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HB 310 – Penal Institutions: Community Supervision and Transition

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PENAL INSTITUTIONS

Community Supervision and Transition: Amend Title 42 of the Official Code of Georgia Annotated, Relating to Penal Institutions, so as to Create the Board of Community Supervision, the Department of Community Supervision, and the Governor’s Office of Transition, Support, and Reentry; Provide for the Responsibilities of DCS with Respect to Supervision of Adult and Certain Juvenile Probationers and Adult Parolees; Enact Reforms Recommended by the Georgia Council on Criminal Justice Reform; Reassign Responsibilities of the Advisory Council for Probation and the County and Municipal Probation Advisory Council to the Board of Community Supervision and Repeal Provisions Relating to Such Councils; Transfer Responsibility of Certain Functions of Probation and Parole Supervision to DCS and Make Corresponding Changes with Respect to the Jurisdiction and Authority of the Department of Corrections, Department of Juvenile Justice, and the State Board of Pardons and Paroles; Provide for the Selection, Service, and Powers and Duties of the Commissioner and Employees of DCS; Provide for Rules and Regulations and Forms; Provide for Administration; Provide for Transfer of Prior Appropriations; Provide for Transfer of Personnel, Equipment, and Facilities; Provide for Defined Terms; Provide for the Revocation, Modification, and Tolling of Sentences under Certain Circumstances; Provide for the Conditions of Probation; Provide for the Assessment and Collection of Costs of Probation; Revise Certain Standards for Private Corporations, Private Enterprises, and Private Agencies That Enter into Written Contracts for Probation Services; Change Provisions Relating to Confidentiality of Records; Revise Certain Standards for Counties, Municipalities, or Consolidated Governments Who Enter into Written Agreements to Provide Probation Services; Provide for Management of Probated Sentences When a Defendant Wants to Enter an Accountability Court as a Condition of a Probation Revocation; Change Provisions Relating to Informing a Defendant Regarding the First Offender Laws; Provide for Retroactive First Offender Treatment under Certain Circumstances; Provide for the

Filing of a Petition for Retroactive First Offender Treatment; Amend Titles 15, 16, 17, 19, 20, 21, 34, 35, 37, 40, 42, 43, 45, 48, and 49 of the Official Code of Georgia Annotated, Relating to Courts, Crimes and Offenses, Criminal Procedure, Domestic Relations, Education, Elections, Labor and Industrial Relations, Law Enforcement Officers and Agencies, Mental Health, Motor Vehicles and Traffic, Penal Institutions, Professions and Businesses, Public Officers and Employees, Revenue and Taxation, and Social Services, Respectively, so as to Conform Provisions to the New Chapter 3 of Title 42; Provide for Certain Changes in the Administrative Organization of the Department of Corrections, Department of Juvenile Justice, and the State Board of Pardons and Paroles and Provide for Conforming Amendments; Correct Cross-References and Remove Obsolete or Improper References; Provide for Legislative Findings and Intent; Provide for Related Matters; Provide for an Effective Date and Applicability; Repeal Conflicting Laws; and for Other Purposes

CODE SECTIONS: O.C.G.A. §§ 15-1-4, -15, -16, -17 (amended); 15-5-81 (amended); 15-6-30, -77 (amended); 15-11-2, -58, -67, -471, -473, -506, -562, -601, -705 -710, (amended); 15-12-40.1 (amended); 16-5-21 (amended); 16-6-5.1, -25 (amended); 16-10-24, -33, -34, -97 (amended); 16-11-37, -130 (amended); 17-6-1.1 (amended); 17-10-1, -1.4, -3, -9.1 (amended); 17-12-51 (amended); 17-14-2, -8, -14, -16 (amended); 17-15-13 (amended); 17-17-3, -8, -14 (amended); 19-7-52 (amended); 19-11-21, -67 (amended); 19-13-10, -31, -32, -34, -51, (amended); 20-2-699 (amended); 21-2-231 (amended); 34-9-1 (amended); 35-3-36 (amended); 35-6A-3 (amended); 35-8-2, -3 (amended); 37-2-4 (amended);

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40-5-64, -81, -83 (amended); 42-1-1, -10, -11, -12, -14, -19 (amended); 42-2-11, -15 (amended); 42-3-1, -2, -3, -4, -5, -6, -7, -8, -9, -30, -31, -32, -33, -34, -35, -50, -51, -52, -53, -54, -70, -71, -72, -73, -74, -90, -110, -111, -112, -113, -114, -115, -116, -117, -118, -119 (new); 42-4-50 (amended); 42-5-50 (amended); 42-8-20, -21 (new), -22, -23, -24, -25, -26, -27, -28, -29, -29.1, -30, -30.1, 31, -32, -33, -34, -34.1, -34.2, -35, -35.1, -35.2, -35.3, -35.4, -35.5, -35.6, -35.7, -36, -37, -38, -39, -40, -41, -42, -43, -43.1, -43.2, -43.3, -44, -61, -66, -70, -71, -72, -73, -74, -80, -81, -82, -83, -84, -100, -101, -102, -103, -104, -105 (amended), -106, -107, -108, -109, -109.1, -109.2, -109.3, -109.4, -109.5 (new), -112, -114, -116, -130, -150, -151, -152, -153, -154, -155, -156, -157, -158, -159 (amended); 42-9-3, -9, -20, -21, -41, -42, -44, -48, -53, -57, -90 (amended); 43-12A-5 (amended); 45-7-9, -21 (amended); 45-9-81, -83, -101 (amended); 45-18-7 (amended); 48-7-161 (amended); 49-3-6 (amended); 49-4A-8, -11 (amended)

BILL NUMBER:

HB 310

ACT NUMBER:

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GEORGIA LAWS:

2015 Ga. Laws 422

SUMMARY:

The Act transfers the supervisory powers and duties of the Department of Corrections, the State Board of Pardons and Paroles, and the Board and Department of Juvenile Justice to the newly established Department of

Community Supervision. The Act creates the Board of Community Supervision, which has three main roles: 1) it is the rule-making body for the Governor's Office of Transition, Support, and Reentry; 2) it is the rule-making body for the Department of Community Supervision; and 3) it is its own agency, replacing the County and Municipal Probation Advisory Council of Georgia and overseeing the supervisory functions which were taken over by the Department of Community Supervision. The Act also implements Governor Nathan Deal's (R) "probation overhaul" and addresses many concerns about the current probation system. The Act limits fees in pay-only probation and gives judges the authority to waive fines and fees and order community service if the costs are beyond what an offender can afford. Under the Act, before a judge can jail an offender for failing to pay, the judge must find that the failure was willful and not the result of poverty. It also gives judges the authority to put a misdemeanor probation case on hold if an offender stops reporting.

EFFECTIVE DATE: July 1, 2015

History

House Bill (HB) 310 is one of a series of Governor Nathan Deal's (R) criminal justice reform bills, aimed at "creating the finest and most efficient justice system in the nation."¹ The Governor's initial

1. Ga. Council on Criminal Justice Reform, Report 3, 18 (Feb. 2015), *available at*

push began in 2011 with the creation of the Special Council on Criminal Justice Reform, which has since recommended a myriad of substantial policy changes focused on reforming prisons, strengthening probation, revamping drug courts, and considering alternative sentencing.² These reforms were embodied in HB 1176, which was signed into law in 2012 and that instigated a new “smart on crime” approach for Georgia.³ The following two years saw more substantial criminal justice reform with the addition of alternative programs for nonviolent young offenders in 2013 and changes to the juvenile court system in 2014.⁴ HB 310 adds to the list of reforms with a misdemeanor probation overhaul and the creation of a new administrative agency, the Department of Community Supervision.

