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We Must Act Now on Indigent Appellate Defense

by Adam M. Hames

The state of indigent appellate representation is a growing problem. Much of the discussion surrounding Georgia Public Defenders Council (GPDSC) and indigent defense in Georgia centers on a few, high profile, death penalty cases, and one's perspective on the council may reflect one's perspective on issues as wide-ranging as the death penalty, race, class, governmental spending, separation of powers, the O.J. Simpson trial, and the meaning of the constitution. While the problems of GPDSC, perceived and real, are multifaceted and a comprehensive discussion of indigent defense in Georgia is beyond the scope of this article, we must address the growing problem of indigent appellate representation in Georgia.

Not having adequate indigent defense on appeal creates problems for defendants and the state alike. Georgia's current path will lead to long delays between trial and appeal. Long delays in the appellate process will have collateral consequences in the justice system, some of which could not have been fairly contemplated just a few short years ago.

Georgia allows for a direct appeal of a criminal conviction by statute.¹ It is this statutory right that triggers the constitutional requirement that counsel be appointed to handle the direct appeal of indigent defendants.² Recently, the Georgia Supreme Court reiterated in *Davis v. Frazier* the importance of the right to appointed counsel on appeal.³ However,

about a year ago the Court also held in *Garland v. State* that if a defendant wishes to raise a claim of ineffective assistance of counsel then new counsel should be appointed to represent the indigent defendant in order to timely raise such a claim.⁴ That case is consistent with Georgia law and on the surface posed no real problem for indigent defendants.

However, the so called *Garland* rule has become a cost-saving mechanism for some and a burden for others. As the budgets of individual public defenders'

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offices are squeezed ever tighter, many cases are simply transferred to GPDSC or to the handful of attorneys willing to handle conflict cases with an ineffective assistance of counsel claim. That claim need not even be a colorable one before conflict counsel must be appointed. Reportedly, if all of these handoff cases were to stop being referred to GPDSC today it would still take the council three years to become current on these appeals. And this incoming tide of appellate cases shows no sign of ebbing or retreating in the foreseeable future, because there are simply not enough lawyers and resources available to deal with the “conflict” appeals.

The most obvious problem is that the trials of indigent defendants will not be reviewed in a timely manner. If the current trend continues, the state’s ability to retry a deserving defendant who filed a successful appeal will diminish greatly with the passing of years, as witnesses move, memories fade, and exhibits get lost. On the other side of the case, a person incarcerated after a defective trial should not bear the burden of unjust imprisonment for years before being released upon appellate review.⁵ Further, this backlog presents a more systematic problem for the criminal justice system. The law is not static and immovable. The longer cases are in the pipeline, the more likely the law will change to provide a basis for reversal that did not exist at the time of trial. The concern that a ruling could potentially set aside convictions that may take years to reach an appeal could further chill an appellate court from making difficult rulings in particular cases.

Another consequence of a broken indigent appellate system might be the effect of a long delay on post-conviction litigation in state and federal court. A direct appeal, especially from a criminal conviction, has become an integral part of our justice system. A great deal of post-conviction and habeas corpus law assumes that there was or will be a fair review of a

trial through an appeal before certain procedural bars and legal presumptions are enforced.⁶ If the appellate process breaks down systematically, the state’s ability to rely upon certain procedural bars for state and federal habeas corpus proceedings may be limited. A defendant might find recourse by claiming denial of his due process right to a speedy appeal. While the Sixth Amendment right to a speedy trial does not apply to an appeal, several courts have found that the Due Process Clause requires a speedy appeal.⁷ The right of a speedy appeal is a right enforced by a difficult and unpopular remedy – reversal. Appellate courts are reluctant to overturn a criminal conviction absent some harmful error in the proceedings below, and a speedy appeal claim is based, not on a defect in the trial, but on a denial of the appellate process.

At this time the likelihood of a conviction in Georgia being overturned upon a denial of a speedy appeal is almost none. While the United States Supreme Court in a recent Sixth Amendment speedy trial case noted that delays caused by defense counsel are attributable

to the defendant, the Court also noted that “delay resulting from a systematic breakdown in the public defender system could be charged to the State.”⁸ The time to address indigent defense on appeal is now. If the current backlog of direct appeals continues to grow, the number of speedy appeal claims with potential viability is sure to grow.

“A class action lawsuit seeking to address a long delay in the appellate process . . . has the potential to create a constitutional crisis between the Georgia General Assembly and the courts.”

The due process problem is certainly bad enough, but a systematic failure of indigent appellate defense in Georgia could also result in a class action lawsuit seeking to address a long delay in the appellate process. Such a suit has the potential to create a constitutional crisis between the Georgia General Assembly and the courts. As the GPDSC’s responsibilities continue to be defined through litigation, Georgia could face federal judicial oversight of its public defender system.

