NO. 19-_____

In the Supreme Court of the United States

LINDSAY WATERS,

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

D. TIMOTHY HUEY
HUEY DEFENSE FIRM LLC
3240 WEST HENDERSON ROAD
COLUMBUS, OH 43220
(614) 487-8667
DTHLAW@GMAIL.COM

GREG WILLIS, ESQ.
COUNSEL OF RECORD
WILLIS LAW FIRM
6000 LAKE FORREST DRIVE
SUITE 375
ATLANTA, GA 30328
(404) 835-5553
GW@WILLISLAWGA.COM

FEBRUARY 3, 2020 *COUNSEL FOR PETITIONER*

SUPREME COURT PRESS ♦ (888) 958-5705 ♦ BOSTON, MASSACHUSETTS

QUESTION PRESENTED

A blood draw is an intrusive search. A breath test is less intrusive and an effective alternative in a DUI alcohol case. This Court held in *Missouri v. McNeely*, 569 U.S. 141 (2013), and *Birchfield v. North Dakota*, 136 S.Ct. 2160 (2017), that the Fourth Amendment protects citizens from compelled warrantless blood draws (even in DUI drug cases). Many States have ignored the holdings of this Court that explained that there are limitations to the "implied consent" of drivers to testing by driving on the roads and that warrantless blood tests cannot be compelled. After *McNeely* and *Birchfield*, many states have refused to amend their "implied consent" laws even though the laws were carefully crafted to compel drivers to submit to the designated tests (including warrantless blood tests that were deemed unconstitutional in *McNeely* and *Birchfield*). The Georgia statute, described below, is one illustrative example among many.

THE QUESTION PRESENTED IS:

Whether the Fourth Amendment permits police to coerce submission to a warrantless blood test by telling motorists arrested for driving under the influence of alcohol that any refusal to submit to the blood test will be used against them at trial as proof of guilt, that the law requires the motorists to submit to the blood draw, and that their driving privileges will be suspended for a year for refusing to submit to the blood test?

LIST OF PROCEEDINGS

State Court of Cobb County, State of Georgia

State of Georgia v. Lindsay Waters

Case No. 13-T-10704

Date of Bench Trial Preserving Fourth Amendment Issues for Review: October 4-5, 2016

Supreme Court of Georgia

Lindsay Waters v. the State

Supreme Court of Georgia Case No. S19C0968

Denial of Constitutional Challenges to Statute and Transfer to Court of Appeals: April 30, 2018

Court of Appeals of Georgia

Waters v. The State

Case No. A18A2031

Date of Appellate Opinion: March 4, 2019

Supreme Court of Georgia

Lindsay Waters v. the State

Case No. S19C0968

Denial of Petition for Certiorari: November 4, 2019

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

Page

TABLE OF CONTENTS – Continued

Page

APPENDIX TABLE OF CONTENTS

OPINIONS AND ORDERS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

CONSTITUTIONAL PROVISIONS

STATUTES

OPINIONS BELOW

All decisions from below are unreported. *Waters v. State*, No. S19C0968 (Ga.) (judgment denying writ of certiorari entered Nov. 4, 2019). (App.1a) *Waters v. State*, No. A18A2031. (Ga. Ct. App.) (opinion issued, and judgment entered affirming trial court on March 4, 2019). (App.2a) *Waters v. State*, No. S18A0423 (Ga.) (opinion issued, and judgment remanding case to Georgia Court of Appeals entered April 30, 2018). (App.9a).

JURISDICTION

The final judgment of the Supreme Court of Georgia, denying the petition for certiorari, was entered on November 4, 2019. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., amend. IV

> 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.

O.C.G.A. § 40-5-67.1 (in relevant part):

(a) The test or tests required . . . shall be administered as soon as possible at the request of a law enforcement officer . . . and the officer has arrested such person for a violation of [DUI statute] . . . Subject to Code Section 40-6-392, the requesting law enforcement officer shall designate which test or tests shall be administered initially and may subsequently require a test or tests of any substances not initially tested. (b) At the time a chemical test or tests are requested, the arresting officer shall select and read to the person the appropriate implied consent notice from the following: . . .

(2) "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. If you submit to testing and the results indicate an alcohol concentration of 0.08 grams or more, your Georgia driver's license or privilege to drive on the highways of this state may be suspended for a minimum period of one year. After first submitting to the required state tests, you are entitled to additional chemical tests of your blood, breath,

> urine, or other bodily substances at your own expense and from qualified personnel of your own choosing. Will you submit to the state administered chemical tests of your (designate which tests) under the implied consent law?"

O.C.G.A. § 40-6-392(d):

> 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.

O.C.G.A. § 40-5-67.1(d):

> If a person under arrest . . . refuses, upon the request of a law enforcement officer, to submit to a chemical test designated by the law enforcement officer as provided in subsection (a) of this Code section, no test shall be given . . . the department shall suspend the person's driver's license, permit, or nonresident operating privilege for a period of one year . . .

STATEMENT OF THE CASE

A. Factual Background

On May 11, 2013, Officer Desvernine of the Cobb County Police Department stopped Petitioner Ms. Waters for improper use of horn and weaving within her lane. After conducting a roadside investigation, Officer Desvernine placed Ms. Waters under arrest

for driving under the influence of alcohol.[1] He handcuffed her and read her Georgia's implied consent warning (ICW) for suspects over the age of 21, as is the statutorily-required procedure in Georgia for drivers arrested for DUI.

