ALABAMA DUI HANDBOOK

2016-2017 Edition

By Phillip B. Price, Sr.,

George D. Flowers

and Frank S. Ward

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Dedication

"This is the beginning of a new day. God has given me this day to use as I will. I can waste it or use it for good. What I do today is important because I am exchanging a day of my life for it. When tomorrow comes, this day will be gone forever, leaving something in its place I have traded for it. I want it to be gain, not loss; good, not evil. Success, not failure, in order that I shall not forget the price I paid for it."*

W. W. Heartsill Wilson

Just as this book is composed of chapters, so our lives can be viewed as a series of chapters. I consider my "life-chapters" to consist of periods, each usually lasting a number of years, in which I interacted with a particular person or group of people or explored a particular subject matter. We are all made up of our different life-experiences and the knowledge that we have acquired through the help and guidance of others. I have never considered myself to be scholarly or an academic wizard, but I believe I have a good sense of fairness and for spotting injustice. I have also been very fortunate throughout my life to have been taught and associated with great people. It would be impossible within the limited confines of this dedication to name all of the people who influenced my direction in life, but it is to all of those people who let be under their influences, that I dedicate this edition of this book.

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* Tram Sessions, a former legislator from Birmingham, Alabama, sent this quote to University of Alabama football coach Paul "Bear" Bryant. It became a favorite of his. He kept a tattered copy in his wallet and read it every day.

About the Authors

"Do not go where the path may lead, go instead where there is no path and leave a trail."

Ralph Waldo Emerson

"It isn't the mountains ahead to climb that wear you out; it's the pebble in your shoe."

Muhammad Ali

Phillip B. Price, Sr. has been representing citizens in the legal arena for over 37 years and is a pioneer in the field of DUI defense. Most of the significant DUI appellate cases in the state of Alabama were handled by Price, including the case that defines the crime of driving under the influence of alcohol. He is a Founding Fellow of the National College for DUI Defense (NCDD), and served as Dean of the College in 1997-98. Price was the third attorney in the United States to become a Fellow of the National College, and is the only attorney in North Alabama who is Board Certified by the College as a DUI Specialist. He had the Alabama Supreme Court throw out the Alabama breath test program in the mid 1990s. He handled the appellate case that has become the leading case dealing with an arrestee's right to an independent blood alcohol test. He has represented more people accused of the offense of DUI than any other lawyer in North Alabama. Mr. Price has been an invited lecturer in over 25 states, teaching other lawyers in DUI defense. He served as president of the Alabama Criminal Defense Lawyers in 1992-93.

In July 2012, Phillip Price was the recipient of the coveted NCDD Erwin Taylor Lifetime Achievement Award. This award is considered the highest award in the country that can be given to an attorney in the field of DUI Defense. This award is given for outstanding service in the profession of DUI Defense. He was the eighth attorney in the United States to receive the award.

Price has taught and published on all aspects of DUI cases, including the subject of breath tests, field sobriety tests, jury selection, cross-examination, and various other topics. He is well-known for his knowledge of various breath testing instruments, including the Drager Alcotest MK III, Intoxilyzer Model 5000, and Alco Sensor IV. He owns models of each of these devices.

George D. Flowers interned with the Supreme Court of Mississippi while attending law school. After graduation, he worked in the Office of the Alabama Attorney General and with the Alabama Court of Criminal Appeals. From 1997 to 1999 he was employed as an Assistant District Attorney for 19th Judicial Circuit. During this time, he worked closely with the Alabama Department of Forensic Sciences helping to establish the Dreager Alcotest MK-III-C program predicate and was involved in early litigation concerning Alabama's new breath test device. Mr. Flowers became associated with Price Law Firm in 1999. In the summer of 2005, Mr. Flower's efforts were recognized when he was made a full partner in the firm.

Mr. Flowers is associated with many professional organizations. In 1999, he joined the Alabama Criminal Defense Lawyers Association. In the summer of 2001, he became a board member for the DUI Advocacy Committee of the National Association of Criminal Defense Lawyers. He has regularly lectured at many sessions for nationally recognized DUI organizations such as The National College for DUI Defense, Texas Criminal Defense Lawyers Association, California DUI Lawyers Associations and the Connecticut Criminal Defense Lawyers, as well as others.

Frank S. Ward is a DUI defense attorney at Price, Flowers & Ward Law Firm in Huntsville, Alabama. He graduated from Cumberland School of Law in 2006. He received his B.A. degree from the University of Alabama in Huntsville in 2003 with majors in both English and Philosophy.

Mr. Ward has served as a research and writing editor for the American Journal of Trial Advocacy. He has been a practicing attorney in Alabama for 10 years and is admitted to practice in the United States District Court for each of the three districts in Alabama. He is a past president of the Huntsville Young Lawyers and a member of the National College for DUI Defense.

Preface

"When you make a mistake, there are only three things you should do about it: admit it; learn from it; and don't repeat it."

Coach Paul "Bear" Bryant

"Keep preparing more and more, and you will be a winner, even if you lose."

Phillip Price

The purpose of this book is to provide the reader with comprehensive information relating to statutes, case law and administrative rules and regulations regarding the subject of DUI in Alabama. The primary focus of the book is DUI law within the state of Alabama, expanding from time to time to Federal and other states' cases and how they relate to Alabama law. Specific attention is placed on the so-called "field sobriety tests", including the history of their development in this country and many of the weaknesses involving the government's attempt to give them credibility. Details are included about the breath test device used throughout Alabama, namely the Drager Alcotest MK III-C. This book is meant to be a concise reference guide for DUI defense lawyers, prosecutors, judges and even police officers who are seeking to understand all aspects of DUI cases.

During the process of writing this book I have received the help of some very fine, qualified lawyers. First and foremost, I extend a special thanks to my partner, George D. Flowers who, not only contributed in writing portions of the book, but he also tirelessly worked on our heavy caseload, giving me the opportunity to spend more of my time with the book. Secondly, I wish to recognize Frank S. Ward, who has been with our firm for years, so he has become, well, firmly established. Frank has great editing skills accompanied with a winning attitude to accomplish the mission. Other lawyers that I wish to acknowledge who contributed in assisting with this book are: Charles H. Younger who helped with Chapter 2, Emily Baggett who helped with Chapter 3, and Victor Carmody of Jackson, Mississippi, who wrote the office management chapter.

I would like to point out a few things about the recent editions of this book. In the 2013–14 Edition, I felt that the book was getting too fat, so I decided to trim it down in girth. In the 2013-14 book I included full texts of some of the important cases that exist in DUI law. Even though the full texts of these cases have been removed, I still wish to

emphasize their importance. I have decided to take out the full text and just summarize the case of United States v. Horn, 185 F. Supp. 2d 530 (D. Md. 2002). Every DUI lawyer should have this case in their briefcase. It is a well-written opinion about the admissibility and relevance of the standardized field sobriety tests (SFSTs), including the horizontal gaze nystagmus (HGN) test. Included within this opinion is:

1.) The applicable rules of evidence regarding SFSTs
2.) History of the development of the SFSTs
3.) Summaries of experts regarding SFSTs
4.) Summaries of each state law opinions regarding SFSTs

Another case where the full text was included in the 2013-14 Edition was Maryland v. Brightful, No K-10-04-259 (Circuit Court for Carroll County, MD, March 5, 2012). I have left the full text in this Edition due to the fact that the opinion is so well-reasoned and is not readily available to the practitioner. The case deals with the DRE protocols and admissibility issues thereof. I have deleted the transcript where I had the opportunity to cross-examine a well-seasoned police officer regarding the HGN test. Readers who are interested should just contact me if interested in getting a copy of the transcript. See transcript in Appendix 6A of the DUI Handbook, 2013-14. I have deleted the transcript in its entirety of Dr. Marceline Burns taken in State of Florida v. Meador, et al in the County Court of the 17th Judicial Circuit of Broward County, Florida, Case No. 93-810MM10A et al. I have placed what I consider important portions of Dr. Burns testimony in Appendix 6B. We have included a great deal of information about Alabama's Expungement law which took effect July 1, 2014. Expungement is discussed in Chapter 19.

Foreword

"By failing to prepare, you are preparing to fail."

Benjamin Franklin

"But when Orion and Sirius are come into mid-heaven, and rosy-fingered Dawn sees Arcturus, then cut off all the grape-clusters… and bring them home. Show them to the sun ten days and ten nights: then cover them over for five, and on the sixth day fraw off into vessels the gifts of joyful Dionysus."

Hesiod, *Works and Days* (ll. 609-617 B.C.)

From time to time, I reflect upon the reason why I chose to specialize in the law of DUI defense. Timing influences almost everything. The year after I graduated from law school the Alabama legislature substantially changed our state DUI statute. In 1980 and again in 1983, Alabama's DUI law was altered more so than any other time in history. For the first time, driver license suspensions and mandatory jail sentences came into play in the DUI context. I saw that practicing DUI defense law would afford me an opportunity to practice criminal law in a context where, far more often than not, my client would not fit the profile of a "criminal".

As evidenced by the ancient wine recipe above, alcohol has been around for thousands of years. Alcoholic beverages have continued to be used prolifically throughout the world as a part of and as a catalyst for social interaction. Alcohol is utilized in almost every type of social event. Birthdays, weddings and holiday celebrations are but a few of the events where alcohol is served as a beverage of choice. This has been true throughout our country's history. From the vineyards of the early settlers in Virginia to the thousands of vineyards and breweries scattered throughout the United States today, the citizens of our land continue to experiment with methods of cultivating, crafting, blending, brewing, distilling and aging alcoholic beverages. For example, there are currently 35 wineries just in the state of Tennessee. The attempt to take alcohol away from the American public was a dismal failure. Prohibition occurred on January 16, 1919, via the 18th Amendment of the United States Constitution and was repealed just twelve years later. Utah cast the last ballot necessary to repeal prohibition via the 21st Amendment on December 3, 1933. New Orleans greeted the repeal of prohibition with a twenty minute cannonade! The 18th Amendment remains the *only* U.S. Constitutional Amendment in history to have been repealed.

Even during prohibition it was not made illegal to consume alcohol. If you had it, you could drink it. You just could not make it, sell it, or transport it. Bootleggers abounded, and rum-running became prevalent. One of the most famous rum-runners was William C. McCoy. He became well-known for not watering down his alcoholic beverages, so alcohol bought from him began to be referred to as "the real McCoy!" (*Drink, a Cultural History of Alcohol*, by Iain Gately, Gotham Books, 2008.)

The reasons why I have continued practicing DUI Defense have varied through the years. I have been very lucky to have great people working with me as lawyers. George Flowers and Charles Younger have been with me for many years. Frank Ward has proven to be an invaluable addition to our law firm. From time to time something that I consider to be significant will happen that reminds me of why I practice within this specialty. Recently, I was in court waiting to try a case. While waiting I listened to a non-jury speeding case being tried pro se. I listened to the trial testimony, and, had I been wearing the robe, I would have found the young lady being tried not guilty. What was significant to me in this moment was what the judge said as he was finding the defendant guilty. He said, "Ma'am, I have found that when a party testifies, they stand to gain or lose by what they say, and whenever I have a police officer testifying on one side and a party [defendant] on the other side, I *always* believe the police officer." This reminded me of my position in this system of justice where you do have the police wearing a badge and a gun, with a patch that says "to serve and protect" on it and, on the other side, an ordinary citizen having been accused by that very same police officer of committing the crime of driving under the influence.

The first lawyers were actually Monks who would go to the King's Court and interpret and assist those who were accused of wrong-doing and who could not speak the "King's English". I will continue my journey, now in its 35nd year, of going to court to speak for those who cannot speak for themselves, knowing that in some venues the blindfold of Lady Justice droops below one eye so that she (Justice) sees the badge and gun on one side and sees the accused citizen on the other. Justice not "blinded" is not just. Therefore, I press on representing citizens accused of driving under the influence. This is my privilege.

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Chapter 1

The Offense

Research References

West's Key Number Digest

Automobiles ⚿332

Westlaw Databases

Drinking/Driving Litigation: Criminal and Civil (2d ed.) (DRNKDRIVING)

Treatises and Practice Aids

Nichols and Whited, Drinking/Driving Litigation: Criminal and Civil § 2:5 (2d ed.)

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§ 1:1 Alabama DUI law

Research References
West's Key Number Digest, Automobiles ⚿332

DUI laws in Alabama have for the most part followed the national trends in the passage of newer and tougher such laws over the past few decades. Prior to 1983, there was no enforceable mandatory driver's license suspension for first-time DUI offenders. The DUI law in 1980 made a first offender's driver's license suspension subject to the discretion of the court trying the case. Second or subsequent offenders were faced with a mandatory revocation or six months if convicted. The basic form of Alabama's present DUI law was first passed in 1983. For the first time in history, first offenders convicted of DUI faced mandatory loss of driving privileges. Mandatory minimum jail sentences were imposed at that same time for second and subsequent convictions. The 1983 DUI law was passed as a result of pressure from the federal government upon the states to strengthen DUI laws. The feds said that in order for the states to obtain highway dollars from the federal government in of the form of grants, the states had to pass certain legislative enactments set out by Congress. Alabama and her sister states complied. Since 1983, Alabama's DUI law as found in the Alabama Code, 1975 § 32-5A-191 has been amended 13 times, the most recent being 2014 (as of the time of this writing). The details of the most pertinent of these amendments are discussed below.

2011 brought about the most sweeping changes Alabama DUI law has seen for some time. On June 9, 2011, Governor Robert Bentley signed two bills into law that made major changes to Alabama's DUI law. The first of these pieces of legislation (House Bill 361/Act No. 2011-613) was an ignition interlock bill that requires people convicted of a second or subsequent DUI within a five year period to have ignition interlock devices installed on their vehicles. The bill further requires ignition interlock devices for those convicted of a first DUI if the person convicted blew refused to provide a blood alcohol concentration, had a passenger under the age of 14 years, or if someone other than the offender was injured at the time of the offense. The 2011 interlock bill as passed also provided for mandatory interlock for a first offender who blew 0.15% or higher, but a 2012 Act removed that provision. Alabama Acts 2012, No. 12-363, § 1(b)(4). The 2011 ignition interlock bill was riddled with ambiguous and conflicting provisions.

The second bill passed in 2011 (Senate Bill 67/Act No. 2011-621) provided for doubling the mandatory minimum punishment for a person convicted of DUI when that person had 0.15% or more by weight of alcohol in his blood. The new law also provided that for first offenders

with a BAC of at least 0.15%, the minimum punishment shall be imprisonment for one year, although the entire time may be suspended. Further, under the new law a first time offender who falls in the 0.15% or above category will have his license revoked for a period of not less than one year.

In 2014, a bill was enacted that, expanded the roll of ignition interlock devices in Alabama's DUI punishment regime. (Senate Bill 319/Act No. 2014-222). Under the 2014 law, a person convicted under the DUI statute may, in certain circumstances, have a portion of the previously mandatory driver's license suspension converted to a period of imposed ignition interlock.

In 2016, the Legislature made a couple of very minor tweaks to the DUI statute. *See*, Ala. Act 2016-259. That act replaced references to Directory of Public Safety and the Department of Public Safety to Secretary of the Alabama State Law Enforcement Agency and Alabama State Law Enforcement Agency, respectively. It also replaced the "Impaired Drivers Trust Fund" with the "Alabama Head and Spinal Injury Trust Fund" as the recipient of a certain moneys collected from fines.

Alabama's DUI statute is found in Ala. Code 1975 § 32-5A-191.

§ 32-5A-191. Driving while under influence of alcohol, controlled substances, etc.

(a) A person shall not drive or be in actual physical control of any vehicle while:

(1) There is 0.08 percent or more by weight of alcohol in his or her blood;

(2) Under the influence of alcohol;

(3) Under the influence of a controlled substance to a degree which renders him or her incapable of safely driving;

(4) Under the combined influence of alcohol and a controlled substance to a degree which renders him or her incapable of safely driving; or

(5) Under the influence of any substance which impairs the mental or physical faculties of such person to a degree which renders him or her incapable of safely driving.

(b) A person who is under the age of 21 years shall not drive or be in actual physical control of any vehicle if there is 0.02 percent or more by weight of alcohol in his or her blood. The Alabama State Law Enforcement Agency shall suspend or revoke the driver's license of any person, including, but not limited to, a juvenile, child, or youthful offender, convicted or adjudicated of, or subjected to a finding of, delinquency based on this subsection. Notwithstanding the foregoing, upon the first violation of this subsection by a person whose blood alcohol level is between 0.02 and 0.08, the person's driver's license or driving privilege shall be suspended for a period of 30 days in lieu of any penalties provided in subsection (e) of this section, and there shall be no disclosure, other than to courts, law enforcement agencies, the

person's attorney of record, and the person's employer, by any entity or person of any information, documents, or records relating to the person's arrest, conviction, or adjudication of or finding of delinquency based on this subsection.

