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## CRIMINAL PROCEDURE Courts and Legal Defense for Indigents: Clarify and Change Provisions Relating to Fees and Collection of Fees for Indigent Defense Services; Provide that Local Victim Assistance Funds Collected by the Courts Shall be Paid Directly to the County Governing Authority of the District Attorney; Provide for Certain Reports; Provide that the Criminal Justice Coordinating Council shall Quarterly Prepare and Publish a Report of all Courts that have not Filed Certain Reports; Change Certain Provisions Relating to the Procedure for Reporting and Remittance of Certain Funds Collected by any

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Clerk of Court or other Officer or Agent of any court; Change Certain Provisions Relating to the Application Fees fro Free Legal Services and Remittance of Funds; Clarify Remittance of the \$50.00 Application Fee to Certain Entities; Change Provisions Relating to an Additional Filing Fee on Civil Actions in the Probate Courts; Change Provisions Relating to the System of Reporting and Accounting Relating to the Georgia Superior Court Clerks Cooperative Authority; Authorize Certain Inquiries and Audits; Authorize the Recovery of Attorney's Fees and Costs under Certain Circumstances; Provide for Definitions; Provide for Clarity Regarding which Entities may be Entitled to Collect Attorney's Fees and the Mechanism for Such Collection; Correct a Cross-Reference Relating to Circuit Public Defender Office's Contracts with Local Governments; Provide for Provisions Relating to Work Release Programs in Felony Sentences; Provide for Revocation of Work Release Status; Provide for Related Matters; Provide an Effective Date; Repeal Conflicting Laws; and for Other Purposes

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## CRIMINAL PROCEDURE

***Courts and Legal Defense for Indigents: Clarify and Change Provisions Relating to Fees and Collection of Fees for Indigent Defense Services; Provide that Local Victim Assistance Funds Collected by the Courts Shall be Paid Directly to the County Governing Authority or the District Attorney; Provide for Certain Reports; Provide that the Criminal Justice Coordinating Council shall Quarterly Prepare and Publish a Report of all Courts that have not Filed Certain Reports; Change Certain Provisions Relating to the Procedure for Reporting and Remittance of Certain Funds Collected by any Clerk of Court or other Officer or Agent of any court; Change Certain Provisions Relating to the Application Fees for Free Legal Services and Remittance of Funds; Clarify Remittance of the \$50.00 Application Fee to Certain Entities; Change Provision Relating to an Additional Filing Fee on Civil Actions in the Probate Courts; Change Provisions Relating to the System of Reporting and Accounting Relating to the Georgia Superior Court Clerks Cooperative Authority; Authorize Certain Inquiries and Audits; Authorize the Recovery of Attorney's Fees and Costs under Certain Circumstances; Provide for Definitions; Provide for Clarity Regarding which Entities may be Entitled to Collect Attorney's Fees and the Mechanism for Such Collection; Correct a Cross-Reference Relating to Circuit Public Defender Office's Contracts with Local Governments; Provide for Provisions Relating to Work Release Programs in Felony Sentences; Provide for Revocation of Work Release Status; Provide for Related Matters; Provide an Effective Date; Repeal Conflicting Laws; and for Other Purposes***

CODE SECTIONS:	O.C.G.A. §§ 15-21-132 (amended), 15-21A-4, -6 to -7 (amended), 17-10-1 (amended), 17-12-23 (amended), adding Chapter 12 Title 17 Article 2A (new) including 17-12-50 to -52 (new).
BILL NUMBER:	SB 203
ACT NUMBER:	739
GEORGIA LAWS:	2006 Ga. Laws 710

**SUMMARY:**

This Bill clarifies and changes provisions related to fees and the collection of fees for indigent defense services. The Bill provides that local victim assistance funds collected by the courts shall be paid directly to the county governing authority or the district attorney. Further, the Bill provides that the Criminal Justice Coordinating Council will quarterly prepare and publish a report of all courts that have not filed certain reports. The Bill changes certain provisions relating to the procedure of reporting and remittance of certain funds collected by any clerk of court or other officer or agent of any court. The Bill changes certain provisions relating to the application fees for free legal services and remittance of funds and clarifies remittance of the \$50.00 application fee to certain entities. The Bill changes provisions relating to an additional filing fee on civil actions in the probate courts. The Bill changes provisions relating to the system of reporting and accounting to the Georgia Superior Court Clerk's Cooperative Authority. The Bill authorizes certain inquiries and audits and recovery of attorney's fees and costs under certain circumstances. The Bill provides for definitions to provide clarity regarding which entities may be entitled to collect attorney's fees and the mechanism for such collection. The Bill corrects a cross-reference relating to circuit public defender office's contracts with local

governments. It provides provisions related to work release programs in felony sentences and provides for revocation of work release status.