Community-Based Supervision

HB 1176 largely focused on curbing Georgia’s excessive prison population, but also sought to enhance community-based supervision.⁵ Community-based supervision is not a concept unique to Georgia but is a new approach to criminal corrections and has been advanced by the American Legislative Exchange Council (ALEC), which created a model policy called “The Recidivism Reduction Act.”⁶ Part of this push was to decrease the number of individuals serving prison sentences for nonviolent crimes.⁷ Governor Deal, in his 2011 Inaugural Address, envisioned giving such individuals expanded probation options, particularly those who struggle with drug addiction.⁸ HB 310 turns towards administrative reform in

<http://gotsr.dcor.state.ga.us/wp-content/uploads/2015/02/2014-2015-GA-Council-on-Criminal-Justice-Reform.pdf> [hereinafter Report]; see also Sheila Bilimoria & Ray Carver, *Court: Juvenile Court Administration*, 31 GA. ST. U. L. REV. 25 (2014).

2. REPORT, *supra* note 1, at 3.

3. *Id.*; see also Meg Buice & Tamara Garcia, *Crimes and Offenses: Appeal or Certiorari by State in Criminal Cases*, 29 GA. ST. U. L. REV. 290, 296–97 (2012).

4. REPORT, *supra* note 1, at 3; Bilimoria & Carver, *supra* note 1; Jason Carruthers & Jessica Sully, *Courts: Juvenile Justice Reform*, 30 GA. ST. U. L. REV. 63 (2013).

5. Buice & Garcia, *supra* note 3, at 293, 297.

6. *Recidivism Reduction: Community-Based Supervision Alternatives to Incarceration*, THE STATE FACTOR, Apr. 2015, at 5, available at <http://www.alec.org/publications/recidivism-reduction/> (detailing general considerations and citing North Carolina as a state that adopted a similar approach).

7. Buice & Garcia, *supra* note 3, at 299.

8. *Id.* at 294.

advancing “community-based supervision” while tackling Georgia’s expansive and problematic misdemeanor probation system.⁹

Creating the Department of Community Supervision

HB 310 forms the Department of Community Supervision under which the Board of Pardons and Parole, the Department of Corrections, and the Department of Juvenile Justice are organized.¹⁰ Originally, these three groups dealt with different classes of people but conducted similar duties, so for years officers were similarly trained for their duties, but were not cross-trained to deal with different classes of people.¹¹ The Department of Pardons and Parole handled pardons and clemency of adult offenders who were already in prison and had not been released into society.¹² The Department of Corrections conducted probation supervision and services, essentially the same type of supervision as the Department of Pardons and Paroles, but the offenders had not yet been to prison.¹³ The Department of Juvenile Justice monitored probation of juvenile offenders.¹⁴

The new ability for comprehensive cross-training employees leads to cost-effectiveness and efficiency.¹⁵ Governor Deal stated that this consolidation will help the State coordinate its supervision work and reduce recidivism.¹⁶ The Department of Community Supervision addresses concerns with efficiency, where, for example, the prior administrative scheme had different agencies dealing with adult and juvenile offenders but conducting essentially the same duties.¹⁷

9. *See generally* Audio Recording of Senate Public Safety Committee, Mar. 24, 2015 (remarks by Rep. Alan Powell (R-32nd)) (on file with the Georgia State University Law Review) [hereinafter Senate Recording].

10. O.C.G.A. § 42-3-2(a) (Supp. 2015).

11. Senate Recording, *supra* note 9, at 2 min., 47 sec. (remarks by Rep. Alan Powell (R-32nd)).

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

13. *Id.*

14. *Id.*

15. *Id.*

16. Carrie Teegardin & Kristina Torres, *Probation Overhaul Passes Senate: Misdemeanor System has been Used as Costly Payment Plan for Fines*, ATLANTA J.-CONST., Mar. 28, 2015, at B1, available at 2015 WLNR 9158865.

17. *See id.*

Georgia is saving money and promoting efficiency by merging these separate agencies into one.¹⁸

Privatized Probation

In 1991, various new laws gave Georgia’s municipal and county governments responsibility for managing misdemeanor probation.¹⁹ About ten years later, Georgia realized that it could not afford to hire and pay private probation officers, so it delegated to the courts the ability to operate internal probation officers or to hire low-cost private probation companies.²⁰ Georgia currently places more people on probation than any other state, largely due to the state’s expansive misdemeanor probation system.²¹ The inability to pay traffic or high-level misdemeanor fines results in increasing numbers of low-income citizens on probation.²² By June 2015, Georgia reported nearly 170,000 Georgians on probation for traffic offenses or other misdemeanors, a substantial reduction from 2013.²³ Additionally, 80% of Georgia probationers are under the supervision of private probation companies.²⁴

In 2012, Assistant Attorney General Angelique McClendon opined on the constitutionality of the intergovernmental agreements central to privatized probation services.²⁵ The previous version of Code section 42-8-100 authorized county and municipal court judges to enter into agreements for probation services with “corporations, enterprises, or agencies.”²⁶ McClendon stated that, in her opinion, these agreements are permissible under article IX, section 3, paragraph 1(a) of the Georgia Constitution so long as the contracting parties are authorized by law to provide those probation services (that

18. See Senate Recording, *supra* note 9, at 3 min., 5 sec. (remarks by Rep. Alan Powell (R-32nd)).

19. See REPORT, *supra* note 1, at 21.

20. See *id.*; see also Senate Recording, *supra* note 9, at 7 min., 19 sec. (remarks by Rep. Alan Powell (R-32nd)).

21. Carrie Teegardin, *Probation Companies Facing Slate of Reforms*, ATLANTA J.-CONST., Mar. 1, 2015, at A1, available at 2015 WLNR 6118843.

22. *Id.*

23. Compare Ga. Dep’t of Corr., Probationer Statistical Profile 5 (2015), available at http://www.dcor.state.ga.us/Research/Monthly/Profile_probationers_2015_06.pdf, with Teegardin, *supra* note 21.

24. Teegardin, *supra* note 21.

25. 2012 Ga. Op. Att’y Gen. 7.

26. *Id.*

law being Code section 42-8-100).²⁷ Additionally, the Supreme Court of Georgia held in 2014 that using private probation officers was constitutional; however, the court concluded that state law does not authorize tolling probation sentences resulting in the dismissal of tens of thousands of arrest warrants for those who failed to comply with their probation sentences.²⁸

Problems with the old system were widespread in practice because most local courts in Georgia “outsource[d] misdemeanor probation supervision to private probation companies.”²⁹ Critics of the old system argued that the private probation companies’ profit motives turned probation payment plans into predatory loans.³⁰ Moreover, indigent citizens unable to pay probation fines were jailed pending payment, usually as a result of an inability to pay additional administrative fees and not an inability to pay the principal fine imposed at sentencing.³¹ Before the legislative session, the Georgia Council for Criminal Justice Reform proposed several recommendations for reforming the misdemeanor probation system.³² These recommendations were offered to “improve the transparency and fairness of misdemeanor probation.”³³

Georgia Council for Criminal Justice Reform Recommendations

First, the contracts between private probation companies and local governments shall include provisions requiring the company to issue an annual report to the local governing authority (to be a public document) offering general statistics on the number of offenders, the price of fines, and community service hours—among other things.³⁴ Second, probationers should receive documentation relating to their sentence, including receipts, balance statements, and a copy of their probation supervision file.³⁵ Third, the Georgia General Assembly

27. *Id.*

28. *See generally* Sentinel Offender Svcs., LLC v. Glover, 296 Ga. 315, 766 S.E.2d 456 (2014); *see also* REPORT, *supra* note 1, at 22.

