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THE GREAT WRIT HIT: THE CURTAILMENT OF HABEAS CORPUS IN GEORGIA SINCE 1967

DONALD E. WILKES, JR.^{*}

“Its history and function in our legal system and the unavailability of the writ [of habeas corpus] in totalitarian societies are naturally enough regarded as one of the decisively differentiating factors between our democracy and totalitarian governments.”¹

Capt. Jeffrey T. Spaulding (Groucho): We’ll go to court, and we’ll get out a writ of habeas corpus.

Signor Emanuel Ravelli (Chico): You’re gonna get rid-a what?²

ABSTRACT

A welcome development, the landmark Georgia Habeas Corpus Act of 1967 modernized and vastly expanded the availability of postconviction habeas corpus relief in the Georgia court system. Since the early 1970s, however, there has been an unfortunate trend of imposing crippling restrictions on use of the Georgia writ of habeas corpus to obtain postconviction relief. Six restrictive Georgia habeas statutes, enacted between 1973 and 2004, have, among other things, reduced the number of claims which may be asserted in postconviction habeas proceedings, curtailed appeals of postconviction habeas decisions denying relief, and created a maze of procedural barriers to obtaining postconviction habeas relief. Moreover, in a dispiriting manifestation of lack of

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1. *Daniels v. Allen*, 344 U.S. 443, 512 (1953).

2. *ANIMAL CRACKERS* (Paramount Pictures 1930).

appreciation for Great Writ, five lamentable Georgia Supreme Court decisions, handed down between 1975 and 2012, have severely limited postconviction habeas corpus, both substantively and procedurally.

Part II of this Article examines the six statutes curbing Georgia habeas corpus, while Part III explores the five Georgia Supreme Court decisions. Part IV points out the current weakened condition of the Georgia postconviction habeas remedy, deplores the sinister success of the law enforcement establishment in denigrating and politicking against postconviction remedies, and offers suggestions and strategies for restoring the habeas remedy to its former greatness as our legal system's most efficient protector of personal liberty.

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I. INTRODUCTION

The Georgia Habeas Corpus Act of 1967³ was a landmark statute, which modernized the availability of postconviction habeas corpus in the Georgia court system.⁴ Among other things, the 1967 Georgia Habeas Act greatly expanded the number of cognizable claims for relief and swept away numerous procedural rules which stood as irksome obstacles to obtaining relief.⁵ The 1967 Act made claims of violations of

3. 1967 Ga. Laws 835. The key provisions of the 1967 Act were borrowed from the Illinois Post-Conviction Hearing Act of 1949, as can be seen by comparing the two statutes. The text of the Illinois statute is reprinted at 9 F.R.D. 365-66 (1950). Unlike the Illinois statute, however, Georgia's 1967 Habeas Act did not grant a right to postconviction counsel for petitioners seeking relief under the Act. (In the context of postconviction litigation, the right to postconviction counsel is the right of an indigent applying for postconviction relief to an appointed attorney.).

4. See generally Donald E. Wilkes, Jr., *Postconviction Habeas Corpus Relief in Georgia: A Decade After the Habeas Corpus Act*, 12 GA. L. REV. 249, 249 (1978) (discussing the narrow availability of habeas corpus relief in Georgia) [hereinafter *Postconviction Habeas Corpus Relief in Georgia*]; Donald E. Wilkes, Jr., *A New Role for an Ancient Writ: Postconviction Habeas Corpus Relief in Georgia (Part II)*, 9 GA. L. REV. 13, 52-57 (1974) (examining the history of the Georgia Habeas Corpus Act of 1967) [hereinafter *A New Role for an Ancient Writ Part II*]; Donald E. Wilkes, Jr., *A New Role for an Ancient Writ: Postconviction Habeas Corpus Relief in Georgia (Part I)*, 8 GA. L. REV. 313, 319 (1974) (expressing various reasons why the Habeas Corpus Act of 1967 expanded protections of the writ in Georgia) [hereinafter *A New Role for an Ancient Writ Part I*].

5. *A New Role for an Ancient Writ Part II*, *supra* note 4, at 52-57. Under the 1967 Georgia Habeas Act, superior courts are the only courts vested with

rights, rather than claims of lack of jurisdiction, the usual basis for granting postconviction habeas relief, and made it unlikely that a petitioner's claim of a violation of a federal constitutional right would be rejected for purely procedural reasons.⁶ The 1967 Act was enacted in response to federal court decisions widening the availability of the federal writ of habeas corpus for state convicts.⁷ Indeed, the Act was enacted at a time when the federal writ of habeas corpus was at its apogee,⁸ a time when "a strong interest in upholding the Constitution usually outweighed principles of waiver and finality, so that a federal court was

jurisdiction to hear postconviction habeas corpus petitions, *i.e.*, habeas petitions filed by persons restrained of their liberty under sentence of a state court of record. *See* 1967 Ga. Laws 835, § 3 (current version at O.C.G.A. § 9-14-43 (West, Westlaw through 2014)) (granting jurisdiction to hear postconviction habeas corpus petitions to superior courts in Georgia).

6. 1967 Ga. Laws 835, § 3.

7. *Postconviction Habeas Corpus Relief in Georgia*, *supra* note 4, at 267; *A New Role for an Ancient Writ Part II*, *supra* note 4, at 39-52. Georgia was not the only state to do this. In the 1950's, 1960's, and 1970's, numerous states modernized their state postconviction relief machinery in response to the expansion of federal habeas corpus for state convicts. *See* 1 DONALD E. WILKES, JR., *STATE POSTCONVICTION REMEDIES AND RELIEF HANDBOOK* 36-45 (2013) (discussing the modernization of state postconviction relief throughout history) [hereinafter *STATE POSTCONVICTION* 2013].

8. From DONALD E. WILKES, JR., *FEDERAL POSTCONVICTION REMEDIES AND RELIEF* 136 (1996) (footnotes omitted) [hereinafter *FEDERAL POSTCONVICTION* (1996)]:

In the 1930's, 1940's, and 1950's, the [United States] Supreme Court and the lower federal courts gradually liberalized federal habeas corpus for state prisoners In the 1960's the United States underwent a 'criminal procedure revolution' under the leadership of the Warren Court The criminal procedure revolution included . . . the transformation of the federal writ of habeas corpus into an effective instrument for enforcing [federal constitutional rights] By the early 1970's, when the criminal procedure revolution ended, federal habeas corpus for state prisoners had acquired an 'extraordinary prestige' and had become the principal instrument for assuring that state criminal proceedings were conducted in accordance with federal constitutional requirements The Warren Court . . . was committed to a 'manifest federal policy that federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary federal judicial review.'

generally able to consider a petitioner's constitutional claims."⁹

Beginning around 1972, however, as a result of changes in its membership, the United States Supreme Court, in an unusual display of judicial activism running contrary to its previous trend of expanding and liberally construing postconviction remedies, commenced handing down decision after decision narrowing the availability of federal habeas relief for persons convicted in a state court.¹⁰ These decisions hobbled the federal writ of habeas corpus by, among other things, constructing new procedural obstacles to relief¹¹ and by imposing new substantive

9. Ronald J. Tabak & J. Mark Lane, *Judicial Activism and Legislative "Reform" of Federal Habeas Corpus: A Critical Analysis of Recent Developments and Current Proposals*, 55 ALB. L. REV. 1, 19 n.65 (1991).

10. For an overview of these decisions for the period 1972 to 1996, see FEDERAL POSTCONVICTION (1996), *supra* note 8, at 136-37 (delineating various procedural and substantive limitations on the writ of habeas corpus). See generally Stephen B. Bright, *Is Fairness Irrelevant?: The Evisceration of Federal Habeas Corpus Review and Limits on the Ability of States' Courts to Protect Fundamental Rights*, 54 WASH. & LEE L. REV. 1 (1997); Barry Friedman, *A Tale of Two Habeas*, 73 MINN. L. REV. 247 (1988); Joseph L. Hoffmann, *The Supreme Court's New Vision of Federal Habeas Corpus for State Prisoners*, 1989 SUP. CT. REV. 165 (1989); Emanuel Margolis, *Habeas Corpus: The No-Longer Great Writ*, 98 DICK. L. REV. 557 (1994); Karl N. Metzner, *Habeas Corpus in the Supreme Court in 1992: Confusion, Illusion, and Limitation*, 1 GEO. MASON IND. L. REV. 33 (1992); Kathleen Patchel, *The New Habeas*, 42 HASTINGS L.J. 939 (1991); Yale L. Rosenberg, *Kaddish for Federal Habeas Corpus*, 59 GEO. WASH. L. REV. 362 (1991); Robert Weisberg, *A Great Writ While It Lasted*, 81 J. CRIM. L. & CRIMINOLOGY 9 (1990); Ann Woolhandler, *Demodeling Habeas*, 45 STAN. L. REV. 575 (1993).

11. See, e.g., *Coleman v. Thompson*, 501 U.S. 722, 730 (1991) (explaining how the "state ground doctrine" bars federal habeas corpus); *McCleskey v. Zant*, 499 U.S. 467, 487 (1991) (describing various forms of procedural errors that would bar habeas relief); *Murray v. Carrier*, 477 U.S. 478, 497 (1986) (denying habeas review of a petitioner's "procedurally defaulted" discovery claim); *Engle v. Isaac*, 456 U.S. 107, 108-09 (1982) ("[A] state prisoner, barred by procedural default from raising a constitutional claim on direct appeal, may not litigate that claim in a § 2254 habeas corpus proceeding without showing cause for and actual prejudice from the default."); *Wainwright v. Sykes*, 433 U.S. 72, 81 (1977) (claim that confession was obtained in violation of federal constitutional right was procedurally defaulted in state court system because it was not raised at trial,

limits¹² on federal habeas corpus.¹³ Some of the Court's opinions in these cases are written in a querulous, chastening tone indicative of the Court's distaste for habeas litigation and

and therefore is barred in federal habeas corpus, absent cause and prejudice); *Francis v. Henderson*, 425 U.S. 536, 542 (1976) (federal habeas claim that blacks had been excluded from the state grand jury that had indicted habeas petitioner was barred, absent a showing of prejudice, because the claim was not raised before trial as required by state law). *See generally* Stephen B. Bright, *Death by Lottery – Procedural Bar of Constitutional Claims in Capital Cases Due to Inadequate Representation of Indigent Defendants*, 92 W. VA. L. REV. 679 (1990); Alan W. Clarke, *Procedural Labyrinths and the Injustice of Death: A Critique of Death Penalty Habeas Corpus (Part One)*, 29 U. RICH. L. REV. 1327 (1995); Alan W. Clarke, *Procedural Labyrinths and the Injustice of Death: A Critique of Death Penalty Habeas Corpus (Part Two)*, 30 U. RICH. L. REV. 303 (1996); Jack A. Guttenberg, *Federal Habeas Corpus, Constitutional Rights, and Procedural Forfeitures: The Delicate Balance*, 12 HOFSTRA L. REV. 617 (1984); Graham Hughes, *Sandbagging Constitutional Rights: Federal Habeas Corpus and the Procedural Default Principle*, 16 N.Y.U. REV. L. & SOC. CHANGE 321 (1987-88); Maria L. Marcus, *Federal Habeas Corpus After State Court Default: A Definition of Cause and Prejudice*, 53 FORDHAM L. REV. 663 (1985).

12. *See, e.g.*, *Teague v. Lane*, 489 U.S. 288, 305-10 (1989) (subject to two exceptions, federal habeas corpus cannot be used as a vehicle to create new constitutional rules of criminal procedure); *Stone v. Powell*, 428 U.S. 465, 494 (1976) (“[W]here the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial.”). *See generally* Marc M. Arkin, *The Prisoner's Dilemma: Life in the Lower Federal Courts After Teague v. Lane*, 69 N.C. L. REV. 371 (1991); James S. Liebman, *More Than “Slightly Retro:” The Rehnquist Court's Rout of Habeas Corpus Jurisdiction in Teague v. Lane*, 18 N.Y.U. REV. L. & SOC. CHANGE 537 (1990-91); Karl N. Metzner, *Anatomy of an Upset: The Supreme Court's Shocker on Habeas Retroactivity*, 28 CRIM. L. BULL. 521 (1992); Ira P. Robbins & James E. Sanders, *Judicial Integrity, the Appearance of Justice, and the Great Writ of Habeas Corpus: How to Kill Two Thirds (or More) with One Stone*, 15 AM. CRIM. L. REV. 63 (1977); David M. Snyder, *Habeas Corpus: Stoned But Not Dead*, 19 CRIM. L. BULL. 197 (1983).

13. These decisions had their desired effect of “transforming the federal writ of habeas corpus from a broad and effective postconviction remedy into an attenuated remedy available only in extraordinary circumstances.” FEDERAL POSTCONVICTION (1996), *supra* note 8, at 137.

its dislike of federal postconviction review.¹⁴ They convey the impression that the writ of habeas corpus just might be a candidate for Public Enemy No. 1. Then, in the midst of the Supreme Court's unrelenting assault on and weakening of the federal habeas remedy, the beleaguered remedy received an additional staggering blow when Congress enacted Title I of the Antiterrorism and Effective Death Penalty Act of 1996,¹⁵ which, for the first time in the nation's history, amended the federal habeas corpus statutes for the purpose of drastically restricting the power of federal courts to grant habeas relief to state prisoners whose conviction or sentence was obtained in violation of their federal constitutional rights under the federal Bill of Rights or the Fourteenth Amendment.¹⁶

As the effectiveness of the federal habeas corpus remedy for state prisoners has steadily declined over the past four decades due to both judicial activism and legislative enactment, there has during the same period also been a marked decline in Georgia's habeas corpus remedy. Georgia's retrenchment is closely connected to the federal retrenchment. Just as

14. The majority opinions in *Engle v. Isaac*, 456 U.S. 107 (1982), and *Stone v. Powell*, 428 U.S. 465 (1976), are classic examples.

15. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214-1319 (1996), available at <http://www.gpo.gov/fdsys/pkg/PLAW-104publ132/content-detail.html>.

16. See FEDERAL POSTCONVICTION (1996), *supra* note 8, at 510 (discussing the United States Supreme Court case law developments in the 1970's and the enactment of Title I of the Antiterrorism and Effective Death Penalty Act of 1996 and their effects on the writ of habeas corpus). See also Daniel Klaidman, "The Great Writ" Hit, *NEWSWEEK*, May 6, 1996, at 72 ("E[nglish judges invented it]. A[braham] L[incoln] suspended it. Wrongly convicted prisoners rely on it. And last week Congress and the president bruised it badly."). For a recent Supreme Court decision describing the severe restrictions the 1996 Act placed on the granting of federal habeas corpus relief to state convicts, and emphasizing the enormous deference the Act requires federal habeas courts now to give to state court criminal judgments, see *Cullen v. Pinholster*, 131 S. Ct. 1388 (2011). In 2010 and 2011, the Court, on appeals by prison wardens, reversed lower federal courts 10 times on grounds that those courts had exceeded the limits placed by the 1996 Act on the power of the federal courts to grant habeas relief. *Hill v. Humphrey*, 662 F.3d 1335, 1343 (11th Cir. 2011).

enlargement of federal habeas corpus once had the effect of encouraging Georgia to expand its state writ of habeas corpus, so curtailment of federal habeas corpus has emboldened Georgia to curtail its habeas corpus remedy. This curtailment has been effected principally by legislation but also by judicial decision.¹⁷

Part II of this Article explores the curtailment of the Georgia writ of habeas corpus by six statutes enacted since 1967, while Part III examines five notably egregious post-1967 Georgia Supreme Court decisions curtailing the Georgia writ. Part IV, the conclusion, surveys the damaging changes in habeas corpus that have occurred since 1967, calls for the abandonment of what is called the “finality fetish”, points out the lack of love the law enforcement establishment has for habeas corpus, and, finally, reminds us of some important things we used to be aware of back when the protection of our rights was the overarching concern in postconviction habeas proceedings.

II. STATUTORY CURTAILMENT OF GEORGIA HABEAS CORPUS SINCE 1967

Six times since 1967 – in 1973, 1975, 1982, 1986, 1999, and 2004 – the Georgia legislature has statutorily curtailed habeas corpus.¹⁸ One of these six statutes restricts both postconviction

17. Georgia is not the only state to cut back on state postconviction relief in response to these federal developments. In recent years numerous states have imposed new restrictions on state postconviction remedies. At least 38 states, for example, have now added statutes of limitations applicable in postconviction cases. *See* STATE POSTCONVICTION 2013, *supra* note 7, at 12-13 (listing those aforementioned states). In 1970, by contrast, only three states had such statutes of limitations. *Id.* at 13.

18. Since 1967, five additional statutes relating to Georgia habeas corpus have been enacted which do not curtail habeas corpus but instead deal with matters of court administration or funding in habeas cases. *See* 2004 Ga. Laws 420, § 3 (codified at O.C.G.A. § 38-3-62(7) (West, Westlaw through 2014)) (authorizing extension of time to file habeas petition when judicial emergency is declared); 1985 Ga. Laws 883, § 1 (codified at O.C.G.A. § 9-10-14 (West, Westlaw through 2014)) (providing for model form of postconviction habeas petition required to be used by certain inmates); 1985

and pre-conviction habeas corpus proceedings; the other five statutes restrict only postconviction habeas corpus proceedings.

Ga. Laws 440, § 1 (codified as amended at O.C.G.A. §15-6-17(a) (West, Westlaw through 2014)) (authorizing superior court judges in a county in which a state correctional institution is located to conduct postconviction habeas corpus proceedings involving inmates of the institution in a suitable room at the institution); 1980 Ga. Laws 390, § 1 (codified at O.C.G.A. § 17-10-36(d) (West, Westlaw through 2014)) (in death sentence cases, procedures governing the writ of habeas corpus may be employed to assert rights or seek remedies if the Unified Review Procedure procedures established in the rules of the Supreme Court as applied to the petitioner are inadequate or ineffective in any constitutional sense); 1978 Ga. Laws 2051, § 1 (codified as amended at O.C.G.A. § 9-14-53 (West, Westlaw through 2014)) (providing for a habeas corpus clerk in certain counties and authorizing reimbursement to certain counties for expenses incurred in post-conviction habeas proceedings). One other post-1967 habeas statute was the Georgia Death Penalty Habeas Corpus Reform Act of 1995, 1995 Ga. Laws 381 (codified at O.C.G.A. §§ 9-14-44, 9-14-47, 9-14-47.1, 9-14-48 (West, Westlaw through 2014), and 15-1-9.1(3), (4) (West, Westlaw through 2014)). For analysis of the 1995 statute, see John A. Creasy, Jr., *Habeas Corpus: Amend Procedures for First Time Challenges to State Court Death Sentence Proceedings; General Provisions: Require Establishment of Uniform Court Rules Concerning Time Periods and Schedules*, 12 GA. ST. U. L. REV. 18, 20 (1995); Donald E. Wilkes, Jr., *The Georgia Death Penalty Habeas Corpus Reform Act of 1995*, GA. DEFENDER, Nov. 1995, at 1. The 1995 Act was designed primarily to expedite postconviction habeas proceedings in death sentence cases, and an un-codified portion of the statute, 1995 Ga. Laws, § 1, seems to endorse the law enforcement establishment's pro-death penalty talking point that death row inmates are using habeas corpus "solely as a delaying tactic under the guise of asserting rights . . ." See 1995 Ga. Laws 381, § 2(2).

Nevertheless, taking the provisions of the 1995 Act into account as a whole, it would probably be inaccurate to regard the 1995 statute as an example of curtailment of habeas corpus. *But see* Gibson v. Turpin, 513 S.E.2d 186, 197 (Ga. 1999) (Fletcher, P.J., dissenting) (recognizing that the 1995 Act imposes strict time limitations on habeas petitions in death penalty cases; these strict time limits discourage lawyers from providing pro bono assistance because they "do not permit adequate time to become familiar with the Byzantine requirements of habeas corpus law."); Jill Wasserman, Note, *Has Habeas Corpus Been Suspended in Georgia? Representing Indigent Prisoners on Georgia's Death Row*, 17 GA. ST. U. L. REV. 605, 613-615 (2000) (examining, under Georgia Death Penalty Habeas Corpus Reform Act of 1995, specific time limits and schedules for habeas proceedings in death sentence cases).

A. 1973 Statute

The first statute cutting back on the availability of habeas relief in Georgia was enacted only six years after passage of the Georgia Habeas Corpus Act of 1967. The 1973 statute¹⁹ was enacted to deal with situations where a habeas petitioner files a second or subsequent habeas petition raising a claim omitted from the original habeas petition.²⁰ Under the 1973 statute, such a claim cannot be entertained on the merits, subject to two exceptions.²¹

19. 1973 Ga. Laws 1314, § 1 (originally codified at GA. CODE § 50-127(10) (1973); now codified at O.C.G.A. § 9-14-51 (West, Westlaw through 2014)):

All grounds for relief claimed by a petitioner for a writ of habeas corpus shall be raised by a petitioner in his original or amended petition. Any grounds not so raised are waived unless the Constitution of the United States or of this state otherwise requires or unless any judge to whom the petition is assigned, on considering a subsequent petition, finds grounds for relief asserted therein which could not reasonably have been raised in the original or amended petition.

20. If the habeas petition (whether successive or not) raises a claim decided against the petitioner on the direct appeal, the claim is regarded as *res judicata*, unless there is newly discovered evidence bearing on the claim or there has been a change in the law subsequent to the previous habeas proceeding. *See, e.g.,* *Humphrey v. Morrow*, 717 S.E.2d 168, 178 (Ga. 2011) (emphasis in original):

This Court allows claims to be revisited on habeas corpus where new facts have developed since the time of the direct appeal not because the Court intends to allow prisoners to have a second chance to *prove* their claims but, instead, because a claim that is based on facts that did not actually exist at the time of direct appeal is essentially a different claim.

The same *res judicata* principle applies if the habeas petition raises a claim decided adversely to the petitioner in the previous habeas proceeding. *Id.*

21. The statute actually says that, subject to the two exceptions, the claim is “waived.” O.C.G.A. § 9-14-51 (West, Westlaw through 2014). “‘Waiver’ is a vague term used for a great variety of purposes . . . in the law.” *Green v. United States*, 355 U.S. 184, 191 (1957). Traditionally, “it connotes some kind of voluntary knowing relinquishment of a right.” *Green*, 355 U.S. at 191. In 1973, the United States Supreme Court announced that “[a]lmost without exception, the requirement of a knowing and intelligent waiver has been applied only to those rights which the Constitution guarantees to a

Prior to 1967 in Georgia, a successive habeas petition raising a claim not included in the original petition was governed by the judicially created abuse of writ doctrine, under which “a court would refuse to entertain the substantive allegations of a habeas corpus petition whenever they had been withheld from an earlier petition.”²² The Georgia Habeas Corpus Act of 1967

criminal defendant in order to preserve a fair trial.” *Schneckloth v. Bustamonte*, 412 U.S. 218, 237 (1973). “The question of whether the defendant himself ha[s] to knowingly waive the right or whether his counsel could waive it without consulting him depend[s] on the nature of the right at issue.” *Tabak & Lane, supra* note 9, at 19 n.67 (citing to *Fay v. Noia*, 372 U.S. 391, 439 (1963)). Constitutional rights of a criminal defendant, which are inherently personal – for example, the right to jury trial and the right to testify – can be waived only by the defendant personally. *FEDERAL POSTCONVICTION* (1996), *supra* note 8, at 681.

Intentional relinquishment of a known right is not the only meaning of waiver in regard to the law of postconviction remedies.

Another principal meaning of waiver in the postconviction context has to do with whether the defendant has forfeited the right to complain to the courts about the violation of his rights as a consequence of having committed a procedural default. “A procedural default consists of the failure of a defendant to comply with a state’s procedural rule governing the timing or manner for asserting errors in criminal proceedings [or postconviction proceedings].” *Barry Friedman, A Tale of Two Habeas*, 73 MINN. L. REV. 247, 288 (1988). “The failure to follow legitimate procedural rules that result in the loss of a remedy is often referred to as a ‘waiver,’ ‘forfeiture’ or ‘[procedural] default.’” *Guttenberg, supra* note 11, at 619 n.4. In this sense, waiver “describe[s] those situations where rights or remedies are lost by operation of law regardless of the parties’ volitional actions.” *Guttenberg, supra* note 11, at 620. A right which may no longer be asserted in court because it was not raised in compliance with a procedural rule is, therefore, commonly said to be “waived,” “barred,” “forfeited,” or “procedurally defaulted.”

In postconviction statutes and postconviction case law, therefore, “waiver” is sometimes used to refer to an intentional relinquishment of rights and sometimes to refer to a failure to raise a rights claim at the time or in the manner required by a procedural rule.

In this Article, depending on the context, “waiver” sometimes refers to a knowing relinquishment of rights and at other times to a loss of the right to raise a rights claim, due to a previous failure to properly raise the claim in court.

22. *A New Role for an Ancient Writ*, Part II *supra* note 4, at 361.

abolished the abuse of writ doctrine²³ and replaced it with a different, more petitioner-friendly rule which (1) authorized dismissal of a subsequent habeas petition on grounds it was successive only where in the previous habeas proceeding there had been an evidentiary hearing on the merits or a hearing on an issue of law, and (2) permitted the court to entertain a successive habeas petition even though it raised a new ground for relief deliberately withheld from the earlier petition.²⁴

The 1973 statute repealed the petitioner-friendly provision of the 1967 Act governing successive habeas petitions that presented a new claim for relief, and replaced it with the following:

All grounds for relief claimed by a petitioner for a writ of habeas corpus shall be raised by a petitioner in his original or amended petition. Any grounds not so raised are waived unless the Constitution of the United States or of this state otherwise requires or unless any judge to whom the petition is assigned, on considering a subsequent petition, finds

23. *Postconviction Habeas Corpus Relief in Georgia*, *supra* note 4, at 265.

24. 1967 Ga. Laws 835, 838 § 3 (codified at GA. CODE § 50-127(10) (1967) (repealed 1973)):

Where after an evidentiary hearing on the merits of a material factual issue, or after a hearing on the merits of an issue of law, a person in custody pursuant to the judgment and sentence of a court has been denied relief upon application for a writ of habeas corpus, a subsequent application for a writ of habeas corpus on behalf of such person need not be entertained by the court unless the application alleges and is predicated upon a ground not adjudicated on the hearing of the earlier application for the writ, and unless the court is satisfied that the applicant has not on the earlier application deliberately withheld the newly asserted ground or otherwise abused the writ.

For a survey of judicial interpretation of the 1967 version of § 50-127(10) during the six years before it was repealed, see *A New Role for an Ancient Writ*, Part II *supra* note 4, at 63-66. The text of the 1967 version of §50-127(10) was borrowed verbatim from former 28 U.S.C. § 2244(b) (1966), a federal habeas corpus statute enacted in 1966 but repealed 30 years later by Title I of the Antiterrorism and Effective Death Penalty Act of 1996. For a discussion of judicial interpretation of the 1966 version of 28 U.S.C. § 2244(b), see RONALD P. SOKOL, *FEDERAL HABEAS CORPUS* 190-92 (1969).

grounds for relief asserted therein which could not reasonably have been raised in the original or amended petition.²⁵

For most practical purposes, the effect of the 1973 statute was (with slight modifications) “to reestablish the abuse of writ doctrine which was in effect until it was abolished by the 1967 [Habeas Corpus] Act.”²⁶ The 1973 statute established a procedural default rule under which omitting to raise a claim in a habeas petition may very well result in the claim being barred in a subsequent habeas petition by the same petitioner, regardless of the merits of the claim.

“The Georgia Supreme Court has explained that the purpose of the procedural rule [created by the 1973 statute] is to bar successive petitions [raising a claim omitted from the initial petition].”²⁷ Specifically, the purpose of the 1973 statute was “to discontinue the practice of filing multiple habeas corpus petitions under a single conviction.”²⁸ Thus, “[u]nder Georgia law, a prisoner seeking habeas corpus relief must present all of his grounds for relief in his original petition.”²⁹ However, the 1973 statute does not “prohibit separate habeas . . . petitions attacking different convictions based on separate trials.”³⁰

Pursuant to the 1973 statute, the Georgia Supreme Court has upheld or ordered the dismissal of numerous successive habeas petitions, even in death sentence cases, without inquiring into their merits, on the ground the successive petition raised a claim that was omitted from a previous petition filed by the same

25. 1973 Ga. Laws 1314, § 1 (originally codified at GA. CODE § 50-127(10) (1973); now codified at O.C.G.A. § 9-14-51 (West, Westlaw through 2014)). This law is derived from a 1973 Maine postconviction statute, which in turn was derived from the Illinois Post-Conviction Hearing Act of 1949. See *infra* note 46.

26. *Postconviction Habeas Corpus Relief in Georgia*, *supra* note 4, at 265 (footnote omitted).

27. *Mincey v. Head*, 206 F.3d 1106, 1136 (11th Cir. 2000); *Hunter v. Brown*, 223 S.E.2d 145, 146 (Ga. 1976).

28. *Brown*, 223 S.E.2d at 146.

29. *Head*, 206 F.3d at 1136.

30. *Brown*, 223 S.E.2d at 146.

petitioner.³¹

The 1973 statute does not focus on whether the habeas petitioner or his attorney knowingly and voluntarily relinquished a known right, but instead on whether the claim for relief is procedurally barred because, in violation of the statute, it was not raised in the first habeas petition. Under the 1973 statute, there is an objective test for determining whether a claim not raised in a previous petition is defaulted and hence barred in the subsequent habeas proceeding.³² A claim is defaulted “if a reasonable person would have raised the omitted claim in the first petition,”³³ even if the habeas petitioner did not knowingly or subjectively intend the waiver,³⁴ even if the petitioner has been sentenced to death,³⁵ and even if in the initial habeas proceeding the petitioner was acting *pro se*.³⁶

31. *See, e.g.*, Gaither v. Sims, 387 S.E.2d 889, 889 (Ga. 1990) (reversing habeas grant based on procedural waiver); Tucker v. Kemp, 351 S.E.2d 196, 198 (Ga. 1987) (denying habeas relief on the basis that petitioner could have raised claim in earlier state petition); Gunter v. Hickman, 348 S.E.2d 644, 645 (Ga. 1986) (denying habeas relief based on failure to raise issue in original habeas petition not considered a “miscarriage of justice”); Smith v. Zant, 301 S.E.2d 32, 32 (Ga. 1983) (holding that habeas court’s refusal to hear petition on the merits was not error when the issue had already been raised in the first and second petitions); Dix v. Zant, 294 S.E.2d 52, 528 (Ga. 1982) (affirming lower court’s denial of habeas relief because “any and all grounds for relief could reasonably have been raised in the original or amended petition of habeas corpus”); Fuller v. Ricketts, 214 S.E.2d 541, 542 (Ga. 1975) (affirming motion to dismiss based on waiver of grounds not raised in original petition).

