In or Out?
Admissibility of Breath Tests, Blood Tests and Refusals in DUI Cases in Light of *Elliott v. State* and Other Recent Cases

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Introduction

New cases, e.g., ***Elliott v. State***, 305 Ga. 179 (S18A1204, February 18, 2019), and ***Williams v. State***, 296 Ga. 817 (2015), have re-defined constitutional protections for DUI defendants in Georgia.

Elliott expressly held that breath refusals are inadmissible.

Williams requires actual consent for blood testing and will likely result in the exclusion of blood refusals.

Both cases have implications for test cases as well as refusals.

Importantly, these cases were decided based on principles in the Bill of Rights in the **Georgia** Constitution– Paragraph XVI ("Georgia's Fifth Amendment") and Paragraph XIII ("Georgia's Fourth Amendment").

Breath Refusals: Out per Elliott

Elliott was preceded by ***Olevik v. State***, 302 Ga. 228 (2017), which held that the Georgia Constitution's right against compelled self-incrimination applies to breath tests. The Georgia Supreme Court based its decision on Article I, Section I, Paragraph XVI of the Georgia Constitution, which provides, "No person shall be compelled to give testimony tending in any manner to be self-incriminating." This language is similar to that in the U.S. Constitution's Fifth Amendment, which proscribes a person being "compelled in any criminal case to be a witness against himself . . ."

In ***Olevik***, the Georgia Supreme Court held that under a long line of Georgia cases, Paragraph XVI protects not only against compelled testimony, but also against compelled incriminatory acts, and that blowing into a breath machine is an incriminatory act. ***Olevik*** overruled ***Klink v. State***, 272 Ga. 605 (2000), which had held that the right to refuse to blow was not a constitutional right. ***Olevik*** thus ruled that "Paragraph XVI protects against compelled breath tests and affords individuals a constitutional right to refuse testing." ***Olevik***, 302 Ga. at 252.

Elliott expanded ***Olevik***, holding that since blowing into a breath machine is an incriminatory act, and since a person's refusal to blow constitutes the exercise of a constitutional right, the person's refusal cannot be admitted into evidence:

> Paragraph XVI precludes admission of evidence that a suspect refused to consent to a breath test. 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. We reverse the trial court's denial of Elliott's motion to suppress. [***Elliott***, 305 Ga. at 223]

Thus under ***Elliott***, breath refusals are clearly out. This is true for all past, present and future cases, unless the powers-that-be manage to amend the Georgia Constitution and take away the constitutional right defined by the Supreme Court of Georgia in ***Elliott***.

Pre-Elliott Breath Tests: Out

These are also out, because the pre-***Elliott*** warning was misleading. Prior to ***Elliott***, Georgia's implied consent notice ("ICN"[1]) was:

> Georgia law requires you to submit to state administered chemical 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. If you refuse this testing, your Georgia driver's license or privilege to drive on the highways of this state will be suspended for a minimum period of one year. ***Your refusal to submit to the required testing may be offered into evidence against you at trial.*** If you submit to testing and the results indicate an alcohol concentration of 0.08 grams or more, your Georgia driver's license or privilege to drive on the highways of this state may be suspended for a minimum period of one year. After first submitting to the required state tests, you are entitled to additional chemical tests of your blood, breath, urine, or other bodily substances at your own expense and from qualified personnel of your own choosing. Will you submit to the state administered chemical tests of your (designate which tests) under the implied consent law? [Emphasis supplied.] [2]

In light of ***Elliott***, the statement (highlighted above), "Your refusal to submit to the required testing may be offered into evidence against you at trial" is false and misleading.

[1] Also known as "implied consent warning" or ICW.

[2] O.C.G.A. § 40-5-67.1(b)(2) (notice for suspects age 21 and over) (prior to 4-28-19).

