CASENOTE

Calling on the Legislature: *Dixon v. State* and Georgia's Statutory Scheme to Protect Minors from Sexual Exploitation

In *Dixon v. State*,[1] the Georgia Supreme Court analyzed Georgia's statutory scheme to protect children from sexual exploitation.[2] A jury convicted Marcus Dixon of statutory rape and aggravated child molestation, for which he received the mandatory minimum sentence of fifteen years to serve ten.[3] The Georgia Supreme Court reversed Dixon's conviction for aggravated child molestation.[4] As a result of the reversal, Dixon was released from prison because he had already served the requirements for his statutory rape conviction.[5] The majority and concurring opinion urged the Legislature to clarify Georgia's statutes to expressly distinguish statutory rape from child molestation.[6] The dissenting opinions argued that "no legal justification whatsoever" existed for the reversal of Dixon's conviction, and a once clear statutory scheme to protect children from exploitation was clouded by the

1. 278 Ga. 4, 596 S.E.2d 147 (2004).
2. *Id.* at 5, 596 S.E.2d at 148.
3. *Id.* at 4 n.1, 596 S.E.2d at 148 n.1.
4. *Id.* at 4, 596 S.E.2d at 148.
5. *Id.* at 8, 596 S.E.2d at 151.
6. *Id.* at 9, 596 S.E.2d at 151 (Hunstein, J., concurring).

majority.[7] This Note argues that future courts will not hold the *Dixon* opinion expanded the scope of the rule of lenity because either: (1) the use of the rule of lenity was dicta, or (2) the rule of lenity, as used in *Dixon*, only applies to situations where the Legislature clearly intended for misdemeanor punishment to apply.

I. FACTUAL BACKGROUND

Marcus Dixon, a highly recruited football player and honor student, planned to attend Vanderbilt University on an athletic scholarship. During his senior year at Pepperrell High School in Dalton, Georgia, Dixon admitted he had sexual intercourse with a sophomore student in one of the school's classroom trailers. Dixon was eighteen years old at the time; the girl was fifteen years old. Dixon maintained the act was consensual, and the victim fabricated the rape accusation because she feared what her father would do if he discovered his daughter had intercourse with an African-American.'

The victim testified that after school Dixon approached her in the trailer, locked the door, and forced her to have sex with him. Specifically, the victim introduced evidence of vaginal injuries and a bruised arm.[9] The defense argued that the "slight" vaginal injuries were not caused by force and were incidental to sexual intercourse. Dixon denied causing the bruises on the victim's arm.[10] The testimony of two additional witnesses was also admitted for the "limited purpose of illustrating [Dixon's] intent, motive or bent of mind in engaging in the act of intercourse with the 15-year old."[11] One young woman testified Dixon had exposed himself to her, and another testified Dixon had placed his hands inside her underwear."

On May 15, 2003, a jury found Dixon guilty of statutory rape and aggravated child molestation, but acquitted him of all other charges including rape, sexual battery, false imprisonment, and aggravated assault.[13] As required by Georgia's mandatory sentencing laws, Dixon

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7. *Id.* at 12, 596 S.E.2d at 156 (Carley and Thompson, JJ., dissenting).
8. Brief for Appellant at 2-5, Dixon **v.** State, 278 Ga. 4, 596 S.E.2d 147 (2004) (No. S04A0072).
9. *Dixon,* 278 Ga. at 9, 596 S.E.2d at 154 (Carley and Thompson, JJ., dissenting).
10. Brief for Appellant at *3, Dixon* (No. S04A0072).
11. *Dixon,* 278 Ga. at 10, 596 S.E.2d at 155 (Carley and Thompson, JJ., dissenting).
12. *Id.* (Carley and Thompson, JJ., dissenting).
13. *Id.* at 4 n.1, 596 S.E.2d at 148 n.1.

received a sentence of fifteen years to serve ten for the aggravated child molestation conviction.[14]

A large amount of media coverage surrounded the case and sentencing.[15] An outcry ensued claiming the sentence was unjust because Dixon was found not guilty of rape, sexual battery, false imprisonment, and aggravated assault.[16] Because Dixon was acquitted of rape and sexual battery, many felt the jury's verdict proved that the sexual encounter was consensual.[17] However, Dixon's appeal did not allege that the verdict proved the act was consensual, but rather that Georgia's Legislature could not have intended for a teenager to serve a minimum of ten years in prison for non-rape intercourse with another teenager." On September 2, 2003, Dixon filed a Notice of Appeal to the Georgia Supreme Court invoking jurisdiction by challenging the constitutionality of the aggravated child molestation statute.[19] On May 3, 2004, Dixon's conviction for aggravated child molestation was reversed, and he was released from prison having completed his sentence for misdemeanor statutory rape.[20]

