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CRIMINAL PROCEDURE

Searches and Seizures: Provide Extraordinary Appeals and Motions for New Trial Based on Request for DNA Testing and Analysis; Establish Procedure for Preservation of Evidence

CODE SECTIONS:	O.C.G.A. §§ 5-5-41, 5-7-1 (amended), 17-5-55, -56 (new), 17-17-12 (amended)
BILL NUMBER:	SB 119
ACT NUMBER:	37
GEORGIA LAWS:	2003 Ga. Laws 247
SUMMARY:	The Act provides the procedure for post-conviction DNA testing through an extraordinary motion for a new trial in serious violent felonies. The Act amends the “Victim’s Bill of Rights” to require victim notification of extraordinary motions by the defendant. The Act also provides the standards, limitations, and conditions for the testing. The Act allows the State to appeal all extraordinary motions for new trial. In addition, the Act provides the standards for retention of evidence by court-appointed custodians.
EFFECTIVE DATE:	May 27, 2003 ¹

History

“It’s about doing what is right.”² Lieutenant Governor Mark Taylor and Senator David Adelman of the 42nd district introduced SB 119 as part of an effort to allow the law to keep pace with technology and

1. The Act applies to future convictions and past convictions where (1) the defendant was denied testing, (2) the defendant had not previously argued the issue, or (3) new testing technology has become available. *See* 2003 Ga. Laws 252, § 5.

2. *See* Interview with Sen. David Adelman, Senate District No. 42 (Apr. 17, 2003) [hereinafter Adelman Interview].

to try to ensure that innocent people are not kept in prison for serious crimes they did not commit.³ In the United States, courts have released 114 inmates after DNA evidence absolved them of the crime for which they had been convicted.⁴ Three of these exonerated inmates were from Georgia.⁵

The Prosecuting Attorneys' Council and the Georgia Bureau of Investigation worked in tandem with the Georgia Innocence Project and the Georgia Association of Criminal Defense Lawyers to draft SB 119 and HB 599.⁶ HB 599 was more expansive and applied to all crimes, while SB 119, as introduced, only applied to death penalty cases.⁷ Senator Adelman introduced SB 119 to the Georgia General Assembly, marking the first introduction of post-conviction DNA legislation to that body.⁸ The bill had the "broadest base of support you will see behind a criminal law-related statute."⁹

SB 119

Introduction

Senators David Adelman of the 42nd district, Rene Kemp of the 3rd district, Michael S. Meyer von Bremen of the 12th district, and Kasim Reed of the 35th district sponsored SB 119.¹⁰ Senator Adelman introduced the bill on the Senate floor on February 11, 2003, and it was assigned to the Judiciary Committee.¹¹ The Senate

3. *See id.*

4. *See* Editorial, *Our Opinions: Provide Equal Access to DNA Tests*, ATLANTA J. CONST., Apr. 7, 2003, available at 2003 WL 16550352 [hereinafter *Our Opinions*]. At the time of this publication, the overall number of exonerated individuals was 138. Innocence Project, *Mistaken I.D.*, available at <http://www.innocenceproject.org/causes/mistakenid.php>.

5. *See Our Opinions*, *supra* note 4.

6. *See* Interview with Robert Keller, Clayton County District Attorney (Apr. 15, 2003) [hereinafter *Keller Interview*]; Electronic Mail Interview with Chuck Olson, General Counsel, Prosecuting Attorneys' Council (Apr. 18, 2003) [hereinafter *Olson Interview*]; Electronic Mail Interview with Aimee Maxwell, Executive Director, Georgia Innocence Project (Oct. 9, 2003).

7. *See* *Keller Interview*, *supra* note 6; *Olson Interview*, *supra* note 6. Compare SB 199, as introduced, 2003 Ga. Gen. Assem., with HB 599, as introduced, 2003 Ga. Gen. Assem.

8. *See* *Keller Interview*, *supra* note 6. Prior to SB 119, the Georgia statute on extraordinary motions, Code section 5-5-41, had not been amended in 130 years. *See* 1873 Ga. Laws 47, § 1, at 47 (formerly found at O.C.G.A. § 5-5-41 (1995)).

