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26

Drunk Driving Laws & Enforcement: An Assessment of Effectiveness

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ABSTRACT

The project's general objective was to assess the effectiveness and appropriateness of commonly used and newly emerging legal approaches to drunk driving. The specific objectives were:

- ◆ To identify existing and proposed sanctions and enforcement techniques that offer potential for reducing the likelihood of alcohol-related traffic accidents, and present significant legal issues in their application, or both;
- ◆ To study and analyze those sanctions and enforcement techniques believed to be of particular interest to legal system personnel, news media, public action groups, the general public, and other individuals and organizations who are involved in anti-drunk driving activities or affected by the problem;
- ◆ To assess, through a series of conferences, meetings, and seminars, the impact of these proposed sanctions and enforcement techniques on highway safety in general and alcohol-related accidents in particular; and
- ◆ To publish this monograph, which documents the project's findings.

Study Approach

The project relied primarily upon the judgment and experience of persons within the justice system in identifying and assessing sanctions and enforcement techniques applied to drunk driving. These capabilities were augmented by the advice of researchers and practitioners representing other disciplines. It should be emphasized that no attempt was made to perform a scientific evaluation of the sanctions and enforcement techniques, although information from the scientific literature was used.

It is interesting to note that very little literature is available on drunk driving that makes an assessment from the perspective of lawyers and judges. However, lawyers (both prosecutors and defense attorneys) and judges deal with drunk drivers every day. They talk with them and get to know them. It is logical to assume that they have some insight into the characteristics that are common to these offenders and have some knowledge as to what will be most effective in deterring their drunk driving conduct. This project sought to elicit some of these viewpoints.

It also sought the views of State legislators. Many changes have been made in drunk driving laws in recent years. It is important to know what legislators believe have been the most effective. After all, scientific evidence that a drunk driving law is effective will be of no use if the persons who enact the laws do not perceive it as effective.

The list of sanctions and enforcement techniques to be addressed in the project was finalized during the second meeting of the Advisory Board. Those selected were:

- ◇ Sobriety checkpoints;
- ◇ Minimum drinking age;
- ◇ "Per se" laws;
- ◇ Server liability for alcohol-related accidents;
- ◇ Admissibility of evidence of alcohol impairment in a civil case;
- ◇ Reduction or elimination of judicial discretion in sentencing first offenders;
- ◇ Restriction or elimination of charge reduction;
- ◇ Improved evidentiary aids and procedures;
- ◇ Required chemical testing of drivers involved in an accident;
- ◇ Administrative summary suspension of the driver's license;
- ◇ Separate offense with enhanced penalties for driving with a revoked, suspended, or restricted license; and
- ◇ Other approaches and programs.

The last item on this list contains several actions for improving the legal system's handling of drunk driving cases through enforcement techniques and sanctions applied to offenders. These include programs for educating the public and legal system personnel on the nature of the problem of drinking and driving and ways of dealing with it, scientific evaluation of programs directed at drunk driving, an interstate system of driver records, specially trained experts for recognizing drug impairment of drivers, and pre-sentence investigations to provide information for sentencing convicted drunk drivers. Also included is legislation prohibiting open containers in motor vehicles, and legislation requiring medical insurance and health maintenance organizations to cover in-patient and out-patient treatment of alcohol and drug dependency.

Two additional meetings were held to assess the sanctions and enforcement techniques selected for the project's focus. The first of these meetings developed a series of assessment criteria and applied them to the sanction and enforcement techniques. They included factors related to the effect of each sanction and enforcement technique on the drunk driving problem, the public, the legal system, and the public's awareness of the significance of the sanction and enforcement techniques on the highway safety process.

Sobriety Checkpoints

Description

Through sobriety checkpoints, vehicles traveling along a designated roadway are stopped by a team of law enforcement officers. A few routine questions are asked by the police and observations are made to find any indication of alcohol impairment. Further investigation is initiated if it is believed that the driver is impaired.

The use of sobriety checkpoints has been fairly widespread outside the United States, including several European countries, Australia and Canada. Recently, it has been used in a number of locations in the United States.

The way a checkpoint operation is implemented varies among the States, counties and cities using them. Sometimes, they are conducted periodically (for example, every month), often during the nighttime hours. On a given night, checkpoints may be set up serially or simultaneously at several locations in the jurisdiction. The specific locations of the checkpoints are usually not announced to the public prior to operation. However, the fact that checkpoints are being set up is usually (but not always) publicized.

The checkpoint team may involve a fairly large number of law enforcement officers (15 or more) and their vehicles. Typically, officers direct groups of several vehicles into an observation area (such as a side street or parking lot) and briefly engage the drivers in conversation by asking routine questions. During the conversation, observations of the driver are made for signs indicating alcohol impairment. Vehicles are selected from the traffic stream so that each vehicle has an equal chance of being stopped. For example, one way of accomplishing this is to stop every fifth or tenth vehicle. If indicated, behavioral tests or preliminary breath tests may be administered, and further action taken (including an arrest for drunk driving). The process is continued until traffic subsides, and the team moves on or ceases operation.

Assessment and Commentary

Effect on Alcohol-Related Accidents. Research in other countries suggests well designed and executed sobriety checkpoint programs initially have a general deterrent effect. Public information and educational aspects are invariably a part of these "successful" programs. Unfortunately, these effects appear to be short lived in many instances. This limited duration of deterrence is a characteristic of many drunk driving programs that have been evaluated.

Effect on the Public. Public response to sobriety checkpoints has been mixed. In most instances, they seem to have been accepted, but several applications have resulted in a strong negative response. Surveys in Oakland County, Michigan (Wolfe and O'Day 1984) found that about 50% of the respondents were in favor of checkpoints. By contrast, the establishment of a roadblock in 1983 on an interstate highway in Arkansas during a time of high traffic volume resulted in a public outcry and subsequent abandonment of these programs by the Arkansas Highway Patrol. In a number of States, opponents of sobriety checkpoints have filed suit to stop them.

Effect on the Legal System. Checkpoints have usually been operated under general constitutional and legislative provisions authorizing the use of police power. However, some States have legislation specifically authorizing checkpoints to verify drivers' licenses and vehicle registrations (for example, S.D. Codified Laws Ann., §32-33-12 (1984) and Wyo. Stat. §7-17-701 et seq. (1977)). At least one State, North Carolina, has enacted legislation (N.C. Gen. Stat §20-16.3A (1983)) dealing with sobriety checkpoints. The North Carolina statute authorizes "impaired driving checkpoints" that are systematically planned in advance, that set out in advance the scheme for stopping drivers, and that mark the checkpoint site to warn the public.

Checkpoints place the greatest operational burden on law enforcement agencies. Checkpoints are labor intensive and impose heavy peak demands for police resources. It is argued by some police officials that allocation of scarce police resources to checkpoints reduces the ability of the police to enforce other laws. Other police officials and analysts assert that the publicity and increased tempo of activity surrounding checkpoint operations actually enhance the enforcement of other laws.

Most police administrators agree that checkpoints are a highly inefficient tactic for catching drunk drivers, and some agencies have abandoned their checkpoint programs because they were perceived as unproductive. This perception seems accurate. For example, a large scale checkpoint effort in New York City resulted in more than 184,000 stops, but only 222 arrests for alcohol or drug-related crimes, including drunk driving. Over 100 police officers were engaged in this effort over a one month period.

Proponents argue that checkpoints are not intended primarily to be a means of apprehending drunk drivers. They support the checkpoints because they perceive them to have a deterrent effect. However, the "general deterrent effect" (i.e. effect upon the total driving population) of checkpoints is not a persuasive argument to many of the individuals who believe that there are less costly and more effective techniques for achieving the same effect. At this time, research provides little objective information for settling these arguments.

Checkpoints are subject to significant legal constraints. They result in stops and brief detentions of drivers by police officers. When a driver is stopped and detained at a checkpoint, the officer usually has no probable cause, or reasonable suspicion, that the driver was under the influence. Therefore, checkpoints must comply with limitations imposed by the Fourth Amendment to the U.S. Constitution.

Effects on Raising Public Awareness. Checkpoints are inherently newsworthy. They are easy to explain and understand. They have also been well covered by the news media wherever they have been used. When they generated controversy, they received even greater coverage. This possibly increased their deterrent effect, but decreased the resolve of enforcement agencies to continue their use.

"Per Se" Laws

Description

"Per se" laws provide that it is an offense to drive with a blood alcohol concentration (BAC) greater than a specified value (usually .10% weight per unit volume). These laws should not be confused with the so-called "presumptive" standards, which are also based on blood alcohol concentration.

Under the "per se" laws, a defendant will be convicted on the basis of chemical test evidence alone, since the offense is committed if a person drives with a blood alcohol concentration in excess of that allowed by law. The accused's degree of impairment is not an issue under "per se" laws.

Laws that use blood alcohol concentration to create presumptive standards, on the other hand, allow the accused to submit evidence that he or she was not, in fact, impaired at the prescribed limit. They also allow a prosecutor to submit evidence that a driver was impaired, even though his or her BAC was less than the presumptive limit established by the statute. A State may have both a "per se" law and a law prescribing presumptive standards on the basis of blood alcohol concentration.

The rationale of "per se" laws is that they increase the likelihood of convicting a drunk driver because it is no longer necessary to prove impairment. It is only necessary to show that the driver's BAC exceeded the legal limit. According to theory, the effect of these laws in making convictions easier would promote general deterrence among the total driving population, and would thus be beneficial.

All but a handful of States now have some form of "per se" law. (Adoption of these laws is a requirement for receiving an incentive grant from the U.S. Department of Transportation.) However, there are variations in the laws.

Under the most prevalent variation of drunk driving statutes containing a "per se" provision, driving with an illegally high blood alcohol content is an alternative definition of drunk driving (driving while "under the influence" of alcohol, drugs, or both is the other). In a second variation, driving while under the influence and driving with an illegal BAC are separate offenses. Under this variation, a drunk driver could, in theory, be convicted of both driving while under the influence and driving with an illegal BAC. A third variation defines driving with an illegal BAC as a separate offense, but a less serious offense than driving while under the influence.

Assessment and Commentary

Effect on Alcohol-Related Accidents. There is no known scientific evidence that "per se" laws alone either have or do not have an effect on traffic safety. Evaluations of the safety impact of those laws in Europe and Canada have found that "per se" provisions usually are adopted along with other provisions and that any reductions in traffic accidents due to the total legislation could not be attributed to any specific component, including the "per se" provision. The rationale behind "per se" laws stated above, however, is reasonable and can be accepted provisionally, pending the availability of evidence to the contrary.

Effect on the Public. There is no evidence of any widespread awareness of "per se" laws among the public in general. Neither is there any reliable information on the public's perception of the effectiveness and efficiency of the law in reducing alcohol-related accidents. Certainly, there have been no reports of public outcry against the "per se" laws in jurisdictions that have passed them. It may be assumed that the public is essentially neutral on the subject and is likely to remain so in the absence of any widespread campaign to convince them otherwise.

Effect on the Legal System. Contacts with attorneys indicate they are highly aware of these laws. Acceptance is mixed, tending to be high among law enforcement officials and prosecutors, and low to moderate among defense attorneys. In some States, opposition from defense attorneys has been an obstacle to passage of the law. It should be noted that none of these impressions is supported by any scientific data.

The effort required to implement a "per se" law does not appear to be excessive. If anything, fewer legal system resources are needed to adjudicate drunk driving cases under a "per se" law because these laws reduce the number of legal issues that could arise. In addition, persons charged with a "per se" offense are less likely to contest the charge and will enter fewer pleas of "not guilty," and are also less inclined to appeal a "guilty" verdict. This reticence may also be attributed to the narrow range of legal issues that a "per se" law provides as a basis to contest the charge or a conviction resulting from it. Studies sponsored by the U.S. Department of Transportation's National Highway Traffic Safety Administration (MacDonald and Wagner 1984; Loeb 1980) did find an increase in guilty pleas and convictions. However, this has not been the case everywhere. Loeb's North Carolina study found no increase in conviction rates for drivers with measured BACs of .10% or higher because of pleas to a lesser included offense.

"Per se" laws have apparently not created any large scale problems in the justice system's operation. There have, however, been some reports that "per se" laws are increasing the number of drivers refusing to take a chemical test under an implied consent law. This might be expected, since the results of a proper chemical test would, in effect, determine guilt or innocence. No quantitative data, however, has been found on the magnitude of this effect in jurisdictions that have "per se" laws.

"Per se" statutes make guilt easier to prove once a driver has been arrested and charged. However, it does not free police officers from relying on bad driving and physical symptoms of intoxication in making the initial decision to stop the driver, and arrest him or her for drunk driving.

"Per se" laws have changed some aspects of defense strategy. Defense counsel no longer can attempt to show that, despite an unfavorable test result, the defendant was not "under the influence". Their attack has shifted to three aspects: (1) the initial stop and arrest; (2) the reliability of the testing device; and (3) the way the test was administered.

A persistent criticism raised by defense attorneys is that the impairing effects of alcohol vary too much from person to person to have a hard-and-fast "per se" standard of impairment based on chemical test results. Research does indicate variances in individuals' tolerance to the impairing effects of alcohol. However, the overwhelming majority of experimental and epidemiologic evidence indicates that the likelihood of an accident increases significantly in virtually everyone at blood alcohol levels exceeding .10% weight per volume.

Another technical issue is the effect that delay in giving a chemical test has on its accuracy in estimating the driver's BAC at the time he or she was driving. If alcohol was still being absorbed into the driver's body when he or she was stopped (that is, the driver's BAC was rising), then a test given a short time after the stop could give an inflated estimate of the BAC when the stopped driver was actually driving. A similar but opposite effect could occur when the driver's BAC was falling at the time of the stop.

Research indicates that there is a reasonable cause for concern on the basis of this issue. There are wide variances in the rate at which alcohol is absorbed and eliminated by different individuals. A precise calculation of an individual's BAC backward in time is not possible. Thus, the time delay between driving and testing should be set low enough to provide a reasonable assurance that, despite the test delay, an individual's BAC was above a given limit at the time he or she was driving. A maximum time delay of one hour should provide this assurance.

It should be noted that most existing "per se" statutes define the offense of driving with an illegal BAC in terms of the test result alone. They make no provision for "relating back" the test result to the time of driving. In addition, some statutes provide that a test result can support a conviction for driving with an illegal BAC if the test was administered within two hours of the driving and its results shows a BAC at or above the limit.

Effect on Raising Public Awareness. In all probability, the "per se" concept may be too technical and abstract for the general public and potential drunk drivers to understand fully, unless great care is taken to communicate it. However, there is no reason why effective messages concerning the potential effect of "per se" laws on drunk drivers could not be created and delivered to selected audiences or even the general public.

Minimum Drinking Age

Description

Minimum drinking age laws establish the age at which a person may purchase or possess alcoholic beverages. From the repeal of Prohibition until the 1970s, the legal age was 21 in most, but not all States. After the 26th Amendment to the U.S. Constitution was passed in 1971, many States lowered the legal age to 18. An increase in alcohol-related traffic accidents among young adults led many States to adopt higher drinking ages. There has been, especially in the last decade, variation in legal drinking ages among adjoining States. This led Congress to enact a federal statute, 98 Stat. 435, P.L. 98-363, §6(a) (codified as 23 U.S.C. §158 (West Supp. 1985)), which requires all States to adopt 21 years as their minimum drinking age by October 1, 1986, or lose five percent of their funding for projects covered by the Federal Aid Highway Act.

Assessment and Commentary

Effect on Alcohol-Related Accidents. The legal drinking age is one of the most studied issues in the field of highway safety. It is also one of the most widely reviewed in literature surveys. This project will not add to this growing body of literature, except to note that the highway safety value of these laws has never been established unequivocally. As soon as one study is published showing a positive effect, another study emerges refuting that study and all previous studies that found a positive effect.

After examining this literature, this project has concluded that minimum drinking age laws generally tend to reduce the risk of an alcohol-related accident, but that the amount of the reduction is unknown and probably related to a host of demographic, economic, cultural, and other variables. It also seems likely that if all States adopt the same minimum age, then its effects would be enhanced by eliminating so-called "bloody borders" that exist between States that do not have identical drinking age laws.

Effect on the Public. For the most part, minimum drinking age laws have been accepted by the public, and the public appears to support a uniform national age. However, there are some exceptions. A number of State legislatures and public officials oppose a national standard as an infringement of States' rights, oppose an age of 21, or both.

Effect on the Legal System. There appear to be no serious problems for the justice system that have been created by minimum drinking age laws, except for the difficulties in agreeing on what the age should be. There are, however, several legal constraints that should be considered.

Any minimum drinking age is a form of prohibition and therefore difficult to enforce. The vast majority of underage persons have used alcohol, and a considerable number use it regularly. The extent of noncompliance and the limited resources available for enforcement generally limit law enforcement agencies to taking action against aggravated violations. These include incidents such as establishments regularly selling alcoholic beverages to underage customers, "house parties" and similar gatherings attended by large numbers of underage persons, and flagrant public violations such as possessing open containers in vehicles.

Effect on Raising Public Awareness. There is no reason why raising the drinking age would, in itself, promote the general public's knowledge about highway safety. It has, however, increased discourse about the role of persons under 21 years of age in alcohol-related accidents and may have raised awareness of the drunk driving problem posed by persons in this age group.

The main informational problem is the communication of accurate information about the law, including its rationale and expected effects. A strong justification will have to be provided to counterbalance perceived losses in freedom among persons under 21 years of age, and among others, such as tavern owners, who will be affected by it.

Improved Evidentiary Aids and Procedures

Description

A number of devices and procedures have been proposed for improving the quality and efficiency of drunk driving arrests and gathering more persuasive evidence for use at trial. Three aids involving technology were considered in this project. They are:

- ◆ Preservation of breath specimens, in which a set of procedures is followed for the handling, storage, and preservation of breath specimens from the time of testing to the time the drunk driving prosecution is concluded;
- ◆ Video taping of a suspect's behavior, in which a driver under arrest for drunk driving is asked to perform a series of physical sobriety tests, and his or her performance of those tests is video taped for use at trial for the purpose of demonstrating impairment by alcohol; and
- ◆ Preliminary breath testing, in which a police officer uses a portable device called a preliminary breath tester (PBT) to determine whether a suspect should be arrested for drunk driving. In most preliminary breath testing procedures, the testing officer already has probable cause to believe the driver is under the influence and uses the PBT to verify his or her belief. However, another proposed use of the PBT is to establish probable cause in "marginal" cases of driver impairment, or to determine alcohol involvement in accidents and moving traffic violations. (For example, Neb. Rev. Stat., §39-669.08(3)(1984) and N.Y. Veh. & Traf. Law, §1193a (McKinney Supp. 1984-85)) appear to authorize the testing of all traffic violators.)

Two other technological procedures were not specifically addressed but have been proposed and evaluated in other contexts. They are:

- ◆ Passive, or "noncooperative" breath testers (NCBTs), in which a police officer places a device, resembling a wand, flashlight, or wristwatch, near a driver. The device—which exists on an experimental basis, but is not in general use—determines whether the driver's expelled breath contains alcohol or, possibly, how much alcohol the driver's breath contains; and
- ◆ Roadside testing of suspected offenders, in which evidentiary tests are administered at a portable facility, such as a van, rather than at a fixed location, such as a police station.

Assessment and Commentary

Effect on Alcohol-Related Accidents. Used properly, these technological evidentiary and detection devices and techniques should promote more accurate identification of persons who are drunk drivers. They should therefore enhance deterrence of the general driving public and help reduce recidivism.

Specifically, horizontal gaze nystagmus, PBTs, and video taping increase the probability that drivers suspected of driving while drunk will be arrested and found guilty. Roadside testing (such as is done with the PBT) tends to reduce the amount of time a police officer spends transporting suspects to a police station or other testing facility and increases the officer's efficiency. Furthermore, the highly visible use of some devices (for example, vans used for roadside testing, or PBTs used in connection with selective enforcement programs) creates an additional deterrent effect on the general driving public.

The preservation of breath specimens does not by itself reduce drunk driving. However, it reduces the likelihood of unsuccessful prosecutions that may result from failing to establish at trial a chain of custody for the blood alcohol evidence, or withholding potentially exculpatory evidence from the defense. In this indirect way, it supports deterrence of specific individual defendants and reduces recidivism.

The "noncooperative breath tester" (NCBT) has been proposed for use in connection with sobriety checkpoints, post-accident investigations, and routine traffic law enforcement to identify impaired drivers who are able to mask the physical signs of their alcohol impairment. These devices, if used, would be expected to promote general deterrence.

Currently, no evaluation is known to have been conducted with respect to these devices' effect on drunk driving. However, studies in several jurisdictions (for example, MacDonald and Wagner (1981)) have found that police officers regard PBTs as highly useful in deciding whether to arrest a stopped driver. These studies also suggest that the use of PBTs may increase the number of drunk drivers with lower blood alcohol levels (especially in the range of .10 to .15 percent) who are arrested.

Effect on the Public. It is possible that the public would consider video taping and PBTs too intrusive, although there is no data to support this. At this time, however, it is doubtful whether either device is sufficiently well understood to be a major concern to the general public. It appears likely that only their gross misuse would provoke any kind of adverse public reaction.

Public reaction to the "noncooperative breath tester" (NCBT), however, may not be as accepting. The device could provoke a strong and adverse reaction, especially if it is used on a wide scale, for example, after every traffic stop.

Vans used for roadside testing are often marked with identifying signs (such as "DWI Testing Van") and anti-drunk driving logos designed to capture public attention. Therefore, roadside testing vans can be a means of increasing public awareness of enforcement efforts.

Preservation of breath specimens has little or no effect on the public because it receives little publicity outside the criminal justice system and is connected with legal issues about which the public is not generally aware.

Effect on the Legal System. All evidentiary aids and procedures are connected with arrest and trial and therefore must comply with protections accorded by the U.S. Constitution. Specific provisions of the U.S. Constitution include:

- ◆ The Fourth Amendment's prohibition against unreasonable searches and seizures.
- ◆ The Fifth Amendment's privilege against self-incrimination; and
- ◆ The Fifth and Fourteenth Amendments' requirement of due process of law.

In addition, procedures involving testing for alcohol impairment must be consistent with State law, especially implied consent statutes.

Effect on Raising Public Awareness. Preservation of breath specimens will have no significant effect on heightening the public's awareness of this procedure's contribution to more effective drunk driving enforcement. However, many of the other evidentiary aids—video taping of suspected offenders, roadside testing, PBTs, and especially NCBTs—are newsworthy and can be expected to generate publicity. This, in turn, should increase the public's perception that drunk driving laws are being more efficiently enforced and that the opportunity for a drunk driver to avoid conviction is lessened.

