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The Great Writ in the Peach State: Georgia Habeas Corpus, 1865-1965

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The Great Writ in the Peach State: Georgia Habeas Corpus, 1865-1965

By Donald E. Wilkes, Jr. *

The writ of habeas corpus has always been regarded as a bulwark of the liberty of English-speaking people. It is safeguarded in the constitution of our State. It is a summary and speedy remedy . . . .

– Richards v. McHan, 139 Ga. 37, 39, 76 S.E. 382, 383 (1912).

[T]he remedy to discharge a person held illegally in custody under any form of law or without law is as old as the foundations of English liberty. It is the writ of habeas corpus . . . . That remedy in complete, and it had better be adhered to.

– Southern Express Co. v. Lynch, 65 Ga. 240, 244-45 (1880).

The right of any citizen to have the legality of his restraint inquired into by the courts on a writ of habeas corpus is as old as English liberty itself, and will no doubt endure as long as any institution of our government exists.

– Barranger v. Baum, 103 Ga. 465, 482, 30 S.E. 524, 531 (1898).

Introduction

There is a plenitude of scholarly writing on the Great Writ of Habeas Corpus, which is universally recognized as “one of the decisively differentiating factors between our democracy and totalitarian governments.” The overwhelming majority of these scholarly publications are concerned with the writ of habeas corpus as administered in the federal court system. There are far fewer scholarly publications on the writ of habeas corpus as

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administered in the courts of the State of Georgia, and most of these works are concerned with Georgia habeas corpus as a state postconviction remedy, past and present. Only one scholarly piece, a law review article, provides a comprehensive view of the writ of habeas corpus in Georgia. It covers the time span from 1733 (when the Georgia colony was founded) until 1865 (when the Civil War concluded).

This Article provides a thorough account of the writ of habeas corpus in Georgia during the century after the Civil War, from 1865 to 1965. When this period began, Georgia was in ruins and on the verge of Reconstruction; when the period ended, the state was prosperous and in the midst of a Second Reconstruction. Part I of this Article examines the habeas protections in the Georgia state constitutions of 1865, 1868, 1877, and 1945. Part II explores the various Georgia habeas corpus statutes enacted or in force at one time or another from 1865 to 1965. Part III reviews Georgia habeas corpus practice and procedure during this same time period, and Part IV surveys the Georgia habeas corpus case law during this period.

I. Georgia Habeas Corpus Constitutional Provisions

Between 1865 and 1965 Georgia adopted a total of four state constitutions, each of which contained a provision in its bill of rights protecting the writ of habeas corpus. The first two of these constitutions permitted suspension of habeas corpus, while the second two flatly prohibited it. The habeas provisions of the 1865 and 1868 constitutions each provided: "The writ of Habeas Corpus shall not be suspended, unless, in case of rebellion or invasion, the public safety may require it." The habeas provisions of the 1877 and 1945 constitutions, on the other hand, each provided: "The writ of habeas corpus shall not be suspended." Thus, the writ of habeas corpus was a state constitutional right in Georgia throughout the period 1865 to 1965, and except for the first twelve years of this period, any suspension of the state's writ was constitutionally barred. At no time after the Civil War was habeas corpus ever suspended in Georgia.
II. Georgia Habeas Corpus Statutory Provisions

A. Overview

The Georgia habeas corpus statutes that were adopted or in operation at one time or another from 1865 to 1965 may be divided into four categories. First, there were the various provisions of the habeas chapter, article, or title of each of the seven Georgia Codes—those of 1861, 1868, 1873, 1882, 1895, 1910, and 1933—in force during this period. Second, there were the miscellaneous other habeas corpus provisions of these Georgia Codes, located outside the habeas chapter, article, or title of each Code. Third, there were the numerous pre-1933 uncoded statutes conferring habeas jurisdiction on various courts and judges. Finally, there were the habeas corpus statutes enacted from 1933 to 1965.

B. Georgia Code Habeas Provisions

The State of Georgia’s first official code, the Georgia Code of 1861, which was in effect from 1863 until 1868, “included a habeas corpus chapter consisting of twenty-three sections which comprehensively regulated habeas corpus proceedings at the trial court level. The 1861 Code also included miscellaneous additional habeas corpus sections scattered throughout other portions of the Code.”

Like the 1861 Code, each of the six official Georgia Codes adopted between 1868 and 1965—the Codes of 1868, 1873, 1882, 1895, 1910, and 1933—contained a habeas corpus chapter, article, or title consisting of between twenty-three and twenty-seven consecutive habeas statutory sections, most of which were derived from the habeas chapter of the 1861 Code. The post-1861 Codes, like the 1861 Code, each contained a number of other habeas sections outside the habeas chapter, article, or title.

1. Habeas Chapter of 1868 Code

With twenty-three sections, the habeas corpus chapter of the 1868 Code was identical to the habeas chapter of the 1861 Code, except in two respects. First, a new Code section was enacted which codified the provisions of an 1863 statute authorizing a civil action against and the imposition of a
monetary penalty of twenty-five hundred dollars on a judge who in violation of his duty refused to issue a writ of habeas corpus. Second, the 1868 Code abolished the habeas powers of the justices of the inferior courts and transferred them to the county court judges, while at the same time eliminating all references to the previous habeas jurisdiction of justices of the inferior courts.\(^\text{15}\) The 1861 Code had vested power to grant writs of habeas corpus in (1) the superior court judge of the circuit where the detention existed, and (2) in the absence of the local superior court judge, the justices of the inferior courts of the county of detention.\(^\text{14}\)

The 1868 Code, on the other hand, vested habeas power in (1) the superior court judge of the circuit where the detention existed, and (2) the judge of the county court of the county where the detention existed.\(^\text{15}\) Where the 1861 Code required that habeas proceedings be returned to and recorded by the clerk of the superior or inferior court of the county in which the habeas case was heard,\(^\text{16}\) the 1868 Code required that the returning and recording be performed by the clerk of the superior or county court.\(^\text{17}\) Where the justices of the inferior court were barred by the 1861 Code from granting habeas relief to persons imprisoned under final order or process of a superior court,\(^\text{18}\) the 1868 Code made the bar applicable instead to the judge of the county court.\(^\text{19}\) Furthermore, a habeas section of the 1861 Code\(^\text{20}\) requiring that a majority of the justices of an inferior court hear the return to a writ of habeas corpus in cases where the writ had been issued by a single justice was not reenacted. The power given to county courts under the 1868 Code to issue habeas writs turned out to be illusory, because the county courts were abolished by the 1868 state constitution\(^\text{21}\) on the very day the 1868 Code took effect.\(^\text{22}\)

2. **Habeas Chapter of 1873 Code**

With twenty-three sections, the habeas corpus chapter of the 1873 Code\(^\text{23}\) was identical to the habeas chapter of the 1868 Code, except in three respects. First, while vesting superior court judges with the same power to issue habeas writs that they had enjoyed under the 1868 Code, the 1873 Code stripped county courts of habeas jurisdiction and vested it instead in the ordinary of the county where the detention existed.\(^\text{24}\) The ordinary was,
however, forbidden to issue habeas writs if the imprisoned person was charged with a capital felony.\textsuperscript{25} Second, because ordinaries instead of county judges now had habeas jurisdiction, a habeas proceeding not heard by a superior court judge henceforth would be returned to and recorded by the clerk of the court of ordinary (rather than the county court clerk).\textsuperscript{26} Third, two provisions of a section of the 1868 Code—one barring county courts from granting habeas relief to persons imprisoned under order or process of a superior court,\textsuperscript{27} the other barring habeas relief for imprisoned debtors whose jail fees were unpaid\textsuperscript{28}—were not reenacted.

3. Habeas Chapter of 1882 Code

The habeas corpus chapter of the 1882 Code contained twenty-three sections\textsuperscript{29} and was identical to the habeas chapter of the 1873 Code.

4. Habeas Article of 1895 Code

Prior to 1895, each of the various Georgia Codes contained a habeas chapter consisting of twenty-three consecutive statutory sections located within the Code of Practice portion of the particular Code. By contrast, the habeas portion of the 1895 Georgia Code consisted of twenty-six consecutive habeas sections contained not in a chapter but in an article, which was located not in a Code of Practice but in a Penal Code that had its own numbered sections.\textsuperscript{30} The habeas article of the 1895 Penal Code was in most respects identical to the habeas chapter of the 1882 Code, but did make six changes.

First, the category of judges with power to grant a writ of habeas corpus was expanded. In addition to superior court judges and ordinaries, who continued to be vested with power to issue the writ, the writ could now also be granted by a judge of a city court established on recommendation of a grand jury.\textsuperscript{31} Second, the power of ordinaries to grant a writ of habeas corpus was trimmed; under the 1882 Code ordinaries had been barred from issuing the writ only in capital cases, but they were now additionally barred from issuing the writ in extradition cases.\textsuperscript{32} Third, presumably because the 1877 state constitution prohibited habeas corpus suspension, the provision of the 1882 Code permitting habeas suspension in time of war for persons in
military custody was not reenacted. Fourth, apparently to reinforce the 1877 constitutional ban on habeas suspension, a new Code section was enacted which, in wording identical to the constitutional provision, prohibited suspending habeas.\textsuperscript{94} Fifth, a second new Code section authorized superior courts to issue writs of habeas corpus ad testificandum to compel the production in court of legally imprisoned persons needed as witnesses.\textsuperscript{95} Finally, a third new Code section was added when a Code section of the habeas chapter of the 1882 Code was divided into two Code sections in the habeas article of the 1895 Penal Code.\textsuperscript{96}

5. **Habeas Article of 1910 Code**

Like the 1895 Georgia Code, the 1910 Georgia Code included a separately numbered Penal Code containing a habeas article consisting of consecutive statutory sections. The habeas article of the 1910 Penal Code was identical to the habeas article of the 1895 Code, except that it contained twenty-seven rather than twenty-six sections.\textsuperscript{97} The new Code section added in 1910 expedited appellate practice in the Georgia Supreme Court in habeas cases.\textsuperscript{98}

6. **Habeas Title of 1933 Code**

The Georgia Code of 1933, which took effect on January 1, 1935,\textsuperscript{99} consisted, unlike the previous Georgia Codes, of 114 alphabetically arranged separate titles. The writ of habeas corpus was allocated an entire title in the new Code. The habeas article of the 1910 Penal Code was incorporated en bloc into Title 50, the habeas corpus title of the 1933 Code, except that (1) the portion of the section of the 1910 Code\textsuperscript{40} vesting habeas power in judges of city courts established on recommendation of a grand jury was not reenacted, so that now only superior court judges and ordinaries were empowered by the Georgia Code to issue the writ; and (2) for unknown reasons the section of the 1910 Penal Code\textsuperscript{41} forbidding suspension of habeas corpus was not reenacted. The habeas title of the 1933 Code therefore consisted of twenty-six rather than twenty-seven sections.\textsuperscript{42}

7. **Other Code Habeas Provisions**

Like the 1861 Georgia Code, each of the six Georgia Codes
enacted from 1868 to 1933 contained at the time of adoption various habeas statutory provisions outside its habeas corpus chapter (or article or title). For example, there were eight habeas sections in the 1868 Code that were not in the habeas corpus chapter, and seven of the 1933 Code’s habeas sections were not in Title 50.

C. Pre-1933 Uncodified Statutes Conferring Habeas Jurisdiction

Under the Georgia Code of 1861 and the six Georgia Codes adopted between 1868 and 1933, habeas corpus jurisdiction was vested in these judges or courts during the following time periods:

- Superior court judges, 1865-1965;
- Inferior court judges, 1865-1868;
- County courts, 1868 (this jurisdiction never became operative);
- Ordinaries, 1873-1965;
- Judges of city courts established on grand jury recommendation, 1895-1933.

These, however, were not the only Georgia courts or judges authorized to issue writs of habeas corpus at various times between 1865 and 1933. During the century after the Civil War, at one time or another, miscellaneous uncodified statutory provisions bestowed habeas jurisdiction on various other courts or judges, including:

- Judges of district courts;
- Judges of the “new” (post-1872) county courts;
- Judges of city courts established by a special statute;
- Judges of various other localized state courts.

D. Post-1933 Habeas Statutes

After the adoption of the 1933 Code but prior to 1965, a total of five Georgia habeas corpus statutes were enacted.

1. 1951 Legislation

In 1951, the Georgia legislature enacted the Juvenile Court Act, which provided in part that “[c]ourts of record handling habeas corpus cases involving the custody of a child or
children may transfer the question of the determination of custody . . . to the juvenile court for investigation and report back to the superior court or for investigation and determination." The same year the Georgia legislature passed the Uniform Criminal Extradition Act, one section of which secured the habeas rights of a person arrested under the Act by providing that if the person brought before a judge "desires to test the legality of his arrest, the judge . . . shall fix a reasonable time to be allowed him within which to apply for a writ of habeas corpus." Another section provided that the arrestee could in the presence of a judge waive the extradition proceedings against him after the judge first, among other things, "inform[ed] such person of his right[] to obtain a writ of habeas corpus . . . ."

2. 1956 Legislation

A 1956 statute amended the 1933 Code so as to change the amount of time the respondent had to make his return in a habeas proceeding. Previously, the return time in all habeas proceedings had been twenty days. Under the 1956 statute, the return time remained twenty days, except that it was shortened to eight days in cases of criminal imprisonment.

3. 1958 Legislation

Two years later a statute authorizing involuntary commitment of mentally ill persons was enacted, a section of which protected the habeas rights of committed persons by providing that any person "detained pursuant to this Act shall be entitled to the writ of habeas corpus . . . ."

4. 1964 Legislation

Six years later the Georgia Health Code Act, among other things, added a new section to the 1933 Code regulating habeas corpus proceedings instituted on behalf of persons hospitalized and confined by order of the Department of Health, and providing for the discharge of a committed person if further detention was not required.
III. Georgia Habeas Practice and Procedure

A. Trial Court Level Proceedings

A 1903 Georgia Supreme Court habeas decision, Simmons v. Georgia Iron & Coal Co., is the single most important decision of the era with regard to the proper procedures to be followed in Georgia habeas proceedings at the trial court level. A habeas corpus proceeding at the trial court level—typically heard by a superior court judge, a city court judge, or an ordinary—was commenced by the filing of a petition for a writ of habeas corpus. Such a proceeding, according to the Georgia Supreme Court, "was a summary application by the person detained," and "was, strictly speaking, neither a civil nor a criminal action." Except in child custody cases, habeas petitions could not properly be filed unless the person in whose behalf relief was sought was restrained of his liberty—that is, unless he was a prisoner or was otherwise in physical custody.

Each of the seven Georgia Codes adopted from 1861 to 1933 included a section providing that a habeas petition could be filed by "[a]ny person restrained of his liberty under any pretext whatever ...." The habeas petition could therefore—and this was usually the case—be filed by an imprisoned person acting by himself or through his attorney. That same Code section also provided that a habeas petition could be filed by "any person alleging that another, in whom for any cause he is interested, is restrained of his liberty ...." This statutory language permitting a third-party to file a habeas petition in behalf of a prisoner was generously construed by the Georgia Supreme Court. "Any person," the Court said, "may petition for the writ of habeas corpus in behalf of one imprisoned .... Interest arising from humanity alone comes within both letter and spirit of the section." Georgia was more accepting of third-party habeas petitions than some other American jurisdictions. In the federal system, for example, unlike Georgia, third-party habeas petitions "[were] by no means granted automatically to whomever seeks to pursue [a habeas] action on behalf of another." Nearly all the reported third-party habeas litigation in Georgia was instituted by the prisoner's spouse or by a close blood relative.
The plaintiff in a Georgia habeas corpus proceeding—the person in whose behalf the relief was sought—was the “petitioner,” and the defendant was the “respondent.” In almost all the reported Georgia habeas litigation, child custody cases excepted, the habeas petitioner was a prisoner in the custody of a state or local law enforcement official and imprisoned in a state, county, or local detention facility. It was improper in such cases for the petitioner to name the State of Georgia or a local governmental entity as the respondent, although this sometimes occurred. The proper practice was to designate the immediate custodian—the official in charge of the institution where the petitioner was detained—as the respondent. This was usually a law enforcement or detention facility official. The prison warden would be named as the respondent if the habeas petitioner was incarcerated in a state prison; the superintendent or warden of the chain gang, if the petitioner was on a chain gang; the sheriff, if the petitioner was confined in a county jail; the chief of police, if the petitioner was detained in a city jail or a police station.