Georgia law gives police (not motorists) the choice of test and requires the officer to designate the test or tests being demanded. In Ms. Waters' case, Officer Desvernine demanded she submit to the blood test. She was not given the option of a breath test. The warning Officer Desvernine read to Ms. Waters was the statutory warning required by Georgia law.

O.C.G.A. § 40-5-67.1(b)(2) codifies the exact language of the warning that must be read to a DUI suspect after arrest and which authorizes the officer to designate any and all of the tests of the officer's choice:

> "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. If you submit to testing and the results indicate an alcohol concentration of 0.08 grams or more, your Georgia

---

[1] The Petitioner was initially charged under O.C.G.A. § 40-6-391(a)(1) which specifically alleged that she was under the influence of alcohol.

> driver's license or privilege to drive on the highways of this state may be suspended for a minimum period of one year. After first submitting to the required state tests, you are entitled to additional chemical tests of your blood, breath, urine, or other bodily substances at your own expense and from qualified personnel of your own choosing. Will you submit to the state administered chemical tests of your (designate which tests) under the implied consent law?"

Under Georgia's implied consent scheme, if the officer designates a blood test, the driver must submit to the blood draw to avoid the use of the refusal against the driver at trial. Failure to submit to the blood draw also bars the driver from getting an independent test of the driver's own choosing and results in a driver's license suspension. If the driver demands or requests a different test than the officer designates in the warning, then the driver is punished as a refusal under Georgia law and no tests are completed. For example, if a driver demands a breath test instead of a blood test designated by the officer, Georgia law punishes the driver as a refusal to submit to testing. There is no requirement of the law that the driver be informed of her constitutional right to decline to consent to the blood draw or *Miranda* rights.

The officer expressly advised Ms. Waters that her refusal to submit to the blood test would be used against her in her criminal trial as proof of guilt, and that, if she refused, her license would be suspended for a minimum of one year. O.C.G.A. § 40-5-67.1.

The officers in this case did not give the Petitioner the option to submit to a State breath test. Breath

tests have been approved, regulated, and widely used throughout Georgia for over 20 years, and there is no dispute that a breath test was readily available to test Ms. Waters. *See also* O.C.G.A. § 40-6-392. The officers did not attempt to obtain a search warrant for Ms. Waters' blood. There is no claim made of exigent circumstances to excuse the warrant requirement. Instead, Georgia argues that Ms. Waters voluntarily consented to the blood draw.

After the above warnings were given and the officer demanded a blood test, Ms. Waters agreed to submit to the blood test. Petitioner was transported to Kennestone Hospital. At the hospital, Officer Desvernine remained with Petitioner while she discussed private health information with hospital staff during medical intake. The hospital required Petitioner to complete a 'General Consent to Treat Form' before the blood test could be performed. Nothing in the consent form indicated that Petitioner was consenting to her blood being used by law enforcement in a criminal case. The hospital form stated that the Petitioner had the right to have her questions answered before and during any procedures carried out by the medical staff. After reading the form, the Petitioner asked the medical staff questions about the procedure. Officer Desvernine testified that he believed Petitioner was asking questions of the medical staff to avoid taking the blood test. He also testified she was asking questions he was not qualified to answer. He then began pressuring her to submit to blood test and, again, read her Georgia's "implied consent warnings." He again designated blood as her only option to comply with the warning. Officer Desvernine eventually told Ms. Waters that he "needed a yes or a no answer" and that

if she did not provide a "yes" or "no" answer he would take that as a refusal. Thereafter, Ms. Waters submitted to the blood draw. Defendant's blood alcohol was reported above the legal limit of 0.08 g/ml at 0.091 g/ml. Ms. Waters refused most of the field sobriety tests and there was minimal significant evidence of her impairment other than the blood test result.

B. Procedural History

Ms. Waters was arrested on May 11, 2013 and charged with: (1) DUI Alcohol Less Safe, O.C.G.A. § 40-6-391(a)(l); (2) Failure to Maintain Lane, O.C.G.A. § 40-6-48; and (3) No Horn/Improper Use of Horn, O.C.G.A. § 40-8-70(a).

The criminal matter remained pending in the trial court from May 11, 2013 until October 4, 2016 when Ms. Waters' final arraignment was held and trial commenced. Pursuant to O.C.G.A. § 17-7-170 ("[a]ll pretrial motions, including demurrers and special pleas, shall be filed within ten days after the date of arraignment, unless the time for filing is extended by the court"), all motions were timely filed before her final arraignment date that was also her trial date.

There is no dispute that all motions related to the Fourth Amendment challenges to the statute and admissibility of the blood test were properly and timely filed and considered by each court below. In its transfer Order dated April 30, 2018, the Supreme Court acknowledged but denied Petitioner's facial challenge and as-applied challenge to the implied consent statute and transferred the case to the Court of Appeals. (App.9a) In that Order, the Supreme Court of Georgia based its decision on a breath test case that was recently decided finding that the both the facial challenge and as-applied

challenge to the statute failed. After resolving the constitutional challenges to the statute, the Supreme Court of Georgia lost jurisdiction of the case and transferred the case to the Court of Appeals. The Court of Appeals denied the Fourth Amendment challenges to the admissibility of the blood test results by ruling that consent was voluntary. (App.2a) On November 4, 2019, her Petition for Writ of Certiorari was denied by the Supreme Court of Georgia. (App.1a) This Petition for Writ of Certiorari timely follows.