Required Chemical Testing of Drivers Involved in An Accident

Description

Alcohol is involved in a disproportionately high number of personal injury and fatal traffic accidents. Those accidents have received much closer attention in recent years. Consequently, the prosecution and conviction of drinking drivers responsible for serious accidents has become more common. Still, many prosecuting attorneys and traffic safety officials are not satisfied with the frequency of prosecution and conviction of drivers at fault in these accidents. As a result, it has been proposed that all drivers involved in accidents be tested, whether or not there is probable cause to believe that a particular person drove while under the influence of alcohol.

One difficulty in proving a person guilty of aggravated drunk driving offenses (manslaughter, vehicular homicide, and the like) is the problem of establishing the driver's mental state, which may have a bearing on demonstrating recklessness or gross negligence. These are typical elements that must be proved in this type of offense. In that regard, establishing the driver's intoxication is very important. Chemical test evidence is vital in proving these elements.

However, obtaining a sample of breath or blood from the driver can present problems. Problems typically arise if the driver was unconscious, transported to a hospital after the accident, or was mindful of the consequences of potential test results and therefore refused to submit to a test.

In most States, the implied consent law governs testing for alcohol content in connection with aggravated drunk driving offenses. One weakness of implied consent statutes in these cases is that a driver may refuse to submit to a test and instead risk a license suspension. In addition, some States' implied consent laws, as written, prohibit the withdrawal of blood from an unconscious driver because he or she was not given the opportunity to refuse the test before it was administered.

In certain States, the threat of a license suspension under the implied consent law is not the only means of obtaining a specimen from a driver suspected of a drunk driving offense. Some implied consent statutes give a police officer the power to require a driver to submit to a test, provided the officer has probable cause to believe the driver was intoxicated (and, in some States, has obtained a warrant or court order authorizing the testing). The officer's power to conduct forcible tests is, however, limited by the constitutional requirement (described in *Breithaupt v. Abram*, 352 U.S. 432 (1957)) that the officer avoid using excessive force to obtain the specimen.

Laws in some countries, most notably Britain's Road Safety Act, authorize police officers to test all drivers involved in traffic accidents and even drivers stopped for suspected traffic offenses. A number of U.S. jurisdictions have enacted laws authorizing prearrest screening tests for all drivers involved in accidents. These include, for example, Iowa Code Ann., §321B.3 (West 1985), Minn. Stat. Ann., §169.123 (West Supp. 1985), and N.C. Gen. Stat., §20-16.3(a)(1)(b)(1983). Some of those laws do not require probable cause on the officer's part as a condition of testing.

Assessment and Commentary

Effect on Alcohol-Related Accidents. The principal rationale for universal testing of drivers involved in accidents is to prosecute more effectively those whose alcohol impaired driving causes traffic accidents. To the extent that test results strengthen the prosecution's case for conviction, and increase the penalties imposed on

drivers who are at fault and ultimately found guilty, universal testing would increase specific deterrence—that is, punished drivers will be less likely to commit another offense.

However, the effect of universal testing as a deterrent to the general public is probably uncertain, at best. It is reasonable to assume that the trial and conviction of a person charged with a serious drunk driving offense likely would generate publicity that could increase public awareness. Universal testing would have an additional subsidiary benefit. It would provide additional statistical data for researchers. Information obtained as a result of this testing could be used to reveal more information about the drunk driving problem and the offenders.

Effect on the Public. Public sympathies currently lie with the victims of fatal traffic accidents, rather than with drivers suspected of being at fault. A universal testing program in connection with fatal accidents, or even all accidents, would affect a far smaller segment of the driving public than certain other drunk driving laws such as sobriety checkpoints. They may, therefore, be expected to arouse considerably less public opposition. For this and other reasons, public and legislative support for universal testing of drivers involved in accidents would likely be high.

Effect on the Legal System. Statutes requiring the testing of all drivers involved in automobile accidents could be expected to increase the number of prosecutions for aggravated offenses related to drunk driving and the number of convictions for those offenses. Still, the number of these cases is expected to be relatively small compared to other criminal prosecutions and, therefore, the increases in the prosecution's and court's workload (if any) and the jail population would probably not place a significant additional burden on the justice system.

Effect on Raising Public Awareness. Statutes requiring all drivers involved in accidents to be tested raises constitutional and statutory issues that are more readily understood by judges, attorneys, and police officers than members of the public. If publicized, the statute probably would not have a great impact on drivers in general, since the differences between the present and proposed practices are more subtle and the number of people to be affected is small.

Drivers prone to be involved in accidents, especially the more "streetwise" ones, might be more aware of their legal rights and obligations (especially since police officers are required to advise them of the consequences of submitting to and refusing tests). If a statute calling for universal testing is enacted, it can be expected that police officers and prosecuting attorneys, in particular, will quickly learn of the testing requirement and apply it as soon after its effective date as possible.

Administrative Summary Suspension of the Driver's License

Description

Until recently, the "traditional" method of taking license action against a drunk driver was to impose a license suspension after the driver was convicted of drunk driving. However, in many instances, months or even years elapsed from the time of the offense until the time the suspension occurred. To ensure that the sanction of license suspension occurs more swiftly after the offense, "administrative summary suspension" of a drunk driver's license has been proposed.

Administrative summary suspension statutes typically require the arresting police officer to seize the license of a driver who either refuses an evidentiary chemical test for alcohol or "fails" it (has a blood alcohol at or above the legal standard of intoxication). The arresting police department issues the driver a receipt and forwards the seized license to the State driver licensing agency. The receipt serves as a temporary license until the driver licensing agency has taken final action.

The administrative license suspension procedure operates independently from the criminal charge for drunk driving. Therefore, it is possible for a driver to receive an administrative suspension in connection with an incident for which he or she was not convicted of drunk driving. In some States, license suspension is imposed by the driver licensing agency only. In other States, the drunk driving laws call for mandatory suspension of a

license upon conviction of the criminal drunk driving charge, but provide that any suspension period already imposed by the driver licensing agency is deducted from the court imposed penalty.

Assessment and Commentary

Effect on Alcohol-Related Accidents. Deterrence theory suggests that administrative summary suspension would, by decreasing the time lapsing between the offense and the punishment, increase specific deterrence. In effect, it would tend to discourage punished offenders from committing the same offense again. This, in turn, would more quickly incapacitate the offender and, provided the offender complied with his or her suspension, have some effect on the number of drunk driving accidents likely to occur. The practical effect of administrative summary suspension on deterring the general public and reducing the frequency with which they drive is less clear. The amount of deterrence depends on how much drivers fear loss of their license and how well the administrative suspension procedure is publicized.

Effect on the Public. Many citizens may not fully understand the concept of administrative summary suspension. However, the fact that a license is seized at the time of arrest would have an impact on the public. Immediate license seizure can be publicized as another means of "getting tough" on drunk drivers, and a means of taking license suspension cases out of the hands of judges. For these reasons it may be expected to receive public support.

Most of the opposition to administrative summary suspension has come from elements of the organized defense bar on the grounds that the concept provides punishment before trial and is therefore unfair. Their objections probably represent a minority view in terms of public opinion, but appear to be very influential within some State legislatures.

Effect on the Legal System. A driver's license has been classified by the U.S. Supreme Court as an "important interest" protected by the Due Process Clause. Therefore, it cannot be revoked or suspended without a hearing. The Due Process Clause raises two questions: (1) whether a license suspension can occur before a hearing; and (2) whether it can occur after a hearing but before trial on the drunk driving charge.

The creation of an administrative summary suspension procedure tends to have several effects on the legal system. The driver licensing system's workload—both hearings and paperwork—will increase. In a few States, it has been reported that driver licensing system personnel have not kept pace with their increased workload. However, this situation appears to be the exception and not the rule. Since the administrative suspension may go into effect before the trial, defendants charged with drunk driving will probably be more inclined to plead guilty and will be less likely to seek a delay of the trial.

Effect on Raising Public Awareness. Administrative summary suspension is very understandable to personnel within the justice system. However, as pointed out earlier, the concept is not as well understood by the general public. It is possible that an administrative system, properly publicized, will create among some members of the public an additional motivation not to drive after drinking.

Restriction or Elimination of Charge Reduction

Description

Restricting or eliminating the ability to reduce charges narrows a prosecutor's authority to substitute for a drunk driving charge some lesser, non-alcohol related offense, dismiss the charge, or not file a drunk driving charge in the first place. The rationale of restricting the prosecutor's charging discretion is that charge reduction, or diversion from the traffic law system at an early stage of a criminal prosecution, prevents the risk of an individual drunk driving event from being fully assessed. It also eliminates many options for appropriate actions by the justice system to reduce future risk. Further, failure to charge an offender with a drunk driving offense may prevent the system from accurately identifying the risk the individual presents if he or she should commit a subsequent offense, because the original charge reduction will most likely result in there being no record of the first offense in the offender's driving record.

State legislation, most of it enacted during the last several years, has placed a number of restrictions on the prosecutor's ability to reduce or dismiss charges. Some States have effectively limited, or at least restricted, the prosecutor's authority to plea bargain.

The least stringent statutes require the prosecutor to make a public disclosure of the reasons for making a plea bargain to reduce a charge to an offense less serious than drunk driving. A few States expressly require court approval for plea bargains in drunk driving cases. Finally, a number of States by statute flatly forbid plea bargaining when the defendant's blood alcohol level is at or above a given level (usually the legal standard of intoxication) if the evidence supports a drunk driving conviction. (Some State statutes forbid a trial judge to accept a plea to a lesser offense in these cases.)

Even in States that prohibit charge reductions, a prosecuting attorney conceivably could avoid the letter (though not the intent) of charge reduction statutes by failing to charge the defendant in the first place. However, a few States' statutes require the prosecution to bring an initial charge of drunk driving when the evidence (principally the chemical test result) indicates that such a charge would be appropriate. In other States, where the traffic citation issued by the police officer serves as the charging instrument, the prosecutor may not have the option of deciding whether to charge.

A number of States restrict charge reduction by requiring the adjudication of drunk driving cases. Under the most common mandatory adjudication statute, a judge may not divert a drunk driving offender under either a statutory or nonstatutory program. A few States also forbid a judge to engage in certain delaying techniques, such as continuing the action for an extended period of time or postponing sentencing while the defendant participates in a treatment program similar to diversion.

Finally, a number of States allow a defendant to participate in a diversion program or enter a guilty plea to a lesser offense only on the condition that the defendant receive a license suspension and participate in alcohol education and treatment. Many of those laws provide that a defendant who is charged with drunk driving a second time after participating in such a program must be charged as a second offender.

Assessment and Commentary

Effect on Alcohol-Related Accidents. Eliminating or restricting charge reduction impacts on two major factors believed to be related to reducing drunk driving.

The first of these is, as indicated above, accurate risk identification. Limiting charge reduction enhances "risk identification" by removing the opportunity for a "high risk" offender (such as a person with an alcohol problem) to hide in a labyrinth of charges and convictions for offenses that are unrelated to those involving alcohol. Without the ability of identifying repeat offenders, proper action cannot be taken by the justice system to reduce risk, because the person will not be identified through subsequent and successive convictions.

The second factor impacting on drunk driving that is helped by curbing charge reduction is the assurance that the full range of sanctions authorized by law—including jail, license action, fines, and mandatory alcohol education and treatment—is available for use by the sentencing judge.

Effect on the Public. Although no data is known to exist on the subject, it is probable that limits on charge reduction would be, in today's climate, strongly supported by the public. In most States that have laws eliminating or restricting charge reduction, the only known strong opposition has come from the defense bar. However, other potential sources of opposition include judges faced with increased trial dockets, individual prosecuting attorneys who would lose some of their authority regarding the handling of these cases, and police officers, whose documentation of arrests would become more extensive in light of the possibility that every drunk driving case could go to trial.

Effect on the Legal System. A major reason behind prosecutorial policies favoring large scale charge reduction or diversion is the need, actual or perceived, to reduce the prosecution's and the courts' traffic caseload. The caseload problem is exacerbated by the need for more time consuming processing (for example, jury trials) of cases and could reach crisis proportions if some accommodation is not made to relieve it. It is

aggravated in some jurisdictions by the lack of funds or personnel required to handle the court's caseload or by obsolete management systems (such as manual record keeping). In some instances, plea bargaining has resulted from a perception that the penalties for a given offense are excessive or not sufficiently flexible to accommodate all offenders. However, during the last few years, public opinion has tended to favor harsher treatment of drunk drivers.

Effect on Raising Public Awareness. A statute or policy that eliminates or restricts charge reduction is likely to generate significant news media attention. It is reasonable to assume that the driving public, and particularly prior drunk driving offenders, will take cognizance of it and grasp its significance as a threat to their ability to conceal successive drunk driving offenses.

It will also strongly affect the quality of information available to justice system personnel to identify persons who are likely to commit drunk driving offenses. The degree to which that information is effectively communicated to these personnel will be dependent upon existing information system and communications capabilities, such as a State's driver records system.

Reduction or Elimination of Judicial Discretion in Sentencing First Offenders

Description

Limiting judges' discretion in sentencing is usually accomplished by a statute. These laws narrow traditional judicial discretion to select from a broad range of case dispositions involving persons convicted of first offense or subsequent offenses of drunk driving. They restrict a judge's freedom to select both the type and severity of sanctions by statutorily requiring the court to impose mandatory minimum sanctions, forbidding sentencing judges to use certain sanctioning techniques (such as suspending or probating certain offenders), or both. In many jurisdictions, statutes limiting judicial discretion have been coupled with laws directed at plea negotiation.

The major mandatory sanctions imposed on drunk drivers include license action, fines, and confinement to jail. Many States' drunk driving laws also provide for other sanctions, especially community service, restitution to victims, and alcohol evaluation and treatment.

All States provide for the potential suspension or revocation of the driver's license of a person convicted of first-offense drunk driving. State laws vary, however, with respect to the length of the suspension (minimum suspension and allowable range of suspension), and whether the revocation or suspension is mandatory. Likewise, all States provide for the potential imposition of fines and costs on convicted drunk drivers. As in the case of license action, there is variation among States with respect to minimum fines and the range of allowable fines. Finally, a number of States have legislated mandatory minimum jail sentences.

However, very few States have laws that do not contain "loopholes" for avoiding mandatory sentences. For example, a restricted driver's license is available in most States for permitting driving in circumstances where the inability to drive would impose a severe hardship on the convicted drunk driver or others. "Mandatory" jail sentences can be avoided in some States through laws allowing the judge to suspend the jail sentence if jail would constitute a risk to the driver's physical or mental well being. In other States, the judge is allowed to substitute community service for jail as a sentence. Thus, even when "mandatory" sentences are prescribed, the actual sentence a convicted first offender receives often depends, to a greater or lesser extent, on the decision of the sentencing judge.

Studies indicate that the most effective drunk driving sanctions are certain, severe, and swift. Eliminating or reducing judicial discretion specifically addresses the first two of these elements. Those favoring mandatory sentences argue that judges have imposed sentences less severe than the law allows as well as less severe than warranted by the gravity of the offense. They further contend that the lenient sentencing has, in turn, diluted the potential deterrent effect of drunk driving laws.

Assessment and Commentary

Effect on Alcohol-Related Accidents. The effect of mandatory sentences on the alcohol-related traffic accident problem is largely unknown. It is known that actions against the driver's license can have a positive effect on both general deterrence and recidivism.

On the other hand, the jail sanction has not been adequately evaluated, and the evaluations that have been conducted have been inconclusive. The lack of evaluation has been the result of the infrequency with which first offenders have actually gone to jail. This infrequency is caused by "loopholes" in the mandatory sentencing laws that permit the "mandatory" jail sentence to be avoided, and the reluctance of judges to send offenders to jail (despite having the legal authority—and sometimes even the obligation—to do so), or both.

More recently, however, for a variety of reasons, this picture has changed and several careful evaluations have recently been initiated. These evaluations are important to this assessment, because it is the jail sanction that is most often at issue in discussions of judicial discretion in drunk driving sentencing. Some new data offers potential evidence that strong sanctions, widely applied, can reduce alcohol-related accidents, at least among drivers who have received the sanctions.

Effect on the Public. Public awareness of the jail sanction appears high. In Hennepin County, Minnesota, 61 percent of all respondents to a telephone interview, and 59 percent of respondents who drank more than once a week were aware of the sentencing policy. In Davidson County, Tennessee, which includes Nashville, awareness of mandatory jail reported in a questionnaire survey was 50 percent of all respondents and 79 percent of respondents who drank more than once a week.

Effect on the Legal System. Several studies have investigated the effect of mandatory jail on the justice system's operation. For example, research in the States of Washington, Tennessee, and Arizona has found that failures to appear in court increased, findings of guilty decreased, diversions and charge reductions increased, jury trials increased, pleas of "not guilty" increased, and more time was spent on drunk driving cases by prosecutors and judges. By contrast, the Hennepin County study reported none of these negative effects. That study also found that no great overcrowding of the jail occurred as a result of the new policy.

Effect on Raising Public Awareness. Mandatory jail laws have generated much news media attention wherever they have been used. This appears to stem primarily from their impact on the jails, which have created some highly newsworthy methods for coping with overcrowding—for example, establishing "tent cities" or housing prisoners on weekends in school gymnasiums. In addition, a large portion of the general public fears being placed in jail. For example, reports (which were not accurate) to the effect that the 1982 amendments to California's drunk driving law required the jailing of all offenders attracted a great deal of news media and public attention. Aside from that attention, however, the mandatory jail sanction would have no effect in itself on increasing the public's awareness about the dangers of drunk driving.

Server Liability for Alcohol-Related Accidents

Description

"Server liability" means the imposition of civil liability on certain servers who provide alcohol to intoxicated or underage individuals. Specifically, the server (that term includes both commercial establishments and social hosts) is civilly liable to those who suffer injury or other harm as the result of the intoxicated or underage person's irresponsible use of alcohol. Thus, servers providing alcohol to drivers who later harm themselves and others in alcohol-related accidents can be required to pay damages to the accident victims.

Commercial establishments are civilly liable in a majority of States. In most of those States, their liability is based on a statute. Those statutes are generally called "dram shop" laws because they were first introduced over a hundred years ago to make tavern owners financially responsible for supporting the families of customers who were "habitual drunkards." After Prohibition, the laws were used in suits against commercial establishments that served persons who later became involved in automobile accidents. The typical dram shop

law imposes civil liability for damages caused by the establishment's providing alcohol to "visibly intoxicated" or underage customers.

The second legal basis for a commercial establishment's liability is the common law. The New Jersey Supreme Court was the first to hold that liability could be imposed on a tavern under common law negligence without the necessity for an explicit dram shop law (*Rapaport v. Nichols*, 31 N.J. 188, 156 A.2d 1 (1959)). A growing number of State courts—some of which created a civil cause of action on the basis of existing laws forbidding taverns to serve minors or intoxicated persons—have since imposed common law liability on establishments.

To provide eligibility to recover damages under a dram shop law, an injured party must show the following:

- ◆ He or she was a member of the class of persons entitled to recover damages. (For example, in some States, an intoxicated driver who is injured may recover. In other States, he or she may not);
- ◆ The server provided alcohol to a "visibly intoxicated" or underage person (in the case of a typical dram shop law) or failed to exercise reasonable care with respect to serving alcohol (in the case of a common law action against the server); and
- ◆ The server's providing alcohol caused the harm that the injured party suffered. Not only must consumption of alcohol have been a cause of the injury, but that particular server's actions also must have been a cause.

Dram shop laws vary from State to State. The variables include who may recover, how much time the victim has to file a suit after being injured, how much money he or she may recover, and whether solvent defendants must pay their insolvent codefendants' share of the damage award.

Assessment and Commentary

Effect on Alcohol-Related Accidents. No published research is known that evaluates the effect of server liability laws on alcohol-related motor vehicle accidents. However, the laws clearly seek a general deterrent effect through the threat of a financial judgment against a server, rather than jail or loss of the driver's license suffered by the drunk driver.

There is evidence from roadside surveys of drivers that many drinking drivers have been served their alcohol in commercial establishments. Persons who drink in these establishments are the individuals who server liability laws seek to keep from drinking excessively and then driving. There is also evidence that this group may be heavier drinkers than are other groups of drivers. Research shows that heavy drinkers (including alcoholics and "problem drinkers") are greatly overrepresented in serious traffic accidents. There is also at least anecdotal evidence that large judgments have occurred in many recent server liability cases and that commercial servers are much concerned about this "trend." Recently, servers have increasingly taken steps to reduce their exposure to lawsuits by undergoing training to recognize and deal with persons who have drunk too much to drive safely. A study reported in the October 1983 issue of *American Psychologist*, however, disputes the ability of persons to estimate the sobriety of individuals and thereby challenges the basis for imposing liability under dram shop laws.

Nevertheless, server liability appears to offer some aspects of a successful strategy that will deter the general public from drinking and driving, although it could be argued that the requirement for quick imposition of punishment is not met. Further, while there is no guarantee that denial of access to alcohol in some settings would prevent access in alternative settings, one would expect at least some fraction of heavier drinkers and a larger fraction of moderate drinkers to be thwarted in some instances by the imposition of server liability.

Effect on the Public. No publicly available published reports are known that contain scientific surveys of public attitudes on server liability. However, responses to legislation (existing and proposed) reported in the news media have been predictable—the groups directly affected by the financial liability have strongly opposed the laws.

Dram shop laws have generally been opposed by commercial servers, on the grounds that the costs of legal defense and liability insurance have become prohibitive. Social host laws have been opposed by the general public, especially those who fear being financially ruined by a lawsuit resulting from their entertaining of others.

On the other hand, dram shop liability enjoys strong support from the organized bar in many States, because it provides drunk driving accident victims with a means of recovering damages. Both dram shop and social host liability laws are supported by anti-drunk driving groups, who see more responsible serving practices as a way to help eliminate drunk driving.

Effect on the Legal System. The effects of server liability on commercial establishments and social hosts will be dealt with in State legislatures, as indicated above. In some States, legislatures will deal with server liability as part of a larger issue posed by increasing liability awards and insurance costs. Since server liability is civil in nature, enforcement is carried out by victims of alcohol-related accidents, not by the police. Thus, any increase in activity in relation to server liability will not increase the workloads of law enforcement agencies. Currently, server liability actions are not so numerous that the courts have become "clogged" with them. The court systems' problems in handling these cases, such as delay, are common to all civil actions.

There are no significant constitutional constraints that apply to dram shop and social host liability laws. State legislatures generally have the power to create or abolish civil causes of action, and State courts likewise have the power—subject to legislative checks on them—to create common law causes of action.

Effect on Raising Public Awareness. Both dram shop and social host laws will most certainly receive wide attention in the news media. Court decisions holding social hosts liable gained wide attention in the press. Civil liability leads to large judgments which are inherently newsworthy, especially in light of widespread concern over the cost of liability insurance.