EFFECTIVE DATE: July 1, 2006<sup>1</sup>

### *History*

The Sixth Amendment to the United States Constitution provides that “[i]n all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defense.”<sup>2</sup> In the landmark decision of *Gideon v. Wainwright*, the United States Supreme Court clarified that the Sixth Amendment guarantees all criminal defendants the right to counsel, and defendants who cannot afford an attorney shall have counsel appointed for them.<sup>3</sup> Further, the Georgia Constitution mandates that “[e]very person charged with an offense against the laws of this state shall have the privilege and benefit of counsel.”<sup>4</sup> However, despite this simple statutory language, the road to obtaining adequate counsel for indigent defendants in Georgia has remained an ongoing, arduous struggle over the years, and our state legislature continues to grapple with the most effective way to run the Georgia indigent defense system.<sup>5</sup>

The Georgia Supreme Court issued an order on December 27, 2000 establishing the Chief Justice’s Commission on Indigent Defense, directing the group to “study the status of indigent defense in Georgia, to develop a strategic plan and to set a timetable for its implementation.”<sup>6</sup> The Commission contracted with the Spangenberg Group (“TSG”) to conduct a comprehensive study of Georgia’s indigent defense system to be used in overhauling the system.<sup>7</sup>

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1. See 2006 Ga. Laws 710, § 8 at 717.

2. See U.S. CONST. amend. VI.

3. See *Gideon v. Wainwright*, 372 U.S. 335 (1963).

4. See Ga. Const. art. 1, § 1, para. 14.

5. See discussion *infra* History.

6. JUDICIAL BRANCH OF GEORGIA, INDIGENT DEFENSE REPORTS, available at <http://www.georgiacourts.org/aoc/press/idc/idc.html> (last visited Apr. 14, 2006).

7. SPANGENBERG REPORT, STATUS OF INDIGENT DEFENSE IN GEORGIA, PART I, at i (2002), available at <http://www.georgiacourts.org/aoc/press/idc/idchearings/spangenberg.doc> (last visited Apr. 14, 2006). TSG is a nationally and internationally recognized criminal justice research and consulting firm that specializes in indigent defense services, and it has conducted comprehensive statewide studies

Accordingly, in December 2002, TSG released a comprehensive 101-page report to the Commission entitled “Spangenberg Report: Status of Indigent Defense in Georgia” which detailed the numerous problems of Georgia’s indigent defense system.<sup>8</sup> Among the report’s critical findings was the conclusion that “[a] lack of program oversight and insufficient funding are the two chief problems underlying a complete absence of uniformity in the administration of and quality of indigent defense services.”<sup>9</sup> The report further found that, throughout Georgia, there are hardly any mechanisms in place to guarantee that defense lawyers are consistently held accountable for the quality of representation provided to indigent defendants.<sup>10</sup> One of the Commission’s recommendations was that indigent defense services be funded primarily by the state instead of the county, and that services be provided with greater state oversight and accountability.<sup>11</sup>

In a similar vein as the Spangenberg Report, Georgia enacted the Georgia Indigent Defense Act of 2003, which created the Georgia Public Defender Standards Council as an independent agency to oversee indigent defense throughout the state.<sup>12</sup> However, the Georgia General Assembly did not provide for adequate funding for the 2003 Georgia Indigent Defense Act, and in May 2004 Georgia Governor Sonny Perdue called a special five-day session to provide for funding for the Act.<sup>13</sup> Governor Perdue held the special session of the 2004 General Assembly to pass House Bill 1-EX to provide for

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of indigent defense systems in more than half of the states. *Id.* In addition, TSG had conducted several prior studies of indigent defense in Georgia; thus, TSG already had familiarity with Georgia’s indigent defense system before undertaking the statewide study. *Id.*

8. *See id.*

9. *Id.* at ii.

