IN THE SUPREME COURT

OF THE STATE OF GEORGIA

OMAR AWAD,

APPELLANT

vs.

STATE OF GEORGIA,

APPELLEE

Case No. S21G0370
(Ct. App. A20A1490)

BRIEF OF APPELLEE

BERT POSTON
DISTRICT ATTORNEY
CONASAUGA JUDICIAL CIRCUIT

MARK P. HIGGINS, JR.
ASSISTANT DISTRICT ATTORNEY
CONASAUGA JUDICIAL CIRCUIT

IN THE SUPREME COURT

OF THE STATE OF GEORGIA

OMAR AWAD, APPELLANT vs. STATE OF GEORGIA, APPELLEE	Case No. S21G0370 (Ct. App. A20A1490)

BRIEF OF APPELLEE

STATEMENT OF FACTS RELEVANT TO THIS APPEAL

On February 1, 2019, Appellee filed an Accusation 19-CR-197-M charging Appellant with driving under the influence, under O.C.G.A. §40-6-391(a)(2), violations of O.C.G.A. §40-6-203(a)(1)(C) for improper stopping and O.C.G.A. §40-8-76.1 for failure to wear a safety belt. (R-4) On April 15, 2019 Appellant waived arraignment, entered a not guilty plea and filed motions including a preliminary motion to suppress. (R-20) Appellant, changed counsel and his current counsel entered an appearance on July 1, 2019. (R-45) Trial was set for November 4, 2019. (R-54) On November 4, 2019, Appellant urged an oral motion to exclude certain evidence including a refusal to submit to a urine test and provided the court with briefs in support of those motions (T-1)(R-55, R-60). No

testimony was presented at the hearing on the motion to exclude evidence as the facts were not in dispute. (T-1) Appellee proffered and the same was not disputed by Appellant, that the evidence would show that the officer read the appropriate implied consent warning and requested Appellant submit to a urine test. (T-9, T-32) Senior Judge Walter Matthews who was sitting in for Judge Cindy Morris heard arguments from both parties as to the issues. Appellant's counsel framed the issue of whether or not a urine test would be an act for the purposes of Paragraph XVI (of Article I, of the Georgia Constitution) and claimed to the trial court that no definitive answer existed as to that issue. (T-2) Appellee contended to the trial court that the Supreme Court of Georgia's decision in *Green v. State*, 260 Ga. 627 (1990) and *Robinson v. State*, 180 Ga. App. 43 (1986) were controlling. (T-3) While there was some debate about what types of motions Appellant actually urged, the trial court ultimately, as to the motion at issue, treated it as a motion to suppress. (T-21-22) The trial judge then indicated that he would pick a jury, but not swear them in, and that jeopardy would not attach, and that he would rule on the motion before getting started. (T-24) After the motion on November 4, 2019, a jury was selected but not sworn in the case for trial to be heard on November 6, 2019 and the trial court continued to hear arguments regarding the motion. (T-25-45)

In deciding the motion the trial court expressed its belief Elliott stood for the proposition that allowing evidence of any refusal of breath, blood or urine would be allowing the State to impermissibly comment on a defendant's privilege against self-incrimination and in turn made a finding that "the State is prohibited from introducing to the jury evidence that the defendant refused a urine test on the basis that to do so would violate his privilege against self-incrimination, as protected by the Georgia Constitution." (T-45)

Appellee, immediately filed its Notice of Appeal and filed an Amended Notice of Appeal. (R-1, R-2).

On February 10, 2020, the Supreme Court of Georgia issued an order transferring the case to the Court of Appeals finding that:

> Because there is no novel constitutional construction issue for this Court to address regarding whether *Olevik* and *Elliot* require the suppression of evidence of a defendant's refusal to submit to a urine test under Paragraph XVI, see *Green v. State*, 260 Ga. 625, 626 (398 SE.2d 360)(1990); see also *Olevik*, 302 Ga. at 243-244, this appeal is transferred to the Court of Appeals.

