



School of Law  
UNIVERSITY OF GEORGIA

Digital Commons @ Georgia Law

---

Popular Media

Faculty Scholarship

---

2-1-2007

# The Writ of Habeas Corpus in Georgia

Donald E. Wilkes Jr.

*University of Georgia School of Law*, [wilkes@uga.edu](mailto:wilkes@uga.edu)

---

## Repository Citation

Wilkes, Donald E. Jr., "The Writ of Habeas Corpus in Georgia" (2007). *Popular Media*. 63.  
[https://digitalcommons.law.uga.edu/fac\\_pm/63](https://digitalcommons.law.uga.edu/fac_pm/63)

This Article is brought to you for free and open access by the Faculty Scholarship at Digital Commons @ Georgia Law. It has been accepted for inclusion in Popular Media by an authorized administrator of Digital Commons @ Georgia Law. [Please share how you have benefited from this access](#)  
For more information, please contact [tstriepe@uga.edu](mailto:tstriepe@uga.edu).

# The Writ of Habeas Corpus in Georgia

by Donald E. Wilkes Jr.

*It not only now is, but ever has been, since Georgia became a sovereign state, her will and intention to preserve the writ [of habeas corpus]<sup>1</sup> as beneficially and perfectly as it existed, or was known to her while in a state of colonial dependence, or as it existed in the mother country from which it is derived.<sup>2</sup>*

Lauded as “the Great Writ”<sup>3</sup> and praised as “one of the precious heritages of Anglo-American civilization,”<sup>4</sup> the legal writ of habeas corpus marvelously triggers a judicial proceeding in which courts may release individuals from unlawful restraints on their liberty. Indeed, this writ has been a part of Georgia law even prior to the creation of the United States.<sup>5</sup> Today Georgia habeas corpus proceedings commonly involve pretrial confinement on criminal charges,<sup>6</sup> detention in a mental health facility,<sup>7</sup> extradition<sup>8</sup> and postconviction cases.<sup>9</sup> Some of these habeas decisions have even taken on human rights landmark status.<sup>10</sup>

Historically, the Georgia Constitution of 1777 was the first state constitution to make habeas corpus a constitutional right.<sup>11</sup> At the 1787 Federal Constitutional Convention held in Philadelphia, Georgia’s delegation voted unanimously against ever permitting habeas corpus to be suspended.<sup>12</sup> Later, during the Civil War, opposition to the Confederate Congress’ suspension of habeas corpus statutes was strongest and most vociferous in Georgia, where the Supreme Court of Georgia went so far as to refuse to consider the writ suspended.<sup>13</sup> During that era, the legislature enacted the Georgia Code of 1863, which included 23 sections on the writ of habeas corpus.<sup>14</sup>

Currently, the Code of Georgia’s codified habeas corpus statutes are located in Articles 1 and 2 of Chapter 14 of Title 9 of the Code of Georgia Annotated. Article 1, which is based on earlier codified habeas statutes dating back to the Georgia Code of 1863, focuses on proceedings where the custody complained of is not pursuant to a criminal conviction. Article 2, which governs postconviction habeas corpus proceedings, is derived principally from six statutes enacted since 1967. Other miscellaneous habeas corpus statutory provisions (including some further governing postconviction habeas proceedings) are codified outside both Articles 1 and 2.<sup>15</sup>

In Georgia, a writ of habeas corpus is applied for by submitting a written petition to the appropriate court. Such a petition must be signed under oath by the petitioner or someone else acting on his or her behalf.<sup>16</sup> A habeas corpus petition prepared on behalf of an inmate held in a state or local penal or correctional institution must be completed on the model form promulgated by the Georgia Administrative Office of the Courts.<sup>17</sup> In the case of a postconviction habeas corpus petition, all grounds for relief must be raised in the original or amended petition.<sup>18</sup> There is no statute of limitations on habeas petitions filed by death row inmates. However, subject to certain exceptions, noncapital felony postconviction habeas petitions must be filed within four years of the date the conviction became final by the conclusion of direct review or the expiration of the time for seeking direct review.<sup>19</sup>