29. Teegardin & Torres, *supra* note 16.

30. *Id.*; *see also* REPORT, *supra* note 1, at 21.

31. *See* Teegardin, *supra* note 21.

32. *See* REPORT, *supra* note 1, at 22–27.

33. *Id.* at 22.

34. *Id.*

35. *Id.* at 22–23.

should amend the laws “to create express statutory authority for tolling a misdemeanor probation sentence.”³⁶ Fourth, a judge should have discretion to allow a probationer who is unable to pay his fines to convert his or her debt into community service.³⁷ Fifth, courts should conduct an analysis on the indigent status of a probationer in deciding whether to waive certain fees.³⁸ Sixth, no probationer’s sentence shall be waived without first conducting a hearing.³⁹ Seventh, amend Code section 42-8-100 to include “(a)(4) ‘Significant financial hardship’” and an enumeration of the potential causes of such a hardship.⁴⁰ The recommendation also suggested that the General Assembly add a section to allow courts, upon finding of significant financial hardship, to waive or modify the monetary obligations flowing from probation supervision.⁴¹ Eighth, create a study committee within the Council to examine the issues related to misdemeanor probation.⁴² Ninth, cap the amount of time that misdemeanor probation can be converted to jail time for failure to pay.⁴³ Tenth, provide a definition for “pay only” misdemeanor cases in Code section 42-8-100.⁴⁴ Eleventh, make the County and Municipal Probation Advisory Council a part of the newly created Department of Community Supervision.⁴⁵ Finally, the State should expand the felony probation database to include documentation of misdemeanor cases.⁴⁶

Representative Alan Powell (R-32nd) stated at the Senate Public Safety Committee Meeting that HB 310 seeks to address many of the Georgia Council for Criminal Justice Reform’s recommendations.⁴⁷

36. *Id.* at 23.

37. *Id.*

38. REPORT, *supra* note 1, at 23.

39. *Id.* at 23–24.

40. *Id.* at 24.

41. *Id.*

42. *Id.*

43. *Id.* at 24–25.

44. REPORT, *supra* note 1, at 25–26.

45. *Id.* at 26.

46. *Id.* at 26–27.

47. See Senate Recording, *supra* note 9, at 10 min., 30 sec.

*Bill Tracking of HB 310**Consideration and Passage by the House*

Representatives Alan Powell (R-32nd), Christian Coomer (R-14th), Chad Nimmer (R-178th), Terry Rogers (R-10th), Robert Dickey (R-140th), and Jay Powell (R-171st) sponsored HB 310.⁴⁸ The House read the bill for the first time on February 12, 2015.⁴⁹ It read the bill for the second time on February 17, 2015, and assigned the bill to the House Judiciary Non-Civil Committee.⁵⁰ The Committee reported the bill by substitute on March 2, 2015.⁵¹

The Committee substitute contained one substantive change to Part I, Section 1-1 of the bill.⁵² The bill originally provided that the Board of Community Supervision would consist of eleven members.⁵³ Five of those members were appointed by the Governor: a sheriff, a superior court judge, a juvenile court judge, a mayor or city manager, and a county commissioner.⁵⁴ The substitute changed the size of the board to nine members and eliminated two appointed positions: the superior court judge and the juvenile court judge.⁵⁵

The House read the Committee substitute on March 11, 2015.⁵⁶ Representative Powell proposed an amendment to the Committee's substitute that would provide an opportunity for a hearing before a court may reinstate probation supervision fees in a case where pay-only probation is converted to a sentence requiring community supervision.⁵⁷ The amendment was adopted without objection.⁵⁸ The

48. Georgia General Assembly, HB 310, Bill Tracking, <http://www.legis.ga.gov/Legislation/en-US/display/20152016/HB/310>.

49. State of Georgia Final Composite Status Sheet, HB 310, May 14, 2015.

50. *Id.*

51. *Id.*

52. *Compare* HB 310 (HCS), § 1-1, p. 3, ln. 76, 2015 Ga. Gen. Assem., *with* HB 310, as introduced, § 1-1, p. 3, ln. 75, 2015 Ga. Gen. Assem.

53. HB 310, as introduced, § 1-1, p. 3, ln. 75, 2015 Ga. Gen. Assem.

54. *Id.* § 1-1, p. 3, ln. 80–90.

55. *Compare* HB 310 (HCS), § 1-1, p. 3, ln. 76, 81–87, 2015 Ga. Gen. Assem., *with* HB 310, as introduced, § 1-1, p. 3, ln. 75, 81–87, 2015 Ga. Gen. Assem.

56. State of Georgia Final Composite Status Sheet, HB 310, May 14, 2015.

57. HB 310 (HCSFA), § 3-2, p. 27, ln. 893–97, 2015 Ga. Gen. Assem.

58. *See* State of Georgia Final Composite Status Sheet, HB 310, May 14, 2015.

House passed the Committee substitute, as amended, by a vote of 164 to 5.⁵⁹

Consideration and Passage by the Senate

Senator John Kennedy (R-18th) sponsored HB 310 in the Senate.⁶⁰ The Senate read the bill for the first time on March 13, 2015, and assigned it to the Senate Public Safety Committee.⁶¹ The Public Safety Committee favorably reported the bill on March 24, 2015.⁶² The Senate read the bill for the second time on March 25, 2015, and for the third time on March 27, 2015.⁶³ The Senate passed the bill on March 27, 2015, by a vote of 33 to 3.⁶⁴ HB 310 was sent to Governor Nathan Deal (R) on April 6, 2015, and signed into law on May 5, 2015.⁶⁵

The Act

Part I

In Part I, the Act amends Chapter 3 of Title 42, relating to penal institutions, for the purpose of transferring the supervisory powers of the State Board of Pardons and Paroles, the Department of Corrections, and the Board and Department of Juvenile Justice to the newly created Department of Community Services.⁶⁶ The Act also amends Titles 15, 16, 17, 19, 20, 21, 34, 35, 37, 40, 42, 43, 45, 48, and 49 so as to conform the provisions to the new Chapter 3 of Title 42.⁶⁷

59. Georgia House of Representatives Voting Record, HB 310 (Mar. 11, 2015).

60. Georgia General Assembly, HB 310, Bill Tracking, <http://www.legis.ga.gov/Legislation/en-US/display/20152016/HB/310>.

61. State of Georgia Final Composite Status Sheet, HB 310, May 14, 2015.

62. *Id.*

63. *Id.*

64. Georgia Senate Voting Record, HB 310 (Mar. 27, 2015).

65. State of Georgia Final Composite Status Sheet, HB 310, May 14, 2015.

66. 2015 Ga. Laws 422, at 422.

