No. 22-

IN THE

Supreme Court of the United States

COURTNEY DRAKE,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Petitioner, a Georgia motorist who was arrested for driving under the influence of alcohol, refused to submit to a warrantless blood test. Breath testing is readily available in Georgia and effective in prosecuting DUI alcohol cases. There were no exigent circumstances preventing the officer from obtaining a search warrant for Petitioner's blood. The trial court issued an Order permitting Georgia to use Petitioner's refusal to waive her Fourth Amendment rights at trial as evidence of guilt pursuant to Georgia statute.

I. Pursuant to the Fourth Amendment and Due Process, is it reasonable and therefore constitutional to permit the government to arbitrarily demand an intrusive, warrantless blood test as a motorist's only option for complying with implied consent laws to avoid civil and criminal evidentiary penalties (i.e., license suspension and evidence of guilt at trial) when breath tests, the less intrusive alternative, are readily available and effective at prosecuting DUI cases?

II. If the government is permitted to arbitrarily demand the intrusive, warrantless blood test under implied consent laws, despite this search's protections under the Fourth Amendment, may the government use motorist's exercise of their Fourth Amendment rights to be free from the intrusive blood test at trial as positive evidence of guilt based on a statutory presumption to prove the motorist is guilty of a criminal offense (DUI alcohol)?

III. Whether Georgia's Implied Consent Scheme is unconstitutional on its face and as applied to Petitioner where the officer designated a warrantless blood test as Petitioner's only option for complying with state-administered testing without a warrant or exigent circumstances; where Petitioner refused the warrantless blood test; and where statutes permit the government to use Petitioner's refusal at trial as positive evidence of guilt?

IV. As a matter of first impression, may the government use a defendant's exercise of Fourth Amendment rights as evidence of guilt at trial?

RELATED CASES

State of Georgia v. Courtney Drake, No. 19-T-8083, State Court of Cobb County. Judgments entered March 11, 2020, and October 20, 2021.

Courtney Drake v. State of Georgia, No. S22I0320, Supreme Court of Georgia. Judgment entered December 9, 2021.

Courtney Drake v. State of Georgia, No. A22I0113, Georgia Court of Appeals. Judgment entered February 7, 2022.

Courtney Drake v. State of Georgia, No. S22C0724, Supreme Court of Georgia. Judgment entered November 17, 2022.

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MISCELLANEOUS

PETITION FOR A WRIT OF CERTIORARI

Petitioner Courtney Drake respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Georgia.

OPINIONS BELOW

The Orders of the Supreme Court of Georgia denying Petitioner's Application for Interlocutory Appeal are reported under case no. S22I0320 (Ga. 2021). Pet. App. 5a-6a. The Order of the Georgia Court of Appeals denying Petitioner's Application for Interlocutory Appeal is reported under case no. A22I0113 (Ga. Ct. App. 2022). Pet. App. 3a-4a.

The Order of the Supreme Court of Georgia denying the Petition for Writ of Certiorari is reported under case no. S22C0724 (Ga. 2022). Pet. App. 1a-2a. The Orders of the State Court of Cobb County (19-T-8083) are unreported. Pet. App. 7a-19a.

JURISDICTION

The judgment of the Supreme Court of Georgia was entered on November 17, 2022. Pet. App. 1a-2a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourteenth Amendment provides, in relevant part:

> **Section 1.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Georgia's former implied consent warnings were codified under O.C.G.A. § 40-5-67.1(b)(2), which provided, in relevant part:

> "Georgia law requires you to submit to state administered chemical tests of your blood,

> breath, urine, or other bodily substances for the purpose of determining if you are under the influence of alcohol or drugs. If you refuse this testing, your Georgia driver's license or privilege to drive on the highways of this state will be suspended for a minimum period of one year. Your refusal to submit to the required testing may be offered into evidence against you at trial. … Will you submit to the state administered chemical tests of your (designate which tests) under the implied consent law?"

The current version of O.C.G.A. § 40-5-67.1(b)(2) (effective April 28, 2019), provides, in relevant part:

> "The State of Georgia has conditioned your privilege to drive upon the highways of this state upon your submission to state administered chemical tests of your blood, breath, urine, or other bodily substances for the purpose of determining if you are under the influence of alcohol or drugs. If you refuse this testing, your Georgia driver's license or privilege to drive on the highways of this state will be suspended for a minimum period of one year. Your refusal to submit to blood or urine testing may be offered into evidence against you at trial. … Will you submit to the state administered chemical tests of your (designate which test)?"

O.C.G.A. § 40-6-392(d) provides:

> In any criminal trial, the refusal of the defendant to permit a chemical analysis to be

> made of his blood, breath, urine, or other bodily substance at the time of his arrest shall be admissible in evidence against him.

INTRODUCTION

The instant case involves novel issues of unresolved federal constitutional law. It comes before this Court to determine whether it is reasonable for the government to arbitrarily demand a warrantless blood test as a motorist's only option for complying with implied consent laws for a DUI alcohol arrest where a breath test is readily available and effective, and whether the government may use a motorist's exercise of their Fourth Amendment rights to be free from the intrusive, warrantless blood test as evidence of guilt at trial. The public at large has a compelling need for this Court's guidance on these issues.

Petitioner's case includes matters of great importance to the public due to the constitutional implications and the widespread abuse of the Fourth Amendment by officers in Georgia and other states unreasonably demanding warrantless blood tests in many DUI alcohol cases.[1] The

1. In 2021, the Georgia Governor's Office of Highway Safety granted law enforcement funds for training officers in phlebotomy for DUIs. According to Allen Poole, director of the Office of Highway Safety, "A blood test is often the key piece of evidence needed to convict a DUI driver in court, but the barriers law enforcement officers are facing in getting blood drawn during a DUI investigation are resulting in too many of these cases going to trial without any toxicology evidence[.]" Associated Press, *Georgia officers to learn to draw blood for DUI cases,* (Aug. 22, 2021) https://apnews.com/article/business-georgia-11341660f8da417bf9a4db5767f532f3.

warrantless blood test demands are egregious in Georgia because prosecutors are statutorily authorized to use a motorist's refusal to submit to the intrusive blood test as evidence of guilt at trial.

The trial court's October 20, 2021, Order (Pet. App. 7a-12a) interpreted the constitutional framework set forth in *Birchfield v. North Dakota*, 579 U.S. 428 (2016) as an approval of arbitrary warrantless blood demands under implied consent laws. The court found that *Birchfield* permits civil and criminal evidentiary penalties for motorists who refuse warrantless blood demands, even if the government failed to show that there were exigent circumstances or that a breath test was insufficient.

The constitutionally offensive ruling in the court's Order held that pursuant to O.C.G.A. § 40-6-392(d), the refusal to submit to blood tests "may be considered as positive evidence inferring the test would show the presence of the prohibited substance[,]" citing *Birchfield* and *Mackey v. Georgia*, 507 S.E.2d 482 (Ga. Ct. App. 1998)). Pet. App. 9a-10a. The court found that pursuant to *Birchfield,* "[t]he State was not required to show any exigent circumstances for the blood draw request, because the request was based on the Georgia Implied Consent law, not exigency." *Id.* at 10a.

The Georgia appellate courts' denial of Petitioner's appeals and other appeals raised by Counsel for Petitioner endorsed the trial court's findings.[2] If the court's Order is

2. *See Waters v. Georgia*, S19C0968 (Ga. 2019), cert. denied *Waters v. Georgia*, 140 S. Ct. 2642 (2020); and *Hogan v. Georgia*, S21I0301 (Ga. 2020).

not reversed, Petitioner's constitutional rights under the Fourth and Fourteenth Amendments will be eviscerated.

Georgia's implied consent scheme ("IC Scheme") is unconstitutional on its face because it allows officers to arbitrarily demand a warrantless blood test as a motorist's only option for complying with implied consent laws to avoid civil and criminal evidentiary penalties, and it punishes motorists who exercise their Fourth Amendment rights to be free from the intrusive test.

Georgia's IC Scheme is unconstitutional as applied because Petitioner was threatened with an unreasonable, warrantless blood test as her only option for complying with the implied consent warning. Georgia statutes authorize Petitioner's refusal to submit to the warrantless blood test to be used against her at trial and a license suspension of at least one year. There were no exigent circumstances to justify a warrantless blood search. Georgia did not and cannot argue a breath test was insufficient to satisfy its interests in prosecuting Petitioner for DUI alcohol.

