"Garbage In, Garbage Out": The Litigation Implosion Over the Unconstitutional Organization and Jurisdiction of the City Court of Atlanta

Edward C. Brewer III
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I think that we should be men first, and subjects afterward. It is not desirable to cultivate a respect for the law, so much as for the right.

I. INTRODUCTION

The City Court of Atlanta, the primary traffic court for Atlanta, Georgia, has exercised jurisdiction since 1996 over more than one million traffic violations and, since 1988 and under two statutes, some fifty thousand nontraffic misdemeanors. The City Court's first predecessor,
the Traffic Court of Atlanta, adjudicated traffic law violations from 1955 to 1967 and was replaced in 1967 by a second court, also known as the City Court, which existed until 1996. That City Court's jurisdiction was expanded in 1988 to include nontraffic misdemeanors arising from the same occurrence as the traffic violation. In 1996 the City Court was "re-create[d]" as "a system of state courts," and its same-occurrence misdemeanor jurisdiction was included within the new court's jurisdiction. In its various incarnations over forty-five years, the City Court has proven to be a highly efficient and effective forum for resolving traffic cases.

An earlier article suggested that the 1988 and 1996 City Court statutes are unconstitutional for a variety of reasons. Most simply, the 1996 "recreation" of the City Court as a state court and the 1988 and 1996 grants of same-occurrence misdemeanor jurisdiction violate Articles III, VI, and XI of the 1983 Georgia Constitution. The result is that either the court's entire jurisdiction from 1996 to the present, the court's same-occurrence misdemeanor jurisdiction from 1988 to the present, or both, have been and are being exercised unconstitutionally. This article will discuss the analytical underpinnings of the state court litigation that can be expected to follow in the wake of the court's constitutional and jurisdictional problems.

A. Recent Developments in the City Court of Atlanta

In July 1998 the Court Services Division of the National Center for State Courts ("NCSC") began a study of the City Court of Atlanta, which culminated in January 2000 in a three-volume report entitled A

8. Id. at 1017-29.
Management Review of the City Court of Atlanta. The NCSC Management Review made 211 recommendations for improved administration of the City Court, over forty of which were implemented by May 2000 and almost eighty of which were addressed in the court's 2000 budget. The report covers the subjects of organization, workflow, finance, records, forms analysis, automation, and caseflow. An early draft of the Management Review, which was submitted to the City Court, resulted in the preparation of a Revised Draft dated December 1999, reflecting comments made by the City Court of Atlanta Management Study Task Force Committee ("the Task Force") in a Final Master List of Errata, ("Final Master List") dated October 1, 1999. It appears the Task Force thought the Court Services Division was critical of the City Court's management and operation. In any event, the Task Force was critical of the earlier draft, which it said contained "errors which seem pervasive throughout the entire report" and "errors . . . identified as to a specific page or to a specific 'Recommendation' because it presents a conclusion based upon some incorrect or inaccurate premise." The Task Force maintained, in language from which the title of this Article is partly derived, that "[s]everal of the errors are of such a significant nature as to substantially alter the conclusions drawn from this wrong input. 'Garbage In; Garbage Out.'"
This Article, like the earlier article, is based on the same premises as those that led the City Court to request that the management study be conducted. "Knowing that the time had come for the court to make serious changes and to be given meaningful direction, [the City Court] decided to undertake a task which most courts may not have the courage to entertain." The Task Force correctly argued:

Hardly [ever] does any organization hang its dirty laundry for all to see. However, our court believes that the false gods of vanity and pride must be set aside if changes are to occur for the common good of all. If a dialogue without rigorous honesty cannot exist, then real solutions cannot be forged.

Perhaps the City Court's courageous undertaking will include a self-examination of the dirty laundry of its own unconstitutional existence and lack of subject matter jurisdiction because, under B & D Fabricators v. D.H. Blair Investment Banking Corp., the City Court has the same duty as an appellate court to examine its own jurisdiction.

The first case that raised the issue was Georgia v. Wickham. In Wickham the City Court, without requesting any briefs on the issues, summarily denied a motion to dismiss or to transfer to the State Court of Fulton County based in part on the arguments raised in the earlier article. If those decisions are any indication of the approach being taken, then the City Court's response to these critical constitutional

City Court of Atlanta. See Executive Town & Country Serv., Inc. v. Young, 258 Ga. 860, 861, 376 S.E.2d 190, 191 (1989).

16. 1 NCSC MANAGEMENT REVIEW, supra note 2, at 1. The Task Force stated:

This court recognizes that it is a court of first impression to [sic] the justice system for most citizens of this state. Accordingly, it fully recognizes its responsibility to the public for access to it. It is an established principle of any democracy that the judicial branch of government provides the greatest access and participation by its citizens. The court recognizes that because very few courts have allowed themselves to be examined in such a courageous way that data of a comparable nature does not exist until more courts perform their own self-examination before imploding upon themselves.

17. FINAL MASTER LIST, supra note 13, at 1. The Task Force's very apt image of "implosion," like the Task Force's epithetical description of the earlier draft report, contributed to the title of this Article. See supra notes 5, 13, and accompanying text.

18. Id.


20. Id. at 375, 469 S.E.2d at 686.

21. No. 200424 (City Court of Atlanta, motion to transfer heard May 24, 2000 and amended May 26, 2000, to add motion to dismiss). The Author is counsel of record in the Georgia Supreme Court.

22. Id.
concerns about its existence and jurisdiction would seem to have more in common with the "false gods of vanity and pride" than with "rigorous honesty," leaving "the common good of all" unrealized and "real solutions" unforged.  

The Task Force did make several observations on the merits that may be instructive in the litigation of the constitutional issues of the court's existence and jurisdiction. The Final Master List clearly states the City Court is a special court of Georgia, not a state court and not a municipal court:

It is apparent from the entire study that the state law which created this court, and which describes the duties and functions of the chief judge and other court personnel, was either ignored or not acknowledged. Throughout the report, recommendations are made based upon the court being some type of municipal court, while in other instances, it appears that there are efforts to treat the court as a state court. This court is neither a state court as defined by the Georgia Constitution and state statutes, nor a municipal court created by City Charter. It is a special court, created by the state legislature under the powers of the Georgia Constitution and given state court

23. FINAL MASTER LIST, supra note 13, at 1.
24. The City Court's 1996 statute and its constitutional amendments do not demonstrate that it is one of the courts listed in article VI, section 1, paragraph 1 of the 1983 Georgia Constitution. Brewer, supra note 7, at 1019. It is curious, indeed mystifying, that the City Court's current letterhead reads as follows: "CITY COURT OF ATLANTA, A STATE COURT." See Letter from Edward L. Baety, Chief Judge, City Court of Atlanta (Apr. 17, 2000) (on file with author), to various invitees, regarding "a public hearing to be held on Friday, April 28, 2000." The NSCS states that the court should "[formulate a budget position with the city that is based upon the unique legal status of the Court as a State Court"). See Brewer, supra note 2, at 8. The final report also noted under Recommendation 43 that:

[i]f the court has a unique legal status in Georgia and proclaims itself a state court.
Yet, it is very much within the city orbit and treated like a city agency. The court has threatened to invoke inherent powers in the recent budget struggle with the city. The court appears to be reconsidering the budgetary implication of its legal status as a state court.

1 NCSC MANAGEMENT REVIEW, supra note 2, at 63; see Trisha Renaud, Judges Sue City Over Traffic Court Funding, FULTON COUNTY DAILY REP., June 12, 2000, at 1, 8. One surmises that one of the City Court's most important original attributes, its ability to generate revenue for the City of Atlanta, continues to figure into its existence and operations within the political systems of the State of Georgia and the City of Atlanta, see Brewer, supra note 7, at 990 (citing City of Atlanta v. Landers, 212 Ga. 111, 114, 90 S.E.2d 583, 586 (1955)).

25. However literally accurate this statement may be, it is of course incomplete at best because article VI, section 10, paragraph 1(5) of the Georgia Constitution, along with other provisions of law, suggests that the City Court is a Municipal Court. See Brewer, supra note 7, at 1004.
jurisdiction, to handle a high volume of cases. Such courts may be created in all Georgia cities with populations of 300,000 or more based upon the last census.\[26\] Initially, this court was created in 1967. However, being the only court of its kind in the entire state, through the years of its existence, laws became effective for “state courts”, “superior” courts, “probate” courts and “magistrate” courts that did not include or reference this court. These other courts can be found in many jurisdictions, but this unique court only flourished in the City of Atlanta.\[27\] Therefore, in order to understand and fully appreciate

26. A small but critical correction is in order, because the 1967 and 1986 amendments purport to permit the creation of such courts only in cities over 300,000, and the Task Force apparently is quoting from one of the City Court statutes rather than the amendment. See Brewer, supra note 7, at 996-97 n.392 (citing 1967 Ga. Laws 3360, 3360-61). More importantly, with due respect, it is difficult to justify this reference to “all Georgia cities” when the only city in Georgia over 300,000 is Atlanta. The next largest city is Columbus at 178,683 as of the revised 1990 census data, and the Supreme Court of Georgia held in Lomax v. Lee, 261 Ga. 575, 408 S.E.2d 788 (1991) that the 300,000 population bracket could only have been intended to refer to the City of Atlanta. Id. at 581, 408 S.E.2d at 792-93; see also Brewer, supra note 7, at 989. The General Assembly may have said the same thing in the 1996 Act, 1996 Ga. Laws 627, but saying something incorrect twice does not make it so.

27. The Task Force’s statement is a telling admission that the City Court is not (as it cannot be) part of the uniform system of article VI courts in Georgia. See Brewer, supra note 7, at 1021-22. That being so, the Task Force had to look (indeed, some seem to have had to travel) outside Georgia to California to find a court that it regarded as of like kind with the City Court—the City of Los Angeles Traffic Court. See FINAL MASTER LIST, supra note 13, at 3 (adverting to judges’ trip to Los Angeles and conclusion therefrom that they found it to be a much more comparable court than those selected by the National Center study team). The NCSC apparently either rejected the comparison or lacked comparative information because it did not include the Los Angeles Municipal Court in the final report. Id. One would not be surprised to find that the NCSC simply decided to avoid any potential that more charges of “garbage in, garbage out” might be leveled at any detailed comparisons. See text accompanying supra note 15.

A 1962 report on the Traffic Court of Atlanta, the grandparent of the present City Court, noted that the then Detroit Recorder’s Court was similar to that earlier Atlanta court. See Brewer, supra note 7, at 993. It is unknown whether that Detroit court ever flourished, although the Detroit court’s juridical provenance seems more conducive to its flourishing than does the present City Court’s. Constitutionality being of course the point of the matter, both the parallels and the nonparallels in the Detroit and Atlanta courts’ histories are instructive. Both were, or are, traffic courts, but there end the constitutionally significant similarities. Effective September 1, 1981, the Detroit court’s traffic and ordinance division became part of the state-level District Court for the 36th District. See MICH. COMP. LAWS section 600.9941 (1987). Effective October 1, 1997, the court was “abolished and merged with the third judicial circuit of the circuit court.” Id. § 600.9931 (Supp. 1999); see id. § 726.1 (1993 & Supp. 1999) (providing statutory history of subject matter jurisdiction). The latter transfer of jurisdiction was upheld as constitutional in Kuhn v. Secretary of State, 579 N.W.2d 101, 107 (Mich. Ct. App. 1998), and the federal courts refused to hear a related case on grounds of res judicata with overtones of Pullman abstention. Kuhn v. Miller, No. 98-2012 (6th Cir. Oct. 28, 1999). (The City of Detroit lies
the unique nature of our court, it is strongly requested that the entire copy of the Act creating the court be referred to and attached as an Appendix to the Final Study.\textsuperscript{28}

The Task Force later repeated its assessment that "[t]he court is not a municipal entity such as The Atlanta Municipal Court."\textsuperscript{29} However, the Task Force made clear that "the cases handled by the court are overwhelmingly classified as misdemeanors. In addition to traffic misdemeanors, this court also tries other misdemeanors that arise out of the traffic stop. In reality there are very few city 'ordinance' violations that are filed in the City Court of Atlanta."\textsuperscript{30} The Task Force remarked that "there are some states that do not treat their traffic cases the same as criminal cases. Georgia, like most states, is not one of those jurisdictions. Therefore, the Court must follow the procedures outlined in our state statutes including the criminal procedure laws."\textsuperscript{31}
Furthermore, the City Court must also follow the principles of Georgia law governing courts with limited constitutional and criminal jurisdiction.\textsuperscript{32}

\section*{B. Nature and Scope of the Present Arguments}

The City Court's unconstitutionality presents a significant and pressing question for the judges and solicitor of the City Court, for past, present, and future City Court defendants and their attorneys, and for the State of Georgia: What is to be done? The \textit{Judicial Engine} article proposed solutions for the General Assembly in restructuring the City Court in a constitutional manner by recreating a Traffic Division for the Municipal Court of Atlanta as part of more comprehensive legislation affecting municipal courts in three or more large counties in Georgia.\textsuperscript{33}

This Article addresses the state procedural alternatives that criminal defendants have for bringing direct and collateral challenges against the City Court's judgments and that the Georgia courts, for their part, have available for managing the litigation that may be anticipated.

