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GEORGIA traffic PROSECUTOR

A Publication of the Prosecuting Attorneys' Council of Georgia Traffic Safety Program

···> our mission

The goal of PAC's Traffic Safety Program is to effectively assist and be a resource to prosecutors and law enforcement in keeping our highways safe by helping to prevent injury and death on Georgia roads.

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feature article >

Although attorneys are becoming more innovative and creative in defending impaired drivers, it seems their most consistent trial strategy is placing officers on trial for their investigation of the impaired driver. That is why it is so important that law enforcement officers and prosecutors concentrate on the basics at the roadside investigation. Utilizing the standardized field sobriety tests and applying common sense and reasoning generally will prevail against the impaired driver…

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Creative Roadside Investigations: Limiting Impaired Driving Defenses

By W. Clay Abbott, TDCAA DWI Resource Prosecutor, Austin, Texas

Excerpts reprinted from *The Texas Prosecutor* journal with permission from the Texas District and County Attorneys Association

The best counter to a defendant's explanation for bad driving (lately, cell phone conversations or texting is a popular explanation) is an officer's solid questioning at the scene of the initial traffic stop. Often officers are afraid to ask drivers to explain their actions, but that is a serious misstep. Fear that the offender will have an excuse for a traffic violation, nystagmus, lack of mental abilities, lack of physical coordination, and the refusal to take a breath test is misplaced. The roadside stop is the exact place for such questioning! At the traffic stop, a driver doesn't have time to concoct a believable story, but you can bet that after several months with capable defense counsel, the defendant will have a halfway reasonable explanation for every clue the officer notes in the police report and video. (I know it may come as a shock that defendants might lie or that defense counsel could suggest through cross-examination alternatives to impairment.) The best time to get to the truth is when the defendant is most likely to TELL the truth, and if not the truth, then at least the most ineffective lie.

Conduct "Mom's Sobriety Tests"

Remember that all jurors had mothers, just like yours, who conducted their own field sobriety tests when those jurors came home as teenagers, just like your own mom did. My mother made me wake her up and give her a hug; then she asked me silly questions about my night, all while smelling my breath for alcohol, scanning for bloodshot eyes, and checking my ability to converse with all of my faculties. Mom's sobriety tests, while not as well researched, tested, and verified as the SFSTs, are far better accepted by and understandable to the average juror. So before officers on the stand ever get to SFSTs, they must fully explain that they conducted Mom's sobriety tests on the defendant too. This is where DUI cases are won. While defense counsel will always put OFFICERS on trial for their execution of SFSTs, the DEFENDANT is the focus of Mom's sobriety tests. As a note to prosecutors, don't forget how important an officer's initial observations are during jury selection. And officers, nothing in a DUI investigation is as important as this first contact and conversation you have with the defendant. Don't rush it. Spend as much energy developing this set of skills and techniques as you do any other.

When an officer stops a vehicle for poor driving performance or a traffic violation, he must ask the driver to explain why he committed the violation or dangerous behavior. The question should be conversational, not accusatory—it should provide a fair opportunity to explain. The officer should confirm or rebut this excuse with his own observations. Later (after arrest) it is also very helpful to broach the issue again; it is amazing how easy it is for the suspect to remember the truth and how hard to remember a lie. Remember that the jury should and does expect the officer's investigation to be fair, and his ability to explain why he pulled the defendant over is the very essence of fairness. Will the defendant lie? Perhaps—but ask yourself whether the lie at the scene will be better or worse than the one crafted for trial. The explanation the defendant gives on the roadside can be investigated, but it can't once it is made in court. Ask to see the dropped soda, cigarette burn, cell phone, or whatever the defendant says took her attention away from the road and caused the bad driving.

