PREFACE

The purpose of this manual is to provide the most recent updates and information to those involved in the adjudication of alcohol and drug related offenses in Montana.

The offenses involving alcohol and drugs are a constantly changing body of law, not only in Montana but on the federal level as well.

The 2003 Montana Legislature made sweeping changes in the evidentiary and sentencing elements of alcohol related offenses as a result of federal influence. The 2005 Legislature was not as aggressive but made some changes in the sentencing parameters. The Montana Supreme Court ruled on 20 cases in 2005 and 7 cases up to March 1st 2006 involving DUI crimes. The majority of those cases reaffirmed earlier case law, the ones that did not are addressed throughout this updated manual.

It is a continuing obligation of those involved in the adjudication of alcohol and drug related offenses to study and keep abreast of the changes and interpretations of the laws as they occur.

This manual is dedicated to that purpose and those who have been involved in its inception, revision and continuance. Their insight and commitment has helped those involved in the adjudication of alcohol and drug related offenses to more efficiently and effectively provide due process and justice to the people of the State of Montana. For this, we owe the following people in chronological order a debt of gratitude:

1. Honorable John Albrecht
2. Honorable Mike Morris
3. Honorable Nancy Sabo

INTRODUCTION

This manual has changed in form, substance, and format over the years of its existence in order to provide the user with the best information possible to perform their specific duties.

The target audiences are mainly judges of courts of limited jurisdiction and general jurisdiction judges. The manual can also be of service to prosecutors, law enforcement, defense counsel and other state agency personnel.

There is a certain amount of generic information that must be included to cover all aspects of the offenses listed. General terms will be used as much as possible to avoid confusion. Specific terms are just that *"specific"* and must be adhered to.

This manual will guide the user through the entire gauntlet of a case from the initial stop, arrest, testing, plea, trial and sentence, including the proper use of all forms.

CAVEAT:

Throughout the manual there are subject matter references to case law. There is a short synopsis of the case for reader convenience. Always read the entire case and refer to the proper statutory authority in making your decision. The cases cited in this manual can be overruled by new case law at any time. I would suggest that when new case law is handed out at the semi-annual training sessions, which affects this manual, that it be incorporated into the manual. Do not be afraid to write margin notes whenever needed to keep it updated.

Some cases that have been overruled for one reason can still give guidance in your decision making process. As an example, a case that has good reasonable suspicion facts can be overruled on a suppression of evidence issue. The suppression overruling doesn't necessarily taint the reasonable suspicion findings and facts.

The following definitions, abbreviations and icons will aid the user to quickly maneuver through the manual.

D.U.I. - 61-8-401 MCA, Driving under the influence of alcohol or drugs

PER SE - 61-8-406 MCA, This is a misnomer but is language that is commonly used. It is driving with a BAC of .08 or greater

BAC - Blood Alcohol Content

BRAC - Breath Alcohol Content

URAC - Urine Alcohol Note: Urine tests can detect the presence of alcohol but but there is no way to equate it with Blood or Breath alcohol. Urine & Blood detect the presence of Drugs.

DEFENDANT – Driver, Operator, suspect

 - Case Law

❋ - Important point or note

If you find any errors or have questions or comments about the manual, please call me or send the questions in writing to the address listed below:

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I would like to thank Priscilla Sinclair and Audrey Allums of the Traffic Safety Bureau for her help and support in preparing this manual. I would also like to thank Bradley F. Johnson, Whitefish City Judge for his support. I would like to give a well deserved and special thanks to Barbara J. Pepos for her dedication and work in typing this manual.

I. INITIAL CONTACT/ARREST/FILING OF COMPLAINT

Apprehending and accusing a driver of driving under the influence of alcohol and/or drugs (hereafter DUI) or driving with an alcohol concentration of 0.08 or more (hereafter "per se") involves certain basic steps, including (A) Determination of Particularized Suspicion; (B) Stop of the vehicle; (C) Arrest of the Defendant and an Alcohol Concentration (hereafter "AC") Test; (D) Filing of a complaint; and (E) Trial.

In addition, **Section I** includes a brief discussion of the civil procedure for appealing the implied consent driver's license suspension. It is important to note that the district court has exclusive jurisdiction of this procedure.

A PARTICULARIZED SUSPICION

Section 46-5-101 M.C.A. Investigative stop. In order to obtain or verify an account of the person's presence or conduct or to determine whether to arrest the person, a peace officer may stop any person or vehicle that is observed in circumstances that create a *"particularized suspicion"* that the person or occupant of the vehicle has committed, is committing, or is about to commit an offense.

Following are case excerpts that the Montana Supreme Court has considered to determine what is sufficient information to establish a particularized suspicion.

- A law enforcement officer must have a particularized suspicion to stop a vehicle.
  → *In Re Blake 712 P.2d1338 (Mt.1986)*
- In order to show sufficient cause to stop a vehicle, the burden is on the State to show: (1) objective data from which an experienced police officer can make certain inferences; and (2) a resulting suspicion that the occupant of the vehicle is or has been engaged in wrongdoing or was witness to criminal activity.

  → *State v. Gilder, 985 P.2d147 (Mt.1999)*

→*State v. Gopher 631 P.2d293 (Mt.1981); State v. Stemple 646 P.2d539 (Mt.1982)*

🏛 Particularized suspicion is less than reasonable or probable cause. Probable cause is not required to stop a vehicle.

→*State v. Sharp 702 P.2d959 (Mt.1985); State v. Schatz 634 P.2d1193 (Mt.1981)*

🏛 The essence of this test is that the totality of the circumstances must give law enforcement a particularized and objective basis for suspecting the person of criminal activity.

→ *State v. Reynolds 272 Mt. 46, 50, 899 P.2d540, 544-43. (1995)*

🏛 In evaluating the totality of the circumstances, a court should consider the quantity, or content, and quality, or degree of reliability of the information ava1ilable to the officer.

→*State v. Pratt 286 Mt. 156, 161, 951 P.2d37 (1997)*

→**(also citing** Alabama v. White 496 U.S. 325,330 (1990)

🏛 A citizen report of a DUI, the reported vehicle observed half-way off the road, and the vehicle pulling away when an officer approached is sufficient to establish a particularized suspicion.

→*State v. Sharp 702 P.2d959(Mt.1985)*

🏛 Three citizen informants and the officer's observation of the defendant's driving (and the citizens are presumptively reliable) are sufficient to establish particularized suspicion.

→*Santee v. State of Montana, Dept. of Justice, 267Mt.304,883 P.2d829(1994)*

🏛 One swerve into the wrong traffic lane, in the vicinity of bars around closing time, establishes a particularized suspicion.

→*In Re Blake 712 P.2d1338(Mt.1986)*

🏛 The Court found that two anonymous phone calls corroborated by officers and evidence of excessive speed were sufficient grounds for a justifiable stop.

→*State v.Shaffer 227 Mt. 221, 738P.2d and 491(1987)*

In another case a citizen observed a man staggering out of the door of a convenience store and get into a vehicle, and call police, who stopped the vehicle. The defendant challenged the stop as lacking particularized suspicion because the officer himself had

not observed the driver's difficulties but, further, did not know if the informant was anonymous or what the informant's observations were.
The Court found that : (1) the officer initiating a stop may rely on the informant's report as relayed by dispatch without "cross-examining" it; also appropriate to consider what the dispatching officer knew when determining whether particularized suspicion existed; and (2) the stopping officer need not observe the same actions observed by the informant in order to corroborate the report (recall Pratt) "or finds the person, vehicle, and the vehicle's location substantially as described by the informant."

State v. Hall, 2004 Mt 106, 321 Mont. 78

State v. Myhre, 2005 Mt. 278
The court found that observation of a traffic offense is sufficient to establish particularized suspicion.

State v. Loney, 2004 Mt 204

Other P.C. cases of interest:

State v. Trombley, 2005 MT 174 The defendant made a legal U-turn but crossed the fog-line and straddled the centerline in completing the U-turn.

State v. Todd , 2005 MT 108 The defendant drove into a closed park in Bozeman and was approached by officers conducting a canine training excercise. The officers approached the vehicle to inform the occupants the park was closed. The officer saw the defendant exit the vehicle with alcohol, smelled alcohol on his breath and saw his eyes were glassy. The officer did not witness any erratic driving and stated he had no intention of issuing citations for open container or being in the closed park. The Court upheld the stop.

The next four cases cites stand for the reasons cited but have been overruled for other reasons by State v Bush 968 P.2d 716 (1998)

In another case, a Highway Patrolman stopped a car and the defendant who was driving another vehicle stopped also. The defendant was told to leave but refused, then exhibited signs of intoxication, which led to probable cause for his arrest for D.U.I.

→*State v.Lee232Mt.105,754 P.2d512(1988)*

The Supreme Court determined that particularized suspicion was **not met** in a case where police officers saw a vehicle which was being operated legally. After the vehicle was out of their sight, they heard squealing tires and an engine revving. The

subsequent stop of the defendant's vehicle was determined illegal and the defendant's driver's license was ordered returned despite his refusal to take an AC test.

→*State v.Grinde 813 P.2d473(Mt.1991)*

🏛 An officer had reasonable suspicion based on a citizen's report that a truck was swerving on the road, went partially off the road and nearly hit a bridge.

→ *Jess v.M.V.D.,255 Mt.254,841 P.2d1137(1992)*

🏛 Officers found a truck in a ditch with a man, who had obviously been drinking, in control of the vehicle and the Montana Supreme Court found reasonable suspicion existed.

→*McCullugh v.State, 856 P.2d 958(1993)*

🏛 A recent case held that: a driver's minor crossings of the right fog line on the right lane of traffic were not traffic infractions and the officer did not have a particularized suspicion that would support a traffic stop based on an anonymous tip and his observations of the driver's minor crossings of the right fog line.

→ *State v. Lafferty: 967 P.2d 363 (1998)*

🏛 Driving without headlights after dark equals particularized suspicion

→*Seyferth v. MVD, 922 P.2d 494 (1996)*

B. Stopping the Vehicle

If the officer has particularized suspicion, then the vehicle may be stopped. Section 46-5-401, M.C.A., defines an investigative stop. Most "stops" are obvious. However, in some cases, the issue of if and when a "stop" occurred arises. The test is whether a reasonable person, innocent of crime, would feel free to terminate the police encounter and go about his or her business.

🏛 A police officer who followed defendant's vehicle, pulled into defendant's one-lane driveway blocking his exit, and then exited his patrol car while armed and in uniform, executed an investigative stop requiring particularized suspicion of wrongdoing.

→*State v. Roberts 977 P.2d 974 (Mont1999)*

🏛 An officer approached a car running on the side of the road and found the defendant unresponsive behind the wheel. After the defendant failed to respond to a knock on the window , the officer opened the door and roused the defendant, at which

time he observed the odor of alcohol, etc. Defendant appeals the denial of his motion to suppress. In a case of first impression, Court adopts community caretaking doctrine establishing a three-part test: 1. As long as there are objective, specific and believable facts from which an experienced officer would suspect that a citizen is in need of aid, or help or is in peril, then that officer has the right to stop and investigate. 2. If the citizen is in need of aid, then the officer may take appropriate action to render assistance or mitigate the peril. 3. Once, however, the officer is assured that the citizen is not in peril or is no longer in need of assistance or that the peril has been mitigated, then any actions beyond that constitute a seizure.

State v. Lovegren, 310 Mont. 358 (2002)

State v. Nelson 2004 Mt. 13

State v. Seaman, 2005 MT 307

🏛The officer is not required to give the Miranda warnings at the time of the stop.

→*Miranda v. AZ 384 U.S.436, 16 L.Ed 2d.694, 86 S. Ct.1602, 10 A.L.R.3d 974(1966)*

→*Berkemer v. McCarthy 468 U.S. 420, 82 L.Ed 2d 317, 104 S. Ct. 3138(1984)*

→*City of Billings v. Skurdal 730 P.2d 371 (Mt. 1986)*

Commonly, the officer will check the credentials of the driver and the vehicle, including the driver's license, [1] vehicle registration, [2] and proof of insurance. [3]

🏛 The officer may check the driver's license and vehicle registration by use of the Criminal Justice Information Network, commonly called "CJIN". This procedure was found to be constitutional as cited in the following case.

→*City of Billings v. Skurdal 730 P.2d 371 (Mt. 1986)*

In addition, the officer should be observing the driver. Some common observations made before and during the stop are: the driving behavior prior to the stop, the driver's ability to control the vehicle during the stop, the condition of the vehicle's interior, the condition of the individual's clothing, the actions, balance and demeanor of the subject, and a perceived odor of an alcoholic beverage.

If any observations are made that the driver may be under the influence of alcohol or drugs, then the officer may request that the driver complete the field sobriety

tests(FST) or AC tests. The observations made by the officer should be noted in written form.

1. Preliminary Screening Tests

A. Field Sobriety Test (FST)

🏛 The officer need not inform the driver of the right to refuse to perform the field sobriety tests. A videotape of the tests is admissible without *"Miranda Warnings"* as the performance of the field sobriety tests is not testimonial in nature.

→ *State v. Johnson 719 P.2d 1248 (Mt.1986)*

🏛 If the driver successfully performs the field sobriety tests, then other offenses may be charged and the driver may be allowed to proceed. Although helpful, field sobriety tests are not required to establish probable cause. Probable cause may be established with other evidence.

→ *State v. Forest 236 Mt. 129, 769 P.2d 699 (1989)*

🏛 The defendant may not be arrested in the defendant's home or private dwelling place at night for a misdemeanor committed at some other time and place without a warrant authorizing the arrest. [(4)] However, a defendant's warrantless arrest on his front porch after he voluntarily submitted to FSTs was upheld in the following case.

→ *State v. Ellinger 725 P.2d 1201 (Mt.1986)*

B. Horizontal Gaze Nystagmus (HGN)

One test, which may be given, is the horizontal gaze nystagmus. This test, in conjunction with other tests may be sufficient to establish probable cause for an arrest for DUI.

🏛 This test is used to establish probable cause only and not used to establish any level of alcohol or drug concentration in the body.

→ *State v. Superior court 718 P.2d 171 (Ariz.1986)*

→*State v. Clark 234 Mt. 222, 762 P.2d 853 (1988)*

In order to admit results of an HGN into evidence, a proper foundation must be laid.

🏛 Before an arresting officer may testify to HGN test results, the evidence must show that the arresting officer was properly trained to administer the HGN test and that he or she administered it in accordance with that training.

→**Rules of Evid. Rule 702**; *Hulse v. MVD 961 P.2d 75 (1998)*

🏛 A proper foundation requires the showing that the officer had special training or education and adequate knowledge qualifying him as an expert to explain the correlation between alcohol consumption and nystagmus.

→ Bramble v. MVD 982 p.2d 464 (1999)

C. Preliminary Breath Tests (PBT)

A 1995 statute allows police officers to request a preliminary screening test, [5] for alcohol concentration only. The test is requested "if the officer has a particularized suspicion". This statute is similar to the "implied consent" statute, in that a refusal may result in the suspension or revocation of the driver's license or privilege to drive.

A PBT may be administered for purposes of establishing probable cause for arrest.

🏛 Results of preliminary breath tests, statutorily identified as preliminary alcohol screening tests, are not substantive evidence of amount of alcohol present in person's body, but instead are estimates of alcohol concentration, for the purpose of establishing probable cause.

→ *State v. Strizich 952 P.2d 1365(1997)*

There is a new case that takes PBT tests to a new level for evidentiary purposes. This case should be read in its entirety. The Court held that if the state lays a proper foundation, PBT tests can be admitted in DUI prosecutions.

State v. Damon, 2005 MT 218

C. **Arrest of the Defendant and an Alcohol Concentration (AC) Test**

1. Probable Cause for Arrest of the Defendant

An arrest of the Defendant, without a Warrant, is authorized by Section 46-6-311(1), MCA, when:

(1) the officer has probable cause to believe that the driver is committing an offense, or

(2) the officer has probable cause to believe that the driver has committed an offense and existing circumstances require immediate arrest. [6]

Some cases below review probable cause and arrest issues.

🏛 An air patrolman's citizens arrest at the gates of the airbase was held to be unconstitutional based on the smell of alcohol alone on the defendants breath with no other evidence of impaired driving witnessed.

State v. May 2004 Mt. 45

🏛 Probable cause to arrest is established, if the facts and circumstances within an officer's personal knowledge or related to the officer by reliable source, are sufficient to warrant a reasonable person to believe that someone is committing or has committed an offense.

→ *Jess v. State, Dept. of Justice, MVD 255 Mt. 254, 261,841 P.2d 1137, 1141 (1992)*

→*State v. StaeSchoffner 248 Mt. 260, 264, 811 P.2d 548, 551 (1991)*

🏛 An Officer saw what appeared to be a man urinating along the road and stopped to investigate. The stop ended in the man being arrested for DUI. The court in it's infamous " To Pee or not to Pee," decision ruled that when the call of nature strikes in Montana's vast area as long as someone is not violating another law of the state may heed natures call and it is not probable cause for a stop.

Kleinsasser v. State 2002 Mt 36

🏛 Probable cause is evaluated in light of a trained law enforcement officer's knowledge, taking into account all the relevant circumstances.

→ *City of Missoula v. Forest 236 Mt. 129, 132, 769 P.2d 699, 701 (1989)(Citation omitted)*

🏛 Furthermore, although not requiring evidence sufficient to prove a person's guilt, probable cause cannot be established based on an officer's mere suspicion of criminal activity. Keep in mind *State v. Trombley, 2005 MT 174 supra*

→ *State v. Lahr 172 Mt. 32, 35, 560 P.2d 527, 529 (1977) Citations omitted)*

🏛 Clearly, then, the probable cause standard is more stringent than particularized suspicion.

→ *State v. Anderson 258 Mt. 510, 514, 853 P.2d 1245, 1248 (1993)*
→ *State v. Williamson 965 P.2d 231 (1998)*

🏛 The need to preserve the defendant's diminishing alcohol concentration is a circumstance requiring an immediate arrest.

→ *State v. Ellinger 725 P.2d 1201 (Mt. 1986)*

🏛 The arresting officer may rely on information conveyed by a reliable third person or another officer in determining probable cause to arrest.

→ *State v. Hamilton 185 Mt. 522, 605 P.2d 1121 (1980)*

🏛 Information obtained from the stop of one driver may be used to determine reasonable grounds (the current language standard from case law is particularized suspicion) to arrest another defendant.

→ *State v. Sharp 702 P.2d 959 (Mt. 1985)*

🏛 A private citizen may arrest another when there is probable cause to believe that the person is committing or committed an offense and existing circumstances require the person's immediate arrest. (7) In the same manner, an arrest may be made by a police officer outside the officer's jurisdiction.

→ *State v. McDole 734 P.2d 683 (Mt. 1987)*

→ *State v. Maney, 225 Mt. 270, 842 P.2d 704, (1992)*

🏛 A peace officer outside his jurisdiction acts as a private citizen. An officer has authority to make a citizen's arrest for DUI, but that authority ceases once an officer with jurisdiction arrives on the scene.

→ *State v. Sunford 796 P.2d 1084 (Mt. 1990)*

🏛 The defendant may not be arrested in the defendant's home or private dwelling place at night for a misdemeanor committed at some other time and place without a warrant authorizing the arrest. (8) However, a defendant's warrantless arrest on his front porch after he voluntarily submitted to FSTs was upheld in the following case.

→ *State v. Ellinger 725 P.2d 1201 (Mt. 1986)*

🏛 The standard for determining whether someone is under arrest when there is no physical restraint of the person is whether a reasonable person innocent of any crime would have felt free to walk away under the circumstances. If a Defendant makes it to the threshold of his house, he is safe from a warrantless arrest.

→ *City of Billings v. Whalen 242 Mt. 293, 790 P.2d 471 (1990)*

🏛 After the arrest, the defendant must be advised of the *Miranda* rights before any questions may be asked or an interview conducted about the offense. However, routine booking questions to obtain biographical information necessary to complete booking do not qualify as custodial interrogation.

→ *Pennsylvania v. Muniz 16 S. Ct. 2638 (1990)*

🏛 If the defendant asks to talk to an attorney, the law enforcement officer may not conduct an interview without the presence of an attorney. The Montana Supreme Court has interpreted a request "to talk to somebody" as a request for counsel.

→ *State v. Johnson 719 P.2d 1248 (Mt. 1986)*

🏛 When making a DUI stop (and alcohol only is involved), the officer must determine that the offender is on a "way of the state open to the public". As defined in 61-8-101(1) MCA. [(9)] The Montana Supreme Court decided that the phrase "ways of the state open to the public" includes private parking facilities, such as the one at the Northern Hotel in Billings.

→ *City of Billings v. Peete 224 Mt. 158, 729 P.2d 1268 (1987)*

🏛 A bank parking lot in the middle of a business district was also determined to be "a way of the state open to the public".

→*Santee v. State of Montana, Dept. of Justice. 267 Mt. 304, 883 P.2d 829 (1994)*

🏛 A police officer's request that the defendant recite the alphabet and count in sequence did not violate his right against self-incrimination.

→ *State v. Devlin 980 P.2d 1037 (1999)*

2. Alcohol Concentration (AC) Test

In Montana, every person who operates or is in actual physical control of a vehicle is deemed to have given consent to a test of blood or breath to determine any measured amount or detected presence of alcohol or drugs in the body. This is called the "*Implied Consent Law"*. [(10)] A defendant either under arrest, unconscious, or in a condition rendering the defendant incapable of refusal is subject to a request for an AC test.

🏛 The defendant does not have the right to speak to an attorney before deciding whether to submit to an AC test.

→ *State v. Amfield 693 P.2d 1226 (Mt. 1984)*

🏛 Also, a continued request to speak to an attorney before submitting to an AC test is deemed a refusal. There is no affirmative duty on the part of an officer to inform a driver that there is no right to counsel before deciding whether or not to take an AC test.

→ *Blomeyer v. State 264 Mt. 414.871 P.2d 1338 (1994)*

🏛 There is no reason for an officer to inform a defendant of their right to an independent blood test before requesting a defendant take a PBT.

State v. Fulbrugge, 2002 Mt. 154, 310 Mont. 368, 50 p.3d 1067

🏛The officer decides whether a blood or breath test shall be administered. (11) Only a physician, a nurse, or other qualified person under one of their supervision and direction, may draw a blood sample. (12) The rules from the Department of Justice for drawing and maintaining the sample must be followed. (**For a complete text of the rules see ARM 23.4.201 tense.)**

→ *State v. McDonald 697 P.2d 1328 (1985)*

🏛 The defendant may obtain a second BAC test, (an independent blood sample) at his/her own expense. (13) This right is reserved even if there is a refusal to take an officer requested test.

→ *State v. Swanson 722 P.3d 1155 (Mt. 1986)*

🏛 At the police station an officer told the defendant he had a right to an independent blood test. The defendant asked the officer if he should get one. The officer at first did not answer the defendant but later twice told the defendant the independent blood test would be higher. The Court concluded the officer's advice frustrated and unreasonably impeded Minkoff's due process right to an independent blood test.

State v. Minkoff 2002 MT 29, 308 Mont. 248, 42 P.3d 223

🏛 Refusing to take the test requested by the officer, however, will still be considered a refusal under the "Implied Consent Law".

→ *State v. Christopher son 705 P.2d 121 (Mt. 1985)*

🏛 The 1997 amendment to Section 61-8-405(2) MCA, states, in part, "…..The peace officer may not unreasonably impede the person's right to obtain an independent blood test ……If the Officer does not follow up on a request for an independent blood test, the DUI or Per Se charge must be dismissed.

→ *City of Whitefish v. Pinson 271 Mt. 170. 895 P.2d 610 (1995)*

🏛 The state is not required, by the due process clause, to preserve a sample of blood or breath for a second test.

→ *California v. Trumpets 467 U.S.479, 81 L.Ed.2d 413, 104 Sect. 2528 (1984)*

→*State v. Larson 313 N. W. 2d 750 (N.D.1981); State v. Albright 718 P.2d 1186(ID1986)*

🏛 Further, the State is not required to maintain a sample of the solution used to calibrate the breath alcohol measuring device.

→ *Jhargroo v. City of Phoenix 694 P.2d 1209 (Ariz. App.1984)*

🏛 When a defendant has obtained an independent blood test to use as possible exculpatory evidence at trial the state has an obligation to adequately care for the sample when both the defendant and the sample are in police custody.

→ *State v. Swanson 722 P.2d 1155 (1986)*

The defendant may refuse the AC Test. If there is a refusal, then any valid driver's license must be seized. A temporary driving permit, which is valid for five days, is issued. [(14)] The defendant's driver's license is suspended for six months upon a first refusal and revoked for one year upon a second or subsequent refusal within five years of a previous refusal. [(15)] No probationary license can be issued during the suspension/revocation period. Commercial driver's license suspensions are in 61-8-805,

MCA. The Defendant may appeal an implied consent suspension or revocation. That procedure is considered under Section I Part E.

MCA 61-8-402(4) specifies that the driver's license of a driver shall be seized for refusal to take an AC test. The 1991 legislature abolished any distinction in procedure for seizure of residence versus non-resident driver's licenses. MCA 61-8-402(7) provides, after seizure, for the department to send the non-resident driver's license to the licensing authority which issued the license. (16)

🏛 MCA 61-8-404(3) does not limit the evidence gathering procedures for crimes other than DUI. That case involved a negligent homicide charge, however, 61-8-402(4) MCA says, "if an arrested person refuses to submit to one or more tests requested and designated by the officer as provided in subsection (2), the refused test or tests may not be given…"

→ *State v. Thompson 674 P.2d 1094 (Mt. 1984)*

🏛 The prosecution may obtain the results of a medical blood test from a hospital pursuant to an investigative subpoena and the results are admissible with a showing of a compelling state interest. Section 61-8-402(10) should be reviewed. (17)

→ *State v. Newill 946 P.2d 134 (1997)*

State ex rel. Mcgrath v. Montana Twenty-first Judicial District2001 MT 305, 307 Mont. 491, 38 P.3d 820

🏛 The arresting officer has an "affirmative duty" to advise the suspect of his rights to an independent blood test.

→ *State v. Strand, 951 P.2d 552 (1997)*

🏛 Moreover, the officer may not unreasonably impede defendant's rights to a test. If a defendant claims he was denied an independent blood test, he must show 1. that he made

a timely request for an independent test and 2. that a law enforcement officer unreasonably impeded his right to obtain the test.

