NEW MEXICO DWI BENCHBOOK

Criminal Proceedings Involving Driving
Under the Influence of Alcohol or Drugs

OCTOBER 2010

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New Mexico Judicial Education Center
Institute of Public Law, UNM School of Law
MSC11 6060, 1 University of New Mexico, Albuquerque, NM 87131-0001

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1	*Chapter 1* **DWI Offenses and Elements**
2	*Chapter 2* **Initial Stop, FSTs and Arrest**
3	*Chapter 3* **Post-Arrest and Pre-BAC Issues**
4	*Chapter 4* **Breath and Blood Testing**
5	*Chapter 5* **Sentencing**
6	*Chapter 6* **Other Alcohol-Related Offenses**
7	*Appendix A* **Case Flow Charts**
8	*Appendix B* **Penalty Charts**
9	*Appendix C* **DWI Citation Form**
10	*Appendix D* **SLD Regulations, Sample Forms**
11	*Appendix E* **DWI Statute**
12	*Appendix F* **DWI Municipal UTOs**

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Criminal Proceedings Involving Driving Under the Influence of Alcohol or Drugs

TABLE OF CONTENTS

Preface

1. DWI Offenses and Statutory Elements *(Tab 1)*

1.1 Overview
1.2 DWI Offenses - Generally
  1.2.1 Statutory Presumptions Applicable to DWI Offenses
  1.2.2 Driving Under the Influence of Intoxicating Liquor, §66-8-102(A)
  1.2.3 Driving Under the Influence of a Drug, §66-8-102(B)
  1.2.4 Driving with a Specific Alcohol Concentration Level, §66-8-102(C)
  1.2.5 Aggravated DWI: Driving with an Alcohol Level of .16 or Higher, §66-8-102(D)(1)
  1.2.6 Aggravated DWI: Driving Under the Influence of Intoxicating Liquor or Drugs and Causing Bodily Injury, §66-8-102(D)(2)
  1.2.7 Aggravated DWI: Driving Under the Influence of Intoxicating Liquor or Drugs and Refusing to Submit to Chemical Testing, §66-8-102(D)(3)
1.3 DWI Elements Common to All DWI Offenses
  1.3.1 Under the Influence
  1.3.2 Intoxicating Liquor
  1.3.3 Drugs
  1.3.4 Drive
  1.3.5 Vehicle
  1.3.6 Within the State
  1.3.7 Uniformed Officer
1.4 DWI: A Strict Liability Criminal Offense
1.5 Defenses to a DWI Prosecution
  1.5.1 Common DWI Defenses
  1.5.2 Duress as a Defense
1.6 Conclusion

2. Initial Stop, Field Sobriety Testing and Arrest *(Tab 2)*

2.1 Overview
2.2 Initial Stop: Traffic Stop Based on Violation of Law
  2.2.1 Community Caretaker Vehicle Stops or Approaches

2.2.2 Citizen Reporting of Possible DWI or Other Violations of Law
2.2.3 DWI and Other Types of Checkpoints (Roadblocks)
2.3 DWI Detection: Initial Contact Between Officer and Driver
2.4 DWI Investigation: Standardized Field Sobriety Tests (SFSTs)
2.4.1 Horizontal Eye Gaze Nystagmus (HGN) SFST
2.4.2 Walk-and-Turn and One-Leg Stand SFSTs
2.4.3 Inability to Perform Standardized FSTs and Use of Alternative FSTs
2.4.4 Refusal to Take FSTs
2.5 Probable Cause and Arrest
2.6 Conclusion

3. Post-Arrest and Pre-Breath and Blood Testing Issues *(Tab 3)*

3.1 Overview
3.2 Implied Consent Act Advisories
3.3 Refusal to Submit to Breath and/or Blood Testing
3.3.1 "Clear" or Unequivocal Refusal
3.3.2 Refusal Based on Insufficient Sample
3.3.3 Refusal Based on Only One Measurable Breath Sample
3.3.4 Refusal by Not Taking the Test Chosen by Law Enforcement
3.3.5 Refusal by Taking One Test Chosen by Law Enforcement but Not the Second Test
3.4 Subsequent Change of Mind After Initial Refusal of Test
3.5 Driver's Right to an Independent Test
3.6 *Miranda* Warnings and Right to Counsel at Chemical Testing Stage
3.6.1 *Miranda* Warnings, Generally
3.6.2 *Miranda* Warnings and the Implied Consent Act
3.6.3 Right to Counsel and the Implied Consent Act
3.6.4 Practical Considerations Regarding DWI, *Miranda*, and Right to Counsel
3.7 Conclusion

4. Breath and Blood Testing *(Tab 4)*

4.1 Overview
4.2 Requirements for a Valid Breath Test
4.2.1 Twenty-Minute Deprivation/Observation Period for Breath Tests
4.2.2 Breath Testing Machine Foundational Matters
4.3 Requirements for a Valid Blood Test
4.3.1 Blood Sample Collection Under the Implied Consent Act
4.3.2 Blood Sample Extracted for Medical Treatment
4.3.3 Search Warrant for Blood Test
4.4 Time of Breath and/or Blood Testing and "Relation Back" Evidence
4.4.1 What is "Relation Back" Evidence?
4.4.2 Forms of Relation Back Evidence
4.4.3 Use of Expert Witnesses for Relation-Back Evidence
4.5 Conclusion

5. Sentencing *(Tab 5)*

5.1 Overview
5.2 Number of DWI Convictions/Subsequent Convictions
5.3 Use of Prior Out-of-State DWI Conviction(s) to Enhance the Sentence for a New Mexico DWI Conviction
5.4 Effect of Prior Legal Representation on Sentencing for Subsequent DWI
5.5 Defense Challenges to the Prosecution's Use of Prior DWI Convictions
5.6 DWI Sentences
5.6.1 First DWI Conviction
5.6.2 Second DWI Conviction
5.6.3 Third DWI Conviction
5.6.4 Fourth, Fifth Sixth, Seventh and Subsequent DWI Convictions
5.7 Presentence Report
5.8 Sentencing Considerations
5.9 Deferral, Suspension and Probation
5.10 Mandatory Court Fees
5.11 DWI Conviction Records
5.12 Driver's License Revocation
5.13 DWI and Double Jeopardy
5.14 Ignition Interlock Driver's License

6. Other Alcohol-Related Offenses *(Tab 6)*

6.1 Alcohol-Related Misdemeanor Offenses
6.1.1 Open Container in Vehicle
6.1.2 Driving While Suspended or Revoked
6.1.3 Boating While Intoxicated
6.1.4 Off-Highway Motor Vehicle DWI
6.2 Alcohol-Related Felony Offenses
6.2.1 Vehicular Homicide and Great Bodily Harm by Vehicle
6.2.2 Injury to Pregnant Woman by Vehicle
6.3 Under Age 21 DWI and Other Alcohol-Related Offenses
6.3.1 Under Age 18: Delinquent Acts
6.3.2 Ages 18-21: DWI and Other Alcohol-Related Offenses

(see next page for Appendices)

APPENDICES

A. Case Flow Charts *(Tab 7)*

DWI Flow in New Mexico
Magistrate: DWI Cases
Municipal: Arrestable Offenses

B. Penalty Charts *(Tab 8)*

High Cost of DWI in New Mexico
Penalties for Under-21 Alcohol Offenses

C. DWI Citation Form *(Tab 9)*

DWI Citation Form

D. Scientific Laboratory Division, New Mexico Department of Health, Regulations and Sample Forms *(Tab 10)*

Regulations: Blood and Breath Testing Under the New Mexico Implied Consent Act
Sample Breath Test Printout Form
Sample Report of Blood Alcohol Analysis Form (SLD 705, used when blood is tested for alcohol content)
Sample Report of Drug Analysis Form (SLD 705 Supplement, used when blood is tested for drug content)

E. DWI Statute *(Tab 11)*

DWI State Statute, §66-8-102

F. DWI Municipal Uniform Traffic Ordinances *(Tab 12)*

DWI Uniform Traffic Ordinance 12-6-12.1: Operating a Motor Vehicle Under the Influence of Intoxicating Liquor or Drugs; Chemical Testing; Officer to File Statement; Immediate License Revocation
DWI Uniform Traffic Ordinance 12-6-12.2: Operating a Motor Vehicle Under the Influence of Intoxicating Liquor or Drugs; Penalties; Sentencing; Fees

PREFACE

Acknowledgements

The *New Mexico DWI Benchbook* was authored by the staff at the New Mexico Judicial Education Center and by Judith Olean, formerly a Rio Rancho Municipal Court judge and currently an Associate Dean at Central New Mexico Community College.

The Judicial Education Center gratefully acknowledges the generous assistance provided by the expert volunteers who helped in developing the *New Mexico DWI Benchbook*. Those volunteers contributed their expertise and time in providing background material and reviewing and editing drafts. This benchbook was developed in part under a grant from the Traffic Safety Bureau of the New Mexico Department of Transportation.

Purpose

The *New Mexico DWI Benchbook* is intended to serve as a comprehensive resource guide for trial courts in handling criminal proceedings involving DWI and other alcohol-related offenses. It covers driving under the influence of alcohol or drugs and driving with an alcohol level of .08 or higher (.04 for commercial vehicles), as well as the additional elements that raise the offense to an aggravated level. These are collectively referred to as "DWI" cases.

The benchbook is a current and convenient secondary source of law, policy and practice for DWI cases. **Because laws and court cases can change frequently, do not rely on this benchbook as legal authority.** Instead, consult the New Mexico statutes, rules, forms and uniform jury instructions, as well as case law and court policies and procedures, for specific requirements.

Style and Format

The *New Mexico DWI Benchbook* is written in a descriptive style. Abbreviations are kept to a minimum and should be readily recognizable when encountered. Likewise, citations to statutes, rules and cases use the most concise style possible while still providing adequate reference information. In general, citations in the text use the following style:

- Laws: New Mexico statutes are cited as §__-__-__, such as §66-8-113, without "NMSA 1978." Uniform traffic ordinances are cited as UTO __-__-__, such as UTO 12-6-12.1. Federal laws are cited as __ U.S.C. §___, such as 25 U.S.C. §1901.

- Rules: New Mexico judicial rules are cited as Rule __-___, such as Rule 9-501, without the addition of "NMRA."

- Cases: New Mexico cases are cited using the vendor-neutral citation form adopted in 1998, such as 1998-NMCA-039, where available, or the New Mexico Reports or Pacific Reporter citation, such as 116 N.M. 456 (1993) or 863 P.2d 1077 (1993).

Effective Date

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CHAPTER 1

DWI Offenses and Statutory Elements

This chapter covers:

- Overview of DWI offenses and statutory presumptions.
- Statutory elements of each DWI offense.
- Elements common to all DWI offenses.
- The strict liability nature of DWI.
- Common defense challenges to a DWI prosecution.

1.1 Overview

Purpose of DWI Laws

The crime of driving while intoxicated (DWI) involves operation of a vehicle by a person who has consumed a sufficient quantity of an alcoholic beverage or drugs to affect the person's ability to manage the vehicle safely, either demonstrably (by proof of impaired driving) or on a *per se* basis (by proof of a prohibited specific alcohol concentration level). §66-8-102. As the Supreme Court stated in *State v. Johnson,* 2001-NMSC-001, ¶ 17:

> The purpose of our DWI legislation is to protect the public from the risk of harm posed by intoxicated drivers…[and] to prevent individuals from driving…when they, either mentally or physically, or both, are unable to exercise the clear judgment and steady hand necessary to handle a vehicle with safety both to themselves and the public.

The Implied Consent Act in General

Under the Implied Consent Act, §66-8-105 through §66-8-112, anyone who operates a motor vehicle in New Mexico is deemed to have given consent to breath and/or blood chemical tests if arrested for DWI. §66-8-107(A). The test results may then be introduced into evidence in any civil or criminal action arising out of the acts allegedly committed by the person tested. §66-8-110(A).

The Implied Consent Act is also the basis for revoking drivers' licenses administratively in an entirely separate non-judicial action. The Act provides a series of revocation penalties for

refusing to take the chemical test(s) or for driving with a breath and/or blood alcohol level over the legal limit. §66-8-111.

Note on Municipal Court Ordinances

Provisions similar to the state DWI statute are contained in The Uniform Traffic Ordinance, UTO 12-6-12.1, Operating a Motor Vehicle Under the Influence of Intoxicating Liquor or Drugs; Chemical Testing; Officer to File Statement; Immediate License Revocation or other locally adopted ordinance.

Municipal and county ordinances that prohibit driving while under the influence of intoxicating liquor or drugs cannot specify an unlawful alcohol concentration level that is different than the alcohol concentration levels specified in state statutes §66-8-102(C) and (D). §66-8-102.2. Municipal ordinances must be "not inconsistent" with state laws. §3-17-1.

Be sure to check the wording of your local ordinance.

Note on DWI and Juvenile Defendants

The district courts have exclusive jurisdiction over DWI cases in which the defendant has not yet reached his or her eighteenth birthday. These types of DWI cases are handled in the children's court system in the district courts. DWI defendants who are age 18 and older and are charged with a misdemeanor DWI will have their cases brought before a metropolitan, magistrate or municipal court. If the defendant is 18 or older and charged with felony DWI, the district courts have exclusive jurisdiction in the case.

Note on Felony DWI

A fourth or fifth DWI conviction is a fourth degree felony. §66-8-102(G)-(H). A sixth and subsequent DWI conviction is a third degree felony. §66-8-102(I)-(J). Jurisdiction over felony DWI lies exclusively with the district courts. The crime of felony DWI does not have different elements from the crime of misdemeanor DWI. Proof of a minimum of three prior convictions is not a statutory element of felony DWI, but proof of those prior convictions is required in order to sentence a defendant for felony DWI. The felony designation is intended to enhance the sentence for offenders with multiple DWI convictions, and not to create a new offense with discreet elements other than those already provided in §66-8-102(A)-(D). *State v. Anaya*, 1997-NMSC-010, ¶ 18.

The prosecution must provide formal notice in order to enhance a misdemeanor DWI to a felony. This requirement was satisfied in *Anaya* by the prosecution filing a criminal information alleging the defendant committed a felony in violation of §66-8-102(G) and by the trial court holding a hearing to determine whether the defendant had in fact been previously convicted of three or more DWI offenses. A probable cause finding by the court on the existence of those prior DWI convictions is not required to support jurisdiction in the district court for a felony DWI. *Anaya* at ¶¶ 24, 25.

If the charge is brought by a grand jury indictment, the statute number will reflect the felony nature of the DWI offense.

1.2 DWI Offenses - Generally

DWI offenses fall within the following general categories:

- Driving while impaired by alcohol or drugs (also known as "impaired to the slightest degree," "simple impairment," or "simple" DWI).
- Driving with a specific statutorily prohibited level of alcohol regardless of demonstrable effect (also known as "*per se*" or "BAC" DWI).
- Driving while impaired by alcohol or drugs and committing certain additional actions (also known as "aggravated" DWI).

In cases where a motorist submits to either breath or blood testing, or both, the term "BAC" is commonly used by the judge, prosecution, defense and law enforcement as shorthand for the specific alcohol concentration either of those testing methods revealed. For example, Officer Rodney testified that "[t]he driver's breath test revealed a BAC of .11."

For breath tests, the specific alcohol concentration level is determined by the testing equipment in grams of alcohol in 210 liters of breath, and for blood tests, the alcohol concentration is determined in the analysis by grams of alcohol in 100 milliliters of blood.

§66-8-110(F). However, for purposes of how a defendant is charged and for the prosecution to secure a conviction, the important consideration is the actual BAC test result, not the method(s) of testing or the formula by which the specific BAC result is derived.

"DWI" Compared to "Aggravated DWI"

There are three "basic" (i.e. non-aggravated) DWI offenses and three aggravated DWI offenses. The aggravated offenses are based on the same elements as the basic DWI offenses, but involve additional behaviors or actions that are considered to be more egregious and hence subject to greater punishment. What specific DWI offense a motorist is charged with is determined by law enforcement and/or the prosecution based on the facts of the case, the DWI statute or ordinance and, on occasion, case law.

The basic DWI offenses are:

- Driving under the influence of alcohol. §66-8-102(A).
- Driving under the influence of drugs. §66-8-102(B).
- Driving with a blood or breath alcohol level of .08 or higher, or .04 or higher when driving a commercial vehicle. §66-8-102(C).

The aggravated DWI offenses are:

- Driving with a blood or breath alcohol level of .16 or higher. §66-8-102(D)(1).
- Driving under the influence of alcohol or drugs and causing bodily injury to a human being as a result. §66-8-102(D)(2).
- Driving under the influence of alcohol or drugs and refusing to submit to chemical testing (breath and/or blood). §66-8-102(D)(3).

The jury instructions for DWI offenses are contained in Chapter 45 (Motor Vehicle Offenses) of the Uniform Jury Instructions - Criminal.

1.2.1 Statutory Presumptions Applicable to DWI Offenses

The Implied Consent Act sets forth several presumptions based on a driver's alcohol concentration level. A "presumption" is defined as being "an assumption of fact that the law requires to be made from another fact or group of facts…." *Black's Law Dictionary, 5th Edition*. (These presumptions do not apply if the defendant has been charged with having a blood alcohol content of .08 or above.) A presumption works in the following manner: if certain facts are presented to the court, it must then assume the existence of other facts resulting from them.

The Implied Consent Act, in §66-8-110(B), provides the following presumptions:

- Alcohol level of less than .04: It shall be presumed that the person was not under the influence of intoxicating liquor. §66-8-110(B)(1).

- Alcohol level of at least .04 but less than .08: No presumption shall be made that the person either was or was not under the influence of intoxicating liquor, unless the person was driving a commercial motor vehicle. §66-8-110(B)(2)(a). However, the amount of alcohol in the person's system may be considered with other competent evidence in determining whether the person was impaired or under the influence of intoxicating liquor. §66-8-110(B)(2)(b).

- Alcohol level of .04 or more and the person was driving a commercial vehicle: It shall be presumed that the person was under the influence of intoxicating liquor. §66-8-110(B)(3).

How Statutory Presumptions Can Be Overcome

The first two presumptions can be overcome by the prosecution in its efforts to prove its case beyond a reasonable doubt. Specifically, those presumptions can be overcome through the introduction of competent (relevant, believable, persuasive) evidence relating to whether the motorist was under the influence of intoxicating liquor. §66-8-102. For example, that evidence may include the signs of intoxication the driver exhibited, the manner in which the driver was observed operating his or her vehicle, any admissions made by the driver to alcohol consumption and performance on Field Sobriety Tests. As with all criminal offenses, evidence that is relevant to the elements of an offense can be admitted and considered in accordance with the Rules of Evidence. Regarding the third presumption previously listed, the prosecution is still required to prove beyond a reasonable doubt all other essential elements of a DWI charge involving a commercial vehicle.

Municipal Court: Similar provisions are contained in UTO 12-6-12.1, Operating a Motor Vehicle Under the Influence of Intoxicating Liquor or Drugs; Chemical Testing; Officer to File Statement; Immediate License Revocation.

Be sure to check the wording of your local ordinance.

1.2.2 Driving Under the Influence of Intoxicating Liquor, §66-8-102(A) ("Impaired to the Slightest Degree" DWI) - Elements

Section §66-8-102(A) makes it unlawful for:

- **A person**

- **Who is under the influence**
- **Of intoxicating liquor**
- **To drive**
- **A vehicle**
- **Within this state.**

See UJI Criminal 14-4501 for a jury instruction on the essential elements of this offense.

1.2.3 Driving Under the Influence of a Drug, §66-8-102(B) ("Impaired to the Slightest Degree" DWI) - Elements

Section §66-8-102(B) makes it unlawful for:

- **A person**
- **Who is under the influence**
- **Of any drug**
- **To a degree that renders the person incapable of safely driving a vehicle**
- **To drive**
- **A vehicle**
- **Within this state.**

See UJI Criminal 14-4502 for a jury instruction on the essential elements of this offense.

1.2.4 Driving with a Specific Alcohol Concentration Level, §66-8-102(C) ("*Per se*" or "BAC" DWI) - Elements

Drivers of Non-Commercial Vehicles:

Section §66-8-102(C)(1) makes it unlawful for:

- **A person**
- **To drive**

- **A vehicle**
- **In this state**
- **If the person has an alcohol concentration of .08 or more in the person's breath or blood within three (3) hours of driving the vehicle and the alcohol concentration is from alcohol consumed before or while driving the vehicle.**

See UJI Criminal 14-4503 for a jury instruction on the essential elements of this offense.

Drivers of Commercial Vehicles:

Section §66-8-102(C)(2) makes it unlawful for:

- **A person**
- **To drive**
- **A commercial vehicle**
- **In this state**
- **If the person has an alcohol concentration of .04 or more in the person's breath or blood within three (3) hours of driving the commercial motor vehicle and the alcohol concentration is from alcohol consumed before or while driving the vehicle.**

  "Commercial motor vehicle" is defined as "a motor vehicle or combination of motor vehicles used in commerce to transport passengers or property if the motor vehicle:
  (a) has a gross combination weight rating of more than twenty-six thousand pounds inclusive of a towed unit with a gross vehicle weight rating of more than ten thousand pounds;
  (b) has a gross vehicle weight rating of more than twenty-six thousand pounds;
  (c) is designed to transport sixteen or more passengers, including the driver; or
  (d) is of any size and is used in the transportation of hazardous materials, which requires the motor vehicle to be placarded under applicable law." §66-8-102(T)(2).

1.2.5 Aggravated DWI: Driving with an Alcohol Concentration Level (BAC) of .16 or Higher, §66-8-102(D)(1) - Elements

Section §66-8-102(D)(1) makes it unlawful for:

- **A person**

- **To drive**
- **A vehicle**
- **In this state**
- **Who has an alcohol concentration of .16 or more in the person's breath or blood within three (3) hours of driving the vehicle and the alcohol concentration is from alcohol consumed before or while driving the vehicle.**

See UJI Criminal 14-4506 for a jury instruction on the essential elements of this offense. UJI Criminal 14-4509 is a jury instruction on all three types of aggravated DWI for use when the evidence supports more than one of the ways in which aggravated DWI can be committed.

1.2.6 Aggravated DWI: Driving Under the Influence of Intoxicating Liquor or Drugs and Causing Bodily Injury, §66-8-102(D)(2) - Elements

Section §66-8-102(D)(2) makes it unlawful for:

- **A person**
- **To drive**
- **A vehicle**
- **Within this state**
- **Who is under the influence**
- **Of intoxicating liquor or drugs**
- **And as a result caused bodily injury to a human being.**

  "Bodily injury" is defined as "an injury to a person that is not likely to cause death or great bodily harm to the person, but does cause painful temporary disfigurement or temporary loss or impairment of the functions of any member or organ of the person's body." §66-8-102(T)(1). This may include injuries to the driver of the vehicle.

See UJI Criminal 14-4507 for a jury instruction on the essential elements of this offense. UJI Criminal 14-4509 is a jury instruction on all three types of aggravated DWI for use when the evidence supports more than one of the ways in which aggravated DWI can be committed.

1.2.7 Aggravated DWI: Driving Under the Influence of Intoxicating Liquor or Drugs and Refusing to Submit to Chemical Testing, §66-8-102(D)(3) - Elements

Section §66-8-102(D)(3) makes it unlawful for:

- **A person**
- **To drive**
- **A vehicle**
- **Within this state**
- **Who, in the judgment of the court, based upon evidence of intoxication presented to the court, was under the influence**
- **Of intoxicating liquor or drugs**
- **And refused to submit to chemical testing, as provided for in the Implied Consent Act.**

Conviction of this offense requires proof beyond a reasonable doubt of DWI and refusal to submit to chemical testing (i.e. breath and/or blood tests to determine alcohol or drug content). Refusal itself is not a criminal offense, although it can result in a separate administrative driver's license revocation.

See UJI Criminal 14-4508 for a jury instruction on the essential elements of this offense. UJI Criminal 14-4509 is a jury instruction on all three types of aggravated DWI for use when the evidence supports more than one of the ways in which aggravated DWI can be committed.

1.3 DWI Elements Common to All DWI Offenses

All DWI offenses have many common elements, such as "under the influence" or "intoxicating liquor." These elements have the same meaning in each type of DWI offense, e.g. "under the influence" means the same in §66-8-102(A) as it does in §66-8-102(D)(2). The elements common to all DWI offenses are explained below.

1.3.1 Under the Influence

"Under the influence" is not defined in the DWI statute. From case law, it means that as a result of consuming intoxicating liquor and/or drugs, the defendant was less able to the slightest degree, either mentally or physically, or both, to exercise the clear judgment and steady hand necessary to handle a vehicle with safety to the defendant and the public. *State*

v. Sanchez, 2001-NMCA-109, ¶ 6. The same definition is used in UJI Criminal 14-4501 (DWI) and UJI Criminal 14-243 (vehicular homicide).

1.3.2 Intoxicating Liquor

"Intoxicating liquor" is not defined in the DWI statute. The Motor Vehicle Code defines "alcoholic beverages" as "any and all distilled or rectified spirits, potable alcohol, brandy, whiskey, rum, gin, aromatic bitters or any similar alcoholic beverage, including all blended or fermented beverages, dilutions or mixtures of one or more of the foregoing containing more than one-half percent alcohol but excluding medicinal bitters." §66-1-4.1(D).

1.3.3 Drugs

"Drug" is not defined in the DWI statute. The Controlled Substances Act defines "drug" as "substances recognized as drugs in the official United States pharmacopoeia, official homeopathic pharmacopoeia of the United States or official national formulary or any respective supplement to those publications. It does not include devices or their components, parts or accessories." §30-31-2(K).

Note that §66-8-102(B) refers to being under the influence of "any drug." This includes both illegal and legal (prescription and over-the-counter) drugs. Some law enforcement agencies have officers with specialized drug recognition training. According to the Drug-Impaired Driving Fact Sheet prepared by the Scientific Laboratory Division of the New Mexico Department of Health:

> Drug effects can vary between individuals. The effects are influenced by history of drug use (chronic or naïve user), tolerance, overall health, individual sensitivity to the drug, metabolism and other factors. Many drugs, especially those that affect the central nervous system, can impair driving. These include illicit drugs, as well as therapeutic and over-the-counter medications. Many therapeutic drugs that are available with or without a prescription can have unwanted side effects that impair driving performance.
>
> Illicit, therapeutic and over-the-counter drugs can impair driving performance.

SLD Drug-Impaired Driving Fact Sheet, p. 2.

1.3.4 Drive

"Drive" is not defined in the DWI statute. Prior to the 2010 case of *State v. Sims*, 2010-NMSC-027, New Mexico defined driving to include the term "actual physical control." Under this definition, an individual could be prosecuted for and found guilty of DWI if they placed "themselves in a situation in which they [could] directly commence operating a vehicle…" *State v. Johnson,* 2001-NMSC-001¶19. For example, an individual passed out behind the wheel of a parked car could be found guilty of DWI under the "actual physical control" definition. After a lengthy series of cases further expanding the circumstances under

which the "actual physical control" definition applied, the New Mexico Supreme Court decided the *Sims* case.

Mr. Sims' vehicle was not in motion when he was arrested for DWI. He was either "passed out or asleep behind the wheel…The keys were on the front seat." *Sims* at ¶1. On appeal to the District Court, Mr. Sims' conviction was upheld using the actual physical control standard. The Court of Appeals also upheld the conviction stating that "there was nothing to prevent the Defendant from awakening, reaching for the keys, and driving from the parking lot." The New Mexico Supreme Court reversed the decision of the Court of Appeals, and in doing so, completely changed the way some DWI cases will need to be investigated and presented. The Court stated:

> …we do not believe that the Legislature intended to forbid intoxicated individuals from merely entering their vehicle as passive occupants or using their vehicles for temporary shelter….
> …a fact finder cannot simply assume or speculate that the individual in question might sometime in the future commence driving his or her vehicle. Instead, the fact finder must assess the totality of the circumstances and find that (1) the defendant was actually, not just potentially, exercising control over the vehicle, and (2) the defendant had the general intent to drive so as to pose a real danger to himself, herself, or the public.

Sims, ¶¶ 3, 4.

The Court recognized that intoxicated persons sometimes use their vehicle as a place to "sleep it off," with no current intention to drive. A person may even exercise control over the vehicle by turning it on so that the heater may be used. In this case, the Court found that this individual by consciously deciding not to drive poses no danger to society. It is only when this person forms an intent to drive that they become a danger, and this is the behavior the law was intended to punish. So, while upholding the cases that state that DWI is a strict liability crime (see Section 1.4), in a case where the vehicle is not in motion, the prosecution must be able to prove a "general intent to drive."

This intent to drive can be proven in many ways: was the vehicle running? Where was the key? Where was the defendant located within the vehicle? Was the defendant awake, asleep, passed out? Where was the vehicle, e.g. in the middle of the road? Many other factors could be shown to point to intent to drive. "The Court held that it is the totality of the circumstances that must shown to prove this intent. The concern is no longer what the defendant might do, but what the defendant intends to do…"

In a case decided a couple of weeks after *Sims*, the New Mexico Supreme Court addressed the issue of inferences of prior driving. *State v. Mailman*, 2010-NMSC-036. In this case (overturned for other reasons) the defendant was in his parked vehicle in a convenience store parking lot. The defendant admitted that he had been drinking and had thrown beer cans out his vehicle window while driving. The officer also observed an open can of beer on the

console next to the driver. The Court stated that this circumstantial evidence could be used to prove actual driving on the part of the defendant.

The defendant's statements may be used to prove that he or she was the driver. *State v. Greyeyes*, 105 N.M. 549, 552 (Ct. App. 1987). Typically, such statements are introduced by the prosecution in situations where law enforcement comes upon a vehicle where two or more alleged occupants are already outside of the vehicle and therefore the officer did not observe anyone in the driver's seat.

1.3.5 Vehicle

"Vehicle" is defined as "every device in, upon or by which any person or property is or may be transported or drawn upon a highway, including any frame, chassis or body of any vehicle or motor vehicle, except devices moved exclusively by human power or used exclusively upon stationary rails or tracks." §66-1-4.19(B).

"Highway" means "every way or place generally open to the use of the public as a matter of right for the purpose of vehicular travel, even though it may be temporarily closed or restricted for the purpose of construction, maintenance, repair or reconstruction." §66-1-4.8(B).

"Motor vehicles," which are a subset of vehicles, are defined as "every vehicle that is self-propelled and every vehicle that is propelled by electric power obtained from batteries or from overhead trolley wires, but not operated upon rails. §66-1-4.11(I).

The term "vehicle" in §66-8-102 should be interpreted in accordance with legislative intent. *State v. Saiz*, 2001-NMCA-035, ¶ 2. The purpose of §66-8-102 "is to prevent individuals who, either mentally or physically, or both, are unable to exercise the clear judgment and steady hand necessary to handle a vehicle with safety both to the individual and the public." *State v. Richardson*, 113 N.M. 740, 742 (Ct. App. 1992).

The DWI statute "is not expressly limited to a type of vehicle with a particular function--all vehicles are included." *Richardson* at 741. The definition of vehicle does not require that it be primarily, regularly or frequently used on a highway, but rather that it may be lawfully used on a highway.

Therefore, "vehicle" includes:

- Farm tractors. *Richardson* at 742 ("no one would argue that a farm tractor suddenly veering into oncoming traffic on a highway would be any less dangerous than an automobile operated in the same manner").

- Mopeds. *Saiz*, 2001-NMCA-035, ¶ 5 ("a moped operated irresponsibly could endanger other traffic on the road").

Note on Snowmobiles, All-Terrain Vehicles, Off-Highway Motorcycles and Boats:

The New Mexico statutes contain the "Off-Highway Motor Vehicle Act," §66-3-1001 to §66-3-1-1020. Within that Act, under §66-3-1010.3(A)(2), it provides that "[a] person shall not operate an off-highway motor vehicle while under the influence of intoxicating liquor or drugs as provided by Section 66-8-102…." "Off-highway motor vehicle" is defined as being a snowmobile, an all-terrain vehicle or an off-highway motorcycle. §§66-3-1001.1(D)(1)(2)(3). Thus, it appears that DWI charges can be brought against persons operating either a snowmobile, all-terrain vehicle or an off-highway motorcycle in a manner in which they are intended to be driven while allegedly under the influence.

Regarding the operation of a boat, the New Mexico statutes contain the Boating While Intoxicated Act, Sections 66-13-1 through 66-13-13, which is structured in a fashion similar to the general DWI statute and the Implied Consent Act. More about the Boating While Intoxicated Act can be found in Chapter 6 of this manual.

When pursuing a DWI conviction against a person operating such vehicles, the prosecution should charge the driver under the DWI statute specific to that type of vehicle at issue, rather than the general DWI law, Section 66-8-102.

1.3.6 Within the State

For a defendant to be convicted of DWI in New Mexico, one of the matters the prosecution must prove is that the alleged offense was committed within the state of New Mexico. In this section, DWI on public versus private property will be discussed as well as issues relating to DWI and Native Americans and reservation lands.

DWI can occur on public or private property when the offense is cited under state law. In *State v. Johnson*, 2001-NMSC-001, ¶ 1, the Supreme Court stated: "After a careful and in-depth analysis of the applicable statutes, existing case law, and the policy underlying our DWI legislation, we reject any public/private property distinction with respect to the offense of DWI."

The *Johnson* court ruled that the legislature did not intend to place a geographical limitation on the offense of DWI depending on the type of activity constituting the "driving" of a vehicle. The only geographical limitation to the offense of DWI is found in the statutory operative words "within this state." The plain meaning of "within this state" is quite broad and does not specify a distinction between public and private property in the interior of the state of New Mexico. In general, therefore, the DWI statute has no geographical limitation and applies to both public and private property.

Municipal Court: A municipal DWI ordinance applies to conduct on private property only if the private property owner has consented in writing to municipal regulation. Under §3-49-1(L), municipalities have authority to "regulate traffic and sales upon streets, sidewalks and public places." The same statute says that municipalities may "with the written consent of the owner, regulate the speed and traffic conditions on private property." §3-49-1(O).

In *City of Rio Rancho v. Young*, 119 N.M. 324 (Ct. App. 1995), the court ruled that a defendant cannot be convicted of DWI under a municipal ordinance for conduct on private property unless the owner had previously consented in writing to municipal regulation of traffic on the property. The court concluded that while municipalities have authority to regulate traffic conditions within the municipality, their power to control traffic activities on private property is contingent on first obtaining the written consent of the property owner. This requirement applies to all municipalities, regardless of whether they have home rule designation. See also, *City of Las Cruces v. Rogers*, 2009 –NMSC-042.

Native Americans and State Court Jurisdiction for DWI

Because New Mexico contains several Indian reservations, and those reservations are sovereign nations, there may be jurisdictional problems with DWI cases arising on reservation land. *United States v. McBratney*, 104 U.S. 621 (1881). As a general principle, the state does not have jurisdiction over crimes committed by an Indian in Indian country. *State v. Dick*, 1999-NMCA-062, ¶ 8. Under 18 U.S.C. §1151, Indian country means Indian reservations, Indian allotments, pueblos, and dependent Indian communities. The U.S. Supreme Court has established a two-prong test for determining what constitutes a dependent Indian community. In *Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 527 (1998), the court held that an area is a dependent Indian community if: (1) the land was set aside by the federal government for the use of Indians as Indian land; and (2) the land is under federal superintendence.

The New Mexico Supreme Court adopted this two-prong test in *State v. Frank*, 2002-NMSC-026, for determining state court jurisdiction over Indians in criminal and civil cases. The *Frank* court upheld the district court's conclusion that the state had jurisdiction over a member of the Navajo nation on charges of vehicular homicide occurring on a state road in a checkerboard area that was not a dependent Indian community under the *Venetie* test.

Under the reasoning of case law, a non-Indian arrested for DWI on reservation land should be subject to state court jurisdiction. *Draper v. United States*, 164 U.S. 240 (1896). In keeping with these decisions, the New mexico Supreme Court has held that a state court has jurisdiction to try a non-Indian on a charge of DWI allegedly occurring on an Indian reservation. *Ryder v. State*, 98 N.M. 316 (1982).

An Indian arrested for DWI on a reservation or other areas of Indian country is subject to either federal court jurisdiction under the General Crimes Act or tribal court jurisdiction. *State v. Begay*, 105 N.M. 498 (Ct. App. 1987); *State v. Ortiz*, 105 N.M. 308 (Ct. App. 1986). Conversely, an Indian arrested for DWI in non-Indian country is subject to state or municipal court jurisdiction. *State v. Frank*, 2002-NMSC-026.

State v. Harrison, 2010-NMSC-038 dealt with the issue of a local law enforcement officer's entry onto Indian Country to pursue and investigate an alleged intoxicated driver. The defendant was observed speeding on a county road. When the officer attempted to stop the vehicle, the defendant continued driving and, at some point, threw a bottle out a window. The officer pursued the vehicle and stopped it about 1/3 of a mile into reservation land. The officer asked and the defendant agreed to perform field sobriety tests which, in the officer's opinion indicated intoxication. The officer, knowing he did not have authority to arrest on the reservation, and unable to get help from the reservation law enforcement agency, let the defendant walk home. The officer then got an arrest warrant which was served in accordance with the tribal code.

The New Mexico Supreme Court held that the officer had the authority to pursue the defendant onto tribal lands and conduct an investigation "so long as the investigation does not infringe on tribal sovereignty by circumventing or contravening a governing tribal procedure." *Harrison* ¶34. Here, since there was no tribal procedure regarding field sobriety tests, there was no infringement and the officer proceeded properly by securing the arrest warrant.

1.3.7 Uniformed Officer

New Mexico law requires that arrests for traffic violations and misdemeanor Motor Vehicle Code offenses be made by officers in uniform:

- "No person shall be arrested for violating the Motor Vehicle Code or other law relating to motor vehicles punishable as a misdemeanor except by a commissioned, salaried peace officer who, at the time of arrest, is wearing a uniform clearly indicating his official status." §66-8-124(A).

- "Members of the New Mexico state police, sheriffs, and their salaried deputies and members of any municipal police force may not make arrest for traffic violations if not in uniform; however, nothing in this section shall be construed to prohibit the arrest, without warrant, by a peace officer of any person when probable cause exists to believe that a felony crime has been committed or in nontraffic cases." §66-8-125(C).

How to Determine if Officer was "in Uniform" for Arrest

The Court of Appeals examined the meaning of the uniformed officer requirement in *State v. Archuleta*, 118 N.M. 160 (Ct. App. 1994), where the defendant was stopped and issued a citation for speeding. The court stated that "it seems clear enough that the intention of the

legislature in requiring the officer to wear a uniform plainly indicating his official status was to enable the motorist to be certain that the officer who stops him is, in fact, a police officer." *Archuleta* at 162. Recognizing that police officers may have more than one uniform or may wear different combinations, the court adopted two alternative tests for determining if an officer is in "uniform" within the intent of the statute:

- Objective Test: whether there are sufficient indicia that would permit a reasonable person to believe the person purporting to be a police officer is, in fact, who he claims to be. This objective test best suits more populated areas or persons traveling through the state;

or

- Subjective Test: whether the person stopped and cited either personally knows the officer or has information that should cause him to believe the person making the stop is an officer with official status. This subjective test may be appropriate in small towns where everyone knows the officer and recognizes his official status.

The court in *Archuleta* determined the facts of the case satisfied both tests. The officer was using a marked police car and was wearing a windbreaker with "Albuquerque Police" clearly marked in two places. This supported a finding that he was wearing a uniform clearly indicating his official status. The officer testified it was APD's policy for off-duty officers making a traffic stop to wear either jackets or wind-breakers displaying the police shield on the front and the shoulder when they are able to do so. This evidence satisfied the objective test. In addition, the trial court could infer the defendant actually knew the officer was a police officer and was acting in his official capacity. The defendant pulled up alongside the police car, accelerated after observing the officer in civilian clothes, and then abruptly confronted the officer about his lack of uniform immediately after the stop. These facts would permit an inference that the defendant, a former law enforcement officer, was trying to taunt the officer and challenge his official status because of his apparel. The trial court could find the defendant demonstrated little doubt regarding his knowledge of the officer's official status. This satisfied the subjective test.

Non-Uniformed Officer with Reasonable Suspicion Can Make Traffic Stop to Investigate, But Not Arrest

Note that an officer with reasonable suspicion that the law has been or is being violated may stop a vehicle to investigate, even if the officer is not in uniform and not displaying his or her badge. In *State v. Ray*, 91 N.M. 67 (Ct. App. 1977), the defendant challenged an arrest based on an earlier version of §66-8-124(A), which at that time stated: "No person shall be arrested for violating the Motor Vehicle Code or other law relating to motor vehicles punishable as a misdemeanor except by a full-time, salaried peace officer who, at the time of arrest, is wearing a uniform clearly indicating his official status." The Court of Appeals ruled the statute "does not prevent officers from carrying out their duty to investigate possible criminal behavior even if the officers are not in uniform. The statute may prevent an arrest if the arrest is to be for violations covered by the statute and the officer is not in uniform. In those circumstances the plain clothes officer would have to wait for the arrival of the uniformed

officer." *Ray* at 70.

1.4 DWI: A Strict Liability Criminal Offense

Many types of criminal offenses require the prosecution to prove beyond a reasonable doubt that the actions of the accused were done with a specific intent to do a further act or achieve a further consequence**.** Such offenses are generally known as "specific intent" crimes. For example, aggravated battery is a specific intent offense given that the prosecution must prove the accused had the specific intent to knowingly injure a person.

In contrast to "specific intent" crimes, "[a] strict liability crime is one which imposes a criminal sanction for an unlawful act without requiring a showing of criminal intent." *State v. Lucero*, 87 N.M. 242 (Ct. App. 1975). The rationale for making an act criminal without regard to the alleged perpetrator's intent is that the public interest is so compelling, or the potential harm so great, that the public interest must override the individual's interests. *State v. Barber*, 91 N.M. 764 (Ct. App. 1978).

Intent of the Driver Need Not be Proven in a DWI Prosecution – Vehicle in Motion

In *State v. Harrison*, 115 N.M. 73, 78 (Ct. App. 1992), the Court of Appeals held that DWI is a crime, in and of itself, regardless of the intent of the driver, and therefore it is a strict liability crime. The court analyzed the state's DWI statute, §66-8-102, and noted it made absolutely no reference to a required intent on the part of a driver. Instead, the court determined §66-8-102 clearly provides the only thing necessary to convict a defendant of DWI is proof beyond a reasonable doubt that the defendant was driving a vehicle either under the influence of intoxicating liquor or while he had a specific percentage of alcohol in his blood. *Harrison* at 77. In other words, the prosecution, while required to prove the statutory elements of DWI beyond a reasonable doubt, need not also prove the defendant specifically intended to drive while under the influence of intoxicating liquor. In reaching its conclusion the court also relied on the public's interest in deterring DWI, given the dangers in such activity not only to those who drive while DWI but also to the general public who are injured or killed as a result of a DWI driver.

Intent of the Driver Needs to be Proven in a DWI Prosecution – Vehicle Not in Motion

As discussed earlier in this chapter, the 2010 case of *State v. Sims*, 2010-NMSC-027, changed the way DWI must be proven in a case where an officer comes upon a defendant in a vehicle that is not in motion. While maintaining that DWI is a strict liability offense when a vehicle is in motion, the Court held that if the vehicle is stationary, either a general intent to drive or circumstantial evidence of past driving must be proven. See section 1.3.4 for a full discussion of *Sims* and *Mailman*.

Prosecution's Burden of Proof "Beyond a Reasonable Doubt"

It is vital to remember that DWI, as a strict liability criminal offense, still requires the prosecution prove all of the statutory elements of the charge beyond a reasonable doubt. This

burden always applies regardless of whether the prosecutor is a District Attorney, City Attorney or a law enforcement officer acting as a prosecutor. This burden always applies regardless of whether the judge or a jury is the fact finder.

Uniform Jury Instruction Criminal 14-5060 deals with the prosecution's burden of proof and the presumption of innocence. It states:

> The law presumes the defendant to be innocent unless and until you are satisfied beyond a reasonable doubt of his guilt. The burden is always on the state to prove guilt beyond a reasonable doubt. It is not required that the state prove guilt beyond all possible doubt. The test is one of reasonable doubt. A reasonable doubt is a doubt based upon reason and common sense - the kind of doubt that would make a reasonable person hesitate to act in the graver and more important affairs of life.

In all criminal cases, including DWI, the defendant has the right to remain silent and is not required to prove his or her innocence. If the defendant chooses to remain silent, it can never be held against the defendant by the judge or the jury. Nor can the prosecution comment about the defendant exercising his or her right to remain silent in any proceeding, whether it is arraignment, pre-trial, trial or post-trial.

1.5 Defenses to a DWI Prosecution

Since DWI is a strict liability offense, a defendant cannot validly present the defenses of, for example, "I did not intend to drive in that condition," or "I cannot be convicted of DWI because I was too drunk to form the conscious intent to drive drunk." *Harrison*, 115 N.M. at 78. As the court recognized, to allow that second defense would be absurd and contrary to the DWI statute's intended purpose. *Harrison* at 77.

As is the case in virtually every criminal prosecution, many defense challenges to the prosecution's ability to prove its DWI case depend on the specific facts of the case and their interpretation by the judge, with reference to both statutory and case law.

1.5.1 Common DWI Defenses

The most commonly seen areas of defense challenges to the prosecution's ability to prove its DWI case include:

- Did the officer have reasonable suspicion to stop or approach the driver?
- Was the defendant actually the "driver" of the vehicle or was the defendant properly determined to be "in actual physical control" of the vehicle?
- Did the officer follow and apply his training in DWI investigation and detection such that the observations of the driver's performance on Field Sobriety Tests should be admitted as evidence, and, if so, should those observations be persuasive?

- Did the officer have probable cause to arrest the driver for DWI?

- Did the officer follow and apply her training regarding the post-arrest requirements of a valid minimum twenty-minute deprivation, the reading of the Implied Consent advisories to the driver, and the breath and/or blood testing process?

- Did the prosecution meet the initial steps (the foundation) for the introduction of the breath and/or blood test results?

- If the BAC test was taken more than three hours after driving, did the prosecution, through "relation-back" evidence, meet its burden to prove the defendant was DWI at the actual time of driving?

This list is certainly not intended to be a thorough summary of the areas of focus in a DWI defense, but rather a breakdown of the most commonly seen challenges to the prosecution's efforts to prove its case.

1.5.2 Duress as a Defense

In *State v. Rios*, 1999-NMCA-069, the Court of Appeals held that the common-law defense of duress is available to defendants charged with the strict liability offense of DWI. In that case, the defendant claimed that, after leaving a bar, he and his brother were threatened with violence from an angry mob. Therefore, they both sought refuge in the defendant's truck, and, as the alleged attack continued, the defendant started the vehicle and slowly began to drive out of the parking lot. Almost immediately thereafter, the police arrived and eventually arrested the defendant for DWI. *Rios* at ¶ 2.

Under New Mexico law, the defense of duress in the context of a strict liability crime consists of four elements: (1) the defendant acted under unlawful and imminent threat of death or serious bodily injury; (2) the defendant did not find himself in a position that compelled him to violate the law due to his own recklessness; (3) the defendant had no reasonable legal alternative; and (4) the defendant's illegal conduct was directly caused by the threat of harm. *Rios* at ¶ 25.

If a defendant raises the defense of duress in a DWI prosecution, it is the defendant's burden to provide sufficient evidence to place the issue of duress before the court. In addition to considering all of the elements of a duress defense, the cornerstone of the analysis is that the defendant must have had no alternative, either before or during the event in question, to avoid violating the law. *Rios* at ¶¶ 17, 22.

A similar case was decided in 2010. In *State v. Tom*, 2010-NMCA-062, defendant also sought refuge in her vehicle from an altercation, and similar to the defendant in *Rios*, drove off because she felt she was in danger. However, going further than *Rios*, the defendant here stopped her vehicle and as the officers approached she drove off almost hitting the officers.

Defendant alleged that the prosecutor misstated the law of duress thereby depriving her of a fair trial.

The prosecutor stated that, in order to assert the defense of duress, the defendant must admit to the underlying crime – here, the DWI. The court held, that while a defendant must admit to some of the elements of the crime, they need not admit to all of them. Therefore, the defendant's admission of drinking some alcohol and of being the driver was sufficient to raise the defense of duress. The defendant does not have to admit to being impaired.

1.6 Conclusion

Perhaps no other criminal offense in New Mexico receives the attention that DWI does from the executive branch, the legislature, the courts, advocacy organizations, the media and the general public. However, despite the attention and the resulting public concerns and pressures it produces from those groups, it is vital for judges to keep in the forefront of their minds that the DWI defendant, like all other criminal defendants, is entitled to the presumption of being innocent until proven guilty and has the right to legal representation. It is likewise critical that judges require the prosecution to prove each of the statutory elements of DWI beyond a reasonable doubt. Finally, it is critical that judges remember that attorneys for both sides are obligated to zealously represent their clients, within the bounds of the law, and in accordance with legal ethics and the attorney code of conduct.

CHAPTER 2

Initial Stop, Field Sobriety Testing and Arrest

This chapter covers:

- Different types of traffic stops, including citizen reporting of DWI, guidelines for DWI roadblocks and the community caretaker role of police officers.
- Field sobriety tests, including the types of tests and inability or refusal to take the tests.
- Arrest and probable cause.

2.1 Overview

Before an officer may arrest an alleged DWI offender, he or she must follow certain prescribed steps. Many of those steps are very detailed, especially administration of both field sobriety tests and chemical tests (breath and/or blood) to determine alcohol or drug levels. An officer making a stop and subsequent arrest must be well trained in DWI detection, field sobriety tests, chemical tests, reports, citation and complaint writing, and how to testify in court.

The role of the judge is to determine from the evidence presented whether the arresting officer followed proper procedure at each step of the process. If the judge determines the officer proceeded correctly at the initial stop, investigation, testing and arrest, then the case should proceed to judgment on the charges filed. If a defendant, through counsel or *pro se*, challenges the officer's procedures at any step and the prosecution cannot provide adequate evidence to show the officer proceeded properly, the judge may consider granting a motion to suppress improperly obtained evidence and/or a motion to dismiss the charges, as appropriate. As with all criminal cases, in order to secure a conviction, the prosecution must prove the elements of the DWI charge beyond a reasonable doubt.

2.2 Initial Stop: Traffic Stop Based on Violation of Law

"Reasonable Suspicion" Defined

Before an officer may make a suspected DWI traffic stop, or any traffic stop, the officer must have "reasonable suspicion" to do so. This standard is separate from, and lower than, the probable cause standard needed to make an arrest and therefore more easily satisfied. To show reasonable suspicion, the officer must be "aware of specific articulable facts, together

with rational inferences from those facts," and, based on those facts and inferences, reasonably believe that a violation of the law has occurred or is occurring. *State v. Galvan*, 90 N.M. 129, 131 (Ct. App. 1977). Whether an officer has reasonable suspicion to stop a vehicle is based on the totality of the circumstances surrounding the stop. To define reasonable suspicion in a less complicated manner, if the officer can persuasively explain to the court what was seen and why that led the officer to reasonably believe the law had been or was being violated, reasonable suspicion will be shown.

To sum up, the relevant considerations for a court to consider when determining if there was valid reasonable suspicion for a traffic stop are:

- whether the officer had knowledge of specific facts that he or she can satisfactorily and persuasively explain to the court;
- whether the officer's inferences from those specific facts were reasonable, and;
- whether based on those facts and inferences, the court is persuaded that the officer was reasonable in his or her belief that the law was being, or had already been, violated.

Example: Officer Locke persuasively testifies he observed a late model red four-door Lexus traveling southbound with both driver's side tires in the adjacent traffic lane by approximately two feet [Specific Fact # 1], proceeding in both lanes for approximately one-half block [Specific Fact # 2], and then traveling back into its original lane of traffic. [Specific Fact # 3] The officer further testifies he observed the Lexus passing all other traffic around it [Specific Fact # 4] and gaining distance from his patrol unit, which was being driven at the speed limit. [Specific Fact # 5] Based on his observations and his twenty two years of speed detection and estimation, the officer persuasively testifies he estimated the vehicle was speeding over the posted limit. [Rational inference # 1] Officer Locke testifies that based on those observations, he stopped the vehicle both for failing to maintain lane and for speeding. [Reasonable belief that misdemeanor traffic laws were being violated.]

Hunches Are Not Sufficient for Reasonable Suspicion

As noted earlier, reasonable suspicion must be based on an officer's awareness of specific articulable facts, along with rational inferences from those facts. Based on those facts and inferences, the officer reasonably believes that a violation of the law had taken place or was taking place. Given the need for specificity in the officer's facts and observations and reasonableness in any inferences from them, an officer's hunch that the law has been or is being violated does not rise to the level of reasonable suspicion.

Considering the totality of the circumstances regarding the stop, the Court of Appeals in *State v Lackey*, 2005-NMCA-038, held that a stop was illegal. While investigating an automobile crash, officers observed the defendant drive by the scene twice. The officers testified that, based on their experience, DWI suspects frequently leave the scene of the accident, and this is why they stopped the vehicle. The court found this testimony unpersuasive given that the defendant was returning to the scene, not leaving. The court also relied on the fact that the area in question was one where the presence of traffic was not

unusual and there were other alternative reasons why a vehicle would be driven by a crash scene more than once. In other words, the totality of the circumstances did not support reasonable suspicion for the traffic stop. The testimony of the officers revealed that their decision to stop the driver was essentially based on a hunch, which is not sufficient for reasonable suspicion purposes.

Example: Officer Rodriguez testifies that, based on the lateness of the hour and the slow speed at which a vehicle was traveling, he felt the driver was "up to no good" or was "casing the area for places to break into" and therefore, stopped the vehicle. This is not proper reasonable suspicion given that the officer's inference of illegal activity is not a reasonable one to draw simply from his observations of a slow moving vehicle traveling at a late hour of the night.

Mistaken Reasonable Suspicion

In some instances, what a law enforcement officer originally believes was reasonable suspicion for a traffic stop or initial contact turns out to be incorrect. An example of this is where an officer reasonably believes that he observed the driver of a vehicle not wearing his or her seatbelt and makes a traffic stop based on that only to discover upon approach that the seatbelt is in fact being worn. Another example is where an officer observes from a distance an oncoming vehicle failing to maintain its traffic lane. The officer makes a stop only to discover that the driver was required to do so due to some minor road construction blockages in their traffic lane.

A reasonable suspicion may be a mistaken one on the part of law enforcement. *State v. Apodaca*, 112 N.M. 302, 304 (Ct. App. 1991). A lawful investigatory stop may be made on reasonable suspicion of an offense even though the defendant cannot ultimately be convicted of that offense. *State v. Mann*, 103 N.M. 660, 664 (Ct. App. 1985). In other words, in cases of mistaken reasonable suspicion, the issue is whether the court is persuaded that the officer made a reasonable mistake, as compared to creating a pretextual reason for the stop, such that the case can continue, not whether there is sufficient evidence to convict the driver for the offense that was the basis for the initial traffic stop. Even if the officer makes a mistake of law (the officer believes an act is illegal, when, in fact, it is not) the court will look at the totality of the circumstances to determine reasonable suspicion. *State v. Hubble*, 2009-NMSC-014.

An example of a pretextual stop would be where the court is not persuaded by the officer's testimony that he stopped the approaching vehicle for being operated at night with no headlights when compared to the driver's persuasive evidence that her brand new vehicle has functioning automatic headlights that were operating on the night in question. In that situation, the court would conclude that reasonable suspicion for the traffic stop was lacking and, therefore, the prosecution cannot proceed with its case.

Reasonable Suspicion: Traffic Stops Perhaps Indicative of Possible DWI

In the DWI context, the officer may observe an alleged traffic violation which his or her training indicates might be indicative of a possible DWI driver. Common traffic infractions of this type include a car failing to maintain its designated lane of traffic, being driven at erratic speeds, traveling at night with no headlights or a car that continues to sit at a traffic light after it has turned green.

These actions and inactions may indicate to the trained officer that the individual is not paying attention to the act of driving and this may perhaps be due to the influence of alcohol and/or drugs. If the officer can explain to the court's satisfaction what drew his or her attention to the offender's vehicle and why the officer felt a violation of the law had occurred or was occurring, the reasonable suspicion standard for the stop will be met.

Reasonable Suspicion: Traffic Stops Not Necessarily Indicative of DWI

It is a common occurrence that an officer stops a motorist for a traffic offense without initially having any reason to suspect DWI. For example, an officer may stop a car based on the observation that it lacks a valid registration tag or for a seat belt violation. Upon making contact with the driver, the officer then may observe indicators that provide reasonable grounds to conduct a DWI investigation, such as an odor of an alcoholic beverage, slurred speech or an open container of liquor. Here again, if the officer can explain to the court's satisfaction what drew his or her initial attention to the offender's vehicle and why the officer felt a violation of the law had occurred or was occurring, the reasonable suspicion standard for the stop will be met.

Most DWI investigations and charges stem from a traffic stop of a motorist by law enforcement in response to an officer's observation of some type of traffic offense. However, a DWI investigation can also commence from an officer's exercise of his or her community caretaking function, whereby the officer either stops a moving vehicle or comes upon an already stopped vehicle to check on the safety and welfare of the motorist. DWI investigations can also commence from a concerned citizen's report about improper driving they allegedly witnessed. DWI cases can also begin with an initial contact at a DWI or other type of vehicle checkpoint. What follows is a discussion of DWI cases commencing from those types of initial contact situations.

2.2.1 Community Caretaker Vehicle Stops or Approaches

It is well established that an officer may "stop a vehicle for a specific, articulable safety concern." *Apodaca v. State ex rel. Tax & Revenue Dep't.*, 118 N.M. 624, 626 (Ct. App. 1994). This is known as the "community caretaker" function of law enforcement. Officers have a duty to stop a vehicle if they believe someone in the vehicle may be in danger or might require assistance. The same law enforcement duty applies to vehicles which are already stopped where there may be a need for assistance. In *Apodaca*, a motorcycle was stopped because the officer observed it weaving within its lane. This did not rise to the level of suspicion of DWI, but the officer was justified in stopping the vehicle out of concern the

rider may have been having some physical or mechanical problems. Later investigation resulted in a charge of DWI, but this did not affect the lawfulness of the community caretaker stop.

