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CHAPTER 1 - DUI

1. DRIVING UNDER THE INFLUENCE

1.1 ELEMENTS OF THE CRIME

1.11 The Code provides six (6) ways in which someone can be convicted of DUI. The sixth condition has been declared unconstitutional vis a vis marijuana.[1] The six variants are -- Being in actual physical control of any moving vehicle while:

A. Under the influence of alcohol to the extent that it is less safe for the person to drive
   - no need to commit less safe act [Susman v. State, 256 App. 94, 567 SE2d 736 (2002)];

B. Under the influence of any drug to the extent that it is less safe for the person to drive **OCGA § 40-6-391 (b)** -
   - driving under influence of prescription drugs - standard for conviction, namely: "incapable of driving safely"is the same as "under the influence of alcohol to the extent that it is less safe for the person to drive" [State v. Kachwalla, 274 Ga. 886, 561 SE2d 403 (2002)];
   - Court need not charge jury "incapable of driving safely" language in a "less safe"case [State v. Johnson, 268 App. 426, 602 SE2d 177 (2004)];

C. Under the intentional influence of any glue, aerosol, or other toxic vapor to the extent that it is less safe for the person to drive;

D. Under the combined influence of any two or more of the substances specified in paragraphs (1) through (3) of this subsection to the extent that it is less safe for the person to drive;

E. Per se violations:
   1. The person's alcohol concentration is 0.08 grams or more at any time within three hours after such driving or being in actual physical control from alcohol consumed before such driving or being in actual physical control ended;

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[1]The Georgia Supreme Court has declared **OCGA § 40-6-391 (a) (6)** unconstitutional *vis a vis* ***marijuana*** due to the lack of relation between the legislative distinction between legal and illegal marijuana use (see § 40-6-391 (b)) and the public safety purpose. As of this writing, conviction under paragraph (6) for marijuana is not permitted. Love v. State, 271 Ga. 398, 517 SE2d 53 (1999). Note: The Georgia Court of Appeals has held that § 40-6-391 (a) (6) is constitutional as "applied to those convicted, with driving with a detectable level of ***cocaine*** in their system." Keenum v. State, 248 App. 474, 475 (2001).

2. For commercial vehicles, the amount of alcohol present in the blood, breath, or urine for which a defendant can be convicted is 0.04 grams [**OCGA § 40-6-391 (i)**];
3. For persons under the age of 21, the amount of alcohol present in the blood, breath, or urine for which a defendant can be convicted is 0.02 grams [**OCGA § 40-6-391 (k)]**; OR

F. Subject to the provisions of subsection (b) of **OCGA § 40-6-391**, there is any amount of marijuana or a controlled substance, as defined in **OCGA § 16-13-21**, present in the person's blood or urine; or both, including the metabolites and derivatives of each or both without regard to whether or not any alcohol is present in the person's breath or blood. **OCGA § 40-6-391(a)**. f the defendant is being charged with paragraph (5) or paragraph (6) of subsection (a), determining whether the person is a less safe driver is irrelevant [Stevenson v. State, 264 Ga. 892, 453 SE2d 18 (1995)].

1.12 ACTUS REUS

A. There are two (2) actus reus elements
   1. Driving or actual physical control of a moving vehicle;
      - Vehicle is broadly construed, includes a golf cart [Simmons v. State, 281 App. 252, 635 SE2d 849 (2006)], and need not be self-propelled [Jones v. State, 206 App. 604, 605 (2), 426 SE2d 179 (1992) (dicta); Simmons].
   2. The circumstance element of either:
      a. being under the influence; or
      b. violating either paragaph (5) or (6) of **OCGA § 40-6-391 (a).**

B. It is not a crime merely to occupy a parked automobile while under the influence of alcohol [Ferguson v. City of Doraville, 186 App. 430, 367 SE2d 551 (1988)] "however, where car is not cranked or controllable by steering, but defendant breaks into car and brake releases, allowing it to go into motion, jury is not required to accept Defendant's denial of physical control of car" [Savage v. State, 252 App. 251, 556 SE2d 176 (2001)].

C. The *actus reus* of being "under the influence" means that the defendant's intoxication was such that it was less safe to operate the vehicle than it would be if he were not affected by the intoxicating liquor. However, there cannot be a jury instruction that authorizes a conviction where the defendant was under the influence of an intoxicant "to any extent whatsoever" [Cook v. State, 220 Ga. 463, 139 SE2d 393 (1964)].

D. Driver need not be seen behind the wheel while under the influence if driving can be inferred by circumstantial evidence [State v. Loy, 251 App. 721, 554 SE2d 800 (2001). *See also, e.g.*, Deering v. State, 244 App. 30, 535 SE2d 4 (2000)(driver found away from car, but was only person who could have driven car, and car had just been driven); Jarriel v. State, 255 App. 305, 565 SE2d 521(2002) (jury allowed to presume driver had driven vehicle immediately prior to police arriving when driver was found unconscious in truck with the engine running with a blood alcohol level of 0.12); Schoolfield v. State, 251 App. 52, 554 SE2d 181 (2001) (same)].

1.13 MENS REA (Intent and Related Affirmative Defenses) [*See* Savage v. State, 252 App. 251, 556 SE2d 176 (2001)].

A. The only mens rea (intent) requirement is the general intent to drive at the same time that one is under the influence [Tam v. State, 232 App. 15, 511 SE2d 578 (1998)].

B. ***Voluntary intoxication*** resulting in lack of memory is ***not*** a defense to DUI [Larsen v. State, 253 App. 196, 558 SE2d 418 (2001)]. Case law is conflicting as to whether ***involuntary intoxication*** is a defense to DUI [*Compare* Colon v. State, 256 App. 505, 568 SE2d 811 (2002)) (involved alcohol and drug (GHB - gamma hydroxybutyric acid)) *with* Crossley v. State, 261 App. 250, 582 SE2d 204 (2003)].

C. Accident (OCGA 16-2-2) ***may*** be available as an affirmative defense in a DUI [*See* Savage v. State, 252 App. 251, 556 SE2d 176 (2001)]. An accident defense would require defendant to admit the act constituting a DUI.

D. Justification may be possible defense but requires admitting offense [*compare* London v. State, 289 App. 17, 656 SE2d 180 (2007) *with* Tarvestad v. State, 261 Ga. 605 (409 S.E.2d 513) (1991) (wife in labor)].

1.14 Endangering child - A separate crime of endangering a child by driving under the influence of alcohol or drugs exists when the person charged with driving under the influence was transporting a child under 14 years of age. For purposes of prosecution, this does not merge with the D.U.I. offense. **OCGA § 40-6-391 (l)**.

1.2 INDICTMENTS OR ACCUSATIONS

1.21 LANGUAGE

A. The phrase "driving under the influence" with respect to both alcohol and drugs and "to the extent it is less safe for the person to drive" are equivalent concepts describing the same physical condition [Hogan v. State, 178 App. 534, 348 SE2d 770 (1986)].

B. An indictment charging the defendant with "driving under the influence" does not put the defendant on notice of violating **OCGA § 40-6-391** (a) (5) or (6) since these paragraphs don't contain the phrase "under the influence" and don't require the state to prove impaired driving ability [Kevinezz v. State, 265 Ga. 78, 454 SE2d 441 (1995)].

1.22 ONE CRIME - **OCGA § 40-6-391** establishes one crime [Lester v. State, 253 Ga. 235, 320 SE2d 142 (1984)] and subsection (a) paragraphs (1) and (5)[formerly (4)] are merely two different methods of proving the same crime [Hogan v. State, 178 App. 534, 342 SE2d 770 (1986)].

A. Alternative Counts - An indictment or accusation is not subject to objection of multiplicity or multifariousness when alternative methods of violating **OCGA § 406-391 (a)** are alleged in a single count [Morgan v. State, 212 App. 394, 442 SE2d 257 (1994)]. However, if a single count alleges violations of paragraphs (1) and (5), the accusation must use the conjunctive "and" not the disjunctive "or." *See Daniel*, Criminal Trial Practice, § 13-15 (2000).

B. Merger - If offenses charged under both paragraphs (1) and (5) are based on the same conduct, they merge under the rule [Hoffman v. State, 208 App. 574, 430 SE2d 886 (1993)]. Merger would occur after trial [Jenkins v. State, 253 App. 8, 557 SE2d 470 (2001)]. "However, a person can be convicted of DUI-alcohol and DUI drugs arising out of the same incident" [Carthon v. State, 248 App. 738, 548 SE2d 649 (2001)].

- No merger for child endangerment and DUI [Slayton v. State, 281 App. 650, 637 S.E.2d 67 (2006); **OCGA § 40-6-391 (l)**]. This results in a second conviction suspension of driver's license [Dozier v. Jackson, 282 App. 264, 638 SE2d 337 (2006)].

C. DUI (less safe) and DUI (excessive blood alcohol content) are different methods of proving the offense of "driving under the influence," and indictment or accusation on one does not permit conviction on the other, since "such an indictment would not put a defendant on notice that he or she could be convicted under §§ 40-6-391 [(a) (5) DUI -- excessive blood alcohol content], which [does] not contain the phrase 'under the influence' and [does] not require the state to prove impaired driving ability" [Kevinezz v. State, 265 Ga. 78, 454 SE2d 441 (1995)].

1.23 Uniform Traffic Citations (UTC)

A. Traffic charges - UTC is a proper charging instrument for a DUI and other traffic offenses in all courts other than superior court [Carroll v. State, 252 App. 39, 554 SE2d 560 (2001)].

B. Statute of Limitations - if a UTC is filed within the statute of limitations and an accusation filed after without any final disposition, the action is commenced within the statute [Carroll v. State, 252 App. 39, 554 SE2d 560 (2001)].

C. Non-traffic charges - Where the statute authorizes proceeding via a citation, UTC is proper charging instrument for non-traffic charges outside of superior court [Shaver v. Peachtree City, 276 Ga. 298, 578 SE2d 409 (2003); see **OCGA § 3-3-23.1**(d)]. Where the statute does not authorize proceeding by citation, a UTC is not proper [Cotton v. State, 263 App. 843, 589 SE2d 610 (2003) (citation confers no jurisdiction upon state court); see **OCGA § 4-3-12**; *but see* Shaver (alternate holding suggests any problem with citation form not jurisdictional in nature, demurrer required to raise challenge)].

D. Citation requires that the offense:
   1. be observed by the officer;
   2. or result in an accident [OCGA 17-4-23(a); State v. Cooper, 271 App. 771, 611 SE2d 90 (2005)].

   Warrantless custodial arrest may be made based upon probable cause without citation if there is likely to be failure of justice for want of a judicial officer to issue a warrant [OCGA 17-4-20(a); State v. Cooper, 271 App. 771, 611 SE2d 90 (2005)].

1.24 Description of offense controls over cited code section [Mullinax v, State, 231 App. 534, 499 SE2d 903 (1998)]. Generally, citing the wrong code section is not a fatal variance affecting validity of conviction [Smith v. State, 239 App. 515, 521 SE2d 450 (1999)].

1.25 Circumstantial evidence - Observations of the officer and opinions based upon them are circumstantial evidence of impairment and intoxication - trial court should give circumstantial evidence jury charge [Taylor v. State, 278 App. 181, 628 SE2d 611 (2006)].

1.26 Location - The exact location of the offense is not a material element of D.U.I. An accusation is sufficiently certain if it charges that the offense took place in a particular county. [Walker v. State, 201 App. 672, 411 SE2d 734 (1991)].

