

House Bill 170 (AS PASSED HOUSE AND SENATE)

By: Representatives Golick of the 34th, Roberts of the 154th, Ralston of the 7th, Mumford of the 95th, Miller of the 106th, and others

A BILL TO BE ENTITLED
AN ACT

1 To enact the "Criminal Justice Act of 2005" so as to substantially revise the laws of this state
2 relating to the conduct of criminal trials and appeals in criminal cases; to provide for a short
3 title; to amend Title 5 of the Official Code of Georgia Annotated, relating to appeal and error,
4 so as to specifically provide that the denial of a defendant's motion to recuse may be subject
5 to interlocutory appeal; to provide that the state may appeal from an order, decision, or
6 judgment of a superior court granting a motion for new trial or denying a motion by the state
7 to recuse or disqualify a judge; to amend Article 5 of Chapter 12 of Title 15 of the Official
8 Code of Georgia Annotated, relating to trial juries, so as to provide the state and the accused
9 with the same number of peremptory challenges in misdemeanor, felony, and death penalty
10 cases and in challenging alternate jurors; to provide the manner in which peremptory
11 challenges are made; to change the size of the jury panel in felony and death penalty cases;
12 to provide for excuses for cause under certain circumstances; to provide the manner in which
13 the number of alternative jurors is determined; to amend Title 17 of the Official Code of
14 Georgia Annotated, relating to criminal procedure, so as to provide for additional peremptory
15 challenges in trials for jointly indicted defendants; to provide that the prosecuting attorney
16 shall always conclude the argument to the jury; to provide that provisions relating to
17 discovery apply to sentencing proceedings; to change certain provisions relating to
18 discovery; to amend Title 24 of the Official Code of Georgia Annotated, relating to evidence,
19 so as to change the provisions relating to the impeachment of the defendant; to change
20 certain provisions relating to complainant's past sexual behavior not admissible in rape
21 prosecution, exceptions, and court orders; to change provisions relating to when a witness
22 has been impeached; to provide for the impeachment of witnesses through evidence of
23 conviction of a crime and bad character; to provide for the admission of specific instances
24 of conduct by a witness; to provide for other matters relative to the foregoing; to provide for
25 applicability; to repeal conflicting laws; and for other purposes.

26 BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

H. B. 170

1 "(a) An appeal may be taken by and on behalf of the State of Georgia from the superior
 2 courts, state courts, City Court of Atlanta, and juvenile courts and such other courts from
 3 which a direct appeal is authorized to the Court of Appeals of Georgia and the Supreme
 4 Court of Georgia in criminal cases and adjudication of delinquency cases in the following
 5 instances:

6 (1) From an order, decision, or judgment setting aside or dismissing any indictment,
 7 accusation, or petition alleging that a child has committed a delinquent act or any count
 8 thereof;

9 (2) From an order, decision, or judgment arresting judgment of conviction or
 10 adjudication of delinquency upon legal grounds;

11 (3) From an order, decision, or judgment sustaining a plea or motion in bar, when the
 12 defendant has not been put in jeopardy;

13 (4) From an order, decision, or judgment suppressing or excluding evidence illegally
 14 seized or excluding the results of any test for alcohol or drugs in the case of motions
 15 made and ruled upon prior to the impaneling of a jury or the defendant being put in
 16 jeopardy, whichever occurs first;

17 (5) From an order, decision, or judgment of a court where the court does not have
 18 jurisdiction or the order is otherwise void under the Constitution or laws of this state;

19 (6) From an order, decision, or judgment of a superior court transferring a case to the
 20 juvenile court pursuant to subparagraph (b)(2)(B) of Code Section 15-11-28; ~~or~~

21 (7) From an order, decision, or judgment of a superior court granting a motion for new
 22 trial or an extraordinary motion for new trial; or

23 (8) From an order, decision, or judgment denying a motion by the state to recuse or
 24 disqualify a judge made and ruled upon prior to the defendant being put in jeopardy."

25 SECTION 4.

26 Article 5 of Chapter 12 of Title 15 of the Official Code of Georgia Annotated, relating to trial
 27 juries, is amended by striking Code Section 15-12-125, relating to demand of jury panels for
 28 misdemeanor trials, and inserting in lieu thereof a new Code Section 15-12-125 to read as
 29 follows:

30 "15-12-125.

31 For the trial of misdemeanors in all courts, each party may demand a full panel of 12
 32 competent and impartial jurors from which to select a jury. When one or more of the
 33 regular panel of trial jurors is absent or for any reason disqualified, the judge, at the request
 34 of counsel for either party, shall cause the panel to be filled by additional competent and
 35 impartial jurors to the number of 12 before requiring the parties or their counsel to strike
 36 a jury. From this panel, the accused shall have the right to challenge four peremptorily,

1 defendant and the state two shall each have the right to challenge three jurors peremptorily.
 2 The defendant and the state shall exercise their challenges as provided in Code Section
 3 15-12-166. The remaining six jurors shall constitute the jury."