→ *State v. Sidmore, 951 P.2d 558 (1997)*

Defendant Unconscious/Incapable of Refusal

If a defendant is unconscious, then the officer may require an AC test. If the defendant is in a condition rendering the defendant incapable of refusal, then an AC test may be required. **The following are examples of defendants held to be in a condition rendering them incapable of refusal:**

🏛 The officer must use the best evidence which is reasonably available to determine if the defendant is in a condition rendering the defendant incapable of refusal. In the following case, the defendant was conscious, confused, and suffering from abrasions and contusions. The defendant was not in a condition rendering the defendant incapable of refusal.

→ *State v. Mangels 166 Mt. 190, 531 P.2d 1313 (1975)*

🏛 A defendant whose eyes were closed, had intravenous needles inserted, had a nurse in attendance, and whose doctor refused to allow a law enforcement officer to conduct an interview, was in a condition rendering the person incapable of refusal.

→ *State v. Morgan 646 P.2d 1177 (Mt. 1982)*

🏛 A defendant who is confused, disoriented and incoherent in giving responses is in a condition rendering the person incapable of refusal.

→ *State v. Rumley 634 P.2d 446 (Mt. 1981)*

🏛 A defendant who is seriously injured, who does not give coherent answers and whose nurse tells the officer that it is better not to speak to the defendant is in a condition rendering the person incapable of refusal.

→ *State v. Campbell, 615 P.2d 190 (Mt. 1980)*

🏛 The driver's right to privacy under the state constitution extends to his medical records. For discovery of medical records, from a health care provider, the State must show probable cause.

→ *State v. Nelson 941 P.2d 441 (1997)*

For more examples, see cases collected at "Admissibility of Criminal Case of Blood Alcohol Test Where Blood was taken from Unconscious Driver." 72 A.L.R. 3d 325. Also see State v. Dolan 940 P.2d 436 (1997)

D. Filing of a Complaint

A complaint must be prepared and a copy of it given to the defendant. The officer/Prosecutor may charge: (1) driving under the influence of alcohol and/or drugs (DUI)[18] or (2) driving with an alcohol concentration of 0.08 or more (Per Se) .[19] The officer may charge both offenses, DUI and Per Se in the alternative on the same complaint or on separate complaints. The defendant may be convicted of one or the other, or neither, but not both offenses.[20]

A 1991 amendment to Section 61-8-401, M.C.A., defines "under the influence of alcohol or drugs." The reference to dangerous drugs now corresponds to Title 45 of the criminal code describing dangerous drugs. The operation of a vehicle while under the influence of a dangerous drug or any other drug is a violation. It is not a defense that the defendant has or had a prescription for the drug and possesses it lawfully. [21] The Implied Consent Law, 61-8-402, MCA, amended by the 1997 legislature, now applies to both alcohol and drug presence in the person's body. The Forensic Science Laboratory in Missoula (often called the Crime Lab) will analyze blood samples for the presence of drugs. When a sample is sent with no breath analysis, the Crime Lab will test for alcohol first and will complete drug testing upon request of the officer.

The arresting officer should indicate on the citation if it is a second, third, or subsequent offense because the defendant must be notified of the charge and the possible sentence and the Court needs the information for sentencing purposes.

The use of the term "2nd offense" or "3rd offense" is sufficient to notify a defendant that the enhanced penalty is sought. If a second or subsequent offense is not stated, then the judge will probably consider it a first offense unless later amended.

→ *State v. Nelson 178 Mt. 280, 583 P.2d 435 (1978)*

Justice, city, and municipal courts have original jurisdiction over first and second DUI and Per Se offenses. These are termed "Limited Jurisdiction Courts". The limited jurisdiction courts and district courts have concurrent jurisdiction over a third DUI and Per Se offense. (22) District courts have original jurisdiction over fourth or subsequent DUI and Per Se offenses. Complaints may be filed in city courts under a city ordinance for this offense. (23)

The prosecutor will decide in which court (limited jurisdiction or district) third offenses of DUI and Per Se will be prosecuted and should inform the limited jurisdiction court judge if the third offense will be prosecuted in the limited jurisdiction court or the district court. A fourth or subsequent offense is a felony and must be heard in the district court. (24)

The defendant may post bail according to the bail schedule set by a limited jurisdiction judge or a district court judge. A law enforcement officer may accept bail and release the defendant. (25) A personal check is acceptable if the check is drawn on a bank in Montana and the person writing the check has two forms of identification. (26)

State law does not authorize a law enforcement officer to release a defendant on the defendant's own recognizance after an arrest was made. (27) A judge must be contacted to authorize a release on the defendant's own recognizance.

If the defendant remains incarcerated, then he must be taken before a judge without unnecessary delay. (28) A probable cause determination for an arrest without a warrant must be made within 48 hours of arrest to avoid a civil rights violation suit.

→ *Riverside County, California v. McLaughlin 111 S.Ct. 1661 (1991)*

The lack of a timely probable cause determination does not require automatic dismissal of the complaint. Evidence obtained during an unnecessary delay before an initial appearance is not admissible.

→ *State v. Benbo 570 P.2d 894 (Mt. 1977)*

At the initial appearance the judge must set bail or release the defendant on an "own recognizance" bail. The original complaint and disposition copy should be filed with the court.

A defendant may post bail and then fail to appear for a court appearance. If this occurs, then the Court may forfeit the bail and issue a Warrant of Arrest for the Defendant. [29] The disposition copy of the charge indicating that bail was forfeited is to be mailed to the Records and Driver Control Bureau. (See address in Appendix R)

E. Appealing Suspension/Revocation Under Implied Consent Law

A defendant whose driver's license is suspended or revoked for the failure to submit to an AC Test may appeal the suspension or revocation to the district court. [30]

The appeal must be filed within 30 days of the suspension or revocation. The district court must set a hearing, giving ten days notice to the County Attorney

At the hearing on appeal for the suspension or revocation of a driver's license, the following issues are considered:

(1) did the peace officer have "reasonable grounds" to believe the Defendant was in violation of 61-8-401;

(2) was the person under the age of 21 and placed under arrest for a violation of 61-8-410;

(3) did the officer have probable cause to believe the person was in violation of 61-8-401 and involved in an accident resulting in property damage, personal injury, or death; and

(4) did the defendant refuse to submit to a test designated by the officer.

→ *In re Blake 712 P.2d 1338 (Mt. 1986)*

🏛 If these conditions are established, then the defendant's driver's license is suspended or revoked. A restricted probationary driver's license may **not** be issued and the court has no authority to consider the issue of hardship as a mitigating factor. (See Endnote 30 of this section)

→ *Blake v. State 735 P.2d 262 (Mt. 1987)*

At the time of the request for the AC test, the officer should carefully inform the defendant of the consequences of a refusal. The first refusal will result in a driver's license suspension for six months. A second or subsequent refusal within five years of the previous refusal will result in a driver's license revocation for one year. A driver suspended for an implied consent refusal may not obtain a restricted/probationary license.

🏛 If a defendant previously refused the test and the officer leads the defendant to believe that a refusal will result in a 90 day suspension, then defendant's driver's license will only be suspended for 90 days.

→ *Matter of Orman 731 P.2d 893 (Mt. 1986)*

🏛 A plea of guilty to a charge of DUI or Per Se is not a withdrawal of the refusal. The defendant's driver's license is suspended under the *Implied Consent Law*, a statute independent of DUI or Per Se violations.

→ *Petition of Burnham 705 P.2d 603 (Mt. 1985)*

🏛 A defendant's own AC test is not a "cure" of a refusal and the defendant's driver's license is suspended under the Implied Consent. Neither is a subsequent attempt to withdraw the refusal a cure for a prior refusal. The rule in Montana is that subsequent consent does not cure a prior refusal to submit to an AC test.

→ *Johnson v. Division of Motor Vehicles 711 P.2d 815 (Mt.1985)*

→ *Hunter v. State 264 Mt. 84. 869 P.2d 787 (1994)*

🏛 Penalties imposed for both civil (implied consent) and criminal (DUI sentencing) proceedings do not violate the constitutional guarantee against double jeopardy.

→ *City of Helena v. Danichek 922 P.2d 1170 (Mt. 1996)*

SECTION I – STATUTORY REFERENCES

(ENDNOTE REFERENCES LISTED IN THE TEXT OF SECTION I)

1. **MCA 61-5-116**. **License to be carried and exhibited on demand**. Every licensee shall have his driver's license in his immediate possession at all times when operating a motor vehicle and shall display the same upon demand of a justice of the peace, a city or municipal judge, a peace officer, a highway patrol officer, or a field deputy or inspector of the department. However, no person charged with violating this section shall be convicted if he produces in court or the office of the arresting officer a driver's license theretofore issued to him and valid at the time of his arrest.

2. **MCA 61-3-322. Certificates of registration – issuance.**

(3) The registration receipt, a photo static copy of the receipt acknowledged by the county treasurer or a deputy county treasurer, a notarized photo static copy or a duplicate furnished by the department must at all times be carried in the vehicle to which it refers or must be carried by the person driving or in control of the vehicle, who shall display it upon demand of a police officer or any officer or employee of the department or the transportation department.

3. **MCA 61-6-302. Proof of compliance**.

(2) Each person shall carry in a motor vehicle being operated by the person an insurance card approved by the department but issued by the insurance carrier to the motor vehicle owner as proof of compliance with 61-6-301. A motor vehicle operator shall exhibit the insurance card upon demand of a justice of the peace, a city or municipal judge, a peace officer, a highway patrol officer, or a field deputy or inspector of the department. A person commits an offense under this subsection if the person fails to carry the insurance card in a motor vehicle or fails to exhibit the insurance card upon demand of a person specified in this subsection. However, a person charged with violating this subsection may not be convicted if the person produces in court or the office of the arresting officer proof of insurance valid at the time of arrest.

4. **MCA 46-6-311. Basis for arrest without warrant – arrest of primary aggressor**. (1) A peace officer may arrest a person when a warrant has not been issued if the officer has probable cause to believe that the person is committing an offense or that the person has committed an offense and existing circumstances require immediate arrest.

5. **MCA 61-8-409. Preliminary alcohol screening test.**

(1) A person who operates or is in actual physical control of a vehicle upon ways of this state open to the public is considered to have given consent to a preliminary alcohol screening test of the person's breath, for the purpose of estimating the person's alcohol concentration, upon the request of a peace officer who has a particularized suspicion that the person was driving or in actual physical control of a vehicle upon ways of this state

open to the public while under the influence of alcohol or in violation of 61-8-410.
(2) The person's obligation to submit to a test under 61-8-402 is not satisfied by the person submitting to a preliminary alcohol-screening test pursuant to this section.

(3) The peace officer shall inform the person of the right to refuse the test and that the refusal to submit to a preliminary alcohol screening test will result in the suspension or revocation for up to 1 year of that person's driver's license.

(4) If the person refuses to submit to a test under this section, a test will not be given. However, the refusal is sufficient cause to suspend or revoke the person's driver's license as provided in 61-8-402.

(5) A hearing as provided for in 61-8-403 must be available. The issues in the hearing must be limited to determining whether a peace officer had a particularized suspicion that the person was driving or in actual physical control of a vehicle upon ways of this state open to the public while under the influence of alcohol, or in violation of 61-8-410 and whether the person refused to submit to the test.

(6) The provisions of 61-8-402(3) through (8) that do not conflict with this section are applicable to refusals under this section. If a person refuses a test requested under 61-8-402 and this section for the same incident, the department may not consider each a separate refusal for purposes of suspension or revocation under 61-8-402.

(7) A test may not be conducted or requested under this section unless both the peace officer and the instrument used to conduct the preliminary alcohol screening test have been certified by the department pursuant to rules adopted under the authority of 61-8-405(5).

6. **See Endnote (4) for MCA 46-6-311.** Basis for arrest without warrant – arrest of primary aggressor.

7. **MCA 46-6-502. Arrest by private person**. (1) A private person may arrest another when there is probable cause to believe that the person is committing or has committed an offense and the existing circumstances require the person's immediate arrest.

(2) A private person making an arrest shall immediately notify the nearest available law enforcement agency or peace officer and give custody of the person arrested to the officer or agency.

8. MCA **46-6-105. Time of making arrest**. An arrest may be made at any time of the day or night, except that a person may not be arrested in the person's home or private dwelling place at night for a misdemeanor committed at some other time and place unless upon the direction of a judge endorsed upon an arrest warrant. However, a person may be arrested in the person's home or private dwelling at night if the person is

being arrested pursuant to 46-6-311 for the offense of partner or family member assault.

9. **MCA 61-8-101. Application – exceptions**. (1) As used in this chapter,

"ways of this state open to the public" means any highway, road, alley, lane, parking area, or other public or private place adapted and fitted for public travel that is in common use by the public.

10. MCA 61-8-402. Blood or breath tests for alcohol, drugs, or both.

(1) A person who operates or is in actual physical control of a vehicle upon ways of this state open to the public is considered to have given consent to a test or tests of the person's blood or breath for the purpose of determining any measured amount or detected presence of alcohol or drugs in the person's body.

(2) (a) The test or tests must be administered at the direction of a peace officer when:

(1) The officer has reasonable grounds to believe that the person has been driving or has been in actual physical control of a vehicle upon ways of this state open to the public while under the influence of alcohol, drugs, or a combination of the two and the person has been placed under arrest for a violation of 61-8-401;

(2) The person is under the age of 21 and has been placed under arrest for violation of 61-8-410; or

(3) The officer has probable cause to believe that the person was driving or in actual physical control of a vehicle in violation of 61-8-401 and the person has been involved in a motor vehicle accident or collision resulting in property damage, bodily injury or death.

(b) The arresting or investigating officer may designate which test or tests are administered.

(3) A person who is unconscious or who is otherwise in a condition rendering the person incapable of refusal is considered not to have withdrawn the consent provided by subsection (1).

11. MCA 61-8-402 Blood or breath tests for alcohol, drugs, or both.

(4) If an arrested person refuses to submit to one or most tests requested and designated by the officer as provided in subsection (2), the refused test or tests may not be given, but the officer shall, on behalf of the department, immediately seize the person's driver's license. The peace officer shall immediately forward the license to the department, along with a report certified under penalty of law stating which of the conditions set forth in subsection (2)(a) provides the basis for the testing request and confirming that the person refused to submit to one or more tests requested and designated by the peace officer.

Upon receipt of the report, the department shall suspend the license for the period provided in subsection (6).

12. MCA 61-8-405. Administration of Tests. (1) Only a physician or direction of a physician or registered nurse, may, at the request of a peace officer, withdraw blood for the purpose of determining any measured amount or detected presence of alcohol, drugs, or any combination of alcohol and drugs in the person. This limitation does not apply to the sampling of breath.

13. MCA 61-8-405. Administration of Tests. (2) In addition to any test administered at the direction of a peace officer, a person may request that an independent blood sample be drawn by a physician or registered nurse for the purpose of determining any measured amount or detected presence of alcohol, drugs, or any combination of alcohol or drugs in the person. The peace officer may not unreasonably impede the person's right to obtain an independent blood test. The officer may but has no duty to transport the person to a medical facility or otherwise assist the person in obtaining the test. The cost of an independent blood test is the sole responsibility of the person requesting the test. The failure or inability to obtain an independent test by a person does not preclude the admissibility in evidence of any test given at the direction of a peace officer.

14. MCA 61-8-402. Blood or breath tests for alcohol, drugs, or both.

(5) Upon seizure of a driver's license, the peace officer shall issue, on behalf of the department, a temporary driving permit, which is effective 12 hours after issuance and is valid for 5 days following the date of issuance, and shall provide the driver with written notice of the license suspension or revocation and the right to a hearing as provided in 61-8-403.

15. **MCA 61-8-402. Blood or breath tests for alcohol, drugs, or both**.

(6) The following suspension and revocation periods are applicable upon refusal to submit to one or more tests:

(a) Upon a first refusal, a suspension of 6 months with no provision for a restricted probationary license;

(b) Upon a second or subsequent refusal within 5 years of a previous refusal, as determined from the records of the department, a revocation of 1 year with no provision for a restricted probationary license.

16. **MCA 61-8-402.** Blood or breath tests for alcohol, drugs, or both.

(7) A nonresident driver's license seized under this section must be sent by the department to the licensing authority of the nonresident's home state with a report of the nonresident's refusal to submit to one or more test.

17. MCA 61-8-402. Blood or breath test for alcohol, drugs, or both.
(10) This section does not apply to blood and breath tests, samples, and analysis used for the purpose of medical treatment or care of an injured motorist or related to a lawful seizure for a suspected violation of an offense not in this part.

18. **MCA 61-8-401. Driving under the influence or alcohol or drugs.**

(1) It is unlawful and punishable, as provided in 61-8-442, 61-8-714, and 61-8-731 through 61-8-734, for a person who is under the influence of:

(a) alcohol to drive or be in actual physical control of a vehicle upon the ways of this state open to the public;
(b) a dangerous drug to drive or be in actual physical control of a vehicle within this state;
(c) any other drug to drive or be in actual physical control of a vehicle within this state; or
(d) alcohol or any dangerous or other drug to drive or be in actual physical control of a vehicle within this state.

19. MCA 61-8-406. Operation of vehicle by a person with alcohol concentration of 0.08 or more. It is unlawful and punishable as provided in 61-8-442, 61-8-722, 61-8-723, and 61-8-731 through 61-8-734 for any person to drive or be in actual physical control of a vehicle upon the ways of this state open to the public while the person's alcohol concentration, as shown by analysis of the person's blood, breath, or urine, is 0.08 or more. Absolute liability as provided in 45-2-104 will be imposed for a violation of this section.

20. MCA 61-8-408. Multiple convictions prohibited. When the same acts may establish the commission of an offense under both 61-8-401 and 61-8-406, a person charged with such conduct may be prosecuted for a violation of both 61-8-401 and 61-8-406. However, he may only be convicted of an offense under either 61-8-401 or 61-8-406.

21. MCA 61-8-401. Driving under the influence of alcohol or drugs.

(2) The fact that any person charged with a violation of subsection (1) is or has been entitled to use alcohol or a drug under the laws of this state does not constitute a defense against any charge violating subsection (1).

22. **MCA 3-10-303. Criminal Jurisdiction**. (1) The Justices' courts have jurisdiction of public offenses committed within the respective counties in which the courts are established as follows:

(a) except as provided in subsection (2), jurisdiction of all misdemeanors punishable by a fine not exceeding $1000 or imprisonment not exceeding 1 year, or both;

MCA 3-10-303. Criminal Jurisdiction.

1(d) concurrent jurisdiction with district courts of all misdemeanors punishable by a fine exceeding $500 or imprisonment exceeding 6 months, or both;

MCA 3-11-102. Concurrent Jurisdiction. (1) The city court has concurrent jurisdiction with the justice's court of all misdemeanors and proceedings mentioned and provided for under chapter 10, part 3, of this title.

23. MCA 61-8-401. Driving under influence of alcohol or drugs.
(6) Each municipality in this state is given authority to enact 61-8-406, 61-8-408, 61-8-410, 61-8-714, 61-8-722, 61-8-731 through 61-8-734, and subsections (1) through (5) of this section, with the word "*state*" in 61-8-406 and subsection (1) of this section changed to reach "*municipality*", as an ordinance and is given jurisdiction of the enforcement of the ordinance and of the imposition of the fines and penalties provided in the ordinance.

24. MCA 3-5-302. Original Jurisdiction. (1) Except as provided in subsection (6), the district court has original jurisdiction in:
(a) all criminal cases amounting to felony;
(b) all civil and probate matters;
(c) all cases at law and in equity;
(d) all cases of misdemeanor not otherwise provided for; and
(e) all such special actions and proceedings as are not otherwise provided for.
(2)The District court has concurrent original jurisdiction with the justice's court in the following criminal cases amounting to misdemeanor:
(a) misdemeanors arising at the same time as and out of the same transaction as a felony or misdemeanor offense charged in district court.
(b) Misdemeanors resulting from the reduction of a felony or misdemeanor offense charged in the district court; and
(c) Misdemeanors resulting from a finding of a lesser included offense in a felony or misdemeanor case tried in District court.

25. MCA 46-9-302. Bail schedule – acceptance by police officer.
(1) A judge may establish and post a schedule of bail for offenses over which the judge has original jurisdiction. A person may not be released on bail without first appearing before the judge when the offense is any assault on a partner or family member, as partner or family member is defined in 45-5-206, or stalking, as defined in 45-5-220.
(2) A peace officer may accept bail on behalf of a judge:
(a) in accordance with the bail schedule established under subsection (1); or
(b) whenever the warrant of arrest specifies the amount of bail.
(3) Whenever a peace officer accepts bail, the officer shall give a signed receipt to the offender setting forth the bail received. The peace officer shall then deliver the bail to the judge before whom the offender is to appear, and the judge shall give a receipt to the peace officer for the bail delivered.

26. MCA 44-1-1103. Check in lieu of cash. (1) In the case of traffic violations, bond may be personal check in lieu of cash. Highway Patrol officers or other authorized agents receiving bonds on behalf of the court may accept a personal check in lieu of cash provided that:

(a) the check is drawn on a bank domiciled in the state of Montana; and
(b) the person who writes the check in lieu of cash bond has two documents identifying himself/herself.

(2) If a check is offered in lieu of cash, the highway patrol officer or other authorized agent who accepts the check is not liable in the case of nonpayment.
(3) A person who writes a check in lieu of cash bond which is returned for insufficient funds is subject to prosecution under 45-6-316, and obtaining bond constitutes securing services for the purposes of that section.

27. See Endnote (25) for **MCA 44-1-1101. Duty of patrol officer upon making arrest.**

MCA 46-9-111. Release on own recognizance. Any person in custody, if otherwise eligible for bail, may be released on his personal recognizance subject to such conditions as the court may reasonably prescribe to assure his appearance when required. Any person released as herein provided shall be fully apprised by the court of the penalty provided for failure to comply with the terms of his recognizance.

28. MCA 46-7-101. Appearance of arrested person – use of two way electronic audio-video communication. (1) A person arrested, whether with or without a warrant must be taken without unnecessary delay before the nearest and most accessible judge for an initial appearance.

(2) A defendant's initial appearance before a judge may, in the discretion of the court, be satisfied either by the defendant's physical appearance before or by two-way electronic audio-video communication. The audio-video communication must operate so that the defendant and the judge can see each other simultaneously and converse with each other and so that the defendant and his counsel, if any, can communicate privately. A judge may order a defendant's physical appearance in court for an initial appearance hearing.

29. MCA 46-9-503. Violation of release condition – forfeiture. (1) If a defendant violates a condition of release, including failure to appear, the prosecutor may make a written motion to the court for revocation of the order of release. A judge may issue a warrant for the arrest of a defendant charged with violating a condition of release. Upon arrest, the defendant must be brought before a judge in accordance with 46-7-101.
(2) If a defendant fails to appear before a court as required and bail has been posted, the judge may declare the bail forfeited. Notice of the order of forfeiture must be mailed to the defendant and the defendant's sureties at their last-known address within 10 working

days or the bond becomes void and must be released and returned to the surety within 5 working days.
(3) If at any time within 90 days after the forfeiture the defendant's sureties surrender the defendant pursuant to 46-9-510 or appear and satisfactorily excuse the defendant's failure to appear, the judge shall direct the forfeiture to be discharged without penalty. If at any time within 90 days after the forfeiture the defendant appears and satisfactorily excuses the defendant's failure to appear, the judge shall direct the forfeiture to be discharged upon terms as may be just.
(4) The surety bail bond must be exonerated upon proof of the defendant's death or incarceration or subjection to court-ordered treatment in a foreign jurisdiction for a period exceeding the time limits under subsection (3).
(5) A surety bail bond is an appearance bond only. It cannot be held or forfeited for fines, restitution,or violations of release conditions other than failure to appear. The original bond is in effect pursuant to 46-9-121 and is due and payable only if the surety fails, after 90 days from forfeiture, to surrender the defendant or if the defendant fails to appear on the defendant's own within the same time period.

MCA 46-9-505. Issuance of arrest warrant – redetermining bail.
(1) Upon failure to comply with any condition of a bail or recognizance, the court having jurisdiction at the time of the failure may, in addition to any other action provided by law, issue a warrant for the arrest of the person.
(2) On verified application by the prosecutor setting forth facts or circumstances constituting breach, or threatened breach of any of the conditions of the bail or a threat or an attempt to influence the pending proceeding, the court may issue a warrant for the arrest of the defendant.
(3) If the defendant has been released under the supervision of a pretrial services agency, referred to in 46-9108 (1) (f) , an officer of that agency may arrest the defendant without a warrant or may deputize any other officer with power of arrest to arrest the defendant by giving the officer oral authorization and within 12 hours delivering to the place of detention a verified written statement setting forth that the defendant has, in the judgment of the officer, violated the conditions of the defendant's release. An oral authorization delivered with the defendant by the arresting officer to the official in charge of a county detention center or other place of detention is a sufficient warrant for detention of the defendant if the pretrial officer delivers a verified written statement within 12 hours of the defendant's arrest.
(4)Upon the arrest, the defendant must be brought before the court without unnecessary delay and the court shall conduct a hearing and determine bail in accordance with 46-9-311.
(5) As used in this section, "pretrial services agency" means a government agency or a private entity under contract with a local government whose employees have the minimum training required in 46-23-1003 and that is designated by a district court, justice's court, municipal court, or city court to provide services pending trial.

MCA 61-8-403. Right of appeal to court. (1) Within 30 days after notice of the right to a hearing has been given by a peace officer, a person may file a petition to challenge the

license suspension or revocation in the district court in the county where the person resides or in the county where the arrest was made.
(2) The court has jurisdiction and shall set the matter for hearing. The court shall give at least 10 days' written notice of the hearing to the county attorney of the county where the appeal is filed and to the city attorney, if the incident leading to the suspension or revocation resulted in a charge filed in a city or municipal court. The county attorney or city attorney may represent the state. If the county attorney and the city attorney cannot agree on who will represent the state, the county attorney shall represent the state.
(3) Upon request of the petitioner, the court may order the department to return the seized license or issue a stay of suspension or revocation action pending the hearing.
(4) (a) The court shall take testimony and examine the facts of the case, except that the issues are limited to whether:

(1) A peace officer had reasonable grounds to believe that the person had been driving or was in actual physical control of a vehicle upon ways of this state open to the public while under the influence of alcohol, drugs, or a combination of the two and the person was placed under arrest for violation of 61-8-401;

(2) The person is under the age of 21 and was placed under arrest for a violation of 61-8-410;

(3) The officer had probable cause to believe that the person was driving or in actual physical control of a vehicle in violation of 61-8-401 and the person was involved in a motor vehicle accident or collision resulting in property damage, bodily injury, or death; and

(4) The person refused to submit to one or more tests designated by the officer.

