IN THE SUPREME COURT OF GEORGIA
STATE OF GEORGIA

MIA LASHAY AMMONS Appellant,	)	
v.	)	CASE NO: S22A0542
STATE OF GEORGIA Appellee	)	

APPELLEE'S BRIEF

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PART ONE

STATEMENT OF THE CASE

On September 7, 2021, in the underlying Paulding County case, 19-CR-324, the Trial Court conducted a hearing on the Appellee's motion to suppress (motion); during the hearing, the arresting officer, Trooper Levi Perry, Georgia State Patrol, testified and his squad car video footage of the underlying incident was played for the Trial Court's consideration. (R-2-3) Later, this squad car video was admitted into evidence by consent as State Exhibit One for the purpose of said hearing. Ultimately, the Trial Court denied the motion, and on October 19, 2021, the appealed-from-order was filed; thereafter, the Trial Court issued the Appellant a certificate of immediate review, and the Appellant filed with this Court a petition for certiorari, and the Appellee filed a response brief to the petition in this Court's case **S22I0281**. (R-34-36, 43-46) For this appeal, the Appellee re-asserts all said

contentions and factual assertions of said response brief. This Court then granted certiorari, and the Appellant filed a timely notice of appeal, resulting in this case becoming docketed with this Court. (R-1)

The Appellee continues to contend that the Trial Court has not erred in any way in issuing its at-issue order.

STATEMENT OF FACTS

The Appellee contends that the provided transcript of the motion to suppress hearing speaks for itself and that Trooper Perry's testimony at the hearing supports the Trial Court's at-issue order denying the Petitioner's motion. (The transcript of the motion hearing is designated by M.T. and the corresponding pagination; M.T. 24-36). (R-9-13) However, Appellee contends that Trooper Perry's testimony during the motion hearing and his squad car's dashcam video footage of the underlying incident demonstrate that Appellant had not been in custody and had not been handcuffed when she submitted to the HGN evaluation; additionally, this evidence shows that the Appellant had not been coerced, threatened or tricked in any way into submitting to the HGN evaluation. (M.T. 24-36) Moreover, Appellant never indicated to Trooper Perry that she did not want to submit to the HGN evaluation and she never requested to discontinue the HGN evaluation. (M.T. 24-36)

Regarding the HGN evaluation, the Trial Court's appealed-from-order indicates that Appellant voluntarily performed the HGN evaluation and that she was not unlawfully compelled to submit to the HGN evaluation; in this regard, the order cites Bramlett v. State, 302 Ga. App. 527, 530 (2010) and State v. Leviner, 213 Ga. App. 99, 103 (4) (1994). The Appellee contends that the Trial Court has not abused its discretion in ruling said HGN evidence admissible during a trial in this case.

PART TWO

APPELLEE'S RESPONSES TO THE QUESTIONS ASKED ON THIS COURT'S GRANT OF CERTIORARI

1. THIS COURT SHOULD NOT OVERRULE ITS AT-ISSUE HOLDING IN KEENAN V. STATE, 263 GA. 569, 572 (2) (1993).
2. FOR PURPOSES OF A DEFENDANT WHO IS NOT IN CUSTODY, GA. CONST., 1983, ART. I, SECT. I, PARA. XVI SHOULD NOT APPLY WHEN SUCH DEFENDANT IS REQUESTED TO PERFORM FIELD SOBRIETY TESTS, AND SUCH DEFENDANT'S REFUSAL TO SUBMIT TO SUCH TESTS SHOULD BE ADMISSIBLE IN A CORRESPONDING TRIAL.

3. O.C.G.A §§ 40-5-67.1 AND 40-6-392 DO NOT VIOLATE THE GEORGIA PRIVILEGES AND IMMUNITIES CLAUSE, GA. CONST., 1983, ART. I, SECT. I, PARA. VII.

STATEMENT OF JURISDICTION

Because this Court has granted certiorari in this matter, the Appellee assumes that this Court has jurisdiction of this matter.

1. THIS COURT SHOULD NOT OVERRULE ITS AT-ISSUE HOLDING IN KEENAN V. STATE, 263 GA. 569, 572 (2) (1993).

"Drunk drivers take a grisly toll on the Nation's roads, claiming thousands of lives, injuring many more victims, and inflicting billions of dollars in property damage every year. To fight this problem, *all States have laws* that prohibit motorists from driving with a blood alcohol concentration (BAC) that exceeds a specified level. But determining whether a driver's BAC is over the legal limit requires a test, and many drivers stopped on suspicion of drunk driving would not submit to testing if given the option. *So every State also has long had what are termed 'implied consent laws*.' These laws impose penalties on motorists who refuse to undergo testing when there is sufficient reason to believe they are violating the State's drunk-driving laws." Birchfield v. North Dakota, 136 S. Ct.

2160, 2166, 2168-2169 (2016)[1]; see too State v. LeMeunier-Fitzgerald, 2018 ME 85, P10, n. 5 (Maine Supreme Court 2018) ("The National Highway Traffic Safety Administration reports that, in 2016, **10,497 people died** in traffic accidents involving at least one driver with a blood-alcohol content of .08 grams per deciliter or more. Nat'l Highway Traffic Safety Admin., *Traffic Safety Facts*: *Alcohol Impaired Driving*, DOT HS 812 450 at 2 (Oct. 2017). That is the highest reported number of fatalities since 2009.") (Bold emphasis added.) and Olevik v. State, 302 Ga. 228, 229-230 (2017) ("The scourge of people operating motor vehicles under the influence of alcohol, drugs, or other intoxicating substances has plagued us as long as people have been driving, leading states to enact criminal laws to combat the problem."). Notwithstanding such penalties for such refusals, "[o]n average, over one-fifth of all drivers [in the United States] asked to submit to BAC testing in 2011 refused to do so." Birchfield v. North Dakota, 136 S. Ct. at 2169; see too State v. Frost, 297 Ga. 296, 304-305 (2015) (discussing the challenges that a DUI defendant's refusal can pose to the State's DUI prosecution of him because of the

[1] "Alcohol-impaired driving fatalities increased by 3.2 percent from 2014 to 2015 (Table 4), accounting for 29 percent of 2015 over-all fatalities. [For this calculation] [a]n alcohol-impaired-driving fatality is defined as a fatality in a crash involving a driver or motorcycle rider (operator) with a blood alcohol concentration (BAC) of .08 g/dl or greater." National Highway Traffic Safety Administration (NHTSA), "Traffic Safety Facts"; "Research Note"; "2015 Motor Vehicle Crashes: Overview"; "August 2016"; this article is embedded via a hyperlink in an internet article/press release titled "Traffic fatalities up sharply in 2015" ("NHTSA 20-16") and found at www.nhtsa.gov/press-releases/traffic-fatalities-sharply-2015". Said 3.2 percent increase breaks down as follows: in year 2014, the total number of Alcohol-impaired driving fatalities in the United States was 9,943; in year 2015, the total number of such fatalities was 10,265. NHTSA's above-cited, embedded digital article titled "Traffic Safety Facts"; Research Note"; "2015 Motor Vehicle Crashes: Overview"; "August 2016" ("Table 4"). For Georgia, in the year 2014, the total number of Alcohol-impaired driving fatalities was 279; in year 2015, the total number of such fatalities was 366. NHTSA's above-cited, embedded digital article titled "Traffic Safety Facts"; Research Note"; "2015 Motor Vehicle Crashes: Overview"; "August 2016" ("Table 6").

