ANOTHER VICTORY FOR DUI SUSPECTS UNDER THE GEORGIA CONSTITUTION'S EXPANSIVE INTERPRETATION OF THE PROTECTION AGAINST SELF-INCRIMINATION

AMMONS V. STATE, 880 S.E.2D 544 (GA. 2022).

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TABLE OF CONTENTS

I. INTRODUCTION

A November 2022 Georgia Supreme Court decision emphatically stands as yet another victory for the rights of individuals suspected of DUI under the Georgia Constitution. In *Ammons v. State*, the court held that a defendant's right against self-incrimination under Article 1, Section I, Paragraph XVI of the Georgia Constitution prohibits the State from admitting into evidence any evidence of that person's refusal to perform a preliminary breath test or field sobriety tests.[1] The court determined that both tests require a defendant to cooperate with the

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1. 880 S.E.2d 544, 546 (Ga. 2022).

State by performing an act that generates self-incriminating evidence.[2] In doing so, the court overruled its prior decision in *Keenan v. State*, holding that *Keenan* sits at odds with both preceding and subsequent decisions, and is overall inconsistent with Georgia's longstanding history of extending the protections of the self-incrimination provision to self-incriminating "acts."[3]

This Comment will first present the pertinent facts of *Ammons* and then provide a history of how the right against self-incrimination has been construed both by the U.S. Supreme Court and the Georgia Supreme Court, as well as by other jurisdictions. Next, it will examine the court's reasoning, including the majority opinion as well as two concurring opinions and one opinion concurring in part and dissenting in part. Finally, it will analyze how the majority opinion closely adheres to stare decisis and how the majority advances its non-originalist interpretation of the protection against self-incrimination in accordance with how non-originalism has been used to expand constitutional protections, both in Georgia and federally.

II. STATEMENT OF THE CASE

The events leading to this case occurred early in the morning on July 14, 2018, when State Trooper Levi Perry pulled over Mia Ammons on a state highway because her car's license plate light was not working.[4] After smelling alcohol on Ammons's breath and instructing her to step out of the car, Trooper Perry noticed that Ammons was "extremely unsteady" and had "bloodshot watery eyes" and slurred speech.[5] These symptoms caused Trooper Perry to become suspicious, and he asked Ammons if she would provide a "preliminary breath test," which she refused to do.[6] She briefly cooperated in a horizontal gaze nystagmus (HGN) test, which flagged positive for all six possible indicia that Ammons was impaired.[7] Then, after directing Ammons to perform a "walk and turn" test, which she also refused to participate in, Trooper Perry arrested Ammons for DUI pursuant to O.C.G.A section 40-6-391

2. *Id.* at 550–51.
3. *Id.* at 549–51.
4. *Id.* at 546.
5. *Id.*
6. *Id.* This preliminary breath test is sometimes referred to as an "alco-sensor" test, which alerts the officer to the presence of alcohol. *Id.* at 548 (citing Keenan v. State 436 S.E.2d 475 (Ga. 1993)).
7. *Id.* at 546–47. Trooper Perry testified that "[t]he HGN test evaluates whether there is involuntary jerking of the eyes either caused by a medical condition or by impairment." *Id.* at 547.

(a) (1).[8] Trooper Perry asked Ammons for consent to take a blood sample and Ammons refused to answer.[9] Both a dashboard camera and a body camera recorded Trooper Perry's interactions with Ammons.[10]

Ammons filed a motion in limine to exclude evidence about the traffic stop and her refusals to consent to the various tests.[11] The trial court denied Ammons's motion and subsequent move for reconsideration. It determined that evidence of her refusal to submit to both the preliminary breath test and field sobriety test could be admitted into evidence under the Georgia Supreme Court's decision in *Keenan v. State*,[12] and did not implicate her rights against self-incrimination under the Georgia Constitution.[13] The trial court also determined that, by allowing Ammons's refusal to consent to a blood test as evidence of guilt in her DUI case, Georgia's implied consent statutes do not violate the privileges and immunities clause.[14]

Later that day, the trial court issued a certificate of immediate review.[15] Ammons timely filed in the Georgia Supreme Court an application for interlocutory review, which was granted.[16]

III. BACKGROUND

Article I, Section I, Paragraph XVI of the 1983 Georgia Constitution protects criminal defendants against self-incrimination.[17] It reads, "[n]o person shall be compelled to give testimony tending in any manner to be self-incriminating."[18] The clause was first ratified in the Georgia Constitution of 1877, and has since been modified only slightly and non-substantively in subsequent versions of the Georgia Constitution.[19] For

8. *Id.* at 546–47.
9. *Id.* at 547.
10. *Id.*
11. *Id.* at 546.
12. 436 S.E.2d 475 (Ga. 1993).
13. *Ammons*, 880 S.E.2d at 547.
14. *Id.* The court also determined that the implied consent statutes do not violate the Due Process Clause or the Search and Seizure Clause of the Georgia Constitution. *Id.* However, only the question of whether the statutes implicate the privileges and immunities clause was considered on appeal by the Georgia Supreme Court. *Id.* at 548; *see* O.C.G.A. §§ 40-5-67.1, 40-6-392.
15. *Ammons*, 880 S.E.2d at 547.
16. *Id.*
17. GA. CONST. art. I, § 1, ¶ XVI.
18. *Id.*
19. Anthony Sanders, *A "Keg of Worms" of Original Meaning*, INST. FOR JUST. (Nov. 5, 2022), https://ij.org/cje-post/a-keg-of-worms-of-original-meaning/. Georgia has had ten constitutions since the colonies first declared independence from Great Britain. MELVIN B. HILL, JR. & G. LAVERNE WILLIAMSON HILL, THE GEORGIA STATE CONSTITUTION xix (2nd ed.

