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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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The long-running battle over access to the source code to the Intoxilyzer 5000 seems to be far from over. For now, Georgia traffic prosecutors are in a holding pattern waiting on two important decisions from the Georgia Supreme Court. Both cases will dramatically affect when and how a DUI defendant can attempt to access the source code from the out-of-state manufacturer of Georgia's breath-testing instrument.

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Georgia Intoxylizer 5000 Source Code: Still in a Holding Pattern

By Todd Hayes, Traffic Safety Resource Prosecutor, Prosecuting Attorneys' Council of Georgia

We know we don't have it. We know trial courts can't order us to produce it *because* we don't have it. What we DON'T know is what has to happen in order for a DUI defendant to successfully obtain the source code of the Intoxilyzer 5000 from CMI, Inc., the third-party out-of-state manufacturer of the instrument. (A "source code" is a human-readable computer program language, including English words and common mathematical notations, which are created by the programmer and which ultimately tell an electronic device how to perform its desired functions.) Currently, attempts to obtain the source code focus on use of the Uniform Act to Secure the Attendance of Witnesses from Without the State (O.C.G.A. § 24-10-90, *et seq.*). Before the end of 2011, two cases argued before the Georgia Supreme Court in February and currently under advisement, should provide much needed guidance on if, when, and how that can happen.

Despite the repeated, and often purely dilatory, assertion that the source code is "vital" to a DUI defendant's ability to contest a *per se* charge under O.C.G.A. § 40-6-391(a)(5), only six Georgia source code cases have been decided by our appellate courts. First, in *Hills v. State*, 291 Ga. App. 873 (2008), the Court of Appeals issued a very brief opinion authored by then-Judge Edward H. Johnson which held that because the State of Georgia did not possess or control the source code and could not make it available, the discovery process could not be used to compel the State to disclose it.

Hills was followed less than a year later by *Holowiak v. State*, 295 Ga. App. 474 (2009), also referred to as *Holowiak I*. It was in *Holowiak I* that the Uniform Act first appeared as the focus of attempts to obtain the source code. In that case, the Court of Appeals held that the Appellant waived his right to appeal the trial court's failure to find the source code material pursuant to the Uniform Act because he failed to raise that argument at the trial court level, focusing instead on attempts to compel the State to disclose it. In addition, the *Holowiak I* decision stated in *dicta* that even if the Appellant had appealed the trial court's finding that the code was not in the State's possession, he had failed to produce evidence showing that the State did, in fact, possess it. *Id*. at 475. In this regard, *Holowiak I* essentially followed the reasoning in *Hills*, as did *Mathis v, State*, 298 Ga. App. 817 (2009), issued five months later.

In February 2010, the Court of Appeals at last directly reached the issue of whether the Uniform Act can be used to obtain the source code in *Yeary v. State*, 302 Ga. App. 535 (2010) and *Davenport v. State*, 303 Ga. App. 401 (2010). Before diving into the meat of those cases, it is essential to have a working knowledge of the mechanics of the Uniform Act. As explained in *Yeary*:

> The Uniform Act, a reciprocal act adopted by Georgia and Kentucky [the State where CMI, Inc. is located], sets forth a procedure by which a defendant in a criminal prosecution in this state may seek to compel an out-of-state witness to appear and testify in this state. The judge in this state must make certain findings under the Uniform Act, including a finding that the out-of-state witness is a material witness in the prosecution pending in this state. The judge's certification of the required findings is then presented to a judge of a court of record where the witness lives in the other state for consideration by that judge under the reciprocal provisions of the Act.
> *Id. at 536-537 (citations omitted).*

Once the certificate of materiality is presented to the court of record in the other state, that court must hold a hearing and make the following determinations:

> (1) Whether the requested witness is material and necessary;
> (2) Whether it will cause undue hardship to the witness to be compelled to attend and testify;
> (3) Whether the laws of the state in which the prosecution is pending, and of any other state through which the witness may be required to pass by ordinary course of travel,

continued >

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> will give to him protection from arrest and the service of civil and criminal process. *Kentucky Revised Statutes Annotated § 421.240 (2).*

