Has Habeas Corpus Been Suspended in Georgia? Representing Indigent Prisoners on Georgia's Death Row

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HAS HABEAS CORPUS BEEN SUSPENDED IN GEORGIA? REPRESENTING INDIGENT PRISONERS ON GEORGIA’S DEATH ROW

INTRODUCTION

The writ of habeas corpus, also known as the “great writ,” has traditionally been used by prison inmates to challenge the constitutionality or legality of their imprisonment. The writ exists as part of the federal code and in some form in state codes, as well as constitutions and judicial tradition.\(^1\) Habeas corpus procedures are unusual in that a petitioner may raise federal or state constitutional claims (or both) in either federal or state court.\(^2\) Generally, prisoners must exhaust state post-conviction remedies, for either federal or state claims, in state court before federal courts will hear their petition.\(^3\) Habeas corpus proceedings are especially important in death penalty cases, both because of the finality of the penalty and because these cases seem to have higher rates of constitutional error.\(^4\)

In August 1999, lawyers from around Georgia attended the State Capital Cases Symposium in which the state attorney general and members of the criminal defense bar agreed that the time is ripe to lobby the Georgia General Assembly for increased funding for death penalty cases on both sides.\(^5\) As Attorney General Thurbert Baker said, “[w]hen all the pieces are funded and working well, the administration of justice is better.”\(^6\) Although the conference concerned funding at trial

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6. Id.
and appellate levels, this approach should also be taken with respect to funding habeas corpus in Georgia. Baker's idea that better funding produces more efficient and effective justice is not a new one, but it does produce some difficult questions for politicians. Because prisoners in Georgia currently have no right to counsel at a habeas corpus proceeding, lobbying the General Assembly to fund habeas corpus representation will be an uphill battle for the defense bar.7

This Note arises out of the context of the goals expressed at that meeting and in light of recent Georgia Supreme Court cases that, in many ways, run counter to those goals. Part I of this Note describes the current state of habeas corpus law in Georgia, with a particular emphasis on the impact on indigent prisoners. Part II explains the recent changes to the federal code's habeas corpus provisions, which Congress drafted specifically to expedite and limit capital habeas proceedings. Part III compares other states' post-conviction relief systems to Georgia's, with particular emphasis on state funding. Part IV discusses why habeas proceedings are particularly important in the context of the death penalty. Finally, this Note concludes with a discussion of possible mechanisms that the Georgia General Assembly could use to provide funding for habeas corpus representation for at least indigent death row inmates.

I. GEORGIA HABEAS CORPUS STATUTORY AND COMMON LAW RULES

The Georgia Constitution provides that "[e]very person charged with an offense against the laws of this state shall have the privilege and benefit of counsel."8 Since the 1969 case of Croker v. Smith,9 the Georgia Supreme Court has interpreted this language as not encompassing a right to representation by counsel at a habeas corpus proceeding.10 The court reasoned that the constitution requires the state to provide counsel only at criminal proceedings; because habeas is a collateral, civil

8. GA. CONST. art. I, § 1, ¶ XIV.
10. See Gibson, 513 S.E.2d at 188; Croker, 169 S.E.2d at 788.
proceeding, the state is not constitutionally required to provide counsel.\textsuperscript{11}

Since 1969, when \textit{Croker} was decided, the United States Supreme Court has held that the right to counsel it initially recognized in \textit{Gideon v. Wainwright}\textsuperscript{12} and \textit{Douglas v. California}\textsuperscript{13} means that a defendant has a right to \textit{effective} assistance of counsel.\textsuperscript{14} The Georgia Supreme Court has similarly held.\textsuperscript{15} Furthermore, both the United States and Georgia Supreme Courts have recognized that prisoners must have meaningful access to the courts to exercise their constitutional right to pursue a habeas petition.\textsuperscript{16} Therefore, when Ezvavious Gibson brought his application for certificate of probable cause to appeal the habeas court’s denial of habeas relief, the Georgia defense bar was optimistic that the Georgia Supreme Court would recognize a state constitutional right to representation at habeas proceedings, at least in capital cases.\textsuperscript{17}

\textbf{A. The Majority Opinion in Gibson v. Turpin}

In 1990 a jury convicted Ezvavious Gibson of malice murder and armed robbery and sentenced him to death.\textsuperscript{18} Gibson had confessed to robbing and stabbing a grocery store owner thirty-nine times.\textsuperscript{19} The jury, however, did not hear evidence in the

\begin{itemize}
  \item \textit{See Gibson,} 513 S.E.2d at 188; \textit{Croker,} 169 S.E.2d at 788. The term \textit{habeas corpus} is from the Latin for “you have the body,” and when used alone is commonly understood to mean \textit{habeas corpus ad subjiiciendum}, although technically any writ meaning “to bring a party before a court or judge” is a habeas corpus. BLACK'S LAW DICTIONARY 703-10 (6th ed. 1990). Black's continues to define \textit{habeas corpus ad subjiiciendum} as “[a] writ directed to the person detaining another, and commanding him to produce the . . . person detained . . . to test the legality of the detention or imprisonment; not whether he is guilty or innocent.” \textit{Id} at 703. In Georgia, “[a]ny person restrained of his liberty as a result of a sentence imposed by any state court of record may seek a writ of habeas corpus to inquire into the legality of the restraint.” O.C.G.A. § 8-14-1(c) (1983 & Supp. 2000).
  \item 372 U.S. 335 (1963).
  \item 372 U.S. 355 (1963).
  \item \textit{See Gibson,} 513 S.E.2d at 191.
  \item \textit{See Bounds v. Smith,} 430 U.S. 817 (1977); \textit{Fullwood v. Sivley,} 517 S.E.2d 511 (Ga. 1999).
  \item \textit{See Gibson,} 513 S.E.2d at 187.
  \item \textit{See id.} 
\end{itemize}
sentencing phase that Gibson had an abusive childhood and was addicted to crack cocaine. The Georgia Supreme Court affirmed both the conviction and the sentence on direct appeal.

In December 1995, without counsel, Gibson filed a habeas petition “asserting ineffective assistance of counsel, prosecutorial misconduct, and other claims.” The Georgia Appellate and Educational Resource Center (“Resource Center”) assisted Gibson in preparing and filing his habeas petition and attempted to retain pro bono counsel to represent him at the hearing. The habeas court denied the habeas petition in March 1997, despite the Resource Center's failure to obtain pro bono counsel for Gibson and despite its inability to represent him directly. Gibson then filed an application for a

20. See Motion for Evidentiary Hearing and Memorandum of Law in Support Thereof at 15-25, Gibson v. Head, No. CV300-013 (S.D. Ga. filed July 12, 2000) [hereinafter Motion for Evidentiary Hearing]. An investigation by Gibson's present counsel revealed that his trial counsel might also have neglected to mention that Gibson was seventeen years old at the time of the murder, that the state might not have adequately investigated the crime scene, and that trial counsel was also serving as a Special Assistant Attorney General at the time of the trial, among other alleged instances of ineffectiveness. See id. passim.

21. See Gibson, 513 S.E.2d at 187.

22. Id.

23. The Georgia Supreme Court, the State Bar of Georgia, the Georgia Attorney General's Office, and the federal courts established the Resource Center in 1988 to provide expert assistance to pro bono counsel in post-conviction proceedings for indigent death-row inmates. See Gibson, 513 S.E.2d at 188 n.1; Davis v. Thomas, 471 S.E.2d 202, 203 n.2 (Ga. 1998). When Congress decided no longer to fund such programs nationally in 1998, the Center's staff shrank from approximately twelve lawyers to two lawyers, and its budget shrank from $1 million to $300,000. See Davis, 471 S.E.2d at 203; Motion for Evidentiary Hearing, Affidavit of M. Elizabeth Wells at 5, Gibson v. Head, No. CV300-013 (S.D. Ga. filed July 12, 2000) [hereinafter Affidavit of M. Elizabeth Wells].