1.3 ADMISSIBILITY OF EVIDENCE

1.31 Testimony

A. Lay witnesses can express their opinions as to intoxication [New v. State, 171 App. 392, 319 SE2d 542 (1984)].

B. Police officers can express their opinions as to intoxication and as to the extent of intoxication that would render the defendant a less safe driver [Chance v. State, 193 App. 242, 387 SE2d 437 (1989). *Accord*, Driver v. State, 240 App. 513, 523 SE2d 919 (1999) (a trained and experienced officer can render as evidence an opinion based on the officer's personal observations of a defendant as to whether the driver was less safe)].

C. Opinion on inhalant intoxication as basis for arrest [Castaneda v. State (Ct. App. #A08A0407, 7/2/2008)].

D. Smell of marijuana can be factor for probable cause for arrest for DUI [Albert v. State, 236 App. 146, 511 SE2d 244 (1999)]. Smell of marijuana together with refusal to submit to testing is sufficient to circumstantially establish presence of marijuana in blood.

E. Testimony regarding the speed and manner of driving is admissible to show intoxication [McGregor v. State, 89 App. 522, 80 SE2d 67 (1954)].

F. Evidence of post-driving drinking can be used to show drinking while driving [Turner v. State, 95 App. 157, 97 SE2d 348 (1957)].

G. Defendant's drinking at other times is ***not admissible*** [Reliford v.State, 101 App. 244, 113 SE2d 473 (1960)]. However, ***if*** a defense ***witness testifies that the defendant did not appear intoxicated*** on the day of his arrest, the state is entitled to cross-examine the witness to determine the facts upon which the witness's observation was based, including the witness's observations of the ***defendant's drinking on previous occasions*** [Kelly v. State, 242 App. 30, 528 SE2d 812 (2000); Woods v. State, 235 App. 894, 896, 510 SE2d 848 (1999)].

1.32 Field Sobriety Evaluations (FSE)

A. If there exists a reasonable and articulable suspicion that a driver may be intoxicated, he may be detained by the police and field sobriety tests may be administered in order to determine whether he had been driving under the influence. In order for the field sobriety test results to be admissible at trial, the state must offer evidence that the arresting officer had a reasonable and articulable suspicion to justify the administration of the tests [Kinman v. State. 243 App. 258, 533 SE2d 124 (2000) (physical precedent only); Vaughn v. State, 243 App. 816, 534 SE2d 513 (2000)].

B. Evaluations such as the "walk and turn," "one leg stand," and alphabet tests are common-sense observations and any problems in how they were administered go to weight, not admissibility [State v. Pastorini, 222 App. 316, 474 SE2d 122 (1996); Hawkins v. State, 223 App. 34, 476 SE2d 803 (1996); *but see* Brent v. State, 270 Ga.160, S10 SE2d 14 (1998) ("It is the officer's training and experience that makes the results of field sobriety tests meaningful. Without that expert interpretation the trier of fact is unable to evaluate the evidence properly before them")] (see G below for different standards for HGN).

- Although "improperly" administered non-scientific FSE may be admissible, the trial court has great leeway in accepting or rejecting their persuasiveness when evaluating probable cause for the arrest at a motion to suppress [State v. Sanders, 273 Ga. App. 393, 617 SE2d 633 (2005)].

C. The trial court must closely scrutinize the facts of the case to ensure that reasonable suspicion actually was present at the initiation of the DUI investigation and was not invented after the arrest to cover a scheme of screening routine traffic stops without observing constitutional safeguards. Routine traffic stops cannot be used as a screening device for DUI offenders absent specific facts authorizing such inquiry in a case [Lyons v. State, 244 App. 658, 535 SE2d 841 (2000)].

D. Although there is no statutory scheme covering field sobriety tests and other initial screening tests, lack of such a scheme does not prevent the admission of field sobriety test results into evidence at trial [Rawl v. State, 192 App. 57, 383 SE2d 903 (1989)].

E. Evidence of refusal to submit to FSE is admissible as evidence for trial for DUI [Ferega v. State, 286 App. 808, 650 SE2d 286 (2007) (not 5th Amendment violation); Hoffman v. State, 275 Ga. App. 356, 620 SE2d 598 (2005) ("circumstantial evidence of intoxication" together with other evidence supporting inference of impairment); Long v. State, 271 App. 565, 610 SE2d 74 (2004) ("together with the other evidence discussed above, would support an inference that she was an impaired driver"); Johnson v. State, 268 App. 426, 602 SE2d 177 (2004) (refusal of submission to ***alcosensor*** without foundation for test); Bravo v. State, 249 App. 433, 548 SE2d 129 (2001); *but see* Wallace v. State, 272 Ga. 501, 530 SE2d 721(2000) (commenting that defendant "swallowed hard, wrung his hands, breathed and sighed deeply, and shuffled his arms and legs" in response to pre-arrest questioning not allowable); Jarrett v. State, 265 Ga. 28, 453 SE2d 461 (1995) (evidence of defendant's pre-arrest silence is not admissible because it is more prejudicial than probative); Mallory v. State, 261 Ga. 625, 630, 409 SE2d 839 (1991)]. ***Don't charge on effect of evidence*** (see Baird v. State, 260 App. 661, 580 SE2d 650 (2003)).

F. *Miranda* Warnings

1. Because a defendant generally is not in custody or under arrest at the time field sobriety tests are administered, Miranda warnings generally are not necessary prior to administering the tests [State v. Sumlin, 224 App. 205, 480 SE2d 260 (1997) (physical precedent only); Arce v. State, 245 App. 466, 538 SE2d 128 (2000) (Miranda warning not necessary for FSE unless suspect was in custody at time of test). *See also* Trudewind v. State, 224 App. 223, 480 SE2d 211 (1996)].
2. However, if the trial court finds that the defendant was under arrest at the time he or she took the field sobriety tests and that the officer failed to give the required Miranda warnings, the trial court should suppress the field sobriety tests results [Moody v. State, 273 App. 670, 615 SE2d 803 (2005); State v. O'Donnell, 225 App. 502, 484 SE2d 313 (1997); State v. Norris, 281 App. 193, 635 SE2d 810 (2006) (***alcosensor*** test after arrest requires Miranda warnings and implied consent - although note 23 also suggests requirement of Miranda may be questionable)].
3. No requirement to advise suspect that field sobriety tests are voluntary. Suspect is not in custody during preliminary investigation and no Fifth

Amendment violation exists [State v. Leviner, 213 App. 99, 443 SE2d 688 (1994)].

G. Horizontal gaze nystagmus (HGN) test is a ***scientific test*** [Hawkins v. State, 223 App. 34, 476 SE2d 803 (1996)].

1. Court determines whether HGN was properly administered to allow admissibility. Other evaluations, such as the "walk and tum," and "one leg stand" are not scientific tests, can not be suppressed on the grounds that they were not properly administered [State v. Pastorini, 222 App. 316, 474 SE2d 122 (1996)].
2. ***Standard for admission***
   a. General scientific principles and techniques involved are valid and capable of producing reliable results - established by judicial notice - no expert testimony is required to establish scientific foundation for the reliability of the HGN test [Hawkins v. State, 223 App. 34, 476 SE2d 803 (1996); Sultan v. State, 289 App. 405, 657 SE2d 311 (2008)].
   b. ***Also*** whether "the person performing the test substantially performed the scientific procedures in an acceptable manner." [Sultan v. State, 289 App. 405, 657 SE2d 311 (2008); *accord*, State v. Stewart, 280 Ga. App. 366, 634 SE2d 141 (2006); State v. Tousley, 271 App. 874, 611 SE2d 139 (2005); *see* Keller v. State, 271 App. 79, 608 SE2d 697 (2004); Monroe v. State, 272 Ga. 201, 528 SE2d 504 (2000) (DNA case setting forth general standard for scientific tests); Brent v. State, 270 Ga. 160(3), 510 SE2d 14 (1998) ("It is the officer's training and experience that makes the results of field sobriety tests meaningful. Without that expert interpretation the trier of fact is unable to evaluate the evidence properly before them"); State v. Pastorini, 222 App. 316, 474 SE2d 122 (1996) (trial court *may* exclude HGN tests based upon failure to comply with NHTSA standards)].
      - Cases saying that problems with performance of the test go only to the weight appear to repudiated by implication by the recent cases: [e.g., State v. Pierce, 266 App. 233, 596 SE2d 725 (2004) (seemed to say that ***any*** challenge to how the HGN was administered went to weight and not admissibility)].
   c. HGN, unlike field evaluations, may require some expertise to administer [Brent v. State , 270 Ga.160, 510 SE2d 14 (1998); *but see* State v. Stewart, 280. App. 366, 634 SE2d 141 (2006) (NHTSA certification of officer not needed if ***defendant's*** burden of showing lack of compliance with NHTSA standards not met); Hawkins].
   d. ***Burden of proof*** rests ***upon*** the ***defendant*** to show that the test is inadmissible [State v. Tousley, 271 App. 874, 611 SE2d 139 (2005) (reversed exclusion of test where only 2 clues questioned - testimony showed only 4 of 6 clues needed for impairment); Tuttle v. State, 232 App. 530, 502 SE2d 355 (1998)].

e. Examples: Admit [State v. Tousley, 271 App. 874, 611 SE2d 139 (2005) (reversed exclusion of test where only 2 clues questioned - testimony showed only 4 of 6 clues needed for impairment); State v. Stewart, 280. App. 366, 634 SE2d 141 (2006) (defendant failed to show substantial non-compliance with NHTSA standards ***despite*** failure to ask screening question about head injuries)];
Exclude - Sultan v. State, 289 App. 405, 657 SE2d 311 (2008) (officer admitted error in not performing equal traction portion of test)].

3. HGN test is admissible to demonstrate impairment from alcohol or drugs, not merely presence of alcohol [Kirkland v. State, 253 App. 414, 559 SE2d 161 (2002); Duren v. State, 252 App. 257, 555 SE2d 913 (2001), cert. denied Case No. S02CO385 (2002); Albert v. State, 236 App. 146, 511 SE2d 244 (1999); *see also* Kuehne v. State, 274 Ga. App. 668, 618 S.E.2d 702 (2005); Wrigley v. State, 248 App. 387, 546 SE2d 794 (2001) (Jury instruction citing "verifiable certainty" in scientific community of HGN test as evidence of alcohol consumption is valid)]. HGN test observations are admissible where test is administered with defendant seated in car.

Note - It is also ***unclear*** whether HGN may justify opinion that blood alcohol is over a particular ***numerical level*** [*See* Webb v. State, 277 App. 355, 626 SE2d 545 (2006)].
4 of 6 clues along with presence of alcohol (by admission, alcosensor, and smell) as well as bloodshot eyes ***held to require finding of probable cause*** despite no clues on other field exercises and officer's opinion of no probable cause [State v. Preston (Ct. App. #A08A0183, 7/11/2008) (trial court reversed) (fatal accident case)].
For defense witness lack of expertise to testify about HGN, see Muir v. State, 256 App. 381, 568 SE2d 515 (2002).

H. Officer is subject to cross-examination based on NHTSA standards if trained in such standards [James v. State, 260 App. 536, 580 SE2d 334 (2003) (explains Cantwell v. State, 230 App. 892, 497 SE2d 609 (1998) (NHTSA standards not relevant to lay observation that defendant moves head during HGN test); *compare* State v. Pastorini, 222 App. 316, 474 SE2d 122 (1996); Torrance v. State, 217 App. 562, 458 SE2d 495 (1995) (cross-examination limited if not trained in NHTSA standards); *see also* Brent v. State, 270 Ga. 160(3), 510 SE2d 14 (1998); State v. Stewart, 280 Ga. App. 366, 634 SE2d 141 (2006) (application of NHTSA standards in judging admissibility discussed)].
- With cases such as Tousley, and Stewart, it may now always be proper to cross-examine about NHTSA standards irrespective of officer's training.

