IN THE STATE COURT OF BIBB COUNTY
STATE OF GEORGIA

STATE OF GEORGIA,	:	
	:	
v.	:	
	:	Case No. 424923
LEROY MORGAN,	:	
	:	
Defendant.	:	

BRIEF IN SUPPORT OF MOTION TO SUPPRESS AND MOTION TO DECLARE O.C.G.A. §§ 40-5-55, 40-5-67.1, AND 40-6-392 UNCONSTITUTIONAL

The Defendant in this case was arrested for DUI and was informed of the Georgia implied consent advisement. The implied consent advisement the Defendant received improperly informed him that "[y]our refusal to submit to the required testing may be offered into evidence against you at trial." And, the Defendant submitted to the requested state-administered blood test after receiving this improper and misleading implied consent advisement. In support of the Defendant's motion to suppress, the Defendant respectfully shows this Honorable Court the following:

The state-administered blood test is a search governed by the Fourth Amendment:

> The Fourth Amendment provides in relevant part that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause." Our cases have held that a warrantless search of the person is reasonable only if it falls within a recognized exception. See, *e.g., United States v. Robinson,* 414 U.S. 218, 224, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973). That principle applies to the type of search at issue in this case, which involved a compelled physical

> intrusion beneath McNeely's skin and into his veins to obtain a sample of his blood for use as evidence in a criminal investigation. Such an invasion of bodily integrity implicates an individual's "most personal and deep-rooted expectations of privacy." *Winston v. Lee,* 470 U.S. 753, 760, 105 S.Ct. 1611, 84 L.Ed.2d 662 (1985); see also *Skinner v. Railway Labor Executives' Assn.,* 489 U.S. 602, 616, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989).[1]

The State did not obtain a warrant for the search of the Defendant's body and blood. "It is well settled under the Fourth and Fourteenth Amendments that a search conducted without a warrant issued upon probable cause is 'per se unreasonable . . . subject only to a few specifically established and well-delineated exceptions."[2] "[O]ne of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent."[3] The Defendant had a constitutional right to refuse consent to the search of her body and blood.[4]

The State relies solely upon the Defendant's purported consent as the exception to the warrant requirement of the Fourth Amendment. However, the implied consent misled the Defendant by informing the Defendant that a refusal of the requested state-administered blood test may be used against him at trial.

I. Georgia appellate courts have routinely held that a Defendant's refusal to submit to a warrantless search may not be used as evidence against a Defendant at trial. O.C.G.A. §§ 40-5-67.1(b) and 40-6-392(d) are unconstitutional to the extent that they purport to allow the State to use a defendant's decision to

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1 Missouri v. McNeely, 569 U.S. 141, 148, 133 S. Ct. 1552, 1558, 185 L. Ed. 2d 696 (2013).

2 Schneckloth v. Bustamonte, 412 U.S. 218, 219, 93 S. Ct. 2041, 2043, 36 L. Ed. 2d 854 (1973).

3 Schneckloth v. Bustamonte, 412 U.S. 218, 219, 93 S. Ct. 2041, 2043–44, 36 L. Ed. 2d 854 (1973).

4 See, id.

exercise his constitutional right to refuse to consent to a warrantless search of the her blood at trial.

Established precedent holds that the State cannot use a Defendant's refusal to submit to a warrantless search against a Defendant at trial:

> A defendant's refusal to consent to a warrantless search of his vehicle or other property is quite a different issue. A refusal of permission to search is analogous to the assertion of the privilege against self-incrimination. It is forbidden to "parade [a witness] in front of the jury for the sole purpose of having him invoke the Fifth Amendment. [Cit.]" *Sweat v. State,* 226 Ga.App. 88, 89(2), 485 S.E.2d 259 (1997). By analogy, an individual should be able to invoke his Fourth Amendment rights without having his refusal used against him at trial. Moreover, the legislature has not yet stated that such a refusal is admissible against a defendant. Mackey's refusal to consent to the search cannot be used as evidence of guilty knowledge.[5]

The analogy that our courts have made between the assertion of the right against self-incrimination and the right to refuse consent to a search is critical. In light of the Georgia Supreme Court's recent ruling in Elliott v. State, if the right to refuse consent to a search is to be treated like the assertion of the right not to incriminate one's self, the State could not introduce evidence of the Defendant's refusal to submit to a blood test.