24. See generally Affidavit of M. Elizabeth Wells passim, Gibson v. Head (No. CV300-013). Ms. Wells was the Resource Center attorney who assisted Mr. Gibson with his petition. Throughout her affidavit Ms. Wells explained that she tried diligently to obtain pro bono counsel and had succeeded in finding someone willing to appear on Gibson's behalf only if the habeas judge would assure that there would be enough time for this lawyer to prepare the case. See id.

25. See Gibson, 513 S.E.2d at 188. At the hearing on the habeas petition, the court denied Ms. Wells' pleas for a continuance to find pro bono counsel for Mr. Gibson. See Petition for Writ of Certiorari in the United States Supreme Court at 4, Gibson v. Turpin, 513 S.E.2d 180 (Ga. 1999) (No. 99-77) [hereinafter Petition for Cert.]. The following exchange proceeded:

The Court: Okay. Mr. Gibson, do you want to proceed?
Mr. Gibson: I don't have an attorney.
The Court: I understand that.
2000] HAS HABEAS CORPUS BEEN SUSPENDED IN GEORGIA?  609

certificate of probable cause to appeal with the state supreme court. Essentially following the reasoning of Croker that habeas is a civil, not a criminal matter, the Georgia Supreme Court denied the application on grounds that neither the federal nor the state constitution requires appointed counsel for habeas petitions. Specifically, Justice Hines wrote that "[i]t is well settled that there is no federal or state constitutional right to appointed counsel in Georgia habeas corpus proceedings."  

Mr. Gibson: I'm not waiving any rights.
The Court: I understand that. Do you have any evidence you want to put up?
Mr. Gibson: I don't know what to plead.
The Court: Huh?
Mr. Gibson: I don't know what to plead.
The Court: I am not asking you to plead anything. I'm just asking you if you have anything you want to introduce to this Court.
Mr. Gibson: But, I don't have an attorney.

Id. at 5. The exchange continued, and the court concluded, "I judge you have nothing you want to say or nothing you want to tell me. Is that correct?" Mr. Gibson replied only, "I don't have an attorney." Id. At this point the Court declared Mr. Gibson's case in chief closed and allowed the State to present its case, permitting the State to ask improper questions of Mr. Gibson's trial attorney because Mr. Gibson failed to object. See id. at 6. When it was Mr. Gibson's turn to "cross examine" the trial lawyer, the following exchange occurred:

The Court: . . .[C]an you tell me yes or no whether you want to ask him any questions or not?
Mr. Gibson: I'm not my own counsel.
The Court: I'm sorry, sir, I didn't understand you.
Mr. Gibson: I'm not my own counsel.
The Court: I understand, but do you want, do you, yourself, individually, want to ask him anything?
Mr. Gibson: I don't know.

Id. at 6-7. Furthermore, when the Resource Center attorney objected from behind the bar to the State's line of questioning at one point, the court had a Sheriff physically remove her. See id. at 7. Ultimately the court signed an order that had been written and submitted ex parte by the State. See id. at 7.

26. See Gibson, 513 S.E.2d at 187. After the habeas proceeding, attorneys Joseph Bankoff and Courtland Reichman of King & Spalding in Atlanta represented Mr. Gibson pro bono before the Georgia Supreme Court and filed a petition for certiorari in the U.S. Supreme Court on July 8, 1999. See Petition for Cert. at 8, 30, Gibson v. Turpin (No. 99-77). The U.S. Supreme Court denied certiorari without comment on October 12, 1999. See Legal Briefs, FULTON COUNTY DAILY REP., Oct. 14, 1999, at 8. Since then, Messrs. Reichman and Bankoff, along with counsel at the Resource Center, filed a federal habeas petition in July 2000 in the Southern District of Georgia along with a motion for evidentiary hearing. See Motion for Evidentiary Hearing at 1, Gibson v. Head (No. CV990-013).

27. See Gibson, 513 S.E.2d at 188-89 (citing Mackey v. United States, 401 U.S. 667, 682-83 (1971)).

28. Id. at 188 (emphasis added) (citing Murray v. Giarratano, 492 U.S. 1, 11-12 (1989),
The matter is not well settled, however, in the U.S. Supreme Court. For example, in *Pennsylvania v. Finley*, the Court stated in dicta that "[w]e have never held that prisoners have a constitutional right to counsel when mounting collateral attacks upon their convictions . . . ." The question before the Court concerned only the proper procedure for an indigent prisoner's appointed lawyer to follow if the post-conviction claims are frivolous. In addition, the Court in *Murray v. Giarratano* held that *Finley* should apply to capital as well as noncapital, post-conviction petitions. Justice Kennedy's deciding concurrence, however, limited the holding narrowly to the facts, particularly the fact that the state had a system of representation in place for indigent prisoners.

The Georgia Supreme Court rejected Gibson's argument that he was constitutionally entitled to state-funded counsel for his habeas petition because requiring a defendant to represent himself would deny meaningful access to the courts. The court reasoned that the U.S. Supreme Court has defined meaningful access as ensuring that inmates have a "reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts." Thus, access to a law library could be sufficient to constitute meaningful access to the

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Pennsylvania v. Finley, 481 U.S. 551, 555 (1987), and State v. Davis, 289 S.E.2d 481 (Ga. 1980), among other cases, to support this proposition. All petitioners in *Murray, Finley*, and *Davis* had attorneys—although the state did not fund all of them—at their state post-conviction proceedings. See *Murray*, 492 U.S. at 14; *Finley*, 481 U.S. at 553; *Davis*, 289 S.E.2d at 462.

29. See, e.g., *Murray*, 492 U.S. at 14-15 (Kennedy, J., concurring). Justice Kennedy's concurrence in *Murray* emphasizes that the petitioners actually had legal counsel throughout the habeas process. See id. at 14.


31. Id. at 555.

32. See id. at 554.


34. See id. at 10. ("*Finley* should apply no differently in capital cases than in noncapital cases. State collateral proceedings are not constitutionally required as an adjunct to the state criminal proceedings . . . .")

35. See id. at 14-15 ("The complexity of our jurisprudence in [capital habeas proceedings] makes it unlikely that capital defendants will be able to file successful petitions for collateral relief without the assistance of persons learned in the law . . . . [W]e can decide only the case before us . . . [and] I am not prepared to say that [Virginia's prison lawyer system] violates the Constitution.").


37. Id. at 189 (quoting Lewis v. Casey, 518 U.S. 343, 351 (1996)).
courts, as long as the state does not interfere with the judicial process. The cases upon which the court relied for this proposition assume that the state is expending resources on earlier phases of the criminal justice process, like the trial and the direct appeals. Georgia, however, spends relatively few resources during any part of the process, creating a question as to whether an indigent defendant ever has meaningful access to the courts in Georgia.

Additionally, the court rejected Gibson’s argument that he had a state constitutional right to counsel at his habeas petition because it was his first opportunity to raise an ineffective assistance of counsel claim. Gibson argued that he must have a right to effective counsel at a habeas proceeding because habeas review represented the only available means of enforcing his right to effective counsel. The court rejected this argument primarily out of fear that it would open the floodgates of a never-ending cycle of ineffective assistance of counsel claims and new habeas petitions and that it would necessarily apply to noncapital cases as well.

