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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.

···> contents

The Georgia Supreme Court has spoken in two key Source Code opinions, and, from the outside, it doesn't look good for the State. However, a closer examination of the opinions and of the reaction of the DUI defense bar reveals that the decisions aren't all that bad for prosecutors, and provides key insight into how to deal with future Source Code litigation.

contents

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The Source Code Fallout From *Yeary* and *Davenport*: Bad, But Not That Bad

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

On June 20, 2011, the Georgia Supreme Court decided the Intoxilyzer 5000 Source Code cases of *Yeary v. State*, No. S10G1085, 2011 Ga. LEXIS 501(Ga. Jun. 20, 2011), and *Davenport v. State*, No. S10G1355, 2011 Ga. LEXIS 502 (Ga. Jun. 20, 2011). Though the decisions are not at all what Georgia traffic prosecutors hoped they would be, a proper understanding of what the cases actually hold—and more importantly, what they do not hold—leads to the conclusion that Per Se DUI cases based on Intoxilyzer 5000 readings are in much the same posture they were in before *Yeary* and *Davenport*. In this article, we will examine the holdings of both cases and consider strategies for dealing with the flood of Source Code litigation that is sure to follow.

A Quick Review of the Uniform Act

Ultimately, both *Yeary* and *Davenport* deal only with the interpretation and application of the Uniform Act to Secure the Attendance of Witnesses from Without the State (O.C.G.A. § 24-10-90, *et. seq.*). Neither case directly impacts either the availability of the Intoxilyzer 5000 Source Code to DUI defendants, or the validity of Georgia's Intoxilyzer 5000 program. Therefore, because of the nature of the cases, it is helpful to review the Uniform Act itself before examining the opinions. As explained by the Court of Appeals in *Yeary v. State*, 302 Ga. App. 535, 536-537 (2010):

> The Uniform Act, a reciprocal act adopted by Georgia and Kentucky, 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 (*citations omitted*).

Upon proper presentation of the certificate of materiality from the Georgia trial court, the judge in the other state must hold a hearing to 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 in the other state; and
> (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, will give to the witness protection from arrest and the service of civil and criminal process.
> Kentucky Revised Statutes Annotated § 421.240 (2).

Yeary: Sound and Fury Signifying Nothing

The sole question presented to the Georgia Supreme Court in *Yeary* was "whether the Uniform Act authorizes a party in a criminal proceeding to seek purportedly material evidence from an out-of-state corporate entity without naming a person within the corporation as the witness to be summoned to Georgia." *Yeary*, 2011 Ga. LEXIS 501. Last year, the Court of Appeals held that the Uniform Act ***did not*** "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." *Yeary*, 302 Ga. App. 535, 537 (2010). Therefore, as a result of defense counsel's failure to name a natural person as a witness—instead naming just the corporation "CMI, Inc." (the Kentucky-based manufacturer of the Georgia-model Intoxilyzer 5000)—the Court of Appeals affirmed the trial court's decision not to issue the Certificate of Materiality requested by the defendant.

The Supreme Court came to the opposite conclusion, holding that:

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> The Court of Appeals erred when it concluded that a request under the Uniform Act that an out-of-state corporation be required to produce purportedly material evidence in its possession must be accompanied by the identification as a material witness of the corporate agent through which the corporation is to act. Should the certificate of materiality be issued by the Georgia court, it is for the Kentucky corporation to identify the human agent through whom it will act, perhaps in conjunction with the hearing that would be held in Kentucky upon receipt of the Georgia certificate of materiality.
> *Yeary, 2011 Ga. LEXIS 501 (2011).*

Based on this holding, it is now permissible and appropriate for a criminal defendant seeking production of the Source Code to simply name "CMI, Inc." as the material witness in possession of the Source Code, and to request that the corporation be required to come to Georgia and bring the Source Code to trial. That is absolutely ALL that the Supreme Court held in *Yeary*; any reading of the case that goes beyond that simple and narrow holding is overbroad and unwarranted.

The question that remains is whether *Yeary* makes it easier for DUI defendants tested on the Intoxilyzer 5000 to acquire the Source Code from CMI, Inc. The answer is that it does—but only slightly. In the end, *Yeary* does not leave traffic prosecutors in a noticeably worse position than they were in before the Supreme Court ruled because the case only speaks to the *entity* that a defendant can ask a trial court to deem material, and not to *whether materiality actually exists* or should be found to exist. So while the DUI defense bar will howl about their victory in this case, the noise they will make is really just "sound and fury, signifying nothing."

