CASE No. S22A0542

IN THE

Supreme Court of Georgia

STATE OF GEORGIA

MIA LASHAY AMMONS,

Appellant,

v.

STATE OF GEORGIA,

Appellee.

Brief of Appellant Mia Lashay Ammons

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QUESTIONS PRESENTED

After the trial court denied Mia Ammons's motion to suppress, ruling that her refusals to produce a preliminary breath test sample and perform field sobriety tests were admissible in her criminal case, as well as rejecting her constitutional challenge to the Implied Consent statutes, Ms. Ammons sought this Court's permission for an interlocutory appeal. In the order granting review, this Court posed three questions to address:

> 1. Should this Court overrule its holding in *Keenan v. State*, 263 Ga. 569, 572 (2) (1993), that admission of evidence that a defendant refused a roadside alco-sensor test does not violate the Georgia Constitution's guarantee of the right against compelled self-incrimination?
>
> 2. Does the Georgia Constitution's guarantee of the right against compelled self-incrimination apply to field sobriety tests, such that evidence that the defendant refused to submit to such tests is inadmissible?
>
> 3. Do O.C.G.A. §§40-5-67.1 or 40-6-392 violate the Georgia Privileges and Immunities Clause?

Because an alco-sensor test requires a defendant to produce incriminating evidence against them; because field sobriety tests are acts sought by police to determine intoxication; and because the Implied Consent statutes allow the exercise of a constitutional right to be substantive evidence of guilt in a criminal trial, the answer to all three questions is Yes.

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Brief of Appellant Mia Lashay Ammons

Mia Lashay Ammons appeals to this Court the trial court's denial of her motion to suppress.

JURISDICTIONAL STATEMENT

As an interlocutory appeal involving a novel constitutional question, jurisdiction lies with this Court. Ga. Const. 1983, Art. VI, Sec. VI, Para. II(1); see O.C.G.A. §5-6-34(d). Further, Ms. Ammons specifically challenged the Implied Consent statutes on state constitutional grounds, argued this at the hearing, and obtained a definitive ruling thereupon in the court below. See V2.16-18, 45; see also Ga. Sup. Ct. R. 19.

CONSTITUTIONAL PROVISIONS AT ISSUE

> No person shall be compelled to give testimony tending in any manner to be self-incriminating.

Ga. Const. 1983, Art. I, Sec. I, Para. XVI ("Paragraph XVI").

> All citizens of the United States, resident in this state, are hereby declared citizens of this state; and it shall be the duty of the General Assembly to enact such laws as will protect them in the full enjoyment of the rights, privileges, and immunities due to such citizenship.

Ga. Const. 1983, Art. I, Sec. I, Para. VII ("Paragraph VII").

> No person shall be deprived of life, liberty, or property except by due process of law.

Ga. Const. 1983, Art. I, Sec. I, Para. I ("Paragraph I").

> 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 warrant shall issue except upon probable cause supported by oath or affirmation particularly describing the place or places to be searched and the persons or things to be seized.

Ga. Const. 1983, Art. I, Sec. I, Para. XIII ("Paragraph XIII").

STATEMENT OF THE CASE

Just after midnight on July 14, 2018, Trooper Levi Perry of the Georgia State Patrol stopped a car in Paulding County for a tag violation. State's Ex. 1, at 00:05:30 – 00:06:48.[1] Upon smelling alcohol, Trooper Perry asked the driver of the vehicle, Mia Ammons, to get out and step over to his patrol car. V2.10. While speaking to Ms. Ammons, the Trooper asked her if she would provide a preliminary breath test sample ("PBT"), which Ms. Ammons refused. State's Ex. 1, at 00:08:04 – 00:08:20. Returning to his patrol car, Trooper Perry radioed dispatch to inform them he was "fixing to do field sobriety." *Id.* at 00:08:55-58. Upon exiting, Trooper Perry then instructed Ms. Ammons to perform horizontal gaze nystagmus, neither informing Ms. Ammons of the test nor its voluntary nature. *Id.* at 00:09:30 – 00:11:45.

As Trooper Perry attempted to make room for additional field sobriety tests, Ms. Ammons asked what he was doing. State's Ex. 1, at 00:11:45-50. When the Trooper told her he was preparing for more field sobriety tests, she again refused, stating she "just told [him] that [she] didn't want to do any

[1] All dashcam video time stamps refer to the time listed in the dashcam itself, not the length of time into the video, which is found by toggling on the closed captioning. (00:05:30 is 12:05:30 a.m., not 5.5 minutes into the video.)

This Court is not bound by the lower court's factual findings to the extent that the underlying facts definitively can be ascertained by reference to evidence that is uncontradicted and presents no questions of credibility, "such as facts indisputably discernable from a videotape." *Caffee v. State*, 303 Ga. 557, 559 (2018) (quoting *State v. Allen*, 298 Ga. 1, 2 (2015)).

tests," to which Trooper Perry replied, "No, you said you did not want to do the PBT. You didn't say anything about field sobriety." *Id.* at 00:11:58 – 00:12:05. After Ms. Ammons reiterated she did not wish to do any tests, Trooper Perry arrested her and read Implied Consent. *Id.* at 00:12:13. He requested a blood test, and when asked whether she consented, Ms. Ammons said she refused to answer. State's Ex. 1, at 00:12:50 – 00:14:15.

Accused in 2019, Ms. Ammons filed her motion to suppress on June 21, 2021. V1.2, 16-18. The trial court heard the motion on September 7, initially denying it on September 21. V1.34-35. After Ms. Ammons filed a motion to reconsider on September 28 seeking affirmative rulings on the specific arguments she raised, the trial court issued an amended order denying the motion on October 19, along with a certificate of immediate review. V1.37-38; V1.43-45. After timely filing her application for interlocutory appeal, which this Court granted on December 9, 2021, Ms. Ammons timely filed her notice of appeal. V1.62-63; V1.1.

ARGUMENT

This case is about whether the government can weaponize the assertion of a constitutional right to convict someone of a crime. Under this Court's recent decisions in *Elliott v. State*, 305 Ga. 179 (2019), and *Olevik v. State*, 302 Ga. 228 (2017), a person's refusal to perform incriminating acts *should* be inadmissible against them at trial. See, e.g., *State v. Bradberry*, 357 Ga. App. 60, 65-66 (2020) (relying upon *Elliott* and *Olevik* to hold alco-sensor test refusals inadmissible). In *Keenan v. State*, however, this Court held otherwise, without any discussion of the text, history, and context so critical to interpreting our state constitution. But *Keenan* is wrong, has led lower courts astray on interpreting Paragraph XVI, and winnowed away at Georgians' constitutional rights.

Similarly, Georgians have the constitutional right to insist upon a warrant before a blood test, yet the legislature has authorized treating that invocation as evidence of guilt in a criminal case. But this it simply cannot do while keeping with its affirmative duty to provide Georgians the "full enjoyment" of their state constitutional rights. Because the people have a fundamental right to demand a warrant before the State may invade their body, the General Assembly violated its duty in the Implied Consent statutes.

1. This Court should Jettison *Keenan* from its Paragraph XVI Jurisprudence.

Keenan has no place in Paragraph XVI. Under its original public meaning, Paragraph XVI applies both pre- and post-arrest. In saying otherwise, *Keenan* relied upon an erroneous conflation of Paragraph XVI with the self-incrimination statute. Not only that, but *Keenan* also made a constitutional ruling neither raised nor briefed by the parties, making its Paragraph XVI holding pure dictum. Whether dicta or a holding, however, this Court should abandon *Keenan* and restore Paragraph XVI to its full scope.

(a) Paragraph XVI's original public meaning covers pre-arrest compelled acts or one's refusal to act.

Though Georgia did not adopt Paragraph XVI until 1877, Georgians were not subject to the rack and thumbscrew until that time. Rather, Georgians' right against self-incrimination came over as part of their common-law heritage from Great Britain, much like many other provisions within the federal Bill of Rights. See *Campbell v. State*, 11 Ga. 353, 366-67 (1852) (rejecting argument that federal Bill of Rights enumerated principles limiting federal government only). As this Court has recognized, Paragraph XVI did not create Georgians' privilege against self-incrimination, but rather "merely secure[d] and protect[ed] it." *Elliott*, 305 Ga. at 212. Applying the *Elliott* Court's extensive treatment of both the applicable principles for interpreting the Georgia Constitution, see *id.* at 181-89—as well as Paragraph XVI's

historical context, *Elliott*, 305 Ga. at 199-200, 211-18—leads to a single result: Paragraph XVI applies prior to the initiation of formal criminal proceedings.

