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## CRIMINAL PROCEDURE Malicious or Unfounded Prosecution: Penalties Assessed by Magistrates

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## CRIMINAL PROCEDURE

### *Malicious or Unfounded Prosecution: Penalties Assessed by Magistrates*

CODE SECTION:	O.C.G.A. § 17-11-4 (amended)
BILL NUMBER:	SB 339
ACT NUMBER:	1203
SUMMARY:	This Act amends the Criminal Code to give magistrates at commitment hearings the discretion to assess costs against persons who instigate unfounded or malicious prosecutions.
EFFECTIVE DATE:	July 1, 1986 and applicable to prosecutions commenced on or after the effective date.

#### *History*

As recently as 1982, the Georgia Code provided for magisterial discretion in assessing costs where the "accused is discharged for want of sufficient cause for commitment."<sup>1</sup> Although O.C.G.A. § 17-7-33 referenced the justice of the peace as the official with this discretion, case law interpreted the statute to include magistrates as well.<sup>2</sup> O.C.G.A. § 17-7-33 had been in the Georgia Code for over 100 years when the General Assembly abolished the justice of the peace courts and established a system of magistrate courts in 1983.<sup>3</sup> Repeal of this section left magistrates uncertain as to whether they retained discretion to assess costs to those who instigated unwarranted prosecutions.<sup>4</sup> SB 339 was introduced at the request of magistrates to reestablish their authority to assess costs and jail fees against instigators of baseless prosecutions.<sup>5</sup>

#### *SB 339*

The Act adds a new subsection to O.C.G.A. § 17-11-4 which authorizes magistrates to impose costs and jail fees against the prosecutor. This section of the Criminal Code defines the circumstances under which costs are automatically imposed upon one seeking prosecution of another. Its

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1. O.C.G.A. § 17-7-33 (1982).
  2. See *Irvin v. State*, 54 Ga. App. 480, 188 S.E. 261 (1936).
  3. 1983 Ga. Laws 884, 922.
  4. Telephone interview with Senator Nathan Deal, Senate District No. 49 (Apr. 9, 1986) [hereinafter cited as Deal Interview].
  5. *Id.*

purpose is to penalize "violation[s] of the rights and liberty of others."<sup>6</sup>

The Act redesignates the original text of O.C.G.A. § 17-11-4 as subsection (a) and adds a new subsection (b). The new subsection, in its original form, reiterated the discretionary power of a magistrate, formerly expressed in O.C.G.A. § 17-7-33, to assess costs and jail fees against a person who instigates prosecution which fails.<sup>7</sup> The House Committee on the Judiciary amended the Act at the behest of victims' rights groups to specify that this penalty falls only on persons who instigate malicious or unfounded prosecution. The victims' rights groups feared an innocent victim who brought charges in good faith might be subject to the penalty unless the terms "unfounded and malicious" were added to O.C.G.A. § 17-11-4(b).<sup>8</sup> Law enforcement groups agreed with the inclusion of this terminology since it was already present in other parts of the Criminal Code.<sup>9</sup>

Law enforcement groups also vigorously promoted the bill's final amendment, which specifically exempts law enforcement personnel from its penalty provisions. They were concerned with being penalized in cases of good faith initiations of prosecution, such as drug arrests, for which no probable cause was later established.<sup>10</sup>

In its final form, the Act protects the interests of both victims' rights groups and law enforcement groups while reinstating the authority of magistrates to use their discretion in penalizing people who maliciously and without foundation file charges against others.

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6. *Green v. State*, 112 Ga. 52, 56, 37 S.E. 93, 95 (1900).

7. Deal Interview, *supra* note 4.

8. Telephone interview with Joseph J. Drolet, Fulton County Assistant District Attorney (Apr. 11, 1986) [hereinafter cited as Drolet Interview].

9. *Id.*; see also O.C.G.A. § 16-5-43 (1984) ("malicious confinement of a sane person in an asylum"); O.C.G.A. § 16-10-95 (1984) ("stirring up of groundless actions").

10. Drolet Interview, *supra* note 8.