THE STATUS OF INDIGENT DEFENSE IN GEORGIA

Report of the Chief Justice's Commission on Indigent Defense
Part II: Impact of *Alabama v. Shelton* in Georgia

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1. BACKGROUND

On May 20, 2002 the U. S. Supreme Court issued its decision in ***Alabama v. Shelton***, 535 U.S. 654, 122 S.Ct. 1764, holding that the Sixth Amendment to the U.S. Constitution forbids imposition of a suspended sentence of imprisonment where an indigent defendant has neither received a court-appointed lawyer nor waived the right to counsel. (See Appendix 1.) Most states were unaffected by this ruling. However, the Georgia Supreme Court had previously held that the right to counsel only applied if the defendant was "actually imprisoned."[1] Because the majority of traffic and other misdemeanor cases in Georgia concluded with a suspended or probated sentence of imprisonment, rather than immediate incarceration, courts handling such cases rarely provided counsel to most indigent defendants.

In October 2002 at the request of the Commission, the Administrative Office of the Courts of Georgia contracted with The Spangenberg Group (TSG) to conduct a review of the effects of the ***Shelton*** decision on courts in Georgia. TSG had previously conducted a study of indigent defense in Georgia for the Commission's first report. Spangenberg made on site assessments of the indigent defense systems in 19 sample counties – the same counties selected for initial study. This sample was representative of Georgia's 10 judicial administrative districts; the combined population represents 45% of George's population. Between October and December 2002 TSG spent 42 days in on site assessments, meeting with approximately 200 people who work in 95 different courts. They conducted court observations in most of the study counties. The TSG Report was submitted to the Commission on June 9, 2003. (See Appendix 2.)

The Commission held two public hearings that focused on the effect of the ***Shelton*** decision. On July 26, 2002 testimony was received from Richard A. Malone, Executive Director of the Prosecuting Attorneys' Council of Georgia; Michael B. Shapiro, Executive Director of the Georgia Indigent Defense Council; Clark D. Cunningham, W. Lee Burge Professor of Law & Ethics, Georgia State University College of Law; and the Hon. J. Carlisle Overstreet, President of the Council of Superior Court Judges. After receiving the TSG Report, a second hearing was held on September 24, 2003; testimony was received from the Hon. Roger Warren, President of the National Center for State Courts; the Hon. Melodie H. Clayton, President of the Council of State Court Judges; the Hon. William M. Coolidge III, President-Elect of the Council of Municipal Court Judges; John B. Long, Esq., Member of the Tripartite Committee for the Augusta Judicial Circuit; and Professor Clark D. Cunningham. The Commission had also previously received testimony of relevance to this issue, in particular on August 8, 2001 from the Hon. James Thurman, then-President of the Council of Magistrate Court

[1] ***Johnston v State***, 236 GA. 370, 223 S.E.2d 808 (1976).

Judges. A working session of the Commission to discuss the TSG Report and the *Shelton* issue was held on August 11, 2004.

2. DENIAL OF THE RIGHT TO COUNSEL IN TRAFFIC AND OTHER MISDEMEANOR CASES

TSG reported a number of courts where it appeared that the right to counsel was either denied to all persons charged with traffic offenses[2] or was recognized only for defendants who were "looking at jail time" without including persons entitled to counsel under the ***Shelton*** decision.[3] The TSG Report also noted that some judges were unsure of how to handle cases of persons sentenced to probation prior to the ***Shelton*** decision who appeared before them on probation revocations. It is clear from the ***Shelton*** decision that such persons cannot be sentenced to any term of imprisonment on a probation revocation unless they were represented by counsel on the underlying case or unless the record shows a knowing and intelligent waiver of counsel. Any aspect of the sentence other than imprisonment, such as a monetary fine, court costs, and restitution remains in effect. See **Shelton**, 122 S.Ct. at 1768.

An even more pervasive problem observed by TSG was the use of purported "waivers" of the constitutional right to counsel, especially in guilty pleas, which comprise the vast bulk of traffic and misdemeanor cases. Some courts simply assumed that a defendant's failure to ask for appointed counsel was a "waiver,"[4] even though the right to counsel does not depend upon a request by the defendant. ***State v Simmons***, 260 Ga. 92, 390 S.E.2d 43, 44 (1990). Many other courts used pre-printed "waiver forms," usually executed as a part of a guilty plea package offered to the defendant by the prosecutor. TSG provided a detailed description of this process in one state court:

> The judge came out at the start of the arraignment session to deliver the general admonitions. After that, the judge left the bench and three assistant solicitors stood up, faced the audience and said 'we need to talk to you,' and began calling names for people to come line up. After the three prosecutors each had long lines of defendants before them, they took the defendants one at a time into private rooms inside the courtroom. This process took more than two hours, as the calendar was long. Eventually the judge returned to the bench and the clerks started to call

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[2] TSG Report at 25, 27, 28, 32, 33, 34. See also Aug 8, 2001 Commission Hearing at 112-13 (President of Council of Magistrate Court Judges told the Commission: "We have Municipal Courts throughout the State of Georgia that do not, will not appoint attorneys even though they know that this person standing in front of them is going to jail.") See also *id.* at 114 (while judge was teaching at a continuing education seminar, he was told by a fellow judge, "we don't appoint attorneys in our circuit or in my municipal court.")

[3] Id. at 21, 24.

[4] See TSG Report at 44 (Judge announced to defendants at beginning of court session that "if they were without an attorney and did not ask for one, the court would be '"assuming [they]'re waiving that right.")

> the cases. A prosecutor would come forward with a defendant, inform the judge of the charges, give a brief description of the alleged crime and incident and inform the judge that the defendant wished to waive counsel and plead guilty. In some cases the prosecutor came forward and handed the judge an already completed waiver of counsel form, which was reportedly taken by the solicitor. The judge did not provide individualized admonishments to defendants before accepting their guilty pleas."[5]

The procedures observed by TSG did not conform to the well-established standards for waiver of the constitutional right to counsel. As the U.S. Supreme Court explained in ***Faretta v California***, 422 U.S. 806,835, 95 S.Ct. 2525, 2542 (1975) (citations omitted):

> "When an accused manages his own defense, he relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel. For this reason, in order to represent himself, the accused must 'knowingly and intelligently' forgo those relinquished benefits. Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open."