"permissive," not "mandatory," inference that a jury may glean from such refusal during a trial); State v. Kilby, 961 N.W.2d 374, 382 (Iowa Supreme Court 2021) (In this DUI case, the Iowa Supreme court noted that "extending [the holding in a prior BUI case that the Kirby-Court ultimately overruled] would undermine enforcement of drunk driving laws, at a cost in lives and to public safety. If breath test refusals were inadmissible, drunk drivers, especially *repeat offenders, would be motivated to decline breath tests as well as field tests for sobriety*. Lawyers consulted under Iowa Code section 804.20 would advise more detainees to refuse the test. It would become even harder to obtain convictions in test-refusal cases, and more recidivists would remain on the road. Kirby herself is a repeat offender. [W]e have continuously affirmed that *the primary objective of the implied consent statute* is the removal of dangerous and intoxicated drivers from Iowa's roadways in order to *safeguard the traveling public*.") (emphasis added) and Georgia's Department of Driver Services (DDS) website "dds.georgia.gov/dui-data-reports" (On February 11, 2022, this website indicated that in year 2020, the total number of Georgia DUI refusals reported to DDS was 12, 840; in 2019, the total number of such DUI refusals was 11, 786; in 2018, the total number of such DUI refusals was 11,370; and in 2017, the total number of such DUI refusals was 11,325. One option for the website shows various DUI related statistics by each of Georgia's 159 counties. However, see said website's disclaimer.). "Suspension or

revocation of the motorist's driver's license remains the standard legal consequence of [a DUI suspect's] refusal[]" to take a state administered chemical test to determine the suspect's BAC. Birchfield v. North Dakota, 136 S. Ct. at 2169. Moreover, under such "implied consent" laws throughout this country, "evidence of the motorist's refusal is admitted as evidence of likely intoxication in a drunk-driving prosecution." Birchfield v. North Dakota, 136 S. Ct. at 2169. Indeed, as the United States Supreme Court pointed out in Birchfield: "Our prior opinions have referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply. Petitioners do not question the constitutionality of those laws, and nothing we say here should be read to cast doubt on them." Birchfield v. North Dakota, 136 S. Ct at 2185 (citations omitted). In Mitchell v. Wisconsin, the United States Supreme Court, again, seemed to approve of the general concept of states' implied consent laws that impose civil penalties and evidentiary consequences on a properly arrested DUI suspect who has refused to take a state administered test under a state's implied consent laws. Mitchell v. Wisconsin, 139 S. Ct. 2525, 2532-2533 (II) (2019).

In Elliott v. State, the Court noted that its holding that excludes evidence of a defendant's refusal to take a state administered breath test following a lawful DUI arrest "may make the task" of prosecuting DUI cases in this state "more

difficult." Elliott v. State, 305 Ga. 179, 223 (2019). However, this Court's queries in the instant case concerning Keenan v. State, 263 Ga. 569 (1993) and evidence of a defendant's refusals to submit to FSE in general concern a significant public safety issue in Georgia.

In State v. Bradberry, the Court of Appeals, relying on Elliott, supra, held that an officer's providing a portable breath test (PBT) evaluation to a DUI suspect – even when the suspect is not in custody – implicates Paragraph XVI. The Respondent contends that the Court of Appeals' reliance on Elliott in this regard is misplaced, because in Elliott, this Court addressed Elliott's *post-arrest refusal* to submit to a state administered breath test pursuant to the implied consent notice. Elliott v. State, 305 Ga. at 209-210, 221-222. Additionally, said holding in State v. Bradberry, supra, is inconsistent with this Court's related holding in Keenan v. State, 263 Ga. 569, 570-572 (1993) that evidence of a defendant's pre-arrest refusal to submit to an alco-sensor test is admissible at the corresponding DUI jury trial; the Appellee contends that this holding in Keenan is currently binding precedent, not dicta, and that this Court's above-mentioned holding in Elliott does not address it and has not affected it. As a result, Appellee contends that the Court of Appeals' at-issue holding in Bradberry, supra, has been wrongly decided.

The Appellee contends that the Court of Appeals' aforementioned holding in State v. Bradberry, supra, -- that during a DUI investigation on the roadside, the

refusal by a DUI suspect *who is not in custody* to provide a breath sample for a portable breath test (PBT) evaluation implicates Paragraph XVI and evidence of the refusal must be excluded from trial as a result -- could unduly impede DUI investigations in this State. In other words, to what extent could the reasoning underpinning that holding be applied to interactions between a not-in-custody DUI suspect and an officer during that officer's properly initiated DUI investigation pursuant to a traffic stop or motor vehicle accident? To what extent could the Bradberry-Court's holding be applied to a stopped motor vehicle driver whom the stopping officer asks to provide his driver's license, provide proof of insurance and vehicle registration, tell the officer the driver's name and date of birth, which would enable the officer to conduct lawfully a warrant check on the individual? What would happen when an officer seeks to ensure that a tractor-truck driver is driving a proper class commercial vehicle and of proper weight and that such driver has properly maintained his logbook or its equivalent to ensure the interstate tractor-truck driver has not exceeded the maximum hours allowed of continuous driving without resting or being out of service for a sufficient period of time. See O.C.G.A. §§ 40-5-29 (regarding maintaining driver's license while driving a motor vehicle); 40-6-10 (regarding a driver's showing proof of insurance); 40-6-273 (regarding a driver's duty to report motor vehicle accident in certain situations); and 40-2-8 and 40-6-15 (regarding the registration requirements of motor

vehicles). To what extent could the Bradberry-Court's holding be applied to a lawfully conducted investigative, second tier stop, i.e., a *Terry* stop, in the DUI context or otherwise? The Respondent contends that if the Bradberry-Court's at-issue holding were affirmed and extended to other FSE, a very likely result of a lawful traffic stop in which an officer duly initiates a DUI investigation of a motorist in a non-accident case would or could be that such motorist would refuse all FSE and would refuse to answer any questions about his consumption of alcohol. See, e.g., Long v. State, supra, 271 Ga. App. 565, 566-570 (2004) (In the case, an officer conducted a traffic stop of the appellant for her having flashed her car's headlights repeatedly or multiple time; then, upon the officer's detecting the odor of alcohol and beginning his DUI investigation, the defendant refused all FSE and refused the state administered chemical test. After the defendant's conviction for DUI at trial, she argued unsuccessfully on appeal, among other things, that the trial evidence had been insufficient to support her DUI conviction although evidence of her aforementioned refusals had been admitted into evidence during trial.); see too Jenkins v. Gaither, 543 Fed. Appx. 894 (11th Cir. Court of Appeals 2013) (affirming the grant of summary judgment based upon qualified immunity to two (2) police officers in lawsuit filed against them and their based upon appellant's claim that they had wrongly arrested him for DUI, which charge was

later dropped, after appellant had refused to perform FSE and the state administered test to determine his BAC).

In Elliott, this Court reaffirmed its Olevik-holding that Paragraph XVI applies to state administered breath tests under Georgia's implied consent statutes (ICS) and noted that said holding obviated the need for a stare decisis analysis of that holding, citing "*Kimble v. Marvel Entertainment*, LLC, ___ U.S. ____, _____ (135 SCT 2401, 192 LE2d 463) (2015) ('stare decisis has consequence only to the extent it sustains incorrect decisions; correct judgments have no need for that principle to prop them up.')." Elliott v. State, 305 Ga. at 209, n. 21, 189. Notably in Olevik, though, this Court further held that neither the Fourth Amendment to the Federal Constitution nor Paragraph XIII of Georgia's 1983 constitution prohibits such state administered breath test as an incident to a DUI suspect's arrest. Olevik v. State, 302 Ga. 228, 234 (2017). Of course, that holding is consistent with the Birchfield-Court's holding that such state administered breath test is proper as an incident to a lawful DUI arrest. Birchfield v. North Dakota, 136 S. Ct. at 2185-2187. Indeed, in Birchfield, supra, the United States Supreme Court upheld as in compliance with the United States Constitution a state statute that made it a crime for a DUI suspect to refuse to take a state-administered chemical test of his breath under an implied consent statutory framework. Birchfield v. North Dakota, 136 S. Ct. 2160, 2171, 2186 (2016). In this regard, the Birchfield – Court held as follows:

> Bernard, on the other hand, was criminally prosecuted for refusing a warrantless breath test. That test was a permissible search incident to Bernard's arrest for drunk driving, an arrest whose legality Bernard has not contested. Accordingly, the Fourth Amendment did not require officers to obtain a warrant prior to demanding the test, and Bernard had no right to refuse it.

Birchfield v. North Dakota, 136 S. Ct. at 2186; see too Olevik v. State, supra, 302 Ga. at 248 ("The Supreme Court of the United States has approved the 'general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply.' … The *Birchfield* Court, however, struck down implied consent laws that impose criminal penalties for refusing to submit to blood testing. … Georgia's implied consent statute does not impose criminal penalties for refusing to submit to chemical testing, squarely putting our implied consent notice within the category of statutes that the Supreme Court of the United States has deemed not unconstitutionally coercive."). Additionally in Olevik, in rejecting appellant Olevik's contention that Georgia's at-issue implied consent notice had misled him about his right to refuse such test and that said notice was unduly coercive accordingly, this Court explained as follows:

> Because the notice refers to a right to refuse, advises suspects of the consequences for doing so, and concludes with a request to submit to testing, a reasonable suspect relying solely on the notice should understand that the State is asking for a suspect's cooperation, rather than demanding it, and that they have a right to refuse to cooperate."