32. Presnell v. Kemp, 835 F.2d 1567, 1572 n.15 (11th Cir. 1988) (as applicable to successive habeas petitions, the 1973 statute “requir[es] an objective standard of waiver”).

33. *Id.*

34. *Id.*

35. *See, e.g.*, Hall v. Lee, 684 S.E.2d 868, 884 (Ga. 2009) (“The habeas court correctly found that portion of Lee’s claim ‘wherein he assert[ed] his death sentence [wa]s disproportionate’ was *res judicata*.”); *Tucker*, 351 S.E.2d at 198-99 (providing examples of past decisions of defaulted claims in death penalty cases); *Smith*, 301 S.E.2d at 34.

36. McCoy v. Newsome, 953 F.2d 1252, 1259 (11th Cir. 1992):

Georgia has imposed a procedural rule requiring any state prisoner collaterally attacking his sentence by way of a petition for writ of

Under the terms of the 1973 statute, the Georgia Supreme Court has explained:

[A] subsequent habeas petition effects a waiver on any grounds not originally raised, subject to two exceptions. First, where the state or the federal Constitution provides otherwise; and second, if the judge presiding finds other grounds in the subsequent petition which could not reasonably have been raised in the original or amended petition.”³⁷

There do not appear to be any Georgia Supreme Court cases where the first exception was found to authorize a successive petition.³⁸ There are cases where the Court has found a successive petition to be permissible under the second exception.³⁹

habeas corpus to present all grounds for relief in the petition or amendment thereto . . . The Georgia procedural default rule does not provide an exception to its requirements for pro se prisoners.

37. *Dix v. Zant*, 294 S.E.2d 527, 528 (Ga. 1982). *See also Smith*, 301 S.E.2d at 34 (ruling that in order to be so entitled to a hearing on a successive habeas petition raising a claim not raised in the earlier petition, “the petitioner must raise grounds which are either constitutionally non-waivable or which could not reasonably have been raised in the earlier petition.”).

38. In *Gaither v. Sims*, 387 S.E.2d 889 (Ga. 1990), for example, the Georgia Supreme Court reversed a superior court ruling that an involuntary guilty plea claim based on *Boykin v. Alabama*, 395 U.S. 238 (1969), was constitutionally non-waivable and hence could be raised in a successive habeas petition even though it had been omitted from the convicted person’s first habeas petition. The Georgia Supreme Court held that “[t]he habeas trial court’s holding that a *Boykin* claim is non-waivable was error. . .” *Gaither*, 387 S.E.2d at 889.

39. *See, e.g., Gibson v. Head*, 646 S.E.2d 257, 260 (Ga. 2007) (“[T]he habeas court erred in relying on the assumption that Gibson could have discovered his trial attorney’s conflict of interest prior to filing his first habeas petition to reach the conclusion that Gibson’s conflict of interest claim was barred as successive.”); *Bruce v. Smith*, 553 S.E.2d 808, 810 (Ga. 2001) (holding that a successive habeas petition was permissible where the claim omitted from the previous petition was based upon a court decision decided after the previous petition); *Fleming v. Zant*, 386 S.E.2d 339, 340 n.1 (Ga. 1989) (“We limit our review to an examination of the impact of the newly amended statute on the validity of Fleming’s death sentence because this is the only issue that has not been previously decided and could not

The 1973 statute sometimes results in a habeas claim being barred not only in a Georgia prisoner's state habeas corpus proceeding, but also in the prisoner's subsequent federal habeas corpus proceeding. The United States Supreme Court has held that a state prisoner (including a death row inmate) who applies for federal habeas corpus may be denied relief on procedural grounds, without an inquiry into the merits of his federal constitutional claim, if the claim was procedurally defaulted in the course of the state postconviction proceedings.⁴⁰ Stated differently, if, in the course of seeking state postconviction relief (including habeas relief), the convicted person violated a state procedural rule regulating how and when his claim for relief should be asserted, and if, as a result of that procedural default, the claim is procedurally barred in the courts of the state, the claim may also be barred in a federal habeas proceeding.⁴¹ The 1973 statute is, of course, a procedural rule which regulates state postconviction proceedings and which,

reasonably have been raised in Fleming's previous petitions for habeas corpus."); *Smith v. Zant*, 301 S.E.2d 32, 37 (Ga. 1983) (allowing successive habeas petition when there was previously unavailable evidence that the prosecution had violated due process by failing to reveal false witness testimony at trial); *Jarrell v. Zant*, 284 S.E.2d 17, 17 (Ga. 1981) (finding successive habeas petition was permissible where the claim omitted from the previous petition was based upon a court decision decided after the previous petition).

40. *See, e.g., Coleman v. Thompson*, 501 U.S. 722, 729-30 (1991) (dismissing federal habeas proceeding by state death row inmate without inquiring into its merits because the inmate's lawyers seeking state appellate court review of denial of state postconviction habeas relief filed the appeal after expiration of the time for appeal).

The Court further held that the only situation in which a procedural default committed in a state postconviction proceeding would not bar federal habeas relief would be if the petitioner could show either (1) cause for and actual prejudice resulting the default or (2) actual innocence of the crime for which the petitioner was convicted (both of which are narrowly defined and extremely difficult to prove). *Id.* at 750-51. The petitioner in this case, the Court concluded, had made no such showing, and therefore his federal habeas petition had to be dismissed. *Id.* at 752-57. The Court also formally overruled *Fay v. Noia*, 372 U.S. 391 (1963) (or what was left of it by then). *Id.* at 750.

41. *Id.* at 752-757.

when violated, may operate to bar consideration of the merits of a claim omitted from the initial habeas petition and raised for the first time in a successive habeas petition.

Adhering to United States Supreme Court precedents, the United States Court of Appeals for the Eleventh Circuit has held that, even in death sentence cases, a Georgia prisoner may be denied federal habeas relief, and the merits of his federal claim not inquired into, if the claim is barred in the Georgia court system because, in violation of the 1973 statute, it was omitted from the prisoner's initial state habeas petition.⁴² The federal

42. *See, e.g.,* Conner v. Hall, 645 F.3d, 1277, 1287 (11th Cir. 2011) (citation omitted):

[I]f the decision of [the state] court rests on a state law ground that is independent of the federal question and adequate to support the judgment . . . unless a petitioner can show cause for the failure to properly present the claim and actual prejudice, or that the failure to consider the claim would result in a fundamental miscarriage of justice.

See also Ogle v. Johnson, 488 F.3d 1364, 1370 (11th Cir. 2007) (“The Georgia statute . . . can and should be enforced in federal habeas proceedings against claims never presented in state court, unless there is some indication that a state court judge would find the claims in question ‘could not reasonably have been raised in the original or amended [state] petition.’”); Mincey v. Head, 206 F.3d 1106, 1124 (11th Cir. 2000) (ruling that 21 of the 25 claims the petitioner presented in his federal habeas claim were procedurally barred because they had not been previously presented in state court); Chambers v. Thompson, 150 F.3d 1324, 1327 (11th Cir. 1998) (barring petitioner’s federal claims on basis of procedural default in the state habeas petition); Alderman v. Zant, 22 F.3d 1541, 1549 (11th Cir. 1994) (“Where a state court has ruled in the alternative, addressing both the independent state procedural ground and the merits of the federal claim, the federal court should apply the state procedural bar and decline to reach the merits of the claim . . .”) (quoting Harmon v. Barton, 894 F.2d 1268, 1270 (11th Cir.)); Burger v. Zant, 983 F.2d 1129, 1135 (11th Cir. 1993) (ruling that “[a]ccordingly, the procedural default and abuse of the writ doctrines serve as a procedural bar and preclude habeas corpus relief”); Stevens v. Zant, 968 F.2d 1076, 1089 (11th Cir. 1992) (holding that “the district court was correct in refusing to consider Stevens’ claim under the Fifth and Fourteenth Amendments” because they were not presented until the third habeas petition); McCoy v. Newsome, 953 F.2d 1252, 1262 (11th Cir. 1992) (refusing to hear the federal habeas claims of the petitioner because they were procedurally barred).

habeas court may decide that the claim was forfeited under the 1973 statute even if the Georgia courts have not passed upon the issue.⁴³ If the federal court concludes that the claim is barred in the Georgia court system under the 1973 statute, the merits of the claim may be examined by the federal habeas court only in the extremely unlikely event that the petitioner shows either that there is cause for and actual prejudice resulting from the default, or that he is factually innocent of the crime.⁴⁴

The origins of the Georgia's 1973 statute are to be found in, first, a Maine postconviction statute enacted in 1963, on which the Georgia statute was modeled, and, second, a 1972 United States Supreme Court decision interpreting the Maine statute.

In 1972 the United States Supreme Court decided *Murch v. Mottram*,⁴⁵ in which the Court enforced a 1963 Maine postconviction habeas corpus statutory provision which was almost identical to the 1973 Georgia statute. Expressing approval of the Maine statutory provision,⁴⁶ the Supreme Court held that federal habeas relief should not have been granted to a state prisoner based on a federal claim which, in violation of the Maine statute, had been omitted from the petitioner's first state postconviction petition.⁴⁷ The Court concluded that, under the circumstances of the case, the federal habeas petitioner had

43. See, e.g., *Chambers*, 150 F.3d at 1327 (ruling that because the petitioner's state habeas claims would be procedurally defaulted, they are also barred in his federal habeas claim).

44. See, e.g., *Conner*, 645 F.3d at 1287; *Putman v. Head*, 268 F.3d 1223, 1228 (11th Cir. 2001) ("[W]e conclude that . . . [f]or the third issue, [a]ppellant has made the necessary substantial showing [of actual prejudice]. We grant a COA on the third issue and address only that issue in this opinion."); *Mincey*, 206 F.3d at 1124.

45. *Murch v. Mottram*, 409 U.S. 41 (1972).

46. "There can be no doubt that States may . . . provide, as Maine has done, that a prisoner seeking post-conviction relief must assert all known constitutional claims in a single proceeding." *Id.* at 45. The 1973 Maine statute itself seems to have been based on a section of the Illinois Post-Conviction Hearing Act of 1949 which provided: "Any claim of substantial denial of constitutional rights not raised in the original or amended petition [for postconviction relief] is waived." 9 F.R.D. 347, 365 (1950).

47. *Mottram*, 409 U.S. at 47.

deliberately bypassed state court procedures and thereby waived the federal claim he had withheld from his initial state habeas petition.⁴⁸

Murch was decided at a time when Supreme Court case law prohibited violations of state procedural rules from barring federal habeas relief except where the habeas petitioner had deliberately bypassed state procedures,⁴⁹ and the Court purported to apply the deliberate bypass principle in deciding the case. Nevertheless, in retrospect the decision was a harbinger of the Court's decisions, soon to come, which would replace the deliberate bypass rule with the cause and prejudice rule, under which it is far more likely that courts will deny habeas petitions for procedural reasons, without ever ruling on the merits of the constitutional violations alleged in the habeas petition.

Since the Court in *Murch* reversed a federal appellate court decision in favor of the habeas petitioner, the decision also presaged the numerous future habeas decisions in which the Court would exhibit a penchant for hearing appeals by prison wardens complaining about a grant of habeas relief and for then reversing the lower court for having overprotected a habeas petitioner's rights.⁵⁰

48. *Id.*

49. *See, e.g.,* *Humphrey v. Cady*, 405 U.S. 504 (1972); *Jackson v. Denno*, 378 U.S. 368 (1964); *Fay v. Noia*, 372 U.S. 391 (1963), *overruled by* *Coleman v. Thompson*, 501 U.S. 722 (1991).

50. *See, e.g.,* *Goeke v. Branch*, 514 U.S. 115 (1995); *Caspari v. Bohlen*, 510 U.S. 383 (1994); *Gilmore v. Taylor*, 508 U.S. 333 (1993); *Lockhart v. Fretwell*, 506 U.S. 364 (1993); *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992); *Estelle v. McGuire*, 502 U.S. 62 (1991); *Collins v. Youngblood*, 497 U.S. 37 (1990); *Saffle v. Parks*, 494 U.S. 484 (1990); *Duckworth v. Eagan*, 492 U.S. 195 (1989); *Lockhart v. Nelson*, 488 U.S. 33 (1988); *Lowenfield v. Phelps*, 484 U.S. 231 (1987); *Ricketts v. Adamson*, 483 U.S. 1 (1987); *Murray v. Carrier*, 477 U.S. 478 (1986); *Lockhart v. McCree*, 476 U.S. 162, 165 (1986); *Moran v. Burbine*, 475 U.S. 412 (1986); *Morris v. Mathews*, 475 U.S. 237 (1986); *Nix v. Whiteside*, 475 U.S. 157 (1986); *Wainwright v. Witt*, 469 U.S. 412 (1984); *Nix v. Williams*, 467 U.S. 431 (1984); *Strickland v. Washington*, 466 U.S. 668 (1984); *Wainwright v. Goode*, 464 U.S. 78 (1983); *Marshall v. Lonberger*, 459 U.S. 422 (1982); *Engle v. Isaac*, 456

The circumstances in which the Supreme Court upheld enforcement of the 1963 Maine statute which served as the model for the 1973 Georgia statute were far different from circumstances in which the Georgia statute is usually applied. In *Murch v. Mottram* the habeas petitioner (as was his statutory right under the Maine postconviction statute) was represented by court-appointed counsel and made his decision to omit claims only after he was informed in open court by the judge and also by his counsel of the dangers of omitting claims from his initial postconviction petition.⁵¹ In Georgia, by contrast, the 1973 statute is typically applied in situations where the petitioner is acting *pro se*; where the petitioner is not informed in person by the judge in the courtroom of the consequences of failing to comply with the 1973 statute; and where, if the petitioner does violate the statute, the violation rarely can be said to have amounted to a deliberate bypassing of the statute or a knowing and voluntary waiver of a constitutional claim. Furthermore, *Murch v. Mottram* involved a noncapital sentence, whereas the 1973 Georgia statute sometimes procedurally bars the claims of death row inmates.

B. 1975 Statute

In 1975, eight years after its enactment, the Georgia Habeas Corpus Act of 1967 was amended restrictively for the second time. The 1975 statute⁵² limited the availability of

U.S. 107 (1982); *Smith v. Phillips*, 455 U.S. 209 (1981); *Sumner v. Mata*, 449 U.S. 539 (1980); *Parker v. Randolph*, 442 U.S. 62 (1979); *Arizona v. Washington*, 434 U.S. 497 (1978); *Manson v. Braithwaite*, 432 U.S. 98 (1977); *Wainwright v. Sykes*, 433 U.S. 72 (1977); *Stone v. Powell*, 428 U.S. 465 (1976); *Estelle v. Williams*, 425 U.S. 501 (1976); *Caldwell v. Lewis*, 417 U.S. 583 (1974); *Michigan v. Tucker*, 417 U.S. 433 (1974); *Illinois v. Somerville*, 410 U.S. 458 (1973); *Cady v. Dombrowski*, 413 U.S. 433 (1973); *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973); *Tollett v. Henderson*, 411 U.S. 258 (1973); *Adams v. Williams*, 407 U.S. 143 (1972).

51. *Mottram*, 409 U.S. at 43-44.

52. 1975 Ga. Laws 1143, §§ 1-3 (originally codified as GA. CODE § 50-127(1), (7), (11) (1975), now codified as amended at O.C.G.A. §§ 9-14-42(a)-(b), 9-14-52 (West, Westlaw through 2014)).

postconviction habeas relief in two important respects. First, it made it likely that a habeas claim relating to the composition of a grand or petit jury would be procedurally barred – and hence not considered on the merits – if the claim had not been properly raised at trial. Second, the 1975 statute abolished appeals of right from habeas decisions denying postconviction relief.⁵³

1. Barring Grand and Petit Jury Claims Based on Procedural Default

One of the most intriguing features of the Georgia Habeas Corpus Act of 1967 was its emphasis on deciding federal constitutional claims on the merits. It imposed what has been called a high waiver standard for relinquishing federal constitutional rights. Under the Act, a federal constitutional claim raised in a postconviction habeas proceeding was not to “be deemed to have been waived unless it is shown that there was an intentional relinquishment of a known right or privilege which relinquishment or abandonment was participated in by the party and was done voluntarily, knowingly and intelligently.”⁵⁴

Under this high waiver standard, federal constitutional claims could, as a general rule, be raised via state habeas corpus even though the claim could have been but was not raised at trial.⁵⁵

53. *Id.* The 1975 Act made other changes in the 1967 Habeas Act, but they do not require discussion in this Article.

54. 1967 Ga. Laws 835, § 3 (codified at GA. CODE § 50-127(1) (1967) (amended 1975, repealed 1982).

55. *See, e.g.,* McDuffie v. Jones, 283 S.E.2d 601, 603 (Ga. 1981), *overruled on other grounds by* West v. Waters, 533 S.E.2d 88 (2000):

Because the constitutional rights of persons accused and convicted of crimes, if not identical, are substantially the same under both the state and federal constitutions, the waiver standard as to state constitutional rights would be controlled in most instances by the statutory waiver standard for federal constitutional rights (and we will not deal here with the waiver standard for state constitutional rights, if any, which may be in addition to federal constitutional rights).

As the Georgia Supreme Court has acknowledged,⁵⁶ the standard was derived from *Fay v. Noia*,⁵⁷ the 1963 United States Supreme Court decision which for about a decade governed the effect of state procedural defaults on federal habeas proceedings, after which time the Court began to subvert the decision step by step until it was officially overruled in 1991. Under *Fay v. Noia*, violations of state procedural rules did not bar federal habeas relief except where the habeas petitioner had deliberately bypassed state procedures.⁵⁸ *Fay v. Noia* defined a

See also *Smith v. Garner*, 222 S.E.2d 351, 354 (Ga. 1976):

Although appellant's earlier counsel did not raise the present constitutional grounds in the first habeas case, it is clear that appellant did not waive them as he tried to raise them and did not voluntarily, knowingly and intelligently relinquish or abandon these grounds which he now seeks to assert through his present counsel.

See also *Blaylock v. Hopper*, 212 S.E.2d 339, 340 (Ga. 1975) (noting that a valid waiver exists only when "the defendant intentionally relinquishes or abandons a known right or privilege"); see also *Spencer v. Zant*, 715 F.2d 1562, 1583 (11th Cir. 1983) (remanding petitioner's jury challenge and challenge to constitutionality of death penalty). See generally *Postconviction Habeas Corpus Relief in Georgia*, *supra* note 4, at 260 ("The Georgia Supreme Court has consistently held that a claimed denial of such a right shall not be considered waived for purposes of habeas corpus relief merely because the petitioner did not timely and properly object in the sentencing court to the alleged denial."); *A New Role for an Ancient Writ*, Part II *supra* note 4, at 59-60.

56. See *McDuffie*, 283 S.E.2d at 603 n.1 (federal habeas petition raising claim that blacks were systematically excluded from the trial jury that convicted petitioner; according to the state, this claim is procedurally defaulted because it was not properly preserved under Georgia procedural law; the court held the claim was not forfeited under governing Georgia law at the time of petitioner's trial).

57. *Fay v. Noia*, 372 U.S. 391, 399 (1963).

58. *Id.* at 438 ("We therefore hold that the federal habeas judge may in his discretion deny relief to an applicant who has deliberately bypassed the orderly procedure of the state courts and in so doing has forfeited his state court remedies.").

Three habeas decisions of the former United States Court of Appeals for the Fifth Circuit between June 1964 and March 1965 construed *Fay v. Noia* to mean that a federal habeas corpus petitioner convicted in Georgia could raise a federal claim he had not raised in the Georgia courts, provided the petitioner had not in the state court proceedings intentionally relinquished or

deliberate bypass as “an intentional relinquishment or abandonment of a known right or privilege.”⁵⁹

The high waiver standard meant, among other things, that a petitioner in a Georgia state habeas corpus proceeding was permitted to raise federal constitutional claims relating to the composition of the grand jury that had indicted him or the petit jury that had convicted him, even though he could have, but did not, raise those claims at his criminal trial.⁶⁰

In 1973, however, in one of the earliest of its line of major decisions enlarging the circumstances under which a procedural default committed at trial would bar a federal habeas claim, the United States Supreme Court decided *Davis v. United States*.⁶¹

abandoned a known right. *A New Role for an Ancient Writ*, Part II, *supra* note 4, at 41-50.

59. *Noia*, 372 U.S. at 439.

60. *See, e.g., Spencer v. Zant*, 715 F.2d 1562, 1569-71 (11th Cir. 1983) (federal habeas petition raising claim that blacks were systematically excluded from the trial jury that convicted petitioner; according to the state the claim was procedurally defaulted because it was not properly preserved under Georgia procedural law; the 11th Circuit held the claim was not forfeited; under governing Georgia law at the time of petitioner’s trial, rights conferred or secured by the Constitution of the United States were not be deemed waived unless it was shown that there was an intentional relinquishment or abandonment of a known right or privilege which relinquishment or abandonment was participated in by the party and was done voluntarily, knowingly and intelligently); *Lumpkin v. Ricketts*, 551 F.2d 680, 682 (5th Cir. 1977) (same); *O’Neal v. Caldwell*, 203 S.E.2d 191, 192 (Ga. 1974); *Pass v. Caldwell*, 200 S.E.2d 720, 721 (Ga. 1973) (considering defendant’s challenge to the grand jury venire); *Mitchell v. Smith*, 194 S.E.2d 414, 418 (Ga. 1972) (“The habeas corpus court was therefore in error in refusing to hear evidence on the question of the illegal composition of the jury, which question had not previously been decided.”); *Johnson v. Caldwell*, 187 S.E.2d 844, 849 (Ga. 1972) (considering defendant’s jury discrimination claim). *But see Atkins v. Martin*, 194 S.E.2d 463, 464 (Ga. 1972) (“The failure of the petitioner to raise any question as to the make-up of the jury until after verdict constitutes a waiver of any contention as to the legality of the same.”).

61. *Davis v. United States*, 411 U.S. 233 (1973). This postconviction case involving a federal rather than a state prisoner was brought not under the federal habeas statute but under 28 U.S.C. § 2255 (Supp. V 2011), a related statute which governs postconviction proceedings by federal convicts. Nonetheless, because the § 2255 remedy is commensurate with and

In *Davis*, the Court referred to a federal criminal procedure rule providing that defenses and objections based on defects in the institution of the prosecution or in the indictment might be raised only by motion before trial, and held that failure to so present such defenses or objections constitutes a waiver thereof unless the court shown grants relief from the waiver for cause.⁶² A federal prisoner seeking postconviction relief was barred from raising, for the first time, a claim of unconstitutional discrimination in the composition of a grand jury where there was no plausible explanation of the failure to timely make objection to the composition of the grand jury.⁶³

Recognizing that if a federal prisoner was, under the *Davis* decision, barred from attacking via 28 U.S.C. § 2255 the grand jury's composition because he failed under federal criminal procedure rules to raise the grand jury claim at trial, the former United States Court of Appeals for the Fifth Circuit soon reasoned that "no principle relative to the Great Writ of Habeas Corpus compels the conclusion that a state prisoner stands in any better position."⁶⁴ Therefore, in decisions beginning early in 1974, that Court upheld denials of federal habeas relief to state convicts raising claims of unlawful selection of a grand or petit jury, not on the merits, but on the procedural ground that the prisoners had failed, in violation of state procedural rule requirements, to raise the claim at trial.⁶⁵ These federal court decisions, each of which, without an inquiry into the merits of a petition for postconviction relief involving a jury claim, upheld the dismissal of the petition based on a procedural default that did not amount to a deliberate bypassing, set the stage for the

equivalent to habeas corpus and is intended to substitute for habeas corpus when federal prisoners collaterally attack their convictions or sentences, decisions involving this remedy are usually regarded as having equal application to federal habeas corpus proceedings involving state prisoners.

62. *Id.* at 236.

63. *Id.* at 242.

64. *Rivera v. Wainwright*, 488 F.2d 275, 277 (5th Cir. 1974).

65. *See, e.g., id.*; *Jones v. Henderson*, 494 F.2d 47, 48 (5th Cir. 1974); *Marlin v. Florida*, 489 F.2d 702, 703 (5th Cir. 1974).

1975 Georgia statute.⁶⁶

The 1975 statute carved out an exception to the high waiver standard established by the 1967 Habeas Act, but only with respect to claims involving the composition of a grand or petit jury. Clearly, the 1975 statute was enacted with *Davis v. United States* and its former Fifth Circuit progeny in mind.

The 1975 statute added the following italicized wording to the waiver provisions of the 1967 Act:

*Except for objections relating to the composition of a grand or traverse jury, rights conferred or secured by the Constitution of the United States shall not be deemed to have been waived unless it is shown that there was an intentional relinquishment or abandonment of a known right or privilege which relinquishment was participated in by the party and was done voluntarily, knowingly, and intelligently. The right to object to the composition of the grand or traverse jury will be deemed waived under this section, unless the person challenging the sentence shows in the petition and satisfies the court that cause exists for his being allowed to pursue the objection after the conviction and sentence has otherwise become final.*⁶⁷

The 1975 statute, like the 1973 statute, uses the term waiver to refer to a rule of procedural default. Under the statute, a jury composition claim is barred, even in a death sentence case, if the habeas petitioner committed the procedural default of failing to raise the issue at his trial, irrespective of whether he had knowingly or intentionally decided to relinquish his rights.⁶⁸ This is subject to the statutory exception for cases where the petitioner is able to satisfy the court that there is cause for his being allowed to pursue the objection after the conviction and

66. See *supra* notes 60 and 65 and accompanying text.

67. 1975 Ga. Laws 1143, § 1 (originally codified at GA. CODE § 50-127(1) (1975), now codified at O.C.G.A. § 9-14-42(b) (West, Westlaw through 2014)).

68. See, e.g., *Godfrey v. Francis*, 308 S.E.2d 806 (Ga. 1983); *Smith v. Zant*, 301 S.E.2d 32 (Ga. 1983); *Zant v. Gaddis*, 279 S.E.2d 219 (Ga. 1981); *Patterson v. Balkcom*, 266 S.E.2d 179 (Ga. 1980); *Pulliam v. Balkcom*, 263 S.E.2d 123 (Ga. 1980).

sentence have become final.⁶⁹ Adhering to the federal approach as to the effect of a procedural default on the subsequent invocation of a federal claim in a federal habeas proceeding, the Georgia Supreme Court has held that in order to satisfy the cause exception to the 1975 statute's default rule, the petitioner must show both cause for the noncompliance with the rule and actual prejudice resulting from the violation of his constitutional rights.⁷⁰ The 1975 statute itself says nothing of prejudice.

Like procedural defaults under the 1973 statute, a default under the 1975 statute may effect a double whammy on a habeas petitioner. This is because a jury composition claim barred in a Georgia habeas proceeding under the 1975 statute will also be procedurally barred in federal court, even in death sentence cases, if the convicted person then files a federal habeas petition but fails to show cause and prejudice for the default.⁷¹

2. *Abolition of Appeals of Right From Denials of Postconviction Habeas Relief*

In addition to restricting postconviction attacks on the composition of a grand or petit jury, the 1975 Act also abolished the right of persons denied postconviction relief to take a direct appeal to the Georgia Supreme Court from the denial.

Traditionally, the final orders of superior courts granting or denying habeas relief, including postconviction relief, have been appealable of right.⁷² The 1975 Act, however, provided

69. See *supra* note 68 and accompanying text.

70. *Id.*

71. See, e.g., *Lancaster v. Newsome*, 880 F.2d 362, 375 (11th Cir. 1989) ("Lancaster must establish cause for and actual prejudice from this procedural default in order to excuse the untimely jury claim."); *Birt v. Montgomery*, 725 F.2d 587, 597 (11th Cir. 1984) ("Before we can hear the merits of his jury composition challenge on collateral attack, Birt must show cause for his failure to raise the challenge before the trial court and actual prejudice from that failure.").

72. For the appealability of final orders of superior courts in habeas cases from 1846 (when the newly created Georgia Supreme Court began hearing cases) through the end of the Civil War, see Donald E. Wilkes, Jr., *From*

that, with respect to orders denying postconviction habeas relief, “no appeal shall be allowed unless a justice of the Supreme Court of Georgia shall issue a certificate of probable cause for such appeal.”⁷³ Application for the certificate of probable cause had to be filed with the clerk of the Georgia Supreme Court within 30 days from entry of the order of the superior court denying relief.⁷⁴ The 1975 statute left intact the traditional power of the state to appeal as of right a postconviction habeas order granting relief.⁷⁵ It also left intact the right of habeas petitioners charged with a crime but not yet convicted to appeal a denial of relief.⁷⁶ For persons seeking appellate review of a

Oglethorpe to the Overthrow of the Confederacy: Habeas Corpus in Georgia, 1733–1865, 45 GA. L. REV. 1015, 1039-40 (2011), and for the appealability of such orders from 1865 to 1965, see Donald E. Wilkes, Jr., *The Great Writ in the Peach State: Georgia Habeas Corpus, 1865–1965*, 22 J. S. LEG. HIST. (forthcoming 2014). The 1967 Georgia Habeas Act specifically provided that final orders in habeas corpus proceedings under the Act would be appealable of right. *See* 1967 Ga. Laws 835, 838-839 § 3 (codified at GA. CODE § 50-127(11) (1967) (repealed 1975)). *See also* O.C.G.A. § 9-14-22 (West, Westlaw through 2014) (regulating appeals in non-postconviction habeas cases).