The Georgia Court of Appeals has long held that misleading ICN's render test results and refusals inadmissible. In ***State v. Leviner***, 213 Ga. App. 99 (1994), the officer read the defendant a long DPS form which was quite a monstrosity:

> Georgia law requires you to submit to a state-administered chemical test(s) of your blood, breath, urine or other bodily substances for the purpose of determining if you are under the influence of alcohol or other drugs. If you refuse this testing your driver's license or right to drive will be suspended for a period of one year or, if you are under age 18, for a period of one year or until the age of 18, whichever is greater, or, if you are operating a commercial vehicle you will be disqualified from operating a commercial motor vehicle for a minimum period of one year, if a test(s) is performed and results indicate a blood alcohol concentration of 0.10 grams or more your driver's license or right to drive may be suspended for a minimum period of one year or, if you are under the age of 18, with a blood alcohol concentration of 0.06 grams or more, your driver's license or right to drive will be suspended for a minimum period of one year or until the age of 18, whichever is greater, and if the vehicle was a commercial motor vehicle and the test(s) 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, and if the results indicate a blood alcohol concentration of 0.04 grams or more, you will be disqualified from operating a commercial motor vehicle for a minimum period of one year, after submitting to the required testing, you are entitled to obtain an additional chemical test or tests at your own expense, and your refusal to submit to a test(s) may be offered into evidence against you at trial. Will you submit to the State-administered chemical test(s) of your [Designate which test or tests] under the Implied Consent Law? [3]

The Court in ***Leviner*** held that since this warning contained inapplicable and irrelevant information, the trial court should have suppressed the defendant's urine test.

In numerous cases involving out-of-state defendants, the Georgia Court of Appeals has held that ICN's were false and misleading because they erroneously told those defendants that their out-of-state licenses would be suspended. ***Deckard v. State***, 210 Ga. App. 421 (1993) (Officer erroneously advised defendant that his Tennessee driver's license would

[3] This wording was set forth on Form DPS-354 and was used from January 1993 to June 1993. Head & Gomez, *Georgia DUI Trial Practice Manual*, Appendix 6, Form 2, page 1152 (West, 2019 Edition). Mr. Head was Mr. Leviner's attorney. The full wording was not set forth in the ***Leviner*** opinion.

be suspended; trial court should have suppressed breath test result.) ***State v. Coleman***, 216 Ga. App. 598 (1995) (9-3 whole court opinion; officer erroneously advised North Carolina licensee: "You will lose your privilege to operate a motor vehicle from six to twelve months should you refuse . . ."; trial court properly granted defendant's motion to suppress breath test.) ***State v. Renfroe***, 216 Ga. App. 709 (1995) (Officer erroneously advised Florida licensee that his license would be suspended; trial court properly granted defendant's motion to suppress.) ***State v. Peirce***, 257 Ga. App. 623 (2002) (Officer read Texas licensee the proper ICN but added that the defendant would lose his license if he refused the test; trial court properly granted defendant's motion to suppress.) ***Kitchens v. State***, 258 Ga. App 411 (2002) (Officer erroneously advised defendant that her Alabama license would be suspended if she refused; trial court erred in admitting the breath test result.) ***Hernandez v. State***, 348 Ga. App. 569 (2019) (Officer erroneously advised defendant that her Washington State license would be suspended if she refused; trial court erred in denying defendant's motion to suppress.)

In ***Kitchens***, the officer also overstated the legal limit (10 grams instead of .10 grams), and the Court of Appeals held that this was an additional reason to suppress the breath test result. The state must demonstrate "substantial compliance," i.e., the state must show that the ICN was "substantially accurate" as required by O.C.G.A. § 40-5-67.1(b)(3). 258 Ga. App. at 413. The court also rejected the state's "harmless error" argument:

> To accept the State's arguments, 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 ... 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.' [cits.] [***Kitchens***, 258 Ga. App. at 414.]

In ***State v. Terry***, 236 Ga. App. 248 (1999),[4] the officer read the correct ICN but added incorrect information by giving the defendant the false impression that obtaining bond was a pre-condition to independent testing. Suppressing Ms. Terry's blood refusal, the ***Terry*** Court held:

> Further, we do not believe that the officer's intent with regard to such information is determinative. Even if an officer did not intend

[4] ***Terry*** was cited by ***Kitchens***.

> to mislead, if the defendant is misled or misinformed as to his rights, his ability to make an informed decision would be impaired. [236 Ga. App. at 250]

The Georgia Supreme Court, too, has addressed the issue of a misleading ICN. In ***Sauls v. State***, 293 Ga. 165, 168 (2013) (overruled in part by ***Olevik***.[5]), the arresting officer omitted the sentence, "Your refusal to submit to the required testing may be offered into evidence against you at trial." The trial court granted the defendant's motion to suppress defendant's refusal. The Court of Appeals reversed, but the Georgia Supreme Court reversed the Court of Appeals. 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." ***Sauls***, 293 Ga. at 168.