By statute the habeas petition was required to be filed with a habeas judge having territorial jurisdiction over the place where the petitioner was restrained of his liberty, which meant that the petitioner had to be detained within the geographical limits of the court over which the habeas judge presided. If the petition was submitted to a superior court judge, the petitioner had to be detained in one of the counties within the judge’s circuit. If the petition was submitted to an ordinary, the petitioner had to be detained in the county of the court of ordinary over which the ordinary presided. If the petition was submitted to a judge of a city court established on grand jury recommendation, the petitioner had to be detained within the territorial limits of the county in which the city court was located. If the petition was submitted to a judge of a city court created by special statute, the petitioner had to be detained within the territorial limits of the county or portion of the county over which the city court had jurisdiction.

The habeas petition had to be in writing and under oath, and it had to be “signed by the applicant, his attorney or agent, or some other person in his behalf . . . .” The petition had to state: (1) “[t]he name or description of the
person whose liberty is restrained;” (2) “[t]he person restraining, the mode of restraint, and the place of detention, as nearly as practicable;” (3) “[t]he cause or pretense of the restraint; and if under pretext of legal process, a copy of the process, if within the power of the applicant, must be annexed to the petition;” (4) “[a] distinct averment of the alleged illegality in the restraint or other reason why the writ of habeas corpus is sought;” and (5) “[a] prayer for the writ of habeas corpus.”

In reviewing the habeas petition for facial sufficiency, the habeas judge was “not [to] be too astute in finding technical objections to the manner in which the legality of the restraint is called in question,” and the review was “not to be dissipated by subtle objections and technical niceties.” If it was apparent from the habeas petition itself that the petitioner’s alleged detention was legal (or that he was not detained), the habeas judge would refuse to issue the habeas writ, deny the petition, and dismiss the proceeding.91 If it fairly appeared from the face of the habeas petition that the detention complained of was illegal, the judge was required to issue the writ of habeas corpus.92 A model form of writ of habeas corpus was prescribed by statute.93 The writ required the respondent, at the date and time specified in the writ, to produce the body of the person allegedly illegally detained, together with the cause of the detention. The writ would be served by delivering a copy of the writ to the respondent, and any citizen could make the service.94 Disobedience of the writ was contempt of court.95

The respondent’s return to the writ had to be made within twenty days of the filing of the habeas petition.96 The return had to be under oath, and the body of the restrained person had to be produced in court.97 If the return denied material facts alleged in the habeas petition, or alleged other facts upon which issue was taken, the judge could in a summary manner hear testimony as to the issue and compel the attendance of witnesses or the production of documents.98 If the petitioner was charged with crime and the solicitor general (i.e., district attorney) was in the county, he was to be notified of the hearing.99 At the hearing on the return to the writ, the respondent was permitted to demur to the habeas petition, and if it then appeared to the judge that the habeas petition on its face failed make an adequate showing that the petitioner was illegally
restrained of his liberty, the judge could dismiss or quash the writ and remand the petitioner to custody.100

Under statute, the habeas petitioner could not be granted relief if (1) he was imprisoned under lawful process except where bail was allowed and properly tendered; (2) the defect in the warrant of commitment was technical; (3) he was imprisoned under a bench warrant valid on its face; (4) the court was satisfied that the habeas petitioner was the person charged in a criminal warrant, despite any misnomer in the warrant; (5) the petitioner was in custody for contempt and the committing court had not exceeded its jurisdiction in the length of imprisonment; or (6) the detention of the petitioner was otherwise authorized by law.101 Nor could the petitioner be discharged from custody on criminal charges by reason of any defect in the affidavit, warrant, or commitment if there was probable cause for his detention.102 If the petitioner had been arrested on reasonable suspicion of committing a crime in another state, he could not be discharged until there had been sufficient time for the other state to demand his extradition.103 In all other cases, the judge was to "discharge, remand or admit the party to bail, or deliver him to the custody of the officer or person entitled thereto, as the principles of law and justice may require."104 If relief was denied, the judge would remand the habeas petitioner to custody.105 If the issue was bail and the judge granted relief, bail would be fixed or the amount of bail reduced.106 If the judge granted habeas relief to a petitioner entitled to release, the habeas petitioner would be discharged from custody.107 Such a petitioner could not "lawfully be again arrested, imprisoned, restrained, or kept in custody for the same cause, or under the same sentence."108 However, he could be remanded to custody on other grounds if there were separate, valid reasons for detaining him, as where there was an outstanding arrest warrant on other charges pending against him.109

B. Appellate Review

The final decision of the judge in a Georgia habeas corpus proceeding at the trial court level was subject to appellate review, irrespective of whether relief was denied or granted. The habeas petitioner could obtain appellate review of a decision denying relief,110 and the habeas respondent could obtain appellate
review of a decision granting relief. The final decision of a superior court judge in a habeas proceeding was directly reviewable of right via the writ of error in the Georgia Supreme Court. The final decision of an ordinary in a habeas case was subject to appellate review via the writ of certiorari in the local superior court, and the superior court's decision was directly reviewable of right via the writ of error in the Georgia Supreme Court. Similarly, the final decision of a county judge in a habeas case was reviewable in the local superior court via the writ of certiorari, with the superior court's decision directly reviewable of right via the writ of error in the Georgia Supreme Court.

Appellate review of final decisions of city courts (and city court judges) was governed by Georgia Supreme Court decisions construing the provisions of the 1868 and 1877 Georgia state constitutions, as well as various Georgia statutes, relating to writs of error. Under these decisions, if the habeas judge presided over a city court created on recommendation of a grand jury, his decision was subject to appellate review via the writ of certiorari in the local superior court, and the decision of the superior court was directly reviewable of right via the writ of error in the Georgia Supreme Court. If the habeas judge presided over a city court created by statute, the available appellate review depended on whether the court was a "constitutional city court." If it was, then the habeas decision was directly reviewable of right via the writ of error in the Georgia Supreme Court. On the other hand, if the habeas judge presided over a city court that was established by special statute but was not a constitutional city court, then the decision was subject to appellate review via the writ of certiorari in the local superior court, with the decision of the superior court directly reviewable of right via the writ of error in the Georgia Supreme Court.

C. Res Judicata

Three Georgia Supreme Court decisions, spread over a period of half a century, were required before there was final resolution of the issue of whether the doctrine of res judicata extended to Georgia habeas decisions. In Perry v. McLendon, an 1879 case involving imprisonment under civil process, the Court held that where the two persons petitioning for a writ of
habeas corpus had previously been denied habeas relief based on the same claims, the prior determination was conclusive.\textsuperscript{121} This holding marked a departure from the common law rule, under which res judicata did not apply to a decision denying habeas relief.\textsuperscript{122} The Court's reasoning was that Georgia habeas decisions, unlike those at common law, were subject to appellate review.\textsuperscript{123}

In 1927, in \textit{Pryor v. Pryor},\textsuperscript{124} res judicata was held applicable to child custody habeas proceedings.

In 1931, in \textit{Day v. Smith},\textsuperscript{125} the Court completed its gradual extension of res judicata to habeas corpus cases by holding that habeas proceedings involving criminal imprisonment were governed by res judicata principles. In a prior, unappealed habeas proceeding, an ordinary had granted the petitioner, who had been convicted in superior court, habeas relief from several criminal sentences imposed in superior court which the ordinary determined were void. The grant of habeas relief was not appealed. Thereafter, amazingly, the successful habeas petitioner was rearrested and once again imprisoned under the same void sentences from which he had been discharged in the habeas proceeding. He promptly filed a second habeas petition, this time with a superior court judge, who dismissed the petition. The habeas petitioner then appealed directly via the writ of error to the Georgia Supreme Court, which, perceiving no reason why res judicata should not apply to habeas decisions in criminal cases to the same extent it applied in civil cases, reversed and ordered the petitioner discharged from custody under the void sentences.\textsuperscript{126}

Under these decisions, it became a fixed principle that res judicata extended to all habeas corpus proceedings in Georgia.\textsuperscript{127} If the habeas petitioner had previously been denied habeas relief, he would be remanded to custody if his subsequent habeas petition attacked the same imprisonment and raised the same claims;\textsuperscript{128} if he had been discharged from custody on his prior petition but for some reason later returned to that same custody, he would be released.\textsuperscript{129}

Although the doctrine of res judicata did extend to habeas decisions in child custody cases, it was applied somewhat differently. The doctrine barred relitigation, but only based on the same facts.\textsuperscript{130} Successive habeas proceedings between the
same parties to relitigate a child custody issue were permissible if there had been a change of circumstances since the previous habeas proceeding.  

IV. Georgia Habeas Case Law

A. Child Custody Cases

1. Generally

During the century following the end of the Civil War, perhaps a quarter of the habeas cases decided by the Georgia Supreme Court were child custody cases, where the issue for determination was who was entitled to the custody of a minor child, not whether a prisoner was unlawfully incarcerated. During that century the habeas chapter, article, or title of each of the Georgia Codes included a section which provided that the habeas judge in a child custody case had discretion as to whom the custody should be given and could grant custody to someone other than the father or mother. Various other statutes enacted during this period also governed the disposition of child custody habeas cases.

In child custody cases, the habeas proceeding usually was instituted by the child’s father, mother, grandparent or some other relative, and habeas proceedings in which divorced or separated parents fought one another tenaciously over custody of their child were common. Occasionally the habeas case would involve a child born out of wedlock. Most child custody habeas cases were filed with a superior court judge, but many were filed with a city court judge or an ordinary. The proper venue for filing a habeas petition in a child custody case was the county of residence of the person allegedly in possession of the child, irrespective of the location of the child (or the location of the residence of the child’s legal custodian if there was one).

Although Georgia in 1845 abolished the common law rule vesting the custody of minor children in habeas cases always in the father, until 1913—when it was statutorily abolished—the Georgia courts adhered to a related rule under which prima facie the right to custody of a child belonged to the father. The 1913 statute, however, did no more than place
the parents on an equal footing, and did not prevent courts from holding that a parent or the parents were prima facie entitled to the custody of their child in a controversy with some other person seeking custody of the child.\textsuperscript{145}

After 1913, the master rule in a Georgia child custody habeas proceeding in which divorced or separated parents each sought custody was that the court

may exercise its sound discretion, taking into consideration all the circumstances of the case ... the duty of the court being ... in exercising such discretion, to look to and determine solely what is for the best interest of the child or children, and what will promote their welfare and happiness, and make awards accordingly.\textsuperscript{146}

The final judgment—that is, an unappealed judgment or a judgment upheld on appellate review—awarding custody of a child in a habeas case was binding on the parties and res judicata.\textsuperscript{147} However, “[w]hile judgments in habeas-corpus proceedings instituted by parents to secure the custody of their minor children are conclusive upon them, such conclusiveness relates to the status existing at the time of the rendition of such judgments. Change of status may authorize a different judgment in a subsequent [habeas] proceeding.”\textsuperscript{148} Successive habeas proceedings involving the same parties and the same child were therefore permitted if, since the prior habeas proceeding, there had been a change of circumstances warranting a fresh determination of the child custody issue.\textsuperscript{149}

2. Child Apprentices

In the decade following the Civil War the Georgia Supreme Court handed down six notable child custody habeas decisions\textsuperscript{150} which merit special mention because they involved children who, pursuant to an 1866 statute,\textsuperscript{151} had been bound out as apprentices. Under the statute, children could be bound out as apprentices (1) with parental consent, or (2) if they were orphans or their parents were unable to support them, by order of an ordinary or a county judge. In at least five of the cases the child was African-American, and in all six cases the child was released from the apprenticeship and returned to a parent because the procedures by which the child had been bound out were tainted by fraud, overreaching, or illegality. In these cases
the Georgia Supreme Court, while sympathetic to the good intentions behind the statute, exhibited a laudable determination to stop in its tracks subtle endeavors to use the apprenticeship law as a method of reverting to the evils of black slavery.

B. Civil Imprisonment Cases

Some of the habeas litigation involved civil imprisonment. Persons imprisoned pursuant to an adjudication of civil contempt sometimes sought habeas relief. Relief was rarely granted, however, because it was available only if the court ordering the imprisonment lacked jurisdiction to commit for civil contempt, which was unlikely. There were a few habeas cases involving (1) material witnesses imprisoned to ensure their appearance at an upcoming grand jury proceeding or criminal trial; (2) persons imprisoned pursuant to peace warrant or bastardy proceedings; and (3) persons detained on mental health grounds.

Following Georgia's abolition of imprisonment for debt in the second half of the nineteenth century, the likelihood that persons would be imprisoned pursuant to civil process issued as part of a traditional common law civil action was reduced but not eliminated. Various forms of civil arrest process continued to exist. Between 1863 and 1933, each of the Georgia Codes contained a section authorizing pretrial imprisonment under civil process of defendants in civil actions for the recovery of personality. Under these provisions, if the personal property sought to be recovered could not be found, a defendant who failed to produce the property and who failed to make bail pending the action could be imprisoned. As a result, there were habeas proceedings instituted on behalf of defendants in bail trover actions who had been imprisoned under civil process for failing to produce the personal property at issue or to give bail. The courts rejected claims that such civil imprisonment constituted imprisonment for debt, and held that proof that the defendant was unable to produce the property did not authorize the granting of habeas relief. All these habeas proceedings were unsuccessful.

Furthermore, after passage of an 1878 act, which created a statutory procedure in the nature of habeas corpus by which a civil defendant who had been imprisoned for failing to produce
personal property and was unable to make bail could petition the trial court and under some circumstances be released on his own recognizance, the Georgia Supreme Court held that the statutory procedure had to be invoked before a habeas petition could be filed.\textsuperscript{169} If the statutory procedure was invoked unsuccessfully, a subsequent habeas petition was barred.\textsuperscript{170} If the statutory procedure was successful, of course, resort to habeas corpus became unnecessary.

Another form of civil imprisonment provided for under each of the Georgia Codes from 1863 to 1933 was in regard to possessory warrant civil actions.\textsuperscript{171} Under some circumstances, the defendant in a possessory warrant action could be imprisoned under civil process if he failed to produce the property at issue.\textsuperscript{172} Imprisonment under such civil process was sometimes attacked via habeas corpus.\textsuperscript{173}

C. Extradition Cases

In Georgia, as in every state, the writ of habeas corpus traditionally has been the state court remedy invoked by arrested persons seeking to avoid criminal extradition to another state.\textsuperscript{174} And in Georgia, as in the other states, “[t]he traditional scope of review in extradition habeas cases [has been] narrow.”\textsuperscript{175} From 1865 to 1951, the extent to which Georgia habeas relief was available to prevent a prisoner from being extradited to another state was governed by (1) 18 U.S.C. § 3182, the federal statute which, because the U.S. Constitution’s Extradition Clause\textsuperscript{176} is not self-executing, implements the Clause by establishing a procedure pursuant to which any person who is a “fugitive from justice” under the statute may be extradited from one state to another state;\textsuperscript{177} (2) four consecutive Georgia Code sections which supplemented the federal statute by imposing duties on the governor and state law enforcement officials in regard to the extradition of persons from Georgia to another state;\textsuperscript{178} and (3) another Code section, located in the habeas corpus chapter, article, or title, which, with respect to a person arrested on reasonable suspicion for committing a crime in another state, prohibited the arrestee’s release on habeas corpus “until a sufficient time shall be given for a demand to be made on the Governor for his rendition.”\textsuperscript{179} Although some of the Georgia habeas extradition litigation involved claims arising under the five
Georgia statutes, most of it focused on whether the procedure prescribed by the federal statute had been violated.

During this period of more than three-quarters of a century, the Georgia courts, like the courts of most states, rarely granted habeas relief from extradition. The Georgia Supreme Court held that a person whose extradition to another state was sought could not use habeas corpus to assert his innocence or to question the motives of those filing the charges against him in the demanding state. The court rejected suggestions that the term fugitive from justice be given a narrow, technical definition. Nor would the court permit habeas to be used to attack irregularities in the governor’s extradition arrest warrant or defects in form in the indictment or affidavits filed against the fugitive in the demanding state. A facially valid extradition arrest warrant issued by the governor was presumed to be valid, and the burden was on the habeas petitioner to show some good reason why the extradition should not take place.

However, an arrestee would be released from custody in a Georgia habeas proceeding if the extradition request did not comply with the requirements of the federal extradition statute. Under *Hyatt v. New York ex rel. Corkran,* for example, a 1903 U.S. Supreme Court decision construing that statute, a person was deemed not to be a “fugitive from justice” within the coverage of the statute if it was beyond dispute that he was not in the demanding state when, if ever, the alleged crime was committed there. In 1920 the Georgia Supreme Court granted habeas relief based on *Hyatt.* In 1942 the court granted habeas relief where the extradition request was based on an affidavit which had been sworn to in the demanding state before a notary public rather than, as required by the federal statute, a “magistrate.”