Finally, the court explained that most other death penalty states that recognize a right to counsel at habeas have done so through legislation, not by judicial action. Therefore, the court

39. See Gibson, 513 S.E.2d at 189.
40. See id. at 189 (citing Lewis v. Casey, 518 U.S. 343, 351 (1996), and Bounds v. Smith, 430 U.S. 817 (1977)).
41. See generally THE SPANGENBERG GROUP, COMPARATIVE ANALYSIS OF INDIGENT DEFENSE EXPENDITURES AND CASELOADS IN STATES WITH MIXED STATE & COUNTY FUNDING (1998) [hereinafter SPANGENBERG REPORT] (comparing state and county spending on indigent criminal defense in jurisdictions with similar funding mechanisms). The mechanics of funding indigent defense in Georgia are discussed in detail in Part III of this Note.
42. See Gibson, 513 S.E.2d at 191.
43. See id.
44. See id. On the other hand, Justice Hines describes the ways that other states and the federal government have handled this potential problem, mostly by prohibiting ineffective assistance claims arising out of habeas proceedings. See id. at 191 n.4.
45. See id. at 192 (listing statutes for Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Missouri, Montana, Nebraska, Nevada, New Jersey, New York, North Carolina, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, and the federal government). Mississippi is the only death penalty state whose judiciary has recognized a state constitutional right to habeas representation. See id. at 191 (citing Jackson v. State, 732 So. 2d 187, 191 (Miss. 1999)).
concluded that creating such a right is a legislative and not a judicial function.\(^{46}\)

**B. The Gibson Dissent**

The dissent, however, focused its conclusions on the premise that “death is different” and on a broader understanding of meaningful access.\(^{47}\) Justice Fletcher phrased the question as: “[W]hether meaningful access and fundamental fairness require appointment of counsel in a capital post-conviction proceeding that provides the first opportunity to raise a constitutional challenge to the conviction and sentence,”\(^{48}\) which is precisely the question left open by U.S. Supreme Court jurisprudence.\(^{49}\) He further observed that neither *Murray* nor *State v. Davis*, upon which the majority relied for the proposition that neither the state nor the federal constitution requires the state to appoint counsel in post-conviction proceedings, involved defendants who did not have counsel at their first habeas petitions.\(^{50}\)

Justice Fletcher's dissent in *Gibson* echoed his special concurrence in *Davis v. Thomas*.\(^{51}\) There, the court held that an indigent habeas petitioner was entitled to representation because he had been represented by government-funded counsel until two months before the complicated case was scheduled for hearing and because he was no longer represented after Congress eliminated funding for the legal assistance program.\(^{52}\) The court specifically limited its holding to the facts.\(^{53}\) Justice Fletcher urged the court to reconsider its prior rulings that state law provides death penalty prisoners no

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46. *See Gibson*, 513 S.E.2d at 192.
47. *Id.* at 199 (Fletcher, J., dissenting).
48. *Id.* at 196.
49. *Id.; see also Coleman v. Thompson*, 501 U.S. 722 (1991) (holding that a prisoner does not have a constitutional right to counsel on an appeal from a state habeas decision and expressly declining to decide whether a prisoner has a constitutional right to counsel at a habeas hearing when it is the first time the prisoner can bring certain claims). *See generally Murray v. Giarratano*, 492 U.S. 1 (1989); *Pennsylvania v. Finley*, 491 U.S. 551 (1987).
50. *See Gibson*, 513 S.E.2d at 196; *see also Murray*, 492 U.S. 1 (1989); *State v. Davis*, 296 S.E.2d 461 (Ga. 1980).
51. 471 S.E.2d 202 (Ga. 1996) (Fletcher, J., concurring).
52. *See id.* at 204.
53. *See id.* at 204-05.
right to representation at habeas corpus proceedings. He asserted that the right to seek habeas relief is empty without a complementary right to competent counsel, particularly in death penalty cases because “an indigent death row inmate’s first habeas challenge is an integral part of ensuring the fundamental fairness of the state’s death penalty procedures . . . .”

C. Current Georgia Habeas Rules

In 1995 the Georgia General Assembly enacted new procedures governing habeas petitions “challenging for the first time state court proceedings” in death penalty cases. The statute specifically states that a “petitioner shall not be entitled to invoke any of the [habeas] provisions . . . to delay the proceedings . . . [and] the court shall expedite the proceedings and the time limits shall not exceed those set for initial petitions.” Moreover, the statute provides for the establishment of court rules setting specific time limits and schedules for habeas petitions arising from death penalty convictions. Thus, Georgia Court Rule 44 provides that any amendments to the petition must be made and discovery completed within 120 days after filing the petition. The evidentiary hearing must be completed within 180 days after filing the petition. The court will rule on the petition within 90 days of the filing of final briefs. Failure to meet these deadlines will result in no hearing on the merits of the habeas claim, either in state or federal court, because defaulting on state post-conviction remedies essentially blocks federal review.

54. See id. at 205 (noting that this particular case did not actually present such an opportunity, making the plurality’s “rigid and technical” review of that issue unnecessary).
55. Id.
56. O.C.G.A. § 9-14-47.1(a) (Supp. 2000).
57. Id. § 9-14-47.1(d).
58. See id. § 9-14-47.1(c); see also GA. Ct. R. 44.
59. See GA. Ct. R. 44.7.
60. See GA. Ct. R. 44.9.
61. See GA. Ct. R. 44.12.
62. See 28 U.S.C. §§ 2254, 2261-68 (Supp. 1998); GA. Ct. R. 44; Gibson v. Turpin, 513 S.E.2d 186, 197 (Ga. 1999); Ide, supra note 3, at 1113; see also infra Part II.
Additionally, an unsuccessful habeas petitioner "must file a written application for a certificate of probable cause to appeal with the . . . Supreme Court within thirty days from the entry of the order denying him relief . . . [and] shall also file within the same period a notice of appeal with the clerk of the concerned superior court."63 This provision is strictly enforced; substantial compliance is not sufficient.64 The Georgia Supreme Court will not grant a certificate of probable cause to appeal to a pro se, indigent defendant who files only a notice of appeal but fails to file the application for certificate of probable cause to appeal.65 On the other hand, the statute provides that "no certificate of probable cause need be obtained by [the State] as a condition precedent to appeal."66 The State need only file a notice of appeal to stay the lower court's judgment until the Georgia Supreme Court hears the case.67

Furthermore, in order to be eligible to seek federal habeas review of the state proceedings, federal law requires a death penalty petitioner to file "within one year of the conviction becoming final, with tolling allowed if state post-conviction proceedings are pending."68 Therefore, eligibility for federal habeas review necessarily requires that state post-conviction proceedings be initiated within one year of the conviction becoming final, even if the state has no statute of limitations on filing a state habeas petition. As a result of these strict time constraints, the traditional pro bono system of post-conviction advocacy fails because lawyers are hesitant to take such cases knowing that they will have inadequate time to become familiar with both the highly technical habeas procedures and the facts and issues of the particular case.69

Additionally, Columbia University recently released a massive study of national rates of constitutional error in death

63. O.C.G.A. § 9-14-52(b) (Supp. 2000); see also Fullwood v. Sivley, 517 S.E.2d 511 (Ga. 1999). Fullwood is discussed in Part I.D., infra.
64. See Fullwood, 517 S.E.2d at 514.
65. See id.
66. O.C.G.A. § 9-14-52(c).
67. See id. The Georgia Supreme Court has held that this disparity in filing requirements presents no equal protection problems. See Fullwood, 517 S.E.2d at 517 (Benham, C.J., dissenting) (citing Reed v. Hopper, 219 S.E.2d 409 (Ga. 1975)).
69. See Gibson, 513 S.E.2d at 197 (Fletcher, J., dissenting).
penalty cases between 1973 and 1995. In addition to the astonishing national statistics on error rates, the study points out that in many states, including Georgia, post-conviction state review detects errors that were “missed” on direct review, compensating somewhat for “relatively low error-detection rates on direct appeal.”