Three possible responses

The defendant has only three responses to an officer's request for an explanation. First, he can deny what the officer saw. Such a response is not a problem in court—the officer should

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This newsletter is a publication of the Prosecuting Attorneys' Council of Georgia. The "Georgia Traffic Prosecutor" encourages readers to share varying viewpoints on current topics of interest. The views expressed in this publication are those of the authors and not necessarily of the State of Georgia, PACOG or the Council staff. Please send comments, suggestions or articles to Fay McCormack at fmccormack@pacga.org.

win this battle of credibility. And denying the officer's observations also suggests that the defendant is unaware of her dangerous driving behavior. What better evidence of impairment? Secondly, he can admit the behavior with an explanation. This response is certainly not a disaster for the prosecution—the defendant just admitted to the probable cause for the stop. Prosecutors DREAM of this kind of evidence in a suppression hearing. Finally, the well-coached and experienced drunk driver can invoke her right to silence. Such is her right; so be it. Jurors will still view the officer as very fair and concerned that the truth comes out, which is a better result than if the officer had never asked the question.

Remember too that the officer's questions are documented on video. His observations are now locked into our main piece of evidence along with the defendant's unrehearsed and probably most frank explanation. This documentation helps the officer put essential details in his reports and recall details at trial, which is very valuable. Officers and prosecutors are doomed to fail if they are, or appear to be, afraid of the truth.

"Why" questions

The officer should also ask "why" questions during the SFST performance. For example, an officer observing HGN should ask, "Have you ever been diagnosed with any eye problems?" Again, every defendant ever tried for DUI has "natural nystagmus"—just listen to any defense cross-examination. Investigate if a driver claims eye trouble at the scene: Who is her doctor, when did the eye injury happen, what treatment is she receiving, etc. Again, a suspect's initial excuse will not be as believable as the one defense counsel makes after discovery or on cross when the defendant sits silently, cloaked in the 5th Amendment.

All suspects on the roadside want one thing more than anything in the universe: They want to go home, not to jail. Most will avail themselves of every opportunity to talk their way out of an arrest. If in answering these "why" questions, they establish legitimate explanations for their bad driving (other than intoxication), the officer can make the right call and let them go. Being open to such options makes the officer much more credible.

But never forget that one of the stages of intoxication (right between "I should sing in public" and "Dang! My clothes are too hot") is "I can outsmart this officer." Some offenders have learned the hard way that they cannot outsmart officers when caught driving while impaired—they might still retain the ABILITY to remain silent as well as the RIGHT to remain silent. In such a total-refusal case, I have one other suggestion: Turn the in-car video camera around during the drive to jail. Don't ask questions, just let the camera observe the suspect in the cruiser's backseat. Videotaping your own driving is of limited utility. What your camera records during the drive has the best chance of bringing something admissible to the prosecutor. Is the defendant sleeping? Nice touch. Ranting? Even better! Praying? My personal favorite.

All of these questions should be asked before the officer finishes his roadside investigation and makes an arrest decision. That being the case, the defendant is not in custody. Because he cannot be the target of custodial interrogation when not in custody, the defendant's statements should be admissible without MIRANDA warnings or waiving her rights. These techniques must be applied as early as possible in the investigation and as completely as the stop will allow.

Finally, after Implied Consent is read, the defendant refuses a breath test, and the defendant is MIRANDIZED and waives her rights, ask her why he does not want to take a breath test. I bet very few can cite as many creative but idiotic reasons for refusing the test as a DUI attorney can. Far more clever defense counsel are worried about flesh-eating bacteria on sealed Intoxilyzer mouthpieces than intoxicated suspects are. Silence also works here. No impaired suspect will ever wax as eloquently as a defense attorney on voir dire or as a well-coached defendant on the stand.

Prosecutors, make sure that all of this information gets in front of the jury on direct. It will drain the effectiveness of those defense-favorite "isn't it possible" questions on cross.

Photo courtesy: NHTSA.org

2008 Traffic Legislation

House Bill 336

O.C.G.A. § 40-5-63.1, O.C.G.A. § 40-6-391

- A condition of license reinstatement is that anyone with two driving under the influence (DUI) convictions within 10 years, must undergo clinical evaluation, and, if recommended, substance abuse treatment.

- For purposes of determining the sentence for a second or third DUI, the time period for counting prior DUI convictions has been raised to 10 years (previously it was within a five year period). A third DUI conviction remains a high and aggravated misdemeanor. (Note: DUI convictions that were obtained prior to July, 1, 2008 count for determining punishment for a second or third DUI.)

- Conviction of a fourth offense for driving under the influence within 10 years of the current arrest is a felony. However, only DUI offenses occurring on or after July 1, 2008 can be used to calculate the number of prior convictions for the purpose of imposing a felony sentence.