In 1951, the Georgia legislature enacted the Uniform Criminal Extradition Act. The Uniform Act established a modernized procedure for extraditing persons from Georgia to another state, and could be used in place of the federal extradition statute. Under the Act, no matter what issues previously had been cognizable in Georgia extradition habeas cases, habeas review was now strictly limited to four issues: (1) whether the arrestee was the person named in the extradition warrant; (2) whether the arrestee was a fugitive; (3) whether the demand for
extradition was in due form; and (4) whether there was a substantial charge of crime.\textsuperscript{193}

After the 1951 adoption of the Uniform Act, which simplified and expedited the extradition process, the Georgia Supreme Court was not inclined to retreat from its previous rulings making habeas relief from a proposed extradition unlikely.\textsuperscript{194} Surprisingly, however, until the early 1960s there continued to be habeas cases where extradition was sought under the federal extradition statute rather than the Uniform Act, and where the court granted relief which might not have been issued if the Uniform Act had been used.\textsuperscript{195}

D. Road Court Cases

There used to be a time when under state law some Georgians—“road defaulters”\textsuperscript{196}—could be imprisoned, even placed on the chain gang, for failing to work on the public roads. In the late nineteenth and early twentieth century Georgia, “there [were] three distinct general systems for working public roads.”\textsuperscript{197} The original system, known as the “stick and dirt” system,\textsuperscript{198} originated in the Georgia Code of 1861;\textsuperscript{199} the second system, known as the “alternative road law,”\textsuperscript{200} was created by an 1891 statute;\textsuperscript{201} and the third system, the “four-day road law,”\textsuperscript{202} was created by a statute enacted in 1896.\textsuperscript{203} Under the first two of these systems, a male who had reached a certain age could, under some circumstances, be imprisoned if without satisfactory explanation he defaulted on his statutory obligation to perform designated work on the public roads of his county of residence.\textsuperscript{204} Under the “dirt and stick” system, males between the age of sixteen and fifty could be sentenced to imprisonment, while under the “alternative road law” males aged between twenty-one and fifty could be sentenced to serve up to ninety days on the chain gang.\textsuperscript{205} The trial of an alleged defaulter would be held before a local board of road commissioners sitting as a road court. Between 1883 and 1933, there were five reported Georgia appellate court habeas decisions involving persons imprisoned after having been convicted and sentenced in a road court.\textsuperscript{206} Habeas relief was available only on grounds the conviction or the sentence was void for lack of jurisdiction,\textsuperscript{207} and in none of the five cases was habeas relief granted.
E. Criminal Imprisonment Cases: Criminal Contempt

Persons imprisoned for criminal contempt could apply for a writ of habeas corpus, but relief would be granted only if the court ordering the imprisonment lacked jurisdiction, or if the sentence of imprisonment was unreasonable and excessive as a matter of law. This was in accordance with a Code section in the habeas chapter, article, or title of the Georgia Codes from 1861 to 1933.

F. Criminal Imprisonment Cases: Bail

Habeas corpus could be used to obtain release on bail by persons in pretrial custody on criminal charges. Under Georgia statutes, as construed by the Georgia Supreme Court, prior to conviction all crimes except capital offenses were bailable of right, and this right to pretrial bail was reinforced by the state constitutional prohibition on excessive bail. Since "[e]xcessive bail is the equivalent of a refusal to grant bail . . . in such a case habeas corpus [was] an available and appropriate remedy for relief." However, it was also true that "according to our practice and procedure, the amount of bail to be assessed in each criminal case is left to the sound legal discretion of the court required to fix it and, in the absence of a flagrant abuse of such discretionary power, his action will not be controlled." Habeas corpus petitions seeking reduction of bail were, therefore, frequently unsuccessful. Under Georgia law, there was no right to bail after conviction in a felony case. In misdemeanor cases there was a right to bail after conviction and pending appeal. If the bail set pending appeal for a person convicted of misdemeanor was excessive, it could be reduced in a habeas proceeding.

G. Criminal Imprisonment Cases: Pretrial

It was not uncommon for persons imprisoned on criminal charges and awaiting trial to sue out a writ of habeas corpus in an effort to obtain release from custody and dismissal of the charges. The Georgia Supreme Court took a dim view of this. Its attitude was that habeas corpus was "not designed to interrupt the orderly administration of law by a court of compe-
tent authority acting within its jurisdiction."\textsuperscript{220} Nor was it "the function of the writ of habeas corpus . . . to determine the guilt or innocence of one accused of crime."\textsuperscript{221} With very few exceptions,\textsuperscript{222} the court relentlessly rebuffed attempts by criminal defendants to use habeas to prevent or preempt an upcoming criminal trial.\textsuperscript{223} The court crushed efforts by pretrial defendants to use habeas to attack defects or irregularities in the commitment proceedings.\textsuperscript{224} The court positively refused to permit pretrial habeas corpus to be used to prove the defendant's innocence\textsuperscript{225} or to assert a defense to the charges.\textsuperscript{226} The court would, however, permit a defendant in pretrial custody to use habeas corpus to attack the constitutionality of the statute, or the validity of the ordinance, defining the offense he was charged with committing.\textsuperscript{227}

H. Criminal Imprisonment Cases: Postconviction

Postconviction habeas corpus proceedings are perhaps the most fascinating of all habeas proceedings. A postconviction habeas corpus proceeding is a habeas case brought in behalf of a person convicted of violating a criminal statute or a penal ordinance and sentenced to imprisonment or other custody, where the convicted person seeks relief on grounds the conviction or the sentence is invalid.\textsuperscript{228} Traditionally, postconviction habeas corpus relief usually has been granted in the federal courts or in the state courts, including Georgia courts, only on either jurisdictional grounds or constitutional grounds—that is, only if the defect in the conviction or the sentence is either jurisdictional in nature or involves a violation of a constitutional right.

During the period 1865 to 1965 postconviction habeas relief was infrequently granted in Georgia.\textsuperscript{229} The grounds for relief were few in number and narrow in scope. In addition, various procedural rules could prevent the granting of postconviction relief, even if the habeas petition raised arguably meritorious claims. But there were cognizable habeas claims, and sometimes relief would be granted. Habeas relief granted on grounds involving the invalidity of the conviction usually would consist of either discharge from custody\textsuperscript{230} or, if the defendant was subject to retrial or there was a pending warrant against him, a remand to the custody of the proper law enforcement offi-
Where the conviction was valid but relief was granted on grounds involving the invalidity of the sentence, the defendant, unless the sentence had been fully served, would be remanded in custody to the convicting court for resentencing. It was well established that either a city court judge or (except in capital cases) an ordinary could grant postconviction habeas relief even though the conviction had occurred in superior court.

1. Jurisdictional Grounds for Relief

Under what has been termed the "voidness requirement," postconviction habeas corpus relief usually was available in Georgia only if the conviction or sentence was void because the convicting court had acted without jurisdiction or had exceeded its jurisdiction in the premises. A convicting court acted without jurisdiction if the conviction was void for lack of either personal or subject matter jurisdiction, and a convicting court exceeded its jurisdiction in the premises if it imposed a void sentence—that is, a sentence ordering infliction of an illegal or unauthorized punishment.

(a) Void Convictions: Lack of Personal Jurisdiction. Although the Georgia Supreme Court proclaimed that habeas relief was available if a conviction was void for want of in personam jurisdiction, there are no known cases where relief was actually granted based on a claim of lack of personal jurisdiction. There is an explanation. First, jurisdiction over the person of a criminal defendant is acquired merely by arresting him (whether lawfully or unlawfully), and therefore it is extremely unlikely that a defendant will be convicted without the trial court having first secured personal jurisdiction. Second, for purposes of habeas corpus a claim of lack of personal jurisdiction is deemed waived if it was not timely asserted in the convicting court or raised on direct review.

(b) Void Convictions: Lack of Subject Matter Jurisdiction. While habeas relief based lack of personal jurisdiction was mostly a theoretical possibility, habeas relief based on lack of subject matter jurisdiction was not. There were several dozen decisions between 1865 and 1965 in which habeas relief was granted on grounds the conviction was void for lack of subject matter jurisdiction. Under case law, a conviction would be deemed void
for lack of subject matter jurisdiction, and habeas corpus relief could be granted, under the following circumstances: (1) the convicting court lacked authority to convict the habeas petitioner because the offense charged was not within the class of offenses the convicting court had lawful jurisdiction to try;\(^2\)\(^4\) (2) the statute defining the offense charged was unconstitutional\(^2\)\(^4\)\(^1\) or had been repealed,\(^2\)\(^4\)\(^2\) or the ordinance defining the offense was void;\(^2\)\(^4\)\(^3\) (3) the indictment or accusation alleged acts which were not criminal or otherwise failed to charge an offense;\(^2\)\(^W\) (4) the habeas petitioner’s criminal trial had been presided over by an unauthorized judge, as where in a municipal court the judge was a “mere usurper,”\(^2\)\(^1\) or where in a trial in superior court the proceeding was presided over by a judge of a city court created on recommendation of a grand jury;\(^2\)\(^4\)\(^6\) or (5) the habeas petitioner had been convicted of a felony without having been indicted by a grand jury and without having validly waived indictment, as where the waiver of indictment had been oral rather than (as required by statute) in writing,\(^2\)\(^4\)\(^7\) or where the habeas petitioner had waived indictment to a capital crime (even though waiver of indictment was statutorily authorized only for noncapital offenses).\(^2\)\(^4\)\(^8\)

(c) Void Sentences. Even though the conviction itself was valid, habeas relief was available if the sentence was void because the convicting court had exceeded its jurisdiction in imposing it, as where the sentence ordered a punishment that was in excess of the statutory maximum for the offense of conviction,\(^2\)\(^4\)\(^9\) or where the sentence was otherwise contrary to the applicable sentencing statute.\(^2\)\(^5\)\(^0\)

2. Constitutional Grounds for Relief

(a) Unconstitutional Convictions. At first, the Georgia courts took the position that violations of constitutional rights occurring in the proceedings resulting in the conviction and sentence were not grounds for postconviction habeas corpus relief.\(^2\)\(^5\)\(^1\) Thus, claims that in violation of due process an involuntary confession had been admitted at the defendant’s trial\(^2\)\(^9\)\(^2\) or that in violation of equal protection there had been invidious discrimination in the selection of the grand jury that indicted the defendant or the petit jury that tried him,\(^2\)\(^5\)\(^3\) were not regarded as cognizable in habeas corpus. The reasoning was that claims of violations
of constitutional rights had to be raised at trial and on direct review via the writ of error or writ of certiorari, and, if they had not been, they were to be deemed waived for purposes of habeas corpus.\(^\text{254}\)

In 1939, in response to United States Supreme Court decisions expanding the federal writ of habeas corpus in postconviction cases, the Georgia Supreme Court began to modify its views on using habeas to litigate infringements of constitutional rights, at least in regard to the constitutional right to counsel.\(^\text{255}\) In \textit{Aldredge v. Williams},\(^\text{256}\) a death sentence case, the Court, instead of repeating its usual mantra that habeas corpus was limited to correcting void convictions and sentences, startlingly proclaimed:

\textit{A discharge under a writ of habeas corpus, after conviction, cannot be granted unless the judgment is absolutely void; as where the convicting court was without jurisdiction, or where the defendant in his trial was denied due process of law, in violation of the Federal fourteenth amendment \ldots and the State constitution.}\(^\text{257}\)

This passage in \textit{Aldredge}, in which the Georgia's highest court for the first time acknowledged the availability of state habeas to redress violations of constitutional rights occurring at trial, echoed a passage in a United States Supreme Court habeas decision earlier that year.\(^\text{258}\) The Georgia Supreme Court mentioned but did not discuss the possibility that a violation of the right to counsel might render the judgment of conviction void.\(^\text{259}\) On the merits, however, the court rejected the habeas petitioner's claim that had received ineffective assistance of counsel at his capital trial, reversing the superior court judge's order granting relief.\(^\text{260}\)

Two years later, in 1941, in \textit{Wilcoxon v. Aldredge},\(^\text{261}\) another death sentence case, the Georgia Supreme Court went further and after extensive discussion squarely held that a violation of the right to counsel was a fundamental legal error that stripped the convicting court of jurisdiction and rendered the resulting conviction void, and hence a right to counsel claim was cognizable in a habeas proceeding.\(^\text{262}\) The decision was heavily influenced by a noted 1938 United States Supreme Court decision, \textit{Johnson v. Zerbst},\(^\text{263}\) in which the Court granted habeas relief to a federal prisoner tried and convicted without the benefit or
waiver of counsel, and announced that a "court's jurisdiction . . . may be lost" due to a violation of the constitutional right to counsel, and that denial of the right to counsel "stands as a jurisdictional bar to a valid conviction and sentence."264 The Georgia Supreme Court not only expressed its support for the holding in Johnson v. Zerbst ("we consider the ruling sound"265), but proceeded to expand it.266 Johnson involved a denial of counsel; the defendant had not been represented at his trial. Wilcoxon involved a defendant who been represented at his trial but now claimed his attorney was ineffective. Going beyond the United States Supreme Court, the Georgia Supreme Court held that either a denial of counsel or a violation of the right to the effective assistance of counsel would render a conviction void for lack of jurisdiction and authorize postconviction habeas corpus relief.

Beginning in 1941, therefore, a violation of the constitutional right to counsel was a ground for state habeas relief in Georgia, on the theory that the constitutional violation was a jurisdictional error that rendered the conviction void. In the 1960s there were a modest number of cases where Georgia habeas relief was granted based on a violation of the right to counsel.267 In some of these cases nothing was said about any lack of jurisdiction or about the conviction being void, relief apparently being granted solely on account of the violation of a constitutional right.268 All the cases where relief was granted involved an actual denial of counsel. From 1941 to 1965 no one was granted Georgia habeas relief based on an ineffective counsel claim, presumably because the right to effective counsel was so narrow in scope at the time.269 After 1941, the Georgia courts continued to adhere to the rule that claims of violations of rights not raised at trial or on direct review were waived and could not be presented in habeas proceedings.270 Claims of violations of the right to counsel were exempted from the waiver rule, because they could not have been so raised.271

(b) Unconstitutional Sentences. Even though the conviction itself might be valid, postconviction habeas relief was nonetheless available if the sentence was unconstitutional—that is, violated a constitutional right, including the Georgia state constitutional right to due process. The leading case was Pearson v. Wimbish,272 where relief was granted to a habeas petitioner who had
been convicted in a municipal court of violating a municipal ordinance prohibiting drunk and disorderly conduct and (as was authorized by the state statute creating the municipal court) sentenced to the chain gang. While sentencing the petitioner to imprisonment would have been perfectly legal, the Georgia Supreme Court held, sentencing him to the chain gang violated due process. Leaving the underlying conviction undisturbed, the Court ordered the defendant resentedenced, explaining that

> process which tries a man without formality for a "petty offense," and, punishes him in the same manner as, and along with, criminals violating the laws of the state, with no right to a jury trial, no record save the entries upon a recorder's docket, and upon his judgment alone, is not due process.  

3. Procedural Obstacles to Relief

Five procedural rules might operate to prevent the granting of postconviction relief habeas even though the habeas petition raised a possibly meritorious claim. First, there was the waiver of constitutional rights doctrine, under which a violation of a constitutional right was deemed waived for purposes of habeas corpus if it had not been raised at trial and on direct review. Second, since the res judicata doctrine applied to Georgia habeas proceedings, the doctrine barred a postconviction habeas petition raising a claim rejected in a prior Georgia habeas proceeding brought by the same habeas petitioner. Third, a second or subsequent habeas petition was barred if it raised a claim that could have been raised in a previous habeas petition filed by the same defendant. Fourth, a habeas petitioner was barred from using habeas to attack a conviction if he was presently also serving a concurrent sentence pursuant to another conviction that was valid or unattacked. Finally, in regard to persons convicted of crime, it was a basic principle of Georgia habeas corpus jurisprudence that the writ could not be used as a substitute for other remedies, including the motion for new trial, the writ of certiorari, the writ of error, and the bill of exceptions. This principle, which
was closely related to the waiver of constitutional rights doctrine, was intended to prevent convicted persons from using habeas to bypass other, regularly established judicial procedures for the review of convictions and sentences. This principle prevented not only habeas review of issues which were still raisable via some other remedy, but also of issues which once could have been raised via the other remedy but had not been. This principle also bolstered rules limiting postconviction habeas relief to jurisdictional errors.