D. The Implications of Georgia Habeas Law as Seen in Fullwood v. Sivley

The Gibson dissent implied that the majority’s decision could result in indigent prisoners’ federal and state constitutional claims never being heard on the merits because of the technical requirements in filing habeas corpus petitions. This prediction became reality in the June 1999 decision of Fullwood v. Sivley. In a four-to-three decision, the Georgia Supreme Court dismissed a pro se prisoner’s request to appeal a habeas court decision due to a technical filing error. The petitioner in Fullwood pleaded guilty to drug charges and later attempted to challenge his sentence. The habeas court never heard the merits of the petition; rather, it dismissed the petition due to improper venue.

As stated above, a prisoner must file both a “notice of direct appeal” with the Georgia Court of Appeals and an “application for certificate of probable cause to appeal” with the Georgia Supreme Court within thirty days of the habeas court’s order. Here, the petitioner sought to appeal the habeas court’s dismissal but filed only the notice of direct appeal and failed to file the application for probable cause within the statutory time limitation. The Georgia Supreme Court thus determined that

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71. Id. at 58. The study’s main findings include frightening statistics, including that sixty-eight percent of capital cases involve prejudicial error. See id. at Executive Summary.
72. See Gibson, 513 S.E.2d at 196-99.
73. 517 S.E.2d 511 (Ga. 1999).
74. See id. at 513, 517.
75. See id. at 513.
76. See id. at 517.
77. See id. at 513; see also O.C.G.A. § 9-14-52 (Supp. 2000).
78. See Fullwood, 517 S.E.2d at 513. Petitioner filed the application almost thirty days
the appellate court had no jurisdiction to hear the appeal because "strict adherence to statutorily mandated time limits has always been considered an absolute requirement to confer jurisdiction upon an appellate court." Moreover, the court held that substantial compliance was not sufficient to meet the jurisdictional requirement, despite the equitable nature of the writ.

The dissent in *Fullwood* stated that pro se petitioners should not be held to strict compliance with these procedural requirements as long as "sufficient steps are taken by the petitioner to give notice of an intention to begin the appellate process." Rather, the dissent urged that substantial compliance should be sufficient because it would meet the statute's intent to provide the court with enough information to decide whether or not to grant the appeal. To require strict compliance would, according to the dissent, amount to a suspension of the writ of habeas corpus, which would be particularly tragic in light of the fact that Georgia was the first state to "include a specific right to the [writ of habeas corpus] in its constitution."

Although *Fullwood* is a noncapital case, it has frightening implications for capital cases. The *Fullwood* court denied a pro se habeas petitioner access to an appeal of an adverse habeas determination purely on procedural grounds, without ever reaching the merits. In light of its statement in *Gibson v. Turpin* that capital and noncapital habeas petitions should be treated alike, the Georgia Supreme Court is unlikely to find differently in a capital case.

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79. *Id.* at 514.
80. *Id.* at 514-15. Recall that the State, which has scores of attorneys to represent its interests, is entitled to appeal an adverse habeas ruling directly without applying for a certificate of probable cause. *See O.C.G.A. § 9-14-52(c) (Supp. 2000).*
82. *See id.* at 518. The dissent further noted that pro se petitioners generally do not have access to "document production facilities" and therefore are unable to provide the court with very complete information even when they file the right forms. *See id.*
83. *Id.* at 517.
84. *See id.* at 514-15.
II. THE FEDERAL HABEAS CORPUS SYSTEM

The 1996 Federal Antiterrorism and Effective Death Penalty Act (AEDPA) codifies, for the first time, both procedural and substantive law governing federal habeas review, including a statute of limitations.86

A. New Federal Habeas Procedures

The AEDPA generally “requires a prisoner attacking a state conviction to file in federal court within one year . . . from the conclusion of direct review.”87 Furthermore, the AEDPA essentially precludes a petitioner from filing multiple federal habeas petitions, with a few very strict exceptions, such that commentators opine that no one will be able to file successive federal habeas petitions.88 Theoretically, this provision’s purpose is to make prisoners aggregate all claims and to prevent multiple trips through the federal system.89

Under the AEDPA, a federal court cannot grant a habeas corpus petition “with respect to any claim that was adjudicated on the merits in State court proceedings unless” the state proceeding “resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law.”90 The U.S. Supreme Court recently interpreted this language in Williams v. Taylor91 (Williams I) in a manner that is contrary to some early scholarship anticipating that the new habeas procedures would not depart significantly from what had been done in the past.92 There, the Court held that a

86. See generally Larry W. Yackle, A Primer on the New Habeas Corpus Statute, 44 BUFF. L. REV. 381 (1996) (providing a general explanation of the various incarnations of the AEDPA through almost forty years of congressional debate).
87. See id. at 387; see also 28 U.S.C. § 2254 (Supp. 1998). Yackle further notes that the AEDPA fails to define the term “direct review” leaving that open for judicial interpretation. See Yackle, supra note 86, at 387.
88. See 28 U.S.C. § 2244(a) (Supp. 1998); Yackle, supra note 86, at 391-92 (noting that the court is required to dismiss successive petitions unless a new claim is raised and it rests on a newly and retroactively recognized federal right or the factual basis could not have been discovered earlier).
89. See Yackle, supra note 86, at 392.
91. 120 S. Ct. 1495 (2000).
92. See id. See generally Yackle, supra note 86, at 383-84 ("I had expected . . . Congress to attack the conventional role of federal habeas more vigorously, installing,
Virginia death row inmate was entitled to habeas corpus relief for ineffective assistance of counsel under the AEDPA because the Virginia Supreme Court’s decision denying relief fell into the section 2254 exception. The Court explained that this section "defines two categories of cases" in which a federal court may grant habeas relief to a petitioner whose claims have been adjudicated on the merits in state court (1) when the state decision was contrary to federal law and (2) when the state court unreasonably applies federal law. Therefore, the Court explained that a federal court may not grant the habeas application just because it "concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." Prior to passage of the AEDPA, the standard for federal courts considering habeas claims that had been heard on the merits at the state level had been independent review. Thus, the AEDPA, as interpreted by the Supreme Court, represents a narrowing of the federal role in habeas corpus review.

Additionally, under the AEDPA, if a federal habeas "applicant has failed to develop the factual basis of a claim" in the state proceedings, the federal court may not hold an evidentiary hearing on that claim unless it is based on new law or facts that "could not have been previously discovered through the exercise of due diligence." In Williams v. Taylor (Williams II), the Supreme Court confirmed that this section of the AEDPA does not set a "no-fault standard" for prisoners...
seeking federal habeas review. Rather, a prisoner who makes claims that were not developed at state review did not fail to develop the claims "unless there is lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel." Thus, as long as a prisoner seeking federal habeas review is diligent in pursuing state post-conviction claims, a federal court may hold an evidentiary hearing on those claims.

B. Optional Expedited Provisions for Capital Cases

The AEDPA sets out an optional expedited process for reviewing federal death penalty habeas petitions, requiring states wishing to opt-in to the rule to provide indigent defendants with competent counsel in state post-conviction proceedings.

1. Shortened Time Frames

The AEDPA's optional capital procedure effectively cuts in half the time that a prisoner has to file a habeas petition for federal court review of the constitutionality of his or her imprisonment. Rather than one year, the petitioner has six months from completion of direct review to file a federal habeas petition, with tolling allowed for final disposition of: (1) a writ for certiorari filed in the U.S. Supreme Court; (2) state post-conviction proceedings; or (3) an additional thirty days for "good cause." As a result of this shortened deadline, many indigent prisoners will be unable to contact and "recruit an attorney ready, willing, and able" to provide representation, despite being entitled to such an attorney under federal law.

