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CRIMES AND OFFENSES Sexual Offenses: Change the Provisions Relating to the Offense of Rape; Change Penalty Provisions to Require Life In Prison Without Parole

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CRIMES AND OFFENSES

Sexual Offenses: Change the Provisions Relating to the Offense of Rape; Change Penalty Provisions to Require Life In Prison Without Parole

CODE SECTION:	O.C.G.A. § 16-6-1 (amended)
BILL NUMBER:	HB 249
ACT NUMBER:	356
GEORGIA LAWS:	1999 Ga. Laws 666
SUMMARY:	The Act changes the definition of the offense of rape. Originally, the Georgia statute defined rape as forcibly having carnal knowledge of a woman against her will. While retaining this traditional definition of rape for the adult female, the Act amends the definition with regard to a female under ten years of age to include merely having carnal knowledge of such a female. The Act also amends the penalty provision to allow a sentence of life imprisonment without parole; previously the Code section allowed only for death, life in prison, or imprisonment for ten to twenty years.
EFFECTIVE DATE:	July 1, 1999

History

Prosecutors in Georgia have long had a difficult time securing convictions for rape when the victim of a sexual assault is a minor.[1] This difficulty primarily results from the fact that under the Georgia rape statute, the State must separately prove that the defendant had sexual intercourse with the victim against her will and with the use of force.[2] The element of "against her will" has been interpreted to mean merely without consent.[3] Because a female minor is legally incapable of giving her consent, this element is presumed to exist as a matter of

1. *See* Telephone Interview with Rep. Tom Campbell, House District No. 42 (Apr. 19, 1999) [hereinafter Campbell Interview].
2. *See* Drake v. State, 239 Ga. 232, 233-34, 236 S.E.2d 748, 749-50 (1977).
3. *See* State v. Collins, 270 Ga. 42, 508 S.E.2d 390, 391 (1998).

law.[4] However, in *Drake v. State*[5] the Georgia Supreme Court held that the element of force may not be presumed as a matter of law.[6] In *State v. Collins*,[7] the Georgia Supreme Court affirmed the holding from *Drake*, even in cases in which the victim is a minor.[8]

The problem arose from the fact that it was extremely difficult to prove that a defendant used force to engage in sexual intercourse with a minor.[9] This was because the "victims [were] usually intimidated by the events and the perpetrator [was] often a close friend or family member,"[10] and because the victims were often infants, toddlers, or "so psychologically damaged by prior abuse that [they] passively submitted to the sex act."[11] As a result, the State often could only convict a defendant for statutory rape.[12] While the crime of rape carries a penalty of death, life imprisonment, or ten to twenty years in prison, statutory rape has a sentence of one to twenty years; if the defendant is under twenty-one years of age, statutory rape could be classified as a misdemeanor.[13] In the *Collins* decision, in addition to affirming its holding that the element of force must be proven, the court also urged the General Assembly to amend the Georgia rape statute.[14] The Court suggested that by following the Model Penal Code's definition of rape, the General Assembly could alleviate this problem.[15] Under one definition of rape, the Model Penal Code "provides that a man is guilty of rape if the 'female is less than [ten] years old.' "[16] The General Assembly followed the Court's suggestion and passed the Act.[17]

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4. *See id.* at 42, 508 S.E.2d at 391.
5. 239 Ga. 232, 236 S.E.2d 748 (1977).
6. *See id.* at 234, 236 S.E.2d at 750.
7. 270 Ga. 42, 508 S.E.2d 390.
8. *Id.* at 43, 508 S.E.2d at 391.
9. *See* Campbell Interview, *supra* note 1.
10. *Id.*
11. *Collins*, 270 Ga. at 50, 508 S.E.2d at 396 (Hunstein, J. dissenting).
12. *See* Campbell Interview, *supra* note 1.
13. *Compare* 1997 Ga. Laws 6, § 2, at 7 (formerly found at O.C.G.A. § 16-6-1 (Supp. 1998)), *with* O.C.G.A. § 16-6-3 (1999). Although the rape statute, O.C.G.A. § 16-1-1 (1999), currently includes the death penalty as a possible penalty for rape, the United States Supreme Court has held that imposition of the death penalty for the rape of an adult woman is grossly disproportionate and excessive punishment, and therefore is unconstitutional under the Eighth Amendment to the United States Constitution. *See* Coker v. Georgia, 433 U.S. 584 (1973).
14. *See Collins*, 270 Ga. at 46, 508 S.E.2d at 393.
15. *See id.*
16. *Id.* (quoting Model Penal Code § 213.1(1)(d) (1980)).
17. *See* Campbell Interview, *supra* note 1.

