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John A. Creasy Jr.

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CIVIL PRACTICE, COURTS

Habeas Corpus: Amend Procedures for First Time Challenges to State Court Death Sentence Proceedings; General Provisions: Require Establishment of Uniform Court Rules Concerning Time Periods and Schedules

CODE SECTIONS: O.C.G.A. §§ 9-14-44, -47 (amended), -47.1 (new), -48, 15-1-9.1 (amended)

BILL NUMBER: SB 113

ACT NUMBER: 288

GEORGIA LAWS: 1995 Ga. Laws 381

SUMMARY: The Act reforms habeas corpus procedure for death penalty cases. The Act imposes time limits for both the filing of a Request for Judicial Assistance with the Council of Superior Court Judges and for the assignment of such cases to a judge. Additionally, the Act limits discovery except upon a showing of exceptional circumstances. The Act increases the number of days allowed for service of affidavits upon opposing parties. The Act places certain limitations on the availability of habeas corpus relief. Lastly, the Act requires the Council of Superior Court Judges to establish uniform court rules for scheduling habeas corpus appeals.

EFFECTIVE DATE: January 1, 1996, O.C.G.A. § 9-14-47; April 10, 1995, §§ 9-14-44, -47.1, -48, 15-1-9.1¹

History

Modern death penalty habeas corpus reform in Georgia began with the Habeas Corpus Act of 1967.² Unlike other southern states, Georgia was a leader in adopting liberalized federal standards broadening the scope of post-conviction review.³

1. The Act, except section 4, became effective upon approval by the Governor. Section 4 shall become effective on January 1, 1996.

2. 1967 Ga. Laws 835 (codified at O.C.G.A. § 9-14-40 to -52 (Supp. 1995).

3. See Donald P. Lay, *The Writ of Habeas Corpus: A Complex Procedure*

In the 1970s, rising crime rates and increased numbers of convictions and appeals resulted in a new reform movement.⁴ In advocating the adoption of the Unified Appeal Procedure (UAP), Chief Justice H.E. Nichols argued that its use “would shorten the time from the day the jury returns its verdict to the day that the sentence actually is carried out or the defendant is released or retried.”⁵ Concern for speed in adjudicating and carrying out criminal appeals was a factor in adopting the UAP.⁶

Despite this attempt at reform, public dissatisfaction with the appeals process has continued to mount.⁷ While legislative efforts focused on federal habeas corpus, Georgia judges recognized that “the general public equates the inability of

for a Simple Process, 77 MINN. L. REV. 1015, 1064 (1993).

4. Marion T. Pope, Jr., *A Study of the Unified Appeal Procedure in Georgia*, 23 GA. L. REV. 185, 186 (1988). Key academic proposals for reform of the state criminal appellate system were adopted by then Chief Justice H.E. Nichols of the Georgia Supreme Court. *Id.* at 192. The Chief Justice’s proposals eventually became Georgia’s Unified Appeal Procedure, adopted by the Georgia Supreme Court order dated August 15, 1980, and ratified by the General Assembly in 1981. *Id.* at 193-94. The order requires that the “Unified Appeal Outline of Proceedings” and the “Checklist for Unified Appeal” be followed in all Georgia cases in which the State seeks the death penalty. *Id.* at 193. In 1980, the General Assembly established the Uniform Appellate Procedure. 1980 Ga. Laws 390 (codified at O.C.G.A. § 17-10-36 (1990)).

5. Pope, *supra* note 4, at 192.

6. *See* Pope, *supra* note 4, at 193.

7. Michael Mello & Ruthann Robson, *Ariadne’s Provisions: A ‘Clue of Thread’ to the Intricacies of Procedural Default, Adequate and Independent State Grounds, and Florida’s Death Penalty*, 76 CAL. L. REV. 87, 92 n.17, 149 (1988). Perhaps the most notorious example of such dissatisfaction in Georgia occurred in 1985, when the Eleventh Circuit Court of Appeals ordered new trials for the convicted murderers of the Alday family. *Id.* at 149. This decision and other similar decisions prompted a “firestorm of criticism” of the courts, with Georgia legislators calling for reform of federal habeas corpus procedure. *Id.* A Georgia Senate resolution urged Congress to require that all appeals in death penalty cases be filed within twelve months of sentencing. *Id.* at 149 n.17. The average length of time now required to adjudicate a death penalty conviction in Georgia is nine years and five months. Ira P. Robbins, *Toward A More Just and Effective System of Review in State Death Penalty Cases*, 40 AM. U. L. REV. 296 n.96 (1990). Despite public discontent with the cost and length of time involved in death penalty appeals, the popularity of the death penalty remains high. *See* NAT’L L.J., Mar. 20, 1995, at A8 (detailing New York becoming the thirty-eighth state to enact the death penalty).

