September 2003

MJI Publications Updates

Child Protective Proceedings Benchbook

Managing a Trial Under the Controlled Substances Act

Crime Victim Rights Manual

Criminal Procedure Monograph 6--Pretrial Motions (Revised Edition)

Domestic Violence Benchbook (2d ed)

Juvenile Justice Benchbook (Revised Edition)

Juvenile Traffic Benchbook

Sexual Assault Benchbook

Traffic Benchbook--Revised Edition, Vol. 2

September 2003

Update: Child Protective Proceedings Benchbook

CHAPTER 21

Appeals

21.6 Delayed Appeals

Insert the following text on page 21-3 at the end of Section 21.6:

Effective September 1, 2003, the Michigan Supreme Court amended MCR 7.205(F) by adding subsection 5:

> "(5) The time limit for late appeals from orders terminating parental rights is 63 days, as provided by MCR 3.993(C)(2)."*

*Effective May 1, 2003, Subchapter 5.900 of the Michigan Court Rules became Subchapter 3.900. Former MCR 5.993(C)(1) was redesignated MCR 3.993(C)(2).

CHAPTER 21

Appeals

21.10 Appeals to the Supreme Court

Insert the following new section on page 21-5 before Section 21.10:

An application for leave to appeal to the Supreme Court may be taken from a case pending in the Court of Appeals or after a decision by the Court of Appeals. MCR 7.301(A)(2). If the application is filed before the Court of Appeals' decision, the application must be filed within 42 days of one of the following:

> "(a) after a claim of appeal is filed in the Court of Appeals;
>
> "(b) after an application for leave to appeal is filed in the Court of Appeals; or
>
> "(c) after entry of an order by the Court of Appeals granting an application for leave to appeal." MCR 7.302(C)(1)(a)–(c).

If the case is not pending before the Court of Appeals, then the application for leave to appeal is governed by MCR 7.302(C)(2)–(4). MCR 7.302(C)(2) provides:

> "(2) Other Appeals. Except as provided in subrule (C)(4), in other appeals the application must be filed within 42 days in civil cases . . . ,
>
> > (a) after the Court of Appeals clerk mails notice of an order entered by the Court of Appeals;
> >
> > (b) after the filing of the opinion appealed from; or
> >
> > (c) after the Court of Appeals clerk mails notice of an order denying a timely filed motion for rehearing.
>
> "However, the time limit is 28 days where the appeal is from an order terminating parental rights."

MCR 7.302(C)(4) provides that if the Court of Appeals remands the case to a lower court for further proceedings, the application for leave may be filed within 42 days, in civil cases, after one of the following:

> "(a) the Court of Appeals decision ordering the remand, or

> "(b) the Court of Appeals decision disposing of the case following the remand procedure, in which case an application may be made on all issues raised in the Court of Appeals, including those related to the remand question."

Late applications will not be accepted. MCR 7.302(C)(3).

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Update: Managing a Trial Under The Controlled Substances Act

CHAPTER 13

Expert Testimony

13.7 Basis for an Expert Witness's Opinion

Replace existing Section 13.7 with the following text:

Effective September 1, 2003, MRE 703 provides:

> "The facts or data in the particular case upon which an expert bases an opinion or inference shall be in evidence. This rule does not restrict the discretion of the court to receive expert opinion testimony subject to the condition that the factual bases of the opinion be admitted in evidence thereafter."

Former rule 703 left to the trial court's discretion the decision whether facts or data "essential" to an expert's testimony must be admitted into evidence. The Staff Comment to Administrative Order No. 1999–10, which amended MRE 703, states that the "modification of MRE 703 corrects a common misreading of the rule by allowing an expert's opinion only if that opinion is based exclusively on evidence that has been introduced into evidence in some way other than through the expert's hearsay testimony."

MRE 705 provides:

> "The expert may testify in terms of opinion or inference and give reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination."

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Update: Crime Victim Rights Manual

CHAPTER 8

The Crime Victim at Trial

8.10 Expert Testimony on the Psychological Effects of Battering and Criminal Sexual Conduct

Insert the following note in the middle of page 176 before the second bullet:

> **Note:** Effective September 1, 2003, MRE 703 requires that the facts or data on which an expert's opinion is based be admitted into evidence at trial. MRE 703 now provides:
>
> > "The facts or data in the particular case upon which an expert bases an opinion or inference shall be in evidence. This rule does not restrict the discretion of the court to receive expert opinion testimony subject to the condition that the factual bases of the opinion be admitted in evidence thereafter."

Former rule 703 left to the trial court's discretion the decision whether facts or data "essential" to an expert's testimony must be admitted into evidence. The Staff Comment to Administrative Order No. 1999–10, which amended MRE 703, states that the "modification of MRE 703 corrects a common misreading of the rule by allowing an expert's opinion only if that opinion is based exclusively on evidence that has been introduced into evidence in some way other than through the expert's hearsay testimony."

CHAPTER 8

The Crime Victim at Trial

8.11 Admissible Hearsay Statements by Crime Victims

C. Statements of Existing Mental, Emotional, or Physical Condition

Insert the following language on page 186 after the first sentence of the second paragraph:

Hearsay testimony regarding the victim's intention of meeting the defendant on the night she was killed was properly admitted under MRE 803(3) as evidence relevant to the victim's plan to meet the defendant at her apartment on the night of her death. *People v Coy*, ___ Mich App ___, ___ (2003). In *Coy*, *supra*, the victim's roommate testified that the victim had asked her to page the defendant to remind him of their plan to meet at the victim's apartment the night she was killed. *Coy*, *supra* at ___. The roommate's testimony made it more probable than not that the victim and the defendant were acquainted and that the defendant was permitted entry into the victim's apartment where there was no evidence of forced entry. *Coy*, *supra* at ___.

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Update: Criminal Procedure Monograph 6—Pretrial Motions (Revised Edition)

6.10 Motion for Adjournment or Continuance

Insert the following language at the bottom of page 9:

See also *People v Coy*, ___ Mich App ___, ___ (2003) (trial court properly denied a defendant's request for adjournment, where the motion was made on the first day of trial and "[t]here was no evidence that [defendant] made any effort, much less a diligent one, to locate [the witness] before requesting the adjournment"). Citing to the Michigan Supreme Court's decision in *People v Jackson*, 467 Mich 272, 276 (2002) (included in the October 2002 update to this monograph), the *Coy* Court ruled that in addition to his failure to exercise diligence, the defendant failed to establish good cause for an adjournment. *Coy*, *supra* at ___.

The defendant in *Coy*, *supra*, similarly failed to establish good cause for an adjournment to complete DNA testing of an individual's blood sample taken one week before trial. *Coy*, *supra* at ___. The trial court denied the defendant's motion to adjourn until the DNA tests on the individual's blood were complete because the individual's alibi was corroborated, he was not considered a suspect, the defendant was dilatory in requesting the blood tests, and the individual's involvement in the victim's death was highly speculative. *Id*. at ___.

6.10 Motion for Adjournment or Continuance

Insert the following case summary on page 10 before the paragraph beginning with "Where the defendant is not at fault . . . .":

A trial court abused its discretion when it refused to grant the prosecution's motion for adjournment after the complainant and two other prosecution witnesses failed to return to court following a lunch recess. *People v Grace*, ___ Mich App ___, ___ (2003). In *Grace*, the trial court dismissed the charge against the defendant after 17 minutes elapsed following a lunch recess and the complainant and two primary witnesses had not yet returned. *Grace*, *supra* at ___. The Court of Appeals noted that the record showed the missing witnesses' testimony was material to the case, the prosecutor had attempted to locate them, and the witnesses' history suggested their continued cooperation. *Grace*, *supra* at ___.

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6.23 Motion to Dismiss Because of Double Jeopardy—Successive Prosecutions for the Same Offense

2. Retrial for the Same Offense After Declaration of a Mistrial

Insert the following text on page 52 after the first sentence of the third paragraph (referring to *People v Bommarito*):

A defendant's right against double jeopardy is not violated when a trial court reinstates a defendant's charge after granting the defendant's motion to dismiss when the complainant and two other prosecution witnesses failed to return on time after a lunch recess. *People v Grace*, ___ Mich App ___, ___ (2003). The defendant in *Grace* requested and received a dismissal, which is the equivalent of the defendant's consent to a mistrial, after which retrial on the same charge is constitutionally permissible. *Grace*, *supra* at ___.

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Update: Domestic Violence Benchbook (2d ed)

CHAPTER 3

Common "Domestic Violence Crimes"

3.5 Parental Kidnapping

B. Defenses to Parental Kidnapping

Insert the following text after the citation to *People v Luther* on page 68:

If a defendant denies that he or she has committed a crime, that defendant is not entitled to a jury instruction on duress. *People v McKinney*, ___ Mich App ___ (2003) (defendant sought to prove that she lived with defendant out of fear but denied committing major controlled substance offenses).

CHAPTER 5

Evidence in Criminal Domestic Violence Cases

5.13 Testimonial Evidence of Threats Against a Crime Victim or a Witness to a Crime

B. Exceptions to the Hearsay Rule

Insert the following case summary on page 199 at the end of Section 5.13:

- *People v Coy*, ___ Mich App ___ (2003) (evidence of then existing mental, emotional, or physical condition)

  The defendant was convicted of second-degree murder. At trial, a witness testified that the victim told her that she had planned to meet the defendant on the night of the murder and asked her to page the defendant to remind him about the meeting. The defendant objected to the admission of the statement on hearsay grounds. The trial court found the statement relevant to the victim's intention or plan to meet the defendant at her apartment on the night of the murder and therefore admissible pursuant to MRE 803(3). The Court of Appeals upheld the trial court's determination and indicated that the victim's statement of future intent or plan to meet with defendant on the night of her murder fell within the plain meaning of MRE 803(3). ___ Mich App at ___.

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Update: Juvenile Justice Benchbook (Revised Edition)

CHAPTER 23

Selected Issues Regarding Imposition of Adult Sentence

23.1 Applicable Court Rule and Legislative Sentencing Guidelines

Insert the following text after the first full paragraph on page 470:

In *People v Babcock (Babcock III)*, ___ Mich ___ (2003), the Michigan Supreme Court issued its first comprehensive interpretation of the legislative sentencing guidelines. In *Babcock,* the trial court made a downward departure from the sentencing guidelines. The prosecutor appealed, and in *People v Babcock (Babcock II)*, 250 Mich App 463 (2002), the Court of Appeals affirmed the sentence indicating that although some factors cited by the trial court were not objective and verifiable, the trial court did not abuse its discretion by departing from the guidelines. The prosecutor filed an application for leave to appeal. The Supreme Court granted leave and concluded*:

> "[T]he Court of Appeals concluded that some of the reasons articulated by the trial court were not objective and verifiable. As explained above, if a reason is not objective and verifiable, it cannot constitute a substantial and compelling reason. As also explained above, if the trial court articulates multiple reasons, and the Court of Appeals, as in this case, determines that some of these reasons are substantial and compelling and some are not, and the Court of Appeals is unable to determine whether the trial court would have departed to the same degree on the basis of the substantial and compelling reasons, the Court must remand the case to the trial court for resentencing or rearticualtion. Because the Court of Appeals in this case did not determine whether the trial court would have departed, and would have departed to the

*Justices Markman, Kelly, and Taylor signed the lead opinion. Chief Justice Corrigan concurred in part and dissented in part, as explained below, and Justice Young signed the Chief Justice's opinion. Justice Cavanagh and Justice Weaver also concurred in part and dissented from the majority's requirement that the factors allowing for departure be "objective and verifiable."

> same degree, absent consideration of the reasons that the Court of Appeals found to be not objective and verifiable, we reverse its judgment and remand this case to the Court of Appeals for further consideration." [Footnotes omitted.] *Babcock III, supra* at ___.

In order to assist the bench and bar, the Supreme Court included an appendix to the opinion.* The appendix summarizes the responsibilities of the trial court and the Court of Appeals under the statutory sentencing guidelines as follows:

*The Court of Appeals has stated that "[b]ecause a majority of the justices writing separately concurred with most of the lead opinion except one or two parts specifically stated in those separate opinions, we conclude that a majority of justices concurred with the appendix. Thus, the appendix is binding law." *People v Lowery,* ___ Mich App ___, ___ n 3 (2003).

> "1. A trial court is required to choose a minimum sentence within the guidelines range, unless there is a substantial and compelling reason for departing from this range. MCL 769.34(2), (3).
>
> "2. If a trial court's sentence is within the guidelines range, the Court of Appeals must affirm the sentence unless the trial court erred in scoring the guidelines or relied on inaccurate information in determining the defendant's sentence. MCL 769.34(10).
>
> "3. A substantial and compelling reason must be 'objective and verifiable'; must "'keenly' or 'irresistibly' grab our attention"; and must be "of 'considerable worth' in deciding the length of a sentence.'" [*People v*] *Fields*, [448 Mich 58, 62, 67 (1995)].
>
> "4. A trial court must articulate on the record a substantial and compelling reason for its *particular* departure, and explain why this reason justifies that departure. MCL 769.34(3); *People v Daniel*, 462 Mich 1, 9; 609 NW2d 557 (2000).
>
> "5. A trial court 'shall not base a departure on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds . . . that the characteristic has been given inadequate or disproportionate weight.' MCL 769.34(3)(b).
>
> "6. In considering whether, and to what extent, to depart from the guidelines range, a trial court must ascertain whether taking into account an allegedly substantial and compelling reason would contribute to a more proportionate criminal sentence than is available within the guidelines range. MCL 769.34(3).
>
> "7. In reviewing sentencing decisions, the Court of Appeals may not affirm a sentence on the basis that, although the trial court did not articulate a substantial and compelling reason for a departure, one nonetheless exists in the judgment of the Court of Appeals. Instead, in such a situation, the Court of Appeals must remand the case to the trial court for resentencing. MCL 769.34(3); MCL 769.34(11).

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> "8. If a trial court articulates multiple 'substantial and compelling' reasons for a departure from the guidelines, and the Court of Appeals determines that some of these reasons are substantial and compelling and others are not, the panel must determine whether the trial court would have departed, and would have departed to the same degree, on the basis of the substantial and compelling reasons alone. MCL 769.34(3).
>
> "9. If a trial court departs from the guidelines range, and its sentence is not based on a substantial and compelling reason to justify the *particular* departure, i.e., the sentence is not proportionate to the seriousness of the defendant's conduct and his criminal history, the Court of Appeals must remand to the trial court for resentencing. MCL 769.34(11).
>
> "10. ''[T]he existence or nonexistence of a particular [sentencing] factor is a factual determination for the sentencing court to determine, and should therefore be reviewed by an appellate court for clear error.'' *Babcock I,* [244 Mich App 64, 75-76 (2000)], quoting [*People v*] *Fields*, [448 Mich 58, 77 (1995)].
>
> "11. ''The determination that a particular [sentencing] factor is objective and verifiable should be reviewed by the appellate court as a matter of law.'' *Babcock I,* [244 Mich App 64, 76 (2000)], quoting [*People v*] *Fields*, [448 Mich 58, 78 (1995)].
>
> "12. ''A trial court's determination that the objective and verifiable factors present in a particular case constitute substantial and compelling reasons to depart from the statutory minimum sentence shall be reviewed for abuse of discretion.'' *Babcock I,* [244 Mich App 64, 76 (2000)], quoting [*People v*] *Fields*, [448 Mich 58, 78 (1995)]. An abuse of discretion occurs when the trial court chooses an outcome falling outside the permissible principled range of outcomes." *Id.* at ___.

Chief Justice Corrigan dissented from the majority's requirement that the Court of Appeals remand a case to the trial court "if the trial court articulates multiple reasons [for departure], and the appellate court . . . determines that some of these reasons are substantial and compelling and some are not, and the Court of Appeals is unable to determine whether the trial court would have departed to the same degree on the basis of the substantial and compelling reasons . . . ." *Babcock III, supra* at ___. This requirement may force the Court of Appeals to remand a large number of cases to the trial courts for resentencing or rearticulation. In an effort to mitigate the number of cases that would be remanded, Chief Justice Corrigan strongly urges that every trial judge add the following disclaimer to every judgment of sentence that departs from the guidelines:

> "I am persuaded that the defendant should serve the sentence I have rendered and it is my intention that this

sentence be sustained if an appellate court determines that any of my rationales for departure survive review." *Id.* at ___.

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Update: Juvenile Traffic Benchbook

CHAPTER 2

Obtaining Custody of a Juvenile Following a Criminal Traffic Offense

2.2 Required Procedures After Taking Juvenile Into Custody for a "Drunk Driving" Offense

B. Chemical Testing of Blood, Breath, or Urine

Effective September 30, 2003, 2003 PA 61 amends MCL 257.625c. Beginning on the bottom of page 2-4, replace the quotation of MCL 257.625c(1) with the following:

> "(1) A person who operates a vehicle upon a public highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles, within this state is considered to have given consent to chemical tests of his or her blood, breath, or urine for the purpose of determining the amount of alcohol or presence of a controlled substance or both in his or her blood or urine or the amount of alcohol in his or her breath in all of the following circumstances:
>
> > "(a) If the person is arrested for a violation of section 625(1), (3), (4), (5), (6), (7), or (8), section 625a(5), or section 625m or a local ordinance substantially corresponding to section 625(1), (3), (6), or (8), section 625a(5), or section 625m.*
> >
> > "(b) If the person is arrested for felonious driving, negligent homicide, manslaughter, or murder resulting from the operation of a motor vehicle, and the peace officer had reasonable grounds to believe the person was operating the vehicle in violation of section 625."

*See Chapter 9 for a description of some of these offenses.

CHAPTER 9

Elements of Selected Criminal Traffic Offenses

"Drunk Driving" Offenses

9.11 Section 625(1) and (8) Offenses—OUIL, OUID, UBAL, OWPD

Effective September 30, 2003, 2003 PA 61 amends §625 offenses. On page 9-20, change the title of the section as indicated above, and replace the introductory paragraph in Section 9.11 and all of subsections (A), (B), and (C) with the following text:

This section addresses four of the driving offenses contained in §625. The offenses all involve operating a motor vehicle while under the influence of alcoholic liquor, a controlled substance, or both, or with an unlawful bodily alcohol level or the presence of a controlled substance in the body. The four offenses are:

- Operating a motor vehicle while under the influence of alcoholic liquor (OUIL).
- Operating a motor vehicle while under the influence of a controlled substance (OUID).
- Operating a motor vehicle with an unlawful bodily alcohol level (UBAL).*
- Operating a motor vehicle with the presence of controlled substance (OWPD).

*UBAL is also referred to as UBAC, operating a motor vehicle with an unlawful bodily alcohol *content*.

All four offenses are subject to the same penalties.

A. Statute

"(1) A person, whether licensed or not, shall not operate a vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles, within this state if the person is operating while intoxicated. As used in this section, 'operating while intoxicated' means either of the following applies:

"(a) The person is under the influence of alcoholic liquor, a controlled substance, or a combination of alcoholic liquor and a controlled substance.

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"(b) The person has an alcohol content of 0.08 grams or more per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine, or, beginning October 1, 2013, the person has an alcohol content of 0.10 grams or more per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine.

. . . .

"(8) A person, whether licensed or not, shall not operate a vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles, within this state if the person has in his or her body any amount of a controlled substance listed in schedule 1 under . . . MCL 333.7212, or a rule promulgated under that section, or of a controlled substance described in . . . MCL 333.7214.

"(9) If a person is convicted of violating subsection (1) or (8), all of the following apply:

"(a) Except as otherwise provided in subdivisions (b) and (c), the person is guilty of a misdemeanor punishable by 1 or more of the following:

(*i*) Community service for not more than 360 hours.

(*ii*) Imprisonment for not more than 93 days.

(*iii*) A fine of not less than $100.00 or more than $500.00.

"(b) If the violation occurs within 7 years of a prior conviction, the person shall be sentenced to pay a fine of not less than $200.00 or more than $1,000.00 and 1 or more of the following:

(*i*) Imprisonment for not less than 5 days or more than 1 year. Not less than 48 hours of the term of imprisonment imposed under this subparagraph shall be served consecutively.

(*ii*) Community service for not less than 30 days or more than 90 days.

"(c) If the violation occurs within 10 years of 2 or more prior convictions, the person is guilty of a felony and shall be sentenced to pay a fine of not less than $500.00 or more than $5,000.00 and to either of the following:

(*i*) Imprisonment under the jurisdiction of the department of corrections for not less than 1 year or more than 5 years.

(*ii*) Probation with imprisonment in the county jail for not less than 30 days or more than 1 year and community service for not less than 60 days or more than 180 days. Not less than 48 hours of the imprisonment imposed under this subparagraph shall be served consecutively.

"(d) A term of imprisonment imposed under subdivision (b) or (c) shall not be suspended."

MCL 257.625(1), (8), and (9)(a)–(d).

In addition to the penalties set forth above, the court may order the offender to pay the costs of prosecution. MCL 257.625(13).

2003 PA 61 changed the terminology in the drunk driving statutes from "intoxicating liquor" to "alcoholic liquor." "Alcoholic liquor" is defined as "any spirituous, vinous, malt, or fermented liquor, liquids and compounds, whether or not medicated, proprietary, patented, and by whatever name called, containing 1/2 of 1% or more of alcohol by volume which are fit for use for beverage purposes as defined and classified by the commission according to alcoholic content as belonging to 1 of the varieties defined in [the Michigan Liquor Control Code of 1998]." MCL 257.1d and MCL 436.1105(2).

B. Elements

Note: The following criminal jury instructions may be used in cases involving these offenses:

CJI2d 15.1 OUIL/UBAC Violation

CJI2d 15.2 Elements Common to OUIL, UBAC, and OWI

CJI2d 15.3 Specific Elements of OUIL/UBAC

CJI2d 15.4 Specific Elements of OWI

CJI2d 15.5 Factors in Considering OUIL, UBAC, and OWI

NOTE: The revised statutory language effective September 30, 2003 **eliminated the rebuttable presumptions of impairment** arising from a defendant's bodily alcohol content. The previous statutory language in MCL 257.625a(9) provided for a rebuttable presumption of impairment based on a defendant's bodily alcohol content. The amended statute contains no such language and consequently, for offenses committed on or after September 30,

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2003, portions of CJI2d 15.5 will represent an incorrect statement of the relevant law.

CJI2d 15.6 Possible Verdicts

CJI2d 15.7 Verdict Form

CJI2d 15.9 Defendant's Decision to Forgo Chemical Testing

1. Operating a Motor Vehicle Under the Influence of Alcoholic Liquor and/or a Controlled Substance (OUIL, OUID)

1) Defendant, whether licensed or not, operated a motor vehicle on the date in question.

2) Defendant operated a motor vehicle on a Michigan highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking.

3) At the time defendant operated the motor vehicle, defendant was under the influence of alcoholic liquor, a controlled substance, or a combination of both.

4) As a result, the defendant was substantially deprived of normal control or clarity of mind.*

5) Defendant was no longer able to operate a vehicle in a normal manner.

*This element was set for by the Court of Appeals in *People v Raisanen*, 114 Mich App 840, 844 (1982).