example, before 1983, the language of paragraph XVI ended in the outdated phrase "to criminate himself."[20]

Paragraph XVI is Georgia's equivalent of the Fifth Amendment—the federal protection against self-incrimination—which reads: "No person . . . shall be compelled in any criminal case to be a witness against himself."[21] In 1964, the Supreme Court of the United States found this privilege applicable to the states by way of the Due Process Clause of the Fourteenth Amendment.[22] Two years later, the Court analyzed the limited scope of the privilege in the seminal case *Schmerber v. California*.[23] In *Schmerber*, the Court held that compelling a criminal defendant to produce physical evidence is allowable, but coercing that defendant into testifying at their own trial is unconstitutional.[24]

At the time of *Schmerber*, in alignment with this reading of the protection against self-incrimination, the majority of states limited the privilege to testimonial compulsion.[25] However, a few jurisdictions—including Georgia—extended the sweep of the self-incrimination protection to nontestimonial evidence.[26] In *Aldrich v. State*,[27] the Georgia Supreme Court ruled that a suspect accused of driving a truck over a statutorily mandated weight level was convicted in violation of his right

2018) ("The history of the constitutions of Georgia is influenced by the unique experiences of the South— the hideous and peculiar institution of slavery, the Civil War, the brutal Reconstruction period that followed, and the resulting fear of government control.").

20. Sanders, *supra* note 19; *see* George D. Busbee, *An Overview of the New Georgia Constitution*, 35 MERCER L. REV. 1, 7 (1983) (describing the extensive process behind creating and ratifying the Georgia Constitution of 1983, and discussing the many changes made from the 1976 Constitution).

21. U.S. CONST. amend. V.

22. Malloy v. Hogan, 378 U.S. 1, 3 (1964); *see also* U.S. CONST. amend. XIV, § 1. For roughly 175 years after the passage of the Bill of Rights and the adoption of the Fifth Amendment, federal protections associated with self-incrimination were restricted to federal courts and states were left to come up with their own laws. *See* Ferguson v. Georgia, 365 U.S. 570, 570 (1961) (noting that Georgia was "apparently the only jurisdiction in the common-law world—to retain the common-law rule that a person charged with a criminal offense is incompetent to testify under oath in his own behalf at his trial").

23. 384 U.S. 757, 759 (1966).

24. *See id.* at 764–65*; see also* Sanders, *supra* note 19 ("Here the federal courts have said 'testimony' does not mean being compelled to act in certain ways, such as standing in a lineup. Thus, if a person simply refuses to perform those acts that refusal can be used against her.").

25. Brian Fussell, Jr., Comment, *Is There a Georgia Supreme Court, Problem? Analyzing the Georgia Supreme Court's New Peculiar Approach Towards Breathalyzers and Implied Consent Law*, 71 MERCER L. REV. 393, 396 (2020).

26. *Id; see also* Davis v. State, 31 So. 569, 571 (Ala. 1902) ("This testimony was clearly illegal upon the principle that the accused cannot be compelled to do or say anything that may tend to criminate him . . . .").

27. 137 S.E.2d 463 (Ga. 1964).

against self-incrimination when he refused to drive onto a scale.[28] Ever since, the Georgia Supreme Court has consistently ruled that self-incrimination will apply to both compelled acts and compelled testimony, making it a clear outlier among other jurisdictions in the country.[29] In *Olevik v. State*,[30] the court recognized that paragraph XVI "prohibits law enforcement from compelling a person suspected of DUI to blow his deep lung air into a breathalyzer" for purposes of determining his blood alcohol content.[31] Two years later, in *Elliott v. State*,[32] the court expanded *Olevik*'s holding in determining that the "admission of evidence that the defendant refused to consent to a chemical breath test likewise violates the rights protected by paragraph XVI."[33] Then, in *Awad v. State*,[34] the court decided that under *Olevik* and *Elliott*, the right must expand to state-administered urine tests, noting that requiring a defendant to urinate into a collection container to generate a sample for testing "necessarily requires a defendant to cooperate with the State by performing an act that generates self-incriminating evidence."[35] It further reasoned that, like the tests at issue in *Olevik* and *Elliott*, the urine test involved the state "asking the defendant to affirmatively give [it] evidence from the defendant's body in a particular manner that is neither natural nor automatic."[36]

Conversely, the Supreme Court of the United States continued to uphold its more restrictive self-incrimination doctrine. In *Mitchell v. Wisconsin*,[37] the Court held that a defendant's refusal to submit to a blood alcohol content (BAC) test can be used as evidence against the defendant at trial.[38] Similarly, most state courts have continued to yield decisions consistent with the Supreme Court's reading of the protection against self-incrimination,[39] making Georgia's expansive interpretation of paragraph XVI unusual.

