

IN THE STATE COURT OF _____ COUNTY
STATE OF GEORGIA

STATE OF GEORGIA,

vs.

Defendant.

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Case No. _____

**MOTION TO EXCLUDE THE DEFENDANT’S REFUSAL OF THE
STATE-ADMINISTERED TEST AND MOTION TO DECLARE
O.C.G.A. §§ 40-5-55, 40-5-67.1, AND 40-6-392 UNCONSTITUTIONAL**

Prior to *Olevik v. State*, No. S17A0738, 2017 WL 4582402 (Ga. Oct. 16, 2017), Georgia courts routinely recognized that the right to refuse a state-administered chemical test following a DUI arrest was not a constitutional right:

As we noted, the United States Supreme Court ruled it was not fundamentally unfair to allow the refusal into evidence against the driver because “the driver's ability to refuse to submit to chemical testing was not a right of constitutional dimension,” but rather was “a matter of grace bestowed by the South Dakota legislature.” *South Dakota v. Neville*, supra at 565, 103 S.Ct. 916. **Indeed, this Court has readily acknowledged that to be permitted to refuse to submit to chemical testing is not a right of constitutional magnitude but is one created by legislative enactment, and that a violation of due process is not implicated when the statutory implied consent notice does not inform the driver that test results could be used against the driver at trial.**

Sauls v. State, 293 Ga. 165, 167, 744 S.E.2d 735, 737 (2013), citing *Klink v. State*, 272 Ga. 605, 606(1), 533 S.E.2d 92 (2000).

Olevik marks a landmark change in how we must view the right to refuse a request for submission to a state-administered test:

Accordingly, we overrule *Klink* and other cases to the extent they hold that Paragraph XVI of the Georgia Constitution does not protect against compelled breath tests or that the right to refuse to submit to such testing is not a constitutional right.

Olevik v. State, No. S17A0738, 2017 WL 4582402, at *12 (Ga. Oct. 16, 2017). The cases that *Olevik* specifically overruled are *Sauls v. State*, 293 Ga. 165, 167, 744 S.E.2d 735 (2013); *Cooper v. State*, 277 Ga. 282, 290 (V), 587 S.E.2d 605 (2003); *Lutz v. State*, 274 Ga. 71, 73 (1), 548 S.E.2d 323 (2001); *Fantasia v. State*, 268 Ga. 512, 514 (2), 491 S.E.2d 318 (1997); *Oliver v. State*, 268 Ga. App. 290, 294 (2), 601 S.E.2d 774 (2004); *State v. Coe*, 243 Ga. App. 232, 234 (2), 533 S.E.2d 104 (2000); *State v. Lord*, 236 Ga. App. 868, 870, 513 S.E.2d 25 (1999); *Nawrocki v. State*, 235 Ga. App. 416, 417 (1), 510 S.E.2d 301 (1998). The basis upon which courts routinely admitted evidence of and allowed the State to comment upon a Defendant's refusal to submit to a breath test has been altered. The right to refuse, which our courts routinely called a matter of legislative grace, has been recognized as a constitutional right that should not be used as a sword against the citizen that exercises it.

Can the State lawfully introduce evidence of and comment upon the Defendant's decision to exercise a constitutional right to refuse to submit to a breath test?

What good is a right that can be used against a person if they decide to exercise it? If the State can use a Defendant's decision to exercise his right to refuse to submit to a breath test against him, that constitutional right is of no value. That is the most basic reason why our courts have traditionally scoffed at the notion of using the decision to exercise a constitutional right against a person: "To punish a person because he has done what the law plainly allows him to do is a due process violation "of the most basic sort." *Bordenkircher v. Hayes*, 434 U.S. 357, 363. "For while an individual certainly may be penalized for violating the law, he just as certainly may not be punished for exercising a protected statutory or constitutional right." *United States v. Goodwin*, 457 U.S. 368 (102 S. Ct. 2485; 73 L. Ed. 2d 74) (1982). The use of a Defendant's decision to exercise his right to be free from self-incrimination against him runs afoul of both the U.S. and Georgia Constitution's Due Process Clause.

Beyond the more general prohibition against using a constitutional right against a Defendant, our case law has consistently held that "[i]t is error for the prosecutor to comment to the jury on the defendant's exercise of his constitutional right to remain silent." *Marlow v.*

State, 152 Ga. App. 218, 219, 262 S.E.2d 460, 461–62 (1979) citing *Griffin v. California*, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 and *Mitchell v. State*, 226 Ga. 450, 455(2), 175 S.E.2d 545 (1970).

The law prohibits improper comment upon the exercise of the right to silence or any other invocation of the right against self-incrimination. What is proscribed are attempts by the state to infer or encourage the jury to infer guilt from that exercise. Thus, the state may not use against an accused the fact that he stood mute or claimed his privilege.

Jacobs v. State, 137 Ga. App. 592, 593, 224 S.E.2d 462, 464 (1976), citing *Reid v. State*, 129 Ga.App. 660(5), 200 S.E.2d 456. *Olevik, supra*, establishes that a request for submission to a breath is protected by self-incrimination clause of the Georgia Constitution. Accordingly, the State should not be permitted to introduce evidence of or comment upon the Defendant refusal to submit to a breath test.

Introducing evidence of or commenting upon the Defendant's refusal to submit to requested state-administered breath test runs afoul of the Due Process Clause of the U.S. and Georgia Constitution and the self-incrimination provision of the Georgia Constitution. For these reasons, the Defendant respectfully prays that this Honorable Court declares O.C.G.A. §§ 40-5-55, 40-5-67.1, and 40-6-392 unconstitutional to the extent that they (or any other statutory authority the State relies upon) purports to give the State the authority comment upon the Defendant's refusal to submit to a

breath test at trial, and that this Honorable Court excludes evidence of his refusal to submit to the state-administered breath test from the trial of this case.

RESPECTFULLY SUBMITTED, this 13th day of November, 2017.

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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 upon opposing counsel by email.

This 13th day of November, 2017.

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