During the pretrial period, Ms. Waters filed numerous, timely pleadings including Motions and Memorandums challenging the admissibility of the blood tests results. Ms. Waters challenged, among other things, the constitutionality (facially and as-applied) of Georgia's Implied Consent Scheme ("IC Scheme"), including O.C.G.A. § 40-5-67.1, and also made Fourth Amendment challenges to the admissibility of the blood test results through the numerous pretrial hearings. Ms. Waters contended that Georgia's IC Scheme was coercive and that Ms. Waters' submission to the blood draw was coerced, and not voluntary, as required by the Fourth Amendment. The trial court issued its first order denying Ms. Waters' relevant motions on September 17, 2014, finding that "[t]he [Petitioner's] argument that the Georgia Implied Consent law is unconstitutional is without merit." (App.11a). The trial court issued its order denying Petitioner's Motion to Reconsider on September 2, 2015. (App.13a, Enumeration 2.)

After this Court issued its decision in *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016), Ms. Waters filed a Memorandum citing to *Birchfield* and argued that this Court clarified that the language of O.C.G.A. § 40-5-67.1 and Georgia's IC scheme violated the

Fourth Amendment and the blood test should not be admissible.

A bench trial commenced on October 4, 2016. Prior to and during that trial Petitioner properly preserved all objections and constitutional challenges for purposes of appeal. Petitioner was found guilty of DUI alcohol—less safe and DUI alcohol *per se* on October 5, 2016, and Petitioner timely filed a Notice of Appeal on the same date.

This appeal was taken directly to the Supreme Court of Georgia as required by Georgia law (*see* Ga. Const. of 1983, Art. VI, Sec. VI, Par. II-III and O.C.G.A. § 15-3-3.1) because the appeal involved a challenge to the constitutionality of a Georgia statute. On April 30, 2018, the Supreme Court of Georgia issued an order denying the facial constitutional challenge and as-applied constitutional challenge to O.C.G.A. § 40-5-67.1. The Supreme Court of Georgia also transferred the matter to the Georgia Court of Appeals to consider the other Fourth Amendment challenges to the admissibility of the blood test.

In that order, the Supreme Court of Georgia found that the recently-decided case of *Olevik v. State*, 806 S.E.2d 505 (Ga. 2017) (App.15a) was dispositive on Ms. Waters' constitutional challenges to the statute (facial and as-applied). However, as discussed herein, *Olevik* involved a breath test.

The Court of Appeals issued a non-reported opinion on March 4, 2019 affirming the ruling of the trial court denying Ms. Waters' Fourth Amendment challenges by holding that her consent to the blood test was voluntary. (App.2a). Ms. Waters timely filed

a Petition for Writ of Certiorari in the Supreme Court of Georgia on March 25, 2019.

In that Petition, she argued that the Supreme Court of Georgia had applied the wrong standard to the constitutionality of the statutes in the instant case. She argued that reliance on *Olevik v. State* was erroneous for numerous reasons including that the Georgia implied consent law was unconstitutional on its face and as-applied to the facts of this blood test case pursuant to this Court's holdings. She also argued that the proper standard to be applied was the Fourth Amendment standard addressing the legality of statutes authorizing searches by this *Court in City of Los Angeles v. Patel*, 135 S.Ct. 2443 (2015). Surprisingly, the Supreme Court of Georgia had applied the standard from *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442 (2008) to a Fourth Amendment issue in *Olevik v. State*.

Ms. Waters also argued that the Fourth Amendment required her blood test results to have been suppressed as they were obtained without valid consent, warrant or exigency. The Petition for Writ of Certiorari filed with the Supreme Court of Georgia was denied on November 4, 2019.

REASONS FOR GRANTING THE PETITION

I. THIS COURT HAS REPEATEDLY HELD THAT THE FOURTH AMENDMENT PROTECTS CITIZENS FROM COMPELLED WARRANTLESS BLOOD DRAWS—BUT THE STATES ARE IGNORING THIS COURT'S DECISIONS.

A. Warrantless Blood Draws in DUI Alcohol Cases Are Unconstitutional and Absent Exigent Circumstances Cannot Be Compelled.

The Fourth Amendment protects individuals against the seizure and search of the contents of their blood unless the State has a warrant or a valid warrant exception applies. This protection applies to those who are arrested for driving under the influence. The Court's decisions in *Missouri v. McNeely*, 569 U.S. 141 (2013), *Birchfield v. North Dakota*, 136 S.Ct. 2160 (2017) and *Mitchell v. Wisconsin*, 139 S.Ct. 2525 (2019), are directly on point:

> Blood tests are significantly more intrusive, and their reasonableness must be judged in light of the availability of the less invasive alternative of a breath test. Respondents have offered no satisfactory justification for demanding the more intrusive alternative without a warrant.

Birchfield, 136 S.Ct. at 2184.

> [Missouri's position is] that a driver who declines to submit to testing after being arrested for driving under the influence of alcohol is always subject to a nonconsensual

> blood test without any precondition for a warrant. That is incorrect.