28. *Id.* at 464.
29. *See* Fussell, Jr., *supra* note 25, at 397.
30. 806 S.E.2d 505 (Ga 2017).
31. *Id.* at 509. The court reasoned that the provision "applies to more than mere testimony; it also protects us from being forced to perform acts that generate incriminating evidence." *Id.*
32. 824 S.E.2d 265 (Ga 2019).
33. *Id.* at 287. The court noted that "Paragraph XVI generally prohibits admission of a defendant's pretrial refusal to speak or act." *Id.*
34. 868 S.E.2d 219 (Ga. 2022).
35. *Id.* at 223.
36. *Id.*
37. 588 U.S. 840 (2019).
38. *Id.* at 847.
39. *See, e.g.*, State v. Taylor, 648 So.2d 701, 704 (Fla. 1995) (holding that the use of evidence of the defendant's refusal to submit to sobriety tests at trial did not violate either the federal or state constitutions).

However, more than two decades before the Georgia Supreme Court's decisions in *Olevik*, *Elliott*, and *Awad*, that very same court suggested that paragraph XVI's constitutional protections did not apply to the type of preliminary breath test Ammons was asked to submit to.[40] In *Keenan v. State*, a defendant suspected of driving under the influence refused to submit to what is sometimes referred to as an "alco-sensor" test, or a preliminary breath test that would alert the officer to the presence of alcohol.[41] Over the defendant's objection, the State was permitted to introduce evidence of his refusal to undergo the breath test, which the court held to be not violative of his constitutional right to not incriminate himself since he was not in custody at the time the field sobriety test was requested.[42] It is against the backdrop of its decision in *Keenan*—a case that although never expressly overruled is undoubtedly at odds with later decisions—that the court now takes up the present issues in *Ammons v. State*.[43]

IV. THE COURT'S REASONING

In a nearly unanimous opinion, the Supreme Court of Georgia issued its decision in *Ammons* on November 2, 2022.[44] Reversing the trial court's opinion, the court held that "Ammons had the right to refuse to perform the preliminary breath test and the field sobriety tests under the Georgia Constitution, and evidence of her refusals cannot be introduced at her trial."[45] Reasoning that providing a breath sample for a preliminary breath test using an alco-sensor requires the cooperation of the suspect, the court held that admission of this refusal as evidence violates the protection against self-incrimination.[46] In doing so, the court officially overruled its decision in *Keenan v. State*, which it revisited throughout the opinion in reference to its "flawed holding."[47]

Similarly, the court held "that field sobriety tests that require the suspect to cooperate by performing some affirmative act are covered by the protections of paragraph XVI."[48] Therefore, evidence of refusal to participate in these tests also violates the protection against self-

40. Ammons v. State, 880 S.E.2d 544, 548 (Ga. 2022).
41. *See* Keenan v. State, 436 S.E.2d 475, 476 (1993).
42. *Id.* at 477.
43. *Ammons*, 880 S.E.2d at 546.
44. *Id.* at 544.
45. *Id.* at 546.
46. *Id.* at 548.
47. *Id.* at 550–51.
48. *Id.* at 552.

incrimination.[49] Lastly, and of lesser significance, the court affirmed the portion of the trial court's holding that Georgia's implied consent statutes—which allowed for evidence of Ammons refusal to consent to a blood test to be introduced at her trial—do not violate Georgia's privileges and immunities clause.[50]

The following sections of this Comment will examine the reasoning of the majority opinion and briefly present the arguments made within the two concurring opinions, as well as Justice Colvin's opinion concurring in part and dissenting in part.

A. The Majority Opinion

Writing for the majority, Justice Bethel first addressed the question of whether this court should overrule its holding in *Keenan* "that admission of evidence that a defendant refused a roadside alco-sensor test does not violate the Georgia Constitution's guarantee of the right against compelled self-incrimination."[51] The court answered this question in the affirmative.[52] It began by citing the language of paragraph XVI, which reads that "[n]o person shall be compelled to give testimony tending in any manner to be self-incriminating."[53] It recognized, however, that while the language referred specifically to "testimony," the Georgia Supreme Court has held that this provision "applies to more than mere testimony; it also protects us from being forced to perform acts that generate incriminating evidence."[54] Specifically, the court supported its history of expansive readings of paragraph XVI with a brief recitation of its decisions in *Olevik*,[55] *Elliott*,[56] and *Awad*.[57]

49. *Id.*

50. *Id.* at 554 ("Citing dictionary definitions (and little else), [Ammons] claims that this language prohibits the General Assembly from imposing any degree of 'burden' on her constitutional rights. In other words, she reads Paragraph VII to add a significant measure of extra or prophylactic protection of rights *beyond* what the provisions recognizing those rights cover.").

51. *Id.* at 547.

52. *Id.* at 551.

53. *Id.* at 548 (citing GA. CONST. art. I, § I, para. XVI).

54. *Id.* (quoting Olevik v. State, 806 S.E.2d 505, 509 (Ga. 2017)).

55. *Id.* (quoting *Olevik*, 806 S.E.2d at 509) ("Paragraph XVI 'prohibits law enforcement from compelling a person suspected of DUI to blow his deep lung air into a breathalyzer' for purposes of determining his blood alcohol content.").

56. *Id.* (citing Elliot v. State, 824 S.E.2d 265, 287 (Ga. 2019)) (holding that "evidence that the defendant refused to consent to a chemical breath test likewise violates the rights protected by Paragraph XVI").

