

IN THE SUPERIOR COURT OF MORGAN COUNTY
STATE OF GEORGIA

STATE OF GEORGIA, _____ :

_____ :
v., _____ : Case No. _____ NUMBER

_____ :
_____ :
_____ :
Defendant. _____ :

IN THE SUPERIOR COURT OF MORGAN COUNTY
STATE OF GEORGIA

STATE OF GEORGIA, _____ :

_____ :
v., _____ : Case No. _____

_____ :

_____ :
Defendant. _____ :

STATE COURT OF FAYETTE COUNTY

STATE OF GEORGIA

STATE OF GEORGIA _____ *
_____ * CRIMINAL ACCUSATION
vs _____ *
_____ * NO. 2013SR-0363
SCOTT WILSON _____ *

**SUPPLEMENTAL BRIEF IN SUPPORT OF DEFENDANT'S MOTION
TO SUPPRESS STATE-ADMINISTERED TEST RESULTS**
**BRIEF IN SUPPORT OF DEFENDANT'S
MOTION TO SUPPRESS REGARDING ADMISSIBILITY OF THE STATE-ADMINISTERED
CHEMICAL TESTS**

COMES NOW, the Defendant, by and through the undersigned counsel of record, and
respectfully moves this Honorable Court to exclude the Defendant's state-administered test
results. In furtherance of this motion, the Defendant respectfully shows this Honorable Court
the following:

After being arrested for DUI, WilsonOden was read the age-appropriate implied consent notice for commercial motor vehicle drivers. _____ did not possess a commercial motor vehicle driver's license. and subsequently submitted to a state-administered chemical test. No search warrant was obtained for _____'s blood and urine., and it cannot be seriously argued that exigent circumstances existed, this being an ordinary DUI case, Therefore,U under Williams v. State,¹ Williams v. State, Ga. (Case No. _____, decided 3/27/15). the test results will be admissible only if the State can prove that WilsonOden actually consented to the test, and that the consent was freely and voluntarily given.

In *Williams*, the Supreme Court distinguished between "implied consent" under O.C.G.A. § 40-5-55 and "actual consent" which is required to permit a warrantless search. Under *Williams*, the trial court must determine whether actual consent was given, "which would require the determination of the voluntariness of the consent under the totality of the circumstances."¹

~~the And although the test in *Williams* was a blood test, it matters not if the instant case involves a breath test, for the U.S. Supreme Court has held that such as test is also a search for Fourth Amendment purposes.~~

~~Subjecting a person to a breathalyzer test, which generally requires production of alveolar or "deep lung" breath for~~

~~chemical analysis, see, e.g. *California v. Trombetta*, 467 U.S. 479, 481(1984), implicates similar concerns about bodily integrity and, like the blood alcohol test we considered in *Schmerber*, should also be deemed a search, see W. LaFave, Search and Seizure Sec. 2.6(a), p.463 (1987).²~~

~~-~~

¹ *Id.*

² *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 616-617 (1989).

~~Searches without a warrant are considered per se unreasonable and are subject to only a few well delineated exceptions. *State v. Slaughter*, 252 Ga. 435, 436 (1984). The burden is on the person who seeks to use the exception and there are two exceptions emergency and consent. (Cite) If relying on consent then the burden is on the State to show that Reynolds freely and voluntarily consented to the search. To determine whether Reynolds freely and voluntarily consented this Court is to consider the totality of the circumstances. (Cite Williams).~~

~~— In order to weigh the totality of the circumstances on a case by case basis as Williams instructs, the particular facts of this case must be taken into account.~~

The salient facts of this case are as follows:

- ~~[1.] Wilson~~**Oden** ~~was already under arrest, in handcuffs, with two police officers present, when he was asked if he was going to submit to testing.~~
- ~~1.[2.]~~ **_____** ~~had an Alabama driver's license.~~
- ~~2.[3.]~~ **He** ~~was a resident and licensee of California, and no evidence was presented that he was familiar with Georgia law.~~
- ~~[4.]~~ **He** ~~was 70 years old, but there was no indication that he had ever before been involved with the law.~~
- ~~[5.]~~ **There was no evidence of diminished mental capacity or intelligence.**
- ~~[6.]~~ **Oden** ~~He was told, "Georgia law requires you to submit [to the requested test] to state-administered tests of your blood, breath, urine, or other bodily substances for determining if you are under the influence of alcohol or drugs."~~
- ~~3.[7.]~~ **_____** ~~was told, "If you refuse this testing, you will be disqualified from operating a commercial motor vehicle for a minimum period of one year."~~
- ~~4.[8.]~~ **_____** ~~was told, "If you submit to testing and the results indicate the presence of any alcohol, you will be issued an out-of-service order and will be prohibited from operating a motor vehicle for 24 hours."~~
- ~~[9.]~~ **He** ~~He was not asked for consent, but merely asked, "will you submit [to the testing] under the implied consent law?"~~
- ~~[10.]~~ **He** ~~He was not read his *Miranda* rights, nor was he told that he had a right not to consent to a search.~~
- ~~[11.]~~ **He** ~~He was never asked if he was consenting to the test, or if he was freely and voluntarily agreeing to be tested.~~
- ~~[12.]~~ **The State alleges that he was under the influence of alcohol drugs at the time he submitted to the test.**

[13.]

Before the issue of voluntariness is reached, the first question is whether Wilson Oden in fact consented to the search. And the State has not shown that consent was even requested, much less given freely and voluntarily. It is not “disputed that where the validity of a search rests on consent, the State has the burden of proving that the necessary consent was obtained and that it was freely and voluntarily given, a burden that is not satisfied by showing a mere submission to a claim of lawful authority.”⁴ *Florida v. Royer*, 460 U.S. 491, 497, 103 S. Ct. 1319, 1324, 75 L. Ed. 2d 229 (1983), citing, *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 329, 99 S.Ct. 2319, 2326, 60 L.Ed.2d 920 (1979); *Schneckloth v. Bustamonte*, 412 U.S. 218, 233–234, 93 S.Ct. 2041, 2050–2051, 36 L.Ed.2d 854 (1973); *Bumper v. North Carolina*, 391 U.S. 543, 548–549, 88 S.Ct. 1788, 1791–1792, 20 L.Ed.2d 797 (1968); *Johnson v. United States*, 333 U.S. 10, 13, 68 S.Ct. 367, 368, 92 L.Ed. 436 (1948); *Amos v. United States*, 255 U.S. 313, 317, 41 S.Ct. 266, 268, 65 L.Ed. 654 (1921).

The distinction between merely submitting to a search and consent drawn by the U.S. Supreme Court in *Royer* has been followed in Georgia law. Consent is not considered free and voluntary if it is “in submission to authority rather than as an understanding and intentional waiver of a constitutional right.” *Johnson v. United States*, 333 U.S. 10, 13 (1948) (emphasis added). It is critical to acknowledge that Wilson _____ was not asked if he would consent to a search and test of his bodily substances – he was asked, “will you submit [to the testing] under the implied consent law?”

Webster's defines the intransitive verb "submit" as follows: "to yield oneself to the power or authority of another.”⁵ Random House Webster's College Dictionary, 1991 Ed., p. 1331. Legally speaking, “submission” means “[a] yielding to the authority or will of another.”⁶ Black's Law Dictionary, 7th Ed., 1999, p. 1439. So when Wilson _____ answered “yes” to

the officer, he was saying, "yes, I will submit to your authority." By definition he/she was simply yielding to the authority of the police. As in *State v. Fulghum*, "it was not an express consent."⁷ 261 Ga.App. 594, 595 (2003).

