CASE No. S20G1339

IN THE

Supreme Court of Georgia

STATE OF GEORGIA,
Appellant,

v.

KEMAR HENRY,
Appellee.

Brief of Georgia Association of Criminal Defense Lawyers as *Amicus Curiae* In Support of Appellee Kemar Hanry

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The Interest of Amicus

The Georgia Association of Criminal Defense Lawyers (GACDL) is a private, member-funded statewide criminal defense organization. It is comprised of criminal defense lawyers, law school students, and full-time criminal investigators. Its mission is to promote fairness and justice through member education, services and support, public outreach, and a commitment to quality representation for all. Consistent with its mission, GACDL has a particular interest in the proper application and development of Georgia's criminal law. This case involves important questions affecting DUI prosecutions, which are frequently litigated.

This Amicus brief is timely filed pursuant to the extensions granted on February 16, 2021 (EXHIBIT A) and March 10, 2021 (EXHIBIT B).

Question Presented

"Was the Court of Appeals correct when it concluded that '[a]n accused's right to have an additional, independent chemical test or tests administered [pursuant to O.C.G.A. §40-6-392(a)(3)] is invoked by some statement that reasonably could be construed, in light of the circumstances, to be an expression of a desire for such test'? *Ladow v State*, 256 Ga.App. 726, 728 (2002). See also, e.g., *Wright v. State*, 338 Ga.App 216, 220-223 (1)(b) (2016); *Id*. at 226-229 (Peterson, J., concurring)."

Summary of Argument

The question presented is not ripe; this court should reconsider its grant of certiorari as improvident.

In the alternative, the question presented must be answered in the affirmative and the ruling below affirmed. The rule enunciated in *Ladow v. State*[1] gives drivers the benefit of the doubt when they make a vague or equivocal request for an independent test. This rule is well-suited to the unique circumstances common to DUI arrests and fosters fair outcomes. It protects a driver's substantial rights without hindering the State's interest in law enforcement. Greater procedural protections have been afforded other rights conferred by statute. Public policy demands that officers be trained to inquire of the suspect and resolve whether or not that person wants an independent test.

If anything, this Court should expand on *Ladow*: the better rule would be to require proof of an accused driver's affirmative waiver of independent testing before allowing any State-administered blood alcohol test into evidence.

[1] 256 Ga.App. 726 (2002).

Argument and Citation of Authority

1. **THE QUESTION PRESENTED IS NOT RIPE; CERTIORARI WAS IMPROVIDENTLY GRANTED.**

There are two types of certiorari jurisdiction granted to this Court in our State Constitution: certified question jurisdiction, and the review of important Court of Appeals cases.[2] This grant was under the latter provision, found in Paragraph V of Article VI, Section 6. As such, the grant should address only issues material to the Court of Appeals' holding. The question presented in this Court's order granting certiorari is not material and sets a dangerous precedent. This appeal should be dismissed as improvidently granted.

(A) There Must Be Both Error and Grave Importance to Justify Granting Certiorari, and There Was No Error in The Court of Appeals' Application of Strickland V. Washington.

While this Court is empowered to address tangential issues on certiorari, it should not in this case. The question presented (basically whether *Ladow* is presently good law) is not necessary to review the Court of Appeals' ruling below. It properly held that *Ladow*, being good law at the time of Henry's trial, would have been relied upon by a reasonably competent defense lawyer as part of a

[2] "The Supreme Court shall have jurisdiction to answer any question of law from any state appellate or federal district or appellate court." Ga. Const. art. VI, § 6, ¶ IV. "The Supreme Court may review by certiorari cases in the Court of Appeals which are of gravity or great public importance." Ga. Const. art. VI, § 6, ¶ V.

motion to suppress the breathalyzer test.[3] The Court of Appeals did not have to rule on the propriety of the holding in *Ladow* in order to reach its holding on ineffective assistance. It properly exercised restraint. The legal basis of the Court of Appeals' decision is found in *Strickland v. Washington* and its progeny.[4]

This Honorable Court should exercise its jurisdiction based on judicial review only to address whether the Court of Appeals correctly applied *Strickland;* there was no error in the case below due to a misconstrued holding in *Ladow*. "Our rules provide and we undertake to grant certiorari, not as a matter of right but as a matter of judicial discretion, in those cases in which *not only error* but also gravity and importance are demonstrated. Rule 36(d), (j)."[5] There was no error below.

