14-134

No. _____

In The
Supreme Court of the United States

[redacted] SMITH,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of Georgia

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Compulsory Process and Confrontation Clauses of the Sixth Amendment permit a trial court to conduct a criminal trial in the absence of evidence material to the defense that is located outside the state but subject to the Uniform Act to Secure the Attendance of Witnesses from Without the State.

2. Is CMI a state actor pursuant to *Georgia v. McCollum,* 505 U.S. 42 (1992), when it is the exclusive provider of statutorily approved state breath-testing instruments used in the investigation and prosecution of DUI cases in Georgia and where the breath test results are admissible pursuant to statute in all cases.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner [redacted]Smith respectfully petitions for a writ of certiorari to the Court of Appeals of Georgia arising out of the case, *Smith v. State.*

OPINION BELOW

The ruling of the Court of Appeals of Georgia is reported at 325 Ga. App. 405, 750 S.E.2d 758. (Pet. App. 1-10).

JURISDICTION

The Court of Appeals of Georgia opinion in *Smith v. State* was issued on November 15, 2013. (Pet. App. 1). Reconsideration denied December 11, 2013. The Supreme Court of Georgia denied review of this case on May 05, 2014. (Pet. App. 18). The jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL, STATUTORY, AND OTHER PROVISIONS

The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; [and] to have compulsory process for obtaining witnesses in his favor."

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall . . . deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction equal protection of the laws.

Art. I, § 10, cl. 3 of the United States Constitution provides in relevant part: "No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State. . . ."

Art. IV, § 1 of the United States Constitution provides: "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof."

4 U.S.C. § 112, enacted in 1934, provides in relevant part: "the consent of Congress is hereby given to any two or more States to enter into agreements or compacts for cooperative effort and mutual

assistance . . . in the enforcement of their respective criminal laws and policies. . . ."

28 U.S.C. § 1738 provides in relevant part:

> The records and judicial proceedings of any court of any such State . . . shall be proved or admitted in other courts within the United States . . . by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form . . . Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken.

O.C.G.A. § 24-13-90 et seq. (formerly O.C.G.A. § 24-10-90) shall be known as "The [Georgia] Uniform Act to Secure the Attendance of Witnesses from Without the State."

The Georgia Uniform Act to Secure the Attendance of Witnesses from Without the State, O.C.G.A. § 24-13-94(a) (formerly O.C.G.A. § 24-10-94(a)) provides in relevant part:

> If a person in any state which by its laws has made provision for commanding persons within its borders to attend and testify in criminal prosecutions . . . commenced or about to commence in this state is a material witness in a prosecution pending in a court of record in this state . . . a judge of such

> court may issue a certificate under the seal of the court stating these facts and specifying the number of days the witness will be required. . . . This certificate shall be presented to a judge of a court of record in the county in which the witness is found.

O.C.G.A. § 24-13-97 (formerly O.C.G.A. § 24-10-97) provides:

> [The Georgia Uniform Act to Secure the Attendance of Witnesses from Without the State] shall be interpreted and construed so as to effectuate its general purpose to make uniform the laws of the states which enact it and shall be applicable only to such states as shall enact reciprocal powers to this state relative to the matter of securing attendance of witnesses as provided in this article.

The Kentucky Uniform Act to Secure the Attendance of Witnesses from Within or Without a State in Criminal Proceedings, KRS § 421.240, provides in relevant part:

> (1) If a judge of a court of record in any state which by its laws has made provision for commanding persons within that state to attend and testify in this state certifies under the seal of such court that there is a criminal prosecution pending in such court . . . that a person being within this state is a material witness in such prosecution . . . and that his presence will be required for a specified number of days, upon presentation of such certificate to any judge of a court of record in

> the county in which such person is, such judge shall fix a time and place for a hearing, and shall make an order directing the witness to appear at a time and place certain for the hearing.
>
> (2) If at a hearing the judge determines that the witness is material and necessary, that it will not cause undue hardship to the witness to be compelled to attend and testify in the prosecution . . . in the other state, and that the laws of the state in which the prosecution is pending . . . will give to him protection from arrest and the service of civil and criminal process, he shall issue a summons, with a copy of the certificate attached, directing the witness to attend and testify in the court where the prosecution is pending . . . at a time and place specified in the summons. In any such hearing the certificate shall be prima facie evidence of all the facts stated therein.

Ga. Comp. R. & Regs. 92-3-.06(5)(a) [*hereinafter* GBI Rule 92-3-.06] provides:

> (5) Breath tests other than the original alcohol-screening test shall be conducted on a breath alcohol analyzer approved by the Director of the Division of Forensic Sciences or his or her designee. Any other type of breath alcohol analyzer not specifically listed in this paragraph must be approved by the Director of the Division of Forensic Sciences or designee prior to its use in the State.

(a) The Intoxilyzer Model 5000 manufactured by CMI, Inc. is an approved instrument for breath alcohol tests conducted on or before December 31, 2015.

(b) The Intoxilyzer Model 9000 manufactured by CMI, Inc. is an approved instrument for breath alcohol tests conducted on or after January 1, 2013.

STATEMENT OF THE CASE

1. On May 5, 2007, police arrested Petitioner for driving under the influence of alcohol. Officers transported Petitioner to jail, where, as required by law, he submitted to a state-administered breath test on a Georgia Model Intoxilyzer 5000 [*hereinafter* Intoxilyzer]. Based upon the Intoxilyzer result, the State charged Petitioner for driving with an unlawful blood alcohol concentration of 0.08 grams or more [*hereineafter* DUI *per se*]. O.C.G.A. § 40-6-391(a)(5); *see also* O.C.G.A. § 40-5-67.1(b)(2) (Georgia law requires you to submit to state administered chemical tests of your . . . breath . . . for the purpose of determining if you are under the influence of alcohol or drugs).