4 **SECTION 5.**

5 Said article is further amended by striking Code Section 15-12-160, relating to required panel
 6 of jurors in felony trial, and inserting in lieu thereof a new Code Section 15-12-160 to read
 7 as follows:

8 "15-12-160.

9 When any person stands indicted for a felony, the court shall have impaneled 30 jurors
 10 from which the defense and prosecution may strike jurors; provided, however, that in any
 11 case in which the state announces its intention to seek the death penalty, the court shall
 12 have impaneled 42 jurors from which the defense and state may strike jurors. If, for any
 13 reason, after striking from the panel there remain less than 12 qualified jurors to try the
 14 case, the presiding judge shall summon such numbers of persons who are competent jurors
 15 as may be necessary to provide a full panel. In making up the panel or successive panels,
 16 the presiding judge shall draw the tales jurors from the jury box of the county and shall
 17 order the sheriff to summon them."

18 **SECTION 6.**

19 Said article is further amended by adding at the end of Code Section 15-12-164, relating to
 20 challenges to jurors in a felony trial, a new subsection (d) to read as follows:

21 "(d) The court shall also excuse for cause any juror who from the totality of the juror's
 22 answers on voir dire is determined by the court to be substantially impaired in the juror's
 23 ability to be fair and impartial. The juror's own representation that the juror would be fair
 24 and impartial is to be considered by the court but is not determinative."

25 **SECTION 7.**

26 Said article is further amended by striking Code Section 15-12-165, relating to number of
 27 peremptory challenges, and inserting in lieu thereof a new Code Section 15-12-165 to read
 28 as follows:

29 "15-12-165.

30 Every person ~~indicted for a crime or offense~~ accused of a felony may peremptorily
 31 challenge ~~12~~ nine of the jurors impaneled to try him or her. The state shall be allowed
 32 ~~one-half~~ the same number of peremptory challenges allowed to the ~~accused~~ defendant;
 33 provided, however, that in any case in which the state announces its intention to seek the
 34 death penalty, the ~~person indicted for the crime~~ defendant may peremptorily challenge 20

1 15 jurors and the state shall be allowed ~~one-half the same~~ number of peremptory challenges
2 ~~allowed to the accused."~~

3 **SECTION 8.**

4 Said article is further amended by striking Code Section 15-12-169, relating to manner of
5 selecting alternate jurors, and inserting in lieu thereof a new Code Section 15-12-169 to read
6 as follows:

7 "15-12-169.

8 Alternate jurors must be drawn from the same source and in the same manner and have the
9 same qualifications as the jurors already sworn. They shall be subject to the same
10 examination and challenges. The number of alternate jurors shall be determined by the
11 court. The state and the defendant shall be entitled to as many peremptory challenges to
12 alternate jurors as there are alternate jurors called. ~~The defendant shall be entitled to~~
13 ~~additional peremptory challenges in an amount twice greater than the additional~~
14 ~~peremptory challenges of the state.~~ The peremptory challenges allowed to the state and to
15 the defendant in such event shall be in addition to the regular number of peremptory
16 challenges allowed in criminal cases to the defendant and to the state as provided by law.
17 When two or more defendants are tried jointly, ~~each defendant shall be entitled to as many~~
18 ~~peremptory challenges to alternate jurors as there are alternate jurors called~~ the number and
19 manner of exercising peremptory challenges shall be determined as provided in Code
20 Section 17-8-4."

21 **SECTION 9.**

22 Title 17 of the Official Code of Georgia Annotated, relating to criminal procedure, is
23 amended by striking Code Section 17-8-4, relating to procedure for trial of jointly indicted
24 defendants, and inserting in lieu thereof a new Code Section 17-8-4 to read as follows:

25 "17-8-4.

26 (a) When two or more defendants are jointly indicted for a capital offense, any defendant
27 so electing shall be separately tried unless the state shall waive the death penalty. When
28 indicted for a capital felony when the death penalty is waived, or for a felony less than
29 capital, or for a misdemeanor, such defendants may be tried jointly or separately in the
30 discretion of the trial court. In any event, a jointly indicted defendant may testify for
31 another jointly indicted defendant or on behalf of the state. When separate trials are ordered
32 in any case, the defendants shall be tried in the order requested by the state. If the offense
33 requires joint action and concurrence of two or more persons, acquittal or conviction of one
34 defendant shall not operate as acquittal or conviction of others not tried.