The State Practice Seminar

The Section held its annual “Georgia Appellate Practice” seminar on February 27, 2009. As usual, it was an outstanding presentation on issues of concern for those who practice before the Georgia Supreme Court and Court of Appeals.

The programs included “Post-Trial Appellate Motions,” an “Introduction to Appellate Jurisdiction,” “Preserving Issues for Appeal,” “The Winning Brief: How to Capture an Appellate Judge's Attention (And How to Lose It),” “Internal Procedures of the Appellate Courts,” a mock oral argument, and “Professionalism in the Appellate Process.”

The program was ably chaired by Ronan P. Doherty of Bondurant, Mixson & Elmore, LLP, Atlanta, Georgia. An impressive group of state Supreme Court and Court of Appeals jurists participated: Justices Harris Hines, Carol Hunstein, Harold Melton, and Hugh Thompson of the Supreme Court and Judges Debra Bernes, Sara Doyle, John Ellington, Yvette Miller, Herbert Phipps, John Ruffin (recently retired from the bench), and J.D. Smith of the Court of Appeals. (Judge Anne Barnes agreed to participate – as she always does – but was unable to make it due to a conflict.) It is a testament to the vitality of the Section's annual state practice seminar that eleven of our state appellate judges made it a point to participate and contribute their experience to the program.

Also as usual, an equally impressive array of attorneys in private practice participated (in addition to Ronan): B.J. Bernstein, The Bernstein Firm, Atlanta; Jay Bennett of Alston & Bird LLP, Atlanta; M. Katherine Durant of the Law Offices of M. Katherine Durant, Atlanta; Lee Grant, Assistant District Attorney, Appellate Division, DeKalb County; W. Scott Henwood of Hall, Booth, Smith & Slover (formerly the Reporter of Decisions for the Supreme Court and Court of Appeals); Paul J. Kaplan of Alston & Bird, Atlanta; and Frank Lowrey, Sarah M. Shalf, J. Darren Summerville, and Mike Terry of Bondurant, Mixson & Elmore, Atlanta. I thank each of these practitioners for taking the time to prepare for and participate in the program.



FROM THE CHAIR

James F. Bogan III
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For those of you who have never attended the program, one outstanding benefit is that each attendee received a copy of the Georgia Appellate Practice Handbook, 6th Edition, authored by the appellate practitioners at Alston & Bird and one of the best reference guides on Georgia appellate practice that you will find. The attendees also received a great handout from Paul Kaplan on preserving issues for appeal. Every member of the Section should be on the lookout for next year's program, which is traditionally held in February or March of each year.

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State Practice Seminar



Judge Debra Bernes, Georgia Court of Appeals; **B.J. Bernstein**; **Lee Grant**; **John H. Ruffin, Jr.**, **Judge John Ellington**, Georgia Court of Appeals; **Chief Judge Yvette Miller**, Georgia Court of Appeals.



Judge Sara Doyle, Georgia Court of Appeals; **Justice Harold Melton**, Georgia Supreme Court; **Justice Harris Hines**, Georgia Supreme Court.



Michael Terry; **Judge Herbert Phipps**, Georgia Court of Appeals; **Justice Carol Hunstein**, Georgia Supreme Court.

Dodging Minefields in the Application Process: A Primer for the Road – Part II

by M. Katherine Durant

As we continue down the road, we further explore certain traps, potholes, and minefields for the unwary and uninformed in filing applications for discretionary and interlocutory appeals in our state appellate courts. Part II of II.

*[85] South [85] South
[85] South tryin' to whistle a tune
Potholes deeper than the craters on the moon.¹*

What to File: What to file when you submit an application for appeal is specified by statute, by rule – and by common sense. To begin with, both appellate courts have specific rules for application paper and font sizes, margins, line spacing, binding, backings, and numbers of copies that must be filed.² Make sure you adhere to these rules. You must steer clear of these potholes if you wish to avoid having the appellate court return your brief for revamping!³

Who Seeks an Appeal? Be certain to identify the name of the party you are representing. It may seem perfectly apparent to you which party is appealing, but it may be far from obvious to the appellate court clerk docketing your application. For example, if there is more than one defendant in the case, your application should not begin, “Comes now the defendant and files his application for appeal.” Even more confusing is the application which begins, “This application seeks to appeal the trial court’s order of such-and-such date.”⁴ Likewise, expressly state which order or orders you are appealing from and their date of entry.⁵ Again, what is obvious to you may not be obvious to others.

