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SB 174: Revising Georgia's List of Bail Restricted Offenses

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CRIMINAL PROCEDURE

Bonds and Recognizances: Amend Article 1 of Chapter 6 of Title 17 of the Official Code of Georgia Annotated, Relating to General Provisions Regarding Bonds and Recognizances, so as to Revise Bail Restricted Offenses; Revise a Definition; Provide for and Authorize Appointed Judges Who Are Fulfilling a Vacancy of an Elected Judge to Issue Certain Bonds and an Unsecured Judicial Release under Certain Circumstances; Provide for Related Matters; Provide for an Effective Date; Repeal Conflicting Laws; and for Other Purposes

CODE SECTIONS:	O.C.G.A. §§ 17-6-1 (amended); 17-6-12 (amended)
BILL NUMBER:	SB 174
ACT NUMBER:	216
GEORGIA LAWS:	2021 Ga. Laws 461
SUMMARY:	The Act amends Georgia's law relating to the general provisions regarding bond and recognizances by revising the list of bail restricted offenses through the addition of both misdemeanor and felony crimes. The Act authorizes appointed judges who are fulfilling a vacancy of an elected judge to issue certain bonds and an unsecured judicial release in certain circumstances.
EFFECTIVE DATE:	May 4, 2021

History

Many people in Atlanta, including former Atlanta Police Chief Erika Shields, will tell you that Atlanta has long struggled with a "revolving door" of the same criminals repeatedly committing the same crimes.[1] In 2019, residents of the affluent and politically

1. Christian Boone, *In Fulton County, a Revolving Door for Some Repeat Offenders*, ATLANTA J.-CONST. (Aug. 21, 2019), https://www.ajc.com/news/crime—law/fulton-county-revolving-door-for-some-

powerful Buckhead area drew attention to the issue after an increase in car thefts, burglaries, and armed robberies.[2] Items stolen from Buckhead vehicles proved particularly "lucrative" for thieves.[3]

Blame for this situation was passed around among the police, the district attorney, and the judiciary.[4] Shields, in her position as Chief, acknowledged that the Atlanta Police Department (APD) could have been doing more to serve the Buckhead area but said that District Attorney Paul Howard's office was also to blame for not prosecuting cases quickly enough, presumably leaving the accused out on bail for longer periods in which they could commit more crimes.[5]

The APD also pushed for prosecutors to provide magistrate court judges with more information, like criminal history and reasons for arrest, so that they could make better bail decisions.[6] But police also failed to appear for grand jury testimony 2,340 times in 2018, causing many cases to be dismissed.[7] In response to the APD's accusations, District Attorney Howard blamed magistrate court judges for releasing violent offenders despite prosecutors' objections.[8] He suggested that more bail decisions should be heard by Fulton County Superior Court judges, who are elected and thus held more accountable than unelected magistrate judges.[9] Police have also complained that judges who set low bonds contribute to the revolving door of criminals but are not held accountable for their decisions.[10]

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repeat-offenders/1qAhW95lHB4h7wFbq2AQnI/ [https://perma.cc/VD82-KFVL].

2. Raisa Habersham & Stephen Deere, *Buckhead Residents Confront Mayor, Police Chief About Crime*, ATLANTA J.-CONST. (Mar. 1, 2019), https://www.ajc.com/news/local/buckhead-residents-confront-mayor-police-chief-about-crime/5VYluSvFkIAmqUloAIIRSK/ [https://perma.cc/TU4X-P7Z7]; Boone, *supra* note 1.

3. Raisa Habersham, *Police Arrest Repeat Offenders, Say Crime Falling in Buckhead*, ATLANTA J.-CONST. (Mar. 11, 2019), https://www.ajc.com/news/local/police-arrest-repeat-offenders-say-crime-falling-buckhead/pn3cnaCk8pEQPLJeiqCX9H/ [https://perma.cc/PY59-WFAL].

4. *Id.*; Habersham & Deere, *supra* note 2.

5. Habersham & Deere, *supra* note 2.

6. Habersham, *supra* note 3.

7. *Id.*

8. *Id.*

9. Bill Torpy, *Torpy at Large: Fulton's Courts and the Revolving Door of Complaint*, ATLANTA J.-CONST. (Mar. 8, 2019), https://www.ajc.com/news/local/torpy-large-fulton-courts-and-the-revolving-door-complaint/gXXknUA229mJxdWvOuKqgO/ [https://perma.cc/LRF6-24JP].

10. Bill Torpy, *Torpy at Large: Fulton's Courts, the Buckhead Bad Guys' Best Friend*, ATLANTA J.-CONST. (Feb. 11, 2019), https://www.ajc.com/news/local/torpy-large-fulton-courts-the-buckhead-bad-guys-best-friend/8nEgJbHVdXFSgEMAnSP2VN/ [https://perma.cc/KF5N-PP4W].

Georgia law only permits superior court judges to preside over bail hearings for serious offenses, like murder, rape, and armed robbery; magistrate judges are not permitted to hear such bail hearings.[11] But a superior court judge can issue a written order delegating authority in those same cases to a magistrate judge within the same circuit.[12] Fulton Superior Court judges had been taking advantage of this rule to clear the backlog of cases in their courts.[13] Meanwhile, Georgia legislators also took notice of bail decisions in Fulton County and made them an issue in the 2020–2021 General Session.[14]

Specifically, legislators took issue with two types of release but would refer to them by the same names. The first is a release on recognizance—a type of release where the accused simply promises to return to court and is not required to post any amount of money for bail.[15] Under the second type of release—the judge sets a bail amount, but the accused is not required to post bail up front; they only face financial consequences if they fail to appear.[16] Confusingly, the terms "OR bond" and "signature bond" are commonly used to refer to both types of release.[17] The interchangeable use of these terms would create confusion and significant misunderstanding of the bill throughout the legislative process.[18] For the sake of clarity and consistency, this Article will use the term "release on recognizance" to refer generally

11. O.C.G.A. § 17-6-1(a) (2020 & Supp. 2020).

12. *Id.* § 17-6-1(h).

13. Torpy, *supra* note 9.

14. Ross Williams, *Lawmakers OK Bill Intended to Make 'Revolving Door' Jail Bonds Transparent*, GA. RECORDER (June 26, 2020), https://georgiarecorder.com/brief/lawmakers-ok-bill-intended-to-make-revolving-door-jail-bonds-transparent/ [https://perma.cc/7355-YNUQ].

15. *Release on Recognizance*, BLACK'S LAW DICTIONARY (11th ed. 2019); *see also* 2020 Ga. Laws 570, § 1-1, at 572.

16. *See* 2020 Ga. Laws 570, § 1-1, at 572.

17. Victoria Law, *Criminal Justice Advocates Say New Law Undermines Georgia's Efforts at Bail Reform*, APPEAL (Aug. 12, 2020), https://theappeal.org/criminal-justice-advocates-say-new-law-undermines-georgias-efforts-at-bail-reform/ [https://perma.cc/J2Y3-5WB4]; Video Recording of Senate Public Safety Committee Meeting at 36 min., 25 sec. (Feb. 24, 2020) [hereinafter SB 402 Senate Public Safety Committee Video] (remarks by Sen. Randy Robertson (R-29th)), https://livestream.com/accounts/26021522/events/8869277/videos/202252820.

