CASE No. S22G1050

IN THE

Supreme Court of Georgia

STATE OF GEORGIA

PATRICK MIDDLETON,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

Brief of Georgia Association of Criminal Defense Lawyers as *Amicus Curiae*

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INTRODUCTION

After granting certiorari in this case on February 7, 2023, the next day this Court invited the Prosecuting Attorneys' Council of Georgia, the Attorney-General's Office, and the Georgia Association of Criminal Defense Lawyers (GACDL) to express their views as *amici* on the Question Presented:

> Did the trial court err in granting petitioner's motion to suppress evidence obtained during a traffic stop on the basis that the officer was not engaged in the lawful discharge of her official duties at the time of the search and subsequent arrest?

As detailed below, GACDL acknowledges the general trend in other jurisdictions

that an extra-territorial arrest in violation of state statutes does not automatically require exclusion under the Fourth Amendment. That said, GACDL takes this opportunity to recommend this Court dismiss this case as improvidently granted. Should this Court proceed to rule on the merits, GACDL would urge the Court to address whether a municipal officer's extraterritorial seizure, search, and arrest plays any role in the exclusionary analysis, especially when this Court has already held the officer had no authority for her actions. Additionally, GACDL raises several concerns about how a holding against exclusion can cause confusion and conflict throughout Georgia law, and the multiple thorny issues that would arise from it.

AMICUS AND ITS INTEREST

A frequent friend of this Court, GACDL is a domestic nonprofit corporation whose members routinely exercise the only office of the Court dignified in the Bill of Rights: defending the life and liberty of the accused against the powers of organized society and ensuring the processes of law that they are due. GACDL's membership includes both public defenders and private counsel. Together, they stand united in their dedication to the rule of law, the fair and impartial administration of criminal justice, the improvement of our adversarial system, the reasoned and informed advancement of criminal jurisprudence and procedure, and the preservation and fulfillment of our great constitutional heritage.

STATEMENT OF THE CASE[1]

Less than a month before COVID-19 brought the world crashing to a halt, Officer Amanda Graw with the Kingsland Police Department pulled over Petitioner Patrick Middleton on I-95 after he allegedly failed to maintain his lane of travel. Approaching the vehicle, Officer Graw smelled the odor of raw cannabis while speaking to Middleton. Based on that odor, Officer Graw ordered Middleton out of his car, patted him down,[2] then searched the car, subsequently discovering several pills of alprazolam, a Schedule IV controlled substance, as well as a grinder commonly used for smoking cannabis. From that discovery, Officer Graw arrested Middleton for Violation of the Georgia Controlled Substances Act and Possession of Drug-Related Objects.

One problem: Officer Graw lacked authority to do any of it. As stipulated to by the State at the motion to suppress hearing, Officer Graw observed the alleged traffic violation outside the jurisdiction of Kingsland. The State sought to justify Officer Graw's extraterritorial seizure by pointing to her 2013 deputization by the Camden County Sheriff's Office, but on cross-examination, Officer Graw admitted she had never been paid by the Sheriff's Office, nor even worked a shift for that

[1] Unless otherwise indicated, all facts arise from the Trial Court's order.

[2] But see *Arizona v. Johnson*, 555 U.S. 323, 327 (2009) ("To justify a patdown of the driver or a passenger during a traffic stop, . . . the police must harbor reasonable suspicion that the person subjected to the frisk is armed and dangerous.")

agency.[3] Further, Officer Graw admitted that she never identified herself as a deputy sheriff at any time during the stop, instead holding herself out as a Kingsland city police officer, in a Kingsland police cruiser and a Kingsland police uniform.[4] After the hearing, the trial court granted Middleton's motion to suppress, finding the lack of jurisdiction rendered the entire stop, search, and arrest illegal under this Court's decision in *Zilke v. State*.[5]

Reviewing the ruling on appeal by the State, the Court of Appeals reversed. Although the trial court was "not persuaded" that Officer Graw's claimed deputization in light of the State's failure "to introduce evidence as to the scope and/or content" of it, the Court of Appeals disagreed since "Graw explicitly testified—and without contradiction—that, having been deputized, she was authorized to make arrests within Camden County."[6] Crediting that testimony, the lower court reversed, since deputy sheriffs "have the general duty to enforce the law and maintain the peace" without any jurisdictional limit like municipal officers.[7] After petitioning for review, this Court granted certiorari on February 7, 2023.

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[3] Motion Hearing Transcript ("M.T.") at 10.