Jurisdictional Statement; Standard of Review. You must also include a jurisdictional statement explaining why that particular appellate court has jurisdiction to consider the application.⁶ And do not forget to include the standard of review!⁷ The Court of Appeals website contains a “Standard of Review” link,⁸ which states, “The standard of review is a

threshold question as to how much deference will be accorded to the decision of the trial court.” This link provides a comprehensive list of the various standards of review for almost every type of case coming before the appellate courts. I encourage you to use this valuable time-saving resource.

Stamped “Filed” Orders; Motions and Responses. With discretionary and interlocutory applications, you must include a stamped “filed” copy of the order you seek to appeal,⁹ and interlocutory applications must also include a stamped “filed” copy of the certificate of immediate review. The copies of orders you submit must show that they were signed by the judge,¹⁰ although the appellate courts will accept electronic signatures of judges in those jurisdictions allowing them.¹¹ You must also include a copy of any petition or motion – and response thereto – that led to the order being appealed.¹² Surprisingly, this rule is frequently ignored.

The Body of the Application.

*Keep your eyes on the road
Your hands upon the wheel.¹³*

Your most intense focus along the application road must, of course, be on the content of the application itself, which should follow the general rules outlined for briefs before the appellate courts: a concise statement of the facts showing the general nature of the case, including citation to any portions of the record you have included; proposed enumeration of errors; the argument in sequence with the enumeration of errors, and citation of authorities.¹⁴ Remember that an application for discretionary appeal will be granted only when either reversible error appears to exist; the

establishment of a precedent is desirable; or, in the case of the Supreme Court, further development of the common law, particularly in divorce cases, is

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desirable.¹⁵ Likewise, the appellate courts will only grant an application for interlocutory appeal where the issue to be decided appears to be dispositive of the case; the order appears erroneous and will probably cause a substantial error at trial or will adversely affect the rights of the appealing party until entry of final judgment; or the establishment of precedent is desirable.¹⁶ If you are filing an interlocutory application, the application must also “set forth, in addition to the enumeration of errors to be urged, the need for interlocutory appellate review.”¹⁷

Including Portions of the Record.

Both the discretionary and interlocutory appeal statutes give the applicant the choice as to whether to include portions of the record with the application, as deemed appropriate.¹⁸ But be mindful that the burden is on the applicant to show error by the record.¹⁹ Thus, you should include such portions of the record that will enable the appellate court to make a determination as to whether it should grant the application under the criteria listed above. The Supreme Court Rules makes this clear by stating, “A transcript is not necessary, but affidavits, exhibits and relevant portions of the transcript should be attached to the application to demonstrate to the Court what the record will show if the application is granted.”²⁰ In even stronger language, the Court of Appeals Rules expressly admonish that “[t]he materials must be sufficient to apprise the Court of the appellate issues, in context, and support the arguments advanced. Failure to submit sufficient material to apprise the Court of the issues and support the argument shall result in denial of the application.”²¹

A thorough discussion of these principles is found in the Supreme Court’s decision in *Harper v. Harper*,²² which advised that “unless the alleged errors are otherwise established as, for instance, by the agreement of the parties on appeal or by a quote or paraphrase from the record or transcript, a prudent applicant should support the assertions of error with relevant parts of the record or transcript.”²³ The Court

went on to deny the application because the applicant in that case failed to adequately demonstrate reversible error.²⁴

The Long and Short of It. The flip side, however, is that you do not want to overwhelm the appellate court with extraneous paper or verbiage. “The volume of cases necessarily requires that all matters be presented succinctly. Inclusion of extraneous facts and frivolous issues tends to obscure critical issues.”²⁵ So, use your common sense in deciding how much to say in the body of your application and what exhibits to include with it. In any event, applications in civil cases

cannot exceed 30 pages²⁶ and in criminal cases cannot exceed 50 pages, excluding exhibits.²⁷

Your Signature and Information.

You must sign the application as the attorney of record *yourself*,²⁸ provide your bar number,²⁹ mailing address, and telephone number.³⁰ For both discretionary and interlocutory

applications, you must be a member in good standing of the bar and admitted to practice before the Georgia Supreme Court³¹ or Court of Appeals,³² as the case may be.

Don’t Forget the Money! No matter how brilliant your application for appeal, if you forget to include payment for costs or a sufficient pauper’s affidavit,³³ the appellate courts will not accept your application for filing.³⁴ OCGA § 5-6-4 in fact prohibits them from doing so.³⁵ If you wait until the last moment to file your application, and the Court of Appeals Clerk’s Office calls you as a courtesy to remind you that you failed to include your filing fee, and you are forced to tender the filing fee the following day, your application will be dismissed as untimely. This happens all too frequently. The Georgia Supreme Court reminds us that “[a]ttorneys are liable for costs. Failure to pay costs subjects the offender to sanctions.”³⁶ At this writing, the cost for filing an

“[Y]ou do not want to overwhelm the appellate court with extraneous paper or verbiage.... So, use your common sense in deciding how much to say and what to include.”