The methods for challenging a court's existence, a court's jurisdiction, or a judge's authority to take judicial action may be divided into two general categories: direct and collateral challenges.\textsuperscript{34} The direct challenges may lie in the trial court or on appeal, and the primary question is whether the defendant must raise the issue "in the first instance" before the court whose existence or jurisdiction, or the judge...
whose authority, is being challenged. The collateral challenges include the writ of habeas corpus.

The law of direct and collateral challenges to the City Court's judgments, although complex, provides fairly clear answers for criminal defendants and courts in Georgia. Georgia is one of two states in the United States (the other is Colorado) in which the judgments of an unconstitutional de facto court are void and may be challenged not only by raising the issue in the trial court in the first instance but also by raising it both directly on appeal and collaterally on habeas corpus, even though no objection to the court's existence has been raised in the trial court. Thus, besides the obvious approach of raising the issue in the City Court, the criminal defendant may raise the issue for the first time on appeal or in a state habeas proceeding, perhaps including a class action. This principle, like the similar principle applicable to the City Court's lack of subject matter jurisdiction over same-occurrence misdemeanors, is deeply embedded in the provisions of the Georgia Constitution and the history of the Georgia court system, and it is not likely to be dislodged even, or perhaps especially, by the need for expediency created by the large number of defective judgments that the City Court has rendered. This Article will address those issues as they arise in the state courts, leaving aside the question of federal court involvement in the City Court's problems.

II. THE NATURE OF THE DEFECTS IN THE CITY COURT

In the absence of a court with constitutional existence under state law and having subject matter jurisdiction constitutionally granted, judicial exercise of criminal misdemeanor jurisdiction presents problems that lie at the core of the authority of any state judicial system. The City Court of Atlanta's existential and jurisdictional defects are fundamental organic problems that are products of the unconstitutionality of the acts creating and empowering the City Court. Article I, section II, paragraph V of the 1983 Georgia Constitution provides that "[l]egislative acts in violation of this Constitution or the Constitution of the United States are void, and the judiciary shall so declare them." The provision has constitutional antecedents that go back to the 1861 Georgia Constitution, which is the first constitution approved after the Supreme Court was created in 1845, and the later Georgia constitutions in 1865.

35. See infra notes 61-88 and accompanying text.
36. See infra notes 197-278 and accompanying text. Due to space limitations, this article will not address declaratory judgments or the extraordinary writs.
37. GA. CONST. of 1861, art. I, § 17 ("Legislative Acts in violation of the fundamental law are void; and the Judiciary shall so declare them."). See 1845 Ga. Laws 18.
1868, 1877, 1945, and 1976. It has earlier judicial antecedents in the rule of judicial review as stated in *Nunn v. State*, decided by the Georgia Supreme Court during its first term; in *McLeod v. Burroughs*; and in earlier decisions of the Superior Courts in 1809, 1815, 1822, and 1830. The specificity of the provision goes beyond creating a rule of judicial review, however, and as discussed further below, it provides expressly that an unconstitutional legislative act is void, which under Georgia decisions means that the Act has no legal effect whatsoever.

**A. The City Court's Lack of Subject Matter Jurisdiction Over Same-Occurrence Misdemeanors**

The Official Code of Georgia Annotated ("O.C.G.A.") section 17-9-4 provides that "[t]he 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." It is well settled in Georgia that when a court of limited jurisdiction lacks subject matter jurisdiction over a prosecution, its judgment rendered in the case is void under O.C.G.A. section 17-9-4 and is subject to collateral attack. As early as 1848 in

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38. GA. CONST. of 1865, art. I, § 13 ("Legislative acts in violation of the Constitution are void, and the Judiciary shall so declare them.").

39. GA. CONST. of 1868, art. I, § 32. The 1868 and later versions are in the same form as the modern language.

40. GA. CONST. of 1877, art. I, § 4, para. 2.

41. GA. CONST. of 1895, art. I, § 4, para. 2.

42. GA. CONST. of 1945, art. I, § 4, para. 2.

43. GA. CONST. of 1976, art. I, § 4, para. 2.

44. 1 Ga. 243 (1846).

45. 9 Ga. 213 (1851). The decision in *McLeod* is interesting in part because it was included in an early treatise on Georgia constitutional law, *Albert Berry Saye & Charles Joseph Hilkey, Constitutional Law of Georgia* 239 (1952).

46. GA. CONST. art. I, § 2, para. 5.


48. See *Fleming v. Lowry*, 173 Ga. 894, 162 S.E. 144 (1931); *Wright v. Davis*, 120 Ga. 670, 48 S.E. 170 (1904); *see also infra* notes 197-278 and accompanying text (habeas corpus
Bostwick v. Perkins, Hopkins & White, the Georgia Supreme Court held that a judgment entered in the absence of subject matter jurisdiction is "unquestionably void, and a nullity." In 1850 in Rodgers v. Evans, the court held that "[a] judgment of a Court which has no jurisdiction of the cause, is entirely void." The question of the City Court's authority over same-occurrence misdemeanors is definitely a question of subject matter jurisdiction under Georgia law.

B. The City Court's Lack of Existence Under the De Facto Doctrines

1. Summary of the Georgia Decisions

The de jure and de facto doctrines describe, in the judicial context, whether a court, judge, or other officer has the authority to conduct judicial business under the constitution and laws of the jurisdiction, in this case the State of Georgia. At least three de facto doctrines exist that appear in the Georgia cases. These doctrines apply when: (1)
there is no state statute providing for the court, so that the court does not exist "under color of state law"; (2) a statute exists creating the court, but the statute is unconstitutional; and (3) there is a statute, constitutional or otherwise, providing for the court and office, but the judge or officer's appointment, election, tenure, or other claim of authority is unlawful, unconstitutional, or otherwise defective. The first two situations are usually referred to, again in the judicial context, as the de facto court doctrines, and they will be distinguished in this Article by the terms "nonstatutory de facto court" and "unconstitutional de facto court." The third situation is usually referred to as the de facto judge or de facto officer doctrines, and those doctrines will be distinguished by the terms "nonstatutory de facto judge" or "officer" and "unconstitutional de facto judge" or "officer." That there is a difference between the de facto court doctrines on the one hand and the de facto judge doctrines on the other is well accepted. In Smith v. Langford, the Georgia Supreme Court held that the question of a senior judge's ability to exercise judicial authority under the Constitution does not involve the same question as the establishment of a separate judicial forum. The Georgia courts have addressed all three situations covered by the de facto doctrines. The de facto court doctrines are significant here for three purposes: (1) the consequences of a court's lack of de jure existence or authority; (2) the necessity of a defendant's objecting to the exercise of de facto authority prior to judgment; and (3) the availability of a collateral attack on the judgment, for example, the writ of habeas corpus. Further, at least under the de facto court doctrines in Georgia, it is significant whether the purported judicial action occurs in a civil case or in a criminal case. Regardless of what other jurisdictions may decide, the Georgia courts are clear on the issues of a court's constitu-

Atlanta. See infra notes 114-88 and accompanying text.

56. The court in State v. Carroll, 38 Conn. 449 (1871) breaks down the de facto judge category still further, but the City Court's problems relate to its own existence and authority, not the authority of its judges, and in any event the analysis in the decision in Carroll is inconsistent in numerous regards with that of the Georgia courts. See infra text accompanying notes 170-88.

57. The distinction is the same as that between the writs of prohibition and quo warranto, to the extent that the former lies to determine whether an official's actions are lawful and constitutional, whereas the latter lies to challenge the right of a person to hold public office. See infra note 197. The writ of prohibition was used to challenge de facto courts in Logan v. Harris, 210 S.W.2d 301 (Ark. 1948) and Tobler v. Beckett, 297 So. 2d 59 (Fla. Dist. Ct. App. 1974).


59. Id. at 224, 518 S.E.2d at 887.
tional authority under a criminal statute. Under article I, section II, paragraph V of the Georgia Constitution and O.C.G.A. section 17-9-4, if a court is found to lack constitutional existence or jurisdiction, the court's judgments are "void for any other cause," and the court's unconstitutionality need not be raised in the initial proceedings and may be raised on collateral attack of the judgment.⁶⁰

a. The De Facto Court Doctrines in Georgia. In Murray v. State,⁶¹ the Georgia Supreme Court addressed the unlawfulness of a nonstatutory de facto court.⁶² A county court operated in Washington County in 1895, purportedly pursuant to the 1872 county courts statute,⁶³ despite that county's exclusion from the statute by a local act.⁶⁴ The supreme court determined that the county court had not been authorized by statute and adverted to the argument that "the consequences to result from a holding that the court was illegally established would be, to many persons, very disastrous."⁶⁵ The court concluded:

It is said that the authority of the court should be sustained for the reason that the persons assuming to be officers thereof were acting under color of law, and that their acts would be valid as the acts of de facto officers. Without attempting now to decide the question as to whether there can be such a thing as a de facto court, so far as property rights which are sought to be affected by the judgment of such a court are concerned, we are clear that in a case involving the liberty of the citizen there can be no such thing as a de facto court, where the jurisdiction and authority sought to be exercised are questioned at the threshold of the proceeding, as was done in the present case by a plea to the jurisdiction, filed on arraignment.⁶⁶

Whether the authority of a de facto court must be "questioned at the threshold of the proceeding" or whether this was no more than descrip-

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⁶⁰. GA. CONST. art. I, § 2, para. 5; O.C.G.A. § 17-9-4.
⁶¹. 112 Ga. 7, 37 S.E. 111 (1900).
⁶². Id. at 11, 37 S.E. at 113.
⁶⁵. 112 Ga. at 13, 37 S.E. at 114.
⁶⁶. Id. at 12, 37 S.E. at 114 (emphasis added); see Ryder v. United States, 515 U.S. 177, 183-86 (1995) (distinguishing between civil and criminal cases for purposes of de facto judge doctrine).
tive of what had occurred in Murray and need not occur in order to preserve error will be considered below. 67

The question left open in Murray on the juridical possibility of a de facto court was answered in the negative in Wright v. Davis. 68 Wright involved a habeas corpus proceeding in which the petitioner argued that the City Court of Wrightsville was unconstitutionally created and, therefore, an unconstitutional de facto court. 69 The supreme court held the petitioner was estopped to deny the existence of the court in which he had filed the writ, reasoning that it would not have certiorari jurisdiction on review of the decision of a nonexistent court. 70 Furthermore, if the City Court had been unconstitutionally created, it would necessarily follow that there was no court:

There may be a de facto judge of a de jure court, but, in our opinion, there can be no such thing as a de facto court. We know of no such anomaly in law as a de facto judge of a de facto court. Before there can be a de facto officer, there must be a de jure office for him to fill. "An unconstitutional act is not a law. It confers no rights. It imposes no duties. It affords no protection. It creates no office. It is, in legal contemplation, as inoperative as though it had never been passed." 71