In *Yeary*, Gregory A. Willis, of the firm of Head, Thomas, Webb & Willis, "sought a ruling that the source code was relevant solely as a basis to facilitate court-ordered production of a digital version of the source code possessed by CMI in Kentucky . . . to examine it prior to trial for possible defects which [Appellant] contends might have affected the accuracy of her breath test." Importantly, Willis FAILED to identify a witness from CMI, Inc. capable of producing the source code. While the Court of Appeals noted that "[t]he Uniform Act may provide access not only to testimonial evidence from an out-of-state material witness, but also access to relevant, material documentary or like evidence in the possession of the witness," the Court further stated that the Act "does not, however, support a stand-alone request for production (or subpoena *duces tecum*) for out-of-state documents; rather, a request for documents and like things under the Act must be made ancillary to a request for testimony from an out-of-state witness." Id. at 537. Because of the failure to identify a particular out-of-state witness, the Court of Appeals affirmed the trial court's decision not to issue the certificate of materiality required by the Uniform Act.

One day after the *Yeary* opinion, the Court of Appeals issued another decision in the similar case of *Davenport v. State*, 303 Ga. App. 401 (2010). In *Davenport*, the Court was presented with a set of facts that allowed them to review how a trial court should analyze and decide whether an out-of-state witness is material and relevant such that a certificate of materiality under the Uniform Act is issued. The Appellant in *Davenport*, through William C. "Bubba" Head, also of Head, Thomas, Webb & Willis, sought the source code under the Uniform Act, but with two important distinctions. First, Head named an actual representative of CMI, Inc. as the witness through whom the source code could be obtained from Kentucky. *Id*. at 401. In addition, Head presented evidence to support his client's contention that the code was material and relevant to her case because she suffered from asthma; she alleged that she needed the code to "determine how and whether [the Intoxilyzer 5000] adjusts its calculations for persons who suffer from asthma." Id. at 402. The Court of Appeals summarized the evidence presented to the trial court as follows:

> Davenport testified that she had suffered from asthma since she was a child. . . [she] testified that she had not recently been treated for asthma, but did have a prescribed inhaler, which she kept in her purse. She had not used the inhaler on [the incident date]. She also testified that although she had taken breath tests several years ago to measure her "vital capacity," she did not remember the results of those tests. [She] testified that her asthma generally flared up after exercise or when she was upset. She testified and the videotape of the incident showed that she became upset after she was arrested and handcuffed and when she realized she was going to jail. At that point, she began crying. When [she] submitted to the breath test, she was still upset and crying but had "decreased the amount of huffing and puffing" she had been doing. She testified that at some point during the test, she asked the officer administering it if someone could bring her inhaler to her because she was having trouble breathing.
>
> Davenport offered no medical testimony about the impact her asthma condition had on her breathing capacity or about the status of her condition in October 2007. She did not show that any breathing difficulties she may have encountered before the breath test were related to her asthma condition. Id. *at 402-403.*

Faced with this record, the trial court declined to find that the source code was sufficiently material to Davenport's case to require issuance of a certificate of materiality. In reviewing that determination, the Court of Appeals noted that a party requesting the presence of an out-of-state witness does not have an absolute right to obtain the witness. Instead, that party has the burden of presenting the trial court with sufficient evidence that would allow both that court *and* the out-of-state court to which the certificate is issued, to "determine whether the witness should be compelled to travel to trial in a foreign jurisdiction." *Id*. at 402. According to the Court of Appeals, "the decision whether to grant the process is within the trial judge's sound discretion." *Id*., *citing Mafnas v. State*, 149 Ga. App. 286, 287 (1) (1979).

Given the facts shown to the trial court, the Court of Appeals held that "the trial court was authorized to find that [Davenport] had not made a sufficient showing" of materiality based upon the evidence that she presented, and affirmed the decision not to issue the certificate of materiality pursuant to the Uniform Act. However, the Court also noted that "[t]he evidence presented could also have authorized the trial court to find that [Davenport] had made a sufficient showing in this regard, but it does not demand such a finding." *Id*. at 403.

