

**IN THE COURT OF APPEALS
OF THE STATE OF GEORGIA**

Case No. _____

STATE OF GEORGIA,

Appellant,

v.,

_____,

Appellee.

BRIEF OF APPELLEE

COUNSEL FOR APPELLEE

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Appellee's Brief

The State v. _____

Case No. _____ No. A22A0489

INTRODUCTION

~~Field sobriety tests require a citizen's participation. For that reason, they violate the Georgia constitutional right against self-incrimination. In this case, the trial court excluded the Defendant's refusal to submit to the horizontal gaze nystagmus (hereinafter, "HGN") test by keeping his head motionless and tracking an object with his eyes.—The trial court granted the Defendant's motion in limine to exclude his refusal to submit to pre-arrest field sobriety tests and, in particular, the horizontal gaze nystagmus test. The trial court found that the field sobriety tests implicate the self-incrimination clause of the Georgia Constitution. Consistent with the rulings of this Honorable Court and the Georgia Supreme Court's application of the self-incrimination clause, the trial court held that the Defendant's refusal to perform an act (i.e., the horizontal gaze nystagmus test) cannot be introduced in evidence at the Defendant's trial. The State is appealing from that decision.~~

Because submitting to the HGN test is a voluntary, self-incriminating act, the Appellee had a right to refuse. And the State may not seek to convict citizens by proving that they asserted their constitutional rights. See, *Griffin v. California*, 380 U.S. 609 (1965) (forbidding the use of a defendant's failure to self-incriminate as evidence of guilt); see also, *Elliott v. State*, 305 Ga. 179, 223, 824 S.E.2d 265, 296 (2019) ("Having considered the text of Paragraph XVI and the context in which it was enacted ... we conclude that Paragraph XVI precludes admission of evidence that a suspect refused to consent to a breath test."); *State v. Bradberry*, 357 Ga. App. 60, 65-66, 849 S.E.2d 790, 794-95 (2020) ("Not only is there ample case law supporting the conclusion 'that Paragraph XVI precludes admission of a defendant's refusal to speak or act and the drawing of adverse inferences therefrom,' but our Supreme Court has 'specifically applied Paragraph XVI to bar a criminal prosecution that was based on a refusal to provide incriminating evidence by the side of the road.'" (citations omitted)).

Because the trial court correctly applied the rulings of the Georgia Supreme Court and this Honorable Court in its application of the self-incrimination clause of the Georgia Constitution, we ask that this Honorable Court affirm the ruling and allow this case to continue to trial.

~~The application of the self-incrimination clause of the Georgia Constitution to pre-arrest field sobriety tests has recently been addressed by this Honorable Court:~~

~~We note, at the outset, that the facts of this case differ from *Olevik* and its progeny, because **the sobriety tests here were taken before Woods's arrest and before Boyd's reading of the implied consent notice. While the State contends that these facts distinguish the case from *Olevik* and the application of Paragraph XVI, we decline to adopt that view.** The totality of the circumstances test as explained in *Olevik* "is not foreign to trial courts." And we have reviewed trial courts' application of this test to a defendant's pre-arrest consent, especially in determining whether the consent was voluntary or mere acquiescence to authority.~~

~~*Woods v. State*, No. A21A0723, 2021 WL 4947060, at *3 (Ga. Ct. App. Oct. 25, 2021), reconsideration denied (Nov. 12, 2021) (citations omitted) (emphasis added).~~

~~—— Because the field sobriety tests are protected by the self-incrimination clause, the Defendant’s decision to refuse the tests and exercise his right not to incriminate himself should not be admissible against him. *Elliott v. State*, 305 Ga. 179, 223, 824 S.E.2d 265, 296 (2019) (“Having considered the text of Paragraph XVI and the context in which it was enacted ... we conclude that Paragraph XVI precludes admission of evidence that a suspect refused to consent to a breath test.”); *State v. Bradberry*, 357 Ga. App. 60, 65–66, 849 S.E.2d 790, 794–95 (2020) (“Not only is there ample case law supporting the conclusion ‘that Paragraph XVI precludes admission of a defendant’s refusal to speak or act and the drawing of adverse inferences therefrom,’ but our Supreme Court has ‘specifically applied Paragraph XVI to bar a criminal prosecution that was based on a refusal to provide incriminating evidence by the side of the road.’” (citations omitted)).~~

