2011 WL 8156009 (Ga.) (Appellate Brief)
Supreme Court of Georgia.

STATE OF GEORGIA,
v.
James R. HARPER, III, Jerry W. Chapman, Jeffrey L. Pombert, Appellants.

No. S12A1508.
2011.

Appellants' Joint Appeal to the Supreme Court On the Issues Relating to the Plea in Bar and Motion to Dimiss

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***1 I.**

STATEMENT OF THE CASE

Appellants James Harper, III, Jerry W. Chapman and Jeffrey L. Pombert were indicted in Cobb County on January 22, 2010 and charged with violating the Georgia RICO Act (OCGA § 16-14-1, *et seq.*), as well as ten additional counts of theft by taking. (Cobb County Case No. 100220; R2:4-31). [1]

Numerous pretrial motions were filed by the Appellants, including a Plea in Bar (R24:174-209), a Motion to Dismiss (R21:142-154), and both General and Special Demurrers (R23:160-174; R30:232-253). Following evidentiary hearings that were held in October 2010, the trial court denied the motions, but signed a Certificate of Immediate Review pursuant to OCGA §5-6-34(b) (R40:475-476). This Court granted the Certificate on September 23, 2011, expressing particular concern with the issues raised by the Plea in Bar and the Motions to Dismiss. Both ***2** of these pleadings focus on the Appellants' claim that various counts of the indictment are barred by the applicable Statute of Limitations.

Several issues relating to the Statute of Limitations are presented by this appeal and will be addressed separately, including:
(1)The sufficiency of proof that the “victim” was not aware of the alleged thefts and therefore the Statute of Limitations was tolled;

(2) The constitutionality of the extended Statute of Limitations that applies when the alleged victim is over the age of 65;

(3) The applicability of the extended Statute of Limitations when the alleged victim is a corporation and the owner of the corporation is 65 years of age or older, or in this case where the individual who is over 65 is the beneficiary of a trust or shareholder of a corporation that owns the “victim” corporation.

***3 II.**

ENUMERATION OF ERRORS STATEMENT OF JURISDICTION

I. The trial court erred in finding that the substantive counts of the indictment were not barred by the Statute of Limitations on the basis that the limitations period was tolled during the time that the law enforcement agency was not aware of the crime, even though the victim was aware of the crime more than four years prior to the return of the indictment.

II. The trial court erred in denying the Plea in Bar regarding Count 1, because the only two Racketeering Acts that occurred within five years of the indictment were invalid and subject to Demurrer.

III. The trial court erred in applying the extended Statute of Limitations period in OCGA § 17-3-2.2 where the alleged victim of the theft is a corporation and the individual identified as the "older than 65 year old victim" is merely the beneficiary of a trust that is a partial owner of the corporation.

IV. The trial court erred in concluding that the "over-65 year old victim" Statute of Limitations was constitutional, despite the lack of any rational basis for this classification.

***4** This Court has jurisdiction over this appeal because Appellants challenge the constitutionality of OCGA § 17-3-2.2 and this Court granted a Certificate of Immediate Review.

III.

STATEMENT OF THE FACTS

Harper, an attorney and former Assistant United States Attorney for the Northern District of Georgia and a colonel in the Marine Corps Reserve, was hired in 2000 by Glock, Inc. the Smyrna gun manufacturing company, and Consultinvest, Inc. (Glock Inc. and Consultinvest, Inc. shall be referred to collectively herein as the "Companies"), to conduct an internal investigation of certain matters relating to the operation of the Companies as well as their foreign counterparts and the conduct of a former high-ranking associate of Gaston Glock. During the course of his internal investigation, Harper retained the services of both Chapman and Pombert. Pombert, too, is an attorney in Georgia and was hired by Harper to do contract legal work.

The indictment alleges, in summary, that Harper, Chapman and Pombert committed the crime of theft by taking through Harper's billing of the Companies for services rendered from 2001 through 2003. (There are also allegations in the RICO count that there were certain acts of obstruction of justice committed by Harper). The indictment *does not allege* how these supposed thefts occurred. That ***5** is, it is not alleged that there was over-billing, or double-billing, or billing for expenses not incurred. The indictment simply alleges, in both the RICO count and the substantive counts, that one or more of the Appellants committed the crime of theft by taking.

Each of the substantive counts occurred more than four years prior to the return of the indictment. Each substantive count as alleged in the indictment claims that one of two "tolling" provisions applied, which authorized the return of the indictment outside the four year statute of limitations for the substantive offense and five year statute of limitations for the RICO charge: (1) The crime was unknown; (2) the victim was older than 65 years old. See OCGA § OCGA § 17-3-1 (statute of limitation for the substantive offenses is four years); OCGA § 17-3-2(2) (statute of limitations is tolled during any time that the "crime is unknown"); OCGA § 17-3-2.2 (statute of limitations in cases in which the "victim" is 65 years of age or older is 15 years); OCGA § 16-14-8 (statute of limitations in RICO case is five years after the commission of the last racketeering act).

Throughout the course of the proceedings in the trial court, Appellants challenged the failure of the indictment to set forth the allegations with sufficient clarity to enable Appellants to mount a defense. These issues were raised most forcefully in the

Special Demurrers, which denounced the indictment's failure to explain what was meant by "theft by taking" in the context of a case in which the ***6** facts as alleged simply stated that Harper, Chapman and Pombert were acting as counsel for Glock, Inc., Consultinvest, Inc. and related companies at the time the alleged thefts occurred. The indictment never alleges, and the state has refused to provide any additional information (and the trial court summarily denied the Special Demurrers) to explain whether these alleged "thefts" were the product of fraudulent legal bills, double billing, inadequate service rendered, inflated expense reimbursement requests, or any other form of theft. It is apparent that none of the Appellants filched money from an account, or stole money from a money bag, or wrote forged checks. On the contrary, *virtually every alleged* theft according to the indictment was accomplished when Glock Inc., or one of its affiliated companies, wrote a check to Harper, or his law firm, in payment of a bill.

Yet, how these payments amounted to a theft remains, to this day, a mystery.

Appellants urge this Court to include in its appellate review, the issues raised by the Special Demurrers (R23:160-174; R30:232-253) and to remand this case to the lower court with directions to grant the Special Demurrers so that Appellants are able to prepare a defense to these vague and unspecified charges. [2]

***7 The Various Entities Involved in the Case**

Harper was hired by the Companies to perform legal services. He created and utilized two entities in addition to his law firm for the purpose of billing and collecting legal fees. The entities he used and which belonged to him were Tremont Enterprises, Ltd. ("Tremont") and Technical Supplies, Inc. ("TSI") (1T:27, 35). The bills for the services rendered were invoiced to either Glock, Inc. or Consultinvest, Inc. Likewise, payments that were made for the services by Harper, Tremont or TSI were made by Glock Inc. or Consultinvest (1T:26-28).

At the time period relevant to the Indictment, the ownership of Glock, Inc. was as follows: In 1999, Glock, Inc. was owned by Unipatent 50% and Glock Gmbh 50%. No stock was owned by Gaston Glock personally (1T:71 -73; Defendant's Exhibit 7 admitted on October 22, 2010). As of Glock Inc.'s 2003 tax return, Glock, Inc. was owned 10% by Unipatent, 40% by Multipatent and 50% by Glock Gmbh (1T:71-73). There is no evidence that Mr. Glock had any interest in Unipatent or Multipatent (1T:93-94).