The Georgia Supreme Court issued writs of certiorari in both *Yeary* and *Davenport* and consolidated them for oral argument on February 15, 2011. At oral argument, the questions posed by the Court in both cases—mostly asked by Justices David E. Nahmias, Harold D. Melton, and Carol W. Hunstein—focused on the contents of the source code itself rather than on the proper function and usage of the Uniform Act. On behalf of both Appellants, Willis and Head seemed to argue that the Uniform Act's requirement that judges determine whether a witness is material is a mere formality that should—in most cases—lead to automatic issuance of a certificate of materiality. Counsel for the State attempted on several occasions to re-focus the Justices on the fundamental importance of the specific Uniform Act provisions at issue by (1) pointing out the requirement that a *named witness* be sought, and (2) arguing that the materiality component of the statute was not just for show. Only time will tell which arguments were more persuasive.

Six weeks after the Georgia Supreme Court heard oral argument in *Yeary* and *Davenport*, the Court of Appeals issued another source code decision that followed the reasoning of its own earlier *Davenport* decision. In *Holowiak v. State*, 2011 Ga. App. LEXIS, Ct. App. Docket No. A10A2021, (3/29/2011), known as *Holowiak II*, the same Appellant as in *Holowiak I* successfully preserved his objection to the trial court's refusal to issue a certificate of materiality for a CMI witness to produce the source code. Again representing Holowiak, Head argued that the source code was necessary to "determine the accuracy, reliability and admissibility" of his client's breath test in relation to his physical health problems. *Id*. at (2). However, in this case, there was no allegation or evidence adduced showing that Holowiak actually had a physical or health issue that might affect the results of his breath test. *Id*. Citing *Eliopulos v. State*, 203 Ga. App. 262, 266-267 (2) (1992), the Court of Appeals held that "[a] trial court does not abuse its discretion in refusing to compel attendance of an out-of-state witness where the materiality of the anticipated testimony is speculative." *Id*. Therefore, because no evidence about any health issues was presented, the Court of Appeals found that Holowiak failed to carry his burden of showing materiality and affirmed the trial court's decision not to issue a certificate. *Id*.

Three years and six cases later, Georgia law enforcement officers and prosecutors still do not have the final answer about when and how a DUI defendant can compel production of the Intoxilyzer 5000 source code from CMI, Inc. Thanks to *Hills* and its progeny, it seems certain that because the State does not possess and cannot obtain the source code, there is no legal basis for attempting to force the State to disclose it. What is uncertain, however, is what a defendant must do to successfully obtain a certificate of materiality for the source code for presentation to a competent court in Kentucky. It is difficult to imagine the Georgia Supreme Court resolving *Yeary* by disregarding the long-standing precedents disallowing a true subpoena *duces tecum* under the auspices of the Uniform Act. It is much easier to imagine the Court using *Davenport* to set the bar for issuance of certificates of materiality so low that they effectively become available upon request. And no matter what the Georgia Supreme Court does, if Kentucky trial courts refuse to adopt the finding of materiality from Georgia, does the whole process come to a screeching halt? (To date, NO Kentucky court has found that a witness named in a certificate of materiality from a Georgia trial court aimed at the Intoxilyzer source code was sufficiently material to order them to appear for trial in Georgia.) For now, the Georgia source code argument is in a holding pattern, and no one knows where or when it is going to land. GTP

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Tips and Techniques for DUI Prosecutors

Jeff Kwiatkowski, Assistant Solicitor-General, Cobb County Solicitor-General's Office

Since first being validated by the National Highway Traffic Safety Administration (NHTSA) in 1983, the three Standardized Field Sobriety Tests (SFSTs) have provided law enforcement officers and traffic prosecutors alike with a straightforward, systematic, yet easily-understood methodology for evaluating the ability of suspected DUI offenders to drive safely. Before undertaking the prosecution of a DUI case, it is vital that prosecutors gain a comprehensive understanding of what the SFSTs are and how to use them to effectively convey an offender's level of impairment to a jury.