Davenport: Lowering the Bar

Much like the *Yeary* case, the Supreme Court's holding in *Davenport* is very narrow. As an initial matter, it is important to note that the *Davenport* ruling *presupposes* that a DUI defendant seeking the Source Code from CMI, Inc., will use the Uniform Act procedure to attempt to compel the corporation's attendance and ancillary production of the code. According to the Supreme Court, "Georgia's version of the Uniform Act, O.C.G.A. § 24-10-90, *et seq*., is **the** statutory means by which a witness living in a state other than Georgia can be compelled to attend and testify at a criminal proceeding in Georgia." *Id*., (emphasis added). It is therefore axiomatic that any attempt to subpoena or otherwise insist upon CMI, Inc.'s presence that *does not* utilize the Uniform Act is legally deficient. For example, attempts to serve CMI, Inc. by serving the Georgia Secretary of State pursuant to O.C.G.A. § 14-2-1510 must fail given the authority of *Hughes v. State*, 228 Ga. 593 (3) (1972) and *Pennoyer v. Neff*, 95 U.S. 714, 722 (1877), *overruled in part by Shaffer v. Heitner*, 433 U.S. 186, 212 n. 39 (1977). Furthermore, since CMI, Inc. is not registered to do business in Georgia, they are not amenable to service of process in that manner. Regardless of what form defense efforts to circumvent the provisions of the Uniform Act might take, DUI prosecutors are on very safe ground when opposing such practices.

To correctly understand the Supreme Court's holding in *Davenport*, it is necessary to re-examine how the Court of Appeals decided the case. At the trial court level, the defendant presented evidence regarding her asthmatic condition and argued that the evidence required a finding that the named CMI, Inc. witness was "necessary and material" within the meaning of the Uniform Act. When the trial court disagreed and declined to issue the certificate, the defendant appealed. In reviewing the trial court's determination, the Court of Appeals, in accordance with decades of existing precedent, stated that:

> A party requesting the presence of an out-of-state witness does not have an absolute right to obtain the witness; the Act requires presentation of sufficient facts 'to enable both the court in the demanding state and the court in the state to which the requisition is directed to determine whether the witness should be compelled to travel to a trial in a foreign jurisdiction.' The party seeking the witness has the burden of showing that the witness sought is a *necessary and material* witness to the case. And under the Act, the decision whether to grant the process is within the trial judge's sound discretion.
> *Davenport v. State, 303 Ga. App. 401, 402 (2010)*, (emphasis added).

For the most part, the Supreme Court followed the Court of Appeals' approach to the case. However, the Supreme Court "disapprove[d] the Court of Appeals' repeated misreading" of the standard a trial court must use in determining whether to issue a certificate of materiality. *Davenport*, 2011 Ga. LEXIS 502. The Court of Appeals held that the trial court's determination was whether the requested witness was "necessary and material" to the defense case, but the Supreme Court held that "[i]t is the out-of-state judge who must decide whether the sought-after witness is necessary and material, not the requesting court in Georgia. O.C.G.A. § 24-10-92(b). Ky. Rev. Stat. Ann. 421.240 (1). The Georgia trial judge presented with a request for a certificate is charged with deciding whether the sought-after witness is a 'material witness.' O.C.G.A. § 24-10-94(a)." *Id*.

Having clarified that Georgia trial courts must review petitions for Certificates of Materiality to decide *only* if the requested witness is "material," the Supreme Court went on to define "the appropriate standard by which a Georgia trial court should decide whether an out-of-state witness is a 'material witness.'" *Id*. Referring to Uniform Act decisions from other states (which themselves relied in no small part on Black's Law Dictionary), the Court ultimately decided that a "material witness" is "a witness who can testify about matters having some logical connection with the consequential facts, esp. if few others, if any, know about these matters." *Id*. Without question, the net effect of *Davenport* will be to make it easier for DUI defendants to demand the Source Code using the Uniform Act by lowering the bar for issuance of a certificate of materiality. Indeed, it appears that a defendant who petitions a trial court for a certificate of materiality *will get it* upon the most perfunctory of evidentiary showings. However, all is not lost. Indeed, once we understand what the majority of DUI defense attorneys *really* want when they demand the Source Code, it becomes evident that we have not lost much at all.