2. Operating a Motor Vehicle with an Unlawful Bodily Alcohol Level (UBAL)

1) Defendant operated a motor vehicle on a Michigan highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for parking.

2) At the time of operating the motor vehicle, defendant had an alcohol content of 0.08 grams or more per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine.*

*On October 1, 2013, the blood alcohol levels necessary for a UBAL conviction will revert to the prior level of 0.10. See 2003 PA 61.

3. Operating a Motor Vehicle with the Presence of a Controlled Substance (OWPD)

1) Defendant operated a motor vehicle on a Michigan highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for parking.

2) At the time of operating the motor vehicle, defendant had in his or her body any amount of one of the controlled substances listed in either:

- Schedule 1 under MCL 333.7212 (or a rule promulgated under that section); or

- MCL 333.7214.

C. Licensing and Vehicle Sanctions

1. First-time Offenders

If the offender has no prior convictions within seven years, the Secretary of State must suspend his or her license for 180 days. MCL 257.319(8)(a). After the first 30 days of the suspension have elapsed, the Secretary of State may issue a restricted license during a specified portion of the suspension, if the person is otherwise eligible for a license. MCL 257.319(8)(a) and (15).

The Secretary of State will assess six points for a violation of §625(1) or (8). MCL 257.320a(1)(c).

Upon conviction of a violation of §625(1) or (8) (or a local ordinance that substantially corresponds with it), the court may order vehicle immobilization for not more than 180 days, unless vehicle forfeiture is ordered. MCL 257.904d(1)(a) and 257.625(9)(e).

2. Offenders Who Violate §625(1) or (8) Within Seven Years of a Prior Conviction

*If the offender does not have a driver's license, the Secretary of State must deny issuance of a license to the offender.

Under MCL 257.303(2)(c) and (4), offenders convicted of violating §625(1) or (8) within seven years of another prior conviction listed in the statute will be subject to mandatory driver's license revocation for a minimum of one year. The Secretary of State must revoke the licenses* of §625(1) or (8) offenders who have one prior conviction for a violation or attempted violation of any of the following:

- OUIL, OUID, or UBAL, under §625(1).
- OWI, under §625(3).
- OUIL, OUID, UBAL, OWI, or OWPD causing death of another under §625(4).
- OUIL, OUID, UBAL, OWI, or OWPD causing serious impairment of a body function of another, under §625(5).
- Being under 21 years of age and operating a vehicle with any bodily alcohol content, under §625(6) ("zero tolerance").
- Child endangerment, under §625(7).
- OWPD, under §625(8).
- Any prior enactment of §625 in which the defendant operated a vehicle while under the influence of intoxicating or alcoholic liquor or a controlled substance, or a combination of intoxicating or alcoholic liquor and a controlled substance, or while visibly impaired, or with an unlawful bodily alcohol content.

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- Former §625b, which provided criminal penalties for OWI.
- Operating a commercial motor vehicle with an unlawful bodily alcohol level, under §625m.

For a conviction under §625(1) or (8) within seven years after a prior conviction, the court shall order vehicle immobilization for not less than 90 days or more than 180 days. MCL 257.904d(1)(c). Forfeiture may be ordered in the court's discretion if the offender has an ownership interest in the vehicle used in the offense. The court may order that a leased vehicle be returned to the lessor. MCL 257.625n.

3. Offenders Who Violate §625(1) or (8) Within Ten Years of Two or More Prior Convictions

Under MCL 257.303(2)(g) and (4), offenders convicted of violating §625(1) or (8) within ten years of two other prior convictions listed in the statute will be subject to mandatory driver's license* revocation for a minimum of five years. The Secretary of State must revoke the licenses of §625(1) or (8) offenders who have two prior convictions of the following violations or attempted violations, if the convictions resulted from arrest on or after January 1, 1992:

*If the offender does not have a driver's license, the Secretary of State must deny issuance of a license to the offender.

- OUIL, OUID, or UBAL, under §625(1).
- OWI, under §625(3).
- OUIL, OUID, UBAL, OWI, or OWPD causing death of another, under §625(4).
- OUIL, OUID, UBAL, OWI, or OWPD causing serious impairment of a body function of another, under §625(5).
- Being under 21 years of age and operating a vehicle with any bodily alcohol content, under §625(6) ("zero tolerance"). (Only one zero tolerance violation may be considered for purposes of license revocation under the statute.)
- Child endangerment, under §625(7).
- OWPD, under §625(8).
- Any prior enactment of §625 in which the defendant operated a vehicle while under the influence of intoxicating or alcoholic liquor or a controlled substance, or a combination of intoxicating or alcoholic liquor and a controlled substance, or while visibly impaired, or with an unlawful bodily alcohol content.
- Former §625b, which provided criminal penalties for OWI.
- Operating a commercial motor vehicle with an unlawful bodily alcohol level, under §625m.

For a conviction under §625(1) or (8) within ten years after two or more prior convictions, the court shall order vehicle immobilization for not less than one year or more than three years, unless the vehicle is forfeited. MCL 257.904d(1)(d). Forfeiture may be ordered in the court's discretion if the offender has an ownership interest in the vehicle used in the offense. The court may order that a leased vehicle be returned to the lessor. MCL 257.625n.

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CHAPTER 9

Elements of Selected Criminal Traffic Offenses

"Drunk Driving" Offenses

9.11 Section 625(1) and (8) Offenses—OUIL, OUID, UBAL, OWPD

D. Issues

Delete the first paragraph at the top of page 9-26. 2003 PA 61 eliminated MCL 257.625a(9), which contained presumptions applicable to drunk driving cases.

CHAPTER 9

Elements of Selected Criminal Traffic Offenses

"Drunk Driving" Offenses

9.12 Operating While Visibly Impaired (OWI)—§625(3)

Effective September 30, 2003, 2003 PA 61 amends §625 offenses. Beginning on page 9-26, replace the introductory paragraph and subsections (A), (B), and (C) with the following text:

This section addresses the elements of and sanctions for offenses under §625(3), operating a vehicle while visibly impaired. OWI is a lesser offense of OUIL/OUID and UBAL, so that a defendant charged with OUIL, OUID, or UBAL may be found guilty of OWI. MCL 257.625(3).

A. Statute

"(3) A person, whether licensed or not, shall not operate a vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles, within this state when, due to the consumption of alcoholic liquor, a controlled substance, or a combination of alcoholic liquor and a controlled substance, the person's ability to operate the vehicle is visibly impaired. If a person is charged with violating subsection (1), a finding of guilty under this subsection may be rendered.

. . . .

"(11) If a person is convicted of violating subsection (3), all of the following apply:

"(a) Except as otherwise provided in subdivisions (b) and (c), the person is guilty of a misdemeanor punishable by 1 or more of the following:

(*i*) Community service for not more than 360 hours.

(*ii*) Imprisonment for not more than 93 days.

(*iii*) A fine of not more than $300.00.

"(b) If the violation occurs within 7 years of 1 prior conviction, the person shall be sentenced to pay a fine of not less than $200.00 or more than $1,000.00, and 1 or more of the following:

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(*i*) Imprisonment for not less than 5 days or more than 1 year. Not less than 48 hours of the term of imprisonment imposed under this subparagraph shall be served consecutively.

(*ii*) Community service for not less than 30 days or more than 90 days.

"(c) If the violation occurs within 10 years of 2 or more prior convictions, the person is guilty of a felony and shall be sentenced to pay a fine of not less than $500.00 or more than $5,000.00 and either of the following:

(*i*) Imprisonment under the jurisdiction of the department of corrections for not less than 1 year or more than 5 years.

(*ii*) Probation with imprisonment in the county jail for not less than 30 days or more than 1 year and community service for not less than 60 days or more than 180 days. Not less than 48 hours of the imprisonment imposed under this subparagraph shall be served consecutively.

"(d) A term of imprisonment imposed under subdivision (b) or (c) shall not be suspended."

MCL 257.625(3) and (11)(a)–(d).

In addition to the penalties set forth above, the court may order the offender to pay the costs of prosecution. MCL 257.625(13).

2003 PA 61 changed the terminology in the drunk driving statutes from "intoxicating liquor" to "alcoholic liquor." "Alcoholic liquor" is defined as "any spirituous, vinous, malt, or fermented liquor, liquids and compounds, whether or not medicated, proprietary, patented, and by whatever name called, containing 1/2 of 1% or more of alcohol by volume which are fit for use for beverage purposes as defined and classified by the commission according to alcoholic content as belonging to 1 of the varieties defined in this [the Michigan Liquor Code of 1998]." MCL 257.1d and MCL 436.1105(2).

B. Elements

Note: The following criminal jury instructions may be used in OWI cases:

CJI2d 15.2 Elements Common to OUIL, UBAC, and OWI

CJI2d 15.4 Specific Elements of OWI

CJI2d 15.5 Factors in Considering OUIL, UBAC, and OWI

Note: The revised statutory language effective September 30, 2003, **eliminated the rebuttable presumptions of impairment** arising from a defendant's bodily alcohol content. The previous statutory language in MCL 257.625a(9) provided for a rebuttable presumption of impairment based on a defendant's bodily alcohol content. The amended statute contains no such language and consequently, for offenses committed on or after September 30, 2003, portions of CJI2d 15.5 will represent an incorrect statement of the relevant law.

CJI2d 15.6 Possible Verdicts

CJI2d 15.7 Verdict Form

CJI2d 15.9 Defendant's Decision to Forgo Chemical Testing

The elements of OWI are as follows:

1) Defendant, whether licensed or not, operated a motor vehicle on the date in question.

2) Defendant operated a motor vehicle on a Michigan highway or other place open to the general public or generally accessible to motor vehicle, including an area designated for the parking of vehicles.

3) Defendant had consumed alcoholic liquor, a controlled substance, or a combination of alcoholic liquor and a controlled substance.

4) Because of the consumption of alcoholic liquor and/or a controlled substance, defendant's ability to operate the vehicle was visibly impaired.

C. Licensing and Vehicle Sanctions

1. First-time Offenders

If there are no prior convictions within seven years and the offender's impairment was due to alcohol alone, the Secretary of State shall suspend the offender's license for 90 days. The period of suspension is increased to 180 days if the impairment was caused by consumption of a controlled substance or a combination of alcoholic liquor and controlled substance. MCL 257.319(8)(b). The offender may be issued a restricted license during all or a specified portion of the suspension, if he or she is otherwise eligible for a license. MCL 257.319(8)(b).

The Secretary of State will assess four points for a violation of §625(3) or a law or local ordinance substantially corresponding to it. MCL 257.320a(1)(i).

Upon conviction of a first offense under §625(3) or a local ordinance substantially corresponding to it, the court may in its discretion order vehicle

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immobilization for not more than 180 days, unless vehicle forfeiture is ordered. MCL 257.904d(1)(a) and MCL 257.625(11)(e).

2. Repeat Offenders—Violation Within Seven Years of One Prior Conviction

Under MCL 257.303(2)(c) and (4), offenders convicted of violating §625(3) within seven years of another prior conviction listed in the statute will be subject to mandatory driver's license* revocation for a minimum of one year. The Secretary of State must revoke the licenses of §625(3) offenders who have one prior conviction of any the following violations or attempted violations:

*If the offender does not have a driver's license, the Secretary of State must deny issuance of a license to the offender.

- OUIL, OUID, or UBAL, under §625(1).
- OWI, under §625(3).
- OUIL, OUID, UBAL, OWI, or OWPD causing death of another, under §625(4).
- OUIL, OUID, UBAL, OWI, or OWPD causing serious impairment of a body function of another, under §625(5).
- Being under 21 years of age and operating a vehicle with any bodily alcohol content, under §625(6) ("zero tolerance").
- Child endangerment, under §625(7).
- OWPD, under §625(8).
- Any prior enactment of §625 in which the defendant operated a vehicle while under the influence of intoxicating or alcoholic liquor or a controlled substance, or a combination of intoxicating or alcoholic liquor and a controlled substance, or while visibly impaired, or with an unlawful bodily alcohol content.
- Former §625b, which provided criminal penalties for OWI.
- Operating a commercial motor vehicle with an unlawful bodily alcohol level, under §625m.

For a conviction under §625(3) within seven years after a prior conviction, the court shall order vehicle immobilization for not less than 90 days or more than 180 days, unless forfeiture is ordered. MCL 257.904d(1)(c). Forfeiture may be ordered in the court's discretion if the offender has an ownership interest in the vehicle used in the offense. The court may order that a leased vehicle be returned to the lessor. MCL 257.625n.

3. Repeat Offenders—Violation Within Ten Years of Two or More Prior Convictions

*If the offender does not have a driver's license, the Secretary of State must deny issuance of a license to the offender.

Under MCL 257.303(2)(g) and (4), offenders convicted of violating §625(3) within ten years of two other prior convictions listed in the statute will be subject to mandatory driver's license* revocation for a minimum of five years. The Secretary of State must revoke the licenses of §625(3) offenders who have two prior convictions of the following violations or attempted violations, if the convictions resulted from arrest on or after January 1, 1992:

- OUIL, OUID, or UBAL, under §625(1).
- OWI, under §625(3).
- OUIL, OUID, UBAL, OWI, or OWPD causing death of another, under §625(4).
- OUIL, OUID, UBAL, OWI, or OWPD causing serious impairment of a body function of another, under §625(5).
- Being under 21 years of age and operating a vehicle with any bodily alcohol content, under §625(6) ("zero tolerance"). (Only one zero tolerance violation may be considered for purposes of license revocation under the statute.)
- Child endangerment, under §625(7).
- OWPD, under §625(8).
- Any prior enactment of §625 in which the defendant operated a vehicle while under the influence of intoxicating or alcoholic liquor or a controlled substance, or a combination of intoxicating or alcoholic liquor and a controlled substance, or while visibly impaired, or with an unlawful bodily alcohol content.
- Former §625b, which provided criminal penalties for OWI.
- Operating a commercial motor vehicle with an unlawful bodily alcohol level, under §625m.

For a conviction under §625(3) within ten years after two or more prior convictions, the court shall order vehicle immobilization for not less than one year or more than three years, unless the vehicle is forfeited. MCL 257.904d(1)(d). Forfeiture may be ordered in the court's discretion if the offender has an ownership interest in the vehicle used in the offense. The court may order that a leased vehicle be returned to the lessor. MCL 257.625n.

The Secretary of State must refuse issuance of a certificate of title, a registration, or a transfer of registration for a vehicle if the driver's license of the vehicle's owner or lessee is suspended, revoked, or denied for a third or subsequent violation of §625 or §625m or a local ordinance substantially corresponding to these sections. MCL 257.219(1)(d). This provision also applies to co-owners and co-lessees of the vehicle.

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CHAPTER 9

Elements of Selected Criminal Traffic Offenses

"Drunk Driving" Offenses

9.12 Operating While Visibly Impaired (OWI)—§625(3)

D. Issues

Delete the last paragraph on page 9-31 (beginning with "Impairment of ability. . .") and the quotation from *People v Calvin* on page 9-32. 2003 PA 61 eliminated MCL 257.625a(9), which contained presumptions applicable to drunk driving cases.

CHAPTER 9

Elements of Selected Criminal Traffic Offenses

"Drunk Driving" Offenses

9.13 "Zero Tolerance" Violations—§625(6)

Effective September 30, 2003, 2003 PA 61 amends §625 offenses. Beginning on page 9-33, replace the text in subsections (A), (B), and (C) with the following:

A. Statute

"(6) A person who is less than 21 years of age, whether licensed or not, shall not operate a vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles, within this state if the person has any bodily alcohol content. As used in this subsection, "any bodily alcohol content" means either of the following:

"(a) An alcohol content of not less than 0.02 grams or more but less than 0.08 grams per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine, or, beginning October 1, 2013, the person has an alcohol content of not less than 0.02 grams or more but less than 0.10 grams per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine.

"(b) Any presence of alcohol within a person's body resulting from the consumption of alcoholic liquor, other than consumption of alcoholic liquor as a part of a generally recognized religious service or ceremony."

. . . .

"(12) If a person is convicted of violating subsection (6), all of the following apply:

"(a) Except as otherwise provided in subdivision (b), the person is guilty of a misdemeanor punishable by 1 or both of the following:

(*i*) Community service for not more than 360 hours.

(*ii*) A fine of not more than $250.00.

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> "(b) If the violation occurs within 7 years of 1 or more prior convictions, the person may be sentenced to 1 or more of the following:
>
> (*i*) Community service for not more than 60 days.
>
> (*ii*) A fine of not more than $500.00.
>
> (*iii*) Imprisonment for not more than 93 days."

MCL 257.625(6) and (12)(a)–(b).

In addition to the penalties set forth above, the court may order the offender to pay the costs of prosecution. MCL 257.625(13).

B. Elements

1) The defendant, whether licensed or not, operated a motor vehicle on the date in question.

2) The defendant operated the vehicle on a Michigan highway or other place open to the public or generally accessible to motor vehicles, including a designated parking area.

3) The defendant was less than 21 years of age.

4) The defendant had "any bodily alcohol content."*

*See Section 9.13(A) for the definition of "any bodily alcohol content."

C. Licensing Sanctions

The discussion below sets forth the licensing sanctions imposed for first-time and repeat offenders convicted of violating §625(6). The Vehicle Code imposes no vehicle sanctions (i.e., immobilization or forfeiture) for §625(6) violations.

1. First-time Offender

After a violation of §625(6), the Secretary of State must suspend a person's driver's license for 30 days if the person has no prior convictions within seven years. MCL 257.319(8)(c). The Secretary of State may issue the person a restricted license during all or a specified portion of suspension, if the person is otherwise eligible for a license. MCL 257.319(8)(c) and (15).

The Secretary of State will assess four points for a violation of §625(6) or a law or local ordinance substantially corresponding to it. MCL 257.320a(1)(i).

2. Second-time Offenders of §625(6)

If the person has one or more prior convictions of §625(6) within seven years, the Secretary of State must suspend a person's driver's license for 90 days upon conviction of another violation of §625(6). MCL 257.319(8)(d). There

is no provision in the statute for issuing a restricted license to persons subject to this 90-day suspension.

The Secretary of State will assess four points for a violation of §625(6) or a law or local ordinance substantially corresponding to it. MCL 257.320a(1)(i).

3. Offenders Who Violate §625(6) Within Seven Years of a Prior Conviction

*MCL 257.303(2)(c) also includes a conviction of an attempted violation of §625(6).

Under MCL 257.303(2)(c) and (4), offenders convicted of violating §625(6)* within seven years of another prior conviction listed in the statute will be subject to mandatory driver's license revocation for a minimum of one year. The Secretary of State must revoke the licenses of §625(6) offenders who have one prior conviction of any of the following:

- OUIL, OUID, or UBAL, under §625(1).
- OWI, under §625(3).
- OUIL, OUID, UBAL, OWI, or OWPD causing death of another, under §625(4).
- OUIL, OUID, UBAL, OWI, or OWPD causing serious impairment of a body function of another, under §625(5).
- Child endangerment, under §625(7).
- OWPD, under §625(8).
- Any prior enactment of §625 in which the defendant operated a vehicle while under the influence of intoxicating or alcoholic liquor or a controlled substance, or a combination of intoxicating or alcoholic liquor and a controlled substance, or while visibly impaired, or with an unlawful bodily alcohol content.
- Former §625b, which provided criminal penalties for OWI.
- Operating a commercial motor vehicle with an unlawful bodily alcohol level, under §625m.

3. Offenders Who Violate §625(6) Within Ten Years of Two or More Prior Convictions

*This also includes offenders convicted of an attempted violation of §625(6).

Under MCL 257.303(2)(g) and (4), offenders convicted of violating §625(6) within ten years of two other prior convictions listed in the statute will be subject to mandatory driver's license revocation for a minimum of five years. The Secretary of State must revoke the licenses of §625(6) offenders* who have two prior convictions of the following violations or attempted violations, if the convictions resulted from arrest on or after January 1, 1992:

- OUIL, OUID, or UBAL, under §625(1).
- OWI, under §625(3).

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- OUIL, OUID, UBAL, OWI, or OWPD causing death of another, under §625(4).
- OUIL, OUID, UBAL, OWI, or OWPD causing serious impairment of a body function of another, under §625(5).
- Child endangerment, under §625(7).
- OWPD, under §625(8).
- Any prior enactment of §625 in which the defendant operated a vehicle while under the influence of intoxicating or alcoholic liquor or a controlled substance, or a combination of intoxicating or alcoholic liquor and a controlled substance, or while visibly impaired, or with an unlawful bodily alcohol content.
- Former §625b, which provided criminal penalties for OWI.
- Operating a commercial motor vehicle with an unlawful bodily alcohol level, under §625m.

September 2003

Update: Sexual Assault Benchbook

CHAPTER 4

Defenses To Sexual Assault Crimes

4.8 Duress

C. Burden of Proof

Insert the following text at the bottom of page 223:

In *People v McKinney*, ___ Mich App ___ (2003), the defendant was convicted of possession of over 650 grams of cocaine, possession with intent to deliver over 650 grams of cocaine, being a felon in possession of a firearm, maintaining a drug house, and possession of a firearm during the commission of a felony. The defendant's convictions resulted from evidence discovered during the execution of a search warrant in the apartment where the defendant resided with her boyfriend. The defendant was in the apartment when the search warrant was executed. The police confiscated two large bags of cocaine found inside a dresser that contained women's clothing. The defendant denied seeing any cocaine in the apartment or assisting her boyfriend in selling or packaging the cocaine. At trial, the defendant requested a jury instruction on duress based on allegations that her boyfriend was abusive and that she continued to live with him because she feared his reprisals. The defendant argued that a duress instruction was necessary to rebut the presumption that the defendant must have been helping her boyfriend given her presence in the apartment and the large amount of drugs that were discovered. The trial court declined to give the duress instruction because the defendant denied committing the crime. The Court of Appeals upheld the trial court's ruling and stated the following:

> "In [*People v*] *Lemons*, [454 Mich 234 (1997)], the Supreme Court affirmed the trial court's refusal to provide an instruction on duress where the defendant denied that any crime took place. As noted by *Lemons, supra* at 249, such testimony does not 'meet the burden on the defense to come forward with some evidence that the defendant did the act and chose to do so out of a reasonable and actual

belief that it was the lesser of two evils.' In the instant case, defendant expressly denied *ever* assisting [her boyfriend] in the sale or packaging of narcotics. . . . We further note that the jury was instructed that defendant's mere knowledge of the presence of cocaine in the apartment was insufficient to establish possession. Accordingly, the trial court acted within its discretion when it declined to give the requested duress instruction. See id. at 249." *McKinney, supra* at ___.

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CHAPTER 7

General Evidence

7.4 Selected Hearsay Rules (and Exceptions)

D. Statements of Existing Mental, Emotional, or Physical Condition—MRE 803(3)

Insert the following language in the fourth paragraph of subsection D, after the first sentence, on page 345:

In *People v Coy*, ___ Mich App ___ (2003), a witness testified that the murder victim told her that she had planned to meet the defendant on the night of the murder and asked her to page the defendant to remind him about the meeting. The trial court found the statement relevant to the victim's intention or plan to meet the defendant at her apartment on the night of the murder and was therefore admissible pursuant to MRE 803(3). The Court of Appeals upheld the trial court's determination and indicated that the victim's statement of future intent or plan to meet with defendant on the night of her murder fell within the plain meaning of MRE 803(3). ___ Mich App at ___.