And the police officer did verbally assert that he had the legal authority to search. The implied consent notice leads with "Georgia law *requires* you to submit to state-administered tests of your blood, breath, urine, or other bodily substances for the purpose of determining if you are under the influence of alcohol or drugs." When the State seeks to rely upon consent to justify the lawfulness of a search, it "has the burden of proving that the consent was, in fact, freely and voluntarily given. This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority."³ And appellate courts "are required to scrutinize closely any alleged consent given by a suspect to the police, [cit.], bearing in mind that mere acquiescence to the authority asserted by a police officer cannot substitute for free consent."⁴ After being told by police that the law requires submission to the test, any subsequent submission must surely be characterized as mere acquiescence to a claim of lawful authority.

Compare *State v. Padley*,⁵ the Wisconsin case cited by our Supreme Court in *Williams*. There, Padley was not advised that the law required ~~her~~his to submit to a test, but instead his ~~she~~ was advised, "[t]his law enforcement agency now wants to test one or more samples of your breath, blood or urine . . ."⁶ Padley was found to have consented

³ *Bumper v. North Carolina*, 391 U.S. 543, 548-549 (1968).

⁴ *Williams v. State*, 318 Ga.App. 715, 718-719 (2012).

⁵ 849 N.W.2d 867 (Wis.App. 2014).

⁶ *Id.*, at 872.

voluntarily to the search and seizure of his her blood, but it was not coerced by the express assertion of authority used here. Furthermore, “[t]here [was] no dispute that Padley indicated to the deputy his her consent to a blood draw”¹² Id., at 873. after being so advised. Here, Wilson_____ merely stated his his intention to submit to the testing.

No Georgia appellate decision equate~~s~~ "submitting" to a search to "con~~s~~enting" to a search. Researching the phrase "submit to a search" produced 19 reported cases. In_

15 of those cases, the defendant was required to submit to a search by the terms of his probation, or the underlying sentence.⁷ In one case, the Court held that "the agent's request that [the defendant] submit to a search of his person was clearly unauthorized."⁸ And in the remaining three cases, the officer told the defendant he was not required to submit to the search, which was a factor in determining that consent was freely given.⁹ Using the same search terms in the 11th Circuit and U.S. Supreme Court cases yielded the same results. Simply put, a person *submits* to a search when heshe is required to do so by some lawful authority, and *consents* to a search if heshe does so freely and voluntarily, under no assertion of such authority.

Certainly, in some circumstances, a person under arrest for DUI might go beyond submission and actually consent. But the State must prove it with convincing evidence. For example, although Wilson_____ only submitted to the search "under the implied consent law" in this case, the officer was free to bypass the implied consent law altogether under OCGA § 40-5-67.1(d.1),¹⁶ "Nothing in this Code Section shall be deemed to preclude the

⁷ See, e.g., *Stephens v. State*, 289 Ga. 758 (2011); *Perince v. State*, 299 Ga. App. 164 (2009).

⁸ *State v. Smith*, 164 Ga. App. 142, 145 (1982).

⁹ *Scott v. State*, 253 Ga. 147 (1984); *State v. Rezvani*, 181 Ga. App. 328 (1986); *Agnero v. State*, 169 Ga. App. 462 (1984).

acquisition or admission of evidence of [DUI] if obtained by voluntary consent . . ." and instead request voluntary consent. In the recent case of

***McMullen v. State*,¹⁰ the officer "asked McMullen if ~~she~~he would voluntarily consent to giving a blood sample, and ~~she~~he agreed to do so."**¹¹ **McMullen appealed the denial of ~~he~~his motion to suppress the test results because the officer did not seek to obtain the test though the implied consent law. The Court of Appeals held that OCGA § 40-5-67.1(d.1) "eliminates the need to ~~g~~give the notice when an individual voluntarily agrees to testing."**¹²

What's more, even if Wilson_____ had expressly consented to testing, ~~heshe~~ was not advised that ~~heshe~~ could refuse to submit. Although "[t]he law does not require that a party be told of his right to refuse a search,"²⁰ *Martinez v. State*, 239 Ga. App. 662, 663 (1999). it is nevertheless one of the factors this Court must take into consideration.²¹ *State v. Tye*, 276 Ga. 559, 560-561 (2003). See also, *State v. Durrence*, 295 Ga. App. 216, 218 (2008). Nor was WilsonOden advised of his Miranda rights .

