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HB 941 - Pretrial Proceedings

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CRIMINAL PROCEDURE

Pretrial Proceedings: Amend Chapter 12 of Title 15, Chapter 7 of Title 17, and Chapter 11 of Title 45 of the Official Code of Georgia Annotated, Relating to Juries, Pretrial Proceedings, and Miscellaneous Offenses Concerning Public Officers and Employees, Respectively, so as to Provide for Procedure for Review of Incidents Involving a Peace Officer's Use of Deadly Force that Results in Death or Serious Bodily Injury; Provide for Definitions; Provide for Procedure and Disclosure of Information from Such Review; Repeal Provisions Relating to the Use of Stenographers and Enact Provisions Relating to Court Reporters in Grand Jury Proceedings; Change Provision Relating to the Use of Special Purpose Grand Juries; Repeal Population Act Features Connected to Grand Juries; Provide for Peace Officer Notification of Grand Jury Proceedings and the Process of Testifying before a Grand Jury; Change Provisions Relating to the Indictment of Public Officials for Professional Misconduct; Provide for Related Matters; Repeal Conflicting Laws; and for Other Purposes

CODE SECTIONS:	O.C.G.A. §§ 15-12-71, -74 (amended); 15-12-83, -102 (new); 17-7-52, -70.1 (amended); 45-11-4 (amended)
BILL NUMBER:	HB 941
ACT NUMBER:	350
GEORGIA LAWS:	2016 Ga. Laws 186
SUMMARY:	The Act changes the grand jury proceedings for police officers charged with committing a crime in the course of performing their official duties. Prior to the Act, Georgia police officers were permitted to be present for the entire duration of grand jury proceedings, hear all of the evidence presented against them, and then testify to the grand jury at the end of the proceedings without being subject to cross examination. Grand jury hearings

produced no records, so interested parties had no opportunity to find out what transpired in the proceedings. After the passage of the Act, police officers retain the right to testify at the end of grand jury hearings. However, police officers can no longer be present for the other parts of the proceedings. After testifying, police officers will now be subject to cross examination by the prosecutor and the grand jury. Police officers will, however, retain their Fifth Amendment right to refuse to answer questions. The grand jury can draw negative inferences from a police officer's assertion of his or her Fifth Amendment right. Prosecutors may also call forward other witnesses to refute a police officer's testimony. Finally, a court reporter will be present to transcribe what is said in the proceedings, and these transcripts will be made public.

EFFECTIVE DATE:

July 1, 2016

History

Since 2010, Georgia police officers have shot and killed 171 people.¹ Thus far, only one officer has been indicted and faced prosecution.²

In 2010, a Glynn County police officer shot and killed a woman after a car chase that never exceeded thirty-five miles per hour.³

1. Brad Schrade, *Police Shootings in Georgia: 171 Dead, Zero Officers Prosecuted*, ATLANTA J.-CONST.: THE WATCHDOG BLOG (Oct. 12, 2015), <http://investigations.blog.ajc.com/2015/10/12/ajc-investigation-171-police-shootings-0-officers-prosecuted/>.

2. Christian Boone, *Dekalb Officer Indicted in Shooting Death of Unarmed Civilian*, ATLANTA J.-CONST. (Jan. 21, 2016, 7:51 PM), <http://www.ajc.com/news/news/local/dekalb-officer-xyxyx-shooting-naked-man/np9B5/> (noting that there has only been one "law enforcement officer in more than five years to face prosecution in the shooting death of a civilian").

Police officers immediately claimed the woman was trying to run them down,⁴ but the evidence implied that the officers had tampered with the crime scene.⁵ In a surprising turn of events, the District Attorney gave the officers all of the evidence that would be presented against them months before the grand jury proceeding.⁶ The officer charged with the shooting testified at the end of hearing, after sitting through the entire hearing, and the grand jury declined to indict him.⁷

In 2011, a Union City police officer shot and killed an unarmed, handcuffed teenager while he lay face down “twice in the back at close range”⁸ Michael Levine, a consultant for the Fulton County District Attorney’s office, called the officer’s actions a “disregard for human life that is unacceptable.”⁹ During the resulting grand jury hearing, the Union City police officer sat through the entire twelve hours of offered testimony at the grand jury hearing.¹⁰ He then testified after hearing all of the evidence against him, and the grand jury declined to indict him after twenty minutes of deliberation.¹¹ With no record of what transpired, the teenager’s mother was left merely to guess as to what the grand jury could have heard to support their decision.¹²

Incidents like these naturally sparked a public outcry for justice.¹³ To ensure the public that the “integrity of the grand jury

3. Brad Schrade, *Did Caroline Small Have to Die?* ATLANTA J.-CONST. (July 2, 2015), <http://investigations.myajc.com/caroline-small-shooting/>.

4. *Id.*

5. *Id.* (highlighting the fact that one of the police cars involved was moved after the accident and that the same car, “was left off crime scene diagrams, and its exact location was never established by investigators”).

6. *Id.*

7. *Id.*

8. Brad Schrade, *Shot in the Back*, ATLANTA J.-CONST. (May 17, 2015, 12:00 AM), <http://www.ajc.com/news/news/special-reports/shot-in-the-back/nmGsF/>.

9. Jodie Fleischer, *Deadly Police Shooting of Unarmed Teen Reopened after Channel 2 Investigation*, WSB-TV (May 17, 2015, 3:42 PM), <http://www.wsbtv.com/news/deadly-police-shooting-unarmed-teen-reopened-after/53852345>.