100. See id. at 1488.
101. Id.
102. See id. at 1491.
104. See id. § 2263 ("Any application under this chapter for habeas corpus relief ... must be filed in the appropriate district court not later than 180 days after final State court affirmance of the conviction and sentence on direct review ... ").
105. See id. § 2263(b).
106. Yackle, supra note 86, at 395 n.45; see also 21 U.S.C. § 2254(h) (requiring appointment of counsel in federal habeas petitions).
Similarly, the AEDPA “establishes strict timetables for federal court action on petitions filed by death row prisoners in states that have invoked the optional chapter.”107 Thus, once a petition is filed, the court must rule within four months of the reply brief being filed.108

2. Limits on the Claims Cognizable at Federal Habeas Petitions

The AEDPA’s expedited capital provisions restrict the federal court “to the consideration of claims that have previously been raised and decided on the merits in state court” with a few exceptions.109 Therefore, in a state with expedited procedures, it would seem that in a case such as Fullwood, when the state fails to hear the habeas petition’s merits because of a procedural error, the federal court might be precluded from hearing those claims because they have not been heard on the merits at the state level.110 Thus, indigent prisoners run a very real risk that their constitutional claims will never be heard on the merits in any court when a state has opted-in to these expedited procedures.

3. Automatic Stay of Execution

The optional capital procedure grants an automatic stay of execution in cases in which the state has issued an order or warrant setting the execution date and the prisoner applies for the stay.111 The expedited review, however, provides that the stay will expire upon filing the federal habeas petition, absent a “substantial showing of the denial of a Federal right.”112 Moreover, once the stay is discontinued, no federal court may

109. Yackle, supra note 86, at 396; see 28 U.S.C. 2264. The federal court may hear claims not raised before the state court when the state violates the U.S. Constitution or otherwise acts illegally, when the Supreme Court has recognized a new federal right to be retroactively applied, or when the claims involve facts that could not have been discovered in time for the state proceedings. See id.
110. See generally id, supra note 3.
112. Id. § 2262(b). The stay also expires if the prisoner fails to file the habeas petition in time, if the prisoner waives federal habeas review, or if at any point in the federal review process the petitioner is denied relief. See id.
grant an additional stay without the appeals court's approval.113 Thus, the apparent goal in providing this stay—avoiding last minute litigation before an execution date—is not met because the prisoner must still demonstrate a meritorious claim at the time the petition is filed in order to keep the stay.114 Again, this provision is directed at allowing a state to keep an execution "on schedule."115

Finally, the optional capital provisions allow the states to enact a "unitary review" procedure by which collateral claims, such as would be raised in a habeas petition, may be raised on direct appeal of the conviction.116

C. Criticisms of the AEDPA

Even though the AEDPA seems to encourage states to provide counsel for indigent prisoners at post-conviction proceedings, it really presents a lose-lose proposition for those prisoners.117 The AEDPA includes a short statute of limitations subject to complicated tolling rules and provides for expedited determinations by the already over-burdened federal courts in death penalty cases, cases which particularly require careful, painstaking review.118 This statute, ostensibly enacted to clarify and simplify federal habeas review, has been described as "extraordinarily arcane verbiage that will require considerable time and resources to sort out."119

The non-expedited procedures alone present a number of uncertainties. For example, to preserve the right to federal review of constitutional claims, a prisoner must file the federal habeas petition within one year of the conviction becoming final.120 Thus, to ensure that the federal deadline is not missed,
the prisoner must file all state post-conviction claims within one year to take advantage of the tolling allowances.\textsuperscript{121} While death penalty advocates may fear that attorneys for death row prisoners are deliberately trying to delay the executions, genuine problems of constitutional error, new forensic technologies, and limited resources to protect the rights of the (mostly indigent) death row population must be addressed within these very limited time frames.\textsuperscript{122}

Moreover, the expedited death penalty procedures present even more disturbing possibilities. As stated above, a prisoner's constitutional claims might never be heard on the merits in any court if the state insists on imposing highly technical procedural barriers to filing.\textsuperscript{123} Even though the opt-in procedures provide for state appointment of counsel for the state post-conviction proceedings, the language does not explicitly require counsel to assist with filing.\textsuperscript{124} Consequently, a prisoner on death row could be \textit{executed} without federal (or any) review of constitutional claims.\textsuperscript{125} This is literally a matter of life and death and should not be taken lightly.

\section*{III. Comparing Georgia to Other States}

Georgia is the only state in the United States that does not provide state-funded counsel for indigent defendants at state habeas proceedings in death penalty cases.\textsuperscript{126} The vast majority

\begin{footnotesize}
121. \textit{See} Gibson v. Turpin, 513 S.E.2d at 187 (Fletcher, J., dissenting); Ide, \textit{supra} note 3, at 1113; Yackle, \textit{supra} note 86, at 387.
123. \textit{See supra} Part II.B.2.
125. \textit{See} Ide, \textit{supra} note 3, at 1113.
126. \textit{See} Ringel, \textit{supra} note 5, at 2; \textit{see also} Gibson v. Turpin, 513 S.E.2d 186, 191-92 (Ga. 1999) (listing the statutory or judicial authority for appointment of indigent defense counsel in all states with the death penalty). The list in the opinion does not include Wyoming, which has recently enacted a law entitling death row inmates to representation at post-conviction proceedings. \textit{See} WYO. STAT. ANN. § 7-6-104(c)(ll) (Michie 1999); \textit{see also} Stephen B. Bright, \textit{Neither Equal nor Just: The Rationing and Denial of Legal Services to the Poor When Life and Liberty Are at Stake}, 1991 ANN. SURV. AM. L. 783, 807.
\end{footnotesize}
of states that provide appointed counsel for post-conviction proceedings do so through a statute.127 Only Mississippi recognizes a constitutional right to counsel in habeas petitions.128 Currently Georgia has not opted in to the AEDPA expedited review procedures, although all states are governed by the new one-year statute of limitations for federal filing.129

A. The Spangenberg Report: Comparing Similarly Funded Jurisdictions’ Expenditures and Caseloads

In 1997 the Georgia Indigent Defense Council (GIDC)130 commissioned the Spangenberg Group,131 through the American Bar Association (ABA), to conduct a comparative analysis of similarly situated states to determine whether “Georgia is currently providing an adequate level of funding for indigent defense services.”132

1. Indigent Defense Funding in Georgia

In Georgia, indigent defense services are provided at the county level with the state paying a portion of the cost through the GIDC.133 The GIDC originally set a target date of 1999 for the state and the counties to share equally in indigent defense

127. See Gibson, 513 S.E.2d at 192. As Justice Hines points out in the majority opinion, a number of such statutes have been enacted in order to opt in to the AEDPA expedited review procedures. See id. at 192 n.5. For example, Arkansas’ statute states explicitly that the intent of the statute is to comply with the requirements of the AEDPA’s expedited proceedings. See Ark. Code Ann. § 16-91-204 (Michie 1997).
129. See 28 U.S.C. § 2244(d)(1) (Supp. 1998). The author has found no indication that the Georgia General Assembly intends in the near future to opt in to the expedited review procedures.
130. The Georgia General Assembly first created the GIDC in 1979. See O.C.G.A. §§ 17-12-32 to -34 (1997). See generally SPANGENBERG REPORT, supra note 41, at 1. The GIDC provides assistance and support to attorneys, including public defenders, who represent indigent defendants and has administered state funds for that purpose since 1989. See O.C.G.A. §§ 17-12-32, -33; SPANGENBERG REPORT, supra note 41, at 1.
131. “The Spangenberg Group, a nationally recognized criminal justice research and consulting firm specializing in delivery of indigent defense services . . . located in West Newton, Massachusetts” and has been retained for the last twelve years by the ABA’s Bar Information Program “which provides support and technical assistance to individuals and organizations working to improve their jurisdictions’ indigent defense systems.” SPANGENBERG REPORT, supra note 41, at 1.
132. Id.
133. See id. at 1, 3-4; see also O.C.G.A. §§ 17-12-32 to -34 (1997).
expenditures. For fiscal year 2001, however, GIDC’s “grant to counties” budget was only $4,890,000, which accounts for approximately 12.5% of the indigent defense expenditures made by the counties. Each county may decide “whether to provide indigent defense services through a county public defender program, an assigned counsel system, or a contract defender program.” For fiscal year 2001, 136 of Georgia’s 159 counties applied for GIDC funding, which requires adherence to guidelines promulgated by the GIDC.