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Denial of Immunity Directly Appealable

by Kenneth A. Hindman

In *Board of Regents v. Canas*, ___ Ga. App. ___ (672 SE2d 471) (2009), the Georgia Court of Appeals held that a government defendant which claimed immunity from suit was entitled to file a direct appeal from an order denying immunity. This result had been foreshadowed by a number of earlier cases, but the Court of Appeals made the right to direct appeal explicit, while cogently explaining the need for such a rule.

Plaintiff Derek Canas asserted that the Board of Regents, operating as the Medical College of Georgia (“MCG”), breached a duty to notify him that a transfusion of untested blood he received at MCG in 1985 might have exposed him to HIV, and to advise him to be tested.

The Board filed a motion to dismiss Canas’s failure to warn claim on the ground that it was barred by sovereign immunity, which the trial court denied. The Board filed a direct appeal, contending that Canas failed to show that the Board had waived sovereign immunity by purchasing liability insurance.¹

Canas moved to dismiss the appeal because the Board had not followed the interlocutory appeal procedures found in OCGA § 5-6-34 (b). While its appeal was clearly interlocutory, and it had not followed the statutory procedures, the Board contended that the denial of its motion to dismiss was a “collateral order,” which could be appealed directly because it was based on sovereign immunity.

The Court of Appeals acknowledged that normally a direct appeal could be taken only from a “final order,” and that the denial of the Board’s motion to dismiss was not final, since the case remained pending in the trial court. It went on to explain why the courts have historically recognized some types of rulings as “collateral orders” from which a direct appeal is allowed.

A “collateral order” is an order that (1) makes a final ruling on (“conclusively determines”) (2) an “important issue” completely separate from the merits of the case and (3) that will be “effectively unreviewable” if no appeal can be made until after final judgment.²

This doctrine has been applied by the U.S. Supreme Court since the 1940’s.³ The Supreme Court of Georgia adopted the doctrine in 1982, permitting a direct appeal from the denial of a plea of double jeopardy.⁴

In 1985, the U.S. Supreme Court held in *Mitchell v. Forsyth* that a denial of summary judgment based on a determination that a government official was not entitled to qualified immunity was immediately appealable under the collateral order doctrine.⁵ The Eleventh Circuit followed the *Mitchell* case in 1992, holding in a diversity case that denial of immunity under Georgia law met the criteria for treatment as a collateral order.⁶ The *Canas* case, however, is the first Georgia case to hold that a denial of a plea of immunity is directly appealable as a collateral order.

COMMENT:

The Court of Appeals opinion is valuable because it provides a clear explanation for practitioners of why an order denying a government defendant’s plea of sovereign immunity merits the “special treatment” of being directly appealable, when almost all other types of interlocutory rulings, however important to the parties, are unappealable until the end of the case or the grant of a certificate of immediate review. The opinion also effectively explains the narrow procedural settings in which the doctrine applies.

First, an order must be “completely separate from the merits of the action.” As the United States Supreme Court put it in *Cohen*, the issue must be “too

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important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.”⁷

In *Scroggins v. Edmondson*,⁸ for example, the trial court ordered that a lis pendens be cancelled. The Supreme Court of Georgia determined that “there can be no dispute that cancellation of the [lis pendens] notice is substantially separate from the basic issues presented in the complaint,” which concerned a bankruptcy trustee’s attempt to place a lien on a landowner’s property.⁹

Even if an order concerns a question that can be resolved independently of the basic questions in a case, the court must also have decided that question “conclusively” for the ruling to be treated as a “collateral order.” Georgia courts have historically considered a ruling to meet this standard when, “from a practical viewpoint, nothing further in the basic suit could affect the [issue]...and nothing with respect to the question...is left open, unfinished, or inconclusive.”¹⁰

In *Scroggins*, the Supreme Court of Georgia reasoned that nothing that might subsequently occur in the underlying case could alter the fact that the lis pendens had been cancelled, and the order was therefore “conclusive” on that issue.

In contrast, other Georgia decisions have denied collateral order treatment to orders that were found not “conclusive.” In *State v. Gober*, for instance, the Court of Appeals held that a trial court’s decision denying summary judgment on sovereign immunity grounds to the state, against whom the defendant judge had filed a third-party indemnification action, was not appealable as a collateral order, because it “left the questions at issue open, unfinished, and inconclusive.”¹¹

The most interesting aspect of the Court of Appeals decision is its holding that denial of a government

defendant’s plea of immunity is both important enough to justify immediate direct review, and “effectively unreviewable” if a direct appeal is not available.