10. *Id.*

11. *Id.* at 10. Prior to passage of the Act, Georgia’s indigent defense system was funded and organized on a local level by the state’s 159 counties. *Id.*

12. *See* O.C.G.A. § 17-12-8 (2003). The Act amends Title 17 of the Official Code of Georgia Annotated. *Id.*

13. *See* Audio Recording of Remarks of Governor Perdue on Indigent Defense Agreement for Special Session, Apr. 29, 2004 (remarks by Gov. Sonny Perdue), [http://www.gov.state.ga.us/2004\\_multimedia.shtml](http://www.gov.state.ga.us/2004_multimedia.shtml) [hereinafter Purdue Audio]. Since House and Senate rules require five days for bills to work their way through the process, the shortest a special session can be to pass a bill is five days. Eagle Forum of Georgia, *2004 Five-Day Special Session: It’s a Wrap!*, May 2004, available at <http://www.georgiaeagle.org/?where=insight&ID=96>.

funding for the State's portion of indigent criminal defense.<sup>14</sup> House Bill 1-EX imposed an additional surcharge of 10% on fines for violations of criminal ordinances and a surcharge of 10%, up to \$50, on criminal bonds.<sup>15</sup> Further, it imposed an additional a \$15 fee on all civil filings and a \$50 application fee for applicants for indigent defense services.<sup>16</sup> The Georgia Superior Court Clerks Cooperative Authority (GSCCCA) was to collect all of these fees.<sup>17</sup>

SB 203 represents the Georgia General Assembly's next attempt to fine-tune the State's indigent defense system.<sup>18</sup> Senator John Wiles, of the 37<sup>th</sup> district, initially introduced SB 203 to require indigent defendants to pay the State back for free legal services if it is later found that they were not indigent and actually able to pay.<sup>19</sup>

### *Bill Tracking of SB 203*

#### *Consideration and Passage by the Senate*

SB 203 was originally introduced in the 2005 legislative session.<sup>20</sup> Because each General Assembly begins in an odd-numbered year and lasts for two years, the bill was still alive for the 2006 legislative session.<sup>21</sup> SB 203 underwent several changes during the 2006 legislative session.<sup>22</sup> SB 203 was originally introduced by Senator Wiles, and was only intended to be an amendment to one section of the Georgia Code relating to public defenders.<sup>23</sup> Senator Wiles proposed the bill to amend Article 2 of Chapter 12 of Title 17 of the Official Code of Georgia so as to authorize the government to recover attorney's fees and costs from persons who receive indigent

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14. See Purdue Audio, *supra* note 13 (Governor Perdue called the session because legislature had not funded 57 million dollars, which would have left the state's budget unbalanced for the year).

15. Georgia Public Defenders Standards Council, *Frequently Asked Questions*, <http://www.gpdsc.com/cpdsystem-transition-faq.htm#twelve> (last visited Apr. 12, 2006).

16. *Id.*

17. *Id.*

18. See SB 203, as introduced, 2006 Ga. Gen. Assem.

19. *Id.*

20. See SB 203, as introduced, 2005 Ga. Gen. Assem.

21. See GA. CONST. art. 3, § 4, para. 1

22. See discussion *infra* Bill Tracking of SB 203.

23. See SB 203, as introduced, 2005 Ga. Gen. Assem.

defense services but actually were able to pay.<sup>24</sup> Senator Wiles wanted to add a new Code section to the end of Chapter 12 to state that “[a]ny person who has received indigent defense services pursuant to this article may be required to reimburse the county which provided the services for attorney’s fees and other costs of defense if: (1) [t]he person received services that he was not entitled to receive; (2) [t]he person was not financially eligible to receive such services at the time he or she received the services; (3) [a]t the time of the disposition of the person’s case, the person is financially able to reimburse the county for such services; or (4) the court otherwise determines that the person shall be required to pay for such services.”<sup>25</sup> When introducing the bill on the Senate floor, Senator Wiles stated that the bill had been brought to him by several cities and counties.<sup>26</sup> He stated that the premise of the bill is simple: If you claim to be indigent and it’s later found out that you are not, then you have to pay back the city, county, or state government that paid the bill for your legal defense.<sup>27</sup> Further, he stated that “importantly, for you people who are concerned about your cities and counties, if the state has paid 20% and the city has paid 80%, then the city gets it all. We are not going to get in the business of splitting up the amount of money.”<sup>28</sup> This was the initial idea behind SB 203; however, it was later amended before passage.<sup>29</sup> Even though SB 203 started as a simple request on the part of cities and counties to be reimbursed for free legal services provided to indigent defendants, the bill as passed would eventually touch on a wide variety of Code sections involving judicial accounting.<sup>30</sup>

The Senate Judiciary Committee favorably reported Senator Wiles’ original bill with a substitute related to judicial accounting.<sup>31</sup> The Committee proposed that the bill amend Chapter 21A of Title 15 of the Official Code of Georgia to clarify that the remittance of the

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24. *Id.*

25. *Id.*

26. See Audio Recording of Senate Proceedings, Mar. 10, 2005 (remarks by Rep. John Wiles), <http://www.state.ga.us/services/leg/audio/2005archive>.