It is unconstitutional for the government to use an individual's exercise of constitutional rights as evidence against the motorist at trial. It is unconstitutional for the government to condition and suspend a driver's license based on the exercise of a constitutional right. The exercise of these cherished rights was made in response to an unreasonable demand for a warrantless blood test in a DUI alcohol investigation with no exigent circumstances or an inability to obtain a warrant. Petitioner could have provided a breath sample but was never given the opportunity. Breath testing was available and is effective at prosecuting DUIs.

In *Underwood v. Georgia*, 78 S.E. 1103, 1106 (Ga. Ct. App. 1913), the Georgia Court of Appeals eloquently described the importance of the Fourth and Fifth Amendments, and why a warrant is necessary when the government seeks to invade the sanctity of bodily integrity.

> They are the sacred civil jewels which have come down to us from an English ancestry, forced from the unwilling hand of tyranny by the apostles of personal liberty and personal security. They are hallowed by the blood of a thousand struggles, and were stored away for safe–keeping in the casket of the Constitution. It is infidelity to forget them; it is sacrilege to disregard them; it is despotic to trample upon them. They are given as a sacred trust into the keeping of the courts, who should with sleepless vigilance guard these priceless gifts of a free government. . . . This court knows and fully appreciates the delicate and difficult task of those who are charged with the duty of detecting crime and apprehending criminals, and it will uphold them in the most vigilant, legal discharge of their duties; but it utterly repudiates the doctrine that these important duties cannot be successfully performed without the use of illegal and despotic measures. It is not true that in the effort to detect crime and to punish the criminal "the end justifies the means." This is especially not true when the means adopted are violative of the very essence of constitutional free government. Neither the liberty of the citizen nor the sanctity of his home should be invaded without legal warrant.

STATEMENT

1. Factual Background

On April 29, 2019, Petitioner was involved in a traffic accident. Officer Lovelady of the Cobb County Police Department responded to the accident. Pet. App. 14a.

There were no major injuries in the accident. Petitioner was not injured and did not require medical treatment. Petitioner was conscious throughout the entirety of her interactions with Officer Lovelady. Officer Lovelady initiated a DUI investigation after observing Petitioner exhibit signs of alcohol consumption. Petitioner was arrested for DUI alcohol. *Id.*

Following her arrest, Petitioner was read Georgia's implied consent warning ("ICW"). As permitted by statute, Officer Lovelady arbitrarily designated the warrantless blood test as Petitioner's only option for complying with the ICW. *Id.* Without the benefit of *Miranda* and the advice of counsel, Petitioner initially consented to the blood test but later refused. Petitioner was not given an option to submit to a state-administered breath test. It is common practice for officers in Georgia to choose the warrantless blood test as a motorist's only option to avoid civil and criminal sanctions pursuant to implied consent laws.

Georgia's legislature enacted a new ICW that went into effect the day before Petitioner's arrest (April 28, 2019). However, Officer Lovelady read Petitioner the former ICW. For the purposes of this petition (and as the trial court found), the substance of the ICW as it relates to warrantless blood demands, and the admissibility of a blood refusal, remains the same for both ICWs. *Id*. at 11a.

After arriving at the hospital for the blood draw, Petitioner revoked her consent. Petitioner asked Officer Lovelady about the warrantless blood test and the license suspension if she refused. Officer Lovelady responded to Petitioner's questions and advised Petitioner: "if you are going to say no now and not do the blood kit, what happens is, *I go get a search warrant for your blood with the Judge*." *Id.* at 15a (emphasis added).

Officer Lovelady had the means and opportunity to obtain a breath test or a warrant *prior* to demanding Petitioner's submission to the blood test. However, Officer Lovelady did neither. Officer Lovelady only mentioned a warrant for Petitioner's blood *after* Petitioner revoked her consent.

Petitioner then requested to speak to her attorney. Her request was denied. *Id.* It is undisputed that Officer Lovelady never obtained a warrant for Petitioner's blood. Georgia is statutorily authorized to use Petitioner's exercise of her Fourth Amendment rights to be free from the intrusive, warrantless blood test against her as evidence of guilt at trial.

2. Procedural Background

Petitioner was charged in the State Court of Cobb County, Georgia with misdemeanor DUI alcohol and other traffic offenses. She timely moved to suppress evidence of her refusal to submit to the warrantless blood test, arguing that the Fourth Amendment guaranteed her the right to refuse the warrantless blood test and that her refusal could not be used against her at trial. Petitioner also moved the court to find that Georgia's IC

Scheme is unconstitutional, on its face and as applied, because it allows officers (including Officer Lovelady) to arbitrarily demand a warrantless blood test absent exigent circumstances or a warrant, and because it allows a license suspension and a refusal to submit to the warrantless blood test to be admissible at trial.

The trial court heard oral arguments on Petitioner's motions. On March 11, 2020, the court issued its first Order denying the motions. Pet. App. 13a-19a. This Order did not rule on several of the constitutional issues raised by Petitioner, including the unconstitutionality of Georgia's implied consent laws (on their face and as applied), the unlawful demand of a warrantless blood test absent exigent circumstances or a warrant, and the unconstitutionality of allowing Georgia to use Petitioner's refusal as evidence at trial.

The court held another hearing on Petitioner's motions. On October 20, 2021, the court issued a second Order denying Petitioner's motions.[3] Pet. App. 7a-12a.

The court's Order made the following findings: (1) federal law does not support the argument that Petitioner had the constitutional right to refuse a warrantless blood test without her refusal being used against her at trial, *Id.* at 9a; (2) *Birchfield* found that requesting warrantless blood tests under implied consent laws which provide civil and evidentiary penalties are permissible and constitutional, *Id.*; (3) *Birchfield* states blood cannot be taken as a search incident to arrest but a warrant or

3. Note: The October 20, 2021, Order adopted portions of the first Order that were not in conflict, including the findings of fact.

consent are permissible, *Id.*; (4) *Birchfield* held similarly to a Georgia case (*Mackey, supra*) in finding that **a refusal to submit to the warrantless blood test "may be considered as positive evidence inferring the test would show the presence of the prohibited substance[]"** (emphasis added), *Id.* at 9a-10a; (5) Georgia's IC Scheme does not violate the Fourth Amendment, *Id.* at 10a; (6) "[Petitioner's] refusal to submit to the blood test may be admitted at trial[]", *Id.*; (7) *Birchfield* did not hold that a warrant or exigent circumstances were necessary for Georgia to overcome the Fourth Amendment's warrant requirement, *Id.*; (8) **"[t]he State was not required to show any exigent circumstances for the blood draw request, because the request was based on the Georgia Implied Consent law, not exigency[]"** (emphasis added), *Id.*; and (9) Georgia's IC Scheme (including the former and latter versions of O.C.G.A. §40-5-67.1) is not unconstitutional as applied to Petitioner, *Id.* at 11a.

The trial court's Order effectively declared that an unreasonable demand in North Dakota for blood testing was a reasonable demand in Georgia simply because Georgia does not charge the motorist with a separate criminal offense for refusing the blood test.

The court issued a Certificate of Immediate Review. Petitioner filed a timely Application for Interlocutory Appeal in the Supreme Court of Georgia (S22I0320). On December 9, 2021, the Supreme Court of Georgia issued an Order transferring Petitioner's case to the Georgia Court of Appeals. Pet. App. 5a-6a. The Order cited various Georgia cases that ruled on the admissibility of breath tests and self-incriminating evidence related to breath test refusals under the Georgia Constitution. *Id.* None of

the cases cited in this Order addressed a challenge to the constitutionality of Georgia's implied consent laws based upon an officer's arbitrary demand for a warrantless blood test as the only option for complying with implied consent laws or a challenge to the constitutionality of admitting a defendant's exercise of their Fourth Amendment rights to be free from an intrusive, warrantless blood test at trial.

Petitioner filed a timely Motion to Reconsider in the Supreme Court of Georgia. It was denied on January 6, 2022. Petitioner's case was transferred to the Georgia Court of Appeals. Petitioner filed a timely Application for Interlocutory Appeal in the Court of Appeals identical to the November 8, 2021, Application filed in the Supreme Court of Georgia. The Court of Appeals denied the Application on February 7, 2022. *Id.* at 3a-4a.

On February 28, 2022, Petitioner filed a timely Petition for Certiorari in the Supreme Court of Georgia (S22C0724), raising the same issues. On November 17, 2022, the Supreme Court of Georgia issued an Order denying the petition. *Id.* at 1a-2a. The Supreme Court of Georgia's denial of this writ conflicts with the Supreme Court of Kentucky's decision in *Kentucky v. McCarthy*, 628 S.W.3d 18 (Ky. 2021), cert. denied *sub nom* by this Court in *Kentucky v. McCarthy*, 142 S. Ct. 1126 (2022).

