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SB 104 - Carjacking, Fentanyl and "Upskirting"


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CRIMES AND OFFENSES

Crimes Against the Person: Amend Title 16 of the Official Code of Georgia Annotated, Relating to Crimes and Offenses, so as to Designate the existing Crime of Hijacking a Motor Vehicle as Being in the First Degree and Create a new Crime of Hijacking a Motor Vehicle in the Second Degree; Provide for Penalties; Change Provisions Relating to Burglary in the Second Degree Involving a Vehicle; Amend the Official Code of Georgia Annotated to Provide for Conforming Cross-References; Require the Posting of the Human Trafficking Hotline Model Notice in Government Buildings; Provide for Definitions; Provide for Exceptions; Delete the Sunset Provision; Change Provisions Relating to Punishment for the unlawful Manufacture, Sale, or Distribution of a Counterfeit or False Proof of Insurance Document; Prohibit the Use of a Device to Film underneath or through an Individual's Clothing under Certain Circumstances; Provide for Definitions; Provide for Exceptions; Include the Sale, Manufacture, Delivery, or Possession of Fentanyl and Related Substances within the Prohibition of Trafficking certain Drugs; Change Provisions Relating to Schedule I and II Controlled Substances; Amend Section 115 of Article 6 of Chapter 4 of Title 26 of the Official Code of Georgia Annotated, Relating to the wholesale Drug Distributions, so as to Provide for Exceptions; Provide for Related Matters; to Provide for effective Dates; Repeal Conflicting Laws; and for Other Purposes

CODE SECTIONS: O.C.G.A. §§ 15-11-2 (amended),
-505 (amended), 16-5-44.1 (amended),
-47 (amended), 16-7-1 (amended),
16-9-5 (amended), 16-11-91 (new),
-131 (amended), 16-13-25 (amended),
-26 (amended), -30 (amended),
-31 (amended), 17-6-1 (amended),
-12 (amended), 17-7-130 (amended),
17-10-9.1 (amended),
26-4-115 (amended)

BILL NUMBER:	SB 104
ACT NUMBER:	182
GEORGIA LAWS:	2017 Ga. Laws 417
SUMMARY:	The Act includes various amendments to Georgia's criminal code. Three changes are most notable. First, the Act designates the offense of hijacking a motor vehicle as hijacking a motor vehicle in the first degree and creates the offense of hijacking a motor vehicle in the second degree. Second, the Act criminalizes the use of a device to film underneath or through an individual's clothing. Lastly, the Act adds the drug Fentanyl and its various analogs to the list of controlled substances.
EFFECTIVE DATE:	O.C.G.A. §§ 16-13-25, -26, -30, -31; 26-4-115, May 8, 2017 O.C.G.A. §§ 15-11-2, -505; 16-5-44.1, -47; 16-7-1; 16-9-5; 16-11-91, -131; 17-6-1, -12; 17-7-130; 17-10-9.1, July 1, 2017

History

Senate Bill (SB) 104 contains sections from five different criminal bills that the General Assembly eventually combined into one piece of legislation. This Peach Sheet will evaluate three main subparts of SB 104.

HB 9 & SB 45

In 2013, Brandon Lee Gary, a Publix grocery store employee, aimed his cellphone camera underneath a female grocery shopper's skirt and recorded a video.¹ Gary did this four different times while

1. Gary v. State, 338 Ga. App. 403, 404, 790 S.E.2d 150, 151 (2016).

the victim shopped.² The State of Georgia charged Gary with a single count of “Unlawful Eavesdropping and Surveillance.”³ Although Gary’s indictment did not specifically indicate which state statute he allegedly violated, the prosecution insisted Gary violated Code section 16-11-62(2), Georgia’s Invasion of Privacy Act.⁴ Under this Code section, it is illegal for “[a]ny person, through the use of any device, without the consent of all persons observed, to observe, photograph, or record the activities of another which occur *in any private place and out of public view*[.]”⁵ Gary moved to quash the indictment, arguing “his conduct did not violate the statute” because he filmed under the victim’s skirt “as she walked and shopped in the aisles of a public store.”⁶ Therefore, “the victim’s activities were not occurring in a private place.”⁷ The trial court, however, rejected Gary’s argument and, following a bench trial, convicted Gary of criminal invasion of privacy.⁸

The Georgia Court of Appeals reversed the decision, interpreting the term “private place” as used in Code section 16-11-62(2) to mean “some physical location, out of public view and in which an individual may reasonably expect to be safe from intrusion or surveillance.”⁹ The court reasoned a specific area of an individual’s body is not a “private place” within the meaning of the statute.¹⁰ Therefore, Gary was not guilty of criminal invasion of privacy.¹¹ Although the dissent agreed with the majority’s definition of “place,” it also found “equally clear that ‘place,’” by its plain meaning, “may also refer to a part of or location on one’s body.”¹² The dissent further reasoned that the word “place” is susceptible to many different meanings, reading the statute as applying to only one meaning, as the majority did, was “troubling.”¹³ Given the statute’s

2. *Id.*

3. *Id.*

4. *Id.*

5. O.C.G.A. § 16-11-62(2) (Supp. 2017) (emphasis supplied).

6. *Gary*, 338 Ga. App. at 404, 790 S.E.2d at 151.

7. *Id.*

8. *Id.* at 404–05, 790 S.E.2d at 151–52.

9. *Id.* at 408, 790 S.E.2d at 154.

10. *Id.*

11. *Id.* at 409–10, 790 S.E.2d at 154–55.

12. *Gary*, 338 Ga. App. at 411, 790 S.E.2d at 156.

13. *Id.*

“plain and unambiguous language,” the dissent concluded Code section 16-11-62(2) criminalized the act of filming up a woman’s skirt without her consent.¹⁴

Though not convinced by the dissent’s definition of “place,” the Court of Appeals admitted it was “regrettable” that no law existed at that time to criminalize Gary’s “reprehensible conduct.”¹⁵ The court further indicated, due to a “gap in Georgia’s criminal statutory scheme,” current laws failed to criminalize “all of the disturbing conduct that has been made possible by ever-advancing technology.”¹⁶ The Court of Appeals’ majority opinion essentially instructed the legislature to create a statute outlawing Gary’s actions, which are colloquially known as “upskirting.”¹⁷ Thus, the Georgia General Assembly soon responded with House Bill (HB) 9 and SB 45, two almost identical bills, to close the gap in the existing law which failed to criminalize Gary’s behavior.¹⁸

HB 213

Fentanyl drugs are a class of synthetic opioids fifty times more powerful than heroin and one hundred times more powerful than morphine.¹⁹ In its pharmaceutical form, fentanyl is often prescribed to patients suffering from advanced stages of cancer to manage their acute and chronic pain.²⁰ However, illicitly-manufactured fentanyl has created a recent surge in fentanyl-related overdoses and deaths across the United States, including in Georgia.²¹ Illicitly-manufactured fentanyl is increasingly used as a cutting agent with heroin and other potent drugs, a process which creates lethal combinations.²² Illicitly-manufactured fentanyl is often sold as

14. *Id.* at 412, 790 S.E.2d at 156.

15. *Id.* at 409, 790 S.E.2d at 155.

16. *Id.*

17. Telephone Interview with Rep. Shaw Blackmon (R-146th) at 4 min., 21 sec. (April 19, 2017) (on file with Georgia State University Law Review) [hereinafter Blackmon Interview] (explaining the Court of Appeals’ opinion in *Gary v. State* “all but instructed” the legislature to create a law outlawing Gary’s and other similar actions).

18. *Id.*, at 18 min., 30 sec.

19. *Synthetic Opioid Data*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/drugoverdose/data/fentanyl.html> (last visited: May 26, 2017).