Olevik v. State, supra, 302 Ga. 228, 249 (2017). In other words, as previously noted, the Implied Consent's language is not coercive; it enables a person to make

an informed decision; it does not force or coerce a person to consent to the test or refuse the test. See Hynes v. State, supra, 341 Ga. App. 500, 507-508 (2017) (discussing, in part, South Dakota v. Neville, 459 U.S. 553 (1983)) and South Dakota v. Neville, 459 U.S. 553, 560-564 (1983); compare Elliott v. State, 305 Ga. at 221-222. Finally, the Neville-Court specifically held that permitting a DUI arrestee's refusal to take a state administered "blood alcohol test" does not offend the Fifth Amendment; notably in Neville, appellant Neville had not been specifically informed that evidence of his refusal could or would be admitted against him during the related trial. South Dakota v. Neville, 459 U.S. at 564-565.

The Appellee contends that for this appeal, this Court should re-evaluate the correctness of its holding in Elliott as to the admissibility of evidence of a DUI arrestee's refusal of a state administered test under the ICS and, if this Court were to find the holding wrongly decided, jettison the holding under a stare decisis analysis. See generally Olevik v. State, 302 Ga. 228, 244-245 (2017) (explaining what a stare decisis analysis entails). The Appellee contends that this Court should also ultimately overrule its recent holding in Awad v. State, 2022 Ga. LEXIS 10, (S21G0370) (January 19, 2022, decided) (holding that pursuant to Paragraph XVI, the trial court had properly granted defendant Awad's motion to suppress his refusal to submit to the state administered urine test under Georgia's implied consent statute). Moreover, the Appellee requests this Court to reconsider and

overrule its principal holding in Olevik, supra, as to Paragraph XVI's application to a state-administered breath test under Georgia's implied consent statutory framework. See Awad v. State, 2022 Ga. LEXIS 10, *13-14 (S21G0370) (January 19, 2022, decided) (Colvin, J., concurring) ("While I have grave concerns about the interpretation of our Constitution in *Olevik* and *Elliott*, that issue is not squarely before the Court today.").

As to Day v. State, 63 Ga. 668, 669 (2) (1879), one of the older cases on which this Court relied in making its aforementioned holding in Olevik, the Elliott – Court noted that "[a]lthough *we do not determine conclusively that Day was correctly decided*, that case (and others like it) established a well-settled interpretation of the self-incrimination right, one that was not unique but within the mainstream of American Judicial decisions at the time." Elliott at 209. Indeed, the Day opinion is short and sparse as to the underlying facts. Day v. State, 63 Ga. 668 (1879). Additionally, in addressing the State's argument that the Day-Court had misconstrued Georgia's then-self-incrimination clause, this Court noted as follows: "But even if the State were right that *Day* (and all the other cases that have since followed it) misread the constitutional text, we are no longer governed by the 1877 Constitution that Day interpreted." Olevik v. State, 302 Ga. at 241. Below in the section of the brief concerning the Privileges and Immunities Clause of the 1983 Georgia Constitution, Calhoun is mentioned again as to its language

concerning the then-Georgia Constitution's search and seizure provisions, which are now noted by the 1983 Georgia Constitution, Art. I, § I, Para. XIII (Paragraph XIII). In discussing another opinion discussing Georgia's constitution's compelled self-incrimination clause, the Elliott-Court cited Calhoun v. State, 144 Ga. 679, 680-681 (1916), which the Olevik-Court also discussed. Elliott v. State, 305 Ga. at 203; Olevik v. State, 302 Ga. at 239-241. In discussing Calhoun, supra, the Elliott-Court noted that "*Calhoun* more clearly explained the rationale behind *Day* that the constitutional right was 'as broad as … the common-law privilege from which it is derived.' 144 Ga. at 680." Elliott v. State, 305 Ga. at 203.

In Elliott, this Court noted that "[t]he pre-Revolution English common-law right against compelled self-incrimination did *not* preclude admission of a defendant's refusal to incriminate herself or adverse inferences therefrom. And the text of Paragraph XVI does not by its plain terms preclude admission of evidence that a defendant refused to speak or act." Elliott v. State, 305 Ga. at 210, 212-213 (emphasis added). Indeed, Elliott explains that even at the beginning of the 1800s in this country, states permitted juries in criminal trial in their state courts to draw adverse inferences from a criminal defendant's refusal to make a statement at trial. Elliott at 213. However, this Court pointed out that by the end of the 1800s in this country, all states but Georgia had begun to permit criminal defendants to make sworn statements at trial and had enacted laws to prevent the trier of fact from

drawing adverse inferences when such defendants did not testify during their trials. Elliott at 213-214. In fact, under English law, criminal "defendants were deemed incompetent to testify" until 1898." Id. at 213. Interestingly, though, not until 1962, did Georgia permit a criminal defendant to make a sworn statement during his state trial, and in that same year, Georgia enacted its seminal statute prohibiting a trier of fact from drawing adverse inferences from such criminal defendant's failure to testify during his trial. Elliott at 213-214. Such statutory prohibition is now included in O.C.G.A. § 24-5-506 and had been included in O.C.G.A. § 24-9-20. Additionally, the Elliott-Court noted that in the century between the Revolution and the enactment of the 1877 Georgia Constitution, when the compelled self-incrimination clause was first constitutionalized in Georgia, the legal landscape had changed as shown by, among other things, decisions by this Court around year 1877. Id. at 213-215. Indeed, Elliott points out that during the 19th Century, this country's legal landscape had "shifted" as to whether evidence of a person's refusal to incriminate himself was admissible during a related trial (Id. at 213, 217); in this respect, this Court pointed to Day, supra, and the United States Supreme Court case Boyd v. United States, 116 U.S. 616, 634-635 (1986), for the proposition that "around the time *Day* was decided, the United States Supreme Court construed the Fifth Amendment as covering more than oral testimony." Elliott at 198. In reflecting on those changed times in this state,

Elliott explains that according to the "historical record," the common law had changed or evolved to preclude such refusal evidence by when the 1877 Georgia Constitution was enacted. Elliott at 210-214. Indeed, in discussing the at-issue holding(s) in Robinson v. State, 82 Ga. 535, 546 (1889) and its progeny, the Elliott-Court explained that Robinson its progeny appear to be "common-law cases" and that they applied "the common law that was incorporated into the 1877" self-incrimination provision. Elliott at 217-128. This Court further noted that appellate decisions in this state and elsewhere in this country near but after the adoption of the 1877 Georgia Constitution "could not change its original public meaning. But, as previously discussed, their temporal proximity to its adoption makes them good indicators of its meaning." Elliott at 216-217. In this regard, previously in the Elliott-opinion, this Court explained that to interpret a constitutional provision, the Court

> may look to the broader context in which the text was enacted, including other law – constitutional, statutory, decisional, and common law alike – that forms the legal background of the constitutional provision.

Elliott at 187 (quoting Olevik, supra, at 236 (2) (c) (i)). The Elliott-Court further noted that because the language of the at-issue Paragraph XVI is very similar to the self-incrimination provision that had been originally adopted in 1877 and carried forward in the intervening Georgia Constitutions, a presumption, perhaps even a strong presumption but still possibly rebuttable, exists that the meaning of the self-

incrimination clause of the 1877 constitutions is the meaning of that provision in Georgia's current constitution. Elliott at 208-210. Ultimately the Elliott Court held that after the enactment of the 1877 constitution, "[n]o subsequent development clearly altered the meaning of the 1877 Provision." Id. at 218.

Although the Elliott-Court pointed out that currently, the Fifth Amendment's self-incrimination clause is interpreted to include testimonial evidence, but not incriminating acts evidence, and that most other states in this country interpret their respective constitutional self-incrimination clauses to include testimonial evidence, but not incriminating acts evidence, such shift in the landscape of this country is no reason for Georgia to change the meaning of Paragraph XVI, including the meaning of "testimony." Elliott at 190-191. Indeed, in Elliott, this Court noted as follows:

> The State also argues that this Court stands alone in affording protection to incriminating acts, and we should start over with our interpretation of XVI because the 1983 constitution was a new constitution that was meant as a departure from established jurisprudence.