The United States Supreme Court has observed that a ruling may be appealable as a collateral order where “unless it can be reviewed before [the proceedings terminate], it can never be reviewed at all.”¹² The Supreme Court of Georgia explained that a ruling is “effectively unreviewable” when, as a practical result of the ruling, important rights may be lost before the case is concluded and an appeal can be filed; for example, the property on which a lis pendens had been filed might be sold before an appeal from the

cancellation of the lis pendens could be decided¹³ or a criminal defendant may be tried before his Double Jeopardy claim is considered.

The Supreme Court of Georgia has also found “unreviewable” orders which (1) denied a “reporter’s privilege” not to disclose information from a

jailhouse interview; by the time an appeal could be filed at the end of the case, the reporter would already have revealed the information;¹⁴ and (2) denied a motion to quash a subpoena for records that would have revealed the strategy of the attorneys for a number of capital defendants. “Once this information is revealed, the damage will already have been done, and an appeal after a final judgment in [Defendant’s] case could never rectify the harm.”¹⁵

The “harm which could not be rectified” in *Canas* and other cases denying immunity is that the defendant is compelled to go to trial at all. In the court’s eyes, avoiding a civil trial is as important as avoiding a criminal trial after a plea of double jeopardy has been incorrectly rejected. The decision discusses this issue only briefly, stating that, under Georgia law, “sovereign immunity is an immunity from suit, rather than a mere defense to liability” and that the issue of immunity “must therefore be resolved as the threshold issue in a suit against [an] officer in his personal

“Denial of a government defendant’s plea of immunity is . . . important enough to justify immediate direct review.”

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capacity.” That line of reasoning has been repeated in a number of other cases.¹⁶

The Court of Appeals’ opinion does not, however, explain why a decision that denies a defendant immunity causes greater harm to the defendant than a decision that, for example, denies a defendant’s motion to dismiss for failure to state a claim, thereby forcing him to go through a trial to defend against a meritless claim. In other words, if an appeal at the conclusion of a case may determine that either defendant was correct, and therefore shield him from any consequences of an erroneous ruling, why is sparing an “immunity” defendant from going to trial in the first place considered exceptionally important, but the claims of other defendants seeking to avoid unnecessary trial not important enough to warrant allowing them an immediate appeal?

While the Court of Appeals decision does not answer this question directly, a case cited in the opinion does. In *Cameron v. Lang*, 274 Ga. 122, 123-124 (2001), the Supreme Court of Georgia adopted the reasoning of the United States Supreme Court in the *Mitchell* case, and explained that:

Qualified immunity is provided to permit government officials to act with independence and without the fear of consequences. These consequences are not limited to liability for money damages; they also include the general costs of subjecting officials to the risks of trial – distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service.

The Court of Appeals’ *Canas* opinion is clear and well reasoned. The Court demonstrated that its ruling was in line with the historical development of the collateral order doctrine. Even more important, it took the trouble to anticipate the questions the opinion would raise, such as why the denial of immunity warrants “special treatment,” and to provide cases to answer them.

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Endnotes

¹ This article will address only Division 1 of the Court of Appeals opinion, which discusses the right to direct appeal issue.

² *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468-469 (1978).

³ *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949).

⁴ *Patterson v. State*, 248 Ga. 875 (1982).

⁵ *Mitchell v. Forsyth*, 472 U.S. 511 (1985).

⁶ *Griesel v. Hamlin*, 963 F. 2d 338 (11th Cir. 1992).

⁷ 337 U.S. at 546.

⁸ 250 Ga. 430, 432 (1982)

⁹ See also, for example, *Cohen*, 337 U.S. at 546 (court determined that an order had “settled conclusively the corporation’s claim that it was entitled by state law to require [a] shareholder to post security for costs,” which was an issue separate from the stockholder’s derivative suit itself).

¹⁰ 250 Ga. 430, 432 (1982)

¹¹ 229 Ga. App. 700, 701 (1997); See also *Becker v. Bishop*, 151 Ga. App. 224 (1979) (holding that an order setting aside a default judgment was not a final order because “the effect [of the order] is to continue the pendency of the case in the trial court”; and *Miller v. Miller*, 282 Ga. 164 (2007) (holding that a “final judgment” in a divorce case could not be directly appealed, because the trial court left the parties the opportunity to present further evidence). The *Becker* and *Miller* cases were cited by the Court of Appeals, though they did not involve whether the orders were “conclusive” for collateral order purposes.

¹² *Mitchell*, 472 U.S. at 525.

¹³ *Scroggins*, 250 Ga. at 432.