10. Schrade, *supra* note 8.

11. *Id.*

12. *Id.*

13. Christian Boone, *Feds to Investigate Shooting of Maserati Driver by Smyrna Officer*, ATLANTA J.-CONST. (July 22, 2015, 12:55 PM), <http://www.ajc.com/news/news/crime-law/feds-to-investigate-shooting-of-maserati-driver-by/nm4wP/> (noting that the Cobb County “shooting drew widespread protests from activists . . .”).

process . . . is above question,” a Representative from Smyrna took action.¹⁴

During Georgia’s 2016 legislative session, Representative Rich Golick (R-40th) introduced House Bill (HB) 941, a bill designed to bring transparency, accountability, and uniformity to the grand jury proceedings involving officers accused of wrongdoing in the performance of their duties.¹⁵ The Act brings transparency to the process by having a court reporter present to create a transcript for interested parties to review.¹⁶ Finally, the Act brings accountability to the process by restricting when a police officer may be present during the proceedings, and requiring testifying officers to sit for cross examination.¹⁷ The Act brings uniformity by creating a state-wide procedure for prosecutors to follow.¹⁸

Before the passage of the Act, Georgia police officers had more generous privileges in grand jury proceedings than any citizen and, more notably, than other police officers across the country.¹⁹ Georgia law allowed a charged police officer to be present “in the grand jury room the entire time, to hear and see all of the testimony presented and then be able to make a statement at the end of the proceedings without being subject to questioning by either the grand jury or the

14. Operation Educate, *First Senate Judicial Non Civil Hearing on HB 941 March 9, 2016*, YOUTUBE (Mar. 9, 2016), at 2 min., 25 sec. (remarks by Rich Golick (R-40th)), https://www.youtube.com/watch?v=rdF5bJZ_fe0 [hereinafter March 9 Senate Committee Hearing].

15. See Georgia General Assembly, HB 941, Bill Tracking, <http://www.legis.ga.gov/legislation/en-US/Display/20152016/HB/941>; see generally March 9 Senate Committee Hearing, *supra* note 14.

16. O.C.G.A. § 15-12-71(b)(5)(D) (Supp. 2016).

17. O.C.G.A. § 17-7-52(d) (Supp. 2016).

18. March 9 Senate Committee Hearing, *supra* note 14, at 5 min., 46 sec. (remarks by Chuck Spahos) (commenting that the Act “creates a clear civil authority to inquire into these cases that [was] not clear [before]”); see Interview with Chuck Spahos, Executive Director of Prosecuting Attorney’s Council of Georgia (Mar. 11, 2016) [hereinafter Spahos Interview] (commenting that the Act “creates consistency throughout the state. Some prosecutors and [district attorneys were] handling these cases very similar to the way it is laid out [in the act], and some [were] doing it very differently because [there was] not clear guidance.”).

19. March 9 Senate Committee Hearing, *supra* note 14, at 10 min., 54 sec. (remarks by Rich Golick (R-40th)); Don McKee, *House Bill 941 by Rep. Golick: Needed reform of the Grand Jury process*, MARIETTA DAILY J. (Mar. 30, 2016), http://www.mdjonline.com/opinion/house-bill-by-rep-golick-needed-reform-of-the-grand/article_85c2fb0e-f6b6-11e5-9f2a-e31c0e08b08c.html (quoting Rep. Rich Golick who stated that “Georgia is the only state in the nation” to allow police officers to sit in the entire grand jury proceeding and then testify at the end).

[District Attorney].²⁰ In the past, what transpired in the grand jury proceeding was not revealed.²¹

Representative Golick did not introduce the bill because of actual, confirmed manipulation taking place in the grand jury process.²² Rather, the Act was designed to remove “the potential of manipulation in the grand jury process.”²³ The Act was designed to strike a balance between the “state’s interest and the interest of the officer.”²⁴ Representative Golick also stated that although to some the Act may not go far enough, it was important to introduce a “reform that [was] possible to pass both bodies and get a signature.”²⁵ Representative Golick, and those involved in drafting HB 941, chose not to go as far as to completely remove police officers from the proceedings against them.²⁶ The drafters recognized the “special role that law enforcement officers play in our society” and chose to merely dial back the privileges awarded to Georgia’s police officers.²⁷

The Act removed some of the privileges awarded to officers while providing much-needed transparency to the proceedings. Now, police officers “will not be able to be in the grand jury room the entire time.”²⁸ Police officers will be able to exercise the right to appear before the grand jury . . . at the end.”²⁹ Officers will then be “subject to cross-examination by the prosecutor [and] by members of the grand jury, like any other witness.”³⁰ Police officers will have the right to refuse to answer a question based on their Fifth Amendment rights³¹ and a right created in the Act.³² The right for an officer to

20. March 9 Senate Committee Hearing, *supra* note 14 at 1 min., 30 sec.

21. Spahos Interview, *supra* note 18.

22. March 9 Senate Committee Hearing, *supra* note 14 at 2 min., 8 sec. (commenting that “when [the officer] can hear and see everything in the process, it allows for the potential of manipulation in the grand jury process [and] some will say that does occur”).

23. *Id.* at 2 min., 8 sec.

24. *Id.* at 5 min., 36 sec. (remarks by Chuck Spahos).

25. *Id.* at 1 hr., 31 min., 22 sec. (remarks by Rep. Rich Golick).