I. For initial screening chemical tests (alcosensor) (see **§ 1.61**).

1.33 Chemical Tests - (see **§ 1.6**)

1.34 Conduct - Speeding is unsafe act supporting DUI charge [Yglesia v. State, 288 App. 217, 653 SE2d 823 (2007); Tomko v. State, 233 App. 20, 503 SE2d 300 (1998)]; as well as other traffic offenses [Sistrunk v. State, 287 App. 39, 651 SE2d 350 (2007) (failure to yield at stop sign)]

1.35 Reputation for sobriety - Defendant's reputation for sobriety does not tend to prove or disprove whether the defendant's alcohol consumption on the night in question rendered him a less safe driver; such evidence is irrelevant and therefore not admissible [King v. State, 205 App. 825, 423 SE2d 429 (1992)].

1.36 Similar Transactions:

A. Evidence of a prior DUI offense, regardless of the circumstances surrounding its commission, is logically connected with a pending DUI charge as it is relevant to establish that the perpetrator has the state of mind to get behind the wheel of a vehicle when it is less safe to do so [Bagwell v. State, 248 App. 806 (2001); Schoolfield v. State, 251 App. 52, 554 SE2d 181(2001); *see* Pecina v. State, 274 Ga. 416, 554 SE2d 167 (2001)].
   - Evidence of serious injuries to victim in prior OK [Harris v. State, 272 Ga. App. 366, 612 SE2d 557 (2005)].

B. Age of prior offense [Scott v. State, 240 App. 586, 524 SE2d 287 (1999) (over 18 years old OK); Starks v. State, 240 App. 346, 523 SE2d 397 (1999) (over 10 years old OK)].

C. DUI's subsequent to case at trial OK [Lefler v. State, 210 App. 609, 436 SE2d 777 (1993); Weaver v. State, 179 App. 641, 347 SE2d 295 (1986)].

D. ***Nevertheless***, because the admission of evidence of prior offenses is generally the exception rather than the rule, the state has the burden of ensuring that the necessary requirements are met before such evidence may be admitted, even in a DUI. This includes ensuring that the hearing of the prior offenses is taken down or recorded, and that the trial court's determination that the state has made three affirmative showings[2] is on the record. The three affirmative showings are:

[2] Williams v. State, 261 Ga. 640, 409 SE2d 649 (1991) (adopting Uniform Superior Court Rule 31.3 (B)).

1. That the evidence is being presented for an appropriate purpose;
2. That the accused actually committed the similar offense; and
3. That the similar offense and the charged offense are sufficiently connected or similar that proof of the former tends to prove the latter.

Otherwise, the admission of such evidence is improper [Tam v. State, 225 App. 101, 483 SE2d 142 (1997)].

E. Nor can State merely introduce certified copy of convictions [Lucas v. State, 234 App. 534, 507 SE2d 253 (1998); Stephens v. State, 261 Ga. 467, 486(6), 405 SE2d 483 (1991)]. State must use some form of admissible evidence of the underlying events ***at trial***, e.g., testimony or a videotape [Lucas].

- At similar transaction ***hearing***, however, testimony is ***not required***, Court may rely upon statement of evidence by prosecutor [High, 271 App. 388, 609 SE2d 722 (2005)].

Query - Could the State use a recorded statement of the factual basis of a plea from a prior conviction?

F. An acquittal on a per se DUI charge in one trial does not necessarily include a finding that the breath test results are unreliable for any purpose. The fact that some level of alcohol was detected in the defendant's system after his arrest would be relevant to a less safe driver charge in a second trial of the defendant. Thus, the state is not precluded by the doctrine of collateral estoppel from introducing evidence of the breath test results in the second trial [Sullivan v. State, 235 App. 768, 510 SE2d 136 (1998)].

G. Nor does a nolle pros in an earlier charge prevent the State from presenting evidence of underlying conduct showing a prior DUI- [Nameth v. State, 234 App. 20, 505 SE2d 778 (1998)].

1.37 Prior adjudication - administrative hearing - Results of administrative law proceedings are not binding against the state [Swain v. State, 251 App. 110, 552 SE2d 880 (2001)], ***nor is testimony*** at implied consent hearing admissible under OCGA 24-3-10 if witness unavailable [Green, 207 Ga. App. 800, 429 SE2d 169 (1993)].

1.4 INFERENCES [FORMERLY PRESUMPTIONS] - The amount of alcohol in the person's blood at the time alleged, as shown by chemical analysis of the person's blood, urine, breath, or other bodily substance, may give rise to inferences as follows:

1. If there was at that time an alcohol concentration of .05 grams or less, the trier of fact in its discretion ***may infer*** therefrom that the person was not under the influence of alcohol, as prohibited by paragraphs (1) and (4) of subsection (a) of **OCGA § 40-6-391**; or
2. If there was at that time an alcohol concentration in excess of 0.05 grams but less that 0.08 grams, such fact shall not give rise to any inference that the person was or was not under the influence of alcohol, as prohibited by paragraphs (1) and (4) of subsection (a) of **OCGA § 40-6-391**, but such fact may be considered by the trier of fact with other competent evidence in determining whether the person was under the influence of alcohol, as prohibited by paragraphs (1) and (4) of subsection (a) of **OCGA § 40-6-391**. **OCGA § 40-6-392 (b)**;
3. Pattern charge on inference at 0.08 grams or more apparently ***remains valid*** *despite elimination* of the statutory provision effective 7/1/2001:
   "If you find that the defendant was driving with an alcohol concentration of 0.08 grams or more, it may be inferred that he was under the influence of alcohol. However, whether or not you make such inference in this case is a matter solely within your discretion as members of the jury." [Anderson v. State, 260 App. 606, 580 SE2d 249 (2003) (incident prior to 7/1/2001 but trial after (evidentiary rules usually apply to the time of trial - State v. Martin, 266 Ga. 244, 466 SE2d 216 (1996)); Johnson v. State, 261 App. 633, 583 SE2d 489 (2003) (dicta - but incident after 7/1/2001)].;
   - Charge may be given even if chemical test is *over three hours* after the driving, at least if the charge for between 0.05 to 0.08 is also given [Anderson v. State, 260 App. 606, 580 SE2d 249 (2003)].
   - Blood alcohol level relevant in less safe cases Webb v. State, 277 App. 355, 626 SE2d 545 (2006)].

EXCEPT: In cases involving commercial motor vehicles, if there was at that time or within three hours after driving or being in actual physical control of a moving vehicle from alcohol consumed before such driving or being in actual physical control ended an alcohol concentration of 0.04 or more grams, the person shall be is violation of subsection (i) of **OCGA § 40-6-391**, **OCGA § 40-6-392 (c)(1)**.
AND EXCEPT: In cases involving offenders under 21 years old, if there was at that time or within three hours after driving or being in actual physical control of a moving vehicle from alcohol consumed before such driving or being in actual physical control ended an alcohol concentration of 0.02 grazers shall be in violation of subsection (k) of **OCGA § 40-6-391. OCGA § 40-6-392 (c) (2).**

NOTE: Under the 2001 statute, there is no longer a presumption that someone is not under the influence if the alcohol concentration is 0.05 grams or less. It is merely an inference that the jury is free to make or ignore. Under a presumption, the jury starts out with something that has to be rebutted, but with the inference the jury doesn't have to give it any consideration at all.

TABLE 1

OFFENDER	0.02 GRAMS – 0.04 GRAMS	0.04 GRAMS – 0.05 GRAMS	0.05 GRAMS - 0.08 GRAMS	0.08 GRAMS OR MORE
LESS THAN 21 YEARS OLD	PER SE VIOLATION	PER SE VIOLATION	PER SE VIOLATION	PER SE VIOLATION
21 YEARS OR OLDER	TRIER MAY INFER NO VIOLATION	TRIER MAY INFER NO VIOLATION	NO INFERENCE BUT TRIER MAY CONSIDER WITH OTHER EVIDENCE	PER SE VIOLATION ***And*** MAY INFER LESS SAFE
21 YEARS OR OLDER INVOLVING COMMERCIAL VEHICLES	TRIER MAY INFER NO VIOLATION	PER SE VIOLATION	PER SE VIOLATION	PER SE VIOLATION

1.5 SUFFICIENCY OF EVIDENCE

1.51 Quantum - The leading case concerning the quantum of evidence sufficient to support a DUI conviction is Stephens v. State, 127 Ga. 416, 193 SE2d 870 (1972). Stephens stands for the proposition that circumstantial evidence may be used in establishing DUI. Specifically, the court affirmed the conviction based on a positive blood test and the defendant's admission that he was alone in the car. There was no direct testimony of anyone who saw the defendant driving.

1.52 Examples of insufficient evidence:

A. Refusal alone [Brinson v. State, 232 App. 706, 503 SE2d 599 (1998)]

B. One-car accident, drinking, alcohol level below 0.08 grams [Allen v. State, 257 App. 246, 570 SE2d 683 (2002)].

C. Drinking and less than 21 [Ricks v. State, 255 App. 188, 564 SE2d 793 (2002)]

D. Admission of drinking, smell of alcohol, plus refusal of test [Shaheed v. State, 270 App. 709, 607 SE2d 897 (2004) (questionable analysis with respect to effect of inference from failure to take test); *compare* Long v. State, 271 App. 565, 610 SE2d 74 (2004) (adding bloodshot eyes, refusal of field evaluations, and flashing high-beams at oncoming traffic sufficient); Hoffman v. State, 275 App. 356, 620 S.E.2d 598 (2005) (refusal to submit to FSE, smell of alcohol, and mildly erratic driving with no traffic offense enough)].

E. Hitting child and speeding and presence of marijuana and open containers, but missing passenger as alternate possible user and no attempt to perform field exercises [Hughes v. State, 290 App. 475, 659 SE2d 844 (2008)].

1.53 Absence of Opinion Testimony - The failure of an officer to testify to any behavior indicating less safe driving on the defendant's part does not render the evidence insufficient to support the conviction. An officer's opinion is not critical to establish the fact of the defendant's less safe driving, as the trier of fact can form its own opinion based on the indicia pointing to that fact [In Interest of C.P.M., 213 App. 763, 446 SE2d 242 (1994)]. For instance, the circumstantial evidence of the defendant's physical appearance and demeanor would be sufficient for the trier of fact to determine that the defendant was less safe to drive in his condition [Deering v. State, 244 App. 30, 535 SE2d 4 (2000)].

1.54 Quantum of evidence for investigation and probable cause:

A. Smell of alcohol from car, open containers, sufficient to commence DUI investigation (stepping out of car, field exercises) in stop without suspicious driving (littering) [Hinton v. State, 289 App. 309, 656 SE2d 918 (2008)].

B. ***4 of 6 clues*** along with presence of alcohol (by admission, alcosensor, and smell) as well as bloodshot eyes ***held to require finding of probable cause*** despite no clues on other field exercises and officer's opinion of no probable cause [State v. Preston (Ct. App. #A08A0183, 7/11/2008) (trial court reversed)].

C. Presence of alcohol (smell and admission) plus refusal to submit to field exercises sufficient for probable cause [Hazley v. State, 289 App. 558, 657 SE2d 628 (2008)].