"Whether the accused was advised of his constitutional rights is a factor to be taken into account in determining voluntariness."¹³ **After ~~Wilson~~Oden said ~~heshe~~ planned to submit to the test, the officer could have perhaps established voluntary consent by asking, e.g., "Are you consenting to the test voluntarily? Because you can say no." But no such evidence or testimony has been introduced in this case.**

¹⁰ 316 Ga. App. 684 (2012).

¹¹ *Id.*, at 685-686.

¹² *Id.* At 693-694.

¹³ *Arrington v. State*, 286 Ga. 335, 344-345 (2009).

And, of course, ~~Wilson~~Oden was already under arrest and in handcuffs when submission to the search was requested. The State's burden of showing that consent was freely and voluntarily given "is particularly heavy in cases where the individual is under arrest."¹⁴ Consideration must be given to "the vulnerable state of the individual

detained, in custody, or under arrest..."¹⁵ In *Schneckloth v. Bustamonte*,¹⁶ the

Supreme Court held

That when the subject of a search is not in custody and the State attempts to justify a search on the basis of his consent, the Fourth and Fourteenth Amendments require that it demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied. (emphasis added).¹⁷

But the Court was careful to point out that in that case, there was nothing inherently coercive about the environment in which the consent to search was requested. "Indeed, since consent searches will normally occur on a person's own familiar territory, the specter of incommunicado police interrogation in some remote station house is simply inapposite."¹⁸ In a footnote, the Court explained,

The present case does not require a determination of the proper standard to be applied in assessing the validity of a search authorized solely by an alleged consent that is obtained from a person after he has been placed in custody. We do note, however, that other courts have been particularly sensitive to the heightened possibilities for coercion when the 'consent' to a search was given by a person in custody. [Cit.]¹⁹

¹⁴ *Radowick v. State*, 145 Ga. App. 231, 239-240 (1978).

¹⁵ *Id.*

¹⁶ 412 U.S. 218 (1973).

¹⁷ *Id.*, at 248-249.

¹⁸ *Id.*, at 247.

¹⁹ *Id.*, fn 29.

Much has been written about warrantless searches in which the government attempts to prove that voluntary consent was given by a person under arrest.

This burden on the Government is particularly heavy in cases where the individual is under arrest. Non-resistance to the

orders or suggestions of the police is not infrequent in such a situation; true consent, free of fear or pressure, is not so readily to be found. *United States v. Novero*, D.C., 58

F.Supp. 275; *United States v. McCunn*, D.C.S.D.N.Y.1930, 40 F.2d 295. In fact, the circumstances of the defendant's plight may be such as to make any claim of actual consent "not in accordance with human experience", and explainable only on the basis of "physical or moral compulsion". *Ray v.*

United States, 5 Cir., 84 F. 2d 654, 656.²⁰

~~— And although Wilson was originally from Georgia, he was at the time of his arrest a California resident and licensee, in legally unfamiliar territory, making his custodial environment even more coercive.~~

Not only was ~~Wilson~~Oden under arrest, but a reasonable person in his situation would likely believe that the police were not going to take no for an answer. Ever sSince 2006, pursuant to OCGA § 40-5-67.1(d.1),²¹ an arresting officer is authorized to disregard a refusal to ~~consent~~submit to testing, obtain a search warrant, and forcibly take a blood sample to be tested.²² And "[e]veryone is presumed to know the law."²³ In fact, the only reason the officer was required to read the implied consent notice is that the statute demands it.