Ms. Drake petitions this Court for a writ of certiorari to the Supreme Court of Georgia for its erroneous Order denying her Petition for a Writ of Certiorari.

REASONS FOR GRANTING THE PETITION

This Court should grant the petition for a writ of certiorari because Georgia's IC Scheme is incompatible with established constitutional principles. Georgia's IC Scheme, codified in relevant part under O.C.G.A. §§ 40-5-67.1 and 40-6-392, allows officers to arbitrarily demand warrantless blood tests as the only option to comply with implied consent laws to avoid civil and criminal evidentiary penalties when breath tests are readily available and effective.

After this Court's decision and sound reasoning in *Birchfield*, state courts have issued conflicting opinions on the important constitutional issue of Fourth Amendment protections for warrantless blood tests and refusals to submit to the intrusive tests.[4] Many states have also modified DUI statutes so that an officer cannot demand a blood test pursuant to the implied consent laws. This petition now presents this Court with an opportunity to rectify the inconsistencies with constitutional mandates and implied consent laws in Georgia and many other states following *Birchfield*. Law enforcement officers will continue to violate the Fourth Amendment by demanding intrusive blood tests until this Court addresses this compelling issue.

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4. *See McCarthy*, *supra*; *Oregon v. Banks,* 434 P.3d 361 (Or.2019); *Idaho v. Jeske*, 436 P.3d 683 (Idaho 2019); *New Mexico v. Vargas*, 404 P.3d 416 (N.M. 2017); *Cf. Pennsylvania v. Bell*, 211 A.3d 761 (Pa. 2019); *Vermont v. Rajda*, 196 A.3d 1108 (Vt. 2018); *Nebraska v. Hood*, 917 N.W.2d 880 (Neb. 2018); *Fitzgerald v. Colorado*, 394 P.3d 671 (Colo. 2017).

States are prohibited from placing impermissible burdens on the exercise of a constitutional right. *United States v. Jackson*, 390 U.S. 570, 572 (1968). Moreover, the State "may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence." *Frost v. R.R. Comm'n of State of Cal.*, 271 U.S. 583, 594 (1926).

Georgia and many other states have impermissibly burdened constitutional rights and the exercise of such rights by enacting implied consent laws that give officers unbridled discretion to demand a warrantless blood test as a motorist's only option for testing to avoid civil and criminal evidentiary penalties. Motorists who exercise their constitutional rights by refusing the intrusive blood test are punished with a license suspension and their refusal being used as evidence of guilt at trial. This occurs despite the admissibility, availability, and accuracy of breath tests for determining a motorist's blood alcohol content. Exigency can obviate the need for a warrant, however, there is no evidence that exigency existed in this case.

I. Georgia's Implied Consent Laws Are in Conflict With the Fourth Amendment.

A. Arbitrary demands for warrantless blood tests are categorically unreasonable.

The Fourth Amendment provides, in relevant part, "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated[.]" "[R]easonableness is always the touchstone of Fourth Amendment analysis." *Birchfield*, 579 U.S. at 477.

"It is well settled under the Fourth and Fourteenth Amendments that a search conducted without a warrant issued upon probable cause is 'per se unreasonable . . . subject only to a few specifically established and well-delineated exceptions.'" *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973).

This Court held in *Missouri v. McNeely*, 569 U.S. 141 (2013) that there are no *per se* exceptions to the warrant requirement in DUI alcohol cases. "[T]he natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant." *Id.* at 165. Exigency exists when "'there is compelling need for official action and no time to secure a warrant.'" *Id.* at 149 (citation omitted).

"In those drunk-driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, ***the Fourth Amendment mandates that they do so***." *Id.* at 152 (emphasis added).

Blood tests for DUI investigations involve a physical intrusion beneath a person's skin and into their veins to obtain a sample of blood that will be used as evidence in a criminal case. *Id.* at 148. "Such an invasion of bodily integrity implicates an individual's 'most personal and deep-rooted expectations of privacy.'" *Id.* (Citations omitted).

As noted by this Court in *Birchfield,* the privacy implications of blood tests go beyond the physical intrusion of the skin.

> [A] blood test, unlike a breath test, places in the hands of law enforcement authorities a sample that can be preserved and from which it is possible to extract information beyond a simple BAC reading. Even if the law enforcement agency is precluded from testing the blood for any purpose other than to measure BAC, the potential remains and may result in anxiety for the person tested.
>
> *Birchfield*, 579 U.S. at 464.

Because breath tests "in most cases amply serve law enforcement interests," the reasonableness of a blood test "must be judged in light of the availability of the less invasive alternative of a breath test." *Id.* at 474, 476. "Nothing prevents the police from seeking a warrant for a blood test when there is sufficient time to do so in the particular circumstances or from relying on the exigent circumstances exception to the warrant requirement when there is not. See *McNeely*, 569 U.S., at 165." *Id*. at 474–75.

The Fourth Amendment's protections against warrantless blood tests were reiterated in *Mitchell v. Wisconsin,* 139 S. Ct. 2525 (2019). "[I]f an officer has probable cause to arrest a motorist for drunk driving, the officer may conduct a breath test (*but not a blood test*) under the rule allowing warrantless searches of a person incident to arrest." *Id.* at 2531 (emphasis added).

"[T]he government's general interest in combating drunk driving does not justify departing from the warrant requirement without showing exigent circumstances that make securing a warrant impractical in a particular case." *McNeely,* 569 U.S. at 143. "[T]he fact that people are 'accorded less privacy in ... automobiles because of th[e] compelling governmental need for regulation,' does not diminish a motorist's privacy interest in preventing an agent of the government from piercing his skin." *Id.* at 159 (citation omitted).

Birchfield, McNeely and *Mitchell* thus recognized the significant privacy implications and the intrusiveness of warrantless blood draws, appearing to limit the demand for such tests to circumstances where an officer either (a) has exigent circumstances or (b) obtains a warrant.

To date, Georgia has "offered no satisfactory justification for [allowing officers to] demand[] the more intrusive alternative without a warrant." *Birchfield*, 579 U.S. at 474. Nor has Georgia presented any indication for why breath tests fail to satisfy "the State's interests in acquiring evidence to enforce its drunk-driving laws[.]" *Id.* at 478.

B. Georgia's implied consent laws cannot substitute actual consent.

The implied consent laws in Georgia (and many other states) which grant officers unbridled discretion to demand warrantless blood tests rely on the notion that consent to a blood test remains a valid exception to the Fourth Amendment's warrant requirement.

"When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given. This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority." *Bumper v. North Carolina*, 391 U.S. 543, 548–49 (1968) (footnote omitted). "When a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search." *Id.* at 550.

The same can be said for those instances where an officer demands a blood test as the motorist's only option for complying with implied consent laws. The officer suggests that submission to the blood test is required and that the driver has consented by virtue of driving on the roadways. "The situation is instinct with coercion—albeit colorably lawful coercion. *Where there is coercion there cannot be consent*." *Id.* at 550 (emphasis added).

After a motorist in Georgia has been arrested for DUI, they are read the ICW. The ICW for persons over the age of 21 (O.C.G.A. § 40-5-67.1(b)(2)) advises the motorist, in relevant part, that: (1) Georgia has conditioned their privilege to drive upon their submission to a blood test;

(2) if they refuse testing, their privilege to drive will be suspended for at least one year; (3) they must submit to the designated state-administered test before choosing their own test; and (4) their refusal to submit to a blood test can be used against them at trial.

The ICW then directs *the officer* to choose which test the officer designates the arrestee must take. Motorists are not given any measure of choice in the decision. If the motorist refuses the test chosen by the officer or even asks for a different test, it is considered a refusal and the motorist does not have the right to an independent test.

In *Birchfield*, this Court remanded Petitioner Beylund's case to reevaluate his consent to the warrantless blood test. The voluntariness of Beylund's consent had to be considered with the knowledge that the officer inaccurately advised Beylund that a blood test could be compelled. *Birchfield*, 579 U.S. at 478.

Implied consent laws do not "do what their popular name might seem to suggest—that is, create actual consent to all the searches they authorize." *Mitchell*, 139 S. Ct. at 2533. Consent cannot be given voluntarily when a motorist is inaccurately advised that the government can obtain a sample of their blood without a warrant. That is especially so when the motorist is also advised that exercising their Fourth Amendment rights by refusing the warrantless blood test will result in a license suspension and can be used against them at trial.

Garrity v. New Jersey, 385 U.S. 493 (1967) addressed a form of coercion inherent in Georgia's IC Scheme. Georgia's ICW is "likely to exert such pressure upon

an individual as to disable him from making a free and rational choice.'" *Id.* at 497.