[4] Ibid.

[5] *Zilke v. State*, 299 Ga. 232 (2016).

[6] *State v. Middleton*, 363 Ga. App. 851, 854 (2022), cert. granted, S22G1050 (Feb. 7, 2023).

[7] *Id.* at 855 (citation omitted); see O.C.G.A. §40-13-30 (limiting municipal officers' arrest powers to the city limits).

VIEWS OF THE AMICUS

Almost a century ago, Chief Justice Taft talked of how "those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official, *authorized to search*, probable cause for believing" a crime occurred.[8] Such halcyon days of yore no longer exist in the modern era: Police no longer need the textual probable cause required to seize someone on the roadside, but the atextual, "original-meaning-is-irrelevant, good-policy-is-constitutional-law" tier of reasonable suspicion.[9] Once viewed as "belong[ing] in the catalog of indispensable freedoms" and as a permanent bastion against "one of the first and most effective weapons in the arsenal of every government,"[10] today the Fourth Amendment has been belittled into only a determination of reasonableness. This case stands on the precipice of further eroding what little protections remain.

Two views exist in this case: Either the Court of Appeals correctly credited Officer Graw's testimony, or it overstepped its limited role by making its own credibility determinations. If this Court agrees with the former, GACDL respectfully

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[8] *Carroll v. United States*, 267 U.S. 132, 154 (1925) (emphasis supplied).

[9] *Minnesota v. Dickerson*, 508 U.S. 366, 382 (1993) (Scalia, J., concurring) (criticizing *Terry v. Ohio*, 392 U.S. 1 (1968)); see *Navarette v. California*, 572 U.S. 393, 396-97 (2014) (traffic stops require reasonable suspicion only).

[10] *Brinegar v. United States*, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting).

submits this case should be dismissed as improvidently granted. Any other ruling would serve only as an unconstitutional advisory opinion. Under the latter, however, then Officer Graw's illegal conduct should play a role in determining the reasonableness of the stop. Accordingly, GACDL offers its views to this Court on whether Officer Graw's actions warrant exclusion.

1. If the Lower Court Correctly Found the Trial Court Erred in Discounting the Sheriff's Office Deputization, this Case Should be Dismissed as Improvidently Granted.

If this Court agrees with the Court of Appeals that the trial court's rejection of Officer Graw's deputization was "clearly erroneous" entitled to "no deference,"[11] then this petition should be dismissed as improvidently granted. This Court granted cert. to consider whether O.C.G.A. §40-13-30's statutory jurisdictional limit triggers exclusion under O.C.G.A. §17-5-30 where the officer "was not engaged in the lawful discharge of her official duties at the time of the search and subsequent arrest[.]"[12] If the lower court correctly ruled that the trial court erred in not crediting Officer Graw's testimony, then Officer Graw's sheriff deputization gave her the necessary arrest powers. Even if this Court were to rule in Middleton's favor on the Question Presented, then, it would not change the case's outcome: Officer Graw had the legal authority to detain Middleton. Thus, to rule on this petition would serve only to issue

[11] *Middleton*, 363 Ga. App. at 854.
[12] *Middleton v. State*, S22G1050 (Feb. 7, 2023).

an advisory opinion, which this Court cannot do.[13]

This assumes, of course, that the *Middleton* Court was correct in giving credence to Officer Graw's testimony about her deputization.[14] By discussing how it was "not persuaded" by Officer Graw's testimony about her cross-deputization, "especially where the State has failed to introduce evidence as to the scope and/or content of said deputization," the trial court could have made a credibility determination, declining to believe Officer Graw's bare assertions.[15] Viewed in that light, the *Middleton* Court patently overstepped its limited role on review, something which this Court has had to remind the Court of Appeals of multiple times in the past.[16] If the *Middleton* Court ran afoul in crediting the Officer's testimony where

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[13] See *Sons of Confederate Veterans v. Henry Cnty. Bd. of Comm'rs*, 315 Ga. 39, 51-52 (2022). Cf. *Chrysler Group, LLC v. Walden*, 303 Ga. 358, 372 (2018) (Peterson, J., concurring specially in part) (discussing how "the cardinal principle of judicial restraint—if it is not necessary to decide more, it is necessary not to decide more—counsels us to go no further.") (citation and quotation marks omitted).

[14] But see *State v. Austin*, 310 Ga. App. 814, 822-23 (2011) (Mikell, J., concurring specially) (criticizing the notion that testimonial evidence can ever be uncontested because of the inherent credibility determinations to which fact-finders are entitled).