20. *Id.*

21. *Id.*

22. Video Recording of House Non-Civil Judiciary Committee Meeting at 7 min., 26 sec. (Feb. 21,

counterfeit prescription pills, such as oxycodone or Xanax, containing deadly amounts of fentanyl.²³ In many cases, buyers do not even know the counterfeit pills they buy contain fentanyl, a deception that is “proving fatal.”²⁴ Termed the “gray death,” fentanyl can be absorbed through the skin, and thus, can be lethal even to those who simply come into contact with the drug or its residue.²⁵ Further, fentanyl is so potent that opioid reversal drugs typically used to counteract the effects of an overdose may be useless against it.²⁶

According to the federal Drug Enforcement Administration, the arrival of counterfeit prescription drugs containing fentanyl in the United States is resulting “in an increase in overdoses, deaths, and opiate-dependent individuals.”²⁷ The surge in fentanyl use across the United States has already created a crisis situation, with law enforcement reporting more encounters with fentanyl and more overdose deaths due to fentanyl than at any other time since the drug was created in 1959.²⁸ In 2013, no state reported more than 500 law enforcement encounters with fentanyl.²⁹ However, from 2014 to 2015, law enforcement encounters with fentanyl across the United States more than doubled, with eight states reporting more than 500

2017) (remarks by Rep. Rich Golick (R-40th)), <https://livestream.com/accounts/19771767/events/6811913/videos/150067943> [hereinafter February 21, 2017 House Committee Video]; *Synthetic Opioid Data*, *supra* note 19.

23. February 21, 2017 House Committee Video, *supra* note 22, at 15 min., 17 sec. (remarks by Deneen Kilcrease, Section Manager at Georgia Bureau of Investigation (GBI)); U.S. DRUG ENF’T AGENCY, INTELLIGENCE BRIEF: COUNTERFEIT PRESCRIPTION PILLS CONTAINING FENTANYLS: A GLOBAL THREAT 2–3 (2016), <https://www.dea.gov/docs/Counterfeit%20Prescription%20Pills.pdf>; U.S. DEP’T JUST. DRUG ENF’T ADMIN., FENTANYL: A BRIEFING GUIDE FOR FIRST RESPONDERS 5 (2017), https://gbi.georgia.gov/sites/gbi.georgia.gov/files/related_files/document/DEA%20Fentanyl%20Guidebook%20for%20First%20Responders%20June%202017.pdf.

24. Sarah Wakeman, *Fentanyl: The Dangers of This Potent “Man-made” Opioid*, HARV. HEALTH PUBLICATIONS (Aug. 5, 2016, 9:30 AM), <http://www.health.harvard.edu/blog/fentanyl-dangers-potent-man-made-opioid-2016080510141>.

25. *New Lethal Forms of Fentanyl Confirmed in Georgia*, USA TODAY (June 28, 2017, 8:49 AM), <https://www.usatoday.com/story/news/nation-now/2017/06/28/new-lethal-forms-fentanyl-confirmed-georgia/434854001/>.

26. *Id.*; Jessica Firger, *Fentanyl Found in Georgia Resists Life-Saving Naloxone Antidote*, NEWSWEEK (June 28, 2017, 2:57 PM), <http://www.newsweek.com/fentanyl-georgia-naloxone-resistant-synthetic-opioids-acrylfentanyl-629846>.

27. U.S. DRUG ENF’T AGENCY, *supra* note 23, at 2.

28. *Id.*

29. *Reported Law Enforcement Encounters Testing Positive for Fentanyl Increase Across US*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/drugoverdose/data/fentanyl.html> (last visited May 26, 2017) [hereinafter *Fentanyl Increase Across US*].

encounters in 2015.³⁰ During the same time period, the death rate from synthetic opioids such as fentanyl increased by 72.2%.³¹

Georgia has also felt the effects of the national fentanyl epidemic. In Georgia alone, fentanyl caused nineteen deaths from January 2016 to May 2017.³² In late April 2017, four people overdosed in Forsyth County in thirty-six hours from fentanyl and other opioid mixtures.³³ Similarly, in early June 2017, just after SB 104 was signed, a wave of opioid overdoses swept through middle Georgia, with more than a dozen overdoses reported to local emergency rooms in just forty-eight hours.³⁴ According to the Georgia Bureau of Investigation (GBI), the victims all took the same yellow pills, counterfeit Percocet pain pills containing a mixture of fentanyl and another type of synthetic opioid.³⁵

In 2017, Georgia became one of many states to legislate in reaction to the fentanyl crisis.³⁶ According to Representative Rich Golick (R-40), who sponsored HB 213, the bill responds to the current fentanyl crisis by adding fentanyl to the list of controlled substances under Georgia's drug trafficking statute, Code section 16-13-31.³⁷

30. *Id.*

31. *Increases in Drug and Opioid-Involved Overdose Deaths — United States, 2010–2015*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/mmwr/volumes/65/wr/mm655051e1.htm> (last visited May 26, 2017).

32. Mark Winne, *This New Drug Is So Potent, the GBI Says You Can Die from Touching It*, WSB-TV (May 5, 2017, 4:06 PM), <http://www.wsbtv.com/news/local/this-new-drug-is-so-potent-it-can-cause-a-fatal-overdose-just-by-touching-it/519423310>.

33. Jessica Noll & Kaitlyn Ross, *'Bad Batch' of Drugs Causes 4 Overdoses, 2 Deaths; Police Seek Dealer*, 11 ALIVE (Apr. 24, 2017, 6:41 PM), <http://www.11alive.com/news/crime/bad-batch-of-drugs-cause-4-overdoses-2-dead-police-seek-dealers-/433672298>.

34. Rhonda Cook, *Death Toll Rises in Mass Overdose in Middle Georgia*, ATLANTA J.-CONST. (June 6, 2017, 4:02 PM), <http://www.ajc.com/news/crime-law/death-toll-rises-mass-overdose-middle-georgia/pH6cM5ifTL95wCDGJ9c3IK/>.

35. Michael Warrick, *GBI Finds "New" Fentanyl in Fake Pills Blamed for Middle Georgia Overdoses*, 41 NBC (June 8, 2017, 11:18 AM), <https://www.41nbc.com/2017/06/08/gbi-finds-new-fentanyl-fake-pills-blamed-middle-georgia-overdoses/>.

36. *See infra*, Analysis. Other states that legislated in reaction to the fentanyl crisis include the following: Florida, Maryland, Kentucky, Alabama, Ohio, West Virginia, and New York. *Id.*; *see e.g.*, Ian Duncan, *Maryland Senate Rewrites Hogan's Deadly Drug Bill to Target Fentanyl*, BALTIMORE SUN-SENTINAL (Mar. 15, 2017, 6:25 PM), <http://www.baltimoresun.com/news/maryland/politics/bs-md-fentanyl-dealing-bill-20170315-story.html> (reporting that the Maryland Legislature passed legislation that imposes harsh prison sentences on drug dealers who possess fentanyl); Ryan Van Velzer, *Bill with Tougher Fentanyl Penalties Heads to Florida Governor*, SUNSENTINAL (May 5, 2017, 6:50 PM), <http://www.sun-sentinel.com/local/palm-beach/fl-reg-tougher-penalties-for-fentanyl-20170505-story.html> (reporting that the Florida Senate passed several laws imposing harsh penalties on fentanyl possession).

37. Telephone Interview with Rep. Rich Golick (R-40th) at 14 min., 1 sec. (Apr. 28, 2017) (on file

Representative Golick described HB 213 as a “kitchen sink” approach to the fentanyl crisis because the bill includes fentanyl as well as its various derivatives, analogs, and related substances.³⁸ This comprehensive approach will give law enforcement broad prosecutorial power regardless of whether fentanyl or its derivatives are used in isolation or in conjunction with other drugs such as heroin.³⁹ By adding fentanyl and its derivatives to Georgia’s controlled substances list, lawmakers hope to combat the recent surge in fentanyl-related overdoses across the state.⁴⁰ HB 213 seeks to achieve this goal by giving law enforcement the power to prosecute individuals for drug trafficking, not just mere possession charges, if the individuals possess fentanyl or its derivatives.⁴¹

HB 67

Georgia, and particularly South Fulton county, has experienced a spike in incidents of individuals’ cars being driven away while they are pumping gas or getting mail from their mailboxes.⁴² In 2016, more than 900 cars were stolen in unincorporated Fulton County—twelve percent more than in the previous year.⁴³ One notable example happened in December 2016, when Queen Latifah’s car was stolen from a Shell gas station while her associate was filling the tank with gas.⁴⁴ A similar incident occurred in May 2017 when a stranger

with Georgia State University Law Review) [hereinafter Golick Interview]; February 21, 2017 House Committee Video, *supra* note 22 at 6 min., 55 sec. (remarks by Rep. Rich Golick (R-40th)).

38. February 21, 2017 House Committee Video, *supra* note 22, at 11 min., 49 sec. (remarks by Rep. Rich Golick (R-40th)).

39. *Id.*

40. Golick Interview, *supra* note 37, at 14 min., 1 sec.; February 21, 2017 House Committee Video, *supra* note 22 at 7 min., 26 sec. (remarks by Rep. Rich Golick (R-40th)).