State v. Awad, S20A0743 (Order dated February 10, 2020)

On October 20, 2020, the Court of Appeals issued an opinion reversing the trial court's ruling prohibiting the State from introducing evidence of the refusal. The Court of Appeals pointed out that:

> "On the morning of trial, Awad moved to suppress evidence of his refusal to submit to a urine test. No evidence was presented at the hearing. Rather, the parties agreed to stipulate that the officer read an implied consent warning and, post arrest, requested that Awad submit to a urine test, which Awad refused" *State v. Awad*, Ga. App. A20A1490 (October 20, 2020)

The Court of Appeals further pointed out in footnote 1, "The parties did not stipulate to the actual words read to Awad. Instead the parties and the court speculated about the contents of the warning" *Id.*

Appellant Petitioned this Court for a Writ of Certiorari which this court granted on May 3, 2021.

Appellant's inclusion in his "Statement of Facts Relevant to this Appeal" that "…Appellant's urine sample was not sought by use of a catheter (MT-5)" is not supported by any facts in the record nor by a proffer of the State as to what the evidence would be. Appellant's citation to the record, MT-5, and conclusion that a catheter would not be a method used to procure the urine is completely a conclusory statement of his trial counsel (also his current counsel) based on rank speculation and that conclusion is not supported whatsoever in the form of evidence or proffered evidence in the record concerning the method(s) that would or may be used to complete the urine test requested, the procedure used to obtain the urine requested, or the actual testing of the urine itself.

In fact, the lack of details concerning the method of urine testing requested was mentioned by the Court of Appeals, in reversing the trial court based on this Court's precedent in *Green v.* State, 260 Ga. 625 (1990) when it concluded:

> Moreover, even if we were to attempt to apply *Olevik's* analysis — of whether compelling a suspect to submit to a breath test violated Paragraph XVI's right against self-incrimination — to this urine-test case, we could not proceed because, as the Supreme Court explained in *Olevik*, the analysis "depends on the details of the test." *Olevik*, 302 Ga. at 243 (2) (c) (iii). And here, no details were presented below regarding the proposed urine test. *State v. Awad*, Ga. App. A20A1490 (October 20, 2020) (Emphasis supplied)

Despite Appellant's contention otherwise, there exists nothing in the record as to the nature of how the urine test would be conducted or how a urine sample would be obtained.

Further, Appellant, points to the following statement of the trial judge:

> [y]ou could hold a cup in front of [the Appellant] and you can't make him urinate. He is not going to naturally urinate. You have to wait and he has to voluntarily release the sphincter …. He must voluntarily release the sphincter in order to produce a urine sample which could be self-incriminating." (MT – 43).

Appellant contends this is the trial court making a finding of fact that an act is required. Again, nothing exists in the record to support either the trial court's assumption or Appellant conclusion as to how the sample of urine was to be obtained despite Appellant's conclusion *without citation to the any part of the transcript* that "Appellant produce the sample through the excretion of urine."

Further, no evidence was proffered by the State or testified to by any witness concerning any bodily function or the process of urination, or anything concerning what methods are available for the testing and collection of urine from which the trial court could determine the nature of the bodily functions involved in the processing of urine by the human body.

Finally, the trial court did not take judicial notice of any medical treatise describing any biological processes related to urination or how it is excreted or removed from the human body.

ARGUMENT

I. The holding of G*reen v. State* 260 Ga. 625, 627 (1990) 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" should be upheld

A. The Court in *Green* applied a correct constitutional analysis

The Court in *Green*, performed the proper analysis, under the proper constitutional framework, and correctly recognized the longstanding additional protections Georgia has with regard to self-incrimination stating:

> While the language in the United State Constitution has been construed to be limited to "testimony," the Georgia Constitution has been construed to limit the State from forcing the individual to

> present evidence, oral or real. ….You cannot force a defendant to act, but you can, under proper circumstances, produce evidence from his person. *Creamer v. State*, 229 Ga. 511, 515-517 (1972). *Green* at 627

The Court then went on to conclude,

> "We adopt with some modification, the holding of the Court of Appeals in *Robinson v. State* 180 Ga.App. 43 (1986), reversed on other grounds, 256 Ga 564 (1986): 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. Thus, the use of appellant's urine sample did not violate appellant's constitutionally-protected right against self incrimination. *Green* at 627.

In *Robinson* the Court of Appeals, compared and contrasted 12 different cases addressing the issue and ultimately found "no significant difference between those cases in which a "defendant is forced to submit his body for the purpose of having the evidence removed" (*Creamer*, supra, at 518), and the present case." *Robinson* at 50.