73. 1975 Ga. Laws, § 3 (originally codified at Ga. Code § 50-127(11)(a), now codified as amended at O.C.G.A. § 9-14-52(a), (b) (West, Westlaw through 2014)).

74. *Id.* Under these provisions, the habeas petitioner who seeks appellate review of a denial of postconviction relief must not only file an application for a certificate of probable cause to appeal within 30 days with the Georgia Supreme Court, but also file within the same time period a notice of appeal with the superior court. *See, e.g., Roberts v. Cooper*, 691 S.E.2d 875 (Ga. 2010).

75. *See Reed v. Hopper*, 219 S.E.2d 409, 411 (Ga. 1975) (“The 1975 Habeas Corpus Act provides . . . that if the trial court finds in favor of the petitioner, no certificate of probable cause need be obtained by the respondent as a condition precedent to appeal.”); STATE POSTCONVICTION 2013, *supra* note 7, at 681 (“If the final order grants relief, no certificate of probable cause need be obtained by the state in order to appeal.”).

76. *See, e.g., Smith v. Nichols*, 512 S.E.2d 279, 281-82 (Ga. 1999) (“[S]ince appellant filed his habeas petition while in custody in lieu of bond awaiting a probation revocation hearing, he was authorized under § 9–14–22 to appeal directly the denial of habeas relief.”); *Kearse v. Paulk*, 448 S.E.2d 369, 370 (Ga. 1994) (considering habeas corpus relief for petitioner who was indicted but not yet charged); *Reed v. Stynchcombe*, 290 S.E.2d 469, 469

denial of a postconviction habeas corpus petition, however, the 1975 statute replaced appeal of right with a discretionary appeal.⁷⁷

In *Reed v. Hopper*,⁷⁸ decided the year the 1975 statute was enacted, the habeas petitioner attacked the portions of the statute stripping habeas petitioners of their right to appeal denials of postconviction relief, asserting that the statute was “just a clever piece of legislation that was promoted by the Attorney General of the State of Georgia to deny [the petitioner] his constitutional

(Ga. 1982) (considering Reed’s petition while he was “in custody in lieu of bond pending trial”).

77. See *Nichols*, 512 S.E.2d at 281:

[The 1975 statute] does not authorize a prisoner to appeal directly the denial of a [postconviction] petition for habeas corpus relief . . . [The 1975 statute] requires this Court to engage in a discretionary review process concerning an appeal from the habeas court’s denial of relief to a prisoner held under a sentence of a state court of record, thereby making unauthorized a direct appeal from the denial of a post-trial habeas petition.

See also *Mancill v. Hall*, 545 F.3d 935, 939-40 (11th Cir. 2008) (“Georgia law does not allow for a direct appeal as of right of the denial of a habeas petition but rather provides for a discretionary appeal procedure whereby an unsuccessful petitioner may seek a certificate of probable cause to appeal to the Supreme Court of Georgia.”); *Crosson v. Conway*, 728 S.E.2d 617, 619 (Ga. 2012) (“[A]n unsuccessful post-conviction habeas petitioner who desires to appeal must file, within 30 days of entry of the final order, both a notice of appeal with the clerk of the habeas court and an application for certificate of probable cause with the clerk of this Court.”); *Fullwood v. Sivley*, 517 S.E.2d 511, 514 (Ga. 1999) (quoting *Patterson v. Earp*, 363 S.E.2d 248, 248 (Ga. 1988)):

O.C.G.A. § 9-14-52(b) requires an application for certificate of probable cause to appeal habeas corpus denials . . . [C]ompliance with that requirement is jurisdictional . . . Although an application for a certificate of probable cause was filed in this case, it was late. There is no legal distinction between the failure to file any application and the failure to file a timely application.

Rule 36, GA. SUP. CT. R., governs applications for a certificate of probable cause filed in that Court: “A certificate of probable cause to appeal a final judgment in a habeas case involving a criminal conviction will be issued where there is arguable merit, provided there has been compliance with O.C.G.A. § 9-14-52(b).”

78. *Reed v. Hopper*, 219 S.E.2d 409 (Ga. 1975).

right to have his appeal heard by the full bench of the Supreme Court of Georgia.”⁷⁹ Over the strong dissents of two justices, the Court held that the provisions of the statute abolishing appeals of right for postconviction habeas petitioners were constitutional, except to the extent they permitted a single justice to grant or deny an application for a certificate of probable cause.⁸⁰ The Court held that it would effectuate the state legislature’s intent by deciding all applications for a certificate of probable cause by the Court sitting as a body and by a quorum of the justices.⁸¹ The Court rejected the contention that it was a violation of equal protection to grant the state but not the habeas petitioner a right to appeal adverse decisions of the habeas corpus court.⁸²

The dissenting justices would have struck down the 1975 statute insofar as it did away with the right of habeas petitioners to appeal denials of relief but preserved the appellate rights of the state:

The doctrine of “selective review,” created by . . . the 1975 Habeas Corpus Act, is a dangerous one and is clearly unconstitutional . . . [T]o classify the prisoner and the warden in a different category for appeal is not a reasonable classification, amounts to invidious discrimination, and is a denial of equal protection of the law.⁸³

The certificate of probable cause requirement is now regarded as jurisdictional in nature.⁸⁴ Failure to obtain the certificate

79. See *Postconviction Habeas Corpus Relief in Georgia*, *supra* note 4, at 261 n.88 (1978) (quoting Brief for Appellant, *Reed v. Hopper*, 219 S.E.2d 409 (Ga. 1975)).

80. *Hopper*, 219 S.E.2d at 410-11.

81. *Id.* at 411. The codified successor of the 1975 statute, as amended, now provides that it is “the Supreme Court [which] will either grant or deny the application [for a certificate of probable cause].” O.C.G.A. § 9-14-52(b) (West, Westlaw through 2014).

82. *Id.* at 411-12.

83. *Id.* at 412-413 (Jordan, J., dissenting).

84. See, e.g., *Wade v. Battle*, 379 F.3d 1254, 1263 (11th Cir. 2004) (“[T]he Georgia Supreme Court has unequivocally held that compliance with O.C.G.A. § 9-14-52(b) is jurisdictional.”); *Crosson v. Conway*, 728 S.E.2d

means the appeal will be dismissed, even if a timely notice of appeal was filed in the superior court.⁸⁵ A decision of the Georgia Supreme Court to deny a certificate of probable cause is unreviewable (except in those extremely rare cases where the United States Supreme Court reverses a decision denying the certificate of probable cause).⁸⁶

As a consequence of the abolition of appeals of right for postconviction habeas petitioners there has been a noticeable decrease in the number of Georgia Supreme Court cases reviewing denials of postconviction habeas relief. An examination of volumes 231 through 233 of the *Georgia Reports* shows that, in 1974, the last full year before enactment of the 1975 statute, and at a time of fewer convictions and fewer prison inmates than now, there were (excluding cases handled summarily and without an opinion) 38 Georgia Supreme Court decisions involving an appeal from a denial of postconviction habeas relief. In 2010, in contrast, the Georgia Supreme Court heard 25 such appeals but denied a certificate of probable cause in 235 cases, while the respective figures for 2011 are 13 and 264.⁸⁷

C. 1982 Statute

The third statute cutting back on the protections of the Georgia Habeas Corpus Act of 1967 was enacted in 1982. The 1982 statute limited postconviction habeas relief in two major

617, 619 (Ga. 2012) (“[T]here is no federal or state constitutional right to appeal from an adverse order in a habeas corpus proceeding in the absence of compliance with appellate jurisdictional requirements, nor is there any constitutional right to counsel in a habeas proceeding or on application to appeal a ruling therein.”); *Fullwood v. Sivley*, 517 S.E.2d 511, 515 (Ga. 1999) (explaining that the jurisdictional requirement of O.C.G.A. § 9-14-52(b) cannot be ignored in a habeas petition).

85. *Crosson*, 728 S.E.2d at 619; *Fullwood*, 517 S.E.2d at 515; *Patterson v. Earp*, 363 S.E.2d 248, 249 (Ga. 1988).

86. *See, e.g., Sears v. Upton*, 130 S. Ct. 3259, 3261 (2010).

87. JUDICIAL COUNCIL OF GA., ANNUAL REPORT: GEORGIA COURTS FY 2012, available at http://www.georgiacourts.gov/files/Annual%20Reports/fy12_annual%20report_updated.pdf.

respects.⁸⁸ First, it abolished one of the three classes of grounds for postconviction habeas relief, thereby narrowing the substantive scope of the writ. Second, it abrogated in its entirety the high waiver standard of federal constitutional rights established by the 1967 Habeas Act and replaced it with a cause and prejudice test, under which a failure to raise a constitutional claim results in waiver of the claim absent a showing of cause for and prejudice from the constitutional violation. Under the cause and prejudice standard, it is much more likely that a habeas petition will be dismissed for procedural reasons without any inquiry into the merits of the claims raised in the habeas petition.

1. Abolition of Nonconstitutional Grounds for Relief

Prior to 1967, postconviction habeas corpus relief from a conviction or a sentence was narrowly available in Georgia.⁸⁹ Relief was limited to claims of jurisdictional error, and, except with regard to the right to counsel, a violation of a constitutional right was not deemed an error of jurisdictional proportions. The Georgia Habeas Corpus Act of 1967 eliminated the pre-1967 requirement that postconviction habeas relief could be granted only on grounds involving lack of jurisdiction. The Act “established broad new grounds for obtaining the writ in postconviction cases.”⁹⁰ It authorized three new, broad categories of cognizable claims: (1) violations of federal constitutional rights; (2) violations of Georgia constitutional rights; and (3) violations of rights secured by the laws of Georgia.⁹¹ Thus, in addition to federal and state constitutional

88. The 1982 statute made several additional changes in the 1967 Habeas Act which do not require discussion here.

89. *See generally Postconviction Habeas Corpus Relief in Georgia*, *supra* note 4, at 249-52 (highlighting the grounds of habeas relief prior to 1967); *A New Role for an Ancient Writ*, Part II *supra* note 4, at 39; *A New Role for an Ancient Writ*, Part I *supra* note 4, at 336-52.

90. *A New Role for an Ancient Writ*, Part II *supra* note 4, at 55.

91. 1967 Ga. Laws 835, 836 § 3 (codified at GA. CODE § 50-127(1) (1967), and O.C.G.A. § 9-14-42(a) (West, Westlaw through 2014)) (repealed 1982) (granting habeas relief to an imprisoned person “if in the proceedings

rights, rights secured by Georgia nonconstitutional law were among the rights that could be vindicated in Georgia postconviction habeas proceedings. The Georgia Supreme Court specifically so held in 1981 in *McDuffie v. Jones*:⁹²

[N]ot only can a substantial denial of a federal or state constitutional right be raised on habeas corpus, but a substantial denial of rights under the laws of this state can also be raised pursuant to our habeas corpus act.⁹³

McDuffie v. Jones appears to be the only Georgia Supreme Court case between 1967 and 1982 in which the Court openly acknowledged that it was dealing with a habeas claim based on a violation of a nonconstitutional right secured by “the laws of Georgia.” The petitioner claimed that at his trial he had been denied his statutory right to make a closing argument. The Court found that this right had indeed been violated but that the violation was harmless error,⁹⁴ and denied relief. In a concurring opinion, one justice asserted that the provision in the

resulting in his conviction there was a substantial denial of his rights under the Constitution of the United States or of the State of Georgia or the laws of the State of Georgia”). This language was borrowed from the Illinois Post-Conviction Hearing Act of 1949; *see* 9 F.R.D. 347, 365 (1950). Since 1867 federal habeas relief for state prisoners has been available to redress not only federal constitutional violations, but also violations of “the laws . . . of the United States,” 28 U.S.C. §§ 2241(c)(3), 2254(a) (2006); and since its enactment in 1948, 28 U.S.C. § 2255 (Supp. V 2011), the postconviction remedy for federal prisoners equivalent to habeas corpus, has authorized relief not only from federal constitutional violations, but also from convictions or sentences “imposed in violation of the . . . laws of the United States.” In authorizing relief based on violations of nonconstitutional law, therefore, the 1967 Georgia Habeas Corpus Act followed the federal example.

92. *McDuffie v. Jones*, 283 S.E.2d 601, 607 (Ga. 1981), *overruled on other grounds by* *West v. Walters*, 533 S.E.2d 88 (2000).

93. *Id.* at 603.

94. *Id.* at 604-05. The Court, in dicta, also addressed the question of whether and to what extent a claim of denial of rights under the laws of Georgia is barred by virtue of a failure to properly raise the claim at trial, saying: “The waiver standard as to rights under the laws of this state is certainly no more stringent than the statutory standard for constitutional rights and in many instances may be less stringent.” *Id.* at 603.

1967 Habeas Act making denials of Georgia nonconstitutional rights grounds for relief “was a serious defect” in the statute requiring legislative alteration.⁹⁵ Neither the per curiam opinion for the majority nor the concurring opinion seemed to comprehend that in permitting claims arising under the laws of Georgia the 1967 Habeas Act did not have to be construed so as to make every violation of a state statutory right – such as the right to make the closing argument – cognizable in habeas. Violations of nonconstitutional federal law are cognizable in federal habeas proceedings filed by state convicts under 28 U.S.C. § 2254 and in 28 U.S.C. § 2255 proceedings filed by federal convicts, but the federal courts have held that relief is available not for every violation of nonconstitutional federal law, but only for those violations amounting to a fundamental defect which inherently results in a complete miscarriage of justice.⁹⁶ If the Georgia Supreme Court had understood this, it

95. *Id.* at 607 (Jordan, C.J., concurring):

The majority opinion points up a serious defect in our Habeas Corpus statute. An applicant for the Writ of Habeas Corpus should be required to allege violation of the Federal and or State Constitution. A simple violation of a state statute should not be relitigated in a habeas proceeding . . . The General Assembly should take steps to amend our Habeas Corpus statute so that it allows relief only for a substantial denial of a Federal or State constitutional right.

The concurring justice seems to have been unaware of the fact that habeas corpus or other postconviction remedies under which, in addition to federal and state constitutional violations, violations of the laws of the state constitute a ground for relief are common among the states.

See, e.g., UNIFORM POST-CONVICTION PROCEDURE ACT (1966), § 1(a)(1) (“the conviction was obtained or the sentence imposed in violation of . . . the . . . laws of this State”); Rule 3.850(a)(1), FLA. R. CRIM. PROC. (“judgment was entered or sentence was imposed in violation of the . . . laws of the . . . State of Florida”).

96. *Reed v. Farley*, 512 U.S. 339, 340 (1994) (§ 2254); *see Davis v. United States*, 417 U.S. 333, 346 (1974) (“We suggested that the appropriate inquiry was whether the claimed error of law was ‘a fundamental defect which inherently results in a complete miscarriage of justice,’ and whether ‘(i)t . . . present(s) exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent.’”) (quoting *Hill v. United*

would have realized that the 1967 Act did not necessarily require vindication of all nonconstitutional habeas claims; it could have rejected the claim before it on the ground it did not involve fundamental error; and there would have been no occasion for deeming the 1967 Act defective.

One year after *McDuffie v. Jones*, and apparently in an endeavor to implement the concurring opinion in that decision criticizing the portion of the 1967 Georgia Habeas Act making violations of nonconstitutional Georgia rights cognizable in habeas corpus,⁹⁷ the Georgia legislature enacted the 1982 statute which, among other things, deleted the provision of the 1967 Habeas Act providing that violations of the laws of Georgia could be raised in habeas corpus.⁹⁸ “The effect of the [1982 statute] was to limit the relief available by habeas corpus to errors or deficiencies which constitute ‘a substantial denial of . . . rights under the Constitution of the United States or of this state.’”⁹⁹ Claims of denials of Georgia nonconstitutional rights are therefore no longer cognizable in Georgia postconviction habeas proceedings.¹⁰⁰ The only Georgia rights cognizable in a Georgia habeas proceeding are state constitutional rights.

2. *Expansion of Procedural Default Grounds for Denying Habeas Relief*

The concurring opinion in the 1981 *McDuffie v. Jones* decision recommended not only abolition of violations of

States, 368 U.S. 424, 429 (1962)).

97. See *Valenzuela v. Newsome*, 325 S.E.2d 370, 373 (Ga. 1985) (“It is interesting (and gratifying) that the General Assembly implemented . . . Chief Justice Jordan’s suggestions in amending O.C.G.A. § 9-14-42. Now, under the 1982 amendment, habeas corpus is available to review constitutional deprivations only . . .”) (citations omitted).

98. Act of 1982, 1982 Ga. Laws 786, sec. 1, § 9-14-42; sec. 2, § 3 (1982) (current version at O.C.G.A. § 9-14-42 (West, Westlaw through 2014)).

99. *Black v. Hardin*, 336 S.E.2d 754, 754 (Ga. 1985) (citations omitted).

100. See *id.*; see also *Valenzuela*, 325 S.E.2d at 373-374; *Parker v. Abernathy*, 324 S.E.2d 191, 191-192 (Ga. 1985); *Britt v. Smith*, 556 S.E.2d 435, 437 (Ga. 2001) (“[T]he controlling principle [is] that ‘habeas corpus is available to review constitutional deprivations only.’”) (citation omitted).

nonconstitutional Georgia laws as grounds for relief, but, in addition, replacing the high waiver of rights standard under the 1967 Habeas Act with the waiver standard being used in the federal courts, i.e., the cause and prejudice test.¹⁰¹ The next year the Georgia legislature followed through on this recommendation.¹⁰²

Because the provisions of the 1982 statute abrogating the high waiver standard and replacing it with the cause and prejudice standard were inspired by various United States Supreme Court decisions which restrictively construed the federal habeas postconviction remedy between 1974 and 1982, it will be helpful, before examining those procedural default statutory provisions, to explore the four most important of those decisions. In all four decisions the Court denied relief because the habeas petitioner committed a procedural default in the state court system before or during his criminal trial.¹⁰³ These decisions, Justice Harry Blackmun said, are part of the Court's "crusade to erect petty procedural barriers in the path of any state prisoner seeking review of his federal constitutional claims."¹⁰⁴ These judicially manufactured rules of pleading and procedure have created a "Byzantine morass of arbitrary, unnecessary, and unjustifiable impediments to the vindication of federal rights."¹⁰⁵

The first of these federal habeas decisions, *Francis v. Henderson*,¹⁰⁶ handed down in 1976, involved a grand jury discrimination claim which was procedurally defaulted in the state court system because, in violation of a state rule of

101. *McDuffie v. Jones*, 283 S.E.2d 601, 607 (Jordan, C.J., concurring) ("The statute should also be amended to eliminate the waiver requirements of the statute, which as written exceed the waiver requirements of present federal constitutional law.").

102. *See supra* note 90.

103. For a more comprehensive analysis of these decisions, *see* FEDERAL POSTCONVICTION (1996), *supra* note 8, at 674-78.

104. *Coleman v. Thompson*, 501 U.S. 722, 758-59 (1991) (Blackmun, J., dissenting).

105. *Id.* at 759.

106. *Francis v. Henderson*, 425 U.S. 536 (1976).

procedure, it had not been raised prior to trial.¹⁰⁷ The United States Supreme Court held that, where the federal claim has been forfeited in the state courts because it was not raised in accordance with state procedural requirements, the claim is barred in a federal habeas proceeding unless there is both cause for and actual prejudice resulting from the constitutional violation.¹⁰⁸

In the following year the Court extended *Francis v. Henderson* when it decided *Wainwright v. Sykes*,¹⁰⁹ where the federal habeas claim was that an illegal confession had been admitted at the petitioner's trial, although in violation of a state procedural rule the claim had not been raised prior to the trial.¹¹⁰ Partially overruling *Fay v. Noia*,¹¹¹ the Court held that the rule of *Francis v. Henderson* applied and that, absent cause and actual prejudice, the confession claim was barred in federal habeas:

[W]e deal only with contentions of federal law which were *not* resolved on the merits in the state proceeding due to [the habeas petitioner's] failure to raise them there as required by the state procedure. We leave open for resolution in future decisions the precise definite of the "cause"-and-"prejudice" standard, and note here only that it is narrower than the standard set forth in dicta in *Fay v. Noia*, which would make federal habeas review generally available to state convicts absent a knowing and deliberate waiver of the federal constitutional contention. It is the sweeping language of *Fay v. Noia*, going far beyond the facts of the case eliciting it, which we today reject.¹¹²

107. *Id.* at 536.

108. *Id.* at 542.

109. *Wainwright v. Sykes*, 433 U.S. 72 (1977).

110. *Id.* at 72.

111. *Fay v. Noia*, 372 U.S. 391 (1963).

112. *Wainwright*, 433 U.S. at 87-88 (emphasis added) (citation omitted). The Court also directed that the federal habeas petition be dismissed because there was neither cause nor actual prejudice shown. *Id.* at 91. Cause was lacking because no explanation had been advanced for failing to raise the confession claim at trial, and actual prejudice was absent because the other

The other two decisions were handed down on the same day, less than two weeks before enactment of the 1982 statute. In *Engle v. Isaac*,¹¹³ the Court held: (1) “the futility of presenting an objection to the state courts cannot alone constitute cause for a failure to object at trial;”¹¹⁴ and (2) the cause and prejudice test applies to all procedurally defaulted claims,¹¹⁵ even those that “affect the truthfinding function of the trial.”¹¹⁶ In *United States v. Frady*,¹¹⁷ the person seeking postconviction relief raised the due process claim that he had been convicted by a jury which had been erroneously instructed on the meaning of malice, a claim which was procedurally defaulted because it had not been raised at trial.¹¹⁸ The Court held: (1) “the proper standard for review of Frady’s [postconviction] motion is the ‘cause and actual prejudice’ standard enunciated in *Davis v. United States*, and later confirmed and extended in *Francis v. Henderson* and *Wainwright v. Sykes*;”¹¹⁹ (2) “[u]nder this standard, to obtain collateral relief based on trial errors to which no contemporaneous objection was made, a convicted defendant must show both . . . ‘cause’ excusing his . . . procedural default, and . . . ‘actual prejudice’ resulting from the errors of which he complains;”¹²⁰ (3) Frady, who claimed actual prejudice, “must shoulder the burden of showing, not merely that the errors at his trial created a *possibility* of prejudice, but that they worked to

evidence admitted at the habeas petitioner’s trial was “substantial to a degree that [it] negate[d] any possibility of actual prejudice.” *Id.*

113. 456 U.S. 107 (1982).

114. *Id.* at 130.

115. *Id.* at 129 (“We reaffirm, therefore, that any prisoner bringing a constitutional claim to the federal courthouse after a state procedural default must demonstrate cause and actual prejudice before obtaining relief.”).

116. *Id.* at 129.

117. *United States v. Frady*, 456 U.S. 152 (1982) (involving a federal postconviction case rather than a state prisoner and brought not under the federal habeas statute but under 28 U.S.C. §2255, which provides a remedy which is equivalent to the federal habeas remedy and is governed by habeas corpus principles.)

118. *Id.* at 152.

119. *Id.* at 167 (citations omitted).

120. *Id.* at 167-68.

his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions;”¹²¹ and (4) “the strong uncontradicted evidence of malice in the record, coupled with Frady’s utter failure to come forward with a colorable claim that he acted without malice, disposes of his contention that he suffered such actual prejudice that reversal of his conviction 19 years later could be justified.”¹²²

The procedural default portions of the 1982 statute show the influence of these four decisions on Georgia lawmakers. These decisions have also influenced Georgia Supreme Court interpretations of the 1982 statute, as the case law demonstrates.

*Murray v. Carrier*¹²³ and *Smith v. Murray*,¹²⁴ two 1986 United States Supreme Court decisions further enlarging the effect of state procedural defaults on federal habeas corpus proceedings, were handed down four years after the 1982 statute, and therefore did not contribute to enactment of the statute. However, these two decisions deserve mention because, like the four United States Supreme Court decisions just discussed, they too, as the case law indicates, have influenced Georgia Supreme Court decisions interpreting the procedural default provisions of the 1982 statute.

In *Murray v. Carrier*, the Court held: (1) “the mere fact that counsel failed to recognize the factual or legal basis for a claim, or failed to raise the claim despite recognizing it, does not constitute cause for a procedural default”¹²⁵ and therefore “the question of cause for a procedural default does not turn on whether counsel erred or on the kind of error counsel may have made;”¹²⁶ (2) “the existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel’s

121. *Id.* at 170 (emphasis added).

122. *Id.* at 172.

123. 477 U.S. 478 (1986).

124. 477 U.S. 527 (1986).

125. *Carrier*, 477 U.S. at 486.

126. *Id.* at 488.

efforts to comply with the State's procedural rule;"¹²⁷ (3) "a showing that the factual or legal basis for a claim was not reasonably available to counsel, or that 'some interference by officials[]' made compliance impracticable, would constitute cause under this standard;"¹²⁸ (4) "[i]neffective assistance of counsel . . . is cause for a procedural default;"¹²⁹ (5) "generally . . . a claim of ineffective assistance [must] be presented to the state courts as an independent claim before it may be used to establish cause for a procedural default;"¹³⁰ (6) "the cause and prejudice test applies to procedural defaults on appeal" as well as those at trial;¹³¹ and (7) "in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default."¹³²

In *Smith v. Murray*, decided the same day, the Court held: (1) "although federal courts at all times retain the power to look beyond state procedural forfeitures, the exercise of that power ordinarily is inappropriate unless the defendant succeeds in showing both 'cause' for noncompliance with the state rule and 'actual prejudice resulting from the alleged constitutional violation;'"¹³³ (2) "a deliberate, tactical decision not to pursue a particular claim is the very antithesis of the kind of circumstance that would warrant excusing a defendant's failure to adhere to a State's legitimate rules for the fair and orderly disposition of its criminal cases;"¹³⁴ (3) "a federal habeas court must evaluate appellate defaults under the same standards that apply when a defendant fails to preserve a claim at trial;"¹³⁵ and

127. *Id.*

128. *Id.* (citations omitted).

129. *Id.*

130. *Id.* at 489.

131. *Carrier*, 477 U.S. at 489.

132. *Id.* at 496.

133. *Smith v. Murray*, 477 U.S. 527, 533 (1986).

134. *Id.* at 534.

135. *Id.* at 533.

(4) “the concept of ‘actual,’ as distinct from ‘legal,’ innocence does not translate easily into the context of an alleged error at the sentencing phase of a trial on a capital offense.”¹³⁶

With this background – truly a “bleak story”¹³⁷ – filled in, it is now appropriate to take a close look at the 1982 statute’s default provisions and the resultant case law. That statute added the following italicized provisions to the Georgia Habeas Corpus Act of 1967:

*The court shall review the trial record and transcript of proceedings and consider whether the petitioner made timely motion or objection or otherwise complied with Georgia procedural rules at trial and on appeal and 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; and absent a showing of cause for noncompliance with such requirement, and of actual prejudice, habeas corpus relief shall not be granted. In all cases habeas corpus relief shall be granted to avoid a miscarriage of justice. If the court finds in favor of the petitioner, it shall enter an appropriate order with respect to the judgment or sentence challenged in the proceeding and such supplementary orders as to rearraignment, retrial, custody, or discharge as may be necessary and proper.*¹³⁸

Nowadays, as a result of the 1982 statute, “[o]ne of the basic tenets of Georgia’s statutory habeas corpus scheme is the ‘procedural default’ rule” established by the statute.¹³⁹ The Georgia Supreme Court has described the procedural default regime instituted by the 1982 statute as follows:

[A] failure to make timely objection to *any* alleged error or

136. *Id.* at 537.

137. Larry W. Yackle, *The Misadventures of State Postconviction Remedies*, 16 N.Y.U. REV. L. & SOC. CHANGE 359, 379 (1987-88).

138. Act of 1982, 1982 Ga. Laws 786, sec. 1, § 9-14-42; sec. 2, § 3 (1982) (emphasis in original) (current version at O.C.G.A. § 9-14-42 (West, Westlaw through 2014)).

139. *Chatman v. Mancill*, 604 S.E.2d 154, 155 (Ga. 2004) (citation omitted).

deficiency or to pursue the same on appeal ordinarily will preclude review by writ of habeas corpus. However, an otherwise valid procedural bar will not preclude a habeas corpus court from considering alleged constitutional errors or deficiencies if there shall be a showing of adequate cause for failure to object or pursue on appeal *and* a showing of actual prejudice to the accused. Even absent such a showing of cause and prejudice, the relief of the writ will remain available to avoid a miscarriage of justice where there has been a substantial denial of constitutional rights.¹⁴⁰

The 1982 statute closely follows the federal approach with respect to procedural default of postconviction habeas claims, and the Georgia court decisions applying the statute are informed by federal decisions.¹⁴¹ “A procedural bar to asserting a claim on habeas corpus arises if the defendant failed to timely object to any alleged error or deficiency at trial or on appeal.”¹⁴² If, therefore, even in death sentence cases, the habeas claim was not properly raised at trial, or (even if it was properly raised at trial) if it was not also properly raised on the direct appeal, the claim is barred, absent a showing of either cause and actual prejudice or of a miscarriage of justice.¹⁴³ In accordance with

140. *Black v. Hardin*, 336 S.E.2d 754, 755 (Ga. 1985) (emphasis added).

141. *See, e.g., Turpin v. Todd*, 493 S.E.2d 900, 905 (Ga. 1997) (“Because the procedural default standards of [the 1982 statute] are modeled after the federal standards, we look to federal decisions for guidance on this issue.”).