41. February 21, 2017 House Committee Video, *supra* note 22 at 10 min., 58 sec. (remarks by Chuck Spahos, Executive Director of Prosecuting Attorneys’ Council of Georgia).

42. Arielle Kass, *Theft of Queen Latifah’s Car Helps Draw Focus to Some Fulton Crime*, ATLANTA J.-CONST. (Dec. 29, 2016, 6:21 PM), <http://www.ajc.com/news/local-govt—politics/theft-queen-latifah-car-helps-draw-focus-some-fulton-crime/kR6gPtjI3VQxIv4JsOGy4N/> (noting high profile thefts are “indicative of a larger trend”); see also Craig Johnson, *Queen Latifah’s Car Stolen at Georgia Gas Station*, ATLANTA PATCH (Dec. 20, 2016, 2:06 PM), <https://patch.com/georgia/atlanta/queen-latifahs-car-stolen-fulton-county-gas-station-report>; Joshua Sharpe, *Cops Search for Man with Tattooed Face in DeKalb Carjacking*, ATLANTA J.-CONST. (May 22, 2017, 11:17 AM), <http://www.ajc.com/news/local/cops-search-for-man-with-tattooed-face-dekalb-carjacking/UKmvCRrV5JWQqHdfoJTFjP/>.

43. Kass, *supra* note 42.

44. Johnson, *supra* note 42.

asked a driver for a ride and subsequently stole the car after the driver got out to check if the car had a flat tire.⁴⁵ In response to the increasing number of “entering auto” crimes that are occurring throughout Georgia, Representative William Boddie (D-62nd) sponsored HB 67.⁴⁶

Georgia’s burglary statute, Code section 16-7-1, already criminalized unauthorized entry into unoccupied vehicles.⁴⁷ At the time, the statute allowed the state to charge an individual with burglary in the second degree “when, without authority and with the intent to commit a felony or theft therein, he or she enters . . . an occupied, unoccupied, or vacant . . . vehicle[.]”⁴⁸ However, Representative Boddie contended this Code section insufficiently addressed the problem because prosecutors never charged people with second degree burglary.⁴⁹

SB 104

In the last few days of the legislative session, after HB 9, SB 45, HB 67, and HB 213 failed to pass both bodies, the bills’ sponsors began looking for vehicle bills to which they could attach their legislation.⁵⁰ They chose SB 104, sponsored by Senator Donzella James (D-35th), which originally only required the posting of the human trafficking hotline model notice in government buildings.⁵¹ Although not originally intended, in the end, SB 104 became the session’s “omnibus crime bill.”⁵²

45. Sharpe, *supra* note 42.

46. Video Recording of House Non-Civil Judiciary Committee Meeting at 8 min., 55 sec. (Feb. 22, 2017) (remarks by Rep. William Boddie (D-62nd)), <https://livestream.com/accounts/19771794/events/6811961/videos/150148035> [hereinafter February 22, 2017 House Committee Video]; *id.* at 8 min., 12 sec.

47. O.C.G.A. § 16-7-1(c) (2017).

48. *Id.*

49. February 22, 2017 House Committee Video, *supra* note 22 at 11 min., 9 sec. (remarks by Rep. William Boddie (D-62nd)).

50. Golick Interview, *supra* note 37, at 21 min., 15 sec.

51. *Id.* at 21 min., 40 sec.

52. *Id.*

*Bill Tracking of SB 104**Consideration and Passage by the Senate (SB 104)*

Senator Donzella James (D-35th) sponsored SB 104 in the Senate.⁵³ The Senate read the bill for the first time on February 1, 2017, and it committed the bill to the State Institutions and Property Committee.⁵⁴ On February 24, 2017, the State Institutions and Property Committee favorably reported the bill.⁵⁵ The Senate read the bill for the second time on February 27, 2017.⁵⁶ The Senate read the bill for the third time on March 1, 2017.⁵⁷ Before its passage, Senator Renee Unterman (R-45th) offered a floor amendment which consisted of two minor changes.⁵⁸ First, the addition of “with public access” clarified the type of government building within the bill’s scope.⁵⁹ Second, in Section 1, line 101, “or the Statewide Georgia Hotline for Domestic Minor Trafficking” was inserted after “Call the National Human Trafficking Resource Center.”⁶⁰ This change made a second resource available to human trafficking victims.⁶¹ SB 104, including this amendment, passed in the Senate on March 1, 2017, by a vote of 52 to 0.⁶²

Consideration and Passage by the House (SB 104)

Representative Wendell Willard (R-51st) sponsored SB 104 in the House.⁶³ The House read the bill for first time on March 3, 2017,⁶⁴

53. See Georgia General Assembly, SB 104, Bill Tracking, <http://www.legis.ga.gov/legislation/en-US/Display/20172018/SB/104>.

54. State of Georgia Final Composite Status Sheet, SB 104, May 11, 2017.

55. *Id.*

56. *Id.*

57. *Id.*

58. Senate Floor Amendment to SB 104, introduced by Sen. Renee Unterman (R-44th), Mar. 1, 2017.

59. *Id.*

60. *Id.*

61. Video recording of Senate Proceedings at 1 hr., 20 min., 14 sec. (Mar. 1, 2017) (remarks by Sen. Renee Unterman (R-45th)), <http://www.gpb.org/lawmakers/2017/day-27> [hereinafter Senate Proceedings Video].

62. Georgia Senate Voting Record, SB 104, #115 (Mar. 1, 2017).

63. Georgia House of Representatives, SB 104, Bill Tracking, <http://www.legis.ga.gov/legislation/en-US/Display/20172018/SB/104>.

64. State of Georgia Final Composite Status Sheet, SB 104, May 11, 2017.

and it referred the bill to the House Judiciary Non-Civil Committee.⁶⁵ The House read the bill for the second time on March 6, 2017.⁶⁶ On March 22, 2017, the House Judiciary Non-Civil Committee reported favorably on the bill.⁶⁷ On March 28, 2017, the House read the bill for the third time.⁶⁸ The House amended the bill to include the language from HB 9 and SB 45, and then voted, 161 to 3, to pass SB 104 as amended by the House.⁶⁹

On March 30, 2017, once returned to the Senate, the Senate disagreed on the House substitute, citing the House amendment as non-germane.⁷⁰ Later that day, the House insisted the Senate adopt its version.⁷¹ The Senate and House appointed a Conference Committee and adopted the Committee's report incorporating HB 9, SB 45, HB 67, and HB 213 into SB 104.⁷² The bill was sent to Governor Nathan Deal (R) on April 6, 2017; the Governor signed the bill into law on May 8, 2017.⁷³ Parts of the bill became effective on May 8, 2017; the remaining parts became effective on July 1, 2017.⁷⁴ The legislative histories of four of the bills incorporated into SB 104 are discussed below.

Bill Tracking of HB 9 / SB 45

Both HB 9 and SB 45 would have created criminal penalties for “upskirting.”⁷⁵ HB 9 passed in the House, but did not pass in the Senate, ending in the Senate Rules Committee.⁷⁶ Similarly, while the Senate passed SB 45, the bill failed to make it out of the House Non-Civil Judiciary Committee after being recommitted by the House

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. Georgia House of Representatives Voting Record, SB 104, #387 (Mar. 28, 2017); House Floor Amendment to SB 104 (AM 29 2648), introduced by Reps. Rich Golick (R-40th) and Shaw Blackmon (R-146th), Mar. 28, 2017.

70. State of Georgia Final Composite Status Sheet, SB 104, May 11, 2017.

71. *See id.*

72. State of Georgia Final Composite Status Sheet, SB 104, May 11, 2017; *See* SB 104 (CCS), 2017 Ga. Gen. Assemb.

73. State of Georgia Final Composite Status Sheet, SB 104, May 11, 2017.

74. 2017 Ga. Laws 417, § 8-1, at 429–30.

75. *See* HB 9, as introduced, 2017 Ga. Gen. Assemb.; SB 45, as introduced, 2017 Ga. Gen. Assemb.

