

2010 WL 1285411 (Ga.Super.) (Jury Instruction)
Superior Court of Georgia.
Cobb County

The State of Georgia,
v.
Frank CONSTANTINO, Defendant.

No. 099530142.
January 25, 2010.

Case No. 09-9-5301

State's Request for Instruction to the Jury

Christopher W. Timmons, Assistant District Attorney, Cobb Judicial Circuit, Georgia.

NOW COMES THE STATE OF GEORGIA, by and through Assistant District Attorney Christopher W. Timmons, for the Cobb Judicial Circuit, and respectfully requests that the Court instruct the jury with the following charges, which are individually numbered 1 through 39. These charges were served upon Defendant's attorney by hand delivery.

RESPECTFULLY SUBMITTED this, the 25th day of January, 2010.

<<signature>>

Christopher W. Timmons

Assistant District Attorney

Cobb Judicial Circuit, Georgia

STATE'S REQUEST TO CHARGE NO. 1

1.34.10 Similar or Connected Offenses or Transactions

(Note: “[A]lthough a trial judge is not required in the absence of a request to give a limiting instruction when ... evidence [or related acts] is admitted it would be better for the trial judge to do so.” State v. Belt, 269 Ga. 793 (1998). Charge should be given prior to admission of such evidence and repeated in final charge. Chisholm v. State, 231 Ga. App. 835 (1998).)

Sometimes evidence is admitted for a limited purpose. Such evidence may be considered by the jury for the sole issue, or purpose, for which the evidence is limited and not for any other purpose.

The law provides that evidence of other acts or occurrences of this defendant that are sufficiently similar or connected, and therefore purportedly related, to the offenses for which the defendant is on trial may be considered for the limited purpose of showing, if it does, the bent of mind and course of conduct of the defendant in the crime charged in the case now on trial. Such evidence, if any, may not be considered by you for any other purpose.

The defendant is on trial for the offenses charged in this bill of indictment only and not for any other acts or occurrences (even though such acts or occurrences may incidentally be criminal).

Before you may consider any other acts or occurrences for the limited purposes stated, you must first determine whether the accused committed the other acts or occurrences. If so, you must then determine whether the act was similar or connected, and therefore purportedly related, to the crime charged in the indictment such that proof of the other acts or occurrences tends to prove the crime charged in the indictment. Remember to keep in mind the limited use and consideration of other acts or occurrences of the defendant.

By giving this instruction, the Court in no way suggests to you that the defendant has or has not committed any other acts, nor whether such acts, if committed, prove anything; this is solely a matter for your determination.

U.S.C.R. 31.3. Notice of Prosecution's Intent to Present Evidence of Similar Transactions

Campbell v. State, 234 Ga. 130, 131-32 (1975) (admissible despite lapse of seven years; balancing test)

French v. State, 237 Ga. 621(3) (1976) (requiring evidence establishing that the defendant committed the independent crime)

Clemson v. State, 239 Ga. 357, 361(3) (1977) (requiring evidence establishing sufficient similarity or connection to the offense charged)

Johnson v. State, 242 Ga. 649, 653(3) (1978) (Exception has been most liberally extended in the area of sexual offenses.)

State v. Johnson, 246 Ga. 654, 655(1) (1980) (admissible to prove identity)

Dowling v. United States, 493 U.S. 342, 350, 354, 110 S. Ct. 688, 107 L. Ed.2d 708 (1990) (Double jeopardy clause does not preclude the evidentiary use of a prior crime, even when the defendant has been acquitted)

Gilstrap v. State, 261 Ga. 798, 799 (1991) (child molestation case; may be admissible after 11 or 19 years; 31-year lapse makes independent crime too remote)

Stephens v. State, 261 Ga. 467, 468-69(6) (1991) (drug sale; proof required at trial of similarity; certified copy of conviction normally insufficient)

Williams v. State, 261 Ga. 640,641-42(2) (1991) (drug case; procedure under U.S.C.R. 31.3(B); three-part test: (1) purpose, (2) identification, and (3) proof of the former tends to prove the latter)

