (GPTV broadcast, Mar. 14, 1995) (videotape available in Georgia State University College of Law Library).

21. SB 58 (HFSFA), 1995 Ga. Gen. Assem.

22. Compare SB 58 (HFS), § 1, 1995 Ga. Gen. Assem. with SB 58 (HFSFA), § 1, 1995 Ga. Gen. Assem.

23. Compare SB 58 (HFS), 1995 Ga. Gen. Assem. with SB 58 (HFSFA), 1995 Ga. Gen. Assem.

24. Watts Interview, *supra* note 20. Rep. Watts removed this provision because he believed that the bill had a better chance of passing the Senate without it. *Id.* Rep. Kem W. Shipp, House District No. 38, added it back as a floor amendment. *Id.*; see also *Lawmakers '95* (GPTV broadcast, Mar. 14, 1995) (videotape available in Georgia State University College of Law Library). On May 1, 1982, Kennesaw declared that: "Every head of household must 'own and maintain a firearm and ammunition.'" H.M. Cauley, *Railroad Still a Vivid Part of Town's Heritage*. ATLANTA CONST., Mar. 10, 1991, at H6.

25. *Tracking Legislation*, *supra* note 17.

26. Compare SB 58 (HFSFA), 1995 Ga. Gen. Assem. with SB 58 (SFS), 1995 Ga. Gen. Assem. (offered by Sen. David Scott, Senate District No. 36); see also *Lawmakers '95* (GPTV broadcast, Mar. 14, 1995) (videotape available in Georgia State University College of Law Library).

27. *Tracking Legislation*, *supra* note 17. The National Rifle Association (NRA) was reported to be crucial in securing passage of the bill. See

*Discharge of Firearm While Intoxicated*

The Act makes it unlawful for any person to discharge a firearm while intoxicated by adding Code section 16-11-134.<sup>28</sup> This section provides that any person who discharges a firearm while impaired by alcohol or drugs is “guilty of a misdemeanor of a high and aggravated nature.”<sup>29</sup> A person can be convicted under this section if the alcohol or drug renders the person incapable of safely discharging the firearm,<sup>30</sup> if the person’s blood alcohol level is 0.08 grams or more within three hours after discharging the firearm,<sup>31</sup> or if there is “any amount of marijuana or a controlled substance . . . present in the person’s blood or urine.”<sup>32</sup> The Act provides an exception for an intoxicated person who discharges a firearm in the defense of life, health, and property.<sup>33</sup> This change was made to ensure that a person could not be charged if, after having consumed alcohol, that person had a justifiable reason to use a firearm, such as to stop a forced entry into his or her own home.<sup>34</sup> In the case of a person under the influence of legally prescribed drugs, the Act is not violated unless the drug has rendered the person “incapable of possessing or discharging a firearm safely.”<sup>35</sup>

*Instant Background Checks of Potential Handgun Purchasers and Related Provisions*

The Act creates Code sections 16-11-170 to -184. These sections provide for instant background checks of potential handgun purchasers and preemption of most local firearms regulations.<sup>36</sup>

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Rhonda Cook, *Gun Bill’s Passage Victory for NRA*, ATLANTA CONST., Mar. 15, 1995, at A1. The NRA, while acknowledging its lobbying activities, credits the success of the bill to the efforts of its Georgia members in making their views known to their representatives. Telephone Interview with Randy Kozuch, Director, State and Local Affairs, NRA Institute for Legislative Action (Apr. 7, 1995).

28. O.C.G.A. 16-11-134 (Supp. 1995).

29. *Id.* § 16-11-134(a), (c).

30. *Id.* § 16-11-134(a)(1).

31. *Id.* § 16-11-134(a)(2).

32. *Id.* § 16-11-134(a)(3).

33. *Id.* § 16-11-134(a)(1).

34. Clay Interview, *supra* note 3.

35. O.C.G.A. § 16-11-134(b) (Supp. 1995).

36. *Id.* §§ 16-11-170 to -184.