The Dog that Caught the Car

The simple fact of the matter is that the bulk of the DUI defense bar does not really want the Intoxilyzer 5000 Source Code because they *know* that the instrument produces reliable results. Minnesota, another jurisdiction that has faced significant Intoxilyzer 5000 Source Code litigation, allowed a team of experts hired by the Minnesota DUI defense bar to examine, review, and report on the Source Code beginning in May, 2010. The report of this team of experts—known as the Source Code Coalition—was disclosed to the state of Minnesota in October, 2010. Not surprisingly, the report admitted that no defect in the Source Code was found, and concluded that the Minnesota Intoxilyzer 5000EN produces accurate breath-alcohol concentration results. State of Minnesota District Court Order 20 – Order and Memorandum Following Final Evidentiary Hearing, In re: Source Code Evidentiary Hearings in Implied Consent Matters, Master File No. 70-CV-09-19459 and In re: Source Code Evidentiary Hearings in Criminal Matters, Master File No. 70-CR-09-19749. There is no reason to expect anything different from the Source Code of the Georgia model Intoxilyzer 5000. Indeed, in the wake of *Yeary* and *Davenport*, Georgia's DUI defense bar finds itself in the position of a dog that has chased the same car down the street day after day, year after year; when the car finally stops, the dog has no idea what to do with it.

So what does the DUI defense bar expect to gain by demanding the Source Code via the Uniform Act, if not the Source Code itself? The answer can be summarized in one word: *delay*. By dragging out misdemeanor DUI cases for months and years (if possible), the defense bar hopes to take full advantage of numerous time-sensitive factors that naturally work against the State. Officers can transfer unexpectedly or be deployed overseas. Other fact-witnesses become more reluctant to cooperate as the State is forced to release subpoena after subpoena, calendar after calendar. Judges grow weary of seeing the same case caption at the head of their trial calendars and place increasing pressure on the State to "just close the case." And all the while, defense attorneys hold out the increasingly attractive offer, "you know my client will plead to the Reckless, if you would only . . ." By taking advantage of the cumbersome and time consuming machinery of the Uniform Act, and by using *Yeary* and *Davenport* to effectively remove determination of the status of a purportedly "material" witness to

another state, the defense bar hopes to force the State to capitulate by either reducing or dismissing cases, or by frustrating prosecutors to the point that they abandon perfectly sound DUI–Per Se charges in favor of proceeding to trial only on DUI–Less Safe counts.

Proof that delay is the ultimate goal of the defense bar came within days of the *Yeary* and *Davenport* decisions. In a 25 page facsimile sent to the "registered agent" and "registered secretary" of CMI, Inc. in Owensboro, KY on July 1, 2011 at 2:14 PM, the firm of Head, Thomas, Webb & Willis LLC—the same firm that represented the *Davenport* and *Yeary* defendants—attempted to compel disclosure of the Source Code using *Georgia subpoenas* directed at representatives of an entity known to lie outside the state. This was followed up with affidavits asserting that the firm had used O.C.G.A. § 14-2-1510 to attempt extra-territorial service on CMI., Inc. by serving the Georgia Secretary of State. Both routes of attempted service are procedurally invalid and legally meaningless. The question must be asked: ***why?*** Why on earth would such a high-profile firm attempt to use Georgia subpoenas to compel attendance of an out-of-state witness and/or base service on a misreading of the foreign corporations provisions of the Georgia code? It is clear from both *Yeary* and *Davenport* that the *only* way to compel the attendance of a foreign witness is by using the Uniform Act. Are the attorneys at Head, Thomas, Webb & Willis LLC utterly and hopelessly incompetent? Certainly not. Instead, only one conclusion remains viable: they are playing games designed to buy time, ***not*** trying to get the Source Code.

The Road Ahead

In light of *Yeary* and *Davenport*, and the fact that the DUI defense bar is clearly more interested in playing games than in pursuing justice, what are prosecutors to do? What do these cases tell us about how to proceed when confronted with either a request for a certificate of materiality under the Uniform Act or demands that our trial courts enforce invalid legal processes?

First, we must strictly adhere to the limited holdings of *Yeary* and *Davenport*. Neither case stands for the proposition that the Source Code is available upon demand, nor do they stand for the proposition that defendants can dispense with the provisions of the Uniform Act when requesting it. When read together, the cases hold *only* that a defendant seeking the Source Code must use the Uniform Act procedures to request a Georgia trial court to find that the corporate entity CMI., Inc. is a material witness such that a certificate of materiality should issue. A "material witness" is defined as one that "can testify about matters having some logical connection with the consequential facts, esp. if few others, if any, know about these matters." *Davenport* (S10G1355), 2011 Ga. LEXIS 502.