SFSTs are Indicative of the *AMOUNT* of Alcohol in a Suspect's System

NHTSA's Standardized Field Sobriety Test battery consists of three separate evaluations, the Horizontal Gaze Nystagmus (HGN) evaluation, the Walk and Turn Evaluation, and the One-Leg Stand evaluation. Each of the three is designed with its own set of standardized instructions and a standardized system for evaluating suspect performance. As first developed and validated, the SFST battery was designed to assist an officer in the field in determining the *actual level of alcohol* in an offender's system. According to the most recent SFST student manual from NHTSA, the initial 1983 validation study of the three-test battery demonstrated that the tests "were found to be highly reliable in identifying subjects whose BACs [blood alcohol concentrations] were above 0.10." *DWI Detection and Standardized Field Sobriety Testing*, DOT HS 178 R2/06, February 2006, pg. VIII-2. Subsequent validation studies yielded similar or better results in identifying suspects with a BAC at and above 0.08. *Id.*

For many years, Georgia's appellate courts have recognized the link between field sobriety testing and the level of alcohol impairment. As early as *Sieveking v. State*, 220 Ga. App. 218, 219 (1996), the Georgia Court of Appeals noted that "[f]ield sobriety tests are not designed to detect the mere presence of alcohol in a person's system, but to produce information on the question whether alcohol is present at an impairing level such that the driver is less safe within the meaning of O.C.G.A. § 40-6-391(a)(1). Mere presence of alcohol is not the issue; the quantity is needed because the issue is effect." Therefore, an officer with sufficient training and experience in DUI enforcement and SFST administration can offer opinion testimony regarding whether a suspect's BAC exceeded an impairing level (such as 0.08) based upon the suspect's SFST performance *if* the prosecutor can lay the appropriate foundation as to his experience. This is especially true in cases where the officer has performed the Horizontal Gaze Nystagmus (HGN) evaluation. *See Werner v. State*, 246 Ga. App. 677 (2000); *Kirkland v. State*, 253 Ga. App. 414 (2002); *Webb v. State*, 277 Ga. App 355 (2006). However, neither the HGN evaluation nor the three-test SFST battery should be used by officers to determine a suspect's actual numerical BAC. *Bravo v. State*, 304 Ga. App. 243 (2010).

SFSTs are Indicative of Impairment WITHOUT Reference to BAC

In cases where either: (1) the law enforcement officer does not possess the required training and experience to offer his opinion regarding whether a suspect's BAC is at or above an impairing level; (2) the prosecutor is unable to lay the foundation for such opinion testimony; or (3) such testimony is disallowed by the trial judge in his or her discretion, SFSTs still provide useful evidence for prosecutors. In the context of an HGN evaluation, an officer that has been trained to administer the evaluation has all the training and experience needed to offer testimony on the guidelines for the test, how he or she administered the test, and to interpret what he or she observed during the test. *Hann v. State*, 292 Ga. App. 719 (2008); see also *Stewart v. State*, 280 Ga. App. 366 (2006). Even without reference to an actual BAC, such an officer can testify about the progressive nature of the six clues of the HGN evaluation; that is, that the two observable clues in the "lack of smooth pursuit" portion of the evaluation indicate the presence of an impairing substance; that the next two clues in the "distinct and sustained nystagmus at maximum deviation" portion indicate a higher level of the substance and likely impairment; and that the final 2 clues in the "onset of nystagmus prior to 45 degrees" portion indicate the highest measurable level of the impairing substance that the evaluation can detect. Hence, even without reference to any BAC whatsoever, it is possible to use HGN results to demonstrate the level of a suspect's impairment based upon the relationship between the clues of the evaluation.

Furthermore, in regard to the Walk and Turn and One-Leg Stand tests, Georgia's Court of Appeals has said that the "word 'tests' is a misnomer; these are physical dexterity exercises that common sense, common experience, and the 'laws of nature' show are performed less well after drinking alcohol. The screening of these gross motor skills is hardly the type of 'scientific principle or technique' [that requires expert testimony or interpretation], and this Court will not hold these physical manifestations of impairment, which could be as obvious to the layperson as to the expert, to such a standard of admissibility." *Hawkins v. State*, 223 Ga. App. 34, 36 (1996). See also *State v. Pastorini*, 222 Ga. App. 316 (1996); *Mullady v. State*, 270 Ga. App. 444 (1) (2004). In practice, what this means is that if a prosecutor can assist the arresting officer to completely and thoroughly articulate what he observed during the Walk and Turn and One-Leg Stand evaluations, the nature of those observations lies well within what the average juror knows about the effects of alcohol and can be a sufficient basis for concluding that a suspect was impaired and unsafe to drive—again without reference to a specific BAC.