Part One

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Appellee’s Brief

The State v. _____

Case No. _____ No. A22A0489

Statement of Facts

The facts relevant to the question on appeal are straightforward. Following a traffic stop, a law enforcement officer, Trooper Joshua Staff of the Georgia State Patrol, requested that the Defendant ~~perform field sobriety tests to assist in the officer's determination of whether the Defendant was impaired by alcohol. The first field sobriety test that the officer requested that Defendant~~ perform ~~was~~ the HGN test. (MT - 10).

The officer described the acts that the Defendant was required to perform during the HGN test:

Defendant's Counsel: And when we're performing the Horizontal Gaze Nystagmus test, does it require a suspect to actually do anything?

Trooper Staff: Stand straight up, feet together, arms down by your side and to focus on the stimulus and to follow it without, with just their eyes and not moving their head.

(MT - 21-22).

The trooper ~~testified that HGN cannot be performed without the suspect's willing participation. was asked if he could observe the clues on the horizontal gaze nystagmus test without the~~

~~suspect willingly performing the act of following the stimulus with his eyes, and the answer was no. (MT - 22-23). The horizontal gaze nystagmus test requires the Defendant to perform the act of following the stimulus with his eyes, and if the Defendant will not voluntarily perform that act, the horizontal gaze nystagmus test cannot be completed.~~

The officer testified that:

[a]fter I check for equal tracking and equal pupil size and any resting nystagmus to qualify them, I began to check for lack of smooth pursuit, and after I checked for that he stopped me and asked if it was voluntary, or if he had to do this, and I said it was completely voluntary.

(MT - 10).

The State has conceded in its brief that the HGN test requires active participation by suspects for the test to be performed: “The presence of HGN in an individual cannot be passively observed without the subject’s participation.”

(Appellant’s Brief, p. 11).

After the officer told the Defendant this his participation in the HGN was voluntary, the Defendant declined to volunteer.
~~Following the officer’s statement that the Defendant’s~~

~~participation in the horizontal gaze nystagmus was voluntary,~~
~~according to the officer, the Defendant unequivocally stopped the~~
~~horizontal gaze nystagmus test.~~ (MT - 10). The officer
understood that the Defendant was refusing to submit to the
HGN test and assumed he would also would ~~The officer~~
~~understood the Defendant to refuse further submission to the~~
~~horizontal gaze nystagmus test. Based upon the Defendant's~~
~~decision to not perform the horizontal gaze nystagmus test, the~~
~~officer also concluded that the Defendant would~~ not perform the
walk-and-turn and one-leg-stand tests. (MT - 24).

The trial court entered a written order granting the Defendant's motion to exclude from evidence his refusal to submit to field sobriety tests. In pertinent part, the trial court's order stated:

The state constitutional principles pronounced and applied in Elliott, Olevik, and Bradberry are applicable to Mr. _____'s refusal to incriminate himself by performing the Field Sobriety Tests. Like a breath test, whether post-arrest or a pre-arrest, and unlike a blood test, the Field Sobriety Tests require the subject to engage in affirmative actions to produce the evidence which may incriminate him. Mr. _____ had the right under Paragraph XVI to refuse to perform the Field Sobriety Tests; therefore, admission of Mr. _____'s refusal to perform the Field Sobriety Tests would violate his state constitutional right against self-incrimination.

(R - 56).