II. LEGAL BACKGROUND

A. *Statutory Rape*

Statutory Rape in Georgia is a strict liability crime, and the State must prove only that the defendant engaged in sexual intercourse with a person under the age of sixteen.[21] The relationship between the age of the defendant and victim can cause statutory rape, a felony, to be reduced to a misdemeanor.[22] Section 16-6-3(a) of the Official Code of Georgia Annotated ("O.C.G.A.")[23] governs statutory rape, and a person is guilty of a felony "when he or she engages in sexual intercourse with

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14. *Id*. at 4, 596 S.E.2d at 148.
15. Articles and editorials appeared in the *New York Times* and *Washington Post*. The *Oprah Winfrey Show* and *HBO's Real Sports* also featured pieces on the trial.
16. Courtland Milloy, *Marcus Dixon Doesn't Belong in Ga. Prison*, WASH. POST, Jan. 25, 2004, at C1.
17. *Dixon*, 278 Ga. at 4, 596 S.E.2d at 148. This was a flawed argument because being found not guilty only means the state failed to prove guilt beyond a reasonable doubt.
18. Brief for Appellant at 29, *Dixon* (No. S04A0072).
19. *Dixon*, 278 Ga. at 4 n.1, 596 S.E.2d at 148 n.1.
20. *Id*. at 4, 596 S.E.2d at 147.
21. *Dixon*, 278 Ga. at 4, 13, 596 S.E.2d 147, 152 (2004) (Hines, Carley, and Thompson, JJ., dissenting).
22. *Dixon*, 218 Ga. at 5, 596 S.E.2d at 148.
23. O.C.G.A. § 16-6-3(a) (2003).

any person under the age of 16 years" who is not his or her spouse.[24] However if "the victim is 14 or 15 years of age and the person so convicted is no more than three years older than the victim," then the defendant will be guilty of a misdemeanor rather than a felony.[25] The misdemeanor provision prevents teenagers who engage in consensual sex and are not more than three years apart in age from being charged with a felony.[26]

In 1995 the Georgia Legislature added the misdemeanor provision and gave the trial judge discretion to sentence a teenager guilty of statutory rape to either a felony or a misdemeanor.[27] However, in 1996 the Legislature again amended O.C.G.A. section 16-6-3 to specifically eliminate any discretion a trial judge may have in sentencing a defendant to a felony or a misdemeanor.[28] The 1996 amendment mandated one will only be guilty of a misdemeanor when certain age factors are established.[29]

Both the 1995 and 1996 amendments are consistent with laws in other states and recognize that two teenagers engaging in consensual sex should not be subject to felony prosecution.[30] Some states, such as Arkansas, Iowa, and Colorado, have enacted statutory rape laws that only criminalize sexual activity when a defendant is a specified number of years older than the victim.[31] Other states, like Georgia, California, and Ohio, prevent a defendant from being charged with a felony when certain age factors are present.[32] Regardless of the approach taken, either to totally decriminalize or to reduce the punishment to a misdemeanor, the majority of states have laws to differentiate sexual activity between teenagers from sexual activity between a much older defendant and a minor victim.[33]

B. Child Molestation and Aggravated Child Molestation

Child molestation is not a strict liability crime and requires the State to prove the defendant engaged in "any immoral or indecent act to or in the presence of or with any child under the age of 16 years with the

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24. *Id.*
25. Id. § 16-6-3(b).
26. Id.
27. Dixon, 278 Ga. at 5-6, 596 S.E.2d at 148-49.
28. Id.
29. Id.
30. Amicus Brief on Behalf of The Children's Defense Fund at 13-16, Dixon v. State, 278 Ga. **4,** 596 S.E.2d 147 (2004) (No. S04A0072).
31. Id.
32. Id.
33. Id.

intent to arouse or satisfy the sexual desires of either the child or the person."[34] Aggravated child molestation occurs when one "commits an offense of child molestation which act physically injures the child or involves the act of sodomy."[35] A person convicted of aggravated child molestation is subject to the sentencing requirement under O.C.G.A. section 17-10-6.1,[36] and the defendant must serve a minimum of ten years in prison.[37] Unlike statutory rape, the Legislature has not passed any amendments to reduce child molestation or aggravated child molestation to a misdemeanor depending on the age of the defendant and the victim.