¹⁴ *In re Paul*, 270 Ga. 680, 682 (1999); the court also pointed out that OCGA § 5-6-34 (a)(2) already allowed for direct appeals in situations where a ruling would have an irreparable effect on the rights of parties.

¹⁵ *Britt v. State*, 282 Ga. 746, 748 (2007).

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¹⁶ E.g. *Griesel*, 963 F. 2d at 340: “In discussing the *Cohen* factor relating to whether the order is effectively unreviewable after trial, the Supreme Court emphasized that qualified immunity is an *immunity from suit* rather than a mere defense to liability...;” and *Mitchell*, 472 U.S. at 525: “The essence of absolute immunity is its possessor’s entitlement not to have to answer for his conduct in a civil damages action.”

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All of these problems could lead to a radical legislative solution – to do away with direct appeals as a matter of right for most criminal convictions. There is no federal constitutional right to a direct appeal⁹ and the constitutional right to the appointment of counsel is only triggered when the State allows a direct appeal as a matter of right.¹⁰ If the costs of indigent appeals become too burdensome, one way to alleviate that expense would be to make all or most criminal appeals discretionary. The potential that Georgia could make criminal appeals discretionary is hard to imagine today, but may not be so farfetched if the backlog of appeals continues to grow.

While indigent defense generates heated debate, indigent appellate defense has been mostly ignored because those convicted of a crime have no political capital. Indigent appellate defense is a growing

problem that must be addressed now or the entire justice system will face serious consequences. Simply throwing money at the problem is not a silver bullet answer, but we can no longer ignore the dearth of appellate defense lawyers and hope the problem will go away.

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Endnotes

¹ OCGA § 5-6-33(a)(1).

² *Evitts v. Lucey*, 469 U.S. 387 (II)(A) (105 SC 830; 83 LE2d 821) (1985).

³ *Davis v. Frazier*, No. S08A1786 (Ga. Feb. 9, 2009).

⁴ *Garland v. State*, 283 Ga. 201, 657 S.E.2d 842 (2008).

⁵ Clearly this is a small number of cases.

⁶ OCGA § 9-14-48(d); *Coleman v. Thompson*, 501 U.S. 722 (111 SC 2546; 115 LE2d 640) (1991).

⁷ *Simmons v. Beyer*, 44 F.3d 1160 (3rd Cir. 1995); *Harris v. Champion*, 15 F.3d 1538 (10th Cir. 1994); *United States v. Johnson*, 732 F.2d 379 (4th Cir. 1984).

⁸ *Vermont v. Brillion*, 556 U.S. ____, Slip Opinion No. 08-88 (March 9, 2009).

⁹ *Abney v. United States*, 431 U.S. 651, 656 (97 SC 2034, 52 LE2d 651) (1977).

¹¹ *Evitts v. Lucey*.

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application for appeal is \$80.00;³⁷ however, legislation is currently pending in the Georgia General Assembly which would increase that amount to \$300.00.³⁸

Certificate of Service. Finally, the application must include a certificate of service demonstrating that the requirements of OCGA § 5-6-32 have been met.³⁹ In addition, service must be “perfected at or before the filing of the application.”⁴⁰

Docketing of the Application for Appeal. After you remit your application for appeal and it is accepted for filing by the appropriate Office of the Clerk of Court, it will there be docketed and assigned an application case number. The Clerk of Court will notify all attorneys of the docketing dates of all applications for appeal.⁴¹

Supersedeas. The filing of either a discretionary or interlocutory application for appeal acts as a supersedeas to the extent that a notice of appeal acts as supersedeas.⁴²

Responses. Responses to applications are not required.⁴³ But as Will Rogers⁴⁴ said, “Even if you’re

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Minefields, continued from page 10

on the right track, you'll get run over if you just sit there." Likewise, once the unhappy party has filed his or her application for appeal, a respondent should not "just sit there" by failing to file a response and risk getting run over! Responses are thus "encouraged."⁴⁵ A response to either a discretionary or interlocutory application must be filed within ten days of the date the application is docketed.⁴⁶ Make sure your response is stamped "filed" with the appropriate clerk's office within this ten-day time frame. In terms of content, OCGA § 5-6-35 (e) notes that "[t]he response may be accompanied by copies of the record in the same manner as is allowed with the application. The response may point out that the decision of the trial court was not error, or that the enumeration of error cannot be considered on appeal for lack of a transcript of evidence or for other reasons."