The principle that habeas was not a substitute for other remedies was not unlimited. It did not extend to habeas claims of lack of subject matter jurisdiction. Postconviction habeas relief could be granted on the ground that the statute defining the offense was unconstitutional or that the indictment failed to allege a criminal offense, even though these claims could have but had not been raised at trial or on direct review via a writ of error or writ of certiorari.

I. Other Criminal Imprisonment Cases

There were numerous cases involving convicted persons who invoked the writ of habeas corpus, not to attack the validity of their conviction or sentence, but rather to raise a claim that some event occurring after conviction now entitled them to habeas relief. There were, for example, cases where habeas relief was granted because (1) the habeas petitioner had been sentenced to pay a fine and then was imprisoned to coerce him to pay the fine, even though the convicting court lacked authority to coerce payment by this method; 281 (2) after being sentenced to pay a fine or else be imprisoned, the habeas petitioner was still imprisoned even though he had timely paid or tendered payment of the fine; 282 (3) after being sentenced to pay a fine or else be imprisoned, the habeas petitioner had been released by authorities upon the promise of a third person to pay the fine and then reimprisoned when the third party failed to pay the fine; 283 (4) after being convicted of fornication, the habeas petitioner had married the woman with whom the offense had been committed; 284 (5) the habeas petitioner was imprisoned under a sentence he had fully served or that had expired; 285 (6) in violation of state statutory law, the habeas petitioner was being worked on a chain gang operated by private individuals; 286 or
in violation of the state probation statute, the habeas petitioner’s probation had been revoked without notice and a hearing.\textsuperscript{287} Habeas corpus could also be used to raise a claim that the habeas petitioner’s parole\textsuperscript{288} or conditional pardon\textsuperscript{289} had been unlawfully revoked.

J. Other Imprisonment Cases

Miscellaneous other examples of Georgia habeas corpus litigation included (1) cases where a U.S. Army deserter arrested by local enforcement officials was awaiting transfer to the proper military authorities,\textsuperscript{290} and (2) cases where a delinquent or wayward child, by order of a court or judge, had been committed to a state juvenile facility or other institution for juveniles.\textsuperscript{291}

Conclusion

The study of the history of the writ of habeas corpus in Georgia between 1865 and 1965 draws our attention to interesting facts about Georgia habeas in that era.

First, as a general rule, the Georgia legislature vested the state’s habeas jurisdiction in judges, rather than in the courts over which these judges presided. In most states, the legislature has tended to grant habeas jurisdiction either to certain courts themselves (rather than the individual judges of those courts) or to both those courts and their judges. Georgia’s legislature, on the other hand, with very exceptions, refused to follow this approach. Habeas jurisdiction was vested in superior court judges, ordinaries, and city court judges, not superior courts, courts of the ordinary, or city courts.

Second, in Georgia a habeas corpus petition could be filed only at the trial court level. Neither of the state’s appellate courts (the Georgia Supreme Court and the Georgia Court of Appeals), nor the individual appellate judges of those courts had any original habeas corpus jurisdiction. The only way the Georgia Supreme Court or the Georgia Court of Appeals could hear a habeas case was on appellate review of a habeas proceeding instituted at the trial court level. In many other states, by contrast, both the state supreme court and the individual justices of that court had jurisdiction to entertain an original habeas petition filed directly with the court or a justice thereof. In those states, the original habeas jurisdiction of the appellate court or
of the appellate judges typically was conferred by the specific provisions of the state constitution itself. The only habeas provisions in Georgia's state constitutions, however, were those dealing with suspension of the writ.

Third, in Georgia during the century covered in this Article, there was at all times on the books a state statute that authorized a civil action against and provided for a significant monetary penalty to be levied on any habeas judge who in violation of his duty refused to issue a writ of habeas corpus. There was, however, only one reported case under the statute, and it was unsuccessful because the statute was narrowly construed.

The memorable 1903 decision in Simmons v. Georgia Iron & Coal Co., it has been said, was not only "learned and humane," but also "arguably the most important habeas decision ever handed down by [the Georgia Supreme Court]." Certainly at a minimum Simmons was one of the most significant Georgia habeas decisions during the century following the Civil War. Simmons not only lucidly analyzed the history, importance, and function of the writ of habeas corpus, but also established the basic procedural rules to be followed when a Georgia habeas corpus petition is filed, while simultaneously emphasizing the liberal, nontechnical attitude every habeas judge should display where personal liberty is at stake.

Of perhaps greater importance was Wilcoxon v. Aldredge, in 1941, where the Georgia Supreme Court, extending its 1939 decision in Aldredge v. Williams, held for the first time on the merits and after discussing the matter at length that a violation of a fundamental federal or Georgia constitutional right was grounds for invalidating a conviction in a habeas corpus proceeding. The court even went beyond the United States Supreme Court by holding that not only denial of counsel, but also ineffectiveness of counsel, could render a conviction void for lack of jurisdiction for purposes of habeas corpus. Prior to this holding, Georgia, like most states in the nineteenth and first half of the twentieth centuries, restricted postconviction habeas relief to instances of lack of jurisdiction, and violations of fundamental rights were not deemed to affect the jurisdiction of the convicting court. In embracing the legal fiction that a violation of the right to counsel was such a fundamental error that it stripped the convicting court of subject matter jurisdiction, the Georgia
Supreme Court became one of the earlier state appellate courts to emulate the United States Supreme Court by expanding the concept of lack of jurisdiction to permit postconviction habeas review of violations of basic rights. With its decision in *Wilcoxon*, the Georgia Supreme Court aligned itself with the federal system and the numerous states which were embarked on a path of broadening the writ of habeas corpus and thereby commendably enlarging judicial protections of the rights of convicted persons. *Wilcoxon* and its path-breaking predecessor, *Aldredge v. Williams*, opened the way for the modern view that issues involving deprivations of constitutional rights, not the issues regarding the jurisdiction of the convicting court, are and should be the staple of modern postconviction habeas proceedings.

On the whole, the Georgia courts administered the writ of habeas corpus in conformity with the basic principles of habeas corpus at common law. The Georgia Supreme Court's determination that res judicata applied to habeas corpus proceedings was that court's boldest departure from the common law habeas corpus.

Generally, the body of Georgia habeas jurisprudence was in accordance with habeas jurisprudence in most other states. Like many states, Georgia required that the habeas petitioner be detained within the territorial jurisdiction of the court on which the habeas judge sat; it adhered to the common law rule that habeas relief from civil or criminal judgments was usually limited to jurisdictional errors; it refused to allow habeas to substitute for other remedies; it declined to allow habeas corpus to frustrate interstate extradition of criminal suspects; and it permitted habeas to be used to decide child custody issues. On the other hand, Georgia differed from many states in requiring that the return to the writ be under oath; in welcoming third-party habeas petitions; and in forbidding, during nearly the entire century, any suspension of habeas corpus.

What Professor Edward Jenks once called *The Story of the Habeas Corpus* is one of the finest, most enriching, and most enduring stories in the annals of the law. The marvelous story of the writ of habeas corpus is, after all, the story of "the most important writ known to the constitutional law," and it is a story that "is inextricably intertwined with the growth of funda-
mental rights of personal liberty."\textsuperscript{302} From this perspective, the present Article may be regarded as a Georgia contribution to the epic story of the inestimable writ—the writ that surely will thrive as long as liberty lives.
ENDNOTES


4. GA. CONST. of 1868 art. I, § 13; GA. CONST. of 1865 art. I, § 3. These provisions were identical to the habeas provisions of the Georgia constitutions of 1798 and 1861. See Wilkes, A New Role for an Ancient Writ, supra note 2, at 314 n.5. All four of these pre-1877 Georgia habeas provisions were patterned after the habeas clause of the U.S. Constitution.

Although the Georgia constitutions of 1865 and 1868 protected habeas from suspension only in cases where there was no rebellion or invasion and the public safety did not require suspension, there were at the time broader, nonconstitutional protections against suspending habeas. Between 1865 and 1877 provisions of Georgia statutory law barred habeas suspension except in time of war and only as to persons in military custody. See GA. CODE § 4009 (1873); GA. CODE § 3933 (1868); see also GA. CODE § 3909 (1863). These protective statutory provisions which limited but nonetheless allowed suspension, were retained in the 1882 Code, even though by then the state constitution prohibited any habeas suspension. See GA. CODE § 4009 (1882).

5. GA. CONST. of 1945 art. I, § 1, para. 11; GA. CONST. of 1877 art. I, § 1, para. 11.

6. Suspension of this state's writ of habeas corpus is no longer constitutionally prohibited. Although Georgia's 1976 constitution continued the ban on habeas suspension, GA. CONST. of 1976 art. I, § 1, para. 12, the current constitution does not. Like the U.S. Constitution, and like the Georgia constitutions of 1789, 1861, 1865, and 1868, the
current state constitution, adopted in 1982, protects the writ but permits its suspension if “in case of rebellion or invasion, the public safety may require it.” GA. CONST. art. I, § 1, para. 15.

7. Some of these statutes were in fact enacted after 1933—for example, special statutes creating city courts and conferring habeas jurisdiction on the judge of the court. See, e.g., 1935 Ga. Laws 541 (authorizing judge of city court of Miller County to issue writs of habeas corpus).

8. Wilkes, From Oglethorpe to the Overthrow of the Confederacy, supra note 3, at 1043.

9. The 1861, 1868, 1873, and 1882 Codes each had a habeas chapter containing twenty-three sections. The habeas article of the 1895 Code had twenty-six sections, while the habeas article of the 1910 Code had twenty-seven. The habeas title of the 1933 Code consisted of twenty-six sections.

10. GA. CODE §§ 3933-3955 (1868). These provisions were located in Chapter 1 (“Proceedings on Application for Habeas Corpus”) of Title 16 (“Proceedings on Application for Habeas Corpus”) of Part 3 (“The Code of Practice”) of the 1868 Code.

11. GA. CODE § 3955 (1868).

12. For discussion of this statute and its background, see Wilkes, From Oglethorpe to the Overthrow of the Confederacy, supra note 3, at 1047-48; see also infra note 92, and infra notes 292-93 and accompanying text.

13. Inferior courts, it should be noted, were abolished by the 1868 state constitution. GA. CONST. of 1868 art. V, § 14 (“The courts heretofore existing in this State styled inferior courts are abol- ished . . . .”). The 1868 constitution took effect on the same day as the 1868 Code. See infra note 22.

14. GA. CODE § 3911 (1861). Both superior court judges and justices of inferior courts had been statutorily authorized to grant habeas writs since the 1790s. See Wilkes, From Oglethorpe to the Overthrow of the Confederacy, supra note 3, at 1037-38.

15. GA. CODE § 3935 (1868). See also GA. CODE § 311(1) (county judge shall have authority to issue habeas writs), and § 276 (county court at quarter sessions has jurisdiction in habeas cases).

16. GA. CODE § 3930 (1861).

17. GA. CODE § 3953 (1868).

18. GA. CODE § 3924(2) (1861).

19. GA. CODE § 3947(2) (1868).

20. GA. CODE § 3921 (1861).
21. GA. CONST. of 1868 art. V, § 16 "([T]he county courts now existing in Georgia are hereby abolished.").

22. The 1868 Georgia Code was put into effect by the 1868 state constitution, GA. CONST. of 1868 art. II, § 3. Both the 1868 Code and the 1868 constitution became effective on July 21, 1868. This does not mean that county courts never had habeas jurisdiction. County courts and the offices of county judges had been created by 1865-66 Ga. Laws 64, enacted on March 17, 1866, which included a provision giving county courts jurisdiction in habeas corpus cases. Although county courts never had an opportunity to exercise the habeas jurisdiction given them by the 1868 Code, they did possess—and presumably did exercise—a statutory habeas jurisdiction during the two years before the 1868 Code came into operation. The 1866 statute vested habeas jurisdiction in the county court, not the county court judge. This was one of the few occasions when the Georgia legislature conferred habeas power on a court rather than a judge of the court.

23. GA. CODE §§ 4009-4031 (1873). These provisions were located in Chapter 1 ("Proceedings on Application for Habeas Corpus") of Title 16 ("Proceedings on Application for Habeas Corpus") of Part 3 ("The Code of Practice") of the 1873 Code.

24. GA. CODE § 4011 (1873). Courts of the ordinary (which are now known as probate courts) were first constitutionally authorized by GA. CONST. of 1861 art. IV, § 1, cl. 1; art. IV, § 3, cl. 5. Ordinaries (currently known as probate judges) had first been vested with power to issue writs of habeas corpus five years earlier, in 1868, pursuant to 1868 Ga. Laws 128.

25. GA. CODE § 4011 (1873). Ordinaries had first been prohibited from issuing the writ in capital cases one year earlier, in 1872, pursuant to 1872 Ga. Laws 44.

26. GA. CODE § 4029 (1873).

27. GA. CODE § 3947(2) (1868).

28. Id. § 3947(3). Presumably, this was repealed because imprisonment for debt had been abolished by the 1868 constitution. See GA. CONST. of 1868 art. I, § 18 ("There shall be no imprisonment for debt.").

29. GA. CODE §§ 4009-4031 (1882). These provisions were located in Chapter 1 ("Proceedings on Application for Habeas Corpus") of Title 16 ("Proceedings on Application for Habeas Corpus") of Part 3 ("The Code of Practice") of the 1882 Code.
30. **GA. PENAL CODE §§ 1209-1234 (1895).** These provisions of the Penal Code were located in Article 1 ("Proceedings on Habeas Corpus"), which itself was located within two unnumbered subdivisions, "Special Quasi Criminal Proceedings" and "Habeas Corpus."

31. **GA. PENAL CODE § 1212 (1895); see also GA. CODE § 4286 (1895) (judges of city courts established on recommendation of a grand jury shall have same power to issue writs of habeas corpus as a judge of superior court).** **GA. CODE § 4286 (1895)** was not reenacted in the 1910 and 1933 Codes. Not to be confused with municipal courts, city courts were state trial courts, often of county-wide jurisdiction, and typically could try both misdemeanors and minor civil actions. **ALBERT BERRY SAYE, A CONSTITUTIONAL HISTORY OF GEORGIA, 1732-1945, at 408-09 (1948); see also Edward C. Brewer, III, The City Court of Atlanta and the 1983 Georgia Constitution: Is the Judicial Engine Souped Up or Blown Up?, 15 GA. ST. U. L. REV. 941, 946-58 (1999) (surveying history of city courts).**

Trials in city courts were by jury, unless waived. In the late nineteenth and early twentieth centuries there were two types of city courts in Georgia: (1) city courts established on recommendation of the local grand jury, and (2) city courts established by special statute. **Brewer, supra, at 946-47.**

City courts established on recommendation on a grand jury dated back to 1891, when 1890-91 Ga. Laws 96, as amended by 1892 Ga. Laws 107, provided for the automatic establishment of city courts, on recommendation of the local grand jury, in counties with a population of 10,000 or more. These two statutes provided that the city courts established under the two Acts would have the same powers and jurisdiction as the city court of Macon previously established by an 1885 special statute, 1884-85 Ga. Laws 470. Because the 1885 statute gave the judge of the city court of Macon authority to issue writs of habeas corpus with the same power of the judge of the superior court, the judges of all city courts established on recommendation of the grand jury had the same authority as superior court judges to issue writs of habeas corpus.

Thus, the habeas corpus jurisdiction of judges of city courts established on recommendation of the grand jury antedated the 1895 Code by several years. The habeas jurisdiction of city court judges created by special statute is examined infra at note 50. Numerous city courts still existed as late as 1965. **Volume 110 of the Georgia Appeals Reports lists fifty-five city courts for that year. City court judges continued to hear habeas cases until the mid-1960s. See, e.g., Dutton v. Mims, 223 Ga. 423, 156 S.E.2d 93 (1967). In 1970, the remaining city courts were renamed state courts. See 1970 Ga. Laws 679.**
32. GA. PENAL CODE § 1212 (1895). Ordinaries had first been prohibited from hearing habeas petitions in extradition cases a decade earlier, in 1885, pursuant to 1884-85 Ga. Laws 50.

33. This was the second sentence of GA. CODE § 4009 (1882), which provided: "And this right shall be suspended or denied only in times of existing war, and then only as to such persons as shall be in military confinement." Id.