federal courts to establish finality on death verdicts with the entire court system.”⁸

With increasing pressure from the states for federal habeas corpus reform, United States Supreme Court Chief Justice William H. Rehnquist formed an Ad Hoc Committee on Federal Habeas Corpus in Capital Cases (Committee).⁹ The Committee concluded that the three problems with the federal habeas corpus system were: (1) delay and repetition; (2) lack of qualified defense counsel; and (3) costly last minute appeals.¹⁰ The Committee concluded that these problems resulted in a lack of finality for state court death sentences and undermined public confidence in the entire criminal justice system.¹¹ The Committee recommended reforms to channel capital cases through “one complete and fair course of collateral review in the state and federal system.”¹²

8. Mello & Robson, *supra* note 7, at 149 (citing MACON TEL. & NEWS, July 21, 1986, at B2 (quoting Judge Hugh Lawson, the Georgia Superior Court judge assigned to retry the Alday cases)); *see* Coleman v. State, 226 S.E.2d 911 (1976); Isaacs v. State, 226 S.E.2d 922 (1976) (affirming sentences of death for defendants Coleman, Isaacs, and Dungee); Isaacs v. State, 355 S.E.2d 644 (1977) (reversing trial court’s denial of motion to recuse judge as to all three); Coleman v. Zant, 708 F.2d 541 (11th Cir. 1983); Isaacs v. Zant, 709 F.2d 634 (11th Cir. 1983) (remanding to federal district court); Coleman v. Kemp, 778 F.2d 1487 (11th Cir. 1985); Isaacs v. Kemp, 778 F.2d 1482 (11th Cir. 1985) (granting habeas corpus review to all three); Isaacs v. State, 364 S.E.2d 567 (1988) (affirming denial of several motions by Isaacs); Isaacs v. State, 386 S.E.2d 316 (1989) (affirming death penalty of Isaacs upon retrial).

9. Lay, *supra* note 3, at 1048.

10. Lay, *supra* note 3, at 1048-50.

11. Lay, *supra* note 3, at 1048.

12. Lay, *supra* note 3, at 1050. The federal judiciary, in response to United States Supreme Court case law, has created procedural hurdles to limit access to federal habeas corpus review. *See* Michael Mello, *Facing Death Alone: The Post-Conviction Attorney Crisis on Death Row*, 37 AM. U. L. REV. 513, 586 (1988); Lay, *supra* note 3, at 1018. However, the blame placed on federal habeas corpus procedures for delay in death penalty executions may be unfounded. Pope, *supra* note 4, at 205-06. A study by the Georgia Supreme Court of post-UAP death penalty habeas corpus appeals found that while Georgia judges and prosecutors attribute delay in death penalty adjudication to the federal appeals process, there was only one case of a Georgia defendant being granted federal relief after state habeas corpus appeals. Pope, *supra* note 4, at 205-06. However, Judge Marion T. Pope of the Georgia Court of Appeals concluded in a recent report that the UAP has been a “limited success” and that “[b]ased upon

The question of death penalty habeas corpus reform was also studied by the American Bar Association Task Force on Death Penalty Habeas Corpus (Task Force) in 1989.¹³ The Task Force considered various areas of death penalty habeas corpus, including "delay, time limitations, successive petitions, and abuse of the writ."¹⁴ The Task Force specifically considered the questions of whether there should be a "statute of limitations for state and/or federal post-conviction petitions in death penalty cases" and whether standards should be the same for "same claim" successive petitions and "new claim" successive petitions.¹⁵ The ABA Task Force Report concluded that "[a] one-year limitations period should be employed as a substitute mechanism to move the case toward reasonably prompt completion" and that different standards of review were appropriate for initial post-conviction petitions and later petitions for the same claim.¹⁶

Several bills designed to reform death penalty habeas corpus procedure in Georgia were introduced in the 1995 legislative session.¹⁷

SB 80

Governor Zell Miller's 1995 legislative package included a death penalty habeas corpus reform bill, SB 80.¹⁸ This bill did

the data compiled . . . , the UAP is losing ground in reducing the time span" of death penalty adjudication in Georgia. Pope, *supra* note 4, at 217-18.