SFSTs are Helpful in Establishing Officer Credibility and Competence

When a person is charged with DUI-Less Safe pursuant to O.C.G.A. § 40-6-391(a)(1), the ultimate question presented to the jury is whether or not the defendant was less safe to drive his or her vehicle as a result of the alcohol they consumed. In every case, the prosecutor will come to a moment when he or she must ask the arresting officer whether or not the defendant was less safe to drive based upon what they observed during their encounter. Because this question requires an officer to offer opinion testimony, it is critical that the jury clearly understands the basis for the opinion and the process by which the officer arrived at his conclusion. If a jury is not provided with that information, they have no reason to afford the officer's opinion any more weight than the defendant's opinion—which will, in every case, be that he or she was perfectly fine to drive.

The SFSTs are a powerful tool with which a prosecutor can enhance the credibility of and juror confidence in the arresting officer. By providing the jury with information about the amount of training necessary to adequately administer and interpret the SFST battery, prosecutors can demonstrate that the officer is not simply relying on personal experiences or anecdotes as he interprets the defendant's behavior. Instead, he or she is relying upon a specific and validated methodology of classifying and interpreting behavior patterns. Furthermore, by letting the jurors know that there is a precise and detailed manner by which the officer must conduct the tests, the prosecutor can show that the officer performed according to the high standards of his or her training and that he or she did not take "short-cuts" or rush to an unsupported judgment. Using the SFSTs in this way to enhance the credibility and competence of the arresting officer almost always leads to better results at trial.

Using SFSTs at Trial

Obviously, before a prosecutor can put the SFST battery to its best use at trial, he or she must know how each one of the three tests is administered and interpreted. The best way to gain this knowledge is for the prosecutor to attend and complete a 24-hour course in SFST administration offered either by a local law enforcement agency or at the Georgia Public Safety Training Center in Forsyth, GA. The demands of prosecution being what they are, obtaining a copy of NHTSA's most recent SFST Student Manual (the 2006 edition) and becoming familiar with it is an adequate substitute. The manual can assist prosecutors in a variety of ways.

Case Review with Law Enforcement

Preparation and discussion of a DUI case with the arresting officer prior to trial is an essential element of any successful DUI prosecution. Unlike officers, prosecutors were not on-scene when the defendant was arrested, and therefore do not have firsthand knowledge of the facts of their case. On the other hand, officers are not trained to grasp the legal nuances that surround DUI prosecution and therefore cannot be expected to know how judges will evaluate the evidence they develop or what potential challenges can be expected from the defense. Only when this information is shared between the parties before trial can both enter the courtroom fully confident in the case they will present.

The NHTSA manual provides an excellent starting point for these types of pre-trial discussions. By reviewing the officer's conduct of the DUI investigation with a copy of the manual on-hand, the prosecutor can begin to effectively gauge the strength of the case. Furthermore, as the officer and prosecutor together discover problems in the case, they can use the manual as a guide for dealing with or explaining those problems. Pre-trial discussions also allow the prosecutor to gain a better understanding of the officer's training so as to enable them to adequately frame and lay a foundation for the presentation of the evidence in the case.

Usefulness of the Manual for Direct Examination

A prosecutor familiar with the contents of the NHTSA manual is better able to structure his or her direct examination of the arresting officer. The standard direct examination questions for DUI cases (available on the PAC website at: www.pacga.org/pubs/manuals/manuals_index.shtml) provide a good place for DUI prosecutors to begin to frame their questions, but familiarity with the testing procedures in the manual will allow the prosecutor to highlight areas of strength in their case. For example, asking the officer what kind of test the Walk and Turn is (divided attention—see page VII-4 of the 2006 manual) and how that kind of test relates to the act of driving (also on page VII-4) adds meaning and depth to the officer's testimony that the defendant "stopped counting as instructed" when performing the test.