The Court of Appeals correctly ruled that *Ladow's* validity was immaterial in the context of ineffective assistance of counsel. The question presented here, whether *Ladow itself* misconstrued the law, is a question for another day. This Court should withhold comment on *Ladow* until it has the opportunity to review a decision on its merits.

There is precedent for abandoning the stated "question presented." In *Licata*

3 "[W]e are not looking at this issue in the context of a trial court's denial of a motion to suppress; rather, Henry's claim is premised on an assertion of ineffective assistance of counsel. Regardless of whether the standard espoused in *Ladow* should be revisited, it was the standard which was in place at the time of Henry's trial, and thus it is the standard which governs our analysis about the reasonableness of trial counsel's performance." *Henry v.*

4 *State*, 355 Ga. App. 217, 222, n.5 (2020).

5 466 U.S. 668 (1984).
Todd v. Dekle, 240 Ga. 842, 843 (1978).

v. State,[6] litigants and *amici curiae* were asked to brief three questions relating to Miranda warnings in the context of DUI arrests. After soliciting briefs and hearing oral arguments, the court declined to address the issue based on a reconsideration of the record:

> We asked the parties to address this issue by briefing whether Miranda-type warnings are required before a suspect in police custody is asked to perform acts protected by Paragraph XVI. But Licata was not actually in custody when he was asked to undergo the field sobriety tests. Even under *Price*, Miranda warnings for field sobriety tests are required only when a person is in custody. ...We leave for another day whether *Price* was rightly decided."[7]

This Court should similarly "leave for another day" whether *Ladow* was rightly decided. The Court of Appeals' decision was soundly reasoned and need not be disturbed. "This court's certiorari jurisdiction was granted it in order to achieve uniformity of decision; careless exercise of certiorari jurisdiction defeats the purpose of the Court of Appeals as an independent reviewing court."[8]

(B) Issuing A Novel Decision in the Context of Ineffective Assistance Sets A Dangerous Precedent.

Should this court overrule *Ladow* and reverse the ineffective assistance

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7 *Licata v. State*, 305 Ga. 498, 498 (2019).

8 *Id*., at 503, n. 5, citing *Price v. State*, 269 Ga. 222 (1998).
See, *Cent. of Georgia Ry. Co. v. Yesbik*, 146 Ga. 620 (1917), Acts 1916, p. 19 ("it is manifest that a careless exercise of the power would defeat the very purpose of the institution of the Court of Appeals. ... This court, therefore, should be chary of action in respect to certiorari, and should not require by certiorari any case to be certified from the Court of Appeals for review and determination unless it involves gravity and importance. It was not intended that in every case a complaining party should have more than one right of review.")

ruling, it would effectively excuse defense lawyers from filing and fighting motions to suppress where it is possible that the existing case law supporting the motion could be overruled. That would unreasonably infringe upon the defendant's right to zealous representation. The current longstanding rule is that attorneys are not considered ineffective for failing to anticipate helpful changes in the law.

> In making litigation decisions, there is no general duty on the part of defense counsel to anticipate changes in the law. … When addressing a claim of ineffectiveness of counsel, the reasonableness of counsel's conduct is examined from counsel's perspective at the time of trial.[9]

By reversing the Court of Appeals here, this Court would abrogate that rule. The message would be that defense lawyers may forgo a meritorious motion to suppress with impunity if a Court of Appeals case supporting the motion is likely to be overruled. This would be unwise.

A reversal here would open up a world of defenses to ineffective assistance claims based on the possibility of a change in the law. Our courts would be called upon to see into the future in order to determine whether a lawyer's failure to file routine motions was, or was not, reasonably competent given the possibility of future unfriendly appellate decisions.