13. Robbins, *supra* note 7. The Report of the Task Force was presented to the governing Council of the ABA's Criminal Justice Section in November 1989, and adopted by the ABA House of Delegates in February 1990. Robbins, *supra* note 7.

14. Robbins, *supra* note 7, at 5.

15. Robbins, *supra* note 7, at 7.

16. Robbins, *supra* note 7, at 11. Regarding the length of death penalty habeas corpus appeals, however, the ABA Report concluded that:

If this analysis is correct . . . the current average of about six years and five months from sentence to execution is not that far off an "optimal" time line. Thus any idea that these can be completed adequately in two, three, or even four years, given the current remedies that are available to the inmate, is not realistic.

Robbins, *supra* note 7, at 47-48.

17. See, e.g., SB 80, as introduced, 1995 Ga. Gen. Assem. (the Governor's bill); SB 102, as introduced, 1995 Ga. Gen. Assem. (the Attorney General's bill); SB 113, as introduced, 1995 Ga. Gen. Assem. (the Lt. Governor's bill).

18. SB 80, as introduced, 1995 Ga. Gen. Assem.; Interview with Jack

not include any time schedules, but attempted to speed death penalty habeas corpus appeals by requiring that “all post-conviction remedies must be pursued in . . . [a new] unified review procedure” and “that remedies not so pursued shall be deemed waived.”¹⁹ SB 80 was opposed by the Georgia Defense Lawyer’s Association.²⁰ SB 80 was rejected by the Senate, but a variant of its name (Death Penalty Appeal and Habeas Corpus Reform Act) and its statement of findings by the General Assembly are included in the Act.²¹

SB 102

Attorney General Michael Bowers also drafted a death penalty habeas corpus reform bill, SB 102.²² SB 102 became the primary framework for the Act.²³ SB 102, like SB 113 as introduced,

Martin, Esq., President of the Georgia Association of Criminal Defense Lawyers (Apr. 5, 1995) [hereinafter Martin Interview].

19. SB 80, as introduced, 1995 Ga. Gen. Assem.

20. Martin Interview, *supra* note 18. The bill, they argued, would not speed death penalty habeas corpus appeals but would merely force issues to be heard on federal habeas corpus rather than state habeas corpus, causing “the state courts [to] lose total control over the resolution of key issues in death cases.” Georgia Defense Lawyer’s Association, Facts About Senate Bill 80 (undated) (available in Georgia State University College of Law Library). Specifically, SB 80:

[did] not provide any means to litigate the issues most often raised in a state habeas corpus action in a capital case, specifically (1) whether the defendant received constitutionally effective assistance of counsel and (2) whether the prosecution disclosed to the defense in a timely fashion all information and evidence known to it which would be favorable to the defendant on the issues of guilt or sentence under *Brady v. Maryland*.

Georgia Defense Lawyer’s Association, Facts Regarding Current Unified Appeal Procedure in Death Penalty Cases and Changes Proposed by SB 80 (undated) (available in Georgia State University College of Law Library). The Defense Lawyers Association argued that these issues cannot be litigated before exhaustion of all direct appeals because a defendant’s lawyer cannot argue his own ineffectiveness and because the Open Records Act does not apply until after direct appeals are completed. *Id.*; Martin Interview, *supra* note 18.

21. Compare SB 80, as introduced, 1995 Ga. Gen. Assem. with SB 113, as passed, 1995 Ga. Gen. Assem.

22. SB 102, as introduced, 1995 Ga. Gen. Assem.; Martin Interview, *supra* note 18; Telephone Interview with Mary Beth Westmoreland, Assistant Attorney General of Georgia (Mar. 30, 1995) [hereinafter Westmoreland Interview].