111. COURT'S RATIONALE

Chief Justice Fletcher, writing for the majority, held that the Legislature intended to punish Dixon's conduct as misdemeanor statutory rape rather than felony child molestation; therefore, the court reversed Dixon's conviction for aggravated child molestation.[38] The decision consisted of three major parts. First, the court determined how the Legislature intended to treat the conduct that occurred in this case.[39] After concluding the Legislature intended to punish Dixon's conduct as a misdemeanor, the court used several canons of statutory interpretation to support its argument that only misdemeanor statutory rape applied.[40] Second, the court specifically responded to the State's contention[41] that the statutory construction analysis was not applicable in this case.[42] Finally, the court encouraged the Legislature to make

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34. O.C.G.A. § 16-6-4(a) (2003).
35. ***Id.*** § 16-6-4(c).
36. O.C.G.A. § 17-10-6.1 (2003). The only crimes applicable to O.C.G.A. section 17-10-6.1 are: (1) murder or felony murder, as defined in O.C.G.A. section 16-5-1; (2) armed robbery, as defined in O.C.G.A. section 16-8-41; (3) kidnapping, as defined in O.C.G.A. section 16-5-40; (4) rape, as defined in O.C.G.A. section 16-6-1; (5) aggravated child molestation, as defined in O.C.G.A. section 16-6-4; (6) aggravated sodomy, as defined in O.C.G.A. section 16-6-2; or (7) aggravated sexual battery, as defined in O.C.G.A. section 16-6-22.2 ***Id.*** A conviction of any crime listed in O.C.G.A. section 17-10-6.1 requires that the defendant serve a minimum of ten years in prison. *Id*. Section 17-10-6.1 was amended in 1998 and prevents a defendant from entering a first offender sentencing program when convicted of one of the these crimes. ***Dixon,*** 278 Ga. at 11, 596 S.E.2d 155 (Carley, J., dissenting).
37. O.C.G.A. § 16-6-4(d)(1) (2003).
38. ***Dixon,*** 278 Ga. at 4, 596 S.E.2d at 148.
39. ***Id.***
40. ***Id.*** at 5, 596 S.E.2d at 148-49.
41. A view shared by the dissent.
42. ***Dixon,*** 278 Ga. at 7-8, 596 S.E.2d at 150.

a more recognizable distinction between statutory rape, child molestation, and other sexual crimes, especially with respect to teenage defendants.[43]

A. *Georgia Legislature's Intent and Canons of Statutory Construction*

The majority's decision stated statutory rape and child molestation were part of a legislative framework and coordinated scheme aimed at "protecting children from sexual exploitation."[44] Using the statutory canon *in pari materia*, the court stated the statutes in question must be construed together to determine how the Legislature intended to punish Dixon's conduct.[45] To properly use the canon *in pari materia*, the court must determine that the statute is ambiguous.[46] According to the court, reading the two statutes together showed "a clear legislative intent to prosecute the conduct that the jury determined to have occurred in this case as misdemeanor statutory rape."[47] The majority used several canons of construction to support its position that the Legislature only intended to punish Dixon for misdemeanor statutory rape.[48]

First, the 1996 amendment to the statutory rape law provided that if certain age factors were present, statutory rape was punishable only as a misdemeanor.[49] When a defendant was convicted of statutory rape, the trial judge is not able to choose whether to sentence the defendant to either a misdemeanor or a felony.[50] The majority stated "it would be entirely incongruous with the intent of the Legislature" to mandate conduct under O.C.G.A. section 16-6-3 to be a misdemeanor if the exact same conduct could meet felony child molestation.[51] Thus, the Legisla-

43. *Id.* at 8, 596 S.E.2d at 150-51.

44. *Id.* at 4-5, 596 S.E.2d at 148.

45. *Id. See* Butterworth v. Butterworth, 227 Ga. 301, 304, 180 S.E.2d 548, 552 (1971) (determining that the canon of *in pari materia* requires that a statute must be construed in relation to other statutes of which it is a part).

46. *See Butterworth*, 227 Ga. at 304, 180 S.E.2d at 552 (stating "in pan materia may not be resorted to where the language of the statute under consideration is clear, it is equally as well settled that, where the terms of the statute to be construed are ambiguous or its significance is of a doubtful character, it becomes necessary to give proper consideration to other related statutes").

47. *Dixon*, 278 Ga. at 5, 596 S.E.2d at 148.

48. *Id.*

49. *Id.* at 5-6, 596 S.E.2d at 149.

50. Brief for Appellant at 10, Dixon v. State, 278 Ga. 4, 596 S.E.2d 147 (2004) (No. S04A0072) (arguing a defendant could be found guilty of numerous felonies such as rape, aggravated assault, and sexual battery if forcible or nonconsensual intercourse were found to occur).