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9 *Perera v. State*, 295 Ga. 880, 885–86 (2014), citing *Rickman v. State*, 277 Ga. 277, 280(2)(2003)(cleaned up).

2. <u>THE COURT OF APPEALS' CONCLUSION IN *LADOW* WAS CORRECT; *DAVIS V. UNITED STATES* IS NEITHER CONTROLLING NOR PERSUASIVE</u>.

In *Wright v. State*,[10] the Court of Appeals invites comparison between the requirement of an unequivocal request for an attorney after a Miranda warning and the lesser standard in *Ladow* that an independent test must be afforded a DUI suspect who makes any statement that "reasonably could" be construed as a request for an independent test.[11] The author cited *Davis v. United States*,[12] which held that there is no duty to follow up a suspect's vague or equivocal request for an attorney after a Miranda warning has been given.

> We held in *Miranda* that a suspect is entitled to the assistance of counsel during custodial interrogation even though the Constitution does not provide for such assistance. We held in *Edwards* that if the suspect invokes the right to counsel at any time, the police must immediately cease questioning him until an attorney is present. But we are unwilling to create a third layer of prophylaxis to prevent police questioning when the suspect *might* want a lawyer. Unless the suspect actually requests an attorney, questioning may continue.[13]

Davis is inapposite for four reasons: first, the current procedures of a DUI arrest inherently require confirmation and clarification of any vague or equivocal test request; second, the implied consent warning does not ensure a knowing waiver of rights as the Miranda warning does; third, the implied consent warning

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11 338 Ga.App 216 (2016).

12 *Id*. at 226-229 (Peterson, J., concurring).

13 512 U.S. 452 (1994).
Davis v. United States, 512 U.S. 452, 462 (1994), citing *Miranda v. Arizona*, 384 U.S. 436 (1966), and *Edwards v. Arizona*, 451 U.S. 477 (1981).

does not require an understanding of the warning; and finally, in a DUI arrest, the State always gets its DUI test, whereas the police do not get their confessions once the right to counsel has been invoked.[14] GACDL urges this Honorable Court, in the interests of justice, to affirm and enhance the right of accused drivers to independent testing. An affirmative waiver of independent testing rights should be required in every case before any State chemical test may be admitted as evidence.

(A) In DUI Cases, Confirmation and Clarification of a Vague or Equivocal Independent Test Request Is Built Into The Arrest Process.

The nature of the DUI arrest process ensures clarification of any vague or equivocal request for an independent test. A "totality of the circumstances" standard is not unfair to the state in the context of a DUI arrest. This Court is offering to solve a problem that does not exist.

It is well established that the driver is entitled to both choose the type of test they want and the person they want to do the testing while the driver is in police custody.[15] In additiom, the driver has to pay for his own test. The arresting officer

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[14] Even after a driver refuses the state test, the officer may obtain a search warrant for the driver's blood. See O.C.G.A. § 40-5-67.1 (d.1).

[15] "(a) Upon the trial of any [DUI case], evidence of the amount of alcohol or drug in a person's blood, urine, breath, or other bodily substance at the alleged time, as determined by a chemical analysis of the person's blood, urine, breath, or other bodily substance shall be admissible. Where such a chemical test is made, the following provisions shall apply: … (3) The person tested may have a physician or a qualified technician, chemist, registered nurse, or other qualified person of his own choosing administer a chemical test or tests in addition to

is required to make reasonable accommodations such that the test is obtained at or near the time of arrest.[16] This makes an initially vague or equivocal response easy to resolve because the officer has the duty to reasonably help accommodate the request because the driver is in police custody.

A vague, equivocal test request will never remain so. Police are required to facilitate the testing selected by the driver, including transportation to the testing facility. A driver who makes a vague request for an independent test will have to first submit to State testing, after which the request will have to be reasonably accommodated; the driver will have to confirm what kind of test the driver wants and where the driver wants to go for the test.

