IN THE SUPREME COURT
STATE OF GEORGIA

CASE № S21G0370

OMAR AWAD,
APPELLANT,

v.

STATE OF GEORGIA,
APPELLEE.

BRIEF OF THE GEORGIA ASSOCIATION OF SOLICITORS-GENERAL, AS *AMICI CURIAE*

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BRIEF OF THE GEORGIA ASSOCIATION OF SOLICITORS-GENERAL, AS *AMICUS CURIAE*

COME NOW the parties named above as *amici curiae* pursuant to Supreme Court Rule 23, and respectfully urge this Court to consider the following analyses and arguments of law along with the briefs of the parties to this important case:

PART ONE

IDENTITY & INTEREST OF *AMICI CURIAE*

The Georgia Association of Solicitors-General (hereafter referred to as the "Solicitors-General Association") is a voluntary professional association of Georgia's full and part-time State Court Solicitors-General, those District Attorneys who also prosecute in State Court,[1] prosecutors in county and municipal courts, and the personnel who work in their offices. The Solicitors-General Association provides a forum through which prosecuting attorneys throughout the State can address

[1] *See* O.C.G.A. § 15-18-60(e).

matters of common concern which affect not only the direct interests of prosecuting attorneys, but also the law enforcement community as a whole.

While this case addresses a single case from Whitfield County, this Court's opinion will affect impaired driving investigations statewide, as any case where a urine test might provide useful information will be potentially affected by this Court's decision.

PART TWO

FACTUAL AND PROCEDURAL HISTORY OF THE CASE

Amici generally adopts and endorses the factual history provided by Appellee in his brief. However, due to the relatively sparse factual record, particularly as it relates to the lack of evidence as to how the requested sample may have been collected, *Amici* urges this Court to reject "facts" offered through speculation not included in any official stipulations. See *Morrison v. State,* 181 Ga. App. 440, 443 (1987). Specifically, there was no evidence offered concerning the manner in which a urine sample would be collected, which is vital to any claim that Appellant would be required to perform any self-incriminating act.

ARGUMENT & CITATION OF AUTHORITY

Principles of *stare decisis* compel this Court to affirm correctly-decided precedent in *Green v. State.*

Precedent currently exists preventing the Appellant from prevailing in this case. In *Green v. State*, 260 Ga. 625 (1990), this Court considered whether a urine sample implicated a suspect's protections against self-incrimination under the

Georgia Constitution and held that it does not. *Id*, at 627. Appellant acknowledges his case would require this court to overturn *Green*, as well as a similar holding in *Robinson v. State*, 180 Ga. App. 43 (1986), overturned on other grounds by *Robinson v. State*, 256 Ga. 564 (1986). Appellant's Brief, at 9. While Appellee asserts that the circumstances of this case compel reversal of this established precedent, a full application of the principles of *stare decisis* supports affirming the decision of the Court of Appeals, and retaining *Green* as precedent.

This Court considers four factors in *stare decisis* analysis, "the age of precedent, the reliance interests at stake, the workability of the decision, and most importantly, the soundness of its reasoning." *Olevik v. State*, 302 Ga. 228, 245 (2017), citing *State v. Jackson*, 287 Ga. 646 (2010). Beginning first with the soundness of the reasoning, *Green* is, simply, correct on the law. The collection of a substance naturally excreted from the human body (and one with potential negative health consequences if retained too long[2]) implicates no self-incrimination issues. Appellant alleges that *Green* contains no analysis of the legal issues. However *Green* clearly acknowledges the key principle at issue, that "Georgia has long granted more protection to its citizens than has the United States," and "You cannot force a defendant to act, but you can, under proper circumstance, produce evidence from his person." *Green*, at 627, citing *Creamer v. State*, 229 Ga. 511, 515-517 (1972). In explaining the decision in *Green*, this Court cited to *Creamer*, as well as *Robinson v. State*, which included a fuller discussion of the application of Georgia's

[2] See https://www.piedmont.org/living-better/how-long-is-it-safe-to-hold-your-urine

self-incrimination protections, citing its use in cases going all the way back to *Day v. State*, 63 Ga. 668 (1879). This Court will recall that *Day* is the source of the idea (later reaffirmed in *Elliott v. State*, 305 Ga. 179 (2019) that the self-incrimination protections of what is now Paragraph XVI of Article I of the 1983 Georgia Constitution offers greater protections to persons than the Federal Constitution. While it is true that *Green* itself contains no lengthy discussion of self-incrimination, by citing these cases in its holding, this Court made it plain that it fully considered the argument at issue today – that Paragraph XVI is implicated by a urine test – and rejected it.

This Court was correct to do so. Appellant and *amicus* attempt to draw a similarity between the acquisition of a breath sample and a urine sample. This argument must fail for several reasons. First, as will be discussed further below, the lack of a record relating to how a urine sample would have been collected from Appellant requires speculation not needed in cases of breath or blood. There was no evidence produced at the trial court below concerning how the sample would be provided had Appellant consented to the collection of his urine. This gap required counsel to offer speculation to the court in lieu of testimony or any proposed stipulation. (Motion Hearing, at 5, 35.) But even assuming *arguendo* that what is being discussed is voluntary urination, the "act" that occurs more properly describes the retention of urine, rather than releasing it.[3] Meanwhile, a breath test, as contemplated by Georgia law, is not performed with the release of air that comes

[3] https://www.ncbi.nlm.nih.gov/books/NBK279384/

with breathing. Rather, it requires the subject to breathe deeply and exhale for several seconds in a particular manner at the direction of a law enforcement officer. *Olevik*, at 243. This Court, as well as the Court of Appeals, following this Court's instructions, have correctly treated differently obtained tests as implicating rights differently.[4] Further, this Court held that the reasoning in *Green* did not apply to the Paragraph XVI analysis at issue in *Olevik*, (and later *Elliott)*, as the two situations were entirely different. *Olevik*, at 243-245.