2. CMI, Inc. [*hereinafter* CMI], located in Owensboro, Kentucky, in Daviess County is the exclusive manufacturer and provider of forensic breath-testing devices for the state of Georgia pursuant to the Administrative Procedures Act. GBI Rule 92-3-.06. At the time police tested Petitioner, the *only* approved

breath-testing machine in Georgia that was admissible in court was the Intoxilyzer. *See* Rule 92-3-.06(5). CMI enjoys an exclusive agreement with the State to produce a specific model of the Intoxilyzer and performs this function exclusively for the State. (R. 154-56); *see* GBI Rule 92-3-.06. CMI will not sell the Model Intoxilyzer to anyone outside law enforcement. (R. 156, 598). All Georgia counties, municipalities, and university law enforcement agencies must purchase all evidentiary breath-testing devices from CMI. (R. 154-56). CMI is the only authorized service and repair agent for the Intoxilyzer in the state. (R. 154-56). Although CMI offers a breath preservation function for later independent analysis, the Intoxilyzer does not include this feature. (R. 598). The Intoxilyzer's sole purpose is to produce forensic evidence with which to prosecute criminal defendants. (R. 154). In order to receive approval to sell such devices to Georgia law enforcement, CMI actively solicited business from James Panter, former Director of the Georgia Bureau of Investigation [*hereinafter* GBI] – Department of Forensic Science (R. 154). CMI designed the Intoxilyzer according to parameters designated by the GBI. (R. 155). CMI, through its agents, has traveled to Georgia on numerous occasions to train State implied consent supervisors. (*Id.*). CMI and its attorneys regularly assist the State with legal issues regarding the use of the machine. (*Id.*). Many prosecutors have consistently opposed access on the part of criminal defendants and private individuals to full information regarding the Intoxilyzer programming and source code. (*Id.*). Georgia law

enforcement entities purchase Intoxilyzer machines, and all associated replacement parts, printer cards, and mouthpieces from CMI using State funds. (R. 156). The State pays for all repair, maintenance, training and supplies with State funds. (*Id.*). All Intoxilyzer machines are in the possession of law enforcement agencies, which limit access to State agents and employees except for suspects to be tested after arrest for DUI. (*Id.*). Georgia law enforcement has regularly and consistently refused defense experts access to the Intoxilyzer for testing or analysis. (*Id.*). Despite being an integral part of law enforcement in all DUI cases in Georgia that involve a breath test, CMI refuses to cooperate with the courts and provide the programming and source code of the Intoxilyzer. (*Id.*).

3. The source code and resulting programming of the Intoxilyzer is the computer programming of the machine that analyzes the breath sample to compute the breath test result and determine if there are problems with the sample.

4. On September 22, 2011, counsel for Petitioner filed a written motion for an issuance of a Certificate of Materiality [*hereinafter* Certificate] to obtain an out of state subpoena under the Uniform Act to Secure the Attendance of Witnesses from Without the State [*hereinafter* the Uniform Act], O.C.G.A. § 24-13-90 et seq. (R. 159). The Uniform Act provides the statutory means to compel an out-of-state witness to provide evidence (testimony and other evidence) in criminal proceedings in Georgia. *See* O.C.G.A. § 24-13-94(a). Under the Uniform Act, a party desiring to

secure the attendance of an out-of-state witness in a prosecution or grand jury investigation pending in a Georgia court may request that the court issue a Certificate regarding that witness. O.C.G.A. § 24-13-94(a). In an effort to obtain the source code and programming of the Intoxilyzer, the motion requested a subpoena for CMI and its representatives because access to the source code and programming provides the only means by which a criminal defendant charged with DUI *per se* can meaningfully confront and examine the forensic evidence against him. (R. 154-220). Counsel asserted that the source code had a logical connection to the accuracy of the test result because it is the source code and programming that calculated the computer generated breath test result. Counsel maintained that the State had no standing to object to the Petitioner's request to seek a Certificate and that any governmental attempts to block defense access to witnesses violated the Petitioner's federal constitutional rights to compulsory process, confrontation, due process, and a fair trial. On October 6, 2011, the trial court determined that the requested witnesses, the source code, and programming were material, granted Petitioner's motion, and issued a Certificate directed to CMI. (Pet. App. 15-17).

5. On February 17, 2012, the Daviess County Circuit Court in Owensboro, Kentucky [*hereinafter* Kentucky court], held a limited hearing on a protective order to determine how it would proceed with the Certificate. Rather than holding a hearing on necessity and materiality as mandated by the Uniform Act,

however, the Kentucky court instead found Petitioner's Certificate – and every other Georgia Certificate – to be "defective" on its face. (Pet. App. 21-24). (To Petitioner's knowledge every Certificate sent to Kentucky from every state has been ruled defective by the Kentucky court). The Kentucky court then entered a protective order in favor of CMI and the Intoxilyzer source code. (Pet. App. 25). Petitioner's witnesses were never required to appear before the Kentucky court. The Kentucky court made it clear that "the Georgia courts, they have to decide whether they want due process for their citizens and to incarcerate them without that due process or if they want the use of the Intox 5000."

6. Counsel for Petitioner thereafter moved the Georgia trial court to correct the Certificate in order to allow the Kentucky court to grant the required hearing on the necessity and materiality of the evidence requested. (Pet. App. 19-20). The motion asserted that because Petitioner took no part in drafting the Certificate, it would be contrary to the interests of justice to punish him for the trial court's purportedly defective order. Counsel also filed a motion to suppress the breath test results for a violation of Petitioner's federal constitutional rights to compulsory process, confrontation, due process and a fair trial. The trial court denied both motions and forced Petitioner to trial without the evidence that it had previously determined to be material to his defense.

7. Petitioner again raised all prior objections under the federal constitution during Petitioner's

bench trial and sought to exclude the breath test results because Petitioner was denied access to the material evidence. Notwithstanding the fact that it had already determined that the source code was material evidence in the case, the trial court overruled the objections. The State proceeded to introduce the breath test result through a police officer lacking any training or knowledge as to how the Intoxilyzer had calculated the result. The trial court convicted Petitioner of DUI *per se* based on this evidence alone. O.C.G.A. § 40-6-391(a)(5). Thereafter, counsel timely filed a notice of appeal.

8. The Court of Appeals of Georgia affirmed Petitioner's conviction in two separate opinions. The Court addressed a few, but not all, of Petitioner's errors and arguments in *Smith v. State*, 750 S.E.2d 758 (Ga. App. 2013). (Pet. App. 1). It also referenced and adopted *Phillips v. State*, 751 S.E.2d 526 (Ga. App. 2013) (Pet. App. 27), to address Petitioner's remaining claims, stating without elaboration that Petitioner's "challenges fail for the reasons stated in *Phillips*." (Pet. App. 12). In *Phillips*, the Court inexplicably held that the defendant's breath test result was not testimonial, further explained that the testimony and documentation sought from CMI employees were not testimonial, and concluded that the trial court had not violated the defendant's federal constitutional rights to compulsory process, confrontation, due process and a fair trial by forcing him to proceed to trial in the absence of the material evidence he had sought. After reaching identical

conclusions in *Smith*, the Court went on to reject Petitioner's contention that the State has constructive possession of the computer source code, and held the State's unwillingness and/or inability to obtain and disclose the source code did not render the results inadmissible. The Court ultimately rejected Petitioner's contention that CMI is a state actor for purposes of the Fourteenth Amendment without addressing his arguments. The Court declined to reconsider the matter.