The Appellate Court's Decision - Discretionary Applications. The state appellate courts have 30 days from the date of filing to issue an order granting, denying, or dismissing an application for discretionary appeal.⁴⁷ If your application is denied, that is generally the end of the road for that case: The Supreme Court has held that the denial of an application for discretionary appeal is an adjudication on the merits "with respect to the substance of the requested review" and acts as res judicata in subsequent proceedings.⁴⁸

The Appellate Court's Decision - Interlocutory Applications. The state appellate courts have 45 days from the date of filing to issue an order granting, denying, or dismissing an application for interlocutory appeal.⁴⁹ But unlike a denial of a discretionary application, the previous denial of an interlocutory application or a dismissal of an interlocutory application on procedural grounds does not preclude the appellate courts from subsequently considering the issues raised on direct appeal.⁵⁰

Motions for Reconsideration. Motions for reconsideration may be filed but must physically be received in the court for filing within ten days of the order granting, denying, or dismissing an application for appeal.⁵¹ Neither appellate court allows second or subsequent motions for reconsideration by the same

party after a first motion has been denied except by permission of the court.⁵² The Court of Appeals Rules note that the filing of a motion for permission to file a second motion for reconsideration does not toll the 10 day limit for filing a notice of intent to apply for certiorari with the Supreme Court of Georgia.⁵³ No response to a motion for reconsideration is required, but, given the short time frame, any party wishing to respond must obviously do so quickly.⁵⁴

The Court of Appeals will only grant a motion for reconsideration if it appears that the court overlooked a material fact in the record, a statute or a decision which is controlling as authority and which would require a different judgment from that rendered, or has erroneously construed or misapplied a provision of law or a controlling authority.⁵⁵

If the Application is Granted. Within 10 days after the appellate court grants an application, the applicant must file a notice of appeal in the trial court following the procedures outlined in OCGA §§ 5-6-37 and 5-6-38 in order to secure review of the issues.⁵⁶ The good news is that costs need not be paid again when the appellate court has granted a discretionary or interlocutory application.⁵⁷ For a granted interlocutory application, the notice of appeal acts as supersedeas as provided in OCGA § 5-6-46, and the procedure thereafter is the same as in an appeal from a final judgment.⁵⁸ Once the notice of appeal is filed for granted discretionary or interlocutory applications, the appeal process then follows the course of any direct appeal.

With that, we've reached the end of the appellate application road. While the path does indeed contain many potholes, pitfalls, and minefields, they only make the application journey more interesting!

*Well, the road's been rocky along the way
It's been a long, hard haul on the motorway
But if it gets too smooth it's time to call it a day!*⁵⁹

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Endnotes

¹ Adapted from “95 South”. Words and Music by Joe Ely; copyright Tornado Temple.

² Georgia Supreme Court Rules 15-18; Georgia Court of Appeals Rules 1(c), 6, 24(c), 30 (e), 31(c).

³ “Any documents that do not comply with the Court rules may be returned to counsel with notice of the defect of the pleading, and/or counsel may be ordered to redact and recast such documents.” Georgia Court of Appeals Rule 1(c). The real danger is that if the Clerk of Court refuses to file the application as tendered, it may be untimely – and thus dismissed – once the application is corrected and filed. See Georgia Supreme Court Rule 7; Georgia Court of Appeals Rule 7.

⁴ These are real-life examples of applications filed with the Georgia Court of Appeals.

⁵ OCGA § 5-6-35 (b); Georgia Supreme Court Rule 19 n.1.

⁶ OCGA § 5-6-35 (b); Georgia Supreme Court Rules 30, 33; Georgia Court of Appeals Rules 30 (b).

⁷ Georgia Court of Appeals Rules 27 (a) (3), 27 (b) (2).

⁸ http://www.gaappeals.us/rules2/standards_of_review.php.

⁹ OCGA § 5-6-35 (c); Georgia Supreme Court Rules 30, 33; Georgia Court of Appeals Rules 30 (b), 31 (e).

¹⁰ Georgia Court of Appeals Rules 1 (a), 30 (b), 31 (e).

¹¹ See OCGA § 10-12-3 (3) (electronic signature defined).

¹² OCGA § 5-6-35 (c); Georgia Court of Appeals Rules 30 (d), 31 (b).

¹³ The Doors: “Roadhouse Blues”. Written by Jim Morrison, Robby Krieger, Ray Manzarek, John Densmore; published by Hal Leonard Corporation.

¹⁴ Georgia Supreme Court Rule 19 n.1.

¹⁵ Georgia Supreme Court Rules 34; Georgia Court of Appeals Rules 31 (a).

¹⁶ Georgia Supreme Court Rules 31; Georgia Court of Appeals Rules 30 (a).

¹⁷ OCGA 5-6-35 (b).

¹⁸ OCGA § 5-6-34 (b) provides: “The applicant may, at his or her election, include copies of such parts of the record as he or she deems appropriate.” OCGA § 5-6-35 (c) provides: “An applicant may include copies of such other parts of the record or transcript as he deems appropriate.”