1 (b) When two or more defendants are tried jointly for a crime or offense, such defendants
 2 shall be entitled to the same number of strikes as a single defendant if tried separately. The
 3 strikes shall be exercised jointly by the defendants or shall be apportioned among the
 4 defendants in the manner the court shall direct. In the event two or more defendants are
 5 tried jointly, the court, upon request of the defendants, ~~acting in its sole discretion, may~~
 6 shall allow an equal number of additional strikes to the defendants, not to exceed five each,
 7 as the court shall deem necessary, to the ends that justice may prevail. The court may allow
 8 the state additional strikes not to exceed the number of additional strikes as are allowed to
 9 the defendants."

10 SECTION 10.

11 Said title is further amended by striking Code Section 17-8-71, relating to order of argument
 12 after evidence presented, and inserting in lieu thereof a new Code Section 17-8-71 to read
 13 as follows:

14 "17-8-71.

15 After the evidence is closed on both sides, the prosecuting attorney shall open and conclude
 16 the argument to the jury. ~~If the defendant introduces no evidence, his counsel shall open~~
 17 ~~and conclude the argument to the jury after the evidence on the part of the state is closed~~
 18 The defendant shall be entitled to make a closing argument prior to the concluding
 19 argument of the prosecuting attorney."

20 SECTION 11.

21 Said title is further amended by striking subsection (a) of Code Section 17-10-2, relating to
 22 conduct of presentence hearings in felony cases, and inserting in lieu thereof a new
 23 subsection (a) to read as follows:

24 "(a)(1) Except in cases in which the death penalty or life without parole may be imposed,
 25 upon the return of a verdict of 'guilty' by the jury in any felony case, the judge shall
 26 dismiss the jury and shall conduct a presentence hearing at which the only issue shall be
 27 the determination of punishment to be imposed. In the hearing the judge shall hear
 28 additional evidence in extenuation, mitigation, and aggravation of punishment, including
 29 the record of any prior criminal convictions and pleas of guilty or nolo contendere of the
 30 defendant, or the absence of any prior conviction and pleas, ~~provided that only such~~
 31 ~~evidence in aggravation as the state has made known to the defendant prior to the~~
 32 ~~defendant's trial shall be admissible.~~

33 (2) The judge shall also hear argument by the defendant or the defendant's counsel and
 34 the ~~district~~ prosecuting attorney, as provided by law, regarding the punishment to be
 35 imposed. ~~The district~~ Except in cases where the death penalty may be imposed, the

1 prosecuting attorney shall open and ~~the defendant or the defendant's counsel shall~~
 2 conclude the argument. In cases where the death penalty may be imposed, the prosecuting
 3 attorney shall open and the defendant or the defendant's counsel shall conclude the
 4 argument.

5 (3) Upon the conclusion of the evidence and arguments, the judge shall impose the
 6 sentence or shall recess the trial for the purpose of taking the sentence to be imposed
 7 under advisement. The judge shall fix a sentence within the limits prescribed by law."

8 SECTION 12.

9 Said title is further amended by adding a new subsection (e) to Code Section 17-16-2,
 10 relating to applicability of discovery in criminal cases, to read as follows:

11 "(e) Except as provided in paragraph (3) of subsection (b) of Code Section 17-16-4, if a
 12 defendant has elected to have the provisions of this article apply, the provisions of this
 13 article shall also apply to sentencing hearings and the sentencing phase of a death penalty
 14 trial."

15 SECTION 13.

16 Said title is further amended in Code Section 17-16-4, relating to discovery disclosure
 17 required by the prosecuting attorney and defendant, by adding a new paragraph (5) at the end
 18 of subsection (a) and a new paragraph (3) at the end of subsection (b) to read as follows:

19 "(5) The prosecuting attorney shall, no later than ten days prior to trial, or at such time
 20 as the court orders but in no event later than the beginning of the trial, provide the
 21 defendant with notice of any evidence in aggravation of punishment that the state intends
 22 to introduce in sentencing."

23 "(3)(A) The defendant shall, no later than the announcement of the verdict of the jury
 24 or if the defendant has waived a jury trial at the time the verdict is published by the
 25 court, serve upon the prosecuting attorney all books, papers, documents, photographs,
 26 tangible objects, audio and visual tapes, films and recordings, or copies or portions
 27 thereof and to inspect and photograph buildings or places which are within the
 28 possession, custody, or control of the defendant and which the defendant intends to
 29 introduce as evidence in the presentence hearing.

30 (B) The defendant shall, no later than the announcement of the verdict of the jury or
 31 if the defendant has waived a jury trial at the time the verdict is published by the court,
 32 serve upon the prosecuting attorney all reports of any physical or mental examinations
 33 and scientific tests or experiments, including a summary of the basis for the expert
 34 opinions rendered in the reports, or copies thereof, if the defendant intends to introduce
 35 in evidence in the presentence hearing the results of the physical or mental examination

1 or scientific test or experiment. If the report is oral or partially oral, the defendant shall
 2 reduce all relevant and material oral portions of such report to writing and shall serve
 3 opposing counsel with such portions.