9. The Supreme Court of Georgia denied Petitioner's petition for discretionary review with one justice dissenting. (Pet. App. 18).

REASONS FOR GRANTING WRIT

1. This Court held in *Minder v. Georgia*, 183 U.S. 559, 562 (1902), that a criminal defendant's federal rights to Compulsory Process and Due Process were not violated when a criminal trial was completed in the absence of a material witness when it was not within the power of the state trial court (through any vehicle) to compel the attendance of material witnesses located beyond the state's limits. In response to the regularly appearing obstacles identified in *Minder*, all fifty states enacted the congressionally sanctioned Uniform Act, which "allows a defendant compulsory process for material witnesses in other states to testify in criminal prosecutions in [the requesting] state." *McQueen v. Com.*, 721 S.W.2d 694,

702 (Ky. 1986); *see also New York v. O'Neill,* 359 U.S. 1 (1959) (holding the Uniform Act Constitutional).

The Uniform Act's nationwide adoption gave rise to vastly different interpretations among the states, despite indistinguishable statutory language. The lower courts are now deeply divided on whether forcing a criminal defendant to trial without a material out-of-state witness violates the Compulsory Process and Confrontation Clauses – especially after the defendant exhausts the procedures outlined in the Uniform Act. This petition provides the opportunity to address the significant constitutional issues presented and to resolve this conflict.

2. CMI – Georgia's exclusive provider of state-administered breath-testing instruments – supplies Georgia law enforcement with the tools and resources needed to conduct forensic breath tests on the State's drivers accused of DUI. Although a private corporation, CMI constitutes an integral cog in the machinery of the State's criminal justice system. The results generated by CMI's devices are admissible in court through statute, and the tests are conducted by law enforcement for the purpose of prosecuting cases. At the time of Petitioner's arrest, GBI Rule 92-3-.06 established the Intoxilyzer as the only approved device admissible in Georgia courts. Whether these circumstances qualify CMI as a "state actor" under this Court's doctrine is a question of great magnitude. The answer to this question may determine the rights of every defendant facing charges based on evidence generated by outsourced law enforcement. Petitioner

moves this Honorable Court to employ the reasoning of *Georgia v. McCollum,* 505 U.S. 42 (1992), *West v. Atkins*, 487 U.S. 42, 54 (1988), *et al.* and find CMI is a state actor subject to constitutional and statutory due process requirements.

I.

A. The Decision Below Contravenes this Court's Compulsory Process and Confrontation Clause Jurisprudence.

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; [and] to have compulsory process for obtaining witnesses in his favor." Material witnesses and evidence constitute vital components of all criminal trials. Exempting them from the adversarial process simply because they are located in another state denies the accused of the procedural guarantees of the Sixth Amendment and poses a significant threat of wrongful convictions.

1. All fifty states and the District of Columbia have implemented the Uniform Act precisely to avoid such failures in the criminal justice system. In light of the Uniform Act, the holding below misconstrues the Compulsory Process Clause. Forcing the accused to trial in the absence of critical defense evidence – solely due to its location in a sister state – renders the Compulsory Process Clause meaningless.

The Uniform Act, *United States v. Burr*, 25 F.Cas. 30 (C.C. Va. 1807); *Washington v. Texas*, 388 U.S. 14 (1967); *United States v. Dioguardi,* 428 F.2d 1033 (2d Cir. 1970); and *United States v. Nixon,* 418 U.S. 683 (1974), all demand production of material evidence prior to and during a criminal trial. Georgia's willingness to force a defendant to trial without material evidence ignores the protections enshrined in the Sixth and Fourteenth Amendments, and requires this Court's attention and review. Federal constitutional protections have evolved dramatically since *Minder* – yet the nation's courts still seem to live in its shadow despite a nationwide binding agreement between states creating a mechanism to marshal material out-of-state evidence into court. *See Burr*, 25 F.Cas. at 33 ("[u]pon immemorial usage, then, and upon what is deemed a sound construction of the constitution and law of the land . . . any person charged with a crime in the courts of the United States has a right . . . to the process of the court to compel the attendance of his witnesses"); *Washington,* 388 U.S. at 14 (the right to compulsory process is so fundamental and essential to a fair trial that it is incorporated in the Due Process Clause of the Fourteenth Amendment); *Nixon,* 418 U.S. at 711 ("The right to the production of all evidence at a criminal trial similarly has constitutional dimensions. The Sixth Amendment explicitly confers upon every defendant in a criminal trial the right [. . .] 'to have compulsory process for obtaining witnesses in his favor.'"); *Dioguardi*, 428 F.2d at 1038 ("It is quite incomprehensible that the prosecution should tender a witness to state the

results of a computer's operation without having the program available for defense scrutiny prior to trial"). Moreover, subsequent to *Minder,* this Court held:

> There is no constitutional provision granting [a citizen] relief from th[e] obligation to testify even though he must travel to another State to do so. Comity among States, an end particularly to be cherished when the object is enforcement of internal criminal laws, is not to be defeated by an *a priori* restrictive view of state power.

O'Neill, 359 U.S. at 11-12.

Although this Court has never squarely reversed *Minder,* loyalty to the spirit of the Compulsory Process Clause demands such a result. In light of this constitutional mandate, the Uniform Act now provides the mechanism by which a criminal defendant can secure the attendance of out-of-state witnesses and evidence. And though absent a century ago, the Uniform Act has since resolved *Minder's* obstacles. *See Silverman v. Berkson*, 661 A.2d 1266, 1273 (N.J. 1995) (holding the issue in *Minder* has been addressed by the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings). Indeed, the Uniform Act constitutes "the clear and unambiguous means" for securing out-of-state defense witnesses; and is demonstrably important as "the statutory expression of the state and federal constitutional rights to compulsory process

and a fair hearing." *Rivera v. District Court,* 851 P.2d 524, 527 (Okla. 1993). Accordingly, when a state (either the requesting state or the responding state) refuses or fails to follow the procedures set forth in the Uniform Act for securing the attendance of material out-of-state evidence and witnesses, the state violates a criminal defendant's Sixth and Fourteenth Amendment rights.