Admittedly, *Davenport* sets a low standard for materiality, and it is likely that little evidence will be necessary for defendants to meet it. Nevertheless, the Uniform Act requires an actual hearing at which a defendant must present evidence to the trial court upon which a finding of materiality can be based. Without such a hearing, and without a witness to testify about CMI, Inc.'s materiality, there is no factual basis for a court to issue a certificate. Therefore, in most cases, prosecutors should insist that the defendant make a case for materiality. Should the defendant choose not to go forward with a materiality hearing, or if they should fail to demonstrate materiality, then they have exhausted their exclusive means of access to the Source Code, and prosecutors should urge that the case be set for trial.

When trial courts do issue certificates of materiality—as they almost have to under the *Davenport* standard—the Uniform Act assumes that the certificates will be filed in the appropriate foreign court of record. It is at this stage of Uniform Act proceedings that defendants will actively seek delay. Even before *Yeary* and *Davenport*, a handful of Georgia Certificates of Materiality were issued by several different trial courts throughout the state. As of the date of this writing, the Prosecuting Attorneys' Council has found no indication that those certificates have been appropriately filed in Kentucky. Nevertheless, in many of those cases, motions and trials have been put off for months and years. Justice is not served when defendants are allowed to use procedural machinations to effectively delay trials indefinitely. Therefore, prosecutors must find ways to minimize delay in cases where certificates of materiality are issued.

Two strategies seem suited to this purpose. First, prosecutors have the option of consenting to the issuance of the certificate of materiality in exchange for the agreement of the defendant to file it in Kentucky within a reasonable amount of time (30 days seems to be enough). The downside to this approach is that it alleviates the need for the defendant to produce a witness and present evidence about materiality. On the other hand, it allows the state to lock the defense in to a time frame for filing the certificate. Should the defendant fail to file the certificate as the Uniform Act requires within the time allotted, he or she must appear before the trial court to show good cause why the certificate has not been filed. If good cause cannot be shown, then prosecutors should move the court to find that the defendant has abandoned his or her efforts to secure CMI, Inc.'s attendance and vacate the certificate. Once the certificate has been vacated, prosecutors should seek to set the case for trial expeditiously. (For a sample "Consent Certification of Materiality of an Out-Of-State Witness," contact the author at thayes@pacga.org.)

In most cases, the better strategy will be to force the defendant to go forward with a materiality hearing. A fair number of defendants will choose to avoid that, ending the Source Code arguments in those cases. Certain others will be unable to show materiality, also ending the argument. When defendants do choose to go forward and are able to satisfy the low standard for materiality, prosecutors should then file a motion for an order requiring the defendant to either file the certificate within a certain time (again, 30 days) and show proof of filing to the court, or appear on a date certain to show cause why the certificate has not been filed. As with the consent strategy, if good cause cannot be shown, prosecutors should move the court to find abandonment by the defense and to vacate the certificate such that the case can be set for trial. (For sample forms to facilitate a show cause hearing as outlined above, contact the author at thayes@pacga.org.)

Finally, prosecutors must not allow creative defense attorneys to invent novel and inapposite methods with which to attempt service of Source Code demands on CMI, Inc. When read together, *Yeary* and *Davenport* clearly indicate that the Georgia Supreme Court views the Uniform Act as "**the** statutory means by which a witness living in a state other than Georgia can be compelled to attend and testify at a criminal proceeding in Georgia." *Id.*, (emphasis added). No other mechanism—not trying to fax Georgia subpoenas out-of-state or serving the Secretary of State using O.C.G.A. §14-2-1510—exists whereby a criminal defendant can attempt to compel CMI to bring the Intoxilyzer 5000 Source Code to Georgia. Prosecutors should oppose all such machinations and be prepared to appeal any orders that attempt to enforce them under the authority of *Davenport* itself.

Conclusion

Whatever strategy is selected, the ultimate aim of Georgia DUI prosecutors must be to keep DUI–Per Se cases moving forward and to minimize or eliminate the delay defendants so desperately want to artificially introduce into their cases. To that end, prosecutors are well within their rights to demand ongoing status hearings with regard to Uniform Act proceedings and to seek proof that defendants are actively engaged in legitimately obtaining the Source Code. When defendants fail to do so, prosecutors must be ready to move ahead and try their Intoxilyzer 5000 cases.