Another case resulted in a DWI charge being dismissed on a directed verdict due to the court's finding that a valid community caretaker function was not proven. In *State v. Joe*, 2003-NMCA-071, the officer testified he was concerned about the safety of the public and stopped the vehicle because it was dusk and the driver had not turned on his headlights as had all other drivers. At trial, the officer testified several times he could see the vehicle from 500 yards away. The court held this was not a proper exercise of the community caretaker function because, if the officer could see the vehicle from that distance, there was no valid basis for his concern about the need for the driver to turn on his headlights. In other words, the totality of the circumstances did not support a specific, articulable and reasonable safety concern.

Another example of community caretaker contact is where an officer observes a vehicle on the side of the road with a flat tire or some indication of mechanical problems. A community caretaker approach may also be taken where an officer observes a parked vehicle in which a driver appears to be incapacitated or passed out and contact is made to see if medical attention is necessary.

2.2.2 Citizen Reporting of Possible DWI or Other Violations of Law

With the proliferation of cell phones it is not uncommon for citizens to call police to report suspicious or improper driving. In fact, the state of New Mexico has set up a designated hotline number for citizens to report suspected DWI motorists.

What happens when an officer comes upon a reported vehicle but observes no problems with the driving? This was the situation in *State v Contreras*, 2003-NMCA-129, where police dispatch received an anonymous call that described a vehicle the caller said had been "driving erratically." When officers came upon the vehicle, they did not observe any erratic driving but stopped it anyway. After observing signs of intoxication, officers had the defendant perform field sobriety tests, and he was eventually arrested for DWI.

In upholding the conviction, the court held that for an anonymous tip to be the basis for establishing reasonable suspicion to stop a vehicle, there must be enough information to believe that "a crime was being or was about to be committed, or . . . the possible danger to public safety was sufficient . . . to conduct the investigatory stop." *Contreras* at ¶ 7.
The court found the caller's tip was specific about the description and location of the vehicle and little time had passed between the tip and the stop. Additionally, the court noted that New Mexico courts have long held that eyewitness citizen informants are inherently reliable. Lastly, it determined the interest in protecting the public from a possibly dangerous driver outweighed the driver's right to be free from interference with his or her liberty. The court acknowledged this was especially true in drunk-driving cases, where serious harm or death to others can result. Considering all of these factors together, the Court of Appeals held the

anonymous tip from an eyewitness was sufficient to provide reasonable suspicion for the stop of the vehicle and further investigation.

Factors to Consider in Citizen Informant Cases

The critical considerations in citizen informant DWI cases are:

> (1) the level of specificity provided by the citizen in their outreach to law enforcement regarding the description of the vehicle, what was observed regarding that vehicle's operation, and the location in which the observations were made; and
>
> (2) the amount of time which passed between when law enforcement was advised and when they made the traffic stop.

If sufficient details are provided in the citizen's information, the officer does not have to witness a traffic infraction before a stop of the identified vehicle can be made.

2.2.3 DWI and Other Types of Checkpoints (Roadblocks)

A DWI or other checkpoint acts as a substitute for individualized reasonable suspicion when it meets constitutional requirements and is determined to be reasonable in its design, set-up and operation. A DWI checkpoint, also known as a sobriety checkpoint or roadblock, is valid if there is "evidence to ensure that an individual's reasonable expectation of privacy is not subject to arbitrary invasion solely at the unfettered discretion of officers in the field." *City of Las Cruces v. Betancourt*, 105 N.M. 655, 658 (1987). In *Betancourt*, the New Mexico Supreme Court set out eight guidelines that must be considered by the court "in determining the reasonableness of a roadblock." *Betancourt* at 658. These guidelines apply to DWI checkpoints as well as checkpoints for other purposes, such as license and registration checks. *Betancourt* at 659. The guidelines are:

1. **Supervisory personnel must be involved in the planning of the checkpoint**. These personnel must approve both the site of the checkpoint and the specific procedures to be followed.

2. **There must be very little to no discretion allowed the officers conducting the checkpoint.** In other words, they must be instructed to follow a uniform pattern, such as stopping every vehicle or every third vehicle. Additionally, the officers should be instructed on uniform procedures on how to deal with each driver, so that as nearly as possible all drivers are dealt with in precisely the same manner.

3. **Adequate safety measures must be in place to protect the officers and the motoring public.** These include properly placed lights and directional signs prior to, and while directing vehicles into, the roadblock, safety vests and equipment for the officers, and safety planning for the actual placement of the checkpoint.

4. **The location of the checkpoint must be safe and reasonable** and not intended to target a specific population.

5. **The time of the checkpoint's operation must be reasonable** and not at a time when it will impede a large volume of traffic.

6. **The official nature of the checkpoint must be apparent.** Officers must be in uniform, signs must be posted and marked police cars should be present.

7. **Motorists should not be subject to lengthy detentions.** Initial questioning should be brief, and if the officer needs to do further investigation, the motorist should be directed to another location.

8. **There should be advance publicity of the checkpoint**, although the specific location need not be publicized.

All of the *Betancourt* guidelines must be considered by the trial court, but none are absolutely required to be met to the court's satisfaction except the role of supervisory authority (the first guideline) and the restrictions on the discretion of the line officers (the second guideline). *State v. Bates*, 120 N.M. 457 (Ct. App. 1995). If the court determines that law enforcement failed to establish uniform procedures for dealing with motorists at a checkpoint, the checkpoint will not pass constitutional requirements and the initial contact will be determined to be invalid. *Bates* at 462-63.

Regarding the guideline pertaining to limitations on the discretion of line officers, slight deviation from the script or instructions given to officers on how to greet and deal with motorists upon initial contact does not violate constitutional concerns. *State v. Duarte*, 2007-NMCA-012, ¶¶ 35, 40. Thus, for example, an officer asking a driver the nonscripted or noninstructed question of whether the driver had been drinking that night is not problematic given that it is an appropriate, limited inquiry and the initial contact will still be minimal in duration and intensity. *Duarte*, ¶¶ 35, 37. However, such slight latitude does not mean line officers are allowed broad discretion in questioning motorists or deviating from the supervisory plan or script. *Duarte*, ¶ 41.

The Court of Appeals upheld a DWI conviction based on a checkpoint, even though the line officers violated certain *Betancourt* guidelines. In *State v. Villas*, 2002-NMCA-104, the defendant argued her conviction should be overturned because another driver who was stopped at the checkpoint and who had a BAC above the legal limit was not charged with DWI. That other driver was the brother of a police officer, and the line officers allowed another officer to take this individual home rather than charging him. The Court of Appeals held the *Betancourt* standards applied to "the constitutionality of a roadblock stop, and not later police actions." Here, the checkpoint was set up properly and the initial stop of the driver was lawful under *Betancourt*. The fact that the officers violated proper procedure was a matter for which they were later disciplined, but did not affect the validity of the checkpoint itself or the defendant's conviction.

The issue of whether a motorist can avoid a checkpoint was decided in *State v. Anaya*, 2009-NMSC-043. The defendant, presumably upon observing the checkpoint, made a legal U-turn. The officer, who was assigned to look out for this very thing, pursued and stopped defendant who was subsequently arrested for DWI. The officer testified that he was following the DWI checkpoint plan which required him to stop vehicles that turned away in an effort to evade the checkpoint. The Supreme Court, in overturning the decision of the Court of Appeals held that once an individual is within the signed area notifying them of the presence of the checkpoint, an officer has reasonable suspicion to stop that vehicle if the individual turns away from the checkpoint. The turning away will not be enough, however. The officer will need to prove that the turning away was in an effort to evade the checkpoint.

> The conclusion that a driver is attempting to avoid a checkpoint may be unreasonable in light of the circumstances of the stop—the time of day, the proximity of the turn to the checkpoint, or whether the driver's actions were typical considering the layout of the area and the normal flow of traffic.

Anaya, ¶17.

2.3 DWI Detection: Initial Contact between Officer and Driver

Regardless of the reason(s) the officer stops and/or comes into contact with a driver, that initial contact is critical with respect to how the officer, based on her training and experience, chooses to continue to deal with the driver from that point forward. The officer's training in observation of the driver at initial contact is how sometimes a seemingly routine traffic stop can ripen into a DWI investigation.

Consider the following scenario:

> Deputy Kingsbury is on routine patrol about 11 p.m. and observes a vehicle entering an intersection from the west, clearly seeing that it does not have a valid license registration sticker. The deputy makes a traffic stop intending to cite the person for that offense. The driver rolls down the window and the deputy notices a strong odor of an alcoholic beverage. [Observation Number One of Possible DWI.] The deputy may then shift focus from the registration violation to a preliminary determination of whether a DWI investigation is necessary. Deputy Kingsbury asks the driver for license, registration and proof of insurance. The driver fumbles while retrieving these documents. [Observation Number Two of Possible DWI.] The deputy notices the driver's speech is quite slurred. [Observation Number Three of Possible DWI.]

At this point in the above scenario, Deputy Kingsbury is probably more concerned with getting a possibly impaired driver off the road than with citing the driver for the initial registration violation. In court, the deputy should be prepared to testify to all of those initial observations and how, based on his training and experience in DWI detection, they provided the reasonable grounds for a DWI investigation.

Developing Reasonable Grounds for Conducting a DWI Investigation

When there is reason to suspect DWI from an initial contact, the officer is trained to make several observations before determining whether field sobriety tests are warranted. Three are mentioned above – odor of alcoholic beverage, fumbling for paperwork and slurred speech. The officer is also trained to observe the driver's physical characteristics: are the eyes bloodshot, watery or not open wide; are the pupils dilated or constricted; is the person speaking erratically or not making sense; is there any indication the person may have vomited; is the person looking exceptionally disheveled? Additionally, the officer may validly inquire of the motorist whether he or she has been consuming liquor.

Officers are further trained to look for indicators beyond the driver's physical characteristics during the initial stop. Officers are trained that any observations of open containers of alcohol, drugs or drug paraphernalia in the vehicle, or anything else that would indicate drinking or drug use should be noted and included in their police report. The better and more complete the officer's report, the greater the potential for more detailed testimony from the officer, allowing for a better and more informed decision from the judge or jury.

Any or all of these factors, together with other evidence of allegedly being under the influence, can be offered in court to assist the judge or jury in getting a complete picture of the driver for determining both whether there was a reasonable basis for conducting a DWI investigation and sufficient evidence beyond a reasonable doubt to convict for DWI. These observations are particularly important when the motorist refuses to take field sobriety tests, is unable to take the tests due to a physical disability, or refuses the chemical (breath and/or blood) tests. In these cases, the officer's observations of the driver are all the judge or jury may have to rely on in determining guilt or innocence.

In summation, regardless of the reason(s) for the initial contact between the driver and the officer, the officer is trained to be prepared to advise the court, in detail, about what specific observations she made about the driver and how that provided the reasonable grounds to conduct a DWI investigation.

2.4 DWI Investigation: Standardized Field Sobriety Tests (SFSTs)

When an officer suspects a driver may be DWI, the next step is to confirm or refute that suspicion through the administration of field sobriety tests (FST). The National Highway Traffic Safety Administration (NHTSA, http://www.nhtsa.gov) adopted, and now officers are trained in the use of, a series of three standardized field sobriety tests (SFST). All certified New Mexico law enforcement officers have been trained in the NHTSA SFSTs.

The general purpose of SFSTs is to distinguish between motorists who are above, or below, the presumptive .08 alcohol level. *State v. Lasworth*, 2002-NMCA-029, ¶¶ 16, 22. SFSTs are <u>not</u> designed to measure driving impairment, *Lasworth* at ¶ 16. It is important to note that SFSTs are <u>not</u> "pass/fail" tests, but, rather, investigative tools that assist law enforcement in the development of probable cause for a DWI arrest.

The three standardized tests chosen by NHTSA – the horizontal gaze nystagmus (HGN), walk-and-turn, and one-leg stand – all have specific purposes. The HGN test measures the physiological response of the eye. The walk-and-turn and one-leg stand tests are "divided attention" tests designed to assess a combination of cognition and dexterity. In other words, the officers are looking for the motorist's ability to: (1) follow the instructions on the SFSTs and; (2) physically perform those tests pursuant to those instructions.

NHTSA developed a scoring system using a specific number of clues, or indicators, for each test. Each clue, or indicator, counts as one point. The walk-and-turn test has a total of nine standardized clues, or indicators, which officers are trained to look for and document in a motorist's performance of that test. The one-leg stand has a total of five possible standardized clues, or indicators, officers are trained to look for and document. Pursuant to NHTSA's controlled tests on the walk-and-turn and one-leg stand, if a motorist exhibits two, or more, clues on either one of those tests, that is an indication that they are at, or above, the .08 alcohol level. Those specific indicators will be discussed in greater detail later in this chapter.

NHTSA's purpose in developing the SFSTs was to give officers a set of standards to follow to assist them in the determination of whether there is probable cause for arrest. These standards must be applied, in detail, to the driver's specific performance on SFSTs and then explained in detail to the judge or jury. In that way, there is no question regarding whether the officer acted arbitrarily or on a "gut reaction" when he or she arrested the driver for DWI.

2.4.1 Horizontal Eye Gaze Nystagmus (HGN) SFST

The first test in NHTSA's battery of SFSTs is the HGN test. While incorporating some of the elements of a divided attention test, this is primarily a physiological (relating to the functioning and activities of a living being) test.

Eyeball movement (nystagmus) is involuntary and is impacted by actions such as alcohol consumption and drug use. Because the driver cannot control the eye movement, NHTSA determined this test to be a good indicator of the level of intoxication. Along with the other two standardized FSTs, the HGN test may be used to assist an officer in estimating a driver's level of intoxication for purposes of developing probable cause.

It is important to remember that HGN test results may <u>not</u> be introduced in court as evidence to support guilt or innocence of <u>impaired driving</u>. Additionally, HGN test results should <u>not</u> be allowed into evidence by the court <u>unless</u> the prosecution can lay the proper and required scientific foundation for their admission. "Foundation" refers to the steps that must be met and/or testimony that must be provided, to the court's satisfaction, before it will allow introduction of the evidence in question for consideration by it with respect to a particular issue

HGN and the Admission of Scientific Evidence in Criminal Cases

The New Mexico Supreme Court ruled in *State v. Torres*, 1999-NMSC-010, that HGN is a scientific test requiring testimony supporting its scientific relevance and reliability before it may be introduced as evidence of guilt or innocence of DWI charges. That required testimony is an example of what is meant by a necessary "foundation" for the admission of evidence. Just as constructing the frame of a house is a necessary foundation to applying the roof, a scientific foundation is necessary before the prosecution can introduce HGN test results.

The *Torres* decision was based on the court's earlier decision in *State v. Alberico*, 116 N.M. 156 (1993). In *Alberico,* the court ruled scientific evidence may be admitted only after expert testimony establishes that the evidence is grounded in the methods and procedures of science. By "grounded," it means it has as its basis, or as its roots, established and recognized scientific methods and procedures. An example of alleged scientific testimony that would not be grounded in scientific methods and procedures is if an attorney attempted to introduce a scientist's testimony that the earth is flat, and that that conclusion was the result of a dream, not from reliable and valid scientific research and data calling into question the commonly understood principle that the earth is spherical.

In *Torres*, the court found that even though the HGN test was "generally accepted," this acceptance did not preclude the application of the "evidentiary reliability" standard given that the HGN constituted scientific evidence *Torres* at ¶ 30. Specifically the court reasoned that since the test was based on "principles of medicine and science not readily understandable to the jury . . . the HGN test is scientific evidence." *Torres* at ¶ 31 (citations omitted).

Therefore, before an officer will be allowed to testify about HGN test results, there must be sufficient underlying foundational testimony about the test itself, such as why the eyes jerk, how alcohol consumption impacts the jerk (the nystagmus), the amount of alcohol one has to consume before nystagmus appears, what physiological changes cause nystagmus, and whether there are conditions other than alcohol consumption that cause nystagmus. All of these questions should be answered before the court makes a determination about whether HGN is scientifically reliable.

The court concluded that since this type of knowledge is probably outside the training and expertise of most police officers, "they are not competent to establish that the test satisfies the relevant admissibility standard." *Torres* at ¶ 37. Rather, a scientist, researcher or medical doctor would be required to supply the scientific and medical data. Once it has been established that the HGN test meets the *Alberico/Daubert* standard of scientific reliability, then a properly trained officer would be able to testify about the "**administration** and **specific results** of the test." *Torres* at ¶ 47 (emphasis in original).

After the *Torres* decision, the New Mexico Court of Appeals decided a case involving expert testimony on the HGN. In *State v. Lasworth*, 2002-NMCA-029, the court ruled HGN did not meet the standard of scientific reliability based upon that expert's testimony. In *Lasworth*, the testifying expert was Dr. Marcelline Burns, a psychologist not a medical doctor, who

worked with NHTSA in developing the SFSTs including HGN. The district court ruled Dr. Burns could testify about the scientific reliability of HGN, but not the scientific validity of the test. The court indicated only a medical doctor or biologist could testify to this prong of the requirement set forth in *Torres*. Because both the reliability and validity prongs of the test were not met, the district court excluded HGN evidence.

The Court of Appeals agreed with the district court. While it agreed HGN is a valid test for "discriminat[ing] between drivers above and below the statutory BAC limit, the court stated that [it was never intended] to measure driving impairment." *Lasworth* at ¶ 15 (quoting J. Stuster & M. Burns, *Validation of the Standardized Field Sobriety Test Battery at BAC's Below 0.10 Percent, Final Report to NHTSA* (1998)). The court noted that just because the test was scientifically valid for one purpose did not make it valid for other purposes. The Court of Appeals, therefore, held HGN is not a valid, proven method of determining impairment and is not admissible for that purpose.

Interestingly, though, the court did state in footnote 4 that the results of HGN could be used "to establish probable cause for arresting a motorist or to establish 'reasonable grounds' for administering a chemical BAC test." *Lasworth* at ¶ 27.

HGN and the Current Practice in New Mexico Courts

As discussed above, there is a significant scientific foundation necessary to enable the prosecution to introduce HGN results, and a witness with scientific background is necessary to provide such a foundation. Therefore, the common practice in New Mexico DWI cases is that the prosecutor will not make efforts to introduce HGN eye movement results. Rather, the prosecutor will instead rely on the other evidence supporting probable cause for the arrest. The court also has the discretion to alert the prosecution and defense counsel, or *pro se* motorist, that it will not allow any HGN testimony absent a scientific foundation. Still other courts will allow the officer to testify to HGN observations other than the eye movement. Examples of this testimony include the driver moving his head contrary to HGN instructions, displaying a sway in his or her stance during the HGN test, and that the driver exhibited bloodshot and watery eyes and an odor of alcohol in his or her facial area during the HGN. In summary, as a result of the requirement for a scientific foundation, testimony regarding the eye movement in the HGN test has been discontinued in most courts in New Mexico.

In cases involving drug recognition experts (DRE), the New Mexico Court of Appeals has stated that the results of the HGN may be admitted as one of the series of tests given. DREs are law enforcement officers specially trained in recognizing drug use. In *State v. Aleman,* 2008-NMCA-137, the HGN was performed as part of a 12 step protocol performed by DRE's when impairment by drugs is suspected. Several doctors testified about the use of HGN and its reliability in predicting drug use. The court held that the DRE could testify as an expert witness about the HGN as one step in the protocol because the scientific reliability of the entire protocol had been proven.

2.4.2 Walk-and-Turn and One-Leg Stand SFSTs

The walk-and-turn and one-leg stand tests are called “divided attention” SFSTs in that drivers are required to simultaneously perform a variety of tasks that include physical performance and the mental ability to listen to and follow instructions. The purpose of divided attention SFSTs is to check the driver's cognitive function (i.e. whether the driver listens to and understands the instructions given by the officer) and to observe the driver's physical performance (i.e. whether the driver can maintain balance, walk a straight line, etc.).

Given the walking and balancing components of the walk-and-turn and one-leg stand, the NHTSA guidelines require officers to make efforts to ensure the tests are performed on as reasonably level and debris-free ground surface as is possible, with adequate lighting, either already present and/or officer-provided, and in weather conditions which reasonably would not impact test performance.

Pursuant to their training in DWI detection and investigation, officers are required to provide drivers a series of standardized instructions prior to their performance of the tests. Also pursuant to their training, officers should testify about the specific instructions given, that they were given according to NHTSA guidelines, that the driver was asked if the instructions were understood, and whether the driver indicated understanding of the instructions.

If the instructions were not given properly, if the driver did not understand the instructions, or if the SFSTs were performed in weather and lighting conditions which might have impacted the driver’s test performance, the integrity of the tests and the value of the testimony are put into question. In other words, the court may decide not to put that much, if any, “weight” (emphasis, significance) on the driver’s SFSTs performance as it relates to the issue of whether the DWI arrest was made with probable cause. An example of this would be if an officer testified he observed the driver raise her arms during the one-leg stand and, pursuant to his NHTSA SFSTs training, he noted that as one of the four potential indicators on that test. However, the officer’s testimony further reveals that contrary to his training, he never instructed the driver on the need to maintain her arms at her side during the one-leg stand. Given the absence of that required instruction, the court may decide to place no significance to the driver raising her arms on that test.

Pursuant to his or her DWI training, the officer is also required to demonstrate the proper performance of the test for the driver. While it is not necessary for the officer to perform the entire test, at least a portion must be shown. In fact, for safety reasons, officers are trained not to perform the entire walk-and-turn test because this would put them at too great a distance from drivers and it would also require officers to turn their back on motorists. At trial, the officer may be asked by the *pro se* defendant, defense attorney or judge to show exactly how the tests were explained and demonstrated at the time of the stop.

The testimony of the officer should also include whether the driver began the test too soon, if applicable, and specifically how the driver actually performed the SFSTs. Again, pursuant to his or her training in DWI investigations the officer must document the driver’s specific SFSTs performance and be able to articulate in court what clues, or indicators, were shown

by the driver and specifically how and when those clues were exhibited. For example, on the walk-and-turn, "Ms. Smith failed to touch heel-to-toe on all steps, front and back, by a distance of approximately 3 to 5 inches, stepped off the line five times, and failed to complete the turn as instructed, doing a military about-face, rather than short choppy steps, as was demonstrated." Or, in the case of the one-leg stand test, "Mr. Jones put his foot down at count 12, began again, put his foot down at count 14, raised his arms, contrary to the instructions provided, and said he couldn't continue."

Pursuant to his or her training, the officer must be specific about the clues, or indicators, he or she observed in the driver's performance on SFSTs. Officers may be tempted to just testify the driver simply "failed" the test or did poorly without explaining how and why. This is contrary to their detailed training in the SFSTs portion of DWI investigations. Keep in mind that SFSTs are not "pass/fail" tests. Therefore, in accordance with his or her training on DWI investigations, the officer is required to document the driver's SFSTs performance and should be required to describe exactly what the driver was able or unable to do. If the driver shows one or all of the SFSTs standardized indicators, each and every one of them should be documented by the law enforcement officer.

Officers may also able to forego the administration of SFSTs altogether if they believe attempts by a driver to perform the tests would pose a safety risk to the driver due to the impact of alleged severe impairment by alcohol. Examples of this would be where the driver falls out of his vehicle when exiting or has a difficult time maintaining his balance while simply standing and dealing with the officer. Other examples where law enforcement can forego FSTs altogether include where the officer has reasonable concerns about a driver fleeing on foot or for officer safety reasons, where a motorist is especially combative in his or her interactions with the officer during the DWI investigation.

Walk-and-Turn SFST and its Specific Indicators

This SFST requires the driver to take nine heel-to-toe steps in one direction, make a turn and then take an additional nine heel-to-toe steps in the opposite direction. The walk-and-turn has the following eight indicators, or clues, which officers are trained to look for and document in a driver's performance of the test. Each clue may be observed several times during the performance but is counted only once. Officers are trained to observe and document every aspect of a driver's SFSTs performance. However, law enforcement is specifically looking to see if a driver shows <u>at least two</u> of the possible nine indicators as part of the determination of probable cause for a DWI arrest.

- Cannot maintain proper stance while listening to the test instructions.
  (This means the driver does not maintain the heel-to-toe position throughout the instructions. The driver's feet must actually break apart to be counted as a clue. The clue is not recorded if the driver sways or uses arms to balance but still maintains heel-to-toe contact.)

- Starts too soon
  (This means the driver commences the walking part of the test before being instructed to do so.)

- Misses heel-to-toe contact while taking the steps.
  (This means the driver leaves a gap of greater than one-half (1/2) inch between heel and toe on any step.)

- Raises arm(s).
  (This means the driver raises arm(s) greater than six (6) inches away from the sides of their body to maintain balance.)

- Makes an improper turn.
  (This means the driver turns contrary to the officer's instruction and demonstration.)

- Stops walking.
  (This means the driver stops at any point between commencing to walk and the completion of the test.)

- Steps off of the line.
  (This means the driver's foot is entirely off of the line, whether it is an actual line or one the driver is instructed to visualize if an actual line is not available.)

- Takes an incorrect number of steps.
  (This means the driver takes more or less than the instructed nine (9) steps in either direction.)

- Fails to complete test.

One-Leg Stand SFST and its Specific Indicators

This SFST requires the driver to raise the foot of his or her choice off the ground approximately six (6) inches while counting aloud until the officer instructs them to stop, specifically for 30 seconds. The one-leg stand has the following four clues, or indicators, which officers are trained to look for and document in a driver's test performance. Each clue may be observed several times during the test but is counted only once. Officers are trained to observe and document every aspect of a driver's SFSTs performance. However, law enforcement is specifically trained to look for and document if a driver shows at least two of the possible five indicators as part of the determination of probable cause for a DWI arrest.

- Sways while balancing.
  (This means the driver exhibits a sway to their stance as a means of assisting themselves to maintain balance.)

- Drops raised foot.
  (Repeated drops are still counted as one indicator, however, officers should observe and document the total number of times the raised foot was dropped.)

- Raises arm(s) from the sides of their body.
  (Any distance the arm(s) are removed from the sides is to be counted as an indicator.)

- Hops to maintain balance.
  (This means the driver hops on the balancing foot as a means of assisting her stance while her other foot is raised.)

- Fails to complete test.

2.4.3 Inability to Perform Standardized FSTs and Use of Alternative FSTs

Occasionally, an officer will encounter a driver who, because of a temporary or permanent physical disability, is unable to perform SFSTs. Numerous physical conditions can render a driver unable to perform the tests. A driver may have a bad back and be unable to stand on one leg or walk heel-to-toe. Another motorist may be a paraplegic. Yet another may have inner ear problems affecting his or her ability to balance. The NHTSA guidelines on SFSTs include direction to law enforcement to take into consideration other factors as well, such as a motorist's weight and/or advanced age, when determining whether standardized FSTs should be administered.

Prior to administering any SFSTs, officers are trained to inquire into the driver's ability to perform the tests. In accordance with his or her training, the officer should explain what SFSTs generally involve and ask the driver about any physical ailments that would prohibit him or her from taking the tests or that would make taking the tests difficult. The officer should also be sure the driver's shoes will not affect the test, e.g. high heels, cowboy boots, "flip-flop" type sandals, etc. Officers may provide the driver the option of removing his or her footwear or they may make that request of the driver. If the motorist expresses concern about taking the tests, the officer needs to make a judgment call on whether to forego standardized FSTs and use alternative FSTs instead, or have the driver perform only standardized FSTs, but factor in the physical problems when assessing the performance. This last option may be problematic since the officer is not a medical expert. Therefore, it is difficult for the officer to distinguish which of the driver's FSTs indicators, or clues, are due to possible alcohol consumption versus which are due to a physical ailment.

In these situations, the better option, and the option outlined in the NHTSA guidelines, is to offer the driver alternative FSTs that do not involve balance, walking or other physical skills. If the officer has doubts about a motorist's claimed infirmity or physical limitations, the officer can administer a combination of standardized and alternative FSTs.

Examples of Alternative FSTs

Alternative FSTs, unlike the standardized FSTs, have not yet been scientifically validated in controlled testing situations. Therefore, there are no standardized clues, or indicators, in alternative FSTs. Some of these alternative FSTs presume a level of literacy which may not be present with the driver in question and, therefore, sometimes officers will make respectful inquiries of the driver to determine their mental capacity for performing some of the alternative FSTs.

Examples of the most commonly administered alternative FSTs include:

- Questioning techniques.
  (The driver is asked questions in a way that requires simple divided attention from him or her, such as asking for two things, e.g., driver's license and vehicle registration, or asking distracting or unusual questions.)

- Alphabet Recital.
  (The driver is asked to recite part of the alphabet beginning with a letter other than A and ending at a letter other than Z. Backwards recitation is never part of the test.)

- Count Down.
  (The driver is asked to count out loud 15 or more numbers in reverse.)

- Finger Count.
  (The driver is asked to touch the tip of his or her thumb in turn to the tip of each finger on the same hand while simultaneously counting up one, two, three, four, and then in reverse direction on the fingers while simultaneously counting down.)

- Finger to Nose.
  (The driver is asked to touch the tip of his or her nose with the tip of the index finger for a specific number of times.)

Given the lack of standardized indicators in alternative FSTs, some of the common signs officers are trained to look for and document include:

- Did the driver perform the tests in accordance with the instructions and demonstrations?

- Did the driver exhibit signs of intoxication during the alternative FSTs, such as a sway in balance, the odor of alcohol coming from the facial area, slurred speech or bloodshot, watery eyes.

- Did the driver make any admissions about alcohol consumption, such as "I couldn't do this test sober!"

- Did the driver skip or repeat part of a test or perform it out of the instructed sequence?

2.4.4 Refusal to Take FSTs

Motorists do have the right to refuse to submit to FSTs given that there is nothing in the law which absolutely mandates that they have to perform such tests. For example, there is no criminal offense relating to a driver's refusal simply to submit to FSTs in a DWI investigation. What follows are discussions relating to drivers who wish to speak to an attorney before they will perform FSTs and how a law enforcement officer develops probable cause for a DWI arrest when there are no FSTs tests to consider.

Right to Counsel and Right to Remain Silent During FSTs

In some instances, drivers tell the officer they want to consult with their lawyer before agreeing to perform the tests. Courts are very consistent in their rulings regarding this: there is no right to consult with a lawyer prior to FSTs. *Armijo v. State ex. rel. Transp. Dept.*, 105 N.M. 771 (Ct. App. 1987).

Defendants have also argued that allowing testimony at trial of their refusal violates the right against self-incrimination protected by both the federal and New Mexico constitutions. Again, the courts agree such testimony is admissible. *State v. Wright*, 116 N.M. 832 (Ct. App. 1993). The rationale is that there is no constitutional right to refuse to take FSTs, nor is refusal to take the tests "a testimonial 'statement' within the Fifth Amendment; rather, it is best described as conduct indicating a consciousness of guilt." *Wright*, 116 N.M. at 835 (internal quotations omitted).

Probable Cause for Arrest in Refusal to Perform FSTs

A driver's FSTs refusal presents the officer with a dilemma. What will the officer use to establish probable cause to arrest? Can the refusal be used for that purpose? The New Mexico Supreme Court has stated a refusal to submit to breath and/or blood testing is "conduct indicating a consciousness of guilt." *McKay v. Davis*, 99 N.M. 29, 32 (1982). Given that, the officer can rely on observations of the defendant's driving, physical characteristics (speech, eyes, fumbling, etc.) as well as refusal to perform FSTs as the means of establishing probable cause. If the totality of all of these observations would lead the officer to believe a DWI crime has been committed, then probable cause to arrest exists. However, a motorist's refusal to submit to FSTs cannot, by itself, serve as sufficient probable cause for a DWI arrest.

A defendant's refusal to take FSTs at a roadblock was discussed in *State v. Sanchez*, 2001-NMCA-109, which posed the question of how an officer reaches the conclusion of probable cause to arrest when there are no FSTs and no observations of erratic driving. In *Sanchez*, the officer observed no erratic or improper driving as the motorist approached the roadblock and stopped. The driver gave the officer an identification card instead of producing the

requested driver's license. The officer testified he "noticed that the defendant had a strong odor of alcohol on his breath, and blood-shot, watery eyes." The defendant also admitted to drinking "two beers." The officer testified at this point he had "reasonable suspicion, but not probable cause" to think the defendant was DWI. *Sanchez* at ¶ 2-3. He asked the driver to perform FSTs and the driver refused, giving no reason. The officer testified this refusal raised his reasonable suspicion to probable cause to arrest for DWI. The driver subsequently refused to take a chemical test under the Implied Consent Act.

The main issue in *Sanchez* was whether the officer had probable cause to arrest for DWI, absent any observations of impaired driving and absent any FSTs. The appellate court stated an observation of impaired driving is not necessary if the officer can presume DWI based on all other observations. In *Sanchez*, the officer actually observed the defendant drive into the roadblock and noted signs of intoxication. The defendant also admitted to drinking beer. In addition, because refusal to take FSTs can indicate a "consciousness of guilt," see *McKay*, 99 N.M. at 32, the officer could "logically infer" the defendant refused the FSTs because he knew he was impaired. *Sanchez* at ¶ 9. Relying on this inference of guilt along with the observations of the officer and the defendant's admission, the court concluded there was sufficient evidence for probable cause to arrest the driver for DWI.

It is clear from *Sanchez* that mere refusal to take FSTs is but one factor that, standing alone, is not enough to give an officer probable cause to arrest. Rather, there must be other independent evidence, such as the officer's observations of the defendant (slurred speech, fumbling for identification, bloodshot eyes) or the defendant's admission to drinking, to reach the standard of probable cause to arrest. Despite the inference of consciousness of guilt based on refusal to take FSTs, there would be insufficient evidence to sustain a conviction without other indicators of DWI being provided to the court.

2.5 Probable Cause and Arrest

At this point in the process, the police officer has stopped the vehicle based on reasonable suspicion that an offense has been, or is being, committed or has made contact by other means, such as a DWI roadblock or a community caretaker function. The officer has also observed certain characteristics or behavior of the driver that leads the officer to believe the person may be DWI. Therefore, the officer has reasonable grounds to conduct a DWI investigation. Accordingly, the officer has the driver perform FSTs or notes a refusal to do so. Based on all of this, the officer should have formed an opinion regarding whether the person has been driving while under the influence of intoxicating liquor or drugs. In legal terms, the officer is developing the necessary "probable cause" to arrest.

"Probable Cause" Defined

Probable cause to arrest is a higher standard than reasonable suspicion, the standard necessary for a traffic stop. "Probable cause exists when the facts and circumstances within the officer's knowledge . . . are sufficient in themselves to warrant a man of reasonable caution to believe that an offense has been or is being committed." *State v. Blea*, 88 N.M. 538, 540 (Ct. App. 1975). In other words, probable cause is established if a reasonable

person, lacking the specialized knowledge and perspective of a law enforcement officer, who observed all that the officer observed, would believe the person was DWI. If after the investigation and FSTs, the officer lacks probable cause, the driver cannot be arrested. All three standardized FSTs, in addition to the officer's observations of the driver's physical characteristics and alternative FSTs, if given, can be used to either establish or rule out probable cause to arrest.

If the officer has probable cause, the driver can be validly arrested. An arrest involves placing the driver into the physical custody of the officer, usually by applying handcuffs and securing the person in the officer's patrol car for transport to the police station or some other place where the breath and/or blood alcohol testing will be administered.

The Misdemeanor Arrest Rule

Generally, an officer cannot make an arrest for a misdemeanor unless the offense is committed in the officer's presence. *State v. Ochoa,* 2008-NMSC-023 ¶11. This rule has created some problems in the area of DWI since, often, an officer does not arrive on the scene to observe the defendant driving. This is most true in cases involving crashes or in cases where the officer comes upon the defendant after the driving has taken place.

In *City of Las Cruces v. Sanchez,* 2009-NMSC-026, the officer, while investigating a crash in which all vehicle occupants had fled, discovered one of the passengers close by. The passenger identified the driver, and other officers checked the vehicle's registration, coming up with the same person. The information regarding this person was radioed to another officer who went to the defendant's residence. After receiving permission to search the home, defendant was found in the bathroom unconscious. He had injuries consistent with the deployment of a vehicle's air bag. Defendant was arrested and charged with DWI after he registered a .16 BAC.

The misdemeanor arrest rule contains an exception which allows officers to arrest "without a warrant any person….present at the scene of a motor vehicle accident." *Ochoa*, ¶12. Here, defendant had left the scene of the crash so the question before the court was, did the exception still apply? The court held that a person should not benefit by leaving the scene of an accident, especially in a DWI case where the evidence of intoxication dissipates over time. In the time it would take to get an arrest warrant, much if not all evidence of alcohol consumption could be gone. "Such a limitation would provide an intoxicated individual with an enticing incentive to flee." *Sanchez*, ¶15. As long as the arrest takes place in a reasonable amount of time, it will be allowed.

The situation of the parked car arose in *State v. Reger*, 2010-NMCA-056. The officer had responded to a call of a possible drunk driver. When the officer arrived the defendant was standing outside of his vehicle which was not running. Defendant stated he stopped because someone told him a light was out. The officer observed signs of intoxication, administered field sobriety tests and subsequently arrested defendant. The court, applying the test from *State v. Greyeyes*, 105 N.M. 549, 734 P.2d 789 (Ct. App. 1987), stated that all of the circumstantial evidence present to the officer was enough to allow an arrest. The defendant

admitted driving and exhibited signs of intoxication. Courts should not be required to submit to an "overly technical application of the misdemeanor arrest rule…" *Reger*, ¶17.

The New Mexico Supreme Court went even further in *City of Santa Fe v. Martinez*, 2010 – NMSC-033 when it declared that the misdemeanor arrest rule does not apply in DWI cases. Because DWI can be either a misdemeanor or a felony, and because the officer does not know which at the time of the stop and investigation, knowing when to apply the rule would be problematic. Additionally, because evidence in a DWI case is time sensitive, it is impractical to hold officers to a requirement that they must obtain a warrant. "[T]he warrantless arrest of one suspected of committing DWI is valid when supported by both probable cause and exigent circumstances." *Martinez*,¶16.

2.6 Conclusion

In summary, at this point in a DWI case before the court, it should be considering the following:

- Did the officer have reasonable suspicion to stop the vehicle either for an alleged traffic infraction or based on other reasons, such as a sufficiently detailed citizen tip or a valid community caretaker function?

- If the initial contact was at a DWI or other roadblock, did the prosecution meet its burden to show the roadblock was constitutional and reasonable in its design, set-up and operation, especially in the decisive factors of the role of supervisory authority and the limitations on the discretion of line officers?

- Did the officer observe, document and testify to specific details about the driver during the initial contact which provided reasonable grounds for a DWI investigation?

- Did the officer administer and document FSTs in accordance with his training and testify to the specific observations he made regarding how the driver performed on those tests?

- If no standardized FSTs were given, were alternative FSTs offered? If no FSTs whatsoever were administered did the officer explain the reason(s) for no such tests?

- Based on the totality of the evidence, did the officer have probable cause to arrest the driver for DWI?

CHAPTER 3

Post-Arrest and Pre-Breath and Blood Testing Issues

This chapter covers:

- Implied Consent Act advisories.
- Refusal situations regarding breath and/or blood tests, and subsequent change of mind.
- Right to an independent breath or blood alcohol test.
- Miranda warnings and right to counsel, including practical considerations.

3.1 Overview

At this point in the DWI investigative process, it is assumed that the officer has developed probable cause to arrest the driver for DWI and taken the driver into physical custody. Thus, in accordance with the officer's DWI training, he or she is beginning the post-arrest procedures of informing the driver of the Implied Consent advisories, conducting a deprivation/observation period on the driver, and administering the chemical (breath and/or blood) tests or noting a driver's refusal to submit to testing.

This chapter provides an in-depth overview of the Implied Consent advisories, the various methods by which a driver can refuse to submit to breath and/or blood testing and how a driver can validly change his or her mind after an initial refusal to submit to testing. The chapter also addresses the right to legal counsel at the DWI investigation stage and whether *Miranda* advisories are required at that time.

3.2 Implied Consent Act Advisories

Either immediately, or soon after the arrest, and always before breath and/or blood testing, the driver must be read an "Implied Consent Notice," by an officer. The Implied Consent Act, §§66-8-105 to 66-8-112, which applies to anyone "who operates a motor vehicle within this state," §66-8-107(A), requires a person under arrest for DWI to provide a breath and/or blood sample to determine his or her drug or alcohol content. A refusal to consent to the test(s) can result in a charge of aggravated DWI, §66-8-102(D)(3), a more severe sentence if convicted and a longer period of administrative driver's license revocation. §66-8-111(B).

Purposes Served by the Implied Consent Advisories

The purpose of the Implied Consent advisories is to inform the driver of her obligations under the Implied Consent Act (as a privilege of driving in New Mexico, the driver's consent to submit to breath and/or blood testing upon a DWI arrest is implied), her rights (the reasonable opportunity to arrange for an independent blood alcohol test at no cost to the driver, following her submission to the officer's requested test(s)), and the consequences of her refusal to submit to breath and/or blood testing (a criminal charge of aggravated DWI and a one-year administrative revocation of her driver's license). The Implied Consent advisories also work to inform motorists that their right to speak to an attorney does not apply at the breath and/or blood alcohol testing phase of a DWI investigation.

Municipal Court: Similar provisions are contained in UTO 12-6-12.1, Operating a Motor Vehicle Under the Influence of Intoxicating Liquor or Drugs; Chemical Testing; Officer to File Statement; Immediate License Revocation.

Be sure to check the wording of your local ordinance.

Implied Consent Advisories are Always Required

The Implied Consent advisories must be read to the driver, regardless of what type of test or tests (breath and/or blood) the officer is requesting. If the officer is requesting both breath and blood tests from the driver, it is sufficient that the Implied Consent advisories are read to the driver one time. Spanish language versions of the Implied Consent advisories are provided to all law enforcement agencies. It is best if the officer reads the notice verbatim. This ensures all the points are covered fully and correctly. It is not proper for the officer to merely point out the Implied Consent advisory poster, usually located near the breath testing equipment, or hand the driver the Implied Consent advisory card, and leave it up to the driver to read the information on his or her own.

Many officers have Implied Consent advisory cards in Spanish that they can read or hand to the driver to read. If this is not available of if the driver speaks a language not covered or understood by the officer, there should be some way to communicate the warnings to the driver.

The officer must advise the arrested person substantially as follows. See *State v. Jones,* 1998-NMCA-076.

Note: The language in this document was developed by an advisory group of police officers, district attorneys, the Scientific Laboratory Division, the Traffic Safety Bureau and other interested parties. *[Instructions to officer are in brackets]*

Operation DWI

1. [*First make sure the driver is listening. Start the advisory with a statement such as*]: "Listen to me. I'm about to tell you something important." [*Then read*]

   You are under arrest for _____.

2. [*Read*]:
   The New Mexico Implied Consent Act requires you to submit to a breath test, a blood test or both to determine the alcohol or drug content of your blood. After you take our tests, you have the right to choose an additional test.

3. [*Read*]:
   If you choose to take this additional test, you have the right to a reasonable opportunity to arrange for a physician, a licensed nurse, or laboratory technician or technologist who is employed by a hospital or physician of your own choice to perform an additional chemical test. The cost of the additional test will be paid by the law enforcement agency.

   Do you agree to take our tests? [*If "Yes," proceed with your tests. If "No," see #4. If the driver has taken your test and is requesting an additional test, you should allow him a reasonable opportunity to contact the appropriate person listed above to draw the blood. At a minimum, you should allow him use of a telephone to make arrangements. You cannot deny the driver the additional test just because there will be a delay in drawing the blood. Consult your agency directives whether your law enforcement blood technician can be called upon to offer to perform this test. Once the two tubes of blood are drawn, give the driver a receipt for his sample*].

4. *[If "No," or driver does not respond, read*]:
   I cannot force you to take our tests, but if you refuse you will lose your New Mexico driver's license or resident operator's privilege for one year. If you are convicted in court of Driving While Under the Influence, you may also receive a greater sentence because you refused to be tested. Do you understand?

   [*If "Yes," proceed to #6*]
   [*If "No," repeat #4 once and proceed to #6*]

5. [*If driver asks for an attorney or remains silent, read*]:
   Your right to speak to an attorney or remain silent does not apply to the requirements of New Mexico law that you take blood and/or breath tests.

6. [*Read*]:

Do you agree to be tested?
[*If "Yes," proceed with the test*].
[*If "No", or driver does not respond or does not give an adequate breath sample, proceed to #7]*
[*If breath test result is inconsistent with observed impairment, return to #2 and #3 for agreement to a blood test*].

7. [*Read*]:
I consider your actions a refusal to be tested.

After advising the driver of the Implied Consent information, if the driver agrees to a breath and/or blood test, then the officer may administer it. If the driver refuses to take the test(s), they cannot be forced to submit to testing and the officer must read the portion of the Implied Consent advisories informing the driver of the possible consequences of refusing to take the test(s). If a motorist never questions the officer about his right to an attorney or specifically requests to speak to an attorney, it is not necessary that the officer read the portion of the advisories stating that the right to counsel does not exist at that stage of the DWI investigation.

3.3 Refusal to Submit to Breath and/or Blood Testing

If the driver refuses to submit to testing, no test(s) may be given except under very limited circumstances. The driver will be charged with aggravated DWI based on the refusal. There can be many issues to consider in determining whether a driver has, in fact, refused to take a test.

3.3.1 "Clear" or Unequivocal Refusal

Obviously, if the driver verbally expresses a definite refusal, such as by saying, "No, I will not/do not want to take the test," this clearly constitutes a refusal. What if the driver says nothing? This also can constitute a refusal if, by the driver's silence and actions or inactions, it is clear to the officer the driver will not submit to the test. For example, officers will sometimes testify that when the breath tube was offered to the silent driver, he made no efforts to accept it. Where the driver is alleged to have refused solely by actions, the officer should be prepared to provide detailed testimony regarding exactly what those actions were to assist the judge or jury in its determination of whether the officer was reasonable in his or her determination that the driver's actions evidenced a refusal to submit to testing. In summation, "clear" or unequivocal refusals can be by words, actions or a combination of both.

3.3.2 Refusal Based on Insufficient Sample

A dilemma is presented when the driver agrees to take the test, but seemingly fails to obey the instructions on how to perform the breath test. For the Intoxilyzer models of breath

testing equipment, the printed breath test card will read either "insufficient sample" or "no sample introduced," in these types of situations.

These situations require the officer to determine whether the driver's actions are a refusal versus an inability to provide adequate air samples. This can occur, for example, when the driver does not or cannot blow into the machine properly. If this is the case, the officer must make efforts to ensure there is no physiological reason for the failure before concluding the driver is, by his or her actions, refusing. If there is a medical reason for the failure (such as asthma or some other breathing difficulty), the officer should arrange for a blood test to be administered. (See discussion in the next chapter regarding blood sample alcohol concentration tests.)

A driver who agrees to take the test, but who, due to the impacts of intoxication, is unable to follow instructions may also be said to have refused. The officer does have the option in those situations to select a blood test rather than a breath test. However, the officer is not required to move to a blood test in those situations.

3.3.3 Refusal Based on Only One Measurable Breath Sample

The Court of Appeals has dealt with the issue of whether a driver's actions of submitting only one breath sample, rather than the two provided for in the Scientific Laboratory Division (SLD) regulations, can constitute a refusal to submit to breath alcohol testing. In *State v. Vaughn*, 2005-NMCA-07, the driver submitted one breath sample, which registered 0.16, twice the statutory .08 limit. After seeing that breath score, the driver then blew into the testing equipment a second and third time resulting in readings of "insufficient sample" and "no sample introduced." The officer testified the testing equipment was working properly, having passed its internal diagnostic and calibration checks. The officer further testified he felt the driver's actions of failing to blow properly were intentional. In contrast, the driver testified he neither refused to blow nor refused to follow instructions. Instead, he explained he could not hear the officer's instructions due to a hearing impairment. The driver was charged with aggravated DWI based both on his one breath test score of 0.16 and his alleged refusal to provide two sufficient samples. *Vaughn* at ¶¶ 2, 3.

On appeal, the issue in *Vaughn* was whether the legislature intended that a driver could provide only one breath sample and still be found guilty of refusing to comply with the testing procedures established by the Implied Consent Act and the SLD regulations. The driver argued the trial court erred both in its interpretation of the refusal to submit to testing aggravated DWI statute, §66-8-102(D)(3), and the Implied Consent Act, when it concluded the driver refused to comply with testing based on having provided only one breath sample. *Vaughn* at ¶ 34.

In its analysis, the Court of Appeals reviewed the DWI statute, the Implied Consent Act and the applicable SLD regulations regarding the collection of breath alcohol samples. In so doing, the court determined that "[s]ince the Implied Consent Act references the authority of SLD to define testing, and SLD has clearly defined correct testing of breath as the collection of two samples, providing one sample is not submitting to testing "as provided for" in the

Act or as designated by SLD." Thus, the court concluded that "[t]hose who provided one sample therefore have refused to take the test as designated by SLD." *Vaughn* at ¶ 40. Under the *Vaughn* analysis, anything less than two breath test samples is a refusal to submit to testing and therefore can constitute an aggravated DWI.

3.3.4 Refusal by Not Taking the Test Chosen by Law Enforcement

Once the driver has consented to take a chemical test, it is up to the arresting officer to specify what type of test or tests (breath and/or blood) will be administered. Section 66-8-107(A) states the type of test shall be "as determined by a law enforcement officer." What happens when a driver refuses to take the test selected by the officer, but states he will take a different type of test? This issue was discussed by the Court of Appeals in *Fugere v. State Tax & Revenue Dept., Motor Vehicle Division*, 120 N.M. 29 (Ct. App. 1995).

In *Fugere*, after being arrested for DWI, the driver was asked to take a breath alcohol test. The driver refused to take the test on the machine selected by the officer (an RBT III Alco-Sensor located in the officer's vehicle), but stated he would take a test on the breathalyzer located at the police station. The driver was advised the selection of the initial test was up to the officer, but after that test, the driver could take a test of his own choosing. The driver still refused the test on the RBT because "he did not trust the RBT." *Fugere,* 120 N.M. at 32. The officer informed him his words would be considered a refusal.

In *Fugere*, the Court of Appeals held the driver had only conditionally consented to take the test, and "[a] conditional consent is a refusal to take the test." *Fugere*, 120 N.M. at 32. Citing *In re Suazo*, 117 N.M. 785 (1994), (discussed in detail later in this chapter), the driver argued his agreeing to take the test at the police station "cured" his refusal. The court stated the *Suazo* analysis did not apply since the driver made no attempt to comply with the officer's request, but "insisted on taking the test on a machine of his own choosing." *Fugere,* 120 N.M. at 35.

The driver's conscious decision not to take a specific type of test constituted a refusal. The court stated that if the driver was concerned about the accuracy of the officer's selected testing method, he should have submitted to it, then taken an independent test of his own choosing, and argued unreliability of the initial test to the court. In short, the conclusion in *Fugere* is that a motorist cannot put conditions upon his or her agreement to submit to the officer's requested method(s) of testing.

3.3.5 Refusal by Taking One Test Chosen by Law Enforcement but Not the Second Test

New Mexico statutory law allows the officer to select a breath or blood test, or both. §66-8-107(B). Therefore, despite having received valid, measurable breath samples from a driver, the officer can request a blood sample as well. The same situation applies where a blood sample is initially obtained.

There may be a variety of reasons why an officer would request both breath and blood samples from a motorist. One example is where the officer suspects the driver's alleged intoxication might be from both drugs and alcohol; the breath test is to measure the alcohol content and the blood test is to analyze for the presence of illegal and/or legal drugs. Another example might be where the officer is concerned about whether the breath testing equipment is functioning properly, perhaps based on review of the log book entries regarding breath tests done on other motorists prior to the officer's driver. In that situation, despite the testing equipment appearing to be working properly in its receipt and analysis of the driver's breath samples, the officer might use the blood test as a back-up in the event the breath test results are challenged by the driver in court and subsequently not allowed into evidence.
When valid breath or blood testing occurs, it is a rare situation where an officer requests of the driver that he or she also submit to the alternative method of testing. To require that of a motorist would add to the duration of time the DWI investigation takes the officer. However, given that §66-8-107(B) gives law enforcement the authority to secure both breath and blood samples, a driver who submits to one form of testing but refuses to submit to the second form of requested testing can be charged with aggravated DWI, §66-8-102(D)(3), based on that refusal.

3.4 Subsequent Change of Mind after Initial Refusal of Test

The case of *In re Suazo*, 117 N.M. 785 (1994), addressed the issue of whether a refusal to submit to breath and/or blood testing can subsequently be changed to an agreement to take the test(s). In that case, the driver was asked to take a breathalyzer test and advised of the consequences of refusing to do so. He agreed to take the test, but, after three attempts during which he neither breathed hard enough nor long enough to obtain a measurable breath sample, the officer "determined that Suazo's failures were willful and amounted to a refusal to take the test." *Suazo*, 117 N.M. at 787. At that time, the driver did not allege any medical difficulty, nor did the officer detect any physical problems that would interfere with the test.

While being transported to jail, the driver asked to be taken to the hospital for treatment from his automobile accident. While there, he called his attorney, who later appeared at the hospital. The driver then agreed to take a blood alcohol test. That test was given two hours and fifteen minutes after the driver's initial refusal to take the breath test. The blood test resulted in a BAC of .04%.

Factors to Consider with Change of Mind after Refusal

After reviewing how other states handled such refusal/change of mind situations, the *Suazo* court adopted a "Flexible Rule Test," which allows a driver to change his or her mind regarding an initial refusal when:

1. The change of mind from refusal to consent is done "before the elapse of the reasonable length of time it would take to understand the consequences of . . . refusal;"
2. The "test would still be accurate" when given at a later time;
3. The equipment is "readily available" to perform the test;

4. There is no "substantial inconvenience or expense to the police" in honoring the change of mind request; and
5. The individual has "been in police custody and under observation for the whole time since his arrest."

Suazo, 117 N.M. at 793.

The court concluded these criteria balanced the needs of officers and the public with the concerns and possible initial confusion of drivers. The court reiterated the Flexible Rule Test would not significantly affect chemical testing procedures.

It is important to note the time delay for advising a change of mind must be "very short, never more than a matter of minutes." *Suazo,* 117 N.M. at 793. The court offered the standard of "reasonableness" in terms of the time delay in indicating a change of mind. The time allowed would be only that which it would take the driver to "comprehend his situation." *Suazo,* 117 N.M. at 794.

Driver's Burden to Show Change of Mind Meets the *Suazo* Criteria

It is up to the driver to prove he meets the criteria of the test. In *Suazo*, the court held that two hours and fifteen minutes did not meet the Flexible Rule Test and therefore the driver's change of mind would not cure his refusal. The trial court will need to apply the Flexible Rule Test to a case's specific facts, when presented with an alleged initial refusal and subsequent change of mind.

Note that while the *Suazo* case involved an administrative Implied Consent driver's license revocation, the Flexible Rule Test adopted by the Supreme Court is applicable in criminal DWI proceedings.

3.5 Driver's Right to an Independent Test

The Implied Consent Act allows a driver to request an independent test after submitting to the test(s) chosen by the officer. §66-8-109(B). This independent test must be performed by a qualified person of the driver's own choosing, such as a physician, licensed professional or practical nurse, laboratory technician or technologist employed by a hospital, or an independent physician. The cost of the independent test is the responsibility of the law enforcement agency involved in the DWI, not that of the motorist. The motorist must be advised of that in the Implied Consent advisories.

The Court of Appeals discussed the independent test provision in *State v. Jones*, 1998-NMCA-076. The first issue was whether the officer was required to read the notice to the defendant verbatim from the statute, and/or the standard Implied Consent advisory card used by the police, or whether substantial compliance was sufficient. The court held that as long as the officer complied with the purpose of the law, to inform the defendant of the "right to arrange to have an independent chemical test performed by a person of his or her own choosing," then recital of the exact words is not necessary. If it can be determined the driver

understood his or her rights and was not confused in any way, then substantial compliance with the statutory language will be sufficient to meet the requirements of the law.

In *State v. Duarte*, 2007-NMCA-012, ¶ 23, the appellate court stated that the trial court could reasonably conclude the law enforcement officer read to defendant what was written on the Implied Consent advisory card and that that included information about the right to an independent test. The evidence before the trial court included testimony from the officer that he read the Implied Consent advisories "exactly how it says on that card," that all Implied Consent advisory cards are standardized and are what are used by officers and that, among other information, the card contains a statement that a driver has the right to an independent test. *Duarte*, ¶ 21.

It is best if law enforcement officers read directly from the card, even though that is not legally required, and provide a complete summary while testifying about what information was given under the Implied Consent advisories. As the appellate court stated, this "would help reduce the need for the courts to consider each notice given under the statute for substantial compliance under the facts of that case." *Jones* at ¶ 21.

Driver Must be Given Reasonable Opportunity to Arrange Independent Test

On the second issue in *Jones*, the court held §66-8-109(B) not only allows the driver the right to have his blood analyzed by the person of his choosing, but also allows the blood to be drawn by a qualified person of his choosing. Balancing the right of the driver to have the independent test and the need to have tests taken within a reasonable period of time, the court held that the statute "does not guarantee the arrestee an additional test will be performed, but only that the arrestee will be given a reasonable opportunity to arrange for an additional test." *Jones* at ¶ 24. Law enforcement must give the driver an opportunity to use the telephone and phone directories to make these arrangements. Failure to do so violates the statute. Even if the driver's independent test is to be taken a significant amount of time after the arrest, it must be allowed to be performed on the driver's behalf. The results, however, are subject to attack by the prosecution based on their reliability due to lapse of time.