34. GA. PENAL CODE § 1209 (1895).

35. Id. § 1225. This provision was not new. It originated in GA. CODE § 3769 (1861). It had not, however, previously been included in the habeas chapters of the previous Georgia Codes.

The writ of habeas corpus testificandum is a different type of writ of habeas corpus. It is not the Great Writ. It is not used in behalf of imprisoned persons to challenge the legality of the imprisonment. Instead, it is "used to bring up a prisoner detained in a jail or prison to give evidence before the court [that issued the writ]." BLACK'S LAW DICTIONARY 639 (5th ed. 1979). While the prisoner is being conveyed to or appears in court, he remains in custody, and after testifying he is returned in custody to his previous imprisonment.

36. The portion of GA. CODE § 4025 (1882) up to the semicolon was reenacted as GA. PENAL CODE § 1227 (1895), and the remainder was reenacted as GA. PENAL CODE § 1228 (1895). The portion that was reenacted as § 1227 prohibited a habeas petitioner from being discharged from custody on criminal charges by reason of any defect in the affidavit, warrant, or commitment if there was probable cause for his detention. The portion that was reenacted as § 1228 provided that if the petitioner had been arrested on reasonable suspicion of committing a crime in another state, he could not be discharged until there had been sufficient time for the other state to demand his extradition.

37. GA. PENAL CODE §§ 1290-1316 (1910). These provisions of the 1910 Penal Code were located in Article 1 ("Proceedings on Habeas Corpus"), which itself was located within two unnumbered subdivisions, "Habeas Corpus" and "Special Quasi Criminal Proceedings."

38. GA. PENAL CODE § 1316 (1910). This provision, which authorized what was known as a "fast writ of error," codified a statute enacted over a decade earlier. See 1897 Ga. Laws 53. For case law on this Code section, which was reenacted by GA. CODE § 50-126 (1933), see Richards v. McHan, 139 Ga. 37, 76 S.E. 382 (1912); Barranger v. Baum, 103 Ga. 465, 30 S.E. 524 (1898); Weaver v. Thompson, 11 Ga. App. 132, 74 S.E. 901 (1912).

40. *GA. Penal Code § 1293 (1910).*

41. *Id. § 1290.*

42. *GA. Code §§ 50-101 to -126 (1933).*

43. See *GA. Code § 4750 (1868)* (prisoners not to be discharged on habeas because of informality in the commitment); *id. § 3647* (fees of jailors for discharging prisoners in habeas cases); *id. § 3646(2)* (fees of sheriffs in habeas cases); *id. § 1785* (use of habeas to determine possession of child in cases of separation or remarriage of the parents); *id. § 311(1)* (county judges may grant habeas writs); *id. § 276* (county court at quarter sessions has jurisdiction in habeas cases); *id. § 237(1)* (superior court judges may grant habeas writs); see also *GA. Code app'x § 4811 (1868)* (judge of city court of Savannah may issue habeas writs).

44. See *GA. Code § 81-102 (1933)* (nothing in Uniform Procedure Act shall repeal or affect the mode of habeas corpus proceedings); *id. § 74-106* (use of habeas to determine possession of child in case of either separation of the parents or the death of one parent and the remarriage of the survivor); *id. § 38-1505* (superior court may issue writ of habeas corpus ad testificandum to produce in court a witness under legal imprisonment); *id. § 27-2521* (convict sentenced to death but not yet executed may be brought before superior court of conviction on a writ of habeas corpus to inquire into facts and circumstances of the case); *id. § 27-422* (prisoners not to be discharged on habeas because of informality in the commitment); *id. § 24-2823* (fees of sheriffs in habeas cases); *id. § 24-2616(1), (4)* (superior court judges may grant writs of habeas corpus and may hear and determine questions arising upon writs of habeas corpus).

45. County courts did have habeas jurisdiction under an uncodified statute from 1866 to 1868. See supra note 23. These county courts, created in 1866 and then abolished in 1868, must be distinguished from the county courts created in 1872. See infra note 49.

46. Ordinaries first acquired habeas jurisdiction under a then-uncodified statute in 1868. See supra note 24.

47. The 1895 and 1910 Codes were the only Georgia Codes to grant habeas jurisdiction to city court judges established on the recommendation of a grand jury. City court judges established on grand jury recommendation were first given habeas jurisdiction under the authority of an uncodified statute passed in 1891.

48. In 1870, the Georgia legislature created district courts presided over by district judges vested with power to issue writs of habeas corpus within their respective districts. 1870 Ga. Laws 33, 35. This habeas jurisdiction existed only briefly, because the statute creating the court...
and its judges was repealed less than a year after taking effect. See 1871 Ga. Laws 68.

49. Although the state's original county courts had been abolished by the 1868 state constitution, the Georgia legislature created a new set of county courts in 1872 in most but not all of the state's counties. 1871 Ga. Laws 288. The following year the judges of these courts were vested with the same power to grant habeas writs that ordinaries possessed. 1873 Ga. Laws 36. As the nineteenth century progressed, county courts were gradually replaced by city courts. ERWIN C. SURENERY, THE CREATION OF A JUDICIAL SYSTEM: THE HISTORY OF GEORGIA COURTS, 1733 TO PRESENT 108 (2001).

50. Quite apart from the city courts created on grand jury recommendation, a city court could also come into existence by virtue of a special statute creating it. See Stewart v. State, 98 Ga. 202, 204, 25 S.E. 424, 425 (1896) (distinguishing city courts owing their existence to special acts of the legislature and city courts created pursuant to grand jury recommendation); Welborne v. State, 114 Ga. 793, 808-09, 40 S.E. 857, 864 (1902) (noting that between 1877 and 1901 Georgia legislature created more than forty city courts by special enactment).

Judges of city courts established by special statute, who were never granted habeas jurisdiction under any Georgia Code, first were granted habeas jurisdiction by an uncodified statute in 1871, when the city court of Atlanta, the first city court created after 1865, was established. There were two varieties of city courts created by special statute: (1) constitutional city courts, and (2) statutory city courts. See Barnes v. State, 211 Ga. 469, 469, 86 S.E.2d 298, 299 (1955) (distinguishing constitutional city courts from statutory city courts); Johnston v. Dollar, 89 Ga. App. 876, 880, 81 S.E.2d 502, 505 (1954) (noting that decisions of constitutional city courts may be directly reviewed by Georgia Supreme Court or Georgia Court of Appeals on writ of error; decisions of statutory city courts may not).

Although none of the Georgia Codes conferred habeas jurisdiction on the judges of city courts created by special statute, these judges nonetheless would have habeas jurisdiction under two circumstances. First, the statute creating the particular city court might, as was often the case, explicitly confer habeas power on the judge of the court. See, e.g., Sumner v. Sumner, 117 Ga. 229, 229, 43 S.E. 485, 485 (1903) (judge of the city court of Wrightsville had power to issue writs of habeas corpus because 1899 statute creating the that city court expressly granted that power to the judge).

Dozens of pre-1933 special statutes, each creating a particular city court, contained a section or provision authorizing the judge of that city court to issue writs of habeas corpus, often with the same power as a
superior court judge. See, e.g., 1931 Ga. Laws 344 (Lyons); 1929 Ga. Laws 425 (Fairburn); 1927 Ga. Laws 407 (Jonesboro); 1925 Ga. Laws 442 (Lakeland); 1921 Ga. Laws 307 (Crawfordville); 1919 Ga. Laws 415 (Alma); 1916 Ga. Laws 500 (Swainsboro); 1916 Ga. Laws 275 (Morgan); 1915 Ga. Laws 83 (Darien); 1912 Ga. Laws 324 (Wrightsville); 1912 Ga. Laws 293 (Quitman); 1907 Ga. Laws 220 (Oglethorpe); 1907 Ga. Laws 198 (Millen); 1907 Ga. Laws 186 (Fort Gaines); 1907 Ga. Laws 177 (Flovilla); 1907 Ga. Laws 161 (Fitzgerald); 1907 Ga. Laws 148 (Covington); 1906 Ga. Laws 306 (Newton); 1906 Ga. Laws 194 (Cairo); 1906 Ga. Laws 152 (Ashburn); 1905 Ga. Laws 401 (Washington); 1905 Ga. Laws 388 (Thomasville); 1905 Ga. Laws 373 (Sylvester); 1905 Ga. Laws 338 (Reidsville); 1905 Ga. Laws 327 (Pelham); 1905 Ga. Laws 296 (Miller County); 1905 Ga. Laws 282 (McRae); 1905 Ga. Laws 266 (Leesburg); 1905 Ga. Laws 213 (Eastman); 1905 Ga. Laws 186 (Camilla); 1903 Ga. Laws 141 (Jefferson); 1902 Ga. Laws 175 (Tifton); 1902 Ga. Laws 166 (Sylvania); 1901 Ga. Laws 104 (Buford); 1901 Ga. Laws 203 (Waynesboro); 1901 Ga. Laws 192 (Vienna); 1901 Ga. Laws 180 (Valdosta); 1901 Ga. Laws 167 (Sandersville); 1901 Ga. Laws 158 (Polk County); 1901 Ga. Laws 149 (Mount Vernon); 1901 Ga. Laws 139 (Moultrie); 1901 Ga. Laws 133 (Moultrie); 1901 Ga. Laws 115 (Carnesville); 1900 Ga. Laws 119 (Dublin); 1900 Ga. Laws 108 (Bainbridge); 1900 Ga. Laws 96 (Americus); 1899 Ga. Laws 432 (Wrightsville); 1899 Ga. Laws 415 (Washington); 1899 Ga. Laws 399 (Lexington); 1899 Ga. Laws 389 (LaGrange); 1899 Ga. Laws 340 (Barnesville); 1899 Ga. Laws 399 (Lexington); 1899 Ga. Laws 372 (Greenville); 1899 Ga. Laws 359; 1898 Ga. Laws 328 (Swainsboro); 1898 Ga. Laws 313 (Dawson); 1897 Ga. Laws 513 (Waycross); 1897 Ga. Laws 501 (Valdosta); 1897 Ga. Laws 488 (Jefferson); 1897 Ga. Laws 474 (Forsyth); 1897 Ga. Laws 465 (Griffin); 1897 Ga. Laws 450 (Douglas); 1897 Ga. Laws 432 (Camilla); 1897 Ga. Laws 423 (Baxley); 1897 Ga. Laws 411 (Albany); 1896 Ga. Laws 290 (Elberton); 1895 Ga. Laws 387 (Gwinnett County); 1895 Ga. Laws 377 (Brunswick); 1895 Ga. Laws 361 (Coffee County); 1893 Ga. Laws 375 (DeKalb County); 1886-87 Ga. Laws 693 (Newnan); 1884-85 Ga. Laws 487 (Bartow County); 1884-85 Ga. Laws 472 (Macon); 1884-85 Ga. Laws 460 (Columbus); 1882-83 Ga. Laws 541 (Floyd County); 1871 Ga. Laws 58 (Atlanta).

Second, even though there was no mention of the writ of habeas corpus in the special act creating the city court, the statute might contain a section which, when properly construed, gave the judge of the court habeas jurisdiction. In Barranger v. Baum, for example, the judge of the city court of Richmond County was held to possess habeas jurisdiction because the statute creating the court conferred on the judge the same powers and authority of judges of the superior court.
103 Ga. 465, 467, 30 S.E. 524, 526.

51. See, e.g., 1890-91 Ga. Laws 936 (judge of criminal court of Atlanta shall have power to issue writs of habeas corpus); 1877 Ga. Laws 81-82 (judge of criminal court of Washington County shall have power to issue writs of habeas corpus); 1874 Ga. Laws 336 (commissioners of Chatham County, acting as ex officio judges, may issue writs of habeas corpus in absence or incapacity of judge of superior court, judge of city court of Savannah, and ordinary).

52. A sixth statute, 1946 Ga. Laws 726, 747-48, made technical amendments, not warranting discussion here, to GA. CODE § 50-126 (1933), which governed habeas appeals to the Georgia Supreme Court.


54. Id. at 298-99.

55. See infra notes 174-95 and accompanying text.


57. 1951 Ga. Laws 735.


59. GA. CODE § 50-107 (1933) (as amended 1956).


61. Id. at 709.


63. GA. CODE § 88-406 (1933) (as enacted 1964).

64. “If a writ of habeas corpus be obtained in behalf of a person ordered hospitalized and confined by the Department of Health, and it appears at the hearing on the return of such writ that such person may properly be discharged, or if the person’s condition is such that it will be in the best interest for him and for others for him to be discharged, the judge or justice before the hearing is held shall so direct . . . .” GA. CODE § 88-406 (1933) (as enacted 1964).

65. 117 Ga. 305, 43 S.E. 780 (1903).

66. Id. at 309, 43 S.E.2d at 781.

67. Id. “The proceeding is sometimes characterized as a ‘cause’ or ‘action,’ but erroneously so . . . [I]t can never be accurately characterized as a technical suit or action.” Id. (emphasis omitted); see also Robertson v. Heath, 132 Ga. 310, 313, 64 S.E. 73, 74 (1909) (noting that a habeas proceeding “is not exactly a lawsuit in the ordinary sense of the term”), overruled by Camp v. Camp, 213 Ga. 65, 97 S.E.2d 125 (1957). Today, however, a Georgia habeas proceeding is a civil action, subject to civil procedure rules.
68. GA. CODE § 50-101 (1933).

69. In child custody habeas litigation, where the issue was not personal liberty but who was entitled to the custody of a minor, the habeas petition usually was filed by the attorney representing the person, typically a parent or relative, seeking custody of the child.

70. GA. CODE § 50-101.

71. Broomhead v. Chisolm, 47 Ga. 390, 393-94 (1872). In this case, which was instituted by a third-party in behalf of a prisoner on a chain gang, the respondent, in answering the habeas writ, had moved to dismiss the writ, complaining to the judge that the third-party “ha[d] no interest in the person of [the prisoner], and does not show, by his petition, any legal authority for suing out said writ.” Id. at 391.

72. Whitmore v. Arkansas, 495 U.S. 149, 163 (1990). In federal habeas practice, third-party habeas corpus petitions were frowned upon and allowed only if (1) the third-party provided an adequate explanation why the prisoner could not appear on his own behalf, and (2) the third-party was truly dedicated to the interests of the prisoner. Furthermore, the third-party probably had to have some significant relationship with the prisoner, and was required to prove that he was a person entitled to file the habeas petition in behalf of the prisoner. Id. at 163-64. In the federal system, third-party habeas petitions are commonly referred to as next-friend petitions. See id.

73. See, e.g., Reid v. Perkerson, 207 Ga. 27, 60 S.E.2d 151 (1950) (husband); Wells v. Pridgeon, 154 Ga. 397, 114 S.E. 355 (1922) (wife).


77. See, e.g., Etheridge v. Poston, 176 Ga. 388, 389, 168 S.E. 25, 26 (1933); Carr v. Cook, 165 Ga. 472, 472, 141 S.E. 202, 203 (1928); Pearson v. Wimbish, 124 Ga. 701, 706, 52 S.E. 751, 754 (1906); McFarland v. Donaldson, 115 Ga. 567, 567, 41 S.E. 1000, 1001 (1902);


80. See Simmons, 117 Ga. at 316, 43 S.E. at 784 ("We are satisfied that when a statute creates a court with jurisdiction over a given territory, and confers upon the judge of that court power to grant the writ of habeas corpus, the right to issue the writ is coextensive with the territorial jurisdiction of the court in other matters."). In child custody cases, where there was no prisoner, the habeas petition had to be submitted to a habeas judge with territorial jurisdiction over the county of residence of the person in possession of the child. See infra note 141 and accompanying text.

81. See, e.g., GA. CODE § 50-103.

82. See Day v. Smith, 172 Ga. 467, 470-71, 157 S.E. 639, 641 (1931) ("The petition for this writ may be presented to the . . . ordinary of the county where such illegal detention exists . . .").

83. See Simmons, 117 Ga. at 316, 43 S.E. at 784; see also GA. PENAL CODE § 1293 (1910); GA. PENAL CODE § 1212 (1895).

84. See Simmons, 117 Ga. at 315, 43 S.E. at 784.

85. See, e.g., GA. CODE § 50-102.

86. See, e.g., id. § 50-103.

87. See, e.g., id. § 50-102.

88. Id.

89. Simmons, 117 Ga. at 308, 43 S.E. at 781.

90. Id. at 312, 43 S.E. at 783.

91. "It is therefore the duty of the court in every case, before issuing the writ, to inspect the application to see if it contains sufficient averments and is properly verified. If it lacks these essential requisites, he should decline to issue the writ." Id. See also Jones v. Hill, 17 Ga. App. 151, 155, 87 S.E. 755, 757 (1915) ("[I]t is clear that the legislature had in mind instances in which applications would be made for the writ when it would not be the duty of the judge to grant it, but on the
contrary it would be his duty to refuse it . . . . [T]he Legislature had in view cases where there would be a refusal because it would not be the duty of the judge in that particular instance to issue the writ.