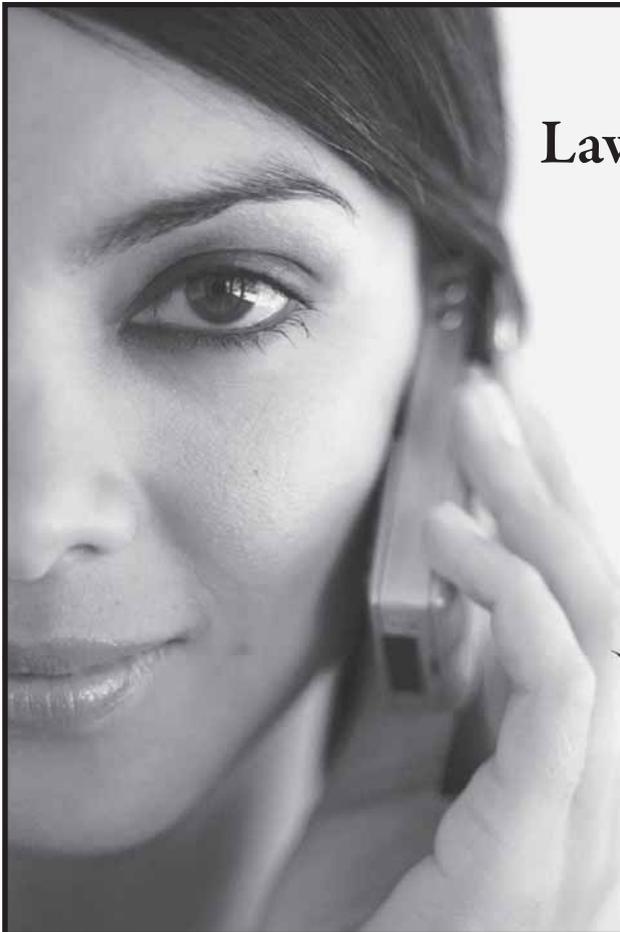
A petition for a writ of habeas corpus may be filed either in the superi-

or or probate court. If a petition for a writ of habeas corpus is filed in probate court, such a filing must be made in the county where the petitioner is detained.<sup>20</sup> In capital, extradition and postconviction cases, a petition for a writ of habeas petition may only be filed in the superior court.<sup>21</sup> If a petition for a writ of habeas corpus is filed in a postconviction matter, such a filing must be made in the county where the petitioner is detained,<sup>22</sup> and the habeas petition must be served upon the person having custody of the convicted person.<sup>23</sup> If the convicted person is in the custody of the Georgia Department of Corrections, a copy of the petition must be served by mail upon the state attorney general.<sup>24</sup> If the convicted person is not in the custody of the Georgia Department of Corrections, a copy of the petition must be served by mail upon the district attorney of the county in which the petition is filed.<sup>25</sup>

Once the habeas petition has been filed, the procedural require-

ments that the parties must follow varies depending on whether the petition: (1) challenges for the first time state court proceedings that resulted in a death sentence,<sup>26</sup> (2) seeks postconviction relief, but does not involve a first time challenge to proceedings that resulted in a death sentence,<sup>27</sup> or (3) does not seek postconviction relief at all.<sup>28</sup> In postconviction habeas corpus proceedings, the court may receive proof by depositions, oral testimony, sworn affidavits or other evidence.<sup>29</sup> Absent a showing of prejudice or a miscarriage of justice, the court may deny relief on a claim that could have been raised in a procedurally correct manner on the direct appeal.<sup>30</sup> Subject to certain exceptions, relief may also be denied by a court if the habeas claim was previously rejected either on the habeas petitioner's direct appeal<sup>31</sup> or in a habeas proceeding instituted by the same petitioner.<sup>32</sup>

A habeas corpus is a civil action and, as such, the burden of persua-



## Lawyers Professional Liability

The ideas, commitment, and energy necessary to grow and run your law firm are enormous, as is the inherent risk. Insurance is one of the strategies you should use to manage that risk.

Daniels-Head is committed to crafting customized insurance solutions for law firms. Call us today, we can help you determine which coverage best suits your needs.



DANIELS-HEAD  
INSURANCE AGENCY, INC.

1-800-950-0551

[www.danielshead.com](http://www.danielshead.com)

sion is on the petitioner to prove his or her case by a preponderance of the evidence.<sup>33</sup> Indigent habeas petitioners do not have a right to appointed counsel, even though a petitioner has a pending death sentence.<sup>34</sup> All postconviction habeas corpus trials shall be transcribed,<sup>35</sup> and the judge is required to make both written findings of fact and conclusions of law.<sup>36</sup> Although Georgia postconviction habeas relief was once limited to cases where the conviction or sentence was void for lack of jurisdiction,<sup>37</sup> it is now available if “in the proceedings which resulted in conviction, there was a substantial denial of [petitioner’s] rights under the Constitution of the United States or of this state.”<sup>38</sup>

If a court finds legally sufficient cause to issue a writ of habeas corpus, it commands that the person restrained of his or her liberty be produced in court and that the cause of that person’s detention be adduced.<sup>39</sup> If a court rules in favor of a petitioner in a postconviction habeas proceeding, it shall enter an appropriate order with respect to the judgment or sentence and appropriate supplementary orders as to arraignment, retrial, custody or discharge.<sup>40</sup> If a court rules in favor of a petitioner in a non-postconviction habeas proceeding, it shall discharge, remand or admit to bail the person restrained of his or her liberty or shall deliver that person to the custody of an individual entitled thereto.<sup>41</sup> Disobedience of the writ is punishable by attachment for contempt of court.<sup>42</sup>

A final judgment granting or denying habeas relief may be appealed as of right to the Supreme Court of Georgia. However, in a postconviction habeas case a denial of relief may only be appealed if the petitioner first obtains a certificate of probable cause to appeal from the Supreme Court of Georgia.<sup>43</sup> The issuance of such a certificate is discretionary.<sup>44</sup> Since 1916, the Georgia Court of Appeals has had no appellate jurisdiction whatsoever in habeas corpus cases.