> This Court cannot change the Georgia Constitution, even if we believe there may be good policy reasons for doing so; only the General Assembly and the people of Georgia may do that. And this Court cannot rewrite statutes. This decision may well have implications for the continuing validity of the implied consent notice as applied to breath tests, but

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[5] Mackey v. State, 234 Ga. App. 554, 555, 507 S.E.2d 482, 484 (1998); see also, Gardner v. State, 255 Ga. App. 489, 493-494, 566 S.E.2d 329, 332 (2002) (holding that "we decline to view the exercise of a constitutional right as a factor in determining probable cause. Thus, the trial court's determination that refusal to consent to a search may be taken into account when determining probable cause is error as a matter of law.").

> revising that notice is a power reserved to the General Assembly. Having considered the text of Paragraph XVI and the context in which it was enacted, as well as all of the arguments made by the parties and the amici, we conclude that Paragraph XVI precludes admission of evidence that a suspect refused to consent to a breath test.[31] Consequently, we conclude that OCGA §§ 40-5-67.1 (b) and 40-6-392 (d) are unconstitutional to the extent that they allow a defendant's refusal to submit to a breath test to be admitted into evidence at a criminal trial.[6]

Elliott holds that "OCGA §§ 40-5-67.1 (b) and 40-6-392 (d) are unconstitutional to the extent that they allow a defendant's refusal to submit to a breath test to be admitted into evidence at a criminal trial."[7] Pursuant to Mackey, Gardner, and multiple other Georgia cases, we are to treat the invocation of the constitutional right to refuse consent to a search in the same manner that we treat the invocation of the right against self-incrimination. Therefore, OCGA §§ 40-5-67.1 (b) and 40-6-392 (d) are unconstitutional to the extent that they allow a defendant's refusal to submit to a blood test to be admitted into evidence at a criminal trial.

II. The implied consent advisement provided to the Defendant improperly provided misleading information to the Defendant when it informed her that a refusal of the requested state-administered blood test may be used against her at trial. This misleading information may have impacted her decision and induced her to submit to the test. Accordingly, the results of the state-administered blood test should be excluded from the evidence.

One who operates a motor vehicle on Georgia's highways is deemed to have given consent to chemical testing of a bodily substance to determine the

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6 Elliott v. State, No. S18A1204, 2019 WL 654178, at *26 (Ga. Feb. 18, 2019).

7 Id.

presence of alcohol or other drugs.[8] "Although consent is implied, before test results may be admitted into evidence the state must show that the accused had been advised of his rights under the Implied Consent Statute."[9] The implied consent notice given pursuant to O.C.G.A. § 40-5-67.1 must be "substantively accurate so as to permit the driver to make an informed decision about whether to consent to testing."[10] The State has the burden of demonstrating compliance with the statutory requirements.[11]

"Accordingly, [Georgia courts] have suppressed the results of chemical tests where the driver was misinformed of his rights and where that misinformation may have affected his decision to consent."[12] This is true even if the officer did not intend to provide the defendant with misleading information.[13] For example, suppression was required when an officer overstated the legal limit of alcohol concentration.[14] Similarly, suppression was required when an out of state driver was wrongly told that he would lose his driver's license if he refused testing.[15] Additionally, in Terry,[16] the court suppressed the defendant's refusal to submit to a chemical test after the officer falsely informed her that obtaining bond was a pre-condition to independent testing. Suppression was required even though the inaccurate and misleading information was given in response to questions about the implied consent

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8 O.C.G.A. § 40-5-55 (a); see, O.C.G.A. § 40-5-67.1(b)(2).
9 State v. Peirce, 257 Ga.App. 623, 625 (2002).
10 Kitchens v. State, 258 Ga.App. 411, 413 (2002).
11 Id. at 414.
12 Id. at 413.
13 State v. Terry, 236 Ga.App. 248, 250 (1999).
14 Kitchens, 258 Ga.App. at 414.
15 E.g. State v. Pierce, 257 Ga.App. 623, 626 (2002); State v. Coleman, 216 Ga.App. 598, 599 (1995); Deckard v. State, 210 Ga.App. 421, 421-22 (1993).
16 236 Ga.App. 248, 249 (1999).

notice after the defendant had previously been given an accurate and complete notice.[17]

In the present case, advising the Defendant was misinformed that refusal to submit to a blood test to be admitted into evidence at her trial. This misstatement regarding the ability of the State to use a refusal against her at trial should lead to the exclusion of the state-administered chemical test results.[18]

