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Paxton Murphy
paxtonmurphy@uga.edu

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Cover Page Footnote

J.D. Candidate, 2024, University of Georgia School of Law; B.A. 2021, Southern Methodist University. A special thanks to Julianne Swilley for her support and mentorship.

THE PROCEDURAL TRAGEDY OF *COOK V. STATE*: A CALL TO THE GENERAL ASSEMBLY TO FINISH WHAT IT STARTED

Paxton Murphy[*]

On March 15, 2022, the Georgia Supreme Court decided Cook v. State. *This case was a bombshell in Georgia's post-conviction law because it discarded decades of judicial precedent overnight. For years, Georgia's criminal defendants relied on motions for out-of-time appeals when defense counsel failed to appeal before a deadline or to advise a defendant of his or her appellate rights. The out-of-time appeal procedure was a quick, easy, and fair way to return the defendant to the exact same place he was before the appeal deadline was missed.*

The ramifications of Cook *were severe. Overnight, every out-of-time appeal case in Georgia was dismissed. There is a considerable chance that there are people in prison who should not be there merely because they relied on what Georgia courts had been telling them to do (for decades). Furthermore,* Cook *forced criminal defendants who missed an appeal deadline through no fault of their own to navigate Georgia's habeas corpus procedure, which can be far more burdensome than an out-of-time appeal.*

Recognizing these severe ramifications, the Georgia General Assembly crafted House Bill 126 which sought to directly address Cook v. State. *The bill sought to codify out-of-time appeals into Georgia law, and it provided a grace period for those defendants' whose cases were dismissed in the wake of* Cook. *The bill received overwhelming approval from Georgia's general assembly. Yet, the bill experienced tweaks and the house was unable to vote on the substitute version before the legislative session came to end for 2023. Thus, the bill never became law.*

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This note details the development of out-of-time appeals, compares Georgia's out-of-time appeals with other jurisdiction's practices, and pleas for the general assembly to finish what it started with House Bill 126.

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I. INTRODUCTION

On March 15, 2022, the Supreme Court of Georgia decided *Cook v. State*, a bombshell case for Georgia's post-conviction laws.[1] For decades, convicted defendants could file "out-of-time" appeals when their trial counsel was ineffective by failing to meet an appeal deadline or by failing to advise defendants of their rights to appeal.[2] The out-of-time appeals procedure was a practical procedural vehicle that allowed convicted defendants who failed to appeal through no fault of the own to appeal directly to the court familiar with the case in lieu of forcing the convicted defendant to travel through Georgia's often burdensome habeas corpus process.[3] In *Cook v. State*, however, the Georgia Supreme Court jettisoned out-of-time appeals and dismissed all pending out-of-time appeals overnight.[4]

Cook concluded that "the trial court out-of-time appeal procedure is not a legally cognizable vehicle for a convicted defendant to seek relief for alleged constitutional violations."[5] As a result, many convicted defendants—some of whom may have been on the verge of a successful appeal—lost their chance at securing justice. Now, there is a considerable chance that people in prison *who should not be there* will remain in prison merely because they relied on Georgia's twenty-five years[6] of precedent—amounting to a true

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[1] Cook v. State, 870 S.E.2d 758 (Ga. 2022).

[2] The legal community has referred to "out-of-time appeals" as "out of time appeals," "delayed appeals," and "belated appeals," but this Note will use "out-of-time appeals" because this terminology is the most commonly used in Georgia.

[3] *See Cook*, 870 S.E.2d at 760 (explaining then-current precedent that allows "a criminal defendant to who alleges that she was unconstitutionally deprived of her appeal as of right to file a motion for out-of-time appeal in the trial court, as opposed to seeking a writ of habeas corpus as an exclusive remedy").

[4] *See id.* at 782 (applying the holding to all pending out-of-time appeals).

[5] *Id.* at 760.

[6] Out-of-time appeals have been precedent since 1995. *See id.* (explaining that in 1995 the Georgia Supreme Court created precedent for out-of-time appeals in *Rowland v. State*, 452 S.E.2d 756 (Ga. 1995)). However, out-of-time appeals have existed for upwards of 50 years. *See id.* at 784 (Peterson, J., dissenting) (agreeing with the majority opinion "that we did something we should not have nearly 50 years ago when we ignored our decision in *Neal* in acknowledging a stand-alone motion for out-of-time appeal"); Lay v. State, 248 S.E.2d 611, 611 n.1 (Ga. 1978) ("'Out of time appeal' in Georgia appears to have had its genesis in *Byrd v. Smith*, 407 F.2d 363 (5th Cir. 1969).").

procedural tragedy.[7] Furthermore, without out-of-time appeals, criminal defendants who miss an appeal deadline through no fault of their own must cling to habeas corpus as their best chance of securing justice in Georgia courts.[8] Compared to the efficiency and simplicity of out-of-time appeals, habeas corpus in Georgia can be onerous. To successfully seek habeas relief, criminal defendants must navigate the numerous procedural hurdles and overcome the burdensome obstacles that were nonexistent in Georgia's motion for out-of-time appeals.[9]

Recognizing the importance of motions for out-of-time appeals, the Georgia House of Representatives introduced House Bill 126, which sought to directly address *Cook v. State* and its severe ramifications.[10] The 2023 bill aimed to "provide for an out-of-time remedy for certain types of postjudgment relief in criminal cases" and to provide a two-year grace period for those criminal defendants who lost their right to appeal after *Cook v. State*.[11] Georgia legislators overwhelmingly approved the bill as the house passed the bill 172–1,[12] and the senate passed the bill by substitute 46–7.[13] However, the senate passed the substitute bill on March 30, 2023 at 12:15 a.m., in the very last minutes before adjournment on *sine die*, leaving the house little time to vote on the substitute version.[14] Sadly, the Georgia House of Representatives did not have enough time to vote on the amended bill, and it was never sent to the governor to sign into law.[15]

This Note pleas for the 2024 General Assembly to finish what it started and enact H.B. 126 in the upcoming session. If the General

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[7] For a convincing argument supporting out-of-time appeals, see Brief for the Georgia Association of Criminal Defense Lawyers as Amicus Curiae, Cook v. State, 870 S.E.2d 758 (Ga. 2022) (No. S21A1270) [hereinafter Brief of GACDL].

[8] *Id.* (explaining that "the only recourse for those appellants [whose cases were dismissed in the wake of *Cook*] would be to petition for a writ of habeas corpus").

[9] *See Cook*, 870 S.E.2d at 788 (Peterson, J., dissenting) ("Granting a motion for out-of-time appeal . . . avoids the need for an inmate to grapple with the procedural hurdles of filing a habeas petition, avoids the need to transfer records between jurisdictions, and reduces travel costs for lawyers and prisoners.")

[10] H.B. 126, 157th Gen. Assemb., Reg. Sess. (Ga. 2023).

[11] *Id.*

[12] *HB 126*, GA. GEN. ASSEMBLY, https://www.legis.ga.gov/legislation/63756.

[13] *Senate Votes*, GA. GEN. ASSEMBLY, https://www.legis.ga.gov/votes/senate.

[14] *Id.*

[15] *Id.* (showing the last house vote occurred at 12:10 AM).

Assembly fails to revisit and pass this bill, countless criminal defendants will suffer. Part II provides background information on the development of habeas corpus and out-of-time appeals in Georgia. Part III explains the history and differences between habeas corpus and motions for out-of-time appeals, and Part IV details *Cook v. State* and its implications for Georgia prisoners. Part V explains H.B. 126 and argues for the upcoming General Assembly to revisit and pass the bill. Part VI compares H.B. 126 to out-of-time appeal practices in other jurisdictions to show that it does not seriously deviate from other jurisdictions' approaches.