In 1981, in order to make sure that this demanding standard is followed, the Georgia Supreme Court announced the following rule:

> "We ... hold that in future cases, the record should reflect a finding on the part of the trial court that the defendant has validly chosen to proceed pro se. The record should also show that this choice was made after the defendant was made aware of his right to counsel and the dangers of proceeding without counsel." ***Clarke v Zant***, 247 Ga. 194, 275 S.E.2d 49, 52 (1981).

The following year the Court of Appeals explained how this rule should be implemented in the context of a misdemeanor case:

> "It is the responsibility of the trial judge, when the accused is without counsel, to clearly determine whether there has been a proper waiver. A judge must investigate as long and as thoroughly as the circumstances of the case before him demand... To be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof,

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[5] *Id.* at 36. For similar procedures see *id.* at 17, 38, 41, 44, 47.

> and all other facts essential to a broad understanding of the matter. A judge can make certain that an accused's professed waiver of counsel is understandingly and wisely made only from a penetrating and comprehensive examination of all the circumstances ..." ***Turner v State***, 162 Ga.App. 806, 293 S.E.2d 67, 67-8 (1982).

In that case the trial court had used a mass announcement procedure similar to that observed by TSG in many courts 20 years later. The court of appeals **in *Turner*** reversed the conviction with this statement:

> "We are not insensitive to the heavy misdemeanor case load which exists in the trial courts and which no doubt encouraged the procedure giving rise to the error alleged. However, the procedure utilized falls far short of the standard quoted above. Indeed, it is difficult to imagine a mass arraignment procedure which could satisfy the trial court's burden. ... Here we find there was no examination by the court of the circumstances of this defendant's waiver of counsel. The court's burden, set forth above, is to investigate these circumstances personally with particular regard and attention to the nature of the crimes charged and the possible penalties." *Id.*

Not only did TSG report that very few judges warned of the consequences or dangers of self-representation,[6] but they also observed judges refusing to answer questions posed by defendants that were clearly relevant to making a "knowing and intelligent" decision as to the need for counsel.[7] As the U.S. Supreme Court emphasized in ***Argersinger v. Hamlin***, 407 U.S. 25, 33 (1971), the legal and constitutional issues involved in a case where imprisonment might be only for a brief period are not necessarily any less complex than cases involving longer terms of incarceration. Indeed, the Court indicated that counsel may be ***especially*** important in misdemeanor cases where there is often "an obsession for speedy dispositions" and the problem of the guilty plea "looms large." ***Id.*** at 34 ("Counsel is needed so that the accused may know precisely what he is doing, so that he is fully aware of the prospect of going to jail or prison, and so that he is treated fairly by the prosecution.") It is also important that defendants fully understand the possible collateral consequences of a conviction of even a seemingly minor offense, consequences that might well surprise a person who has not been advised by a lawyer. One example that was mentioned in testimony to the Commission is that under Georgia law a person under the age of 21 who is convicted of driving 30 miles over the posted speed limit is subject to an automatic revocation of his or her drivers' license. TSG observed reluctance by judges

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[6] TSG Report at 39-40. Indeed several judges actually told TSG that they "fear that any elaboration of such dangers might result in a flood of requests for counsel which may not be possible to meet." *Id.* at 39.

[7] TSG also noted a widespread lack of interpreter services despite the rules promulgated by the Georgia Supreme Court requiring certified or registered interpreters to assist non-English speakers in court proceedings.

to explain potential collateral consequences to unrepresented defendants.[8]

As to the reliance on standardized "waiver forms"[9] the Georgia courts have repeatedly held that such forms are inconsistent with a judge's constitutional duty to conduct an individualized inquiry with each defendant followed by careful findings on the record. ***Glaze v. State***, 172 Ga. App. 802, 325 S.E.2d 172 (1984) (reversing conviction for battery); ***Strozier v State***, 187 Ga. App. 16, 369 S.E.2d 504, 505 (1988) (reversing conviction for trespass); ***Tucci v. State***, 255 Ga. App. 474, 565 S.E.2d 831 (2002) (reversing conviction for traffic offense). See also ***Green v State***, 265 Ga. 263, 454 S.E.2d 466 (1995) (rejecting pre-printed plea form with checklist of standard questions).

The procedure of obtaining waivers of the right to counsel only ***after*** sending defendants to talk to prosecutors clearly violates the following uniform rule applicable to superior, state and magistrate courts:

> The prosecuting attorney should engage in plea discussions or reach a plea agreement with the defendant only through defense counsel, except when the defendant is not eligible for or does not desire appointment of counsel and has not retained counsel.[10]

This procedure also is inconsistent with uniform court rules (discussed below) requiring that counsel for indigent defendants be appointed ***before*** arraignment and that unless the right to counsel has already been properly waived unrepresented defendants not be called to enter a plea.

Prosecution Function Standard 3-3.10(a) of the American Bar Association Standards for Criminal Justice states: "A prosecutor who is present at the first appearance (however denominated) of the accused before a judicial officer should not communicate with the accused unless a waiver of counsel has been entered, except for the purpose of aiding in obtaining counsel or arranging for the pretrial release of the accused." The comments

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[8] See for example *id.* at 17 (Before pleading guilty one defendant wanted to know about possible collateral consequences such as impact on employment and having a criminal record. The judge replied, " I can't tell you the consequences." When the defendant said, " I just wanted to pay the fine," the judge replied, "you have to plead guilty to do that." Another defendant also asked whether a conviction would affect her ability to obtain employment, and the judge again refused to answer. A third defendant – who had pled guilty without counsel –made a statement after leaving the courtroom indicating that she thought (incorrectly) her traffic conviction would not be on her record because her sentence was community service. See also Aug 8, 2001 Commission Hearing at 120 (President of Council of Magistrate Court Judges told the Commission that many municipal court judges are not advising defendants of the collateral consequences of conviction.)

[9] For an example of a waiver form, see Appendix 3. This form is a double-sided sheet of paper: one side is used if a defendant wants to plead not-guilty, the other side for guilty pleas. The "not-guilty" form seems to require waiver of both the right to counsel and the right to a jury trial as a condition of entering a not-guilty plea; the form contains no place for a defendant to request counsel or a jury trial.