It is clear from this language in *Green* and a review of *Robinson* that the Court was aware of the constitutional prohibition against forcing a defendant to perform an act, and the relevant case law interpreting the same. It is equally clear that the conclusion that was reached by this Court is that obtaining a urine sample, a substance naturally excreted by the human body in fact does not force a person to act as the term is contemplated under the self-incrimination protections of the Georgia Constitution.

While the Court certainly is within its authority to re-analyze the issue already decided in *Green*, nothing new has been brought to light to suggest the Court's analysis in 1990 was deficient in the conclusion it made. Appellee is aware of no scientific discoveries, no evolutionary changes in the way the human body processes urine, no advancements in the processes of collection and no changes in the manner of collection of urine since the Court's decision in *Green*. Certainly, no details concerning the collection methods used in urine tests, the manner of obtaining samples or any further elaboration were brought to light in the record of this case at the trial court which is void of any evidence in that respect.

In short, the same analysis performed by this Court in *Elliot* and *Olevik* has already been performed in *Green*. This Court in *Green* found urine to be naturally excreted and this Court in *Olevik* found breath used in breath tests not to be naturally expelled breath. Despite Appellant's urging to the contrary there has not been any newly enunciated legal principle, newly discovered fact, or anything else to warrant a change in the conclusion of this Court in *Green*. Urine is the same naturally excreted substance in 2021 this Court found it to be 1990.

B. The holdings of *Elliot* and *Olevik* did not set forth any new principle that is in conflict with the holding and conclusion of this Court in *Green*

In *Olevik* this Court indicated *Green* cannot support a conclusion that forced and unnatural breathing required in a breath test does not implicate a person's right against compelled self-incrimination. The converse must be true as well: forced and unnatural breathing required in a breath test cannot support a conclusion that a substance this Court has already found to be naturally occurring implicates a person's right against compelled self-incrimination. However, this Court in *Green* specifically ruled that the use of a urine sample is the "use of a substance naturally excreted by the human body" and "does not violate a defendant's right against self-incrimination under the Georgia Constitution." *Green* at 627.

The Court in *Green* acknowledged the longstanding principle of requiring compelled self-incriminating acts as being in violation of Paragraph XVI of the Georgia Constitution and concluded that use of a urine sample did not violate any rights contained therein. *Id.*

The Court in O*levik* found as to the issue of a breath test, the "details of the test" is what mattered. In *Olevik* the Court focused on the fact of deep lung air being required as a dispositive factor in its holding. In fact, the specific holding *Olevik* was "Breathing deep lung air into a breathalyzer is a self-incriminating act that Paragraph XVI prevents the State from compelling" *Olevik* at 241. The Court went on to state:

> If the State sought to capture and test a person's naturally exhaled breath, this might well be a different case. But this is not how a breath

> test is performed. Sustained strong blowing into a machine for several seconds requires a suspect to breathe unnaturally for the purpose of generating evidence against himself. Indeed, for the State to be able to test an individual's breath for alcohol content, it is *required* that the defendant *cooperate* by *performing an act*. *Id.* at 244. (Emphasis supplied)

The importance of this distinction is further underscored by the Court in *Olevik* distinguishing *Green* and *Robinson* when it stated:

> But *Green* and *Robinson* do not apply here. (Footnote 10: Given their inapplicability, we do not consider whether *Green* and *Robinson* were rightly decided) Although a person generally expels breath from his body involuntarily and automatically, the State is not merely collecting breath expelled in a natural manner. For a breath test, deep lung breath is required.

While Appellee acknowledges the Court's pronouncement in Footnote 10 that in *Olevik* it was not deciding whether *Green* and *Robinson* were rightly decided, the Court nevertheless distinguishes those cases concluding that the unnatural requirement of the breathing is the key factor in breath tests.

It also stands to reason that if deep lung air was a deciding factor in *Olevik* nothing in that decision should change the analysis or result established by this court in *Green.* Stated alternatively, the conclusion of *Green* that taking a urine sample which uses a substance naturally excreted from the human body does not violate a defendant's right against self-incrimination should not be affected by the analysis in *Olevik* which is specifically decided on the fact that breath evidence was not naturally obtained.