142. *Id.*

143. *See, e.g., Wilkerson v. Hart*, 755 S.E.2d 192, 195 (Ga. 2014) (holding that a habeas claim was barred by procedural default); *Humphrey v. Riley*, 731 S.E.2d 740, 750 (Ga. 2012) (barring habeas claims on basis of procedural default); *Griffin v. Terry*, 729 S.E.2d 334, 337 (Ga. 2012) (barring petitioner’s right to be present at trial by procedural default); *Humphrey v. Lewis*, 728 S.E.2d 603, 617 (Ga. 2012); *Perkins v. Hall*, 708 S.E.2d 335, 348 (Ga. 2011) (barring incompetency claim and holding that miscarriage of justice exception did not apply); *Hall v. Wheeling*, 646 S.E.2d 236, 238 (Ga. 2007); *Walker v. Johnson*, 646 S.E.2d 44, 45 (Ga. 2007); *Wright v. Hall*, 638 S.E.2d 270, 272 (Ga. 2006) (upholding lower court decision to bar all habeas claims on the basis of procedural waiver); *Upton v. Jones*, 635 S.E.2d 112, 114 (Ga. 2006) (barring habeas for jurisdictional reasons); *Schofield v. Meders*, 632 S.E.2d 369, 376 (Ga. 2006); *Waldrip v. Head*, 620 S.E.2d 829, 831-32 (Ga. 2005) (prosecutorial misconduct claims

the federal approach, the burden of proving that there is cause and prejudice or that there has been a miscarriage of justice is on the habeas petitioner.¹⁴⁴

Proving cause is difficult. “To show cause, [the petitioner] must demonstrate that ‘some objective factor external to the defense impeded counsel’s efforts’ to raise the claim that has been procedurally defaulted.”¹⁴⁵ A showing of “interference by government officials ‘that ma[de] compliance with the . . . procedural rule impracticable’”, or “a showing that the factual or legal basis for the claim was not reasonably available to counsel,” will constitute cause.¹⁴⁶ A showing that the

barred by procedural default); *Chatman v. Mancill*, 604 S.E.2d 154, 155 (Ga. 2004); *Davis v. Turpin*, 539 S.E.2d 129, 134 (Ga. 2000); *Head v. Taylor*, 538 S.E.2d 416, 418-19 (Ga. 2000); *Turpin v. Lipham*, 510 S.E.2d 32, 35-36 (Ga. 1998); *Turpin v. Mobley*, 502 S.E.2d 458, 462 (Ga. 1998); *Turpin v. Todd*, 493 S.E.2d 900, 904 (Ga. 1997); *Black v. Hardin*, 336 S.E.2d 754, 755 (Ga. 1985); *Valenzuela v. Newsome*, 325 S.E.2d 370, 373-73 (Ga. 1985).

However, a failure to raise on direct appeal a claim that trial counsel was ineffective is not deemed a procedural default of the ineffectiveness claim if trial counsel represented the petitioner on the direct appeal. *See, e.g.*, *Gibson v. Head*, 646 S.E.2d 257, 260 (Ga. 2007) (“The [ineffective assistance of counsel] claim would not be barred by res judicata, however, if it were based on facts that were not reasonably available at the time of the first habeas proceeding.”); *Head v. Taylor*, 538 S.E.2d 416, 419 (Ga. 2000); *Turpin v. Mobley*, 502 S.E.2d 458, 462 (Ga. 1998); *White v. Kelso*, 401 S.E.2d 733, 734 (Ga. 1991). Additionally, a claim that since the conviction there has been a retroactive case law change in substantive law affecting the criminality of the habeas petitioner’s conduct may be raised in a Georgia habeas proceeding regardless of whether the claim was raised at trial or on appeal, and without regard to cause and prejudice. *See, e.g.*, *Wilkerson v. Hart*, 755 S.E.2d 192 (Ga. 2014); *Sellars v. Evans*, 745 S.E.2d 643 (Ga. 2013); *Luke v. Battle*, 565 S.E.2d 816 (Ga. 2002).

144. *See, e.g.*, *Walker v. Penn*, 523 S.E.2d 325, 326, 327 (Ga. 1999) (miscarriage of justice); *Turpin v. Todd*, 493 S.E.2d 900, 905, 907 (Ga. 1997) (cause and prejudice).

145. *Mobley*, 502 S.E.2d at 462 (quoting *Todd*, 493 S.E.2d at 905).

146. *Todd*, 493 S.E.2d at 905 (Ga. 1997) (quoting *Carrier*, 477 U.S. at 488). *See also* *McMichen v. Hall*, 684 S.E.2d 641, 659 (Ga. 2009):

[Habeas petitioner]’s claim that the State knowingly presented false testimony [through witness Williams] is, at least as an initial matter, barred by procedural default because it was not raised on direct appeal and, therefore, can be considered on its merits only if

procedural default resulted from constitutionally ineffective assistance of counsel will also constitute cause.¹⁴⁷

Proving prejudice is difficult. “[T]o overcome the procedural bar, [the petitioner] must not only demonstrate cause for failing to raise the claim . . . but also actual prejudice.”¹⁴⁸ “To show prejudice, he must demonstrate actual prejudice that ‘worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.’”¹⁴⁹

[petitioner] can satisfy the cause and prejudice test. Williams’s pre-trial and trial testimony denying the existence of a deal, the district attorney’s representation to the trial court that no deal existed, and the recentness of the recantation by Williams demonstrate cause sufficient to excuse counsel’s failure to raise this claim at trial and on direct appeal.

See also *Walker v. Johnson*, 646 S.E.2d 44, 45 (Ga. 2007). The court found the habeas petitioner’s due process claim arose out of “the State’s failure [at the petitioner’s criminal trial] to produce to the defense audiotapes containing exculpatory witness statements and Johnson’s own statement to police during investigation of the crimes” and was not

[P]rocedurally defaulted because Johnson has shown cause . . . to excuse the default[;] [n]either Johnson nor his counsel was aware of the tapes as a result of the State’s failure to provide them in discovery, and the tapes were obtained only after the denial of Johnson’s direct appeal when Johnson’s father filed an Open Records Request.

Id. (citation omitted).

147. *Todd*, 493 S.E.2d at 905-06. In holding that ineffective assistance of counsel may constitute cause, the Court acknowledged that it was relying on *Murray v. Carrier*, 477 U.S. 478 (1986). *Id.* at 906. The Georgia Supreme Court explained: “In seeking habeas relief, a convicted defendant may assert a Sixth Amendment ineffectiveness claim, or he may assert that counsel’s ineffectiveness constitutes cause to overcome his procedural default, or he may raise ineffectiveness in both contexts.” *Id.* at 908 n.43.

148. *Todd*, 493 S.E.2d at 907.

149. *Mobley*, 502 S.E. at 462 (citing *Todd*, 493 S.E.2d at 907, citing *United States v. Frady*, 456 U.S. 152, 170 (1982)). See also *Humphrey v. Lewis*, 728 S.E.2d 603, 607 (Ga. 2012) (citations omitted):

The warden correctly points out that the habeas court failed to address the fact that Lewis’ [habeas claim] was procedurally defaulted, at least as an initial matter, because he did not raise it at trial or on direct appeal. However, a petitioner may overcome procedural default by satisfying the cause and prejudice test. We

“The only exception to the cause and prejudice test is the granting of habeas corpus relief to avoid a ‘miscarriage of justice’ . . .”¹⁵⁰ That is, “even if a petitioner fails to show cause

need not decide whether Lewis can show cause to excuse the procedural default to his . . . claim, because we are satisfied that Lewis has failed to establish the requisite prejudice. Because [Lewis’] underlying claim is a constitutional claim involving the denial of his due process rights under the Fourteenth Amendment, the underlying claim and the prejudice analysis necessary to satisfy the cause-and-prejudice test are coextensive Lewis cannot prevail on the merits of his underlying . . . claim, and therefore, his claim remains procedurally defaulted.

See also *McMichen*, 684 S.E.2d at 649-650, finding cause for the procedural default was shown:

[T]he fate of the procedural bar to this claim hinges on whether McMichen can show prejudice. This Court has held that, because the prejudice that must be shown to overcome default is a prejudice of constitutional proportions and because a habeas petitioner is entitled to relief only for constitutional violations, the prejudice prong of the cause and prejudice test is ‘co-extensive’ with the merits of a claim of a constitutional violation. Both to show prejudice and to succeed on the merits, McMichen would have to show that Williams’s recent allegation that he and the district attorney lied at the time of trial is true and that there is a ‘reasonable likelihood that the false testimony could have affected the judgment of the jury.’

Id. (citations omitted) (quoting *United States v. Agurs*, 427 U.S. 97, 103 (1976)). See also *Walker v. Johnson*, 646 S.E.2d 44, 45 (Ga. 2007) (finding cause and prejudice for habeas petitioner’s due process claim, which was not raised at trial or on appeal, arising out of the state’s failure at the petitioner’s criminal trial “to produce to the defense audiotapes containing exculpatory witness statements and Johnson’s own statement to police during investigation of the crimes”; “[a]s for the required showing of prejudice, Johnson’s underlying claim is a constitutional claim involving the denial of his Fourteenth Amendment due process rights”); *Upton v. Jones*, 635 S.E.2d 112, 115 (Ga. 2006) (“‘A claim of ineffective assistance of appellate counsel requires a showing both that counsel’s performance was deficient and that the deficiency prejudiced the outcome of the defendant’s appeal.’ A habeas petitioner who meets the prejudice prong of this test establishes thereby the prejudice which is required to overcome the procedural bar of O.C.G.A. § 9-14-48(d).”) (citations omitted) (quoting *Crawford v. Thompson*, 603 S.E.2d 259, 261 (Ga. 2004); *Waldrip v. Head*, 620 S.E.2d 829, 832 (Ga. 2005) (“The prejudice sufficient to satisfy the cause and prejudice test is a prejudice of constitutional dimensions.”).

150. *Mobley*, 502 S.E.2d at 462 (citing *Valenzuela v. Newsome*, 325

[and prejudice] for a procedural default, courts retain the power to grant relief under the writ if the procedural bar would work a miscarriage of justice.”¹⁵¹ Proving a miscarriage of justice is extraordinarily difficult. “The miscarriage of justice exception is an extremely high standard and is very narrowly applied.”¹⁵² There is a miscarriage of justice when the habeas petitioner is factually innocent of the crime for which he has been convicted.¹⁵³

In its first major decision construing the 1982 statute, the Georgia Supreme Court stated:

[T]he term [miscarriage of justice] is by no means to be deemed synonymous with procedural irregularity, or even with reversible error. To the contrary, it demands a much greater substance, approaching perhaps the imprisonment of one who, not only is *not* guilty of the specific offense for which he is convicted, but, further, is not even culpable in the circumstances under inquiry. (A plain example is a case of mistaken identity.)¹⁵⁴

Where a Georgia habeas claim is procedurally barred under the 1982 statute, it may be equally barred for purposes of

S.E.2d 370 (1985)).

151. *Todd*, 493 S.E.2d at 905 n.13.

152. *Walker v. Penn*, 523 S.E.2d 325, 327 (Ga. 1999). *See also Mobley*, 502 S.E. at 462 (noting the miscarriage of justice standard “is an extremely high standard”).

153. *See Head v. Stripling*, 590 S.E.2d 122, 128 (Ga. 2003) (“‘Miscarriage of justice’ is primarily associated with its core purpose, i.e., to free the innocent who are wrongly convicted, and should rarely be used to overcome otherwise-valid procedural bars.”).

154. *Valenzuela v. Newsome*, 325 S.E.2d 370, 374 (Ga. 1985) (emphasis in original); *accord Walker v. Penn*, 523 S.E.2d at 327; *Turner v. Lipham*, 510 S.E.2d 32, 35 (Ga. 1998); *Mobley*, 502 S.E.2d 458, 462 n.15; *Gavin v. Vasquez*, 407 S.E.2d 756, 757 (Ga. 1991). However, a claim that a person sentenced to death is mentally retarded (and hence ineligible for the death penalty) which was not raised at trial or on direct appeal may be presented and considered in a habeas proceeding “under the ‘miscarriage of justice’ exception to the rule of procedural default . . .” *Schofield v. Holsey*, 642 S.E.2d 56, 63 (Ga. 2007); *accord Stripling*, 590 S.E.2d at 128 (Ga. 2003); *Head v. Hill*, 587 S.E.2d 613, 620 (Ga. 2003); *Turpin v. Hill*, 498 S.E.2d 52, 53 (Ga. 1998).

federal habeas corpus in the event the unsuccessful Georgia habeas petitioner thereafter files a federal habeas petition. If the Georgia courts have found the claim to be procedurally barred under the 1982 statute, or if the Georgia courts have not decided the issue but the federal court makes its own determination that, under the 1982 statute, the claim is barred in the Georgia courts, then the claim is also barred in a federal habeas proceeding, even in death sentence cases, unless the federal court makes its own finding of cause and prejudice or of actual innocence.¹⁵⁵ However, if the Georgia courts decline to apply the 1982 statute's procedural default rule and instead decide the claim on the merits, then the claim is not barred for purposes of federal habeas corpus.¹⁵⁶

The superimposition of federal habeas corpus procedural default principles on Georgia state habeas proceedings was, for at least four reasons, misguided.¹⁵⁷ In the first place, these procedural rules run counter to the fundamental principles of modern civil procedure: they involve technicalities; they deflect from fact-finding; they prevent on procedural grounds a court from deciding the merits of the claim raised; and they often have the effect of slamming shut the courthouse door on a party

155. See, e.g., *Crowe v. Hall*, 490 F.3d 840, 845 (11th Cir. 2007); *Lynd v. Terry*, 470 F.3d 1308, 1313 (11th Cir. 2006); *Davis v. Terry*, 465 F.3d 1249, 1250 (11th Cir. 2006) (“[W]hen a death-sentenced prisoner makes a successful showing of actual innocence, procedural default alone cannot bar consideration of his constitutional claims of an unfair trial.”); *Crawford v. Head*, 311 F.3d 1288, 1323 (11th Cir. 2002); *Isaacs v. Head*, 300 F.3d 1232, 1257 (11th Cir. 2002); *Alderman v. Zant*, 22 F.3d 1541, 1549 (11th Cir. 1994); *Devier v. Zant*, 3 F.3d 1445, 1455 (11th Cir. 1993).

156. *Hardin v. Black*, 845 F.2d 953, 958 (11th Cir. 1988).

157. Numerous other states have also extended the federal habeas default rules to their postconviction remedies, with the result that “[i]n an extraordinary number of cases, state courts decline to consider federal claims because of procedural default,” Yackle, *supra* note 137, at 377, and that “wholesale procedural dismissals in . . . state . . . court have now become commonplace.” *Id.* at 381. See also Tabak & Lane, *supra* note 9, at 42 (noting federal habeas procedural default rules have “encouraged several states to develop new preclusion rules that bar state court consideration of [postconviction] claims not presented in earlier proceedings”).

with a valid, provable claim for relief. Inappropriate in ordinary civil actions, these types of procedural rules are even more inappropriate in habeas proceedings, where questions of constitutional rights and personal liberty are at stake.¹⁵⁸ Second, these procedural default rules punish criminal defendants for the mistakes of their attorneys. The procedural default is almost always committed by the defendant's lawyer (who usually is not a lawyer chosen and hired by the defendant but a public defender provided by the government), and to punish the defendant by disregarding his claim because his lawyer mistakenly failed to properly raise the claim is unjust.¹⁵⁹ Third, habeas procedural default rules frequently result "in unnecessarily time-consuming and complex review of purely procedural issues" when "[i]t would often be far quicker and far fairer . . . simply to decide the constitutional issues being presented."¹⁶⁰ Fourth, habeas procedural default rules inevitably produce arbitrary and capricious results.¹⁶¹

158. See ABA ADVISORY COMMITTEE ON SENTENCING AND REVIEW, STANDARDS RELATING TO POST-CONVICTION REMEDIES § 6.1(d) (1968):

Because of the special importance of rights subject to vindication in post-conviction proceedings, courts should be reluctant to deny relief to meritorious claims on procedural grounds. In most instances of unmeritorious claims, the litigation will be simplified and expedited if the courts reaches the underlying merits despite possible procedural flaws.

159. The classic example of such an injustice is *Coleman v. Thompson*, 501 U.S. 722 (1991), where the petitioner, Roger Coleman, was denied federal habeas relief and the merits of his claims disregarded, all because while he was incarcerated on death row, his attorney filed a notice of appeal – a piece of paper – three days late in the state court system. Coleman was subsequently executed.

160. Tabak & Lane, *supra* note 9, at 41.

161. Bright, *supra* note 11, at 685:

This is illustrated by the cases of Smith and Machetti, two codefendants sentenced to death at separate trials by unconstitutionally composed juries within a few weeks of each other in the same county in Georgia. Machetti's lawyers challenged the jury composition in state court; Smith's lawyers did not because they were unaware of a United States Supreme Court decision decided only five days before Smith's trial began. A new trial was ordered

D. 1986 Statute

Prior to 1986 there were no time limits on applying for habeas relief in Georgia. There was no statute of limitations applicable to the writ of habeas corpus, and the doctrine of laches did not extend to habeas proceedings.¹⁶² The first temporal restriction on seeking habeas relief in Georgia dates from 1986, when the Georgia legislature enacted its fourth post-1967 statutory restriction on the state's postconviction habeas corpus remedy.

The 1986 statute¹⁶³ created the first habeas corpus statute of limitations in Georgia history, providing that:

Any challenge to a misdemeanor conviction of any of the traffic laws of this state or the traffic laws of any county or municipal government which may be brought pursuant to Chapter 14 of Title 9 [the habeas chapter of the *Official Code of Georgia*] must be filed within 180 days of the date the conviction becomes final . . . Failure to file the challenge within the time prescribed in this Code section shall divest the court of jurisdiction.¹⁶⁴

The 1986 statute, it appears,¹⁶⁵ was the state legislature's pro-

for Machetti by the Eleventh Circuit Court of Appeals, and, at that trial, a jury which fairly represented the community imposed a sentence of life imprisonment. The Eleventh Circuit refused to consider the identical issue in Smith's case because his lawyers did not preserve it. Smith was executed . . .

162. *Zant v. Cook*, 379 S.E.2d 780, 781 (Ga. 1989); *Jackson v. Jones*, 327 S.E.2d 206, 208 (Ga. 1985). See also *Earp v. Brown*, 391 S.E.2d 396, 397 (Ga. 1990) (Prior to the 1986 statute, "the general rule of law" in Georgia was "that a defendant can collaterally attack void judgments at any time.").

163. Act of 1986, 1986 Ga. Laws 444, § 1 (current version at O.C.G.A. § 40-13-33 (West, Westlaw through 2014)). The 1986 statute also changed the venue to Fulton County for all postconviction habeas proceedings involving misdemeanor traffic laws where the Commissioner of Public Safety (now the Commissioner of Driver Services) is named as respondent, but this aspect of the statute need not be discussed in this Article.

164. *Id.* These provisions are now codified at O.C.G.A. § 40-13-33 (a), (d) (West, Westlaw through 2014).

165. See *Earp v. Boylan*, 390 S.E.2d 577, 578 (Ga. 1990) (noting the 1986 statute was enacted "in response to *Hardinson*"). See *infra* note 166 and

government response to an admirable 1985 Georgia Supreme Court decision, *Hardison v. Martin*,¹⁶⁶ in which the Court held, first, that a person convicted of a traffic offense whose driver's license has been revoked, but who is neither in physical custody nor on probation, is nonetheless sufficiently restrained of his liberty to satisfy the custody requirement of Georgia habeas corpus, and, second, that such a person may use a petition for habeas corpus to challenge the revocation of his driver's license if "the underlying sentence upon which the revocation is based is void for a reason not appearing on the face of the record."¹⁶⁷ Because revocation of a person's driver's license is not considered a sufficient restraint on liberty to amount to custody for purposes of the federal habeas corpus custody requirement,¹⁶⁸ *Hardison v. Martin* provides protections beyond what is mandated under federal constitutional or statutory law. As the Georgia Supreme Court has held, *Hardison v. Martin* not only provides "greater protections than the Federal Constitution requires"¹⁶⁹ but also "goes beyond federal constitutional and statutory habeas corpus requirements."¹⁷⁰

Four years after passage of the 1986 statute, the Georgia Supreme Court, in *Earp v. Boylan*, rejected a habeas petitioner's assertion that the 180-day statute of limitations unconstitutionally suspends the writ of habeas corpus.¹⁷¹ The Court reasoned that: (1) the statute of limitations extends to "a

accompanying text.

166. *Hardison v. Martin*, 334 S.E.2d 161 (Ga. 1985).

167. *Id.* at 163-165.

168. *See, e.g., Harts v. Indiana*, 732 F.2d 95, 96-97 (7th Cir. 1984) (holding one-year suspension of license was not severe enough to constitute "in custody" for purposes of federal habeas corpus jurisdiction); *Westberry v. Keith*, 434 F.2d 623, 624 (5th Cir. 1970) (federal habeas petitioner, who had been deprived of her driver's license and forced to pay several fines for various traffic violations, was not entitled to bring a petition for habeas corpus because at the time of the filing of the habeas petition she was not in custody for purposes of federal habeas statute).

169. *Boylan*, 390 S.E.2d at 579.

170. *Id.*

171. *Id. Accord Earp v. Brown*, 391 S.E.2d 396, 397 (Ga. 1990).

narrowly defined class of cases – those in which a petitioner who is not in custody seeks habeas relief pursuant to *Hardison v. Martin* from a misdemeanor traffic conviction;¹⁷² (2) “[b]ecause *Hardison v. Martin* provides greater habeas corpus protection than is required by the United States Constitution . . . the legislature may place a procedural limitation on that protection without suspending the writ;”¹⁷³ and (3) the 180-day statute of limitations is no different than “a number of recognized procedural limitations on the writ of habeas corpus,” including the limitations on appellate review of denials of relief (derived from 1975 statute), or the procedural default rules barring review of claims not properly raised at trial or on direct appeal (derived from the 1982 statute).¹⁷⁴ Thus, the 1986 statutory restriction on habeas corpus was validated, at least in part, by virtue of two of the other post-1967 statutes restricting habeas corpus.

The Georgia Supreme Court has not yet construed the unusual provision of the 1986 statute under which a failure to file a habeas petition within the required statute of limitations divests the habeas court of jurisdiction. Most statutes of limitations in civil litigation, including the statute of limitations on filing federal habeas petitions enacted in 1996, are regarded as affirmative defenses that are nonjurisdictional and subject to waiver, forfeiture, and equitable tolling.¹⁷⁵

The 180-day statute of limitations enacted in 1986, applicable to misdemeanor traffic law convictions, was the only time restraint on filing Georgia habeas corpus petitions until 2004,

172. *Boylan*, 390 S.E.2d at 579.

173. *Id.*

174. *Id.*

175. *See, e.g., Holland v. Florida*, 560 U.S. 631, 632 (2010) (holding “[a] ‘petitioner’ is ‘entitled to equitable tolling’ if he shows ‘(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way’ and prevented timely filing.” (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005))); *Day v. McDonough*, 547 U.S. 198, 199 (2006) (finding that “a district court has discretion to decide whether the administration of justice is better served by dismissing the case on statute of limitations grounds or by reaching the merits of the petition.”).

when both a general statute of limitations and a rule of laches were grafted onto Georgia habeas by statute.

E. 1999 Statute

The 1999 statute¹⁷⁶ is the fifth of the six post-1967 statutory curtailments of the writ of habeas corpus in Georgia. It is the only one of the six statutes whose restricting provisions are not limited to postconviction cases. The habeas restrictions imposed by the 1999 statute fall into two categories.

First, the 1999 statute abolished appeals of right for habeas petitioners charged with a crime who were not yet convicted. This had the indirect effect of ending all appeals of right in habeas cases involving confinement on criminal charges, whether pretrial or postconviction, except that the government's right to appeal grants of postconviction relief was undisturbed. This startling curtailment of the writ was accomplished so stealthily that it took the Georgia Supreme Court a dozen years to figure out what the state legislature had done.

Second, the 1999 statute placed new procedural burdens on indigent prisoners who proceed, or apply to proceed, in forma pauperis in a postconviction habeas corpus proceeding. These burdens are punitive in purpose and practice.

1. Abolition of Appeals of Right for Habeas Petitioners in Criminal Confinement

The story of how the Georgia legislature utilized the 1999 statute to unobtrusively abolish the long-standing and important right of habeas petitioners imprisoned prior to trial on criminal charges to appeal of right a denial of relief is complicated and convoluted. It requires, to begin with, an examination of two other Georgia statutes, the Discretionary Application Appeals Act and the Prison Litigation Reform Act of 1996.

Expansively amended numerous times since its original

176. Act of 1999, 1999 Ga. Laws 847, §§ 1 to 3 (current version at O.C.G.A. §§ 42-12-3(1), 42-12-7.1, 42-12-7.2 (West, Westlaw through 2014)).

enactment in 1979, the Discretionary Application Appeals Act¹⁷⁷ is designed “to assist in reducing the massive caseload of the appellate courts.”¹⁷⁸ The Act provides for discretionary appeals instead of appeals of right. The Act abolishes appeals of right with respect to the classes of cases specified by the Act, and requires that in these cases the party who was unsuccessful in a trial court (including a superior court) and now seeks appellate review must apply for and obtain permission of the appellate court before the appeal is allowed. If permission is granted, the appeal thereafter proceeds as if it was an appeal of right. If permission is denied, there is no appeal.

The Discretionary Application Appeals Act vests the Georgia appellate courts with discretion not to entertain an appeal,¹⁷⁹ and any attempt to appeal in violation of the statute will result in dismissal of the appeal for lack of jurisdiction.¹⁸⁰ While it does provide for discretionary appeals, the Act also specifically states that it “shall not affect”¹⁸¹ the codified provisions of the 1975 statute, which preserve the government’s power to take an appeal of right from a grant of relief but require postconviction habeas petitioners to obtain a certificate of probable cause before appealing a denial of relief. Thus, by its own terms, the Discretionary Application Appeals Act does not extend to postconviction habeas corpus cases (where appeals continue to be governed by the 1975 statute as now codified).¹⁸²

Allegedly to cope with expenses and problems resulting from frivolous or malicious civil actions filed by prison inmates, the Georgia legislature enacted the Prison Litigation Reform Act of

177. O.C.G.A. § 5-6-35 (West, Westlaw through 2014).

178. *Rebich v. Miles*, 448 S.E.2d 192, 193 (Ga. 1994).

179. *See, e.g., id.* at 192; *Citizens & Southern Nat’l Bank v. Rayle*, 273 S.E.2d 139, 142 (Ga. 1980).

180. *See, e.g., Prison Health Services, Inc. v. Ga. Dep’t of Admin. Services*, 462 S.E.2d 601 (Ga. 1995); *Armstrong v. Miles*, 455 S.E.2d 587 (Ga. 1995).

181. O.C.G.A. § 5-6-35(i) (2013).

182. *See, e.g., Brown v. Crawford*, 715 S.E.2d 132, 134 (Ga. 2011); *Jones v. Townsend*, 480, 490 S.E.2d 24 (Ga. 1997).

1996.¹⁸³

Regrettably, the 1996 Act is suffused with the tone of hostility to prison and jail inmates, and to the civil litigation these inmates institute, that is a hallmark of the law enforcement establishment's public policy positions; and the Act plainly is the product of political forces aligned with that establishment.¹⁸⁴

The Act's legislative findings and determinations are based on anecdotal, one-sided, and unreliable assertions about the alleged evils and expenses of prisoner civil litigation, and the wording of the Act bespeaks a callous indifference to the harsh realities of incarceration in penal institutions.¹⁸⁵ The Act even purports to find and determine that "prisoners . . . view litigation as a recreational exercise"¹⁸⁶ – a heartless exaggeration which dehumanizes prisoners and desensitizes society to the suffering and misery that criminal confinement entails and to the legitimate, understandable complaints of citizens detained in total institutions. Unsurprisingly, the fingerprints of the law enforcement establishment are on the Act, which is based on

183. The Prison Litigation Reform Act of 1996, 1996 Ga. Laws 400 (current version at O.C.G.A. §§ 42-12-1 to 42-12-9 (West, Westlaw through 2014)). A number of other states also have enacted prison litigation reform acts. See George R. Blum, Annotation, *Validity, Construction, and Application of State Prison Litigation Reform Acts*, 85 A.L.R. 6TH 229 (2013).

184. For background information on the Act, see Kevin W. King, *Prison Litigation Reform: Impose Court Costs on Prisoners Who File Lawsuits; Authorize Courts to Order Payments of Defendant's Attorney Fees Incurred in Defending Frivolous Lawsuits*, 13 GA. ST. U.L. REV. 280 (1996); see also Roger S. Williams, *Prison Litigation Reform: Provide that a Prisoner Filing a Writ of Habeas Corpus Pay Fees from the Prisoner's Account; Prohibit in Forma Pauperis Filing Prisoners Who Have Repeatedly Filed Frivolous or Malicious Claims*, 16 GA. ST. U.L. REV. 219 (1999).

185. The findings and recommendations even refer to "the fact all prisoners' needs are provided at city, county, or state expense," O.C.G.A. § 42-12-2(2) (West, Westlaw through 2014) (emphasis added), which is not even remotely true. Contrary to what some Georgia lawmakers seem to believe, imprisonment in a Georgia penal facility is hardly comparable to a pleasure trip on a cruise ship, where all the passengers' needs (including three meals a day) are attended to. See *infra* Part II.E.2.

186. O.C.G.A. § 42-12-2(1) (West, Westlaw through 2014).

“substantial research and drafting contributions by the Georgia Attorney General’s Office,”¹⁸⁷ with much of what we know about the origins and provisions of the Act coming from an interview with an Assistant Attorney General of Georgia.¹⁸⁸

The Prison Litigation Reform Act of 1996 broadly defines a prisoner as “a person 17 years of age or older who has been convicted of a crime and is presently incarcerated or is being held in custody awaiting trial or sentencing.”¹⁸⁹ Thus, all adults confined on criminal charges before or after conviction are subject to the Act. These are the persons who are stripped of appeals of right by the Act. These are the persons who, if they seek habeas relief while indigent, are weighed down by the Act with new, punitive procedural requirements.

The Prison Litigation Reform Act, among other things, abolishes appeals of right with respect to civil actions filed by prisoners, requiring instead that appeals of such actions be in accordance with the Discretionary Application Appeals Act.¹⁹⁰ Prisoners seeking to appeal are now required to apply for and obtain permission of the appellate court before being allowed to appeal, and without that permission there will be no appeal.