1.55 Ingestion of drugs - Evidence that the defendant had ingested a controlled substance is ***by itself*** insufficient to support a conviction of DUI under **OCGA § 40-6-391 (a) (2)**. There must be additional evidence from which the jury can infer that the defendant was under the influence to the extent that he was a less safe driver, such as evidence of his physical condition or conduct at the time of the arrest [Sparks v. State, 195 App. 589, 394 SE2d 407 (1990)] ***or*** erratic driving [Gilbert v. State, 262 Ga. App. 93, 616 SE2d 857 (2005); Ponder v. State, 274 App. 93, 616 SE2d 857 (2005)].

1.56 Blood alcohol level

A. Per se charge - Evidence is sufficient even when blood alcohol is above per se level but ***within margin of error*** for machine; further, margin of error cannot be established through judicial notice, rather competent evidence must be offered [Totino v. State, 266 App. 265, 596 SE2d 749 (2004)].

B. Less safe charge - where State cannot show measurement within 3 hours of driving, no per se conviction authorized; however, BAC exceeding legal limit undetermined time after accident may justify less safe conviction - jury may infer no alcohol was consumed after collision and loss of control was caused by impairment [Norton v. State, 280 App. 303, 640 SE2d 48 (2006); Abelson v. State, 269 App. 596, 604 SE2d 647 (2004)].

1.57 Under 21

A. Less safe - Even where defendant is under 21, and admitted drinking alcohol, charges not warranted if no field or chemical test was given and defendant did not exhibit any signs of less safe driving [Ricks v. State, 255 App. 188; 564 SE2d 793 (2002)].

B. Per se - Smell of alcohol and admission of drinking "2 beers" "a little bit earlier" sufficient for probable cause of per se violation (.02 BAC) [Dodds v. State, 288 App. 231, 653 SE2d 828 (2007)].

1.58 Presence of drug - the mere presence in the driver's blood or urine of a controlled substance (that has no legal use (such as ***cocaine***)) is sufficient to convict under **OCGA § 40-6-391 (a) (6)** [Keenum v. State, 248 App. 474, 475 (2001). The supreme court has declared this provision unconstitutional as applied to ***marijuana*** (which arguably has legal uses) Love v. State, 271 Ga. 398, 517 SE2d 53 (1999)].

1.59 Smell of marijuana -Where defendant smells of marijuana, has slurred speech, admits smoking marijuana, and refuses to submit to blood or urine test, it is reasonable to conclude the presence of some quantity of marijuana [Albert v. State, 236 App. 146, 511 SE2d 244 (1999)].

1.6 CHEMICAL TESTS - Introduction of chemical tests is governed by **OCGA § 40-6-392.**

1.61 Initial Alcohol Screening Test (alcosensor):

A. If there exists a reasonable and articulable suspicion that a person is intoxicated, the police may detain him and an initial alcohol-screening test may be administered in order to determine if it is safe for him to drive [State v. Stansburv, 234 App. 281, 505 SE2d 564 (1998)].

B. If the person is not under arrest when an initial alcohol-screening test is administered, there is no requirement that the administration of the screening-test be preceded by *Miranda* warnings [Keenan v. State, 263 Ga. 569, 436 SE2d 475 (1993); after arrest both *Miranda* warnings and implied consent are required [State v. Norris, 281 Ga.App. 193, 635 S.E.2d 810 (2006)].

C. The results of the initial alcohol-screening test are admissible to show the presence of alcohol rather than the amount of alcohol [Mendoza v. State, 196 App. 627, 396 SE2d 576 (1990)]; unless Defendant opens door by testifying as to her belief [Capps v. State, 273 Ga. App. 696, 615 SE2d 821 (2005)].

D. Foundation:

1. Document certifying that the type of Alco-sensor used was approved by the GBI is proper foundation for admission of results [Guinn v. State, 224 App. 881, 482 SE2d 480 (1997)].
2. Officer's testimony that:
   a. From training and experience he knew that the Department of Forensic Sciences of the Georgia Bureau of Investigation had approved the design of the Alco-sensor for use in detecting the presence or absence of alcohol or drugs in the body system of a person [Lewis v. State, 247 App. 440, 543 SE2d 810 (2000); *see also* Gray v. State, 222 App. 626, 476 SE2d 12 (1996)];
   b. Alco-sensor approved for use by the Georgia Bureau of Investigation in driving under the influence investigations was sufficient foundation for admitting results of positive for alcohol. [Aman v. State, 223 App. 309, 477 SE2d 431 (1996)].
3. Evidence of positive alco-sensor result was not harmful error, if error at all, even where officer did not know who had approved use of the device [Baker v. State, 252 App. 695, 556 SE2d 892 (2001)].

1.62 Authority to Request Test and Analyze Sample

A. Arrest - Once an arrest for DUI is made, an officer is authorized by the implied consent law to request a chemical test. **OCGA § 40-5-55 (a)**.
   - Implied consent read (even immediately) prior to arrest is ineffective [Hough v. State, 279 Ga. 11, 620 S.E.2d 380 (2005)] (for other implied consent requirements, see **1.63**);
   - Arrest for other crime ***without probable cause for DUI*** insufficient [Hough impliedly overrules language in State v. Goolsby, 262 App. 867, 586 SE2d 754 (2003); Parsons v. State, 190 App. 803, 380 SE2d 87 (1989); Davis v. State, 187 App. 517, 370 SE2d 779 (1988)];
   - Arrest for other crime ***where probable cause for DUI is present*** authorizes implied consent warning [State v. Underwood, 283 Ga. 498, 661 SE2d 529 (2008), rev'g 285 App. 640, 647 SE2d 338 (2007)].

B. Search Warrant - case law on pre-2006 statute forbids use of search warrant to obtain DUI test sample [Collier v. State, 266 App. 762, 598 SE2d 373 (2004), aff'd 279 Ga. 316, 612 SE2d 281(2005)], but 2006 enactment of **OCGA § 40-5-67.1** (d.1) permits use of search warrant [*see* Rylee v. State, 288 App. 784, 655 SE2d 239 (2007)].

C. Serious Injury:
   - **OCGA § 40-5-55 (a)** is ***unconstitutional*** to the extent that it authorizes a chemical test in the ***"regardless of any determination of probable cause"*** that the driver was under the influence [Cooper v. State, 277 Ga. 282, 587 SE2d 605 (2003)];
   - Where officer ***does have probable cause*** to believe the suspect was driving under the influence of alcohol or drugs, a test may be requested and implied consent read in serious injury cases [Hough v. State, 279 Ga. 11, 620 S.E.2d 380 (2005); *see* Snyder v. State, 283 Ga. 211, 657 SE2d 834 (2008) (injury must be known to officer at time of request)];
   - Injury may be to anyone [Snyder];
   - "Serious injury" requires one of the following: death, fractured bone, severe burns, disfigurement, dismemberment, partial or total loss of sight or hearing, or loss of consciousness - paralysis, for instance, does not qualify [Hough];
   - Results of chemical test taken where officer believed serious injuries to be present, requiring testing under **OCGA § 40-5-55(a)**, are inadmissible under that section when injuries perceived by officer were not actually present [Pilkenton v. State, 254 App. 127; 561 SE2d 462 (2002), *but see* discussion in Hough that belief in paralysis is ineffective, possibly implying that belief in covered item might be effective];

- When a motorist is not arrested for DUI but is tested solely based upon involvement in an accident involving serious injuries or fatalities, under **O.C.G-A. § 40-5-67.1**, implied consent warnings must be given within a reasonable time after the accident, as determined by the circumstances [State v. Becker, 240 App. 267, 270 (1), 523 SE2d 98 (1999); Joiner v. State, 239 App. 843, S22 SE2d 25 (1999); Seith v. State, 225 App. 684, 686-687, 484 SE2d 690 (1997)]. Under ordinary circumstances, that may be "at the time [a chemical] test is requested, which may or may not be at the time of actual testing."

D. Officer has authority to designate which test or tests are to be administered "initially and may subsequently be allowed to require additional tests of any substance not initially tested." **OCGA § 40-5-67.1 (a)**.
   - Officer need not complete more than one test after specifying multiple tests initially [Mueller v. State, 257 App. 830, 572 SE2d 627 (2002); State v. Brantley, 263 Ga. App. 209, 587 SE2d 383 (2003)].
   - Second request (for suspicion of DUI) after initial refusal (of request for sample under "serious injury" provision OK [Walczak v. State, 259 App. 140, 575 SE2d 906 (2003)].

1.63 Implied Consent Notices

NOTE - A 2006 amendment to the implied consent statute [**OCGA § 40-5-67.1** (d.1)] states: "Nothing in this Code section shall be deemed to preclude the acquisition or admission of evidence of a violation of Code Section 40-6-391 if obtained by voluntary consent or a search warrant as authorized by the Constitution or laws of this state or the United States."

In State v. Morgan, 289 App. 706, 658 SE2d 237 (2008), without stating the offense date and ***without discussing this provision*** in any fashion, the consent of the defendant to a simple request for a blood test without a reading of the implied consent warning was disallowed: "We do not condone such conduct. Were we to do so, we would effectively eviscerate the implied consent statute.… We will not permit or encourage the circumvention of the mandatory implied consent statute by police. Therefore, we hold that in all cases in which police officers request a chemical test of a person's blood, urine or other bodily substances in connection with the operation of a motor vehicle for the purpose of determining whether the driver was under the influence of alcohol or drugs, they must give the notice required by the implied consent statute."

A. Each notice informs the suspect:
   1. Georgia law requires him to submit to state-administered chemical testing for the purpose of determining if he is under the influence of alcohol or drugs,
   2. consequences if he refuses state-administered testing,
   3. consequences if he submits to state-administered testing and the

results indicate he is under the influence "per se," and

4. after submitting to state-administered testing he is entitled to additional testing at his own expense and from qualified personnel of his own choosing.

B. There are separate implied consent notices for:

1. suspects under age 21;
2. suspects age 21 or over; and,
3. suspects who are commercial motor vehicle drivers (CDL).

The warning for CDL holders should only be read to one actually ***driving a commercial vehicle***. If the CDL holder is ***driving a noncommercial*** vehicle, the warning for a non-CDL driver should be read [Chancellor v. Dozier, 283 Ga. 259, 658 SE2d 592 (2008); Meyer v. State, 224 App. 183, 480 SE2d 234 (1997)]. If the driver is generally informed about possibility of license suspension, due process does not require information about all of the consequences, including the effect on the CDL license.[Chancellor].

C. Implied consent statute has repeatedly withstood constitutional challenge: [Chancellor v. Dozier, 283 Ga. 259, 658 SE2d 592 (2008) (need not inform of all adverse consequences of refusal); Cornwell v. State, 283 Ga. 247, 657 SE2d 195 (2008) (implied consent adequate basis without exigent circumstances); Rodriguez v. State, 275 Ga. 283, 565 SE2d 458 (2002) (constitutional challenge to disparate treatment of hearing impaired and non-English speakers rejected)]. DUI suspects may constitutionally be subjected to chemical testing without warning that test results may be used against them at trial. Right to refuse testing is ***not a constitutional right*** [Klink v. State, 272 Ga. 605, 533 SE2d 92 (2000); *accord*, Chancellor].