All persons, except as otherwise provided in this subsection for a first offense, including, but not limited to, a juvenile, child, or youthful offender, convicted or adjudicated of or subjected to a finding of delinquency based on this subsection shall be fined pursuant to this section, notwithstanding any other law to the contrary, and the person shall also be required to attend and complete a DUI or substance abuse court referral program in accordance with subsection (k).

(c) (1) A school bus or day care driver shall not drive or be in actual physical control of any vehicle while in performance of his or her duties if there is greater than 0.02 percent by weight of alcohol in his or her blood. A person convicted pursuant to this subsection shall be subject to the penalties provided by this section, except that on the first conviction the Secretary of the Alabama State Law Enforcement Agency shall suspend the driving privilege or driver's license for a period of one year.

(2) A person shall not drive or be in actual physical control of a commercial motor vehicle, as defined in 49 CFR Part 383.5 of the Federal Motor Carrier Safety Regulations as adopted pursuant to Section 32-9A-2, if there is 0.04 percent or greater by weight of alcohol in his or her blood. Notwithstanding the other provisions of this section, the commercial driver's license or commercial driving privilege of a person convicted of violating this subdivision shall be disqualified for the period provided in accordance with 49 CFR Part 383.51, as applicable, and the person's regular driver's license or privilege to drive a regular motor vehicle shall be governed by the remainder of this section if the person is guilty of a violation of another provision of this section.

(3) Any commutation of suspension or revocation time as it relates to a court order, approval, and installation of an ignition interlock device shall not apply to commercial driving privileges or disqualifications.

(d) The fact that any person charged with violating this section is or has been legally entitled to use alcohol or a controlled substance shall not constitute a defense against any charge of violating this section.

(e) Upon first conviction, a person violating this section shall be punished by imprisonment in the county or municipal jail for not more than one year, or by fine of not less than six hundred dollars ($600) nor more than two thousand one hundred dollars ($2,100), or by both a fine and imprisonment. In addition, on a first conviction, the Secretary of the Alabama State Law Enforcement Agency shall suspend the driving privilege or driver's license of the person convicted for a period of 90 days. The 90-day suspension shall be stayed if the offender elects to have an approved ignition interlock device installed

and operating on the designated motor vehicle driven by the offender for six months. The offender shall present proof of installation of the approved ignition interlock device to the Alabama State Law Enforcement Agency and obtain an ignition interlock restricted driver license. The remainder of the suspension shall be commuted upon the successful completion of the elected use, mandated use, or both, of the ignition interlock device. If, on a first conviction, any person refusing to provide a blood alcohol concentration or if a child under the age of 14 years was a passenger in the vehicle at the time of the offense or if someone else besides the offender was injured at the time of the offense, the Secretary of the Alabama State Law Enforcement Agency shall suspend the driving privilege or driver's license of the person convicted for a period of 90 days and the person shall be required to have an ignition interlock device installed and operating on the designated motor vehicle driven by the offender for a period of two years from the date of issuance of a driver's license indicating that the person's driving privileges are subject to the condition of the installation and use of a certified ignition interlock device on a motor vehicle. After a minimum of 45 days of the license revocation or suspension pursuant to Section 32-5A-304 or this section, or both, is completed, upon receipt of a court order from the convicting court, upon issuance of an ignition interlock restricted driver license, and upon proof of installation of an operational approved ignition interlock device on the designated vehicle of the person convicted, the mandated ignition interlock period of two years provided in this subsection shall start and the suspension period, revocation period, or both, as required under this subsection shall be stayed. The remainder of the driver license revocation period, suspension period, or both, shall be commuted upon the successful completion of the period of time in which the ignition interlock device is mandated to be installed and operational.

(f) On a second conviction within a five-year period, a person convicted of violating this section shall be punished by a fine of not less than one thousand one hundred dollars ($1,100) nor more than five thousand one hundred dollars ($5,100) and by imprisonment, which may include hard labor in the county or municipal jail for not more than one year. The sentence shall include a mandatory sentence, which is not subject to suspension or probation, of imprisonment in the county or municipal jail for not less than five days or community service for not less than 30 days. In addition, the Secretary of the Alabama State Law Enforcement Agency shall revoke the driving privileges or driver's license of the person convicted for a period of one year and the offender shall be required to have an ignition interlock device installed and operating on the designated motor vehicle driven by the offender for a period of two years from the date of issuance of a driver's license indicating that the person's driving privileges are subject to the condition of the installation and use of a certified ignition interlock device on a motor vehicle. After a minimum of 45 days of the license revocation or suspension pursuant to Section 32-5A-304, this

section, or both, is completed, upon receipt of a court order from the convicting court, upon issuance of an ignition interlock restricted driver license, and upon proof of installation or an operational approved ignition interlock device on the designated vehicle of the person convicted, the mandated ignition interlock period of two years approved in this subsection shall start and the suspension period, revocation period, or both, as required under this subsection shall be stayed. The remainder of the driver license revocation period, suspension period, or both, shall be commuted upon the successful completion of the period of time in which the ignition interlock device is mandated to be installed and operational.

(g) On a third conviction, a person convicted of violating this section shall be punished by a fine of not less than two thousand one hundred dollars ($2,100) nor more than ten thousand one hundred dollars ($10,100) and by imprisonment, which may include hard labor, in the county or municipal jail for not less than 60 days nor more than one year, to include a minimum of 60 days which shall be served in the county or municipal jail and cannot be probated or suspended. In addition, the Secretary of the Alabama State Law Enforcement Agency shall revoke the driving privilege or driver's license of the person convicted for a period of three years and the offender shall be required to have an ignition interlock device installed and operating on the designated motor vehicle driven by the offender for a period of three years from the date of issuance of a driver's license indicating that the person's driving privileges are subject to the condition of the installation and use of a certified ignition interlock device on a motor vehicle. After a minimum of 180 days of the license revocation or suspension pursuant to Section 32-5A-304, this section, or both, is completed, upon receipt of a court order from the convicting court, upon issuance of an ignition interlock restricted driver license, and upon proof of installation of an operational approved ignition interlock device on the designated vehicle of the person convicted, the mandated ignition interlock period of three years provided in this subsection shall start and the suspension period, revocation period, or both, as required under this subsection shall be stayed. The remainder of the driver license revocation period, suspension period, or both, shall be commuted upon the successful completion of the period of time in which the ignition interlock device is mandated to be installed and operational.

(h) On a fourth or subsequent conviction, a person convicted of violating this section shall be guilty of a Class C felony and punished by a fine of not less than four thousand one hundred dollars ($4,100) nor more than ten thousand one hundred dollars ($10,100) and by imprisonment of not less than one year and one day nor more than 10 years. Any term of imprisonment may include hard labor for the county or state, and where imprisonment does not exceed three years confinement may be in the county jail. Where imprisonment does not exceed one year and one day, confinement shall be in the county jail. The minimum sentence shall include a term of imprisonment for at

least one year and one day, provided, however, that there shall be a minimum mandatory sentence of 10 days which shall be served in the county jail. The remainder of the sentence may be suspended or probated, but only if as a condition of probation the defendant enrolls and successfully completes a state certified chemical dependency program recommended by the court referral officer and approved by the sentencing court. Where probation is granted, the sentencing court may, in its discretion, and where monitoring equipment is available, place the defendant on house arrest under electronic surveillance during the probationary term. In addition to the other penalties authorized, the Secretary of the Alabama State Law Enforcement Agency shall revoke the driving privilege or driver's license of the person convicted for a period of five years and the offender shall be required to have an ignition interlock device installed and operating on the designated motor vehicle driven by the offender for a period of five years from the date of issuance of a driver's license indicating that the person's driving privileges are subject to the condition of the installation and use of a certified ignition interlock device on a motor vehicle. After a minimum of one year of the license revocation or suspension pursuant to Section 32-5A-304, this section, or both, is completed, upon receipt of a court order from the convicting court, upon issuance of an ignition interlock restricted driver license, and upon proof of installation of an operational approved ignition interlock device on the designated vehicle of the person convicted, the mandated ignition interlock period of five years provided in this subsection shall start and the suspension period, revocation period, or both, as required under this subsection shall be stayed. The remainder of the driver license revocation period, suspension period, or both, shall be commuted upon the successful completion of the period of time in which the ignition interlock device is mandated to be installed and operational.

The Alabama habitual felony offender law shall not apply to a conviction of a felony pursuant to this subsection, and a conviction of a felony pursuant to this subsection shall not be a felony conviction for purposes of the enhancement of punishment pursuant to Alabama's habitual felony offender law. However, prior misdemeanor or felony convictions for driving under the influence may be considered as part of the sentencing calculations or determinations under the Alabama Sentencing Guidelines or rules promulgated by the Alabama Sentencing Commission.

(i) When any person convicted of violating this section is found to have had at least 0.15 percent or more by weight of alcohol in his or her blood while operating or being in actual physical control of a vehicle, he or she shall be sentenced to at least double the minimum punishment that the person would have received if he or she had had less than 0.15 percent by weight of alcohol in his or her blood. Upon the first violation of this subsection, the offender shall be ordered by the court to have an ignition interlock device installed and operating on his or her designated motor vehicle for a period of two years from

the date of issuance of an ignition interlock-restricted driver's license. If the adjudicated offense is a misdemeanor, the minimum punishment shall be imprisonment for one year, all of which may be suspended except as otherwise provided for in subsections (f) and (g).

(j) When any person over the age of 21 years is convicted of violating this section and it is found that a child under the age of 14 years was a passenger in the vehicle at the time of the offense, the person shall be sentenced to at least double the minimum punishment that the person would have received if the child had not been a passenger in the motor vehicle.

(k) (1) In addition to the penalties provided herein, any person convicted of violating this section shall be referred to the court referral officer for evaluation and referral to appropriate community resources. The defendant shall, at a minimum, be required to complete a DUI or substance abuse court referral program approved by the Administrative Office of Courts and operated in accordance with provisions of the Mandatory Treatment Act of 1990, Sections 12-23-1 to 12-23-19, inclusive. The Alabama State Law Enforcement Agency shall not reissue a driver's license to a person convicted under this section without receiving proof that the defendant has successfully completed the required program.

(2) Upon conviction, the court shall notify the Alabama State Law Enforcement Agency if the person convicted is required to install and maintain an approved ignition interlock device. The agency shall suspend or revoke a person's driving privileges until completion of the mandatory suspension or revocation period required by this section, and clearance of all other suspensions, revocations, cancellations, or denials, and proof of installation of an approved ignition interlock device is presented to the agency. The agency shall not reissue a driver's license to a person who has been ordered by a court or is required by law to have the ignition interlock device installed until proof is presented that the person is eligible for reinstatement of driving privileges. Upon presentation of proof and compliance with all ignition interlock requirements, the agency shall issue a driver's license with a restriction indicating that the licensee may operate a motor vehicle only with the certified ignition interlock device installed and properly operating. If the licensee fails to maintain the approved ignition interlock device as required or is otherwise not in compliance with any order of the court, the court shall notify the agency of the noncompliance and the agency shall suspend the person's driving privileges until the agency receives notification from the court that the licensee is in compliance. The requirement that the licensee use the ignition interlock device may be removed only when the court of conviction confirms to the agency that the licensee is no longer subject to the ignition interlock device requirement.

(l) Neither reckless driving nor any other traffic infraction is a lesser included offense under a charge of driving under the influence of alcohol or of a controlled substance.

(m) Except for fines collected for violations of this section charged pursuant to a municipal ordinance, fines collected for violations of this section shall be deposited to the State General Fund; however, beginning October 1, 1995, of any amount collected over two hundred fifty dollars ($250) for a first conviction, over five hundred dollars ($500) for a second conviction within five years, over one thousand dollars ($1,000) for a third conviction within five years, and over two thousand dollars ($2,000) for a fourth or subsequent conviction within five years, the first one hundred dollars ($100) of that additional amount shall be deposited to the Alabama Chemical Testing Training and Equipment Trust Fund, after three percent of the one hundred dollars ($100) is deducted for administrative costs, and beginning October 1, 1997, and thereafter, the second one hundred dollars ($100) of that additional amount shall be deposited in the Alabama Head and Spinal Cord Injury Trust Fund after deducting five percent of the one hundred dollars ($100) for administrative costs and the remainder of the funds shall be deposited to the State General Fund. Fines collected for violations of this section charged pursuant to a municipal ordinance where the total fine is paid at one time shall be deposited as follows: The first three hundred fifty dollars ($350) collected for a first conviction, the first six hundred dollars ($600) collected for a second conviction within five years, the first one thousand one hundred dollars ($1,100) collected for a third conviction, and the first two thousand one hundred dollars ($2,100) collected for a fourth or subsequent conviction shall be deposited to the State Treasury with the first one hundred dollars ($100) collected for each conviction credited to the Alabama Chemical Testing Training and Equipment Trust Fund and the second one hundred dollars ($100) to the Alabama Head and Spinal Cord Injury Trust Fund after deducting five percent of the one hundred dollars ($100) for administrative costs and depositing this amount in the general fund of the municipality, and the balance credited to the State General Fund. Any amounts collected over these amounts shall be deposited as otherwise provided by law. Fines collected for violations of this section charged pursuant to a municipal ordinance, where the fine is paid on a partial or installment basis, shall be deposited as follows: The first two hundred dollars ($200) of the fine collected for any conviction shall be deposited to the State Treasury with the first one hundred dollars ($100) collected for any conviction credited to the Alabama Chemical Testing Training and Equipment Trust Fund and the second one hundred dollars ($100) for any conviction credited to the Alabama Head and Spinal Cord Injury Trust Fund after deducting five percent of the one hundred dollars ($100) for administrative costs and depositing this amount in the general fund of the municipality. The second three hundred dollars ($300) of the fine collected for a first conviction, the second eight hundred dollars ($800) collected for a second conviction, the second one thousand eight hundred dollars ($1,800) collected for a third conviction, and the second three thousand eight hundred dollars ($3,800) collected for a fourth conviction shall be divided with 50 percent of the funds collected to be deposited to the

State Treasury to be credited to the State General Fund and 50 percent deposited as otherwise provided by law for municipal ordinance violations. Any amounts collected over these amounts shall be deposited as otherwise provided by law for municipal ordinance violations. Notwithstanding any provision of law to the contrary, 90 percent of any fine assessed and collected for any DUI offense charged by municipal ordinance violation in district or circuit court shall be computed only on the amount assessed over the minimum fine authorized, and upon collection shall be distributed to the municipal general fund with the remaining 10 percent distributed to the State General Fund. In addition to fines imposed pursuant to this subsection, a mandatory fee of one hundred dollars ($100) shall be collected from any individual that successfully completes any pretrial diversion or deferral program in any municipal, district, or circuit court where the individual was charged with a violation of this section or a corresponding municipal ordinance. The one hundred dollars ($100) shall be deposited into the Alabama Chemical Testing Training and Equipment Fund.

(n) A person who has been arrested for violating this section shall not be released from jail under bond or otherwise, until there is less than the same percent by weight of alcohol in his or her blood as specified in subsection (a)(1) or, in the case of a person who is under the age of 21 years, subsection (b) hereof.

(o) Upon verification that a defendant arrested pursuant to this section is currently on probation from another court of this state as a result of a conviction for any criminal offense, the prosecutor shall provide written or oral notification of the defendant's subsequent arrest and pending prosecution to the court in which the prior conviction occurred.

(p) A prior conviction within a five-year period for driving under the influence of alcohol or drugs from this state, a municipality within this state, or another state or territory or a municipality of another state or territory shall be considered by a court for imposing a sentence pursuant to this section.

(q) Any person convicted of driving under the influence of alcohol, or a controlled substance, or both, or any substance which impairs the mental or physical faculties in violation of this section, a municipal ordinance adopting this section, or a similar law from another state or territory or a municipality of another state or territory more than once in a five-year period shall have his or her motor vehicle registration for all vehicles owned by the repeat offender suspended by the Alabama Department of Revenue for the duration of the offender's driver's license suspension period, unless such action would impose an undue hardship to any individual, not including the repeat offender, who is completely dependent on the motor vehicle for the necessities of life, including any family member of the repeat offender and any coowner of the vehicle or, in the case of a repeat offender, if the repeat offender has a functioning ignition interlock device installed on the

designated vehicle for the duration of the offender's driver's license suspension period.