II. BACKGROUND

Prior to 1967, Georgia prisoners had a "limited availability" of post-conviction relief.[16] While habeas corpus relief existed, this relief could only be sought in narrow circumstances and involved numerous procedural hurdles.[17] For a Georgia prisoner to successfully obtain habeas corpus relief, the prisoner was limited to arguing that their conviction "was absolutely void for lack of personal or subject matter jurisdiction."[18] In attacking convictions, prisoners also needed to avoid procedural barriers which ranged from waiver of constitutional rights to the abuse of writ doctrine.[19] Compared to federal habeas corpus, which was broadened under the Warren Court in the 1960s,[20] Georgia's habeas corpus had severe

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[16] *See* Donald E. Wilkes, Jr., *Postconviction Habeas Corpus Relief in Georgia: A Decade After the Habeas Corpus Act*, 12 GA. L. REV. 249, 249 (1978) ("Prior to 1967 . . . [t]he limited availability of postconviction relief in Georgia . . . frustrated attempts of Georgia prisoners to prove that they were unfairly convicted or sentenced . . . .").

[17] *See id.* (noting that "there were less than a dozen claims for relief cognizable in a postconviction relief proceeding, and these claims were so narrowly defined as to make relief unavailable in all but the most extraordinary of circumstances" and that "a number of procedural rules often operated to prevent a Georgia court from inquiring into the allegations made in a petition for postconviction habeas relief").

[18] *Id.* at 250.

[19] *See id.* at 252 (identifying major procedural barriers as: the waiver of constitutional rights, the res judicata doctrine, the present detention rule, and the abuse of writ doctrine).

[20] *See* Donald E. Wilkes, Jr., *A New Role for an Ancient Writ: Postconviction Habeas Corpus Relief in Georgia* (pt. 2), 9 GA. L. REV. 13, 32 (1974) ("Between 1961 and 1969 . . . . [t]he federal habeas corpus statute was given a liberal construction in other [U.S. Supreme Court] decisions involving applications for habeas corpus relief submitted by state convicts. By increasing the number of substantive grounds for relief, annulling procedural rules which

limitations.[21] These limitations caused a "friction" between Georgia habeas courts and federal habeas courts because the more expansive federal habeas courts heard claims that Georgia habeas courts were unable to consider.[22]

Aware of this tension between federal and state courts, the Georgia General Assembly passed the Habeas Corpus Act of 1967 so that "the friction could be reduced."[23] The statute afforded Georgia prisoners the ability to seek habeas relief when they were subject to a "substantial denial of [their] rights" under the Georgia or federal constitutions.[24] The Act also declared that rights under the U.S. Constitution would not be waived unless intentionally done so, required Georgia habeas courts to hear claims that had not been adjudicated before if the trial court found that the petitioner had not intentionally withheld the claim, and established the venue of habeas petitions as the county of the petitioner's confinement.[25] Lastly, the Act established that the article provides "the exclusive procedure for seeking a writ of habeas corpus."[26] In sum, these changes helped modernize Georgia's post-conviction machinery, thereby closing the disparity between federal and state relief.

In *Neal v. State*, a prisoner attempted to appeal his conviction and sentence seven years late, in contravention of Georgia's

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operated to bar resolution of the merits of a habeas petition, and expanding the fact-finding powers of federal courts, these decisions expanded dramatically the scope of the federal writ of habeas corpus.").

[21] *See id.* at 38–40 (contrasting the narrow scope of Georgia's habeas corpus relief prior to the Habeas Corpus Act of 1967 with the then-newly broadened scope of federal habeas corpus relief).

[22] *See id.* at 40 ("This was the friction produced whenever a federal habeas court passed on a federal claim presented by a Georgia convict which the Georgia courts had never entertained on the merits because of the narrow range of Georgia habeas corpus."); William F. Swindler, *State Post-Conviction Remedies and Federal Habeas Corpus*, 12 WM. & MARY L. REV. 149, 170 (1970) (showing that federal habeas corpus petitions in Georgia totaled 10 petitions in 1962, 78 petitions in 1964, 114 petitions in 1966, and 211 petitions in 1968).

[23] Wilkes, *supra* note 20, at 51; *see also* O.C.G.A § 9-14-40 (explaining the legislative intent of the Habeas Corpus Act and that "it is necessary that the scope of state habeas corpus be expanded and the state doctrine of waiver of rights be modified").

[24] O.C.G.A. § 9-14-42(a); *see also* State v. Smith, 573 S.E.2d 64, 65 (Ga. 2002) ("Habeas corpus is the exclusive post-appeal procedure available to a criminal defendant who asserts the denial of a constitutional right").

[25] *See* Wilkes, *supra* note 20, at 54–57 (detailing how habeas corpus changed under the Habeas Corpus Act of 1967).

[26] O.C.G.A. § 9-14-41.

statutorily imposed thirty-day deadline for direct appeals.[27] The Georgia Supreme Court dismissed the motion because the prisoner's appeal was not framed as a habeas petition.[28] The Court explained that "[u]nder the Habeas Corpus Act of 1967 . . . there is provided an adequate post-conviction remedy to a prisoner seeking relief upon a claim arising from the substantial denial of rights guaranteed by the Federal or State Constitutions or by the statute laws of [Georgia], including . . . the denial of the right of appeal or of the effective assistance of counsel on appeal."[29]

Although the 1974 Georgia Supreme Court explicitly held that there was no right to out-of-time appeals, the 1975 court strangely began considering appeals on their merits stemming from trial courts' denial or grant of motions for out-of-time appeals.[30] In *King v. State*, 120 days had elapsed between the deadline to file a direct appeal and when the defendant moved for an out-of-time appeal, yet the Georgia Supreme Court considered an appeal on the merits from the trial court's denial of the defendant's motion for an out-of-time appeal.[31] In *Furgerson v. State*, the Court considered an appeal on the merits from the trial court's grant of the defendant's motion for out-of-time appeal.[32] In both *King* and *Furgerson*, the Georgia Supreme Court failed to acknowledge its previous holding in *Neal*, the Habeas Corpus Act of 1967, or any other authority that permitted the Court to consider out-of-time appeals on the merits. Georgia appellate courts continued to ignore *Neal* for years, and

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[27] Neal v. State, 205 S.E.2d 284, 285 (Ga. 1974) ("The appellant . . . filed a motion in forma pauperis . . . seeking an appeal from his conviction and sentence for murder in that court approximately seven years prior to the filing of the motion.").

[28] *Id.*

[29] *Id*.

[30] *See, e.g.*, King v. State, 212 S.E.2d 807, 808 (Ga. 1975) (considering a direct appeal filed more than 120 days after the date of appellant's conviction); Furgerson v. State, 216 S.E.2d 845, 846 (Ga. 1975) ("This is an out of time appeal, granted by the Superior Court of Telfair County where the defendant was convicted.").

[31] *See King*, 212 S.E.2d at 808 (finding that the trial court correctly denied the defendant's out-of-time appeal).