18. *See* Video Recording of House Judiciary Committee Meeting at 12 min., 25 sec. (June 23, 2020) [hereinafter SB 402 House Judiciary Committee Video] (remarks by Rep. Chuck Efstration (R-104th)), https://livestream.com/accounts/25225474/events/8737140/videos/207837953. Representative Efstration asked, "Is there a difference between an OR bond and a signature bond?" Senator Robertson (R-29th) responded, "No, sir. Not in the general practice." *Id.*

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to the first type of release and "deferred bond" for the second type of release where the exchange of money is deferred.[19]

Before January 1, 2021, judges had broad authority and discretion to issue a release on recognizance.[20] The only restriction on this authority applied to persons charged with one of the bail restricted offenses enumerated in O.C.G.A. § 17-6-12(a), which is comprised mostly of serious, violent crimes.[21] Someone accused of a bail restricted offense could not be released on their own recognizance for the purpose of entering a pretrial program, unless an elected judge entered a written order specifying the reasons why the accused should be released on their own recognizance.[22]

But in the 2020–2021 Regular Session, Senator Randy Robertson (R-29th) introduced SB 402, which made significant changes to bail eligibility in Georgia.[23] Then, in the 2021–2022 Regular Session, Senator Steve Gooch (R-51st) introduced SB 174, which he described as a "simple clean-up bill" of the previous session's SB 402.[24] Both bills would lead to important debate and conversation about their future effects on bail reform in Georgia.

Bill Tracking of SB 402

Senate Consideration of SB 402

Senator Randy Robertson (R-29th) sponsored SB 402 in the Senate, along with Senator John Albers (R-56th), Senator Butch Miller

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19. The Department of Justice uses "unsecured bond" to refer to what the authors of this Article are calling a "deferred bond"; however, because SB 402 would introduce "unsecured judicial release" to refer to a release on recognizance, the authors assumed it may be too confusing to the reader to use the Department of Justice's terminology. BRIAN A. REAVES, U.S. DEP'T OF JUST., NCJ 243777, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2009 - STATISTICAL TABLES 35 (2013), https://bjs.ojp.gov/content/pub/pdf/fdluc09.pdf [https://perma.cc/WUK3-BCNF].

20. *Compare* O.C.G.A. § 17-6-12(a)(2) (2020 & Supp. 2020), *with* 2020 Ga. Laws 570, § 1-1, at 572.

21. § 17-6-12(a).

22. 2020 Ga. Laws 570, § 1-1, at 572.

23. Georgia General Assembly, SB 402, Bill Tracking [hereinafter SB 402, Bill Tracking], https://www.legis.ga.gov/legislation/57545.

24. Video Recording of Senate Public Safety Committee Meeting at 21 min., 46 sec. (Feb. 23, 2021) [hereinafter SB 174 Senate Public Safety Committee Video] (remarks by Sen. Steve Gooch (R-51st)), https://www.youtube.com/watch?v=ppG7YqlufXo&list=PLBFf_azbJKlW2_WEbngTVlw7aStSV2CxB&index=2.

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(R-49th), Senator Renee Unterman (R-45th), Senator Chuck Payne (R-54th), Senator Steve Gooch (R-51st), and Senator Blake Tillery (R-19th).[25] The Senate first read SB 402 on February 21, 2020, and referred the bill to the Senate Public Safety Committee that same day.[26]

The Senate Public Safety Committee favorably reported the bill on February 26, 2020.[27] The Senate read the bill for the second time on February 27, 2020.[28] The Senate made no changes to the bill.[29] Then, on March 3, 2020, the Senate read the bill for the third time, and SB 402 passed the Senate that same day with a vote of 46 to 8. [30]

House Consideration of SB 402

Representative Todd Jones (R-25th) sponsored the bill in the House, and the House first read the bill on March 4, 2020.[31] The House read the bill for the second time on March 5, 2020.[32] On June 23, 2020, SB 402 was withdrawn from the House Judiciary Non-Civil Committee and recommitted to the House Judiciary Committee.[33] The House Judiciary Committee favorably reported on the bill on June 24, 2020.[34]

The House postponed its reading on June 25, 2020, and read the bill for the third time on June 26, 2020.[35] That same day, the House passed and adopted the bill with a vote of 99 to 68.[36] The Senate sent the bill to Governor Kemp (R) on June 29, 2020, and he signed it into law as Act 547 on August 3, 2020.[37] The bill went into effect on January 1, 2021.[38]

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25. SB 402, Bill Tracking, *supra* note 23.
26. State of Georgia Final Composite Status Sheet, SB 402, Aug. 7, 2020.
27. *Id.*
28. *Id.*
29. *Compare* SB 402, as introduced, 2020 Ga. Gen Assemb., *with* SB 402, as passed Senate, 2020 Ga. Gen Assemb.
30. Georgia Senate Voting Record, SB 402, #523 (Mar. 3, 2020).
31. SB 402, Bill Tracking, *supra* note 23.
32. State of Georgia Final Composite Status Sheet, SB 402, Aug. 7, 2020.
33. *Id.*
34. SB 402, Bill Tracking, *supra* note 23.
35. State of Georgia Final Composite Status Sheet, SB 402, Aug. 7, 2020.
36. Georgia House of Representatives Voting Record, SB 402, #767 (June 26, 2020).
37. State of Georgia Final Composite Status Sheet, SB 402, Aug. 7, 2020.
38. *Id.*

Bill Tracking of SB 174

Senate Consideration of SB 174

Senator Steve Gooch (R-51st) sponsored SB 174 in the Senate, along with Senator Jeff Mullis (R-53rd), Senator Larry Walker, III (R-20th), Senator Bill Cowsert (R-46th), and Senator Matt Brass (R-28th).[39] The Senate first read SB 174 on February 16, 2021, and the Lieutenant Governor referred the bill to the Senate Public Safety Committee that same day.[40]

The Senate Public Safety Committee favorably reported the bill on February 24, 2021.[41] The Senate read the bill for the second time on February 25, 2021.[42] The Senate made no changes to the bill.[43] On February 26, 2021, the Senate read the bill for the third time, and SB 174 passed the Senate that same day with a vote of 50 to 0.[44]

House Consideration of SB 174

Representative Steven Sainz (R-180th) sponsored the bill in the House, and the House first read the bill on March 1, 2021.[45] The House read the bill for the second time on March 3, 2021.[46] On March 24, 2021, the bill reached the House Judiciary Non-Civil Subcommittee, chaired by Representative Ed Setzler (R-35th), and a substitute bill had already been written and was considered in place of the version that passed the Senate.[47] It is unclear when those changes were made or

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39. Georgia General Assembly, SB 174, Bill Tracking [hereinafter SB 174, Bill Tracking], https://www.legis.ga.gov/legislation/59677.

40. State of Georgia Final Composite Status Sheet, SB 174, May 13, 2021; Video Recording of Senate Chamber Meeting at 2 hr., 29 min., 46 sec. (remarks by LG Geoff Duncan (R)), https://www.youtube.com/watch?v=U0UA4KtSztU.

41. State of Georgia Final Composite Status Sheet, SB 174, May 13, 2021.

42. *Id.*

43. *Compare* SB 174, as introduced, 2021 Ga. Gen. Assemb., *with* SB 174, as passed Senate, 2021 Ga. Gen. Assemb.

44. *Id.*; Georgia Senate Voting Record, SB 174, #83 (Feb. 26, 2021).