> 'Were it otherwise, as conduct under duress involves a choice, it always would be possible for a State to impose an unconstitutional burden by the threat of penalties worse than it in case of a failure to accept it, and then to declare the acceptance voluntary.
>
> *Where the choice is 'between the rock and the whirlpool,' duress is inherent in deciding to 'waive' one or the other.*
>
> 'It always is for the interest of a party under duress to choose the lesser of two evils. But the fact that a choice was made according to interest does not exclude duress. It is the characteristic of duress properly so called.' Ibid.
>
> *Id.* at 498 (citations and punctuation omitted) (emphasis added).

Georgia is unlike the many states referenced in *Birchfield* "that specifically prescribe that breath tests be administered in the usual drunk-driving case instead of blood tests or give motorists a measure of choice over which test to take." *Birchfield*, 579 U.S. at 464.

There is no designation for Georgia's officers to prescribe breath tests in the typical DUI alcohol case. The only "measure of choice" given to a motorist is *after* they have first submitted to the test chosen by the officer, which is oftentimes the intrusive, warrantless blood test. Even

if a motorist consents to the state test, officers can refuse to honor a motorist's request for independent testing so long as it is "justifiable." *Georgia v. Henry*, 864 S.E.2d 415, 420 (Ga. 2021). According to *Henry*, it is justifiable if the motorist does not make a clear request for independent testing. *Id*. *See also Sigerfoos v. Georgia*, 829 S.E.2d 666 (Ga. Ct. App. 2019) (overruled by *Henry*, *supra* regarding the "reasonably could" standard).

Consent to a warrantless blood demand under Georgia's IC Scheme cannot be given freely and voluntarily under the totality of the circumstances due to (a) the inaccurate statements of law given by officers and (b) the inherent coercion of threatening the motorist with civil and criminal evidentiary penalties for exercising their constitutional rights to be free from the intrusive test.

C. Breath tests are readily available in Georgia but are rarely used by officers for DUI alcohol arrests.

"The most common and economical method of calculating BAC is by means of a machine that measures the amount of alcohol in a person's breath." *Birchfield*, 579 U.S. at 445. Breath tests are an approved method for alcohol analysis in Georgia. Georgia has even acknowledged the accuracy, reliability, and wide use of breath tests for DUI alcohol arrests. *See* Georgia Bureau of Investigation Division of Forensic Sciences, *Intoxilyzer 9000 Georgia Operator's Training Manual*, at *44 (2022).

Despite breath tests being readily available and an approved method of chemical testing for DUI arrests, officers in Georgia regularly demand warrantless blood

tests as the motorist's only option to comply with implied consent laws.

If the officer wants to force the DUI suspect to submit to a blood test, the officers can apply for a warrant before an independent judiciary. O.C.G.A. § 17-5-21.1 grants law enforcement and judges the ability to conduct search warrant application hearings through video conferences. This makes the process of obtaining a warrant for a blood test much faster and easier.

"[T]he Constitution requires 'that the deliberate, impartial judgment of a judicial officer be interposed between the citizen and the police[.]' . . . [B]ypassing a neutral predetermination of the scope of a search leaves individuals secure from Fourth Amendment violations 'only in the discretion of the police.'" *Katz v. United States*, 389 U.S. 347, 358–59 (1967) (citations and punctuation omitted).

> Search warrants protect privacy in two main ways. First, they ensure that a search is not carried out unless a neutral magistrate makes an independent determination that there is probable cause to believe that evidence will be found.
>
> Second, if the magistrate finds probable cause, the warrant limits the intrusion on privacy by specifying the scope of the search—that is, the area that can be searched and the items that can be sought.
>
> *Birchfield*, 579 U.S. at 469 (citation omitted)

In most cases, police in Georgia only turn to the independent judgment of a magistrate if a motorist refuses the designated state test. Georgia is different than the many states that "place significant restrictions on when police officers may obtain a blood sample despite a suspect's refusal … or prohibit nonconsensual blood tests altogether." *McNeely*, 569 U.S. at 161.[5]

D. Georgia's IC Scheme impermissibly burdens constitutional rights.

This Court was recently tasked with deciding "whether motorists lawfully arrested for drunk driving may be convicted of a crime *or otherwise penalized* for refusing to take a warrantless test measuring the alcohol in their bloodstream." *Birchfield*, 579 U.S. at 454 (emphasis added).

---

5. In 2015, a Wellstar Hospital policy became a barrier between law enforcement and non-consensual blood tests. The hospital refused to draw a DUI suspect's blood without their consent. Barry Morgan, then Solicitor General of Cobb County, told a local news station that he believed the hospital's policy was because officers were getting more search warrants for non-consenting DUI suspects. Atlanta Journal Constitution, *Hospital policy says DUI suspects must consent before blood test* (Sept. 1, 2015), https://www.ajc.com/news/local/hospital-policy-says-dui-suspects-must-consent-before-blood-test/QUXo5bFz0QgoIqxzCMkq7J/.

Law enforcement agencies in Georgia began relying on private companies to conduct blood draws. Ten-Eight Forensics, for example, is often used. Ten-Eight Forensic Services, Inc. (last accessed Feb. 8, 2023) https://teneightforensic.com/?fbclid=IwAR3DbnZujDwhlrBKmlUNSaJt13KrsLUzg3igEotWMFrHNCnFfAS-Bi3ysVA.

While *Birchfield*'s holding made it clear that a driver cannot be subjected to a criminal conviction for refusing a warrantless blood test, the question of whether a driver can be "otherwise penalized" for refusing a blood test remains unanswered according to Georgia's appellate courts. After *Birchfield*, many states have come to varying conclusions regarding the penalties, if any, for refusing a warrantless blood test.

This Court has generally approved of "implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply." *Birchfield*, 579 U.S. at 476-77. However, *Birchfield* found that these penalties differ when the "State not only [ ] insist[s] upon an intrusive blood test, but also [ ] impose[s] criminal penalties on the refusal to submit to such a test. *There must be a limit to the consequences to which motorists may be deemed to have consented by virtue of a decision to drive on public roads*." *Id.* at 477 (emphasis added).

The civil and evidentiary penalties referenced in *Birchfield* and *McNeely* are based on the holding in *South Dakota v. Neville*, 459 U.S. 553 (1983). *Neville* found that it was permissible to coerce motorists into submitting to state tests through the implied consent laws because at that time, the motorist did not have a constitutional right to refuse.

The Supreme Court of Kentucky discussed the application of *Birchfield* in *McCarthy, supra*:

> [In *Neville*,] the Court referred to "simple blood-alcohol test[s]" as "safe, painless and

> commonplace," a premise undermined as to blood tests after *Birchfield*, which found the intrusive tests unreasonable and held a warrant is required absent exigent circumstances, a recognized exception to the warrant requirement.
>
> *McCarthy*, 628 S.W.3d at 34 (citation omitted).

The landscape of DUI laws has changed drastically since *Neville* was decided due, in part, to the availability of accurate breath testing and statutes that authorize warrants to be obtained more expediently. *Birchfield* and *McNeely* held that motorists *do* have a constitutional right to refuse an intrusive, warrantless blood test. Thus, *Neville*'s reasoning for permitting a refusal to submit to a blood test to be admissible at trial is no longer applicable.

The civil and evidentiary penalties in Georgia's IC Scheme surpass the limits allowed by the Fourth and Fourteenth Amendments. Those who refuse the warrantless blood test face criminal evidentiary penalties by having the exercise of their constitutional right to refuse the test being used against them at a criminal trial to prove guilt, a mandatory license suspension for at least one year, and losing the right to take an independent test.

A motorist who consents to a warrantless blood test has been inherently coerced by the threat of a license suspension, their refusal being used at trial, and Georgia's "erroneous assumption that the State could permissibly compel [ ] blood [ ] tests." *Birchfield*, 579 U.S. at 478.

The sound reasoning of this Court in *Birchfield* should be extended to states like Georgia that do not make the refusal a separate crime. All other factors discussed in *Birchfield* with blood and breath testing are exactly the same in Georgia and North Dakota. Our courts and government are relying solely on this one distinguishing factor to justify their arguments and reasoning denying Petitioner's challenges. License suspensions for many drivers is far worse than a criminal charge.

Georgia's IC Scheme impermissibly burdens and places unlawful conditions upon the exercise of constitutional rights.

> In reality, the [motorist] is given no choice, except a choice between the rock and the whirlpool-an option to forego a privilege which may be vital to his livelihood or submit to a requirement which may constitute an intolerable burden.
>
> It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold. It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the

> state in that respect is not unlimited, and **one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights**.
>
> *Frost*, 271 U.S. at 593–94 (emphasis added).