Finally, if the Court chooses to apply the *Olevik* "details of the test" is what matters principle, *Id.* at 243, to urine, the result of *Green* would be the same, barring any evidence that urine testing under Georgia's implied consent would require unnaturally occurring urine or the production of urine in an unnatural manner.

C. The holding of *Green* is consistent with primary factual considerations in *Olevik* and *Elliot* in that regardless of the method of removal of urine from the human body a suspect is not required to do anything that creates, enhances or changes the nature of the naturally occurring evidence

Again, while there is no record to reference in this regard, Appellee is aware of no evidence that urine is different whether it leaves a suspect's body via the relaxation of a muscle and gravity pulling the urine into a container or via the process of catheterization. Unlike, the "deep lung breath" this Court has found unique to breath tests, there is no deep bladder urine counterpart. Deep lung air necessary for a breath test forces a suspect to provide prolonged breathing of a certain level for the intoxilizer machine to process the sample. *Olevik* at 243.

Appellant's conclusion, "if the self-incrimination clause does not apply to a substance naturally excreted from the body, *Olevik* and *Elliot* were decided incorrectly" ignores this distinction that this Court went to significant lengths to explain that was clearly a deciding factor in its holding, the requirement that a

defendant generate, not normally breathed air, but deep lung air. *Olevik* at 241-244. In fact the Court rejected the State's argument in *Olevik* that the substance at issue in a breath test was "naturally excreted by the human body." *Id* at 243-244 ("the State is not merely collecting breath expelled in a natural manner. For a breath test, deep lung breath is required.")

Producing urine from a suspect, regardless of the manner results in the same naturally occurring urine being obtained. Further, unlike breath, urine is then sent to a lab for the actual testing to be done at a later time.

D. The holding of *Green* is consistent with this Court's treatment of other naturally occurring substances as they relate to the constitutional protection against self-incrimination.

In addition to breath, two other naturally occurring substances have been addressed by this Court in the context of Georgia's Constitutional protection against self-incrimination by compelling a defendant to do an act.

In *Quarterman v. State*, 282 Ga. 383, 386 (2007) the Court found that a statute requiring felon to provide DNA sample did not infringe upon a defendant's constitutional protection against self-incrimination because it did not force the convicted felon to remove incriminating DNA evidence from his body but only to submit to having the evidence removed.

While the Court in *Quarterman* did not analyze the method of collection, DNA evidence like blood and urine is naturally occurring evidence. The two most common forms of taking DNA evidence for comparison is by use of a buccal swab which is a swabbing of cheek cells inside of the mouth or by taking a blood sample. A buccal swab necessarily would require a defendant to open his mouth which obviously is an act in some sense. However, this process has not been found to require an act in violation of constitutional self- incrimination protections. In the same manner, a defendant merely opening his mouth to collect DNA after the defendant has been told to open his mouth, while it makes the collection process easier does not prohibit authorities from shackling an inmate and prying his mouth open to collect the already existing evidence, or drawing a blood sample.

Similarly, it would be logically inconsistent for the court to find that asking a defendant simply to open a valve he controls in his human body to allow his naturally occurring urine to be collected violated his constitutional protections against compelled self-incrimination, particularly when a medical device (a catheter) could be used to collect the exact same evidence in the exact same condition.

In *Olevik* the Court mentioned *Strong v. State* 231 Ga. 514 (1973) which concerned the withdrawal of a blood sample from an unconscious defendant. The

Court concluded that while the holding as to unreasonable search and seizure was no longer good law,

> "Nothing we say here should be understood as casting any doubt on *Strong*'s self-incrimination holding" the conclusion of which was that "extracting blood did not cause the defendant to be a witness against himself under the Fifth Amendment and "similar provisions of Georgia law," approvingly citing cases to the effect that the removal of evidence from a defendant's body does not implicate his right against compelled self-incrimination. Id. at 519." *Olevik* at 233.

The withdrawal of blood closely parallels the use of a catheter to withdraw urine as far as a method and parallels both a catheter and natural excretion of urine in that the product expelled blood or urine is in its naturally occurring state.