In addition, article 2 of chapter 3 of title 35 of the Code is amended to bring the Georgia Crime Information Center's operations into compliance with the requirements of the instant background check provision.<sup>37</sup> Code section 15-9-60 is also amended to allow the probate courts to collect fees for determining the eligibility of prospective handgun purchasers.<sup>38</sup>

The background checks do not apply to certain antique,<sup>39</sup> replica,<sup>40</sup> curio, or relic<sup>41</sup> firearms, nor to purchasers who possess valid pistol permits<sup>42</sup> or who are certified peace officers.<sup>43</sup>

### *Instant Background Checks*

The Act expressly provides that it is the intent of the General Assembly to operate consistently with and be construed in conformity with the Federal Brady Handgun Violence Prevention Act.<sup>44</sup> The Act then provides for the implementation of an instant background check system for potential handgun purchasers.<sup>45</sup> Before buying a handgun, the purchaser must complete a consent form with the purchaser's "name, birth date, gender, race, and social security number or other identification number."<sup>46</sup>

The firearms dealer then examines the purchaser's identification, which must contain a photograph, and places a toll-free call to the Georgia Bureau of Investigation (GBI), which must immediately conduct a criminal history and involuntary mental hospitalization check on the purchaser.<sup>47</sup> If no disqualifying data is found, the GBI gives the firearms dealer a unique transaction number, which the dealer records on the purchaser's consent form before completing the sale.<sup>48</sup> If the

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37. *Id.* §§ 35-3-34(d.1), -37(f).

38. *Id.* § 15-9-60(a)(29), (e)(1)(CC).

39. *Id.* § 16-11-181(a)(1).

40. *Id.* § 16-11-181(a)(2).

41. *Id.* § 16-11-181(a)(3).

42. *Id.* § 16-11-181(a)(4).

43. *Id.* § 16-11-181(a)(5).

44. *Id.* § 16-11-170(a), (b).

45. *Id.* § 16-11-172.

46. *Id.* § 16-11-172(1).

47. *Id.* §§ 16-11-172(2)-(3), -173(a).

48. *Id.* §§ 16-11-172(4)-(5), -173(a)(2).

records check reveals incomplete information that may indicate the purchaser is ineligible to purchase a handgun, the GBI so advises the dealer, and the dealer may not complete the transaction until informed by the GBI that the prospective purchaser is eligible.<sup>49</sup> If there is a delay in responding, which is expected to exceed the close of business that day, the seller may complete the transaction immediately.<sup>50</sup> If the GBI fails to conduct the required background check within the same business day, the dealer may complete the transaction without the background check or transaction number.<sup>51</sup> Similarly, the dealer may complete the transaction if unable to communicate with the GBI because of interruption or unavailability of telephone service, disaster, or emergency.<sup>52</sup> The GBI is authorized to charge \$5.00 for each background check.<sup>53</sup> The Act provides a complete defense against liability for a dealer who complies with its provisions.<sup>54</sup>

### *Recourse for Persons Denied Eligibility*

Persons denied eligibility to purchase a handgun may petition the GBI to correct their records.<sup>55</sup> If the GBI fails to act within seven days, they may petition the superior court to order the GBI to correct their records.<sup>56</sup> If the GBI background check information is shown to be incorrect, the incorrect information must be destroyed.<sup>57</sup> Persons denied eligibility to purchase a handgun because of an involuntary mental hospitalization in the five years preceding the transaction may petition the committing

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49. *Id.* § 16-11-173(b).

50. *Id.* § 16-11-174(a).

51. *Id.*

52. *Id.* § 16-11-174(b).

53. *Id.* § 16-11-175. Local sheriffs had been charging anywhere from \$15 to \$45 to conduct a background check. Watts Interview, *supra* note 20. The actual estimated cost to perform the check is \$10.00. Rhonda Cook, *GBI Won't Implement All Changes Right Away*, ATLANTA CONST., Mar. 16, 1995, at B4. An appropriation of \$1.125 million was added to the budget to implement the system. Ken Foskett, *24 Hours Later: Funds Added for Gun Background Checks*, ATLANTA CONST., Mar. 16, 1995, at B5.

54. O.C.G.A. § 16-11-180(a) (Supp. 1995).

55. *Id.* § 16-11-178(a).