3.6 *Miranda* Warnings and Right to Counsel at Chemical Testing Stage

Miranda warnings and a citizen's right to legal counsel are both critical safeguards in our criminal justice system. However, neither of them is absolutely required each and every time a citizen is approached by law enforcement. In fact, there are limitations on the requirement of the *Miranda* warnings and right to counsel even when a person is being investigated for suspicion of DWI and following an arrest for that offense. What follows is a general discussion of the *Miranda* warnings and right to legal counsel followed by an overview of whether they are in fact required in DWI investigations.

3.6.1 *Miranda* Warnings, Generally

Miranda warnings, arising out of the U.S. Supreme Court decision in *Miranda v. Arizona*, 384 U.S. 436 (1966), inform individuals of their constitutional right against self-incrimination and their constitutional right to assistance of counsel. *Miranda* warnings must be given to an individual prior to actual custodial interrogation by a law enforcement officer, or its functional equivalent. The "functional equivalent" of custodial interrogation is defined as "words or actions on the part of the police…that the police should know are reasonably likely to elicit an incriminating response from the suspect." *State v. Pisio*, 119 N.M. 252, 257 (Ct. App. 1994) (quoting *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980)).

The warnings are intended to protect against any coercive effect of custodial police interrogation. If the warnings are not given and the individual does not knowingly and voluntarily waive his or her rights, nothing the individual says during custodial interrogation can be used as evidence against him or her. The individual's statements can be used only if the *Miranda* warnings were given and the individual made a valid waiver of rights.

Prior to custodial interrogation, a person "must be warned that he or she has the right to remain silent, that any statement he or she does make may be used as evidence against him or her, and that he or she has a right to the presence of an attorney, either retained or appointed." *Miranda*, 384 U.S. at 444. Although the Supreme Court did not require that a specific script be followed, *Miranda* warnings (also called "Advice of Rights") typically state:

> You have the right to remain silent.
> Anything you say can be used against you in court.
> You have the right to talk to a lawyer for advice before we ask you any questions and to have a lawyer present with you while we ask you questions.
> If you cannot afford a lawyer, one will be appointed at no cost to you before we ask you any questions, if that is your desire.
> If you decide to answer questions now, without a lawyer present, you will still have the right to stop answering my questions at any time. You also have the right to stop answering my questions at any time until you talk to a lawyer for advice.

See, e.g., *State v. Rascon*, 89 N.M. 254, 261 n. 4 (1976).

Miranda Warnings and Traffic Stops

As far back as 1984, the U.S. Supreme Court has held *Miranda* warnings are <u>not</u> required for a "routine traffic stop." In order for the *Miranda* requirement to come into play, the defendant must "demonstrate that, at any time between the initial stop and the arrest, he was subjected to restraints comparable to those associated with a formal arrest." *Berkemer v. McCarty*, 468 U.S. 420, 441 (1984).

In discussing that case in *Armijo v. State ex. rel. Transp. Dept.*, 105 N.M. 771 (Ct. App. 1987), the New Mexico Court of Appeals held even though a defendant suspected of DWI

was asked to perform FSTs during a traffic stop, the investigation and request to perform FSTs did not constitute restraint comparable to formal arrest as required by *Berkemer*. The defendant in *Berkemer* was found not to have been "in custody," thus eliminating the need to give *Miranda* warnings. Citing other New Mexico cases, the court held:

- "The fact the motorist may temporarily feel he is not free to leave does not render him "in custody" for purposes of *Miranda*."
- "The privilege against self-incrimination is not necessarily implicated whenever a person is compelled in some way to cooperate in developing evidence which may be used against him."
- "[Q]uestions asked by officers during their investigations are not subject to *Miranda* warnings if the defendant is not in custody."
- On-the-scene roadside questioning does not require advisement of *Miranda* rights.
- "A field sobriety test, in and of itself, does not violate this privilege."
- "Inculpatory statements made to police during the traffic stop, prior to formal arrest, are not the product of 'custodial interrogation.'"

Armijo, 105 N.M. at 773-74 (internal quotations and citations omitted).

The important thing to remember is that *Miranda* warnings are <u>not</u> required prior to custodial arrest. Once a defendant has been arrested, the warnings may be required. Yet even this requirement is conditioned on two circumstances. First, the person must be in custody; second, the person must be questioned. *Miranda*, 384 U.S. 436.

Clearly, in a DWI case there is a custodial arrest after the officer has completed the preliminary investigation, including FSTs. If, after this point, the officer asks the driver any questions, other than general identification questions (and Implied Consent questions discussed below), the *Miranda* warnings will be required or the driver's statements will be inadmissible in court.

3.6.2 *Miranda* Warnings and the Implied Consent Act

If an officer gives the *Miranda* warnings upon arrest, it could lead to contradictory and confusing information being given to the driver. For example, under *Miranda*, the driver is told she does not have to make any statements and any statements made could be used against her in a court of law. The driver is also told she has a right to counsel. This is all generally true, but there are times when those rights are applicable in DWI cases and times when they are not. The exceptions in DWI cases arise in reference to the Implied Consent Act.

As discussed earlier in this chapter, the Implied Consent Act requires an individual under arrest for DWI to submit to breath and/or blood testing to determine his or her alcohol content. If the driver refuses to submit to the test(s), the administrative (driver's license revocation) and criminal consequences are greater than if he or she had taken the test(s) and had an alcohol level over the legal limit.

Drivers have argued that because the breath and/or blood tests provide incriminating evidence against them, they should not be compelled to take the tests under the rules set forth in *Miranda*. As discussed below, the New Mexico courts have ruled against drivers in this instance.

Miranda warnings are usually only necessary where there is evidence from the defendant that is testimonial or communicative in nature. The mandatory submission of physical evidence is not protected by the constitutional protection against self-incrimination.

The United States Supreme Court in *Schmerber v. California*, 384 U.S. 757 (1966), held that "minor intrusions into an individual's body under stringently limited conditions" do not violate a person's constitutional right not to incriminate himself. New Mexico courts have interpreted this holding to apply to blood and/or breath tests given under the Implied Consent Act. *State v. Myers*, 88 N.M.16 (Ct. App. 1975). Therefore, *Miranda* warnings are not required either prior to asking the driver to consent to, or prior to submitting to, a breath and/or blood test.

3.6.3 Right to Counsel and the Implied Consent Act

The next question concerns the driver's right to consult with legal counsel prior to deciding whether to submit to a breath and/or blood test or before requesting an independent test, as provided for in the Implied Consent Act. Drivers have argued that they should be afforded the right to confer with an attorney at these stages of a DWI investigation.

The New Mexico courts have ruled the constitutional protections afforded to criminal defendants do <u>not</u> apply at this stage of the proceedings. In 1985, the United States Supreme Court, in dismissing an appeal from a Minnesota case, upheld the principle that there is no Sixth Amendment right to consult with counsel when deciding whether or not to take a breath or blood test. *Nyflot v. Minnesota Comm'r of Pub. Safety*, 474 U.S. 1027 (1985) (mem.).

The right to counsel, as interpreted by the courts, attaches either when there is custodial interrogation, or its functional equivalent, or when judicial proceedings begin. As discussed previously, questions posed by officers to drivers regarding consent to submit to breath and/or blood test(s) do not amount to custodial interrogation.

Moreover, judicial proceedings are generally considered initiated at the point when formal charges are filed. *State v. Kanikaynar*, 1997-NMCA-036. Since formal charges have not yet been filed at the time the breath and/or blood test is administered, there is no right to consult

with counsel when deciding whether or not to take the test(s). Rather, drivers must make that decision for themselves.

Another right to counsel issue arises during the period after the initial test and prior to a driver requesting an independent test. This was the issue raised in *State v. Sandoval*, 101 N.M. 399 (Ct. App. 1984). The court had to decide whether the time immediately following a breath test involved either the initiation of adversarial proceedings or was a "critical stage" in the proceedings, thereby requiring the assistance of counsel. A “critical stage” is defined as one where "the government could abuse its power and potentially take advantage of the accused" in a way that cannot be repaired by counsel at trial. *Sandoval*, 101 N.M. at 403 (citing *United States v. Ash*, 413 U.S. 300, 315 (1973)).

The Court of Appeals held the initiation of adversarial proceedings does not occur when the officer fills out the citation, but rather when the driver is "faced with the prosecutorial forces of organized society.” *Sandoval*, 101 N.M. at 402 (quoting *Kirby v. Illinois*, 406 U.S. 682 (1972)). Presumably, this refers to the time of arraignment, when the formal charges are filed with the court. Thus, the time period after a breath test is given is not considered the initiation of adversarial proceedings.

The driver and legal counsel have ways at trial to call into question both the breath and/or blood test administered by the police and any failure to provide an independent test, if applicable. Therefore, the independent test portion of DWI investigations is also not a critical stage and, therefore, no right to counsel exists at that time.

3.6.4 Practical Considerations Regarding DWI, *Miranda* and Right to Counsel

It can be confusing to a driver to be given *Miranda* rights upon a DWI arrest and then be told those rights do not apply to post-arrest procedures under the Implied Consent Act. Consider this scenario: The driver is arrested and told, "You have the right to remain silent, anything you say can and will be used against you in a court of law; you have the right to an attorney, if you cannot afford one, one will be provided for you." Then at the police station, the driver is read the Implied Consent advisories. When asked whether she consents to testing, the driver chooses to remain silent as she was just told she could under *Miranda*. She then asks for an attorney, as she was just told is her right. The arresting officer tells her that if she does not answer his question regarding submission to the test, it will be considered a refusal and the penalties will be more severe, and also that she does not have the right to a lawyer at this time. Having first been told of two constitutional rights, the driver now is told exactly the opposite – and the consequences and potential confusion are significant.

In order to prevent the confusing situations previously discussed, what many experienced law enforcement officers do is avoid giving *Miranda* warnings altogether in DWI investigations and arrests. In those situations, the officers make conscious efforts to refrain from engaging in custodial interrogation, or its functional equivalent, for the entirety of the DWI investigation.

If the officers do provide *Miranda* warnings, they sometimes wait until after the breath and/or blood test(s) have been completed. Keep in mind that unless there is custodial interrogation, or its functional equivalent, the *Miranda* warnings are not necessary. Many citizens are under the impression *Miranda* warnings are absolutely required upon placing a person under arrest and in handcuffs, since that is the scene played out in countless television programs and motion pictures. While that may make for good drama, it simply is not a realistic portrayal of when *Miranda* warnings are required.

Breath and/or blood testing, as provided for and contemplated under the Implied Consent Act, do not involve custodial interrogation. Chemical testing (breath and/or blood), under the Implied Consent Act, does not occur at a "critical stage" or after commencement of adversarial proceedings, which would implicate the right to counsel. Therefore, there is no need to give *Miranda* warnings at this time.

3.7 Conclusion

Once an officer has placed a suspected DWI offender under arrest, certain formalities must be observed or the prosecution risks being unable to introduce potentially valuable evidence at trial. The trial court must hold the officer to high standards in this regard and look for the following:

- Did the officer read the driver the Implied Consent advisories exactly as provided? If the advisories were not read exactly as written, were they substantially the same?

- Is the evidence clear that the defendant understood these advisories?

- If there is an allegation of refusal to take the breath and/or blood test(s), was the refusal made clear by the defendant's words or actions? Was the driver advised of the consequences of his or her refusal under the Implied Consent advisories?

- If the defendant changed his or her mind about refusing, did the change meet the criteria set forth in the *Suazo* case?

CHAPTER 4

Breath and Blood Testing

This chapter covers:

- Requirements for a valid breath or blood alcohol test.
- Blood tests, including tests for medical treatment and by search warrant.
- "Relation back" evidence connecting breath and/or blood test results to the actual time of driving.

4.1 Overview

At this point in the DWI investigative process, it is assumed that the officer has developed sufficient probable cause to arrest the driver for DWI and taken the driver into physical custody. The officer has also informed the driver of the Implied Consent advisories. The officer is now prepared to conduct a deprivation/observation period on the driver and to administer the chemical (breath and/or blood) tests or note a driver's refusal to submit to testing. This chapter addresses the post-arrest processes of breath and blood testing.

4.2 Requirements for a Valid Breath Test

After a driver agrees to take a breath test under the Implied Consent Act, the officer must follow strict guidelines to ensure the test will be admissible in court. The training on use of breath testing devices is overseen by the New Mexico Department of Health, Scientific Laboratory Division (SLD).

SLD Regulations, Generally

The administration of breath tests is guided by SLD-adopted regulations. The regulations, most recently revised in April of 2010, govern the laboratories, the machines and the individuals administering breath alcohol tests. The courts look to the SLD regulations when a question arises regarding the admissibility of a breath and/or blood alcohol test. A summary of the regulations is as follows:

- Rule 7.33.2.8 governs the certification of laboratories engaged in conducting breath or blood tests. For most departments, SLD will be the laboratory used to analyze tests. However, if a law enforcement department uses its own lab, such

as is done in Albuquerque, SLD regulates how that lab will perform its duties, what reports need to be made, and the quality control measures required to maintain lab certification.

- Rules 7.33.2.9 - 7.33.2.10 govern the machines used to collect the samples.

- Rules 7.33.2.11 – 7.33.2.13 set forth the requirements for certification of a machine operator and key operator.

- Rules 7.33.2.14 –7.33.2.15 govern the methods and procedures for collecting and analyzing samples.

Most legal challenges to the breath tests have been in the areas of machine calibration and adherence to the proper procedure for administering the tests.

4.2.1 Twenty-Minute Deprivation/Observation Period for Breath Tests

The first step in securing a proper breath test with accurate results is for law enforcement to conduct a deprivation/observation period of the driver for a minimum of twenty minutes before the first sample is provided. What follows is a discussion of the reasoning for that and the applicable regulations and case law on the deprivation/observation.

Purpose of the Twenty-Minute Deprivation Period Before Breath Testing

SLD Rule 7.33.2.15(B)(2) mandates no breath alcohol test shall be given until the operator of the machine has "ascertained that the subject has not had anything to eat, drink or smoke for at least 20 minutes prior to collection of the first breath sample." This is to ensure there is no interference from any other substance when the driver is submitting a breath sample. The breath testing machine is designed to detect and quantify the grams of alcohol per 100 milliliters of blood. This is done by having the driver breathe deeply into the machine. The machine, through a process called infrared spectrometry where the breath passes through a fuel cell, is then able to calculate the blood-alcohol ratio. Any recently ingested substance or any recent regurgitation or belching can affect the results. Therefore, it is imperative the machine get clean breath samples for the results to be valid. This is the reason for the minimum twenty-minute deprivation/observation period. The deprivation/observation requirement applies only to breath testing, not blood testing.

Deprivation Period Affects Admissibility of the Breath Test Results

In *State v. Gardner*, 1998-NMCA-160, the driver was arrested for DWI and transported for a breathalyzer test. About fifteen to twenty minutes before the test, the driver went to the restroom, placing her out of the officer's sight. During this time "the officer admitted that he did not know whether Defendant burped, belched, or vomited while she was in the bathroom." *Gardner* at ¶ 3. The defense objected to the admission of the breath test arguing the officer had not strictly complied with the SLD regulations. The trial court allowed the results, but the Court of Appeals reversed.

The court held that since the Implied Consent Act requires "a test of blood or breath or both, approved by the scientific laboratory division of the department of health[,]" the legislature was mandating compliance with the regulations. *Gardner* at ¶ 8 (quoting §66-8-107(B)). If the prosecution cannot show strict compliance with the regulations, the proper evidentiary foundation (the necessary matters the prosecution must first show before evidence will be introduced for consideration by the judge or jury) will not be established and the breath test results will be inadmissible. The court was explicit that failure to comply with the regulations, including the twenty-minute deprivation/observation period requirement, does not go to the weight of the evidence, but rather to its admissibility, because "compliance with applicable regulations is explicitly a part of the statute that permits the tests into evidence." *Gardner* at ¶ 14.

Direct Officer Observation of Driver or "Substantial Compliance"

The court also explained the requirements for compliance with the twenty-minute deprivation/observation period. It is clear that if the driver is out of the officer's sight, such as being in another room during the required time, the test results will not be admissible. Depending on the specific circumstances surrounding the deprivation period, trial courts may allow cases of what it called "substantial compliance." Examples of this include where the officer "glanced down periodically to do paperwork," or had the driver under observation during transport to the police station.

In these types of situations, the officer will need to testify that, even though he may not have directly observed the driver for the full twenty minutes, the driver was in the officer's presence and the officer would have noticed had the driver ingested a substance, regurgitated or belched. If the officer cannot persuasively testify to this, the breath test results cannot be admitted due to the failure to prove compliance with the twenty-minute observation requirement.

More than one officer can be involved in the deprivation/observation period and it can still be valid. For example, such a situation may arise if the arresting officer asks another officer to watch the driver to make sure he or she remains deprived while the arresting officer steps out for a brief period of time. Another example involving two officers conducting a deprivation/observation period might be where the officer who arrested and will test the driver cannot transport the driver from the scene of the traffic stop to the location of the testing. This might be perhaps because the arresting officer's police unit does not have a transport safety cage or is a canine unit.

In those situations, upon the arresting/testing officer reconnecting with the driver, the officer should ensure from his or her assisting/transporting officer that nothing occurred to break the deprivation/observation during the arresting/testing officer's absence. The arresting officer should also document that that situation occurred. Both that officer and the other officer involved in the deprivation must testify and be able to persuasively explain why it happened and how they ensured that deprivation/observation remained valid.

Officer's Inspection of a Driver's Mouth

In the case of *State v. Willie,* 2009-NMSC-37, the Supreme Court overturned the Court of Appeals decision that addressed the issue of what the applicable SLD regulation on deprivation requires from law enforcement.. As previously noted, SLD Rule 7.33.2.15(B)(2) mandates no breath alcohol test shall be given until the operator of the machine has "ascertained that the subject has not had anything to eat, drink or smoke for at least 20 minutes prior to collection of the first breath sample." Although the regulation number has changed, that was the wording of the regulation in effect at the time of the defendant's DWI arrest in *Willie*. The question the court was presented with was, "what does ascertain mean?" Given the regulation's use of the term "ascertained," the Court of Appeals concluded that the regulation required more than observation of the driver by the officer. Specifically, the court stated that the regulation requires the officer either look into the defendant's mouth or ask if the defendant had anything in his mouth. The Supreme Court disagreed. As long as the officer can satisfy the court by a preponderance of the evidence that the defendant has had nothing to eat, drink or smoke during the deprivation period, the requirement will be met. The officer can do this in a variety of ways: continuous observation, inability of defendant to ingest anything, position of the defendant in relation to the officer, and any other relevant factors.

Deprivation Period Details

Is the required minimum twenty-minute period before breath alcohol testing can occur a deprivation or an observation period? In essence, it really is both a deprivation and an observation period. Specifically, the officer has to ascertain and ensure a driver is "deprived" in that he does not have anything to eat, drink or smoke for a minimum of twenty minutes. That realistically requires maintaining some sort of visual observation of the driver either ideally for all of the time but certainly for the overwhelming majority of those minimum twenty minutes.

Therefore, the officer will oftentimes testify that upon arrest, when the driver was patted down for safety reasons it was found that he had no liquids, food, gum or candy in his possession. The officer may also specify the driver was handcuffed behind her back, thereby limiting her ability to reach into her pockets to place anything she might have there in her mouth. Officers may also specify the back seat of their patrol units contained nothing the driver could have placed in his mouth. The officer may also testify that periodically during transport, from the arrest location to the breath testing location, she glanced back to visually check on the driver. Officers might testify to taking affirmative action to check the driver's mouth and/or asking the driver if he/she has anything in her mouth.

Officers might also testify that the time periods they were not in visual contact with the driver were extremely minimal amounts of time, seconds perhaps, and that upon return to the driver's visual presence, there was no indication of any regurgitating or other actions that are of concern during the deprivation/observation. Examples of times when an officer might not be in visual contact with the driver include when the officer deals with the tow truck driver or exits his or her police unit and goes around to open the driver's door in order to have him

exit. Finally, officers might testify that a holding cell the driver was placed in before testing still allowed visual observation of the driver and there were no signs seen, or heard, of the driver vomiting at any time prior to breath testing.

Another critical factor in the deprivation/observation period is how the officers ensured that the period was at least the minimum of the required twenty minutes. Did they note those important beginning and ending times in their report, along with what time piece(s) were used to keep track of the time? Ideally, the use of the officer's personal watch for beginning and ending times for the deprivation/observation is best rather than relying on two different, and possibly unsynchronized, time pieces. This is especially so in situations where the deprivation/observation is testified to as being exactly twenty minutes or twenty-one minutes. If no specific times were provided by the officer, can the prosecution show the required minimum twenty minutes from circumstantial evidence, such as the time of the arrest in comparison to the time of the first breath sample introduction? The deprivation/observation can be longer than the required minimum twenty minutes. Often times it necessarily is, in a large state like New Mexico. In those situations, the officer must either prove to the court's satisfaction that the driver was deprived and observed for that entire duration of time, in accordance with the SLD Regulations, or, at a minimum, for at least the twenty minutes immediately before breath samples were provided. Again, keep in mind the requirement for a minimum twenty minute deprivation/observation period applies only to breath alcohol testing, not blood sample collection.

In conclusion, if the prosecution does not, to the court's satisfaction, prove a valid deprivation period was conducted and the defendant observed for a minimum of twenty minutes before breath testing commenced, the breath test results cannot be allowed into evidence.

4.2.2 Breath Testing Machine Foundational Matters

Once the officer has completed his or her deprivation/observation of the driver, the actual breath testing can begin. A critical component of a valid breath test is ensuring the breath testing equipment has been properly maintained by both SLD and the specific law enforcement agency. The officer must also ensure the breath testing equipment is functioning properly during the driver's submission of samples.

SLD Annual Certification/Measuring Ratio of Breath Testing Machines

SLD Rule 7.33.2.10 requires that all machines used by law enforcement agencies must be certified by SLD before they are put into use. The machines must then be inspected annually at SLD. "SLD certification" refers to the testing and approval process SLD must conduct throughout the year on each breath testing machine to ensure it is working properly.
In *State v. Onsurez*, 2002-NMCA-082, ¶ 13, the Court of Appeals held that where a driver properly raises and preserves (brings to the attention of the trial court) an objection relating to the certification of the testing equipment, the prosecution must show the breath testing equipment had been certified by SLD.

The court also held that another foundational requirement for the admission of breath test results is the prosecution showing that the breath test results are analyzed by the testing equipment using the measuring ratio of "grams of alcohol per 210 liters of breath." *Onsurez* at ¶¶ 16, 19. That foundational requirement can be met by the prosecution having the testing officer testify to the measuring ratio. Alternatively, some models of breath testing equipment will include reference to that measuring ratio directly on the print-out of the test results, located adjacent to the specific test scores, and that can be brought to the attention of the court by either the prosecution or officer.

When a defendant raises an SLD foundational objection to the proposed introduction of breath alcohol test results, it is the prosecution's responsibility and burden to prove SLD certification of the testing equipment. The issue of what evidence from the prosecution was sufficient to show SLD certification was analyzed by the Supreme Court in *State v. Martinez*, 2007-NMSC-025, discussed below.

SLD Annual Certification Can be Proven by Law Enforcement Testimony

In *Martinez*, the Supreme Court held that, for foundational purposes in admitting the breath results into evidence, an officer's testimony that he or she saw a SLD certification sticker attached to the breath testing equipment and that the sticker revealed the certification to be current is sufficient. *Martinez*, ¶ 6. The sticker is a replica of the actual SLD "annual certification certificate," which is a one page document, prepared and issued by SLD for each individual breath testing machine. The certificate makes reference to the breath machine by its unique and individualized serial number. The date of the driver's breath testing must fall within the one-year certification period referenced in the SLD annual certification certificate in order to be valid. The court also reiterated the distinction made in *Onsurez* that proof of the breath testing equipment's calibration (discussed in the next section) is different than proof of SLD certification and, therefore, the prosecution cannot substitute calibration proof for certification proof. *Martinez*, ¶ 12.

The state must present testimony regarding the certification of the machine. In *State v. Tom*, 2010-NMCA-___ (27,549, decided May 25, 2010), the state's witness testified he was "certified to operate the machine, that a calibration check was performed…, and that he believed the machine to be functioning correctly…." *Tom* at ¶ 14. The officer never testified whether he observed the SLD certificate. The court held that there must be proof of certification, and it was not present in this case. The results of the test should not have been admitted.

In determining that an officer's testimony regarding the SLD certification sticker is sufficient for foundational purposes to admit the breath test results, the Supreme Court made clear that foundational matters such as SLD certification, breath testing equipment calibration, whether the equipment was functioning properly at the time of the test and whether the testing officer was certified to do so by SLD are not elements of the offense of DWI. *Martinez*, ¶ 14. Given that those matters are not elements of the offense of DWI, the burden of proof the prosecution must meet for the trial court to conclude such foundational matters were satisfied is "preponderance of the evidence," not the "beyond a reasonable doubt" standard for

determining guilt or innocence on the offense(s) charged. *Martinez*, ¶¶ 14, 19. "Preponderance of the evidence" basically means that at least 51% of the evidence before the trial court on a foundational matter supports the conclusion that the foundational matter at issue has been satisfied.

Keep in mind that, under *Onsurez*, the prosecution's requirements to show SLD certification of breath testing equipment and the testing equipment's specific measuring ratio formula only come into play if the driver raises such specific objections (arguments) in response to the proposed introduction of breath test results. When such an objection is made that foundational requirement must be satisfied by a preponderance of the evidence before test results can be admitted into evidence. *Martinez*, ¶¶ 11, 12.

Law Enforcement Agency/Key Operator Weekly Calibration of Breath Testing Machines

In addition to regular inspection and annual certification by SLD, the local law enforcement agency must perform a calibration check "at least once every seven calendar days." Rule 7.33.2.10B(1)(c). A "calibration check" involves the introduction into the breath testing equipment of prepared simulator solutions (liquid solutions which mimic breath alcohol concentrations of .08 and .16), running the machine, and ensuring the equipment measures the sample within the allowable tolerance. These weekly calibration checks can be done only by "key operators." Key operators are law enforcement officers who receive special training by SLD on such procedures. Most, if not all, law enforcement agencies have at least one officer who is also a key operator. In order for a calibration check to be valid it must fall within the range of .070 and .090, for the .08 simulator solution. For the .16 simulator solution, a valid calibration check must be within the range of .15 and .17. The results of these calibration tests must be noted in a written log that is kept with each machine. In addition to the weekly calibration test results the log book documents the results of all the tests given to drivers on a particular machine.

What if there is a Problem with the Calibration Checks?

The Court of Appeals addressed the issue of noncompliance with the required calibration tests in *State v. Montoya*, 1999-NMCA-001. In *Montoya*, the driver was arrested and a breath test performed on May 25, 1997. The written logs showed the breath machine had been calibrated on May 21, four days prior to the driver's test. However, the machine was not calibrated again until May 30th, five days after the driver's test and, more importantly, nine days after the prior calibration test. Therefore, it was two days beyond when it should have been performed. Specifically, in accordance with the SLD regulations the second calibration check test should have been performed no later than May 28 to meet the seven day requirement.

The question on appeal was whether the failure to comply with SLD weekly calibration requirements rendered the test results inadmissible. Initially, the court noted there was no evidence the machine did not work properly. Additionally, the driver's test was given within seven days of the previous calibration check test (four days after that calibration check), and,

when the next calibration test was given five days later, it showed the machine was working properly. "[T]he calibration test results indicated that the machine was working properly both before and after the Defendant's breatalyzer [sic] test. . . . [A]ny deviation from the regulation that occurred after Defendant's test does not compromise the purpose of the regulation and will be deemed to go to the weight of the evidence, not its admissibility." *Montoya* at ¶ 12.

The fact that the driver's test was given within seven days of the first calibration test, and that the second calibration, even though two days late, showed the machine was working properly were conclusive factors. In other words, despite the late weekly calibration check after the driver's test, the breath test results would still be allowed into evidence (admissible) since all of the calibration checks fell within the acceptable ranges. However, the trial court could decide to place less significance (weight and effect) on the breath test results, based on the untimely calibration check after the driver's tests.

What if the second weekly calibration check had shown some problem with the machine? For example, what if that second calibration for the .08 simulator solution was below .070 or above .090, and, therefore, outside of the acceptable range? What if the .16 simulator solution weekly calibration check was below .15 or above .17? While the trial court's decision regarding admissibility might have been the same, the end result of Mr. Montoya's case may well have been different. Assume the trial court determined the breath test results would still have been admissible into evidence. However, the weight placed by the court on that evidence – how much credibility, significance and reliability it is given – would have perhaps been severely reduced given the improper second calibration check. If the judge or jury felt the breath testing machine may not have been working properly when the driver's test was performed, those results might have been discarded in the minds of those deciding whether the prosecution proved its case beyond a reasonable doubt. This is what is meant by "admissibility subject to the weight of the evidence." This is also what is meant by the "weight and effect" a court might place on evidence before it.

The Court of Appeals discussed a prior malfunction of the Intoxilyzer 5000 in *State v. Collins*, 2005-NMCA-044. The breath machine used to test the driver had an erroneous test sample 16 days prior to his arrest. The breath machine was sent to SLD for maintenance at which time a calibration test was performed which produced a result within the acceptable range (between .070 and .090). This was done on January 24. The court ruled that since the prosecution had shown the machine in question was calibrated and functioning properly within seven days of the driver's test, the evidence of the machine's earlier malfunctioning again went to the weight, and not the admissibility, of the test results.

Who Can Testify to Key Operator Weekly Calibration of Breath Testing Machines?

The issue of who is required to, or can, present testimony regarding the calibration of the breath testing equipment arose in *State v. Smith*, 1999-NMCA-154. In that case, the officer who administered the driver's test was not the key operator/officer who performed the required weekly calibrations. This is common in many DWI cases: most officers will be

certified to administer tests on the breath machines, but each law enforcement agency will only have a few officers who are SLD-trained as key operators.

The standard method of proving the machine was properly calibrated within the required weekly time limit is for the prosecution to introduce into evidence the written log book entries that show all weekly calibrations, as well as all actual drivers' breath tests performed on a given machine. It is common to introduce only those pages of the log book that cover the calibration test done prior to the driver's test, the driver's test itself, and the calibration check done after the driver's test.

In *Smith*, the driver argued only the key operator can testify about the weekly calibration results, not the officer who gave the test. The breath testing officer testified "the machine appeared to be in working order on the morning of [defendant's test] . . . and that the log attached to the machine indicated that it had been calibrated within the previous seven days . . . . [Additionally, he] explained how the machine performed its self-calibration upon startup." *Smith* at ¶ 11. The court held this testimony laid the proper foundation for admission of the test results into evidence for consideration by the judge. Therefore, the key operator's testimony was not necessary. In summation, either key operators or the actual officer who administered a driver's breath tests can testify about the weekly key operator calibration checks as shown in the written log books. However, only the officer who actually administered the breath test can be used by the prosecution to introduce into evidence the test results.

There are situations where only the key operator can testify about the breath testing equipment. Specifically, if the log books are produced in court but fail to show the required weekly calibrations or if the weekly calibrations shown indicate a problem with the machine, i.e. a calibration check not falling within the acceptable range (.070 to .090 or .15 to .17), the key operator is the only person who can testify to what, if anything, was done in response. This is because it is solely the key operator's responsibility to respond to problems with the weekly calibrations and their potential impact on the proper functioning of the testing equipment. SLD Rule 7.33.2.14(F). Without such testimony, the issue for the trial court, considering whatever evidence was presented on calibration, is whether the prosecution laid a proper foundation such that breath test results should be allowed into evidence. If allowed into evidence, any discrepancies in testing or deficiencies in who testified about the testing equipment go to the weight and effect the judge or jury chooses to place on the evidence. *State v. Christmas*, 2002-NMCA-020, ¶ 12.

Breath Testing Equipment's Self-Calibration (Simultaneous) Check

A "self-calibration" check, also known as a "simultaneous calibration" check, is performed by the breath testing equipment itself on the Intoxilyzer 5000 and 8000 models. The self-calibration check is automatically performed between the driver's first and second breath samples and is a means by which the machine checks itself to determine if it is functioning properly. The acceptable range for the self-calibration is .070 to .090. The specific self-calibration will be listed on the actual printed-out page of the breath tests, located in between

the driver's two breath scores and identified as "cal check." Normally, if the self-calibration check is out of acceptable range, the breath testing equipment will automatically fail the test.

What if the Self-Calibration Check is Problematic?

In *Christmas*, the court held that breath test results are not necessarily inadmissible when a problem with the self-calibration check occurs. In that case, the breath testing machine's self-calibration test registered ".000." The key operator testified the machine had been calibrated within the weekly time specified by SLD and no problems were evident. The officer who administered the breath tests testified the machine did not give a "fail" message indicating a problem with it.

Because there was no evidence the self-calibration affected the driver's test results, the court held it was proper to admit the results and "any discrepancy in regard to the validity of Defendant's breathalyzer results went to the weight of the evidence to be considered by the jury." *Christmas* at ¶ 12. In other words, the trial court or jury could take into account the .000 self-calibration check, along with all other evidence before it on that issue, and determine what weight and effect to give the test results. Depending on the court's determination of what weight and effect to give to the test results, it then determines whether the prosecution proved its DWI case beyond a reasonable doubt.

In conclusion, both the *Christmas* and *Collins* cases provide that problems with the breath testing calibrations, whether it is the weekly key operator checks or the self-calibrations, do not go to the issue of admissibility of the breath test results into evidence. Therefore, such breath test results can be admitted into evidence. However, calibration problems might impact the weight and effect (the significance, the persuasiveness) the court decides it will place on a driver's actual breath test results.

Summary of Foundational Matters for the Introduction of Breath Test Results

Deprivation: If the prosecution cannot show to the court's satisfaction that a proper deprivation/observation was conducted, the driver's breath test results cannot be allowed into evidence.

SLD Annual Certification, Key Operator Weekly Calibration Checks, and the Testing Equipment's Self-Calibration Check: The prosecution must meet these foundational requirements by a preponderance of the evidence, not by the beyond a reasonable doubt standard. If there are any problems or irregularities with any of these foundational matters, the breath test results can still be allowed into evidence. Then, the fact finder, be it judge or jury, can decide what weight and effect (the significance, the persuasiveness) to place on the breath results in light of those problems and whether the prosecution has met its burden of proof.

Assuming a proper deprivation/observation period, important foundational factors to look for in the officer's testimony and in the log books themselves (if the prosecution introduces them into evidence) are: (1) whether the key operator's weekly calibration tests were done within

the required time period; (2) if not, or if they were problematic, did the prosecution have the key operator testify to explain those matters and what, if anything, was done to correct them; (3) whether the testing officer was aware the weekly calibration tests had been done (usually by the officer's review of the relevant entries in the log book); (4) whether the officer testified that based on his or her training and experience the breath testing machine appeared to be functioning properly during the driver's tests; (5) whether the machine performed its self-calibration test, indicating it was operating properly, meaning it fell within the acceptable ranges of .070 and .090; and (6), if a specific objection is raised by the defense, whether the officer testified to observing the SLD certification sticker on the breath testing machine and whether the driver's tests took place within the effective dates of certification.

4.3 Requirements for a Valid Blood Test

4.3.1 Blood Sample Collection under the Implied Consent Act

Officers choose a blood sample rather than a breath sample for a variety of reasons. Some officers believe a blood sample analysis is a more accurate test to determine a person's alcohol concentration level. Sometimes, and in light of time being of the essence in terms of sample collection, a medical facility might be closer to the location of the stop and arrest than the location of the breath testing equipment. On occasion, blood sample collection might be the only alternative for the officer if the available breath testing equipment is broken or malfunctioning. Finally, officers might not yet be certified to operate breath testing equipment or their certification as operators might have lapsed, thereby necessitating blood sample collection.

As with the collection of breath samples, the SLD Regulations provide the manner by which blood is to be collected. See Rule 7.33.2.14A and B. That regulation requires the blood be drawn in the arresting officer's presence and that that should occur within three hours of the arrest. Rule 7.33.2.15A(2). (Prior to the 2010 amendment, the rules required the test be performed within two hours of the arrest, however, the rule was amended to conform to the 2007 statutory amendment providing for three hours between arrest and test.)

There is no requirement of a twenty-minute deprivation/observation period prior to a blood test.

Methods of Collection of Blood Samples

In *State v. Dedman*, 2004-NMSC-037 (overruled on other grounds), the Supreme Court dealt with the issue of the foundation for the admission of blood analysis results in a DWI prosecution. Regarding how blood samples are collected, the court examined the three different methods available and determined that the SLD requirement of the use of the venti-puncture method appeared to be based on the recognition that that method was the safest and most convenient way to draw blood from adults. *Dedman* at ¶ 19. Given the court's belief that the purpose behind the venti-puncture requirement was not one that goes to the accuracy of the test results, but rather to the ease of collection, it held that "compliance with the "collection by venti-puncture" requirement is not a foundational requirement to the

admissibility of blood alcohol reports." *Dedman* at ¶ 21. In other words, the use of a different type of blood sample collection method instead of venti-puncture does not render the blood results inadmissible into evidence.

Admissibility of Blood Draw Analysis Results into Evidence and Defendant's Right of Confrontation in Blood Draw Cases

The 2009 United States Supreme Court case of *Melendez-Diaz v. Massachusetts,* 129 S.Ct. 2527 (2009) completely changed the way courts admit laboratory results. *Melendez-Diaz* was a state court prosecution for drug dealing. The prosecution submitted the lab results of the drug testing instead of calling the analysts who performed the tests. The Court held that the prosecution's failure to call the analysts made the evidence inadmissible. The Court based its ruling on its determination that the report was "testimonial" and subject to the requirements of the Confrontation Clause of the United States Constitution. U.S. Const., Amendment 6. The Sixth Amendment provides that a defendant has the right to "confront" witnesses against him. The witness must appear at trial and be subject to cross examination. The drug analysis report was held to be testimonial because it is a "declaration of facts"; "a solemn declaration or affirmation made for the purpose of establishing or proving some fact"; "functionally identical to live, in-court testimony…." *Melendez-Diaz* at 4 (citations omitted).

The drug test report was made for the specific purpose of being used at trial. It contained the analyst's opinion and did not contain any information regarding the integrity of the sample or qualifications of the analyst. Based on this, the Supreme Court held that any analysts who participated in the drug testing must be present in court and subject to cross examination for the evidence to be admitted.

The New Mexico Supreme Court took up this issue in *State v. Bullcoming,* 2010-NMSC-007.

Please note that this case has been accepted for review by the United States Supreme Court. The decision discussed below is the law in New Mexico until and unless overturned by the United States Supreme Court. A decision should be rendered some time during 2011.

Unlike *Melendez-Diaz,* Bullcoming is a DWI case, but the issue is similar. Can the Report of Blood Alcohol Analysis be admitted without having all of the individuals involved testify? And unlike *Melendez-Diaz,* the court in *Bullcoming* held that the report was admissible. The New Mexico Supreme Court distinguished this case from the *Melendez-Diaz* case, by holding that although the report of blood alcohol content was testimonial, the analyst was "a mere scrivener who simply transcribed the results generated by the gas chromatograph machine…." *Bullcoming* at ¶ 1. The Report, which is on an approved form, is signed by the person receiving the blood sample at the Scientific Laboratory Division (SLD), then signed by the analyst who records the test results, then signed by a reviewer, and lastly, an SLD employee signs verifying that a copy of the report has been mailed to the defendant. The first two signatories certify that the sample was received properly and intact. In *Bullcoming* the analyst who signed regarding the test results did not testify. The individual who testified is

also an analyst for SLD who was not a part of Bullcoming's blood analysis. The analyst testified about the workings of the gas chromatograph machine and stated that all an analyst does is review the printout from the machine and transcribe those results onto the form.

Holding that the Report of Blood Alcohol Analysis and the drug testing report in *Melendez-Diaz* were similar documents, and therefore both testimonial, the report in *Bullcoming* was merely a transcription of the machine results. There was no interpretation of the results, nor any exercise of independent judgment. The "true 'accuser' was the gas chromatograph machine which detected the presence of alcohol in Defendant's blood, assessed Defendant's BAC, and generated a computer printout listing its results." *Bullcoming* at ¶ 19. The court then held that "the live, in-court testimony of a separate qualified analyst is sufficient to fulfill a defendant's right to confrontation. *Id.*

While allowing the introduction of the Report with the testimony of the analyst, the Court did "strongly suggest that, in future cases, the State admit into evidence the raw data produced by the gas chromatograph machine to supplement the live, in-court testimony…." *Id.* at ¶ 26. Again, it is important to note that this case is being reviewed by the United States Supreme Court. It is also important to note that this case involves blood alcohol testing, not drug testing. In a separate case, *State v. Aragon,* 2010-NMSC-008, the New Mexico Supreme Court held that a forensic report of drug testing, like the one in *Melendez-Diaz*, is testimonial and requires the presence of the analyst who performed the test and prepared the report.

In-Person Versus Other Methods of Providing Testimony

Assume that the trial court has heard argument from the prosecution and defense and made a decision about who will be required to present testimony about the blood draw and analysis. Can any or all of those witnesses testify in a manner other than in-person in the courtroom? Regarding the general question of receiving testimony in a criminal trial, the Court of Appeals recently dealt with the issue of whether a witness could be allowed to testify telephonically in the absence of a compelling reason or need for such testimony. In *State v. Almanza*, 2007-NMCA-073, the issue was whether a state laboratory chemist could testify by telephone in a case involving distribution of methamphetamine. The prosecution and defendant had negotiated a plea agreement and, therefore, the prosecution did not subpoena the chemist. After defendant changed his mind about entering a plea, the matter was set for trial but it was too late to subpoena the chemist. The trial court allowed the chemist to testify by phone. Defendant objected on the basis of his Sixth Amendment right to face-to-face confrontation and appealed.

The appellate court first recognized that face-to-face confrontation serves many important purposes including allowing the judge and jury to observe witness demeanor, impressing on the witness the seriousness of the matter, assuring the witness's identity, and that the witness is not being improperly influenced. *Almanza*, ¶ 7. Thereafter, recognizing that the rights conferred under the Confrontation Clause are not absolute, the court stated that any exceptions to the general rule of face-to-face confrontation are to be narrowly tailored to only those situations where the exception is necessary to further an important public policy and there must also be a required necessity. *Almanza*, ¶ 8.

With that in mind, the court concluded that the chemist's busy schedule and the inconvenience from either requiring his in-person testimony or postponing the trial until that could be secured were not the sort of considerations that satisfy the exceptions to the Confrontation Clause. *Almanza*, ¶ 12. This was especially the case given the requirements of both furthering important public policy and showing necessity in order to dispense with the face-to-face confrontation norm.

The analysis in *Almanza* is instructive when courts are faced with any request to have any witness, not just DWI foundation witnesses, testify in a manner other than face-to-face in the courtroom. Each such request must be dealt with on a case-by-case basis considering the facts pertinent to the particular witness for whom an exception to the general rule on face-to-face confrontation is sought. Any exception to that Confrontation Clause rule must be narrowly tailored only to those situations where it is shown that the exception is needed to further an important public policy and there is a required necessity to forego face-to-face confrontation.

4.3.2 Blood Sample Extracted for Medical Treatment

When a person is treated in a hospital emergency room, a blood sample is commonly collected and analyzed to determine the presence of alcohol or drugs in the person's system. This information is vital to physicians treating the person, so they can avoid any potentially lethal consequences resulting from administering further medications.

Can Blood Samples for Medical Treatment be used in a DWI Case?

Can analysis results from blood extracted for medical treatment purposes be used in a criminal prosecution for DWI? If there was no consent by the driver under the Implied Consent Act, they cannot. In *State v. Roper*, 1996-NMCA-073, the driver, who had been in a motorcycle crash, was transported to a hospital. While at the hospital and after the arrest, he refused to submit to a blood alcohol test. Knowing the driver had been given a blood test as part of his treatment, the officer asked a nurse about the results, who advised that the driver's blood alcohol content was .10.

The court analyzed this case under the Rule of Evidence regarding physician-patient privilege. Rule 11-504(B) gives a patient the right to keep confidential "communications made for the purposes of diagnosis or treatment." The main issue for the court was whether the blood test, administered as part of medical treatment, should be considered confidential information under the physician-patient privilege. A blood test meets the definition of a "communication" under the Rules of Evidence because it provides treatment information to the doctor. When a patient sees a physician for treatment, it is implied that any information given is meant to be confidential, and the patient's interests are protected by keeping the information confidential. The court held a blood test is protected under the physician-patient privilege and, therefore, inadmissible unless the patient waives this privilege. Even if consent is given, the timing of the test may be an issue, as discussed later in this chapter.

The court was “mindful of the severe drunk-driving problems in New Mexico” in its ruling, *Roper* at ¶ 17, but went on to conclude the prosecution had other options to keep impaired drivers from operating motor vehicles. First, refusal to take a test under the Implied Consent Act can trigger a one-year administrative driver’s license revocation. *Roper* at ¶ 18; §66-8-111(B). Second, the prosecution can prove its case without the blood test results if it has enough other evidence of intoxication. *Roper* at ¶ 18; §66-8-102(D)(3).

4.3.3 Search Warrant for Blood Test

Under the Implied Consent Act, when a driver refuses to submit to a breath and/or blood alcohol test, that is the end of the matter in terms of securing a voluntary submission to testing, unless the driver changes his mind in accordance with *Suazo* (discussed in Chapter 3). The officer cannot "force" the driver to take the test if he or she does not wish to do so. The officer notes the refusal and charges the motorist accordingly. However, even if a driver refuses to voluntarily submit to a breath and/or blood test, there are limited instances where law enforcement can nonetheless secure a blood sample via a search warrant.

Situations Where Warrant Can be Used for Blood Sample

Section 66-8-111(A) states if an officer has probable cause to believe a motorist, while driving under the influence of alcohol or drugs, caused death or great bodily injury or committed a felony, then the officer can request a search warrant to collect a blood sample. If, in response to an officer's written affidavit, a judge issues a search warrant, then the officer may have a blood sample taken from the driver without his or her consent. Trial courts may be faced with defense motions or pretrial arguments challenging whether the warrant allowing for the collection of a blood sample was validly issued and asking the court not to allow the results into evidence.

There is very little case law on §66-8-111(A). In the case of an automobile crash involving death or great bodily harm, the officer need only comply with the requirements for a search warrant. The officer must prove to the judge's satisfaction that death or great bodily harm resulted and that there is probable cause to believe the motorist was driving under the influence. The probable cause necessary for the warrant may be shown through things such as the officer's observations of the motorist, any observations of driving, either by the officer or other witnesses, the presence of alcohol containers in the driver's vehicle and any other evidence of alleged impairment. In these situations, officers should be mindful of the time delays between the actual time of driving versus the time of blood sample collection. As discussed in the following section, chemical tests (breath and/or blood) should be done as close as possible to the actual time of the driving. Ideally, the tests should be performed within the three-hour window provided for in Section 66-8-102.

Felony DWI Can be the Basis for Search Warrant

An interesting issue was raised in *State v. Duquette*, 2000-NMCA-006, regarding whether allegedly committing felony DWI could be the basis, under § 66-8-111(A), for securing a search warrant on the basis of a felony allegedly being committed while being DWI. In that

case, the basis for the search warrant was law enforcement's allegation that the driver had committed a felony DWI while DWI. The officer's affidavit for the search warrant alleged the motorist's driving record indicated three prior DWI offenses, thereby making the current charge a fourth, or felony, DWI. The driver argued that with respect to a blood search warrant for felony DWI, an alleged felony DWI itself could not be the underlying felony. Rather, the driver argued the underlying felony had to be any felony crime other than felony DWI. The Court of Appeals disagreed, concluding that since the legislature did not specifically list which felonies it meant, any felony could be used. As long as the officer presented sufficient information in his or her affidavit for the search warrant that the current offense was a fourth or subsequent DWI (i.e. a felony DWI), that would be sufficient for the issuance of a search warrant under §66-8-111(A).

4.4 Time of Breath and/or Blood Testing and "Relation Back" Evidence

Since the 2007 change in the DWI law which, in essence, gives the officer up to three hours to administer a BAC test, there should be little need for relation back evidence. However, in unusual situations the test may be given outside that time limit. Depending on the driver's specific BAC test results and the duration of time between when he was driving and when the breath and/or blood tests were obtained, the need for relation back evidence might arise.

4.4.1 What is "Relation Back" Evidence?

"Relation back" evidence can be presented by either, or both, the prosecution and defense in a DWI case. The relation back evidence the prosecution presents is designed to connect the driver's chemical testing (BAC) scores and/or the signs of intoxication the driver exhibited to the actual time of driving. In other words, the prosecution is attempting to relate back the BAC test scores taken hours later to the time the defendant was either driving or in actual physical control over the vehicle in order to show defendant was DWI at that time. The relation back evidence the defense might present is designed to call into question the prosecution's ability to meet its beyond a reasonable doubt burden on that nexus (connection) between the BAC test results and BAC at the earlier time of driving. If a scientific expert witness testifies on the issue of relation back, such testimony is often referred to as "retrograde extrapolation" evidence. In *per se* DWI cases, the nexus must be proven by evidence supporting the inference that a driver's chemical testing scores, at the time of driving, were at the applicable *per se* alcohol level. *State v. Hughey*, 2005-NMCA-114, ¶ 8.

Breath and/or Blood Testing <u>Within</u> Three Hours of Driving

As discussed in the New Mexico Supreme Court case of *State v. Day*, 2008-NMSC-007, ¶ 28, the three-hour time limit for testing will <u>not</u> eliminate the need to show in *per se* DWI cases a nexus or to relate the BAC test results to the time of driving in all situations. One scenario discussed by the Court involved the prosecution using retrograde extrapolation evidence to prove that a BAC test taken <u>within</u> three hours but yielding results <u>below</u> .08 shows that the defendant had an actual BAC of .08 or higher within the three hours of

driving. *Day* at ¶ 30. This situation would arise in *per se* DWI cases where the prosecution is attempting to introduce specific breath and/or blood test results.

Breath and/or Blood Testing Beyond Three Hours of Driving

The circumstances surrounding a DWI investigation might be such that breath and/or blood testing could conceivably take place beyond that three hour statutory window. Section 66-8-110(E) provides that if a breath and/or blood test is administered more than three (3) hours after the motorist was driving, those test results may be introduced as evidence of the alcohol concentration of the driver at the time of the test, and the judge or jury is to determine what weight and effect to give to the results as proof of a DWI violation.

4.4.2 Forms of Relation Back Evidence

New Mexico does not follow the rule, used in other states, that requires relation back evidence be introduced solely through expert testimony. Therefore, in New Mexico courts relation back evidence "might include a police officer's observation of significant incriminating behavior on the part of the driver, or the evidence might include expert testimony relating the test result back in time to the time of driving." *State v. Baldwin*, 2001-NMCA-063, ¶ 2. Case law has suggested such retrograde extrapolation evidence would be admissible if it meets the usual requirements for the admissibility of expert witness testimony. *Hughey* at ¶ 8.

In "impaired to the slightest degree" DWI prosecutions, under Section 66-8-102(A), the corroborating evidence of impairment may include the officer's observations of the motorist's driving, observations upon contact with the driver, performance on the field sobriety tests and any other evidence of the driver's behavior. This is why it is so important that officers, in accordance with their DWI training, document and testify to all of their observations of a driver up to the time the chemical tests are given. If, as in *Baldwin*, this evidence is nonexistent, it may result in an acquittal on a "simple impairment" charge under §66-8-102(A).

State v. Martinez, 2002-NMCA-043, is an example of how an officer's testimony can be sufficient relation back evidence. That case upheld the driver's conviction for DWI based on driving with a .08 alcohol level. Although the driver was not tested until one and one-half hours after driving, his alcohol level was .09. However, the driver said he drank 3 hours before driving, performed poorly on FSTs, acted drunk, put his hands and keys out of the window when he was stopped, and gave a false name. All of this was sufficient evidence, under the totality of the evidence, to support the DWI conviction, despite the delayed testing.

The Court in Day noted that corroborating behavioral evidence might be of limited relevance to the scientific retrograde extrapolation evidence. *Day* at ¶ 32. Examples of "behavioral evidence" include testimony from law enforcement regarding the physical signs of alcohol consumption or intoxication the driver exhibited and statements made by the driver to the police officer on matters such as the timing of alcohol consumption and amounts and types of beverages consumed. Such evidence is "qualitative," (relating to characteristics of behavior)

in contrast with BAC test results, which are "quantitative" (a measurement of a physical property). The Court stated that behavioral (qualitative) evidence by itself cannot be sufficient for the prosecution to show the required nexus between a BAC test result and the alcohol concentration of the defendant at the time he was actually in operation of the vehicle. *Day*, ¶ 32.

4.4.3 Use of Expert Witnesses for Relation Back Evidence

In *State v. Silago*, 2005-NMCA-100, a blood test was not administered until six hours and twenty minutes after the driving, due to delays in obtaining a search warrant for sample collection. In a pre-trial evidentiary hearing, the prosecution called an SLD forensic toxicologist who testified that, using retrograde extrapolation, the driver's alcohol content at the time of the crash was between .08 and .14. *Silago* at ¶ 9. However, the trial court did not allow the testimony. Specifically, it concluded that because the driver's alcohol content at the time of testing was below the legal limit and he did well on the FSTs, *Baldwin* and the other relevant cases prohibited such testimony. Additionally, the trial court found that because the time between driving and testing was far longer than the delay in *Baldwin*, relation-back testimony was inadmissible.

The Court of Appeals disagreed, holding that, in appropriate cases, retrograde extrapolation would be sufficient to prove the required nexus between the blood sample test result and the alcohol content at the time of driving. The factors put forth in the prior cases were not cumulative, but could stand alone. The time delay between the driving and the test is not the determining factor. However, the court did state any expert witness evidence must be admissible under the standard in *State v. Alberico*, 116 N.M. 156 (1993). *Alberico*, discussed more fully in Section 2.4.1, sets forth the requirements for admissibility of expert witness testimony.

In *State v. Hughey*, 2005-NMCA-114, the driver was tested four hours after a crash. Both driver and prosecution called expert witnesses to discuss retrograde extrapolation. The defense expert testified there were many variables that could affect the calculation of the alcohol concentration level at the time of driving, such as food in the driver's stomach, adrenaline, and body metabolism. *Hughey* at ¶ 3. The prosecution's expert agreed with some of these assertions. The trial court found the prosecution's expert did not meet the *Alberico* standard of reliability and, therefore, that testimony would not be admissible. The trial court held the prosecution's expert was "so vague and general as to provide no real assistance to the trier of fact." *Hughey* at ¶ 11. The Court of Appeals, while stating that retrograde extrapolation testimony may be admissible in the appropriate case, held that, in this case, the trial judge did not abuse his discretion in not allowing the testimony, thereby excluding evidence of the driver's alcohol concentration level.

4.5 Conclusion

Once an officer has placed a suspected DWI offender under arrest and advised him or her of the Implied Consent information, certain formalities must be observed regarding breath and/or blood testing or the prosecution risks being unable to introduce such potentially

valuable evidence at trial. The trial court must hold the officer and prosecutor to high standards in this regard and look for the following:

- Did the testing officer comply with the continuous minimum twenty-minute deprivation/observation period? (For breath testing cases only.) If not, the breath test results cannot be introduced into evidence.

- Is there sufficient evidence of breath testing equipment calibration, meaning either the weekly key operator calibration checks or the self-calibration done by the testing equipment in between the driver's two breath samples, or both, to indicate that it was working properly? If not, the test results can still be admitted into evidence, and the fact finder will determine the impact of those problems or deficiencies in the calibration process on the weight and effect it will give to the specific breath test results.

- Depending on the amount of time between the initial contact with the driver and the breath and/or blood testing, and the BAC test score obtained, was relation back evidence necessary and presented by the prosecution? If so, and taking into account the factors previously listed, has the prosecution provided sufficient relation back evidence to show beyond a reasonable doubt the driver was DWI within the statutory three hour time period?

CHAPTER 5

Sentencing

This chapter covers:

- ❑ Degree of conviction and the impact of prior legal representation on sentencing for subsequent DWI.
- ❑ Use of out-of-state convictions to enhance in-state convictions.
- ❑ Defense challenges to use of prior convictions for sentence enhancement.
- ❑ DWI sentences, including mandatory and discretionary components.
- ❑ Presentence reports and other sentencing considerations.
- ❑ Deferral, suspension and probation.
- ❑ Court fees and records of conviction.
- ❑ Administrative DWI driver's license revocation.
- ❑ DWI vehicle forfeiture and double jeopardy.
- ❑ Ignition interlock driver's license.

5.1 Overview

Sentencing for a DWI offense is governed by the applicable statute or ordinance. While the law specifies the penalties that must (mandatory) or may (within the court's discretion) be imposed, other factors come into play, such as the number of prior conviction and the court's jurisdiction. Finally, court costs and fees also must be included, as appropriate.

Important Limitation on Pleas in DWI Cases

Note that state law imposes significant limitations on a defendant's option to plead guilty to other charges to avoid a DWI conviction. Under §66-8-102.1, when a defendant is:

- Charged with violating §66-8-102 (the DWI statute) and

- the defendant's breath or blood test results are .08 or higher (or .04 or higher when driving a commercial vehicle), then
- Any plea entered in satisfaction of the charges must include at least a guilty plea to one of the subsections of §66-8-102.

In other words, in the situations previously outlined, a plea agreement must include the driver entering a plea to some type of DWI offense. The defendant cannot plead guilty to another charge, such as reckless driving, in order to satisfy the DWI charge. However, in cases where the prosecution is unable to prove a DWI charge beyond a reasonable doubt, the defendant can plead to a non-DWI charge as a means of resolving the case.

Municipal Court: Similar provisions on guilty pleas are contained in UTO 12-6-12.2, Operating a Motor Vehicle Under the Influence of Intoxicating Liquor or Drugs; Penalties; Sentencing; Fees.

Be sure to check the wording of your local ordinance.