23. Westmoreland Interview, *supra* note 22.

proposed time limits on various phases of habeas corpus appeals.²⁴ Like the Act, SB 102 would have required a hearing within ninety days of filing a petition for a writ of habeas corpus.²⁵ However, the bill imposed a detailed time schedule for the habeas corpus review procedure.²⁶ While the detailed time schedule was rejected by the House Judiciary Committee as too arbitrary, it was the source of the Act's requirement that the Council of Superior Court Judges issue a schedule of procedural deadlines.²⁷ SB 102 also suggested a ninety-day deadline for issuance of the court's order.²⁸ Again, this deadline was rejected in the Act.²⁹

SB 113

Lieutenant Governor Pierre Howard introduced SB 113.³⁰ The Act, however, bears little resemblance to the original SB 113.³¹ As introduced, SB 113 did not deal specifically with death penalty habeas corpus appeals, but rather attempted to reform all habeas corpus appeals by requiring courts to complete all hearings on habeas corpus petitions within six months of the

24. SB 102, as introduced, 1995 Ga. Gen. Assem.

25. *Id.*

26. *See id.* SB 102 imposed the following timetable: ten days from date of filing for the case to be assigned to a judge or for a request for judicial assistance to be filed by the chief judge of the circuit; twelve days from filing and docketing for respondent to file an answer or motion to dismiss; thirty days from filing and docketing for petitioner to file any amendments to the petition; forty days from filing, or ten days from the filing of any amendments, whichever is later, for respondent to file any necessary motions (petitioner to file all additional motions at time of filing of any amendments); thirty days from filing of any motion for the court to rule on that motion; and ninety days from filing for the court to conduct any necessary hearings on the petition. *Id.*

27. Martin Interview, *supra* note 18; compare SB 102, as introduced, 1995 Ga. Gen. Assem. with O.C.G.A. § 9-14-47.1(c) (Supp. 1995). The language of the Act tracks nearly verbatim that of SB 102.

28. SB 102, as introduced, 1995 Ga. Gen. Assem.

29. *See* O.C.G.A. § 9-14-47.1 (Supp. 1995).

30. Martin Interview, *supra* note 18.

31. Compare SB 113, as introduced, 1995 Ga. Gen. Assem. with SB 113, as passed, 1995 Ga. Gen. Assem.

filing of the petition.³² The bill also required a decision within ninety days of the hearing.³³

The Georgia Appellate Practice and Educational Resource Center (Resource Center), which represents defendants in state death penalty habeas corpus appeals, opposed these deadlines as “unreasonable and totally artificial.”³⁴ Thomas H. Dunn, Director of the Resource Center, wrote in a letter to Senator Mary Margaret Oliver, Chair of the Senate Judiciary Committee, that Georgia Assistant Attorney General Mary Beth Westmoreland had identified the “four main causes of delay in the state habeas corpus process: 1) delays in getting judges assigned; 2) filing of amendments on the day of an evidentiary hearing; 3) problems in getting hearing dates set; and 4) delays in judges not issuing final orders.”³⁵ He asserted that

Senate Bill 113 ignores that fact that the delays are directly attributable to the judiciary and that there may be reasons for these delays which this legislation does not address and can not address The General Assembly should present these questions to the Georgia Supreme Court for further study³⁶

Similarly, the State Bar of Georgia issued a resolution requesting further study of the habeas corpus bill because of its potentially adverse effects on the delivery of legal services, particularly in the Flint Judicial Circuit where most habeas corpus cases are heard.³⁷

Finally, the Georgia Supreme Court, the Council of Superior Court Judges (Council), the Governor’s Office, and the Attorney General’s Office worked together to produce a compromise bill which would become the Act.³⁸

32. SB 113, as introduced, 1995 Ga. Gen. Assem.

33. *Id.*

34. Memorandum of Thomas H. Dunn, Executive Director of Georgia Resource Center, to Tom Boller, State Bar of Georgia (Mar. 8, 1995) (available in Georgia State University College of Law Library).

35. Letter from Thomas H. Dunn to Sen. Mary Margaret Oliver, Senate District No. 42, at 1 (Feb. 8, 1995) (available in Georgia State University College of Law Library).

36. *Id.* at 5.