67. *Id.*

Board of Community Supervision

Part I creates the Board of Community Supervision (the Board) which establishes the general policies to be followed by the Department of Community Supervision (DCS) and the Governor's Office of Transition, Support, and Reentry.⁶⁸ The powers, functions, and duties of the Board of Corrections, the Board of Pardons and Paroles, and the Board of Juvenile Justice are transferred to the Board of Community Supervision.⁶⁹

The Board consists of nine members, six of whom will serve for the entire time they remain in their appointed positions.⁷⁰ The other three members are appointed by the Governor and serve terms of four years.⁷¹ The Governor appoints members to fill vacancies in office.⁷² A Chairperson is also elected by the Board's membership.⁷³

The Board is required to adopt rules and regulations governing the management and treatment of probationers and parolees.⁷⁴ These rules must ensure that the Board's decisions regarding probationer and parolee management are guided by practices that are shown by scientific research to reduce recidivism.⁷⁵ The Board must also require the Department of Community Supervision to collect and analyze certain data regarding the type and effectiveness of treatments given to probationers and parolees.⁷⁶

Part I gives the Board the authority and duty to consult with an advisory council.⁷⁷ The advisory council is composed of a state court judge, a municipal court judge, a probate court judge, a magistrate

68. O.C.G.A. § 42-3-2(a) (Supp. 2015).

69. *Id.*

70. O.C.G.A. § 42-3-2(b) (Supp. 2015). These six members are the Commissioner of corrections, the Commissioner of juvenile justice, the Chairperson and Vice Chairperson of the State Board of Pardons and Paroles, the Director of the Division of Family and Children Services of the Department of Human Services, and the Commissioner of behavioral health and developmental disabilities. *Id.*

71. *Id.* These members will consist of a sheriff, a mayor or city manager, and a county commissioner or manager. *Id.*

72. O.C.G.A. § 42-3-2(c) (Supp. 2015).

73. O.C.G.A. § 42-3-2(e) (Supp. 2015).

74. O.C.G.A. § 42-3-2(g)(2) (Supp. 2015).

75. *See id.*

76. *Id.* The DCS must prepare an annual report of this information and submit it to various elected officials. *Id.*

77. O.C.G.A. § 42-8-106(b) (Supp. 2015).

judge, a criminal defense attorney appointed by the Governor, and a private probation officer or an expert in private probation appointed by the Governor.⁷⁸

Department of Community Supervision

Part I also creates the Department of Community Supervision, which is the agency primarily responsible for the supervision of: (1) defendants who receive a felony sentence of straight probation, (2) defendants who receive a split sentence, (3) defendants placed on parole or other conditional release, and (4) certain juvenile offenders released from confinement.⁷⁹ The DCS is responsible for administering and enforcing laws, rules, and regulations related to probation and parole supervision.⁸⁰ Additionally, the DCS must ensure that community supervision officers supervising juvenile offenders receive the same training to work specifically with children and adolescents as required of the Department of Juvenile Justice probation officers.⁸¹ Within the DCS, a victim services unit will be established by the Commissioner to coordinate the payment of court-ordered restitution and other victim services.⁸²

The Commissioner of community supervision, a salaried position to be appointed by the Governor, is responsible for supervising, directing, and executing the functions of the DCS.⁸³ The Commissioner, with the approval of the Board, has the power to establish units within the DCS and designate an assistant commissioner for each unit.⁸⁴ With the approval of the Board, the Commissioner is also authorized to make and publish rules and regulations related to the administration of probation and parole supervision.⁸⁵ Until the Commissioner does so, however, the effective rules and regulations will be those previously adopted by

78. O.C.G.A. § 42-8-106(a) (Supp. 2015).

79. O.C.G.A. § 42-3-3(a) (Supp. 2015).

80. O.C.G.A. § 42-3-3(a)(5) (Supp. 2015).

81. O.C.G.A. § 42-3-3(b) (Supp. 2015).

82. O.C.G.A. § 42-3-5(a) (Supp. 2015).

83. O.C.G.A. § 42-3-4(a) (Supp. 2015).

84. O.C.G.A. § 42-3-5(a) (Supp. 2015).

85. O.C.G.A. § 42-3-6(a) (Supp. 2015).

the agencies that, pursuant to this Act, transferred their probation and parole supervision duties to the Board.⁸⁶ The state agencies that, pursuant to this Act, transfer their duties and powers to the newly created DCS must also transfer personnel, equipment, and facilities to the DCS.⁸⁷ Finally, the Commissioner may prescribe forms, confer powers of police officers on employees,⁸⁸ and allow certain employees to assist law enforcement officers in preserving order and peace.⁸⁹

Part I of the Act allows a DCS or community supervision office to purchase vending machines or contract with vending services if the operation of such services is “capable of generating a profit.”⁹⁰ The profits generated from these services go to an “employee benefit fund” which, with some restrictions, may be expended on items or activities that benefit employees of the office.⁹¹

The Governor’s Office of Transition, Support, and Reentry

Part I also creates the Governor’s Office of Transition, Support, and Reentry (Office) in order to administer rules and regulations that promote successful offender reentry.⁹² The duties and powers related to reentry services of the State Board of Pardons and Paroles, Department of Corrections, and Board and Department of Juvenile Justice are transferred to the Office.⁹³ Appropriations to these agencies related to reentry service functions are also transferred to the Office.⁹⁴ A Director of the Office, a salaried position appointed by the Governor, will be responsible for supervising, directing,

86. O.C.G.A. § 42-3-6(e) (Supp. 2015).

87. O.C.G.A. § 42-3-7(a) (Supp. 2015). Additionally, appropriations to these agencies will also be transferred to the DCS. *Id.*

88. O.C.G.A. § 42-3-6(c) (Supp. 2015).

89. *See* O.C.G.A. § 42-3-6(d) (Supp. 2015).

90. O.C.G.A. § 42-3-8(c) (Supp. 2015).

91. *See generally* O.C.G.A. § 42-3-8 (Supp. 2015). Examples include recognizing the birth of an employee’s child, events that foster camaraderie amongst employees, or training sessions. O.C.G.A. § 42-3-8(d) (Supp. 2015). The bill provides monetary limitations on how much may be spent on these items or events. *Id.*

92. O.C.G.A. §§ 42-3-31, -32 (Supp. 2015).

93. O.C.G.A. § 42-3-33 (Supp. 2015). Personnel, equipment, and facilities of these agencies are also transferred this newly created Office. *Id.*

94. O.C.G.A. § 42-3-33(b) (Supp. 2015).

organizing, planning, administering, and executing the functions of the Office.⁹⁵ The Director is authorized to establish units within the Office and designate assistant directors of each unit.⁹⁶

The Director of the Office holds a “separate and distinct position from any other position in state government.”⁹⁷ The Director is authorized to employ, assign, compensate, and discharge employees; however, no DCS employee or person performing services for the Office may be compensated on a commission or contingent fee basis.⁹⁸ Neither the Commissioner of the DCS, the Director of the Office, nor any employee may be given anything of value in addition to their compensation.⁹⁹

Title 42, Chapter 3, Article 3

The Act makes it a misdemeanor for a community service officer to use an offender for any purpose resulting in private gain to *any* individual.¹⁰⁰ This prohibition does not apply to (1) services provided to a disabled person under the newly created Code section 42-3-52, (2) work on private property because of a natural disaster, or (3) if the services are performed pursuant to a court order.¹⁰¹

Part I also requires agencies who wish to participate in a community service program to submit an application letter to the court showing eligibility, number of offenders capable of being placed in the agency, the type of work to be performed, and the provisions for supervision.¹⁰² The court will then assign offenders to work through the agency.¹⁰³ Part I provides immunity to agencies and community service officers from liability for acts performed while the officers are participating in a community service program.¹⁰⁴

95. O.C.G.A. § 42-3-34 (Supp. 2015).

96. O.C.G.A. § 42-3-35(a) (Supp. 2015).

97. O.C.G.A. § 42-3-34 (Supp. 2015).

98. O.C.G.A. § 42-3-35(b) (Supp. 2015).

99. O.C.G.A. § 42-3-35(c) (Supp. 2015).

100. O.C.G.A. § 42-3-50(b) (Supp. 2015).

101. O.C.G.A. § 42-3-50(c) (Supp. 2015).

102. O.C.G.A. § 42-3-51(a) (Supp. 2015).

103. O.C.G.A. § 42-3-51(b) (Supp. 2015).

104. O.C.G.A. § 42-3-51(d) (Supp. 2015). The immunity does not apply to acts that are grossly negligent, reckless, or willful. *Id.*