51. *Dixon*, 278 Ga. at 6, 596 S.E.2d at 149.

ture intended for the misdemeanor statutory rape provision to have exclusive application to conduct falling within its parameters, and "[i]f the conduct at issue in this case also qualifies as child molestation, then . . . any instance of sex between teenagers would also constitute child This would be the case because consensual sex between unmarried teenagers, which normally is classified as misdemeanor statutory rape, also satisfies the elements of child When the Legislature amended the statutory rape provision in 1996 to require a misdemeanor sentence in certain situations, the Legislature did not intend for the same act to be punishable as a felony under the child molestation

A second independent reason to support the Legislature's intent to punish Dixon for misdemeanor statutory rape was based on the canon of statutory construction that states absent contrary legislative intent, a specific statute will prevail over a general In *Dixon* the statutory rape provision was more specific than the child molestation provision because statutory rape contained guidelines governing the activity of This canon of statutory construction showed the Legislature's intent to punish sex between teenagers who are not more than three years apart in age exclusively under the misdemeanor statutory rape The majority cited to previous decisions that applied this cannon of construction and held "where a crime is penalized by a special law, the general provisions of the penal code are not

Third, the majority concluded misdemeanor statutory rape should apply based on the canon of statutory interpretation that states when two statutes conflict, the most recent expression of the Legislature shall The most recent modification by the Legislature on sexual acts between teenagers was the 1996 amendment of O.C.G.A. section 16-6-3, which removed a trial judge's discretion to sentence a person guilty of statutory rape to either a felony or a misdemeanor when certain age

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52. *Id*.

53. Unlike statutory rape, child molestation is not a strict liability crime; one **of** the elements that must be proved is an "indecent **or** immoral act." The majority seems to imply that consensual sex between unmarried minors is an indecent or immoral act.

54. ***Dixon,*** 278 Ga. at 6, 596 S.E.2d at 149.

55. *Id.*, 596 S.E.2d at 150.

56. *Id*. at 6-7, 596 S.E.2d at 149-50.

57. *Id*.

58. *Id*. at 6 n.10, 596 S.E.2d at 149 n.10 (quoting Gee v. State, 225 Ga. 669, 676, 171 S.E.2d 291, 296 (1969)).

59. *Id*. at **7,** 596 S.E.2d at 150.

factors were The majority held the misdemeanor statutory rape provision, which was amended more recently, must prevail over the felony child molestation

Finally, the majority reasoned the rule of lenity required that Dixon only be sentenced to a misdemeanor because the child molestation statute conflicted with the statutory rape statute, and uncertainty existed as to which statute should Under the rule of lenity, when reasonable minds might disagree on the Legislature's intent, a criminal defendant is entitled to the interpretation that imposes the more lenient Because the same conduct can result in drastically different penalties depending on which statute is applied, Dixon was entitled to the lesser of the two

*B. Response to Argument that Statutory Construction Has **No** Merit*

The majority addressed the State's argument that because Dixon was convicted of aggravated child molestation, and not just child molestation, the canons of statutory construction were not The majority reasoned that child molestation must be proven as an element **of** aggravated child Several canons of statutory construction indicate that the Legislature intended Dixon's conduct to be misdemeanor statutory rape and not child molestation. Thus, Dixon could not possibly be convicted of aggravated child molestation because he could not be guilty of child

C. Calling on the Legislature

The majority encouraged the Legislature to make a more recognizable distinction between statutory rape and child molestation in order to clarify the type of conduct that necessitates the minimum ten-year

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60. The dissent argued that the Legislature's amendment **of** O.C.G.A 17-10-6.1 in 1998 was the most recent action in this area. *Id*. at 11, 596 S.E.2d at 155 (Carley and Thompson, **JJ.**, dissenting).

61. *Dixon,* 278 Ga. at 7, 596 S.E.2d at 150.

62. *Id*. The majority's use **of** the rule **of** lenity seems to conflict with the reasoning given earlier in the opinion. Previously in the opinion, the majority stated that the Legislature clearly intended to punish Dixon's conduct as misdemeanor statutory rape. However, when addressing the rule **of** lenity, the majority states that an uncertainty exists as to which statute applies. *Compare Dixon*, 278 Ga. at 7, 596 S.E.2d at 150, *with Dixon*, 278 Ga. at 5, 596 S.E.2d at 149.

63. *Id*. at 7, 596 S.E.2d at 150.

64. *Id*.

65. *Id*. at 7-8, 596 S.E.2d at 150.

66. *Id*.