A working knowledge of the manual will also permit the prosecutor to demonstrate in greater detail exactly how the arresting officer *complied* with the administration criteria of each test, thereby enhancing the officer's credibility. For example, asking an officer to explain the proper positioning of the stimulus in relation to the defendant's eyes during the HGN evaluation provides the jury with the chance to see that the officer knew the correct way to administer the evaluation, that he or she did exactly what he or she was trained to do, and that the results therefore deserve greater weight.

Finally, by comparing the contents of the manual with what is contained in the officer's report or video, a savvy prosecutor can anticipate and cut-off avenues of cross-examination by defense counsel. For example, if a female defendant was wearing shoes with heels more than 2 inches high during Walk and Turn and One-Leg Stand testing, a prosecutor familiar with pages VIII-11 and VIII-14 of the manual will know the importance of the fact that the officer asked her if she wanted to remove her shoes. Asking the officer if he did so and why would eliminate a potential avenue of attack upon the results of the tests.

Manual-Driven Cross-Examination

In many DUI cases, the cross-examination of the arresting officer is drawn directly from the SFST manual. Therefore, even when it is impossible to eliminate the attack by defense counsel, familiarity with the manual will enable prosecutors to identify likely areas of cross-examination and to prepare their law enforcement witnesses accordingly. For example, if an officer incorrectly administered a portion of an evaluation, the prosecutor can help the officer articulate what was wrong, how it deviated from the standards in the manual, and that the officer did not base his decision to arrest on that one element standing alone. A prosecutor familiar with the manual can not only help the officer explain himself more thoroughly, but can also convincingly rehabilitate an officer after cross-examination. Such techniques will build juror confidence in the officer's training and experience.

The NHTSA Training Manual also provides a wealth of material with which to cross-examine so-called defense "experts" in SFST administration. These "experts" are often former law enforcement officers or instructors who have taken their familiarity with NHTSA standards and turned it around for use against their former colleagues. Awareness of the contents of the manual and how the "expert" used the information therein in his or her prior occupation can permit a prosecutor to demonstrate the inherent bias in their testimony. For example, if the "expert" indicates that the arresting officer failed to comply with a particular testing requirement for the One-Leg Stand evaluation, the prosecutor can either directly impeach him or her with pages VIII-13 and VIII-14 of the manual or point out that under similar circumstances and conditions, the "expert" would have made the same arrest decision the officer did.

Understanding Substantial Compliance

In conclusion, it is important for prosecutors and law enforcement officers to understand that, for the most part, deviation from the standards contained in the NHTSA manual goes to the weight afforded to the evaluations, not their admissibility. In regard to the Walk and Turn and One-Leg Stand evaluation, Georgia appellate courts have said that because they are not "scientific" tests, any error in administration or deviation from testing guidelines "affects only the weight and credibility of the behavioral observations made by the officer." *Keller v. State*, 271 Ga. App. 79, 81 (2004). *See also* Hawkins, *supra*; *Stewart*, *supra*. Even in the context of the HGN test, which is "an accepted, common procedure that has reached a state of verifiable certainty in the scientific community," *State v. Tousley*, 271 Ga. App. 405 (2008), errors or deviations in the administration of the test do not require its exclusion if the officer substantially complied with the test methodology. *See also State v. Pierce*, 266 Ga.App. 233 (2004); *Sultan v. State*, 289 Ga. App. 405 (2008) *Duncan v. State*, 305 Ga. App. 268 (2010).

Given that "substantial compliance" with NHTSA standardized methods is all that is required for the SFSTs to be admissible, the most important consideration a prosecutor must face when evaluating an officer's performance is NOT whether he perfectly administered the test, but rather whether or not the way that the test was administered will compromise the officer's credibility to the jury. As indicated by the *Duncan* case above, it is possible for a trial court to admit, without error, a badly performed SFST. However, that does not mean that the jury must give any weight to the test or that they will continue to believe the remainder of the officer's testimony in light of his or her poor performance. Such considerations are best made by the prosecutor in the field on a case-by-case basis and in consultation with the arresting officer.