Smith v. State, 206 Ga. App. 557, 558(1) (1992) (bent of mind motive, or intent; less similarity than when identity is sought to be proved)

Sheppard v. State, 205 Ga. App. 373, 374(2) (1992) (predisposition; rebut defense of entrapment)

Bradford v. State, 261 Ga. 512, 513 (1992) (corroboration of accomplice testimony)

Bradford v. State, 261 Ga. 833,834 (1992) (corroboration of accomplice testimony connecting party to crime)

Rash v. State, 207 Ga. App. 585, 586-87(3) (1993) (corroboration of victim testimony in sex crime)

Adams v. State, 208 Ga. App. 29, 32-36(2) (1993) (child molestation case; evidence of any sexual **abuse** of young children is sufficient to establish similarity requirement; must present trier of fact with evidence that accused committed the independent offense; balancing probative value against prejudicial impact)

Freeman v. State, 268 Ga. 185, 187(4) (1997) (Standard of proof is a preponderance of the evidence.)

STATE'S REQUEST TO CHARGE NO. 2

RICO; Statutory Definition

To prove a Racketeering Influenced and Corrupt Organizations (RICO) charge under [O.C.G.A. § 16-14-4\(a\)](#), the State must prove that the defendant

- (a) acquired money or property

- (b) through a pattern of racketeering activity.

[O.C.G.A. 16-14-4\(a\)](#)

“Racketeering activity” means to commit any of the following crimes:

- (a) Theft by Taking

- (b) Violation of the Georgia Securities Act

[O.C.G.A. 16-14-3\(9\)\(A\)\(ix\), \(xxi\)](#)

STATE'S REQUEST TO CHARGE NO. 3

RICO; No Nexus to Organized Crime Required

It is not necessary to demonstrate a nexus with organized crime to prevail on a RICO claim.

Dee v. Sweet, 218 Ga. App. 18 (1995).

STATE'S REQUEST TO CHARGE NO.4

RICO; Only Two Acts of Racketeering Required

A RICO conviction requires proof that a defendant has committed two or more offenses of the kind included in the RICO statute; the State is not required to prove all of the acts of racketeering alleged in the indictment

See Overton v. State, 295 Ga. App. 223, 232 (2008).

STATE'S REQUEST TO CHARGE NO. 5

Securities; Fraudulent or Deceptive Practices in Sale of a Security

I charge you that it shall be unlawful for any person, in connection with an offer to sell, [or] sale, offer to purchase, or purchase of any security, directly or indirectly,

...

(b) To make an untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading; or <SU22#...

[O.C.G.A. § 10-5-12](#) (a)(2) (Repealed by the Georgia Uniform Securities Act of 2008, see [O.C.G.A. § 10-5-1, et. seq.](#))

STATE'S REQUEST TO CHARGE NO. 6

Securities; Sale of Unregistered Security or Sale by an Unregistered Salesperson

I charge you that it shall be unlawful for any person to offer to sell or to sell any security in violation of [Code Section 10-5-3](#), [10-5-5](#), or [10-5-19](#) or any rule, regulation, or order promulgated or issued by the Georgia Commissioner of Securities under the Georgia Securities Act of 1973.

[O.C.G.A. § 10-5-12](#) (a)(1) (Repealed by the Georgia Uniform Securities Act of 2008, see [O.C.G.A. § 10-5-1, et. seq.](#))

STATE'S REQUEST TO CHARGE NO. 7

Securities; Test for Determining if an Instrument is a Security

I charge you that the test for determining if an instrument is a security is whether it shows “an investment in a common venture premised on a reasonable expectation of profits to be derived from the entrepreneurial or managerial efforts of someone other than the investor.”

[Huggins v. Chapin](#), 227 Ga. App. 340 (1997)

[Tech Resources Inc. v. Estate of Hubbard](#), 246 Ga. 583 (1980)

[Dunwoody County Club of Atlanta, Inc. v. Fortson](#), 243 Ga. 236 (1979)

[United Housing Foundation v. Forman](#), 421 U.S. 837 (1975)

[SEC v. W. J. Howey Co.](#), 238 U.S. 293 (1946)

STATE'S REQUEST TO CHARGE NO. 8

Securities; Definition of an Investment Contract

I charge you that an “investment contract” means a contract, transaction or scheme whereby a person invests his money in a common enterprise and is let to expect profits solely from the efforts of the promoter or a third party, it being immaterial whether the shares in the enterprise are evidenced by formal certificates or by nominal interests in the physical assets employed in the enterprise.

