



GEORGIA PRISONERS' SPEAK

The GDC Accountability Project, Inc. · a Georgia 501(c)(3)

SUMMARY BRIEF

For every right there shall be a remedy

*O.C.G.A. § 9-2-3 — and the one change that would make it true again in
Georgia's post-conviction courts*

Submitted to the
House Study Committee on Criminal Post-Conviction Litigation
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This is the whole recommendation. Supporting papers carry the statutory history and the case law behind it. You should not need them to act on this one. *Emphasis within quotations is added unless otherwise noted.*

What we are asking for

One change, and it is not presently before this Committee:

Repeal the four-year limitation on habeas corpus — O.C.G.A. § 9-14-42(c) — and provide that the repeal applies to any petition filed on or after the effective date, whatever the date of conviction.

It creates no office, no program, and no appointment obligation. It removes a limitation period.

It reopens two things at once. The constitutional claims this Committee is already considering — which, once decoupled, are heard in habeas and nowhere else. And the right O.C.G.A. § 17-9-4 has guaranteed since 1863: that a void judgment is "a mere nullity." Both are shut by the same clock, and both open when it is removed.

We are not asking you to revisit the ineffectiveness reforms already before you. We support them, they are well represented by others, and we have nothing to add to the case for them. **What we set out below is where they land** — and why the one change above decides whether they reach anyone.

I. Why we are writing

In March, seven of the nine Justices of the Supreme Court of Georgia joined a written opinion about this State's post-conviction system. They said it is broken. They said the Court itself did much of the breaking. And they said that repairing it "**will require legislative action to fix it.**"

They named the rule governing claims of ineffective assistance of counsel, described it as a rule of the Court's own creation — adopted, in its words, having "cited no legal authority" — and wrote that they were writing separately "**to encourage the General Assembly to change it.**"

But they did not describe an isolated defect. They described a system — "Georgia's post-conviction litigation system is a mess" — and the changes they said the General Assembly would have to make ran past the timing rule to counsel, to venue, and to the budget.

We took that wider description seriously. Working outward from ineffective assistance, we examined the whole of the habeas article and traced its statutory history back through the Code of 1863, together with the

case law from 1967 to this year. **What we found is a second problem, older and larger than the timing rule, that no one has put in front of you.**

The 1967 Act made habeas the only door. The 2004 Act put a clock on it.

Georgia post-conviction habeas has not always reached what it reaches now, and the sequence matters.

Before 1967, it reached almost nothing. Post-conviction habeas relief was available on grounds of lack of jurisdiction and little else — unless the judgment or the sentence was **void**, the writ was denied.

The Habeas Corpus Act of 1967 did two things in one motion. It **widened** the writ to constitutional claims — § 9-14-42(a) now reaches "a substantial denial of his rights under the Constitution of the United States or of this state." And it **closed the alternatives**: the extraordinary motion for new trial, which courts had construed to allow constitutional claims, was narrowed to exclude them. Section 9-14-41 makes Article 2 "the **exclusive** procedure for seeking a writ of habeas corpus for persons whose liberty is being restrained by virtue of a sentence imposed against them by a state court of record."

That was a considered trade, and the General Assembly wrote down why. Section 9-14-40 still carries the 1967 findings: Georgia convictions were being attacked in federal court on issues Georgia courts had never considered, this "tends to weaken state courts," and the answer was that "**the scope of state habeas corpus be expanded.**"

In 2004 a four-year limitation was placed on that exclusive procedure. Ga. L. 2004, p. 917. Georgia's habeas statute had carried no filing deadline for the 141 years from the Code of 1863 until then. The limitation now at the center of these problems is twenty-two years old.

The scope of what a Georgia habeas court may consider is not continuous — 1967 changed it. What runs unbroken from 1863 to 2004 is the absence of a filing deadline, not the breadth of the remedy.

What the four-year limitation closed

Because the alternatives are closed, a deadline on habeas became a deadline on everything routed into it. Five consequences are concrete and documented.

1. A void conviction becomes permanent. O.C.G.A. § 17-9-4 provides that a judgment void for any other cause "is **a mere nullity.**" In *Tolbert v. Toole*, 296 Ga. 357, 361 n.8 (2014), a unanimous Court held that procedural default "**does not apply**" to such a claim — indeed, that a claim that the sentencing court lacked jurisdiction is "**one of the traditional grounds for the writ of habeas corpus, rooted in basic principles of due process**" — and that the petitioner was entitled to have it "**decided on the merits.**" The word carrying the holding is "**timely.**" After four years, the right in § 17-9-4 survives and nothing will hear it.