The court dismissed the writ based upon the doctrine of estoppel and necessarily concluded that an unconstitutional de facto court does not exist under Georgia law. 72 The court stated:

67. See infra notes 86-88, 197-209 and accompanying text.
68. 120 Ga. 670, 48 S.E. 170 (1904).
69. Id. at 673, 48 S.E. at 171-72.
70. Id. at 674, 48 S.E. at 172.
71. Id. (quoting Norton v. Shelby County, 118 U.S. 425, 442 (1886)). Cf. Strickland v. Griffin, 70 Ga. 541, 545 (1883) (holding void fieri facias issued after abolition of court). This description illustrates why the term "nonexistent" cannot be limited to describing a nonstatutory de facto court and also shows that Georgia does not distinguish between nonstatutory and unconstitutional de facto courts in holding their judgments to be void.
72. Id. at 674, 48 S.E. at 172. The conclusion about whether the judgment was void or voidable was necessary to the holding on certiorari jurisdiction because, under the statute of that day, only a voidable judgment could be reviewed on certiorari. See, e.g., McDonald v. Farmers Supply Co., 143 Ga. 552, 556, 85 S.E. 861, 863 (1915); Frese v. Link, 76 Ga. App. 709, 710, 47 S.E.2d 170, 171 (1948). The court in Wright reasoned that if the lower court did not exist, its judgments were void, and further that it was logically and legally impossible to direct a writ of certiorari to a nonexistent court, so certiorari jurisdiction could not exist. 120 Ga. at 674, 48 S.E. at 172. Conversely, had Wright's argument about the court's existence led to the conclusion that the judgment was merely voidable, irregular or erroneous, certiorari jurisdiction would have existed. Id. at 673-74, 48 S.E. at 171-72. In McDonald Justice Lumpkin criticized the rule:

Speaking for myself, I think the rule is not sound. If there is no court at all, the attempt to make a ruling is a mere assumption of authority. But, if there is a
[If the petitioner wished, through the writ of habeas corpus, to test the legal existence of the city court of Wrightsville, he could have done so by applying to the judge of the superior courts of the circuit, or perhaps to the ordinary of Johnson county, either of whom has authority to issue the writ of habeas corpus.]

The significance of Wright for the de facto court doctrines in Georgia was confirmed by Bass v. City of Milledgeville, in which the defendant filed for certiorari in the Superior Court of Baldwin County to overturn a judgment of the Milledgeville police court on the ground that it was an unconstitutional de facto court. The supreme court again held that "the writ of certiorari will not lie to review a void judgment by a court legally constituted, or any pretended judgment by an individual or body of individuals assuming to exercise judicial powers without any lawful authority so to do." The court cited three cases for this proposition. Murray, which involved a nonstatutory de facto court; Wright, which involved an unconstitutional de facto court; and Levadas v. Beach, which was relevant only to the unavailability of certiorari for review of void judgments. The court went on, reasoning that "[i]f the police court of Milledgeville has no legal existence, one who is deprived of his liberty by the person assuming to act as a judge of that court is not without remedy. He is entitled to a discharge on habeas corpus." For this second proposition the court cited Moore v. Wheeler, which

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court with a case before it, I have never appreciated the force of the reasoning by which it is held that, if the judgment is wrong, the litigant against whom it is pronounced may have it reversed by certiorari; but, if it is so wrong as to be void, the injured party cannot get rid of it by that means—in other words, that there is any inverse ratio between the degree of the wrong and the right to correct it.

143 Ga. at 556, 85 S.E. at 863.
73. 120 Ga. at 674, 48 S.E. at 172.
74. 122 Ga. 177, 50 S.E. 59 (1905).
75. Id. at 177, 50 S.E. at 59.
76. Id. (emphasis added). The court's use of the word "authority" is instructive. See supra note 54.
77. See supra notes 61-67 and accompanying text.
78. See supra notes 68-73 and accompanying text.
79. 117 Ga. 178, 43 S.E. 418 (1903).
80. Id. at 180, 43 S.E. at 419. Specifically, Levadas involved an argument, addressed only in dicta, that a judgment was void because it was entered outside the term of court, which has nothing to do with the existence or constitutionality of the statute creating the court. Id.
81. 122 Ga. at 177, 50 S.E. at 59.
82. 109 Ga. 62, 35 S.E. 116 (1900); accord Riley v. Garrett, 219 Ga. 345, 133 S.E.2d 367 (1963). The court in Moore stated that:
permitted a habeas challenge to a void judgment because the underlying substantive statute was unconstitutional.\textsuperscript{83}

The court in \textit{Bass} reaffirmed its holding in \textit{Wright} that the absence of a statute creating the court, the unconstitutionality of that statute, and the unconstitutionality of the substantive statute underlying the court's judgment will all render the court's judgment void.\textsuperscript{84} The reasoning also indicates that in Georgia the concept of "no legal existence" includes both a court that does not exist because no statute created it and a court that purports to exist under an unconstitutional statute. These decisions eliminated any doubt as to the application of the voidness principle to a de facto court created by an unconstitutional statute under the plain language of article I, section II, paragraph V of the 1983 Georgia Constitution, which expressly provides that an unconstitutional statute is void.\textsuperscript{85} The \textit{Wright} and \textit{Bass} decisions further clarify that \textit{Murray} does not require the defendant to object to a de facto court's jurisdiction, and that the issue may be raised by collateral attack. In sum, both nonstatutory de facto courts and unconstitutional de facto courts in Georgia are subject to the same analysis as to the validity of judgments, the preservation of objections, and the availability of collateral attack.

Four conclusions may be drawn from \textit{Wright} and \textit{Bass}. First, the judgments of an unconstitutional de facto court are void in Georgia. Second, the defendant need not present the constitutional question to the trial court in the first instance. Third, an unconstitutional de facto court's judgments are subject to collateral attack by writ of habeas corpus. Lastly, the rule of voidness applies with particular force in criminal cases, because the court in \textit{Murray} was "clear that in a case involving the liberty of the citizen there can be no such thing as a de facto court."\textsuperscript{86} The first of these conclusions is equivalent to saying that the judgment is unconstitutional within the meaning of article I, section II, paragraph V of the 1983 Constitution and void within the "void for any other cause" language of O.C.G.A. section 17-9-4, which has existed as part of every Georgia code since at least the 1863 Code.\textsuperscript{87}

\textsuperscript{83} An unconstitutional enactment is never a law; and, if there can be a case in which a conviction is illegal and without jurisdiction, it seems that such a case is presented when it appears either that there is no law making criminal the alleged crime, or authorizing its prosecution in the court wherein the sentence has been imposed.

109 Ga. at 63, 35 S.E. at 116 (emphasis added).

83. \textit{Id.} (citing 2 FREEMAN ON JUDGMENTS § 624, at 1092).

84. 122 Ga. at 177, 50 S.E. at 59.

85. GA. CONST. art. I, § 2, para. 5.

86. 112 Ga. at 13, 37 S.E. at 114.

87. \textit{See, e.g.,} GA. CODE § 3513 (1863); GA. CODE § 110-709 (Harrison 1933).
The second and third conclusions are equivalent to saying that this type of judgment "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."

The fourth conclusion speaks for itself as to the gravity of the City Court's lack of constitutional existence when it is exercising judicial authority in a criminal case.

b. The De Facto Judge Doctrines in Georgia. The other Georgia cases involving the de facto doctrines deal with the de facto judge or de facto officer doctrine. The Georgia Supreme Court has ruled that a de jure office is required if a de facto judge or officer is to have any authority. In *Herrington v. State*, the court held that a county policeman whose office was created by Fulton County ordinance but "has[d] never been in existence even under color of legislative enactment" was not a de facto officer and therefore could be prosecuted for extortion. In dicta the court distinguished between wholly ultra vires action and action under color of an unconstitutional statute:

There is an irreconcilable conflict of authority upon the proposition as to whether or not it is possible that the doctrine of an officer de facto can be applied to any case without presupposing the existence of an office [sic] de jure. Much respectable authority can be produced to the effect that, where an office is provided for by an unconstitutional act of the legislature, the incumbent of such an office, for the sake of public policy and the protection of private rights, will be recognized as an officer de facto until the unconstitutionality of the act has been judicially determined. On the other hand, there is considerable, and perhaps a greater, weight of authority directly the reverse.

The court cited the United States Supreme Court's decision in *Norton v. Shelby County* for the proposition that "the acts of a person assuming to fill and perform the duties of an office which does not exist de jure can have no validity whatever in law." The Georgia Supreme Court

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88. O.C.G.A. § 17-9-4; see, e.g., Crutchfield v. State, 24 Ga. 335 (1858); cf. O.C.G.A. §§ 9-11-60(a), (f), 9-12-16 (1993). One "other cause" for a collateral attack on a judgment occurs when the law upon which the conviction is based is unconstitutional. *Riley*, 219 Ga. at 352, 133 S.E.2d at 373.
90. 103 Ga. 318, 29 S.E. 931 (1898); accord *Bedingfield v. First Nat'l Bank*, 4 Ga. App. 197, 61 S.E. 30 (1908) (stating judge pro hac vice acted ultra vires when office not provided for in circumstances).
91. 103 Ga. at 320, 29 S.E. at 931.
92. *Id.* at 319, 29 S.E. at 931.
93. 118 U.S. 425 (1886).
94. 103 Ga. at 320, 29 S.E. at 931.
concluded that the county policeman had been engaged in wholly ultra
vires action because the Fulton County commissioners had not been
authorized by the General Assembly to create the office.\textsuperscript{95}

Similarly, in \textit{Bedingfield v. First National Bank},\textsuperscript{96} the Georgia Court
of Appeals addressed the authority of an attorney sitting without
statutory authority as a judge pro hac vice and held that a judgment
entered by the attorney was void.\textsuperscript{97} The statute provided that when the
regular judge of the court is disqualified, either another county court
judge or an attorney, with the consent of the parties, might serve as
judge pro hac vice.\textsuperscript{98} The court determined that no statutory office of
judge pro hac vice existed and reasoned that “above all else there must
be an office corresponding with that which he purports to hold. If there
is no office, there can be no officer de facto.”\textsuperscript{99} The court relied on
\textit{Hinton v. Lindsay}\textsuperscript{100} and held that for the de facto officer doctrine to
apply, “there must be a specific office, the duties of which the de facto
officer assumes to discharge.”\textsuperscript{101} Turning to general principles in some
jurisdictions that uphold the authority of a person who has the
“reputation” of a judge, the court reasoned that on the facts,

\begin{quote}
[H]e could not be a de facto judge of the county court, because there is
already a judge of the county court de jure, and it is well settled that
there cannot exist at one and the same time an officer de jure and one
de facto, or even two de facto officers.\textsuperscript{102}
\end{quote}

Finally, turning to the procedural methods for attacking the judgment,
the court held that an affidavit of illegality was available under \textit{Rodgers
v. Evans}\textsuperscript{103} Although parts of the decision suggest a variant of the
first de facto court doctrine, that is, the lack of an office within a duly
created court, the court analyzed the case as one involving a de facto
judge, but the result was the same: The judgment in the case was
void.\textsuperscript{104}

\begin{flushleft}
\textsuperscript{95} Id.
167, 82 S.E. 805 (1914) (stating constable prohibited by statute from serving as deputy
sheriff had no authority as “special deputy sheriff”).
\textsuperscript{97} 4 Ga. App. at 209, 61 S.E. at 34.
\textsuperscript{98} Id. at 201, 61 S.E. at 31.
\textsuperscript{99} Id., 61 S.E. at 32.
\textsuperscript{100} 20 Ga. 746 (1856).
\textsuperscript{101} 4 Ga. App. at 201, 61 S.E. at 32.
\textsuperscript{102} Id. at 202, 61 S.E. at 32.
\textsuperscript{103} 8 Ga. 143 (1850).
\textsuperscript{104} 4 Ga. App. at 206, 61 S.E. at 34.
\end{flushleft}
Since *Hinton* the procedural rule has been that when the defect in authority is procedural rather than statutory, the defendant must object to the authority of a de facto judge or officer or seek a writ of *quo warranto*. The defendant may not collaterally attack the judgment for the judge’s or officer’s lack of authority. Later cases apply the same rule to an unconstitutional de facto judge. In *Garcia v. Miller,* the Georgia Supreme Court held that a judge who held office past the expiration of his term when no successor was elected because of the *Brooks* litigation was a de facto judge entitled to sit until a successor was qualified. In *Murphy v. State,* the court held that the State Properties Commission had de facto authority when the appointments of some of its members violated separation of powers. Similarly, the Georgia Court of Appeals held in *Dominguez v. Enterprise Leasing Co.,* without citation of authority but probably consistent with the principles later stated in *Garcia* and *Murphy*, that a de facto judge may properly enter judgment when he acts for a duly constituted court but pursuant to a statute on filling judicial vacancies that may be but has yet to be declared, unconstitutional. The other de facto judge cases involve nonconstitutional defects in the appointment or tenure of

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105. *See Tarpley*, 204 Ga. at 726, 727, 51 S.E.2d at 642. Whether a quo warranto would serve when no objection was raised to a de facto judge’s authority seems doubtful, but the resolution of that question is not necessary to the present analysis.