(r) (1) Any person ordered by the court to have an ignition interlock device installed on a designated vehicle, and any person who elects to have the ignition interlock device installed on a designated vehicle for the purpose of reducing a period of suspension or revocation of his or her driver's license, shall pay to the court, for each of the first four months following his or her conviction or the first four months following the installation of the ignition interlock device on his or her vehicle, seventy-five dollars ($75) per month, which shall be divided as follows:

a. Forty-five percent to the Alabama Interlock Indigent Fund.

b. Twenty percent to the State Judicial Administration Fund administered by the Administrative Office of Courts.

c. Twenty percent to the Highway Traffic Safety Fund administered by the Alabama State Law Enforcement Agency.

d. Fifteen percent to the District Attorney's Solicitor Fund.

(2) In addition to paying the court clerk seventy-five dollars ($75) per month for the first four months following the conviction or the voluntary installation of the ignition interlock device, the defendant shall pay all costs associated with the installation, purchase, maintenance, or lease of the ignition interlock devices to an approved ignition interlock provider pursuant to the rules of the Department of Forensic Sciences, unless the defendant is subject to Section 32-5A-191.4(g)(4) during which he or she shall pay one-half the cost for the available indigency period.

(s) The defendant shall designate the vehicle to be used by identifying the vehicle by the vehicle identification number to the court. The defendant, at his or her own expense, may designate additional motor vehicles on which an ignition interlock device may be installed for the use of the defendant.

(t) (1) Any person who is required to comply with the ignition interlock provisions of this section as a condition of restoration or reinstatement of his or her driver's license, shall only operate the designated vehicle equipped with a functioning ignition interlock device for the period of time consistent with the offense for which he or she was convicted as provided for in this section.

(2) The duration of the time an ignition interlock device is required by this section shall be doubled if the offender refused the prescribed chemical test for intoxication, or if the offender's blood alcohol concentration was 0.15 grams percent or greater unless already doubled by a previous section.

(u) (1) The Alabama State Law Enforcement Agency may set a fee of not more than one hundred fifty dollars ($150) for the issuance of a driver's license indicating that the person's driving privileges are subject to the condition of the installation and use of a certified ignition interlock device on a motor vehicle. Fifteen percent of the fee shall be distributed to the general fund of the county where the person was convicted to be utilized for law enforcement purposes.

Eighty-five percent shall be distributed to the State General Fund. In addition, at the end of the time the person's driving privileges are subject to the above conditions, the agency shall set a fee of not more than seventy-five dollars ($75) to reissue a regular driver's license. The fee shall be deposited as provided in Sections 32-6-5, 32-6-6, and 32-6-6.1.

(2) The defendant shall provide proof of installation of an approved ignition interlock device to the Alabama State Law Enforcement Agency as a condition of the issuance of a restricted driver's license.

(3) Any ignition interlock driving violation committed by the offender during the mandated ignition interlock period shall extend the duration of ignition interlock use for six months from the date of violation. Ignition interlock driving violations include any of the following:

a. A breath sample at or above a minimum blood alcohol concentration level of 0.02 recorded more than four times during the monthly reporting period.

b. Any tampering, circumvention, or bypassing of the ignition interlock device, or attempt thereof.

c. Failure to comply with the servicing or calibration requirements of the ignition interlock device every 30 days.

(v) Nothing in this section and Section 32-5A-191.4 shall require an employer to install an ignition interlock device in a vehicle owned or operated by the employer for use by an employee required to use the device as a condition of driving pursuant to this section and Section 32-5A-191.4.

(w) The provisions in this section and Section 32-5A-191.4 relating to ignition interlock devices shall not apply to persons who commit violations of this section while under 19 years of age and who are adjudicated in juvenile court, unless specifically ordered otherwise by the court.

(x) (1) The amendatory language in Act 2014-222 to this section, authorizing the Alabama State Law Enforcement Agency to stay a driver's license suspension or revocation upon compliance with the ignition interlock requirement shall apply retroactively if any of the following occurs:

a. The offender files an appeal with the court of jurisdiction requesting all prior suspensions or revocation, or both, be stayed upon compliance with the ignition interlock requirement.

b. The offender wins appeal with the court of jurisdiction relating to this section.

c. The court of jurisdiction notifies the Alabama State Law Enforcement Agency that the offender is eligible to have the driver's license stayed.

d. The Alabama State Law Enforcement Agency issues an ignition interlock restricted driver's license.

e. The offender remains in compliance of ignition interlock requirements.

(2) The remainder of the driver license revocation, suspension, or both, shall be commuted upon the successful completion of the period of time in which the ignition interlock device is mandated to be installed and operational.

Ala. Code § 32-5A-191.

§ 1:2 Actual physical control

Research References
West's Key Number Digest, Automobiles ⚿332

Alabama's DUI statute codifies the phrase "actual physical control." Prior DUI law required proof that the defendant actually drove or operated the vehicle in some manner. Section 32-5A-191 requires merely that the accused was in "actual physical control" of the vehicle. Several cases have interpreted the meaning of "actual physical control." Proof that the accused actually drove the vehicle or operated the vehicle or made the vehicle move is no longer required to prove that an individual violated the Alabama DUI law. The first case that interpreted just what constituted "actual physical control" set out three specific elements that had to be proven in order to convict. The elements set forth are as follows:

1. Active or constructive possession of the vehicle's ignition key by the person charged or, in the alternative, proof that such a key is not required for the vehicle's operation;
2. Position of the person charged in the driver's seat, behind the steering wheel, and in such condition that, except for the intoxication, he or she is physically capable of starting the engine and causing the vehicle to move;
3. A vehicle that is operable to some extent.

Key v. Town of Kinsey, 424 So. 2d 701 (Ala. Crim. App. 1982).

The strict three-pronged approach to what constitutes "actual physical control" was later changed by the case of *Cagle v. City of Gadsden*, 495 So. 2d 1144 (Ala. 1986). Instead of the three-prong approach of the *Key* case, the court adopted a "totality of the circumstances" approach and said:

> . . . the test set forth in *Key v. Town of Kinsey, supra,* is too restrictive and should give way to a totality-of-the-circumstances approach. In this particular case, the result would be the same under either method-the conviction would be set aside. However, there will undoubtedly be cases wherein the facts would support a conviction under one test and would be insufficient to support a conviction using the other. This being the case, the stringent, three-pronged test set forth in *Key v. Town of Kinsey* is hereby abandoned, and in its place we adopt a totality-of-the-circumstances test. This is not to say that the factors which compose the test in the *Key* case are not to be considered when determining whether a person is guilty of driving under the influence, but that these are not the only factors to be considered.

Cagle v. City of Gadsden, 495 So.2d at 1147.

Author's Note: It should be noted that in *Cagle*, the Alabama Supreme Court held the evidence was not sufficient to prove "actual physical control." Cagle was found behind the wheel of a motor vehicle which obviously had just been driven. The truck was involved in an accident wherein it smashed into a power pole, cracking the pole in half. There was no evidence produced as to whether the defendant had possession of the car keys. Also, *Cagle* never admitted to having driven the truck into the power pole. The Alabama Supreme Court found that these facts, as a matter of law, were insufficient to prove circumstantially that Cagle was in "actual physical control" of the truck. In applying the rule of circumstantial evidence, the court stated, "[u]nder the facts of this case, we are of the opinion that the State has failed to prove that the evidence is inconsistent with any reasonable hypothesis that the defendant is innocent." *Cagle*, 495 So.2d at 1147.

Unfortunately, Alabama case law has not adequately defined of the term "actual physical control." However, a look at Texas case law does provide some guidance. The Texas Court of Appeals has interpreted "operate," which is the operative term in the Texas DUI statute, to mean that the totality of the circumstances must demonstrate that the defendant took action to affect the functioning of his vehicle that would enable the vehicle's use. *See Laroque v. State*, 2010 WL 3303857 (Tex. App. Fort Worth 2010) (Not Reported in S.W.3d). A person may be said to operate a motor vehicle if he exerts personal effort upon the motor vehicle in a manner that shows intentional use of the vehicle for its intended purpose. 2010 WL 3303857 at *2–3. This definition is appropriate for situations where the accused was not actually driving the vehicle (e.g., just sitting in the vehicle).

Also of interest to the topic of actual physical control is the Georgia case of *Reynolds v. State*, 306 Ga. App. 1, 700 S.E.2d 888 (2010). In Reynolds a jury found the defendant guilty of violating Georgia's DUI statute and hit-and-run statute. 700 S.E.2d at 889. Like Alabama, to be proven guilty of DUI in Georgia, the state must prove the defendant drove or was in actual physical control of a vehicle. OCGA § 40-6-391(a). However, the Georgia DUI statute adds the requirement that the vehicle be a "moving vehicle." 700 S.E.2d at 891. At trial in Reynolds there was testimony that a tow truck driver saw the defendant walking away from a damaged vehicle parked along the interstate highway. 700 S.E.2d at 890. However, it was not determined that the defendant was intoxicated until an hour later. 700 S.E.2d at 890. There was no evidence presented at trial that the defendant owned the vehicle, had authority to drive the vehicle, or had a key to the vehicle. 700 S.E.2d at 892. Further, there was no testimony from anyone who actual saw the defendant inside the vehicle. 700 S.E.2d at 892. The Georgia Court of Appeals reversed Reynold's conviction stating "[g]iven this record, we conclude that the evidence was insufficient to show beyond a reasonable doubt that the DUI element of 'drive or be in actual physical control of any moving vehicle.' " Of particular interest in the Reynolds opinion is the distinction the court drew between the facts before it and the facts of other cases where convictions were affirmed:

> There are a number of decisions in which DUI convictions have been upheld on circumstantial evidence, against the defendant's assertion that the evidence failed to prove that he was the driver of the car. However, in all those cases, the evidence revealed specific facts supporting the State's contention that the defendant was indeed the driver.[1]
>
> In some of those cases, the accused admitted driving a vehicle during the pertinent time period.[2] In other cases affirming convictions on *5 circumstantial evidence, there were other indicia that the accused had recently operated the vehicle at issue.[3] And in still other cases, the circumstantial evidence included indicia of ownership such as registration of the vehicle in the accused's name.[4]

Reynolds v. State, 306 Ga. App. 1, 700 S.E.2d 888, 891–92 (2010).

The Supreme Court of Virginia has held that a driver was in actual physical control of a vehicle, despite being asleep, when he was seated in the driver's seat and had his keys in the ignition switch even though the arresting officer could not remember whether the ignition was in the on or off position. *Enriquez v. Com.*, 283 Va. 511, 722 S.E.2d 252 (2012), petition for cert. filed, 81 U.S.L.W. 3073 (U.S. July 25, 2012).

[Section 1:2]

[1]*Krull v. State*, 211 Ga. App. 37, 39, 438 S.E.2d 152 (1993).

[2]*See, e.g.*, *Silvers v. State*, 297 Ga. App. 362, 364, 677 S.E.2d 410 (2009) (defendant admitted that he owned the vehicle and was driving it in the area of the reported incident approximately one hour before the "be on the lookout" was issued); *Coates v. State*, 216 Ga. App. 93, 453 S.E.2d 35 (1994) (evidence showed that defendant owned the car, was in the driver's seat when the officer arrived at the vehicle parked in the right through-lane of traffic, and defendant admitted to officer that she had been driving); *State v. Hill*, 178 Ga. App. 669, 344 S.E.2d 491 (1986) (when the investigating officer asked how the accident occurred, defendant answered, "I swerved to miss a dog.").

[3]*See, e.g.*, *Brockington v. State*, 245 Ga. App. 571, 572–573, 538 S.E.2d 474 (2000) (evidence showed that, immediately after collision, defendant was observed partially in driver's seat and appeared to be attempting to slide into passenger seat; defendant's nephew was initially completely in back seat and appeared to be almost lying down; and while other driver talked to defendant, defendant slid over to passenger seat and nephew got completely into driver's seat); *Henson v. State*, 205 Ga. App. 419, 422 S.E.2d 265 (1992) (after an automobile collision, defendant and another man exited the vehicle and fled the scene; no one else occupied that vehicle; both men were soon apprehended; defendant was in possession of keys to vehicle; investigating officers found blood and cracked windshield on passenger side of car; and man who had fled with defendant was bleeding from a cut on his head); *Melendy v. State*, 202 Ga. App. 638, 415 S.E.2d 62 (1992) (when investigating officer asked defendant, after having observed the defendant pouring gasoline into the tank of car stopped in the road, what had happened, defendant answered that he was on his way home from a football game when the car ran out of gas; there was no one else in or near the car; and after being arrested for DUI told officer there was no one who could move car); *Jones v. State*, 187 Ga. App. 132, 369 S.E.2d 509 (1988) (car was not on scene 20 to 30 minutes earlier; officer found defendant slumped over the steering wheel at a railroad crossing, with the engine running and transmission in "drive"); *Phillips v. State*, 185 Ga. App. 54, 363 S.E.2d 283 (1987) (officer found defendant behind the steering wheel, parked in the middle of the road, with the engine running and the lights on).

[4]*See, e.g.*, *Frye v. State*, 189 Ga. App. 181, 375 S.E.2d 101 (1988) (officer observed defendant staggering alongside a roadway and wearing soiled clothing; approximately 100 yards down the road was an overturned car registered to the defendant).

The Court of Appeals of Maryland held in *Atkinson v. State*, 331 Md. 199, 627 A.2d 1019 (1993), that there was reasonable doubt whether a defendant, who was found asleep in an automobile parked on the shoulder of a road with keys in the ignition but turned off, was in actual physical control of the vehicle. The appellate court stated:

> We believe that the General Assembly, particularly by including the word "actual" in the term "actual physical control," meant something more than merely sleeping in a legally parked vehicle with the ignition off. As we have already said with respect to the legislature's 1969 addition of "actual physical control" to the statute, we will not read a statute to render any word superfluous or meaningless. *Sandefur*, 300 Md. at 341, 478 A.2d at 315. Thus, we must give the word "actual" some significance. Further, when interpreting a statute, we assume that the words of the statute have their ordinary and natural meaning, absent some indication to the contrary. *Richmond v. State*, 326 Md. 257, 262, 604 A.2d 483, 485-86 (1992). We have no such contrary indications here, so we examine the ordinary meaning of "actual physical control." *Webster's Third New International Dictionary* 1706 (1986) defines "physical" as "relating to the body . . . often opposed to *mental*." (Emphasis in original). *Webster's* also defines "control" as "to exercise restraining or directing influence over." *Id.* 604 A.2d at 496. Most importantly, "actual" is defined as "present," "current," "existing in fact or reality," and "in existence or taking place at the time." *Webster's* also contrasts "actual" with "potential and possible" as well as with "hypothetical." *Id.* at 220. By using the word "actual," the legislature implied a current or imminent restraining or directing influence over a vehicle. Accordingly, a person is in "actual physical control" if the person is presently exercising or is imminently likely to exercise "restraining or directing influence" over a motor vehicle while in an intoxicated condition.
>
> *We believe that, by using the term "actual physical control," the legislature intended to differentiate between those inebriated people who represent no threat to the public because they are only using their vehicles as shelters until they are sober enough to drive and those people who represent an imminent threat to the public by reason of their control of a vehicle.* When the occupant is totally passive, has not in any way attempted to actively control the vehicle, and there is no reason to believe that the inebriated person is imminently going to control the vehicle in his or her condition, we do not believe that the legislature intended for criminal sanctions to apply.

Atkinson v. State, 331 Md. 199, 627 A.2d 1019, 1027 (1993) (emphasis added).

In the New Mexico case of *State v. Sims*, 2010-NMSC-027, 148 N.M. 330, 236 P.3d 642, 93 A.L.R.6th 647 (2010), reversed a conviction for DWI, holding that a conviction that is based upon a defendant being in actual physical control requires proof that both the defendant actually exercised control over the vehicle and proof of a general intent to drive. The defendant in *Sims* was found passed out asleep behind the wheel of his vehicle located in a commercial parking lot with his keys in the front passenger seat. The appellate court noted:

> The threat, if any, that was posed by Defendant as he lay passed out or asleep in his vehicle was far short of that posed by an intoxicated individual who is *driving*. While Defendant arguably exercised some level of control over the vehicle, given his location in the driver's seat and the proximity of his keys, there was no indication that he posed any actual, as opposed to hypothetical, threat to the public.