27. *Id.*

28. *Id.*

29. *Id.*; see discussion *infra* Bill Tracking of SB 203.

30. See discussion *infra* Bill Tracking of SB 203.

31. S.B. 203 (SCS), 2005 Ga. Gen. Assem.



\$50.00 application fee will go to the county or municipality that provides indigent defense services or contracts with a circuit public defender office for the indigent defense services.<sup>32</sup> Also, the Senate Judiciary Committee proposed amending Code section 17-12-23 to clarify that only a city or county may contract with the public defender's office for providing a criminal defense attorney for indigent persons accused of violating city or county ordinances or state laws.<sup>33</sup> Basically, with this amendment, the Senate Judiciary Committee made clear that only city and county governments may be entitled to collect attorney's fees for indigent defendants who later are required to pay back the money.<sup>34</sup> On March 10, 2006, SB 203 passed the Senate and began the legislative process in the House of Representatives.<sup>35</sup>

*Consideration and Passage by the House.*

The House Judiciary Committee offered several more substitutes to SB 203.<sup>36</sup> The Committee recommended amending several other provisions of the O.C.G.A relating to the assessment and collection of local victim assistance funds and the procedure for remittance of certain funds collected by any clerk of court and other officers of the court.<sup>37</sup> Also, the Committee proposed adding an additional filing fee for notary public applications, and changing provisions relating to an additional filing fee on civil actions in the probate courts.<sup>38</sup> Specifically, the Committee proposed to amend Code section 15-21-132 to provide that the Criminal Justice Coordinating Council shall quarterly prepare and publish a report of all courts that have not filed certain reports.<sup>39</sup> Representative Wendell Willard, of the 49th district,

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32. *Id.*

33. *Id.*

34. *Id.*

35. State of Georgia Final Composite Status Sheet, SB 203, Mar. 10, 2006 (Mar. 30, 2006).

36. See SB 203 (HCS), 2005 Ga. Gen. Assem.

37. *Id.*

38. *Id.*

39. *Id.*

stated on the House floor that he wanted the public to be able to collect this information as necessary.<sup>40</sup>

Further, the Committee proposed to amend Code section 15-21A-4 to clarify that every clerk of any court or other officer of any court receiving any funds required to be remitted to the authority under this Chapter shall remit all such funds to the authority by the end of the month that they are received.<sup>41</sup> Representative Willard specifically pointed out the amendment to paragraph (b) of this section, which he said addresses a problem that has been occurring over the past year since the enactment of House Bill 1-EX.<sup>42</sup> Representative Willard stated that probate courts throughout the state had different guidelines for filing petitions, and that probate court clerks were unsure about when and under what circumstances to collect fees.<sup>43</sup>

Thus, in an attempt to clarify this matter, the Committee proposed amending Code section 15-21A-6 to give specific direction to probate court clerks as to when a \$15.00 fee was to be collected and placed in the indigent defense fund.<sup>44</sup> The amendment added an additional \$15.00 filing fee for each civil action filed in probate court while keeping the Senate Committee's amendment to that Chapter regarding the payment of the \$50.00 filing fee to the county or municipality providing the services.<sup>45</sup> The purpose of this amendment was to clarify past confusion and define circumstances under which probate court clerks would be required to collect the \$15.00 fee for the indigent defense fund.<sup>46</sup>

Next, the Committee further amended the system of accounting by amending Code section 15-21A-7 to provide that a government authority must develop rules and regulations regarding all court fines that are authorized to be collected or disbursed in any court.<sup>47</sup> This amendment authorized the GSCCCA to promulgate rules and

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40. See Audio Recording of House Proceedings, Mar. 24, 2005 (remarks by Rep. Wendell Willard), <http://www.state.ga.us/services/leg/audio/2005archive> [hereinafter House Audio].