[32] *See Furgerson*, 216 S.E.2d at 845 (finding that the trial court, after granting defendant's out-of-time appeal, did not err in concluding that defendant's trial counsel had provided effective assistance of counsel).

reviewing appeals from trial courts' denial or grant of out-of-time appeals became routine.[33]

As Georgia courts considered out-of-time appeals on the merits, the supreme court began to conflate the treatment of out-of-time appeals as a *remedy* for constitutional errors with the treatment of out-of-time appeals as a *procedural vehicle* in which constitutional claims could be brought to obtain that remedy. For example, in *McAuliffe v. Rutledge*, the court found that the appellant was denied effective assistance of counsel and directed the trial court that the "appellant be allowed, if he so desires, to file an out of time appeal to the proper appellate court."[34] Eleven years later in *Cannon v. State*, the Court quoted *McAuliffe* and said that "the appellant [who] was indeed denied effective assistance of counsel in attempting to appeal his conviction . . . [shall] be allowed, if he so desires, to file an out of time appeal to the proper appellate court."[35] The Court's insertion of the word "shall" suggests that the Court began thinking of out-of-time appeals as a procedural entitlement for convicted defendants—an entitlement to obtain a remedy—instead of as a remedy the courts could supply.[36]

In 1995, the Georgia Supreme Court cemented out-of-time appeals as a standalone procedure in *Rowland v. State* and held that a convicted defendant could seek an out-of-time appeal in habeas corpus *or in the trial court*.[37] The court declared that "[s]hould, upon the defendant's application for out-of-time appeal, it be established

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[33] *See* Rowland v. State, 452 S.E.2d 756, 759 n.5 (Ga. 1995) ("[The Supreme Court of Georgia] and the Court of Appeals routinely review criminal appeals that are timely filed after the trial court's grant of the defendant's motion for an out-of-time appeal.").

[34] McAuliffe v. Rutledge, 204 S.E.2d 141, 142 (Ga. 1974).

[35] Cannon v. State, 334 S.E.2d 342, 343 (Ga. 1985) (alterations in original) (quoting *McAuliffe*, 204 S.E.2d at 142); *see also* Mobley v. State, 288 S.E.2d 702, 703 (Ga. 1982) ("A failure to advise a defendant of his right to appeal *will require* the grant of an out-of-time appeal." (emphasis added)); Harper v. State, 269 S.E.2d 56, 56 (Ga. Ct. App. 1980) ("It is true that where the right of appeal is lost because of counsel's conduct, granting of an out-of-time appeal is appropriate.").

[36] *See* Shirley v. State, 373 S.E.2d 257, 259 (Ga. Ct. App. 1988) (explaining that "by way of parallel development, a deprivation of the right to appeal because of some constitutional infirmity, which would be grounds for habeas relief, was used to allow an out-of-time appeal directly without requiring the procedurally correct habeas corpus route").

[37] *See Rowland*, 452 S.E.2d at 759 ("The 'out-of-time appeal' . . . serves as a remedy for a habeas corpus petitioner who suffered a constitutional deprivation as well as the criminal defendant who has shown 'good and sufficient reason' to a trial court.").

to the trial court's satisfaction that the appellate procedural deficiency was due to appellate counsel's failure to perform routine duties, appellant is entitled to an out-of-time appeal."[38] The "*Rowland* Procedure"[39] effectively gave Georgia prisoners two viable avenues for appealing constitutional errors: through a petition for a writ of habeas corpus or through a motion brought in the trial court.[40]

III. THE CURTAILMENT OF HABEAS AND THE RISE OF THE *ROWLAND* PROCEDURE

Upon first glance, the Georgia Supreme Court's judicial invention of out-of-time appeals appears strange in light of Georgia's Habeas Corpus Act of 1967. After all, the Act allowed criminal defendants to obtain relief for the "substantial denial of [their] rights under the Constitution of the United States or of [Georgia]," thus permitting criminal defendants to bring ineffective assistance of counsel claims in habeas petitions.[41] Moreover, the Act indicated that habeas corpus was to be the *exclusive* procedural vehicle for vindicating a convicted defendant's constitutional rights.[42] Therefore, when criminal defendants received ineffective assistance of counsel that frustrated their appellate rights, habeas corpus would have been the natural avenue for obtaining relief.

However, once convicted defendants entered the habeas realm, they are subject to a whole new set of rules that can often be onerous. First, Georgia was, and still is, one of the few states that does not constitutionally or statutorily guarantee the right to counsel in habeas proceedings.[43] This lack of representation has

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[38] *Id.* at 760 (footnote omitted).

[39] This Note uses the "*Rowland* Procedure" and "out-of-time appeals" interchangeably.

[40] See *Rowland*, 452 S.E.2d at 760 (explaining the process by which Georgia prisoners could bring a motion for an out-of-time appeal through the trial court).

[41] O.C.G.A. § 9-14-42.

[42] *See* O.C.G.A. § 9-14-41 (stating that "this article provides the exclusive procedure for seeking a writ of habeas corpus for persons whose liberty is being restrained by virtue of a sentence imposed against them by a state court of record"); State v. Smith, 573 S.E.2d 64, 65 (Ga. 2002) ("Habeas corpus is the exclusive post-appeal procedure available to a criminal defendant who asserts the denial of a constitutional right.").

[43] *See* DONALD E. WILKES, JR., STATE POSTCONVICTION REMEDIES AND RELIEF HANDBOOK § 1:5 (2020 update) ("In the District of Columbia and seven states—Alabama, Georgia,

naturally led habeas petitioners to trip over procedural hurdles.[44] For example, habeas petitioners must raise all grounds for relief in the original or amended petition, and failure to do so can result in waiver.[45] Additionally, unsuccessful habeas petitioners wishing to appeal must file an "application for certificate of probable cause" along with the notice of appeal, and "no appeal shall be allowed unless the Supreme Court [of Georgia] issues a certificate of probable cause for the appeal."[46] Therefore, even if pro se habeas petitioners timely file their notices of appeal, the appeals can be dismissed by the mere failure to apply for an "application for certificate of probable cause."[47] In 2004, the General Assembly enacted another mechanism for dismissing habeas claims when it

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Massachusetts, Michigan, Nebraska, and New Hampshire—there is no right to counsel in postconviction proceedings, even in death sentence cases."); Jill Wasserman, *Has Habeas Corpus Been Suspended in Georgia? Representing Indigent Prisoners on Georgia's Death Row*, 17 GA. ST. U. L. REV. 605, 608–09 (2000) (discussing a case where the Georgia Supreme Court held that "neither the federal nor the state constitution requires appointed counsel for habeas petitions"); Comment, *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, 1141 (2005) (arguing that habeas corpus is a quasi-criminal proceeding and thus that a right to counsel should exist).

[44] *See* Brief of the Prosecuting Attorneys' Council of Georgia as Amicus Curiae at 7, Cook v. State, 870 S.E.2d 758 (Ga. 2022) (No. S21A1270) [hereinafter Brief of PAC] ("Habeas proceedings, like any matter featuring pro se litigations, can be fraught with dangers to parties and the bench.").

[45] *See* O.C.G.A. § 9-14-51 ("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."); Williams v. Hall, 687 S.E.2d 414, 415 (Ga. 2009) (upholding the dismissal of the habeas petition "[b]ecause the adequacy of counsel's pretrial investigation was not raised in the petition or at the hearing, and instead appeared in the case for the first time in the habeas court's final order").

[46] O.C.G.A. § 9-14-52.

[47] *See* Fullwood v. Sivley, 517 S.E.2d 511, 516–17 (Ga. 1999) (dismissing a pro se habeas petitioner's appeal because he failed to comply with the strict statutory mandate requiring an application for certificate of probable cause, despite timely filing the direct notice of appeal); Crosson v. Conway, 728 S.E.2d 617, 620 (Ga. 2012) (holding that the defendant's lack of compliance with the thirty day rule under O.C.G.A. § 9-14-52(b) "cannot be excused for failure to abide by a judicially imposed rule that the habeas petitioner be informed of that statute's requirements").

passed O.C.G.A. § 9-14-42.[48] The statute imposed a statute of limitations of one year for misdemeanor cases and four years for felony cases.[49] Failure to comply with these deadlines results in dismissal of habeas petitions.