The naturally excreted substance principle of *Green* as it applies it to urine provides a rule that is both logical and consistent with *Elliot, Olevik, Quarterman* and *Strong* and recognizes that merely taking a more convenient option does not compel a defendant to produce evidence against himself.

E. The holding of *Green* is consistent with the historical holdings concerning acts as they relate to Georgia's prohibition against self-incrimination

Urine samples regardless of how they are obtained most reasonably parallel the following cases that involve the taking of items from a defendant in that they involve the obtaining of evidence present in or on the Defendant in its current state: *See, Drake v. State*, 75 Ga. 413, 414-415 (1885) (taking shoes from a

Defendant, did not violate right against self-incrimination); *Franklin v. State*, 69 Ga. 36, 43-44 (1882) (taking blood stained clothes from defendant did not violate right against self-incrimination); (pulling boots from defendant did not violate right against self-incrimination); *Ingram v. State*, 2532 Ga. 622, 634 (1984) (Requiring defendant to strip to waist to allow police to photograph tattoos on his body did not violate right against self-incrimination) *Quarterman v. State*, 282 Ga. 383, 386 (2007) (Statute requiring felon to provide DNA sample because it did not force the convicted felon to remove incriminating DNA evidence from his body but only to submit to having the evidence removed); *State v. Thornton*, 253 Ga. 524 (1984) (taking impression of defendant's teeth did not compel defendant to perform an act); *Creamer v. State*, 229 Ga. 511, 517-518 (1972) (removal of bullet from defendant's body did not violate right against self-incrimination) *Strong v. State*, 231 Ga. 514, 159 (removal of blood from the body through a minor intrusion does not cause person too be a witness against himself)

There are very few times, if any, where evidence is being produced from a defendant that a defendant cannot make a semantical argument that he or she is being "forced" to do something. And such would have been the case in many of the scenarios involving the taking of evidence from a defendant where this Court found no violation of the protection against self-incrimination. Telling a defendant

"Take off your clothes so I can see your tatoos" or, "Open your mouth so I can get an impression of your teeth" could be argued to be force in some degree.

Two distinctions exist in each of these cases that parallel urine regardless of the manner in which it is obtained. First, each involves the removal of evidence that has not changed. Second, each involves allowing access to that evidence in its existing state.

Applying this analysis, one reaches the same conclusion of the Court of Appeals in *Robinson* regarding urine samples, the holding of which was adopted by this Court in *Green*, "We find no significant difference between those cases in which a "defendant is forced to submit his body for the purpose of having evidence removed" (*Creamer*, supra, at 518) and the present case. There is nothing in the record to show that appellant was "forced" to produce a urine sample"

In contrast to these cases are the cases that the Court has found as unconstitutionally forcing a defendant to perform an act of self-incrimination. Those cases each have characteristics not present in obtaining urine samples that all involve requiring an affirmative act that either creates evidence or enhances the presentation of evidence against a defendant.

In *Day v. State*, 63 Ga. 668, 669 (1879), the affirmative act of placing his foot in footprints near the crime scene was found to be a violation of constitutional self-incrimination protections.

In *Blackwell v. State*, 67 Ga 76, 78-79 (1881) the affirmative act of standing up at trial required a defendant to himself *enhance* the view of the witness.

In *Brown v. State*, 262 Ga at 833, 836 (1993) the defendant was forced to *create* handwriting examples to be used against him.

In *Aldrich v. State*, 220 Ga 132, 135 (1964) the defendant was required to perform the act of driving onto scales, *that directly produced the basis for a criminal offense*.

II. Irrespective of the holdings in *Green, Elliot* and *Olevik*, obtaining a urine sample from a suspect under Georgia's implied consent statute does not require a suspect to perform an act of self-incrimination under Paragraph XVI of the Georgia Constitution and thus evidence of a refusal to submit to urine testing is admissible evidence

Unlike breath tests under Georgia's implied consent law for which there is only one method of obtaining an adequate sample, a method which requires the production of deep lung air, as discussed extensively in *Olevik*, there is no required manner for the collection of urine either statutorily or by regulation, which is then at a later time submitted for alcohol or drug testing. O.C.G.A. §40-6-392 mandates "chemical analysis of the person's blood, urine, breath or other bodily substance, to be considered valid under this Code section, shall have been performed according to methods approved by the Division of Forensic Sciences of the Georgia Bureau of Investigation…." but does not mandate any method for obtaining urine. While

Georgia Bureau of Investigation regulations, discuss the qualifications, techniques and methods for the performance of chemical analysis of blood, breath and urine, there are no requirements for the method of obtaining urine samples that are to undergo that chemical analysis. *See*, Ga. Comp. R. & Regs. R.92-3-.01 et. al (Lexis Advance through Rules and Regulations filed through May 19, 2021).