5.2 Number of DWI Convictions/Subsequent Convictions

The state DWI statute, §66-8-102, sets forth increasingly severe penalties based on the number of prior convictions, from a first one to a sixth or subsequent conviction. The term "conviction" means "an adjudication of guilt and does not include imposition of a sentence." §66-8-102(T)(3). For purposes of determining a second or subsequent conviction, this *includes convictions under a municipal or county DWI ordinance or a DWI law in any other jurisdiction*, including other states and tribes, if the other law is equivalent to New Mexico's DWI law. §66-8-102(Q). In the next subsection of this chapter, the prosecution's use of DWI conviction(s) from states other than New Mexico to enhance the sentence for a defendant's New Mexico DWI conviction will be discussed in greater detail. The adjudication of guilt may be based on a guilty plea, a no contest plea, or a guilty verdict after a trial. Any of these outcomes count as a conviction, regardless of whether a sentence was imposed, suspended or deferred. Also, a conviction under any of the subsections (A) through (D) of §66-8-102 counts as a prior conviction for any subsequent conviction under §66-8-102, even if the later conviction is under a different subsection.

In *State v. Yazzie*, 2009-NMCA-040, the defendant pled to two DWI in one plea agreement. He had three priors. The court sentenced the defendant for a fourth and fifth conviction, both felonies. Defendant argued that the court could not count the fourth as a "prior" to the fifth because the convictions happened simultaneously. The Court of Appeals disagreed. By pleading to two DWI offenses, the defendant was admitting that he committed the offense on two separate occasions. Two separate convictions were entered and one of these could be counted as a prior offense for purposes of sentencing.

The prosecution bears the burden of proof with respect to the validity of prior DWI convictions that it seeks to use to sentence on a second or subsequent DWI. *State v. Sedillo*, 2001-NMCA-001,¶5. However, the burden of proof on prior DWI convictions is not the beyond a reasonable doubt burden the prosecution has for securing a conviction. Rather, the prosecution's burden of proof on prior DWI convictions is "preponderance of the evidence," essentially meaning that the majority of the evidence presented, i.e. 51%, supports the existence of a prior conviction. *Sedillo*, 2001-NMCA-001, ¶ 5.

Regarding all prior DWI offenses which could be used to enhance defendant's sentence, the prosecution must prove those at the sentencing hearing. *State v. Diaz*, 2007-NMCA-026, ¶ 2. The specific issue in *Diaz* was whether the trial court was required to increase defendant's original felony DWI sentence when a prior DWI conviction was discovered by the prosecution after imposition of the original sentence and after defendant had completed the original term of imprisonment but was still on probation. *Diaz*, ¶ 5. In *Diaz*, the defendant was adjudged a felon and sentenced accordingly after the prosecution established that he had four prior DWI convictions. The defendant finished serving that sentence and was still on probation when the prosecution attempted to re-imprison him and enhance his sentence again on the basis that it had recently discovered an additional prior DWI conviction. With two months remaining on defendant's prison terms, the prosecution filed a "Motion to Correct Illegal Sentence." The trial court denied the prosecution's motion to increase defendant's original felony DWI sentence and the appellate court agreed. In so agreeing, the Court of Appeals noted that defendant's original sentence was neither illegal nor improper. It also concluded that defendant had a reasonable expectation of finality in that original sentence and, therefore, further increasing it after his prison release could be a violation of double jeopardy and due process. *Diaz*, ¶¶ 2, 21.

Each DWI case will present its own unique facts that may come into play for sentencing. Regardless of those facts, under *Diaz*, the prosecution is required to prove all prior DWI offenses which it is relying on to enhance a defendant's current DWI sentence. Although *Diaz* dealt with a felony DWI, its analysis also applies to misdemeanor DWI sentencing.

When a person is convicted of DWI, the trial judge is required to review the past driving record of the person before imposing a sentence. §66-8-110(H).

5.3 Use of Prior Out-of-State DWI Conviction(s) to Enhance the Sentence for a New Mexico DWI Conviction

As previously noted, §66-8-102(Q) provides in part that "[a] conviction pursuant to…a law of any other jurisdiction, territory or possession of the United States or of a tribe…" shall be determined to be a conviction for enhancement purposes "when that ordinance or law is equivalent to New Mexico law…" on DWI and the ordinance or law "prescribes penalties…" for the DWI. The Court of Appeals recently dealt with the issue of the use of out-of-state DWI convictions in order to enhance the sentence for a New Mexico DWI conviction.

In *State v. Lewis*, 2008-NMCA-070, the Court of Appeals held that §66-8-102 requires that equivalent out-of-state DWI convictions be used to enhance a defendant's sentence for

subsequent DWI convictions. The court further determined that when the prosecution is attempting to rely on an out-of-state DWI conviction to enhance a New Mexico DWI conviction, the question is whether the state DWI statute or ordinance and the out-of-state DWI law applicable to the prior conviction are equivalent. The equivalency determination is done by comparing the elements of the two laws. *Lewis*, ¶ 25. The first question is whether the two DWI statutes' elements are "substantially identical in nature and definition when compared to each other." *Lewis*, ¶ 29. The second question is whether both DWI laws provide for specific penalties for a conviction. *Lewis*, ¶ 29.

In light of the analysis and holding in *Lewis*, when the prosecution is attempting to rely on a prior out-of-state or tribal DWI conviction to enhance a New Mexico DWI conviction, it should provide the court and defendant a copy of the other DWI law on which the prior conviction was obtained. The prosecution should be prepared to specifically argue how the two laws are equivalent and advise the court regarding whether both statutes provide for penalties upon conviction. Defendant or his or her counsel should be provided with the opportunity to respond. Thereafter, the court should do its own comparison between the New Mexico DWI statute and the out-of-state DWI law. Following that, the court can then render its decision about the appropriateness of the use of the prior out-of-state DWI conviction to enhance sentencing in the case at hand. That same analysis would be applied to every out-of-state and tribal court DWI conviction the prosecution is seeking to rely on to enhance the sentence for the New Mexico DWI conviction.

5.4 Effect of Prior Legal Representation on Sentencing for Subsequent DWI

The U.S. Constitution places an important limit on the use of prior convictions to increase the penalty for a current conviction. If a defendant was previously convicted of DWI and sentenced to jail, that conviction can be used to increase the sentence in a new DWI case only if the defendant was either represented by an attorney or validly waived the right to legal representation.

Under the Sixth Amendment, a court cannot deprive a person of liberty (i.e. impose a jail sentence) unless the person was represented by counsel or validly waived the right to assistance of counsel. *Argersinger v. Hamlin*, 407 U.S. 25 (1972). This constitutional guarantee applies even if a sentence of imprisonment is suspended, for "the sentence itself constitutes the deprivation of liberty necessitating a right to counsel." *State v. Gonzales*, 1997-NMSC-050, ¶ 12. See also *Alabama v. Shelton*, 535 U.S. 654 (2002). The prosecution has the burden of showing the validity of a prior conviction.

To be valid, a waiver of the right to counsel must be knowing, intelligent and voluntary. *State v. Gonzales*, 1997-NMSC-050. See Criminal Forms 9-401, 9-401A (Waiver of Counsel). The waiver must be "voluntary," meaning done by the defendant of his or her own free will, rather than being forced or pressured to do so by anyone. The waiver must be "intelligent," meaning that the defendant was advised by the court of the right to counsel, the right to legal representation at no cost to them if the defendant cannot afford to hire an attorney, and what it means for the defendant to be waiving legal counsel. Finally, the

waiver must be "knowing," meaning that after being advised of the right to counsel, the defendant is aware of what they are agreeing (and signing, if a written waiver) to when he or she waives legal counsel. At a minimum, a written and signed waiver of counsel, witnessed and countersigned by a judge, is *prima facie* (i.e., initially valid) evidence of a valid waiver. *Gonzales* at ¶ 17. However, the defendant can argue and present evidence to the court on the reason(s) that such a written and signed waiver is not valid.

There is no right to counsel when there is no sentence of imprisonment. *Scott v. Illinois*, 440 U.S. 25 (1972). A prior uncounseled misdemeanor DWI conviction not resulting in a sentence of imprisonment can be used to enhance a subsequent misdemeanor DWI conviction, *State v. Woodruff*, 1997 NMSC-061, or a subsequent felony DWI conviction. *State v. Hosteen*, 1997-NMSC-063; *State v. Aragon*, 1997-NMSC-062.

Summary: Use of Prior DWI Conviction(s) for Enhancement in Sentencing on a Subsequent DWI

A prior DWI conviction can be used to enhance the sentence for a defendant's current DWI conviction only if:

1. There was no sentence of imprisonment for the prior conviction.

   or

2. There was a sentence of imprisonment for the prior conviction (even if no time was actually served) and the defendant was either:

   - Represented by counsel; or
   - Not represented by counsel but executed a valid waiver of counsel.

5.5 Defense Challenges to the Prosecution's Use of Prior DWI Convictions

As previously discussed, the prosecution bears the burden of proof regarding prior DWI convictions that it seeks to use to secure a conviction on a second or subsequent DWI, but that burden is "preponderance of the evidence," rather than "beyond a reasonable doubt," required for a conviction. *Sedillo*, 2001-NMCA-001, ¶ 5. If the prosecution is able to establish a sufficient showing of the existence of valid prior DWI convictions, the defendant is entitled to present evidence calling into question the validity of those priors. *State v. Gaede*, 2000-NMCA-004, ¶ 8.

Some examples of challenges defendants have raised to the prosecution's use of prior DWI convictions in a subsequent DWI case include:

- Mistaken identity, meaning the defendant in the prior DWI case is not the same defendant in the current case due perhaps to misappropriation of defendant's identity by the other person or clerical error in the prior conviction's identifying information.

- Insufficient evidence, meaning the evidence presented by the prosecution is not enough to meet the preponderance of the evidence standard for the burden of proof.

- Fundamental error, meaning that some critical flaw took place in the prior DWI cases, like the judge not sufficiently advising defendant of all the necessary information about his or her constitutional rights or the impacts of the various types of pleas available, or that defendant was sentenced to and served jail time in the prior DWI even though he did not have an attorney and never executed a valid waiver of counsel.

In *State v. Pacheco*, 2008-NMCA- 59, the Court of Appeals dealt with the issue of a defendant's collateral challenge to the validity of two prior in-state DWI convictions, which the prosecution was attempting to use to enhance her sentence on a subsequent DWI . Defendant's challenge to her prior DWI convictions was "collateral" because the challenge was raised and argued in the subsequent DWI case, rather than within those two prior DWI cases or by a direct appeal of those convictions to the district court.

When a collateral attack is made on a prior DWI conviction, it requires a showing by defendant of fundamental error. *State v. Pino*, 1997-NMCA-001, ¶ 14. In *Pacheco*, defendant's claim of fundamental error was procedural and constitutional given her allegations that the judge in the prior cases failed to adequately ensure that her guilty pleas were made voluntarily, knowingly and intelligently. In other words, the judge's alleged failures resulted in two critically flawed prior convictions because a foundational right of defendant was not adhered to by the court.

Given the need to show fundamental error in her collateral attack, it was defendant's burden to produce evidence demonstrating the invalidity of the prior convictions, rather than the prosecution's burden to prove their validity. *Pacheco*, ¶ 8. When a defendant raises a fundamental error challenge to a guilty or no contest plea, the defendant must meet the following two factors: "(1) the error must be clear, and (2) the error must clearly have affected the outcome." *State v. Bencomo*, 109 N.M. 724, 725 (Ct. App. 1990).

Reviewing the evidence on those factors in *Pacheco*, the Court of Appeals concluded defendant did not meet those factors. Specifically, the evidence presented did not point out deficiencies in the acceptances of the two prior pleas, the pre-plea acceptance information provided by the judge in those two prior cases substantially complied with the required information, and there was no evidence that defendant would have not pleaded guilty had she been more completely informed of her rights in those prior cases. *Pacheco*, ¶¶ 13, 14.

Therefore, the defendant failed to show fundamental error in the prior guilty pleas, and the prosecution could use them to enhance the subsequent DWI.

5.6 DWI Sentences

Municipal Court: Provisions similar to §66-8-102 are contained in UTO 12-6-12.2, Operating a Motor Vehicle Under the Influence of Intoxicating Liquor or Drugs; Penalties; Sentencing; Fees.

Although municipalities are authorized under §3-17-1(C)(2) to adopt a DWI ordinance with up to 364 days of imprisonment and a $1000 fine, in practice municipal courts are limited to 179 days and a $999 fine as their maximum sentence for DWI. To exceed 179 days would require providing defendants with the opportunity for a trial by jury, which municipal courts have no statutory authority to conduct.

Note that under UTO 12-6-12.2(C), the possible sentence for a first DWI conviction is 90 days of jail and a $999 fine. For a second or third DWI conviction under UTO 12-6-12.2(D), the possible sentence is 179 days of jail and a $999 fine. Mandatory consecutive hours or days in jail must be imposed for second and third convictions, and for all aggravated DWI convictions. UTO 12-6-12.2 also has provisions similar to §66-8-102 for community service, DWI school, alcohol and drug screening and treatment, and installation of ignition interlock devices.

Be sure to check the wording of your local ordinance.

5.6.1 First DWI Conviction

A "first conviction" for DWI means:

1. The defendant does not have a prior DWI conviction.

or

2. The defendant has a prior DWI conviction, but:

    - The conviction resulted in a sentence of imprisonment; AND
    - The defendant was not represented by counsel and did not execute a valid waiver of counsel.

Mandatory Sentence: Under §66-8-102(E), the sentence for a first conviction for DWI must include the following, **none of which may be suspended, deferred or taken under advisement**:

- 24 hours of community service.
- "DWI school"--a driver rehabilitation program for alcohol or drugs approved by the Traffic Safety Bureau of the State Department of Transportation.
- Alcohol or drug abuse screening program approved by the Department of Finance and Administration.
- An ignition interlock driver's license must be obtained and an ignition interlock device must be installed and operating on all motor vehicles driven by the offender for one year. Unless it is determined that the offender is indigent, the offender must pay all costs associated with having the ignition interlock device installed on the appropriate motor vehicles. §66-8-102(N).

Aggravated DWI--First Conviction

If the first conviction is for aggravated DWI, the sentence also must include not less than 48 consecutive hours of jail. This jail sentence shall not be suspended, deferred or taken under advisement. §66-8-102(E).

Discretionary Sentence: Under §66-8-102(E), the sentence for a first conviction for DWI may include the following:

- Imprisonment up to 90 days total.
- Fine up to $500.
- Additional hours (no limit) of community service for DWI arrests.
- Costs of any court-ordered screening and treatment programs. §66-8-102(R).

Additional Considerations.

- Any time spent in jail for the offense prior to conviction must be credited to any term of imprisonment imposed by the court. §66-8-102(E).
- If the defendant fails to complete any court-ordered community service, screening program, treatment program or DWI school, or fails to comply with any other condition of probation, within the time specified by the court, the defendant must be sentenced to at least 48 additional consecutive hours in jail. Any such jail time shall not be suspended, deferred or taken under advisement. §66-8-102(E).

- If the sentence is partially or fully suspended or deferred, the period of probation may extend beyond 90 days up to one year. A deferred sentence is considered a first conviction for determining subsequent convictions. §66-8-102(E).

- If a defendant, whose sentence was partially or fully suspended or deferred, violates any condition of probation, the court may impose any sentence that it could have originally imposed and credit shall not be given for the time served on probation. §66-8-102(S).

5.6.2 Second DWI Conviction

A "second conviction" for DWI means:

1. The defendant has one prior DWI conviction and was represented by counsel, regardless of the sentence.

or

2. The defendant has one prior DWI conviction and validly waived counsel, regardless of the sentence.

or

3. The defendant has one prior DWI conviction, was not represented by counsel, and the conviction did not result in a sentence of imprisonment.

Mandatory Sentence: Under §66-8-102(F)(1), the sentence for a second conviction for DWI must include the following, **none of which can be suspended, deferred or taken under advisement**:

- 96 consecutive hours of jail.

- $500 fine.

- Not less than 48 hours of community service.

- Alcohol or drug abuse screening program approved by the Department of Finance and Administration. §66-8-102(K).

- Completion, within a time specified by the court, of one of the following court-approved programs: (1) an inpatient, residential or in-custody substance abuse treatment program at least 28 days in duration; (2) an outpatient treatment program at least 90 days in duration; (3) a drug court program; or (4) any other substance abuse treatment program. §66-8-102(L).

- An ignition interlock driver's license must be obtained and an ignition interlock device must be installed and operating on all motor vehicles driven by the offender for two years. Unless the court determines the offender is indigent, the offender must pay all costs associated with having the ignition interlock device installed on the appropriate motor vehicles. §66-8-102(N).

Aggravated DWI--Second Conviction

If the second conviction is for aggravated DWI, sentence also must include not less than 96 additional consecutive hours of jail, for a total of 8 consecutive days in jail. This jail sentence shall not be suspended, deferred or taken under advisement.§66-8-102(F)(1).

Discretionary Sentence: Under §66-8-102(F), the sentence for a second conviction for DWI may include the following:

- Up to 356 additional days in jail.
- Up to $500 additional fine.
- Costs of any court-ordered screening and treatment programs. §66-8-102(R).

Additional Considerations.

- If the defendant fails to complete any court-ordered community service, screening program or treatment program within the time specified by the court, the defendant must be sentenced to at least 7 additional consecutive days in jail and this can not be suspended, deferred or taken under advisement. §66-8-102(F)(1).
- If the sentence is partially or fully suspended, the period of probation may extend beyond one year up to five years. §66-8-102(F).
- If a defendant whose sentence was partially or fully suspended or deferred violates any condition of probation, the court may impose any sentence that it could have originally imposed and credit shall not be given for the time served on probation. §66-8-102(S).
- While §66-8-102(F) does not require that any pre-conviction time spent in jail be credited against the term of imprisonment imposed by the court, trial courts have inherent discretionary authority to provide presentence credit for second DWI convictions. *State v. Martinez*, 1998-NMSC-023, ¶ 15. Note that presentence credit for in-patient alcohol treatment can be applied only to a sentence of alcohol treatment and not to a sentence of jail. *Martinez* at ¶ 16.

5.6.3 Third DWI Conviction

A "third conviction" for DWI means the defendant has two prior DWI convictions, and for each conviction:

1. The defendant was represented by counsel, regardless of the sentence.

or

2. The defendant validly waived counsel, regardless of the sentence.

or

3. The defendant was not represented by counsel, and the conviction did not result in a sentence of imprisonment.

Mandatory Sentence: Under §66-8-102(F)(2), the sentence for a third conviction for DWI must include the following, **none of which can be suspended, deferred or taken under advisement**:

- 30 consecutive days of jail.
- $750 fine.
- Not less than 96 hours of community service.
- Alcohol or drug abuse screening program approved by the Department of Finance and Administration. §66-8-102(K).
- Completion, within a time specified by the court, of one of the following court-approved programs: (1) an inpatient, residential or in-custody substance abuse treatment program at least 28 days in duration; (2) an outpatient treatment program at least 90 days in duration; (3) a drug court program; or (4) any other substance abuse treatment program. §66-8-102(L).
- An ignition interlock driver's license must be obtained and an ignition interlock device must be installed and operating on all motor vehicles driven by the offender for three years. Unless the court determines the offender is indigent, the offender must pay all costs associated with having the ignition interlock device installed on the appropriate motor vehicles. §66-8-102(N).

Aggravated DWI--Third Conviction

If the third conviction is for aggravated DWI, sentence also must include not less than 60 additional consecutive days of jail, for a total of 90 days in jail. §66-8-102(F)(2).

Discretionary Sentence: Under §66-8-102(F), the sentence for a third conviction for DWI may include the following:

- Up to 334 additional days in jail.
- Up to $250 additional fine.

- Costs of any court-ordered screening and treatment programs. §66-8-102(R).

Additional Considerations.

- If the defendant fails to complete any court-ordered community service, screening program or treatment program within the time specified by the court, the defendant must be sentenced to at least 60 additional consecutive days in jail and this can not be suspended, deferred or taken under advisement. §66-8-102(F)(2).

- If the sentence is partially or fully suspended, the period of probation may extend beyond one year up to five years. §66-8-102(F).

- If a defendant, whose sentence was partially or fully suspended or deferred, violates any condition of probation, the court may impose any sentence that it could have originally imposed and credit shall not be given for the time served on probation. §66-8-102(S).

- While §66-8-102(F) does not require that any pre-conviction time spent in jail be credited against the term of imprisonment imposed by the court, trial courts have inherent discretionary authority to provide presentence credit for third DWI convictions. *State v. Martinez*, 1998-NMSC-023, ¶ 15. Note that presentence credit for in-patient alcohol treatment can be applied only to a sentence of alcohol treatment and not to a sentence of jail. *Martinez* at ¶ 16.

5.6.4 Fourth, Fifth, Sixth, Seventh and Subsequent DWI Convictions

Under §66-8-102, a fourth or subsequent DWI conviction is a felony that must be handled in district court exclusively.

A fourth DWI conviction is a fourth degree felony for which the offender must be sentenced to 18 months of imprisonment, of which 6 months shall not be suspended, deferred or taken under advisement. §66-8-102(G). In addition, under §31-18-15(E)(8), a fourth degree felony is subject to a $5000 maximum fine.

A fifth DWI conviction is a fourth degree felony for which the offender must be sentenced to 2 years of imprisonment, of which 1 year shall not be suspended, deferred or taken under advisement. §66-8-102(H). In addition, under §31-18-15(E)(8), a fourth degree felony is subject to a $5000 maximum fine.

A sixth DWI conviction is a third degree felony for which the offender must be sentenced to 30 months of imprisonment, of which 18 months shall not be suspended, deferred or taken under advisement. §66-8-102(I). In addition, under §31-18-15(E)(8), a third degree felony is subject to a $5000 maximum fine.

A seventh or subsequent DWI conviction is a third degree felony for which the offender must be sentenced to 3 years of imprisonment, of which 2 years shall not be suspended, deferred or taken under advisement. §66-8-102(J). In addition, under §31-18-15(E)(8), a third degree felony is subject to a $5000 maximum fine.

Additional Considerations:

- For felony convictions, the Corrections Department is required to provide substance abuse counseling and treatment to offenders in its custody. When the offender is on probation or parole under its supervision, the Corrections Department must either provide the offender with substance abuse counseling or treatment or require the offender to obtain substance abuse counseling or treatment. §66-8-102(M).

- For fourth or subsequent DWI convictions, the offender must obtain an ignition interlock driver's license and install and operate an ignition interlock device on all motor vehicles driven by the offender for the remainder of his or her life. Unless it is determined that the offender is indigent, the offender must pay all costs associated with having the ignition interlock device installed on the appropriate motor vehicles. §66-8-102(N).

- Five years from the date of conviction and every five years thereafter, a fourth or subsequent offender may apply to a district court for removal of the ignition interlock device requirement and restoration of a regular driver's license. A district court may, for good cause shown, remove the ignition interlock device requirement and order restoration of the regular driver's license, provided the offender has not been subsequently convicted of DWI. Good cause may include an alcohol screening and proof from the ignition interlock vendor that the person has not had violations involving the use of the interlock device. §66-8-102(O).

  Based on the requirement in §31-20-12, for presentence credit for felony convictions, trial courts must grant presentence credit for official confinement to defendants convicted of a fourth or subsequent DWI offense. *State v. Martinez*, 1998-NMSC-023, ¶ 10. A defendant released prior to a felony DWI conviction (1) under conditions of house arrest that require the defendant to remain at home except to attend specified events such as treatment, work, or school, and (2) pursuant to a community custody release program that holds the defendant liable to a charge of escape under §30-22-8.1, is entitled to presentence confinement credit for time spent in the program. *State v. Guillen*, 2001-NMCA-079. By contrast, presentence confinement credit cannot be granted against a felony DWI jail sentence for time spent in an in-patient alcohol treatment program that is not court-ordered and which imposes no restrictions or legal consequences on the defendant's ability to leave. *State v. Clah*, 1997-NMCA-091, ¶ 15.

- A fourth or subsequent DWI conviction cannot be enhanced under the habitual offender statute (§31-18-17), *State v. Anaya*, 1997-NMSC-010, ¶ 33; *State v.*

Gonzales, 1997-NMSC-050, ¶ 20, nor can it be enhanced by aggravating circumstances under §31-18-15.1. *State v. Coyazo*, 2001-NMCA-018, ¶ 11.

5.7 Presentence Report

Any judge may require a presentence report be prepared by a probation officer or other qualified professional prior to the imposition of a sentence. The purpose of the pre-sentence report is to provide factual information about the defendant and to assist the court by recommending a sentence based on the information.

There are no statutory limitations on the contents of a presentence report. *State v. Montoya*, 91 N.M. 425 (Ct. App. 1978). In general, the report should contain the fullest information possible concerning the defendant's life and characteristics, including accurate information regarding prior arrests that did not result in convictions and convictions for which the defendant had the benefit of legal counsel. Inclusion of such information does not violate the defendant's due process rights. *Montoya*.

The judge is not bound by the recommendations contained in the presentence report and must make an independent determination of the proper sentence in each case. The prosecuting attorney and defense attorney have a right to review the factual information contained in the report prior to the sentencing hearing.

5.8 Sentencing Considerations

It is important for the court to distinguish between mandatory sentencing and discretionary in imposing its sentences, and the proof needed for each. In order for a mandatory DWI sentence to be imposed, proof beyond a reasonable doubt of each and every prior conviction is necessary. For example, if a defendant is to be sentenced as a third DWI offender, and the judge plans to impose the mandatory sentence of 30 consecutive days in jail, the prosecution must first produce certified copies of each of the prior convictions, showing the defendant was represented by, or waived, counsel in order to prove both of those prior convictions. Only then may the judge sentence the defendant to the mandatory 30 days in jail.

However, the prosecution not being able to prove the prior DWI offenses beyond a reasonable doubt does not preclude the judge from sentencing the defendant to that 30 days in jail discussed in the above example. This may be done as part of the judge's discretionary sentencing as long as the sentence given is within what is allowed by statute. For example, for a first offense DWI the jail sentence may be up to 90 days. §66-8-102(E). This means that the judge can sentence the defendant anywhere from 0 days to 90 days.

Factors in Deciding Sentence Within the Statutory Range

In deciding what sentence to impose within the allowable statutory range, the judge may take many things into account. Factors that can be considered include: how does the driver come across if he or she exercises the right of allocution (makes a statement to the court about the incident); was there an automobile crash; was anyone injured; were any children in the

vehicle; does the defendant have a prior criminal history; and does the defendant's prior driving history include any prior DWI convictions. Courts are required to review the defendant's past driving record before imposing a sentence. §66-8-110(H).

The difference here is that the prior convictions do not have to be proven beyond a reasonable doubt for the judge to consider them in imposing any authorized discretionary sentence. In a sentencing hearing, the standard for the prosecution is to present matters and prove them to the court by a preponderance of the evidence, meaning that at least 51% of the evidence presented supports the existence of the prior DWI conviction for the defendant at issue. *State v. Sedillo*, 2001-NMCA-001, ¶ 5. If, for example, because of problems obtaining a certified record, the prior offenses cannot be proven, but do appear on the defendant's driving record, the judge, in his or her discretion, may consider them if it feels the record is correct.

In these situations, the judge does not sentence the defendant as a second or third offender; rather, the sentence is for a first offense. But taking into account all mitigating and aggravating factors, the judge may impose a sentence anywhere within the allowable statutory range.

"Mitigate" is defined as "to make less severe, violent, cruel, intense, painful; soften, alleviate," while "aggravate" is defined as "to make worse, more serious, or more severe: intensify." *State v. Segotta*, 100 N.M. 498, 501 (1983). Therefore, a defendant with a clean driving record, no past criminal history, a fairly low breath and/or blood alcohol level and no other aggravating factors may get no jail time, or all jail time suspended, while a defendant with two prior uncertified/unproven DWI convictions, five prior speeding tickets, a criminal history of minor crimes, and other factors, may get 30 or even 60 days in jail with no portion suspended.

5.9 Deferral, Suspension and Probation

"Deferred" and "Suspended" Sentences Defined

A "deferred sentence" is one that is not handed down (announced, imposed) by the court and will not be as long as the defendant successfully meets certain requirements such as complying with conditions of probation. For example, the judge tells the defendant "I find you guilty of DWI 1st but will defer sentencing for that crime on the condition that you successfully complete all of the terms of probation. If you do not, the court will sentence you as allowed by statute for a DWI 1st conviction."

For DWI, a deferred sentence is permissible only on a first DWI conviction. §66-8-102(E). §31-19-1; §31-20-5. A deferred sentence on a first DWI conviction is considered a first conviction for enhancement purposes if the driver is convicted for a subsequent DWI.

A "suspended sentence" is one that is handed down (announced, imposed) by the court but essentially postponed such that the defendant is not required to serve the sentence unless she or he violates some other court-imposed condition or commits another crime. For example,

the judge tells the defendant "I find you guilty of DWI 1st and sentence you to two days in jail and a $300 fine, but will suspend both the jail time and fine on the condition you successfully complete all conditions of probation." A suspended sentence, in effect, is a form of probation.

If the sentence is suspended or deferred, the judge should place the defendant on probation for all, or some, of the period of deferment or suspension and should impose conditions that are reasonably related to the defendant's rehabilitation. Suspending or deferring a sentence and imposing probation is an act of clemency, not a right of the defendant. However, keep in mind that sentencing for DWI does contain some mandatory sentencing requirements, as discussed previously.

In deferring or suspending a DWI sentence, a judge may order probation of up to one year for a first conviction under §66-8-102(E) and up to five years for a second or third conviction under §66-8-102(F).

Municipal Court: Municipal courts have authority to suspend or defer a sentence or place a convicted DWI offender on probation for up to one year only if the municipality enacts an ordinance granting the court this authority. §35-15-14(A)(1). UTO 12-6-12.2(J) states that except as otherwise prohibited, "a municipal judge may suspend in whole or in part the execution of sentence or place the defendant on probation for a period not exceeding one year on terms and conditions that municipal judge deems best, or both, or defer sentence."

Be sure to check the wording of your local ordinance.

If a defendant is convicted on only one charge, the sentence cannot be both deferred and suspended. If the defendant is convicted on more than one charge, the court may impose (and suspend) a fine and/or jail sentence on one charge and defer the sentence on the other.

Information on Probation

"Probation" is the method by which courts essentially maintain a degree of continued authority over a defendant while she or he completes the terms of the sentence imposed by the court. The terms and conditions of probation are at the discretion of the judge and must be reasonably related to the defendant's rehabilitation. To be reasonably related, the probation condition must be relevant to the offense for which probation was granted.

As a condition of probation, for example, the court may require attendance at an alcohol treatment program or may order the defendant to make restitution to anyone who was injured as a result of the offense. The judge has discretion to determine whether probation is to be supervised or unsupervised. Probation may be supervised by the court, community and probation services, or county misdemeanor compliance officers under §31-20-5.1.

If the court defers a sentence or suspends all or part of a sentence without setting the terms and conditions of probation on an original valid judgment and sentence form, it may not later amend it to include the terms and conditions of probation. The original valid sentence may not be amended by including any conditions such as probation.

The length of the probation period should be specifically entered on the judgment form. If a fixed probation period is not specified, the probation period will be assumed to be the same as the maximum allowable sentence. *Note:* The court may modify, but not increase, a sentence under Rules 5-801 (district court), 6-801 (magistrate court), 7-901 (metropolitan court) and 8-801 (municipal court). Changing the sentence from incarceration to probation is a permissible reduction under these rules.

If multiple sentences are ordered to be served consecutively (run one right after the other), the individual probation periods for each sentence will be "stacked" (except in municipal court); that is, imposed one after the other for a combined total period longer than the probation for one offense. If multiple sentences will be served concurrently (run together at the same time), the probation periods will be effective for the duration of the longest of the individual probation periods.

Effects of Defendant's Violation of Probation

If defendant violates the conditions of probation under a suspended or deferred sentence, the prosecution may file a motion with the court for the revocation of the suspended or deferred sentence. If such a motion is made, the court must hold a hearing and must give prior notice to the defendant.

The court, on its own initiative, may also start a proceeding to determine whether probation has been violated, and, if so, what sentence to impose. A hearing must be held in this situation. The court may also issue an arrest warrant for the alleged probation violator for good cause shown.

If, after the hearing, the court revokes the probation, a new judgment and sentence form is prepared, with a notation that the probation on the original form has been revoked. The court may then reinstate the defendant's probation or if sentence was suspended, require the defendant to serve the sentence imposed or any lesser sentence. If imposition of sentence was deferred, the court may impose any sentence that could originally have been imposed and credit shall not be given for time served on probation. §66-8-102(S).

If the court revokes the deferral of sentence, a new judgment and sentence form is prepared, with a notation that the sentence is being imposed as a result of a violation of the conditions of probation under the deferred sentence. Because a hearing on probation revocation is not a trial, the right to a speedy trial is not applicable.

5.10 Mandatory Court Fees

NOTE: Fees are subject to legislative amendment. The fees noted below are current as of October 2010. Please check specific legislation or municipal ordinance for current fees after each legislative session.

In addition to the sentencing provisions of §66-8-102, the following fees are mandatory and must be imposed on a defendant convicted of DWI, either by a guilty verdict after trial or by a plea of guilty or no contest. The fees are mandatory (must always be imposed) for every DWI conviction, even if the defendant receives a deferred or suspended sentence. The fees cannot be imposed if the defendant is not convicted. The state Supreme Court's order dealing with fines and fees is located in this chapter.

Courts are required to collect these fees and distribute them to the appropriate agencies:

- $85 DWI lab fee (to defray the costs of chemical and other tests used to determine the influence of liquor or drugs). §31-12-7(A). This applies to convictions under §66-8-102 and municipal DWI ordinances. These fees are sent to the Administrative Office of the Courts, which deposits them in the Crime Laboratory Fund for payment to the Scientific Laboratory Division of the Department of Health, the State Police Crime Laboratory Division and the Albuquerque Police Crime Laboratory. §31-12-9.

- $75 DWI community prevention fee (to fund comprehensive community programs for the prevention of DWI and for other traffic safety purposes). §31-12-7(B). This applies to convictions under §66-8-102 and municipal DWI ordinances. These fees are sent to the Administrative Office of the Courts, which deposits them in the Crime Laboratory Fund for payment to the Traffic Safety Bureau of the Highway and Transportation Department. §31-12-9.

- Docket fee:

    - $35 in district court for criminal appeals from magistrate court decisions. $10 of this fee must be deposited in the court automation fund. §35-13-2(B). Except as otherwise specifically provided by law, docket fees are paid into the General Fund. §34-6-40(C).

    - $20 in magistrate and metropolitan court. Under §35-6-4(B), the court must attempt to collect a $20 docket fee from a defendant convicted in any criminal action. The docket fee is charged per criminal complaint, not per conviction of separate criminal offenses in the complaint. These fees are transferred to the Administrative Office of the Courts for deposit in the Court Facilities Fund. §§35-6-4(B), 35-6-1(A).

    - Municipal courts do not have the authority to collect this fee.

- Corrections fee:
  - $20 in magistrate court and $10 in metropolitan court. §35-6-1(D)(1).

    These fees are deposited in the Local Government Corrections Fund administered by the Administrative Office of the Courts for payment to counties and municipalities in counties with a metropolitan court for county or municipal jailer or juvenile detention training; for construction planning, construction, maintenance and operation of the county or municipal jail or juvenile detention facility; for the costs of housing county or municipal prisoners or juveniles in any detention facility in the state; or for complying with match or contribution requirements for receipt of federal funds relating to jails. §33-3-25(B).

  - $20 in municipal court. §35-14-11(B)(1). These fees are deposited in a special fund in the municipal treasury and used for municipal jailer or juvenile detention officer training; construction planning, construction, operation and maintenance of a municipal jail or juvenile detention facility; paying the costs of housing municipal prisoners in a county jail or detention facility or housing juveniles in a detention facility; complying with match or contribution requirements for receipt of federal funds relating to jails or juvenile detention facilities; providing inpatient treatment or other substance abuse programs in conjunction with or as an alternative to jail sentencing; defraying the cost of transporting prisoners to jails or juveniles to juvenile detention facilities; or providing electronic monitoring systems. §35-14-11(D).

- Court automation fee:
  - Of the $35 docket fee in district court for criminal appeals from magistrate court decisions, $10 is deposited in the court automation fund. §35-13-2(B). The Court Automation Fund is administered by the Administrative Office of the Courts and used for service contracts related to court automation systems and the purchase, lease-purchase, financing, refinancing and maintenance of court automation systems in the judiciary. §34-9-10(B).

  - $10 in magistrate and metropolitan court. §35-6-1(D)(2). These fees are deposited in the Court Automation Fund, administered by the Administrative Office of the Courts, and used for service contracts related to court automation systems and the purchase, lease-purchase, financing, refinancing and maintenance of court automation systems in the judiciary. §34-9-10(B).

  - $6 in municipal court. §35-14-11(B)(3). These fees are deposited in the Municipal Court Automation Fund, administered by the Administrative Office of the Courts, and used for the purchase, maintenance and operation, including

personnel costs, of court automation systems in the municipal courts. §34-9-12(B).

- Traffic safety fee:
  - $3 in magistrate and metropolitan court. §35-6-1(D)(3). These fees are deposited in the Traffic Safety Education and Enforcement Fund administered by the Traffic Safety Bureau of the Highway and Transportation Department. §66-7-512.
  - Municipal courts do not have authority to collect this fee.
- Judicial education fee:
  - $3 in magistrate and metropolitan court. §35-6-1(D)(4). These fees are deposited in the Judicial Education Fund and administered by the Judicial Education Center, within the Institute of Public Law at the University of New Mexico School of Law, for education, training and instruction for the justices, judges, magistrates and court personnel of the state, municipalities and counties. §§34-13-1, 34-13-2.
  - $3 in municipal court. §35-14-11(B)(2). These fees are handled the same as above.
- Jury and witness fee:
  - $5 in magistrate and metropolitan court. §35-6-1(D)(5). These fees are deposited in the Jury and Witness Fee Fund, administered by the Administrative Office of the Courts, and used to pay the costs of jurors and prospective jurors; witnesses of fact or character subpoenaed by the court, the prosecution or the defense; expert witnesses for grand juries and magistrate courts; court interpreters; and defending persons whom the court has ordered the public defender to represent when those persons do not meet the public defender's indigency standards. §34-9-11(B).
  - Municipal courts do not have authority to collect this fee.
- Brain injury services fee:
  - $5 in magistrate and metropolitan court. §35-6-1(D)(6). These fees are deposited in the Brain Injury Services Fund, administered by the Department of Health, and used to institute and maintain a statewide brain injury services program designed to increase the independence of persons with traumatic brain injuries. §24-1-24.
  - Municipal courts do not have authority to collect this fee.

- Court facilities fee:
    - $24 in metropolitan court. §35-6-1(D)(7). These fees are deposited in the Court Facilities Fund, administered by the Administrative Office of the Courts, and used for acquisition of real property and the design, construction, furnishing and equipping of a new Bernalillo county metropolitan court building and parking facility. §34-9-14.
    - $10 in magistrate court. §35-6-1(D)(6). These fees are handled the same as above.
    - Municipal courts do not have authority to collect this fee.
- Domestic violence offender treatment fee:
    - $5 in magistrate, metropolitan and district court. These fees are deposited in the domestic violence offender treatment fund. §31-12-11.
    - Municipal courts do not have authority to collect this fee.

Following is a copy of the New Mexico Supreme Court Order in 2009 for the collection of fines and fees in criminal cases.

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

NO. 09-8110

IN THE MATTER OF THE ADOPTION OF A COLLECTION SCHEME FOR FINES, FEES, AND COSTS ASSESSED IN CRIMINAL PROCEEDINGS

ORDER

WHEREAS, Section 31-23-3(A) NMSA allows any person sentenced to pay a fine or to pay fees and costs in any criminal proceedings against him or her in installments or allows community service to be performed in lieu of costs and fees; and

WHEREAS, effective July 1, 2009, new and increased fees will be added to criminal convictions, specifically, $10 was added to the automation fee, $1 was added to the judicial education fee, and a new $5 fee to fund jury, witness, and interpreter payments was enacted,

and the Court having considered said Legislative changes and being sufficiently advised, Chief Justice Edward L. Chávez, Justice Patricio M. Serna, Justice Petra Jimenez Maes, Justice Richard C. Bosson, and Justice Charles W. Daniels concurring:

NOW, THEREFORE, IT IS ORDERED that, effective July 1, 2009, the money received shall be applied in the following order when the fee is applicable:

1. Court Costs/Docket Fee ----------Section 35-6-1 NMSA 1978
2. Court Automation Fee----------Section 35-6-1 NMSA 1978
3. Court Facilities Fee----------Section 35-6-1 NMSA 1978
4. Jury and Witness Fee----------Sections 35-6-1 & 66-8-116.3 NMSA 1978
5. Bench Warrant Fee----------Sections 34-8A-12 & 35-6-5 NMSA 1978
6. Driving While Under the Influence
   Lab Fee----------Section 31-12-7 NMSA 1978
7. Substance Abuse Lab Fee----------Section 32-12-8 NMSA 1978
8. Corrections Fee----------Section 35-6-1 NMSA 1978
9. Traffic Safety Fee----------Section 35-6-1 NMSA 1978
10. Driving While Under the Influence
    Prevention Fee----------Section 31-12-7 NMSA 1978
11. Judicial Education Fee----------Section 35-6-1 NMSA 1978
12. Domestic Violence
    Treatment Fee----------Section 34-15-1 & 2 NMSA 1978
13. Brain Injury Services Fee----------Section 35-6-1 NMSA 1978
14. Fines----------Section 31-19-1 NMSA 1978

IT IS FURTHER ORDERED that community service performed in lieu of payment or a jail payout shall be applied starting with number fourteen (14) fines and proceed in reverse order;

IT IS FURTHER ORDERED that the collection scheme is based upon the principles that fees numbered one (1) through five (5) are pledged to pay off bonds (court costs are paid into the Court Facilities Fund) or to directly fund the courts, and that fees numbered six (6) through fourteen (14) are paid off in the order in which they were identified as critical to court-related and other programs in Supreme Court Order No. 03-8200 filed June 18, 2003.

IT IS SO ORDERED.

Done in Santa Fe, New Mexico, this 20th day of May, 2009.

_____/s/_____
Chief Justice Edward L. Chávez

_____/s/_____
Justice Patricio M. Serna

_____/s/_____
Justice Petra Jimenez Maes

_____/s/_____
Justice Richard C. Bosson

_____/s/_____
Justice Charles W. Daniels

5.11 DWI Conviction Records

Within 10 days of a DWI judgment and sentence, the court must send an abstract of the court case to the Motor Vehicle Division, unless the conviction is appealed to a higher court. According to §66-8-135(B), the abstract must contain the following information:

- Name and address of the defendant.
- Specific section number and common name of the state statute or local law, ordinance or regulation under which the defendant was tried.
- The plea, finding of the court and disposition of the charge, including any fine, jail sentence, forfeiture of bail or dismissal of the charge.
- Itemization of costs assessed to the defendant.
- Date of the hearing.
- Court's name and address.
- Whether the defendant was a first or subsequent offender.
- Whether the defendant was represented by counsel or waived the right to counsel and, if represented, the name and address of counsel.

This information is usually entered on the court abstract form from the DWI citation provided by the Motor Vehicle Division. Failure or refusal of any judicial officer to comply

with the requirements of §66-8-135 is misconduct in office and grounds for removal. §66-8-135(F).

A prior DWI conviction will be counted for the purpose of determining subsequent convictions, for charging and sentencing decisions, even if the sentence is deferred. Therefore, it is important for court abstract information to reach the Motor Vehicle Division in a timely manner.

A DWI conviction stays on a motorist's driving record for 25 years, unlike other traffic convictions, which drop off after three years. Although a deferred sentence for other Motor Vehicle Code violations means the offense drops off a motorist's driving record entirely, that is not the case for DWI convictions that result in deferred sentences.

5.12 Driver's License Revocation

The following section is for informational purposes only given that license revocation is an administrative action handled exclusively by the Motor Vehicle Division of the New Mexico Taxation and Revenue Department. A judge may never revoke a defendant's driver's license or order that it be revoked, regardless of the offense. A judge may never physically take away a motorist's driver's license for any reason.

Because license revocation is considered to be an important sanction against DWI offenders, there are two separate systems that operate to make certain a DWI offender loses his or her driver's license:

- **Implied Consent Act Revocation Stemming from a DWI Arrest**. The process of administrative revocation begins when the arresting officer, acting as an agent for the MVD, physically removes the driver's license from a DWI suspect if the suspect either fails the chemical test, by registering a .08 or higher alcohol level (.04 for drivers of commercial vehicles or .02 for under age-21 offenders), or refuses to take the chemical test(s). The driver receives from the officer a temporary license (the driver's copy of the "Notice of Revocation") that is valid for 20 days.

  If the driver does not request an administrative hearing on the pending license revocation within 10 days, his or her driver's license will be automatically revoked, either for six months (no prior DWI administrative revocations) or for a year (a prior DWI administrative revocation, an under-age 21 driver, or a refusal to submit to breath and/or blood testing in the DWI that is the subject matter of the license revocation hearing). If the driver timely requests a hearing and the administrative license revocation (Implied Consent) hearing officer rules for the driver, the driver's license will be returned. The most common reason that a driver would prevail at the Implied Consent hearing is because the law enforcement officer fails to appear at the hearing, or because the hearing officer is convinced that the stop, arrest or chemical testing procedures were deficient in some way.

The Implied Consent administrative hearing, to determine whether a motorist should have their driver's license revoked for the DWI arrest, must occur within ninety days of the service of the Notice of Revocation paperwork on the motorist. Therefore, typically, the administrative license revocation hearing is held prior to the completion of the criminal DWI case in court. Thus, it is not unusual for a DWI defendant's driver's license to already be administratively revoked during the criminal DWI case.

On rare occasions, in the DWI criminal case, judges may be presented with the written decision of the administrative license revocation hearing officer. The prosecution, defense counsel or the pro se driver may ask the court to apply the decision's reasoning to the criminal case. Keep in mind that those decisions are not binding in any way on the court, and the judge can decide whether or not to consider the decision.

- **Revocation Stemming from a DWI Criminal Conviction**. After a DWI conviction, the court sends official notice of the conviction to the Motor Vehicle Division, as required by §66-8-135(B). This notice is in the form of the court abstract, which is part of the DWI citation.

  When the Motor Vehicle Division receives the court's notice of a DWI conviction, the defendant's license will be administratively revoked by MVD for one year from the date of conviction. This can be in addition to the administrative revocation under the Implied Consent Act.

It is possible for the defendant to prevail at the administrative hearing and receive his license back, only to lose it upon the criminal conviction for DWI. Conversely, the defendant can lose his license administratively and win at the criminal trial, and still be revoked. In general, what happens at one forum does not affect the other.

If the defendant loses his license administratively and then is also convicted of DWI, the two revocations run concurrently (together, at the same time) for a single year.

Note on Degree of Offense: If a judge signs a DWI plea agreement that contains language specifying the defendant is a first offender "for all lawful purposes," the Motor Vehicle Division may be required to revoke the defendant as a first offender. Compare *Collyer v. State Taxation & Revenue Dep't,* 121 N.M. 477 (Ct. App. 1995) (holding that a court judgment treating a DWI conviction as first offense bound the Motor Vehicle Division to consider it a first offense under §66-5-29) with *Medrow v. State Taxation & Revenue Dep't,* 1998-NMCA-173 (holding that a guilty plea to first offense aggravated DWI by a defendant who had a prior license revocation under the Implied Consent Act did not preclude the Motor Vehicle Division from revoking the license for one year under §66-8-111 of the Act).

The New Mexico Supreme Court has ruled the administrative license revocation process and a subsequent criminal prosecution based on the same DWI incident do not violate the

constitutional prohibition against double jeopardy. *State ex rel. Schwartz v. Kennedy,* 120 N.M. 619 (1995). That case and the concept of double jeopardy will be discussed in greater detail in the following section.

5.13 DWI and Double Jeopardy

The double jeopardy clause of the United States and New Mexico constitutions prohibit the state from seeking to punish citizens twice in separate proceedings for a single incident. In the DWI arena, issues of double jeopardy in New Mexico have been addressed by the courts in the context of administrative, civil law vehicle seizure and forfeiture programs and in situations where the prosecution seeks to secure a criminal conviction for DWI.

Vehicle Forfeiture Laws and Double Jeopardy

Some municipalities have enacted ordinances providing for the forfeiture of vehicles as a result of a DWI arrest, and other municipalities are considering the passage of similar ordinances. The general purpose behind such ordinances is to take away from the arrested individual the very instrument, i.e. the vehicle, which allowed the driver to allegedly commit the crime of DWI. As more local governing bodies enact forfeiture laws, courts may have double jeopardy arguments presented to them in DWI criminal cases.

In *State ex rel. Schwartz v. Kennedy*, 120 N.M. 619 (1995), the state Supreme Court held the system of a criminal process for DWI and a separate administrative system for revocation of drivers' licenses for those arrested for DWI does not violate double jeopardy principles. In reaching its decision, the court concluded the administrative license revocation process is not "punishment" for purposes of double jeopardy but instead has a remedial purpose of removing dangerous drivers from the roads. To so conclude, the court considered the fact that the administrative license revocation proceeding and the criminal proceeding are entirely separate and distinct processes which are pursued independently of each other, before two different fact finders under two different standards of review resulting in two separate judgments.

Based on the analysis in *Kennedy*, it appears DWI vehicle forfeiture proceedings would likewise not violate double jeopardy principles. Such proceedings are civil and remedial in nature and therefore similar to the administrative license revocation process. Additionally, vehicle forfeiture proceedings are pursued independently of the DWI criminal prosecution before different decision makers applying different standards of review and resulting in two separate judgments.

Criminal Prosecutions and Double Jeopardy

In *State v Gomez*, 2006-NMCA-132, the Court of Appeals dealt with a double jeopardy issue where the prosecution generically charged the defendant with violating Section 66-8-102, the state DWI statute. In that case, after impaneling of the jury and during the middle of the trial, the district court heard and granted defendant's motion to exclude the blood alcohol test

result based on the prosecution's failure to lay the proper foundation for the admission of the result.

While that ruling prevented the prosecution from being able to secure a conviction for *per se* DWI, the prosecution refused to make efforts to secure a DWI conviction based on the theory of simple impairment, which does not require any reference to breath or blood draw alcohol test results. Following that refusal, the district court entered a directed verdict in defendant's favor acquitting him of DWI.

In its analysis, the Court of Appeals first noted that the prohibition against double jeopardy attached when the jury was empanelled. *Gomez* at ¶ 10. Second, the appellate court held that given the trial court's express ruling acquitting defendant, the prosecution could not attempt to retry him for DWI. *Gomez* at ¶ 13.

The holding and analysis of *Gomez* is essentially that a trial court's acquittal of a defendant in a DWI case acts to affirmatively prevent the prosecution from a second effort to secure a DWI conviction, even under the alternative method of proving DWI not initially relied on in the first case. The real impact of the *Gomez* case is perhaps on the prosecution and its determination of how it will charge a defendant with DWI and on what theory of the crime, simple impairment or *per se* DWI, it will pursue in its conviction efforts.

5.14 Ignition Interlock Driver's License

For all DWI arrests after June 17, 2005, the only limited driver's license available to a motorist, either convicted of DWI and/or administratively revoked under the Implied Consent Act, is the ignition interlock driver's license. The "school/work" limited driver's license is no longer available to motorists who have their driver's license revoked as a result of a DWI.

The ignition interlock driver's license requires a motorist to have an ignition interlock device installed in any vehicle they will be operating. That device requires the motorist to provide a breath sample in order to start the vehicle and, periodically, when they are driving provide additional breath samples to ensure the motorist is not drinking and driving. The ignition interlock device is obtained from a private vendor, usually through a leasing agreement.

Once that device is installed, the motorist must obtain an ignition interlock driver's license from MVD. The ignition interlock driver's license, on its face, will advise law enforcement the motorist is driving with the restriction of having to have an ignition interlock device on every vehicle they operate.

The 2009 amendment to the law requires that anyone who has had their driver's license revoked for DWI at any time must have an interlock license and interlock device installed for a minimum of six months before they will be able to reinstate their license. This means that an individual who was revoked in 2000, prior to the adoption of the interlock law, and who is now asking that their license be reinstated, must satisfactorily complete six months with an interlock license and device.

Section 66-5-504 was amended in 2008 to make it an offense to drive a vehicle without an interlock device when required to do so or to knowingly and deliberately tamper with an ignition interlock device. The penalty is the same as it would be for driving with a revoked license under Section 66-5-39.

Remember, a judge may never revoke a motorist's driver's license for any reason whatsoever, order that it be revoked or physically remove their driver's license from them for any reason. However, as part of DWI sentencing, the installation of an ignition interlock device must be ordered.

CHAPTER 6

Other Alcohol-Related Offenses

This chapter covers:

- Misdemeanor offenses of open container, driving while revoked, boating while intoxicated and off-highway motor vehicle DWI.
- Felony offenses of vehicular homicide, great bodily harm by vehicle and injury to pregnant woman by vehicle.
- Under age 21 DWI-related offenses.

6.1 Alcohol-Related Misdemeanor Offenses

6.1.1 Open Container in Vehicle

State law prohibits consumption or possession of alcoholic beverages in open containers in a motor vehicle, with limited exceptions. §66-8-138. The prohibition applies to all occupants of the vehicle, including the driver and passengers, and in some instances to owners of the vehicle, regardless of whether the owner is in the vehicle at the time of the offense.

Municipal Court: Similar provisions are contained in UTO 12-6-13.14, Consumption or Possession of Alcoholic Beverages in Open Containers in a Motor Vehicle Prohibited – Exceptions.

Section 66-8-139(C) states that the statute does not affect the authority of a municipality to prescribe penalties in an ordinance for possession or consumption of alcoholic beverages while driving a motor vehicle.

Be sure to check the wording of your local ordinance.

"Alcoholic beverages" are defined in the Motor Vehicle Code as “any and all distilled or rectified spirits, potable alcohol, brandy, whiskey, rum, gin, aromatic bitters or any similar alcoholic beverage, including all blended or fermented beverages, dilutions or mixtures of one or more of the foregoing containing more than one-half percent alcohol but excluding medicinal bitters.” §66-1-4.1(D).

Vehicle Occupants: It is unlawful while in a motor vehicle on a public highway within the state to:

Consume:

- Knowingly drink an alcoholic beverage. §66-8-138(A).

Possess:

- Knowingly have in one's possession, on one's person;
- Any bottle, can or other receptacle containing any alcoholic beverage that has been:
  - opened;
  - had its seal broken; or
  - the contents of which have been partially removed. §66-8-138(B).

Vehicle Owners: It is unlawful for the registered owner of a motor vehicle to:

Consume:

- Knowingly drink any alcoholic beverage while in a motor vehicle upon any public highway. §66-8-138(A);

Possess: (see below)

- Knowingly keep or allow to be kept in a motor vehicle;
- When the vehicle is on any public highway within the state;
- Any bottle, can or other receptacle containing any alcoholic beverage that has been:
  - opened;
  - had its seal broken; or
  - the contents of which have been partially removed;

Possession defined: *State v. Nevarez*, 2010 NMCA 049, *cert. granted* discussed the meaning of "possession" as it applies to the open container law. The passengers in defendant's vehicle all had open containers and there were other open containers in the vehicle, but defendant was not physically holding a container. The open container statute

prohibits containers "in his possession on his person" and defendant argued that this meant he actually had to be in actual physical possession. The court disagreed, but did hold that the statute "requires more than facts merely showing that an open container was located within a defendant's vehicle…" *Nevarez* In other words, constructive possession is not applicable t*o* the open container statute, because of the wording of the statute. However, if, for example an open container was found under the defendant's seat and the defendant admitted to drinking from that container, possession could be proven. **Please note that this case has been accepted by the New Mexico Supreme Court, so this decision may change.**

Exceptions to the Open Container Prohibition: The prohibitions in §66-8-138 do <u>not</u> apply to:

- Alcohol containers kept in:
  - The trunk of the vehicle or in some other area not normally occupied by the driver or passengers if the vehicle is not equipped with a trunk (the utility or glove compartment is deemed to be within the area occupied by the driver and passengers);
  - The living quarters of a motor home or recreational vehicle;
  - A truck camper; or
  - The bed of a pick-up truck, when the bed is not occupied by passengers. §66-8-138(C).
- Passengers in a bus, taxicab or limousine for hire licensed to transport passengers under the Motor Carrier Act or other legal authority. §66-8-138(C).
- Any person who, upon the recommendation of a doctor, carries alcoholic beverages in his or her motor vehicle for medicinal purposes, §66-8-138(D)(1); or
- Any clergyman or his or her agent who carries alcoholic beverages for religious purposes in the clergyman's or agent's motor vehicle. §66-8-138(D)(2).

Penalties for Open Container Violations

<u>First Violation</u>. A penalty assessment misdemeanor subject to a $25 fine. §66-8-116(A). A person who elects to appear in court rather than pay a penalty assessment, and who is subsequently convicted of the offense, cannot be fined in an amount higher than the penalty assessment and any probation imposed with a suspended or deferred sentence cannot exceed 90 days. §66-8-116(C). Note that the term "penalty assessment misdemeanor" does not include violations that cause or contribute to an accident resulting in injury or death. §66-8-116(B).

Subsequent Violations. A second or subsequent violation of §66-8-138 is a misdemeanor punishable according to §66-8-7. §66-8-139(A). Section 66-8-7(B) provides that unless another penalty is specified in the Motor Vehicle Code, individuals convicted of a misdemeanor violation of the Code shall be punished by:

- A fine up to $300; and/or
- Imprisonment up to 90 days.

In addition to any other penalty or disposition, a person convicted for a second or subsequent violation of §66-8-138 must have his or her driver's license revoked for:

- Three months for a second violation.
- One year for a third or subsequent violation. §66-8-139(B).

Revocation is handled exclusively and administratively by the Motor Vehicle Division of the New Mexico Department of Transportation. A judge may never revoke a defendant's license, order that it be revoked or physically remove a motorist's driver's license from the defendant.

Municipal Court: A violation under a municipal ordinance prohibiting possession or consumption of alcoholic beverages while driving a motor vehicle is deemed to be a violation under §66-8-139 for purposes of determining second, third and subsequent violations of the statute. §66-8-139(C).