McNeely, 569 U.S. at 164

Motorists arrested for DUI cannot be compelled or coerced to submit to a warrantless blood draw absent exigent circumstances. *Birchfield*, *supra*, at 2185 ("It is another matter, however, for a State not only to insist upon an intrusive blood test, but also to impose criminal penalties on the refusal to submit to such a test"). *Id.* Under Georgia's Implied Consent scheme, however, this is exactly what is happening.

This Court has already suggested that so-called "implied consent" laws passed by the States are a misnomer—that is, that they are not a substitute for free and voluntary consent required under this Court's precedents. ("[O]ur decisions have not rested on the idea that these laws do what their popular name might seem to suggest—that is, create actual consent to all the searches they authorize.") *Mitchell v. Wisconsin*, 139 S.Ct. 2525, 2533 (2019). But more guidance is needed, as this misnomer continues to either substitute for, or coerce, motorist's consent, in violation of the Fourth Amendment. There must be a limit to the legal fictions implied consent laws create; but in Georgia, it seems no end is in sight.

The implied consent statutes of Georgia and many states were passed long before this Court held in *McNeely* and *Birchfield* that motorists arrested for DUI have a Fourth Amendment right to refuse a blood test (but no right to refuse a breath test). Yet, since *Birchfield*, implied consent statutes like Georgia's still remain the same. They do not recognize a legal difference between a breath test demand and a blood

test demand. The statutes were passed and continue to be enforced under the erroneous assumption that motorists do not have constitutional rights to refuse any chemical tests requested by law enforcement after a DUI arrest.

Implied Consent laws like Georgia's are offensive to the Fourth Amendment. They either claim a fictional consent or permit a coerced consent to blood draws, as an end-run around the warrant requirement. This Court's intervention is necessary. ("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.") *Birchfield*, *supra*, at 2185.

B. A Blood Draw Is Fundamentally Different Than a Breath Test.

As this Court has repeatedly emphasized, a blood draw is a significant intrusion that is not justified absent a warrant, a valid warrant exception, or voluntary consent. A blood draw is a "compelled physical intrusion beneath [a person's] skin and into his veins to obtain a sample of his blood for use as evidence in a criminal investigation. Such an invasion of bodily integrity implicates an individual's 'most personal and deep-rooted expectations of privacy.'" *Missouri v. McNeely*, 569 U.S. 141, 148, 133 S.Ct. 1552, 1558 (2013) (quoting *Winston v. Lee*, 470 U.S. 753, 760, 105 S.Ct. 1611, 84 L.Ed.2d 662 (1985)).

In contrast, breath tests do not remotely impact the same significant privacy concerns. They do not require the piercing of the skin or the withdrawal of bodily fluids. They do not allow the State to remain in possession of a sample which can be used for purposes beyond the detection of alcohol. Breath tests

do not involve trips to the hospital or other interaction with medical personnel.

Breath tests are efficient and effective for the State in determining a person's alcohol concentration. As this Court has held:

> Neither respondents nor their amici dispute the effectiveness of breath tests in measuring BAC. Breath tests have been in common use for many years. Their results are admissible in court and are widely credited by juries, and respondents do not dispute their accuracy or utility. What, then, is the justification for warrantless blood tests?

Id. at 2184.

It is, therefore, no surprise that this Court has expressed a significant preference for a breath test over blood, when one is available. ("Because breath tests are significantly less intrusive than blood tests and in most cases amply serve law enforcement interests, we conclude that a breath test, but not a blood test, may be administered as a search incident to a lawful arrest for drunk driving.) *Id.* A blood test only becomes reasonable once a breath test is unavailable to be used in the situation. *Mitchell*, 139 S.Ct. at 2533-34.

In Georgia, however, this distinction has been lost and remains at sea. Police can demand a blood test without even considering a breath test for any case including a DUI alcohol case. This very first step taken under Georgia's Implied Consent Scheme thus offends the Fourth Amendment's requirement of reasonableness. Upon arbitrarily demanding the motorist's blood, the warnings that follow are designed to (and

effectively do) coerce the motorist's consent to the test. The entire procedure is constitutionally intolerable.

C. A Citizen's Refusal to Consent to a Warrantless Search Is Constitutionally Protected.

Many states, Georgia included, are still operating under the pre-*McNeely* assumption that the refusal of warrantless blood tests can be used against the driver in a criminal trial for DUI exactly like a breath test refusal. Yet, at the same time, numerous federal and state courts hold that a defendant's assertion of his constitutional right to refuse a warrantless search may not be used against him at trial. *United States v. Turner*, 39 M.J. 259, 262 (II)(A) (C.M.A. 1994); *United States v. Thame*, 846 F.2d 200, 206-07 (IV) (3d Cir. 1988); *United States v. Prescott*, 581 F.2d 1343, 1351 (IV) (9th Cir. 1978); *State v. Banks*, 434 P.3d 361 (Or. 2019); *State v. Gauthier*, 298 P.3d 126 (Wash. Ct. App. 2013); *State v. Stevens*, 267 P.2d 1203 (Ariz. Ct. App. 2012); *Rose v. State*, 134 So.3d 996, 998 (Fla. Dist. Ct. App. 2012); *Frazier v. Commonwealth*, 406 S.W.3d 448, 455 (Ky. 2013) ("While [the defendant's] refusal to a consent to search may have aggravated the officers, that refusal cannot be considered as a basis for reasonable suspicion of criminal activity, as such a determination would violate the Fourth Amendment."); *Ramet v. State*, 209 P.3d 268 (Nev. 2009); *Longshore v. State*, 924 A.2d 1129 (Md. 2007); *State v. Jennings*, 430 S.E.2d 188 (N.C. 1993); *Simmons v. State*, 419 S.E.2d 225 (S.C. 1992); *Garcia v. State*, 712 P.2d 1375 (N.M. 1986); *Dolson v. United States*, 948 A.2d 1193, 1201 (III) (D.C. 2008); *State v. Ryce*, 368 P.3d 342 (Kan. 2016) (finding that implied consent law allowing refusal evidence impermissibly infringed upon fundamental Fourth Amendment right).