26. *Id.* at 3 min., 50 sec.

27. *Id.* at 1 min., 25 sec.

28. March 9 Senate Committee Hearing, *supra* note 14 at 2 min., 48 sec.; O.C.G.A. § 17-7-52(d) (Supp. 2016) (clarifying that “[i]f the officer requests to testify before the grand jury . . . he or she shall only be present in the grand jury room while he or she is testifying”).

29. March 9 Senate Committee Hearing, *supra* note 14 at 2 min., 59 sec.

30. *Id.* at 3 min., 10 sec.

31. *Id.* at 6 min., 30 sec.

32. O.C.G.A. § 17-7-52(d)(3).

invoke his or her Fifth Amendment rights is similar to the right afforded to all citizens.³³ The Act also includes language that allows an officer to refuse to answer a question “if a truthful answer to the question . . . would tend to incriminate the officer or would tend to bring infamy, disgrace, or public contempt upon the officer.”³⁴ When an officer refuses to answer, the grand jury is “entitled to believe silence is evidence of guilt . . . [and] draw a negative inference.”³⁵ Additionally, the prosecutor can call “rebuttal witness[es] to refute what the officer has said.”³⁶ Finally, a court reporter will create a public record of all the witness statements, “all of the advice the prosecuting attorney potentially gave [and] questions that [were] asked.”³⁷ Thus, by limiting officers’ involvement in the process and creating a public record, the Act improves accountability and transparency in the proceedings.

Bill Tracking of HB 941

Consideration and Passage by the House

Representatives Golick, Alex Atwood (R-179th), B.J. Pak (R-108th) and Stacey Abrams (D-89th) sponsored HB 941.³⁸ The House read the bill for the first time on February 9, 2016, and for a second time on February 10, 2016.³⁹ The bill was assigned to the House Judiciary Non-Civil Committee, which amended the bill and reported it by substitute on February 18, 2016.⁴⁰

The Committee substitute eliminated the initially introduced amendment to Code section 15-12-73, relating to admissions and communications among grand jurors.⁴¹ The Committee also replaced the phrase, “or any part of the testimony of any witness who testifies”

33. March 9 Senate Committee Hearing, *supra* note 14 at 6 min., 30 sec.

34. O.C.G.A. § 17-7-52(d)(3).

35. March 9 Senate Committee Hearing, *supra* note 14 at 11 min., 45 sec.

36. *Id.* at 10 min., 30 sec.

37. See Spahos Interview, *supra* note 18.

38. Georgia General Assembly, HB 941, Bill Tracking, <http://www.legis.ga.gov/legislation/en-US/Display/20152016/HB/941>.

39. State of Georgia Final Composite Status Sheet, HB 941, May 5, 2016.

40. State of Georgia Final Composite Status Sheet, HB 941, May 5, 2016.

41. Compare HB 941, as introduced, § 2, pp. 3–4, ll. 85–105, 2016 Ga. Gen. Assemb., with HB 941 (HCS), 2016 Ga. Gen. Assemb.

in Code section 5-12-83(c), with “of any witness appearing before the grand jury and any argument or legal advice provided to the grand jury by the prosecuting attorney,” clarifying the language of the provision and expanding its scope to include not only witness testimony but any argument or legal advice presented.⁴² The House read HB 941 for the third time on February 23, 2016.⁴³ The House adopted the bill by substitute and passed HB 941 on February 23, 2016, by a vote of 161 to 0.⁴⁴

Consideration and Passage by the Senate

Senator Charlie Bethel (R-54th) sponsored HB 941 in the Senate.⁴⁵ The Senate first read HB 941 on February 24, 2016, and assigned it to the Senate Judiciary Non-Civil Committee.⁴⁶ The Committee made a number of amendments to the bill.⁴⁷ The Senate Judiciary Non-Civil Committee reported the bill by substitute on March 16, 2016.⁴⁸

In Part I, the Senate Committee changed the language in Code section 15-12-71(b) from “or the date a different prosecuting attorney is appointed by the attorney general under Code section 15-8-5 or 15-16-8, whichever is later” to “or if an attorney was appointed under Code section 15-8-15, one year from the date of that appointment,” simplifying the language and further specifying the time by which the District Attorney is to begin assisting the grand jury in its review.⁴⁹

In Part III, the Committee made several amendments to Code section 15-12-83.⁵⁰ Specifically, in Code section 18-12-83(a), the Committee replaced “accused peace officer” with “when the grand

42. *Compare* HB 941, as introduced, § 4, p. 5, ll. 133–34, 2016 Ga. Gen. Assemb., *with* HB 941 (HCS), § 3, p. 4, ll. 111–13, 2016 Ga. Gen. Assemb.

43. State of Georgia Final Composite Status Sheet, HB 941, May 5, 2016.

44. Georgia House of Representatives Voting Record, HB 941 (Feb. 23, 2016).

45. Georgia General Assembly, HB 941, Bill Tracking, <http://www.legis.ga.gov/legislation/en-US/Display/20152016/HB/941>.

46. State of Georgia Final Composite Status Sheet, HB 941, May 5, 2016.

47. *Compare* HB 941 (HCSFA), 2016 Ga. Gen. Assemb., *with* HB 941 (SCS), 2016 Ga. Gen. Assemb.