What this means: before 1967 the writ reached a want of jurisdiction and almost nothing else. **The oldest and narrowest core of the writ is the part the 2004 clock now extinguishes.**

2. A claim can be granted below and undone by the calendar. In *State v. Sosa*, 291 Ga. 734 (2012), a man who pled guilty in 2002 was never told by his lawyer that the plea would make him deportable. The **habeas**

court granted relief. The Supreme Court **reversed as untimely**: "Judgment reversed. All the Justices concur."

That case is not purely a timing story. Sosa relied on the trigger for newly recognized rights, and the Court reasoned that if *Padilla v. Kentucky* announced a new right it did not apply retroactively, while if it applied retroactively it was not new. **Repeal removes the limitation; it would not by itself have answered that second problem.** We cite Sosa for what it plainly shows — **a Georgia habeas court found a claim worth granting, and the limitation is what undid it** — and not for more.

3. The warning the statute requires carries nothing behind it. Section 9-14-42(d) provides that "[a]t the time of sentencing, the court **shall** inform the defendant of the periods of limitation set forth in subsection (c) of this Code section." In *Stubbs v. Hall*, 308 Ga. 354 (2020), the Court held that § 9-14-42 provides no remedy when that does not happen — its Division 4 is headed "OCGA § 9-14-42 Does Not Provide a Remedy for Violations of Subsection (d)" — a holding seven Justices joined, with the present Chief Justice concurring in the judgment only. A defendant may lose the only proceeding open to him without ever having been told it had an end date.

4. Once the clock starts, nothing stops it. *Stubbs* holds the petition before it "**not subject to statutory or equitable tolling**," because granting relief would require the Court to create "for the first time in Georgia law" an equitable remedy against a limitation the General Assembly enacted. **The Court said plainly that this is yours to fix, not theirs.**

5. The General Assembly's most emphatic instruction has never been tested against the deadline. O.C.G.A. § 9-14-48(d) provides, in mandatory terms: "**In all cases habeas corpus relief shall be granted to avoid a miscarriage of justice.**"

What that sentence does is narrower than it reads. It sits within the procedural-default subsection, and Georgia's courts have read it as the exception to default — a petitioner who failed to raise a claim at trial or on appeal may still be heard if the failure would work a miscarriage of justice. It was not written about filing deadlines.

But no Georgia court has ever held that it cannot reach a petition dismissed as late — because the question does not arise. A case dismissed on the limitation ends there. **The General Assembly wrote "in all cases," and there is a class of cases in which those words have never been given the chance to operate.**

One qualification. Section 9-14-42(c) does not run only from finality — it supplies four alternative starting dates, including the date the supporting facts "could have been discovered through the exercise of due diligence." **On paper that is a discovery rule, and it works — for the petitioner who reaches the Supreme Court of Georgia to say so.** It has saved petitions, including very late ones. But twenty-two years have produced only nine distinct pieces of litigation citing it, and it asks only whether the facts were *discoverable* — never whether the person was in any position to act on them. **That is a reason to remove the limitation rather than to rely on its exception.**

One provision of Georgia law speaks to all five. O.C.G.A. § 9-2-3, from the same Code of 1863 and never amended: "**For every right there shall be a remedy.**" Section 17-9-4 comes from that same Code. The right

and the principle have sat together since 1863. **What separated them is twenty-two years old, and it is a statute this body can amend.**

II. Everything before this Committee ends in habeas corpus

The Committee's announced subject is ineffective assistance of counsel, and the Supreme Court has already told you what it thinks should be done about it. **We support that work.** We are here about where it lands.

Decoupling moves the claim into habeas corpus. That is the point of the change — the ineffectiveness claim stops being something that must be raised at the motion for new trial and becomes something raised on collateral review instead. **Habeas is therefore the proceeding that will receive whatever this Committee builds.** And habeas is governed by a four-year clock that nothing tolls.

A limited right to counsel does not answer this, and it is worth setting out why.

