1 **PART 6**

**IGNITION INTERLOCK LICENSES**

**66-5-501. Short title.**

Sections 1 through 4 of this act [66-5-501 to 66-5-504 NMSA 1978] may be cited as the "Ignition Interlock Licensing Act".

**History:** Laws 2003, ch. 239, § 1.

**Cross references.** — For provisions regarding driving under the influence of intoxicating liquor or drugs, see 66-8-102 NMSA 1978.

As to the interlock driving fund, see 66-8-102.3.

**Emergency clauses.** — Laws 2003, ch. 239, § 11 makes this section effective immediately. Approved April 6, 2003.

**66-5-502. Definitions.**

As used in the Ignition Interlock Licensing Act [66-5-501 NMSA 1978]:

A. "denied" means having an instructor's permit, driver's license or provisional license denied for driving while under the influence of intoxicating liquor or drugs, pursuant to the provisions of Subsection D of Section 66-5-5 NMSA 1978;

B. "ignition interlock device" means a device, approved by the traffic safety bureau, that prevents the operation of a motor vehicle by an intoxicated or impaired person;

C. "ignition interlock license" means a driver's license issued to a person by the division that allows that person to operate a motor vehicle with an ignition interlock device after that person's instructor's permit, driver's license or provisional license has been revoked or denied. The division shall clearly mark an ignition interlock license to distinguish it from other driver's licenses; and

D. "revoked" means having an instructor's permit, driver's license or provisional license revoked for driving while under the influence of intoxicating liquor or drugs, pursuant to the provisions of Section 66-8-102 or 66-8-111 NMSA 1978.

**History:** Laws 2003, ch. 239, § 2; 2005, ch. 268, § 1.

**The 2005 amendment,** effective June 17, 2005, defines "ignition interlock device" in Subsection B to mean a device that prevents the operation of a motor vehicle by an intoxicated or impaired person and deletes the former definition of "ignition interlock device" in Subsection B to be a regularly calibrated device that regulates the operation of a motor vehicle by measuring an operator's blood alcohol level before allowing the operator to start the vehicle and that periodically tests the operator's blood alcohol level while he operated the vehicle.

**66-5-503. Ignition interlock license; requirements; exclusions.**

A. A person whose instructor's permit, driver's license or provisional license has

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been revoked or denied may apply for an ignition interlock license from the division.

B. An applicant for an ignition interlock license shall:

(1) provide proof of installation of the ignition interlock device by a traffic safety bureau-approved ignition interlock installer on any vehicle the applicant drives; and

(2) sign an affidavit acknowledging that:

(a) operation by the applicant of any vehicle that is not equipped with an ignition interlock device is subject to penalties for driving with a revoked license; and

(b) the applicant shall maintain the ignition interlock device and keep up-to-date records in the motor vehicle showing required service and calibrations and be able to provide the records upon request.

C. A person who has been convicted of homicide by vehicle or great bodily injury by vehicle while under the influence of intoxicating liquor or drugs, as provided in Section 66-8-101 NMSA 1978, shall not be issued an ignition interlock license.

**History:** Laws 2003, ch. 239, § 3.

**Emergency clauses.** — Laws 2003, ch. 239, § 11 makes this section effective immediately. Approved April 6, 2003.

**66-5-504. Penalties.**

A person who is issued an ignition interlock license and operates a vehicle that is not equipped with an ignition interlock device in violation of the Ignition Interlock Licensing Act [66-5-501 NMSA 1978] shall be subject to the penalties provided in Section 66-5-39 NMSA 1978.

**History:** Laws 2003, ch. 239, § 4.

**Emergency clauses.** — Laws 2003, ch. 239, § 11 makes this section effective immediately. Approved April 6, 2003.

**66-5-39. Driving while license suspended or revoked; providing penalties.**

A. Any person who drives a motor vehicle on any public highway of this state at a time when his privilege to do so is suspended or revoked and who knows or should have known that his license was suspended or revoked is guilty of a misdemeanor and shall be charged with a violation of this section. Upon conviction, the person shall be punished notwithstanding the provisions of Section 31-18-13 NMSA 1978 by imprisonment for not less than four days or more than three hundred sixty-four days or participation for an equivalent period of time in a certified alternative sentencing program, and there may be imposed in addition a fine of not more than one thousand dollars ($1,000). When a person pays any or all of the cost of participating in a certified alternative sentencing program, the court may apply that payment as a deduction to any fine imposed by the court. Notwithstanding any other provision of law for suspension or deferment of execution of a sentence, if the person's privilege to drive was revoked for driving while under the influence of intoxicating liquor or drugs or a violation of the Implied Consent Act [66-8-105 to 66-8-112 NMSA 1978], upon conviction under this section, that person shall be punished by imprisonment for not less than seven consecutive days and shall be