While it is not required that the officer make specific inquiries, Georgia law requires that a suspect be given a "meaningful opportunity" to choose the independent testing facility.[17] If the suspect's choice is unreasonable, the officer is justified in refusing to accommodate the request; otherwise, the two must co-operate in obtaining the chosen test. Inherent in this schema is the need for some further dialogue with the driver about a request. Several factors are used to

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any administered at the direction of a law enforcement officer. The justifiable failure or inability to obtain an additional test shall not preclude the admission of evidence relating to the test or tests taken at the direction of a law enforcement officer." O.C.G.A. § 40-6-392.

16 See *State v. Metzager*, 303 Ga. App. 17, 19 (2010)(The state has the burden of showing that police made a reasonable effort to accommodate the accused's request for an independent test).

17 See *Brown v. State*, 334 Ga. App. 509 (2015).

determine the reasonableness of the driver's request, including:

> (1) availability of or access to funds or resources to pay for the requested test; (2) a protracted delay in the giving of the test if the officer complies with the accused's requests; (3) availability of police time and other resources; (4) location of [the] requested facilities, e.g., the hospital to which the accused wants to be taken is nearby but in a different jurisdiction; [and] (5) opportunity and ability of accused to make arrangements personally for the testing.[18]

Various inquiries as to the specifics of the test request must therefore take place under current law. In a DUI arrest, once an ambiguous request for a test is made, it does not create more work for the officer to confirm it; the request will always need to be clarified as to the specifics of the request. Unlike in most custodial police interrogations, the DUI suspect is already under arrest, is not going anywhere, is about to be given a state-administered test, and will be spending several hours being tested and booked.[19]

In contrast, once a Miranda warning has been read, there is no such built-in clarification: if a lawyer is clearly requested, questioning stops. Recognition of this reality played a role in the Supreme Court's ruling in *Davis*:

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19 *Id.* at 511.

"(A) A person charged with violating Code Section 40-6-391 whose alcohol concentration at the time of arrest, as determined by any method authorized by law, violates that provided in paragraph (5) of subsection (a) of Code Section 40-6-391 may be detained for a period of time up to six hours after booking and prior to being released on bail or on recognizance;" O.C.G.A. § 17-6-1(b)(2)(A).

> When the officers conducting the questioning reasonably do not know whether or not the suspect wants a lawyer, a rule requiring the immediate cessation of questioning would transform the Miranda safeguards into wholly irrational obstacles to legitimate police investigative activity, because it would needlessly prevent the police from questioning a suspect in the absence of counsel even if the suspect did not wish to have a lawyer present.[20]

Since a vague or equivocal test request will always be confirmed, there is no need to require that it be crystal clear from the onset. Police evidence collection does not cease after a DUI independent test request, and the current requirement of reasonable accommodation guarantees that there will ultimately be no misunderstanding. A totality of the circumstances approach is already used to determine whether police were justified in failing to accommodate a test; the same legal standard should apply to a driver's "failure" to clearly express the desire for a test.

Davis v. United States is also distinguishable because, in contrast to the Miranda warning, the implied consent warning does not ask a straight question about independent testing designed to get a straight answer. Nor does it seek confirmation of understanding of the right to an independent test.

[20] *Davis*, supra, 512 U.S. 452 at 460 (cleaned up).

(B) An Affirmative Response to The Implied Consent Warning Does Not Sufficiently Establish A Driver's Knowing Waiver of The Right to An Independent Test or An Understanding of The Warning.

Davis held that it was reasonable to require a straight answer after a Miranda warning because that warning adequately sets forth the suspect's rights and options and confirms the subject's understanding of those rights. It is fair to imply a knowing waiver from a suspect's agreement to talk to police post-advisement. The same is not true of the implied consent warning in the DUI context.