76. State of Georgia Final Composite Status Sheet, HB 9, May 11, 2017.

Rules Committee.⁷⁷ Both bills were integrated into Part VA of SB 104.⁷⁸

House Consideration of HB 9

Representative Shaw Blackmon (R-146th) sponsored HB 9 in the House.⁷⁹ The bill was pre-filed in the House on November 21, 2016.⁸⁰ The House read the bill for the first time on January 11, 2017, and committed the bill to the House Judiciary Non-Civil Committee.⁸¹ The House read the bill for the second time on January 12, 2017.⁸² On February 14, 2017, the House Judiciary Non-Civil Committee amended the bill and favorably reported a substitute.⁸³

The substitute first added “observing” to line 21.⁸⁴ The line now reads as follows: to create “the purpose of surreptitiously *observing*, photographing, videotaping, filming, or video recording such person underneath such person’s clothing, for the purpose of viewing the intimate parts of the body”⁸⁵ This change addressed a policy concern regarding whether an individual using the technology to *view* underneath a person’s clothing, rather than record, violated the bill.⁸⁶

Additionally, the substitute expanded the business exception in Section 1.⁸⁷ This change expanded the exception by allowing any business owner to use surveillance to detect unlawful activity if it is in the ordinary course of business.⁸⁸

77. State of Georgia Final Composite Status Sheet, SB 45, May 11, 2017.

78. SB 104 (CCS), § 5A, p. 8, 2017 Ga. Gen. Assemb.

79. Georgia General Assembly, HB 9, Bill Tracking, <http://www.legis.ga.gov/Legislation/en-US/InjectSession.aspx?BillType=HB&BillNum=9>.

80. HB 9, pre-filed, 2017 Ga. Gen. Assemb.

81. State of Georgia Final Composite Status Sheet, HB 9, May 11, 2017.

82. *Id.*

83. *Id.*

84. HB 9 (HCS), § 1, p. 1, 21, 2017 GA. Gen. Assemb.

85. *Id.* (emphasis supplied).

86. Video Recording of House Judiciary Non-Civil Committee at 48 min., 7 sec. (Feb. 13, 2017) (remarks by Rep. Ed Setzler (R-35th)), <https://livestream.com/accounts/19771755/events/6810993/videos/149354241> [hereinafter February 13, 2017 House Committee Video].

87. *Compare* HB 9 (HCS), § 1, p. 2, ll. 29–31, 2017 Ga. Gen. Assemb., *with* HB 9, as introduced, § 1, p. 2, ll. 29–30, 2017 Ga. Gen. Assemb.

88. *Compare* HB 9 (HCS), § 1, p. 2, 29–31, 2017 Ga. Gen. Assemb., *with* HB 9, as introduced, § 1, p. 2, ll. 29–30, 2017 Ga. Gen. Assemb. Originally, the business exception read, “A retailer that surveils a customer changing room, provided that signage conspicuously warns customers of the retailer’s surveillance.” HB 9, as introduced, § 1, p. 2, ll. 29–30, 2017 Ga. Gen. Assemb. The substitute provided,

Further, the Committee changed the exception regarding law enforcement in Section 1.⁸⁹ The amended version included the word “lawful” in line 28, limiting the exception to only lawful activities of law enforcement.⁹⁰ Additionally, the amendment removed the phrase “in the investigation and prosecution of criminal offenses” from line 27 to allow non-investigative, legal law enforcement work to fall into the exception.⁹¹

Finally, the substitute addressed a House Judiciary Non-Civil Committee concern regarding the potential types of technology used to perpetrate these crimes.⁹² The initial bill included technologies that allowed an individual to see through or underneath a person’s clothing.⁹³ This created an issue in subcommittee regarding thermal imaging devices that allow someone to see through a person’s clothing, and “down-blousing,” or viewing someone’s intimate areas from above.⁹⁴ The substitute deleted “through such person’s clothing,” narrowing the language to only “underneath such person’s clothing.”⁹⁵ The House adopted and passed the Committee substitute on February 17, 2017, by a vote of 156 to 1.⁹⁶

Senate Consideration of SB 45

Senator Larry Walker III (R-20th) sponsored SB 45 in the Senate.⁹⁷ The Senate read the bill for the first time on January 25, 2017, and referred it to the Judiciary Committee.⁹⁸ On February 10, 2017, the Senate Judiciary Committee amended the bill and favorably

“A business’s or entity’s surveillance device used in the ordinary course of its business, provided that signage conspicuously warns of such surveillance and the use of such device is primarily designed to detect unlawful activity.” HB 9 (HCS), § 1, p. 2, 29–31, 2017 Ga. Gen. Assemb.

89. HB 9 (HCS), § 1, p. 2, 28, 2017 Ga. Gen. Assemb.

90. *Id.*

91. *Id.* § 1, p. 2, l. 27.

92. February 13, 2017 House Committee Video, *supra* note 86 at 47 min., 44 sec. (remarks by Rep. Ed Setzler (R-35th)).

93. HB 9, as introduced, p. 1, 3, 2017 Ga. Gen. Assemb.

94. February 13, 2017 House Committee Video, *supra* note 86 at 47 min., 44 sec. (remarks by Rep. Ed Setzler (R-35th)).

95. *Compare* HB 9, as introduced, §1, p. 1, l. 21, 2017 Ga. Gen. Assemb., *with* HB 9 (HCS), § 1, p. 1, l. 22, 2017 Ga. Gen. Assemb.

96. Georgia House of Representatives Voting Record, HB 9, #68 (Feb. 17, 2017).

97. Georgia General Assembly, SB 45, Bill Tracking, <http://www.legis.ga.gov/legislation/en-US/Display/20172018/SB/45>.

98. State of Georgia Final Composite Status Sheet, SB 45, May 11, 2017.

reported a substitute.⁹⁹ The substitute changed the first offense penalty from a misdemeanor to a felony.¹⁰⁰ The Senate read the bill for the third time on February 15, 2017, and it adopted and passed the substitute by a vote of 49 to 0.¹⁰¹

Bill Tracking of HB 213

HB 213 addressed the fentanyl crisis.¹⁰² While the House adopted HB 213, the Senate tabled the bill, and it failed to reach the Senate floor for a third reading.¹⁰³ Part VI and VII of SB 104 incorporates language from HB 213.¹⁰⁴

House Consideration of HB 213

Representative Rich Golick (R-40th) sponsored HB 213 in the House.¹⁰⁵ The House read the bill for the first time on February 2, 2017, and referred it to the House Judiciary Non-Civil Committee.¹⁰⁶ The House read the bill for the second time on February 7, 2017.¹⁰⁷ On February 21, 2017, the House Judiciary Non-Civil Committee amended the bill and favorably reported a substitute.¹⁰⁸ The Committee substitute significantly modified the bill by adding, among other things, an entirely new section, Part II.¹⁰⁹ First, on line 3, the substitute added “and related substances” after “the possession of fentanyl.”¹¹⁰ This phrase indicates the addition of Part II, which adds all known isomers, derivatives, hybrids, and strains of fentanyl

99. *Id.*

100. Compare SB 45 as introduced, § 1, p. 1, ll. 25–26, 2017 Ga. Gen. Assemb., with SB 45 (SCS), § 1, p. 2, l. 27, 2017 Ga. Gen. Assemb.

101. State of Georgia Final Composite Status Sheet, SB 45, May 11, 2017; Georgia Senate Voting Record, SB 45, #55 (Feb. 15, 2017).

102. See February 21, 2017 House Committee Video, *supra* note 22 at 6 min., 55 sec. (remarks by Rep. Rich Golick (R-40th)).

103. State of Georgia Final Composite Status Sheet, HB 213, May 11, 2017.

104. SB 104 (CCS), §§ 6-1 to 7-4, p. 9–15, 2017 Ga. Gen. Assemb.

105. Georgia General Assembly, HB 213, Bill Tracking, <http://www.legis.ga.gov/legislation/en-US/Display/20172018/HB/213>.

106. State of Georgia Final Composite Status Sheet, HB 213, May 11, 2017.

107. *Id.*

108. *Id.*

109. Compare HB 213 (HCS), 2017 Ga. Gen. Assemb., with HB 213, as introduced, 2017 Ga. Gen. Assemb.

110. *Id.* at p. 1, 3.

that law enforcement agencies are currently finding on the streets.¹¹¹ The addition of Part II was mainly to include what the GBI deems fentanyl's most potent isomers currently being used.¹¹² On February 27, 2017, the House read the bill for the third time and adopted the substitute by a vote of 161 to 5.¹¹³

Senate Consideration of HB 213

Senator Hunter Hill (R-6th) sponsored HB 213 in the Senate.¹¹⁴ The Senate read the bill for the first time on February 28, 2017, and referred it to the Senate Judiciary Committee, which favorably reported the bill on March 10, 2017.¹¹⁵ The Senate read the bill for the second time on March 13, 2017, and for a third time on March 15, 2017.¹¹⁶ The Senate tabled the bill on March 15, 2017.¹¹⁷ On March 28, 2017, the bill was tabled once again.¹¹⁸

Bill Tracking of HB 67

HB 67 created a new crime—carjacking in the second degree.¹¹⁹ HB 67 passed in the House, but the Senate tabled the bill after the bill's second reading.¹²⁰ The Conference Committee appointed for SB 104 added language from HB 67 to Part I, Part II and Part III of SB 104.¹²¹

111. February 21, 2017 Video Recording of House Judiciary Non-Civil Committee, *supra* note 86, at 12 min., 45 sec. (remarks by Deneen Kilcrease).