57. *Id.* (citing Awad v. State, 868 S.E.2d 219, 223 (Ga. 2022)) (holding that paragraph XVI's protections must expand to state-administered urine tests).

The court recognized, however, that these decisions sit at odds with its 1993 decision in *Keenan v. State*.[58] It noted that, "[a]lthough we have never expressly overruled *Keenan,* it is clearly in tension with our holdings in *Olevik*, *Elliott*, and *Awad*" in which "this Court has determined that Paragraph XVI offers a number of protections to a suspect who refuses to cooperate with police during a roadside DUI stop."[59]

Moreover, the court acknowledged that the court of appeals in *State v. Bradberry*, applying *Olevik* and *Elliott*, recently determined that paragraph XVI prohibits the State from admitting evidence of a defendant's refusal to take the type of preliminary breath test Ammons refused here.[60] Agreeing with the *Bradberry* Court that there is "little distinction between the preliminary alco-sensor breath test Ammons refused to take . . . and the type of chemical breath tests at issue in *Olevik* and *Elliott*," the majority rejected the State's efforts to distinguish these tests.[61] In doing so, they reasoned that "[b]oth a preliminary alco-sensor test and a chemical breath test require the defendant to affirmatively blow into a device," and that "because the preliminary test detects the presence of alcohol, evidence generated by the test is plainly incriminating against a suspect who has consumed alcohol."[62]

Further, the court determined that stare decisis does not require it to perpetuate *Keenan*'s flawed holding.[63] Refusing to strain to find distinctions between the breath test at issue in this case and those considered in *Olevik* and *Elliott* where "no meaningful ones exist," the court articulated that stare decisis is not an inexorable command.[64]

Specifically, the court placed the most significance on the stare decisis factor of "the soundness of [the court's] reasoning" in ultimately

58. *See id.* at 549; Keenan v. State, 436 S.E.2d 475, 477 (Ga. 1993) (holding that evidence of the defendant's refusal to submit to the same type of preliminary breath test that Ammons was asked to perform was admissible at the defendant's trial and thus not violative of the right against self-incrimination).

59. *Ammons*, 880 S.E.2d at 549.

60. State v. Bradberry, 849 S.E.2d 790, 793–94 (Ga. Ct. App. 2020) (holding that "[b]ecause [the defendant] had the right to refuse to provide incriminating evidence by performing such an affirmative act under Paragraph XVI, the admission of evidence of his refusal violates the state constitutional right against self-incrimination").

61. *Ammons*, 880 S.E.2d at 549.

62. *Id.*

63. *Id.* at 550.

64. *Id.* Stare decisis is a legal principle that "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." Payne v. Tennessee, 501 U.S. 808, 827 (1991).

deciding to overrule *Keenan*,[65] which it found to be the most important consideration "especially in constitutional cases."[66] The court noted that the opinion in *Keenan* "never quoted or referred to any specific provision of the Georgia Constitution, nor did it attempt to tie its ruling to the text or history of any Georgia constitutional provision."[67] Thus, the *Keenan* court offered no concrete reasoning to support its lone statement about the Georgia Constitution and its opinion was therefore unsound.[68]

The court likewise determined that none of the remaining stare decisis factors indicate that *Keenan* should remain good law.[69] It reasoned that it has overruled decisions older than *Keenan* before, *Keenan* created none of the reliance interests of the type normally given weight in stare decisis analysis, and the remaining factor of workability weighs against upholding *Keenan*.[70]

The court then turned to the second question taken up on appeal, which is whether to extend paragraph XVI's protections to field sobriety tests that require the suspect's cooperation.[71] It answered this question in the affirmative as well.

The court first considered that, "as with other tests performed by the police during DUI stops, a field sobriety test is designed to 'reveal some other condition or impairment' of the driver," which is then useful to the State in proving at the trial that the defendant violated the DUI statute.[72] Further, it is clear that the suspect's cooperation is required to perform these types of tests,[73] which the court likened both to the cooperation required to perform the chemical breath tests at issue in

65. *Ammons*, 880 S.E.2d at 550 (quoting Olevik v. State, 806 S.E.2d 505, 519 (Ga. 2017) ("To that end, we have developed a test that considers the age of precedent, the reliance interests at stake, the workability of the decision, and, most importantly, the soundness of its reasoning.").

66. *Id.* (citing State v. Turnquest, 827 S.E.2d 865, 877 (Ga. 2019)).

67. *Id.*

68. *Id.*

69. *Id.* (citing *Turnquest*, 827 S.E.2d at 878).

70. *Id.* at 550–51 (quoting *Olevik*, 806 S.E.2d at 520) ("'We recognize that requiring this determination before administering a [preliminary] breath test [using an alco-sensor] is more difficult than simply waiting for an affirmative response' to an officer's request to perform the test. 'But this difficulty is not reason enough to persist' in *Keenan*'s error.").

71. *Id.* at 551.

72. *Id.* (citing Mitchell v. State, 802 S.E.2d 217, 224 (Ga. 2017) (disapproved of on other grounds by *Turnquest*, 827 S.E.2d at 879 & n.15)).