6.1.2 Driving While Suspended or Revoked

State law prohibits individuals from driving when they know, or should have known, that their driver's license is suspended or revoked. §66-5-39. The offense is a misdemeanor with a mandatory jail sentence and a possible fine.

If the individual's driver's license was revoked because of a DWI conviction or an Implied Consent Act administrative revocation, the mandatory jail sentence is increased and a minimum fine must be imposed, with no suspension or deferral allowed. §66-5-39(A).

Municipal Court: Similar provisions are contained in UTO 12-6-12.6, Unlawful Use of License; Driving when Privilege To Do So Has Been Suspended or Revoked.

Section 66-5-39(A) requires that municipal ordinances prohibiting driving with a suspended or revoked license must provide penalties no less stringent than provided in the statute.

Be sure to check the wording of your local ordinance.

Basic Offense: Under §66-5-39(A), it is unlawful for:

- Any person;
- To drive;
- A motor vehicle;
- On any public highway in New Mexico;
- When the person's privilege to do so is suspended or revoked; and
- The person knew, or should have known, that his or her license was suspended or revoked.

Driving While Revoked For DWI Offense: This is a subset of the basic driving while revoked offense and has the same basic elements, with the additional requirement that the prosecution must prove the reason for the license revocation is the result of a DWI. Accordingly, it is unlawful under §66-5-39(A) for:

- Any person;
- To drive;
- A motor vehicle;
- On any public highway in New Mexico;
- When the person's privilege to do so is revoked, due to;
    - a conviction for DWI,

  OR
    - an administrative revocation resulting from the Implied Consent Act (§66-8-105 to §66-8-112);

and

- The person knew, or should have known, that his or her license was revoked.

Driver's Knowledge of Revocation or Suspension: The prosecution must prove beyond a reasonable doubt defendant actually knew, or should have known, of the driver's license suspension or revocation. Proof can be based on direct or circumstantial evidence. The prosecution is not required to provide direct evidence of defendant's subjective mental state. "Because the subjective nature of intent makes proof through direct evidence difficult, intent may be proved by circumstantial evidence." *State v. Herrera*, 111 N.M. 560, 563 (Ct. App. 1991). Failure to instruct a jury about this essential element of the offense is fundamental error. *State v. Castro*, 2002-NMCA-093, ¶ 2.

The defendant in *Herrera* was convicted of driving while his license was revoked for a DWI conviction. On appeal, the court held the undisputed fact that the Motor Vehicle Division had mailed a written notice of license revocation to defendant in accordance with the requirements of §66-2-11 did not create a legal presumption that defendant had actual knowledge of the revocation. *Herrera* at 565. However, that fact could be used to support an inference defendant knew about the license revocation. "Permitting a fact finder to infer a defendant's knowledge of a license revocation from prosecutorial proof that the department mailed the notice of revocation by registered mail to the defendant's last address as shown by the records of the department is supported by reason and common sense." *Herrera* at 565, quoting *Jolly v. People*, 742 P.2d 891, 897 (Colo. 1987).

The court explained the nature and use of inferences:

> The trier-of-fact may, based upon the evidence, make reasonable inferences supported by logic, common knowledge, and experience. A conviction can only stand, however, if it is supported by evidence or reasonable inferences arising therefrom, rather than surmise or conjecture. … An inference is sufficient to establish a fact if the evidence upon which the inference is based, taken as a whole and including the sum of permissible inferences, combine to prove each element beyond a reasonable doubt.

Herrera at 565-566 (internal citations omitted). The court found the following evidence was sufficient to support a reasonable inference defendant was aware he was driving with a revoked license:

- Certified copies of MVD records showed that two separate notices of revocation were sent by certified mail to defendant's home address after he received two separate convictions for DWI.
    - Both notices were unreturned to MVD.
    - Both notices were sent to the same address listed as defendant's home address on a traffic citation issued personally to defendant.

  - Defendant did not challenge the accuracy of the address used on the mailings.

- Nine months prior to his arrest for driving while revoked, defendant had been arrested for DWI and had refused to submit to a blood alcohol test. The evidence showed the DWI arresting officer had complied with the provisions of §66-8-111.1 by advising defendant that failure to submit to a chemical test would result in revocation of his license for one year.

In light of these facts, the court ruled there was sufficient evidence to conclude, beyond a reasonable doubt, that defendant knew his license was revoked at the time he was arrested for driving while his license was revoked. *Herrera* at 566.

Ignition Interlock Violations

Section 66-5-504 was amended in 2008 to make it an offense to drive a vehicle without an interlock device when required to do so or to knowingly and deliberately tamper with an ignition interlock device. The penalty is the same as it would be for driving with a revoked license under Section 66-5-39.

Penalties for Driving While Revoked or Suspended

Basic Offense Penalties: The penalties for a conviction under §66-5-39 are:

- Imprisonment for not less than 4 days or not more than 364 days, or participation for an equivalent period of time in a certified alternative sentencing program; and

- A fine up to $1,000. When defendant pays all or part of the cost of participating in a certified alternative sentencing program, the court may apply the payment as a deduction to any fine the court imposes.

There is no specific statutory restriction on suspending or deferring these penalties. Therefore, it appears that traditional judicial discretion applies meaning the judge can suspend or defer the penalties.

Driving While Revoked For DWI Penalties: The penalties for a conviction under §66-5-9, when the license revocation was for a DWI conviction or resulted from an Implied Consent Act administrative action, are:

- Mandatory imprisonment for not less than 7 consecutive days; and

- A mandatory fine of not less than $300 or not more than $1,000.

§66-5-39(A). The imprisonment and fine for driving while revoked for DWI cannot be suspended, deferred or taken under advisement. Defendant cannot plead guilty to another charge as a way of satisfying a charge for driving while revoked for DWI.

Additional Penalty: In addition to these penalties for both the basic revocation offense and for driving while revoked for DWI, when a person is convicted of this offense, or a municipal ordinance that prohibits driving on a suspended or revoked license, the motor vehicle the person was driving must be placed in an immobilization device for thirty days, unless immobilization poses an imminent danger to the health, safety or employment of the person's immediate family or the family of the owner of the motor vehicle. The convicted person is required to bear the cost of immobilizing the motor vehicle. §66-5-9(B).

6.1.3 Boating While Intoxicated (BWI)

The Boating While Intoxicated Act, §66-13-1 through §66-13-13, is structured in a fashion similar to the DWI statute and the Implied Consent Act. It applies only to operation of motorboats.

Municipal Court: Similar provisions are contained in UTO 12-6-17, Boating Regulations and Offenses; Boating While Intoxicated Act.

Municipal and county ordinances that prohibit the operation of a motorboat while under the influence of intoxicating liquor or drugs cannot specify an unlawful alcohol concentration level that is different than the alcohol concentration levels specified in §66-13-3. §66-13-5. Municipal ordinances must be "not inconsistent" with state laws. §3-17-1.

Be sure to check the wording of your local ordinance.

Definitions: "Motorboat" is defined as "any boat, personal watercraft or other type of vessel propelled by machinery, whether or not machinery is the principle source of propulsion." Motorboat also includes "a vessel propelled or designed to be propelled by a sail" but does not include "a sailboard or a windsurf board" or "a houseboat or any other vessel that is moored on the water, but not moving on the water." §66-13-2(C).

"Operate" is defined in §66-13-2(D) as "to physically handle the controls of a motorboat that is moving on the water."

Offenses: The Boating While Intoxicated (BWI) Act makes it unlawful for:

- A person who is under the influence of intoxicating liquor to operate a motorboat. §66-13-3(A).
- A person who is under the influence of any drug to a degree that renders him incapable of safely operating a motorboat to operate a motorboat. §66-13-3(B).
- A person who has an alcohol concentration of eight one hundredths or more in his blood or breath to operate a motorboat. §66-13-3(C).

- A person to commit aggravated boating while under the influence of intoxicating liquor or drugs, which occurs when a person:
  (1) has an alcohol concentration of .16 or more in his blood or breath while operating a motorboat;
  (2) has caused bodily injury to a human being as a result of the unlawful operation of a motorboat while under the influence of intoxicating liquor or drugs; or
  (3) refused to submit to chemical testing, as provided for in the Boating While Intoxicated Act, and in the judgment of the court, based upon evidence of intoxication presented to it, was determined to be under the influence of intoxicating liquor or drugs. §66-13-3(D)(1-3).

Penalties: Similar to the general DWI statute, the Boating While Intoxicated Act imposes limitations on defendant's option to plead guilty to other charges to avoid a conviction for boating while intoxicated. Under §66-13-4, when a defendant is charged with violating §66-13-3 and the defendant's breath and/or blood test results are .08 or higher, any plea entered in satisfaction of the charges must include at least a guilty plea to one of the subsections of §66-13-3. The defendant cannot plead guilty to another charge in order to satisfy the boating while intoxicated charge.

Prior to sentencing for a BWI conviction, the court is required to inquire into the criminal history of the defendant for past convictions for boating while intoxicated. §66-13-11(G). Although the BWI Act does not specifically address the process the prosecution and courts must follow to determine if prior BWI conviction(s) can be used to enhance the sentence for a subsequent BWI conviction, given the similarities between BWI and DWI offenses, it appears that the exact same process would be applied in BWI subsequent cases.

For a first conviction: A defendant shall be punished by:

- Imprisonment for up to 90 days; and/or
- A fine of up to $500.
- Note that if the sentence is suspended in whole or in part or deferred, the period of probation may extend beyond 90 days but shall not exceed one year.
- In addition, the court must order defendant to attend a boating safety course approved by the National Association of State Boating Law Administrators. The defendant must provide the court with proof of successful course completion within seven months of conviction or prior to completion of probation, whichever time period is less.

In addition to those penalties, when defendant commits aggravated boating while under the influence of intoxicating liquor or drugs, they shall be sentenced to at least 48 consecutive hours in jail and may be fined up to $750.

On a first conviction, any time spent in jail for the offense prior to the conviction for this offense must be credited to any term of imprisonment.

A deferred sentence is considered a first conviction for the purpose of determining subsequent convictions.

For a second or subsequent conviction: A defendant shall be punished by:

- Imprisonment for up to 364 days; and/or
- A fine of up to $750.
- Note that if the sentence is suspended in whole or in part or deferred, the period of probation shall not exceed one year.

In addition to those penalties, when defendant commits aggravated boating while under the influence of intoxicating liquor or drugs, they shall be sentenced at least 48 consecutive hours in jail and may be fined up to $1000.

See the full provisions of the Boating While Intoxicated Act, §66-13-1 through §66-13-13, for additional details about blood alcohol testing and implied consent in the context of operating a motorboat.

Note on Operation of Other Water Vessels While Intoxicated: Under §66-12-11(B) of the Boat While Intoxicated Act, it is unlawful for any person to operate or manipulate while intoxicated or under the influence of a narcotic drug, barbiturate or marijuana:

- Any vessel not defined as a motorboat under the Boating While Intoxicated Act, or
- Any water skis, surfboard or similar device.

No penalties are specified in §66-12-11(B), but a violation of the Boat Act is a petty misdemeanor punishable by imprisonment up to 6 months and/or a fine of up to $500. §66-12-23, §31-19-1(B).

6.1.4 Off-Highway Motor Vehicle DWI

Section 66-3-1010.3(A)(2) of the New Mexico statutes makes is a crime to operate an off-highway motor vehicle while under the influence of intoxicating liquor or drugs as provided for under the general DWI statute, Section 66-8-102. Given the reference to the general DWI statute, Section 66-8-102 provides the elements and penalties for off-highway DWI offenses.

Definitions: "Off-highway motor vehicle" is defined as "a motor vehicle designed by the manufacturer for operation exclusively off the highway or road." §66-3-1001.1(D). "Off-highway motor vehicle" includes:

- "all-terrain vehicle" defined as "a motor vehicle fifty inches or less in width, having an unladen dry weight of one thousand pounds or less, traveling on three or more low-pressure tires and having a seat designated to be straddled by the operator and handle-bar-type steering control." §66-3-1001.1(D)(1);

- "off-highway motorcycle" defined as "a motor vehicle traveling on not more than two tires and having a seat designed to be straddled by the operator and that has handlebar-type steering control." §66-3-1001.1(D)(2);

- "snowmobile" defined as "a motor vehicle designed for travel on snow or ice and steered and supported in whole or in part by skis, belts, cleats, runners or low-pressure tires." §66-3-1001.1(D)(3).

6.2 Alcohol-Related Felony Offenses

What follows is an overview of alcohol-related criminal offenses which are felony level crimes. Jurisdiction over these offenses lies exclusively with the district courts.

6.2.1 Vehicular Homicide and Great Bodily Harm by Vehicle

Serious injury or death caused by an alcohol or drug impaired driver are crimes governed by §66-8-101. This statute addresses two offenses:

- **Homicide by vehicle.** Also known as "vehicular homicide," is the killing of a human being in the unlawful operation of a motor vehicle. §66-8-101(A).

- **Great bodily harm by vehicle.** This is the injuring of a human being, to the extent defined in §30-1-12, in the unlawful operation of a motor vehicle. §66-8-101(B). According to §30-1-12(A), "great bodily harm" means an injury to a person that:

    - Creates a high probability of death; or

    - Causes serious disfigurement; or

    - Results in permanent or protracted loss or impairment of the function of any member or organ of the body.

See UJI Criminal 14-240, 14-243 and 12-245 for instructions on the essential elements of this offense.

Committing Homicide by Vehicle or Great Bodily Harm by Vehicle while under the influence of intoxicating liquor or drugs is a third degree felony punishable in accordance with the felony sentencing provisions in §31-18-15. §66-8-101(C).

It is also a third degree felony to commit Homicide by Vehicle or Great Bodily Harm by Vehicle while violating the prohibition in §66-8-113 against reckless driving. Speeding in violation of the law cannot in itself be used as the basis for a reckless driving violation and hence a violation of §66-8-101. §66-8-101(C). Willful operation of a motor vehicle in violation of §30-22-1(C) (willful refusal to stop a vehicle when signaled by a uniformed officer in a police vehicle) that directly or indirectly causes death or great bodily harm is a third degree felony as well. §66-8-101(F).

Court cases have established the following principles concerning vehicular homicide:

- When a vehicular homicide charge is based on DWI, defendant cannot be convicted of both vehicular homicide and DWI as separate offenses. To do so would violate defendant's constitutional right against double jeopardy because in those circumstances DWI is a lesser-included offense of vehicular homicide. *State v. Santillanes*, 2000-NMCA-017, ¶ 15, *reversed on other grounds, State v. Santillanes*, 2001-NMSC-018.

- When multiple deaths occur due to vehicular homicide, each death is a separate violation of the statute. Vehicular homicide punishes the killing of another, not the unlawful operation of a motor vehicle. *State v. House*, 2001-NMCA-011.

- When defendant causes the death of a child by driving while intoxicated, the prosecution has discretion to charge defendant with either vehicular homicide or child abuse resulting in death (§30-6-1), or both. *State v. Santillanes*, 2001-NMSC-018, ¶ 27. However, the constitutional protection against double jeopardy precludes conviction on both charges. *Santillanes* at ¶ 27. When defendant is convicted of both, the conviction for vehicular homicide must be vacated because it merges into the greater offense of child abuse resulting in death with respect to the death of the same victim. *Santillanes* at ¶ 27. Note also that driving while impaired can be the basis for a conviction of child abuse not resulting in death. *State v. Castaeda*, 2001-NMCA-052.

Penalties

For a third degree felony: the basic sentence is 3 years of imprisonment and a fine up to $5,000. §31-18-15(A)(8), (E)(8).

For a third degree felony resulting in the death of a human being: the basic sentence is 6 years of imprisonment and a fine up to $5,000. §31-18-15(A)(6), (E)(6). Vehicular homicide is, by its nature, a third degree felony resulting in the death of a human being and, therefore, is subject to the 6 year basic sentence. *State v. Guerro*, 1999-NMCA-026.

According to §31-18-15(B), the basic sentence of imprisonment must be imposed unless the court alters the sentence pursuant to:

- §31-18-15.1 (adjustment by up to one third due to aggravating or mitigating circumstances);

- §31-18-16 (additional 1-3 years for use of a firearm); or

- §31-18-17 (additional 1-8 years for habitual offenders with prior felony convictions).

DWI Conviction Enhancement: The basic sentence for defendant convicted of homicide by vehicle or great bodily harm by vehicle, while under the influence of intoxicating liquor or drugs, must be increased by 4 years for each of defendant's prior DWI convictions within the past 10 years. §66-8-101(D). For this purpose, "prior DWI conviction" means:

- A prior conviction under §66-8-102; or

- A prior conviction in New Mexico or any other jurisdiction, territory or possession of the United States, including a tribal jurisdiction, for the criminal act of driving under the influence of alcohol or drugs. §66-8-101(E).

6.2.2 Injury to Pregnant Woman by Vehicle

The elements of the offense of Injury to a Pregnant Woman by Vehicle, as set forth in §66-8-101.1(A), are:

- Injury;

- To a pregnant woman;

- By a person other than the pregnant woman;

- In the unlawful operation of a motor vehicle;

- Causing the pregnant woman to suffer a miscarriage or stillbirth;

- As a result of the injury.

See UJI Criminal 14-240A and 14-246 for instructions on the essential elements of this offense.

Committing Injury to a Pregnant Woman by Vehicle while under the influence of intoxicating liquor or drugs is a third degree felony punishable in accordance with the felony sentencing provisions in §31-18-15. §66-8-101.1(C). It is also a third degree felony to commit Injury to a Pregnant Woman by Vehicle while violating the prohibition in §66-8-113 against reckless driving. Speeding in violation of the law cannot in itself be used as the basis for a reckless driving violation and hence a violation of §66-8-101.1. §66-8-101.1(C).

A defendant can be convicted of both vehicular homicide under §66-8-101 and Injury to a Pregnant Woman by Vehicle under §66-8-101.1 without violating the right against double jeopardy. *State v. Begay,* 105 N.M. 498 (Ct. App. 1987). Double jeopardy prohibits conviction for two offenses only when one offense necessarily involves another, either under a statutory analysis of the elements of each offense in light of the facts, or where it is impossible to commit one offense without necessarily committing the other. The offense of vehicular homicide or Injury to a Pregnant Woman by Vehicle can be committed without necessarily committing the other offense, and neither offense requires proof of the same operative facts as the other. Vehicular homicide is proved by showing the victim died of injuries caused by defendant's unlawful operation of a motor vehicle; Injury to a Pregnant Woman is proved by showing defendant, while unlawfully operating a motor vehicle, caused injury to the victim resulting in a miscarriage or still birth. *Begay* at 502.

Penalties

For a third degree felony: the basic sentence is 3 years of imprisonment and a fine up to $5,000. §31-18-15(A)(8), (E)(8).

For a third degree felony resulting in the death of a human being: the basic sentence is 6 years of imprisonment and a fine up to $5,000. §31-18-15(A)(6), (E)(6).

According to §31-18-15(B), the basic sentence of imprisonment must be imposed unless the court alters the sentence pursuant to:

- §31-18-15.1 (adjustment by up to one third due to aggravating or mitigating circumstances);
- §31-18-16 (additional 1-3 years for use of a firearm); or
- §31-18-17 (additional 1-8 years for habitual offenders with prior felony convictions).

6.3 Under Age 21 DWI and Other Alcohol-Related Offenses

Alcohol and DWI-related offenses committed by individuals under age 18 are governed by the state Children's Code, §32A-1-1 et seq. The Children's Code is a collection of laws concerning the welfare of children and their families.

The Code defines a "child" as an individual under 18 years old, and an "adult" as an individual age 18 or older. §32A-1-4(A), (B). The Code establishes a division in the district court for each county known as the "children's court." Designated district judges serve as judge of the children's court. §32A-1-5(A). The children's court has exclusive original jurisdiction for all cases involving delinquency, child abuse and neglect, and adoption. §32A-1-8(A).

The Children's Code includes the Delinquency Act, §32A-2-1 et seq. The Act is intended to hold children accountable for their unlawful actions based on their age, education, mental and physical condition, background and other relevant factors, without subjecting them to the adult consequences of criminal behavior. §32A-2-2(A). The Act designates a number of DWI-related offenses as delinquent acts for which children are subject to various consequences.

Note: For individuals age 18-21, alcohol and DWI-related offenses are governed by the regular provisions of state law, with an additional restriction in the Liquor Control Act that prohibits this age group from buying, receiving, possessing or being served alcohol. §60-7B-1.

6.3.1 Under Age 18: Delinquent Acts

The Delinquency Act defines "delinquent act" in §32A-2-3(A) as:

- An act;
- Committed by a child (i.e. under age 18);
- That would be designated as a crime under the law;
- If committed by an adult.

Motor Vehicle-Related Delinquent Acts: Delinquent acts include the following offenses committed by a child in violation of the Motor Vehicle Code or a municipal traffic code:

- Driving while under the influence of intoxicating liquor or drugs.
- Homicide by vehicle.
- Reckless driving.
- Driving with a suspended or revoked license.

§32A-2-3(A)(1).

It is also a delinquent act for a child to:

- Buy, attempt to buy, receive, possess or be served any alcoholic liquor.
- Be present in a licensed liquor establishment, other than a restaurant or a licensed retail liquor establishment, except in the presence of the child's parent, guardian, custodian or adult spouse.

§32A-2-3(A)(2).

Since under §32A-1-8(A)(1) delinquency cases can be handled only in children's court, municipal, magistrate and metropolitan courts have no jurisdiction over any proceedings filed under the Delinquency Act. The detailed requirements in the Children's Code for delinquency procedures and the rights of children from the time they are taken into custody through hearing and disposition, found at §32A-2-1 et seq., are beyond the scope of this publication.

Penalties: When the children's court has adjudicated a child as a delinquent offender for one of the alcohol-related violations listed above, the court has the following options under §32A-2-19(B) for disposition of the case:

- A fine, not to exceed the fine that could be imposed if the child were an adult;
- Any disposition authorized for disposition of a neglected or abused child;
- Transfer of legal custody of the child pursuant to the Delinquency Act for appropriate placement, supervision, rehabilitation or treatment;
- Probation under court-imposed conditions and limitations; or
- Confinement in a local detention facility for up to fifteen days within a 365-day period.

In addition, if a child age 15 or older is adjudicated as delinquent for violation of §32A-2-3(A)(2), the child's driving privileges may be denied or the child's driver's license may be revoked for 90 days. For a second or a subsequent adjudication, the child's driving privileges may be denied or the child's driver's license revoked for one year. §32A-2-19(H). The actions on the child's driving privileges are done administratively by the Motor Vehicle Division upon receipt of the court order adjudicating delinquency.

6.3.2 Ages 18-21: DWI and Other Alcohol-Related Offenses

Generally, laws against DWI and related violations, including laws against committing vehicular homicide, consumption or possession of an open container of alcohol in a motor vehicle and reckless driving, apply the same to persons who are age 18-21 as they do to adults. The Liquor Control Act, however, includes a criminal offense in §60-7B-1 that applies only to this age group.

Minor in Possession: An alcohol offense that applies specifically to individuals age 18-21 is the prohibition in the Liquor Control Act commonly known as "minor in possession." §60-7B-1. As used in the Liquor Control Act, "minor" means a person under age 21. 60-7B-1(E). Section 60-7B-1(C) makes it illegal for minors to buy, attempt to buy, receive, possess or permit themselves to be served with alcoholic beverages. This offense is a misdemeanor. In actuality, §60-7B-1(C) only applies to persons age 18-21, for when an individual under age 18 engages in similar activity the offense is a delinquent act, as defined in §32A-2-3(A)(2), and is handled in children's court under the Children's Code.

Penalties: A conviction for violation of Minor in Possession has the following penalties:

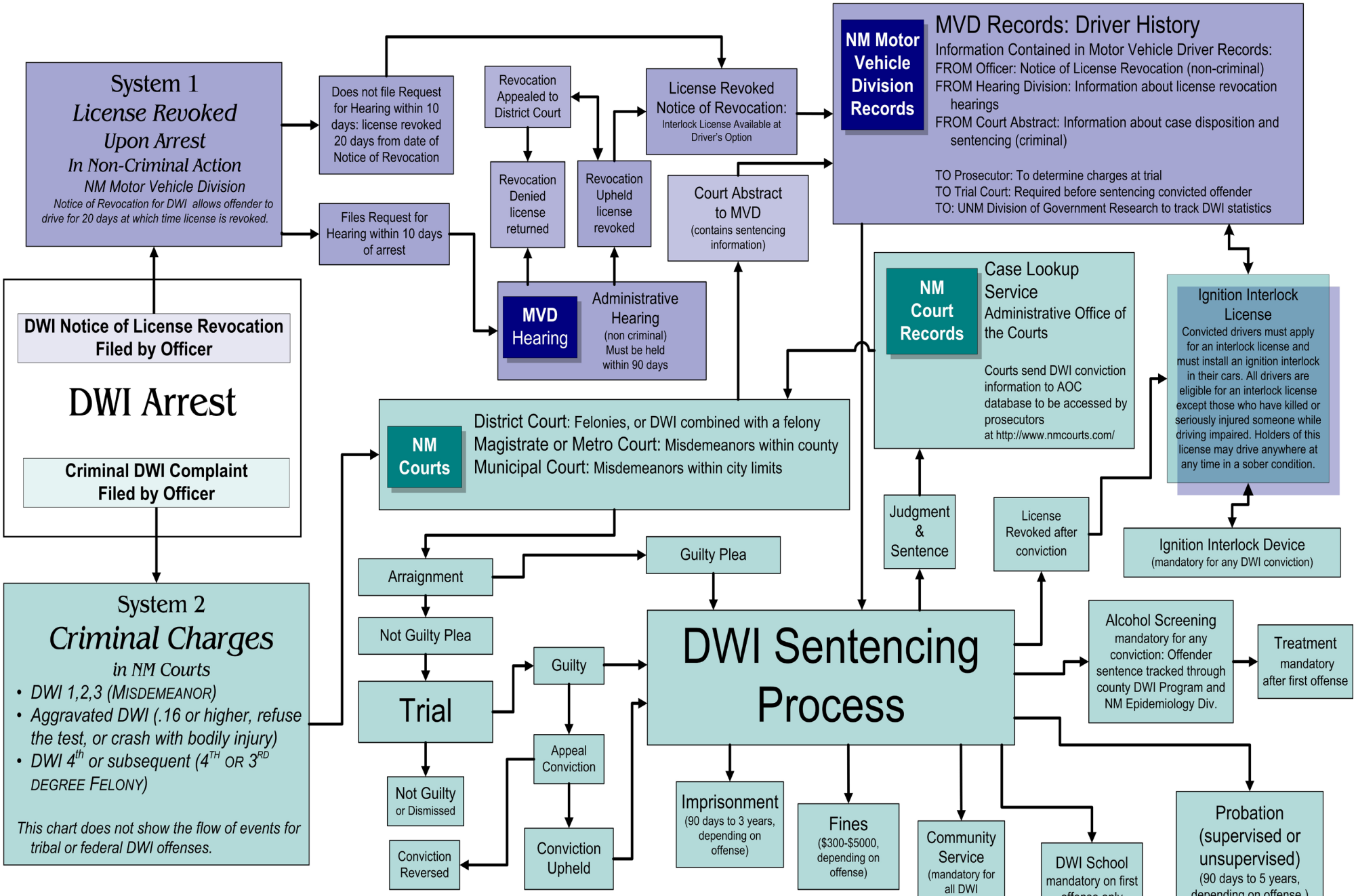
- **First offense:**
    - Fine up to $1,000; and
    - 30 hours of community service related to reducing the incidence of DWI. §60-7B-1(G)(1).
- **Second offense:**
    - Fine up to $1,000;
    - 40 hours of community service related to reducing the incidence of DWI; and
    - Suspension of offender's driver's license for 90 days. If the minor is too young to possess a driver's license at the time of the violation, 90 days must be added to the date the minor would otherwise become eligible for a license. §60-7B-1(G)(2).
- **Third or subsequent offense:**
    - Fine up to $1,000;
    - 60 hours of community service related to reducing the incidence of DWI; and
    - Suspension of offender's driver's license for 2 years or until age 21, whichever is greater. §60-7B-1(G)(3).

Appendix A

Case Flow Charts

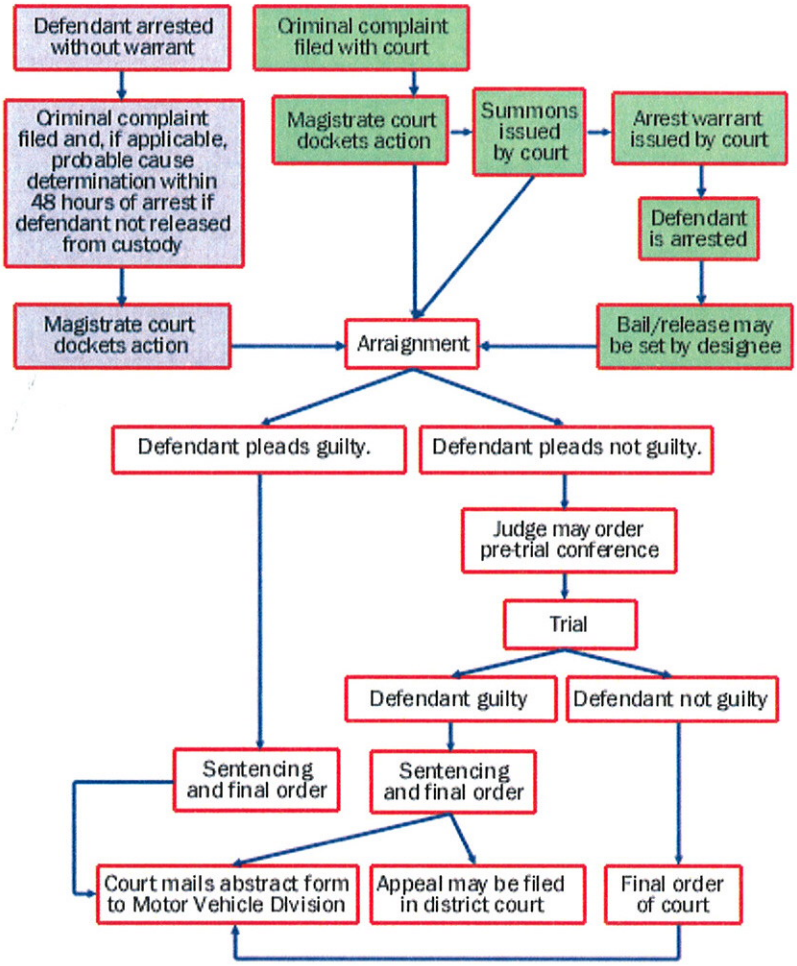
DWI Flow in New Mexico

New Mexico Department of Transportation, Traffic Safety Bureau,
and The Institute of Public Law, University of New Mexico School of Law

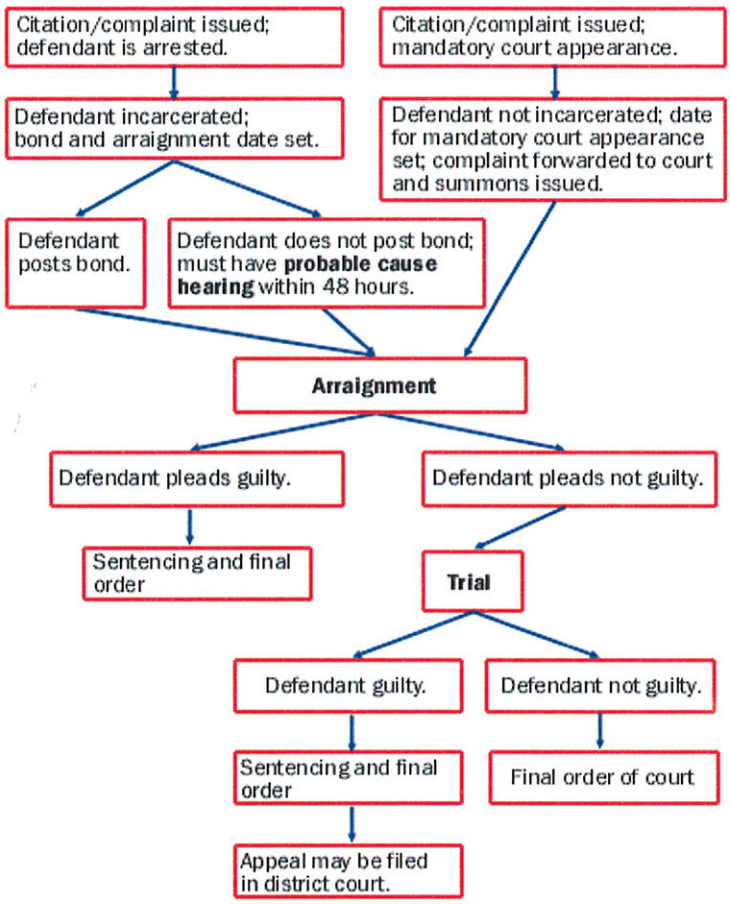


KEY: **Green Boxes** = The New Mexico Court System **Blue Boxes** = Administrative License Revocation System

Magistrate: Civil
Magistrate: DWI
Magistrate: Felony
Magistrate: Misdemeanor
Magistrate: Traffic
Municipal: Arrestable
Municipal: Non-arrestable



Magistrate: Civil
Magistrate: DWI
Magistrate: Felony
Magistrate: Misdemeanor
Magistrate: Traffic
Municipal: Arrestable
Municipal: Non-arrestable



Appendix B

Penalty Charts

THE HIGH COST OF DWI IN NEW MEXICO 2009-2010

DWI Offense	Jail[1]	Fines & Fees[2]	License Revocation	Other
1st misdemeanor	**Maximum:** 90 days, 66-8-102E **Aggravated DWI[5], Mandatory:** Additional 48 hours if convicted of aggravated DWI, 66-8-102D & E **Probation Violations:** 48 hours (mandatory) if offender fails to comply with any condition of probation. 66-8-102E	**Maximum fine:** $500, 66-8-102E **Mandatory Fees:** **Mandatory Crime Lab Fee:** $65, 31-12-7A **Mandatory Community Fee:** $75, 31-12-7B **Mandatory Corrections Fee:** $10-20, 35-6-1D(1) **Mandatory Court Automation Fee:** $10, 35-6-1D(2) **Mandatory Traffic Safety Fee:** $3, 35-6-1D(3) **Mandatory Judicial Ed. Fee:** $3, 35-6-1D(4) **Mandatory Jury/Witness Fee:** $5, 35-6-D(5) **Mandatory Brain Injury Fee:** $5, 35-6-1D(6) **Mandatory Court Facilities Fee:** $10-24, 35-6-1D(7)	**Administrative Revocation[3]:** **Under 21**: 1 year (.02+ BAC, 66-8-111C(2) **Age 21+:** 6 months .08+ BAC **OR** .04+ BAC for a CDL, 66-8-111C **Any Refusal:** 1 year (66-8-111B) Ignition interlock license available 66-5-503[7] **Revocation after Criminal Conviction[6]** Upon Conviction: 1 year 66-5-29A(2) and 66-5-29C(1) Ignition interlock license required, 1 year. 66-8-102N(1)[6]	**Mandatory:** Alcohol Screening, 66-8-102E & K DWI school, 66-8-102E Community service, minimum 24 hrs, 66-8-102E Ignition Interlock installed for 1 year, 66-8-102N(1)[6] **Court discretion:** Treatment, 66-8-102E & K; Probation, up to 1 year, 66-8-102E[9] **Other Costs [2]:** **Mandatory Alcohol Screening:** $100-200 **License Reinstatement Fee:** $100, 66-5-33.1A, B **Interlock license Fees:** $63, 66-5-35, 66-5-44 **DWI school**: up to $150 **Cost of Interlock:** $960/year or more
2nd misdemeanor	**Maximum:** 364 days, 66-8-102F **Mandatory**: 96 hours, 66-8-102F1 **Failure to comply**: mandatory extra 7 days for failure to comply with sentence, 66-8-102F(1) **Aggravated DWI[5], Mandatory:** Additional 96 hours jail if convicted of aggravated DWI, 66-8-102D & F(1)	**Maximum fine**: $1,000 66-8-102F **Mandatory fine:** $500 66-8-102F(1) All other fines and fees same as first offense	**Administrative Revocation[3]:** **.02+ BAC** (under 21) OR **.04+ BAC(**Commercial DL) OR **.08+ BAC** OR **any refusal:** All 1 year revocation 66-8-111B and 66-8-111C **Ignition interlock license** available 66-5-503[7] **Revocation after Criminal Conviction[6]** 2 years, 66-5-29A(3), and 66-5-29C(2)(a) **Ignition interlock license** required, 2 years, 66-8-102N(2)[6]	**Mandatory:** Treatment: 66-8-102L[8] Screening: 66-8-102K Community service, minimum 48 hrs, 66-8-102F(1) Ignition interlock installed for 2 years, 66-8-102N(2)[6] **Court discretion:** Probation, up to 5 years, 66-8-102F[9] **All other costs same as first offense.** **Albuquerque, Dona Ana County, Las Cruces, and Torrance County:** Forfeiture of vehicle in civil action
3rd misdemeanor	**Maximum:** 364 days, 66-8-102F **Mandatory:** 30 days, 66-8-102F2 **Failure to comply:** Mandatory 60 days for failure to comply with sentence, 66-8-102F(2) **Aggravated DWI[5], Mandatory:** Additional 60 consecutive days if convicted of aggravated DWI, 66-8-102D & F(2)	**Maximum fine**: $1,000 66-8-102F **Mandatory fine:** $750 66-8-102F(2) All other fines and fees same as first offense	**Administrative Revocation[3]:** Same as second offense **Revocation after Criminal Conviction[6]** 3 years, 66-5-29A(3) and 6-5-29C(2)(b) **Ignition interlock license** required, 3 years, 66-8-102N (3)[6]	**Mandatory:** Treatment: 66-8-102L[8] Screening, 66-8-102K Ignition interlock installed for 3 years, 66-8-102N(3)[6] Community service, minimum 96 hours, 66-8-102F(2) **Court discretion:** Probation, up to 5 years, 66-8-102F[9] **All other costs same as first offense.** **Albuquerque, Dona Ana County, Las Cruces, Torrance County and Santa Fe (City and County):** Forfeiture of vehicle in civil action
4th 4th degree felony	**Maximum:** 18 months 66-8-102G **Mandatory:** 6 months 66-8-102G	**Maximum fine:** $5,000 31-18-15E(9) All other fines and fees same as first offense	**Administrative Revocation[3]:** Same as second offense **Revocation after Criminal Conviction[6]** The remainder of the offender's life **Ignition interlock license** required, 66-5-29A(3) & 66-5-29C(2)(c); may apply to district court for restoration of license after five years if not subsequently convicted of DWI. 66-5-5D, 66-8-102O	**Mandatory:** Treatment: 66-8-102M[8] Screening, 66-8-102K Install ignition interlock for the remainder of the offender's life 66-8-102N(4)[6]; may apply to district court for restoration of license after five years if not subsequently convicted of DWI. 66-5-5D, 66-8-102O **All other costs same as first offense.** **Albuquerque, Dona Ana County, Las Cruces, Torrance County and Santa Fe (City and County):** Forfeiture of vehicle in civil action
5th 4th degree felony	**Maximum:** 2 years 66-8-102H **Mandatory:** 1 year 66-8-102H	**Maximum fine:** $5,000 31-18-15E(9) All other fines and fees same as first offense	**Administrative Revocation[3]:** Same as second offense **Revocation after Criminal Conviction[6]** Same as fourth offense	Same as fourth offense
6th 3rd degree felony	**Maximum:** 30 months 66-8-102I **Mandatory:** 18 months, 66-8-102I	**Maximum fine:** $5,000 31-18-15E(9) All other fines and fees same as first offense	**Administrative Revocation[3]:** Same as second offense **Revocation after Criminal Conviction[6]** Same as fourth offense	Same as fourth offense
7th or subsequent 3rd degree felony	**Maximum:** 3 years 66-8-102J **Mandatory**: 2 years 66-8-102J	**Maximum fine:** $5,000 31-18-15E(9) All other fines and fees same as first offense	**Administrative Revocation[3]:** Same as second offense **Revocation after Criminal Conviction[6]** Same as fourth offense	Same as fourth offense
Driving While Revoked misdemeanor	**Maximum:** 364 days, 66-5-39A **Mandatory:** 7 days, 66-5-39A	**Maximum fine**: $1,000 66-5-39A **Mandatory fine:** $300 66-5-39A	**Administrative Revocation[3]:** There is no administrative license sanction for driving while revoked for DWI. **Revocation after Criminal Conviction[6]** 1 year added to current revocation period, 66-5-39C	**Mandatory**: 30 days immobilization of vehicle driven by offender, 66-5-39B **Albuquerque, Dona Ana County, Las Cruces, Torrance County and Santa Fe (City and County):** Forfeiture of vehicle in civil action
DWI Vehicular Homicide 3rd degree felony	**Maximum:** 6 years, 31-18-15A(7)	**Maximum fine:** $ 5,000 31-18-15E(6)	**Administrative Revocation[3]:** Up to 1 year, **no limited license or interlock license** permitted, 66-5-35A(5) and 66-5-503C[7] **Revocation after Criminal Conviction[6]** 1 year, no limited license or ignition interlock license permitted, 66-5-29A(4) and B.	**Mandatory:** 4 years extra jail time added for every prior DWI conviction within the last 10 years, 66-8-101D, including tribal convictions, 66-8-101E(2)

The New Mexico Department of Transportation and The Traffic Safety Bureau **YOU DRINK. YOU DRIVE. YOU LOSE.** NMDOT

1. Mandatory jail time must be consecutively served. **2. Fines and fees** do not include increased insurance costs, treatment, lost wages, towing and storage, victim impact panels and attorney fees. **3. Administrative Revocation**: Licenses are administratively revoked for driving with .08 BAC or higher (21 and older), .02 BAC or higher (under 21), .04 or higher (commercial driver's licenses) and any refusal. These are violations of the Implied Consent Act, 66-8-105 through 112. Note that a violation of the Implied Consent Act is not part of the *criminal* sentence. **4. Chemical test must be given within 3 hours of driving and must measure alcohol consumed before or while driving.** The results of a chemical test given **more than 3 hours after driving** may be introduced as evidence of the BAC in the driver's blood or breath *at the time of the test* (not the time of driving) and the judge or jury will determine how much weight to give the evidence. 66-10-110E. **5. Aggravated DWI consists of:** (1) Refusal to take a BAC test at time of arrest for DWI; ***OR*** (2) Testing at a BAC of .16 or higher within 3 hours of driving when the BAC is from alcohol consumed before or while driving ; ***OR*** (3) Causing bodily injury to someone while driving under the influence of alcohol or other drugs, 66-8-102D. See 66-8-102T(1) for "bodily injury." **6. Criminal ignition interlock provisions:** Interlock **must** be installed on all vehicles driven by the offender AND the offender must obtain ignition interlock license. **7. An ignition interlock license** allows drivers to drive without time and place restrictions and is available to every revoked driver except those who have committed vehicular homicide or great bodily injury by vehicle while under the influence of intoxicating liquor or drugs**. Reinstatement of unrestricted license:** The Motor Vehicle Division will not reinstate an unrestricted driver's license after a DWI conviction or administrative revocation unless a driver has had a minimum of six months of driving with an ignition interlock license with no attempts to circumvent or tamper with the device, 66-5-33.1B(4). An interlock is defined as "a device, approved by the traffic safety bureau, that prevents the operation of a motor vehicle by an intoxicated or impaired person." 66-5-502B. Out-of-state drivers convicted elsewhere of DWI within the last 10 years who apply for a NM license are eligible ONLY for an interlock license, according to the same schedule as NM offenders, 66-5-5E. The penalty for driving without an interlock when it's required by license **is the same as driving while revoked for DWI,** 66-5-504, 66-5-39. The penalty for tampering or interfering or causing someone else to tamper or interfere with an ignition interlock device, when it is required under an ignition interlock license, **is the same as driving while revoked for DWI**, 66-5-503 and 504. Licenses remain revoked until offenders apply to reinstate them. For NM MVD form *Affidavit for Ignition Interlock License* go to http://www.tax.state.nm.us/forms/mvd/mvd10456.pdf **8. Treatment is mandatory,** as follows, for a *second* or *third* conviction: not less than a 28-day inpatient residential or in-custody substance abuse treatment program approved by the court; not less than a 90-day outpatient treatment program approved by the court; a drug court program approved by the court; OR any other substance abuse treatment program approved by the court. **For any felony DWI conviction**, the Corrections Department is required to provide substance abuse counseling and treatment to the offender, while the offender is in custody and on probation or parole. **9. Probation violations:** On any offense, if the offender violates probation under a suspended or deferred sentence, the judge may impose any sentence originally available and credit shall not be given for time served by the offender on probation, 66-8-102S.

PENALTIES FOR UNDER-21 ALCOHOL OFFENSES

Published by the New Mexico Traffic Safety Bureau, Department of Transportation
and The Institute of Public Law, University of New Mexico School of Law

Under Age 18: Delinquent Acts	Adult Crimes

POSSESSION OF ALCOHOL

Under Age 18: Delinquent Acts	Adult Crimes
Law: **Delinquent Act**: "...buying, attempting to buy, receiving, possessing or being served any alcoholic liquor or being present in a licensed liquor establishment, other than a restaurant or a licensed retail liquor establishment, except in the presence of the child's parent, guardian, custodian or adult spouse." 32A-2-3A(2).*****	**Law:** **Misdemeanor (**applies to **age 18-20)**: It is a violation of the Liquor Control Act for a minor to buy, attempt to buy, receive, possess or permit himself to be served with alcoholic beverages, 60-7B-1C. As used in the Liquor Control Act, "minor" means a person under 21 years of age, 60-7B-1E.
Fine: Not to exceed fine for adults 32A-2-19B.	**Fine:** Maximum $1,000 60-7B-1G and 31-19-1.
Detention: Up to 15 days in a local detention facility 32A-19B(3); or up to 2 year commitment in a rehab facility, 32A-2-19B(1)(a) and (b).	**Jail:** None specified; however, under the general misdemeanor statute, less than one year in county jail, 31-19-1A.
License: 1st offense, 90 days revocation; 2nd or subsequent, 1 year, 32A-2-19H	**License:** 90 day suspension on 2nd offense, or if driver is too young to have a license, 90 days added to the date he would otherwise be eligible to obtain a license, 60-7B-1G(2). On a 3rd or subsequent offense, two years suspension, or suspension until the offender reaches twenty-one years of age, whichever period of time is greater, 60-7B-1G(3).
Other: Place child on probation and transfer custody to CYFD for up to 6 months, 32A-2-19B(4). Probation under conditions and limitations as court may prescribe, 32A-2-19B(2).	**Other:** Up to 60 hours of community service related to reducing the incidence of DWI, depending on number of priors, 60-7B-1G.

*** Note:** the Children's Code Section 32A-2-3A(2) appears to provide an exception for minors, allowing them to be served alcohol "in the presence of the child's parent, guardian, custodian or adult spouse." **Note however**, that the Liquor Control Act declares it illegal to serve minors in a *licensed establishment* (see below) and for minors to allow themselves to be served alcohol in a licensed establishment. The Liquor Control Act specifically states that it is not a violation for a parent, legal guardian, or adult spouse of a minor to serve alcohol to the minor on "real property, other than licensed premises, under the control of the parent, legal guardian or adult spouse." 60-7B-1B(1). It is not a violation to provide alcohol to minors when they are used in the practice of religious beliefs, 60-7B-1B(2)

SELLING OR SERVING ALCOHOL TO A MINOR

Law: The Children's Code does not define the selling of alcohol by children to minors to be a delinquent act.	**Law:** **Felony (4th degree):** (Liquor Control Act, applies to **age 18 or over**) To knowingly "(1) sell, serve or give alcoholic beverages to a minor or permit a minor to consume alcoholic beverages on the licensed premises; (2) buy alcoholic beverages for or procure the sale or service of alcoholic beverages to a minor; (3) deliver alcoholic beverages to a minor; or (4) aid or assist a minor to buy, procure or be served with alcoholic beverages," 60-7B-1A. Minor here means someone under 21 years of age, 60-7B-1E. **Felony (4th degree)**: Contributing to the Delinquency of a Minor: any person committing any act or omitting the performance of any duty, which act or omission causes or tends to cause or encourage the delinquency of any person under the age of eighteen years, 30-6-3. (See *State v. Perea*, 2001-NMCA-002 and 2001-NMSC-026, 130 N.M. 732, 31 P.3d 1006, for further information on this crime.)
Fine: NA	**Fine:** **Felony**: (4th Degree) Up to $5,000, 60-7B-1F, or 30-6-3, and 31-18-15E(9)
Detention: NA	**Jail:** **Felony** (4th Degree): 18 months prison, 60-7B-1F, or 30-6-3 and 31-18-15A(10)
License: NA	
Other: NA	

PRESENTING OR MAKING A FALSE ID

Law: **Delinquent Act:** "altering or forging of a driver's license or permit or any making of a fictitious license or permit," 32A-2-3A(1)(h).	**Law:** **Petty Misdemeanor** (Liquor Control Act, applies to **age 18-20**): AA minor who presents to any person licensed pursuant to the provisions of the Liquor Control Act or any employee, agent or lessee of that person any written, printed or photostatic evidence of age or identity that is false, for the purpose of procuring or attempting to procure any alcoholic beverages, is guilty of a petty misdemeanor.@ 60-7B-7. **Fine:** Liquor Control Act: up to $500, 31-19-1B. **Jail:** Liquor Control Act: up to 6 months, 31-19-1B.
Fine: Not to exceed fine for adults, 32A-2-19B.	
Detention: Up to 15 days in a local detention facility 32A2-19B(3); or up to 2 year commitment in a rehab facility, 32A-2-19B(1)(a) and (b).	**Law:** **Misdemeanor** (Motor Vehicle Code, applies to **age 18 and over**): A person who *uses or possesses* an altered, forged or fictitious driver's license, permit, or identification card is guilty of a misdemeanor, 66-5-18A. **Fine:** Motor Vehicle Code: up to $300, 66-8-7B. **Jail:** Motor Vehicle Code: Up to 90 days, 66-8-7B.
License: Suspension of license for unlawful or fraudulent use, 66-5-30A(6).	**Law:** **Fourth Degree Felony** (Motor Vehicle Code, applies to **age 18 and over**): A person who *alters or forges* a driver's license, permit or identification card, or who *makes a fictitious* driver's license, permit or identification card is guilty of a fourth degree felony, 66-5-18B. OR, A person who possesses or uses a fraudulent, counterfeit or forged document to apply for or renew a driver's license, permit or identification card is guilty of a fourth degree felony. **Fine:** Motor Vehicle Code: up to $5,000, 66-8-9 and 31-18-15-E(8). **Jail:** Motor Vehicle Code: up to 18 months in prison, 66-5-18, 31-18-15A(10).
Other: Probation under conditions and limitations as court may prescribe, 32A-2-19B(2).	**License**: Suspension of license for unlawful or fraudulent use, 66-5-30A(6). **Other:** Probation required when sentence is suspended or deferred, 31-19-1C, 31-20-5.

DWI

Law: **Delinquent Act: "**driving while under the influence of intoxicating liquor or drugs," 32A-2-3A(1)(a)	**Law:** **Misdemeanor** (Motor Vehicle Code, applies to **age 18 or over): ** Drive a vehicle within the state while under the influence of intoxicating liquor, or while under the influence of any drug, to a degree which renders the person incapable of driving safely; or drive with an alcohol concentration of .08 or more in the breath or blood, (.04 for commercial licenses), tested within 3 hours of driving when the BAC is from alcohol consumed before or while driving, 66-8-102. **Felony:** 4th degree, or 3rd degree, depending on number of prior offenses, 66-8-102G, H, I and J.
Fine: Not to exceed fine for adults, 32A-2-19B.	**Fine:** Up to $5,000, depending on the number of prior offenses, 66-8-102E and F (misdemeanors), and 31-18-15E(9), (felonies).
Detention: Up to 15 days in a local detention facility 32A-2-19B(3); or up to 2 year commitment in a rehab facility, 32A-2-19B(1)(a) and (b).	**Jail:** Up to 3 years in prison, depending on the number of prior offenses: see 66-8-102E and F (misdemeanors) and 66-8-102 G and H for felonies.
License: Revocation from 1 year to permanent revocation, depending on number of prior offenses, 66-5-29C; setback of graduated driving privileges for at least 90 days, 66-5-8C, 66-5-1.1F.	**License:** Revocation from 1 year to permanent, depending on priors, 66-5-5D, 66-5-29C, and 66-8-102N and O, with interlock license required and a minimum of 6 months of interlock usage with no attempts to circumvent or tamper, 66-5-33.1B(4)
Other: Probation under conditions and limitations as court may prescribe, 32A-2-19B(2).	**Other:** Mandatory screening and ignition interlock, mandatory treatment for a subsequent offense, community service, up to 5 years probation, 66-8-102.

VEHICULAR HOMICIDE

Law: **Delinquent Act: "**homicide by vehicle;" 32A-2-3A(1)(e).	**Law:** **Third Degree Felony** (Motor Vehicle Code, applies to **age 18 or over**)**:** Killing a human being in the unlawful operation of a motor vehicle, including while under the influence of intoxicating liquor or any drug, 66-8-101.
Fine: Not to exceed fine for adults, 32A-2-19B.	**Fine:** Not to exceed $5,000, 31-18-15E(6).
Detention: Up to 15 days in a local detention facility 32A-2-19B(3); or up to 2 year commitment in a rehab facility, 32A-2-19B(1)(a) and (b).	**Jail:** Up to 6 years, with mandatory 4 years extra for each prior DWI conviction within the last 10 years, 66-8-101D and 31-18-15A(7).
License: Revocation 1 year, ignition interlock license not allowed, 66-5-29A(4) & B.	**License:** Revocation 1 year, ignition interlock license not allowed, 66-5-29A(4) & B
Other: Probation under conditions and limitations as court may prescribe, 32A-2-19B(2).	**Other:** Probation, 31-20-5.

OPEN CONTAINER

Law: **Misdemeanor:** A person under age 18 who is charged with a traffic violation will be prosecuted as an adult (in a municipal, magistrate or metropolitan court), if no delinquent act is charged, 32A-2-29A,B. **Delinquent Act:** may be charged with possession under the Children's Code, 32A-2-3A(2) (for penalties, see "Possession" above.)	**Law:** **Misdemeanor** (Motor Vehicle Code): Knowingly drink any alcoholic beverage or have in one's possession any receptacle containing alcohol which has been opened, had its seal broken or the contents of which have been partially removed, while in a motor vehicle upon any public highway within the state, 66-8-138.
Fine: Same as adults, 66-8-138	**Fine:** Not more than $300, 66-8-7B.
Detention: Same as adults. Only the children's court may incarcerate a child who has been found guilty of any Motor Vehicle Code or municipal traffic code violations. 32A-2-29D.	**Jail:** Not more than 90 days, 66-8-7B.
License: Same as adults, 32A-2-29.	**License:** 3 months revocation for 2nd offense, 1 year for subsequent offenses, 66-8-139B.
	Other: Probation when sentence is suspended or deferred, 31-19-1C.

ADMINISTRATIVE LICENSE REVOCATION FOR DWI

Law: **This is a non-criminal sanction which applies to all drivers:** Driving privileges will be revoked administratively (through the MVD, not through the courts) for driving in New Mexico with a blood or breath alcohol concentration of .02 or higher (if under age 21), or .08 or higher (if 21 or over), or .04 or higher (driving a commercial vehicle) or for refusing to take a chemical test. 66-8-111B and C.

Fine: None: **Jail:** None

License: **Under 21**: 1 year revocation, 66-8-111C(2); **Under 18**: DWI is a traffic violation that will set back graduated driving privileges for drivers under 18 for at least 90 days, 66-5-8C; see 66-5-1.1F for definition of a "traffic violation."

21/over: 1st offense: 6 months revocation, 66-8-111C(1); subsequent offense or any refusal: 1 year revocation; 66-8-111C(3) and 66-8-111B.

Appendix C

DWI Citation Form

DWI CITATION AND LAW ENFORCEMENT OFFICER'S STATEMENT INSTRUCTIONS

THIS BOOK CONTAINS TEN SETS OF A TWO PART FORM. THE FIRST PART IS THE DWI CITATION CONSISTING OF FIVE (5) COPIES AND THE SECOND IS THE LAW ENFORCEMENT OFFICER'S STATEMENT CONSISTING OF TWO (2) COPIES. INSERT THE BOOK FLAP BETWEEN THE TWO PARTS AND FILL OUT THE DWI CITATION. THIS WILL AUTOMATICALLY FILL OUT THE DRIVER INFORMATION PORTION OF THE STATEMENT PART. ONCE THIS HAS BEEN DONE, INSERT THE BOOK FLAP BETWEEN THE STATEMENT PART AND THE NEXT CITATION AND THEN COMPLETE THE STATEMENT PART. BOOKS ARE PRE-ASSIGNED TO SPECIFIC AGENCIES BY CONTROL NUMBERING SEQUENCE ***AND ARE NOT TRANSFERABLE TO OTHER AGENCIES***.

PLEASE PRINT AND PRESS HARD USING A BALL POINT PEN. ALL COPIES MUST BE LEGIBLE

THE LAW ENFORCEMENT OFFICER'S STATEMENT PART HAS THREE SECTIONS: THE NOTICE OF REVOCATION, THE TEMPORARY DRIVING PRIVILEGES AND THE STATEMENT ITSELF.

THE NOTICE OF REVOCATION MUST BE SIGNED AND ISSUED WHEN:

1. The officer has immediate access to the test results showing a BAC of .02 or greater for persons under the age of twenty-one (21) or a BAC of .08 or greater for persons twenty-one (21) years of age or older, or .04 or greater and the person was driving a commercial motor vehicle, or
2. The driver refuses to submit to a chemical test.
3. If the law enforcement officer serves the Notice of Revocation on the driver, the officer will also ask the driver to sign the notice acknowledging receipt. If the driver is unable or refuses to sign, the officer shall mark the appropriate box.

