IN THE SUPERIOR COURT OF CHATHAM COUNTY
STATE OF GEORGIA

GEORGIACARRY.ORG, INC., SHANE MONTGOMERY, and WILLIAM THEODORE MOORE, III,	)	
Plaintiffs,	)	Civil Action No. SPCV 18-00523-BA
v.	)	
THOMAS C. BORDEAUX, JR., Individually and as Judge of the Chatham County Probate Court	)	
Defendant.	)	

PLAINTIFFS' POST-HEARING BRIEF

On August 7, 2018, the Court held an omnibus hearing on pending motions. At the conclusion of the hearing, the Court invited the Parties to make any further submissions they cared to within one week. Plaintiffs are filing this Post-Hearing Brief pursuant to that invitation.

Introduction

Plaintiffs Shane Montgomery, William Theodore Moore, III, and GeorgiaCarry.Org, Inc. (collectively, "GCO") commenced this action for mandamus and other relief against Defendant Thomas C. Bordeaux, Jr.,, the judge of the Probate Court of Chatham County, ("Bordeaux") for violating O.C.G.A. § 16-11-129(d)(4) by failing to process applications and issue Georgia weapons carry licenses ("GWLs") within the time required by that statute. After commencement of this action, and well outside the statutory requirements, Bordeaux issued a GWL to each individual plaintiff. A third putative plaintiff not only did not receive his GWL in the time required, but he was denied – presumably he never will receive a license absent a court order requiring Bordeaux to issue him one.

Bordeaux essentially concedes the merits of the case. He admits that he frequently does not process GWL applications within the statutory requirements. He blames Chatham County for underfunding his office, but he admits he violates the statute. Unable to defend himself on the merits, Bordeaux resorts to numerous procedural roadblocks to avoid liability. Plaintiffs will show in this brief that none of those roadblocks are effective in this case, and the Court should reach the merits. This brief will address the merits and then those roadblocks by topic.

Merits

In Paragraph 19 of the Answer, Bordeaux "admits that it routinely takes longer than 35 days from the time of filing to the time of issuance to process some other Georgia Weapons Carry License applications." Then in Paragraph 23 Bordeaux admits that "he as Judge of the Probate Court of Chatham County is violating O.C.G.A. § 16-11-129(d)(4)." Pursuant to O.C.G.A. § 16-11-129(j), a judge of a probate court that does not issue GWLs in the times required by O.C.G.A. § 16-11-129(d)(4) is liable in mandamus or other relief. The Answer, therefore, confesses liability on the merits.

Individual Capacity

Bordeaux insists that he cannot be sued in his individual capacity. He says, "It is hard to understand the logic of suing a judge in his individual capacity whether as part of a Writ or otherwise." Bordeaux's difficulty understanding it notwithstanding, that is the law. The law in Georgia is clear that mandamus may be obtained against a government official in his individual capacity. *Crow v. McCallum*, 113 S.E.2d 203, 215 Ga. 692 (Ga., 1960) ("What the writ of mandamus seeks to enforce is the personal obligation of the individual to whom it is addressed. The writ does not reach the office nor can it be directed to the office. It acts directly on the person of the officer …, coercing him in the performance of a plain duty. It is a personal action

against the officer and not one in rem against the office). *See, also Harmon v. James*, 200 Ga. 742, 38 S. E. 2d 401 (1946); *Bryant v. Mitchell*, 195 Ga. 135 23 S. E. 2d 410 (1942); *McCallum v. Bryan*, 213 Ga. 669, 670, 100 S.E.2d 916, 918 (1957); *City of Elberton v. Adams*, 130 Ga. 501 61 S. E. 18(1908).

In addition, the Supreme Court of Georgia has made clear that sovereign immunity applies to the state, its agencies ***and its employees in their official capacities,*** but that government employees in their individual capacities may be sued for prospective relief to right future wrong. *Lathrop v. Deal*, 301 Ga. 408, 444, 801 S.E.2d 867, 891 (2017) (Allegedly unconstitutional laws may give rise to "remedies that the plaintiff … may pursue against state officers in their individual capacities."), *Georgia Department of Natural Resources v. Center for a Sustainable Coast*, 294 Ga. 593, 755 S.E.2d 184, 192 (2014) ("[C]itizens aggrieved by the unlawful conduct of public officers … must seek relief against such officers in their individual capacities [to avoid sovereign immunity bars].")

