CASE No. S21G0370

IN THE

Supreme Court of Georgia

STATE OF GEORGIA

OMAR J. AWAD,

Appellant,

v.

STATE OF GEORGIA,

Appellee.

Brief of Georgia Association of Criminal Defense Lawyers as *Amicus Curiae* in Support of Appellant Omar J. Awad

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AMICUS AND ITS INTEREST

A frequent friend of this Court, the Georgia Association of Criminal Defense Lawyers (GACDL) is a professional association of many of Georgia's lawyers who regularly rise to the Constitution's clarion to defend those accused of crime and to secure the processes of law to which they are due. It includes both public defenders and private counsel, united in aspiration to improve the administration of criminal justice and to sustain the rule of law. GACDL's standing *Amicus Curiae* Committee believes that its views might aid the Court.

This is an important DUI case requiring this Court "to consider the meaning of the Georgia Constitution." *State v. Turnquest*, 305 Ga. 758, 758 (2019); *see* Ga. Const. 1983, Art. I, Sec. I, Para. XVI ("No person shall be compelled to give testimony tending in any manner to be self-incriminating.") ("Paragraph XVI"). The question presented—whether Paragraph XVI applies to a defendant's refusal to submit to a urine test—is easily addressed by examining this Court's precedent. With the recent analysis of Paragraph XVI by this Honorable Court, *Amicus* believes this case presents this Court the opportunity to eliminate any aberrant precedents and bring clarity to Georgia jurisprudence.

STATEMENT OF THE CASE

Omar Jamal Awad was arrested by the police for improper stopping, seatbelt violation, and Driving Under the Influence of Drugs. *State v. Awad*, 357 Ga. App. 255, 256 (2020). Through counsel, Awad appeared for trial and moved the court to preclude the State from tendering evidence of his refusal to submit to the urine test requested by the officer. *Ibid.* Based on limited stipulated facts, the trial court granted Awad's motion solely "under the theory that [the refusal's admission] would violate his privilege against self-incrimination that's guaranteed by the Georgia Constitution[.]" *Ibid.*

On appeal, the Court of Appeals reversed, finding itself bound by this Court's opinion in *Green v. State*. *Awad*, 357 Ga. App. at 257 (1) (citing *Green v. State*, 260 Ga. 625, 627 (2) (1990); *Robinson v. State*, 180 Ga. App. 43, 50-51 (3), reversed on other grounds, 265 Ga. 564 (1986)). Additionally, the Court of Appeals rejected that this Court's decisions in *Elliott v. State* and *Olevik v. State* altered *Green*'s validity. *Awad*, 357 Ga. App. at 257 (citing *Elliott v. State*, 305 Ga. 179, 205 (III)(C)(i) (2019); *Olevik v. State*, 302 Ga. 228, 244-45 n.10 (2)(c)(iii) (2017)). From this, Mr. Awad petitioned for certiorari, which this Court granted.

VIEWS OF THE AMICUS

This case presents a straightforward question: Is the State permitted to use a criminal defendant's refusal to produce a urine sample to law enforcement to incriminate him at a subsequent criminal trial? The answer is likewise straightforward: No.

Paragraph XVI protects against compelling Georgians to perform incriminating acts, including weaponizing someone's refusal against them. *Elliott*, 305 Ga. at 210 (IV) ("Paragraph XVI generally prohibits admission of a defendant's pretrial refusal to speak or act.") The lone decision to the contrary, *Green v. State*, offers no real argument against this: the authority it adopted "with some modification" ignored this Court's precedent. *Green*, 260 Ga. at 627 (2) (citing *Robinson*, 180 Ga. App. at 50-51 (3)). And though there may be concerns from the State that this ineluctable conclusion will hamper its ability to prosecute crimes, "the right to be free from compelled self-incrimination does not wax or wane based on the severity of a defendant's alleged crimes." *Elliott*, 305 Ga. at 223. Thus, *Amicus* respectfully requests this Honorable Court to harmonize its Paragraph XVI precedent by holding that the "act" of providing urine samples is an incriminating act, and a defendant's refusal to produce one for law enforcement cannot be used against him at trial.