112. *Id.* at 6 min., 40 sec. (remarks by Rep. Rich Golick (R-40th)).

113. State of Georgia Final Composite Status Sheet, HB 213, May 11, 2017; Georgia House of Representatives Voting Record, HB 213, #124 (Feb. 27, 2017).

114. Georgia General Assembly, HB 213, Bill Tracking, <http://www.legis.ga.gov/legislation/en-US/Display/20172018/HB/213>.

115. State of Georgia Final Composite Status Sheet, HB 213, May 11, 2017.

116. *Id.*

117. *Id.*

118. *Id.*

119. *See* HB 67 (HCS), 2017 Ga. Gen. Assemb.

120. State of Georgia Final Composite Status Sheet, HB 67, May 11, 2017.

121. SB 104 (CCS), §§ 1-1 to 3-3, p. 1-4, 2017 Ga. Gen. Assemb.

House Consideration of HB 67

Representative William Boddie (D-62nd) sponsored HB 67 in the House.¹²² The House read the bill for the first time on January 24, 2017, and committed the bill to the House Judiciary Non-Civil Committee.¹²³ The House read the bill for the second time on January 25, 2017.¹²⁴ On February 22, 2017, the House Judiciary Non-Civil Committee amended the bill and favorably reported it by substitute.¹²⁵

The Committee significantly modified the bill.¹²⁶ The substitute created a new offense: carjacking in the second degree.¹²⁷ Carjacking in the first degree requires a firearm and intimidation.¹²⁸ HB 67's carjacking in the second degree does not require confrontation and creates a new felony when an individual takes another's car without the driver's consent.¹²⁹ The bill also creates penalties.¹³⁰ The first offense carries a one- to twenty-year prison sentence.¹³¹ The second offense results in a three- to twenty-year prison sentence.¹³² The third offense is punishable by a five- to twenty-year prison sentence.¹³³ The House read the bill for the third time on March 3, 2017.¹³⁴ The House passed the Committee substitute of HB 67 on March 3, 2017, by a vote of 151 to 18.¹³⁵

122. Georgia General Assembly, HB 67, Bill Tracking, <http://www.legis.ga.gov/legislation/en-US/Display/20172018/HB/67>.

123. State of Georgia Final Composite Status Sheet, HB 67, May 11, 2017.

124. *Id.*

125. *Id.*

126. February 22, 2017 House Committee Video, *supra* note 22 at 7 min., 50 sec. (remarks by Rep. William Boddie (D-62nd)).

127. *Id.*; HB 67 (HCS), § 1, p. 1, ll. 14–17, 2017 Ga. Gen. Assemb.

128. HB 67 (HCS), § 1, p. 1, ll. 14–17, 2017 Ga. Gen. Assemb.

129. *Id.* at ll. 18–21.

130. *Id.* at ll. 3–4.

131. *Id.* § 1-1, p. 2, ll. 33–35.

132. *Id.* at ll. 35–38.

133. *Id.* at ll. 38–40.

134. State of Georgia Final Composite Status Sheet, HB 67, May 11, 2017.

135. Representatives Voting Record, HB 67, #200 (Mar. 3, 2017).

Senate Consideration of HB 67

Senator Mike Dugan (R-30th) sponsored HB 67 in the Senate.¹³⁶ The Senate read the bill for the first time on March 6, 2017, and referred the bill to the Senate Judiciary Committee.¹³⁷ On March 20, 2017, the Senate Judiciary Committee amended the bill and favorably reported the bill by substitute.¹³⁸ The Committee substitute also lessened the maximum possible jail time for an individual convicted of hijacking a motor vehicle in the second degree for that individual's first and second convictions.¹³⁹

Senator Blake Tillery (R-19th) offered a floor amendment to the Committee substitute which added language from HB 214,¹⁴⁰ relating to false proof of insurance documents.¹⁴¹ The amendment, offered by Senator Blake Tillery (R-19th), inserted language changing the provisions "relating to punishment for the unlawful manufacture, sale, or distribution of a counterfeit or false proof of insurance document."¹⁴² These additions, which changed the punishments for the unlawful manufacture, sale, or distribution of counterfeit or false proof of insurance documents, were included after "vehicle" on line 5.¹⁴³

The Senate tabled the bill on March 28, 2017, by a vote of 50 to 3.¹⁴⁴ The text of HB 67, including the addition of HB 214, was integrated into the final version of SB 104.¹⁴⁵

136. Georgia General Assembly, HB 67, Bill Tracking, <http://www.legis.ga.gov/legislation/en-US/Display/20172018/HB/67>.

137. State of Georgia Final Composite Status Sheet, HB 67, May 11, 2017.

138. *Id.*

139. HB 67 (SCS), § 1-1, p. 2, 33-38, 2017 Ga. Gen Assemb.

140. Rep. Rich Golick (R-40th) sponsored HB 214 in the House. Georgia General Assembly, HB 214, Bill Tracking, <http://www.legis.ga.gov/legislation/en-US/Display/20172018/HB/214>. The House read the bill for the first time on February 2, 2017. State of Georgia Final Composite Sheet, HB 214, May 11, 2017. The House committed the bill to the Judiciary Non-Civil Committee. *Id.* The House Judiciary Non-Civil Committee favorably reported the bill by substitute on February 7, 2017, and it was adopted by the House on February 14, 2017. *Id.* But, the bill failed to reach the Senate floor for a vote. *Id.*

141. Senate Floor Amendment to HB 67 (AM 41 0308), introduced by Sens. Blake Tillery (R-19th), Marty Harbin (R-16th), P.K. Martin, IV (R-9th), Burt Jones (R-25th), Mar. 28, 2017.

142. *Id.* p. 1, 3-4.

143. *Id.* p. 1, 11; LEGISLATIVE SERV. COMM., *Summary of General Statutes Enacted at the 1st Session of the 154th General Assembly of Georgia at 9* (2017), <http://www.legis.ga.gov/Legislation/20172018/17sumdoc.pdf>.

144. State of Georgia Final Composite Status Sheet, HB 67, May 11, 2017; Georgia Senate Voting Record, HB 67, #297 (Mar. 28, 2017).

145. SB 104, as passed, § 1-1, pp. 1-2, ll. 21-53; § 1-2, pp. 2-3, ll. 54-64; § 2-1, p. 3, ll. 67-76;

*The Act**Part I*

Part I of the Act amends the following portions of the Official Code of Georgia Annotated: Code section 16-5-44.1, relating to hijacking a motor vehicle, and Code section 16-7-1, relating to burglary.¹⁴⁶ Specifically, Section 1-1 of the Act designates that a person who uses a firearm to obtain a motor vehicle, which was already criminalized under Georgia law, is now guilty of “hijacking a motor vehicle in the first degree.”¹⁴⁷ Section 1-1 also creates a new offense of “hijacking a motor vehicle in the second degree.”¹⁴⁸ A person is guilty of hijacking motor vehicle in the second degree when that person obtains a motor vehicle from an individual without his or her consent but does not use a weapon or firearm to do so.¹⁴⁹

Section 1-1 creates different penalties for hijacking a motor vehicle in the first degree and in the second degree.¹⁵⁰ The penalty for hijacking a motor vehicle in the first degree is the same as the previously existing penalty for hijacking a motor vehicle under the old Code section.¹⁵¹ The first conviction of hijacking a motor vehicle in the second degree results in imprisonment for one to ten years, and a maximum fine of \$5,000.¹⁵² Upon a second conviction of hijacking a motor vehicle in the second degree, a person may be imprisoned for a minimum of three years and a maximum of fifteen years and fined a maximum of \$5,000.¹⁵³ A third or subsequent conviction is punished by imprisonment for a minimum of five years and a maximum of twenty years and a maximum fine of \$5,000.¹⁵⁴

Section 1-2 removes the word “vehicle” from Code section 16-7-1.¹⁵⁵ A person can no longer be convicted of burglary in the

§ 5-1, p. 7, ll. 205–230, 2017 Ga. Gen. Assemb.

