

No. _____

In the Supreme Court of the United States

MARK JOSEPH DERRICO, PETITIONER,

V.

STATE OF GEORGIA.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA*

PETITION FOR A WRIT OF CERTIORARI

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I. QUESTION PRESENTED

Under *Kolender v. Lawson*, 461 U.S. 352, 357-358 (1983), this Court has cautioned, “Where the legislature fails to provide ... minimal guidelines, a criminal statute may permit ‘a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections,” citing *Smith v. Goguen*, 415 U.S. 489, 575 (1974). The resulting rule—sometimes known as the void-for-vagueness doctrine—has proven to have a blind spot, a presentation in which clearly arbitrary enforcement is lost sight of in application. As in the instant case, the alleged victim meets the same criteria (the elements) of each of the statutes or offenses under which Petitioner Derrico was prosecuted. This is a sort of arbitrariness *per se*, in that Defendant was prosecuted and convicted and the alleged victim was not, though he could have been.

The question presented is:

Does the void-for-vagueness doctrine extend to cases such as Derrico’s where courts have rested on the authority of judges and juries to ratify arbitrary enforcement? In the decision below, the Supreme Court of Georgia wholly ignores arbitrary enforcement because it concludes that the evidence was sufficient to convict Derrico. The problem is that the evidence is also sufficient to convict the victim who was not prosecuted, on each of the same charges.

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PETITION FOR A WRIT OF CERTIORARI

Mark Joseph Derrico respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Georgia.

OPINIONS BELOW

The opinion of the Supreme Court of Georgia, App., *infra*, a1-a7, is reported at 831 S.E.2d 794. The Forsyth County, Georgia, State Court's order denying motion for new trial, App., *infra*, a8-a10, is not reported.

JURISDICTION

The judgment of the Supreme Court of Georgia was entered on August 5, 2019. On October 25, 2019, Justice Thomas extended the time for filing a certiorari petition to January 2, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent constitutional and statutory provisions are set forth in the appendix to this petition. App., *infra*, a14.

INTRODUCTION

Petitioner's case is simple. He contends that he is innocent of the driving offenses for which he was convicted to the extent that whatever actions he took were defensive in nature and caused by the alleged victim, whose driving could have been fit into the same statutes Petitioner's driving was, but was not. Inasmuch as and to the extent that the Georgia statutes under which Petitioner was prosecuted allow for him to be convicted while the aggressive driver who pulled in front of him and recklessly intimidated him goes entirely without citation or consequence, the Georgia statutes are void for vagueness.

STATEMENT

Defendant and Appellant below, Petitioner here, was prosecuted by the State of Georgia on a three-count accusation for 1) Aggressive Driving under O.C.G.A. § 40-6-397; 2) Reckless Conduct under O.C.G.A. § 16-5-60(b); and 3) Failure to Signal Lane Change or Turn under O.C.G.A. § 40-6-123(a). Petitioner was found guilty by the jury on all three counts and therefore moved for new trial and appealed those verdicts along with rulings made by the trial court.

On April 30, 2018 Petitioner's motion for new trial was denied, and on May 30, 2018, Petitioner filed his notice of appeal. Petitioner alleged in the notice of appeal 1) that the trial court erred in denying Petitioner's Motion to Dismiss for Unconstitutional Vagueness, 2) that the evidence was insufficient to prove guilt beyond a reasonable doubt, 3) that the trial court erred in failing to admit Felix Ambrosetti's (the alleged victim's) driving history, which would have supported Petitioner's theory of defense that it was in fact Ambrosetti who was driving dangerously, 4) that the trial court failed to direct a verdict of acquittal after the close of the state's case, 5) that the trial court failed to grant an acquittal notwithstanding the verdict, and 6) that the trial court failed to grant Petitioner's Motion for New Trial. When the trial court denied Petitioner's Motion for New Trial and Petitioner appealed, defendant's appeal was transferred to the Supreme Court of Georgia because it raised the issue of the constitutionality of statutes. The Supreme Court of Georgia affirmed the trial court, and therefore, Petitioner seeks relief here in the form of his Petition for Writ of Certiorari.