9. *See* Adelman Interview, *supra* note 2. Twenty-seven other states have passed similar laws allowing post-conviction motions for DNA testing. *See Our Opinions*, *supra* note 4.

10. *See* SB 119, as introduced, 2003 Ga. Gen. Assem.

11. *See* State of Georgia Final Composite Status Sheet, SB 119, Apr. 25, 2003; Adelman Interview, *supra* note 2.

Committee favorably reported a substitute to the bill on March 25, 2003.¹² The Senate adopted the Committee substitute and passed the bill on March 28, 2003.¹³ On April 8, 2003, the Speaker assigned the bill to the House Judiciary Committee, which created its own substitute and favorably reported the bill, as substituted, on April 17, 2003.¹⁴ The House adopted the Committee substitute and passed the bill on April 25, 2003, the final day of the session.¹⁵ The bill returned to the Senate, which agreed to the House Committee substitute that same day.¹⁶ The General Assembly forwarded the bill to Governor Sonny Perdue, who signed SB 119 into law on May 27, 2003.¹⁷

Senate Consideration

After introduction, SB 119 was assigned to the Senate Judiciary Committee.¹⁸ The Senate Committee changed the bill to reflect the House's post-conviction DNA bill, HB 599.¹⁹ SB 119, as introduced, only applied to death penalty cases, while HB 599 applied to all crimes.²⁰ The Senate Committee incorporated HB 599 into SB 119 because HB 599 was more "comprehensive."²¹

Section 1 of SB 119, as introduced, would have added an extraordinary motion exception to Code section 5-5-40, which provides procedures for a motion for new trial generally.²² Section 2, as introduced, would have amended Code section 5-5-41, which provides the requirements for extraordinary motions.²³ The Senate Committee replaced sections 1 and 2 of SB 119 with language

12. See State of Georgia Final Composite Status Sheet, SB 119, Apr. 25, 2003.

13. See Georgia Senate Voting Record, SB 119 (Mar. 28, 2003).

14. See State of Georgia Final Composite Status Sheet, SB 119, Apr. 25, 2003.

15. See Georgia House of Representatives Voting Record, SB 119 (Apr. 25, 2003).

16. See Georgia Senate Voting Record, SB 119 (Apr. 25, 2003).

17. 2003 Ga. Laws 247.

18. See State of Georgia Final Composite Status Sheet, SB 119, Apr. 25, 2003.

19. Compare SB 119, as introduced, 2003 Ga. Gen. Assem., and HB 599, as introduced, 2003 Ga. Gen. Assem., with SB 119 (SCS), 2003 Ga. Gen. Assem.

20. See Keller Interview, *supra* note 6. Compare SB 119, as introduced, 2003 Ga. Gen. Assem., with HB 599, as introduced, 2003 Ga. Gen. Assem.

21. See Olson Interview, *supra* note 6.

22. See SB 119, as introduced, 2003 Ga. Gen. Assem.

23. See *id.*

specifically defining the procedure for extraordinary motions for a new trial for some serious violent felonies.²⁴

The Committee also changed the bill to prevent defendants from using this extraordinary motion as a delay tactic on the eve of their execution.²⁵ The Senate Committee substitute states that the motion “shall not automatically stay an execution.”²⁶ The Senate Committee changed the bill to ensure that defendants “file [their] motion[s] as soon as possible.”²⁷ Section 1 would have added a new subsection to the end of Code section 5-5-41 to clearly provide the procedure for an extraordinary motion to perform DNA testing.²⁸

The Senate Committee changed section 2 of SB 119.²⁹ These changes would have amended Code section 5-7-1, relating to the circumstances under which prosecutors can appeal decisions in criminal cases.³⁰ The section specifies circumstances such as, “[f]rom an order, decision, or judgment of a superior court granting an extraordinary motion for new trial.”³¹ The Senate Committee added language to grant the prosecution the ability to appeal the defendant’s extraordinary motion, an option that was unavailable prior to this bill.³²