In *Mapp v. Ohio,* 367 U.S. 643 (1961), this Court held that the Fourth Amendment's exclusionary rule applied to the states under the Fourteenth Amendment, overruling *Wolf v. Colorado,* 338 U.S. 25 (1949). *Mapp* addressed the intertwined nature of the Fourth and Fifth Amendments "as running 'almost into each other.'" *Mapp*, 367 U.S. at 646–47 (citing *Boyd v. United States*, 116 U.S. 616, 630 (1886)).

Although *Wolf* and several other cases were overruled by *Mapp*'s application of the exclusionary rule to the states, the cases cited in *Mapp* (dating back to the late 1800s) all addressed the fundamental nature of these deeply cherished rights. *Mapp* acknowledged dicta in *Wolf* which stated: "'(W)e have no hesitation in saying that *were a State affirmatively to sanction such police incursion into privacy it would run counter to the guaranty of the Fourteenth Amendment*.'" *Id.* at 650 (emphasis added).

Georgia's IC Scheme *has* affirmatively sanctioned police intrusion into a motorist's privacy, in violation of the Fourth and Fourteenth Amendments, by permitting officers to arbitrarily demand warrantless blood draws from motorists (absent exigent circumstances or a warrant) and allowing the government to use the motorist's exercise of their Fourth Amendment rights as evidence of guilt at trial.

Mapp acknowledged that *Wolf*'s application of the Fourth Amendment to the states "could not consistently tolerate denial of its most important constitutional privilege, namely, the exclusion of the evidence which an accused had been forced to give by reason of the unlawful seizure. *To hold otherwise is to grant the right but in reality to w[i]thhold its privilege and enjoyment.*" *Id.* at 656 (emphasis added).

> We find that, as to the Federal Government, the Fourth and Fifth Amendments and, as to the States, the freedom from unconscionable invasions of privacy and the freedom from convictions based upon coerced confessions do enjoy an 'intimate relation' in their perpetuation of 'principles of humanity and civil liberty (secured) only after years of struggle.' They express 'supplementing phases of the same constitutional purpose—to maintain inviolate large areas of personal privacy.' **The philosophy of each Amendment and of each freedom is complementary to, although not dependent upon, that of the other in its sphere of influence—the very least that together they assure in either sphere is that no man is to be convicted on unconstitutional evidence**.
>
> *Id.* at 656–57 (emphasis added) (footnotes, punctuation and citations omitted).

In *Griffin v. California*, 380 U.S. 609 (1965), this Court addressed a similar issue regarding the exercise of Fifth Amendment rights. *Griffin* found that

> comment on the refusal to testify is a remnant of the 'inquisitorial system of criminal justice,' which the Fifth Amendment outlaws. *It is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly.* … [T]he Fifth Amendment, in its direct application to the Federal Government and in its bearing on the States by reason of the Fourteenth Amendment, forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt.
>
> *Id.* at 614 (emphasis added) (citation and footnote omitted).

The "penalty imposed by courts for exercising a constitutional privilege" addressed in *Griffin* is analogous to the penalties incurred when a motorist in Georgia exercises their constitutional privilege to be free from an intrusive, warrantless search of their blood. *Id.* Georgia's IC Scheme "cuts down on the [Fourth Amendment] privilege by making its assertion costly." *Id.*

Similarly, *Garrity, supra* involved officers who were investigated for allegedly fixing traffic tickets. The officers were told that anything they said during the investigation might be used against them in a criminal proceeding; they had the privilege to refuse questioning if their answers would be self-incriminating; but if they refused to answer, they would be removed from office. *Garrity,* 385 U.S. at 495.

The officers' statements were used against them at trial. They were convicted, despite their objections that "their statements were coerced, by reason of the fact that, if they refused to answer, they could lose their positions with the police department." *Id.* This Court agreed and held that protections under the Fourteenth Amendment prohibited coerced statements from being used in a subsequent criminal proceeding where the person was threatened with removal from office.

> 'The privilege against self-incrimination *would be reduced to a hollow mockery if its exercise could be taken as equivalent either to a confession of guilt* or a conclusive presumption of perjury. The privilege serves to protect the innocent who otherwise might be ensnared by ambiguous circumstances.'
>
> *Id.* at 499–500 (emphasis added) (citation and punctuation omitted).

Georgia and many other states have reduced the privilege to be free from an intrusive, warrantless blood test "to a hollow mockery" by allowing a refusal to submit to the unreasonable blood demand as evidence at trial. Such use is violative of the very principles our fundamental constitutional guarantees were founded upon.

"[T]he [Fourth] Amendment is designed to prevent, not simply to redress, unlawful police action." *Steagald v. United States*, 451 U.S. 204, 215 (1981). "To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort, and for an agent of the State to pursue a course of action

whose objective is to penalize a person's reliance on his legal rights is 'patently unconstitutional.'" *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978) (citations omitted).

Mapp's holding that "no man is to be convicted on unconstitutional evidence[]" is applicable to all warrantless blood demands, and the refusals to submit to such tests, where officers lacked exigent circumstances or a warrant before demanding a blood test as the only option for compliance with implied consent laws. *Mapp*, 367 U.S. at 657. "To hold otherwise is to grant the right but in reality to w[i]thhold its privilege and enjoyment." *Id.* at 656.

E. Georgia's IC Scheme is unconstitutional on its face.

As a Fourth Amendment facial challenge to O.C.G.A. §§ 40-5-67.1 and 40-6-392, "the proper focus is on searches that the law *actually authorizes* and not those that could proceed irrespective of whether they are authorized by the statute, e.g., where exigent circumstances, a warrant, or consent to search exists." *City of Los Angeles v. Patel*, 576 U.S. 409, 410 (2015) (emphasis added).

Patel addressed a Fourth Amendment facial challenge regarding ordinances that authorized a means to permit the warrantless search. While *Patel* focused on the ordinance authorizing a warrantless search (comparable to O.C.G.A. § 40-5-67.1), this Court briefly noted the effect of a separate statute that penalized refusal to submit to the search (comparable to O.C.G.A. § 40-6-392).

O.C.G.A. § 40-5-67.1 authorizes the warrantless search of a motorist's blood and gives officers unbridled discretion in selecting which test will be administered. O.C.G.A. § 40-6-392 allows the motorist's refusal to submit to the warrantless blood test to be admissible at trial.

Applying the foregoing principles, O.C.G.A. §§ 40-5-67.1 and 40-6-392 are unconstitutional on their face.

II. Georgia's Implied Consent Scheme Is Unconstitutional As Applied to Petitioner.

All foregoing and subsequent sections are adopted as if fully stated herein. Petitioner was faced with similar circumstances as Danny Birchfield. Although Petitioner was not criminally charged with refusing the warrantless blood test, Petitioner was threatened with an unreasonable search, and now faces criminal evidentiary penalties for exercising her constitutional rights to be free from the intrusive search. As in North Dakota, Petitioner has privacy interests in reference to a blood sample. Breath testing is readily available in Georgia.

Officer Lovelady designated the intrusive, warrantless blood test as Petitioner's only option for complying with the implied consent laws without a warrant or exigent circumstances. Georgia law allows the exercise of Petitioner's Fourth Amendment rights to be admissible as evidence of guilt at Petitioner's criminal trial.

Pursuant to the Fourth Amendment, Officer Lovelady's demand for a blood test was illegal unless the officer had either: (a) a warrant or (b) exigent circumstances. *Birchfield*, 579 U.S. at 474-75. These

requirements were not met. Georgia did not present any evidence or argument that a breath test would have failed to satisfy the government's interest in prosecuting Petitioner for DUI alcohol.

The trial court's Order denying Petitioner's motions found that *Birchfield* approved of both civil and evidentiary penalties for refusals to submit to warrantless blood tests. Pet. App. 9a. According to the court, Petitioner's refusal to submit to the warrantless blood test "may be considered as positive evidence inferring the test would show the presence of the prohibited substance." *Id.* at 9a-10a. The court found that Georgia's IC Scheme is not unconstitutional as applied to Petitioner. *Id.* at 11a.

The denial of Petitioner's challenges by the trial and appellate courts endorses the trial court's erroneous rulings. This Court must extend the sound reasoning of *Birchfield* to states like Georgia that are ignoring the factors discussed by this Court.

A. The State failed to satisfy the exigency requirement for demanding a warrantless blood draw from Petitioner.

Georgia cannot and did not satisfy the exigency requirement for demanding a warrantless blood test from Petitioner. Pursuant to *McNeely*, the mere dissipation of alcohol in the bloodstream is insufficient to satisfy exigency in every case. *McNeely*, 569 U.S. at 165.

