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## CRIMINAL PROCEDURE Death Penalty Cases: Provide for Review of Pretrial Proceedings

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## CRIMINAL PROCEDURE

### *Death Penalty Cases: Provide for Review of Pretrial Proceedings*

CODE SECTIONS:	O.C.G.A. §§ 5-6-34 (amended), 5-6-38 (amended), 17-7-171 (amended), 17-10-35.1 (new), 17-10-35.2 (new), 17-10-36 (amended)
BILL NUMBER:	SB 100
ACT NUMBER:	1364
SUMMARY:	The Act provides for discretionary review by the Georgia Supreme Court of all pretrial proceedings in death penalty cases. In addition, the Act sets forth procedures to be followed in ordering and conducting such a review.
EFFECTIVE DATE:	July 1, 1988

#### *History*

Since Georgia reinstated the death penalty in 1973,<sup>1</sup> administering the penalty has proven quite difficult because defendants have raised appeals predicated on numerous errors.<sup>2</sup> In an effort to deal with this problem as efficiently as possible, SB 100 was introduced to provide state supreme court review of all pretrial proceedings in death penalty cases before a trial on the merits could begin.<sup>3</sup> The legislation was introduced previously<sup>4</sup> but failed because many legislators believed their positions on this issue would reflect their views on capital punishment generally.<sup>5</sup> How-

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1. O.C.G.A. § 17-10-30 (1982), enacted by 1973 Ga. Laws 159.

2. Many of these appeals concern rulings on pretrial motions. *See, e.g.*, *Lipham v. State*, 257 Ga. 808, 364 S.E.2d 840 (1988) (challenges to trial court's denials of the following: motion for severance; request for *pro hac vice* representation by out-of-state counsel; motion for change of venue; challenge to jury array); *Frazier v. State*, 257 Ga. 690, 362 S.E.2d 351 (1987) (challenges to trial court's denials of the following: motion for recardation of grand jury proceedings; motion to sever; request to order state not to present evidence of similar offenses to grand jury; motion to disqualify district attorney in new trial; challenge to jury array; plea in abatement; plea of misnomer; and challenge of the sufficiency of the indictment); *Isaacs v. State*, 257 Ga. 126, 355 S.E.2d 644 (1987) (challenges to trial court's denial of motions to recuse); *Curry v. State*, 255 Ga. 215, 336 S.E.2d 762 (1985) (challenge to trial court's denial of motion to suppress).

3. SB 100, as introduced, 1988 Ga. Gen. Assem.

4. Final Composite Status Sheet, Mar. 12, 1987.

5. Telephone interview with Senator Alex Crumbley, Senate District No. 17 (Apr.

ever, the legislation is based on the premise that the death penalty is the law of the state, and the bill simply reforms procedures in death penalty litigation.<sup>6</sup>

### *SB 100*

The Act provides for a hearing to determine the necessity of supreme court review of the pretrial proceedings in death penalty cases.<sup>7</sup> Procedures dealing with such reviews are outlined in two new Code sections created by the Act.<sup>8</sup> The Act also addresses the time for filing appeals<sup>9</sup> and demanding trials<sup>10</sup> in death penalty cases. Finally, the Act amends the unified review procedure used by the supreme court in death penalty cases.<sup>11</sup>

The requirement of a hearing to determine the necessity of review was not included in the original version of SB 100.<sup>12</sup> The sponsor intended immediate supreme court review of all death penalty pretrial proceedings.<sup>13</sup> Such mandatory review was opposed by district attorneys who believed that requiring review in all cases would not be efficient, as some reviews would be unwarranted.<sup>14</sup> The House Committee on Judiciary proposed a substitute that would make supreme court review discretionary rather than mandatory, but did not provide for a trial court hearing to determine whether a review was appropriate.<sup>15</sup> The final version of SB 100 requires that such a hearing be held.<sup>16</sup> If, after the hearing, the trial court finds that the delay resulting from the supreme court review will outweigh the need for review, the Act provides that no review will follow.<sup>17</sup> However, if a review is ordered, the parties and the court must follow the procedures set forth in O.C.G.A. § 17-10-35.1.<sup>18</sup> This section outlines the process by which pretrial proceedings will be forwarded to the supreme court for review.<sup>19</sup>

As introduced, the bill required the trial judge to file a report with the

18, 1988) [hereinafter Crumbley Interview].

6. *Id.*

7. O.C.G.A. § 5-6-34(c) (Supp. 1988).

8. O.C.G.A. §§ 17-10-35.1, -35.2 (Supp. 1988).

9. O.C.G.A. § 5-6-38(c) (Supp. 1988) (relating to the time of filing a notice of appeal and cross appeal).

10. O.C.G.A. § 17-7-171(c) (Supp. 1988) (relating to the time when a demand for trial is to be made by the defendant in a capital felony case).