[10] Superior and State Court Rule 33.3 , Magistrate Court Rule 30.3

to this provision indicate that it implements several ABA model rules of professional conduct, all of which have been adopted by the Georgia Supreme Court:

- Georgia Rule of Professional Conduct 4.2 prohibits a lawyer who is representing one party in a case from communicating about the case with an opposing party who is represented by a lawyer; this rule specifically applies to attorneys for the state. The comment to the Prosecution Function Standard 3-3.10(a) explains that a prosecutor should assume that a defendant will be represented by an attorney until a waiver of counsel has been entered.
- Georgia Rule 4.3 further provides that in dealing with an unrepresented person, a lawyer should not give advice to that person "other than the advice to secure counsel."
- Georgia Rule 3.8(b) states: "The prosecutor in a criminal case shall ... refrain from making any effort to prevent the accused from exercising a reasonable effort to obtain counsel."

At one of the courts where defendants were directed to meet with prosecutors before any determination of right to counsel was made, TSG was told by a former state court prosecutor that assistant solicitors would counsel defendants to accept their plea offers because the judge was "a tough sentencer" and, on occasion, solicitors would reveal at a trial or hearing information learned in the first appearance meetings with unrepresented defendants.[11] The risk to unrepresented defendants of these procedures was documented in a recent Georgia decision: after a municipal court judge overheard a conversation between an unrepresented defendant and the prosecutor the judge ordered the defendant to testify as to what he had told the prosecutor or be found in contempt. The judge had not advised the defendant of the right to counsel and no waiver of the right was in the record.[12]

Many of the problems described above would not occur if courts complied with the following procedures, which are set forth in the Uniform Superior Court Rules (USCR) (Appendix 4), Uniform State Court Rules (Appendix 5),[13] and Uniform Magistrate Court Rules (UMCR) (Appendix 6):

> - ***Before*** arraignment[14] the court shall inquire whether the accused is represented by counsel. If the defendant desires an attorney and is indigent, the court shall authorize the ***immediate*** appointment of counsel. (USCR 30.2, UMCR 27.2)
> - A defendant shall not be called upon to plead before having an opportunity to

[11] Id. at 36.

[12] ***In re Burgar***, 264 Ga.App. 92, 589 S.E.2d 679 (2003).

[13] Except for Uniform State Court Rule 33.11, the relevant State Court rules simply incorporate by reference the identically numbered Superior Court rule. Although the printed text of State Court Rule 33.11 differs from Superior Court Rule 33.11 by omitting the word "verbatim," the Supreme Court ruled in 1998 that records of guilty pleas in state court must in fact be verbatim. ***King v State***, 270 Ga. 367, 509 S.E.2d 32, 36 (1998).

[14] In traffic proceedings, the ticket takes the place of a formal indictment or accusation. OGC 40-13-24. Therefore the first court hearing on the ticket is the equivalent of an arraignment.

> retain counsel, or if defendant is eligible for appointment of counsel, until counsel has been appointed or right to counsel waived. (USCR 33.2(A), UMCR 30.2)
> - The prosecuting attorney should engage in plea discussions with the defendant only through defense counsel except when the right to counsel has already been waived. (USCR 33.3, UMCR 30.3)
> - A verbatim record of proceedings at which a defendant enters a plea of guilty or nolo contendere shall be made and preserved. (USCR 33.11, UMCR 30.11)

Perhaps one reason for the lack of compliance with these rules in some State Courts is that the Uniform State Court Rules are not readily accessible in complete form. **GEORGIA COURT RULES AND PROCEDURES** (West 2004) in the section for State Court Rules contains only four pages, listing the handful of State Court Rules that ***differ*** from the Superior Court Rules. As to all other rules, the reader is directed to the Uniform Superior Court Rules but told to change certain words when applying the Superior Court Rules to State Courts. No version of the Uniform State Court Rules is available on the official Georgia Courts web site (http://www.georgiacourts.org/). Unfortunately one of the few State Court Rules that is specifically published is Rule 29 (Appointment of Counsel for Indigent Defendants) which is drafted in such a way that, read in isolation, it appears that the right to counsel only arises if a defendant makes a written request. Therefore the Commission recommends redrafting of State Court Rule 29 (and the corresponding Magistrate Court Rule 26) (see Appendix 7) as well as notice to court personnel and prosecutors about the applicability of Superior Court Rules 30.2, 33.2(A), and 33.3 in State Courts and the equivalent Uniform Rules in Magistrate Courts.[15]

As for probate and municipal courts, it appears that published rules for criminal cases rarely exist. The Uniform Probate Court Rules only address probate matters and do not take into account the criminal jurisdiction exercised by probate courts. There are no Uniform Municipal Court Rules. The absence of published rules is particularly problematic given that some probate and municipal court judges have no legal training,[16] and that these courts are not subject to any oversight by higher courts in their

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[15] Judicial education for magistrates should make clear that "a person accused of crime requires the guiding hand of counsel at ***every step*** in the proceedings against him," ***Coleman v. Alabama***, 399 U.S. 1, 7 (1970) (emphasis added) and that the right to counsel applies to a hearing before a magistrate even if not characterized as an "arraignment" under state law. ***White v Maryland***, 373 U.S. 59 (1963) (reversing guilty plea before magistrate because "[o]nly the presence of counsel" could have enabled the accused "to know all the defenses available to him and to plead intelligently.") See, e.g. Dale Smith, "Court Ruling Will Have Little Effect," **ATLANTA JOURNAL-CONSTITUTION** (July 8, 2002) ("Equal Time" column by chief magistrate judge of Stephens County, who stated: "[T]here is no right to have an attorney appointed for any of the pretrial negotiation stage. ... For the great majority of all criminal cases, the only change that may result from the Shelton decision is that the judge, before accepting a negotiated plea, will advise the defendant that he has the right to counsel, and if he is unable to afford one, counsel can be appointed for him. The defendant, already knowing what the outcome of the matter will be, will waive in nearly every case.")

[16] TSG Report at 56 ("a nonlawyer Municipal Court Judge and two non-lawyer probate court judges we interviewed appeared to have little or no understanding of ***Shelton*** and had no provisions in their court for delivering admonitions, securing valid waivers, appointing counsel or keeping proper records of proceedings.")

circuit[17] or by the Tripartite Committees that have had responsibility for indigent defense in State and Superior Courts.[18] Therefore the Commission recommends that at least the basic procedures set out in Magistrate Court Rules 27.2, 30.2, 30.3, and 30.11 be adopted by probate courts and municipal courts as a condition of their exercising the power to impose sentences of imprisonment. This recommendation would require some changes by courts that currently have no arrangement for appointed counsel or preserving a verbatim record at court hearings.[19] Courts that elected not to make these changes would be limited to imposing monetary penalties, an option which might co-ordinate with the recommendation below to allow local courts to classify some traffic offenses as civil infractions.