Elliott at 190. The Appellee continues to assert the State's contentions in Elliott that the Elliott-opinion identifies.

During the 20th Century in this country, significant developments obviously occurred in transportation and public safety with the advent and later wide-spread driving of motor vehicles on the roadways of this country, including the interstate system. See Birchfield v. North Dakota, supra,136 S. Ct. at 2167-2171 (describing

a somewhat historical account through the 20th Century of police and prosecution efforts to deter, prevent, and punish DUI drivers). Part of the progression of the motor vehicle's prevalence in this country's society is the advent, development, and prevalence of the tractor-trailer truck on the highways, roads, and interstates. See O.C.G.A. § 40-5-140, et seq., known as the "Uniform Commercial Driver's License Act," including 40-5-150, which describes one class of commercial vehicle as having a gross weight in excess of 26,000 pounds. The Appellee understands that Georgia's Department of Public Safety has a division devoted to enforcement of laws concerning commercial vehicles, in particular tractor-trailer trucks; the Appellee understands that this division is known as the "Motor Carrier Compliance Division."

In South Dakota v. Neville, which was published February 1983, the United States Supreme Court explained the toll that drunk drivers had taken on this country; in this regard, the Court explained:

> The situation underlying this case – that of the drunk driver – occurs with tragic frequency on our Nation's highways. The carnage caused by drunk drivers is well documented and needs no detailed recitation here. This Court, although not having the daily contact with the problem that the state courts have, has repeatedly lamented the tragedy. See *Breithaupt v. Abram*, 352 U.S. 432, 439 (1957) ('The increasing slaughter on our highways, most of which should be avoidable, now reaches the astounding figures only heard of on the battlefield'); *Tate v. Short*, 401 U.S. 395, 401 (1971) (Blackmun, J., concurring) (deploring 'traffic irresponsibility and the frightful carnage it spews upon our highways'); *Perez v. Campbell*, 402 U.S. 637, 657, 672 (1971) (Blackmun, J., concurring) (footnote omitted) ('The slaughter on the highways of this Nation exceeds the death toll of all our

> wars.'); *Mackey v. Montrym*, 443 U.S. 1, 17-19 (recognizing the 'compelling interest in highway safety.').

South Dakota v. Neville, supra, 459 U.S. 553, 558 (1983).

In Wessels v. State, a DUI-refusal case whose opinion was published in November 1983, appellant Wessels claimed, inter alia, "that evidence of his refusal to submit to the blood-alcohol test is inadmissible because it is irrelevant to the question of guilt or innocence under *Johnson v. State*, 125 Ga. App. 607 (2) (188 SE2d 416) (1972)." Wessels v. State, 169 Ga. App. 246, 247 (1983). In rejecting this claim, the Court of Appeals provided the following explication:

> [W]e find it necessary to overrule the holding in Division 2 of *Johnson*. In the intervening eleven years since the opinion in *Johnson*, the danger to *the public safety posed by the drunk driver has been repeatedly and intensely brought to the awareness of the citizens of Georgia, through the media as well as through recently enacted statutes providing for stricter enforcement of D.U.I. laws and harsher punishment for their infraction. ... As a result, the public is generally aware of the standard procedures attendant to arrest for this offense*, i.e., that chemical tests are administered by law enforcement authorities to ascertain the suspect's level of intoxication. It logically follows that in a trial for the offense of D.U.I., where the state produces no evidence of such test results, the inference raised in the minds of the jurors is that the defendant submitted to the test which resulted in a reading lower than that deemed to show intoxication. To the extent of negation of this inference, evidence of refusal to take the test is indeed relevant and admissible. Further, the defendant may in the course of trial offer explanation for such refusal.

Wessels v. State, 169 Ga. App. at 247-248 (ellipsis and emphasis added). As to Georgia's statutory provision under its ICL that permitted evidence of such refusals at trial, the Wessels-Court explained:

> [T]he General Assembly addressed it in its most recent session. … The statute is codified … and provides: "In any criminal trial, *the refusal of the defendant to permit a chemical analysis* to be made of his blood, breath, urine, or other bodily substance at the time of his arrest *shall be admissible in evidence against him.*" For the reasons presented above, the trial court did not err in admitting evidence of appellant's refusal to submit to the blood-alcohol test.

Id. (emphasis and ellipsis added) The Appellee understands that the just-mentioned statutory section was O.C.G.A. § 40-6-392 (c).

In Georgia v. Harrison Co., the Federal District Court of the Northern District of Georgia described the multi-year process, beginning around 1977, that led to the creation of the "Official Code of Georgia Annotated," which is now cited by its acronym O.C.G.A. and which went into effect on November 1, 1982. Georgia v. Harrison Co., 548 F. Supp. 110, 111-113 (N.D. of Ga. 1982); see too O.C.G.A. 1-1-1. The Appellee contends that said process described in Harrison Co., supra, demonstrates the Georgia Legislature's very deliberate and thoughtful process of enacting the O.C.G.A., of which the aforementioned O.C.G.A. § 40-6-492 was (and is) a part.

The Appellee contends that Wessels, supra, Harrison Co., supra, Neville, supra, and then-O.C.G.A. § 40-6-392 (c), regarding admissibility of a DUI suspect's refusal to submit to a state administered test, demonstrate that when the current Georgia Constitution was ratified and went into effect in 1983, Georgians, including those who ratified it, did not intend for evidence of a properly arrested

DUI suspect's refusal to take a state administered test under Georgia's ICL to be excluded from such suspect's corresponding criminal trial pursuant to the at-issue Paragraph XVI. Moreover, the Appellee contends that said historical record, contemporaneous to the ratification of Georgia's current constitution, shows that said Georgians did not intend a DUI suspect's pre-arrest and pre-custody refusal to submit to FSE to be deemed inadmissible pursuant to Paragraph XVI. The Appellee further asserts that this contention is buttressed by this Court's opinions in Allen v. State, 254 Ga. 433, 434 (1985), overruled in part by Olevik, supra, and Birchfield, supra; Strong v. State, 231 Ga. 514 (1973), overruled in part by Olevik, supra; Birchfield, supra; and Williams v. State, 296 Ga. 817 (2015); Klink v. State, 272 Ga. 605 (2000), overruled in part, if not entirely, by Olevik, supra, and Birchfield, supra; and Cooper v. State, 277 Ga. 282, 290 (2003), overruled in part by Olevik, supra, and Birchfield, supra.

In Keenan v. State, other than the field sobriety issue for which this Court has granted certiorari, appellant challenged the admission of his post-arrest refusal to take a state administered blood test, "contending that the Implied Consent Law is unconstitutional." Keenan v. State, 263 Ga. 569, 570 (1) (1993), overruled on other grounds by Birchfield v. North Dakota, supra. In rejecting this claim and referring to South Dakota v. Neville, supra, this Court explained as follows:

> We agree with the United States Supreme Court's view that neither choice afforded a defendant is 'so painful, dangerous, or severe, or so violative of

> religious beliefs' that no choice actually exists. We thus find no compulsion on behalf of the State and no violation of due process or O.C.G.A. § 24-9-20.

Keenan v. State, 263 Ga. at 570-571; see too Dennis v. State, 226 Ga. 341, 342-343 (1970) ("The fact that such refusal may result in a forfeiture of his right to operate a motor vehicle is not a penalty or such coercion as compels the operator to forego his constitutional protection against self-incrimination.").