Not only was the Defendant misinformed, but the misinformation was relevant to the decision of whether to consent to a state administered chemical test. Suppression is required when the driver is misinformed of his rights and where that misinformation may have affected her decision to consent.[19] In Kitchens, the arresting officer overstated the legal limit when he read the implied consent warning. The officer stated that the legal limit was 10 grams, not 0.10 grams of alcohol concentration. The Court of Appeals held that, given the overstatement of the legal limit, the substance of the implied consent warning given in Kitchens was not substantially accurate. Relying upon Maurer v. State[20], the Kitchens Court recognized that an overstatement of the legal blood alcohol concentration limit "is the type of misinformation that might

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17 See, id. at 250.

18 Kitchens v. State, 258 Ga.App. 411, 413 (2002).

19 Kitchens, 258 Ga.App. at 413. See also Peirce, 257 Ga.App. at 624 (suppression required where defendant did not decide to take test until after receiving misinformation); Terry, 236 Ga.App. at 250 (defendant received misinformation prior to making decision to refuse test and therefore could have affected her decision). Compare, Rojas v. State, 235 Ga.App. 524, 527 (misstatement was harmless because it occurred after the defendant had refused to consent to test). (Emphasis supplied).

20 240 Ga. App. 145, 147, 525 S.E.2d 104 (1999).

cause someone to submit to testing who might otherwise refuse."[21]

The misinformation given to the Defendant in this case is the inverse of the problem that was presented in Sauls v. State.[22] In Sauls, the Georgia Supreme Court held that "the complete omission of this consequence of the refusal of testing renders the implied consent notice insufficiently accurate so as to permit the involved driver to make an informed decision about whether to submit to testing." Consequently, our Supreme Court excluded the Defendant's refusal of the state-administered test in that case.[23] Here, the Defendant was misinformed about the ability of the State to use a refusal of consent against her at trial, and that is the type of misinformation that may induce a person to submit to testing.

Thus, the Court in Kitchens stated, "since the consent was based at least in part on deceptively misleading information…" [24] suppression of the defendant's chemical test was required. Similarly, the Defendant here did not decide whether to consent to the state administered chemical test until after being misinformed regarding the affect and possible use of the refusal at trial. The Defendant's decision was "based at least in part on deceptively misleading information."

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[21] Kitchens, 258 Ga. App. at 413-14 ("To accept the State's arguments [that there was no evidence that the misinformation led the defendant to submit to the test], we must first find that the [language concerning the legal limit] is superfluous. This we refuse to do. We do not believe substantial compliance means that it is permissible to ignore completely the 'particulars' of the laws of this state or that it is permissible to ignore statutory requirements as long as no harm is shown. 'The ... requirement is that when the State seeks to prove the violation by evidence of a chemical test, the State has the burden of demonstrating compliance with the statutory requirements.'" (Citations omitted.)

[22] 293 Ga. 165, 168, 744 S.E.2d 735, 737–38 (2013), overruled by Olevik v. State, 302 Ga. 228, 806 S.E.2d 505 (2017)

[23] Id.

[24] Id. at 415.

Accordingly, the Defendant's state-administered blood test should be excluded from evidence.

III. The Defendant was coerced into submitting to a state-administered blood test based upon an unconstitutional implied consent advisement which informed her that a refusal of the requested state-administered blood test may be used against her at trial. The Defendant did not voluntarily submit to a blood test. She submitted to the search only after the State first threatened that, if she refused, that would be evidence against her at trial.

The authorities cited above suggest that OCGA §§ 40-5-67.1 (b) and 40-6-392 (d) are unconstitutional to the extent that they purport to allow a defendant's refusal to submit to a blood test to be admitted into evidence at a criminal trial. Accordingly, the Defendant was coerced into submitting to a blood test based upon this false and misleading information. Applying a totality-of-the-circumstances inquiry, the Defendant did not voluntarily submitted to a search of her body and blood. She submitted to the search only after the State first threatened that, if she refused, that would be evidence against her at trial.

Accordingly, the Defendant's state-administered blood test should be excluded from evidence.

RESPECTFULLY SUBMITTED, this 11th day of March, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that I have served a true and accurate copy of the foregoing pleadings upon the prosecuting attorney in this case by hand delivery of same.

RESPECTFULLY SUBMITTED, this 11th day of March, 2019.

/s/D. Benjamin Sessions
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