The publicity generated by individual actions against servers is reinforced by the larger debate over whether, and to what extent, liability should be imposed. Supporters and opponents of server liability have already directed substantial efforts toward influencing State legislatures, and have participated actively in public relations efforts. Therefore, those who wish legislatures to adopt server liability—especially social host liability—must also be prepared to participate effectively in a major public relations effort.

Admissibility of Evidence of Alcohol Impairment in a Civil Case

Description

Passengers and other persons who are injured in alcohol-related accidents often file civil actions to recover damages from the drunk driver. However, the evidence gathered by State authorities for use in prosecuting the drinking driver is not admissible in civil cases filed by private citizens. Persons injured in drunk driving accidents (including the drinking drivers themselves) sometimes file suit against the manufacturers of the automobiles in which they were traveling at the time of the accident, as well as against the governmental bodies responsible for building and maintaining the roads which they used.

In some instances, plaintiffs are at least partially the cause of the accidents that led to their injuries. However, judges and juries in civil cases do not have an opportunity to take into account the driver's impairment as reflected in the evidence gathered in conjunction with a drunk driving prosecution of the driver when determining liability or the amount of damages.

It has been proposed that certain evidence gathered by the State to prosecute a drunk driver be permitted to be introduced in civil proceedings if it tended to show that the driver contributed to his or her injuries, and those of the passengers, by being impaired by alcohol or drugs at the time of the accident. It is also highly likely that, if it were permitted by the rules of evidence or an appropriate law, then evidence of impairment would also be introduced by counsel representing victims killed or injured as the result of an alcohol-related or drug-related accident.

The purpose of permitting evidence of impairment to be used in civil cases is to prove that driver impairment—the inability to control a vehicle or take proper action in the event of a driving emergency—was a cause of the accident. The evidence permitted to be offered would consist of chemical analysis of the driver's breath, blood, or other body fluids, as well as other qualitative evidence of the driver's impairment.

Assessment and Commentary

Effect on Alcohol-Related Accidents. It is unlikely that permitting the introduction in a civil proceeding of evidence of the driver's impairment that has been gathered by the State in a drunk driving prosecution would have a significant deterrent effect on the general driving public. Studies conducted in other contexts suggest that most drivers discount the possibility of their being involved in an accident. In fact, public perception regarding the likelihood of accidents has been one reason for historically low seat belt use rates in the absence of mandatory belt use laws. Not only does the public perceive that a traffic accident "can't happen to me," but it is unaware of or may not fully understand the rather abstract legal concepts of contributory and comparative negligence, which are the basis of this proposal. Therefore, the admissibility of evidence of alcohol impairment derived in a drunk driving prosecution cannot be expected to have a major impact on alcohol-related accidents.

Effect on the Public. This proposal, if adopted, may increase the probability that an impaired driver who is sued by the victims of an accident would be found liable. Given today's climate, the jury may choose to "punish" the driver for his or her conduct and award an even larger amount of damages.

This proposal would, however, have a less certain effect on actions in which the impaired driver is claiming to be a victim. Although the public is currently unsympathetic toward drunk drivers, it is also unsympathetic toward such "deep pockets" as automobile manufacturers, State transportation departments, and county road commissions. "Hard" cases in which a drinking driver's family is denied damages on account of the driver's alcohol impairment may not be accepted by the media and elements of the public. In addition, juries are likely to award damages to drivers who bring law suits although they were impaired by alcohol or drugs, and also their passengers, on the basis of sympathy.

In the legislatures and within the legal profession, this proposal can be expected to touch off sharp debate, especially between the plaintiffs and defense bar.

Effect on the Legal System. The U.S. Constitution places no significant restrictions to admitting in a civil proceeding evidence of alcohol impairment that has been obtained for the purpose of prosecuting a drunk driving offense. In some States, narrowly drafted implied consent laws may bar the use of test results in a civil case, if the tests were taken in connection with a possible prosecution for an alcohol-related traffic offense. However, neither rules of evidence, court decisions interpreting those rules, nor a perception within the legal community that the introduction of impairment evidence is improper, pose insurmountable legal obstacles.

In a civil case, evidence of a driver's alcohol impairment should be used to prove who caused the injury. Its purpose is not to vilify an individual or unduly prejudice the jury against a party to the action. It is directed at the issue of causation, not fault.

However, trial attorneys, as well as many judges, take the position that raising the issue of the driver's impairment often works to inflame the jury's prejudices against drunk drivers in general. In their view, the potential abuse overrides its value in identifying the driver's conduct as the proximate cause of the injuries. Therefore, counsel seeking to have evidence of impairment introduced at trial must carefully lay a foundation, showing that alcohol or drugs affect driving ability and cause certain driving errors to occur, and that the driver committed an error that an impaired person typically would commit. Laying this foundation requires counsel to educate the judge and jury about the specific effects of alcohol or drugs on driving. It also requires some degree of technical knowledge on the part of the attorney and the selection of credible experts capable of educating the jury.

Proving that a driver's impairment, not defects in the vehicle or roadway, caused an accident to occur is different from, and more difficult than, proving that driver's guilt of drunk driving. The elements of a drunk driving offense are not complex. They basically entail proving that the defendant was operating a vehicle and met the criteria necessary to fall within the statutory definition of "intoxicated". They do not include legal

concepts related to "causation" (such as assumption of the risk, proximate cause, and contributory negligence), and do not make allowances for the possibility that a given driver was, at the time of his or her arrest, posing no immediate threat to other drivers. Establishing that a driver's impairment caused an accident requires more than proof that his or her blood alcohol content was above the legal standard of intoxication. It requires showing that specific aspects of the driver's ability to operate a vehicle were probably impaired at the time of the accident, and that a sober, alert driver probably would have reacted to the events preceding the accident differently, and thus would have avoided the accident.

Effect on Raising Public Awareness. As stated earlier, admitting in civil cases evidence that was derived in the course of a drunk driving prosecution and that relates to the driver's alcohol or drug impairment will not result in the general public's heightened awareness about the consequences of being prosecuted for drunk driving. Rather, most awareness about the significance of this evidentiary matter will remain within the legal and forensic communities, State legislatures concerned with liability questions, and courts or legislative bodies concerned with developing rules of evidence.

Separate Offense with Enhanced Penalties for Driving with A Revoked, Suspended, or Restricted License

Description

Research indicates that the revocation or suspension of a convicted drunk driver's license is the most effective means of reducing the likelihood that the driver will commit another drunk driving offense. However, the effectiveness of license action is diminished by the fact that many offenders continue to drive after their licenses have been suspended or revoked, and that many offenders granted restricted licenses (to and from work, for example) ignore those restrictions. Many of these drivers compound the problem of driving with revoked, suspended, or restricted licenses by continuing to drive after drinking. One factor leading to this illegal driving (and sometimes drunk driving) behavior is the driver's perception that he or she will not be caught and, even if caught, will not receive a substantial punishment.

This chapter discusses remedying the problem of driving while revoked, suspended, or restricted by defining that conduct as a separate offense with enhanced penalties. These penalties include:

- ◆ Criminal penalties comparable in severity to those for drunk driving itself; and
- ◆ Mandatory administrative penalties—specifically an additional term of license revocation or suspension.

The rationale of these penalties is as follows: If the driver operated a vehicle after drinking, the prosecutor has the option of charging him or her for drunk driving, driving with a revoked, suspended, or restricted license, or both. Given those options, the prosecutor can choose the most effective strategy for prosecution. In many instances, it will be easier to prosecute the driver on the charge of driving on a revoked, suspended, or restricted license because there are fewer elements to prove. Conviction on that charge will nonetheless carry penalties severe enough to have a specific deterrent and incapacitative effect similar to those for drunk driving.

A number of States have, in the course of amending their drunk driving laws, provided for more severe penalties for driving while revoked or suspended, if the cause of the suspension was a drunk driving conviction. Those laws typically call for a mandatory minimum jail term, ranging from several days to a month or more, as well as an extension of the revocation or suspension term.

This proposal is broader than those laws. It would apply the enhanced penalties to persons whose licenses were revoked, suspended, or restricted for any reason (such as accumulation of violation points or failure to meet financial responsibility requirements). However, it is anticipated that the principal person affected by this type of law will be those who received license action as the result of a drunk driving conviction or an implied consent refusal.

Assessment and Commentary

Effect on Alcohol-Related Accidents. To the extent that convicted drunk driving offenders fear additional penalties such as jail, perceive their risk of being caught as high, and take the severity of punishment into account when deciding whether to drive, the proposed additional penalties will increase deterrence among them, and thus tend to reduce the risk that additional alcohol-related accidents will occur. The extent to which the proposed new law is publicized will also determine its deterrent effect on prior offenders. It may also be expected to have a similar effect on those who have not been convicted of drunk driving.

Effect on the Public. The public presently endorses strong action against those they perceive as the "hard core" drunk drivers. Therefore, they can be expected to support more severe sanctions against those who drive in spite of alcohol-related suspensions. However, public support may be weaker in the case of those suspended for other reasons. In many States, failing to respond to a citation for a moving offense results in the automatic imposition of a license suspension until the matter is resolved. The public and the news media may consider severe, mandatory penalties inappropriate for that class of suspended driver.

Effect on the Legal System. One effect that could be expected from enhanced penalties for these offenders is that the prosecution of some repeat offenders would be made easier. The prosecuting attorney could choose to charge the driver with that offense since it is easier to prove, but he or she may decide instead to use it as a lever to negotiate guilty pleas to either offense ("drunk driving" or "driving while revoked, suspended, or restricted") by agreeing not to charge the other offense in exchange. Anecdotal evidence suggests that this type of plea agreement often occurs when a driver is charged with drunk driving as well as one or more collateral charges (most often driving while suspended or refusing to take a test).

Another expected effect would be that more drivers would have their licenses revoked or suspended and for longer periods of time. This could either decrease the number of chronic alcohol traffic offenders who drive (if the suspended drivers comply with the license action) or increase the number of illegal drivers (if individuals continue to drive after receiving the enhanced sanctions). Those that continue to violate the law will probably eventually be sentenced to jail. In some jurisdictions, those familiar with the criminal justice system report that many "hard core" violators repeatedly violate both the drunk driving and driver licensing laws and are eventually sentenced and jailed on a "revolving door" basis.

In some instances, it may be more convenient for a prosecuting attorney to charge a defendant with driving while revoked or suspended. However, it may be more appropriate, in light of a driver's chronic drinking driving behavior, to charge with a second or subsequent drunk driving offense. These drivers pose such a risk to others that the more stringent penalties that can be imposed on multiple offenders are needed to deter and incapacitate.

Effect on Raising Public Awareness. It is expected that drivers sentenced for drunk driving will have the consequence of future drunk driving offenses explained to them at the time of sentencing. A warning about driving while still under suspension could be provided at the same time. If the legislation providing for enhanced penalties for driving while suspended is newly enacted, it probably will be publicized by the news media to the general driving population.

Implementing these kinds of enhanced penalties will require close cooperation among trial courts, driver licensing officials, and law enforcement agencies. Police officers must know the license status of the drivers they stop. In addition, driver licensing personnel must receive conviction abstracts from courts on a prompt and regular basis. If cooperation does not already exist, then bottlenecks may be created within the system.

Summary of Conclusions and Recommendations

This monograph has examined a number of sanctions and enforcement techniques designed to reduce the incidence of traffic accidents caused by alcohol-impaired drivers. Findings from the scientific literature as well as the judgment and experience of justice system personnel and of researchers and practitioners from other disciplines were used in assessing these sanctions and enforcement techniques. An attempt was made to synthesize all information made available during the course of the project. It was used to formulate a balanced, methodical assessment of the overall impact of each sanction and enforcement technique on highway safety, the

public, the legal system, and the impact in raising the public's awareness of drunk driving issues. The project's major conclusions and recommendations are summarized below:

- ◇ **Sobriety Checkpoints.** This approach is a promising tactic for deterring potential drunk drivers in the short term.
- ◇ **"Per Se" Laws.** "Per se" laws can support the deterrence of drunk driving and are believed to have a generally positive effect on highway safety. They can also prove the effectiveness and efficiency of the processing of drunk driving cases through the justice system. The adoption of "per se" laws should be supported. A blood alcohol limit of .10 percent weight/volume should be established for such laws. Chemical tests used in evidence should be taken within one hour of the stop or arrest.
- ◇ **Minimum Drinking Age.** Despite numerous evaluations in a variety of settings, the highway safety impact of minimum drinking age laws remains unknown. Nevertheless, there is reason to believe that the overall effect of these laws is beneficial. State laws establishing a minimum drinking age of 21 years should be adopted. However, each State's law should require that the drinking age law be evaluated periodically.
- ◇ **Server Liability for Alcohol-Related Accidents.** Laws and court decisions imposing civil liability for servers can limit the availability of alcohol to potential drunk drivers and therefore should have a positive effect on highway safety. A civil cause of action should exist against persons—including social hosts—who serve alcohol to visibly intoxicated persons or persons who are under the minimum legal age for consuming alcoholic beverages. Support should be provided to enact State "dram shop" legislation, oppose efforts to eliminate or limit common law server liability, and create a cause of action against providers of drugs.
- ◇ **Admissibility of Evidence of Alcohol Impairment in a Civil Case.** Relevant evidence of a driver's impairment by alcohol or drugs should be admissible in a civil case arising out of a traffic accident. "Relevant" evidence means evidence tending to establish that the driver's impairment was a proximate cause of the accident. The mere fact that a driver's blood alcohol content was at or above the legal standard of intoxication does not by itself meet the standard of relevance. Relevant evidence includes chemical tests carried out for purposes other than establishing impairment under State implied consent laws. For example, it would include postmortem examinations of deceased drivers. Legislation should be supported to specifically provide that the results of those tests be admissible.
- ◇ **Reduction or Elimination of Judicial Discretion in Sentencing First Offenders.** Mandatory jail sentences represent a viable approach toward multiple offenders, since those individuals present such an established threat to traffic safety. Mandatory minimum jail terms for multiple offenders should be supported, and they should be complemented with other punitive and rehabilitative sanctions. However, the project is not convinced that mandatory minimum jail terms for first offenders will have a highway safety effect large enough to justify the cost involved. Nevertheless, it does support the adoption of sanctioning policies by trial judges, which would establish sentencing criteria based on the first offender's blood alcohol level, past driving record, and "aggravating" circumstances such as accident involvement. Any additional sanctions, above the mandatory minimums, should be based on information about the specific offender, which should be provided in a presentence report available to the trial judge at the time of sentencing.
- ◇ **Restriction or Elimination of Charge Reduction.** Reduction of drunk driving charges to non-alcohol convictions, and the dismissal of charges under diversion or earned charge reduction programs, have an adverse effect on highway safety. Those practices result in the drunk driver receiving inappropriate sanctions and the lack of a driving record that would identify the risk that driver poses should he or she be rearrested. Therefore, plea negotiations that result in conviction of lesser, non-alcohol, charges are inappropriate. However, it must be recognized that plea negotiation has a legitimate function in the disposition of some drunk driving charges, such as when there is insufficient evidence of guilt, the plea negotiation would not change the defendant's sentence, or the plea negotiation is necessary to obtain the testimony of a material witness. Even

in those instances when a reduced charge is appropriate, the reasons for the plea negotiation should be placed on the record, and the alcohol involvement noted on the driver's record.

- ◆ **Improved Evidentiary Aids and Procedures.** A number of devices and procedures exist or have been proposed to improve the quality and efficiency of drunk driving arrests and to gather more persuasive evidence to use at trial. Those that the project found particularly useful in drunk driving cases include: (1) preservation of chemical test specimens to allow the defense to reanalyze them, (2) the adoption of calibration requirements to ensure accurate test results, and (3) legislation requiring police officers to advise drivers of their right to a second, independent analysis. Video taping of arrested drivers' behavior, and the use of gaze nystagmus to determine impairment, can likewise be beneficial in obtaining drunk driving convictions and should be used. However, in using video taping, particular care must be taken to ensure fairness. The use of preliminary breath testers is also supported by the project, although it must be remembered that the cost effectiveness of those devices has not yet been demonstrated. Therefore, they should be used only when the testing officer has probable cause to believe that the driver is under the influence of alcohol.
- ◆ **Required Chemical Testing of Drivers Involved in An Accident.** Current statutes add to the difficulty of proving guilt of aggravated drunk driving offenses such as manslaughter. State implied consent laws should therefore be amended, when necessary, to provide that a police officer may require a driver involved in a fatal accident to submit to a chemical test for intoxication if the officer has reasonable grounds to believe the driver was under the influence. Existing State laws should be amended, when necessary, to allow a police officer to test the driver, even if the driver objects to being tested, if the officer can satisfy all constitutional requirements relating to probable cause and a warrant, and uses only a reasonable amount of force to obtain the specimen.
- ◆ **Administrative Summary Suspension of the Driver's License.** A growing number of States have replaced the "traditional" practice of postconviction license suspension with an administrative system which results in swifter punishment for drunk drivers. This concept merits support, provided appropriate measures are taken to ensure due process of law and that the procedures in fact result in swift punishment for the guilty. To that end the following procedures are recommended:
 1. Immediate license seizure after a test refusal or failure;
 2. Issuance of a temporary receipt valid only until the administrative hearing process is completed;
 3. Steps to discourage delaying the administrative process;
 4. Enhanced penalties for subsequent test refusals or failures; and
 5. Provisions for limited licenses in cases of true hardship.
- ◆ **Separate Offense With Enhanced Penalties for Driving With A Revoked, Suspended, or Restricted License.** Convicted drunk drivers who continue to drive and, in many instances, drink and drive represent a major hazard to traffic safety. In many instances, current penalties for driving while under suspension are not severe enough to discourage suspended drivers. Therefore statutes should be enacted that will provide enhanced penalties for persons who drive in spite of an alcohol-related license suspension. The penalties should include a minimum fine and jail term comparable to those imposed for the first offense of drunk driving. There should also be an additional license suspension, equal to that imposed for the first offense of drunk driving. In addition, convictions for driving while the license is suspended or revoked should be considered as an aggravating factor in determining the sentence to be imposed if the offender is later convicted of this same offense, drunk driving, or another serious traffic offense.

- ◇ Other Approaches and Programs. A number of other approaches and programs merit consideration as a means of addressing the drunk driving problem. They include:
 - ◇ A continuing program of training and education to increase understanding of the nature of the drunk driving problem, and to promote awareness of actions being undertaken to reduce the magnitude of the problem;
 - ◇ Evaluation of programs—including legislation—aimed at drunk driving;
 - ◇ Using interstate driver records systems, such as the Driver License Compact and the National Driver Register, to identify license applicants whose licenses have been revoked, suspended, or restricted in other States;
 - ◇ Establishing a drug recognition experts program under which police officers are trained to administer a series of behavioral tests that identify impairment by drugs;
 - ◇ The preparation of presentence investigation reports for all drivers convicted of drunk driving to ensure that the most appropriate combination of sanctions is imposed;
 - ◇ The adoption of "open container" laws prohibiting the possession or consumption of alcoholic beverages in the passenger area of motor vehicles; and
 - ◇ The adoption of State laws and regulations requiring medical insurers and health maintenance organizations to cover treatment for alcohol and drug dependency.

An examination of the literature on drinking driving and consideration of the views of persons who deal with or are otherwise concerned with the problem, make apparent the inherent limitations of legal system approaches in reducing the incidence of alcohol-related traffic accidents. Claims that increased enforcement and tougher laws alone will have a significant impact on the problem must be viewed with skepticism. It must be remembered that all sanctions and enforcement techniques have limitations imposed by our system of laws and other practical considerations. In some cases certain measures are not feasible because of limitations in system resources and limitations in the willingness of the public to support the measures. However, the measures contained in this Report do hold the potential of having a positive effect on highway safety and will also improve the operation and fairness of the justice system's dealing with the problem.

Nevertheless, total reliance should not be placed on the justice system as a means of dealing with drunk driving. Other approaches, including the use of advanced technology and public information and education, should be employed to support and enhance legal approaches. Further, improvements in other components of the highway transportation system, including motor vehicles and the highway environment, should continue to be sought with increased vigor. A combination of sanctions and enforcement technique properly applied in conjunction with these improvements is the best hope for decreasing the overall traffic accident risk and that part of the risk caused by alcohol-impaired drivers.

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Deficiencies in Enforcement, Judicial, and Treatment Programs Related to Repeat Offender Drunk Drivers¹

National Transportation Safety Board

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ABSTRACT

The Report presents the findings and recommendations of the National Transportation Safety Board's study on "repeat offender" drunk drivers. It is organized in the chronological order of events which could be encountered by a drunk driver being processed through the several systems. A variety of weaknesses in the law enforcement, judicial, and treatment systems which contribute to the persistence of the repeat offender problem are documented, and steps are recommended to be taken by states, judicial training organizations, the Veterans Administration, and the National Highway Traffic Safety Administration to enhance the effectiveness of the enforcement, judicial, and treatment practices in reducing recidivism.

Methodology

The Safety Board began this Safety Study in September 1983. It is based on a literature search, research, and accident investigations conducted by the Safety Board's Atlanta, Chicago, Denver, Fort Worth, Los Angeles, and Kansas City field offices.

NTSB investigators reviewed State alcohol education and treatment systems in 10 States.² Local enforcement systems³ and local judicial systems⁴ were probed in selected counties and four cities within these States. In addition, the statewide enforcement system for two of these States⁵ and the State judicial system in one State⁶ were reviewed.

¹ This article presents highlights from a National Transportation Safety Board Safety Study. The information contained in this article complements that presented in the preceding paper, "Drunk Driving Laws & Enforcement: An Assessment of Effectiveness."

² California, Colorado, Georgia, Illinois, Kansas, Missouri, North Carolina, Utah, Washington, and West Virginia.

³ Adams County, Colorado; Hermosa Beach, Los Angeles, and Manhattan Beach, California; Gwinnett County, Georgia; Kanawha County, West Virginia; Kansas City, Missouri; King County, Washington; Raleigh, North Carolina; and Salt Lake City, Utah.

⁴ Dupage County, Illinois; Gwinnett County, Georgia; Johnson County, Kansas; Kanawha County, West Virginia; Kansas City, Missouri; King County, Washington; Los Angeles, California; Raleigh, North Carolina; and Salt Lake City, Utah.

⁵ Illinois and Kansas.

⁶ Colorado.

Thirty-eight of the accidents investigated by the Board involved known repeat offenders. Five other accidents involved at least one driver with a history of alcohol or drug abuse, and eight more involved juvenile drivers with no documented history of drunk driving. These investigations provided information to determine the probable causes of the accidents, as well as to develop a profile of a drunk driver, based on in-depth exploration of previous driving while intoxicated (DWI) arrests, convictions, and sentences. The Board also interviewed accident witnesses, family members, police officers, attorneys, and judges in the conduct of these investigations.