The Supreme Court of the United States has similarly concluded:

> The office of a writ of mandamus is to compel the performance of a duty resting upon the person to whom the writ is sent. That duty may have originated in one way or in another. It may. . . have arisen from the acceptance of an office which has imposed the duty upon its incumbent. But no matter out of what facts or relations the duty has grown, what the law regards and what it seeks to enforce by a writ of mandamus, is the personal obligation of the individual to whom it addresses the writ. If he be an officer, and the duty be an official one, still the writ is aimed exclusively against him as a person, and he only can be punished for disobedience. The writ does not reach the office. It cannot be directed to it. It is, therefore, in substance a personal action, and it rests upon the averred and assumed fact that the defendant has neglected or refused to perform a personal duty, to the performance of which by him the relator has a clear right.

United States v. Boutwell, 84 U.S. 604 21 L. ed. 721(1873). The defense that Bordeaux in his individual capacity is not subject to suit for prospective relief is wholly untenable.

Sovereign Immunity

Sovereign immunity protects the state, its departments and officials (in their official capacities) from suits of all kinds, unless immunity has been waived by the legislature. *Fulton County v. Colon*, 730 S.E.2d 599 (Ct.App. 2012). An act of the General Assembly must specifically provide that sovereign immunity is waived, but the Constitution "does not require that the Act of the General Assembly expressly state 'sovereign immunity is hereby waived.'" *Id.* at 601. "Where a legislative act creates a right of action against the state … and the state otherwise would have enjoyed sovereign immunity from the cause of action, the legislative act *must* be considered a waiver of the state's sovereign immunity…." *Id.* [emphasis in original].

In the present case, O.C.G.A. § 16-11-129(j) creates a private right of action for an eligible GWL applicant who does not receive a GWL within the time required by law. The establishment of a private right of action constitutes a waiver of sovereign immunity.

Regardless, the law in this State is that when an official fails or refuses to perform an official duty requiring no exercise of discretion, any person who sustains personal inquiry thereby is entitled to mandamus relief. *Stanley v. Sims*, 185 Ga. 518, 525-26, 195 S.E. 439, 443 (1938). Such an action is not within the rule that a State cannot be sued without its consent. *Id.* As repeated by the United States Supreme Court in *Rolston v. Mo. Fund Comm'rs*, 120 U.S. 390, 7 S. Ct. 599, 30 L.Ed. 721 (1887) "the litigation is with the officer, not the State." The rule as to immunity of the State does not "forbid suits against officers in their official capacity either to arrest or direct their official action by injunction or mandamus, where such suits are authorized by law, and the act to be done or omitted is purely ministerial, in the performance or omission of which the plaintiff has a legal interest." *In re Ayers*, 123 U.S. 443, 8 S. Ct. 164, 31 L.Ed. 216 (1887)*; See also Pennoyer v. McConnaughy*, 140 U.S. 1, 11 S. Ct. 699, 35 L.Ed. 363 (1891). O.C.G.A. § 16-11-129 contains no provision for discretion of the judicial officer in issuing a GWL; either the

applicant meets the requirements, or the applicant does not. As will be discussed more fully below, the issuance of GWLs in Georgia is a purely ministerial function, and therefore Bordeaux is subject to mandamus under the longstanding principals set forth by the highest courts of both Georgia and the United States.

Official Immunity

Official Immunity is established in the state Constitution. "[O]fficers and employees of the state or its departments and agencies shall not be subject to suit or liability, and no judgment shall be entered against them, for the performance or nonperformance of their official functions." Ga.Const. Art. 1, Sec. II, Par. IX(d). Once again, *Lathrop* is dispositive:

> Read in its proper context, Article I, Section II, Paragraph IX(d) is most reasonably understood to be about suits and liabilities for ***retrospective relief,*** mostly monetary damages in tort cases…. Accordingly, the plaintiff…need not worry any longer that official immunity would bar a suit [seeking prospective relief only] if only it were brought against state officials in their individual capacities.