48. State of Georgia Final Composite Status Sheet, HB 941, May 5, 2016.

49. *Compare* HB 941 (SCS), as passed Senate, § 1, p. 2, ll. 28–30, 2016 Ga. Gen. Assemb., *with* HB 941 (HCS), § 1, p. 2, ll. 28–30, 2016 Ga. Gen. Assemb.

50. *Compare* HB 941 (SCS), as passed Senate, 2016, Ga. Gen. Assemb., *with* HB 941 (HCS), 2016, Ga. Gen. Assemb.

jury proceedings are in accordance with Code section 17-7-52,⁵¹ and substituted “the grand jury proceeding while any witness is being examined by the grand jury” in Code section 18-12-83(c) with the more encompassing “such proceedings.”⁵² Finally, in Code section 8-12-83(f), the Committee added “including compliance with Article 1 of Chapter 16 of Title 17,”⁵³ to specify the nature of the District Attorney’s official duties relevant under the statute.

In Part VI, the Committee replaced “action by the district attorney of the county wherein the grand jury shall convene” in Code section 17-7-52(b) with “action by the prosecuting attorney.”⁵⁴ Throughout Code section 17-7-52, the Committee replaced “district attorney” with “prosecuting attorney.”⁵⁵ The Committee also expanded the language “shall be permitted to testify” in Code section 17-7-52(d) by adding the qualifying phrase, “at the conclusion of the presentation of the state’s case-in-chief and that he or she shall only be present in the grand jury room while he or she is testifying.”⁵⁶ This new language helps clarify the extent to and the circumstances under which an accused police officer is to testify.⁵⁷ In addition, in Code section 17-7-52(e), the Committee simplified “counsel for the officer” to “the officer’s attorney.”⁵⁸

Finally, in Part VII, the amendment clarifies the “above provisions” in Code section 17-7-70.1(e) to include specifically “subsections (a) through (d) of this code section.”⁵⁹

The Senate read HB 941 for the second time on March 16, 2016,⁶⁰ and a third time on March 22, 2016.⁶¹ The Senate adopted the bill by

51. Compare HB 941 (SCS), as passed Senate, § 3, p. 4, l. 103, 2016 Ga. Gen. Assemb., with HB 941 (HCS), § 3, p. 4, l. 102, 2016 Ga. Gen. Assemb.

52. Compare HB 941 (SCS), as passed Senate, § 3, p. 4, l. 104, 2016 Ga. Gen. Assemb., with HB 941 (HCS), § 3, p. 4, ll. 103–04, 2016 Ga. Gen. Assemb.

53. Compare HB 941 (SCS), as passed Senate, § 3, p. 4, ll. 125–26, 2016 Ga. Gen. Assemb., with HB 941 (HCS), § 3, p. 4, ll. 125–26, 2016 Ga. Gen. Assemb.

54. Compare HB 941 (SCS), as passed Senate, § 6, p. 5, l. 154, 2016 Ga. Gen. Assemb., with HB 941 (HCS), § 6, p. 5, ll. 153–54, 2016 Ga. Gen. Assemb.

55. Compare HB 941 (SCS), as passed Senate, § 6, pp. 5–7, ll. 154–214, 2016 Ga. Gen. Assemb., with HB 941 (HCS), § 6, pp. 5–7, ll. 153–210, 2016 Ga. Gen. Assemb.

56. Compare HB 941 (SCS), as passed Senate, § 6, p. 6, ll. 186–88, 2016 Ga. Gen. Assemb., with HB 941 (HCS), § 6, p. 6, l. 184, 2016 Ga. Gen. Assemb.

57. See HB 941 (HCS), § 6, p. 6, l. 184, 2016 Ga. Gen. Assemb.

58. Compare HB 941 (SCS), as passed Senate, § 6, p. 7, l. 209, 2016 Ga. Gen. Assemb., with HB 941 (HCS), § 6, p. 7, l. 205, 2016 Ga. Gen. Assemb.

59. Compare HB 941 (SCS), as passed Senate, § 7, p. 7, l. 231, 2016 Ga. Gen. Assemb., with HB 941 (HCS), § 7, p. 7, l. 227, 2016 Ga. Gen. Assemb.

substitute and passed HB 941 on March 22, 2016, by a vote of 51 to 3.⁶² The Senate transmitted the bill to the House on March 23, 2016.⁶³ The House agreed to the Senate's substitute version of the bill, as amended, on March 24, 2016, by a vote of 156 to 0.⁶⁴ The House sent the bill to Governor Nathan Deal (R) on April 5, 2016; the Governor signed the bill into law on April 26, 2016, and the bill became effective on July 1, 2016.⁶⁵

The Act

Affected Situations and Initiating the Proceedings

Section 1 of the Act amends Code section 15-12-71 by adding a new paragraph to subsection (b) and two new subsections.⁶⁶ The additions describe the kinds of police officer behaviors implicated in the Act, when a grand jury shall review a police officer's actions, and the procedures for initiating the inquiry.⁶⁷

Code section 15-12-71(b)(5)(A) defines "serious bodily injury" as "bodily harm which deprives a person of a member of his or her body, which renders a member of such person's body useless, or which seriously disfigures such person's body or member thereof."⁶⁸ Code section 15-12-71(b)(5)(B) explains when a grand jury will convene to review incidents "in which a police officer's use of deadly force resulted in death or serious bodily injury to another."⁶⁹ The grand jury will convene when it is "deemed necessary by eight or more of its members or at the request of the district attorney."⁷⁰ When the review is initiated by the grand jury members, the review

60. State of Georgia Final Composite Status Sheet, HB 941, May 5, 2016.

61. State of Georgia Final Composite Status Sheet, HB 941, May 5, 2016.

62. Georgia Senate Voting Record, HB 941 (Mar. 16, 2016).

63. State of Georgia Final Composite Status Sheet, HB 941, May 5, 2016.

64. Georgia House of Representatives Voting Record, HB 941 (Mar. 24, 2016).

65. State of Georgia Final Composite Status Sheet, HB 941, May 5, 2016.

66. 2016 Ga. Laws 186, § 1, at 187–88.