These courts have ruled in this manner for a simple reason: allowing the State to invite adverse inferences against Americans for invoking their right to refuse an invasive search "is to discourage the assertion of constitutional rights," which "is 'patently unconstitutional.'" *Chaffin v. Stynchcombe*, 412 U.S. 17, 32 (II)(C) n.20 (1973) (quoting *Shapiro v. Thompson*, 394 U.S. 618, 631 (1969)). It "may suit the purposes of despotic power, but it cannot abide the pure atmosphere of political liberty and personal freedom." *Boyd v. United States*, 116 U.S. 616, 632 (1886).[2] For "while an individual certainly may be penalized for violating the law, he just as certainly may not be punished for exercising a protected statutory or constitutional right." *United States v. Goodwin*, 457 U.S. 368, 372 (II) (1982) (emphasis added).

II. THE GEORGIA DUI STATUTES ARE UNLAWFULLY COMPELLING ARRESTED DUI SUSPECTS TO SUBMIT TO WARRANTLESS BLOOD TESTS THROUGH COERCION IN VIOLATION OF THE FOURTH AMENDMENT WHEN BREATH TESTS ARE EFFECTIVE AND AVAILABLE.

The DUI statutes in Georgia (and many other states) violate the Fourth Amendment because they have not been amended to address the legal differences in blood testing and breath testing discussed in *McNeely* and *Birchfield*. Georgia's laws mandate that the officer shall inform arrested drivers that they are

---

[2] "[W]e have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself." *Boyd*, 116 U.S. at 633. What would the *Boyd* Court have thought of compelling someone to give their blood for incriminating purposes?

required to waive their Fourth Amendment rights as it relates to warrantless tests of the drivers' blood to avoid evidence of the refusal to submit to testing from being used as proof of guilt in a criminal DUI trial. This Court found, when analyzing the facts of Danny Birchfield's case, that the demand for the intrusive blood test itself was unreasonable under the Fourth Amendment. Motorists have a Fourth Amendment right to refuse blood tests and this advisement would render the Fourth Amendment and the holdings in *Birchfield* meaningless if Georgia's implied consent warnings are condoned by this Court. This unlawful "implied consent" warning that compels drivers to submit to warrantless blood tests and permits the officer to arbitrarily designate the intrusive blood test as the only option for a State test is contained in O.C.G.A. § 40-5-67.1(b)(2) and follows:

> 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. If you submit to testing and the results indicate an alcohol concentration of 0.08 grams or more, your Georgia driver's license or privilege to drive on the highways of this state may be suspended for a minimum period of one year. After first submitting to the required state

> tests, you are entitled to additional chemical tests of your blood, breath, urine, or other bodily substances at your own expense and from qualified personnel of your own choosing. Will you submit to the state administered chemical tests of your (designate which tests) under the implied consent law?" (Emphasis added).[3]

Immediately after a driver is arrested for DUI, this warning must be read in its entirety to the driver and the officer is required to designate the test or tests that the officer is demanding. In Petitioner's case, the officer demanded the blood test as the only option even though he arrested her for a DUI alcohol offense (not a DUI drugs offense), and a breath test was available.

The warning in Georgia that threatens the driver with the use of their blood test refusal as proof of guilt in their criminal DUI trial is expressly authorized by Georgia statute. This law was passed long before the federal constitutional right to refuse a warrantless blood test was more clearly defined by this Court in *McNeely* in 2013. O.C.G.A. § 40-6-392(d) directs that the refusal shall be admissible against the DUI defendant in a criminal trial.

Pursuant to both O.C.G.A. § 40-5-67.1 and O.C.G.A. § 40-6-392(d), juries are then instructed as follows when the driver refused the warrantless blood

---

[3] Effective April 28, 2019, the implied consent notice in O.C.G.A. § 40-5-67.1(b)(2) was amended. However, the implied consent notice still provides that "refusal of a blood or urine test may be offered into evidence against you at trial." It also still explains the same license consequences for refusal as the prior statute relevant in this case.

test: "I further charge you that the refusal itself may be considered as positive evidence creating an inference that the test would show the presence of alcohol or other prohibited substances . . . " *Baird v. State*, 580 S.E.2d 650 (Ga. Ct. App. 2003). *See also Bravo v. State*, 548 S.E.2d 129 (Ga. Ct. App. 2001). Judges apply this same legal principle in bench trials. The presence of an impairing substance is an element of the criminal offense of DUI.