- Caveat - probable cause of driving under the influence is required under both State and Federal constitutions [Cooper v. State, 277 Ga. 282, 587 SE2d 605 (2003)]

D. The arresting officer is not required to read the exact language mandated by **OCGA § 40-5-67.1(b)**.

1. The notice must "be read in its entirety but need not be read exactly so long as the substance of the notice remains unchanged." **OCGA § 40-567.1(b)**.
2. Mistakes held not to substantially alter notice in the following cases: Yarborough v. State, 241 App. 777, 527 SE2d 628 (2000); Maurer v. State, 240 App. 145, 525 SE2d 104 (1999) (understatement of legal alcohol limit where defendant performs test); Garland v. State, 256 App. 313, 568 SE2d 540 (2002); (same); Eberly y. State, 240 App. 221, 522 SE2d 294 (2000) (officer's misstatement of types and numbers of blood tests available); State v. Heredia, 252 App. 89, 555 SE2d 91 (2001)(officer's re-reading of notice specifying different test); Satterfield v. State, 252 App. 525, SE2d 568 (2001)(officer stating word "will" rather than "shall" in notice); Colon v. State, 256 App. 505, 568 SE2d 811 (2002) (omission of "under the implied consent law" at end of warning); State v. Cato, 289 App. 702, 658 SE2d 124 (2008) (read from earlier version of card at trial but testified

language was the same); Collins v. State, 290 App. 418, 659 SE2d 818 (2008) (leaving choice of test type to defendant)].

3. Deceptively misleading information given in addition to implied consent warning may require suppression: State v. Pierce, 257 App. 623, 571 SE2d 826 (2002); Deckard v. State, 210 App. 421, 423, 436 SE2d 536 (1993) (loss of license in another state); State v. Peirce, 257 App. 623, 571 SE2d 862 (2002) (same - doesn't matter defendant is actually Georgia resident); State v. Terry, 236 App. 248, 511 SE2d 608 (1999) (officer implied that defendant would have to bond out of jail to obtain independent test); Kitchens v. State, 258 App. 411, 574 SE2d 451 (2002) (explanation that a result of "ten or more" would result in license suspension); Collier v. State, 266 App. 762, 598 SE2d 373 (2004), aff'd 279 Ga. 316, 612 SE2d 281(2005) (threatened to get search warrant if refused).
   - Blood testing for other substances - Defendant charged with DUI (alcohol) need not be advised that blood will also be tested for drugs (even if officer did not request additional testing) [Meiklejohn v. State, 281 App. 712, 637 SE2d 117 (2006)].

E. ***Foreign language*** speaker - Implied consent notice need only be given in English, except hearing impaired driver (see **G** below) [Rodriguez v. State, 275 Ga. 283, 565 SE2d 458 (2002) (constitutional challenge to disparate treatment of hearing impaired and non-English speakers rejected)].

F. Lack of understanding - Error to suppress test because defendant did not understand where warning substantively correct [State v. Stewart, 286 App. 542, 649 SE2d 525 (2007)].

G. Deaf defendant - Officer must attempt to get deaf interpreter [**OCGA § 24-9-103(b)**; Yates v. State, 248 App. 35, 545 SE2d 169 (2001)], but if a signing interpreter is not available within one hour, the officer may proceed to read the implied consent warning to a hearing impaired driver [Allen v. State, 218 App. 844, 463 SE2d 522 (1995)].

H. Ordinarily, "implied consent warning must be read at the time of arrest (for DUI), or as reasonably close thereto as circumstances will allow" [Perano v. State, 250 Ga. 704, 300 SE2d 668 (1983); Crawford v. State, 246 App. 344, 540 SE2d 300 (2000); Carthon v. State, 236 App. 632, 513 SE2d 649 (2001)].

CAUTION - The continued validity of this entire line of cases in part H concerning timeliness could be challenged in light of the 2006 addition of **OCGA § 40-5-67.1** (d.1): "Nothing in this Code section shall be deemed to preclude the acquisition or admission of evidence of a violation of Code Section 40-6-391 if obtained by voluntary consent or a search warrant as authorized by the Constitution or laws of this state or the United States." *But see* State v. Morgan, 289 App. 706, 658 SE2d 237 (2008) ("holds" implied consent statute always controlling without discussing offense date or subsection (d.1), officer could not simply ask for consent).

1. Limited exception "where advising the accused at the moment of arrest would not enable the accused to make an intelligent choice concerning the state's request and his right to undergo an independent test" [Perano v. State, 250 Ga. 704, 300 SE2d 668 (1983)]. Other justifications: exigent circumstances, indication that the accused was too intoxicated or emotionally distraught to understand his implied consent rights, or indication that the officer was unaware the detainee would be charged with violating **OCGA § 40-6-391** [Clapsaddle v. State, 208 App. 840, 842, 432 SE2d 262 (1993)].
2. Cases where delay in advisement authorized: Cain v. State, 274 App. 533, 617 S.E.2d 567 (2005) ("drunken and obstreperous behavior"); State v. Marks, 239 App. 448, 453, 521 SE2d 257 (1999) (dealing with traffic; getting cars towed, interviewing witness, dealing with another obstreperous participant); Martin v. State, 211 App. 561, 562, 440 SE2d 24 (1993) (10-minute delay because the officer did not have new implied consent card); Fore v. State, 180 App. 196, 348 SE2d 579 (1986) (20-25 minute delay while officer took another call and arrested another person); Mason v. State, 177 App. 184 (2), 338 SE2d 706 (1985) (delay of 20-30 minutes at scene while completing investigation of the accident and transferring possession of the defendant's automobile to a wrecker service); Perano v. State, 250 Ga. 704, 300 SE2d 668 (1983) (physical resistance to arrest - "fracas" with officer).
3. Cases where delay unauthorized: Carthon v. State, 248 App. 738, 740(1), 548 S E2d 649 (2001) (exigencies of police work ended when investigatign at scene ended and wrecker towed car away); Vandiver v. State, 207 App. 836, 429 SE2d 318 (1993) (waiting until arrival at police station where no exigencies); Clapsaddle v. State, 208 App. 840, 842, 432 SE2d 262 (1993) (same).
4. "Time of arrest" can be before defendant is specifically informed of being under arrest - where defendant was placed in patrol car was not free to leave, advisement was proper even though officer then requested alco-sensor test and ***only then*** stated defendant was under arrest [Crawford v. State, 246 App. 344, 540 SE2d 300 (2000); *see* Carthon v. State, 248 App. 738, 740(1), 548 SE2d 649 (2001)].

5. Implied consent notice does not have to be given at the time of a non-DUI arrest, even if arrest for DUI follows from same incident. Notice must only be given at time of blood alcohol test, and delay between test (with notice) and arrest does not invalidate test results [Joiner v. State, 239 App. 843, 522 SE2d 25 (1999); State v. Jones, 261 App. 357, 583 SE2d 139 (2003); *compare* Crawford v. State, 246 App. 344, 540 SE2d 300 (2000)].

I. The state must show that the arresting officer properly advised the suspect of his implied consent rights. If the state fails to make this showing, the state-administered test results are inadmissible [State v. Peters, 211 App. 755, 440 SE2d 522 (1995)]. State ***must*** either:
   1. Read implied consent warning into evidence, OR
   2. Place the officer's implied consent card into evidence with testimony of which of the warnings printed thereon was read to the defendant [Miller v. State, 238 App. 61, 516 SE2d 838 (1999); *see also* Cullingham v. State, 242 App. 499, 529 SE2d 199 (2000) (compliance with notice requirement met where officer testified he read notice twice and recited a portion of the notice in court)].

   Sending card to jury is not violation of "continuing witness rule" [Sagenich v. State, 255 App. 663, 566 SE2d 327 (2002)].

J. Where suspect is dead, unconscious, or otherwise unable to respond to implied consent warning, consent has not been withdrawn and test may be administered [Hernandez v. State, 238 App. 796, 520 SE2d 698 (1999)].

K. Implied consent warning speaks about use for DUI; therefore such consent does not allow other uses and results cannot be used for drug possession charge [State v. Burton, 230 App. 753, 498 SE2d 121 (1998); State v. Frazier, 229 App. 344, 494 SE2d 36 (1997); State v. Jewell, 228 App. 825, 492 SE2d 706 (1997); *but see* Cronan v. State, 236 App. 374, 511 SE2d 899 (1999) (prosecution based admission that defendant smoked marijuana could be corroborated by positive urine result)].

L. Consent cannot be withdrawn after submission to the test [Simmons v. State, 270 App. 301, 605 SE2d 846 (2004) (blood already drawn)].

M. No right to counsel when asked to consent, even upon request [Rackoff v. State, 281 Ga. 306, 637 SE2d 706 (2006)].

N. Use of suppressed test for impeachment - Test may be admitted if adequate foundation that it impeaches defendant's testimony about lack of impairment [Rosandich v. State, 289 App. 170, 657 SE2d 255 (2008)].

1.64 Refusal to submit to state test

A. Not *alone* enough to convict [Brinson v. State, 232 App. 706, 503 SE2d 599 (1998)].

B. Permissible factual inferences from refusal:

1. Refusal to submit to a drug test may be considered as positive evidence creating an inference that the test would show the presence of prohibited substance [Alewine v. State, 273 App. 629, 616 SE2d 472 (2005); Nelson v. State, 237 App. 620, 516 SE2d 98 (1999). *See also* Walker v. State, 239 App. 831, 521 SE2d 861 (1999) (even where suspect attempts to justify refusal to submit to test, refusal creates presumption of influence)];
2. "Refusal to take the state test is admissible as evidence that the defendant was a less safe driver" [Vanorsdall v. State, 241 App. 871, 528 SE2d 312 (2000)];"
3. Driver "was under the influence of a substance which impaired her driving" [Walker v. State, 239 App. 831, 521 SE2d 861 (1999)]; "Circumstantial evidence of impairment" Long v. State, 271 App. 565, 610 SE2d 74 (2004), citing Bravo v. State, 249 App. 433, 434(1), 548 SE2d 129 (2001)); *accord*, Jones v. State, 273 App. 192, 614 SE2d 820 (2005)].
4. "Refusal stemmed from a fear that her results would be unfavorable – i.e., that she was conscious of her impairment or guilt" [Kelly v. State, 242 App. 30, 528 SE2d 812 (2000)];
5. "Circumstantial evidence of her guilt" [Johnson v. State, 249 App. 29, 546 SE2d 922 (2001); Matheson v. State, 249 App. 200, 547 SE2d 770 (2001)];
6. **Argument -** Irrespective of charge, **Prosecutor may *argue consciousness of guilt*** and similar inferences [Kelly v. State, 242 App. 30, 33-34(5), 528 SE2d 812 (2000); Taylor v. State, 278 App. 181, 628 SE2d 611 (2006)].

NOTE - *But review conflicting recent caselaw* [*compare* Shaheed v. State, 270 App. 709, 607 SE2d 897 (2004) (no inference of impairment can be made in reviewing sufficiency of evidence) *with* Long v. State, 271 App. 565, 610 SE2d 74 (2004) ("circumstantial evidence of impairment," citing Bravo v. State, 249 App. 433, 434(1), 548 SE2d 129 (2001)); *accord*, Jones v. State, 273 App. 192, 614 SE2d 820 (2005)]. (See **1.32**E, inference from refusal to submit to field evaluations).