For fiscal year 1999, the GIDC requested additional funding which would have brought the total state funding for indigent defense services to $6,750,000. The GIDC’s fiscal year 1999 budget increase request, however, would still only have resulted in the state contributing about twenty-two percent of the cost of indigent defense services in Georgia. The Spangenberg

134. See SPANGENBERG REPORT, supra note 41, at 3.
135. See GIDC Award of Funds, Fiscal Year 2001, at http://gidc.com/01funds.htm (last visited Aug. 14, 2000); Interview with Michael Shapiro, Executive Director, Georgia Indigent Defense Council (July 31, 2000) [hereinafter Shapiro Interview]. This figure represented a $550,000 increase from amended fiscal year 2000’s budgeted $4,340,000 for grants to counties. See Judicial Branch Appropriations, at http://ganet.org/services/leg/brief/index.pdf (last visited Aug. 14, 2000); Shapiro Interview, supra.
136. See SPANGENBERG REPORT, supra note 41, at 5.
137. See GIDC Homepage, at http://www.gidc.com/01funds.htm (last visited Aug. 14, 2000); Guidelines of the Georgia Indigent Defense Council For the Operation of Local Indigent Defense Programs, at http://www.gidc.com/guidelin.pdf (last visited Aug. 14, 2000) [hereinafter Guidelines]. The GIDC Web page features a number of statistical breakdowns, including cost per case and cost per resident for indigent defense programs in each participating county. Interestingly, Long County had the highest cost per case in calendar year 1998 (the year available on the Web page) at $1,305.82 spent per case. The cost per resident in Long County was also high at $28.53. The average cost per case in participating counties was $216.79, and the average cost per resident was $5.69, while the lowest cost per case was an astonishing $9.05 in Cook County. See Statistical Breakdowns, at http://www.gidc.com/cy98$cas.htm and http://www.gidc.com/cy98$res.htm (last visited Aug. 14, 2000).
138. See SPANGENBERG REPORT, supra note 41, at 1. Funding for fiscal year 1998 was $4,250,000, of which $3,500,000 represented grants to counties, and $750,000 funded the Multi-County Public Defender. See id. at 1, 17.
139. See id. at 3–4. The Legislative Budget Office Web page shows GIDC’s state budget for 1999 as being approved at $4,814,708, which includes a $85,000 increase in operating expenses for the Multi-County Public Defender Office. See Georgia General Assembly: Comparative Summary of H.B. 143 S.F.Y. Amended General Appropriation Act Judicial Branch, at http://www.state.ga.us/legis/1999_00/lbo/sfy1999/courts.htm (last visited Oct. 17, 1999). The Multi-County Public Defender is funded entirely by the state and handles death penalty trials and appeals for indigent defendants, but is explicitly excluded from assisting in federal habeas claims. See O.C.G.A. § 17-12-87(c) (1997); see
Report ultimately concluded that "the [GIDC's] request for increased state resources is both reasonable and justified in comparison to how the other similar states fund their indigent defense programs."\(^{140}\) Although specific budget proposals are important, the report's utility in this Note is to provide a brief overview of what other states are doing to ensure effective indigent defense. If Georgia is "behind" other states in providing front-end (trial and direct appeal) representation to indigent defendants, then the impetus on the General Assembly to provide habeas representation at the back-end is even greater.\(^ {141}\)

2. Spangenberg Report Methodology

The Spangenberg Group compared Georgia's indigent defense funding to that of Florida, Indiana, Kentucky, Louisiana, Ohio, South Carolina, and Tennessee based on similarities in funding structure, caseload, state population, and availability of data.\(^ {142}\) Specifically, the group compared death penalty states that use mixed state and county funding for their indigent defense programs.\(^ {143}\) They then conducted telephone surveys with appropriate personnel from each state to discover

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\(^{140}\) See SPANGENBERG REPORT, supra note 41, at 5. For an extremely useful and pragmatic explanation of the Georgia General Assembly's budgeting process, visit the Georgia state government Web page. See The Budget Process in Georgia, at http://www.state.ga.us/legis (last visited Oct. 17, 1999).

\(^{141}\) See, e.g., Liebman et al., supra note 70, at 58 (explaining that in Georgia, among other states, post-conviction review compensates, in part, for deficient direct review).

\(^{142}\) See SPANGENBERG REPORT, supra note 41, at 4-5.

\(^{143}\) See id. at 5-6. The report did not include North Carolina, for example, because the state pays for all of the indigent defense services. Similarly, the report excluded Alabama "because of its unique funding mechanism and lack of statewide data on indigent defense." Id. at 6. Alabama essentially pays attorneys a very low hourly fee for representing indigent defendants, and the funds come from various kinds of filing fees. See ALA. CODE § 15-12-23 (1999); SPANGENBERG REPORT, supra note 41, at 6. Also, the Spangenberg Group pointed out that a number of the states surveyed are employing alternative revenue sources to supplement state funding, mostly through court application or filing fees, or other court fees or bond forfeiture interest. See id. at 7. Thus, in Kentucky, for example, the legislature has begun to cut state funding for indigent defense programs because of increasing alternative revenues. See id. at 10. Similarly, a majority of the funding for indigent defense services in South Carolina comes from alternative revenue sources, namely application fees and criminal conviction surcharges levied on all convicted defendants. See id. at 12.
information on caseload, state and county expenditures, and total funding available.\textsuperscript{144}

3. \textit{Spangenberg Report Results and Findings (Based on Fiscal Year 1997 Budgets)}

As of fiscal year 1997, Georgia had the third highest total population of the eight states surveyed.\textsuperscript{145} Georgia, however, spent the least in state dollars on indigent defense services.\textsuperscript{146} Furthermore, “of the four states that have established a state indigent defense commission to distribute state funds to supplement county indigent defense programs . . . Georgia ranks last in total state dollars committed to indigent defense.”\textsuperscript{147} Moreover, Georgia counties bear more of the relative burden for indigent defense spending than counties in the other states.\textsuperscript{148}

Additionally, Georgia had the highest ratio of felonies (the most expensive cases to handle) to misdemeanors and the highest felony caseload compared to the total.\textsuperscript{149} Likewise, Georgia was the only state whose indigent defense providers’ caseloads had more felonies than misdemeanors.\textsuperscript{150} Given the high number of high cost cases (felonies), one might expect a high cost per case in Georgia.\textsuperscript{151} The contrary is true, however, as Georgia's cost per case was only $210.37, ranking fifth lowest out of the eight.\textsuperscript{152}