The year after it was enacted, the Georgia Supreme Court blandly stated that the Prison Litigation Reform Act was directed “[t]o rectify the perceived imbalances in the judicial system toward which the Act was directed”¹⁹¹ According to the Court, the Act’s provisions could be divided into two categories: first, it “provided procedures for monitoring prisoner litigation,”¹⁹² and second, it “placed certain burdens on prisoners seeking to conduct civil litigation.”¹⁹³

187. King, *supra* note 184, at 281.

188. *Id.* at 280-84, nn.4, 9, 10, 17, 32, 42

189. The Prison Litigation Reform Act of 1996, 1996 Ga. Laws 400, § 1 (current version at O.C.G.A. § 42-12-3(4) (West, Westlaw through 2014)).

190. *See* O.C.G.A. § 42-12-8 (West, Westlaw through 2014) (codifying this provision).

191. Jones v. Townsend, 480 S.E.2d 24, 24-25 (Ga. 1997).

192. *Id.* at 25.

193. *Id.*

As originally enacted in 1996, the Prison Litigation Reform Act itself specifically excepted both direct appeals and habeas corpus proceedings from the Act.¹⁹⁴ After passage of the Act, therefore, prisoners in pretrial custody on criminal charges continued to enjoy the habeas rights they had previously enjoyed, including the ability to appeal as a matter of right an order denying habeas relief.¹⁹⁵ The writ of habeas corpus was not within the scope of the Act and was untouched by the Act.

However, among other things, the 1999 statute¹⁹⁶ repealed the portion of the Prison Litigation Reform Act of 1996 that had exempted habeas cases from its provisions. Specifically, the 1999 statute amended the 1996 Act in three important respects: (1) the 1996 Act's provision exempting habeas corpus proceedings was deleted;¹⁹⁷ (2) several sections of the 1996 Act imposing various procedural requirements on prisoners filing civil actions were declared inapplicable to habeas proceedings;¹⁹⁸ and (3) two new statutory sections imposing

194. 1996 Ga. Laws 400, § 1 (codified at O.C.G.A. § 42-12-3(1)(A), (B) (1996) (repealed 1999) (West, Westlaw through 2014)) (“‘Action’ means any civil lawsuit, action, or proceeding, including an appeal, filed by a prisoner, but shall not include” (A) “a petition for writ of habeas corpus”; or (B) “an appeal of a criminal proceeding.”). See *Brown v. Crawford*, 715 S.E.2d 132, 134 (Ga. 2011) (“[T]he legislature expressly exempted appeals from criminal convictions and habeas corpus filings from the ambit of the Act”); *Jones v. Townsend*, 480 S.E.2d 24, 25 n.3 (Ga. 1997) (“The Act specifically excludes from its scope criminal appeals and habeas corpus actions.”).

195. See, e.g., *Smith v. Nichols*, 512 S.E.2d 279, 282 (Ga. 1999); *Hood v. Carsten*, 481 S.E.2d 525, 528-529 (Ga. 1997).

196. 1996 Ga. Laws 400 (codified as amended at O.C.G.A. §§ 42-12-1 to 42-12-9 (West, Westlaw through 2014)).

197. 1999 Ga. Laws 847, § 1 (codified at O.C.G.A. § 42-12-3(1) (West, Westlaw through 2014)). Thus, where the Prison Litigation Reform Act formerly excepted both habeas corpus and criminal direct appeals from the Act, it now excepts only “appeal[s] of a criminal proceeding.” O.C.G.A. § 42-12-3(1) (West, Westlaw through 2014).

198. 1999 Ga. Laws 847, § 1 (codified at O.C.G.A. § 42-12-3(1) (West, Westlaw through 2014)) (“[T]he provisions of Code Sections 42-12-4 through 42-12-7 shall not apply to petitions for writ of habeas corpus.”). This language would be superfluous if habeas were not now governed by the

punitive procedural burdens with respect to in forma pauperis habeas corpus proceedings by indigents were added to the Prison Litigation Reform Act.¹⁹⁹

The effect of the 1999 statute on habeas appeals does not appear to have ever been considered by the backers of the statute. The only account we have of the background of the statute contains no mention of habeas appeals.²⁰⁰ The scant legislative history of the 1999 statute, which passed both houses of the legislature without opposition, indicates that it was enacted to curb supposedly ongoing evasion of the Prison Litigation Reform Act of 1996 being committed by prisoners wrongfully invoking the writ of habeas corpus.²⁰¹ According to that legislative history, the 1999 statute was intended to institute two principal reforms: to remove the exception for habeas corpus filings from the Prison Litigation Reform Act, and to make it more procedurally complicated and burdensome for indigents to file in forma pauperis habeas corpus petitions.²⁰² Allegedly, “some prisoners [were continuing] to file malicious and frivolous suits under the guise of habeas corpus petitions.”²⁰³ The evidence for alleged evasion of the 1996 Act is anecdotal and unproven; nor is there evidence that, if the problem ever existed, it was a widespread or significant one. The sponsors of the bill appear not to have realized that the legislation was unneeded because the courts already had perfectly adequate ways of dealing with habeas petitioners who abuse the court system by showering it with frivolous or malicious habeas petitions.²⁰⁴

At any rate, the main sponsor of the 1999 statute seems to

Prison Litigation Reform Act.

199. 1999 Ga. Laws 847, §§ 1, 2 (codified at O.C.G.A. § 42-12-3(1), 42-12-7.1, 42-12-7.2 (West, Westlaw through 2014)).

200. See Williams, *supra* note 184, at 219-21 (noting that habeas corpus is not mentioned in the legislative history of the Prison Litigation Reform Act).

201. *Id.* at 220.

202. *Id.*

203. *Id.* (emphasis added).

204. See, e.g., Howard v. Sharpe, 470 S.E.2d 678, 680 (Ga. 1996).

have been unaware of the fact that courts are not bound by the label a prisoner gives his *pro se* pleading and that they may dispose of a such a pleading based on its substance rather than its title. If it was true that some prisoners were filing civil actions disguised as habeas petitions, therefore, it cannot be doubted that the courts of this state would have treated the actions as subject to the Prison Litigation Reform Act and disposed of them in accordance with that Act (which would mean that the prisoner would be unable to appeal of right and would have to seek appellate review via the discretionary appeal procedure). The 1999 statute was not needed.

Amazingly – it bears emphasizing again – nothing indicates its backers or the legislature had thought through the devastating effect the 1999 statute would have on habeas appeals of right. The legislative history says nothing whatsoever about habeas appeals. There is nothing in the legislative history of the 1999 statute suggesting that anyone understood that bringing habeas proceedings within the scope of the Prison Litigation Reform Act would have these three major consequences: (1) appeals of right by habeas petitioners would be abolished in cases involving pretrial custody; (2) since appeals of right had already been abolished in postconviction habeas cases where relief was denied, all appeals of right by habeas petitioners in criminal confinement were, as an indirect consequence of the 1999 statute, now being ended; and (3) although the government would continue to be able to appeal as of right in a postconviction case, it would no longer have the right to appeal an order granting habeas relief from pretrial criminal confinement.

The 1999 statute never explicitly stated that it was abolishing the traditional appeal of right for habeas petitioners in pretrial criminal confinement. However, it did quietly effect such an abolition. It did so in an almost clandestine manner. First, the 1999 statute brought habeas proceedings within the scope of the Prison Litigation Reform Act; that Act made appeals of prisoner civil actions (which now included habeas proceedings in pretrial criminal custody cases) subject to the Discretionary Application

Appeals Act; and under that Act there were no appeals of right, only discretionary appeals. Nor is this all. Since postconviction habeas petitioners previously had been stripped of traditional habeas appeal rights (by the 1975 statute), an indirect effect of the 1999 statute was to bring an end to all habeas appeals of right by persons in custody on criminal charges. By simply repealing an exception to the Prison Litigation Reform Act and without expressly announcing what it was doing or its significance, the legislature quietly, almost furtively, demolished a basic right convicted inmates possessed until 1975 and which unconvicted inmates possessed until 1999.²⁰⁵ Appeals of right from denials of habeas relief were now things of the past.

It took over a decade for the Georgia Supreme Court to figure out that the 1999 statute had zapped habeas appeals of right in cases of pretrial criminal confinement. As late as 2010 the Court was still of the view that “[w]here . . . a prisoner files a pre-trial habeas corpus petition while in custody . . . the discretionary procedures of [the codified version of the 1975 statute relating to certificates of probable cause] are replaced by the direct appeal route”²⁰⁶ It was not until 2011, when it

205. The 1999 statute also abolished the government’s traditional power to take an appeal of right in habeas cases involving pretrial criminal confinement, and replacing it with the discretionary appeal authorized by Discretionary Application Appeals Act. *See Brown v. Crawford*, 715 S.E.2d 132, 134 (Ga. 2011) (“[A]s the Act reads presently, any appeal of a court’s action with respect to a habeas corpus filing by a prisoner must follow the discretionary review process set forth in OCGA § 5-6-35.”); *see also Ray v. Barber*, 548 S.E.2d 283, 284 (Ga. 2001) (“[T]he language is clear and requires that in all actions filed by prisoners, appeals must come by discretionary application.”) It has been said that “[t]his makes little difference” because “[w]here the State is not granted discretionary review, it likely would have lost on appeal anyway.” *Brown*, 715 S.E.2d at 135 (Nahmias, J., concurring). Furthermore, according to the concurrence, “the General Assembly is free to change [the 1999 statute],” thereby restoring the state’s right to appeal. *Brown*, 715 S.E.2d at 135. Such a statutory change seems probable, in view of the legislature’s post-1967 trend of favoring the interests of government over the rights of citizens when passing habeas laws.

206. *Jackson v. Bittick*, 690 S.E.2d 803, 804 (Ga. 2010).

decided *Brown v. Crawford*,²⁰⁷ that the Court, directing its attention to the 1999 statute for the first time, overruled eight post-1999 rulings and announced that persons in pretrial custody on criminal charges could no longer appeal of right from a denial of habeas relief.²⁰⁸ *Brown v. Crawford* was the first Georgia Supreme Court decision to construe the 1999 statute.

The holding in *Brown v. Crawford* was straightforward and logical, even though the legislation it had to construe was complicated and convoluted.

The Court reasoned as follows. First, in cases covered by the Prison Litigation Reform Act no appeals of right are permitted;²⁰⁹ instead, appeal of an order issued by a trial court must “follow a discretionary application procedure.”²¹⁰ Second, the state legislature had originally “expressly exempted . . . habeas corpus filings from the ambit of the [Prison Litigation Reform Act],”²¹¹ which meant that “a prisoner could [continue to] appeal directly from the denial of a pre-trial petition for writ of habeas corpus but [had to] apply [under the 1975 statute] for discretionary review of a judgment rendered on a post-trial petition for writ of habeas corpus.”²¹² Third, “[i]n 1999 . . . the General Assembly amended the [Prison Litigation Reform] Act to remove the exemption for habeas corpus filings”²¹³

207. 715 S.E.2d 132 (Ga. 2011).

208. The eight overruled cases were: *Jackson v. Bittick*, 690 S.E.2d 803 (Ga. 2010); *Massey v. St. Lawrence*, 671 S.E. 2d 834 (Ga. 2009); *Lamb v. Bennett*, 671 S.E.2d 506 (Ga. 2009); *Nguyen v. State*, 651 S.E.2d 681 (Ga. 2007); *Bryant v. Vowell*, 651 S.E.2d 77 (Ga. 2007); *Gresham v. Edwards*, 644 S.E.2d 122 (Ga. 2007); *Whitmer v. Conway*, 610 S.E.2d 61 (Ga. 2005); *Tabor v. State*, 610 S.E.2d 59 (Ga. 2005).

209. *See Brown*, 715 S.E.2d. at 133 (Ga. 2011) (“[I]n the situations covered by the Act, a prisoner does not have the right of direct appeal but must file a discretionary application in the appropriate appellate court in order to obtain [appellate] review . . .”)

210. *Id.* at 133.

211. *Id.* at 134.

212. *Id.*

213. *Id.*

Fourth, pursuant to the 1999 statute, “a prisoner who files for habeas corpus now must abide by [the] procedures in the [Prison Litigation Reform] Act . . . including O.C.G.A. § 42-12-8 [which requires appeals in cases covered by the Act to follow the discretionary appellate review process established by O.C.G.A. § 5-6-35, the Discretionary Application Appeals Act],”²¹⁴ except in postconviction cases (where the codified version of the 1975 statute governs). Therefore, “as the [Prison Litigation Reform] Act reads presently, any appeal of a court’s action with respect to a habeas corpus filing by a prisoner must follow the discretionary review process set forth in O.C.G.A. § 5-6-35 [except in postconviction cases].”²¹⁵ Even appeals by the government (except in postconviction cases) from grants of habeas relief may be reviewed on appeal only via the discretionary application appeals review procedure.²¹⁶ Fifth and finally, the post-1999 cases “allow[ing] a petitioner to file a direct appeal from the denial of a pre-trial petition for writ of habeas corpus”²¹⁷ were overruled.

To summarize: as a result of the 1999 statute, it is now established law in Georgia that “[a]n application for discretionary appeal pursuant to O.C.G.A. § 5-6-35 is required to obtain review of an order on a pretrial habeas petition filed by a prisoner,”²¹⁸ even if it is the government which seeks the appeal.²¹⁹ (A failure to meet the 30-day deadline for filing an application for a discretionary appeal in a pretrial habeas case is a jurisdictional defect requiring dismissal of the habeas appeal).²²⁰ In addition, as an indirect result of the 1999 statute, all appeals of right by habeas petitioners in criminal custody have been abolished and replaced with the discretionary appeal.

214. *Id.*

215. *Brown*, 715 S.E.2d at 134.

216. *Id.*

217. *Id.*

218. *Crosson v. Conway*, 728 S.E.2d 617, 619 (Ga. 2012).

219. *Brown*, 715 S.E.2d at 134.

220. *Crosson*, 728 S.E.2d at 619.

2. Punitive Burdens on Indigent Petitioners

The 1999 statute also added to the Prison Litigation Reform Act two new sections intended to impose heavy new burdens, harsh to the point of punitiveness, on indigent habeas petitioners seeking to proceed in forma pauperis and on the families and friends of those petitioners.

The first of these two new punitive sections is codified at O.C.G.A. § 42-12-7.1:

§ 42-12-7.1. Procedure applicable when indigent prisoner files petition for habeas corpus

The following provisions shall apply when an indigent prisoner files a petition for habeas corpus:

(1) The indigent prisoner shall pay the current balance of funds in the prisoner's inmate account;

(2) The clerk of court shall notify the superintendent of the institution in which the prisoner is incarcerated that a petition for habeas corpus has been filed. Notice to the superintendent shall include:

(A) The prisoner's name, inmate number, and civil action number; and

(B) The amount of the court costs and fees due and payable; and

(3) Upon notification by the clerk of court that an indigent prisoner has filed a petition for habeas corpus, the superintendent shall:

(A) Immediately freeze the prisoner's inmate account; and

(B) Order that all moneys deposited into the prisoner's inmate account be forwarded to the clerk until all court costs and fees are satisfied, whereupon the freezing of the account shall be terminated.²²¹

221. O.C.G.A. § 42-12-7.1 (West, Westlaw through 2014). The legislative history of § 42-12-7.1 tells us little: "Code section 42-12-7.1 . . . require[s] indigent prisoners to pay the current balance in their inmate

Traditionally, most habeas corpus proceedings on behalf of prison inmates are undertaken in forma pauperis. In forma pauperis proceedings are not an evil. They are essential to liberty and the rule of law. In forma pauperis proceedings give meaning to “the fundamental right of every litigant, rich or poor, to equal consideration before the courts.”²²² Leave to proceed in forma pauperis must be given to an indigent habeas petitioner unless the habeas petition is frivolous or malicious; indeed, for a state to deny access to the writ of habeas corpus because the prisoner cannot pay filing fees or costs is unconstitutional.²²³ It is a glory of our system of law that, for those who cannot afford it, the writ of habeas corpus is free of charge. Clarence Earl Gideon was an indigent habeas petitioner who proceeded in forma pauperis.²²⁴

Traditionally, when indigent Georgia prison inmates sought to proceed in forma pauperis, they would file a pauper’s affidavit and, if it was in order, would then be authorized (by order of the judge) to proceed in forma pauperis, which meant they would not have to pay filing fees or costs and the case would thereupon proceed.²²⁵ As a result of enactment of

accounts . . . and defines the procedures that apply when an indigent prisoner files a petition of habeas corpus. Specifically, it requires that the prisoner’s inmate account be frozen until all court costs and fees are satisfied.” Williams, *supra* note 184, at 220-21. Further:

Code section 42-12-7.1 requires that prisoners filing indigent claims pay the current balance of funds in their inmate accounts. This Code section further defines the procedures to be followed by the clerk of court and prison superintendent when an indigent prisoner files a petition for writ of habeas corpus, including freezing the prisoner’s inmate account until all court costs and fees are satisfied.

Id. at 221.

222. *Coppedge v. United States*, 369 U.S. 438, 456 (1962) (Stewart & Brennan, JJ., concurring).

223. *Smith v. Bennett*, 365 U.S. 708, 709 (1961) (“We hold that to interpose any financial consideration between an indigent prisoner of the State and his exercise of a state right to sue for his liberty is to deny that prisoner the equal protection of the laws.”).

224. *Gideon v. Wainwright*, 372 U.S. 335, 337 (1963).

225. See O.C.G.A. §§ 9-15-2, 9-15-4 (West, Westlaw through 2014)

O.C.G.A. § 42-12-7.1 in 1999, there has been a drastic alteration in the procedures followed when an indigent habeas petitioner seeks to proceed in forma pauperis.

The petitioner must still file a pauper's affidavit and still obtain permission from the court to proceed in forma pauperis.²²⁶ However, under the 1999 statute, even if he is indigent and is being allowed to proceed in forma pauperis, the habeas petitioner nonetheless still must pay the clerk of the habeas court all the fees and costs of the habeas proceeding. Furthermore, once an inmate files an in forma pauperis habeas petition, the statute ousts him from accessing his inmate account and transforms the account into a collection agency for the state. When the inmate's habeas petition²²⁷ is filed in forma pauperis, the 1999 statute provides, the current balance in the prisoner's inmate account will be immediately seized and transferred to the habeas court clerk. The account is then immediately frozen, with all funds thereafter deposited into the petitioner's account to be forwarded automatically to the court until all costs and fees are satisfied, at which time, if ever, involuntary transfers from the account will cease, and the account will be unfrozen and thus made usable for the prisoner.

These procedures are gratuitously punitive to indigent prisoners, and they also subject the relatives and friends of those prisoners to unnecessary hardships.

The filing fee for a petition for a writ of habeas corpus is

(permitting in forma pauperis proceedings in civil actions); *see also* O.C.G.A. § 15-6-77(d), (e) (West, Westlaw through 2014) (exempting indigents from filing fees and costs in civil litigation).

226. O.C.G.A. § 9-10-14 (West, Westlaw through 2014). A blank model form of Request to Proceed in Forma Pauperis, which includes the required pauper's affidavit, is available free of charge from the Administrative Office of the Courts of Georgia. A petitioner who seeks to proceed *in forma pauperis* should fill out this form and submit it to the court at the time he submits his habeas petition.

227. The Administrative Office of the Courts of Georgia makes available without charge a model blank form of Application for Writ of Habeas Corpus, for use in postconviction habeas corpus proceedings, the use of which is mandatory. *Heaton v. Lemacks*, 466 S.E.2d 7, 8 (Ga. 1996).

\$207. In addition, there is the cost, typically \$50, of having the sheriff serve the prison warden with a copy of the habeas petition. Thus, at a minimum there usually will be over \$250 in fees and costs that become due the moment a habeas petition is filed. Additional costs may also be incurred later, but it will be assumed for present purposes that \$257 is the total amount of fees and costs which the habeas petitioner must pay through his inmate account. Only rarely will a prison inmate be able to arrange for this amount to be paid up front by a relative or other third party at the time the habeas petition is filed. Usually the prisoner will have to hope that third parties will make enough deposits to his inmate account to pay the pending fees and costs, so that his inmate account will be unfrozen.

If the habeas petitioner has \$257 in his inmate account, he will be required to pay the fees and costs from the money in his account. He will not be regarded as indigent; he will not proceed in forma pauperis; and the petitioner's account will not be frozen (unless additional costs are incurred). But few prisoners will have a balance of more than \$250 in their account. If the prisoner does have funds in his account but they total less than \$257, his account will be emptied and paid to the court clerk; the account will immediately be frozen; during the time the account is frozen, any additional deposits to the account will automatically be taken out and sent to the clerk; and the account will remain frozen until the full amount due to the clerk has been paid. If the indigent prisoner has no funds in his inmate account when he files his habeas petition, the same procedure will be followed and the inmate's account frozen, except that at the time of filing there will be no funds in the inmate account to transfer to the clerk.

Most indigent prisoners, therefore, who file a habeas petition in forma pauperis will have their inmate accounts frozen until the fees and costs due, which will be at least \$250, are paid in full. If neither the prisoner nor his family and friends are able to deposit that amount in the inmate's account, the account will remain frozen indefinitely and therefore continue to be of no use to the prisoner. It is unlikely that the prisoner, on his own, will

be able to make deposits of any significant amount. If his family and friends do make enough deposits, then the account will be unfrozen, but this means of course that the burden of paying the litigation expenses of the habeas petition of an indigent prisoner has been shifted from the government to the relatives and associates of the indigent prisoner. It is unjust to require these persons (who are unlikely to be wealthy) to assume these expenses, which ought to be paid by the government. But if they don't make payments equal to what is due to the court, their loved one's inmate account will remain frozen, and, as they probably will find out, the prisoner will be subjected to various resulting hardships, including loss of his ability to use his account for the purpose of making purchases at the prison commissary, which is the only source for food, toiletries, clothing, and other items.

Under the 1999 statute, therefore, nearly every time an indigent prisoner files a habeas petition, the balance in his inmate account (if there is any) is involuntarily transferred away, the account is promptly frozen, and the account remains frozen indefinitely, perhaps permanently. When a prisoner's account is frozen and he is thereby deprived of access to the commissary, he suffers a multitude of hardships. Even the number of meals he gets to eat per day may be affected.

The Georgia state prison system serves inmates three meals a day four days a week; on Fridays, Saturdays, and Sundays two meals a day are served. Only by purchasing extra food at the commissary can a prisoner eat three meals a day every day of the week. A prisoner denied use of the commissary is forced to eat only twice a day for nearly half of each week. The 1999 statute puts the indigent prisoner who seeks to file a habeas petition and proceed in forma pauperis into an unenviable position. If the prisoner does not file the petition, he is giving up his constitutional right to habeas corpus, and he will lose the opportunity to litigate his claim, which may warrant relief. But if he does file the habeas petition, he will be unable to make purchases at the commissary for an indefinite period of time, and possibly for as long as he is incarcerated. He will have to

eat two meals a day, three days a week.

Forcing an indigent prison inmate to choose between either filing a habeas petition or eating three meals every day is an unnecessary cruelty; no inmate should be placed in a situation where filing a habeas petition may well result in his eating less food three days a week.

The fees and costs of a habeas proceeding instituted by an indigent prisoner should, as they traditionally have been, be paid by the government. Compelling an indigent prisoner, or pressuring his family and friends, to pay the fees and costs of the prisoner's *in forma pauperis* habeas proceeding is inherently wrong and unnecessarily cruel, even if the prisoner is being permitted to proceed *in forma pauperis*. Seizing the contents of a petitioner's inmate account as punishment for proceeding *in forma pauperis* is wanton cruelty, as is indefinitely freezing the account for the same punitive reasons. Compelling an indigent prisoner to choose between proceeding *in forma pauperis* or eating three meals a day is uncivilized.

O.C.G.A. § 42-12-7.1 is inhumane. It subverts the basic principle that the government should pay the costs of *in forma pauperis* litigation. It places undue pressures on family and friends of indigent inmates, and it imposes unfair financial burdens on those families and friends. It mindlessly empties inmate accounts, freezes inmate accounts, and makes an inmate's account useless to the inmate for indefinite amounts of time, causing unnecessary hardships for those inmates. No indigent inmate should have his account balance seized and his account frozen for the "offense" of filing an *in forma pauperis* habeas corpus petition. O.C.G.A. § 42-12-7.1 should be repealed.

The other punitive section added by the 1999 statute is codified at O.C.G.A. § 42-12-7.2. It too needs to be repealed. It provides:

In no event shall a prisoner file any action *in forma pauperis* in any court of this state if the prisoner has, on three or more prior occasions while he or she was incarcerated or detained in any facility, filed any action in any court of this state that

was subsequently dismissed on the grounds that such action was frivolous or malicious, unless the prisoner is under imminent danger of serious physical injury.²²⁸

Let us be clear about this downright noisome law, which is outrageously designed to punish prisoners who file inappropriate civil actions by excluding them, subject to one tiny exception, from the writ of habeas corpus (unless they pay fees and costs, which as indigents they cannot do).

On its face O.C.G.A. § 42-12-7.2 prohibits an indigent prisoner, absent imminent danger of serious physical injury, from filing an in forma pauperis habeas petition if he has, while a prisoner, filed three previous actions which were dismissed as frivolous or malicious. To deprive an indigent habeas petitioner of the opportunity to proceed in forma pauperis is to deny him habeas corpus. O.C.G.A. § 42-12-7.2 insupportably punishes an indigent prisoner (including a prisoner who is illegally detained or otherwise entitled to habeas relief and who would be granted relief if he filed his habeas petition, but who is not in danger of physical harm) by prohibiting him from filing his petition in forma pauperis if in the past he filed three actions that were dismissed for frivolousness or malice. It denies in forma pauperis status to a class of indigents as punishment for having previously filed worthless lawsuits. This means it denies habeas corpus to those indigents: to deny in forma pauperis status to an indigent habeas petitioner is equivalent to denying him access to the writ on account of his poverty, since an indigent cannot pay court fees and costs required of persons who are not indigent. To the extent it denies in forma pauperis standing to any indigent, O.C.G.A. § 42-12-7.2 is not only unjust, but unconstitutional.

In barring certain indigents not in imminent physical danger from proceeding in habeas corpus unless they pay fees and costs, O.C.G.A. § 42-12-7.2 adopts an unheard-of and unacceptable approach to habeas litigation. It excludes an identifiable class of indigents from the writ of habeas corpus for

228. O.C.G.A. § 42-12-7.2 (West, Westlaw through 2014).

reasons unrelated to whether the habeas petition is frivolous or malicious. Denial of access to the writ of habeas corpus is now to be deemed appropriate punishment for out-of-control jailhouse lawyers, regardless of the possible validity of their habeas claims for relief.

Whether or not the indigent inmate is in physical danger, it is unthinkable for government to deny in forma pauperis status to an indigent who seeks habeas corpus relief and may have a valid habeas claim – and thereby in effect deny him access to the writ of habeas corpus – because he previously filed worthless lawsuits or because of any other reason unrelated to whether the current habeas petition is frivolous or malicious. This is monstrous public policy. It is never permissible to deny an indigent habeas petitioner in forma pauperis status, unless the petition is frivolous or malicious. But O.C.G.A. § 42-12-7.2 does exactly this. Moreover, it is unconstitutional to deny an indigent access to habeas corpus because of his inability to pay fees and costs.

The legislative history of O.C.G.A. § 42-12-7.2 indicates that it “is modeled upon a corresponding subsection of the Federal P[risoner] L[itigation] R[eform] A[ct], which has recently been upheld as constitutional.”²²⁹ Unlike the Georgia three-strikes

229. Williams, *supra* note 184, at 222. Despite its official designation, the federal Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, tit. VIII, 110 Stat. 1321-71, was enacted on April 24, 1996 (the same day that Title I of the Antiterrorism and Effective Death Penalty Act of 1996 was enacted), twenty-three days after enactment of Georgia’s Prison Litigation Reform Act of 1996. Just as the Georgia Act severely curbed civil actions filed in the Georgia courts by Georgia prisoners, so, the federal Act severely curbed civil actions filed by prisoners in federal court. And, like the Georgia Act, the federal Act resulted from the exercise of anti-prisoner political power by elements of the law enforcement establishment (e.g., the National Association of Attorneys General) and their law and order political allies (e.g., the American Enterprise Institute).

The provision of the federal Prison Litigation Reform Act of 1995 on which O.C.G.A. § 42-12-7.2 is based is codified at 28 U.S.C. § 1915(g) (West, Westlaw through 2014):

In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has,

provision, however, the federal three-strikes statute does not extend to habeas corpus proceedings.²³⁰ It does bar in forma pauperis status to prisoners seeking to file a civil action if they have previously filed three civil actions dismissed for frivolousness or maliciousness, but the prohibition does not extend to habeas corpus proceedings, and does not bar the filing of any habeas petitions.²³¹

Therefore, contrary to what the legislative history of the 1999 statute might suggest, it is not true in federal court that a prisoner may, absent imminent danger of serious physical injury, be debarred from proceeding in forma pauperis in federal habeas corpus because he previously filed three frivolous or malicious civil actions which were dismissed by a court. However unfriendly they may at times be to prisoner litigation, neither Congress nor the federal courts has opted for Georgia's unusually punitive approach.

F. The 2004 Statute

The sixth restrictive statute, enacted in 2004, placed new, additional time limits on filing a postconviction habeas corpus petition. It established both a statute of limitations and a statutory rule of laches.

As codified, the 2004 statute²³² provides:

on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

230. *See, e.g.,* Jackson v. Johnson, 475 F.3d 261, 263 n.2 (5th Cir. 2007) ("The P[rison] L[itigation] R[eform] A[ct]'s three-strikes provision does not bar prisoners from proceeding in forma pauperis in a habeas action, even if the prisoner has accumulated three strikes) (citations omitted).

231. *See* FEDERAL POSTCONVICTION (2013), *supra* note 8, at 421 (explaining that federal courts have held the draconian provisions of the federal Prison Litigation Reform Act restricting civil litigation filed by prisoners do not apply to federal postconviction habeas proceedings).

232. 2004 Ga. Laws 917, §§ 1, 3 (codified at O.C.G.A. §§ 9-14-42(c), (d), 9-14-48(e) (West, Westlaw through 2014)). The second section of the 2004 statute, codified at O.C.G.A. § 9-14-43 (West, Westlaw through 2014),

§ 9-14-42. Denial of constitutional or other rights; waiver of objections

[. . .]