In State v. Rajda, the Vermont Supreme Court decided "whether the U.S. Supreme Court's decision in *Birchfield* prohibits, pursuant to the Fourth Amendment of the U.S. Constitution, admitting at a criminal DUI proceeding a Defendant's refusal to submit to a warrantless blood test." State v. Rajda, 2018 VT 72, P20 ("July 20, 2018, Decided"). The Court began its analysis in this regard by first discussing four (4) United States Supreme Court decisions – Breithaupt v. Abram, 352 U.S. 432, 434, 438-439 (1957); Schmerber v. California, 384 U.S. 757, 760-772 (1966); South Dakota v. Neville, supra, 459 U.S. 553, 554, 559-564 (1983); and Missouri v. McNeely, 569 U.S. 141, 152-153, 156, 159-160 (2013). Then, in its analysis in this regard, the Vermont Supreme Court discussed the decision in Birchfield v. North Dakota, supra, ___ U.S. _____, 136 S. Ct. 2160 (2016). Thereafter in its analysis, the Vermont Supreme Court considered cases from other States that have been published since the publication of Birchfield, supra. State v. Rajda, 2018 VT at P31-P32. Then, after finding that "the Fourth

Amendment does not bar admission in a criminal DUI proceeding of evidence of a refusal to submit to a warrantless blood draw[,] the Vermont Supreme Court pointed out that 'the [U.S.] Constitution does not forbid 'every government-imposed choice in the criminal process that has the effect of discouraging the exercise of constitutional rights.' *Jenkins v. Anderson*, 447 U.S. 231, 236, 100 S. Ct. 2124, 65 L. Ed. 2d 86 (1980) (quoting *Chaffin v. Stynchcombe*, 412 U.S. 17, 30 … (1973)) …. Indeed, as the U.S. Supreme Court stated in *McGautha v. California*:

> The criminal process, like the rest of the legal system, is replete with situations requiring the making of difficult judgments as to which course to follow. Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose.

402 U.S. 183, 213, 91 S. Ct. 1454, 228 L. Ed. 2d 711 (1971)." State v. Rajda, 2018 VT at P32 (2 ellipses added; block-quote format is in the original.); see too in this regard South Dakota v. Neville, supra, 459 U.S. 553, 563-566 (1983); see McGautha v. California, cited above in Rajda, supra, 402 U.S. 183, 209-221 (1971) (finding that single or unified guilt and punishment proceeding/trial in capital murder case did not impermissibly require Petitioner to choose between invoking his right to silence and not incriminating himself as to guilt-innocence at trial and testifying in mitigation of punishment at trial) and Chaffin v. Stynchombe, cited above in Rajda, supra, 412 U.S. 17, 29-35 (1973) (finding that permitting a

different jury to impose a harsher sentence on retrial did not impermissibly require Petitioner to choose between asserting his statutory right to appeal or foregoing such right). In Elliott, supra, this court quoted the above passage from McGautha v. California, supra, and acknowledged that someone arrested for DUI and who refuses to submit to a state-administered breath test creates a situation in which "such refusal merely is a consequence of a DUI arrestee's choice between two options," noting that either option is "decidedly unpalatable"; however, this Court further noted that "this poor option set is merely a consequence of there being probable cause to arrest a person for driving under the influence. And making a choice between two unpalatable options is still a choice" Elliott v. State, 305 Ga. at 211. However, this Court's opinion in Elliott seems to discount the State's argument regarding the lack of coercion as to appellant Elliott when she *chose* to refuse to submit to the state-administered breath test; this argument by the State relied to some extent on language in South Dakota v. Neville, supra, 459 U.S. at 564. Elliott v. State, 305 Ga. at 221. The Appellee contends that the just mentioned situation identified in Elliott, supra, is also created, first and foremost, by such DUI driver's choice to drive a motor vehicle on Georgia's roadways while impaired by an intoxicant.

In South Dakota v. Neville, supra, the Supreme Court held that "a refusal to take a blood-alcohol test, after a police officer has lawfully requested it, is not an

act coerced by such officer, and thus is not protected by the privilege against self-incrimination[]" under the Fifth Amendment to the United States Constitution. South Dakota v. Neville, 459 U.S. 553, 554-555, n. 2, 561-565 (February 22, 1983, Decided). Also in South Dakota v. Neville, supra, the Supreme Court noted that a police officer's requesting a DUI-arrestee for consent to submit to a State-administered test to determine the suspect's BAC does not constitute *police interrogation* for the purpose of an analysis under Miranda v. Arizona, supra; in this regard, the Supreme Court explained as follows:

> In the context of an arrest for driving while intoxicated, *a police inquiry of whether the suspect will take a blood-alcohol test is not an interrogation within the meaning of Miranda*. As we stated in *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980), police words or actions 'normally attendant to arrest and custody' do not constitute interrogation. The police inquiry here is highly regulated by state law, and is presented in virtually the same words to all suspects. It is similar to a police request to submit to fingerprinting or photography. *Respondent's choice of refusal thus enjoys no prophylactic Miranda protection outside the basic Fifth Amendment protection.*

South Dakota v. Neville, 459 U.S. at 564, n. 15 (emphasis supplied); compare State v. Turnquest, supra, 305 Ga. 758, 758-759, 771 (2019).

In State v. Rajda, supra, in the Court's continued analysis of the propriety of admitting at trial evidence of a DUI suspect's refusal to take a State-administered blood test, the Vermont Supreme Court distinguished between criminalizing such refusals and merely permitting the evidentiary consequence of allowing a jury to learn about such refusals during an underlying trial:

> [T]he admission of evidence of a refusal to submit to a blood draw is a qualitatively different consequence with respect to its burden on the Fourth Amendment. Criminalizing refusal places far more pressure on defendants to submit to the blood test – thereby impermissibly burdening the constitutionally protected right not to submit to the test – than merely allowing evidence of the refusal at a criminal DUI trial, where a defendant can explain the basis for the refusal and the jury can consider the defendant's explanation for doing so. Moreover, the admission of refusal evidence in the context of a DUI proceeding, without directly burdening the privacy interest protected by the Fourth Amendment, furthers the reliability of the criminal process and its truth-seeking function by allowing the jurors to understand why the State is not submitting an evidentiary test in a DUI prosecution.

State v. Rajda, supra, 2018 VT at P35; see too State v. Kilby, supra, 961 N.W.2d 374, 375-383 (Iowa Supreme Court 2021). Moreover, in determining that the admission into evidence at trial of a DUI suspect's revocation of his implied consent to a State-administered blood test pursuant to Vermont's implied consent laws does not "unconstitutionally coerce [such a DUI suspect] to submit to testing[,]" the Vermont Supreme Court elaborated as follows:

> 'The speculative conclusion that a citizen will consent to a search that he or she would otherwise resist solely to avoid evidentiary implications at a possible future trial seems too attenuated to meet the [U.S. Supreme] Court's test in practice.' Indeed, as the Court in *Birchfield* pointed out, states began criminalizing refusals because the other civil and evidentiary consequences provided an insufficient incentive for motorists – most particularly repeat DUI offenders – to submit to testing. ___ U.S. at ___, 136 S. Ct. at 2169.

State v. Rajda, supra, 2018 VT at P37, P32 (Internal citation omitted.) (quoting, in part, from "K. Melilli, *The Consequences of Refusing Consent to a Search and Seizure*: *The Unfortunate Constitutionalization of an Evidentiary Issue*, 75 S. Cal. L. Rev. 901, 910-11[, 913] (2002) (citing numerous situations in which U.S.

Supreme Court has permitted indirectly penalizing constitutional rights in context of criminal trial)"). Finally in State v. Rajda, supra, in response to the defense's cited "caselaw in which courts have refused to admit evidence of a defendant's refusal to permit a warrantless search of a home or vehicle[,]" the Vermont Supreme Court distinguished, as follows, an officer's request for such a search from an officer's request for testing under implied consent laws:

> None of these cases ... involve DUI prosecutions or implied consent laws, and they ultimately conclude that admission of evidence of a refusal to search a home, car, or other property impermissibly burdens the Fourth Amendment. For the reasons stated above, that is not the case in the context of a DUI criminal prosecution pursuant to an implied consent law, where the scope of the requested search is a targeted one following arrest based on suspicion of impaired driving.

State v. Rajda, supra, 2018 VT at P38-P39 (ellipses added).

In Keenan v. State, supra, this Court pointed out that "the alco-sensor is used as an initial screening device to aid the police officer in determining probable cause to arrest a motorist suspected of driving under the influence of alcohol." Keenan v. State, 263 Ga. 569, 571 (2) (1993). Indeed, this Court and the Court of Appeals have recognized that a PBT, i.e., an alco-sensor, is an initial screening device that police officers use in helping to determine whether probable cause exists to arrest a suspect for DUI; this Court has also noted the wide variety of FSE that have been used by police during DUI investigations. See State v. Turnquest, 305 Ga. 758, 772, n. 12 (2019); Mitchell v. State, 301 Ga. 563, 571, n. 9 (2017);

Lenhard v. State, 271 Ga. App. 453, 454 (1) (2005) (Police may use alco-sensor results in determining probable cause to arrest for DUI.); and State v. Johnson, 354 Ga. App. 447, 448, n. 2 (2020). In Cann-Hanson, 223 Ga. App. 690, 691 (1996), the Court of Appeals recognized that the results of the HGN evaluation and other FSE, such as the walk and turn, may provide evidence of probable cause to arrest for DUI in the face of a defendant's claim that no such probable cause had existed.