The trial court's order excluding the Defendant's refusal to submit to field sobriety tests is based its ruling upon the self-incrimination clause of the Georgia Constitution. A substantial portion of the State's brief addresses whether the Fifth Amendment of the U.S. Constitution, O.C.G.A. § 24-5-506, and the Fourth Amendment are implicated by the Defendant's refusal to submit to field sobriety tests. But that is irrelevant. The Georgia Constitution provides more rights to the citizens of Georgia than the federal constitution, and the trial court's order excluding evidence of the Defendant's refusal to submit to field sobriety tests was based only upon the self-incrimination clause of the Georgia Constitution.

Part Two

~~Based upon the officer's testimony, the trial court found that the horizontal gaze nystagmus test required the Defendant to perform acts and, therefore, the trial court properly held that the requested acts were protected by the Georgia Constitution's self-incrimination clause. According to the officer, the horizontal~~

~~gaze nystagmus test requires the Defendant to perform the act of following the stimulus with his eyes, and if the Defendant will not voluntarily perform that act, the horizontal gaze nystagmus test cannot be completed. In accordance with application of the Self-Incrimination Clause of the Georgia Constitution by the Georgia Supreme Court and this Honorable Court, the trial court properly found that the horizontal gaze nystagmus test required the Defendant to perform an act, so the Defendant's refusal to perform an act cannot be introduced against him at trial.~~

~~**The trial court properly held that the horizontal gaze nystagmus test required the Defendant to perform acts and, therefore, the self-incrimination clause of the Georgia Constitution is applicable.**~~

~~In determining~~To determine whether the trial court's order was correct, this Honorable Court must first examine whether the self-incrimination clause of the Georgia Constitution is applicable to the HGN test evidence. The officer testified, and the State agrees, that the HGN test requires the Defendant's participation. ~~The evidence in the record of this case shows that the arresting officer testified to the acts that the Defendant must~~

~~perform in order for the horizontal gaze nystagmus test to be performed and, indeed, the State conceded in its brief that the Defendant must perform acts in order for the test to be performed. The trooper was asked if he could observe the clues on the horizontal gaze nystagmus test without the suspect willingly performing the act of following the stimulus with his eyes, and the answer was no. (MT – 22-23). The horizontal gaze nystagmus test requires the Defendant to perform the act of following the stimulus with his eyes, and if the Defendant will not voluntarily perform that act, the horizontal gaze nystagmus test cannot be completed.~~

~~—— The officer testified that:~~

~~[a]fter I check for equal tracking and equal pupil size and any resting nystagmus to qualify them, I began to check for lack of smooth pursuit, and after I checked for that he stopped me and asked if it was voluntary, or if he had to do this, and I said it was completely voluntary.~~

~~(MT—10). “The presence of HGN in an individual cannot be~~
~~passively observed without the subject’s participation.”~~
~~(Appellant’s Brief, p. 11).~~

~~When a defendant must perform an act requested by the~~
~~State, the Georgia Supreme Court and this Honorable Court have~~
~~consistently held that the Georgia Constitution’s right against~~
~~self-incrimination is implicated.~~

~~The State has conceded in its brief that the horizontal gaze-~~
~~nystagmus test requires active participation by suspects for the~~
~~test to be performed: “The presence of HGN in an individual~~
~~cannot be passively observed without the subject’s~~
~~participation.” (Appellant’s Brief, p. 11).~~

~~The uncontradicted evidence before this Honorable Court~~
~~and the concessions by the State in its brief establish that the~~
~~horizontal gaze nystagmus test requires acts by the Defendant.~~
~~Based upon the holdings of the Georgia Supreme Court and this~~
~~Honorable Court, the self-incrimination clause of the Georgia~~
~~Constitution is, therefore, applicable to this evidence.~~

~~In determining whether the self-incrimination provision of the Georgia Constitution is implicated, our courts have consistently examined whether a defendant must perform a physical action in order to allow the government to obtain evidence.~~ “While the provision under the federal constitution has long been limited to ‘testimony,’ the Georgia provision has been construed liberally to limit the State from forcing an individual to affirmatively produce any ‘evidence, oral or real,’ regardless of whether or not it is testimonial, *Creamer v. State*, 229 Ga. 511, 516(3), 192 S.E.2d 350 (1972)....” *Muhammad v. State*, 282 Ga. 247, 250, 647 S.E.2d 560, 563 (2007). ~~When a defendant must perform an act requested by the State, the Georgia Supreme Court and this Honorable Court have consistently held that the Georgia Constitution’s right against self-incrimination is implicated~~ In a wide variety of circumstances, Georgia courts have held that Georgians may not be required to perform acts that provide evidence of their guilt, for instance::