¹⁹ *Harper v. Harper*, 259 Ga. 246 (378 SE2d 673) (1989).

²⁰ Georgia Supreme Court Rules 30, 33.

²¹ Court of Appeals Rules 30 (e), 31 (c).

²² *Harper v. Harper*, supra, 259 Ga. at 246.

²³ *Id.* at 247.

²⁴ *Id.*

²⁵ Supreme Court Rule 19 n.1.

²⁶ Georgia Supreme Court Rule 20.

²⁷ Georgia Court of Appeals Rules 30 (e), 31 (c).

²⁸ “Documents with conformed or stamped signatures by judges, attorneys, law firm staff, or an attorney’s employee shall not be permitted. No signatures by express permission are permitted. All pleadings, including, but not limited to briefs, motions, requests, applications, and notices shall be signed by counsel filing the document.” Georgia Court of Appeals Rule 1(a).

²⁹ Georgia Supreme Court Rule 18.

³⁰ Georgia Court of Appeals Rule 1(a).

³¹ Georgia Supreme Court Rule 4.

³² Georgia Court of Appeals Rule 9.

³³ The filing fee or pauper’s affidavit must be included with the application unless a form showing a public defender has been appointed to represent the party is filed with the Court or is contained in the record. OCGA § 5-6-4; Georgia Supreme Court Rule 5; Georgia Court of Appeals Rule 5.

³⁴ Georgia Court of Appeals Rules 1(b), 5.

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³⁵ OCGA § 5-6-4 provides in pertinent part: “The clerk is prohibited from receiving the application for appeal or the brief of the appellant unless the costs have been paid or a sufficient affidavit of indigence is filed or contained in the record.”

³⁶ Georgia Supreme Court Rule 5.

³⁷ OCGA § 5-6-4; Georgia Supreme Court Rule 5; Georgia Court of Appeals Rule 5.

³⁸ 2009 Ga. H.B. 283; 2009 Ga. H.B. 331.

³⁹ OCGA §§ 5-6-34 (b); 5-6-35 (d).

⁴⁰ OCGA §§ 5-6-34 (b); 5-6-35 (d).

⁴¹ Georgia Supreme Court Rule 8; Georgia Court of Appeals Rule 13.

⁴² OCGA § 5-6-35 (h).

⁴³ OCGA §§ 5-6-34 (b); 5-6-35 (e); Georgia Supreme Court Rules 30, 33; Georgia Court of Appeals Rules 30(h), 31(h).

⁴⁴ The writer’s only famous relative.

⁴⁵ Georgia Supreme Court Rules 30, 33.

⁴⁶ OCGA §§ 5-6-34 (b); 5-6-35 (e); Georgia Supreme Court Rules 30, 33; Georgia Court of Appeals Rules 30(h), 31(h).

⁴⁷ OCGA § 5-6-35 (f).

⁴⁸ *Northwest Social & Civic Club v. Franklin*, 276 Ga. 859, 860 (583 SE2d 858) (2003); see also OCGA § 9-11-60 (h); *Hook v. Bergen*, 286 Ga. App. 258 (649 SE2d 313) (2007).

⁴⁹ OCGA § 5-6-34 (b).

⁵⁰ *Canoeside Properties v. Livsey*, 277 Ga. 425, 427 (1) (589 SE2d 116) (2003); *C & S Nat. Bank v. Rayle*, 246 Ga. 727, 731 (273 SE2d 139) (1980).

⁵¹ Georgia Supreme Court Rule 27; Georgia Court of Appeals Rule 37(b).

⁵² Georgia Supreme Court Rule 27; Georgia Court of Appeals Rule 37(d).

⁵³ Georgia Court of Appeals Rule 37(d).

⁵⁴ Georgia Court of Appeals Rule 37(b).

⁵⁵ Georgia Court of Appeals Rule 37(e).

⁵⁶ OCGA § 5-6-34 (b); OCGA § 5-6-35 (b)

⁵⁷ OCGA § 5-6-4; Georgia Supreme Court Rule 5; Georgia Court of Appeals Rule 5.

⁵⁸ OCGA § 5-6-34 (b).

⁵⁹ The Kinks: “The Road”. Written by Ray Davies; published by Davray Music Ltd.

About the Appellate Practice Section

The purpose of the Appellate Practice Section of the State Bar of Georgia, as stated in its bylaws, is “to foster professionalism and excellence in appellate advocacy and to encourage improvements in the appellate process.” Appellate advocacy is a distinct practice area that involves a unique set of skills, governed by independent sets of procedural rules very different than those that apply to trial practice. The Appellate Practice Section offers programs and activities focusing on appellate practice, and also provides all members of the bench and bar in Georgia with a source of valuable information about appellate practice in the state and federal court system.

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