[15] See O.C.G.A. §17-5-30(b) (State's burden to prove search/seizure lawful); *Awad v. State*, 313 Ga. 99, 102 (2022) ("The State has the burden of proving that evidence challenged in a motion to suppress is admissible.") (collecting authorities). See also *Caffee v. State*, 303 Ga. 557, 559 (2018) ("The trial court was not required to accept [Officer Graw's] testimony on these issues, even though it was not contradicted."); *Williams v. State*, 301 Ga. 60, 61 (2017) ("The Court of Appeals erred by assuming that the trial court must have accepted all of [Officer Graw's] testimony as true, and then, based on that erroneous assumption, going on to make its own additional factual findings that were not contained in the trial court's order.")

[16] See, e.g., *Caffee*, 303 Ga. at 559 ("We have repeatedly said that on appeal

the trial court did not, then this Court's Question may indeed result in a holding in Middleton's favor.

2. This Court should Clarify whether a Peace Officer Acting Outside their Lawful Jurisdiction can Nevertheless Effect a "Reasonable" Stop.

At first glance, this case is easily disposed of. Probable cause existed to arrest Middleton, and that's all the Fourth Amendment cares about.[17] Closer attention, however, shows that this case deals with power itself: Power to stop someone, remove them from their car, search it top to bottom, then arrest them.

(a) Virginia v. Moore *does not control.*

Right off the bat, let's talk about then-Justice Nahmias's concurrence in *Zilke*, specifically his discussion of *Virginia v. Moore*.[18] As Justice Nahmias correctly pointed out, the U.S. Supreme Court has held that a warrantless arrest for crimes committed within the officer's presence can be reasonable for Fourth Amendment purposes, "even if the arrest was in violation of a state arrest statute[.]"[19] However, *Moore* addressed a procedural question, asking if a state statute requiring citation in

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from the grant or denial of a motion to suppress, appellate courts must 'focus on the facts found by the trial court *in its order*, as the trial court sits as the trier of fact.'") (emphasis in original; quoting *Hughes v. State*, 296 Ga. 744, 746 (2015)).

[17] See *Virginia v. Moore*, 553 U.S. 164, 179 (2008).

[18] *Zilke v. State*, 299 Ga. 232, 237 (2012) (Nahmias, J., concurring) (citing *Moore*, supra).

[19] Ibid. For a comprehensive overview of positions, see *State v. Keller*, 396 P.3d 917, 923-24 (Or. 2017).

lieu of arrest rendered a person's arrest on a citable offense unreasonable.[20] *Moore* sought to clarify a prior holding, *Knowles v. Iowa*,[21] which limited officers' search powers on citable offenses. Neither case involved a stop/arrest by someone acting under color of law to illegally seize someone driving down the road. If Officer Graw would have arrested Middleton within Kingsland city limits for Failure to Maintain Lane, then discovered the alprazolam in an inventory search, *Moore* would sit on all fours.[22] If she would have radioed the call in, rather than taking the law into her own hands, we would have nothing to discuss.

But she did not. Instead, she falsely held herself out as a law enforcement officer, despite not being within her jurisdiction. She seized Middleton for an "alleged traffic violation", patted him down without justification, then searched his vehicle. Then she arrested Middleton, *again* without authority, and brought him to jail. So while *Moore* may look appealing at first glance, its application does not fit squarely with this case. Put differently, *Moore* dealt with procedural concerns; this case deals with jurisdiction, power itself.

(b) A search or seizure based on a false display of authority is not reasonable.

Though it may shock its Framers, current Fourth Amendment doctrine

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[20] *Moore*, 553 U.S. at 177-78.

[21] *Knowles v. Iowa*, 525 U.S. 113 (1998).