- requiring a defendant to place his foot in footprints located near a crime scene violated the right against self-incrimination. *Day*, 63 Ga. at 668-669 (2);
- requiring a defendant to stand up during trial so that his amputated leg could be observed violated the right against self-incrimination (*Blackwell*, 67 Ga. at 78-79 (1));
- requiring a defendant to drive his truck onto scales violated the right against self-incrimination (*Aldrich*, 220 Ga. at 135, 137 S.E.2d 463); and
- requiring a defendant to produce a handwriting exemplar violates the self-incrimination provision (*Brown*, 262 Ga. at 836 (10), 426 S.E.2d 559 (1993));
- an intoxilyzer breath test is an act incriminating in nature and, therefore, Paragraph XVI prohibits the State from compelling such a test (*Elliott v. State*, 305 Ga. 179, 189, 824 S.E.2d 265, 273 (2019), citing *Olevik v. State*, 302 Ga. at 235-246 (2) (c), 806 S.E.2d 505)); and
- a pre-arrest preliminary breath test is protected by the self-incrimination clause of the Georgia Constitution

(*State v. Bradberry*, 357 Ga. App. 60, 65–66, 849 S.E.2d 790, 794–95 (2020)).’

By contrast, Georgia courts have held that the mere removal of evidence from a Defendant, without his participation, does not implicate the self-incrimination clause. *Elliott*, 305 Ga. at 206. “[T]he right against compelled self-incrimination is not violated where a defendant is compelled only to be present so that certain incriminating evidence may be procured from him.” *Olevik v. State*, 302 Ga. 228, 242, 806 S.E.2d 505, 517 (2017), citing *Batton v. State*, 260 Ga. 127, 130 (3), 391 S.E.2d 914 (1990). Those cases in which evidence is obtained from a defendant’s person but do not require an action by the defendant have been consistently held not to implicate the right against self-incrimination:

- removing clothing from a defendant does not violate the right against self-incrimination. See, e.g., *id.* (taking shoes from defendant);

- taking blood-stained clothes from the defendant was not protected by the right against self-incrimination (*Drake v. State*, 75 Ga. 413, 414-415 (2) (1885));
- pulling boots off a defendant did not implicate the right against self-incrimination (*Franklin v. State*, 69 Ga. 36, 43-44 (3) (1882));
- taking a DNA sample from a defendant did not violate his right against self-incrimination (see, e.g., *Quarterman v. State*, 282 Ga. 383, 386 (4), 651 S.E.2d 32 (2007));
- taking impression of defendant's teeth did not compel defendant to perform an act (*State v. Thornton*, 253 Ga. 524, 525 (2), 322 S.E.2d 711 (1984));
- withdrawing blood from an unconscious defendant did not violate the right against self-incrimination (*Strong*, 231 Ga. at 519, 202 S.E.2d 428); and
- removing a bullet from a defendant's body through surgery did not implicate the right against self-incrimination (*Creamer v. State*, 229 Ga. 511, 517-518 (3), 192 S.E.2d 350 (1972)).

