

IN THE STATE COURT OF _____ COUNTY
STATE OF GEORGIA

STATE OF GEORGIA,

v.

_____,

Defendant.

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Case No. _____

**BRIEF IN SUPPORT OF MOTION TO SUPPRESS AND MOTION
TO DECLARE O.C.G.A. §§ 40-5-55, 40-5-67.1, AND 40-6-391
UNCONSTITUTIONAL**

The Defendant in this case expressly withdrew his consent to the testing of his blood prior to the search and analysis of his blood by the Georgia Bureau of Investigation (hereinafter, “GBI”). The GBI received notice of the Defendant’s withdrawal of his consent to search and testing of the blood prior to conducting the analysis. Nonetheless, the GBI proceeded to search and test the Defendant’s blood without obtaining a search warrant.

I. Submission to blood testing is a search under the Fourth Amendment.

The Defendant’s submission to the testing of his blood “is a search within the meaning of the Georgia Constitution [and the Fourth Amendment of the U.S. Constitution].” *Williams v. State*, 296 Ga. 817, 819, 771 S.E.2d 373, 375 (2015).

II. A Defendant may withdraw consent to a search at any time prior to the search being conducted.

It is a basic tenet of Fourth Amendment jurisprudence that a Defendant retains the right to withdraw consent to a search prior to the search being conducted. “Once consent is legally obtained, it continues until it is either revoked or withdrawn.” *Mixon v. State*, 184 Ga. App. 623, 624, 362 S.E.2d 111, 112 (1987), quoting *Bell v. State*, 162 Ga.App. 79, 81, 290 S.E.2d 187 (1982); see, *Montero v. State*, 245 Ga. App. 181, 184, 537 S.E.2d 429, 431–32 (2000); *Garcia v. State*, 207 Ga.App. 653, 656(1)(d), 428 S.E.2d 666 (1993).

III. Compliance with the statutory implied consent scheme does not obviate the requirement to seek a warrant once consent is withdrawn.

Williams was a landmark change in the way that Georgia courts approached the determination of admissibility of blood tests. Prior to *Williams*, our courts determined admissibility of state-administered chemical tests based upon compliance with the statutory implied consent scheme. In fact, our courts routinely viewed DUI cases as being distinguishable from criminal cases, in general.

In *Williams*, the Georgia Supreme Court rejected the suggestion by the State that compliance with Georgia's implied consent scheme obviated the necessity to comply with the warrant requirement of the Fourth Amendment:

The state court denied Williams's motion to suppress his blood test, expressly rejecting the “reasoning” that statutory implied consent implicated Fourth Amendment concerns, and the contention that the statutory consent, in and of itself, was not a valid exception to the Fourth Amendment's requirement of a search warrant. The state court's analysis is flawed.

A suspect's right under the Fourth Amendment to be free of unreasonable searches and seizures applies to the compelled withdrawal of blood, and the extraction of blood is a search within the meaning of the Georgia Constitution. *Cooper v. State*, 277 Ga. 282, 285(III), 587 S.E.2d 605 (2003). In general, searches are of two types: those conducted with a search warrant or those undertaken without one, and searches conducted outside the judicial process are per se unreasonable under the Fourth Amendment, subject only to a few specifically established and well-delineated exceptions. *State v. Slaughter*, 252 Ga. 435, 436, 315 S.E.2d 865 (1984), citing *Coolidge v. New Hampshire*, 403 U.S. 443, 454–455, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). Thus, a warrantless search is presumed to be invalid and the State has the burden of showing otherwise. *State v. Slaughter*, supra, citing *Mincey v. Arizona*, 437 U.S. 385, 390–391, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978), and *McDonald v. United States*, 335 U.S. 451, 456, 69 S.Ct. 191, 93 L.Ed. 153 (1948).

Williams v. State, 296 Ga. 817, 819, 771 S.E.2d 373, 375 (2015).

In no case is this pre-*Williams* view on the admissibility of blood tests more predominant than in *State v. Simmons*, 270 Ga. App. 301, 303–04, 605 S.E.2d 846, 849 (2004). In *Simmons*, the court of appeals held that a defendant’s constitutional right to withdraw consent to a search was subordinate to the statutory implied consent scheme in O.C.G.A. §§ 40-5-55, 40-5-67.1, and 40-6-391. In *Simmons*, the court of appeals addressed a defendant’s attempt to withdraw his consent to a blood test, and the court completely failed to recognize that a defendant has a constitutional right to refuse to consent to a search (*Olevik v. State*, No. S17A0738, 2017 WL 4582402, at *12 (Ga. Oct. 16, 2017)(“[W]e overrule *Klink* and other cases to the extent they hold that ... the right to refuse to submit to such testing is not a constitutional right.”), and the court of appeals treated the constitutional right to withdraw consent as being non-existent in a DUI case.

To the extent that O.C.G.A. §§ 40-5-55, 40-5-67.1, and 40-6-391 purport to allow the State to search the Defendant’s blood after he has withdrawn his consent to testing, those statutes are unconstitutional because of their conflict with the Fourth Amendment of the U.S. Constitution and the Georgia Constitution’s corollary provision.

Accordingly, the Defendant prays that this Honorable Court suppresses the state-administered chemical test results from the trial of this case. While this Honorable Court is not required to declare O.C.G.A. §§ 40-5-55, 40-5-67.1, and 40-6-391 unconstitutional in order to suppress the blood test evidence in this case, if the Court denies this motion the Defendant requests that the Court rule upon the constitutionality of

O.C.G.A. §§ 40-5-55, 40-5-67.1, and 40-6-391 in light of their conflict with the Fourth Amendment of the U.S. Constitution and the Georgia Constitution's corollary provision.

Respectfully Submitted, this ____ day of _____, 2023.

/s/D. Benjamin Sessions
D. Benjamin Sessions
State Bar No. 141280
Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that I served upon opposing counsel in the above-referenced case a true and accurate copy of the foregoing pleading by email of same to office of the _____ County County Solicitor-General.

Respectfully Submitted, this ____ day of _____, 2023.

/s/D. Benjamin Sessions
D. Benjamin Sessions
State Bar No. 141280
Attorney for Defendant