73. *Id.* at 552. The court presents numerous cases involving different field sobriety tests—the HGN test, the walk-and-turn test, and the one-leg stand test—that the court of appeals has held to "plainly require the suspect to cooperate by performing affirmative acts." *Id.*

Olevik and *Elliott* and the urine test in *Awad* (cases in which the court has held paragraph XVI's protections apply).[74]

In reversing this holding from the trial court, the majority subsequently declined the State's invitation to reconsider *Olevik*, *Elliott*, and *Awad*, and rejected the interpretive principles advanced by the dissent.[75] It suggested that the dissent replaced long-standing interpretive principles with "a too-narrow focus on isolated words divorced from history and context" and that the case law it presents for support has all since been rejected.[76] The court also argued that no reasonable observer during the ratification of the 1983 Constitution "would have understood the provisions of the new constitution to be understood without reference to the construction of their predecessors."[77] Essentially, Georgia's long-standing, expansive interpretation of "testimony" in the context of self-incrimination was well understood and accepted by the framers of the 1983 Constitution.

Lastly, the court upheld the trial court's holding that Ammons had not met her burden to establish that the implied-consent statutes violate Article I, Section I, Paragraph VII of the Georgia Constitution—Georgia's equivalent to the Privileges and Immunities Clause.[78] Reasoning "that the predecessor to paragraph VII was understood as having an important role in guaranteeing rights to those who had been recently freed from slavery," the court did not rule out the possibility that paragraph VII's function may be broader than that, but held that Ammons has not met her heavy burden in establishing that fact.[79]

B. Justice Ellington's Concurring Opinion

Justice Ellington wrote separately and very briefly to emphasize the limitations of the majority's final holding.[80] He reasoned that although the court does not have a long history of interpreting this specific clause

74. *Id.*
75. *Id.* at 553.
76. *See id.* at 552–53. ("This simply is not how we have ever engaged in constitutional interpretation in Georgia.").
77. *Id.* at 553. The court cites transcripts of meetings from the Select Committee on Constitutional Revisions, 1977–1981, where several justices suggest it would "open up a keg of worms" to change the language of the constitutional provisions. *Id.* (citation omitted). This is because courts view a change in words "as an intention on the part of the framers to give it a different meaning from the meaning that theretofore existed." *Id.* (citation omitted).
78. *See id.* at 554–57.
79. *Id.* at 557.
80. *Id.* (Ellington, J., concurring).

within paragraph VII,[81] the framers of the Georgia Constitution, as representatives of the people, saw fit to include it and thus it cannot be brushed aside.[82] However, he recognized that there exists the presumption that the statute—which says that blood test refusals are admissible—is constitutional, and since Ammons did not meet her burden in overcoming this presumption, her paragraph VII challenge must be rejected.[83]

C. Justice Pinson's Concurring Opinion

Justice Pinson wrote separately with his own analysis as to why the court was correct in deeming *Olevik* and *Elliott* controlling, and consequently in overruling *Keenan*.[84] He distinguished between decisions of the "deliberate" kind, which ordinarily pose little threat to the rule of law—even when arguably wrong in hindsight—and decisions that are "hasty and crude," which rely on unsound reasoning, undermine the rule of law, and which courts do not hesitate to overrule.[85] He conceded that there may be room for debate about whether *Olevik* and *Elliott* were correctly decided as an original matter, but argued they were decisions of the "deliberate" kind and clearly control in the present case.[86] Further, he said, "given the deliberate nature of these decisions, anyone who seeks to overrule them has to marshal much more than mere disagreement with their outcome," and the dissent has not made its requisite showing.[87]

D. Justice Colvin Concurring in Part and Dissenting in Part

Justice Colvin writes separately to concur with the holding from the trial court that the majority is affirming and to dissent from the holding from the trial court that the majority is reversing—the overruling of *Keenan*.[88]

Most notably, she argues that Article I, Section I, Paragraph XVI of the Georgia Constitution of 1983 protects only the right against

81. Paragraph VII reads: "[A]nd it shall be the duty of the General Assembly to enact such laws as will protect them in the full enjoyment of the rights, privileges, and immunities due to such [Georgia] citizenship." GA. CONST. art. I, § I, para. VII.

82. *Ammons*, 880 S.E.2d at 558 (Ellington, J., concurring).

83. *Id.*

84. *Id.* at 558 (Pinson, J., concurring).

85. *See id.* at 559.

86. *Id.* at 560.

87. *Id.* at 561 ("[T]o me, they need to show in some way that following them would cause even more serious damage to the rule of law than overruling them would.").

88. *Id.* at 562 (Colvin, J., concurring in part and dissenting in part).

compelled self-incriminating *testimony*, and that this court has construed the constitutional right in a manner inconsistent with the constitutional text by extending the right to all compelled self-incriminating *acts*.[89] For support, she provides a history of how the self-incrimination provision has been construed since it first appeared in Georgia's 1877 Constitution, stating that "[t]he meaning of 'to give testimony' has not significantly changed since the phrase first appeared . . . ."[90] She also argues that the court has relied on two non-textual inferences in incorrectly construing the self-incrimination provision, one being that "even if our early precedent badly misinterpreted the constitutional provision, our incorrect construction became the 'original public meaning' of the provision" when it reappeared in later constitutions without material change.[91] This basis for continuing to incorrectly construe the self-incrimination provision is what is referred to as the "prior-construction canon," which Justice Colvin believes is "the only interpretive principle that favors this court's conclusion that the provision applies to all compelled self-incriminating acts."[92]

As for other interpretive principles, Justice Colvin argues that the only stare decisis factor that weighs in favor of upholding Georgia's self-incrimination precedent is the age of that precedent.[93] The remaining factors, she argues, all weigh in favor of overruling the court's "erroneous" precedent.[94] For one, she notes that these decisions did not create particularly strong reliance interests, as "there are presumably

89. *See id.*

90. *Id.* at 563 ("I am aware of no evidence suggesting that the public in 1877 would have understood the term 'testimony,' as used in the constitutional self-incrimination provision, to have some technical or particular idiosyncratic meaning not captured in dictionaries of the time.").