The above statistics clearly indicate that “Georgia falls short of providing adequate indigent defense funding compared to the other sample states.”\textsuperscript{153} Although GIDC funding increased somewhat during 1997 and 1998,\textsuperscript{154} that trend seems to have leveled out with fiscal years 1999 and 2000 budgets.\textsuperscript{155} Thus,

\begin{itemize}
\item \textsuperscript{144} See \textit{Spangenberg Report}, \textit{supra} note 41, at 6.
\item \textsuperscript{145} See id. at 14.
\item \textsuperscript{146} See id.
\item \textsuperscript{147} Id.
\item \textsuperscript{148} See id.
\item \textsuperscript{149} See id. at 16, 20 (Table III).
\item \textsuperscript{150} See id. at 16. Most caseloads in the other states were closer to three times as many misdemeanors as felonies. See id.
\item \textsuperscript{151} See id.
\item \textsuperscript{152} See id.
\item \textsuperscript{153} Id. at 17.
\item \textsuperscript{154} See id.
\item \textsuperscript{155} \textit{Legislative Budget Reports 1999, 2000}, at http://www.state.ga.us/legis (last visited
Georgia has demonstrated a lack of monetary commitment to providing adequate indigent defense services at the front-end of the criminal justice system, making the need for indigent defendant representation at post-conviction proceedings, especially for prisoners on death row and those claiming ineffective assistance of counsel, all the more urgent.\(^{159}\)

**B. Specific States' Habeas or Post-Conviction Procedures and Protections**

**1. Florida**

Florida's indigent defense structure is often called a model system for indigent defense, despite some potential organizational problems.\(^{157}\) Florida's indigent defense services are divided into the following three sections: (1) one publicly elected public defender for each of twenty judicial circuits at trial level, (2) five appellate defender programs representing indigent defendants on appeal, and (3) the Capital Collateral Representative (CCR), which represents indigent capital prisoners in post-conviction proceedings in both state and federal court.\(^{158}\) The trial and appellate public defenders are funded through a combination of state and county money, whereas the state funds all of the CCR.\(^{159}\) At its inception, the CCR was a single entity, but in 1997 the legislature split it into three offices with the governor to appoint the heads of those offices, arguably to make it less effective.\(^{160}\) But in May 1996, Florida instituted a one-year from the finality of the conviction statute of limitations on post-conviction proceedings.\(^{161}\) Nonetheless, indigent death row inmates in

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155. See supra INTRODUCTION (explaining the relationship between back-end and front-end funding).
156. See Ringel, supra note 5, at 1.
158. See Fla. Stat. ch. 27.701 (1999); Spangenberg Report, supra note 41, at 7-8.
159. See Fla. Stat. ch. 27.701 (1999); Spangenberg Report, supra note 41, at 7-8.
160. See Fla. Stat. ch. 27.701 (1999); Bright, supra note 128, at 822 (quoting the attorney who oversees Holland & Knight's pro bono department and who has worked with CCR lawyers as stating, "I am firmly convinced that the criticism CCR received was not because it was frivolous but because it was effective"); see also Spangenberg Report, supra note 41, at 8.
Florida are guaranteed representation in “instituting and prosecuting collateral actions challenging the legality of the judgment and sentence imposed against [them] in the state courts [and] federal courts . . . .” 162

2. Indiana

Indiana’s indigent defense programs could also provide a possible model for other states to follow in revamping their systems. Like the GIDC, the Indiana Public Defender Commission (IPDC) administers state funds and resources to county indigent defense programs that comply with standards promulgated by the IPDC in both capital and noncapital cases. 163 The Indiana Supreme Court, not the legislature, made these standards mandatory for death penalty cases so that all counties should be in compliance and receive fifty percent of their costs back from the state. 164 Currently the IPDC is promulgating standards for noncapital indigent defense programs; although not mandatory, counties in compliance have forty percent of their costs in providing public defenders reimbursed by the state as a compliance incentive. 165 Finally, the Public Defender of Indiana represents all indigent defendants in post-conviction proceedings and is fully state funded. 166

unjustified delay in postconviction [sic] proceedings in capital cases frustrates justice and diminishes public confidence in the criminal justice system.”). However, the statute of limitations on filing post-conviction petitions for noncapital cases is two years. See Fla. Stat. ch. 924.051(6)(a) (Supp. 2000).
162. Fla. Stat. ch. 27.702 (1999). In January 2000, Florida Governor Jeb Bush signed legislation that would have made post-conviction proceedings run almost contemporaneously with the direct appeals process, which the Florida Attorney General hailed as being legislation for families of murder victims. See Allen v. Butterworth, 750 So. 2d 52, 55 (Fla. 2000); S.V. Date & Marcia Gelbart, Florida Curbs Death Row Appeals, ATLANTA J. & CONST., Jan. 8, 2000, at A4. The Florida Supreme Court has since declared most of the “Death Penalty Reform Act of 2000” unconstitutional. See Allen, 750 So. 2d at 64.
163. See SPANGenberg REPORT, supra note 41, at 8.
164. See id.; see also IND. CT. R. 24.
165. See SPANGenberg REPORT, supra note 41, at 8.
166. See id. at 9. The GIDC also promulgates guidelines with which counties seeking GIDC funding must comply. See Guidelines, supra note 137. The guidelines include requirements as to attorney competence and effectiveness, fiscal management, and managing the size and type of caseload. See id.
3. Other States

According to the Spangenberg Report, Tennessee and Ohio fund, at the state level, defender offices to provide post-conviction representation to indigent defendants.\textsuperscript{167} Alabama provides up to $1000 for lawyers handling post-conviction proceedings in death penalty cases.\textsuperscript{168} Additionally, North Carolina requires state-funded representation at all habeas petitions filed by indigent prisoners.\textsuperscript{169} Likewise, South Carolina provides appointed counsel for death penalty post-conviction proceedings, at least upon the indigent petitioner’s request.\textsuperscript{170} Thus, Georgia is alone among her neighbors in failing to provide indigent prisoners with counsel at habeas proceedings, which is usually the only opportunity to enforce their constitutional right to effective assistance of counsel.\textsuperscript{171}

Finally, it is worth mentioning that the Governor of Illinois has taken the very reasonable approach of imposing a moratorium on executions after a now famous string of death row exonerations there.\textsuperscript{172}

IV. Why Death Deserves Special Treatment with Respect to State-Funded Attorneys for Post-Conviction Relief

A. Capital Offenses Are Treated Differently at Trial and Appeal Than Other Felonies in Georgia

The \textit{Gibson} majority opinion, written by Justice Hines, expressed the politician’s concern that if the state has to pay for habeas defense for death penalty defendants, it would also be

\textsuperscript{167} See \textsc{Spangenberg Report}, supra note 41, at 11, 13.
\textsuperscript{168} See ALA. CODE § 15-12-23(d) (Supp. 1999); see also Bright, supra note 128, at 807 (indicating Alabama provided $500 in 1997 at the time the article was written).
\textsuperscript{171} See generally Gibson v. Turpin, 513 S.E.2d 186, 198 (Ga. 1999) (Fletcher, J., dissenting); Davis v. Thomas, 471 S.E.2d 202, 205 (Ga. 1996) (Fletcher, J., concurring) (arguing vehemently that failing to provide counsel for the arcane and obscure habeas process denies prisoners meaningful access to the courts and is a violation of fundamental fairness guaranteed by the U.S. Constitution).
\textsuperscript{172} See Governor Ryan's Brave Example, N.Y. TIMES, July 3, 2000, at A14 (commenting that the Illinois moratorium sparked a national debate on the death penalty, just in time for the 2000 national elections).
responsible in noncapital habeas petitions. This reasoning, however, is unpersuasive given the myriad ways in which the criminal justice system already considers capital offenses differently.