> In fact, an intoxicated individual may exercise a great deal of control over a vehicle, yet still pose little danger to himself, herself, or the public. For example, on a cold night, an intoxicated person may use his vehicle as a temporary shelter—as a place to sleep it off—even going so far as to start the engine so that he can turn on the heater. Such an individual, while clearly in control of his vehicle, does not pose a threat to himself, herself, or the public precisely because he has decided *not* to drive. The individual's recognition that he is too intoxicated to drive embodies the aim of our DWI law and its enforcement. To subject this type of behavior to strict liability would be counterproductive.

State v. Sims, 2010-NMSC-027, 148 N.M. 330, 236 P.3d 642, 650, 93 A.L.R.6th 647 (2010).

§ 1:3 Vehicle defined

One element of DUI is that the accused "drive or be in actual physical control of any vehicle." Ala. Code § 32-5A-191 (emphasis added). The vast majority of DUI cases involve cars, trucks, vans, SUVs, and motorcycles. However, the Alabama Code provides a definition of "vehicle" that encompasses much more:

> VEHICLE. Every device in, upon or by which any person or property is or may be transported or drawn upon a highway, excepting devices moved by human power or used exclusively upon stationary rails or tracks or electric personal assistive mobility devices; provided, that for purposes of this title, a bicycle or a ridden animal shall be deemed a vehicle, except those provisions of this title, which by their very nature can have no application.

Ala. Code § 32-1-1.1(81). Thus, bicycles, tractors, riding lawn mowers, horses, donkeys, mules, and animal drawn wagons qualify, while trains and both powered and unpowered wheelchairs do not. Though not binding precedent, in the case of *Vermont v. Smith,* the Vermont Supreme Court held that a boom lift that the defendant moved across the street from a building site was a "motor vehicle" under the definition of Vermont's DUI law. *State v. Smith*, 190 Vt. 222, 2011 VT 83, 27 A.3d 362 (2011).

Alabama is not the only state where a person can commit DUI by bicycle. *See, e.g.*, *State v. Howard*, 510 So. 2d 612 (Fla. Dist. Ct. App. 3d Dist. 1987) (holding that a bicyclist could be charged under a DUI statute); *State v. Shepard*, 1 Ohio App. 3d 104, 439 N.E.2d 920 (1st Dist. Hamilton County 1981) (same). Further, there is no language in Alabama's DUI statute, which would exempt a person convicted of a bicycle DUI from the driver's license / driving privilege suspension penalties found within that statute. While Alabama's DUI statute does apply to bicycle operators, Alabama's implied consent statute does not because it is limited to the operation of "motor vehicles." Ala. Code § 32-5-192(a) ("Any person who operates a motor vehicle upon the public highways of this state shall be deemed to have given his consent, subject to the provisions of this division, to a chemical test or tests . . .") (emphasis added); *see, also*, *State v. Abbey*, 239 Or. App. 306, 245 P.3d 152 (2010) (noting that while a person can violate Oregon's DUI statute on bicycle, Oregon's implied consent law does not apply to persons stopped for DUI

while on bicycles). The term "motor vehicle" is defined in the Alabama Code as:

> MOTOR VEHICLE. Every vehicle which is self-propelled and every vehicle which is propelled by electric power obtained from overhead trolley wires, but not operated on rails, except for electric personal assistive mobility devices.

Ala. Code § 32-1-1.1(32).

Regarding "ridden animal" DUI's, I have heard of a case in Oneonta, Alabama, where an individual was convicted of DUI for riding a horse in a Christmas parade while intoxicated. As an aside, in a DUI case involving an unbroken or stubborn animal, one might argue that "actual physical control" was lacking.

§ 1:4 Per se violation; .08% BAC or greater

Research References

West's Key Number Digest, Automobiles ⚿332

When it comes to alcohol-related under the influence cases, there are two different ways of charging the crime. The first way is to charge that the defendant "drove or was in actual physical control of a vehicle while there was .08 per cent or greater blood alcohol content." This is referred to as an "A-1" charge, getting its name after the subsection of § 32-5A-191 that sets out those elements, i.e., § 32-5A-191 (a)(1), Code of Alabama, 1975. Other nicknames to this type of DUI charge are "per se" charge and "UBAL" charge. Such statutes are referred to as "per se" statutes because they "make driving an automobile with a blood alcohol concentration of .10% or more a crime *without reference to the effect that alcohol may have on the driver.*" 4 Richard E. Erwin, Marilyn K. Minzer, Leon A. Greenberg, Herbert M. Goldstein, Arne K. Bergh, Harvey M. Cohen, *Defense of Drunk Driving Cases* § 33A.00, at 33A-2 (3d ed. 1991). Similarly, UBAL is an acronym that stands for "unlawful blood alcohol content," meaning that the elements, along with either driving or being in actual physical control of a vehicle, include a blood alcohol content over the so-called legal limit, which is presently .08%.

The leading case in Alabama which discusses the "A-1" DUI charge is *Curren v. State*, 620 So. 2d 739 (Ala. 1993). In *Curren*, the Alabama Supreme Court sets out the elements that are to be proven in the then-new concept of a "per se" DUI charge. They recognized the trend in cases from around the country. They said:

> Section 32-5A-191(a)(1) is commonly referred to as an "illegal per se law," and similar statutes have been enacted in other jurisdictions. *See, e.g.,* Alaska Stat. § 28-35-030(a)(2) (1989); Ariz.Rev.Stat.Ann. § 28-692(A)(2) (Supp.1992); Ark.Code Ann. § 5-65-103(b) (Michie 1987); Cal.Veh.Code § 23152(b) (West Supp.1993); Colo.Rev.Stat. § 42-4-1202(1.5)(a) (Supp.1992); Conn.Gen.Stat. § 14-227a(a)(2) (1993); Del.Code Ann. tit. 21, § 4177(b) (1985); Fla.Stat.Ann. § 316.193(1)(b) (Harrison Supp.1993); Ga.Code Ann. § 40-6-391(a)(4) (Michie 1991); Haw.Rev.Stat. § 291-4(a)(2) (Supp.1992); Idaho Code § 18-8004(1)(a) (Supp.1992); Ill.Rev.Stat. ch. 625,

para. 5/11-501(a)(1) (1992); Ind.Code Ann. § 9-30-5.1 (Burns 1991); Iowa Code § 321J.2(1)(a) (1993); Kan.Stat.Ann. § 8-1567(a)(1) and (a)(2) (1991); Me.Rev.Stat.Ann. tit. 29, § 1312-B(1)(B) (Supp.1992); Mich.Comp.Laws § 257-625(1)(b) (1992 Supp.); Minn.Stat. § 169.121(1)(d) and (e) (1992); Mo.Rev.Stat. § 577.012 (1986); Mont.Code Ann. § 61-8-406 (1991); Neb.Rev.Stat. § 39-699.07(2)–(4) (1988); Nev.Rev.Stat.Ann. § 484.379(1)(b) (Michie 1990); N.H.Rev.Stat.Ann. § 265.82(I)(b) (Supp.1992); N.J.Rev.Stat.Ann. § 39:4-50(a) (West 1990); N.M.Stat.Ann. § 66-8-102(c) (Michie Supp.1992); N.Y.Veh. & Traf.Law § 1192.2 (McKinney Supp.1993); N.C.Gen.Stat. § 20-138.1(a)(2) (1989); N.D.Cent.Code § 39-08-01(1)(a) (1987); Ohio Rev.Code Ann. § 44511.19(A)(2)–(4) (Anderson Supp.1991); Okla.Stat. tit. 47, § 11-902(A)(1) (1991); Or.Rev.Stat. § 813.010(1)(a) (1989); 75 Pa.Cons.Stat.Ann. § 3731(a)(4) (Supp.1992); S.D. Codified Laws Ann. § 32-23-1(a)(1) (1989); Utah Code Ann. § 41-6-44(1)(a) (1988); Vt.Stat.Ann. tit. 23, § 1201(a)(1) (Supp.1992); Va.Code Ann. § 18.2-266(i) (1988); Wash.Rev.Code §§ 46.61.502(1)–(2) and 46.61.504(1)–(2) (1992); W.Va.Code § 17C-5-2(d)(1)(E) (1991); Wis.Stat.Ann. § 346.63(1)(b) (West 1989–90).

Curren, 620 So.2d at 740.

In setting out the elements of the "A-1" charge, the Alabama Supreme Court said:

> There are only two elements required to establish a violation of a "per se" law: (1) driving, or actual physical control of, a vehicle; and (2) a blood alcohol content of 0.10% or greater. See Greaves v. State, 528 P.2d 805, 807–08 (Utah 1974) ("The statute states with sufficient clarity and conciseness the two elements necessary to constitute its violation. They are (1) a blood alcohol concentration of .10 per cent, and (2) concurrent operation or actual physical control of any vehicle."); see also, Davis v. Commonwealth, 8 Va.App. 291, 298, 381 S.E.2d 11, 15 (1989) (requires proof that "*at the time [the defendant] was driving* his blood alcohol concentration was at least .10 percent" (emphasis in original)). Proof that the defendant was "under the influence" or that he was "intoxicated" is not required. See Long v. State, 284 Ark. 21, 24, 680 S.W.2d 686, 688 (1984) (intoxication not a violation of the "per se" law; violation per se to drive with a blood alcohol content of .10% or more); State v. Nelson, 119 Idaho 444, 447, 807 P.2d 1282, 1284–85 (Ct.App.1991) (legislative intent that prosecutions for drunk driving could be "grounded in a per se 0.10 alcohol concentration test, rather than in complicated proof over the level of impairment of any particular individual"); State v. Muehlenberg, 118 Wis.2d 502, 505, 347 N.W.2d 914, 915 (App.Ct.1984) (substantive offense is defined as act of driving with 0.10% blood alcohol content and not "driving under the influence").

Curren, 620 So.2d at 740–741.

§ 1:5 Under the influence of alcohol

Research References

West's Key Number Digest, Automobiles ⚿332

The other way to allege an alcohol-related DUI offense is to allege that the defendant drove or was in actual physical control of a vehicle "under the influence of alcohol." This is commonly referred to as an "A-2" charge, named after its subsection of the Ala. Code § 32-5A-191(a)(2). While the statute states that it is a crime to drive "under the

influence" of alcohol, the statute is silent in defining what constitutes an amount of alcohol that violates the statute. The leading case in Alabama defining the term "under the influence" of alcohol is Ex Parte Barry Wayne Buckner (*Ex parte Buckner*, 549 So. 2d 451 (Ala. 1989)). Prior to *Buckner*, trial judges would charge juries in jury trial cases or apply the law as then pronounced in nonjury cases according to the law as expressed by the Alabama Court of Criminal Appeals. They would apply the following: "The Court of Criminal Appeals has held that [a] person is guilty of violating § 32-5A-191(a)(2) if he drives a vehicle under the influence of alcohol, regardless of the degree of that influence." This standard, which is set forth in the now overruled case of *Pace v. City of Montgomery*, is known as the "Pace Standard." 455 So. 2d 180 (Ala. Crim. App. 1984), overruled by *Ex Parte Buckner*. The *Buckner* court reasoned that applying the logic of the Pace Standard could lead to illegal results. The court said: "The *Pace* standard of applying § 32-5A-191(a)(2) would make it illegal for a person to have a small glass of wine with his dinner at a restaurant and then drive home because he would be 'under the influence' even though the amount of alcohol in his blood would be less than 0.05 percent. At the same time, if that person were given a test for blood alcohol content, he would be presumed not to be under the influence of alcohol. Thus, while the courts have said that paragraphs (a)(1) and (a)(2) of § 32-5A-191 define the same offense, their application can lead to opposite results under the same facts." Judges now charge the jury according to the definition that was adopted by the Alabama Supreme Court in *Buckner*, i.e., that under the influence of alcohol means drinking to the extent that the alcohol renders one "incapable of safely operating the vehicle."

According to the Alabama Pattern Jury Instructions, the elements of a DUI offense under § 32-5A-191 (a)(2) are that the defendant:

1. Drove or was in actual physical control of a vehicle
2. Under the influence of alcohol
3. To the extent that it rendered him or her incapable of safely operating the vehicle

§ 1:6 Under the influence of a controlled substance

Research References

West's Key Number Digest, Automobiles ⚿332

In cases where an individual has not been drinking but has become incapable of safely operating a vehicle safely due to the consumption of one or more controlled substances, he or she should be charged pursuant to § 32-5A-191(a)(3), Code of Alabama. The provisions of § 32-5A-191(d) say that it is not a defense to the charge of driving under the influence of a controlled substance that the person charged had a valid prescription for the substance or was otherwise legally entitled to use the substance. The elements as set out in the statute are that the defendant:

1. Drove or was in actual physical control of a vehicle
2. Under the influence of a controlled substance

3. To a degree that renders him or her incapable of safely driving

Whether or not a substance is a "controlled substance" for purposes of subsection (a)(3) of § 32-5A-191, depends upon whether it is enumerated in Schedule I through V, under the Alabama Uniform Controlled Substances Act (CSA). The CSA is codified in Ala. Code §§ 20-2-1 et seq. Under the CSA, the State Board of Health may add, delete or reschedule substances to the controlled substances schedules. Ala. Code § 20-2-20. The schedules are revised and republished at least annually by the State Board of Health. Ala. Code § 20-2-32. If you represent a client charged with driving under the influence of a controlled substance, make sure you verify whether the substance at issue is in fact one of the substances enumerated in the Controlled Substance List, and make certain you are reviewing the controlled substance list in effect at the time of the alleged offense. At the time of this writing, a copy of the Controlled Substances List is available at www.adph.org/publications/assets/ControlledSubstancesList.pdf.

Author's Note: These types of DUI cases are problematic from a prosecutorial viewpoint. First of all, the prosecution must prove that the defendant actually consumed a controlled substance. More difficult to prove, however, is the fact that there was a sufficient quantity of a controlled substance in the defendant at the time of driving that rendered him or her incapable of safely driving. This would require most often a forensic blood test showing a quantitative analysis of the controlled substance, combined with expert testimony from a qualified witness to interpret the results of the analysis.

§ 1:7 Under the combined influence of alcohol and a controlled substance

Research References

West's Key Number Digest, Automobiles ⚿332

These "combined influence" cases are often more difficult to prove than just an alcohol DUI. The Illinois case of *People v. Foltz*, 403 Ill. App. 3d 419, 343 Ill. Dec. 395, 934 N.E.2d 719 (5th Dist. 2010), appeal denied, 239 Ill. 2d 564, 348 Ill. Dec. 193, 943 N.E.2d 1103 (2011), illustrates this point. In *Foltz* the appellate court held that the smell of burnt cannabis coming from the defendant's car was not sufficient to prove that he had smoked cannabis the evening of his arrest or that cannabis was in his breath, blood or urine at the time of his arrest. 934 N.E.2d at 725. The only evidence of the defendant's impairment was his failure to pass the field sobriety tests that were administered, and the officer testified that the defendant's signs of impairment could be indicators of the presence of drugs, alcohol or both. 934 N.E.2d at 725. The appellate court held that under these circumstances there was insufficient evidence to prove the defendant guilty beyond a reasonable doubt for driving under the combined influence of alcohol and drugs. 934 N.E.2d at 725. The court reversed the defendant's conviction for aggravated combined influence DUI. 934 N.E.2d at 725. The court stated:

> The smell of burnt cannabis coming from the defendant's car does not prove that he had smoked cannabis that evening or that cannabis was in his breath, blood, or urine at the time of his arrest. Furthermore, the remaining evidence of intoxication is far less than the evidence presented in any of above-cited cases. The defendant did not have slurred speech, dilated pupils, glassy eyes, bloodshot eyes, trouble walking, or trouble getting out of his vehicle, nor did he admit to recently smoking cannabis. The only evidence of the defendant's impairment is his failure to pass the field sobriety tests that were administered. However, . . . Officer Wilkey testified that the defendant's signs of impairment could be indicators that drugs, alcohol, or both were present. Therefore, we agree with the defendant that there is insufficient evidence to prove him guilty beyond a reasonable doubt for driving under the combined influence of alcohol and drugs.

People v. Foltz, 934 N.E.2d at 725.