3. IMPRISONMENT FOR TRAFFIC OFFENSES DUE TO INDIGENCY

More than 20 years ago the American Bar Association recommended that: "Persons accused or convicted of traffic offenses, other than hazardous, should not be detained or placed in jail."[20] Since then a majority of states have reclassified most traffic offenses as either civil infractions or as misdemeanors punishable only by a fine.[21] Georgia appears to have by far the harshest penalties in the nation because traffic offenses, whether violations of state law or local ordinance, can be punished by up to 12 months

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[17] Id. at 56 ("[I]n one Superior Court in particular, the two Superior Court judges were aware that ***Shelton*** was not being followed in the county's probate court and a local city municipal court. The judges told us that they had, on more than one occasion, discussed these problems with the probate and municipal court judges, but all they received in return was basically a statement that the superior court does not have any administrative or legal oversight over either the probate or municipal courts.")

[18] The TSG Report re-emphasized the importance of collecting statewide data on the provision of indigent defense in all courts in Georgia, particularly given the lack of oversight over the operations of probate and municipal courts. See Report of the Chief Justice's Commission on Indigent Defense – Part I: Recommendation # 7. The Georgia Indigent Defense Act of 2003 provides that if a city does not contract with the circuit public defender to provide criminal defense to indigent persons accused of violating city ordinances or state law, the city "shall be subject to all applicable standards adopted by the [Georgia Public Defender Standards] council for representation of indigent persons in this state" OGC 17-12-23 (eff. Jan. 1, 2005); however, the Act does not specify how a city's compliance will be monitored or enforced.

[19] *See* ***King v State***, 270 Ga. 32, 509 S.E.2d 32, 36 (1998) (invoking the Supreme Court's "inherent power to regulate the judiciary" to announce a new rule requiring a verbatim record in State Court proceedings so that the accuracy and voluntariness of guilty pleas can receive meaningful appellate review.)

[20] ***American Bar Association Standards for Traffic Justice, Section 5.0*** (approved by the ABA House of Delegates in 1975), *reprinted in* James P. Economos & David C. Steelman, **TRAFFIC COURT PROCEDURE AND ADMINISTRATION**, App. 1 (2d ed. 1983) at 207. Hazardous violations are punishable as felonies, contribute to a serious collision, or involve driving under the influence of drugs or alcohol, reckless driving, leaving the scene, or driving with a suspended license. ABA Standard for Traffic Justice Section 3.3, *id.* at 203.

[21] The **UNIFORM VEHICLE CODE** (2000), promulgated by the National Committee on Uniform Traffic Laws and Ordinances, provides for imprisonment for five serious traffic offenses: consuming alcohol while driving, driving under the influence, reckless driving, homicide by vehicle, and fleeing a police officer. Article IX(DUI and Other Serious Traffic Offenses): Sections 11-901, 902, 909-911. Other traffic offenses, even if defined as misdemeanors, are punishable only by fines unless three offenses are committed within the same year. Section 17-101(b).

of imprisonment. Thus, for example, according to information compiled by the National Highway Traffic Safety Administration, while any first offense speeding violation can be punished in Georgia by up to 12 months of imprisonment, the next most severe states are Missouri and Nevada, which limit punishment to 6 months and then only for serious speeding violations. Nowhere in the South outside Georgia is first offense speeding punishable by more than 30 days in jail. Alabama, Arkansas and Mississippi limit punishment to 10 days of imprisonment; Florida, Kentucky, Virginia, West Virginia and Texas are among the 33 states nationwide that impose only monetary fines for a first offense speeding violation. See Appendix 8 (Summary of state speeding laws).

The impact of Georgia's harsh traffic laws falls primarily on indigent defendants -- either because they are arrested and incarcerated for weeks until a court hearing[22] (when they often plead guilty for time served) or they are imprisoned for failure to pay a fine. TSG described one court where defendants fined less than $200 were told by the judge they would be immediately imprisoned for 10 days if the fine was not paid in full in the courtroom.[23] A more common pattern was the imposition of a fine combined with a probated sentence of imprisonment, which is triggered by failure to meet a payment schedule.[24] Because most courts use a private probation service, which functions primarily as a collection agency in these cases, defendants are subject to imprisonment not only for failure to pay the original fine but also for the probation fee which typically ranges from $25 - $40 per month and can total an amount exceeding the fine itself.

The U.S. Supreme Court has held, in a case reversing a Georgia probation revocation, that a person may not be imprisoned for failure to pay a fine without a hearing to determine if the defendant was financially able to make payments,[25] and the Georgia State-wide Probation Act authorizes courts to waive or amend probation fees "upon determination by the court as to the undue hardship, inability to pay, or any other extenuating factors which prohibit collection of the fee." OGC 42-8-34(d)(1). The Commission is confident that many courts in Georgia do conduct "ability to pay" hearings in probation cases; however, TSG did not observe any court conducting an inquiry into ability to pay, nor do any of the uniform court rules address the need for such hearings or set out the procedures to be followed.

In his testimony before the Commission, Roger Warren, President of the National

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[22] *See, e.g.* TSG Report at 26 (Defendants on the jail plea calendar had all been in jail for at least a couple of weeks even for minor cases.) Brenda J. Blackwell & Clark D. Cunningham, *Taking the Punishment out of the Process*, 67 **LAW & CONTEMPORARY PROBLEMS** _, __ (forthcoming Fall 2004) (study of municipal court in Georgia: in 3 week period 24 traffic defendants spent 3-12 days in jail without seeing a lawyer or receiving constitutionally required probable cause hearing.)

[23] TSG Report at 54.

[24] TSG Report at 38, 53, 54. *See also* ***Geng v. State***, 276 Ga. 428 , 578 S.E.2d 115 (2003) (defendant sentenced to pay $315 for driving 80 mph in a 55 mph zone; upon failure to make payment six-month incarceration to be imposed)(conviction reversed due to denial of right to jury trial).