In the end, Per Se DUI cases are in almost exactly the same position they were in before *Yeary* and *Davenport* were decided. The DUI defense bar will try to make much of the "spectacular" victories they have won, but in reality little has happened that will benefit DUI defendants. As always, prosecutors must recognize the games the defense bar plays for what they are and remain tireless and vigilant in their efforts to remove impaired drivers from Georgia streets and highways. As exhausting, frustrating, and pointless as these games are, prosecutors must keep in mind that the goal is and will always be to make us quit and walk away. Are *Yeary* and *Davenport* bad? Yes, but in the end, not as bad as it seemed at first. As long as we refuse to dismiss or reduce Intoxilyzer-based cases—as long as we *keep on fighting* for the safety of Georgia roads and motorists—they can't win. And they know it. GTP

NHTSA Study Concludes DWI Court Works; It Reduces Recidivism

Courtesy National Highway Traffic Safety Administration

Alexandria, VA – March 25, 2011 – A three-county evaluation done in Georgia found that repeat Driving While Impaired (DWI) offenders participating in DWI Court were up to 65 percent less likely to be re-arrested for a new DWI offense than DWI offenders sentenced in a traditional format. The evaluation conducted by the Pacific Institute for Research and Evaluation (PIRE) and funded by the National Highway Traffic Safety Administration (NHTSA), compared repeat DWI offenders in DWI Court to locations where DWI Courts were not available. The ultimate question of the research was: are DWI Courts more effective than traditional courts in reducing recidivism of repeat offenders? With a recidivism rate of 15 percent for all DWI Court participants that either graduated or were terminated, versus a recidivism rate of up to 35 percent for those not in DWI Court, the conclusion was a clear "yes," DWI Court was more effective. The study also noted that, because of the effectiveness of the Georgia DWI Courts, between 47 and 112 more repeat DWI arrests were prevented. This saved a substantial amount of taxpayer money that would have been needed for incarceration, court time and probation supervision.

Judge Kent Lawrence, Chairman of the National Center for DWI Courts (NCDC) DWI Court Task Force, and one of the judges that participated in the evaluation noted: "The evaluation of the three Georgia DWI Court programs validates and confirms for our DWI Courts that the daily work performed in the trenches with repeat impaired drivers has proven to be both effective and fruitful, and reflects an affirmation that DWI COURT WORKS! All of the DWI Courts in Georgia are pleased with the outstanding positive results reported in the NHTSA evaluation, and commit ourselves to the continued growth of DWI Court in our state."

DWI Court is an accountability court that is based on the proven Drug Court model. It requires individual accountability, enhanced supervision, extended counseling and treatment, frequent and random drug testing, and continued monitoring of the offender by the court.

"The evidence continues to grow that DWI Court is making our communities safer," said David Wallace, director of the NCDC. "We know that jail alone doesn't change the behavior of a repeat DWI offender. We have to hold the person accountable for his or her actions and require long-term treatment to accomplish a change in behavior. That is what DWI Court is all about, and this is one more study that demonstrates it works. DWI Court saves lives."

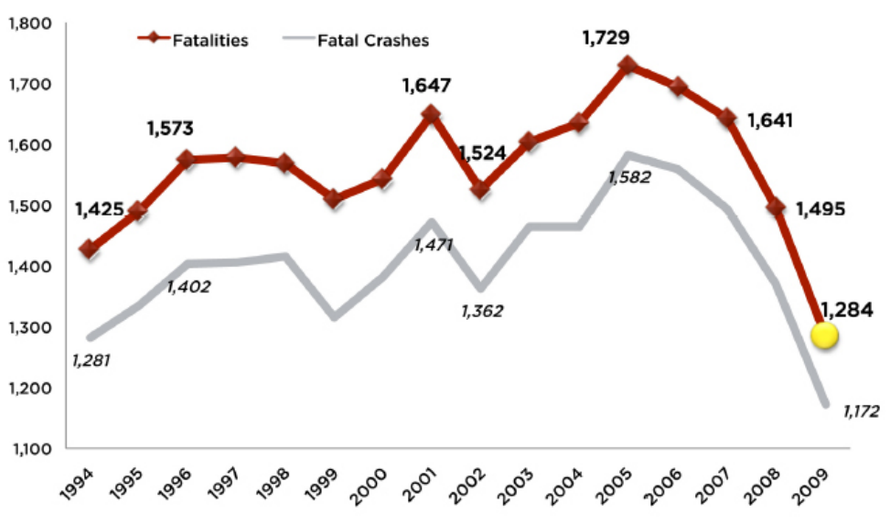
Studies demonstrating that DWI Court works have been growing on a steady basis. A 2008 three-county DWI Court study in Michigan found that the DWI Court participants were up to 19 times less likely to re-offend and a 2009 Wisconsin study also found that DWI Court was more effective than a traditional court. GTP

