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# THE GEORGIA DEFENDER

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## THE GEORGIA DEATH PENALTY HABEAS CORPUS REFORM ACT OF 1995

By Donald E. Wilkes, Jr.  
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On April 10, 1995, Gov. Zell Miller signed into law Georgia's Death Penalty Habeas Corpus Reform Act of 1995.<sup>1</sup> The Act is premised upon the following findings and determinations of the General Assembly: that through direct appeal, sentence review, and habeas corpus the state now provides persons sentenced to death "adequate opportunities" to assert their constitutional rights; that habeas corpus proceedings should not be used by persons sentenced to death "solely as a delaying tactic under the guise of asserting rights;" and that "strict compliance" with habeas corpus procedures "will prevent the waste of limited resources and will eliminate unnecessary delays in carrying out death sentences ...."<sup>2</sup>

The most important provisions of the Act are those which modify portions of Article 2 of Chapter 14 of Title 9 of the Official Code of Georgia Annotated.<sup>3</sup>

The first change the Act makes in Title 9 is that it amends O.C.G.A. §9-14-44, relating to the contents of postconviction habeas corpus petitions. Under §9-14-44, as amended by the section 3 of the Act, a habeas corpus petition, shall, in addition to what previously was required, (1) "state with specificity which claims were raised at trial or on direct appeal, providing appropriate citations to the trial or appeal record"; and (2) "in the case of prior habeas corpus petitions, shall state which claims were previously raised."<sup>4</sup>

A second change in Title 9 made by the Act is that it amends O.C.G.A. §9-14-48, relating to hearings, evidence, depositions, determination of compliance with procedural rules, and disposition of postconviction habeas corpus proceedings. The alterations in O.C.G.A. §9-14-48, made by section 6 of the Act, include: (1) depositions and affidavits are now the only forms of discovery allowed in postconviction habeas corpus proceedings, "except upon leave of court and a showing of exceptional circumstances;" (2) where sworn affidavits are to be introduced into evidence in a postconviction habeas corpus proceeding, the time for serving the affidavits upon the opposing party has now been altered from five to ten days in advance of the date set for a hearing in the case; (3) the affidavits so served must now include the address and telephone number, if known, of the affiant, and failure to provide this information shall render the affidavits inadmissible; and (4) in determining whether the habeas petitioner complied with procedural rules at trial and on direct appeal, the court is now specifically required to consider "whether, in the event the petitioner had new counsel subsequent to trial, the petitioner raised any claim of ineffective assistance of trial counsel on appeal ...."<sup>5</sup>

A third change made in Title 9 made by the Act is that it creates an entirely new section, applicable only to habeas corpus petitions which challenge for the first time state court proceedings resulting in a death sentence. O.C.G.A. §9-14-47.1, created by section 5 of the Act, provides as follows: (1) within 10 days of the filing of a habeas corpus petition challenging for the first time state court proceedings resulting in a death sentence, the superior court clerk of the county wherein the petition was filed shall give written notice of the filing of the petition to The Council of Superior Court Judges of Georgia, which notice shall be deemed to be a request for assistance under O.C.G.A. §15-1-9.1(b)(3), and within 30 days of receipt of such notice the president of the Council shall assign the case to a judge of a circuit other than the circuit in which the sentence was imposed; (2) The Council of Superior Court Judges shall establish, by uniform court rules, appropriate time periods and schedules applicable to habeas petitions filed on or after January 1, 1996, challenging for the first time state court proceedings resulting in a death sentence, which rules shall be adopted by the Georgia Supreme Court no later than December 31, 1995; (3) the new time periods and schedules in the rules shall include but not be limited to the following: (a) respondent's answer or motion

to dismiss, (b) amendments to the petition, (c) filing by either party of motions and responses to motions, (d) scheduling and conducting of evidentiary hearings, and (e) date of final order granting or denying relief; and (4) in habeas proceedings challenging for the second or a subsequent time a state court proceeding resulting in a death sentence, the petitioner shall not be entitled to invoke the provisions of this O.C.G.A. §9-14-47.1, the court shall expedite the proceedings, and the time limits shall not exceed those set for initial habeas petitions.<sup>6</sup>