The warning read to Petitioner violates the Fourth Amendment by coercing her consent. The warning makes clear that any refusal to submit to the blood test (exercise of the constitutional right to refuse the blood test) will be evidence of proof of guilt at her criminal trial. If this status quo is permitted to continue in Georgia, then the Fourth Amendment right to refuse a blood test has been rendered completely meaningless, along with the requirement that any purported consent to search police obtain be given voluntarily. If a person is going to be punished for exercising a constitutional right, then the right has no practical value.

State v. Bailey, 6 N.W. 589 (1880), is often cited for the apt reasoning it provides on this point. In *Bailey*, the defendant refused to answer any questions because the answers would tend to incriminate him. The State was permitted at trial to introduce his refusal to answer the questions. The Supreme Court of Iowa reversed the trial court and held:

> We think it was clearly error to admit this testimony. A witness is privileged from answering when it reasonably appears that the answer will have the tendency to expose him to a criminal charge. It would indeed be

> strange if the law should confer upon a witness this right as a privilege, and at the same time should permit the fact of his availing himself of it to be shown as a circumstance against him. It certainly is a privilege of very doubtful character if the effect of claiming it is as prejudicial to the witness as the effect of waiving it.

Id. at 590.

Petitioner was also threatened with an administrative suspension of a minimum of one year without any driving privileges whatsoever if she refused the intrusive warrantless blood test. O.C.G.A. § 40-5-67.1 (d). The license suspension is far more debilitating punishment than being prosecuted for a misdemeanor traffic offense in many cases due to the overwhelming need to drive to maintain a job and care for a family in our mobile society. In 1971, this Honorable Court found a Georgia statute unconstitutional and held that a driver's license is an important property right in *Bell v. Burson*, 402 U.S. 535 (1971). All the threats of punishment and claims that Petitioner did not have a constitutional right to refuse testing were misleading and unreasonable as was the request by law enforcement for a warrantless blood test.

Georgia's coercive warning destroys any free will of a motorist. It informs them they are required by law to submit to a blood draw, that they will lose their license for a year if they refuse, and worst of all, that their refusal will constitute legislatively-mandated proof of guilt at trial. The Fourth Amendment confers no right to refuse this search at all if such a warning is not deemed unconstitutional.

Most prosecutors throughout the country refuse to acknowledge the major change in the last seven years where this Court confirmed that blood test requests of DUI suspects are protected by the Fourth Amendment and are not limited to a statutory right as discussed in *South Dakota v. Neville*, 459 U.S. 553 (1983). *Neville* recognized that it was permissible to coerce drivers into submitting to State tests through the implied consent laws because the drivers did not have a constitutional right to refuse. After the changes pursuant to *McNeely* and *Birchfield*, the State is now arguing that the coercive implied consent laws are not coercive or unreasonable.

The government has consistently argued in Georgia and other states that the reasoning of *Birchfield* is inapplicable because Petitioner could not be prosecuted for a separate crime for the blood test refusal like the petitioners in *Birchfield*. Petitioner acknowledges that the *Birchfield* decision addressed cases where the refusal was a separate criminal charge, however, the reasoning of this Court was based on the intrusive nature of the blood test and the availability of the less intrusive alternative of a breath test. While this may be an important difference between the petitioners in *Birchfield* and Ms. Waters in some scenarios, it does not undo the Court's statement in *Birchfield* that the demand for a blood test from Danny Birchfield was an unreasonable one. States like Georgia argue that they can constitutionally skip a breath test and demand a blood test under the threat of criminal and civil penalties as long as the refusal cannot be prosecuted as a crime separate from the DUI. They are wrong because the refusal can statutorily prove elements of the crime of DUI and result in a one year

license suspension. The Fourth Amendment requires that searches be reasonable and that consent be voluntary, and Georgia's implied consent scheme has reached a point where there is neither.

In *Birchfield*, Beylund (like Petitioner) submitted to a blood test after being told pursuant to the North Dakota implied consent warning that he was required to submit to the blood test and threatened with civil and criminal penalties if he refused. The Court agreed that Beylund was misinformed that he was required to submit to the blood test, but the majority of states have not changed their implied consent laws to comply with the Fourth Amendment analysis in *Birchfield*.

> Unlike the other petitioners, Beylund was not prosecuted for refusing a test. He submitted to a blood test after police told him that the law required his submission, and his license was then suspended and he was fined in an administrative proceeding. The North Dakota Supreme Court held that Beylund's consent was voluntary on the erroneous assumption that the State could permissibly compel both blood and breath tests. Because voluntariness of consent to a search must be "determined from the totality of all the circumstances," *Schneckloth*, *supra*, at 227, 93 S.Ct. 2041 we leave it to the state court on remand to reevaluate Beylund's consent given the partial inaccuracy of the officer's advisory.

Birchfield, 136 S. Ct. at 2186 (emphasis added).

Petitioner here was misinformed by the "implied consent" law which was read to her twice, because it repeatedly stated that Georgia law required her to

submit to the blood test with criminal and civil penalties for refusal explained. Petitioner had a constitutional right to refuse the unreasonable blood test demand by the government. Unlike Georgia, North Dakota amended its implied consent statutes after *Birchfield* and added the following language to N.D.C.C. § 39-20-01(3)(b): "If the officer requests the individual to submit to a blood test, the officer may not inform the individual of any criminal penalties until the officer has first secured a search warrant."