····> fact

- From 2000 to 2009 the number of Georgia drivers has increased by nearly 14 percent, which is more than 760,000 additional drivers.
- In 2003, there were 5.5 million licensed drivers and 104 billion vehicle miles traveled in comparison to 2009 were there were 6.3 million drivers and 109 billion vehicle miles traveled.
- The crash rate for persons ages 16–19 was 17.2 crashes for every 100 licensed drivers in comparison to 30 to 34-year-olds that experienced 9.0 crashes for every 100 licensed drivers.
- The number of male versus female drivers in Georgia was approximately equal across all age groups in 2009. This distribution is also applicable to individual ages between 16 and 24 years as depicted in the sub-figure.

Courtesy: Governor's Office of Highway Safety's 2011 CASI Report

ROADWAY FATALITIES AND FATAL CRASHES BY YEAR, 1994-2009



The figure shows the number of fatalities and fatal crashes that have occurred from 1994-2009. The gray line represents the number of fatal crashes and the red line represents the total number of crash deaths (fatalities).

In 2009, Georgia had the lowest number of fatalities since the collection of motor vehicle crash data.

Courtesy: Governor's Office of Highway Safety's 2011 CASI Report

2011 Traffic Legislation

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

Bicycles

HB 101, effective July 1, 2011, amended O.C.G.A. § 40-1-1 by adding the new term "bicycle lane." O.C.G.A. § 40-6-55 now requires motor vehicle drivers to yield to bicycle operators when the bicycle is operated in a bicycle lane. This section makes it clear that, where a bicycle lane has been carved out for the use of bicycles, motor vehicles are not to intrude upon the operation of the bicycle in the bicycle lane.

The new O.C.G.A. § 40-6-56 governs how a motor vehicle should pass a bicycle that is on a roadway where there is no designated bicycle lane; "[W]hen feasible, the operator of a motor vehicle, when overtaking and passing a bicycle that is proceeding in the same direction on the roadway, shall leave a safe distance between such vehicle and the bicycle and shall maintain such clearance until safely past the overtaken bicycle." The term "safe distance" is defined as "not less than three feet." O.C.G.A. § 40-6-291(b) permits, but does not require, bicycle operators to ride upon a paved road shoulder where one is available. Bicycle operators are exempted from § 40-6-50 which generally prohibits vehicles from being driven on road shoulders. HB 101 legalized the use of recumbent bicycles by striking the old O.C.G.A. § 40-6-296 (d), which prohibited bicycles from having pedals in the lowermost position to be more than 12 inches above the ground

Motor Vehicle-Security Interest

HB 323, effective July 1, 2011, amended O.C.G.A. § 40-3-50 (b) (2) so that security interests in motor vehicles are perfected at the time of their creation if the application for or notice of security interest is filed as provided within 30 days of its creation. The old requirement was within 20 days.

Sunday Alcohol Sales

SB 10, effective July 1, 2011, amended OCGA §3-3-7 to provide that in each county or municipality in which package sales of alcohol are lawful, the governing authority may authorize package sales by a retailer on Sundays between 12:30 p.m. and 11:30 p.m. This must first be approved by local referendum.

Cameras On School Buses

SB 57, effective July 1, 2011 added subsection (d) to OCGA §40-6-163, permitting school systems to offset the expense of installing video recording devices on school buses showing "clear view of vehicles passing the bus on either side and showing the date and time the recording was made and an electronic symbol showing the activation of amber lights, flashing red lights, stop arms and brakes." These recordings may be used to criminally enforce the laws against passing a school bus or pursue a civil action against the driver. The law prohibits the enforcement of both criminal and civil actions against driver.