CONFISCATE NEW MEXICO DRIVER'S LICENSE WHEN THE FOLLOWING CONDITIONS ARE MET:

1. Test results show a BAC of .02 or greater for persons under the age of twenty-one (21) or a BAC of .08 or greater for persons twenty-one (21) years of age or older; or .04 or greater and the person was driving a commercial motor vehicle, or
2. The driver refuses to submit to a chemical test.

DO NOT CONFISCATE AN OUT-OF-STATE DRIVER'S LICENSE.

IF TEST RESULTS ARE NOT IMMEDIATELY AVAILABLE (BLOOD DRAWN):

1. Issue the DWI Citation but DO NOT confiscate driver's license.
2. DO NOT issue Notice of Revocation or grant Temporary Driving Privileges.
3. DO NOT complete and/or serve the Law Enforcement Officer's Statement on the driver.
4. Upon receipt of the test results from the laboratory, complete the Statement part indicating the appropriate BAC level with officers signature and mail the MVD copy and the violator's copy to the Motor Vehicle Division. The Motor Vehicle Division will notify the driver of the revocation.

DISTRIBUTION OF COPIES

PART 1, DWI CITATION

1st & 2nd Copies:	The ABSTRACT COPY and the COURT COPY are attached at the bottom so they can be removed together and both sent to the court.
3rd Copy:	The VIOLATOR'S COPY is given to the violator by the officer in every case.
4th Copy:	The MOTOR VEHICLE DIVISION COPY is to be mailed to the MVD.
5th Copy:	The ISSUING AGENCY/STATISTICAL COPY is to be retained by the officer and reported as instructed.

PART 2, LAW ENFORCEMENT OFFICER'S STATEMENT

1st Copy: The MOTOR VEHICLE DIVISION COPY is to be signed and mailed to the MVD.

2nd Copy: The VIOLATOR'S COPY is to be served on the driver only when chemical test has been administered and results are immediately available or driver has refused to submit to a chemical test. See above when blood is drawn and test results are not immediately available.

MAILING ADDRESS

MOTOR VEHICLE DIVISION
Driver Services Bureau, DWI Section
P. O. Box 1028

PERF ALL PTS.

XXXXXX X

ABSTRACT OF RECORD

COURT DOCKET NO.

HEARING DATE | ☐ COUNSEL REQUESTED ☐ COUNSEL WAIVED

COUNSEL NAME

ADDRESS

CITY STATE ZIP CODE

PLEA OF DEFENDANT ☐ NOLO ☐ GUILTY ☐ NOT GUILTY

COURT FINDING: ☐ GUILTY ☐ NOT GUILTY ☐ DISMISSED

☐ NOLLE PROSEQUI

SENTENCE OF COURT:

☐ FINE $ _____ Suspended Amt. $ _____ (IF ANY)

☐ JAIL _____ DAYS Suspended Days _____ (IF ANY)

LAB FEES	BOND FORFEIT	COSTS
$	$	$

REMARKS

☐ DWI SCHOOL

THIS IS A CORRECT ABSTRACT OF COURT ACTION FOR DEFENDANT AND OFFENSE SHOWN.

SIGNATURE OF MAGISTRATE OR JUDGE

PRINTED NAME OF MAGISTRATE OR JUDGE

NAME OF COURT | DATE

ADDRESS | POST OFFICE

DISTRIBUTION

OFFICER TO FORWARD THIS COPY TO THE COURT, COURT TO COMPLETE ABSTRACT OF RECORD ABOVE AND MAIL THIS COPY TO THE MOTOR VEHICLE DIVISION. DRIVER SERVICES BUREAU, DWI SECTION, P.O. BOX 1028, SANTA FE, NEW MEXICO 87504-1028.

ABSTRACT COPY

_____ MICROFILM NUMBER, DO NOT WRITE, STAPLE OR PUNCH ABOVE THIS LINE _____

STATE OF NEW MEXICO
COUNTY OF: _____ COUNTY CODE: _____
CITY OF:

DWI CITATION
MVD-10811
REV. 04/05

DRIVER INFORMATION

NAME (LAST) | (FIRST) | (M.I.)

ADDRESS

CITY | STATE | ZIP CODE

DRIVER LICENSE NUMBER | STATE | EXPIRES | CLASS | ENDORSEMENTS

DATE OF BIRTH | AGE | SEX | HEIGHT | WT | SOCIAL SECURITY NUMBER

VEH

COLOR | YEAR | MAKE/MODEL | TYPE | STATE | LICENSE PLATE NUMBER

COND.

TRAFFIC			WEATHER					ROAD				LIGHT			ACCIDENT	
LT	MED	HV	CL	FG	RN	SN	DST	D	W	I	S	LT	DS	DK	YES	NO

CMV ☐ YES ☐ NO PASSENGER (16 OR MORE) ☐ YES ☐ NO

HZ MT ☐ YES ☐ NO DOT NUMBER _____

CITATION

THE ABOVE NAMED DEFENDANT IS CHARGED WITH VIOLATING:

☐ 66-8-102 NMSA 1978 ☐ STATUTE OR ORDINANCE & SECTION: _____

COMMON NAME OF OFFENSE: *Driving Under the Influence of Intoxicating Liquor or Drug*

ON _____ (DAY) _____ (DATE) 20 _____ AT _____ (MILITARY TIME) HRS _____ (LOCATION)

MILEPOST OR NEAREST INTERSECTION _____

_____ DISTRICT: _____

ESSENTIAL FACTS: _____

PRINTED OFFICER'S NAME | BLOOD ALCOHOL CONCENTRATION

OFFICER'S SIGNATURE | I.D. NO. | SHIFT | CURRENT DATE

COURT INFO.

YOU ARE TO APPEAR IN ☐ MAGISTRATE ☐ METROPOLITAN ☐ MUNICIPAL ☐ OTHER: _____ COURT

ADDRESS _____

ON OR BEFORE _____ 20 _____ AT _____ AM _____ PM _____

LITE LINE GLUE BTWN PTS. 1 & 2

PERF ALL PTS.

XXXXXX X

MICROFILM NUMBER, DO NOT WRITE, STAPLE OR PUNCH ABOVE THIS LINE

STATE OF NEW MEXICO
DWI CITATION

COUNTY OF: _____ COUNTY CODE: _____

CITY OF:

MVD-10811
REV. 04/05

ABSTRACT OF RECORD

COURT DOCKET NO.

HEARING DATE | ☐ COUNSEL REQUESTED ☐ COUNSEL WAIVED

COUNSEL NAME

ADDRESS

CITY STATE ZIP CODE

PLEA OF DEFENDANT ☐ NOLO ☐ GUILTY ☐ NOT GUILTY

COURT FINDING: ☐ GUILTY ☐ NOT GUILTY ☐ DISMISSED

☐ NOLLE PROSEQUI

SENTENCE OF COURT:

☐ FINE $ _____ Suspended Amt. $ _____ (IF ANY)

☐ JAIL _____ DAYS Suspended Days _____ (IF ANY)

LAB FEES	BOND FORFEIT	COSTS
$	$	$

REMARKS

☐ DWI SCHOOL

THIS IS A CORRECT ABSTRACT OF COURT ACTION FOR DEFENDANT AND OFFENSE SHOWN.

SIGNATURE OF MAGISTRATE OR JUDGE

PRINTED NAME OF MAGISTRATE OR JUDGE

NAME OF COURT | DATE

ADDRESS | POST OFFICE

DISTRIBUTION

THIS COPY TO BE RETAINED BY THE COURT

COURT COPY

DRIVER INFORMATION

NAME (LAST) | (FIRST) | (M.I.)

ADDRESS

CITY | STATE | ZIP CODE

DRIVER LICENSE NUMBER | STATE | EXPIRES | CLASS | ENDORSEMENTS

DATE OF BIRTH | AGE | SEX | HEIGHT | WT | SOCIAL SECURITY NUMBER

VEH

COLOR | YEAR | MAKE/MODEL | TYPE | STATE | LICENSE PLATE NUMBER

COND.

TRAFFIC			WEATHER					ROAD				LIGHT			ACCIDENT	
LT	MED	HV	CL	FG	RN	SN	DST	D	W	I	S	LT	DS	DK	YES	NO

CMV ☐ YES ☐ NO PASSENGER (16 OR MORE) ☐ YES ☐ NO

HZ MT ☐ YES ☐ NO DOT NUMBER _____

CITATION

THE ABOVE NAMED DEFENDANT IS CHARGED WITH VIOLATING:

☐ 66-8-102 NMSA 1978 ☐ STATUTE OR ORDINANCE & SECTION: _____

COMMON NAME OF OFFENSE: *Driving Under the Influence of Intoxicating Liquor or Drug*

ON _____ (DAY) _____ (DATE) 20 AT _____ (MILITARY TIME) HRS _____ (LOCATION)

MILEPOST OR NEAREST INTERSECTION _____

_____ DISTRICT: _____

ESSENTIAL FACTS: _____

PRINTED OFFICER'S NAME | BLOOD ALCOHOL CONCENTRATION

OFFICER'S SIGNATURE | I.D. NO. | SHIFT | CURRENT DATE

COURT INFO.

YOU ARE TO APPEAR IN ☐ MAGISTRATE ☐ METROPOLITAN ☐ MUNICIPAL ☐ OTHER: _____ COURT

ADDRESS _____

ON OR BEFORE _____ 20 ____ AT _____ AM ____ PM ____

LITE LINE GLUE BTWN PTS. 1 & 2

PERF ALL PTS.

XXXXXX X

MICROFILM NUMBER, DO NOT WRITE, STAPLE OR PUNCH ABOVE THIS LINE

STATE OF NEW MEXICO
COUNTY OF: _____ COUNTY CODE: _____
CITY OF: _____

DWI CITATION
MVD-10811
REV. 04/05

DRIVER INFORMATION

NAME (LAST)	(FIRST)	(M.I.)

ADDRESS

CITY | STATE | ZIP CODE

DRIVER LICENSE NUMBER	STATE	EXPIRES	CLASS	ENDORSEMENTS

DATE OF BIRTH	AGE	SEX	HEIGHT	WT	SOCIAL SECURITY NUMBER

VEH

COLOR	YEAR	MAKE/MODEL	TYPE	STATE	LICENSE PLATE NUMBER

COND.

TRAFFIC			WEATHER					ROAD				LIGHT			ACCIDENT	
LT	MED	HV	CL	FG	RN	SN	DST	D	W	I	S	LT	DS	DK	YES	NO

CITATION

CMV ☐ YES ☐ NO HZ MT ☐ YES ☐ NO
PASSENGER (16 OR MORE) ☐ YES ☐ NO
DOT NUMBER _____

THE ABOVE NAMED DEFENDANT IS CHARGED WITH VIOLATING:

☐ 66-8-102 NMSA 1978 ☐ STATUTE OR ORDINANCE & SECTION: _____

COMMON NAME OF OFFENSE: *Driving Under the Influence of Intoxicating Liquor or Drug*

ON _____ (DAY) _____ (DATE) 20 _____ AT _____ (MILITARY TIME) HRS _____ (LOCATION)

MILEPOST OR NEAREST INTERSECTION _____

_____ DISTRICT: _____

ESSENTIAL FACTS: _____

PRINTED OFFICER'S NAME | BLOOD ALCOHOL CONCENTRATION

OFFICER'S SIGNATURE | I.D. NO. | SHIFT | CURRENT DATE

COURT INFO.

YOU ARE TO APPEAR IN ☐ MAGISTRATE ☐ METROPOLITAN ☐ MUNICIPAL ☐ OTHER: _____ COURT

ADDRESS _____

ON OR BEFORE _____ 20 _____ AT _____ AM _____ PM _____

DISTRIBUTION

OFFICER TO GIVE THIS COPY TO VIOLATOR IN EVERY CASE.

VIOLATOR'S COPY

PERF ALL PTS.

XXXXXX X

MICROFILM NUMBER, DO NOT WRITE, STAPLE OR PUNCH ABOVE THIS LINE

STATE OF NEW MEXICO
COUNTY OF: _____ COUNTY CODE: _____
CITY OF:

DWI CITATION
MVD-10811
REV. 04/05

DRIVER INFORMATION

NAME (LAST) | (FIRST) | (M.I.)

ADDRESS

CITY | STATE | ZIP CODE

DRIVER LICENSE NUMBER | STATE | EXPIRES | CLASS | ENDORSEMENTS

DATE OF BIRTH | AGE | SEX | HEIGHT | WT | SOCIAL SECURITY NUMBER

VEH

COLOR | YEAR | MAKE/MODEL | TYPE | STATE | LICENSE PLATE NUMBER

COND.

TRAFFIC			WEATHER					ROAD				LIGHT			ACCIDENT	
LT	MED	HV	CL	FG	RN	SN	DST	D	W	I	S	LT	DS	DK	YES	NO

CITATION

CMV ☐ YES ☐ NO | PASSENGER (16 OR MORE) ☐ YES ☐ NO
HZ MT ☐ YES ☐ NO | DOT NUMBER _____

THE ABOVE NAMED DEFENDANT IS CHARGED WITH VIOLATING:

☐ 66-8-102 NMSA 1978 ☐ STATUTE OR ORDINANCE & SECTION: _____

COMMON NAME OF OFFENSE: *Driving Under the Influence of Intoxicating Liquor or Drug*

ON _____ (DAY) _____ (DATE) 20 AT _____ (MILITARY TIME) HRS _____ (LOCATION)

MILEPOST OR NEAREST INTERSECTION _____

_____ DISTRICT: _____

ESSENTIAL FACTS: _____

PRINTED OFFICER'S NAME | BLOOD ALCOHOL CONCENTRATION

OFFICER'S SIGNATURE | I.D. NO. | SHIFT | CURRENT DATE

COURT INFO.

YOU ARE TO APPEAR IN ☐ MAGISTRATE ☐ METROPOLITAN ☐ MUNICIPAL ☐ OTHER: _____ COURT

ADDRESS _____

ON OR BEFORE _____ 20 _____ AT _____ AM _____ PM _____

DISTRIBUTION

OFFICER TO FORWARD THIS COPY, THE CONFISCATED VALID NEW MEXICO DRIVER'S LICENSE (WHEN APPLICABLE) AND THE MVD COPY OF THE LAW ENFORCEMENT OFFICER'S STATEMENT (WHEN APPROPRIATE) TO THE MOTOR VEHICLE DIVISION, DRIVER SERVICES BUREAU, DWI SECTION, P.O. BOX 1028, SANTA FE, NEW MEXICO 87504-1028.

MOTOR VEHICLE DIVISION COPY

PERF ALL PTS.

XXXXXX X

MICROFILM NUMBER, DO NOT WRITE, STAPLE OR PUNCH ABOVE THIS LINE

STATE OF NEW MEXICO
COUNTY OF: _____ COUNTY CODE: _____
CITY OF:

DWI CITATION
MVD-10811
REV. 04/05

DRIVER INFORMATION

NAME (LAST) | (FIRST) | (M.I.)

ADDRESS

CITY | STATE | ZIP CODE

DRIVER LICENSE NUMBER | STATE | EXPIRES | CLASS | ENDORSEMENTS

DATE OF BIRTH | AGE | SEX | HEIGHT | WT | SOCIAL SECURITY NUMBER

VEH

COLOR | YEAR | MAKE/MODEL | TYPE | STATE | LICENSE PLATE NUMBER

COND.

TRAFFIC			WEATHER					ROAD				LIGHT			ACCIDENT	
LT	MED	HV	CL	FG	RN	SN	DST	D	W	I	S	LT	DS	DK	YES	NO

CITATION

CMV ☐ YES ☐ NO PASSENGER (16 OR MORE) ☐ YES ☐ NO
HZ MT ☐ YES ☐ NO DOT NUMBER _____

THE ABOVE NAMED DEFENDANT IS CHARGED WITH VIOLATING:

☐ 66-8-102 NMSA 1978 ☐ STATUTE OR ORDINANCE & SECTION: _____

COMMON NAME OF OFFENSE: *Driving Under the Influence of Intoxicating Liquor or Drug*

ON _____ (DAY) _____ (DATE) 20 _____ AT _____ (MILITARY TIME) HRS _____ (LOCATION)

MILEPOST OR NEAREST INTERSECTION _____

_____ DISTRICT: _____

ESSENTIAL FACTS: _____

PRINTED OFFICER'S NAME | BLOOD ALCOHOL CONCENTRATION

OFFICER'S SIGNATURE | I.D. NO. | SHIFT | CURRENT DATE

COURT INFO.

YOU ARE TO APPEAR IN ☐ MAGISTRATE ☐ METROPOLITAN ☐ MUNICIPAL ☐ OTHER: _____ COURT

ADDRESS _____

ON OR BEFORE _____ 20 _____ AT _____ AM _____ PM _____

DISTRIBUTION

THIS COPY TO BE RETAINED BY THE OFFICER AND REPORTED AS INSTRUCTED.

ISSUING AGENCY/STATISTICAL COPY

PERF ALL PTS.

XXXXXX X

State of New Mexico
Taxation & Revenue Department
MOTOR VEHICLE DIVISION

NOTICE OF REVOCATION

Este documento es muy importante. Si no entiende ni leé ingles, por favor, haga que se lo traduzcan.

MICROFILM NUMBER, DO NOT WRITE, STAPLE OR PUNCH ABOVE THIS LINE

STATE OF NEW MEXICO
COUNTY OF: _____ COUNTY CODE: _____
CITY OF:

DWI CITATION
MVD-10811
REV. 04/05

DRIVER INFORMATION

NAME (LAST)	(FIRST)	(M.I.)

ADDRESS

CITY | STATE | ZIP CODE

DRIVER LICENSE NUMBER	STATE	EXPIRES	CLASS	ENDORSEMENTS

DATE OF BIRTH	AGE	SEX	HEIGHT	WT	SOCIAL SECURITY NUMBER

I. NOTICE OF REVOCATION: YOUR DRIVING PRIVILEGES WILL BE REVOKED IN TWENTY (20) DAYS.

Request for Hearing: You may request a hearing on this revocation. The request must be made in writing within ten (10) days from date of service of this notice. ***If you do not request a hearing***, your driver license and/or driving privilege is hereby revoked, pursuant to the Implied Consent Act (Section 66-8-111 NMSA 1978), effective twenty (20) days from receipt of this notice.
Revocation Duration Information and Hearing Request instructions are explained on the back side of this form.

II. TEMPORARY DRIVER LICENSE:

If you are validly licensed in New Mexico, this document will serve as your temporary license for 20 days. ***If you request a hearing***, this period will be extended until otherwise ordered by the hearing officer. If you are licensed in another state this notice does not affect your license itself, but only your privilege to drive in New Mexico.

III. LAW ENFORCEMENT OFFICER'S STATEMENT

I hereby swear or affirm that on the _____ day of _____, 20 ____, I arrested the above-named person based on my reasonable grounds to believe that he/she had been driving a motor vehicle ☐ commercial motor vehicle while under the influence of intoxicating liquor or drugs in the County of _____, New Mexico. Details of said grounds are specified below.

REASON FOR STOP: _____

BASIS FOR CONCLUSION THAT PERSON WAS DRIVING: ☐ SAW PERSON DRIVING ☐ PERSON ADMITTED DRIVING

☐ OTHER: _____

BASIS FOR CONCLUSION THAT PERSON WAS UNDER INFLUENCE:

☐ ODOR OF ALCOHOL ☐ BLOODSHOT, WATERY EYES ☐ SLURRED SPEECH ☐ DRIVER'S ADMISSION

☐ PERFORMANCE ON FIELD SOBRIETY TESTS, (OPTIONAL) DESCRIBE FIELD TESTS: _____

☐ OTHER INFORMATION: _____

☐ REFUSED TEST - The above-named person was asked to submit to a chemical test to determine his/her blood or breath alcohol content and, after being advised that failure to submit to a chemical test could result in the revocation of his/her driver's license and/or driving privileges in New Mexico, refused to submit to such a chemical test. ☐ ACTIONS ☐ WORDS: (OPTIONAL)
("_____")

☐ SUBMITTED TO TEST - All references to alcohol concentration are as defined in Section 66-8-110(E), NMSA 1978.

☐ BREATH TEST - The above-named person submitted to a breath test and the test result indicated an alcohol concentration of eight one hundredths or more in the person's breath if the driver is 21 years of age or older or an alcohol concentration of two one-hundredths or more if the person is less than 21 years of age or an alcohol concentration of four one-hundredths or more and the person was driving a commercial motor vehicle. The actual test result was _____.

☐ BLOOD TEST - The above-named person submitted to a blood test and the test result was received from the laboratory on (date) _____. The test result indicated the person had an alochol concentration of eight one-hundredths or more in the person's blood if the driver is 21 years of age or older or an alcohol concentration of two one-hundredths or more if the person is less than 21 years of age or an alcohol concentration of four one-hundredths or more and the person was driving a commercial motor vehicle. The actual test result was _____.

SERVICE - I personally served a copy of this document on the person named above on this ____ day of _____, 20 ____.
DECLARATION - I hereby declare under the penalty of perjury that the information given in this statement is true and correct to the best of my knowledge.

Printed Arresting Officer's Name & ID Number	Officer's Agency and Agency Code	Arresting Officer's Signature

Name **and Agency** of every other Officer who should be subpoenaed to any hearing requested, including officer who administered test, if different from arresting officer (Full name, ID No & agency): _____

I received the Notice of Revocation on

PERF ALL PTS.

XXXXXX X

State of New Mexico
Taxation & Revenue Department
MOTOR VEHICLE DIVISION

NOTICE OF REVOCATION

Este documento es muy importante. Si no entiende ni leé ingles, por favor, haga que se lo traduzcan.

MICROFILM NUMBER, DO NOT WRITE, STAPLE OR PUNCH ABOVE THIS LINE

STATE OF NEW MEXICO
COUNTY OF: _____ COUNTY CODE: _____
CITY OF:

DWI CITATION
MVD-10811
REV. 04/05

DRIVER INFORMATION

NAME (LAST)	(FIRST)	(M.I.)

ADDRESS

CITY | STATE | ZIP CODE

DRIVER LICENSE NUMBER	STATE	EXPIRES	CLASS	ENDORSEMENTS

DATE OF BIRTH	AGE	SEX	HEIGHT	WT	SOCIAL SECURITY NUMBER

I. NOTICE OF REVOCATION: YOUR DRIVING PRIVILEGES WILL BE REVOKED IN TWENTY (20) DAYS.

Request for Hearing: You may request a hearing on this revocation. The request must be made in writing within ten (10) days from date of service of this notice. ***If you do not request a hearing***, your driver license and/or driving privilege is hereby revoked, pursuant to the Implied Consent Act (Section 66-8-111 NMSA 1978), effective twenty (20) days from receipt of this notice.
Revocation Duration information and Hearing Request instructions are explained on the back side of this form.

II. TEMPORARY DRIVER LICENSE:

If you are validly licensed in New Mexico, this document will serve as your temporary license for 20 days. ***If you request a hearing***, this period will be extended until otherwise ordered by the hearing officer. If you are licensed in another state this notice does not affect your license itself, but only your privilege to drive in New Mexico.

III. LAW ENFORCEMENT OFFICER'S STATEMENT

I hereby swear or affirm that on the _____ day of _____, 20 ____, I arrested the above-named person based on my reasonable grounds to believe that he/she had been driving a motor vehicle ☐ commercial motor vehicle while under the influence of intoxicating liquor or drugs in the County of _____, New Mexico. Details of said grounds are specified below.

REASON FOR STOP: _____

BASIS FOR CONCLUSION THAT PERSON WAS DRIVING: ☐ SAW PERSON DRIVING ☐ PERSON ADMITTED DRIVING
☐ OTHER: _____

BASIS FOR CONCLUSION THAT PERSON WAS UNDER INFLUENCE:
☐ ODOR OF ALCOHOL ☐ BLOODSHOT, WATERY EYES ☐ SLURRED SPEECH ☐ DRIVER'S ADMISSION
☐ PERFORMANCE ON FIELD SOBRIETY TESTS, (OPTIONAL) DESCRIBE FIELD TESTS: _____
☐ OTHER INFORMATION: _____

☐ REFUSED TEST - The above-named person was asked to submit to a chemical test to determine his/her blood or breath alcohol content and, after being advised that failure to submit to a chemical test could result in the revocation of his/her driver's license and/or driving privileges in New Mexico, refused to submit to such a chemical test. ☐ ACTIONS ☐ WORDS: (OPTIONAL) ("_____")

☐ SUBMITTED TO TEST - All references to alcohol concentration are as defined in Section 66-8-110(E), NMSA 1978.

☐ BREATH TEST - The above-named person submitted to a breath test and the test result indicated an alcohol concentration of eight one hundredths or more in the person's breath if the driver is 21 years of age or older or an alcohol concentration of two one-hundredths or more if the person is less than 21 years of age or an alcohol concentration of four one-hundredths or more and the person was driving a commercial motor vehicle. The actual test result was _____.

☐ BLOOD TEST - The above-named person submitted to a blood test and the test result was received from the laboratory on (date) _____. The test result indicated the person had an alochol concentration of eight one-hundredths or more in the person's blood if the driver is 21 years of age or older or an alcohol concentration of two one-hundredths or more if the person is less than 21 years of age or an alcohol concentration of four one-hundredths or more and the person was driving a commercial motor vehicle. The actual test result was _____.

SERVICE - I personally served a copy of this document on the person named above on this ____ day of _____, 20 ____.
DECLARATION - I hereby declare under the penalty of perjury that the information given in this statement is true and correct to the best of my knowledge.

Printed Arresting Officer's Name & ID Number	Officer's Agency and Agency Code	Arresting Officer's Signature

Name **and Agency** of every other Officer who should be subpoenaed to any hearing requested, including officer who administered test, if different from arresting officer (Full name, ID No & agency): _____

I received the Notice of Revocation on

PERF ALL PTS.

NOTICE AND DURATION OF REVOCATION

Under New Mexico law (Section 66-8-111 NMSA 1978), upon receipt of a statement signed under penalty of perjury from a law enforcement officer (the front side of this document), the Secretary of the Taxation and Revenue Department shall revoke your driver license for at least the applicable period listed below:

1. For a period of one (1) year, or until all conditions for license reinstatement are met, whichever is later; if you refused to submit to any chemical test after being advised that failure to submit could result in revocation of your privilege to drive.
2. For a period of six (6) months, or until all conditions for license reinstatement are met, whichever is later; if you are twenty-one years of age or older, took the chemical test, and the results showed a blood-alcohol concentration at or above the per se limit.
3. For a period of six (6) months, or until all conditions for license reinstatement are met, whichever is later; if you were driving a commercial motor vehicle, took a chemical test, and the results showed a blood-alcohol concentration above the legal limit.
4. For a period of one (1) year, or until all conditions for license reinstatement are met, whichever is later; if you are less than twenty-one, took the test, and the results showed a blood-alcohol concentration at or above the per se limit.
5. For a period of one (1) year, or until all conditions for license reinstatement are met, whichever is later; if you took the chemical test, and the results showed a blood-alcohol concentration at or above the per se limit, and you have previously had your license revoked pursuant to the provisions of the Implied Consent Act.

EFFECTIVE DATE OF REVOCATION

This revocation shall become effective twenty (20) days from the day this Notice was served on you. See date noted in the SERVICE section on the front side. However, the revocation will not go into effect until after the hearing, if a hearing is held and the hearing officer finds the revocation to be proper.

REQUEST FOR HEARING

NOTE: The hearing on your license revocation is *completely separate* from your court hearing on the DWI criminal charge.

New Mexico law (Section 66-8-112 NMSA 1978) provides that **IF YOU WISH TO CONTEST THE REVOCATION OF YOUR DRIVER LICENSE** described on the front side of this form, the Driver Services Bureau of the Motor Vehicle Division of the New Mexico Taxation and Revenue Department must **RECEIVE** your **WRITTEN** request for a hearing within **TEN (10) CALENDAR DAYS FROM THE DATE THAT THIS NOTICE WAS SERVED ON YOU**. The date this notice was served is stated under SERVICE on the front side. State law does not permit the department to consider an untimely request for a hearing.

NOTE: *This hearing request must be accompanied by a check or money order payment of $25.00 (no cash) or Form MVD-10813, Statement of Indigency, (available at any motor vehicle field office or on the internet.)*

Your **WRITTEN** request for a hearing may be submitted in person at the Driver Services Bureau of the Motor Vehicle Division in the Montoya Building, 1100 S. St. Francis Drive, Santa Fe, New Mexico or mailed to Driver Service Bureau, Motor Vehicle Division, P.O. Box 1028, Santa Fe, N.M. 87504-1028. A telephone call cannot be accepted as your request for hearing, but if additional information is needed, the number is (505) 827-2241.

To make a request for a hearing, state in writing that you desire a hearing concerning this revocation and either attach a photocopy of the front side of this form and include complete identifying information, including your full name, date of birth, social security number, driver's license number, return address, telephone number, citation number, date of arrest and arresting agency.

The hearing is only for contesting the revocation of your driving privilege based on violation of the Implied Consent Act. The issues at the hearing are the following:

1. Whether the officer had reasonable grounds to believe that you were driving a motor vehicle while under the influence of intoxicating liquor or drugs;
2. Whether you were arrested;
3. Whether the hearing is timely held, and;
4. Whether you refused to submit to a test upon request of the law enforcement officer after being advised that your failure to submit could result in the revocation of your driving privilege.
5. Whether the result of a chemical test you submitted to indicated a blood-alcohol concentration of .08 or greater if you are twenty-one (21) years of age or over, or .02 or greater if you are under twenty-one years of age or .04 or greater if you were driving a commercial motor vehicle.
6. Whether you previously had your driver license revoked pursuant to the provisions of the Implied Consent Act.

Appendix D

Scientific Laboratory Division, New Mexico Department of Health, Regulations and Sample Forms

TITLE 7 HEALTH
CHAPTER 33 SCIENTIFIC, CHEMICAL AND BIOLOGIC LABORATORIES AND TESTING
PART 2 BLOOD AND BREATH TESTING UNDER THE NEW MEXICO IMPLIED CONSENT ACT

7.33.2.1 ISSUING AGENCY: New Mexico Department of Health - Scientific Laboratory Division (SLD).
[7.33.2.1 NMAC - Rp, 7.33.2.1 NMAC, 04-30-2010]

7.33.2.2 SCOPE: This rule governs the certification of laboratories, breath alcohol instruments, operators, key operators, and operator instructors of the breath alcohol instruments as well as establishes the methods of taking and analyzing samples of blood and breath testing for alcohol or other chemical substances under the New Mexico Implied Consent Act, Section 66-8-107 et.seq. NMSA 1978.
[7.33.2.2 NMAC - Rp, 7.33.2.2 NMAC, 04-30-2010]

7.33.2.3 STATUTORY AUTHORITY: This rule is promulgated by the secretary of the department of health under the authority of Section 9-7-6(E), Section 24-1-22 and Section 66-8-107 et seq, NMSA 1978. Administration and enforcement of this rule is the responsibility of SLD of the department of health.
[7.33.2.3 NMAC - Rp, 7.33.2.3 NMAC, 04-30-2010]

7.33.2.4 DURATION: Permanent.
[7.33.2.4 NMAC - Rp, 7.33.2.4 NMAC, 04-30-2010]

7.33.2.5 EFFECTIVE DATE: 04-30-2010, unless a later date is cited at the end of a section.
[7.33.2.5 NMAC - Rp, 7.33.2.5 NMAC, 04-30-2010]

7.33.2.6 OBJECTIVE: The objective is to establish standards and procedures for the certification of laboratories, breath alcohol instruments, operators, key operators, and operator instructors as well as the methods of taking and analyzing samples for blood and breath testing for alcohol and other chemical substances under the New Mexico Implied Consent Act. The scientific laboratory division shall conduct blood/breath tests for alcohol and other chemical substances collected pursuant to the New Mexico Implied Consent Act and this administrative rule.
[7.33.2.6 NMAC - Rp, 7.33.2.6 NMAC, 04-30-2010]

7.33.2.7 DEFINITIONS:

A. "Adequate operational environment" - An area that has limited exposure to volatile organic compounds, has access restricted to authorized personnel and has been evaluated for radio frequency interference.

B. "Alcohol" - A hydrocarbon molecule that contains a hydroxyl group (oxygen, hydrogen) as its primary functional group.

C. "Blood" - Whole blood which contains the cellular components and the serum or plasma of blood or hemolyzed blood.

D. "Blood alcohol concentration (BAC)" - The concentration of alcohol in blood; the unit of measurement of alcohol in blood is the number of grams of alcohol per 100 milliliters of blood.

E. "Breath" - That portion of exhaled lung air that is collected for alcohol analysis.

F. "Breath alcohol concentration (BrAC)" - The concentration of alcohol in breath; the unit of measurement is the number of grams of alcohol per 210 liters of breath.

G. "Breath alcohol instrument" - Any evidential breath testing device that is capable of analyzing breath to establish the concentration of alcohol contained in a breath sample. Such instruments must be approved and individually certified by SLD for use in testing pursuant to the Implied Consent Act and this rule.

H. "Breath alcohol instrument modification" - Any alteration, variation or redesign of any part, device or electronic circuit that directly affects, alters, varies or changes the analytical or operational section of the equipment.

I. "Calibration check" - The analysis of an externally delivered, controlled, ethanol vapor specimen of known alcohol concentration. SLD shall determine the breath alcohol simulator solutions or gases to be used.

J. "Director" - The director of SLD.

K. "Drug" - Any chemical agent that affects living processes and has the potential to impair those processes.

L. “Equipment” - Devices which are not a component of the breath alcohol instrument but assist in meeting the requirements of an evidentiary breath test, including but not limited to simulators, gas tanks, gas brackets, and reference standards.

M. “Fixed location” - A location inside a building or breath testing mobile command center which is the primary or sole site for a breath alcohol instrument.

N. “Foreign substance” - Material not commonly found in the human mouth; it does not include dental appliances, dental adhesives, orthodontics or orthotics.

O. “Certified key operator” - An individual who has successfully completed the course for a certified operator and who has successfully completed a key operator class conducted by SLD.

P. “Certified operator” - A person who has successfully completed a breath alcohol operator class conducted by a representative of SLD or a SLD certified instructor and who qualifies to conduct implied consent breath alcohol tests.

Q. “Inspection” - A thorough examination and testing of a breath alcohol instrument by trained personnel to evaluate its accuracy and compliance with this SLD rule.

R. “Operator instructor” - Operator instructors train, test, and grade breath operators in the use of breath alcohol instruments.

S. “Portable instrument” - A breath alcohol instrument intended for use inside or outside buildings, including mobile applications (e.g. in vehicles).

T. “Preservative” - Any chemical that inhibits the development of microbial growth in a collected blood sample.

U. “Proficiency” - A solution of unknown alcohol concentration in blood or water used to evaluate the competency of an analyst or key operator conducting a chemical test and to assure the accuracy and precision of the instrument in reference to the target value(s).

V. “Sample” - A quantity of a subject's blood or exhaled breath to be analyzed for the presence of alcohol or other drugs or both pursuant to the New Mexico Implied Consent Act.

W. “Supplies” - Items that are used in the process of administering a breath or blood test but do not impact the test results, including but not limited to mouthpieces, and printer paper.

X. “Scientific laboratory division (SLD)” - A division of the department of health.

Y. “System blank” - A reference sample such as ambient air or distilled water containing no analyte of interest used to verify a negative test result for the purpose of testing blood or breath instruments.

Z. “Test” - In the case of blood, “test” means the analysis of a blood sample for alcohol or other chemical substances or both. In the case of breath, "test" means the analysis of breath samples for alcohol or other chemical substances or both.

[7.33.2.7 NMAC - Rp, 7.33.2.7 NMAC, 04-30-2010]

7.33.2.8 LABORATORIES:

A. Initial certification. Any laboratory seeking certified status for alcohol or drug testing in blood shall submit a request in writing to the director of SLD. Applicants shall furnish the materials listed below to the director of SLD for review and approval. SLD shall review the materials and inspect the location of the applicant laboratory within 60 days of receipt. SLD shall issue a certificate to any laboratory that meets the standards and successfully completes the required proficiency testing requirements.

(1) Laboratories seeking SLD certification for blood alcohol analysis shall submit:

(a) written documentation of the scientific training and experience in toxicology or clinical/analytical chemistry of its director and all personnel who will perform tests;

(b) written copies of the analytical methods, techniques and equipment it proposes to use;

(c) a proposed set of quality control/ assurance measures;

(d) results of all required proficiency tests;

(e) evidence that the lab has adequate space, equipment and materials to perform blood alcohol analysis.

(2) Laboratories seeking SLD certification for drug analysis in blood shall submit:

(a) written documentation of the scientific training and experience in toxicology or clinical/analytical chemistry of its director and all personnel who will perform tests;

(b) written copies of the analytical methods, techniques and equipment it proposes to use;

(c) a proposed set of quality control/ assurance measures;

(d) results of all required proficiency tests;

(e) evidence that the lab has adequate space, equipment and materials to perform drug testing on blood.

(f) proof of accreditation by the American board of forensic toxicology (ABFT) in forensic toxicology or by the American society of crime lab directors /laboratory accreditation board (ASCLD/LAB) in the field of forensic science testing in the discipline of toxicology in the category of testing of blood/urine drug testing, or the current accrediting body.

B. Continuing responsibilities of laboratories.

(1) Each SLD-certified laboratory shall adhere to an SLD-approved written standard operating procedure and shall maintain evidence of its compliance.

(2) Each SLD-certified laboratory shall be subject to inspection by authorized personnel of SLD prior to certification and may be re-inspected at any time during the period for which certification was granted.

(3) SLD-certified laboratories are required to submit to the director of SLD any changes in their analytical personnel, analytical methodology or analytical equipment for approval a minimum of 20 days prior to commencing analysis with the new personnel, methodology or equipment.

(4) SLD-certified laboratories shall maintain records containing all pertinent facts relating to analyses performed for a minimum period of five years. All records shall be sufficiently complete as to allow verification by an independent chemist, unaffiliated with the SLD-certified laboratory. Such records shall be open to inspection by authorized personnel of SLD.

(5) SLD certified laboratories shall submit to SLD copies of all results of tests for alcohol or other drugs within 30 days of the completion of the blood analysis. The name of the scientist responsible for reviewing the test data and determining the final result shall be provided on the report.

(6) All SLD-certified laboratories shall establish and maintain adequate SLD-approved quality control measures and shall maintain complete records of their quality control programs. These records shall be available for inspection by SLD personnel upon demand and shall be maintained for a minimum period of five years.

(7) Those laboratories certified in drug testing shall maintain their ABFT or ASCLD/LAB accreditation or accreditation from the current accrediting body with required proficiencies.

(8) Proficiency testing.

(a) SLD shall require that each laboratory certified for blood alcohol testing complete the analysis of a minimum of eight samples each year. These tests include proficiencies issued by SLD as well as proficiencies issued by other certifying agencies. In the case of proficiency samples provided by SLD, certified laboratories must return test results within ten days of their receipt. Performance is considered satisfactory if the results of all analyses in a single year fall within acceptable limits based on considerations that include, but are not limited to, the subject analytes and the sample matrix. Acceptable limits for alcohol proficiencies for blood samples are:

(i) ± 10 percent of the alcohol content of the specimen if the known alcohol content is 0.10 grams per 100 milliliters or more;

(ii) ± 0.01 grams per 100 milliliters if the known alcohol content is less than 0.10 grams per 100 milliliters.

(b) Drug proficiency testing shall be in accordance with accrediting agency standards.

C. Recertification. SLD certified laboratories may be certified for a period not to exceed one year to conduct blood tests subject to the following standards, procedures, conditions and on-site inspections:

(1) all laboratory certifications shall expire annually on June 30;

(2) SLD certified laboratories must apply for renewal of certification annually; all applications must be received at least 60 days prior to the expiration date of the laboratory's certification;

(3) applications for renewal of certification shall include the following:

(a) the same information regarding personnel, techniques and equipment as described in Subsection A of this section;

(b) results of all proficiency tests performed in the previous year including SLD proficiencies as well as proficiencies issued by other certifying agencies;

(4) continued certification of a laboratory shall depend on compliance with approved methods, qualified staff and facilities, and satisfactory performance in the proficiency testing.

D. Denial, suspension, and revocation.

(1) SLD may refuse to certify or may suspend or revoke the certification of any SLD-certified laboratory for any one or more of the following causes:

(a) failure to comply with any of the previously stated requirements for certification in Subsection A of this section;

(b) fraud or deceit in applying for or obtaining the certification or renewal thereof;

(c) loss of professional certification or affiliation of staff;

(d) loss of required accreditation of lab;

(e) any serious or repeated violation of any rule of SLD;

(f) any major violation of the standards for laboratories, facilities, personnel or equipment relevant to the testing procedures that are the subject of this rule;

(g) for good cause, including but not limited to perjury, fraud or incompetence;

(h) failure to perform analyses and proficiency testing in a satisfactory manner as specified by SLD.

(2) SLD shall provide notice to the laboratory of any proposed adverse action.

(3) Any laboratory seeking review of unsatisfactory proficiency test results may request a stay of suspension or revocation for good cause. The request must be in writing to the director of SLD.

(4) Any laboratory that has had their SLD certification denied, revoked or suspended may request a hearing pursuant to Subsection F of 7.33.2.18 NMAC.

(5) Any laboratory that has had their SLD certification revoked may not re-apply for a minimum of one year after the notice of final action or after the completion of any requested hearing whichever is later.

(6) Any laboratory denied certification or renewal of certification may not re-apply for certification until 90 days after the completion of any requested hearing or 90 days after the notice of final action, whichever is later. Subsequent denials will require that six months, not 90 days, elapse prior to re-application.

[7.33.2.8 NMAC - Rp, 7.33.2.9 NMAC & 7.33.2.16 NMAC, 04-30-2010]

7.33.2.9 SELECTION AND EVALUATION OF BREATH ALCOHOL INSTRUMENTS AND ASSOCIATED EQUIPMENT: SLD shall select the primary breath alcohol instrument for use by law enforcement agencies in New Mexico. Selection shall be based on, but not be limited to, performance of the instrumentation in each section of SLD's evaluation process, the field history of the instrumentation, the manufacturer's support capability, and evaluations by other users of the instruments, including approval by the national highway traffic safety administration (NHTSA).

A. All manufacturers of breath alcohol instruments, wet-bath simulators, and reference standards for breath alcohol instruments seeking to introduce their instruments and equipment to law enforcement agencies in New Mexico for the purpose of implied consent evidential testing shall first submit their instrumentation and equipment to SLD for approval.

B. SLD will evaluate these instruments per SLD policy.

C. Manufacturers must also designate at least one representative knowledgeable in the technology and electronic configurations of the breath alcohol instrument to provide training to SLD personnel.

D. Manufacturers must provide all information concerning any modifications, changes or upgrades to SLD-approved breath alcohol instruments within two months of the modifications, changes or upgrades. SLD will evaluate the modifications, changes or upgrades and determine if they substantially affect the operation of the instruments and whether the instrument alterations require that the instruments be reevaluated.

E. All analytical results shall be reported as grams of alcohol per 210 liters of breath (g per 210L). These results shall be reported to two decimal places except in the case of standards and proficiency samples, which shall be reported to three decimal places.

F. Failure to comply with these or any subsequent manufacturer related rules may result in the withdrawal of approval for the manufacturers breath alcohol instruments to be utilized in testing under the New Mexico Implied Consent Act.

G. SLD reserves the right to withdraw the approval of any breath alcohol instrument and equipment if the manufacturer fails to comply with the provisions of the approval criteria or the terms of any contracts with SLD.

H. SLD reserves the right to make recommendations for equipment and supplies for breath alcohol instruments for use by law enforcement agencies in New Mexico based on, but not limited to, performance , manufacturer recommendations of the breath alcohol instrument, the field history, and evaluations by SLD and other users of the instruments.

[7.33.2.9 NMAC - Rp, 7.33.2.18 NMAC, 04-30-2010]

7.33.2.10 BREATH ALCOHOL INSTRUMENTS USED BY LAW ENFORCEMENT AGENCIES:

A. Initial certification. Any breath alcohol instrument to be used for implied consent evidential testing must be approved and certified by SLD. Certification for breath alcohol instruments shall be for a period of up to one year, expiring September 30. A certificate shall be issued for each instrument and shall be maintained by the responsible agency. Instruments requiring initial certification must meet all of the following criteria and such criteria must be met before placement and use of the instrument in the field.

(1) SLD shall inspect and perform a calibration check. This check may take place at SLD.

(2) At least one certified key operator shall be responsible for the maintenance of each breath alcohol instrument. The key operator is not required to be a member of the agency in which the instrument is placed.

B. Continuing responsibilities.

(1) Instruments.

(a) Copies of the logbook forms should be submitted to SLD no later than the 10th day of the following month. Electronic records pertaining to all tests administered on the instrument(s) will be transmitted as scheduled by SLD.

(b) Four proficiency samples should be analyzed yearly on each such certified instrument.

(c) A calibration check on the instrument(s) shall be conducted at least once every seven calendar days or a 0.08 calibration check shall be conducted with each subject test or both.

(d) All breath alcohol instruments shall be returned to SLD twice annually for inspection. Such inspection shall consist of, but not be limited to:

(i) establishing the current status of the breath alcohol instrument;

(ii) evaluating the breath alcohol instrument's electronic functions and settings;

(iii) analyzing a series of controlled ethyl alcohol solutions with an accuracy requirement of ± 5 percent or .005, whichever is greater, on all target values;

(iv) installing all updates, modifications, or changes that have been approved by SLD;

(v) reviewing the breath alcohol instrument's sensitivity for the detection of any interfering substances.

(2) Instrument location.

(a) All agencies maintaining a breath alcohol instrument in a fixed location shall furnish each instrument with an adequate operational environment.

(b) An adequate operational environment for the breath alcohol instrument shall:

(i) have adequate ventilation to minimize volatile organic compounds;

(ii) restrict access to the instrument to only authorized personnel;

(iii) be evaluated for radio frequency interference.

(c) A breath alcohol instrument assigned to a fixed location may be used as a portable breath alcohol instrument if the option is available. Transitions for instruments between portable and fixed shall be recorded in the logbook.

(d) Any portable, certified breath alcohol instrument is approved for use anywhere in the state of New Mexico.

C. Recertification of instruments.

(1) Certification is renewed annually based on compliance with this rule.

(2) A certificate shall be issued for each instrument and shall be maintained by the responsible agency.

D. Denial, suspension, and revocation.

(1) SLD may refuse to certify or may suspend or revoke the certification of any breath alcohol instrument for implied consent testing for any one or more of the following causes:

(a) the instrument in use is not on the list of SLD approved testing instruments;

(b) calibration results do not meet SLD established criteria;

(c) if an agency fails to identify and maintain a certified key operator for each breath alcohol instrument, certification of the instrument shall be suspended or revoked;

(d) other failures to abide by this rule may also result in suspension or revocation.

(2) SLD shall provide notice to an agency before taking an adverse action with regard to the certification of the agency’s instrument.

(3) Agencies seeking review of a denial, suspension or revocation of the instrument’s certification may request a stay of suspension or revocation for good cause. The request must be in writing and in accordance with Subsection B of 7.33.2.18 NMAC.

(4) Agencies seeking review of any denial, suspension or revocation of an instrument’s certification may request a review in writing pursuant to Subsection B of 7.33.2.18 NMAC.

E. Repair of instruments. SLD is not required to support or service any breath alcohol instruments that are not owned by SLD. Law enforcement agencies shall be required to pay for any repairs or adjustments of an SLD owned instrument caused as a result of any negligence, incompetence or misconduct in the operation or handling of the instrument as determined by SLD review.
[7.33.2.10 NMAC - Rp, 7.33.2.8 NMAC, 7.33.2.11 NMAC, 7.33.2.16 NMAC and 7.33.2.17 NMAC, 04-30-2010]

7.33.2.11 OPERATORS OF BREATH ALCOHOL TESTING EQUIPMENT:

A. Initial certification. Certification shall be granted for up to two years and shall expire on the last day of the month issued. SLD shall provide training for operator applicants at SLD or other facilities in Albuquerque. SLD may authorize training classes in other areas of the state.

(1) Qualified applicants for implied consent testing must:

(a) be a salaried peace officer commissioned in New Mexico or an employee of a detention facility in New Mexico; or

(b) be a reserve peace officer commissioned in New Mexico.

(2) Accepted applicants who are not commissioned peace officers or detention employees will be given a certificate of completion and are not authorized to conduct implied consent testing.

(3) SLD approved training shall meet the following requirements:

(a) the training shall be provided by representatives of SLD or SLD-certified operator instructors; the training formulated or approved by SLD must include:

(i) the value and purpose of blood and breath alcohol testing;

(ii) the effects of alcohol on the human body and its performance;

(iii) the methods of alcohol analysis and the theory of breath testing;

(iv) breath alcohol instruments and the procedures for breath testing;

(v) practical experience and demonstration of competency;

(vi) New Mexico Implied Consent Act, this rule and any amendments or revisions and court testimony;

(b) applicants must demonstrate competency by passing comprehensive practical and written examinations; these examinations will be formulated or approved by SLD and shall be graded by representatives of SLD or SLD-certified operator instructors.

(4) Certified operators of an SLD approved model of breath alcohol instrument may be certified to operate additional SLD-approved breath alcohol instruments by demonstrating competency with the successful completion of training conducted by representatives of SLD or SLD-certified operator instructors. This training shall follow a course of instruction outlined or approved by SLD as well as written and practical examinations formulated or approved by SLD.

B. Recertification.

(1) Applications for renewal shall show:

(a) the applicant has successfully completed an operator certification or recertification training formulated or approved by SLD within the previous 27 months;

(b) demonstration of competency by successful completion of recertification training formulated or approved by SLD and conducted by representatives of SLD or SLD-certified operator instructors; this training shall include a written as well as a practical, examinations formulated or approved by SLD.

(2) Candidates for renewal who do not satisfy the requirements must attend and successfully complete the initial certification class, as stated in Subsection A of 7.33.2.11 NMAC above.

(3) If the certification of an operator is due to expire before the certification is renewed, the operator may request an extension from SLD for good cause. This request must be received by SLD before certification is due to expire. Extension of certification shall be within the discretion of SLD based on good cause having been shown and shall be for a period of not more than 60 days. Certification shall be deemed to have expired at the end of the extension period if the renewal requirements have not been completed satisfactorily.

C. Denial, suspension, and revocation.

(1) Certification may be denied for inadequate scores or failure to complete any performance tests or examinations in the manner prescribed by SLD; or for any of the reasons set out in Paragraph (2) of this subsection below.

(2) SLD may suspend or revoke certification of any SLD-certified operator for one or more of the following causes:

(a) fraud or deceit in applying for or obtaining the certification or renewal thereof;

(b) loss of professional certification or affiliation;

(c) any serious or repeated violation of any rule or rules of SLD;

(d) any major violation of the standards for personnel or equipment relevant to the testing procedures that are the subject of this rule;

(e) for good cause, including but not limited to perjury, fraud or incompetence;

(f) as required by New Mexico Parental Responsibility Act (Section 40-5A-1-et. seq. NMSA 1978).

(3) SLD shall provide notice of any proposed adverse action to the officer and the agency chief.

(4) A written request to stay suspension or revocation for good cause may be made by any operator who is unable to carry out his/her specific duties. The request must be made in accordance with Subsection B of 7.33.2.18 NMAC.

(5) If any operator is denied certification or renewal of certification, they may re-apply for certification 90 days after the denial or final decision of the record review. Subsequent denials will require that six months elapse prior to re-application.

(6) If any operator has had their SLD certification revoked, they may not re-apply for a minimum of one year after the denial or final decision of the record review.

[7.33.2.11 NMAC - Rp, 7.33.2.13 NMAC and 7.33.2.16 NMAC, 04-30-2010]

7.33.2.12 KEY OPERATORS OF BREATH ALCOHOL TESTING EQUIPMENT:

A. Initial certification. Certification shall be up to one year.

(1) Qualified applicants must have:

(a) status as a certified operator, or hold an operator certificate of completion for the instrument(s) on which they seek to be certified as a key operator; AND

(b) status as a salaried employee of a law enforcement agency or detention facility in New Mexico; OR

(c) SLD may certify as key operators, SLD-selected individuals of law enforcement agencies or corrections departments in New Mexico who successfully complete written and practical examinations formulated and administered by SLD.

(2) Required training.

(a) Training by SLD representatives shall consist of the following:

(i) the theory of breath testing;

(ii) the operational and theoretical principles of the selected breath testing instruments;

(iii) the preparation and use of a simulator;

(iv) calibration checks of selected breath alcohol instrument(s);

(v) quality control measures and proficiency testing;

(vi) minor maintenance and repair of breath alcohol testing equipment;

(vii) the New Mexico Implied Consent Act, this rule and any amendments or revisions and their application to court testimony on the operation and certification of the selected breath alcohol instruments;

(viii) laboratory practice and the demonstration of competency on the applicable equipment;

(ix) introduction to radio frequency interference (RFI) and how to prepare a RFI report.

(b) Demonstration of competency by successful completion of comprehensive practical and written examinations administered by SLD.

(3) Key operator certification shall be limited to the model of instruments upon which the key operator has been trained and examined or models considered equivalent by SLD.

(4) Certified key operators of a SLD approved model of breath alcohol instrument may be certified to operate additional SLD-approved breath alcohol instrument(s) by demonstrating competency with the successful completion of training conducted by representatives of SLD. This training shall include written as well as and practical examinations formulated by SLD.

B. Continuing responsibilities. Certified key operators shall be responsible for:

(1) the calibration checks of the instruments they oversee, maintenance of those instruments and their supplies;

(2) successful completion of the proficiency testing specified in this rule:

(a) solutions for proficiency testing of each certified key operator shall be issued at least four times every year by SLD;

(b) a minimum of one solution must be analyzed by each certified key operator within 30 days of receipt of the solutions; results on the proficiency report form provided by SLD must be received by SLD within 10 working days thereafter;

(c) the average of the proficiency test results must be within ± 10% of target value; if the target value is less than 0.100 g/210L, then the results must be within ± 0.010 g/210L;

(3) insuring that the records and notifications specified in training are submitted as required by SLD rules;

(4) at least monthly submission to SLD of all logbook copies no later than the 10th day of the following month; electronic records pertaining to all tests administered on the instrument(s) will be transmitted as scheduled by SLD.

C. Recertification. Key operators shall be certified for a period of up to one year. All key operator certifications shall expire annually on March 31.

(1) Certifications may be renewed based on a demonstration of competency which may include successful completion of a refresher class as specified by SLD.

(2) If the certification of a key operator is due to expire before the certification is renewed, the key operator may request an extension of certification. This request must be received by SLD before certification is due to expire. Extension of certification shall be within the discretion of SLD based on good cause having been shown and shall be for a period of not more than 60 days. Extensions shall not be granted for more than a total of 60 consecutive days. Certification shall be deemed to have expired at the end of the extension period if the renewal requirements have not been completed satisfactorily. New certification may be obtained by successfully completing the initial certification process as set out in Subsection A of 7.33.2.12 NMAC above.

D. Denial, suspension, or revocation.

(1) Certification may be denied for inadequate scores; or failure to complete any performance tests; or examinations in the manner prescribed by SLD; or for any of the reasons set out in Paragraph (2) of this subsection.

(2) SLD may refuse to certify or may suspend or revoke certification of any SLD-certified key operator for one or more of the following causes:

(a) fraud or deceit in applying for or obtaining the certification or renewal thereof;

(b) loss of professional certification or affiliation;

(c) any serious or repeated violation of this rule;

(d) any major violation of the standards for personnel or equipment relevant to the testing procedures that are the subject of this rule;

(e) for good cause, including but not limited to perjury, fraud or incompetence;

(f) failure to perform analyses and proficiency testing in a satisfactory manner as specified by SLD;

(g) as required by New Mexico Parental Responsibility Act (Section 40-5A-1-et. seq. NMSA 1978).

(3) SLD shall provide notice of a proposed adverse action to the key operator and the head of the agency maintaining the instrument for which the key operator is responsible.

(4) A written request to stay suspension or revocation for good cause may be made by any key operator who is unable to carry out his/her specific duties. The request must be made in accordance with Subsection B of 7.33.2.18 NMAC.

(5) If any key operator is denied certification or renewal of certification, they may re-apply for certification 90 days after the denial or final decision of the record review. Subsequent denials will require that six months elapse prior to re-application.

(6) If any key operator has had their SLD certification revoked, they may not re-apply for a minimum of one year after the denial or final decision of the record review.

[7.33.2.12 NMAC - Rp, 7.33.2.14 NMAC and 7.33.2.16 NMAC, 04-30-2010]

7.33.2.13 OPERATOR INSTRUCTORS OF BREATH ALCOHOL TESTING EQUIPMENT:

A. Designation as operator instructors. Qualified employees of SLD shall be designated as operator instructors, as determined by the director.

B. Initial certification. Persons not employed by SLD shall be certified for up to one year and certification shall expire on December 31.

(1) Applicants shall demonstrate the following qualifications:

(a) current certification as an operator and key operator of the applicable breath testing equipment;

(b) at least 12 semester hours in which the applicant received a grade of C (or satisfactory) or higher in any combination of the following disciplines: chemistry, biology, physics, or mathematics from an accredited university or college; at least four of those 12 semester hours must be in chemistry;

(c) a minimum of 32 hours of instruction in areas relating to blood/breath collection and analysis, to include the following:

(i) the value and purpose of blood and breath alcohol analysis;

(ii) the effects of alcohol on the human body;

(iii) the instruments and procedures for alcohol analysis;

(iv) the interpretation of the results of alcohol analysis;

(v) the New Mexico Implied Consent Act, this rule and any amendments or revisions and court testimony;

(vi) the methods of alcohol analysis;

(vii) the operational principles of the selected breath alcohol instruments;

(viii) practical experience and demonstration of competency in use of blood/breath collection and analyses;

(d) as an alternative to completing the above course of instruction as listed in Subparagraph (c) of Paragraph (1) of Subsection B of this section, an operator instructor may be certified if he/she has earned a bachelor's degree in chemistry, biology or a related science from an accredited university or college and he/she demonstrates equivalent knowledge by successfully completing written and practical examinations formulated or approved by SLD.