Start with one of the first cases in which this Court interpreted Paragraph XVI, *Day v. State*, 63 Ga. 667 (1879). There, this Court reversed a defendant's conviction where he had been compelled by a witness to put his foot into a shoe track at a crime scene. *Id.* at 668-69. Following *Day*, this Court applied its holding in *Evans v. State* to reverse a conviction where two officers had stopped the defendant on the street and compelled him to hand over a concealed firearm. 106 Ga. 516, 522 (1899). And relying upon *Day* and *Evans*, this Court held in *Elder v. State* that a defendant in sheriff's custody who obeyed when told to put his foot in a track fell within Paragraph XVI. *Elder v. State*, 143 Ga. 363, 364-65 (1915). Of course, Paragraph XVI applies in the courtroom, just as much as on the street corner. See *Blackwell v. State*, 67 Ga. 76, 78-79 (1881) (reversing conviction where defendant made to stand at trial so witness could verify defendant had amputated leg matching crime scene footprints). But Paragraph XVI was never so limited in its scope.

Indeed, this broad reach served as the Court's basis in *Aldrich v. State* to reverse the defendant's conviction. 220 Ga. 132 (1964). There, a truck driver was pulled over by police for an inspection to make sure he was complying with state regulations. *Aldrich*, 230 Ga. at 132-33. The statute criminalizing overweight vehicles required persons to drive their vehicles onto the scales to

weigh their vehicles, and if they refused, they would be punished by a fine. *Id.* at 133. When pulled over and told to drive onto the scales, the defendant refused, and was charged with violating the law. On appeal, this Court reversed. Since there was "no question" that requiring the defendant "to drive his vehicle upon the scales would have constituted evidence tending to incriminate him," the *Aldrich* Court applied its unbroken precedent to conclude that Paragraph XVI demanded reversal. *Id.* at 133, 135.

This is the consistent construction of Paragraph XVI. *Aldrich* followed *Day* and *Evans*, reaffirming that the 1945 Constitution carried forward the same interpretation of the same constitutional provision protecting against self-incrimination. *Elliott*, 305 Ga. at 203. After the 1976 Constitution, this Court again continued *Day*'s "interpretation of the scope of the right" in several cases. *Id.* at 204 (collecting cases). By the time of its ratification, Paragraph XVI had received a longstanding construction that it applied prior to arrest. See *Elliott*, 305 Ga. at 217 ("[W]e have specifically applied Paragraph XVI to bar a criminal prosecution that was based on a refusal to provide incriminating evidence by the side of the road" and citing *Aldrich* as support).

(b) Keenan *rests on neither text nor binding case law.*

Against this consistent and definitive construction, *Keenan* held that the trial court did not err in admitting evidence of the defendant's pre-arrest refusal to submit to the preliminary breath test. *Keenan*, 263 Ga. at 572. The

reasoning was that "he was not in custody at the time" the police requested sought the test. *Id.* at 572 (quoting *Lankford v. State*, 204 Ga. App. 405, 406 (1992)). Instead of discussing the constitutional provision at issue, its own voluminous case law, or even citing to Paragraph XVI, the *Keenan* Court summarily concluded that the Georgia Constitution was not offended by the defendant's refusal to "act" being used against him in a criminal trial. The only support for holding that Paragraph XVI did not apply prior to arrest was a lone Court of Appeals case, *Lankford v. State*. But *Lankford* is far from a stout pillar upon which to base such a dramatic departure from precedent.

In *Lankford,* the Court of Appeals rejected the defendant's argument that his refusal to perform field sobriety tests was inadmissible. But instead of discussing this Court's precedents, the *Lankford* Court concentrated its analysis on the custodial vs. non-custodial application of *Miranda*.[2] *Lankford*, 204 Ga. App. at 406-07. Yet as this Court clarified in *State v. Turnquest*, the analysis and application of *Miranda* holds no water in the analysis and application of Paragraph XVI. See *State v. Turnquest*, 305 Ga. 758, 762-68 (2019) (rejecting *Miranda*-style prophylactic rule for Paragraph XVI rights). Hence why the Court of Appeals has noted that "although under Georgia law, an investigating officer is not required to advise a suspect that his performance

[2] See *Miranda v. Arizona*, 384 U.S. 436 (1966).

of field sobriety tests is voluntary, an officer cannot improperly compel a suspect into submitting to the tests," citing to *Aldrich* for support. *Rowell v. State*, 312 Ga. App. 559, 563 (2011) (punctuation and footnote omitted; citing *Aldrich*, 220 Ga. at 134), disapproved of on other grounds, *Turnquest*, 305 Ga. at 775 n.15.

Nor does the other Court of Appeals case cited by the *Keenan* Court, *Montgomery v. State*, 174 Ga. App. 95 (1985), buttress its ruling. *Montgomery* held that field sobriety tests do not fall within Georgia's statutory self-incrimination privilege, since no "criminal proceeding" is pending when an officer requests a suspect perform field sobriety tests. *Montgomery*, 174 Ga. App. at 96 (citing O.C.G.A. §24-9-20 (1973) (now codified at O.C.G.A. §24-5-506)). When the Court of Appeals went beyond the statutory privilege to address the constitutional issue, it noted that Paragraph XVI was not violated when the defendant "did not refuse to perform the tests." *Id.* at 96.

By relying upon *Lankford* and *Montgomery*, without any discussion of its own precedent, the *Keenan* Court erred when it held that Paragraph XVI was not violated by the State presenting evidence of the defendant's refusal to "act" against the defendant in a criminal trial.

(c) This Court should reject Keenan.

In reaching its ruling, *Keenan* not only contradicted its own precedent but needlessly injected Paragraph XVI into the equation. See *Turnquest*, 305

Ga. at 772 (discussing how the *Keenan* Court "equated the [self-incrimination] statute with Paragraph XVI without further analysis of the constitutional provision," which was not even "raised by the appellant in" *Keenan*). If this Court were to find *Keenan* to be dicta, then its disavowal offers no issue. If binding, however, then *stare decisis* concerns come into play. Under that doctrine, courts stand by their prior decisions because it promotes "the evenhanded, predictable, and consistent development" of the law, "fosters reliance" on the judicial system, and contributes to the judicial process's "actual and perceived integrity[.]" *Olevik*, 302 Ga. at 244 (quotation omitted). While *stare decisis* promotes important principles, that does not make it "an inexorable command." *Turnquest*, 305 Ga. at 773; accord *Olevik*, 302 Ga. at 244. Instead, courts conduct a four-factor test considering "the age of the precedent, the reliance interests at stake, the workability of the decision, and, most importantly, the soundness of its reasoning." *Turnquest*, 305 Ga. at 773; accord *Olevik*, 302 Ga. at 245.

All four factors weigh against *Keenan*. Its unsound reasoning has already been addressed; the other three all support overruling. First, *Keenan* is only twenty-eight years old, much younger than other precedents this Court has overruled. See *Turnquest*, 305 Ga. at 774 (collecting cases which overruled precedents as old as forty-five years). Second, the State has little reliance interests at stake, since substantial reliance interests are "most common with

rulings involving contract and property rights." *Savage v. State*, 297 Ga. 627, 641 (2015). Even if the State has some interest in maintaining decreased constitutional rights for its citizens, this sort of reliance interest does not "outweigh the countervailing interest that all individuals share in having their constitutional rights fully protected." *Olevik*, 302 Ga. at 246 (quoting *Arizona v. Gant*, 556 U.S. 332, 349 (2009)). Nor has *Keenan*'s holding engendered any reliance from this Court. Of the five cases from this Court citing it, three rely on other parts of the opinion. See *Price v. State*, 269 Ga. 222, 225 n.13 (1998), overruled by *Turnquest*, 305 Ga. at 775; *Fantasia v. State*, 268 Ga. 512, 513-14 (1997), overruled by *Olevik*, 302 Ga. at 246 n.11; *Ga. Dept. of Human Res. v. Phillips*, 268 Ga. 316, 325 n.35 (1997) (Benham, C.J., dissenting). One case refused to rely upon *Keenan*, and another mentioned it only in distinguishing it. See *Mitchell v. State*, 301 Ga. 563, 569 & n.6 (2017), disapproved on other grounds by *Turnquest*, 305 Ga. at 775 n.15; *Turnquest*, 305 Ga. at 771. Finally, any workability interests the State would claim cannot justify its retention in Georgia law. Thus, it should be overruled.

