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CRIMINAL PROCEDURE Bonds and Recognizances: Provide for Increased Bail and for Filing of Separate Police Reports for Incidents of Family Violence

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CRIMINAL PROCEDURE

Bonds and Recognizances: Provide for Increased Bail and for Filing of Separate Police Reports for Incidents of Family Violence

CODE SECTIONS:	O.C.G.A. §§ 17-4-20.1 (new), 17-6-1 (amended)
BILL NUMBERS:	HB 448, 449
ACT NUMBERS:	514, 566
SUMMARY:	HB 448 provides for increased bail when an offense involves an act of family violence. If the offense involves serious injury and the arresting officer believes further violence is possible, it is bailable only before a judicial officer. HB 449 provides that a separate report shall be filed whenever a law enforcement officer responds to an incident involving family violence, and outlines the required contents of that report. The Act also provides that the officer shall not base the decision to arrest on the consent or request of the victim and provides guidelines for determining who was the primary physical aggressor. Police departments are required to report all family violence incidents to the Georgia Crime Information Center whether or not an arrest is made.
EFFECTIVE DATE:	July 1, 1991

History

Many jurisdictions in Georgia have a schedule of bails that lists various offenses and the applicable amount of bail for each offense.[1] These schedules are designed to ease the workload of magistrates by not requiring a magistrate to personally set all bail amounts.[2] This

1. Telephone Interview with Deborah C. Benefield, Assistant District Attorney, Clayton County District Attorney's Office (Apr. 3, 1991) [hereinafter D. Benefield Interview]. Ms. Benefield advocated the passage of these bills in the House Judiciary Committee and Subcommittee meetings.

2. *Id.* The Fulton County schedule contains aggravated assault because this crime occurs so often there. *Id.*

system usually works well, but an act of family violence, which is not the typical stranger-on-stranger crime, presents a larger risk of immediate retaliation and, therefore, warrants special treatment.[3] Since the initial charge in a family violence situation is usually a misdemeanor like simple battery, the accused can post a bail of $300 to $400 and be out of jail in a period of time as short as one hour.[4]

Throughout the country there is almost a complete absence of data about incidents of family violence.[5] Georgia is no exception, and without any statistical criteria it is virtually impossible to study and remedy the problem.[6] The proliferation of DUI bills in the 1991 session was due in large part to the efforts of groups like Mothers Against Drunk Drivers, which produced alarming statistics relating to alcohol-related traffic accidents.[7] This in turn resulted in a public response that pushed DUI legislation to the forefront of the session.[8] Family violence has yet to achieve this same statistical recognition.

HB 448

The purpose of HB 448 is to require a judicial officer to review the severity of each case involving serious injury before setting bail, thus protecting the victim from the possibility of immediate retaliation.[9] The judicial officer must look at the schedule, see if it is reasonable and, if necessary, set conditions for bail so the bond can be revoked.[10] The legislators intend to send a message to a defendant that family violence is a serious crime which will not be taken lightly.[11] The Act provides that bail schedules must require increased bail for offenses involving acts of family violence.[12] If such an act involves serious injury to the victim, and if the arresting officer thinks the danger of further violence, harassment, or intimidation warrants it, then the offense is bailable only before a judicial officer.[13] Partly in response to concerns expressed by magistrate judges that the bill as originally drafted would have for

3. *Id.*

4. *Id.*

5. Telephone Interview with M. Louise Bill, Ph.D., Assistant Professor of Sociology, Kennesaw State College (Apr. 1, 1991) [hereinafter Bill Interview]. Dr. Bill appeared before the House Judiciary Committee and Subcommittee to provide information concerning the bills.

6. *Id.*

7. D. Benefield Interview, *supra* note 1.

8. *Id.*

9. Telephone Interview with Rep. Jimmy W. Benefield, House District No. 72 (Apr. 2, 1991) [hereinafter J. Benefield Interview].