Ordinarily, a person is presumed to know the law and his rights secured thereby. [Cit.] But where the statute itself provides that a person 'shall' be advised of his rights under the law, the legislature obviously meant to abrogate this presumption and replace it with the requirement that notice be given.²⁴

²⁰ *Judd v. U.S.*, 190 F.2d 649, 651 (D.C.Cir. 1951)

²¹ "Nothing in this Code Section shall be deemed to preclude the acquisition or admission of evidence of [DUI] if obtained by . . . a search warrant . . ."

²² *McAllister v. State*, 325 Ga. App. 583 (2014).

²³ *Fair v. State*, 288 Ga. 244, 249 (2010). See also OCGA § 1-3-6.

²⁴ *Hulsey v. State*, 138 Ga.App. 221 (1976).

And it cannot be ignored that ~~Wilson~~Oden was arrested because the officer believed ~~he~~he was under the influence of ~~alcohol~~drugs. The State has formally accused him of being under the influence of alcohol at the precise moment ~~he~~he is alleged to have given consent to a search. In *State v. Durrance*,²⁵ the Court of Appeals upheld the granting of a motion to suppress the fruits of a search where the State attempted to prove voluntary consent. One of the officers testified that Durrance was intoxicated, and "this intoxication contributed to the invalidity of the search."²⁶ Compare *Durham v. State*,²⁷ where ~~her~~-lack of intoxication was a factor the Court of Appeals took into account in determining ~~her~~-consent to be voluntary.

**** Need Paragraph**** What is the importance of the property right argument**** No witness has testified that Wilson freely and voluntarily consented to a search and seizure of his bodily substances for testing. No written consent to search was obtained; and the arresting officer, just like in Williams, "did not ask [Wilson] 'if [Wilson] was willing to freely and voluntarily give a test.'"³⁷ Williams v. State, supra, ___Ga.___ (Case No. _____, decided 3/27/15).

The Court should look to the facts of this case in the following light:

The government must prove that consent was given. It must show that there was no duress or coercion, express or implied. The consent must be 'unequivocal and specific\' and 'freely and intelligently given\'. There must be convincing evidence that defendant has waived his rights. There must be clear and positive testimony. "Courts indulge every reasonable presumption against waiver" of fundamental constitutional rights.\' Coercion is implicit in situations where

²⁵ 295 Ga. App. 216 (2008).

²⁶ *Id.*, 295 Ga.App. 216, at 218.

²⁷ 320 Ga.App. 81 (2013).

consent is obtained under color of the badge, and the government must show that there was no coercion in fact. The government's burden is greater where

consent is claimed to have been given while the defendant is under arrest.²⁸

Considering the totality of the circumstances of this case, the State has not carried its heavy burden of showing that Wilson freely and voluntarily consented to the search of his bodily substances that led to the test result it seeks to admit at trial.

~~The United States Supreme Court has declared that the courts of this country shall adhere to the rule that 'constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of the courts to be watchful for the constitutional rights of the citizens, and against any stealthy encroachments thereon.'~~ *Schneekloth v. Bustamonte*, 412 U.S. 218, 228-229 (1973).²⁹

the defendant's T and in handcuffswas was of alcohol or drugsIn determining the voluntariness of _____'s submission to the search pursuant to the implied consent advisement, the Court should consider the line of cases applying the totality of circumstances standard to determine the voluntariness of statements made by law enforcement officers under investigation. The importance of the property right vested in one who obtains a driver's license is well-established in our law:

Once licenses are issued, as in petitioner's case, their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involves state action that adjudicates important interests of the licensees. In such cases the licenses are not to be taken away without that procedural due process required by the

²⁸ *U. S. v. Page*, 302 F.2d 81, 83-84 (9th Cir. 1962)(Citations omitted).

²⁹ *Beasley v. State*, 204 Ga.App. 214, 217 (1992).