45. SB 174, Bill Tracking, *supra* note 39.

46. State of Georgia Final Composite Status Sheet, SB 174, May 13, 2021.

47. *See* Video Recording of House Judiciary Non-Civil Subcommittee Meeting at 1 min., 29 sec. (Mar. 24, 2021) [hereinafter SB 174 House Judiciary Non-Civil Subcommittee Video] (remarks by Rep. James Burchett (R-176th)), https://www.youtube.com/watch?v=6fS_CPD1PxE.

who made them. Then, on March 25, 2021, the House Judiciary Non-Civil Committee received the substitute and favorably reported the bill by substitute.[48]

Compared to the version of the bill that passed the Senate, the House substitute included significant additions and modifications to the bill, which accounts for most of the bill's text.[49] The substitute rearranged text and added new sections altogether, making the bill largely a continuation of SB 402 from the last legislative session.[50]

The House read the bill for the third time on March 31, 2021.[51] That same day, the House passed and adopted the bill by substitute, with a vote of 99 to 71.[52] The House sent the bill to the Senate, and on March 31, 2021, the Senate agreed to the House version of the bill, as amended, by a vote of 36 to 14.[53] The Senate sent the bill to Governor Kemp (R) on April 7, 2021, and he signed it into law as Act 216 on May 4, 2021.[54] The bill went into effect on May 4, 2021.[55]

The Act: SB 402

The Act amends the following portions of the Official Code of Georgia Annotated: Article 1 of Chapter 6 of Title 17, Part 3 of Article 6 of Chapter 11 of Title 15, Chapter 10 of Title 16, Article 4 of Chapter 3 of Title 42, and Article 1 of Chapter 7 of Title 52, relating to general provisions regarding bonds and recognizances, custody and release of child, offenses against public administration, pretrial release and diversion programs, and general provisions regarding registration, operation, and sale of watercraft. [56]

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48. SB 174, Bill Tracking, *supra* note 39.
49. *Compare* SB 174, as passed Senate, 2021 Ga. Gen. Assemb., *with* SB 174 (HCS), 2021 Ga. Gen. Assemb.
50. *Compare* SB 174 (HCS), 2021 Ga. Gen. Assemb., *with* SB 402, as introduced, 2020 Ga. Gen. Assemb.
51. State of Georgia Final Composite Status Sheet, SB 174, May 13, 2021.
52. *Id.*; Georgia House of Representatives Voting Record, SB 174, #412 (Mar. 31, 2021).
53. State of Georgia Final Composite Status Sheet, SB 174, May 13, 2021; Georgia Senate Voting Record, SB 174, #444 (Mar. 31, 2021).
54. State of Georgia Final Composite Status Sheet, SB 174, May 13, 2021.
55. *Id.*
56. 2020 Ga. Laws 570, § 1-1, at 571; 2020 Ga. Laws 570, §§ 3-1 to -4, at 573–74.

Section 1-1

Section 1 of the Act amends Article 1 of Chapter 6 of Title 17, relating to general provisions regarding bonds and recognizances, by revising Code section 17-6-12, relating to discretion of court to release persons charged with crimes on a person's own recognizance.[57] This Section replaces the reference to "serious violent felon[ies]" as defined in Code section 17-10-6.1 with the list of offenses that actually appear in 17-10-6.1: murder or felony murder; armed robbery; kidnapping; rape; aggravated child molestation; aggravated sodomy; and aggravated sexual battery.[58]

Further, the Section provides the definition of "unsecured judicial release" as "any release on a person's own recognizance that does not purport a dollar amount through secured means . . . or property as approved by the sheriff in the county where the offense was committed."[59] Additionally, the Section provides that:

> [A]n elected judge or judge sitting by designation as provided for in subsection (c) or (d) of this Code section may issue an unsecured judicial release if: (1) [s]uch unsecured judicial release is noted on the release order; and (2) [e]xcept as provided for in subsection (c) of this Code section, the person is not charged with a bail restricted offense.[60]

The Section also prohibits a judge from releasing a person charged with a bail restricted offense on an unsecured judicial release for the purpose of a pretrial release program by removing the following exception under subsection (c): "[U]nless an elected magistrate, elected state or superior court judge, or other judge sitting by designation under the express written authority of such elected judge, enters a written order to the contrary specifying the reasons why such

57. 2020 Ga. Laws 570, § 1-1, at 571 (codified at O.C.G.A. §§ 17-6-1, 17-6-12 (2020 & Supp. 2020)).
58. *Id.* (codified at §§ 17-6-1(a), 17-6-12(a))
59. *Id.* at 572 (codified at § 17-6-12(a)(2)).
60. *Id.*

person should be released upon his or her own recognizance."[61] Lastly, the Section replaces all instances of "his or her own recognizance" with "an unsecured judicial release."[62]

Section 2-1

Section 2-1 of the Act further amends Article 1 of Chapter 6 of Title 17, which relates to bailable offenses, procedure, schedule of bails, and appeal bonds.[63] The Act specifically adds the following new paragraphs to subsection (e):

> (4) Any bond issued by an elected judge or judge sitting by designation that purports a dollar amount shall be executed in the full-face amount of such bond through secured means as provided for in Code [s]ection 17-6-4 or 17-6-50 or shall be executed by use of property as approved by the sheriff in the county where the offense was committed.
>
> (5) Notwithstanding any other provision of law, nothing in this Code section shall prohibit a duly sworn sheriff from releasing an inmate from custody in cases of medical emergency with the consent of the judge in the county in which he or she presides.[64]

Further, the Act revises subsection (i) by replacing "such person's own recognizance" with "an unsecured judicial release."[65]

Section 3-1

Section 3-1 of the Act amends Part 3 of Article 6 of Chapter 11 of Title 15, relating to custody and release of children, by revising subsection (f) of Code section 15-11-507, relating to bail.[66] Again, this

61. *Id.*
62. *Id.*
63. 2020 Ga. Laws 570, § 2-1, at 572.
64. *Id.* (codified at O.C.G.A. § 17-6-1(e)(4)–(5) (2020 & Supp. 2020)).
65. *Id.*
66. 2020 Ga. Laws 570, § 3-1, at 573 (codified at O.C.G.A. § 15-11-6(3) (2020 & Supp. 2020)).

Section replaces "his or her own recognizance" with "an unsecured judicial release."[67]

Section 3-2

Section 3-2 of the Act amends Chapter 10 of Title 16, relating to offenses against public administration, by revising Code section 16-10-51, relating to bail jumping.[68] Subsection (a), (b), and (c)(1) are revised to replace any mention of "own recognizance" with "an unsecured judicial release."[69]

Section 3-3

Section 3-3 of the Act amends Article 4 of Chapter 3 of Title 42, relating to pretrial release and diversion programs, by revising Code section 42-3-74, which relates to judicial approval required for pretrial release and diversion programs.[70] Again, this section replaces "his or her own recognizance" with "an unsecured judicial release."[71]

Section 3-4

Section 3-4 of the Act amends Article 1 Chapter 7 of Title 52, relating to general provisions regarding registration, operation, and sale of watercraft, by revising Code section 52-7-26, which relates to penalty. [72] Again, this Section replaces "his or her own recognizance" with "an unsecured judicial release."[73]

The Act: SB 174

The Act amends the following portions of the Official Code of Georgia Annotated: Article 1 of Chapter 16 of Title 17, relating to the

67. *Id.*
68. 2020 Ga. Laws 570, § 3-2, at 573 (codified at O.C.G.A. § 16-10-51 (2018 & Supp. 2020)).
69. *Id.* at 573–74.
70. 2020 Ga. Laws 570, § 3-3, at 574 (codified at O.C.G.A. § 42-3-74 (2014 & Supp. 2020)).
71. *Id.*
72. 2020 Ga. Laws 570, § 3-4, at 574 (codified at O.C.G.A. § 52-7-26 (2011 & Supp. 2020)).
73. *Id.*

general provisions regarding bonds and recognizances; and Article 12 of Chapter 16 of Title 17, relating to bailable offenses, procedure, schedule of bails, and appeal bonds.[74] The Act's overall purpose is to add bail restricted offenses, revise the definition of unsecured judicial release, and "to provide for and authorize appointed judges who are fulfilling a vacancy of an elected judge to issue certain bonds and an unsecured judicial release under certain circumstances."[75]

Section 1

Section 1 of the Act amends paragraph (4) of subsection (e) of Code section 17-6-1, which relates to bailable offenses, procedure, schedule of bails, and appeal bonds.[76] The Act replaces "[a]ny bond issued" with "[a] bond set for any offense."[77] The Act also adds "an appointed judge filling the vacancy of an elected judge," to the existing list of judges enumerated in the subsection.[78]