Part I next provides that community service may be considered as a condition of probation.¹⁰⁵ Primary consideration will be given to traffic violation offenders, ordinance offenders, or offenders convicted of noninjurious, nondestructive, nonviolent misdemeanors or felonies.¹⁰⁶ If community service is ordered in probation cases, the court shall order “[n]ot less than 20 hours nor more than 250 hours in cases involving traffic or ordinance violations or misdemeanors, such service to be completed within one year.”¹⁰⁷ In felony cases, the court shall order “[n]ot less than twenty hours nor more than 500 hours . . . , such service to be completed within three years.”¹⁰⁸

The court may also authorize an offender to serve as a live-in attendant for a disabled person if the court deems it appropriate and the offender and disabled person agree to the arrangement.¹⁰⁹ The offender or disabled person can terminate the arrangement upon request, and the agency must frequently ensure the safety and welfare of the disabled person by maintaining personal contact.¹¹⁰

The court may also order an offender to perform forty hours of community service per week in lieu of incarceration.¹¹¹ A court may also add community service hours to the original court ordered hours as a disciplinary action, “as an additional requirement of any program in lieu of incarceration, or as part of the sentencing options system as set forth in Article 6 of this Chapter.”¹¹²

Title 42, Chapter 3, Article 4

Part I allows the DCS “to establish and operate pretrial release and diversion programs as rehabilitative measures for persons charged with felonies for which bond is permissible”¹¹³ However, unanimous approval of the superior court judges, the district attorney,

105. O.C.G.A. § 42-3-52(a) (Supp. 2015).

106. *Id.*

107. O.C.G.A. § 42-3-52(b)(1) (Supp. 2015).

108. O.C.G.A. § 42-3-52(b)(2) (Supp. 2015).

109. O.C.G.A. § 42-3-52(c)(1) (Supp. 2015). Such service shall last, at most, two years. *Id.*

110. O.C.G.A. § 42-3-52(c)(3)–(4) (Supp. 2015).

111. O.C.G.A. § 42-3-52(d) (Supp. 2015).

112. O.C.G.A. § 42-3-52(e) (Supp. 2015).

113. O.C.G.A. § 42-3-70 (Supp. 2015).

and the sheriff of the county is required in each county before these programs may be established.¹¹⁴

Upon the application by the person charged with a felony for which bond is permissible, a court may “release the person prior to conviction . . . to the supervision of a pretrial release or diversion program . . . after an investigation and upon recommendation of the staff of the . . . program.”¹¹⁵ A person must voluntarily agree to participate in the pretrial release or diversion program and must “knowingly and intelligently . . . waive[] his or her right to a speedy trial for the period of pretrial release or diversion.”¹¹⁶ Finally, the judge having jurisdiction over the case must approve of the release in writing.¹¹⁷

Title 42, Chapter 3, Article 5

Part I allows a county to establish diversion programs and centers for the confinement of persons who have violated court orders granting alimony or child support.¹¹⁸ Under certain conditions, a person confined in a diversion center may be allowed to travel to and from his or her place of employment.¹¹⁹ If not traveling to and from work, the person shall be confined to the diversion center and will continue to be responsible for alimony and child support.¹²⁰ The person may also be required to pay for the costs of his or her incarceration at the center as well as the cost of administering the program.¹²¹ A judge is authorized to provide other methods of incarceration if the person “fails to comply with any of the requirements imposed upon him or her”¹²²

114. *Id.*

115. O.C.G.A. § 42-3-71 (Supp. 2015).

116. *Id.*

117. O.C.G.A. § 42-3-74 (Supp. 2015).

118. O.C.G.A. § 42-3-90 (Supp. 2015).

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

Title 42, Chapter 3, Article 6

Next, Part I adds Article 6, the Probation Management Act, to Chapter 3 of Article 42, relating to agreements for probation services.¹²³ Article 6 allows a sentencing judge to require defendants sentenced to probation to be ordered to a “sentencing options system”¹²⁴ that allows the DCS, as an alternative to judicial modifications or revocations, to sanction probationers who violate terms and conditions of their probation.¹²⁵ The sentencing judge still retains jurisdiction over a defendant ordered to the sentencing options system.¹²⁶ However, before a sanction is imposed, there must be an administrative hearing to determine, by a preponderance of the evidence, if a probation violation has occurred.¹²⁷ The determination is reviewable by the senior hearing officer if the offender files a request for review within fifteen days of the decision.¹²⁸ In turn, this decision is reviewable by the sentencing court.¹²⁹ The sanctions include a confinement to a probation detention center or substance abuse treatment facility, probation boot camp, a DCS day reporting center, electronic monitoring, community service, or probation supervision.¹³⁰

If a probationer who has been ordered to this system is arrested on a warrant for an alleged probation violation, a preliminary hearing is required within fifteen days.¹³¹ This hearing is not required if the probationer was not under arrest on a warrant, the probationer signed a waiver of a preliminary hearing, or the administrative hearing is scheduled to be heard within fifteen days of arrest.¹³² This system will only apply in judicial circuits where the DCS has allocated certified hearing officers.¹³³

123. See O.C.G.A. § 42-3-110 (Supp. 2015).

124. O.C.G.A. § 42-3-112(a) (Supp. 2015).

125. O.C.G.A. § 42-3-111(9) (Supp. 2015).

126. O.C.G.A. § 42-3-112(b) (Supp. 2015).

127. O.C.G.A. § 42-3-114(a), -115(c)(1) (Supp. 2015).

128. O.C.G.A. § 42-3-116(a) (Supp. 2015).

129. O.C.G.A. § 42-3-116(b) (Supp. 2015).

130. O.C.G.A. § 42-3-113(c) (Supp. 2015).

131. O.C.G.A. § 42-3-114(a) (Supp. 2015).

132. O.C.G.A. § 42-3-114(b) (Supp. 2015).

133. O.C.G.A. § 42-3-118 (Supp. 2015).

Part II

Part II repeals and reverses Article I of Chapter 8, relating to the Advisory Counsel for Probation.¹³⁴

Part III

Part III requires the chief judge of a municipal court that has contracted for probation services to initiate the termination of that contract.¹³⁵ The termination is subject to approval by the governing authority of the municipality or the consolidated government that entered into the contract.¹³⁶

If the defendant has violated an ordinance or committed a misdemeanor, Part III allows a court with original jurisdiction to stay or suspend the execution of a sentence or place the defendant on probation if the court determines that the defendant is not likely to engage in unlawful conduct and justice does not require the defendant to suffer the penalty imposed by law.¹³⁷ The period of probation cannot exceed the maximum amount of confinement that could be imposed on the defendant.¹³⁸

The court may also require the defendant to pay a fine or fee as a condition of probation.¹³⁹ When considering any amount imposed on a defendant, other than an amount imposed for restitution, the court may consider the financial situation of the defendant and the goal of the punishment imposed.¹⁴⁰ A court may also convert fines, statutory surcharges, and probation supervision fees into community service.¹⁴¹

If a court determines that the defendant has a “significant financial hardship or inability to pay,” the court must waive, modify, or

134. 2015 Ga. Laws 422, § 2-1, at 439.