67. *Id*.

sentence that accompanies aggravated child The majority noted that as O.C.G.A. section 16-6-4is now written, "teenagers could be convicted of aggravated child molestation . . . if they willingly engage in sexual activity . . . so long as one experienced slight pain or received even minor injuries incidental to the The majority's decision was based on the Legislature not intending to sentence teenagers to prison for ten years in such

D. Concurring Opinion: Justice Hunstein

Justice Hunstein expanded on three points contained in the majority First, through statutory interpretation one could conclude that the Legislature clearly did not intend to impose felony punishment, and the accompanying ten-year minimum sentence, for consensual sexual intercourse between The Legislature intended felony punishment only for sexual predators, regardless of their age, convicted of child molestation and aggravated child Yet, as the majority correctly noted, O.C.G.A. sections 16-6-3 and 16-6-4 conflict, and any conflict must be construed in favor of Second, Justice Hunstein determined that the decision reached by the majority was not based on Dixon's acquittal on the rape and sexual battery The acquittals only showed the State failed to prove the charges beyond a reasonable doubt and not that the sexual encounter was Third, the concurring opinion urged the Legislature, "in the strongest possible terms," to clarify the laws governing statutory rape and child molestation so felony punishment is only available to those who "prey upon other

E. Dissent: Justice Hines joined by Justice Carley and Justice Thompson

The dissent claimed the majority made several errors. First, even if O.C.G.A. sections 16-6-3 and 16-6-4 were part of a coordinated scheme,

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68. *Id*. at 8, 596 S.E.2d at 150-51.
69. *Id*.
70. *Id*.
71. *Id*. at 8, 596 S.E.2d at 151 (Hunstein, **J.,** concurring).
72. *Id*. at 8-9, 596 S.E.2d at 151 (Hunstein, **J.,** concurring).
73. *Id*. (Hunstein, **J.,** concurring).
74. *Id*. (Hunstein, **J.,** concurring).
75. *Id*. (Hunstein, **J.,** concurring).
76. *Id*. (Hunstein, **J.,** concurring).
77. *Id*. (Hunstein, **J.,** concurring).

the Legislature created two separate and distinct The majority incorrectly approached the statutes as if they were "one and the According to the dissenting justices, each crime had its own distinct elements and no conflict existed between **O.C.G.A.** sections 16-6-3 and 16-6-4.[80] When the Legislature amended the statutory rape statute to incorporate discretionary misdemeanor punishment when certain age factors were established, the punishment for aggravated child molestation was increased." The Legislature failed to incorporate a similar age restriction for child molestation." Thus, the 1995 and 1996 amendments to laws governing sex crimes did not show an intention to consider child molestation and statutory rape as one

The second critique offered by the dissent was that the majority failed to recognize that statutory rape was a lesser included offense of aggravated child Merger of crimes occurs when one offense is "established by the same but less than all the facts required to establish another In the Dixon case, injury was needed to establish aggravated child molestation, but injury was not needed to prove statutory The crimes were not identical and did not merge together because the statutory rape conviction could stand without showing Dixon was only sentenced for the aggravated child molestation charge because statutory rape was a lesser included offense." An injustice did not occur because sufficient evidence existed for the aggravated child molestation charge." Additionally, the majority's discussion of the rule of lenity was inappropriate because statutory rape and aggravated child molestation were not proved by the exact same The concept of lesser included offenses, not the rule of lenity, governs when the evidence needed to prove each offense differs

78. *Id.* at 12, 596 S.E.2d at 151 (Hines, Carley, and Thompson, **JJ.,** dissenting).
79. *Id.* (Hines, Carley, and Thompson, **JJ.,** dissenting).
80. *Id.* (Hines, Carley, and Thompson, **JJ.,** dissenting).
81. *Id.* at 14, 596 S.E.2d at 152-53 (Hines, Carley, and Thompson, **JJ.,** dissenting).
82. *Id.*, 596 S.E.2d at 151-52 (Hines, Carley, and Thompson, **JJ.,** dissenting).
83. *Id.* (Hines, Carley, and Thompson, **JJ.,** dissenting).
84. *Id.*, 596 S.E.2d at 153 (Hines, Carley, and Thompson, **JJ.,** dissenting).
85. *Id.* (Hines, Carley, and Thompson, **JJ.,** dissenting).
86. *Id.* (Hines, Carley, and Thompson, **JJ.,** dissenting).
87. *Id.* (Hines, Carley, and Thompson, **JJ.,** dissenting).
88. *Id.* (Hines, Carley, and Thompson, **JJ.,** dissenting).
89. *Id.* (Hines, Carley, and Thompson, **JJ.,** dissenting).
90. *Id.* (Hines, Carley, and Thompson, **JJ.,** dissenting).
91. *Id.* (Hines, Carley, and Thompson, **JJ.,** dissenting).