92. See, e.g., GA. CODE § 50-104 (1933) ("If upon examination of the petition it shall appear to the judge that the restraint of liberty is illegal, he shall grant the writ of habeas corpus . . . ."). Id. (emphasis added); see also Simmons, 117 Ga. at 311, 43 S.E. at 782 (if judge determines that the habeas petition contains sufficient averments and is properly verified, "it is 'his duty to grant it . . . .'"); Perry v. McLendon, 62 Ga. 598, 604 (1879) ("Doubtless there is an obligation to issue the writ of habeas corpus whenever, and as often as, it may be applied for, provided the petition contains the requisite matter, is in due form, duly authenticated, duly presented, and does not show on its face that the imprisonment, though complained of as illegal, is in fact legal.").

Each of the Georgia Codes from 1868 to 1933, it will be remembered, included a section providing that if any person applied for a writ of habeas corpus to a Georgia judge whose duty it was to grant the writ, and the judge refused to grant the writ, the judge would forfeit to the person aggrieved the sum of $2500, to be recovered in any Georgia court having jurisdiction. GA. CODE § 3955 (1868); GA. CODE § 4031 (1873); GA. CODE § 4031 (1882); GA. PENAL CODE § 1234 (1895); GA. PENAL CODE § 1315 (1910); GA. CODE § 50-105 (1933).

By requiring that the writ actually be issued whenever the habeas petition was facially sufficient, Georgia declined to adopt the approach which the federal courts began using in the late nineteenth and early twentieth centuries, see Walker v. Johnston, 312 U.S. 275 (1941), under which a court, instead of issuing a habeas writ in response to a facially sufficient habeas petition, issued instead a show cause order, which did not require production of the prisoner and did not mandate the filing of an actual return. Id. at 284-85.

93. See, e.g., GA. CODE § 50-106 (1933).

94. See, e.g., GA. CODE § 50-108 (1933).

95. See, e.g., GA. CODE § 50-115 (1933).

96. See, e.g., GA. CODE § 50-107 (1933). Under a 1956 statute, the return time in cases of criminal imprisonment was shortened to eight days. See supra notes 58-59 and accompanying text. However, under Wright v. Davis, 120 Ga. 670, 48 S.E. 170 (1904), the return could be amended at any time before the final disposition of the case. Id. at 671, 48 S.E. at 171.

97. See, e.g., GA. CODE § 50-111 (1933). The Georgia requirement that the return be under oath is unusual. At common law, it was not required that the return be under oath; nor has this been required in
federal habeas proceedings; nor, it appears, is this commonly required in the habeas statutes of the other states.

98. See, e.g., GA. CODE § 50-114 (1933).

99. See, e.g., GA. CODE § 50-120 (1933). However, under Pridgen v. James, 168 Ga. 770, 149 S.E. 48 (1929), this notice requirement was held not to be jurisdictional; and if the warden (the immediate custodian) was properly served, and there was no objection by the solicitor general until after a final judgment in favor of the habeas petitioner, the requirement was deemed waived. Id. at 770, 149 S.E. at 48, 49.


102. See, e.g., GA. CODE § 50-117 (1933).

103. See, e.g., GA. CODE § 50-118 (1933).

104. GA. CODE § 50-119 (1933).


109. Id. at 475, 157 S.E. at 643.


112. See Perry, 62 Ga. at 603 ("[J]udgments on habeas corpus are, in this state, subject to review—by writ of error, if rendered by the judge of the superior court . . . .")


114. See, e.g., Russell v. Tatum, 104 Ga. 332, 332, 30 S.E. 812, 813 (1898); Badkins v. Robinson, 53 Ga. 613, 615 (1875).


No reported cases can be cited where a habeas proceeding was instituted before a judge of a city court established on recommendation of a grand jury, that judge's decision was taken to the superior court on a writ of certiorari, and the decision of the superior court was then reviewed by the Georgia Supreme Court on a writ of error. The reporters do not prove sufficient information to permit us to determine whether, when the Georgia Supreme Court on a writ of error reviewed a habeas decision of a superior court, the habeas proceeding had originated in a city court established on recommendation of a grand jury.

117. Galloway v. Mitchell County Elec. Membership Corp., 190 Ga. 428, 434, 9 S.E.2d 903, 907 (1940). For Georgia Supreme Court decisions defining the sometimes complicated term "constitutional city court," see Cone, 154 Ga. at 845, 115 S.E. 481; Ash, 144 Ga. at 716, 101 S.E. at 913; Welborne, 114 Ga. at 809, 40 S.E. at 864; Stewart, 98 Ga. at 203-04, 25 S.E. at 424-25. Under these decisions, a city court established on recommendation of a grand jury could not be a constitutional city court.

118. See Cone, 154 Ga. at 848, 115 S.E. at 483; Welborne, 114 Ga. at 806, 40 S.E. at 863; Heard v. State, 113 Ga. 444, 447, 39 S.E. 118, 119 (1901); Ivey v. State, 112 Ga. 175, 178, 37 S.E. 398, 399 (1900); Cooper v. State, 103 Ga. 405, 406, 30 S.E. 249, 249 (1898); Voils, 98 Ga. at 451, 26 S.E. at 483.

For examples of Georgia Supreme Court decisions reviewing on a writ of error a habeas decision of a judge of a constitutional city court, see Balkcom v. Gardner, 220 Ga. 352, 139 S.E.2d 129 (1964); Fair v. Balkcom, 216 Ga. 721, 119 S.E.2d 691 (1961); Kirkland v. Canty, 122 Ga. 261, 50 S.E. 90 (1905); Morton v. Nelms, 118 Ga. 786, 45 S.E. 616 (1903); Simmons, 117 Ga. 305, 43 S.E. 780 (1903); Sumner, 117 Ga. 229, 43 S.E. 485; Barranger, 103 Ga. 465, 30 S.E. 524.

Between 1907 and 1916 the Georgia Court of Appeals, created by a 1906 state constitutional amendment, 1906 Ga. Laws 24, also exercised appellate review of habeas decisions of judges of constitutional city courts. During this first decade of its existence, the Georgia Court of Appeals decided twenty-seven reported habeas appeals, twenty-four of
which reviewed habeas decisions of constitutional city court judges. The other three appeals reviewed habeas decisions of superior court judges.

Here, in chronological order, are those twenty-seven decisions, the only habeas corpus appeals in the Georgia Court of Appeals in its entire history: (1) Walker v. Jones, 1 Ga. App. 70, 57 S.E. 903 (1907) (child custody); (2) Fincher v. Collum, 2 Ga. App. 740, 59 S.E. 22 (1907) (postconviction); (3) Yeates v. Roberson, 4 Ga. App. 573, 62 S.E. 104 (1908) (postconviction); (4) Callaway v. Mims, 5 Ga. App. 9, 62 S.E. 654 (1908) (postconviction); (5) Wright, 5 Ga. App. 298, 63 S.E. 48 (road court conviction); (6) Jordan v. Smith, 5 Ga. App. 559, 63 S.E. 595 (1909) (child custody); (7) Davis v. Smith, 7 Ga. App. 192, 66 S.E. 401 (1909) (road court conviction); (8) Loeb v. Jennings, 7 Ga. App. 524, 67 S.E. 536 (1910) (postconviction); (9) Crosby v. Potts, 8 Ga. App. 463, 69 S.E. 582 (1910) (material witness jailed to secure his appearance at trial); (10) Evans v. Lane, 8 Ga. App. 826, 70 S.E. 603 (1911) (child custody); (11) Manning v. Crawford, 8 Ga. App. 826, 70 S.E. 959 (1911) (child custody); (12) Crapps v. Smith, 9 Ga. App. 400, 71 S.E. 501 (1911) (child custody); (13) Abram v. Maples, 10 Ga. App. 137, 72 S.E. 932 (1911) (convict has a right, within a reasonable time, to pay monetary part of his sentence; relief granted); (14) Crowder v. Maples, 10 Ga. App. 142, 72 S.E. 934 (1911) (same); (15) Daniel v. Persons, 10 Ga. App. 830, 74 S.E. 573 (1912) (there is no law in this state which confers upon a judge any power or authority to suspend the execution of a sentence imposed in a criminal case; here, portion of convict’s sentence to service on chain gang that suspended sentence during good behavior was of no force); Daniel v. Persons, 137 Ga. 826, 828, 74 S.E. 260, 260-61 (1912). Here, provision in sentence of convict to service in chain gang, suspending sentence during good behavior was of no force; (16) Weaver, 11 Ga. App. 132, 74 S.E. 901 (1912) (child custody); (17) Crawford v. Manning, 12 Ga. App. 54, 76 S.E. 771 (1912) (child custody); (18) Lewis v. Harris, 12 Ga. App. 305, 77 S.E. 108 (1913) (postconviction); (19) Howard, 12 Ga. App. at 354, 77 S.E. at 192 (deputy sheriff’s discharge of convicted person by accepting another’s promise to pay fine precludes rearrest of the convicted person for nonpayment of fine; relief granted); (20) Norman v. Rehberg, 12 Ga. App. 698, 700, 78 S.E. 256, 257 (1913) (under rulings of this state’s highest court, it was wholly beyond the power of the court that imposed the sentence to propose any condition compliance with which would have the effect of altering or voiding a sentence which the court had authority to impose; where, on conviction of larceny, accused was sentenced to a fine and to be confined at hard labor in the chain gang, a suspension of the sentence as to the imprisonment during good
behavior was void); (21) Johnson v. Harris, 13 Ga. App. 618, 618, 79 S.E. 588, 588 (1913) (the questions involved on appeal in a habeas corpus proceeding, being moot questions after expiration of the time for which the petitioner was sentenced to serve in the city chain gang, will not be considered); (22) Mathews v. Swatts, 16 Ga. App. 208, 84 S.E. 980 (1915) (a judge has no authority to amend his judgment in a criminal case after the term of court at which it was passed has expired, and, when amended at that term, the amendment must be before the execution of the sentence has begun); (23) McBride, 16 Ga. App. 240, 85 S.E. 86 (1915) (indictment did not charge a crime; postconviction relief granted); (24) Walden v. Morris, 16 Ga. App. 408, 85 S.E. 452 (1915) (habeas claim regarding whether convicted person paid fine); (25) Turner v. Hill, 17 Ga. 257, 86 S.E. 460 (1915) (civil process imprisonment); (26) Cross v. Foote, 17 Ga. App. 802, 88 S.E. 594 (1916) (postconviction); (27) Ellis v. Golden, 18 Ga. App. 749, 90 S.E. 495 (1916) (postconviction).


119. No reported cases can be cited where a habeas proceeding was instituted before a judge of a statutory city court, that judge’s decision was taken to the superior court on a writ of certiorari, and the decision of the superior court was then reviewed by the Georgia Supreme Court on a writ of error. The reporters do not provide sufficient information to permit us to determine whether, when the Georgia Supreme Court on a writ of error reviewed a habeas decision of a superior court, the habeas proceeding had originated in a statutory city court.

120. 62 Ga. 598 (1879).

121. Id. at 604.

122. See Wilkes, A New Role for an Ancient Writ, supra note 2, at 353.

123. Perry, 62 Ga. at 603-04.

It would seem from the authorities . . . that where there is no such power of review, there may be one writ of habeas corpus after another ad infinitum. But if there can be a review, is there any reason, especially in civil cases, in which the struggle is between party and party, and not with the king or commonwealth on one side, and the subject or citizen on the other, why the first adjudication, if acquiesced in, should not be final and conclusive?

Id.
A judgment in a habeas-corpus proceeding being in this State subject to review, is final until reversed; and where the legality of the same cause of imprisonment is twice drawn in question between the same parties by successive writs of habeas corpus before the same court or before different courts of competent original jurisdiction, the judgment on the former writ may be set up in bar of a defense to a second habeas-corpus proceeding, such defense setting up and asserting the legality of the restraint which had been passed on adversely to the respondent in the first proceeding. The matter will be deemed res judicata as to all points which were necessarily involved in the general question of the legality or illegality of the arrest and detention. . . . We have found no case in this State dealing with the conclusiveness of a judgment in a habeas-corpus case discharging a person held under a sentence in a criminal case. We see no reason why such a judgment should not be conclusive in such a case. As a judgment in a habeas-corpus case in which the applicant seeks to be discharged from restraint under a sentence in a criminal case, which he asserts is illegal and void, can be reviewed, we see no reason why the judgment in such a case should not be conclusive in a case where the State, through one of its officers, is a party and the applicant for the writ is the other party. In such a case the same principle should be applicable as in a case where the struggle is between party and party. We know of no reason which differentiates the conclusiveness of a judgment in a habeas-corpus case, wherein the validity of a sentence is involved, from the conclusiveness of a judgment in a habeas corpus case between private parties.


128. See, e.g., Williams v. Lawrence, 193 Ga. 381, 381, 18 S.E.2d 463, 463 (1942).


130. See infra notes 148-49 and accompanying text.
131. *Id.*

132. Prior to 1865, it was well-established in Georgia that the writ of habeas corpus was appropriate to determine child custody issues; see Wilkes, *From Oglethorpe to the Overthrow of the Confederacy*, supra note 3, at 1015, 1035, 1040, 1041-42. Since 1978, use of the writ of habeas corpus to resolve child custody disputes in Georgia has become less frequent. Under the Georgia Child Custody Intrastate Jurisdiction Act of 1978, O.C.G.A. §§ 19-9-20 to 19-9-24 (2011), if the child has a legal custodian—that is, if a parent or other person has been awarded permanent custody by court order—any proceeding to change the child’s legal custody must be brought in the county of residence of the legal custodian. Hutto v. Hutto, 250 Ga. 116, 117, 296 S.E.2d 549, 550 (1982). Thus, a habeas proceeding brought in some other county, such as the county of residence of a person who has physical but not legal custody of the child, may no longer be used to transfer legal custody of the child. Indeed, the Act flatly prohibits the writ of habeas corpus from being used to change the custody of a child with a legal custodian, although the legal custodian may use the writ to enforce a child custody court order. Douglas v. Douglas, 285 Ga. 548, 549, 678 S.E.2d 904, 906 (2009). The 1978 Act does not, however, bar child custody habeas proceedings where no award of legal custody has been previously made by a court. Alvarez v. Sills, 258 Ga. 18, 18, 367 S.E.2d 107, 108 (1988); Columbus v. Gaines, 253 Ga. 518, 519, 322 S.E.2d 259, 260 (1984); Johnson v. Smith, 251 Ga. 1, 2, 302 S.E.2d 542, 543 (1983).

133. See, e.g., GA. CODE § 50-121 (1933).

134. See, e.g., GA. CODE § 74-107 (1933) (in cases where custody of minor child is involved between the parents, there shall be no prima facie right to the custody of the child in the father); *id.* § 74-106 (use of habeas to determine possession of child in case of either separation of the parents or the death of one parent and the remarriage of the survivor); *id.* § 24-2409(2) (habeas court may transfer child custody cases to the juvenile court for investigation and report back to the superior court or for investigation and determination). The first of the Code sections mentioned in the preceding paragraph of this endnote was derived from 1913 Ga. Laws 110, as amended by 1962 Ga. Laws 714-15 and 1957 Ga. Laws 413-14; the second from GA. CODE § 1745 (1861); and the third from 1951 Ga. Laws 298-99.

798, 43 S.E. 47, 47 (1902) (father). Sometimes the habeas petition would be filed by the child’s legal guardian. See, e.g., Beaver v. Williams, 194 Ga. 875, 877, 23 S.E.2d 171, 174 (1942).


142. See Wilkes, From Oglethorpe to the Overthrow of the Confederacy, supra note 2, at 1035-36.

143. 1913 Ga. Laws 110 (codified at GA. CODE § 74-107 (1933)).

144. The rule apparently was grounded in GA. CODE § 1744 (1861), which, with exceptions, provided that a minor child remained under the control of the father until reaching the age of majority.


146. Lockhart v. Lockhart, 173 Ga. 846, 853, 162 S.E. 129, 132 (1931). The “best interest” test applied in all child custody habeas proceedings, not just those where the parties were the child’s parents.