In Keenan v. State, supra, appellant Keenan claimed that his pre-arrest refusal to submit to an alco-sensor test "was inadmissible under O.C.G.A. § 24-9-20." In rejecting this claim, the Keenan-Court held as follows:

> That statute, 'which embodies the constitutional right against self-incrimination, states that 'no person who is charged in any criminal proceeding with the commission of any indictable offense or any offense punishable on summary conviction shall be compellable to give evidence for or against himself.' This statutory proscription is more protective of the individual's right than the Fifth Amendment, which covers only a defendant's statements, since the Georgia statute has been construed to limit the State from forcing an individual to present evidence, testimonial or real. However, O.C.G.A. § 24-9-20 is inapplicable to field sobriety tests in the case at bar because appellant was not a person charged in a criminal proceeding at the time he [was requested] to complete the tests.' *Montgomery v. State*, supra at 95-96 (1).
>
> [new paragraph] It follows that the trial court did not err in admitting evidence of appellant's pre-arrest refusal to undergo the alco-sensor test. 'There was no violation of [appellant's] right not to incriminate himself under the fifth amendment, the Georgia Constitution, or O.C.G.A. § 24-9-20, because he was not in custody at the time the field sobriety test was [requested].' *Lankford v. State*, 204 Ga. App. 405, 406 (2) (419 S.E.2d 498) (1992).

Keenan v. State, 263 Ga. at 572 (2) (parentheticals regarding "[Cits.]" omitted) (quoting Montgomery v. State, 174 Ga. App. 95, 95-96 (1) (1989) and Lankford v. State, 204 Ga. App. 405, 406 (2) (1992)).

The Appellee contends that while a DUI suspect is being investigated for DUI but not under arrest or otherwise in custody, he is not under duress or being compelled to choose to refuse to submit to a portable breath test (PBT) or other field sobriety evaluations in such circumstances; consequently such refusal should be deemed admissible and not in violation of Paragraph XVI; in other words, such person's right under paragraph XVI is not being unconstitutionally infringed upon by being presented with the option to submit to a voluntary PBT or other FSE, which might or might not reveal incriminating evidence, or refuse with evidence of the refusal of the voluntary evaluation(s) being admissible at trial.

While an officer conducts a DUI investigation while a suspect is not in custody, the Appellee contends that no undue coercion or compulsion normally exists; and often during such an investigation while an officer requests such DUI suspect to perform field sobriety evaluations (FSE), the officer is trying to determine whether probable cause exists to arrest such person for DUI or, presuming no other reason to arrest exists, to permit the suspect to resume driving his motor vehicle, which could weigh, at least, from 3,000 to 6,000 pounds, on Georgia's roadways, where lawful speed limits reach 70 mile per hour. See

generally Licata v. State, 305 Ga. 498, 499-501 (1) (2019) (A police officer's general roadside questioning of a person during a traffic stop does not normally cause the person to be in custody.) An *officer conducting such DUI investigation needs to be able to use field sobriety evaluations* during such roadside investigation to best determine whether the suspect is impaired to the extent of being a less safe driver. Normally, DUI investigations involve this unique and very consequential preliminary investigation by an officer; that is, an officer who has initiated a traffic stop of a suspect, as opposed to responding to a motor vehicle accident involving the suspect's disabled vehicle, and such officer must decide whether to arrest the person for DUI and transport him to a local jail or to let him continue to drive his motor vehicle on roadways and, thereby, possibly further endanger himself and/or someone else on the roadways. Additionally, police officers undergo considerable training to conduct field sobriety evaluations, especially the three NHTSA standardized field sobriety evaluation and need these tools to effectively investigate DUI suspects at a critical decision point in a non-custodial setting. The public safety implications of this Court's decision as to the admissibility of a non-arrested DUI suspect's refusal to submit to a PBT or (other) voluntary preliminary FSE under Paragraph XVI are substantial. See Licata v. State, 305 Ga. 498, 502-503 (2019). Additionally, it would create incentives for

non-custodial DUI suspects to refuse to answer any questions or do or submit to anything that might be incriminating to them.

The Trial Court's order admitting evidence of the Appellant's refusal to submit to the PBT evaluation and other FSE is consistent with Keenan v. State, supra, 263 Ga. 569, 570-572 (1993); Long v. State, supra, 271 Ga. App. 565, 567-569 (2004); Lankford v. State, supra, 204 Ga. App. 405, 406-407 (2) (1992); Bravo v. State, 249 Ga. App. 433, 434 (1) (2001); Forsman v. State, 239 Ga. App. 612, 613 (3) (1999); and MacMaster v. State, supra, 344 Ga. App. 222, 230 (1) (d) (2018). The State contends that the Trial Court's order in this regard does not violate any of the Appellant's Georgia or Federal constitutional rights or Georgia statutory rights; as a result, the Trial Court has not abused its discretion in so ruling.

Therefore, this Court should not overrule Keenan, supra.

If this Court were to determine that the at-issue holding in Keenan has been wrongly decided, this Court should still retain the holding under a **stare decisis analysis**, because of the significant public safety implications for anyone traveling on or along Georgia roadways, the significant workability problems it would create, and the enormous impediments to DUI investigations and subsequent prosecutions it would create.

2. FOR PURPOSES OF A DEFENDANT WHO IS NOT IN CUSTODY, GA. CONST., 1983, ART. I, SECT. I, PARA. XVI SHOULD NOT APPLY WHEN SUCH DEFENDANT IS REQUESTED TO PERFORM FIELD SOBRIETY TESTS, AND SUCH DEFENDANT'S REFUSAL TO SUBMIT TO SUCH TESTS SHOULD BE ADMISSIBLE IN A CORRESPONDING TRIAL.

In Mitchell v. State, supra, this Court held that field sobriety evaluations administered to a DUI suspect while he is not in custody do not constitute searches for Fourth Amendment purposes. Mitchell v. State, 301 Ga. 563, 571 (2017).

A portable breath test and a Horizontal Gaze Nystagmus (HGN) evaluation are preliminary tools that police use to best ascertain whether probable cause exists to arrest someone for DUI; in other words, to decide whether to arrest the person or, if no other reason for arrest exists, to permit the person to resume driving his motor vehicle on the roadways of this State. See Hawkins v. State, 223 Ga. App. 34, 34-39 (1996) (explaining what nystagmus is and why intoxication by alcohol can reliably cause it) and Walsh v. State, supra, 303 Ga. 276, 279-280 (2018). These two evaluations may be performed with a person even if such person has purported physical ailments, real or not, that would prevent him from doing the other two standardized field sobriety evaluation known as the one leg stand and the walk and turn.

Paragraph XVI should not apply to a DUI suspect who is *not in custody*, but who is being lawfully investigated for DUI during a traffic stop, when a police officer duly requests such suspect to submit to a voluntary PBT or other voluntary FSE. As a result, a suspect's refusal to submit to such FSE and PBT should be admissible in that suspect's corresponding criminal trial. The evidence or information such officer is trying to glean from such suspect during the standardized walk and turn (WAT) test, the one leg stand (OLS) test, and the Horizontal Gaze Nystagmus (HGN) test is not evidence or information that is accessible via a search warrant, especially as to the WAT and OLS. Although an officer could watch a DUI suspect while he naturally walks and talks at the roadside during such encounter, the officer would have to watch a person for quite a while in some circumstances to notice certain clues or signs of intoxication. Also, such person could just lean against his car and not say anything. The WAT and OLS test and other dexterity test that cause a DUI suspect to divide his attention among more than one task, also known as divided attention tests, enable an officer to better know whether that suspect is impaired by an intoxicant to the point of being a less safe driver. These divided attention tests are revealing as to impairment because a motor vehicle driver is required to divide his attention among several tasks at once while driving. Additionally, as noted previously, compulsion and duress are absent or reduced much during a non-custodial

encounter. Moreover, a defendant could always challenge his admission to or refusal of such FSE and such evidence would be considered under O.C.G.A. Rule 403. In this way, such refusal evidence would continue to be offered for a permissive inference that such defendant had consumed some intoxicant. However, such evidence would also demonstrate the absence of evidence about FSE in the case. Additionally, if during such non-custodial investigation during a law traffic stop, such officer asks questions of such defendant about possible sources of his impairment and where the person had been, if the person refuses to answer those types of questions surely the state should be able to offer evidence of his refusal to answer those questions during the corresponding trial.