2. Field Sobriety Tests Fall within Paragraph XVI, Rending Inadmissible Defendants' Refusals to Perform Them.

Whether field sobriety tests are incriminating acts should be an easy question. The entire purpose of Field Sobriety Tests is "to reveal, more quickly and in a reproducible fashion,…characteristics [such] as unsteady gait, lack of balance and coordination, impaired speech, lack of memory, or inability to divide one's attention," all signs of intoxication. *Mitchell*, 301 Ga. at 571; accord Br. of Resp't, *Ammons v. State*, S22I0281, at 5 (Nov. 8, 2021) (discussing field sobriety tests' purpose as assisting "the officer [in] trying to determine whether probable cause exists to arrest [the driver] for DUI"). In *Mitchell v. State*, this Court declined to consider Field Sobriety tests as "searches" for Fourth Amendment purposes, since they appeared "to be an act more akin to a handwriting or voice exemplar than the physical removal of tangible evidence." 301 Ga. at 570. Paragraph XVI protects against compelled handwriting exemplars, and likely voice exemplars as well. *Brown v. State*, 262 Ga. 833, 836 (1993); see *Olevik*, 302 Ga. at 242 n.8 (questioning the errant Court of Appeals case holding voice exemplars not covered as "something of an outlier.") Thus, Paragraph XVI protects against compelled field sobriety tests.

The problem, however, stems from (what else?) the *Lankford* case, discussed *supra*. Relying upon *Lankford*, the Court of Appeals held in *State v. Leviner* that, although the record showed that the defendant had been directed

to perform field sobriety tests by law enforcement,[3] the trial court erred in excluding the tests because the defendant "was not in custody at the time he was required to take the field sobriety tests." *State v. Leviner*, 213 Ga. App. 99, 103 (1994). Similarly, the Court of Appeals ruled in *Forsman v. State* that Paragraph XVI was not violated because the defendant's refusal occurred pre-custodial arrest, resting its holding upon *Lankford*. 239 Ga. App. 612, 613 (1999). And in *Long v. State*, the lower court followed *Keenan* and *Forsman* to the same end. 271 Ga. App. 565, 567-68 (2004).

Yet as the Trooper testified at the hearing, "unless there's cooperation [by the defendant in the field sobriety test,] you can't perform it." V2.17. See *Olevik*, 302 Ga. at 243-44 (applying Paragraph XVI to breath tests because with a breath test, "it is *required* that the defendant *cooperate* by *performing an act*") (emphasis in original). If the Trooper had tried to get Ms. Ammons to place her foot in a track and she refused, Paragraph XVI would apply, regardless of whether she was in custody. See *Day*, 63 Ga. at 668-69; accord *Davis v. State*, 31 So. 569, 571 (Ala. 1902) (reversing where defendant's refusal

[3] As this Court noted in *Olevik*, the voluntariness of performing incriminating acts is the same test used to determine the voluntariness in the Fourth Amendment consent to search context. *Olevik*, 302 Ga. at 251. And this Court has long recognized that "[m]ere acquiescence in an officer's authority will not demonstrate the accused's voluntary consensual compliance with the request made of him." *State v. Turner*, 304 Ga. 356, 359 (2018) (quoting *State v. Tye*, 276 Ga. 559, 562 (2003)).

to put shoe in track admitted in evidence against him); *Cooper v. State*, 6 So. 110, 111 (Ala. 1889) (same). If Ms. Ammons was asked to stand up in court at trial for a witness's perusal and she refused, Paragraph XVI would apply. See *Blackwell*, 67 Ga. at 78-79; accord *Allen v. State*, 39 A.2d 820, 822 (Md. 1944) (reversing conviction where State compelled defendant to put on hat during trial); *Ward v. State*, 228 P. 498, 499 (Okla. Crim. App. 1924) (reversing conviction where defendant made to put on coat found at crime scene in front of jury); *Stokes v. State*, 64 Tenn. (5 Baxt.) 619, 620-21 (1875) (reversing conviction where State elicited the defendant to refuse to incriminate himself in front of jury); *State v. Jacobs*, 50 N.C. (5 Jones) 259, 259 (1858) (reversing conviction where defendant compelled to stand up and exhibit himself to jury). To exclude field sobriety tests from Paragraph XVI's aegis would serve only to shatter the cohesion this Court has recently wrought in our state constitutional jurisprudence. Thus, the trial court erred in holding otherwise, and Ms. Ammons requests this Court reverse the lower court.

3. The Implied Consent Statutes Violate Paragraph VII by Allowing the State to Weaponize a Defendant's Assertion of a Constitutional Right against them in a Criminal Trial.

In refusing to consent to a blood test, Ms. Ammons relied upon her constitutional right to insist upon a warrant. Through the Implied Consent statutes, the legislature has authorized her exercise to be evidence of guilt in a criminal case. But by its plain text, Paragraph VII prohibits the General Assembly from enacting laws undermining Georgians' constitutional rights. Thus, the Implied Consent statutes violate Paragraph VII.

(a) Georgians have a constitutional right to insist upon a warrant before being deprived of their blood.

To perform a blood test, the State searches a person's body and seizes their blood, thereby invading the person's personal security, personal liberty, and personal privacy. Erected against this action by the State, however, stands two provisions of the Georgia Bill of Rights: the Search and Seizure Clause and the Due Process Clause.

At the outset, however, and in light of the anticipated arguments of the State,[4] Ms. Ammons stresses the exclusive state law basis of her argument. True, this Court has in the past said that courts interpret Paragraph XIII "in accord" with the Fourth Amendment, rather than in Paragraph XIII's history,

[4] See Br. of Resp't, *Ammons v. State*, S22I0281, at 19-25 (Nov. 8, 2021) (citing other states' case law applying current federal precedent, without discussion of text, history, or context of provisions).

text, and context. *Williams v. State*, 296 Ga. 817, 818 n.5 (2015); cf. *State v. Holland*, 308 Ga. 412, 413 n.3 (2020) (questioning past opinions interpreting Georgia's due process clause in accord with federal case law without discussing original meaning). But "[c]urrent Fourth Amendment jurisprudence is a mess," embroiled in a century-old war between "competing, inconsistent doctrines [like]…the original meaning, the 'touchstone' of reasonableness, and the 'lodestar' of *Katz*.[5]" *State v. Wright*, 961 N.W.2d 396, 410, 411 (Iowa 2021) (plurality op.) (detailing why the Iowa Supreme Court was abandoning its lockstep interpretation of state Fourth Amendment analog). Nowhere is that mess more obvious than in DUI law: From *Schmerber v. California* in 1966 authorizing warrantless blood tests, people lost the sacred protections from unreasonable search and seizure for decades. *Schmerber v. California*, 384 U.S. 757, 770-71 (1966).[6] Even when the U.S. Supreme Court attempted course-correction, it lasted less than a decade.[7] But since the Georgia constitution's

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[5] *Katz v. United States*, 389 U.S. 347 (1967).

[6] This holding was later exacerbated by Justice O'Connor's dicta in *South Dakota v. Neville*, 459 U.S. 553, 563 (1983).

[7] Compare *Missouri v. McNeely*, 569 U.S. 141 (2013) (plurality op.) (rejecting *per se* exigent circumstance in blood-alcohol dissipation) and *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016) (holding blood tests too invasive to count as search-incident-to-arrest) with *Mitchell v. Wisconsin*, 139 S. Ct. 2525 (2019) (plurality op.) (creating an "almost always exigent circumstance" for blood tests in context of unconscious driver for DUI cases). See *State v. McGee*, 969 N.W.2d 432, 438 (Iowa 2021) ("*Mitchell* seemingly walked back (1) *McNeely*'s rejection of categorical exigent-circumstances exceptions and (2) *Birchfield*'s endorsement of warrant applications for blood

safeguards do not wax or wane with the proclivities of the Supreme Court of the United States, and in light of this Court's calls for independent analysis,[8] Ms. Ammons proceeds solely on state grounds.

(i) Absent exigent circumstances, Paragraph XIII requires police obtain a warrant before seizing a person's blood.