If habeas petitioners manage to step over the procedural tripwires, they still must face burdensome obstacles when seeking habeas relief. First, unlike a direct appeal, Georgia's habeas corpus imposes numerous costs on indigent petitioners who "must pay for filing, service, and up front for witnesses (including mileage to often remote jurisdictions)."[50] Moreover, in 1999, the General Assembly enacted O.C.G.A. § 42-12-7.1, which effectively imposed a punitive burden on indigent petitioners.[51] If an indigent habeas petitioner seeks to proceed *in forma pauperis*, prisons are authorized under the Act to seize the habeas petitioner's account funds and transfer them to the habeas court.[52] Prisons are also enabled to freeze the prisoner's account and forward all future deposits to the habeas court until all costs and fees are satisfied for the filing.[53] Second, Georgia requires that habeas petitions be "filed in the superior court of the county in which the petitioner is being detained."[54] This venue rule often results in convicted defendants arguing their claims

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[48] O.C.G.A. § 9-14-42.

[49] O.C.G.A. § 9-14-42(c). The Georgia Supreme Court explicitly denied applying equitable tolling to this statute in *Stubbs v. Hall,* 804 S.E.2d 407 (Ga. 2020). The court held that "such a remedy would require this Court to look beyond the statutory habeas corpus scheme and create—for the first time in Georgia law—an equitable remedy that allows habeas petitioners to circumvent the statute of limitations provision enacted by the General Assembly. We decline to do so." *Id.* at 419. Notably, the General Assembly gave a grace period for defendants who may have sat on their habeas rights and would have lost their right to a file a post-conviction habeas petition. The statute provided "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." O.C.G.A. § 9-14-42(c)(1).

[50] Brief of GACDL, *supra* note 7, at 21; *see also* Orr v. Couch, 260 S.E.2d 82, 82 (Ga. 1979) ("While an indigent is entitled to a copy of his trial transcript for a direct appeal of his conviction, such is not the case in collateral post-conviction proceedings." (quoting Holmes v. Kenyon, 234 S.E.2d 502, 502 (Ga. 1977))).

[51] *See generally* Donald E. Wilkes, Jr., *The Great Writ Hit: The Curtailment of Habeas Corpus in Georgia Since 1967*, 7 J. Marshall L.J. 415, 475–83 (2014) (explaining the statute's effect on prisoners and its humanity).

[52] O.C.G.A. § 42-12-7.1(3)(A)–(B).

[53] *Id.*

[54] *Id.* § 9-14-43.

before an unfamiliar trial court.[55] Ultimately, while Georgia's habeas corpus procedure was modernized in 1967, habeas petitioners still must overcome numerous procedural hurdles—often without the assistance of counsel—and must face burdensome obstacles such as arguing in a different court and funding their petitions.[56]

In view of Georgia's habeas corpus shortcomings, it makes sense that out-of-time appeals were woven into the fabric of Georgia's post-conviction practice. If a defendant were wrongly deprived of their right to appeal by his lawyer's ineffective assistance of counsel, an out-of-time appeal would put the defendant in the same position he would have been in before missing the appeal deadline. The motions were easy, efficient, and fair.[57] The out-of-time appeal could be promptly resolved by the judge who was familiar with the case, and the defendant would often retain the benefit of the assistance of counsel throughout.[58] Out-of-time appeals also made sense because criminal defendants would not have to navigate a whole new set of habeas rules if they missed an appeal deadline *through no fault of their own*.

Motions for out-of-time appeals quickly became a popular and instrumental vehicle for restoring criminal defendants'

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[55] *See* Ryan C. Tuck, *Ineffective-Assistance-of-Counsel Blues: Navigating the Muddy Waters of Georgia Law After 2010 State Supreme Court Decisions*, 45 GA. L. REV. 1199, 1213–14 (2011) ("[T]he venue for habeas for individuals detained in Georgia is the site of detention, not the trial, as it is in most states, meaning that the trial judge may not be the habeas judge—and offer a superior vantage point for resolving the [ineffective assistance of counsel] claim during the collateral review process." (footnote omitted)). Importantly, if a habeas petitioner asserts that his trial counsel provided ineffective assistance, the trial counsel will have to travel to the county of the defendant's confinement—which could be across the state—to testify.

[56] *See* Wilkes, *supra* note 49, at 475–83 for a discussion of the many obstacles facing habeas petitioners in Georgia.

[57] *See* Cook v. State, 870 S.E.2d 758, 788 (Ga. 2022) (Peterson, J., dissenting) ("[An out-of-time appeal] avoids the need for an inmate to grapple with the procedural hurdles of filing a habeas petition, avoids the need to transfer records between jurisdictions, and reduces travel costs for lawyers and prisoners.").

[58] While the assistance of counsel was not guaranteed in motions for out-of-time appeals, indigent defendants were almost always given counsel in everyday practice. *See id.* at 789 n.37 (reasoning that while "indigent defendants do not have a *right* of appointed counsel for such a motion, as a practical matter they often *in fact* have such counsel when a motion is filed to correct a missed deadline.").

unconstitutionally frustrated appellate rights.[59] The Georgia Supreme Court began crafting more rules and interpretations concerning out-of-time appeals,[60] and the criminal justice system in Georgia adapted to these rules.[61] As the use of out-of-time appeals increased, difficult legal questions followed. After all, the mechanism was still a judicial invention that lacked any statutory or constitutional backing. As a result, the supreme court lacked any authority other than its own when presented with legal questions pertaining to out-of-time appeals.

Over the years, this judicial invention quickly became a judicial headache for Georgia courts. The Supreme Court of Georgia had to grapple with countless legal questions, including whether out-of-time appellants were entitled to evidentiary hearings,[62] whether the right to an out-of-time appeal is limited to cases where the issue on appeal can be "resolved by the facts appearing in the record,"[63] whether the state can raise a prejudicial delay defense to out-of-time appeals,[64] and whether a court's granting of an out-of-time appeal authorizes filing a motion to withdraw a guilty plea.[65] In light of these difficult legal questions, motions for out-of-time appeals became a legal mess. Georgia Supreme Court justices called

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[59] *See id.* at 787 ("[T]he true annual number of such appeals [in Georgia's appellate courts] may well be between 50 and 100 per year, and even more in years of heavier caseloads." (footnote omitted)). In fact, in the year before *Cook v. State* was decided, the Georgia Supreme Court had "granted motions for out-of-time appeals as a basis for jurisdiction 16 times." Brief of GACDL, *supra* note 7, at 7.

[60] *See* Ponder v. State, 400 S.E.2d 922, 924 (Ga. 1991) (holding that a defendant who is granted an out-of-time appeal should have the ability to file a motion for new trial to raise ineffectiveness claims against trial counsel for the first time); *see also* Riley v. State, 626 S.E.2d 116, 117 (Ga. 2006) (holding that the "mailbox rule" only applies to habeas corpus proceedings and not out-of-time appeals).

[61] *See* Schoicket v. State, 865 S.E.2d 170, 176 (Ga. 2021) ("The criminal justice system — and especially the structure of our public defender system — has evolved over time to comply with the requirements we have created. The General Assembly has appropriated substantial funds to make that system work.").

[62] *See* Collier v. State, 834 S.E.2d 769, 783 (Ga. 2019) ("When a motion for out-of-time appeal is granted, we have held that grant entitles the movant . . . [to] have an evidentiary hearing.").