[25] ***Bearden v Georgia***, 461 U.S. 658, 103 S.Ct. 2064 (1983). *See also* ***Tate v Short***, 401 U.S. 395, 91 S.Ct. 318 (1971) (state cannot convert fine into prison term for defendant without means to pay fine).

Center for State Courts, who is a former municipal judge, criticized the use of probation to collect fines as an inefficient use of court resources. He also urged the early resolution of less serious cases, ideally by providing a defense lawyer at jail or the first appearance hearing. If defendants received early representation, 90% of cases could be resolved by the first hearing, which would save more money than the cost of appointed counsel. Finally he said that states affected by the ***Shelton*** decision need systems to distinguish at the outset cases where incarceration will not be imposed from those where incarceration should be retained as an option. He concluded that Georgia should therefore consider the example of the many states that have changed their traffic laws to remove incarceration as a possible penalty for all but the most serious offenses.

TSG reported that many people they spoke with – judges, prosecutors, defense counsel, and others – said that many of Georgia's traffic cases should be decriminalized.[26] There seems to be no evidence that Georgia's harsh approach to punishment of traffic offenses is necessary for effective law enforcement. According to a 1994 article by Daniel T. Gilbert, at that time the executive director of the National Committee on Uniform Traffic Laws and Ordinances, "When states changed the classification of certain minor traffic violations to civil infractions, the efficiency and effectiveness of the traffic court improved. The states accomplished this without eliminating the court's primary purpose: prevent crashes, improve traffic safety and provide safe and orderly traffic flow."[27]

Without waiting for a major overhaul of traffic laws, three modest changes to existing Georgia statutes would permit local experimentation with alternatives to imprisonment for traffic offenses. Chapter 13, Article 3, of the Motor Vehicle Code already authorizes any court with jurisdiction over traffic laws to identify all but the most serious offenses for special handling as "traffic violations." Although it appears that the legislature's intent was create a category of less serious offenses which would "not be considered as a misdemeanor,"[28] the legislature left in place the 12 month imprisonment penalty for these "traffic violations." Included in Appendix 7 is a sample amendment to this provision that would add a second category defined as a civil infraction not punishable by imprisonment, thus giving local jurisdictions the option to experiment with

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[26] TSG Report at 58. See also *id*. ("As Solicitor General for a county that reportedly processed 158,000 criminal traffic cases in FY 2001, he finds a more sensible option is making traffic cases infractions.") and 52 (Judge said certain minor misdemeanors should be decriminalized. "You should watch the faces of people who have run stop signs when I tell them they face the possibility of 12 months of jail time.")

[27] ***Decriminalization of Minor Offenses Unburdens Courts***, **TRAFFIC SAFETY** 26, 27 (Nov/Dec 1994). North Carolina decriminalized most traffic offenses in 1986. According to Professor James C. Drennen, Albert Coates Professor of Public Law and Government at UNC-Chapel Hill, and, as Counsel to the Courts Commission, the principal draftsman of the 1986 legislation, there was no opposition from the law enforcement community to decriminalization and no reports since 1986 of any adverse affect on traffic safety. Telephone Interview, July 30, 2004.

[28] OGC 4-13-60. But see *Geng v. State*, 276 Ga. 428 , 578 S.E.2d 115 (2003) (right to jury trial applies to offense characterized as "traffic violation" under OGC 4-13-60 where the potential existed for prosecution as a misdemeanor).

decriminalization of some offenses. A second modest change is found in the amendment to OGC 15-18-80 proposed last session by the Council of Municipal Court Judges (Appendix 7), that would make clear that municipal courts can use pretrial diversion programs. Finally, to provide a cost-effective alternative to imprisonment as a means to enforce traffic fines, a provision similar to Hawaii's **§ 291D-10** (Appendix 7) could be enacted to put a hold on renewal of drivers' licenses and license plates until unpaid fines are satisfied.

4. RECOMMENDATIONS: The Commission recommends that the Supreme Court of Georgia consider taking appropriate steps to encourage, support or implement the following possible responses to the concerns identified in this Report.

1. Judges in all of Georgia's trial courts -- Superior Courts, State Courts, Magistrate Courts, Probate Courts and Municipal Courts – should be informed of the need to apply the following basic principle: **A court may sentence a person to a term of imprisonment (including time served or a suspended or probated sentence) only if the court has complied with the provisions of the U.S. and Georgia constitutions regarding the right to counsel**.

2. All court personnel and prosecutors practicing in State Courts and Magistrate Courts should be informed regarding the need to comply with the following procedures, as set forth in the Uniform Superior Court Rules, Uniform State Court Rules, and Uniform Magistrate Court Rules:

- ***Before*** arraignment the court shall inquire whether the accused is represented by counsel. If the defendant desires an attorney and is indigent, the court shall authorize the ***immediate*** appointment of counsel.
- A defendant shall not be called upon to plead before having an opportunity to retain counsel, or if defendant is eligible for appointment of counsel, until counsel has been appointed or right to counsel waived.
- The prosecuting attorney should engage in plea discussions with the defendant only through defense counsel except when the right to counsel has already been waived.
- A verbatim record of proceedings at which a defendant enters a plea of guilty or nolo contendere shall be made and preserved.

3. State Court Rule 29.2 and Magistrate Court Rule 26.2 should be amended to make clear that the right to counsel does not depend on a written request from an indigent defendant. (See Appendix 7.)

4. The Uniform Probate Court Rules should be amended to require in criminal cases the procedures listed in Recommendation # 2.

5. All municipal courts should adopt and publish rules of procedure in criminal cases. If a municipal court wishes to exercise the power to impose a sentence of imprisonment (including suspended or probated sentences of imprisonment), the published rules should include the procedures listed in Recommendation # 2. It would be desirable if Uniform Rules for Municipal Courts were promulgated.

6. Programs of continuing judicial education for State Court, Magistrate Court, Probate Court and Municipal Court judges should include a session on the right to counsel, with particular emphasis on the need for an individualized inquiry with each defendant before finding a waiver of counsel and the inappropriateness of standardized waiver forms.

7. Local courts should be given the option to handle some traffic offenses as civil infractions. (See Appendix 7.)

8. Municipal courts should be given the option to create pretrial diversion programs. (See Appendix 7.)

9. The Department of Motor Vehicles should be authorized to place a hold on renewal of drivers' licences and license plates until unpaid traffic fines are paid. (See Appendix 7.)