Georgia failed to present *any* facts or circumstances showing that Officer Lovelady had sufficient exigent circumstances or that a breath test would have been

insufficient. According to the trial court, "[t]he State was not required to show any exigent circumstances for the blood draw request *because the request was based on the Georgia Implied Consent law, not exigency*." Pet. App. 10a (emphasis added). The court's interpretation of *Birchfield* is that consent to the intrusive test can still be given under Georgia law and that the demand for a warrantless blood test was lawful.

"There is no indication in the record or briefing that a breath test would have failed to satisfy the State's interests in acquiring evidence to enforce its drunk-driving laws against [Petitioner]. And [Georgia] has not presented any case-specific information to suggest that the exigent circumstances exception would have justified a warrantless search." *Birchfield*, 579 U.S. at 477–78.

B. Petitioner had a constitutional right to refuse the warrantless blood test and her refusal cannot be used against her at trial.

The trial court cited *Mackey*, *supra* and *Birchfield* in finding that Petitioner's refusal to submit to the warrantless blood test "may be considered as positive evidence inferring the test would show the presence of the prohibited substance." Pet. App. 10a. *Mackey* held that "a defendant's refusal to consent to a warrantless search of his vehicle or other property is quite a different issue[]" than "a defendant's refusal to submit to a blood or urine test for determining alcohol or drug content." *Mackey*, 507 S.E.2d at 483.

The reason for this difference, according to *Mackey*, is "the legislature's mandate that such evidence is admissible

in evidence. See OCGA § 40–6–392(d)." *Id.* at 484. *Mackey* recognized one of the primary issues currently before the Court – that Georgia law allows a refusal to submit to a warrantless blood test to be admissible as positive evidence of guilt at trial under O.C.G.A. § 40–6–392(d).

It is incomprehensible that evidence of guilt cannot be inferred from refusing a vehicle or property search but *can* be inferred from refusing an intrusive bodily search where part of the body is removed for storage and testing. Property and bodily searches are both protected by the Fourth Amendment.

The trial court cited *Birchfield*'s general approval of implied-consent laws with civil and evidentiary consequences for refusing to comply. Pet. App. 9a-10a. Petitioner implores this Court to hold that the blood test request was unreasonable and that the refusal is not admissible at trial against the Petitioner to prove her guilt.

Petitioner's exercise of her Fourth Amendment rights to be free from an intrusive, warrantless blood test "would be reduced to a hollow mockery if its exercise could be taken as equivalent [ ] to a confession of guilt." *Garrity,* 385 U.S. at 499–500. "To hold otherwise is to grant the right but in reality to w[i]thhold its privilege and enjoyment." *Mapp*, 367 U.S. at 656.

Permitting Georgia to use the refusal evidence against Petitioner at trial would result in fundamental unfairness and due process violations under the Fourteenth Amendment. Petitioner had a constitutional right to refuse the warrantless blood test under the Fourth Amendment and her refusal cannot be used against her at trial.

III. A Matter of First Impression Regarding the Constitutionality of Allowing the Government to Use the Exercise of Fourth Amendment Rights as Evidence at Trial.

All foregoing sections are adopted as if fully stated herein. Although this Court has never specifically addressed the issue of whether it is unconstitutional for the government to use a defendant's exercise of their Fourth Amendment rights as evidence at trial, several of the federal circuit courts have. The circuit courts addressing this issue "**have unanimously held that a defendant's refusal to consent to a warrantless search may not be presented as evidence of guilt**. See, e.g., *United States v. Moreno*, 233 F.3d 937, 940–41 (7th Cir.2000); *United States v. Dozal*, 173 F.3d 787, 794 (10th Cir.1999); *United States v. Thame*, 846 F.2d 200, 205–08 (3d Cir.1988); *United States v. Prescott*, 581 F.2d 1343, 1351–52 (9th Cir.1978); but cf. *United States v. McNatt*, 931 F.2d 251, 256–57 (4th Cir.1991)." *United States v. Runyan*, 290 F.3d 223, 249 (5th Cir. 2002) (emphasis added). This sound reasoning is persuasive and powerful.

A defendant's refusal may become admissible if they waive their rights by inviting testimony related to the refusal or fail to object to testimony about the refusal. However, "*so long as there is no waiver on her part, her refusal cannot be used against her.*" *Prescott*, 581 F.2d at 1352 (emphasis added).

Where a defendant has challenged the admission of their refusal to submit to a warrantless search as evidence of guilt, courts have consistently referred to the intertwined and related provisions of the Fourth and Fifth

Amendments in holding that evidence of the refusal is not admissible against a criminal defendant. These decisions often rely on the logical reasoning in *Griffin*, *supra*.

The Ninth Circuit addressed this issue in *Prescott*. Prescott was convicted of being an accessory after the fact by preventing the apprehension of a felon when police located a suspect hiding in her apartment. *Prescott*, 581 F.2d at 1352. During trial, the prosecutor referred to Prescott's refusal to allow police to enter her home as evidence that she was harboring the suspect. *Id*. The Circuit Court held that it was a prejudicial error to allow the government to use Prescott's refusal to consent to the search as evidence of her guilt. *Id*.

The Court reasoned that

> [i]f the government could use such a refusal against the citizen, an unfair and impermissible burden would be placed upon the assertion of a constitutional right and *future consents would not be 'freely and voluntarily given*.' . . .
>
> *Id.* at 1351 (emphasis added) (citations omitted).

Additionally, "[j]ust as a criminal suspect may validly invoke his Fifth Amendment privilege in an effort to shield himself from criminal liability, so one may withhold consent to a warrantless search, even though one's purpose be to conceal evidence of wrongdoing." *Id.* (citing *Cole v. United States*, 329 F.2d 437, 442 (9 Cir. 1964) and *United States v. Courtney,* 236 F.2d 921, 923 (2d Cir. 1956)).

Prescott found that prohibiting a prosecutor from commenting on a defendant's refusal to testify was analogous to prohibiting a prosecutor from commenting on a defendant's refusal to consent to a warrantless search of her home. In both scenarios, the prosecutor's comments improperly use the exercise of constitutional rights as evidence of guilt against a criminal defendant that could be misinterpreted by a jury. *Id.* at 1352.

That is exactly what prosecutors in Georgia are entitled to do pursuant to O.C.G.A. § 40-6-392(d).[6] The trial court's Order authorizes it in this case so the jury may rely on the refusal as evidence to convict Petitioner of DUI. Many other states have similar implied consent statutes allowing the refusal evidence to be admissible against a motorist at trial.

Permitting a jury to rely on subjective and speculative evidence would grossly abuse and diminish the rights the Fourth and Fifth Amendments were designed to protect. *Prescott* found that such comments by a prosecutor "can have but one objective[:] to induce the jury to infer guilt." *Id.* It concluded that "[t]he right to refuse protects both the innocent and the guilty, and *to use its exercise against*

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6. Judges are also permitted to charge the jury that they may infer guilt based upon the defendant's refusal to submit to testing. Council of Superior Court Judges of Georgia, *Suggested Pattern Jury Instructions*, Vol. II: Criminal Cases, 4th ed., (2022), 2.84.21 Driving under the Influence; Refusal; Inference, provides in relevant part: "Should you find that the defendant refused to take the requested test, **you may infer that the test would have shown the presence of (alcohol)(drugs)**, though not that the (alcohol)(drugs) impaired his/her driving. Whether or not you draw such an inference is for you to determine. …"

the defendant would be, as the Court said in *Griffin*, *a penalty imposed by courts for exercising a constitutional right.*" *Id.* (Emphasis added).[7]

Despite the extensive jurisprudence finding that a defendant's exercise of their Fourth Amendment rights is not admissible at trial, states across the nation continuously use this evidence, particularly when prosecuting DUIs. Petitioner's case presents this Court with a compelling need and opportunity to rule on this unresolved issue of federal law.