As for the other factors, this Court's holding in *Green* has proven workable, as it involves a basic application of the relevant statute. O.C.G.A. § 40-6-392 (d). The code provides that upon proper reading of the implied consent warning, a suspect's refusal may be admitted into evidence, a task courts can reliably perform based upon relevant facts. This decision can be consistently applied by lower courts, which have considerable history in ascertaining whether a subject has been properly advised of their implied consent rights and has refused testing, avoiding concerns that have manifested in other cases. *Payne v. Tennessee*, 501 U.S. 808, 828-831 (1991). This factor clearly weighs in favor of retention of *Green* as precedent.

While reliance is less of a concern in the instant case[5] , it does bear noting that there are numerous DUI investigations and prosecutions that involve a refusal to submit to urine testing that would be affected by undoing this precedent as that is one of the listed and authorized bodily substances that an officer may seek under

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[4] See, generally, *Elliott v. State*, 305 Ga. 179, 223-224 (2019), noting that the reasoning in *Elliott* does not apply to blood tests, applied in *Hinton v. State*, 355 Ga. App. 263 (2020), & *State v. Johnson*, 354 Ga. Pp. 447 (2020).

[5] See *Woodard v. State*, 296 Ga. 803, 813 (2015)

Georgia's Implied Consent law. O.C.G.A. § 40-5-55. Finally, as to age, while decisions older than *Green* have been overturned (see *State v. Jackson*, 287 Ga. 646 (2010)), such action is unnecessary in this case, given that *Green* was correctly decided, and the record suggests that nothing of consequence has changed in the interim regarding the collection of urine specimens that would require revisiting its holding.

Should this Court consider any potential method of urine collection as a possible violation of Paragraph XVI, there is an insufficient factual record in this case to reach the issue.

There is no evidence in the record as to how a urine sample may have been collected in this case, had Appellant consented to testing. This is important, because urine samples may be collected in several ways, unlike blood or breath. For a breath test to be deemed admissible in court, it must be performed on a machine that meets the standards of the Division of Forensic Sciences of the Georgia Bureau of Investigation. O.C.G.A. § 40-6-392 (a) (1) (A). A valid breath test may only be conducted on an Intoxilyzer Model 9000, manufactured by CMI, Inc., and must be administered according to standards specified by GBI regulations. Ga. Comp. R. & Regs. R. 92-3-.06. When discussing a possible breath test, there is no reason to inquire as to how a breath sample would be obtained, because there is only one way to get a breath test that would be admissible in court.

Similarly, for a blood test to be admissible, the blood must be drawn by a properly qualified individual in a medically proper fashion. O.C.G.A. § 40-6-392 (a)

(2). This limits generally the manner in which a valid blood sample may be taken from a suspect for testing. However, neither the chemical testing statute nor the GBI regulations address, or even contemplate, any particular method or methods for the acquisition of a urine sample. A urine sample may be provided by the subject urinating into a collection cup, or, as counsel for Appellant speculated during the hearing, by means of a catheter. If medical personnel were involved, there may be even more potential collection methods available that were not discussed. All of these methods differ greatly in methodology. If this Court believes that one or more of the methods may potentially require an incriminating act from the subject, the method of intended collection should be on the record, a fact that is absent here. The Court of Appeals noted the lack of details present in the record and held that they could not find that an act was required based upon the speculation at the trial court level. *State v. Awad,* 357 Ga. App. 255, 258 (2020). The Court of Appeals correctly held that *Elliott* and *Olevik* did not overrule *Green* and that the sparse record below in the case at bar gave them no cause to suggest otherwise.

CONCLUSION

For these reasons, as well as those stated in Appellant's brief, the Association respectfully requests this court affirm its prior holdings in *Green* and *Robinson*, and affirm the Court of Appeals' holding in this case.

Respectfully submitted this 23rd day of June, 2021.

s/ Omeeka P. Loggins
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OMAR AWAD **APPELLANT** **VS.** **STATE OF GEORGIA,** **APPELLEE**	**CASE NO. S21G0370** **(CT. APP. A20A1490)**

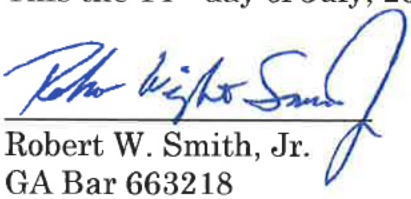
CERTIFICATE OF SERVICE

I hereby certify that I have caused a copy of the foregoing Amicus Curiae on behalf of the Georgia Association of Solicitors-General to be served upon the District Attorney for the Conasauga Judicial Circuit, and upon counsel for the Appellant by placing true and accurate copies of the same in the United States Postal Service with adequate postage thereon and addressing it to:

Hon. Bert Poston
Mark Higgins
Office of the District Attorney
Conasauga Judicial Circuit
PO Box 1086
Dalton, GA 30722-0953

D. Benjamin Session
3155 Roswell Rd., Ste 22
Atlanta, GA 30305

This the 14th day of July, 2021



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SUPREME COURT OF GEORGIA
Case No. S21G0370

June 24, 2021

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

OMAR J. AWAD v. THE STATE.

The request of the Georgia Association of Solicitors-General for an extension of time to file a brief amicus curiae in the above case is granted. You are given an extension until July 14, 2021.

A copy of this order MUST be attached as an exhibit to the document for which you received this extension.

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

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.
Witness my signature and the seal of said court hereto affixed the day and year last above written.

, Clerk