It is true that the Georgia Supreme Court in ***Olevik*** did not find the ICN to be coercive or misleading, ***Olevik***, 302 Ga. at 246-252, but that was before ***Elliott*** made it completely clear that breath refusals are inadmissible. In a concurring opinion in ***Elliott***, Justice Boggs and two other justices noted that "these decisions [***Olevik*** and ***Elliott***] affect significant portions of the implied consent law" and further noted that portions of the current implied consent warning "are likely to become problematic in future cases . . ." ***Elliott***, 305 Ga. at 224.]

In light of the holding in ***Elliott***, the pre-***Elliott*** ICN is clearly false, all breath tests derived therefrom are inadmissible and must be suppressed.

In a jury trial, the jury would not see the test result. In a bench trial, any suppressed test result cannot be used to infer guilt.

Post-Elliott Breath Tests, "Miranda Period": Arguably Out

In the immediate aftermath of ***Elliott***, officers often abandoned the implied consent card they had used for decades, and read ***Miranda*** instead. [6]

[5] ". . . we overrule ***Klink*** and other cases [including ***Sauls***] 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***, 302 Ga. at 246, footnote 11.

[6] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

The wording of ***Miranda*** warnings varies among jurisdictions. The one typically used in Georgia is as follows:

> 1. You have the right to remain silent.
>
> 2. Anything you say can and will be used against you in a court of law.
>
> 3. You have the right to talk to an attorney and have him present with you while you are being questioned.
>
> 4. If you cannot afford to hire an attorney, one will be appointed to represent you before any questioning if you wish.
>
> 5. You can decide at any time to exercise these rights and not answer any questions or make any statements.
>
> The officer will then follow with waiver questions:
>
> 1. Do you understand each of these rights I have explained to you?
>
> 2. Having these rights in mind, do you wish to talk to us now?

Instead of the usual second waiver question, officers in a DUI case would substitute the following question: "With these rights in mind, do you wish to take the state-administered breath alcohol test at the jail?"

Miranda is about statements, not breath tests. Advising a defendant regarding "questioning" and "statements," then immediately switching to "state-administered breath alcohol test" is just as misleading and unhelpful as the one in ***Leviner***, *supra*, which contained "inapplicable and irrelevant information." 213 Ga. App. at 101.

Post-Elliott Breath Tests with New Card: Arguably Out

On April 28, 2019, Georgia Governor Brian Kemp signed a new implied consent warning into law, and law enforcement agencies began distributing the new ICN cards. The language of the new warning is as follows:

> The State of Georgia has conditioned your privilege to drive upon the highways of this state upon your submission to state administered chemical 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. If you refuse this testing, your Georgia driver's license or privilege to drive on the highways of this state will be suspended for a minimum period of one year.

> ***Your refusal to submit to blood or urine testing may be offered into evidence against you at trial.*** If you submit to testing and the results indicate an alcohol concentration of 0.08 grams or more, your Georgia driver's license or privilege to drive on the highways of this state may be suspended for a minimum period of one year. After first submitting to the requested state tests, you are entitled to additional chemical tests of your blood, breath, urine, or other bodily substances at your own expense and from qualified personnel of your own choosing. Will you submit to the state administered chemical tests of your (designate which test)? [Emphasis supplied.] [7]

This new ICN is still misleading. It still sounds like the person is required to take a test. It does not advise the person that he or she can refuse. It does not state that breath refusals are inadmissible. Nowhere does it use the word "consent." This new "warning," hastily crafted by the Prosecuting Attorneys' Council and passed by the legislature in a haphazard attempt to conform to ***Elliott***, is akin to the long warning in ***State v. Leviner***, 213 Ga. App. 99 (1994), which contained inapplicable and irrelevant information.

The new warning is also misleading because of the incorrect statement, italicized above: "Your refusal to submit to blood or urine testing may be offered into evidence against you at trial." For reasons discussed below, blood refusals and urine refusals should not be admitted into evidence at trial. Therefore the foregoing statement is false and misleading. At best it is extraneous, as in ***Leviner***. At worst it is designed to confuse the person and make him or her believe that breath refusals are admissible.