10. D. Benefield Interview, *supra* note 1.

11. *Id.*

12. O.C.G.A. § 17-6-1(f) (Supp. 1991).

13. *Id.*

the first time statutorily mandated how a judge physically and logistically would have to set bail, the House Judiciary Subcommittee recommended allowing police discretion.[14] Although the sponsors would have preferred that all such cases be bailable before a judicial officer regardless of the arresting officer's opinion, they were willing to compromise.[15] One criticism of the discretionary language was that a police officer who was not well trained might make a costly error in judgment.[16]

Upon setting bail, a judicial officer must evaluate each case and, if necessary, place conditions on the bond to avoid further acts of violence.[17] These conditions may include that the accused have no contact with the victim or the victim's family, or that the accused enroll in family violence counseling or substance abuse therapy.[18] "Serious injury" is defined through examples such as "substantially blackened eyes" or "permanent disfigurements;"[19] however, the definition is illustrative and not exhaustive.

HB 449

HB 449 is important because the reports it requires police to file will provide those people who are empowered to make and enforce laws with proof that family violence is a real problem.[20] Public outcry is the most effective means of pushing legislation, and prosecutors do not feel that the problem of domestic violence is fully realized.[21] Defense attorneys, on the other hand, have been quick to point out that if such a report is required to be filed it must be available upon request by the accused.[22]

Another important purpose of the Act is to provide judges with this statistical report.[23] Previously, a police officer might respond to a number of family violence related complaints from the same residence and never file a report since an arrest was never made.[24] A "Family Violence Report" relating to such incidents will provide judges with valuable information to use when deciding these cases.[25]

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14. Telephone Interview with the Honorable Ronald P. Jayson, Mag., DeKalb County (Apr. 5, 1991) [hereinafter Jayson Interview]. Judge Jayson was the Second Vice President of the Council of Magistrate Court Judges. *Id.*

15. J. Benefield Interview, *supra* note 9.

16. D. Benefield Interview, *supra* note 1.

17. O.C.G.A. § 17-6-1(f) (Supp. 1991).

18. *Id.*

19. *Id.*

20. D. Benefield Interview, *supra* note 1.

21. *Id.*

22. Telephone Interview with Jack Martin, Defense Attorney, Martin Brothers, P.C. (Apr. 3, 1991) [hereinafter Martin Interview].

23. J. Benefield Interview, *supra* note 9.

24. *Id.*

25. *Id.*

A secondary purpose for requiring the report would be prosecutorial.[26] In Georgia, any prior act by an accused that is similar to that for which she is being tried is admissible as a "prior similar transaction" whether an arrest was made or not.[27] Before this Act, the prosecutor had nothing to refresh a police officer's recollection of past family violence complaints.[28] Access to these Family Violence Reports will provide prosecutors with admissible evidence which indicates a history of abuse and makes it easier to punish the habitual offender.[29] Conversely, concern was expressed at both the House and Senate Judiciary Committee meetings that if such prosecutorial use was envisioned, defense counsel should be equally able to use the reports as evidence of past false claims and ambiguous circumstances to aid in a defense.[30]

A police officer who responds to an incident involving family violence must not base the decision to arrest on the specific consent or request of the victim.[31] Instead, the Act leaves the decision whether an arrest is warranted with the officer.[32] Police officers are prohibited from threatening to arrest all parties involved simply to discourage those parties from requesting police intervention in the first place.

Subsection (b) of the Act provides the officer with some criteria for deciding who the primary aggressor is in a situation "where complaints of family violence are received from two or more opposing parties."[33] The considerations include "prior family violence involving either party,"[34] injuries received by each person,[35] potential for future injury,[36] and whether or not self-defense was involved.[37]

Subsection (c) is the heart of the Act because it provides for a separate Family Violence Report[38] and outlines what the report should include.[39]

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26. *Id.*

27. D. Benefield Interview, *supra* note 1.

28. *Id.*

29. *Id.*

30. Martin Interview, *supra* note 22.

31. O.C.G.A. § 17-4-20.1(a) (Supp. 1991).

32. *Id.* Dr. Bill pointed out that this provision of discretion differs from HB 298, which was introduced this year but failed to pass. HB 298 would have *required* that an arrest be made rather than leaving the discretion with the officer. *See* HB 298, 1991 Ga. Gen. Assem. O.C.G.A. § 17-4-20.1 instead provides police officers more criteria on which to base the arrest decision. Dr. Bill noted that mandatory arrest laws do not always achieve their desired effect in practice, and officers usually prefer retaining discretion; HB 449 was an attempt to make the arrest more likely while keeping it discretionary. Bill Interview, *supra* note 5.