107. *Id.* at 532, 408 S.E.2d at 98-99.


109. *Id.* at 683, 212 S.E.2d at 841. There was no attack on the existence or powers of the commission itself, thus distinguishing the case from the de facto court decisions, which the court did not cite. To the extent that *Murphy* was supposed to support a similar result in a de facto court case, the simple and sufficient answer would be that the rights of an individual criminal defendant are not at issue in a separation of powers case (or at least were not here) and that the interest in stability of property transactions might justify that result while an exercise of power over an accused criminal defendant would not. *See Murray*, 112 Ga. at 12-13, 57 S.E. at 114.


111. *Id.* at 665, 399 S.E.2d at 270. Leaving aside whether, according to *Wright and Bass*, the result in *Dominguez* should have been otherwise, the decision provides no support for overruling the de facto court decisions, and under *Murray* this observation is particularly true in a criminal case. *See supra* notes 61-78, *infra* notes 173-88 and accompanying text.
judges.112 Most of the de facto officer decisions similarly involve minor, nonconstitutional defects in the purported authority.113

2. The Federal Decisions on the De Facto Doctrines

In Norton v. Shelby County,114 the United States Supreme Court addressed the validity of bonds issued by a county board whose creation violated the state constitution.115 The Supreme Court first deferred to state authorities in holding that the actions of a de facto board or court are void whether taken without statutory authority or under an unconstitutional authority.116 The Court addressed an alternative argument that the board's members had authority as de facto judges or officers, and the Court reasoned that the de facto officer doctrine arises from "considerations of policy and necessity."117 However, the Court stated:

[T]he idea of an officer implies the existence of an office which he holds ... , and a public office can exist only by force of law. This seems to us so obvious that we should hardly feel called upon to consider any adverse opinion on the subject but for the earnest contention of plaintiff's counsel that such existence is not essential, and that it is sufficient if the office be provided for by any legislative enactment, however invalid ... . An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed.118

113. See Hagood v. Hamrick, 223 Ga. 600, 157 S.E.2d 429 (1967) (stating real property transactions valid as against chairman's change of residence when vacancy had not then been judicially determined); Varnadoe v. Housing Auth. of Doerun, 221 Ga. 467, 145 S.E.2d 493 (1965) (holding city attorneys ineligible because authority members were de facto officers); Tarpley, 204 Ga. at 721, 51 S.E.2d at 638 (stating mayor and some councilmen were de facto officers when former city charter revived after new charter declared unconstitutional); DeLoach v. Newton, 134 Ga. 739, 68 S.E. 708 (1910) (involving irregular election of education trustees); Smith & Bondurant v. Meador, 74 Ga. 416 (1885) (concerning notary public); State v. Giangregorio, 181 Ga. App. 324, 352 S.E.2d 193 (1986) (involving police officer).
114. 118 U.S. 425 (1886).
115. Id. at 426.
116. Id. at 438.
117. Id. at 441.
118. Id. at 442. The Georgia Supreme Court in Wright quoted the last sentence of this passage. 120 Ga. at 674, 48 S.E. at 172.
Canvassing the state court decisions, the Court concluded:

None of the cases cited militates against the doctrine that, for the existence of a de facto officer, there must be an office de jure, although there may be loose expressions in some of the opinions, not called for by the facts, seemingly against this view. Where no office legally exists, the pretended officer is merely a usurper, to whose acts no [legal] validity can be attached.119

The Norton principle was significantly eroded in the civil cases Chicot County Drainage District v. Baxter State Bank120 and Lemon v. Kurtzman,121 in which the United States Supreme Court adopted a balancing test to determine whether a determination of unconstitutionality will be given retroactive effect.122 The Chicot-Lemon balancing test arguably has itself been eroded by James B. Beam Distilling Co. v. Georgia,123 when the Court held that judicial decisions generally are fully retroactive.124 The modern application of voidness principles in federal criminal cases under Griffith v. Kentucky125 and Teague v. Lane126 is likewise substantially different.127

There is still life in Norton, however, its core propositions for the authority of de facto courts and judges remain alive and well despite the changes in more general law on retroactivity and prospectivity. In Ryder v. United States,128 the Court applied Norton to the unconstitutional appointments of civilian judges to the federal Court of Military Review, noting that the petitioner made a timely challenge to the judge's

119. 118 U.S. at 449.
120. 308 U.S. 371 (1940).
122. 308 U.S. at 374; 411 U.S. at 198-99. See Ryan v. County of DuPage, 45 F.3d 1090 (7th Cir. 1995); United States v. DePoli, 628 F.2d 779 (2d Cir. 1980); Kopp v. Fair Political Practices Comm'n, 905 P.2d 1248 (Cal. 1995). Norton also has been distinguished in bond cases on a variety of grounds. See Ashley v. Board of Supervisors of Polaque Isle County, 60 F. 55 (6th Cir. 1893); Miller v. Perris Irrigation Dist., 85 F. 693 (C.C. S.D. Cal. 1898); Beatty v. Metropolitan St. Louis Sewer Dist., No. 77985, 1996 LEXIS 19 (Mo., Feb. 20, 1996).
123. 501 U.S. 529 (1991). The effect of Jim Beam on Chicot and Lemon in civil cases is beyond the scope of this Article. It is clear, however, that the Jim Beam rule has far more in common with the rule of voidness under Norton than it does with the more lenient principles of Chicot and Lemon.
124. Id. at 535.
127. See infra notes 265-78 and accompanying text.
constitutional status in the initial adjudication. The Court distinguished decisions such as *Buckley v. Valeo* in which Congress had been given a reasonable opportunity to correct the defective statute and stated that "to the extent these civil cases may be thought to have implicitly applied a form of the de facto officer doctrine, we are not inclined to extend them beyond their facts."

3. The Other State Decisions on the De Facto Doctrines

All states that have considered the issue apply the same substantive rule to the invalidity of the judgments of both statutory de facto courts and unconstitutional de facto courts. Most jurisdictions, like Georgia, require the existence of a court or office before permitting a de facto judge or officer to act, but these jurisdictions are more lenient when the court or office has both statutory and constitutional existence. A small but significant minority of states apply the same rules as Georgia on the two procedural issues, that the lack of constitutional existence need not be raised in the trial court in the first instance and that habeas corpus is available to determine the issue. Many other state jurisdictions differ from Georgia cases on the procedural issues and require that the de facto court's unconstitutionality be raised in the trial court, on direct appeal, or in a special proceeding. The other states' decisions present several arguments that bear reckoning within the context of the de facto court doctrines, but, in the end, they do not shake the teachings of *Wright* and *Bass*.

a. The De Facto Court Doctrines. The de facto court doctrines in other states, as in Georgia, arise in the two contexts of nonstatutory and unconstitutional de facto courts. The State of Colorado has followed

129. *Id.* at 182-83.
131. 515 U.S. 184.
132. Three points bear mention on this analysis of other state decisions. First, the argument that the same principles of lenity favoring the state should be applied in both de facto court and de facto judge cases is addressed infra in notes 173-88 and accompanying text. Second, no effort is made to determine whether a state decision that the removal of a court from its county seat renders its judgments void would be applied by the modern court of that state. Rather, the holding that the judgment was void is taken at face value for purposes of addressing the two remaining questions—preserving the issue in the trial court and presenting the issue for the first time on habeas. Finally, because Georgia cases clearly distinguish between criminal and civil cases involving de facto courts, that distinction in other states will not be exhaustively parsed.
the same rules as Georgia. In *Ex parte Stout*, the Colorado Supreme Court held that when the court was created by an unconstitutional local law, its judgments were void and could be attacked for the first time on habeas.

New York and Kansas have also addressed judgments entered without statutory authority and can be read to suggest that the same rule would apply to courts acting pursuant to an unconstitutional statute. That reading is subject to reasonable criticism. In *People ex rel. Tweed v. Liscomb*, the New York Court of Appeals held that when a court of limited jurisdiction rendered cumulative misdemeanor sentences that exceeded the court's sentencing authority, the judgment was void and subject to attack on habeas. The court relied on *Ex parte Lange* and held that "[w]hen a prisoner is held under a judgment of a court made without authority of law, the proper tribunal will, upon habeas corpus, look into the record so far as to ascertain this fact; and if it be found to be so, will discharge the prisoner." The court further observed:

A party held only by virtue of judgments thus pronounced, and therefore void for want of jurisdiction, or by reason of the excess of jurisdiction, is not put to his writ of error, but may be released by habeas corpus. It will not answer to say that a court having power to give a particular judgment can give any judgment, and that a judgment not authorized by law, and contrary to law, is merely voidable and not void, and must be corrected by error. This would be trifling with the law, the liberty of the citizen, and the protection thrown about his person by the bill of rights and the Constitution, and creating a judicial despotism. It would be to defeat justice, nullify the writ of habeas corpus by the merest technicality, and the most artificial process of reasoning.

On the other hand, in *In re Quinn*, in which the court affirmed a grant of habeas when a de facto judge's office had been abolished, there

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133. 5 Colo. 509 (1881); see *In re Allison*, 22 P. 820 (Colo. 1889) (involving removal of court from county seat).
134. 5 Colo. at 515.
135. 60 N.Y. 559 (1875).
136. *Id.* at 586.
137. 85 U.S. 163 (1873).
138. 60 N.Y. at 572. The New York court's citation of *Lange* is significant because the trial court in *Lange* acted under color of law but its judgment was unconstitutional because of double jeopardy. 85 U.S. 163, 178 (1873). The conclusion may be drawn that the court would follow the same rule when the statute granting jurisdiction was unconstitutional.
139. 60 N.Y. at 591.
140. 46 N.E. 175 (N.Y. 1897).
is dicta suggesting that if the police-court judge had exercised "open or notorious" possession of the former office, had "the reputation of continuing to fill it," or had neither "the name nor indicia of the office which formerly existed," the judge's exercise of de facto authority might have been upheld. The court did not distinguish or even cite *Liscomb*, but the dicta clearly relies on *Liscomb* in the context of an unconstitutional de facto court. The New York Court of Appeals in *Curtin v. Barton*, however, which did cite *Carroll*, suggested by its careful focus on the existence of the office that the de facto judge doctrine cannot provide a surrogate for the existence of a de jure office.