Fourteenth Amendment. *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969); *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970). This is but an application of the general proposition that relevant constitutional restraints limit state power to terminate an entitlement whether the entitlement is denominated a ‘right’ or a ‘privilege.’³⁰

In *Bell v. Burson*, the Court recognized the property interest in one’s driving privileges as being equivalent to other significant property rights, such as employment compensation (*Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963)), public employment (*Slochower v. Board of Higher Education*, 350 U.S. 551, 76 S.Ct. 637, 100 L.Ed. 692 (1956)), tax exemptions (*Speiser v. Randall*, 357 U.S. 513, 78 S.Ct. 1332, 2 L.Ed.2d 1460 (1958)), and welfare benefits (*Goldberg v. Kelly*, _____).³¹

Bell’s recognition the the privilege to drive is entitled to the same due process rights as public employment is particularly significant to the issue in this case in light of the Georgia Supreme Court’s ruling in *State v. Aiken*.³² In *Aiken*, an investigation was initiated in connection with the defendant’s activities as a probation officer.³³ The Georgia Supreme Court addressed the admissibility of “an incriminating statement made by a government employee during an investigation into his conduct is coerced and inadmissible based on allegations by the employee that he was impliedly threatened with the loss of his job if he did not answer questions during the investigation.”³⁴ Applying a totality of the circumstances standard under a *de novo* review of the facts, the Court held that the defendant’s statements in *Aiken* were coerced. The facts of *Aiken* and the Court’s method of analyzing the operative facts are particularly instructive for the present case:

³⁰ *Bell v. Burson*, 402 U.S. 535, 539, 91 S. Ct. 1586, 1589, 29 L. Ed. 2d 90 (1971)

³¹ *Id.*

³² 282 Ga. 132, 135-36, 646 S.E.2d 222, 225-26 (2007).

³³ 282 Ga. 132, 132-33, 646 S.E.2d 222, 223-24 (2007).

³⁴ 282 Ga. 132, 133, 646 S.E.2d 222, 224 (2007).

- “no direct threat of termination from employment was directed at [the defendant]”³⁵;
- “there [was] no statute or ordinance requiring dismissal for a failure to answer questions during an investigation”³⁶;
- there was an evidentiary basis to believe that that the defendant “had a subjective belief that he could be terminated if he did not answer the investigator’s questions”³⁷; and
- “other factors that might lead to a finding of voluntariness are not present. For example, the investigator did not inform [the defendant] of his Miranda rights and did not inform [the defendant] that he was free to stop the interview at any time.”³⁸

Notably absent from the facts of *Aiken* were the following:

- there was no indication that the defendant was in custody and in handcuffs at the time of the statement,
- there was no indication that the investigators were anything but cordial to the defendant,
- there was no indication that the defendant, who was a probation officer, was unfamiliar with the rights available to him under the law,
- there was no indication that the defendant was unfamiliar with the criminal investigatory process,
- there was no indication that the defendant was nervous or in any way intimidated by the interview process, and
- there was no indication that the defendant was under the influence of alcohol or drugs at the time of the interview.

³⁵ 282 Ga. 132, 137, 646 S.E.2d 222, 226 (2007).

³⁶ 282 Ga. 132, 137, 646 S.E.2d 222, 226 (2007).

³⁷ 282 Ga. 132, 137, 646 S.E.2d 222, 226 (2007).

³⁸ 282 Ga. 132, 137, 646 S.E.2d 222, 227 (2007).

The facts of the instant case present a stronger case for a finding of involuntariness than Aiken. The Court in Aiken exerted substantial effort in its analysis of whether there was an implied threat that subjectively affected the defendant's action and if that belief was reasonable. In the present case, _____ was given an express threat of license suspension if he refused to submit to the search. _____ was informed that Georgia law required him to submit to the search. Like Aiken, "other factors that might lead to a finding of voluntariness are not present. For example, the investigator did not inform [_____] of his Miranda rights and did not inform [_____] that he was free to stop the interview at any time."⁴⁹ 282 Ga. 132, 137, 646 S.E.2d 222, 227 (2007). The Aiken Court did not discuss whether the defendant was in custody at the time of his statement. However, given that the Court noted that the defendant was not informed of his right to terminate the interview, presumably he was not in custody. Unlike Aiken, there is evidence in this case that further supports a finding that the submission to the search was not voluntary:

- _____ was in custody at the time of the submission to the search;
- _____ was entirely submissive to law enforcement directives throughout the entirety of the investigation;
- _____ had an Alabama driver's license.
- _____ was told, "Georgia law requires you to submit to state-administered tests of your blood, breath, urine, or other bodily substances for determining if you are under the influence of alcohol or drugs."
- _____ was told, "If you refuse this testing, you will be disqualified from operating a commercial motor vehicle for a minimum period of one year."

- _____ was told, "If you submit to testing and the results indicate the presence of any alcohol, you will be issued an out-of-service order and will be prohibited from operating a motor vehicle for 24 hours."
- He was not asked for consent, but merely asked, "will you submit [to the testing] under the implied consent law?"
- He was not read *Miranda* rights, nor was he told that he had a right not to consent to a search.
- The officer(s) believed that _____ was under the influence at the time of the search.

No witness has testified that Wilson freely and voluntarily consented to a search and seizure of his bodily substances for testing. No written consent to search was obtained; and the arresting officer, just like in Williams, "did not ask [Wilson] 'if [Wilson] was willing to freely and voluntarily give a test.'"50 Williams v. State, supra, __Ga.__ (Case No. _____, decided 3/27/15).

_____ The Court should look to the facts of this case in the following light:

The government must prove that consent was given. It must show that there was no duress or coercion, express or implied. The consent must be 'unequivocal and specific' and 'freely and intelligently given'. There must be convincing evidence that defendant has waived his rights. There must be clear and positive testimony. "Courts indulge every reasonable presumption against waiver" of fundamental constitutional rights.' Coercion is implicit in situations where consent is obtained under color of the badge, and the government must show that there was no

coercion in fact. The government's burden is greater where consent is claimed to have been given while the defendant is under arrest.³⁹

No written consent to search was obtained; and the arresting officer, just like in Williams, “did not ask [_____] ‘if [_____] was willing to freely and voluntarily give a test.”⁵² Williams v. State, supra, __Ga.__ (Case No. _____, decided 3/27/15).

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Considering the totality of the circumstances of this case, the State has not carried its heavy burden of showing that _____ freely and voluntarily consented to the search of his bodily substances that led to the test result it seeks to admit at trial.

The United States Supreme Court has declared that the courts of this country shall adhere to the rule that ‘constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of the courts to be watchful for the constitutional rights of the citizens, and against any stealthy encroachments thereon.’ *Schneckloth v. Bustamonte*, 412 U.S. 218, 228-229 (1973).⁴¹

³⁹ U. S. v. Page, 302 F.2d 81, 83-84 (9th Cir. 1962)(Citations omitted).

⁴⁰ **U. S. v. Page**, 302 F.2d 81, 83-84 (9th Cir. 1962)(Citations omitted).

⁴¹ **Beasley v. State**, 204 Ga.App. 214, 217 (1992).

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Defendant. _____ :

CERTIFICATE OF SERVICE

This is to certify that I have this day served the Morgan County District Attorney's Office with a true and accurate copy of the foregoing Defendant's supplemental motion to suppress regarding admissibility of the state-administered chemical tests by e-mail to Mr. _____ Burks, Assistant District Attorney, Morgan County.

Respectfully Submitted, this 25th day of September, 2015.

MICHAEL M. HAWKINS,
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D. BENJAMIN SESSIONS,
State Bar No. 141280

Attorneys for Defendant

Respectfully submitted,

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CERTIFICATE OF SERVICE

____ I have this day served counsel for the State with a copy of the within and foregoing
BRIEF by delivering the same to his or her customary office.

____ This _____ day of _____, 2015.

ROBERT W. CHESTNEY