The dissent also argued that the majority misconstrued the evidence offered at trial and summarily dismissed the harm suffered by the victim as However, the reasoning used by the majority would have reversed the conviction even if horrific injuries had Based on the majority opinion, the dissent argued that if the conduct met the statutory rape requirement, then regardless of the injuries suffered, the State could not charge a defendant with child molestation because **of** the rule of Because child molestation is an element of aggravated child molestation, the State could only charge a defendant with statutory rape if certain age factors were

The dissent concluded that the statutory rape and aggravated child molestation statutes were not in conflict before the majority's The reason the majority encouraged the Legislature to clarify these statutes was because the majority, and not the Legislature, clouded and confused the

Dissent: Justice Carleyjoined by Justice Thompson

Justice Carley wrote a separate dissent to express additional observations on how the majority erred." Justice Carley also agreed that the majority's decision clouded once clear statutes governing statutory rape and aggravated child Justice Carley argued that the majority's reasoning was based on its belief that the fifteen year old girl "was a willing partner in the sexual act, rather than a victim who was injured by Dixon's sexual However, it was not appropriate for an appellate court to make determinations based on the credibility of a witness."' Because there was sufficient evidence to support the jury's finding of aggravated child molestation, "no legal justification whatsoever" existed for reversing the conviction.

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92. *Id.* at **15, 596** S.E.2d at **153** (Hines, Carley, and Thompson, **JJ.,** dissenting).
93. *Id.* (Hines, Carley, and Thompson, JJ., dissenting).
94. *Id.* at **15-16,596** S.E.2d at **153-54** (Hines, Carley, and Thompson, **JJ.,** dissenting).
95. *Id.* (Hines, Carley, and Thompson, **JJ.,** dissenting).
96. *Id.* (Hines, Carley, and Thompson, JJ., dissenting).
97. *Id.* at **16, 596** S.E.2d at **154** (Hines, Carley, and Thompson, JJ., dissenting).
98. *Id.* at **9, 596** S.E.2d at **154** (Carley and Thompson, JJ., dissenting).
99. *Id.* (Carley and Thompson, JJ., dissenting).
100. *Id.* at **11-12, 596** S.E.2d at **156** (Carley and Thompson, **JJ.,** dissenting).
101. *Id.* (Carley and Thompson, **JJ.,** dissenting).
102. *Id.* (Carley and Thompson, **JJ.,** dissenting).

Justice Carley further noted that sufficient evidence existed to show Dixon was a sexual One witness testified that Dixon had previously exposed himself to her, and another witness testified that Dixon had placed his hands down her Such evidence was sufficient for a jury to find Dixon was a "teenage sexual predator[] who prey[s] on other children," but it was not the role of the Georgia Supreme Court to conclude whether or not the jury classified Dixon as a An appellate court can only determine if sufficient evidence existed to uphold a

IV. IMPLICATIONS

Both the majority and dissent agree that Legislative action is needed to clarify Georgia's laws dealing with the sexual exploitation of children.[107] The majority suggests that the laws governing statutory rape and child molestation, as currently written, conflict with each other, and the Legislature should make a more recognizable distinction between the crimes."' The dissent believes that the laws, as written, are clear and unambiguous, but the majority's opinion clouded the

One explanation for the radically different conclusions reached by the majority and dissent is that each applied a different theory of statutory interpretation. The majority opinion appears to use an intentionalist[110] approach and determined at the onset that the Legislature did not intend to punish Dixon's conduct as felony child molestation."' The majority sought to ascertain the intent of the Legislature and then used canons of statutory construction to support its view.'"

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103. ***Id.*** at 8-9, 596 S.E.2d at 151 (Hunstein, J., concurring) ("the Legislature did intend to impose felony punishment upon sexual predators regardless of the age of the offender").

104. ***Id.*** at 10, 596 S.E.2d at 155 (Carley and Thompson, JJ., dissenting).

105. ***Id.*** (Carley and Thompson, JJ., dissenting).

106. ***Id.*** at 12, 596 S.E.2d at 156 (Carley and Thompson, JJ., dissenting).

107. ***Dixon,*** 278 Ga. at 4, 596 S.E.2d at 147.

108. ***Id.*** This seems to conflict the reasoning used earlier in the opinion that "a clear legislative intent" existed to prosecute the conduct the jury determined to have occurred as misdemeanor statutory rape. ***See Id.*** at 5, 596 S.E.2d at 148.

109. ***Id.*** at 9, 596 S.E.2d at 155 (Carley and Thompson, JJ., dissenting).