Section 2

Section 2 of the Act revises Code section 17-6-12, relating to "unsecured judicial release, requirement, and effect of failure of person charged to appear for trial."[79] The Act adds five new offenses to the list of bail restricted offenses: burglary; "entering an automobile with an intent to commit theft or felony, as defined in Code section 16-8-18"; felony stalking; misdemeanor stalking; and misdemeanor "crimes involving family violence, as defined in Code section 19-13-1."[80] Additionally, the Act removes redundancy in Code section 17-6-12 by striking subsection (c).[81] Rather than explicitly excluding release for pretrial programs in subsection (c), the Act adds release for pretrial programs under the definition of "unsecured judicial release"

74. *See generally* 2021 Ga. Laws 461.
75. *Id.*
76. 2021 Ga. Laws 461, § 1, at 461 (codified at O.C.G.A. § 17-6-1(e)(4) (Supp. 2021)).
77. *Id.*
78. *Id.*
79. 2021 Ga. Laws 461, § 2, at 461 (codified at O.C.G.A. § 17-6-12(a)(1) (Supp. 2021)).
80. *Id.* at 461–62.
81. *See id.* at 463 (formerly found at O.C.G.A. § 17-6-12(c) (2020)).

in subsection (a).[82] Now, an unsecured judicial release is "any release that does not purport a dollar amount through secured means . . . and that is (A) [o]n a person's own recognizance; or (B) [f]or the purpose of entering a pretrial [] program . . . ."[83] The Act removes any cross-reference to subsection (c) throughout.[84]

Analysis

Legislative Intent: SB 402

Supporters of SB 402 believed that the bill would "protect the community while at the same time requiring that the truth be told when an individual wants to know why someone is out on bond."[85]

Public Safety

When Senator Randy Robertson (R-29th) introduced SB 402 in the Senate Public Safety Committee in February 2020, he said that the purposes of the bill were (1) "to limit the number of OR bonds that are issued in the state of Georgia," (2) "to restrict any type of OR bond or requiring a bond for [bail restricted offenses]," and (3) to "clarif[y] what used to be called a[n] own recognizance bond as an 'unsecured judicial release,' which means any release on a person's own recognizance that does not purport a dollar amount through secured means."[86] Although the first two purposes may sound identical—because Senator Robertson referred to "OR bonds" twice—those first two purposes actually refer to two different types of release: the former refers to deferred bonds and the latter refers to release on recognizance.[87]

Further, Senator Robertson explained that these types of release put community safety at risk.[88] He played recent news footage for the

82. *Id.* (codified at § 17-6-12(a)(2)).
83. § 17-6-12.
84. *See generally* 2021 Ga. Laws 461.
85. SB 402 Senate Public Safety Committee Video, *supra* note 17, at 39 min., 47 sec.
86. *Id.* at 36 min., 16 sec.
87. *See id.*
88. *Id.* at 51 min., 06 sec.

committee, which had a common theme: defendants who committed a violent crime while out on bail and awaiting trial.[89] He explained that the bill was intended to reduce "incidents . . . where individuals were allowed to be released from jail without posting any kind of security."[90] Because he felt that the bill would "go further to protect the community," the implication was that requiring defendants to post some financial security would prevent them from reoffending while out on bail.[91]

Judicial Transparency and Accountability

To require defendants to post some meaningful financial security would mean the legislature would likely need to restrict judicial discretion. Opponents of SB 402 argued that "it force[s] judges into one of two extremes: either unsecured judicial release or . . . a secured cash bond," essentially depriving judges of their full discretion.[92] Representative William Boddie (D-62nd) gave the example of a judge looking at the case of a 17-year-old student in high school who committed a felony burglary and argued:

> [T]hat judge should have the discretion to say, "[L]ook I'm going to give this individual a signature bond, make sure they go back to school, make sure they have a curfew." The judge should make that decision. We should not take discretion away from the judge to look at the individual in that situation and not just the crime.[93]

Although proponents stated they wanted to reduce the number of releases without financial security, they have also repeatedly

89. *See id.* at 46 min., 30 sec.

90. *Id.* at 38 min., 11 sec.

91. SB 402 Senate Public Safety Committee Video, *supra* note 17.

92. SB 174 House Judiciary Non-Civil Subcommittee Video, *supra* note 47, at 20 min., 28 sec. (remarks by Rep. Josh McLaurin (D-51st)).

93. Video Recording of House Judiciary Non-Civil Committee Meeting at 37 min., 18 sec. (Mar. 25, 2021) [hereinafter SB 174 House Judiciary Non-Civil Committee Video] (remarks by Rep. William Boddie (D-62nd)), https://livestream.com/accounts/25225474/events/8737140/videos/219248739.

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emphasized that SB 402 has not restricted judicial discretion. They argue that although judges may not issue deferred bonds or issue releases on recognizance for bail restricted offenses, judges may still set bail as low as one dollar.[94] Bail that low, they argue, is effectively the same as collecting no bail amount at all.[95] Thus, proponents contend that a judge may still release a defendant without requiring any meaningful amount of security.[96]

Rather than restricting judges' ultimate decisions, the underlying rationale is that requiring judges to either collect the actual bail amount up front or state "unsecured judicial release" on the release order will "bring[] transparency and accountability" to the bail decision-making process, just as police and prosecutors have been requesting.[97] Specifically, Senator Robertson noted that "[w]e, as part of the judicial system are [] defrauding our constituents by putting a monetary value on something" for which no money is actually paid.[98] Likewise, Representative Barry Fleming (R-121st) explained: "You're not taking any discretion away from the judge. You're simply pointing out to the public what they did so they can own up to it later."[99]

But there is another layer to the Act's purpose—shaming judges into using more cash bail.[100] The legislators do not intend for any judge to

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94. Video Recording of Senate Floor Debate Meeting at 2 hr., 1 min., 16 sec. (Mar. 3, 2020) [hereinafter SB 402 Senate Floor Debate Video] (remarks by Sen. Randy Robertson (R-29th)), https://livestream.com/accounts/26021522/events/7940809/videos/202501941 ("[The bill] does not prevent a judge from assessing a bond that the individual can afford . . . . [T]hat judge can set a bond at what that person can afford to pay, whether that be $1 or whether it be $1,000,000.").

95. *Id.*

96. *See id.*

97. SB 174 House Judiciary Non-Civil Committee Video, *supra* note 93, at 29 min., 13 sec. (remarks by Rep. Bert Reeves (D-34th)).

98. SB 402 Senate Floor Debate Video, *supra* note 94, at 2 hr., 09 min., 04 sec. (remarks by Sen. Randy Robertson (R-29th)).

99. SB 402 House Judiciary Committee Video, *supra* note 18, at 37 min., 18 sec. (remarks by Rep. Barry Fleming (R-121st)).

100. *See, e.g.*, Greg Land, *With Legislative Session Over, Georgia Legal Community Ponders Bills Passed and Defeated*, DAILY REP. (Apr. 1, 2021, 6:05 PM), https://www.law.com/dailyreportonline/2021/04/01/with-legislative-session-over-georgia-legal-community-ponders-bills-passed-and-defeated/ [https://perma.cc/V56A-HKPR]. Mazie Lynn Causey, an attorney and spokesperson for the Georgia Association of Criminal Defense Lawyers, noted her perception of the downfalls of the bill, stating the only thing this bill is doing is "shaming judges for exercising discretion" and "ignoring the presumption of innocence that one enjoys pre-trial." Interview with Mazie Lynn Causey, Att'y & Spokesperson, Ga. Ass'n of Crim. Def. Laws. (June 15, 2021) (on file with Georgia State University Law Review) [hereinafter Causey Interview].

actually set bail at one dollar.[101] During a House Judiciary Committee meeting on SB 402, Representative Chuck Efstration (R-104th) asked Senator Robertson, "If it's truly a public safety matter, does it make sense that the bond amount in your bill could be set as low as one dollar if these particularly heinous crimes cannot be trusted to judges to set the proper bond amount?"[102] Senator Robertson responded, "Do I think that there is any judge within the boundaries of the state of Georgia that would set some of these charges that low? I do not believe so."[103]

Later in the same hearing, Representative Fleming suggested that a judge would not set a one-dollar bond "because he would be embarrassed . . . if [the accused] got out and committed another crime."[104] Instead, he recommended that the judge "set a real bond."[105] He pointedly added, "That's the point."[106] Summarily, "the point" is to leave the one-dollar bail loophole open so that legislators cannot be accused of restricting judicial discretion while simultaneously using transparency and accountability to influence judicial decision-making toward cash bail.