I. Paragraph XVI Covers Compelled Urine Samples, Precluding Admitting a Defendant's Refusal in Evidence.

Georgia adopted the language of Paragraph XVI in 1877, but 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 recognized in *Elliott v. State*, Paragraph XVI did not create Georgians' privilege against self-incrimination, but "merely secure[d] and protect[ed] it." *Elliott*, 305 Ga. at 212. Applying the *Elliott* Court's extensive discussion of both the applicable principles for interpreting the Georgia Constitution, *see id.* at 181-89 (II) —as well as Paragraph XVI's historical context, *Id.* at 190-200 (III)(A-B), 211-18 (IV)(B-C) —two things become clear: providing urine samples are potentially incriminating "acts," and *Green* cannot survive scrutiny.

A) Someone compelled to produce a urine sample commits an incriminating act.

Paragraph XVI guarantees Georgians that they shall never "be compelled to give testimony tending in any manner to be self-incriminating." Ga. Const. 1983, Art. I, Sec. I, Para. XVI. As this Court explained in *Olevik v. State*, and re-affirmed in *Elliott*, although Paragraph XVI speaks only of "testimony," its aegis against self-incrimination has long been construed to

apply to incriminating acts as well. *Olevik*, 302 Ga. at 240 (2)(c)(ii); *see Elliott*, 305 Ga. at 195-201 (III)(B)(i-iii) . At the turn of the 20th century, this Court, in a series of cases, distinguished between what falls within the scope of Paragraph XVI and what falls within Georgia's Search and Seizure constitutional provision[1] and landed on a straightforward test:

> [W]ho furnished or produced the evidence? If the person suspected is made to produce the incriminating evidence, it is inadmissible. But if his person or belongings are searched by another, although without a vestige of authority, the evidence thus discovered may be used against him.
>
> *Duren v. City of Thomasville*, 125 Ga. 1, 4 (1906) (citations omitted); *accord Calhoun v. State*, 144 Ga. 679, 682 (1916).

Thus, where a defendant was compelled to hand over a concealed firearm that was used to convict him of carrying a concealed weapon, Paragraph XVI extended its protection over him. *Evans v. State*, 106 Ga. 159 (1899). Where the evidence was found through another's search of the defendant's person, however, this Court consistently held that Paragraph XVI did not apply. *See, e.g.*, *Dozier v. State*, 107 Ga. 708, 709-11 (1899). Fast forward 100 years, and this Court in *Olevik* synthesized self-incrimination precedents to conclude that Paragraph XVI is not violated "where a defendant is compelled only to be present so that certain incriminating evidence may be procured from him," nor where "evidence is taken from a defendant's body or photographs of the

[1] *See* Ga. Const. 1983, Art. I, Sec. I, Para. XIII.

defendant are taken." *Olevik*, 302 Ga. at 242 (2)(c)(iii) (collecting cases).

How, then, does this apply to urine samples? As the trial court in this case noted, for officers to obtain a urine sample, defendants "must voluntarily release the sphincter" in order to produce it. V2.43. The evidence is not removed from a defendant; defendants need not stand idly by as "evidence is taken from" them, nor is the evidence "procured" from them. To be sure, a suspect will eventually urinate "involuntarily and automatically," as their autonomic system overrides their conscious control. *Olevik*, 302 Ga. at 244. "But this is not how a [urine] test is performed. [Urinating upon an officer's demand] requires a suspect to [urinate] unnaturally for the purpose of generating evidence against [themselves]." *Ibid.*

Remember why the officer requested a urine sample in the first place: it is one of "the most commonly used, accurate and reliable method[s] for the detection of major drugs of abuse[.]" *Jordan v. State*, 223 Ga. App. 176, 181 (1996) (citing Turkula, *Drug & Alcohol Testing*, §6.03, p. 6-6 – 6-7 (1990)). The General Assembly adopted its Implied Consent framework so as to assist officers arresting suspected DUI drivers in obtaining "a chemical test or test of [the driver's] blood, breath, urine, or other bodily substances *for the purpose of determining the presence of alcohol or any other drug*[.]" O.C.G.A. §40-5-55(a) (emphasis supplied). The results of that test "*shall* be admissible" in "the trial of any…criminal action" arising out of a DUI arrest. O.C.G.A. §40-6-392(a)

(emphasis supplied); *see State v. Collier*, 279 Ga. 316, 317 (2005) ("The word 'shall' is generally construed as a word of command. The import of the language is mandatory.") (citations and quotation marks omitted).