Glock Gmbh, owned 50% of Glock Inc. throughout the relevant time period. It is a separate Austrian corporate entity which sells and produces Glock pistols (1T:15). It was owned during this time period as follows: Glock Gmbh shares were owned as of 2003 98% by Glock privatstiftung and 1% by Mr. Glock and 1% ***8** by his wife (1T:93-99). [3] Glock privatstiftung is an entity akin to a foundation or a trust. Mr. Glock is the beneficiary of the Glock Privatstiftung (1T:98).

Consultinvest, another corporation from which the state has claimed Appellants caused funds to be misappropriated, was owned at the time and is owned 100% by Johann Quendler, not Gaston Glock. (1T:67-69; R46: 935, 936, 940, 956). [4]

BIALUX S.A. was an entity created in Luxembourg by Harper. BIA America was a separate U.S. Corporation owned and controlled by individuals other than Harper.

The Purported Victim of Each Alleged Theft as Set Forth in the Indictment

Despite claiming that the statute of limitations was tolled by the fact that Gaston Glock was over 65 at the time of the offense, Gaston Glock is not, according to the Indictment, the victim in most, if not all of the charged offenses. The alleged thefts and the tracing of the funds allegedly stolen are set forth in the Indictment as follows:

_Count 2: on or about August 28, 2001, $850,000 was transferred from Gaston Glock's Swiss account to a corporation known as BIALUX S.A. (See Racketeering Act 1). On December 26, 2001, $750,000 was transferred from ***9** BIALUX S.A. to BIA America, Inc[5]. (See Indictment, Racketeering Act 1). Thereafter, on February 8, 2002, $30,000 is transferred from BIA America to Harper's operating account (R46:1115).

Count 3: On or about October 25, 2002, $50,000 was transferred from BIA America to Harper's Merrill Lynch account. (By this time the $850,000 from Mr. Glock to BIALUX S.A., to BIA America had been fully depleted).

Count 4: As noted in reference to Count 2, on or about August 28, 2001, $850,000 transferred from Gaston Glock's Swiss account to BIALUX S.A. On November 6, 2001, $18,000 is withdrawn in from BIALUX S.A., by Chapman while in Luxemburg (See Indictment, Racketeering acts 1 and 4 of Count 1, Defense Exhibit 1, Tab 21, bate stamp J019253).

Count 5: Between February 28, 2002 and December 18, 2002, approximately $1,198,039.50, was transferred from Consultinvest, Inc. to TSI . During this same time frame, $108,500 of the funds from Consultinvest (done in multiple transactions) was transferred to Harper or Chapman (approximately $80,500 to Harper, $28,000 to Chapman). (See Indictment, Count 1, Racketeering acts 5 and 8. See also, 2T: 42; Defense Exhibit 2 Tab (5) and sm Tab(8)).

Count 6: pursuant to the Indictment, on or about November 17, 2002, $133,150.69 was transferred directly from Consultinvest to Harper.

***10** Count 7: According to Racketeering Acts 14-16 of Count 1, On November 26, 2002, $370,136.50 was transferred from Glock Inc. to TSI. On December 2, 2002 $340,000 was transferred from TSI into an attorney trust account of Pombert (See Indictment, Count 1, Racketeering Acts 15 and 16). On December 2, 2002, $305,000.00 was withdrawn from Pombert's account by Pombert.

Count 8: According to Racketeering Acts 9 and 17; Between January 2003 and March 2003 $855,216.00 was transferred from Consultinvest to Tremont. Between January 2003 and April 2003, $289,980 was transferred from Tremont into an attorney trust account of Pombert. On February 7, 2003: Pombert transferred $21,428.45 to Harper's American Express Account. (See also Defense Exhibit 2, Tab 9).

Count 9: The date of the offense alleged was November 30, 2001. This Count specifically avers that the money allegedly taken, namely $930.25 was the property of Glock, Inc. (See also Defense Exhibit 1, Tab 26).

Count 10: This Count asserts that the Appellants submitted $1,488,622.44 in fraudulent bills. As the evidence introduced at the hearing showed, all such billings were sent to either Glock, Inc. or Consultinvest. No bills were sent to Mr. Glock for payment by him personally.

Count 11: Alleges that on or about August 28, 2001, $850,000 was transferred from Gaston Glock's Swiss account to a corporation known as ***11** BIALUX S.A. (See Racketeering Act 1). On or about June 18, 2002, $10,000 was transferred from BIALUX S.A. to Righteous Oaks Ministries at the alleged direction of Harper (See the Indictment, Count Eleven, Racketeering acts 1 and 28; Defense Exhibit 2,Tab 1 sm Tab 28).

IV.

THE TRIAL COURT ERRED IN DENYING APPELLANTS' PLEA IN BAR

Appellants Harper, Pombert and Chapman moved the court to dismiss all counts of the indictment on the grounds that the statute of limitations had expired prior to the return of the indictment.[6]

When an indictment reveals on its face that the alleged offense occurred outside the statute of limitations, a plea in bar is the appropriate vehicle for challenging the indictment pretrial. *State v. Tuzman,* 145 Ga. App. 481, 243 S.E.2d 675 (1978). At a hearing on the plea, the state shoulders the burden of proving that an exception to the limitations period, or an event that tolled the running of the clock, applies. *Rader v. State,* 300 Ga. App. 411, 685 S.E.2d 405 (2009); *Desalvo v. State,* 683 S.E.2d 652 (2009); *State v. Conzo,* 293 Ga. App. 72, 666 S.E.2d 404 (2008); *State v. Robins,* 296 Ga. App. 437, 674 S.E.2d 615 (2009); *Jenkins v. State,* 278 Ga. 598, 604 S.E.2d 789 (2004).

***12** At a hearing on the plea in bar, the state was required to show that the crime was unknown. *Lee v. State,* 211 Ga. App. 112, 438 S.E.2d 108 (1993); *Lowman v. State,* 204 Ga. App. 655, 420 S.E.2d 94 (1992); *Duncan v. State,* 193 Ga. App. 793, 389 S.E.2d 365 (1989); *State v. Brannon,* 154 Ga. App. 285, 267 S.E.2d 888 (1980). The state failed in this endeavor as the undisputed evidence showed that the indictment was returned far more than five years after the alleged victim and its representatives were aware of the supposed thefts.

With respect to the allegation in the indictment that the "victim" was over the age of 65 at the time of the crime, the defendant argued as follows:
1. As applied in this case to a "victim" who is a multimillionaire who is in complete control of his faculties and personally runs a billion dollar business, the statutory provision amounts to a violation of Equal Protection. Appellants argued that the "over-65" provision was unconstitutional on its face and as applied in this case.

2. To the extent that the 65-year old provision is constitutional, it does not apply to any transactions that involved transfers (or, as the state claims, "thefts") from one corporate entity to another, regardless of the provenance of those funds at some earlier time or the person who owns the stock in the corporations or other corporations which in turn own stock in the alleged victim corporation.

***13** With regard to Count One, which charges a RICO conspiracy, there are two limitations periods that apply. First, the statute of limitations for the RICO offense itself is five years, rather than the four-year period that applies to most felonies. OCGA § 16-14-8. The defense argued at the hearing on the plea in bar that the beginning point of this five-year period cannot be determined until the special and general demurrers were resolved. Thus, if the court had granted the demurrer to the only racketeering acts that occurred within the five year period prior to the return of the indictment, then the RICO count would be barred by the statute of limitations. [7]

***14** A second limitations period applies to the racketeering acts themselves: The definition of a "pattern of racketeering activity includes this caveat: the last of such acts [must have] occurred within four years after the commission of a prior act of racketeering activity." OCGA § 16-14-3(8)(A). The defense demonstrated at the hearing on the plea in bar that the state did not satisfy this requirement.