[22] See O.C.G.A. §17-4-23(a) (authorizing officers to issue citations in lieu of custodial arrest on motor vehicle crimes).

squarely holds that its touchstone is "reasonableness."[23] Where an officer acts unreasonably under the Fourth Amendment, exclusion serves to deter such misdeeds.[24] So the question then turns on whether it is reasonable under the Fourth Amendment for someone to seize a person wholly without authority through falsely representing the power to do so. And while not directly on point, GACDL would suggest this Court consider *Bumper v. North Carolina* as an analogue.[25]

In *Bumper*, officers searched the home where the defendant lived with his grandmother, claiming they had a search warrant to do so.[26] The grandmother let the officers into her home based on that claimed authority, though no search warrant existed. The *Bumper* Court held that the State could not claim the grandmother consented to a search of her home because mere acquiescence to (supposed) lawful authority cannot provide consent.[27] Instead, it recognized that "[w]hen a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search. The situation is instinct

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[23] *Riley v. California*, 573 U.S. 373, 381 (2014) (citation omitted); but see William Rawle, *A View of the Constitution of the United States of America* 127 (Philip Nicklin 2d ed. 1829) (describing how "unreasonable" served "to indicate that the sanction of a legal warrant is to be obtained, before searches or seizures are made.")

[24] See *Lofton v. State*, 310 Ga. 770, 781-82 (2021), disapproved of on other grounds, *Outlaw v. State*, 311 Ga. 396 (2021).

[25] *Bumper v. North Carolina*, 391 U.S. 543 (1968).

[26] *Id.* at 546-47.

[27] *Id.* at 548-49; accord *State v. Turner*, 304 Ga. 356, 359 (2018); *State v. Tye*, 276 Ga. 559, 562 (2003).

with coercion—albeit colorably lawful coercion. Where there is coercion there cannot be consent."[28]

Here, though we deal not with consent, but with the power to effect a seizure in the first place, *Bumper*'s guidance remains relevant. Few people would pull over if a random person started flashing their lights at them on a highway; fewer still would stand back and let the private citizen search their car from top to bottom. But where the private citizen drives a marked patrol car, wears a uniform, carries a badge and gun, and turns on their blue lights, significantly fewer people would think they could keep going about their business. By representing herself as law enforcement, Officer Graw effectively told Middleton he had no right to refuse to pull over, no right to refuse to step out of the vehicle, and no right to refuse Officer Graw's scouring through his car. Graw's misconduct left Middleton with the choice of either "quietly to submit to whatever the officers undertake or to resist at risk of arrest or immediate violence."[29]

(c) Finding Officer Graw's actions reasonable will cause ripple effects throughout Georgia law.

Should this Court find the trial court did err in suppressing evidence in this case based on Officer Graw's lack of jurisdiction, almost immediate consequences will erupt. Everything from officer safety concerns to consequences in the courtroom

[28] *Bumper*, 391 U.S. at 550.
[29] *Brinegar*, 338 U.S. at 182 (Jackson, J., dissenting).

will flow from allowing extraterritorial arrests by municipal officers.

Start with officer safety, a paramount concern in every traffic stop.[30] Because of the "inordinate risks confronting an officer as he approaches a person seated in an automobile,"[31] officers receive a number of reasonable accommodations under Fourth Amendment law, like removing driver and passenger from the vehicle.[32] By illegally detaining Middleton outside her jurisdiction, Officer Graw intentionally created a risk she had no authority to make.[33] To hold that a municipal officer who makes an arrest outside of their jurisdiction is nevertheless entitled to the fruits of their illegal discovery would serve as a blithe handwaving that exclusion was designed to prohibit.[34] Only by holding Officer Graw's actions—in flagrant disregard of Georgia constitutional, statutory, and decisional law[35]—unreasonable

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[30] *State v. Allen*, 298 Ga. 1, 7 n.6 (2015).

[31] *Pennsylvania v. Mimms*, 434 U.S. 106, 110 (1977) (per curiam) (citation and quotation marks omitted); accord *Allen*, 298 Ga. at 7 n.6.

[32] *Mimms*, 434 U.S. at 111 (drivers); *Maryland v. Wilson*, 519 U.S. 408, 414-15 (1997) (passengers).

[33] Cf. *State v. Peterson*, 273 Ga. 657, 660 (2001) (recognizing proposition that "police may not unnecessarily or unreasonably create an exigency and then take advantage of that exigency" as "imminently sensible," for "[t]his court would be remiss in its duty if it permitted artificially created exigent circumstances.") (citation and quotation marks omitted).

[34] See *Herring v. United States*, 555 U.S. 135, 143 (2009) (assessing "flagrancy of the police misconduct constitutes an important step in the calculus of applying the exclusionary rule.") (citation and quotation marks omitted).