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fined not less than three hundred dollars ($300) or not more than one thousand dollars ($1,000) and the fine and imprisonment shall not be suspended, deferred or taken under advisement. No other disposition by plea of guilty to any other charge in satisfaction of a charge under this section shall be authorized if the person's privilege to drive was revoked for driving while under the influence of intoxicating liquor or drugs or a violation of the Implied Consent Act. Any municipal ordinance prohibiting driving with a suspended or revoked license shall provide penalties no less stringent than provided in this section.

B. In addition to any other penalties imposed pursuant to the provisions of this section, when a person is convicted pursuant to the provisions of this section or a municipal ordinance that prohibits driving on a suspended or revoked license, the motor vehicle the person was driving shall be immobilized by an immobilization device for thirty days, unless immobilization of the motor vehicle poses an imminent danger to the health, safety or employment of the convicted person's immediate family or the family of the owner of the motor vehicle. The convicted person shall bear the cost of immobilizing the motor vehicle.

C. The division, upon receiving a record of the conviction of any person under this section upon a charge of driving a vehicle while the license of the person was suspended, shall extend the period of suspension for an additional like period, and, if the conviction was upon a charge of driving while a license was revoked, the division shall not issue a new license for an additional period of one year from the date the person would otherwise have been entitled to apply for a new license.

**History:** 1953 Comp., § 64-5-39, enacted by Laws 1978, ch. 35, § 261; 1985, ch. 186, § 2; 1987, ch. 97, § 1; 1988, ch. 56, § 7; 1993, ch. 66, § 6.

**The 1988 amendment,** effective July 1, 1988, in Subsection A, inserted "shall be charged with a violation of this section" in the first sentence, inserted "the person" in the second sentence, and substituted the present language at the end of Subsection A beginning with "or a violation of the Implied Consent Act" for the former language which read "upon conviction that person shall be fined not less than one hundred fifty dollars ($150) which shall not be suspended, deferred or taken under advisement".

**The 1993 amendment,** effective January 1, 1994, inserted "and who knows or should have known that his license was suspended or revoked" in the first sentence of Subsection A; substituted the language beginning "four days or more" for "two days nor more than six months, and there may be imposed in addition a fine of not more than five hundred dollars ($500)" at the end of the second sentence in Subsection A; inserted the current third sentence in Subsection A; substituted "seven consecutive days" for "ninety-six consecutive hours" and inserted "or not more than one thousand dollars ($1,000)" in the fourth sentence of Subsection A; inserted current Subsection B; and redesignated former Subsection B as Subsection C.

**ANNOTATION**

**Nature of offense.** — The offense of driving under a suspended or revoked driver's license is a malum prohibitum offense. State v. Herrera, 111 N.M. 560, 807 P.2d 744 (Ct. App. 1991).

**Proof of knowledge** by the licensee that his driving privileges have been suspended or revoked is a prerequisite for conviction under the statute. State v. Herrera, 111 N.M. 560, 807 P.2d 744 (Ct. App. 1991).

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Defendant's conviction of driving on a revoked license was reversed where the trial court failed to instruct the jury that the state had the burden of proving that defendant knew or should have known that her license was revoked at the time that she was arrested and the state had not, in fact, proved that the defendant had been given a notice of revocation. State v. Castro, 2002-NMCA-093, 132 N.M. 646, 53 P.3d 413, cert. denied, 132 N.M. 551, \_\_ P.3d \_\_ (2002).

**Sentence mandatory.** — The jail sentence provided under 64-13-68, 1953 Comp. (similar to this section), is mandatory. 1959-60 Op. Att'y Gen. No. 60-95.

**When misdemeanor arrest without warrant justified.** — Where a police officer testified that he knew that the defendant "was on revocation" and that he stopped the defendant "to check his driving privileges," the arresting officer was justified in making the arrest without a warrant for a misdemeanor (driving with a revoked license) committed in his presence. State v. Gutierrez, 76 N.M. 429, 415 P.2d 552 (1966).