The Senate amendment that added the penalty of life in prison without parole for rape was largely motivated by the story of a five-year-old girl who was raped and left for dead in the woods in Cobb County on March 19, 1999.[18] Following the incident, the local news interviewed Representative Warren Massey, who, for the past three years, had been advocating stronger laws dealing with pedophiles.[19] Representative Massey spoke of his own bill, which was then tied up in committee, that would change the penalty provision for the rape of a person under the age of twelve.[20] The next day, Representative Massey received faxes from all across Georgia, some in the form of petitions with forty to fifty signatures each, showing support for his efforts to strengthen the law.[21]

The Act

The Act amends Code section 16-6-1, which sets forth the definition of rape and its applicable penalties.[22] Prior to the Act, the law stated that "a person commits the offense of rape when he has carnal knowledge of a female forcibly and against her will."[23] It defined carnal knowledge as "any penetration of the female sex organ by the male sex organ."[24] The Act amends the definition of rape and provides that rape occurs when either a person has carnal knowledge "of a female forcibly and against her will" or when a person has carnal knowledge of "a female who is less than ten years of age."[25] Prior to the Act, the law allowed for punishment by death, life in prison, or by imprisonment for not less than ten nor more than twenty years.[26] The

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18. *See* Telephone Interview with Rep. Warren Massey, House District No. 86 (May 14, 1999) [hereinafter Massey Interview]; Record of Proceedings on the Senate Floor (Mar. 23, 1999) (remarks by Sen. René Kemp) (available in Georgia State University College of Law Library); Doug Nurse, *Political Notebook: Rape Law a Victory for Massey*, ATLANTA J. & CONST., May 6, 1999, at J2 [hereinafter Nurse, *Political Notebook*].

19. *See* Nurse, *Political Notebook*, *supra* note 18.

20. *See id.* Representative Massey proposed HB 116, which would have provided the death penalty for the rape of a person under the age of twelve. *See* HB 116, as introduced, 1999 Ga. Gen. Assem. HB 116 was read on the House floor twice in early January 1999, but the House never voted on it. *See* State of Georgia Final Composite Status Sheet, May 3, 1999.

21. *See* Massey Interview, *supra* note 18.

22. *Compare* 1996 Ga. Laws 1115, § 1, at 1116 (formerly found at O.C.G.A. § 16-6-1 (1998)), *with* O.C.G.A. § 16-6-1 (1999).

23. 1996 Ga. Laws 1115, § 1, at 1116 (formerly found at O.C.G.A. 16-6-1 (Supp. 1998)).

24. *Id.*

25. O.C.G.A. § 16-6-1 (1999).

26. *See* 1997 Ga. Laws 6, § 2, at 7 (formerly found at O.C.G.A. § 16-6-1 (1996)).