§ 1:8 Under the influence of any substance which impairs the mental or physical faculties of such person to a degree which renders him or her incapable of safely driving

Research References

West's Key Number Digest, Automobiles ⚿332

In situations where an individual is incapable of safely operating a vehicle because of the ingestion of substances other than alcohol or a controlled substance, he or she can still be charged with driving under the influence. Case law in Alabama is clear, however, that if the substance that constitutes the impairing substance is exclusively alcohol or exclusively a controlled substance, the defendant cannot be convicted under this subsection. As the case of *Sturgeon v. City of Vestavia Hills*, 599 So. 2d 92 (Ala. Crim. App. 1992) held, when one is charged under § 32-5A-191(a)(5) (the any-substance subsection) proof must be that the impairing substance was something other than those substances mentioned in subsections 32-5A-191(a) (1, 2, 3 or 4). The *Sturgeon* court said:

> The next question then, is whether the term "any substance" as used in § 32-5A-191(a)(5) includes alcohol. Our examination of the statute indicates that § 32-5A-191(a)(5) does not include the substances covered by subsections (a)(1) through (a)(4).
>
> . . . Subsection (a)(5) was added in 1983. Thus, it was added some years after the enactment that included subsections (a)(1) through (a)(4). It would appear that the legislature enacted subsection (a)(5) in order to cover those situations that were not previously covered by the statute. Because alcohol and controlled substances were already addressed in sections (a)(1) through (a)(4), there would have been no need to enact (a)(5) unless it applied to other substances. Furthermore, if (a)(5) included alcohol and controlled substances, a defendant could always be charged under (a)(5). Certainly, the legislature did not intend to render subsections (a)(2) through (a)(4) meaningless by the enactment of (a)(5). Under subsection (a)(1), the prosecuting authority must prove that the defendant's blood-alcohol was .10 or more. Frazier v. City of Montgomery, 565 So.2d 1255 (Ala.Crim.App.1990). If proceeding under subsection (a)(2), the prosecuting authority must prove that the defendant was under the influence of alcohol. Thus, a person

charged under (a)(1) cannot be convicted under the proof required for (a)(2). A prosecution under (a)(3) requires the prosecuting authority to prove that the defendant was under the influence of a controlled substance. A prosecution under (a)(4) requires proof that the defendant was under the influence of alcohol and a controlled substance. Our review of the statute leads us to conclude that (a)(5) was enacted to cover those situations in which the defendant's mental and/or physical faculties are impaired by some substance other than alcohol or a controlled substance. An example of the proper application of (a)(5) can be seen in Raper v. State, 584 So.2d 544 (Ala.Crim.App.1991). The different subsections of § 32-5A-191 are alternative methods of proving the same offense (DUI) and that *specific* alternative must be alleged and proved.

Sisson v. State, 528 So.2d 1159, 1162–63 (Ala.1988).

§ 1:9 Underage DUI

Research References

West's Key Number Digest, Automobiles ⚿332

Different standards apply to Alabama's DUI laws concerning individuals under 21 years of age. As of the date of this writing, the legal drinking age for alcohol in the state of Alabama is 21. Although there have been some initiatives of certain colleges and universities to lower the legal drinking age back down to 18, there is no immediate expectation that it will be lowered. The debate over a satisfactory age to consume alcoholic beverage goes back for thousands of years. According to Plato, no one under the age of 18 should drink alcoholic beverage (wine at the time) because young people tended to become "excited" and it was improper to inflame this with wine. Plato, Laws, Book II (circa 360 B.C.E).

The debate continues today, with about seven states currently proposing laws to reduce the drinking age to 18 for people in the military. The theory behind this movement is that if they can take a shot on the battlefield, they ought to be able to legally take a shot in a bar.

Alabama's underage DUI Statute is found at Ala. Code § 32-5A-191(b):

b) A person who is under the age of 21 years shall not drive or be in actual physical control of any vehicle if there is .02 percentage or more by weight of alcohol in his or her blood. The Department of Public Safety shall suspend or revoke the driver's license of any person, including, but not limited to, a juvenile, child, or youthful offender, convicted or adjudicated of, or subjected to a finding of delinquency based on this subsection. Notwithstanding the foregoing, upon the first violation of this subsection by a person whose blood alcohol level is between .02 and .08, the person's driver's license or driving privilege shall be suspended for a period of 30 days in lieu of any penalties provided in subsection (e) of this section and there shall be no disclosure, other than to courts, law enforcement agencies, and the person's employer, by any entity or person of any information, documents, or records relating to the person's arrest, conviction, or adjudication of or finding of delinquency based on this sub-section. All persons, except as otherwise provided in this subsection for a first of-

> fense, including, but not limited to, a juvenile, child, or youthful offender, convicted or adjudicated of, or subjected to a finding of delinquency based on this subsection shall be fined pursuant to this section, notwithstanding any other law to the contrary, and the person shall also be required to attend and complete a DUI or substance abuse court referral program in accordance with subsection (i). Code of Alabama, 1975 § 32-5A-191(b).

An analysis of the above Code section may provide more questions than answers, but at a glance one can readily conclude that the section is poorly written and is incomplete. Under certain factual patterns, the statute is easy to decipher. With other facts, however, the statute is either lacking or confusing.

§ 1:10 Underage over .02% BAC charge

Research References
West's Key Number Digest, Automobiles ⚿332

This general classification encompasses the situations where an underage drinker has submitted to a chemical test and a blood alcohol content (BAC) has been obtained. The elements of the offense are:

1. Driving or being in actual physical control of a vehicle, and
2. A blood alcohol level of .02% or greater.

The blood alcohol level of the person is important. If convicted, the punishment available to the court depends upon the BAC level proven. The categories of this situation as it relates to punishment are 1) first offenses with a BAC between .02 and .08%, 2) first offense cases with a BAC over .08%, and 3) multiple offenders.

§ 1:11 Underage first offense BAC between .02 and .08%

Research References
West's Key Number Digest, Automobiles ⚿332

The wording of the statute is quite clear when faced with a situation wherein you have an underage person who is arrested for the first time for DUI and whose blood alcohol content falls between a .02% and a .08%. In that event, the only punishment available to the court is that set out in the statute, i.e., the individual's driver's license shall be suspended for a period of 30 days. This penalty is in lieu of the other penalties in subsection (e). The penalties that are not allowed for a first-offense underage person who has a BAC between .02 and .08% in subsection (e) are 1) a fine, 2) imprisonment, and 3) suspension of driver's license for 90 days. The statute is unclear as to whether a court may order the person to attend a court referral DUI program through the Administrative Office of Courts under subsection (i).

§ 1:12 Underage BAC over .08%

Research References
West's Key Number Digest, Automobiles ⚿332

The next situation to be discussed is the individual who is under 21 and has a blood alcohol content of over .08%. According to subsection (b) of § 32-5A-191, this individual's potential punishment is 1) a fine "pursuant to § 191" and 2) a court referral program. The inclusion of the court referral program here seems to indicate that the CRO program would not be applicable in the situation of a BAC of between a .02 and .08%. The statute does not permit a jail sentence, whether suspended or not.

§ 1:13 Underage multiple offender

Research References

West's Key Number Digest, Automobiles ⚿332

The third situation of an underage person who has been convicted of having a BAC of over .02 or greater is that of the multiple offender. The statute is ambiguous as it relates to underage multiple offenders. It appears that the statute does not permit a jail sentence of any kind, whether it is the underage person's first, second, third, or subsequent offense. The sentence may include an advanced CRO program and an increased fine, but no jail sentence of any kind is permitted under the statute.

§ 1:14 Underage no BAC/refusal

Research References

West's Key Number Digest, Automobiles ⚿332

In cases where an underage driver has refused chemical testing and there is no BAC percentage to present to the trier of fact, then a different set of elements arise as well as a different sentencing scheme. This dichotomy could possibly be considered a fatal defect in the underage DUI law due to a totally different set of rules being applied. In a situation where an underage driver either refuses a chemical test or for whatever reason there is not a BAC number to present to the court, the applicable rules and definitions totally change. Since there is not a BAC, the individual would have to be charged with violating § 32-5A-191(a)(2). There is no underage definition of "under the influence of alcohol," therefore, it is presumed that the court would be left with the "adult" definition. The measure of proof would be to prove that the underage person had consumed alcohol to the extent that it rendered him or her incapable of safely operating the vehicle (*see Buckner*, 549 So.2d at 453.). In addition, the penalty provisions of subsection (b) would not apply so that the underage person who does not have a BAC percentage would be subject to the imprisonment provisions of section 191 of the Code. This could very well be a violation of the U.S. Constitution as an impediment to the right of equal protection of the law.

§ 1:15 Youthful Offender Act

Alabama's Youthful Offender Act, which is found in Ala. Code § 15-

19-1 through 15-19-7, "is intended to extricate persons below twenty-one years of age from the harshness of criminal prosecution and conviction." *Pardue v. State*, 566 So. 2d 502, 505 (Ala. Crim. App. 1990) (quoting *Raines v. State*, 294 Ala. 360, 317 So. 2d 559, 561 (1975)). "It is designed to provide them with the benefits of an informal, confidential, rehabilitative system." 566 So. 2d at 505. Youthful Offender adjudications are designed to protect young people from "the stigma and often harmful consequences of the criminal adjudicatory process." *Raines v. State*, 317 So. 2d at 562. "It is a manifestation of the legislature's judgment that while person are still young they may more readily and appropriately respond to methods of treatment which are more rehabilitative, more correctional and less severe than penalties to which adults are exposed." 317 So. 2d at 562.

The stated intent behind the Youthful Offender Act, finds support in human brain science, a field that has made great strides in the past several years. This relatively new area of science was brought about, in part, as a result of the use of MRI (magnetic resonance imaging). It was not feasible to study the brain using x-ray technology for obvious reasons. Researchers have found that the human brain does not fully develop until the approximate age of 23 years old. The last part of the brain to develop is the frontal lobe, which controls a person's judgment. This is in part the reason for the "I'm invincible" phenomenon commonly associated with teenagers and young adults. *See* Giedd JN, Blumenthal J, Jeffries NO, et al. Brain development during childhood and adolescence: a longitudinal MRI study. Nature Neuroscience, 1999, 2(10): 861-3; Baird AA, Gruber SA, Fein DA, et al. Functional magnetic resonance imaging of facial affect recognition in children and adolescents. Journal of the American Academy of Child and Adolescent Psychiatry, 1999, 38(2): 195-9; Sowell ER, Thompson PM, Holmes CJ, et al. In vivo evidence for post-adolescent brain maturation in frontal and striatal regions. Nature Neuroscience, 1999; 2(10): 859–61.

When it comes to determining whether or not to extend the protections of youthful offender status to a defendant, the trial court has nearly absolute discretion. *Flowers v. State*, 922 So. 2d 938, 945 (Ala. Crim. App. 2005); *Morgan v. State*, 363 So. 2d 1013 (Ala. Crim. App. 1978). While there is no set methodology that the court must follow when considering whether to grant youthful offender status, generally, the trial court considers the nature of the crime charged, any prior convictions, the defendant's age, and any other matters deemed relevant by the court. *Flowers v. State*, 922 So. 2d at 945.

Youthful offender status applies to criminal offenses which are committed prior to the person's 21st birthday and after 17 years. A Defendant reached 21 years of age at first instant of his birthday, and thus was not entitled to youthful offender status for offense committed on 21st birthday, notwithstanding that offense was committed before hour at which he was born 21 years earlier. *Beavers v. State*, 687 So. 2d 214 (Ala. Crim. App.1996). Typically the juvenile court has jurisdiction of crimes committed while 17 and under. Youthful Offender status applies to crimes committed while the person is 18, 19 or 20. These are the

general guidelines regarding the minimum age of the youth, there could be situations where a 17 year old, being charged as an adult would be eligible for treatment as a youthful offender. *See J.C. v. State*, 941 So. 2d 1011 (Ala. Crim. App. 2005). Alabama's DUI offenses are clearly amenable to the youthful offender treatment per *Ex parte King*, 547 So. 2d 579 (Ala. 1989).

In keeping with its the purpose of protecting those who fall within its ambit from the stigma and practical consequences of a conviction for a crime, the Youthful Offender Act provides for confidentiality in the proceedings and in the availability of the offender's records with regard to the adjudication. In most situations, the primary benefit the youth receives from being granted youthful offender status is having a sealed record. "A determination that one is a youthful offender (1) does not disqualify the youth from public office or public employment, (2) does not operate as a forfeiture of any right or privilege, (3) does not make him ineligible to receive any license granted by public authority, and (4) shall not be deemed a conviction of crime; and (5) the record shall not be open to public inspection except upon permission of the court." *Raines v. State*, 317 So.2d at 561. Further, youthful offender adjudications cannot be used to impeach a witness under Rule 609 of the Alabama Rules of Evidence. Ala. R. Evid. 609(d) ("Evidence of juvenile or youthful offender adjudication is not admissible under this rule"). An adjudication as a youthful offender is considered to be a status offense, instead of a criminal offense. Theoretically, even if convicted of being a youthful offender, the person could answer on employment applications, that he has not been convicted of a criminal offense. A youthful offender adjudication cannot be used as "felony conviction" to enhance sentence or to bring the defendant within purview of Habitual Offender Act. *Hardy v. State*, 709 So. 2d 490 (Ala. Crim. App.1995), opinion on return from remand.

If the trial court grants a defendant youthful offender status and the defendant does not plead guilty, then "the trial of the charge as a youthful offender shall be before the judge without a jury." Ala. Code § 15-19-4. As the Alabama Supreme Court has noted, the introduction of a jury in to youthful offender proceedings would destroy any confidentiality with which the Youthful Offender Act attempts to clothe the proceeding and the youthful offender's record. *Raines v. State*, 294 Ala. 360, 317 So. 2d 559 (1975). Further, as a practical matter, the Act's provision that youthful offenders be tried a separate sessions from adults charged with crime would become virtually impossible to implement. 317 So. 2d at 564.

> The failure to inform an age-qualified defendant of his right to apply for youthful offender treatment goes to the voluntariness of the guilty plea, not to the jurisdiction of the trial court. The question of the voluntariness of a guilty plea in a failure-to-advise case may be raised upon direct appeal or it may be raised collaterally under Rule 32 if it is raised within the limitations period of Rule 32.2(c), A.R.Crim.P.

Gordon v. Nagle, 647 So. 2d 91, 96 (Ala. 1994).

Ala. Code § 15-19-6(a)(2) establishes the maximum probationary

sentence or period allowable for a youthful offender, which is three years.

> That [three year] limitation on a sentence of probation is obviously one of the intended advantages of the Act. By comparison, the maximum probationary period for "adult" defendants found guilty of a felony is five years. Code of 1975, § 15-22-54(a). Hence, consecutive sentences of probation would thwart the intention of the legislature.

Ex parte Jackson, 415 So. 2d 1169, 1170 (Ala. 1982); *Ex parte L.R.*, 586 So. 2d 174 (Ala. 1991) (holding that consecutive sentences for a youthful offender that totaled more than three years were not permitted under the Youthful Offender Act).

§ 1:16 Illegal consumption

Research References

West's Key Number Digest, Automobiles ⚿332

It is quite common to see a concurrent charge of illegal consumption of alcohol when an underage driver has been arrested for driving under the influence of alcohol. It is more common in juvenile cases than in nonjuvenile cases. The punishment provisions of illegal consumption are stricter than the punishment provisions of § 32-5A-191(b). There are two separate "illegal consumption" statutes in the Alabama Code. One is found in § 28-1-5, and the other is found in § 28-3A-25. It is the opinion of this writer that only one is intended for regular citizens and the other is intended for offenses occurring while minors are working within the alcoholic beverage industry. Both will be discussed.

§ 28-1-5. Minimum age for purchasing, consuming, possessing, dispensing, or serving alcohol—Penalty

Notwithstanding the provisions of Section 26-1-1, it shall be unlawful for a person less than 21 years of age to purchase, consume, possess, or to transport any alcohol, liquor or malt or brewed beverages within the State of Alabama. Notwithstanding any other provision of this section, it shall not be unlawful for any Alcoholic Beverage Control Board licensee to employ any person under the legal drinking age to work, provided there is an adult in attendance at all times. It shall be permissible to employ persons in an on-premise licensed establishment under legal drinking age such as professional entertainers, show people, musicians, cashiers, hostesses, ushers, waiters and waitresses, busboys or girls, and the like, provided they do not serve, dispense or consume alcoholic beverages and there is an adult in attendance at all times. Notwithstanding the previous sentence, persons who are 19 years of age or older and working as a waiter, waitress, or server may serve alcoholic beverages during normal dining hours in a restaurant which holds an Alcoholic Beverage Control Board restaurant retail license. An employer who employs a person between the ages of 19 and 21 to serve alcoholic beverages as provided in the preceding sentence shall be a licensee of the board who has been annually certified as a responsible vendor under the Alabama Responsible Vendor

Act as provided in Chapter 10 (commencing with Section 28-10-1) of this title.