[SEC v. W. J. Howey Co.](#), 238 U.S. 293 (1946)

STATE'S REQUEST TO CHARGE NO. 9

Securities; Proof of Exemptions

I charge you that in a criminal proceeding under the Georgia Securities Act of 1973 the burden of going forward with evidence of a claim of exemption or exception from a definition is on the person claiming the exemption or exception.

[O.C.G.A. §10-5-22](#) (b) (*Repealed by the Georgia Uniform Securities Act of 2008, see O.C.G.A. § 10-5-1, et. seq.*)

[Greenhill v. State](#), 199 Ga. App. 218 (1991)

STATE'S REQUEST TO CHARGE NO. 10

Securities; Commissioner's Certificates

I charge you that in any criminal action, a certificate signed and sealed by the Commissioner of Securities, stating compliance or noncompliance with the Georgia Securities Act of 1973, shall constitute prima-facie evidence of such compliance or noncompliance with the Georgia Securities Act of 1973, and shall be admissible in any such action.

[O.C.G.A. §10-5-22](#) (d) (*Repealed by the Georgia Uniform Securities Act of 2008, see O.C.G.A. § 10-5-1, et. seq.*)

STATE'S REQUEST TO CHARGE NO. 11

2.64.20 Theft by Taking; Statutory Definition

A person commits theft by taking when

(a) that person unlawfully takes any property of another with the intention of depriving the other person of the property, regardless of the manner in which the property is taken or appropriated; or

(b) being in lawful possession of any property of another, that person unlawfully appropriates such property with the intention of depriving the other person of the property, regardless of the manner in which the property is taken or appropriated.

[O.C.G.A. §16-8-2](#)

[Walker v. State](#), 146 Ga. App. 237,239 (1978)

[Robinson v. State](#), 152 Ga. App. 296 (1979)

STATE'S REQUEST TO CHARGE NO. 12

2.64.41 Theft by Taking; Value over \$500

If you believe beyond a reasonable doubt that the defendant committed the offense of theft by taking the property of a proven value in excess of \$500 that is described in this indictment, the property of Judy Cox, then you would be authorized to find the defendant guilty. In that event, the form of your verdict would be, "We, the jury, find the defendant guilty."

[O.C.G.A. §16-8-12\(a\)\(1\)](#)

Walker v. State, 146 Ga. App. 237,239 (1978)

Robinson v. State, 152 Ga. App. 296 (1979)

STATE'S REQUEST TO CHARGE NO. 13

2.64.42 Theft by Taking; Value of \$500 or Less

Should you find the defendant guilty beyond a reasonable doubt in the way and manner I have instructed you, except that you find and believe that the value of the property alleged to have been taken did not exceed \$500, the form of your verdict would be, "We, the jury, find the defendant guilty of theft by taking property not to exceed \$500 in value."

[O.C.G.A. § 16-8-12\(a\)](#)

STATE'S REQUEST TO CHARGE NO. 14

2.64.90 Theft by Conversion; Statutory Definition.

A person commits theft by conversion when, having lawfully obtained funds or other property of another under an agreement or other known legal obligation to make a specified application of such funds or a specified disposition of such property, that person knowingly converts the funds or property to the person's own use in violation of the agreement or legal obligation. This definition applies whether the application or disposition is to be made from the funds or property of another or from the person's own funds or property in equivalent amount when the agreement contemplates that the person may deal with the funds or property of another as the person's own.

[O.C.G.A. §16-8-4\(a\)](#)

STATE'S REQUEST TO CHARGE NO. 15

2.64.11 Theft; Deprive

"Deprive" means to, without justification, (a) withhold property of another permanently or temporarily or (b) dispose of the property so as to make it unlikely that the owner will recover it.