CAUTION - Jury Charge - "refusal itself may be considered as positive evidence creating an inference that the test would show the presence of alcohol or other prohibited substances *which impaired his driving* [original emphasis]" was ***reversible error*** in Baird v. State, 260 App. 661, 580 SE2d 650 (2003); *see also* Shaheed v. State, 270 App. 709, 607 SE2d 897 (2004) (no inference of impairment can be made in reviewing sufficiency of evidence); Johnson v. State, 261 App. 633, 638, 583 SE2d 489 (2003) (focuses on the "impairment of driving" as objectionable language). The court noted that the statute does not specify the inference to be drawn and cited favorably the charge in Bravo v. State, 249 App. 433, 548 SE2d 129 (2001) ("may be considered as positive evidence creating an inference that the test would show the presence of alcohol. However, such an inference may be rebutted"). This is clearly a safe charge; however, it is far less favorable to the State than the factual inferences case law says are permissible. Trial judges are advised to review the case law in this section and follow their own judgment. Among the possible courses are:

1. Give the safe language in Bravo that has been specifically approved as a charge - avoids conflict of Shaheed v. State , 270 App. 709, 607 SE2d 897 (2004) with other cases;
2. Choose one of the other formulations of permissible inferences which does not specifically discuss *impairment of driving* from the case law above;
3. Charge the jury they can consider the inferences they choose to draw from the refusal under the general rules applying to circumstantial evidence [*see* Johnson v. State, 249 App. 29, 546 SE2d 922 (2001); Matheson v. State, 249 App. 200, 547 SE2d 770 (2001)];
4. Do not attempt to instruct the jury on the inference to be drawn from the refusal but allow the prosecutor to argue any or all of the inferences justified by the above case law [*See* Renner v. State, 260 Ga. 515, 397 SE2d 683 (1990) (pattern charge on flight was disapproved because it highlighted one of many possible circumstantial conclusions from the evidence); Harris v. State, 273 Ga. 608 (2), 543 SE2d 716 (2001) (disapproving pattern charge on inferring intent to kill from use of deadly weapon), *but see* Johnson v. State, 277 Ga. 82 (2003) (Renner will not usually be expanded to other jury charges)];
5. Ignore Baird and Shaheed as inconsistent with the above series of cases and justify your decision by case citations in the record.

C. *Miranda* warning not required before Implied Consent notice. [State v. Lord, 236 App. 868, 513 SE2d 25 (1999)].

1. Where a suspect has been administered *Miranda* warnings and implied consent notice, suspect's ***silence***, amounting to a refusal to take a state alcohol test, is admissible as evidence and is not a violation of defendant's right to silence [Miles v. State, 236 App. 632, 513 SE2d 39 (1999); *see also* State v. Lentsch, 252 App. 655, 556 SE2d 248 (2001) (evidence of test or of refusal admissible where subject in custody and *Miranda* rights not read)].
2. Subsequent Tests: Request for second implied consent test need not be accompanied by *Miranda* warnings, even after arrest, and request can be made after first test is completed. [**OCGA § 40-5-67.1** (authorizes officers to request additional tests); State v. Coe, 243

App. 232, 533 SE2d 283 (2000). *Overrules* State v. Warmack, 230 App. 157, 495 SE2d 632 (1998). *See also* State v. Moses, 237 App. 764, 516 SE2d 807 (1999)]

D. Suspect's dilatory tactics amount to a refusal [Miles v. Smith, 239 App. 641, 521 SE2d 687 (1999); *see also* Fairbanks v. State, 244 App. 123, 534 SE2d 529 (2000) (suspect did not expressly refuse test but asked for attorney every time it was requested); State v. Boger, 253 Ga, App. 412, 559 SE2d 176 (2002) (refusal to take test because of belief of right to have an attorney present not reasonable); Hunt v. State, 247 App. 464, 542 SE2d 591 (2000) (suspect claiming test was inaccurate and failing to properly submit to test is sufficient for refusal)].

E. Implied consent - ***In absence of refusal***, consent is implied from taking test [Stapleton v. State, 279 App. 296, 630 SE2d 769 (2006)].

F. **Withdrawal of Refusal** to submit to state test: Where suspect has refused to submit to blood alcohol test after notice of implied consent statute, refusal may be withdrawn only where:

1. withdrawal is in a short and reasonable time after first refusal,
2. the time must be such that the test would be accurate,
3. testing equipment must still be available,
4. testing would result in no substantial inconvenience or expense to police,
5. the individual requesting the test must be in the custody of and under the observation of the arresting officer for the entire time of the arrest.

Otherwise, **Defendant** has no right to withdraw - refusal will be effective and irrevocable [McCafferty v. State, 248 App. 13, 545 SE2d 91 (2001)].

Withdrawal must be explicit - **State** cannot argue consent after refusal merely because defendant took test [Howell v. State, 266 App. 480, 597 SE2d 546 (2004); *compare* Doyle v. State, 281 App. 592, 636 SE2d 751 (2006) (explicit consent after refusal OK without rereading implied consent); Stapleton v. State, 279 App. 296, 630 SE2d 769 (2006) (if no refusal, consent may be implied from taking test)].

G. Where defendant refuses chemical alcohol testing, defendant cannot introduce evidence to rebut blood alcohol concentration, because inference that arises as a result of refusal to take test makes blood alcohol concentration irrelevant, leaving nothing to rebut [Evans v. State, 253 App. 71, 558 SE2d 51 (2001)].

1.65 Licensed Individual and Certified Testing Instrument Required for State-Administered Test

A. Certificates, such as **machine inspection certificates**, are admissible as business records ***do not violate 6th Amendment*** confrontation clause, where not made in an investigatory or adversarial setting nor generated in anticipation of the prosecution of ***a particular*** defendant [Rackoff v. State, 281 Ga. 306, 637 SE2d 706 (2006)]

- Contrast a record of a particular breath test made for the prosecution

of a particular defendant.

B. The test must be performed according to methods approved by the Division of Forensic Sciences of the Georgia Bureau of Investigation [**OCGA § 40-6-392 (a)(2)(A)**].
   1. ***This is a legal conclusion for trial court*** and does not require opinion testimony in support [State v. Naik, 259 App. 603, 577 SE2d 812 (2003)].
   2. Required showing [State v. Palmaka, 266 App. 595, 597 SE2d 630 (2004)]:
      a. on Intoxilyzer Model 5000 manufactured by CMI, Inc.;
      b. by individual with permit;
      c. testing instrument periodically checked un Rule 92-3-.06(8)(a).
   3. ***Non-compliance with other*** "administrative, procedural, and/or clerical ***steps*** performed in conducting a test shall not constitute a part of the approved method of analysis," ***do not make a test inadmissible***, and go only to the weight of the evidence [State v. Palmaka, 266 App. 595, 597 SE2d 630 (2004) (unanimous, en banc decision reversing trial court) (20-minute rule)].
   4. No proof needed of which methods of chemical testing are approved by the Division of Forensic Sciences - Court takes judicial notice without evidentiary proffer [Scara v. State, 259 App. 510, 577 SE2d 796 (2003)]. Attacks on the sufficiency of these rules would go to ***weight*** with the jury and ***not admissibility*** of the results [Dougherty v. State, 259 App. 618, 578 SE2d 256 (2003)].
   5. Substantial compliance, not exact compliance, is required for admissibility. Dougherty
   6. ***Testimony enough*** - Operator's testimony that the methods used were approved, and that she was certified to perform the test, along with intox printout showing permit number and self-diagnostic test results, is sufficient basis for admissibility of test results. Scara

C. In blood cases, the proper methods to establish the ***qualifications of the blood drawer*** are:
   1. Certificate by the Secretary of State or by the Department of Human Resources;
   2. ***Testimony***, under oath, of the blood drawer himself; or
   3. Sworn, testimony of the drawer's supervisor or medical records custodian. **OCGA § 40-6-392 (e)**.

   Evidence of DHR qualification to draw blood is admissible under a public records exception to the hearsay rule under **O.C.G.A § 24-7-20** [Bess v. State, 254 App. 80, 561 SE2d 209 (2002) (***letter on stationery*** of the DHR's Office of Regulatory Services)]. Testimony of the blood drawer is not required if the qualifications are otherwise established [Millsap v. State, 261 App. 427, 582 SE2d 568 (2003)]. Documentary proof does not violate confrontation clause and certification defect must be raised specifically or is waived [Keller v. State, 271 App. 79, 608 SE2d 697 (2004)].

D. State Crime lab

1. State Crime Lab blood test results were admissible upon "the testimony of a chemist who operated the machine and performed the test.... certificates are not the exclusive means of laying the foundation to admit blood-alcohol test results" [Smith v. State, 256 App. 785, 570 SE2d 26 (2002)].
2. Chain of custody - Where sample routinely handled and there is no evidence of tampering, sample test is admissible without proof of transportation or preservation in sealed police refrigerator [Harrell v. State, 257 App. 177, 570 SE2d 607 (2002) (misspelling of defendant's name also insufficient to raise inference of tampering)].
3. No obligation to preserve sample for defense testing (including DNA test of identity) [Ramsey v. State, 257 App. 648, 572 SE2d 662 (2002)].

E. A licensed individual does not have to have an expert's knowledge of the underlying scientific principles governing the functioning of the testing device [Dotson v. State, 179 App. 233, 345 SE2d 871 (1986)]. Additionally, the GBI is exempted from publishing requirements of certification of operators administering chemical tests [State v. Bowen, 274 Ga. 1, 547 SE2d 286 (2001)].

F. Photocopies of Certificates of Inspection for alcohol testing devices need not be certified to be admissible under **O.C.G.A § 40-6-392(1)** [Andries v. State, 236 App. 842, 512 SE2d 685 (1999)].

G. Test printout results are subject to best evidence objection - In contrast, the machine printout is subject to best evidence objection and State must show account for absence and show due diligence in order to admit copy after objection [Lumley v. State, 280 App. 82, 633 SE2d 413 (2006)].

H. Intoxilyzer Certificates of Inspection are not discoverable *as scientific reports* under **O.C.G.A § 17-16-23** [Prindle v. State, 240 App. 461, 523 SE2d 44 (1999); ***but see*** **§1.66**A below].

1.66 State-Administered Tests - General

A. **OCGA § 40-6-392 (a) (4)** grants defendants access to "full information concerning the test" upon request. Thus, the results generated by the use of the chromatograph are discoverable and it is reversible error to fail to enforce a subpoena for them [Price v. State, 269 Ga. 222, 498 SE2d 262 (1998)].

1. The request for the results need not be by subpoena.
2. No time limit - the statute does not lay out a timetable for production and printout from gas chromatograph is not a scientific report pursuant to **OCGA § 17-16-23** so that penalty and time limits of that section do not apply. Therefore, the procedure to be followed is in the Court's discretion. Court can permit a state expert to testify to results of chemical testing even if state only furnishes test results to defendant at trial, if circumstances don't suggest bad faith, diligent effort to obtain evidence, or refusal to produce evidence after court order [Birdsall v. State, 254 App. 555, 562 SE2d 841 (2002)].

3. Provided at arrest - State's failure to provide results of DUI test after discovery request does not merit exclusion of such evidence where defendant received printout of result at time of arrest [Sillman v. State, 247 App. 681, 545 SE2d 85 (2001)].
4. Where unopposed expert testimony shows information to be irrelevant, not error to refuse information request [Cottrell v. State, 287 App. 89, 651 S.E.2d 444 (2007) (not entitled to unlimited fishing expedition)].
5. Where no enforcement motion is made before trial no right to remedy for failure to produce [Rosandich v. State,289 App. 170, 657 SE2d 255 (2008) (enforcement not sought because test suppressed, but then admitted at trial for impeachment];
6. Defendant not entitled to "source code" for Intoxilyzer 5000 under statute since State did not create, own or possess code [Hills v. State (Ct. App. A08A0726, 5/15/2008)].