41. See S.B. 203 (HCS), 2005 Ga. Gen. Assem.

42. See House Audio, *supra* note 40 (remarks by Rep. Willard).

43. *Id.*

44. *Id.*

45. S.B. 203 (HCS), 2005 Ga. Gen. Assem.

46. House Audio, *supra* note 40 (remarks by Rep. Willard).

47. See S.B. 203 (HCS), 2005 Ga. Gen. Assem.

regulations for the administration of this particular chapter.<sup>48</sup> Further, the GSCCCA is required to develop a system that employs controls necessary to make inquiries as to the accuracy of the fine and fee collections and disbursement by each clerk of court or officer of a court that is receiving fines and fees.<sup>49</sup> As Representative Willard stated, “we want to have [the GSCCCA] given the ability to go in and make a true accounting and auditing of funds.”<sup>50</sup> He concluded that the “main part of the bill is to clarify the purpose of funds, the collection of those funds, and the remitting of those funds as to the . . . Superior Court Clerks Cooperative Authority.”<sup>51</sup>

The House then considered floor amendments to SB 203.<sup>52</sup> The first proposed amendment was for Code section 15-2-8 to provide that the Georgia Supreme Court has the power to provide that certain persons who do not meet certain requirements for admission to the bar but are members in good standing of the bar of any state of the United States shall be eligible to take the Georgia bar exam and, upon successful completion, be admitted to the practice of law in Georgia.<sup>53</sup> Representative Bordeaux questioned the viability of this amendment, asking Willard, “Is it your opinion that Georgia already has too many poorly qualified lawyers practicing in this state?”<sup>54</sup> The House also proposed adding a new subsection (g) to Code Section 17-10-1 to allow judges to make participating in a county work release program a condition of a felon’s probation, and to further allow for this work release status to be revocable at the court’s discretion.<sup>55</sup> Representative Willard stated that “it is not a directive, but is something to give permission and permissive rights to the courts.”<sup>56</sup> Also, the House Floor Amendments proposed amending

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48. *Id.*

49. *Id.*

50. *See* House Audio, *supra* note 40 (remarks by Rep. Willard).

51. *Id.*

52. SB 203 (HCSFA), 2005 Ga. Gen. Assem.; House Audio, *supra* note 40 (remarks by Rep. Tom Bordeaux). Author’s comment: The Floor Amendments were not available from the clerks office at the time of writing, so this information on the floor amendments was obtained from the audio recordings of the discussion on the floor.

53. *Id.*

54. *See* House Audio, *supra* note 40 (remarks by Rep. Bordeaux).

55. SB 203 (HCSFA), 2005 Ga. Gen. Assem.; House Audio, *supra* note 40 (remarks by Rep. Willard).

56. *See* House Audio, *supra* note 40 (remarks by Rep. Willard).

Code section 15-21A-4 to provide an exception to the reporting and remitting requirement for private supervision fees collected by private providers of probation services.<sup>57</sup>

The House finally adopted SB 203 without two of the floor amendments.<sup>58</sup> The House passed a version without the proposed floor amendment to 15-21A-4 which provided an exception to the reporting and remitting requirement for private providers of probation services.<sup>59</sup> Also, the passed version of SB 203 is without the proposed floor amendment to O.C.G.A. 15-2-8 which allowed the Georgia Supreme Court to have the power to allow certain persons who do not meet certain requirements for admission to the bar, but are members in good standing of the bar of any state of the United States, to be eligible to take the Georgia bar exam and be admitted to the practice of law in Georgia.<sup>60</sup> The bill passed the House on March 24, 2005 by a vote of 126 to 38.<sup>61</sup> By a vote of 162 to 1, the House passed the final version of the bill on January 12, 2006 which will either amend or add to six different sections of the O.C.G.A., including 15-21-132 (amended); 15-21A-4, -6 to -7 (amended); 17-10-1 (new); 17-12-23 (amended); adding Chapter 12 Title 17 Article 2A (new) including 17-12-50 to -52 (new).<sup>62</sup>

### *The Act*

The Act first amends Code section 15-21-132 by providing that the sums collected under Code section 15-21-131 will be paid monthly to the GSCCCA, not the court officer.<sup>63</sup> The court officer will distribute the funds to the county governing authority or district attorney, who will submit a monthly report of the collection and distribution of such funds to the GSCCCA. The GSCCCA is then charged with submitting a monthly financial report to the Criminal Justice

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57. SB 203 (HCSFA), 2005 Ga. Gen. Assem.; House Audio, *supra* note 40 (remarks by Rep. Willard).