67. O.C.G.A. § 15-12-71 (Supp. 2016).

68. O.C.G.A. § 15-12-71(b)(5)(B).

69. *Id.*

70. *Id.*

cannot begin until “after the investigative report of the incident has been completed and submitted to the district attorney.”⁷¹

Towards Transparency: The Reporting Mandate

Section 2 of the Act amends Code section 15-12-74, relating to grand jury presentment of offenses, by adding subsection (b).⁷² This addition lays out how a true bill of indictment is to be returned.⁷³

If a true bill is returned “on any count of an indictment or special presentment,” the indictment “shall be published in open court.”⁷⁴ If no bill is returned, the prosecuting attorney “shall file such indictment or special presentment with the clerk.”⁷⁵ By specifying how and why a true bill is to be returned to the court, the provision ensures a transparent process.⁷⁶

Section 3 repeals Code section 15-12-83 and enacts a new Code section 15-12-83.⁷⁷ The newly introduced provisions mandate the presence of a court reporter at the grand jury proceedings and outline the scope of the court reporter’s duties.⁷⁸ The section also serves a key goal of the Act—the provision of transparency.⁷⁹

Prior to undertaking their grand jury duties, court reporters must take an oath of secrecy.⁸⁰ The District Attorney appoints court reporters and fixes their compensation.⁸¹ The County pays for the court reporter’s compensation, as well as the cost of transcripts.⁸² The government thus pays all expenses resulting from the reporting mandate of the provisions.⁸³

71. *Id.*

72. 2016 Ga. Laws 186, § 2, at 188–89.

73. O.C.G.A. § 15-12-74 (Supp. 2016).

74. O.C.G.A. § 15-12-74(a).

75. O.C.G.A. § 15-12-74(b).

76. Video Recording of House Judiciary Non-Civil Committee Meeting, Feb. 12, 2016 at 1 hr., 14 min., 40 sec. (remarks by Chuck Spahos, Executive Director of Prosecuting Attorney’s Council of Georgia), <http://www.house.ga.gov/Committees/en-US/CommitteeArchives146.aspx> [hereinafter House Video].

77. 2016 Ga. Laws 186, § 3, at 189.

78. O.C.G.A. § 15-12-83 (Supp. 2016).

79. House Video, *supra* note 76 at 1 hr., 15 min., 2 sec.

80. O.C.G.A. § 15-12-83(a).

81. O.C.G.A. § 15-12-83(b).

82. *Id.*

83. House Video, *supra* note 76 at 1 hr., 14 min., 55 sec.

The court reporter is to transcribe both the witness testimony and “any argument or any legal advice provided,” ensuring a complete report of the entire proceeding.⁸⁴ Code section 15-12-83(d) further demands that, when a witness testifies under a grant of immunity, the transcript must be filed under seal with the clerk and the District Attorney must receive a copy.⁸⁵ Furthermore, the court reporter is prohibited from testifying at any hearing or trial concerning a matter learned during the Grand Jury proceeding.⁸⁶ Finally, Code section 15-12-83 concludes by requiring that any report of the proceedings, including “a recording, any court reporter’s notes and any transcript prepared from such recording or notes” are placed in the District Attorney’s control and to be used only the in the “proper performance of his or her official duties.”⁸⁷ Under Georgia’s rules of evidence, if a criminal prosecution follows, any such evidentiary recording becomes a part of the State’s file.⁸⁸ The goal of this section is transparency—the provision of an accessible and clear record of the entire grand jury proceeding.⁸⁹

Expanding Authority to Initiate Grand Jury Proceedings and Jurisdiction

Section 4 revises subsection (a) of Code section 15-12-100.⁹⁰ Under the new law, the District Attorney has the authority to move to request the impaneling of the special grand jury in addition to the already existing authority granted to the chief judge of the superior court and any elected public official of the county.⁹¹

Section 5 repeals Code section 15-12-102 in its entirety, and replaces it with a new version.⁹² The new law extends the applicability of special purpose grand juries to “all counties and consolidated city-county governments of this state,”⁹³ thereby

84. O.C.G.A. § 15-12-83(c).

85. O.C.G.A. § 15-12-83(d).

86. O.C.G.A. § 15-12-83(e).

87. O.C.G.A. § 15-12-83(f).

88. House Video, *supra* note 76 at 1 hr., 15 min., 23 sec.

89. *Id.*

90. 2016 Ga. Laws 186, § 4, at 189–90.

91. *Id.*

92. 2016 Ga. Laws 186, § 5, at 190.