[63] Morrow v. State, 463 S.E.2d 472, 475 (Ga. 1995), *overruled by Collier*, 834 S.E.2d 769.

[64] *See Collier*, 834 S.E.2d at 773 (Ga. 2019) (considering "whether the State may raise a 'prejudicial delay' defense to a motion for an out-of-time appeal").

[65] *See Schoicket*, 865 S.E.2d at 172 ("[A] granted out-of-time appeal authorizes the filing of a motion to withdraw a guilty plea.").

Georgia's post-conviction jurisprudence "confusing,"[66] a "tangled mess,"[67] and grounds for "cofounding questions."[68] The supreme court became apprehensive of further extending its invention because doing so might only add to the tangled mess.[69]

As Georgia courts dealt with problems caused by out-of-time appeals, they looked to the legislature for help.[70] Justices continually asked for the General Assembly to fix the mess out-of-time appeals created.[71] In *Collier v. State*, Justice Peterson said that he "fear[s] that our mess has become so large that the effort to untangle it in a single case could be overreaching and unduly disruptive to the system that has built up around it. We may need the General Assembly to save us from ourselves."[72] Former Chief Justice Nahmias pointedly asked during oral argument whether "the general assembly [is] . . . more likely to occupy [the field of out-of-time appeals] if we leave the system in place or if we pull the thread and potentially produce a lot of problems if the system is not corrected."[73]

Despite the Georgia justices indicating their desire for legislation, the General Assembly did not come to the rescue in time, and on March 15, 2022, the Georgia Supreme Court released *Cook v. State*.[74]

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[66] Maxwell v. State, 422 S.E.2d 543, 545 (Ga. 1992) (Fletcher, J., concurring).

[67] *Collier*, 834 S.E.2d at 782 (Peterson, J., concurring specially).

[68] *Schoicket*, 865 S.E.2d at 180 (Ellington, J., dissenting in part).

[69] *See id.* at 176 (majority opinion) (declining to "continue trail-blazing . . . our invented remedy").

[70] *See Collier*, 834 S.E.2d at 785 (Peterson, J., concurring specially) (saying that "[i]t may well be that at this point, the tangle is beyond our unweaving. But it is not beyond the power of the General Assembly").

[71] *See* Oral Argument at 46:55, Cook v. State, 870 S.E.2d 758 (Ga. 2022) (No. S21A1270), https://www.gasupreme.us/oral-arguments-january-20-2022/ [https://perma.cc/Z5DW-5JLW] (documenting Justice Peterson's statement that "[i]f the General Assembly changes [out-of-time appeals] by statute, then we have a new world and hopefully it's less messy.").

[72] *Collier*, 834 S.E.2d at 783 (Peterson, J., concurring specially).

[73] Oral Argument at 1:00:57, Cook v. State, 870 S.E.2d 758 (Ga. 2022) (No. S21A1270), https://www.gasupreme.us/oral-arguments-january-20-2022/ [https://perma.cc/ Z5DW-5JLW].

[74] The Georgia Supreme Court released *Cook v. State* on crossover day, which complicated any attempt to create legislation addressing the court case. *See* Brandon Bullard, *Ga. Supreme Court's Ruling on '*Cook v. State' *Starts the Unraveling*, LAW.COM: THE DAILY REP. (Mar. 21, 2022), https://www.law.com/dailyreportonline/2022/03/21/ga-supreme-courts-ruling-on-cook-v-state-starts-the-unraveling/ [https://perma.cc/5SU2-8NMK] ("Crossover

IV. *COOK V. STATE*

After decades of upholding and developing the *Rowland* Procedure in Georgia, *Cook v. State* jettisoned *Rowland* and its progeny overnight. In a 6–3 decision, the Supreme Court of Georgia found that "the trial court out-of-time appeal procedure is not a legally cognizable vehicle for a convicted defendant to seek relief for alleged constitutional violations."[75] The majority reasoned that Georgia's stare decisis factors, especially the "soundness of the reasoning" factor, weighed in favor of jettisoning the *Rowland* procedure.[76]

Ultimately, the majority opinion concluded that the Georgia Supreme Court only had two options: keep the *Rowland* Procedure or get rid of it, and the Court chose the latter:

> We can overrule our trial court out-of-time appeal precedents, return to the habeas corpus process the General Assembly established for seeking postconviction relief of this sort, and—to the extent that procedure is problematic—allow the General Assembly to fix any flaws by statute. Or we can retain our erroneous trial court out-of-time appeal precedents, maintain an alternative procedure for obtaining post-conviction relief for this one type of constitutional claim, and perpetuate our roles of judges-as-legislators who must continue to establish by judicial opinion the rules

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Day is when the bills passed by each chamber of the General Assembly cross over for the other chamber's consideration. Significantly, the time for filing new legislation for this session has long passed. Even amending existing bills is more difficult than it would have been a week or two ago because each chamber is generally less willing to edit the other's work than it would its own.").

[75] Cook v. State, 870 S.E.2d 758, 760 (Ga. 2022).

[76] *See id.* at 761 ("[W]e conclude that principals of stare decises do not require us to maintain our unsound precedent creating or endorsing the trial court out-of-time appeal procedure, and we therefore overrule Rowland and its handful of progeny."). The opinion is largely a commentary on the Supreme Court's analysis of stare decisis and the main factors considered. *See id.* at 769, 770–81 ("[W]e have regularly considered in our stare decisis analyses 'a number of factors, including the age of the precedent, the reliance interests involved, the workability of the prior decision, and most importantly, the soundness of its reasoning.'" (quoting Pounds v. State, 309 Ga. 376, 382)).

> for the procedural vehicle we created. In light of the analysis conducted above, we choose the former.[77]

Reasonable minds can disagree about whether the supreme court should have adopted the out-of-time appeal procedure in the first instance.[78] But regardless of those views, the decision to reverse decades of precedent turned Georgia post-conviction procedure on its head. This Note remains concerned with the drastic implications of *Cook v. State*.[79] Every out-of-time appeal in the pipeline vanished overnight in Georgia.[80] Georgia's precedent which existed for more than twenty-five years was discarded. Convicted defendants were forced to navigate the world of habeas corpus, even though they may have simply missed an appeal deadline through no fault of their own. Many of these defendants lost any chance they had for securing relief because the statute of limitations had already passed on their potential habeas petitions.[81] This means there is a

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[77] *Id*. at 782 (majority opinion).

[78] *See Cook*, 870 S.E.2d at 770 ("As Justice Peterson's special concurrence in *Collier* recognized, we 'created out of whole cloth' the trial court out-of-time-appeal procedure; we did so 'without any analysis whatsoever'; and 'there can be no doubt that our reasons—to the extent that we've had any—have been purely "policy."'"(quoting Collier v. State, 834 S.E.2d 769, 783–84 (Peterson, J., concurring specially)))

[79] Even the appellees acknowledged the detrimental effects of jettisoning the out-of-time appeal. *See* Brief of PAC, *supra* note 44, at 7 ("A retreat from the judicially created out-of-time appeal process will undoubtedly cause problems.").

[80] There is no way to know the exact number of out-of-time appeals that were in the pipeline when *Cook* was decided, but the following are reported cases in 2022 that were dismissed for relying on an out-of-time appeal: Rutledge v. State, 870 S.E.2d 720 (Ga. 2022); Hopper v. State, 872 S.E.2d 476 (Ga. Ct. App. 2022); Mostiller v. State, 872 S.E.2d 455 (Ga. Ct. App. 2022); Searles v. State, 872 S.E.2d 454 (Ga. Ct. App. 2022); Glover v. State, 872 S.E.2d 466 (Ga. Ct. App. 2022); Mobuary v. State, 872 S.E.2d 301 (Ga. Ct. App. 2022); Polanco v. State, 872 S.E.2d 268 (Ga. 2022); Taylor v. State, 872 S.E.2d 465 (Ga. Ct. App. 2022); Rouzan v. State, 872 S.E.2d 288 (Ga. 2022); Johnson v. State, 872 S.E.2d 330 (Ga. Ct. App. 2022); Armstrong v. State, 872 S.E.2d 490 (Ga. Ct. App. 2022); Lilly v. State, 871 S.E.2d 466 (Ga. Ct. App. 2022).