Lathrop, 301 Ga. At 443-444,801 S.E.2d at 891. GCO in the present case seeks only prospective relief (declaratory, injunctive, and mandamus). Therefore official immunity is no bar to the claims against Bordeaux in his individual capacity.

Judicial Immunity

"Judicial officers have been shielded from civil actions for acts done in their judicial capacity from the earliest dawn of jurisprudence." *West End Warehouses, Inc. v. Dunlap,* 233 S.E.2d 284, 141 Ga.App. 333 (1977). But, judicial immunity is foreclosed and a judge is not immune from liability for nonjudicial functions, i.e., actions not taken in the judge's judicial capacity. *Mireless v. Waco,* 502 U.S. 9, 112 S.Ct. 286, 116 L.Ed.2d 9 (1991). Bordeaux assumes, without support, that he was acting in a judicial capacity when processing GCO's GWL applications.

A judicial act is one that is "normally performed by a judge" when the plaintiff "dealt with the judge in his judicial capacity." *Stump v. Sparkman*, 435 U.S. 349, 362, 98 S.Ct. 1099, 1107 (1978). The issuance of licenses, especially licenses to carry weapons, is not "normally performed by a judge." In the five states bordering Georgia, licenses to carry concealed weapons are issued by sheriffs (Alabama[1] and North Carolina[2]), the state Department of Safety (Tennessee[3]), the state Department of Agriculture (Florida[4]), and the state Law Enforcement Division (South Carolina[5]). In fact, of the 49 states that issue licenses to carry concealed firearms,[6] only New York and New Jersey have provisions for judges to be involved at all in the licensing process. No state besides Georgia actually requires that applicants apply to a judge for a license. It cannot be said that issuing licenses is "normally performed by a judge."

The Court of Appeals has ruled that there is no judicial immunity for non-damages cases seeking declaratory and injunctive relief, and has applied this ruling to suits against probate judges for issuance of firearm licenses (now called GWLs). *Moore v. Cranford*, 285 Ga. App. 666, 647 S.E. 2d 295 FN 2 (2007), *cert. denied*.

In addition, the act of issuing a license is ministerial and not judicial. When what we now call a probate judge was referred to as the "county ordinary," the Supreme Court of Georgia noted that issuing licenses by probate judges is not a judicial act:

> The ordinary, under our laws, is an official charged with the performance of duties judicial, ministerial, and clerical. Not by his title, but only by his acts, can the exact capacity in which he appears ever be known upon any special occasion. In admitting a will to probate, he acts as a judicial officer… In issuing a marriage license, he for the moment becomes a ***ministerial*** officer.

[1] Alabama Code 13A-11-75
[2] North Carolina Statutes 14-415
[3] Tennessee Code Annotated 39-17-1351
[4] Florida Statutes 790.06
[5] South Carolina Code 23-31-215
[6] Vermont does not issue licenses, but does not prohibit carrying a concealed firearm without a license.

Comer v. Ross, 100 Ga. 652, 28 S.E. 387 (1897). [Emphasis supplied]. *Comer* was decided some 13 years before the General Assembly created a licensing requirement and assigned the task of issuing Georgia firearms licenses (the predecessor to the current GWLs) to the probate judges ("ordinaries"). 1910 Ga.L. 134. Presumably, the General Assembly knew from *Comer* that it was assigning yet another ministerial task to the probate judges.

It would be difficult to explain why issuing a GWL is a judicial function, when issuance of a marriage license is not. It is clear in O.C.G.A. § 15-9-30(b)(11) that probate judges "[p]erform such other judicial and ***ministerial*** functions as may be provided by law." (Emphasis supplied).

Moreover, judicial acts involve discretion and ministerial acts do not. The GWL statute itself, O.C.G.A. § 16-11-129, does not appear to confer any discretion upon the probate judges. This is one of the main distinctions between a "shall issue" state like Georgia and a "may issue" state like New Jersey. A probate judge is required to issue a license to all eligible applicants. *Moore v. Cranford*, 285 Ga.App. 666 (2007), abrogated by statute on other grounds ("The use of the term 'shall' means that the probate judge has no discretion…."); Op.Atty.Gen. U89-21 ("Generally speaking, the current statutory provisions do not provide for the exercise of discretion by the probate judge in passing upon an application for a firearms permit").