First adopted in 1861, the Georgia Constitution guarantees its denizens an inestimable safeguard against searches and seizures by the government. Currently enshrined in Paragraph XIII, unchanged since its first entrance in 1861,[9] we interpret Paragraph XIII in light of its original public meaning from that time. *Elliott*, 305 Ga. at 183. And though textually similar to the Fourth Amendment, interpreting Paragraph XIII requires more than mere recitations of federal case law, especially when those cases are not rooted in the language, history, and context of the constitutional text. *Olevik*, 302 Ga. at 234 n.3; accord *Elliott*, 305 Ga. at 188.

Start first with the text. Paragraph XIII preserves the People's right to be secure from unreasonable searches and seizures. Because the Constitution

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tests of incapacitated persons.")

[8] See *Olevik*, 302 Ga. at 234 n.3; accord *White v. State*, 307 Ga. 601, 602 n.2 (2020); *Mobley v. State*, 307 Ga. 59, 61 n.5 (2019); *Bourassa v. State*, 306 Ga. 329, 330 n.2 (2019).

[9] Accord Ga. Const. 1976, Art. I, Sec. I, Para. X (same); Ga. Const. 1945, Art. I, Sec. I, Para. XVI (same); Ga. Const. 1877, Art. I, Sec. I, Para. XVI (same); Ga. Const. 1868, Art. I, Sec. I, Para. X (same); Ga. Const. 1865, Art. I, Para. XVIII (same); Ga. Const. 1861, Art. I, Para. XXII (same).

is interpreted according to its original public meaning, contemporaneous dictionaries prove useful in gleaning that meaning. See, e.g., *Turnquest*, 305 Ga. at 762 & n.3 (looking to contemporaneous dictionaries for interpretation); *Clark v. Deal*, 298 Ga. 893, 896 (2016) (same). In 1861, a "search" meant "[t]o look over or through, for the purpose of finding something; to explore; to examine by inspection," and to seize meant "[t]o take possession by virtue of a warrant or legal authority." N. Webster, *An American Dictionary of the English Language* 997 (Chauncey Goodrich, et al., eds. 1861); *id.* at 1002. Unreasonable, on the other hand, presents a more difficult question. Its ordinary meaning provides little illumination,[10] likely because "unreasonable" in the search-and-seizure context is a term of art. Since Paragraph XIII "no doubt followed the Fourth Amendment" when it first entered our Constitution, determining "unreasonable" circa 1861 requires reviewing the Fourth Amendment's history and context. *Smoot v. State*, 160 Ga. 744, 747 (1925).

(A) The Fourth Amendment's "unreasonable" as "against the reason of the common law."

As Justice Frankfurter noted in one of his Fourth Amendment dissents, when courts discuss the freedom from unreasonable searches and seizures, they deal with "a provision of the Constitution which sought to guard against

[10] See Webster, Goodrich 1861 ed., at 1212 (defining "unreasonable" as "exceeding the bounds of reason" or "immoderate" or "exorbitant").

an abuse that more than any one single factor gave rise to American independence." *Harris v. United States*, 331 U.S. 145, 159 (1947) (Frankfurter, J., dissenting). From a trio of cases leading up to Independence—*Wilkes v. Wood*, 98 Eng. Rep. 489 (C.P. 1763), *Entick v. Carrington*, 19 How. St. Tr. 1029 (C.P. 1765), and *Paxton's Case*, 1 Quincy 51 (Mass. 1761)—emerged the Founders' belief that "unreasonable" meant "against reason," as in "against the reason of the common law." Laura K. Donohue, *The Original Fourth Amendment*, 83 U. CHI. L. REV. 1181, 1270-75 (2016). That common law had a litany of procedural rules to narrow and particularize any warrants. *Carpenter v. United States*, 138 S. Ct. 2206, 2243 (2018) (Thomas, J., dissenting). But because Parliament could alter or abolish them at will,[11] the Framers addressed that aspect as well. Thus the two clauses of the Fourth Amendment, with the first clause securing the substantive right to be free from searches and seizures in violation of the common law, and the second clause codifying those common-law protections for a warrant's issuance.

This did not change between 1791 and 1861. Federally, the U.S. Attorney for Pennsylvania, William Rawle, described in his treatise on the Constitution

[11] See *Beall v. Beall*, 8 Ga. 210, 216 (1850) (discussing how "[t]he omnipotent authority of the Parliament, instead of the Constitution" was the last resort, since "[Parliament's] power is absolute and uncontrollable, inasmuch as it may alter or change the [British] Constitution itself—such as it is—at pleasure.")

that "unreasonable" served "to indicate that the sanction of a legal warrant is to be obtained, before searches or seizures are made." William Rawle, *A View of the Constitution of the United States of America* 127 (Philip Nicklin 2d ed. 1829). And Justice Story, in his constitutional commentaries, similarly recognized that the Fourth Amendment acted as "little more than the affirmance of a great constitutional doctrine of the common law." 3 J. Story, *Commentaries on the Constitution of the United States* §1895, p. 748 (1833).

Likewise, state courts recognized that "[w]hat is meant by 'unreasonable searches and seizures'" in the Fourth Amendment and state analogs finds meaning in the Warrant Clause: "A warrant, founded upon oath, duly describing the person to be arrested, the place to be searched, or the property to be seized, and issued with the formalities and in cases prescribed by law, is in exact conformity with both constitutional provisions." *Banks v. Farwell*, 38 Mass. (21 Pick.) 156, 159 (1838); accord *Commonwealth v. Dana*, 43 Mass. (2 Metcalf) 329, 336 (1841) (state Fourth Amendment analog "does not prohibit all searches and seizures of a man's person, his papers, and possessions; but such only as are 'unreasonable,' and the foundation of which is 'not previously supported by oath or affirmation.'") In speaking of its own search and seizure provision, Delaware's high court affirmed it "was made to protect the rights of individuals, and to secure them from searches and seizures, except under the restrictions therein prescribed"—also known as the Warrant Clause. *Simpson*

v. Smith, 2 Del. Cas. 285, 291 (Del. 1817). A warrant that differed "from the form and without the prerequisites of the Constitution would be void." *Ibid.*; accord *Thorpe v. Wray*, 68 Ga. 359, 367 (1882). And in Georgia, to arrest someone required a warrant that specified the offense charged, what authority issued it, the person who was to execute it, and the person to be arrested. *Brady v. Davis*, 9 Ga. 73, 75 (1850). Likewise, the warrant had to "set forth the particular species of crime alleged against a party with convenient certainty," so that if the party was brought up "for discharge or bail on *habeas corpus*," the Court could determine whether the charges had any merit. *Ibid.*

Of course, none of the antebellum courts approved of criminals, or sought to needlessly give windfalls to defendants. If someone was arrested, then they were subject to a search of their person and premises, "but it cannot be done without warrant under oath, specially designating the person and object of search and arrest, because that would be contrary to the right of every person to be secure against unreasonable searches and seizures." *Maxham v. Day*, 82 Mass. (16 Gray) 213, 216 (1860). Hence why this Court in its first year of existence *de facto* incorporated the freedom from unreasonable searches and seizures as a right "as perfect under the State as the national legislature, and cannot be violated by either." *Nunn v. State*, 1 Ga. (1 Kelly) 243, 251 (1846). Accord *Campbell*, 11 Ga. at 366-67 (rejecting contention that the State had the power "to subject the people to unreasonable search and seizure, in their

persons, houses, papers, and effects"); *Reynolds v. State*, 3 Ga. 53, 73 (1847) (listing as one of "the blessings bequeathed to us by our venerated ancestors" the right to "be exempt in our persons, houses, papers and effects from unreasonable searches and seizures").

(B) Paragraph XIII's interpretations stressed the warrant requirement's importance.

Despite its adoption in 1861, Paragraph XIII would not receive any in-depth interpretations for over 30 years. Except for one case rejecting a Confederate soldier's challenge to his conscription on Paragraph XIII grounds[12] and a false imprisonment case citing Paragraph XIII as support for an insufficient warrant's voidness,[13] Paragraph XIII was not discussed until the 1896 case, *Pickett v. State*. 99 Ga. 12 (1896). In it, this Court confronted a criminal defendant who resisted an officer's attempt to search his person for a concealed weapon, despite lacking probable cause or a warrant. *Pickett*, 99 Ga. at 12-13. After arresting, interviewing, and processing one of three brothers, a police officer approached Pickett (one of the brothers), told him the officer knew he had a pistol, and must search him. *Id.* at 13. When Pickett objected, claiming the officer had no right to search him, the officer "replied that he did have the right, and was going to do it." *Ibid.* The officer then took hold of

[12] *Barber v. Irwin*, 34 Ga. 27, 33 (1864).
[13] *Thorpe v. Wray*, 68 Ga. 359, 367 (1882).