Although a "search conducted pursuant to . . . valid consent is constitutionally permissible," *Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973), valid consent is "in fact, freely and voluntarily given[.]" *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968). The Fourth Amendment requires that an arrestee's voluntary consent be independent of implied consent. *State v. Butler*, 302 P.3d 609 (Ariz. 2013). Moreover, "[v]oluntariness is a question of fact," *Schneckloth*, 412 U.S. at 248-49, which "is assessed from the totality of the circumstances." *Id.* at 227. "[The government's] burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority." *Bumper*, 391 U.S. at 548-49.

Petitioner asked questions about the blood test and her rights when the officer told her that if she answered with anything other than a "yes" then it would be considered a refusal. The officer effectively threatened her with the negative consequences of the refusal for asking any further questions about her rights or the blood test or anything else. The officer acknowledged that Petitioner was trying to avoid submitting to the test and had questions about the test that the officer was not qualified to answer or

refused to answer. The State did not meet its burden of proof to demonstrate that Petitioner voluntarily consented to the blood test when the State could not even articulate all the unanswered questions of Petitioner.

The warning that compelled Petitioner to submit to the test incorrectly informed her that by exercising her constitutional right to refuse a warrantless blood test that she would be punished both in the civil and criminal cases. As discussed above, the federal circuit courts "have unanimously held that a defendant's refusal to consent to a warrantless search may not be presented as evidence of guilt." *State v. Runyan*, 290 F.3d 223, 249 (5th Cir. 2002).[4] "[S]o long as there is no waiver on her part, her refusal cannot be used against her." *Prescott*, 581 F.3d at 1352 (emphasis added). Prescott was convicted of being an accessory after the fact by preventing the apprehension of a felon after police located a suspect in a mail fraud investigation hiding in her apartment, and during trial, the prosecutor referred to Prescott's refusal to allow police to enter her home as evidence that she was harboring the suspect. The Court held that it was a prejudicial error to allow the government to use Prescott's refusal to the search as evidence of her guilt, and reversed earlier decisions holding otherwise. *Id.* The Court reasoned that:

---

[4] (citing *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)). (*See also Simmons v. United States*, 390 U.S. 377 (1968); *United States v. Taxe* 540 F.2d 961 (9th Cir. 1976); *United States v. Harris*, 660 F.3d 47 (1st Cir. 2011)).

> If 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.' . . . .

Prescott, 581 F.3d at 1351 (emphasis added) (citations omitted).

Permitting a jury to rely on subjective and speculative evidence would grossly abuse the rights these amendments were designed to protect, and *Prescott* found that such comments by a prosecutor "can have but one objective to induce the jury to infer guilt." *Id.* It concluded that:

> "The right to refuse protects both the innocent and the guilty, and to use its exercise against the defendant would be, as the Court said in *Griffin*, a penalty imposed by courts for exercising a constitutional right."

Id. (Emphasis added).

Petitioner could not and should not ever be punished for exercising her constitutional right to refuse a constitutionally protected search. The warning read to Petitioner and application of O.C.G.A. §§ 40-5-67.1(d) and 40-6-392(d) are unconstitutional as applied to the facts of this case. Because the blood test evidence was admitted and obtained in violation of the Fourth Amendment (without warrant or valid consent), it must be held inadmissible.

The Supreme Court of Georgia erroneously approved of the Georgia law by holding that the demand for a blood test was the same legally as a

demand for a breath test by referring to its *Olevik* decision. This reasoning is flawed in that this Court distinguished the demands and their reasonableness under the Fourth Amendment and held that warrantless blood tests, unlike breath tests, were unreasonable. In Footnote 14 of *Olevik*, the Supreme Court of Georgia acknowledged that there were problems with the implied consent laws by holding: "The General Assembly may wish to amend the implied consent notice statute; if it does, among the changes it may consider would be a clearer explication of the right to refuse testing, and a more accurate articulation of the likelihood of license suspension." *Id.* at 524.

The Supreme Court of Georgia erroneously denied the constitutional challenge to O.C.G.A. § 40-5-67.1 by failing to apply the proper Fourth Amendment analysis as described by this Court in *Patel*, *supra*.

Patel held that the determination of reasonableness of a search is inherently factual and therefore the "no set of circumstances" test is improper because it "would preclude facial relief in every Fourth Amendment challenge to a statute authorizing warrantless searches." *Id.* At 2451. The standard set out in *Patel* follows:

> [w]hen addressing a facial challenge to a statute authorizing warrantless searches, 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.

Patel at 2451 (emphasis added).

The facial challenge in *Patel* involved a city ordinance that authorized police to inspect hotel records without a search warrant and did not involve the admissibility of the evidence. In defending the city's statute, Los Angeles argued that there were hypothetical circumstances where a search conducted under this provision would be constitutionally appropriate, (*i.e.* an officer responding to an emergency, a hotel operator's consent, or officers had a warrant). *Patel* at 2450-51. The Court found that "laws obligating inns to provide suitable lodging to all paying guests are not the same as laws subjecting inns to warrantless searches." *Patel*, *supra*, at 2455. Further, "the fact that some hotels chose to make registries accessible to the public has little bearing on whether government authorities could have viewed these documents on demand without a hotel's consent." *Patel* at 2456. The Court held that "the constitutional 'applications' that petitioner claims prevent facial relief here are irrelevant to our analysis because they do not involve actual applications of the statute." *Patel* at 2451 (emphasis added).

