2010 WL 10052916 (Ga.Super.) (Trial Motion, Memorandum and Affidavit)
Superior Court of Georgia.
Cobb County

STATE OF GEORGIA, Plaintiff,

v.

James W. HARPER, III and Jeffrey Pombert, Defendants.

No. 10900220.
July 29, 2010.

Motion to Dismiss Indictment Based On Unconstitutionality of Statute of Limitations

Donald F. Samuel, Georgia Bar No. 624475, for defendant, Garland, Samuel & Loeb, P.C., 3151 Maple Drive, N.E., Atlanta, GA 30305, 404-262-2225.

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COME NOW the Defendants, James W. Harper, III and Jeffrey Pombert (collectively "these Defendants") and hereby move this Court to dismiss the Indictment on the basis that O.C.G.A. §17-3-2.2 is unconstitutional on its face and as applied in that it violates the Equal Protection Clause contained in the Fourteenth Amendment to the United States Constitution, and Article 1, Section 1, Paragraph 2 of the Georgia Constitution.

The Indictment was returned in January, 2010. With the exception of a few unrelated acts contained in the RICO conspiracy charge (Count 1 of the Indictment), all events complained of in the Indictment occurred between late 2001 and 2004. In an effort to circumvent the four year statute of limitations (five years for RICO), the state has relied on two specific statutes: O.C.G.A. §17-3-2(2) claiming that the crime was unknown to the state and O.C.G.A. §17-3-2.2, that the victim of the thefts and RICQ offenses, was 65 years of age or older at the time of the event. The Plea in Bar filed by these Defendants contemporaneous herewith sets forth why O.C.G.A. §17-3-2(2) does not apply as the events were in fact known to the state or to the victim. It further sets forth the argument that the alleged thefts and other crimes were not from an individual 65 years of age or older; rather, the allegations show that the thefts allegedly occurred from a corporation. In addition to these grounds, these Defendants also claim that O.C.G.A. §17-3-2.2 is unconstitutional on its face or in the alternative, unconstitutional as applied in this case. For the purpose of this motion, these Defendants concede that Gaston Glock, the state's alleged victim, was over 65 at the time the events alleged in the Indictment occurred.

O.C.G.A. §17-3-2.2 AND ITS ORIGIN

O.C.G.A. §17-3-2.2 reads as follows:

> In addition to any periods excluded pursuant to Code §17-3-2, if a victim is a person who was 65 years of age or older, the applicable period within which a prosecution must be commenced under Code §17-3-1 or other applicable statute shall not begin to run until the violation is reported to or discovered by a law enforcement agency, prosecuting attorney, or other governmental agency, whichever occurs earlier. Such law enforcement agency or governmental agency shall promptly report such allegation to the appropriate prosecuting attorney. Except for prosecutions for crimes for which the law provides a statute of limitations longer than 15 years, prosecution shall not commence more than 15 years after the commission of the crime.

O.C.G.A. §17-3-2.2 was enacted as part of an Act governing treatment of the **elderly**. In 2000, a series of laws were voted into law as part of one Act. Specifically, the Act focused on **elderly** persons who were in the custody or control of others and/or whose physical person or financial resources were subject to guardians or fiduciaries. See, Act 740, S.B. 407, 2000 Ga.Gen. Assem.

The Act, SB 407, contained several statutes. It included the enactment of O.C.G.A. §16-3-12, § 17-3-2.2, §30-5-10 and amended O.C.G.A. §16-9-6 and §30-5-4. Act 740, Bill No. SB 407. 2000 Georgia Laws 1085. The bill was initially called the **Elder**, Disabled Adults Act of 2000. *Compare* SB 407 (SCA), 2000 Ga. Gen. Assem., with SB 407 (HCS), 2000 Ga. Gen. Assem. As introduced in the Senate, SB 407 was entitled the "Georgia Protection of **Elder** Persons, Disabled Adults Act of 2000. When the bill was forwarded to the judiciary committee, it was renamed the "Georgia Protection of **Elder** Persons Act of 2000." Regardless of its name, however, it is clear from a reading of the statutes encompassed in the Act, that the protection was meant for **elderly** individuals who physically, or whose finances, were in the custody and control of guardians or fiduciaries.