[O.C.G.A. § 16-8-1](#)

STATE'S REQUEST TO CHARGE NO. 16

2.64.12 Theft; Property of Another

"Property of another" includes property in which any person other than the accused has an interest (~~but does not include property belonging to the spouse of an accused or to them jointly~~): [O.C.G.A. §16-8-1](#)

STATE'S REQUEST TO CHARGE NO. 17

2.64.14 Theft; Owner

“Owner” in this context means a person who has a right to possession of property, which is a right superior to that of a person who takes, uses, obtains, or withholds the property from him/her and that the person taking, using, obtaining, or withholding is not privileged to infringe.

O.C.G.A. §16-1-3(10)

~~(In That connection, ownership may be described in an indictment in the name of the real owner or in the name of the person in lawful possession of the property. <DP1#If the property alleged to have been stolen was taken from the lawful possession of the person named in the indictment as the owner, then this would constitute sufficient proof of ownership.)~~

Morris v. State, 228 Ga. 39, 45 (1971)

STATE'S REQUEST TO CHARGE NO. 18

2.64.15 Theft; Asportation or Removal of Property

In theft cases, the slightest change of location, whereby complete control of the property is transferred from the owner to another, is sufficient evidence of carrying away or removal.

Johnson v. State, 9 Ga. App. 409 (1911)

Parrish v. State, 123 Ga. App. 625 (1971)

Any unlawful carrying away or removal, however slight, is sufficient to show the “taking” element It is not necessary that property be removed from the premises of the owner.

Stanley v. State, 97 Ga. App. 828 (1958)

Johnson v. State, 9 Ga. App. 409 (1911)

Lundy v. State, 60 Ga. 143 (1878)

Craighead v. State, 126 Ga. App. 300 (1972)

STATE'S REQUEST TO CHARGE NO. 19

Exploitation of an **Elder** Person; Statutory Definition

~~In addition to any other provision of law, the~~ *It is unlawful to* **abuse**, neglect, or exploit of any disabled adult or **elderly** person ~~shall be unlawful.~~ < DP#O.C.G.A. § 30-5-8(a)(1).

STATE'S REQUEST TO CHARGE NO. 20

Exploitation of an **Elder** Person; **Elder** Person Defined

“**Elder** person” means a person 65 years of age or older. ~~who is not a resident of a long term care facility as defined in Article 4 of Chapter 8 of Title 31.~~ < DP#O.C.G.A. § 30-5-3(7.1)

STATE'S REQUEST TO CHARGE NO. 21

Exploitation of an **Elder** Person; Exploitation Defined

“Exploitation” means the illegal or improper use of a ~~disabled adult or~~ **an elder** person or that person's resources through undue influence, ~~fraud, coercion, harassment, duress,~~ deception, false representation, ~~or false pretense, or other similar means~~ for another's *the accused's own* profit or advantage.

O.C.G.A. §

STATE'S REQUEST TO CHARGE NO. 22

1.31.20 Conflicts in Testimony

(Caution: If the defendant offers no evidence, see [Noggle v. State](#), 256 Ga 383, 385-86(4) (1986).)

When you consider the evidence in this case, if you find a conflict, you should settle this conflict, if you can, without believing that any witness made a false statement. If you cannot do so, then you should believe that witness or those witnesses whom you think are best entitled to belief.

You must determine what testimony you will believe and what testimony you will not believe.

[O.C.G.A. §§ 24-4-4, 24-9-80](#)

STATE'S REQUEST TO CHARGE NO. 23

1.31.30 Expert Witness

Testimony has been given by certain witnesses who, in law, are termed experts. The law permits persons who are expert in certain areas to give their opinions derived from their knowledge of that area. The weight that is given to the testimony of expert witnesses is a question to be determined by the jury. The testimony of an expert, like that of any other witness, is to be received by you and given only such weight as you think it is properly entitled to receive. You are not required to accept the opinion testimony of any witness, expert or otherwise.

[O.C.G.A. § 24-9-67](#)

[McNorton v. State](#), 159 Ga. App. 604, 606(2) (1981).