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7. *See also United States v. Clariot*, 655 F.3d 550, 555 (6th Cir. 2011); *Curry v. Georgia*, 458 S.E.2d 385, 386 (Ga. Ct. App. 1995) ("We cannot say, however, that this principle [of admissibility for a refusal to submit to a court order] is broad enough to encompass reasonable opposition to unlawful governmental intrusions. *To say otherwise would not only chill justified resistance to unlawful police practices, but would leave criminal suspects with the unfavorable option of either giving up the right to privacy or resisting unlawful police intrusions knowing that such opposition will be available to support an inference of guilt without running afoul of state and federal prohibitions against coerced self-incrimination.*") (Emphasis added.); *Arizona v. Stevens*, 267 P.3d 1203, 1209 (Ariz. Ct. App. 2012) ("If the Fourth Amendment is to provide rigorous protection against unlawful searches, occupants must not be dissuaded from exercising the right for fear of incurring a penalty in any subsequent criminal prosecution."); *Bargas v. Alaska,* 489 P.2d 130, 133 (Ak. 1971); *Minnesota v. Jones*, 753 N.W.2d 677, 687 (Minn. 2008); *Padgett v. Alaska*, 590 P.2d 432 (Ak. 1979); *Pennsylvania v. Welch*, 585 A.2d 517, 520 (Penn. 1991); and *Washington v. Gauthier*, 298 P.3d 126, 132 (Wash. Ct. App. 2013).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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February 15, 2023

APPENDIX

TABLE OF APPENDICES

APPENDIX A — ORDER OF THE SUPREME COURT OF GEORGIA, DATED NOVEMBER 17, 2022

SUPREME COURT OF GEORGIA

Case No. S22C0724

COURTNEY DRAKE,

v.

THE STATE.

November 17, 2022

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

The Supreme Court today denied the petition for certiorari in this case.

All the Justices concur.

Court of Appeals Case No. A22I0113

SUPREME COURT OF THE STATE OF GEORGIA
Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Appendix A

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/, Clerk

APPENDIX B — ORDER OF THE COURT OF APPEALS OF THE STATE OF GEORGIA, DATED FEBRUARY 7, 2022

COURT OF APPEALS OF
THE STATE OF GEORGIA

A22I0113

COURTNEY DRAKE,

v.

THE STATE.

ATLANTA, February 07, 2022

The Court of Appeals hereby passes the following order

Upon consideration of the Application for Interlocutory Appeal, it is ordered that it be hereby DENIED.

LC NUMBERS:

19T8083

Court of Appeals of the State of Georgia Clerk's Office, Atlanta, February 07, 2022.

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Appendix B

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ Stephen E. Castler, Clerk

APPENDIX C — ORDER OF THE SUPREME COURT OF GEORGIA, DATED DECEMBER 9, 2021

SUPREME COURT OF GEORGIA

Case No. S22I0320

COURTNEY DRAKE,

v.

THE STATE.

The Honorable Supreme Court met pursuant to adjournment.

December 9, 2021

The following order was passed:

Applicant filed the instant interlocutory application seeking review of the trial court's orders denying her motion to suppress and stating that jurisdiction is proper in this Court because she is challenging the constitutionality of OCGA §§ 40-6-392 (d) and 40-5-67.1. However, because the issues she raises are controlled by this Court's decisions in *State v. Turnquest*, 305 Ga. 759 (827 SE2d 865) (2019), *Elliott v. State*, 305 Ga. 179 (824 SE2d 265) (2019), and *Olevik v. State*, 302 Ga. 228 (806 SE2d 505) (2017), her application does not invoke this Court's constitutional question jurisdiction. See *Woods v. State*, 310 Ga. 358, 359 (850 SE2d 735) (2020) (holding that arguments on appeal that "require the mere application

of well settled constitutional principles to the facts of [a] case . . . provide no anchor for this Court's appellate jurisdiction"). Accordingly, as no other basis for exercising this Court's jurisdiction is apparent from the application, the application is transferred to the Court of Appeals.

All the Justices concur.

SUPREME COURT OF THE STATE OF GEORGIA
Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ , Clerk

APPENDIX D — ORDER OF THE STATE COURT OF COBB COUNTY, STATE OF GEORGIA, FILED OCTOBER 20, 2021

IN THE STATE COURT OF COBB COUNTY
STATE OF GEORGIA

Accusation No.
19-T-8083

STATE OF GEORGIA,

vs.

COURTNEY DRAKE,

Defendant.

ORDER

On October 24, 2019, this Court heard the Defendant's "Motion to Suppress" (hereinafter "Defendant's Motions"). Appearing for the Defendant was Greg Willis and appearing on behalf of the State of Georgia was Assistant Solicitor-General Jessica Leiva. The issues before the Court were narrowed at the hearing to the following: (1) reasonable articulable suspicion, (2) probable cause to arrest, (3) the refusal to submit to a preliminary breath test, (4) Implied Consent, (5) refusal of the Defendant to submit to the blood test, (6) to exclude all statements of the Defendant after she was in custody, (7) the Defendant's request for an attorney, and (8) length of custody. On March 11, 2020, this Court issued an Order denying all the Defendant's motions.

Subsequently, the Defendant wrote to the court and requested additional rulings on several issues that were not addressed in the original Order dated March 11, 2020. A Motion to Suppress hearing was held on May 4, 2021, and Defendant requested a new Order to address the following issues: (1) the refusal to submit to a blood test and the State's ability to use the refusal against her at trial, (2) the exigency requirement for demanding a warrantless blood draw, (3) the reading of the improper Implied Consent Warning, and (4) the refusal to submit to a preliminary breath test.

After hearing the arguments of counsel and reviewing briefs submitted by the parties as well as the applicable legal authority, this Supplemental Order addresses those issues, specifically. All other parts of the original Order not specifically addressed remain unchanged and remain the Order of the Court. There are no additional motions pending and the Order entered on March 11, 2020, shall be amended as follows:

FINDINGS OF FACT

There have been no additional facts offered to this Court, therefore, all findings of fact stated in the prior Order are relied upon in making the following conclusions of law.

Appendix D

CONCLUSIONS OF LAW

9. FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ART. I, §I, ARTICLE XIII OF THE GEORGIA CONSTITUTION

Defendant argues she had a constitutional right (both Federal and State) to refuse a warrantless blood draw without the refusal being used against her at trial. Neither Federal nor Georgia law supports this argument. In *Birchfield v. North Dakota,* 136 S. Ct. 2160 (2016), which Defendant cites repeatedly in her argument, the United States Supreme Court held that the taking of a suspect's blood cannot occur without warrant, consent or a warrant exception. *Birchfield v. North Dakota.* 136 S.Ct. 2160, 2183-84 (2016). *Birchfield* held the requesting of blood draws pursuant to implied consent schemes that instituted civil or *evidentiary* penalties, like the Implied Consent scheme in Georgia, are permissible and constitutional. *Id.* at 2186. *Birchfield* actually states blood, unlike breath, cannot be taken as search incident to arrest; a warrant or consent is permissible.

Defendant argues that a refusal to a blood test is analogous to the assertion of the privilege against self-incrimination, and "it is forbidden to parade [a witness] in front of the jury for the sole purpose of having him invoke the Fifth Amendment." *Mackey v. State,* 234 Ga. App. 554, 555 (1998). Using *Mackey,* Defendant analogizes this to an invocation to her Fourth Amendment and Paragraph XIII rights. However, *Mackey,* like *Birchfield,* distinguishes

this type search for purposes of the Implied Consent scheme, and held that such a refusal may be considered as positive evidence inferring the test would show the presence of the prohibited substance. *Id*. at 555.

Georgia's implied consent scheme does not violate the Fourth Amendment of the Constitution or Paragraph XIII of the Georgia Constitution's right against unreasonable searches and seizures. *Oliveck v. State,* 302 Ga. 228 (2017). Therefore, Defendant's Motion to Suppress the Refusal is DENIED, and Defendant's refusal to submit to the blood·test may be admitted at trial.

10. EXIGENCY REQUIREMENT TO REQUEST WARRANTLESS BLOOD DRAW

Defendant argues that *Birchfield* requires a warrant or exigent circumstances sufficient to overcome the Fourth Amendment's warrant exception. This is not the holding in *Birchfield* and ignores other exceptions to the warrant requirement and ignores the Implied Consent scheme completely. Exigency is no longer a categorical warrant exception. *Missouri v. McNeely.* 133 S.Ct. 1552 (2013). The State was not required to show any exigent circumstances for the blood draw request, because the request was based on the Georgia Implied Consent law, not exigency. Therefore, Defendant's Motion to Suppress is DENIED.

Appendix D

11. IMPLIED CONSENT WARNING

Defendant challenges the constitutionality of the former Implied Consent Warning ("ICW") read one day after the present ICW went into effect. This challenge fails, because the changes to the ICW were for the request for breath tests which had no effect on requests for blood. The Court in *Hinton* held that the former ICW card was still valid for the purpose of requesting blood tests. *Hinton v. State,* 335 Ga. App. 263 (2020), The purpose for the changes to the warning, pertaining to breath evidence, were to protect a suspect's Fifth Amendment rights against self-incrimination, as the giving of breath requires a voluntary act of pushing out air. *Oliveck v. State,* 302 Ga. 228. The same protection does not extend to requests for blood. *Elliott v. State,* 305 GA, 179 (2019). The language on the present ICW and the former ICW, as applied to requests for blood tests, did not materially change. Therefore, the substance of the warning was not changed, and the ICW was not unconstitutional as applied to this Defendant. Therefore, Defendant's Motion to Suppress is DENIED.