93. *Id.*

overruling an archaic provision excluding counties and consolidated city governments from the process.⁹⁴

The Proceedings: Limiting Presence and Introducing Testimony of the Police Officer

Section 6 amends Chapter 7 of Title 17 by revising Code section 17-7-52.⁹⁵ The new law establishes the process that must take place in the proceedings, including setting the bounds of the officer's presence in the court room and the right to testify in front of the grand jury.⁹⁶

Section 6 amends the current Code section 17-7-52(a) to specify the timing and content of notice to be given to an officer when a bill of indictment is presented to the grand jury.⁹⁷ A police officer facing grand jury proceedings must receive twenty-day notice thereof, which is to include a copy of the indictment and a notification of the officer's right to testify.⁹⁸ The typical fifteen-day notice requirement thus is extended to twenty days.⁹⁹ The provisions setting forth the detailed notice requirements were enacted at the request of law enforcement.¹⁰⁰

In addition, Section 6 repealed and replaced subsections 17-7-52 (b) through (h) setting forth the exact procedures for the indictment of a police officer.¹⁰¹ Code section 17-7-52(b) requires the officer to notify the prosecuting attorney if he or she intends to testify to the Grand Jury prior to the commencement of the proceedings.¹⁰² Code section 17-7-52(c) lays out the legal advice the prosecuting attorney is to give the Grand Jury before the proceedings start.¹⁰³

Code section 17-7-52(d) first specifies that the officer "shall be permitted to testify at the conclusion of the presentation of the state's case-in-chief," granting the officer a right to testify if they so

94. House Video, *supra* note 76 at 1 hr., 16 min., 20 sec.

95. 2016 Ga. Laws 186, § 6, at 190–92.

96. O.C.G.A. § 17-7-52 (Supp. 2016).

97. O.C.G.A. § 17-7-52(a).

98. *Id.*

99. House Video, *supra* note 76 at 1 hr., 17 min., 27 sec.

100. *Id.*

101. O.C.G.A. § 17-7-52(b–h).

102. O.C.G.A. § 17-7-52(b).

103. O.C.G.A. § 17-7-52(c).

request.¹⁰⁴ Furthermore, the officer “shall only be present in the grand jury room while he or she is testifying,” thereby limiting an officer’s presence in the grand jury room and excluding him from the proceeding at any other time.¹⁰⁵ In addition, the officer may “be questioned by the prosecuting attorney or members of the grand jury as are another witnesses.”¹⁰⁶ By excluding the police officer from the grand jury room during the proceeding and subjecting them to cross examination, the provision places any officer on the same playing field as any other witness in the context of a criminal proceeding.¹⁰⁷ Rebuttal witnesses may also be called.¹⁰⁸ During the deliberations period, only the jurors and necessary interpreters may be present.¹⁰⁹ Finally, Code section 17-7-52(h)(I) specifies that the Act applies to everything a police officer does in the line of duty aside from minor traffic offenses.¹¹⁰

Section 7 revises subsection (e) of Code section 17-7-70.1¹¹¹ to replace an archaic definition of police officer with a more current one.¹¹² Finally, Section 8 repeals Code sections 45-11-4(f)-(i), eliminating archaic provisions laying out the rights of police officers during a grand jury proceeding.¹¹³

Analysis

Intended Consequences

The bill was drafted to balance the competing interests of two entities: the state and the officer.¹¹⁴ Representative Golick introduced HB 941 to increase the integrity of the grand jury process while recognizing the special role law enforcement plays in our society.¹¹⁵

104. O.C.G.A. § 17-7-52(d).

105. *Id.*

106. *Id.*

107. *Id.*

108. O.C.G.A. § 17-7-52(f).

109. O.C.G.A. § 17-7-52(h).

110. O.C.G.A. § 17-7-52(h)(I)(1)–(2).

111. 2016 Ga. Laws 186, § 7, at 192.

112. House Video, *supra* note 76 at 1 hr., 20 min., 22 sec.

113. *Id.* at 37 sec.

114. March 9 Senate Committee Hearing, *supra* note 14, at 6 min., 15 sec. (remarks by Chuck Spahos).

115. *Id.* at 2 min., 25 sec. (remarks by Rep. Rich Golick).

The goal of the bill was not to help the District Attorney secure indictments or to hinder the grand jury process, but was to ensure what happens in the grand jury proceeding is “completely above and beyond question.”¹¹⁶ Lawmakers intended to achieve this objective by increasing transparency, improving accountability, and creating uniformity in proceedings across the state.¹¹⁷

Prior to 2016, Georgia afforded its police officers more substantial privileges than any other state in the nation.¹¹⁸ Before HB 941, police officers had the right to be present to hear all the evidence presented against him or her in a grand jury proceeding.¹¹⁹ After hearing all the witness testimonies and seeing all the evidence, the police officer could then give a statement.¹²⁰ After testifying, neither the prosecutor nor the grand jury were permitted to ask the officer questions about his or her testimony.¹²¹ Georgia was the only state in the country that allowed the police officer to be present in the grand jury room throughout the proceeding.¹²² Moreover, no court reporter attended the hearing to create a public record of what transpired in front of the grand jury.¹²³

The potential for manipulation of the grand jury process was evident to Georgia lawmakers.¹²⁴ Officers got to hear all of the evidence presented against them before presenting their testimony, allowing them to tailor their testimony to corroborate and negate the rest of the evidence adduced during the proceedings.¹²⁵ The potential for manipulation was even greater because prosecuting attorneys could not subject the officers to cross-examination or questioning by

116. *Id.*

117. *Id.* at 6 min., 15 sec. (remarks by Chuck Spahos).

118. *Id.* at 6 min., 30 sec. (remarks by Rep. Rich Golick).