11. O.C.G.A. § 17-10-36 (Supp. 1988).

12. SB 100, as introduced, 1988 Ga. Gen. Assem.

13. Crumbley Interview, *supra* note 5.

14. *Id.*

15. SB 100 (HCS), 1988 Ga. Gen. Assem.

16. O.C.G.A. § 17-10-35.2 (Supp. 1988).

17. *Id.*

18. *Id.*

19. O.C.G.A. § 17-10-35.1 (Supp. 1988).

clerk of the supreme court, certifying that all pretrial proceedings had concluded and the case was ready for trial.<sup>20</sup> The House Committee on Judiciary amended the bill to require that the report be filed with the clerk of the superior court and delivered to the parties.<sup>21</sup> Both provisions were included in the final version.<sup>22</sup>

Under the Act, the prosecutor and the defendant are entitled to prepare a report designating those portions of the pretrial proceedings which may constitute reversible error.<sup>23</sup> The Act provides that the reports shall be in the form of questionnaires.<sup>24</sup> The questionnaires are to be provided by the supreme court and will focus on the existence of reversible error with respect to certain issues.<sup>25</sup> These reports are to be filed with the superior court clerk and served upon the opponent within ten days after the judicial report is filed or the transcripts of the proceedings are received, whichever is later.<sup>26</sup> The report of either party may be consolidated with an application for direct appeal concerning any aspect of the case.<sup>27</sup> Although the Act makes consolidation discretionary, the original and an amended version of the bill required consolidation of any direct appeal.<sup>28</sup> Under those versions, if there was no application for direct appeal, the issues were deemed abandoned.<sup>29</sup>

Once the reports of the parties are filed, the superior court clerk must submit them to the supreme court along with the trial judge's report, a transcript of the pretrial proceedings, and any consolidated applications for appeal.<sup>30</sup> Although the original version of SB 100 did not mandate that a copy of all such materials be forwarded to the Attorney General, all subsequent versions contained such a requirement.<sup>31</sup>

Within twenty days after the case is received, the supreme court must issue an order either denying or granting review of all or part of the pre-

20. SB 100, as introduced, 1988 Ga. Gen. Assem.

21. SB 100 (HCS), 1988 Ga. Gen. Assem.

22. O.C.G.A. § 17-10-35.1(a) (Supp. 1988).

23. *Id.*

24. O.C.G.A. § 17-10-35.1(b) (Supp. 1988).

25. *Id.* The questionnaires shall be designed to elicit possible error concerning change of venue, recusal of the trial judge, challenge to the jury array, motion to suppress evidence, motion for psychiatric or other medical evaluation, and any other matter considered appropriate by the supreme court.

26. O.C.G.A. § 17-10-35.1(a) (Supp. 1988).

27. *Id.* The application is to be in the same form as required for other appeals, with three exceptions: (1) The application is to be filed with the superior court clerk rather than the supreme court clerk; (2) The opponent is neither required nor permitted to respond to the application; and (3) A certificate of immediate review is not required for the filing of the application.

28. Compare SB 100, as introduced, with SB 100 (SCA), 1988 Ga. Gen. Assem.

29. *Id.*

30. O.C.G.A. § 17-10-35.1(c) (Supp. 1988).

31. Compare SB 100, as introduced, 1988 Ga. Gen. Assem. with SB 100 (SCA), SB 100 (HCS), 1988 Ga. Gen. Assem., and O.C.G.A. § 17-10-35.1(c) (Supp. 1988).

trial proceedings.<sup>32</sup> The order shall contain a list of issues that will be reviewed; these issues can include those raised in the reports or consolidated appeals, as well as any other issues recognized by the supreme court.<sup>33</sup> If the order grants review, the court shall specify the time periods for filing briefs and reply briefs on the issues named.<sup>34</sup> Although the early versions of SB 100 gave the parties the right to be heard in oral argument, the final version allows the supreme court to exercise discretion regarding the need for oral arguments.<sup>35</sup>

In order to integrate the procedures for reviewing the pretrial proceedings in death penalty cases, the Act also amends two other Code sections.<sup>36</sup> First, O.C.G.A. § 5-6-38(c) is amended to provide that the procedures for filing a notice of appeal and cross appeal in death penalty cases are different from those for filing other appeals.<sup>37</sup> Second, O.C.G.A. § 17-7-171 is amended to require the counting of trial court terms to begin after pretrial review is completed and demand for trial is made.<sup>38</sup>

Finally, the Act amends O.C.G.A. § 17-10-36, relating to a unified review procedure in death penalty cases.<sup>39</sup> This section requires the supreme court to devise a procedure for both pretrial and post-trial appellate review.<sup>40</sup> In addition, the court is required to design a series of checklists to be used by the trial judge and the parties.<sup>41</sup>

SB 100 has two philosophical underpinnings: promotion of efficiency in court administration and protection of defendants' due process rights.<sup>42</sup> The legislation will promote efficiency by preventing a defendant from collecting pretrial error and using it as the basis for future appeals. Although such error is totally distinct from the fairness of the trial on the merits, the error may be grounds for reversal of a conviction.<sup>43</sup> Also, errors may be more common in these cases, because of the ever-changing nature of death penalty law and the fact that most trial judges handle

32. O.C.G.A. § 17-10-35.1(d) (Supp. 1988).

33. *Id.*

34. *Id.*

35. Compare SB 100, as introduced, and SB 100 (SCA), 1988 Ga. Gen. Assem. with O.C.G.A. § 17-10-35.1(d) (Supp. 1988).

36. O.C.G.A. §§ 5-6-38(c), 17-7-171(c) (Supp. 1988).

37. O.C.G.A. § 5-6-38(c) (Supp. 1988). These procedures are outlined in O.C.G.A. § 17-10-35.1 (Supp. 1988).

38. O.C.G.A. § 17-7-171(c) (Supp. 1988).

39. O.C.G.A. § 17-10-36(a), (b) (Supp. 1988).

40. *Id.*

41. *Id.*

42. Crumbley Interview, *supra* note 5.

43. *Id.*

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these cases infrequently.<sup>44</sup> Thus, affording immediate review of pretrial decisions will protect due process rights of defendants.<sup>45</sup>

*A. Ware*

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44. *Id.*

45. *Id.*