Counsel is appointed after a petition is filed — that is true of every proposal before this Committee. **The limitation decides whether there is a petition to appoint counsel to.** A lawyer cannot file a petition that is already time-barred, and the person deciding whether to file in year three is unrepresented, in prison, and working from a law-library terminal.

Not every claim the clock bars is an ineffectiveness claim. A void judgment is not. Suppressed exculpatory evidence is not. Juror misconduct is not. Counsel on an ineffectiveness petition does nothing for any of them.

And counsel does not make evidence arrive sooner. Danyel Smith was convicted in Georgia in 2003 and has been in prison ever since. By the time the medical understanding of infant head injury had changed enough to matter, his four years had long run — habeas was closed to him. **The only door left was an extraordinary motion for new trial,** which he filed in 2021 and which won him a new trial in July 2026, twenty-three years after his conviction. **He got through only because his claim happened to be newly discovered evidence.** That motion cannot carry a constitutional claim. Had his lawyer failed him, or had the State hidden something, the vehicle that saved him would not have been open — and neither would habeas.

Any provision will also be limited by its own terms — first petitions, indigent petitioners, cases surviving to a hearing. For everyone outside it, the clock is the whole of the law.

So the reforms already before you decide *where* a claim is heard. The one change we ask for decides *whether* it can be heard at all.

III. What we ask for

Repeal O.C.G.A. § 9-14-42(c), and provide that the repeal applies to any petition filed on or after the effective date, whatever the date of the conviction.

The retroactivity sentence is not optional. Repealing a limitation period does not, by itself, revive a claim

on which the period has already run. **Unless the bill provides otherwise, repeal would help only those whose four years have not yet expired** — which is to say almost no one now in prison. That is one sentence of drafting, and without it the rest does very little.

Repeal reaches the person who has not yet filed. For someone who filed once and lost, § 9-14-51 still bars any ground that could reasonably have been raised then — repeal opens the door to a claim that could not be brought, not a second run at one that was.

What repeal restores — first, the constitutional claims

Once an ineffectiveness claim is decoupled from the motion for new trial, habeas is where it is heard. So are the claims that were never anywhere else: a coerced confession, evidence the State suppressed, a juror who decided the case on something outside the courtroom. **Section 9-14-42(a) was written for exactly these** — "a substantial denial of his rights under the Constitution of the United States or of this state." **The limitation is the only thing standing between that sentence and the person it was written for.**

And second, the void judgment

O.C.G.A. § 17-9-4, from the Code of 1863 and never amended, provides that a judgment void for any other cause "is a mere nullity." The Supreme Court of Georgia has held that "[v]oid convictions and illegal sentences have never been subject to general waiver rules." *Nazario v. State*, 293 Ga. 480, 487 (2013). **The right survives. Every means of asserting it has closed but one.**

- A **motion to vacate a conviction** is not available in a criminal case. *Harper v. State*, 286 Ga. 216 (2009). A void **sentence** is different: the sentencing court "has jurisdiction to vacate a void sentence **at any time**." *von Thomas v. State*, 293 Ga. 569, 571 (2013). **The graver defect has the fewer remedies** — an unlawful sentence is correctable forever, an unlawful conviction for four years.
- A **motion in arrest of judgment** — O.C.G.A. § 17-9-61, the record-based motion that fits this claim precisely — "must be made during the term at which the judgment was obtained." Terms of superior court are set county by county under § 15-6-3 — two to six times a year depending on the county — so it closes within months of sentencing, and sometimes within days. *Hammond v. State*, 292 Ga. 237 (2012), eleven years: untimely. *Mitchell v. State*, 282 Ga. 416 (2007), **twenty-one months: untimely**.
- An **extraordinary motion for new trial** cannot carry a constitutional claim; the Habeas Corpus Act of 1967 narrowed it "to exclude such claims."

What remains is habeas corpus — and habeas receives these claims willingly. In *Tolbert v. Toole*, 296 Ga. 357, 361 n.8 (2014), a unanimous Court held that procedural default "**does not apply**" to a void-judgment claim — a claim of the oldest kind the writ knows, "**rooted in basic principles of due process**" — and that the petitioner was entitled to have it "**decided on the merits**." The Court repeated it in *Smith v. Magnuson*, 297 Ga. 210, 213 n.3 (2015). The same principle governed *Jackson v. Crickmar*, 311 Ga. 870 (2021), where the warden conceded it.