Blood Refusals: Likely Out per Williams

Blood refusals are out because when a person refuses blood testing, he or she is exercising his right to refuse a search under Article I, Section I, Paragraph XIII of the Georgia Constitution. The language of Georgia's Paragraph XIII is identical to that in the U.S. Constitution's Fourth Amendment:

> The 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 warrant shall issue except upon probable cause supported by oath or affirmation particularly describing the place or places to be searched and the persons or things to be seized.

[7] O.C.G.A. § 40-5-67.1(b)(2) (notice for suspects age 21 and over) (after 4-28-19).

In ***Williams v. State***, 296 Ga. 817 (2015), the Supreme Court of Georgia held that implied consent is not enough for a blood draw. ***Actual consent*** is required. 296 Ga. at 822-823. The Court based its ruling on both the Fourth Amendment and upon Article I, Section I, Paragraph XIII of the Georgia Constitution.

Overruling ***Strong v. State***, 231 Ga. 514 (1973), the ***Williams*** Court rejected ***Strong***'s *per se* rule that the evanescent nature of alcohol provided a sufficient exigent circumstance which in and of itself necessitated that blood be extracted to help prove that a person is under the influence.

It is clear, therefore, that a person refusing a blood test in a DUI case is exercising his or her right to decline to submit to a search. The person is declining to provide ***actual consent*** for a search of his or her blood.

In a non-DUI context, the Georgia Court of Appeals has held that a defendant's refusal to allow a search of a vehicle cannot be used against him at trial. In ***Mackey v. State***, 234 App. 554 (1998), the trial court in a bench trial had based its decision in part on the defendant's refusal to consent to the search. The Court of Appeals reversed Mackey's conviction for possession of cocaine where the substance was found under the seat of a car in which he was a passenger. See also, ***Gardner v. State***, 255 Ga. App. 489 (2002), in which the Court of Appeals ruled that a refusal to consent to a search of a home property could not constitute part of probable cause for the issuance of a search warrant for marijuana plants, and the magistrate erred in taking the refusal into account.[8]

Given that a search of a person's blood is more intrusive than a search of a person's vehicle or property (See ***Birchfield***, *infra*), a refusal to submit to a blood test should not be admitted into evidence.

Blood Tests: Arguably Out

The new ICN, like the old ICN, states, "***Your refusal to submit to blood or urine testing may be offered into evidence against you at trial***." That is not correct. That is false and misleading. That false statement has induced the person to take a blood test. Therefore, blood tests, like blood refusals, are inadmissible.

Before ***Elliott***, the most common issue arising from ***Williams*** was: If a person is too impaired to drive, is he too impaired to consent to a breath test or blood test? The case

[8] However, the search warrant was upheld; the Gardner court held that a prior air search constituted sufficient probable cause for the ground search.

law is mixed. In ***State v. Bowman***, 337 Ga. App. 313 (2016), the trial judge ruled that the defendant was in fact too intoxicated to consent, and the Court of Appeals affirmed. Similarly, in ***State v. Jung***, 337 Ga. App. 799 (2016), the Court of Appeals affirmed a trial court ruling which disallowed a breath test based on a defendant being too intoxicated to consent. But in ***State v. Depol***, 336 Ga. App. 191 (2016), the Court of Appeals substituted its own judgment for that of the trial court, and reversed a trial court order which disallowed a breath test based solely on intoxication.[9]

The test for consent is "totality of the circumstances." There is no *per se* rule. But shouldn't there be? Consider: If a person appears in court for the purpose of pleading guilty to a criminal offense, his plea must be voluntary. He must assure the court, and the court must find, that he is not under the influence of any alcohol or drug at the time of the plea. If he is, the court cannot take the plea. Shouldn't the same level of voluntariness apply when an officer asks a person to consent to a breath test or a blood test?

In any event, the most compelling reason for the exclusion of a blood refusal is simply that it is an exercise of a right under Paragraph XIII of the Georgia Constitution as set forth in ***Williams***. The two reasons to exclude a blood result are (1) lack of consent, and (2) a false and misleading ICN.

SCOG vs. SCOTUS

Recent and vintage U.S. Supreme Court cases provide context for the Georgia cases. Arguably, however, that is all they provide.