Money

Some opponents of SB 402 have suggested that the true purpose of the bill is not public safety or judicial accountability—the purpose is money.[107] On the House Floor, Representative Robert Trammell (D-132nd) said, "This bill is about money. It's about who makes it when this bill becomes law."[108] The implication was that because this

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101. SB 402 House Judiciary Committee Video, *supra* note 18, at 14 min., 30 sec. (remarks by Rep. Chuck Efstration (R-104th) & Sen. Randy Robertson (R-29th)).

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* at 36 min., 31 sec. (remarks by Rep. Barry Fleming (R-121st)).

106. *Id.* at 36 min., 38 sec.

107. *See* Letter from Council of Mun. Ct. Judges to Rep. Chuck Efstration (R-104th) (June 25, 2020) (on file with the Georgia State University Law Review) [hereinafter Letter to Rep. Chuck Efstration]; *see also* Causey Interview, *supra* note 100.

108. Video Recording of House Chamber: Day 40 at 1 hr., 21 min., 01 sec. (June 26, 2020) [hereinafter SB 402 House Chamber Video] (remarks by Rep. Robert Trammell (D-132nd)), https://livestream.com/accounts/25225474/events/8824297/videos/207947017; Interview with Rep. Erick Allen (D-40th) (May 12, 2021) (on file with the Georgia State University Law Review) [hereinafter Allen

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"bill [was] being supported by [the] bail bonds industry" the purpose is actually to increase cash bail, which in turn creates more business for bail bondsmen.[109]

During the same legislative session, lawmakers introduced two other bills in the House and Senate: Senator Bill Cowsert (R-46th), Senator Robertson, Senator Steve Gooch (R-51st), and others sponsored SB 164, and Representative Micah Gravley (R-67th) and others sponsored House Bill (HB) 340.[110] These identical bills took a more straightforward approach than SB 402 and would have eliminated release on one's own recognizance for anyone charged with a felony.[111] When Representative Gravley introduced HB 340 in the Judiciary Non-Civil Committee, many representatives from the bail bonds industry were in attendance.[112] The Southern Center for Human Rights accused Representative Gravley of allowing those representatives to "dominate[] the discussion and mis[lead] the committee, at times outright lying."[113]

Further, during the 2020 election cycle, Representative Fleming, the Chairman of the House Judiciary Committee and arguably the strongest proponent of SB 402, received the most donations of any candidate from the bail bond industry.[114] Next was former Senator Renee Unterman (R-45th) (a sponsor of SB 402), followed by Senator Gooch.[115] Yet, Representative Trammell also received a donation from

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Interview] ("[Bail is] a cash operation. If you look at some of the best industries in our criminal system, bail bondsmen make pretty good money.").

109. SB 402 House Chamber Video, *supra* note 108, at 1 hr., 24 min., 58 sec. (remarks by Rep. Bee Nguyen (D-89th)).

110. *See* SB 164, as introduced, 2020 Ga. Gen. Assemb.; *see also* HB 340, as introduced, 2020 Ga. Gen. Assemb.

111. *See* SB 164, as introduced, 2020 Ga. Gen. Assemb.; *see also* HB 340, as introduced, 2020 Ga. Gen. Assemb.

112. Billy Corriher, *Georgia Legislators Try to Kill Bail Reform and Require Jail for the Poor*, FACING S. (Feb. 28, 2019), https://www.facingsouth.org/2019/02/georgia-legislators-try-kill-bail-reform-and-require-jail-poor [https://perma.cc/NKS9-8B8C].

113. *Id.*

114. *See Bail Bond Services Contributions to Candidates in Elections in Georgia 2020*, FOLLOWTHEMONEY [hereinafter *Bail Bond Services Contributions*], https://www.followthemoney.org/show-me?dt=1&s=GA&y=2020&c-exi=1&d-ccb=451#%5B [https://perma.cc/JGR5-Q9ZK]. Representative Barry Fleming presented SB 402 on the House Floor and claimed it was his idea to change release on recognizance to "unsecured judicial release." SB 402 House Judiciary Committee Video, *supra* note 18, at 27 min., 05 sec.

115. *Bail Bond Services Contributions*, *supra* note 114.

the Georgia Association of Professional Bondsmen.[116] These campaign donations might hint at lawmakers' motivations, but they are not dispositive.

Legislative Intent: SB 174

Proponents originally introduced SB 174 in the Senate as a "clean-up" bill to SB 402.[117] In response to concerns that judges appointed by the Governor to mid-term judicial vacancies would not have the same authority to issue unsecured judicial releases as elected judges, the bill's sponsors originally intended to add a single clause to Code section 17-6-12(b): "an appointed judge filling the vacancy of an elected judge."[118]

But, as it made its way through the legislative process, lawmakers changed SB 174 to reduce some redundancy in the Code and expand the list of bail restricted offenses.[119] Although proponents offered justifications for expanding bail restricted offenses, opponents questioned the new law's ultimate effectiveness and its potential unintended consequences.[120] Ultimately, SB 402 and SB 174 share the same central purpose: to increase public safety and judicial transparency.[121] Therefore, the debates among legislators largely mirrored the debates over SB 402.

Like Senator Robertson's introduction of SB 402, when Representative Steven Sainz (R-180th) introduced the House substitute for SB 174 in the House Judicial Non-Civil Committee, he explained that the bill would limit the use of deferred bonds for the additional five "crimes that are so egregious to public welfare."[122] He also reiterated:

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116. *Id.*

117. SB 174 Senate Public Safety Committee Video, *supra* note 24.

118. *Id.* at 22 min., 26 sec.

119. *Compare* SB 174, as passed Senate, 2021 Ga. Gen. Assemb., *with* 2021 Ga. Laws 461, § 2, at 461–62 (codified at O.C.G.A. § 17-16-12(a) (Supp. 2021)).

120. *See generally* SB 174 House Judiciary Non-Civil Committee Video, *supra* note 93.

121. *See generally id.*

122. *Id.* at 24 min., 38 sec. (remarks by Rep. Steven Sainz (R-180th)). But the list of bail restricted offenses only affects releases on recognizance. SB 174 had no effect on deferred bonds. *See* discussion *infra* Practical Effects on Bonds and Recognizance

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> [SB 174] does not limit the judge from giving a penny bond if they would like to, but the difference of that penny bond and this is public transparency, and on these crimes [included in the new law], I doubt a judge would be transparent about the about the lack of bonding.[123]

As a proponent of both bills, Representative Bert Reeves (R-34th) also argued that the bills provide transparency of bail decisions.[124] Additionally, he repeated the one-dollar bond argument. In response to Representative Josh McLaurin's (D-51st) assertion that SB 174 would "widen the use of the cash bail system" and effectively criminalize poverty, Representative Reeves said, "I don't see the harm in this, and I just don't think it's that big of a deal. I'm surprised that it causes the emotion that it does because, again, there's nothing stopping a judge from giving somebody a one-dollar bond."[125] But if the purpose of the bill is actually to influence judges to set a "real bond" (that is, a higher dollar amount), Representative McLaurin is correct in his assertion.[126]

Because the committee hearings focused so heavily on rehashing the same debates from SB 402, very little was said specifically about the five offenses added to bail restricted offenses.[127] Representative Reeves did briefly comment on the offenses, stating that he was "surprised burglary wasn't on it last year" because "burglary is a very serious offense."[128] In reference to entering an automobile, he and Representative Gravley alluded to recent increases in car break-ins in Fulton and Cobb Counties.[129] Finally, Representative Reeves stated

123. *Id.* at 25 min., 05 sec.