The fourth change the Act makes in Title 9 is that it adds "Except as otherwise provided in Code Section 9-14-47.1 with respect to petitions challenging for the first state court proceedings resulting in a sentence of death," to the beginning of O.C.G.A. §9-14-47, which relates to the time limits within which the respondent must respond to the habeas petition.<sup>7</sup> Section 4 of the Act, which made this alteration to O.C.G.A. §9-14-47, is the only portion of the Act which did not take effect on April 10, 1995, when the Act was signed into law; Section 4 takes effect January 1, 1996.<sup>8</sup>

The Act also amends O.C.G.A. §15-1-9.1, relating to requesting judicial assistance from other courts. Under the Act, O.C.G.A. §15-1-9.1(b)(3) is amended, and a new O.C.G.A. §15-1-9.1(b)(4) is added, in order to bring the statutory provisions in Title 15 relating to requests for judicial assistance into conformity with O.C.G.A. §9-14-47.1.<sup>9</sup> Under O.C.G.A. §15-1-9.1(b)(3), as amended by the Act, when a habeas petition is filed challenging for the first time state court proceedings resulting in a death sentence, the superior court clerk acting in behalf of the chief judge shall make a request for assistance to The Council of Superior Court Judges, and within 30 days of receipt of the request the president of the Council shall, under guidelines promulgated by the executive committee of the Council, assign the case to a judge of a circuit other than the circuit in which sentence was imposed. Under the new O.C.G.A. §15-1-9.1(b)(4), added by the Act, when a habeas petition is filed challenging for the second or subsequent time a state court proceeding resulting in a death sentence, the chief judge of the circuit wherein the petition is filed may, upon certifying that the business of the court will be impaired unless assistance is obtained, request judicial assistance from The Council of Superior Court Judges; and if the request is made, the case shall within 30 days of receipt of the request be assigned to a judge of a circuit other than the circuit in which sentence was imposed.

On July 31, 1995, the Council of Superior Court Judges tentatively approved Rule 44 of the Uniform Rules for the Superior Courts.<sup>10</sup> Rule 44, entitled "Habeas Corpus Proceedings in Death Sentence Cases," is clearly designed to implement the provisions of O.C.G.A. §9-14-47.1 mandating court rules providing time periods and schedules for state habeas proceedings challenging a death sentence for the first time. Under the proposed Rule 44, which will not take effect until finally approved by the Council and then adopted by the Georgia Supreme Court by December 31, 1995, the following timetables are established: (1) the respondent shall respond to the habeas petition within 20 days after the filing of the petition, or within such further time as the court may set for good cause;<sup>11</sup> (2) the habeas petitioner may file pretrial motions within 60 days after the filing of the petition, and the respondent may file any motions within 90 days after the filing of the habeas petition;<sup>12</sup> (3) no later than 120 days after the filing of the habeas petition, the petitioner (a) may amend the petition, and (b) must complete any discovery allowed under O.C.G.A. §9-14-48;<sup>13</sup> (4) evidentiary hearings must be held within 180 days after the filing of the habeas petition,<sup>14</sup> and the transcript of the evidentiary hearing shall be made available to the parties and the court within 30 days after the evidentiary hearing;<sup>15</sup> (5) the petitioner may file any brief within 60 days after the evidentiary hearing, the respondent may file a responsive brief within 90 days after the evidentiary hearing, and within 100 days after the evidentiary hearing, the petitioner may file a responsive brief;<sup>16</sup> and (6) within 90 days after the filing of the respondent's brief, or of the petitioner's reply brief if one is filed, the court shall rule on the petition and issue its findings of fact and conclusions of law.<sup>17</sup>

Although the Georgia Death Penalty Habeas Corpus Reform Act of 1995 was pushed through the General Assembly by advocates of capital punishment who thought the Act would result in more and speedier executions in this state, it is questionable whether the complicated Act will actually have that effect. Indeed, it might have just the opposite effect; it may slow down the postconviction procedure process and may reduce the number of persons put to death by this state.

At any rate, it must be remembered that the writ of habeas corpus traditionally has been esteemed and held in especially high regard in Georgia. The writ became part of the law of Georgia at the very moment on February 12, 1733 when Gen. Oglethorpe first set foot on the soil of Georgia; in 1777, when Georgia adopted its first state constitution, it thereby became the first jurisdiction in the world to elevate access to the writ to the level of a constitutional right; at the Constitutional Convention in Philadelphia in 1787, the Georgia delegation voted against ever permitting suspension of the writ; and during the War Between the States Georgia spearheaded the opposition to an 1864 statute passed by the Confederate Congress suspending habeas corpus, which statute was in consequence allowed to expire later that same year without being renewed.<sup>18</sup> The death penalty's defenders may, therefore, eventually discover that endeavoring to tamper with the writ of habeas corpus in order to facilitate executions is a vain effort; the spirit of liberty embodied in and protected by habeas corpus is far stronger and more permanent than the primitive passion--so frequently encountered today--to punish criminals by killing them in the name of the law.