Finally, the Safety Board interviewed 40 convicted drunk drivers with previous alcohol-related convictions, seeking their views on what events might have been handled differently at the time of their first encounter with an alcohol-related offense to influence their behavior and perhaps prevent additional offenses. The interviews were conducted while offenders were in treatment, on probation, in jail, or after the sentence was completed.

First Stop or Arrest for Driving While Intoxicated

Detection

Many highway safety experts agree that many drunk drivers persist in their behavior because they believe there is a low risk of arrest and penalty. In a recent nationwide telephone survey, between one quarter and one-third of those interviewed who drink alcohol said they believe that the chances of being caught and punished for drinking and driving are not great enough to deter them from driving after drinking too much.⁸ Even though DWI arrests nationwide have increased steadily (from 561,000 in 1969 to more than 1,300,000 in 1983),⁹ the probability of arrest remains relatively low, with estimates ranging between 1 in 200¹⁰ drunk drivers to 1 in 2,000.¹¹

In an attempt to increase the real risk of detection and arrest, and drivers' perception of that risk, the Safety Board recommended on September 9, 1983, that the Governors of the States, and the Mayor of the District of Columbia

Implement a citizen awareness and citizen drunk driver reporting program such as the IReport Every Drunk Driver Immediately (REDDI) programs now used by Colorado, Maryland, Nebraska, Utah, and Washington. (Class II, Priority Action) (H-82-35)

REDDI programs provide direct assistance to law enforcement efforts to detect and apprehend drunk drivers. With the aid of the mounting public who report drivers who appear to be driving while intoxicated, the detection capabilities of police have been expanded and the deterrent effect of DWI enforcement programs has been increased. Since the Safety Board made these recommendations, 12 States have adopted such programs. As of June 1, 1984, 32 States had established some type of citizen reporting program. Thirteen States that keep records of calls received, report receiving 61,055 citizen calls, resulting in 15,947 contacts with motorists, and leading to 10,120 DWI arrests (61.5% of the contacts).

The International Association of Chiefs of Police and the National Safety Council maintain systems of gathering information and disseminating it to both state and local law enforcement agencies. Therefore, the

⁸ A variety of terms are used in laws concerning drinking and driving, such as "driving while intoxicated" (DWI), "driving while alcohol impaired" (DWA), "driving under the influence" (DUI), and others. The distinctions among these terms are based primarily on the level of blood alcohol concentration (BAC) at the time of the offense. Some State laws use only one term, some use several. Because the fine distinctions are not pertinent in the context of this report, and for the sake of simplicity, this study report uses only DWI.

⁹ R. Compain and R. Engle, "Safety Checkpoints for DWI Enforcement," National Highway Traffic Safety Administration, July 1981.

¹⁰ John Volpe, Chairman, Presidential Commission on Drunk Driving, Statement Before the Subcommittee on Alcoholism and Drug Abuse, Senate Committee on Labor and Human Resources, August 5, 1982.

¹¹ G. A. Beitel, M. C. Sharp, and W. D. Collins, "Probability of Arrest While Driving Under the Influence of Alcohol," *Journal of Studies on Alcohol* (1975), p. 16.

¹² R. F. Borkstein, "Efficacy of Law Enforcement Procedures," *Modern Problems in Pharmacopsychology* (1976), p. 11.

National Transportation Safety Board recommended that the International Association of Chiefs of Police and the National Safety Council:

Collaborate and act as focal points for gathering information on REDDI-type programs and provide information and assistance to the interested States and local communities. (Class II, Priority Action) (H-82-36)

In an effort to determine what more could be done to increase the risk of detection and the drunk driver's perception of the risk of detection, the Safety Board undertook a study of drunk driving deterrence measures and adopted a report on April 13, 1984.¹² One major finding was that sobriety checkpoints had the potential to be an effective means to achieve these goals. During a 1978 sobriety checkpoint campaign in Melbourne, Australia, significant decreases in nighttime fatal and injury crashes involving drivers with illegal blood alcohol concentrations were attained. In the United States, Delaware reported a 32% drop in alcohol-related injury accidents during an 8 1/2-month period from December 4, 1982, to August 13, 1983 when sobriety checkpoints were in use. The study found that sobriety checkpoints currently are in use or under consideration in twenty-one jurisdictions and in at least five foreign countries. The Board's study concluded that sobriety checkpoints should be an integral part of a State's comprehensive alcohol and highway safety program. On April 23, 1984, the Board recommended to the Governors of twenty States and three Territories that they:

Institute use of sobriety checkpoints on a periodic and continuing basis by the appropriate enforcement agencies under your jurisdiction as part of a comprehensive Driving While Intoxicated enforcement program. These checkpoints should be conducted according to accepted procedures and constitutional safeguards. (Class II, Priority Action) (H-84-11)

Encourage local law enforcement agencies within your State to institute sobriety checkpoints on a similar basis. (Class II, Priority Action) (H-84-12)

In addition, in order to provide all States and localities with current information on the effectiveness of sobriety checkpoints and other potential countermeasures, the Board recommended that the National Highway Traffic Safety Administration evaluate their effectiveness. (Safety Recommendation H-84-25.) As of September 1, 1984, sobriety checkpoints were in use by some police agencies in approximately 36 States.

Drivers Stopped While Intoxicated But Not Arrested

A study conducted recently by the Southern California Research Institute on a new standardized field sobriety test battery reinforced earlier studies which showed the inaccuracy of psychometric (physical) tests in detecting drivers at legally intoxicating blood alcohol levels.¹³ Prior to training on the new test battery, the officers studied arrested only 69.2% of stopped drivers who had BAC levels greater than 0.10%. A new test, called "Horizontal Gaze Nystagmus", however, could significantly increase the probability of detecting lower BAC levels in the field. Van K. Tharp of the Southern California Research Institute describes the test:

[His name] refers to a jerking of the eyes as they deviate to the side. The jerking has a slow and a fast phase, with the fast phase being in the direction of the gaze. The eyes of 50-60% of all individuals will show horizontal gaze nystagmus if they move to the lateral extremes of from 45 to 65 degrees, measured from the center of the nose. However, after a person has consumed alcohol, the onset of the gaze nystagmus occurs at a much smaller angle, depending upon the blood alcohol concentration (BAC). The relationship between the angle of onset of horizontal gaze nystagmus and the BAC is so precise that a properly trained police officer can estimate a driver's BAC at roadside within ± 0.02 percent of chemical test readings.¹⁴

¹² Safety Study, "Deterrence of Drunk Driving: The Role of Sobriety Checkpoints and Administrative License Revocations," NHTSS 84-01, April 3, 1984.

¹³ Van K. Tharp, Marceline Burns, and Herbert Moskowitz, "Limited Field Testing of a Standardized Sobriety Test Battery," 23rd Proceedings, American Association for Automotive Medicine, 1981.

¹⁴ Van K. Tharp, "Gaze Nystagmus as a Roadside Sobriety Test," Abstracts and Reviews on Alcohol and Driving, Vol. II, No. 2, UCLA Alcohol Research Center, February 1981.

The NHTSA has recognized the value of the gaze nystagmus test and, in January 1984, issued a report, *Improved Field Sobriety Testing*, which recommends a three-part field sobriety test. The test consists of horizontal gaze nystagmus, a walk and turn, and one leg stand.

Another valuable tool of the police officer is the Preliminary or Pre-arrest Breath Test (PBT). PBTs can establish the BAC to within 0.01%. The tests enable an officer in the field to determine easily, quickly, and accurately whether a person is under the influence of alcohol in marginal cases and whether an arrest is justified. The Presidential Commission on Drunk Driving views PBTs as a reasonable use of police authority when the officer has a reasonable suspicion that DWI laws have been violated. The Safety Board believes that methods to improve the accuracy of field testing should be made available to police officers to increase the likelihood an arrest will be made where warranted.

Evidentiary Problems

The results of breath tests can be introduced as evidence of illegal BAC. However, when a driver suspected of DWI is seriously injured in a crash, breath tests may not be possible.

The drawing of blood for DWI evidentiary purposes generally occurs only at the direction and in the presence of a police officer. State health regulations designate those professionals (physicians, nurses, physician's assistants, paramedics, etc.) allowed to draw blood. In order to meet important legal and scientific requirements, blood samples must be drawn and stored appropriately (e.g., skin cleaned with non-alcohol swabs; blood stored in sterile, tightly sealed vials, etc.); have a documented chain of custody; and be analyzed by State or State-approved laboratories, using specified analytic techniques. In many instances, police report that hospitals and physicians have refused to perform such tests, fearing legal liability or involvement in lengthy court litigation.

Where blood alcohol tests are performed on injured drivers for medical (rather than forensic) purposes, hospitals and physicians also commonly refuse to submit BAC test results without a court order (often citing the doctor-patient confidential relationship). Blood alcohol tests are, however, not universally performed on all injured drivers, even for medical purposes.

These requirements often have the effect of precluding the gathering of evidence necessary to convict drunk drivers. In those States in which these sorts of evidentiary requirements exist, there is a need to examine whether they can be better structured to facilitate the efficient collection of DWI evidence.

When the primary evidence of a defendant's BAC level consists solely of the results of a "breathalyzer" test performed at the time of the arrest, defense attorneys have often argued that the Constitutional guarantees of a right to a fair trial and due process require the preservation of the breath sample for independent testing. Most breathalyzers destroy the sample, even with those that do not; it is difficult to preserve a breath sample through the period between arrest and an opportunity for the defense to have it tested.

On June 11, 1984, the U. S. Supreme Court held that the due process clause of the 14th Amendment does not require preservation of breath samples.¹⁵ In most States at this time, this means that breath samples need not be preserved and breath test evidence cannot be excluded from the trial on the grounds that a sample was not preserved for testing by the defense. However, the Supreme Court noted that State courts and legislatures are free to adopt more rigorous rules on the admissibility of scientific evidence than those imposed by the U.S. Constitution. Vermont and Oklahoma statutes require preservation of breath samples. The Alaska State Supreme Court has held that the due process clause of the Alaska Constitution requires such preservation.¹⁶ Other States may adopt similar statutes or interpret their Constitutions similarly.

¹⁵ *California v. Trombetta*, 104 S. Ct. 2528, 52 U.S.L.W. 4744 (June 11, 1984).

¹⁶ *Municipality of Anchorage v. Serrano*, 649P.2d 256 (Alaska App. 1982).

Court Proceedings

Delays Between Arrest and Adjudication

Continuances and crowded dockets are but two of many reasons for delays between arrest and trial. In drunk driving cases, one result of these delays may be that an offender awaiting trial is arrested for DWI again before the first case is tried. In these cases, both charges may be combined and the defendant may be viewed by the court to be a first offender.

One countermeasure that is receiving increased attention, and that may mitigate some of the negative effects of delays between arrest and trial, is administrative license revocation. In its study of drunk driving deterrence measures,¹⁷ the Safety Board found that although motor vehicle department administrators typically have statutory authority to suspend or even revoke drivers' licenses, this authority rarely has been exercised in the past against drivers who violate drunk driving laws without a court notice of the driver's conviction on these charges. Given the often long delays between the driver's arrest and court conviction, a reluctance on the part of motor vehicle administrators to suspend or revoke on their own authority, permits the offenders to continue to drive on a legal license for long periods of time before trial. Furthermore, even drivers whose BAC levels were over the legal limit often succeed in having the charges reduced, so that their conviction did not result in a traditional license suspension or revocation. The Safety Board recommended that administrative license revocation be made an integral part of each State's comprehensive alcohol safety program (Safety Recommendation H 84-13 and -17). As of September 1, 1984, administrative license revocation procedures had been adopted in 23 States.

Generally, in a State which has administrative license revocation laws, a police officer with probable cause to arrest a driver for a drinking/driving offense may ask the driver to submit to a breath test. The driver is warned that the law provides that his or her license will be revoked for refusal to take the test or if the test results evidence a BAC level above the legal limit. In either case, the police officer will take physical possession of the license, and give the driver a written notice that the driver has the right to request both an administrative and a judicial review of the revocation. (The written notice also serves as a temporary driving permit, valid for up to 30 days, depending on the State.)

Since most repeat offenders are problem drinkers or alcoholics, they may be less influenced by administrative license revocation than non-repeat offenders. Characteristic of problem drivers is a relative lack of regard for legal sanctions and social norms; certainly, repeat offenders have, by definition, demonstrated a certain immunity to the influence of laws and sanctions. Thus, administrative license revocation is likely to be a more effective deterrent against those who are not "hard core" repeat offenders, that is, against those who are more likely to take license revocation seriously, who may be deterred from driving after drinking by fear of arrest and immediate revocation, or who may at least forego driving (particularly driving after drinking) if their license is administratively revoked. However, it also has some advantages even in the case of the sorts of drivers this study addresses. At the very least, administrative revocation at the time of arrest makes it illegal for the driver to continue using his or her license during most of the long delay until the hearing or trial and any subsequent drunk driving offenses are not committed while the driver is legally licensed by the State. Furthermore, even some habitual drunk drivers may be influenced to drive less, or drive sober, during the revocation period.¹⁸ Finally, if a second offense is committed after administrative revocation, it will be much more difficult to present the second offense as a first offense, even if the first offense was plea bargained down and does not appear on the record as a drunk driving offense.

Administrative license revocation is essentially a variation of traditional license suspension or revocation. Because these license actions are known to be effective in reducing both crashes and violations, it is reasonable to believe that administrative revocation likewise will be effective. Furthermore, it meets all three criteria for effective sanctions postulated by drunk driving deterrence theory.¹⁹ It is viewed by drivers as a severe

¹⁷ National Transportation Safety Board, *op. cit.*, p. 10.

¹⁸ H. L. Ross, *Deterring the Drunk Driver: Legal Policy and Social Control* (Lexington, 1982).

sanction,²⁰ it can be avoided with certainty, and it gives more effect shortly after arrest. It also has the advantage of being a less costly sanction in the long run than other countermeasures such as jail sentences.²¹

Plea Bargaining

Plea bargaining not only reduces the sanctions on the drunk driver, it also distorts his or her offense record, particularly when an alcohol related charge is reduced to a nonalcohol related charge. When this happens, there is no record of the arrest involving alcohol, so that the next time the offender is arrested, his or her records lead the court to believe they are first time offenders. Some States have taken steps to deal with this result. For example, the Colorado Revised Statutes require the Division of Motor Vehicles to record all dismissals of DWI charges on a driver's record. They further require that the record show if a DWI charge is amended to a lesser charge. Colorado law also places restrictions on plea bargaining in DWI cases to prevent reduction of DWI charges to nonalcohol related charges.²²

Prosecutors plea bargain for various reasons—to avoid the difficulties of jury trials, to clear overcrowded dockets, or in many cases, because they do not give DWI cases a high priority. The Presidential Commission on Drunk Driving reported:

The public prosecutor is responsible for, among many other things, evaluating, charging and trying (DWI) cases. Historically, prosecutors have not given (DWI) cases a high priority; consequently, they frequently engage in plea bargaining the (DWI) case. This results in reduced or minimal sanctions and reinforces the social acceptability of drinking and driving.

Prosecutors have largely failed to recognize or appreciate the impact, good and bad, that their attitudes and policies can have on the problem of the drinking driver. It is time for the prosecutor to assume a leadership role in dealing with the problem.²³

Sentencing Process

Judicial Training

Those familiar with the State and local court systems agree that many judges lack the training necessary to permit them to adjudicate drunk driving cases in a way that helps to reduce this problem and to do justice in the interests of both the offender and the public. The Presidential Commission on Drunk Driving commented in its final report:

It should be kept in mind that the public, and not only the defendant, has certain rights. Thus, the judiciary plays a vital role in discouraging driving under the influence. There are about 21,000 judges hearing traffic cases in the nation's 17,000 courts.²⁴ (DWI) cases constitute a substantial portion of their caseload. Nonetheless, most of these judges have had little formal training in either the adjudication of these cases or in alcohol use and traffic safety. All too often, the judiciary fails to view driving under the influence as a serious offense meriting certain, swift and appropriate punishment.²⁵

²⁰ E. Lavery, *Minnesota's Inebriated Marital Injured Criminal Law (d.d.)*, Minnesota Department of Public Safety (1981).

²¹ For further discussion of these points, see a paper by Patricia E. Waller, *Enforcing and Other Controls of the Drinking Driver*, prepared for the Ninth Annual Conference on Alcohol and Highway Safety, The Johns Hopkins University School of Medicine, Baltimore, MD (1984).

²² Colorado Revised Statute 42-2-108 and 1202.

²³ Presidential Commission on Drunk Driving, *Final Report*, 1983, p. 16.

²⁴ The American Bar Association estimates that about 6,000 judges handle the bulk of these cases. However, given the relatively high rate of turnover among these judges, ensuring that they are appropriately trained is a fairly formidable task.

²⁵ Presidential Commission on Drunk Driving, *op. cit.*

The Commission noted that "new judges — are generally assigned to the trial of DWI cases. They should receive entry level and annual in-service training in the trial of such cases, and in alcohol abuse and in its relation to highway safety."²⁶

Most State judges are afforded judicial training at the State level, and training is available at a national level. However, there are a number of obstacles that stand in the way of assuring that judges actually receive adequate training. Our court systems are generally so overburdened by their case backlogs that it is difficult for a judge to take a significant amount of time away from his or her courtroom for training. If a judge does find time for training, he or she is faced with the need to make an election from an enormous range of subjects, since most courts are of general jurisdiction, and not limited to a particular type of offense, such as traffic offenses. Even in courts of limited jurisdiction, such as traffic courts, a judge must have a wide range of legal expertise in order to perform well. Many courts are further hampered by inadequate funds to pay for thorough training programs, especially at the national level. In those jurisdictions which have courts of limited jurisdiction, there often is a problem with turnover, since many judges prefer to handle a broader variety of cases.

A 1981 survey found that only two States require some form of mandatory training for new judges, 17 States hold annual mandatory judicial conferences, and 26 States have mandatory judicial continuing education programs.²⁷ Each State sets its own standards; however the American Bar Association (ABA) adopted Standards for Education and Training of State Trial Judges at its 1982 annual meeting. These standards address the goal setting, planning, development, administration, curriculum, faculty selection, and other aspects of training programs appropriate for adoption by the States. Among the areas of emphasis which the standards recommend are:

- ◆ Comprehensive educational training for new judges covering major legal subjects and skills for everyday use on the trial bench;
- ◆ Periodic evaluation and training for all judges on the substantive procedural and evidentiary laws of the State;
- ◆ Advanced or specialized programs, attended by judges not less frequently than every three years, which assure detailed examination of specific judicial concerns;
- ◆ Continuing education and programs directed to new developments, both procedural and technological, and
- ◆ Independent learning opportunities for judges.²⁸

The National Advisory Commission on Justice Standards and Goals also has proposed a standard on judicial education. Although less specific than the ABA standard, it calls for every State to create and maintain a comprehensive program of continuing mandatory judicial education. Education on alcohol related issues or DWI adjudication is not specifically mentioned in either of these standards. However, the standards do call for specialized subject matter programs which might include DWI adjudications.

Virtually every State court system has a judicial education administrator who is a part of the administrative office of the court. These officials are responsible for carrying out the education of a State's judges. In addition, there are State judicial organizations and professional associations which sponsor annual judicial conferences, often a significant source of judicial education. Traffic safety issues are only one of many competing topics which must be covered in the training and, therefore, often do not receive in depth attention. The Safety Board

²⁶ *Ibid.*

²⁷ American University Criminal Courts Technical Assistance Project, *Survey of State Mandatory Judicial Education Requirements*, cited in American Bar Association, *National Conference of State Trial Judges, Standards for Judicial Education*, August 1982.

²⁸ ABA, *op. cit.*, Standard 18.

identified only one State, Florida, with a judicial education program directed specifically at traffic courts. It is the Safety Board's view that the States and judicial and professional organizations within the States should give greater attention to the provision of alcohol-related and DWI adjudication training for judges, including the handling of the more difficult repeat offender cases, since in many courts DWI cases make up a large and growing portion of the docket.

In addition to the programs in individual States, there are training resources available to judges on a national basis. The National Judicial College offers an intensive week-long seminar on alcohol and drugs which addresses the handling of substance abusers in the judicial system, from initial identification through referral, monitoring, and followup. However, this workshop has been attended by only 600 judges to date.

The American Academy of Judicial Education (Academy), in conjunction with the NHTSA, has developed a model traffic law adjudication curriculum for use by judges and judicial educators. The curriculum includes training in alcohol pharmacology, DWI trials and sentencing, habitual, suspended, and revoked offenders, traffic case information and proof requirements, and other legal and technical issues related to traffic law adjudication. According to the NHTSA and the Academy, 2,050 judges in about 45 jurisdictions had received training in this curriculum between 1980 and 1983.

In order to reach a larger number of judges, the NHTSA is developing a self-taught home study course on DWI adjudication for both judges and prosecutors. It is hoped that this will enable judges who are now bound by time and resource constraints to receive some training. In addition, it hopes to prepare a bench book which can serve as a reference tool for judges during the course of a DWI trial. These measures also will help to address the problems caused by the high rate of turnover among judges who bear traffic cases. Constraints imposed by the set schedule of outside training courses are avoided by the home study approach, and jurisdictions will be able to avoid expending major resources on judges who might be on the bench for only a short time before moving on to other types of cases.

The NHTSA also has provided two forms of support to address the resource problems which States face in providing DWI-related training to judges. The first involves a technical assistance grant to the Academy which enables it to organize and administer training programs in the States and to tailor the traffic law adjudication curriculum to a particular State's laws and procedures. The second involves providing Federal highway safety funds to finance judicial education programs at the State level and to pay for training such as that offered by the National Judicial College. However, while helpful, this support will not totally alleviate the problems faced by the States in assuring adequate training for their judges.

One Colorado judge interviewed by Safety Board investigators said, "It serves very little purpose to have effective police agencies, training programs for law enforcement personnel, effective probation, and post-adjudicatory processes if judicial officers do not understand or are unable to effectively deal with either pre-trial or post-trial matters, due to lack of judicial education." The Safety Board agrees. Judges hold key powers in the complex network of persons and systems who interact with drunk drivers. Their willingness and ability to play a strongly constructive role in that network is crucial to the entire system's degree of success in reducing the number of drunk drivers who appear before them over and over again. The Safety Board believes a greater commitment of State resources to making judicial training on DWI matters available to many more judges, and a greater commitment by the judicial organizations to promoting the value of such training to their members, would produce substantial improvement in the system's overall handling of these cases.

Sanctions

Diversion/Supervision Programs

In many States, alcohol education or treatment programs can be substituted for court-ordered punitive sanctions for DWI offenses, typically at the option of the offender. For example, in Kansas, New Mexico, and Oregon, programs used in this way are called "diversion", and are completed by the offender before the trial. In

Illinois, on the other hand, they are called "supervision" (or "court supervision"), and are completed by offenders who plead guilty and ask for supervision.