[81] *See, e.g.*, *Glover*, 872 S.E.2d at 467 n.1 (Ga. Ct. App. 2022) (describing how the defendant pleaded guilty to felony charges in 2014 and later filed an out-of-time appeal in 2020 that was denied in the wake of *Cook*, leaving defendant with no avenue for habeas relief due to the four year statute of limitation set forth in O.C.G.A. § 9-14-42(c)); Johnson v. State, 872 S.E.2d 330 (Ga. App. 2022) (describing how a defendant pleaded guilty to felony charges in 2003, and he filed an out-of-time appeal in 2021 which was denied in the wake of *Cook*, leaving defendant with no avenue for habeas relief under O.C.G.A. § 9-14-42(c)).

considerable chance that people in prison *who should not be there* will remain in prison merely because they relied on what the Georgia Supreme Court had been telling them to do for decades. To make matters worse, *Cook v. State* was not a situation where the people of Georgia were given notice about the new rules, which would give defendants time to adjust and prepare.[82]

V. CALLING ON THE GENERAL ASSEMBLY TO FINISH WHAT IT STARTED

Unfortunately, Georgia legislators failed to answer the call and address the legal "tangle" that the Supreme Court asked them to fix, thereby forcing the Court to decide whether out-of-time appeals should be abandoned or kept.[83] The Court ultimately decided to abandon its out-of-time appeal practice in *Cook*, but there is still time for Georgia legislators to answer the Court's call for help. In the most recent General Assembly session, Georgia house representatives proposed House Bill 126 that would have (1) codified the judicial out-of-time appeal procedure that *Cook v. State* jettisoned and (2) provided a grace period for prisoners who may have been relying on *Cook v. State* precedent.[84] This was exactly the type of bill that was needed to protect Georgia prisoners from irreparable harm.

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[82] *See* Davenport v. State, 846 S.E.2d 83, 94 (Ga. 2020) (finding that, in a change to the court's practice of considering sufficiency of the evidence sua sponte in non-death penalty cases, "the long-standing nature of the practice counsels in favor of our not ending it without notice" and providing approximately four months before ending the practice). Additionally, in 2004, the General Assembly, aware of the consequences of curtailing post-conviction relief, gave a grace period when it imposed a statute of limitations on habeas petitions. *See* O.C.G.A. § 9-14-42(c)(1) (providing "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").

[83] *See* Bullard, *supra* note 74 ("[T]he court has responded to the General Assembly's refusal to intelligently unweave the tangle by beginning to unravel it. The court could have done naught else. Its decision in Cook was binary: keep Rowland or dispense with it").

[84] H.B. 126, 157th Gen. Assemb., Reg. Sess. (Ga. 2023).

The relevant part of the bill reads:

> (a)(1) Notwithstanding the availability of habeas corpus relief . . . or the time limitations . . . for the filing of a motion for new trial[,] . . . upon motion made *within 100 days from the expiration of the time period for such filing*, a defendant may seek an out-of-time motion for new trial or notice of appeal:
> *(A) With the consent of the state;*
> *(B) By showing excusable neglect;*
> *(C) By showing that the failure to timely file such motion or notice was attributable to the deficient performance of such defendant's counsel; or*
> *(D) By other good cause shown.*
> (2) The trial court judge shall have jurisdiction to consider such motion. If the judge grants such motion, *the defendant shall have 30 days to file an out-of-time motion for new trial or notice of appeal* and the judge shall have the discretion to allow an extension of time for filing . . . . An indigent defendant shall be entitled to representation for purposes of seeking an out-of-time motion for new trial or notice of appeal under this subsection.
> (b) In a criminal case, after a judgment of conviction, a defendant whose motion seeking an out-of-time motion for new trial or notice of appeal or whose granted out-of-time motion for new trial or notice of appeal was dismissed based upon the Supreme Court's decision in *Cook v. State*, 313 Ga. 471 (2022), and its progeny, shall have the right to file another motion seeking an out-of-time motion for new trial or notice of appeal until June 30, 2025.[85]

In sum, this bill provides criminal defendants 100 days to seek an appeal (or to seek a motion for a new trial) after the period for such filing expires, if the trial judge is satisfied that the defendant showed excusable neglect for failing to appeal. The bill prevents the

[85] *Id.* (emphases added).

100-day rule from applying until June 30, 2025 (a two-year grace period) for those criminal defendants whose cases were dismissed by *Cook v. State*.

House Bill 126 makes sense for numerous reasons. By codifying out-of-time appeals, Georgia would merely be updating its post-conviction machinery at little expense to the administration of justice in the state. Codifying out-of-time appeals would not put any new burden on Georgia courts because they have been handling them for years.[86] Further, a motion for an out-of-time appeal is not an alien procedure in Georgia; motions for out-of-time appeals were ubiquitous before *Cook v. State*.[87] In fact, out-of-time appeals are not even unique to Georgia. The federal government provides for out-of-time appeals in its Federal Rules of Appellate Procedure.[88] Numerous states have also codified out-of-time appeals.[89]

Although some states do not have out-of-time appeals, these states usually have other laws that would make the motions for out-of-time appeals superfluous. For example, some states already have a similar procedure within their primary post-conviction relief mechanism that results in keeping convicted defendants in the court of conviction and guarantees the assistance of counsel when constitutional deprivations are alleged.[90] Moreover, out-of-time appeals would be somewhat redundant in states where "there is no statute of limitations on filing applications for relief under the principal postconviction remedy."[91] Out of time appeals would not

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[86] *See supra* note 6 and accompanying text.

[87] *See supra* note 59 and accompanying text.

[88] *See* FED. R. APP. P. 4(b)(4) ("Upon a finding of excusable neglect or good cause, the district court may—before or after the time has expired, with or without motion and notice—extend the time to file a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this Rule 4(b).").

[89] *See* FLA. R. APP. P. 9.141(c) (describing Florida's process for "Petitions Seeking Belated Appeal or Belated Discretionary Review"); ARK. R. APP. P. CRIM. R. 2(e) (explaining Arkansas's out-of-time appeals process); MO. SUP. CT. R. 81.07 (noting Missouri's allowances for "When [a] Party May Appeal After Time for Filing of Notice Has Expired"); OHIO APP. R. 5(A) (giving defendants in Ohio a mechanism to file a delayed appeal); OKLA. R. CT. CRIM. APP. 2.1(E) (highlighting the processes used by Oklahoma courts for out-of-time appeals); *cf.* ALASKA R. CIV. P. (60)(b) (providing Alaska's out-of-time appeals rules in civil cases).

[90] *See, e.g.*, KY. R. CRIM. P. 11.42(10) (noting exceptions to the three-year statute of limitations in which the timeline for defendants to appeal in Kentucky is extended).