Whoever violates this section shall be fined not less than $25.00 nor more than $100.00, or imprisoned in the county jail for not more than 30 days or both; provided further, that juvenile offenders shall not be held in the county jail, but shall be held, either before or after sentencing, in a juvenile detention facility pursuant to the guidelines of the Department of Youth Services, which shall be separate and apart from adult offenders.

§ 28-3A-25

(19) For any person under the legal drinking age, as defined in Section 28-1-5, to attempt to purchase, to purchase, consume, possess, or to transport any alcoholic beverages within the state; provided, however, it shall not be unlawful for a person under the legal drinking age, as defined in Section 28-1-5, to be an employee of a wholesale licensee or an off-premises retail licensee of the board to handle, transport, or sell any beer or table wine if the person under the legal drinking age is acting within the line and scope of his or her employment while so acting. There must be an adult licensee, servant, agent, or employee of the same present at all times a licensed establishment is open for business.

(22)

(2) Any violation of any provision of subdivisions (19), (20), (21), and (22) of subsection (a) of this section shall be a misdemeanor punishable by a fine of not less than fifty dollars ($50) nor more than five hundred dollars ($500), to which, at the discretion of the court or judge trying the case, may be added imprisonment in the county jail or at hard labor for the county for not more than three months.

In addition to the penalties otherwise provided for a violation of subdivisions (19) and (22) of subsection (a) of this section, upon conviction, including convictions in juvenile court or under the Youthful Offender Act, the offender's license to operate a motor vehicle in this state shall be surrendered by the offender to the judge adjudicating the case for a period of not less than three months nor more than six months. The judge shall forward a copy of the order suspending the license to the Department of Public Safety for enforcement purposes.

§ 1:17 School bus or day care driver

Research References

West's Key Number Digest, Automobiles ⚿332

There is a special provision in the Alabama Code which applies to school bus or day care drivers. The elements as found in § 32-5A-191(c)(1) are:

1. Must be a school bus or day care driver

2. Driving or be in actual physical control of any vehicle
3. While in the performance of his or her duties
4. Blood alcohol percentage greater than .02

Although somewhat unclear, the statute implies that it only applies to someone who is being hired for compensation for driving, either to or from school in a school bus or to and from day care in an unspecified vehicle. If convicted, the individual will receive an enhanced suspension of his or her driving privileges or license for one year for a first conviction.

Author's Note: This statute needs improvement. It is silent as to whether it would apply to moms or dads who for consideration are driving to or from school or day care with the neighbors' children. It does not have a corresponding stiffer penalty for refusing a chemical test. In addition, it does not define "duties." I have not seen an application of this provision.

§ 1:18 Commercial vehicle

Research References

West's Key Number Digest, Automobiles ⚿332

Section 32-5A-191(c)(2) of the Alabama Code makes it illegal to drive a commercial vehicle with a blood alcohol level of .04% or greater. The subject of commercial vehicle DUI cases will be covered in Chapter 3. Basically, as it relates to commercial drivers' DUI convictions, an individual's regular driver's license suspension is governed by § 32-5A-191 and the commercial driver's license is governed by 49 C.F.R. §§ 383.1 et seq., as applicable.

§ 1:19 Statutory sentencing guidelines

Research References

West's Key Number Digest, Automobiles ⚿332

The statutory punishment for committing a DUI offense is dependent upon a number of factors, including the number of DUI offenses that have been committed by the person, the BAC of the accused, whether the person refused a chemical test, the age of the accused, the age of any passengers and if anyone other than that person was injured. This is an area of DUI law that has been through several recent and significant changes in the last couple of years. Currently, the "look back" period of time for determining whether a DUI offense is a first, second, or third offense is five years. *Hankins v. State*, 989 So. 2d 610 (Ala. Crim. App. 2007). To determine what the statutory minimum sentence is, a determination must be made as to whether the person has had any DUI convictions within five years of the conviction date of the present offense. As a general statement, if the conviction is a first DUI conviction within a five year period, then the statutory minimums apply for a first offense under § 32-5A-191(e) would apply. If it is a second DUI conviction within five years from the present DUI conviction date, then the statutory min-

imum sentencing provisions of § 32-5A-191(f) would apply. Municipal DUI convictions count as a prior DUI convictions for purposes of computing prior offenses.

First Offense

Subsection (e) of the DUI statute sets out the penalties for a first offense DUI conviction:

> (e) Upon first conviction, a person violating this section shall be punished by imprisonment in the county or municipal jail for not more than one year, or by fine of not less than six hundred dollars ($600) nor more than two thousand one hundred dollars ($2,100), or by both a fine and imprisonment. In addition, on a first conviction, the Director of Public Safety shall suspend the driving privilege or driver's license of the person convicted for a period of 90 days. The 90-day suspension shall be stayed if the offender elects to have an approved ignition interlock device installed and operating on the designated motor vehicle driven by the offender for six months. The offender shall present proof of installation of the approved ignition interlock device to the Department of Public Safety and obtain an ignition interlock restricted driver license. The remainder of the suspension shall be commuted upon the successful completion of the elected use, mandated use, or both, of the ignition interlock device. If, on a first conviction, any person refusing to provide a blood alcohol concentration or if a child under the age of 14 years was a passenger in the vehicle at the time of the offense or if someone else besides the offender was injured at the time of the offense, the Director of the Department of Public Safety shall suspend the driving privilege or driver's license of the person convicted for a period of 90 days and the person shall be required to have an ignition interlock device installed and operating on the designated motor vehicle driven by the offender for a period of two years from the date of issuance of a driver's license indicating that the person's driving privileges are subject to the condition of the installation and use of a certified ignition interlock device on a motor vehicle. After a minimum of 45 days of the license revocation or suspension pursuant to Section 32-5A-304 or this section, or both, is completed, upon receipt of a court order from the convicting court, upon issuance of an ignition interlock restricted driver license, and upon proof of installation of an operational approved ignition interlock device on the designated vehicle of the person convicted, the mandated ignition interlock period of two years provided in this subsection shall start and the suspension period, revocation period, or both, as required under this subsection shall be stayed. The remainder of the driver license revocation period, suspension period, or both, shall be commuted upon the successful completion of the period of time in which the ignition interlock device is mandated to be installed and operational.

Ala. Code § 32-5A-191(e).

Second Offense

Subsection (f) of the DUI statute sets out the penalties for a second offense DUI conviction:

> (f) On a second conviction within a five-year period, a person convicted of violating this section shall be punished by a fine of not less than one thousand one hundred dollars ($1,100) nor more than five thousand one hundred dollars ($5,100) and by imprisonment, which may include

> hard labor in the county or municipal jail for not more than one year. The sentence shall include a mandatory sentence, which is not subject to suspension or probation, of imprisonment in the county or municipal jail for not less than five days or community service for not less than 30 days. In addition the Director of Public Safety shall revoke the driving privileges or driver's license of the person convicted for a period of one year and the offender shall be required to have an ignition interlock device installed and operating on the designated motor vehicle driven by the offender for a period of two years from the date of issuance of a driver's license indicating that the person's driving privileges are subject to the condition of the installation and use of a certified ignition interlock device on a motor vehicle. After a minimum of 45 days of the license revocation or suspension pursuant to Section 32-5A-304, this section, or both, is completed, upon receipt of a court order from the convicting court, upon issuance of an ignition interlock restricted driver license, and upon proof of installation or an operational approved ignition interlock device on the designated vehicle of the person convicted, the mandated ignition interlock period of two years approved in this subsection shall start and the suspension period, revocation period, or both, as required under this subsection shall be stayed. The remainder of the driver license revocation period, suspension period, or both, shall be commuted upon the successful completion of the period of time in which the ignition interlock device is mandated to be installed and operational.

Ala. Code § 32-5A-191(f).

Third Offense

Subsection (g) of the DUI statute sets out the penalties for a third offense DUI conviction:

> (g) On a third conviction, a person convicted of violating this section shall be punished by a fine of not less than two thousand one hundred dollars ($2,100) nor more than ten thousand one hundred dollars ($10,100) and by imprisonment, which may include hard labor, in the county or municipal jail for not less than 60 days nor more than one year, to include a minimum of 60 days which shall be served in the county or municipal jail and cannot be probated or suspended. In addition, the Director of Public Safety shall revoke the driving privilege or driver's license of the person convicted for a period of three years and the offender shall be required to have an ignition interlock device installed and operating on the designated motor vehicle driven by the offender for a period of three years from the date of issuance of a driver's license indicating that the person's driving privileges are subject to the condition of the installation and use of a certified ignition interlock device on a motor vehicle. After a minimum of 180 days of the license revocation or suspension pursuant to Section 32-5A-304, this section, or both, is completed, upon receipt of a court order from the convicting court, upon issuance of an ignition interlock restricted driver license, and upon proof of installation of an operational approved ignition interlock device on the designated vehicle of the person convicted, the mandated ignition interlock period of three years provided in this subsection shall start and the suspension period, revocation period, or both, as required under this subsection shall be stayed. The remainder of the driver license revocation period, suspension period, or both, shall be commuted upon the successful completion of the period of time in which the ignition interlock device is mandated to be installed and operational.

Ala. Code § 32-5A-191(g).

Felony

Subsection (h) of the DUI statute sets out the penalties for a fourth of susequent DUI conviction, which is a felony:

> (h) On a fourth or subsequent conviction, a person convicted of violating this section shall be guilty of a Class C felony and punished by a fine of not less than four thousand one hundred dollars ($4,100) nor more than ten thousand one hundred dollars ($10,100) and by imprisonment of not less than one year and one day nor more than 10 years. Any term of imprisonment may include hard labor for the county or state, and where imprisonment does not exceed three years confinement may be in the county jail. Where imprisonment does not exceed one year and one day, confinement shall be in the county jail. The minimum sentence shall include a term of imprisonment for at least one year and one day, provided, however, that there shall be a minimum mandatory sentence of 10 days which shall be served in the county jail. The remainder of the sentence may be suspended or probated, but only if as a condition of probation the defendant enrolls and successfully completes a state certified chemical dependency program recommended by the court referral officer and approved by the sentencing court. Where probation is granted, the sentencing court may, in its discretion, and where monitoring equipment is available, place the defendant on house arrest under electronic surveillance during the probationary term. In addition to the other penalties authorized, the Director of Public Safety shall revoke the driving privilege or driver's license of the person convicted for a period of five years and the offender shall be required to have an ignition interlock device installed and operating on the designated motor vehicle driven by the offender for a period of five years from the date of issuance of a driver's license indicating that the person's driving privileges are subject to the condition of the installation and use of a certified ignition interlock device on a motor vehicle. After a minimum of one year of the license revocation or suspension pursuant to Section 32-5A-304, this section, or both, is completed, upon receipt of a court order from the convicting court, upon issuance of an ignition interlock restricted driver license, and upon proof of installation of an operational approved ignition interlock device on the designated vehicle of the person convicted, the mandated ignition interlock period of five years provided in this subsection shall start and the suspension period, revocation period, or both, as required under this subsection shall be stayed. The remainder of the driver license revocation period, suspension period, or both, shall be commuted upon the successful completion of the period of time in which the ignition interlock device is mandated to be installed and operational.
>
> The Alabama habitual felony offender law shall not apply to a conviction of a felony pursuant to this subsection, and a conviction of a felony pursuant to this subsection shall not be a felony conviction for purposes of the enhancement of punishment pursuant to Alabama's habitual felony offender law. However, prior misdemeanor or felony convictions for driving under the influence may be considered as part of the sentencing calculations or determinations under the Alabama Sentencing Guidelines or rules promulgated by the Alabama Sentencing Commission.

Ala. Code § 32-5A-191(h).

Enhancements and Special Provisions

The DUI practitioner must be aware not only of the number of prior

DUI convictions a client has but also whether the sentence enhancement provisions of the DUI statute apply.

BAC of 0.15 or Greater

Subsection (i) provides for enhanced punishment for any person convicted of DUI who is found to have a BAC of 0.15 or higher. One should note that the driver's license/privilege revocation of one year has been removed by the 2014 DUI Act.

> (i) When any person convicted of violating this section is found to have had at least 0.15 percent or more by weight of alcohol in his or her blood while operating or being in actual physical control of a vehicle, he or she shall be sentenced to at least double the minimum punishment that the person would have received if he or she had less than 0.15 percent by weight of alcohol in his or her blood. Upon the first violation of this subsection, the offender shall be ordered by the court to have an ignition interlock device installed and operating on his or her designated motor vehicle for a period of two years from the date of issuance of an ignition interlock-restricted driver's license. If the adjudicated offense is a misdemeanor, the minimum punishment shall be imprisonment for one year, all of which may be suspended except as otherwise provided for in subsections (f) and (g).

Ala. Code § 32-5A-191(i).

Child Under 14 Years Old in Vehicle

Subsection (j) mandates enhanced sentencing for anyone over the age of 21 who had a child under 14 in his or her vehicle when violating the DUI statute:

> (j) When any person over the age of 21 years is convicted of violating this section and it is found that a child under the age of 14 years was a passenger in the vehicle at the time of the offense, the person shall be sentenced to at least double the minimum punishment that the person would have received if the child had not been a passenger in the motor vehicle.

Ala. Code § 32-5A-191(j).

§ 1:20 Ignition interlock devices

In 2011, Alabama became the 50th state to enact an ignition interlock law and joined a growing number of states that require mandatory ignition interlocks for BAC's of 0.15 or greater and for repeat offenders. Many other states leave the imposition of ignition interlocks to the discretion of the trial judge.

In 2014, Alabama amended the law yet again to allow for the use of ignition interlock devices in the stead of certain portions of otherwise mandatory driver's license suspension periods. In other words, under the latest revisions a person may have all or part of their ordered driver's license suspension commuted into a certain length of ignition interlock time. The 2014 law (Alabama Act No. 2014-222) became effec-

tive on July 1, 2014.[1] This law was apparently "pushed" by the interlock providers' lobbying efforts. It should be noted that although Alabama has had an "interlock law" since 2011, due to a few factors, it has only sporadically been enforced. Time will tell how effective the new law will be implemented.

An ignition interlock device is a device that is wired to a vehicle's ignition system. In order for the vehicle to start, the person must blow a breath sample into the device and the resulting breath alcohol must register below a .02%. If the subject's breath alcohol is higher than .02%, then the vehicle will not start. Under the new law defendants convicted of a second offense DUI (within five years) or a third or subsequent offense DUI (within five years) will be required to have a ignition interlock device installed in their vehicle as part of their DUI sentence. Even some first-time DUI offenders are subject to the new interlock law. More specifically, four classes of DUI first offenders are subject to mandatory ignition interlock: defendants with a BAC of 0.15 or greater, defendants who refuse to provide a BAC sample, defendants who had a passenger under 14 years of age in the vehicle, and defendants who had the misfortune of injuring or being involved in an occurrence that injured someone other than themselves.

There are various costs related to the interlock which must be paid by the defendant. These will be discussed in some detail later. One of the retributive requirements for those convicted under the new law, is the requirement that the person get a "scarlet letter" driver's license. The "scarlet letter" license must display that the person's driving privileges are subject to the condition of the installation and use of an interlock. Thus, whenever the person shows their driver's license as identification, he or she will be exposed as a DUI convict.

How long is a person subjected to the interlock requirement?

- 1st DUI Conviction
  - "Regular" DUI meaning a conviction where either the breath

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[Section 1:20]

[1]Act No. 2014-222 also enacted a few changes to Alabama's "up-front" administrative driver's license suspension statutes, including a provision allowing the AST-60 form to be transmitted electronically to the Department of Public Safety by the arresting officer. Further, the new law removes the requirement that DPS actually return a seized driver's license in cases where the AST-60 is not received with the statutorily required five day window.

Perhaps the most significant change in Act No. 2014-222 is provision which alters how situations where the person did some suspension time under Section 304 and then gets convicted of the corresponding DUI are treated. Under prior law, if one got suspended under Section 304, he would not get suspended if convicted of the DUI. Under this act the person is only *given credit* for the time they were suspended (or revoked) under Section 304. The legislature added a new section to the DUI law that allows retroactive application of the interlock provisions. For example, if one has a case and they were convicted of DUI and are undergoing a one year or three year revocation, or other length of suspension, the statute provided an avenue to get relief. If one were to file a Section 32-5A-195(q) petition, they could potentially be placed on interlock instead of being suspended.

test was below 0.15% or there was no breath test and no refusal. The suspension period is 90 days, however, in lieu of 90 days' suspension, offender can do 6 months of interlock.