146. 2017 Ga. Laws 417, at 417–18.

147. 2017 Ga. Laws 417, § 1-1, at 417–18; O.C.G.A. § 16-5-44.1(b)(1) (Supp. 2017).

148. 2017 Ga. Laws 417 § 1-1, at 418.

149. O.C.G.A. § 16-5-44.1(b)(2) (Supp. 2017).

150. 2017 Ga. Laws 417 § 1-1, at 418.

151. *Compare* O.C.G.A. § 16-5-44.1 (2016), *with* 2017 Ga. Laws 417 § 1-1, at 418.

152. O.C.G.A. § 16-5-44.1(c)(1) (Supp. 2017).

153. O.C.G.A. § 16-5-44.1(c)(2) (Supp. 2017).

154. O.C.G.A. § 16-5-44.1(c)(2) (Supp. 2017).

155. *Compare* O.C.G.A. § 16-7-1(c) (2016), *with* 2017 Ga. Laws 417 § 1-2, at 418.

second degree when “he or she enters or remains within an occupied, unoccupied, or vacant” vehicle.¹⁵⁶

The purpose of creating a new offense of hijacking a motor vehicle in the second degree was to address the increasing number of “entering auto” crimes in Georgia.¹⁵⁷ Before the Act, only people who used a firearm or weapon to obtain a motor vehicle could be charged with hijacking a motor vehicle.¹⁵⁸ The offense did not address those who stole another person’s car while the owner was pumping gas or checking the mail.¹⁵⁹ The new offense creates a different method of prosecuting “entering auto” crimes.¹⁶⁰

Part II

Part II of the Act amends the following portions of the Official Code of Georgia Annotated: Code section 15-11-2, relating to definitions for the Juvenile Code; Code section 15-11-505, relating to use of assessments in determining whether detention is warranted and defining “serious delinquent act”; Code section 17-6-1, relating to when offenses are bailable, procedure, schedule of bails, and appeal bonds; and Code section 17-6-12, relating to the discretion of the court to release a person charged with a crime on a person’s own recognizance only.¹⁶¹ Each of these Code sections is amended by replacing “hijacking a motor vehicle” with “hijacking a motor vehicle in the first degree,” to distinguish this offense from the newly-created offense of hijacking a motor vehicle in the second degree.¹⁶²

156. See O.C.G.A. § 16-7-1 (Supp. 2017).

157. February 22, 2017 House Committee Video, *supra* note 22 at 8 min., 10 sec. (remarks by Rep. William Boddie (D-62nd)).

158. Compare O.C.G.A. § 16-5-44.1 (2016), with 2017 Ga. Laws 417 § 1-1, at 417–18.

159. See O.C.G.A. § 16-5-44.1 (2016).

160. February 22, 2017 House Committee Video, *supra* note 22 at 12 min., 16 sec. (remarks by Rep. William Boddie (D-62nd)); see also 2017 Ga. Laws 417 § 1-1, at 417–18.

161. 2017 Ga. Laws 417 § 2-1, at 419.

162. See *e.g.*, O.C.G.A. 17-6-12(a)(2)(C) (Supp. 2017).

Part III

Part III of the Act amends Code section 16-11-131, relating to possession of a firearm by convicted felons and first-offender probationers; Code section 17-7-130, relating to proceedings upon plea of mental incompetence to stand trial; and Code section 17-10-9.1, relating to voluntary surrender to county jail or correctional institution.¹⁶³ The legislature amended each of these Code sections to reflect the distinction between the offenses of hijacking a motor vehicle in the first degree and hijacking a motor vehicle in the second degree throughout the Code.¹⁶⁴

First, Section 3-1 amends 16-11-131 by replacing “hijacking a motor vehicle” with “hijacking a motor vehicle in the first degree” in the list of forcible felonies, or those felonies involving “the use or threat of physical force or violence against any person”¹⁶⁵ Similarly, Section 3-2 replaces “[h]ijacking of a motor vehicle or an aircraft” with “[h]ijacking a motor vehicle in the first degree or hijacking an aircraft” in the list of violent offenses under Code section 17-7-130.¹⁶⁶ Finally, Section 3-3 replaces “[a]ircraft hijacking and hijacking of a motor vehicle” with “[a]ircraft hijacking and hijacking a motor vehicle in the first degree” in Code section 17-10-9.1.¹⁶⁷

Part VA

Part VA of the Act adds Code section 16-11-91.¹⁶⁸ Code section 16-11-91(b) criminalizes the recording of still or moving images underneath another individual’s clothing in public, after the Georgia

163. 2017 Ga. Laws 417 § 3-1 to 3-3, at 419.

164. O.C.G.A. § 17-7-130 (Supp. 2017).

165. 2017 Ga. Laws 417 § 3-1, at 419; *see also* O.C.G.A. § 16-11-31 (Supp. 2017).

166. 2017 Ga. Laws 417 § 3-2, at 419. Code section 17-7-130 allows a court to order the civil commitment of a person charged with a violent offense as long as the commitment does not exceed the maximum time period that the accused could be sentenced to for the most serious violent offense charged. O.C.G.A. § 17-7-130(e)(2)(B)(iv) (2017).

167. 2017 Ga. Laws 417 § 3-3, at 419. Code section 17-10-9.1 allows defendants who plead *nolo contendere* or guilty to crimes other than those listed in subsection (a) to be released “pending the defendant’s surrendering to a county jail or to a correctional institution designated by the Department of Corrections as authorized in this Code section.” O.C.G.A. § 17-10-9.1(a) (2017).

168. 2017 Ga. Laws 417 § 5A-1, at 423–24.

Court of Appeals held such an act was not covered by Georgia's existing privacy laws.¹⁶⁹ Under Code section 16-11-91(b)(1), it is now unlawful for any person to, “knowingly and without the consent of the individual observed, use or install a device for the purpose of surreptitiously observing, photographing, videotaping, filming or video recording such individual underneath or through such individual’s clothing for the purpose of viewing the intimate parts of the body of or the undergarments worn by such individual, under circumstances in which such individual has a reasonable expectation of privacy, *regardless of whether it occurs in a public place.*”¹⁷⁰ By providing an individual can commit the newly-created offense “regardless of whether [the recording] occurs in a public place,” the amendment specifically addresses the majority’s holding in *Gary v. State* and creates an offense that would have outlawed Gary’s conduct.¹⁷¹ Additionally, under Code section 16-11-91(b)(2), it is “unlawful to disseminate any image with knowledge” the image was “taken or obtained in violation of [Code section 16-11-91(b)(1)].”¹⁷²

Subsection (a) of Code section 16-11-91 defines “device” as “an instrument or apparatus used for observing, videotaping, recording, or transmitting visual images,” such as a camera or mobile phone.¹⁷³ Subsection (a) also defines “intimate parts” to “have the same meaning as set forth in Code section 16-6-22.1.”¹⁷⁴

Subsection (c) makes the new offense a felony and imposes a sentence of imprisonment for a minimum of one year and a maximum of five years, a fine of not more than \$10,000, or both.¹⁷⁵ Subsection (c) gives courts discretionary power to reduce the offense to a misdemeanor.¹⁷⁶

Subsection (d) creates two exceptions to the offense created under subsection (b).¹⁷⁷ Under these exceptions, the offense does not apply to: (1) the lawful activities of law enforcement and prosecution

169. O.C.G.A. § 16-11-91 (Supp. 2017); *Gary v. State*, 338 Ga. App. 403, 408–09, 790 S.E.2d 150, 153–54 (2016).

170. O.C.G.A. § 16-11-91(b)(1) (Supp. 2017) (emphasis added).

171. O.C.G.A. § 16-11-91(b)(1) (Supp. 2017); *Gary*, 338 Ga. App. at 408–09, 790 S.E.2d at 153–54.

172. O.C.G.A. § 16-11-91(b)(2) (Supp. 2017).

173. O.C.G.A. § 16-11-91(a) (Supp. 2017).

174. O.C.G.A. § 16-11-91(a) (Supp. 2017).

175. O.C.G.A. § 16-11-91(c) (Supp. 2017).

176. O.C.G.A. § 16-11-91(c) (Supp. 2017).

177. O.C.G.A. § 16-11-91(d) (Supp. 2017).

agencies, and (2) a “business’s or entity’s surveillance device used in the ordinary course of business provided that signage conspicuously warns of such surveillance and the use of such device is primarily designed to detect unlawful activity.”¹⁷⁸ The Act’s sponsors purposefully exempted *lawful* law enforcement activities from the offense, rather than all law enforcement activities regardless of their legality.¹⁷⁹