With respect to Appellant Pombert, all acts involving Pombert occurred after any funds transferred from Mr. Glock, personally, had been transferred to Harper and his affiliated companies. Thus, at no time during which Pombert was involved in any of these transactions was any money obtained from a person over the age of 65. [8]

***15** With respect to the substantive counts set forth in Counts Two through Eleven, the four-year statute of limitations applies. As with the RICO count, the Appellants asserted that the indictment shows that the offenses occurred more than four years prior to the return of the indictment. The state did not show that the crime was unknown and, moreover, the crimes did not involve a victim who was sixty-five years of age or older.

A. The Crime Was Not Unknown

Detective Harrison, the lead law enforcement agent in this case, testified that he and the Smyrna Police Department did not become aware of the supposed thefts until September, 2007. As the case law unequivocally dictates, the knowledge of the victim is sufficient to begin the running of the statute of limitations. If the victim (individually, or the corporate entities or their agents) were aware of the supposed thefts on a particular date, the statute of limitations began to run on that date, regardless of how long the alleged victim decided to wait before he, it, or its agents reported the theft to the police. State v. Lowman, 198 Ga. App. 8, 400 S.E.2d 373 (1990) (The defendant was executor of his father's estate. More than four years prior to the indictment, some of the legatees and devisees became aware that funds were unaccounted for or misused. This knowledge on the part of the victims triggered the statute of limitations. The fact that they did not know the full extent of the defendant's actions does not toll the running of the limitations ***16** period); Lee v. State, 211 Ga. App. 112, 438 S.E.2d 108 (1993) (Defendant, a correctional officer, was charged with the offenses of sodomy and sexual contact with an inmate in custody. Some of the charges related to conduct which occurred more than four years prior to the return of the indictment. These charges were barred by the statute of limitations. The knowledge of the victim of a crime is imputed to the state, so the "crime is unknown" exception to the limitations period does not apply. This is true even if there is some reason why the victim did not report the crime, such as a person in custody); Duncan v. State, 193 Ga. App. 793, 389 S.E.2d 365 (1989) (The knowledge placed at issue by the "crime-is-unknown" tolling period is the knowledge of the state, which includes that imputed to the state through the knowledge not only of the prosecution, but also the knowledge of someone interested in prosecution, or injured by the offense. The knowledge of a victim of a crime or of a law enforcement officer is imputed to the state).

The knowledge of the alleged victim(s) in this case cannot seriously be disputed after the hearing that was conducted in October, 2010.

Guenther Willner testified on behalf of the State regarding what knowledge the Companies, their principals (including Gaston Glock) and affiliated companies had of the alleged offense as of 2003. According to Willner, he was hired by Mr. Glock and related entities to perform two audits, one in Luxembourg and another in the United States. These audits were of Consultinvest, Inc. Glock Inc. and BIA ***17** America and focused on payment of Harper "and his team's" invoices, specifically payments to him, Tremont, TSI, BIA America, transfers of funds to Jeffrey Pombert's trust account, etc., for the time period 2000-2003. (1T:25-28, 33-36). He reviewed all the invoices (1T:42-44; R46:689-934).

As a result of his review, Willner created two confidential reports for Mr. Glock and the companies, one based on the audit in the United States and the other based on the audit in Luxembourg. (1T:44-46, R46:522). The report specifically set out payments and transfers they deemed improper and suspicious. The transfers to Pombert's attorney trust account were specifically noted (1T:48-49, 78; R46:529-533).
Q:...And in your -- in all of your audits and all of your reviews, you never had the opportunity to question Mr. Pombert about moneys that went, for example, into his trust account, correct?

A: Yes, that's correct.

Q: Now, but that did become an issue for you back in 2003 when you were doing your audit, at least in the report that you did for the audit in Luxembourg, correct?

A: Yes.

***18** Q: And you actually -- in the report, if you look at Tab 5, document 974, Page 974, after noting the funds that went to Jeff Pombert, there is a sentence. Does it not say that this is all more astonishing since Jeff Pombert did, according to the listings by Harper, only perform a total of one thousand two twenty-nine point sixty hours, correct? That's written there?

A: Yes.

Q: So this was something -- money going to Jeff Pombert was something that was of concern to you back in May of 2003, correct?

A: Yes.

Q: And it was something that you were questioning back in May of 2003?

Q: And it was something that you were questioning back in May of 2003

A: What do you mean by questioning back in?

Q: I'm sorry. Questioning, meaning wondering why it's happening.

A: Okay.

Q: Would that be correct?

A: Yes.

Though ultimately all perceived overbillings or fraudulent billings were reclassified as receivables of Consultinvest (see below), the auditors did initially review the billings and payments by each entity. As for Glock, Inc., for example, according to Willner, all what they believed to be overbillings or fraudulent

***19** billings were discovered and documented by him as of 2003 and were reflected on Glock Inc.'s **financial** statement.
Q: Would you read that into the record, please, the first paragraph.

A: The company has discovered overbillings related to legal services provided by certain entities during the years 2003 and 2002. It is the company's intention to seek recoveries of these overbillings. The overbillings totaled U.S. dollar 497,324 and 71,071 for the years ended March 31st, 2003 and 2002, respectively. These amounts are to be recovered from an affiliate.

Q: And does this relate to the work that you had done, the audits that you had done? The legal fees refer to Harper, Tremont, and TSI, right?

A: Yes.

Q: The company had discovered the overbillings, correct? This is their **financial** statement, right?

A: Yes.

(1T:49-50;R46-551).

As noted, as a result of the audits performed by Willner and others, a determination by Mr. Glock, his agents and the representatives for the various entities was made to reclassify all payments to Harper, his team, Tremont and TSI ***20** as receivables due *from Harper*[9] instead of expenses as they had decided none of the payments should have been made and all was owed back. (1T:53-61; R46:620, 630). In fact, payments to Harper, Tremont, TSI, etc. for the time period in question were not just reclassified as receivables owed from Harper, but they decided to clarify the entity or person to whom the debt was due: Consultinvest, Inc. (1T:61-64; R46:589, 596, 600, 603). The total reclassified as of December 2003 as due to Consultinvest,

Inc. from Harper for moneys paid to Harper et al. by Glock, Inc., Consultinvest, or any other potential Glock entity or individual was $3,171,970.00 (1T:61; R46:589). The accountants did not claim that any money was owed to Gaston Glock personally, or that Gaston Glock should be identified as the person who now had a "receivable" because of any overpayment.

In short, as of the close of 2003, Mr. Glock, Glock, Inc., Consultinvest, Inc., any and all affiliates or related companies and representatives knew of the theft alleged in the present Indictment.

The Companies, Mr. Glock and their representatives all knew in 2003. It was only local law enforcement who became aware in the later years. As Smyrna Detective Harrison testified:

A: [Glock] thought a crime had been committed at the time they brought it to me. (1T:144-145).
***21** A: I believe I was the last stop (1T:145)

Q: They had already - I mean we heard this morning from [Mr. Willner] who worked until 2003, they worked nonstop on this between 2003 and 2007, right? Accumulating more and more documents, correct?

A: Yes. (1T:145).

Q: Glock knew - Glock knew what they thought they knew in 2003. It's new to you. It wasn't new to Glock, though was it? Correct?

A: I would assume. They wrote [the document at Tab 13 in the Defendant's Exhibit at the hearing]. (1T:146)

Q: And as of December 2nd of 2003, they already considered this to be a matter solely for the use of United States law enforcement, correct?

A: Yes. (1T:146)

Q: No doubt about what Glock knew back in 2003, am I right?