(b) Based on the above issues and no others, the court shall determine whether the petitioner is entitled to a license or whether the petitioner's license is subject to suspension or revocation.

(5) This section does not grant a right of appeal to a state court if a driver's license is initially seized, suspended or revoked pursuant to a tribal law or regulation that requires alcohol or drug testing of motor vehicle operators.

II. ADJUDICATION – INITIAL APPEARANCE TO TRIAL

After a complaint is filed with a court there are three basic stages to adjudication. They are: (A) Initial Appearance; (B) Arraignment; and (C) Trial, (if a not guilty plea is entered). Judges are encouraged to use the Deskbook and Benchbook for forms and procedures for initial appearance, arraignment, and trial.

A. INITIAL APPEARANCE

❋A person arrested must be taken without unnecessary delay before the nearest and most accessible judge for an initial appearance. [1] A probable cause determination for an arrest without a warrant for a person in custody must be made within 48 hours of arrest.

→ *Riverside County, California v. McLaughlin 111 S. Ct. 1661(1991)*

The judge must advise the defendant of the charge or charges filed; of the right to counsel; to appointed counsel if the defendant cannot afford to retain counsel; right to bail; the right to remain silent and that any statement made may be used against the defendant as evidence; the right to a probable cause hearing for a felony; the right to a jury trial for any misdemeanor charge. The judge must set bail or release the defendant on an own recognizance bail. [2] **Section 46-12-210 M.C.A.,** sets forth all

of the rights to be given at arraignment, including the possible penalties for the crime charged.

If the defendant charged with DUI or Per Se chooses to not have an attorney, it is recommended that the judge have a completed, written Waiver of Attorney form as part of the court file. It is wise to inform any defendant that waives their right to an attorney of the "DANGERS OF SELF REPRESENTATION " see (*Alabama v. Shelton U.S. Supreme Court 00-1214 (2002)* There have been varying opinions on this but it is a **best practice** to do so. Because limited jurisdiction courts are not courts of record, judges are encouraged (Best practice is to make it mandatory) to require the signing of a waiver of attorney form. The signed form may be critical in any enhancement procedures, whereas a docket entry of the defendant's waiver may not be a sufficient record of a knowing and voluntary waiver. (See Appendix A – Waiver of Counsel Form).

🏛 A court may not presume a knowing and intelligent waiver of the right to counsel from a silent record.

→Lewis v State, 457 P.2d 765 (MT1969)

A court must inquire into the financial status of the defendant before determining that a defendant is ineligible for court-appointed counsel on the basis of indigency. A form such as the Appendix B – Indigency Determination Affidavit may be used. Also, the court must inform the defendant that there may be a requirement to pay the compensation and expenses of an attorney, in part or in whole, **if the defendant is found guilty and is financially able to do so.** [(3)] **If** the judge is uncertain as to the imposition of jail or the defendant's eligibility for counsel, the recommended action is to err on the side of caution and to appoint an attorney. The new public defender system scheduled to begin 7-1-06 should alleviate this problem.

🏛 The court must inquire into the financial status of the defendant before determining that a defendant is ineligible for court appointed counsel.

→ *State v. Fry 642 P.2d 1053 (Mt. 1982)*

🏛 The defendant is entitled to court appointed counsel if the defendant is charged with DUI, requests an attorney and is indigent. This is because the penalty for DUI includes mandatory imprisonment. [(4)]

→ *Argersinger v. Hamlin 407 U.S.25, 32 L.Ed 2d 530, 92 S.Ct. 2006 (1972)*

🏛 If the Defendant is charged with Per Se violation and the court will not impose jail time, then the court is not required to appoint an attorney for an indigent defendant. The penalty for a first offense Per Se violation does not include mandatory jail time. (5)

→ *Scott v. Illinois 440 U.S. 367, 59 L.Ed 2d 383, 99 S. Ct. 1158 (1979)*

AGAIN IT IS A BEST PRACTICE TO ALWAYS APPOINT COUNSEL TO AN INDIGENT DEFENDANT ON ANY DUI OR PER SE CASE.

1. Prior Convictions/Enhancement of offense

🏛 If an indigent defendant convicted of a Per Se has not been given the right to an appointed attorney, then perhaps that conviction may not be included to enhance or increase the penalty of a subsequent DUI or subsequent Per Se conviction.

→ *Baldasar v. Illinois 446 U.S. 222, 64 L.Ed 2d 169 100 S. Ct. 1585 (1980)*

→ *United States v. Tucker 404 U.S. 443, 30 L.Ed 2d 592, 92 S. Ct. 589 (1972)*

→ *State v. Herrera 197 Mt. 462, 643 P.2d 588 (1982)*

→ *Ryan v. Christ 172 Mt. 411, 563 P.2d 1145 (1977)*

A common issue arises where a defendant claims he was denied representation by counsel. If a defendant was denied the right to counsel, the sentencing court cannot use that prior conviction for enhancement purposes.

🏛 The State may not use a constitutionally infirm conviction to support an enhanced punishment.

→ *Lewis v. State 457 P.2d 765, 766 (1969)*

State v. Howard, 2002 MT 276, 312 Mont. 359, 59 p.3d 1075

State v, McNalley, 2002 MT 160, 310 Mont. 396, 50 P.3d 1080

🏛 Prior convictions are presumed to be constitutional. "In Montana, a presumption of regularity attaches to prior convictions during a collateral attack. Therefore, even in the absence of a transcript or record, a prior conviction is presumptively valid and a defendant who challenges the validity of his prior conviction during a collateral attack has the burden of producing direct evidence of its invalidity. We further conclude that

the presumption of regularity is a rebuttable presumption. Accordingly, while this presumption does operate, at least initially, to establish the validity of a prior conviction, a defendant who produces direct evidence that his constitutional rights were violated in a prior proceeding can rebut it. Once a defendant has made such a showing, the burden then shifts to the State to produce direct evidence and prove by a preponderance of the evidence that the prior convictions were not entered in violation of the defendant's rights."

→ *State v. Okland 941 P.2d 431 (1997)*

🏛 If the record is silent on whether counsel has been waived, the court may not presume a waiver of counsel from the silent record.

→ *Carnley v. Cochran 369 U.S. 506; 82 S. Ct. 884; 8 L.Ed 2d 70 (1962)*

B. Arraignment

The arraignment is the proceeding where the defendant may enter a plea of guilty or not guilty to the charge. Before accepting the plea, the judge must advise the defendant of all the rights listed in 46-12-210 and 46-7-102 MCA. (6) The arraignment may be conducted with the defendant physically present before the Court or by two-way electronic audio-video communication pursuant to 46-12-201(4) MCA. (7)

1. Nature of the charge

The court must inform the defendant of the charge and should do so by reading the complaint aloud to the defendant. The judge should explain that the defendant is charged with driving under the influence of alcohol and/or drugs or driving with .08 or more AC, and that the charge is not what is traditionally known as "Drunken Driving". The court should ask if the defendant has a copy of the complaint. If not, a copy of the complaint must be given to the defendant.

2. Possible Punishment

The possible punishment specific to a first or subsequent violation, must be explained to the defendant. (See **Sentence and Treatment Section III** of this manual.)

3. Procedural Rights

The court is required to inform the defendant of the following constitutional and

Statutory rights: (1) the right to counsel and to have counsel appointed if the defendant cannot afford one (**See Section II Part A "Initial Appearance");** (2) the right to trial by jury, in either the limited jurisdiction court or at the district court level, or a trial before the judge; (3) the right to confront and cross-examine witnesses; (4) the right to subpoena witnesses on behalf of the defendant; (5) the right to remain silent throughout the proceeding; (6) the right to be proven guilty beyond a reasonable doubt; (7) a guilty plea may result in deportation for an alien; and (8) that a plea of guilty may waive the right to trial and appeal. In addition, (9) the defendant has the right to a reasonable time before entering a plea. At least one day must be given to the defendant on request. [8] If the Defendant remains in custody, (10) then the right to secure bail to be released from custody must be explained to the defendant. MCA 46-12-210 delineates the rights that a defendant must understand.

4. Plea Agreement

If a plea agreement is involved, the defendant must be advised of the Montana law on plea agreements. [9] Specifically, the defendant must be advised: (1) the court is not bound by plea agreements; (2) if the court rejects a plea agreement which calls for a specific recommendation jointly made by the prosecution and defense, the court shall inform the parties, afford the defendant an opportunity to withdraw the plea, and advise the defendant that if the defendant persists in the guilty plea, the disposition of the case may be less favorable than the plea agreement. However, in the event of a plea bargain wherein the prosecution and the defense cannot agree upon a specific recommendation, or the prosecution agrees merely to not oppose the defendant's recommendation, the court shall inform the defendant that a guilty plea will not be allowed to be withdrawn.

Section 61-8-734(4) M.C.A. **does not** allow a sentence to be deferred, even in a plea agreement. Section 46-16-130 M.C.A. **does not** allow a deferred prosecution for DUI, Per Se Violations, or Operation of a vehicle by a person under 21 with an AC of .02 or more.

🏛 An oral plea bargain is valid and binding.

→ *State v. Skroch, 267 Mt. 349, 883 P.2d, 1256 (1994)*

🏛 If a judge rejects the plea agreement, the judge is not required to inform the defendant of the sentence that may be imposed before requiring the defendant to decide whether or not to withdraw the plea of guilty.

→ *State v. Larson 266 Mt. 28.878 P.2d 886 (1994)*

5. The Plea

The defendant may plead guilty, not guilty, or *nolo contendere* to the complaint. If the defendant refuses to plead, then the court must enter a plea of not guilty. (10)

If a defendant is charged with DUI or Per Se in the same complaint, then a plea of guilty may be entered to either charge. A guilty plea may only be entered to one of the two charges, not to both. (11) There is no Montana case law on whether a defendant may plead guilty to Per Se without having taken an AC test. But, the following discussion suggests such a plea might be accepted by the court.

🏛 A plea must be a voluntary and intelligent choice among alternative courses of action.

→ *North Carolina v. Alford 400 U.S. 25, 27, L.Ed. 2d 162, 91 S.Ct. 160 (1970)*

🏛 If a defendant understands the crime and the penalty and voluntarily (12) pleads guilty, the court may accept the guilty plea. The court may refuse to accept a guilty plea if the defendant fails to admit guilty to the charge. At the arraignment, an adequate factual basis for the crime should be established. (13)

→ *State v. Welling 199 Mt. 135, 647 P.2d 852 (1982)*

→*In Matter of Brown 185 Mt. 200, 605 P.2d 185 (1980)*

If a defendant wants to plead guilty to Per Se Violation and there is no test indicating the AC level, the judge may question the defendant about the amount of alcohol the defendant drank before being stopped. If the amount consumed appears to be enough to create an AC level of .080 or more, the court may accept the plea, **but only if the judge is convinced of the factual basis for the plea.**

A defendant who is unwilling to admit to any element of the offense may, with the consent of the court, enter a plea of guilty to the offense, if the defendant considers the plea to be in the defendant's best interest and if a factual basis exists for the plea. This is recognized as an *Alford Plea.* A defendant may also enter a plea of *nolo contendere.* If the defendant chooses to plead guilty, before the court accepts the plea,

the defendant must be advised of the constitutional rights according to the dictates of Section 46-12-210 [14]

If the defendant pleads not guilty, then the court will set the case for a jury trial, unless a defendant waives the right to trial by jury. A written and signed waiver of jury is preferable to a notation in the docket by the judge or clerk.

6. Record of Proceedings

The court must keep a record of the arraignment. [15] The record may be kept on the back of the notice to appear and complaint. Alternatively, a separate docket may be maintained. Accurate records are extremely important and especially for the purposes of enhanced penalties for subsequent offenses.

C. Trial

If the defendant pleads not guilty, the court must set the case for trial. A trial must be held within six months of the entry of the plea unless the delay is upon motion of the defendant or good cause to the contrary is shown. [16] The four-part constitutional analysis concerning speedy trial issues does not apply to misdemeanors. If a case will not be brought to trial within six months because of a request by the defendant, it is recommended that the court file contain a written "Waiver of Speedy Trial" signed by the defendant.

The statutory 6 month period begins to run on the day after the entry of a plea which triggers the running of the time limitation and expires 6 months later.

→ *State v. Belgarde, 244 Mt. 500, 507; 798 P.2d 539, 544 (1990) (citing State v. Ronningen 231 Mt. 358, 691 P.2d 1348 (1984)*

Six months means six calendar months not 180 days.

→ *State v. Hayes 953 P.2d 700 (1998)*

The court may hold the trial in the absence of the defendant, but, if the court determines the defendant's presence is necessary for any purpose, the court may require the personal appearance of the defendant. [17]

Before holding the trial without the defendant, the judge should determine that the defendant was given adequate notice of the trial date.

→ *State v. Ronningen 691 P.2d 1348 (1984)*

Discovery is limited to those applicable subsections 46-15-101 through 46-15-411 MCA. Some of these statutes are specific to district court cases and may not apply to limited jurisdiction courts. The court should carefully review the applicable statutes.

1. Burden of Proof

The burden of proof is on the prosecution and the prosecution must prove all elements of the offense charged beyond a reasonable doubt. In a **DUI** case the prosecution must prove that the defendant:

1. was driving or in actual physical control of a vehicle
2. upon the ways of this state open to the public while under the influence of **alcohol**; or within this state while under the influence of drugs or a combination of alcohol and drugs.
3. was under the influence of alcohol, **drugs or a combination of alcohol and drugs**
4. within city/county to establish venue and jurisdiction

for a **Per Se** violation, the prosecution must prove that the defendant:

1. was driving or in actual physical control of a vehicle
2. upon the ways of this state open to the public
3. while the **alcohol** concentration in the blood, breath or urine was 0.08 or more
4. within city/county to establish venue and jurisdiction

🏛 If a Per Se is charged, then the prosecution need not introduce any evidence of impaired or erratic driving.

→ *State v. Zito 724 P.2d 149 (Kan. App. 1986)*

In 1987, the Montana Legislature established absolute liability for DUI and Per Se. [18]

🏛 The prosecution does not have to prove that the offense was committed knowlingly, purposely, or negligently.

→ *State v. McDole 734 P.2d 683 (Mt. 1987)*

🏛 If a second or subsequent offense is charged, then the prosecution does not have to prove any prior convictions at trial. However, they must be proven at the sentencing hearing.

→ *State v. Campbell 615 P.2d 190 (Mt. 1980)*

If the AC is available, then the prosecution or defendant may want to introduce expert testimony on the degree of impairment of drivers at particular levels. This is

relevant evidence to determine if a person's ability to safely operate a vehicle is diminished by the influence of alcohol or drugs for a charge of DUI. [19]

2. Admissible Evidence

A videotape of the defendant at the time of the offense or soon after, without the *Miranda* warnings having been given, is admissible. A proper foundation for the recording or taping must be established. Proper foundation is:

(1) a showing that the recording device is capable of making a record;
(2) a showing that the operator was competent;
(3) establishment of the authenticity and correctness of the recording;
(4) a showing that changes, additions, or deletions were not made;
(5) a showing of the manner of preservation of the record (chain of custody;
(6) identification of persons recorded; and
(7) a showing of the voluntariness of the statements to be introduced.

🏛 If no testimony of the defendant is taken during the course of the taping, then the last element need not be fulfilled.

→ *State v. Finley 173 Mt. 162, 566 P.2d 1119 (1977)*

→ *State v. Warwick 494 P.2d 627 (Mt. 1972)*

→ *State v. Johnson 719 P.2d 1248 (Mt. 1986)*

→ *State v. Finley 173 Mt. 162, 566 P.2d 1119 (1977)*

🏛 The fact that the defendant refused the AC test is admissible. [20]

→ *State v. Jackson 672 P.2d 255, 206 Mt. 338 (1983)*

→*South Dakota v. Neville 459 U.S. 553, 74 L.Ed 2d 748, 103 S. Ct. 916(1983)*

🏛 The trier of fact can consider the refusal to submit to a blood test or other test of intoxication as evidence of guilt.

→ *State v. Palmer 805 P.2d 580 (Mt. 1991)*

The results of the AC test are admissible. [21]

🏛 Medical records showing an AC level may be subpoenaed. [22]

→ *State v. Newill, 946 P.2d 134 (1997)*

🏛 Blood test results analyzed by the State Crime Laboratory may **not** be admitted as an exception to the hearsay rule of Montana Rules of Evidence Rule 803(6) as that portion of the rule violates due process guarantees. However, test results may be admitted under other permissible grounds.

→ *State v. Clark 964 P.2d 766 (1998)*

🏛 The results of the horizontal gaze nystagmus test are admissible to show probable cause to believe the person was under the influence of alcohol. They are not admissible to prove specific AC levels.

→ *State v. Superior Court 718 P.2d 171 (Ariz. 1986)*

The Montana Supreme Court has allowed admission of the horizontal gaze nystagmus test for limited purposes. The foundation for admission of this test consists of a showing that the officer is certified through the Montana Law Enforcement Academy after completing the required number of training hours and that the officer administered the test in the proper manner. More detailed discussion is found under Section I, B.1. (Preliminary Screening Tests, pages 4 and 5.

🏛 With the proper foundation, this scientific evidence may be admitted in the same manner as other expert testimony under Rule 702, Montana Rules of Evidence.

→ *State v. Clark 234 Mt. 222, 762 P.2d 853 (1988)*

🏛 Lay witnesses may testify about a defendant's state of intoxication. This testimony may be given in the form of an opinion.

→ *State v. Hardy, 604 P. 2d 792 (Mt. 1980)*

→ *State v. Trueman 34 Mt. 249, 85 P. 1024 (1906)*

Pamphlets published by the Traffic Safety Bureau, Montana Department of Transportation containing information regarding alcohol consumption are self-authenticating under Rule 902(5), Montana Rules of Evidence , but they do not fall within the public records hearsay exception of Rule 803(8).

🏛 (These pamphlets) cannot be admitted for their truth or accuracy without proper foundation demonstrating that they are either derived from the public agency's regularly conducted and recorded activities, publishes as a result of a duty imposed by law, or resulting from an investigation. Rule 803(8), Montana Rules of Evidence.

→ *State v. Thompson 773 P.2d 722 (Mt. 1988)*

3. **Jury Instructions**

In 1987 the Montana Legislature defined "under the influence" to mean…"that as

a result of taking into the body alcohol, drugs, or any combination thereof, a person's ability to safely operate a motor vehicle has been diminished".[23] This definition is to be used in any jury instruction for DUI. It is not appropriate for a Per Se charge.

If DUI is charged, then the jury should be instructed regarding the statutory inference which may be drawn by the jury. [24]

There is not a *Montana Supreme Court* case deciding whether a jury instruction for Per Se must be given when only DUI is charged. The following discussion of this issue is based upon Montana Supreme Court cases on other crimes.

An instruction in a Per Se jury trial would **not** be given if only DUI is charged because the elements of the two offenses are not equivalent. An offense is a lesser included offense of a great offense **if the greater offense includes every element of the lesser offense** plus other elements. Per Se requires an additional element not found in DUI, which is proof of an AC level of 0.08 or more. DUI does not necessarily require proof of AC level of 0.08 or more.

🏛 Per Se is not a lesser included offense of DUI

→ *State v. Lagerquist 152 Mt. 21, 445 P.2d 910 (1968)*

🏛 The prosecution may avoid the question by charging DUI or, in the alternative, Per Se, [25] however, the prosecution must move to amend the complaint in a timely manner. [26]

→ *State v. Hardy 719 P.2d 766 (Mt. 1986)*

🏛 The jury instructions may also include a definition of actual physical control if the evidence supports such a finding. Actual physical control is defined as existing or present bodily restraint, directing influence, domination or regulation of a motor vehicle.

→ *State v. Ruona 133 Mt. 243, 321 P.2d 615 (1958)*

🏛 Movement of the vehicle is not necessary. Further the defendant may be asleep or passed out behind the steering wheel and be in actual physical control of the motor vehicle.

→ *State v. Taylor 661 P.2d 33 (Mt. 1983)*

🏛 A driver was in actual physical control of a vehicle when he was found in the driver's seat of his vehicle which had run off the road. The keys were in his pocket, and he was slumped to his right in the middle of the front seat.

→ *State v. Peterson 769 P.2d 1221 (Mt. 1989)*

🏛 A patrolman found the defendant's pickup stuck in mud ten feet off the highway with the engine running, the driver asleep across the seat with his feet beneath the steering wheel and his head near the passenger door. The Court found he was in actual physical control of the pickup.

→ *Matter of Gebhardt, 775 P.2d 1261 (Mt. 1989) (***Overruled by State v. Bush 968 P. 2d 716 (1998) for other reasons than the purpose cited here)**

🏛 A defendant was found to be in actual physical control of his motorcycle as he wheeled it down the street, although, he did not straddle the bike.

→ *State v. Turner 795 P.3d 982 (Mt. 1990)*

4. Verdict and Appeal

If the jury or judge (in a non-jury trial) finds the defendant not guilty, then the defendant is to be discharged. The bail, if any, should be returned to the person who posted the bail. If a surety or property bail is posted, the bond should be exonerated. If the defendant is found guilty, the court may sentence immediately or set a sentencing date within a reasonable time of the verdict. (27) If the defendant and the prosecutor agree, the judge can impose sentence immediately after trial.

A person who is found guilty of DUI or Per Se may appeal to the district court. A written notice of intention to appeal must be filed within 10 days after judgment in the municipal, city or justice court. (28) The appeal must be transferred by the limited jurisdiction court to the district court within 30 days. Because of statutory time requirements judges in courts of limited jurisdiction are encouraged to date stamp the appeal when it is received. An appeal to district court **may not be made until sentencing and a final judgment** has been rendered in the municipal, city or justice court.

🏛 A person who pleads guilty in a limited jurisdiction court waives the right to a trial de novo in district court. (29)

→ *State v. Waymire 736 P.2d 106 (Mt. 1987)*

→ *State v. Wilson 827 P.2d 1286 (Mt. 1992)*

The limited jurisdiction judge should not send the disposition copy of the "Notice to Appear and Complaint" or "Abstract of Court Record" to Driver Control when the defendant files an appeal of the defendant's conviction. On appeal, the entire case file

goes to the District Court and the appeal will "stay" all suspensions or revocations of the defendant's license or privilege. When the limited jurisdiction judge transmits the Notice to Appear and Complaint or Abstract of Court Record to the district court with the appeal, then the district court, through the Clerk of District Court, will be responsible for sending the disposition copy to Driver Control upon conclusion of the proceedings in district court.

→ *State v. Kesler 228 Mt. 242, 741 P.2d 791 (1987)*

🏛 If a defendant appeals to the district court, then fails to appear, the district court may not remand the case to a court of limited jurisdiction because a trial de novo in district court is the exclusive remedy for review of limited jurisdiction cases.

→ *Rickett v. City of Billings 262 Mt. 339, 864 P.2d 793 (1993)*

SECTION II – STATUTORY REFERENCES

(ENDNOTE REFERENCES LISTED IN THE TEXT OF SECTION II)

(1) MCA 46-7-101. Appearance of arrested person – use of two-way electronic audio-video communication. (1) person arrested, whether with or without a warrant, must be taken without unnecessary delay before the nearest and most accessible judge for an initial appearance. (2) A defendant's initial appearance before a judge may, in the discretion of the court, be satisfied either by the defendant's physical appearance before the court or by two-way electronic audio-video communication. The audio-video communication must operate so that the defendant and the judge can see each other simultaneously and converse with each other and so that the defendant and his

counsel, if any, can communicate privately. A judge may order a defendant's physical appearance in court for an initial appearance hearing.

(2) MCA 46-7-102. Duty of Court. (1) The judge shall inform the defendant:

(a) of the charge or charges against the defendant;
(b) of the defendant's right to counsel;
(c) of the defendant's right to have counsel assigned by a court of record in accordance with the provisions of 46-8-101;
(d) of the general circumstances under which the defendant may obtain pre-trial release;
(e) of the defendant's right to refuse to make a statement and the fact that any statement made by the defendant may be offered in evidence at the defendant's trial; and
(f) of the defendant's right to a judicial determination of whether probable cause exists if the charge is made by a complaint alleging the commission of a felony.

(2) The judge shall admit the defendant to bail as provided by law.

MCA 46-9-102. Bailable Offenses. (1) All persons shall be bailable before conviction, except when death is a possible punishment for the offense charged and the proof is evident or the presumption great that the person is guilty of the offense charged.

MCA 46-9-111. Release on own recognizance. Any person in custody, if otherwise eligible for bail, may be released on his personal recognizance subject to such conditions as the court may reasonably prescribe to assure his appearance when required. Any person released as herein provided shall be fully apprised by the court of the penalty provided for failure to comply with the terms of his recognizance.

(3) MCA 46-8-113. Payment for court-appointed counsel by defendant. (1) The court may require a convicted defendant to pay the costs of court-appointed counsel as part of or a condition under the sentence imposed as provided in Title 46.

(4) MCA 61-8-714. Penalty for driving under the influence of alcohol or drugs – first through third offense. (1) A person convicted of a violation of 61-8-401 shall be punished by imprisonment for not less than 24 consecutive hours or more than 6 months and shall be punished by a fine or not less than $300 or more than $1000. The initial 24 hours of the imprisonment term must be served in the county jail and may not be served under home arrest. The mandatory imprisonment sentence may not be sentenced unless the judge finds that the imposition of the imprisonment sentence will pose a risk to the person's physical or mental well-being. Except for the initial 24 hours of the imprisonment term, notwithstanding 46-18-201(2), the imprisonment

sentence may be suspended for a period of up to 1 year pending successful completion of the court-ordered chemical dependency assessment, education, or treatment of the person.

(2) On a second conviction, the person shall be punished by a fine of not less than $600 or more than $1,000 and by imprisonment for not less than 7 days or more than 6 months. At least 48 hours of the imprisonment term must be served consecutively in the county jail and may not be served under home arrest. The imposition or execution of the first 5 days of the imprisonment sentence may not be suspended. Except for the initial 5 days of the imprisonment term, notwithstanding 46-18-201(2), the imprisonment sentence may be suspended for a period of up to 1 year pending successful completion of a chemical dependency treatment program by the person.