Act adds the possibility that a court can give a person convicted of rape life in prison without possibility of parole.[27]

Introduction

When Representative Tom Campbell of the 42nd District introduced the bill in the House, it would have simply changed the definition of rape within the rape statute.[28] When asked by Representative Tom Bordeaux whether any women's groups had requested the bill, Representative Campbell replied that the only request that he had received for the bill had been from the Supreme Court of Georgia in its *Collins* decision, and that he had heard from no one about the bill after he had introduced it.[29] However, Representative Campbell did note that the state's district attorneys supported the bill.[30]

Although there was no real opposition to changing the definition of rape in the statute, some representatives questioned whether the bill provided enough protection for minor females and favored raising the age from "less than ten years of age" to "twelve years of age."[31] Representative Campbell chose the age of less than ten years because the court suggested that the General Assembly follow the Model Penal Code's definition, which protected girls who were less than ten years of age.[32] Then, during the House Special Judiciary Committee meeting, certain members voiced concerns about applying the presumption of force in cases in which the female victim was over the age of ten.[33] These concerns led Representative Campbell to believe that the amendment would be more likely to pass if the age were left at less than ten.[34]

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27. *See* O.C.G.A. § 16-6-1 (1999).

28. *See* HB 249, as introduced, 1999 Ga. Gen. Assem.

29. *See Lawmakers '99* (GPTV broadcast, Feb. 15, 1999) (remarks by Rep. Tom Campbell) (available in Georgia State University College of Law Library).

30. *See* Campbell Interview, *supra* note 1.

31. *Lawmakers '99* (GPTV broadcast, Feb. 15, 1999) (remarks by Rep. Pam Bohannon) (available in Georgia State University College of Law Library). Representative Bohannon asked Representative Campbell whether he would object to a higher age, such as twelve or thirteen. *See id.*

32. *See Lawmakers '99* (GPTV broadcast, Feb. 15, 1999) (remarks by Rep. Campbell) (available in Georgia State University College of Law Library).

33. *See id.*

34. *See id.*

The Senate Floor Amendment

As the close of the legislative session neared, Representative Massey knew that his own bill to change the penalties for rape would not make it out of committee.[35] Representative Campbell approached Massey to ask him if he would like to amend HB 249 to include the change in the penalty provision.[36] At that point, HB 249 had passed through the House and through the Senate Judiciary Committee, but was sitting in the Senate Rules Committee, waiting to be brought onto the floor of the Senate for a vote.[37] With few days left in the session, Massey knew that he would have to act quickly and that he would need the help of the Lieutenant Governor, Mark Taylor.[38] He told the Lieutenant Governor that he planned to amend the bill to add life in prison without parole and asked him to bring the bill out of committee.[39] Taylor expressed his concerns that if the bill were amended to include the new penalty, the bill would open up a debate on abolishing parole.[40] Massey assured him that he would get the Republicans to agree not to use the bill as opportunity to speak about parole, and Taylor agreed to bring HB 249 to the Senate floor, provided that Massey ask Senator René Kemp, a Democrat, to offer the amendment.[41] On March 23, 1999, Senator Kemp brought the amended version of HB 249 to the Senate floor and urged the members of the Senate to support it.[42] He explained that the amendment to the penalty provision was in response to citizens' letters regarding the rape of the five-year-old girl.[43] He also noted that, although in *Coker v. Georgia*[44] the United States Supreme Court ruled that the death penalty was not applicable in a case where the defendant had been convicted of raping an adult woman, but not of murdering her, the drafters of the Act had decided to leave the death

35. *See* Massey Interview, *supra* note 18. Representative Massey proposed a similar bill in 1997 and 1998. In both sessions, the bill "passed the House, only to die in the Senate." Doug Nurse, *1999 Georgia Legislature Death for Child Rapists, Drug Dealers Proposed*, ATLANTA J. & CONST., Jan. 11, 1999, at J1.

36. *See* Massey Interview, *supra* note 18.

37. *See id.*

38. *See id.*

39. *See id.*

40. *See id.*

41. *See id.*

42. *See* Record of Proceedings on the Senate Floor (Mar. 23, 1999) (remarks by Sen. René Kemp) (available in Georgia State University College of Law Library).