STATE'S REQUEST TO CHARGE NO. 24

1.31.80 Immunity or Leniency Granted Witness

In assessing the credibility of a witness, you may consider any possible motive in testifying, if shown. In that regard you are authorized to consider any possible pending prosecutions, negotiated pleas, grants of immunity or leniency, or similar matters. You alone shall decide the believability of the witness.

STATE'S REQUEST TO CHARGE NO. 25

1.41.10 Intent

Intent is an essential element of any crime and must be proved by the State beyond a reasonable doubt.

Intent may be shown in many ways, provided you, the jury, believe that it existed from the proven facts before you. It may be inferred from the proven circumstances or by acts and conduct, or it may be, in your discretion, inferred when it is the natural and necessary consequence of the act. Whether or not you draw such an inference is a matter solely within your discretion.

Griffin v. State, 230 Ga. 449, 452, 453 (1973)

Sandstrom v. Montana, 61 L. Ed.2d 39 (1978)

STATE'S REQUEST TO CHARGE NO. 26

1.42.10 Parties to Crime

Every party to a crime may be charged with and convicted of commission of the crime. A person is a party to a crime only if that person:

- (a) Directly commits the crime;
- (b) Intentionally helps in the commission of the crime;
- (c) Intentionally advises, encourages, hires, counsels, or procures another to commit the crime; or
- (d) Intentionally causes some other person to commit the crime under such circumstances that the other person is not guilty of any crime either in fact or because of legal incapacity.

[O.C.G.A. §16-2-20](#)

STATE'S REQUEST TO CHARGE NO. 27

1.42.11 Principal, Failure to Prosecute; Other Involved Persons

Any party to a crime who did not directly commit the crime may be indicted, tried, convicted, and punished for commission of the crime upon proof that the crime was committed and that the person was a party to it, even though the person alleged to have directly committed the crime has not been prosecuted or convicted, has been convicted of a different crime or degree of crime, is not amenable to justice, or has been acquitted.

[O.C.G.A. §16-2-21](#)

STATE'S REQUEST TO CHARGE NO. 28

2.02.20 Conspiracy (Additional Instructions) (Culpability)

(Charge on culpability by conspiracy is okay even when defendant is not indicted for conspiracy. Edge v. State, 275 Ga. 311(6) (2002).)

A conspiracy is an agreement between two or more persons to do an unlawful act, and the existence of a conspiracy may be established by proof of acts and conduct, as well as by proof of an express agreement. When persons associate themselves in an unlawful enterprise, any act done by any party to the conspiracy to further the unlawful enterprise is considered to be the act of all the conspirators. However, each person is responsible for the acts of others only insofar as such acts are naturally or necessarily done to further the conspiracy.

Whether or not a conspiracy existed in this case is a matter for you to determine.

STATE'S REQUEST TO CHARGE NO. 29

2.02.30 Conduct and Presence of Parties

Presence, companionship, and conduct before and after the commission of the alleged offense may be considered by you in determining whether or not such circumstances, if any, give rise to an inference of the existence of a conspiracy.

Thornton v. State, 119 Ga. 437,439 (1904)

STATE'S REQUEST TO CHARGE NO. 30

1.50.10 Statute of Limitations

Members of the jury, the law of our state sets a time limit upon the State in starting prosecution of most criminal offenses.

The accused is on trial for the offenses of Violations of the Georgia Securities Act, Theft by Taking, and Exploitation of an **Elder** Person.

Under Georgia law, prosecution for the offenses of Violations of the Georgia Securities Act, Theft by Taking, and Exploitation of an **Elder** Person must begin within four years after the offense has been committed.

If you find from the evidence that the indictment in this case was not filed within four years after the offenses were committed, it would be your duty to acquit this defendant.

[O.C.G.A. § 17-3-1](#)

STATE'S REQUEST TO CHARGE NO. 31

Statute of Limitations; RICO

~~Notwithstanding any other provision of law, a criminal or civil action or proceeding~~ Under Georgia law, prosecution for RICO offenses must begin within ~~under this chapter may be commenced up until~~ five years after the conduct in violation of a provision of this chapter terminates or the cause of action accrues.