Officers read Implied Consent in order to obtain incriminating evidence against a DUI arrestee through the arrestee producing a breath sample or urine sample, from a blood sample extraction, or from the arrestee's refusal to submit to the chemical testing. *See* V2.20 (Prosecutor arguing to trial court below that a defendant's "refusal is a fact from which a jury can infer that [the defendant] was under the influence…by virtue of [their] refusal."). Thus, for the State "to be able to test an individual's [urine] for alcohol content, it is *required* that the defendant *cooperate by performing an act*"—exactly what Paragraph XVI prohibits. *Olevik*, 302 Ga. at 244 (emphasis in original). And, since "Paragraph XVI generally prohibits admission of a defendant's refusal to speak or act," someone who refuses to produce a urine sample cannot have that refusal used against them by the State in the criminal case. *Elliott*, 305 Ga. at 210 (IV).

It is impossible for the State to timely and reasonably secure a sufficient urine sample without cooperation and "acts" of a defendant. The defendants must cooperate by agreeing to and then excreting sufficient urine into a container that can preserve the urine sample for testing.

B) Green *and* Robinson *should be overruled.*

Paragraph XVI covers compelled urine samples and prohibits the State from weaponizing someone's refusal to submit to the state administered chemical testing. If this were an issue of first impression, nothing more need be said.[2] The problem, however, is this Court's decision in *Green*, and its adoption of the rule that "the use of a substance naturally excreted by the human body does not violate a defendant's right against self-incrimination under the Georgia Constitution." *Green*, 260 Ga. at 627 (3) (citing *Robinson*, 180 Ga. App. at 50-51). This Honorable Court recently decided that this holding in *Green* was not accurate as it related to the natural excretion of air and alcohol through the lungs in a person's breath. Just as in *Elliott*, this Honorable Court should reverse any cases holding otherwise as it relates to urine samples. Thus, this Court must determine whether *stare decisis* counsels against overruling *Green* which would be the opposite holding of *Elliott*.

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[.]" *Henderson v. State*, 310 Ga. 231,

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[2] *See Chrysler Group, LLC v. Walden*, 303 Ga. 358, 372 (2018) (Peterson, J., concurring specially) ("[T]he cardinal principle of judicial restraint—if it is not necessary to decide more, it is necessary not to decide more—counsels us go no further.") (citation and quotation marks omitted).

241 (2020) (citation and quotation marks omitted). While *stare decisis* promotes important principles, that does not make it "an inexorable command." *Olevik*, 302 Ga. at 244 (2)(c)(iv) (citation and quotation marks omitted). 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." *Duke v. State*, 306 Ga. 171, 184 (4) (2019) (emphasis in original) (citation omitted).

Given that *Green* was decided 31 years ago, its age offers little support since this Court has "overruled decisions older than that." *Olevik*, 302 Ga. at 245 (2)(c)(iv) (collecting cases). Nor does any "workability" considerations warrant retention where all other factors cut strongly against it. *See id.* at 246 ("The remaining factor of workability is not reason enough for preserving [erroneous constitutional precedent]."). Thus, *Green*'s reasoning and any reliance interests on it are its only hope. Yet this proves fatal to *Green*: For constitutional precedent, the reasoning's soundness "becomes even more critical. The more wrong a prior precedent got the Constitution, the less room there is for the other factors to preserve it." *Olevik*, 302 Ga. at 245.