(c) Any action brought pursuant to this article shall be filed within one year in the case of a misdemeanor, except as otherwise provided in Code Section 40-13-33, or within four years in the case of a felony, other than one challenging a conviction for which a death sentence has been imposed or challenging a sentence of death, from:

(1) The judgment of conviction becoming final by the conclusion of direct review or the expiration of the time for seeking such review; provided, however, that any person whose conviction has become final as of July 1, 2004, regardless of the date of conviction, shall have until July 1, 2005, in the case of a misdemeanor or until July 1, 2008, in the case of a felony to bring an action pursuant to this Code section;

(2) The date on which an impediment to filing a petition which was created by state action in violation of the Constitution or laws of the United States or of this state is removed, if the petitioner was prevented from filing such state action;

(3) The date on which the right asserted was initially recognized by the Supreme Court of the United States or the Supreme Court of Georgia, if that right was newly recognized by said courts and made retroactively applicable to cases on collateral review; or

(4) The date on which the facts supporting the claims presented could have been discovered through the exercise of due diligence.

(d) At the time of sentencing, the court shall inform the defendant of the periods of limitation set forth in subsection (c) of this Code section.

provides for venue in postconviction habeas proceedings involving petitioners in federal custody or in custody outside the state of Georgia, or not in custody at all, and need not be discussed in this Article.

§ 9-14-48. Proof; depositions; affidavits; order of court

[. . .]

(e) A petition, other than one challenging a conviction for which a death sentence has been imposed or challenging a sentence of death, may be dismissed if there is a particularized showing that the respondent has been prejudiced in its ability to respond to the petition by delay in its filing unless the petitioner shows by a preponderance of the evidence that it is based on grounds of which he or she could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the respondent occurred. This subsection shall apply only to convictions had before July 1, 2004.²³³

1. Statute of Limitations

The provisions of the 2004 statute of limitations are as follows: (1) the 180-day limitation period with respect to misdemeanor traffic law convictions (originally established by the 1986 statute) is undisturbed; (2) for all other misdemeanors the limitations period is one year; (3) for felonies, the limitations period is four years; and (4) in cases where the death sentence has been imposed, there is no limitations period.

Under the statute, the limitations period runs from the latest of a number of events, which are enumerated at O.C.G.A. § 9-14-42(c)(1) to (4). In most cases, the operative date from which the limitation period is measured will be the one identified in O.C.G.A. § 9-14-42(c)(1), i.e., the date on which the judgment of conviction becomes final at the end of the direct review process. But later filings are permitted where the provisions of O.C.G.A. § 9-14-42(c)(2) to (4) apply. For persons whose convictions occurred before passage of the 2004 statute, however, these limitations periods begin to run on July 1, 2004, the 2004 statute's effective date, with a person convicted of a felony having four years, until July 1, 2008, and a person convicted of a misdemeanor having one year, until July 1, 2005,

²³³ O.C.G.A. §§ 9-14-42(c), (d), 9-14-48(e) (West, Westlaw through 2014).

to file the habeas petition.

The Georgia Supreme Court has not decided a case requiring it to pass upon the constitutional validity of the 2004 statute of limitations; nevertheless, several of its decisions seem to imply that the statute is valid.²³⁴

The statute of limitations enacted in 2004 is patterned after and is worded nearly identically to the statute of limitations on federal habeas corpus proceedings by state prisoners,²³⁵ which was added to the federal habeas corpus statutes by Title I of the Antiterrorism and Effective Death Penalty Act of 1996,²³⁶ except that the federal time limitation period is one year for all offenses. Also, unlike the federal statute, the Georgia statute requires that a criminal defendant be informed at sentencing by the judge of the periods of limitation on applying for habeas relief.²³⁷ Presumably, the Georgia Supreme Court will interpret the Georgia habeas statute of limitations in accordance with the way the United States Supreme Court has interpreted the federal habeas statute of limitations.²³⁸

234. *See, e.g.*, *State v. Sosa*, 733 S.E. 2d 262, 263 (Ga. 2012) (construing O.C.G.A. § 9-14-42(c)(3) to require reversal grant of habeas relief); *Smith v. State*, 716 S.E.2d 143, 143-44 (Ga. 2011) (citing O.C.G.A. § 9-14-42(c) as support to deny postconviction motion); *Humphrey v. Owens*, 715 S.E.2d 119, 120 (Ga. 2011) (“[T]he utilization of such remedy [of habeas corpus] may be barred by the statute of limitation, see OCGA § 9-14-42(c)(1).”); *see also* *Edwards v. State*, 707 S.E.2d 335, 335-36 (Ga. 2011).

235. *Compare* 28 U.S.C. § 2244(d) (West, Westlaw through 2014), *with* O.C.G.A. § 9-14-42(c) (West, Westlaw through 2014).

236. Antiterrorism and Effective Death Penalty Act of 1996, tit. 1, Pub. L. No. 104-132, § 101, 110 Stat. 1217 (1996). Prior to 1996, there was no statute of limitations governing federal habeas corpus proceedings. *See generally* FEDERAL POSTCONVICTION (1996), *supra* note 8, at 714; *see also* *Wyzykowski v. Dep’t of Corrs.*, 226 F.3d 1213, 1216 (11th Cir. 2000) (noting that prior to 1996, “the only time limitation [on filing a federal habeas petition] was provided by [former] Rule 9(a), Rules Governing § 2254 Cases.”).

237. *See* O.C.G.A. § 9-14-42(d) (West, Westlaw through 2014).

238. *See* *McQuiggin v. Perkins*, 133 S. Ct. 1924, 1926 (2013) (holding that the statute of limitations can be overcome by a showing of actual innocence); *Holland v. Florida*, 560 U.S. 631, 631 (2010) (holding that the federal statute of limitations on habeas corpus is subject to equitable tolling

In 2010, in *Phagan v. State*,²³⁹ the Georgia Supreme Court held that under the four year statute of limitations, a habeas petition filed ten years after conviction was nonetheless timely, where the petition had been dismissed by operation of law because no written order had been entered in the case for five years, and where, in accordance with the Civil Practice Act statutes regarding renewal of dismissed civil actions,²⁴⁰ the habeas proceeding had been recommenced within six months of the dismissal.²⁴¹

On the other hand, also in 2010, in *Roberts v. Cooper*,²⁴² the Georgia Supreme Court refused to extend the prison mailbox rule, under which a court document is deemed filed the day it is deposited in the prison mail system, to habeas petitions allegedly filed after the four-year statute of limitations. For purposes of the statute of limitations, a habeas petition is deemed filed only when it is physically received in the superior court clerk's office.

Given the trend of habeas legislation in this state, as well as legislative trends in other states, it is very likely that within a few years the four-year statute of limitations will be shortened.²⁴³ Within a decade, it may be predicted, the limitations period will have been reduced to one year or less.²⁴⁴

in appropriate cases).

239. 700 S.E.2d 589 (Ga. 2010).

240. See O.C.G.A. §§ 9-2-60(b) (West, Westlaw through 2014); O.C.G.A. §§ 9-11-41(e) (West, Westlaw through 2014).

241. *Phagan*, 700 S.E.2d 589 at 593.

242. 691 S.E.2d 875 (Ga. 2010). This case is examined *infra* notes 328-347 and accompanying text.

243. "The trend in recent years has been for states to add statutes of limitation to their principal postconviction remedies and, once a particular statute of limitations had been adopted, to shorten it." STATE POSTCONVICTION 2013, *supra* note 7, at 13.

244. In Idaho, for example, there was no statute of limitations on the state's postconviction remedy until a five-year statute of limitations was enacted in 1979, and in 1993 the limitation period was reduced to one year. DONALD E. WILKES, JR., STATE POSTCONVICTION REMEDIES AND RELIEF 456 (1996). In Alabama, a two-year postconviction statute of limitations was established in 1991, and in 2002 it was shortened to one year. STATE

2. Laches Rule

In addition to the statute of limitations provisions codified at O.C.G.A. § 9-14-42(c) and (d), the 2004 statute also enacted the statutory rule of laches codified at O.C.G.A. § 9-14-48(c). The Georgia laches provision is entirely retrospective; it applies only to convictions which occurred prior to July 1, 2004, the date the 2004 statute became effective.²⁴⁵

The Georgia laches statute is patterned²⁴⁶ after former Rule 9(a) of the Rules Governing Section 2254 Cases in the United States District Courts, which was in effect from 1977 to 2004.²⁴⁷ Prior to 1977, laches did not extend to federal habeas corpus.²⁴⁸ Former Rule 9(a) changed this. “[Former] Rule 9(a) was interpreted as a codification of the equitable doctrine of laches as applied to habeas corpus petitions.”²⁴⁹ “Under the equitable

POSTCONVICTION 2013, *supra* note 7, at 54 (2013); STATE POSTCONVICTION REMEDIES AND RELIEF, *supra* note 244, at 219-20.

245. O.C.G.A. § 9-14-42(c) (West, Westlaw through 2014).

246. *Flint v. State*, 701 S.E.2d 174, 175, 176 n.4 (Ga. 2010).

247. Rule 9(a), Rules Governing Section 2254 Cases in the U.S. District Courts (adopted 1977; repealed 2004). For discussion of former Rule 9(a), see 2 RANDY HERTZ & JAMES S. LIEBMAN, *FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE* 1273-86 (6th ed. 2011); *FEDERAL POSTCONVICTION* (1996), *supra* note 8, at 722-30; see also Robert N. Clinton, *Rule 9 of the Federal Habeas Corpus Rules: A Case Study on the Need for Reform of the Rules Enabling Acts*, 63 IOWA L. REV. 15 (1977); Christine Burt, Note, *Rule 9(a) and Its Impact on Habeas Corpus Litigation*, 11 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 363 (1985).

Former Rule 9(a) provided:

A petition may be dismissed if it appears that the state of which the respondent is an officer has been prejudiced in its ability to respond to the petition by delay in its filing unless the petitioner shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred.

425 U.S. 1178, 1178-79 (1976), *as amended by* Act of Sept. 28, 1976, Pub. Law No. 94-426, 98 Stat. 1335.

248. See *FEDERAL POSTCONVICTION* (1996), *supra* note 8, at 722 (including the “delayed petitions rule” as one of the obstacles to habeas corpus relief); Robert N. Clinton, *supra* note 247 at 31-33.

249. *Flint*, 701 S.E.2d at 176 n.4. See, e.g., *Rideau v. Whitley*, 237 F.3d

doctrine of laches, a suitor may, under some circumstances, be denied relief if his delay in seeking redress prejudiced the other party to the lawsuit.”²⁵⁰ Because it permitted dismissal of a habeas petition which had not been filed in timely fashion, the rule of laches adopted by former Rule 9(a) was sometimes called the delayed petitions rule.²⁵¹

Former Rule 9(a) and O.C.G.A. § 9-14-48(e) are almost identical in wording.²⁵² The Georgia Supreme Court has recognized that the 2004 laches statute is modeled after former Rule 9(a) of the Rules Governing Section 2254 Cases.²⁵³ The federal case law on former Rule 9(a) reveals the rule was “narrow in scope.”²⁵⁴ The federal courts described former Rule 9(a) as “no more than a legitimate procedural device designed to prevent abuses of the habeas corpus process,”²⁵⁵ which had to

472, 479 (5th Cir. 2000) (“Rule 9(a) codifies the application of the equitable doctrine of laches to habeas corpus petitions.”); *Walters v. Scott*, 21 F.3d 683, 687 (5th Cir. 1994); *Strahan v. Blackburn*, 750 F.2d 438, 440 (5th Cir. 1985).

250. FEDERAL POSTCONVICTION (1996), *supra* note 8, at 723.

251. *Id.* at 722.

252. Apart from their different limitations periods and the gender-neutral language in the Georgia provision, there are only two significant differences between former Rule 9(a) and O.C.G.A. § 9-14-48(e). First, although the text of former Rule 9(a) did not require that the state’s showing of prejudice be particularized, case law imposed such a requirement, *see, e.g.*, *Paprskar v. Estelle*, 612 F.2d 1003, 1008 (5th Cir. 1980), and O.C.G.A. § 9-14-48(e) (West, Westlaw through 2014), as enacted in 2004, on its face requires that there be “a *particularized* showing [of prejudice] . . .” (emphasis added). Second, former Rule 9(a) did not specify the burden of proof on the habeas petitioner to show that he could not have had knowledge of the grounds for relief by the exercise of reasonable diligence before the circumstances prejudicial to the government occurred. The Georgia provision, however, specifies that the petitioner must meet this evidentiary burden “*by a preponderance of the evidence.*” O.C.G.A. § 9-14-48(e) (West, Westlaw through 2014) (emphasis added). This was more or less in general accordance with case law interpreting former Rule 9(a); *see, e.g.*, *Rideau*, 237 F.3d at 472; *Walters* 21 F.3d at 683.

253. *See Flint*, 701 S.E.2d at 174-75.

254. FEDERAL POSTCONVICTION (1996), *supra* note 8, at 723.

255. *Davis v. Adult Parole Auth.*, 610 F.2d 410, 415 (6th Cir. 1979).

“be carefully considered and construed liberally.”²⁵⁶ The burden of showing prejudice was on the government,²⁵⁷ and the showing had to be particularized.²⁵⁸ The rule was not mandatory; even if there had been prejudicial delay in filing the petition, the court had discretion to grant relief notwithstanding the delay.²⁵⁹

In *Rideau v. Whitley*,²⁶⁰ the narrow reach of former Rule 9(a) was described as follows:

The State bears a heavy burden under Rule 9(a) to (1) make a particularized showing of prejudice, (2) show that the prejudice was caused by the petitioner having filed a late petition, and (3) show that the petitioner has not acted with reasonable diligence as a matter of law. The State must make a particularized showing of prejudice to its ability to respond to the habeas petition. Mere passage of time alone is never sufficient to constitute prejudice. Prejudice to the State’s ability to retry or reconvict the petitioner is irrelevant. Lapses of time that affect the state’s ability, but that do not make it virtually impossible for the state to respond, [do not] require dismissal. The application of Rule 9(a) must be carefully limited to avoid abrogating the purpose of the writ of habeas corpus.²⁶¹

The Georgia Supreme Court has not carefully limited the laches rule. The Court has decided two cases, the first in 2007 and the other in 2010, involving the Georgia habeas laches statute. In the first, *Wiley v. Miles*,²⁶² the state habeas petition

256. *Id.* at 414.

257. *See, e.g.*, *Bedford v. Attorney Gen. of Ala.*, 934 F.2d 295, 299-300 (11th Cir. 1991); *Lawrence v. Jones*, 837 F.2d 1572, 1574 (11th Cir. 1988); *Paprskar*, 612 F.2d at 1003.

258. FEDERAL POSTCONVICTION (1996), *supra* note 8, at 723. Although the text of former Rule 9(a) did not require that the state’s showing of prejudice be particularized, case law imposed such a requirement, *see, e.g.*, *McDonnell v. Estelle*, 666 F.2d 246 (5th Cir. 1982); *Paprskar*, 612 F.2d at 1003.

259. FEDERAL POSTCONVICTION (1996), *supra* note 8, at 723.

260. 237 F.3d 472 (5th Cir. 2000).

261. *Id.* at 477-79 (internal quotations omitted) (citations omitted).

262. 652 S.E.2d 562 (Ga. 2007).

had been filed thirty-seven years after the conviction; in the second case, *Flint v. State*,²⁶³ it was twenty years. In both cases the Court held that there had been delay warranting dismissal of the habeas proceeding without inquiring into the merits of the claims. In neither case is there much discussion of the meaning of such key terms as “delay” or “prejudice” or much analysis of the personal liberty issues raised by applying laches rules such as O.C.G.A. § 9-14-48(e).²⁶⁴

263. 701 S.E.2d 174 (Ga. 2010).

264. O.C.G.A. § 9-14-48 (West, Westlaw through 2014). In *Wiley v. Miles*, for example, the facts were these: the state habeas petitioner, Wiley, pleaded guilty to two charges of burglary in a Georgia court in 1965 and finished serving his prison sentences around 1978; in 1994 he was convicted in absentia in a federal district court; he remained a fugitive until 2000; in June 2000 he was recaptured and soon thereafter the federal district court sentenced him as a recidivist to life imprisonment without parole, in part based on his two 1965 Georgia burglary convictions; in June 2002, after a federal appellate court on direct review had ordered resentencing proceedings, and shortly before he was to be resentenced, petitioner filed his state habeas petition attacking the burglary convictions which were being used to enhance his federal sentence. *Wiley*, 652 S.E.2d at 563.

Unquestionably, the conviction was in 1965 and the habeas petition was in 2002, thirty-seven years later. For purposes of laches, however, the question is not how many years ago the conviction occurred, but whether the petition was unreasonably delayed. Delay is the *sine qua non* of the laches rule, and not every delay counts against the petitioner – only unreasonable delay. See, e.g., *Strahan v. Blackburn*, 750 F.2d 438, 443 (5th Cir. 1985); *Aiken v. Spalding*, 684 F.2d 632, 633 (9th Cir. 1982). Was there unreasonable delay here? No. Considering the circumstances at the time, the petitioner Wiley acted with reasonable diligence, even though he did not seek habeas relief until he was convicted in federal court and suddenly became subject to a severe recidivist punishment based at least in part on the burglary convictions. Any delay was therefore excusable. To understand this, one must look at the totality of the events, not some isolated fact; see *McDonnell v. Estelle*, 666 F.2d 246, 251 (5th Cir. 1982) (“[A] [laches] case . . . requires careful attention to the facts surrounding each case.”)

To begin, under Georgia law at the time there was no habeas statute of limitations or laches rule. In 1965 Georgians with a claim for postconviction relief were free to decide to postpone the filing of the habeas petition until later. Yes, presumably Wiley could have filed a *pro se*, *in forma pauperis* habeas petition immediately after the conviction; he knew then of the facts giving rise to the claim that his pleas were involuntary (although it is not clear that he knew all the facts or that he understood the legal ramifications

of what allegedly had happened). For unknown reasons, he did not then apply for habeas relief. But this was not unreasonable. This was what the law then allowed. Under Georgia law at the time, no habeas clock began ticking for Wiley in 1965. Wiley's behavior was identical to that of the great majority of convicted persons, including those who think they have a claim for relief; they don't, for one reason or another, seek postconviction relief. We should also remember that the circumstances resulting in a violation of rights may well induce a sense of helplessness and futility which discourages seeking relief in the courts, especially when the victim has to act *pro se* if he acts at all.

Once petitioner Wiley finished his sentences on the burglary convictions, like most inmates who finish their prison time, he saw even less reason to collaterally attack the convictions. What would be the point? Like most persons released from prison, he decided not to petition for postconviction relief. All of this was reasonable. The sentence had been fully served, and why bother further? Besides, habeas corpus was no longer available to Wiley once he was no longer in custody under the sentences. Then, once the petitioner discovered that he was in danger of having his federal sentence enhanced to life without parole because (at least in part) of the Georgia burglary convictions, he, again acting like a reasonable person, promptly sought state habeas corpus. He did not cynically or strategically postpone the state habeas proceeding until documents and court records were lost and the witnesses dead. He filed the petition following the federal conviction, when the validity of burglary convictions became a matter of great practical importance to him. In short, there was no unreasonable delay. The petitioner, under all the circumstances, acted with reasonable diligence, even though thirty-seven years separate the convictions and the habeas petition.

The Georgia Supreme Court's logic was inexorable: Wiley knew of the alleged defects in the guilty pleas as of the time they were entered, yet did not seek postconviction relief until 2002, by which time the necessary records and documents about his guilty pleas no longer existed; therefore his petition was delayed too long and must be dismissed without proceeding further.

But this reasoning is misplaced. It annihilates the true meaning of delay. It suggests that when the time and opportunity for filing a petition passes, any petition filed thereafter is automatically deemed a delayed petition. It turns the rule into an *ex post facto* requirement that all postconviction petitions be filed almost immediately. It erroneously defines delay, without more, as simply the amount of time between when the petitioner knew he had a postconviction claim and the time he first applied for postconviction relief. It doesn't distinguish between *delay* and *unreasonable delay*.

Debating whether the claim could have been raised long ago, or whether the state has been prejudiced, is relevant only once it is determined that there has in fact been unreasonable delay. The basic issue in administering the laches issue is not when the petitioner first became aware of the factual basis

In deciding *Miles*, the Court did not seem to notice the incongruities flowing from its ruling. In the Georgia court system, the only proper forum for collaterally attacking the two Georgia burglary convictions,²⁶⁵ the convictions were ancient history and habeas petitions attacking the convictions were airily dismissed as delayed, without any inquiry into the merits of the claim that the convictions were invalid on constitutional grounds. In federal court, on the other hand, where the burglary convictions could not be collaterally attacked,²⁶⁶ the two convictions were, at least for sentence enhancement purposes, robust and energetic, and by no means ancient history. They had enough vitality and reliability to elevate an imprisonment sentence into a sentence of imprisonment for life without parole.²⁶⁷

Strangely, and despite the pleas of the attorneys representing the habeas petitioner in one of the cases,²⁶⁸ the Georgia Supreme Court in *Wiley v. Miles* and *Flint v. State* ignored the extensive federal case law construing former Rule 9(a), on which the 2004 laches statute is based.²⁶⁹ The Court did not

for his postconviction claim. The basic question is whether there was unreasonable delay in filing the petition. If there was no unreasonable delay, nothing else matters, and the petition cannot be dismissed.

265. See *Custis v. United States*, 511 U.S. 485, 487 (1994) (with the exception of “convictions obtained in violation of the right to counsel,” “a defendant in a federal sentencing proceeding may [not] collaterally attack the validity of previous state convictions that are used to enhance his [federal sentence].”). A person convicted in federal court may not use the federal sentencing forum to gain review of his state convictions; such a convicted person may, however, attack his state sentences in the state courts or through federal habeas review, and, if he is successful, he may then apply for reopening of any federal sentence enhanced by the state sentences. *Id.* at 497.

266. *Id.*

267. Permitting sentence enhancement based on a prior conviction, which itself cannot be attacked because the habeas petition attacking it is delayed within the meaning of former Rule 9(a), does not, the courts have held, violate due process. See *Lawrence v. Jones*, 837 F.2d 1572, 1574 (11th Cir. 1988).

268. See *Flint*, 701 S.E.2d at 176-77.

269. This included case law under former Rule 9(a) dismissing a habeas

mention the case law holding that in order for the prejudice component of former Rule 9(a) to be satisfied, the state must show (1) that the delay was unreasonable,²⁷⁰ (2) that it has suffered some particularized prejudice,²⁷¹ and (3) that the prejudice was caused by the delay.²⁷² Nor did it refer to the case law holding that delay alone is sufficient to warrant dismissal under former Rule 9(a),²⁷³ or that it was a requirement that a habeas petitioner be given notice and opportunity to show that the delay was not prejudicial or that the delay was excusable.²⁷⁴ The Court also failed to mention the significant fact that, during the twenty-eight years former Rule 9(a) was in effect, there was appended to the Rules Governing Section 2254 Cases a model form for use in cases where there was a delayed petition issue. The form, which would be sent to the petitioner by the court, gave the petitioner notice that the habeas petition might be dismissed for delay in its filing, and afforded the petitioner an opportunity to explain why the habeas petition should not be dismissed.²⁷⁵ The form was of immense help in assuring fairness in processing allegedly delayed habeas petitions. Georgia uses no such model form.

petition as delayed. *See, e.g.,* Ford v. Superintendent, Ky. State Penitentiary, 687 F.2d 870, 871 (6th Cir. 1982); Mayola v. Alabama, 623 F.2d 992, 999 (5th Cir. 1980).

270. *See, e.g.,* Rideau v. Whitley, 237 F.3d 472, 482 (5th Cir. 2000); Strahan v. Blackburn, 750 F.2d 438, 443 (5th Cir. 1985); Aiken v. Spalding, 684 F.2d 632 (9th Cir. 1982); Mayola v. Alabama, 623 F.2d 992 (5th Cir. 1980).

271. *See, e.g.,* Rideau, 237 F.3d at 476; Paprskar v. Estelle, 612 F.2d 1003, 1008 (5th Cir. 1980).

272. *See, e.g.,* Bedford v. Attorney Gen. of Ala., 934 F.2d 295, 299 (11th Cir. 1991); Lawrence v. Jones, 837 F.2d 1572, 1575 (11th Cir. 1988); Hill v. Linahan, 697 F.2d 1032, 1034 (11th Cir. 1983).

273. *See, e.g.,* Smith v. Duckworth, 910 F.2d 1492, 1494 (7th Cir. 1990); Davis v. Dugger, 829 F.2d 1513, 1518 (11th Cir. 1987); Strahan v. Blackburn, 750 F.2d 438, 440 (5th Cir. 1985).

274. *See, e.g.,* Norman v. McCotter, 765 F.2d 504, 506 (5th Cir. 1985); Paprskar, 612 F.2d at 1006.

275. *See* Advisory Committee Note to Rule 9, Rules Governing Section 2254 Cases in the United States District Courts (1976).

The habeas petition in *Wiley v. Miles* was filed two years before the 2004 laches statute was enacted; the habeas petition in *Flint v. State* was filed only three years after passage of the statute. Almost all of the supposed “long delay”²⁷⁶ in *Wiley v. Miles* and *Flint v. State* occurred during the pre-2004 era when there was no statute of limitations (except for misdemeanor traffic convictions beginning in 1986) or laches rule applicable to state habeas corpus, and both petitioners had every right to not be concerned about the timing of filing Georgia habeas petitions. They were not under an imperative to race to the courthouse. They could hardly predict that years later the legislature would enact a retrospective statute that would punish them for exercising their pre-2004 rights. Petitioner Wiley had no reason to anticipate that two years *after* he filed his habeas petition the legislature would enact a retrospective statute that would condemn him for having acted as the law previously authorized, even encouraged. The pre-2004 conduct of petitioners Wiley and Flint – which was justifiable and fully protected by law and involved the exercise of a basic right – was, under inauspicious Georgia Supreme Court decisions construing a retrospective statute passed years after one of the habeas petitions was filed, retroactively transmogrified into inexcusable idleness. Exercising rights suddenly became sleeping on those rights.

Both *Wiley v. Miles* and *Flint v. State* transform what was supposed to be an equitable, flexible rule into just another procedural rule for tripping up habeas petitioners and permitting dismissal of a habeas petition without even considering the merits of the habeas claim. These two cases should have been decided differently. In neither case was it “virtually impossible” to respond to the habeas petition, and in at least one of the cases the petitioner had acted with reasonable diligence in filing the habeas petition, so that any delay in his case was excusable.

276. *Wiley v. Miles*, 652 S.E.2d 562, 564 (Ga. 2007).

III. POST-1967 GEORGIA SUPREME COURT DECISIONS CURTAILING GEORGIA HABEAS CORPUS

Since 1967, the Georgia Supreme Court has decided hundreds of postconviction habeas corpus cases. Most of these decisions are examples of ordinary appellate litigation and either turn on procedural issues or, if the merits are reached, determine whether a petitioner should be granted habeas relief due to a violation of constitutional rights. Not infrequently, habeas relief is granted. A few of the Court's habeas corpus decisions granting relief are civil liberties landmarks. Most of the Court's habeas decisions, however, deny relief. Typically, the decisions refusing habeas relief are routine appellate cases. However, at least five of the Georgia Supreme Court's habeas decisions denying relief warrant singling out and close inspection because of their remarkable coldness toward the writ of habeas corpus and the prisoners who invoke the writ, and because they are astounding legal victories for the law enforcement establishment. These five decisions are by no means the only post-1967 decisions of the Court which have treated the writ of habeas corpus shabbily.²⁷⁷

A. *Reed v. Hopper* (1975)

This decision, which has already been examined at length earlier in this Article,²⁷⁸ needs no further discussion.

B. *Jacobs v. Hopper* (1977)

In 1977, in *Jacobs v. Hopper*,²⁷⁹ the Georgia Supreme Court dealt a crippling blow to the Georgia Habeas Corpus Act of

277. See, e.g., *Head v. Hill*, 587 S.E.2d 613, 618 (Ga. 2003) (affirming that it is not unconstitutional to require a death row inmate to prove his retardation beyond a reasonable doubt in order for the inmate to be ineligible for death penalty; superior court order granting habeas relief is reversed).

278. See *supra* notes 78-87 and accompanying text.

279. 233 S.E.2d 169 (Ga. 1977). Prior to 1977, search and seizure claims could be raised in Georgia postconviction habeas proceedings. See, e.g., *Wynn v. Caldwell*, 204 S.E.2d 143 (Ga. 1974); *Morgan v. Kiff*, 196 S.E.2d 445 (Ga. 1973).

1967 when it removed search and seizure claims – claims that evidence seized in violation of the Fourth Amendment had been admitted at the habeas petitioner’s criminal trial, i.e., Fourth Amendment exclusionary rule claims – from the list of claims cognizable under the Act. The Court reasoned that this substantive limitation on Georgia habeas corpus was appropriate in light of *Stone v. Powell*,²⁸⁰ decided the previous year by the United States Supreme Court.

Arguably disregarding precedents,²⁸¹ *Stone v. Powell* slammed the door on federal habeas review of search and seizure claims which, the Court held, could be raised in federal habeas only if the petitioner had been denied an opportunity for full and fair consideration of the claim in the state court system.²⁸² Because a state offers such an opportunity as long as it grants criminal defendants a procedure for objecting at trial to the admission of illegally seized evidence – and every state does this – after the *Stone v. Powell* decision in 1976, search and seizure claims vanished from federal habeas litigation.²⁸³

As a result of *Stone v. Powell*, the Fourth Amendment can no

280. 428 U.S. 465 (1976).

281. See, e.g., *Cardwell v. Lewis*, 417 U.S. 583 (1974); *Cady v. Dombrowski*, 413 U.S. 433 (1973); *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973); *Whiteley v. Warden, Wyo. State Penitentiary*, 401 U.S. 560 (1971); *Chambers v. Maroney*, 399 U.S. 42 (1970); *Mancusi v. DeForte*, 392 U.S. 364 (1968); *Carafas v. LaVallee*, 391 U.S. 234 (1968).