B. Jury charges that:
1. Charge that "the mere fact that the Intoxilyzer 5000 machine has some margin of error or may give an erroneous result under certain circumstances does not diminish the evidentiary value of the test results" is ***error***. Where other evidence was overwhelming, however, error was deemed harmless [Haynes v. State, 244 App. 79, 534 SE2d 807 (2000)].
2. Charge that "Chemical test of bodily substance shall be considered valid if analysis was performed according to approved methods" is harmful ***error***, where defendant introduced evidence (through expert witness) that women score higher on Intox 5000 tests because of physiological differences and state did not rebut claim [Muir v. State, 248 App. 49, 545 SE2d 176 (2001)].

C. Marijuana testing: Microscopic, thin layer chromatography, and Duquenois-Levine tests for marijuana are admissible as evidence without further evidence of reliability [Cunrod v. State, 241 App. 743, 526 SE2d 900 (1999)].

1.67 State-Administered Tests - Breath-Testing Instruments

A. If instrument has been approved for use in this state as specified by administrative rule or as authorized by the Director of the Division of Forensic Sciences, the test results of the instrument are admissible [*See* Rules of the Georgia Bureau of Investigation, Rule 92-3.06(5); State v. Strickman, 173 App. 1, 325 SE2d 775 (1984)].

B. State must establish that the instrument has been maintained in good operating condition in order for test results of the instrument to be admissible [State v. Allen, 165 App. 584, 300 SE2d 337 (1983)].
- Evidence that machine ***later*** became inoperable is not grounds for excluding test [State v. Rackoff, 264 App. 506, 591 SE2d 379 (2003), aff'd 281 Ga. 306, 637 SE2d 706 (2006)].

- Discrepancy between ***time*** in police report and times on machine printout does not exclude test but goes to weight [Young v. State, 275 Ga. 309, 565 SE2d 814 (2002) (less than ten minute variation)].

C. Director of the Division of Forensic Sciences is required to cause each instrument to be checked periodically for calibration and operation and a record of the results of all such checks to be maintained.[3] There is a presumption that the Director has caused the instrument used to administer a breath test to be checked periodically for calibration,[4] and the defendant must adduce sufficient competent evidence to overcome this presumption [Calloway v. State, 191 App. 383, 381 SE2d 598 (1989)].

D. Certification of the breath-testing instrument

1. Each time an approved breath-testing instrument is inspected, the inspector shall prepare a certificate which shall be signed under oath by the inspector and which shall include the following language: "This breath testing instrument (serial no. ____) was thoroughly inspected and standardized by the undersigned on (date _____) and all of its electronic and operating components prescribed by its manufacturer are properly attached and are in good working order."
2. When properly prepared and executed, as prescribed in this subsection, the certificate shall, notwithstanding any other provision of law, be self-authenticating, shall be admissible in any court of law and shall satisfy statutory requirements. **OCGA § 40-6-392 (f)**. **OCGA § 40-6-392(f)** provision for self authentication of Certificates of Inspection for approved breath testing instruments do not violate defendant's right of confrontation [Rackoff v. State, 281 Ga. 306, 637 SE2d 706 (2006)(*Crawford* analysis)].
3. GBI rules for inspection required "difference check" reading between .76 and .84 - actual reading was .74 but inspector certified machine. Machine was nevertheless in "good working order," and discrepancy only went to weight rather than admissibility of result [State v. Carter, 292 App. 322, 665 SE2d 14 (2008)].
4. When machine is certified, motion in limine challenging "good working order" does not put State on notice as to challenge to validity of inspection and certification [State v. Carter].

E. Breath tests in Georgia are usually conducted on the Intoxilyzer 5000. However, the Director of the Division of Forensic Sciences is authorized to approve the design of any other type of breath alcohol analyzer used in the state. *See* Rules of the Georgia Bureau of Investigation, Rule 92-3-.06(5).

F. Two Samples

1. The Intoxilyzer 5000 requires two breath samples that must be within .02 grams of each other [Davis v. State, 237 App. 817, 517 SE2d 87 (1999); **OCGA § 40-6-392 (a) (1) (B)**].

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[3] *See* Rules of the Georgia Bureau of Investigation, Rule 92-3-.06 (8)(a).

[4] Sapp v. State, 185 App. 527, 362 SE2d 406 (1987).

2. No more than two sequential series of a total of two adequate breath samples each are to be required by the State; "an adequate breath sample shall mean a breath sample sufficient to cause the breath-testing instrument to produce a printed alcohol concentration analysis." **OCGA § 40-6-392 (a) (1) (B).**
3. If the samples fall within this window, but differ, the operator is instructed to use the lower reading.
4. Where only one sufficient sample is given, State may admit test into evidence [Chamberlain v. State, 246 Ga, App. 423, 541 SE2d 64 (2000); Thrasher v. State, 292 App. 566, 666 SE2d 28 (2008) (irrespective of whether failure to complete is defendant's fault)], and Defendant's request for independent test must be complied with [Chamberlain].

G. An intox 5000 test may be used in a "less safe case" even though the test is above 0.10 grams [Sullivan v. State, 235 App. 768, 510 SE2d 136 (1998); *but see* Clay v. State, 193 App. 377, 378(2), 387 SE2d 644 (1989) (intox test could not be used where no manifestations of intoxication present because the jury rejected the test as unreliable)].

H. "20 minute rule" - ***Non-compliance with 20-minute rule does not make a test inadmissible***, and goes only to the weight of the evidence [State v. Palmaka, 266 App. 595, 597 SE2d 630 (2004) (unanimous, en banc decision reversing trial court and disapproving Casey v. State, 240 App. 329, 331(3), 523 SE2d 395 (1999)); [Bagwell v. State, 248 App. 806, 547 SE2d 377 (2001); *see also* Klink v. State, 272 Ga. 605, 607(2), 533 SE2d 92 (2000) (20 minute rule not administrative rule of GBI].

1.68 Request for Independent Test

A. When Defendant requests an independent test ,and none is performed, the trial court must decide if, under the totality of the circumstances, the officer made a reasonable effort to accommodate the accused who seeks an independent test. Factors to be considered include, but are not limited to, the following:

1. ***Availability of or access to funds*** or resources to pay for the requested test:
   a. Officer's accommodation for independent test is adequate even if officer informs suspect that suspect must pay for test himself and suspect is unable ultimately to pay for the testing [Avant v. State, 251 App. 165, 554 SE2d 194 (2001); *see also* Brown v. State, 253 App. 741, 553 SE2d 316 (2002)];
   b. Reasonable accommodation includes allowing access to impounded car where wallet left [State v. Brodie, 216 App. 198, 453 SE2d 786 (1995)];
   c. Officer may not unilaterally determine defendant cannot pay from lack of cash - may have to allow defendant to determine whether hospital will take credit card or allow him to telephone to attempt to get funds [State v. Anderson, 258 App. 127, 572 SE2d 758 (2002); Butts v. City of Peachtree City, 205 App. 492,

494 (2), 422 SE2d 909 (1992); *accord*, State v. Howard, (Officer refused to permit parents to make arrangements to pay for test citing security concerns)].

2. ***Protracted delay*** in the giving of the test if the officer complies with the accused's requests;
   - Officer does not have to accommodate a request that would involve an unreasonable time and distance to accomplish [*Compare* Hendrix v. State, 254 App. 807, 564 SE2d 1 (2001) (court within discretion in deciding 25 miles away in another jurisdiction is too far) *with* Akin v. State, 193 App. 194, 196, 387 SE2d 351 (1989) (Gwinnett County officer not justified in refusing to take suspect to Fulton County facility for testing 8-10 miles away)].
3. ***Availability of police time*** and other resources;
4. ***Location*** of requested facilities, e.g., the hospital to which the accused wants to be taken is nearby but in a different jurisdiction;
5. Opportunity and ability of accused to make arrangements personally for the testing [Buffington v. State, 189 App. 800, 377 SE2d 548 (1989); Joel v. State, 245 App. 750, 538 SE2d 847 (2000)]:
   - The fact that the defendant is ***released on bond*** soon enough to obtain an independent test within three hours of driving ***does not excuse*** the officer's failure to accommodate the request [Smith v. State, 250 App. 583, 552 SE2d 528 (2001)].

B. After defendant gives ***one breath sample*** instead of the normally required two, request for independent test must be honored [Chamberlain v. State, 246 App. 423, 541 SE2d 64 (2000); State v. Schmidt, 256 App. 749, 569 SE2d 630 (2002)].

C. After blood sample drawn but no analysis, officer continues to have responsibility of reasonable accommodation. [*Compare* State v. Button, 206 App. 673, 426 SE2d 194 (1992) (upholding suppression of test despite lack of request of Defendant for further action) *and* Cole v. State, 263 App. 262, 587 SE2d 314 (2003) (sample was refrigerated but officer not knowing of lab open on holiday not enough) *with* Hulsinger v. State, 221 App. 274, 470 SE2d 809 (1996) (upholding denial of suppression because officer knew of no other resource than State Crime Lab to obtain analysis)].

D. Defendant must testify or otherwise enter evidence that he requested independent test, mere failure of arresting officer to remember if test was requested is not sufficient to suppress state test evidence [State v. Gillette, 236 App. 571, 512 SE2d 399 (1999)].

E. ***Request before giving implied consent*** must be honored [McGinn v. State, 268 App. 450, 602 SE2d 209 (2004)];

F. ***Request after test*** completed still subject to reasonable accommodation [State v. Braunecker, 255 App. 685, 566 SE2d 409 (2002) (request 30 minutes after test)];

G. State may show that Defendant obtained independent test and comment on failure to introduce it [Schlanger v. State, 290 App. 407, 659 SE2d 823 (2008)].

1.7 SENTENCING

1.71 Generally: Where defendant is under the influence of more than one substance at once, such as both alcohol and cocaine, there is a single DUI offense and only one sentence can be imposed [Taylor v. State, 238 App. 753, 520 SE2d 267 (1999)].

1.72 **"**Less safe" cases - Where defendant pleads guilty to DUI as less safe driver, but admits to a blood alcohol concentration over the legal limit, sentence for DUI over the legal limit under **OCGA § 40-6-391(c)(1)(B)** must be imposed [Phillips v. State, 241 App. 689, 527 SE2d 283 (1999)].

Query - Does Phillips mean that there is no minimum 24 hour sentence in any "less-safe" case where there is no evidence or admission of a specific level of blood alcohol?

1.73 First Offense Within a Five Year Period

A. Fine - Minimum of $300, maximum of $1000 plus statutory surcharges. This fine stall not, except as provided in subsection (g) of this Code section,[5] be subject to suspension, stay, or probation [**OCGA § 40-6-391 (c) (1) (A)]**.

B. Jail - "Minimum" of 10 days; however, all except for 24 hours may be suspended, stayed or probated, if the person's alcohol concentration was 0.08 or more. ***If*** the person's alcohol concentration was ***less than 0.08***, all of the jail time may be suspended, stayed or probated. Maximum of 12 months. [**OCGA § 40-6-391 (e) (1)**].

NOTE - When blood alcohol test mandates mandatory sentence, failure to do so is appealable by state as an illegal sentence. Also, cannot count time in courtroom custody or "house arrest"toward satisfying 24 hour mandatory jail time [Pierce v. State, 278 App. 162, 628 SE2d 235 (2006); State v. Dyer, 275 App. 657, 621 SE2d 606 (2005)].

C. Probation - If the defendant is sentenced to a period of imprisonment for less than 12 months, the defendant must serve a period of probation of 12 months less any days during which the defendant is actually incarcerated [**OCGA § 40-6-391 (c) (1) (E)**].

D. Community Service - Minimum of 40 hours if person is over 21, 20 hours. if person is under 21, and alcohol concentration was less than 0.08 [**OCGA § 40-6-391 (c) (1) (C), (k)**].