In *In re Norton*, the Supreme Court of Kansas addressed the legality of a court with criminal jurisdiction. The statute required a majority vote in a public election, but the vote failed. The court held that the de facto officer doctrines should not be applied to a de facto court by stating that "[w]hile there is some authority for this conclusion, and while cases may arise where it would be proper to so hold, yet mere form or color of an office should not be permitted to stand between a citizen and his liberty." The court's later statements that "[t]here had been . . . no court created . . . , nor was there any such condition as would give color to its existence" and that "[t]he want of power in the court of common pleas to try the petitioner does not arise from any latent defect in the law creating or conferring jurisdiction, which notwithstanding might have given color to its existence as a court," do leave the door open to a distinction between the two types of de facto courts. The court's rejection of "mere form or color of an office" strongly suggests, however, that the result would be the same when the judgment is rendered by an unconstitutional de facto court.

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141. *Id.* at 176. This reasoning is also apparent in *State v. Carroll*, 38 Conn. 449 (1871), which is addressed *infra* at notes 158-59 and accompanying text.

142. 46 N.E. at 92.

143. 34 N.E. 1093 (N.Y. 1893).

144. *Id.* at 1094.

145. 68 P. 639 (Kan. 1902).

146. *Id.* at 639.

147. *Id.*

148. *Id.* at 640.

149. *Id.*

150. *Id.* A reading of *Norton* as applying to unconstitutional de facto courts further follows from the court's reference to latent constitutional defects. *Id.* The Supreme Court of Kansas used the same term to refer to constitutional defects that can be ascertained only by reference to the underlying circumstances to which the statute applied in *City of Topeka v. Duyer*, 78 P. 417 (Kan. 1904). It would be reasonable to infer that "patent" constitutional defects would not provide form or color of authority. *Id.* at 420-21.
The courts of at least twenty-one other states have held that the judgments of an unconstitutional de facto court may be directly attacked. The appellate courts of Alabama, California, Idaho, Louisiana, Missouri, New Jersey, Ohio, and Wisconsin have permitted direct challenges to the jurisdiction of a court organized under an unconstitutional statute. None of the decisions shed clear light on the availability of habeas in a criminal case. The courts of Arkansas, Kentucky, Maine, South Carolina, Tennessee, Texas, and Washington require the issue to be raised in the trial court in the first instance. The courts of Minnesota, Missouri, Nebraska, Oregon, and South Dakota have held that a de facto court's existence and constitutionality can be challenged only in a direct action brought by the state for that purpose. Missouri has held that habeas is available to challenge an unconstitutional exercise of geographic jurisdiction, but other decisions of that state are to the contrary. Two courts, Minnesota and North Carolina, have expressly held that habeas is not available to challenge an unconstitutional de

151. See Brandon v. State, 173 So. 251 (Ala. 1936); King Lumber Co. v. Crow, 46 So. 646 (Ala. 1908); People v. Toal, 24 P. 603 (Cal. 1890); State v. Maleon, 226 P. 1083 (Idaho 1924); Board of Public Utilities v. New Orleans Ry. & Light Co., 82 So. 280 (La. 1919); State v. Searcy, 20 S.W. 186 (Mo. 1892); State v. City of Camden, 28 A. 82 (N.J. 1893); Coyne v. State, 153 N.E. 876 (Ohio Ct. App. 1926); Fenelon v. Butts, 5 N.W. 784 (Wis. 1880).


153. See Burt v. Winona & St. Paul P.R. Co., 18 N.W. 285 (Minn. 1884); Searcy, 20 S.W. 186 (Mo. 1892); In re Hans, 119 N.W.2d 72 (Neb. 1963); State ex rel. Madden v. Crawford, 295 P.2d 174 (Or. 1956); State v. Ness, 65 N.W.2d 923 (S.D. 1954). See also State ex rel. Ex parte Slater, 72 Mo. 102 (1880).

154. In Searcy the Supreme Court of Missouri distinguished Slater as good law but inapplicable because the defendant had not challenged the court in which he filed the writ. 20 S.W. at 188. The analysis is similar to that of Wright v. Davis in Georgia. See supra notes 68-73 and accompanying text. Other decisions from Missouri do not fully elucidate the means of challenging an unconstitutional de facto court. See Ex parte Snyder, 64 Mo. 58 (1876) (permitting habeas in nonstatutory de facto court for criminal case); Merriweather v. Grandison, 904 S.W.2d 485 (Mo. Ct. App. 1995) (permitting habeas for illegal sentence).
facto court, at least when jurisdiction is not challenged in the trial court in the first instance. 156 Finally, the decision in one other state, Hawaii, involved a nonstatutory de facto court and thus is inconclusive as to an unconstitutional de facto court. 157

b. The De Facto Judge Doctrines. The leading case on the de facto judge or officer doctrines is the decision of the Connecticut Supreme Court in State v. Carroll. 158 Relying primarily on English authorities, the court in Carroll held that the judgments of a de facto judge might be legitimate in a number of circumstances, including when the de facto judge has gained the reputation of a judge. 159 The broader implications of Carroll would sweep away all distinctions among nonstatutory, unconstitutional, and procedural defects in the appointment, election, tenure, or other claim of authority of a de facto judge in favor of a laissez-faire regime of judicial authority. Thus, while Carroll has frequently been applied to legitimate a de facto judge's actions pursuant to an unconstitutional or procedurally defective statute, it has not been applied to legitimate de facto judicial action taken in the entire absence of authority.

The de facto judge or officer decisions fall into two groups on the question of such a judge's authority. The courts of at least thirty-two states, including Georgia, have held that a de jure office must exist before either a de facto judge's or officer's actions are valid, but the decisions usually arise on direct review and do not clearly suggest that a habeas petition will lie. 160 The Connecticut Supreme Court has

158. 38 Conn. 449 (1871).
159. Id. at 464.
reaffirmed its earlier suggestion in Carroll that a de facto judge or officer need not have statutory and constitutional authority in all circumstances.\textsuperscript{161} The decisions stating procedural requirements for this kind of challenge are multifarious, but taken together, suggest that an unconstitutional de facto judge’s judgments are valid unless challenged in the trial court or, in some states, by special proceeding. They further suggest that habeas is not available. The supreme courts of Louisiana and Nebraska have held that the actions of a nonstatutory de facto judge or officer are void and subject to collateral attack,\textsuperscript{162} and the Supreme Court of New Mexico has suggested that in a direct appeal the same result would occur.\textsuperscript{163} The courts of Michigan, Ohio, and Wisconsin have invalidated the actions of a nonstatutory de facto judge when the issue was presented to the trial court and on direct appeal.\textsuperscript{164} The Supreme Court of Texas has invalidated an unconstitutional de facto judge’s decision on direct review.\textsuperscript{165} Nevada’s Supreme Court has invalidated an unconstitutional de facto judge’s decision on the state’s \textit{quo warranto} proceeding.\textsuperscript{166} The supreme courts of New Mexico, South Carolina, and Tennessee have held that an unconstitutional de facto judge’s authority may not be challenged on habeas,\textsuperscript{167} and the courts of Minnesota, Missouri, Nebraska, North Carolina, Oregon, and South Dakota would likely follow suit based on their prior de facto court decisions.\textsuperscript{168} Finally, a New York superior court entertained a habeas petition as to an unconstitutional de facto judge but then held, as in an

\begin{itemize}
  \item \textit{v. New England Inv. Co.}, 45 N.W. 191 (N.D. 1890);
  Koch \textit{v. Keen}, 255 P. 690 (Okla. 1927);
  State \textit{ex rel.} Madden \textit{v. Crawford}, 295 P.2d 174 (Or. 1956);
  Keeling \textit{v. Pittsburg, Virginia & Charleston Ry.}, 54 A. 485 (Pa. 1903);
  State \textit{v. Ness}, 65 N.W.2d 923 (S.D. 1954);
  Bankston \textit{v. State}, 908 S.W.2d 194, 198 (Tenn. 1995);
  Hamrick \textit{v. Simpler}, 95 S.W.2d 357 (Tex. 1936);
  \textit{Ex parte} Bassitt, 19 S.E. 453 (Va. 1894) (dicta);
  State \textit{ex rel.} Carson \textit{v. Wood}, 175 S.E.2d 482 (W. Va. 1970);
  State \textit{ex rel.} Gillespie \textit{v. Wood}, 175 S.E.2d 497 (W. Va. 1970);
  State \textit{ex rel.} Elliott \textit{v. Kelly}, 143 N.W. 153 (Wis. 1913);
  \item \textsuperscript{161} See Furtney \textit{v. Simsbury Zoning Comm’n}, 271 A.2d 319 (Conn. 1970);
  State \textit{v. Carroll}, 38 Conn. 449 (1871).
  \item \textsuperscript{162} See Garnier \textit{v. Louisiana Milk Comm’n}, 8 So. 2d 611 (La. 1942);
  \textit{In re Norton}, 68 P. 639 (Kan. 1902).
  \item \textsuperscript{164} See Brockman \textit{v. Brockman}, 317 N.W.2d 327 (Mich. Ct. App. 1982);
  Coyne \textit{v. State}, 153 N.E. 876 (Ohio Ct. App. 1926);
  Fenelon \textit{v. Butts}, 5 N.W. 784 (Wis. 1880).
  \item \textsuperscript{165} See State \textit{v. Gillette’s Estate}, 10 S.W.2d 984 (Tex. Comm’n App. 1928).
  \item \textsuperscript{166} Malone, 231 P.2d 599 (Ne. 1951).
  \item \textsuperscript{167} See \textit{In re Santillanes}, 138 P.2d 503 (N.M. 1943);
  State \textit{ex rel.} McLeod \textit{v. Court of Probate of Colleton County}, 223 S.E.2d 166 (S.C. 1975);
  Bankston \textit{v. State}, 908 S.W.2d 194 (Tenn. 1995).
  \item \textsuperscript{168} See supra notes 153-56 and accompanying text.
\end{itemize}
outright refusal to permit collateral attack, that the judgment would be presumed valid.\textsuperscript{169}

4. Commentary on the De Facto Doctrines

The de facto judge or officer cases are relevant to the City Court of Atlanta's problems only to the extent that they provide wise counsel either that an unconstitutional de facto court's judgments should be deemed constitutional unless challenged in the trial court, or that the writ of habeas corpus should be unavailable in that case. The constitutional and statutory law of Georgia suggests that there may be no room for this counsel, wise or otherwise.

The Kansas Supreme Court reasoned in \textit{In re Norton} that the de facto judge doctrines cannot be held to control the analysis of a de facto court case:

There must be a reality in the existence of the court that undertakes to deprive one of his liberty. In all cases where the acts of de facto officers have been upheld, there existed a de jure office. The strongest reasoning why the acts of de facto officers are sustained is that the office is created by the public, and put in operation as a part of a system of organized society, and a continued administration of the office becomes necessary to the proper adjustment of its affairs and to the perpetuity of the system. This reasoning loses force when we undertake to apply it to a de facto office. Such office, not having been created by the public, and not having been adopted into the organized system, never becomes a part of it, and its displacement does not disturb the harmony of the organization.\textsuperscript{170}

Likewise, the New York decisions suggest the same result,\textsuperscript{171} and nothing in the Georgia cases suggests anything to the contrary.\textsuperscript{172}

The contrary state decisions that apply de facto judge analysis to de facto court cases are unpersuasive and should not be followed by Georgia courts for three reasons. First, those contrary decisions apply notions of public policy,\textsuperscript{173} necessity,\textsuperscript{174} importance of the public acts,\textsuperscript{175} public

\begin{itemize}
\item \textsuperscript{169} People \textit{ex rel.} Gross v. Hayes, 149 N.Y.S. 115 (N.Y. Sup. Ct. 1914).
\item \textsuperscript{170} 68 P. at 640.
\item \textsuperscript{171} See supra notes 135-44 and accompanying text.
\item \textsuperscript{172} See supra notes 61-113 and accompanying text.
\item \textsuperscript{173} State v. Poulin, 74 A. 119, 121 (Me. 1909); Beaver v. Hall, 217 S.W. 649, 654 (Tenn. 1920); see Rath v. LaFon, 431 P.2d 312, 314 (Okla. 1967).
\end{itemize}
reliance,\textsuperscript{176} hardship on the community or litigants,\textsuperscript{177} and concern for individual officials' liability\textsuperscript{178} to rescue statutes and systems of authority from the consequences of their unconstitutionality. Many of the de facto judge or officer decisions confuse the interests at stake in criminal cases and in civil cases.\textsuperscript{179} The decisions in civil cases are grounded in the need to protect other citizens in their private affairs, as in juvenile, marriage, public bond, and related cases.\textsuperscript{180} To the contrary the constitutional protections for criminal defendants are paramount in criminal cases, and the right to be subjected only to the authority of a de jure court constitutionally and statutorily organized should not be treated as a matter of a judicial "last clear chance," requiring the defendant to object to that exercise of unlawful power.\textsuperscript{181} To the extent that the public or community has relied upon the unconstitutional jurisdiction of a court to impose a criminal judgment, it has done so in derogation of the constitution and any reliance is unreasonable.\textsuperscript{182}