(2) Comprehensive practical and written examinations shall be successfully completed by all applicants prior to certification. These examinations shall be administered by SLD.

C. Continuing responsibilities.

(1) Operator instructors not employed by SLD must maintain their certification as operators and key operators.

(2) Requirements for conducting an operator class:

(a) a certified operator instructor should notify SLD in writing at least 10 working days in advance of the date, time and location of all training and examinations to be conducted; in case of emergency or unforeseen circumstances, the date, time, or location of such training or examinations may be changed if SLD is notified at least 24 hours before such a change is made;

(b) all operator training classes conducted by a certified operator instructor shall follow a course of instruction outlined or approved by SLD;

(c) tests must be outlined or approved by SLD for each type of breath alcohol instrument covered in the training;

(d) all students of the operator instructor must take and pass examinations designed or approved by SLD prior to certification;

(e) maintain records of the classes he or she has conducted for at least the previous three years; these records shall include but not be limited to the dates, times, locations and attendees of such classes; SLD may inspect the operator instructor's records concerning the courses taught by the instructor;

(f) allow representatives of SLD to observe any training sessions and examinations;

(g) forward all copies of the graded examinations to SLD within one month of class date with a written statement by the instructor that he or she has conducted the class in compliance with the requirements of this rule;

(h) notify an applicant’s supervisor in writing if the candidate did not successfully complete the course; a copy of the letter shall be submitted to SLD.

(3) SLD instructors shall not release copies of any examinations to anyone other than applicants and approved certified instructors in order to protect the integrity of the training process and to insure that applicants for certification are tested on their knowledge of the materials presented. Applicants shall be required to return all copies of the tests they may have received at the end of the testing session.

(4) Operator instructors must conduct at least one operator class per certification year.

D. Recertification: operator instructors are certified for a period of up to one year.

(1) Certifications may be renewed based upon adequate performance of continuing responsibility requirements, a demonstration of competency, or successful completion of a refresher class as specified by SLD.

(2) If the certification of an operator instructor is due to expire before the certification is renewed, the operator instructor may request an extension of certification from SLD. This request must be received by SLD no later than five working days before certification is due to expire. Extension of certification shall be within the discretion of SLD based on good cause having been shown and shall be for a period of not more than 60 days. Certification shall be deemed to have expired at the end of the extension period if the renewal requirements have not been completed satisfactorily.

E. Suspension, revocation or denial.

(1) Certification may be denied for inadequate scores or failure to complete any performance tests or examinations in the manner prescribed by SLD or for any of the reasons set out in Paragraph (2) of Subsection E of 7.33.2.13 NMAC below.

(2) SLD may refuse to certify or may suspend or revoke the certification of any operator instructor for any one or more of the following causes:

(a) fraud or deceit in applying for or obtaining the certification or renewal thereof;

(b) loss of professional certification or affiliation;

(c) any serious or repeated violation of any rule or rule of SLD;

(d) failure to conduct classes in accordance with the rules and standards of SLD;

(e) for good cause, including but not limited to perjury, fraud or incompetence;

(f) as required by New Mexico Parental Responsibility Act (Section 40-5A-1-et. seq. NMSA 1978);

(g) failure to maintain certification as an operator and key operator;

(h) failure to demonstrate knowledge as established by SLD to be an operator instructor.

(3) SLD shall provide notice of any proposed adverse action to the instructor and the agency chief.

(4) An operator instructor may request a stay of suspension or revocation for good cause. The request must be in writing and in accordance with Subsection of B of 7.33.2.18 NMAC.

(5) If any operator instructor is denied certification or renewal of certification, they may re-apply for certification 90 days after the denial or final decision of the record review. Subsequent denials will require that six months elapse prior to re-application.

(6) If any operator instructor has had their SLD certification revoked, they may not re-apply for a minimum of one year after the denial or final decision of the record review.

[7.33.2.13 NMAC - Rp, 7.33.2.15 NMAC and 7.33.2.16 NMAC, 04-30-2010]

7.33.2.14 METHODS OF ANALYSIS:

A. Alcohol in blood.

(1) All analytical methods and any modifications of approved analytical methods must be approved in advance by SLD.

(2) The method used shall be capable of analyzing reference samples of known alcohol concentration with accuracy limits of ± 10% of the actual blood alcohol concentration if the known alcohol concentration is 0.10 grams per 100 milliliters or more and ± 0.01 grams per 100 milliliters if the known concentration is less than 0.10 grams per 100 milliliters. The method shall also be capable of analyzing reference samples of known alcohol concentration within specificity and precision limits that will be established and reviewed by SLD.

(3) All analytical results shall be expressed in terms of the alcohol concentration in blood, based on the number of grams of alcohol per 100 milliliters of blood. These results shall be reported to two decimal places except for analyses of standards, controls and proficiency samples, which shall be reported to three decimal places.

B. Drugs in blood.

(1) All analytical methods and any modifications of approved analytical methods must be approved in advance by SLD.

(2) The results of positive tests for drugs other than alcohol shall not be reported until they are confirmed. Confirmation tests must employ an approved method that is different than the one utilized to achieve the initial result unless the confirmation test method has been approved for that use by SLD.

(3) Accuracy limits for the reference samples and proficiencies shall be in accordance with the approved methods for the particular analysis as determined by the accrediting agency.

C. Alcohol in breath samples.

(1) Breath samples shall be collected by certified operators or certified key operators on instruments certified by SLD.

(2) The minimum requirements for an evidential breath sample for implied consent testing are:

(a) a system blank analysis shall be used preceding each breath sample;

(b) a calibration check using SLD approved solutions and/or gases shall be performed in accordance with the following:

(i) the instrument shall be maintained and calibration checked by the key operator; calibration checks shall be made a minimum of once every seven days; these calibration checks shall consist of checking the instrument with two breath alcohol solutions or gases, one of which shall simulate 0.08 grams per 210 liters BrAC and the other shall simulate a BrAC of greater than 0.15 grams per 210 liters BrAC; satisfactory calibration results must be within ± 10 percent of the listed values for a BrAC of 0.10 grams per 210 liters and above or ±0.01 for a BrAC below 0.10 grams per 210 liters; or

(ii) a single calibration check using solutions or gases which simulate 0.08 grams per 210 liters shall be performed with each subject test; satisfactory calibration check results must be within ± 0.01; these test results shall be valid for the purpose of determining if the subject test is 0.08 grams per 210 liters or more; or

(iii) both Items (i) and (ii) of this subparagraph.

(3) The minimum requirements for a non-implied consent test are:

(a) a system blank preceding each breath sample;

(b) a system blank after each breath sample.

(4) All analytical results shall be reported as grams of alcohol per 210 liters of breath (g /210L). These results shall be reported to two decimal places except in the case of standards and proficiency samples, which shall be reported to three decimal places.

(5) A chronological log book shall be kept for each instrument to show calibration checks, maintenance, analyses performed, results and identities of the subjects tested, as well as the identities of the persons performing analyses. These records shall be kept on forms provided by SLD. Copies of these records shall be submitted to SLD each month as per Paragraph (4) of Subsection B of 7.33.2.12 NMAC above.

[7.33.2.14 NMAC - Rp, 7.33.2.10 NMAC, 04-30-2010]

7.33.2.15 APPROVED METHODS FOR SAMPLE COLLECTION, ANALYSIS, AND RETENTION:

A. Blood sample collection.

(1) Blood samples shall be collected in the presence of the arresting officer or other responsible person who can authenticate the samples. Blood samples shall be collected by veni-puncture as authorized by the New Mexico Implied Consent Act NMSA 1978, Sections 66-8-105 et. seq. The term laboratory technician shall include phlebotomists.

(2) The initial blood samples should be collected within three hours of arrest. Any blood samples collected subsequent to the initial blood or breath sample collection should be collected within 60 minutes of the initial sample collection.

(3) Ethyl alcohol shall not be used as a skin antiseptic in the course of collecting blood samples. The samples shall be dispensed or collected using an SLD-approved blood collection kit. SLD-approved blood collection kit will contain two or more sterile tubes with sufficient sodium fluoride so that the final concentration shall contain not less than 1.0 percent sodium fluoride. In the case of an insufficient sample, it shall be permissible to collect the sample in one tube only.

(4) The blood samples shall be delivered to SLD or a laboratory certified by SLD to conduct tests for alcohol or other drug content. At the laboratory, the seal shall be broken on one tube and the blood shall be analyzed. If necessary it shall be permissible to open more than one sample tube.

(5) The samples of blood shall be retained by the laboratory which performed the initial alcohol or drug testing for a period of not less than six months. Any interested party may request the laboratory retain the samples longer than 6 months. The request must be made in writing and include: the name of the donor of the sample; the date of arrest; the arresting agency; the county of arrest and; if available, any laboratory identification numbers.

(6) Retained samples shall be made available upon receipt of a court order directing the laboratory to release a portion of the remaining sample to a testing facility specified by the requesting party. The laboratory which performed the initial alcohol or drug testing is not responsible for the transport of the retained samples.

B. Breath sample collection.

(1) Samples of the subject's breath shall be collected and analyzed pursuant to the procedures prescribed by SLD and employing only SLD approved equipment and certified instruments.

(2) Breath samples shall be collected and analyzed by certified operators or certified key operators and shall be end expiratory in composition. The breath test operator should make a good faith attempt to collect and analyze at least two samples of breath. Breath shall be collected only after the certified operator or certified key operator has ascertained that the subject has not had anything to eat, drink or smoke for at least 20 minutes prior to

collection of the first breath sample. If during this time the subject eats, drinks or smokes anything, another 20 minute deprivation period must be initiated. The two breath samples shall be taken not more than 15 minutes apart. If the difference in the results of the two samples exceeds 0.02 grams per 210 liters (BrAC), a third sample of breath or blood shall be collected and analyzed. If the subject declines or is physically incapable of consent for the second or third samples, it shall be permissible to analyze fewer samples.
[7.33.2.15 NMAC - Rp, 7.33.2.12 NMAC, 04-30-2010]

7.33.2.16 SLD LISTS: SLD will maintain lists of the following:

A. all certified laboratories;

B. breath alcohol instruments and equipment that have been approved by SLD for use under the New Mexico Implied Consent Act;

C. approved evidential blood collection devices to ensure the quality of test results.

[7.33.2.16 NMAC - Rp, 7.33.2.19 NMAC and 7.33.2.11 NMAC, 04-30-2010]

7.33.2.17 FEES: For the most current fee list visit the SLD website. SLD reserves the right to charge reasonable fees for the following:

A. replacement or duplicate operator certification credentials;

B. replacement or duplicate key operator certification credentials;

C. replacement or duplicate operator instructor certification credentials.

[7.33.2.17 NMAC - Rp, 7.33.2.13 NMAC and 7.33.2.14 NMAC, 04-30-2010]

7.33.2.18 DENIAL OF CERTIFICATION FOR LABORATORIES, OPERATORS, KEY OPERATORS, OPERATOR INSTRUCTORS AND BREATH ALCOHOL TESTING EQUIPMENT:

A. Record review. All applicants whose certification has been denied, revoked or suspended may request a record review from SLD.

B. Procedure for requesting informal administrative review.

(1) An applicant or certified operator, key operator or operator instructor given notice of a denial, suspension or revocation of their certification or that of their instrument may submit a written request for a record review. To be effective, the written request shall:

(a) be made within 30 calendar days, as determined by the postmark, from the date of the notice of action issued by SLD;

(b) be properly addressed to SLD;

(c) state the applicant's name, address, and telephone numbers;

(d) state the status of the certification as denied, suspended, or revoked;

(e) identify the instrument in question and the agency holding the instrument, if applicable; and

(f) provide a brief narrative rebutting the circumstances of the denial, revocation or suspension.

(2) If the applicant or operator, key operator or operator instructor wishes to submit additional documentation for consideration, such additional documentation must be included with the request for a record review.

C. Record review proceeding. The review proceeding is intended to be an informal non-adversarial administrative review of written documentation. It shall be conducted by an administrative review committee designated for that purpose by SLD. In cases where the administrative review committee finds the need for additional or clarifying information, the review committee shall request that the applicant supply such additional information within the time set forth in the committees' request.

D. Final determination.

(1) Content: the administrative review committee shall render, sign and enter a written decision setting forth the reasons for the decision and the evidence upon which the decision is based.

(2) Effect: the decision of the administrative review committee is the final decision of the informal administrative review proceeding.

(3) Notice: a copy of the decision shall be mailed by registered or certified mail to the applicant/ agency.

E. Judicial review. Judicial review of the administrative review committee's final decision is permitted to the extent provided by law. The party requesting the appeal shall bear the cost of such appeal.

F. Request for hearing and hearing processes and procedure for laboratories.

(1) Any laboratory seeking to contest the denial of certification, denial of recertification, revocation or suspension of certification must request a hearing in writing. The request must be:

(a) addressed to the director of SLD;
(b) signed by the laboratory director;
(c) delivered by hand or mail, return receipt requested; and
(d) received within ten business days after being served with a notice of proposed action by SLD.

(2) SLD will follow the hearing processes and other provisions of 7.1.2.16 NMAC through 7.1.2.43 NMAC as applicable. All references to the "licensing authority" or the "department" in that rule shall be understood and interpreted as references to the department of health and the SLD for purposes of this rule and any hearing relating to the certification of a laboratory by SLD.

[7.33.2.18 NMAC - N, 04-30-2010]

History of 7.33.2 NMAC:

Pre-NMAC History: Material in the part was derived from that previously filed with the commission of public records - state records center and archives:

HED 81-3 (SLD), Emergency Regulations Regarding Certification of Operators for Blood-and-Breath Testing Apparatus, filed 06-30-81.

HED 82-5 (SLD), Regulations Governing Blood and Breath Testing under the Implied Consent Act, filed 12-08-82

HED 87-5 (SLD), Regulations Governing Blood and Breath Testing under the Implied Consent Act, filed 08-25-87

HED 94-12 (SLD), Regulations Governing Blood and Breath Testing under the New Mexico Implied Consent Act, filed 01-23-95.

History of Repealed Material:

7 NMAC 33.2, Blood and Breath Testing under the New Mexico Implied Consent Act (filed 10-18-96) repealed 03-14-01.

7.33.2 NMAC, Blood and Breath Testing under the New Mexico Implied Consent Act (filed 02-21-01) repealed 04-30-2010.

Other History:

HED 94-12 (SLD), Regulations Governing Blood and Breath Testing under the New Mexico Implied Consent Act, (filed 01-23-95) was renumbered, reformatted, amended and replaced by 7 NMAC 33.2, Blood and Breath Testing under the New Mexico Implied Consent Act, effective 10-31-96.

7 NMAC 33.2, Blood and Breath Testing under the New Mexico Implied Consent Act (filed 10-18-96) was replaced by 7.33.2 NMAC, Blood and Breath Testing under the New Mexico Implied Consent Act, effective 03-14-01.

7.33.2 NMAC, Blood and Breath Testing under the New Mexico Implied Consent Act (filed 02-21-01) was replaced by 7.33.2 NMAC, Blood and Breath Testing under the New Mexico Implied Consent Act, effective 04-30-2010.

State of New Mexico - DOH

APD @ WS SUBSTATION

Intoxilyzer - Alcohol Analyzer

NM Model 8000

SN 80-002063

Date of Test11/06/2010

Sub Name = [redacted]

Operators Name = DEHERRERA,BRUCE

Cert No = 1407

Agency Code = 02A03

Test	BrAC		Time
Air Blank	0.00	g210L	03:18 MST
Diagnostic Test	Pass		03:18 MST
Air Blank	0.00	g210L	03:19 MST
Subject Test	0.12	g210L	03:19 MST
Air Blank	0.00	g210L	03:20 MST
Cal Check	0.080	g210L	03:21 MST
Air Blank	0.00	g210L	03:21 MST
Subject Test	0.12	g210L	03:21 MST
Air Blank	0.00	g210L	03:22 MST

Operator's Signature

SCIENTIFIC LABORATORY DIVISION

700 Camino de Salud, NE, P.O. Box 4700, Albuquerque, NM 87196-4700

Please type or print full information to avoid delay in report.

REPORT OF BLOOD ALCOHOL ANALYSIS

Date Received _____ Time Received _____ Lab. No. _____

PART A-INFORMATION IN THIS BLOCK TO BE FILLED IN BY ARRESTING OFFICER

SEND LAB ANALYSIS REPORT TO:

Name: _____
(Complete name of your agency)

Address: _____
(Street or post office box number)

_____
(City) (State) (Zip Code)

SEND COPY TO:

Donor's identification:

Name: _____
(Last) (First) (Middle)

Address: _____
(Street or post office box number)

_____
(City) (State) (Zip Code)

Sex: _____ Weight: _____ Date of Birth: _____

SSN: _____ Place of arrest: _____

Dr. Lic.# _____ County: _____

ARRESTING OFFICER IDENTIFICATION:

Name: _____ Date _____

Department: _____ Arrest Time: _____ ☐AM ☐PM

Blood drawn by: _____ Date blood drawn: _____

Place drawn: _____ Time blood sample drawn: _____ ☐AM ☐PM

Blood draw witnessed by: _____
(Signature)

REMARKS: _____

_____

_____

_____
(Signature of arresting officer)

REASON SUSPECT STOPPED:

☐ Erratic Driving _____

☐ Accident ☐ Fatal ☐ Great Bodily Injury ☐ Other: _____

☐ Other: _____

Investigated or Witnessed by: _____
(Signature)

INFORMATION BELOW IS TO BE FILLED IN BY DRAWER OF ANY BLOOD SAMPLE

I certify that on the date, time and place indicated above, I drew blood samples from the above named donor and that I marked and sealed the samples with the donor's name. The blood was collected using the entire contents of an SLD-approved blood collection kit in accordance with the instructions.

_____ Date _____ Title _____ Employer Name _____
(Signature of blood drawer)

PART B- LABORATORY USE ONLY

CERTIFICATE OF RECEIVING EMPLOYEE

Specimen Blood ☐ ☐ Other _____ Received from _____

Received from: Via Mail ☐ In Person ☐ Other ☐ Other Remarks: _____

Seal Intact: Yes ☐ No ☐ If No, explain _____

I certify that on the date shown in the "date received" blank above, I received the sample which accompanied this report and followed the procedures set out on the reverse of this report, and the statements in this block are correct.

(Signature of receiving employee)

CERTIFICATE OF ANALYST

The seal of this sample was received intact and broken in the laboratory: Yes ☐ No ☐ If No, explain _____

Result of Analysis

Blood sample: 0._____ gms/100ml
alcohol concentration in sample

Remarks: _____

I certify that I followed the procedures set out on the reverse of this report, and the statements in this block are correct. The concentration of alcohol in the sample is based on the grams of alcohol in one hundred milliliters of blood.

Date of analysis: _____ Analyzed by: _____
(Signature of analyst)

CERTIFICATE OF REVIEWER

I certify that the analyst who conducted the analysis in this case meets the qualifications required by the director of this laboratory to properly conduct such analyses; the supervisor of analysts is also qualified to conduct such analyses; and that the established procedure has been followed in the handling and analysis of the sample in this case.

Date _____ Reviewer : _____

CERTIFICATE OF MAILING

I certify that on this date I mailed a legible copy of this report to the donor, in accordance with the mailing procedure set out on the reverse of this report.

Date: _____ Laboratory Employee: _____

SLD 705 (Rules of Procedure for the Municipal Courts, Rule 8-603; Rules of Criminal Procedure for the Magistrate Courts, Rule 6-607; and Rules of Criminal Procedure for

PROCEDURE

1. The laboratory named on the front of this report is a laboratory authorized or certified by the Scientific Laboratory Division of the Health Department to perform blood and alcohol tests. The agency has established formal procedures for receipt, handling and testing of blood samples to assure integrity of the sample, a formal procedure for conduct and report of the chemical analysis of the samples by the gas chromatographic method (_____) *(specify, if other method used)* and quality control procedures to validate the analyses. The quality control procedures include semi-annual proficiency testing by an independent agency. The procedures have the general acceptance and approval of the scientific community, including the medical profession, and of the courts, as a means of assuring a chemical analysis of a blood sample that accurately discloses the concentration of alcohol in the blood. The same procedures are applicable for samples other than blood if submitted for alcohol analysis. The analyst who conducts the analysis in this must meet the qualification required by the director of this laboratory to properly conduct such analyses. The supervisor of analysts must also be qualified to conduct such analyses.
2. When a blood sample is received at the laboratory, the receiving employee examines the sample container and:
   (a) determines that it is a standard container of a kit approved by the director of the laboratory;
   (b) determines that the container is accompanied by this report, with Part A completed;
   (c) determines that the donor's name and the date that the sample was taken have already been entered on this report and on the container and that they correspond;
   (d) makes a log entry of the receipt of the sample and of any irregularity in the condition of the container or its seals;
   (e) places a laboratory number and the date of receipt on the log, on the container, and on this report, so that each has the same laboratory number and date of receipt;
   (f) completes and signs the Certificate of Receiving Employee, making specific notations as to any unusual circumstances, discrepancies, or irregularities in the condition or handling of the sample up to the time that the container and report are delivered to the analysis laboratory;
   (g) personally places the container with this report attached in a designated secure cabinet for the analyst or delivers it to the analyst.
3. When the blood sample is received by the analyst, the analyst:
   (a) makes sure the laboratory number on the container corresponds with the laboratory number on this report;
   (b) makes sure the analysis is conducted on the sample which accompanied this report at the time the report was received by the analyst;
   (c) conducts a chemical analysis of the sample and enters the results on this report;
   (d) retains the sample container and the raw data from the analysis;
   (e) completes and signs the Certificate of Analyst, noting any circumstance or condition which might affect the integrity of the sample or otherwise affect the validity of the analysis;
   (f) delivers this report to the reviewer.
4. The reviewer checks the calculations of the analysis, examines this report, signs the Certificate of Reviewer, and delivers the report to a laboratory employee for distribution.
5. An employee of the agency mails a copy of this report to the donor at the address shown on this report, by depositing it in an outgoing mail container which is maintained in the usual and ordinary course of business of the laboratory. The employee signs the certificate of mailing to the donor, and mails the original of this report to the submitting law enforcement agency.
6. The biological sample will be retained by the testing laboratory for a period of at least six (6) months pursuant to regulations of the scientific laboratory division.

NEW MEXICO DEPARTMENT OF HEALTH

Scientific Laboratory Division
1101 Camino de Salud, N.E.
Albuquerque, NM 87102
(505) 383-9000

NPI: 1548488414
Accredited by American Board of Forensic Toxicology

SLD 705 (Supplement)
Report of Drug Analysis

SLD Case #: IC-DWI-1006-[redacted]

Submitter: Santa Rosa Police Department
244 SOUTH 4TH STREET
Santa Rosa, NM 88435

Donor: [redacted]

Arresting Officer: [redacted]

Date of Birth: [redacted]
Social Security #: [redacted]
Gender: Female
Date of Arrest: 6/3/2010

Sample #: 201020[redacted]
Source: Blood, whole
Date Received: 6/9/2010 10:57

The toxicological results for the above sample are listed below:		Method
Delta-9-Tetrahydrocannabinol	4 ng/ml	GCMS
(THC) is the principal psychoactive constituent of marijuana. When smoked, it is rapidly distributed and disappears quickly from the blood.		
11-Nor-9-Carboxy-Delta-9-Tetrahydrocannabinol	73 ng/ml	GCMS
(Carboxy-THC) is a metabolite of tetrahydrocannabinol (THC). THC is the major psychoactive constituent of marijuana.		
Methamphetamine	0.19 mg/L	GCMS
(Desoxyn®, Methedrine®) is a potent central nervous system stimulant drug with an extremely high potential for abuse. In small doses, the drug is used for the treatment of obesity.		
Amphetamine	<0.05 mg/L	GCMS
(Benzedrine®, Dexedrine®) is a central nervous system stimulant with a high potential for abuse. It may be detected in biological samples as a metabolite of methamphetamine.		

*If called as a witness, I would testify to the results stated in this report.

*Reviewer Signature: Rong-Jen Hwang

Date of Review: 11/2/2010

Print Name: Rong – Jen Hwang, PHD

I certify that on this date I mailed a legible copy of this report to the donor at the above address.

Laboratory Employee: Edna Flappin

Date Mailed: 11-4-10

Final

NEW MEXICO DEPARTMENT OF HEALTH

Scientific Laboratory Division
1101 Camino de Salud, N.E.
Albuquerque, NM 87102
(505) 383-9000

NPI: 1548488414
Accredited by American Board of Forensic Toxicology

ATTN: [redacted]

AGENCY: Santa Rosa Police Departmen

FROM: Rong-Jen Hwang, Ph.D., Chief, Toxicology Bureau

MEMORANDUM CONCERNING TOXICOLOGY TESTING

The Toxicology Bureau has performed toxicology analysis on the case below.

RE: Case Number: IC-DWI-1006-[redacted]

Subject: [redacted]

Date Received: 6/9/2010

PLEASE FAX A COPY OF THE POLICE REPORT TO SLD AT 505-383-9088 AS SOON AS POSSIBLE.

Information of particular interest includes driving pattern or behavior, reason for stop, observations or signs of impairment. Providing this information to SLD will allow us to provide improved service in terms of drug detection.

* If you require an opinion of impairment, please call 505-383-9109.

Pursuant to NMSA 1978, Section 66-8-105 (Implied Consent Act) and NMAC 7.33.2.15, samples shall be retained for a period of not less than six months from the date of receipt at SLD.

If any party requires that samples be retained for more than six months, that party must submit a request in writing to SLD.

The written request must specify the name of the donor of the sample, the date of arrest, the county of arrest and, if available, any laboratory identification numbers.

Thank you for your assistance.

Appendix E

DWI Statute

66-8-102. Driving under the influence of intoxicating liquor or drugs; aggravated driving under the influence of intoxicating liquor or drugs; penalties.

A. It is unlawful for a person who is under the influence of intoxicating liquor to drive a vehicle within this state.

B. It is unlawful for a person who is under the influence of any drug to a degree that renders the person incapable of safely driving a vehicle to drive a vehicle within this state.

C. It is unlawful for:

(1) a person to drive a vehicle in this state if the person has an alcohol concentration of eight one hundredths or more in the person's blood or breath within three hours of driving the vehicle and the alcohol concentration results from alcohol consumed before or while driving the vehicle; or

(2) a person to drive a commercial motor vehicle in this state if the person has an alcohol concentration of four one hundredths or more in the person's blood or breath within three hours of driving the commercial motor vehicle and the alcohol concentration results from alcohol consumed before or while driving the vehicle.

D. Aggravated driving under the influence of intoxicating liquor or drugs consists of:

(1) driving a vehicle in this state with an alcohol concentration of sixteen one hundredths or more in the driver's blood or breath within three hours of driving the vehicle and the alcohol concentration results from alcohol consumed before or while driving the vehicle;

(2) causing bodily injury to a human being as a result of the unlawful operation of a motor vehicle while driving under the influence of intoxicating liquor or drugs; or

(3) refusing to submit to chemical testing, as provided for in the Implied Consent Act, and in the judgment of the court, based upon evidence of intoxication presented to the court, the driver was under the influence of intoxicating liquor or drugs.

E. A first conviction pursuant to this section shall be punished, notwithstanding the provisions of Section 31-18-13 NMSA 1978, by imprisonment for not more than ninety days or by a fine of not more than five hundred dollars ($500), or both; provided that if the sentence is suspended in whole or in part or deferred, the period of probation may extend beyond ninety days but shall not exceed one year. Upon a first conviction pursuant to this section, an offender shall be sentenced to not less than twenty-four hours of community service. In addition, the offender may be required to pay a fine of three hundred dollars ($300). The offender shall be ordered by the court to participate in and complete a screening program described in Subsection K of this section and to attend a driver rehabilitation program for alcohol or drugs, also known as a "DWI school", approved by the bureau and also may be required to participate in other rehabilitative services as the court shall determine to be necessary. In addition to those penalties, when an offender commits aggravated driving under the influence of intoxicating liquor or drugs, the offender shall be sentenced to not less than forty-eight consecutive hours in jail. If an offender fails to complete, within a time specified by the court, any community service, screening program, treatment program or DWI school ordered by the court or fails to comply with any other condition of probation, the offender shall be sentenced to not less than an additional forty-eight consecutive hours in jail. Any jail sentence imposed pursuant to this subsection for failure to complete, within a time specified by the court, any community service,

screening program, treatment program or DWI school ordered by the court or for aggravated driving under the influence of intoxicating liquor or drugs shall not be suspended, deferred or taken under advisement. On a first conviction pursuant to this section, any time spent in jail for the offense prior to the conviction for that offense shall be credited to any term of imprisonment fixed by the court. A deferred sentence pursuant to this subsection shall be considered a first conviction for the purpose of determining subsequent convictions.

F. A second or third conviction pursuant to this section shall be punished, notwithstanding the provisions of Section 31-18-13 NMSA 1978, by imprisonment for not more than three hundred sixty-four days or by a fine of not more than one thousand dollars ($1,000), or both; provided that if the sentence is suspended in whole or in part, the period of probation may extend beyond one year but shall not exceed five years. Notwithstanding any provision of law to the contrary for suspension or deferment of execution of a sentence:

(1) upon a second conviction, an offender shall be sentenced to a jail term of not less than ninety-six consecutive hours, not less than forty-eight hours of community service and a fine of five hundred dollars ($500). In addition to those penalties, when an offender commits aggravated driving under the influence of intoxicating liquor or drugs, the offender shall be sentenced to a jail term of not less than ninety-six consecutive hours. If an offender fails to complete, within a time specified by the court, any community service, screening program or treatment program ordered by the court, the offender shall be sentenced to not less than an additional seven consecutive days in jail. A penalty imposed pursuant to this paragraph shall not be suspended or deferred or taken under advisement; and

(2) upon a third conviction, an offender shall be sentenced to a jail term of not less than thirty consecutive days, not less than ninety-six hours of community service and a fine of seven hundred fifty dollars ($750). In addition to those penalties, when an offender commits aggravated driving under the influence of intoxicating liquor or drugs, the offender shall be sentenced to a jail term of not less than sixty consecutive days. If an offender fails to complete, within a time specified by the court, any community service, screening program or treatment program ordered by the court, the offender shall be sentenced to not less than an additional sixty consecutive days in jail. A penalty imposed pursuant to this paragraph shall not be suspended or deferred or taken under advisement.

G. Upon a fourth conviction pursuant to this section, an offender is guilty of a fourth degree felony and, notwithstanding the provisions of Section 31-18-15 NMSA 1978, shall be sentenced to a term of imprisonment of eighteen months, six months of which shall not be suspended, deferred or taken under advisement.

H. Upon a fifth conviction pursuant to this section, an offender is guilty of a fourth degree felony and, notwithstanding the provisions of Section 31-18-15 NMSA 1978, shall be sentenced to a term of imprisonment of two years, one year of which shall not be suspended, deferred or taken under advisement.

I. Upon a sixth conviction pursuant to this section, an offender is guilty of a third degree felony and, notwithstanding the provisions of Section 31-18-15 NMSA 1978, shall be sentenced to a term of imprisonment of thirty months, eighteen months of which shall not be suspended, deferred or taken under advisement.

J. Upon a seventh or subsequent conviction pursuant to this section, an offender is guilty of a third degree felony and, notwithstanding the provisions of Section 31-18-15 NMSA 1978, shall

be sentenced to a term of imprisonment of three years, two years of which shall not be suspended, deferred or taken under advisement.

K. Upon any conviction pursuant to this section, an offender shall be required to participate in and complete, within a time specified by the court, an alcohol or drug abuse screening program approved by the department of finance and administration and, if necessary, a treatment program approved by the court. The requirement imposed pursuant to this subsection shall not be suspended, deferred or taken under advisement.

L. Upon a second or third conviction pursuant to this section, an offender shall be required to participate in and complete, within a time specified by the court:

(1) not less than a twenty-eight-day inpatient, residential or in-custody substance abuse treatment program approved by the court;

(2) not less than a ninety-day outpatient treatment program approved by the court;

(3) a drug court program approved by the court; or

(4) any other substance abuse treatment program approved by the court.

The requirement imposed pursuant to this subsection shall not be suspended, deferred or taken under advisement.

M. Upon a felony conviction pursuant to this section, the corrections department shall provide substance abuse counseling and treatment to the offender in its custody. While the offender is on probation or parole under its supervision, the corrections department shall also provide substance abuse counseling and treatment to the offender or shall require the offender to obtain substance abuse counseling and treatment.

N. Upon a conviction pursuant to this section, an offender shall be required to obtain an ignition interlock license and have an ignition interlock device installed and operating on all motor vehicles driven by the offender, pursuant to rules adopted by the traffic safety bureau. Unless determined by the bureau to be indigent, the offender shall pay all costs associated with having an ignition interlock device installed on the appropriate motor vehicles. The offender shall operate only those vehicles equipped with ignition interlock devices for:

(1) a period of one year, for a first offender;

(2) a period of two years, for a second conviction pursuant to this section;

(3) a period of three years, for a third conviction pursuant to this section; or

(4) the remainder of the offender's life, for a fourth or subsequent conviction pursuant to this section.

O. Five years from the date of conviction and every five years thereafter, a fourth or subsequent offender may apply to a district court for removal of the ignition interlock device requirement provided in this section and for restoration of a driver's license. A district court may, for good cause shown, remove the ignition interlock device requirement and order restoration of the license; provided that the offender has not been subsequently convicted of driving a motor vehicle under the influence of intoxicating liquor or drugs. Good cause may include an alcohol screening and proof from the interlock vendor that the person has not had violations of the interlock device.

P. An offender who obtains an ignition interlock license and installs an ignition interlock device prior to conviction shall be given credit at sentencing for the time period the ignition

interlock device has been in use.

Q. In the case of a first, second or third offense under this section, the magistrate court has concurrent jurisdiction with district courts to try the offender.

R. A conviction pursuant to a municipal or county ordinance in New Mexico or a law of any other jurisdiction, territory or possession of the United States or of a tribe, when that ordinance or law is equivalent to New Mexico law for driving under the influence of intoxicating liquor or drugs, and prescribes penalties for driving under the influence of intoxicating liquor or drugs, shall be deemed to be a conviction pursuant to this section for purposes of determining whether a conviction is a second or subsequent conviction.

S. In addition to any other fine or fee that may be imposed pursuant to the conviction or other disposition of the offense under this section, the court may order the offender to pay the costs of any court-ordered screening and treatment programs.

T. With respect to this section and notwithstanding any provision of law to the contrary, if an offender's sentence was suspended or deferred in whole or in part and the offender violates any condition of probation, the court may impose any sentence that the court could have originally imposed and credit shall not be given for time served by the offender on probation.

U. As used in this section:

(1) "bodily injury" means an injury to a person that is not likely to cause death or great bodily harm to the person, but does cause painful temporary disfigurement or temporary loss or impairment of the functions of any member or organ of the person's body; and

(2) "commercial motor vehicle" means a motor vehicle or combination of motor vehicles used in commerce to transport passengers or property if the motor vehicle:

(a) has a gross combination weight rating of more than twenty-six thousand pounds inclusive of a towed unit with a gross vehicle weight rating of more than ten thousand pounds;

(b) has a gross vehicle weight rating of more than twenty-six thousand pounds;

(c) is designed to transport sixteen or more passengers, including the driver; or

(d) is of any size and is used in the transportation of hazardous materials, which requires the motor vehicle to be placarded under applicable law.

History: 1941 Comp., § 68-2317, enacted by Laws 1953, ch. 139, § 54; 1953 Comp., § 64-22-2; Laws 1955, ch. 184, § 8; 1965, ch. 251, § 1; 1969, ch. 210, § 2; recompiled as 1953 Comp., § 64-8-102, by Laws 1978, ch. 35, § 510; 1979, ch. 71, § 7; 1981, ch. 370, § 2; 1982, ch. 102, § 1; 1983, ch. 76, § 2; 1985, ch. 178, § 2; 1987, ch. 97, § 3; 1988, ch. 56, § 8; 1993, ch. 66, § 7; 1997, ch. 43, § 1; 1997, ch. 205, § 1; 1999, ch. 61, § 1; 2002, ch. 82, § 1; 2003, ch. 51, § 10; 2003, ch. 90, § 3; 2003, ch. 164, § 10; 2004, ch. 42, § 1; 2005, ch. 241, § 5; 2005, ch. 269, § 5; 2007, ch. 321, § 10; 2007, ch. 322, § 1; 2008, ch. 72, § 3; 2010, ch. 29, § 1.

Cross references. — For mandatory revocation of driver's license by the division, *see* 66-5-29 NMSA 1978.

For Ignition Interlock Licensing Act, *see* 66-5-501 NMSA 1978.

For violation being a felony if homicide committed, *see* 66-8-101 NMSA 1978.

For funding of local government corrections fund by penalty assessment fees, *see* 66-8-116 NMSA 1978 and 66-8-119 NMSA 1978.

For immediate appearance before magistrate for violation, *see* 66-8-122 NMSA 1978.

For the prohibition of operation of a motor vehicle while possessing liquor, *see* 66-8-138 to 66-8-140 NMSA 1978.

For crime laboratory fee, *see* 31-12-7 NMSA 1978.

For crime laboratory fund, *see* 31-12-9 NMSA 1978.

For court automation fund, *see* 34-9-10 NMSA 1978.

For the criminal jurisdiction of magistrate courts, *see* 35-3-4 NMSA 1978.

For court automation fee, *see* 35-6-1 NMSA 1978, 66-8-116.3 NMSA 1978, and 66-8-119 NMSA 1978.

For uniform jury instructions to be used with 66-8-102 NMSA 1978, *see* UJI 14-4501 to 14-4503 NMRA.

The 1987 amendment, effective April 7, 1987, in Subsection D inserted "notwithstanding the provisions of Section 31-18-13 NMSA 1978" following "shall be punished" in the first sentence; in Subsection E inserted "notwithstanding the provisions of Section 31-18-13 NMSA 1987"; and made a minor change in language in Subsection D.

The 1988 amendment, effective July 1, 1988, redesignated part of Subsection E as present Subsection E(1) and added present Subsection E(2); substituted "third conviction" for "subsequent conviction" in present Subsection E(1); added Subsections H, I and J; and made minor stylistic changes.

The 1993 amendment, effective January 1, 1994, rewrote this section.

The 1997 amendment, effective June 20, 1997, inserted "to participate in and complete a screening program described in Subsection H of this section and" near the beginning of the third sentence in Subsection E; added the last sentence of Subsection H; inserted the language beginning "in New Mexico" and ending "liquor or drugs" in Subsection J; and made a minor stylistic change in Paragraph D(3).

Duplicate amendments. — Laws 1997, ch. 43, § 1 and Laws 1997, ch. 205, § 1 enacted identical amendments to this section. The section was set out as amended by Laws 1997, ch. 205, § 1. *See* 12-1-8 NMSA 1978.

The 1999 amendment, effective June 18, 1999, added Subsection I, redesignated former Subsections I through L as Subsections J through M, and made minor stylistic changes.

The 2002 amendment, effective January 1, 2003, rewrote Subsection I to require the installation of an ignition interlock device for first-time offenders; added Subsections J and K; and redesignated former Subsections J to M as present Subsections L to O.

The 2003 amendment, effective July 1, 2003, substituted "A person" for "Every person" at the beginning of Subsection E; and substituted "or of a tribe, where that ordinance or law" for "that" following "the United States" in Subsection M.

Section 66-8-102 NMSA 1978 was amended by Laws 2003, ch. 51, § 10, Laws 2003, ch. 90, § 3 and Laws 2003, ch. 164, § 10. The was set out as amended by Laws 2003, ch. 164, § 10. *See* Section 12-1-8 NMSA 1978.

The 2004 amendment, effective March 2, 2004, added Paragraph (2) of Subsection C making it unlawful for "a person who has an alcohol concentration of four one hundredths or more in his blood or breath to drive a commercial motor vehicle within this state", amended Subsection E to add to the grounds for a 48-hour imprisonment a failure to comply with any condition of probation and to add "Notwithstanding any provision of law to the contrary, if an offender's sentence was suspended or deferred in whole or in part, and the offender violates any condition of probation, the court may impose any sentence that the court

could have originally imposed and credit shall not be given for time served by the offender on probation", amended Subsection G to limit the subsection to a fourth conviction and to change the jail term from not less than six months to eighteen months, six months of which shall not be suspended, deferred or taken under advisement, added new Subsections H, I, J, L and M, redesignated former Subsection H as Subsection K and provided for the approval of the department of finance and administration for the drug screening program, redesignated former Subsections I through O as Subsections N through T and amended redesignated Subsection T by adding a new Paragraph (2) defining "commercial motor vehicle".

The 2005 amendment, effective June 17, 2005, provided in Subsection E that upon a first conviction, an offender shall be sentenced to not less than twenty-four hours of community service and that in addition, the offender may be required to pay the specified fine; deleted the former provision in Subsection E that if an offender's sentence was suspended or deferred and the offender violates any condition of probation, the court may impose any sentence that it could have originally imposed and credit shall not be given for time served on probation; provided in Subsection F(2) that the sentence shall include not less that ninety-six hours of community service and that if an offender fails to complete any community service, the offender shall receive the specified minimum sentence; deleted former Subsection N, which provided that for a first conviction of aggravated driving while under the influence, the offender shall be required as a condition of probation to have an ignition interlock device installed for one year; deleted former Subsection O, which provided that for a first offense of driving while under the influence, the offender may be required as a condition of probation to have an ignition interlock device installed for one year; deleted former Subsection P, which provided that upon a subsequent conviction, as a condition of probation, the offender shall be required as a condition of probation to have an ignition interlock device installed for one year; added Subsection N to provide the periods of time for which an offender shall be required to have an ignition interlock device installed; added Subsection O to provide that a fourth and subsequent offender may apply to the district court for removal of the ignition interlock device requirement five years after conviction and the conditions under which a district court may remove the requirement; and added Subsection S to provide that if an offender violates any condition of probation, the court may impose any sentence the court could originally have imposed and credit shall not be given for time on probation.

Laws 2005, ch. 241, § 5 and Laws 2005, ch. 269, § 5 enacted almost identical amendments to 66-8-102 NMSA 1978. The section was set out as amended by Laws 2005, ch. 269, § 5. *See* 12-1-8 NMSA 1978.

The 2007 amendment, effective April 2, 2007, amended Subsection C to provide for chemical tests within three hours after driving a vehicle for the administration of a chemical test to determine alcohol concentration.

Laws 2007, ch. 321, § 10 and Laws 2007, ch. 322, § 1 both enacted amendments to 66-8-102 NMSA 1978. The section was set out as amended by Laws 2007, ch. 322, § 1. *See* 12-1-8 NMSA 1978.

The 2008 amendment, effective May 14, 2008, deleted former Paragraph (3) of Subsection T which defined "conviction" to mean an adjudication of guilt, but not including the imposition of a sentence.

The 2010 amendment, effective July 1, 2010, in the catchline, deleted "Persons" and added "Driving"; after "aggravated driving", deleted "while"; and changed "penalty" to "penalties"; in Subsection D, in the introductory sentence, after "Aggravated driving", deleted "while" and after "drugs consists of", deleted "a person who"; in Subsection D(1), at the beginning of the sentence, changed "drives" to "driving"; after "in this state", deleted "and has an" and added "with an"; and after "or more in the", deleted "person's" and added "driver's"; in Subsection D(2), at the beginning of the sentence, deleted "has caused" and added "causing"; in Subsection D(3), at the beginning of the sentence, deleted "refused" and added "refusing", and after "presented to the court,", added "the driver"; in Subsection E, in the first sentence, deleted "person under"; in the fifth sentence, after "aggravated driving", deleted "while"; and in the seventh sentence, after "aggravated driving", deleted "while"; in Subsection N, in the first sentence, after "rules adopted by the", added "traffic safety", and in the second sentence, after "determined by the", deleted "sentencing court" and added "bureau"; added Subsection P; relettered succeeding subsections; and in Subsection R, after "law for driving", deleted "while" and after "penalties for driving", deleted "while".

ANNOTATIONS

Reasonable suspicion for traffic stop. — Where a police officer was driving on a county road, the officer observed the defendant come to a stop at a "T" intersection between the county road and an access road; there were no other vehicles on the county road or the access road; as the officer passed through the intersection, the officer observed that the defendant did not have his turn signal engaged; after the officer passed the defendant, the officer never saw the turn signal on the defendant's vehicle engaged; the defendant turned onto the access road without engaging the turn signal; the officer stopped the defendant for turning without using a turn signal and determined that the defendant was intoxicated, the trial court properly denied the defendant's motion to suppress evidence obtained at the traffic stop, because the officer had a reasonable particularized suspicion that the defendant had violated Section 66-7-325 NMSA 1978, which justified the stop at its inception. State v. Hubble, 2009-NMSC-014, 146 N.M. 70, 206 P.3d 579.

Collateral attack on prior convictions. — Where the municipal court judge, who accepted the defendant's prior DWI guilty pleas, testified that his standard practice was to inform defendants that it was their right to go to trial, to plead not guilty, to present witnesses and evidence, and to be represented by counsel and no evidence was presented to show that the outcome of the defendant's prior DWI cases would have been affected in any way if the municipal court judge had strictly followed the procedure in Rule 8-502 NMRA, the deficiencies in the information provided by the municipal court judge in accepting the defendant's prior DWI guilty pleas did not constitute fundamental error and the defendant cannot collaterally attack the validity of the prior DWI convictions. State v. Pacheco, 2008-NMCA-059, 144 N.M. 61, 183 P.3d 946, cert. denied, 2008-NMCERT-003.

The impaired-to-the-slightest-degree standard of proof is the proper measure of the language "under the influence of intoxicating liquor" and gives the public fair and adequate notice of what constitutes a violation of the statute. State v. Neal, 2008-NMCA-008, 143 N.M. 371, 176 P.3d 330, cert. denied, 2008-NMCERT-001.

Probable cause. — The smell of alcohol emanating from the defendant, the defendant's lack of balance, and the manner of the defendant's performance of field sobriety tests constituted sufficient circumstances to give the officer the requisite objectively reasonable belief that the defendant had been driving while intoxicated and to proceed with breath alcohol content tests, and constituted probable cause to arrest the defendant. State v. Granillo-Macias, 2008-NMCA-021, 143 N.M 455, 176 P.3d 1187, cert. denied, 2008-NMCERT-002.

Right to challenge validity of prior convictions. — A defendant has a right, during a sentence enhancement proceeding, to challenge a prior conviction by guilty plea for lack of subject matter jurisdiction. State v. Nash, 2007-NMCA-141, 142 N.M. 754, 170 P.3d 533.

Substantial evidence. — Defendant's conviction of DWI was supported by substantial evidence where police officers observed that the defendant had red, blood shot and watery eyes, slurred speech and a very strong odor of alcohol on his breath; one officer testified that the defendant had admitted to the officer that he had been drinking at this mother's apartment; the officers observed several open cans of beer at the apartment of the defendant's mother; and defendant did not dispute that he refused to consent to take a breath test. State v. Soto, 2007-NMCA-077, 142 N.M. 32, 162 P.3d 187, cert. denied, 2007-NMCERT-006.

More than one act amending section. — Where three acts were enacted to amend Section 66-8-102 NMSA 1978 at the same session of the legislature, were signed by the governor on different dates, had different effective dates, and are irreconcilable, the last act signed by the governor is presumed to be the law pursuant to Section 12-1-8(B) NMSA 1978. State v. Smith, 2004-NMSC-032, 136 N.M. 372, 98 P.3d 1002 (2004).

Where three acts were enacted to amend Section 66-8-102 NMSA 1978 at the same session of the legislature, were signed by the governor on different dates, and had different effective dates, the language of the three enactments, in addition to their titles and purposes, indicated that the objective of

the legislature was to make specific, independent improvements to the statute and permitted the three enactments to be construed harmoniously to give effect to each enactment. In the course of amending an existing law, if the legislature restates existing law to comply with Article IV, Section 18 of the New Mexico constitution, the courts are not obligated to read into that legislative act a repeal by implication of other legislation passed in the same session. State v. Smith, 2004-NMSC-032, 136 N.M. 372, 98 P.3d 1002 (2004).

Constitutionality of Implied Consent Act. — The Implied Consent Act is not rendered unconstitutional in the civil context just because a refusal to take a breath test under the Act may be used as an element of the criminal offense of aggravated driving while intoxicated (DWI). Marez v. State, Taxation & Revenue Dep't, 119 N.M. 598, 893 P.2d 494 (Ct. App. 1995).

Motorist whose license was revoked for refusal to take a breath-alcohol test lacked standing to challenge the constitutionality of Subsection D (3). Marez v. State, Taxation & Revenue Dep't, 119 N.M. 598, 893 P.2d 494 (Ct. App. 1995).

Aggravation of defendant's DWI conviction under this section for his refusal to submit to a chemical test when he was not advised of the criminal consequences of that refusal did not violate federal or state due process provisions. State v. Kanikaynar, 1997-NMCA-036, 123 N.M. 283, 939 P.2d 1091.

Provision of this section subjecting defendant who refuses to submit to chemical testing to a mandatory jail sentence upon conviction of DWI is not unconstitutionally vague. State v. Kanikaynar, 1997-NMCA-036, 123 N.M. 283, 939 P.2d 1091; Kanikaynar v. Sisneros, 190 F.3d 1115 (10th Cir. 1999), cert. denied, 528 U.S. 1090, 120 S. Ct. 821, 145 L. Ed. 2d 691 (2000).

Effect of 1993 amendment. — The 1993 amendment, designating a fourth or subsequent DWI conviction as a fourth degree felony, did not alter the elements required to establish the offense of DWI and thus proof of prior convictions is not an element of felony DWI; the amendment did not change the nature of the offense, but rather increased the punishment for subsequent offenders by conferring fourth-degree felony status on fourth or subsequent DWI convictions. State v. Anaya, 1997-NMSC-010, 123 N.M. 14, 933 P.2d 223.

Double jeopardy not applicable. — Where the state initially brought charges of driving while intoxicated and vehicular homicide in one proceeding and the jury found the defendant guilty of driving while intoxicated but was unable to reach a verdict on the vehicular homicide count, the subsequent retrial of vehicular homicide did not subject the defendant to double jeopardy, as such an action could be characterized as a continuing prosecution of the vehicular homicide charge. State v. O'Kelley, 113 N.M. 25, 822 P.2d 122 (Ct. App.), cert. quashed, 113 N.M. 24, 822 P.2d 121 (1992).

Double jeopardy does not bar DWI prosecution after license revocation. — An administrative driver's license revocation under the Implied Consent Act (66-8-105 to 66-8-112 NMSA 1978) does not constitute "punishment" for purposes of the double jeopardy clause; thus, the state is not barred from prosecuting an individual for driving under the influence (DWI) even though the individual has been subjected to an administrative hearing for driver's license revocation based on the same offense. State ex rel. Schwartz v. Kennedy, 120 N.M. 619, 904 P.2d 1044 (1995).

Right to counsel. — Provision of this section subjecting defendant who refuses to submit to chemical testing to a mandatory jail sentence upon conviction of DWI does not violate the constitutional right to counsel. State v. Kanikaynar, 1997-NMCA-036, 123 N.M. 283, 939 P.2d 1091; Kanikaynar v. Sisneros, 190 F.3d 1115 (10th Cir. 1999), cert. denied, 528 U.S. 1090, 120 S. Ct. 821, 145 L. Ed. 2d 691 (2000).

Offender not subject to both felony DWI provision and habitual offender statute. — Defendants convicted of the offense of felony DWI under Subsection G are not subject to sentence enhancement under both the felony DWI provision and the habitual offender provision, 31-18-17 NMSA 1978. State v. Anaya, 1997-NMSC-010, 123 N.M. 14, 933 P.2d 223; State v. Gonzales, 1997-NMSC-050, 124 N.M. 171, 947 P.2d 128.

Offender not subject to both felony DWI provision and aggravation statute. — The maximum

sentence for felony DWI under Subsection G cannot be enhanced by the aggravation provisions of 31-18-15.1 NMSA 1978. State v. Coyazo, 2001-NMCA-018, 130 N.M. 428, 25 P.3d 267, cert. denied, 130 N.M. 254, 23 P.3d 929 (2001).

No implied acquittal of greater offense. — Where the state brought charges of vehicular homicide and driving while intoxicated as separate counts, as opposed to lesser-included offenses, the jury's conviction of the defendant for driving while intoxicated but inability to reach a verdict on vehicular homicide was not an implied acquittal of vehicular homicide. An implied acquittal generally occurs when the jury is instructed to choose between a greater and a lesser offense, and chooses the lesser. State v. O'Kelley, 113 N.M. 25, 822 P.2d 122 (Ct. App.), cert. quashed, 113 N.M. 24, 822 P.2d 121 (1992).

Meaning of "under the influence". — This section makes a person guilty of driving while under the influence of intoxicating liquor if by virtue of having drunk intoxicating liquor he is to the slightest degree less able, either mentally or physically or both, to exercise the clear judgment and steady hand necessary to handle as powerful and dangerous a mechanism as a modern automobile with safety to himself and the public. State v. Deming, 66 N.M. 175, 344 P.2d 481 (1959); State v. Sisneros, 42 N.M. 500, 82 P.2d 274 (1938).

Term "under the influence" has been interpreted to mean that to the slightest degree defendant was less able, either mentally or physically or both, to exercise the clear judgment and steady hand necessary to handle an automobile with safety to himself and the public. State v. Myers, 88 N.M. 16, 536 P.2d 280 (Ct. App. 1975).

"Under the influence" means that to slightest degree defendant was less able, either mentally or physically, or both, to exercise the clear judgment and steady hand necessary to handle an automobile with safety to himself and the public. State v. Dutchover, 85 N.M. 72, 509 P.2d 264 (Ct. App. 1973).

Offense does not require motion of vehicle. — The offense of driving while intoxicated under this statute does not require motion of the vehicle; the offense is committed when a person under the influence drives or is in actual physical control of a motor vehicle or exercises control over or steers a vehicle being towed. Boone v. State, 105 N.M. 223, 731 P.2d 366 (1986).

English-language notice regarding administrative revocation of driver's license is compatible with due process when it is personally delivered to a driver during the course of his arrest for driving under the influence. Maso v. State Taxation & Revenue Dep't, 2004-NMCA-025, 135 N.M. 152, 85 P.3d 276, aff'd. 2004-NMSC-028, 136 N.M. 161, 96 P.3d 286.

"Operating" vs. "driving" motor vehicle. – The legislature has made no distinction in this section as to whether "operating a motor vehicle" means to drive or be in actual physical control of the vehicle. State v. Laney, 2003-NMCA-144, 134 N.M. 648, 81 P.3d 591, cert. denied, 2003-NMCERT-003, 135 N.M. 51, 84 P.3d 668.

Offense does not require occurrence on highway. — The prohibitive language of the statute does not require that the DWI incident actually occur on a highway. State v. Richardson, 113 N.M. 740, 832 P.2d 801 (Ct. App. 1992).

Vehicle on private property. — The state may charge a person with DWI pursuant to this section, despite the fact that the defendant is found on private property in actual physical control of a non-moving vehicle. State v. Johnson, 2001-NMSC-001, 130 N.M. 6, 15 P.3d 1233.

Parking lot of commercial restaurant. — Fact that police officer arrested defendant for driving in the parking lot of a commercial restaurant does not render the arrest or search and seizure unlawful. United States v. Aguilar, 301 F.Supp.2d 1263 (D.N.M. 2004).

"Vehicle" includes moped. — A "moped," as defined in 66-1-4.11F NMSA 1978 and regulated by 66-3-1101 NMSA 1978, is a "vehicle" for the purpose of the prohibition against driving while intoxicated under this section. State v. Saiz, 2001-NMCA-035, 130 N.M. 333, 24 P.3d 365, cert. denied, 130 N.M. 459, 26 P.3d 103 (2001).

Intent not required. — The only thing necessary to convict a person of driving while intoxicated is proof that the defendant was driving a vehicle either under the influence of intoxicating liquor or while he had a certain percentage of alcohol in his blood. State v. Harrison, 115 N.M. 73, 846 P.2d 1082 (Ct. App. 1992).

State to preserve remains of blood alcohol sample. — The state is constitutionally required to preserve what remains of a blood alcohol sample for independent testing by a person charged with driving while under the influence of intoxicating liquor. Montoya v. Metropolitan Court, 98 N.M. 616, 651 P.2d 1260 (1982).

Term "eight one-hundredths" in Subsection C refers not to a percentage of defendant's blood volume or weight, but to the reading derived from an intoxilyzer or blood test. City of Lovington v. Tyson, 1996-NMCA-068, 122 N.M. 49, 920 P.2d 119.

Violation of section not conclusive proof of negligence. — A mere showing that decedent operated a motor vehicle negligently in violation of this section and 66-7-104 NMSA 1978 is not sufficient to warrant summary judgment as it does not conclusively establish that the decedent's negligence was a contributing proximate cause of the accident. Sweenhart v. Co-Con, Inc., 95 N.M. 773, 626 P.2d 310 (Ct. App. 1981).

Reasonable suspicion raised by citizen-informant. — Information from a citizen-informant may be relied on by an officer to raise a reasonable suspicion that a person is driving while intoxicated, justifying an investigatory stop. State ex rel. Taxation & Revenue Dep't Motor Vehicle Div. v. Van Ruiten, 107 N.M. 536, 760 P.2d 1302 (Ct. App.), cert. denied, 107 N.M. 413, 759 P.2d 200 (1988).

No right to counsel when under custodial arrest following testing. — A person issued a citation and placed under custodial arrest for driving while under the influence of intoxicating liquor does not have a constitutional right to counsel immediately following a breath alcohol test since it did not amount to initiation of judicial criminal proceedings or prosecutorial commitment, nor was the period following administration of the test a critical stage. State v. Sandoval, 101 N.M. 399, 683 P.2d 516 (Ct. App. 1984).