So no second statute is needed to create a forum. The words carrying *Tolbert*'s holding are "**first, timely**."

Remove the four-year limitation and the § 17-9-4 claim is restored on the merits, in a proceeding Georgia already provides.

Repeal removes a clock, not a screen. *Tolbert* names the other bars in the same footnote — the successive-petition bar in § 9-14-51, the jury-composition default in § 9-14-42(b), and *res judicata*. The cause-and-prejudice requirement of § 9-14-48(d) remains, as does the certificate of probable cause required by § 9-14-52 before any appeal. **We are asking you to reopen the door, not to remove the screens behind it.**

On volume

Georgia superior courts receive about **nine hundred** habeas petitions a year. **Repeal enlarges the group that may file — that is its purpose.**

What repeal does not do is lower the bar. Every screen survives: procedural default, the successive-petition bar in § 9-14-51, *res judicata*, and the merits themselves. A petitioner who loses must still obtain a certificate of probable cause from the Supreme Court of Georgia before he may even appeal. **And for convictions predating July 2004 — the oldest cases, and the State's real concern — § 9-14-48(e) already lets the State move to dismiss on a particularized showing that delay has prejudiced its ability to respond. Repeal opens the courthouse door. It does not open the cell.**

IV. What this comes down to

Three sentences of Georgia law, and the General Assembly wrote all three.

"For every right there shall be a remedy; every court having jurisdiction of the one may, if necessary, frame the other." — O.C.G.A. § 9-2-3. Code of 1863. Never amended.

"The judgment of a court having no jurisdiction of the person or subject matter, or void for any other cause, is a mere nullity and may be so held in any court when it becomes material to the interest of the parties to consider it." — O.C.G.A. § 17-9-4. The same Code. Never amended.

"In all cases habeas corpus relief shall be granted to avoid a miscarriage of justice." — O.C.G.A. § 9-14-48(d).

Read them together and the gap is plain. A judgment the Code calls a nullity, which any court may so hold, is enforced — because no proceeding remains in which to ask. The instruction to grant relief in all cases to avoid a miscarriage of justice is never reached in a case dismissed as late. **The right survives. The occasion to assert it does not.**

The second clause of § 9-2-3 is the one that matters most here. It contemplates a court framing the remedy where one is missing. **In *Stubbs* the Court was asked to do precisely that, and declined** — not because it thought the deadline right, but because what stood in the way was a limitation "**enacted by the General Assembly.**" The clause that empowers the court is the clause that points back to this body.

What stands between the right and the remedy is a limitation period enacted in 2004.

And the Court has said so. Seven Justices wrote in March that repairing this system "**will require legislative action to fix it.**" *Stubbs* is the same point applied to this statute: the Court declined to create an equitable exception because doing so would mean inventing a remedy "for the first time in Georgia law" against a limitation the General Assembly enacted. **That is not a court defending the deadline. It is a court saying it cannot reach it.** The same is true of § 17-9-4: the Court has confirmed the right, and confirmed that habeas will decide it on the merits. What it cannot do is move the clock.

And repeal restores this body's own design. The findings the General Assembly wrote into § 9-14-40 in 1967 record why this article exists: Georgia convictions were being decided in federal court on issues Georgia courts had never considered, that "tends to weaken state courts," and the answer was to **widen** state habeas review. **The 2004 limitation narrowed it. Repeal does not create anything. It returns the article to the purpose stated in its own opening section.**

One sentence of amendment, and Georgia's own guarantees mean again what they say.

What accompanies this paper

One supporting paper carries the authorities: the four-year deadline in full, the means the State actually provides to meet it, the case law behind every statement made here, and how each alternative route to a void-judgment claim closed.

One exhibit: a fifty-state comparison of post-conviction filing deadlines, built section by section from each state's own statutes and court rules, with the operative language quoted and verified.

Further material on the ineffectiveness reforms is available should the Committee find it useful; we researched those questions alongside our own and are not asking you to act on them.

Georgia Prisoners' Speak is a Georgia 501(c)(3) that advocates for the rights of people incarcerated in Georgia. We conduct original research on Georgia corrections and post-conviction law, and we operate a free legal-information service used by incarcerated Georgians and their families — which is how most of the problems described in this paper first reached us.