12. REFUSAL TO SUBMIT TO A PRELIMINARY BREATH TEST.

The State conceded, in court, that the Defendant's refusal to submit to the preliminary breath test is not admissible. Therefore, the Defendant's Motion to Suppress is GRANTED.

Having heard and considered argument, citations of authority, briefs, reasons set forth above and other good cause shown,

It is hereby ordered that Defendant's Motion to Suppress the refusal to submit to a blood test and the State's ability to use the refusal against her at trial is **DENIED.**

It is hereby ordered that Defendant's Motion to Suppress the exigency requirement for demanding a warrantless blood draw is **DENIED.**

It is hereby ordered that Defendant's Motion to Suppress the reading of the improper Implied Consent Warning is **DENIED.**

It is hereby ordered that Defendant's Motion to Suppress refusal to submit to the preliminary breath test is **GRANTED.**

So ordered this 20 day of Oct, 2021.

/s/_____
Honorable Marsha S. Lake
Judge, State Court of Cobb County

APPENDIX E — OPINION OF THE STATE COURT OF COBB COUNTY, STATE OF GEORGIA, FILED MARCH 11, 2020

IN THE STATE COURT OF COBB COUNTY
STATE OF GEORGIA

CASE NUMBER: 19-T-8083

STATE OF GEORGIA,

vs.

COURTNEY DRAKE,

Defendant.

ORDER

On October 24, 2019, this Court heard the Defendant's "Motions to Suppress." (hereinafter "Defendant's Motions"). Appearing for the Defendant was Greg Willis and appearing on behalf of the State of Georgia was Assistant Solicitor-General Jessica Leiva. The issues before the Court were narrowed at the hearing to the following: (1) reasonable articulable suspicion, (2) probable cause to arrest, (3) the refusal to submit to a preliminary breath test, (4) Implied Consent, (5) refusal of the Defendant to submit to the blood test, (6) to exclude all statements of the Defendant after she was in custody, (7) the Defendant's request for an attorney, and (8) length of custody. After hearing the evidence, weighing the credibility of the witness, hearing the arguments of

counsel, and reviewing briefs submitted by the parties, the Court makes the following findings of fact and conclusions of law thereon.

FINDINGS OF FACT

The evidence establishes that on April 29, 2019, Officer Lovelady of the Cobb County Police Department responded to a rear-end automobile collision with injuries. The Officer noticed a strong odor of alcoholic beverage on the person of the Defendant, that Defendant slurred her words, her eyes were blood shot and watery and the Defendant admitted to drinking 3-4 beers. Officer Lovelady proceeded with a DUI investigation and performed several field sobriety evaluations; the HGN, Walk and Turn, and One Leg Stand. The Officer observed 6 out of 6 clues on the HGN evaluation, 5 clues out of 8 on the Walk and Turn Evaluation and 4 clues on the One Leg Stand Evaluation. The Defendant refused to submit to a preliminary breath test two times. At the conclusion of the investigation, noting the totality of the circumstances, the Defendant was arrested for Driving Under the Influence of Alcohol. Upon arrest, the Defendant was advised pursuant to the Georgia Implied Consent notice for suspects 21 years or older and Officer Lovelady requested that the Defendant submit to a state-administered chemical test of her blood. Officer Lovelady testified that on the day of arrest she only possessed the orange Implied Consent Notice Card which she read to the Defendant. Upon advisement, the Defendant verbally consented to the state-administered test and was transported to Kennestone Hospital for medical clearance and a blood draw.

Appendix E

Immediately upon arriving at the hospital and before any further discussion regarding Implied Consent, the Defendant rescinded her consent to the state-administered chemical test of her blood by stating, "Nah, we ain't doin' none of that. I don't wanna' do it no more." Shortly after, the Defendant questioned the officer about her decision to refuse by stating, "So you gonna' automatically suspend my license for a year?" Officer Lovelady responds, "You will get paperwork as a temporary license. It's called an ALS hearing. It's umm, basically means that you go to court and apply for a temporary like permit while the case is pending. But if you are going to say no now and not do the blood kit, what happens is, I go get a search warrant for your blood with the Judge." Officer Lovelady explains to Defendant, "This is totally up to you. I'm not coercing you. I'm not promising you anything. I can read you the card again if that makes you feel like you can make a better choice and answer."

The Defendant requested to call her attorney which was denied and the Defendant ultimately decided not to submit to the state-administered test of her blood.

CONCLUSIONS OF LAW

(1) There was articulable suspicion for Officer Lovelady to investigate an automobile accident since she was called to the scene to investigate an automobile accident.

(2) Once on the scene, the Officer noticed a strong odor of alcoholic beverage on the person of the Defendant, that Defendant slurred her words, her eyes were blood shot

and watery and the Defendant admitted to drinking 3-4 beers. The Officer administered several field sobriety evaluations, the HGN, Walk and Tum, and One Leg Stand. Considering the totality of the circumstances, there was probable cause to arrest the Defendant for DUI.

(3) The Defendant refused to submit to a preliminary breath test two times, however, a voluntary pre-custodial alco-sensor test does not amount to a compelled self-incriminating evidence. The alco- sensor request and refusal are admissible.

(4) Officer Lovelady testified that on the day of arrest she only possessed the orange Implied Consent Notice Card which she read to the Defendant and requested the Defendant's blood. The reading of the prior notice has no substantive impact on the Defendant's rights or her ability to make an informed decision regarding Implied Consent when blood is requested. The withdrawal of blood evidence is not a protected act of self-incrimination pursuant to Paragraph XVI of the Georgia Constitution because blood is taken from a defendant as opposed to breath samples that must be affirmatively expelled by the Defendant. Accordingly, the new Georgia Implied Consent Notice tracks the language provided by the old warning regarding blood: "Your refusal to submit to blood or urine testing may be offered into evidence against you at trial." O.C.G.A. § 41-5-67.1. Therefore, in reading Defendant the old warning, Officer Lovelady provided accurate notice with respect to blood requests.

(5) Officer Lovelady provided a "true and informative" description of the procedural process that would apply if Defendant refused the blood test. She accurately informed Defendant that there would be an ALS hearing where Defendant could apply for a permit, but made no guarantees that Defendant would receive a permit. Officer Lovelady further explained that she would apply for a search warrant to obtain Defendant's blood upon refusal, but made it clear that the decision to refuse or submit is "totally" up to the Defendant. Officer Lovelady provided no deceptively misleading information to the Defendant.

(6) Officer Lovelady was not required to advise Defendant of her Miranda rights, as the Defendant was merely being asked to provide a yes or no answer to whether she would submit to testing. Any questions or statements made by the Defendant during this discussion are voluntary and spontaneous and are admissible.

(7) The Defendant requested to call her attorney, but this request did not entitle her to consult with a lawyer when making her decision regarding the Implied Consent request. A suspect is not entitled to an attorney when deciding whether to submit to a state administered blood test under implied consent law.

(8) Although there was some delay from when the Defendant consented to a blood test on scene and further discussion at the hospital regarding Implied Consent, such delay was due to the circumstance of Defendant's voluntary questions.

Appendix E

The State has met its burden of proof.

Having heard and considered the evidence, argument, citations of authority, briefs and other good cause shown,

It is hereby **ORDERED** that Defendant's Motion to suppress reasonable articulable suspicion is **DENIED.**

It is hereby **ORDERED** that Defendant's Motion to suppress probable cause to arrest is **DENIED.**

It is hereby **ORDERED** that Defendant's Motion to suppress the refusal of the Defendant to submit to the preliminary breath test is **DENIED.**

It is hereby **ORDERED** that Defendant's Motion to suppress Implied Consent is **DENIED.**

It is hereby **ORDERED** that Defendant's Motion to suppress the refusal of the Defendant to submit to the blood test is **DENIED.**

It is hereby **ORDERED** that Defendant's Motion to suppress all statements of the Defendant after she was arrested is **DENIED.**

It is hereby **ORDERED** that Defendant's Motion to suppress Defendant's request for an attorney is **DENIED.**

It is hereby **ORDERED** that Defendant's Motion to suppress length of custody is **DENIED.**

Appendix E

SO, ORDERED this 11 day of March, 2020.

/s/_____
Honorable Marsha S. Lake
Judge, State Court of Cobb County