58. State of Georgia Final Composite Status Sheet, SB 203, Mar. 10, 2006 (Mar. 30, 2006).

59. See SB 203 (HCSFA), 2005 Ga. Gen. Assem.

60. *Id.*

61. Georgia House of Representatives Voting Record, SB 203 (Mar. 10, 2005).

62. Georgia House of Representative Voting Record, SB 203 (Mar. 24, 2006).

63. O.C.G.A. § 15-21-132 (Supp. 2006).

Coordinating Council (CJCC).<sup>64</sup> The Act adds a new provision to Code section 15-21-132, providing that the CJCC will publish hard documentation, as well as report on its website, each court that has failed to file the required reports.<sup>65</sup>

The Act amends Code section 15-21A-4 by providing that each court receiving funds which are required to be reported to the GSCCCA will make a report no later than 60 days after the last day of the month in which such funds are received.<sup>66</sup> Further, it provides that the chief judge of each superior court will have the authority to oversee compliance to the rules of this chapter.<sup>67</sup> The Act states that the reporting and remittance of all funds are subject to the GSCCCA's authority to promulgate rules and regulations for the reporting and accounting of all court fines and fees under 15-21A-7<sup>68</sup> The Act further requires that funds partially collected and required to be remitted to the GSCCCA will be remitted by the end of the month following the month in which the funds were collected.<sup>69</sup> However, the GSCCCA has the authority to provide a longer period of time for the remitting of such funds..<sup>70</sup>

The Act amends Code sections 15-21A-6 by exempting "applications by personal representatives for leave to sell or reinvest" from the \$15.00 civil action filing fee in the superior state, recorders, mayors, and magistrate courts.<sup>71</sup> Further, the Act adds a subsection that imposes an additional \$15.00 fee for civil actions in probate court.<sup>72</sup> Also, any person who applies for or receives indigent defense funds will have to pay a \$50.00 fee to be levied by the court or municipality that provides for the legal services.<sup>73</sup> The fee may be waived if the court finds that the applicant is unable to afford such a fee.<sup>74</sup>

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64. *Id.*

65. *Id.*

66. O.C.G.A. § 15-21A-4 (Supp. 2006).

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. O.C.G.A. § 15-21A-6 (Supp. 2006).

72. *Id.*

73. *Id.*

74. *Id.*

The Act amends Code section 15-21A-7 by giving the GSCCCA the authority to promulgate rules and regulations for an indigent defense fee accounting system.<sup>75</sup> This section gives the GSCCCA broad authority to determine the accuracy of fines and to make inquiries of the court when the required reporting of fees does not occur.<sup>76</sup>

The Act amends Code section 17-12-23 by providing that a city or county may contract with the circuit public defender office to provide criminal defense for indigent persons accused of violating city or county laws.<sup>77</sup> If the city or county does not do so, it will be subject to all applicable standards adopted by the Georgia Public Defender Standards Council (GPDSC) for representation of indigent persons in Georgia.<sup>78</sup>

The Act inserts a new section 2A into Chapter 12, Title 17. Within this new section, the Act adds section 17-12-50, which provides definitions for the terms “paid in part” and “public defender”.<sup>79</sup> The Act adds section 17-12-51. This new section provides that a defendant, who enters a plea of *nolo contendere*, first offender, or guilty and who is represented by a public defender paid in part or in whole by a county, municipality or state will have to repay the costs of defense unless the defendant is financially unable to do so.<sup>80</sup> The Act states that in determining “financial hardship,” the court will consider the factors set forth in Code section 17-14-10, and the court will hold a hearing on the issue if requested by the defendant.<sup>81</sup> This Act does not apply to a disposition involving a child pursuant to Chapter 11 of Title 15.<sup>82</sup>

A defendant whose representation is paid entirely by a county will make payments to the county through the probation department.<sup>83</sup> Similarly, a defendant whose representation is paid by a municipality will make the payment to the municipality through the probation

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75. O.C.G.A. § 15-21A-7 (Supp. 2006).

76. *Id.*

77. O.C.G.A. § 17-12-23 (Supp. 2006).

78. *Id.*

79. O.C.G.A. § 17-12-50 (Supp. 2006).

80. O.C.G.A. § 17-12-51 (Supp. 2006).

81. *Id.*

82. *Id.*

83. *Id.* at § 17-12-51(a).

department.<sup>84</sup> A defendant whose representation is paid for entirely by the state will make the payment to the GPDSC through the probation department, and the GPDSC will transfer this payment to the general fund of the state treasury.<sup>85</sup>

The Act adds section 17-12-52, which provides that a county or municipality may recover payment from a person who has received legal assistance from a public defender paid in part or in whole if the person (1) was not eligible to receive such assistance or (2) if the person has been ordered to pay for the legal representation pursuant to Code section 17-12-51.<sup>86</sup> The Act provides that such action will be brought within 4 years after the date on which the legal services were received. In determining the amount of payment imposed, the Act allows the court to consider factors set forth in Code section 17-14-10, and allows the public defender to provide the court with a cost estimate.<sup>87</sup>