135. O.C.G.A. § 42-8-101(a)(1) (Supp. 2015).

136. *Id.*

137. O.C.G.A. § 42-8-102(a)–(b) (Supp. 2015).

138. O.C.G.A. § 42-8-102(b) (Supp. 2015).

139. O.C.G.A. § 42-8-102(c) (2014 & Supp. 2015). This is an additional fee for the supervisory function of probation. *See id.*

140. *Id.* The court may also consider “any other factor the court deems appropriate.” O.C.G.A. § 42-8-102(c)(6) (Supp. 2015).

141. O.C.G.A. § 42-8-102(d) (2014 & Supp. 2015).

convert fines or other moneys assessed.¹⁴² There is a presumption of significant financial hardship when a person has a developmental disability, is totally and permanently disabled, is indigent, or is released from confinement within the last twelve months and was incarcerated for at least thirty days before his or her release.¹⁴³ Additionally, a hearing is required before a court may revoke a probationary sentence for failure to pay fines or fees.¹⁴⁴ If the probation is revoked, the court must make a written determination that the probationer has not made good faith efforts to pay, and the failure was willful.¹⁴⁵

In revocation hearings, the court must consider alternatives to confining the probationer.¹⁴⁶ If a person violates probation by failing to report to probation or failing to pay fines or fees, and an alternative is not warranted, the court must revoke the balance of probation or a period no more than 120 days in confinement, whichever is less.¹⁴⁷ If a person violates probation by failing to comply with any other provision of probation, and an alternative is not warranted, the court must revoke the balance of probation or a period of no more than two years in confinement, whichever is less.¹⁴⁸

Probation supervision fees cannot exceed three months of ordinary probation supervision fees if a defendant is only under probation supervision for his or her failure to pay court imposed fines or statutory surcharges.¹⁴⁹ If the defendant's sentence is later converted to one that requires community service, "the court may reinstate probation supervision fees . . . to monitor the probationer's compliance with community service obligations."¹⁵⁰

A court must determine the terms and conditions of probation.¹⁵¹ A probated sentence may be tolled if it is established by affidavit of the

142. O.C.G.A. § 42-8-102(e)(2) (Supp. 2015).

143. O.C.G.A. § 42-8-102(e)(3) (Supp. 2015).

144. O.C.G.A. § 42-8-102(f)(2) (Supp. 2015).

145. *Id.*

146. O.C.G.A. § 42-8-102(f)(4)(B) (Supp. 2015).

147. O.C.G.A. § 42-8-102(f)(4)(A) (Supp. 2015).

148. O.C.G.A. § 42-8-102(f)(4)(B) (Supp. 2015).

149. O.C.G.A. § 42-8-103(b) (2014 & Supp. 2015).

150. O.C.G.A. § 42-8-103(c) (Supp. 2015).

151. O.C.G.A. § 42-8-104(a) (2014 & Supp. 2015).

probation officer that the probationer has failed to report despite efforts to contact the probationer.¹⁵²

Any unpaid fines or other moneys owed as a condition of probation are due when the probationer is arrested.¹⁵³ If the entire probation is revoked, all of the conditions of probation, including owed money, are negated by the imprisonment.¹⁵⁴ If only part of the probation is revoked, the court determines the probationer's responsibility for unpaid fines or other moneys owed.¹⁵⁵

Part III provides that any private probation company that contracts with a municipality to provide services must report to the Board and the judge who entered into the contract on a quarterly basis.¹⁵⁶ The report must include the amount of fees collected, the nature of such fees, the number of community service hours performed by probationers, and a list of any other service for which the probationer was required to pay to attend.¹⁵⁷ This information must be annually reported to the governing authority that entered into the private probation contract.¹⁵⁸

A probationer must be provided with a written receipt and balance statement each time he or she makes a payment.¹⁵⁹ Upon request, a probationer must also be given a copy of his or her own probation file.¹⁶⁰ One of these requests will be processed for free, but the probationer will be required to pay a fee for each subsequent request.¹⁶¹

Part III also requires that certain rules and regulations of the Board be subject to disclosure.¹⁶² This includes rules and regulations regarding: (1) agreements for the provision of probation services,¹⁶³ (2) the conduct of business by private probation companies,¹⁶⁴ (3)

152. O.C.G.A. § 42-8-105(b)–(c) (2014 & Supp. 2015).

153. O.C.G.A. § 42-8-105(f) (Supp. 2015).

154. *Id.*

155. *Id.*

156. O.C.G.A. § 42-8-108(a) (2014 & Supp. 2015).

157. *Id.*

158. *Id.*

159. O.C.G.A. § 42-8-109.2(b)(1)(A) (Supp. 2015).

160. O.C.G.A. § 42-8-109.2(b)(1)(B) (Supp. 2015).

161. *Id.*

162. O.C.G.A. § 42-8-109.2(b)(3) (Supp. 2015).

163. O.C.G.A. § 42-8-109.2(b)(3)(A) (Supp. 2015).

164. O.C.G.A. § 42-8-109.2(b)(3)(B) (Supp. 2015).

local governments establishing probation systems,¹⁶⁵ and (4) guidelines of private probation companies.¹⁶⁶

The Act requires private probation companies to register with the Board before entering into any contract to provide services.¹⁶⁷ If a company was registered with the County and Municipal Probation Advisory Council on or before June 30, 2015, they are considered registered with the Board.¹⁶⁸

Part IV

Under Part IV of the Act, when a judge is considering revoking a probated sentence in order to require the defendant to enter a drug, mental health, or veterans court division, the defendant may voluntarily agree to extend his or her original sentence if the original sentence is insufficient to authorize the judge's revocation.¹⁶⁹

Analysis

Criticisms of the Creation of the Department of Community Supervision

The Act's critics argue that it promotes big government and creates a police state, while the source of funding for the new agency remains unclear.¹⁷⁰ Although the Act creates a new state department with overarching supervisory powers, whether the Act creates a "police state" is only discernable upon future application. Many of these concerns, however, stem from a general fear of the agency's name rather than the agency's actual role.¹⁷¹ Despite its name, the DCS is only responsible for the supervision of convicted persons on

165. O.C.G.A. § 42-8-109.2(b)(3)(C) (Supp. 2015).

166. O.C.G.A. § 42-8-109.2(b)(3)(D) (Supp. 2015).

167. O.C.G.A. § 42-8-109.3(a)(1) (Supp. 2015).

168. *Id.*

169. O.C.G.A. § 42-8-34(g) (2014 & Supp. 2015).

170. Senate Recording, *supra* note 9, at 3 min., 30 sec. (remarks by Rep. Alan Powell (R-32nd)).

171. Senate Recording, *supra* note 9, at 21 min., 7 sec (remarks by Rep. Alan Powell (R-32nd)). Additionally, Representative Powell stated that nothing is changing but rearranged code sections by taking portions from the existing code sections and pasting them into a new chapter about the Department of Community Supervision. *Id.* He infers that these entities will not have additional power. *See generally* Senate Recording, *supra* note 9.

parole, on probation, or who receive a split sentence of probation and incarceration, and juveniles in restrictive custody.¹⁷²

A more concrete concern is how the new agency will be funded.¹⁷³ First, with the creation of the new agency, will there need to be more funds allocated each year to run the agency and pay the employees?¹⁷⁴ Will more employees need to be hired?¹⁷⁵ Representative Alan Powell (R-32nd) addressed these concerns at the Senate Public Safety Committee meeting by stating that the number of employees will likely decrease due to cross-training while the money allocated to DCS will remain the same as previously allocated to the State Board of Pardons and Parole, Department of Corrections, and Department and Board of Juvenile Justice.¹⁷⁶ If needed, the Governor can remove excess funds by line item in the budget.¹⁷⁷ The transfer of three agencies to one larger agency reflects anticipated cost saving and efficiency.¹⁷⁸ Another fair assumption is that, in reality, reforms to the misdemeanor probation system will decrease the number of individuals on probation and therefore decrease the number of probation officers.¹⁷⁹

Additionally, concerns exist about the limits, or lack thereof, on the Board's power.¹⁸⁰ Representative Powell suggests that while the Board promulgates the rules of the DCS, it can only do so within the boundaries of the law.¹⁸¹ For instance, the Board must “adopt rules and regulations governing the management and treatment of probationers and parolees to ensure that evidence[-]based practices” guide community supervision decisions.¹⁸² Thus, the Board's rulemaking power over probationers and parolees is limited to those policies that reduce recidivism and criminal reoffending.¹⁸³ In

172. See O.C.G.A. § 42-3-3 (2014 & Supp. 2015); Senate Recording, *supra* note 9, at 5 min., 10 sec. (remarks by Rep. Alan Powell (R-32nd)).