The implied consent warning puts the DUI suspect on notice of his right to an independent test, but that is where the similarity ends between it and the Miranda warning. It does not ask a direct question about the right to a test and does not include a confirmation of understanding of that right or any other rights. The implied consent warning read to Appellant was the proper warning in effect at the time:

> 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 blood under the implied consent law [the officer designated the blood test]?[21]

It has been noted by a member of this Honorable Court that the implied consent warning never seeks a direct answer as to whether the suspect wants an independent test:

> We note that [each of the three implied consent warnings] ends with the question, "Will you submit to the state administered chemical tests of your ([officer] designate[s] which tests) under the implied consent law?" None, however, asks the accused whether she wants an additional, independent chemical test. And none specifies to the accused any requirements for requesting that test-linguistically, temporally, or otherwise. We do not believe that the legislature intended the notices to set up pitfalls for an accused who desires to have an additional, independent chemical test administered.[22]

The Miranda warning, in contrast, seeks a direct answer as to invoking the Sixth Amendment right to counsel after seeking confirmation of understanding of the enumerated rights. That is why the court in *Davis* found it to be adequate to ensure a knowing waiver:

> "You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to an attorney. If you cannot afford an attorney, one will be provided for you. Do you understand the rights I have just read to you? With these rights in mind, do you wish to speak to me?"

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22 Former O.C.G.A. § 40-5-67.1.
Ladow, supra, 256 Ga. App. at 728–29.

Davis held that a subject's agreement to speak to law enforcement without a lawyer present was enough to ensure a knowing waiver of Sixth Amendment rights because the Miranda warning is comprehensive in laying out the subject's options and ensuring an understanding of the right to an attorney. A DUI suspect is directly asked only if she will consent to testing by the State. The DUI suspect is never asked whether she understands the rights of which he was just informed. The implied consent warning is much more complicated and lengthy.

With respect to independent testing, an affirmative response to the implied consent warning is meaningless. It says nothing about (a) the driver's understanding of the independent test rights, or (b) whether the driver wishes to assert those rights. Where the court in *Davis* could reasonably draw the line and say that no further "prophylaxis" was needed to ensure fair play other than the existing Miranda warning, the same is not true of the implied consent warning. A knowing waiver cannot be implied from an agreement to submit to testing. This is particularly true in this case where the officer demanded a "yes" or "no" so both options omitted the option of independent testing.

Comparing the Miranda warning to implied consent is comparing apples to oranges. Our implied consent warning is now under construction and has always

been a mess.[23] It has been ruled unconstitutionally vague, misleading, and unnecessarily complex over the years.[24] It is also given under extremely stressful conditions. Police interrogations, in contrast, are routinely held *prior* to the suspect's arrest, in a quiet, secluded setting. Implied consent warnings must be read *at the time of arrest*, usually outdoors, usually in the dark, and often perilously close to noisy traffic. A Miranda warning can be ruled invalid if the subject is intoxicated.[25] An implied consent warning is always given at a time when the driver is suspected to be intoxicated. The officer cannot wait for the suspect to become completely sober or else the alcohol will dissipate, rendering any test useless as evidence.

There are many reasons to give the suspected DUI driver the benefit of the doubt when there is a vague or equivocal test request. Among the best reasons is that it serves the ends of justice while in no way interfering with DUI prosecutions. Confirming the accuracy or proving the inaccuracy of the State test should be embraced by all because it ensures that justice will be determined by accurate

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24 See, *Elliott v. State*, 305 Ga. 179 (2019), *State v. Awad*, 357 Ga. App. 255 (2020). See, *State v. Causey*, 215 Ga. App. 85 (1994), *Elliott v. State*, 305 Ga. 179 (2019).

25 See *Clay v. State*, 290 Ga. 822, 827–28(1)(B) (2012) (defendant's statements to police were not voluntary based on testimony that when defendant made his first statement to officer while in the hospital he was severely intoxicated and could not appreciate his situation); *State v. Folsom*, 286 Ga. 105, 111 (2009) (defendant's lucidity and ability to comprehend questions were factors in determining whether a defendant's statement was rendered involuntary); *State v. Bowman*, 337 Ga. App. 313 (2016)(defendant's consent to DUI blood test invalid due to intoxication).

scientific testing.

(C) The State's Interest in Law Enforcement Is Unaffected by The Rule in Ladow *Requiring That Vague Test Requests Be Honored.*

The Court of Appeals, in *Wright v. State*,[26] questioned the need for a rule requiring police to honor vague or equivocal independent test requests, where, on the other hand, vague or equivocal requests for counsel after a Miranda warning need not be honored by police. After all, the right to counsel is enshrined in the Constitution; it is not a creature of statute like the right to an independent test.