REASONS FOR GRANTING THE PETITION

I. The Decision Below Leaves Defendants Such as Petitioner without Remedy for Situations in Which Statutes Are Impossibly Vague

The only remaining avenue of relief for Petitioner is with the Supreme Court of the United

States, which can clarify the law for others.

A. The Supreme Court of Georgia Dodged the Federal Constitutional Void-for-Vagueness Protection from Standardless Sweep

As the Supreme Court of Georgia states in its opinion, “Iglis [the independent witness] testified that he saw Ambrosetti [victim] merge onto Georgia 400 and then proceed to cross all the way to the left lane in front of [Petitioner] Derrico,” (Opinion, at a1). It is worth noting that the facts of the case and the Opinion of the Supreme Court of Georgia begin with circumstances befalling the Petitioner, which are at best bad luck, to be the individual the “victim” cut off. As Mark Derrico experienced the events, they have turned into much worse than a stroke of bad luck, indeed, a nightmare. Ambrosetti comes all the way across a multi-lane highway, driving right in front of Petitioner Derrico, and yet, though Ambrosetti might himself have been charged with aggressive driving, he was not.

Because whatever Derrico does in reaction is interpreted by the human mind in a narrative context as retaliatory to Ambrosetti, that makes it easier for Ambrosetti to avoid the aggressive driving statute than it does Derrico. The principle at work, a problematic one here, is that the statute does not differentiate between offensive and defensive aggressive driving. Derrico has been trapped, baited into a reaction of some kind, to avoid this dangerous driver, Ambrosetti, with whom he was confronted.

Yet, Ambrosetti avoids the motive determination in the statute because his actions were arguably spontaneous, just bad driving, just a

misjudgment. To state the difficulty clearly, whoever reacts to another, is at the mercy of the statute because of the human mind's bias in favor of attributing retaliation as a motive.

Therefore, in two-car aggressive driving situations, the instigator always has the advantage because the first action is by definition not a reaction to the other car, at least in a reckless-incoming-car scenario as here. Ambrosetti is just an incoming bad driver, arguably, without provable aggression. Petitioner Derrico on the other hand, can be easily ascribed, rightly or wrongly, with the motive to intimidate, or other variety of aggression, because of the way the human mind organizes sequential action between persons. Therefore, because an innocent driver in Derrico's position is at a disadvantage because of the cognitive bias of the human mind, a fact or law finder must carefully analyze judgment of such a situation so as not to disadvantage Derrico, who was forced to react in some way, vis-à-vis Ambrosetti, who was the one who forced him to react.

If one takes the position that Derrico did not have to react, it still is the case that the vastly overbroad Aggressive Driving statute, which includes driving not just with intent to intimidate, but "the intent to annoy, harass, molest, intimidate, injure, or obstruct another person," O.C.G.A. Sec. 40-6-397(a), still encompasses Ambrosetti's action. If not the other motivations, he had at least an intent to obstruct Derrico as he pulled in front of him. Ambrosetti's intentions may have been much worse, but because he is not reacting, inquisitive humans do not do the same

automatic search into his motivations, looking for revenge.

In any event the cavernously broad aggressive driving statute—which was conceded at oral argument by the State to encompass even parents in themed vehicles seeking to embarrass and annoy their children—disadvantages and impairs the rights of drivers forced into a more aggressive defensive driving mode because of casually aggressive intimidators who establish domination by driving recklessly and forcing others to watch and react to their every sudden move.

Consider the sentence applied to Derrico later in the Opinion by the Supreme Court of Georgia, “A person of ordinary intelligence would appreciate the risk from intentionally using one’s vehicle to strike another vehicle at highway speeds around other motorists, and therefore would have fair notice such conduct would violate the statute.” Opinion at a6. Now apply it to Ambrosetti, “A person of ordinary intelligence would appreciate the risk from [crossing lanes and pulling in front of another vehicle] at highway speeds around other motorists, and therefore would have fair notice such conduct would violate the statute.”

What has happened here should have met the Georgia arbitrary classification test of *Wallace v. State*, 299 Ga. 672, 674 (791 SE2d 836) (2016). The situation in which the Petitioner and alleged victim both meet the elements of the charges against the

Petitioner but the victim is not charged is an arbitrary classification *per se*. Otherwise, the most arbitrary discrimination, choosing one over another, is beyond the reach of the test. Of course, while the Supreme Court of Georgia can speak authoritatively on Georgia law, it has ignored that the United States Constitution provides greater protection in this area.