While the record of the trial court does not contain any actual evidence or proffer of the same, this Court nevertheless could take judicial notice of the ways in which urine can be obtained from the human body. The most common of those methods being through the process of urination, or removal via a catheter.

Both of these ways for urine to be obtained from the human body involve collecting the same naturally occurring urine that is being stored in the same place, the bladder, at the same time, and in the same manner by the body. Urination can occur when the person voluntarily releases the urine, a natural and essential bodily function, or when the body has accumulated enough urine whereby it overrides any desire on behalf of the person not to release it. Catheterization overrides any bodily control over storage and removes the same naturally occurring urine from the bladder.

Assuming arguendo, that the method of having a suspect urinate into a container requires some action on part of a defendant, urine testing as a whole under Georgia implied consent does not 'compel' any act whatsoever as the

process of catheterization is available, as is waiting until the body naturally releases it, each of which clearly require no action on behalf of a suspect.

If urine testing as a whole does not 'compel' a suspect to do anything then the introduction into evidence of a suspect's refusal to submit to urine testing, prior to any method being designated, does not comment on the exercise of any constitutionally protect right. Certainly, a suspect may very well choose the option of urinating into a container over the option of a catheterization but he is not compelled to do so and evidence of that refusal to submit to a urine test is should be admissible. This Court in its extensive historical analysis in *Elliot*, regarding breath tests pointed out:

> "Compel" is generally defined as to "constrain" or "force" a person to do something. *See,* Webster's New World Dictionary 289 (2d College ed. 1980). Just as asking a person to take a breath test, without more, is not compelling that person to do any act, admission of evidence of a defendant's refusal to submit to a breath test does not fit within a natural understanding of the word "compel." Rather, such a refusal merely is a consequence of a DUI arrestee's choice between two options. Both options are decidedly unpalatable given that both likely would result in incriminating evidence: agree to the breath test and risk an incriminating result, or refuse and face driver's license suspension and the risk that a jury will assume the arrestee had been drinking. But 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. See *McGautha v. California*, 402 U. S. 183, 213 (91 SCt 1454, 28 LE2d 711) (1971) ("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." (citation and punctuation omitted)); *State v. Modlin*, 291 Neb. 660, 867 NW2d 609, 620 (Neb. 2015) (citing cases from several jurisdictions for proposition that although the legal consequences of an administrative license revocation make refusal of a chemical test a difficult choice to make, "the difficulty of such choice does not render consent involuntary"), cited in *Kendrick v. State*, 335 Ga. App. 766, 772 (782 SE2d 842) (2016).
>
> Elliott v. State, 305 Ga. 179, 211, 824 S.E.2d 265, 288 (2019)

In every case in which urine testing is requested, *at the time of the officer's request* of "Will you submit to a state administered test of your urine?" there exists multiple methods of obtaining that sample for testing, at least one of which cannot support any logical argument of compelling a suspect to do anything. If a catheter is an option under the law, as a legitimate method for a urine sample to be obtained, it cannot be concluded that urine testing under Georgia's implied consent law requires a suspect to do anything. Simply offering a suspect the opportunity to cooperate in providing the naturally occurring sample in a way that is less time consuming and undoubtedly less invasive should not be construed as compelling a defendant to perform an act of self-incrimination.

That one method of collection may be easier, used most often, or even more palatable to a suspect making a choice as to whether to consent to a test or refuse should not affect the Court's analysis as to whether urine testing *compels* a suspect to do anything.