Obtaining the Manual

The 2006 NHTSA SFST Training Manual and 2009 SFST Update are available on the PAC website at www.pacga.org/pubs/manuals/manuals_index.shtml. GTP

Jeff Kwiatkowski is one of Georgia's most experienced DUI prosecutors, having spent 22 years in the fight against impaired driving. After a highly successful career as an Assistant Solicitor-General in Gwinnett County, including a long period of service as Chief Assistant, Jeff recently took his skills to Cobb County, where he continues to serve Georgia's driving public under Solicitor-General Barry E. Morgan. Beginning with this article, Jeff will provide readers of the "Georgia Traffic Prosecutor" with a wide assortment of tips and techniques intended to help them prosecute DUI offenders more successfully.

Look for more tips and techniques from Jeff Kwiatkowski in future issues of the Georgia Traffic Prosecutor.

····> fact

According to the National Highway Traffic Safety Administration (NHTSA), Georgia's 2009 traffic crash fatality rate fell to 1.37 per 100 Million Vehicle Miles Traveled. ***That represents the lowest fatality rate in 15 years.***

Courtesy: NHTSA

2009 Georgia Crash Fatality Data

Courtesy Carol P. Cotton and Stuart E. Fors, excerpted from *2009 Georgia Motor Vehicle Fatality Report*

In 2009, motor vehicle fatalities in Georgia decreased dramatically, marking the lowest number of fatalities in 15 years. Georgia motor vehicle fatalities decreased four years in a row for the first time since 1994; from 1994 to 2005 there were various fluctuations in motor vehicle fatalities. The current downward trend is the longest since the early 1990s. The fatalities per 100 million miles traveled (VMT) rate also decreased in 2009, dispelling the argument that the drop in fatalities is due to decreased driving due to a poor economy. Enhancements in traffic safety programs, increased enforcement, safer vehicles, and improved infrastructures such as adding barriers, signs, lighting, and repairing crumbling shoulders and fading striping have all contributed to the decrease in motor vehicle fatalities on Georgia roads. Current efforts to improve traffic safety must continue to further decrease fatalities.

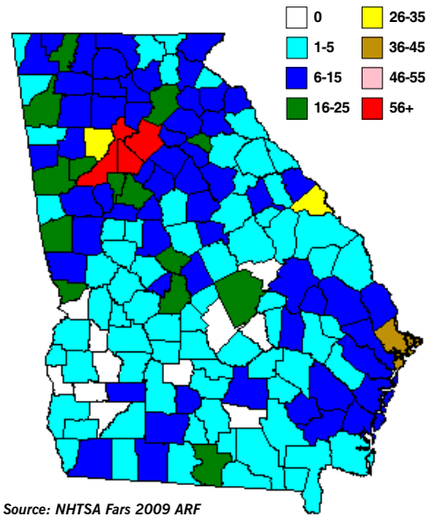
Though overall fatalities have decreased in Georgia over the past fifteen years, motorcycle and pedestrian mortality have not followed the downward trend, either increasing or remaining stable. Georgia motorcyclist fatalities more than doubled from 1994 to 2008; however, in 2009 such fatalities decreased 21%, which is an encouraging sign. Extensive research must be conducted to determine the causes of this decrease in an attempt to replicate these conditions in future years. Historically, one year dramatic decreases do not lead to continued decreases, and those working towards reducing motorcycle fatalities should expect to see a statistical correction in 2010. Steady and progressive decreases over a three year period will be a better indication of a downward trend. Increased enforcement of speeding in areas with high motorcycle fatalities like Metro-Atlanta counties and the mountain and coastal areas of Georgia should reduce the risk to motorcyclists. Educational programs for motorcyclists that focus on safety equipment and road safety should also be implemented to reduce fatalities.

Pedestrian fatalities continue to decrease nationally, but Georgia averages 150 pedestrian fatalities each year which is higher than comparable states. Despite the dramatic and well-documented rise in Georgia motorcycle fatalities, pedestrians made up 25% more fatalities than motorcyclists over the past ten years. More resources must be utilized to reduce average pedestrian fatalities under 150 per year for the next ten years. Efforts to reduce pedestrian fatalities must focus on education, bilingual signage, improving sidewalks, adding crosswalks and signs, and enforcement.