CHAPTER 7

General Evidence

7.13 Polygraphs

A. Testing Rights

1. Defendants Charged With Criminal Sexual Conduct Offenses

Replace the first four sentences in the second paragraph on page 378 with the following text:

A defendant who "allegedly has committed" an enumerated CSC violation does not lose the right to request a polygraph examination until a finding of guilt. See *People v Phillips*, ___ Mich ___ (2003) (holding that a defendant who requests a polygraph after the conclusion of proofs but before the jury returns a verdict does not forfeit the right to a polygraph, although the defendant would not be entitled to a new trial or a polygraph unless he or she can demonstrate that the error was outcome determinative).

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CHAPTER 8

Scientific Evidence

8.2 Expert Testimony in Sexual Assault Cases

A. General Requirements for Admissibility of Expert Testimony

Please replace the text regarding MRE 703 on page 401 with the following:

Effective September 1, 2003, MRE 703 was amended by Michigan Supreme Court . MRE 703 now states:

> "The facts or data in the particular case upon which an expert bases an opinion or inference shall be in evidence. This rule does not restrict the discretion of the court to receive expert opinion testimony subject to the condition that the factual bases of the opinion be admitted in evidence thereafter."

CHAPTER 8

Scientific Evidence

8.6 DNA Testing and Admissibility

J. DNA Statistical Interpretation Evidence

2. When DNA Evidence Must Be Supplemented With Statistical Analysis

Insert the following text at the end of the text on page 431:

After the Court of Appeals issued its decision in *People v Coy (Coy I)*, 243 Mich App 283 (2000), the defendant was retried on the same charges. *People v Coy (Coy II)*, ___ Mich App ___ (2003). Prior to the second trial, the trial court held an evidentiary hearing regarding the admissibility of the mixed sample DNA evidence. At the hearing, the technical director of the testing laboratory testified that the probabilities on the mixed sample were calculated according to the recommendations of the DNA Advisory Board utilizing a computer program developed by the FBI. The technical director indicated that the statistical calculations at issue are not new or novel, are used in many areas, and are accepted by the scientific community. Another expert explained the ratios, their acceptance, reliability, and how they are used in many areas other than forensic DNA or forensic genetic testing. At the close of the evidentiary hearing, the trial court concluded that the admissibility of DNA evidence and statistical evidence concerning DNA has been established throughout Michigan and the United States. Subsequently, the DNA evidence and statistical evidence was introduced at trial, and the defendant was convicted of voluntary manslaughter. The defendant appealed, claiming the trial court erroneously admitted the statistical analysis of the DNA profiles developed from the mixed blood samples. *Coy II, supra* at ___. The Court of Appeals upheld the trial court's decision to admit the DNA statistical evidence. The Court of Appeals stated:

> "In this case, the trial court correctly found no novel scientific techniques or principles at issue such that a *Davis-Frye* analysis was necessary. Our courts firmly accept PCR testing of evidence to obtain DNA profiles. *Coy, supra* at 292. In addition, the premise of this Court's prior opinion is that statistics are an integral part of DNA evidence and are necessary to assist the trier of fact. *Id.* at 297-302." *Coy II, supra at* ___.

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CHAPTER 9

Post-Conviction and Sentencing Matters

9.5 Imposition of Sentence

B. Sentencing Guidelines

1. Guideline Framework

Insert the following text after the third full paragraph on page 454:

In *People v Babcock (Babcock III)*, ___ Mich ___ (2003), the Michigan Supreme Court issued its first comprehensive interpretation of the legislative sentencing guidelines. In *Babcock,* the trial court made a downward departure from the sentencing guidelines. The prosecutor appealed, and in *People v Babcock (Babcock II)*, 250 Mich App 463 (2002), the Court of Appeals affirmed the sentence indicating that although some factors cited by the trial court were not objective and verifiable, the trial court did not abuse its discretion by departing from the guidelines. The prosecutor filed an application for leave to appeal. The Supreme Court granted leave and concluded*:

> "[T]he Court of Appeals concluded that some of the reasons articulated by the trial court were not objective and verifiable. As explained above, if a reason is not objective and verifiable, it cannot constitute a substantial and compelling reason. As also explained above, if the trial court articulates multiple reasons, and the Court of Appeals, as in this case, determines that some of these reasons are substantial and compelling and some are not, and the Court of Appeals is unable to determine whether the trial court would have departed to the same degree on the basis of the substantial and compelling reasons, the Court must remand the case to the trial court for resentencing or rearticualtion. Because the Court of Appeals in this case did not determine whether the trial court would have departed, and would have departed to the same degree, absent consideration of the reasons that the Court of Appeals found to be not objective and verifiable, we reverse its judgment and remand this case to the Court of Appeals for further consideration." [Footnotes omitted.] *Babcock III, supra* at ___.

*Justices Markman, Kelly, and Taylor signed the lead opinion. Chief Justice Corrigan concurred in part and dissented in part, as explained below, and Justice Young signed the Chief Justice's opinion. Justice Cavanagh and Justice Weaver also concurred in part and dissented from the majority's requirement that the factors allowing for departure be "objective and verifiable."

*The Court of Appeals has stated that "[b]ecause a majority of the justices writing separately concurred with most of the lead opinion except one or two parts specifically stated in those separate opinions, we conclude that a majority of justices concurred with the appendix. Thus, the appendix is binding law." *People v Lowery,* ___ Mich App ___, ___ n 3 (2003).

In order to assist the bench and bar, the Supreme Court included an appendix to the opinion.* The appendix summarizes the responsibilities of the trial court and the Court of Appeals under the statutory sentencing guidelines as follows:

> "1. A trial court is required to choose a minimum sentence within the guidelines range, unless there is a substantial and compelling reason for departing from this range. MCL 769.34(2), (3).
>
> "2. If a trial court's sentence is within the guidelines range, the Court of Appeals must affirm the sentence unless the trial court erred in scoring the guidelines or relied on inaccurate information in determining the defendant's sentence. MCL 769.34(10).
>
> "3. A substantial and compelling reason must be 'objective and verifiable'; must "'keenly' or 'irresistibly' grab our attention"; and must be "of 'considerable worth' in deciding the length of a sentence.'" [*People v*] *Fields*, [448 Mich 58, 62, 67 (1995)].
>
> "4. A trial court must articulate on the record a substantial and compelling reason for its *particular* departure, and explain why this reason justifies that departure. MCL 769.34(3); *People v Daniel*, 462 Mich 1, 9; 609 NW2d 557 (2000).
>
> "5. A trial court 'shall not base a departure on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds . . . that the characteristic has been given inadequate or disproportionate weight.' MCL 769.34(3)(b).
>
> "6. In considering whether, and to what extent, to depart from the guidelines range, a trial court must ascertain whether taking into account an allegedly substantial and compelling reason would contribute to a more proportionate criminal sentence than is available within the guidelines range. MCL 769.34(3).
>
> "7. In reviewing sentencing decisions, the Court of Appeals may not affirm a sentence on the basis that, although the trial court did not articulate a substantial and compelling reason for a departure, one nonetheless exists in the judgment of the Court of Appeals. Instead, in such a situation, the Court of Appeals must remand the case to the trial court for resentencing. MCL 769.34(3); MCL 769.34(11).
>
> "8. If a trial court articulates multiple 'substantial and compelling' reasons for a departure from the guidelines, and the Court of Appeals determines that some of these reasons are substantial and compelling and others are not, the panel must determine whether the trial court would have departed, and would have departed to

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> the same degree, on the basis of the substantial and compelling reasons alone. MCL 769.34(3).
>
> "9. If a trial court departs from the guidelines range, and its sentence is not based on a substantial and compelling reason to justify the *particular* departure, i.e., the sentence is not proportionate to the seriousness of the defendant's conduct and his criminal history, the Court of Appeals must remand to the trial court for resentencing. MCL 769.34(11).
>
> "10. ''[T]he existence or nonexistence of a particular [sentencing] factor is a factual determination for the sentencing court to determine, and should therefore be reviewed by an appellate court for clear error.'' *Babcock I,* [244 Mich App 64, 75-76 (2000)], quoting [*People v*] *Fields*, [448 Mich 58, 77 (1995)].
>
> "11. ''The determination that a particular [sentencing] factor is objective and verifiable should be reviewed by the appellate court as a matter of law.'' *Babcock I,* [244 Mich App 64, 76 (2000)], quoting [*People v*] *Fields*, [448 Mich 58, 78 (1995)].
>
> "12. ''A trial court's determination that the objective and verifiable factors present in a particular case constitute substantial and compelling reasons to depart from the statutory minimum sentence shall be reviewed for abuse of discretion.'' *Babcock I,* [244 Mich App 64, 76 (2000)], quoting [*People v*] *Fields*, [448 Mich 58, 78 (1995)]. An abuse of discretion occurs when the trial court chooses an outcome falling outside the permissible principled range of outcomes." *Id.* at ___.

Chief Justice Corrigan dissented from the majority's requirement that the Court of Appeals remand a case to the trial court "if the trial court articulates multiple reasons [for departure], and the appellate court . . . determines that some of these reasons are substantial and compelling and some are not, and the Court of Appeals is unable to determine whether the trial court would have departed to the same degree on the basis of the substantial and compelling reasons . . . ." *Babcock III, supra* at ___. This requirement may force the Court of Appeals to remand a large number of cases to the trial courts for resentencing or rearticulation. In an effort to mitigate the number of cases that would be remanded, Chief Justice Corrigan strongly urges that every trial judge add the following disclaimer to every judgment of sentence that departs from the guidelines:

> "I am persuaded that the defendant should serve the sentence I have rendered and it is my intention that this sentence be sustained if an appellate court determines that any of my rationales for departure survive review." *Id.* at ___.

September 2003

Update: Traffic Benchbook—Revised Edition, Volume 2

CHAPTER 1

Introduction to Vehicle Code §625 and §904

Effective September 30, 2003, Public Act 61 and Public Act 134 make significant changes to statutory law governing Section 625 Offenses. The following text replaces Chapter 1 in its entirety.

Summary of Contents

1.1 Scope Note.....
1.2 Highlights of Recent Legislation.....
1.3 Definitions Commonly Used in §625 and §904 of the Vehicle Code.....

This chapter provides an overview of the material addressed in Part I of this volume of the *Traffic Benchbook.* It also describes recent legislation directed at those who commit repeated violations of §625 and §904 of the Michigan Vehicle Code, and introduces certain terminology that is particularly important in criminal cases involving violations of MCL 257.625 and 257.904.

1.1 Scope Note

Volume 2, Part I of the *Traffic Benchbook* addresses §625 and §904 of the Michigan Vehicle Code,* which set forth the criminal sanctions for various offenses involving driving under the influence of alcohol or drugs and driving with a suspended or revoked license. Volume 2, Part I contains five chapters. These chapters contain:

*MCL 257.625 and MCL 257.904.

- Definitions for terms that occur throughout the Vehicle Code's provisions regarding driving under the influence or unlicensed driving (Chapter 1);
- Information about procedural matters that are unique to §625 and §904 offenses (Chapter 2);

- A list of the elements of and sanctions for each §625 and §904 offense (Chapters 3 and 4); and,
- Information about penalties for violation of vehicle sanctions that may be imposed upon persons who violate §625 and §904 of the Vehicle Code (Chapter 5).

The discussion in this benchbook assumes that the offender is an adult. For information about traffic offenses involving minors, see the companion volume to the *Traffic Benchbook*—Miller, *Juvenile Traffic Benchbook* (MJI, 1999).

Offenses involving vehicles other than private automobiles are beyond the scope of the chapters in this part. For information about offenses involving snowmobiles, watercraft, and ORVs, see Volume 1 of the *Traffic Benchbook.* Although a few isolated sections of the benchbook contain limited information regarding drivers of commercial motor vehicles, the *Traffic Benchbook* does not offer any detailed discussion of offenses involving commercial motor vehicles.

Finally, the chapters in this part only contain information about the offenses set forth in §625 and §904 of the Vehicle Code, along with certain related offenses involving chemical tests for bodily alcohol content, and vehicle sanctions imposed as part of a sentence for a §625 or §904 offense. Drunk driving offenses appearing in other Michigan statutes are discussed elsewhere in the *Traffic Benchbook*. See, e.g., the following sections:

- Drunk driving causing injury to a pregnant woman and resulting in miscarriage or stillbirth under MCL 750.90d—Volume 2, Section 8.2.
- Felonious driving under MCL 752.191—Volume 2, Section 9.1.

For information about drug-related offenses arising under the Controlled Substances Act, MCL 333.7101 et seq., see *Managing a Trial Under the Controlled Substances Act* (MJI, 1995). A discussion of licensing sanctions imposed for violations of the Controlled Substances Act appears at Section 15.8 of that benchbook.

1.2 Highlights of Recent Legislation

*See 1998 PA 340–359 and 1999 PA 21, 51–59, 73–77.

2003 PA 61 and 2003 PA 134 are effective on September 30, 2003. Both acts include amendments to the Vehicle Code intended to increase the criminal penalties and other sanctions imposed for violations of §625 and §904. Notwithstanding the significant changes made by this pair of public acts, the new laws preserve the substantive content of changes made by legislation in 1998 and 1999* aimed at providing a deterrent to potential repeat offenders with its system of progressive punishment.

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The rest of this section summarizes the major changes in §625 and §904 law effected by the recent legislation.

A. New Offenses Added in 1998/99

The following offenses were established by the 1998/99 legislation:*

- Child endangerment—MCL 257.625(7).
- Permitting a person under the influence of alcohol or drugs to operate a motor vehicle, causing death or serious impairment of a body function—MCL 257.625(2).
- Allowing a person to operate a vehicle with a suspended or revoked license, causing death or serious impairment of a body function—MCL 257.904(7).
- Driving with a suspended or revoked license, causing death or serious impairment of a body function—MCL 257.904(4)–(5).

The following provisions of the legislation penalize violations of sentence conditions imposed on drunk or unlicensed drivers:

- Violations of court orders for vehicle immobilization under MCL 257.904e(2)–(4).
- Ignition interlock violations under MCL 257.625*l*(2)–(3).
- Transfers to avoid vehicle forfeiture under MCL 257.233(3)–(4).

*§625 offenses in existence at the time Public Acts 61 and 134 were enacted are discussed in detail in Chapter 3. §904 offenses in existence then are discussed in Chapter 4.

B. Attempted Vehicle Code Violations Are to Be Treated as Completed Offenses

Beginning in 1999, attempted traffic offenses were treated as completed offenses for purposes of imposing criminal penalties, licensing sanctions, or vehicle sanctions under the Vehicle Code. MCL 257.204b provides:

> "(1) When assessing points, taking licensing or registration actions, or imposing other sanctions under this act for a conviction of an attempted violation of a law of this state, a local ordinance substantially corresponding to a law of this state, or a law of another state substantially corresponding to a law of this state, the secretary of state or the court shall treat the conviction the same as if it were a conviction for the completed offense.
>
> "(2) The court shall impose a criminal penalty for a conviction of an attempted violation of this act or a local ordinance substantially corresponding to a provision of this act in the same manner as if the offense had been completed."

See Section 7.1 for more discussion of this statute.

C. New §625 Offense Added by 2003 Legislation

The 2003 legislation added one offense to the violations listed in §625: MCL 257.625(8) prohibits the operation of a motor vehicle by a person with any amount of a specified controlled substance in his or her body. Operating with any presence of drugs (OWPD) is similar to the "zero tolerance" offense involving a minor's consumption of alcohol. Section 3.8 includes a detailed discussion of the elements of an OWPD violation and its consequent criminal penalties and other sanctions.

D. Tracking Misdemeanor Offenders

The 1998/99 legislation increased the term of imprisonment for certain misdemeanor offenses from 90 to 93 days, a difference in sentence length that makes it more likely a person's prior criminal history will appear in state police records. This is critical to providing courts with adequate information for the purpose of sentencing repeat offenders.

Increasing misdemeanor penalties to 93 days makes state police records more complete because the 93-day penalty triggers the fingerprinting requirements of MCL 28.243. Under this statute, local law enforcement authorities must send two sets of fingerprints to the state police as follows:

- Within 72 hours after the arrest of a person for a felony or a misdemeanor for which the maximum penalty exceeds 92 days' imprisonment and/or a fine of $1,000.00. MCL 28.243(1).
- Within 72 hours after entry of a misdemeanor conviction for a local ordinance violation for which the maximum penalty exceeds 92 days' imprisonment. MCL 28.243(2).

Local authorities have discretion to take the fingerprints of persons arrested for other misdemeanors. These fingerprints are only to be sent to the state police if the person is convicted of a misdemeanor. MCL 28.243(4). For traffic offenses, however, MCL 28.243(13) prohibits local authorities from sending the state police the fingerprints of persons accused and convicted under the Vehicle Code or a local ordinance substantially corresponding to the Vehicle Code unless the offense is punishable by more than 92 days' imprisonment or is an offense punishable by more than 92 days' imprisonment upon a subsequent conviction.

Townships, cities, villages, and other municipalities are authorized to adopt ordinances with 93-day terms of imprisonment in cases where the ordinance would substantially correspond to a state statute that also imposes a maximum term of imprisonment of 93 days. See e.g., MCL 41.183(5), 117.4i(k). 93-day penalties trigger the fingerprinting requirements of MCL 28.243, facilitating the compilation of a criminal history in the event that a misdemeanor defendant later commits another offense.

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E. Tougher Criminal Penalties and Licensing Sanctions for Repeat Offenders

In addition to increasing many misdemeanor penalties to 93 days, the 1998/99 legislation enhanced criminal penalties and licensing sanctions for repeat offenders of §625 or §904.

In general, any combination of two prior §625 offenses within seven years results in enhanced criminal penalties and driver's license revocation. Any combination of three prior §625 convictions within ten years will result in felony penalties and license revocation for a longer period of time.* With respect to §904 offenses, the 1998 legislation generally increased criminal penalties and periods of license suspension or revocation where the offender has multiple §904 suspension violations within seven years.

*Only 1 "zero tolerance" violation under §625(6) may be counted as a prior conviction and no §625(2) violations may be counted as prior convictions.

> **Note:** Vehicle Code §625 and §904 offenses are not interchangeable in determining whether a person has prior convictions for purposes of enhancing criminal penalties or periods of license suspension.

F. Discretionary Vehicle Forfeiture

Vehicle forfeiture pursuant to §625n* may be imposed at the court's discretion for various offenses under §625 and §904 of the Vehicle Code. An offender's vehicle is subject to forfeiture for the following violations:

*MCL 257.625n has not yet been amended to reflect the changes made by 2003 PA 61 to section 625 of the Vehicle Code.

- OUIL/OUID/UBAC/OWPD under §625(1) or (8), occurring within seven years of one prior conviction or within ten years of two or more prior convictions. MCL 257.625(9)(e), (f).
- OWI under §625(3), occurring within seven years of one prior conviction or within ten years of two prior convictions. MCL 257.625(11)(e), (f).
- OUIL/OUID/UBAC/OWI/OWPD causing death or serious impairment of a body function under §625(4)–(5). MCL 257.625(4)(a), (5).
- Child endangerment under §625(7). MCL 257.625(7)(c).
- DWLS causing death or serious impairment of a body function under §904(4)–(5). MCL 257.904(6).

G. Vehicle Immobilization

MCL 257.904e(1) authorizes courts to order vehicle immobilization "by the use of any available technology approved by the court that locks the ignition, wheels, or steering of the vehicle or otherwise prevents any person from operating the vehicle or that prevents the defendant from operating the vehicle." Depending on the offense (or on the number of offenses), vehicle immobilization may be mandatory or discretionary.

Mandatory Immobilization — MCL 257.904d(1)–(2) require vehicle immobilization upon conviction of the following violations of §625 and §904:

- Any violation of §904(4) or (5) (DWLS causing death or serious impairment of a body function).
- A moving violation committed while driving with a suspended/revoked license and occurring within seven years of two or more prior suspensions, revocations, or denials imposed under §904(10), (11), or (12) (moving violations committed while driving with a suspended or revoked license).
- Any violation of §625(4) or (5) (OUIL/OUID/UBAC/OWI/OWPD causing death or serious impairment of a body function).
- A violation of §625(1), (3), (7), or (8) (OUIL/OUID/UBAC/OWI/OWPD or child endangerment) within seven years after one prior conviction or within ten years after two or more prior convictions. MCL 257.904d(8) defines "prior conviction" as a violation or attempted violation of the following provisions under Michigan law, or of a substantially corresponding local ordinance or law of another state:

  – OUIL/OUID/UBAC under §625(1).

  – OWI under §625(3).

  – OUIL/OUID/UBAC/OWI/OWPD causing death or serious impairment of a body function under §625(4)–(5).

  – Zero tolerance violations under §625(6); however, only one such conviction may count as a prior conviction for purposes of immobilization.

  – Child endangerment under §625(7).

  – OWPD under §625(8).

  – Operating a commercial motor vehicle with an unlawful bodily alcohol content, under §625m.

  – Former §625b (formerly provided penalties for OWI).

  – A violation of any prior enactment of §625, including former subsections (1) and (2), which penalized OUIL/D and UBAC, respectively.

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– Negligent homicide, manslaughter, or murder resulting from the operation of a vehicle or an attempt to commit any of those crimes.

Note: "Prior conviction" does not include a previous conviction for §625(2) (permitting another to operate a vehicle while intoxicated). If two prior convictions arise from a single incident, only one of those convictions may be counted as a prior conviction. MCL 257.904d(9).

Discretionary Immobilization — The court may order vehicle immobilization for conviction of the following offenses:

– First offenses under §625(1), (3), (7), or (8) or a local ordinance substantially corresponding to §625 (1) or (3). MCL 257.904d(1)(a).

– A moving violation committed while driving with a suspended/ revoked license within seven years of a prior suspension, revocation, or denial imposed under §904(10), (11), or (12) or former section 904(2) or (4). MCL 257.904d(2)(a).

H. Registration Plate Confiscation

MCL 257.904c requires police to immediately confiscate and destroy the vehicle registration plates of drivers detained for offenses for which vehicle immobilization is *required*. These drivers are issued a temporary vehicle registration plate, which is valid until the charges against the driver are dismissed, the driver pleads guilty or nolo contendere to the charges, or the charges are adjudicated.

See the above discussion for a list of offenses requiring vehicle immobilization.

I. Registration Denial

The Secretary of State shall refuse issuance of a certificate of title, a registration, or a transfer of registration for a vehicle if the driver's license of the vehicle's owner, co-owner, lessee, or co-lessee is suspended, revoked, or denied for one of the following offenses:

*Section 625m concerns operating a commercial motor vehicle with an unlawful bodily alcohol content. A detailed discussion of commercial vehicle offenses is beyond the scope of this benchbook.