> The "reasonably could" standard requires law enforcement to make difficult judgment calls on the spot, not only about their interpretation of a defendant's statements, but also about how someone else might interpret those statements differently. The Supreme Court of the United States identified similar concerns in determining that defendants must make clear, unequivocal requests for counsel to invoke their Sixth Amendment right to counsel. Requiring an unequivocal request for an independent test would serve the same purpose.[27]

The rule with respect to Miranda warnings is designed to prevent an unfair loss of police evidence under circumstances where it is reasonable to require a straight "yes" or "no" answer from the suspect brought in for questioning. This Court has cited *Davis* as holding that the *Edwards* rule, allowing police to continue interrogation after a vague or equivocal response to a Miranda warning "provides a

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27 338 Ga. App. 216 (2016).
Wright, 338 Ga. App. at 228 (cleaned up).

bright line that can be applied by officers in the real world of investigation and interrogation without unduly hampering the gathering of information."[28]

In doing so, this Court recognized that once questioning a suspect without an attorney present ceases, there is rarely any attempt made to interview the subject with counsel present. The danger in giving the subject the benefit of the doubt is that the evidence will be lost once the right to remain silent is inevitably invoked on advice of counsel. The Supreme Court, wrote this court in *Green*, is "unwilling ... to prevent police questioning when the suspect *might* want a lawyer."[29]

In a Miranda situation, giving the suspect the benefit of the doubt about an attorney request means the police cannot conduct the interview — a decisive and dramatic difference between Miranda situations and DUI arrests. The State is *always* entitled to obtain its chemical test before the driver may obtain his own test.[30] Leaving the *Ladow* rule intact and requiring police to honor vague independent test requests places no burden on DUI prosecutions or restriction on getting the State test. The State's evidence is never lost, so it is reasonable to give drivers the benefit of the doubt. DUI prosecutions are not prejudiced by the *Ladow* rule. The officers simply need to be trained to confirm or dispel an ambiguous request by a driver.

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29 *Green v. State*, 291 Ga. 287, 292 (2012).
Id.

30 See O.C.G.A. § 40-5-67.1

There is no extra burden on police under *Ladow,* either. When an arrested driver makes a statement that "reasonably could" be construed as an independent test request, the officer need only make a mental note of it and proceed unabated. After that driver completes the State test, only then will the officer have to be determine what kind of test the driver wants, where the driver wants to get it, and whether the driver has the funds to pay for it. There is no additional burden on law enforcement to do anything they are not already required to do in every DUI case with a test except to clarify a potentially ambiguous request. In every situation, the driver will be with either the arresting officer or an officer charged with conducting the State test for 30 minutes to an hour after arrest. Whenever a vague or equivocal independent test request is made, additional time will be spent taking the driver to the police station and administering the state test, giving the driver an opportunity to relax, reflect, and make a reasoned decision.

The only difference reversing *Ladow* will make is that there will be more potential for abuse. Police do not like spending the extra time with DUI suspects necessary to obtaining an independent test. There is already a lot of paperwork involved in arresting and testing a DUI suspect. The temptation is to interpret any vague test request as a non-request and skip the whole independent test process. When officers demand a "yes" or "no" answer like in this case, it lowers the number of requests for independent testing. Reversing *Ladow* would require a

clear, affirmative response to an advisement that does not seek such a response. It would require a "yes" or "no" answer to a question that need never be asked ("do you want to get your own blood alcohol test?"), and which officers have absolutely no incentive to ask.

Whether officers like it or not, however, it is the law that drivers are entitled to their own independent tests, within reason. The State should not be arguing to this Court that the law is an inconvenience for police officers. Independent testing ensures confidence in the justice system and the State should embrace more testing. In addition, the State needs to address its concerns to the General Assembly.

Given our vague, equivocal implied consent warning, and the minimal burden on the State, more should be done to encourage drivers to exercise their right to a private test. Police should have to get an unequivocal *denial* of independent testing, on the record, before assuming a waiver of important rights.