282. *Stone*, 428 U.S. at 494.

283. See generally HERTZ & LIEBMAN, *supra* note 247, at 1537-54; FEDERAL POSTCONVICTION (1996), *supra* note 8, at 732-37.

Recently, and almost unbelievably, in *Young v. Conway*, 698 F.3d 69 (2d Cir. 2012), federal habeas corpus relief was granted on the ground that evidence seized in violation of the Fourth Amendment was admitted at the petitioner’s state criminal trial. The Court held that *Stone v. Powell* is a nonjurisdictional limitation on federal habeas corpus and that, under the circumstances, the state had waived the benefits of the *Stone v. Powell* decision by not raising it despite numerous opportunities to do so, with the record bereft of any reason as to why the state failed to invoke *Stone v. Powell*. The *Young v. Conway* decision is an extraordinarily uncommon one. Nearly 40 years after *Stone v. Powell*, federal habeas decisions granting relief on Fourth Amendment grounds are as unusual as bones in polyps.

longer be protected or enforced in federal habeas corpus proceedings. This was thought to be a good thing by the law enforcement establishment community and by conservative legal scholars. They welcomed an end to federal court habeas review of cases where the issue was whether prosecutors or police violated the Fourth Amendment rights of a convicted state prisoner.

Among other legal scholars and civil liberties advocates, *Stone v. Powell*, which “ha[d] a devastating impact on federal habeas corpus jurisdiction,”²⁸⁴ is widely regarded as one of the worst federal habeas decisions ever decided by the highest court in the land,²⁸⁵ and the decision “produced a flood of commentary, much of it justifiably sharply critical.”²⁸⁶ The decision undermined the Fourth Amendment, the Fourth Amendment exclusionary rule, the federal habeas corpus remedy for state prisoners, and the special function of the federal courts in protecting cherished rights. To crown all, *Stone v. Powell* (along with its companion case) was a successful appeal by a prison warden, and the decision gave the Court occasion both to rebuke a lower federal court for overprotecting constitutional rights and to set aside the lower court’s order granting habeas relief. Reversing grants of habeas relief soon became a common practice of the Court. Of the numerous Supreme Court decisions between 1972 and 1996 which methodically created new restrictions on federal habeas, *Stone v. Powell* is arguably the most important and memorable

284. Ira P. Robbins & James E. Sanders, *Judicial Integrity, The Appearance of Justice, and the Great Writ of Habeas Corpus: How to Kill Two Thirds (or More) with One Stone*, 15 AM. CRIM. L. REV. 63, 68 (1977).

285. FEDERAL POSTCONVICTION (1996), *supra* note 8, at 733 (1996) (“The *Stone* decision is one of the most tragic and unfortunate of all Supreme Court civil liberties decisions. It represents the triumph of those who had been working to block the expansion of federal habeas jurisdiction.”). See also Robbins & Sanders, *supra* note 284, at 86 (“In *Stone v. Powell*, the Court curtailed federal habeas corpus jurisdiction with inadequate explanations and improper reasoning, and failed to address fundamental issues presented by the case.”).

286. FEDERAL POSTCONVICTION (1996), *supra* note 8, at 733.

– and most dangerous to liberty.²⁸⁷ Under the decision, the opportunity a state convict has to redress a search and seizure claim in a federal habeas proceeding is but “a ‘photo’ opportunity.”²⁸⁸

Stone v. Powell has come to symbolize the current era of enfeebled federal habeas corpus and narrowed postconviction remedies. Nearly 40 years after it was lapidated by *Stone v. Powell*, and nearly 20 years after much of its lifeblood was drained away by the 1996 federal habeas corpus statute, the federal habeas corpus remedy for state convicts has been wrenched back to a more primitive epoch, to “a new *Stone* Age.”²⁸⁹ In this desolate legal landscape, once again Leo Frank would be denied habeas corpus relief. The wizened, tottering federal habeas remedy is barely recognizable compared to what it once was. “The writ has become an ambassador without portfolio.”²⁹⁰

In *Jacobs v. Hopper*, the Georgia Supreme Court decided that “the test announced . . . in *Stone v. Powell* . . . regarding federal habeas corpus review would serve equally well for state habeas corpus review, and we therefore adopt it.”²⁹¹ The Georgia Supreme Court thought that a calamitous decision which abolished use of the federal habeas corpus remedy to vindicate Fourth Amendment rights, which clucked with disapprobation

287. For an article advocating the overruling of *Stone v. Powell*, see Steven Semeraro, *Enforcing Fourth Amendment Rights Through Federal Habeas Corpus*, 58 RUTGERS L. REV. 983 (2006). For an article arguing that the *Stone v. Powell* “opportunity” rule should not be extended to constitutional free speech claims, see Michael Wells, *Habeas Corpus and Freedom of Speech*, 1978 DUKE L.J. 1307.

288. FEDERAL POSTCONVICTION (1996), *supra* note 8, at 732.

289. *Postconviction Habeas Corpus Relief in Georgia*, *supra* note 4, at 273. See also Donald E. Wilkes, Jr., *First Things Last: Amendomania and State Bills of Rights*, 54 MISS. L.J. 223, 258 (1984) [hereinafter *First Things Last*] (“*Stone* has come to symbolize an era.”).

290. Tabak & Lane, *supra* note 9, at 42 (quoting *Evans v. State*, 441 So.2d 520, 524 (Miss.1983) (Robertson, J., dissenting)); see also Emanuel Margolis, *Habeas Corpus: The No-Longer Great Writ*, 98 DICK. L. REV. 557 (1994).

291. *Jacobs v. Hopper*, 233 S.E.2d 169, 170 (Ga. 1977).

of a remedy created by Congress to protect personal liberty in the aftermath of the Civil War, and which paved the way for further judicial erosion of the remedy, was a decision worthy of emulation with respect to Georgia habeas corpus. As a result of *Stone v. Powell*, the Fourth Amendment can no longer be protected or enforced in federal habeas corpus proceedings, and Georgia's highest court thought this was a good idea.

The basic reason the Georgia Supreme Court gave for so deciding suggests the Court misunderstood the actual holding in *Stone v. Powell*. In *Stone v. Powell*, the Court, expressing its disapproval of the Fourth Amendment exclusionary rule announced, not for the first time, "that the rule is not a personal constitutional right,"²⁹² and that "the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect . . ."²⁹³ From this language, according to the Georgia Supreme Court in *Jacobs v. Hopper*, "it is clear [from *Stone v. Powell*] that the introduction [in a state criminal trial] of evidence obtained in an illegal search or seizure is not a 'substantial denial' of a defendant's rights under the Constitution of the United States."²⁹⁴ Therefore, the Court reasoned, search and seizure claims were not among the federal constitutional rights protected under Georgia Habeas Corpus Act.

The Georgia Supreme Court's interpretation of *Stone v. Powell* was in error. *Stone v. Powell* did not overturn *Mapp v. Ohio*,²⁹⁵ the case which established that the admission at a state criminal trial of illegally seized evidence was prohibited by the Fourth Amendment. In fact, *Stone v. Powell* acknowledged that illegally seized evidence would continue to be inadmissible in a

292. *Stone v. Powell*, 428 U.S. 465, 486 (1976).

293. *U.S. v. Calandra*, 414 U.S. 338, 348 (1974) ("In sum, the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved.").

294. *Jacobs*, 233 S.E.2d at 170.

295. 367 U.S. 643 (1961).

state trial court (and on direct appeal).²⁹⁶ *Stone v. Powell* involved the availability of raising search and seizure claims in federal habeas proceedings, not at state criminal trials, and courts have not interpreted *Stone v. Powell* as overruling *Mapp v. Ohio*.²⁹⁷

The Georgia Supreme Court was also wrong in inferring from *Stone v. Powell* that search and seizure claims were no longer cognizable under the Georgia Habeas Corpus Act. In *Stone v. Powell* the Court expressly stated that there was and continued to be jurisdiction under the federal habeas statutes to entertain search and seizure claims.²⁹⁸ If that decision did not rob federal habeas courts of authority to hear search and seizure claims, why should the decision prohibit Georgia habeas courts from hearing such claims?

Quite apart from its viewpoint that *Stone v. Powell* was worthy of adoption for state habeas corpus, and its misinterpretation of what *Stone v. Powell* actually held, *Jacobs v. Hopper* fails to appreciate the extent to which federalism issues are central to the holding in *Stone v. Powell*, which is preoccupied with curtailing federal district court review, via habeas corpus, of state court judgments, especially in Fourth Amendment issue cases.²⁹⁹ No federalism issues arise, and

296. *Stone*, 428 U.S. at 493 (“We adhere to the view that these considerations support the implementation of the exclusionary rule at trial and its enforcement on direct appeal of state-court convictions.”).

297. It is also worthy of note that the United States Supreme Court described the *Miranda v. Arizona* decision as involving a prophylactic rule rather than a constitutional right. *Miranda v. Arizona*, 384 U.S. 436, 463 (1966); *Michigan v. Tucker*, 417 U.S. 433, 439 (1974). The Court later held that *Miranda v. Arizona* claims may be raised in federal habeas proceedings. *Withrow v. Williams*, 507 U.S. 680, 680 (1993); *Dickerson v. U.S.*, 530 U.S. 428, n.3 (2000); *see also* *Caldwell v. State*, 917 S.W.2d 662, 688 (Tenn. 1996) (comparing and contrasting *Stone v. Powell* and *Withrow v. Williams*).

298. *Stone*, 428 U.S. at n.37 (“Our decision does not mean that the federal court lacks jurisdiction over such a claim, but only that the application of the [exclusionary] rule is limited to cases in which there has been both such a showing [of denial of opportunity for full and fair litigation] and a Fourth Amendment violation.”).

299. *See Stone*, 428 U.S. at n.31, n.35 (expressing concern about federal

there is no federal court intrusion into state court affairs, when a Georgia habeas court reviews the judgment of another Georgia court on Fourth Amendment (or any other) grounds.

Jacobs v. Hopper should be overruled. Under the decision, postconviction habeas relief based on an illegal search and seizure is impossible as long as Georgia continues to have a statute authorizing persons charged with crime to move to suppress the illegally seized evidence. By erroneously excluding search and seizure claims from the Georgia Habeas Corpus Act, *Jacobs v. Hopper* completely bars state habeas relief for search and seizure claims, no matter what the circumstances. This goes too far. Overturning *Jacobs v. Hopper* will not inconvenience the courts. Search and seizure claims would still be subject to the 1982 statute and therefore procedurally barred in habeas corpus if the claims had not been raised at trial or on appeal, absent cause and prejudice.³⁰⁰

The Georgia Supreme Court appears to be the only state supreme court to have officially embraced *Stone v. Powell* for purposes of state habeas corpus.³⁰¹

habeas corpus creating “friction between our federal and state court system of justice” and about federal habeas intruding on “the doctrine of federalism;” questioning whether a federal judge is “more competent, or conscientious, or learned with respect to the ‘consideration of Fourth Amendment claims’ than his neighbor in the state courthouse”).

300. Because the petitioner in *Jacobs v. Hopper* failed to properly raise the search and seizure issue at trial or on his direct appeal and there was no suggestion of cause and prejudice, the result in *Jacobs v. Hopper* would not have been changed even if the “opportunity” rule was scrapped.

Interestingly, although the Court in *Jacobs v. Hopper* refused the habeas relief requested on Fourth Amendment grounds, it did grant relief in the case based on a separate claim involving a violation of the Sixth Amendment Confrontation Clause that occurred at the petitioner’s criminal trial, a claim which could have been but was not raised at that trial.

301. The Connecticut Supreme Court held “in abeyance the question whether the holding in *Stone v. Powell* . . . applies equally to state habeas corpus proceedings.” *Payne v. Robinson*, 541 A.2d 504, n.1 (Conn. 1988).

C. Gibson v. Turpin (1999)

There is no federal constitutional right to counsel in state postconviction proceedings, even in death sentence cases.³⁰² Thus, indigent prisoners, including death row inmates, have no federal constitutional right to appointed counsel in Georgia habeas proceedings.

Most states recognize a right to counsel in their state court postconviction proceedings, but it is a statutory right, not a constitutional right.³⁰³ Currently, 29 states provide a statutory right to counsel in their state postconviction proceedings, while 14 states provide a statutory right to counsel in their postconviction proceedings in death sentence cases only.³⁰⁴ Thus, in 43 states there is some form of statutory right to postconviction counsel. Georgia is one of only seven states – the other six states are Alabama, Massachusetts, Michigan, Nebraska, New Hampshire, and New York – with no statutory right to postconviction counsel.³⁰⁵ To its discredit, the Georgia

302. *Murray v. Giarratano*, 492 U.S. 1, 7-8 (1989) (death sentence cases); *Penn. v. Finley*, 481 U.S. 551, 555 (1987) (noncapital cases); *Gibson v. Turpin*, 513 S.E.2d 186, 188 (Ga. 1999) (capital and noncapital cases).

303. *Gibson*, 513 S.E.2d at 192 (listing and citing various state statutes securing a right to postconviction counsel); *see generally* Jill Wasserman, *Has Habeas Corpus Been Suspended in Georgia? Representing Indigent Prisoners on Georgia's Death Row*, 17 GA. ST. U.L. REV. 605 (2000) (discussing mechanisms that the Georgia legislature could use to provide funding for postconviction habeas corpus representation of the state's death row inmates); Sarah L. Thomas, *A Legislative Challenge: A Proposed Model Statute to Provide for the Appointment of Counsel in State Habeas Corpus Proceedings for Indigent Petitioners*, 54 EMORY L.J. 1139 (2005) (discussing a model statute for states to adopt, granting a statutory right to postconviction counsel to state habeas petitioners).

304. STATE POSTCONVICTION 2013, *supra* note 7, at 9. Since publication of this book, Delaware has joined the states securing a statutory right to counsel for persons applying for state postconviction relief, and New York (which has no death penalty) has been removed from the list of states granting postconviction counsel only in death sentence cases.

305. STATE POSTCONVICTION 2013, *supra* note 7, at 9. Since publication of this book, Delaware has been removed from the list of states with no statutory right to postconviction counsel, and New York has been transferred to the list of states with no statutory right to postconviction counsel.

legislature has resolutely refused year after year to enact a statute securing a right to counsel for postconviction habeas petitioners, even those on death row.

Along with Alabama, Nebraska, and New Hampshire,³⁰⁶ Georgia is one of only four state death penalty jurisdictions (out of a total of 32 such state jurisdictions) without a statutory right to postconviction counsel in capital cases.³⁰⁷ Stated differently, 28 (87%) of the 32 death penalty states grant a statutory right to postconviction counsel in death sentence cases, while Georgia is one of the four death penalty states (13%) that do not.

Because most states provide a statutory right to postconviction counsel, the issue of whether there is a state constitutional right to postconviction counsel is infrequently litigated. Furthermore, United States Supreme Court decisions holding that there is no federal constitutional right to counsel in state postconviction proceedings tend to make state courts reluctant to reach a different result based on their state constitution.³⁰⁸ Most of the state courts to have reached the

306. Although New Hampshire still has the death penalty on the books, it has executed only 24 persons in its history, and its most recent execution was on July 14, 1939. *Capital Punishment in New Hampshire*, WIKIPEDIA, http://en.wikipedia.org/wiki/Capital_punishment_in_New_Hampshire (last visited Apr. 27, 2014); WILLIAM J. BOWERS, EXECUTIONS IN AMERICA 289-90 (1974); DEATH PENALTY INFORMATION CTR., *State by State Database*, http://www.deathpenaltyinfo.org/state_by_state.

307. Although there is no statutory right to counsel in a Georgia habeas corpus proceeding, even in death sentence cases, Georgia judges do possess power to appoint an attorney to represent a *pro se* habeas petitioner. They cannot, however, order that the state or local government pay the appointed attorney for his services. *See, e.g., Willis v. Price*, 353 S.E.2d 488, 489 (Ga. 1987) (permitting a judge to exercise his discretion to appoint an attorney to represent a habeas petitioner, but not authorizing that judge to order the attorney to be paid out of government funds); *State v. Davis*, 269 S.E.2d 461, 462 (Ga. 1980) (“[W]e know of no statute, case, or constitutional provision which would permit a trial judge to appoint counsel to a habeas petitioner, to be paid out of state or county funds.”).

308. *First Things Last*, *supra* note 289 at 228-29 (footnotes omitted):

In some states it [is] a ‘doctrine of state constitutional construction’ to interpret state constitutional provisions by following federal cases which [have] interpreted similar federal constitutional provisions . . .

issue have held that there is no state constitutional right to postconviction counsel.³⁰⁹ During the 30-year period from 1969 through 1998, the Georgia Supreme Court held again and again that no such right exists in this state.³¹⁰ On the other hand, in three states – Alaska,³¹¹ Minnesota,³¹² and Mississippi³¹³ – there is, under a decision of the state’s highest court, a state constitutional right to postconviction counsel. In Mississippi, the right extends only to death sentence cases.

[M]any state courts follow the practice of interpreting state bills of rights in accordance with the way the [United States] Supreme Court has interpreted the federal Bill of Rights.

309. *See, e.g.*, *Campbell v. State*, 56 A.3d 448, 453 (R.I. 2012) (“We begin by noting that the right to counsel in a postconviction-relief proceeding is a matter of legislative grace, not constitutional right.”); *In re Barnett*, 73 P.3d 1106, 1112 (Cal. 2003) (the fundamental fairness mandated by the Due Process Clause does not require that the state supply a lawyer to indigents to state postconviction proceedings; consequently, there is no federal constitutional right to counsel for state habeas corpus proceedings, not even in a capital case); *Elkins v. Thompson*, 25 P.3d 376, 380 (Or. Ct. App. 2001) (“Accordingly, the rights to counsel guaranteed by the Sixth Amendment to the United States Constitution and Article I, section 11, of the Oregon Constitutions, are inapplicable in this [postconviction] proceeding.”).

310. *See, e.g.*, *State v. Davis*, 269 S.E.2d 461, 463 (Ga. 1980); *Stephens v. Balkcom*, 265 S.E.2d 596, 596 (Ga. 1980); *Spencer v. Hopper*, 255 S.E.2d 1, 4 (Ga. 1979); *Yates v. Brown*, 219 S.E.2d 729, 730 (Ga. 1975). For a list of more than 20 Georgia Supreme Court decisions between 1969 and 1974 holding that there is no state constitutional right to postconviction counsel in Georgia habeas proceedings, see *A New Role for an Ancient Writ*, Part II *supra* note 4, at n.298.

311. *See Grinols v. State*, 74 P.3d 889, 892 (Alaska 2003) (“[W]e hold today that the right to counsel in a first application for post-conviction relief is of a constitutional nature, required under the due process clause of the Alaska Constitution.”); *see also McCracken v. State*, 518 P.3d 85, 88 (Alaska 1974) (“Both the sixth amendment to the United States Constitution and art. I, sec. 11 of the Alaska Constitution guarantee a criminal defendant the right to counsel.”)

312. *See Deegan v. State*, 711 N.W.2d 89, 92 (Minn. 2006) (“We hold that a defendant’s right to the assistance of counsel under Article I, section 6 of the Minnesota Constitution extends to one review of a criminal conviction, whether by direct appeal or a first review by postconviction proceeding.”).

313. *See Jackson v. State*, 732 So.2d 187, 191 (Miss. 1999) (extending the right). Mississippi, like Georgia, is a death penalty state, and *Jackson* was a capital case.

In 1999, in *Gibson v. Turpin*,³¹⁴ the Georgia Supreme Court was given the opportunity to overrule contrary precedents and hold that there is a state constitutional right to postconviction counsel in Georgia, at least in death sentence cases. The Court declined to do so by a four to three vote.

Exzavious Lee Gibson, a Georgia death row inmate with an IQ of 76, was the first capital habeas petitioner in modern times to proceed through state habeas corpus without the assistance of counsel. In December 1995, after the direct review process ended, Gibson filed a *pro se* state habeas petition. In August 1996 a superior court judge conducted an evidentiary hearing in Gibson's habeas case, a hearing at which Gibson was unrepresented by an attorney, while the state was represented by an Assistant Attorney General. Gibson was at a total loss on how to proceed at the hearing. He failed to put on witnesses but repeatedly stated that he was not waiving his rights. The state put on a full defense and put at least one witness on the stand. Gibson did not object to any of the questions put to the witness and did no cross-examination. The judge asked the Attorney General's office to prepare an order denying relief on all grounds and then signed it without making any changes.³¹⁵

Portions of the transcript of Gibson's evidentiary hearing shock the conscience.³¹⁶ The Gibson evidentiary hearing is just

314. 513 S.E.2d 186 (Ga. 1999). *Gibson* was decided one month after the Mississippi Supreme Court in *Jackson v. State*, 732 So.2d 187 (Miss. 1999), held that its state constitution secures a right to counsel for Mississippi postconviction petitioners on death row.

315. Jennifer N. Ide, *The Case of Exzavious Lee Gibson: A Georgia Court's (Constitutional?) Denial of a Federal Right*, 47 EMORY L.J. 1079, 1079-80, 1082-84 (1998).

316. The Court: Okay. Mr. Gibson, do you want to proceed?

Mr. Gibson: I don't have an attorney.

The Court: I understand that.

Mr. Gibson: I am not waiving my rights.

The Court: I understand that. Do you have any evidence that you wish to put up?

Mr. Gibson: I don't know what to plead.

The Court: I am not asking you to plead anything, I am just asking you if

more proof, if any was needed, that “without the assistance of counsel, a habeas petitioner [under a death sentence] is unlikely to receive a fair and adequate hearing on his claims.”³¹⁷

Unmoved by the facts of the case, the majority opinion in *Gibson v. Turpin* concluded that there is no Georgia state constitutional right to counsel for a habeas petitioner, based on the following unconvincing reasoning: (1) “habeas corpus is not a criminal proceeding, but considered to be civil in nature”³¹⁸ (2) “[h]abeas corpus is not intended to be a means for re-litigating a prisoner’s case;”³¹⁹ (3) states are not “obligated under the United States Constitution to provide habeas corpus proceedings as a means of obtaining post-conviction relief;”³²⁰ (4) “[h]abeas corpus is not a second trial;”³²¹ (5) “[t]he lack of appointed counsel upon state habeas corpus . . . is not ‘fundamentally unfair;’” (6) “if a constitutional right to habeas counsel exists . . . it would apply to almost all habeas corpus petitioners, and not just to death-row inmates;”³²² and (7) “a constitutional right to counsel to habeas counsel, carried to its logical conclusion, would spawn more litigation and delay in an already cumbersome system.”³²³

The majority in *Gibson v. Turpin* saw nothing fundamentally unfair about the state of Georgia denying court-appointed counsel to an indigent death row inmate seeking Georgia habeas corpus relief. The majority found it constitutional for the state in a postconviction proceeding to provide attorneys to represent

you have anything you want to put up, anything you want to introduce to this Court.

Mr. Gibson: But I don’t have an attorney.

The Court: Yes, sir. Do you have anything you want to tell this Court?

Mr. Gibson: I don’t waive any rights.

Id. at 1079 (quoting from the transcript of the evidentiary hearing).

317. *Id.* at 1081.

318. *Gibson*, 513 S.E.2d at 188.

319. *Id.* at 188.

320. *Id.* at 189.

321. *Id.* at 188.

322. *Id.* at 191.

323. *Id.* at 191.

the state while not providing an attorney to a death row inmate financially unable to hire a lawyer. The majority had confidence in findings of fact arising out of a evidentiary hearing at which the state is represented by counsel but the death row inmate is without a lawyer because he cannot afford to hire one. The majority's views smack of what George Orwell labeled as defending the indefensible.³²⁴ To paraphrase Stephen B. Bright of the Southern Center for Human Rights, expecting a death row inmate "to file and litigate a postconviction challenge without a lawyer" is comparable to expecting "a passenger to fly the Concorde to France without a pilot."³²⁵

Compared with the majority opinion, the dissenting opinions in *Gibson v. Turpin* are far more realistic about the adverse consequences of denying a postconviction right to counsel to death row inmates and about the advantages of providing such counsel.³²⁶

324. See GEORGE ORWELL, GEORGE ORWELL: IN FRONT OF YOUR NOSE, 1946-1950 Vol. 4, at 136 (Sonia Orwell & Ian Angus eds. 1968) ("the defence [sic] of the indefensible").

325. JIM DWYER, PETER NEUFELD & BARRY SCHECK, ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED 189 (2000). See also Thomas, *supra* note 303, at 1147 ("The History of Habeas Corpus Reveals the Necessity for the Appointment of Counsel in State Habeas Corpus Proceedings for Indigent Petitioners").

326. "When a petitioner is on death row and pursuing his first habeas petition, there can be no glimmer of hope that fundamental fairness will prevail in the absence of counsel and, without a procedure for appointed counsel, the right to meaningful access to habeas review under the Georgia Constitution is lost." *Gibson*, 513 S.E.2d at 199 (Fletcher, P.J., dissenting).

[F]undamental fairness demands that a condemned prisoner have the benefit of competent counsel to articulate his constitutional claims and to navigate the procedural and substantive morass that is our habeas corpus law . . . Nevertheless, the majority today . . . requires a condemned man, without counsel, to bring his claims for relief in an arcane process that he cannot possibly understand in a court of law that (most likely) will not be able to understand his constitutional concerns. This is an outcome that no just government should countenance.

Id. (Sears, J., dissenting).

Since 1999, the Supreme Court of Georgia has reaffirmed its support for its *Gibson v. Turpin* holding.³²⁷

D. Roberts v. Cooper (2010)

The prison mailbox rule is the rule that documents submitted to a court by an unrepresented prisoner shall be deemed filed in the clerk's office at the time they are deposited in the prison mail system for forwarding to the court.³²⁸

In 1988, in *Houston v. Lack*,³²⁹ the United States Supreme Court, sensitive to the hardships faced by prison inmates engaged in *pro se* civil litigation,³³⁰ adopted the prison mailbox

327. See, e.g., *Britt v. Conway*, 637 S.E.2d 43, 44 (Ga. 2006) (referring to *Gibson* as the basis for denying habeas appeals based on appointment of counsel); *Fortson v. State*, 532 S.E.2d 102, 104 (Ga. 2000) (citing to *Gibson* as the basis for "no right to appointed counsel in a death penalty habeas corpus proceeding").

328. See generally Ira P. Robbins, *The Prisoners' Mail Box and the Evolution of Federal Inmate Rights*, 144 F.R.D. 127 (1993); Courtenay Canedy, *The Prison Mailbox Rule and Passively Represented Prisoners*, 16 GEO. MASON L. REV. 773 (2009).

329. 487 U.S. 266 (1988). *Lack* was a federal habeas case filed by a state prisoner acting *pro se*. *Id.* at 268. The petitioner had 30 days to file a notice of appeal from the district court's denial of relief. *Id.* The petitioner on the 27th day deposited the necessary documents in the prison mail system for forwarding to the court clerk. *Id.* The clerk filed the documents on the 31st day, with the result that the petitioner's appeal was dismissed. *Id.* On certiorari, the Supreme Court reversed the appellate court's dismissal). *Id.* at 269.

330. *Id.* at 270-72:

The situation of prisoners seeking to appeal without the aid of counsel is unique. Such prisoners cannot take the steps other litigants can take to monitor the processing of their notices of appeal and that the court clerk receives and stamps their notices of appeal before the thirty-day deadline. Unlike other litigants, *pro se* prisoners cannot personally travel to the courthouse to see that the notice is stamped "filed" or to establish the date on which the court received the notice. Other litigants may choose to entrust their appeals to the vagaries of the mail and the clerk's process for stamping incoming papers, but only the *pro se* prisoner is forced to do so by his situation. And if other litigants do choose to use the mail, they can at least place the notice directly into the hands of the United States Postal Service (or a private express carrier); and they

rule for notices of appeal in federal habeas cases. In *Houston v. Lack*, the federal appellate rule requiring that a notice of appeal in a federal habeas case involving a state prisoner be filed within thirty days after entry of the judgment was construed to mean that a *pro se* prisoner's notice of appeal would be deemed filed at the time it was delivered to prison authorities for mailing.³³¹

can follow its progress by calling the court to determine whether the notice has been received and stamped, knowing that if the mail goes awry they can personally deliver notice at the last moment or that their monitoring will provide them with evidence to demonstrate either excusable neglect or that the notice was not stamped on the date the court received it. Pro se prisoners cannot take any of these precautions; nor, by definition, do they have lawyers who can take these precautions for them. Worse, the pro se prisoner has no choice but to entrust the forwarding of his notice of appeal to prison authorities whom he cannot control or supervise and who may have every incentive to delay. No matter how far in advance the pro se prisoner delivers his notice to the prison authorities, he can never be sure that it will ultimately get stamped "filed" on time. And if there is a delay the prisoner suspects is attributable to the prison authorities, he is unlikely to have any means of proving it, for his confinement prevents him from monitoring the process sufficiently to distinguish delay on the part of prison authorities from slow mail service or the court clerk's failure to stamp the notice on the date received. Unskilled in law, unaided by counsel, and unable to leave the prison, his control over the processing of his notice necessarily ceases as soon as he hands it over to the only public officials to whom he has access—the prison authorities—and the only information he will likely have is the date he delivered the notice to those prison authorities and the date ultimately stamped on his notice.

Id.

331. *Id.* at 270-76:

We conclude that . . . petitioner . . . filed his notice within the requisite 30-day period when, three days before the deadline, he delivered the notice to prison authorities for forwarding to the District Court . . . We thus conclude that the Court of Appeals had jurisdiction over petitioner's appeal because the notice of appeal was filed at the time petitioner delivered it to the prison authorities for forwarding to the court clerk.

Subsequently, Rule 4 of the Federal Rules of Appellate Procedure was amended to specifically authorize the prison mailbox rule for notices of appeal filed by *pro se* prisoners. FED. R. APP. P. 4 (c).