- A third or subsequent violation of §625 or §625m* or a local ordinance substantially corresponding to these sections.
- A fourth or subsequent suspension or revocation of a driver's license under §904.

See MCL 257.219(1)(d).

J. Authority to Order Licensing Sanctions Consolidated in Secretary of State

Prior to October 1, 1999, courts and the Secretary of State had statutory authority to order licensing sanctions for certain offenses, including OUIL, UBAC, and OUIL/OWI causing death or serious injury. For arrests after October 1, 1999, the authority to impose licensing sanctions has been consolidated in the Secretary of State in *all* cases, *except* for:

- Drug suspensions ordered under the Public Health Code, MCL 333.7408a; or
- No proof of insurance convictions, MCL 257.328.

On licensing sanctions imposed by the Secretary of State, see, e.g., MCL 257.319(8) and MCL 257.303(2).

1.3 Definitions Commonly Used in §625 and §904 of the Vehicle Code

A. "Controlled Substance"

*For more complete discussion of "controlled substances," see *Managing a Trial Under the Controlled Substances Act,* Section 1.6 (MJI, 1995).

"Controlled substance" for purposes of the Michigan Vehicle Code means "a controlled substance or controlled substance analogue as defined in [MCL 333.7104, the Controlled Substances Act]." MCL 257.8b. The Michigan Board of Pharmacy classifies drugs as "controlled substances" under the Controlled Substances Act according to five schedules set forth in MCL 333.7211–.7220. These schedules contain many substances that have a potential for or history of abuse, including narcotics (e.g., heroin, morphine, methadone), hallucinogenic drugs (e.g., LSD, marijuana, mescaline, peyote), and cocaine.*

B. "Conviction"

*See also "prior conviction" below.

MCL 257.8a defines "conviction" as "a final conviction, the payment of a fine, a plea of guilty or nolo contendere if accepted by the court, or a finding of guilt for a criminal law violation...."*

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In *People v Vezina*, 217 Mich App 148, 151 (1996), the Court of Appeals distinguished a "violation" of the OUIL statute from a "conviction" for purposes of enhancing the penalties for a repeat offender. At the time at issue in this case, the OUIL statute* provided for enhanced penalties where the "violation" in question occurred within seven years of a prior OUIL "conviction." Rejecting the defendant's argument that the word "violation" in the statute is synonymous with "conviction," the Court held that a "violation" occurs when the unlawful act takes place. Thus, OUIL penalties for a violation must be enhanced if the defendant's wrongful act occurred within seven years of a prior conviction.

*Former MCL 257.625(6). Current §625(9) contains a similar provision.

C. "Generally Accessible" to Motor Vehicles

In a case involving the OUIL statute,* the Court of Appeals noted that "a place where vehicles are routinely permitted to enter for the purpose of driving and parking" is "generally accessible to motor vehicles." *People v Nickerson*, 227 Mich App 434, 440 (1998). In *Nickerson,* such a place included the pit area of a motor speedway where spectators could park upon payment of an admission fee. The Court in *Nickerson* further found that the statutory phrases "open to the general public" and "generally accessible to motor vehicles" in the OUIL statute specify two distinct alternative places other than highways where driving a vehicle under the influence of intoxicants is prohibited. *Id*.

*MCL 257.625(1).

D. "Ignition Interlock Device"

An ignition interlock device measures alcohol concentration in a driver's breath. It prevents a motor vehicle from being started at any time without first determining the driver's breath alcohol level through a deep lung sample. The system is calibrated so that the vehicle may not be started if the breath alcohol level of the driver measures a level of 0.025 grams per 210 liters of breath. MCL 257.625*l*(6).

See Section 2.10(C) on procedures for ordering installation of an ignition interlock device, and Section 5.1 on penalties for circumventing the device.

E. "Motor Vehicle" and "Vehicle"

For purposes of the discussion in this chapter, MCL 257.33 defines "motor vehicle" as follows:

> "'Motor vehicle' means every vehicle that is self-propelled.... Motor vehicle does not include an electric patrol vehicle being operated in compliance with the electric patrol vehicle act."

MCL 257.79 defines "vehicle" as:

> "Every device in, upon, or by which any person or property is or may be transported or drawn upon a

> highway, except devices exclusively moved by human power or used exclusively upon stationary rails or tracks....”

Note: This part of Volume 2 of the *Traffic Benchbook* is concerned only with private automobiles. Offenses involving snowmobiles, watercraft, and ORVs are addressed in Volume 1. Commercial motor vehicles are beyond the scope of this benchbook.

F. “Operating” a Vehicle

MCL 257.35a defines “operate” or “operating” as “being in actual physical control of a vehicle regardless of whether or not the person is licensed under [the Vehicle Code] as an operator or chauffeur.”

The Michigan Supreme Court considered the meaning of “operating” a vehicle in *People v Wood*, 450 Mich 399 (1995). In *Wood,* police found the defendant unconscious in his van at a restaurant drive-through window. The van’s engine was running, the transmission was in drive, and the defendant’s foot was on the brake pedal, which kept the van from moving. The Court held that the defendant was “operating” the vehicle for purposes of the OUIL statute, MCL 257.625(1):

> “We conclude that ‘operating’ should be defined in terms of the danger the OUIL statute seeks to prevent: the collision of a vehicle being operated by a person under the influence of intoxicating liquor with other persons or property. Once a person using a motor vehicle as a motor vehicle has put the vehicle in motion, or in a position posing a significant risk of causing a collision, such a person continues to operate it until the vehicle is returned to a position posing no such risk.” 450 Mich at 404–405.*

*In so holding, the Court overruled *People v Pomeroy* (On Rehearing), 419 Mich 441 (1984).

The Court of Appeals has affirmed OUIL convictions in cases where there was circumstantial evidence to prove that a defendant was operating a vehicle while under the influence of intoxicants at some time prior to arrest. See *People v Schinella*, 160 Mich App 213, 216 (1987) (defendant found in a car straddling a ditch with the engine turned off, under circumstances indicating attempts to dislodge the vehicle before police arrived), and *People v Smith*, 164 Mich App 767, 770 (1987) (defendant found unconscious in a car on the highway shoulder 1/4 mile from the nearest exit, with the transmission in park and the motor running).

See also CJI2d 15.11, 15.12 (OUIL/UBAL/OWI causing death, serious impairment of a body function), which state that “[o]perating means driving or having actual physical control of the vehicle.”

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G. "Prior Conviction"

Enhancement of criminal penalties and certain other sanctions for §625 and §904 violations depends upon whether the offender has any "prior convictions." In considering an offender's "prior convictions" for purposes of imposing enhancements, it is important to distinguish between drunk driving and suspended/revoked license violations. Offenses under §625 and §904 are generally not interchangeable in deciding whether a person has a "prior conviction."

1. "Prior Convictions" for §625 Offenses

The Vehicle Code contains two lists of prior convictions that will result in enhanced penalties for repeat offenders who violate §625. One list applies to the following penalties and sanctions:

- Imposition of criminal penalties (jail terms, fines) under MCL 257.625(25);
- Orders for vehicle immobilization under MCL 257.904d(8); and,
- Driver license suspensions under MCL 257.319(19).

The other list applies to license revocation under MCL 257.303(2).

In cases involving §625 offenses, the definition of "prior conviction" is the same for purposes of imposing criminal penalties, vehicle immobilization, and driver's license suspension. "Prior conviction" in these three contexts means a conviction for any of the following violations or attempted violations, whether under a law of the State of Michigan, a local ordinance substantially corresponding to a Michigan law, or a law of another state substantially corresponding to a Michigan law:*

*See below for a definition of "substantially corresponding" laws or local ordinances.

- OUIL/OUID/UBAC/OWI/OWPD under §625(1), (3), or (8).
- OUIL/OUID/UBAC/OWI/OWPD causing death under §625(4).
- OUIL/OUID/UBAC/OWI/OWPD causing serious impairment of a body function under §625(5).
- "Zero tolerance" violations under §625(6).

> **Note:** With the exception of a second §625(6) violation within seven years of a previous §625(6) conviction, only one violation or attempted violation of §625(6) or a corresponding statute or ordinance from another jurisdiction may be counted as a prior conviction for purposes of penalty enhancement in section 625. Where an offender is convicted of violating §625(6) for a second time within seven years, MCL 257.625(12)(b) allows the

use of both convictions for purposes of the penalties listed there. MCL 257.625(26).

- Child endangerment under §625(7).
- Operating a commercial motor vehicle with an unlawful bodily alcohol content under §625m.
- Former §625b (provided criminal penalties for OWI).
- A violation of any prior enactment of §625, including former subsections (1) and (2) (which penalized OUIL/D and UBAC, respectively).
- Negligent homicide, manslaughter, or murder resulting from the operation of a vehicle or an attempt to commit any of those crimes.

A conviction for violating or attempting to violate MCL 257.625(2) (permitting an intoxicated person to operate a motor vehicle) may **not** be counted as a "prior conviction" for purposes of penalty enhancement under section 625. MCL 257.625(25)(a)(*i*).

If two or more of the above convictions arise out of the same transaction, only one conviction may be counted as a prior conviction. MCL 257.625(27).

2. "Prior Convictions" and License Suspension

MCL 257.319(8) contains a detailed list of suspension periods that increase proportionately to the number of "prior convictions" as defined in section 319. The list of offenses in §319 is the same as the list applicable to §625 offenses. See MCL 257.319(19).

> **Note:** With the exception of a second §625(6) violation within seven years of a previous §625(6) conviction, only one violation or attempted violation of §625(6) or a corresponding statute or ordinance from another jurisdiction may be counted as a prior conviction for purposes of enhanced license suspension under §319. Where an offender is convicted of violating §625(6) for a second time within seven years, MCL 257.319(8)(d) allows the use of both convictions for purposes of the penalties listed there. MCL 257.319(20).

If two or more of the prior convictions arise out of the same transaction, only one conviction may be counted as a prior conviction. MCL 257.319(21).

3. "Prior Convictions" for Purposes of License Revocation

The prior convictions that must be considered for purposes of license revocation under MCL 257.303(2)(c) and (g) are the same as the prior convictions listed in §319 and §625. MCL 257.303(d) mandates license

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revocation for any conviction of §904(4) or (5) (DWLS causing death or serious injury). See Section 2.10(B) for more information about license revocation in drunk driving cases.

4. "Prior Convictions" for Section 904 Offenses

Enhanced licensing sanctions apply to an offender who unlawfully operates a vehicle or commits a moving violation when his or her driver's license is suspended or revoked. MCL 257.904(10), (11), and (12) mandate the imposition of additional periods of suspension or revocation for repeat offenders. However, an offense occurring during a first-time suspension for failing to appear in court (FAC) or failing to comply with a judgment (FCJ) under MCL 257.321a will not count as a prior offense for purposes of enhancement under §904(10)–(12). This exemption for an FAC/FCJ suspension violation applies only once during a person's lifetime; if there is a subsequent FAC/FCJ suspension violation, both it and the first violation are counted for purposes of enhancement. MCL 257.904(18).

In addition to enhanced licensing sanctions, persons who commit multiple offenses while driving with a suspended or revoked license are also subject to increasing criminal penalties and vehicle sanctions. See e.g., §904(3) (providing enhanced criminal penalties for repeat DWLS offenders) and §904d(2) (providing periods of vehicle immobilization that increase with the number of multiple offenses within the past seven years).

H. "Serious Impairment of a Body Function"

"Serious impairment of a body function" is found in the following contexts within the Michigan Vehicle Code:

- OUIL/OUID/UBAC/OWI/OWPD causing serious impairment of a body function, under MCL 257.625(5);
- Driving while license suspended or revoked and causing serious impairment of a body function, under MCL 257.904(5); and,
- Allowing another person to drive with license suspended or revoked, where the other person causes serious impairment of a body function, under MCL 257.904(7).

*2003 PA 61 eliminated the list of serious impairments previously included in §625(5) of the Vehicle Code. However, other subsections of §625 use the phrase "serious impairment of a body function" in defining offenses under that section.

"Serious impairment of a body function"* is defined in MCL 257.904(5) for purposes of its use in §904(5) and (7) as including (without limitation) one or more of the following injuries:

- Loss or lost use of a limb.
- Loss or lost use of a foot, hand, finger, or thumb.
- Loss or lost use of an eye or ear.
- Loss or substantial impairment of a bodily function.
- Serious visible disfigurement.
- A comatose state that lasts for more than 3 days.
- Measurable brain or mental impairment.
- A skull fracture or other serious bone fracture.
- Subdural hemorrhage or subdural hematoma.

I. "Substantially Corresponding" Ordinance or "Law" of Another "State"

Many Vehicle Code provisions authorize enhancement of penalties for repeat offenders based upon prior convictions under other jurisdictions' statutes or ordinances that "substantially correspond" to Michigan statutes. See, e.g., MCL 257.303(2), authorizing the Secretary of State to revoke a driver's license upon receipt of records of conviction under "a law of this state, a local ordinance substantially corresponding to a law of this state, or a law of another state substantially corresponding to a law of this state." To fully understand such provisions, the terms "substantially corresponding," "law of another state," and "state" must be defined.

1. "Substantially Corresponding"

In *Johnson v Secretary of State*, 224 Mich App 158 (1997), the Court of Appeals considered the meaning of "substantial correspondence" in determining whether a driver convicted under Michigan's OUIL statute would be subject to license revocation as a repeat offender based on a previous conviction under a Wisconsin drunk driving statute. The Court noted that the offense of drunk driving was defined in similar terms under both state statutes at issue; however, violation of the Wisconsin statute constituted a civil infraction for which no jail term would be imposed. Nonetheless, the Court found that the Wisconsin statute was "substantially corresponding" to Michigan's OUIL statute, and upheld the Secretary of State's decision to revoke the driver's license. Despite the difference in the categorization of the Michigan and Wisconsin offenses, the Court noted that: 1) it is the offense rather than the penalty that must correspond to the Michigan statute; 2) the procedures for adjudicating first offense OUIL violations in Michigan and Wisconsin were similar; 3) the driver was

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afforded procedural protections similar to those in a criminal proceeding; and, 4) like Michigan, Wisconsin provides criminal penalties for second OUIL offenses.

See also *Kutzli v Secretary of State,* 152 Mich App 38, 41 (1986) (Another state's statute substantially corresponds to a Michigan statute where it contains language similar to the Michigan statute or proscribes the same conduct as the Michigan statute; procedures by which a conviction is obtained are not determinative).

2. "Law of Another State"

The Vehicle Code defines the term "law of another state" to mean "a law *or ordinance* enacted by another state or by a local unit of government in another state." MCL 257.24c [Emphasis added]. Under this definition, violations of local ordinances in other states may be considered for purposes of penalty enhancement under repeat offender provisions that encompass offenses committed under the "law of another state."

3. "State"

Under the Vehicle Code, a "state" is "any state, territory, or possession of the United States, Indian country as defined in 18 USC 1151, the District of Columbia, or any province of the Dominion of Canada." MCL 257.65.

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Update: Traffic Benchbook—Revised Edition, Volume 2

CHAPTER 2

Procedures in Drunk Driving and DWLS Cases

2.2 Police Authority to Arrest Without a Warrant

B. Reasonable Cause to Make a Warrantless Arrest

Replace the Note on pages 2-4 and 2-5 with the following:

The offenses enumerated in §625c(1) (the "implied consent" statute) are:

- OUIL/OUID/UBAC under §625(1).
- OWI under §625(3).
- OUIL/OUID/UBAC/OWI/OWPD causing death or serious impairment of a body function under §625(4) or (5).
- Zero tolerance violations under §625(6).
- Child endangerment under §625(7).
- OWPD* under §625(8).
- Operating a commercial motor vehicle and refusing to submit to a preliminary chemical breath analysis under §625a(5).
- Operating a commercial motor vehicle with an unlawful bodily alcohol content under §625m.
- Violation of a local ordinance substantially corresponding to §625(1), (3), (6), or (8), §625a(5) or §625m.
- Felonious driving, negligent homicide, manslaughter, or murder resulting from the operation of a motor vehicle, if the peace officer had reasonable grounds to believe the driver was operating the vehicle in violation of section 625.

*OWPD is operating a motor vehicle with any amount of certain controlled substances in the operator's body, a new violation added by 2003 PA 61, effective September 30, 2003.

CHAPTER 2

Procedures in Drunk Driving and DWLS Cases

2.3 Chemical Tests Under the Vehicle Code's "Implied Consent" Provisions—§625c

A. Applicability of §625c

Replace the list on page 2-10 with the following list:

- OUIL/OUID/UBAC under §625(1).
- OWI under §625(3).
- OUIL/OUID/UBAC/OWI/OWPD causing death or serious impairment of a body function under §625(4) or (5).
- Zero tolerance violations under §625(6).
- Child endangerment under §625(7).
- OWPD under §625(8).
- Operating a commercial motor vehicle and refusing to submit to a preliminary chemical breath analysis under §625a(5).
- Operating a commercial motor vehicle with an unlawful bodily alcohol content under §625m.
- Violation of a local ordinance substantially corresponding to §625(1), (3), (6), or (8), §625a(5) or §625m.
- Felonious driving, negligent homicide, manslaughter, or murder resulting from the operation of a motor vehicle, if the peace officer had reasonable grounds to believe the driver was operating the vehicle in violation of section 625.

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CHAPTER 2

Procedures in Drunk Driving and DWLS Cases

2.3 Chemical Tests Under the Vehicle Code's "Implied Consent" Provisions—§625c

B. Administering Chemical Tests Under §625c

3. Procedures Pending Results of a Chemical Test

Replace the bulleted list at the bottom of page 2-13 with the following:

- If the person tested is less than 21 years old, 0.02 grams or more of alcohol per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine.
- If the person tested was operating a commercial motor vehicle, 0.04 grams or more of alcohol per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine.
- For all other persons, 0.08 grams* or more of alcohol per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine, or beginning October 1, 2013, 0.10 grams or more of alcohol per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine.

*See 2003 PA 61, effective September 30, 2003.

CHAPTER 2

Procedures in Drunk Driving and DWLS Cases

2.3 Chemical Tests Under the Vehicle Code's "Implied Consent" Provisions—§625c

B. Administering Chemical Tests Under §625c

5. License Confiscation Where a Chemical Test Reveals an Unlawful Alcohol Content

Replace the second bulleted list in the middle of page 2-15 (addressing "unlawful alcohol content") with the following list:

- If the person tested is less than 21 years old, 0.02 grams or more of alcohol per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine.
- If the person tested was operating a commercial motor vehicle, 0.04 grams or more of alcohol per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine.
- For all other persons, 0.08 grams* or more of alcohol per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine, or beginning October 1, 2013, 0.10 grams or more of alcohol per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine.

*See 2003 PA 61, effective September 30, 2003.

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Procedures in Drunk Driving and DWLS Cases

2.3 Chemical Tests Under the Vehicle Code's "Implied Consent" Provisions—§625c

C. Procedures in Cases Where a Driver Refuses to Submit to a Chemical Test

2. Notice of Right to Request Hearing — Sanctions Upon Failure to Request Hearing

Replace the last two lines on page 2-16 and the first two lines on page 2-17 with the following language:

If the person fails to request a hearing within the required 14-day period and the person was operating a vehicle other than a commercial motor vehicle, the Secretary of State will impose a one-year suspension or denial of the person's driver's license. For a second or subsequent refusal within seven years, the period of suspension or denial is increased to two years. MCL 257.625f(1)(a).

Replace the last paragraph on page 2-17 with the following:

If the person requesting the hearing does not prevail, the Secretary of State shall impose a one-year suspension or denial of the person's driver's license. For a second or subsequent refusal within seven years, this period is increased to two years. MCL 257.625f(7)(a).

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Procedures in Drunk Driving and DWLS Cases

2.4 Search Warrants for Chemical Testing

A. Issuance of a Search Warrant — Substance and Procedures

3. Issuance Procedures

Replace the bulleted list following "5. Determine whether the affidavit..." on page 2-21 with the following:

- OUIL/OUID/UBAC under Vehicle Code §625(1).
- OWI under Vehicle Code §625(3).
- OUIL/OUID/UBAC/OWI/OWPD causing death or serious impairment of a body function under §625(4) or (5) of the Vehicle Code.
- A zero tolerance violation under §625(6) of the Vehicle Code.
- Child endangerment under §625(7) of the Vehicle Code.
- OWPD under §625(8) of the Vehicle Code.
- Operating a commercial motor vehicle and refusing to submit to a preliminary chemical breath analysis under §625a(5) of the Vehicle Code.
- Operating a commercial motor vehicle with an unlawful bodily alcohol content under Vehicle Code §625m.
- Violation of a local ordinance substantially corresponding to Vehicle Code §625(1), (3), (6), or (8), §625a(5) or §625m.
- Felonious driving, negligent homicide, manslaughter, or murder resulting from the operation of a motor vehicle, if the peace officer had reasonable grounds to believe the driver was operating the vehicle in violation of section 625.

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Procedures in Drunk Driving and DWLS Cases

2.5 Registration Plate Confiscation for Repeat Offenders

A. Offenses Where Plate Confiscation Is Required

Replace the information contained in the bulleted list on pages 2-28 and 2-29 with the following:

- Any violation of §625(4) or (5) (OUIL/OUID/UBAC/OWI/OWPD causing death or serious impairment of a body function).
- Any violation of §904(4) and (5) (DWLS causing death or serious impairment of a body function).
- A moving violation committed while driving with a suspended/revoked license and occurring within seven years of two or more prior suspensions, revocations, or denials imposed under §904(10), (11), or (12) (which impose additional licensing sanctions on persons who commit moving violations while driving with a suspended/revoked license).
- A violation of §625(1), (3), (7), or (8) (OUIL, OUID, UBAC, OWI, OWPD, or child endangerment) within seven years of one prior conviction or within ten years of two or more prior convictions of any of the following offenses under a Michigan law, or under a substantially corresponding local ordinance or law of another state:*

*The list of "prior convictions" is contained in §904d(8).

- OUIL/OUID/UBAC under §625(1).
- OWI under §625(3).
- OUIL/OUID/UBAC/OWI/OWPD causing death or serious impairment of a body function under §625(4) or (5).
- Zero tolerance violations under §625(6); however, only one such conviction may count as a prior conviction for purposes of plate confiscation.
- Child endangerment under §625(7).
- OWPD (operating with any amount of certain drugs in the body) under §625(8).
- Operating a commercial motor vehicle with an unlawful bodily alcohol content under §625m.
- Former §625b (previously provided penalties for OWI).

- A violation of any prior enactment of §625, including former subsections (1) and (2), which penalized OUIL/D and UBAC, respectively.
- Negligent homicide, manslaughter, or murder resulting from the operation of a vehicle or an attempt to commit any of those crimes.