As students of the law, and federalism in particular, we are used to the concept that federal law preempts state law. But that is not always so. A state constitution may afford its citizens greater protections than does the federal constitution. Georgia's constitution does just that, as illustrated by ***Williams***, ***Olevik*** and ***Elliott***:

> Georgia constitutional provisions may confer greater, fewer, or the same rights as similar provisions of the United States Constitution, and decisions of the United States Supreme Court interpreting those similar provisions are persuasive in our interpretation of the Georgia Constitution only to the extent that those decisions are rooted in shared history, language, and context. [***Elliott***, 305 Ga. at 187.]

[9] For additional cases on this issue, see Head & Gomez, Georgia DUI Trial Practice Manual, § 4:44, page 240 (West, 2019 Edition).

See also, ***Olevik***, 302 Ga. at 234, footnote 3, and ***Powell v. State***, 270 Ga. 327, 331, footnote 3 (1998).

In contrast, as interpreted by the U.S. Supreme Court, the Fourth Amendment and Fifth Amendment provide only thin protection for DUI defendants.

In ***Schmerber v. California***, 384 U.S. 757 (1966), the Court affirmed a DUI conviction and ruled that a warrantless blood draw over objection did not violate defendant's Fourth Amendment or Fifth Amendment rights:

> The officer in the present case . . . might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened 'the destruction of evidence,' [Cit.] We are told that the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system. Particularly in a case such as this, where time had to be taken to bring the accused to a hospital and to investigate the scene of the accident, there was no time to seek out a magistrate and secure a warrant. Given these special facts, we conclude that the attempt to secure evidence of blood-alcohol content in this case was an appropriate incident to petitioner's arrest. [384 U.S at 770-771.]

A key principle in ***Schmerber*** is not applicable in Georgia. ***Schmerber*** rejected a self-incrimination claim, holding that Fifth Amendment protection is limited to evidence of a testimonial or communicative nature. But Paragraph XVI in Georgia's Bill of Rights "has a nearly unbroken history of application to compelled acts, not merely testimony." ***Olevik***, 302 Ga. at 239.

Schneckloth v. Bustamonte, 412, U.S. 218 (1973), is a non-DUI case which is often cited in DUI cases. The ***Schneckloth*** court addressed the issue of informed consent to search. The Court first acknowledged:

> 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." [cits.] 412 U.S. at 219.

One of those exceptions is consent. In ***Schneckloth***, officers performed a "consent search" of a vehicle in which Bustamonte was a passenger, and found stolen checks under the rear seat. In gaining consent, officers did not inform Mr. Bustamonte that he had a right to refuse the search. The Court held that while knowledge of a right to refuse consent is a factor to be taken into account, the State need not prove that the one giving permission to search knew he had a right to withhold his consent. The Court held that the voluntariness of consent is to be determined from the totality of the circumstances.

The Georgia Supreme Court, however, seems to require that a suspect be more fully informed, at least in a DUI case. See ***Sauls***, *supra*, in which the Georgia Supreme Court disallowed evidence of a refusal where the officer omitted the sentence of the ICN which would have informed Mr. Sauls that his refusal might be offered into evidence against him at trial.

The U.S. Supreme Court addressed the question of the admissibility of blood refusals in ***South Dakota v. Neville***, 459 U.S. 553 (1983):

> We now address a question left open in ***Schmerber***, *supra*, at 765, n. 9, and hold that the admission into evidence of a defendant's refusal to submit to such a test likewise does not offend the right against self-incrimination. [***Neville***, 459 U.S. at 554.]

It is very unlikely that blood refusals are admissible in Georgia after ***Williams***, *supra*.

Recent U.S. Supreme Court decisions have been a bit more encouraging. Limiting ***Schmerber***, the Court in ***Missouri v. McNeely***, 569 U.S. 141 (2013), held that the natural dissipation of alcohol in the bloodstream does not present a *per se* exigency that, in all DUI cases, justified an exception to the Fourth Amendment's warrant requirement.

> The question presented here is whether the natural metabolization of alcohol in the bloodstream presents a *per se* exigency that justifies an exception to the Fourth Amendment's warrant requirement for nonconsensual blood testing in all drunk-driving cases. We conclude that it does not, and we hold, consistent with general Fourth Amendment principles, that exigency in this context must be determined case by case based on the totality of the circumstances. [569 U.S. at 145.]

The Court thus affirmed the Missouri Supreme Court, which had affirmed the trial court's suppression of a blood test. ***McNeely*** was cited by ***Williams***. In ***Williams***, the Supreme

Court of Georgia based its decision requiring actual consent for blood on both the Fourth Amendment and Paragraph XIII in the Georgia Constitution.