119. O.C.G.A. § 45-11-4(g) (2015) (“The accused and his or her counsel shall have the right to be present during the presentation of all evidence and alleged statements of the accused on the proposed indictment, presentment, or accusation . . .”).

120. *Id.* (“The accused shall have the right to appear before the grand jury to make such sworn statement as he or she shall desire at the conclusion of the presentation of the state’s evidence.”).

121. *Id.* (“The accused shall not be subject to examination, either direct or cross . . .”).

122. March 9 Senate Committee Hearing, *supra* note 14 at 11 min., 4 sec.

123. See Spahos Interview, *supra* note 18.

124. See Interview with Rep. Rich Golick (R-40th) (March 27, 2016) (commenting that “police shootings across the nation . . . brought to light . . . the fact that [Georgia’s] current law was out of the mainstream . . . and [Georgia legislators] needed to reassess [Georgia’s] position and how [the state] handled [grand jury proceedings for police officers]”).

125. March 9 Senate Committee Hearing, *supra* note 14 at 2 min., 10 sec.

the grand jurors.¹²⁶ Finally, the public could hold anyone involved in the proceedings accountable by the public because the proceedings produced no records for public inspection.¹²⁷

Now, officers can no longer be present to hear the evidence presented against them.¹²⁸ However, police officer will still have the right to testify at the end of a hearing.¹²⁹ If the officer chooses to testify, the prosecutor and the grand jury will have the opportunity to ask the officer questions.¹³⁰ The prosecutor will also have the ability to call rebuttal witnesses to refute an officer's testimony.¹³¹ Finally, in the interest of transparency, all of the testimonies given and the questions asked in the grand jury room will be transcribed by a court reporter and available for public inspection.¹³²

Public Reception

The reaction to this new law was overwhelmingly positive. HB 941 received broad support from groups as diverse as the NAACP¹³³ and the Georgia Association of Chiefs of Police.¹³⁴ The press commended the sponsors of the bill for their ability to work with groups across the political spectrum and broker a compromise that protected the interests of the groups affected by the law.¹³⁵ The law removes the potential for officers to tailor their testimony by removing them from the proceedings, except for when they testify at

126. *Id.* at 1 min., 32 sec.

127. See Golick Interview, *supra* note 124 (commenting that it is “good for the public to have the opportunity to connect the dots whether or not an indictment occurs”).

128. O.C.G.A. § 17-7-52(d) (Supp. 2016) (clarifying that the officer “shall only be present in the grand jury room while he or she is testifying”).

129. March 9 Senate Committee Hearing, *supra* note 14, at 2 min., 44 sec. (remarks by Rich Golick).

130. *Id.* at 3 min.

131. *Id.* at 11 min., 44 sec.

132. See Spahos Interview, *supra* note 18.

133. Gloria Tatum, *Georgia Considers Grand Jury Charges in Police Killing Cases; Opinions Mixed*, ATLANTA PROGRESSIVE NEWS (Mar. 6, 2016), <http://atlantaprogressivenews.com/2016/03/06/georgia-considers-grand-jury-changes-in-police-killing-cases-opinions-mixed/>.

134. Frank V. Rotundo, *Executive Director's Message*, GEORGIA ASS'N OF CHIEFS OF POLICE, ONLINE Q. NEWS, 2d Q. 2016, at 3, http://www.gachiefs.com/wp-content/uploads/2016/04/2016_2ndQuarterNewsletter.pdf.

135. Jim Galloway, *When your Legislature violates the laws of Southern stereotypes*, ATLANTA J.-CONST.: POLITICAL INSIDER BLOG (Feb. 10, 2016), <http://politics.blog.ajc.com/2016/02/10/when-your-legislature-violates-the-laws-of-southern-stereotypes/>.

the end.¹³⁶ The law also removes speculation about what transpires in the grand jury room by creating a record.¹³⁷ Finally, the law also standardizes the process across the state.¹³⁸

A few critics believe the law did not go far enough.¹³⁹ Some interest groups and commentators believed that the special privilege awarded to Georgia police officers should be eliminated altogether.¹⁴⁰ To strike what they believed was the right balance, the sponsors of the bill did not completely prohibit police officers from being included in the grand jury, but instead chose to “dial back the privilege.”¹⁴¹ The sponsors of this Act believed that a police officer who has been charged with a crime during the line of duty should be able to tell their side of the story.¹⁴² They also realized that the bill needed to be balanced or it stood no chance of passing both houses.¹⁴³ Representative Golick believed the bill could be enacted if it dialed back the police officer’s privilege without losing sight of the important role law enforcement officers serve in our state.¹⁴⁴

After the passage of the Bill, the former President of the Atlanta Bar Association, Harold Franklin, voiced his concerns regarding some inconsistencies between the final law and what sponsors purported the law would accomplish.¹⁴⁵ The new law allows the prosecutor and grand jurors to ask the police officer questions if he or she chooses to testify.¹⁴⁶ However, the new law also allows police officers to refuse to answer questions on the basis of a statutory privilege or the Fifth Amendment right awarded to any witness in a

136. March 9 Senate Committee Hearing, *supra* note 14 at 2 min., 10 sec.

137. See Spahos Interview, *supra* note 18.

138. March 9 Senate Committee Hearing, *supra* note 14 at 6 min., 20 sec.

139. See Golick Interview, *supra* note 124.

140. *Id.* (commenting that the “resistance that the [sponsors] got was that the police officer’s special privilege should be eliminated altogether”).