~~Consistent with these holdings interpreting the application of the self-incrimination clause of the Georgia Constitution, this Honorable Court has recent held that field sobriety tests do implicate the self-incrimination clause of the Georgia Constitution:~~

~~We note, at the outset, that the facts of this case differ from *Olevik* and its progeny, because **the sobriety tests here were taken before Woods's arrest and before Boyd's reading of the implied consent notice. While the State contends that these facts distinguish the case from *Olevik* and the application of Paragraph XVI, we decline to adopt that view.** The totality of the circumstances test as explained in *Olevik* “is not foreign to trial courts.” And we have reviewed trial courts’ application of this test to a defendant's pre-arrest consent, especially in determining whether the consent was voluntary or mere acquiescence to authority.²²~~

~~*Woods v. State*, No. A21A0723, 2021 WL 4947060, at *3 (Ga. Ct. App. Oct. 25, 2021), reconsideration denied (Nov. 12, 2021) (citations omitted) (emphasis added).~~

~~—In this case, the trial court properly found that the self-incrimination clause of the Georgia Constitution was implicated by a field sobriety test that required the Defendant to perform~~

~~acts. The officer described the acts that the Defendant was required to perform during the horizontal gaze nystagmus test:~~

~~Defendant's Counsel: And when we're performing the Horizontal Gaze Nystagmus test, does it require a suspect to actually do anything?~~

~~Trooper Staff: Stand straight up, feet together, arms down by your side and to focus on the stimulus and to follow it without, with just their eyes and not moving their head.~~

~~(MT – 21-22).~~

~~—— The trooper was asked if he could observe the clues on the horizontal gaze nystagmus test without the suspect willingly performing the act of following the stimulus with his eyes, and the answer was no. (MT – 22-23). The horizontal gaze nystagmus test requires the Defendant to perform the act of following the stimulus with his eyes, and if the Defendant will not voluntarily perform that act, the horizontal gaze nystagmus test cannot be completed.~~

~~—— The officer testified that:~~

~~[a]fter I check for equal tracking and equal pupil size and any resting nystagmus to qualify them, I began to check for lack of smooth pursuit, and after I checked for that he stopped me and~~

~~asked if it was voluntary, or if he had to do this, and I said it was completely voluntary.~~

~~(MT—10).~~

~~The State has conceded in its brief that the horizontal gaze nystagmus test requires active participation by suspects for the test to be performed: “The presence of HGN in an individual cannot be passively observed without the subject’s participation.” (Appellant’s Brief, p. 11).~~

~~The mere removal of evidence from a defendant is not protected by the right against self-incrimination. *Elliott*, 305 Ga. at 206. “[T]he right against compelled self-incrimination is not violated where a defendant is compelled only to be present so that certain incriminating evidence may be procured from him.” *Olevik v. State*, 302 Ga. 228, 242, 806 S.E.2d 505, 517 (2017), citing *Batton v. State*, 260 Ga. 127, 130 (3), 391 S.E.2d 914 (1990). Those cases in which evidence is obtained from a defendant’s person but do not require an action by the defendant have been consistently held not to implicate the right against~~

~~self-incrimination~~ removing clothing from a defendant does not violate the right against self-incrimination. See, e.g., *id.* (taking shoes from defendant);

taking blood-stained clothes from the defendant was not protected by the right against self-incrimination (*Drake v. State*, 75 Ga. 413, 414-415 (2) (1885));

pulling boots off a defendant did not implicate the right against self-incrimination (*Franklin v. State*, 69 Ga. 36, 43-44 (3) (1882));

taking a DNA sample from a defendant did not violate his right against self-incrimination (see, e.g., *Quarterman v. State*, 282 Ga. 383, 386 (4), 651 S.E.2d 32 (2007));

taking impression of defendant's teeth did not compel defendant to perform an act (*State v. Thornton*, 253 Ga. 524, 525 (2), 322 S.E.2d 711 (1984));

withdrawing blood from an unconscious defendant did not violate the right against self-incrimination (*Strong*, 231 Ga. at 519, 202 S.E.2d 428); and

removing a bullet from a defendant's body through surgery did not implicate the right against self-incrimination (*Creamer v. State*, 229 Ga. 511, 517-518 (3), 192 S.E.2d 350 (1972)).