Appendices:

1. ***Alabama v Shelton***, 53 U.S. 654, 122 S.Ct. 1764 (2002) (opinion of the Supreme Court)
2. ***Status of Indigent Defense in Georgia: A Study for the Chief Justice's Commission on Indigent Defense. Part II: Analysis of Implementing Alabama v. Shelton in Georgia*** (The Spangenberg Group June 9, 2003)
3. Sample Waiver of Counsel Form Used by a Georgia Municipal Court
4. Selected Uniform Superior Court Rules
5. Selected Uniform State Court Rules
6. Selected Uniform Magistrate Court Rules
7. Examples of Possible Changes in Georgia Court Rules and Statutes
   –Uniform State Court Rule 29.2 / Magistrate Court Rule 26.2
   –Local Option for Traffic Infractions
   –Pretrial Diversion for Municipal Courts
   –Authority to Hold Plate Renewals for Payment of Traffic Fines
8. Summary of State Speeding Laws

SELECTED UNIFORM SUPERIOR COURT RULES

30.2. Call for arraignment

Before arraignment the court shall inquire whether the accused is represented by counsel and, if not, inquire into the defendant's desires and financial circumstances. If the defendant desires an attorney and is indigent, the court shall authorize the immediate appointment of counsel.

Upon the call of a case for arraignment, unless continued for good cause, the accused, or the attorney for the accused, shall answer whether the accused pleads "guilty," "not guilty" or desires to enter a plea of nolo contendere to the offense or offenses charged; a plea of not guilty shall constitute the joining of the issue.

Upon arraignment, the attorney, if any, who announces for or on behalf of an accused, or who is entered as counsel of record, shall represent the accused in that case throughout the trial, unless other counsel and the defendant notify the judge prior to trial that such other counsel represents the accused and is ready to proceed, or counsel is otherwise relieved by the judge.

33.2. Aid of counsel -- Time for deliberation

(A) A defendant shall not be called upon to plead before having an opportunity to retain counsel, or if defendant is eligible for appointment of counsel, until counsel has been appointed or right to counsel waived. A defendant with counsel shall not be required to enter a plea if counsel makes a reasonable request for additional time to represent the defendant's interest, or if the defendant has not had a reasonable time to consult with counsel.

(B) A defendant without counsel should not be called upon to plead to any offense without having had a reasonable time to consider his decision. When a defendant without counsel tenders a plea of guilty or nolo contendere to an offense, the court should not accept the plea unless it is reaffirmed by the defendant after a reasonable time for deliberation, following the advice from the court required in section 33.8.

33.3. Propriety of plea discussions and plea agreements

(A) In cases in which it appears that the interests of the public in the effective administration of criminal justice (as stated in section 33.6) would thereby be served, the prosecuting attorney may engage in plea discussions for the purpose of reaching a plea agreement. The prosecuting attorney should engage in plea discussions or reach a plea agreement with the defendant only through defense counsel, except when the defendant is not eligible for or does not desire appointment of counsel and has not retained counsel.

(B) The prosecuting attorney, in reaching a plea agreement, may agree to one or more of the following, as dictated by the circumstances of the individual case:.

(1) to make or not to oppose favorable recommendations as to the sentence which should be imposed if the defendant enters a plea of guilty or nolo contendere; .

(2) to seek or not to oppose dismissal of the offense charged if the defendant enters a plea of guilty or nolo contendere to another offense reasonably related to defendant's conduct; or,.

(3) to seek or not to oppose dismissal of other charges or potential charges against the defendant if the defendant enters a plea of guilty or nolo contendere.

33.11. Record of proceedings

A verbatim record of the proceedings at which a defendant enters a plea of guilty or nolo contendere shall be made and preserved. The record should include:

(A) the inquiry into the voluntariness of the plea (as required in section 33.7);

(B) the advice to the defendant (as required in section 33.8);

(C) the inquiry into the accuracy of the plea (as required in section 33.9), and, if applicable;

(D) the notice to the defendant that the trial court intends to reject the plea agreement and the defendant's right to withdraw the guilty plea before sentence is pronounced.

SELECTED UNIFORM STATE COURT RULES

The Uniform Rules for the Superior Courts shall be applicable in State Courts except as follows:

A. Wherever the words "superior court" or "superior courts" appear in the Uniform Superior Court Rules, the word "state" shall apply in lieu of the word "superior."

B. Wherever the words "district attorney" appear in the Uniform Superior Court Rules, the words "prosecuting attorney" shall apply in lieu of "district attorney."

C. Wherever the word "felony" appears, the words "or misdemeanor" shall be added.

D. Wherever the words "indictment" or "grand jury indictment" appear, the word "accusation" shall apply in lieu thereof.

E. The following Uniform State Court Rules shall read as follows: ...

26.1. Bonds and first appearance

(F) Inform the accused that he has the right to accusation in misdemeanor cases or to Uniform Traffic Citation in traffic cases, and the right to trial by jury;

29.2. Application and appointment of counsel

When an accused person, contending to be financially unable to employ an attorney to defend against pending criminal charges or to appeal a conviction, desires to have an attorney appointed, the accused shall make a request in writing to the court or its designee for an attorney to be appointed. The request shall be in the form of an application for appointment of counsel and certificate of financial resources, made under oath and signed by the accused which shall contain information as to the accused's assets, liabilities, employment, earnings, other income, number and ages of dependents, the charges against the accused and such other information as shall be required by the court. The purpose of the application and certificate is to provide the court or its designee with sufficient information from which to determine the financial ability of the accused to employ counsel. The court may appoint an attorney for an indigent defendant without a written request.

The determination of indigency or not shall be made by a judge of a state court or designee.

Upon a determination of indigency the court shall, in writing, authorize the appointment of counsel for the indigent accused. The original authorization of appointment shall be filed with the accusation or warrant in the case; a copy of the authorization shall be forwarded to the clerk, court administrator, public defender or such other person designated by the court to assign an attorney to an indigent defendant. Such person shall notify the accused, the appointed attorney, the sheriff and the prosecuting attorney of the appointment.