- In cases where the person refused the chemical test, there was child under 14 in the vehicle, or someone other than the offender was injured, the suspension period is 90 days plus 2 years interlock, but after the person does 45 days of the 90, either in the "upfront" suspension under Section 32-5A-304 or Section 32-5A-191, then upon court order, offender does the 2 year interlock.

- 2nd DUI Conviction (within 5 years)
  - The suspension is for one year. In lieu of the one year, the offender can elect to do 45 days of suspension (under Section 32-5A-304 or Section 32-5A-191) followed by 2 years of interlock.
- 3rd DUI Conviction (within 5 years)
  - The suspension is for 3 years. In lieu of the 3 years, the offender can do 180 days of suspension (under Section 32-5A-304 or Section 32-5A-191) followed by 3 years of interlock.
- 4th or subsequent DUI Conviction (within 5 years)
  - The suspension is for 5 years. In lieu of the 5 years, the offender can do one year of actual suspension, (under Section 32-5A-304 or Section 32-5A-191) followed by 5 years of interlock.
- 0.15% BAC Enhancer
  - First offender where 0.15% or greater, the offender must do 2 years of interlock.
- Doubling Provision 0.15% or Refusal
  - There is also a confusing "doubler" that says the interlock period shall be doubled if the offender was 0.15% or greater or if the offender refused the prescribed chemical test. (Unless already doubled by a previous section.)

When does the interlock period begin to run?

The period for which the person's driving privilege is subject to an interlock device does not begin to run until the date of issuance of a "scarlet letter" driver's license. Such a restricted license cannot be obtained prior to end of any non-commutable portion of the ordered license suspension/revocation.

Further, "[w]hen the court imposes the use of an ignition interlock device . . ., the court shall require that the person provide proof of installation of a device to the court or probation officer within 30 days of the date the defendant becomes eligible to receive an ignition interlock-restricted license for the Department of Public Safety." Ala. Code § 32-5A-191.4(h)(i)(1). It goes on to state that "If the person fails to provide proof of installation within that period, absent a finding by the court of good cause for the failure which is entered into the court record, the court shall revoke the person's probation." *Id.*

Interlock Driving Violations vs. Criminal Offenses

It should be pointed out that there are certain wrongs that if commit-

ted would merely extend the period of time that the offender would be required to use the interlock device. These are referred to as "Interlock Driving Violations" or an "IDV." [See § 32-5A-191(u)(3)] Other wrongs are classified as actual criminal offenses with a built in habitual offender scheme. These new crimes are found in Section 32-5A-191.4(j) for the offender and for crimes for people other than the offender we look to Section 32-5A-191.4(l) and (m).

Extension of the Interlock Period

There are several things that can occur during the interlock period that can extend the length of time the person is subject to the interlock. If the interlock device registers readings at .02 or above more than four times during a monthly reporting period, then the interlock period will be extended for six months from the date of violation. Ala. Code § 32-5A-191(u)(3). Likewise, (1) succeeding or attempting to tamper, circumvent or bypass the interlock device or (2) failing to comply with servicing or calibration requirements every 30 days, can result in a six-month extension. *Id.* The defendant is also subject to a six-month extension if convicted of one of the misdemeanor offenses set forth in Ala. Code § 32-5A-191.4. These offenses are discussed below under the heading "New Criminal Offenses Related to Interlocks."

How much will the Interlock cost?

Persons sentenced to an interlock must pay the court $75 dollars per month during the first four months following his or her conviction or the first four months following the installation of the ignition interlock device on his or her vehicle. Ala. Code § 32-5A-191(r)(1). However, (s) is silent as to what happens with first time offenders who only have their licenses suspended for 90 days, less than four months. Perhaps they get away without paying the last $75 installment, perhaps not. These funds are divided as follows: 45% to the Alabama Interlock Indigent Fund, 20% to the State Judicial Administration Fund administered by the Administrative Office of Courts, 20% to the Highway Traffic Safety Fund administered by the Department of Public Safety and 15% to the District Attorney's Solicitor Fund.

The defendant will also have to pay a third party interlock device provider to purchase/lease, install and calibrate the interlock device. The device will have to be calibrated monthly, so this could get quite expensive. Special rules apply for indigent defendants and defendants without a motor vehicle.

DPS may set a fee of not more than $150 for the issuance of the required "scarlet letter" driver's license. A 15% cut of this fee is to go to the general fund of the county where the defendant was convicted. At the end of the interlock period, DPS can charge a fee of up to $75 to reissue a regular driver's license.

What is an "ignition interlock device"?

The new law defines "ignition interlock device" as "a constant monitoring device that prevents a motor vehicle from being started at any time without first determining the equivalent blood alcohol level of the operator through the taking of a breath sample for testing." Ala. Code

§ 32-5A-191.4. The law goes on to say the interlock must be calibrated so that the vehicle will not start if a BAC of .02 or greater is measured.

Who installs, calibrates and maintains the interlocks?

The new law sets up a frame work where private businesses actually install and calibrate the interlocks under rules that are promulgated by the Department of Forensic Sciences. These rules are currently available on the Department's website (http://www.adfs.alabama.gov).

What brand or model interlock devices may be used?

Department of Forensic Sciences maintains and makes public a list of approved ignition interlock devices. This list is currently available on the Department's website (http://www.adfs.alabama.gov/ApprovedInterlockDevices.aspx).

What about indigent defendants?

A defendant can apply to the court for indigent status and, if found to be indigent, will only have to pay one half of the costs associated with installing and maintaining an interlock device. The criteria for indigent status is the same as that set forth in Ala. Code § 15-12-5. How does the state plan to pay for this? The new law provides that all interlock providers are required to pay 1.5% of all payments collected to the Alabama Interlock Indigent Fund in the State Treasury.

What about defendants who do not have a motor vehicle?

A defendant who does not own a vehicle will be required to pay $75 per month for the entire period the defendant is required or elects to have an ignition interlock device. Ala. Code § 32-5A-191.4(i)(6).

New Criminal Offenses Related to Interlocks

Under the present DUI law it is a Class A misdemeanor for a person who is sentenced to an interlock to "Operate, lease, or borrow a motor vehicle unless that vehicle is equipped with a functioning ignition interlock device." Ala. Code § 32-5A-191.4(j)(1). It is also a Class A misdemeanor to "Request or solicit any other person to blow into an ignition interlock device or to start a motor vehicle equipped with the device for the purpose of providing the person so restricted with an operable motor vehicle." Ala. Code § 32-5A-191.4(j)(2).

Alabama Code § 32-5A-191.4(l) states: "No person shall blow into an ignition interlock device or start a motor vehicle equipped with the device for the purpose of providing an operable motor vehicle to a person who is prohibited from operating a motor vehicle without an ignition interlock device." Subsection (k) states: "No person shall intentionally attempt to tamper with, defeat, or circumvent the operation of an ignition interlock device." If convicted of either of these offenses, the person convicted is punished up to 6 months in jail and or a fine of up to $500. Ala. Code § 32-5A-191.4(n).

§ 1:21 Murder, manslaughter and homicide

Drivers who are involved in fatal motor vehicle collision and who are suspected of being under the influence of alcohol or some other substance

may find themselves charged with vehicular homicide under Ala. Code § 32-5A-192, criminally negligent homicide under § 13A-6-4, manslaughter under § 13A-6-3, or even reckless murder under § 13A-6-2(a)(2).

§ 13A-6-2. Murder

(a) A person commits the crime of murder if he or she does any of the following:

. . . .

(2) Under circumstances manifesting extreme indifference to human life, he or she recklessly engages in conduct which creates a grave risk of death to a person other than himself or herself, and thereby causes the death of another person.

. . . .

(b) A person does not commit murder under subdivisions (a)(1) or (a)(2) of this section if he or she was moved to act by a sudden heat of passion caused by provocation recognized by law, and before there had been a reasonable time for the passion to cool and for reason to reassert itself. The burden of injecting the issue of killing under legal provocation is on the defendant, but this does not shift the burden of proof. This subsection does not apply to a prosecution for, or preclude a conviction of, manslaughter or other crime.

(c) Murder is a Class A felony; provided, that the punishment for murder or any offense committed under aggravated circumstances by a person 18 years of age or older, as provided by Article 2 of Chapter 5 of this title, is death or life imprisonment without parole, which punishment shall be determined and fixed as provided by Article 2 of Chapter 5 of this title or any amendments thereto. The punishment for murder or any offense committed under aggravated circumstances by a person under the age of 18 years, as provided by Article 2 of Chapter 5, is either life imprisonment without parole, or life, which punishment shall be determined and fixed as provided by Article 2 of Chapter 5 of this title or any amendments thereto and the applicable Alabama Rules of Criminal Procedure.

If the defendant is sentenced to life on a capital offense, the defendant must serve a minimum of 30 years, day for day, prior to first consideration of parole.

Ala. Code § 13A-6-2.

§ 13A-6-3. Manslaughter

(a) A person commits the crime of manslaughter if:

(1) He recklessly causes the death of another person, or

(2) He causes the death of another person under circumstances that would constitute murder under Section 13A-6-2; except, that he causes the death due to a sudden heat of passion caused by provocation recognized by law, and before a reasonable time for the passion to cool and for reason to reassert itself.

(b) Manslaughter is a Class B felony.

Ala. Code § 13A-6-3.

§ 13A-6-4. Criminally negligent homicide

(a) A person commits the crime of criminally negligent homicide if he or she causes the death of another person by criminal negligence.

(b) The jury may consider statutes and ordinances regulating the actor's conduct in determining whether the actor is culpably negligent under subsection (a).

(c) Criminally negligent homicide is a Class A misdemeanor, except in cases in which the criminally negligent homicide is caused by the driver or operator of a vehicle or vessel who is driving or operating the vehicle or vessel in violation of Section 32-5A-191 or 32-5A-191.3; in these cases, criminally negligent homicide is a Class C felony.

Ala. Code § 13A-6-4.

The only difference between manslaughter under § 13A-6-3(a)(1) and criminally negligent homicide is the difference between recklessness and criminal negligence. *Woods v. State*, 485 So. 2d 1243, 1245 (Ala. Crim. App. 1986); *Phelps v. State*, 435 So. 2d 158, 163-164 (Ala. Crim. App. 1983). The reckless offender is award of the risk and consciously disregards it, while the criminally negligent offender is not aware of the risk created—he fails to perceive. *Woods v. State*, 485 So. 2d 1243, 1245 (Ala. Crim. App. 1986).

> Negligence is distinguished from acting purposefully, knowingly, or recklessly in that it does not involve a state of awareness. It is the case where the actor creates inadvertently a risk of which he ought to be aware, considering its nature and degree, the nature and purpose of his conduct and the care that would be exercised by a reasonable person in his situation.

Woods v. State, 485 So. 2d at 1245-46, (quoting *Phelps v. State*, 435 So. 2d at 163-164) (internal citations and quotations removed).

Be aware that while criminally negligent homicide is typically a Class A misdemeanor, in cases where the driver is in violation of the DUI statute or BUI statute, it is a Class C felony. Ala. Code § 13A-6-4(c).

Vehicular Homicide

Alabama previously has a separate vehicular homicide statute that was located Ala. Code § 32-5A-192, but that section has been repealed. There is, of course, still the offense of criminally negligent homicide found in Ala. Code § 13A-6-4, which is a Class C felony. The penalty for criminally negligent homicide is covered in the preceding section of this chapter.

§ 1:22 Boating under the influence § 32-5A-191.3

Research References

West's Key Number Digest, Automobiles ⚿332

Section 32-5A-191.3. "Operation of vessel and other marine devices while under influence of alcohol or controlled substances," provides:

(a) A person shall not operate or be in actual physical control of any vessel, or manipulate any water skis, aquaplane, or any other marine transportation device on the waters of this state, as the waters are defined in Section 33-5-3, under any condition in which a person would be guilty of driving under the influence of alcohol or drugs pursuant to Section 32-5A-191 if the person was driving or controlling a motor vehicle.

(b) In the case of a vessel or other marine device described in subsection (a), where a law enforcement officer has probable cause to believe that the operator of the vessel or other marine device is operating in violation of this section, the law enforcement officer is authorized to administer and may test the operator, at the scene, by using a field breathalyzer or other approved device, as a screening device, to determine if the operator may be operating a vessel or device in violation of subsection (a). Refusal to submit to a field breathalyzer test or other approved testing device shall result in the same punishment as provided in subsection (c) of Section 32-5-192 for operators of motor vehicles on the state highways.

(c) The fact that any person charged with violating this section is or has been legally entitled to use alcohol or a controlled substance shall not constitute a defense against any charge of violating this section.

(d) Upon a first or subsequent conviction, a person violating this section shall be punished in the same manner and under the same conditions as a person convicted of driving under the influence of alcohol or drugs pursuant to Section 32-5A-191, or any successor section or sections providing for the offense of driving under the influence of alcohol or drugs, except that in any case where reference is made to the Director of Public Safety and the driving privilege or driver's license of the person, the reference shall be deemed to refer to the Commissioner of Conservation and Natural Resources and the vessel operating privilege or boater safety certification of the person convicted under this section.

(e) Neither reckless or careless operation of a vessel, nor any other boating or water safety infraction, is a lesser included offense under a charge of operating a vessel while under the influence of alcohol or controlled substances.

(f) All fines collected for violation of this section as to vessels or other marine devices on the waters of this state shall be paid into the State Water Safety Fund.

(g) A person who has been arrested for violating this section shall not be released from jail under bond or otherwise, until there is less than the same percent by weight of alcohol in the person's blood as specified in subdivision (1) of subsection (a).

(h) Upon verification that a defendant arrested pursuant to this section is currently on probation from another court of this state as a

result of a conviction for any criminal offense, the prosecutor shall provide written or oral notification of the defendant's subsequent arrest and pending prosecution to the court in which the prior conviction occurred.

(i) When any person over the age of 21 years is convicted pursuant to this section and a child under the age of 14 years was present on the vessel or other marine device described in subsection (a) at the time of the offense, the defendant shall be sentenced to double the minimum punishment that the person would have received if the child had not been present.

(j) "Vessel," for the purposes of this section, shall mean any vessel as defined in Section 33-5-3, operated on the waters of this state, as defined in Section 33-5-3.

(k) No provision of this section shall be construed to assess points for DUI convictions under motor vehicle convictions for driving under the influence.

§ 1:23 Public intoxication

Public intoxication is often the criminal charge of choice when a law enforcement officer crosses paths with a person who appears intoxicated but who is not driving or in actual physical control of a vehicle. The offense of public intoxication is found at Ala. Code § 13A-11-10.

§ 13A-11-10. Public intoxication

(a) A person commits the crime of public intoxication if he appears in a public place under the influence of alcohol, narcotics or other drug to the degree that he endangers himself or another person or property, or by boisterous and offensive conduct annoys another person in his vicinity.

(b) Public intoxication is a violation.

Mere intoxication is not itself is not a violation of the public intoxication statute. *Martin v. Anderson*, 107 F. Supp. 2d 1342 (M.D. Ala. 1999). Where the evidence showed that the defendant, while drunk, was not endangering himself, others or property and was not boisterous, offensive or annoying, the elements of public intoxication were not met. *Congo v. State*, 409 So. 2d 475 (Ala. Crim. App. 1981). It has been held that a vehicle parked on or near a public thoroughfare that was open to public view, constituted a "public place" for purposes of the elements of public intoxication. *Atchley v. State*, 393 So. 2d 1034 (Ala. Crim. App. 1981).

APPENDIX 1A

A Historical Perspective of Alabama's D.U.I. Laws

The date of the invention of the first mechanical device to be considered an automobile is disputed, however such vehicles date back to the 1760's. However, as early as 1335, wind driven vehicles were known in Italy. Gas powered engines came along around 1806 and in 1885, the first gasoline powered internal combustion engines were put into use. Steam-powered, self-propelled vehicles were devised in the late 18th century. These steam carriages were utilized for some time and next came developments such as hand-brakes, multispeed transmissions and better steering. Some large people-carrying vehicles were put in use and, due to the danger of them, were the catalysts for passage of the Locomotive Act of 1865. This act required all self-propelled vehicles on public roads in the United Kingdom be preceded by a man on foot waving a red flag and blowing a horn. This act all but did away with road development for the rest of the 19th century. The red flag requirement was removed in 1878.