Sentence: A fine of less than $1000 and not more than $5000; Imprisonment 1 – 5 years but the judge may suspend all but 90 days; At least 60 days community service; but if a defendant is sentenced to serve 3 years of actual imprisonment, the judge may suspend the community service; Completion of an approved DUI Alcohol or Drug Risk Reduction Program; Clinical evaluation and, if recommended, as a part of such evaluation, a substance abuse treatment program, provided however, that in the court's discretion such evaluation may be waived; 5 years probation.

- If the defendant is charged with DUI after July 1, 2008 and has at least three prior DUI's within 10 years of the current arrest but some of those convictions occurred

before July 1, 2008, they will be sentenced as if it were the 3d DUI conviction.

- O.C.G.A. § 40-6-391(c) now mandates clinical evaluation in all DUI sentences.

- High and aggravated misdemeanors may now be adjudicated in municipal courts.

- Felony DUI Under 21: If a person under 21 has been convicted (under § 40-6-391 (k)) based on refusing the chemical test or having an alcohol concentration of .08 grams or more and is subsequently convicted of DUI, that previous conviction will count as a violation of § 40-6-391 (a).

- DUI's adjudicated in juvenile court cannot be considered priors when determining the proper sentence for a new DUI. [Deleted from O.C.G.A. 40-6-391(c) (6)].

Effective July 1, 2008.

Senate Bill 350

O.C.G.A. §§ 40-5-2, 40-5-20, 40-5-121, 42-4-14

- Anyone convicted of Driving without License shall be fingerprinted.

- OCGA 40-5-20 is amended to make the penalties for driving without a license the same as those for driving on suspended license in violation of OCGA 40-5-121, which includes a mandatory minimum sentence of 2 days (which can be on probation) and a minimum fine of $500.00. If at the time of the hearing the person presents the court with proof of a valid Georgia's driver's license, he/she will not be found guilty.

- The fourth or subsequent conviction of driving without a license within 5 years is a felony.

Effective July 1, 2008.

Senate Bill 529

O.C.G.A. §§ 40-6-270, 40-6-393, 40-6-393.1, 52-7-12.2, 52-7-12.3

- A person who causes the death of a person through the operation of a vehicle or vessel, respectively, where the person fails to stop and attempt to render assistance, commit the offense of homicide by vehicle in the first degree or homicide by vessel in the first degree. The punishment is imprisonment for not less than three years and not more than 15 years.

- Duties relating to hit and run are expanded to include obligation to attempt to contact law enforcement and/or EMS if anyone in the accident is unconscious, appears deceased, or is otherwise unable to communicate.

- This law changes the penalty for feticide by vehicle to not less than 3 years and not more than 15 years.

Effective July 1, 2008, and applies to offenses committed on or after such date.

House Bill 1235

O.C.G.A. § 40-6-10

A law enforcement agency that improperly has a fleet vehicle towed or impounded for failure to provide sufficient proof of insurance shall be liable for the fees related to the wrongful towing or impoundment of such vehicle.

Effective July 1, 2008.

House Bill 77

O.C.G.A. §§ 40-6-20(f) (3), 40-6-20(f) (8), 40-14-21, 40-14-22, 40-14-23, 40-14-24, 40-14-25, 40-14-26

- Red-light camera citations must be issued by sworn law enforcement officers.

- The law requires that a second summons be sent via certified mail if the vehicle owner fails to appear at the initially scheduled hearing on a red-light camera citation.

- The issuance of a civil citation is prohibited if the owner of the vehicle was cited criminally.

- "Governing authorities" are required to obtain a red-light camera permit from Georgia Department of Transportation. A public hearing must be held; the DOT permit application must include proof of safety need for red-light camera at intersection; and the application must include a traffic engineering study.

- Adjustments to red and yellow light timing for red-light cameras are prohibited.

- Signs must be posted warning of red-light cameras at intersections.

- O.C.G.A. 40-14-25 establishes a red-light camera complaint procedure through DOT; creates a rebuttable presumption of misconduct if the camera is operated without a permit or otherwise in violation of camera provisions; and creates an appeal procedure for governing authority if DOT denies permit application.

Effective December 31, 2008.