[91] *See* WILKES, *supra* note 43, §1:6 at 10 (noting that the District of Columbia, Connecticut, Hawaii, Massachusetts, Michigan, Nebraska, New Hampshire, New York, Rhode Island,

be superfluous in Georgia because they do not have a statute of limitations, guarantee defendants a right to counsel, and do not have to be filed in the court where the defendant was convicted. Georgia's primary post-conviction relief mechanism, habeas corpus, suffers from all of these drawbacks.[92]

H.B. 126's proposed two-year grace period also makes sense because defendants whose cases were dismissed by *Cook v. State* would be outside the 100-day period for seeking an appeal. Without a grace period for the 100-day rule, these defendants would be prevented from seeking an appeal or a motion for a new trial, a result that would undermine the whole purpose of the statute: restoring defendants' appellate rights that were forfeited through no fault of their own. Furthermore, the two-year grace period mirrors what the Georgia General Assembly has done in the past when criminal defendants were at risk of losing post-conviction relief due to a newly imposed statute of limitations. When the 2004 General Assembly passed O.C.G.A. § 9-14-42, the bill imposed a statute of limitations on habeas petitions—one year for petitions involving misdemeanors and four years for petitions involving most types of felonies—and the Georgia statute provided a grace period for individuals who were adversely affected by the new statute of limitations.[93] The 2004 statute provided 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."[94] This meant that Georgia prisoners who may have been waiting to bring a habeas claim would still have time to bring their habeas claims despite the newly created statute of limitations. In other words, defendants who waited would not lose their rights overnight. The General Assembly has taken the same approach in H.B. 126 as the bill affords criminal defendants whose cases were dismissed by *Cook* the "right to file another motion seeking an out-of-time motion for new trial or notice

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Vermont, West Virginia, and Wisconsin do not have a statute of limitations on their primary post-conviction remedy).

[92] *See* discussion *supra* Part III.

[93] *See supra* note 49 and accompanying text.

[94] O.C.G.A. § 9-14-42(c)(1).

of appeal until June 30, 2025."[95] Thus, Georgia defendants who were relying on out-of-time appeals precedent but whose cases were dismissed in the wake of *Cook* still have a right to appeal for two years despite otherwise being outside the bill's 100-day limitation.

Importantly, the H.B. 126 out-of-time appeal practice will not displace habeas corpus in Georgia; out-of-time appeals will only be available to criminal defendants in limited circumstances.[96] Otherwise, habeas corpus will be the proper avenue for seeking relief.

VI. HOUSE BILL 126 COMPARED TO OTHER JURISDICTIONS' APPROACHES

As alluded to above, other states and the federal government utilize out-of-time appeals,[97] and this section contrasts H.B. 126 to the out-of-time appeal regimes of other jurisdictions to determine if it deviates from these schemes in any serious way. The consequential elements in out-of-time appeals are (1) the deadline that convicted defendants must file an out-of-time appeal, (2) the court in which the out-of-time appeal must be sought, and (3) what the convicted defendant must show to successfully obtain an appeal.

Because the *Rowland* Procedure allowed final judgments in Georgia to be appealed regardless of how long ago the final judgment was (there was no deadline),[98] there is a strong argument that Georgia's desire for finality was disrupted under the *Rowland* Procedure—before *Cook*, a criminal defendant could have theoretically brought an out-of-time appeal *decades* after a final judgment.[99] By imposing a deadline on when motions for out-of-time appeals can be sought, the main concerns of the prosecutorial camp

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[95] H.B. 126, 157th Gen. Assemb., Reg. Sess. (Ga. 2023). Of course, the 2024 General Assembly should update this date to be June 30, 2026.

[96] *See id.* (limiting the applicability of out-of-time appeals to certain unconstitutional scenarios leading to the failure to appeal).

[97] *See supra* notes 88–91 and accompanying text.

[98] *See* Cook v. State, 870 S.E.2d 758, 767 ("[W]e acknowledged that motions for out-of-time appeal in trial courts were 'not directly barred by the application of any statute of limitation' . . ." (quoting Collier v. State, 834 S.E.2d 769, 780)).

[99] *See* Brief of PAC, *supra* note 44, at 12 ("Allowing for out-of-time appeals allows a criminal defendant, convicted of a crime . . . [to] wait decades to file an out-of-time challenge.").

will be satisfied.[100] In view of the concern for finality but keeping in mind the need to restore constitutional rights, it seems fair to have some sort of temporal limitation on when out-of-time appeals can be brought.[101] Most states do this and impose deadlines on bringing out-of-time appeals. These deadlines range anywhere from four years to eighteen months, six months, and thirty days.[102] Thus, the 100-day deadline presented in H.B. 126 does not amount to any notable deviation from other states' practices.[103]

The second major element in out-of-time appeals is which court defendants must file their motions for out-of-time appeals in. Some jurisdictions allow for defendants to seek out-of-time appeals in the trial court and the appellate court, while others mandate one of the two.[104] For example, Oklahoma mandates that out-of-time appellants must first apply to the trial court and receive its

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[100] *See Collier* 834 S.E.2d at 776–77 (Ga. 2019) ("[The District Attorney] asks that we abolish the practice of allowing defendants to file a motion for an out-of-time appeal in the trial court. The primary reason the District Attorney gives for making such a significant change is that defendants who seek out-of-time appeals in trial courts may do so long after their convictions, thereby circumventing the limitation provision, OCGA § 9-14-42 (c), and the prejudicial delay provision, OCGA § 9-14-48 (e), imposed on habeas petitioners since 2004.").

[101] The author of the Amicus Brief for Cook in *Cook v. State* later proposed a year deadline on filing such appeals. The deadline would begin once the timing for properly filing a direct appeal lapsed. *See* Bullard, *supra* note 36 (proposing a year deadline).

[102] *See* FLA. R. APP. P. 9.141(c)(5)(A) (four years); ARK. R. APP. P. CRIM. R. 2(e) (eighteen months); MO. SUP. CT. R. 81.07(a) (six months); FED. R. APP. P. R.4(b)(4) (thirty days). Ohio does not seem to have a deadline. *See* OHIO APP. R. 5 (providing for a motion for out-of-time appeal but never imposing a temporal limitation).

[103] It might be worth extending the 100-day period to one year. While there is no perfect number, a year might be a fairer amount of time because it would afford defendants ample time to make an appeal, especially in light of circumstances where they were not initially advised of their right to appeal. Indeed, Justice Peterson's dissent in *Cook v. State* notes that the "vast majority" of motions for out-of-time appeals in cases the Court considered in the prior year were filed within a year of the thirty-day notice of appeal expiring. *See* Cook v. State, 870 SE.2.d 758, 787 (Ga. 2022) (Peterson, J., dissenting) ("In the vast majority of the 14 cases we considered last year from the grant of a motion for out-of-time appeal, the motion was filed less than one year after the notice of appeal was due . . . ."). Further, a one-year deadline is easy to count, and there is nothing wrong with simplifying procedural rules when a prisoner's freedom is on the line.