Further limiting ***Schmerber***, the Court in ***Birchfield v. North Dakota***, 579 US. ____, 136 S.Ct. 2160 (2016), held that the Fourth Amendment permits warrantless breath tests but not warrantless blood tests. ***Birchfield*** emphasized that blood tests are more intrusive than breath tests.

The ***Birchfield*** Court decided three companion cases: ***Birchfield***, ***Bernard*** and ***Beylund***. Mr. Birchfield was criminally prosecuted for refusing a blood test. His conviction was reversed. Mr. Bernard was criminally prosecuted for refusing a breath test. His conviction was affirmed. Mr. Beylund submitted to a blood test after being told that the state could compel both breath and blood tests. His case was remanded for the state court "to reevaluate Beylund's consent given the partial inaccuracy of the officer's advisory." 136 S.Ct. at 2186.

However, Georgia cannot criminally prosecute anyone for refusing a breath test. Any such law would be unconstitutional under ***Elliott***. Therefore the U.S. Supreme Court's holding in the ***Bernard*** portion of ***Birchfield*** is not applicable in Georgia.

In federal jurisprudence, there is perhaps one limited scenario in which ***Schmerber***'s exigent circumstance exception applies. In ***Mitchell v. Wisconsin***, ____ U.S. ____, 139 S.Ct. 2525 (June 27, 2019), a plurality of the U.S. Supreme Court determined that where a DUI suspect is unconscious or in a stupor, the exigent circumstances doctrine generally permits a blood test without a warrant. 139 S.Ct. at 2531.

However, the "stupor exception" delineated in ***Mitchell*** does not apply in Georgia. Relying on ***Williams***, the Georgia Court of Appeals held that the trial court erred in admitting blood and urine test results where a trooper had ordered hospital personnel to take samples from an unconscious defendant. ***Bailey v. State***, 338 Ga. App. 428 (2016) (overruled on other grounds, *Welbon v. State*, 301 Ga. 106).

Paragraph XVI vs. Paragraph XIII

Breath is primarily a self-incrimination issue which implicates Paragraph XVI pursuant to ***Elliott***. Blood is primarily a search issue which implicates Paragraph XIII pursuant to ***Williams***. However, there is some cross-over.

A breath test does involve a search. “The [Fourth] Amendment thus prohibits “unreasonable searches,” and our cases establish that the taking of a blood sample or the administration of a breath test is a search. [Cits.]” ***Birchfield***, *supra*, 136 S.Ct. at 2173.

A blood test does arguably involve incriminatory acts. A person submitting to a blood test must generally walk into a hospital, lie down or sit down, stretch out his arm, squeeze a bulb or ball up his fist, etc.

But, at least in Georgia, blood is primarily a search issue. When a person refuses a blood test, he or she is simply refusing to provide the “actual consent” required by Paragraph XIII of the Georgia Constitution as set forth in ***Williams***.

Therefore, the essential principles for Georgia DUI defendants are as follows:

> **1.** A person refusing a breath test is exercising his constitutional right under Paragraph XVI.
>
> **2.** A person refusing a blood test is exercising his constitutional right under Paragraph XIII.
>
> **3.** The exercise of a constitutional right should result in the exclusion of a refusal in a DUI case, regardless of whether it is breath or blood.
>
> **4.** Test results– breath, blood and urine– are implicated as well, and should generally be inadmissible, because of lack of consent or because of false and misleading ICN advisements, or both.

Urine Tests

Urine tests are rare, but they implicate both Paragraph XVI and Paragraph XIII. Producing a urine sample is certainly an incriminatory act on the part of the defendant, and it is a search on the part of the state. Therefore a refusal to submit to a urine test is an exercise of a constitutional right under both paragraphs and is therefore inadmissible. And since the ICN falsely states that a refusal of a urine test “may be offered into evidence against you at trial,” a urine test result is likewise inadmissible.

The DUI Exception to the Constitution[10]
Including a Short History of Breath Testing and Georgia's Conviction Box

In the government's zeal to prosecute DUI's, the rights of the accused have steadily eroded. This has not happened by accident. Prosecutors and lobbyists have consistently and persistently lobbied for laws to make it easier to convict people of DUI.