(D) This Court Should Reaffirm The Holding In Ladow *And Expand It By Requiring An Affirmative Waiver Of The Right To Independent Testing In All Cases.*

The right to an independent test is granted by statute and not the Constitution. However, once a right has been granted by statute, there must be adequate procedural safeguards in place to make it effective. The current

procedures for a DUI arrest do not include any procedural safeguards for the right to an independent test, except that, once invoked, it must be reasonably accommodated. This should change.

In every DUI case, there already exists an opportunity to obtain an affirmative waiver of the right to an independent test in a quiet, indoor environment after the stress of arrest subsides. Police have recording equipment and routinely have the arrestee complete paperwork as part of booking. It would place no additional burden on law enforcement to gather written or video proof of an affirmative waiver if rights in every case.

The right to an independent test is substantial and important even if it is a statutory right.[31] Waiving the right is a big deal. A blood alcohol test is the single most decisive piece of evidence on a DUI "per se" case, which requires proof of a blood alcohol concentration of over 0.08% grams within three hours of driving. The best way to fight a test result is with comparable proof exonerating the driver. There is no other time to obtain an effective independent test except within three hours of driving. After that, it is irrelevant due to the rapid dissipation of alcohol from the blood.

[31] "A defendant's right to an independent test, a right created by § 40–6–392(a)(3), is not one of constitutional dimension but a 'matter of grace' bestowed by the Georgia legislature. Therefore, while a DUI defendant may not be deprived of his right to an independent test without appropriate procedural safeguards, the right itself is defined by and conditioned upon the legislature's choice of procedures for its application." *Padidham v. State*, 291 Ga. 99, 101 (2012)(cleaned up).

Without an independent test, the state's test is hard to beat. One must hire experts to extrapolate backwards and investigate the driver's unique metabolism.[32] Even then, if admissible, such proof rarely rises to the level necessary to impeach a government-sanctioned test.

In general, all rights can be waived so long as the waiver is knowing and voluntary.[33] It is not unusual or unreasonable to require an affirmative waiver of a 'mere statutory' right in criminal cases in order to ensure the validity of a waiver in a given context. Our criminal procedure does so frequently. Grand jury waivers must be in writing under O.C.G.A. 17-7-70.[34] A written waiver of first appearance hearing lacking sufficient gravity was rejected in *Capestany v. State:*[35]

> The [first appearance waiver] form does not purport to inform the arrestee of the various aspects of the right to a first appearance hearing or the consequences of relinquishing that right. Furthermore, the form does not specify that the waiver is knowing and voluntary. The

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32 As a defense tool, the "Widmark formula" reestimates a defendant's blood alcohol content in an attempt to negate the statutory inferences that arise under O.C.G.A. § 40–6–392(b) when chemical testing of a defendant's blood, breath, or urine results in a charge for driving under the influence with an excessive blood alcohol content per O.C.G.A. § 40–6–391(a)(5)." *Evans v. State*, 253 Ga. App. 71, 75 (2001).

33 *Rose v. State*, 128 Ga.App. 370, 371 (1973), cited in *Mingo v. State*, 133 Ga. App. 385, 387 (1974)("We must recognize that generally all rights can be waived. Code s 105-106. This may be done by the accused where such is 'done voluntarily, knowingly and intelligently.'"); see also O.C.G.A. § 1-3-7.

34 "In all felony cases, other than cases involving capital felonies ... the district attorney shall have authority to prefer accusations, and such defendants shall be tried on such accusations, provided that defendants going to trial under such accusations shall, in writing, waive indictment by a grand jury." O.C.G.A. § 17-7-70.

35 289 Ga. App. 47 (2007).