In addition, it must be kept in mind that the General Assembly made a provision for mandamus to obtain a GWL for an eligible applicant. Mandamus is intended to compel ministerial acts. It is not available to compel discretionary ones. *Duty Free Air & Ship Supply Co. v. City of Atlanta*, 282 Ga. 173, 174 (2007) ("It is axiomatic that mandamus is a remedy designed to compel the doing of ministerial acts. Mandamus is not an appropriate remedy to … compel the exercise of official discretion.")

The General Assembly is presumed to be aware of existing law when it enacts a new law. *United States Bank National Association v. Gordon*, 289 Ga. 12, 14 (2011). It is therefore safe to say that the General Assembly knew when it enacted the language providing for mandamus to compel issuance of a GWL that mandamus is available for ministerial functions and not discretionary ones. The General Assembly can thus be presumed to know that issuance of GWLs is a ministerial function (consistent with the Supreme Court's pronouncement in *Comer* that issuance of marriage licenses is a ministerial function).

Even if the Court somehow concludes that Defendant's processing of a GWL application is a judicial function, judicial immunity still does not apply. GCO did not sue Bordeaux for damages. GCO sued in mandamus and for declaratory and injunctive relief. It is well settled that the doctrine of judicial immunity does not apply for declaratory and injunctive relief. *Earl v. Mills*, 275 Ga. 503, 504 (2002). Moreover, the attorney's fees sought by Plaintiff are not an item of damages. This is distinguishable from a case for attorney's fees under O.C.G.A. § 13-6-11, in which attorney's fees are an item of damages (and explicitly called so). *Earl, Id.* GCO is unable to find a case where Georgia courts have disallowed attorney's fees, under a public policy fee-shifting statute, on the grounds of judicial immunity.

At least one other court in this state has explicitly considered the issue of whether the processing of a GWL is a judicial function. In 2010, the Superior Court of Gwinnett County, in deciding a mandamus case similar to the present case, said:

> It cannot be said that processing a firearms license application is an exercise of "judicial powers." This Court finds that the processing of firearms license applications is not a judicial function.

Hill v. Clarke, Case No. 09-A-07488-2, Order Granting Plaintiff's Motion for Summary Judgment (Superior Court of Gwinnett County, August 3, 2010) ("*Hill 1*"). A copy of the Order in *Hill 1* was filed previously in this case, with Plaintiffs' Brief in Support of Motion to Strike Defenses.

The *Hill* case is a close parallel to the present case. In *Hill*, the plaintiff sued the probate judge of Gwinnett County for refusing to issue him a GWL. The Superior Court of Gwinnett County ruled in the plaintiff's favor, entered a writ of mandamus to issue the GWL, but denied the plaintiff's motion for attorney's fees pursuant to O.C.G.A. § 16-11- 129(j), on the grounds that it was not "appropriate" to do so. The Court of Appeals reversed, but ordered the trial court to consider the issue of judicial immunity. *Hill v. Clarke*, 310 Ga.App. 799, 714 S.E.2d 385 (2011) ("*Hill 2*"). On remand, the trial court decided there was no judicial immunity and awarded fees and costs of $20,545.50. *Hill v. Clarke*, Case No. 09-A-07488-2, Order Awarding Attorney's Fees and Costs (Superior Court of Gwinnett County, March 2, 2012) ("*Hill 3*"). A copy of *Hill 3* has been filed previously as well.

In another closely paralleled case, the Superior Court of Clayton County entered a writ of mandamus against the Probate Judge of Clayton County for failing to issue a GWL to an eligible applicant. *Perry v. Ferguson*, Case No. 2010CV-1196-6, Order on Motions for Summary Judgment (Superior Court of Clayton County, March 30, 2012) ("*Perry 1*"). A copy of *Perry 1* has been filed previously. The Supreme Court of Georgia affirmed, without any mention of judicial immunity. *Ferguson v. Perry*, 292 Ga. 666 (2013) ("*Perry 2*"). After affirmance in that case, the Superior Court of Clayton County awarded fees and costs in the amount of $32,910. *Perry v. Ferguson*, Case No. 2010CV-1196-6, Final Order Awarding Plaintiff's Costs and Fees (Superior Court of Clayton County, September 9, 2013) ("*Perry 3*"). A copy of *Perry 3* was filed previously.