Constitutional protections for DUI defendants have disappeared at an alarming rate. This phenomenon has become known as "The DUI Exception to the Constitution."[11]

Most traffic stops require reasonable suspicion but not roadblocks for DUI's. With roadblocks, the police can stop a person just for driving a car, and the courts have approved this. ***Michigan v. Sitz***, 496 U.S. 444 (1990). The Fourth Amendment gets lip service and the police continue to set up roadblocks. There are some technical requirements but that's about it. ***Williams vs. State***, 293 Ga. 883 (2013); ***LaFontaine v. State***, 229 Ga. 251 (1998); ***State v. Golden***, 171 Ga. App. 27 (1984).

If a person is in custody, and the police want to question him, the police have to read the person ***Miranda*** rights, and obtain a waiver. But not in a traffic stop. This is deemed to be a temporary detention, and a policeman can, without cause, order the person out of the car and ask, "How much did you have to drink," etc. ***Berkemer v. McCarty***, 468 U.S. 420 (1984); ***Hughes v. State***, 259 Ga. 227 (1989).

Witnesses can be cross examined but defense counsel is not allowed to cross examine a breath machine. Technically a defendant can bring in an expert to call the breath machine's credibility into question. ***Lattarulo v. State***, 261 Ga. 124 (1991).

But the state will not release the machine's source code– which controls the software which runs the thing– and courts have refused to require the state or the manufacturer to release it. ***Cronkite v. State,*** 293 Ga. 476 (2013).

The manufacturer of Georgia's breath machine is CMI, located in Owensboro, Kentucky. CMI sells their machines to law enforcement only. The company will not sell a machine

[10] Larry Taylor, *The DUI Exception to the Constitution*, https://www.duicentral.com/dui/the-dui-exception/. Mr. Taylor is a nationally known DUI defense attorney in California.

[11] This section includes highlights from Mr. Taylor's essay and observations and experiences of this writer and other defense counsel. The case cites in this section are illustrative and by no means exhaustive.

to a defense lawyer. This prevents any experimentation or meaningful research regarding the reliability or accuracy of the machine.

What is the mathematical formula used to measure the decrease in light detected at the end of the breath test chamber caused by infrared absorption of alcohol molecules and convert such measurement of light into a measurement of blood alcohol level? CMI knows but we do not.

In effect, we are told, "Trust us, we are the government and we are here to help you." We must place our faith in an unregulated, uncontrolled commercial, for-profit corporation selling the government life-altering testing equipment. Only in DUI cases is that allowed or tolerated by the executive branch or the judiciary.

Nor is defense counsel allowed to access the state's machine. ***Blanos v. State***, 192 Ga. App. 835 (1989). Thus with no ability to obtain a machine or access the government's machine or access its source code, it is next to impossible to point out any particular issue prior to trial. The Sixth Amendment right to cross examine gets lip service and little else.

Breath machines can be manufactured with the ability to preserve a breath sample but most states do not purchase machines with this function. There is no right to have breath re-tested. There is no right or ability to re-test the state's evidence.

The machine uses a ratio of 1:2100 called the "partition ratio." This assumes that for one unit (by weight) of alcohol in the breath by there are 2100 such units in a person's blood. Thus the machine must multiply its result by 2100 to produce a "result" purportedly revealing the amount of alcohol in the person's blood. 1:2100 is an "average." Hardly anyone has that exact ratio. But the government falsely assumes everyone does.

In the 1990's, CMI offered their machines (then the Intoxilyzer 3000) with a component called a Taguchi cell. The Taguchi cell screened for chemical compounds such as paint fumes which the machine would otherwise read as alcohol. However, the director of the section of the state crime lab that oversees breath testing ordered the machines with the Taguchi cell disconnected. AND DIDN'T TELL ANYBODY. It took a great deal of effort by defense counsel and expert witnesses to discover that this essential piece of the machine was inoperable. It is anyone's guess how many people were unfairly convicted before this was discovered. ***Lattarulo v. State***, 261 Ga. 124 (1991); ***State v. Hunter***, 221 Ga. App. 837 (1996); ***Oxley v. State***, 210 Ga. App. 296 (1993).