Part VI

Part VI of the Act amends Code section 16-13-30 and 16-13-31, relating to purchase, possession, manufacture, distribution, or sale of controlled substances or marijuana.¹⁸⁰ Specifically, the new fentanyl drug class is excluded from the criminal penalties designated in Code section 16-13-31(c)(3)(A).¹⁸¹ Rather, “the provisions of Code [s]ection 16-13-31 . . . control these substances.”¹⁸² Code section 16-13-31 provides criminal penalties for trafficking cocaine, illegal drugs, marijuana, or methamphetamine.¹⁸³

Part VII

Part VII of the Act amends Code section 16-13-25 and Code section 16-13-26 to add multiple new Schedule I controlled substances and two new Schedule II controlled substances.¹⁸⁴ Specifically, Section 7-1 adds 3,4-dichloro-N-[(1-dimethylamino)cyclohexylmethyl]benzamide (AH-7921) and 3,4-dichloro-N-(2-(dimethylamino)cyclohexyl)-N-methylbenzamide (U-47700) to the list of Schedule I controlled substances.¹⁸⁵ Section 7-2 adds “[t]he fentanyl analog structural class, including any of the following derivatives, their salts, isomers, or salts of isomers” to the

178. *Id.*

179. Blackmon Interview, *supra* note 16, at 10 min., 56 sec.

180. 2017 Ga. Laws 417 § 6-1 to 6-2, at 424–25.

181. O.C.G.A. § 16-13-30 (c)(3)(B) (Supp. 2017).

182. O.C.G.A. § 16-13-30(c)(3)(B) (Supp. 2017).

183. O.C.G.A. § 16-13-31 (Supp. 2017).

184. 2017 Ga. Laws 417 § 7-1 to 7-4, at 425–29.

185. 2017 Ga. Laws 417, § 7-1, at 425; O.C.G.A. § 16-13-25(1) (Supp. 2017).

list of Schedule I controlled substances.”¹⁸⁶ Section 7-3 adds “carfentanil” and “thiafentanil” to the list of Schedule II controlled substances.¹⁸⁷

Part VIII

Part VIII of the Act amends Code section 26-4-115, relating to wholesale drug distributors.¹⁸⁸ Specifically, Section 8-1 now provides “transfers of drugs from a licensed hospital pharmacy to an entity that is affiliated with or owned by the hospital shall not be deemed wholesale distributors of drugs.”¹⁸⁹ The amendments in Parts VI, VII, and VIII of the Act were all included to combat the ongoing fentanyl crisis in Georgia.¹⁹⁰ Representative Rich Golick (R-40th), who sponsored HB 213 (these parts of SB 104), was careful to include the various derivatives of fentanyl because new derivatives are discovered frequently.¹⁹¹

Analysis

HB 9 & SB 45: Creating a New Offense

Part of this Act is the Legislature’s response to *Gary v. State*.¹⁹² In *Gary*, the Georgia Court of Appeals held the phrase “private place” in the relevant statute “does not refer to a specific area of a person’s body.”¹⁹³ Because the court found a “private place” only encompassed a physical location, “out of public view and in which individuals may reasonably expect to be safe from intrusion or surveillance,” the law only criminalized non-consensual videotaping and surveillance in private places like “homes, dressing rooms, and locker rooms.”¹⁹⁴ The Act attempts to correct a fundamental loophole

186. 2017 Ga. Laws 417, §7-2, at 426–29; O.C.G.A. § 16-13-25(13) (Supp. 2017).

187. 2017 Ga. Laws 417, §7-3, at 429; O.C.G.A. § 16-13-26(2) (Supp. 2017).

188. 2017 Ga. Laws 417 § 8-1, at 429.

189. O.C.G.A. § 26-4-115(g) (Supp. 2017).

190. Golick Interview, *supra* note 37, at 29 min., 38 sec.

191. February 21, 2017 House Committee Video, *supra* note 22 at 12 min., 46 sec. (remarks by Deneen Kilcrease, Chemistry Section Manager at the Georgia Bureau of Investigation).

192. Blackmon Interview, *supra* note 17, at 3 min., 40 sec.

193. *Gary v. State*, 338 Ga. App. 403, 408, 790 S.E.2d 150, 154 (2016).

194. *Id.* at 408, 790 S.E.2d at 154; Holly Kearl, *Yes, It’s Legal to Take Pictures Up a Woman’s Skirt*

in Georgia law by criminalizing such non-consensual videotaping in the public arena as well.¹⁹⁵

A Common Issue Across the Country: State Responses

Other states face similar privacy issues, but in many of those instances the courts find fault in a different section of the applicable privacy statute.¹⁹⁶ In Georgia, the Court of Appeals' narrow interpretation of "private place" allowed Gary's conviction to be overturned.¹⁹⁷ Courts in other states reach the same outcome by different means: narrowly interpreting "reasonable expectation of privacy" to permit the non-consensual videotaping and surveillance.¹⁹⁸

Like Georgia, other states have explicitly changed their laws to prevent similar forms of unwanted surveillance and recordings.¹⁹⁹ In Virginia, for example, "lawmakers added a specific clause expressly prohibiting taking photos or recordings 'of the person's intimate parts or undergarments covering those intimate parts when the intimate parts or undergarments would not otherwise be visible to the general public.'"²⁰⁰ Additionally, the Washington legislature changed its privacy law to include language stating an individual's expectation of privacy exists in both private and public places.²⁰¹

What's the Big Deal?

Some may argue this type of conduct should not be criminalized because, most of the time, the victim is not aware of the surveillance or recording.²⁰² However, opponents argue allowing such conduct perpetuates a widespread form of gender-based harassment that is

Without Her Consent, TIME (July 25, 2016), <http://time.com/4422772/upskirt-photos-harassment/>.

195. O.C.G.A. § 16-11-91(b)(1) (Supp. 2017).

196. Kearl, *supra* note 194.

197. *Gary*, 338 Ga. App. at 408, 790 S.E.2d at 154.

198. Kearl, *supra* note 194.

199. *Id.*

200. *Id.*

201. Ray Sanchez, *States and Victims Grapple with 'Upskirt' Laws Against Voyeurism*, CNN (Mar. 6, 2014), <http://www.cnn.com/2014/03/06/us/upskirt-photography/index.html>.

202. Kearl, *supra* note 194.

rampant in America's inner cities.²⁰³ Additionally, women who have been victims or know someone who has been a victim may feel unsafe and uncomfortable in public places knowing such behavior is legal and unpreventable.²⁰⁴ An Ohio Representative, who sponsored legislation similar to the Act, reasoned the existence of the internet justifies the more severe criminalization of taking nonconsensual videos because the video could be posted and could violate an unknowing victim's privacy millions of times.²⁰⁵

In Conjunction with O.C.G.A § 16-11-90

In 2014, the Georgia Legislature passed an act in an attempt to combat "revenge porn."²⁰⁶ Revenge porn is "the practice of trying to shame a former boyfriend or girlfriend by posting their nude images online."²⁰⁷ Code section 16-11-90 forbids electronically transmitting or causing the non-consensual electronic transmission of a photograph depicting a nude adult or an adult engaged in sexually explicit conduct when the transmission "serves no legitimate purpose" to the depicted person and causes financial loss or harasses the depicted person, provided the accused knew the content of the image.²⁰⁸ Under the Act, it is now unlawful to disseminate any image or recording with knowledge it was taken or obtained without the consent of the individual observed.²⁰⁹ This bill may provide greater prosecutorial power against an individual who knowingly disseminated the non-consensual photos or videos but who did not set up the original cameras or take the images themselves. To prove a violation, however, the state would have to show the individual who shared the image did so despite knowing the victim was filmed

203. *Id.*

204. *Id.*

205. Oliver Libaw, *States Crack Down on 'Upskirting' Voyeurs*, ABC NEWS (Oct. 10, 2017), <http://abcnews.go.com/US/story?id=95441&page=1>.