1. <u>*Green*'s reasoning was non-existent and has been subsequently undermined.</u>

Green was wrongly decided. In construing the Georgia Constitution, this Court has made plain that "any decision about the scope of a provision…must

be rooted in the language, history, and context of that provision." *Elliott*, 305 Ga. at 188 (citation and quotation marks omitted) . Where prior courts have issued constitutional holdings in the past, but did so "with no analysis" or only "a mere citation" to another principle, those holdings offer little support in this factor. *Olevik*, 302 Ga. at 244 (2)(c)(iii) ; *see Conley v. Pate*, 305 Ga. 333, 341 (2019) (Peterson, J., concurring specially) (criticizing earlier court precedent which "flatly ignored the history and context of the Georgia Constitution, as well as over 100 years of Georgia precedent").

Green made no mention of Paragraph XVI's history or context; it failed to even quote the provision it construed. *Green*, 260 Ga. at 627 (2). Instead, it relied upon only two cases in its holding: a block quote from *Creamer v. State*, and its adoption of the *Robinson* case. *Ibid.* (quoting *Creamer v. State*, 229 Ga. 511, 515-17 (1972); citing *Robinson*, 180 Ga. App. at 50-51). Neither offer support to the relevant holding of the case.

Robinson actually discussed Paragraph XVI's precedents, recognizing the participation/passive division. *Robinson*, 180 Ga. App. at 50 (collecting authorities). Yet the *Robinson* Court then summarily held that "the procurement of substances which are naturally produced by the body" did not violate Paragraph XVI, given that there was "nothing in the record to show that [the] appellant was 'forced' to produce a urine sample." *Id.* at 50-51. The *Robinson* Court flatly ignored, however, that the urine sample was obtained

"[p]ursuant to a search warrant," and a suspect's resistance to a valid search warrant is obstruction. *Id.* at 50; *see* O.C.G.A. §16-10-24; *Johnson v. State*, 330 Ga. App. 75, 78-79 (1)(b) (2014) (whole court) (per Boggs, J.) (affirming obstruction conviction where defendant interfered with officer's executing search warrant); *Dye v. State*, 114 Ga. App. 299, 299-300 (3)(a) (1966) (same). In that situation, the defendant could either produce the incriminating evidence, or commit a crime—exactly what Paragraph XVI prohibits. *See Aldrich v. State*, 220 Ga. 132 (1964).

Creamer, by contrast, did involve the removal of evidence from the defendant. The defendant in *Creamer* had been shot, and State actors sought to surgically remove the bullet from his body. *Creamer*, 229 Ga. at 512-13. All the defendant needed to do in that situation was hold still, "to submit his body for the purpose of having the evidence removed." *Id.* at 518 (3). Had *Green* relied upon this principle, which *Creamer* discussed more in depth, its holding might have differed. But *Green* did not. Instead, it erroneously adopted the *Robinson* holding with neither discussion nor analysis, a holding which defines "unsound."

2. No reliance interests—even the State's—support retention.

The second factor, the reliance interests at stake in an opinion, could be summarily dismissed since this factor normally is "an important consideration for precedents involving contract and property rights," which are not at issue

here. *Olevik*, 302 Ga. at 245. Nor has *Green* engendered any reliance by this Court: the only case to distinctly rely upon its "natural excretion" principle was *Klink v. State*, which *Olevik* overruled. *See Klink v. State*, 272 Ga. 605, 606 (1) (2000), overruled by *Olevik*, 302 Ga. at 246. But given past experience,[3] *Amicus* anticipates claims from the State about how it "has some sort of interest in preserving [*Green*] so that pending DUI cases are not disturbed." *Olevik*, 302 Ga. at 245. This is not only wrong, but dangerous.

Constitutions are more than simply the expression of popular will. They are the tapestries of the shared history of the People, the communal experience of public wrongs made manifest in republican uproar. *See Grimball v. Ross*, T. Charlton 175, 176, 1 Ga. Ann. 63, 64 (Super. Ct. 1808). Their provisions reveal the "scars of political disease," and disclose the purpose for which the People join together in community. Walter McElreath, *A Treatise on the Constitution of Georgia*, §1 (Atlanta: Harrison Co. 1912 (2020 reprint)). They are not "designed to micromanage disputes between citizens," subjects best left to statutory and common law. *Putensen v. Hawkeye Bank*, 564 N.W.2d 404, 408 (Iowa 1997). Rather, a constitution's purpose is "to provide an orderly foundation for government and to keep even the sovereign…within its bounds."