Senate Bill 55

O.C.G.A. §§ 3-6-4, 40-6-253

Each patron is authorized to remove for off-premises consumption, one resealed partially consumed bottle of wine that was purchased with a meal. The bottle must be placed in a bag or other container, with the receipt attached, and secured in a manner that it is apparent if the container has been subsequently opened or tampered with.

The bottle must be in a locked trunk or glove compartment (or behind the last upright seat if there is no trunk). This law creates an exception to open container violations.

Effective July 1, 2008.

House Bill 1111

O.C.G.A. §§ 40-5-2, 40-5-22, 40-5-25, 40-5-54.1, 40-5-56, 40-5-60, 40-5-64, 40-5-103, 40-5-147, 40-5-149, 40-5-150, 40-5-151, 40-5-159, 40-5-171, 40-8-27

- Department of Driver Services is allowed to release driver's license photographs and signatures to voter registrars and the Secretary of State's Office when needed for voter registration identity verification.

- DDS may charge fees up to $10.00 for anyone failing written tests or $50.00 for CDL applicants who fail to appear for road test appointments.

- As a consequence of the Court of Appeals' decision in State v. Fuller, 289 Ga. App. 283 (2008), DDS must now send notice of suspension of driver's license for child support non-payment, and for failure to appear on traffic citation, via certified mail, to the driver's mailing address on the license. Effective January 1, 2010.

- All uniform traffic citations must include language that failure to appear and respond will result in suspension of driver's license. Effective January 1, 2010.

- Also as a result of Fuller, the law now makes it clear that license suspensions and revocations resulting from convictions occur by operation of law.

- DDS is now authorized to renew and replace limited driving permits and identification cards.

- DDS must obtain out-of-state records for CDL applicants and impose any federal disqualifications not imposed by prior jurisdiction(s).

- Reference to O.C.G.A. 20-2-701 is deleted from TAADRA (Teenage and Adult Driver Responsibility Act) license suspension language relating to school absences, withdrawals and misconduct. The law also clarifies that proof of re-enrollment in school only resolves TAADRA license suspensions based upon withdrawal from school.

- A commercial driver convicted of violating an out-of-service order shall be subject to a civil penalty of not less than $2,500 (previously $1,100) for first offense and not

less than $5,000 (previously $2,500) for subsequent offense. Any employer knowingly allowing or requiring a driver to drive in violation of an out of service order shall be subject to a civil penalty of not less than $2,750 and not more than $25,000 (previously $11,000).

- In lieu of strobe lights, light-emitting diode (LED) lights may be placed on trailers carrying logs, pulpwood, poles or posts which extend more than four feet beyond rear.

Effective January 1, 2009, except as indicated.

Senate Bill 488

O.C.G.A. §§ 40-5-20, 40-5-21, 40-5-21.1, 40-5-21.2, 40-5-100

- Foreign nationals may be issued a driver's license without surrendering their license previously issued by a foreign jurisdiction. This exemption does not apply to an applicant for a commercial driver's license or anyone required to terminate any previously issued driver's license pursuant to federal law.

- Nonresidents are exempted from getting a Georgia license as long as they meet all licensing requirements in Georgia except for residency, and have a valid driver's license issued in their home state or country. If this driver's license is from a foreign country and is in a language other than English, the nonresident must also carry a valid international driving permit (issued by the driver's country).

- When obtaining a Georgia ID card, noncitizens are allowed to retain foreign ID cards. DDS is required to make a notation about the retention of the foreign ID card and make that information available to law enforcement.

- The legislation authorizes lawful presence to be proven using Systematic Alien Verification for Entitlements Program (SAVE) and allows DDS to verify immigration documentation with United States Citizenship and Immigration Services (USCIS) by telephone or email.

Effective January 1, 2009

Status of the Intoxilyzer Source Code Issue in Georgia

Although some defense attorneys continue to file discovery motions demanding the computer source code of the breath testing instrument used by the State to obtain the blood alcohol of their clients, these motions seem to have slowed down recently. This may have to do with two Court of Appeals rulings on this issue.