As introduced, section 3 of SB 119 would have added new Code section 5-5-41.1 to describe the procedure and requirements for an extraordinary motion based on DNA testing.³³ As introduced, section 4 of SB 119 would have amended Code section 17-5-54 to provide the procedure for disposing of personal property not “subject to

24. See Keller Interview, *supra* note 6. Compare SB 119, as introduced, 2003 Ga. Gen. Assem., with SB 119 (SCS), 2003 Ga. Gen. Assem. These offenses are known by some as the “seven deadly sins.” They are (1) murder, (2) rape, (3) aggravated sodomy, (4) kidnapping, (5) aggravated child molestation, (6) aggravated sexual battery, and (7) armed robbery. See Norman Arey, *Teen’s Sentence a Shock to Jurors*, ATLANTA J. CONST., June 3, 2003, available at 2003 WL 56078717.

25. See Adelman Interview, *supra* note 2.

26. See SB 119 (SCS), 2003 Ga. Gen. Assem.

27. See Adelman Interview, *supra* note 2.

28. See SB 119 (SCS), 2003 Ga. Gen. Assem.

29. Compare SB 119, as introduced, 2003 Ga. Gen. Assem., with SB 119 (SCS), 2003 Ga. Gen. Assem.

30. Compare 2000 Ga. Laws 863, § 3, at 864 (formerly found at O.C.G.A. § 5-7-1 (2002)), with SB 119 (SCS), 2003 Ga. Gen. Assem.

31. Compare SB 119, as introduced, 2003 Ga. Gen. Assem., with SB 119 (SCS), 2003 Ga. Gen. Assem.

32. Compare 2000 Ga. Laws 863, § 3, at 864 (formerly found at O.C.G.A. § 5-7-1 (2002)), with SB 119 (SCS), 2003 Ga. Gen. Assem.

33. See SB 119, as introduced, 2003 Ga. Gen. Assem.

preservation” as DNA evidence.³⁴ The Senate Committee substitute removed that language from sections 3 and 4.³⁵

The Senate Committee substitute to SB 119 merged sections 3 and 4 and would have added new Code sections 17-5-55 and 17-5-56.³⁶ These new sections set forth the procedure for the retention of evidence after the trial’s conclusion.³⁷ Prior to SB 119, no evidence preservation statute existed in the Code.³⁸ Thus, the state could destroy evidence after appeals were exhausted.³⁹ Section 3 of SB 119 details the length of time required to keep the evidence, the location to preserve the evidence, and the procedure to maintain a chain of custody.⁴⁰ Section 4 would have amended the “Victim’s Bill of Rights,” Code section 17-17-12, regarding victim notification of a defendant’s appeals or motions for new trial, to include “an extraordinary motion for new trial.”⁴¹

Section 5 limits the extraordinary motion filed under section 1 of the bill only to DNA and restricts the court from considering other issues.⁴² The section also requires the court to allow those convicted prior to the effective date of the Act an extraordinary motion for DNA, even if the court has previously denied this motion.⁴³ The Senate Committee favorably reported the bill, as substituted, on March 25, 2003.⁴⁴ The Senate adopted the Committee substitute and unanimously passed the bill on March 28, 2003.⁴⁵

34. *See id.*

35. *Compare* SB 119, as introduced, 2003 Ga. Gen. Assem., *with* SB 119 (SCS), 2003 Ga. Gen. Assem.

36. *Compare* SB 119, as introduced, 2003 Ga. Gen. Assem., *with* SB 119 (SCS), 2003 Ga. Gen. Assem.

37. *See* SB 119 (SCS), 2003 Ga. Gen. Assem.; Interview with Aimee Maxwell, Executive Director, Georgia Innocence Project (Apr. 17, 2003) [hereinafter Maxwell Interview].

38. *See* Maxwell Interview, *supra* note 37.

39. *See id.*

40. *See* SB 119 (SCS), 2003 Ga. Gen. Assem.