[104] *See* MO. SUP. CT. R. 81.07(a) (declaring that "a party may seek a special order of the appropriate appellate court permitting a late filing of the notice of appeal"); ARK. R. APP. P. CRIM. 2(e) (requiring appellants to file belated appeals in the Arkansas Supreme Court); OHIO APP. R. 5(A)(2) ("A motion for leave to appeal shall be filed with the court of appeals.").

recommendation, then the out-of-time appellant can petition the intermediate appellate court for an out-of-time appeal.[105] The federal government gives district courts the ability to grant motions for out-of-time appeals,[106] while Florida requires that "[p]etitions seeking belated review must be filed in the court to which the appeal or discretionary review should have been taken."[107] H.B. 126 follows the federal court model that mandates defendants file out-of-time appeals in the trial court without requiring anything else.[108] This policy is likely to result in a hearing before a judge who is familiar with the matter and who can make a prompt decision on whether the defendant was wrongfully denied their constitutional right to appeal. If the trial court agrees that an out-of-time appeal is necessary, then the defendant would be permitted to file a direct appeal.[109] While most jurisdictions involve appellate courts in the process of hearing out-of-time appeals, H.B. 126 does not present a serious deviation from other out-of-time appeals laws because the trial court's involvement is not uncommon either.[110]

Because Georgia has intermediary appellate courts, there is also a possibility that appellate counsel could be ineffective by missing the deadline to apply for certiorari to the Georgia Supreme Court from the Georgia Court of Appeals.[111] Therefore, the upcoming General Assembly should consider updating H.B. 126 to better

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[105] *See* OKLA. CRIM. APP. R. 2.1(E)(1) ("If the trial court recommends an appeal out of time, then petitioner shall file a petition for an appeal out of time in this Court within thirty (30) days from the date the trial court's ruling was filed with the trial court clerk.").

[106] *See* FED. R. APP. P. 4(a)(5)(A) (furnishing the district court with the power to "extend the time to file a notice of appeal").

[107] FLA. R. APP. P. 9.141(c)(3).

[108] *See* H.B. 126, 157th Gen. Assemb., Reg. Sess. (Ga. 2023) (stating the "*trial court judge* shall have jurisdiction to consider such motion" (emphasis added)).

[109] Georgia representatives in the upcoming General Assembly should refrain from adopting the federal rule allowing judges to determine the number of days, with a cap of thirty, that the time to untimely appeal may be extended. *See* FED. R. APP. P. 4(b)(4) (allowing judges to "extend the time to file a notice of appeal for a period not to exceed 30 days from the expiration of the time" to appeal). If Georgia adopted such a rule, the only meaningful result would be less standardization in post-conviction law.

[110] *See supra* notes 105–106 and accompanying text.

[111] *See* GA. SUP. CT. R. 38 (stating that "[c]ompliance with the requirements of this rule governing petitions for certiorari is mandatory" and that "[n]otice of intention to apply for certiorari shall be given to the Clerk of the Court of Appeals within 10 days after the date of entry of judgment").

reflect Georgia's judicial structure by permitting appellate courts to hear defendants seeking out-of-time appeals as well. Georgia legislators should consider inserting language that instructs defendants to file their out-of-time appeal in the court that heard the case, which would allow defendants to seek out-of-time appeals in the appropriate trial or intermediate court.

The last major out-of-time appeal element in other jurisdictions is the type of cause that must be shown to obtain an out-of-time appeal. Most jurisdictions generally have language resembling the federal rules of appellate procedure: the party must "show[] excusable neglect or good cause."[112] Some jurisdictions have statutory language that appears broader than the federal rules. For instance, Ohio will permit out-of-time appeals if the defendant satisfactorily "set[s] forth the reasons for the failure of the appellant to perfect an appeal as of right,"[113] and Arkansas will permit an out-of-time appeal "when a good reason for the omission is shown by affidavit."[114] H.B. 126 mirrors the federal language of "excusable neglect" and "good cause," but the bill also seems to be more generous to criminal defendants in that it includes situations where the State (the prosecuting party) may agree to allow for an out-of-time appeal.[115] This trigger does appear to be a deviation from other jurisdictions. While this particular language might be helpful in some unique situations, it ultimately is unnecessary because the heart of this issue is helping prisoners who were deprived of their constitutional right *through no fault of their own.* The General Assembly should make this intent clear by only including language that emphasizes that out-of-time appeals are available for

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[112] FED. R. APP. P. 4(a)(5); *see also, e.g.*, OKLA. CRIM. APP. R. 2.1(E)(1) (allowing out-of-time appeals "upon the ability to prove he/she was denied an appeal through no fault of his/her own"); ARK. R. APP. P. CRIM. 2(e) (allowing out-of-time appeals "when a good reason for the omission is shown by affidavit"); MO. SUP. CT. R. 81.07(a) (allowing out-of-time appeals "only upon a showing by affidavit, or otherwise, that the delay was not due to appellant's culpable negligence").

[113] OHIO APP. R. 5(A)(2).

[114] ARK. R. APP. P. CRIM. 2(e).

[115] *See* H.B. 126, 157th Gen. Assemb., Reg. Sess. (Ga. 2023) (allowing criminal defendants to file an out-of-time appeal (1) "*with the consent of the state,*" (2) "by showing excusable neglect," (3) "by showing that the failure to timely file such motion or notice was attributable to the deficient performance of such defendant's counsel," and (4) "by other good cause shown" (emphasis added)).

defendants who are not responsible for the failure to timely appeal. The "excusable neglect" and "good cause" language does just that.[116] In light of this language, the "consent of state" language is extraneous, and it remains a deviation from the out-of-time appeal norms. However, the language is also likely immaterial given that the situations where it will be invoked will be limited and that the overall scheme still matches up with many jurisdictions' approaches.

The overarching goal of any out-of-time appeal legislation is to put defendants who were unconstitutionally deprived of their appellate rights in the same position as there were before the deprivation.[117] While there are similarities between many jurisdictions' approaches to out-of-time appeals, there is no one mold for out-of-time appeals and how to achieve this goal.[118] Consequently, this Note acknowledges that consensus on enacting *something* furthering this goal is more important than getting the bill perfect. While H.B. 126 could benefit from minor changes, the bill as written would certainly further the goal of putting defendants who were unconstitutionally deprived of their appellate rights in the same position as they were before they were deprived of their appellate rights.

VII. CONCLUSION

Georgia's motion for out-of-time appeal was a procedural vehicle that was embedded into the fabric of Georgia law.[119] Georgia prisoners relied on out-of-time appeals to secure their freedom for decades, but on March 15, 2022, *Cook v. State* jettisoned out-of-time

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[116] One last option available to the General Assembly would be to specify all of the possible showings that would warrant an out-of-time appeal. While this approach may clear up any ambiguity, it would also cabin the Georgia courts' ability to grant out-of-time appeals if presented with an unusual set of circumstances. Therefore, any language that mirrors the federal rules is preferred.

[117] *See* Rutledge v. State, 798 S.E.2d 355, 357 (Ga. Ct. App. 2017) ("Out-of-time appeals are designed to address the constitutional concerns that arise when a criminal defendant is denied his first appeal of right because the counsel to which he was constitutionally entitled to assist him in that appeal was professionally deficient in not advising him to file a timely appeal and that deficiency caused prejudice.").

[118] *See* discussion *supra* note 89.

[119] *See supra* note 4 and accompanying text.

appeals, pulling a major thread from the fabric of Georgia's post-conviction law.[120] Overnight, prisoners were diverted to seek post-conviction relief in the more burdensome habeas corpus proceedings, and other defendants were prevented from seeking post-conviction relief at all.[121] Georgia's prisoners were effectively punished for following the rules that the Georgia Supreme Court told them to follow.

This Note agrees that the Georgia's out-of-time appeals were a judicial invention that lacked any statutory or constitutional backing.[122] *Cook v. State* is a case where reasonable minds can differ, but this Note is more concerned with mitigating the damage of *Cook*'s effects.[123] This Note pleas for the General Assembly to come to the rescue and finish what it started by enacting H.B. 126 in the upcoming session.[124] By doing so, prisoners who were cheated of their constitutional right to appeal can have an easy, efficient, and fair procedural vehicle for seeking post-conviction relief.

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[120] *See supra* note 1 and accompanying text.

[121] *See* discussion *supra* Part IV.

[122] *See* discussion *supra* Part IV.

[123] *See* discussion *supra* Part V.

[124] *See supra* note 84 and accompanying text.