Petitioner, like all accused, holds a bedrock procedural right to compulsory process. A trial without this right is structurally unsound and fundamental unfair. *Cf. Bullcoming v. New Mexico*, 131 S.Ct. 2705, 2716 (2011) ("If a 'particular guarantee' of the Sixth Amendment is violated, no substitute procedure can cure the violation") (citing *United States v. Gonzalez-Lopez*, 548 U.S. 140, 146 (2006)).

In the present case, the mechanism provided by the Uniform Act utterly failed the Petitioner – depriving him of a fair trial. This petition provides this Court with the perfect vehicle to revisit the holding and reasoning of *Minder*, now obsolete given the nationwide adoption of the Uniform Act. This Court, alone, possesses the power to breathe life back into the Compulsory Process Clause and to ensure the uniform application of the Uniform Act.

2. The Court of Appeals of Georgia erred by holding that Petitioner's breath test result was not testimonial. (Pet. App. 12); *Smith,* 750 S.E.2d at 758; *see also Phillips,* 751 S.E.2d at 531 (holding the "testimony" of the Intoxilyzer, as well as the

witnesses and documentation Phillips and Smith sought from CMI were not testimonial and were admissible); *see Melendez-Diaz v. Massachusetts,* 129 S.Ct. 2527, 2543, 2554 (2009); *Bullcoming*, 131 S.Ct. at 2717 (holding forensic laboratory reports are testimonial for the purposes of the Confrontation Clause of the Sixth Amendment). This erroneous holding by the Court of Appeals of Georgia further supports the necessity for Petitioner to be able to compel the production of the programming and source code of the automated computer used to generate Petitioner's breath test results.

B. The Decision Below Implicates an Irreconcilable Conflict Among Federal and State Courts.

After the adoption of the Uniform Act by all states and given the holding of *Minder,* there are many unanswered questions about proper resolution of the current conflicts in this area of federal law. The current lack of case law, lack of clear guidance on the Uniform Act, and the lack of a remedy for a state's unilateral noncompliance therewith is unsettling and problematic. This is particularly true given the growing number of people regularly traveling between states for jobs and leisure activities (*e.g.,* business, vacations, sporting events, etc.) who are witnesses to crimes. Without guidance from this Court, lower courts are divided over whether *Minder* is still binding precedent and whether the Uniform Act actually

guarantees compulsory process for out-of-state witnesses and evidence.

Notably, this Court explicitly left open the question whether the Compulsory Process Clause, standing alone, would require the production of witnesses or evidence located within the country in *United States v. Valenzuela-Bernal*, 458 U.S. 858 (1982). This Court held that sanctions could be imposed on the government for deportation of potential defense witnesses if the defendant "makes a plausible showing" the unavailable testimony "would have been material and favorable to his defense, in ways not merely cumulative" to available witnesses. *Id.* at 873. This Court drew a distinction between potential witnesses located in another country and those within the United States, noting that "[i]n adopting this standard, we express no opinion on the showing which a criminal defendant must make in order to obtain compulsory process for securing the attendance at his criminal trial of witnesses within the United States. *Id.* at 873 n.9. This petition seeks, in part, to resolve that question.

1. The holding of the lower court in this case, directly contradicts at least two federal courts, five state supreme courts and two intermediate courts – which have held that proceeding to trial without material out-of-state evidence or witnesses frustrates a criminal defendant's right to a fair trial, due process and compulsory process. *See Perry v. Norris*, 879 F.Supp. 1503, 1509-10 (E.D. Ark. 1995) (analyzing the trial court's failure to utilize the Uniform Act in

terms of whether its denial violated the Compulsory Process Clause); *Silverman*, 661 A.2d at 1273 (the Uniform Act resolved the obstacles identified in *Minder*); *Arizona v. Brady*, 594 P.2d 94 (Ariz. 1979) (trial court's failure to authorize a subpoena for a material witness under the Uniform Act violated the defendant's rights to due process and compulsory process; reading interrogatories of the out-of-state witness was not sufficient to provide defendant due process); *Preston v. Blackledge*, 332 F.Supp. 681 (D.C.N.C. 1971) (same); *Tracy v. Superior Court,* 810 P.2d 1030, 1044 (Ariz. 1991) ("The Uniform Act . . . serves a truth-seeking function and is consistent with other mechanisms . . . intended to assist in the pursuit of a fair trial"); *State v. Tindall*, 242 S.E.2d 806, 811-12 (N.C. 1978) (granting or denial of motion for material witness order is a matter committed largely to discretion of judge; such discretion must, however, be exercised in a manner not inconsistent with a criminal defendant's right to compulsory process for obtaining witnesses in his favor); *Rivera*, 851 P.2d at 527 (recognizing the Uniform Act as the statutory expression of the state and federal rights to compulsory process and a fair hearing); *State v. Hogan*, 372 So.2d 1211, 1214 (La. 1979) (defendant who follows proper procedure under Uniform Act is entitled to hearing on materiality and necessity in sending state, and right to compulsory process violated if continuance denied); *People v. McFall*, 569 N.W.2d 828, 832 (Mich. App. 1997) (a trial court must not deny a request under the Uniform Act in a manner inconsistent

with the Sixth Amendment); and *State v. Carlos*, 17 P.3d 118, 124 (Ariz. App. 2001) (defendant is entitled to the court's assistance in obtaining the necessary information from out-of-state witness, who should have been compelled to appear before the court).

The sound decisions of these courts illustrate what should be the correct rule of constitutional law in light of the Uniform Act along with the logical result of the Act's adoption and effect on the application of the Compulsory Process Clause. The constitutional rights of Georgia defendants should stand on equal footing as those from Arizona, North Carolina, Oklahoma, Louisiana, and Michigan. To leave this area of the law unsettled would entrust this sacred constitutional right to the interpretations of fifty different states – at the mercy of their local interests. *See Holmes v. Winter,* 3 N.E.3d 694 (N.Y. 2013).

2. In the present case, the Court of Appeals of Georgia implicitly followed *Minder's* binding precedent and declined to find a compulsory process violation despite the trial court's decision to proceed to trial without material out-of-state witnesses and evidence. This holding contravenes *Burr* and *Nixon* because the Uniform Act is an available mechanism to secure such evidence.