By way of example, with the exception of O.C.G.A. §17-3-2.2, the Act includes new statutes or amendments dealing with the protection of the **elderly** under very specific circumstances. O.C.G.A. §16-5-100 makes it a crime for a "guardian or other person supervising the welfare of or having immediate charge or custody of a person who is 65 years of age or older" with cruelty when they willfully deprive a person of necessaries, including health care or shelter. O.C.G. A. §16-8-12, also part of the Act, made it clear that for theft crimes involving property taken by a fiduciary in breach of the fiduciary obligation to a person 65 years or older, the penalty would be increased. Further, O.C.G.A. 16-9-6 made it clear that in regard to forgery and related offenses,if a fiduciary committed such an offense against a person who is 65 years or older, the term of imprisonment would be higher for this crime as well.

The Act also amended two existing statutes. O.C.G.A. 30-5-4 which concerned the reporting of disabled adults or **elder** persons in need of protective services. It directs physicians and others who see that an **elderly** person has been **abused**, etc., to report. O.C.G.A. §30-5-10 concerned training programs for such professionals so they could spot **abuse** of the **elderly** by those under their care.

A review of the Act of which this statute was a part reveals that the intention was to protect those who are disabled, and the **elderly** who are in the care of guardians or whose assets are overseen by fiduciaries. However, the legislature failed accomplish this objective and, instead, wrote an overbroad, arbitrary and unconstitutional law.

In challenging a statute on the basis that it violates the Equal Protection Clause, a defendant must show that the statute treats similarly situated people differently without a rational relationship to a legitimate state purpose when a suspect class is not involved. *Willowbrook v. Olech,* 528 U.S. 562, 564 (1981). Age is not a protected classification, *Gregory v. Ashcroft,* 501 U.S. 452, 470 (1991). A statute that discriminates on the basis of age will only violate the Equal Protection Clause if the age classification is not rationally related to a legitimate state interest. *Kimel v. Florida Board of Regents,* 528 U.S. 62 (2000). Nevertheless,

The Equal Protection Clause of [the Fourteenth Amendment to the United States Constitution] does... deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria, wholly unrelated to the objective of the statute. A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.'

Reed v. Reed, 404 U.S. 71, 75-76 (___), quoting *Royster Guano Co. v. Virginia,* 253 U.S. 412, 415 (1920). See also, Deen v. Egleston, DMD, 597 F.3d 1223, 1230 (11th Cir. 2010) ("The rational basis inquiry is not a toothless one. There are limits to the latitude afforded states.") See also, *City of Cleburne v. Cleburne Living Ctr.,* 473 U.S. 432, 446-47 (1985)

In *Pickett v. Brown,* 462 U.S. 1 (1983) the U.S. Supreme Court was faced with a Tennessee statute of limitations governing certain paternity and support actions which

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In *Pickett v. Brown,* 462 U.S. 1 (1983) the U.S. Supreme Court was faced with a Tennessee statute of limitations governing certain paternity and support actions which differentiated between illegitimate children and legitimate children. The Supreme Court found that the state's attempt to justify such distinction by the state's purported interest was not rationally based and that the statute of limitations which differentiated between illegitimate children and legitimate children resulted in a denial of equal protection.

Likewise, the Supreme Court of Georgia has struck down legislative enactments it found violative of the Equal Protection Clause. For example, in Employees' *Retirement System of Georgia v. Martin,* 272 Ga. 535,533 S.E. 2d 68 (2000), the Georgia Supreme Court found no rational basis for a classification system under which former employees of DFCS received significantly diminished pension benefits compared to employees who transferred before a particular date.