91. *Id.* at 564. The other non-textual inference the court has incorrectly relied upon, she notes, is that "because the constitutional right against self-incrimination derived from the common-law right against self-incrimination, the constitutional right is identical to the common-law right." *Id.* For support, she references *Calhoun v. State* as "the first decision of this Court to conflate the constitutional and common-law rights based on faulty logic." *Id.*; *see Calhoun v. State*, 87 S.E. 893, 893 (holding that "[t]he constitutional guaranty protects one from being compelled to furnish evidence against himself, either in the form of oral confessions or incriminating admissions of an involuntary character, or of doing an act against his will which is incriminating in its nature.").

92. *Ammons*, 315 Ga. at 565–67 (Colvin, J., concurring in part and dissenting in part). The prior-construction cannon generally provides that, "[i]f a statute uses words or phrases that have already received authoritative construction by the jurisdiction's court of last resort, . . . they are to be understood according to that construction." *Id.* at 565 (citing ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 322 (2012)).

93. *Id.* at 567 ("Whether one measures from *Calhoun* or *Day*, our erroneous precedent stretches back more than 100 years. That is undeniably old precedent.").

94. *Id.* at 568.

few, if any, people currently facing criminal charges who refused to perform a self-incriminating act" because of holdings that led them to believe this refusal could not be used against them in court.[95] Next, she argues that the workability factor also weighs in favor of overruling this precedent, proffering several examples where the court has engaged in "arbitrary line drawing" in order to construe the self-incrimination provision as the majority intends.[96] Lastly, she notes that the final and most important factor of the "soundness of our precedent's reasoning" strongly favors overruling this court's interpretations of paragraph XVI, as the relied-upon precedent of *Calhoun* was decided "fallaciously" through an "atextual analysis [that] would not pass muster today, nor should it."[97] Accordingly, Justice Colvin would overrule Georgia's precedent in which it has held that paragraph XVI applies to nontestimonial self-incriminating acts, and clarify that the provision applies only to testimony.[98]

V. AUTHOR'S ANALYSIS

A. Adherence to Stare Decisis

The Georgia Supreme Court's decision in *Ammons* to overrule *Keenan* closely comports with the principles of stare decisis. The factors considered by a state court in deciding whether to overrule a prior precedent can vary subtly from those considered under federal law.[99] As such, the court in *Ammons* articulates its own version of the stare decisis factors for consideration here.[100] These factors include "the age of precedent, the reliance interests at stake, the workability of the decision,

95. *Id.*

96. *Id.* at 568–69. For example, Justice Colvin notes how this court has said that "requiring a defendant to 'stand up at trial' so a witness could look at his amputated leg requires an affirmative act," but that "requiring a defendant to 'strip to the waist' so police could photograph his tattoos did not require an affirmative act." This, she observes, "makes little sense . . . ." *Id.* at 568 (citation omitted).

97. *Id.* at 569 ("*Calhoun* fallaciously reasoned that the constitutional and common-law rights against self-incrimination were identical because they were historically associated.").

98. *Id.* at 570.

99. ROBERT F. WILLIAMS & LAWRENCE FRIEDMAN, THE LAW OF AMERICAN STATE CONSTITUTIONS 389–91 (2nd ed. 2023) ("It is possible that our view of the force of precedent, as with many other doctrines, might be different in state constitutional law as compared to federal constitutional law.").

100. *See id.* at 550–51 (majority opinion). *See generally* Zachary B. Pohlman, *Stare Decisis and the Supreme Court(s): What States Can Learn from* Gamble, 95 NOTRE DAME L. REV. 1731, 1747–49 (2020) ("How the doctrine is articulated, much like the state-by-state variance in substantive law, likewise varies by state, though the differences are often subtle and its basic tenet remains consistent throughout . . . .").

and, most importantly, the soundness of [the prior precedent's] reasoning."[101] The court keenly notes that this last factor becomes even more critical in light of the fact that the prior precedent "involved the interpretation of the [c]onstitution, which is more difficult than statutory interpretation for the legislative process to correct."[102] In other words, "[t]he more wrong a prior precedent got the [c]onstitution, the less room there is for the other [stare decisis] factors to preserve it."[103]