After passage of the Uniform Act, at least one state high court and three intermediate courts failed to find a right to compel the attendance of out-of-state witnesses under the Compulsory Process Clause. *See Com. v. Dirring,* 238 N.E.2d 508, 512 (Mass. 1968)

(finding that although the Uniform Act entitled defendant to compulsory process for necessary witnesses, that right did not automatically extend beyond the state); *People v. Trice*, 101 A.D.2d 581, 584 (N.Y. App. 1984) (the Sixth Amendment guarantee of compulsory process does not extend to a witness without the state's subpoena powers); *Com. v. Edgerly*, 375 N.E.2d 1, 11 (Mass. App. 1978) (the right to have witnesses brought in from other states is not a constitutional right); *Chesser v. State,* 308 S.E.2d 589, 591 (Ga. App. 1983) (the right to have witnesses brought in from other states is not an absolute right). These courts followed the binding precedent established in *Minder* – precedent Petitioner respectfully submits should be revisited and overruled in light of the Uniform Act.

In *Preston*, 332 F.Supp. 681, the United States District Court for the Eastern District of North Carolina discussed the effect of the Uniform Act on the holding of *Minder* and held that the trial court had abused its discretion after failing to issue the requested subpoenas for out-of-state defense witnesses under the Uniform Act.

> In the case at bar the State of North Carolina had issued process in the first four trials under the Uniform Act . . . to secure the attendance of the petitioners' alibi witnesses . . . who were residents of the State of Pennsylvania. [The witnesses] had appeared and testified in the four previous trials . . . In the fifth trial the trial court refused to order

> such process finding that the testimony of these witnesses as given under oath at the previous trials was available to the petitioners . . . and that the interests of the petitioners could be protected by the use of the testimony of these witnesses as theretofore given. The North Carolina Court of Appeals found that such procedure constituted no error.
>
> **The case of *Washington v. Texas* is interpreted . . . to prohibit such a procedure when the means are available to secure the attendance of the defendant's witnesses. That means in the case at bar was the Uniform Act.** The Supreme Court held in [*Minder*] . . . that there was no deprivation of due process of law where an accused was denied the benefit of the testimony of witnesses who were beyond the jurisdiction of the state court. The basis of that holding was that the legislative power of the state was powerless to make a provision which would result in compulsory attendance of non-resident witnesses. Subsequent to that decision the states began adopting the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings.

Id. at 683 (emphasis added).

Similarly, in *Brady*, 594 P.2d at 94, the Supreme Court of Arizona granted defendant's petition for review to consider whether the defendant was denied due process of law by the trial court's denial of her

motion to summon an out-of-state witness, under the Uniform Act, to testify on her behalf at her trial. *Id.* The Court noted Arizona adopted the Uniform Act in order to implement the Sixth Amendment's guarantee that the accused shall enjoy the right to compulsory process when there are out-of-state witnesses. *Id.* at 96. As such, the Court found that although defendant was permitted to present favorable interrogatories to the jury, compulsory process demanded the presence of her material witness in court. *Id.* The Court found the trial court's denial of her motion to summon a nonresident witness violated due process and reversed her conviction. *Id.*

In this case, Petitioner made every diligent and reasonable effort to fully comply with the Uniform Act. Nevertheless the Kentucky court refused to hold the required hearing on materiality and necessity, going so far as to summarily quash every Certificate the Kentucky court has received from every state. In so doing, the Kentucky court failed "to extend to the decisions of [Georgia courts] the full faith and credit to which they are entitled . . . the Kentucky trial court overstepped when it declared the decisions of [Georgia's trial courts] 'defective on their face.'" *See Phillips*, 751 S.E.2d at 526; *see also* U.S. Const. art. IV, § 1 ("Full Faith and Credit Clause"). This is precisely the situation the Uniform Act was intended and designed to prevent. It is crucial for this Court to clarify each state's respective responsibilities under the Uniform Act. Otherwise the promise of the Uniform Act is illusory.

As Professor Peter Westen noted in his scholarly work on the Compulsory Process Clause:

> If the forum alone cannot prosecute the accused while simultaneously suppressing a material witness in his favor, it cannot prosecute the accused while a sister state . . . operates to suppress a material witness in the defendant's favor. Thus, even though the forum has done everything within its power to produce the witness, it should not be permitted to proceed with the prosecution if the witness is unavailable because of the unjustified actions of a sister state.

Westen, Compulsory Process II, 74 Mich. L. Rev. 191, 296-97 (1975).

This Court has expressed its "emphatic [ ]affirmation . . . of the constitutional obligation of the state courts to uphold federal law, and its expression of confidence in their ability to do so." *See Allen v. McCurry*, 449 U.S. 90, 105 (1980). State governments have a constitutional obligation to enforce defendants' Sixth Amendment right to compulsory process. Moreover, states have a duty to render their subpoenas effective, which the Georgia trial court failed to do. Instead the court stubbornly insisted Petitioner proceed to trial without material evidence. "Few rights are more fundamental than that of an accused to present witnesses in his own defense. . . ." *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973); *see also Preston*, 332 F.Supp. at 682-85 (once the state adopts the Uniform Act it has the obligation under the

Compulsory Process Clause to apply it on defendant's behalf). To hold Petitioner responsible for the trial court's drafting of an allegedly defective Certificate, and the success or failure thereof, deprived the accused of fundamental constitutional guarantees based solely on the actions of the trial court.

In denying a hearing on materiality and necessity, the Kentucky court noted, "isn't the Georgia court's remedy to the State of Georgia to say, okay, if you don't give that discovery to the Defendant, you don't get to use it . . . you don't get to use that evidence . . . I mean in a criminal case, if you don't . . . if the State does not comply with the discovery order that the court has issued, then they don't get to present that evidence." In other words, the Kentucky court was fully aware that the evidence sought was material and necessary to Petitioner's defense, but nevertheless denied the Georgia court full faith and credit while depriving Petitioner of his right to compulsory process. In denying Georgia full faith and credit, the Kentucky court pointed out, "the Georgia court, they have to decide whether they want due process for their citizens and to incarcerate them without that due process or if they want the use of the Intox 5000." This Court should not allow Georgia or any other state to deny compulsory process and due process to its citizens.

It is worth repeating that the Georgia court still had the ability to correct the supposedly defective Certificate or to instead suppress the printed test result. As such, Petitioner moved the Georgia court to

correct its alleged errors in the original Certificate or suppress the printed test result. The court declined both options. This Court should clarify the proper remedy of the instant case when states disregard the dictates of the Sixth and Fourteenth Amendments.