The mailbox rule is just and fair, and is good public and penal policy.³³² Since 1988, many states, by statute, court rule, or judicial decision, have adopted some form of prison mailbox rule for use in various *pro se* prisoner judicial proceedings, including habeas cases.³³³

In 2001, in *Massaline v. Williams*,³³⁴ the Georgia Supreme Court, aware of the difficulties facing inmate litigants,³³⁵ and agreeing with *Houston v. Lack*'s policy arguments,³³⁶ adopted the prison mailbox rule with respect to both habeas notices of appeal (which are filed in the superior court) and applications for a certificate of probable cause to appeal a denial of habeas relief (which are filed in the Georgia Supreme Court).³³⁷ *Massaline v. Williams* held:

[W]hen a prisoner, who is proceeding *pro se*, appeals from a decision on his habeas corpus petition, his application for certificate of probable cause to appeal and notice of appeal will be deemed filed on the date he delivers them to the prison authorities for forwarding to the clerks of this Court and the superior court, respectively.³³⁸

Three years later, in 2004, the Georgia habeas corpus statute

332. See *Haag v. State*, 591 So.2d 614, 617 (Fla. 1992) ("We find the approach taken by the Court in *Houston* to be most consistent with . . . simplicity and fairness . . .").

333. See, e.g., *Massaline v. Williams*, 554 S.E.2d 720, 721-22, n.6, n.7 (Ga. 2001) (delineating such adoptions).

334. *Massaline*, 554 S.E.2d at 721-22.

335. *Id.* ("[W]e conclude that this Court also should make allowances for the unique circumstances faced by *pro se* prisoners who bring their habeas corpus petitions to this Court.").

336. The Court in *Massaline v. Williams* quoted extensively and approvingly from *Houston v. Lack*. *Id.*

337. *Massaline*, 554 S.E.2d at 722-23.

338. *Id.* Subsequently, the Georgia Supreme Court's rules were amended to expressly authorize the prison mailbox rule with respect to all documents, and not just notices of appeal and applications for probable cause, submitted to the Georgia Supreme Court by a *pro se* prisoner. GA. SUP. CT. R. 13 (1) ("A document submitted by a prisoner who is not represented by counsel shall be deemed filed on the date the prisoner delivers the document to prison officials for forwarding to the Supreme Court Clerk.").

of limitations was enacted. This presented a question: would the prison mailbox rule also apply in determining whether a *pro se* habeas petition is timely under the 2004 statute of limitations? In 2008, when that issue first arose in a federal appellate court, the federal court took a look at *Massaline v. Williams* and then predicted that the Georgia Supreme Court would extend the mailbox rule to the filing of habeas petitions:

The rationale of *Massaline* applies equally in the case at hand. We discern no basis for distinguishing between a *pro se* prisoner filing a habeas petition and a *pro se* prisoner filing a habeas appeal, and we have no reason to believe that the Georgia Supreme Court would find one.³³⁹

This prediction turned out to be incorrect. In 2010, in *Roberts v. Cooper*,³⁴⁰ the *pro se* habeas petitioner, because his conviction occurred before July 1, 2004, had until July 1, 2008 to file his state habeas petition. He delivered the habeas petition to prison officials for mailing on June 27, 2008, but it was not received at the superior court clerk's office until July 2, one day late. Citing the statute of limitations, the warden moved to dismiss the habeas petition. The motion was denied, and the warden, with the permission of the superior court, took an interlocutory appeal. The legal arguments of the habeas petitioner were quite convincing.³⁴¹ Nonetheless, the Georgia

339. *Taylor v. Williams*, 528 F.3d 847, 850-51 (11th Cir. 2008).

340. 691 S.E.2d 875 (Ga. 2010).

341. Brief of Appellee, *Roberts v. Cooper*, 691 S.E.2d 875 (Ga. 2010) (No. S09A1512), 2009 WL 2954805, at *3-4:

First, applying the *Massaline* filing rule to Cooper's habeas petition is not foreclosed by this Court's case law. Second, as a practical matter, there is no distinction between a *pro se* habeas petitioner's inability to monitor the filing of his legal papers in an appellate court and his inability to monitor the filing of his legal papers in a trial court. Nor is there a relevant distinction between a notice-of-appeal deadline and a statute-of-limitation deadline that would warrant applying the *Massaline* filing rule in the former context but not in the latter. Third, the *Massaline* filing rule is consistent with the text of OCGA § 9-14-42(c)(1). Subsection (c)(1) is a habeas-specific statute of limitation written in language materially indistinguishable from the notice-of-appeal provision at issue in *Massaline* and, for

Supreme Court held that the prison mailbox rule was inapplicable and that therefore the habeas petition had to be dismissed because it had not been filed within the four-year statute of limitations. It was one day late in being received at the superior court and therefore, according to an implacable Court, the appeal must be dismissed without inquiring into its merits.

The Court was emphatic that it would not expand the mailbox rule:

[W]e take this opportunity to repeat that the mailbox rule stated in *Massaline* is to be applied only in the circumstances presented therein, that is, the attempted appeal of a pro se habeas petitioner . . . There is no valid justification for this Court to broaden the mailbox rule . . . We will continue to apply the mailbox rule only in the confines we have previously set forth . . .³⁴²

The reason the Court came up with to defend its decision was:

A pro se felony habeas petitioner has four years to prepare and submit his initial petition . . . [but] only 30 days to prepare and submit his application for a certificate of probable cause in this Court, and to prepare and submit his notice of appeal in the habeas court. The difference between the length of the two periods appears to us to have import.³⁴³

that reason, should be interpreted in light of *Massaline's* filing rule under a longstanding canon of statutory construction. Finally, because the *Massaline* filing rule applies to appeals from adverse habeas decisions, discretionary appeals that are statutorily authorized but not constitutionally guaranteed, it follows that the filing rule applies *a fortiori* to Cooper's habeas petition itself, which is the exclusive means for accessing a judicial forum to secure habeas relief that he is constitutionally (not merely statutorily) entitled to pursue.

342. *Roberts*, 691 S.E.2d at 877-78.

343. *Id.* at 878. The Court also suggested that the failure of the legislature to provide for the mailbox rule in the 2004 statute of limitations itself was important. *Id.* "Had the General Assembly desired to extend the mailbox rule, it could have done so, but it did not." *Id.* However, the legislature did not expressly forbid use of the mailbox rule in connection with the filing of

The Georgia Supreme Court's approach is at odds with that of the federal courts. In the federal court system, where admittedly the habeas statute of limitations is shorter than in Georgia, a habeas petition by a state prisoner is, entirely on the basis of case law, deemed filed within the one year statute of limitations if it is deposited in the prison mail system within the statute of limitations, even though it does not arrive at the clerk's office until after the limitations period has expired.³⁴⁴ Thus, Georgia's prisoners enjoy the benefits of a mailbox rule when they file a habeas corpus petition in a federal district court in Georgia,³⁴⁵ but they are denied these benefits when petitioning for habeas corpus in the courts of the State of Georgia.

The dissenting opinion of Chief Justice Hunstein in *Roberts v. Cooper*, representing the views of three justices, is persuasive:

First, the relatively short time for filing an appeal was not a consideration in *Massaline*. Second, given the lack of control an inmate has over his habeas petition . . . he "can never be *sure* that it will ultimately get stamped 'filed' on time" no matter how early in the four-year period it is submitted. Finally, one seeking to file a habeas petition has the right to utilize the full amount of time provided by statute, and "the state cannot subtract from that period through the failure to deliver a pro se inmate's petition until after the period has expired, even if the delay is through honest oversight."³⁴⁶

Roberts v. Cooper seems to view the prison mailbox rule as

habeas petitions. If the only statutory rights Georgia prisoners have are those which the courts find the legislature has explicitly authorized, the list of prisoners' rights will never be lengthy.

344. See, e.g., *Taylor v. Williams*, 528 F.3d 847, 848-849 (11th Cir. 2008); *Alexander v. Sec'y, Dep't of Corrections*, 523 F.3d 1291 (11th Cir. 2008), *abrogated on other grounds by* *Wall v. Kholi*, 131 S. Ct. 1278 (Mar. 7, 2011).

345. See, e.g., *Taylor*, 528 F.3d at 851.

346. *Roberts*, 691 S.E.2d at 880 (Hunstein, C.J., dissenting) (citations omitted) (emphasis in original).

something of a nuisance, and needs to be overruled. Contrary to the decision, there are many valid justifications for judicial expansion of the prison mailbox rule to include the filing of habeas petitions. Implementing the mailbox rule with respect to the statute of limitations on filing habeas petitions will not cause any practical problems and definitely will improve the administration of justice. Occasionally a habeas petition received at the clerk's office a few days after the limitations period expires will nonetheless be deemed timely filed. The possibility of palpable injustices such as the one in *Roberts v. Cooper*, where the habeas petition was dismissed because it had not been received by the clerk until one day after the statute of limitations period ended, even though the prisoner had mailed the petition days before the limitations period expired, will be precluded.

Even if it is not overruled, the holding in *Roberts v. Cooper* could be ameliorated by amending the Georgia Uniform Superior Court Rules to provide that a *pro se* prisoner's habeas petition will be deemed filed at the time it is placed in the prison mail system for delivery to the superior court.

E. Crosson v. Conway (2012)

As noted previously in this Article, since 1975, a petitioner in a Georgia postconviction habeas proceeding who has been denied relief must follow a two-step process involving two courts if he seeks to appeal. First, he must within 30 days file a notice of appeal with the superior court, and second, within the same 30 days he must file an application for a certificate of probable cause to appeal with the Georgia Supreme Court.

In *Fullwood v. Sivley*,³⁴⁷ in 1999, the Georgia Supreme Court held that the requirement that a certificate of probable cause be issued before there can be an appeal from a denial of postconviction habeas relief is jurisdictional in nature, and that where the application for a certificate of probable cause had not been filed by a *pro se* prisoner within the 30-day statutory time

347. 517 S.E.2d 511 (Ga. 1999).

limit, even though the prisoner had been fully informed as to the proper appellate procedure by the superior court judge, and even though the prisoner did file a timely notice of appeal, the appeal had to be dismissed for lack of jurisdiction.

In holding that the certificate of probable cause requirement is jurisdictional, *Fullwood v. Sivley* followed the federal approach. In the federal court system, a certificate of appealability (known until 1996 as certificate of probable cause) is required before there can be an appeal from a denial of federal postconviction habeas corpus relief to a state prisoner, and the requirement has been held to be jurisdictional.³⁴⁸

In three decisions between 2001 and 2008,³⁴⁹ the Georgia Supreme Court construed *Fullwood v. Sivley* to prohibit dismissal of a *pro se* prisoner's untimely postconviction habeas appeal if the "habeas petitioner is not informed [by the superior court judge] of the proper procedure for obtaining appellate review of an unfavorable ruling."³⁵⁰

In 2012, however, in *Crosson v. Conway*,³⁵¹ the Georgia Supreme Court overruled these three decisions and held that a failure to comply with the statutory requirement that a petitioner seeking to appeal a denial of postconviction habeas relief must, within 30 days, both (1) file a notice of appeal in the superior court, and (2) file an application for a certificate of probable cause in the Georgia Supreme Court, cannot be excused merely because the *pro se* habeas petitioner was not informed by the judge of the statutory requirements for an appeal.³⁵² A habeas appeal must be dismissed if either the notice of appeal or the application for probable cause was not filed within the 30-day deadline, even though the petitioner is proceeding *pro se* and

348. See, e.g., *Gonzalez v. Thaler*, 132 S. Ct. 641, 651 (2012); *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003); *Slack v. McDaniel*, 529 U.S. 473, 480 (2000).

349. *Thomas v. State*, 667 S.E.2d 375, 376 (Ga. 2008); *Capote v. Ray*, 577 S.E.2d 755, 757 (Ga. 2002); *Hicks v. Scott*, 541 S.E.2d 27, 27 (Ga. 2001).

350. *Capote*, 577 S.E.2d at 757.

351. 728 S.E.2d 617 (Ga. 2012).

352. *Id.* at 620.

even though he is ignorant of the proper appellate procedures required to be followed.³⁵³

Like *Roberts v. Cooper*, *Crosson v. Conway* suggests a Court that is dissociated from the daunting realities experienced by inmates confined in total institutions. In *Crosson v. Conway*, as in *Reed v. Hopper*, *Gibson v. Turpin*, and *Roberts v. Cooper*, the dissenting opinion is more convincing than the majority opinion. Rather than re-canvassing any arguments, however, it is preferable to point out that, while *Crosson v. Conway* may deserve overruling, the adverse effects of the decision can be ameliorated without actually overruling it. Promulgation of new court rules will solve the problem.

In the federal court system, under a provision of the federal habeas corpus statute, if a district court denies the habeas petition of a state convict, the petitioner may not appeal the denial to the appropriate United States Court of Appeals unless a certificate of appealability is issued by a judge.³⁵⁴ (As noted previously in this Article, this is a jurisdictional requirement.) Under the federal system, the certificate of appealability may be issued or denied by either the habeas trial judge or an appellate judge, whereas under the Georgia system only the Georgia Supreme Court can issue or deny the certificate of probable cause. This distinction is unimportant for present purposes.

In the federal courts, there is no statute of limitations on applying for the certificate of appealability, and therefore, unlike the situation in Georgia, there are no cases where the certificate has been denied because of delay in requesting it, or where an appeal was dismissed because the certificate was not timely requested or granted.

More importantly for our purposes, in the federal court system the certificate must be either issued or denied on the

353. *Id.*

354. 28 U.S.C. § 2253(c) (West, Westlaw through 2014). In addition to obtaining issuance of a certificate of appealability, the petitioner, to perfect the appeal itself, must file a notice of appeal in the district court within 30 days after entry of the judgment appealed from. FED. R. APP. P. 4(a)(1)(A).

merits by the trial or an appellate judge, even if the habeas petitioner does not request it. Under the federal scheme, the habeas petitioner is not required to request the certificate at either the trial court or appellate court level. Under the Rules Governing Section 2254 Cases, the district court must, without any application by the petitioner, issue or deny a certificate of appealability when it enters a final order denying relief.³⁵⁵ Under the Federal Rules of Appellate Procedure, if the district judge denies the certificate, the petitioner may request a circuit judge on the Court of Appeals to issue the certificate.³⁵⁶ However, it is not necessary that the habeas petitioner do so, because the application will be made for him anyway by operation of law under the Federal Rules of Appellate Procedure: “If no express request for a certificate [of appealability] is filed, the notice of appeal constitutes a request addressed to the judges of the court of appeal.”³⁵⁷ Under these circumstances, no federal habeas petitioner can or will be denied the certificate of appealability for having asked for it too late or for not having asked for it at all. If the certificate is denied, it will be because probable cause to appeal is lacking, and not because of any procedural misstep.

The Georgia Supreme Court should consider adopting a rule patterned after the federal approach on this issue. Rule 36 of the Rules of the Supreme Court of Georgia, relating to certificates of probable cause, could be amended to add a provision under which, if the habeas petitioner applied for a certificate of probable cause late, or if the petitioner did not apply for the certificate at all, then a timely filed notice of appeal shall constitute a request for the certificate. Thus, as long as the notice of appeal was filed on time, no certificate of probable cause – and hence no habeas appeal – would ever be denied or dismissed on timeliness grounds. The Georgia

355. R. GOVERNING SECTION 2254 CASES IN THE U.S. D. CT. 11(a), available at <http://www.uscourts.gov/uscourts/rules/2254-2255.pdf>.

356. FED. R. APP. P. 22(b)(1) (“If the district judge has denied the certificate, the applicant may request a circuit judge to issue it.”).

357. FED. R. APP. P. 22(b)(2).

Uniform Superior Court Rules also need amendment. A provision ought to be added requiring superior court judges to advise habeas petitioners as to the appropriate appellate procedures to be followed if they are denied relief and want to appeal.³⁵⁸

IV. CONCLUSION

Unquestionably, Georgia's state writ of habeas corpus is in better shape than it was before passage of the Georgia Habeas Corpus Act of 1967. But also unquestionably, in the years since 1967, there has been a steady stream of legislative and judicial developments which have eroded the Georgia writ of habeas corpus and increased not only the probability that habeas petitioners will be unsuccessful, but also the likelihood that habeas petitions will be dismissed for purely procedural reasons, without inquiry into their merits. This methodical curtailment of the availability of relief is attributable mainly to the series of state statutes curbing habeas corpus in various ways, but also to some disconcerting Georgia Supreme Court decisions which are low points in Georgia habeas corpus case law jurisprudence.

Not every Georgia habeas statute since 1973 has constricted the writ. Although, tellingly, none of the post-1973 statutes expanded habeas relief, some did improve the administration of habeas proceedings. For example, a portion of the 2004 statute clarified the rules for proper venue in postconviction habeas cases where the petitioner currently is in federal custody, in custody outside Georgia, or not in custody at all,³⁵⁹ and the Georgia Death Penalty Habeas Corpus Reform Act of 1995 efficiently reconfigured the use of depositions and affidavits in postconviction habeas litigation.³⁶⁰

358. For an example of a proposed form of advising instructions to be given by superior court judges to habeas petitioners denied relief, *see* *Thomas v. State*, 667 S.E.2d 375, 377 (Ga. 2008).

359. *See supra* note 232.

360. These provisions are codified at O.C.G.A. § 9-14-48(a)(b)(c) (West,

And by no means have all the Georgia Supreme Court decisions since 1973 weakened the writ. Some, indeed, have strengthened habeas. The Court, for example, has held that a felony conviction, without more, is a sufficient restraint on liberty to invoke the state writ even though the convicted person's sentence has been fully served.³⁶¹ It has also held that a person convicted of a misdemeanor traffic offense who is not in physical custody or even on probation, but whose driver's license has been suspended, is restrained of his liberty for purposes of state habeas corpus, even though the loss of such a license is not regarded as sufficient custody to invoke the federal writ of habeas corpus.³⁶² The Court has also swept away older procedural rules which prohibited habeas attacks on concurrent or consecutive sentences.³⁶³

And although it is true that the Court denies relief more often than it grants it,³⁶⁴ the Court nevertheless grants postconviction habeas relief in both death sentence³⁶⁵ and noncapital³⁶⁶ cases

Westlaw through 2014).

361. *See, e.g.*, *Parris v. State*, 208 S.E.2d 493, 494 (Ga. 1974). Federal habeas relief, on the other hand, is not available to a convicted person who has finished his felony sentence; such a person is not regarded as being in custody under the conviction or sentence sought to be attacked; *see, e.g.*, *Maleng v. Cook*, 490 U.S. 488, 493 (1989).

362. *See supra* notes 166-170 and accompanying text.

363. *See, e.g.*, *Middlebrooks v. Allen*, 216 S.E.2d 331, 331 (Ga. 1975) (finding habeas petitioner may attack a future sentence to be served consecutively to the sentence petitioner is presently serving); *Atkins v. Hopper*, 216 S.E.2d 89, 90-91 (Ga. 1975) (finding habeas petitioner may attack a sentence being served concurrently with valid sentence).

364. *See, e.g.*, *Brown v. Parody*, 751 S.E.2d 793 (Ga. 2013); *Sears v. Humphrey*, 751 S.E.2d 365 (Ga. 2013); *O'Donnell v. Smith*, 751 S.E.2d 324 (Ga. 2013); *Humphrey v. Nash*, 744 S.E.2d 706 (Ga. 2013); *Harris v. Upton*, 739 S.E.2d 300 (Ga. 2013); *Seabolt v. Hall*, 737 S.E.2d 314 (Ga. 2013); *Upton v. Hardeman*, 732 S.E.2d 425 (Ga. 2012); *Walker v. Hagins*, 722 S.E.2d 725 (Ga. 2012); *Hall v. Lance*, 687 S.E.2d 809 (Ga. 2010); *Hall v. Lee*, 684 S.E.2d 868 (Ga. 2009); *Hall v. Terrell*, 679 S.E.2d 17 (Ga. 2009); *State v. Sabillon*, 622 S.E.2d 846 (Ga. 2005); *Lewis v. McDougal*, 583 S.E.2d 859 (Ga. 2003).

365. For a list of seven decisions where the Court has granted relief to a death row inmate, see *Gibson v. Turpin*, 513 S.E.2d 186, 198 n.27 (Ga.

on a regular basis. Some of the Court's decisions granting habeas relief are recognized as civil liberties landmarks.³⁶⁷

The steady curtailment of Georgia habeas corpus over the past four decades does not prove that the legislators who passed the six restrictive statutes acted in bad faith or that the justices on the Georgia Supreme Court responsible for the five deplorable habeas-eroding decisions intended to wreck the writ. Nor does it prove that Georgia is unique in moving in the direction of curbing the effectiveness of habeas corpus and postconviction review. In recent years other states have been moving in the same direction as Georgia.

More than anything else, the curtailment of habeas in Georgia and elsewhere bespeaks the growing political influence of the law enforcement establishment and its law and order political allies. The best explanation for the retrenchment of habeas corpus in the federal courts and in the state courts lies in the extensive, burgeoning political power of this country's law enforcement establishment and its law and order allies, who have a vested interest in sapping the vitality of the writ of

1999) (Fletcher, P. J., dissenting).

366. *See, e.g.,* *Pride v. Kemp*, 711 S.E.2d 653, 654 (Ga. 2011) (granting habeas to a petitioner accused of cruelty to children and aggravated assault on basis of wrongful judicial participation in plea negotiations); *Thompson v. Brown*, 708 S.E.2d 270, 271 (Ga. 2011) (affirming habeas petition of ineffective assistance of counsel claim); *Arnold v. Howerton*, 646 S.E.2d 75, 76 (Ga. 2007) (granting habeas application on basis of involuntary plea); *Beckworth v. State*, 635 S.E.2d 769, 769 (Ga. 2006) (same); *Harvey v. Meadows*, 626 S.E.2d 92, 166 (Ga. 2006) (grant of habeas based on a court's oral warning about consequences of violating a special condition of probation); *Petty v. Smith*, 612 S.E.2d 276, 277 (Ga. 2005) (granting habeas for petitioner convicted of aggravated assault on basis of ineffective assistance of counsel); *Clowers v. Sikes*, 532 S.E.2d 98, 99 (Ga. 2000) (grant of habeas on basis of whether petitioner waived his right to counsel at the time of making a guilty plea).

367. *See, e.g.,* *Humphrey v. Wilson*, 652 S.E.2d 501, 523 (Ga. 2007) (granting habeas on the basis of a cruel and unusual punishment claim in conviction for child molestation sentencing as disproportional); *Nelson v. Zant*, 405 S.E.2d 250, 252 (Ga. 1991) (granting habeas relief to death row inmate convicted in violation of due process because prosecution knowingly used false material evidence to convict petitioner).

habeas corpus (and other postconviction remedies) and a proven record of wielding their political muscle in legislatures to advance their agenda in the name of “finality,” “federalism,” “comity,” “efficiency,” and “crime control.”

The law enforcement establishment – prosecutorial agencies, police forces, and the prison industrial complex – and its law and order political allies have no love for postconviction review and seek its curtailment for understandable reasons. Postconviction review is used by criminal defendants to investigate, review, and (where appropriate) bring to the attention of the courts and the public the violations of the federal or state bills of rights committed by members of the law enforcement establishment – the prosecutors who violate due process to get convictions, the police officers who exceed their constitutional powers in investigating crime, and the prison officials who may violate the rights of the persons in their custody in a multitude of ways, including physical mistreatment. When postconviction relief is granted, prosecutors who withheld exculpatory evidence or manufactured false evidence are exposed, as are police who committed perjury or coerced a confession or planted false evidence. Cutting back on habeas and postconviction remedies means less exposure of and less accountability for government agents who engage in lawless law enforcement. It also means that the victims of illegal law enforcement are more easily intimidated, discouraged, and rendered powerless.

There are no large or powerful political lobbying groups who speak for the writ of habeas corpus or for the rights of the convicted persons who seek to invoke the writ. Is it any surprise that legislators and judges veer in the direction of pleasing, or are sympathetic to the arguments of, the tough-on-crime, well-financed, politically pervasive law enforcement establishment which seeks to prevent the writ from challenging the exercise of power by that establishment and which patiently, step by step, advances its goals?

We must cease obsessing about rules of practice and pleading that prevent consideration of the merits of habeas claims. A

postconviction remedy system, which emphasizes procedural defaults by prisoners and downplays violations of basic rights, is a system in need of systemic change. Judicial review of the merits of claimed violations of basic rights must be the norm in habeas cases, not the exception.

To cut the tightening procedural coils that are suffocating habeas corpus, something must be done about what Graham Hughes calls “the fetish of finality.”³⁶⁸ Finality is not an independent entity; it is a competing interest; it is a question of degree. We must jettison the procedures-oriented, technicalities-based, don’t-decide-the-merits jurisprudence that values finality interests over liberty, treating enforcement of procedural default rules as of equal or even greater importance than the protection of basic individual rights. This free country should not have allowed itself to forget the brilliant observation of Louis H. Pollak:

Those who advocate curtailment of the writ lay special emphasis upon the asserted need for judicial finality: at some point, it is urged, there must be an end to litigation. As a general proposition there is, of course, much to be said for the procedural devices which limit the suitor to his day in court and his right of appeal. But the manifest utility within their proper sphere, of *res judicata*, collateral estoppel, and the rest of that unfriendly but expeditious tribe, should not so dazzle the beholder as to stimulate their application outside that sphere. These concepts, like *stare decisis*, stem from the principle that “in most matters it is more important that the applicable rule . . . be settled than that it be settled right.” But where personal liberty is involved, a democratic society employs a different arithmetic and insists that it is less important to reach an unshakable decision than to do justice.³⁶⁹

368. Hughes, *supra* note 11, at 328.

369. Louis H. Pollak, *Proposals to Curtail Federal Habeas Corpus for State Prisoners: Collateral Attack on the Great Writ*, 66 YALE L.J. 50, 65 (1956) (citations omitted). See also Louis E. Goodman, *Use and Abuse of the Writ of Habeas Corpus*, 7 F.R.D. 313, 313 (1948) (“No honest believer in liberty will object to the judicial policy of always making the writ [of habeas

Here in Georgia the list of the bitter fruits of the state legislature's and the state Supreme Court's finality fetish grows ever lengthier.

And what a list it is: Refusing indigent habeas petitioners, including death row inmates, the right to postconviction counsel. Adding time limitations on applying for habeas relief, including retrospective ones. Reducing the number of claims arising under Georgia law that can be raised in a habeas proceeding. Removing Fourth Amendment claims en masse from the scope of state habeas corpus. Creating and expanding procedural rules that operate to block consideration of the merits of a habeas petition raising valid claims, and establishing and maintaining a postconviction system in which disposition of petitions for relief all too often involves denials of relief based on procedural errors committed by lawyers, without even examining the validity of the habeas claims. Eliminating appeals of right from habeas decisions denying relief to persons charged with or convicted of crime, while preserving the state's right to appeal grants of postconviction habeas relief. Trying to force indigent petitioners (or their relatives and friends) to pay fees and costs which ought to be paid by the government anyway. Freezing the inmate accounts of indigents who cannot pay those fees and costs. Eliminating, subject to one narrow exception, the right of indigent jailhouse lawyers to proceed *in forma pauperis* in habeas corpus proceedings, thereby excluding them from access to the writ.

In our rush to fret about compliance with state court pleading requirements, we are "artificially . . . elevat[ing] procedural rulings over substantive adjudications in post-conviction review."³⁷⁰ We overlook the simple truth that "[o]ur system of criminal justice is not infallible."³⁷¹ Above all, we should never forget this: the prosecutors and the police who dominate the system are not infallible and have a proven history of

corpus] available to prevent unjust restraint of liberty.").

370. *State v. Preciose*, 609 A.2d 1280, 1294 (N.J. 1992).

371. *State v. Nash*, 58 A.3d 705, 718 (N.J. 2013).

misconduct and abuse of power. We forget about the innumerable cases where postconviction habeas relief was granted to innocent persons (including death row inmates) wrongly convicted of a crime they did commit, or where such relief was granted to persons, regardless of their guilt, who were denied a fair trial or sentenced to an unconstitutional punishment. We have blinded ourselves to the preciousness of the writ of habeas corpus, to what Justice Frankfurter referred to as “the uniqueness of habeas corpus in the procedural armory of our law.”³⁷² We cannot seem to remember that “[h]abeas corpus is one of the precious heritages of Anglo-American civilization.”³⁷³ We close our eyes to the reality that postconviction remedies provide “a built-in safeguard that ensures a defendant is not unjustly convicted” and that gives a convicted person his last chance to challenge the fairness and the reliability of his conviction.³⁷⁴ We have forgotten that in postconviction proceedings “it is not a needle we are searching for in these stacks of paper, but the rights of a human being.”³⁷⁵ We have also fallen into the dehumanizing trap of underprizing our constitutional rights. We need to memorize the majestic, stirring words of the Georgia Court of Appeals written a century ago:

They [constitutional rights] are the sacred civil jewels which have come down to us from an English ancestry, forced from the unwilling hand of tyranny by the apostles of personal liberty and personal security. They are hallowed by the blood of a thousand struggles, and were stored away for safe-keeping in the casket of the Constitution. It is infidelity to forget them; it is sacrilege to disregard them; it is despotic to trample upon them. They are given as a sacred trust into the keeping of the courts, who should with sleepless

372. *Brown v. Allen*, 344 U.S. 443, 512 (1953) (opinion of Frankfurter, J.).

373. *Fay v. Noia*, 372 U.S. 391, 441 (1963).

374. *See Nash*, 58 A.3d at 718.

375. Walter V. Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 25 (1956).

vigilance guard these priceless gifts of a free government.³⁷⁶

Whatever their intentions or motives, Georgia's legislators and jurists are quietly and smoothly, one restrictive step at a time, ridding this state of the Great Writ of Habeas Corpus. And any trend of getting rid of habeas corpus, whether by outright abolishing it or by fettering it with immobilizing restrictions, is a sobering Orwellian development, not an occasion for laughing at Marx brothers' buffoonery. Unlike Captain Jeffrey Spaulding and Signor Emanuel Ravelli, it does not cheer us up. It is doubleplusunfunny.

376. *Underwood v. State*, 78 S.E. 1103, 1106 (Ga. Ct. App. 1913).