

# 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 >

*"This issue of the Georgia Traffic Prosecutor is dedicated to the memory of Malcolm McCormack, an extraordinary young man who was taken from us on October 10, 2008 by an impaired driver. His memory and how he departed this life will be forever etched in the hearts and minds of all who loved or knew him."*

*-Richard A. Malone, Executive Director, Prosecuting Attorneys' Council of Georgia*

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## Just Another Traffic Fatality

By Fay McCormack, Traffic Safety Resource Coordinator, Prosecuting Attorneys' Council of Georgia

ON FRIDAY, OCTOBER 10, 2008, AT 11:00 p.m., 28-year-old Malcolm, who lives in New York, calls his mother in Georgia and tries to convince her that he can fix her computer remotely. Like many parents of her generation, she turns to her techno-savvy offspring for help with modern gadgets like computers and cell phones. Mother asks a litany of questions, unsure of Malcolm's ability to troubleshoot her computer problems from miles away. Still unable to convince her, Malcolm ends their call with the words, "I'll call you tomorrow, Mom. A friend is coming over with his girlfriend to hang out and we're going out to eat." At about 2 a.m. on Saturday the phone rings. Mother sees Malcolm's name on the caller ID but does not pick up the phone. Instead she goes back to sleep, mentally promising to give Malcolm a piece of her mind for calling her at that hour. (She thought he was calling to tell her how great the meal was). At 5:00 a.m., the phone wakes her again. This time she picks up. The voice on the other end is a New York Police officer who speaks the dreaded words, "Mrs. McCormack, I regret to inform you that your son was struck by a car as he crossed the street this morning. He did not make it."

The irony of this tragedy is that, as a prosecutor in Georgia, I have been involved in the prosecution of traffic cases since I joined the

Fulton County Solicitor's Office in 1985. In 2002, a Criminal Justice Summit was convened by the National Highway Administration and the National Criminal Justice Association. The summit was held to identify gaps, problems and challenges in the criminal justice system in the handling of impaired drivers, and to assess solutions and strategies for increasing effectiveness in the enforcement, prosecution and adjudication phases of impaired driving cases. One of the recommendations made was the establishment of a state level traffic resource prosecutor in all 50 states. In 2003, I was employed by the Prosecuting Attorneys' Council of Georgia as the Traffic Safety Resource Prosecutor (TSRP) for the state of Georgia. A TSRP's primary duty is to provide training, education and technical support to traffic crime prosecutors and law enforcement agencies throughout a state.

The tragic irony of my story continues when the 21-year-old driver who struck and killed my son and who has now been indicted for Driving Under the Influence and Negligent

*continued >*



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](mailto:fmccormack@pacga.org).

Homicide turns out to be the son of a retired New York City police officer. Suddenly, I along with Malcolm's other relatives and friends, have become victims. My sadness is compounded by the awareness that another family must also be suffering, because their child has caused the death of another. I am now even more deeply appreciative of the difference it makes when a victim's family has the support of prosecutors, police officers, and victim support organizations such as Mothers Against Drunk Driving.

I would like to extend my deepest thanks to members of the prosecution, law enforcement and judicial communities for the support and comfort you have given and continue to extend to me on the loss of my son. My one request of you is to persevere in your fight for traffic safety so that there will be fewer calls that begin with, "I regret to inform you ...."



...> fact

A pedestrian is defined as any person not in or upon a motor vehicle or other vehicle.

- In 2007, 4,654 pedestrians were killed in traffic crashes in the United States — a decrease of 13 percent from the 5,321 pedestrians killed in 1997.
- On average, a pedestrian is killed in a traffic crash every 113 minutes and injured in a traffic crash every 8 minutes.
- There were 70,000 pedestrians injured in traffic crashes in 2007.
- Most pedestrian fatalities in 2007 occurred in urban areas (73%), at non-intersection locations (77%), in normal weather conditions (90%), and at night (67%).
- More than two-thirds (70%) of the pedestrians killed in 2007 were males. In 2007, the male pedestrian fatality rate per 100,000 population was 2.19 — more than double the rate for females (0.91 per 100,000 population).