33.11. Record of proceedings

A record of the proceedings at which a defendant enters a plea of guilty or nolo contendere shall be made and preserved. The record should include:

(A) the inquiry into the voluntariness of the plea (as required in section 33.7);

(B) the advice to the defendant (as required in section 33.8);

(C) the inquiry into the accuracy of the plea (as required in section 33.9), and, if applicable;

(D) the notice to the defendant that the trial court intends to reject the plea agreement and the defendant's right to withdraw the guilty plea before sentence is pronounced.

SELECTED UNIFORM MAGISTRATE COURT RULES

26.2. Application for and appointment of counsel

When an accused person, contending to be financially unable to employ an attorney to defend against pending criminal charges or to appeal a conviction, desires to have an attorney appointed, the accused shall make a request in the form of an application for appointment of counsel and certificate of financial resources, made under oath and signed by the accused. This form shall contain information as to the accused's assets, liabilities, employment, earnings, other income, number and ages of dependents, the charges against the accused and such other information as shall be required by the court. The purpose of the application and certification is to provide the court or its designee with sufficient information from which to determine the financial ability of the accused to employ counsel.

Upon a determination of indigency the court shall, in writing, authorize the appointment of counsel for the indigent accused. The original authorization of appointment shall be filed with the clerk of court; a copy of the authorization shall be forwarded to the clerk, court administrator, public defender or such other person designated by the court to assign an attorney to an indigent defendant. Such person shall notify the accused, the appointed attorney, the sheriff and the prosecuting attorney of the appointment. The applicant for an attorney and certificate of financial resources shall be in substantially the following form: [form omitted]

27.2. Call for arraignment

Before arraignment the court shall inquire whether the accused is represented by counsel and, if not, inquire into the defendant's desires and financial circumstances. If the defendant desires an attorney and is indigent, the court shall authorize the immediate appointment of counsel.

Upon the call of the case for arraignment, unless continued for good cause, the accused, or the attorney for the accused, shall answer whether the accused pleads "guilty," "not guilty" or desires to enter a plea of nolo contendere to the offense or offenses charged; a plea of not guilty shall constitute a joining of the issue.

Upon arraignment, the attorney, if any, who announces for or on behalf of an accused, or who is entered as counsel of record, shall represent the accused in that case throughout the trial, unless other counsel and the defendant notify the judge prior to trial that such other counsel represents the accused and is ready to proceed, or counsel is otherwise relieved by the judge.

30.2. Aid of counsel - Time for deliberation

(A) A defendant shall not be called upon to plead before having an opportunity to retain counsel, or if defendant is eligible for appointment of counsel, until counsel has been appointed or right to counsel waived. A defendant with counsel shall not be required to enter a plea if counsel makes a reasonable request for additional time to represent the defendant's interest, or if the defendant has not had a reasonable time to consult with counsel.

(B) A defendant without counsel should not be called upon to plead to any

offense without having had a reasonable time to consider this decision. When a defendant without counsel tenders a plea of guilty or nolo contendere to an offense, the court should not accept the plea unless it is reaffirmed by the defendant after a reasonable time for deliberation, following the advice from the court required in section 30.8.

30.3. Propriety of plea discussions and plea agreements

(A) In cases in which it appears that the interests of the public in the effective administration of criminal justice (as stated in section 30.6) would thereby be served, the prosecuting attorney may engage in plea discussions for the purpose of reaching a plea agreement. The prosecuting attorney should engage in plea discussions or reach a plea agreement with the defendant only through defense counsel, except when the defendant is not eligible for or does not desire appointment of counsel and has not retained counsel.

(B) The prosecuting attorney, in reaching a plea agreement, may agree to one or more of the following, as dictated by the circumstances of the individual case:.

(1) to make or not to oppose favorable recommendations as to the sentence which should be imposed if the defendant enters a plea of guilty or nolo contendere;

(2) to seek or not to oppose dismissal of the offense charged if the defendant enters a plea of guilty or nolo contendere to another offense reasonably related to defendant's conduct; or,.

(3) to seek or not to oppose dismissal of other charges or potential charges against the defendant if the defendant enters a plea of guilty or nolo contendere.

30.11. Record of proceedings

A verbatim record of the proceedings at which a defendant enters a plea of guilty or nolo contendere shall be made and preserved. The record should include:

(A) the inquiry into the voluntariness of the plea (as required in section 30.7);

(B) the advice to the defendant (as required in section 30.8);

(C) the inquiry into the accuracy of the plea (as required in section 30.9), and, if applicable;

(D) the notice to the defendant that the trial court intends to reject the plea agreement and the defendant's right to withdraw the guilty plea before sentence is pronounced.

EXAMPLES OF POSSIBLE CHANGES IN GEORGIA COURT RULES AND STATUTES

POSSIBLE AMENDMENT TO UNIFORM STATE COURT RULE 29.2

29.2. Application and appointment of counsel

~~When~~ An accused person, contending to be financially unable to employ an attorney to defend against pending criminal charges or to appeal a conviction, shall be promptly provided with [~~desires to have an attorney appointed, the accused shall make a request in writing to the court or its designee for an attorney to be appointed. The request shall be in the form of~~] an application for appointment of counsel and certificate of financial resources, to be made under oath and signed by the accused which shall contain information as to the accused's assets, liabilities, employment, earnings, other income, number and ages of dependents, the charges against the accused and such other information as shall be required by the court. The purpose of the application and certificate is to provide the court or its designee with sufficient information from which to determine the financial ability of the accused to employ counsel. The court may immediately appoint an attorney for an apparently indigent defendant without a written ~~request~~. application. ...

[Also make corresponding amendment to first paragraph of Uniform Magistrate Court Rule 26.2]

POSSIBLE AMENDMENT TO TRAFFIC VIOLATION BUREAU LAW TO CREATE LOCAL OPTION FOR TRAFFIC INFRACTIONS

40-13-50. Power of judges to list traffic infractions and violations and establish traffic violations bureau

In every court of this state having jurisdiction over the violation of traffic laws or traffic ordinances, the judge, or the judges where there is more than one judge, may provide by written order for the establishment of a traffic violations bureau and for the handling or disposition of certain traffic cases in substantial compliance with this article. The court shall promulgate a list of the traffic offenses which shall be handled and disposed of as either civil infractions or traffic violations and provide to the clerk of the traffic violations bureau a list of such offenses which shall be handled and disposed of by the traffic violations bureau. However, nothing in this article shall authorize the judge of such court to employ any person or persons to administer this article.