After the Kentucky court specifically indicated to both parties that it was not going to schedule a hearing on necessity and materiality and that it would only address the protective order, the Kentucky court entered a protective order in favor of CMI, stating from the bench that production of the source code would present an undue burden on CMI without any evidence presented by either side. The Kentucky court was wrong, however, to consider CMI's intellectual property privilege to find an undue burden because under the Uniform Act the trial court of the forum state – Georgia – was the proper venue to determine the scope of the privilege. "Comity and respect for a sister State's investigative processes" supports the conclusion that the receiving state – the forum state – is best suited to make determinations about privilege. *See Matter of Codey (Capital Cities, Am. Broadcasting Corp.)*, 605 N.Y.S.2d 661, 667 (N.Y. 1993) (it would be inefficient and inconsistent with the purpose and design of the Uniform Act to permit the sending state's courts to resolve questions of privilege). Additionally, the Kentucky court did not even require the CMI witnesses to appear and address Petitioner's subpoena or the alleged privilege. *Compare Brady*, 594 P.2d at 94 (reading

interrogatories of the out-of-state witness was not sufficient to provide defendant due process).

Absent further guidance from this Court, this conflict will remain irreconcilable. This petition presents the opportunity and vehicle to address the widening split between states. The current conflict is sufficiently evolved to beg for resolution. Nothing would be gained from further percolation. Courts have had ample time to digest the implications of the Uniform Act on *Minder*, and they continue to reach conflicting decisions.

C. The Question Presented Significantly Impacts the Administration of Criminal Justice.

For at least three reasons, this Court should not allow the conflict over the question presented to persist.

1. The interpretation of the Uniform Act is a matter of federal law pursuant to the Compact Clause and the Crime Control Consent Act of 1934 [*hereinafter* Consent Act]. The Compact Clause of the United States Constitution provides, "[n]o State shall, without the consent of Congress . . . enter into any Agreement or Compact with another State. . . ." U.S. Const. art I, § 10, cl. 3. Congress passed the Consent Act and granted consent for any two or more states to enter into agreements or compacts "for cooperative effort and mutual assistance in the prevention of crime and *in the enforcement of their respective criminal laws*

and policies. . . ." 4 U.S.C. § 112(a) (emphasis added); *see, e.g., Cuyler v. Adams*, 449 U.S. 433, 442 (1981) (interpreting the Interstate Agreement on Detainers Act).

This Court's decision in *Cuyler* logically extends to the Uniform Act as "the congressional 'consent' in the Consent Act applies with the same force to all reciprocal legislation [including the Uniform Act] as it does to the Detainer Agreement." *Id.* at 454 (Rehnquist, J., dissenting); *see also Alabama v. North Carolina*, 560 U.S. 330, 358 (2010) (Kennedy, J., concurring) ("Congressional consent to an interstate compact gives it the status of a federal statute. This is an apt and proper way to indicate that a compact has all the dignity of an Act of Congress.").

The Uniform Act is controlled by the Consent Act. The Consent Act is a means of resolving problems that are clearly the state's responsibility, but which transcend the boundaries of a particular state. If, as in the case of the Uniform Act, the compact makes no provision for resolving impasse, this Court may exercise its jurisdiction to do so. As demonstrated here by both Georgia and Kentucky, without this Court's guidance, states remain free to limit the reach of the Uniform Act in order to protect the favored citizens of one signatory state to the detriment of the accused. This Court should grant this petition to eliminate inconsistencies arising from varying state court interpretations of the Uniform Act, to restore principles of comity, and to ensure a

uniform interpretation of the statutory expression of criminal defendants' compulsory process rights.

2. The question presented affects every criminal court across the country. Material evidence plays a central role in all criminal trials; the production of which "has constitutional dimensions." *Nixon,* 418 U.S. at 711. *See also Washington*, 388 U.S. at 18; *Burr,* 25 F.Cas. at 33.

As provided in *State ex rel. Dyer v. Sims,* 341 U.S. 22, 28 (1951):

> A State cannot be its own ultimate judge in a controversy with a sister State. To determine the nature and scope of obligations as between States [such as] through the legislative means of compact . . . is the function and duty of the Supreme Court of the Nation.

The Uniform Act's very purpose is to provide a nationwide *uniform* mechanism to ensure both the prosecution and defense are afforded process for obtaining the presence of necessary material evidence and witnesses within the United States. *See State v. Tolley,* 226 S.E.2d 353 (N.C. 1976); *State v. Tindall,* 242 S.E.2d 806, 812 (N.C. 1978).

3. If left unresolved, the conflict between *Minder* and the Uniform Act damages the integrity of the criminal justice system. This Court should grant certiorari to expressly define the role of the Uniform Act, or in the alternative, to overturn *Minder* so as to maintain and effectuate the constitutional rights of criminal defendants in all types of cases. This would

also prevent states from enacting automated testing schemes similar to the Georgia Intoxilyzer testing program for DNA analysis, ballistics analysis, fingerprint analysis, hair analysis, blood analysis, voice analysis and all other types of scientific testing where the secret programming of the computer generated evidence is difficult – if not impossible – to challenge in court.[1] Without an express and uniform interpretation of the Uniform Act from this Court, states can simply buy computers that automate an analysis, make sure the company selling the machines refuses to sell the machine to anyone outside law enforcement, and maintain the secret programming of the computer outside of the state. The evidence will then be impossible to challenge, as it was in this case.

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[1] Georgia has created a statutory scheme in which: (1) evidence usually determinative of the defendant's guilt . . . is tested and reported, not by forensic experts who testify and face cross-examination on the reliability of their methods and the accuracy of their results, but rather by a machine . . . that takes in a specimen from the defendant and, through internal mechanisms and computer code, generates a test report; (2) the machine's computer code is unavailable to the defendant through discovery or compulsory process because the State avoids possessing it in Georgia; (3) the machine's test result is admissible at trial through a witness who can say that he was qualified to operate the machine and it operated as designed . . . but who has no knowledge about whether the machine was in fact designed to produce reliable and accurate results under the circumstances presented; and (4) the machine uses up the specimen, with nothing maintained for later confirmation or independent testing. *Davenport v. State*, 289 Ga. 399, 404-05 (2011) (Nahmias, J., concurring).

D. This Case Is an Excellent Vehicle for Resolving the Question Presented.

This case presents an excellent vehicle for resolving the split of authority over the question presented.

1. Petitioner unambiguously objected at trial that the introduction of the printed breath test results without the production of the material source code evidence used to calculate his BAC would violate his federal constitutional right to due process, compulsory process, confrontation and a fair trial. Petitioner preserved his constitutional objections at trial and throughout his state court appeals. Finally, the Georgia courts purported to resolve these important issues on the merits but gave them short shrift.