Following the Taguchi cell fiasco, in 1995 language was added to O.C.G.A. § 40-6-392(a)(1)(A) which required that to be considered valid, blood, breath or urine tests must be performed according to methods approved by the GBI ". . . on a machine . . . with all its electronic and operating components prescribed by its manufacturer properly attached and in good working order . . ." However the Court of Appeals has ruled that the state can meet this evidentiary "burden" simply by tendering copies of certificates of inspection and a copy of the operator's permit. ***State v. Naik***, 259 Ga. App. 603 (2003).

Thus, other than asking perfunctory questions of the operator and tendering pieces of paper into evidence, the state has no real burden to show the machine had all its parts and was working properly. The defendant is left with no meaningful opportunity to challenge the machine's result. The burden of proof applies but is meaningless.

The "legal limit" began at .15 because that was deemed to be the level at which most people were "less safe." But with no evidence to support any different conclusion, it gradually became lower and lower. It was reduced to .12, then to .10, and now to .08. And now the level itself has been made a crime, even if the person is not impaired. O.C.G.A. § 40-6-391(a)(5). This relieves the state of the pesky burden of proving impairment.

What arguably makes a person "less safe"? The answer of course is the amount of alcohol in the person's system[12] ***at the time of driving***. But Georgia's statute, like that of many other states, allows the state to prove a "DUI" simply by proving that the person's alcohol concentration is 0.08 grams or more at any time ***within three hours*** after the driving. O.C.G.A. § 40-6-391(a)(5). Thus if a person's BAC is less than .08 at the time of driving, in most courts the defense is prohibited from presenting evidence of that.

The Georgia manual for the Intoxilyzer machine requires a 20-minute observation period to make sure the person does not burp or belch. But this "requirement" is routinely ignored by the police. And the courts do not enforce it. No observation, no problem. The result still comes in. It goes to weight, not admissibility. ***State v. Palmaka***, 266 Ga. App. 595 (2004); ***Berkow v. State***, 243 Ga. App. 698 (2000).

Notwithstanding these multiple issues in breath testing, courts will often ask, "What was the level?" The number is taken at face value, without question.

[12] It is actually alcohol in the brain that impairs. Neither blood alcohol nor breath alcohol cause any impairment.

A person who refuses a test must suffer a suspension of his driver's license and will also be prosecuted for DUI. Certainly this is a second punishment. But courts find no double jeopardy. ***Nolen v. State***, 218 Ga. App. 819 (1995).

And of course there is the issue of "rent on the courtroom." Thankfully, most municipal and probate judges do not impose harsher sentences upon people who exercise their right to a trial. But Superior Court judges do. The sentences imposed for a DUI defendant following a jury's guilty verdict are often devastating. Not just a higher fine or more community service, but sometimes months in jail. This chills a person's right to trial. Many defendants simply cannot afford to take the chance.

In most states, if a person refuses to blow into the machine, this comes into evidence and the prosecutor can argue to the jury, "He refused because he knew he was guilty."

Finally, thankfully, with ***Elliott***, there is a little pushback. The Fifth Amendment doesn't apply but Georgia's Paragraph XVI does. A person does not have to blow into the state's metal box with all its false assumptions. In Georgia, a person does not have to blow into the state's **conviction box** in order to help the state convict him of DUI.[13]

Elliott thus is an exception to the exception.

We'll see how long it lasts.

"**Wherefore, Defendant prays . . .**"

What does defense counsel ask of Municipal Court judges?[14]

Of course we ask for basic fairness.

But more specifically, we ask that DUI cases be reduced or dismissed where appropriate. Not every person arrested for DUI is guilty of DUI.

Given the systematic unfairness that already exists, it is often impossible for a DUI defendant to mount an effective defense in a jury trial. It is simply too expensive.

[13] However, in most cases the person must still suffer an administrative license suspension. ***Elliott***, 305 Ga. at 224 (concurring opinion). The state will always get its pound of flesh.

[14] This writer served as judge *pro tem* in the Dalton Municipal Court for 5 years during the 1990's, but now prefers "the begging side of the bench."

Probate Courts and Municipal Courts have traditionally been good places to work cases out. And frankly, that is in large part how lawyers make a living.

We ask that Probate and Municipal Court judges not browbeat prosecutors to push every case to the limit. A solicitor should be able to compromise, where appropriate.

Most importantly, counsel asks that the Court respect the reasonable doubt standard in bench trials, and where there is reasonable doubt, to find a defendant not guilty, just as a jury would do.

-End-