Appellant's counsel goes to great lengths to manufacture a basis for how the urine sample in this case would have been taken, even to the point of citing his own pronouncement that a catheter would not be used at the trial court level, in his brief to this Court despite nothing in the record to support his proclamation. Appellee, posits this was intentionally done to deflect from the fact that in any given case, at the time implied consent warnings are read and a urine test is requested, multiple methods are available for that testing. Whether any given officer would seek to obtain urine via a catheter may depend on a variety of factors that cannot necessarily be known at the time the request for a urine test is made. Appellee, does not contend that a catheter would generally be the first choice of an officer in obtaining a sample, but nevertheless, it is a method available. A defendant may express an inability to urinate, in which case the officer may give him the option of a catheterization. By the same token the officer may allow the defendant to remain until he is able to or his body requires him to urinate. A ruling on the admissibility of a refusal to submit to a urine test under Georgia's implied consent law must take into consideration every method available under the law. The alternative is to require trial courts to speculate as to what method or methods would have been used in every case at the time of the refusal, or require law enforcement officers to request a suspect to submit not just to a urine test but to spell out for the suspect in detail the nature of the test and all of the possible

manners and methods of collection of samples for chemical analysis. A refusal to submit to urine testing under Georgia's implied consent law must be treated as a refusal of any of these available means for that testing to be completed under the law.

In summary, O.C.G.A. §40-6-392(a) provides for the admissibility of the chemical analysis of a person's urine. No restrictions as to the method of collection of urine for purposes of this testing exist and therefore any method of collection, that does not in some other manner violate the law, would be acceptable.

Most, if not all of those methods, require no act at all on the part of a defendant, and the only one that arguably involves any act voluntary excretion nevertheless involves an act that simply makes available a naturally excreted substance that necessarily must leave the human body. Based on arguments previously made, the Court should find that urine testing under Georgia's implied consent law does not compel a defendant to perform an act to incriminate himself within the meaning of Paragraph XVI of the Georgia Constitution.

O.C.G.A. §40-6-392(d) states that: "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." Upon reaching the decision urged above that urine testing does not

require a compelled act of self-incrimination, the introduction of evidence of such a refusal does not violate any protections under the Georgia Constitution and therefore the Court of Appeals reversal of the trial courts ruling prohibiting the introduction of Appellant's refusal must be affirmed.

CONCLUSION

For the reasons stated above, this Court should affirm the ruling of the Court of Appeals reversing the trial court's exclusion of evidence that Appellant refused urine testing under Georgia's implied consent law.

This the 14th day of June, 2021.

/s/ BERT POSTON
BERT POSTON
DISTRICT ATTORNEY
CONASAUGA JUDICIAL CIRCUIT
GA BAR NO. 585605
P.O. Box 1086 Dalton, Georgia 30722
(706) 876-1300

/s/MARK P. HIGGINS, JR.
MARK P. HIGGINS, JR.
ASSISTANT DISTRICT ATTORNEY
CONASAUGA JUDICIAL CIRCUIT
GA BAR NO. 675189
P.O. Box 1086 Dalton, Georgia 30722
(706)876-1300

IN THE SUPREME COURT OF GEORGIA

STATE OF GEORGIA

OMAR JAMAL AWAD, Appellee vs. THE STATE OF GEORGIA, Appellant	Case No. S21G0370 (Ct. App. A20A1490)

CERTIFICATE OF SERVICE

I hereby certify that I have caused to be served a copy of the Appellee's Brief upon Appellant's attorney, and Amicus attorneys supporting Appellant, by placing same in the United States mail with adequate postage affixed thereon and addressed as follows:

D. Benjamin Sessions
715 Peachtree St. NE Ste 100
Atlanta, GA 30308
(Appellant's attorney)

Kimberly Dymecki
50 Technology Parkway South
Peachtree Corners, GA 30092
(Amicus attorney)

Gregory Willis, Esq.
The Willis Law Firm
6000 Lake Forrest Dr. Ste 375
Atlanta GA 30328
(Amicus attorney)

Hunter Rodgers, Esq,
3939 Atlanta Rd SE
Smyrna GA 30080
(Amicus attorney)

This the 14th day of June, 2021

/s/MARK P. HIGGINS, JR.
MARK P. HIGGINS, JR.
ASSISTANT DISTRICT ATTORNEY
CONASAUGA JUDICIAL CIRCUIT
GA BAR NO. 675189
P.O. Box 1086 Dalton, Georgia 30722
(706)876-1300