The use of diversion/supervision programs is not universally regarded as an effective means of reducing alcohol-related offenses. These programs are attractive to the judicial system because they are a means of handling the increasing numbers of alcohol-related traffic offenses outside the already overloaded court system. It is true also that diversion/supervision programs can be one means to promote participation by alcohol offenders in alcohol education or treatment programs, a desirable goal. On the other hand, they are often used to supplant certain punitive sanctions which are known to have at least a temporary effect in reducing subsequent crashes by alcohol offenders. Furthermore, these programs can result in major distortions in individual and collective records on alcohol-related traffic violations and convictions, since all or part of the judicial process may be bypassed. The particular ways in which diversion/supervision programs are structured and administered are thus important in their overall effects on traffic safety.

For example, in Illinois (as in most States with these programs), supervision is supposed to be available only to first-time DWI offenders. Under supervision, Illinois DWI offenders are typically required to complete a "DWI school", perhaps a period of community service, and have no moving violations for at least one year. The following case, however, is an example of an inappropriate use of the Illinois supervision program.

On September 4, 1983, about 12:30 a.m., a Chevrolet sedan was traveling eastbound on I-55 near First Avenue in Chicago, when the driver drove onto the left shoulder and hit and killed a pedestrian standing in front of her disabled car. The Chevrolet driver left the accident scene, exited the expressway, and stopped when his vehicle became disabled. His BAC was tested at 0.17%. As a result of this hit-and-run accident, the driver was charged with DWI and reckless homicide.

Safety Board investigation of his previous driving record disclosed that, since 1973, he had been arrested for DWI at least three times, twice more for driving with an open liquor container, six times for speeding, and once each for obstructing police, attempting to elude police, and improper passing. The most severe sanction he had received for these offenses was 12 days in jail and one year's probation (sentenced to this twice); his fines ranged from \$15 (for one of the speeding convictions) to \$110 (for one of the DWI convictions). His license had been revoked twice for DWI offenses.

In September 1982, he had been arrested for DWI and speeding; his BAC level was tested at 0.228%. The judge at his trial seven months later knew of the BAC level and knew of at least two of the man's previous DWI arrests and convictions. Nevertheless, when the man requested permission to attend an alcohol treatment program under the Illinois court supervision program, in lieu of a punitive sanction, the judge granted the request. Three months later, while still in the supervision program, he was involved in the Chicago pedestrian killing described above.

At one time, the Illinois supervision program did not require that DWI arrests or convictions appear on the records of those who completed supervision programs. Since January 1, 1984, Illinois law has required that supervision for DWI offenses be recorded on the driver license abstract that is available to all law enforcement and judicial agencies. Although several States recently have amended their laws in this way, in some States it is still true that DWI charges are dismissed when a diversion/supervision program is completed, and no record of the DWI arrest is retained on the driver's DMV record. When this happens, it is easy for an offender to be arrested repeatedly for DWI and treated every time as a first offender.

First-time DWI offenders who apply for the Kansas diversion program are referred to an alcohol rehabilitation program for an evaluation, on the basis of which the offender is granted or denied diversion. If denied, the offender's case continues through the court system. If accepted for a diversion program, the offender signs an agreement with the prosecutor's office, which is transmitted to the Driver License Division. This Division codes the offender's driver record to show that he or she has entered a diversion program. By State law, the offender is thereafter considered as having a DWI conviction; if he or she is again arrested for DWI, he

or she will not be eligible for diversion. If convicted of this subsequent charge, the offender must be sentenced as a repeat offender.

In August 1981, Oregon enacted legislation which included a diversion program option for DWI offenders who have not, within ten years, been arrested for a DWI offense, been in a diversion program, been convicted of a felony resulting from the operation of a motor vehicle, and have no reportable accident associated with the current charge. Such an offender may agree with the court to be evaluated by an alcohol and drug evaluation specialist and to participate in an education and/or treatment program. Successful completion of the program and compliance with other conditions of the diversion agreement result in the charge of DWI being dismissed. However, an entry is made on the driving record and is maintained there for ten years. From the beginning of this new program on November 1, 1981, to June 30, 1982, 5,590 Oregonians chose the diversion option—80 to 90% of the eligible first offenders.²⁹

Under the program, a first offender is evaluated and determined to be either a social or a problem drinker. This is accomplished through a series of standardized tests, examination of the offender's criminal and driving histories, consideration of the BAC level and police report at the time of arrest, and a structured interview with the individual. Those classified as social drinkers are referred to a level I program, which is primarily alcohol education, such as short film/lecture programs. Those classified as having more severe drinking problems are referred to a level II program, which includes therapeutically oriented education (group or individual), residential or outpatient therapy, Antabuse, or various combinations of these. Certainly diversion programs which try to match appropriate levels of treatment to the seriousness of the participant's alcohol abuse are improvements on those in which all participants are automatically sent to an alcohol education school. Research findings by the U.S. Department of Transportation indicate that lecture-oriented "DWI schools" alone do not affect the behavior of problem drinkers and should not be used for these persons.³⁰

Diversion/supervision programs are not the only, nor even the best, way to get alcohol offenders into treatment programs. Although these programs do help to reduce court caseloads, they may produce net reductions in benefits to traffic safety when their structure permits expungement of offense records and precludes the implementation of other laws which depend on the existence of a conviction of DWI. Equally important, if they are structured so as to supplant the imposition of punitive sanctions with known loss reduction effectiveness, they are undesirable. As the Presidential Commission on Drunk Driving noted:

Rehabilitation and education programs should be provided as a supplement to other sanctions. Education and treatment programs are not substitutes for appropriate penalties to be assessed upon those who violate the law. Rather, they should be looked upon as adjuncts to legal and administrative sanctions, intended to address the knowledge, attitude, and behavioral problems that may underlie driving under the influence.³¹

One of the sanctions with known crash reduction effectiveness which is often supplanted by diversion/supervision programs is license suspension/revocation, discussed in the following section.

License Suspension/Revocation

All 50 States and the District of Columbia have statutes that permit driver's license actions (suspension or revocation) to be imposed for first and/or subsequent offenses.³² In 26 States, these actions are mandatory: in

²⁹ Office of Programs for Alcohol and Drug Problems, Profile and Results of Clonox Served, Chapter VII Oregon Laws 1981, prepared for the 92d Oregon Legislative Assembly, November 26, 1982.

³⁰ U.S. DOT, Summary of National Alcohol Safety Action Project, August, 1979.

³¹ Presidential Commission on Drunk Driving, op. cit., p. 22.

³² The basic differences between "suspension" and "revocation" lie in the different procedures an offender must follow in order to regain his or her full driving privileges. Typically, restoration of a suspended license is accomplished by the automatic return of the license if it was confiscated or an administrative action by the DMV to update their records. However, the restoration following revocation is more complex and requires the offender to submit an application, pay a fee, and, in some cases, complete an alcohol education and/or treatment.

24 of these States, license actions are mandatory for first and subsequent offenses; in two, they are mandatory for second and subsequent offenses.³³

There is evidence that persons whose licenses have been suspended or revoked continue to drive. A 1980 California study found that, of drivers with a suspended or revoked license, two-thirds admitted to driving despite the license action.³⁴

Despite the tendency of many drivers to continue driving with suspended or revoked licenses, some highway safety experts consider it to be the most cost-effective countermeasure known at this time for reducing crashes by drunk driving offenders.³⁵ A 1974 study in Oregon found that 50% of the drivers whose licenses had been suspended or revoked stated that during revocation they drove less, and more carefully.³⁶ A 1978 California study found that repeat offenders whose licenses were suspended (12 months) or revoked (36 months), in addition to the usual fines and/or jail terms, subsequently had 30% fewer crashes and convictions (DWI, reckless driving, speeding, hit/run, etc.) than repeat offenders who merely were fined and/or jailed. These results persisted past the expiration of the suspension/revocation period.³⁷ Studies comparing the effectiveness of license suspension with that of treatment programs do not indicate that treatment is superior to the less costly license actions.³⁸ Current thinking is that DWI offenders should receive both treatment and license action.³⁹

The maximum effectiveness of any general deterrence countermeasure is achieved by drivers perceiving an unacceptably high risk of being apprehended and a certainty of being swiftly subjected to a sanction severe enough to be unacceptable to them.⁴⁰ These requirements also are true of attempts to deter motorists from driving with a suspended or revoked license. Although it may be difficult to devise ways to increase a driver's risk of being apprehended for driving with a suspended or revoked license, there are steps that could be taken to increase the swiftness and certainty of severe sanction for this crime, once apprehended. One method being used is impoundment of the offender's vehicle. A recent Washington law authorizes impoundment and sale at public auction of vehicles whose drivers are caught driving in violation of a license suspension or revocation. Wisconsin recently amended its laws to include a combination of fine, jail term, and an additional six-month license suspension for such offenders and, for offenders who own their own vehicles, the court may order the vehicle's indefinite impoundment.

Ways to increase the effectiveness of license actions as a drunk driving deterrent should be explored further. States now can gain credit toward obtaining supplemental Federal highway safety funds if making impoundment of license plates mandatory if a person whose license has been suspended or revoked for a drunk driving offense is caught driving. Only one State has so far adopted such a provision, it is not yet known whether it is effective in increasing the deterrence benefits of license actions against DWI offenders.

³³ National Highway Traffic Safety Administration, *DWI Sanctions: The Law and the Practice* (DOT HS 806-417), June 1981.

³⁴ R. E. Hagen et al., *Suspension and Revocation Effects on the DUI Offender*, California Department of Motor Vehicles, 1981.

³⁵ See Waller, op. cit.

³⁶ N. Koestner and L. Spreight, *Oregon Study of Driver License Suspension*, Oregon Department of Transportation, 1974. Cited in Waller, op. cit.

³⁷ R. E. Hagen, "The Efficacy of Licensing Controls as a Countermeasure for Multiple DUI Offenders", *Journal of Safety Research*, Vol. III, pp. 115-122 (1978). Cited in Waller, op. cit. A subsequent study, "The Long Term Traffic Safety Impact of a Pilot Alcohol Abuse Treatment as an Alternative to License Suspensions", by Daniel C. Suller and M.W. Perrino (California Department of Motor Vehicles, April 1984), found similar results.

³⁸ R. E. Hagen et al., "The Traffic Safety Impact of Alcohol Abuse Treatment as an Alternative to Mandatory Licensing Controls", *Accident Analysis and Prevention*, Vol. XI, pp. 272-291 (1979); C.L. Pupkin, L.K. Li, J.H. Lukay, J.R. Stewart, and P.F. Waller, *An Initial Evaluation of the North Carolina Alcohol and Drug Education Traffic Schools* (Technical Report, Vol. 1), University of North Carolina Highway Safety Research Center (1983); P.M. Salzberg, R. Hauser, and C.L. Klingberg, *License Revocation and Alcoholism Treatment Programs for Habitual Traffic Offenders*, Washington State Department of Licensing (1981). Cited in Waller, op. cit.

³⁹ Presidential Commission on Drunk Driving, op. cit.

⁴⁰ See Ross, op. cit.

Treatment and Rehabilitation

The sanctions discussed so far largely have been punitive in nature. Since the early 1970s, highway safety experts have focused increasing attention on trying to find effective ways to change the behavior of the DWI offender. Incarceration keeps the DWI repeat offender off the street for a time, but if his or her alcohol abuse problem has not been resolved (at least to some extent), that offender is likely to repeat the offense sooner or later, after release. Even license actions, known to be effective in reducing repeat offenders' subsequent accidents for a period of time, are, in the last analysis, a temporary remedy. At some point after license reinstatement, some, perhaps most, problem drinkers are likely to repeat their offense, unless they have had treatment for alcohol dependency.

Perhaps this will be the case even with alcohol treatment. Although court-based referral programs have become quite common and accepted by the treatment community as an appropriate source for identifying persons with alcohol problems, it has been difficult to evaluate the effectiveness of these programs, either in terms of highway safety or overall social benefits. One recent assessment of alcoholism treatment could only conclude:

There is some evidence to support the hypothesis that alcoholism treatment is cost-beneficial. The benefits of alcoholism treatment, even if they fall short of what may be claimed, seemed to be in excess of the costs of providing such treatment.⁴¹

However precisely we understand why people abuse alcohol and what to do to prevent or cure this social ill, there seems to be little alternative at this time to continuing research and evaluation of treatment methods.

⁴¹ Leonard Saxe et al., *The Effectiveness and Costs of Alcoholism Treatment*, (Office of Technology Assessment (a research arm of the U.S. Congress) (March 1983), p. 66.

BIBLIOGRAPHIC SECTION

ABSTRACTS

Abstracts are presented within categories and ordered first by category number, and secondly by first author. The abstracts are then numbered sequentially. This volume begins with a new series of abstract numbers.



KWIC INDEX

In the Key-Word-In-Context (KWIC) index each significant word of an English title or translated title is listed alphabetically. Each listing includes a portion of the title just preceding and just following the key word. To conduct a search for all citations on "BAC" for example, the searcher should look for "BAC" and should also look for related terms such as "blood alcohol concentration" to find all articles which are about this topic.

estimating posterior	• BAC distributions for per	146
ifornia update: the	• battle against drinking d	111
d risks and driving	• behavior. Perceived ris	152
isk and risk-taking	• behaviour among young dr	128
eliefs and Reported	• Behaviours of Drivers on	126
nowledge, Attitudes,	• Beliefs and Reported Beha	126
the Development of	• Blood Alcohol Concentrati	142
ey to understanding	• blood alcohol levels. C	101
Gaze nystagmus and	• blood alcohol. Gaze nys	137
Analyser Evidential	• Breath Alcohol Measuring	104

The number following the KWIC entry corresponds to the number of the citation and abstract in the Abstracts section of the issue.



AUTHOR INDEX

All authors of articles listed in the Abstracts section are listed in alphabetical order in this section. The number following the author's name corresponds to the number of the citation in the Abstracts section of the issue.

AASAP MISDEMEANOR SERVICES

CASELOAD STATISTICS

<u>CASELOAD SUMMARY</u>	<u>1985</u>	<u>1986</u>
New Cases Added.	3995	3396
Screenings Completed	2986	2683
Cases Closed	2804	2286
Case Management Only / No Screening.	353	260
Bench Warrent Reassignment to ASAP	389	617
Agency Reassignment by ASAP.	2227	3065

BACKGROUND INVESTIGATIONS/SCREENING

DRINKER CLASSIFICATION SUMMARY:

Problem Drinker	1870	62.6%	1716	63.9%
Presumptive Problem Drinker.	83	2.7%	78	2.9%
Non-Problem Drinker.	923	30.9%	704	26.2%
Unidentified	110	3.6%	185	6.8%

STAGE OF BACKGROUND INVESTIGATION/SCREENING:

Post-Sentence.	2796	93.6%	2419	90.1%
Pre-Sentence	102	3.4%	150	5.5%
Deferred Prosecution	3	0.1%	3	0.1%
Suspended Imposition of Sentence	67	2.2%	87	3.2%
Other.	14	0.4%	23	0.8%

AASAP MISDEMEANOR SERVICES

CASELOAD STATISTICS

SOURCE OF REQUEST FOR BACKGROUND
INVESTIGATION/SCREENING:

	1985		1986	
Anchorage Court.	2551	85.4%	2179	81.2%
Outside Anchorage Court.	415	13.8%	483	18.0%
Out-of-State	11	0.3%	9	0.3%
Prosecution.	4	0.1%	0	0.0%
Other.	5	0.1%	12	0.4%

ORIGIN OF CASE:

Municipality	2069	69.2%	1728	64.4%
State.	901	30.1%	935	34.8%
Federal.	1	0.0%	0	0.0%
Other.	15	0.5%	20	0.7%

AASAP MISDEMEANOR SERVICES

CASELOAD STATISTICS

TREATMENT REFERRALS:

	<u>1985</u>		<u>1986</u>	
Alcohol Information School/Education	881	29.5%	655	24.4%
Outpatient Counseling.	1161	38.8%	955	35.5%
Inpatient Residential Treatment	169	5.6%	171	6.3%
Alcoholics Anonymous	169	5.6%	171	6.3%
Evaluation	634	21.2%	666	24.8%
AASAP Correspondence	15	0.5%	12	0.4%
Assignment Pending	64	2.1%	164	6.1%
Other	57	1.9%	60	2.2%
No Assignment	57	1.9%	60	2.2%

CASELOAD MONITORING AND FOLLOW-UP ACTIVITIES:

Total Follow-Up Reports Processed	13183		11095
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NON-COMPLIANCE ACTIVITY:

Fail to Satisfy/Letter to Defendant	2024		1666
Non-compliance Affidavits Prepared/Filed.	2808		2614
AASAP Court Appearance.	261		655

AASAP MISDEMEANOR SERVICES

CASELOAD STATISTICS

<u>TOTAL CASES TERMINATED:</u>	<u>1985</u>		<u>1986</u>	
ASAP Completed	2143		1739	
ASAP Terminated Uncompleted.	320		412	
Other.	341	11.4%	135	5.0%

CLIENT CHARACTERISTICS:

Sex:

Male.	2495	83.5%	2220	82.7%
Female.	491	16.4%	463	17.2%

Race:

Caucasian	2229	74.6%	1839	68.5%
Black	116	3.8%	135	5.0%
Native.	513	17.1%	428	15.9%
Other	79	2.6%	182	6.7%
Unknown	49	1.6%	99	3.6%

Employment Status:

Employed.	2034	68.1%	1532	57.1%
Unemployed.	780	26.1%	922	34.3%
Unknown	172	5.7%	229	8.5%

AASAP MISDEMEANOR SERVICES

CASELOAD STATISTICS

CLIENT CHARACTERISTICS CONT.:19851986

Family Income:

\$45,000 +	271	9.0%	216	8.0%
\$40,000 - 45,000	38	1.2%	27	1.0%
\$35,000 - 40,000	116	3.8%	62	2.3%
\$30,000 - 35,000	76	2.5%	67	2.4%
\$25,000 - 30,000	180	6.0%	143	5.3%
\$20,000 - 25,000	163	5.4%	142	5.2%
\$15,000 - 20,000	244	8.1%	208	7.7%
\$10,000 - 15,000	304	10.1%	244	9.0%
\$5,000 - 10,000	452	15.1%	353	13.1%
\$5,000 or less	369	12.3%	457	17.0%
Unknown	773	25.8%	764	28.4%

Education:

0-11	564	18.8%	495	18.4%
12 or GED	1462	48.9%	1248	46.5%
12+	692	23.1%	697	25.9%
College Degree	173	5.7%	124	4.6%
Unknown	95	3.1%	119	4.4%

AASAP MISDEMEANOR SERVICES

CASELOAD STATISTICS

CLIENT CHARACTERISTICS CONT.:

1985

1986

Marital Status:

Married.	739	24.7%	664	24.7%
Divorced	455	15.2%	406	15.1%
Separated.	131	4.3%	124	4.6%
Widowed.	34	1.1%	18	0.6%
Single	1552	51.9%	1391	51.8%
Unknown.	75	2.5%	80	2.9%

AASAP MISDEMEANOR SERVICES

CASELOAD STATISTICS

CLIENT CHARACTERISTICS CONT.:

1985

1986

Occupation

Professional, Technical	119	3.9%	163	6.0%
Managers, administrators.	104	3.4%	91	3.3%
Sales workers	137	4.5%	111	4.1%
Clerical and kindred.	309	10.3%	197	7.3%
Craftsmen and kindred	738	24.7%	616	22.9%
Operatives, except transportation	62	2.0%	50	1.8%
Transport operators	98	3.2%	51	1.9%
Laborers, except farm	662	22.1%	543	20.2%
Farmers, farm managers.	77	2.5%	99	3.6%
Farm laborers, foremen.	4	0.1%	10	0.3%
Service workers	352	11.7%	318	11.8%
Other	324	10.8%	434	16.1%

Age:

19 or Under	151	5.0%	187	6.9%
20 - 29	1471	49.2%	1260	46.9%
30 - 39	814	27.2%	799	29.7%
40 - 44	230	7.7%	169	6.2%
44 - 49	115	3.8%	134	4.9%
50 - 59	165	5.5%	98	3.6%
60 and Older.	40	1.3%	36	1.3%

HOMER ASAP OVERVIEW
1986 PROGRAM STATISTICS

NEW CASES

During 1986 there were 189 new cases opened; a total of 31 screenings were completed.

REFERRAL SOURCES

In 1986 about 99% of the cases were referred from the District Court.

CHARGE WHEN REFERRED TO HOMER ASAP

Of the 81 screenings, 55 cases were DWI's , and there were 26 other alcohol related cases.

CLIENT CHARACTERISTICS

66 of the clients were male, 15 female; the highest age concentration was between 20 and 40 year old; Caucasians accounted for 90% of the caseload. About 90% of the referred cases were employed and most seasonally employed. 47 of the cases earned \$10,000 or less. 36 of the clients were single; 23 married; 17 divorced; 4 separated; 1 unknown.

SCREENING AND DRINKER CLASSIFICATION

Screenings were completed on 81 cases. According to established procedures 51% of the screenings were classified Problem Drinkers; 4% Presumptive Problem Drinkers; 23% classified Non Problem Drinkers; 22% classified Unidentified.

EDUCATION AND TREATMENT REFERRALS

19 cases were referred to a Driver Alcohol Information School an eight hour course; 33 Problem Drinkers were referred to Out Patient Counseling; 6 were referred for In Patient Treatment; 21 referred for further evaluation.

CLIENT MONITORING AND FOLLOW-UP

During 1986, 959 reports were processed from treatment agencies in monitoring the progress of cases in treatment. Over 190 letters were sent to defendants and 66 affidavits were filed.

Homer ASAP was present at 29 arraignments and provided testimony at 1 court case.

ASSIGNMENT COMPLETE/TERMINATED.....CASE CLOSED

During the 1986 calendar year 130 cases were closed by this office.