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Procedures in Drunk Driving and DWLS Cases

2.6 Arraignment/Pretrial Procedures

E. Guilty and Nolo Contendere Pleas

7. Restrictions on Plea Bargains Involving the Zero Tolerance Provisions of the Vehicle Code

Replace the information under "Plea to Zero Tolerance Violation Prohibited" on page 2-39 with the following:

Under MCL 257.625(16), persons charged with any of the following violations may not enter a plea of guilty or nolo contendere to a zero tolerance charge in exchange for dismissal of the original charge:

- OUIL/OUID/UBAC under §625(1).
- OWI under §625(3).
- OUIL/OUID/UBAC/OWI/OWPD causing death under §625(4).
- OUIL/OUID/UBAC/OWI/OWPD causing serious impairment of a body function under §625(5).
- Child endangerment under §625(7).
- OWPD under §625(8).
- Operating a commercial motor vehicle with an unlawful bodily alcohol content under §625m.

MCL 257.625(16) does not prohibit the court from dismissing the charge on the prosecutor's motion.

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Procedures in Drunk Driving and DWLS Cases

2.8 Evidentiary Questions — Chemical Tests

A. Admissibility of Preliminary Chemical Breath Analysis Results

Replace the information on page 2-43 and the bullet at the top of page 2-44 with the following:

*See Section 2.3 on chemical tests under the implied consent statute.

The results of a preliminary chemical breath analysis* administered pursuant to MCL 257.625a(2) are admissible for certain purposes in an administrative hearing, or in a criminal prosecution for one of the following crimes listed in Vehicle Code §625c(1):

- OUIL/OUID/UBAC under §625(1).
- OWI under §625(3).
- OUIL/OUID/UBAC/OWI/OWPD causing death or serious impairment of a body function under §625(4) or (5).
- Zero tolerance violations under §625(6).
- Child endangerment under §625(7).
- OWPD under §625(8).
- Operating a commercial motor vehicle and refusing to submit to a preliminary chemical breath analysis under §625a(5).
- Operating a commercial motor vehicle with an unlawful bodily alcohol content under §625m.
- Violation of a local ordinance substantially corresponding to §625(1), (3), (6), or (8), §625a(5), or §625m.
- Felonious driving, negligent homicide, manslaughter, or murder resulting from the operation of a motor vehicle, if the police had reasonable cause to believe the driver was operating the vehicle in violation of §625.

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Procedures in Drunk Driving and DWLS Cases

2.8 Evidentiary Questions — Chemical Tests

B. Admissibility of Chemical Tests Taken Under the Implied Consent Statute

Replace the second paragraph on page 2-44 with the following:

The foregoing provisions for the admissibility of chemical test results do not limit the introduction of any other admissible evidence bearing on the question whether a person was driving in violation of the OUIL/OUID/UBAC, OWI, OWPD, or zero tolerance provisions in Vehicle Code §625(1), (3), (6), or (8). MCL 257.625a(7). The amount of alcohol or the presence of a drug or both as shown by the chemical test results "is presumed to be the same as at the time the person operated the vehicle." MCL 257.625a(6)(a).

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Procedures in Drunk Driving and DWLS Cases

2.8 Evidentiary Questions — Chemical Tests

D. Evidentiary Effect of Defendant's Refusal to Submit to a Chemical Test

Replace the bulleted list beginning at the bottom of page 2-45 with the following:

- OUIL/OUID/UBAC under §625(1).
- OWI under §625(3).
- OUIL/OUID/UBAC/OWI/OWPD causing death or serious impairment of a body function under §625(4) or (5).
- Zero tolerance violations under §625(6).
- Child endangerment under §625(7).
- OWPD under §625(8).
- Operating a commercial motor vehicle and refusing to submit to a preliminary chemical breath analysis under §625a(5).
- Operating a commercial motor vehicle with an unlawful bodily alcohol content under §625m.
- Violation of a local ordinance substantially corresponding to §625(1), (3), (6), or (8), §625a(5), or §625m.
- Felonious driving, negligent homicide, manslaughter, or murder resulting from the operation of a motor vehicle, if the police had reasonable cause to believe the driver was operating the vehicle in violation of §625.

Following the end of the above list on page 2-46, eliminate "E. Presumptions Arising from Results...." 2003 PA 61, effective September 30, 2003, removed from §625 the language regarding statutory presumptions.

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Procedures in Drunk Driving and DWLS Cases

2.9 General Sentencing Considerations for §625 and §904 Offenses

F. Applying the Sentencing Guidelines

Delete the second paragraph ("As of September 1, 1999...") on page 2-51, and replace the information following the deleted paragraph on page 2-51 through the first full paragraph of page 2-52 with the following:

1. Guidelines Provisions as of September 30, 2003

Under MCL 777.12f and 12h, the following §625 offenses are subject to the legislative sentencing guidelines:

- §625(4)(a) and (b)—violation of §625(1), (3), or (8) causing death.
- §625(5)—violation of §625(1), (3), or (8) causing serious impairment of body function.
- §625(7)(a)(*ii*)—subsequent violations of the child endangerment provision under §625(7).
- §625(9)(c)—violation of §625(1) or (8) within ten years of two prior convictions.
- §625(10)(b) and (c)—violation of §625(2) where death or serious impairment of a body function resulted from operator's conduct.
- §625(11)(c)—violation of §625(3) within ten years of two prior convictions.
- §625k(7) and (9)—violation of provisions governing certification of ignition interlock providers.
- §625m(5)—commercial motor vehicle violation within ten years of two prior convictions.

On page 2-52 replace the content of subsection 1 beginning with the paragraph, "Pursuant to MCL 777.12..." and through the third bullet at the top of page 2-53 with the following:

Pursuant to MCL 777.12f, Vehicle Code §625 offenses belong to the following Crime Groups and Crime Classes:

- §625(4)(a)—Person, Class C.

- §625(4)(b)—Person, Class B.
- §625(5)—Person, Class E.
- §625(7)(a)(*ii*)—Person, Class E.
- §625(9)(c)—Public safety, Class E.
- §625(10)(b)—Person, Class E.
- §625(10)(c)—Person, Class G.
- §625(11)(c)—Public safety, Class E.
- §625k(7) and (9)—Public safety, Class D.
- §625m(5)—Public safety, Class E.

Offense variables 3 and 18 are of particular interest in drunk driving cases. Effective September 30, 2003, Public Act 134 changed the point values assessed in scoring offense variable (OV) 3, the variable used to address the severity of physical injury suffered by victims of the crime being scored. MCL 777.33. Prior to 2003 PA 134, 35 points were assessed against a defendant when the offense was OUIL/D or OWI and "[a] victim was killed." PA 134 increased the number of points assessed from 35 to 50 where death results from the commission of the offense and the offense involves the operation of a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive and any of the following apply:

> "(*i*) The offender was under the influence of or visibly impaired by the use of alcoholic liquor, a controlled substance, or a combination of alcoholic liquor and a controlled substance.
>
> "(*ii*) The offender had an alcohol content of 0.08 grams or more per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine or, beginning October 1, 2013, the offender had an alcohol content of 0.10 grams or more per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine.
>
> "(*iii*) The offender's body contained any amount of a controlled substance listed in schedule 1 under section 7212 of the public health code, 1978 PA 368, MCL 333.7212, or a rule promulgated under that section, or a controlled substance described in section 7214(a)(*iv*) of the public health code, 1978 PA 368, MCL 333.7214."

OV 18 assesses points for the impact of alcohol or drugs on the offender's ability to operate a motor vehicle. MCL 777.48. The number of points increases with the level of the offender's bodily alcohol or drug content or the

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extent to which he or she was visibly impaired by the consumption of alcohol or drugs.

The sentencing guidelines also identify seven prior record variables that are assigned points according to circumstances described in MCL 777.50–.57. For purposes of scoring, prior felonies are assigned a class designation depending on the seriousness of the offense. When scoring prior record variables (PRV) under the legislative sentencing guidelines, the following provision in PRV 5 is of particular importance to convictions involving OUIL/D, OWI, UBAC, and OWPD:

In scoring prior record variable 5 (prior misdemeanor convictions or juvenile adjudications), the court should count all prior misdemeanor convictions and prior misdemeanor juvenile adjudications for operating a vehicle, vessel, aircraft, or locomotive while under the influence of or impaired by alcohol, a controlled substance, or a combination of alcohol and a controlled substance. However, prior misdemeanor convictions that are used to enhance the current offense to felony status cannot be scored. For example, in a felony OUIL case (involving a third offense within ten years), the two prior convictions used to enhance the offense to felony status are not scored, but any other additional prior misdemeanor OUIL conviction will be. MCL 777.55(2)(b).

Eliminate subsection 2 on pages 2-53 and 2-54.

CHAPTER 2

Procedures in Drunk Driving and DWLS Cases

2.10 Licensing Sanctions

B. Revocation of Driver's License for Drunk Driving Offenses

Replace the statutory language quoted on the bottom half of page 2-56 and the top half of page 2-57 with the following:

> "(2)(c) Any combination of 2 convictions within 7 years for any of the following or a combination of 1 conviction for a violation or attempted violation of section 625(6) and 1 conviction for any of the following within 7 years:
>
> > "(*i*) A violation or attempted violation of section 625, except a violation of section 625(2), or a violation of any prior enactment of section 625 in which the defendant operated a vehicle while under the influence of intoxicating or alcoholic liquor or a controlled substance, or a combination of intoxicating or alcoholic liquor and a controlled substance, or while visibly impaired, or with an unlawful bodily alcohol content.
> >
> > "(*ii*) A violation or attempted violation of section 625m.
> >
> > "(*iii*) Former section 625b.
>
> "(d) One conviction for a violation or attempted violation of . . . section 625(4) or (5) . . . or section 904(4) or (5).
>
> "(e) One conviction of negligent homicide, manslaughter, or murder resulting from the operation of a vehicle or an attempt to commit any of those crimes.
>
> * * *
>
> "(g) Any combination of 3 convictions within 10 years for any of the following or 1 conviction for a violation or attempted violation of section 625(6) and any combination of 2 convictions for any of the following within 10 years, if any of the convictions resulted from an arrest on or after January 1, 1992:
>
> > "(*i*) A violation or attempted violation of section 625, except a violation of section 625(2), or a

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violation of any prior enactment of section 625 in which the defendant operated a vehicle while under the influence of intoxicating or alcoholic liquor or a controlled substance, or a combination of intoxicating or alcoholic liquor and a controlled substance, or while visibly impaired, or with an unlawful bodily alcohol content.

"(*ii*) A violation or attempted violation of section 625m.

"(*iii*) Former section 625b."

CHAPTER 2

Procedures in Drunk Driving and DWLS Cases

2.10 Licensing Sanctions

D. Suspension of Driver's License for §625 Offenses

1. Periods of Suspension

Replace the information in the first bullet at the top of page 2-59 with the following:

- 180 days for a violation of §625(1) or (8) (OUIL/OUID/UBAC/OWPD) if the defendant has no prior convictions within seven years. After the first 30 days, a restricted license may be issued for all or a portion of the remaining period of suspension.

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CHAPTER 2

Procedures in Drunk Driving and DWLS Cases

2.11 Vehicle Sanctions

A. Immobilization

1. Offenses Subject to Immobilization

In the paragraph on page 2-64 beginning with "**Mandatory Immobilization...,**" replace the bulleted list with the following:

- Any violation of §625(4) or (5) (OUIL/OUID/UBAC/OWI/OWPD causing death or serious impairment of a body function.)
  - First-time offenders are subject to immobilization for a maximum 180 days.
  - Offenders with one conviction within seven years after a prior conviction are subject to immobilization for not less than 90 days or more than 180 days.*
  - Offenders with two or more prior convictions within ten years are subject to immobilization for not less than one year or more than three years.
- Any violation of §904(4) or (5) (DWLS causing death or serious impairment of a body function). First time offenders and offenders with one prior §904 suspension within seven years are subject to immobilization for not more than 180 days.
- A moving violation committed while driving with a suspended/revoked license and occurring within seven years of two or more prior suspensions, revocations, or denials imposed under §904(10), (11), or (12) (which impose additional licensing sanctions on persons who commit moving violations while driving with a suspended/revoked license).
  - Offenders with any combination of two or three prior suspensions, revocations, or denials under §904(10), (11), or (12) within the past seven years are subject to immobilization for not less than 90 days or more than 180 days.
  - Offenders with any combination of four or more prior suspensions, revocations, or denials under §904(10), (11), or (12) within the past seven years are subject to immobilization for not less than one year or more than three years.

*See Section 1.3(G) for a definition of "prior conviction" under MCL 257.904d.

*See Section 1.3(G) for a definition of "prior conviction."

- A violation of §625(1), (3), (7), or (8) (OUIL, OUID, UBAC, OWI, OWPD, or child endangerment) within seven years after one prior conviction or within ten years after two or more prior convictions:*
  - Offenders with one conviction within seven years after a prior conviction are subject to immobilization for not less than 90 days or more than 180 days.
  - Offenders with two or more prior convictions within ten years are subject to immobilization for not less than one year or more than three years.

In the paragraph on page 2-65 beginning with "**Immobilization in the Court's Discretion,**" replace the information in the first bullet with:

- For first offenders under §625(1), (3), (7), or (8) (OUIL, OUID, UBAC, OWI, OWPD, or child endangerment or a violation of a local ordinance substantially corresponding to §625(1) or (3), the court has discretion to order vehicle immobilization for not more than 180 days. MCL 257.904d(1)(a).

Replace the bulleted list beginning at the bottom of page 2-65 and ending on page 2-66 with the following:

- Suspensions, revocations, or denials based on a violation of the Support and Parenting Time Enforcement Act, MCL 552.601 et seq.
- Rental vehicles.
- Vehicles registered in other states.
- Vehicles not subject to registration under §216.
- Vehicles owned by the federal government, Michigan state government, or a local unit of Michigan state government.
- Violations of Chapter II of the Vehicle Code, regarding administration, registration, certificate of title, and anti-theft, or a substantially corresponding local ordinance.
- Violations of Chapter V of the Vehicle Code, the Financial Responsibility Act, or a substantially corresponding local ordinance.
- Violations for failure to change address, under the Vehicle Code or a substantially corresponding local ordinance.

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- Parking violations, under the Vehicle Code or a substantially corresponding local ordinance.
- Bad check violations, under state law, or a substantially corresponding local ordinance.
- Equipment violations, under the Vehicle Code or a substantially corresponding local ordinance.
- A pedestrian, passenger, or bicycle violation, other than a violation of:
  - MCL 436.1703(1) or (2) (purchases of alcohol by minors); or,
  - MCL 257.624a or 624b (open container, minor in possession of alcohol); or,
  - A local ordinance substantially corresponding to the foregoing statutes.

September 2003

Update: Traffic Benchbook—Revised Edition, Volume 2

CHAPTER 3

Section 625 Offenses

Effective September 30, 2003, Public Act 61 and Public Act 134 make significant changes to statutory law governing Section 625 offenses and penalties. The following information replaces the content of Chapter 3 in its entirety.

Summary of Contents

3.1 OUIL/OUID/UBAC — §625(1)
3.2 Permitting Another to Drive OUIL/OUID/UBAC/OWI — §625(2)
3.3 Operating While Visibly Impaired (OWI) — §625(3)
3.4 OUIL/OUID/UBAC/OWI/OWPD Causing Death of Another — §625(4)
3.5 OUIL/OUID/UBAC/OWI/OWPD Causing Serious Impairment of a Body Function — §625(5)
3.6 "Zero Tolerance" Violations — §625(6)
3.7 Child Endangerment — §625(7)
3.8 Operating With the Presence of Drugs (OWPD) — §625(8)
3.9 Refusal to Submit to a Preliminary Chemical Breath Analysis — §625a(2)
3.10 Chart: Criminal Penalties, Licensing Sanctions, and Vehicle Sanctions Under Vehicle Code §625

This chapter outlines the various criminal offenses listed in §625 of the Vehicle Code, as well as the related offense of refusing to submit to a preliminary chemical breath analysis. The criminal penalties, licensing sanctions, and vehicle sanctions consequent to each offense are also discussed, as those penalties or sanctions apply to both first-time and repeat offenders. A series of charts summarizing the information presented in this chapter appears at Section 3.10.

> **Note:** For purposes of assessing points, taking licensing or registration actions, or imposing criminal penalties and other sanctions, a conviction for an attempted violation of the Vehicle Code, or an attempted violation of a substantially corresponding local ordinance or law of another state, is treated as if it was a conviction for a completed offense. See MCL 257.204b.

3.1 OUIL/OUID/UBAC — §625(1)

MCL 257.625(1) prohibits a person from operating a motor vehicle while intoxicated. "Operating while intoxicated" is defined as:

- under the influence of alcoholic liquor (OUIL), or a controlled substance (OUID), or both, or
- with an unlawful bodily alcohol content (UBAC).
  MCL 257.625(1)(a)–(b).

Note: The following criminal jury instructions may be used in cases involving these offenses:

CJI2d 15.1 OUIL/UBAC Violation

CJI2d 15.2 Elements Common to OUIL, UBAC, and OWI

CJI2d 15.3 Specific Elements of OUIL/UBAC

CJI2d 15.4 Specific Elements of OWI

CJI2d 15.5 Factors in Considering OUIL, UBAC, and OWI

NOTE: The revised statutory language effective September 30, 2003 **eliminated the rebuttable presumptions of impairment** arising from a defendant's bodily alcohol content. The previous statutory language in MCL 257.625a(9) provided for a rebuttable presumption of impairment based on a defendant's bodily alcohol content. The amended statute contains no such language and consequently, for offenses committed on or after September 30, 2003, portions of CJI2d 15.5 will represent an incorrect statement of the relevant law.

CJI2d 15.6 Possible Verdicts

CJI2d 15.7 Verdict Form

CJI2d 15.9 Defendant's Decision to Forgo Chemical Testing

A. Operating a Motor Vehicle While Under the Influence of Alcoholic Liquor and/or a Controlled Substance (OUIL/OUID) — Elements of the Offense

The elements of this offense are set forth in MCL 257.625(1)(a) as follows:

1. Defendant, whether licensed or not, operated a motor vehicle on a Michigan highway, or other place open to the

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general public or generally accessible to motor vehicles, including an area designated for parking,

See Section 1.3 for definition of the terms "operating" and "generally accessible to motor vehicles" as used in the statute.

AND

2. At the time defendant operated the motor vehicle, defendant was under the influence of alcoholic liquor, a controlled substance, or a combination of alcoholic liquor and a controlled substance,

Historically, persons charged with, and convicted of, operating a motor vehicle under the influence of a controlled substance have been treated and sentenced just the same as persons who are charged with operating a motor vehicle under the influence of alcohol. MCL 257.625(1)(a).* In *People v Prehn*, 153 Mich App 532 (1986), the Court of Appeals addressed a situation where a defendant had ingested a combination of alcohol and a prescription drug. The information filed in *Prehn* stated only that the defendant had driven under the influence of alcohol; however, the trial court gave the following instruction in response to a question from the jury about the interaction of the drug with alcohol:

*__Note:__ Public Act 61 creates an entirely new offense for individuals who operate a motor vehicle with the presence of any prohibited controlled substance in their bodies. MCL 257.625(8). See Section 3.8.

> "The defendant...can only be convicted of [OUIL] if it is proved beyond a reasonable doubt that he was under the influence of intoxicating liquor at the time he was operating a motor vehicle. He is not charged with driving while under the influence of prescription drugs...and...cannot be convicted if he was intoxicated, and his intoxication was solely caused by his consumption of drugs or medication.
>
> "If, however, it is proven beyond a reasonable doubt that the defendant was intoxicated while driving the motor vehicle...and that such intoxication was due to the combined effect of prescription drugs...then the defendant may be convicted of driving under the influence of intoxicating liquor, even though the amount of intoxicating liquor consumed would not alone, absent the effect of the prescription drugs...have rendered him intoxicated to the extent described in the [previous] jury instructions I have given you defining this offense." 153 Mich App at 533–534.

The Court of Appeals disagreed with the defendant's assertion on appeal that the foregoing instruction amounted to an amendment of the information to include a new offense (i.e., OUID). The panel found that the jury could properly consider the effect of the

prescription drug on the defendant's susceptibility to alcohol, just as it could consider the defendant's weight in determining whether the amount of alcohol he had consumed was sufficient to render him intoxicated. "The [trial court's] instruction merely clarified for the jury one of the factors which might be of relevance in determining defendant's guilt of the charged offense." 153 Mich App at 535.

"Under the influence" is defined in CJI2d 15.3(2) as follows:

> "'Under the influence of alcohol' means that because of drinking alcohol, the defendant's ability to operate a motor vehicle in a normal manner was substantially lessened. To be under the influence, a person does not have to be what is called 'dead drunk,' that is, falling down or hardly able to stand up. On the other hand, just because a person has drunk alcohol or smells of alcohol does not prove, by itself, that the person is under the influence of alcohol. The test is whether, because of drinking alcohol, the defendant's mental or physical condition was significantly affected and the defendant was no longer able to operate a vehicle in a normal manner."

For a definition of "controlled substance," see Section 1.3(A).

AND

3. As a result, defendant was substantially deprived of normal control or clarity of mind,

This element was set forth by the Court of Appeals in *People v Raisanen*, 114 Mich App 840, 844 (1982).

AND

4. Defendant was no longer able to operate a vehicle in a normal manner.

In *People v Walters*, 160 Mich App 396, 403 (1987), the defendant Walters was charged with OUIL and convicted by a jury of the lesser included offense of driving while impaired. A police officer testified that he saw Walters drive about 30 feet along the road, stop, and back into a driveway. The officer said he did not notice anything abnormal about Walters's driving; however, Walters smelled of alcohol, his eyes were glazed and bloodshot, and he swayed slightly on his feet. On appeal from his conviction, Walters asserted that he could not be convicted of OUIL or driving while impaired when the officer saw him driving normally. The Court of Appeals affirmed the conviction, holding that the circumstantial evidence presented was sufficient to establish that Walters was unable to drive normally. In so holding, the panel noted that "this case probably represents the low-water mark in

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the amount of evidence necessary to allow the submission of an OUIL charge to a jury. We do point out, however, that we have no difficulty in the submission of the DWI charge to the jury. The circumstantial evidence was clearly strong enough to allow the jury to consider a DWI charge." 160 Mich App at 405.

In *People v Crawford*, 187 Mich App 344, 352 (1991), the Court of Appeals held that a conviction of OUIL and felonious driving resulting from the same incident does not constitute multiple punishment for the same offense and therefore does not violate the double jeopardy clauses of the federal and Michigan constitutions.

B. Operating a Motor Vehicle with an Unlawful Bodily Alcohol Content (UBAC) — Elements of the Offense

The elements of this offense are set forth in MCL 257.625(1)(b) as follows:

1. Defendant, whether licensed or not, operated a motor vehicle on a Michigan highway, or other place open to the general public or generally accessible to motor vehicles, including an area designated for parking,

For discussion of the meaning of "operating" a motor vehicle, and places "generally accessible to motor vehicles," see Section 1.3.

AND

2. Defendant had an alcohol content of 0.08 grams or more per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine (alcohol content of 0.08 is effective September 30, 2003 through September 30, 2013).