Finally, if issuing GWLs is a judicial act, then it is done in violation of the Canons of Judicial Conduct. Rule 2.9 prohibits judges from receiving *ex parte* information, or considering factual information not part of the record. Part of the GWL process is the probate judge asks a local law enforcement agency to conduct a background check on the applicant and submit a report to the judge. The judge does not share this report with the applicant. Either the probate judge violates Rule 2.9 every time he processes a GWL application, or the process is not done in a judicial capacity.

Bordeaux counters that he must be acting in a judicial capacity because O.C.G.A. § 16-11-129 empowers GWL applicants to request hearings before the probate judge (it does not empower probate judges to require hearings on their own). Bordeaux mistakenly believes that "hearings" are the exclusive province of the judiciary. They are not. It is regularly part of the legislative process, at least at the state level, to conduct hearings. Virtually every bill introduced in the legislature is assigned to a committee, which then holds a hearing on the bill. Does Bordeaux suggest that legislative hearings are a judicial function?

It is also well known that the executive branch conducts hearings. Indeed, there is nothing stopping an executive officer from conducting a hearing on any topic within his province. A county development official can hold a hearing on a building permit application. Zoning hearings are commonplace. And if he chose to do so, the Commission of Driver Services could hold a hearing on a driver's license application.

Bordeaux has not offered any support for his position that hearings are, by definition, an exercise of judicial authority.

Mootness

Bordeaux claims that the case is moot because Plaintiffs Montgomery and Moore have received their GWLs. There are multiple reasons why mootness does not apply. First, the familiar exception to mootness of "capable of repetition, yet evading review." *State v. Morrell*, 281 Ga. 152, 635 S.E.2d 716 FN 1 (2006). For an example of a case where this principle was applied and where mandamus was sought, see *Owens v. Hill*, 295 Ga. 302, 758 S.E.2d 794 (2014).

In the present case, the entire GWL application cycle is at most 35 days (this number can be derived by adding up the various time requirements contained in O.C.G.A. § 16-11-129). On day 36, at the latest, the issue is ripe and an applicant could commence litigation. A probate judge, faced with a complaint, could just process the application of the applicant (which is exactly what happened in the present case), and make the case moot. Indeed, it is highly unlikely a case ever would be heard. Thus, the present case squarely illustrates the concept of being capable of repetition yet evading review.

In addition, Bordeaux overlooks that the individual Plaintiffs also are seeking a declaratory judgment. It is their position that the timelines of O.C.G.A. § 16-11-129 are mandatory, and Bordeaux insists they are not. He says as much in his Motion to Dismiss. Thus the rights of the parties and the meaning of a statute are squarely before this Court and ripe for a declaration. The declaration is not dependent on whether any particular Plaintiffs have received their licenses. The question is not abstract, either, because Plaintiffs will have to file again in five years for renewal licenses.

Bordeaux claims that he may not be the judge in five years. That may be, but the question is before the Court ***today.*** Today there is a live controversy between Plaintiffs and Bordeaux as to the meaning of the statute. Plaintiffs are entitled to a declaratory judgment ***today.*** It is not for this

Court to speculate that maybe the controversy will not exist in five years, or in any other period of time.

Standing of GeorgiaCarry.Org, Inc.

Bordeaux claims that Plaintiff GeorgiaCarry.Org, Inc. ("GCOI") lacks standing. He claims that GCOI never had standing in this case, not that it has lost standing (that possibility will be discussed below for completeness, however). An association has standing to bring suit on behalf of its members when (a) its members would otherwise have standing to sue in their own right; (b) the interests the association seeks to protect are germane to its purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Atlanta Taxicab Comp. Owners Assoc., Inc. v. City of Atlanta*, 218 Ga. 342, 344 (2006). Bordeaux does not complain that Plaintiffs Montgomery and Moore did not have standing, so presumably he concedes that. Even if he did not concede it, however, it is clear that they did. They allege an entitlement to a GWL and the failure of Bordeaux to issue one as provided by law. They trace their injury (failure to receive a GWL) to Bordeaux, and there is relief available (mandamus, declaratory judgment, injunction). These allegations make out the prerequisites for standing. GCOI alleges that Montgomery and Moore are members, and that it has other members who have to apply to Bordeaux for GWLs. Bordeaux admits he sometimes does not issue GWLs in the time required by law and that he therefore violates O.C.G.A. § 16-11-129. GCOI's members therefore would have standing in their own right, thus meeting the first prong.