- removing clothing from a defendant does not violate the right against self-incrimination. See, e.g., *id.* (taking shoes from defendant);

- taking blood-stained clothes from the defendant was not protected by the right against self-incrimination (*Drake v. State*, 75 Ga. 413, 414-415 (2) (1885));
- pulling boots off a defendant did not implicate the right against self-incrimination (*Franklin v. State*, 69 Ga. 36, 43-44 (3) (1882));
- taking a DNA sample from a defendant did not violate his right against self-incrimination (see, e.g., *Quarterman v. State*, 282 Ga. 383, 386 (4), 651 S.E.2d 32 (2007));
- taking impression of defendant's teeth did not compel defendant to perform an act (*State v. Thornton*, 253 Ga. 524, 525 (2), 322 S.E.2d 711 (1984));
- withdrawing blood from an unconscious defendant did not violate the right against self-incrimination (*Strong*, 231 Ga. at 519, 202 S.E.2d 428); and
- removing a bullet from a defendant's body through surgery did not implicate the right against self-incrimination (*Creamer v. State*, 229 Ga. 511, 517-518 (3), 192 S.E.2d 350 (1972)).

In its brief, the State continuously confuses rulings addressing the Fourth Amendment and the self-incrimination clause of the Georgia Constitution. For example, the State cites *Mitchell v. State*, 301 Ga. 563 (2017), for the proposition that the field sobriety tests do not implicate the self-incrimination provision of the Georgia Constitution. (Appellant's Brief, p. 10-11). However, in _____, the Georgia Supreme Court addressed whether field sobriety tests implicated the Fourth Amendment, not the right against self-incrimination. But voluntarily providing something to the government almost never violates the 4th Amendment, and having something taken from you without a warrant almost never violates the right against self-incrimination. These are two totally separate rights, and a ruling on one has very little to do with the other.

~~This confusion by the State illustrates a fundamental misunderstanding of the difference between the self-incrimination clause in the Georgia Constitution and the Fourth Amendment of the United States Constitution. The self-incrimination clause of the Georgia Constitution protects a person from being required to perform any act that may be incriminating—without regard to whether the act would constitute a search under the Fourth Amendment.~~

The trial court's order (R - 56), which included reference to the Georgia Supreme Court's ruling in *Elliott* and *Olevik* and this Honorable Court's ruling in *Bradberry*, properly held that the

self-incrimination clause of the Georgia Constitution was implicated by the HGN test. The trial court' order recognized the important distinction between evidence that is merely extracted from a suspect (e.g., a blood test) and evidence In pertinent part, the trial court's order stated:

The state constitutional principles pronounced and applied in Elliott, Olevik, and Bradberry are applicable to Mr. _____'s refusal to incriminate himself by performing the Field Sobriety Tests. Like a breath test, whether post-arrest or a pre-arrest, and unlike a blood test, the Field Sobriety Tests require the subject to engage in affirmative actions to produce the evidence which may incriminate him.

(R – 56).

The self-incrimination clause of the Georgia Constitution protects a suspect from being compelled to perform acts prior to arrest.

The next issue that this Honorable Court should consider is whether the self-incrimination clause of the Georgia Constitution is applicable prior to a suspect being placed under arrest or in custody. The HGN test that the arresting officer sought to perform upon the Defendant was requested prior to arrest. Applying the holdings of the Georgia Supreme Court and this Honorable Court, the trial court properly found that the self-incrimination clause of the Georgia Constitution protects a

suspect on the side of the road prior to a suspect being placed under arrest or in custody.

The Georgia Supreme Court has specifically addressed the application of the self-incrimination clause to pre-arrest evidence. “[W]e have specifically applied Paragraph XVI to bar a criminal prosecution that was based on a refusal to provide incriminating evidence by the side of the road.” *Elliott v. State*, 305 Ga. 179, 217, 824 S.E.2d 265, 292 (2019), citing *Aldrich*, 220 Ga. 132, 137 S.E.2d 463. Following *Elliott*, this Honorable Court has held that the self-incrimination clause of the Georgia Constitution precludes use of a Defendant’s refusal to submit to a **pre-arrest** preliminary breath test. *State v. Bradberry*, 357 Ga. App. 60, 66, 849 S.E.2d 790, 795 (2020).