Child Restraints

SB 88, effective July 1, 2011, amended O.C.G.A. § 40-8-76(b) by raising the age of children transported in passenger vehicles using child restraint systems, from 6 to 8 years old. O.C.G.A. § 40- 8-76(d) was amended to require daycare facilities operating vehicles that are not "school buses" or "multifunction school activities buses" to use child passenger restraining systems to transport children between the ages of 4 and 8. O.C.G.A. § 40- 8-76.1(e) (3), relating to the use of safety belts in passenger vehicles, was also amended to raise the age of covered children from 4 to 8 years

Personal Transportation Vehicles

SB 240, effective July 1, 2011 amended O.C.G.A. § 40-1-1 to create a new class of motor vehicle called a "personal transportation vehicle." The requirements set out for these vehicles are as follows: Number of wheels–4, maximum speed–20 mph, maximum gross weight–1375 lbs., number of occupants–no more than eight.

O.C.G.A. § 40-6-363 was amended to set out the equipment required on personal transportation vehicles: A braking system sufficient for the weight and passenger capacity of the vehicle, a functional reverse warning device, a main power switch or key that renders the motive power circuit inoperative when is switch is off or the key is removed, head lamps, reflex reflectors, tail lamps, a horn, a rearview mirror, safety warning labels, hip restraints, hand holds.

Exempted from this class are mobility aids (including power wheelchairs and scooters) and all-terrain vehicles. O.C.G.A. §40-6-363 was amended to exclude from this new law counties and municipalities that, prior to January 1, 2012, enacted ordinances authorizing the operating of motorized carts pursuant to O.C.G.A. §40-6-331.

Illegal Immigration

HB 87: The Illegal Immigration Reform and Enforcement Act of 2011 became effective on July 1, 2011 (except for Section 17, effective January 1, 2012). This Bill provides penalties for the failure of public employers to utilize the federal work authorization program and creates new criminal offenses involving illegal aliens, investigations into illegal alien status, and authority for law enforcement officers to enforce federal immigration laws.

Federal Judge Trash, however, issued an injunction against the governor of Georgia to stop Sections 7 and 8. [see Ga. Latino Alliance for Human Rights v. Deal, 2011 U.S. Dist. LEXIS 69600 (N.D. Ga. June 27, 2011)]). The new O.C.G.A. § 16-11-200 (b) and § 17-5-100 are currently unenforceable, and until the appeal is resolved, generally, law enforcement cannot ask for immigration documents (However, this does not apply to 287(g) counties like Gwinnett and Cobb, which have separate agreements with the federal government to implement immigration laws.). Under the injunction, police cannot stop a person on the street without probable cause, but if it happens in 287(g) counties, officers can investigate immigration status and detain persons in the country illegally.

Aggravated Identity Fraud: The court did ***not*** issue an injunction against the new offense of Aggravated Identity Fraud, which is aimed at persons who use false identification in order to obtain employment. Anyone who uses a fake green card or fake social security number to get a job after July 1 may be guilty of a felony, and the court may impose a fine of up to $250,000 and 15 years in prison or both.

E-Verify: All companies with more than 10 employees are required to use the E-Verify system. If a business does not comply with the mandatory E-Verify requirements, the state can pull their business license.

What did ***not*** change: State and local officers may verify the immigration status of individuals who are otherwise lawfully detained. *Muehler v. Mena*, 544 U.S. 93, 100-101 (2005).

Officers cannot unreasonably extend lawful detentions beyond the original purpose unless there is articulable suspicion of another crime. *Arizona v. Johnson*, 555 U.S. 323 (2009); *Nunnally v. State*, 2011 Ga. App. LEXIS 518 (6/20/11); *Young v. State*, 2011 Ga. App. Lexis 544 (6/23/11).

Pseudoephedrine

SB 93, effective May 13, 2011, amended O.C.G.A. § 16-13-29 to include pseudoephedrine as a Schedule V drug and conversely amended O.C.G.A. § 16-13-71 by removing pseudoephedrine as a dangerous drug.

Municipal Judge

SB 30 added O.C.G.A. § 36-32-1.1, which requires that, after July 1, 2011, judges of the municipal courts must be attorneys and members in good standing of the State Bar of Georgia. Non-lawyer judges who are in office as of June 30, 2011 may remain in office as long as they comply with O.C.G.A. § 36-32-27.

The Evidence Code

HB 24, effective January 1, 2013, will totally revise Title 24, the Evidence Code. The current rules of evidence remain in effect until the beginning of 2013.

The Prosecuting Attorneys' Council will provide intensive training on the new evidence rules before they go into effect. GTP

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····> fact:

Each 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.