Pickett's arm, "and with the other hand reached round and felt a pistol concealed in [Pickett's] pocket under his coat." *Ibid.* Pickett broke away and fled, and when the officer shot at him escaping, he returned fire. *Pickett*, 99 Ga. at 13. At trial, the officer testified that he "had no warrant authorizing him to arrest and search [Pickett]; and testified that he never had one when he went to arrest anybody." *Ibid.*

On appeal, this Court reversed. Initially acknowledging that an officer had the authority to arrest someone without a warrant for a crime committed in his presence, *id.* at 15 (citing Code 1882, §4723), the *Pickett* Court castigated the officer, holding he had "no authority, upon bare suspicion, or upon mere information derived from others, to arrest a citizen and search his person in order to ascertain whether or not he is carrying a concealed weapon in violation of law." *Pickett*, 99 Ga. at 15. Quoting Paragraph XIII, the *Pickett* Court held that "[i]f any search is unreasonable, and obnoxious to our fundamental law," the case before it qualified. *Ibid.* Even if the defendant did have a pistol concealed on his person, because that fact was not discoverable without a search, then it not only "was not, in legal contemplation, committed in the presence of the officer," but also the officer "violated a sacred constitutional right of the citizen, in assuming a pretended authority to search his person in order to expose his suspected criminality." *Ibid.*

Nor is this an outlier viewpoint: A few years before *Pickett*, the U.S.

Supreme Court affirmed the denial of a request in a personal injury case to order the plaintiff to submit to surgical examination. *Union Pac. R. Co. v. Botsford*, 141 U.S. 250 (1891). In rejecting the notion, the *Botsford* Court rested on the principle that "[t]he inviolability of the person is as much invaded by a compulsory stripping and exposure as by a blow." *Id.* at 252. Compelling anyone "to lay bare the body, or to submit it to the touch of a stranger, without authority, is an indignity, an assault, and a trespass[.]" *Ibid.*

When Paragraph XIII received its first in-depth interpretation in *Williams v. State*, this Court rejected the defendant's argument that they could object to illegally seized evidence and create a collateral issue of it in the middle of trial. *Williams v. State*, 100 Ga. 511, 514-18 (1897). Even so, the *Williams* Court reiterated the *Pickett* holding that "[n]o search is more unreasonable or more obnoxious to our fundamental law than one without warrant, based upon a bare suspicion that a criminal offense has been committed." *Id.* at 525 (citing *Pickett*, 99 Ga. at 15). This Court would again rely upon the *Pickett* holding in the 20th century, and none of those cases' reliance have been repudiated. *See Douglass v. State*, 152 Ga. 379, 391 (1921).

Paragraph XIII has been consistently interpreted as requiring a warrant before a search or seizure could occur. Thus, this Court correctly held in *Olevik* that a blood test both falls within Paragraph XIII and generally requires a warrant before the human body is pierced. *Olevik*, 302 Ga. at 233 (reiterating

that Paragraph XIII "require[s] the extraction of blood to be conducted either pursuant to a search warrant or under a recognized exception to the warrant requirement.") (citing *Williams*, 296 Ga. at 821). A contrary reasoning—that officers may invade a person's body with a needle and extract their blood in search of incriminating evidence, all without needing an impartial magistrate's authorization—would only make a mockery of Paragraph XIII's protections.

(ii) Before the State can invade a person's personal security, liberty, or property, Paragraph I insists that the process due is a warrant.

Not only does Ms. Ammons have a constitutional right to insist upon a warrant through Paragraph XIII, she also has the right to insist upon a warrant under Georgia's Due Process Clause, Paragraph I. Interpreted in light of its original public meaning, Paragraph I requires a warrant's issuance before the State may deprive a suspect of their constitutionally protected liberty, privacy, and security.

(A) Paragraph I's original public meaning requires the government follow positive law before a deprivation occurs.

Like Paragraph XIII (and many other provisions of the Georgia Bill of Rights), Paragraph I first entered the Georgia Constitution in 1861 as part of the Declaration of Fundamental Principles. See Ga. Const. 1861, Art. I, Para. IV; Walter McElreath, *A Treatise on the Constitution of Georgia*, §100, p.134 (Atlanta: Harrison Co. 1912 (2020 reprint)). Amended in 1865, and reaching

its current form in 1868, Paragraph I guarantees that "[n]o person shall be deprived of life, liberty, or property except by due process of law." Ga. Const. 1983, Art. I, Sec. I, Para. I; see *Turnquest*, 305 Ga. at 769. Given its obvious connection to the Fifth Amendment's Due Process Clause as well as its common-law status in Georgia,[14] interpreting Paragraph I's original public meaning requires looking to the state of due process at the time of its adoption. From this comes two distinct concepts: a procedural requirement insisting that the State follow its own laws before depriving someone of their life, liberty, or property; and a substantive component that insisted that the government could not "deprive a person of those rights without affording [them] the benefit of (at least) those 'customary procedures to which freemen were entitled by the old law of England.'" *Sessions v. Dimaya*, 138 S. Ct. 1204, 1224 (2018) (Gorsuch, J., concurring in part and in judgment) (quoting *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 28 (1991) (Scalia, J., concurring in judgment)).

Procedurally, due process in Georgia rests on its historical predecessor, *Magna Charta*—specifically, paragraph 39's requirement that "[n]o freeman shall be taken or imprisoned or dis-seized or outlawed or banished, or in any ways destroyed, nor will we pass upon him, nor will we send upon him, unless by the lawful judgment of his peers, or by the law of the land." *Magna Charta*

[14] See *Campbell*, 11 Ga. at 367; *Reynolds*, 3 Ga. (3 Kelly) at 73.

Libertatum, par. 39 (1215). Through the "law of the land" clause and its subsequent evolution to due process,[15] the Clause ensured that "the executive would not be able unilaterally to deprive persons within the nation of their rights of life, liberty, or property except as provided by common law or statute and as adjudicated by independent judicial bodies[.]" Nathan S. Chapman, Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1807 (2012); *cf. In re Winship*, 397 U.S. 358, 382 (1970) (Black, J., dissenting) (defining due process as requiring "that our Government must proceed according to the 'law of the land'—that is, according to written constitutional and statutory provisions as interpreted by court decisions.") So where the State prosecuted a defendant outside of the statute of limitations without showing a tolling exception, this Court declared the proceeding void as against the "fundamental principle" of due process: "From the face of this indictment, the Government, through the agency of its judicial officers, not only seeks to deprive the citizen of his liberty, without authority of law, but in express violation of the declared will of the Legislature." *McLane v. State*, 4

[15] By 1861, American courts had recognized that "due process of law," "due course of law," and "the law of the land" all carried the same meaning. See, e.g., *Lipscomb v. Postell*, 38 Miss. (9 George) 476, 490 (1860) (using the three interchangeably); *Cavender v. Smith's Heirs*, 5 Iowa (5 Clarke) 157, 161 (1858) (same); see also *Murray's Lessee v. Hoboken Land & Imp. Co.*, 59 U.S. (18 How.) 272, 276 (1855) ("The words, 'due process of law,' were undoubtedly intended to convey the same meaning as the words, 'by the law of the land,' in *Magna Charta*.")

Ga. 335, 340 (1848). Or where a defendant challenged a judge's ordering the sheriff to bring more people to serve as jurors as against due process, this Court rejected the contention because "[i]t was authorized by law." *Bird v. State*, 14 Ga. 43, 52 (1853) (emphasis deleted).

Substantively, due process sought to establish the base line of those procedures the Government could use before depriving someone's life, liberty, or property. So when the antebellum Georgia Supreme Court confronted a claim of double jeopardy, it reversed the conviction based upon the "general principles" brought over from England—"Magna Charta, the Petition of Right, the Habeas Corpus, the Bill of Rights, and Act of Settlement," which served as "the original foundation, basis and embodiment of the liberty of the world." *Reynolds*, 3 Ga. (3 Kelly) at 72 (emphasis deleted). When confronted with a taking without compensation, the Supreme Court rejected it: "[a]gainst the contrary the great Charta guarded, by declaring that no individual should be deprived of his property, but by the law of the land, and by judgment of his peers." *Parham v. Justices, etc., Decatur Cnty.*, 9 Ga. 341, 349 (1851). And as the U.S. Supreme Court held only a few years before Paragraph I's adoption, due process meant either those procedures provided for by the Constitution, or "those settled usages and modes of proceeding existing in the common law[.]" *Murray's Lessee v. Hoboken Land & Imp. Co.*, 59 U.S. (18 How.) 272, 277 (1855); accord *Sutton v. Hancock*, 118 Ga. 436, 442 (1903) ("Any rule or

procedure which is in accord with the settled usage and practice of the common law afford 'due process,' within the meaning of that phrase as used in the various Constitutions of this country.")