In 1789, Oliver Evans, who made the first automobile in the United States, was granted a patent. Evans' automobile was steam-powered and also had amphibious capabilities. A plethora of forms of self-propulsion sprang up during the 19th century including such surprisingly modern methods as Hydrogen-oxygen fuel and electric motors powered by rechargeable batteries. Karl Benz of Germany made the first production of automobiles in 1888. Other well-known names, such as Gottlieb Daimler, and Wilhelm Maybach also got into the act. In August, 1888, Daimler teamed up with William Steinway (of Steinway & Sons piano factory) and opened a plant producing petrol powered vehicles in Hartford, Connecticut. The first company formed exclusively to build automobiles was Panchard et Levasson in France. The French also have the distinction of being the first to produce a four-cylinder engine. In 1903, 30,204 cars were produced by Panchard, accounting for 48.8% of the world's production in that year. The first American auto production company was the Duryea Motor Wagon Company, which was formed in 1893. However, it was Ransom E. Olds (as in Oldsmobile) who became the major producer of automobiles in the United States. Later to the game was Henry Ford, who began producing cars (Cadillac) by the thousands. Between 1902 and 1920 the engine powered automobile all but replaced the horse-drawn carriage in all but the most remote areas. By 1915, car racing had become a passion. In short, the world, including small-town U.S.A., had been changed forever.

Coinciding with the mass production of the automobile was the need for laws controlling their use. In 1911, the Alabama legislature passed

Act No. 452, which included the first DUI law in the State of Alabama. The "bridge" of crossing from horses and carriage over to motor vehicles is exemplified in the "Motor Vehicle Law" (as the 1911 law was named). For example Section 19 states:

> A person operating or driving a motor vehicle shall, on signal by raising the hand, from a person riding, leading or driving a horse or horses or other draft animals bring such motor vehicle immediately to a stop, and, if travelling in the opposite direction remain stationary so long as may be reasonable to allow such horse or animal to pass, and if travelling in the same direction, use reasonable caution in thereafter passing such horse or animal appears badly frightened, or the person operating such motor vehicle is so signaled to do, such person shall cause the motor of such vehicle to cease running so long as shall be reasonably necessary to prevent accident and insure the safety of others. In approaching or passing a car of a street railway which has been stopped to allow passengers to alight or embark, the operator of every motor vehicle shall slow down and if it be necessary for the safety of the public he shall bring said vehicle to a full stop. Upon approaching a pedestrian who is upon the travelled part of any highway and not upon a sidewalk and upon approaching an intersecting highway or a curve or a corner in a highway where the operator's view is obstructed, every person operating a motor vehicle shall slow down and give a timely signal with his bell, horn or other device for signaling."

The speed of cars in the early 1900's is evidenced by the Alabama speed limit found in the Motor Vehicle Law of 1911:

> *Section 21*. Speed permitted: No person shall operate a motor vehicle upon the public highways of this State recklessly, or at a rate of speed greater than is reasonable and proper, having regard to the width, traffic and use of the highway, or so as to endanger property, or the life or limb of any person; provided that a rate of speed in excess of thirty miles per hour for a distance of a quarter of a mile shall be presumed evidence of travelling at a rate of speed which is not careful and prudent.

The first DUI statute in the State of Alabama as passed in this 1911 Motor Vehicle Law made it illegal as a misdemeanor to "operate a motor vehicle while in an intoxicated condition."

Intoxication was not defined, nor was any blood alcohol level mentioned. The punishment provision is ambiguous, but was probably a fine of not more than $25.00 and up to $500 for a second offense. The conviction is supposed to be sent by the trial court as clerk to the Secretary of State who would suspend the driver's license if recommended by the trial court. The registration of the vehicle could, similarly, be suspended.

The only relevant change found in the 1919 vehicle law was to make the State Tax Commissioner the reported-to agency for Driver's License suspensions. In addition, records of convictions were to be maintained by the Probate Judges.

1923 Act

The 1923 Alabama Legislature added a specific punishment provision for Driving While Intoxicated. It made the punishment a fine not to exceed $500.00 and/or imprisonment in the County Jail or "hard labor for the County for a term not exceeding six months".

1927 Act

The 1927 legislature session substantially changed the DUI law by adding a narcotics drug provision and in addition, increasing the penalty provisions. For the first time, the substantive crime elements and the penalty for conviction of the crime appear in the same code provision. In addition, the wording of the DUI law was changed to read "under the influence of intoxicating liquor" instead of driving while intoxicated. To be guilty of driving under the influence of a narcotic drug, one first had to be a habitual user of narcotic drugs. The punishment was increased to not less than 30 days nor more than one year in the county or municipal jail. The minimum fine was $100.00, and the maximum fine was $1,000. A multiple offender provision was added. For a second offender, the punishment was 90 days to one year and/or a fine of $200 to $1,000 and a mandatory driver's license suspension of up to one year.

The 1927 Act also established the State Highway Department and was the firs act to be given the titled "Alabama Highway Code."

1936-37 Act

The 1936–37 Act provided the following penalties:

First Offense:

1. Fine of $100–$1,000
2. Imprisonment up to one year in the discretion of the court
3. The Court trying the case was given the "exclusive authority to prohibit and must prohibit the person so convicted from driving on public highways for a period not to exceed one year

Second Offense:

The Court shall:

1. Imprisonment up to one year and/or discretionary
2. Fine of $100-$1,000
3. Prohibited from driving for 30 days to one year

1940 Act

The 1940 Act provided that it was "Unlawful for anyone to be intoxicated" while driving. The act did not use the word "alcohol" expressly. The act further provided for the following penalties:

First Offense:

1. Jail sentence of up to one year
2. Fine of $100-$1,000 and MUST
3. Prohibited driving up to one year

Second Offense or (subsequent):

1. Jail sentence of up to one year
2. Fine of $100-$1,000
3. Prohibited driving not less than 30 days nor more than one year (does not include the word "must")

1947 Act

The 1947 Act was essentially the same as the 1940 Act, but it "fixed" the "must" provision related to the prohibition of driving in first offense by taking out the provision that said the trial court "must" prohibit driving.

1980 Act

Significant changes came about in 1980 when the Alabama Rules of the Road Act was passed. This was precipitated by the federal government's push to get states to enact, not only stricter, but also more uniform DUI laws. The federal government was successful in this regard through the use of the "carrot" of federal grant money made available to states who passed certain provisions as parte of their respective highway codes. For example, in order for the State of Alabama to obtain millions of dollars in federal grant money for highways, Alabama had to pass certain legislative enactments creating stricter DUI laws. Such was the case with the 1980 Act.

Another significant change to Alabama's DUI law found in the 1980 Act, came about when the legislature added the phrase "actual physical control" into the act. For the first time, in Alabama history, an individual, who was not proven to have driven an automobile, could be convicted of DUI upon a mere showing that he or she was in "actual physical control" of an automobile.

Also for the first time in Alabama history, being intoxicated became tied to having a certain blood alcohol level at the time of driving. The so-called legal limit was established at .10 per cent BAC by weight of alcohol in the blood. Another significant change in the 1980 law was that the legislature defined the crime as driving "under the influence of alcohol" as opposed to driving while intoxicated. In addition, the legislature added provisions for driving under the influence of a controlled substance and also for driving under the influence of alcohol and controlled substance. Although the legislature failed to define the phrase "under the influence" in the act, that phrase has since been defined by case law.

The 1980 penalty provisions were as follows:

First conviction:

1. Fine of $100-$1,000
2. Up to a one year jail sentence
3. The court trying the cause may prohibit the person so convicted from driving a motor vehicle for a period of not more than six months
4. Added a provision that the individual convicted would have to go through and complete a DUI court referral program approved by the State Administrative Office of Courts

Second or subsequent conviction (within a five year period):

1. Fine of $200-$1,500

2. Imprisonment up to one year
3. And the Director of Public Safety shall revoke the driving privilege or driver's license of the person so convicted for six months

1983 Act No. 83-620

More significant changes were brought about in 1983. For the first time, the legislature added a provision that an individual can be found guilty of driving under the influence of any substance which impairs the mental or physical faculties of such person to a degree which renders him or her incapable of safely driving. The act also included mandatory minimum jail sentences for second and third offenders within a five year period of time.

The other major change in the 1983 Act was the incorporation of a mandatory driver's license suspension, even for those convicted of a first offense. The legislature made the law such that if an individual was convicted of a first offense DUI, the driver's license or privilege of that individual would be mandatorily suspended for a period of 90 days. For a second offense, the driver's license suspension would be for a period of one year. Other changes in the sentencing provisions are as follows:

First conviction:

1. Fine of $250-$1,000
2. Up to a one year jail sentence
3. Driver's license suspension of 90 days

Second conviction within a five year period:

1. Fine of $500-$2,500
2. Mandatory jail sentence of not less than 48 consecutive hours or community service of not less than 20 days
3. Driver's license suspension of one year

Third conviction with a five year period:

1. Fine of $1,000-$5,000
2. Mandatory minimum sentence of 60 days in jail that cannot be probated or suspended
3. Driver's license suspension of three years

1994 Act No. 94-590

In 1994, the legislature added a felony provision to Alabama's DUI law making a fourth or subsequent conviction within a five year period a Class C felony: Fourth or subsequent offense Felony

1. Fine of $2,000-$5,000
2. Imprisonment of not less than one year and a day up to a maximum of ten years
3. Driver's license suspension of five years

1996 Acts No. 96-341 and 96-705

In 1996, for the first time in history, the legislature lowered the so-called legal blood alcohol limit to 0.08%. The Alabama Chemical Test

Fund was created with one hundred dollars of each fine collected going to the Department of Forensic Sciences Chemical Testing Fund. This was as a result of *Ex parte Mayo*, 652 So. 2d 201 (Ala. 1994).

Also under the 1996 Act, fines were increased as follows:

First offense: increased from $250-$1,000 to $500-$2,000

Second offense: increased from $1,000 to $5,000

Third offense: increased from $2,000 to $10,000

The 1996 Act also included a provision specifically targeting school bus or day care drivers by setting up a so-called "legal limit" at 0.02% by weight of alcohol in his or her blood for person's exercising those capacities. Persons convicted under this new provision automatically had their driver's licenses suspended for one year.

Also in 1996, a provision was added specifically affecting underage individuals by making it illegal for anyone under 21 years of age to drive or be in actual physical control of a vehicle with 0.02% or more BAC. There were also certain other provisions relating to collection of moneys by municipalities pursuant to the DUI law which were added in 1996.

1997 Act No. 97-556

In 1997, the legislature took out the five year look-back window for a third and fourth offense, thereby opening up the lifetime records of an individual's past DUI convictions for sentence enhancement purposes. Also in 1997, the Alabama Impaired Drivers Trust Fund was created with hundred dollars of each fine collected for DUI cases going to the Impaired Drivers Trust Fund.

1999 Act No. 99-432

In 1999, the legislature added a provision making the doubling penalties in cases where the convicted individual is over 21 and, at the time of the offense, had a child under the age of 14 present in the vehicle. Such a defendant is to be sentenced to double the minimum punishment otherwise given under the statute.

2000 Act No. 2000-677

In 2000, the legislature increased the DUI penalties as follows:

First offense:

Fines from $600 to $2,100

Second offense:

Fines from $1,100 to $5,100 with a mandatory sentence of five days in jail or community service for 30 days. This was an increase from 48 hours or 20 days community service.

In addition, the legislature made provisions for how fines are to be distributed from municipalities.

2002 Act No. 2002-502

In 2002 the legislature added language dealing with municipal ordinance violations and the distribution of money collected.

2005 Act No. 2005-326

In 2005, a provision was added specifically addressing drivers of commercial vehicles. This provision made it illegal to drive or be in actual physical control of a commercial vehicle with a BAC of 0.04% or greater.

2006 Act No. 2006-654

In 2006, the legislature added a somewhat controversial provision to the DUI law. That provision is as follows:

> *Section(O)* A prior conviction within a five-year period for driving under the influence of alcohol or drugs from this state, a municipality within this state, or another state or territory or a municipality of another state or territory shall be considered by a court for imposing a sentence pursuant to this section.

The appellate courts of the State of Alabama held, pursuant to the above amended code section, that for enhancement purposes, only the record of the individual the preceding five year period could be used for punishment enhancement.

2011 Act No. 2011-613 and Act No. 2011-621

In 2011, two acts of the Alabama Legislature were signed into law that made major changes to Alabama's DUI law. The first of these pieces of legislation (House Bill 361/Act No. 2011-613) was an ignition interlock bill that requires people convicted of a second or subsequent DUI within a five year period to have ignition interlock devices installed on their vehicles. The bill further requires ignition interlock devices for those convicted of a first DUI under certain circumstances. A copy of House Bill 361/Act No. 2011-613 is attached in Appendix 1B.

The second act (Senate Bill 67/Act No. 2011-621) provides for doubling the mandatory minimum punishment for a person convicted of DUI when that person had 0.15% or more by weight of alcohol in his blood. The act also provides that, for first offenders with a BAC of at least 0.15%, the minimum punishment shall be imprisonment for one year, although the entire time may be suspended. Also, under the new law a first time offender who falls in the 0.15% or above category will have his license revoked for a period of not less than one year. A copy of Senate Bill 67/Act No. 2011-621 is attached in Appendix 1B.

There is some question regarding whether the two 2011 acts can be reconciled or whether the second act repealed the first. The Alabama Code Commissioner is of the opinion that the amendments found in the two separate acts are not in substantial conflict and incorporated the changes from both Acts into a version of § 32-5A-191 operative 12 months after September 1, 2011.

2012 Act No. 2012-363

In 2012, a slight change was made to subsection (e) of Alabama's DUI statute (§ 32-5A-191) in order to clear up a particular conflict between the two 2011 legislative acts that amended the DUI statute. Both of those 2011 Acts had provided, in part, for enhanced punishment of offenders with BAC's of 0.15 or higher. The first 2011 Act provided for

mandatory ignition interlock for first offenders with high BAC's. The second provided for double the minimum punishment for offenders with high BAC's. In 2012 the Legislature passed Act No. 2012-363, which in Section (1)(b)(4), deleted the language in the DUI statute that required ignition interlock for first offenders with BAC's of 0.15 or higher. The act specifically provided:

> Section 32-5A-191, as amended by Act 2011-621 and Act 2011-613, 2011 Cumulative Supplement to Volume 17A, page 19. In subsection (e), to resolve a conflict between two amendatory acts so as to give the later act effect, delete the following language appearing in the third sentence of subsection (e): "the person provides blood alcohol concentration of 0.15 or greater or."

2014 Act No. 2014-222

In 2014, Alabama's DUI statute was amended yet again by the Alabama Act 2014-222, which expanded the role of ignition interlock devices in Alabama's DUI sentencing scheme. The general thrust of the act was allow certain periods of previously mandatory driver's license suspension for DUI convictions to be all or partially commuted to periods of ignition interlock restricted driving. The new law appears to be due to a successful "push" by the ignition interlock providers' lobby. It is interesting to note that the legislature took out the provision that when someone is convicted of DUI with a finding of a BAC of 0.15% or higher, that their driver's license or privilege would be revoked for one year. So, for DUI offenses that occur after July 1, 2014 and they are convicted of "super DUI" (BAC 0.15% or higher) they are no longer facing the one-year revocation that previously existed under the prior DUI law.

2016 Act No. 2016-259

2016 saw a couple of very minor tweaks to the DUI statute by Alabama Act 2016-259. That act replaced references to Directory of Public Safety and the Department of Public Safety to Secretary of the Alabama State Law Enforcement Agency and Alabama State Law Enforcement Agency, respectively. It also replaced the "Impaired Drivers Trust Fund" with the "Alabama Head and Spinal Injury Trust Fund" as the recipient of a certain moneys collected from fines. The act also amended Ala. Code § 32-5A-304. A separate act, Alabama Act 2016-152, persons holding a CDL, commercial learner license, or operating a commercial vehicle, who were administratively suspended/disqualified for having a BAC of .08 or above, are no longer entitled to have the companion administrative license case rescinded and deleted from their record upon a favorable resolution of a DUI criminal charge. *See*, Ala. Code § 32-5A-304(c) (as amended by Ala. Act. 2016-152). Non-commercial drivers are still entitled to have their administrative suspension rescinded and deleted from their driving record, where the suspension was for having a BAC of .08 or greater, upon a favorable disposition of the DUI criminal case. *Id.*