Whether an officer could discern sufficiently the voluntary jerking of a person's eyes known as nystagmus to be considered a valid clue of impairment purposes has not been developed enough in the lower court record.

In State v. O'Donnell, while the Court of Appeals decided whether appellee O'Donnell should have been apprised of his *Miranda* rights while he had been in custody but before the officer had asked him to perform FSE while he had been in custody, the Court explained that "[*i*]*n almost all cases involving field sobriety tests*, we have not needed to address this question because we have determined that the *detainee had not been arrested* when he performed the field sobriety tests." State v. O'Donnell, 225 Ga. App. 502, 505 (1997) (emphasis supplied), overruled

in part by State v. Turnquest, 305 Ga. 758, 771, 775 (2019). In the instant case, the Appellant had not been in custody when the Officer interacted with her about her performing or submitting to field sobriety evaluations and the PBT.

The Appellee re-asserts the same public safety concerns noted above concerning the at-issue holding in Keenan, supra, because they apply with equal force here.

The Appellee re-asserts the above-contentions concerning lack of compulsion and lack of constitutional infringement on a non-custodial DUI suspect's choice to submit or not to any voluntary field sobriety evaluation or PBT.

Whether a FSE constitutes an affirmative act for Paragraph XVI purposes under this Court's rulings would depend on the specific tasks involved.
The Trial Court's order admitting evidence of the Appellant's refusal to submit to the PBT evaluation and other FSE is consistent with Keenan v. State, supra, 263 Ga. 569, 570-572 (1993); Long v. State, supra, 271 Ga. App. 565, 567-569 (2004); Lankford v. State, supra, 204 Ga. App. 405, 406-407 (2) (1992); Bravo v. State, 249 Ga. App. 433, 434 (1) (2001); Forsman v. State, 239 Ga. App. 612, 613 (3) (1999); and MacMaster v. State, supra, 344 Ga. App. 222, 230 (1) (d) (2018). The State contends that the Trial Court's order in this regard does not violate any of the Appellant's Georgia or Federal constitutional rights or Georgia statutory rights; as a result, the Trial Court has not abused its discretion in so ruling.

3. O.C.G.A §§ 40-5-67.1 AND 40-6-392 DO NOT VIOLATE THE GEORGIA PRIVILEGES AND IMMUNITIES CLAUSE, GA. CONST., 1983, ART. I, SECT. I, PARA. VII.

When a criminal defendant challenges the constitutionality of a statute,

> [a] trial court must uphold [the] statute unless the party seeking to nullify it shows that it manifestly infringes upon a constitutional provision or violates the rights of the people. The constitutionality of a statute presents a question of law. Accordingly, [this Court] review[s] a trial court's holding regarding the constitutionality of a statute de novo.

Rhodes v. State, 283 Ga. 361, 362 (2008) (Parentheticals added.); see too generally Williams v. State, supra, 299 Ga. 632, 633 (2016). Regarding the presumed constitutionality of a Georgia statute, this Court has also explained as follows:

> We presume that statutes are constitutional, and before an Act of the legislature can be declared unconstitutional, the conflict between it and the fundamental law must be clear and palpable and this Court must be clearly satisfied of its unconstitutionality. Because all presumptions are in favor of the constitutionality of a statute, the burden is on the party claiming that the law is unconstitutional to prove it.

Ga. Dep't of Human Servs. v. Steiner, 303 Ga. 890, 894-895 (II) (2018) (Internal citations and quotations omitted.).

A Georgia Appellate Court reviews under a de novo standard a Trial Court's ruling that involves its construction or interpretation of a Georgia statute. See generally Williams v. State, 299 Ga. 632, 633 (2016).

In Commonwealth v. Bell, the Supreme Court of Pennsylvania held that the admission during trial of evidence of a DUI suspect's refusal to submit to a State-

administered test of his blood under Pennsylvania's implied consent framework does not violate such arrestee's rights under the Fourth Amendment. Commonwealth v. Bell, 211 A.3d 761, 776 (July 17, 2019, decided). In reaching this conclusion, the Court quoted from Rajda, supra, and noted that "[o]ur view on this point is substantially aligned with that of the Supreme Court of Vermont." Commonwealth v. Bell, supra, 211 A.3d 761, 774 (2019). The Bell-Court analyzed several United States Supreme Court cases, including Birchfield, supra, and McNeely, supra, in reaching its following conclusion:

> The 'evidentiary consequence' provided by Section 1547 (e) for refusing to submit to a warrantless blood test – the admission of that refusal at a subsequent trial for DUI – remains constitutionally permissible post-*Birchfield*.

Commonwealth v. Bell, 211 A.3d. at 763-776.

In addition to Rajda, supra, and Bell, supra, the Appellee contends that the reasoning in the following cases from other states supports the Appellee's contention that evidence of Appellant's refusal to submit to a State- administered blood test under Georgia's implied consent statute should be admissible at a trial in the instant case: State v. Hood, 301 Neb. 207, 209-12, 219-223, n. 49 ("October 5, 2018, Filed"); Fitzgerald v. People, 2017 CO 26, *P1 - *P27 (Supreme Court of Colorado, April 17, 2017); People v. Simpson, supra, 2017 CO 25 (Supreme Court of Colorado, April 17, 2017, decided); People v. Hyde, 2017 CO 24 (Supreme Court of Colorado, April 17, 2017, decided); People v. Simpson, 2017 CO 25,

*P20-*P25, 392 P.3d 1207 (Colorado Supreme Court; April 17, 2017, decided); and State v. Storey, 2018-NMCA-009, *32 (Court of Appeals of New Mexico, "September 28, 2017, Filed").

In Williams v. State, supra, this Court noted that since the at-issue Paragraph XIII of the Georgia constitution (Paragraph XIII) contains the same language as the Fourth Amendment, it "is to be applied in accord with the Fourth Amendment." Williams v. State, 296 Ga. 817, 817-823, 818 n. 5, (2015); see too Olevik v. State, 302 Ga. 228, 234 (2017) ("Because we generally interpret Paragraph XIII [of the Georgia Constitution] consistent with the Fourth Amendment, under *Birchfield*, our Constitution also would allow warrantless breath tests as searches incident to arrest. Olevik offers no reason that we should interpret Paragraph XIII differently in this context."); Mobley v. State, 307 Ga. 59, 61 n. 5 (2019) ("There are cases suggesting, however, that Para. XIII is coextensive with the Fourth Amendment and provides no greater protection against unreasonable searches and seizures. See, e.g., *Wells v. State*, 180 Ga. App. 133, 134 (2) (1986)"); State v. Kirbabas, 232 Ga. App. 474, 480-481 (1998) (In general, paragraph XIII of the Georgia constitution is construed consistently with the Fourth Amendment.); Oswell v. State, 181 Ga. App. 35, 35-36 (1986) (same).

In Mobley v. State, supra, this Court explained that prior to Mapp v. Ohio, 367 U.S. 643 (1961), "there was no exclusionary rule in Georgia courts for

unlawful searches and seizures. As early as 1897, this Court squarely rejected an exclusionary rule as a matter of state law in *Williams v. State*, 100 Ga. 511, 521 (28 SE 624) (1897), a decision that we reaffirmed *in Calhoun v. State*, 144 Ga. 679, 682 (87 SE 893) (1916)." Mobley v. State, 307 Ga. 59, 69, (2019).

Based upon the above-cited cases concerning the 1983 Georgia constitution, Art. I, Sect. I, Para. XIII, and the pre-1983 cases discussing the same language in previous Georgia constitutions, the Appellee contends that Paragraph XIII is coextensive with the Fourth Amendment and provides no greater protection in the context of the instant case. The United States Supreme Court in Birchfield v. North Dakota, supra, 136 S. Ct. 2160, 2169-2171, 2175-2182, 2185 (2016) and Mitchell v. Wisconsin, supra, have demonstrated approval of evidence of a DUI suspect's refusal to submit to a state-administered blood test under that state's implied consent laws to being admissible in that DUI suspect's corresponding DUI trial.