With that important consideration in mind, the court assesses each of the factors that weigh in favor of overruling *Keenan* with cognizance of the constitutional right implicated by the decision. First, as even dissenting Justice Colvin recognized, the precedent construing the self-incrimination provision broadly enough to encompass not only "testimony" but "acts" stretches back more than 100 years.[104] *Keenan*, on the other hand, was decided twenty-nine years before the decision in *Ammons*, and sits at odds with several decisions made afterwards that cast doubt on its validity.[105] Second, any reliance interests that may have developed around the practice of admitting into evidence a suspect's refusal to perform an alco-sensor test "do not outweigh the countervailing interest that all individuals share in having their constitutional rights fully protected."[106] Interestingly, the third factor of workability seemingly favors upholding *Keenan* and overruling the following decisions of *Olevik*, *Elliott*, and *Awad* that contradict *Keenan*'s holding. This point is advanced by dissenting Justice Colvin, who recognizes the "arbitrary line-drawing" problem which is demonstrated by the court's failure to formulate a clear standard for when a defendant was compelled to engage in a self-incriminating *act*.[107]

101. *Ammons*, 880 S.E.2d at 550 (quoting Olevik v. State, 806 S.E.2d 505, 519 (Ga. 2017)). *See generally* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854–55 (1992) (discussing the factors the Supreme Court of the United States considers to "gauge the respective costs of reaffirming and overruling a prior case").

102. *Ammons*, 880 S.E.2d at 550 (quoting *Olevik*, 806 S.E.2d at 519).

103. *Id.*; *see also* WILLIAMS & FRIEDMAN, *supra* note 99, at 391 ("Regardless of the relative ease of amending state constitutions when compared to the federal Constitution, the fact remains that, in an absolute sense, state constitutions are the highest source of law in any given state, and they are much harder to change than common law or statutory law.").

104. *Ammons*, 880 S.E.2d at 567 (Colvin, J., concurring in part and dissenting in part).

105. *Id.* at 549–50 (majority opinion). The court also recognizes that it has overruled decisions older than *Keenan* numerous times. *Id.*; *see, e.g.*, Southall v. State, 796 S.E.2d 261, 267 (Ga. 2017) (overruling Harrison v. Harrison, 194 S.E.2d 87 (Ga. 1972), standing precedent of forty-five years on the subject of premature motions for new trial).

106. *Ammons*, 880 S.E.2d at 551 (quoting *Olevik*, 806 S.E.2d at 520).

107. *Id.* at 568–69 (Colvin, J., concurring in part and dissenting in part). Justice Colvin also argues that perpetuating this construction of the self-incrimination clause will inevitably open the door to endless rifts in the case law, such as a defendant arguing that

However, stare decisis is a balancing test in which no single factor is dispositive. As such, the majority correctly notes that any difficulty created for law enforcement or the courts by this standard does not outweigh the other factors, and thus is not reason enough to persist in *Keenan*'s error.[108]

Lastly, and most importantly, the soundness of the court's reasoning in *Keenan* rests on shaky grounds. Not only is the opinion basically void of any reference to the Georgia Constitution or the court's vast history of construing the right broadly, but there is also no plausible distinction between the breath test at issue in *Keenan* and those considered in *Olevik* and *Elliott*.[109] Further, as concurring Justice Pinson keenly notes, while there is perhaps room for debate about whether *Olevik* and *Elliott* were correctly decided as an original matter, they are the sort of "deliberate" decisions the court made with thorough consideration of the history of the provision and the implications of extending it to self-incriminating acts.[110] "Given the deliberate nature of these decisions," the dissent has not made its requisite showing that following these precedents would in some way "cause even more serious damage to the rule of law than overruling them would."[111]

While the dissent does marshal some genuine cause for concern that *Olevik* and *Elliott* were decided incorrectly as an initial matter, these concerns boil down to mere disagreement with their outcome that "does not come close to justifying the harm to the rule of law of *overruling* that unanimous, carefully reasoned decision just five years later, especially when a unanimous court has since reaffirmed it, and nothing material to the legal question has changed . . . ."[112]

producing their driver's license is an affirmative act that generates potentially incriminating evidence. *See id.* at 569; *see also* Fussell, Jr., *supra* note 25, at 412 ("Drawing a distinction between protecting a person's 'breath,' based on the fact that a person self-incriminates himself by blowing into a machine and does not when the person is forced to give a urine sample or is stuck with a needle, is substantively useless. Regardless of how the sample is taken, the result is the same; a suspect is being forced to give evidence of that person's level of intoxication.").

108. *Id.* at 550–51.

109. *Id.* at 550.

110. *Id.* at 560–61 (Pinson, J., concurring) ("Whatever one's views about how to answer the questions these two decisions addressed as an original matter, it is not possible to read them and come away thinking that *how* they addressed and resolved those questions is anything other than consistent with the rule of law.").

111. *Id.* at 561.

112. *Id.* ("Although the dissent applies the familiar four-factor analysis for assessing whether to apply stare decisis, its arguments reduce to mere disagreements with how those decisions should have applied the relevant legal principles, hypotheticals that might pose close questions in the future, a couple of past cases that are arguably inconsistent with

Accordingly, the majority's decision to overrule *Keenan* resembles a thorough application of stare decisis, which carefully weighed the factors in accordance with the constitutional right implicated by paragraph XVI.