173. See Senate Recording, *supra* note 9, at 19 min., 10 sec. (remarks by Sen. John Albers (R-56th) (asking if the legislation lacked a fiscal note because there would be no additional costs for Georgia)).

174. See *id.*

175. *Id.* at 17 min., 50 sec. (remarks by Sen. John Albers (R-56th)).

176. *Id.* at 2 min., 48 sec. (remarks by Rep. Alan Powell (R-32nd)).

177. See *id.* at 18 min., 5 sec. (remarks by Rep. Alan Powell (R-32nd)).

178. See *id.* at 3 min., 4 sec. (remarks by Rep. Alan Powell (R-32nd)).

179. Senate Recording, *supra* note 9, at 18 min., 55 sec. (remarks by Rep. Alan Powell (R-32nd)).

180. See, e.g., *id.* at 4 min., 10 sec.

181. See Senate Recording, *supra* note 9, at 21 min., 23 sec. (remarks by Rep. Alan Powell (R-32nd)).

182. O.C.G.A. § 42-3-2(g)(2) (2014 & Supp. 2015).

183. Senate Recording, *supra* note 9, at 5 min., 50 sec (remarks by Rep. Alan Powell (R-32nd)). In

addition to this power, however, the Board is responsible for promulgating all rules “necessary and appropriate to the administration of DCS and the Governor’s Office of Transition, Support, and Reentry, to the accomplishment” of the Act’s purposes.¹⁸⁴ Despite the breadth of this language, the scope of the Board’s power should not exceed the power already allocated to the boards of individual agencies as the Act simply *transfers* existing powers to the DCS and its Board.¹⁸⁵

Ultimately, this Act is about efficiency, cost savings, maintaining the criminal justice reforms of the past few years, and revitalizing Georgia’s misdemeanor probation system. The consolidation of the functions of administrative agencies is seen in many governmental entities.¹⁸⁶ After three years of legislative reform, the Governor sought to ensure that the regulation and maintenance of that reform falls under a single agency to promote efficiency, uniformity, and cost savings to ensure longevity.¹⁸⁷ All of these reforms were created to decrease the prison population, promote re-entry into society, and provide programs for community-based supervision.¹⁸⁸

Privatized Probation

The issue of privatized probation has plagued many states since the early 1990s.¹⁸⁹ Georgia has been criticized as having one of the worst

the Act, evidence based practices are defined as “supervision policies, procedures, programs, and practices that scientific research demonstrates reduce recidivism among individuals who are under some form of correctional supervision.” O.C.G.A. § 42-3-2(g)(1)(A) (2014 & Supp. 2015).

184. O.C.G.A. § 42-3-2(j) (2014 & Supp. 2015).

185. Senate Recording, *supra* note 9, at 4 min., 10 sec. (remarks by Rep. Alan Powell (R-32nd)).

186. See, e.g., Tex. Health and Human Servs., Benefits of Consolidation Four-Year Report 1–2 (2009), available at <http://www.dars.state.tx.us/announcements/consolidationrep.pdf>. In 2003, Texas consolidated over 200 programs across twelve state agencies into a single health and human services system comprised of five agencies. *Id.* In 1993, North Carolina merged its probation and parole offices into the newly created Division of Community Corrections for the sake of efficiency. VERA Inst. of Justice, Considering Consolidation: The Nebraska Probation and Parole Services Study 6–7 (2007), available at http://www.ncc.nebraska.gov/pdf/others/NE_Probation_and_Parole_Services_Study_Report.pdf.

187. See REPORT, *supra* note 1, at 3–8.

188. *Id.* at 4–6.

189. See Ethan Bronner, *Poor Land in Jail as Companies Add Huge Fees for Probation*, N.Y. TIMES (July 2, 2012), <http://www.nytimes.com/2012/07/03/us/probation-fees-multiply-as-companies-profit.html>.

misdemeanor probation systems in the United States.¹⁹⁰ Therefore, reform is not just necessary, but should be expected by Georgia citizens. The misdemeanor probation system prior to the passage of HB 310 was criticized as creating de facto debtors' prisons because individuals unable to pay probation fees ultimately were incarcerated.¹⁹¹ Additionally, if an individual could not pay civil fines, such as traffic fines, he or she would be put on probation and handed over to a private corporation to manage payment of the fine.¹⁹² In fact, Georgia used private probation more than any other state,¹⁹³ and its misdemeanor probation system was unique in how quickly it put offenders on probation.¹⁹⁴ "More than half the states classify minor traffic offenses as civil matters, not crimes, so probation [is not] even a possibility."¹⁹⁵

When an individual was on probation, he or she only would not only have to pay the original court probation fines, but also monthly fees and penalties to the probation companies if put on a payment plan.¹⁹⁶ This resulted in individuals on probation racking up an unprecedented amount of debt with payments not even being used to reduce the original principal fine.¹⁹⁷

In *Bearden v. Georgia*, the United States Supreme Court held that a sentencing court bears the burden of determining whether a probationer has the ability to make court-ordered payments, including the payment of fees, and considering alternative measures of punishment other than imprisonment.¹⁹⁸ While the Supreme Court

190. REPORT, *supra* note 1, at 21.

191. See Tierney Sneed, *Private Misdemeanor Probation Industry Faces New Scrutiny*, U.S. NEWS & WORLD REP., Feb. 6, 2015, available at 2015 WLNR 3987681; see generally Sarah Dolisca Bellacicco, Note, *Safe Haven No Longer: The Role of Georgia Courts and Private Probation Companies in Sustaining a De Facto Debtors' Prison System*, 48 GA. L. REV. 227 (2013).

192. See Teegardin, *supra* note 21.

193. James Salzer, *Georgia Supreme Court: Private Probation Ruling Mixed System Constitutional, Ga. Supreme Court Says; Extended Sentences Illegal*, ATLANTA J.-CONST., Nov. 25, 2014, at B1, available at 2014 WLNR 33133211 ("More than 500,000 Georgians were on probation last year, a rate quadruple the national average."). Additionally, "[f]igures from 2013 show that about 175,000 Georgians are on probation for traffic offenses and other misdemeanors at any one time, paying approximately \$125 million annually in fines and surcharges." REPORT, *supra* note 1, at 21.

194. Teegardin, *supra* note 21.

195. *Id.*

196. *Id.* (explaining that probation companies get their revenue from the supervision fees local courts allow them to collect). Additionally, counties and courts may impose additional administrative fees. *Id.*

197. See *id.*

198. *Bearden v. Georgia*, 461 U.S. 660, 672 (1983).

of Georgia held the old system facially constitutional, it did not determine the constitutionality of its application.¹⁹⁹ The question remained whether Georgia's probation system, if raised in an as-applied challenge, conflicted with *Bearden*.