A: Right

Q: They knew - they thought they knew - there was billing fraud, right?

A: Yes. (1T:153).

Q: So there's no way to deny the fact that Glock had already determined that there was a scheme, that there was fraud dealing with the billings before May of 2003?

A: Right. (1T:154)

***22** A: Glock knew

Q: The, quote, victim knew about it, right?

A: Right.

Q: You agree with that?

A: I agree. (1T:154).

In Detective Harrison's own written summary of the case (R46:497), he wrote that the over-billing scheme was detected in 2003 (1T:147). In court, Detective Harrison acknowledged that it was apparently true that Glock, the Companies, et al. were aware of the overbilling in 2003. (1T:147).

In the search warrant affidavits, Detective Harrison wrote that the overbillings resulted in Glock firing Harper. This, too, was in 2003.

Gaston Glock himself prepared an affidavit that expressly stated that he was aware of the overbilling and other irregularities and fired Harper in 2003 as a result (1T:151; R46:545).

In light of this uncontradicted testimony from Guenter Willner, Detective Harrison, including the documents each authored, as well as the affidavit of Mr. Glock that was accepted into evidence, the state could not seriously contend that the crime was not known to the victims prior to 2007.

If there is the slightest uncertainty about this testimony - and there really is no uncertainty - this Court should bear in mind that the state has the burden of ***23** proving the existence of the tolling period. In other words, the state must prove that the victims in this matter, whether it was Gaston Glock, Consultinvest or Glock Inc. were unaware of the crime prior to 2007. *Rader v. State*, 300 Ga. App. 411 (2009); *Desalvo v. State*, 299 Ga. App. 688, 683 S.E.2d 652 (2009); *State v. Conzo*, 293 Ga. App. 72, 666 S.E.2d 404 (2008).

Perhaps it is no surprise, given this testimony, that the State ignores entirely the law that declares that the tolling period ends when the crime becomes known to the victim. The state's repeated protestation in the trial court that the crime was not known until it was reported to Detective Harrison in September, 2007, is entirely irrelevant.

The trial court, too, relied, with no explanation, on the date that the "crime" was reported to the Detective as the end of the tolling period (Order denying Plea, R39:451-474, pages 15, 19, 21 and 22). This "observation" by the trial court was entirely irrelevant. When the victim(s) decided to report their knowledge to the police has no bearing on the relevant question: When did the victim or its agents, know (or think that they knew) that a crime had been committed.

B. The "over-65 year old victim" Extended Statute of Limitations Does Not Apply

This Court should reject without hesitation the state's claim (as well as the lower court's holding in its Order denying the Plea in Bar (R39) page 10) that the "over-65" extended period should apply with regard to any transaction involving a ***24** corporate "victim" if a significant shareholder or principal in the corporation is over 65. The Court should also reject the alternative holding of the lower court, that if a person over the age of 65 places money in a corporation, any subsequent theft from that corporation triggers the extended statute of limitations period.

None of the Counts of the Indictment involve funds paid by Gaston Glock directly to any defendant. In fact, for the majority of the counts, there is no evidence that the funds even originated with Gaston Glock. The funds alleged to have been stolen in most instances came from either Consultinvest, Inc. or Glock, Inc.:
Count 2: Gaston Glock ->BIALUX S.A. - > BIA America - > Harper.

Count 3: BIA America - > Harper.

Count 4: Gaston Glock -> BIALUX S.A. -> Chapman

Count 5: Consultinvest, Inc. - > TSI - > Harper or Chapman

Count 6: Consultinvest, Inc. - > Harper

Count 7: Glock, Inc. - > TSI - > Pombert trust account - > Pombert.

Count 8: Consultinvest, Inc. - > Tremont - > Pombert trust account - & gt; Harper's American Express Account.

Count 9: Glock, Inc. - > Harper

Count 10: Invoices submitted by Appellants to Glock, Inc. or Consultinvest, Inc. (not Gaston Glock).

***25** Count 11: Gaston Glock - > BIALUX S.A. - > Righteous Oaks Ministries.

As noted in the prior section, according to the documents and testimony introduced, by 2003 all funds paid to or associated with Harper et al. by either Gaston Glock, Consultinvest, Inc., Glock Inc. or any other related or affiliated entity were re-categorized by Gaston Glock's own auditors as debts owed to Consultinvest only. Not one penny of the alleged theft or fraud as of the reclassification was money due anyone other than Consultinvest, Inc. (See 1T:61-64; Defense Exhibit 1, Tab 14, Bate stamp consultinvest000116). Despite these facts, despite the funds coming from corporations and the billings made to corporations and despite the reclassification, the State asserts that the tolling period of the statute of limitations for someone 65 years or older applies as somewhere, somehow, Gaston Glock was a victim.

Not surprisingly, the state cites no case, or statute, or secondary source (and relies on no identifiable logic) to support the argument that if a shareholder of a corporation is over 65, the statute of limitations is tolled, or extended, pursuant to the statutory "over-65" extended period. The state's argument, if accepted by the court, necessitates a complete abandonment of the corporate form in cases involving crimes perpetrated against corporate entities. Nor does the state suggest by what method a court should decide that the corporate existence should be ignored: Does the 65-year-old principal need to be the 100% owner? Is it ***26** sufficient if the 65-year-old is a 51% owner? What if among other owners, there are two 65-year-old principals and each owns 26% of the corporation; that is, over 50% of the shares of stock are owned by individuals over 65-years old? Should their ownership interests be combined in considering whether the corporate form should be ignored?

Georgia law is very clear.

> The corporate identity is entirely separate from the identity of its officers and stockholders. A corporation and even its sole owner are two separate and distinct persons. One person may own all the stock of a corporation, and still such individual shareholder and the corporation would, in law, be two separate and distinct persons.

Nationwide Mortg. Services, Inc. v. Troy Langley Const., Inc., 280 Ga. App. 539, 542, 634 S.E.2d 502, 506 (2006) citing Jerry Dickerson Presents, *Inc. v. Concert/Southern Chastain Promotions*, 260 Ga. App. 316, 326(2)(c), 579 S.E.2d 761 (2003); *Accurate Printers, Inc. v. Stark*, 295 Ga. App. 172, 671 S.E.2d 228 (2008); *Levy v. Reiner*, 290 Ga. App. 471, 473(1), 659 S.E.2d 848 (2008) . *See also, Accurate Printers, Inc. v. Stark*, 295 Ga. App. 172, 671 S.E.2d 228 (2008) (Corporation was not a party to asset purchase agreement between its stockholder and seller and thus corporation could not bring action against seller for allegedly violating covenant not to compete contained in purchase agreement.); *Milk v. Total Pay and H.R. Solutions, Inc.*, 280 Ga. App. 449, 634 S.E.2d 208 (Ga. App. 2006) (Corporation is a separate and distinct entity from its shareholders. As a result, a ***27** shareholder (or a member in an LLC) is not a proper party to a proceeding by or against the company, solely by reason of being a member of the company, except in the case of actions by the member or derivative actions.); *Dale v. City Plumbing and Heating Supply Company*, 112 Ga. App. 723, 146 S.E.2d 349 (1965) (Sole owner of corporation had no

right of action for the devaluation of corporation stock or invasion of any other right belonging to the corporation as such; the corporation was the proper party in that event.);

Even if this were not the law and a shareholder had some joint identity with the corporation, in the present matter the corporate entity is so far removed from Mr. Glock individually as to make a total mockery of the statute upon which the state is attempting to rely to circumvent the actual statute of limitations. As noted herein, at the time period relevant hereto, the ownership of Glock, Inc. was as follows: In 1999, Glock, Inc. was owned by Unipatent 50% and Glock Gmbh 50%. No stock was owned by Gaston Glock personally (1T:71, 72, Defense Exhibit 7). As of Glock Inc.'s 2003 tax return, Glock, Inc. was owned 10% by Unipatent, 40% by Multipatent and 50% by Glock Gmbh (1T:72-73). There is no evidence that Mr. Glock had any interest in Unipatent or Multipatent (1T: 93).