Today, as in the past, the great Writ of habeas corpus “continue[s] to play an important role in preserving and protecting liberty in Georgia.”<sup>45</sup> 



**Donald E. Wilkes Jr.** is a professor of law at the University of Georgia School of Law, where he has taught since 1971.

## Endnotes

1. “Habeas Corpus” is Latin for “You have the body.” Prisoners often seek release by filing a petition for a writ of habeas corpus. The writ is a judicial mandate to a prison official ordering that an inmate be brought to the court so that it can be determined whether or not that person is imprisoned lawfully and whether or not he should be released from custody.
2. *State v. Philpot*, 1 Ga. Ann. (Dud. 46) 375, 377 (Super. Ct. Richmond County 1831).
3. *See, e.g., Fullwood v. Sivley*, 271 Ga. 248, 251, 517 S.E. 2d 511 (1999).
4. *Fay v. Noia*, 372 U.S. 391, 441 (1963).
5. *See* 1 DONALD E. WILKES, JR., STATE POSTCONVICTION REMEDIES AND RELIEF 948-49 (2005).
6. *See, e.g., Rainwater v. Langley*, 277 Ga. 127, 587 S.E. 2d 18 (2003).
7. *See, e.g., Hogan v. Nagel*, 276 Ga. 197, 576 S.E. 2d 873 (2001).
8. *See, e.g., Bradford v. Brown*, 277 Ga. 92, 586 S.E. 2d 631 (2003).
9. *See, e.g., John v. Smith*, 280 Ga. 235, 626 S.E. 2d 470 (2006).
10. *See, e.g., Nelson v. Zant*, 261 Ga. 358, 405 S.E. 2d 250 (1991).
11. Donald E. Wilkes, Jr., *A New Role for an Ancient Writ: Postconviction Habeas Corpus Relief in Georgia (Part I)*, 8 GA. L. REV. 313, 314 (1974).
12. *Id.* at 313-14.
13. In *Andrews v. Strong*, 33 Ga. Supp. 164 (1864), for example, at a time when legislation enacted by the Confederate Congress was supposed to be suspended, the Supreme Court of Georgia affirmed a lower court’s judgment granting habeas relief to a

citizen conscripted into the Confederate Army who claimed that as a justice of the peace he was exempt from military service.

14. Ga. Code §§ 3909-31 (1863).
15. *See, e.g., O.C.G.A. § 15-6-9(I)* (authorizing superior court judges to grant writs of habeas corpus within their respective circuits); *id.* § 9-10-14 (2005) (providing model forms, including model form of habeas corpus petition, required to be used by certain inmates).
16. *Id.* §§ 9-14-3 to -4, 9-14-44.
17. *Id.* § 9-10-14.
18. *Id.* § 9-14-51.
19. *Id.* § 9-14-42(c). In misdemeanor traffic offenses, the statute of limitations period is 180 days, *Id.* § 40-13-33(a), and in all other misdemeanor conviction cases, it is one year, *Id.* § 9-14-42(c).
20. *Id.* § 9-14-4.
21. *Id.* §§ 9-14-4, 9-14-40(b), 9-14-43.
22. *Id.* § 9-14-43.
23. *Id.* § 9-14-45.
24. *Id.*
25. *Id.*
26. *See id.* § 9-14-47(a)-(c); Rule 44, Ga. Sup. Ct. R.
27. *See* O.C.G.A. §§ 9-14-45 to -47, 9-14-47.1(d).
28. *See id.* §§ 9-14-5, 9-14-7 to -15.
29. *Id.* § 9-14-48(a).
30. *Id.* § 9-14-48(d).
31. *See, e.g., Hall v. Vargas*, 278 Ga. 868, 608 S.E. 2d 200 (2005).
32. *See, e.g., Stevens v. Kemp*, 254 Ga. 228, 327 S.E. 2d 185 (1985).
33. *See, e.g., Bruce v. Smith*, 274 Ga. 432, 553 S.E. 2d 808 (2001).
34. *See Fortson v. State*, 272 Ga. 457, 532 S.E. 2d 102 (2000).
35. O.C.G.A. § 9-14-50.
36. *Id.* § 9-14-49.
37. *See, e.g., Balkcom v. Parris*, 215 Ga. 122, 109 S.E. 2d 48 (1959).
38. O.C.G.A. § 9-14-42(a).
39. *Id.* § 9-14-6.
40. *Id.* § 9-14-48(d).
41. *Id.* § 9-14-19.
42. *Id.* § 9-14-23.
43. *Id.* §§ 9-14-22, 9-14-52.
44. *See* Rule 36, Ga. Sup. Ct. R.
45. Donald E. Wilkes, Jr., *A New Role for an Ancient Writ: Postconviction Habeas Corpus Relief in Georgia (Part II)*, 9 GA. L. REV. 13, 78 (1974).