Right to jury trial. — A potential period of probation of more than six months does not present the degree of liberty deprivation that would convert the offense under Subsection D to the nature of such a serious offense as would trigger the right to a jury trial. Meyer v. Jones, 106 N.M. 708, 749 P.2d 93 (1988).

Defendant charged with driving while intoxicated, second offense, was entitled to a jury trial. State v. Grace, 1999-NMCA-148, 128 N.M. 379, 993 P.2d 93, cert. denied, 128 N.M. 149, 990 P.2d 823 (1999).

Duress defense. — The defense of duress is available against the strict liability charge of driving while intoxicated. State v. Rios, 1999-NMCA-069, 127 N.M. 334, 980 P.2d 1068.

Offense/conviction chronological sequence rule does not apply. — Offense/conviction chronological sequence rule, judicially required for imposition of habitual offender penalties, does not apply to driving while intoxicated sentencing. State v. Hernandez, 2001-NMCA-057, 130 N.M. 698, 30 P.3d 387, cert. denied, 130 N.M. 558, 28 P.3d 1099 (2001).

Use of prior uncounseled convictions to enhance sentence. — A prior uncounseled misdemeanor DWI conviction that did not result in a sentence of imprisonment could be used for enhancement under this section, and such use did not violate the New Mexico Constitution. State v. Woodruff, 1997-NMSC-061, 124 N.M. 388, 951 P.2d 605; State v. Aragon, 1997-NMSC-062, 124 N.M. 399, 951 P.2d 616; State v. Hosteen, 1997-NMSC-063, 124 N.M. 402, 951 P.2d 619.

Absent a showing that defendant's plea of guilty or no contest to a charge of DWI was expressly conditioned upon a promise that his conviction would not be used in the future to aggravate subsequent DWI sentences, he is not entitled to a claim of immunity from future enhancement of subsequently committed DWI offenses. State v. Gaede, 2000-NMCA-004, 128 N.M. 559, 994 P.2d 1177, cert. denied, 128 N.M. 688, 997 P.2d 820 (2000).

Presentence confinement credits. — Trial court must award presentence confinement credit to first-

time offenders and has discretionary authority to grant presentence confinement credit, for a defendant who has been convicted of a second or third offense of driving under the influence. State v. Calvert, 2003-NMCA-028, 133 N.M. 281, 62 P.3d 372, cert. denied, 63 N.M. 516, 63 P.3d 516 (2003).

Effect of municipal ordinance violations. — A person convicted of violating a municipal ordinance prohibiting driving while intoxicated can be treated as having a prior offense under this section for purposes of sentencing a defendant for a second or subsequent conviction. However, when the defendant was convicted for three prior violations of a municipal ordinance, the mandatory jail term for fourth offenders did not necessarily apply, as the language is unclear as to whether this section encompasses municipal ordinance convictions. State v. Russell, 113 N.M. 121, 823 P.2d 921 (Ct. App. 1991).

Proof of prior convictions. — An order in the form of a judge's handwritten notations on a complaint was sufficient to prove prior convictions for driving while intoxicated. State v. Sedillo, 2001-NMCA-001, 130 N.M. 98, 18 P.3d 1051.

Reckless driving and driving under influence are distinct offenses. — The crimes of reckless driving and driving while under the influence of intoxicating liquor are distinct offenses, provable by different evidence, and conviction of one would not bar prosecution for the other. Rea v. MIC, 48 N.M. 9, 144 P.2d 676 (1944); State v. Sisneros, 42 N.M. 500, 82 P.2d 274 (1938).

Driving-while-intoxicated merges with vehicular homicide. — A defendant's driving-while-intoxicated (DWI) offense merges with his vehicular homicide offense, and his sentence for the DWI conviction must be vacated. State v. Wiberg, 107 N.M. 152, 754 P.2d 529 (Ct. App. 1988); State v. Santillanes, 2000-NMCA-017, 128 N.M. 752, 998 P.2d 1203, cert. denied, 128 N.M. 689, 997 P.2d 821 (2000).

Offense not necessarily lesser included offense in vehicular homicide. — A conviction or acquittal of a lesser offense necessarily included in a greater offense bars a subsequent prosecution for the greater offense. However, where the indictment against defendant was phrased in the alternative charging him with homicide by vehicle while violating either this section or 64-22-3, 1953 Comp. (similar to 66-8-113 NMSA 1978), the prosecution was not barred by a conviction in municipal court for driving under the influence since the lesser offense of driving while under the influence of intoxicating liquor is not necessarily included in the greater offense of homicide by vehicle. State v. Tanton, 88 N.M. 333, 540 P.2d 813 (1975).

Greater crime of aggravated DWI can be committed in such a manner that the lesser crime of DWI .08 is not committed. State v. Collins, 2005-NMCA-044, 137 N.M. 353, 110 P.3d 1090.

Notice of lesser included offense constructively given. — Where during the questioning of the state's first witness, the court asked the state to clarify whether the state’s request for the jury instruction of DWI .08 was also a motion to amend the charges, and the state responded that it did seek to amend the charges and the court granted the state's request at that time, there is no need to amend a charging document to include a lesser included offense because notice of a lesser included offense is constructively given. State v. Collins, 2005-NMCA-044, 137 N.M. 353, 110 P.3d 1090.

Defendant could not commit per se aggravated DWI without also committing DWI. State v. Notah-Hunter, 2005-NMCA-074, 137 N.M. 597, 113 P.3d 867, cert. denied, 2005-NMCERT-006, 137 N.M. 766, 115 P.3d 229.

No double jeopardy when facts fail "same evidence" test. — Where the facts offered in municipal court to support a conviction for driving while under the influence of intoxicating liquors would not necessarily sustain a conviction for homicide by vehicle in district court, under the "same evidence" test there was no double jeopardy when the state sought to prosecute the defendant for homicide by vehicle. State v. Tanton, 88 N.M. 333, 540 P.2d 813 (1975).

Construction under general/specific statute rule. — The legislature did not intend to limit prosecution for either or both child abuse and driving while under the influence; thus, the statute was not preempted under the general/specific statute rule. State v. Castaeda, 2001-NMCA-052, 130 N.M. 679, 30 P.3d 368.

Validity of prior DWI guilty pleas. — Where the state met its burden of showing that defendant voluntarily signed waivers of his right to counsel at the time of guilty pleas resulting in prior DWI convictions, the court did not err in relying on those convictions to enhance defendant's DWI conviction from a misdemeanor to a felony. State v. Gonzales, 1997-NMSC-050, 124 N.M. 171, 947 P.2d 128.

Use of out-of-state conviction to enhance penalty. — The phrase "under this section" does not include within its purview out-of-state convictions; therefore, only those valid prior DWI convictions obtained in New Mexico courts may be considered for purposes of criminal enhancement penalties. State v. Nelson, 1996-NMCA-012, 121 N.M. 301, 910 P.2d 935.

Guilty of manslaughter where collision directly resulted from defendant's intoxication. — Where evidence established beyond all question that defendant drove his car upon highway in intoxicated condition and collision of his car with the rear of the one in which decedent was riding resulted not only proximately, but directly, from defendant's condition, trial court correctly instructed jury that if it should so find, defendant would be guilty of involuntary manslaughter. State v. Alls, 55 N.M. 168, 228 P.2d 952 (1951).

Right to preliminary hearing. — An accused has no right to a preliminary hearing on a misdemeanor charge of driving while intoxicated. State v. Greyeyes, 105 N.M. 549, 734 P.2d 789 (Ct. App. 1987).

Presentence confinement credit for multiple offenders. — Because the legislature provides in this section that, for a first DWI offender, time spent in jail prior to conviction is to be credited against the offender's sentence, the legislature's silence as to second and third offenses implies an intent to afford courts discretion to grant credit to second and third offenders. State v. Martinez, 1998-NMSC-023, 126 N.M. 39, 966 P.2d 747.

Suspending or deferring impoundment of vehicle. — Magistrate court had the discretion to suspend or defer the impoundment of the defendant's vehicle after his conviction of a second offense of driving under the influence. State v. Barber, 108 N.M. 709, 778 P.2d 456 (Ct. App. 1989).

Presentence confinement credit not allowed for voluntary inpatient program. — Presentence confinement credit against a felony DWI jail sentence may not be given for time spent in an inpatient alcohol treatment program, where the state did not require defendant's participation in the program and exercised no control over him while he was in the program. State v. Clah, 1997-NMCA-091, 124 N.M. 6, 946 P.2d 210.

Presentence confinement credit for in-patient alcohol treatment can only be applied to a defendant's sentence of alcohol treatment and not a jail sentence. State v. Martinez, 1998-NMSC-023, 126 N.M. 39, 966 P.2d 747.

Offset of time spent in post-traumatic unit after sentencing. — In sentencing for felony DWI, the trial court had discretion to allow an offset for the postsentence time defendant spent in a post-traumatic stress unit at a veteran's hospital, so long as it did not impinge on the mandatory portion of the sentence required by Subsection G. State v. Clah, 1997-NMCA-091, 124 N.M. 6, 946 P.2d 210.

Municipality may enact a drunken driving ordinance notwithstanding that state statute covers same subject matter and provides penalty for violations. Mares v. Kool, 51 N.M. 36, 177 P.2d 532 (1946).

Municipal court had subject matter jurisdiction to try first offenders for driving while intoxicated (DWI), contrary to local ordinance, where the charges were brought under the ordinance rather than this section. Incorporated County v. Montoya, 108 N.M. 361, 772 P.2d 891 (Ct. App. 1989).

State's appeal after remand to magistrate. — District court's order remanding defendant's misdemeanor DWI trial to magistrate court was, in effect, a dismissal of the charges against defendant; thus, under the doctrine of practical finality, the appellate court had jurisdiction to review the state's appeal. State v. Ahasteen, 1998-NMCA-158, 126 N.M. 238, 968 P.2d 328.

Prosecutorial discretion. — Although magistrate court has concurrent jurisdiction with district court over

misdemeanor DWI cases, a defendant has no right to demand trial in the magistrate court; the decision is one of prosecutorial discretion and can only be challenged upon a showing of bad faith. State v. Ahasteen, 1998-NMCA-158, 126 N.M. 238, 968 P.2d 328.

Court loses jurisdiction upon entering of nolle prosequi. — The court which first acquired jurisdiction when a prosecution was commenced therein loses jurisdiction by the entering of a nolle prosequi, and thereafter another prosecution may be carried on in another court of coordinate jurisdiction. State v. Sweat, 78 N.M. 512, 433 P.2d 229 (Ct. App. 1967).

Inferior court may be divested of concurrent jurisdiction prosecution. — As this section vests concurrent jurisdiction in justice of the peace courts (now magistrate courts) and district courts in a case of first offense, that jurisdiction having first attached in the inferior court it could be divested by the district attorney and transferred to the district court and defendant could be prosecuted in district court after the nolle prosequi was entered in the justice court. State v. Sweat, 78 N.M. 512, 433 P.2d 229 (Ct. App. 1967).

Section subject to assimilation under federal law. — The offenses described by 66-5-39 NMSA 1978 (driving while license suspended), this section (driving while under the influence) and 66-7-3 NMSA 1978 (violation of traffic laws) are all criminal offenses, and, as such, the applicable sentences are assimilated for offenses committed on military installations within the state under the Assimilative Crimes Act, 18 U.S.C. § 13. United States v. Adams, 140 F.3d 895 (10th Cir.), cert. denied, 525 U.S. 895, 119 S. Ct. 219, 142 L. Ed. 2d 180 (1998).

Concurrent jurisdiction is that jurisdiction exercised by different courts, at the same time, over the same subject matter and within the same territory and wherein litigants may, in the first instance, report to either court indifferently. 1965 Op. Att'y Gen. No. 65-202.

District and municipal courts can have jurisdiction over second offense. — District courts, and also municipal courts if the charge arises under a municipal ordinance, have jurisdiction over second offense of driving while intoxicated. 1972 Op. Att'y Gen. No. 72-13.

Magistrate courts have jurisdiction over second or subsequent offenses. — The specific provision of this section (relating to magistrate courts having concurrent jurisdiction for first offenses) is no longer required to confer jurisdiction on the magistrate courts and it should not be read as a bar to magistrate courts' jurisdiction over second or subsequent offenses. 1975 Op. Att'y Gen. No. 75-45.

Evidence of correlation between field sobriety test and blood alcohol content was prejudicial. — Where defendant was convicted by a jury of driving while intoxicated; the trial court improperly permitted a police officer to give scientific evidence that correlated defendant's performance on three field sobriety tests with a ninety percent statistical probability of a blood alcohol content at or above the legal limit; the state produced sufficient evidence to support defendant's conviction without reference to the officer's improperly admitted scientific evidence; and there was substantial conflicting testimony by defendant to discredit the police officer's testimony, the improperly admitted evidence undermined defendant's credibility and the evidentiary error was not harmless. State v. Marquez, 2009-NMSC-055, 147 N.M. 386, 223 P.3d 931, reversing 2008-NMCA-133, 145 N.M. 31, 193 P.3d 578.

Evidence sufficient to show driving under the influence. — Where defendant admitted that he had consumed two beers prior to driving defendant's vehicle; a police officer testified that defendant staggered out of a bar before defendant entered defendant's vehicle; defendant was slow to react to the near collision with another vehicle as defendant was leaving the bar parking lot; defendant drove in reverse into a dangerous street; defendant had fumbling fingers when defendant searched for defendant's driver's license, registration and proof of insurance; defendant was slow to respond when exiting defendant's vehicle; defendant had to brace against the vehicle for balance; defendant performed poorly on the field sobriety tests; and defendant refused to submit to a breath alcohol test, the evidence was sufficient to support defendant's conviction of driving while intoxicated. State v. Marquez, 2009-NMSC-055, 147 N.M. 386, 223 P.3d 931, affirming 2008-NMCA-133, 145 N.M. 31, 193 P.3d 578.

Where defendant weaved out of defendant's driving lane, nearly colliding with another vehicle;

defendant's breath alcohol content test showed that there was alcohol in defendant's system; defendant admitted drinking beer; the arresting officer noticed an odor of alcohol on defendant; and defendant failed some field sobriety tests, the evidence was sufficient to convict the defendant of violation of Subsection A of Section 66-8-102 NMSA 1978. State v. Pickett, 2009-NMCA-077, 146 N.M. 655, 213 P.3d 805, cert. denied, 2009-NMCERT-006.

Ascertaining that the defendant has not had anything to eat, drink or smoke prior to the collection of a breath sample. — The provisions of 7.33.2.12(B)(1) NMAC, which provides that a BRAT machine operator shall not take a breath sample until the operator has ascertained that the subject has not had anything to eat, drink or smoke prior to the collection of the breath sample, does not require the operator to either ask a person suspected of drunk driving whether the subject has anything in the subject's mouth or to inspect the subject's mouth for food or other substances prior to initiating the required twenty-minute deprivation period. State v. Willie, 2009-NMSC-037, 146 N.M. 481, 212 P.3d 369, reversing State v. Willie, 2008-NMCA-030, 143 N.M. 615, 179 P.3d 1223 and overruling State v. Collins, 2005-NMCA-044, 137 N.M. 353, 110 P.3d 1090.

Where the defendants waited for an hour following their arrest to submit to a breathalyzer test; the defendants waited for the test either in the arresting officer's patrol car with their hands cuffed behind their backs, a holding cell at the police station in view of the arresting officer or the breath testing room while in the arresting officer's presence; the arresting officer engaged the defendants in conversation; the arresting officer testified that the officer was confident that the defendants had not put anything in their mouths or had anything to eat, drink or smoke during the one-hour period; and the officers neither asked the defendants if they had anything in their mouths nor inspected the defendants' mouths for any substances prior to taking their first breath samples, the officers did not violate 7.33.2.12(B)(1) NMAC, which provides that breath samples can be collected only after the arresting officer has ascertained that the subject has not had anything to eat, drink or smoke for at least twenty minutes prior to taking the first breath sample. State v. Willie, 2009-NMSC-037, 146 N.M. 481, 212 P.3d 369, reversing State v. Willie, 2008-NMCA-030, 143 N.M. 615, 179 P.3d 1223 and overruling State v. Collins, 2005-NMCA-044, 137 N.M. 353, 110 P.3d 1090.

The 12-Step Protocol is not scientific even though some of the individual steps of the Protocol are scientific processes and require a scientific foundation. State v. Aleman 2008-NMCA-137, 145 N.M. 79, 194 P.3d 110, cert. denied, 2008-NMCERT-008.

Drug recognition evaluator. — Where the state has established the scientific reliability of the 12-Step Protocol, a drug recognition evaluator may testify as an expert witness regarding the administration and results of the protocol as it is applied to a particular defendant. State v. Aleman 2008-NMCA-137, 145 N.M. 79, 194 P.3d 110, cert. denied, 2008-NMCERT-008.

Horizontal gaze nystagmus test. — To establish a scientific foundation for the admission into evidence of the results of the horizontal gaze nystagmus test (HGN), the state must establish the required physiological relationship between HGN and impairment, and between HGN and a particular category of drugs. State v. Aleman 2008-NMCA-137, 145 N.M. 79, 194 P.3d 110, cert. denied, 2008-NMCERT-008.

For purposes of DWI sentencing, proof beyond a reasonable doubt is not required to prove prior DWI convictions; a preponderance of the evidence is sufficient. State v. Bullcoming, 2008-NMCA-097, 144 N.M. 546, 189 P.3d 679, cert. granted, 2008-NMNCERT-007.

Compliance with regulations. — The state laboratory division regulation, which requires an officer administering the breath test to collect a subject's breath for testing only after ascertaining that the subject has not had anything to eat, drink or smoke for at least twenty minutes prior to collection of the first breath sample, requires the officer to look in the subject's mouth or ask the subject if there is anything in his or her mouth. State v. Willie, 2008-NMCA-030, 143 N.M. 615, 179 P.3d 1223, cert. granted, 2008-NMCERT-002.

Sufficient evidence. — Where defendant was stopped for an unilluminated license plate, the officer smelled an odor of alcohol emanating from defendant, defendant admitted that he had been drinking for two hours while preparing and eating dinner before driving his vehicle, defendant failed his field sobriety

tests, defendant's eyes were bloodshot and watery, defendant had slurred speech and defendant's expert witness testified regarding the alcohol time response curve, defendant's per se DWI conviction, based in part on a 0.08 BAC result one hour and six minutes after defendant's arrest, was supported by substantial evidence. State v. Day, 2008-NMSC-007, 143 N.M. 359, 176 P.3d 1091.

Scientific proof of defendant's blood or breath alcohol content is not required for a conviction under this section. State v. Neal, 2008-NMCA-008, 143 N.M. 371, 176 P.3d 330, cert. denied, 2008-NMCERT-____.

Actual physical control. – Defendant was in actual physical control of his vehicle when he was discovered asleep or passed out at the wheel with the ignition key on the passenger seat. State v. Sims, 2008-NMCA-017, 143 N.M. 400, 176 P.3d 1132, cert. granted, 2008-NMCERT-____.

Proper admission of blood alcohol test. — Because the state showed that the machine used to test defendant's blood alcohol content was calibrated and functioning properly within the seven-day period prior to defendant's blood alcohol test, the calibration requirements in the administrative regulations were met and it was not an abuse of discretion for the district court to admit the results of the blood alcohol test. State v. Collins, 2005-NMCA-044, 137 N.M. 353, 110 P.3d 1090.

Odor of liquor, standing alone, does not of itself prove intoxication. Sellers v. Skarda, 71 N.M. 383, 378 P.2d 617 (1963).

Odor of liquor is not sufficient basis for inferring "under the influence". — An odor of liquor on one's breath is not a sufficient basis for inferring he was "under the influence" of intoxicating liquor. Lopez v. Maes, 81 N.M. 693, 472 P.2d 658 (Ct. App.), cert. denied, 81 N.M. 721, 472 P.2d 984 (1970).

Failure to see decedent's car not sufficient basis for inference. — The failure of driver to see decedent on well-lighted road when driving at 40 miles per hour, until just before the impact, is not a sufficient basis for the inference that defendant was under the influence of intoxicating liquor. Lopez v. Maes, 81 N.M. 693, 472 P.2d 658 (Ct. App.), cert. denied, 81 N.M. 721, 472 P.2d 984 (1970).

Although evidence showed that breath of accused smelled of whiskey and that he was nervous and restless, it was insufficient to prove that he was under the "influence of intoxicating liquor." State v. Sisneros, 42 N.M. 500, 82 P.2d 274 (1938).

Since there was evidence that defendant, while driving fast at night without lights, veered into the lane of an oncoming car, had an opened can of beer on the floorboard under the steering wheel, had smell of alcohol on his breath and spoke as if affected by the alcohol, had .075% blood alcohol and .086% urine alcohol content, had imbibed five or six beers during the day, had taken some heroin, and morphine content of the blood was .15 micrograms per milliliter while morphine content of the urine was .45 micrograms per milliliter, there was substantial evidence that defendant was driving the car while under the influence of either intoxicating liquor, or a narcotic drug, or both. State v. Dutchover, 85 N.M. 72, 509 P.2d 264 (Ct. App. 1973).

Since officer testified that he smelled alcohol on defendant's breath, that the defendant staggered when he walked, had difficulty in dialing the telephone, talked with difficulty and in the opinion of the officer was under the influence of alcohol when arrested, is substantial evidence to support the conviction of driving "under the influence." City of Portales v. Shiplett, 67 N.M. 308, 355 P.2d 126 (1960).

Not irrelevant to show defendant had given another a drink. — In prosecution for driving automobile while under influence of intoxicating liquor, it was not irrelevant to show that on the occasion in question accused had given another a drink. State v. Tinsley, 34 N.M. 458, 283 P. 907 (1929).

Mere consumption of six beers not basis for inference of "influence". — The mere consumption of about six beers during a two-hour period does not give rise to an inference that a person was under the influence of intoxicating liquor. Lopez v. Maes, 81 N.M. 693, 472 P.2d 658 (Ct. App.), cert. denied, 81 N.M. 721, 472 P.2d 984 (1970).

Admission of refusal to take test constitutional. — The admission of evidence concerning the refusal to take a field sobriety test did not violate the right to be free from self-incrimination under the U.S. Const., amend. V and N.M. Const., art. II, § 15. State v. Wright, 116 N.M. 832, 867 P.2d 1214 (Ct. App. 1993).

Refusal to take blood test may be excluded as irrelevant. — In a prosecution for driving while intoxicated, a driver's refusal to take a blood alcohol test is no more a relevant circumstance to establish consciousness of guilt than the arresting officer's refraining from obtaining a search warrant indicates a belief that the driver is not intoxicated. Thus a trial court may exclude evidence of the refusal as irrelevant. State v. Chavez, 96 N.M. 313, 629 P.2d 1242 (Ct. App. 1981).

Admission of breathalyzer results. — All that is necessary to lay a proper foundation for the admission of breathalyzer test results in a criminal DWI trial is the live testimony of the officer who administered the test as to his familiarity with the testing procedure, the recent calibration of the machine, and his observation that the test administration proceeded without error. State v. Smith, 1999-NMCA-154, 128 N.M. 467, 994 P.2d 47, cert. denied, 128 N.M. 149, 990 P.2d 823 (1999).

Lack of evidence of rising or falling blood alcohol content. — Although the defendant argued that the state failed to produce evidence by which a trier of fact could find that his blood alcohol content (BAC) was .10% at the time that he was actually driving his vehicle, he waived this argument when, following his arrest, the officer proposed to test the defendant's BAC a second time and he refused to take the test. A second BAC reading would have provided the sort of evidence necessary to show a "rising" or "falling" of the defendant's BAC. Also, the defendant need not have been informed of all of the consequences of his refusal to take a second test, since there is no requirement that a party must be informed of every possible consequence of an action before suffering the consequences of that action. State v. Scussel, 117 N.M. 241, 871 P.2d 5 (Ct. App. 1994).

Aggravated DWI. — When marginal blood alcohol test results from a test administered one hour and twenty-two minutes after driving, and without corroborating evidence to substantiate that defendant was actually driving with a blood alcohol count of 0.16 or greater, a conviction for per se aggravated DWI will be reversed. State v. Notah-Hunter, 2005-NMCA-074, 137 N.M. 597, 113 P.3d 867, cert. denied, 2005-NMCERT-006, 137 N.M. 766, 115 P.3d 229.

DWI conviction affirmed. — Where defendant smelled of alcohol, had slurred speech, admitted to drinking alcohol, failed field sobriety tests, and was speeding while driving down the middle of the road, sufficient evidence existed to find defendant guilty of the lesser included offense of driving while intoxicated in violation of Subsection A of this section. State v. Notah-Hunter, 2005-NMCA-074, 137 N.M. 597, 113 P.3d 867, cert. denied, 2005-NMCERT-006, 137 N.M. 766, 115 P.3d 229.

Inconclusive test requires corroboration. — A blood or breath alcohol test administered over two hours after the time of driving, and yielding only marginal results, must be corroborated by additional evidence to support a jury verdict. State v. Baldwin, 2001-NMCA-063, 130 N.M. 705, 30 P.3d 394.

Defendant's conviction for a per se violation of the driving while intoxicated statute was affirmed where corroborating evidence established a nexus between his breath alcohol concentration test results and his behavior one hour and 31 minutes earlier at the time of driving. State v. Martinez, 2002-NMCA-043, 132 N.M. 101, 45 P.3d 41, cert. denied, 132 N.M. 193, 46 P.3d 100 (2002).

Unconscious driver exercised actual physical control. — A person who was discovered unconscious or asleep at the wheel of an automobile, whose engine was on, was deemed to be in actual physical control, and thus was driving a vehicle within the meaning of this section. State v. Harrison, 115 N.M. 73, 846 P.2d 1082 (Ct. App. 1992); State v. Rivera, 1997-NMCA-102, 124 N.M. 211, 947 P.2d 168; State v. Grace, 1999-NMCA-148, 128 N.M. 379, 993 P.2d 93, cert. denied, 128 N.M. 149, 990 P.2d 823 (1999).

Defendant sleeping in vehicle with key in ignition. — Evidence that defendant was found asleep at the wheel of his parked vehicle, without the motor running, but with the key in the ignition in the "on" position, was sufficient to establish that he was "driving" as that term is construed for purposes of "driving under the influence". State v. Tafoya, 1997-NMCA-083, 123 N.M. 665, 944 P.2d 894.

Evidence supporting finding of driving while intoxicated. — Defendant's conviction of driving while intoxicated was supported by substantial circumstantial evidence, where he admitted to the investigating officer that he had been drinking "all night", admitted leaving a liquor store and driving into a rail, and the level of alcohol found in his blood could reasonably lead the jury to infer that he had been drinking for several hours. State v. Greyeyes, 105 N.M. 549, 734 P.2d 789 (Ct. App. 1987); State v. Luna, 93 N.M. 773, 606 P.2d 183 (1980).

Evidence sufficient to show driving under the influence. — There was sufficient evidence to show that the defendant was driving his vehicle under the influence of intoxicating liquor as required by subsection A: defendant's breath smelled strongly of alcohol; his eyes were bloodshot and watery; his speech was slurred; he admitted having recently consumed alcohol; he failed three field sobriety tests; he tested at .10% for blood alcohol content; and in the officer's opinion, the defendant was intoxicated. The defendant's argument that he failed the field sobriety tests due to impairment from back problems goes to the weight and effect placed on that evidence by the fact finder. Moreover, the evidence of intoxication was obtained 39 minutes after the defendant was stopped, inferring that the defendant was under the influence of alcohol at the time he was in control of the vehicle. State v. Scussel, 117 N.M. 241, 871 P.2d 5 (Ct. App. 1994).

Evidence regarding defendant's appearance, slurred speech, and a strong order of alcohol, as well as defendant's admission of having drunk a few beers and his refusal to submit to a chemical test for blood alcohol level was sufficient for a reasonable jury to conclude, beyond a reasonable doubt, that defendant's driving was likely impaired, and that he was guilty of DWI. State v. Caudillo, 2003-NMCA-042, N.M. , 64 P.3d 495.

Evidence sufficient to support inference of driving while intoxicated. — Where officers found a defendant passed out in his vehicle in a parking lot of a store that does not sell alcohol at 10:30 a.m., the defendant appeared intoxicated, and the officers did not report seeing alcohol containers in or around the defendant’s vehicle, these facts could support a reasonable inference that the defendant drove to the parking lot while he was intoxicated. State v. Gomez, 2003-NMSC-012, 133 N.M. 763, 70 P.3d 753.

Evidence supported finding that defendant was under the influence at time of accident. State v. Copeland, 105 N.M. 27, 727 P.2d 1342 (Ct. App. 1986).

Substantial evidence to support conviction despite alleged inaccuracy of breath machine. — Despite the defendant's argument that breath machines generally are only accurate to plus or minus 10%, there was substantial evidence - including a test result of .153% and the testimony of the arresting officer - to support a conviction. State v. Watkins, 104 N.M. 561, 724 P.2d 769 (Ct. App.), cert. dismissed, 104 N.M. 522, 724 P.2d 231 (1986).

Evidence supporting finding of driving while intoxicated. — Substantial evidence supported defendant's conviction for driving while intoxicated despite consideration of the duress defense. State v. Rios, 1999-NMCA-069, 127 N.M. 334, 980 P.2d 1068.

Improper admission of blood alcohol test. — The improper admission of a blood alcohol test (BAT) was harmless error since the defendant was charged with driving under the influence of intoxicating liquor or drugs and there was sufficient evidence to support a conviction of the offense without consideration of the BAT results. State v. Gutierrez, 1996-NMCA-001, 121 N.M. 191, 909 P.2d 751.

DWI test predicated on careless driving stop in parking lot valid. — Although careless driving cannot be committed in a parking lot, police officer who witnessed defendant driving at an excessive speed in a crowded parking lot had reasonable, although mistaken, suspicion to stop defendant, and such stop could be the predicate for a DWI test. State v. Brennan, 1998-NMCA-176, 126 N.M. 389, 970 P.2d 161, cert. denied, 126 N.M. 532, 972 P.2d 351 (1998).

Insufficient evidence of prior convictions. — Where the state filed an information alleging that defendant had eight prior convictions for DWI; although the document indicated that certified copies of the abstracts of record or judgments and sentences associated with the prior convictions were attached as exhibits, the exhibits were never filed; the state presented a copy of a prior judgment and sentence which

was filed in the same judicial district and which reflected that the court had previously determined that defendant had admitted to at least six prior convictions for DWI as a part of a plea agreement; the state asked the court to take judicial notice of its own records; and the court took judicial notice that the court had found that defendant had at least six prior DWI convictions, the state failed to make a prima facie showing of any prior DWI convictions. State v. Lopez, 2009-NMCA-127, 147 N.M. 364, 223 P.3d 361, cert. denied, 2009-NMCERT-010.

Offenses included in a plea agreement. — A plea agreement that includes two separate DWI offenses, which are later combined in one judgment and sentence should be considered as two DWI convictions for purpose of sentencing. State v. Yazzie, 2009-NMCA-040, 146 N.M. 115, 207 P.3d 349, cert. denied, 2009-NMCERT-003.

This section requires that equivalent out-of-state convictions be used to enhance a defendant's sentence for repeated DWI convictions. State v. Lewis, 2008-NMCA-070, 144 N.M. 156, 184 P.3d 1050, cert. denied, 2008-NMCERT-004.

Test for equivalent statutes. — To determine whether two statues are equivalent for purposes of using an out-of-state conviction to enhance a defendant's sentence for repeated DWI convictions, the focus is on whether the elements of the statutes are equivalent as to the degree of impairment prohibited by the statutes. State v. Lewis, 2008-NMCA-070, 144 N.M. 156, 184 P.3d 1050, cert. denied, 2008-NMCERT-004.

Penalties for repeat offenders. — The legislature clearly intended to amend and increase the penalties for repeat offenders in this section. State v. Smith, 2004-NMSC-032, 136 N.M. 372, 98 P.3d 1022.

DWI sentencing is plainly governed by this section and not the Criminal Code or Criminal Procedure Act. State v. Smith, 2004-NMCA-026, 135 N.M. 162, 85 P.3d 804, cert. granted, 2004-NMCERT-001, 135 N.M. 160, 85 P.3d 802.

Electronic monitoring system. — Felony DWI defendants may be sentenced to a "jail term" in a county detention center electronic monitoring program, as that program is equivalent to official confinement. State v. Frost, 2003-NMCA-002, 133 N.M. 45, 60 P.3d 492, cert. denied, 133 N.M. 126, 61 P.3d 835 (2002).

Law reviews. — For comment on Valencia v. Strayer, 73 N.M. 252, 387 P.2d 456 (1963); Garrett v. Howden, 73 N.M. 307, 387 P.2d 874 (1963), see 4 Nat. Resources J. 168 (1964).

For article, " 'To Purify the Bar': A Constitutional Approach to Non-Professional Misconduct," see 5 Nat. Resources J. 299 (1965).

For comment, "Two-Tiered Test for Double Jeopardy Analysis in New Mexico," see 10 N.M.L. Rev. 195 (1979-80).

For annual survey of New Mexico criminal procedure, see 16 N.M.L. Rev. 25 (1986).

For annual survey of New Mexico criminal law and procedure, 19 N.M.L. Rev. 655 (1990).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 7A Am. Jur. 2d Automobiles and Highway Traffic §§ 296 to 300, 302, 303, 305 to 311, 375 to 380, 384.

Conflict between statutes and local regulations as to intoxication of driver, 21 A.L.R. 1212, 64 A.L.R. 993, 147 A.L.R. 522.

Arrest without warrant for driving automobile while intoxicated, 42 A.L.R. 1512, 49 A.L.R. 1400, 68 A.L.R. 1374, 142 A.L.R. 555.

Constitutionality and effect of statute relating to civil liability of person driving automobile while under influence of liquor, 56 A.L.R. 327.

Necessity and sufficiency of indictment for driving while intoxicated, 68 A.L.R. 1374.

Driving while intoxicated as reckless driving, where driving while intoxicated is a separate offense, 86 A.L.R. 1274, 52 A.L.R.2d 1337.

Admissibility and weight of evidence based on scientific test for intoxication or presence of alcohol in system, 127 A.L.R. 1513, 159 A.L.R. 209.

Degree or nature of intoxication for purposes of statute or ordinance making it a criminal offense to operate an automobile while in that condition, 142 A.L.R. 555.

Admissibility, in vehicle accident case, of evidence of opposing party's intoxication where litigant's pleading failed to allege such fact, 26 A.L.R.2d 359.

Admissibility of evidence showing plaintiff's antecedent intemperate habits, in personal injury motor vehicle accident action, 46 A.L.R.2d 103.

"Motor vehicle" within law against driving while intoxicated, 66 A.L.R.2d 1146.

Intoxication, unconsciousness, or mental incompetency of person as affecting his status as guest within automobile guest statute or similar common-law rule, 66 A.L.R.2d 1319.

Construction and application of statutes creating presumption or other inference of intoxication from specified percentages of alcohol present in system, 16 A.L.R.3d 748.

Right to trial by jury in criminal prosecution for driving while intoxicated or similar offense, 16 A.L.R.3d 1373.

Driving while under the influence or when addicted to use of drugs as criminal offense, 17 A.L.R.3d 815.

Liability based on entrusting automobile to one who is intoxicated or known to be excessive user of intoxicants, 19 A.L.R.3d 1175.

Application, to operation of motor vehicle on private property, of legislation making drunken driving a criminal offense, 29 A.L.R.3d 938.

Admissibility under state law of hospital record relating to intoxication or sobriety of patient, 80 A.L.R.3d 456.

What constitutes driving, operating or being in control of motor vehicle for purposes of driving while intoxicated statute or ordinance, 93 A.L.R.3d 7.

Duty of law enforcement officer to offer suspect chemical test under implied consent law, 95 A.L.R.3d 710.

Evidence of automobile passenger's blood-alcohol level as admissible in support of defense that passenger was contributorily negligent or assumed risk of automobile accident, 5 A.L.R.4th 1194.

Reckless driving as lesser included offense of driving while intoxicated or similar charge, 10 A.L.R.4th 1252.

Destruction of ampoule used in alcohol breath test as warranting suppression of result of test, 19 A.L.R.4th 509.

Drunk driving: motorist's right to private sobriety test, 45 A.L.R.4th 11.

Failure to restrain drunk driver as ground of liability of state or local government unit or officer, 48 A.L.R.4th 320.

Snowmobile operation as DWI or DUI, 56 A.L.R.4th 1092.

Validity, construction, and application of statutes directly proscribing driving with blood-alcohol level in excess of established percentage, 59 A.L.R.4th 149.

Horizontal gaze nystagmus test: use in impaired driving prosecution, 60 A.L.R.4th 1129.

Social host's liability for injuries incurred by third parties as a result of intoxicated guest's negligence, 62 A.L.R.4th 16.

Passenger's liability to vehicular accident victim for harm caused by intoxicated motor vehicle driver, 64 A.L.R.4th 272.

Driving while intoxicated: "choice of evils" defense that driving was necessary to protect life or property, 64 A.L.R.4th 298.

Cough medicine as "intoxicating liquor" under DUI statute, 65 A.L.R.4th 1238.

Horseback riding or operation of horse-drawn vehicle as within drunk driving statute, 71 A.L.R.4th 1129.

Operation of bicycle as within drunk driving statute, 73 A.L.R.4th 1139.

Operation of mopeds and motorized recreational two-, three- and four-wheeled vehicles as within scope of driving while intoxicated statutes, 32 A.L.R.5th 659.

Intoxication of automobile driver as basis for awarding punitive damages, 33 A.L.R.5th 303.

Applicability, to operation of motor vehicle on private property, of legislation making drunken driving a criminal offense, 52 A.L.R. 5th 655.

Admissibility of hospital records under Federal Business Records Act (28 USC § 1732(a)), 9 A.L.R. Fed. 457.

Assimilation, under assimilative crimes act (18 U.S.C.A. § 13), of state statutes relating to driving while intoxicated or under influence of alcohol, 175 A.L.R. Fed. 293.

61A C.J.S. Motor Vehicles §§ 625(1), 628.

Denial of accused's request of initial contact with attorney – drunk driving cases. 109 A.L.R.5th 611.

Vertical gaze nystagmus test, use in impaired driving prosecution. 117 A.L.R.5th 491.

Admissibility and sufficiency of extrapolation evidence in DUI prosecutions. 119 A.L.R 5th. 379.

Excessiveness or inadequacy of damage awards against drunk drivers. 14 A.L.R.6th 263.

Claim of diabetic reaction or hypoglycemia as defense in prosecution for driving under influence of alcohol or drugs. 17 A.L.R.6th 757.

Validity, construction, and application of state "zero tolerance" laws relating to underage drinking and driving. 34 A.L.R.6th 623.

Appendix F

DWI Municipal Uniform Traffic Ordinances

MUNICIPAL UNIFORM TRAFFIC ORDIANCES
12-6-12.1 and 12-6-12.2

12-6-12.1 OPERATING A MOTOR VEHICLE UNDER THE INFLUENCE OF INTOXICATING LIQUOR OR DRUGS; CHEMICAL TESTING; OFFICER TO FILE STATEMENT; IMMEDIATE LICENSE REVOCATION.

A. It is unlawful for a person who is under the influence of intoxicating liquor to drive a vehicle within this municipality.

B. It is unlawful for:

(1) a person to drive a vehicle in this state if the person has an alcohol concentration of eight one-hundredths or more in the person's blood or breath within three hours of driving the vehicle and the alcohol concentration results from alcohol consumed before or while driving the vehicle; or

(2) a person to drive a commercial motor vehicle in this state if the person has an alcohol concentration of four one hundredths or more in the person's blood or breath within three hours of driving the commercial motor vehicle and the alcohol concentration results from alcohol consumed before or while driving the vehicle.

C. It is unlawful for a person who is under the influence of any drug to a degree which renders him incapable of safely driving a vehicle to drive a vehicle within this municipality. The fact that any person charged with a violation of this subsection is or has been entitled to use such drug under the laws of this state is not a defense against the charge.

D. Aggravated driving while under the influence of intoxicating liquor or drugs consists of a person who:

1) drives a vehicle in this state and has an alcohol concentration of sixteen one-hundredths or more in the person's blood or breath within three hours of driving the vehicle and the alcohol concentration results from alcohol consumed before or while driving the vehicle;

(2) has caused bodily injury to a human being as a result of the unlawful operation of a motor vehicle while driving under the influence of intoxicating liquor or drugs; or

(3) refused to submit to chemical testing, as provided for in the Implied Consent Act (66-8-105 to 66-8-112 NMSA 1978), and in the judgment of the court,

based upon evidence of intoxication presented to the court, was under the influence of intoxicating liquor or drugs. (66-8-102 NMSA 1978).

E. Any person who operates a motor vehicle within this municipality shall be deemed to have given consent, subject to the provisions of the Implied Consent Act, to chemical tests of his breath or blood or both, approved by the scientific laboratory division of the Department of Health pursuant to the provision of Section 24-1-22 NMSA 1978 as determined by a law enforcement officer, or for the purpose of determining the drug or alcoholic content of his blood, if arrested for any offense arising out of the acts alleged to have been committed while the person was driving a motor vehicle while under the influence of an intoxicating liquor or any drug.

F. A test of blood or breath or both, approved by the scientific laboratory division of the department of health pursuant to Section 24-1-22 NMSA 1978, shall be administered at the direction of a law enforcement officer having reasonable grounds to believe the person to have been driving a motor vehicle within this municipality, while under the influence of intoxicating liquor or drug. (66-8-107 NMSA 1978)

G. Any person who is dead, unconscious or otherwise in a condition rendering him incapable of refusal, shall be deemed not to have withdrawn the consent provided by Section 12-6-12.1E, and the test or tests designated by the law enforcement officer may be administered. (66-8-108 NMSA 1978)

H. Only the persons authorized by Section 66-8-103 NMSA 1978 shall withdraw blood from any person for the purpose of determining its drug or alcoholic content. This limitation does not apply to the taking of samples of breath.

I. The person tested shall be advised by the law enforcement officer of the person's right to be given an opportunity to arrange for a physician, licensed professional or practical nurse, or laboratory technician or technologist who is employed by a hospital or physician, of his own choosing to perform a chemical test in addition to any test performed at the direction of a law enforcement officer.

J. Upon the request of the person tested, full information concerning the test or tests performed at the direction of the law enforcement officer shall be made available to him as soon as it is available from the person performing the test.

K. The law enforcement agency represented by the law enforcement officer at whose direction the chemical test is performed shall pay for the chemical test.

L. If a person exercises his right under Subsection I to have a chemical test performed upon him by a person of his own choosing, then the cost of that test shall be paid by the law enforcement agency represented by the law enforcement officer at whose direction a chemical test was administered under Subsection E. (66-8-109 NMSA 1978)

M. The results of a test performed pursuant to the Implied Consent Act may be introduced into evidence in any civil action or criminal action arising out of the acts alleged to have been committed by the person tested for driving a motor vehicle while under the influence of intoxicating liquor or drug.

N. When the blood or breath of the person tested contains:

(1) an alcohol concentration of less than four one-hundredths or less, it shall be presumed that the person was not under the influence of intoxicating liquor;

(2) an alcohol concentration of at least four one-hundredths but less than eight one-hundredths, no presumption shall be made that the person either was or was not under the influence of intoxicating liquor unless the person is driving a commercial vehicle and the amount of alcohol in the person's blood or breath may be considered with other competent evidence in determining whether or not the person was under the influence of intoxicating liquor;

(3) an alcohol concentration of eight one-hundredths or more, the arresting officer shall charge him with a violation of this section; or

(4) an alcohol concentration of four one-hundredths or more and the person is driving a commercial vehicle, it shall be presumed that the person is under the influence of intoxicating liquor. (66-8-110 NMSA 1978)

O. If the test performed pursuant to the Implied Consent Act is administered more than three hours after the person was driving a vehicle, the test result may be introduced as evidence of the alcohol concentration in the person’s blood or breath at the time of the test and the trier of fact shall determine what weight to give the test result for the purpose of determining a violation of Sec. 12-6-12.1. (66-8-110 NMSA 1978)

P. The determination of alcohol concentration shall be based on the grams of alcohol in one hundred milliliters of blood or the grams of alcohol in two hundred ten liters of breath.

Q. The presumptions in Subsection N of this section do not limit the introduction of other competent evidence concerning whether or not a person was under the influence of intoxicating liquor. (66-8-110 NMSA 1978)

R. Nothing in this section is intended to authorize any police officer, or any judicial or probation officer, to make any arrest or to direct the performance of a blood-alcohol test, except in the performance of his official duties and as otherwise authorized by law. (66-8-104 NMSA 1978)

S. If a person under arrest for violation of an offense enumerated in the Motor Vehicle Code refuses upon request of a law enforcement officer to submit to chemical tests designated by the law enforcement agency as provided in Section 12-6-12.1 E and F, none shall be administered, except when a municipal judge, magistrate or district judge issues a search

warrant authorizing chemical tests as provided in Section 12-6-12.1 E and F, upon his finding in a law enforcement officer's written affidavit that there is probable cause to believe that the person has driven a motor vehicle while under the influence of intoxicating alcohol or drug thereby causing the death or great bodily injury of another person, or there is probable cause to believe that the person has committed a felony while under the influence of intoxicating alcohol or drug and that chemical tests as provided in Section 12-6-12.1 E and F will produce material evidence in a felony prosecution. (66-8-111 NMSA 1978)

T. If a law enforcement officer has reasonable grounds to believe that a person arrested for violation of Subsections A, B, C or D of this section had been driving a motor vehicle within this municipality while under the influence of intoxicating liquor or drug and that upon his request, the person refused to submit to a chemical test, after being advised that failure to submit could result in revocation of his privilege to drive, then the law enforcement officer shall transmit to the director a statement signed under penalty of perjury stating what such reasonable grounds were and stating that the person refused to submit to a chemical test after being advised of the consequences of such refusal.

U. On behalf of the director, a law enforcement officer requesting a chemical test or directing the administration of a chemical test pursuant to Section 12-6-12.1 E and F shall serve immediate written notice of revocation and of right to a hearing on a person who refuses to permit chemical testing or on a person who submits to a chemical test the results of which indicate an alcohol concentration in the person’s blood or breath of eight one-hundredths or more if the person is twenty-one years of age or older, four one-hundredths or more if the person is driving a commercial vehicle or two one-hundredths or more if the person is less than twenty-one years of age. Upon serving notice of revocation, the law enforcement officer shall take the license or permit of the driver, if any, and issue a temporary license valid for twenty days or, if the driver requests a hearing pursuant to Section 66-8-112 NMSA 1978, valid until the date the department issues the order following that hearing; provided that a temporary license shall not be issued to a driver without a valid license or permit. The law enforcement officer shall send the person's driver's license to the director along with the signed statement required pursuant to Subsection S of this section. (66-8-111.1 NMSA 1978)

12-6-12.2 OPERATING A MOTOR VEHICLE UNDER THE INFLUENCE OF INTOXICATING LIQUOR OR DRUGS; PENALTIES; SENTENCING; FEES. *Amended June, 2010*

A. If a person is convicted of driving a motor vehicle while under the influence of intoxicating liquor or drug (12-6-12.1A through D) the trial judge shall be required to inquire into the past driving record of the person before sentence is entered in the matter. (66-8-110 NMSA 1978)

B. When a person is charged with a violation of 12-6-12.1A through D, any plea of guilty thereafter entered in satisfaction of the charges shall include at least a plea of guilty to violation 12-6-12.1A, B, C or D and no other disposition by plea of guilty to any other charge in satisfaction of such charge shall be authorized if:

(1) the results of a test performed pursuant to the Implied Consent Act discloses that the blood of the person charged contains an alcohol concentration of eight one-hundredths or more; (66-8-102 NMSA 1978 as amended)

(2) four one-hundredths or more if the person is driving a commercial vehicle; or

(3) the defendant has refused to submit to a chemical test or tests of his breath or blood. (66-8-102 NMSA 1978)

C. A person under first conviction pursuant to this section shall be punished by imprisonment for not more than ninety days or by a fine of not more than nine hundred ninety-nine dollars ($999.00), or both; provided that if the sentence is suspended in whole or in part or deferred, the period of probation may extend beyond ninety days but shall not exceed one year. Upon a first conviction pursuant to this section, an offender shall be sentenced to not less than twenty-four hours of community service. In addition, the offender may be required to pay a fine of three hundred dollars ($300.00). The offender shall be ordered by the court to participate in and complete a screening program described in Subsection F of this section and to attend a driver rehabilitation program for alcohol or drugs, also known as a "DWI school," approved by the traffic safety bureau of the state transportation department and also may be required to participate in other rehabilitative services as the court shall determine to be necessary. In addition to those penalties, when an offender commits aggravated driving while under the influence of intoxicating liquor or drugs, the offender shall be sentenced to not less than forty-eight consecutive hours in jail. If an offender fails to complete, within a time specified by the court, any community service, screening program, treatment program or DWI school ordered by the court or fails to comply with any other condition of parole, the offender shall be sentenced to not less than an additional forty-eight consecutive hours in jail. Any jail sentence imposed pursuant to this section for failure to complete, within a time specified by the court, any community service, screening program, treatment program or DWI school ordered by the court or for aggravated driving while under the influence of intoxicating liquor or drugs shall not be suspended, deferred or taken under advisement. On a first conviction pursuant to this section, time spent in jail for the offense prior to the conviction for that offense shall be credited to any to any term of imprisonment fixed by the court. A deferred sentence pursuant to this subsection shall be considered a first conviction for the purpose of determining subsequent convictions.

D. A second or third conviction pursuant to this section shall be punished by imprisonment for not more than one hundred seventy-nine days or by a fine of not more than nine hundred ninety-nine dollars ($999.00), or both; provided that if the sentence is suspended in whole or part, the period of probation may extend beyond one hundred seventy-nine days but shall not exceed one year. Notwithstanding any provision of law to the contrary for suspension or deferment of execution of a sentence:

(1) upon a second conviction, each offender shall be sentenced to a jail term of not less than ninety-six consecutive hours, not less than forty-eight hours of community service and a fine of five hundred dollars ($500.00). In addition to those penalties, when an offender commits aggravated driving while under the influence of intoxicating liquor or drugs,

the offender shall be sentenced to a jail term of not less than ninety-six consecutive hours. If an offender fails to complete, within a time specified by the court, any community service, screening program or treatment program ordered by the court, the offender shall be sentenced to not less than an additional seven consecutive days in jail. A penalty imposed pursuant to this paragraph shall not be suspended or deferred or taken under advisement; and

(2) upon a third conviction, an offender shall be sentenced to a jail term of not less than thirty consecutive days, not less than ninety-six hours of community service and a fine of nine hundred ninety-nine dollars ($999.00). In addition to those penalties, when an offender commits aggravated driving under the influence of intoxicating liquor or drugs, the offender shall be sentenced to a jail term of not less than sixty consecutive days. If an offender fails to complete, within a time specified by the court, any community service, screening program or treatment program ordered by the court, the offender shall be sentenced to not less than an additional sixty consecutive days in jail. A penalty imposed pursuant to this paragraph shall not be suspended or deferred or taken under advisement.

E. Fourth and subsequent offenses shall be prosecuted under state law in magistrate or district court. (66-8-102 NMSA 1978)

F. Upon any conviction pursuant to this section, an offender shall be required to participate in and complete, with a time specified by the court, an alcohol or drug abuse screening program approved by the Department of Finance and Administration and if necessary, a treatment program approved by the court. The requirement imposed pursuant to this subsection shall not be suspended, deferred or taken under advisement.

G. Upon a second or third conviction pursuant to this section, an offender shall be required to participate in and complete, within a time specified by the court:

(1) not less than a twenty-eight-day inpatient, residential or in-custody substance abuse program approved by the court;

(2) not less than a ninety-day outpatient treatment program approved by the court;

(3) a drug court program approved by the court; or

(4) any other substance abuse treatment approved by the court.

The requirement imposed pursuant to this section shall not be suspended, deferred or taken under advisement. (66-8-102 NMSA 1978)

H. Upon a conviction pursuant to section 12-6-12.1, an offender shall be required to obtain an ignition interlock license and have an ignition interlock device installed and operating on all motor vehicles driven by the offender, pursuant to rules adopted by the Traffic Safety Bureau of the Department of Transportation. Unless determined by the Traffic Safety Bureau to be indigent, the offender shall pay all costs associated with having an ignition interlock device installed on the appropriate motor vehicles. The offender shall operate only those vehicles equipped with ignition interlock devices for:

(1) a period of one year, for a first offender;

(2) a period of two years, for a second conviction pursuant to this section;

(3) a period of three years, for a third conviction pursuant to this section; or

(4) the remainder of the offender's life, for a fourth or subsequent conviction pursuant to this section.

I. A person who is issued an ignition interlock license and operates a vehicle that is not equipped with an ignition interlock device is driving with a license that was revoked for driving under the influence of intoxicating liquor or drugs or a violation of the Implied Consent Act and may be subject to the penalties provided in section 12-6-12.6.

J. A person who is issued an ignition interlock license and who knowingly and deliberately tampers or interferes or causes another to tamper or interfere with the proper and intended operation of an ignition interlock device may be subject to the penalties for driving with a license that was revoked for driving under the influence of intoxicating liquor or drugs or a violation of the Implied Consent Act as provided in Section 12-6-12.6. (66-5-504 NMSA 1978)

K. Five years from the date of conviction and every five years thereafter, a fourth or subsequent offender may apply to a district court for removal of the ignition interlock device requirement provided in this section and for restoration of a driver's license. A district court may, for good cause shown, remove the ignition interlock device requirement and order restoration of the license; provided that the offender has not been subsequently convicted of driving a motor vehicle while under the influence of intoxicating liquor or drugs. Good cause may include an alcohol screening and proof from the interlock vendor that the person has not had violations of the interlock device. (66-8-102 NMSA 1978)

L. An offender who obtains an ignition interlock license and installs an ignition interlock device prior to conviction shall be given credit at sentencing for the time period the ignition interlock device has been in use. (66-8-102 NMSA 1978)

M. Except as otherwise prohibited in this section, a municipal judge may suspend in whole or in part the execution of sentence or place the defendant on probation for a period not exceeding one year on terms and conditions that municipal judge deems best, or both, or defer sentence. If the municipal judge decides to defer the execution of a sentence, such deferral shall be granted only as allowed in Subsection N of this section. A suspension of execution of sentence or probation, or both, as allowed pursuant to this section, shall be granted only when the municipal judge is satisfied it will serve the ends of justice and of the public, and that the defendant's liability for any fine or other punishment imposed is fully discharged upon successful completion of the terms and conditions of probation.

N. If a person is convicted of driving a motor vehicle while under the influence of intoxicating liquor or drugs in violation of 12-6-12.1A, B, C or D, a first offender, at the discretion of a trial court after a presentence investigation, including an inquiry to the motor vehicle division of the transportation department concerning the driver's driving record, may

receive a deferred sentence on the condition that the driver attend a driver rehabilitation program, also known as the "driving-while-intoxicated-school," approved by the court and the division and such other rehabilitative services as the court may determine to be necessary; however, imposition of a deferred sentence shall classify the person as a first offender. The municipal court shall forward to the division the abstract of all proceedings and the report of the disposition of the case. For the purpose of this subsection, marijuana, as defined in the Controlled Substance Act, shall be classified as a drug. (*)

O. A person convicted of driving a motor vehicle while under the influence of intoxicating liquor or drugs in violation of 12-6-12.1A, B, C or D shall be assessed, in addition to any other fee or fine, a fee of eighty-five dollars ($85.00) to defray the cost of chemical and other tests used to determine the influence of alcohol or drugs. Additionally, the person shall be assessed a fee of seventy-five dollars ($75.00) to fund comprehensive community programs for the prevention of driving while under the influence of intoxicating liquor or drugs or for other traffic safety purposes. The municipal court shall collect the fees and maintain the fees in separate funds and transfer the fees along with other funds collected by the court per 35-14-7 NMSA 1978. The municipality shall maintain the fees pursuant to this subsection in separate funds and transfer the fees collected pursuant to this subsection to the administrative office of the courts for credit to the crime laboratory fund and the traffic safety fund. (31-12-7 through 31-12-9 NMSA 1978)

P. With respect to this section and notwithstanding any provision of law to the contrary, if an offender’s sentence was suspended or deferred in whole or in part and the offender violates any condition of probation, the court may impose any sentence that the court could have originally imposed and credit shall not be given for time served by the offender on probation. (66-8-102 NMSA 1978)

Q. As used in this section and in 12-6-12.1:

(1) "bodily injury" means an injury to a person not likely to cause death or great bodily harm to the person, but does cause painful temporary disfigurement or temporary loss or impairment of the functions of any member or organ of the person's body; and

(2) "conviction" means adjudication of guilt and does not include imposition of a sentence.

(3) “commercial motor vehicle” means a motor vehicle or combination of motor vehicles used in commerce to transport passengers or property if the motor vehicle:

(a) has a gross combination weight rating of more than twenty-six thousand pounds inclusive of a towed unit with a gross vehicle weight rating of more than ten thousand pounds;

(b) has a gross vehicle weight rating of more than twenty-six thousand pounds;

(c) is designed to transport sixteen or more passengers, including the driver; or

(d) is of any size and is used in the transportation of hazardous materials, which requires the motor vehicle to be placarded under applicable law.

R. A conviction pursuant to a municipal or county ordinance in New Mexico or a law of any other jurisdiction, territory, or possession of the United States or of a tribe where that ordinance is equivalent to New Mexico law for driving while under the influence of intoxicating liquor or drugs, prescribing penalties for driving while under the influence of intoxicating liquor or drugs shall be deemed to be a conviction pursuant to this section for purposes of determining whether a conviction is a second or subsequent conviction. (66-8-102. NMSA 1978)

S. A law enforcement officer making an arrest for a violation of the provisions of 12-6-12.2 or of similar municipal or county ordinances shall use standard arrest reports and procedures developed and approved by the Department of Public Safety in accordance with Section 8 of Laws of 2005, Chapter 269.