[35] See Ga. Const. 1983, Art. IX, Sec. II, Para. III(b); O.C.G.A. §40-13-30; *Zilke*, supra.

can this Court avoid that "most deplorable paradox" of erroneous admission.[36]

Turning to the courtroom, problems arise at a trial in this and other similar cases. We already know that if Middleton had fought Officer Graw on the roadside, it would not be obstruction.[37] If Middleton had fled from Officer Graw in his car, no Fleeing charges could be leveled against him.[38] Moreover, Officer Graw falsely held "herself out as a peace officer" with the intent to mislead Middleton into thinking she had the authority to seize him; did she not commit felony Impersonating an Officer?[39] Officer Graw both "detain[ed]" and "arrest[ed]" Middleton "without legal authority," in clear violation of his personal liberty; will Officer Graw stand trial for False Imprisonment?[40] If the prosecution declines to pursue these charges, can Middleton cross-examine Officer Graw about it at trial to attack her credibility?[41]

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[36] *Winston v. State*, 79 Ga. App. 711, 714 (1949); accord *id.* at 715 ("[This] affords a poor protection to the citizen for the outlawry of his public servants.")

[37] See *Bacon v. State*, 347 Ga. App. 689 (2018) (holding municipal officer outside jurisdiction not discharging official duties and thus, no obstruction).

[38] See O.C.G.A. 40-6-395(a) (requiring as element of Fleeing that accused either "flee or attempt to elude a pursuing. . .police officer"); *Bacon*, 347 Ga. App. at 692 ("[I]f [s]he was acting as a private person effecting a citizen's arrest, as opposed to acting as a law enforcement officer, [s]he was without certain authority otherwise conferred only upon law enforcement officers.")

[39] O.C.G.A. §16-10-23.

[40] O.C.G.A. §16-8-41(a).

[41] Cf. *Woods v. State*, 312 Ga. 405, 412 (2021) (discussing how witness's partiality "may be exposed by proof that [s]he hopes to benefit in related cases from h[er] cooperation with the prosecution" in the case at bar because "[s]uch partiality is subject to exploration at trial, and is always relevant as discrediting the witness and affecting the weight of h[er] testimony.") (citation omitted).

Finally, deciding this issue now will offer little guidance to Georgians. That Officer Graw pulled over Middleton *could* have been an open question back under Georgia's old citizen's arrest statutes.[42] But with the General Assembly's repeal of those statutes in 2021 and subsequent replacement with a much more narrowly tailored version which does not apply to traffic stops,[43] this Court's decision would proffer scant illumination for municipal officers. No longer will a municipal officer be acting with even a scintilla of authority when they arrest extraterritorially. Since "[i]gnorance of the law excuses no one,"[44] municipal officers will risk serious felony charges should they continue to violate Georgia law.[45] Yet if they know that any evidence so obtained will nevertheless be admissible in a criminal prosecution, expect exponential growth in extraterritorial arrests.[46]

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[42] See O.C.G.A. §§17-4-60 et seq., repealed by Ga. L. 2021, Act 264, §2. But see *Zilke*, 299 Ga. at 235 n.4 (declining to address "whether a POST-certified police officer who is in uniform, who is driving a marked vehicle outside of [her] jurisdiction, and who uses blue lights and/or sirens to effect a stop may be validly characterized as a private person" under Georgia's old private-person arrest statute).

[43] See O.C.G.A. §17-4-80(b); see also O.C.G.A. §17-4-20(a)(2) (limiting extra-jurisdictional arrest powers where provided by law).

[44] O.C.G.A. §1-3-6.

[45] But see *State v. Bunn*, 288 Ga. 20, 25 n.10 (2010) (Benham, J., dissenting).

[46] Cf. *Brinegar*, 338 U.S. at 182 (Jackson, J., dissenting) ("We must remember that the extent of any privilege of search and seizure without warrant which we sustain, the officers interpret and apply themselves and will push to the limit.")

CONCLUSION

"It is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people."[47] This Court's decision will have ramifications felt throughout the State. But it is the role of this Court to say what the law *is*, not what it could, should, or ought to be. If this Court should find that Officer Graw's actions were constitutionally reasonable, then GACDL asks only that clarity be given as to that reasonableness's scope. If an Atlanta police officer can pull you over—whether in Braswell or Valdosta, Buchanan or Augusta—and nevertheless remain reasonable, then the parchment barrier falls.

Respectfully submitted this 13th day of March, 2023.

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[47] *United States v. Rabinowitz*, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting).

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the below-listed parties, by and through counsel, in the foregoing matter with a copy of **Brief of Georgia Association of Criminal Defense Lawyers as *Amicus Curiae*** by delivering a copy via United States mail with postage pre-paid to the following:

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