Finally, the Act amends Code section 17-10-1 by adding a new subsection (g).<sup>88</sup> In this subsection, the Act provides that, in sentencing a defendant convicted of a felony to probated confinement, the sentencing judge may make the defendant's participation in a county work release program a condition of the probation.<sup>89</sup> The Act provides that any defendant accepted into such a work program will be transferred into the legal custody of the administrator of the program, and any defendant that is not accepted will remain in the custody of the Department of Corrections.<sup>90</sup> This work release status may be revoked for cause by either the sentencing court in its discretion or by the state or local authority operating the work release program.<sup>91</sup> This subsection does not apply to any violent felony or any offense for which the work release status is specifically prohibited by law.<sup>92</sup>

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84. *Id.* at 17-12-51(b)

85. *Id.* at 17-12-51(c).

86. O.C.G.A. § 17-12-52 (Supp. 2006).

87. *Id.*

88. O.C.G.A. § 17-10-1 (Supp. 2006).

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

*Analysis*

The Act's main purpose is to define the responsibilities for collecting and remitting fees for indigent defendants.<sup>93</sup> Because courts were not mandating the requirements for collecting these fees, the Act is meant to provide a mechanism that will allow the GSCCCA to oversee this collection.<sup>94</sup> Within this framework, all funds derived from the filing fees collected under Code section 15-21A-6 will go directly into Georgia's general fund, which may or may not be used for the purposes of funding indigent defense.<sup>95</sup> Similarly, where a defendant is represented by a public defender who is paid for entirely by the state, repayment of the cost of representation will go directly into Georgia's general fund.<sup>96</sup> If a county or municipality has paid for any portion of the representation, that governmental unit may seek to recover the funds.<sup>97</sup>

The Act primarily deals with collecting and remitting of fees but does not clarify which organizations will first get access to these fees and in what order.<sup>98</sup> Where money collected under this scheme goes directly to the state's general fund, the Act does not dictate a hierarchy as to who gets to first "draw down" against those funds.<sup>99</sup> With respect to partial payments made to the court by defendants, Michael Mears, Director of the Georgia Public Defender's Council, believes his organization is fifth on the list of priority because they deal with criminal defendants, a historically unpopular group among the citizens of Georgia.<sup>100</sup> Mears does not necessarily agree with his organization's place on the list, but concedes that the Public

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93. See Telephone Interview with Rep. Wendell Willard, House Dist. No. 49 (April 7, 2006) [hereinafter Willard Interview].

94. *Id.*

95. See O.C.G.A. § 15-21A-6(e) (Supp. 2006).

96. See O.C.G.A. § 17-12-51 (Supp. 2006).

97. See O.C.G.A. § 17-12-52 (Supp. 2006).

98. See Telephone Interview with Michael Mears, Georgia Public Defender's Council (Apr. 11, 2006) [hereinafter Mears Interview].

99. See O.C.G.A. § 15-21A-6(e) (Supp. 2006) ("It is the intent of the General Assembly that all funds derived under this Code section shall be made available through the general appropriations process and may be appropriated for purposes of funding indigent defense.").

100. See O.C.G.A. § 15-6-95 (2006); Mears Interview, *supra* note 98.



Defender's Office is "a creature of the legislature, and we have to live and die by them."<sup>101</sup>

Although the Act's imposition of fees on the indigent defendant could feasibly raise constitutional issues, Lisa Kung, Director of the Southern Center for Human Rights (SCHR), does not foresee any legal obstacles in the future.<sup>102</sup> Because the Act only imposes fees on those defendants who would not suffer a financial hardship as a result, the bill does not take away an indigent person's right to an attorney.<sup>103</sup> Mears agrees, contending that the application fee as well as the repayment procedure is constitutionally sound.<sup>104</sup> According to Mears, the United States Constitution requires that individuals be given a lawyer if they can't afford one, but does not preclude a state from recouping its costs and expenditures as long as it does not do so at the financial peril of the indigent defendant.<sup>105</sup>

Both Mears and Kung agree that the text of the Act does not take away an indigent defendant's right to an attorney, and thus is based soundly on the Constitution.<sup>106</sup> However, Kung stresses that caution must be exercised in the implementation of the Act.<sup>107</sup> The Act provides that the presiding judge will make the determination as to whether or not the fees would impose a "financial hardship" on the defendant.<sup>108</sup> Although Kung concedes that there is no reason to think that these judges will not perform their constitutional duty in a serious and competent manner, she emphasizes that the state must pay careful attention to the Act's implementation in its early years.<sup>109</sup> Comparing the new statewide system of indigent defense to an "infant," Kung points out that, like an infant, extra attention must be

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101. *Id.*

102. *See* Telephone Interview with Lisa Kung, Southern Center for Human Rights (Apr. 13, 2006) [hereinafter Kung Interview].