Sentinel Offender Services v. Glover was a consolidated case of thirteen civil actions brought by probationers against Sentinel Offender Services, LLC, a private for-profit probation servicing company, among other defendants.²⁰⁰ The plaintiffs challenged the constitutionality of Code subsection 42-8-100(g)(1), which permitted courts to contract with private probation companies.²⁰¹ Additionally, the plaintiffs argued that Code section "42-8-30.1 precludes tolling of misdemeanor probation sentences and restricts [certain] conditions" to probation, such as electronic monitoring.²⁰² The Court held that Code section 42-8-100(g)(1) did not, on its face, violate the plaintiffs' due process rights because it simply gives courts the authority to contract with private probation companies, and nothing on its face gives the private probation company the ability to deprive an individual of his or her property or liberty without due process of law.²⁰³ Moreover, the Court held that the Due Process Clause does not preclude a state from entering into private contracts.²⁰⁴ Thus, it is important to note that the Act does not outlaw or preclude courts from entering into contracts with private companies; rather, the Act adds requirements alleviate the consequences felt by indigent defendants within the private probation system. Also, the Georgia Supreme Court found that tolling of a probationer's sentence is not authorized by statute and therefore precluded under the State-Wide Probation Act.²⁰⁵

HB 310 sought to remedy situations in which indigent defendants acquired unprecedented amounts of debt. Several provisions of the Act attempt to address problems with transparency²⁰⁶ and rising

199. See *Sentinel Offender Svcs., LLC v. Glover*, 296 Ga. 315, 326, 766 S.E.2d 456, 467 (2014).

200. *Sentinel Offender*, 296 Ga. at 315–16, 766 S.E.2d at 460–61.

201. *Sentinel Offender*, 296 Ga. at 316, 766 S.E.2d at 460.

202. *Id.*

203. *Sentinel Offender*, 296 Ga. at 326, 766 S.E.2d at 467.

204. *Id.*

205. *Sentinel Offender*, 296 Ga. at 329–30, 766 S.E.2d at 469–70.

206. See *infra* notes 215–17 and accompanying text.

amounts of debt incurred by indigent defendants.²⁰⁷ First, the Act provides for a sentencing options system.²⁰⁸ Sentencing options system means a “continuum of sanctions for probationers” for violating their probation.²⁰⁹ Essentially, this provides probationers who violate their probation, such as by not paying fines, with alternative options to imprisonment; these alternatives include community service, electronic monitoring, probation supervision, and others.²¹⁰ There are few guidelines for how the judge imposes sanctions on individuals, other than the requirement that a violation of probation must be proved by a preponderance of the evidence.²¹¹ However, this provision will prove beneficial if it decreases the number of incarcerated individuals while ensuring that individuals have an incentive to comply with probation.

Additionally, the Act provides amnesty for people who display a significant financial hardship or inability to pay, in that the court must waive, modify, or convert fines or other moneys assessed.²¹² Significant financial hardship is defined as “a reasonable probability that an individual will be unable to satisfy his or her financial obligations for two or more consecutive months.”²¹³ While those who are indigent or suffering significant financial hardship are relieved from payment of substantial fees, situations may arise where people slip through the cracks. In those cases, the Act further allows judges to revoke, modify, or change a probated sentence at their discretion or waive fees if a probationer demonstrates a bona fide effort to pay.²¹⁴ Thus, the Act gives individuals who are unable to pay probation fines potential alternatives to accumulating debt.

The Act further addresses transparency with several reporting requirements for private probation companies.²¹⁵ Private probation companies are required to meet quarterly reporting requirements including summarizing the amount of fees collected and the nature of

207. *See infra* notes 212–14 and accompanying text; *see also* REPORT, *supra* note 1, at 21.

208. O.C.G.A. § 42-3-112(a) (Supp. 2015).

209. O.C.G.A. § 42-3-111(9) (Supp. 2015).

210. O.C.G.A. § 42-3-113(c) (Supp. 2015).

211. *See* O.C.G.A. § 42-3-115(e)(1) (Supp. 2015).

212. O.C.G.A. § 42-8-102(e)(2) (Supp. 2015).

213. O.C.G.A. § 42-8-102(e)(1)(C) (Supp. 2015).

214. O.C.G.A. § 42-8-102(f)(1) (Supp. 2015).

215. *See* O.C.G.A. § 42-8-108(a) (2014 & Supp. 2015).

such fees such as: “rehabilitation programing fees, electronic monitoring fees, drug or alcohol detection device fees,” among others.²¹⁶ Whereas the private contracts with these companies were largely under-regulated in the past, under the Act, the government can track the involvement of these companies and determine if they are overcharging fees.²¹⁷

The Act addresses, in detail, many of the failures of the current misdemeanor probation system.²¹⁸ With new regulations in place, suits challenging the constitutionality of the system will not stand given both the statutory language and the alternative sanction options to imprisonment. Under the Act, imprisonment for probation violations occurs when the probationer is unreachable, and tolling is now statutorily provided for in such circumstances.²¹⁹ Caps on pay-only probation seem to limit the strain put on probationers for failure to pay traffic fines, for instance.²²⁰ While Georgia could have followed other states that consider traffic violations civil violations,²²¹ Georgia maintained its original system with significant policy changes and an eye towards transparency with probation companies.

First Offender Statute Changes

The Act also addresses concerns with the First Offender Act, particularly that many offenders otherwise qualified for such protections do not receive the benefits afforded to them under the First Offender Act.²²² The Council on Criminal Justice Reform announced a few recommendations for remedying these issues.²²³ For instance, it suggested that courts should be required to assess a

216. *Id.*

217. O.C.G.A. § 42-8-108(b) (Supp. 2015); Senate Recording, *supra* note 9, at 10 min., 5 sec. (remarks by Rep. Alan Powell (R-32nd)).

218. *See* REPORT, *supra* note 1, at 21–24; *see also supra* notes 208–17 and accompanying text.

219. O.C.G.A. § 42-8-105 (2014 & Supp. 2015).

220. Jordan Blair Woods, *Decriminalization, Police Authority, and Routine Traffic Stops*, 62 UCLA L. REV. 672, 700–08 (2015).

221. *Id.* at 679–80 (“Since 1970, twenty-two state legislatures have decriminalized minor traffic offenses by removing them from the criminal framework and eliminating the criminal sanctions that once attached to them.”).

222. *See* REPORT, *supra* note 1, at 19.

223. *Id.* at 19–20.

defendant's eligibility for the First Offender Act, to ensure that the defendant receives notice of his or her eligibility, and to explain the consequences of entering a plea pursuant to this Act.²²⁴

The Act codified this recommendation and also requires attorneys to inform their clients of the client's eligibility for treatment under the First Offender Act.²²⁵ If a defendant is *pro se*, Courts are required to alert defendants of their rights under the First Offender Act.²²⁶ The Act goes further by allowing a qualified defendant not informed of his or her eligibility for first offender treatment to petition a superior court for discharge and exoneration²²⁷ and a hearing on the evidence surrounding the defendant's qualifications.²²⁸ These provisions exceed the protections provided by the recommendations while ensuring that there is a check on judges' and attorneys' compliance with the Act.²²⁹

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224. *Id.* at 20.

225. O.C.G.A. § 42-8-61 (2014 & Supp. 2015).

226. *Id.*

227. O.C.G.A. § 42-8-66(a) (Supp. 2015).

228. O.C.G.A. § 42-8-66(b) (Supp. 2015).

229. *See* REPORT, *supra* note 1, at 19–20.