Sharon Booth
Homer Alcohol Safety Action
Program Administrator

	1985 Past Year	1986 Current Year
<u>CASELOAD SUMMARY</u>		
New Cases Added	219	189
Screenings Completed	132	81
Screenings Transferred	9	4
Case Management Only/No Screening	44	34
Bench Warrant Reassignment to ASAP	10	20
Agency Reassignment by ASAP	2	4
Cases Closed	175	130
Affidavits Filed	73	66
<u>CASELOAD ACTIVITIES</u>		
Total Follow-Up Reports Processed	959	959
Written Reports Filed	13	18
Court Appearances	47	29
Letters Sent	160	190
<u>CLASSIFICATION SUMMARY</u>		
Screenings Completed	132	81
Problem Drinker	69	41
Presumptive Problem Drinker	5	3
Non-Problem Drinker	38	19
Undantified/Pending	20	18
<u>DISPOSITION OF CASE</u>		
Post-Sentence	108	59
Pre-Sentence	14	19
Distorted Prosecution	0	0
Unsuccessful Imposition of Sentence	0	3
Other	0	0

RECEIVED
ASAP

JAN 20 1987

	Past Year	Current Year
<u>SOURCE OF REQUESTED SCREENING:</u>		
..... Court	125	80
Other Trial Courts (Alaska)	7	1
Out-of-State	0	0
Prosecution	0	0
Other	0	0

CLIENT CHARACTERISTICS CONT.:

	Past Year	Current Year
Age:		
Under 19	26	6
20 - 29.	46	31
30 - 39.	45	33
40 - 44.	5	5
44 - 49.	1	3
50 - 59.	6	2
60 and Older	3	1
 Marital Status:		
Married.	25	23
Divorced	26	17
Separated.	3	4
Widowed.	0	0
Single	77	36
Unknown.	1	1

CLIENT CHARACTERISTICS CONT.:

Family Income:

	Last Year	Current Year
\$45,000 +	9	9
\$40,000 - 45,000.	4	2
\$35,000 - 40,000.	4	0
\$30,000 - 35,000.	1	1
\$25,000 - 30,000.	5	5
\$20,000 - 25,000.	15	9
\$15,000 - 20,000.	16	9
\$10,000 - 15,000.	25	8
\$5,000 - 10,000	35	29
\$5,000 or less.	18	13
Unknown	0	5

Education:

0-11.	33	19
12 or GED	60	31
12+	35	27
College Degree.	4	2
Unknown	0	2

	Post Year	Current Year
<u>CLIENT CHARACTERISTICS</u>		
SEX:		
Male	108	66
Female	24	15
Race:		
White	129	77
Black	0	1
Native	2	1
Other	1	2
Unknown	0	0
Employment Status:		
Employed	120	68
Unemployed	12	11
Unknown	0	2

TREATMENT REFERRALS	Past Year	Current Year
Alcohol Information School/Education	36	19
Outpatient Counseling	59	33
Inpatient Treatment	5	8
Correspondence	1	0
Alcoholics Anonymous	3	0
Evaluation	25	21
Assignment Pending	0	0
No Assignment	0	0
Other	0	0

<u>CHARGE AT TIME OF ASAP REFERRALS</u>	Past Year 1985	Current Year 1986
City DWI	3	1
State DWI	78	54
Disorderly Conduct	2	1
Mal. Destruction of Property	0	0
Shoplifting/Removal of Merchandise	2	0
Trespass	2	2
Assault	2	9
Reckless Driving (Original Charge)	6	3
Careless Driving (Original Charge)	0	0
Reduced from DWI	6	1
Drunk on Roadway	1	0
Drinking in Public	0	0
Others	13	6
No Charge	0	0
Minor Consuming.....	17	4
<u>PRIOR DWI CRIMINAL CONVICTIONS</u>		
No Prior DWI	91	52
One Prior DWI	33	17
Two Prior DWIs	5	9
Three Prior DWIs	1	1
More than Three Prior DWIs	0	1
Information Not Available	2	1



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NOME ALCOHOL SAFETY ACTION PROGRAM

ANNUAL REPORT

1986

Prepared by:

Linda Roy
 Nome ASAP Coordinator

January 1987

Prepared for:

Matt Felix
 Coordinator
 State Office of Alcoholism and Drug Abuse

TABLE OF CONTENTS

NOME ASAP OVERVIEW

New Cases.....	1
Referral Sources.....	1
Charges.....	2
Client Characteristics.....	2
Screening and Drinker Classification.....	3
Education and Treatment Referrals.....	3
Client Monitoring and Follow-up.....	3
Assignment Completed/Terminated.....	4
Appendix.....	5

1986 NOME ASAP OVERVIEW

NEW CASES

90 new cases were added in 1986. This represented a 31% decrease from 1985. There were three NASAP Coordinators in 1986 and this personnel turnover may have negatively affected the number of NASAP referrals.

72 screenings were completed in 1986. This represented a 37% decrease from 1985. 24 cases were handled for management only (no screening was required). This represented a 26% increase from the previous year. Most of the case management only cases involved incarcerated clients assigned/or recommended corrections counseling by the Nome Court.

11 clients were reassigned to other forms of treatment or back to treatment at agency/client request. For example, a noncompliant client was reassigned to residential from outpatient counseling at the agency's request and clients who successfully completed outpatient counseling were reassigned to aftercare counseling.

NASAP had 30 active cases at the end of 1986. There were 85 active cases at the end of 1985. It should be noted that 22 additional cases were closed in 1986 as compared to 1985. This statistic, along with personnel turnover, may have contributed to the decreased caseload.

REFERRAL SOURCES

58 cases were referred by the Nome Trial Court in 1986. This represented 81% of the total number of cases referred to NASAP by all referral sources. In 1985, 65% of the new cases were referred by the Nome Trial Court.

There were no referrals from other trial courts in 1986. In 1985, 7 cases were referred by other trial courts. The absence of referrals from other courts may be explained by the accessibility of closer ASAPs throughout the state.

3 cases were referred by the Prosecution in 1986. Although 9 cases were referred by the Prosecution in 1985, this just represented a 3% decrease in the total number of new cases referred. The Prosecution cases were referred through the Pretrial Diversion Program. The Diversion Program was inactive during the first quarter of 1986, which may have contributed to a decrease in the total number of cases referred by the Prosecution in 1986.

There was little change in the total number of cases referred by the Defense Attorney in 1986 (13 and 11 for 1985 and 1986, respectively). Due to the decrease in the total number of referrals in 1986, this statistic represented a 4% increase in 1985.

CHARGES

More than half (57%) of the clients referred in 1986 were charged with DWI. This was a 6% increase over 1985. In turn, the 1985 statistic represented a 16.8% increase over 1984 and 1983 statistics. The rising percentages may be a direct result of the increased enforcement of drunk driving statutes by the Nome Police and Alaska State Troopers.

The next most frequent offense among NASAP clients in 1986 was "assault" (21%). The percentage of clients charged with this crime decreased 7% from 1985, although the number of clients charged with assault remained virtually unchanged (14 and 15 for 1985 and 1986, respectively).

The number of clients charged with "minor consuming alcohol" decreased from 16 in 1985 to 1 in 1986. There is no explanation as to why defendants charged with this crime were not referred to NASAP in 1986.

72% of the clients in 1986 had no prior DWI convictions. This percentage was virtually unchanged from the previous year. There was also little change among the percentages of clients with one (1985-15%, 1986-17%), two (1985-6%, 1986-4%), three (1985-3%, 1986-4%), and more (1986-0%, 1985-1%) prior DWI convictions.

CLIENT CHARACTERISTICS

89% of the clients referred to NASAP in 1986 were male and 11% were female. This statistic represented an increase in the percentage of male clients from 1985. 80% of the clients referred to NASAP in 1985 were male and 20% were female.

Almost half (47%) of the clients in 1985 were between the ages of 20 and 29. The next most frequent age group was defendants between the ages of 30 and 39 (26%). The age breakdown has remained fairly stable over the past four years.

As in previous years, most of the NASAP clients in 1986 fell into two race categories: Alaska Native and Caucasian. However, the percentage of Caucasians screened increased from 14% in 1985 to 21% in 1986. Subsequently, the percentage of Alaska Natives screened decreased from 84% in 1985 to 68% in 1986.

52% of the clients screened in 1986 were employed. This represented an 8% decrease from 1985. It should be noted that 1985 marked the first year where the number of employed clients exceeded the number of unemployed clients.

The percentage of clients with under \$5,000 income remained the largest category in income statistics for 1986 (30%). This represented an 11% decrease from 1985. The statistic for the \$10,000-15,000 income category represented a 7% increase from 1985. There was little change in the statistics for the \$20,000+ income categories for the past two years (21% and 19% for 1985 and 1986, respectively).

46% of the NASAP clients screened in 1986 completed high school or earned a GED. 24% did not complete high school or earn a GED. Both of these percentages were the same as those obtained in 1985. However, the number of clients who had earned a college degree increased from 2% in 1985

to 9% in 1986.

63% of the clients in 1986 were single and 11% were married. In 1985, 72% of the clients were single and 14% were married. Subsequently, the 1986 statistics revealed slight increases in the divorced and separated categories.

SCREENING AND DRINKER CLASSIFICATION

77% of the clients screened in 1986 were classified as problem drinkers. This represented a 5% increase from 1985.

The percentage of clients in the presumptive drinker classification remained unchanged from 1985 (8%).

The percentage of clients in the nonproblem drinker classification remained unchanged from 1985 (15%).

EDUCATION AND TREATMENT REFERRALS

The most frequent treatment referral in 1986 was inpatient treatment (26%). This represented a 20% increase from 1985. Although this statistic reflected an increase in the percentage of clients classified as problem drinkers, it also reflected an increase in the number of defendants "assigned" inpatient treatment by the Nome Court. During the past four years, outpatient counseling was the most frequent treatment referral.

The next most frequent treatment referral in 1986 was outpatient counseling (22%). This represented an 11% decrease from 1985. The number of outpatient counseling referrals would have been higher, however, village clients were assigned to complete the NLRC Correspondence Course due to their inability to attend counseling sessions in Nome.

A total of 42% of the clients screened in 1986 were assigned to some type of alcohol education (Alcohol Information School-14%, NLRC Correspondence Course-21%, Alcoholic's Anonymous-7%) as compared to 28% in 1985.

90% of the clients screened in 1986 were assigned to education or treatment. The remaining 10% were referred for evaluation, had pending assignments, were not given an assignment, or referred to an outside agency. 68% of the clients screened in 1985 were assigned to education or treatment. The 1986 statistic represented a 22% increase in education/treatment referrals.

CLIENT MONITORING AND FOLLOW-UP

343 follow-up reports were processed in 1986 (300 satisfactory reports and 51 unsatisfactory reports). This number was significantly down from 1985 and reflected the decreased number of active cases.

188 written reports were filed, 136 letters were sent (61 failure to comply letters), and 142 phone calls were made (31 failure to comply calls). These numbers were significantly up from 1985 and may have reflected communication problems created by personnel turnover in the NASAP office.

The NASAP Coordinators attended 228 court arraignments and 58 change of plea hearings in 1986. The NASAP Coordinators also went to court to testify or be

available to answer questions about an affidavit or screening recommendation in 11 instances during 1986. 13 affidavits were filed in 1986 as compared to 25 in 1985.

ASSIGNMENT COMPLETED/TERMINATED

122 cases were closed in 1986. This represented a 23% increase from 1985. 54% of the cases were closed due successful completion of assignment. This represented a 7% increase from 1985.

APPENDIX

	Past Year	Current Year
<u>CASELOAD SUMMARY</u>		
New Cases Added	129	90
Screenings Completed	113	72
Screenings Transferred	1	3
Case Management Only/No Screening	19	24
Bench Warrant Reassignment to ASAP	--	--
Agency Reassignment by ASAP	29	11
Cases Closed	99	122
Affidavits Filed	25	13
<u>CASELOAD ACTIVITIES</u>		
Total Follow-Up Reports Processed	485	343
Written Reports Filed	112	188
Court Appearances	30	11
Letters Sent	49	136
<u>CLASSIFICATION SUMMARY</u>		
Screenings Completed	113	72
Problem Drinker	83	58
Presumptive Problem Drinker	9	6
Non-Problem Drinker	17	11
Unidentified/Pending	4	0
<u>STAGE OF CASE</u>		
Post Sentence	73	46
Pre-Sentence	19	15
Deferred Prosecution	14	7
Suspended Imposition of Sentence	2	2
Other	5	2

SOURCE OF REQUESTED SCREENING:

<u>Name</u> Court	84	58
Other Trial Courts (Alaska)	7	--
Out-of-State	--	--
Prosecution	9	3
Other (including Defense Attorney)	13	11

<u>CHARGE AT TIME OF ASAP REFERRALS</u>	Past Year	Current Year
City DWI	—	—
State DWI	58	41
Disorderly Conduct	1	—
Mal. Destruction of Property	3	—
Shoplifting/Removal of Merchandise	2	—
Trespass	7	1
Assault	14	15
Reckless Driving (Original Charge)	—	2
Careless Driving (Original Charge)	—	—
Reduced from DWI	—	—
Drunk on Roadway	—	—
Drinking in Public	—	—
Minor Consuming	16	1
Others	10	11
No Charge	2	1
 <u>PRIOR DWI CRIMINAL CONVICTIONS</u>		
No Prior DWI	81	52
One Prior DWI	17	12
Two Prior DWIs	7	3
Three Prior DWIs	3	3
More than Three Prior DWIs	1	—
Information Not Available	4	1

<u>TREATMENT REFERRALS</u>	Past Year	Current Year
Alcohol Information School/Education	7	10
Outpatient Counseling	38	16
Inpatient Treatment	7	19
Correspondence	17	15
Alcoholics Anonymous	8	5
Evaluation	4	4
Assignment Pending	14	3
No Assignment	5	0
Other (Including Village Volunteer Counseling and NASAP Supervision)	13	4

	Past Year	Current Year
<u>CLIENT CHARACTERISTICS</u>		
Sex:		
Male	90	64
Female	23	8
Race:		
Caucasian	16	15
Black	0	0
Native	95	49
Other	0	1
Unknown	2	7
Employment Status:		
Employed	68	27
Unemployed	41	37
Unknown	4	8

CLIENT CHARACTERISTICS CONT.:

	Past Year	Current Year
Age:		
Under 19	3	9
20 - 29.	74	34
30 - 39.	22	19
* 40 - 44.	12	4
44 - 49.		5
** 50 - 59.	12	1
60 and Older		—
 Marital Status:		
Married.	16	8
Divorced	7	4
Separated.	4	4
Widowed.	1	1
Single	81	44
Unknown.	4	11

* past year's figure only includes 40-49

** past year's figure only includes 50 and above

	Past Year	Current Year
<u>CLIENT CHARACTERISTICS CONT.:</u>		
Family Income:		
\$45,000 +		1
\$40,000 - 45,000.		1
\$35,000 - 40,000.		1
\$30,000 - 35,000.		3
\$25,000 - 30,000.		3
* \$20,000 - 25,000.	24	5
\$15,000 - 20,000.	10	5
\$10,000 - 15,000.	10	11
\$5,000 - 10,000	19	7
\$5,000 or less.	46	21
Unknown	4	14
Education:		
0-11.	28	17
12 or GED	64	33
12+	14	7
College Degree.	2	7
Unknown	5	8

* past year's figure only includes \$20,000+

KETCHIKAN ALCOHOL SAFETY ACTION PROGRAM

ANNUAL REPORT

1986

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ASAP

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KETCHIKAN OVERVIEW

1986 PROGRAM STATISTICS

NEW CASES

During 1986, there were 410 new cases opened, an increase of 20% over 1985. A total of 328 screenings were completed.

REFERRAL SOURCES

This year, reports showed that 100% of all referred cases originated in the Ketchikan District Court. This increase reflects a change in court procedure in the event a case is heard in Craig or another out-lying area. These cases are being referred directly to programs near the city in which they are being heard.

STATE/MUNICIPALITY CASES

In 1986, the City of Ketchikan Police Department made 76 arrests for DWI, while the Alaska State Troopers made 98 similar arrests, for a total of 174 DWI arrests. This reflects a decrease of 30% over last year's DWI arrests.

CHARGE WHEN REFERRED TO KETCHIKAN ASAP

DWI charges made up 47% of the caseload in the Ketchikan ASAP office in 1986. There were 154 other alcohol related charges as compared to 186 in 1985. The DWI charges reflected a 10% decrease in comparison to 1985. The other alcohol related offenses represented 53% of the cases screened in 1986 compared to 57% in 1985.

CLIENT CHARACTERISTICS

PERSONAL CHARACTERISTICS

Approximately 84% of the 328 clients screened in the Ketchikan ASAP office were males and 16% were females. The racial origin consisted of 64% Caucasian, 35% Alaska Native, and 1% Other or Unknown. The highest concentration in the Age Category was found in the 20-29 Group, with 38% of the total falling into this category. The next highest concentration was found in the 19/Under Group, with 77 or 23% falling into this bracket, and the third highest concentration was in the 30-39 Group, with 75 or 22% of the clients screened.

Employment status questionnaires revealed 56% Employed, 42% Unemployed, and 2% Unknown. The number of clients earning between \$5,000 and \$45,000 per year reflected only 29% of the total clients screened while the number of clients earning less than \$5,000 or whose income was unknown represented 71% of the clients screened.

It is this preparer's conclusion that these employment statistics represent or closely parallel the continuing downturn in the economy in and around Ketchikan.

The marital status questionnaire revealed that 20% of the clients screened were married-equal to the 1985 stats, 15% were divorced-a 2% decrease over 1985, 6% were separated or widowed-consistent with last year, and 59% were single-and increase of 2% over last year.

PRIOR CRIMINAL RECORD

Over all the cases screened, 70% of the clients had no prior DWI conviction, 22% had one prior, 7% had two priors, and 1% had three priors. No one screened had more than three. These statistics were parallel to the ones reported in 1985.

SCREENING AND DRINKER CLASSIFICATION

Screenings were completed on 328 cases. Classified according to established procedures, approximately 66% were placed in the Problem or Presumptive Problem category. 34% were in the Non-Problem category.

This compares to 62% in the Problem category in 1985, and 37% in the Non-Problem category in the report.

EDUCATION AND TREATMENT REFERRALS

In keeping with established referral procedures, 111 clients classified as Non-Problem were assigned to Substance Abuse Information School. 158 clients classified as Problem Drinkers were referred to outpatient counseling while 20 were referred to inpatient treatment. The remaining clients were referred to Alcohol Education Correspondence Courses (2), AA (4), further evaluation (9), or other (1). Twenty-three were given no assignment. The majority of the 23 receiving no assignment were assigned to ASAP as a result of Minor Consuming arrests and were in for "Screening Only" at a judge's request.

CLIENT MONITORING AND FOLLOW-UP

In 1986, the Ketchikan ASAP office processed 889 follow-up reports to agencies providing services in the area of treatment. Other than standard forms, 21 written reports were filed. There were 606 letters written to clients to accomplish the desired results, an increase over 1985 but demonstrative of the difficulties encountered with notifying clients who are frequently working out of town and unable to be contacted otherwise. Affidavits were filed for 159 cases in 1986, an increase of 67% over 1985.

ASSIGNMENT COMPLETED/FOLLOW-UP

In 1986, the Ketchikan ASAP office closed 242 cases as successful completions, a 10% decrease from last year. Thirty-five cases were closed because they were opened for "Screening Only" or for other reasons.

KETCHIKAN ALCOHOL SAFETY ACTION PROGRAM

BRIEF SUMMARY

In February of 1986, the Ketchikan ASAP office received an on-site visit by Diana Mulholland of the Anchorage ASAP office. While in Ketchikan, Ms. Mulholland met with Assistant Chief of Police Ben Neff, Public Defender Carmen Gutierrez, State Trooper John Glass, District Court Magistrate Susan E. Thomsen, Area Court Administrator Kristen Carlisle and Assistant District Attorney Mark Ellis. An exit interview was held at Gateway Mental Health Center with GMH Director Wes Terwilliger and Alcohol Program Coordinator Charlie Laub present, as well as Ken Goodrich, ASAP Administrator and GMH Administrative Assistant Ann Graham.

Quarterly reports were distributed April 14, 1986, to the District Attorney's office, District Court, and the City Attorney's office. In that same month, Ken Goodrich gave a presentation to the U. S. Forest Service explaining the function of the Alcohol Safety Action Program.

For a two week period during the month of May, the KASAP office hours were reduced to four hours a day in the absence of the Administrator. Mr. Goodrich was in Anchorage attending the University of Alaska for the Annual School of Alcohol Studies and a subsequent vacation. During that period, Beth Dexter was in charge.

In June of this year, Beth Dexter resigned and was replaced the following month by Kathy Lux. During June, an ASAP Systems Conference was also conducted. Emily McKenzie of the Anchorage ASAP office held the conference. Attending were Ketchikan District Court Magistrate Susan E. Thomsen, District Court Judge G. L. Gucker, Asst. D. A. Steve West, a representative of the City of Ketchikan Police Department Patrick Orten, KADAS Coordinator Charlie Laub, Area Court Administrator Kristen Carlisle, Structured Residential Center Administrator Arlene McCary, K.I.P. Counselor, KADAS Harry Day, KADAS Outpatient Counselor Supervisor Tom Coyne, COHO-Craig Alcohol Program Counselor Dick Puckett, KADAS Board Member James Galley, KASAP Data Coordinator Beth Dexter, a representative of Families in Action Betty Wilson, Public Defender Kevin Callahan, and SOADA representative George Mundel

In November, another on-site visit was conducted by Pat Smith from the Anchorage ASAP office. No major problems were encountered but Ms. Smith gave some guidelines on client flow and suggested we implement a more formal method of reporting from treatment to KASAP on client status. While in Ketchikan, Ms. Smith met with Dan Anslinger of the Ketchikan Police Dept., Assistant D.A. Mark Ellis, John Glass of the Alaska State Troopers, and Judge G. L. Gucker of the Ketchikan District Court.