124. *Id.* at 36 min., 01 sec. (remarks by Rep. Bert Reeves (R-34th)) ("If the constituents can't find out, they can't trace information and find out that judges are releasing folks that are then immediately upon release engaging in criminal content again, . . . then they don't have the ability to be informed, and that's the problem.").

125. *Id.* at 27 min., 02 sec. (remarks by Rep. Josh McLaurin (D-51st)); *id.* at 30 min., 19 sec. (remarks by Rep. Bert Reeves (R-34th)).

126. SB 402 House Judiciary Committee Video, *supra* note 18, at 36 min., 31 sec. (remarks by Rep. Barry Fleming (R-121st)).

127. *See generally* SB 174 House Judiciary Non-Civil Committee Video, *supra* note 93.

128. *Id.* at 29 min., 28 sec. (remarks by Rep. Bert Reeves (R-34th)).

129. *Id.* at 41 min., 49 sec. (remarks by Rep. Micah Gravley (R-37th)); *id.* at 29 min., 40 sec. (remarks by Rep. Bert Reeves (R-34th)).

that the legislature had "done a lot of bipartisan work this session on the concept of stalking and family violence."[130]

Practical Effects on Bonds and Recognizance

To understand how the rules of SB 402 and SB 174 affect bail, they must be framed in terms of three elements: the type of release, the offenses the rule applies to, and the judges authorized or restricted by the rule. The bail rule established by amendments to Code section 17-6-1, which proponents also consider a transparency rule, applies to deferred bonds; all offenses; and elected judges, appointed judges filling the vacancy of an elected judge (added by SB 174), and judges sitting by designation (judges in elected seats).[131] Specifically, the Act requires that "[a] bond set for any offense . . . that purports a dollar amount shall be executed in the full-face amount of such bond through secured means."[132] By requiring a bond that purports a dollar amount to be secured in the full-face amount, the rule forbids the use of deferred bonds. Because this Code section does not mention bail restricted offenses, this requirement is not limited to specific offenses and applies to all offenses.

Finally, this rule applies to "[a] bond issued by an elected judge, an appointed judge filling the vacancy of an elected judge, or judge sitting by designation."[133] In other words, any other judge not in an elected seat is not restricted from issuing deferred bonds. Summarily, the rule states that judges sitting in elected seats may not issue deferred bonds for any offense, but magistrates, who are appointed and not elected, may issue deferred bonds.[134]

The bail rule established by amendments to Code section 17-6-12 applies to releases on recognizance, bail restricted offenses, and judges sitting in elected seats.[135] Specifically, the Act defines "unsecured judicial release" as "any release on a person's own recognizance that

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130. SB 174 House Judiciary Non-Civil Committee Video, *supra* note 93, at 30 min., 01 sec. (remarks by Rep. Bert Reeves (R-34th)).

131. *See generally* O.C.G.A. § 17-6-1 (2020 & Supp. 2021).

132. 2021 Ga. Laws 461, § 1, at 461 (codified at O.C.G.A. § 17-6-1(e)(4) (Supp. 2021)).

133. *Id.*

134. *See id.*

135. *See* 2021 Ga. Laws 461, § 2, at 461–63 (codified at O.C.G.A. § 17-6-12 (Supp. 2021)).

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does not purport a dollar amount," which is a release on recognizance.[136] Next, "an elected judge, an appointed judge filling the vacancy of an elected judge, or [a] judge sitting by designation may issue an unsecured judicial release if . . . the person is not charged with a bail restricted offense."[137] In other words, they may not issue a release on recognizance for bail restricted offenses.

Although legislators believed that this rule would prevent magistrates from issuing an unsecured judicial release, it does not. In response to inquiries from Representative Bonnie Rich (R-97th) and Representative Mitchell Scoggins (R-14th) regarding the bill's effect on magistrates, Representative Fleming said that an elected judge and a judge sitting by designation "are the two categories of judges that are allowed to issue an unsecured judicial release; [a]n appointed judge would not be able to."[138] He added that he was happy about that outcome because he only wanted judges who are accountable to the electorate to issue unsecured judicial releases—Fulton County magistrates had been criticized for being too lenient with releases.[139]

But the language of Code section 17-6-12(b) is a restriction, not an authorization—it limits when an elected judge or judge sitting by designation may issue an unsecured judicial release.[140] The authorization for a release on recognizance was already in Code section 17-6-12(c), which SB 402 and SB 174 left mostly intact.[141] It states that "the judge of any court having jurisdiction over a person charged with committing an offense . . . shall have authority . . . to authorize the release of the person upon his or her own recognizance only."[142] Therefore, SB 402 added a restriction to that authority that only applies to judges sitting in an elected seat, not appointed magistrates.

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136. § 17-6-12(a)(2).

137. *Id.* § 17-6-12(b).

138. SB 402 House Judiciary Committee Video, *supra* note 18, at 29 min., 53 sec. (remarks by Rep. Barry Fleming (R-121st), Rep. Bonnie Rich (R-97th), & Sen. Randy Robertson (R-29th)).

139. *Id.*

140. *See generally* § 17-6-12(b).

141. *See id.* § 17-6-12(c); *see also* 2020 Ga. Laws 570, § 1-1, at 572. The only change was that SB 402 changed "upon his or her own recognizance" to "on an unsecured judicial release." 2020 Ga. Laws 570, § 1-1, at 572.

142. § 17-6-12(c).

Taking all these provisions into account, along with the amendments to Code section 17-6-12, judges sitting in an elected seat cannot issue a release on recognizance for anyone charged with a bail restricted offense.[143] Instead, they must deny bail or set bail at some dollar amount. Magistrates, however, are still free to issue a release on recognizance for any offense.[144]

The transparency rule established by amendments to Code section 17-6-12 applies to releases on recognizance, all offenses other than bail restricted offenses, and judges sitting in elected seats.[145] Specifically, the Acts state that "[a]n elected judge, an appointed judged filling the vacancy of an elected judge, or judge sitting by designation . . . may issue an unsecured judicial release if [] such unsecured judicial release is noted on the release order and . . . the person is not charged with a bail restricted offense."[146] Therefore, judges sitting in elected seats must note "unsecured judicial release" on a release order for any release on recognizance.

Do the Acts Serve Their Intended Purpose?

Public Safety

To know whether a policy has improved public safety, relevant data from before and after policy implementation must be compared. But unfortunately, legislators appeared not to know the extent of the problem they wanted to solve. First, it is difficult to know how often an individual out on either a release on recognizance or a deferred bond commits a crime. Second, most evidence presented during the last two legislative sessions has been anecdotal.[147] Although some lawmakers presented statistics, their accuracy cannot be confirmed without the sources for these figures.[148] Moreover, the cited statistics concern

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143. *See* O.C.G.A. § 17-6-12(b)(2) (Supp. 2021).

144. *See id.* § 17-6-12(a). Separate from the restrictions of SB 402 and SB 174, Code section 17-6-12(a), which lists offenses bailable only before a superior court judge, limits the offenses for which magistrates may set bail. *Id.*

145. *See generally* § 17-6-12.

146. *Id.* § 17-6-12(b).

147. *See generally* SB 174 House Judiciary Non-Civil Committee Video, *supra* note 93.