In *Ciak v. State,* 278 Ga. 27, 597 S.E. 2d 392 (2004), the Georgia Supreme Court found that the statute which drew a distinction between use of tinted automobile windows for residents of this state and those who were non-residents violated equal protection. Specifically, the Court found that the distinction drawn in the statute was not justified. While it was a legitimate attempt to address a perceived problem, namely endangerment to law enforcement officers conducting vehicle stops, it did not qualify for treatment as "one step at a time," where no basis existed to distinguish between dangers posed by vehicles driven by non-residents. *See also Woodard v. State,* 269 Ga. 317, 496 S.E.2d 896 (1998) (declaring certain Child Hearsay statute amendments unconstitutional where there was no rational basis for distinguishing between offenders in cases where witnesses were over the age of 16 versus under the age of 16).

The present situation is no different than Ciak. There is no rational basis to believe that the statute of limitations in which to prosecute an individual for an offense should be greater when the alleged victim us over 65 than for someone under 65. Indeed, the federal government has enacted laws prohibiting age discrimination in employment. 29 U.S.C. §621 was enacted for the purpose of promoting the employment of older persons based on their ability rather than their age. Extending the statute of

limitations for prosecution of individuals based on whether the victim was 65 or older or under 65 is arbitrary, capricious, and overbroad. There is no rational basis to the distinction made by the legislature.

Consideration of the ages of the current leaders of our society demonstrates that distinguishing between 65 year-Id victim and those that are younger is irrational. Of the Presidents of the United States, eight of them were 65 years or older: John Adams was 65 at the end of his term. Andrew Jackson began his second term at 65. William Henry Harrison was 68 at his inauguration. Zachary Taylor was 641/2 at his inauguration. James Buchanan, on the date of his inauguration, was just shy of 66. He served four years thereby placing him over 70 at the end of his term. Harry Truman served his second term as president beginning at age 66. Dwight Eisenhower, likewise, was over 65 when he began his second term as president. Ronald Reagan, who served two terms as president, was 69 when he was inaugurated the first time. George H. Bush was 641/2 on the day he was inaugurated.

Currently, the United States Senate consist of approximately 44 senators 65 years or older. Four of the senators are in their 80's. 23 of the senators are in their 70's. Even Georgia's Johnny Isakson is presently 65 years old. Is there really a rational basis to believe that if Mr. Isakson was victimized at age 65 instead of 60 an extension of the period to prosecute the perpetrator should be extended?

If we look to the judicial branch of government, four of our Supreme Court Justices are over 65. Antonin Scalia and Anthony Kennedy are 74. Ruth Bader Ginsberg is 77 and Stephen Breyer is 71. John Paul Stevens when he retired was 90 years old. He served 25 years as a Supreme Court Justice over the age of 65 years. On the Eleventh Circuit Court of Appeals, Justices Tjoflat, Burch, Black and Barquette are 65 years or older. On the District Court for the Northern District of Georgia, Judges Cooper, Evans, Forrester, Hunt, O'Kelly, Shoob, Tidwell, Vining and Ward are all 65 years or older. Likewise, in the Superior Court of Cobb County, Judge Robinson and Judge Nix are 65 or older.

Corporations are also run by individuals under 65 and over 65. Warren Buffet, of Berkshire Hathaway, is 80 years old. Lawrence Ellison is 65 years old and is CEO of Oracle. Ray Iran is the CEO of Occidental Petroleum and is presently 75. He has been in that position for 19 years. Even Ralph Lauren, who is an active CEO of Polo Ralph Lauren, is 70 years old.

The alleged victim in this case, presuming the state can even prove that Gaston Glock was the victim, is no different. As the Forbe's article attached hereto shows, in 2003, Gaston Glock was and still remains a vibrant man in full control of his faculties. He was running his companies and was actively involved. He was not incapacitated in any way. He was the dominant and driving force of his empire as he had been when he was under 65. He was a multi-millionaire, many times over who was not under the care of a guardian or unable (or impaired in any way) from handling his financial affairs.

CONCLUSION

There is no rational basis for differentiating prosecutions where the victim is over the age of 65 and under the age of 65. The differentiation is arbitrary, capricious, overbroad and not rationally based. As a result, O.C.G.A. §17-3-2.2 should be struck as unconstitutional or unconstitutional as applied to this case.

Respectfully submitted, this the 29th day of July, 2010.

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