141. *Id.*

142. *Id.*

143. March 9 Senate Committee Hearing, *supra* note 14 at 1 hr., 31 min., 20 sec.

144. *Id.* at 31 min., 51 sec.

145. Brad Schrade, *New Police Grand Jury Law Flawed, Atlanta Bar Leader Says*, ATLANTA J.-CONST.:THE WATCHDOG BLOG (May 27, 2016), <http://investigations.blog.ajc.com/2016/05/27/new-police-grand-jury-law-flawed-atlanta-bar-says/>; Harold Franklin, *Grand Jury Law Could be Undermined, Atlanta Bar President Tells Lawmakers*, DAILY REPORT (May 25, 2016), <http://www.dailyreportonline.com/printerfriendly/id=1202758606694> (commenting that “the intent and purpose of the legislation could be undermined by the use of the language included in the final version of the legislation”).

146. O.C.G.A. § 17-7-52(d) (Supp. 2016).

criminal trial.¹⁴⁷ The statutory provision about self-incrimination allows the officer to refuse to testify if a “truthful answer to the question . . . would tend to incriminate the officer or would tend to bring infamy, disgrace, or public contempt upon the officer.”¹⁴⁸ In a letter to the sponsors of the bill, Franklin opined that this privilege could “be used as a shield against answering questions after making statements to the grand jury.”¹⁴⁹ Franklin wrote the letter because of the “potential impact of this provision on the confidence of Georgia [c]itizens in the integrity of the legal process and the fair administration of justice.”¹⁵⁰

The sponsors of the bill believed including this provision would not diminish the intent or purpose of the law. They ensured the public that prosecutors giving the warning about the right to refusal was new, but the actual right was not new.¹⁵¹ Representative Golick clarified that “even if this law did not exist in the first place, the officer would always have the right to refuse to answer pursuant to his or her Fifth Amendment right” or the statutory privilege awarded to all witnesses testifying in Georgia.¹⁵² The statutory privilege was carried over from Georgia’s old evidence code and is available in any proceeding and to any witness.¹⁵³ The sponsors stated this provision would not diminish the power of the law because grand jurors can draw negative inferences from the police officer’s refusal to answer questions.¹⁵⁴ Additionally, regardless of the statutory

147. March 9 Senate Committee Hearing, *supra* note 14, at 10 min., 15 sec. (remarks by Chuck Spahos).

148. O.C.G.A. § 17-7-52(d)(3) (Supp. 2016).

149. Franklin, *supra* note 145.

150. *Id.*

151. March 9 Senate Committee Hearing, *supra* note 14, at 12 min., 5 sec. (remarks by Chuck Spahos) (commenting that “[i]t’s new to this [process] that we’ve created the warning that we’re giving to the officer before he testifies. The right under that is not new.”).

152. See Electronic Mail Interview with Rep. Rich Golick (Aug. 4, 2016).

153. See Electronic Mail Interview with Chuck Spahos (Aug. 5, 2016) (clarifying that “[t]he privilege language [was] not [only] stolen from the old evidence code, it is current law”); O.C.G.A. § 24-5-505(a) (2016) (“No party or witness shall be required to testify as to any matter which may incriminate or tend to incriminate such party or witness or which shall tend to bring infamy, disgrace, or public contempt upon such party or witness or any member of such party or witness’s family.”).

154. March 9 Senate Committee Hearing, *supra* note 14, at 11 min., 40 sec. (remarks by Rep. Rich Golick) (“If [the officer] does not want to testify, the grand jury will hear and see that. That is going to send a particular message to them . . . [and it] all paints a picture for the grand jury.”); Schrade, *supra* note 145 (noting that “if officers refuse to answer questions grand jurors would weigh that decision and it would color their view of the officer’s treatment”).

privilege, the officer would have, just like any witness, privileges under the Fifth Amendment.¹⁵⁵ The sponsors clarified “that the [Fifth] Amendment trumps an act by the Georgia General Assembly.”¹⁵⁶ Chuck Spahos opined that a law that “required the officer to answer questions after they testified in a pre-trial proceeding . . . would have most certainly been found unconstitutional.”¹⁵⁷

Like any new piece of legislation, both the General Assembly and courts will wrestle with issues of interpretation and application.¹⁵⁸ One month after the law went into effect, a former Atlanta Police officer learned that he will go before the grand jury.¹⁵⁹ This case and others will provide the courts with opportunities to interpret the new law, and will provide the General Assembly with case studies should they decide to enact follow-up legislation in the upcoming sessions.

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155. March 9 Senate Committee Hearing, *supra* note 14, at 10 min., 15 sec. (remarks by Chuck Spahos).

156. See Electronic Mail Interview with Chuck Spahos (Aug. 5, 2016).

157. *Id.*

158. See Golick Interview, *supra* note 124 (“[A]ny time you have a major reform it is nearly inevitable that you’re going to have an issue or two in the next few years that pop up. [Legislators] perfect the legislation as much as [they] can. . . . The truth is you really only discover those once the process actually happens for real.”).

159. *Grand Jury Next Step for Atlanta Police Officer Charged With Murder*, ATLANTA J.-CONST.: THE WATCHDOG BLOG (Aug. 1, 2016), <http://investigations.blog.myajc.com/2016/08/01/grand-jury-next-step-for-atlanta-police-officer-charged-with-murder/>.