(B) Blood tests invade a person's security, liberty, and privacy, requiring due process before deprivation.

At common law, "absolute personal rights were divided into personal security, personal liberty, and private property." *Johnson v. Bradstreet Co.*, 87 Ga. 79, 81 (1891); accord *Selma, Rome & Dalton R. Co. v. Gammage*, 63 Ga. 604, 609 (1879) (referring to "the three inherent, absolute rights of all men in civilized society—the rights of personal liberty, personal security, [and] private property"). Blood tests invade all three. Personal security—"a person's right to a 'legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation'"—bars the State from physically invading a person's body without due process. *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 195 (1905) (quoting 1 W. Blackstone, *Commentaries on the Laws of England* 129 (1765)); accord *Johnson*, 87 Ga. at 81. See *Botsford*, 141 U.S. at 251 ("No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.") Beyond the "right not only of freedom from servitude, imprisonment, or restraint," personal liberty includes the Georgia right to

privacy, or "to be let alone." *Pavesich*, 122 Ga. at 195-96. Long construed as "far more extensive than that protected by the Constitution of the United States," through this privacy right, Georgians "can refuse to allow intrusions on [their] person" by the State. *King v. State*, 272 Ga. 788, 789 (2000); *Zant v. Prevatte*, 248 Ga. 832, 834 (1982). And because "[o]n the law of nature rests the right of property which a man has in his own body," seizing someone's blood infringes upon their property interest in it. *Driscoll v. Nichols*, 71 Mass. (5 Gray) 488, 491 (1855). Cf. *Schloendorff v. Soc'y of N.Y. Hosp.*, 105 N.E. 92, 93 (N.Y. 1914) (Cardozo, J.) (discussing in informed-consent context how "[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body").

If any doubt remained regarding the interplay between Paragraph I and Paragraph XIII to the 1861 Constitution's framers, the General Assembly's response to the Confederate suspension of *habeas corpus* resolves it. Within three years of the Georgia Bill of Rights, the General Assembly passed a resolution on March 19, 1864, condemning the Confederate Congress suspending the writ of habeas corpus. Ga. L. 1863, p.152.[16] In it, the Assembly

[16] Generally, legislative history finds little support in Georgia, since "[t]he statements of the Georgia Constitution's drafters…are not controlling as to the original public meaning of the constitutional text ultimately ratified by the people of Georgia." *Barrow v. Raffensperger*, 308 Ga. 660, 676 n.16 (2020). However, this was a resolution passed by the General Assembly, rather than mere statements from individual legislators; its consideration does not

chastised the Confederate Congress, and noted that the power to suspend the Great Writ, as a negative implication instead of a positive assertion, lay subordinate to "the express, emphatic and unqualified constitutional prohibitions" found in Paragraph I & XIII. *Id.* at 152-53. More importantly, the General Assembly saw the two as complementary and reinforcing: the "due process of law" required "for seizing the persons of the people, as defined by the Constitution itself," were the requirements found in Paragraph XIII. *Id.* at 153. Accordingly, the same people who drafted and ratified Paragraph XIII thought that "*all* seizures of the persons of the people, by *any* officer of the Confederate Government, without warrant, and *all* warrants for that purpose from any but a Judicial source, are, in the judgment of this General Assembly, unreasonable and unconstitutional." *Ibid.* (emphasis supplied).

With these protected interests, Georgians cannot be deprived of their blood through a blood test without due process of law. That process to which a person is due before any invasion of their person can occur is a search warrant.

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constitute an impermissible reliance upon legislative intent. See *In re Abbott*, 628 S.W.3d 288, 293 (Tex. 2021) ("Our goal when interpreting the Texas Constitution is to give effect to the plain meaning of the text as it was understood by those who adopted it. Thus, 'legislative construction and contemporaneous exposition of a constitutional provision is of substantial value in constitutional interpretation.'") (quoting *Am. Indem. Co. v. City of Austin*, 246 S.W. 1019, 1023 (Tex. 1922)); cf. *Seila Law, LLC v. C.F.P.B.*, 140 S. Ct. 2183, 2197 (2020) (interpreting President's removal power in light of actions of First Congress, which "provides contemporaneous and weighty evidence of the Constitution's meaning") (citation omitted).

Compare *King v. State*, 272 Ga. 788 (2000) (holding defendant's right to privacy violated when State obtained protected information through a subpoena) with *King v. State*, 276 Ga. 126 (2003) (finding no privacy violation when State obtained private information through search warrant).

(b) The Implied Consent statutes infringe upon a Georgian's full enjoyment of their constitutional right to a warrant.

Georgians have the constitutional right to insist upon a warrant before the State may invade their person and seize their blood under both Paragraph XIII and Paragraph I. Yet through the Implied Consent statutes, a person who invokes these constitutional rights can have that exercise used against them in a criminal proceeding as evidence of guilt. Because this cannot afford Georgians the "full enjoyment" of that right to a warrant, the Implied Consent statutes violate Paragraph VII.

(i) <u>The plain meaning of Paragraph VII.</u>

Found in Paragraph VII, the Georgia Constitution provides that "[a]ll citizens of the United States, resident in this state, are hereby declared citizens of this state; and it shall be the duty of the General Assembly to enact such laws as will protect them in the full enjoyment of the rights, privileges, and immunities due to such citizenship." Ga. Const. 1983, Art. I, Sec. I, Para. VII. Appearing first in the 1868 Constitution in similar language,[17] Paragraph VII

[17] See Ga. Const. 1868, Art. I, Sec. I, Para. II ("All persons born or

has remained unchanged since its readoption in the 1877 charter. See *id.*; Ga. Const. 1976, Art. I, Sec. II, Para. IX (same); Ga. Const. 1945, Art. I, Sec. I, Para. XXV (same); Ga. Const. 1877, Art. I, Sec. I, Para. XXV (same). Admittedly lacking a robust body of precedents,[18] nevertheless Paragraph VII can be interpreted through following the *Elliott* guidelines.

Beginning with the text, Paragraph VII places upon the General Assembly the affirmative constitutional duty to enact laws providing for the "full enjoyment" of those rights guaranteed under the Georgia Constitution. As this Court recognized within the first year of Paragraph VII's existence, the rights Paragraph VII covers include those listed in the Georgia Constitution: "A citizen is one who, unless it is otherwise expressly provided by law, is entitled to the rights mentioned. […] If the right in question be one guaranteed in the Constitution of the State, then an Act of the Legislature cannot deny it." *White v. Clements*, 39 Ga. 232, 262 (1869); see *id.* at 272-73 (Brown, C.J., concurring) (declining to expand upon what rights, privileges, and immunities are guaranteed by Paragraph VII, "subject to such guarantees as are contained

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naturalized in the United States, and resident in this State, are hereby declared citizens of this State, and no laws shall be made or enforced which shall abridge the privileges or immunities of citizens of the United States, or of this State, or deny to any person within its jurisdiction the equal protection of its laws. And it shall be the duty of the General Assembly, by appropriate legislation, to protect every person in the due enjoyment of the rights, privileges, and immunities guaranteed in this section.")

[18] See *Ambles v. State*, 259 Ga. 406, 407 (1989).

in the Constitution itself, which the Legislature cannot take away.") And although non-binding upon this Court, Justice Thomas's concurrence in *McDonald v. City of Chicago* proves powerfully persuasive upon the original public meaning of "rights, privileges, and immunities" in Paragraph VII, given the contemporaneous adoption. See *McDonald v. City of Chicago*, 561 U.S. 742, 813-38 (2010) (Thomas, J., concurring in part and in judgment) (detailing an exhaustive review of the Fourteenth Amendment Privileges or Immunities Clause's original public meaning).