Applying *Patel* to a facial challenge of the Georgia's implied consent statutes, the officers would not be relying on the implied consent laws if there was another constitutional basis for the search like a suspect asking to take a blood test before she was arrested. There will always be a hypothetical set of circumstances where a warrantless search would be reasonable. But those sets of circumstances are not the focus of facial challenges according to this Court in *Patel*. Another example would be if a suspect began demanding a blood test to prove her innocence when the officer told

her she was under arrest and prior to the demand for blood through the ICW.

The Supreme Court of Georgia ignored the reasoning and holdings of *Birchfield* while acknowledging problems with the statutory warning. Some judges and courts throughout the country appear to be ensconced in the implied consent laws that assume motorists have implicitly consented to compelled warrantless blood tests despite this Court's sound reasoning in *Birchfield*.

It is reprehensible to authorize civil and criminal penalties for the exercise of a constitutional right. The practical solution is simple. In order to comply with the Fourth Amendment, the State should be required to demand a breath test as the initial test or give the motorist a choice of which test the motorist prefers to take. After a completed breath test, the officer can always apply for a search warrant for a blood test. A blood test must require a warrant or voluntary consent not coerced by threats of unreasonable negative consequences to the driver. If the officer does not have the time or resources to obtain a search warrant, the officer can rely on the exigent circumstances exception to the warrant requirement. Georgia, like most states, has a statutorily approved process to issue search warrants through electronic communication devices to expedite the process while maintaining judicial safeguards. *See* O.C.G.A. § 17-5-21.1 and *McAllister v. State*, 754 S.E.2d 376 (Ga. Ct. App. 2014) (search warrants are approved to obtain DUI evidence while limiting the scope of the blood testing that is permissible). Review by a neutral magistrate for a search warrant will limit the intrusions on privacy interests by making sure probable cause exists before the blood draw is

conducted and also by specifying the scope of the search and what testing is authorized on the blood. This Court should find that implied consent laws that arbitrarily allow officers to demand warrantless blood tests with threats of criminal and civil penalties are unconstitutional on their faces and as-applied to the facts.

III. THIS PETITION IS OF GREAT NATIONAL SIGNIFICANCE BECAUSE THE STATE LEGISLATURES AND STATE COURTS NEED GUIDANCE AS TO WHAT CAN AND CANNOT CONSTITUTIONALLY BE INCLUDED IN "IMPLIED CONSENT" STATUTES AND WARNINGS.

As mentioned, in the post-*Birchfield* world, North Dakota is an exception because most states have not amended their implied consent warnings since the decision. Most states, including Georgia, have responded by continuing to litigate cases at every level rather than amending the implied consent laws to be consistent with *Birchfield.*

Each year, thousands of drivers throughout this country are being coerced into submitting to warrantless blood draws by statutes like the Georgia statute. In almost all instances, this is occurring when the less intrusive breath test is available. Drivers are being told that any refusal to consent will become evidence against them and proof of their guilt. There are very few cases before this Court that can clarify and stop more daily Fourth Amendment violations than the instant case.

The Georgia statutes and this case provide the Court with perfect vehicle to provide guidance to the state legislatures and state courts that law enforcement cannot compel a driver to submit to a warrantless blood

test by threats of criminal and civil punishment. At least four members of this Court have suggested the need to clarify the holdings of this Court as it relates to implied consent laws. *See Mitchell v. Wisconsin*, *supra* (Sotomayor, J., joined by Ginsburg and Kagan, JJ., dissenting) (noting that the Court granted certiorari to consider the constitutionality under the Fourth Amendment of provisions in implied consent laws allowing officers to draw blood from unconscious drunk drivers); *id.* at 2551 (Gorsuch, J., dissenting) ("We took this case to decide whether Wisconsin drivers impliedly consent to blood alcohol tests thanks to a state statute.").

There remains a pressing need to clarify the existing Fourth Amendment analysis of the implied consent laws in Georgia and dozens of other similarly-situated states. Law enforcement officers are demanding a staggering number of warrantless blood tests annually. This has resulted in an inordinate amount of litigation as it relates to this Court's holdings in *Birchfield* and *McNeely*. There are many differing interpretations of this Court's holdings from state to state causing confusion as to the proper analysis of implied consent and coercive warnings. This case presents an excellent opportunity to address the grave Fourth Amendment concerns that remain with regard to implied and express consent statutory schemes in the blood testing context.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

GREG WILLIS, ESQ.
COUNSEL OF RECORD
WILLIS LAW FIRM
6000 LAKE FORREST DRIVE
SUITE 375
ATLANTA, GA 30328
(404) 835-5553
GW@WILLISLAWGA.COM

D. TIMOTHY HUEY
HUEY DEFENSE FIRM LLC
3240 WEST HENDERSON ROAD
COLUMBUS, OH 43220
(614) 487-8667
DTHLAW@GMAIL.COM

COUNSEL FOR PETITIONER

FEBRUARY 3, 2020