In the Clayton County case of ***Cottrell v. State, 287 Ga. App. 89 (2007)***, the defendant requested a wealth of information, including "source codes" and related information. The State subsequently agreed to provide the defendant with any notes, memos, graphs, computer printouts, or other specific data related to the actual blood test, but did not provide the more generalized information that was unrelated to the specific test, including the "source codes" and related information. The defendant continued to claim that it was entitled to all such information.

The Court of Appeals disagreed with the defendant, and held that the defendant did not demonstrate any relationship between interferents detected by the breath test and blood test, and that he was not entitled to pursue a 'fishing expedition' to establish such a relationship, and that "under the circumstances, the trial court did not abuse its discretion in limiting Cottrell's request for full information to the material conceded by the state to be discoverable."

The second decision was the case of ***Hills v. State, A08A07***, Decided May 15, 2008.

Defendant was arrested for driving while intoxicated. He filed a motion for discovery of the "source code" used to program a breath test machine. A Gwinnett County trial court denied the motion. The court granted defendant's request for interlocutory review.

The court stated that under O.C.G.A. §§ 17-16-1(1) and 17-16-23(b), before discovery would be ordered, a defendant had to make a prima facie showing that the requested evidence was in the possession, custody, or control of the State. Here, the trial court had concluded that the State did not possess or control the source code and that the source code was not available to the State. Defendant had offered no evidence that the breath test software was created for the State or that the State owned or was otherwise in possession or control of the code. Thus, the trial court properly denied his discovery motion. Next, defendant had enumerated as error the trial court's alleged failure to afford him a full and fair hearing on the issue of relevancy of the source code. Defendant had failed to address the enumeration of error in his brief by argument or citation of authority; thus, it was deemed abandoned under Ga. Ct. App. R. 25(c)(2)(i).

····> facts about young drivers

Motor vehicle crashes are the leading cause of death for young drivers (15 to 20 years old). In 2006, 3,490 young drivers were killed and an additional 272,000 were injured in motor vehicle crashes.

LICENSES:

Among young drivers involved in fatal crashes in 2006, 28 percent (378) of those who did not have valid operator's licenses at the time of the crash also had previous license suspensions or revocations.

MOTORCYCLES:

During 2006, 318 young motorcycle operators were killed and an additional 8,000 were injured. During 2006, 38 percent of the young motorcycle drivers who were fatally injured in crashes were not wearing helmets. Of the young motorcycle drivers involved in fatal crashes in 2006, more than one-third (42%) were either unlicensed or driving with an invalid license.

ALCOHOL

31 percent of the young drivers who were killed in motor vehicle crashes during 2006 had been drinking. Additionally, in 2006, 25 percent of the young drivers who were killed in crashes had a BAC of .08g/dL or higher.

Seizing Legal Aliens Foreign Driver's Licenses for Impaired Driving Convictions

Courtesy: American Prosecutors Research Institute

One of the most effective penalties against impaired drivers is the seizure of the driver's license. Whether through administrative law revocations or upon a finding of conviction, seizure of the license eats at defendants more than court fees, attorney fees, fines, treatment and even jail time. Sit in a courtroom and watch the contorted facial expressions of defendants turning in their licenses. Their faces make that "Hey Vern" guy's facial antics look like an emotionless Star Trek Vulcan.

But, what about resident aliens? No, not Vulcans, but foreign nationals legally residing in the United States. Can the judge take their foreign license upon conviction? Can he require them to obtain a state driver's license?

The short answer is yes, but it depends on how the judge does it.

Based on the **1949 Convention on Road Traffic (CRT), TIAS 2487**, published in 3 UST 3008, aliens with a foreign driver's license issued by a country party to the CRT are allowed to drive in the United States. But, according to legal advisors at the Consular Affairs Office at the U.S. Department of State, some conditions apply:

- This treaty does not apply to *illegal* aliens –only aliens who have been lawfully admitted to the U.S. Illegal aliens do not have the right to drive in the U.S. even if they have a valid license from their country of origin.
- Aliens may use their foreign driver's license to lawfully operate a motor vehicle, but only during the first year. This requirement also takes care of any alien who was legally admitted to the country but has violated the conditions of admission by exceeding his authorized period of stay.
- After one year, aliens must comply with the residence laws of the U.S. state or territory where they reside for continued authorization to drive. In other words after a year, they must surrender their foreign driver's license and obtain a driver's license from the state where they live.
- Nothing in the treaty affects the driver's responsibility to strictly conform to the laws and regulations relating to residence in each country where the alien travels.