As for "full enjoyment," contemporaneous dictionaries defined "enjoyment" as "the condition of enjoying," and to enjoy meant "to have, possess, and use with satisfaction; […] as, to *enjoy* a free constitution and religious liberty." N. Webster, *An American Dictionary of the English Language* 449 (C. Goodrich & N. Porter eds. 1865). For "full," it meant the "complete measure; utmost extent; the highest state or degree," or "not wanting in any essential quality; complete; entire; perfect[.]" *Id.* at 549. So by guaranteeing Georgians the "full enjoyment" of their state constitutional rights, Paragraph VII insures the complete measure, utmost extent, and highest state of having, possessing, and using those rights with satisfaction.

Last but not least is Paragraph VII's unique language imposing an "affirmative constitutional duty" upon the General Assembly to enact laws to insure Georgians' full enjoyment of their rights. *State v. Miller*, 260 Ga. 669,

672 (1990), called into doubt on other grounds, *Unified Gov't of Athens-Clarke Cnty.*, 289 Ga. 726 (2011). Unlike the federal analogues' negative restrictions,[19] Paragraph VII's thrust of constitutional duty upon the General Assembly reflects long-held Georgia thought on the separation of powers. To this Court lies the "indispensable duty…to act as a faithful guardian of the personal liberty of the citizen, and to give ready and effectual aid to the means provided by law for its security." *Mims v. Wimberly*, 33 Ga. 587, 598 (1863) (quoting *In re Stacy*, 10 Johns. 328, 333 (N.Y. 1813)). At the same time, because "[g]enerally the rights guaranteed to the citizens by the Constitution" lack an enforcement remedy, "the manner of enforcing the rights is usually left for legislative enactment." *Bearden v. Daves*, 139 Ga. 635, 635 (1913) (syllabus). Thus, Paragraph VII's placing the "affirmative constitutional duty" upon the General Assembly to provide Ms. Ammons the full enjoyment of her rights under the Georgia Constitution serves as a nod to the separation of powers. See *Williams*, 100 Ga. at 523 ("To the legislative branch of government is confided the power, and upon that branch alone devolves the duty, of framing such remedial laws as are best calculated to protect the citizen in the enjoyment of such rights, as will render the same a real, and not an empty, blessing."); cf. *St. Louis Sw. Ry. Co. v. Griffin*, 171 S.W. 703, 704 (Tex. 1914)

[19] See U.S. CONST., Art. IV, §2, cl.1; U.S. CONST., amend. XIV, §1.

("[A]ll legislative power is by the Constitution vested in the Legislature, and the judicial department cannot frame laws, nor change, nor mold them by construction.")

(ii) The Implied Consent statutes burden a person's exercise of their constitutional rights.

The Implied Consent statutes authorize someone's refusal to consent to a test of their blood, breath, urine, or other bodily substances to be used as evidence against them in a criminal case. O.C.G.A. §40-5-67.1(b); O.C.G.A. §40-6-392(d). As this Court made plain in *Elliott*, someone's refusal to consent to a breath test is protected under Paragraph XVI. *Elliott*, 305 Ga. at 223. Likewise, the State cannot compel a person to provide a urine sample, nor weaponize that refusal against them. *Awad v. State*, ___ Ga. ____, S21G0370 (slip op.) at *17 (Jan. 19, 2021). Through the Implied Consent statutes, then, asserting a constitutional right can be evidence used by a jury to convict. *State v. Frost*, 297 Ga. 296, 303 (2015). Through the statutes, the General Assembly has determined that to prosecute DUI cases requires Georgians forfeit their constitutional rights. But see *Williams*, 100 Ga. at 520 (Paragraph XIII "was intended to operate upon legislative bodies, so as to render ineffectual any effort to legalize by statute what the people expressly stipulated could in no event be made lawful").

But a right is not a right if the State can weaponize the right's invocation

against you. See *Pittsburgh, Ft. W. & C. Ry. Co. v. Swinney*, 91 Ind. 399, 402 (1883) ("A legal right may be vindicated without a sacrifice; to aver the contrary is to assert that a right is not a right, and this is self-destructive.") Nor can it be said that someone's constitutional rights are "not wanting in any essential quality" if their invocation can be used to convict. Webster, 1865 ed., at 549. If you refuse to consent to the police searching your home without a warrant, can that incriminate you? No, because "this refusal was the exercise of a constitutionally protected right available to any person." *Miley v. State*, 279 Ga. 420, 421 (2005). What about refusing consent to your car? Again, no. *Mackey v. State*, 234 Ga. App. 554, 556 (1998). The only way to distinguish blood tests is to say that DUI cases are different than searches of one's home, papers, or effects. But if the State cannot impinge upon your right to refuse a warrantless search of your home, papers, or effects, then no principled basis exists for distinguishing persons. See *Williams*, 100 Ga. at 515 (rejecting any distinction "for none is recognized by either the federal or by our state constitution").

Consider other states' analyses of enjoying constitutional rights.[20] The Tennessee Constitution guarantees that "the right to trial by jury, as that right

[20] See *Lee v. Smith*, 307 Ga. 815, 823 (2020) ("To answer [questions of first impression], we look to rulings from other jurisdictions for guidance," to the extent they are persuasive).

existed at common law, shall remain inviolate." *Ricketts v. Carter*, 918 S.W.2d 419, 421 (Tenn. 1996) (citing Tenn. Const., Art. I, §6); accord Ga. Const. 1983, Art. I, Sec. I, Para. XI(a). So where a state statute imposed juror costs upon the losing parties in a civil case, the Tennessee Supreme Court held it unconstitutional because "the right shall never be embarrassed or encumbered with conditions which, in their practical operation, may impair or violate the free and full enjoyment of the right." *Neely v. State*, 63 Tenn. (4 Baxt.) 174, 184 (1874). Here, the Implied Consent statutes encumber Ms. Ammons's Paragraph XIII & I rights to insist upon a warrant by making that invocation evidence of guilt; do the statutes not "impair or violate the free and full enjoyment of the right" to demand a warrant?

Or look at Virginia and its analysis of its Free Press Clause, which guarantees that "any citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right[.]" Va. Const., Art. I, §12; accord Ga. Const. 1983, Art. I, Sec. I, Para. V. Where a municipal ordinance criminalized solicitation of magazines, periodicals, and newspapers without a permit, the Virginia Supreme Court voided that ordinance as against the state Free Speech Clause. *Robert v. City of Norfolk*, 49 S.E.2d 697, 704 (Va. 1948). Because soliciting readers "is merely a step and but one of the steps" in the publication of ideas, the Virginia high court held soliciting falls within "the category of those activities which are included in the

steps which lead to the full enjoyment of the rights guaranteed to a free press." *Id.* at 703. Insisting that the government follow the procedures enshrined in the Constitution is one of those "steps which lead to the full enjoyment" of those guarantees, yet the statutes weaponize that right against you.

Here is a simple analogy. Suppose the General Assembly passes a law saying that drug trafficking along I-75 "constitutes a direct and immediate threat to the welfare and safety of the general public." O.C.G.A. §40-5-55(a). To combat this threat, the new law provides that "any person who operates a motor vehicle upon the highways or elsewhere throughout this state shall be deemed to have given consent" to the search of their vehicle for evidence of contraband, and the refusal to consent counts as evidence of guilt in a subsequent criminal trial. *Ibid.* You have a fundamental right to be free from searches or seizures without probable cause, but the statute turns your exercise of that right against you. Can that be constitutional?

How about the General Assembly passing a law prohibiting Georgians from physically resisting unlawful arrests, escaping from unlawful custody, or damaging government property in the course of resisting/escaping? That law would fail to provide Georgians their full enjoyment of their constitutional rights because Paragraph XIII guarantees the common-law right to resist in those circumstances. See *Glenn v. State*, 310 Ga. 11, 24 (2020).

What about competing rights? The General Assembly passes a law

providing that in child custody disputes, a parent's possession of firearms in the home shall create a rebuttable presumption of unfitness. Yet both firearms possession and parental status are fundamental rights under the Georgia Constitution. See Ga. Const. 1983, Art. I, Sec. I, Para. VIII (right to bear arms); *Patten v. Ardis*, 304 Ga. 140, 143 n.9 (2018) (noting parental rights rooted in Georgia's Inherent Rights Clause) (citing Ga. Const. 1983, Art. I, Sec. I, Para. XXIX). Does making a parent choose between their constitutional right to own firearms in the home and their right to parent their child give that parent the "full enjoyment" of their rights?