	Past Year	Current Year
<u>CASELOAD SUMMARY</u>		
New Cases Added	340	410
Screenings Completed	435	328
Screenings Transferred	21	6
Case Management Only/No Screening	0	0
Bench Warrant Reassignment to ASAP	45	14
Agency Reassignment by ASAP	86	35
Cases Closed	271	242
Affidavits Filed	95	159
<u>CASELOAD ACTIVITIES</u>		
Total Follow-Up Reports Processed	710	889
Written Reports Filed	71	21
Court Appearances	104	68
Letters Sent	148	606
<u>CLASSIFICATION SUMMARY</u>		
Screenings Completed	435	328
Problem Drinker	261	206
Presumptive Problem Drinker	8	12
Non-Problem Drinker	164	110
Unidentified/Pending	2	0
<u>STAGE OF CASE</u>		
Post Sentence	308	218
Pre-Sentence	127	104
Deferred Prosecution	0	3
Suspended Imposition of Sentence	0	2
Other	0	0

<u>SOURCE OF REQUESTED SCREENING:</u>	Past Year	Current Year
<u>KETCHIKAN</u> Court	433	328
Other Trial Courts (Alaska)	1	0
Out-of-State	1	0
Prosecution	0	0
Other	0	0

CHARGE AT TIME OF ASAP REFERRALS

	Past Year	Current Year
City DWI	72	76
State DWI	177	98
Disorderly Conduct	26	25
Mal. Destruction of Property	1	0
Shoplifting/Removal of Merchandise	0	0
Trespass	12	11
Assault	18	15
Reckless Driving (Original Charge)	3	0
Careless Driving (Original Charge)	0	0
Reduced from DWI	0	0
Drunk on Roadway	0	0
Drinking in Public	0	0
Others	126	103
No Charge	0	0

PRIOR DWI CRIMINAL CONVICTIONS

No Prior DWI	310	227
One Prior DWI	96	73
Two Prior DWIs	21	23
Three Prior DWIs	5	5
More than Three Prior DWIs	1	0
Information Not Available	2	0

<u>TREATMENT REFERRALS</u>	Past Year	Current Year
Alcohol Information School/Education	136	111
Outpatient Counseling	229	150
Inpatient Treatment	28	20
Correspondence	7	2
Alcoholics Anonymous	6	4
Evaluation	9	9
Assignment Pending	1	0
No Assignment	18	23
Other	1	1

	Past Year	Current Year
<u>CLIENT CHARACTERISTICS</u>		
Sex:		
Male	371	276
Female	64	52
Race:		
Caucasian	300	209
Black	1	0
Native	123	113
Other	10	5
Unknown	1	1
Employment Status:		
Employed	240	183
Unemployed	187	138
Unknown	8	7

	Last Year	Current Year
<u>CLIENT CHARACTERISTICS CONT.:</u>		
Family Income:		
\$45,000 +	11	6
\$40,000 - 45,000.	12	4
\$35,000 - 40,000.	5	3
\$30,000 - 35,000.	20	11
\$25,000 - 30,000.	19	8
\$20,000 - 25,000.	29	14
\$15,000 - 20,000.	24	10
\$10,000 - 15,000.	48	18
\$5,000 - 10,000	58	23
\$5,000 or less.	79	41
Unknown	132	190
Education:		
0-11.	66	76
12 or GED	232	209
12+	41	42
College Degree.	2	1
Unknown	3	0

CLIENT CHARACTERISTICS CONT.:

Past Year

Current Year

Age:

Under 19	80	77
20 - 29.	175	125
30 - 39.	104	75
40 - 44.	32	21
44 - 49.	20	14
50 - 59.	22	12
60 and Older	2	5

Marital Status:

Married.	90	68
Divorced	76	48
Separated.	16	14
Widowed.	4	3
Single	247	195
Unknown.	2	0

SEWARD ASAP
ANNUAL REPORT - 1986

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SEWARD ASAP
ANNUAL REPORT - 1986

NEW CASES

A total of one hundred and forty four cases were referred to the Seward ASAP office during 1986. This figure represents a 9 month total rather a 12 month total as the Seward ASAP office was closed for 2 months during the summer due to the absence of the ASAP Administrator for maternity leave. In addition, the Seward District Court did not hold court during the month of December. The referral rate, therefore, averaged 16 new cases per month for 1986.

REFERRAL SOURCES

The main referral source for the Seward ASAP office is the Seward District Court. A few referrals come from other ASAP offices in the state, other trial courts in Alaska, and some are probation referrals that the ASAP office monitors. Ninety nine percent of the referrals are post sentence.

The Seward ASAP office and the Seward District Court continue to coordinate very smoothly. The ASAP office also monitors community work service referrals for the court. Meetings are held on an as-needed basis between the ASAP Administrator and the District Court magistrate and clerk in regards to any policy change or refinements.

CHARGES

Seventy five percent of the cases referred were for DWI charges. Three percent of the charges were for Trespass and Assault, six percent were for Reckless Driving charges (reduced from DWI) and the remaining sixteen percent were Minor Consuming, Disorderly Conduct, and Minor in Possession. Approximately forty nine percent were first offenders.

CLIENT CHARACTERISTICS

Eighty five percent of the clients screened were caucasian. Seventy four percent of these were male clients. The majority of clients were between 30 and 39 years of age and single. Sixty percent were employed, but the average wage earned was \$5,000 per year or less. Fifty six percent of those screened had a high school diploma and twenty seven percent had some college or training beyond the twelfth grade.

SCREENING AND DRINKER CLASSIFICATION

Sixty five percent of the clients screened out as problem drinkers. Thirty two percent were classified as non-problem drinkers, and three percent were unidentified. Forty two percent of the clients had previous DWI offenses.

EDUCATION AND TREATMENT REFERRALS

Twenty seven percent of those screened were referred to Alcohol Information School. Sixty five percent were referred to outpatient counselling and three percent were scheduled for an evaluation by the treatment agency to determine the degree of alcohol abuse.

CLIENT MONITORING AND FOLLOW-UP

538 follow-up reports were processed during 1986. 331 letters were sent out as part of the tracking system, and 78 affidavits were filed with the District Court. 20 cases were monitored for community service assignments for the Court as well.

ASSIGNMENT COMPLETED/TERMINATED

A total of 134 cases were closed by the ASAP office during 1986. Many of these cases were old cases that had been screened by Seward Life Action Council prior to the opening of the ASAP office and had been set up as monitor only by the ASAP administrator.

	Past Year	Current Year
<u>CASELOAD SUMMARY</u>		
New Cases Added	164	144
Screenings Completed	127	85
Screenings Transferred	7	9
Case Management Only/No Screening	37	20
Bench Warrant Reassignment to ASAP	32	16
Agency Reassignment by ASAP	9	3
Cases Closed	89	134
Affidavits Filed	118	78
<u>CASELOAD ACTIVITIES</u>		
Total Follow-Up Reports Processed	656	538
Written Reports Filed	210	340
Court Appearances	19	13
Letters Sent	486	331
<u>CLASSIFICATION SUMMARY</u>		
Screenings Completed	127	85
Problem Drinker	87	53
Presumptive Problem Drinker	6	2
Non Problem Drinker	27	28
Unidentified/Pending	7	2
<u>STAGE OF CASE</u>		
Post Sentence	115	84
Pre-Sentence	5	1
Deferred Prosecution	1	0
Suspended Imposition of Sentence	1	0
Other	5	0

SOURCE OF REQUESTED SCREENING:

	Past Year	Current Year
<u>Seward Court</u>	110	75
Other Trial Courts (Alaska)	16	10
Out-of-State	1	0
Prosecution	0	0
Other	0	0

<u>CHARGE AT TIME OF ASAP REFERRALS</u>	Past Year	Current Y
City DWI	0	1
State DWI	85	64
Disorderly Conduct	0	0
Mal. Destruction of Property	0	0
Shoplifting/Removal of Merchandise	0	0
Trespass	0	1
Assault	0	1
Reckless Driving (Original Charge)	0	0
Careless Driving (Original Charge)	0	0
Reduced from DWI	2	5
Drunk on Roadway	0	0
Drinking in Public	0	0
Others	40	13
No Charge	0	0
<u>PRIOR DWI CRIMINAL CONVICTIONS</u>		
No Prior DWI	86	49
One Prior DWI	27	30
Two Prior DWIs	7	5
Three Prior DWIs	2	1
More than Three Prior DWIs	1	0
Information Not Available	4	0

<u>TREATMENT REFERRALS</u>	Past Year	Current Year
Alcohol Information School/Education	27	27
Outpatient Counseling	73	40
Inpatient Treatment	0	0
Correspondence	0	0
Alcoholics Anonymous	0	0
Evaluation	25	15
Assignment Pending	2	0
No Assignment	0	2
Other	0	1

Past Year

Current Y

CLIENT CHARACTERISTICS

Sex:

Male	99	65
Female	28	20

Race:

Caucasian	109	72
Black	1	0
Native	16	11
Other	0	2
Unknown	1	1

Employment Status:

Employed	71	51
Unemployed	56	34
Unknown	0	0

Yast Year

Current Y

CLIENT CHARACTERISTICS CONT.:

Family Income:

\$45,000 +	2	3
\$40,000 - 45,000.	2	1
\$35,000 - 40,000.	0	0
\$30,000 - 35,000.	3	0
\$25,000 - 30,000.	4	7
\$20,000 - 25,000.	8	8
\$15,000 - 20,000.	5	7
\$10,000 - 15,000.	12	13
\$5,000 - 10,000	24	18
\$5,000 or less.	28	21
Unknown	39	7

Education:

0-11.	18	9
12 or GED	44	48
12+	39	23
College Degree.	4	5
Unknown	22	0

CLIENT CHARACTERISTICS CONT.:

	Past Year	Current Year
Age:		
Under 19	8	12
20 - 29	50	26
30 - 39	44	29
40 - 44	14	5
44 - 49	4	7
50 - 59	5	4
60 and Older	2	2
 Marital Status:		
Married	27	24
Divorced	30	20
Separated	9	2
Widowed	1	0
Single	47	32
Unknown	13	7

TO:

ELLEN MOORE

465-4362

for [unclear] [unclear]
Rep. [unclear]

1/16 [unclear] [unclear] (DUI's)

Insurance District Court [unclear]

Ketchikan + NOME + HOMER + SEWARD	1st 9 pages
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17 ASAP
EM...
EMMY MCKENZIE
264-0735
FOR FBX

of DWI (prior)
growing
- more change of lienholders -

Governors Rep. for Highway
Safety
BL-MONTY 4/12 -

Table 1.54

Criminal sanctions, administrative licensing actions, and related actions for driving while intoxicated offenses

By jurisdiction, as of January 1986

Jurisdiction	Criminal sanctions					Administrative licensing actions			Other actions				
	Term of imprisonment	Mandatory minimum term of imprisonment	Fine	Mandatory minimum fine	Community service	Restitution	Pre-conviction licensing action	Suspension or revocation	Mandatory minimum term of withdrawal	Alcohol education or treatment program	Education or treatment program as alternative to sanctions	Vehicle impoundment/ confiscation	Vehicle forfeiture
Alabama	S	S	S	S	S	(b)	S	S	S	S	S	S	S (\$24.35.038)
Alaska	S	S	S	S	S	(b)	S	S	S	S	S	S	S
Arizona	S	S	S	S	S	(b)	S	S	S	S	S	S	S
Arkansas	S	S	S	S	S	(b)	S	S	S	S	S	S	S
California	S	S	S	S	S	(b)	S	S	S	S	S	S	S
Colorado	S	S	S	S	S	(b)	S	S	S	S	S	S	S
Connecticut	S	S	S	S	S	(b)	S	S	S	S	S	S	S
Delaware	S	(f)	S	S	S	S	(e)	S	S	S	S	S	S
District of Columbia	S	S	S	S	S	S	S	S	S	S	S	S	S
Florida	S	S	S	S	S	S	S	S	S	S	S	S	S
Georgia	S	S	S	S	S	S	S	S	S	S	S	S	S
Hawaii	S	S	S	S	S	S	S	S	S	S	S	S	S
Idaho	S	S	S	S	S	(b)	S	S	S	S	S	S	S
Illinois	S	S	S	S	S	S	S	S	S	S	S	S	S
Indiana	S	S	S	S	S	S	S	S	S	S	S	S	S
Iowa	S	S	S	S	S	S	S	S	S	S	S	S	S
Kansas	S	S	S	S	S	S	S	S	S	S	S	S	S
Kentucky	S	S	S	S	S	S	S	S	S	S	S	S	S
Louisiana	S	S	S	S	S	S	S	S	S	S	S	S	S
Maine	S	S	S	S	S	S	S	S	S	S	S	S	S
Maryland	S	S	S	S	S	S	S	S	S	S	S	S	S
Massachusetts	S	S	S	S	S	S	S	S	S	S	S	S	S
Michigan	S	S	S	S	S	S	S	S	S	S	S	S	S
Minnesota	S	S	S	S	S	S	S	S	S	S	S	S	S
Mississippi	S	(e)	S	S	S	S	S	S	S	S	S	S	S
Missouri	S	S	S	S	S	S	S	S	S	S	S	S	S
Montana	S	S	S	S	S	S	S	S	S	S	S	S	S
Nebraska	S	S	S	S	S	S	S	S	S	S	S	S	S
Nevada	S	S	S	S	S	S	S	S	S	S	S	S	S
New Hampshire	S	S	S	S	S	S	S	S	S	S	S	S	S
New Jersey	S	S	S	S	S	S	S	S	S	S	S	S	S
New Mexico	S	S	S	S	S	S	S	S	S	S	S	S	S
New York	S	S	S	S	S	S	S	S	S	S	S	S	S
North Carolina	S	S	S	S	S	S	S	S	S	S	S	S	S
North Dakota	S	S	S	S	S	S	S	S	S	S	S	S	S
Ohio	S	S	S	S	S	S	S	S	S	S	S	S	S
Oklahoma	S	S	S	S	S	S	S	S	S	S	S	S	S
Oregon	S	S	S	S	S	S	S	S	S	S	S	S	S
Pennsylvania	S	S	S	S	S	S	S	S	S	S	S	S	S
Puerto Rico	S	S	S	S	S	S	S	S	S	S	S	S	S
Rhode Island	S	S	S	S	S	S	S	S	S	S	S	S	S
South Carolina	S	S	S	S	S	S	S	S	S	S	S	S	S
South Dakota	S	S	S	S	S	S	S	S	S	S	S	S	S
Tennessee	S	S	S	S	S	S	S	S	S	S	S	S	S
Texas	S	S	S	S	S	S	S	S	S	S	S	S	S (\$67011-7)
Utah	S	S	S	S	S	S	S	S	S	S	S	S	S
Vermont	S	S	S	S	S	S	S	S	S	S	S	S	S
Virginia	S	S	S	S	S	S	S	S	S	S	S	S	S
Washington	S	S	S	S	S	S	S	S	S	S	S	S	S
West Virginia	S	S	S	S	S	S	S	S	S	S	S	S	S
Wisconsin	S	S	S	S	S	S	S	S	S	S	S	S	S
Wyoming	S	S	S	S	S	S	S	S	S	S	S	S	S

Notes: See Note, table 1.53. "The sanctions listed for convictions of alcohol driving offenses... are those specified by statute. If a sanction is not specified by law... it is not listed" (U.S. Department of Transportation, National Highway Traffic Safety Administration, Digest of State Alcohol-Highway Safety Related Legislation, January 1983 [Washington, D.C.: U.S. Department of Transportation, 1983], (pp. 1, 2)). "Term of imprisonment" refers to both jail sentences and prison sentences. "The term 'mandatory sanction' means either a criminal sanction or an administrative licensing action which must be imposed by either a court or administrative agency" (Source, p. 1-1). "Pre-conviction licensing action" refers

to provisions which enable the State licensing agency to suspend a license prior to conviction based on blood alcohol concentration level. "Mandatory minimum term of withdrawal" refers to a mandatory minimum term of either license suspension or revocation. Because of variation among the jurisdictions within categories of sanctions, e.g., terms of imprisonment or amounts of fines, the Source document as well as individual jurisdictions' statutes should be consulted. In the table, "S" indicates that such a provision is provided expressly by statute. Statutes should be consulted for the full text and meaning of specific provisions.

Table 1.54

Statutory provisions authorizing blood alcohol concentration tests for persons suspected of driving while intoxicated, and sanctions for refusal to take such tests

By Jurisdiction, as of January 1986

Jurisdiction	Preliminary breath test			Implied consent chemical test	
	Statutory authorization	Sanctions for refusal to submit to preliminary breath test		Sanctions for refusal to take implied consent chemical test	
		Criminal	Administrative licensing action	Arrest required for consent	Criminal
Alabama			Yes		S
Alaska	S	S	Yes	S	S
Arizona			Yes		S
Arkansas			Yes		S
California			Yes		S
Colorado	S		Yes		S
Connecticut			Yes		S
Delaware	S		No		S
District of Columbia			Yes		S
Florida	S		Yes		S
Georgia			Yes		S
Hawaii			Yes		S
Idaho			No		S
Illinois			Yes		S
Indiana	S		No		S
Iowa	S ^a		No ^b		S
Kansas			Yes		S
Kentucky	S		Yes		S
Louisiana			Yes		S
Maine			No		S
Maryland	S		Yes		S
Massachusetts			Yes		S
Michigan	S		Yes		S
Minnesota	S	S	No		S
Mississippi	S		No		S
Missouri			Yes		S
Montana			Yes		S
Nebraska	S	S	Yes	S	S
Nevada	S		Yes		S
New Hampshire	S		Yes		S
New Jersey			Yes	S	S
New Mexico			Yes		S
New York	S ^c	S	Yes		S
North Carolina	S		Yes		S
North Dakota	S		Yes		S
Ohio			Yes	S	S
Oklahoma			Yes		S
Oregon			Yes		S
Pennsylvania	S		No		S
Puerto Rico	S		Yes		S
Rhode Island	S		Yes	S	S
South Carolina			Yes		S
South Dakota	S		Yes		S
Tennessee			No		S
Texas			Yes		S
Utah			Yes		S
Vermont	S		(d)		S
Virginia	S		Yes		S
Washington			Yes		S
West Virginia	S		Yes		S
Wisconsin	S		Yes		S
Wyoming			Yes		S

Notes: See Note, table 1.53. In the table, "S" indicates that such a provision is provided expressly by statute. Statutes should be consulted for the full text and meaning of specific provisions.

^a Applies only when there has been either an injury or death related accident.

^b Arrest may be a prior condition to an implied consent chemical test under certain circumstances but is not required in all conditions.

^c Limited to drivers involved in accidents and traffic law violations.

^d Unclear, but probably not.

Sources: U.S. Department of Transportation, National Highway Traffic Safety Administration, *Digest of State Alcohol-Highway Safety Related Legislation*, 4th ed., March 1986 (Washington, DC: USDO, 1986), pp. 3-1--3-377. Table adapted by SOURCEBOOK staff.

Table 1.56

Criminal sanctions, administrative licensing actions, and related actions for driving while intoxicated offenses

By jurisdiction, as of January 1986--Continued

<p>^aNot for first offense but may apply to second and/or subsequent offenses.</p> <p>^bMay be required where involved in accident causing damages, injury, or death.</p> <p>^cAdministrative per se with a blood alcohol concentration level of 0.15 percent; the period of license revocation is 1 year.</p> <p>^dWhere there has been a previous conviction or if defendant is under 21 years of age.</p> <p>^ePolice may take and hold a drivers' license for 24 hours if the driver has a blood alcohol concentration level of 0.10 percent or more.</p> <p>^fThese minimum sanctions may not be suspended by the Court; the law is silent as to prohibiting the Court from placing a person on probation.</p> <p>^gYes, but only if convicted of driving with suspended or revoked license.</p> <p>^hFirst offense only.</p> <p>ⁱIn lieu of fine.</p> <p>^jIn lieu of imprisonment for first offense and in lieu of fine for second and subsequent offenses.</p> <p>^kIn lieu of fine or imprisonment except for injury related driving while intoxicated offenses.</p> <p>^lAfter two-thirds of license suspension period has passed, offender may be issued a license if they have completed an alcohol education/treatment program. Special provisions apply.</p> <p>^mIf defendant consents.</p> <p>ⁿA limited license may be issued for employment purposes or attendance at an alcohol treatment program.</p>	<p>^oThe law does not specifically prohibit suspending or placing persons on probation for the minimum imprisonment term.</p> <p>^pIn lieu of imprisonment.</p> <p>^qApplies to all offenses, however, injury must have been intentionally inflicted for the victim to be compensated.</p> <p>^rAdministrative per se with a blood alcohol concentration level of 0.13 percent; the period of revocation varies with number and type of alcohol related convictions.</p> <p>^sExcept for the driving while intoxicated death or bodily injury offense.</p> <p>^tWhere there is serious bodily injury or a 0.20 percent blood alcohol level.</p> <p>^uTo be paid by the defendant if a sentence is either suspended or deferred.</p> <p>^vWhere there has been a previous conviction. Also, license may be seized if the blood alcohol concentration level is 0.10 percent or above.</p> <p>^wMay be imposed if defendant is an alcoholic or suffering from acute alcohol intoxication.</p> <p>^xAdministrative per se with a blood alcohol concentration of 0.08 percent.</p> <p>^yGenerally no; but there are limited alternatives.</p>
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Source: U.S. Department of Transportation, National Highway Traffic Safety Administration, *Digest of State Alcohol-Highway Safety Related Legislation*, 4th ed., March 1986 (Washington, DC: U.S. Department of Transportation, 1986), pp. 3-1--3-379. Table adapted by SOURCEBOOK staff.

INDEX FOR DEPARTMENT OF FISH & GAME

I	GUIDELINES FOR PROSECUTING FORFEITURE ACTIONS: FISH, GAME AND GUIDING	V - 3
A.	Statutory Authority: Forfeiture in Fish and Game and Guiding Violations.	V - 3
B.	Civil <u>In Rem</u> Actions <u>In rem</u> action - burden of proof, right to jury, discovery procedure.	V - 6
C.	Guidelines for Bringing Civil <u>In Rem</u> Actions.	V - 10
D.	Relationship between Civil and Criminal Actions Separate actions; when both civil and criminal may be filed; timing of civil and criminal cases.	V - 11
II	MECHANICS OF BRINGING CIVIL FORFEITURE ACTIONS	V - 14
A.	Notification	V - 14
B.	Seizure and Service of Process	V - 15
C.	Release - Stipulations for release of property	V - 16
D.	Service and Parties	V - 17
III	DISPOSITION OF FORFEITED EQUIPMENT	V - 19
	Rights of innocent owners and lienors; Remission	V - 19
	Forfeiture checklist	V - 21
IV	FORMS	
	INSTRUCTIONS FOR SEIZURE INFORMATION FORM	
FORM NO. 1	OPERATOR'S SEIZURE INFORMATION FORM (AIRCRAFT)	V - 22
FORM NO. 2	OPERATOR'S SEIZURE INFORMATION FORM (VESSEL)	V - 24
FORM NO. 3	COMPLAINT FOR FORFEITURE AND DAMAGES	V - 26
FORM NO. 4	DIRECTIONS FOR SERVICE	V - 30

INDEX FOR DEPARTMENT OF FISH & GAME continued

V.	INSTRUCTIONS FOR SEIZURE WARRANT FORMS	V - 32
FORM NO. 5	WARRANT TO SEIZE	V - 33
FORM NO. 6	RETURN	V - 35
	INSTRUCTIONS FOR NOTICE OF FORFEITURE	V - 36
FORM NO. 7	NOTICE OF FORFEITURE	V - 38
	INSTRUCTIONS FOR RELEASES	V - 40
FORM NO. 8	STIPULATION FOR RELEASE OF AIRCRAFT	V - 41
FORM NO. 9	STIPULATION FOR RELEASE OF VESSEL	V - 48

I GUIDELINES FOR PROSECUTING FORFEITURE ACTIONS :
FISH, GAME AND GUIDING

A. Statutory Authority: Forfeiture in Fish, Game and Guiding Violations

Several statutes provide authority for forfeiture of equipment and illegally taken fish and game; these include AS 16.05.190, AS 16.05.195, and AS 08.54.210. The statute primarily used as a basis for in rem forfeiture of illegally used equipment is AS 16.05.195, enacted in 1974. That statute provides, in relevant part:

(a) Guns, traps, nets, fishing gear, vessels, aircraft, other motor vehicles, sleds, and other paraphernalia or gear used in or in aid of a violation of this title, or regulation promulgated under this title, be forfeited to the state

(1) upon conviction of the offender in a criminal proceeding
...or

(2) upon judgment of a court of competent jurisdiction in a proceeding in rem that an item specified above was used in or in aid of a violation of this title or regulation promulgated under it.