Glock Gmbh, owner of 50% of Glock Inc. throughout, is a separate Austrian corporate entity which sells and produces Glock pistols (1T:14). It was owned during this time period as follows: Glock Gmbh shares were owned as of 2003 ***28** 98% by Glock privatstiftung and 1% by Mr. Glock and 1% by his wife (1T: 94). [10] Glock privatstiftung is an entity akin to a foundation or a trust. Mr. Glock is the beneficiary of the Glock Privatstiftung (1T:94). In short, to even argue that Mr. Glock has an interest in Glock Inc., the state had to pierce three layers of foreign and domestic corporate entities.

As for Consultinvest, inc. the state produced not even a modicum of evidence that would cause the over 65 statute of limitations to apply even if corporations were not separate entities from their shareholders. According to the state's witness and the documents introduced at the hearing, Consultinvest was and is owned 100% by Johann Quendler, not Gaston Glock. (1T:68-69).

The funds involved and the allegations set forth in Counts 5-10 are for alleged thefts from Consultinvest, Inc. or Glock, Inc. In regard to Consultinvest, the evidence at the hearing established Mr. Glock not only was not a victim but he was not even a shareholder of the alleged victim. As for Glock Inc., to reach Mr. Glock, many corporate layers would have to be removed and then he is only a beneficiary of a trust that owned stock in a company that owned shares in the company alleged to be a victim of the alleged thefts.

***29** In regard to the remaining substantive counts, similarly, as argued in the initial Plea in Bar, the 65-year old extended period should only apply to the allegations of a direct theft from Mr. Glock personally. As explained in the General Demurrer, the indictment in this case alleges that money was stolen from Mr. Glock personally and then placed in a corporate account that was either controlled by Harper (or Chapman) or controlled by a representative of Mr. Glock. (see Counts 2, 3, 4 and 11). However that question is resolved, any subsequent transfer of money from the corporate account is not subject to the 65-year old extended statute of limitations period, because any subsequent transfer would be a theft from the corporation that owned that account.

The tolling periods in the statute of limitations should be strictly construed to further the goal of repose that is at the heart of the statutes of limitations. The state's theory in this case expands the tolling period far beyond its intended scope.

Regarding the substantive counts of the indictment, every count involves conduct that occurred more than four years prior to the return of the indictment. The state has failed to show that Gaston Glock was the personal victim of any of these counts and therefore, each of these counts should be dismissed in light of the state's failure to prove the applicability of any tolling period or the extended “over-65” statute of limitations.

***30 C. The “Over-65” Extended Statute of Limitations is Unconstitutional**

Appellants challenge the constitutionality of O.C.G.A § 17-3-2.2 on the grounds that it is violative of the Equal Protection Clause within the Fourteenth Amendment to the United States Constitution and Article 1, Section 1, Paragraph 2 of the Georgia Constitution (“EPC” or the “Equal Protection Clause”). It violates these protections because it rests on a fallacy: all person sixty five (65) years or older are feeble (or otherwise incapacitated) and unable to manage their own affairs. This fallacy subjects those who provide professional or **financial** services to a 65 year old to potential criminal prosecution long after the services

were provided; documents have been lost or cannot otherwise be obtained; witnesses have died or cannot be located, memories have faded; and it is therefore unduly prejudicial to the rights of a Defendant.

As discussed below, Appellants believe that the statute is unconstitutional because it arbitrarily (i) extends the statute of limitation for alleged crimes committed against persons who have reached the age of sixty-five (65) years of age; and (ii) extends the statute of limitations for fifteen (15) years.

In 2000, the Georgia General Assembly enacted O.C.G.A § 17-3-2.2 as part of a law entitled the "Georgia Protection of **Elder** Persons Act" ("GPEPA" or the "Act"). The Act made it unlawful to willfully deprive **elder** persons of health care, shelter, or necessary sustenance in a manner that jeopardizes their well-being; ***31** provides for penalties and fines for enumerated theft and forgery offenses committed by fiduciaries against **elder** persons; extends the statute of limitations for offenses against an **elder** person; and delineates procedures for reporting abuse, neglect, or **exploitation** of an **elder** person. See, Act 740, S.B. 407, 2000 Ga.Gen. Assem. The Act, SB 407 [11], 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."

From reading the Act as a whole, it is clear that the legislature was concerned with "**elder** abuse" [12] - predatory and abusive conduct directed at individuals who were in a dependent and vulnerable situation and who as a result were more susceptible to harm. 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 ***32** 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.

As to the statute of limitations, one commentator noted that O.C.G.A § 17-3-2.2 extends "the statute of limitations for ***elder*** *abuse* crimes to fifteen years." [13] However, despite these good intentions, the extension of the statute of limitations contained in GPEPA is overly inclusive and not rationally related to a legitimate state interest because it treats all persons sixty five (65) years of age or older as if they are either per se feeble or victims: incapable of thinking for themselves, contracting for themselves and engaging mentally and physically in society. The Act extends special protections to persons for no other reason than their age and ***33** not because of any particular impediment or special need. [14] Rather than focusing on the truly vulnerable, the law gives special status to an entire group of persons even though the members of that group are not similarly situated. In the present case, GPEPA extends the statute of limitations for an excessive period of fifteen years without any rational basis to the clear detriment of defendants who may have provided some form of professional service to a 65 year old.

The statute of limitations in question (O.C.G.A. *17-3-2.2) reads as follows:

> ***34** 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.

The law treats otherwise similarly situated people differently based solely on one's date of birth, and it treats unequally people who are otherwise similarly situated: alleged victims under the age of 65 and over the age of 65 who have both been the victim of an identical crime and who are both physically and mentally competent. It also treats defendants who are similarly situated differently simply because of the age of the person against whom they allegedly committed a crime.

As will be discussed below, the Georgia law in comparison to other states is an outlier. It appears that other states that have addressed the issue of **elder** abuse have avoided over-inclusiveness by more narrowly tailoring the class of people who the law seeks to protect.

Before beginning a discussion of the constitutional issues, it must be acknowledged that Appellants have not located any appellate court decisions interpreting or analyzing O.C.G.A. §17-3-2.2. However, Appellants have located at least one case (post enactment of O.C.G.A. §17-3-2.2), addressing allegations of ***35** racketeering against **elder** persons. *State v. Conzo*, 293 Ga. App. 72, 666 S.E.2d 404, 405 (2008). *Conzo* involved a telemarketing scheme to defraud **elderly** persons throughout the United States. The alleged scheme involved calling **elderly** persons and telling them they either had won something, could win something or could receive a free gift. But in return they had to purchase magazine subscriptions and were required to provide credit card and banking information. In Conzo, the Georgia Attorney General argued that the RICO statute of limitations had not yet run. The Attorney General did not rely on the state of limitations at issue here. The trial court had dismissed the indictment based on the RICO statute of limitations and the Court of Appeals affirmed.

It is also important to remember why statutes of limitation exist:

> to limit exposure to criminal prosecution to a certain fixed period of time following the occurrence of those acts the legislature has decided to punish by criminal sanctions. Such a limitation is designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past....