56. *Id.*

57. *Id.*



court for a hearing.<sup>58</sup> If the court finds that they are not a danger to themselves or others, the finding of ineligibility to purchase a handgun will be reversed and the adverse information destroyed.<sup>59</sup> The Act provides for a cause of action against the state or political subdivision that was the source of any erroneous information.<sup>60</sup>

### *Protection of Background Check Information*

The GBI is required to ensure the confidentiality of any background check information.<sup>61</sup> The Act prohibits the unauthorized disclosure of background check information by any government official.<sup>62</sup> It also forbids any dealer or government official from using the background check system for any use other than compliance with the Act or from disclosing the results to unauthorized persons.<sup>63</sup> The GBI is prohibited from compiling the background check information, except for those persons found ineligible to purchase a handgun.<sup>64</sup>

### *Penalties*

A purchaser who supplies false information or identification to a dealer in connection with a background check is guilty of a misdemeanor.<sup>65</sup> The transfer of a handgun by a dealer in violation of the Act is also a misdemeanor.<sup>66</sup> Any purchaser or owner of a firearm who transfers it to a third person knowing that person is prohibited from possessing a handgun is guilty of a felony.<sup>67</sup>

### *Preemption of Local Regulation of Firearms*

The portion of the Act that preempts most local regulation of firearms<sup>68</sup> was the most controversial provision in the Act.<sup>69</sup> A

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58. *Id.* § 16-11-178(b).

59. *Id.*

60. *Id.* § 16-11-178(c).

61. *Id.* § 16-11-179.

62. *Id.*

63. *Id.* § 16-11-182(a).

64. *Id.* § 16-11-176.

65. *Id.* § 16-11-182(b).

66. *Id.* § 16-11-182(c).

67. *Id.* § 16-11-182(d).

68. *Id.* § 16-11-184.

69. Watts Interview, *supra* note 20; *see also* R. Robin McDonald & Rhonda

second substitute to the original House substitute to SB 58, which would have kept the instant background check system while also preserving local waiting periods of up to five days, failed to win approval.<sup>70</sup> A similar measure that would have allowed a three-day waiting period also failed in the Senate, and the House substitute was approved without changes.<sup>71</sup> The Act declares that "regulation of firearms is properly an issue of general, state-wide concern"<sup>72</sup> and prohibits local governments from regulating firearms.<sup>73</sup> Exceptions are provided to allow local governments to regulate the use of firearms by local government employees in the course their employment,<sup>74</sup> to limit or prohibit the discharge of firearms within municipalities,<sup>75</sup> and to require heads of households to possess firearms.<sup>76</sup>

### *Miscellaneous Provisions*

The Act also amends article 2 of chapter 3 of title 35 of the Code by adding a subsection that requires the Georgia Crime Information Center (Center) to take appropriate measures to comply with the Act.<sup>77</sup> This subsection also restricts the Center's collection of mental health information to only that necessary to determine whether potential purchasers have been involuntarily hospitalized and provides for purging of that data after five years.<sup>78</sup> A final amendment to chapter 3 of title 35 requires the

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Cook, *New Gun Law: Miller Signs Bill as Criticism Builds*, ATLANTA CONST., Mar. 23, 1995, at L4; *Lawmakers '95* (GPTV broadcast, Mar. 14, 1995) (videotape available in Georgia State University College of Law Library).

70. *Lawmakers '95* (GPTV broadcast, Mar. 14, 1995) (videotape available in Georgia State University College of Law Library).

71. *Id.* Sen. David Scott, Senate District No. 36, offered a measure that would allow a local three-day waiting period, if approved by voter referendum. *Id.*

72. O.C.G.A. § 16-11-184(a) (Supp. 1995).

73. *Id.* § 16-11-184(b). Rep. Watts, sponsor of the proposal, noted that it makes no sense to be able to buy a gun over the counter at one location, but drive a few miles and be faced with a fifteen-day wait to purchase the same gun. Watts Interview, *supra* note 20.

74. O.C.G.A. § 16-11-184(c) (Supp. 1995).

75. *Id.* § 16-11-184(e).

76. *Id.* § 16-11-184(d).

77. *Id.* § 35-3-34(d.1).

78. *Id.* § 35-3-34(d.1)(2).

Center, upon request, to provide a copy of the record of involuntary hospitalization to persons denied the right to purchase a handgun. Additionally, it requires the Center to inform persons of their right to petition the courts for a hearing.<sup>79</sup> The Act also provides for the collection of fees by the probate courts for eligibility hearings.<sup>80</sup> Finally, the Act provides for the automatic repeal of the instant background check portion of the Act and its related provisions if it is found to be invalid for any reason.<sup>81</sup>

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79. *Id.* § 35-3-37(f).

80. *Id.* § 15-9-60(a)(29), (e)(1)(CC).

81. 1995 Ga. Laws 139, § 8, at 150. As is common practice, the severability clause is not codified.