4 (C) The defendant shall, no later than five days before the trial commences, serve upon
 5 the prosecuting attorney a list of witnesses that the defendant intends to call as a witness
 6 in the presentence hearing. No later than the announcement of the verdict of the jury or
 7 if the defendant has waived a jury trial at the time the verdict is published by the court,
 8 the defendant shall produce for the opposing party any statement of such witnesses that
 9 is in the possession, custody, or control of the defendants or the defendant's counsel
 10 that relates to the subject matter of the testimony of such witnesses unless such
 11 statement is protected from disclosure by the privilege contained in paragraph (5), (6),
 12 (7), or (8) of Code Section 24-9-21."

13 SECTION 13.1.

14 Title 24 of the Official Code of Georgia Annotated, relating to evidence, is amended by
 15 striking subsections (a) and (b) of Code Section 24-2-3, relating to direct evidence or cross-
 16 examination of a complaining witness or other witnesses, and inserting in lieu thereof new
 17 subsections (a) and (b) to read as follows:

18 24-2-3.

19 (a) In any prosecution for a violation of Code Section 16-6-1, relating to rape; Code Section
 20 16-6-2, relating to aggravated sodomy; Code Section 16-6-4, relating to aggravated child
 21 molestation; or Code Section 16-6-22.2, relating to aggravated sexual battery ~~rape~~, evidence
 22 relating to the past sexual behavior of the complaining witness shall not be admissible, either
 23 as direct evidence or on cross-examination of the complaining witness or other witnesses,
 24 except as provided in this Code section. For the purposes of this Code section, evidence of
 25 past sexual behavior includes, but is not limited to, evidence of the complaining witness's
 26 marital history, mode of dress, general reputation for promiscuity, nonchastity, or sexual
 27 mores contrary to the community standards.

28 (b) In any prosecution for a violation of Code Section 16-6-1, relating to rape; Code Section
 29 16-6-2, relating to aggravated sodomy; Code Section 16-6-4, relating to aggravated child
 30 molestation; or Code Section 16-6-22.2, relating to aggravated sexual battery ~~rape~~, evidence
 31 relating to the past sexual behavior of the complaining witness may be introduced if the
 32 court, following the procedure described in subsection (c) of this Code section, finds that the
 33 past sexual behavior directly involved the participation of the accused and finds that the
 34 evidence expected to be introduced supports an inference that the accused could have
 35 reasonably believed that the complaining witness consented to the conduct complained of in
 36 the prosecution.

1 (b) Time limit. Evidence of a conviction under subsection (a) of this Code section is not
 2 admissible if a period of more than ten years has elapsed since the date of the conviction
 3 or of the release of the witness or the defendant from the confinement imposed for that
 4 conviction, whichever is the later date, unless the court determines, in the interest of
 5 justice, that the probative value of the conviction supported by specific facts and
 6 circumstances substantially outweighs its prejudicial effect. However, evidence of a
 7 conviction more than ten years old, as calculated herein, is not admissible unless the
 8 proponent gives to the adverse party sufficient advance written notice of intent to use such
 9 evidence to provide the adverse party with a fair opportunity to contest the use of such
 10 evidence.

11 (c) Effect of pardon or annulment. Evidence of a conviction is not admissible under this
 12 Code section if:

13 (1) The conviction has been the subject of a pardon or annulment based on a finding of
 14 the rehabilitation of the person convicted and such person has not been convicted of a
 15 subsequent crime that was punishable by death or imprisonment for one year or more; or

16 (2) The conviction has been the subject of a pardon, annulment, or other equivalent
 17 procedure based on a finding of innocence.

18 (d) Juvenile adjudications. An adjudication of delinquency in juvenile court shall be
 19 inadmissible against a defendant in a criminal case. An adjudication of delinquency in
 20 juvenile court shall be presumed to be inadmissible against a witness in a criminal case;
 21 however, this presumption may be rebutted only if it is shown that:

22 (1) The factual basis for the proven allegations of delinquency would have constituted
 23 a crime under the laws of the state of the juvenile court if committed by an adult at the
 24 time they were committed by the juvenile;

25 (2) The probative value of the evidence substantially outweighs the prejudicial effect of
 26 its admission; and

27 (3) The court finds that admission of the adjudication into evidence is necessary for a fair
 28 determination of the issue of guilt or innocence of the defendant.

29 (e) Pendency of appeal. The pendency of an appeal from a conviction does not render
 30 evidence of a conviction inadmissible. Evidence of the pendency of an appeal shall be
 31 admissible."

32 SECTION 17.

33 This Act shall apply to all trials which commence on or after July 1, 2005.

34 SECTION 18.

35 All laws and parts of laws in conflict with this Act are repealed.