Womack v. State, 260 Ga. 21, 22, 389 S.E.2d 240, 242 (1990)(citation omitted).

In addition, the statute of limitations is the primary guarantee against bringing overly stale criminal charges, and so guards against prejudicial pre-accusation delays. *Andrews v. State*, 175 Ga. 22, 332 S.E.2d 299 (1985), quoting *U.S. v. Marion*, 404 U.S. 307, 322 (1971). "Any exception to the limitation period ***37** must be construed narrowly and in light most favorably to the accused." *Sears v. Sears*, 182 Ga. App. 480, 356 S.E.2d 72 (1987) (overruled on other grounds by *Johnston v. State*, 213 Ga. App. 579, 445 S.E.2d 566 (1994)). [15]

Crime	Statute	Statute of Limitations
Murder	O.C.G.A. § 17-3-1.a	No statute
Prosecution for non-murder crimes punishable by death or life imprisonment	O.C.G.A. § 17-3-1.b	7 years
Forcible rape	O.C.G.A. § 17-3-1.b	15 years
Felonies other than murder or other crimes punishable by death of life imprisonment	O.C.G.A. § 17-3-1.c	4 years

Felonies other than murder or other crimes punishable by death of life imprisonment committed against minors	O.C.G.A. § 17-3-1.c	7 years
Armed robbery, kidnapping, rape, aggravated child molestation; aggravated sodomy; aggravated sexual battery	O.C.G.A. § 17-3-1.c.1	At any time after DNA identifies the accused
Misdemeanors	O.C.G.A. § 17-3-1.c.1	2 years

Now, turning to the Constitutional issues, let's first look at the applicable provisions.

Pursuant to the Fourteenth Amendment to the United States Constitution,

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the ***38** State wherein they reside. No State... nor deny to any person within its jurisdiction the equal protection of the laws.

Likewise, pursuant to the Georgia Constitution,

> Protection to person and property is the paramount duty of government and shall be impartial and complete. No person shall be denied the equal protection of the laws.

Georgia Constitution, Article 1, Section 1, Paragraph 2. Because the Equal Protection Clause of the U.S. Constitution is coextensive with that provided in the Georgia Constitution, the Georgia courts apply them as one. *Favorito v. Handel,* 285 Ga. 795, 797, 684 S.E. 2d 257 (2009).

If neither a suspect class nor a fundamental right is affected by a statute, the statute's constitutionality for equal protection purposes is judged by the rational basis standard. *Love v. State,* 271 Ga. 398, 400, 517 S.E.2d 53, 55 (1999). In analyzing a claim that a statute 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 interest 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); *Barnett v. State,* 270 Ga. 472, 472, 510 S.E.2d 527, 528 (1999).

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 ***39** 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 (1971), 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); *City of Cleburne v. Cleburne Living Ctr.,* 473 U.S. 432, 446-47 (1985)); *City of Atlanta v. Watson,* 267 Ga. 185, 187-88, 475 S.E.2d 896, 899 (1996) ("The rational basis test requires that the

classification drawn by the legislation be reasonable and not arbitrary, and rest upon some ground of difference having a fair and rational relationship to the legislation's objective, so that all similarly situated persons are treated alike.").

There are several relevant cases which address the applicability of the EPC to criminal and civil statutes. [16] For instance, in ***40** *Barnett v. State*, 270 Ga. 472, 510 S.E.2d 527 (1999), this Court addressed an equal protection challenge to a criminal statute based on age. The Court first looked to whether the statute implicated a protected class or infringed upon a fundamental right. The appellant claimed that the criminal statute in question violated his equal protection rights under the State and Federal constitutions because it set forth a blood alcohol concentration standard different for persons under age 21 than for persons above age 21. The Court found that since the statute did not disadvantage a suspect class or interfere with the exercise of a fundamental right, it need only bear a reasonable relationship to a legitimate state purpose. The Court further determined that protection of the public safety and safeguarding the physical well-being of children represented two legitimate state purposes. The statute bore a reasonable relationship to both of these purposes because it prohibits operation of motor vehicles by young people lacking experience in both driving and judging the effect of alcohol on their ability to drive. The Court believed that younger less experienced drivers pose a greater threat to the public safety than older, more experienced drivers. The Court also found that the statute was rationally related to a legitimate purpose because it protects children by providing a strong disincentive to violate alcohol consumption laws and otherwise protects them from the dangers of driving while intoxicated. In this case, the Court believed that the statute was constitutional because it had a legitimate state purpose (i.e. public safety) and ***41** because it was directed at protecting children (or people under 21) from themselves and others due to inexperience with drinking and driving.

In other circumstances, this Court has struck down legislation found to be violative of the Equal Protection Clause because it fails the rational basis test. *See Employees' Retirement System of Georgia v. Martin*, 272 Ga. 535, 533 S.E. 2d 68 (2000) (holding there was no rational basis for a classification system under which former employees of DFCS received diminished benefits compared to employees who transferred before a particular date). *In Ciak v. State*, 278 Ga. 27, 597 S.E. 2d 392 (2004), this Court found a statute that drew a distinction between the use of tinted automobile windows for residents of this state and those who were non-residents to be a violation of equal protection. While the interest involved was legitimate, namely endangerment to law enforcement officers conducting vehicle stops, the law did not qualify for treatment as a "one step at a time," where no basis existed to distinguish between dangers posed by vehicles driven by non-residents.

Love v. State, 271 Ga. 398, 517 S.E.2d 53 (1999), involved a statute which allowed a person with metabolites of legally-used marijuana in his body fluids to be convicted of driving with marijuana in his system only if it was established that he was "rendered incapable of driving safely" while a person with metabolites of illegally-used marijuana could be found guilty of driving with marijuana in his system without evidence of impairment. The Court found that because the statute ***42** drew no distinction between legal and illegal users of marijuana it could not relate to legislature's purpose and, thus, violated equal protection.

Unlike Barnett, and like Ciak and Love, the present controversy concerns a statute inappropriately tailored to a legitimate end. Providing greater protection for vulnerable senior citizens is a legitimate state interest, and in fact this was the context from which O.C.G.A § 17-3-2.2 originated. The law was enacted under the umbrella "Georgia Protection of **Elder** Persons Act of 2000." See Act 740, Bill No. SB 407; 2000 Georgia Laws 1085. The Act created numerous statutes focused on **elderly** persons within the custody or control of others and/ or whose physical person or **financial** resources were subject to guardians or fiduciaries. Each of the enacted provisions, with the exception of § 17-3-2.2, concerned very specific circumstances where senior citizens are particularly vulnerable. O.C.G.A § 17-3-2.2 departs from this specificity by creating a statutory exception for citizens 65 years and older without reference to any particular vulnerability. Fourteenth Amendment jurisprudence has been leery of such overly broad classifications. See Reed, 404 U.S. 75 ("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").