The Maine Supreme Court in\textit{Poulin} professed:

\begin{quote}
[W]e are unable to discover any difference in reason for declaring an officer to be de facto, whether he holds a de facto or de jure office, if he has occupied it with the usual insignia of a de facto officer. The authorities are in harmony that the de facto doctrine was invented to deal with effects, not with causes. The effects only can be reached. The causes cannot. The official acts are accomplished. If the effects are alike, it is immaterial that the causes differ. The effects, whether from a de jure or a de facto office, are alike. Hence the acts of the officer occupying either position should be declared de facto.
\end{quote}

In\textit{Norton} the Kansas Supreme Court provided an ample response to the foregoing.\textsuperscript{184} Furthermore, the de facto officer doctrine was not invented to clean up judicial messes after the fact, but to distinguish unlawful and unconstitutional exercises of power that should be held void from acts that have a sufficient cloak of authority and regularity as

\begin{enumerate}
\item \textsuperscript{176} Poulin, 74 A. at 121.
\item \textsuperscript{177} Hamrick\textit{v. George}, 378 P.2d 324, 330 (Okla. 1963); Beaver, 217 S.W. at 654.
\item \textsuperscript{178} Hamrick, 378 P.2d at 330; Beaver, 217 S.W. at 654.
\item \textsuperscript{179} See Tumbs\textit{v. State}, 718 S.W.2d 105 (Ark. 1986) (uncritically applying policy arguments from civil and juvenile status cases in criminal context); State\textit{ex rel. Bales v. Bailey}, 118 N.W. 676 (Minn 1908) (applying civil policy arguments).
\item \textsuperscript{180} Beaver, 217 S.W. at 654.
\item \textsuperscript{181} See supra notes 132-57 and accompanying text (requiring objection in de facto judge case).
\item \textsuperscript{182} 217 S.W. at 652.
\item \textsuperscript{183} 74 A. at 122.
\item \textsuperscript{184} 118 U.S. at 444-45.
\end{enumerate}
to require a citizen's objection before being subjected to them. The Maine court's muddled understandings of the various de facto doctrines, to say nothing of its ignoring basic principles of state authority in a constitutional system, can be compared to the Tennessee Supreme Court's grounding its decision in Beaver in the self-proving proposition that defendants would "escape the punishment that the courts have said should be meted out to them." The courts in Poulin and Beaver differ only in that the court in Beaver was more candid, because both decisions display a remarkable disrespect for the rights of criminal defendants to be tried by a duly constituted tribunal.

The second reason why contrary decisions should not be followed is that unconstitutional de facto doctrines in criminal cases involve an unconstitutional legislative action, upon which the executive has acted against a criminal defendant and then receives the blessing of the judicial branch. This practice is nothing more nor less than an interbranch conspiracy against the criminal defendant, and dressing it up in the language of an opinion does not change its nature. It is fair to say that this vice is equally present in both de facto court and de facto judge cases, but the judicial branch should minimize the circumstances in which it legitimates unconstitutional actions by the other two branches of government by refusing to countenance an unconstitutional de facto court's exercise of power under purported public authority.

Finally, the state decisions that permit an unconstitutional de facto court to enter judgments, that refuse the writ of habeas corpus, and that suppose de facto judge analysis to be applicable to de facto court cases are inconsistent with the Georgia authorities discussed above. The de facto court doctrines have survived intact in Georgia for over a century, through forty-seven years of amending the 1877 Constitution, through the 1945 and 1976 Constitutions, and now through seventeen years under the 1983 Constitution. They represent the principled triumph of the rule of law over a rule of expediency and should not be abandoned.

III. REMEDIES IN THE GEORGIA COURTS

The nature of the City Court's existential and jurisdictional defects provides defendants in the Georgia courts with two alternatives for attacking the City Court's judgments: direct attacks at the trial and
appellate levels and collateral attacks including state habeas corpus, potentially through a class action. The City Court's constitutional problems can be raised immediately by numerous defendants, in numerous classes of cases, and in four courts, making highly desirable an early and expeditious decision by the Georgia Supreme Court.\textsuperscript{189}

A. The City Court and Direct Appeals

The City Court's lack of subject matter jurisdiction can be raised at any point in the process of initial adjudication or direct review of the judgment. First, the issue of subject matter jurisdiction may be raised by the defendant during the prosecution or defense in the City Court of Atlanta, prior to the entry of judgment, either by a motion to dismiss or a plea in bar.\textsuperscript{190} Second, the issue may be raised by a motion in arrest of judgment\textsuperscript{191} filed during the same term of court in which the judgment was rendered.\textsuperscript{192} Lastly, the issue may be raised for the first time on appeal from a judgment of conviction.\textsuperscript{193} If the appeal is

\textsuperscript{189} Three of the four courts are the City Court of Atlanta itself, the Georgia Supreme Court, and the Superior Court of Fulton County. The Superior Court of Fulton County might be presented with the issue on certiorari in a case involving an ordinance conviction, on writ of prohibition or habeas corpus, or in a Section 1983 action. The fourth court is the Georgia Court of Appeals, to which most appeals from the City Court are taken.

\textsuperscript{190} See Murray v. State, 112 Ga. 7, 37 S.E. 111 (1900); cf. Maldonado v. State, 240 Ga. App. 497, 523 S.E.2d 917 (1999) (stating defendant must raise issue of de facto judge's authority); Hicks v. State, 231 Ga. App. 552, 553, 499 S.E.2d 341, 343 (1998). Although an order denying a motion to dismiss in a civil case and most of those motions in a criminal case are interlocutory and require certification under O.C.G.A. § 5-6-34(b), a motion to dismiss or a plea in bar that raises a fundamental objection to the proceeding itself may be subject to immediate review under O.C.G.A. § 5-6-34(a) as a final order. See Christopher J. McFadden, Edward C. Brewer, III & Charles R. Shepherd, Georgia Appellate Practice, §§ 4-6, 4-14, 13-8, at 163, 171, 333-34 (1996). In this regard, the City Court's lack of constitutional existence and subject matter jurisdiction seem equally fundamental as, for example, a plea of double jeopardy, one of the more common uses of the plea in bar. See id. § 13-8. An interlocutory appeal would be equally justified under the "public importance" rationale of Waldrip v. Head, 272 Ga. 572, 532 S.E.2d 380 (2000).

\textsuperscript{191} See O.C.G.A. §§ 17-9-60 to -63 (1997); see also Georgia Appellate Practice, supra note 190, § 5-4, at 181-82; cf. McDonald v. State, 126 Ga. 536, 55 S.E. 235 (1906) (stating motion in arrest of judgment not proper when indictment was void). A motion for new trial and a motion to set aside judgment are not proper for this purpose. State v. McCrary, 193 Ga. App. 11, 387 S.E.2d 10 (1989); Georgia Appellate Practice, supra note 190, § 5-3, at 179-81.


\textsuperscript{193} See Bowen, 144 Ga. App. at 337, 241 S.E.2d at 437 (citing Parker v. Bond, 47 Ga. App. 318, 170 S.E.331 (1933)); see also Ward v. State, 248 Ga. 60, 61 n.1, 281 S.E.2d 503,
pending in the Georgia Court of Appeals, where most appeals from City Court misdemeanor convictions are taken, the appeal may be transferred to the Georgia Supreme Court upon presentation of the constitutional issue.\footnote{194}

It may well be noted that the City Court of Atlanta may raise these questions sua sponte and arguably has a duty to do so. In \textit{B \& D Fabricators v. D.H. Blair Investment Banking Corp.},\footnote{195} the court of appeals held that the trial court has the same duty as an appellate court to examine its own jurisdiction.\footnote{196}

\section*{B. State Habeas Corpus Petitions}

\subsection*{1. Generally}

The City Court's lack of constitutional existence and subject matter jurisdiction may be raised in a Georgia habeas corpus proceeding.\footnote{197}

\footnote{504 n.1 (1981) (stating when issue is likely to be a matter of habeas review, court will address on direct appeal).}

\footnote{194. \textit{See} \textit{Kolker v. State}, 193 Ga. App. 306, 387 S.E.2d 597 (1989) (concerning constitutional question of municipal court jurisdiction), \textit{opinion after transfer}, 260 Ga. 240, 391 S.E.2d 391 (1990); \textit{see also} \textit{In re T.A.W.}, 214 Ga. App. 1, 447 S.E.2d 136 (1994), \textit{opinion after transfer}, 265 Ga. 106, 454 S.E.2d 134 (1995). With due regard for the court's ability to dismiss an appeal filed in the wrong court, an appeal pending in the Georgia Court of Appeals may be transferred to the Georgia Supreme Court when a constitutional issue is presented. \textit{See} O.C.G.A. \textsection{5-6-37} (1995); GA. CONST. art. VI, \textsection{1}, \textparagraph{8}; GA. CT. R. 31, 34; GA. CT. APP. R. 32(c); \textit{see also} \textit{Marr v. Georgia Dep't of Educ.}, 264 Ga. 841, 452 S.E.2d 112 (1995) (resolving problem of timeframes in discretionary cases); \textit{GEORGIA APPELLATE PRACTICE}, \textit{supra} note 190, \textsection{6-2}. The danger of dismissal would exist for the defendant who learned of the City Court's existential and jurisdictional problems prior to taking an appeal but took an appeal to the court of appeals anyway.}

\footnote{195. 220 Ga. App. 373, 469 S.E.2d 683 (1996).}

\footnote{196. \textit{Id.} at 375, 469 S.E.2d at 686.}

Section 9-14-1(c) of the O.C.G.A. provides that “[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.” The petition must be brought in a superior court, and it must allege a “substantial denial” of the petitioner’s constitutional rights. Furthermore, only one petition may be filed unless the issues presented in a subsequent petition could not reasonably have been raised in the original or amended petition.

Several Georgia Supreme Court decisions define the scope of habeas. The writ of habeas corpus is available to attack a judgment that is void under O.C.G.A. section 17-9-4, under Riley v. Garrett. Likewise, the supreme court held in Fleming v. Lowry that the writ is appropriate when it is contended that the trial court was without jurisdiction over the subject matter of the case. The court’s holding in Wright v. Davis also necessarily includes the conclusion that the writ is appropriate to attack the constitutional existence of a trial court. In Hammock v. Zant, the court held the writ also extends to cases in which the substantive law under which the defendant has been tried is unconstitutional. Both the statute and these decisions make clear


The ability to raise the City Court’s problems in federal sentencing or habeas seems doubtful unless the federal courts could be persuaded that those problems raise due process concerns under the Fourteenth Amendment. Despite the sentence enhancement of certain state misdemeanors under the United States Sentencing Guidelines, see U.S.S.G. §§ 4A1.1(b)-(e), 4A1.2(c), the legality of a state sentence may not be considered for the first time on federal sentencing. See United States v. Roman, 989 F.2d 1117 (11th Cir. 1993); but see generally Cross v. Lackawanna County District Attorney, 204 F.3d 453 (3d Cir. 2000), cert. granted, 2000 WL 694197 (U.S. Oct. 10, 2000); United States v. Tucker, 404 U.S. 443 (1972). Likewise, a state constitutional issue probably is not cognizable in federal habeas corpus. See 28 U.S.C. §§ 2241(c)(3), 2254(b), (c), 2255 (1994) (discussing when habeas appropriate from state court judgments).
that a habeas petition is available to challenge all judgments of the City Court rendered after April 4 or July 1, 1996 and those judgments rendered after March 24 or July 1, 1988, include same-occurrence misdemeanor convictions.