**Sufficiency of evidence of notice.** — Record supported a finding that defendant was aware that he was driving with a revoked license, where two separate notices of revocation were sent by certified mail to his home address after defendant received separate convictions of driving while under the influence of alcohol, and both notices were unreturned. State v. Herrera, 111 N.M. 560, 807 P.2d 744 (Ct. App. 1991).

**Section subject to assimilation under federal law.** — The offenses described by this section (driving while license suspended), 66-8-102 NMSA 1978 (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).

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** 7A Am. Jur. 2d Automobiles and Highway Traffic § 148.

Liability for injury or damage by car driven by unlicensed person, 16 A.L.R. 1108, 35 A.L.R. 62, 38 A.L.R. 1038, 43 A.L.R. 1153, 54 A.L.R. 374, 58 A.L.R. 532, 61 A.L.R. 1190, 78 A.L.R. 1028, 87 A.L.R. 1469, 111 A.L.R. 1258, 163 A.L.R. 1375.

Lack of proper automobile registration or operator's license as evidence of operator's negligence, 29 A.L.R.2d 963.

Necessity or emergency as defense in prosecution for driving without operator's license, or while license is suspended, 61 A.L.R.3d 1041.

Automobiles: Necessity or emergency as defense in prosecution for driving without operator's license or while license is suspended, 7 A.L.R.5th 73.

61A C.J.S. Motor Vehicles §§ 639(1), 639(2).

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New Mexico’s DWI Statute

**66-8-102. Persons under the influence of intoxicating liquor or drugs; aggravated driving while under the influence of intoxicating liquor or drugs; penalty.**

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 him incapable of safely driving a vehicle to drive a vehicle within this state.

C. It is unlawful for:

(1) a person who has an alcohol concentration of eight one hundredths or more in his blood or breath to drive a vehicle within this state; or

(2) 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.

D. Aggravated driving while under the influence of intoxicating liquor or drugs consists of a person who:

(1) has an alcohol concentration of sixteen one hundredths or more in his blood or breath while driving a vehicle within this state;

(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, 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.

E. A person under 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 and not more than forty-eight 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 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 probation, the offender shall be sentenced to not less than an additional

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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 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, 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, 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 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, 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 while 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

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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 bureau. Unless determined by the sentencing court 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

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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.

P. 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.

Q. 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 while under the influence of intoxicating liquor or drugs, and prescribes 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.

R. 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.

S. 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.

T. 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;

(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; and

(3) "conviction" means an adjudication of guilt and does not include imposition of a sentence.

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.

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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.

**Cross references.** — For definitions of "conviction" and "convicted," see 66-5-28 NMSA 1978.

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 et seq.

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 a minor's operation of a motor vehicle while possessing liquor, see 66-8-138 to 66-8-140 NMSA 1978.

For operating snowmobiles while under the influence, see 66-9-8 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.

See UJI Crim. 14-4501 to 14-4503 NMRA for uniform jury instructions to be used with Section 66-8-102 NMSA 1978.

**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 amendments.** — Identical amendments to this section were enacted by Laws 1997, ch. 43, § 1, effective July 1, 1997, and Laws 1997, ch. 205, § 1, which 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).

**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

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redesignated former Subsections J to M as present Subsections L to O.

**2003 amendments.** — Laws 2003, ch. 164, § 10, effective July 1, 2003, substituting "A person" for "Every person" at the beginning of Subsection E; and substituting "or of a tribe, where that ordinance or law" for "that" following "the United States" in Subsection M was approved April 5, 2003, effective July 1, 2003.

However, this section was also amended by Laws 2003, ch. 51, § 10, effective March 19, 2003, and by Laws 2003, ch. 90, § 3, effective March 28, 2003.

Laws 2003, ch. 51, § 10, substituted "A" for "Every" at the beginnning of Subsection E; rewrote Subsection C to limit Paragraph (1) to persons twenty-one years of age or more and to add a new Paragraph (2) as follows:

"C. It is unlawful for:

"(1) a person twenty-one years of age or more who has an alcohol concentration in his blood or breath of eight one hundredths or more to drive a vehicle within this state; and

"(2) a person who has an alcohol concentration in his blood or breath of four one hundredths or more to drive a commercial motor vehicle"; and changed "each offender" to "an offender" at the beginning of Subsection F, Paragraph (1).