> Courtesy NHTSA

...> important safety reminders

- Drivers are required to yield the right-of-way to pedestrians crossing streets in marked or unmarked crosswalks in most situations. Pedestrians need to be especially careful at intersections where the failure to yield right-of-way often occurs when drivers are turning onto another street and a pedestrian is in their path.
- When possible, cross the street at a designated crosswalk. Always stop and look left, right, and left again before crossing. If a parked vehicle is blocking the view of the street, stop at the edge line of the vehicle and look around it before entering the street.
- Increase visibility at night by carrying a flashlight when walking and by wearing retro-reflective clothing that helps to highlight body movement.
- It is much safer to walk on a sidewalk, but if you must walk in the street, walk facing traffic.

> Courtesy NHTSA

***“Alcohol involvement—either for the driver or the pedestrian—was reported in 49 percent of all pedestrian fatalities.”***

> Courtesy NHTSA

## Fatal Crashes and Fatalities Involving Alcohol-Impaired Drivers

Courtesy NHTSA

**DRIVERS ARE CONSIDERED TO BE ALCOHOL-IMPAIRED WHEN THEIR BLOOD ALCOHOL concentration (BAC) is .08 grams per deciliter (g/dL) or higher.** Thus, any fatality occurring in a crash involving a driver with a BAC of .08 or higher is considered to be an alcohol-impaired-driving fatality. The term “driver” refers to the operator of any motor vehicle, including a motorcycle. In 2007, 12,998 people were killed in alcohol-impaired-driving crashes. These alcohol-impaired-driving fatalities accounted for 32 percent of the total motor vehicle traffic fatalities in the United States. Traffic fatalities in alcohol-impaired-driving crashes decreased nearly 4 percent from 13,491 in 2006 to 12,998 in 2007. The alcohol-impaired-driving fatality rate per 100 million Vehicle Miles Travelled (VMT) decreased to 0.43 in 2007 from 0.45 in 2006. Estimates of alcohol-impaired driving are generated using BAC values reported to the Fatality Analysis Reporting System (FARS) and imputed BAC values when they are not reported. The term “alcohol-impaired” does not indicate that a crash or a fatality was caused by alcohol impairment. The 12,998 fatalities in alcohol-impaired-driving crashes during 2007 represent an average of one alcohol-impaired-driving fatality every 40 minutes. In 2007, all 50 States, the District of Columbia, and Puerto Rico had by law created a threshold making it illegal per se to drive with a BAC of .08 or higher. Of the 12,998 people who died in alcohol-impaired-driving crashes in 2007, 8,644 (67%) were drivers with a BAC of .08 or higher. The remaining fatalities consisted of 3,581 (28%) motor vehicle occupants and 773 (6%) nonoccupants. The national rate of alcohol-impaired-driving fatalities in motor vehicle crashes in 2007 was 0.43 per 100 million vehicle miles of travel.

### Fatalities, by Role, in Crashes Involving at Least One Driver with a BAC of .08 or higher, 2007

Role	Number	Percent of Total
Driver With BAC=.08+	8,644	66.5%
Passenger Riding w/Driver With BAC=.08+	2,148	16.5%
Subtotal	10,792	83.0%
Occupants of Other Vehicles	1,433	11.0%
Nonoccupants	773	5.9%
<b>Total Fatalities</b>	<b>12,998</b>	<b>100%</b>

# The Closing Argument

By Fay McCormack, Traffic Safety Resource Coordinator, Prosecuting Attorneys' Council of Georgia

*Volume 4, Issue 4 of the Georgia Traffic Prosecutor, the final issue for 2007, contained an example of a closing argument made in a DUI refusal case.*

*For the final newsletter of 2008, we present an example of part of a closing argument in a DUI case where the defendant is charged with both "less safe" and "per se" counts of DUI and has his own expert to testify.*

**"THE EVIDENCE PRESENTED IN THIS CASE** leaves no reasonable doubt that the State has proved that Lee Jackson is guilty of the following charges: Count 1. Driving while his alcohol concentration was 0.08 grams or more; Count 2. Driving under the influence of alcohol to the extent that he was a less safe driver; and Count 3. Failure to Maintain Lane.

You have heard testimony from the defendant's expert witness, an expert being paid \$250.00 an hour to help this defendant avoid a conviction. His testimony was at times complicated, confusing and unclear. However, it is very clear that this expert was not present at the stop, did not observe the defendant drive, was not at the roadside observing the field sobriety tests, did not administer the breath test and did not observe the demeanor of the defendant that night.