(3) On the third conviction, the person shall be punished by imprisonment for a term of not less than 30 days or more than 1 year and by a fine of not less than $1,000 or more than $5,000. At least 48 hours of the imprisonment must be served consecutively in the county jail and may not be served under home arrest. The imposition or execution of the first 10 days of the imprisonment sentence may not be suspended. The remainder of the imprisonment sentence may be suspended for a period of up to 1 year pending successful completion of a chemical dependency treatment program by a person.

(5) MCA 61-8-722. Penalty for driving with excessive alcohol concentration – first through third offense. (1) A person convicted of a violation of 61-8-406 shall be punished by imprisonment for not more than 10 days and shall be punished by a fine of not less than $300 or more than $1000.

(6) MCA 46-12-210. Advise to defendant. (1) Before accepting a plea of guilty or nolo contendere, the court shall determine that the defendant understands the following:

(a) (i) the nature of the charge for which the plea is offered;

(ii) the mandatory minimum penalty provided by law, if any;

(iii) the maximum penalty provided by law, including the effect of any penalty enhancement provision or special parole restriction; and

(iv) when applicable, the requirement that the court may also order the defendant to make restitution of the costs and assessments provided by law;

(b) if the defendant is not represented by an attorney, the fact that the defendant has the right to be represented by an attorney at every stage of the proceeding and that, if necessary, one will be appointed to represent the defendant;

(c) that the defendant has the right:

(i) to plead not guilty or to persist in that plea if it has already been made;

(ii) to be tried by a jury and at the trial has the right to the assistance of counsel;

(iii) to confront and cross-examine witnesses against the defendant;

(iv) not to be compelled to reveal personally incriminating information;

(d) that if the defendant pleads guilty or nolo contendere in fulfillment of a plea agreement, the court is not required to accept the terms of the agreement and the defendant may not be entitled to withdraw the plea if the agreement is not accepted pursuant to 46-12-211;
(e) that if the defendant's plea of guilty or nolo contendere is accepted by the courts, there will not be a further trial of any kind, so that by pleading guilty or nolo contendere the defendant waives the right to a trial; and
(f) that if the defendant is not a United States citizen, a guilty or nolo contendere plea might result in deportation from or exclusion from admission to the United States or denial of naturalization under federal law.

(2) The requirement of subsection (1) may be accomplished by the defendant filing a written acknowledgment of the information contained in subsection (1).

See Reference Note (2) for **MCA 46-7-102. Duty of Court.**

(7) MCA 46-12-201. Manner of conducting arraignment – use of two-way electronic audio-video communication – exception. (1) Arraignment must be conducted in open court and must consist of reading the charge to the defendant or stating to the defendant the substance of the charge and calling on the defendant to plead to the charge. The defendant must be given a copy of the charging document before being called upon to plea. For purposes of this chapter, an arraignment that is conducted by the use of two-way electronic audio-video communication, allowing all of the participants to be observed and heard in the courtroom by all present is considered to be an arraignment in open court. (2) The court shall inquire of the defendant or the defendant's counsel the defendant's true name, and if the defendant's true name is given as any other than that used in the charge, the court shall order the defendant's name to be substituted for the name under which the defendant is charge. (3) The court shall determine whether the defendant is under any disability that would prevent the court, in its discretion, from proceeding to arraignment. The arraignment may be continued until the court determines the defendant is able to proceed. (4) Whenever the law requires that a defendant in a misdemeanor or felony case be taken before a court for an arraignment, this requirement may, in the discretion of the court, be satisfied either by the defendant's physical appearance before the court or by two-way electronic audio-video communication. The audio-video communication must operate so that the defendant and the judge can see each other simultaneously and converse with each other, so that the defendant and the defendant's counsel, if any, can communicate privately, so that the defendant and the defendant's counsel are both physically present in the same place during the two-way electronic audio-video communication. The defendant may waive the requirement that the defendant's counsel be in the defendant's physical presence during the two-way electronic audio-video communication. (5) A judge may order a defendant's physical appearance in

court for arraignment. In a felony case, a judge may not accept a plea of guilty or nolo contendere from a defendant who is not physically present in the courtroom.

(8) MCA 46-12-203. Time allowed to answer. If on the arraignment the defendant requires it, he must be allowed a reasonable time, not less than 1 day, to answer or otherwise plead to the indictment, information or complaint. The answer may include appropriate pre-trial motions.

(9) MCA 46-12-211. Plea agreement procedure – use of two-way electronic audio-video communication. (1) The prosecutor and the attorney for the defendant, or the defendant when acting pro se, may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or *nolo contendere* to a charged offense or to a lesser or related offense, the prosecutor will do any of the following:

(a) move for dismissal of other charges;

(b) agree that a specific sentence is the appropriate disposition of the case; or

(c) make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that the recommendation or request may not be binding upon the court.

(2) Subject to the provisions of subsection (5) , if a plea agreement has been reached by the parties, the court shall, on the record, require a disclosure of the agreement in open court, or on a showing of good cause in camera, at the time the plea is offered. If the agreement is of the type specified in subsection (1)(a) or (1)(b), the court may accept or reject the agreement or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report. If the agreement is of the type specified in subsection (1) (c), the court shall advise the defendant that, if the court does not accept the recommendation or request, the defendant nevertheless has no right to withdraw the plea.

(3) If the court accepts a plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement.

(4) If the court rejects a plea agreement of the type specified in subsection (1)(a) or (1)(b), the court shall, on the record, inform the parties of this fact and advise the defendant that the court is not bound by the plea agreement, afford the defendant an opportunity to withdraw the plea, and advise the defendant that if the defendant persists in the guilty or nolo contendere plea, the disposition of the case may be less favorable to the defendant then that contemplated by the plea agreement.

(5) For purposes of this section, in cases in which the defendant is charged with a misdemeanor offense, a disclosure of the agreement through the use of two-way electronic audio-video communication, allowing all of the participants to be observed and heard in the courtroom by all present, is considered to be a disclosure in open court. Audio-video communication

may be used if neither party objects and the court agrees to its use. The audio-video communication must operate as provided in 46-12-201.

(10) MCA 46-12-204. Plea alternatives. (1) A defendant may plead guilty, not guilty, or with the consent of the court and the prosecutor, *nolo contendere.* If a defendant refuses to plead or if a defendant corporation fails to appear, the court shall enter a plea of guilty.

(11) MCA 61-8-408. Multiple convictions prohibited. When the same acts may establish the commission of an offense under both 61-8-401 or 61-8-406, a person charged with such conduct may be prosecuted for a violation of both 61-8-401 and 61-8-406. However, he may only be convicted of an offense under either 61-8-401 or 61-8-406.

(12) MCA 46-12-204. Plea alternatives. (2) The court may not accept a plea of guilty or *nolo contendere* without first determining that the plea is voluntary and not the result of force or threats or of promises apart from the plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or *nolo contendere* results from prior discussions between the prosecutor and the defendant or the defendant's attorney.

(13) MCA. 46-12-212. Determining accuracy of plea. (1) The court may not accept a guilty plea without determining that there is a factual basis for the plea in charges of felonies or misdemeanors resulting in incarceration. (2) A defendant who is unwilling to admit to any element of the offense that would provide a factual basis for a plea of guilty may, with the consent of the court, enter a plea of guilty or may, with the consent of the court and prosecutor, enter a plea of *nolo contendere* to the offense if the defendant considers the plea to be in the defendant's best interest and if a factual basis exists for the plea.

(14) See reference Note (6) for **MCA 46-12-210**. Advice to Defendant.

(15) MCA 46-12-205. Record of Arraignment. The court must prepare and keep a written record of all arraignment proceedings. In district courts a verbatim record of all arraignment proceedings must be made, preserved, and filed with the court.

(16) MCA 46-13-401. Dismissal at instance of court or prosecution. (2) After the entry of a plea upon a misdemeanor charge, the court, unless good cause to the contrary is shown, shall order the prosecution to be dismissed, with prejudice, if a defendant whose trial has not been postponed upon the defendant's motion is not brought to trial within 6 months.

(17) MCA 46-16-122. Absence of Defendant from Trial. (1) In a misdemeanor case, if the defendant fails to appear in person, either at the time set for the trial or at any time during the course of the trial and if the defendant's

counsel is authorized to act on the defendant's behalf, the court shall proceed with the trial unless good cause for continuance exists. (2) If the defendant's counsel is not authorized to act on the defendant's behalf as provided in subsection (1) or if the defendant is not represented by counsel, the court in its discretion, may do one or more of the following:

a. Order a continuance;
b. Order bail forfeited;
c. Issue an arrest warrant, or
d. Proceed with the trial after finding that the defendant had knowledge of the trial date and is voluntarily absent.

(18) MCA. 45-2-104. Absolute liability. A person may be guilty of an offense without having, as to each element of the offense, one of the mental states of knowingly, negligently, or purposely only if the offense is punishable by a fine not exceeding $500 or the statute defining the offense clearly indicates a legislative purpose to impose absolute liability for the conduct described.

MCA 61-8-401. Persons under the influence of alcohol or drugs. (7) Absolute liability as provided in 45-2-104 will be imposed for a violation of this section.

MCA 61-8-406. Operation of vehicle by a person with alcohol concentration of .08 or more. It is unlawful and punishable as provided in 61-8-442, 61-8-722, 61-8-723, 61-8-731 through 61-8-734 for any person to drive or be in actual physical control of a vehicle upon the ways of this state open to the public while the person's alcohol concentration, as shown by analysis of the person's blood, breath, or urine, is 0.08 or more. Absolute liability as provided in 45-2-104 will be imposed for a violation of this section.

(19) MCA 61-8-401. Driving under the influence of alcohol or drugs. (3) "Under the influence" means that as a result of taking into the body alcohol, drugs, or any combination of alcohol and drugs, a person's ability to safely operate a motor vehicle has been diminished.

(20) MCA 61-8-404. Evidence admissible – conditions of admissibility. (2) If the person under arrest refused to submit to one or more tests as provided in this section, proof of refusal is admissible in any criminal action or proceeding arising out of acts alleged to have been committed while the person was driving or in actual physical control of a vehicle upon the ways of this state open to the public, while under the influence of alcohol, drugs, or a combination of alcohol or drugs.

(21) MCA 61-8-404. Evidence admissible – conditions of admissibility. (1) Upon the trial of a criminal action or other proceeding arising out of acts alleged

to have been committed by a person in violation of 61-8-401, 61-8-406, 61-8-410, or 61-8-805;

(a) evidence of any measured amount or detected presence of alcohol, drugs, or a combination of alcohol and drugs in the person at the time of the test, as shown by an analysis of the person's blood or breath, is admissible. A positive test result does not, in itself, prove that the person was under the influence of a drug or drugs at the time the person was in control of a motor vehicle. A person may not be convicted of a violation of 61-8-401 based upon the presence of a drug or drugs in the person unless some other competent evidence exists that tends to establish that the person was under the influence of a drug or drugs while driving or in actual physical control of a motor vehicle within this state.

(b) a report of the facts and results of one or more tests of a person's blood or breath is admissible in evidence if:

(i) a breath test or preliminary alcohol screening test was performed by a person certified by the forensic sciences division of the department to administer the test

(ii) a blood sample was analyzed in a laboratory operated or certified by the department or in a laboratory exempt from certification under rules of the department and the blood was withdrawn from the person by a person competent to do so under 61-8-405(1);

(c) a report of the facts and results of a physical, psychomotor, or physiological assessment of a person is admissible in evidence if it was made by a person trained by the department or by a person who has received training recognized by the department.

(2) If the person under arrest refused to submit to one or more tests as provided in this section, proof of refusal is admissible in any criminal action or proceeding arising out of acts alleged to have been committed while the person was driving or in actual physical control of a vehicle upon the ways of the state open to the public, while under the influence of alcohol, drugs, or a combination of alcohol and drugs.

(22) MCA 61-8-404. Evidence admissible – conditions of admissibility. (3) The provisions of this part do not limit the introduction of any other competent evidence bearing on the question of whether the person was under the influence of alcohol, drugs, or a combination of alcohol and drugs.

(23) See Endnote (19) for **MCA 61-8-401(3). Driving while under the influence of alcohol or drugs.**

(24) MCA 61-8-401. Driving while under the influence of alcohol or drugs. (4) Upon the trial of any civil or criminal action or proceeding arising out of acts alleged to have been committed by any person driving or in actual physical control of a vehicle while under the influence of alcohol, the concentration of alcohol in the person at the time of the test, as shown by analysis of a sample of

the person's blood or breath drawn or taken within a reasonable time after the alleged act, gives rise to the following inferences:

(a) If there was at that time an alcohol concentration of 0.04 or less, it may be inferred that the person was not under the influence of alcohol.

(b) If there was at that time an alcohol concentration in excess of 0.04 but less than 0.08, that fact may not give rise to any inference that the person was or was not under the influence of alcohol, but the fact may be considered with other competent evidence in determining the guilt or innocence of the person.

(c) If there was at that time an alcohol concentration of 0.08 or more, it may be inferred that the person was under the influence of alcohol. The inference is rebuttable.

(25) See Reference Note (11) for **MCA 61-8-408. Multiple convictions prohibited.**

(26) MCA 46-11-111. Amending Complaint A court may allow a complaint to be amended under the same circumstances and in the same manner as an information as provided in 46-11-205.

MCA 46-11-205. Amending information as to substance or form. (1) The court may allow an information to be amended in matters of substance at any time, but not less than 5 days before trial, provided that a motion is filed in a timely manner, states the nature of the proposed amendment, and is accompanied by an affidavit stating facts that show the existence of probable cause to support the charge as amended. A copy of the proposed amended information must be included with the motion to amend the complaint.

(27) MCA 46-18-102. Rendering Judgment and pronouncing sentence – use of two-way electronic audio-video communication. (1) The judgment must be rendered in open court. For purposes of this section, in cases in which the defendant is charged with a misdemeanor offense, a judgment rendered through the use of two-way electronic audio-video communication, allowing all of the participants to be observed and heard in the courtroom by all present, is considered to be a judgment rendered in open court. Audio-video communication may be used if neither party objects and the court agrees to its use. The audio-video communication must operate as provided in 46-12-201. (2) If the verdict or finding is not guilty, judgment must be rendered immediately and the defendant must be discharged from custody or from the obligation of a bail bond. (3) (a) Except as provided in 46-18-301, if the verdict or finding is guilty, sentence must be pronounced and judgment rendered within a reasonable time. (b) When the sentence is pronounced, the judge shall clearly state for the record the reasons for imposing the sentence.

(28) <u>MCA 46-17-311.</u> Appeal from justices', municipal, and city courts. (2) The defendant may appeal to the district court by filing written notice of intention to appeal within 10 days after a judgment is rendered following trial. In the case of an appeal by the prosecution, the notice must be filed within 10 days of the date that the order complained of is given. The prosecution may appeal only in the cases provided for in 46-20-103.

(29) <u>MCA 46-17-203.</u> Plea of guilty – use of two-way electronic audio-video communication. (2) A plea of guilty or *nolo contendere* in a justice's court, city court or other court of limited jurisdiction waives the right of trial de novo in district court. A defendant must be informed of the waiver before the plea is accepted, and the justice or judge shall question the defendant to ensure that the plea and waiver are entered voluntarily.

III. <u>SENTENCE AND TREATMENT</u>

A. <u>Sentencing procedures</u>

The judge imposes sentence after a defendant enters a plea of guilty or after the judge or jury enters a verdict of guilty at a trial. Some penalties apply to both DUI and Per Se and may include court costs. **DUI and Per Se Violations cannot be deferred by sentence or by prosecution.** [(1)]

In all cases of DUI and Per Se violations, the **judge may order a chemical dependency assessment prior to sentencing.** If the assessment is not completed prior to sentencing, then the judge shall order the assessment as part of the sentencing.

If a defendant is convicted in a jury or judge (non-jury) trial, or the defendant pleads guilty or *nolo contendere*, then the judge may order the defendant to pay the costs of the trial, including the costs of the jury or witness fees, in addition to any fine assessed.[(2)] If an attorney was appointed for the defendant, then the judge may also order the defendant to repay the cost of court appointed counsel to the city or county. [(3)]

🏛 The court must inquire into the offender's financial status before requiring payment of those costs.

→ *State v. Ferrell 676 P.2d 168 (Mt. 1984)*

A conviction of DUI or Per Se will result in ten points on the offender's driving record[4] maintained by the Records and Driver Control Bureau of the State of Montana Motor Vehicle Division, located in Helena.

In addition to any fine imposed by the court, a person convicted of a misdemeanor DUI or Per Se must pay a $60.00 surcharge unless the person is unable to pay.[5]

1. Driving Under the Influence of Alcohol (DUI)

Sentence **may not be deferred** for a DUI offense. (See Appendix C for 1st offense Sentence and Order)

The penalty provision for a first offense DUI is found at 61-8-714(1)[6] The offender must be fined a minimum of $300 to a maximum of $1000. The offender must be sentenced to a minimum of 24 consecutive hours in the county jail (or a county facility approved by the court) to a maximum of 6 months. The minimum requirement of 24 consecutive hours indicates that the court should not credit for time served unless a total of 24 consecutive hours will be served. If served in a county facility, the statute provides that the offender, if financially able, must pay the cost of imprisonment in the facility.[7]

Any imprisonment served beyond the 24 consecutive hours can be served under home arrest as provided in Title 46, Chapter 18, part 10.[8] The minimum 24 consecutive hours may be suspended only if the imprisonment poses a risk to the offender's physical or mental well-being.[9] A letter signed by a physician, psychologist or psychiatrist describing the risk is sufficient if the judge is convinced of the seriousness of the risk.

In addition, the offender **must attend and complete a chemical dependency assessment and education course** at an approved alcohol treatment program. The assessment may be ordered prior to or at sentencing. The course may include alcohol and/or drug treatment, or both. The court **must order** treatment at a level appropriate to the defendant's alcohol or drug problem, if a finding of chemical dependency is found by a certified chemical dependency counselor.[10] This course and possible treatment is called the ACT program (**A**ssessment **C**ourse **T**reatment). The offender may choose which ACT program to attend, but the assessment and course must be at a program

approved by the Department of Public Health and Human Services.[11] For a list of approved ACT programs contact Addictive and Mental Disorders Division (See address in Appendix R).

Treatment, if recommended by the ACT program and ordered by the Court, may be provided by any certified chemical dependency counselor. All treatment required must be contained in the original court order. Attendance at Alcoholics Anonymous does not meet the treatment requirement of a certified chemical dependency counselor. Unless a psychologist or psychiatrist is certified as a chemical dependency counselor, treatment by a psychologist or psychiatrist will not meet chemical dependency requirements. (For information about certified chemical dependency counselors see address for Addictive and Mental Disorders Division in Appendix R. Each ACT program also has a list of certified chemical dependency counselors in its service area.)

🏛 All treatment required must be contained in the original court order.

→ *State, ex rel v. Eschler 767 P.2d 336 (Mt. 1989)*

Driver Control suspends or revokes the offender's driver's license or privilege.[12] Under this section, the suspension or revocation of the driver's license or privilege is not part of the criminal penalties imposed by the court. For a first offense DUI conviction, Driver Control will suspend the driver's license or privilege for six months. [13] However, if there is a record of a conviction for Per Se in the prior five year period then the license or privilege will be suspended for one year even though the present conviction is for a first offense DUI.[14]

Further, on an offender's first refusal of the AC Test, the defendant is ineligible for a probationary license for six months after the date of the refusal. For a second or subsequent refusal within five year, the defendant is ineligible for a probationary license for one year after the date of the second or subsequent refusal. [15] Because of these circumstances, the judge should not make absolute statements to the offender about the length of time of suspension or revocation of the driver's license or privilege for any level of DUI or Per Se offense. The decision for periods of suspension rests with Driver Control.

For a first offense DUI, the judge **may recommend** that the offender receive a restricted probationary driver's license. [16] If issued, the license will generally state

"essential driving only." [17] A judge may refuse to recommend that a restricted probationary driver's license be issued. If the judge does not recommend a probationary driver's license, then Driver Control will not issue any license to the offender until the judge does recommend a probationary license or until the six month suspension is completed. To receive a probationary driver's license, an offender must have the judge's recommendation, pay a $200 reinstatement fee to Driver Control, comply with ACT and treatment, and have a valid Montana license. [18] The defendant must have cleared any suspension or revocation in any other state. **Driver Control will not issue a probationary license if the driver's license is suspended or revoked in any other state.**

In addition to other punishments provided for in 61-8-401 or 61-8-406, the court may restrict a defendant to only driving a motor vehicle if an ignition interlock device is installed and functioning. This penalty includes the payment of the costs of leasing, installing and maintaining the device. The criteria for ordering the interlock device are:

If the interlock device is reasonably available; the defendant's BAC at the time of the arrest was 0.16 or greater; or the defendant was previously convicted of 61-8-401 or 61-8-406.[19]

The duration of this restriction must run parallel to the time period for suspension or revocation of the driver's license of the defendant. If the defendant pays the reinstatement fee and shows proof of compliance with an interlock restriction imposed by the court, the department may "stay" the suspension or revocation of the defendant's driver's license. [20]

For a second offense DUI the penalty provision is found at MCA 61-8-714(2). [21] (For 2nd offense Sentence and Order, see Appendix D). The offender must be fined a minimum of $600 to a maximum of $1000. The offender must be sentenced to a minimum of seven days in the county jail (or county facility approved by the court) to a maximum of six months. If served in a county facility, the statute provides that the offender, if financially able, must pay the cost of imprisonment in the facility. [22] Forty-eight hours of the jail/facility time must be served consecutively. Any imprisonment served beyond the required 48 consecutive hours can be served under home arrest as

provided in Title 46, Chapter 18, part 10. [23] A minimum of five days in the jail/facility may be suspended only if the sentence will pose a risk to the offender's physical or mental well-being. [24] A letter signed by a physician, psychologist, or psychiatrist describing the risk is sufficient if the judge is convinced of the seriousness of the risk.

The offender convicted of second offense DUI must complete an assessment for chemical dependency and the ACT education course and treatment. (ACT programs should follow Addictive and Mental Disorders Division requirements as to the assessment and general educational course requirements for multiple offenders.) Treatment is required at a level appropriate to the defendant's alcohol and/or drug problem as determined by the judge based upon recommendations of a certified chemical dependency counselor. The offender may attend the ACT program of the offender's choice as long as the program has been approved by the Department of Public Health and Human Services. The mandatory treatment can be provided by any certified chemical dependency counselor. [25] For second or subsequent convictions, the treatment program must be followed by monthly monitoring for a period of at least one year from the date of admission to the program.

61-8-733 (1) On the second or subsequent conviction of a violation of 61-8-401 or 61-8-406 the court, in addition to the punishments provided in 61-8-714 and 61-8-722 and any other penalty imposed by law, shall order that each motor vehicle owned by the person at the time of the offense be either seized and subjected to the procedure provided under 61-8-421 or equipped with an ignition interlock device as provided under 61-8-442. **Caveat:** Read the rest of the statute for further guidance.

Driver Control suspends the driver's license or privilege for one year of any person convicted of a second offense DUI. The revocation will remain in effect after one year unless the ACT program is completed and the $200 reinstatement fee is paid. [26] This means that a person convicted of second offense DUI who fails to complete treatment will be suspended indefinitely and must be charged with a violation of MCA 61-5-212 *Driving while license suspended or revoked – penalty – seizure of vehicle or rendering*

vehicle inoperable, rather than a violation of MCA 61-5-102 *Driver's to be licensed*, if the person operates a motor vehicle.

The judge may not recommend a probationary license for a person convicted of a second or subsequent DUI. The offender must contact Driver Control to obtain a probationary license. (See address in Appendix R). Driver Control will issue a probationary driver's license three months after conviction with license restrictions determined by Driver Control based on good cause or necessity as shown by the offender if:

1. The offender files an Application for Restricted Probationary License with Driver Control.
2. The offender provides proof of financial responsibility.
3. The offender is compliant with ACT including completion of any ordered treatment.
4. The offender pays the $200 reinstatement fee.
5. The offender pays the driver's examination fee and completes the driver's test. (27)

In addition to other punishments provided for in 61-8-401 or 61-8-406, the court may restrict a defendant to only driving a motor vehicle if an ignition interlock device is installed and functioning. This penalty includes the payment of the costs of leasing, installing and maintaining the device. The criteria for ordering the interlock device are:

If the interlock device is reasonably available; the defendant's BAC at the time of the arrest was 0.16 or greater; or the defendant was previously convicted of 61-8-401 or 61-8-406.(28)

The duration of this restriction must run parallel to the time period for suspension or revocation of the driver's license of the defendant. If the defendant pays the reinstatement fee and shows proof of compliance with an interlock restriction imposed by the court, the department may "stay" the suspension or revocation of the defendant's driver's license. (29)

For a third DUI, the penalty provision is found at Section 61-8-714(3) [30] The offender must be fined a minimum of $1000 to a maximum of $5000. The offender must be sentenced to a minimum of 30 days in the county jail (or a county facility approved by the court) to a maximum of one year. If served in a county facility, the statute provides that the offender, if financially able, must pay the cost of imprisonment in the facility. [31] Forty-eight hours of the jail/facility time must be served consecutively. The first ten days of the jail/facility time cannot be suspended. Any imprisonment served beyond the 48 consecutive hours can be served under home arrest as provided in Title 46, Chapter 18, Part 10. [32] The law provides for no suspension of the jail/facility time because of a risk to the offender's physical or mental well-being.

🏛 The penalty for third offense DUI is constitutional and not cruel and unusual punishment.

→ *State v. Bruns 691 P.2d817 (Mt. 1984)*

In addition to the penalties listed above, on a third or subsequent conviction, the court **shall order** the motor vehicle owned and operated by the person at the time of the offense to be seized and subjected to forfeiture pursuant to 61-8-733. [33]

The requirements for ACT including assessment, education, treatment, monthly monitoring, the revocation of license or privileges and the issuance of a probationary driver's license are the same as the DUI second offense.

In addition to other punishments provided for in 61-8-401 or 61-8-406, the court may restrict a defendant to only driving a motor vehicle if an ignition interlock device is installed and functioning. This penalty includes the payment of the costs of the leasing, installing, and maintaining the device. The criteria for ordering the interlock device are:

If the interlock device is reasonably available; the defendant's BAC at the time of the arrest was 0.16 or greater; or the defendant was previously convicted of 61-8-401 or 61-8-406.[34]

The duration of this restriction must run parallel to the time period for suspension or revocation of the driver's license of the defendant. If the defendant pays the reinstatement fee and shows proof of compliance with an interlock restriction imposed by

the court, the department may "stay" the suspension or revocation of the defendant's driver's license.[35]

Since forfeiture is mandatory, the judge should include as one of the conditions of release that the defendant **may not** sell, transfer, or dispose of the vehicle while the case is pending.