147. Id. at 853, 162 S.E. at 132. A final judgment in a child custody habeas case was not res judicata as to a nonparty. McAfee v. Martin, 211 Ga. 14, 14, 83 S.E.2d 605, 606 (1954).


The city-court judge having jurisdiction of the parties and the subject-matter, his [habeas] judgment awarding the custody of the child to the respondent was conclusive between the petitioner and
the respondent until there should be a change in the circumstanc-
es that would authorize further proceedings by the court.

[A] habeas-corpus court is always open in the interests and for the
protection of children, and its judgment is not conclusive where
the status of the parties has changed . . . [I]f one habeas-corpus
court awards the custody of children to their father, and after that
judgment he becomes an unfit and improper person to take
charge of the children, another habeas corpus court would not be
bound by that judgment.
Kirkland, 122 Ga. at 263, 50 S.E. at 90.

149. Lockhart, 173 Ga. at 854, 612 S.E. at 132.
150. Ballenger v. McLain, 54 Ga. 159 (1875); Mitchell v. McElvin, 45
Ga. 558 (1872); Hatcher v. Cutts, 42 Ga. 616 (1871); Alfred v. McKay,
36 Ga. 440 (1867); Adams v. Adams, 36 Ga. 236 (1867); Comas v.
Reddish, 35 Ga. 236 (1866).
151. 1865-66 Ga. Laws 6. This statute was codified at GA. CODE
§§ 1865–1874 (1868), and GA. CODE §§ 1875–1884 (1873).
of this act is humane, just and wise. Humane and just towards the
unprotected minors, and wise in its intention towards the public, in
protecting it against youthful idlers and vagabonds, guaranteeing that
some useful trade or occupation shall be taught the needy young.” Id.;
see also Comas, 35 Ga. at 237 (“The spirit of this act is wise, just, and hu-
mane . . . .”).
153. In the first of these cases, decided a year after ratification of the
Thirteenth Amendment, the Court said:
The [apprentice statute] comprehends, alike, the white and black,
without discrimination. It is, moreover, clear and perspicuous, and
should be enforced in good faith; and under color of its provi-
sions, public functionaries should be vigilant in preventing any
one, under the name of master, from getting the control of the
labor and services of such minor apprentice, as if he were still a
slave. It should be borne always in mind, and at all times should regulate
the conduct of the white man, that slavery is with the days beyond the
flood; that it is prohibited by the Constitution of the State of Georgia, and
by that paramount authority, the Constitution of the United States; and
that its continuance will not by any honest public functionary be tolerated,
under the forms of law or otherwise, directly or indirectly.
Comas, 35 Ga. at 237-38 (emphasis added).
154. There are important differences between civil contempt and criminal contempt. Civil contempt is remedial and designed to compel obedience to an order of a court. A person imprisoned for civil contempt is entitled to release as soon as the court is obeyed. Criminal contempt is punitive and its purpose is to punish disobedience to a court order. Persons imprisoned for criminal contempt are usually sentenced to a fixed term for their contempt. See generally Davis v. Davis, 138 Ga. 6, 11-12, 74 S.E. 830, 832 (1912); Hancock v. Kennedy, 22 Ga. App. 144, 144, 95 S.E. 735, 735 (1918).


156. See, e.g., Grimes, 219 Ga. at 676, 135 S.E.2d at 282; Tolleson, 83 Ga. at 504, 10 S.E. 120 at 121.


158. See, e.g., Crosby, 8 Ga. App. at 664, 69 S.E. at 582.

159. See, e.g., Foster v. Withrow, 201 Ga. 260, 39 S.E.2d 466 (1946); Rhodes v. Pearce, 189 Ga. 623, 7 S.E.2d 251 (1940); Young v. Fain, 121 Ga. 737, 49 S.E. 731 (1905).


162. See Wood v. Wood, 84 Ga. 102, 106, 10 S.E. 501, 501 (1889) ("Since the abolition of imprisonment for debt by the constitutions of 1868 and 1877 . . . ")

163. See, e.g., GA. CODE § 107-203 (1933).

164. Id.

165. See, e.g., Coleman, 154 Ga. at 853, 115 S.E. at 641; Nash v. Mangum, 141 Ga. 648, 649, 81 S.E. 883, 884 (1914); Harper v. Terry, 139 Ga. 763, 763, 78 S.E. 175, 175 (1913); Bass v. Hightower, 94 Ga. 602, 602, 21 S.E. 592, 592 (1894); State ex rel. Lynch v. Bridges, 64 Ga. 146, 155 (1879); Perry, 62 Ga. at 601-02; Harris v. Bridges, 57 Ga. 407, 407 (1876). In one of these cases, Perry v. McLendon, a 65-year old widow and her 18-year old daughter-in-law, co-defendants in a bail trover action, were jailed for a year and a half.

166. See, e.g., Harris, 57 Ga. at 408.
167. Id.

168. 1878-79 Ga. Laws 144. An 1893 act made decisions under the 1878 act appealable to the Georgia Supreme Court via a writ of error. 1893 Ga. Laws 50. Both statutes were codified in the 1895, 1910, and 1933 Georgia Codes; see, e.g., GA. CODE §§ 107-205, 107-206 (1933).


170. See, e.g., Terry, 139 Ga. 763, 764, 78 S.E. 175, 176 (1913).

171. See, e.g., GA. CODE § 82-204 (1933).

172. Id.


174. For a discussion of the use, across the nation, of state habeas corpus to resist interstate extradition, see Note, Extradition Habeas Corpus, 74 YALE L.J. 78 (1964); Note, Scope of a Habeas Corpus Hearing on Interstate Extradition of Criminals, 53 YALE L.J. 359 (1964). For discussion of the pre-1965 use of the state writ of habeas corpus in Georgia to resist extradition to another state, see Henry G. Neal, Interstate Criminal Extraditions, 24 GA. B.J. 219 (1964).

175. RONALD P. SOKOL, FEDERAL HABEAS CORPUS 47 (1969). Ordinaries having been statutorily prohibited from hearing extradition habeas cases since 1885, all the reported Georgia habeas cases involving extradition were instituted before either a superior court judge see, e.g., Rex v. Aldredge, 191 Ga. 638, 13 S.E.2d 665 (1941), or a city court judge, see, e.g., Mainer v. Plunkett, 216 Ga. 820, 120 S.E.2d 175 (1961).

176. "A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime." U.S. CONST. art. IV, § 2, cl. 2.

177. 18 U.S.C. § 3182 (2006). Except for a few minor alterations, this statute "remains virtually unchanged from the original version enacted in 1793." Michigan v. Doran, 439 U.S. 282, 287 n.6 (1978). Prior to 1948, the statute was codified at U.S. REV. STAT. § 5278. Essentially, the statute provides:

Whenever the executive authority of a state . . . demands any person as a fugitive from justice, of the executive authority of any State . . . to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate . . .
charging the person demanded with having committed treason, felony or other crime, certified as authentic by the governor or chief magistrate of the State from whence the person so charged has fled, the executive authority of the State . . . to which such person has fled shall cause him to be arrested and secured . . . and shall cause the fugitive to be delivered to [the] agent of the executive authority of [the demanding state].

Id.  

178. These statutes were included in every one of the Georgia Codes adopted from 1861 to 1933. See GA. CODE §§ 44-302 to -305 (1933); GA. PEN. CODE §§ 1354-1356 (1910); GA. PEN. CODE §§ 1271-1274 (1895); GA. CODE §§ 54-57 (1882); GA. CODE §§ 54-57 (1873); GA. CODE §§ 57-60 (1868); GA. CODE §§ 61-64 (1861).

In essence, these four statutes provided: (1) it was the duty of the governor, upon the demand of the executive of another state, to cause the arrest and the deliverance of any fugitive from justice, upon demand by the executive of any other state, in the manner prescribed by the laws and Constitution of the United States; (2) the governor was to suspend delivery of a fugitive from justice if the fugitive was under prosecution for violating the laws of Georgia; (3) if a fugitive from justice charged with crime in another state fled to Georgia and was arrested, it was the duty of the governor to issue a warrant for the fugitive's arrest and to direct that the fugitive be imprisoned for as long as twenty days if the governor of the other state had not yet made a formal demand for extradition; (4) when the governor issued an extradition arrest warrant, it was the duty of Georgia law enforcement officials to execute it.

179. GA. CODE § 50-118 (1933). This Code section was included in the habeas corpus chapter, article, or title of each of the Georgia Codes from 1861 to 1933; GA. PEN. CODE § 1309 (1910); GA. PEN. CODE § 1228 (1895); GA. CODE § 4025 (1882); GA. CODE § 4025 (1873); GA. CODE § 3949 (1868); GA. CODE § 3926 (1861).


181. See, e.g., Mayfield v. Hornsby, 199 Ga. 70, 70, 33 S.E.2d 312, 312 (1945); Dawson v. Smith, 150 Ga. 352, 352, 103 S.E. 847, 848 (1920); Barranger, 103 Ga. at 473, 30 S.E. at 528.

182. See, e.g., Blackwell v. Jennings, 128 Ga. 264, 264, 57 S.E. 484, 484 (1907); Barranger, 103 Ga. at 465, 473, 30 S.E. at 525, 528.


187. 188 U.S. 691, 711 (1903).

188. Dawson, 150 Ga. at 352-53, 103 S.E. at 848.

189. Deering v. Mount, 194 Ga. 833, 840-41, 22 S.E.2d 828, 832 (1942); see also Denny v. Foster, 204 Ga. 872, 873-74, 52 S.E.2d 596, 597 (1949) (affidavit sworn to in demanding state before notary public was insufficient to authorize extradition). Deering relied on Compton v. Alabama, 214 U.S. 1 (1909), where the United States Supreme Court held that the federal extradition statute does not require a governor to issue an extradition arrest warrant, unless the demanding state shows that the person to be extradited has been charged with crime in the demanding state by either an affidavit before a magistrate or by an indictment. Deering, 194 Ga. at 838, 22 S.E.2d at 828.

190. See supra note 56 and accompanying text.

191. In 1955, the Georgia legislature amended the Uniform Extradition Act. 1955 Ga. Laws 587. The 1955 statute also repealed GA. CODE § 44-303 (1933), under which the governor was to suspend delivery of a fugitive from justice if the fugitive was under prosecution for violating the laws of Georgia. The repealed statute, § 44-303, was the second of the four state extradition statutes which had appeared in consecutive order in every Georgia Code from 1861 to 1933; see supra note 178 and accompanying text.

192. Where the federal extradition statute is basically a system of "executive demand and executive surrender," Note, The Uniform Criminal Extradition Act, 32 COLUM. L. REV. 1411, 1412 (1932), the Uniform Act involves the judiciary in the extradition process. Generally, the extradition machinery furnished by the Uniform Act is broader in scope and procedurally more effective than the procedure under the federal extradition statute. For example, under the Uniform Act, but not under the federal statute, alleged fugitives may be arrested in the asylum state even though they have not yet been charged with crime in the state from which they fled and even though their extradition has not yet been demanded. Furthermore, unlike the federal statute, the Act not only permits, under certain circumstances, the extradition of
persons who were not physically present in the demanding state at the
time the crime was committed, but also specifically forbids the asylum
state from inquiring into the guilt or innocence of the person whose
extradition is sought.

Generally, the Uniform Act is the extradition procedure used in the
more than forty states which have adopted the Act, and the federal
extradition statute procedure is used in the states which have not
adopted the Act. See Henry G. Neal, Interstate Criminal Extraditions, 24

193. Id. at 224.

194. See, e.g., House, 214 Ga. at 574, 105 S.E.2d at 747 (declining to
adopt narrow interpretation of "fugitive from justice"); Williams v.
Grimes, 214 Ga. 302, 302, 104 S.E.2d 460, 460 (1958) ("Where it is
shown in a habeas corpus case that the respondent holds the petitioner
in custody under an executive warrant which is regular on its face, the
presumption is that the governor has complied with the Constitution
and law, and the burden is cast upon the petitioner to show some valid
and sufficient reason why the warrant should not be executed");
Mathews v. Foster, 209 Ga. 699, 699, 75 S.E.2d 427, 428 (1953) (courts
of this state may not inquire into guilt or innocence of person to be
extradited.).

The Court in Mathews recalled its reasoning in Blackwell.

When, in the trial of a habeas corpus case, it appears that the
respondent holds the petitioner in custody under an executive
warrant based upon an extradition proceeding, and the warrant is
regular on its face, the burden is cast upon the petitioner to show
some valid and sufficient reason why the warrant should not be
executed; the presumption is that the governor has complied with
the Constitution and the law, and this presumption continues until
the contrary appears.

Mathews, 209 Ga. at 700, 75 S.E.2d at 428-29 (quoting Blackwell, 128 Ga.
at 264, 57 S.E. at 484).

797 (1963) (the extradition warrant purports to be issued under the
federal extradition statute, not the Uniform Act; relief granted because
the documents in support of the requested extradition conclusively
show that the crime was committed in Georgia, not the demanding
state, and therefore the habeas petitioner is not a fugitive from justice
under the federal statute); Brown v. Grimes, 214 Ga. 388, 391, 104
S.E.2d 907, 909-10 (1958) (granting relief because, in violation of
federal extradition statute, there was no formal demand for the habeas
petitioner's extradition, and because the documents in support of the
extradition request show that no crime was committed); West v. Graham, 211 Ga. 662, 664-65, 87 S.E.2d 849, 850-51 (1955) (granting relief because, in violation of federal extradition statute, there was no copy of indictment or of an affidavit made before a magistrate); Jackson v. Pittard, 211 Ga. 427, 428, 86 S.E.2d 295, 296 (1955) (holding that where extradition proceeding was under federal extradition statute rather than Uniform Act, relief granted on grounds habeas petitioner was not "fugitive from justice," because it was conclusively established that he was not in demanding state at the time alleged crime was committed); McFarlin v. Shirley, 209 Ga. 794, 800, 76 S.E.2d 1 (1953) (granting relief because, in violation of federal extradition statute, there was no copy of indictment or of an affidavit made before a magistrate).

198. Id.
199. GA. CODE §§ 585-594 (1861).
204. See Wright, 5 Ga. App. at 300, 63 S.E. at 48. Imprisonment of defaulters under the "stick and dirt" system was first authorized by 1865-66 Ga. Laws 23, which amended GA. CODE § 594 (1861). The imprisonment provision was codified at GA. CODE § 658 (1868); GA. CODE § 619 (1873); GA. CODE § 619 (1882); GA. CODE § 539 (1895); GA. CODE § 660 (1910); GA. CODE § 95-420 (1933).
205. 1891 Ga. Laws 137. The chain gang punishment provision for defaulters under the "alternative road law" was codified at GA. CODE § 580 (1895); GA. CODE § 701 (1910); GA. CODE § 95-808 (1933).
207. Etheridge, 176 Ga. at 388, 168 S.E. at 25; Davis, 7 Ga. App. at 195, 66 S.E. 403.

210. GA. CODE § 50-116 (1933) (habeas relief not to be granted if "the party is in custody for contempt, and the court has not exceeded its jurisdiction in the length of the imprisonment").


212. See Reid, 207 Ga. at 29, 60 S.E.2d at 154.

213. Id.

214. Id.


219. One reason for this was a section which appeared in each of the Georgia Codes from 1861 to 1933 and prohibited habeas relief for persons "imprisoned under lawful process issued by a court of competent jurisdiction," persons imprisoned under irregular warrants which nonetheless "substantially conform[ed] to the requirements of [the] Code, or persons imprisoned under a bench warrant regular upon its face." See, e.g., GA. CODE § 50-116 (1933). Another reason was another Code section which also appeared in each of these Codes and which barred habeas relief to a person detained on criminal charges under a defective affidavit or warrant, provided there was probable cause for his detention. See, e.g., GA. CODE § 50-117 (1933).

220. Holders, 141 Ga. at 218, 80 S.E. at 715.

221. Stephens, 120 Ga. at 220, 47 S.E. at 499.

222. See, e.g., Tollison v. George, 153 Ga. 612, 617-18, 112 S.E. 896, 898 (1922) (granting relief because warrant under which the habeas petitioner was arrested was based upon an affidavit alleging acts which
did not amount to a violation of the statute under which petitioner was charged); Sell v. Turner, 138 Ga. 106, 106, 74 S.E. 783, 783 (1912) (granting relief because undisputed evidence showed that statute under which habeas petitioner was charged was inapplicable to his conduct); Hudson v. Jennings, 134 Ga. 373, 374, 67 S.E. 1037, 1037 (1910) (granting relief because of unconscionable alteration and manipulation of charges against habeas petitioner by municipal court judge); Dominick v. Bowdoin, 44 Ga. 357, 358 (1871) (holding that habeas court erred in refusing to receive pretrial pardon as evidence in habeas proceeding brought by petitioner in custody awaiting trial on the charges for which he had been pardoned).