37. State Bar of Georgia, Resolution (undated) (available in Georgia State University College of Law Library).

38. Telephone Interview with Mike Mears, Acting Director of the Georgia

Purpose

According to Senator Sonny Perdue, sponsor of SB 113, the purpose and intent of the Act is to “prevent the waste of limited resources and . . . eliminate unnecessary delays” in death penalty habeas corpus appeals.³⁹ This purpose statement, as well as the Act’s title, was taken nearly verbatim from SB 80, the Governor’s bill.⁴⁰

Waiver of Previously Raised Issues

The Act amends Code section 9-14-44, requiring petitioners to “state with specificity which claims were raised at trial or on direct appeal.”⁴¹ This requirement accords with current Georgia law, providing that no issues dealt with at trial or on direct appeal shall be raised in a state habeas corpus proceeding.⁴² The Act also requires petitioners to “state which claims were

Indigent Defense Counsel (Mar. 30, 1995) [hereinafter Mears Interview]; Martin Interview, *supra* note 18; Telephone Interview with Molly Perry, Executive Director, Georgia Council of Superior Court Judges (Mar. 30, 1995) [hereinafter Perry Interview]. By this time, Speaker of the House Thomas B. Murphy, House District No. 18, had also stated his position: the current bill was a bad idea. Martin Interview, *supra* note 18.

39. *Lawmakers '95* (GPTV broadcast, Feb. 7, 1995) (remarks by Sen. Sonny Perdue, Senate District No. 18) (videotape available in Georgia State University College of Law Library).

40. *Compare* 1995 Ga. Laws 381 with SB 80, as introduced, 1995 Ga. Gen. Assem. Section 1 of SB 113 changes only the name of the Act from “Death Penalty Appeal and Habeas Corpus Reform Act of 1995,” found in SB 80, to “Death Penalty Habeas Corpus Reform Act of 1995.” Section 2(1) substantially recites SB 80’s section 2(1), providing that defendants are afforded sufficient opportunities to assert their constitutional rights via “automatic direct appeal, sentence review procedures, and the writ of habeas corpus.” 1995 Ga. Laws 381. SB 80’s section 2(2), condemning “[t]he use of the writ of habeas corpus in state courts by defendants [facing the death penalty],” was rejected in SB 113. *Compare* 1995 Ga. Laws 381 with SB 80, as introduced, 1995 Ga. Gen. Assem. SB 113’s section 2(2) substantially recites SB 80’s section 2(3), admonishing defendants who would use the writ of habeas corpus solely as a means of delay. *Compare* 1995 Ga. Laws 381 with SB 80, as introduced, 1995 Ga. Gen. Assem.

41. O.C.G.A. § 9-14-44 (Supp. 1995). This language was taken verbatim from proposed SB 102 (the Attorney General’s bill) sponsored by Sen. Edwin A. Gochenour, Senate District No. 27. *Compare* SB 102, as introduced, 1995 Ga. Gen. Assem. with O.C.G.A. § 9-14-44 (Supp. 1995).

42. *See* Gibson v. Ricketts, 260 S.E.2d 877, 878 (Ga.), *cert. denied*, 445 U.S. 920 (1980).

previously raised” in earlier habeas corpus proceedings.⁴³ Again, this accords with existing law that bars petitioners from raising the same issues in subsequent state habeas corpus proceedings.⁴⁴ The Act also amends Code section 9-14-44 to allow for submission of a brief in support of a petition for a writ of habeas corpus.⁴⁵

Deadlines for Initial Habeas Corpus Filing and Response

Section 4 of the Act, taken from SB 102,⁴⁶ amends Code section 9-14-47.⁴⁷ This provision excepts initial death penalty habeas corpus cases from the twenty-day deadline for filing responsive pleadings.⁴⁸ Procedural deadlines for first-time habeas corpus proceedings in death penalty cases are to be established by the Council under new Code section 9-14-47.1(c).⁴⁹

As introduced, SB 113 imposed a six-month deadline for completion of hearings on habeas corpus petitions.⁵⁰ However, this provision was rejected by the House Judiciary Committee as arbitrary.⁵¹

Time Limitations in Death Penalty Habeas Corpus Proceedings

The Act creates Code section 9-14-47.1, which applies to habeas corpus petitions “challenging for the first time state court proceedings resulting in a death sentence.”⁵² Subsection (b) adopts the SB 102 provision requiring that these petitions be addressed within ten days of filing.⁵³ The Act departs from SB

43. O.C.G.A. § 9-14-44 (Supp. 1995).

44. *Gibson*, 260 S.E.2d at 878.