43. *See id.*

44. 433 U.S. 584 (1973).

penalty in the statute just in case the Supreme Court reversed its position.[45]

However, Representative Massey noted that he consciously chose to leave the death penalty provision in the statute because he believed that the bill's changes to the definition of rape might make a difference in the Court's ruling in *Coker*.[46] He explained that the bill basically creates two classes of victims: adult females and females under the age of ten.[47] In the *Coker* decision, the court specifically noted that the rape of an adult woman was not enough of an aggravated circumstance; therefore, applying the death penalty to the crime was unconstitutional.[48] Representative Massey believes that the rape of a female under ten years of age may present the aggravated circumstances necessary to sustain the death penalty, and now that there are two classes of victims, the death penalty may be applicable to those cases that involve a female under the age of ten.[49]

On March 23, 1999, no one came to the floor of the Senate to speak against the amendment,[50] and the Senate approved the amendment by a vote of thirty-nine to zero.[51] The amended version of the bill passed the Senate by a vote of forty-eight to zero, with seven senators abstaining and one senator excused.[52] The next day, the House of Representatives agreed to the Senate floor amendment, and the Governor signed the bill on April 28, 1999.[53]

Representative Massey explained that many senators voted for the bill although they did not actually realize the implications that the bill could have on the ability of prosecuting attorneys to seek the death penalty in child-rape cases.[54] He noted that those who abstained from

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45. *See* Record of Proceedings on the Senate Floor (Mar. 23, 1999) (remarks by Sen. René Kemp) (available in Georgia State University College of Law Library).

46. *See* Massey Interview, *supra* note 18.

47. *See id.*

48. *See* Coker v. United States, 433 U.S. 584 (1973).

49. *See* Massey Interview, *supra* note 18. Representative Massey's optimism was somewhat fueled by the recent decision in *State v. Wilson*, 685 So. 2d 1063 (La. 1996), in which the Louisiana Supreme Court upheld the Louisiana legislature's decision to allow for the death penalty as a punishment for the rape of a child. Furthermore, in 1997, the United States Supreme Court denied certiorari to the case. *See* Bethley v. Louisiana, 520 U.S. 1259 (1997).

50. *See* Record of Proceedings on the Senate Floor (Mar. 23, 1999) (available in Georgia State University College of Law Library).

51. *See* Georgia Senate Voting Record, HB 249 (Mar. 23, 1999).

52. *See id.*

53. *See* State of Georgia Final Composite Status Sheet, May 3, 1999.

54. *See* Massey Interview, *supra* note 18. However, Rep. Massey did note one

voting did not vote against the bill because they knew that the Lieutenant Governor supported the bill.[55] Representative Massey gives most of the credit for the bill's passage to Lieutenant Governor Taylor, Senator Kemp, and Representative Campbell, noting that the bill would never have made it out of committee without their help.[56]

A Possible Challenge to the Act

Representative Massey explained that once the American Civil Liberties Union (ACLU) realized the ramifications of the Act, it vowed to challenge it.[57] The ACLU of Georgia has opposed Representative Massey's previous attempts to add the death penalty to the sentences available for raping a child on the grounds that courts generally apply capital punishment " 'arbitrarily and primarily against blacks and the poor.' "[58] Representative Massey is not certain of the grounds on which the ACLU would challenge the Act, but believes that they may rest upon a law passed by the General Assembly in 1998, which requires a two-thirds majority vote in both the House of Representatives and the Senate for any law that amends the penalty provision of a crime to include life in prison without parole.[59] However, the bill did pass both the House of Representatives and the Senate by more than a two-thirds majority.[60]

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exception; Rep. J.E. McKinney raised the possibility that the Act may allow for the imposition of the death sentence on rapists of children. *See id.*

55. *See id.*

56. *See id.*

57. *See id.*

58. Nurse, *supra* note 35 (quoting Debbie Seagroves, Executive Director of the ACLU of Georgia).

59. *See* Massey Interview, *supra* note 18.

60. *See* Georgia House of Representatives Voting Record, HB 249 (Mar. 24, 1999); Georgia Senate Voting Record, HB 249 (Mar. 23, 1999).