MCL 257.625(1)(b) creates a per se misdemeanor offense permitting a conviction based solely on the defendant's bodily alcohol content, without regard to whether alcohol affected the defendant's ability to operate the vehicle. UBAC is an alternative charge to OUIL. The prosecutor may charge both OUIL and UBAC as alternative theories, but the defendant can be convicted of only one of these offenses. Accordingly, the prosecutor should proceed on a single count complaint alleging alternative theories for conviction. *People v Nicolaides*, 148 Mich App 100, 103 (1985).

*The changes effective September 30, 2003, include the addition of a new offense for operating a motor vehicle with the presence of any amount of certain controlled substances in the body. The offense is contained in subsection (8) and its penalties are identical to those for violations of subsection (1). Details of new §625(8) are in Section 3.8 below.

C. Criminal Penalties and Other Sanctions for Violations of §625(1)*

The discussion below sets forth the criminal penalties and licensing and vehicle sanctions imposed for first-time and repeat offenders convicted of violating MCL 257.625(1). See Section 2.9 for discussion of general sentencing considerations in all drunk driving cases (e.g., alcohol assessment, payment of costs, sentencing guidelines, etc.). See Section 2.10 on licensing sanctions generally. Section 2.11 addresses general procedures for forfeiture and immobilization of vehicles. Section 1.3 contains definitions of the following terms:

- Conviction — Section 1.3(B).
- Prior conviction — Section 1.3(G).
- Substantially corresponding ordinance or state statute — Section 1.3(I).

1. First-time Offenders

Criminal Penalties — According to MCL 257.625(9)(a), first-time violators of §625(1) are guilty of a **misdemeanor** punishable by one or more of the following:

- community service for not more than 360 hours.
- imprisonment for not more than 93 days. This prison term may be suspended. See MCL 257.625(9)(d).
- a fine of not less than $100.00 or more than $500.00.

Licensing Sanctions — The Secretary of State must suspend a first-time offender's driver's license for 180 days. After the first 30 days of the suspension, the Secretary of State may issue the offender a restricted license for a specified portion of the remaining suspension if the offender is otherwise eligible for a license. MCL 257.319(8)(a), (15).

Points — First-time offenders are assessed six points for violating §625(1). MCL 257.320a(1)(c).

Vehicle Sanctions — Vehicle immobilization may be ordered for not more than 180 days. MCL 257.904d(1)(a) and MCL 257.625(9)(e).

Ignition Interlock Device — The court has discretion to order as a condition of probation that an offender's vehicle be equipped with an ignition interlock device as described in Sections 625k and 625*l*. MCL 257.625(24).

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2. Offenders Who Violate §625(1) Within Seven Years of a Prior Conviction

Criminal Penalties — Offenders who violate §625(1) within seven years of one prior conviction are guilty of a **misdemeanor** punishable by:

- a **mandatory fine** of not less than $200.00 or more than $1,000.00, **and**
- not less than five days or more than one year of imprisonment, **or**
- community service for not less than 30 days or more than 90 days, **or**
- both the imprisonment and community service noted above. MCL 257.625(9)(b). Any term of imprisonment shall not be suspended, and no less than 48 hours of the term shall be served at a time. MCL 257.625(9)(b)(*i*), (d).

Licensing Sanctions — Offenders convicted of violating §625(1) within seven years of a prior conviction are subject to mandatory driver's license revocation for a minimum of one year. MCL 257.303(2)(c), (4). The period of revocation is the longer of the following:

- not less than one year from the date of revocation, or
- not less than five years from the date of revocation if the subsequent revocation occurs within seven years of a previous revocation. MCL 257.303(4)(a)(*i*)–(*ii*).

Vehicle Sanctions — For a conviction under §625(1) within seven years of a prior conviction, the court must order vehicle immobilization for not less than 90 days or more than 180 days, unless forfeiture is ordered under MCL 257.625n.* MCL 257.904d(1)(c). Forfeiture may be ordered in the court's discretion if the offender has an ownership interest in the vehicle used in the offense. The court may order that a leased vehicle be returned to the lessor. MCL 257.625n.

*Forfeiture is permitted by MCL 257.625(9)(f).

Ignition Interlock Device — The court has discretion to order as a condition of probation that an offender's vehicle be equipped with an ignition interlock device as described in Sections 625k and 625*l*. MCL 257.625(24).

3. Offenders Who Violate §625(1) Within Ten Years of Two or More Prior Convictions

Criminal Penalties — Offenders who violate §625(1) within ten years of two or more prior convictions are guilty of a **felony** punishable by:

- a **mandatory fine** of not less than $500.00 or more than $5,000.00, **and** ***either***
- imprisonment for not less than one year or more than five years under the jurisdiction of the Department of Corrections, **or**
- probation with imprisonment in the county jail for not less than 30 days or more than one year **and** community service for not less than 60 days or more than 180 days. MCL 257.625(9)(c). Any term of imprisonment shall not be suspended, and no less than 48 hours of the term shall be served at a time. MCL 257.625(9)(c)(*ii*), (d).

Licensing Sanctions — The Secretary of State must revoke the driver's licenses of repeat offenders who have two prior convictions of any of the offenses listed in the statute within ten years, if any of the convictions resulted from an arrest on or after January 1, 1992. MCL 257.303(2)(g). The period of revocation is the longer of the following:

- not less than one year from the date of revocation, or
- not less than five years from the date of revocation if the subsequent revocation occurs within seven years of a previous revocation. MCL 257.303(4)(a)(*i*)–(*ii*).

Vehicle Sanctions — For a conviction under §625(1) within ten years of two or more prior convictions, the court must order vehicle immobilization for not less than one year or more than three years, unless forfeiture is ordered under MCL 257.625n. MCL 257.904d(1)(d). Forfeiture may be ordered in the court's discretion if the offender has an ownership interest in the vehicle used in the offense. The court may order that a leased vehicle be returned to the lessor. MCL 257.625n.

Registration Denial — The Secretary of State shall refuse issuance of a certificate of title, a registration, or a transfer of registration for a vehicle if the driver's license of the vehicle's owner or lessee is suspended, revoked, or denied for a third or subsequent violation of §625n or §625m or a local ordinance substantially corresponding to these sections. MCL 257.219(1)(d), (2)(d). This provision also applies to co-owners and co-lessees of the vehicle.

Ignition Interlock Device — The court has discretion to order as a condition of probation that an offender's vehicle be equipped with an ignition interlock device as described in Sections 625k and 625*l*. MCL 257.625(24).

Using an offender's prior convictions to enhance a subsequent charge does not offend the prohibition against ex post facto laws. In *People v*

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Callon, ___ Mich App ___ (2003), the Michigan Court of Appeals upheld the use of a "prior conviction" to enhance a conviction of OUIL/UBAC to a felony. The defendant was convicted of OUIL as a third offender. The defendant claimed that use of his "prior conviction" operated as an ex post facto law because the prior OWI occurred before the effective date of the amendment adding OWI to the list of offenses in the enhancement statute. The Court held that the enhancement statute did not act as an ex post facto law because it did not attach legal consequences to the defendant's prior OWI conviction, but rather attached legal consequences to the defendant's future conduct of committing an OUIL. *Id*. at ___.

3.2 Permitting Another to Operate a Motor Vehicle — OUIL/OUID/UBAC/OWI — §625(2)

MCL 257.625(2) prohibits knowingly permitting or authorizing another person to operate a motor vehicle while intoxicated under the conditions set forth in MCL 257.625(1)(a) and (b) (described above in Section 3.1). In addition to OUIL/D and UBAC, §625(2) prohibits permitting a person to operate a motor vehicle if the person's ability to operate the vehicle is visibly impaired by his or her consumption of alcoholic liquor, a controlled substance, or a combination of alcohol and drugs. MCL 257.625(2)(c).

A. Elements of the Offense

1. The defendant was the owner, the person in charge, or the person in control of a motor vehicle;

AND

2. The defendant authorized or knowingly permitted another to operate the motor vehicle on a Michigan highway, or other place open to the general public, or generally accessible to motor vehicles, including an area designated for parking;

See Section 1.3 for definitions of "operate," and "generally accessible to motor vehicles."

AND

3. The operator of the vehicle:

a. Was under the influence of alcoholic liquor, a controlled substance, or a combination of alcoholic liquor and a controlled substance, so that the operator's mental or physical condition was significantly affected and he or she was no longer able to operate a vehicle in a normal manner; **or**

*On October 1, 2013, the level at which a person's bodily alcohol content will be unlawful returns to 0.10 grams or more.

b. Had at the time of operating the vehicle an alcohol content of 0.08 grams or more per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine;* or

c. Was visibly impaired in his or her ability to operate the vehicle due to the consumption of alcohol and/or a controlled substance.

See Section 3.1(A) for a definition of "under the influence." See Section 3.3(A) for discussion of what constitutes "visible impairment." A "controlled substance" is defined in Section 1.3(A).

Elements 3a and 3b above represent alternative elements to this offense. See Section 3.1 for a discussion of case law related to the alternative charges available under §625(1) (where the operator is the offender).

Element 3b above creates a per se offense permitting conviction based solely on the driver's bodily alcohol content, without regard to whether the alcohol affected the driver's ability to operate the vehicle.

It appears that before the defendant may be convicted of this offense, the person whom the defendant authorized or knowingly permitted to operate the motor vehicle would first have to be convicted of OUIL/OUID/UBAC.

B. Penalties for Violations of §625(2)

Criminal Penalties — Depending on the existence and severity of injuries caused by the person operating the motor vehicle, MCL 257.625(10) sets forth three levels of criminal penalties for a defendant who violates §625(2):

- **Operator Causes Death.** If the person operating the motor vehicle causes death (MCL 257.625(4)), the defendant is guilty of a **felony** punishable by imprisonment for not more than five years, a fine of not less than $1,500.00 or more than $10,000.00, or both. MCL 257.625(10)(b).

*2003 PA 61 eliminated the list of serious impairments previously included in the statutory provision. The list formerly appearing in §625(5) still appears in §904 of the Vehicle Code.

- **Operator Causes Serious Impairment of Body Function.** If the person operating the motor vehicle causes serious impairment of body function* (MCL 257.625(5)), the defendant is guilty of a **felony** punishable by imprisonment for not more than two years, a fine of not less than $1,000.00 or more than $5,000.00, or both. MCL 257.625(10)(c).

- **All Other Cases.** In all other cases where the operator's conduct did not result in death or serious impairment of body function, the defendant is guilty of a **misdemeanor** punishable by imprisonment for not more than 93 days, a fine of not less than $100.00 or more than $500.00, or both. MCL 257.625(10)(a).

Licensing and Vehicle Sanctions — None.

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Note: A conviction under §625(2) is not counted as a prior conviction for purposes of enhancing penalties for repeat drunk driving offenders. MCL 257.625(25)(a)(*i*).

3.3 Operating While Visibly Impaired (OWI) — §625(3)

OWI is a lesser offense of OUIL/OUID and UBAC, so that a defendant charged with OUIL, OUID, or UBAC may be found guilty of OWI. MCL 257.625(3).

Note: The following criminal jury instructions may be used in OWI cases:

CJI2d 15.2 Elements Common to OUIL, UBAC, and OWI

CJI2d 15.4 Specific Elements of OWI

CJI2d 15.5 Factors in Considering OUIL, UBAC, and OWI

NOTE: The revised statutory language effective September 30, 2003, **eliminated the rebuttable presumptions of impairment** arising from a defendant's bodily alcohol content. The previous statutory language in MCL 257.625a(9) provided for a rebuttable presumption of impairment based on a defendant's bodily alcohol content. The amended statute contains no such language and consequently, for offenses committed on or after September 30, 2003, portions of CJI2d 15.5 will represent an incorrect statement of the relevant law.

CJI2d 15.6 Possible Verdicts

CJI2d 15.7 Verdict Form

CJI2d 15.9 Defendant's Decision to Forgo Chemical Testing

A. Elements of the Offense

The elements of OWI are as follows:

1. Defendant, whether licensed or not, operated a motor vehicle on a Michigan highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles;

For discussion of the meaning of "operating" a motor vehicle and "generally accessible to motor vehicles," see Section 1.3.

AND

2. Defendant had consumed alcoholic liquor, a controlled substance, or a combination of alcoholic liquor and a controlled substance;

See Section 1.3(A) for a definition of "controlled substance."

AND

3. Because of the consumption of alcoholic liquor and/or a controlled substance, defendant's ability to operate the vehicle was visibly impaired.

The Michigan Supreme Court has defined visible impairment as follows:

> "[The] defendant's ability to drive was so weakened or reduced by consumption of intoxicating liquor that defendant drove with less ability than would an ordinary, careful and prudent driver. Such weakening or reduction of ability to drive must be visible to an ordinary, observant person." *People v Lambert*, 395 Mich 296, 305 (1975).

The degree of a person's intoxication for purposes of §625(3) may be established by chemical analysis tests of the person's blood, breath, or urine, or by testimony of someone who saw the impaired driving. *People v Calvin*, 216 Mich App 403, 407–408 (1996). However, the revised statutory language effective September 30, 2003 eliminated the rebuttable presumptions of impairment arising from a defendant's bodily alcohol content. The previous statutory language in MCL 257.625a(9) provided for a rebuttable presumption of impairment based on a defendant's bodily alcohol content. The amended statute contains no such language.

Circumstantial evidence may also be used to establish that a person was driving while visibly impaired. In *People v Walters*, 160 Mich App 396, 403 (1987), the defendant Walters was charged with OUIL and convicted by a jury of the lesser included offense of driving while impaired. A police officer testified that he saw Walters drive about 30 feet along the road, stop, and back into a driveway. The officer said he did not notice anything abnormal about Walters's driving; however, Walters smelled of alcohol, his eyes were glazed and bloodshot, and he swayed slightly on his feet. On appeal from his conviction, Walters asserted that he could not be convicted of OUIL or driving while impaired when the officer saw him driving normally. The Court of Appeals affirmed the conviction, holding that the circumstantial evidence presented was sufficient to establish that Walters was unable to drive normally. In so holding, the panel noted

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that "this case probably represents the low-water mark in the amount of evidence necessary to allow the submission of an OUIL charge to a jury. We do point out, however, that we have no difficulty in the submission of the DWI charge to the jury. The circumstantial evidence was clearly strong enough to allow the jury to consider a DWI charge." 160 Mich App at 405.

B. Penalties for OWI

The discussion below sets forth the criminal penalties, licensing sanctions, and vehicle sanctions imposed for first-time and repeat offenders convicted of violating MCL 257.625(3). Section 1.3 contains definitions of the following terms:

- Conviction — Section 1.3(B).
- Prior conviction — Section 1.3(G).
- Substantially corresponding ordinance or state statute — Section 1.3(I).

1. First-time Offenders

Criminal Penalties — First-time offenders convicted of violating §625(3) are guilty of a **misdemeanor** punishable by one or more of the following penalties under MCL 257.625(11)(a):

- community service for not more than 360 hours.
- imprisonment for not more than 93 days. This prison term may be suspended. MCL 257.625(11)(d).
- a fine of not more than $300.00.

Licensing Sanctions — If there are no prior convictions within seven years and the offender's impairment was due to alcohol alone, the Secretary of State shall suspend the offender's license for 90 days. The period of suspension is increased to 180 days if the offender was convicted of violating §625(3) for visible impairment caused by the offender's consumption of a controlled substance or combination of alcohol and a controlled substance. MCL 257.319(8)(b). The Secretary of State may issue the offender a restricted license for all or part of the suspension if the person is otherwise eligible for a license. MCL 257.319(15).

Points — First-time offenders are assessed four points for violating §625(3) or a substantially corresponding law or ordinance. MCL 257.320a(1)(i).

Vehicle Sanctions — The court may order vehicle immobilization for not more than 180 days. MCL 257.904d(1)(a), MCL 257.625(11)(e).

2. Offenders Who Violate §625(3) Within Seven Years of a Prior Conviction

Criminal Penalties — Offenders who violate §625(3) within seven years of one prior conviction are guilty of a **misdemeanor** punishable by:

- a **mandatory fine** of not less than $200.00 or more than $1,000.00, **and**
- not less than five days or more than one year of imprisonment, **or**
- community service for not less than 30 days or more than 90 days, **or**
- both the imprisonment and community service noted above. MCL 257.625(11)(b). Any term of imprisonment shall not be suspended, and no less than 48 hours of the term shall be served at a time. MCL 257.625(11)(b)(*i*).

Licensing Sanctions — Offenders convicted of violating MCL 257.625(3) within seven years of one prior conviction are subject to mandatory driver's license revocation for a minimum of one year. MCL 257.303(2)(c), (4)(a).

Vehicle Sanctions — Vehicle forfeiture under MCL 257.625n is discretionary for offenders with one prior conviction within seven years. MCL 257.625(11)(f). If, however, the court does not order forfeiture, it must order vehicle immobilization under MCL 257.904d. MCL 257.625(11)(e). Immobilization is mandatory for a period of 90–180 days. MCL 257.904d(1)(c).

3. Offenders Who Violate §625(3) Within Ten Years of Two or More Prior Convictions

Criminal Penalties — If the violation occurs within ten years of two or more prior convictions, the offender is guilty of a **felony** punishable by:

- a **mandatory fine** of not less than $500.00 or more than $5,000.00, **and** ***either***
- imprisonment under the jurisdiction of the Department of Corrections for not less than one year or more than five years, **or**
- probation with imprisonment in the county jail for not less than 30 days or more than one year **and** not less than 60 days or more than 180 days of community service. MCL 257.625(11)(c). Any term

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of imprisonment shall not be suspended, and no less than 48 hours of any term of imprisonment shall be served at a time. MCL 257.625(11)(c)(*ii*), (d).

Licensing Sanctions — Under MCL 257.303(2)(g), violators of §625(3) with two or more prior convictions within ten years (if *any* of the convictions resulted from arrests on or after January 1, 1992) are subject to mandatory license revocation. The period of revocation is the longer of the following:

- not less than one year from the date of revocation, or
- not less than five years from the date of revocation if the subsequent revocation occurs within seven years of a previous revocation. MCL 257.303(4)(a)(*i*)–(*ii*).

Vehicle Sanctions — Unless the court orders vehicle forfeiture under MCL 257.625n, the court must order vehicle immobilization under MCL 257.904d. MCL 257.625(11)(e), (f). Mandatory vehicle immobilization is for not less than one year and not more than three years. MCL 257.904d(1)(d).

Registration Denial — The Secretary of State shall refuse issuance of a certificate of title, a registration, or a transfer of registration for a vehicle if the driver's license of the vehicle's owner or lessee is suspended, revoked, or denied for a third or subsequent violation of §625n or §625m or a local ordinance substantially corresponding to these sections. MCL 257.219(1)(d), (2)(d). This provision also applies to co-owners and co-lessees of the vehicle.

3.4 OUIL/OUID/UBAC/OWI/OWPD Causing Death of Another — §625(4)

A. Elements of the Offense

*The changes effective September 30, 2003, include the addition of a new offense for operating a motor vehicle with the presence of any amount of certain controlled substances in the body. The offense is contained in subsection (8) and its penalties are identical to those for violations of subsection (1). Details of new §625(8) are in Section 3.8, below.

MCL 257.625(4) provides the penalties for violations of §625(1), (3), and (8)*, where death results from the violation. The elements of this offense are as follows:

1. The defendant, whether licensed or not, operated a motor vehicle on the date in question,

CJI2d 15.11 states that "[o]perating means driving or having actual physical control of the vehicle." See also Section 1.3(F) for more discussion of "operating" a vehicle.

AND

2. The defendant operated the vehicle on a Michigan highway or other place open to the public or generally accessible to motor vehicles, including a designated parking area,

For discussion of what constitutes an area "generally accessible to motor vehicles," see Section 1.3(C).

AND

3. The defendant was operating the vehicle in violation of §625(1), (3), or (8) because he or she:

a) was under the influence of alcohol and/or a controlled substance;

b) had an unlawful bodily alcohol content; or,

c) was visibly impaired in his or her ability to operate the vehicle because of the consumption of alcoholic liquor and/or a controlled substance,

For discussion of "under the influence," "unlawful bodily alcohol content," and "visibly impaired," see Sections 3.1(A), 3.1(B), and 3.3(A), respectively.

AND

4. The defendant voluntarily decided to drive knowing that he or she had consumed alcohol and might be intoxicated,

In *People v Lardie,* 452 Mich 231, 256, 259 (1996), the Michigan Supreme Court held that §625(4) is a general intent offense, requiring proof that the

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defendant intended to drive knowing that he or she might be intoxicated. In so holding, the Court explained:

> "[I]n creating this irrebuttable presumption of gross negligence from the wrongful act, the Legislature intended to deter drunk driving and, therefore, must have intended that the people prove that the driver voluntarily, i.e., "*willingly*," decided to commit this culpable act.
>
> * * *
>
> "[C]onsistent with the Legislature's decision to presume gross negligence as a matter of law and its desire to deter intoxicated driving, the Legislature must reasonably have intended that the people prove a mens rea by demonstrating that the defendant purposefully drove while intoxicated or, in other words. that he had the general intent to perform the wrongful act." *Lardie*, *supra*, 452 Mich at 252–253, 256.

AND

5. By the operation of the vehicle, the defendant caused the death of another person.

The defendant's decision to drive while intoxicated must substantially contribute to another person's death. In proving causation, the prosecutor must establish that the defendant's decision to drive while intoxicated produced a change in the defendant's operation of the vehicle that caused another's death. The statute does not penalize a driver if the injury was unavoidable regardless of the driver's intoxication. *People v Lardie, supra,* 452 Mich at 258–260.

> **Note:** The majority opinion in *Lardie* noted that its standard for causation is consistent with the common-law causation standard articulated in *People v Tims*, *People v Kneip*, 449 Mich 83, 97–99 (1995), which were consolidated cases involving involuntary manslaughter with a vehicle. In *Tims* and *Kneip,* the Supreme Court held that a defendant's conduct need only be "a" proximate cause of death, rather than "the" sole cause. See *People v Lardie, supra,* 452 Mich at 260 n 51. For a jury instruction on the victim's contributory negligence, see CJI2d 16.20.

In cases involving negligent homicide under MCL 750.324, the Court of Appeals has held that evidence of the decedent's failure to wear a seat belt was inadmissible at trial to prove contributory negligence because it was not relevant to causation of the accident. *People v Burt*, 173 Mich App 332, 334 (1988); *People v Richardson*, 170 Mich App 470, 472 (1988).

Defendants charged with violating Vehicle Code §625(4) are frequently subject to common-law murder charges as well. In the following cases, the Michigan Supreme Court considered issues arising from charging defendants with these multiple counts:

- **Double Jeopardy**

  A conviction of both involuntary manslaughter under MCL 750.321 and OUID causing death under Vehicle Code §625(4) is not violative of state or federal double jeopardy provisions. *People v Price*, 214 Mich App 538 (1995).

  A conviction of both second-degree murder under MCL 750.317 and OUIL causing death under Vehicle Code §625(4) is not violative of state or federal double jeopardy provisions. *People v Werner*, 254 Mich App 528, 535–536 (2002).