Accordingly, the trial court properly found that the Georgia Constitution’s self-incrimination clause was applicable to the pre-arrest HGN test.

The trial court properly held that the defendant’s refusal to submit to the HGN test could not be used against him at trial.

Because the trial court properly found that the HGN test required the Defendant to perform acts and, therefore, implicated the Defendant's rights under the Georgia Constitution's self-incrimination clause, the trial court properly found that the Defendant's refusal to submit to the HGN test could not be introduced against him at trial.

The introduction of a suspect's refusal to perform an act that is protected by the self-incrimination clause of the Georgia Constitution cannot be introduced against him at trial:

'Paragraph XVI generally prohibits admission of a defendant's pretrial refusal to speak or act.' *Elliott*, at 210 (IV), 824 S.E.2d 265. Not only is there ample case law supporting the conclusion 'that Paragraph XVI precludes admission of a defendant's refusal to speak or act and the drawing of adverse inferences therefrom,' *Id.* at 218 (IV) (D), 824 S.E.2d 265, but our Supreme Court has 'specifically applied Paragraph XVI to bar a criminal prosecution that was based on a refusal to provide incriminating evidence by the side of the road.' *Id.* at 217 (IV) (C) (ii), 824 S.E.2d 265. That 'holding was consistent with an understanding that the [state] constitutional provision prohibit[s] using refusal to support a criminal prosecution.' *Id.* at 218-219 (IV) (D), 824 S.E.2d 265 (footnote omitted).

State v. Bradberry, 357 Ga. App. 60, 65, 849 S.E.2d 790, 794 (2020).

Applying *Elliott* and *Bradberry*, the trial court properly ruled that the Defendant's refusal to submit to a pre-arrest HGN test that required him to perform an act could not be introduced as evidence against him at trial.

State statutes, general principles of state criminal law, and policy concerns cannot overcome the self-incrimination clause of the Georgia Constitution.

There is a considerable portion of the State's brief which cites state statutes, general principles of state criminal law, and policy concerns in support of its position that a Defendant's refusal to perform acts on the side of the road should be admissible. Those arguments by the State virtually mirror arguments made by the State in *Elliott*, and each of those arguments for overriding the application of the self-incrimination clause of the Georgia Constitution were rejected by the Georgia Supreme Court in *Elliott*:

The State's remaining arguments, citing state statutes, general principles of state criminal law, and policy concerns, fail to appreciate the constitutional nature of the right at issue. We acknowledge that the State has a considerable interest in prosecuting DUI offenses (and thereby deterring others), and that our decision today may make that task more difficult. **But the State also has a**

compelling interest in prosecuting murders, rapes, armed robberies, and a whole host of other serious crimes, and the right to be free from compelled self-incrimination does not wax or wane based on the severity of a defendant's alleged crimes.

Elliott v. State, 305 Ga. 179, 223, 824 S.E.2d 265, 296 (2019)

(citations omitted)(emphasis added).

There is no legal or practical reason why this statement by our Supreme Court should not control these policy arguments by the State.

CONCLUSION

Based on the foregoing, the Appellee respectfully prays that this Honorable Court affirms the ruling of the trial court excluding evidence of the Defendant's refusal to submit to field sobriety tests, particularly the HGN test.

Respectfully submitted this 20th day of December, 2021.

This submission does not exceed the word count limit imposed by Rule 24.

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Appellee's Brief

The State v. _____

Case No. _____ No. A22A0489

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true and accurate copy of the foregoing Brief of Appellee upon all parties by place a copy of same in the U.S. Mail with adequate postage affixed thereon to ensure delivery to:

Ms. _____ Grist, Solicitor-General, Bibb County
Ms. _____ Murphy, Assistant Solicitor, Bibb County
Office of the Bibb County Solicitor-General
601 Mulberry St., Room 504
Macon, GA 31201

Respectfully Submitted, this 20th day of December, 2021.

This submission does not exceed the word count limit imposed by Rule 24.

By: D. Benjamin Sessions
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