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[5]Subsection (g) refers to those situations where the payment would impose an economic hardship.

E. DUI School - Completion of a DUI Alcohol or Drug Use Risk Reduction Program approved by the Department of Human Resources [**OCGA § 40-6-391 (c) (1) (D)**].

F. License Suspension

1. "Revocation of driver's license" means the termination by formal action of the department of a person's license or privilege to operate a motor vehicle on the public highways, which license shall not be subject to renewal or restoration, except that an application for a new license may be presented and acted upon by the department after the expiration of the applicable period of time prescribed in this chapter.
2. "Suspension of driver's license" means the temporary withdrawal by formal action of the department of a person's license or privilege to operate a motor vehicle on the public highways, which temporary withdrawal shall be for a period specifically designated by the department [**OCGA § 40-5-1**].
3. If person is 21 or over, license is suspended for one year [**OCGA § 40-5-67.1**]. After 120 days,[6] and upon completion of an alcohol/drug risk reduction course, offender may get his license reinstated [**OCGA § 40-5-84**]. During those 120 days, the offender may obtain a limited driving permit [**OCGA § 40-5-64**].
4. If the person is under 21, license is revoked for six months. However, if the person's BAC was over 0.08, then his license must be revoked for twelve months. There is *no limited permit allowed* [**OCGA § 40-5-57.1**].

NOTE: This section assumes that the person has had no other license revocations under **OCGA § 40-5-57.1**. Consult **OCGA § 40-5-57.1** if offender has had license revoked in the past.

1.74 Second Offense Within TEN Year Period[7]

A. Fine - Minimum of $600, maximum of $1000, plus statutory surcharges. This fine shall not, except as provided in subsection (g) of this Code section,[8] be subject to suspension, stay, or probation [**OCGA § 40-6-391 (c) (2) (A.)**].

B. Jail - "Minimum" of 90 days. Maximum of 12 months. All except for 72 hours may be suspended, stayed or probated [**OCGA § 40-6-391 (c) (2)**

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[6] If the DUI conviction involves drugs, the offender may get his license reinstated after *six months with no limited driving permit allowed*. OCGA § 40-5-75 (e).

[7] Measure back 10 years if current offense on or after 7/1/08. Before 7/1/08, 5 years.

[8] Subsection (g) refers to those situations where the payment would impose an economic hardship.

(B)].

C. Probation - The defendant must serve a period of probation of 12 months less any days during which the defendant is actually incarcerated [**OCGA § 406-391 (c) (2) (F)**].

D. Community Service - Minimum of 30 days [**OCGA § 40-6-391 (c) (2) (C)**].

E. DUI School - Completion of a DUI Alcohol or Drug Use Risk Reduction Program approved by the Department of Human Resources [**OCGA § 40-6-391 (c) (2) (D)**].

F. Clinical evaluation - Defendant must undergo a clinical evaluation as defined in **OCGA § 40-5-1** and, if indicated by such evaluation, must complete a substance abuse treatment program as defined in **OCGA § 40-5-1. OCGA § 40-6-391 (c) (2) (E)**.

G. License Suspension - license must be suspended for three years. After 12 months, offender may get an ignition interlock limited permit.[9] No limited driving permit is allowed during the 12-month suspension period. The IID must remain on whatever vehicle the offender operated for at least six months. After the expiration of the IID permit, the offender may get his license reinstated. Under no circumstances can the offender get his license reinstated before 18 months.[10] [**OCGA §§ 40-5-63, 40-5-67.2**].

H. License Plates - Upon conviction, the license plates of all vehicles registered to the offender will be confiscated. No anew plates will be issued to the offender until such time as he obtains a limited permit or full reinstatement of driving privileges. Under certain conditions, a hardship license plate is available to a co-owner of the vehicle or to family members [**OCGA § 40-2-136**].

I. Photo Published - Offenders shall have their photograph, name and address, as well as the date, time, and place of arrest published in their local newspaper. There is a $25 charge for this notice [**OCGA § 40-6-391 (j)**].

1.75 Third Offense Within a TEN-Year[11] Period - high and aggravated misdemeanor[12]

A. Fine - Minimum of $1000, maximum of $5000, plus statutory surcharges. This fine shall not, except as provided in subsection (g) of this Code

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[9]The court can exempt a person from having the device on all vehicles if the court determines that such installation would Subject the person to undue financial hardship. If the court allows such exemption, it must notify DPS.

[10]The court can no longer order no driving for the full term of suspension as it could under prior law.

[11]Measure back 10 years if current offense on or after 7/1/08. Before 7/1/08, 5 years.

[12] Affects eligibility for good time credit [OCGA 17-10-4].

section,[13] be subject to suspension, stay, or probation [**OCGA § 40-6-391 (c) (3) (A)**].

B. Jail - "Minimum" of 120 days. Maximum of 12 months. However, all except for 15 days may be suspended, stayed or probated [**OCGA § 40-6-391 (c) (3) (B)**].

C. Probation - Defendant must serve probation of 12 months less any days during which the defendant is actually incarcerated [**OCGA § 40-6-391 (c) (3) (F)**].

D. Community Service - Minimum of 30 days [**OCGA § 40-6-391 (c) (3) (C)**].

E. DUI School - Completion of a DUI Alcohol or Drug Use Risk Reduction Program approved by the Department of Human Resources [**OCGA § 40-6-391 (c) (3) (D)**].

F. Clinical Evaluation - Defendant must undergo a clinical evaluation as defined in **OCGA § 40-5-1** and, if indicated by such evaluation, must complete a substance abuse treatment program as defined in **OCGA § 40-5-1.** [**OCGA § 40-6-391 (c) (3) (E)**].

G. License Suspension - license must be revoked for five years. After two years, offender may get an ignition interlock limited permit.[14] The IID must remain on whatever vehicle the ofender operated for at least six months. After the expiration of the IID permit, the offender may get his license reinstated [**OCGA §§ 40-5-63, 40-5-67.2**].

H. License Plates - Upon conviction, the license plates of all vehicles registered to the offender will be confiscated. No new plates will be issued to the offender until such time as he obtains a probationary license or full reinstatement of driving privileges. Under certain conditions, a hardship license plate is available to a co-owner of the vehicle or to family members [**OCGA § 40-2-136**].

I. Photo Published - Offenders shall have their photograph, name and address, as well as the date, time, and place of arrest published in their local newspaper. There is a $25 charge for this notice [**OCGA § 40-6-391 (j)**].

1.76 Fourth Offense within TEN Years - ***All*** offenses must occur after 7/1/08 - felony; if ***any*** of the relevant offenses pre-date 7/1/08 treat as high and aggravated misdemeanor if current offense after 7/1/08 - sentence per **1.75** above. Would State Court would have jurisdiction over case which qualifies as felony if State does not plead or prove prior offense? See State v. Sterling, 244 Ga. App. 328, 535 SE2d 329 (2000) (dismissal of shoplifting case for lack of jurisdiction after trial but before sentence upon discovery it was fourth offense).

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[13]Subsection (g) refers to those situations where the payment would impose an economic hardship.

[14]The court can exempt a person from having the device on all vehicles if the court determines that such installation would subject the person to undue financial hardship. If the court allows such exemption, it must notify DPS.

1.8 IGNITION INTERLOCK DEVICE (IID)

1.81 Generally

A. For a second or subsequent DUI conviction within a five-year period, a court *shall* order as a condition of probation that the offender install and maintain an IID [**OCGA § 42-8-111**]. For a second conviction, the first twelve months is a hard suspension, and the offender may not get even a limited or probationary license until this time has elapsed.

B. For a third conviction, the offender may not apply for a probationary license for two years (the first six months of the probationary license require an MD) [**OCGA § 42-8-112**].

C. However, the State Court's jurisdiction is only twelve months per charge [**OCGA § 15-7-4**]. Thus, it appears that the only way a State Court Judge can order an IID as a condition of probation is if there are multiple charges, whose penalties run consecutively. When there is only one charge, a State Judge cannot enforce the IID order; however, **OCGA § 40-5-63** mandates when the offender may apply for license reinstatement (which is binding on DPS); and, **OCGA § 40-5-64** delineates the conditions of reinstatement, which includes an IID for DUI offenders. Thus, it is questionable whether State Court can order the IID on a 12 month sentence since an offender cannot obtain the device within 12 months; however, this is apparently required [State v. Villella, 266 App. 499, 597 SE2d 563 (2004)]. Order clearly is required even though Defendant lives in a state which doesn't require IID [Villella]. If multiple charges extend the court's jurisdiction to cover the applicable time-frame of the IID requirements, the State Judge shall issue an IID order.

1.82 SUMMARY OF THE IGNITION INTERLOCK DEVICE REQUIREMENTS

A. For a first offense, the State Judge is not required to order an IID.

B. For a second conviction, the IID order is applicable if there are at least two charges on which the offender was convicted. If so, the Judge shall order as a condition of probation an IID after twelve months in accordance with **OCGA § 42-8-112**. If sentence is twelve months, court may nevertheless have to order it although Defendant cannot comply until twelve months has expired [State v. Villella, 266 App. 499, 597 SE2d 563 (2004)].

C. For a third conviction, the IID order is inapplicable unless there are at least three charges on which the offender was convicted. If so, the Judge shall order as a condition of probation an IID after two years in accordance with **OCGA § 42-8-112**.

1.9 CHECKLIST FOR SENTENCING

FINE

JAIL TIME (except 1st offense & < 0.08 BAC)

MANDATORY PROBATION

COMMUNITY SERVICE

DUI SCHOOL

CLINICAL EVALUATION (2nd & subsequent offenses)

LICENSE SUSPENSION (& IID order for 2nd & subsequent offenses)

LICENSE PLATE SURRENDER (2nd & subsequent offenses - all vehicles registered in defendant's name)

PHOTO PUBLISHED (2nd & subsequent offenses)

FIRST OFFENSE W/IN 10-YR. PERIOD OVER 21

The offender's license is suspended for one year. After 120 days, he is eligible to get his license back. During those 120 days, he is eligible for a limited driving permit. If the charge involves drugs, no reinstatement for six months and there is no limited permit.

If the offender's BAC is less than 0.08, the entire sentence may be probated, suspended or stayed. (i.e., no jail time required).

FIRST OFFENSE W/IN 10-YR. PERIOD UNDER 21

For offenders under 21, if the offender's BAC is less than 0.08, the minimum community service is 20 hrs.

License is REVOKED for 6 months if the BAC < 0.08 and 12 months if the BAC is 0.08 or higher.

SECOND OFFENSE W/IN 10-YR. PERIOD

License is suspended for three years. It may be reinstated after 18 months. For the first 12 months – no limited permit. After that, IID for 6 months. License plates are confiscated. Offender's photo is published in the local newspaper ($25 fee). Must undergo clinical evaluation as defined in **OCGA § 40-5-1.**

THIRD OFFENSE W/IN 10-YR. PERIOD

Offender is a Habitual Violator (this only applies to persons 21 or over). License is revoked for five years. After two years, a probationary license may be issued. Must have IID with probationary license for first six months. No limited permit. License plates confiscated. Photo published in newspaper ($25 fee). Must undergo clinical evaluation as defined in **OCGA § 40-5-1.**

FOURTH OFFENSE W/IN 10-YR. PERIOD - Felony

Time of offenses - For current ***misdemeanor*** provisions, ***current*** offense must be on or after 7/1/08, then count back 10 years. If earlier current offense, count back 5. To qualify as a ***felony, all four*** offenses must be on or after 7/1/08. If not, but current offense is after 7/1/08, sentencing provisions are same as for ***third*** offense.