148. *Id.* at 25 min., 22 sec. (remarks by Rep. Steven Sainz (R-180th)) ("They're 20% less likely if they're on an unsecured judicial release bond to come back."); SB 402 House Judiciary Committee Video,

appearance rates, not actual crime rates.[149] Because the purpose of this bill is to reduce crimes committed while on pretrial release, not to ensure court appearances, the statistics presented were irrelevant.[150]

Presumably, the statistics they needed were not readily available for Georgia.[151] But the Bureau of Justice Statistics does provide some data on a national level.[152] In one study, 55% of all released defendants charged with a felony were released on some form of "nonfinancial release."[153] Only 16% of all released felony defendants were rearrested prior to trial; almost half of those (7%) were rearrested for committing new misdemeanors, and the other half (8%) were rearrested for committing new felonies.[154] Looking only at those individuals whose most serious offense was a violent crime, 7% were arrested for committing new misdemeanors, and 6% were arrested for committing new felonies.[155] Further, felony rearrests were slightly higher for those awaiting trial on nonviolent property charges or drug charges than for those awaiting trial on violent offenses.[156] Among those defendants released while awaiting trial for murder, no one was rearrested.[157]

Although counterintuitive, this data appears to contradict legislators' assumption that release on recognizance should be restricted for more serious, violent felonies. After all, it was bail restricted offenses like murder, kidnapping, and rape that legislators wanted to prohibit from release on recognizance. Instead, it appears that in determining the likelihood of reoffending, there is no

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supra note 18, at 17 min., 50 sec. (remarks by Rep. Todd Jones (R-25th)); Williams, *supra* note 14. Representative Barry Fleming (R-121st) said that "a third of the people arrested[,] who were given signature bonds in Fulton County[,] did not show back up to court." *Id.*

149. Williams, *supra* note 14.

150. *See generally* SB 174 House Judiciary Non-Civil Committee Video, *supra* note 93; SB 402 House Judiciary Committee Video, *supra* note 18.

151. Rebecca Lindstrom & Lindsey Basye, *They Were Arrested But Didn't Go to Court: Does Atlanta's Bail Reform Lack Justice?*, 11ALIVE, https://www.11alive.com/article/news/some-say-its-time-to-bail-out-of-bail-reform/85-4ca6c167-9198-424f-bf62-9de42bea8e38 [https://perma.cc/4XLA-S86D] (Apr. 15, 2019, 6:28 PM) ("11Alive's Reveal Investigators learned the jail doesn't track who returns to court[,] and the court doesn't track how a defendant is released from jail. So, we decided to build the database ourselves, manually cross referencing every person arrested, with the court's system.").

152. *See generally* REAVES, *supra* note 19.

153. *Id.* at 17.

154. *See id.* at 21.

155. *Id.*

156. *Id.*

157. *Id.*

statistically significant difference in the violence of the defendant's original charge.[158]

Additionally, the data implies that judges generally make good decisions with the information they have. Code section 17-6-1(e)(1), which was already in effect before SB 402, states:

> (e)(1) A court shall be authorized to release a person on bail if the court finds that the person: (A) Poses no significant risk of fleeing from the jurisdiction of the court or failing to appear in court when required; (B) Poses no significant threat or danger to any person, to the community, or to any property in the community; (C) Poses no significant risk of committing any felony pending trial; and (D) Poses no significant risk of intimidating witnesses or otherwise obstructing the administration of justice.[159]

The Georgia Supreme Court has interpreted this to mean that judges may release an accused *only if* they find that the accused does not pose a risk to the community.[160] Accordingly, judges must find every person they release on a deferred bond, a release on recognizance, or cash bail to not pose a risk to the community.

Assuming the Bureau of Justice Statistics' findings apply to Georgia judges, they have an 84% success rate in determining whether the accused would pose any risk to the community, and they are 92% successful in determining risk of felonies.[161] Further, considering that only some fraction of those felonies will be as violent as the ones legislators spoke about anecdotally, it is safe to say the type of cases legislators sought to prevent are rare. That rarity, considered along with the likelihood that legislators have made an incorrect assumption

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158. The authors of this Article did not calculate p-values for the Bureau of Justice Statistics' data.

159. O.C.G.A. § 17-6-1(e)(1) (2020 & Supp. 2020).

160. Constantino v. Warren, 285 Ga. 851, 854, 684 S.E.2d 601, 604 (2009) (emphasis added).

161. If only 16% of felony defendants are rearrested, the judges are correct, or successful, in releasing the other 84% of felony defendants. If only 8% of felony defendants are rearrested for felonies, the judges are successful the other 92% of the time. S*ee supra* text accompanying note 154.

about which original charges should be targeted, weighs in favor of concluding the Acts will do little to affect public safety.[162]

Georgia legislators may speculate that Georgia's problem is worse than the national average in these studies, and that may be true. But without putting a mechanism in place for measuring the problem, the question of these bills' efficacy will remain unanswered, allowing the debate to continue indefinitely.

To accurately measure judges' performance on release decisions, legislators would need to implement a method of tracking rearrest data for each defendant who appears before each judge, the information the judge receives from both defense and prosecuting attorneys in each case, and the type of release the judge issues for each defendant. Perhaps the Georgia General Assembly will consider this in the future.

Moreover, as Representative Fleming, Representative Reeves, and Senator Robertson have pointed out, judges who are now restricted from issuing a deferred bond or release on recognizance have another option—to set bail at one dollar.[163] If judges choose this option, the same people can be released as before the passing of SB 402. Further, no one can reasonably conclude that an accused who posts only one dollar will be less likely to commit a crime while on release. Therefore, under the one-dollar-bond scenario, these bills do not prevent criminal activity on pretrial release.

But if judges act as Representative Fleming and Senator Robertson actually expect them to and set a significant dollar amount, those defendants who can afford to post bail will seemingly still be released. Those who cannot afford to post bail, will remain in jail. Therefore, in this scenario, it appears that the public would only be protected from those who would reoffend and who could not afford bail. Overall, the

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162. *See generally* SB 174 House Judiciary Non-Civil Committee Video, *supra* note 93; *see supra* Public Safety.

163. SB 402 House Judiciary Committee Video, *supra* note 18, at 37 min., 10 sec. (remarks by Rep. Barry Fleming (R-121st)) ("A signature bond is a zero-dollar bond they have to put down. This will allow them to put down one-dollar bond if they want to."); SB 174 House Judiciary Non-Civil Committee Video, *supra* note 93, at 34 min., 58 sec. (remarks by Rep. Bert Reeves (R-34th)) ("If a judge wants to let somebody out and they believe that person should walk out without having to put up any collateral, they give them a $1 bond."); SB 402 Senate Floor Debate Video, *supra* note 94 ("[The bill] does not prevent a judge from assessing a bond that the individual can afford . . . . [T]hat judge can set a bond at what that person can afford to pay, whether that be $1 or whether it be $1,000,000.").

deLatour and Meeler: SB 174: Revising Georgia's List of Bail Restricted Offenses

circumstances in which the public will be protected from violent, revolving-door reoffenders seem very limited.

Judicial Transparency and Accountability

The practical effects on transparency and accountability are also quite limited. Regarding transparency, proponents argued that judges across the state "abused" deferred bonds and that these bills would stop this abuse by eliminating the "façade" and increasing accountability.[164] Senator Robertson called deferred bonds "extremely misleading" and gave the example of a citizen reading the newspaper and seeing that an accused was released on a $100,000 bond.[165] That citizen would assume, based on what they have seen on television, that the accused must have put up at least 10% of that amount. But in reality, the judge released the accused on a "signature bond" (that is, a deferred bond).

But the apparent culprit in this example is not the judge; it is the newspaper. News agencies and the public have access to all the necessary information. The newspaper chooses how to present the accused's release in the news story, and if they do not mention that the accused did not pay the bond amount up front, the newspaper is the one misleading the public, not the judge.

Moreover, the proponents of the bill were aware that citizens could access this information on their own. In the Senate Public Safety Committee hearing on SB 402, Senator Robertson referred to a large black binder sitting in front of him that contained records on thousands of individuals released without any financial security.[166] Amber Connor, an Atlanta resident who ran a Facebook group called Concerned Citizens United, gave Senator Robertson those records.[167] Connor testified at that same hearing and explained that her group collected those records from "Fulton County's Sheriff's Jail website

164. SB 174 House Judiciary Non-Civil Subcommittee Video, *supra* note 47, at 22 min., 29 sec. (remarks by Rep. Bert Reeves (R-34th)).