103. *See* Gideon v. Wainwright, 372 U.S. 335 (1963) (holding the Sixth Amendment's guarantee of counsel is one of the fundamental and essential rights); O.C.G.A. § 17-12-51 (Supp. 2006) (allowing the court to impose as a condition of probation repayment of all or a portion of legal expenses as long as doing so does not place the defendant in a "financial hardship").

104. *See* Mears Interview, *supra* note 98.

105. *Id.*

106. *See* Mears Interview, *supra* note 98; Kung Interview, *supra* note 102 ("[T]he burden of payment is created by the Bill, but the [section of the Act that says the defendant doesn't have to pay] ameliorates the problem.").

107. *See* Kung Interview, *supra* note 102.

108. O.C.G.A. § 17-12-51 (Supp. 2006).

109. *See* Kung Interview, *supra* note 102.

paid early on.<sup>110</sup> Kung states that it is too early to tell how the system will mature, and it is crucial that particular attention is paid to the implementation of the Act in its beginning stages.<sup>111</sup> Although the SCHR has taken a neutral position as to the Act, Kung contends that if her organization had “the run of the place,” they may have done things somewhat differently.<sup>112</sup> Kung notes that because it is the State’s responsibility to provide adequate funding for the indigent, it may be problematic to have such a system rely on the indigent to provide funding.<sup>113</sup> However, Kung continued, “we are dealing with the reality of politics,” and this Act is a step in the right direction in alleviating the myriad problems Georgia has had in administering an effective indigent defense system.<sup>114</sup>

The Act is meant to continue the State’s effort to fix its indigent defense system.<sup>115</sup> Georgia’s indigent defense system has historically been the cause of much concern, both nationally and in the State.<sup>116</sup> The Act provides a mechanism to better account for funds collected under this system, and also provides an organized framework for collecting and remitting these funds to the proper authorities.<sup>117</sup> Within this framework, however, lies the problematic aspect of having the system rely on the indigent to provide the funding.<sup>118</sup> Kung spoke to this problem and addressed her observation that by the time all fees and fines are added up, an indigent defendant may owe the state more than \$1,000.<sup>119</sup> At some point, Kung states, the weight of this becomes “unbearable.”<sup>120</sup>

The Act ameliorates this burden by requiring a defendant to repay the county, municipality or state only when he or she is financially able to, and thus the Act falls in line with the current law surrounding

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110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *See* Willard Interview, *supra* note 93.

116. *See* discussion *supra* History.

117. *See* Willard Interview, *supra* note 93.

118. *See* Kung Interview, *supra* note 102.

119. *Id.*

120. *Id.*

an indigent defendant's right to counsel.<sup>121</sup> However, the Act puts the determination of what is a "financial hardship" in the judge's hands.<sup>122</sup> Most expect the members of the judiciary to perform their duty objectively. However, the Act requires that the judge consider certain factors set forth in section 17-14-10.<sup>123</sup> On their face, none of the factors are able to be determined to an exact certainty. Thus, in making his determination, the judge must always rely to some extent on "what he deems appropriate."<sup>124</sup> While this Act is a "step in the right direction," it is imperative that the system is followed by a "watchful eye" to ensure that all appropriate constitutional standards are satisfied.<sup>125</sup>

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121. See *McQueen v. State*, 522 S.E.2d 512, 514 (Ga. Ct. App. 1999) (holding that the trial court must consider the fairness of forcing a low income illiterate to trial without an attorney in light of the trial court's power to appoint counsel and require reimbursement).

122. See O.C.G.A. 17-12-51 (Supp. 2005); see also *Mapp v. State*, 403 S.E.2d 833 (Ga. Ct. App. 1991) (finding that the determination of indigency calls for exercise of discretion).

123. O.C.G.A. § 17-14-10 (2006) (the factors the court must consider are (1) the present financial condition of the offender; (2) the probable future earning capacity of the offender; (3) financial obligations of the offender; (4) the amount of damages; (5) the goal of the restitution to the victim and the goal of rehabilitation of the offender; (6) any restitution previously made; (7) the period of time during which the restitution order will be in effect; and (8) other factors which the ordering authority deems to be appropriate).

124. *Id.*

125. See, e.g., Mears Interview, *supra* note 98; Kung Interview, *supra* note 102.