206. See 2014 Ga. Laws 220 (codified at O.C.G.A. § 16-11-90 (2017)); Tyler Jett, *North Georgia District Attorney's Son Charged for Uploading Revenge Porn*, TIMES FREE PRESS (May 19, 2017), <http://www.timesfreepress.com/news/local/story/2017/may/19/district-attorneys-scharged-revenge-porn/428949/>.

207. See Jett, *supra* note 194.

208. O.C.G.A. § 16-11-90 (Supp. 2017).

209. O.C.G.A. § 16-11-91(b) (Supp. 2017).

unknowingly in an area in which the victim had a reasonable expectation of privacy.

HB 213: Fentanyl-Related Deaths: A National Issue

Federal legislators recognize fentanyl-related deaths are a national problem. “Senators Edward Markey (D-MA), Marco Rubio (R-FL), Sherrod Brown (D-OH) and Shelley Moore Capito (R-WV)” sponsored a bill in the U.S. Senate that would increase the funding for technology that allows Customs and Border Patrol agents to better screen and identify fentanyl and fentanyl-laced drugs and trace where the drugs originated.²¹⁰ The bill would increase the screening and equipment available at borders and in post offices.²¹¹ The bill’s sponsors want to stop drugs from ever entering the country.²¹²

Georgia is not the only state with increasing fentanyl-related deaths. “Florida has been particularly hard hit by the opioid epidemic.”²¹³ Florida Governor Rick Scott (R) declared a statewide public health emergency due to the fentanyl epidemic and released \$27 million of federal funding to fight it.²¹⁴ The Florida Senate passed several laws imposing harsh penalties on fentanyl possession, which included “charging drug dealers with murder if their customers overdose on [fentanyl].”²¹⁵ Individuals possessing between four and fourteen grams of fentanyl receive a minimum of three years of incarceration and a hefty \$50,000 fine.²¹⁶ Possession of fourteen to twenty-eight grams of fentanyl results in a minimum of fifteen years of incarceration and a \$100,000 fine. The minimum prison sentence

210. Hanna Schwarz, *Fentanyl Legislation Would Beef Up Border Detection*, USA TODAY (Apr. 12, 2017), <https://www.usatoday.com/story/news/local/2017/04/12/fentanyl-legislation-would-beef-up-border-detection/100376132/>.

211. *Id.*

212. *Id.*

213. Andrew O’Reilly, *Drug Dealers Would Face Manslaughter Charges for Opioid Overdoses Under Proposed Florida Law*, FOX NEWS (Mar. 9, 2017), <http://www.foxnews.com/us/2017/03/09/drug-dealers-would-face-manslaughter-charges-for-opioid-overdoses-under-proposed-florida-law.html>. “The latest figures from the state’s department of health found that there were 779 heroin-related deaths in 2015—an increase of almost 80 percent from the previous year—and in 2016 more people in Miami-Dade County died of opioid abuse than died as victims of homicide.” *Id.*

214. Van Velzer, *supra* note 36.

215. *Id.*; O’Reilly, *supra* note 213.

216. Van Velzer, *supra* note 36.

for possession of twenty-eight grams or more is twenty-five years, and the fine is \$500,000.²¹⁷ Opponents argue these harsh penalties wrongly punish drug users alongside drug dealers.²¹⁸ These opponents point out drug users who may unknowingly possess fentanyl should not be punished to the same extent as dealers who knowingly cut their drugs with the potent substance.²¹⁹ They further argue the legislation does not address the real problem of addiction.²²⁰

In 2017, the Maryland legislature also passed legislation imposing harsh prison sentences on drug dealers who possess fentanyl.²²¹ The new law imposes an additional ten-year sentence on any dealer found with fentanyl.²²² Similar legislation adding harsh punishments for fentanyl possession and distribution has been proposed in Kentucky,²²³ Alabama,²²⁴ Ohio,²²⁵ West Virginia,²²⁶ and New York,²²⁷ among other states.

HB 67: Increasing the Scope of the Car Hijacking Statute

As discussed above, the Act amends the current car hijacking statute by designating the prior offense as hijacking a motor vehicle in the first degree and creating a new offense of hijacking a motor vehicle in the second degree.²²⁸ Although both crimes are felonies,

217. *Id.*

218. *Id.*

219. *Id.*

220. O'Reilly, *supra* note 213.

221. S.B. 539, 2017 Leg., 437th Sess. (Md. 2017); Duncan, *supra* note 36.

222. S.B. 539, 2017 Leg., 437th Sess. (Md. 2017); Duncan, *supra* note 36.

223. H.B. 333, 2017 Gen. Assemb., Reg. Sess. (Ky. 2017).

224. Senator Cam Ward & Representative April Weaver, *Opioid & Fentanyl Crises' Deserve Legislative Action* (Apr. 3, 2017),

<http://www.alreporter.com/2017/04/03/opioid-fentanyl-crises-deserve-legislative-action/>; Amy Yurkanin, *Proposed Bills Would Crack Down on Fentanyl and Heroin*, AL.COM (Feb. 17, 2017, 6:14 AM), http://www.al.com/news/index.ssf/2017/02/proposed_bills_would_crack_dow.html.

225. *Legislators Toughening Ohio's Drug Abuse Laws Regarding Fentanyl*, NORWALK REFLECTOR (Mar. 29, 2017, 4:30 PM), <http://www.norwalkreflector.com/Government/2017/03/29/Legislators-updating-Ohio-s-drug-abuse-laws>.

226. Ashton Marra, *Fentanyl Bill Progresses in Senate*, WEST VIRGINIA PUBLIC BROADCASTING (Mar. 31, 2017), <http://wvpublic.org/post/fentanyl-bill-progresses-senate#stream/>.

227. George A. Amedore, *Amedore Bill to Crack Down on Fentanyl Use Passes Senate* (Apr. 24, 2017), <https://www.nysenate.gov/newsroom/press-releases/george-amedore-jr/amedore-bill-crack-down-fentanyl-use-passes-senate>.

228. O.C.G.A. § 16-11-91(b) (Supp. 2017).

hijacking a motor vehicle in the first degree requires the offender use a firearm or weapon to obtain a motor vehicle.²²⁹ By creating the offense of hijacking a motor vehicle in the second degree, the Georgia Legislature expanded the statute's scope and gave prosecutors greater leeway to prosecute motor vehicle hijackings.

Hijacking Statutes—Comparing Georgia and Federal Law

18 U.S.C. § 2119, the federal car hijacking statute, makes it a federal offense to, “with the intent to cause death or serious bodily harm[,]” take a motor vehicle “from the person or presence of another by force and violence or by intimidation.”²³⁰ Georgia’s law for hijacking a motor vehicle in the first degree is similar to the federal offense; both offenses require the use of “force and violence.”²³¹ However, the federal offense requires a higher standard of culpability than the Georgia offense.²³² While the federal offense requires an offender have “the intent to cause death or serious bodily harm,” the Georgia offense does not require intent.²³³ The sentences imposed by the federal statute and Georgia’s statute are comparable. While the federal law imposes a fine, imprisonment for a maximum of fifteen years, or both, Georgia’s statute imposes “imprisonment for not less than ten nor more than 20 years and a fine of not less than \$10,000.00 nor more than \$100,000.00.”²³⁴ However, the federal car hijacking statute lacks any offense like Georgia’s offense of hijacking a motor vehicle in the second degree. Thus, the Georgia law provides broader prosecutorial powers to address car hijacking.²³⁵

Conclusion

SB 104 made multiple changes to Georgia’s criminal statutes this year. First, by criminalizing “upskirting,” the Georgia Legislature

229. O.C.G.A. §1 6-11-91(b)(1) (Supp. 2017).

230. 18 U.S.C. § 2119 (2012).

231. *Compare* 18 U.S.C. § 2119, with O.C.G.A. § 16-5-44.1(b) (Supp. 2017).

232. *Id.*

233. *Compare* 18 U.S.C. § 2119, with O.C.G.A. § 16-5-44.1(b) (Supp. 2017).

234. *Compare* 18 U.S.C. § 2119, with O.C.G.A. § 16-5-44.1(c) (Supp. 2017).

235. *Id.*

filled a statutory gap that was uncovered by the previous privacy laws. Second, by adding fentanyl to the list of controlled substances, the Georgia Legislature responded to the fentanyl epidemic by allowing prosecutors to more effectively punish individuals possessing fentanyl with the intent to distribute. Third, by making hijacking a motor vehicle in the second degree a new crime, the Georgia Legislature addressed the recent surge in non-violent car hijackings across Fulton County.

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