GCOI alleges that its mission is to foster the rights of its members to keep and bear arms, so obtaining GWLs for its members and vindicating the rights of its members to obtain GWLs are clearly germane to GCOI's purpose. Finally, it is not necessary for individual GCOI members to

participate in the case, because no special damages (or any damages) are claimed. GCOI therefore has organizational standing.

If Bordeaux were to claim that GCOI had standing, but lost it because the named individual plaintiffs have received their GWLs, that would perhaps more properly be called mootness, but that possibility will be discussed here regardless of its name.

For the reasons discussed under the Mootness section above, this case is not moot. Even if it is moot as to the named individual Plaintiffs, however, that does not make it moot as to GCOI. GCOI alleged that it has other members in a similar position as Moore and Montgomery. It is not necessary that they be named plaintiffs in order for organizational standing to exist. They all are entitled to seek declaratory and injunctive relief on account of the actual controversy of whether Bordeaux is required to follow the statutory timelines or not.

Bordeaux curiously invokes *GeorgiaCarry.Org, Inc. v. James,* 298 Ga. 420 (2016) for the proposition that, because GCOI conceded that ***that*** case was moot, that concession is binding in the present case. Bordeaux fails to realize that mootness is fact specific and cannot be ported from one case to another. The factual underpinnings of the two cases are very different.[7]

In *James,* plaintiffs mailed in a complaint for filing against the Richmond County probate judge because that judge refused to issue temporary GWLs, contrary to statute. While the complaint was in the mail (i.e., before it was filed by the clerk), the probate judge reversed his position and began issuing temporary GWLs. At that point the trial court probably should have dismissed the case as moot, but instead issued a summary judgment against plaintiffs on the merits. Plaintiffs appealed for, *inter alia,* a vacatur of the wrongly-entered summary judgment. The plaintiffs conceded that the case was moot because there no longer was any relief available – the

[7] Counsel for GCO was counsel for plaintiffs in *James,* so he is intimately familiar with the facts of that case, something that Bordeaux perhaps failed to appreciate.

probate judge changed his position and there was no reason to believe he would revert to his illegal practice. (The Supreme Court did order the vacatur of the summary judgment, saying the case should have been dismissed).

In the present case, Bordeaux admits that he is in violation of the statute. He was in violation when the case was filed and apparently still is. He has never given any indication that he no longer is in violation. The present case is not moot. One judge's change of position and another judge's continued violations simply are not the same, and *James* offers no help, with one exception. Judge James was sued in his official and individual capacities, and no one complained, including the Supreme Court.

Availability of Other Relief

Bordeaux claims that because O.C.G.A. § 16-11-129(j) affords an applicant an opportunity to request a hearing before a probate judge that a hearing ***must*** be requested and had before filing an action in mandamus. Bordeaux would write the private right of action (at least for mandamus) right out of the statute. Bordeaux apparently does not see the irony in the official against whom mandamus is sought having the power to stop a mandamus action in the first place. Nothing in the statute says the probate judge is required to hold a hearing, only that an applicant may request one (it does not say the probate judge can request a hearing). Even if one assumes the implication is that a hearing must be had, there is no deadline by which a hearing must be held. Finally, the subject matter of the hearing, according to the statute, is limited to the "fitness" of the applicant for a GWL. Even if we assume this means all eligibility requirements it does not say anything about the timing of the GWL issuance. That is, the statute does not say that an applicant may request a hearing to ask a judge why he is violating the timelines in the statute.