Relevant to Justice Hines's concerns are Georgia's statutory distinctions when imposing the electric chair rather than just prison time. Justice Hines himself stated that “[d]eath penalty cases do require closer examination and the additional safeguards provided by law.” Such protections, Justice Hines continued, are found in Georgia's death penalty statute, which provides that the prosecution must prove at least one aggravating circumstance, that the defendant may introduce almost any mitigating evidence at sentencing, and that the death penalty may not be imposed on mentally retarded defendants. Rather than recognizing the error in his logic that courts treat death penalty cases the same as noncapital cases, Justice Hines instead stated that “anyone familiar with the facts that underlie this [case] . . . knows that Exzavious Lee Gibson is neither innocent nor undeserving of the death penalty.” Thus, instead of addressing the fact that “death is different,” Justice Hines decided that no capital defendant is entitled to habeas counsel because this defendant deserved the death penalty.

In addition, the federal government clearly treats death differently. For example, the AEDPA expedited procedures discussed above, and its short statute of limitations on federal habeas petitions, apply only to capital cases. Additionally, recall that Florida has a shorter statute of limitations for filing post-conviction relief petitions in death penalty cases than in noncapital offenses.

173. See Gibson, 513 S.E.2d at 191.
175. Gibson, 513 S.E.2d at 1900.
176. See O.C.G.A. § 17-7-131(j) (1997); Gibson, 513 S.E.2d at 190 n.3.
177. Gibson, 513 S.E.2d at 190.
178. See id. at 199 (Fletcher, J., dissenting) (“The majority’s response to the reality that ‘death is different’ is to focus on the facts of this case and make the subjective determination that Gibson deserves the death penalty. That decision is never appropriate for this Court to make; it is the province of the jury.”).
179. See 28 U.S.C. §§ 2254, 2262-66 (Supp. 1998); see also supra Part II.
180. See FLA. STAT. ch. 924.055 (1999); see also supra Part III.
B. Death Is Final: There Is No "Re-Animation Chair"

In his *Gibson* dissent, Justice Fletcher pointed out that because of the high degree of error at the trial and direct appellate levels and because the constitutional standard is meaningful access to the courts, access in death penalty habeas cases is only meaningful when a defendant has counsel.\(^{181}\) The statistics bear out the importance of habeas proceedings, considering that sixty to seventy percent of federal habeas petitions in capital cases are successful and result in reversal.\(^{182}\) Furthermore, courts have found constitutional error in forty-six percent of all federal habeas petitions between 1976 and 1991.\(^{183}\) and during the twenty-three year period covered by the Columbia study, "the overall rate of prejudicial error in the American capital punishment system" was sixty-eight percent.\(^{184}\)

Moreover, the concern that innocent people will be executed is grounded in fact.\(^{185}\) Since the U.S. Supreme Court reinstated the death penalty in 1973, eighty-two "people have been released from death row with evidence of their innocence."\(^{186}\) Furthermore, researchers have found that since 1990 at least twenty-three innocent people have been executed.\(^{187}\) The rate of death row inmates being released due to innocence is growing, from 2.5 per year between 1973 and 1993, to 4.8 per year between 1993 and mid-1997.\(^{188}\) Although some of this increase is due to

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183. *See Gibson*, 513 S.E.2d at 198-197.
184. Liebman et al., *supra* note 70, at Executive Summary.
185. The Death Penalty Information Center publishes on its Web page an annual state-by-state update on executions and keeps track of the number of people released from death row due to evidence of their innocence. See DPIC Home Page, at http://www.deathpenaltyinfo.org (last visited Sept. 9, 2000).
187. *See id* (citing MICHAEL RADELET & HUGO BEDAU, *IN SPITE OF INNOCENCE* (1992)).
changing technologies, often the exculpatory evidence does not come to light through the direct appeals process but rather through journalists and death penalty activists.189 However, it seems clear that a prisoner lacking counsel at a critical opportunity to raise constitutional claims and show new exculpatory evidence is far less likely to succeed than a prisoner with counsel.

CONCLUSION

The Georgia General Assembly should lead the way in providing counsel for indigent habeas petitioners by adopting legislation that follows the most effective and efficient aspects of other states’ laws and by creating a statutory right to such representation, at the very least for petitioners pursuing their first constitutional claims. Specifically, following Florida’s model of the Capital Collateral Representative, Georgia should fund an independent office that is responsible for representing death row inmates at habeas corpus proceedings.190 Alternatively, the General Assembly could authorize the Multi-County Public Defender to represent indigent capital habeas petitioners and provide increased funding to effectuate such representation.

In addition, Georgia could adopt a program similar to that of Indiana. For example, the General Assembly could encourage each county to implement a post-conviction representation program for indigent prisoners by awarding additional state funds to counties that develop such programs.191 This could be accomplished through the GIDC and ideally would enable the GIDC to promulgate and enforce minimum qualifications and guidelines for such state-funded programs. Furthermore, such a program would not have to be limited to capital cases, but eventually could expand to include noncapital petitioners.

Extending this idea, Georgia should also provide increased funding to indigent defense programs for front-end (trial and direct appeal) death penalty representation to make the whole process more efficient and just. If these programs have

189. See id.
190. See supra Part III.B.1 (discussing Florida’s post-conviction representation plan).
191. See supra Part III.B.2 (discussing Indiana’s funding initiatives).
adequate resources, the need for post-conviction review will be lessened, as Georgia’s attorney general has admitted.192 The state, through the GIDC, could issue guidelines for the receipt of such funding predicated on defense programs following policies that ensure competent representation, including a commitment to paralegal and investigatory assistance.193

Clearly, one problem with these proposed programs is finding the money. One commentator suggests that to ensure the independence of indigent defense programs, funding should not even come from the state; he proposes that a portion of state bar association fees be used.194 While this idea deserves serious consideration and is consistent with the tradition of pro bono legal work, it is unlikely to provide sufficient funding. Other lawyers have suggested that some of the money currently appropriated for prison construction be used for indigent defense programs, especially if adequate legal representation can help lower prison populations by assuring that only justly convicted inmates are incarcerated.195 Several attorneys have also suggested that large, mostly civil, law firms should contribute money to fund salaried positions for attorneys and staff in public defender offices as part of their pro bono or community outreach programs. Finally, if states make a real commitment to these programs, then Congress might be convinced to reinstate federal funding.

Meanwhile, Governor Barnes should follow the lead of Governor Ryan of Illinois and impose a moratorium on executions in Georgia until we can be assured that every defendant, rich or poor, receives a fair trial, free of constitutional error.

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192. See Ringel, supra note 5, at 1. In fact, Governor Barnes has agreed to appoint a commission to study ways to improve indigent defense in Georgia, but had not acted on that promise at the time of this writing (Aug. 15, 2000). See Strengthen Legal Defense for State's Poor Suspects, ATLANTA CONST., June 14, 2000, at A14. House Representative Jim Martin is also pushing the House Judiciary Committee to look into the issue. See id.

193. See generally Bright, supra note 128, at 789-90 (emphasizing that funding indigent defense programs does not necessarily guarantee competent representation).

194. See id. at 833.

Georgia can lead its southern sisters in the fight for justice by funding programs that ensure that prisoners are not wrongfully or unconstitutionally incarcerated in both death penalty and non-death penalty cases. It seems only right that in the state that provided the model for modern, constitutional death penalty statutes and first recognized a right to habeas corpus review in its constitution, the General Assembly would guarantee every prisoner the right to counsel at that proceeding.\footnote{See Fullwood v. Sivley, 517 S.E.2d 511, 517-19 (Benham, C.J., dissenting); MEARS, supra note 122, at 62-69.}

\textit{Jill Wasserman}\footnote{The author wishes to express her sincere thanks to everyone who helped with providing the resources to write this Note, most especially her husband, Wystan Getz, whose patience is infinite.}