Charges of fourth or subsequent offense DUI's or fourth or subsequent offense Per Se violations are felonies and must be tried in the District Court. A court of limited jurisdiction will probably see charges initially and they will be handled as all other felony charges in an *Initial Appearance.* If a citation is filed in your court citing a fourth or subsequent offense of DUI or a Per Se violation, the judge should handle the charge as if it were filed by the city or county prosecutor and **no plea should be taken.** The judge should notify the prosecutor's office immediately about the charge.

2. Driving With 0.08 or More AC/(Per Se Violation)

Sentence **may not be deferred** for a Per Se offense. (for a sample sentencing order see Appendix C and Appendix D)

The penalty provision for a first offense Per Se violation is found at MCA 61-8-722(1) [36] The offender must be fined a minimum of $300 to a maximum of $1000. There is no minimum imprisonment; the maximum imprisonment is ten days. Imprisonment can be either in a county jail or a county facility approved by the court. If served in a county facility, the statute provides that the offender, if financially able, must pay the cost of imprisonment in the facility. [37] The statute further states that imprisonment may be served under home arrest as provided in Title 46, Chapter 18, part 10. [38]

A person convicted of a first offense Per Se **must attend and complete a chemical dependency assessment and education course** at an approved alcohol treatment program, including alcohol and/or drug treatment or both. The assessment may be ordered prior to or at sentencing.

Treatment is required at a level appropriate to the alcohol and/or drug problem as determined by the judge based upon recommendations of a certified chemical dependency counselor. The offender may attend the ACT program of the offender's choice as long as the program has been approved by the Department of Public Health and

Human Services. The mandatory treatment can be provided by any certified chemical dependency counselor. [39]

The suspension of the license or privilege and the issuance of a probationary Driver's license for a Per Se, first offense, are the same as the DUI, first offense. [40] If there is a record of a conviction of DUI in the prior five year period then the license will be suspended for one year even though the present conviction is for a first offense Per Se.

In addition to other punishments provided for in 61-8-401 or 61-8-406, the court may restrict a defendant to only driving a motor vehicle if an ignition interlock device is installed and functioning. This penalty includes the payment of the costs of the leasing, installing, and maintaining the device. The criteria for ordering the interlock device are:

If the interlock device is reasonably available; the defendant's BAC at the time of the arrest was 0.16 or greater; or the defendant was previously convicted of 61-8-401 or 61-8-406.[41]

The duration of this restriction must run parallel to the time period for suspension or revocation of the driver's license of the defendant. If the defendant pays the reinstatement fee and shows proof of compliance with an interlock restriction imposed by the court, the department may "stay" the suspension or revocation of the defendant's driver's license.[42]

For a second offense Per Se the penalty provision is found at Section 61-8-722(2) [43] The offender must be fined a minimum of $600 to a maximum of $1000. The offender must be sentenced to a minimum of 5 days in the county jail (or county facility approved by the court) to a maximum of 30 days. If served in a county facility, the statute provides that the offender, if financially able, must pay the cost of imprisonment in the facility. [44]

Any imprisonment served beyond the 5 days can be served under home arrest as provided in Title 46, Chapter 18, part 10, MCA. [45] Unlike the DUI statute, there is no provision for suspension of the imprisonment because of a risk of mental or physical well-being.

The offender convicted of a second offense Per Se must complete a chemical dependency assessment and the ACT program. A second offense Per Se conviction

requires treatment at a level appropriate to the alcohol and/or drug problem as determined by the judge based upon recommendations of a certified chemical dependency counselor. For second or subsequent convictions, the treatment program must be followed by monthly monitoring for a period of at least one year from the date of admission to the program.

Driver Control suspends the license or privilege for one year of any person convicted of a second offense Per Se. The suspension will remain in effect indefinitely unless the ACT program including treatment is completed. (46)

The forfeiture statute is the same for Per Se as DUI and the vehicle is subject to the same procedures as enumerated in **61-8-733.**

The judge may not recommend a probationary license for a person convicted of a second or subsequent Per Se. The requirements to receive a probationary driver's license are the same as for a second or subsequent offense DUI.

In addition to other punishments provided for in 61-8-401 or 61-8-406, the court may restrict a defendant to only driving a motor vehicle if an ignition interlock device is installed and functioning. This penalty includes the payment of the costs of the leasing, installing, and maintaining the device. The criteria for ordering the interlock device are:

If the interlock device is reasonably available; the defendant's BAC at the time of the arrest was 0.16 or greater; or the defendant was previously convicted of 61-8-401 or 61-8-406.(47)

The duration of this restriction must run parallel to the time period for suspension or revocation of the driver's license of the defendant. If the defendant pays the reinstatement fee and shows proof of compliance with an interlock restriction imposed by the court, the department may "stay" the suspension or revocation of the defendant's driver's license.(48)

For a third offense Per Se the penalty provision is found at Section 61-8-722(3) (49) The offender must be fined a minimum of $1000 to a maximum of $5000. The offender must be sentenced to a minimum of 10 days in the county jail (or county facility approved by the court) to a maximum of 6 months. If served in a county facility, the statute provides that the offender, if financially able, must pay the cost of imprisonment

in the facility. [50] Any confinement served beyond the 10 days can be served under home arrest as provided in Title 46, Chapter 18, Part 10. [51] There is no provision for suspension of the imprisonment because of a risk of mental or physical well-being.

The requirements for assessment, education costs, treatment, monthly monitoring, the revocation of license or privilege and the issuance of a probationary driver's license are the same for Per Se or DUI, second offense.

In addition to the penalties listed above, on a 2nd or subsequent conviction, the Court **shall order** the motor vehicle owned and operated by the person at the time of the offense to be seized and subjected to forfeiture pursuant to 61-8-733. [52]

In addition to other punishments provided for in 61-8-401 or 61-8-406, the court may restrict a defendant to only driving a motor vehicle if an ignition interlock device is installed and functioning. This penalty includes the payment of the costs of the leasing, installing, and maintaining the device. The criteria for ordering the interlock device are:

If the interlock device is reasonably available; the defendant's BAC at the time of the arrest was 0.16 or greater; or the defendant was previously convicted of 61-8-401 or 61-8-406.[53]

The duration of this restriction must run parallel to the time period for suspension or revocation of the driver's license of the defendant. If the defendant pays the reinstatement fee and shows proof of compliance with an interlock restriction imposed by the court, the department may "stay" the suspension or revocation of the defendant's driver's license.[54]

3. Enhancement for Multiple Offenses

A second or subsequent offense DUI or Per Se occurs when the present offense is committed within five years of the previous DUI or Per Se conviction. An offense becomes a fourth offense, counting the lifetime DUI or Per Se convictions, using the criteria established by the series of Montana Supreme Cases decided in September, 1997. A conviction occurs the day sentence is entered, [55] or the day that bail is forfeited. [56] A second or subsequent offense Per Se is calculated in the same manner as a second or subsequent offense DUI. [57]

The determination of number of convictions for Per Se is the same as DUI [58]

→ *State v. Beckman 944 P.2d 756 (1997)*

→ *State v. Reams 945 P.2d 52 (1997)*

→*State v. Bowles 947 P.2d 52 (1997)*

→*State v. Cooney 945 P.2d 891 (1997)*

DUI second offense (or more) may be charged if there is a first offense conviction for DUI or Per Se. A Per Se conviction may be used to enhance a DUI charge. (59)
The reverse situation is also true. A DUI conviction may be used to enhance a Per Se charge.
(See Section II. Part A for discussion of enhancement involving pleas entered without counsel).

II. B. POST-SENTENCE PROCEDURES

1. Court Procedures for Collecting Fines.

A judge should follow standard procedures for the collection of the fine and imposition of the jail sentence. The court may accept time payments. Section 61-6-214, MCA, provides for an indefinite suspension of the driver's license of an offender who fails to pay a fine, costs, or restitution of $200 or more. (See the Deskbook and appropriate statutes for more information)

Before this provision of the law may be applied, the defendant must have written notice of suspension possibilities, which may have been included on the summons, complaint, or notice to appear or the court must notify the offender by first class mail or by a statement signed before the court. (60) This must be followed by a written warning from the court sent by first class mail advising the defendant of imminent suspension. (See Appendix E for a form for court notification to Driver Control. (See Appendix F for a form for the offender to sign).

2. ACT Referral and Notification to Driver Control

Whether convicted of DUI or Per Se, an offender must be directed by the judge to complete an ACT program. (61) The referral to a Montana ACT program form is called "Court Order/Referral Form", Appendix G. Copies of this form are available from the Traffic Safety Bureau (See Appendix R for address). Instructions are printed on the back of the pad of forms and included here as Appendix H.

The court completes Part A, B, C and D of the Court Order/Referral Form. For first offense, the judge may recommend that Driver Control issue a restricted

probationary driver's license. The judge should mark the choice to recommend a probationary license or to not recommend a license. While it is preferable to refer the offender to a specific ACT program, the offender may choose an ACT program. A list of all approved ACT programs is published quarterly by the Addictive and Mental Disorders Division. (See address in Appendix R). A date should be written in the blank following the phrase "Enroll by." It is recommended that the date to enroll be set within ten days of sentencing, unless special circumstances require a longer period of time be given.

The Court Order/Referral Form has an original plus three copies. The Original (white) is retained by the court. The" Offender" (yellow) copy is given to the defendant. The "Driver Control" (pink) copy is mailed to the Driver Control Bureau. (See address in Appendix R). The goldenrod copy is mailed or delivered to the designated ACT program. The **goldenrod copy should not be given to the offender** to deliver to the ACT program.

In summary, Driver Control is to receive the pink copy of the Court Order/Referral Form ; the completed disposition copy (in all cases) of the "notice to appear" and the offender's driver's license (in cases where the offender has a valid Montana driver's license at the time of sentencing). (62)

The court should not accept the $200 reinstatement fee from the offender. The offender should mail the fee directly to Driver Control or Driver Control will contact the offender about the length of the suspension or revocation of the driver's license or privileges and the payment of the $200 reinstatement fee after it receives the completed disposition copy of the *Notice to Appear and Complaint or Abstract of Court Record.* It is important that the court have a current mailing address for the offender on the disposition copy. Driver Control will send the notice of suspension or revocation and the requirement to pay the $200 reinstatement fee to the offender's address listed on the disposition copy.

After conviction of a DUI or Per Se violation, the offender is required to enroll at an ACT program. If the offender cannot afford to pay part or all of the fee, the ACT program may have the offender complete an indigency application. (See Appendix B for a sample Indigency Determination Affidavit). The ACT program and the offender may try to negotiate an agreement on the fee. If they cannot agree, the issue of the amount of

the fee and a payment schedule may be referred to the court for a hearing to determine the fee the offender can afford to pay and a payment schedule. **No person may be refused service by an ACT program because of the inability to pay.** [63]

If the offender fails to enroll by the enrollment date specified in the Court Order/Referral Form, the ACT program needs to notify the referring court, immediately. This can be accomplished in several ways. The ACT program may use the Court Order-Referral Form, a non Compliance form/Affidavit, or other notice (such as a letter) to advise the court of the offender's failure to enroll. The ACT program staff and judges should meet routinely and agree on what forms and procedures will be used in each local area.

The Court Order/Referral Form can be used by marking the appropriate space on Part E of the goldenrod copy. The form may be copied and the copy sent to the referring court. (For sample Noncompliance Affidavit and letter see Appendixes I, J and K.)

If the offender enrolls, but later fails to remain in compliance, in lieu of sending a notice to the court immediately, the ACT program may send a warning letter to the offender advising of the non-compliance and that failure to come into compliance by a date certain will result in a notice of non-compliance to the court. (A sample warning notice is in Appendix L.)

Upon notice from the ACT program that the offender failed to enroll or failed to remain in compliance, the Court may follow several different procedures. They are: (1) civil contempt ,[64] (2) revocation of a suspended sentence if one was imposed, [65] (3) revocation of the recommendation that the offender receive a restricted probationary driver's license. [66] (Judges are encouraged to use the Deskbook and Benchbook for information on forms and procedures for sentencing, contempt and revocation.)

To initiate civil contempt or revocation of a suspended sentence, the court may issue a warrant of arrest, an order to show cause, or a notice of hearing. [67] To initiate the revocation of the recommendation that the offender receive a restricted probationary license procedure, the court may mail a notice of hearing or an order to show cause to the offender. The court must hold a hearing before any action is taken. If the offender denies that he failed to enroll in or attend the ACT program, then the court can hear evidence on that fact question. If the court finds that the offender did fail to enroll in or

attend the ACT program, the court may give the offender another opportunity to comply before imposing any sanctions. Finally, the court may hold the offender in civil contempt, revoke any suspended sentence, and revoke the court's recommendation that the offender receive a restricted probationary driver's license. If the recommendation for a restricted probationary driver's license is revoked, then Driver Control must be notified to reinstate the original suspension. After an initial recommendation by the Judge that the offender receive a probationary license, the judge's recommendation may be revoked and the suspension reinstated if the offender is non compliant with ACT. (68) If Driver Control does reinstate the suspension because of the offender's non-compliance with ACT and the judge later wishes to renew the recommendation because the offender has returned to compliance, the judge must renew the recommendation for a probationary license by notifying Driver Control in writing.

Alternatively, the city or county attorney may file a complaint alleging criminal contempt, section 45-7-309, M.C.A. (69) The standard criminal procedures would be followed in that case.

3. **ACT Assessment and Treatment**

Prior to and during the ACT program, the offender will be assessed/evaluated for alcohol or drug dependency. The assessment may be ordered prior to sentencing or included at sentencing. Upon completion of the assessment/evaluation a written summary of those findings and treatment recommendation if any, should be prepared. The form used is the Evaluation/Recommendation Report Form, (See Appendix M). On the form the counselor will mark whether the assessment findings indicate that the offender is a misuser, an abuser, chemically dependent, unidentified, or multiple offender (treatment mandatory). Both the counselor and offender need to sign the ACT Evaluation Recommendation Report Form, with a copy given to the offender. The original should be placed in the offender's file with the ACT program.

If the offender does not require treatment, the counselor will date and check the Completed Assessment/Course box in Part E – ACT Program Report – of the Court Order/Referral Form. The goldenrod form needs to be signed by the offender and the counselor. The counselor should make two copies of the goldenrod form – one copy for the court and one copy for Driver Control. Please note that the judge is no longer

required to “sign off” on the form. Either the counselor, treatment or aftercare provider must “sign off”. The court should keep a copy of the completed form in the defendants’ court file.

If a determination for treatment is made by the counselor, the offender will be advised that:

1. The offender can disagree with the findings and treatment recommendation.
2. The offender can secure a second opinion at the offender’s own cost from: any certified chemical dependency counselor, any state approved inpatient facility, or outpatient facility. The ACT program will provide a list of counselors and programs in the area.
3. The offender can consult with an attorney.
4. The offender can request a hearing with the court on the treatment recommendation.
5. The offender can complete treatment with any certified chemical dependency counselor of the offender’s choice.

(See Appendix N for a suggested form for this purpose.)

If the offender agrees with the treatment recommendation, then on Part E – ACT Program Report – of the Court/Order Referral Form the counselor will check that the offender agrees and check the treatment recommendation. The counselor will also fill out Part F (1) – Treatment Program Referral – of the Court Order/Referral form. Both the offender and the counselor need to sign the Court Order/Referral Form. The counselor should make three copies of the goldenrod form of the Court Order/Referral Form. The goldenrod form is sent to the treatment provider. One copy is given to the offender, one copy is sent to the referring court for its information, and one copy kept in the ACT program file. (See Appendix O for an ACT Program Treatment Referral Form which can be used to document a treatment referral.) The treatment provider is responsible for notifying the court if the offender fails to enroll, fails to complete, or in the alternative, to notify the court when the offender completes treatment successfully.

If the offender disagrees with the treatment recommendations, then the counselor must check the appropriate boxes on Part E of the Court Order/Referral Form. The offender and the counselor both need to sign the form. The counselor then makes two

copies of the goldenrod form; one for the offender and one copy is for the referring court, along with a copy of the ACT Evaluation/Recommendation Report Form. The ACT program will keep the goldenrod form pending a determination by the court of the treatment issue.

When the court receives notice that the offender disagrees with the treatment recommendation, the judge should schedule a "second opinion hearing". At the hearing, the prosecutor may present evidence from the ACT program concerning findings and rationale for the recommended treatment. The offender will also be allowed to provide evidence in opposition to the ACT findings and recommendations. The testimony and evidence will be weighed and the judge will determine which treatment is appropriate, if any.

🏛 To avoid jurisdictional issues, if the judge determines that the offender requires treatment, a new order for treatment is not entered, rather the original sentencing order for treatment is confirmed.

→ *State, ex rel v. Eschler 767 P.2d 336 (Mt. 1989)*

If the judge determines that treatment is appropriate, then following the hearing, the counselor and the offender will meet to confirm the choice of the treatment provider. The counselor then fills out Part F (1) – Treatment Program Referral – of the Court Order/Referral Form and follows the procedures discussed previously for referral to a treatment provider.

It is recommended to ACT programs and judges that multiple offenders also be afforded the right to disagree with the ACT recommendations for the type of treatment and be heard in the court to argue for an alternative form of treatment to the one recommended by ACT. (See Appendix P for a form for ACT programs to use for multiple offenders.)

Part F (2) – Aftercare Referral – of the Court Order/Referral form is intended to be used in instances where the ACT counselor determines that after completion of inpatient or intensive outpatient treatment, the offender needs follow up aftercare. If aftercare is recommended, then the aftercare provider must notify the court if the offender fails to enroll, fails to complete, or when the offender successfully completes aftercare.

The aftercare provider is responsible for signing Page G of the Court Order/Referral Form when court requirements have been met. Driver Control will not issue probationary licenses or restore licenses for multiple offenders until the completed Court Order/Referral Form is received in the Driver Control offices in Helena.

The sentencing statute for DUI and Per Se convictions require court ordered treatment. ACT programs are encouraged to follow the procedure discussed previously i.e. advise the offender of the offender's rights; review the treatment recommendation with the offender; provide the offender an opportunity to disagree with the recommendation; and refer the case back to the court for hearing if necessary.

4. **Summary of Treatment Recommendations**

a. DUI and Per Se, First Offense

i. **Criminal**

Treatment is **not** mandatory for a first offense DUI. The penalty requires treatment at an appropriate level upon a finding of chemical dependency by a certified chemical dependency counselor. The judge may proceed to a contempt process or revocation of suspended sentence if the court has jurisdiction and if the offender fails to complete treatment.

ii. Civil

Completion of treatment is not required for Driver Control to issue a probationary license or to restore privileges at the end of the six month suspension. Driver Control will restore the offender's license at the end of six months even if the offender fails to complete court ordered treatment.

b. DUI and Per Se, Second (or subsequent)

i. **Criminal**

Treatment is mandatory. If the offender fails to complete treatment, **including monthly monitoring,** the judge may move to contempt or revocation proceedings, if the court still has jurisdiction over the offender.

ii. **Civil**

Completion of treatment is mandatory for Driver Control to issue a probationary license or restore privileges at the end of the one year revocation.

5. **Failure to Comply with Treatment/Aftercare**

If the offender refuses or fails to follow the treatment or aftercare recommendations, then the treatment provider or aftercare provider shall notify the court. This can be accomplished in the same manner as the notice given to the court for failure to enroll or to comply, as discussed previously. If the Court Order/Referral form is used, then the treatment provider or aftercare service will check the appropriate box in Part E and F of the goldenrod form. Two copies are to be made. One copy is to be sent to the offender and one copy is sent to the referring court. The treatment provider or aftercare service will retain the goldenrod copy pending the court's determination of non-compliance.

The court may follow the procedure described under failure to enroll in or failure to attend the ACT program. A hearing must be held before any action is taken. The remedies of contempt, revocation of a suspended sentence and revocation of the court's recommendation for a restricted probationary driver's license may be imposed upon an offender who fails to follow treatment recommendations.

C. Juveniles

In 1987, the Montana Legislature enacted 61-8-723, MCA. This section allows the court to assess fines for juvenile traffic offenders in the same amount as an adult would be charged. (70) This does not allow the imposition of jail time. **A court of limited jurisdiction may not order incarceration for a juvenile except under juvenile detention hearing proceedings and then only in compliance with the statute.** Section 61-8-723, MCA, prohibits a court from incarcerating a youthful offender under any violation of Title 61.

In addition to the adult penalties for fines, ACT and treatment, the court may suspend or revoke the juvenile's driver's license for any length of time. Driver Control will suspend or revoke the juvenile's driver's license the same as an adult without court action and is based upon the DUI and Per Se statutes. (71)

The court may also impound the motor vehicle operated by the juvenile for up to 60 days. The impoundment is done if the juvenile owns the vehicle or is the only person who uses it.

In 1995, MCA 61-8-410 was enacted and amended as follows:

61-8-410. Operation of a vehicle by a person under twenty-one with alcohol concentration of 0.02 or more. (1) it is unlawful for a person under the age of 21 who has an alcohol concentration of 0.02 or more to drive or be in actual physical control of a vehicle upon ways of this state open to the public.
Absolute liability, as provided for in 45-2-104, is imposed for a violation of this section.
(2) Upon a first conviction under this section, a person shall be punished by a fine of not less than $100 or more than $500
(3) Upon a second conviction under this section, a person shall be punished by a fine of not less than $200 or more than $500 and, if the person is 18 years of age or older, by incarceration for not more than 10 days.
(4) Upon a third or subsequent conviction under this section, a person shall be punished by a fine of not less than $300 or more than $500 and, if the person is 18 years of age or older, by incarceration for not less than 24 consecutive hours or more than 60 days.
(5) In addition to the punishment provided in this section, regardless of disposition:

(a) the person shall comply with the alcohol education course and alcohol and drug treatment provisions in 61-8-714; and

(b) the department shall suspend the person's driver's license for 90 days upon the first conviction, 6 months upon the second conviction, and 1 year upon the third or subsequent conviction. A restricted or probationary driver's license may not be issued during the suspension period until the person has paid a license reinstatement fee in accordance with 61-2-107 and, if the person was under the age of 18 at the time of the offense, has completed at least 30 days of the suspension period.

(6) A conviction under this section may not be counted as a prior conviction under 61-8-401 or 61-8-406.

Section 61-8-410, MCA, does not clearly prohibit the use of 61-8-401 or 61-8-406 in cases of youthful offenders. However, the specific statute would usually rule over the general statute. This question may have to be determined by future case law, however, it appears that a person under the age of 21 could be charged under any of the three statutes relating to drinking and driving.

The judge must be very careful when applying the law to juveniles. There are major differences in the penalties listed for a violation of 61-8-410 and the penalties for a violation of either 61-8-401 or 61-8-406. (See Appendix Q for Sentencing Form)

D. **Commercial Motor Vehicle Safety**

Although a person operating with a commercial driver's license would be cited for a violation of DUI or Per Se under Sections 61-8-401 or 61-8-406, there are additional restrictions and penalties provided in Title 61, chapter 8, part 8.

It is important that the above noted sections be consulted anytime law enforcement, prosecutors, or judges have occasion to deal with an offender with a commercial driver's license.

SECTION III – STATUTORY REFERENCES

(ENDNOTE REFERENCE LISTED In the TEXT OF SECTION III)

(1)MCA 46-18-201. Sentences that may be imposed.
(1)(a) Whenever a person has been found guilty of an offense upon a verdict or a plea of guilty or *nolo contendere,* a sentencing judge may defer imposition of sentence, except as otherwise specifically provided by statute, for a period:

not exceeding 1 year for any misdemeanor or for a period not exceeding 3 years for a felony; or

not exceeding 2 years for a misdemeanor or for a period not exceeding 6 years for a felony if a financial obligation is imposed as a condition of sentence for either the misdemeanor or the felony, regardless of whether any other conditions are imposed.

MCA 46-16-130. Pretrial Diversion.
A prosecution for a violation of 61-8-401, 61-8-406, or 61-8-410 may not be deferred.

(2) MCA 46-18-232. Payment of costs by Defendant.

(1) A court may require a convicted defendant in a felony or misdemeanor case to pay costs, as defined in 25-10-201, plus costs of jury service as a part of his sentence. Such costs shall be limited to expenses specifically incurred by the prosecution in connection with the proceedings against the defendant.

(2) The court may not sentence a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take into account the financial resources of the defendant and the nature of the burden that payment of costs will impose.

(3) A defendant who has been sentenced to pay costs and who is not in default in the payment thereof may at any time petition the court that sentenced him for remission of the payment of costs or of any unpaid portion thereof. If it appears to the satisfaction of the court that payment of the amount due will impose manifest hardship on the defendant or his immediate family, the court may remit all or part of the amount due in costs or modify the method of payment.

(3) MCA 46-8-113. Payment for court-appointed counsel by defendant.

(1) The court may require a convicted defendant to pay the costs of court-appointed counsel as part of or a condition under the sentence imposed as provided in Title 46.

(2) Costs must be limited to reasonable compensation and costs incurred by the court-appointed counsel in the criminal proceeding.

(3) The court may not sentence a defendant to pay the costs of court-appointed counsel unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take into account the financial resources of the defendant and the nature of the burden that payment of costs will impose.

(4) A defendant who has been sentenced to pay costs may at any time petition the court that sentenced the defendant for remission of the payment of costs or of any unpaid portion of the costs. If it appears to the satisfaction of the court that payment of the amount due will impose manifest hardship on the defendant or the defendant's immediate family, the court may remit all or part of the amount due in costs or modify the method of payment.

MCA 46-8-114. Time and Method of Payment. When a defendant is sentenced to pay the costs of court-appointed counsel, the court may order payment to be made within a specified period of time or in specified installments. Payments must be made to the clerk of the district court. The clerk of the district court shall distribute the payments to the government agency responsible for the expense of court-appointed counsel as provided for in 46-8-201.

(4) MCA 61-11-203. Definitions. As used in this part, the following definitions apply:

(2) (d) driving while under the influence of intoxicating liquor or narcotics or drugs of any kind or operation of a motor vehicle by a person with alcohol concentration of 0.08 or more, 10 points;. . .