There are four further issues that require examination for a Georgia habeas petition: (1) the time limits on a habeas petition; (2) the existence of direct or collateral consequences of the same-occurrence misdemeanor conviction; (3) the question of prior presentation or disposition of the issue during the initial prosecution; and (4) the retroactive and prospective application of judicial decisions in criminal cases and the relationship of those doctrines to the writ of habeas corpus. The response to each is in favor of the defendant challenging the judgment, except in the case of a defendant's failure to appeal an adverse jurisdictional ruling by the trial court.

2. Timing of a Habeas Petition

There is no time limit in Georgia, whether in limitations or laches, for a habeas petition based on lack of subject matter jurisdiction or unconstitutionality of a statute when the conviction is based on a nontraffic-related misdemeanor. The defendant's direct appeal must be completed before the writ can be filed.210 Relying on O.C.G.A. section 17-9-4 and Mason v. Carter,211 the Georgia Court of Appeals in Barrett v. State212 held that laches is not a bar to a habeas petition.213 In Mason the supreme court held that an attack under O.C.G.A. section 17-9-4 on a void civil judgment is not barred by any statute of limitations.214 The supreme court later held in Murphy v. Murphy215 that the three-year limit of O.C.G.A. section 9-11-60(f) for attacking a judgment based on a nonamendable defect appearing on the face of the pleadings does not apply to a judgment that is void under O.C.G.A. section 17-9-4.216 The Barrett decision suggests that the same principles apply a fortiori in a criminal case, and given the greater

211. 223 Ga. 2, 153 S.E.2d 162 (1967).
213. 183 Ga. App. at 730, 360 S.E.2d at 401.
214. 223 Ga. at 4, 153 S.E.2d at 164.
216. Id. at 283, 430 S.E.2d at 752.
interests at stake, it is hard to understand how the rule could be otherwise.

A traffic misdemeanor case is a different matter, in part. Section 40-13-33 of O.C.G.A. places a 180-day time limit on challenges to "a misdemeanor conviction of any of the traffic laws of this state or the traffic laws of any county or municipal government," which under Earp v. Boylan is not an unconstitutional suspension of the writ of habeas corpus. Although it might have some effect on raising the City Court's unconstitutional existence, the statute is inapposite on its face to the problems of the City Court's jurisdiction. First, a same-occurrence misdemeanor is by definition not a traffic misdemeanor. Second, a traffic ordinance violation in the City Court of Atlanta is not a "misdemeanor conviction of any of the traffic laws of any county or municipal government" because an ordinance violation is not a misdemeanor.

3. The Collateral Consequences Doctrine

The writ of habeas corpus may be filed by a defendant actually in physical custody, but the writ also is in favor of defendants subject to other restraints or consequences as the result of a conviction. Under Lillard v. Head, a defendant who is incarcerated beyond the term of a lawful sentence can file a petition. Likewise, under Cochran v. City of Rockmart, a defendant in custody for an ordinance violation can file a petition. However, whether this time limit violates article I, section 2, paragraph 5 of the 1983 Constitution by effectively constitutionalizing an unconstitutional statute is worth considering. More generally, the argument seems well taken that the 180-day limit should not be applied to defects of the fundamental nature of existence and subject matter jurisdiction.

219. A due process challenge on the ground of the short time-frame seems doomed to failure and is not considered here. On the other hand, whether this time limit violates article I, section 2, paragraph 5 of the 1983 Constitution by effectively constitutionalizing an unconstitutional statute is worth considering. More generally, the argument seems well taken that the 180-day limit should not be applied to defects of the fundamental nature of existence and subject matter jurisdiction.
223. See O.C.G.A. § 9-14-1(c) (1993).
225. 242 Ga. 732, 251 S.E.2d 259 (1978). Because an ordinance violation is not a misdemeanor, see O.C.G.A. § 16-1-4 (1999), it may well be that it is not a misdemeanor within the enhancement provisions of the United States Sentencing Guidelines. See infra notes 284-91 and accompanying text. If it is not, the only ground for habeas relief that
file a petition. In *Parris v. State*, the Georgia Supreme Court held that a state petitioner who alleges that a federal sentence was enhanced by his unconstitutional state conviction can file a petition under the principles of adverse collateral consequences. The court in *Parris* further noted that there might be other adverse collateral consequences that justify a petition for the writ even when the defendant is not presently incarcerated. Under *Baker v. State*, the defendant has the burden of pleading and proving adverse collateral consequences. The writ is also available to a defendant who, though not in custody, suffers some other consequence or detriment as a result of a conviction. A City Court judgment cannot be the basis for a denial of first-time offender status under O.C.G.A. sections 42-8-60 to -66, a prior-felony enhancement under O.C.G.A. section 16-11-133, a three-strikes enhancement under O.C.G.A. section 17-10-7, or a death penalty enhancement under O.C.G.A. section 17-10-30 because the City Court hears only misdemeanor and ordinance cases. The City Court's judgments may appear as part of the presentence report at sentencing in a felony case, although their effect depends upon their significance on the record as a whole.

There are other circumstances in which the existence of a conviction in the City Court may be significant. In *Hardison v. Martin*, the court held that a driver's license revocation was a sufficient restraint to support the writ when the defendant shows that he is suffering from significant detriments in employment or other collateral consequences. The existence of a City Court misdemeanor conviction could

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227. 232 Ga. at 690, 208 S.E.2d 496.

228. Id. at 688-91, 208 S.E.2d at 494-96.


230. Id. at 431-32, 241 S.E.2d at 188.


232. Id. § 16-11-133 (1999).

233. Id. § 17-10-7 (1997).

234. Id. § 17-10-30.


238. 254 Ga. at 721, 334 S.E.2d at 164.
affect a sixteen-to-eighteen-year-old criminal defendant’s ability to obtain first-offender treatment under O.C.G.A. section 17-10-3(c). Under Huff v. McLarty, a defendant whose judgment allows a choice between payment of a fine and imprisonment may use the writ.

The problem of whether a traffic fine without imprisonment may constitute a significant restraint on liberty, which could affect the ability of some City Court defendants to launch collateral attacks on judgments already final for purposes of direct review, may be answered in part by the Georgia “points” system. In this system, points are assessed on a 15-point/24 month scale for both statutory and ordinance-based traffic violations, and excessive points can result in a driver’s license suspension. Any defendant who has lost a driver’s license to points and who can make the factual showing required by Hardison can argue that he or she suffers from a “significant restraint on liberty” just as burdensome as that suffered by a driver whose license was suspended for multiple DUI violations. The more difficult question is that of the driver who is not incarcerated and whose points are not so high that the City Court’s judgment has resulted or is likely to result in a suspension because the only detriment presently suffered is a fine, which is not a restraint on liberty.

4. Issues Presented for the First Time on Habeas

The Georgia Supreme Court and the Georgia Court of Appeals have laid down several rules for presenting issues for the first time on habeas. The supreme court held in Simmons v. State and the court of appeals held in Barrett that a petitioner may challenge the constitutionality of a criminal statute for the first time in a habeas petition. Furthermore, in Hardison, the supreme court held that the failure

239. O.C.G.A. § 17-10-3(c) (1997).
244. 246 Ga. 390, 721 S.E.2d 468 (1980).
246. 246 Ga. at 391, 721 S.E.2d at 469; 183 Ga. App. at 400, 360 S.E.2d at 730.
to present on direct appeal an issue properly cognizable on habeas does not prevent the habeas petition.\textsuperscript{248} Under \textit{Barnes v. State},\textsuperscript{249} a habeas-worthy issue presented at trial but not determined against the defendant does not bar a future habeas petition.\textsuperscript{250} A contrary rule applies, however, when the issue was in fact presented to the trial court and decided against the defendant. In \textit{Barnes} the court relied on \textit{White v. Hornsby}\textsuperscript{251} for the proposition that the defendant must seek direct review of the trial court's decision.\textsuperscript{252} Similarly, under \textit{Moore v. Burnett},\textsuperscript{253} if the defendant appealed the decision and the appeal was not pursued to its conclusion, the defendant will be barred by res judicata from presenting the issue on habeas.\textsuperscript{254} Finally, if an issue was decided on appeal, the supreme court held in \textit{Brown v. Ricketts}\textsuperscript{255} that the issue may not be raised again on habeas.\textsuperscript{256}

In \textit{Stevens v. Kemp}\textsuperscript{257} and in \textit{Hammock v. Zant},\textsuperscript{258} the supreme court held that the rules of res judicata may not apply to a habeas petition when there has been a significant change in the law such as a holding that a statute is unconstitutional.\textsuperscript{259} In \textit{Tucker v. Kemp}\textsuperscript{260} and in \textit{Jarrell v. Zant},\textsuperscript{261} the court held that a successive habeas petition may be permissible in a "new law" case.\textsuperscript{262} To the extent that additional equities were required for successive habeas petitions in a nondeath-penalty case, the questions of the City Court's existence and same-occurrence misdemeanor jurisdiction present these equities.\textsuperscript{263}

\begin{itemize}
  \item \textsuperscript{248} \textit{Id.} at 722, 334 S.E.2d at 164-65.
  \item \textsuperscript{249} 244 Ga. 302, 260 S.E.2d 40 (1979).
  \item \textsuperscript{250} \textit{Id.} at 303, 260 S.E.2d at 41. A failure to pursue a ruling on this kind of objection seems on its face to be fraught with danger as a potential waiver. See \textit{Crawford v. State}, 254 Ga. 435, 330 S.E.2d 567 (1985); \textit{Ale-8-One of Am., Inc. v. Graphicolor Servs., Inc.}, 166 Ga. App. 506, 305 S.E.2d 14 (1983). The decisions in \textit{Crawford} and \textit{Graphicolor} are perhaps distinguishable from \textit{Barnes} on the ground that both cases involved procedural rather than fundamental error, but whether that distinction is viable is beyond the scope of this Article.
  \item \textsuperscript{251} 191 Ga. 462, 12 S.E.2d 875 (1941).
  \item \textsuperscript{252} \textit{Id.} at 463-64, 12 S.E.2d at 876.
  \item \textsuperscript{253} 215 Ga. 146, 109 S.E.2d 605 (1959).
  \item \textsuperscript{254} \textit{Id.} at 147, 109 S.E.2d at 605.
  \item \textsuperscript{255} 233 Ga. 809, 213 S.E.2d 672 (1975).
  \item \textsuperscript{256} \textit{Id.} at 811, 213 S.E.2d at 673.
  \item \textsuperscript{257} 254 Ga. 228, 230, 327 S.E.2d 185, 187 (1985).
  \item \textsuperscript{258} 243 Ga. 259, 253 S.E.2d 727 (1979).
  \item \textsuperscript{259} 254 Ga. at 230, 327 S.E.2d at 185; 243 Ga. at 260 n.1, 253 S.E.2d at 728 n.1.
  \item \textsuperscript{260} 256 Ga. 571, 351 S.E.2d 196 (1987).
  \item \textsuperscript{261} 248 Ga. 492, 284 S.E.2d 17 (1981).
  \item \textsuperscript{262} 256 Ga. at 573, 351 S.E.2d at 198; 248 Ga. at 492 n.1, 284 S.E.2d at 17 n.1.
  \item \textsuperscript{263} The present issues have lain uncovered for 12 years since 1988, and 4 years since 1996, primarily because the stakes are not high enough at the time of trial in most
The Georgia courts could be expected to apply the same principles under article I, section II, paragraph V of the Georgia Constitution and O.C.G.A. section 17-9-4, not only when the question is one of constitutionality but also when the question goes to the court's existence or lack of subject matter jurisdiction. Thus, the present issues should be permitted even in a successive state habeas petition.