That leads one to wonder what Bordeaux suggests Plaintiffs were ***supposed*** to do. At the time they filed their Verified Complaint, their applications had not been denied nor approved. All they knew was that Bordeaux had violated the timelines of the statute. Their counsel had been communicating with Bordeaux for over a year, trying to resolve Bordeaux's chronic violations, but that had been unsuccessful. Does Bordeaux really suggest that if only Plaintiffs had requested a hearing, there would be no problem?

In reality, of course, that is exactly what Bordeaux ***wishes*** would happen. If every applicant whose application is more than 35 days old would ask for a hearing, Bordeaux would know which applicants are positioning themselves to sue. He can move their applications to the top of the list, just as he did with Moore and Montgomery, to ensure their cases never can be filed. The law was not passed to require probate judges to act within a certain amount of time and then avoid having to answer for their failure to do so by erecting innumerable barriers to justice.

Verification of Complaint

Bordeaux complains that GCOI did not verify the complaint, but he does not say what he thinks the significance of that fact is. Pretermitting whether verification is even necessary, the Verified Complaint was verified by two people. Bordeaux does not explain why he things every single plaintiff has to verify a complaint individually. Nevertheless, lack of verification is an amendable defect. *Mellon Bank, N.A. v. Coppage,* 243 Ga. 219, 253 S.E.2d 202 (1978). Out of an abundance of caution, Plaintiffs served defense counsel with a copy of the verification of the Executive Director of GCOI on August 6, 2018, and the same is being filed contemporaneously with this Brief.

Deposition of Bordeaux

GCO seeks to take the deposition of Bordeaux, who has filed a motion for a protective order that no deposition be had. His opposition is based on his belief that he has judicial immunity, a theory that has been thoroughly debunked already. In addition, he claims others have knowledge of everything germane to the case. That remains to be seen, but Bordeaux has made himself a witness in this case by signing the verification to his Answer. If he did not want to be a witness, presumably one of those others could have verified his Answer. He testified that he admits he violates the statutory deadlines for issuing GWLs, and he testified that his office is underfunded. He also testified that he sometimes violates the timelines of the statute and sometimes he does not. It would severely hamper GCO's case for GCO not to be able to explore those issues.

GCO also points out that it has deposed several probate judges in similar cases.

Constitutional Rights

It is not clear why he raised the issue, but Bordeaux asserts on p. 4 of his Motion to dismiss, "The right to carry a concealed weapon in public places is NOT a constitutional right…. The right to carry your gun … in other specified areas upon the grant of a permit by a probate judge is strictly a statutory right." Those observations are so blatantly misleading and incorrect they call for response.

First, it should be pointed out the GWL is not a license to carry a ***concealed*** weapon because Georgia does not criminalize carrying a concealed weapon in the first place. It is a crime to carry a weapon without a license, but the manner of carry (i.e., openly or concealed) is irrelevant. And the right to carry a weapon openly in Georgia has been well established for nearly two centuries. *Nunn v. State,* 1 Ga. 243 (1846) (Holding a charge against carrying a weapon in public unconstitutional because it did not charge that the weapon was concealed – implicitly ruling that the right to carry a weapon ***openly*** is constitutionally protected). If it were not for the real

possibility of obtaining a license to carry a weapon, Georgia's prohibition against carrying a weapon would be unconstitutional. And the Supreme Court of Georgia recently affirmed that the right to keep and bear arms is a civil right. *Ferguson*, cited above. It is absolutely wrong for Bordeaux to relegate this important civil right to one of statutory grace.

Statutory Changes

Bordeaux also complains that the legislature has amended O.C.G.A. § 16-11-129 several times in the past decade. Again, the point of this issue is unclear. Bordeaux concludes, "The only constant that is unquestioned is that the judge has jurisdiction to act."[8] Well, no. While the fact that the legislature frequently addresses this statute indicates the high level of importance the legislature attaches to it, a check of the changes reveals that they are mostly subtle issues dealing with eligibility for a GWL, the physical specifications for GWLs, and even the time constraints that are the subject of this case. The fundamental aspects of the licensing process remain unchanged. If Bordeaux is implying that his chronic failure to follow the statute is due to legislative changes with which he is unable to cope, he might consider an alternative vocation.