165. SB 402 House Judiciary Committee Video, *supra* note 18, at 25 min., 12 sec. (remarks by Sen. Randy Robertson (R-29th)).

166. SB 402 Senate Public Safety Committee Video, *supra* note 17, at 50 min., 38 sec.

167. *Id.* at 1 hr., 23 min., 29 sec.

and Fulton's Court's Odyssey website" and delivered them to Senator Robertson.[168]

Further, the video that Senator Robertson showed the Committee included screenshots of those records. The audio was cut to repeat District Attorney Paul Howard saying the words "over and over" as the video zoomed in on one jail record and shifted to the right column that repeatedly read: "Pretrial Release Signature Bond."[169] The implication of the audio combined with the visual was that this defendant had been released "over and over" on "signature bonds."

Yet, two more columns are visible.[170] One column shows the date of offense, which is the same in every row.[171] All the rows of "Pretrial Release Signature Bond" were for a single arrest; each row of the record represented a separate charge from that arrest. The defendant had not, as far as this record shows, been given multiple "signature bonds." Whether accidental or intentional, this portion of the video was misleading.

The other visible column is the bond type. This column repeatedly reads: "5,000.00 Pre-Trial Release."[172] Thus, it should be clear to anyone viewing that record that the judge set a $5,000 bond and released the defendant on a "signature bond." The proponents, who argued that judges are misleading the public by issuing deferred bonds, showed in their own video that this information is publicly available. Therefore, it is unclear why the proponents feel that deferred bonds are a façade. But the fact that deferred bonds are not a judicial secret strongly weighs against the conclusion that restricting deferred bonds increases judicial transparency and accountability.

Finally, recall that magistrate judges, who are appointed and not elected, received much of the blame in the revolving door debate.[173] Although proponents believed that SB 402 and SB 174 would restrict magistrate judges from issuing deferred bonds and unsecured judicial releases, the restrictions do not actually apply to magistrate judges.[174]

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168. *Id.* at 1 hr., 25 min., 22 sec.
169. *Id.* at 48 min., 40 sec.
170. *Id.*
171. *Id.*
172. SB 402 Senate Public Safety Committee Video, *supra* note 17, at 48 min., 40 sec.
173. *See, e.g.*, Habersham, *supra* note 3.
174. *See* O.C.G.A. § 17-6-1(e)(4) (Supp. 2021).

Although proponents intended to affect accountability by limiting use of these releases to judges who are accountable to voters, the bills do not actually do so.[175]

Unintended Consequences

Representative McLaurin, one of the central opponents of the bill, and others raised numerous concerns about the bill's unintended consequences as the bill moved through the House.[176]

Widespread Solution to a Centralized Issue

Representative McLaurin acknowledged that this bill was created to address the problems in his own district, Fulton County.[177] Representative McLaurin's biggest problem with the law is that it is "a statewide rule change to restrict judicial discretion because of what's ostensibly . . . a Fulton County issue that Fulton County legislators have fully acknowledged."[178] He stressed the importance of finding an alternative solution to and conducting a "thoughtful assessment" of the concentrated problem, instead of resorting to a "statewide bludgeon."[179]

"Bond" vs. "Release"

Judges across the state are concerned about the effects of the new law. In a letter to Representative Efstration in 2020, the Municipal Court Judges expressed their concern with SB 402:

> Assuming municipal court judges are even allowed to take advantage of the unsecured judicial releases, we might not be able to tack on additional bond conditions,

175. *See, e.g.*, SB 174 House Judiciary Non-Civil Subcommittee Video, *supra* note 47, at 22 min., 29 sec. (remarks by Rep. Bert Reeves (R-34th)).

176. *See generally* SB 174 House Judiciary Non-Civil Committee Video, *supra* note 93; SB 174 House Judiciary Non-Civil Subcommittee Video, *supra* note 47, at 05 min., 59 sec. (remarks by Rep. Josh McLaurin (D-51st)).

177. *See* SB 174 House Judiciary Non-Civil Subcommittee Video, *supra* note 47, at 09 min., 30 sec.

178. *Id.*

179. *Id.* at 09 min., 57 sec.

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> such as no-contact provisions, or release into treatment facilities, or the like. An unsecured judicial release is not a bond, and therefore could not be revoked like a bond. The unforeseen consequences of using new language like this could be catastrophic.[180]

But, Representative Fleming says calling it a "release" instead of a "bond" will more clearly describe the situation.[181] Representative Fleming noted that "[a] third of the people arrested who were given signature bonds in Fulton County did not show back up to court," and replacing "release on his or her own recognizance" with "unsecured judicial release" leaves out any reference to "bond."[182] Judges across Georgia are concerned about how this language will affect busy courts because "[w]hen judges issue bonds, they can include restrictions, such as banning the defendant from contacting the alleged victim[;] [t]hat might not be possible under a release, according to the state Council of Municipal Court Judges."[183]

Cash Bail

Looking to the future, opponents' greatest concern is that this new law "is becoming a cash bail series of bills that stretches out indefinitely."[184] There are many problems associated with more cash bail. First, more cash bail arguably leads to more people who are unable to make bail, which leads to more crowded jails and higher costs of incarceration. Second, many opponents argue that cash bail "criminalizes poverty" by detaining only those who cannot afford bail, despite the presumption of innocence.[185] Third, more cash bail goes

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180. Letter to Rep. Chuck Efstration, *supra* note 107.
181. Williams, *supra* note 14.
182. *Id.*
183. *Id.*
184. Video Recording of House Floor Debate Meeting at 1 hr., 59 min., 05 sec. (Mar. 31, 2021) [hereinafter SB 174 House Floor Debate Video] (remarks by Rep. Josh McLaurin (D-51st)), https://www.youtube.com/watch?v=sRojqP_qZSQ.
185. SB 174 House Judiciary Non-Civil Committee Video, *supra* note 93, at 27 min., 02 sec. (remarks by Rep. Josh McLaurin (D-51st)). Representative Eric Allen (D-40th) expressed his opinion on the cash bail system, stating:

> The problem with bail, and this is where there's a philosophical difference between the two sides, it's basically a poor man's tax. Because someone with means and someone not,

against national trends that are moving away from cash bail. With the passage of SB 174, the worry for future legislative sessions is that if new expansions to this law continue, "we are deepening and widening this state's unhealthy, sick dependency on cash bail."[186]

Conclusion

There are legitimate concerns regarding the substance of these bills, but the process by which they were passed is particularly alarming.[187] Proponents of SB 402 and SB 174 said they did not want to affect judicial discretion, only transparency and accountability. Yet, closely examining all the new statutory language, and even some of the words of the proponents themselves, seems to reveal that their true intent is to push judges toward more cash bail. Whether the bills technically take away judicial discretion or leave a loophole no one expects judges to use is a red herring. Further, the convoluted language of these bills, which may have been an intentional tactic to distract from the bills' true purpose, caused confusion throughout the process. In fact, both bills were passed without anyone, including the proponents of the bills, fully understanding what the bills actually did. Finally, these bills were predicated on anecdotal evidence only and made no effort to improve the dearth of data lawmakers need to make informed policy decisions.

Lawmakers should create and use empirical evidence to ensure policies achieve the intended result. They should write and present laws in a way that citizens and lawmakers alike can understand, while holding themselves to the same level of accountability and transparency they expect from others.

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> arrested for the exact same offense, one person is able to buy themselves out of jail, while the other one is not—costing them their job, their livelihood, revenue, all because they can't come up with the $500 . . . . To me that just creates such an unevenness in the system, that we need to address it in a different way.

Allen Interview, *supra* note 108. Mazie Lynn Causey also weighed in: "Even if it's a de minimis amount of money, it's still predicating your release on having some kind of money." Causey Interview, *supra* note 100.

186. SB 174 House Floor Debate Video, *supra* note 184, at 1 hr., 58 min., 45 sec.

187. *Id.* at 1hr., 49 min.