(5) MCA 46-18-236. Imposition of charge upon conviction or forfeiture – administration. (1) Except as provided in subsection (2), there must be imposed by all courts of original jurisdiction on a defendant upon his conviction for any conduct made criminal by state statute or upon forfeiture of bond or bail a charge that is in addition to other taxable court costs, fees, or fines, as follows:

(a) $15.00 for each misdemeanor charge; and
(b) the greater of $20 or 10% of the fine levied for each felony charge; and
(c) an additional $25 for each misdemeanor and felony charge under Title 45, 61-8-401, or 61-8-406.

If a convicting court determines under 46-18-231 and 46-18-232 that the person is not able to pay the fine and costs or that the person is unable to pay within a reasonable time, the court shall waive payment of the charge imposed by this section.

MCA 3-1-317. User surcharge for court information technology – exception. (1) Except as provided in subsection (2), all courts of original jurisdiction shall impose:

(a) on a defendant in criminal cases, a $10 user surcharge upon conviction for any conduct made criminal by state statute or upon forfeiture of bond or bail;. .

(**6) MCA 61-8-714. Penalty for driving under the influence of alcohol or drugs – first through third offense.** (1) A person convicted of a violation of 61-8-401 shall be punished by imprisonment for not less than 24 consecutive hours or more than 6 months and shall be punished by a fine of not less than $300 or more than $1000. The initial 24 hours of the imprisonment term must be served in the county jail and may not be served under home arrest. The mandatory imprisonment sentence may not be suspended unless the judge finds that the imposition of the imprisonment sentence will pose a risk to the defendant's physical or mental well-being. Except for the initial 24 hours of the imprisonment term, the imprisonment sentence may be suspended for a period of up to 1 year pending successful completion of court-ordered chemical dependency assessment, education, or treatment by the defendant.

(2) On a second conviction, the person shall be punished by a fine of not less than $600 or more than $1000 and by imprisonment for not less than 7 days or more than 6 months. At least 48 hours of the imprisonment term must be served consecutively in the county jail and may not be served under home arrest. Five days of the imprisonment sentence may not be suspended unless the judge finds

that the imposition of the imprisonment sentence will pose a risk to the defendant's physical or mental well-being. Except for the initial 5 days of the imprisonment term, the imprisonment sentence may be suspended for a period of up to 1 year pending successful completion of a chemical dependency treatment program by the defendant.
(4)On the third conviction, the person shall be punished by imprisonment for a term of not less than 30 days or more than 1 year and by a fine of not less than $1000 or more than $5000. At least 48 hours of the imprisonment term must be served consecutively in the county jail and may not be served under home arrest. The imposition or execution of the first 10 days of the imprisonment sentence may not be suspended. The remainder of the imprisonment sentence may be suspended for a period of up to 1 year pending successful completion of a chemical dependency treatment program by the defendant.

(7) MCA 61-8-734. Driving under influence of alcohol or drugs – driving with excessive alcohol concentration – conviction defined – place of imprisonment – home arrest – exceptions – deferral of sentence not allowed. (2) Except as provided in 61-8-731, the court may order that a term of imprisonment imposed under 61-8-714 or or 61-8-722 be served in another facility made available by the county and approved by the sentencing court. The defendant, if financially able, shall bear the expense of the imprisonment in the facility. The court may impose restrictions on the defendant's ability to leave the premises of the facility and require that the defendant follow the rules of that facility. The facility may be, but is not required to be, a community-based prerelease center as provided for in 53-1-203. The prerelease center may accept or reject a defendant referred by the sentencing court.

(8) MCA 61-8-734. Driving under the influence of alcohol or drugs – driving with excessive alcohol concentration – conviction defined – place of imprisonment – home arrest – exceptions – deferral of sentence not allowed. (3) Subject to the limitations set forth in 61-8-714 and 61-8-722 concerning minimum periods of imprisonment, the court may order that a term of imprisonment imposed under either section be served by imprisonment under home arrest, as provided in Title 46, Chapter 18, Part 10.

(9) See Endnote (6) for MCA 61-8-714(1) Penalty for driving under the influence of alcohol or drugs – first through third offense.

(10) MCA 61-8-732. Driving under influence of alcohol or drugs – driving with excessive alcohol concentration – assessment, education and treatment required.

(1) In addition to the punishments provided in 61-8-714, 61-8-722, and 61-8-731, regardless of disposition, a defendant convicted of a violation of 61-8-401 or 61-8-406 shall complete:

(a) a chemical dependency assessment;
(b) a chemical dependency education course; and
(c) on a second or subsequent conviction for

violation of 61-8-401 or 61-8-406 or as required by subsections (8) of this section, chemical dependency treatment.

(2) The sentencing judge may, in the judge's discretion, require the defendant to complete the chemical dependency assessment prior to sentencing the defendant. If the assessment is not ordered or completed before sentencing, the judge shall order the chemical dependency assessment as part of the sentence.

(3) The chemical dependency assessment and the chemical dependency education course must be completed at a treatment program approved by the department of public health and human services and must be conducted by a certified chemical dependency counselor. The defendant may attend a treatment program of the defendant's choice as long as a certified chemical dependency counselor provides the treatment services. The defendant shall pay the cost of the assessment, the education course, and the chemical dependency treatment.

(4) The assessment must describe the defendant's level of addiction, if any, and contain a recommendation as to education, treatment, or both. A defendant who disagrees with the initial assessment may, at the defendant's cost, obtain a second assessment provided by a certified chemical dependency counselor or a program approved by the department of public health and human services.

(5)The treatment provided to the defendant at a treatment program must be at a level appropriate to the defendant's alcohol or drug problem, or both, as determined by a certified chemical dependency counselor pursuant to diagnosis and patient placement rules adopted by the Department of Public Health and Human Services. Upon determination, the court shall order the defendant's appropriate level of treatment. If more than one counselor makes a determination as provided in this subsection, the court shall order an appropriate level of treatment based upon the determination of one of the counselors.

(6)Each counselor providing education or treatment shall, at the commencement of the education or treatment, notify the court that the defendant has been enrolled in a chemical dependency education course or treatment program. If the defendant fails to attend the education course or treatment program, the counselor shall notify the court of the failure.

(7) a court or counselor may not require attendance at a self-help program other than at an "open meeting" as that term is defined by the self-help program. A defendant may voluntarily participate in self-help programs.

(8) Chemical dependency treatment must be ordered for a first-time offender convicted of a violation of 61-8-401 or 61-8-406 upon a finding of chemical dependency made by a certified chemical dependency counselor pursuant to diagnosis and patient placement rules adopted by the Department of Public Health and Human Services.

(9) (a) On a second or subsequent conviction, the treatment program provided in subsection (5) must be followed by monthly monitoring for a period of at least 1 year from the date of admission to the program. (b) if a defendant fails to comply with the monitoring program imposed under subsection (9)(a), the court shall revoke the suspended sentence, if any, impose any remaining portion of the suspended sentence, and may include additional monthly monitoring for up to an additional 1 year.

11. Section 20.3.503 Administrative Rules of Montana.

(1) This program is for persons convicted of a DUI, Per Se, or misdemeanor dangerous drug offense and sentenced under 61-8-714, 61-8-722 or Title 45, Chapter 9 or 10, MCA, to complete an alcohol or other dangerous drugs information course provided by a state approved program and which may include alcohol or drug treatment or both in accordance with state approved placement criteria and provided by a certified chemical dependency counselor.

(2) The ACT program is a three part process which includes:
(a) Assessment, which is the evaluation component utilized to identify chemical use patterns of DUI/Per Se offenders and to make appropriate recommendations for education and/or treatment. Misdemeanor dangerous drug offenders may complete the assessment with the ACT program or a state approved treatment program which offers an MDD education program.
(b) Course, which is an educational component based on the curriculum contained and explained in ARM 20.3.509 and further defined in the ACT course curriculum manual. The manual may be obtained from the Department of Transportation, Traffic Safety Bureau, 2701 Prospect Ave., P. O. Box 201001, Helena, Mt. 59620-1001. Misdemeanor dangerous drug offenders must complete a specific drug education course equivalent in hours to ACT curriculum. The course will be based on the ACT curriculum but must contain specific information on misdemeanor drug laws. The MDD course may be combined with or held separately from the DUI Course. If more than eight MDD clients are enrolled at one time on a consistent basis, it is recommended that the courses be offered separately.
(c)Treatment, which is defined in 53-24-103 MCA. Standards for treatment are required by 53-24-208, MCA and ARM 20.3.201 through 20.3.216. The need for treatment services must be documented and verified through assessment and state approved patient placement procedures. Treatment may be provided by the treatment program conducting the ACT program or through a referral to another treatment program.
(i) First DUI/Per Se offenders assessed as chemically dependent, all second and subsequent DUI/Per Se offenders and MDD offenders ordered by the court must complete all three components of the ACT program.

The treatment provided must be at a level appropriate to the offender's alcohol/drug problem, based upon patient placement criteria as defined in ARM 20-3-208.

(3) To complete the ACT program, the offender:

(a) must enroll by the date specified by the sentencing court. If no date is specified, then within 10 days of the ACT program's receipt of the court referral notice;

(b)must start the course process within 30 days of the program's receipt of the court referral notice; and

(c) must complete the program in a minimum of 30 days from the date of enrollment, but no longer than 90 days from the date of enrollment. An exception to the 30-day minimum may be granted by the department based only on justified geographical considerations. The ACT program will notify the sentencing courts in all cases of failure to comply and the sentencing court may notify the Driver Control Bureau.

(12)MCA 61-5-208. Period of suspension or revocation – probationary license – ignition interlock device .

(3) A person whose license or privilege to drive a motor vehicle on the public highways has been suspended or revoked may not have the license, endorsement, or privilege renewed or restored unless the revocation was for a cause that has been removed. After the expiration of the period of the revocation or suspension, the person may apply for a new license or endorsement as provided by law, but the department may not issue a new license or endorsement unless it is satisfied, after investigation of the driving ability of the person and upon a showing by its record or other sufficient evidence, that the person is eligible to be licensed to drive in Montana.

(4) When a person is convicted or forfeits bail or collateral not vacated for the offense of operating or being in actual physical control of a motor vehicle while under the influence of alcohol or any drug or a combination of alcohol or drugs or for the offense of operation of a motor vehicle by a person with alcohol concentration of .08 or more, the department shall, upon receiving a report of conviction or forfeiture of bail or collateral not vacated, suspend the driver's license or driving privilege of the person for a period of 6 months. Upon receiving a report of a conviction or forfeiture of bail or collateral for a second, third, or subsequent offense within 5 years of the first offense, the department shall revoke the license or driving privilege of the person for a period of 1 year and, upon issuance of any restricted probationary license during the period of revocation, restrict the person to driving only a motor vehicle equipped with a functioning ignition interlock device. If the 1-year period passes and the person has not completed a chemical dependency education course, treatment, or both, as ordered by the sentencing court, the license revocation remains in effect until the course, treatment, or both, are completed.

(13) See Reference Note 12 for **MCA 61-5-208(2). Period of suspension or revocation – probationary license – ignition interlock device.**

(14) See Reference Note 12 for **MCA 61-5-208(2). Period of suspension or revocation – probationary license – ignition interlock device.**

(15) MCA 61-8-402. blood or breath test for alcohol, drugs, or both. (6) The following suspension and revocation periods are applicable upon refusal to submit to one or more tests:
(a) Upon a first refusal, a suspension of 6 months with no provision for a restricted probationary license;
(b) Upon a second or subsequent refusal within 5 years of a previous refusal, as determined from the records of the department, a revocation of 1 year with no provision for a restricted probationary license.

(16) MCA 61-11-101. Report of convictions and suspension or revocation of driver's licenses – surrender of licenses.

(2) A court having jurisdiction over offenses committed under a statute of this state or a municipal ordinance regulating the operation of motor vehicles on highways shall forward a record of the conviction or forfeiture to the department within 5 days after a conviction or a forfeiture of bail that is not vacated, except for a conviction or a forfeiture of bail for a standing or parking statute or ordinance, and may recommend the suspension of the driver's license of the convicted person. The court may also recommend that the department issue a restricted probationary license on the condition that the individual comply with the requirement that the person attend and complete a chemical dependency education course, treatment, or both, as ordered by the court under 61-8-732. The department shall issue a restricted probationary license unless the person is not entitled to a Montana driver's license. Upon issuance of a probationary license, the licensee is subject to the restrictions set forth and may not operate a vehicle in violation of the restrictions.

(17) Section 23.3.232 Administrative Rules of Montana

(1) The division may restrict probationary licenses in the following manner:

(a) Licenses restricted to "occupational driving only" means only be used by the licensee to travel to and from the regular place of employment, or in search of employment, by the most direct route from the residence in a period of time no greater than reasonable under existing traffic conditions; and during work hours at the specific direction of the employer for the purposes of carrying out assigned job related functions.

(b) Licenses restricted to "home to school and return" may only be used by the licensee to travel between the residence and the school or educational institution in which the licensee is enrolled. Travel is only authorized immediately before and after regular school hours and must be the most direct

route between the residence and the school in a period of time no greater than is reasonable under existing traffic conditions. Driving to and from extracurricular activities not allowed.

(c) Licenses restricted to "essential driving only" may only be used by the licensee for:

(i) occupational driving as defined in subsection (1)(a) above; and

(ii) home to school driving as defined in subsection(1)(b) above; and;

(iii) travel to and from the regular residence in a period of time no greater than is reasonable under existing traffic conditions for purposes related to maintenance of the household.

(d) Licenses restricted to "daytime hours only" may only be used by the licensee to operate a motor vehicle from one-half hour before sunrise to one-half hour after sunset.

(2) The above list of restricted probationary licenses is not exclusive. The Division may impose additional restrictions on the use of the license with respect to time and purpose of use or improve any other condition or restriction deemed necessary to promote driver improvement or safety.

(3) All restricted probationary licenses issued by the division may be used for travel to and from required alcohol programs.

(4) Licensees holding probationary licenses with the restriction "no recreational driving" are subject to the same driving restrictions as those applicable to licenses restricted to "essential driving only" under subsection (1) (c) above.

18. **Section 23.3.231. Administrative Rules of Montana**.

(1) The Division may issue a person a restricted probationary license in lieu of suspension of driving privilege for 6 months upon conviction or forfeiture of bail or collateral not vacated for the offense of driving or being in control of a motor vehicle while under the influence of alcohol or drugs for the first time in 5 years as detailed in section 61-5-208 MCA if;

(a) The judge and the court in which the conviction or forfeiture occurred recommends probation, and

(b) The licensee continues to comply with the alcohol and treatment program or driver improvement school participation directed by the court.

(2) The Division may issue a restricted probationary license in lieu of suspension or revocation to any person, not covered in subsection (1), whose license or permission to operate a motor vehicle in Montana is subject to suspension or revocation if:

(a) the licensee is eligible for the Driver Rehabilitation Program under ARM 23.3.203 through 23.3.205 and

(b) The licensee enrolls and continues to participate in the Driver Rehabilitation program.

(3) If a probationary licensee fails to continue to comply with the requirements for issuance of his or her probationary license or the restrictions thereon, the Division shall require the return of the person's probationary license and shall reinstate the full term of the originally authorized suspension or revocation.
(4) If a probationary licensee is convicted of or forfeits bail or collateral on any traffic violation during the period of suspension or revocation, the Division shall require the return of the person's probationary license and shall reinstate the full term of the originally authorized suspension or revocation.

MCA 61-2-107. License reinstatement fee to fund county drinking and driving prevention programs. (1) Notwithstanding the provisions of any other law of the state, a driver's license that has been suspended or revoked under 61-05-205 or 61-8-402 must remain suspended or revoked until the driver has paid the department a fee of $200 in addition to any other fines, forfeitures, and penalties assessed as a result of conviction for a violation of the traffic laws of the State.

MCA. 61-5-102. Drivers to be licensed. (1) Except as provided in 61-5-104, a person may not drive a motor vehicle upon a highway in this state unless the person has a valid Montana driver's license. A person may not receive a Montana driver's license until the person surrenders to the department all valid driver's licenses in his possession issued by any other jurisdiction. A person may not have in the person's possession or under the person's control more than one valid Montana driver's license at any time.

(19)MCA 61-8-442. Driving under the influence of alcohol or drugs – driving with excessive alcohol concentration – ignition interlock device discretionary on first offense. (1) In addition to the punishments provided in 61-8-714 and 61-8-722, regardless of disposition, the court may restrict a defendant to driving only a motor vehicle equipped with a functioning ignition interlock device and require the defendant to pay the reasonable costs of leasing, installing, and maintaining the device if:

(a) the court determines that approved ignition interlock devices are reasonably available;

(b) The defendant's blood alcohol concentration at the time of the arrest was 0.16% or greater; and

(c) the defendant has not been previously convicted of a violation of 61-8-401 or 61-8-406.

(2) Any restriction imposed under this section must be included in a report of the conviction made by the court to the department in accordance with 61-11-101 and placed upon the person's driving record maintained by the department in accordance with 61-11-102.

(3) The duration of the restriction imposed under this section must run parallel to the time period for suspension of the driver's license of the defendant in accordance with 61-2-107, 61-5-205, 61-5-208 and must be monitored by the department.

(20) MCA 61-5-208. Period of suspension or revocation – probationary license – ignition interlock device.

(3) (a) If a person pays the reinstatement fee required in 61-2-107 and provides the department proof of compliance with an ignition interlock restriction imposed under 61-8-442, the department shall stay the license suspension of a person who has been convicted of a violation of 61-8-401 and 61-8-406 and return the person's driver's license. The stay must remain in effect until the period of suspension has expired and any required chemical dependency education course, treatment, or both, have been completed.

(b) If the department receives notice from a court, peace officer, or ignition interlock vendor that the person has violated the court-imposed ignition interlock restriction by, including but not limited to, operating a motor vehicle not equipped with the device, tampering with the device, or removing the device before the period of restriction has expired, the department shall lift the stay and reinstate the license suspension for the remainder of the time period. The department may not issue a probationary driver's license to a person whose license suspension has been reinstated because of a violation of an ignition interlock restriction.

(21) MCA 61-8-714. Penalty for driving under the influence of alcohol or drugs – first through third offense.

(2) On a second conviction, the person shall be punished by a fine of not less than $600 or more than $1,000 and by imprisonment for not less than 7 days or more than 6 months. At least 48 hours of the imprisonment term must be served consecutively in the county jail and may not be served under home arrest. The imposition or execution of the first 5 days of the imprisonment sentence may not be suspended. Except for the initial 5 days of the imprisonment term, notwithstanding 46-18-201(2), the imprisonment sentence may be suspended for a period of up to 1 year pending successful completion of a chemical dependency treatment program by the person.

(22)See Reference Note 7 for **MCA 61-8-734(2). Driving under influence of alcohol or drugs – driving with excessive alcohol concentration – conviction defined – place of imprisonment – home arrest – exceptions – deferral of sentence not allowed.**

(23) See reference Note 8 for **MCA 61-8-734(3). Driving under influence of alcohol or drugs – driving with excessive alcohol concentration –conviction defined – place of imprisonment – home arrest – exceptions – deferral of sentence allowed.**

(24) See reference Note 6 for **MCA 61-8-714(1) Penalty for driving under influence of alcohol or drugs – first through third offense.**

(25) See Reference Note 10 for **MCA 61-8-732(1). Driving under influence of alcohol or drugs – driving with alcohol concentration – assessment, education, and treatment required.**

(26) See Reference Note 12 for **MCA 61-5-208(2) Period of suspension or revocation – probationary license – ignition interlock device.**

See reference Note 18 for **MCA 61-2-107. License reinstatement fee to fund county drinking and driving prevention programs.**

(27) MCA 61-2-302. Establishment of driver rehabilitation and improvement program – participation by offending drivers. (1) The department may establish by administrative rules a driver rehabilitation and improvement program or programs that may consist of classroom instruction in rules of the road, driving techniques, defensive driving, driver attitudes and habits, actual on-the-road driver's training, and other subjects and tasks designed to contribute to proper driving attitudes, habits, and techniques.
(2) Official participation in the driver rehabilitation and improvement program is limited to those persons whose license to operate a motor vehicle in the State of Montana is:

(a) subject to suspension or revocation as a result of a violation of the traffic laws of this state, unless the suspension was imposed under the authority provided in title 61, chapter 8, part 8or, a violation of 45-5-624; or
(b) revoked and they have:
(i) completed at least 3 months of a 1-year revocation or, if revocation is for a second or subsequent violation of 61-8-401 or 61-8-406, have provided the department with proof of compliance with the ignition interlock device restriction imposed under 61-5-208; or
(ii) completed 1 year of a 3 year revocation; and
(iii) met the requirements for reobtaining a Montana driver's license.

(3) Notwithstanding any provision of this part inconsistent with any other law of the state of Montana, the enforcement of any suspension or revocation order that constitutes the basis for any person's participation in the driver rehabilitation and improvement program provided for in this section may be stayed if that person complies with the requirements established for the driver-improvement program and meets the eligibility requirements of subsection (2).
(4) In the event a person's driver's license has been surrendered before the person's selection for participation in the driver rehabilitation and improvement program, the license may be returned upon receipt of the person's agreement to participate in the program.
(5) The stay of enforcement of any suspension or revocation order must be terminated and the order of suspension or revocation enforced if a person declines to participate in the driver rehabilitation and improvement program or fails to

meet the attendance or other requirements established for participation in this program.
(6) This part does not create a right to be included in any program established under this part.
(7) The department may establish a schedule of fees that may be charged those persons participating in the driver improvement and rehabilitation program. The fees must be used to help defray costs of maintaining the program.
(8) A person may be referred to this program by a driver improvement analyst, city judge, justice of the peace, youth court judge, judge of a district court of the state, or a hearing examiner of the department.
(9) The department of justice may issue a restricted probationary license to any person who enrolls and participates in the driver rehabilitation and improvement program. Upon issuance of a probationary license under this section, the licensee is subject to the restrictions set forth on the license.
(10) It is a misdemeanor for a person to operate a motor vehicle in any manner in violation of the restrictions imposed on a restricted license issued to the person under this section.

MCA 61-6-131. When proof of financial responsibility required. (1) Whenever the department under any of the laws of this state revokes the license of any person, such license shall remain revoked and shall not at any time thereafter be renewed nor shall any license be thereafter issued to such person until permitted under the motor vehicle laws of this state and not then unless and until he shall give and thereafter maintain proof of financial responsibility.

See Reference Note 12 for **MCA 61-5-208(2). Period of suspension or revocation – probationary license – ignition interlock device .**

See Reference Note 17 for **Section 23.3.232. ARM**

See Reference Note 18 for **MCA 61-2-107(1). License reinstatement fee to fund county drinking and driving prevention programs.**

MCA 61-1-504. Revocation. "Revocation" means that the driver's license and privilege to drive a motor vehicle on the public highways are terminated and may not be renewed or restored. An application for a new license may be presented and acted upon by the department after the expiration of the period of the revocation.

(28) See Reference Note 19 for **MCA 61-8-442. Driving under the influence of alcohol or drugs – driving with excessive alcohol concentration – ignition interlock device discretionary on first offense.**

(29) See Reference Note 20 for **MCA 61-5-208(3). Period of suspension or revocation – probationary license – ignition interlock device.**

(30) MCA 61-8-714. Penalty for driving under the influence of alcohol or drugs – first through third offense.

(31) See reference Note 7 for **MCA 61-8-734(2) Driving under influence of alcohol or drugs – driving with excessive alcohol concentration – conviction defined – place of imprisonment – home arrest – exceptions – deferral of sentence not allowed.**

(32) (32) See Reference Note 8 for **MCA 61-8-734(3). Driving under influence of alcohol or drugs – driving with excessive alcohol concentration – conviction defined – place of imprisonment – home arrest – exceptions – deferral of sentence not allowed.**

(33) MCA 61-8-733. Driving under the influence of alcohol or drugs – driving with excessive alcohol concentration – forfeiture of vehicle.
(1) On the 2nd or subsequent conviction of a violation of 61-8-401 or 61-8-406, the court, in addition to the punishments provided in 61-8-714 and 61-8-722 and any other penalty imposed by law, shall order the motor vehicle owned and operated by the person at the time of the offense to be seized and subjected to the procedure provided under 61-8-421.
(2) A vehicle used by a person as a common carrier in the transaction of business as a common carrier is not subject to forfeiture unless it appears that the owner or other person in charge of the vehicle consented to or was privy to the violation. A vehicle may not be forfeited under this section for any act or omission established by the owner to have been committed or omitted by a person other than the owner while the vehicle was unlawfully in the possession of a person other than the owner in violation of the criminal laws of this state or the United States.
(3) Forfeiture of a vehicle encumbered by a security interest is subject to the secured person's interest if the person did not know and could not have reasonably known of the unlawful possession, use, or other act on which the forfeiture is sought.

MCA 61-8-421. Forfeiture procedures. (1) A motor vehicle forfeited under 61-8-733 must be seized by the arresting agency within 10 days after the conviction and disposed of as provided in Title 44, Chapter 12, part 2. Except as provided in this section, the provisions of Title 44, Chapter 12, part 2, apply to the extent applicable.
(2) Forfeiture proceedings under 44-12-201(1) must be instituted by the arresting agency within 20 days after the seizure of the motor vehicle.
(3) For purposes of 44-12-203 and 44-12-204, there is a rebuttal presumption of forfeiture. The owner of the motor vehicle may rebut the presumption by proving a defense under 61-8-733(2) or by proving the owner was not convicted of a 2nd or subsequent offense under 61-8-401 and 61-8-406. It is not a defense that the convicted person owns the motor vehicle jointly with another person.
(4) (a) For purposes of 44-12-206, the proceeds of the sale of the motor vehicle must be distributed first to the holders of security interest who have presented proper proof of their claims, up to the amount of the interest or the amount received from

the sale, whichever is less, and the remainder to the general fund of the arresting agency.

(b) A holder of a security interest may petition the sentencing court for a transfer of title to the motor vehicle to the holder of the security interest if the secured interest is equal to or greater than the estimated value of the motor vehicle.

(5) Actions the court may take under 44-12-205(3) to protect the rights of innocent persons include return of the motor vehicle without a sale to an owner who is unable to present an adequate defense under this section but is found by the court to be without fault.