This broad classification seems even more problematic when compared to other similar state laws. Numerous states have laws that treat "**elderly**" people ***43** differently in various contexts. But even in these other contexts, States do not simply distinguish

between people 65 and those who are younger. Rather, these states distinguish between people who are 65 or over and are either suffering from some other impairment, or are otherwise unable to fend for themselves. For instance, under the Florida "Abuse, Neglect, and **Exploitation** of **Elderly** Persons and Disabled Adults" law, FSA § 825.101 defines "**elderly** person" as "a person 60 years of age or older who is suffering from the infirmities of aging as manifested by advanced age or organic brain damage to the extent that the ability of the person to provide adequately for the person's own care or protection is impaired" (emphasis added). Fla. Stat. Ann. § 825.101. Missouri's **elder** abuse laws define an "eligible adult" as someone for whom the law was enacted and who is "a person sixty years of age or older who is unable to protect his or her own interests " Mo. Rev. Stat. § 660.250. See also Ill. Comp. Stat. § 20/2 ("'Eligible adult' means a person 60 years of age or older who resides in a domestic living situation and is, or is alleged to be, abused, neglected "); N. D. Cent. Code § 12.1-31-07 (defining "vulnerable **elderly** adult" in an **elderly** abuse statute as being sixty years old and who manifests an infirmity associated with advanced age); N. C. Gen. Stat. § 14-112.2; Okla. Stat. Ann tit. § 10-103; Tenn. Code Ann. § 71-6-120. In each of these **elder** abuse statutes, states avoided equal protection problems by clearly ***44** distinguishing the victims intended to be protected and the general senior citizen population.

Even in circumstances where states define an **elder** victim broadly, it is still done so in the specified context of direct **elder** abuse. California, for example, defines **elder** as being a "person residing in this state, 65 years of age or older," but this is done within the State's "**Elder** Abuse and Dependent Adult Civil Protection Act." Cal. Comm. Code § 15610.27; *see also* R.I. Gen. Laws § 12-29.1-3 (defining "**elderly** person" under the **Elderly** Violence Prevention Act to be anyone over age sixty); Conn. Gen. Stat. § 53a-320 (defining **elderly** victim broadly under its Abuse of **Elderly**, Blind or Disabled Persons or Persons with Intellectual Disability section of the state Penal Code). Additionally, as explained below, even in these states, a short extended limitations period is designed to ensure that a reasonable time exists after the victim learns about the crime. The Georgia statute, in contrast, summarily extends the limitations period by over 300% regardless of when the victim learns about the crime, reports it the police and/or the district attorney.

Even a liberal reading of the statute to support tolling for seniors for all crimes does not salvage the provision from a constitutional challenge. The statute still fails in a rational basis review. For example, § 17-3-2.2 deals exclusively with tolling the statute of limitations for criminal cases. There is no similar provision under Georgia law for civil cases. If protecting senior citizens from harm is the ***45** primary justification for the criminal statute, surely providing a corresponding tolling statute for civil cases would seem logical.

There are also numerous problems with age classification in general and specifically with the parameters of the class within § 17-3-2.2. While age classifications have been constitutionally permitted in certain circumstances, old age alone "does not define a 'discrete and insular group,' in need of 'extraordinary protection from the majoritarian political process."' *Mass. Bd. of Retirement v. Murgia,* 427 U.S. 307, 313 (1976), *quoting U.S. v. Carolene Products Co.,* 304 U.S. 144, 152-153 (1938). In fact, overly broad age classifications have been previously held unconstitutional when their breadth becomes "so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to unconstitutional behavior." *Kimel*, 528 U.S. 86, *quoting City of Boerne v. Flores,* 521 U.S. 507, 532 (1997). The statute at issue is such a classification. Its scope is over-inclusive in light of its intended purpose of protecting vulnerable seniors by insulating all Georgia citizens age 65 and older (regardless of whether they are infirm, incompetent or fully in command of their faculties and health) from the normal statute of limitations.

***46** This latter point is particularly problematic when considering the status of 65 year olds in the world today. [17] There is little evidence that anything automatically happens to a person's competence on their 65th birthday; therefore, this law creates an arbitrary line of protection between those who are 64 years, 364 days old, and those who are 65. As previously noted, the United States Senate currently consist of approximately 44 senators 65 years or older. Presidential candidate Mitt Romney is 65. Four current Supreme Court justices are over 65. Numerous district court judges in Georgia are over 65. Warren Buffet is 81. The alleged victim is this case, Gaston Glock, is now in his eighties, and there is no evidence that he is anything other than an active man in full control of his faculties. It is irrational to claim that these highly powerful and influential people in our society

need special legal protections, and even more illogical to argue that they, along with other citizens 65 years and older whose competencies remain faultless, would need an additional 15 year statutory tolling period for crimes committed against them.

The statute not only suffers from an over-inclusive and irrational age classification problem, but it unfairly favors older citizens over younger persons.

***47** The 15 year tolling period it creates for **elder** victims is particularly exorbitant when compared to other Georgia laws and similar state laws affecting other age groups. For instance, in Georgia, felonies committed against minors (under the age of 18) years must be commenced within seven years after the commission of the crime. O.C.G.A § 17-3-1(c). Why are older citizens given a longer period than younger?

In the civil context, the 11th Circuit Court upheld the Georgia medical malpractice tolling statute (codified as O.C.G.A. § 9-3-73). Deen v. Egleston, 597 F.3d 1223 (11th Cir. 2010). The court saw the balance struck within the law by providing some relief for incompetents and minors by granting them extra tolling periods with the legislative concern of opening too wide a door for plaintiffs, and incompetent plaintiffs specifically, to sue on stale claims. The details of the statute, however, are in stark contrast to the one in the present controversy. § 9-3-73 offers a five year tolling period beyond the two year statute of limitations for medical malpractice for minors under the age of 10. But a perfectly competent 65 year old successful businessman has until age 80 to seek a criminal prosecution, regardless of when the crime is fully known to law enforcement or a district attorney.

Other jurisdictions have enacted limited tolling statutes for **elder** victims, but none of them go so far as to grant 15 years. The corresponding Florida tolling provision for its highly specified **elder** abuse statute, codified as § 775-15, grants ***48** **elder** victims five years from the time when the violation was committed. Fla. Stat. Ann. § 775-15. The California tolling statute, § 803, extends the statute of limitations for **elder** victims to one year after discovery of the violation. Cal. Comm. Code § 803; see also Del. Code Ann. tit. 11, § 205 (giving **elder** guardians two years from the time of discovery for an indictment); *People v. McKinney*, 99 P.3d 1038 (Co. 2004) (applying a three year statute of limitations from the time of discovery rather than commission, § 16-5-401, to an **elder** victim case). As shown above, Gaston Glock and his team of highly qualified and highly paid accountants, auditors and lawyers detected the alleged crime in 2003. No other state would permit a prosecutor to begin a prosecution 15 years after the victim was fully aware of the existence of a **financial** crime.

The Georgia statute, thus, suffers from irrationality and over-inclusivity and this is evidenced by the fact that it is not looked to by any other state as a model. Appellants have been unable to locate any other **elder** abuse law in any jurisdiction that opens so wide a door for prosecutions. No other jurisdiction grants senior citizens so broad a protection, and no other jurisdiction awards this class with so great a tolling period. It comes, then, as little surprise that as more **elder** abuse statutes have been enacted, including the Federal **Elder** Abuse Victims Act of 2009, neither legal commentators nor legislatures have even referenced the Georgia law.

***48** O.C.G.A. § 17-3-2.2, thus, violates the Equal Protection Clause. Its broad age classification is not rationally related to the state interest of protecting vulnerable **elder** victims. The classification, along with the extended 15 year tolling period, creates a special status for competent 65 year olds and older and, as the present case illustrates, allows prosecutors to use the statute for purposes other than **elder** abuse and therefore it should be declared unconstitutional.

CONCLUSION

For the foregoing reasons, Appellants urge the Court to reverse the decisions of the trial court denying Appellants' General and Special Demurrers and the Plea In Bar.