33. O.C.G.A. § 17-4-20.1(b) (Supp. 1991).

34. O.C.G.A. § 17-4-20.1(b)(1) (Supp. 1991).

35. O.C.G.A. § 17-4-20.1(b)(2) (Supp. 1991).

36. O.C.G.A. § 17-4-20.1(b)(3) (Supp. 1991).

37. O.C.G.A. § 17-4-20.1(b)(4) (Supp. 1991).

38. O.C.G.A. § 17-4-20.1(c) (Supp. 1991).

39. O.C.G.A. §§ 17-4-20.1(c)(1)—(14) (Supp. 1991).

The House Judiciary Subcommittee inserted the language designating that the Family Violence Report must actually be a separate report.[40] There was some concern that officers might simply copy their arrest report. This would frustrate the purpose of obtaining the specific data outlined in subsection (c).[41]

Concern was also expressed over including the names of the parties in the report.[42] This led to the adoption of subsection (d) which exempts the reports from Code section 50-18-4, Georgia's Open Records Law, where no arrest is made.[43] The addition of subsection (d) quelled concerns about including the names of the parties, something that is necessary from a prosecutorial standpoint.[44] Names would be necessary for prosecutors seeking to introduce prior acts of family violence in future litigation under Georgia's similar transaction rule. There was also some mention that if the information was public it could reach further than intended and cause embarrassment in unrelated situations.[45] The primary example of this is that of a child being embarrassed at school when it becomes public knowledge that a parent has been involved in some form of family violence.[46]

Subsection (d) was again altered by the Senate Judiciary Committee to include access to the reports by a defendant.[47] The major concern from a defense standpoint was that, under Georgia's limited discovery rules, defendants would have no absolute right to the reports.[48] The only alternatives could be provided by permitting a subpoena or by the Brady Rule,[49] under which the State is required to provide the defendant with any evidence arguably favorable to the defense.[50] The problem with the Brady Rule is twofold. First, prosecutors take a narrower view of what is considered favorable to the defendant than the defense does.[51] Also, there may be information that is not necessarily favorable but still arguably good for the defense to have.[52] Second, in Georgia the information has to be in the prosecutor's file for it to be available under

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40. J. Benefield Interview, *supra* note 9. Rep. Denmark Groover chaired the House Judiciary Subcommittee.

41. *Id.*

42. *Id.*

43. O.C.G.A. § 17-4-20.1(d) (Supp. 1991).

44. D. Benefield Interview, *supra* note 1.

45. J. Benefield Interview, *supra* note 9.

46. *Id.*

47. *Id.*

48. Martin Interview, *supra* note 22. Mr. Martin pointed out that access under the Open Records Law applies only to the initial arrest report. *Id. See* O.C.G.A. §§ 50-18-70—75 (Supp. 1991).

49. *See* Brady v. Maryland, 373 U.S. 83 (1963).

50. *Id.*

51. Martin Interview, *supra* note 22.

52. *Id.*

the Brady Rule.[53] The weakness of a subpoena is that there is no access to the report until the actual time of trial; by then it may be too late to be helpful.[54] The basic concern from a defense standpoint is that these reports can be as helpful in exposing a history of frivolous complaints against a defendant as they can be in establishing that the defendant is a habitual offender.[55] Proponents of the bill had no objection to this change since they viewed the reports as already being accessible to defendants.[56]

Finally, subsection (e) provides that all police and sheriff departments must provide the Georgia Crime Information Center with information regarding all family violence incidents whether they involve arrests or nonarrests.[57]

Although the entire package of family violence bills did not pass the General Assembly this year, the sponsors were pleased with the outcomes of HB 448 and HB 449.[58] Statistical information produced as a result of this session's efforts will stimulate the kind of public support necessary to curb family violence through the enactment of tougher laws.[59] In the meantime, stiffening bail requirements in family violence cases may provide added protection for victims.[60]

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53. *Id.*

54. *Id.* Mr. Martin gave the example of wanting the names of the officers who prepared the report for possible subpoena purposes; by the time of trial this might be impossible. *Id.*

55. *Id.*

56. J. Benefield Interview, *supra* note 9.

57. O.C.G.A. § 17-4-20.1(e) (Supp. 1991).

58. J. Benefield Interview, *supra* note 9.

59. D. Benefield Interview, *supra* note 1.

60. *Id.*