(34) See Reference Note 19 for **MCA 61-8-442**. **Driving under the influence of alcohol or drugs – driving with excessive alcohol concentration – ignition interlock device discretionary on first offense.**

(35) See Reference Note 20 for **MCA 61-5-208(3) Period of suspension or revocation – probationary license – ignition interlock device.**

(36) MCA 61-8-722. Penalty for driving with excessive alcohol concentration – first through third offense. (1) A person convicted of a violation of 61-8-406 shall be punished by imprisonment for not more than 10 days and shall be punished by a fine of not less than $300 or more than $1000.

(37) MCA 61-8-734. Driving under influence of alcohol or drugs – driving with excessive alcohol concentration – conviction defined – place of imprisonment – home arrest – exceptions – deferral of sentence not allowed.

(2) Except as provided in 61-8-731, the court may order that a term of imprisonment imposed under 61-8-714 or or 61-8-722 be served in another facility made available by the county and approved by the sentencing court. The defendant, if financially able, shall bear the expense of the imprisonment in the facility. The court may impose restrictions on the defendant's ability to leave the premises of the facility and require that the defendant follow the rules of that facility. The facility may be, but is not required to be, a community-based prerelease center as provided for in 53-1-203. The prerelease center may accept or reject a defendant referred by the sentencing court.

(38) MCA 61-8-734. **Driving under influence of alcohol or drugs – driving with excessive alcohol concentration – conviction defined – place of imprisonment – home arrest – exceptions – deferral of sentence not allowed.**
(3) Subject to the limitations set forth in 61-8-714 and 61-8-722 concerning minimum periods of imprisonment, the court may order that a term of imprisonment imposed under each section by served by imprisonment under home arrest, as provided in Title 46, Chapter 18, part 10.

(**39)** See Reference Note 10 for **MCA 61-8-732**. **Driving under influence of alcohol or drugs – driving with excessive alcohol concentration – assessment, education, and treatment required.**

(40) See Reference Note 12 for **MCA 61-5-208(2) Period of suspension or revocation – ignition interlock device.**

(41) See Reference Note 19 for **MCA 61-8-442. Driving under the influence of alcohol or drugs – driving with excessive alcohol concentration – ignition interlock device discretionary on first offense.**

(42) See Reference Note 20 for **MCA 61-5-208(3) Period of suspension or revocation – probationary license – ignition interlock device.**

(43) MCA 61-8-722. Penalty for driving with excessive alcohol concentration – first through third offense.

(2) On a second conviction of a violation of 61-8-406, the person shall be punished by imprisonment for not less than 5 days, to be served in the county jail and not on home arrest, or more than 30 days and by a fine of not less than $600 nor more than $1000.

(44) See Reference Note 37 for **MCA 61-8-734(2). Driving under influence of alcohol or drugs – driving with excessive alcohol concentration – conviction defined – place of imprisonment – home arrest – exceptions – deferral of sentence not allowed.**

(45) See Reference Note 38 for **MCA 61-8-734(3). Driving under influence of alcohol or drugs – driving with excessive alcohol concentration – conviction defined – place of imprisonment – home arrest – exceptions – deferral of sentence not allowed.**

(46) See Reference Note 12 for **MCA 61-5-208(2). Period of suspension or revocation – probationary license – ignition interlock device required on second or subsequent offense.**

(**47)** See Reference Note 19 for **MCA 61-8-442. Driving under the influence of alcohol or drugs – driving with excessive alcohol concentration – ignition interlock device discretionary on first offense.**

(48) See Reference Note 20 for **MCA 61-5-208(3). Period of suspension or revocation – probationary license – ignition interlock device.**

(49) MCA 61-8-722. Penalty for driving with excessive alcohol concentration – first through third offense. (3) On a third conviction of a violation of 61-8-406, the person shall be punished by imprisonment for not less than 10 days, to be served in the county jail and not on home arrest, or more than 6 months and by a fine of not less than $1000 or more than $5000.

(50) See Reference Note 37 for **MCA 61-8-734(2). Driving under influence of alcohol or drugs – driving with excessive alcohol concentration – conviction defined – place of imprisonment – home arrest – exceptions – deferral of sentence not allowed.**

(**51)** See Reference Note 38 for **MCA 61-8-734(3). Driving under influence of alcohol or drugs – driving with excessive alcohol concentration – conviction defined – place of imprisonment – home arrest – exceptions – deferral of sentence not allowed.**

(52) See Reference Note 33 for **MCA 61-8-733. Driving under the influence of alcohol or drugs – driving with excessive alcohol concentration – forfeiture of vehicle.**

(53) See Reference Note 19 for **MCA 61-8-442. Driving under the influence of alcohol or drugs – driving with excessive alcohol concentration – ignition interlock device.**

(**54)** See Reference Note 20 for **MCA 61-5-208(3). Period of suspension or revocation – probationary license – ignition interlock device.**

(55) MCA 45-2-101. General definitions.
(15) "Conviction" means a judgment of conviction or sentence entered upon a plea of guilty or *nolo contendere* or upon a verdict or finding of guilty of an offense rendered by a legally constituted jury or by a court of competent jurisdiction authorized to try the case without a jury.

(56) MCA 61-8-734. Driving under influence of alcohol or drugs – driving with excessive alcohol concentration – conviction defined – place of imprisonment – home arrest – exceptions – deferral of sentence not allowed.
(1) (a) For the purpose of determining the number of convictions under 61-8-714 or 61-8-722 for a violation of 61-8-401 or 61-8-406, "conviction" means a final conviction, as defined in 45-2-101, in this state; conviction for a violation of a similar statute or regulation in another state, or a federally recognized Indian reservation; or a forfeiture of bail or collateral deposited to secure the defendant's appearance in court in this state, another state, or a federally recognized Indian reservation, which forfeiture has not been vacated.
(b) An offender is considered to have been previously convicted for the purposes of sentencing if less than 5 years have elapsed between the commission of the present offense and a previous conviction, unless the offense is the offender's 4th or subsequent offense, in which case all previous convictions must be used for sentencing purposes.
(c) A previous conviction under 61-8-714 or 61-8-722 for violation of 61-8-401 or 61-8-406 may be counted for purposes of determining the number of a subsequent conviction for violation of either 61-8-401 or 61-8-406.

(57) See Reference Note 55 for **MCA 45-2-101(15)** General Definitions.

(58) See Reference Note 56 for **MCA 61-8-734(1). Driving under influence of alcohol or drugs – driving with excessive alcohol concentration – conviction defined – place of imprisonment – home arrest – exceptions – deferral of sentence not allowed.**

(59) See Reference Note 56 for **MCA 61-8-734(1). Driving under influence of alcohol or drugs – driving with excessive alcohol concentration – conviction defined – place of imprisonment – home arrest – exceptions – deferral of sentence not allowed.**

(60) MCA 61-5-214. Mandatory suspension for failure to appear or pay fine – notice. (1) The department shall suspend the license or driving privileges of a person immediately upon receipt of a certified copy of a docket page or other sufficient evidence from the court that the person:

(a) is charged with or convicted of a violation of chapters 3 through 10 of this title;

(b) (i) failed to post the set bond amount or appear upon issued complaint, summons, or court date; or

(ii) when assessed a fine, costs or restitution of $100 or more, failed to pay the fine, costs, or restitution and;

(c) received prior written notice that the driver's license or driving privileges of the person will be suspended upon a failure to post bond or appear on an issued complaint, summons, or court order or upon a failure to pay assessed fines, costs, or restitution.

(2) The suspension continues in effect until the court notifies the department that the person has paid the reinstatement fee and either appeared in court or paid the assessed fines, costs or restitution.

(3) The notice required under this section may be included on the summons or complaint and notice to appear form given to the person when charges are initially filed or may be contained in a court order, either hand-delivered to the person while in court or sent by first-class mail, postage prepaid, to the most current address for that person received by or on record with the court. The initial notice must be followed by a written warning from the court, sent by first-class mail, advising the person that a license suspension is imminent and of the probable consequences of a suspension unless the person appears or pays within a specified number of days.

(61) See Reference Note 10 for **MCA 61-8-732. Driving under influence of alcohol or drugs – driving with excessive alcohol concentration – assessment, education, and treatment required.**

(62) MCA 61-11-101. Report of convictions and suspensions or revocation of driver's licenses – surrender of licenses.

(1) If a person is convicted of an offense for which chapter 5 makes mandatory the suspension or revocation of the driver's license of the person by the department, the court in which the conviction occurs shall require the surrender to it of all driver's licenses then held by the convicted person. The court shall, within 5 days, forward the license and a

record of the conviction to the department. If the person does not possess a driver's license, the court shall indicate that fact in its report to the department.

See Reference Note 16 for **MCA 61-11-101(2) Report of convictions and suspensions or revocation of driver's licenses – surrender of licenses**.

(63) MCA 53-24-108. Use of funds generated by taxation on alcoholic beverages.

(4) A person receiving funding under this section to support operation of a state-approved alcoholism program may not refuse alcoholism treatment, rehabilitation, or prevention services to a person solely because of that person's inability to pay for those services.

(64) MCA 3-10-401. Contempts a justice may punish for. A justice may punish for contempt persons guilty of the following acts and no other: . . . (1)
(3) disobedience or resistance to the execution of a lawful order or process made or issued by the judge**.**

(65) MCA 46-18-203. Revocation of suspended or deferred sentence.
(1) Upon the filing of a petition for revocation showing probable cause that the offender has violated any condition of a sentence or any condition of a deferred imposition of sentence, the judge may issue an order for a hearing on the revocation. The order must require the offender to appear at a specified time and place for the hearing and be served by delivering a copy of the petition and order to the offender personally. The judge may also issue a Warrant directing any peace officer or a probation officer to arrest the defendant and bring the defendant before the court.
(2) The petition for revocation must be filed with the sentencing court during the period of suspension or deferral. Expiration of the period of suspension or deferral after the petition is filed does not deprive the court of its jurisdiction to rule on the petition.
(3) The provisions pertaining to bail, as set forth in Title 46, chapter 9, are applicable to persons arrested pursuant to this section.
(4) Without unnecessary delay, the offender must be brought before the court, and the offender must be advised of:

(a) the allegations of the petition;
(b) the opportunity to appear and to present evidence in the offender's own behalf;
(c) the opportunity to question adverse witnesses; and
(d) the right to be represented by counsel at the revocation hearing pursuant to title 46, Chapter 8, part 1.

(5) A hearing is required before a suspended or deferred sentence can be revoked or the terms or conditions of the sentence can be modified, unless;

(a) the defendant admits the allegations and waives the right to a hearing, or;
(b) the relief to be granted is favorable to the offender, and the prosecutor, after having been given notice of the proposed relief and a reasonable opportunity to object, has not objected. An extension of the term of probation is not favorable to the defendant for the purposes of this subsection(b).

(6) At the hearing, the prosecution shall prove, by a preponderance of the evidence, that there has been a violation of the terms and conditions of the suspended or deferred

sentence. However, when a failure to pay restitution is the basis for the petition, the offender may excuse the violation by showing sufficient evidence that the failure to pay restitution was not attributable to a failure on the offender's part to make a good faith effort to obtain sufficient means to make the restitution payments as ordered.
(7) (a) If the judge finds that the offender has violated the terms and conditions of the suspended or deferred sentence, the judge may:

(i) continue the suspended or deferred sentence without a change in conditions;
(ii) continue the suspended sentence with modified or additional terms and conditions;
(iii) revoke the suspension of sentence and require the offender to serve either the sentence imposed or any lesser sentence; or
(iv) if the sentence was deferred, impose any sentence that might have been originally imposed.

(b) If a suspended or deferred sentence is revoked, the judge shall consider any elapsed time and either expressly allow all or a part of the time as credit against the sentence or reject all or part of the time as credit. The judge shall state the reasons for the judge's determination in the order. Credit, however, must be allowed for time served in a detention center or home arrest time already served.
(8) If the court finds that the prosecution has not proved, by a preponderance of the evidence, that there has been a violation of the terms and conditions of the suspended or deferred sentence, the petition must be dismissed and the offender, if in custody, immediately released.

(66) See Reference Note 18 for **Section 23.3.231(3)** Administrative Rules of Montana.

(67) See Reference Note 65 for **Section 46-18-203(1) Revocation of suspended or deferred sentence.**

(68) See Reference Note 18 for **Section 23.3.231(3).** Administrative Rules of Montana.

(69) MCA 45-7-309. Criminal Contempt. (1) A person commits the offense of criminal contempt when he knowingly engages in any of the following conduct;

(c) purposely disobeying or refusing any lawful process or other mandate of the court, . . .

(2) A person convicted of the offense of criminal contempt shall be fined not to exceed $500 or be imprisoned in the county jail for a term not to exceed 6 months, or both.

(70) MCA 61-8-723. Offenses committed by persons under the age of eighteen. A person under 18 years of age who is convicted of an offense under this title shall not be punished by incarceration, but shall be punished by:

(1) a fine not to exceed the fine that could be imposed on him if he were an adult, provided that such person may not be imprisoned for failure to pay such fine;
(2) revocation of his driver's license by the court or suspension of the license for a period set by the court;

(3) impoundment by a law enforcement officer designated by the court of the motor vehicle operated by the person for a period of time not exceeding 60 days if the court finds that he either owns the vehicle or is the only person who uses the vehicle; or
(4) any combination of subsections (1) through (3)

(71) MCA 61-5-217. Suspending privileges of persons under age of eighteen. The privilege of driving a motor vehicle on the highways of this state given to a person under the age of 18 is subject to suspension or revocation by the department in like manner and for like causes as an adult.

MINORS IN POSSESION OF ALCOHOL

The MIP laws of the state of Montana are not adjudicated the same across the state. The legislature has not given a clear cut definition of " Possession", although it has been requested many times. A clear definition would clear up misconceptions for judges as well as law enforcement personnel. It is up to the prosecutor to decide which cases he will prosecute and what proof he requires to take his case forward.

45-5-624. Unlawful attempt to purchase or possession on intoxicating substance- interference with sentence or court order. (1) A person under 21 years of age commits the offense of possession of an intoxicating substance if the person **knowingly** (my emphasis) consumes or has in the person's possession an intoxicating substance. A person does not commit the offense if the person consumes or gains possession of the beverage because it was lawfully supplied to the person under 16-6-305 or when in the course of employment it is necessary to possess alcoholic beverages.

In a Nutshell the only time a person under 21 can lawfully possess alcohol is if when in the course of their employment they possess it (example an 18 year old driving a beer delivery truck) or if the their parent or legal guardian gives it to them (16-6-305). Section 16-6-305 presents other problems. If mom or dad allows junior to drink alcohol at home and junior decided to drive up town and gets a case of the blue flu (cops) junior's defense that he was lawfully supplied the alcohol under 16-6-305 will not fly.

Assuming the person under 21 is not insulated from prosecution by 16-6-305, or in the course of their employment, technically there are three types of possession:

1. If a person under 21 has a container of alcohol in their hand, this amounts to physical possession.
2. If a person under 21 has consumed alcohol and has it in their body and it can be detected, this amounts to possession by consumption, the purest form of possession.
3. If a person is in the same room where there is alcohol present and they know the alcohol is present, then this is possession by association. This is the weakest of the three types.

The reasoning behind #3 is that persons under the age of 21 are legally forbidden to consume alcohol by statute. If its there, you are there, and you know its there and you aren't heading for the door the minute you know it's there, you are BUSTED. The courts and cops are constantly bombarded with the argument that one of the individuals at the party was the designated driver. This is a valid argument but legally won't hold up because again unless insulated by law, persons under the age of 21 cannot legally possess or consume alcohol. There is also a nation-wide campaign " be a designated driver and don't let your friends drive drunk", which is a good campaign, but it needs a disclaimer that it doesn't apply to anyone under the age of 21 in Montana.

Lets be realistic, I as a parent, judge, taxpayer, and just plain old citizen of Montana would rather have a sober designated driver, driving home a bunch of drunk kids that have made a bad decision to party, than get a 3:00 a.m. visit from the police or coroner. No one wants to go there.

Where is the justice for an under aged designated driver, if for some reason the police have reasonable cause to pull over the vehicle and encounter a car load of drunk kids with alcohol. The officers don't want to argue with everyone on the spot so they write them all up and send them to the judge. In the course of due process you find out that the driver wasn't drinking but knew the alcohol was in the vehicle. What are you going to do? You be the judge, because you are.

PENALTIES:

UNDER 18:

1st Offense:

(1) Maximum Fine: $360.00 Minimum Fine: $160.00

(2) Shall be ordered to perform 20 hours of community service.

(3) Shall be ordered and the persons parent or parents or guardian shall be ordered to complete and pay all costs of participation in a community based substance abuse information course that meets the requirements of subsection (9) if one is available; and

(4) Must have their drivers license confiscated by the court for a period of 30 days. (Local Confiscation)

2nd Offense:

(1) Maximum Fine $660.00 Minimum Fine $ 260.00
(2) Shall be ordered to do 40 hours of community service;
(3) Counseling the same as #3 above
(4) Must have the drivers license confiscated by the court for 6 months, except as provided in (2) (b).
(5) Shall be required to complete a chemical dependency assessment and treatment if recommended, as provided in subsection 8.

3rd Offense:

(1) Maximum Fine $960.00 Minimum Fine $360.00
(2) Shall be ordered to do 60 hours of community service.
(3) Counseling as required in #3 above
(4) Shall have drivers license confiscated by the court for 6 months, except as provided in subsection(2) (b).
(5) Shall be required to complete a chemical dependency assessment and treatment, if recommended as provided in subsection(8).

Subsection (2) (b) If the convicted person fails to complete the community based substance abuse course and has a drivers license, the court shall order the license suspended for 3 months for a first offense, 9 months for a second offense, and 12 months for a third or subsequent offense.
(c) The court shall retain jurisdiction for up to 1 year to order suspension of a license under subsection (2) (b).
(3) A person 18 years of age or older who is convicted of the offense of possession of an intoxicating substance:

(a) for a first offense, shall be fined an amount not to exceed $200, and may be ordered to perform community service.
(b) For a second offense, shall be fined an amount not to exceed $200 and may be ordered to perform community service.
(c) For a third or subsequent offense, shall be fined an amount not to exceed $500 and;
(i) may be ordered to perform community service;
(ii) shall be ordered to complete an alcohol information course at an alcohol treatment program that meets the requirements of subsection (9), which may, in the sentencing court's discretion and upon recommendation of a licensed addiction counselor, include alcohol or drug treatment, or both; and
(iii) in the discretion of the court, shall be imprisoned in the county jail for a term not to exceed 6 months.

(4) A person under 21 years of age commits the offense of attempt to purchase an intoxicating substance if the person knowingly attempts to purchase an alcoholic beverage. A person convicted of attempt to purchase an intoxicating substance shall be

fined an amount not to exceed $150 if the person was under 21 years of age at the time that the offense was committed and may be ordered to perform community service.
(5) A defendant who fails to comply with a sentence and is under 21 years of age and was under 18 years of age when the defendant failed to comply must be transferred to the youth court. If proceedings for failure to comply with a sentence are held in the youth court, the offender must be treated as an alleged youth in need of intervention as defined in 41-5-103. The youth court may enter its judgment under 41-5-1512.
(6) A person commits the offense of interference with a sentence or court order if the person purposely or knowingly causes a child or ward to comply with a sentence imposed under this section or a youth court disposition order for a youth found to have violated this section and upon conviction shall be fined $100 or imprisoned in the county jail for 10 days, or both;
(7) A conviction or youth court adjudication under this section must be reported by the court to the Department of Public Health and Human Services if treatment is ordered under subsection (8).
(8) (a) A person convicted of a second or subsequent offense of possession of an intoxicating substance shall be ordered to complete a chemical dependency assessment.
(b) The assessment must be completed at a treatment program that meets the requirements of subsection (9) and must be conducted by a licensed addiction counselor. The person may attend a program of the person's choice as long as a licensed addiction counselor provides the service. If able, the person shall pay the cost of the assessment and any resulting treatment.
(c) The assessment must describe the person's level of abuse or dependency, if any, and contain a recommendation as to the appropriate level of treatment if treatment is indicated. A person who disagrees with the initial assessment may, at the person's expense, obtain a second assessment provided by a licensed addiction counselor or program that meets the requirements of subsection (9).
(d) The treatment provided must be at a level appropriate to the person's alcohol or drug problem, or both, if any, as determined by a licensed addiction counselor pursuant to diagnosis and patient placement rules adopted by the Dept. of Public Health and Human Services. Upon determination, the court shall order the appropriate level of treatment, if any. If more than one counselor makes a determination, the court shall order an appropriate level of treatment based upon the determination of one of the counselors.
(e) Each counselor providing treatment shall, at the commencement of the course of treatment, notify the court that the person has been enrolled in a chemical dependency treatment program. If the person fails to attend the treatment program, the counselor shall notify the court of the failure.
(f) The court shall report to the Dept. of Health and Human Services the name of any person who is convicted under this section. The Dept. of Public Health and Human Services shall maintain a list of those persons who have been convicted under this section. This list must be made available upon request to peace officers and to any court.
(9) (a) A community-based substance abuse information course required under subsection (2)(a)(i)B, (2)(a)(ii)(B) or (2)(a)(iii) must be:
(i) approved by the Dept. of Health and Human services under 53-24-208 or by a court or provided under a contract with the department of corrections; or

(ii) provided by a hospital licensed under Title 50, chapter 5, part 2, that provides chemical dependency services and that it is accredited by the joint commission on accreditation of healthcare organizations to provide chemical dependency services.
(b) An Alcohol information course required under subsection (3)(c)(ii) must be provided at an alcohol treatment program:
(i) approved by the Dept. of Health and Human services under 53-24-208 or by a court or provided under a contract with the department of corrections; or
(ii) provided by a hospital licensed under Title 50, chapter 5, part 2, that provides chemical dependency services and that it is accredited by the joint commission on accreditation of healthcare organizations to provide chemical dependency services.
(c) A chemical dependency assessment required under subsection (8) must be completed at a treatment program:
(i) approved by the Dept. of Health and Human services under 53-24-208 or by a court or provided under a contract with the department of corrections; or
(ii) provided by a hospital licensed under Title 50, chapter 5, part 2, that provides chemical dependency services and that it is accredited by the joint commission on accreditation of healthcare organizations to provide chemical dependency services.

APPENDICES

JUNE 2000

APPENDIX A - WAIVER OF COUNSEL

IN THE _____ COURT OF _____ CITY/COUNTY, STATE OF MONTANA

BEFORE _____ JUSTICE OF THE PEACE/CITY JUDGE

* * * * * * *

STATE OF MONTANA)
Plaintiff)
vs) **WAIVER OF COUNSEL**
)
_____,) Case No. _____
Defendant)

* * * * * * *

A complaint has been filed in this Court; the Defendant appeared in open court for arraignment; and Defendant has been advised of the following rights:

The right to post bail.

The right to remain silent and, if I speak what I say could be used against me.

The right to have an attorney and consult with an attorney before entering a plea. If I cannot afford to hire one, an attorney may be appointed by the court. I understand that IF convicted, I may have to repay the costs of the attorney.

The right to a jury trial or a trial by the judge.

The right to confront and question witnesses called in to testify against me and the right to call witnesses to testify for me.

The right to have the pending charge proven beyond a reasonable doubt against me.

I have been informed of the charges that are pending, and have been fully advised of the penalties that may result in a plea or finding of guilty. I also understand that a conviction may result in the imposition of jail time. Having been advised of all the above facts and rights, and **I voluntarily and with knowledge waive my right to be represented by an attorney**.

Dated this _____ day of _____, 20 _____.

_____
Defendant

and sworn to before:

_____
JUDGE

_____
Notary Public of the State of Montana
Residing at _____
My commission expires _____

APPENDIX B - INDIGENCY DETERMINATION AFFIDAVIT

IN THE _____ COURT OF _____ CITY/COUNTY, STATE OF MONTANA
BEFORE _____ JUSTICE OF THE PEACE/CITY JUDGE

_____) APPLICATION FOR COURT
Applicant) APPOINTED COUNSEL and
) FINANCIAL DATA FOR
_____) SENTENCING
Address)
) CASE # _____
_____)
Phone Number)

Offense(s) charged: _____ Age: _____
Defendant is _____ is not _____ in custody. DOB: _____

****

No. of Dependents _____ Date last employed _____

I am / my family is currently receiving:

Salary	$_____	AFDC	$_____	Unemployment	$_____
SSI	$_____	Workers Comp	$_____	Medicaid	$_____
Pension	$_____	Food Stamps	$_____	Child Support	$_____
Retirement	$_____	Other Income	$_____	Spouse's Inc.	$_____
				Total Income:	$_____

Assets:		**Monthly Debts:**	
Cash on hand or in bank	_____	Rent / Mortgage payment	_____
Wages owed to you	_____	Utilities	_____
Money owed to you	_____	Telephone	_____
Interest in real estate	_____	Groceries	_____
Motor Vehicles	_____	Gas for vehicles	_____
Guns, boats and other sporting equipment	_____	Cable or satellite	_____
		Drs., Hospitals	_____
Stereo or TV	_____	Courts	_____
Furniture/appliances	_____	Attorneys	_____
Other personal property	_____	Credit cards	_____
Savings Accts	_____	Other monthly debts	_____
Stocks/bonds/securities	_____		

I do solemnly swear that the statements in this affidavit are true, and that I have fully disclosed my assets.

SWORN TO this _____ day of _____, 20 _____.

_____
Signature of Applicant

_____
ACT Provider

_____
Notary Public for the State of Montana
Residing at _____
My Commission expires _____

APPENDIX C - SENTENCE FIRST OFFENSE

IN THE _____ COURT OF _____ CITY/COUNTY, STATE OF MONTANA
BEFORE _____ JUSTICE OF THE PEACE/CITY JUDGE

* * * * *

STATE OF MONTANA)
Plaintiff)
vs) SENTENCE/ORDER
)
_____,) Case No. _____
Defendant)

* * * * *

The Defendant having been found guilty of DUI / PER SE, **first offense** in violation of Section _____ _____ M.C.A.;

IT IS HEREBY ORDERED that the Defendant be sentenced as follows:

That Defendant be fined $_____ plus a surcharge of $ 30.00 and for a total of $ _____; **and in addition,**

That Defendant be sentenced to _____ days in jail._____ days of jail term is suspended for _____ on the following conditions:

_____ 1. Complete jail / jail alternatives
_____ 2. Pay fine and surcharge.
_____ 3. Pay restitution of $_____.
_____ 4. Pay attorney fees of $_____.
_____ 5. Pay jury costs of $_____.
_____ 6. Pay costs of home arrest at $ _____ per day.
_____ 7. Pay for costs of in jail service at $_____ per day.
_____ 8. Install ignition interlock device and pay for same.
_____ 9. Attend and complete: the ACT program and the Defendant is ordered to enroll within _____ _ days and shall pay for the cost of the ACT program if financially able. Defendant shall complete treatment if a finding of chemical dependency is found. The Court retains jurisdiction to impose treatment conditions at a hearing, on a finding of chemical dependency by a certified counselor. ACT will be completed at:

Name_____
Address_____
City _____
Phone number _____

_____ 10. No consumption of alcohol/drugs nor frequenting bars/taverns.
_____ 11. No convictions for violation of Montana laws/City codes.
_____ 12. Keep address and phone number current with the Court.
_____ 13. Defendant's drivers license and/or privileges shall be suspended or revoked as determined by the State Driver Control. The Court does / does not recommend that the Defendant receive a probationary license if the Defendant is otherwise eligible.