110. ***See*** Sawnee Elec. Membership v. Ga. Pub. Serv., 273 Ga. 702, 704, 544 S.E.2d 158, 160 (2001) (quoting City of Calhoun v. N. Ga. Elec. Membership Corp., 233 Ga. 759, 761, 213 S.E.2d 596, 599 (1975): "The cardinal rule of statutory construction is 'first, to ascertain the legislative intent and purpose in enacting the law and then to give it that construction which will effectuate the legislative intent and purpose."').

111. ***Dixon,*** 278 Ga. at 5, 596 S.E.2d at 148.

112. ***Id.***

The majority's opinion does not hinge on the use of the rule of lenity. Future courts likely will hold that the use of the rule of lenity was dicta because the conviction for aggravated child molestation could have been reversed solely on the reasoning that the Legislature did not intend to punish Dixon's conduct as a felony.[113]

The dissent used a plain meaning approach and determined that Dixon's conduct established both statutory rape and aggravated child If a statute is clear and unambiguous on its face, a judge adopting a plain meaning theory of statutory interpretation will only use the text of the statute to determine how to apply the Here, the dissent concluded aggravated child molestation ought to apply because the statute itself was

If the majority, as the dissent argued, misconstrued the rule of lenity and extended the rule's scope, then ***Dixon*** could have far reaching implications. First, the dissent argued that the use of the rule of lenity in ***Dixon*** makes the extent of injuries suffered by a victim of child molestation Thus, if a defendant was guilty of misdemeanor statutory rape, then "that is the only crime for which [the defendant may be This argument fails to acknowledge that a defendant could still be charged with crimes such as rape, sexual battery, and aggravated

Second, expanding the rule of lenity could affect the prosecution of other crimes. The dissent argued that under the majority's reasoning "one whose reckless driving kills another cannot be found guilty of the felony of vehicular homicide, because the rule of lenity limits his culpability to misdemeanor punishment under O.C.G.A. 40-6-390- Additionally, others contend that the majority's use of the rule

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113. ***See*** Brief for Appellants at i-iii, ***Dixon*** **(No.** S04A0072). Dixon's appeal contended three separate errors supported a reversal of his conviction. The first error was based on Legislative intent supported by the canons of statutory construction. The second error was based on the rule of lenity. The third error was that the punishment was unconstitutionally cruel and unusual.

114. ***Dixon,*** 278 Ga. at 15, 596 S.E.2d at 153 (Hines, Carley, and Thompson, **JJ.,** dissenting). ***See Sawnee Elec.,*** 273 Ga. at 705, 544 S.E.2d at 161 ("The use of plain and unequivocal language in a legislative enactment obviates any necessity for judicial construction").

115. ***Sawnee Elec.,*** 273 Ga. at 705, 544 S.E.2d at 161.

116. ***Dixon,*** 278 Ga. at 13-14, 596 S.E.2d at 152-53 (Hines, Carley, and Thompson, **JJ.,** dissenting).

117. *Id.* at 15, 596 S.E.2d at 153 (Hines, Carley, and Thompson, **JJ.,** dissenting).

118. *Id.* (Hines, Carley, and Thompson, **JJ.,** dissenting).

119. Dixon was found not guilty of each of these crimes.

120. ***Dixon,*** 278 Ga. at 11, 596 S.E.2d at 155-56 (Carley and Thompson, **JJ.,** dissenting). O.C.G.A. section 40-6-390(b) states that "every person convicted of reckless driving shall

of lenity will wreak havoc within the criminal justice system by overturning numerous convictions and changing how prosecutors charge For ***Dixon*** to have far reaching implications, courts will have to determine that the opinion expands the application of the rule of lenity. However, it is unlikely that courts will use ***Dixon*** to extend the scope of the rule of lenity.

The majority's use of the rule of lenity was "due to the conflicting nature of the two However, the first section of the majority's opinion argued the statutes "[showed] a clear legislative intent to prosecute the conduct that the jury determined to have occurred in this case as misdemeanor statutory Dixon's appeal was based on the argument that his conviction could be reversed by either: **(1)** determining that the Legislature clearly intended misdemeanor statutory rape to apply, ***or*** (2) if uncertainty existed ***then*** the rule of lenity ought to The majority opinion did not emphasize that the rule of lenity argument was an alternative justification for reversing the conviction.

The Motion for Reconsideration argued that applying the reasoning in ***Dixon*** would wreak havoc within the criminal justice system because of the improper use of the rule of However, this fear is likely unfounded because the use of the rule of lenity, even if improperly applied by the majority, was not necessary for Dixon's reversal. The majority, after concluding the Legislature intended to punish Dixon's conduct as a misdemeanor, stated "a number of sound legal arguments

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be guilty of a misdemeanor." O.C.G.A. 40-6-390(b) (2003).