Footnotes

1 There are five volumes of Record contained in the case (two of which are transcripts of two hearings on the motions that are the subject of this appeal). Throughout this brief, Appellants are jointly referring to the Record that was filed in the case of James R. Harper, III. Appellants use the following citation format throughout this brief: (1) A citation to a pleading will reference the Docket number, followed by the page in the official appellate record ("R2:4" references docket #2, page 4 of the appellate record). All exhibits introduced at the hearing are contained in Docket entry #46. Thus, a reference to an exhibit will appear as "R46:550" which will refer to an exhibit located at page 550 of the record. The Hearings on the Motions lasted two days: October 22, 2010 and October 28, 2010. All references to the transcript for October 22 shall be referenced as "1T" followed by the page number (e.g. "1T:50" denotes the transcript from day one of the hearings, page 50). The October 28 hearing transcript shall be referenced herein as "2T:".

2 Appellants included copies of the Special Demurrers in the Application for Certificate of Immediate Review. *See generally Falagian v. State*, 300 Ga. App. 187, 684 S.E.2d 340 (2009); *State v. Jones*, 251 Ga. App. 192, 553 S.E.2d 631 (2001); *Scott v. State* 207 Ga. App. 553, 428 S.E.2d 359 (1993); *England v. State*, 232 Ga. App. 842 (1998); *State v. Delaby*, 298 Ga. App. 723, 681 S.E.2d 645 (2009).

3 In 1999 the shares were owned 80% by Glock privatstiftung and 10% by Mr. Glock and Mrs. Glock. It changed to the 98% to the privatstiftung at the end of 1999. (1T:94).

4 Numerous exhibits were introduced during the hearing on the Plea in Bar and all of these exhibits are included in the Record on Appeal in Document #46. An index to these exhibits is located at R46:489-494.

5 Of the $750,000 transferred to BIA America, $650,000 was returned to BIALUX S.A. on February 19, 2002 (*See* Defense Exhibit 2, Tab 1; 2T:21,33)

6 Chapman joined the motions filed by Harper and Pombert and the court treated all motions as having been jointly filed. (1T:5-6; 2T:115).

7 The Demurrer to Racketeering Act #27, one of the two predicate acts that are within the five year limitation period was denied by the trial court (R:38, page 11-12). This Court should review that decision, however, because it is clearly erroneous. The challenge to Racketeering Act 27 addresses the failure to allege an eligible predicate act, because the misdemeanor offense of obstruction of justice is not a qualifying act. The state's response to the demurrer was two-fold. First, the state contends that this allegation actually represents an allegation based on OCGA § 16-10-20, not § 16-10-24(a). Second, the state alleges that even if the allegation is based on § 16-10-24(a), that section is a qualifying racketeering act. Both responses are meritless.

The state argued in the lower court - contrary to the allegation in the indictment - that this Racketeering Act actually alleges a violation of OCGA § 16-10-20. The indictment, however, alleges in its opening paragraphs that the obstruction of justice allegation amounted to a violation OCGA § 16-10-24(a) (Indictment page 4). This sleight of hand is characteristic of the state's response to the demurrer. Rather than explaining how the indictment is sufficient, the state simply "amends" the indictment and supplements its allegations in the response brief. It is also worth noting that the state apparently can't keep track of its legerdemain: in its brief filed on November 22 in response to the Plea in Bar, the state unambiguously states that the indictment alleges a violation of OCGA § 16-10-24 (not § 16-10-20) in this paragraph (State's Brief In Opposition to Plea in Bar Filed by Defendants Harper and Pombert, Filed November 22, 2010, page 7-8). The state next responds that *other* misdemeanor offenses may be qualifying acts. With that proposition, the defendants do not quarrel. But the misdemeanor offense of obstruction of justice does not qualify. The question is whether the misdemeanor offense of obstruction of justice qualifies. The state's response claims that obstruction of justice (i.e., OCGA § 16-10-24) *does* qualify because the definition of Racketeering Acts in RICO expressly states, "Racketeering activity shall also mean obstruction of justice" OCGA § 16-14-3(9)(B). What the state fails to include in this quote - what the ellipsis conceals - is that in order to qualify, only an obstruction of justice "which is punishable by imprisonment for more than one year" qualifies under 16-14-3(9)(B). The state's argument urges the court to read half of the code section and ignore the other half. If the court reads the entire code section (it is just one sentence, after all), the state's flawed argument is exposed.

The second predicate act that was within the five-year period (Racketeering Act #25) was a reiteration of a prior racketeering act - a subsequent attempt to transfer the same money previously alleged to have been stolen - and could not serve as a separate predicate act.

8 As set forth previously, in addition to the RICO count, Pombert is charged in substantive counts 7, 8 and 10. The alleged victim(s) of these counts are Consultinvest, Inc. and/or Glock, Inc. The funds transferred by Mr. Glock from his swiss bank account are not alleged to be involved in these offenses.

9 All invoices and expenses attributable to Harper, TSI or Tremont were now listed as a debt owed from Harper only.

10 In 1999 the shares were owned 80% by Glock privatstiftung and 10% by Mr. Glock and Mrs. Glock. It changed to the 98% to the privatstiftung at the end of 1999. (1T: 94).

11 See http://wwwl.legis.ga.gov/legis/1999 00/fulltext/sb407.htm

12 "Abuse of a senior citizen, esp. by a caregiver or relative. Examples include deprivation of food or medication, beatings, oral assaults and isolation." Black's Law Dictionary (9th ed), pp. 594, 11.

13 *See Crimes Against the Person: Provide Protection for Elderl Persons and Disabled Adults,* 17 Ga. St. U. L. Rev. 93 (2000) (emphasis supplied)

14 Consideration of the ages of the current leaders of our society demonstrates that distinguishing between 65 year-old victims and those that are younger is completely irrational. Here in Georgia, the Governor and both U.S. Senators are sixty five years of age or older. As of this writing, five of the seven members of the Georgia Supreme Court are sixty five years of age or older.

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. The 2012 presumptive Republican nominee for President, Governor Mitt Romney, is sixty five (65) years old.

Currently, the United States Senate consist of approximately 45 senators 65 years or older. Four of the senators are in their 80's. 23 of the senators are in their 70's.

There are four U.S. Supreme Court Justices who 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. Justices Souter and O'Connor were more than sixty five years of age when they retired.

Corporations are also run by individuals under 65 and over 65. The legendary, Warren Buffet, of Berkshire Hathaway, is 81 years old. Lawrence Ellison is 67 years old and is CEO of Oracle. Ray Irani is the Chairman and CEO of Occidental Petroleum and is presently 77. He has been in that position for 21 years. Even Ralph Lauren, who is an active CEO of Polo Ralph Lauren, is 72 years old.

15 For the convenience of the Court, here is a brief summary of significant criminal statute of limitations in Georgia. According to this summary a felony crime committed against a 65 year old has the same statute of limitation as forcible rape:

16 Generally, a criminal statute violates equal protection if it treats similarly-situated individuals differently by creating disparate categories among them. When considering an equal protection challenge in criminal matters, individuals are "similarly situated" only if they are charged with the same crime or crimes. Woodard v. State, 269 Ga. 317, 321-22, 496 S.E.2d 896, 900-01 (1998).

17 Recent discussions of old age actually portray senior citizens today being creatively and intellectually healthier than seniors of earlier generations. *See* Shelley Carson, Ph.D., The Creativity and the Aging Brain, PSYCHOLOGY TODAY , Mar. 30, 2009, *available at* http:// www.psychologytoday.com/blog/life-art/200903/creativity-and-the-aging-brain; *see also* Jeremy Clyman, Adult Animation: The New Image of 'Old,' PSYCHOLOGY TODAY, July 14, 2009, *available at* http://www.psychologytoday.com/blog/reel-therapy/200907/adult-animation-the-new-image-old.

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