_____ Defendant surrendered license to the Court.
_____ Defendant license seized for failure to take AC.
_____ Defendant has no driver's license.
_____ Defendant license is previously suspended / revoked.
_____ Other _____.

Defendant warned of possible loss of driver's license, under 61-5-214 MCA., and Contempt of Court pursuant to 3-10-401 MCA.

_____ _____
Date Defendant
cc:

APPENDIX D - SENTENCE SECOND/SUBSEQUENT OFFENSE

IN THE _____ COURT OF _____ CITY/COUNTY, STATE OF MONTANA
BEFORE _____ JUSTICE OF THE PEACE/CITY JUDGE

* * * * *

STATE OF MONTANA)
Plaintiff)
vs) SENTENCE/ORDER
)
_____,) Case No. _____
Defendant)

* * * * *

The Defendant having been found guilty of DUI / PER SE, **second or subsequent offense** in violation of Section _____ _____ M.C.A.;

IT IS HEREBY ORDERED that the Defendant be sentenced as follows:
That Defendant be fined $_____ plus a surcharge of $ 30.00 and for a total of $ _____ _____; **and in addition**
That Defendant be sentenced to _____ days in jail._____ days of jail term is suspended for _____ on the following conditions:

_____ 1. Complete jail / jail alternatives
_____ 2. Pay fine and surcharge.
_____ 3. Pay restitution of $_____.
_____ 4. Pay attorney fees of $_____.
_____ 5. Pay jury costs of $_____.
_____ 6. Pay costs of home arrest at $ _____ per day.
_____ 7. Pay for costs of in jail service at $_____ per day.
_____ 8. Install ignition interlock device and pay for same.
_____ 9. Attend and complete: the ACT program and the Defendant is ordered to enroll within _____ days and shall pay for the cost of the ACT program if financially able. Defendant shall complete treatment if a finding of chemical dependency is found. The Court retains jurisdiction to impose treatment conditions at a hearing, on a finding of chemical dependency by a certified counselor. ACT will be completed at:

Name_____
Address_____
City _____
Phone number _____

_____ 10. No consumption of alcohol/drugs nor frequenting bars/taverns.
_____ 11. No convictions for violation of Montana laws/City codes.
_____ 12. Keep address and phone number current with the Court.
_____ 13. Defendant's drivers license and/or privileges shall be suspended or revoked as determined by the State Driver Control. The Court does / does not recommend that the Defendant receive a probationary license if the Defendant is otherwise eligible.

_____ Defendant surrendered license to the Court.
_____ Defendant license seized for failure to take AC.
_____ Defendant has no driver's license.
_____ Defendant license is previously suspended / revoked.
_____ Other _____.

Defendant warned of possible loss of driver's license, under 61-5-214 MCA., and Contempt of Court pursuant to 3-10-401 MCA.

_____ _____
Date Defendant

cc:

APPENDIX F - DRIVER LICENSE SUSPENSION FORM

IN THE _____ COURT OF _____ CITY/COUNTY, STATE OF MONTANA

BEFORE _____ JUSTICE OF THE PEACE/CITY JUDGE

* * * * *

You are hereby advised that Montana law states

61-5-214. Mandatory suspension for failure to appear or pay fine - notice. (1) The department shall suspend the license or driving privilege of a person immediately upon receipt of a certified copy of a docket page or other sufficient evidence from the court that the person:

(a) is charged with or convicted of a violation of chapters 3 through 10 of this title;

(b) (i) failed to post the set bond amount or appear upon issued complaint, summons, or court order; or

(ii) when assessed a fine, costs, or restitution of $100 or more, failed to pay the fine, costs, or restitution; and

(c) received prior written notice that the driver's license or driving privileges of the person will be suspended upon a failure to post bond or appear on an issued complaint, summons, or court order or upon a failure to pay assessed fines, costs, or restitution.

(2) The suspension continues in effect until the court notifies the department that the person has paid the reinstatement fee and either appeared in court or paid the assessed fines, costs, or restitution.

(3) The notice required under this section may be included on the summons or complaint and notice to appear form given to the person when charges are initially filed or may be contained in a court order, either hand-delivered to the person while in court or sent by first-class mail, postage prepaid, to the most current address for that person received by or on record with the court. The initial notice must be followed by a written warning from the court, sent by first-class mail, advising the person that a license suspension is imminent and of the probable consequences of a suspension unless the person appears or pays within a specified number of days.

61-5-215. Provisional Licenses prohibited - reinstatement fee. (1) No provisional, restricted, or probationary license may be issued upon a suspension under 61-5-214.

2) A person whose license is suspended under 61-5-214 shall pay a reinstatement fee of $25 to the court for deposit in the state general fund.

My signature below indicates:

1) I have been advised and have read the above laws.

2) I understand that if I fail to pay the fine, costs, or restitution as ordered by the court, that my driver's license will be suspended.

Dated this _____ day of _____, 20 _____.

_____ _____DEFENDANT

JUDGE

APPENDIX G -

COURT ORDER REFERRAL FORM

A

Referring Judge:_____ Court:_____ City/County:_____
Defendant Name:_____
Address:_____ Phone:_____
City & State:_____ Docket #_____
Date of Birth:_____ Driver's License # & State:_____
Convicted of: ☐ DUI: 1st Offense ☐ AC: 1st Offense ☐ .02: 1st Offense
☐ DUI: 2nd or 3rd Offense ☐ AC: 2nd or 3rd Offense ☐ .02: 2nd Offense
☐ DUI: 4th or Subsequent *(Felony)* ☐ AC: 4th or Subsequent *(Felony)* ☐ .02: 3rd or Subsequent Offense
☐ Court Ordered Interlock *(If Applicable)*
☐ MIP (3rd or Subsequent Offense) ☐ Drug Misdemeanor ☐ Other:_____
(Please State Reason)
Date of Conviction:_____ AC Level:_____
Number of Prior DUI/AC Convictions in the Past Five Years:_____ Number of Known Lifetime Prior DUI/AC Convictions:_____

B

PRE-ASSESSMENT PRIOR TO SENTENCING (Optional)

Program name if recommend pre-assessent_____
Judge's Signature:_____ Date:_____

C

FIRST OFFENSE ONLY

☐ I do recommend the Department of Justice issue a restricted probationary license.
☐ I do ***not*** recommend the Department of Justice issue a restricted probationary license.

Judge's Signature:_____ Date:_____

D

ORDER *(Please check all appropriate boxes)*

1. ☐ Defendant has already received a pre-sentence evaluation.
2. ☐ Defendant is sentenced to enroll, attend, and complete ACT (assessment, course, and treatment). Treatment is based upon the requirements of MCA 61-8-714/61-8-732.
3. ☐ Defendant is evaluated by a certified chemical dependency counselor (1st offense). If found chemically dependent, defendant must complete treatment.
4. ☐ Treatment is mandatory for the 2nd or subsequent offense.
5. ☐ Defendant is not referred back to this Court unless there is failure to enroll, attend, and complete ACT: or comply with treatment and/or aftercare recommendations of the ACT counselor; or disagrees with the recommendations of the counselor.

ACT Program Name:_____
Address:_____ Enroll by date:_____
Judge's Signature:_____ Date:_____

E

ACT PROGRAM REPORT

☐ Found not chemically dependent *(1st offense only)*
☐ Failed to Enroll
☐ Failed to Complete Assessment/Course (Date)_____
☐ Completed Assessment/Course (Date)_____
☐ ACT Evaluation/recommendation report attached

Treatment Recommendation:
☐ Outpatient/Continuing Care
☐ Intensive Outpatient/Continuing Care
☐ Inpatient/Continuing Care
Defendant: ☐ Agrees ☐ Disagrees ☐ Referred to Judge

_____ _____ _____ _____
Defendant's Signature *Date* *Certified Chemical Dependency Counselor* *Date*

F

TREATMENT PROGRAM REFERRAL

1. Initial Treatment Program Referral - Level of Care:_____
Program Name:_____
Address:_____
City/State/Zip:_____
☐ Did not enroll ☐ Did not complete Reason:_____
Date Entered:_____ Date Completed:_____
Referred to Continuing Care, Level_____, on this date:_____

Treatment Provider's Signature:_____ Date:_____

2. Final Continuing Care Treatment Program Referral - Level of Care:_____
Program Name:_____
Address:_____
City/State/Zip:_____
☐ Did not enroll ☐ Did not complete Reason:_____
Date Entered:_____ Date Completed:_____
Referred to Further One Year Monitoring at Program:_____
Address:_____
City/State/Zip:_____
Months/Days of Monitoring Left to Complete_____

Treatment Provider's Signature:_____ Date:_____

G

CHEMICAL DEPENDENCY COUNSELOR'S SIGNATURE

The counselor's signature indicates that all requirements have been completed in accordance with Montana law and that the defendant is in compliance with the recommendations of the ACT program and order of the court.

Certified Chemical Dependency Counselor's Signature:_____ Date:_____

Distribution: Original — Court Copy; Yellow — Defendant; Pink — Driver Improvement; Goldenrod — ACT Progra

APPENDIX H - COURT ORDER/REFERRAL FORM INSTRUCTIONS

Part A: (Completed by the judge)

1. **Judges fill in this entire section and must mark** the appropriate box for the type of conviction on referral.
2. Please note there are new blocks on minors in possession, court order interlock and other.
3. Three new blocks request information about the number of .02's committed by an under age drinker and driver.
4. If known, list the number of DUI/AC and .02 convictions in the past five years.
5. For enhancement purposes, the judge should fill in the number of known lifetime prior DUI/AC convictions.

Part B: (Completed by the judge)

The judge will complete this section, if the defendant will be required to complete an assessment prior to sentencing.

Part C: (Completed by the judge)

For a **first offense only**, the judge decides whether to grant a probationary license to the defendant. The judge then signs and dates this section and sends the pink copy to drivers control.

Part D: (Completed by the judge) PLEASE CHECK ALL APPROPRIATE BOXES!

The judge checks block 1 when appropriate. Block 2 will be checked if the court is ordering the defendant to enroll, attend and complete ACT. The judge must also check either blocks 3, 4, or 5 on treatment depending upon whether it is the defendant's first or subsequent offense. Upon completion of part D, the judge signs the form, retains the original for court records and gives the yellow copy to the defendant. The court then mails the goldenrod copy to the designated ACT program. **Be sure to fill in the "enroll by date".**

Part E: (Completed by the ACT program)

After receiving the referral form, the ACT program will complete the required information in this section. The block *Found not chemically dependent* pertains only to first offenders. This occurs when a certified chemical dependency counselor determines the defendant does not need treatment. In cases of noncompliance (failure to enroll or failure to complete) the ACT program will check the appropriate boxes and mail a signed copy of the form back to the judge for action. If the court determines there is noncompliance, the court contacts the appropriate parties including drivers improvement.

The ACT program, if required, will check the appropriate treatment recommendations after completion of the ACT assessment and course. Both the counselor and defendant then sign and date this section. The ACT program retains the assessment/evaluation but sends the information to the appropriate treatment program in part E.

If treatment is not required, the ACT counselor and defendant will sign their name and date part E. The counselor will also sign and date part G and make two copies of their goldenrod copy. He or she will sign each of these and send one copy to the court and the other to drivers improvement.

Part F: (Completed by the chemical dependency counselor or aftercare provider)

The treatment program completes this section, which is divided into two parts. Part one covers the initial treatment program and the level of care recommended for the defendant. If the client does not complete treatment, the treatment program marks the appropriate block(s) and gives the reason(s) for noncompliance. A copy is then immediately forwarded to the judge for action. If the judge determines there is noncompliance, the court will notify the appropriate parties including driver improvement. The provider keeps a photocopy.

Part 2 of F covers monitoring and aftercare. The treatment program **must enroll 2nd or subsequent DUI/AC offenders in a one year monitoring program**. Monitoring starts from the date of admission to the treatment program. The ACT program will use a separate form for tracking the monitoring of a defendant. The treatment program then forwards a photocopy of the form to the aftercare provider. If the client does not enroll in and complete the aftercare program, the program annotates the appropriate space and makes a photocopy for its records and mails a copy to the judge. Again, if the judge determines there is noncompliance, the court will notify the appropriate people and organizations including drivers improvement. If all requirements are met, the aftercare provider signs and dates this section. The aftercare provider also signs part G showing all requirements have been met by the defendant

Part G: (Signed by a certified chemical dependency counselor)

Signing part G indicates that treatment has been completed in accordance with Montana law and that the defendant is in compliance with recommendations of the court and ACT program. (Treatment for first offenders is based upon the determination of the chemical dependency counselor. For 2nd or subsequent offenders, treatment is mandatory). A certified chemical dependency counselor signs part G showing the defendant has met all requirements. *Upon signing the completed form, the chemical dependency counselor mails a copy of the form to Records & Driver Control and a copy to the appropriate court for its records.*

APPENDIX I - NOTICE OF NONCOMPLIANCE

NOTICE OF NONCOMPLIANCE

I. TO: _____ FROM: ACT Program

Judge

_____

Sentencing Court

_____

Address

Re:_____ DOB:_____ Case/Docket No._____

The above-mentioned client is not in compliance with ACT Program requirements because he/she failed to:

A.	_____	Enroll (attend intake session)
B.	_____	Attend first assessment interview sessions (Level I)
C.	_____	Attend second assessment interview sessions (Level I)
D	_____	Attend classes (Level II)
E	_____	Pay fees as per signed agreement
F.	_____	Complete treatment
G.	_____	Other

Comments: _____

_____

_____

_____

_____ _____

ACT Program Counselor Date

II. To Be Completed by the Court

_____	Court will set show-cause hearing
_____	City/County Attorney will petition for revocation of sentence
_____	Other: _____

_____

_____

_____ _____

Judge Date

Return to:

ACT Program

APPENDIX J - NONCOMPLIANCE AFFIDAVIT

NON-COMPLIANCE AFFIDAVIT

State of Montana)
:ss
County of _____)

I, _____, ACT Counselor, after being first duly sworn, deposes and says:

1. The attached Court Order/Referral Form is incorporated by reference.

2. The Defendant, _____ has done the following: (Check one)

_____ A. Failed to enroll in the ACT Program by _____

_____ B. Failed to attend the ACT Program.

_____ C. Refused to follow the treatment recommendation of the ACT Counselor.

_____ D. Failed to comply with the treatment recommendation of the ACT Counselor by: _____
(specify)

Dated this _____ day of _____, 20_____.

_____
ACT Counselor

Subscribed and sworn to this _____ day of _____, 20____.

_____
Notary Public for the State of Montana
Residing at:_____
My Commission Expires:_____

APPENDIX K - ACT LETTER OF NONCOMPLIANCE

The Honorable Jane Doe
Justice of the Peace
Somewhere County Courthouse
Somewhere, Montana

Re: Bill Defendant
Case/Docket No. _____

Dear Judge Doe:

This is to notify you that Bill Defendant missed the third session of the ACT Program. Please take whatever action is appropriate.

If I can provide any further information or assistance, please contact me.

Yours truly,

ACT Counselor

cc: Bill Defendant

APPENDIX L - ACT WARNING LETTER

DATE:_____

TO: _____
_____
_____
_____

FROM: ACT Program

WARNING

You are **not** in compliance with ACT Program requirements. Unless you complete the item(s) checked below by _____, the sentencing court will be notified.

_____ Schedule an appointment for the first assessment interview session.

_____ Schedule an appointment for the second assessment interview session.

_____ Plan to attend a make-up session for class(e's) _____ on _____
_____.

_____ Contact your ACT Program counselor with the name of the treatment provider you have selected and make arrangements to sign a consent form to transfer records.

_____ Other _____
_____
_____

cc: File

APPENDIX M - ACT REPORT

ACT EVALUATION/RECOMMENDATION REPORT

TO: _____
Judge

_____
Sentencing Court

_____
Address

RE: Name:_____

DOB: _____

Case/Docket #:_____

_____DUI_____Per Se ____MDD_____Multiple MIP (18-20 yrs old) ____UDD

ASSESSMENT FINDINGS:

_____ Misuse
_____ Abuse
_____ Chemical Dependency
_____ Unidentified
_____ Multiple Offender (Treatment mandated per 61-5-208, and 61-8-732)

INDICATORS (DSM IV CRITERIA):

A maladaptive pattern of substance use, leading to clinically significant impairment or distress, as manifested by three (or more) of the following, occurring at any time in the same 12-month period;

_____ (1) Tolerance
_____ (2) Withdrawal
_____ (3) The substance is often taken in larger amounts or over a longer period than was intended.
_____ (4) There is persistent desire or unsuccessful efforts to cut down or control substance use.
_____ (5) A great deal of time is spent in activities necessary to obtain the substance, use the substance, or recover from its effects.
_____ (6) Important social, occupational, or recreational activities are given up or reduced because of substance use.
_____ (7) The substance use is continuing despite knowledge of having a persistent or recurrent physical or psychological problem that is likely exacerbated by the substance.

Specify: _____ With Physiological Dependence
_____ Without Physiological Dependence

APPENDIX M - ACT REPORT

Page two

ASSESSMENT TESTS	RESULTS	CONCLUSION

PATIENT PLACEMENT RECOMMENDATION:

_____ None

_____ Residential (Inpatient) Treatment

_____ Intensive Outpatient Treatment

_____ Outpatient Treatment

_____ Aftercare

CRITERIA JUSTIFICATION FOR TREATMENT RECOMMENDATION:

_____

_____

_____

_____

NEXT APPOINTMENT: (Place):_____

_____(Date):_____ (Time):_____

This information has been disclosed from records whose confidentiality is protected by Federal Law. Federal regulations (42 CRF Part 2) prohibit further disclosure of it without the specific written consent of the person to whom it pertains, or as otherwise permitted by such regulations. A general authorization for the release of medical or other information is not sufficient for this purpose.

_____ _____

Certified Chemical Dependency Counselor Date

_____ _____

ACT Participant Date

APPENDIX N - 1ST OFFENSE RIGHTS

ADVISAL OF RIGHTS - 1st OFFENSE

My signature below indicates I have read this document and understand the following:

1. The ACT counselor discussed with me the evaluation/assessment findings and treatment recommendations.
2. I understand that I have the right to disagree with the ACT findings and recommendation.
3. I understand I can secure a second opinion at my own cost from any certified chemical dependency counselor, or any state approved inpatient or outpatient facility. The ACT Counselor has offered me a list of such counselors and programs in my area.
4. I understand I can consult with an attorney.
5. I understand I can request a hearing before the court. At the hearing, I can present evidence why I should not be required to do treatment or I can present evidence that I should do some other form of treatment than is recommended by the ACT counselor.
6. I understand that I do not have to complete treatment with the ACT program. I can complete treatment with any certified chemical dependency counselor or state approved inpatient or outpatient program.
7. I understand that if I am first DUI/Per Se offender, alcohol or drug treatment, or both, must be ordered upon a finding of chemical dependency made by a certified chemical dependency counselor pursuant to diagnosis and patient placement rules adopted by the DPHHS.

Of my own free will I have chosen:

_____ To accept the ACT evaluation/assessment findings and treatment recommendations.
_____ To disagree with the ACT evaluation/assessment findings and treatment recommendations.
  _____ I wish to have a hearing in the court.
  _____ I wish to secure a second opinion.

_____ _____
Signature of ACT Participant Date

_____ _____
Signature of ACT Counselor Date

cc: ACT File
ACT Participant

APPENDIX O - ACT TREATMENT REFERRAL FORM

ACT PROGRAM TREATMENT REFERRAL FORM

To: _____ From: ACT Program
Name of Treatment Provider

_____
Address

_____
City State Zip

Re: _____ D.O.B._____
Client's Name Court Case #_____

_____
Name of Judge

_____
Sentencing Court

_____
Address

_____
City State Zip

The above-referenced ACT Program participant is being referred to you for completion of the recommended level of treatment. The sentencing court has approved and ordered completion of the recommended program of treatment. This document transfers to you the responsibility for reporting completion or noncompliance to the sentencing court. **In the event the participant fails to make contact by _____ _____, you will need to immediately notify the sentencing court.**

This client _____ is _____ is not required to participate in one year monitoring. If the offender is required to participate, it is the treatment provider's responsibility to refer and/or enroll the client in a monitoring program for one year from the date of admission to treatment and communicate with the court regarding the client's compliance or noncompliance.

Comments:_____

_____

UPON COMPLETION, THE COURT ORDER/REFERRAL FORM (ENCLOSED) MUST BE SIGNED, DATED, AND RETURNED TO THE SENTENCING COURT LISTED ABOVE.

_____
ACT counselor Date

cc: ACT Program Participant
Sentencing Court

APPENDIX P - MULTIPLE OFFENSE RIGHTS

ADVISAL OF RIGHTS - MULTIPLE OFFENSE

My signature below indicates I have read this document and understand the following:

1. The ACT counselor discussed with me the evaluation/assessment findings and treatment recommendation.
2. I understand that I have the right to disagree with the ACT findings and recommendation.
3. I understand I can secure a second opinion at my own cost from any certified chemical dependency counselor, or any state approved inpatient or outpatient facility. The ACT counselor has offered me a list of such counselors and programs in my area.
4. I understand I can consult with an attorney.
5. I understand I can request a hearing before the court. At the hearing, I can present evidence why I should not be required to do the treatment recommended by ACT, but instead complete some other type of treatment.
6. I understand that I do not have to complete treatment with the ACT program. I can complete treatment with any certified chemical dependency counselor or state approved inpatient or outpatient program.
7. I understand that if I am a second or subsequent DUI/Per Se offender that I must complete treatment at a level appropriate to my alcohol or drug problem, or both, as determined by a certified chemical dependency counselor pursuant to diagnosis and patient placement rules adopted by the DPHHS. I also understand that the treatment program must be followed by monthly monitoring with a certified chemical dependency counselor for a period of at least one year from the date of admission to treatment.

Of my own free will **I have chosen:**

_____ To accept the ACT evaluation/assessment findings and treatment recommendations.
_____ To disagree with the ACT evaluation/assessment findings and treatment recommendations.
_____ I wish to have a hearing in the court.
_____ I wish to secure a second opinion.

_____ _____Signature of
ACT Participant Date

_____ _____
Signature of ACT Counselor Date

cc: ACT File
ACT Participant

APPENDIX Q - UNDER 21/OVER 0.02 SENTENCE FORM

IN THE _____ COURT OF _____ CITY/COUNTY, STATE OF MONTANA
BEFORE _____ JUSTICE OF THE PEACE/CITY JUDGE

* * * * *

STATE OF MONTANA	)	UNDER 21/OVER .02 AC
Plaintiff	)	**SENTENCE/ORDER**
vs	)	
	)	
_____,	)	Case No. _____
Defendant	)	

* * * * *

The Defendant having been found guilty of UNDER 21/OVER 0.02 AC in violation of Section 61-8-401 M.C.A; **IT IS HEREBY ORDERED** that the Defendant be sentenced as follows:
That Defendant be fined $_____ plus a surcharge of $ 30.00 and for a total of $ _____ _____; **and in addition,**
That Defendant, **if 18 years of age or older,** be sentenced to _____ days in jail. _____ _____ days of jail term is suspended for _____ on the following conditions:

_____ 1. Complete jail/jail alternatives **(if 18 years of age or older)**
_____ 2. Pay fine and surcharge.
_____ 3. Pay restitution of $_____.
_____ 4. Pay attorney fees of $_____.
_____ 5. Pay jury costs of $_____.
_____ 6. Pay costs of home arrest at $ _____ per day.
_____ 7. Pay for costs of in jail service at $_____ per day.
_____ 8. Install ignition interlock device and pay for same.
_____ 9. Attend and complete:
the ACT program and the Defendant is ordered to enroll within _____ days and shall pay for the cost of the ACT program if financially able. Defendant shall complete treatment if a finding of chemical dependency is found. The Court retains jurisdiction to impose treatment conditions at a hearing, on a finding of chemical dependency by a certified counselor. ACT will be completed at:
Name_____
Address_____
City _____
Phone number _____
_____ 10. No consumption of alcohol/drugs nor frequenting bars/taverns.
_____ 11. No convictions for violation of Montana laws/City codes.
_____ 12. Keep address and phone number current with the Court.
_____ 13. Defendant's drivers license and/or privileges shall
be suspended or revoked as determined by the State Driver Control. The Court does / does not recommend that the Defendant receive a probationary license if the Defendant is otherwise eligible.
_____ Defendant surrendered license to the Court.
_____ Defendant license seized for failure to take AC.
_____ Defendant has no driver's license.
_____ Defendant license is previously suspended / revoked.
_____ Other _____.
Defendant warned of possible loss of driver's license, under 61-5-214 MCA., and Contempt of Court pursuant to 3-10-401 MCA.

_____ _____
Defendant Date
cc:

APPENDIX R - ADDRESSES AND PHONE NUMBERS

ADDRESSES

Records and Driver Control Bureau
Department of Justice
303 North Roberts
P.O. Box 201430
Helena, MT 59620-1430
Phone: 444-3288

Traffic Safety Bureau
Montana Department of Transportation
2701 Prospect Avenue
P.O. Box 201001
Helena, MT 59620-1001
Phone: 444-3423

Addictive and Mental Disorders Division
Department of Public Health and Human Services
1400 Broadway
Cogswell Building #C-118
P.O. Box 202951
Helena, MT 59620-2951
Phone: 444-3964
Fax: 444-4435

Office of the Attorney General
Department of Justice
3rd Floor Justice Building
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
Phone: 444-2026
Fax: 444-3549

State of Montana
Division of Forensic Science
Department of Justice
Broadway Building
554 W. Broadway - 6th Floor
Missoula, MT 59802
Phone: 728-4970