Laws 2003, ch. 90, § 3, rewrote Subsection C as follows:

"C. It is unlawful for:

"(1) a person who has an alcohol concentration of eight one hundredths or more in his blood or breath to drive a vehicle within this state; and

"(2) 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."

Laws 2003, ch. 90, § 3 also changed "Every" to "A" at the beginning of Subsection E; amended Subsection F, Paragraph (1) to increase the number of hours of the sentence upon a second conviction from 72 to 96 hours; amended Subsection G to limit its applicability to a fourth conviction and increase the sentence from 6 months to 18 months; added new Subsections H, I and J; amended former Subsection H to provide for approval of screening programs by the department of finance and administration; and added new Subsections L and M. Subsections G, H, I, J, K, L and M of ch. 90 read as follows:

"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 or 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,

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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, not less than a twenty-eight-day inpatient, residential or in-custody substance abuse treatment program approved by the court, not less than a ninety-day outpatient treatment program approved by the court or a drug court 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."

Former Subsections I through O were redesignated as Subsections N through T.

Section 66-8-102 was set out in full 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".

**2005 amendments.** — Laws 2005, ch. 241, § 5 and Laws 2005, ch. 269, § 5 enact almost identical amendments to 66-8-102 NMSA 1978, effective June 17, 2005.

**Laws 2005, ch. 269, § 5** provides 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; deletes 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; provides 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; deletes 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; deletes 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; deletes 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; adds Subsection N to provide the periods of time for which an offender shall be required to have

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an ignition interlock device installed; adds 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 adds 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. Pursuant to Section 12-1-8 NMSA 1978 this section is set out as amended by Laws 2005, ch. 269, § 5.

**Laws 2005, ch. 241, § 5** also amends 66-8-102 NMSA 1978, but does not include the amendment in Subsection E to provide that an offender "shall be sentenced to not less than twenty-four hours and not more than forty-eight hours of community service in addition to the fine of $300.00" or the amendment of Subsection E(2) to add 96 hours of community service. Subsections E and F of 66-8-102 NMSA 1978 as amended by Laws 2005, ch. 241, § 5 provide:

**66-8-102. Persons under the influence of intoxicating liquor or drugs; aggravated driving while under the influence of intoxicating liquor or drugs; penalty.**

E. A person under 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 may be sentenced to not less than forty-eight hours of community service or 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 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 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 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, 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, 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 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 and a fine of seven hundred fifty dollars ($750). In addition to those penalties, when an offender commits aggravated driving while under the influence of intoxicating

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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 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.

**Effective dates.** — Laws 1997, ch. 205 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective June 20, 1997, 90 days after adjournment of the legislature.

**ANNOTATION**

**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).

**Title of act governs scope of this section and limits** it to driving or being in actual physical control of a vehicle upon the public highways of this state. 1953-54 Op. Att'y Gen. No. 5858.

**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.

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**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).

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**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).

**HB 278 (Laws 2003, ch. 164) is the controlling law after July 1, 2003.** 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.

Not only was HB 278 (Laws 2003, ch. 164) the later-enacted statute of the acts amending this section in 2003, but it was given an effective date of July 1, 2003, thereby assuring that it would replace any version of this section that was in effect at that time. Because it is presumed that the legislature was aware of the sequential nature and effect of its actions, full force and effect is to be given to HB 278. 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.

**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.

**"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).

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**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,

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2001-NMCA-001, 130 N.M 98, 18 P.3d 1051.

**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.

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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

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while intoxicated or under influence of alcohol, 175 A.L.R. Fed. 293.

61A C.J.S. Motor Vehicles §§ 625(1), 628.

**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).

**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

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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).

**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.

**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).

**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.

**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.

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**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).

**Sufficient foundation for admission of blood alcohol report.** — State's offer of proof, which included the testimony of the toxicologist who prepared the blood alcohol report and the police officer in whose presence the blood was drawn, provided sufficient foundation for admission of the report and lack of opportunity to cross-examine the nurse who drew the sample did not violate defendant's confrontation right. State v. Dedman, 2004-NMSC-037, \_\_\_N.M.\_\_\_, 102 P.3d 628.

**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).

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**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).

**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

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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-

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176, 126 N.M. 389, 970 P.2d 161, cert. denied, 126 N.M. 532, 972 P.2d 351 (1998).

**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).

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