> officers who presented the waiver forms for signature did not testify at the bail hearing regarding the circumstances of the purported waiver. Thus, the record contains no evidence that the appellants' waiver of their due process right to a first appearance hearing was knowing and voluntary.[36]

The State has the burden of proving an alleged waiver of the statutory speedy trial right conferred by O.C.G.A. § 17-7-170.[37] The right to a twelve-person jury may only be waived in writing.[38] Extradition proceedings can only be waived in writing after a judicial colloquy placing the accused on notice of her rights.[39] A defendant is entitled to a hearing on restitution unless affirmatively waived.[40] The right to appeal, a creature of statute, may only be waived in writing or after a colloquy between the court and the defendant:

> First, a signed [appeal] waiver may indicate that the defendant understands the right he is waiving. Second, and more important, detailed questioning of the defendant by the trial court that reveals that he was informed of his right to appeal and that he voluntarily waived that right is sufficient to show the existence of a valid, enforceable waiver.[41]

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36 289 Ga. App. at 49–50.

37 *Twiggs v. State*, 315 Ga. App. 191, 199 (2012); *Thornton v. State*, 301 Ga. App. 784, 788 (2009).

38 See O.C.G.A. § 9-11-47.

39 See O.C.G.A. § 17-13-46 ("[B]efore the waiver shall be executed or subscribed by the person it shall be the duty of the judge to inform the person of his rights to the issuance or service of a warrant of extradition and to obtain a writ of habeas corpus as provided in Code Section 17-13-30.")

40 See *Parker v. State*, 320 Ga. App. 319, 321 (2013).

41 *Brant v. State*, 306 Ga. 235, 237 (2019).

Each of the foregoing waivers involves a 'mere' statutory right. A driver's right to preserve dissipating scientific evidence needed to confront his accusers at trial is of greater or equal dignity. The required procedural safeguards surrounding a waiver vary with the circumstances but must be adequate. In the context of a DUI arrest, the circumstances allow for a detailed written or videotaped waiver after the stress of the roadside arrest has passed.

The police should be trained to ask about an independent test and accommodate the driver's test until he affirmatively declines it. That would be the better rule. If it should result in more frequent exercise of the driver's rights, then accused drivers will receive more fair trials based on reliable scientific evidence. Georgia drivers will enjoy sturdy confrontation rights at trial. Drivers will likely be encouraged to submit to chemical testing knowing that an independent test is readily available. DUI trials will center less on antiquated, quasi-scientific coordination, spelling, and "odor" tests.[42]

Conclusion

GACDL urges this Honorable Court to dismiss the State's petition for certiorari as improvidently granted. The decision below was sound and should only be reviewed for adherence to *Strickland v. Washington* and its progeny. It is unwise to address the validity of *Ladow v. State* in this context since its validity did

[42] See *Hawkins v. State*, 223 Ga. App. 34 (1996).

not factor into the lower court decision in this case.

In the alternative, GACDL urges this Honorable Court to affirm the decision of the Court of Appeals. There is no good reason to overrule *Ladow* and every reason to affirm and strengthen it. The invited comparison to a waiver of Sixth Amendment rights prior to a police interrogation is inapt: DUIs are different. The hardline rule of *Davis v. United States* does not make sense in this context where the law already requires clarification of the driver's request and elaboration thereon. *Ladow* was decided correctly and encouraging its protection and expansion is the best option. It serves the interests of justice while placing no new burden on prosecutors or restrictions on law enforcement.

RESPECTFULLY SUBMITTED March 29, 2021.

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CERTIFICATE OF SERVICE

This is to certify that I served all interested parties with a copy of this Amicus brief via USPS First-Class Mail as follows:

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EXHIBIT A

SUPREME COURT OF GEORGIA
Case No. S20G1339

February 16, 2021

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed.

THE STATE v. KEMAR HENRY.

Your request for an extension of time to file the brief of appellee in the above case is granted until March 10, 2021.

A copy of this order **MUST** be attached as an exhibit to the document for which the appellee received this extension.

All the Justices concur.

SUPREME COURT OF THE STATE OF GEORGIA
Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

, Clerk

EXHIBIT B

SUPREME COURT OF GEORGIA
Case No. S20G1339

March 10, 2021

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed.

THE STATE v. KEMAR HENRY.

Your request for an extension of time to file the brief of appellee in the above case is granted until March 29, 2021.

A copy of this order **MUST** be attached as an exhibit to the document for which the appellee received this extension.

All the Justices concur.

SUPREME COURT OF THE STATE OF GEORGIA
Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

, Clerk