B. Non-Originalism

The majority opinion, and arguably most of the jurisprudence in Georgia surrounding the protection against self-incrimination, advances a non-originalist interpretation of the provision that the dissent vehemently rejects.[113] Specifically, the majority characterizes the dissent's approach to constitutional interpretation as a "too-narrow focus on isolated words divorced from history and context."[114] The majority, on the other hand, recognizes that "no reasonable observer during the drafting and ratification of the 1983 Constitution would have understood the provisions of the new constitution to be understood without reference to the construction of" previous constitutions or the longstanding history of reading the self-incrimination provision broadly.[115] As such, the decision in *Ammons* aligns with more than 100 years of Georgia jurisprudence expanding the protection beyond the common interpretation of "testimony" that appears in the plain text.[116]

The ongoing battle between originalism and non-originalism as methods of constitutional interpretation has divided both courts and scholars for years.[117] Today, the Supreme Court is predominantly

Olevik and *Elliott*, and the policy concern that the General Assembly has been 'stripped . . . of its authority to protect the public from dangerous drivers.'").

113. For a detailed discussion of originalism and non-originalism as competing views, see generally Jeffrey Goldsworthy, *Constitutional Interpretation: Originalism*, 4 PHIL. COMPASS 682 (2009), https://compass.onlinelibrary.wiley.com/doi/epdf/10.1111/j.1747-9991.2009.00207.x. Specifically, Goldsworthy argues "Non-originalists reject 'the dead hand of the past', and urge that the constitution be interpreted according to contemporary meanings, values or understandings. Originalists reply that . . . unless it has been formally amended, the constitution continues to mean today what it meant when it was first enacted or adopted." *Id.* at 683.

114. *Ammons*, 880 S.E.2d 880 at 553 ("This novel approach would ignore all of our case law on constitutional interpretation before 1983 and begin anew with 1983 dictionary definitions. This simply is not how we have ever engaged in constitutional interpretation in Georgia.").

115. *Id.*

116. *See generally* HILL, JR. & HILL, *supra* note 19, at 60 ("Since the nineteenth century, Georgia has used an 'active/passive' distinction for determining whether the accused has been compelled to give incriminating evidence or testimony. . . . The U.S. constitutional protection has been construed primarily to protect against self-incrimination by testimony, whereas the Georgia Constitution has been read to limit the state from compelling the defendant to give up any evidence, either oral or tangible.").

117. *See* Goldsworthy, *supra* note 113, at 683 ("The central question is not how judges should decide constitutional disputes when the constitution itself proves insufficiently

composed of originalists.[118] As one scholar notes, however, "[v]irtually all of the constitutional rights recognized by the modern Supreme Court . . . are *nonoriginalist* in derivation; that is, they depend at least to some extent on norms not provided by the framers, but drawn instead from some other source of values."[119] Non-originalist review, in other words, looks to "a set of societal values that has changed and continues to change over the course of our nation's history."[120] For example, it is because societal values have pushed the Equal Protection Clause beyond its original 1868 conceptualization that classifications based on gender, alienage, illegitimacy, and race all now call for special judicial scrutiny.[121]

In a similar fashion to the U.S. Supreme Court's expansion of constitutional protections via non-originalist interpretation, the Georgia Supreme Court has exercised non-originalist methodology in extending the self-incrimination provision to self-incriminating acts since *Calhoun* in 1916.[122] As such, the majority in *Ammons* correctly recognized that this broad interpretation of the language carried forward into subsequent constitutions, and it would contravene Georgia's typical approach to constitutional interpretation to revert to a dictionary definition of "testimony" simply because that is how the provision reads.[123] Further, by way of non-originalist interpretation, the court took the liberty of not only overruling *Keenan*, but also extending the protections of paragraph XVI to field sobriety tests that necessarily require the defendant's cooperation, as is consistent with its expansive interpretation of the provision.[124]

VI. CONCLUSION

In *Ammons v. State*, the Georgia Supreme Court held that the protection against self-incrimination extended to both preliminary

determinate to provide a solution, but how they should ascertain whether or not it does provide a solution, and if so, what that solution is.").

118. *See* Joshua Zeitz, *The Supreme Court's Faux 'Originalism'*, POLITICO MAG. (June 26, 2022, 7:00 AM), https://www.politico.com/news/magazine/2022/06/26/conservative-supreme-court-gun-control-00042417 ("With originalists holding six of the Supreme Court's nine seats, we're all living in an originalist world.").

119. Daniel O. Conkle, *Nonoriginalist Constitutional Rights and the Problem of Judicial Finality*, 13 HASTINGS CONST. L.Q. 9, 9 (1985).

120. *Id.* at 20.

121. *Id.* at 20–21.

122. *See* Ammons v. State, 880 S.E.2d 544, 564 (2022) (Colvin, J., concurring in part and dissenting in part).

123. *See id.* at 553 (majority opinion).

124. *Id.* at 552.

breath tests and field sobriety tests, as both require a defendant to cooperate with the State by performing an act that generates self-incriminating evidence. In doing so, the court overruled its decision in *Keenan v. State*, which held that evidence of a defendant's refusal to submit to the same type of preliminary breath test Ammons refused to submit to did not violate paragraph XVI.

The court correctly determined that stare decisis factors did not weigh in favor of upholding *Keenan*, especially because it relied on unsound reasoning and was followed by several decisions that casted doubt on its validity. The majority opinion also closely comported with Georgia's long-standing non-originalist construction of the right against self-incrimination, a method of constitutional interpretation which has been famously applied to expand constitutional protections. Standing in solidarity with more than 100 years of Georgia precedent, the decision was yet another victory for the rights of individuals under the Georgia Constitution and will perpetuate Georgia's legacy of being an outlier amongst other jurisdictions in the realm of self-incrimination law.