2. The Sixth Amendment compulsory process issue here turns exclusively on whether the government can deny a criminal defendant's right to compulsory process for the production of material out-of-state evidence. This Court described the right as "in plain terms the right to present a defense [. . .] to the jury so it may decide where the truth lies." *Washington*, 388 U.S. at 19. Despite the binding precedent of *Minder*, there is now a mechanism in place to facilitate the production of material out-of-state evidence – the Uniform Act.

Aside from the Uniform Act, Georgia does not have any other statutory procedure that allows criminal defendants to demand the production of out-of-state witnesses or evidence. Accordingly, there can

be no claim that some procedural aspect of state law satisfied Petitioner's right to compulsory process.

Given the absence of reasonable ways to assess the source code, the court's decision ignored Petitioner's right to subject the government's sole piece of evidence related to his blood alcohol concentration to meaningful adversarial testing. Georgia's scheme allows the State to claim it lacks actual possession of the source code, thereby relieving the State of its discovery obligations and depriving defendants of the rights guaranteed under the Sixth and Fourteenth Amendments. Without judicial assistance in forcing the executive branch to play fair by requiring defense access to the critical evidence, these abuses will continue.

3. This case aptly illustrates the dangers of tolerating a state's decision to ignore the mandates of the Uniform Act. Doing so creates a culture in which individual states have the power to be the ultimate judge in a controversy with a sister state. This Court explicitly condemned a similar practice in *Sims,* 341 U.S. at 28 (A state cannot be its own ultimate judge in a controversy with a sister state).

4. This case presents a nontrivial Confrontation Clause issue that goes hand in hand with the Compulsory Process Clause issue. The Sixth Amendment Confrontation Clause issue turns on whether the State may admit a forensic test result without the underlying data solely through the testimony of a lay witness that cannot be cross-examined about the

inner workings of the computer. Allowing the admission of such evidence deprives the accused from effectively challenging reliability, and is grossly inconsistent with this Court's established and binding precedent. *See Melendez-Diaz,* 129 S.Ct. at 2543, 2554; *Bullcoming*, 131 S.Ct. at 2705.

5. The facts of the present case allow this Court to finally decide an unresolved issue left in the wake of this Court's fractured *Pennsylvania v. Ritchie,* 107 S.Ct. 989 (1987) opinion: *whether the denial of pretrial access to information necessary for effective cross-examine of a crucial prosecution witness may violate the right to Confrontation.*

II.

A. The Lower Court's Decision Misconstrues this Court's State Actor Jurisprudence and Must be Addressed to Prevent Future Harm.

1. The lower court misconstrued this Court's precedent when it limited the state actor doctrine to "civil claims under 42 U.S.C. § 1983." *Smith*, 50 S.E.2d at 763. This Court has specifically held a *criminal defendant* can be a state actor for Fourteenth Amendment purposes. *McCollum*, 505 U.S. at 42.

In *McCollum*, this Court held a criminal defendant was a state actor when exercising his right to use preemptory challenges during jury selection. *Id.*

In doing so, this Court, relying on *Edmonson v. Leesville Concrete Co.,* 500 U.S. 614 (1991), applied three principles: (1) the extent to which the state actor relied on governmental assistance and benefits; (2) whether the state actor was performing a traditional governmental function; and (3) whether the injury caused was aggravated in a unique way by the incidents of governmental authority. *McCollum*, 505 U.S. at 51.

In determining that a criminal defendant relies on governmental assistance and benefits during jury selection, this Court noted Georgia law provides the procedure for empanelling a jury. *Id.* at 52. In light of these procedures, the defendant in a Georgia criminal case relies on governmental assistance and benefits. *Id.* "By enforcing a discriminatory peremptory challenge, the Court 'has . . . elected to place its power, property and prestige behind the [alleged] discrimination.'" *Id.* (citing *Edmonson,* 500 U.S. at 624).

Similarly, the evidentiary breath-testing system, in which CMI plays an integral role, relies on governmental assistance and benefits in the context of DUI investigations. "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." O.C.G.A. §§ 40-5-55 and 40-5-67.1(b)(2). Georgia law further requires the requesting law enforcement officer to determine which test the suspect performs for the sole purpose of gathering evidence against the DUI suspect for use

in court. O.C.G.A. § 40-5-67.1(a). With regard to breath-testing, Georgia rules provide:

> [b]reath tests . . . shall be conducted on an Intoxilyzer Model 5000 manufactured by CMI, Inc. The Director of the Division of Forensic Sciences will approve the design of any other type of breath alcohol analyzer in the State, not specifically approved under this rule.
>
> Ga. Comp. R. & Regs. 92-3-.06.

Not only does Georgia law require a DUI suspect to provide a chemical sample to determine the presence of alcohol for the sole purpose of admitting this forensic evidence at trial, no other company has been approved to provide evidentiary breath-testing machines to Georgia from 1995 to the present day. The Georgia legislature has instead exclusively vested CMI with essential investigatory and prosecutorial roles (both roles of the State). Similarly, just as the peremptory challenge and jury system from *McCollum* "could not exist without the overt significant participation of the government," (*McCollum*, 505 U.S. at 52), CMI's role as the sole provider of evidentiary breath-testing devices to Georgia could not and would not exist without the significant and overt participation of the executive branch and judicial branch of government. *See* Ga. Comp. R. & Regs. 92-3-.06.

Despite the lower court's erroneous limitation of the state actor doctrine, Judge McFadden publicized

that the state actor argument would apply if Petitioner had shown "by the admission of evidence that CMI is a state actor." *Smith,* 750 S.E.2d at 764 (McFadden, concurring). However extrinsic evidence on this point was unnecessary as this fact is the proper subject of judicial notice. Petitioner placed the court on notice of GBI Rule 92-3-.06 (establishing state actor relationship between CMI and the State) – enacted pursuant to the Georgia Administrative Procedures Act. Georgia's legislature via statute determined "courts *shall* take judicial notice of any rule which has become effective pursuant to [the Administrative Procedure Act]. O.C.G.A. § 50-13-8. The Court of Appeals of Georgia has consistently held that trial courts and appellate courts could take judicial notice of the GBI rules. *See, e.g., State v. Naik,* 577 S.E.2d 812, 814 (2003).