Who was there? Sgt. Smith was there! Sgt. Smith, an experienced and credible police officer, who told you the facts that occurred in the early hours of that January morning in 2008. The defense attempted to question the officer's memory of the facts because this incident took place 11 months ago but the officer pointed out to you that he wrote his report at the time of the incident, and all he had to do was retrieve his report and read it to refresh his memory. The officer was honest and straightforward. If he did not recollect certain

minor details, he told you so. Sgt. Smith is a dedicated public servant who makes the same salary regardless of whether or not the defendant was under the influence that night. He's not a hired gun that gets paid to come here only if his testimony comes out one way.

Sgt. Smith related to you why this pickup truck caught his attention, but he did not pull it over right away. Instead, to be sure about the defendant's condition, he drove behind the vehicle and observed several instances of the defendant's vehicle crossing over the white or yellow lines before he pulled him over. When the defendant stepped out of his vehicle, the officer noticed he was unsteady on his feet, his speech slurred and he smelled of alcohol. Now folks, most of you have seen people before who have been drinking and you don't need a machine to tell you they have no business driving. But this officer didn't immediately arrest this defendant for DUI. He wanted to be sure, so he first performed some field sobriety tests, which he explained to you. Based on Jackson's performance of those tests and based on the officer's observation of persons under the influence of alcohol, in his opinion Lee Jackson was under the influence of alcohol to the extent that it made him a less safe driver. At this time Sgt. Smith placed the defendant under arrest for DUI and read him the implied consent warning, which you will have an opportunity to read yourself.

The defendant consented to a breath test and was then taken to the north precinct for a breath test that was administered by Officer Ward. Officer Ward, another experienced public servant, also testified that, based on that experience and his observation of the defendant, the defendant was under the influence of alcohol to the extent that he was a less safe driver. The result of the breath test confirmed what two officers had already observed. Jack-

son had no business driving because he had a .12 blood alcohol content.

Under oath, the defendant himself admitted that he had been drinking. He testified that he had been drinking from early evening to 3:00 a.m. and consumed only 3 or 4 beers—and, just like he wants you to believe his expert, he wants you to believe that! The defendant's expert explained to you what, in his opinion, it would take for the defendant to get intoxicated. The State did not charge this defendant with being drunk or intoxicated. The defendant is charged with driving under the influence of alcohol with an unacceptable level of alcohol in his system and with driving under the influence to the extent that he was a less safe driver. He has shown you nothing to disprove that he was a less safe driver and the evidence is clear that he was driving while his blood alcohol concentration was .08 or more. It is not at all surprising that his drinking buddy testified that, in his opinion, the defendant was a safe driver. The defendant figured himself to be a safe driver. However, the opinion of these alcohol drinkers was contradicted by the very credible Sgt. Smith, whose expertise was demonstrated in the professional way he handled the stop and subsequent arrest of this defendant.

You heard the officer testify that not everyone he stops on suspicion of driving under the influence is eventually arrested. This officer afforded this defendant the benefit of any doubt. He pulled the defendant over only after observing him drive for a good distance; and he arrested the defendant only after smelling alcohol on his breath, hearing his slurred speech, and observing him unsteady on his feet. Officer Smith gave the defendant the standardized field sobriety tests and Lee Jackson came up short. The officer's decision was confirmed by the breath test result of .12 which exceeded the .08 blood alcohol limit set by the Georgia Legislature to justify an impaired driving conviction without even proving that the defendant was a less safe driver.

(Use other argument specific to your case such as additional charges, explaining the law, using your exhibits, and so on.)

The legislature of this great state passed laws to protect the citizens of Georgia from the havoc caused by impaired drivers. Sgt. Smith performed his duty on January 4, 2008 by removing Lee Jackson from the street that night, because when a motor vehicle is driven by a person impaired by alcohol that vehicle becomes a deadly weapon. It is now up to you, members of the jury, to do your duty, to let the defendant know that he should not drive when his impaired driving ability makes him a danger to the other users of our roads and to the community as a whole. The State is asking you to find the defendant GUILTY of all charges."



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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](http://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.*