45. O.C.G.A. § 9-14-44 (Supp. 1995). Argument and citation of authority, however, continue to be prohibited from inclusion in the petition itself. *Id.*

46. *Compare id.* § 9-14-47 with SB 102, as introduced, 1995 Ga. Gen. Assem.

47. O.C.G.A. § 9-14-47 (Supp. 1995).

48. *Id.*

49. *Id.* § 9-14-47.1(c).

50. SB 113, as introduced, 1995 Ga. Gen. Assem.

51. Martin Interview, *supra* note 18; *compare* SB 113 (SCS), 1995 Ga. Gen. Assem. with O.C.G.A. § 9-14-47.1(c) (Supp. 1995).

52. O.C.G.A. § 9-14-47.1(a) (Supp. 1995). This section generally follows the framework of SB 102. *Compare id.* § 9-14-47.1 with SB 102, as introduced, 1995 Ga. Gen. Assem.

53. *Compare* SB 102, as introduced, 1995 Ga. Gen. Assem. with O.C.G.A.

102 by requiring the clerk of the superior court in the county where the petition is filed to give written notice of the filing to the Council.⁵⁴ This notice will serve as a request for judicial assistance under Code section 15-1-9.1(b)(3).⁵⁵ The Act rejected the SB 102 proposal which would have given the chief judge of the circuit in which the petition is filed the authority to “either make a request for judicial assistance . . . or . . . enter an order assigning the case to a judge of that circuit.”⁵⁶ Thus, the Act removed the discretionary authority of the chief judge to decide who will hear the case and imposes a ten-day deadline for the filing of notice with the Council.⁵⁷

The Act also requires that the president of the Council assign the case to a judge of a circuit other than the circuit in which the conviction and sentence were imposed within thirty days of receipt of the notice.⁵⁸ The Act thus creates a deadline of forty days for the case to be assigned to a judge and rejects the original SB 113 proposal under which the case would either be referred to the Council or assigned to a judge of the same circuit in which the conviction and sentence were imposed.⁵⁹

Subsection (c) of Code section 9-14-47.1 requires the Council to promulgate uniform court rules establishing time periods and schedules for initial death penalty habeas corpus petitions filed after January 1, 1996.⁶⁰ The Council is required to establish time limits for filing responsive pleadings, petitioner’s amendments, and motions by either party; the Council must also establish the conduct and scheduling of evidentiary hearings and deadlines for issuance of the final order.⁶¹

§ 9-14-47.1 (Supp. 1995).

54. O.C.G.A. § 9-14-47.1(b) (Supp. 1995).

55. *Id.*

56. *Compare* SB 102, as introduced, 1995 Ga. Gen. Assem. *with* O.C.G.A. § 9-14-47.1(b) (Supp. 1995).

57. Perry Interview, *supra* note 38.

58. O.C.G.A. § 9-14-47.1(b) (Supp. 1995).

59. *Compare* SB 113, as introduced, 1995 Ga. Gen. Assem. *with* O.C.G.A. § 9-14-47.1(b) (Supp. 1995).

60. O.C.G.A. § 9-14-47.1(c) (Supp. 1995).

61. *Id.* The Act tracked the framework of proposed SB 102, but rejected its proposed deadlines. *Compare id. with* SB 102, as proposed, 1995 Ga. Gen. Assem.

Finally, this section of the Act provides for subsequent state death penalty habeas corpus petitions.⁶² Adopting verbatim the language of proposed SB 102, the Act provides that defendants “shall not be entitled to invoke any of the provisions set forth in this Code section to delay the proceedings.”⁶³ The Act provides that the same deadlines adopted for initial proceedings shall be imposed upon any subsequent state death habeas corpus appeal.⁶⁴

Discovery, Pleading, and Affidavits

The Act restricts discovery to “depositions, oral testimony, sworn affidavits, or other evidence . . . except upon leave of court and a showing of exceptional circumstances.”⁶⁵ This provision was included to relieve the Attorney General of the burden of having to respond to excessive discovery characteristic of pro se defendants.⁶⁶ The Act also requires affidavits to include the name and telephone number of the affiant.⁶⁷ This provision is likewise intended to reduce harassment via discovery and was adopted wholesale from the Attorney General’s bill, SB 102, adding only the qualifier “if known” to the telephone number requirement.⁶⁸