5. Retroactivity, Prospectivity, and Habeas Relief

The present arguments against the City Court's existence and jurisdiction are based entirely on existing Georgia law, but could be said to involve a new rule of law, raising questions of retrospectivity and prospectivity of any decision by the Georgia Supreme Court. Those issues will be addressed, given the likelihood that they may be presented in any litigation over the City Court's judgments.

In Taylor v. State, the Georgia Supreme Court adopted "the 'pipeline' approach of Griffith v. Kentucky" that is, that a new rule of criminal procedure . . . will be applied to all cases then on direct review or not yet final. The Georgia Supreme Court also held in Turpin v. Todd that the pipeline rule does not permit a new procedural issue to be applied in a habeas case when the new decision was

misdemeanor cases to justify the level of research and analysis necessary to uncover the unconstitutionality of the 1988 and 1996 statutes. By comparison, the unconstitutionality of the tax procedure statutes at issue in Lomax v. Lee, 261 Ga. 575, 408 S.E.2d 788 (1991), appeal after remand 262 Ga. 461, 421 S.E.2d 705 (1992), was not determined for 38 years after the enactment of the earliest among them in 1953. 261 Ga. at 580-81, 408 S.E.2d at 792. Further, these City Court issues could not reasonably have been presented in earlier cases because of their obscurity and lack of accessibility to most Georgia attorneys, circumstances exacerbated by the very nonuniformity that has troubled the Georgia courts for more than a century and that remains a problem at the heart of article VI, section 10 and article XI of the 1983 Constitution. On the other hand, it is fair to say that when the 1988 and 1996 statutes were passed, anyone considering carefully how to craft the statutes constitutionally was faced with a fairly simple analysis: the 1967 amendment, the 1983 Constitutional provisions, and the 1986 continuation amendment. See Brewer, Judicial Engine, supra note 7, at 1017-29.

264. See supra notes 61-113 and accompanying text.
rendered after final judgment in the underlying criminal case. It would appear that Simmons, Stevens, and Hammock describe an exception permitting an issue to be presented for the first time on habeas corpus that is more liberal than the federal counterpart, but federal analysis bears mention because the City Court's defects come even within the narrower federal rule. In Teague relying on Justice Harlan's concurrence in Mackey v. United States, the United States Supreme Court held that a habeas corpus petitioner may raise a defect in the criminal proceedings not presented on direct review when the right infringed is "implicit in the concept of ordered liberty." It is beyond cavil that a court's existence and jurisdiction are "implicit in the concept of ordered liberty," as both the United States Supreme Court and the Georgia Supreme Court have treated those issues. In Ex parte Siebold, an early decision on the proper scope of a federal habeas petition under what is now 28 U.S.C. § 2255, the Supreme Court considered whether it had jurisdiction over a habeas petition raising the unconstitutionality of the substantive statute under which the defendant was convicted. The Supreme Court stated:

The only ground on which this court, or any court, without some special statute authorizing it, will give relief on habeas corpus to a prisoner under conviction and sentence of another court is the want of jurisdiction in such court over the person or the cause, or some other matter rendering its proceedings void.

This distinction between an erroneous judgment and one that is illegal or void is well illustrated by the two cases of Ex parte Lange (18 Wall. 163) and Ex parte Parks, 93 U.S. 18. The Court in Exparte Lange, permitted a double jeopardy argument to be heard on habeas, and the Court held in Ex parte Parks, 93 U.S. 18 (1876), that habeas would not lie to determine whether the court had jurisdiction of the

269. Id. at 830-31, 493 S.E.2d at 909. Because habeas will not lie in Georgia until the judgment is final, see supra text accompanying note 210, the effect of Turpin is that a new rule of criminal procedure ordinarily cannot be the basis for habeas relief.
270. See supra notes 208-09, 244-46, 257-59 and accompanying text.
273. 489 U.S. at 307.
274. See supra notes 61-88, 114-31 and accompanying text.
275. 100 U.S. 371 (1879); see also Steel Co. v. Citizens for a Better Env't, 523 U.S. 83 (1998) (stating subject matter jurisdiction must be decided before merits of case because it goes to question of court's authority); Carlisle v. United States, 517 U.S. 416, 435 (1996) (Ginsburg, J., concurring) (calling subject matter jurisdiction a more fundamental question than procedural error).
276. 100 U.S. at 374.
277. Id. at 375. The Court in Ex parte Lange, 85 U.S. 163 (1873), permitted a double jeopardy argument to be heard on habeas, and the Court held in Ex parte Parks, 93 U.S. 18 (1876), that habeas would not lie to determine whether the court had jurisdiction of the
The above language may be compared to that of the Georgia statutes regarding void judgments. Pursuant to O.C.G.A. section 17-9-4, "[t]he judgment of a court having no jurisdiction over 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."\(^{278}\)

C. Habeas Corpus Class Actions

The Georgia Supreme Court's holdings in *Nelson v. Zant*\(^{279}\) and *Johnson v. Caldwell*\(^{280}\) that a habeas corpus action is subject to the Civil Practice Act suggest that the court would join the lower federal courts and the majority of state courts that have embraced the possibility of the habeas class action or representative action in the nature of a class action. Subject only to the limitations and problems posed by the "one-petition" statute, a habeas class action could be an effective means for resolving the present issues.\(^{281}\)

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\(^{278}\) O.C.G.A. § 17-9-4 (1997). In *Teague*, 489 U.S. at 309, the Court cited Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963), in discussing what lacks of jurisdiction should be cognizable on habeas. Professor Bator cited *In re Mayfield*, 114 U.S. 107 (1891), which involved subject matter jurisdiction, as an example of a jurisdictional question appropriate for decision in a habeas case. Bator, *supra*, at 469 n.65. Professor Bator also argued, more generally, that the availability of jurisdictional argument on habeas could be determined under the principles outlined in section 10 of the Restatement of Judgments:

1. Where a court has jurisdiction over the parties and determines that it has jurisdiction over the subject matter, the parties cannot collaterally attack the judgment on the ground that the court did not have jurisdiction over the subject matter, unless the policy underlying the doctrine of res judicata is outweighed by the policy against permitting the court to act beyond its jurisdiction.

2. Among the factors appropriate to be considered in determining that collateral attack should be permitted are that

   a. the lack of jurisdiction over the subject matter was clear;

   . . .

   c. the court was one of limited and not of general jurisdiction;

   . . .

   e. the policy against the court's acting beyond its jurisdiction is strong.

Bator, *supra*, at 461 & n.35 (quoting RESTATEMENT OF JUDGMENTS § 10 (1942)). The City Court is, of course, a classic example of a court of limited jurisdiction as described in Section 10.


\(^{281}\) The Georgia class action has been considered by several authors. See Jeffrey G. Casurella & John R. Bevis, *Class Action Law in Georgia: Emerging Trends in Litigation, Certification, and Settlement*, 49 MERCER L. REV. 39, 39, 55-56 (1997); Howard O. Hunter,
The United States Supreme Court has not expressly determined whether a habeas class action is available under Federal Rule 23 but has permitted joint proceedings in habeas corpus when common questions were presented. The Court has noted also that the Federal Rules have limited application in habeas cases under Federal Rule 81(a)(2) and that the discovery process should not be applied to prejudice the writ. In the lower federal courts, mandatory (b)(2) classes have been certified in both immigration and death penalty habeas cases, and class actions have been certified in a variety of other habeas cases. Other federal courts have held that although

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284. FED. R. CIV. P. 81(a)(2).


287. See, e.g., Martin v. Strasburg, 689 F.2d 365 (2d Cir. 1982) (drawing distinction between habeas and civil rights actions for juvenile detainees); Hartmann v. Scott, 488 F.2d 1215 (8th Cir. 1973) (involving persons confined in state hospital); In re Class Action Application for Habeas Corpus on Behalf of All Material Witnesses, 612 F. Supp. 940 (W.D. Tex. 1985); Streicher v. Prescott, 103 F.R.D. 559 (D.D.C. 1984) (civil committees); Adderly v. Wainwright, 58 F.R.D. 389 (M.D. Fla. 1972) (prisoners, pre-Preiser); see Cox v. McCarthy,
class actions are not available, a representative habeas action in the nature of a class action is available. But a small minority have rejected habeas class actions, either in general or on the facts.

A majority of the state supreme courts that have considered the issue have approved class actions for habeas corpus petitions. In Commonwealth ex rel. Paulinski v. Isaac, a habeas class action was used to challenge the constitutionality of a Pennsylvania magistrate court's jurisdiction, essentially the same use proposed as that for the City Court of Atlanta. Habeas class actions have been approved, mostly by intermediate courts of appeals, in California, Florida, Indiana, Kansas, Michigan, and Washington. In Ohio at least one intermediate appellate court has acknowledged the possibility of a habeas class action. On the other hand, a significant minority of state courts,


291. Id. at 762-63.


Colorado, New Jersey, New York, Oklahoma, and West Virginia, have rejected habeas class actions based upon rationales inconsistent with the principles of habeas corpus and class actions in Georgia.\textsuperscript{294}

As attractive as a habeas class action may be for the efficient determination of the City Court of Atlanta’s constitutional problems, a significant potential limitation exists in the habeas corpus statute. Under O.C.G.A. section 9-14-51,\textsuperscript{295} a petitioner may bring only one state habeas petition against a criminal conviction unless the subsequent petition raises issues that could not reasonably have been presented in the first petition.\textsuperscript{296} This provision will limit the availability of a habeas class action in three ways. First, the named plaintiffs, who should in the first instance be first-time filers, must be prepared to raise any and all other defects in their convictions that are cognizable in habeas, which may raise adequacy and typicality issues.\textsuperscript{297} Second, any petitioner who has already brought a habeas petition raising other issues must be prepared to argue that the City Court’s unconstitutionality falls within the “new law” exception for successive petitions.\textsuperscript{298} Lastly, and more problematically, if the “one-petition” rule of O.C.G.A. section 9-14-51 were construed to mean that an unnamed class member had filed his or her first petition by remaining a member of the plaintiff class, whether by opting in or by failing to opt out,\textsuperscript{299} a class action could have the effect of eliminating those petitioners’ other grounds for review.

There are several potential solutions for this admittedly serious problem. Two potential rationales that would permit the habeas class action device to serve a useful function in resolving the City Court’s constitutional problems are as follows: (1) a holding grounded in statutory construction that a habeas class action does not constitute a first petition for anyone other than the named plaintiffs;\textsuperscript{300} and (2) an

\begin{footnotes}
\item[296] Id.
\item[298] See supra notes 265-78 and accompanying text.
\item[299] See Casarella & Bevis, supra note 281, at 54-58.
\item[300] See generally HERBERT R. NEWBERG & ALMA CONTE, NEWBERG ON CLASS ACTIONS § 16.22 (3d ed. 1992). The practical problems with this rule of lenity would seem to be few
\end{footnotes}
opportunity for unnamed class members to raise additional grounds for habeas relief in supplementary petitions.  

IV. CONCLUSION

The Georgia authorities make clear that the City Court’s lack of constitutional jurisdiction under the 1996 statute and its lack of same-occurrence misdemeanor jurisdiction under the 1988 and 1996 statutes are fundamental constitutional defects that can be challenged before the City Court of Atlanta on motion to dismiss and plea in bar, on direct appeal from both interlocutory and final orders, and by the writ of habeas corpus. The City of Atlanta can be expected to defend any and all of these cases vigorously on the merits. It may be that in the near future, if not already, the General Assembly will find a solution for the City Court’s ongoing problems in corrective legislation. It is to be hoped, however, that in the meantime, the City, the defense bar, and the courts will approach the dispute resolution process cooperatively to see that these issues are decided in the most efficient way possible and in such a manner that justice is done for all defendants affected by the City Court’s judgments.

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because no criminal defendant is likely to undertake a habeas class action in any other than the most significant of circumstances.