In many states, a conviction for a first offense DUI is a one-year loss of license. Most courts seize the licenses of in-state residents. For out-of-state licenses, there is no uniformity. Some jurisdictions seize them. In other states, the state's department of motor vehicles (DMV) notifies the issuing state's DMV. For example, a Tennessee judge will not take a California defendant's driver's license, but the court knows that Tennessee's DMV will notify California's DMV. Then, it is up to California to pull the offender's license.

Things get trickier when dealing with foreign governments. How many DMV's are equipped to provide impaired driving conviction notification to Monaco, Poland or Chile? After all, the U.S. Constitution prohibits state governments from entering agreements or compacts with foreign countries. The treaty does allow states to withdraw the foreign license or international driving permits and mark them as revoked or suspended according to state law. But, there is no real uniformity in how that is done, and the reality of the situation is that once the defendant shows a judge his foreign driver's license, many courts are afraid to pull it. That still leaves the alien possessing a driver's license that must be honored in all 50 states.

This is where the judge or prosecutor must use his authority to trump a multilateral international agreement. A prosecutor is always free to enter into a contract (or plea) with the defendant for anything the prosecutor believes is appropriate to the situation. Judges are also free to impose any condition on a sentence they believe appropriate. While a legal alien within his first year of residency may retain a legal ability to drive under the treaty, fairness and public safety beg prosecutors and judges to take the license as part of the sentence.

After conviction, all offenders –alien or native born— face a host of conditions for a basis of their probation: 48 hours in jail, a big fine, court fees, good behavior, no driving, etc.… Turning in a foreign license should be one of them.

Additionally, the foreign license should be pulled if the legal alien has resided in the United States for longer than one year, and the state DMV should be notified of the conviction, which will preclude the alien impaired driver from becoming eligible to apply for a state license for one year.

Some offenders won't have a foreign driver's license but an International Driving Permit (IDP) or an Inter-American Driving Permit (IADP) which allows them to drive in the U.S., based on the validity of their foreign license. So, if the court takes a French citizen's

IDP, that person could still drive (again, if within the first year of residency) with his valid French license. Therefore, the court should take both as a condition of plea or sentencing.

Mixing traffic law with international agreements along with requirements of the DMV can be any over-worked prosecutor or judge's nightmare, but conditions of a plea or sentence are binding upon the defendant. Violation of the conditions means issuance of an arrest warrant and the possibility of spending the remainder of their probation in jail. After all, taking the license is going to have more bite than almost anything else the judge does, but if that does not prevent further driving or impaired driving, a jail cell will.

Currently, there are about 110 countries party to the CRT. Most notably absent from the list is Mexico. The Consular Affairs Office at the U.S. Department of State says that Mexico is covered in another treaty that would also follow similar guidelines. For a list of the countries that participate in the Convention of Road Traffic see the automotive section of the ***Treaties In Force*** posted in PDF format on the State Department's web site www.state.gov. Another resource on these issues is the American Association of Motor Vehicle Administrator's *Foreign Reciprocity Resource Guide* available in PDF format at www.aamva.org.

On July 14, 2008, the Franklin County Sheriff's Office hosted a Joint Law Enforcement and Prosecutor Training put on by PAC's Traffic Safety Department.

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····> fact:

Drunk driving is the nation's most frequently committed violent crime, killing someone every 30 minutes. Because drunk driving is so prevalent, about three in every ten Americans will be involved in an alcohol-related crash at some time in their lives. In 2006, an estimated 17,602 people died in alcohol-related traffic crashes in the USA. These deaths constituted 41 percent of the nation's 42,642 total traffic fatalities.

-Statistics courtesy NHTSA (www.nhtsa.gov)

The "Georgia Traffic Prosecutor" addresses a variety of matters affecting prosecution of traffic-related cases and is available to prosecutors and others involved in traffic safety. Upcoming issues will provide information on a variety of matters, such as ideas for presenting a DUI/Vehicular Homicide case, new strategies being used by the DUI defense bar, case law alerts and other traffic-related matters. If you have suggestions or comments, please contact Editor Fay McCormack at PAC.