Subsection (c) also provides that affidavits, to be admissible, must be served upon the opposing party at least ten days before a hearing.⁶⁹ The statute previously required that affidavits be served at least five days prior to the hearing.⁷⁰ The Attorney General’s Office requested this change in SB 102, and the language was adopted by SB 113.⁷¹ The previous deadline provided insufficient time for such affidavits, as twenty to forty such affidavits are typically filed at once.⁷²

62. O.C.G.A. § 9-14-47.1(d) (Supp. 1995).

63. Compare *id.* with SB 102, as introduced, 1995 Ga. Gen. Assem.

64. O.C.G.A. § 9-14-47.1(d) (Supp. 1995).

65. *Id.* § 9-14-48(a).

66. Martin Interview, *supra* note 18.

67. O.C.G.A. § 9-14-48(c) (Supp. 1995).

68. Westmoreland Interview, *supra* note 22; compare O.C.G.A. § 9-14-48(c) (Supp. 1995) with SB 102, as introduced, 1995 Ga. Gen. Assem.

69. O.C.G.A. § 9-14-48(c) (Supp. 1995).

70. 1975 Ga. Laws 1144, § 2, at 1145 (formerly found at O.C.G.A. § 9-14-48(c) (1993)).

71. Westmoreland Interview, *supra* note 22.

72. Westmoreland Interview, *supra* note 22.

The Act also requires that defendants retaining different counsel after trial must have raised ineffective assistance of counsel on direct appeal.⁷³ Failure to have raised the claim on appeal shall warrant denial of the writ of habeas corpus.⁷⁴

Other Provisions

The Act amends subsection (b) of Code section 15-1-9.1.⁷⁵ The changes harmonize the section with new Code section 9-14-47.1. The chief judge of the circuit in which the petition is filed no longer has authority to file for judicial assistance with the Council.⁷⁶ Instead, the Act imposes a duty upon the clerk of the court to file the request.⁷⁷ The Act repeats the mandate of Code section 9-14-47.1(b), requiring the Council president to assign the case within thirty days to a judge of a circuit other than that in which the conviction and sentence were imposed.⁷⁸

Code section 15-1-9.1 is amended to provide for the request and assignment to judges of subsequent death penalty habeas corpus petitions.⁷⁹ This measure also conforms existing law to the language of new Code section 9-14-47.1(d).⁸⁰ The Act, however, combines provisions of Code section 9-14-47.1(d) and previous Code section 15-1-9.1, as applied to subsequent death penalty habeas corpus petitions.⁸¹ In this provision, as in the former Code section 15-1-9.1, the chief judge retains discretionary authority to request judicial assistance from the Council.⁸² The request must be accompanied by certification that "the business of the court will be impaired unless assistance is obtained."⁸³ The Act's mandatory time limits begin when the chief judge requests assistance.⁸⁴ Further, the requirement that the Council

73. O.C.G.A. § 9-14-48(d) (Supp. 1995).

74. *Id.*

75. *Id.* § 15-1-9.1(b)(3), (4).

76. *See id.* § 15-1-9.1(b)(3).

77. *Id.*

78. *Compare id.* § 9-14-47.1(b) *with id.* § 15-1-9.1(b)(3).

79. *Id.* § 15-1-9.1(b)(4).

80. *Compare id.* § 9-14-47.1(d) *with id.* § 15-1-9.1(4).

81. *Compare id.* § 15-1-9.1(b)(4) *with* 1988 Ga. Laws 1958 (formerly found at O.C.G.A. § 15-1-9.1(b)(3) (1994)).

82. *Compare* O.C.G.A. § 15-1-9.1(b)(3) (Supp. 1995) *with* 1988 Ga. Laws 1958 (formerly found at O.C.G.A. § 15-1-9.1(b)(3) (1994)).

83. O.C.G.A. § 15-1-9.1(b)(4) (Supp. 1995).

84. *Id.*

president assign the case to a judge of a circuit other than the one in which the conviction and sentence were imposed also applies when assistance is requested.⁸⁵

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85. *Id.* § 15-1-9.1(b)(3).