Of course, Ms. Ammons does not expect to have her cake and eat it, too. If she were to testify at trial that she wanted to take the blood test, her refusal could be used to impeach and rebut her testimony. The right to insist upon a warrant is a shield, not a sword; one cannot use it to hack and slash their way to an acquittal. But by the same token, the State may not use that shield to batter and bash someone to conviction.

(iii) Federal case law about "choices" cannot reconcile with Paragraph VII's plain meaning.

Against this, Ms. Ammons expects the initial response of pointing to federal case law about Implied Consent giving defendants a "choice."[21] Yet when Implied Consent is predicated upon a legislative scheme to coerce suspects into waiving their constitutional rights, then "[i]n reality, [Ms. Ammons] 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." *Frost v. R.R. Comm. of Cal.*, 271 U.S. 583, 593 (1926). Those cases' analysis should not control in this case because they not only cannot be reconciled with Paragraph VII's plain language, but also because they ignore the purpose of written constitutions and constitutional rights.

(A) Forcing defendants to make a "choice" about which constitutional right to sacrifice fails to provide those rights' full enjoyment.

In all of the choice case law, none of the courts grappled with explicit constitutional language requiring the legislature provide Georgians the *full enjoyment* of their constitutional rights. Since to this tribunal lies the definitive construction of the Georgia Constitution, opinions from the federal high court

[21] See, e.g., *Neville*, 459 U.S. at 564; *United States v. Goodwin*, 457 U.S. 368 (1982); *Bordenkircher v. Hayes*, 434 U.S. 357 (1978); *Chaffin v. Stynchcombe*, 412 U.S. 17 (1973); *McGautha v. California*, 402 U.S. 183 (1971).

do not mandate this Court's path, even in situations involving materially identical provisions. *Elliott*, 305 Ga. at 187. If that rule controls when the text is identical, then the federal courts' inapposite opinions cannot countermand plain textual mandates of a state constitution.

If the federal high court holds that Confrontation need not be face-to-face under the Sixth Amendment, that means little to states guaranteeing face-to-face confrontation. Compare *Maryland v. Craig*, 497 U.S. 836 (1990) (face-to-face confrontation not required for Sixth Amendment) with *Com. v. Ludwig*, 594 A.2d 281, 283-84 (Pa. 1991), superseded by constitutional amendment as stated in *Com. v. Williams*, 84 A.3d 680, 682 n.2 (Pa. 2014) (rejecting *Craig* because of specific "face-to-face" guarantee in state Confrontation clause).

Does it matter that the Eighth Amendment's Cruel and Unusual Punishment Clause lacks a proportionality guarantee where a state constitution explicitly requires proportionate sentencing? See *People v. Clemons*, 968 N.E.2d 1046, 1055-56 (Ill. 2012) (rejecting argument that state analog with explicit proportionality requirement should be interpreted in lockstep with the Eighth Amendment).

Regardless of the federal Constitution not guaranteeing criminal defendants self-representation on appeal, can its logic control when the Georgia Constitution enshrines the "right to prosecute or defend, either in person or by an attorney, that person's own cause in *any of the courts* of this

state"? Ga. Const. 1983, Art. I, Sec. I, Para. XII (emphasis supplied); compare *Martinez v. Ct. of App. of Cal.*, 528 U.S. 152 (2000) with *Cook v. State*, 296 Ga. App. 496, 497 (2009).

When the People of Georgia adopted the Constitution, they chose to require the General Assembly provide them the full enjoyment of their rights. Making someone choose between invoking their constitutional right, and thereby incriminate themselves, or abandoning that right and potentially incriminate themselves, may be tolerable in other States, with other constitutions. But imposing that burden cannot provide for the full enjoyment of Georgians' rights.

(B) The "choice" cases miss the whole point of constitutions and bills of rights.

Assuming that Paragraph VII's plain text alone does not reject the "choice" notion, those cases' reasoning still should not persuade here because they misconstrue the role of constitutions in general and bills of rights in particular. In Georgia, the state government "originates with the people, is founded upon their will only, and is instituted solely for the good of the whole." Ga. Const. 1983, Art. I, Sec. II, Para. I. When the General Assembly passes a law, it speaks indirectly for the People as their trustee. *Ibid.* Legislation operates as a diluted form of the People's will, filtered through their representatives; the problem, however, is that the dilution attenuates the

People's voice, and thus, their control.

The real McCoy of the People's will, however, emerges from the Constitution, and particularly the Bill of Rights. Constitutions, especially written ones, are the product of deliberate thought: "Words are hammered and crystalized into strength," and behind those words "is the power of a free people, operating through the medium of a constitutional convention, called together for the purpose of framing a fundamental and inviolable system of government." *Noble v. State*, 21 N.E. 244, 245 (Ind. 1889). Their provisions reveal the "scars of political disease," and disclose the purpose for which the People join together in community. McElreath, at §1. Thus when the People chose to enshrine their right to be free from warrantless searches and seizures, and to due process, they made the only "choice" that matters in this case. Cf. *Claybourn v. State*, 190 Ga. 861, 869 (1940) ("Power is not given unto the judiciary to determine which of [the rights in the Georgia Constitution] are of greater importance, or to nullify or destroy any one of them on the theory that such is necessary for the preservation of another."); *Dist. of Columbia v. Heller*, 554 U.S. 570, 636 (2008) ("[T]he enshrinement of constitutional rights necessarily takes certain policy choices off the table.")

How, then, can a derivative exercise of sovereign power (a statute) compromise a primary safeguard of the People? It cannot, and courts long recognized that. As far back as 1883, state courts recognized that "[i]t is

inconceivable that a party may have a plain legal right and a known remedy for the vindication of that right, and yet not be at liberty to assert it except at the expense of the loss of another legal right." *Swinney*, 91 Ind. at 402. Of course, as the font of Georgians' legislative power, and "[u]nlike the United States Congress, which has only delegated powers," the General Assembly "is absolutely unrestricted in its power to legislate, *so long as it does not undertake to enact measures prohibited by the State or Federal Constitution*." *Sears v. State of Ga.*, 232 Ga. 547, 553-54 (1974) (emphasis supplied) (citations omitted). Since the Great Depression, then, this Court has recognized that "[a]s a general rule, the state having the power to deny a privilege altogether may grant it upon such conditions, *not requiring relinquishment of constitutional rights*, as it sees fit to impose." *McIntyre v. Harrison*, 172 Ga. 65, 157 S.E. 499, 506 (4) (1931) (citation omitted) (emphasis supplied). For "[a] constitutional power cannot be used by way of condition to obtain an unconstitutional result. The state cannot use its most characteristic powers to reach unconstitutional results." *Id.* at 507.

CONCLUSION

This Court faces an unpleasant task: Interpret the Georgia Constitution according to its plain meaning, and thereby impede the State's ability to prosecute DUI cases, or water down the constitutional rights the People of Georgia enshrined in our organic law. To be sure, the State "has a considerable interest in prosecuting DUI offenses," and Paragraph XIII, Paragraph I, and Paragraph VII interfere with that interest; but "the right to be free from [unreasonable searches and seizures] does not wax or wane based on the severity of a defendant's alleged crimes." *Elliott*, 305 Ga. at 223; cf. *Entick*, 19 How. St. at 1073 ("[T]here are some crimes, such, for instance, as murder, rape, robbery, and house-breaking, to say nothing of forgery and perjury, that are more atrocious than libeling. But our law has provided no paper-search in these cases to help forward the conviction.") Where the Georgia Constitution "requires a particular procedural vehicle or safeguard, the cost of satisfying that requirement is of little moment." *Collier v. State*, 307 Ga. 363, 381 (2019) (Peterson, J., concurring specially). Because a right is not a right if its invocation can convict you, the Implied Consent statutes violate Paragraph VII. In light thereof, Ms. Ammons asks this Court reverse the trial court's decision and provide her the aegis Paragraphs I, VII, XIII, & XVI intend.

Respectfully submitted this 24th day of January, 2022.

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IN THE SUPREME COURT OF GEORGIA
STATE OF GEORGIA

MIA LASHAY AMMONS *Petitioner,*	
	CASE No. S22A0542
vs.	
STATE OF GEORGIA *Respondent.*	

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the Paulding County District Attorney's Office, by and through counsel, in the foregoing matter with a copy of **Brief of Appellant Mia Lashay Ammons** by delivering a searchable PDF via e-mail to the following:

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I further certify there exists a prior agreement between Mr. Williams and myself to allow documents in a PDF format sent via e-mail to suffice for service.

This 24th day of January, 2022.

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