- **Distinguishing Requisite Intent for Second-degree Murder and OUIL Causing Death**

  In *People v Goecke,* 457 Mich 442 (1998), the Supreme Court distinguished "malice" as an element of second-degree murder from the intent required to establish OUIL causing death. To establish "malice" in a second-degree murder case, the prosecutor must establish "the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm." 457 Mich at 464. The third form of malice may be implied "when the defendant does an act with a high probability that it will result in death and does it with a base antisocial motive and with wanton disregard for human life." 457 Mich at 467. The "wanton" nature of the defendant's actions distinguishes the intent requirement for second-degree murder from the intent required for OUIL causing death. Noting that the misconduct in the consolidated cases before the Court went beyond drunk driving, the *Goecke* majority specifically rejected the contention that drunk driving alone is sufficient to establish the element of malice for purposes of sustaining a conviction or deciding whether there is sufficient evidence to bind a defendant over for trial on charges of second-degree murder. 457 Mich at 469.

  In *People v Werner*, 254 Mich App 528 (2002), the Court of Appeals reaffirmed the principle articulated in *Goecke*, *supra* [*People v Goecke*, 457 Mich 442, 464-465 (1998)], that extreme intoxication does not necessarily require proof that the defendant was "subjectively" aware of the risk created by his or her conduct. In *Werner*, the defendant was convicted of second-degree murder and OUIL causing death after becoming seriously intoxicated and driving his pick-up truck the wrong direction on a freeway and colliding with a Jeep, killing the passenger and seriously injuring the driver. During

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the trial, the prosecution showed that defendant was not only extremely intoxicated but that he also knew, from a recent incident, that if he drank alcohol he could experience a black-out and drive recklessly and irresponsibly. On appeal, relying on dicta in *Goecke*, defendant claimed that the trial court erred in denying his motion for directed verdict because there was insufficient evidence to support his second-degree murder conviction. Specifically, defendant argued that since he was seriously intoxicated and since this was a "highly unusual case," the prosecutor was required to prove that he was "subjectively" aware of the risk of death or great bodily harm. The Court of Appeals disagreed, holding:

> "*Goecke* did not expressly prescribe a subjective analysis for malice in cases of extreme intoxication. . . . [T]he Court recognized that, theoretically, a 'highly unusual case' may require a determination of whether the defendant was subjectively aware of the risk his conduct created, such as where the defendant was 'more absent-minded, stupid or intoxicated than the reasonable man.' . . . This is not the same as stating, as defendant suggests, that plaintiff should have been held to a higher standard of proof of intent because defendant was so severely intoxicated. If defendant's argument is correct, it would mean that moderately intoxicated drivers could be tried for and convicted of second-degree murder while severely intoxicated drivers would be excused because they were too intoxicated to know what they were doing. This would be contrary to the *Goecke* Court's statement that 'malice requires egregious circumstances.' . . . It also would effectively create for some defendants an intoxication defense to second-degree murder, which would be plainly contrary to the *Goecke* Court's holding that voluntary intoxication is not a defense to a second-degree murder charge. . . . Accordingly, an advanced state of voluntary intoxication is not sufficient to qualify as the sort of 'unusual case' that requires a subjective determination of awareness under *Goecke*." *Werner*, *supra* at 532–533. [Citations omitted.]

In concluding that the trial court did not err in denying defendant's motion for directed verdict, and that there was sufficient evidence to support his second-degree murder conviction, the Court held that this was "not a case where a defendant merely undertook the risk of driving after drinking." *Id*. at 533. Instead, the Court found that "[d]efendant knew, from a recent prior incident, that his drinking did more than simply impair his judgment and

> reflexes. He knew that he might actually become so overwhelmed by the effects of alcohol that he would completely lose track of what he was doing with his vehicle. If defendant knew that drinking before driving could cause him to crash on boulders in front of a house, without any knowledge of where he was or what he was doing, he knew that another drunk driving episode could cause him to make another major mistake, one that would have tragic consequences." *Id*.

B. Penalties for Violations of §625(4)

Persons convicted of violating §625(4) are guilty of a **felony** punishable by the penalties and sanctions described below. See Section 2.9 for discussion of general sentencing considerations in all drunk driving cases. See Section 2.10 on licensing sanctions generally. Section 2.11 addresses general procedures for forfeiture and vehicle immobilization. Section 1.3 contains definitions of the following terms:

- Conviction — Section 1.3(B).
- Prior conviction — Section 1.3(G).
- Substantially corresponding ordinance or state statute — Section 1.3(I).

1. Penalties Applicable to All §625(4) Offenders

Under MCL 257.625(4), both first-time and repeat offenders whose violations of §625(1), (3), or (8) caused another person's death are guilty of a felony punishable by:

- not more than 15 years of imprisonment, **or**
- a fine of not less than $2,500.00 or more than $10,000.00, **or**
- both. MCL 257.625(4)(a).

2. Sanctions Specific to First-time Offenders of §625(4)

Licensing Sanctions — A first-time offender convicted of violating §625(4) is subject to mandatory license revocation for a period of not less than one year. MCL 257.303(2)(d), (4)(a)(*i*).

Points — First-time offenders are assessed six points for a violation of §625(4) or a law or local ordinance substantially corresponding to it. MCL 257.320a(1)(c).

Vehicle Sanctions — The court has discretion whether to order vehicle forfeiture under MCL 257.625n. If, however, the court does not order forfeiture, the court must order vehicle immobilization

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pursuant to MCL 257.904d. Vehicle immobilization may not exceed 180 days. MCL 257.904d(1)(b).

3. Sanctions Specific to Offenders Who Violate §625(4) Within Seven Years of a Prior Conviction or Within Ten Years of Two Prior Convictions

Licensing Sanctions — If the subsequent offense occurs within seven years of the date on which the offender's license was revoked for the prior conviction, the offender's license revocation is for a period of not less than five years. MCL 257.303(2)(d), (4)(a)(*ii*).

Vehicle Sanctions — If a person is convicted of violating §625(4) within seven years after one prior conviction, the court has discretion to order vehicle forfeiture under MCL 257.625n. If the court does not order forfeiture, it must order vehicle immobilization for not less than 90 days and not more than 180 days. MCL 257.625(4)(a); MCL 257.904d(1)(c).

The court also has discretion to order vehicle forfeiture when a person is convicted of violating §625(4) within ten years of two prior convictions. Should the court not order vehicle forfeiture under MCL 257.625n, it must order immobilization for not less than one year and not more than 3 years. MCL 257.904d(1)(d).

Registration Denial — The Secretary of State shall refuse issuance of a certificate of title, a registration, or a transfer of registration for a vehicle if the driver's license of the vehicle's owner or lessee is suspended, revoked, or denied for a third or subsequent violation of §625n or §625m or a local ordinance substantially corresponding to these sections. MCL 257.219(1)(d), (2)(d). This provision also applies to co-owners and co-lessees of the vehicle.

3.5 OUIL/OUID/UBAC/OWI/OWPD Causing Serious Impairment of a Body Function — §625(5)

A. Elements of the Offense

*2003 PA 61 eliminated the list of serious impairments previously included in the statutory provision. The list formerly appearing in §625(5) still appears in §904 of the Vehicle Code.

MCL 257.625(5) provides the penalties for violations of §625(1), (3), and (8), where the violation causes serious impairment of a body function of another person.* The elements of this offense are as follows:

1. The defendant, whether licensed or not, operated a motor vehicle on the date in question,

CJI2d 15.12 states that "[o]perating means driving or having actual physical control of the vehicle." See also Section 1.3(F) for more discussion of "operating" a vehicle.

AND

2. The defendant operated the vehicle on a Michigan highway or other place open to the public or generally accessible to motor vehicles, including a designated parking area,

For discussion of what constitutes an area "generally accessible to motor vehicles," see Section 1.3(C).

AND

3. The defendant was operating the vehicle in violation of §625(1), (3), or (8) because he or she:

a) was under the influence of alcohol and/or a controlled substance;

b) had an unlawful bodily alcohol content; or,

c) was visibly impaired in his or her ability to operate the vehicle because of the consumption of alcoholic liquor and/or a controlled substance;

For discussion of "under the influence," "unlawful bodily alcohol content," and "visibly impaired," see Sections 3.1(A), 3.1(B), and 3.3(A), respectively.

AND

4. The defendant voluntarily decided to drive knowing that he or she had consumed alcohol and might be intoxicated,

The Michigan Supreme Court has addressed the element of criminal intent in a case involving OUIL causing *death* under Vehicle Code §625(4). See the discussion in Section 3.4(A) above, regarding *People v Lardie*, 452 Mich 231,

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256, 259 (1996) (where the Court held that §625(4) is a general intent offense, requiring proof that the defendant intended to drive knowing that he or she might be intoxicated).

AND

5. By the operation of the vehicle, the defendant caused another person to suffer serious impairment of a body function.

The Michigan Supreme Court has addressed the standard for determining causation in a case involving OUIL causing death under §625(4). In *People v Lardie*, *supra*, 452 Mich at 258–260, the Court stated that the defendant's decision to drive while intoxicated must substantially contribute to another person's death. In proving causation, the prosecutor must establish that the defendant's decision to drive while intoxicated produced a change in the defendant's operation of the vehicle that caused another's death. The statute does not penalize a driver if the injury was unavoidable regardless of the driver's intoxication.

> **Note:** The majority opinion in *Lardie* noted that its standard for causation is consistent with the common-law causation standard articulated in *People v Tims*, *People v Kneip*, 449 Mich 83, 97–99 (1995), which were consolidated cases involving involuntary manslaughter with a vehicle. In *Tims* and *Kneip,* the Supreme Court held that a defendant's conduct need only be "a" proximate cause of death, rather than "the" sole cause. See *People v Lardie, supra,* 452 Mich at 260 n 51. For a jury instruction on the victim's contributory negligence, see CJI2d 16.20.

In cases involving negligent homicide under MCL 750.324, the Court of Appeals has held that evidence of the decedent's failure to wear a seat belt was inadmissible at trial to prove contributory negligence because it was not relevant to causation of the accident. *People v Burt*, 173 Mich App 332, 334 (1988); *People v Richardson*, 170 Mich App 470, 472 (1988).

B. Penalties for Violations of §625(5)

Under §625(5), individuals convicted of violating MCL 257.625(1), (3), or (8), and whose violations cause another person to suffer serious impairment of a body function are guilty of a **felony** punishable by the penalties and sanctions described below. See Section 2.9 for discussion of general sentencing considerations in all drunk driving cases. See Section 2.10 on licensing sanctions generally. Section 2.11 addresses general procedures for forfeiture and vehicle immobilization. Section 1.3 contains definitions of the following terms:

- Conviction — Section 1.3(B).
- Prior conviction — Section 1.3(G).

- Substantially corresponding ordinance or state statute — Section 1.3(I).

1. Criminal Penalties Applicable to All §625(5) Offenders

*Amendments effective September 30, 2003, removed language from §625(5) listing examples of conditions considered to be "serious impairments" for purposes of this section. 2003 PA 61.

Under MCL 257.625(5), both first-time and repeat offenders convicted of violating §625(1), (3), or (8) resulting in serious impairment of a body function* of another are guilty of a **felony** punishable by:

- imprisonment for not more than five years, **or**
- a fine of not less than $1,000.00 and not more than $5,000.00, **or**
- both. MCL 257.625(5).

2. Sanctions Specific to First-time Offenders of §625(5)

Licensing Sanctions — First-time offenders are subject to mandatory license revocation for a period of not less than one year. MCL 257.303(2)(d), (4)(a)(*i*).

Points — The Secretary of State will assess six points for a violation of §625(5) or a law or local ordinance substantially corresponding to it. MCL 257.320a(1)(c).

Vehicle Sanctions — The court has discretion to order vehicle forfeiture under MCL 257.625n for an offender's first conviction. If the court does not order forfeiture of the vehicle, it must order vehicle immobilization for up to 180 days. MCL 257.904d(1)(b).

3. Sanctions Specific to Offenders Who Violate §625(5) Within Seven Years of a Prior Conviction or Within Ten Years of Two Prior Convictions

Licensing Sanctions — If the subsequent offense occurs within seven years of the date on which the offender's license was revoked for the prior conviction, the offender's license revocation is for a period of not less than five years. MCL 257.303(2)(d), (4)(a)(*ii*).

Vehicle Sanctions — If a person is convicted of violating §625(5) within seven years after one prior conviction, the court has discretion to order vehicle forfeiture under MCL 257.625n. If the court does not order forfeiture, it must order vehicle immobilization for not less than 90 days and not more than 180 days. MCL 257.625(5)(a); MCL 257.904d(1)(c).

The court also has discretion to order vehicle forfeiture when a person is convicted of violating §625(5) within ten years of two prior convictions. Should the court not order vehicle forfeiture under MCL

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257.625n, it must order immobilization for not less than one year and not more than three years. MCL 257.904d(1)(d).

Registration Denial — The Secretary of State shall refuse issuance of a certificate of title, a registration, or a transfer of registration for a vehicle if the driver's license of the vehicle's owner or lessee is suspended, revoked, or denied for a third or subsequent violation of §625n or §625m or a local ordinance substantially corresponding to these sections. MCL 257.219(1)(d), (2)(d). This provision also applies to co-owners and co-lessees of the vehicle.

3.6 "Zero Tolerance" Violations — §625(6)

A. Elements of the Offense

MCL 257.625(6) prohibits an individual under the age of 21 from operating a motor vehicle if he or she has "any bodily alcohol content." The elements of this offense are as follows:

1. The defendant, whether licensed or not, operated a motor vehicle on the date in question,

See Section 1.3(F) for discussion of "operating" a vehicle.

AND

2. The defendant operated the vehicle on a Michigan highway or other place open to the public or generally accessible to motor vehicles, including a designated parking area,

For discussion of what constitutes an area "generally accessible to motor vehicles," see Section 1.3(C).

AND

3. The defendant was less than 21 years of age,

AND

4. The defendant had "any bodily alcohol content."

The statute defines "any bodily alcohol content" to mean either of the following:

- An alcohol content of not less than 0.02 grams or more but less than 0.08 grams per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine.
- Any presence of alcohol within a person's body resulting from the consumption of alcoholic liquor, other than consumption of

alcoholic liquor as part of a generally recognized religious service or ceremony.

In a prosecution for a violation of §625(6), the defendant bears the burden of proving that the consumption of alcoholic liquor was a part of a generally recognized religious service or ceremony by a preponderance of the evidence. MCL 257.625(23).

B. Penalties for Violations of §625(6)

The discussion below sets forth the criminal penalties and licensing sanctions imposed for first-time and repeat offenders convicted of violating §625(6). The Vehicle Code imposes no vehicle sanctions (i.e., immobilization or forfeiture) for §625(6) violations.

See Section 2.9 for discussion of general sentencing considerations in all drunk driving cases. See Section 2.10 on licensing sanctions generally. Section 1.3 contains definitions of the following terms:

- Conviction — Section 1.3(B).
- Prior conviction — Section 1.3(G).
- Substantially corresponding ordinance or state statute — Section 1.3(I)

See Miller, *Juvenile Traffic Benchbook* (MJI, 1999) for discussion of proceedings involving persons under the age of 17.

1. First-time Offenders of §625(6)

First-time offenders convicted of violating MCL 257.625(6) are guilty of a **misdemeanor** punishable by:

- community service for not more than 360 hours, **or**
- a fine of not more than $250.00, **or**
- both. MCL 257.625(12)(a).

Licensing Sanctions — A first-time offender is subject to a mandatory 30-day suspension of his or her driver's license. The Secretary of State may issue a restricted license for all or part of the suspension period if the person is otherwise eligible for a license. MCL 257.319(8)(c), (15).

Points — Violators of §625(6) are assessed four points. MCL 257.320a(1)(i).

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3. Offenders Who Violate §625(6) Within Seven Years of One or More Prior Convictions

An individual convicted of violating MCL 257.625(6) within seven years of one or more prior convictions is guilty of a **misdemeanor** punishable by one or more of the following:

- community service for not more than 60 days, **or**
- a fine of not more than $500.00, **or**
- imprisonment for not more than 93 days. MCL 257.625(12)(b).

Licensing Sanctions — Repeat offenders are subject to a mandatory 90-day license suspension for **subsequent violations of §625(6)** within seven years of a prior conviction for **§625(6).** MCL 257.319(8)(d). There is no provision in the statute for issuing a restricted license to persons subject to this 90-day suspension.

If the person has one or more prior convictions **other than** a conviction of violating §625(6) within seven years, the Secretary of State shall revoke the person's driver's license for a minimum of one year upon conviction of a violation of §625(6). MCL 257.303(2)(c), (4).

Points — Violators of §625(6) are assessed four points. MCL 257.320a(1)(i).

3.7 Child Endangerment — §625(7)

A. Elements of the Offense

MCL 257.625(7) provides penalties for specified violations of §625 when a person younger than age 16 is occupying the vehicle. The elements of child endangerment are as follows:

1. The defendant, whether licensed or not, operated a motor vehicle on the date in question,

See Section 1.3(F) for discussion of "operating" a vehicle.

AND

2. The defendant operated the vehicle on a Michigan highway or other place open to the public or generally accessible to motor vehicles, including a designated parking area,

For discussion of what constitutes an area "generally accessible to motor vehicles," see Section 1.3(C).

AND

3. While defendant was operating the vehicle, another person less than 16 years of age was occupying the vehicle,

AND

4. The defendant was operating the vehicle in violation of MCL 257.625(1), (3), (4), (5), (6), or (8).

This statute creates a separate offense for endangering a person under 16 years of age while committing one of the following drunk driving offenses:

> a) Driving under the influence of alcohol and/or a controlled substance in violation of §625(1);
>
> b) Driving with an unlawful bodily alcohol content in violation of §625(1);
>
> c) Driving while visibly impaired because of the consumption of alcoholic liquor and/or a controlled substance in violation of §625(3);
>
> d) OUIL/OUID/UBAC/OWI/OWPD causing death, in violation of §625(4);
>
> (e) OUIL/OUID/UBAC/OWI/OWPD causing serious impairment of a body function, in violation of §625(5);
>
> (f) being under age 21 and driving with any bodily alcohol content, in violation of §625(6); or
>
> (g) Driving with the presence of any amount of a specified controlled substance in the body (OWPD), in violation of §625(8).

*OUIL/OUID/UBAC/OWI/OWPD causing death or serious injury.

A person may be charged with, convicted of, and punished for a violation of §625(4) or (5)* occurring at the same time the person commits the violation of §625(7). MCL 257.625(7)(d).

B. Penalties for Violations of §625(7)

The section below discusses the penalties and sanctions imposed for first-time and repeat offenders convicted of violating §625(7). See Section 2.9 for discussion of general sentencing considerations in all drunk driving cases. See Section 2.10 on licensing sanctions generally. Section 2.11 addresses general procedures for forfeiture and vehicle immobilization. Section 1.3 contains definitions of the following terms:

- Conviction — Section 1.3(B).

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- Prior conviction — Section 1.3(G).
- Substantially corresponding ordinance or state statute — Section 1.3(I).

B. Criminal Penalties

Section 625(7) imposes two sets of criminal penalties, depending upon the underlying drunk driving offense that gives rise to the charges of child endangerment:

a. If the underlying offense is a violation of §625(1), (3), (4), (5), or (8), first-time offenders are subject to misdemeanor sanctions, while repeat offenders are subject to felony sanctions.

- MCL 257.625(7)(a)(*i*) subjects first-time offenders to **misdemeanor** sanctions consisting of a mandatory fine of not less than $200.00 or more than $1,000.00, and to one or both of the following:
  - Imprisonment for not less than five days or more than one year. Not less than 48 hours of the prison term shall be served consecutively, and the prison term shall not be suspended.
  - Community service for not less than 30 days or more than 90 days.
- If the violation of §625(7) occurs within seven years of a prior conviction or within ten years of two or more prior convictions, MCL 257.625(7)(a)(*ii*) subjects the offender to **felony** sanctions consisting of a mandatory fine of not less than $500.00 or more than $5,000.00, and to **either** of the following:
  - Imprisonment under the jurisdiction of the Department of Corrections for not less than one year or more than five years.
  - Probation with imprisonment in the county jail for not less than 30 days or more than one year and community service for not less than 60 days or more than 180 days. Not less than 48 hours of the imprisonment shall be served consecutively, and the term of imprisonment shall not be suspended.

b. If the underlying offense is a violation of §625(6), both first-time and repeat offenders are subject to misdemeanor sanctions.

- MCL 257.625(7)(b)(*i*) subjects first-time offenders to **misdemeanor** sanctions consisting of one or more of the following:
  - Community service for not more than 60 days.
  - A fine of not more than $500.00.
  - Imprisonment for not more than 93 days.

- If the violation of §625(7) occurs within seven years of a prior conviction or within ten years of two or more prior convictions, MCL 257.625(7)(b)(*ii*) subjects the offender to a mandatory fine of not less than $200.00 or more than $1,000.00, and to one or both of the following:
  - Imprisonment for not less than five days or more than one year. Not less than 48 hours of the imprisonment shall be served consecutively, and the term of imprisonment shall not be suspended.
  - Community service for not less than 30 days or more than 90 days.

1. Licensing Sanctions

No prior convictions — The Secretary of State shall suspend a person's driver's license for a violation of §625(7) for 180 days if the person has no prior convictions within seven years. The Secretary of State may issue the person a restricted license after the first 90 days of suspension if the person is otherwise eligible for a license. MCL 257.319(8)(e), (15).

*See Section 2.10(B) for a list of prior convictions that result in revocation.

Repeat offenders — Under MCL 257.303(2)(c), offenders convicted of violating §625(7) **within seven years of another prior conviction** listed in the statute will be subject to mandatory driver's license revocation for a minimum of one year. This period increases to five years for offenders convicted of violating §625(7) **within ten years of two other prior convictions** listed in the statute, if the revocation occurs within seven years after the date of any prior revocation or denial. MCL 257.303(2)(g), (4)(a).*

*OUIL/OUID/UBAC/OWI/OWPD causing death or serious injury.

Points — The Secretary of State will assess six points for a violation of §625(7) or a law or local ordinance substantially corresponding to it. MCL 257.320a(1)(c). However, if a person is convicted of a violation of §625(4) or (5)* that occurs while the person is violating §625(7), the Secretary of State shall not assess points under §320a for both violations where the charges arise out of the same transaction. MCL 257.625(7)(d).

2. Vehicle Sanctions

First-time offenders — MCL 257.625(7)(c) provides that sentences for first-time offenders may include vehicle forfeiture under MCL 257.625n or immobilization for up to 180 days under MCL 257.904d(1)(a), in the court's discretion.

Repeat offenders — If the violation of §625(7) occurs within seven years of a prior conviction or within ten years of two or more prior convictions, immobilization is mandatory, unless the court has exercised its discretion to order vehicle forfeiture. MCL 257.625(7)(c). The immobilization periods are as follows:

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- For a conviction within seven years after a prior conviction, not less than 90 days or more than 180 days. MCL 257.904d(1)(c).
- For a conviction within ten years after two or more prior convictions, not less than one year or more than three years. MCL 257.904d(1)(d).