Since Georgia's current constitution went into effect in 1983, a Georgia appellate decision has *not* held inadmissible at trial evidence of a properly arrested DUI suspect's refusal to submit to a properly requested State-administered blood test.

The Appellee contends that the reasoning in State v. Rajda, supra, demonstrates that the admission during trial of evidence of the Appellant's refusal

to submit to a state-administered blood test in the instant case would not impermissibly infringe upon her rights under the United States Constitution or the Georgia Constitution, including any privacy interest.

In Bohannon v. State, when rejecting the appellant's constitutional challenge to O.C.G.A. § 40-6-391 (a) (5), which made it a crime to drive with a BAC of .10 or greater, this Court recognized that said statutory provision is a proper exercise of **this State's police powers** and that the determination of a per se unlawful limit of alcohol concentration for that statute was "particularly well-suited to the legislative process."' Bohannon v. State, 269 Ga. 130, 131-133 (2) (1998); see too Lester v. State, 253 GA. 235, 237, and 236-237, n. 2 (1984) (In discussing the then per se DUI statute, this Court explained, in light of a due process challenge, that "[w]here the statute informs the public that a person who has consumed a large amount of alcohol chooses to drive at his own risk, we find that the statute is sufficiently definite in informing the public so that it might avoid the proscribed conduct."). The following cases discuss a State's *police powers*, and the Appellee contends that said cases demonstrate that the two (2) DUI statutory provisions that Appellant claims violate her rights under the Privileges and Immunities clause of Georgia's current constitution *do not* so violate her rights. In other words, the challenged statutory provisions have been enacted by the Legislature as a proper exercise of this State's police powers. See Dennis v. State, supra, 226 Ga. 341,

342-343 (1) (1970) (discussing the police power of this state); Davis v. Pope, 128 Ga. App. 791, 792 (3) (1973) (In response to the claimant's claim that Georgia's implied consent law suspending his driver's license for his refusal to take a state-administered test violated Due Process, the Court of appeals noted that "[t]he state has the right to regulate drivers upon its public highways, and to impose conditions upon the use thereof, such as requirement of a driver's license, and as to the laws regarding nonresident motorists. This is a proper exercise of the police power of the state to prescribe regulations for public safety. Hence, the application of the Implied Consent Law does not offend the constitutional provisions respecting due process in any manner."); Mackey v. Montrym, 443 U.S. 1, 13, 17-19 (1979) (in light of claimant's rejected-due process challenge to Massachusetts' implied consent statutory scheme, discussing Massachusetts' police power in relation to its implied consent statute that suspended a person's license for refusing a state-administered test); Lebrun v. State, 255 Ga. 406, 406 (1986) (noting that under Georgia's police power, it was constitutionally permissible to impose reasonable conditions to qualify for a license); Quiller v. Bowman, 262 Ga. 769, 770-771 (1) (1993) (discussing Georgia's police power); see also Queen v. State, 189 Ga. App. 161, 161-163 (1) (1988) (discussing the Necessary and Proper Clause of the 1983 Ga. Const., Art. I, Sect. I, Para. II, in relation to Chapter 8 of Title 40 of the O.C.G.A. and strict criminal liability for certain motor vehicle safety statutes); see

too McCoy v. Sanders, 113 Ga. App. 565, 566-569 (1966) (discussing Georgia's police power as extended to police officers during the course of their employment); Barbier v. Connolly, 113 U.S. 27, 31-32 (1885) (discussing a state's police power in rejecting appellant's due process claim); Veit v. State 182 Ga. App. 753,755-757 (2) (1987) (discussing state police powers that extend to Georgia Sheriff's and their Deputies police and that extend to the protection of lives, health and property of the citizen) and Nelson v. State, 252 Ga. App. 454, 456-457 (2001) (explaining that a state's police powers that extend to police officers and that extend to the protection of lives, health and property).

O.C.G.A. § 40-5-55 indicates, in part, that "[t]he State of Georgia considers that any person who drives or is in actual physical control of any moving vehicle in violation of any provision of Code Section 40-6-391 [Georgia's main DUI statute] constitutes a direct and immediate threat to the welfare and safety of the general public." Because of this threat, this statute also indicates that subject to O.C.G.A. § 40-6-392, any person who is arrested for DUI shall be deemed to have given consent to a state administered test to help ascertain his impairment level. This Court has deemed that this promulgation of implied consent does not constitute a driver's actual consent to such a state administered test or an agreement that a refusal to consent to a breath test may be admissible against her in a related criminal trial. See Elliott v. State, 305 Ga. at 221-222. Compare People v.

Simpson, supra, 2017 CO 25, *P20-*P25, 392 P.3d 1207 (Colorado Supreme Court; April 17, 2017, decided) ("By choosing to drive in Colorado, Simpson consented to the terms of the Expressed Consent Statute, including its requirement that a driver "shall be required to take and complete" a blood-alcohol test if a law enforcement officer has probable cause to suspect him of a drunk-driving offense. § 42-4-1301.1(2)(a)(I). Simpson therefore consented to the blood draw."). The Appellee contends that the laws concerning Georgia's implied consent laws, which should be read together, give ample notice to people concerning their implied consent to state-administered if they are duly arrested for DUI in Georgia. Also, Appellee contends that by a driver's choosing to drive a motor vehicle while impaired on Georgia's roadways, such driver, once duly arrested for DUI, should be deemed to have consented to a state-administered test.

Few Georgia appellate cases have interpreted **the privileges and immunities clause of the 1983 Georgia constitution, Art. I, Sect. I, Para VII.** Ambles v. State, 259 Ga. 406, 407 (2) (1989). However, the Georgia constitution's privileges and immunities clause indicates that "it shall be the duty of the General Assembly to enact such laws as will protect [citizens of this state] in the full enjoyment of the rights, privileges, and immunities due to such citizenship." Ga. Const. Art. I, section I, Para. VII (parenthetical added). Accordingly, the General Assembly has a duty to protect all those citizens of this State who are on or along

Georgia roadways from the drunken or otherwise impaired motor vehicle driver. Indeed, all persons traveling on or along Georgia's roadways and all their property deserve protection from the impaired motorist. Further, citizens of this state and all persons who travel on and along the roadways of this state have an expectation that they can travel on and along these roadways safely; they expect safe roads and bridges; they expect that DUI drivers will be removed from the roadway and not create unjustifiable risks to their safety. In an effort to provide this protection as to DUI drivers, the General Assembly has enacted laws to try to reduce, deter, and punish drunk drivers in this state.

The Appellee contends that Appellant has not cited a single case that supports her contention that she has been deprived of her privileges and immunities or that discusses implied consent or impaired driving prosecutions in the context of the privileges and immunities clause of the Georgia constitution. As a result, the Appellee contends that Appellant's privileges and immunities claim is without merit. See Women's Surgical Ctr., LLC v. Berry, 302 Ga. 349, 352, n. 4, 352-353 (2017) and Slaughter House cases, 83 U.S. 36 (1872).

CONCLUSION

For the foregoing reasons, the Appellee requests this Court affirm the Trial Court's appealed-from order and to rule on this Court's three questions in the manner in a way that is consistent with the Appellee's contentions herein.

Respectfully submitted this 14th day of February, 2022.

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IN THE SUPREME COURT OF GEORGIA
STATE OF GEORGIA

MIA LASHAY AMMONS	)	
	)	
Appellant	)	
	)	
v.	)	CASE NO: S22A0542
	)	
STATE OF GEORGIA	)	
Appellee	)	

CERTIFICATE OF SERVICE

This is to certify that I have served a true electronic copy of the foregoing Appellee brief on the Appellant's attorneys, **Mr. Hunter Rogers, APD, and Mr. Keegan Gary, APD,** at the Paulding Judicial Circuit's Public Defender's Office at 280 Constitution Boulevard, Room 1086, Dallas, Georgia 30132. These attorneys and I have agreed to electronic service on our common appellate cases with this Court. I emailed both attorneys their respective copies at their work email addresses: keegan.gary@paulding.gov and hunter.rodgers@paulding.com.

This 14th day of February, 2022.

/s/ A. Brett Williams
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