Traffic fatalities continued to rise in rural Georgia counties in 2009, an upward trend since 2000. To reduce fatalities in rural counties, infrastructure changes should be made to state and county roads. Changes should be made to expand narrow roads and shoulders, add separation and barriers, reduce sharp pavement drop offs, repair crumbling shoulders, and add adequate lighting to areas around rural roads. Future efforts should focus on education, increased signage, improved striping, and increased enforcement; all of these would lead to fewer overall deaths on Georgia roadways.

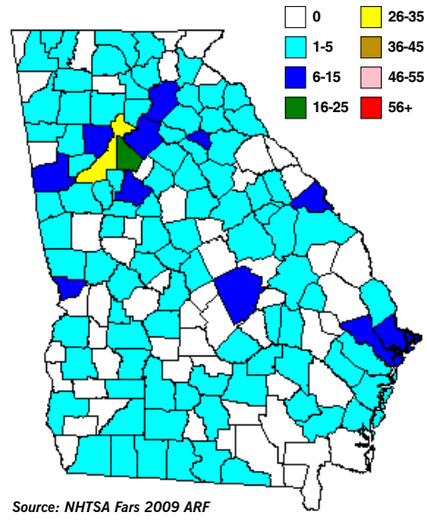
Excerpted from 2009 Georgia Motor Vehicle Fatality Preliminary Draft Report by Carol P. Cotton and Stuart E. Fors (with assistance from Christina Proctor, James Barlament, and Laurel Loftin) Universtity of Georgia College of Public Health Department of Health Promotion and Behavior, May 12, 2010.

FATALITIES (ALL CRASHES) BY COUNTY



Source: NHTSA Fars 2009 ARF

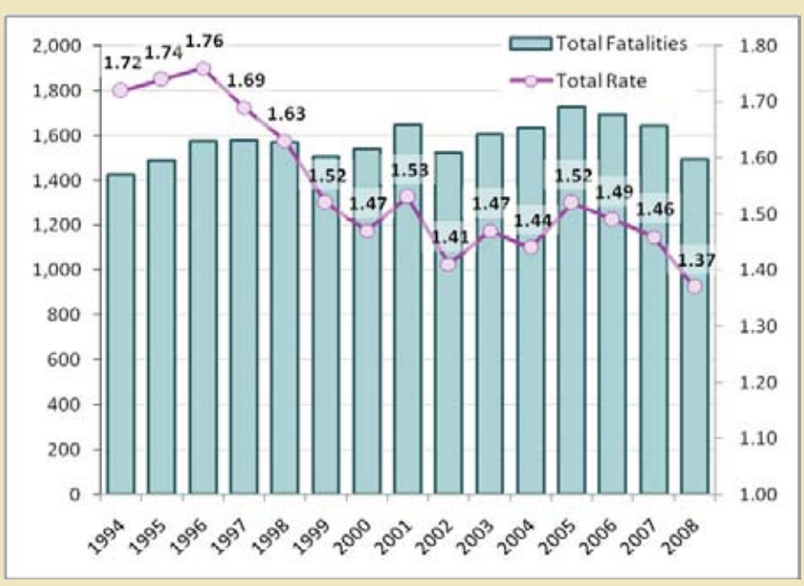
FATALITIES IN CRASHES INVOLVING AN ALCOHOL-IMPAIRED DRIVER (BAC = .08+) BY COUNTY



Source: NHTSA Fars 2009 ARF

····> Georgia Roadway Fatalities & Fatality Rates

(Per 100 Million Vehicle Miles Traveled)



The number of roadway fatalities has varied from 1994 to 2008, peaking in 2005 with 1,729 fatalities, but a rate of 1.52 fatalities per 100 vehicle miles travelled (VMT). However, in 2008 Georgia experienced the lowest fatality rate in fifteen years, with 1.37 fatalities per every 100 million VMT. The highest fatality rate occurred in 1996 with 1.76 fatalities per 100 million VMT and 1,573 roadway fatalities.

Courtesy: Governor's Office of Highway Safety

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····> fact:

Every day, 32 people in the United States die in motor vehicle crashes that involve an alcohol-impaired driver. This amounts to one death every 45 minutes. The annual cost of alcohol-related crashes totals more than $51 billion.

-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 Editors Fay McCormack or Todd Hayes at PAC.