[3] *See Elliott*, 305 Ga. at 189 ("Unhappy with our decision in *Olevik* and its potential implications, the State has, in this case and in other appeals currently before the Court, asked us to reconsider our decision in *Olevik*.")

Dean v. Rampton, 556 P.2d 205, 206 (Utah 1976). *Accord State v. Rich*, 110 N.E.2d 778, 785 (Ohio 1953) ("[O]ne of the purposes of a constitution is to curb government power"); *DuPont v. DuPont*, 85 A.2d 724, 728 (Del. 1951) ("[T]he basic purpose of a written constitution has a two-fold aspect, first, the securing to the people of certain unchangeable rights and remedies, and, second, the curtailment of unrestricted governmental activity within certain defined fields.").

The privilege against self-incrimination is one of "the sacred civil jewels" which the People of Georgia inherited "from an English ancestry, forced from the unwilling hand of tyranny by the apostles of personal liberty and personal security." *Underwood v. State*, 13 Ga. App. 206, 213 (1913). *Accord Bram v. United States*, 168 U.S. 532, 544 (1897) (discussing how the Fifth Amendment's self-incrimination provision sought to preserve "by means of a constitutional provision, principles of humanity and civil liberty which had been secured in the mother country only after years of struggle, so as to implant them in our institutions in the fullness of their integrity, free from the possibilities of future legislative change."). Rooted in the common law, the privilege aimed to enshrine in our organic charter a crucial protection against the coercive might of the State. The framers of the 1877 Constitution knew of the dangers of crime, and knew that self-incrimination protections could interfere with law enforcement needs; yet the People of Georgia ratified Paragraph XVI. It was

"hallowed by the blood of a thousand struggles," stored away "for safe-keeping in the casket of the Constitution. It is infidelity to forget them; it is sacrilege to disregard them; it is despotic to trample upon them." *Underwood*, 13 Ga. App. at 213.

Where the People of Georgia have expressed their will through a constitution, they "have already weighed the policy tradeoffs that constitutional rights entail. Those tradeoffs are thus not for us to re-evaluate." *Luis v. United States*, 136 S. Ct. 1083, 1101 (2016) (Thomas, J., concurring in judgment). That some criminals may escape capture and punishment is troubling, but it pales in comparison to the contempt and disrespect *Green* showed to Georgians' Paragraph XVI privilege. *See Elliott*, 305 Ga. at 223 ("[T]he right to be free from compelled self-incrimination does not wax or wane based on the severity of a defendant's alleged crimes.") It is a truism that constitutional protections have costs. *Coy v. Iowa*, 487 U.S. 1012, 1020 (1988). But the enshrinement of constitutional rights "necessarily takes certain policy choices off the table." *Dist. of Columbia v. Heller*, 554 U.S. 570, 636 (2008).

Paragraph XVI prohibits the State from compelling a person to produce incriminating evidence against themselves. The "cost of satisfying that requirement is of little moment." *Collier v. State*, 307 Ga. 363, 381 (2019) (Peterson, J., concurring specially). *Accord Bradshaw v. Berryhill*, 372 F. Supp.3d 349, 361-62 (E.D.N.C. 2019) ("[T]he Constitution does not exist to

guarantee efficiency; it exists to guarantee individual liberty.")

CONCLUSION

Green was wrongly decided. It constrained Paragraph XVI's scope, undermined the People's will, and did so without analysis. For these and all the foregoing reasons, *Amicus* respectfully requests this Court overrule *Green* and bring harmony to Georgians' self-incrimination rights.

Respectfully submitted this 3rd day of June, 2021.

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VS.	*	
	*	
THE STATE OF GEORGIA,	*	
Defendant.	*	

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true and correct copy of the within and foregoing pleading via U.S. Mail with first-class postage upon the following parties:

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