Mandatory v. Directory

Bordeaux claims that the time constraints he chronically violates are directory and not mandatory, because there is no prescribed penalty. The premise is invalid, however, because there is a prescribed penalty. A probate judge such s Bordeaux who flouts the statute is subject to legal action (such as the present case), and if he loses he is liable to GCO for the costs of litigation, including attorney's fees. This is hardly "no penalty." Furthermore, the matter of whether the timelines are mandatory is settled law. They are.

[8] Motion to Dismiss, p. 8.

In *Moore v. Cranford,* cited above, the Court of Appeals ruled, "Thus the legislature expressly provided that the probate court *shall* issue a license to a qualified applicant within 60 days of the date of the application. *O.C.G.A. § 16-11-129(d)(4).* The use of the term 'shall' means that the probate judge has no discretion to extend the 60-day time period." 285 Ga.App. at 670 [emphasis in original]. The Court went on to say, however, that the time period for issuing licenses is implicitly extended by statute in order to wait for law enforcement background checks to be returned to the probate judge, even if they are late.

As a direct result of *Moore,* the legislature made several changes to the statute. 2008 Act 802 (HB 89). First of all, the statute as described in *Moore* said the probate judge should issue a GWL ***if he found the applicant to be eligible.*** The legislature reversed the logic of the statute, so that now the statute reads that the probate judge should issue a GWL ***unless he finds the applicant to be ineligible.*** *Id.,* §6. That is, the default situation is that a license must be issued. The exception, if the applicant is found to be ineligible, is denial.

The second change made after *Moore* was the express creation of a private right of action – the "penalty" that Bordeaux thinks is necessary. *Id.*

The third change was to shorten the time period for issuing licenses, to include an express time limit for law enforcement to issue the report (under pain of mandamus for failure to do so on time), and to require the probate judge to time stamp the report to prevent finger-pointing between law enforcement and probate judges. *Id.*

Even with those changes, though, the central holding in *Moore* was not disturbed. The time limits contained in the statute are mandatory and the probate judge may not extend them.

Attorney's Fees

Bordeaux has asked this Court to deny an award of attorney's fees to GCO, even though no motion for fees has been filed. Just as it would be premature to file such a motion at this point, it is premature to ask the Court to foreclose such a motion.

Joinder of Parties

Plaintiffs have moved to add as a party plaintiff one Joseph Smith, who alleges he is a member of GCOI, he applied to Bordeaux for a GWL, that he is eligible, and the statutory time expired and he did not receive a GWL. Bordeaux's only objection to Smith adding as a plaintiff is that Bordeaux claims he denied Smith's application, although he does not claim to have done so within the statutory deadlines.

Parties may join an action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any questions of law or fact common to all of them will arise in the action. O.C.G.A. § 9-11-20. Montgomery, Moore, and now Smith all applied to Bordeaux for a GWL in a series of applications. They all allege that Bordeaux routinely exceeds the statutory time to issue GWLs (common question of law and of fact).

If Smith is not permitted to join this action, he will just have to commence his own action, unnecessarily consuming additional judicial resources. The fact that Smith's application was denied is of no consequence. It is happenstance that neither Moore's nor Montgomery's applications were not denied after this action was commenced. They had no way of knowing at the time they commenced this action if Bordeaux would ultimately grant, deny, or take no action on their applications. All Plaintiffs must show they are eligible in order to maintain an action. O.C.G.A. § 16-11-129(j) ("When an ***eligible*** applicant fails to receive a license … within the timer period required by this Code section….") It just so happens that Bordeaux has admitted that Moore

and Montgomery were eligible and apparently would deny that Smith is eligible. That denial of a fact necessary for Smith to prevail should not be a bar to his joining as a plaintiff.

This 9th day of August, 2018

/s/ John R. Monroe

John R. Monroe
John Monroe Law, P.C.
Attorney for Plaintiffs
156 Robert Jones Road
Dawsonville, GA 30534
678-362-7650
jrm@johnmonroelaw.com
State Bar No. 516193

CERTIFICATE OF SERVICE

I certify that on August 10, 2018, I served a copy of the foregoing via U.S. Mail upon:

Jennifer Davenport
Assistant County Attorney
POB 8161
Savannah, GA 31412

_____
John R. Monroe