Registration Denial — The Secretary of State shall refuse issuance of a certificate of title, a registration, or a transfer of registration for a vehicle if the driver's license of the vehicle's owner or lessee is suspended, revoked, or denied for a third or subsequent violation of §625n or §625m or a local ordinance substantially corresponding to these sections. MCL 257.219(1)(d), (2)(d). This provision also applies to co-owners and co-lessees of the vehicle.

3.8 Operating With the Presence of Drugs (OWPD)—§625(8)

Effective September 30, 2003, 2003 PA 61 created the new offense of operating a motor vehicle with the presence of drugs (OWPD). Newly added MCL 257.625(8) establishes a "zero tolerance" violation specific to controlled substances for individuals who operate motor vehicles "if the person has in his or her body any amount of a controlled substance . . . ." The statute specifies the controlled substances included in the prohibition, but it offers no guidance with regard to the method by which the presence or identity of a substance is to be determined.

A. Elements of the Offense

MCL 257.625(8) prohibits an individual from operating a motor vehicle if the person "has in his or her body any amount of a controlled substance." The elements of this offense are as follows:

1. The defendant, whether licensed or not, operated a motor vehicle on the date in question,

See Section 1.3(F) for discussion of "operating" a vehicle.

AND

2. The defendant operated the vehicle on a Michigan highway or other place open to the public or generally accessible to motor vehicles, including a designated parking area,

For discussion of what constitutes an area "generally accessible to motor vehicles," see Section 1.3(C).

AND

3. At the time the defendant operated the vehicle, "any amount of a controlled substance" was present in the defendant's body.

Unlike MCL 257.625(6), which precisely defines "any bodily alcohol content," MCL 257.625(8) does not define "any amount of a controlled substance."

"Controlled substance" is specifically defined in MCL 257.625(8) as a Schedule 1 controlled substance listed in MCL 333.7212 or a substance described in MCL 333.7214(a)(*iv*).

The lists found in §7212 and §7214(a)(*iv*) include numerous opiates and opium derivatives, a variety of compounds or mixtures containing different hallucinogenic substances, synthetic equivalents of the substances extracted from marijuana plants, and coca leaves and their derivatives.*

*This list is not meant to be exhaustive. For a complete list of the included substances, their chemical designations, and their trade names, see MCL 333.7212 and 7214(a)(*iv*).

B. Penalties for Violations of §625(8)

The penalties and sanctions for §625(8) offenses are set forth below. See Section 2.9 for discussion of general sentencing considerations in all drunk driving cases. See Section 2.10 on licensing sanctions generally. Section 2.11 addresses general procedures for forfeiture and vehicle immobilization. Section 1.3 contains definitions of the following terms:

- Conviction — Section 1.3(B).
- Prior conviction — Section 1.3(G).
- Substantially corresponding ordinance or state statute — Section 1.3(I).

1. First-time Offenders

Criminal Penalties — According to MCL 257.625(9)(a), first-time violators of §625(8) are guilty of a **misdemeanor** punishable by one or more of the following:

- community service for not more than 360 hours.
- imprisonment for not more than 93 days. This prison term may be suspended. See MCL 257.625(9)(d).
- a fine of not less than $100.00 or more than $500.00.

Licensing Sanctions — The Secretary of State must suspend a first-time offender's driver's license for 180 days. After the first 30 days of the suspension, the Secretary of State may issue the offender a restricted license for a specified portion of the remaining suspension

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if the offender is otherwise eligible for a license. MCL 257.319(8)(a), (15).

Points — First-time offenders are assessed six points for violating §625(8). MCL 257.320a(1)(c).

Vehicle Sanctions — Vehicle immobilization may be ordered for not more than 180 days. MCL 257.904d(1)(a) and MCL 257.625(9)(e).

Ignition Interlock Device — The court has discretion to order as a condition of probation that an offender's vehicle be equipped with an ignition interlock device as described in Sections 625k and 625*l*. MCL 257.625(24).

2. Offenders Who Violate §625(8) Within Seven Years of a Prior Conviction

Criminal Penalties — Offenders who violate §625(8) within seven years of one prior conviction are guilty of a **misdemeanor** punishable by:

- a **mandatory fine** of not less than $200.00 or more than $1,000.00, **and**
- not less than five days or more than one year of imprisonment, **or**
- community service for not less than 30 days or more than 90 days, **or**
- both the imprisonment and community service noted above. MCL 257.625(9)(b). Any term of imprisonment shall not be suspended, and no less than 48 hours of the term shall be served at a time. MCL 257.625(9)(b)(*i*), (d).

Licensing Sanctions — Offenders convicted of violating §625(8) within seven years of a prior conviction are subject to mandatory driver's license revocation for a minimum of one year. MCL 257.303(2)(c), (4). The period of revocation is the longer of the following:

- not less than one year from the date of revocation, or
- not less than five years from the date of revocation if the subsequent revocation occurs within seven years of a previous revocation. MCL 257.303(4)(a)(*i*)–(*ii*).

Vehicle Sanctions — For a conviction under §625(8) within seven years of a prior conviction, the court must order vehicle immobilization for not less than 90 days or more than 180 days, unless forfeiture is ordered under MCL 257.625n.* MCL 257.904d(1)(c). Forfeiture may be ordered in the court's discretion if the offender has

*Forfeiture is permitted by MCL 257.625(9)(f).

an ownership interest in the vehicle used in the offense. The court may order that a leased vehicle be returned to the lessor. MCL 257.625n.

Ignition Interlock Device — The court has discretion to order as a condition of probation that an offender's vehicle be equipped with an ignition interlock device as described in Sections 625k and 625*l*. MCL 257.625(24).

3. Offenders Who Violate §625(8) Within Ten Years of Two or More Prior Convictions

Criminal Penalties — Offenders who violate §625(8) within ten years of two or more prior convictions are guilty of a **felony** punishable by:

- a **mandatory fine** of not less than $500.00 or more than $5,000.00, **and** ***either***
- imprisonment for not less than one year or more than five years under the jurisdiction of the Department of Corrections, **or**
- probation with imprisonment in the county jail for not less than 30 days or more than one year **and** community service for not less than 60 days or more than 180 days. MCL 257.625(9)(c). Any term of imprisonment shall not be suspended, and no less than 48 hours of the term shall be served at a time. MCL 257.625(9)(c)(*ii*), (d).

Licensing Sanctions — The Secretary of State must revoke the driver's licenses of repeat offenders who have two prior convictions of any of the offenses listed in the statute within ten years, if any of the convictions resulted from an arrest on or after January 1, 1992. MCL 257.303(2)(g). The period of revocation is the longer of the following:

- not less than one year from the date of revocation, or
- not less than five years from the date of revocation if the subsequent revocation occurs within seven years of a previous revocation. MCL 257.303(4)(a)(*i*)–(*ii*).

Vehicle Sanctions — For a conviction under §625(8) within ten years of two or more prior convictions, the court must order vehicle immobilization for not less than one year or more than three years, unless forfeiture is ordered under MCL 257.625n. MCL 257.904d(1)(d). Forfeiture may be ordered in the court's discretion if the offender has an ownership interest in the vehicle used in the offense. The court may order that a leased vehicle be returned to the lessor. MCL 257.625n.

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Registration Denial — The Secretary of State shall refuse issuance of a certificate of title, a registration, or a transfer of registration for a vehicle if the driver's license of the vehicle's owner or lessee is suspended, revoked, or denied for a third or subsequent violation of §625n or §625m or a local ordinance substantially corresponding to these sections. MCL 257.219(1)(d), (2)(d). This provision also applies to co-owners and co-lessees of the vehicle.

Ignition Interlock Device — The court has discretion to order as a condition of probation that an offender's vehicle be equipped with an ignition interlock device as described in Sections 625k and 625*l*. MCL 257.625(24).

Using an offender's prior convictions to enhance a subsequent charge does not offend the prohibition against ex post facto laws. In *People v Callon*, ___ Mich App ___ (2003), the Michigan Court of Appeals upheld the use of a "prior conviction" to enhance a conviction of OUIL/UBAC to a felony. The defendant was convicted of OUIL as a third offender. The defendant claimed that use of his "prior conviction" operated as an ex post facto law because the prior OWI occurred before the effective date of the amendment adding OWI to the list of offenses in the enhancement statute. The Court held that the enhancement statute did not act as an ex post facto law because it did not attach legal consequences to the defendant's prior OWI conviction, but rather attached legal consequences to the defendant's future conduct of committing an OUIL. *Id*. at ___.

3.10 Refusal to Submit to a Preliminary Chemical Breath Analysis — §625a(2)

This section addresses the misdemeanor and civil sanctions for a driver's refusal to submit to a preliminary chemical breath analysis under MCL 257.625a(2).

Note: For discussion of the circumstances where police may require a preliminary chemical breath analysis, see Section 2.1(B). A preliminary chemical breath analysis should be distinguished from a chemical test of a person's blood, urine, or breath pursuant to the implied consent statute, MCL 257.625c. A discussion of the implied consent statute appears at Section 2.3.

A. Elements of the Offense/Infraction

1. The defendant operated a vehicle on a Michigan highway or other place open to the public or generally accessible to motor vehicles, including a designated parking area,

For discussion of what constitutes "operating" a vehicle, or an area "generally accessible to motor vehicles," see See Section 1.3.

AND

2. Police had reasonable cause to believe that the defendant:

a) by consumption of alcoholic liquor, may have affected his or her ability to operate the vehicle; **or**

b) was operating a commercial motor vehicle while his or her blood, breath, or urine contained any measurable amount of alcohol or detectable presence of alcoholic liquor; **or**

c) was under age 21 and was operating the vehicle with any bodily alcohol content as defined by §625(6);

In criminal cases, "reasonable cause" is shown by facts leading a fair-minded person of average intelligence and judgment to believe that an incident has occurred or will occur. See *People v Richardson*, 204 Mich App 71, 79 (1994).

AND

3. An officer requested the defendant to submit to a preliminary chemical breath analysis,

AND

4. The defendant refused to submit to the preliminary chemical breath analysis.

B. Penalties/Civil Sanctions

The statute requires that the driver of a commercial vehicle asked to submit a preliminary chemical breath analysis be informed of the consequences of refusal. MCL 257.625a(4). After having been so informed, the driver of a commercial motor vehicle who refuses to comply with a peace officer's lawful request to submit to a preliminary chemical breath analysis is guilty of a misdemeanor punishable by imprisonment for not more than 93 days, a fine of not more than $100, or both. Additionally, the officer will issue a 24 hour out-of-service order. MCL 257.625a(5).

In cases involving drivers of vehicles other than commercial motor vehicles, refusal to submit to a preliminary chemical breath analysis is a civil infraction subject to sanctions under MCL 257.907. MCL 257.625a(2)(d).

The Secretary of State will assess two points to a driver under age 21 who refuses to submit to a preliminary breath test. MCL 257.320a(1)(t).

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3.10 Chart: Criminal Penalties, Licensing Sanctions, and Vehicle Sanctions Under Vehicle Code §625

	OUIL/OUID/ UBAC–§625(1)	OWI–§625(3)	OUIL/OUID/ UBAC/OWI/ OWPD Death/Injury §625(4)–(5)	Zero Tolerance §625(6)	Endangering Child by Zero Tolerance Offense– §625(7)(b)	Endangering Child by Other §625 Offense– §625(7)(a)	Operating With the Presence of Drugs–OWPD §625(8)
1st Offense (no prior convictions)*	**Misdemeanor penalties– §625(9)(a):** One or more: – Up to 93 days jail – $100-$500 fine – Up to 360 hours community service	**Misdemeanor penalties– §625(11)(a):** One or more: – Up to 93 days jail – Max. $300 fine – Up to 360 hours community service	**Felony penalties** **– If death §625(4):** Prison up to 15 years and/or $2,500-$10,000 fine **– If injury §625(5):** Prison up to 5 years and/or $1,000-$5,000 fine	**Misdemeanor penalties– §625(12)(a):** One or more: – Up to $250 fine – Up to 360 hours community service	**Misdemeanor penalties– §625(7)(b):** One or more: – Community service up to 60 days – Up to $500 fine – Up to 93 days jail	**Misdemeanor penalties– §625(7)(a):** mandatory $200-$1,000 fine and one or more: – 30-90 days community service – 5 days to 1 year jail	**Misdemeanor penalties– §625(9)(a):** One or more: – Up to 93 days jail – $100-$500 fine – Up to 360 hours community service
	License sanction – §319(8)(a): – 180-day suspension – After 30 days, may issue restricted license **Ignition interlock— §625(24):** May be probation condition	**License sanction – §319(8)(b):** – If alcohol only, 90 day suspension, may issue restricted – If drugs/drugs and alcohol, 180 day suspension, may issue restricted	**License sanction – §303(2)(d):** Minimum 1-year revocation/denial	**License sanction – §319(8)(c):** 30-day suspension, may issue restricted license	**License sanction – §319(8)(e):** 180-day suspension, may issue restricted license after first 90 days	**License sanction – §319(8)(e):** 180-day suspension, may issue restricted license after first 90 days	**License sanction – §319(8)(a):** – 180-day suspension – After 30 days, may issue restricted license **Ignition interlock— §625(24):** May be probation condition
	Immobilization – §904d(1)(a): Permissive up to 180 days	**Immobilization – §904d(1)(a):** Permissive up to 180 days	**Immobilization – §904d(1)(b):** Required up to 180 days, unless forfeited	**Immobilization – §904d(1):** None	**Immobilization – §904d(1)(a):** Permissive up to 180 days, unless forfeited	**Immobilization – §904d(1)(a):** Permissive up to 180 days, unless forfeited	**Immobilization – §904d(1)(a):** Permissive up to 180 days
	Plate confiscation – §904c(1): None	**Plate confiscation – §904c(1):** None	**Plate confiscation – §904c(1):** Required	**Plate confiscation – §904c(1):** None	**Plate confiscation – §904c(1):** None	**Plate confiscation – §904c(1):** None	**Plate confiscation – §904c(1):** None
	Registration denial – §219(1)(d): None	**Registration denial – §219(1)(d):** None	**Registration denial – §219(1)(d):** None	**Registration denial – §219(1)(d):** None	**Registration denial – §219(1)(d):** None	**Registration denial – §219(1)(d):** None	**Registration denial – §219(1)(d):** None
	Forfeiture— §625n(1): None	**Forfeiture– §625n(1):** None	**Forfeiture– §625n(1):**Permissive	**Forfeiture– §625n(1):** None	**Forfeiture– §625n(1):**Permissive	**Forfeiture– §625n(1):**Permissive	**Forfeiture— §625n(1):** None
	Points–§320a(1): 6	**Points–§320a(1):** 4	**Points–§320a(1):** 6	**Points–§320a(1):** 4	**Points–§320a(1):** 6	**Points–§320a(1):** 6	**Points–§320a(1):** 6

*See Section 1.3(G) for a definition of "prior conviction" for purposes of the offenses listed here.

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Criminal Penalties, Licensing Sanctions, and Vehicle Sanctions Under Vehicle Code §625

	OUIL/OUID/ UBAC–§625(1)	OWI–§625(3)	OUIL/OUID/ UBAC/OWI/ OWPD Death/Injury §625(4)–(5)	Zero Tolerance §625(6)	Endangering Child by Zero Tolerance Offense– §625(7)(b)	Endangering Child by Other §625 Offense– §625(7)(a)	Operating With the Presence of Drugs–OWPD §625(8)
2nd Offense (1 prior §625 conviction* within 7 years)	**Misdemeanor penalties– §625(9)(b):** – mandatory fine of $200-$1,000 and one or both: – 5 days to 1 year prison – 30 to 90 days community service **License sanction – §303(2)(c), (4)(a):** mandatory minimum 1-year revocation/ denial **Ignition interlock— §625(24):** May be probation condition **Immobilization – §904d(1)(c):** Required 90 to 180 days unless forfeited **Plate confiscation – §904c(1):**Required **Registration denial – §219(1)(d):** None **Forfeiture- §625n(1):** Permissive	**Misdemeanor penalties– §625(11)(b):** Mandatory fine of $200-$1,000 and one or both: – 5 days to 1 year prison – 30 to 90 days community service **License sanction – §303(2)(c), (4)(a):** mandatory minimum 1-year revocation/ denial **Immobilization – §904d(1)(c):** Required 90 to 180 days unless forfeited **Plate confiscation – §904c(1):**Required **Registration denial – §219(1)(d):** None **Forfeiture- §625n(1):** Permissive	**Felony penalties** **If death §625(4):** Prison up to 15 years and/or $2,500–$10,000 fine **If injury §625(5):** Prison up to 5 years and/or $1,000–$5,000 fine **License sanction – §303(2)(d), (4)(a):** minimum 5 years revocation/denial, if imposed within 7 years after prior revocation/denial **Immobilization – §904d(1)(c):** Required 90 to 180 days unless forfeited **Plate confiscation – §904c(1):**Required **Registration denial – §219(1)(d):** None **Forfeiture- §625n(1):** Permissive	**Misdemeanor penalties– §625(12)(b):** One or more: – Up to 60 days community service – Up to $500 fine – Up to 93 days jail **License sanction –** – If prior is §625(6) violation, 90-day suspension, no restricted license, per §319(8)(d) – If prior is other §625 or §904(4)-(5) violation, 1-yr revocation/denial, per §303(2)(c) **Immobilization – §904d(1):** None **Plate confiscation – §904c(1):**None **Registration denial – §219(1)(d):** None **Forfeiture– §625n(1):** None	**Misdemeanor penalties– §625(7)(b):** Mandatory fine of $200-$1,000 and one or both: – 30-90 days community service – 5 days to 1 year jail **License sanction – §303(2)(c), (4)(a):** mandatory minimum 1-year revocation/ denial **Immobilization – §904d(1)(c):** Required 90 to 180 days unless forfeited **Plate confiscation – §904c(1):**Required **Registration denial – §219(1)(d):** None **Forfeiture- §625n(1):** Permissive	**Felony penalties– §625(7)(a):** Mandatory fine of $500-$5,000 and either: – 1 to 5 years prison – Probation with 30 days to 1 year jail AND 60-180 days community service **License sanction – §303(2)(c), (4)(a):** mandatory minimum 1-year revocation/ denial **Immobilization – §904d(1)(c):** Required 90 to 180 days unless forfeited **Plate confiscation – §904c(1):**Required **Registration denial – §219(1)(d):**None **Forfeiture- §625n(1):** Permissive	**Misdemeanor penalties– §625(9)(b):** – mandatory fine of $200-$1,000 and one or both: – 5 days to 1 year prison – 30 to 90 days community service **License sanction – §303(2)(c), (4)(a):** mandatory minimum 1-year revocation/ denial **Ignition interlock— §625(24):** May be probation condition **Immobilization – §904d(1)(c):** Required 90 to 180 days unless forfeited **Plate confiscation – §904c(1):**Required **Registration denial – §219(1)(d):** None **Forfeiture- §625n(1):** Permissive

*See Section 1.3(G) for a definition of "prior conviction" for purposes of the offenses listed here.

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Criminal Penalties, Licensing Sanctions, and Vehicle Sanctions Under Vehicle Code §625

	OUIL/OUID/ UBAC–§625(1)	OWI–§625(3)	OUIL/OUID/ UBAC/OWI/ OWPD Death/Injury §625(4)–(5)	Zero Tolerance §625(6)	Endangering Child by Zero Tolerance Offense– §625(7)(b)	Endangering Child by Other §625 Offense– §625(7)(a)	Operating With the Presence of Drugs–OWPD §625(8)
3rd or subsequent offense (2 or more prior §625 convictions* within 10 years)	**Felony penalties–§625(9)(c):** Mandatory $500-$5,000 fine and either: – 1-5 years prison – Probation with 30 days to 1 year jail AND 60 to 180 days community service **License sanction – §303(2)(g), (4)(a):** minimum 5 years revocation/denial, if imposed w/i 7 years of prior revocation/ denial **Ignition interlock—§625(24):** May be probation condition **Immobilization – §904d(1)(d):** Required 1 to 3 years unless forfeited **Plate confiscation – §904c(1):**Required **Registration denial §219(1)(d):** Required **Forfeiture-§625n(1):**Permissive	**Felony penalties–§625(11)(c):** Mandatory $500-$5,000 fine and either: – 1-5 years prison – Probation with 30 days to 1 year jail AND 60 to 180 days community service **License sanction – §303(2)(g), (4)(a):** minimum 5 years revocation/denial, if imposed w/i 7 years of prior revocation/ denial **Immobilization – §904d(1)(d):** Required 1 to 3 years unless forfeited **Plate confiscation – §904c(1):**Required **Registration denial §219(1)(d):** Required **Forfeiture-§625n(1):**Permissive	**Felony penalties** **If death §625(4):** Prison up to 15 years and/or $2,500–$10,000 fine **If injury §625(5):** Prison up to 5 years and/or $1,000–$5,000 fine **License sanction – §303(2)(g), (4)(a):** minimum 5 years revocation/denial, if imposed w/i 7 years of prior revocation/ denial **Immobilization – §904d(1)(d):** Required 1 to 3 years unless forfeited **Plate confiscation – §904c(1):**Required **Registration denial §219(1)(d):** Required **Forfeiture–§625n(1):**Permissive	**(No statutory provisions for third or subsequent offenses)**	**Misdemeanor penalties–§625(7)(b):** Mandatory $200-$1,000 fine and one or both: – 30-90 days community service – 5 days to 1 year jail **License sanction – §303(2)(g), (4)(a):** minimum 5 years revocation/denial, if imposed within 7 years after prior revocation/denial **Immobilization – §904d(1)(d):** Required 1 to 3 years unless forfeited **Plate confiscation – §904c(1):**Required **Registration denial §219(1)(d):** Required **Forfeiture–§625n(1):**Permissive	**Felony penalties–§625(7)(a):** Mandatory $500-$5,000 fine and either: – 1 to 5 years prison – Probation with 30 days to 1 year jail AND 60-180 days community service **License sanction – §303(2)(g), (4)(a):** minimum 5 years revocation/denial, if imposed within 7 years after prior revocation/denial **Immobilization – §904d(1)(d):** Required 1 to 3 years unless forfeited **Plate confiscation – §904c(1):**Required **Registration denial §219(1)(d):**Required **Forfeiture–§625n(1):**Permissive	**Felony penalties–§625(9)(c):** Mandatory $500-$5,000 fine and either: – 1-5 years prison – Probation with 30 days to 1 year jail AND 60 to 180 days community service **License sanction – §303(2)(g), (4)(a):** minimum 5 years revocation/denial, if imposed w/i 7 years of prior revocation/ denial **Ignition interlock—§625(24):** May be probation condition **Immobilization – §904d(1)(d):** Required 1 to 3 years unless forfeited **Plate confiscation – §904c(1):**Required **Registration denial §219(1)(d):**Required **Forfeiture–§625n(1):**Permissive

*See Section 1.3(G) for a definition of "prior conviction" for purposes of the offenses listed here.

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