In regard to the second principle, this Court has found that peremptory challenges perform a traditional function of the government: "Their sole purpose is to permit litigants to assist the government in the selection of an impartial trier of fact." *Edmonson,* 500 U.S. at 620. This Court recognized, the jury system in turn "performs the critical governmental functions of guarding the rights of litigants and 'ensur[ing] continued acceptance of the laws by all of the people'" *Id.* at 624. These conclusions apply with even greater force in the criminal context because the selection of a jury in a criminal case fulfills a unique and constitutionally compelled governmental function. *McCollum*, 505 U.S. at 52.

Similarly, the purpose of evidentiary breath-testing is to assist Georgia law enforcement in the investigation and prosecution of DUIs. *See Edmonson*, 500 U.S. at 628 (no area is more firmly within the exclusive and traditional sphere of activity of the state than law enforcement).

Finally, this Court indicated, "the courtroom setting in which the peremptory challenge is exercised intensifies the harmful effects of the private litigant's discriminatory act and contributes to its characterization as state action." *McCollum*, 505 U.S. at 53.

Law enforcement in Georgia designates the type of test and then operates the Intoxilyzer to generate the breath test result after a suspect is placed under arrest. The evidence from the Intoxilyzer is admissible in court due to the approval of the machine by the GBI as required by the legislature. The State specifically selected CMI to participate in this role in law enforcement. CMI accepted this role in Georgia and is paid through State funds for the machines, necessary supplies, training, and maintenance. In fact, CMI advertised and sought this role in law enforcement in many states. All three branches of government are involved in the approval and eventually the admission of this forensic evidence at trial.

The Intoxilyzer analyzes breath specimens for the specific purpose of being used as evidence against a criminal defendant during a public trial. The

defendant is unable to challenge the evidence because of the scheme created in Georgia. *See* n.1, *supra.*

Just as courts must not allow abuse of peremptory challenges during jury selection, they must also prevent the unfair introduction and utilization of evidence in violation of a criminal defendant's constitutional rights.

Similarly, in *Atkins*, 487 U.S. at 42, this Court found Atkins, a part-time physician providing medical services to state prison inmates, to be a state actor. This Court noted that Atkins' "delivery of medical treatment to West was state action fairly attributable to the State." *Id.* at 57. Just as Atkins' provision of medical care to state prisoners constituted state action, CMI's provision of evidentiary breath-testing machines for the purpose of criminal investigations and prosecutions must be ruled to be state action.

Georgia vested CMI with its role as the sole provider of evidentiary breath-testing machines. Forensic testing by the police – for the sole purpose of prosecution – is undeniably a fundamental government function. CMI's refusal to disclose the source code is particularly troubling, because "guarding the rights of litigants" is a critical government function, which applies with "even greater force in the criminal context." *Id.* at 52. And "the injury . . . is made more severe because the government permits it to occur within the courthouse itself." *Shelley v. Kraemer,* 334 U.S. 1, 16 (1948) (noting this Court has reversed

numerous convictions when the trial court failed to provide the "essential ingredients" of a fair hearing).

2. Additionally, the lower court's decision arbitrarily obligated Petitioner to prove "collusion" with the State for CMI to be a state actor. *Smith,* 750 S.E at 763 n.22, 764. This Court has never held collusion must be established in order for a private party to be a state actor. In fact, the lower court's decision is irreconcilable with *McCollum* in which this Court held that even a criminal defendant (an adversarial opponent of the state by definition) was a state actor. *McCollum*, 505 U.S. at 42. It would be absurd to infer that the defendant in *McCollum* had colluded with the state in any manner.

3. In misconstruing the state actor doctrine the lower court denied Petitioner his constitutionally guaranteed right to access evidence under the Sixth and Fourteenth Amendments, O.C.G.A. § 40-6-392(a)(4) (defendants are entitled to full information concerning the State administered test taken at the time of arrest); *Brady v. Maryland,* 373 U.S. 83 (1963); and *Kyles v. Whitley,* 514 U.S. 419 (1995). *See, e.g., California v. Trombetta*, 467 U.S. 479 (1984).

In *Brady,* 373 U.S. at 83, this Court held due process is violated when the state suppresses material evidence, "irrespective of the good faith or bad faith of the prosecution." *Id.* at 87. In *Kyles,* 514 U.S. at 438, this Court acknowledged the state may not bury its head in the sand when it comes to the disclosure of material evidence. Even when such evidence is in the

hands of other state actors, this obligation continues. *Id.* This same principle applies here. In a *Brady* analysis, the minimum required if there is a dispute between the state and defendant is an in camera inspection of the evidence by the trial judge to determine if the evidence is exculpatory. Petitioner requested an in camera inspection of the programming and source code in writing but that was denied when the court found that CMI was not a state actor.

Under this Court's state actor jurisprudence, the State must provide the source code and programming of the instrument being used to convict criminal defendant's accused of DUI *per se*. CMI refuses to provide this information in any manner useful to properly analyze the source code and programming. CMI refuses to allow the results of a limited source code analysis to be presented to jurors. CMI refuses to allow the experts to present this evidence to a judge or jury. It is constitutionally offensive to allow the state of Georgia to contract out its forensic testing to CMI, which welcomes State funds for profit while disregarding the constitutional requirements of its role in law enforcement and the trial courts. The out-of-state location of CMI does not modify its responsibility to the courts.

B. The Issue Presented is Extremely Important.

The utter disregard or confusion of the lower court as to the application and reach of the state actor doctrine epitomizes the need for clarification. CMI's

refusal to disclose the source code prevented Petitioner from challenging the State's evidence. Petitioner calls on this Court to apply its clear precedent and address this manifest injustice. CMI's relationship with Georgia qualifies it as a state actor, and disclosure of the material evidence sought by Petitioner is constitutionally mandated under the Due Process Clause of the Fourteenth Amendment. CMI's actions fall squarely under this Court's state actor doctrine when applied to a criminal case.

Allowing individual states to outsource their criminal investigation obligations to private companies in sister states, without ensuring defense access to material evidence in their possession constitutes manifest injustice. The executive branch of the state of Georgia has effectively placed critical defense evidence beyond the reach of Petitioner *and* all Georgia courts. But "judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers." *United States v. Reynolds*, 345 U.S. 1, 9-10 (1953). Petitioner's fundamental Fourteenth Amendment rights to due process and access to material evidence cannot be circumvented by a scheme implemented by the State to intentionally outsource law enforcement forensic testing. This petition presents this Court with the opportunity to ensure the state actor doctrine is uniformly applied in criminal cases across the United States.

CONCLUSION

For the foregoing reasons this petition for writ of certiorari should be granted.

Respectfully submitted,

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