## FOOTNOTES

1. 1995 Ga. Laws 381. Section 1 of the Act, which gives the statute its name, is uncodified.
2. 1995 Ga. Laws 381, 381-82. Section 2 of the Act, which contains these findings and determinations, is uncodified.
3. Title 9 is entitled "Civil Practice;" Chapter 3 of Title 9 is entitled "Habeas Corpus;" and Article 2 of Chapter 3 is entitled "Procedure for Persons Under Sentence of State Court of Record."
4. 1995 Ga. Laws 381, 382 (amending O.C.G.A. §9-14-44). Certain other changes in O.C.G.A. §9-14-44 made by the Act will not be discussed here.
5. 1995 Ga. Laws 381, 383-84 (amending O.C.G.A. §9-14-48).
6. 1995 Ga. Laws 381, 383 (enacting O.C.G.A. §9-14-47.1).
7. 1995 Ga. Laws 381, 382-83 (amending O.C.G.A. 9-14-47).
8. 1995 Ga. Laws 381, 385 (§4 of the Act takes effect on Jan. 1, 1996; the other sections of the Act take effect when the Act becomes law).
9. 1995 Ga. Laws 381, 384-85 (amending O.C.G.A. §15-1-9.1(b)(3) and adding O.C.G.A. §15-1-9.1(b)(4)).
10. Proposed Amendments to the Uniform Superior Court Rules, Ga. St. B. J., at 50 (Oct. 1995).
11. Rule 44.3; see Ga. St. B. J., at 50 (Oct. 1995).
12. Rule 44.6; see Ga. St. B. J., at 50 (Oct. 1995).
13. Rule 44.7; see Ga. St. B. J., at 50 (Oct. 1995).
14. Rule 44.9; see Ga. St. B. J., at 51 (Oct. 1995).
15. Rule 44.10; see Ga. St. B. J., at 51 (Oct. 1995).
16. Rule 44.11; see Ga. St. B. J., at 51 (Oct. 1995).
17. Rule 44.12; see Ga. St. B. J., at 51 (Oct. 1995).
18. See generally Donald E. Wilkes, Jr., A New Role For an Ancient Writ: Postconviction Habeas Corpus Relief in Georgia (Part I), 8 Ga. L. Rev. 313, 313-315, 326, 332-35 (1974).

## ACQUITTALS

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**State v. Robert Foster Warnock**  
**Cobb County Superior Court**

The Defendant was indicted in a nine count indictment for the offense of Rape, Aggravated Child Molestation and Cruelty to Children. The two alleged victims were the nieces of the Defendant.

The State's evidence consisted of the testimony of the alleged victims, a counselor of one alleged victim, and other witnesses who gave testimony of the Defendant's relationship with his nieces.

The Defendant offered alibi evidence, general good character, impeachment testimony, and evidence of general bad character of the alleged victims.

The jury acquitted the Defendant on all nine counts following a four day trial.

The Defendant was represented by GACDL member Hylton B. Dupree and Russell D. King of Marietta.

**State v. Nathaniel Hayes**  
**Chatham County State Court**

The Defendant was charged with vehicular homicide, improper turning movement, and improper right turn. Lucinda Knox, a bicyclist, was killed in Savannah when she approached the intersection of MLK Boulevard and Bay Street at the same time as an eighteen wheel tractor trailer truck. The prosecution alleged that the tractor trailer truck turned right from MLK Boulevard onto Bay Street from the wrong lane, thereby causing the death of the bicyclist.

In support of its case, the prosecution called four witnesses, but only two of those witnesses actually saw the tractor trailer turn. The defense called four eye witnesses who testified that the tractor trailer truck turned from its proper lane and that the death of the bicyclist was merely an accident. Significantly, the defense's case was anchored by the testimony of the two traffic fatality investigators from the Savannah Police Department who testified that their investigation revealed that the Defendant had done nothing improper or illegal and that there was no merit to the prosecution of the Defendant. The