Abrosetti met the terms of OCGA § 40-6-123(a), failure to signal a lane change or turn, as recited by the Supreme Court of Georgia at footnote three (3), “[n]o person shall ... change lanes or move right or left upon a roadway unless and until such movement can be made with reasonable safety.” (Opinion at a3). Abrosetti met the terms of OCGA § 16-5-60(b), reckless conduct, as recited by the court at footnote two (2), “A person who causes bodily harm to or endangers the bodily safety of another person by consciously disregarding a substantial and unjustifiable risk that his act or omission will cause harm or endanger the safety of the other person and the disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation is guilty...” (Opinion at 2a).

Ambrosetti endangered Derrico and others by cutting across lanes as he did. Finally, Abrosetti meets the criteria of the broad aggressive driving statute as above. Because Ambrosetti violated each statute under which Derrico was prosecuted, the prosecution for each of them was arbitrary.

The Georgia Supreme Court did not address Derrico's argument with regard to the 14th Amendment due process issue embodied in the void-for-vagueness problem and doctrine as set out in *Kolender v. Lawson*:

As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. [citations omitted] Although the doctrine focuses both on actual notice to citizens and arbitrary enforcement, we have recognized recently that the more important aspect of vagueness doctrine "is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement." [citations omitted]. Where the legislature fails to provide such minimal guidelines, a criminal statute may permit "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections."

Kolender v. Lawson, 461 U.S. 352, 357–58 (1983), citing Smith v. Goguen, 415 U.S. 566, 574-75 (1974).

It is not just speculation that Ambrosetti was guilty of charges that Derrico was charged with; yet Ambrosetti was not charged. As Derrico set out in his Supreme Court of Georgia brief's facts, witness Inglis testified that he observed Derrico and his struggles with the blue Honda. Inglis made a call to 911 to report what he saw. Though Inglis admitted that the driver of the blue Honda (Felix Ambrosetti) "had road rage and was hitting Mr. Derrico's car," for unknown reasons Inglis advocated for the driver of the blue Honda and against Mr. Derrico. Even Mr. Ambrosetti himself admitted that he, Ambrosetti, "got stupid," and the incident was not one of his brightest moments. Ambrosetti, therefore, certainly was guilty of the offenses with which Derrico was charged.

Justice that is not equal is not justice. When the same law applies to different individuals differently, the arbitrary enforcement must be corrected under the vagueness doctrine. Arbitrary enforcement of justice cannot stand uncorrected.

Though in many cases the system works. It did not here. Mr. Derrico had the misfortune of having Mr. Ambrosetti cross his path and paid an unconscionable price for it, while Mr. Ambrosetti went uncharged. The prosecution of Petitioner was arbitrary.

B. The Supreme Court of Georgia Did Not Acknowledge the Extraordinarily Broad Language of the Reckless Conduct and Aggressive Driving Statutes as They Applied to Petitioner and His Alleged Victim

The Supreme Court of Georgia did not acknowledge the extreme breadth of the reckless conduct statute (O.C.G.A. § 16-5-60(b)) and the aggressive driving statute (O.C.G.A. § 40-6-397). Their decision below fails to address federal constitutional protections that would come into play when a law prohibits conduct with such a wide sweep as to include annoyance, leaving open the arbitrariness trap of a who-annoyed-whom determination. As described above, the psychology that can come into play is complex and vexing. The Supreme Court of Georgia does not adequately treat the federal issue raised by Petitioner.

II. This Case Presents an Ideal Vehicle for Articulating Proper Application of the Void-for-Vagueness Doctrine in Cases Such as Petitioner's, A Common but Often Hard to Reach Situation

Petitioner is not the first individual to have his case prosecuted to the exclusion of the alleged victim in the case. Some such cases are resolved simply by acquittal. Other juries focus on whomever is before them as the defendant and ignore the issue of the obvious guilt of the victim, oblivious to the fact the defendant will bear the entire brunt of process. This case allows an opportunity to address this vexatious and unresolved issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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