40-13-53. Release of offenders upon citation and complaint; excepted offenses

(a) Subject to the exceptions set out in subsection (b) of this Code section, any officer who arrests any person for the violation of a traffic law or traffic ordinance alleged to have been committed outside the corporate limits of any municipality shall permit such person to be

released upon being served with a citation and complaint and agreeing to appear, as provided in this article. If such officer has reasonable and probable grounds to believe that the person will not obey such citation and agreement to appear, the officer may require such person to surrender his driver´s license in accordance with Code Section 17-6-11.
(b) The following offenses shall not be handled or disposed of ~~by a traffic violations bureau~~ as either civil infractions or traffic violations:
(1) Any offense for which a driver´s license may be suspended by the commissioner of motor vehicle safety;
(2) Any motor vehicle registration violation;
(3) A violation of Code Section 40-5-20;
(4) Speeding in excess of 30 miles per hour over the posted speed limit; or
(5) Any offense which would otherwise be a civil infraction or a traffic violation~~s bureau offense~~ but which arose out of the same conduct or occurred in conjunction with an offense which is~~ excluded from the jurisdiction of the traffic violations bureau~~ listed in this subsection. Any such offense shall be subject to the maximum punishment set by law.

40-13-60. Traffic infractions and violations distinguished from misdemeanors; handling of cases
(a) Any traffic offense characterized and classified as a civil infraction shall not be considered as a misdemeanor and shall not be punished by imposition of any term of imprisonment, including a suspended or probated sentence of imprisonment.
(b) Any traffic violation under the jurisdiction of the traffic violations bureau ~~shall be characterized and classified as a traffic violation and~~ shall not be considered as a misdemeanor. Whenever any traffic violation is transferred from another court to a court which has a traffic violations bureau, if such offense is classified as a traffic violation on the traffic violations bureau schedule of the receiving court, such violation shall be handled and disposed of by such traffic violations bureau. Where a defendant demands a trial on a traffic violation, it shall be tried before a judge of the court which established the traffic violations bureau. The request for a trial shall not result in a loss of jurisdiction by the traffic violations bureau.

POSSIBLE AMENDMENT TO PRETRIAL DIVERSION LAW TO ADD MUNICIPAL COURTS

To amend Article 4 of Chapter 18 of Title 15 of the Official Code of Georgia Annotated, relating to pretrial intervention and diversion programs, so as to allow certain courts to create and administer pretrial intervention and diversion programs; to provide for court costs; to provide for related matters; to repeal conflicting laws; and for other purposes.
BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

SECTION 1.
Article 4 of Chapter 18 of Title 15 of the Official Code of Georgia Annotated, relating to pretrial intervention and diversion programs, is amended by striking subsections (a), (f), and (g) of Code Section 15-18-80, relating to policy and procedure, and inserting in their respective places the following:
"(a) The prosecuting attorneys for each judicial circuit of this state shall be authorized to create and administer a Pretrial Intervention and Diversion Program. The prosecuting attorney for a municipal court shall also be authorized to create and administer a Pretrial Intervention and Diversion Program for offenses within the jurisdiction of the municipal court.
(f) The prosecuting attorney shall be authorized to assess and collect from each

offender who enters the program a fee not to exceed $300.00 for the administration of the program. Any fee collected under this subsection shall be made payable to the general fund of the county in which the crime is committed or to the general fund of the municipality in which the crime was committed if the program is being administered by the prosecuting attorney of a municipal court. (g) The prosecuting attorney shall be further authorized to collect restitution on behalf of victims. Any restitution collected under this subsection shall be made payable to and disbursed by the clerk of court ~~in the county~~ in which the case would be prosecuted."

SECTION 2.
Said article is further amended by striking Code Section 15-18-81, relating to court costs, and inserting in lieu thereof the following:
15-18-81.
The prosecuting attorney may assess court costs against the defendant for the dismissal of criminal warrants when the affiant is not a peace officer. Any fee collected under this subsection shall be made payable to the general fund of the county in which the crime is committed or to the general fund of the municipality in which the crime was committed if the program is being administered by the prosecuting attorney of a municipal court."

SECTION 3.
All laws and parts of laws in conflict with this Act are repealed.

[Taken from House Bill 821, proposed by the Council of Municipal Court Judges, and passed by the House on January 29, 2004. Not enacted during the 2004 Session.]

POSSIBLE PROVISION TO RESTRICT DRIVER'S LICENSE RENEWAL AND MOTOR VEHICLE REGISTRATION FOR UNPAID TRAFFIC FINES

(a) When the person issued a notice of traffic infraction not involving parking fails to pay a monetary assessment that has been ordered, the court shall cause an entry to be made in the driver's license record so as to prevent the person whose assessment is outstanding from acquiring or renewing the person's driver's license until the outstanding assessment is paid or the notice of traffic infraction is otherwise disposed of pursuant to this chapter.

(b) In all cases where the registered owner of a motor vehicle to which a notice of traffic infraction has been issued fails to pay any monetary assessments that have been ordered, the court shall cause an entry to be made in the motor vehicle's record so as to prevent issuance or renewal of the motor vehicle's certificate of registration and transfer of title to the motor vehicle until the outstanding assessment is paid or the notice of traffic infraction is otherwise disposed of pursuant to this chapter.

[Taken from Hawaii Revised Statutes **§ 291D-10**]

MAXIMUM IMPRISONMENT FOR SPEEDING (1st offense)

No More Than **12 Months**	Georgia (all speeding violations)
No More Than **6 months**	Missouri (more than 20 mph over limit), Nevada (some speeding violations)
No More Than **90 Days**	Utah
No More Than **30 Days**	Iowa, Louisiana, New York, North Carolina (more than 15 mph over limit or over 80 mph), Oklahoma, South Carolina, South Dakota, Tennessee, Wyoming
No More Than **15 Days**	Missouri (most violations), New Jersey,
No More Than **10 Days**	Alabama, Arkansas, Mississippi,
None	Other 33 states including Florida, Kentucky, West Virginia, Virginia, Texas

Source: **SUMMARY OF STATE SPEED LAWS** (5th ed. current as of January 1, 2001)
U.S. Department of Transportation, National Highway Traffic Safety Administration
Available at: http://www.nhtsa.dot.gov/people/injury/enforce/speedlaws501/introduction.htm