41. *Compare* 2002 Ga. Laws 386, § 2, at 391 (formerly found at O.C.G.A. § 17-17-12 (2002)), *with* SB 119 (SCS), 2003 Ga. Gen. Assem.

42. *See* SB 119 (SCS), 2003 Ga. Gen. Assem.

43. *See id.*

44. *See* State of Georgia Final Composite Status Sheet, SB 119, Apr. 25, 2003.

45. *See* Georgia Senate Voting Record, SB 119 (Mar. 28, 2003).

House Consideration

After introduction in the House, the Speaker sent SB 119 to the House Judiciary Committee on April 8, 2003.⁴⁶ The House Committee offered a substitute to make a few minor language changes and favorably reported the substitute on April 17, 2003.⁴⁷ The House unanimously passed SB 119 on April 25, 2003.⁴⁸ The Senate also unanimously passed the House substitute later that day.⁴⁹

The Act

Section 1 of the Act provides the procedures and requirements for extraordinary motions for a new trial based on DNA evidence where the method of testing was not available until after the trial was over.⁵⁰ Under new subsection 5-5-41(c), defendants who have not raised the issue of DNA evidence, or who did not have access to DNA testing, now have the opportunity to move the court to order DNA testing.⁵¹ If the identity of the perpetrator was at issue, and the DNA testing has a reasonable probability of affecting the outcome of the trial, the defendant can move for a new trial based on evidence or new testing procedures unavailable at the time of the trial.⁵² The Act allows the court to impose the cost of the DNA test on the movant, or if the movant is indigent, the court may pay for the test from court or county funds.⁵³

Section 2 amends Code section 5-7-1 to allow prosecutors the opportunity to appeal the court's decision to grant the extraordinary motion for new trial.⁵⁴ Section 3 specifically sets forth the method of preservation of evidence and the chain of custody of seized property.⁵⁵ Code section 17-5-55 calls for the appointment of

46. See State of Georgia Final Composite Status Sheet, SB 119, Apr. 25, 2003.

47. See *id.*

48. See Georgia House of Representatives Voting Record, SB 119 (Apr. 25, 2003).

49. See Georgia Senate Voting Record, SB 119 (Apr. 25, 2003).

50. See O.C.G.A. § 5-5-41(c) (Supp. 2003).

51. See *id.*

52. See *id.*

53. See *id.*; *Our Opinions*, *supra* note 4.

54. Compare 2000 Ga. Laws 863, § 3, at 864 (formerly found at O.C.G.A. § 5-7-1 (Supp. 2002)), with O.C.G.A. § 5-7-1 (Supp. 2003).

55. See O.C.G.A. §§ 17-5-55 to -56 (Supp. 2003).

custodians to inventory seized evidence.⁵⁶ The Act also details the procedures for maintaining a chain of evidence, as well as the procedures for disposing of evidence post-trial, with the exception of evidence containing biological material.⁵⁷ The Act adds Code section 17-5-56 to appoint custodians to maintain potential DNA evidence for as long as the Act requires.⁵⁸ In death penalty cases, the Act requires biological material to “be maintained until the sentence in the case has been carried out.”⁵⁹ Biological evidence shall be kept ten years after conviction for other serious violent felonies.⁶⁰

Section 4 amends the “Victim’s Bill of Rights” to require notification to victims and their families when a defendant files an extraordinary motion for new trial.⁶¹ The Act gives Georgia courts the flexibility to grant a new trial for defendants facing long sentences, or even death, if scientific technology could exonerate them.⁶²

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56. See O.C.G.A. § 17-5-55 (Supp. 2003).

57. See *id.*

58. See *id.*

59. *Id.*

60. *Id.* The Act specifically states that custodians must keep biological evidence ten years post-judgment or ten years after the Act’s effective date, whichever is later. See *id.*

61. Compare 2002 Ga. Laws 386, § 2, at 391 (formerly found at O.C.G.A. § 17-17-12 (Supp. 2002)), with O.C.G.A. § 17-17-12 (Supp. 2003).

62. See Adelman Interview, *supra* note 2.