[Insert new indent] If a criminal prosecution ~~or civil action~~ is brought by the state to punish or prevent any violation of this chapter, then the running of this period of limitations, with respect to any cause of action arising under subsection (b) or (c) of [Code Section 16-14-6](#) which is based upon any matter complained of in such prosecution or action by the state, shall be suspended during the pendency of the prosecution or action by the state and for two years thereafter.

If you find from the evidence that the indictment in this case was not filed within five years after the offenses were (last racketeering activity was) committed, it would be your duty to acquit this defendant

[O.C.G.A. § 16-14-8](#)

STATE'S REQUEST TO CHARGE NO. 32

1.50.11 Statute of Limitations; Tolling

In calculating this period of time, you should exclude from your calculation any period of time during which the evidence shows that the person committing the crime or the crime itself was unknown.

[O.C.G.A. § 17-3-2](#)

STATE'S REQUEST TO CHARGE NO. 33

Statute of Limitations; Tolling; **Elderly** Victim

In addition to any periods excluded pursuant to [Code Section 17-3-2](#), if the victim is a person who is 65 years of age or older, the applicable period within which a prosecution must be commenced under [Code Section 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 other 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](#)

STATE'S REQUEST TO CHARGE NO. 34

Limitation on Prosecutions; Extension of Limitations Period; Superseding Indictment

~~They have held that~~ *Where* a superseding indictment is brought after the statute of limitation has run, *the superseding indictment* is valid as long as (i) the original indictment is still pending; (ii) the original indictment was timely; and (iii) the superseding indictment does not broaden or substantially amend the original charges.

[Wooten v. State, 240 Ga. App. 725, 726\(7\) \(1999\).](#)

STATE'S REQUEST TO CHARGE NO. 35

1.50.12 Statute of Limitations; Burden of Proof

When statute of limitations is raised, the burden is on the State to prove that the offense occurred within the statute of limitations (or occurred within an exception) beyond a reasonable doubt

STATE'S REQUEST TO CHARGE NO. 36

1.51.10 Venue; Generally

The law provides that criminal actions shall be tried in the county in which the crime was committed. In a prosecution in any case in which it cannot be determined in what county the crime was committed, venue is proper and may be proved in any county in which the evidence shows beyond a reasonable doubt that it might have been committed.

Venue, that is the crime was committed in Cobb County, is a jurisdictional fact that must be proved by the State beyond a reasonable doubt as to each crime charged in the indictment just as any element of the offenses. Venue must be proved by direct or circumstantial evidence, or both.

[O.C.G.A. § 17-2-2](#)

[Jones v. State, 272 Ga. 900 \(2000\)](#)

STATE'S REQUEST TO CHARGE NO. 37

1.51.14 Venue; RICO

Venue for a RICO charge is proper in any county in which an incident of racketeering occurred or in which an interest or control of an enterprise or real or personal property is acquired or maintained.

[O.C.G.A. 16-14-11](#)

STATE'S REQUEST TO CHARGE N 38

Venue; Violations of Georgia Securities Act

I charge you that for the purposes of venue for any criminal action under the Georgia Securities Act of 1973 any violation of the Georgia Securities Act of 1973 shall be considered to have been committed in any county in which any act was performed in furtherance of the transaction which violated the Act, in any county of any violator's principal place of business in this state, in the county of the issuer's principal place of business in this state, and in any county in which any violator had control or possession of any proceeds of the violation or of any books, records, documents, or other material or objects which were used in furtherance of the violation.

[O.C.G.A. §10-5-15](#) (*Repealed by the Georgia Uniform Securities Act of 2008, see O.C.G.A. § 10-5-1, et. seq.*)

[Moss v. State, 209 Ga. App. 486 \(1993\)](#)

STATE'S REQUEST TO CHARGE NO. 39

1.51.11 Venue; Theft

In a prosecution for the offense of Theft by Taking ([O.C.G.A. §16-8-2](#)), venue is proper and may be proved in any county in which the accused exercised control over the property that was the subject of the alleged theft

[O.C.G.A. §16-8-11](#)