121. Motion for Reconsideration at 11-16, ***Dixon*** (No. S04A0072); Brief of the District Attorneys' Association of Georgia In Support of the State's Motion For Reconsideration at 14-18, ***Dixon*** (No. S04A0072).

122. ***Dixon,*** 278 Ga. at 7, 596 S.E.2d at 150.

123. ***Id.*** at 5, 596 S.E.2d at 149.

124. ***See*** Brief for Appellant at 31, ***Dixon*** (No. S04A0072) (***"If this Court is not persuaded*** that Misdemeanor Statutory Rape is a clear expression of the General Assembly's intent. . . ***then it must acknowledge*** that the uncertainty in how the aggravated child molestation and statutory rape statutes are to be applied here." (emphasis added)).

125. For example, one convicted of possession of marijuana with the intent to distribute, a felony, could only be charged with a misdemeanor if he possessed less than one ounce of marijuana because possession of less than one ounce of marijuana is a misdemeanor. Also, before ***Dixon,*** using a weapon to rob a convenience store would lead to a conviction of armed robbery or robbery by force. After ***Dixon*** if the amount stolen was less than $500, then only the misdemeanor theft by taking applies. ***See*** Motion for Reconsideration at 11-16, ***Dixon*** (No. S04A0072); Brief of the District Attorneys' Association of Georgia In Support of the State's Motion For Reconsideration at 14-18, ***Dixon*** (No. S04A0072).

support this The use of the rule of lenity was just one of several reasons used by the majority to support its reversal of the conviction. The reversal was also supported by each canon of statutory construction used by the majority. Accordingly, rather than expanding the rule of lenity, future courts will likely determine the rule of lenity was dicta in ***Dixon.***

Even if the rule of lenity was critical to the holding, the majority's reasoning would only be applicable in very limited situations. The majority only arrived at the rule of lenity after concluding that the clear intent of the Legislature was to punish Dixon's conduct as a misdemean-

In the situations suggested by the Motion for Reconsideration and by the dissent, it is unlikely a judge would ever conclude the Legislature intended to punish the conduct as a misdemeanor. In these hypotheticals, the felony crime is more specific than the misdemeanor. In ***Dixon*** the majority argued the Legislature intended to punish Dixon's conduct as a misdemeanor because misdemeanor statutory rape contained age requirements that made it more specific than felony child

The State argued "the Supreme Court's decision in ***Dixon,*** has far reaching implications for the prosecution of criminal cases in Geor-

While it is impossible to fully know how the decision in ***Dixon*** will be used in the future, it is unlikely the majority's opinion will lead to numerous reversals of convictions or cause district attorneys to prosecute defendants differently. It is likely that courts will interpret ***Dixon*** in two ways: (1) that the use of the rule of lenity was dicta, or (2) that the rule of lenity, as used in ***Dixon,*** is only applicable when the Legislature's intent clearly shows a misdemeanor and not a felony is

Those who fear that ***Dixon*** will have a much greater impact than this Note recognizes can take comfort in knowing that the

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126. ***Dixon,*** 278 Ga. at ***5,*** 596 S.E.2d at 149.
127. *Id.*
128. *Id.*
129. Motion for Reconsideration at 16, ***Dixon*** (No. S04A0072).
130. Shortly before submitting this Note for publication, the Georgia Court of Appeals examined the use of the rule of lenity in ***Dixon.*** In ***Webb*** *v.* ***State*** a defendant guilty of felony child molestation and sexual battery argued that under the rule of lenity he should only be sentenced for sexual battery, which carried less jail time than child molestation. Nos. A04A0860, A04A0861, 2004 WL 2591257, at *2-3 (Ga. Ct. App. Nov. 16,2004). The court held that ***Dixon*** was not controlling and stated the rule of lenity was "among a number of. . . reasons" used to reverse Dixon's conviction. Additionally, "[n]o uncertainty exist[ed] concerning the applicable penal statute to be used in sentencing Webb." ***Id.*** While ***Webb,*** like ***Dixon,*** dealt with sexual abuse statutes, it supports the view that the rule of lenity in ***Dixon*** will not have far reaching implications.

court has expressly asked the Legislature to weigh in on the opinion by more clearly defining the type of conduct establishing child molestation when misdemeanor statutory rape is involved.[131]

After being released from prison on May 3, 2004, Marcus Dixon signed a football scholarship with Hampton University. He played in all of the teams twelve games and helped lead the Pirates to a Mid-Eastern Athletic Conference championship.

JED D. MANTON

131. *Dixon*, 278 Ga. at 8, 596 S.E.2d at 150.