223. See, e.g., Harris v. Whittle, 190 Ga. 850, 850, 10 S.E.2d 926, 927 (1940); Jackson v. Lowry, 170 Ga. 755, 756 154 S.E. 228, 228-29 (1930); Peebles v. Mangum, 142 Ga. at 701, 83 S.E. at 523; Holder, 141 Ga. at 218, 80 S.E. at 715.

224. See, e.g., Pennaman v. Walton, 220 Ga. 295, 298, 138 S.E.2d 571, 573 (1964); Harris v. Norris, 188 Ga. 610, 611-12, 4 S.E.2d 840, 840 (1939); Paschal, 186 Ga. at 837, 199 S.E. at 153; Manor v. Donahoo, 117 Ga. 304, 304, 43 S.E. 719, 719 (1903); see also Milton, 149 Ga. at 29-30, 98 S.E. at 608 (alleged disqualification of grand jury that indicted habeas petitioner not basis for pretrial habeas relief).

225. See, e.g., Paulk v. Sexton, 203 Ga. 82, 82, 45 S.E.2d 768, 772 (1947); Peebles, 142 Ga. at 701, 83 S.E. at 522-23.


227. See, e.g., Jenkins v. Jones, 209 Ga. 758, 764, 75 S.E.2d 815, 819 (1953) (granting relief because habeas petitioner charged in municipal court with violating void ordinance); Reid, 207 Ga. at 28, 60 S.E.2d at 153; Henderson v. Heyward, 109 Ga. 375, 381, 34 S.E. 590, 593 (1899) (granting relief because habeas petitioner was charged in municipal court with violating void ordinance).

228. A criminal defendant is convicted when he is found guilty by either the jury or (in a bench trial) by the judge, or when he pleads guilty. Thus, a conviction is a finding of guilt. A conviction must be distinguished from a sentence, which is the order or pronouncement of the court fixing the punishment to be imposed on a defendant who has been convicted.

availability of postconviction habeas relief.


231. See, e.g., Day, 172 Ga. at 475, 157 S.E. at 643 (habeas petitioner properly discharged from restraint under certain void sentences, but should have been remanded to custody of sheriff holding arrest warrants on other charges); Wells, 101 Ga. at 145, 28 S.E. 642 ("The verdict and judgment rendered in superior court when the judge of the city court was presiding affords no legal reason for detaining in custody the person against whom they were rendered; but as the record shows that the sheriff has the accused in custody, and has also in his hands the bench-warrant originally issued against him in the case, the judge did not err in refusing to discharge the accused upon the hearing of the habeas corpus").

232. See, e.g., Heard v. Gill, 204 Ga. 261, 261, 49 S.E.2d 656, 657 (1948) ("a defendant ... may, when a void sentence has been imposed, be returned before the proper court in order that a legal sentence may be imposed upon him in accordance with law"); Whittle v. Jones, 198 Ga. 545, 32 S.E.2d 94, 99 (1944) (habeas petitioner stands convicted of a crime, and if the sentence that was passed was void, "the proper procedure ... would have been to remand him to be sentenced for his crime"); Littlejohn v. Stells, 123 Ga. 427, 430, 51 S.E. 390, 391 (1905) (habeas petitioner sentenced to punishment in excess of legal maximum should be taken before convicting court for resentencing).

233. See, e.g., Day, 173 Ga. at 473, 157 S.E. at 642 (except in capital cases, ordinary had authority to grant relief to person convicted in superior court); Simmons, 117 Ga. at 308, 43 S.E. at 481 (city court judge may grant relief to person convicted in a superior court); McBride, 16 Ga. App. at 242-43, 85 S.E. at 88 (city court judge properly granted relief to person convicted in a superior court).

234. See Wilkes, A New Role for an Ancient Writ, supra note 2, at 336.

235. See generally id. at 336-38.

236. Id.

237. See, e.g., Plocar v. Foster, 211 Ga. 153, 153, 84 S.E.2d 360, 361 (1954) ("Where a person charged with a criminal offense has been sentenced by a court having jurisdiction of the person of the defendant and of the offense charged," habeas corpus cannot be used) (emphasis added); Clark, 185 Ga. 328, 330, 195 S.E. 166, 167 (1938) ("The general rule is that a judgment of a court having jurisdiction of the offense and
the party charged with its commission is not open to collateral attack.”) (emphasis added); Pridgeon, 154 Ga. at 399-400, 114 S.E. at 357 (“When the court has jurisdiction by law of the offense and the offender, its judgments are, in general, not nullities . . . . The general rule is that the judgment of a court having jurisdiction of the offense and the party charged with its commission is not open to collateral attack.”) (emphasis added).

238. See Wilkes, Postconviction Habeas Corpus Relief in Georgia, supra note 2, at 250-51 nn.2, 3.

239. Id. On the other hand, if a claim of lack of personal jurisdiction had been raised on direct review but decided against the defendant, it would be barred in a habeas proceeding under the res judicata doctrine. See infra note 277 and accompanying text. As a practical matter, therefore, the only way to successfully raise a claim of lack of personal jurisdiction after conviction was on direct review by appeal, certiorari, or writ of error. See, e.g., Chow Bing Kew v. United States, 248 F.2d 466, 468 (9th Cir. 1957) (on direct appeal, conviction reversed due to lack of in personam jurisdiction over the defendant); Russell v. State, 349 So. 2d 1224, 1226 (Fla. App. 1977) (same).

240. See, e.g., Mathis v. Rowland, 208 Ga. 571, 571, 67 S.E. 760, 760-61 (1951); Gibson, 204 Ga. at 717, 51 S.E.2d at 666; Clarke v. Johnson, 199 Ga. 163, 167, 33 S.E.2d 425, 428 (1945); see also Grant v. Camp, 105 Ga. 628, 631-32, 31 S.E. 429, 430 (1898) (statute conferring on convicting court jurisdiction over the offense charged was unconstitutional; habeas relief granted).

241. See, e.g., White v. Hornsby, 191 Ga. 462, 463, 12 S.E.2d 875, 876 (1941); Moore v. Wheeler, 35 S.E. 116 (1900); see also Lowry v. Herndon, 182 Ga. 582, 583, 186 S.E. 429, 430 (1936) (state criminal statute under which habeas petitioner was convicted and sentenced did not violate federal constitutional free speech and freedom of assembly protections; nor did it violate federal constitutional protections against vague criminal statutes), rev’d, Herndon v. Lowly, 301 U.S. 242, 263-64 (1937).


243. See, e.g., Giles v. Gibson, 208 Ga. 850, 852, 69 S.E.2d 774, 776 (1952); Griffin v. Smith, 184 Ga. at 871, 193 S.E. at 778; Marshall, 173 Ga. at 782, 161 S.E. at 622; Smith v. Chapman, 166 Ga. 479, 480, 143 S.E. 422, 422 (1928); Landford v. Alfriend, 147 Ga. 799, 799-800, 95 S.E. 688, 688 (1918); Snope v. Dixon, 147 Ga. 285, 286, 93 S.E. 399, 400 (1917); Mayo v. Williams, 146 Ga. 650, 652, 92 S.E. 59, 60 (1917); Duren v. Stephens, 126 Ga. 496, 497-98, 54 S.E. 1045, 1045 (1906);


249. See, e.g., Littlejohn, 123 Ga. at 630, 51 S.E. at 391 (municipal court had authority to sentence habeas petitioner to imprisonment, but not to sentence him to the chain gang); see also Balkcom v. Defore, 219 Ga. 641, 643, 135 S.E.2d 425, 427 (1964) (after habeas petitioner was convicted of a single offense, court could not impose five separate, consecutive imprisonment sentences).

250. See, e.g., Morris v. Clark, 156 Ga. 489, 489, 119 S.E. 303, 303 (1923) (indeterminate sentence statute required convicting court to sentence habeas petitioner to a term of imprisonment within the maximum and minimum limits of the punishment prescribed by law for the offense, but superior court sentenced petitioner to an indeterminate sentence of imprisonment which was within the statutory maximum but below the statutory minimum for the offense; habeas relief granted).

251. Pridgen, 154 Ga. at 400, 114 S.E. at 357.


253. See, e.g., Smith, 205 Ga. at 410-11, 54 S.E.2d at 274; Wilcoxson, 182 Ga. at 637, 15 S.E.2d at 876.

254. See Wilkes, Postconviction Habeas Corpus Relief in Georgia (Part I), supra note 2, at 349.

255. From the 1930s until the 1960s the constitutional right to counsel was commonly regarded as protected by both right to counsel provisions and by due process protections. A violation of the right to counsel was often considered a species of due process violation, and therefore a violation of the right to counsel was frequently described by courts, including the federal courts and the Georgia courts, as a due process violation. See, e.g., Powell v. Alabama, 287 U.S. 45, 71 (1932).
256. 188 Ga. 607, 4 S.E.2d 469 (1939).

257. Id. at 608, 4 S.E.2d at 469 (emphasis added). This passage was quoted approvingly one month later in Sanders v. Aldredge, 189 Ga. at 69, 5 S.E.2d at 372.

258. See Bowen v. Johnston, 306 U.S. 19, 24 (1939) ("But if it be found that the court had no jurisdiction to try the petitioner, or that in its proceedings his constitutional rights have been denied, the remedy of habeas corpus is available.").

259. Williams, 188 Ga. at 608-09, 4 S.E.2d at 469-70.

260. Id. at 470.

261. 192 Ga. 636, 15 S.E.2d 873 (1941).

262. Id. at 639, 15 S.E.2d at 877 ("The deprivation of counsel is such a fundamental and radical error that it operates to render the trial illegal and void. It follows that the charge that the applicant was denied the benefit of counsel, if meritorious, constituted a ground for issuance of the writ of habeas corpus.").

263. 304 U.S. 458 (1938).

264. Id. at 468 ("If this requirement of the Sixth Amendment is not complied with, the court no longer has jurisdiction to proceed.").

265. Wilcoxon, 192 Ga. at 639, 15 S.E.2d at 877.

266. It should be kept in mind that Johnson involved a noncapital crime, whereas Wilcoxon was a death sentence case.


268. See, e.g., Turner, 217 Ga. at 611, 123 S.E.2d at 919; Fair v. Balkcom, 216 Ga. at 727, 119 S.E.2d 695; see also Dutton v. Mims, 223 Ga. at 423-24, 156 S.E.2d at 94.

269. See, e.g., Jones v. Balkcom, 210 Ga. 262, 79 S.E.2d 1 (1953); Smith, 205 Ga. 408, 54 S.E.2d 272; Coates v. Lawrence, 193 Ga. 368, 18 S.E.2d 685 (1942); Wilcoxon, 192 Ga. 634, 19 S.E.2d 499; see also Aldredge, 188 Ga. 607, 4 S.E.2d 469.


271. Wilcoxon, 192 Ga. at 639, 15 S.E.2d at 876-77.

272. 124 Ga. 701, 52 S.E. 751 (1906).

273. Id. at 713, 52 S.E. at 757.
274. See supra notes 252-54, 270-71 and accompanying text. There was also deemed to be a waiver of rights for habeas purposes if the habeas petitioner had been convicted after entering a valid plea of guilty. See, e.g., Bradford v. Mills, 208 Ga. 198, 188, 66 S.E.2d 58, 59 (1951); Jackson v. Lowry, 171 Ga. 349, 351, 155 S.E. 466, 467 (1930).

275. See supra notes 120-29 and accompanying text.


283. See, e.g., Pridgeon, 168 Ga. at 770, 149 S.E. at 48, 49; Long v. Collier, 154 Ga. 673, 674, 115 S.E. 9, 10 (1922); Williams v. Mize, 72 Ga. 129, 130-31 (1883); Howard, 12 Ga. App. at 354, 77 S.E. at 192.

284. See, e.g., Cox v. Lanier, 133 Ga. 682, 683-84, 66 S.E. 799, 799-800 (1909). At the time the Georgia Penal Code provided that in criminal prosecutions for fornication or adultery, the prosecution and the punishment could at any time be prevented or suspended if the parties
lawfully married. *Id.*

285. *See, e.g.,* Balkcom v. Jackson, 219 Ga. 59, 61, 131 S.E.2d 551, 553 (1963); Wimbish v. Reece, 170 Ga. 64, 64-65, 132 S.E. 97, 97 (1930); Teasley v. Nelson, 164 Ga. 242, 246, 138 S.E. 72, 74 (1927); *Fortson,* 117 Ga. at 151, 43 S.E. at 492-93; see also Goble, 214 Ga. at 699, 107 S.E.2d at 177 (habeas corpus is a proper remedy where prisoner contends that he has executed the sentence or sentences imposed).

286. *See, e.g., Tatum,* 104 Ga. at 333, 30 S.E. at 813.


291. *See, e.g.,* Hampton v. Stevenson, 210 Ga. 87, 78 S.E. 32 (1953) (habeas proceeding to obtain release of minor child from detention in State Training School); Wingate v. Gornto, 147 Ga. 192, 93 S.E. 206 (1917) (habeas attack on commitment of juvenile female to Georgia Training School for Girls); Baugh v. Lovvorn, 143 Ga. 827, 85 S.E. 1027 (1915) (habeas relief granted to child committed to institution by superior court judge presiding over children's court branch of superior court; statute establishing children's court was invalid); Law v. McCord, 143 Ga. 822, 85 S.E. 1025 (1915) (same); Rooks v. Tindall, 138 Ga. 863, 76 S.E. 378 (1912) (habeas proceeding to secure discharge of delinquent child held under commitment by judge of children's court); Vandiver v. Associated Charities of August, 130 Ga. 413, 60 S.E. 999 (1908) (habeas proceeding by parent to recover custody of child whose custody had been awarded by ordinary to benevolent society); Kennedy v. Meara, 127 Ga. 68, 56 S.E. 243 (1906) (habeas proceeding by parent to regain custody of child committed to benevolent institution by a municipal recorder's court pursuant to state statute).
292. See supra note 92. This statute, last codified as GA. CODE § 50-105 (1933), was repealed in 1967. See Wilkes, From Oglethorpe to the Overthrow of the Confederacy, supra note 3, at 1048 n.128.

293. In Jones v. Hill, 17 Ga. App. 151, 87 S.E. 755 (1915), the court held that a judge denying the writ would be liable to the monetary penalty only if the judge had acted "unreasonably, oppressively, or corruptly . . . ." 17 Ga. App. at 158, 87 S.E. at 758. Ironically, the defendant judge who was sued in this case was Fulton Superior Court Judge Benjamin H. Hill, "an ardent defender of the rights of the individual," Donald E. Wilkes, Jr., "A Most Deplorable Paradox:" Admitting Illegally Obtained Evidence in Georgia–Past, Present, and Future, 11 GA. L. REV. 105, 120 (1976), who, while formerly serving for six years as the first Chief Judge of the Georgia Court of Appeals, had authored the opinion in Underwood v. State, 13 Ga. App. 206, 78 S.E. 1103 (1913), perhaps the most eloquent, most sublime, and most magnificent prose hymn in praise of constitutional rights ever written in the English language.

294. 117 Ga. 305, 43 S.E. 780 (1903).

295. Donald E. Wilkes, Jr., A Brief History of the Western Judicial Circuit, ATHENS HISTORIAN 1, 5-6 (2013).

296. 192 Ga. 634, 15 S.E.2d 873 (1941).

297. 188 Ga. 607, 4 S.E.2d 469 (1939).


299. Although the decisions in their cases measurably advanced the cause of human rights, the habeas petitioners in Wilcoxon and Aldredge v. Williams were executed. After the Georgia Supreme Court on September 13, 1939 overturned the judgment of the superior court judge granting him habeas relief, Norman Williams was put to death in the electric chair on May 15, 1942. Habeas petitioner Lewis Wilcoxon also did not prevail on a claim of ineffective counsel. On March 27, 1942, in a followup habeas proceeding, the Georgia Supreme Court, affirmed the superior court's ruling that Wilcoxon had not been denied the effective assistance of counsel at his trial. On March 26, 1943, Lewis Wilcoxon was electrocuted. WILLIAM J. BOWERS, EXECUTIONS IN AMERICA 255 (1974).