(b) Items classified in (a) of this section may be forfeited under this section regardless of whether they were seized before instituting the forfeiture action.

(c) An action for forfeiture under this section may be joined with an alternative action for damages brought by the state to recover damages for the value of fish and game or parts of them...transported or possessed contrary to the provisions of this title or a regulation promulgated under it.

- (d) It is no defense that the person who had the items specified in (a) of this section in possession at the time of its use and seizure has not been convicted or acquitted in a criminal proceeding resulting from or arising out of its use.
- (e) No forfeiture may be made of an item subsequently sold to an innocent purchaser in good faith. The burden of proof as to whether the purchaser purchased the item innocently and in good faith shall be on the purchaser.
- (f) An item forfeited under this section shall be disposed of at the discretion of the department.

The legislature passed this statute partly in response to procedural questions that arose in the case State v. Graybill, 545 P.2d 629 (Alaska 1976), where forfeiture was demanded by the state in a criminal case involving illegal possession and transportation of a bear hide. Graybill had argued that it was mandatory for the state to initiate a separate in rem civil proceeding in order to seek forfeiture of the airplane used in the violation. The supreme court rejected this argument and held that under AS 16.05.190, which was the only fish and game forfeiture statute at the time, an aircraft could be forfeited in a criminal proceeding.

AS 16.05.190, which was not repealed or replaced by AS 16.05.195, provides authority for the state to seize guns, traps, nets, aircraft, etc., and provides that upon conviction of the offender of a violation of the fish and game code, the

equipment may be forfeited by court order. AS 16.05.190 differs from AS 16.05.195 in that it does not address civil in rem procedures, and it specifies that illegally taken fish and game shall be forfeited by the court upon conviction; it does not, however, address the disposition of vessels, aircraft or other equipment forfeited by a court. In contrast, AS 16.05.195 establishes that forfeited equipment "shall be disposed of at the discretion of the department" [of Fish and Game].

Generally, when bringing an in rem forfeiture action, AS 16.05.195 is the appropriate statutory authority; use AS 16.05.190 for obtaining a search and seizure warrant or for obtaining a court order disposing of illegally taken fish or game in a criminal proceeding.

In addition to the forfeiture authority provided in Title 16 for fish and game violations, AS 08.54.210(b) provides in pertinent part:

[A] person who engages in guiding or transporting activity during the period his license is suspended or revoked under this chapter [guiding chapter, Title 8, Alaska Statutes] is guilty of a felony punishable, upon conviction, by a fine or not more than \$5,000 and by imprisonment for not less than one year nor more than 3 years. In addition to punishment for a felony, all guns, fishing tackle, boats, aircraft, automobiles or other vehicles, camping gear and other equipment and paraphernalia used in, or in aid of, guiding or transporting activity engaged in during the period of suspension or revocation shall be confiscated by persons authorized to enforce this chapter. [Emphasis added]

This statute uses the term "confiscate" rather than "forfeit" but the terms have been used synonymously, State. Conservation Department v. Brown, 53 N.W.2d 859 (Mich. 1952), and thus the statute provides a separate forfeiture authority for guiding violations.

It is clear, both from the statutes discussed above and from case law, that the state has the authority to seek forfeiture of vessels, aircraft and other equipment used in violation of fish and game and some guiding statutes or regulations both in a criminal case brought against the individual or in a civil in rem action brought against the vessel or airplane itself. State v. Graybill, 545 P.2d 629 (Alaska 1976).

B. Civil In Rem Actions.

In contrast to a criminal action, which is prosecuted by the district attorney's office, a civil in rem action is brought by the attorney general. An in rem proceeding is substantially different from a criminal action, and provides certain strategic advantages. First, the in rem complaint is brought against the aircraft or vessel itself as the defendant, and no individual people need be named as defendants in the case.

Service is effected on a vessel or aircraft by actual or constructive seizure of the equipment (with a warrant), by posting the item with a copy of the complaint, and by filing notice of forfeiture by publication. The warrant should be

obtained under Alaska Rule of Criminal Procedure 37. See F/V American Eagle v. State, 620 P.2d 657 (Alaska 1980). The registered owner and any known claimants should be notified of the action, but need not be made parties. United States v. Pollastrine, 8 Alaska 104 (D. Alaska 1929); United States v. Bleasby, 257 F.2d 278 (3d Cir. 1958); People v. One 1971 Mercury Sedan, 168 P.2d 443 (Ct. App. Cal. 1946).

Secondly, the in rem proceeding is a civil action and therefore the rules of evidence, burden of proof, and discovery provisions for civil cases are applicable. Civil rules provide considerably more expansive discovery than criminal rules, and the civil burden of proof by a preponderance of the evidence applies. Case law shows that in rem forfeitures are considered, although civil actions, "quasi criminal in nature". Graybill v. State, 545 P.2d 629 (Alaska 1976). This holding does not, however, mean that a criminal burden of proof applies. Judge Madsen, who rendered the superior court decision in F/V American Eagle v. State, 620 P.2d 657 (Alaska 1980), cert. denied, ___ U.S. ___, 71, L. Ed.2d 284 (1982), stated in his decision granting forfeiture of a fishing vessel:

The court, after having heard and weighing the testimony of the witnesses and the exhibits, finds that the state has met its burden by clearly and convincingly proving by a preponderance of the evidence.

See also, State v. Rice, 626 P.2d 104 (Alaska 1981); U.S. v. Twelve Ermine Skins, 78 F. Supp. 734 (D. Alaska 1948).

Because the in rem action is civil rather than criminal, the case must be filed within two years (AS 09.10.070); in rem civil actions are not bound by the criminal procedure four-month rule.

Most forfeiture statutes, like AS 16.05.195, are silent on the question of whether a jury trial is of right. The opportunity for a jury trial will probably be favored in Alaskan courts, but because of the complexity and nature of civil forfeiture proceedings, judge trials are preferable, as is the practice in admiralty. In general, courts look to admiralty procedures in handling forfeitures. U.S. v. \$5,372.85 U.S. Coin and Currency, 283 F. Supp. 904 (D.N.Y. 1968); One Plymouth Automobile v. U.S., 165 F.2d 186 (5th Cir. 1947). Also see, F/V American Eagle v. State, 620 P.2d 657 (Alaska 1980), cert. denied, ___ U.S. ___ 71 L. Ed.2d 284 (1982). As a general rule, admiralty cases are tried by a court, not a jury. The Paolina S., 11 F. 171 (_____ 1880); Clark v. U.S., 5 F. Case No. 2, 837 (C.C. Pa. 18__); see also, Humble Oil & Refining Co. v. Philadelphia Ship Maintenance Co., 342 F. Supp. 786 (D. Pa. 1972); American of Puerto Rico, Inc. v. Transocean Tankers Corp., 317 F. Supp. 798 (D. Puerto Rico 1969); Texas Menhaden Co. v. Palermo, 328 F.2d 579 (6th Cir. 1964).

Some courts refuse to apply admiralty procedure that denies a trial by jury in civil forfeitures for state or federal

drug violations. This position is based on the argument that although admiralty forfeitures are prosecuted in rem according to admiralty practice, seizures on land are not admiralty cases but "common law informations," in which a jury trial is demandable. People v. One 1941 Chevrolet Coupe, 231 P.2d 832 (Cal. 1951); One Plymouth Automobile v. U.S., 165 F.2d 186 (5th Cir. 1947). The court in People v. One 1941 Chevrolet Coupe, 231 P.2d 832 (Cal. 1951) distinguishes between forfeitures of contraband, where there is no right to trial by jury, and forfeitures of otherwise lawful instrumentalities, where trial by jury is a constitutional right. The court in State Conservation Dept. v. Brown, 55 N.W.2d 859 (Mich. 1952) held that forfeiture actions are statutory and not founded in the common law, and claimants therefore are not accorded a right to a jury trial.

Another important distinction between a criminal case and an in rem civil action, is that the in rem civil forfeiture is not considered strictly a punishment or penalty, but rather is a deterrent and remedial, i.e., it is a way to remove an instrumentality from the hands of one using it improperly, in order to protect the state's resources. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974); Gulp v. U.S., 523 F.2d 557 (8th Cir. 1975). A court may be more willing to order forfeiture in a civil in rem proceeding than in a criminal action where there may be a large disparity between the maximum fine or penalty (generally, the maximum fine for fish and game violations is \$1,000 and one year in jail) and the value of the vessel or

aircraft that is seized and forfeited, which may be in excess of \$1,000,000. However, many courts, while recognizing the deterrent and remedial aspects, still view forfeitures as primarily a punishment or penalty and not favored in the law. See One Cocktail Glass v. State, 565 P.2d 1265 (Alaska 1977).

Because the value of property subject to forfeiture may be so great, some courts favor granting partial forfeiture of the equipment, or ordering forfeiture of a bond or other security in lieu of the item itself. F/V American Eagle v., State, 620 P.2d 657 (Alaska 1980), cert. denied, ____ U.S. ____ 71 L.Ed.2d 284 (1982).

Neither AS 16.05.195 nor the rules of civil procedure in Alaska provide specific guidelines for the procedure to be followed in an in rem action. The closest rules or guidelines are, as discussed above, the Federal Admiralty Rules that relate to bringing a complaint or libel against a vessel, and Alaska Rules of Civil Procedure 4 and 5; courts will look to these procedures as guidelines for the action.

C. Guidelines for Bringing Civil In Rem Actions.

An action for forfeiture of valuable equipment such as a vessel or airplane is an extreme measure and represents the harshest penalty for a fish and game violation. On the other hand, vessels and airplanes provide a unique opportunity to

deplete the fish and game populations of the state, and it is for this reason that special consideration has been given to the matter by the legislature, which granted broad authority for forfeiture under AS 16.05.195.

In determining whether to prosecute in rem a boat or aircraft used in a fish and game violation, one should keep in mind that forfeiture actions are difficult and time-consuming to prosecute and may take up to three to five years attorney commitment time. Therefore, the following is an outline of the criteria to assess before bringing a civil forfeiture action:

1. Does the violation involve a substantial commercial benefit to the violator, i.e., a "windfall profit"? E.g., big game guiding, commercial fishing, fish guiding.
2. Is the violation, even if committed by a sport hunter or fisherman, egregious? Is there any intent involved or was the crime a mistake that would be excused if strict liability did not apply to fish and game violations? E.g., herding and harassing game, grossly over limit on fish or game, waste, inhumane kill, destruction of significant breeding stock, hunting in closed area. In particular, is there a likely detriment to the species or stock?

3. Is the equipment, vessel, vehicle, or aircraft an integral part of the violation? E.g., spotting from aircraft, using boat for access to closed area.
4. Is this the second or third similar violation by the offender?
5. Is there a significant need to deter the public that necessitates bringing a case to civil trial on evidence that would not support a criminal action? E.g., violation occurring on identified vessels but crewmen now known.
6. What is the value of the equipment, vessel, vehicle, or aircraft relative to the commercial profit or damage to the resource?

If the violation does not fit one or more of these categories, civil forfeiture is probably not appropriate.

D. Relationship Between Civil and Criminal Actions.

A criminal case against an individual for a fish or game violation is an action independent of any in rem proceeding for forfeiture. Haas v. One 1965 Ford Auto, 529 P.2d 410 (Or. App. 1974). See also State v. Graybill, 545 P.2d 629 (Alaska 1976). A judge in a criminal action has authority to forfeit, as part of the criminal sentencing procedure, the equipment, aircraft, vessels, etc. used in or in aid of a violation of the

fish and game statutes or regulations, under AS 16.05.190; whether a prosecuting attorney in a criminal case will ask for forfeiture is a decision to be made by the district attorney. Many cases will involve a criminal prosecution only, for example, where a private sport hunter flies his aircraft to an open hunting area where he is then involved in a minor game violation not related to the use of the airplane; here the attorney general would not bring a civil in rem proceeding because the case does not fall within the category of cases outlined above.

Because an action in rem for forfeiture is independent of any criminal prosecution, a forfeiture action may be brought even though the individual defendant in the underlying criminal case was acquitted. United States v. One 1961 Cadillac Hardtop, 207 F. Supp. 693 (D. Tenn. 1962); U.S. v. Three Thousand Two Hundred Thirty Six Dollars, 167 F. Supp. 495 (D. Alaska 1958). Also, there may be situations where no criminal case can be brought, yet where there is sufficient evidence to proceed with a civil in rem action (for example, when there is no positive identification of the pilot or passengers of an aircraft, but there is a clear description of the aircraft used in a violation). Cases resting on circumstantial evidence are particularly appropriate for civil action because the extensive discovery procedures available can identify critical evidence.

If both civil and criminal actions are contemplated, it is best to bring both cases simultaneously, or as near to the same time as possible. If the cases are brought simultaneously,

and if the criminal case, which will probably be heard first, is dismissed or if the defendants are acquitted, the defendants will not be in a position to argue that the in rem case was brought merely because the criminal case was lost and the state is "out to get" the defendants. Furthermore, it is very helpful for an assistant attorney general to attend a criminal case before trying the same general issues in a subsequent civil in rem action. The criminal court might decline to grant forfeiture, even if the case were won by the district attorney, and the attorney general in that situation would be in a position to continue with the in rem action against the aircraft or vessel itself. This may be particularly appropriate in cases, such as fishing in closed areas, where a maximum criminal penalty is insufficient to deter the conduct, because the value of the harvest far exceeds the criminal fine. In some instances the criminal court may choose not to order forfeiture because of the pending civil action.

If a criminal case is won and forfeiture is granted but the judgment is appealed, the attorney general may wish to proceed with an action in rem on the theory that if the criminal conviction were overturned on appeal, the in rem action would still be valid. Although the attorney general need not wait for the final outcome of a criminal action before proceeding in rem, strategy may favor staying action in the civil case until the criminal action is over. The primary advantage of this sequence is that it will preclude the criminal defendant's resort to the

fifth amendment right to remain silent which might hinder evocation of pertinent evidence in the civil suit.

II MECHANICS OF BRINGING CIVIL FORFEITURE ACTIONS

A. Notification.

As mentioned above, it is important that the district attorney's office notify the attorney general's office (and vice versa) of any fish and game violation that involves a possible forfeiture, if the violation falls within the guidelines for civil prosecution in rem as outlined above. It is essential for the attorney general's office to become involved in the case from the very beginning, so that the attorney general's office can review the evidence and make a determination as to whether there is sufficient basis to proceed with a civil in rem case.

If there is a stipulation to release the vessel or airplane in the criminal action, the attorney general's office has a strong interest in making sure that the release will cover the subsequent civil in rem action, i.e., the release must provide for a sufficient bond or other security for the equipment, and include an agreement that the vessel or aircraft is properly insured and will not leave the state or be sold or encumbered. The release agreement should also obviate the need to re seize the vessel or aircraft for the civil in rem action in order to "serve" the item.

B. Seizure and Service of Process.

A.S. 16.05.195 provides: "Items specified in (a) of this section may be forfeited under this section regardless of whether they were seized before instituting the forfeiture action." At least one superior court judge in Anchorage has ruled that, notwithstanding this language, the state must actually or constructively seize the equipment in order to bring it within the court's jurisdiction; merely filing a notice of lis pendens was held insufficient to obtain jurisdiction. State v. One Blue and White PA-18 Airplane, No. 3AN-78-900 Civ. (Super. Ct. Third Jud. Dist. Alaska, Sept. 1978). There are several other reasons why actual seizure may be appropriate. First, looking to the Rules of Admiralty for guidance in bringing an in rem action, seizure is the means for bringing the action, and the libel must be posted on the vessel. (Supplemental Rule C, FRCP provides that the clerk of court issue an arrest warrant when a verified complaint is filed.) Since an action in rem is brought against the item itself, it may be necessary to "serve" the aircraft or vessel while it is within the jurisdiction of the court; due to the high mobility of aircraft and vessels, seizure may be the only way to assure that the res will be within or remain within the jurisdiction of the court. It would be pointless to bring a forfeiture action against an aircraft or vessel that may subsequently disappear from the jurisdiction of the court or be sold or otherwise encumbered.

Seizure for an in rem civil case should be made upon a warrant issued by a superior court judge. Evidence obtained as the result of an illegal search may not be admissible in a civil in rem action. One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965). However, as long as the evidence supporting the forfeiture is not tainted, it can be argued that an illegal seizure of the defendant's property is not a basis for dismissal of the case. See, The Ship Richmond v. United States, 9 Cranch 102, 3 L.Ed. 670 (1815); United States v. One Chevrolet Sedan, 7 Alaska 605 (D. Alaska 1927). The court in Boyd v. United States, 116 U.S. 616 (1886) distinguished between a search for and seizure of a man's private books and papers for the purpose of obtaining information or using them as evidence against him, and seizure for the purpose of forfeiture. In United States v. One Ford Coupe Auto, 272 U.S. 321 (1926), the court held that where property declared forfeit by a federal statute is seized by one having no authority to do so, the United States may "adopt" the seizure with the same effect as if it originally had been made by a duly authorized officer.

C. Release.

Depending on the circumstances, it may be desirable to allow the defendant property to be released pending trial.

If an aircraft or vessel is released on stipulation, it is important that the agreement provide either a bond or

promissory note or at least insurance coverage for the value of the vessel or aircraft. If a bond is secured, it should cover at least the full value of the vessel, with a provision for alteration of the stated value in the event that the property increases in value during the pendency of the litigation. It may be impossible to accomplish this as a practical matter. In that event, it is best to establish the security or bond in much the same manner as bail. Any stipulation for release should also include a provision that the owner not sell or otherwise encumber the property, and that the owner will produce the item upon demand.

D. Service and Parties.

In accordance with admiralty procedure, service on a ship (or airplane) can be effected by posting a copy of the complaint on the property and leaving a copy with the person having control of it, and by publication of a notice of filing a forfeiture complaint.

Alaska courts may require personal service of the notice of filing a forfeiture action on all ascertainable owners or claimants, so a title search should be made in connection with service of process. The U.S. Supreme Court has ruled that where the government knew that the owner of a forfeited car was not at the address to which notice was sent, the service was inadequate. Robinson v. Hanrahan, 409 U.S. 29 (1972).

Because the action is in rem, there are no "necessary" parties to the action, other than the "res" and the state. Utah Liquor Control Comm'n. v. Wooras, 93 P.2d 455 (Utah 1939). For a case contra this general rule, see People v. Broad, 12 P.2d 941 (Cal. 1932). The presence of the owner or claimant is not necessary for the action to proceed. The owner of the item, or anyone claiming an interest in it, although not named as a party, may appear and make a defense, either by filing a claim and answer or by moving to intervene. People v. One 1941 Mercury Sedan, 168 P.2d 443 (Ct. App. Cal. 1946).

Because of AS 16.05.195(e), a lis pendens giving notice of the forfeiture action must be filed against the ship or aircraft, with the U.S. Coast Guard, FAA, or local recording district, as appropriate. In the case of vessels, the U.S. Coast Guard will file the notice, with the vessels documentation papers.

III DISPOSITION OF FORFEITED EQUIPMENT

AS 16.05.195 provides that equipment, including aircraft and boats, forfeited for a fish and game violation is to be disposed of at the discretion of the Department of Fish and Game. The statute does not require that the department sell the equipment at public auction, nor does it specify that the department pay off liens or mortgages on the forfeited equipment. However, the Alaska Supreme Court, in State v. Rice, 626 P.2d 104

(Alaska 1981) held that where a third party (in that case, a financial institution) had done all it reasonably could be expected to do to avoid illegal use of equipment in which it had an interest, it was entitled to remission of its interest in the forfeited equipment.

FORFEITURE CHECKLIST: INITIATING THE ACTION

1. Seizure Warrant, Affidavit of Return. (n.b. - separate court number and file for the seizure warrant).
2. Receipt and Inventory of aircraft/floats, skis, or vessel and gear.
3. Civil Complaint for Forfeiture, Summons (post on vessel or airplane), Return.
4. Title Search.
5. Notice of Filing Complaint - send to owner and lienor.
6. Motion for Service by Publication, Affidavit, Order.
7. Notice of Filing Complaint (for publication in newspaper).
8. Affidavit of Publication.
9. Lis Pendens (file in Oklahoma City, for aircraft, or State Recording Office further equipment).
10. Stipulation for Release, bond, insurance coverage, etc.

OPERATOR'S
SEIZURE INFORMATION
(AIRCRAFT)

1. Make of aircraft _____
2. Model of aircraft _____
3. Official F.A.A. Registration No. _____
4. Engine Serial No(s). _____
5. Airframe Serial No. _____
6. Floats (Skiis) type _____
7. Floats (Skiis) - Serial No. _____
8. Floats (Skiis) - Estimated value today _____
9. Description of aircraft, (wheels, STOL kits, stall fences,
types of fabric, color scheme, etc.)

10. Value when purchased \$ _____
11. a. Date of last reappraisal _____, 19____
b. Value at last reappraisal \$ _____
c. Name and address of appraiser _____

12. Estimated value today \$ _____
13. Place and date of most recent overhauls or repairs
_____, 19____
_____, 19____
14. a. Name of owner(s) _____
b. Address of owner _____

Tele. () _____

15. Liens. _____

Name & Address	Balance	Date Incurred	Payment Schedule
a. _____ _____	_____	_____, 19__	\$_____ per mo.
b. _____ _____	_____	_____, 19__	\$_____ per mo.
c. _____ _____	_____	_____, 19__	\$_____ per mo.

16. Insurance coverage.

Names of	Insurance Company	Type of Insurance	Amount of Insurance	Premium Amount and Due Date
a. _____	_____	_____	_____	\$___ per ___; Due _____
b. _____	_____	_____	_____	\$___ per ___; Due _____
c. _____	_____	_____	_____	\$___ per ___; Due _____

17. Description of instruments, radios, and appurtenant equipment and other paraphernalia.

Item	Model No.	Serial No.	Date of Purchase	Condition
a. _____	_____	_____	_____	_____
b. _____	_____	_____	_____	_____
c. _____	_____	_____	_____	_____
d. _____	_____	_____	_____	_____

DATED this ___ day of _____, 19__ , at

_____, Alaska.

Signature of Operator(Owner)

OPERATOR'S
SEIZURE INFORMATION
(VESSEL)

1. Name of vessel _____
2. Kind of vessel _____
3. Official U.S.C.G. No. _____
4. Port of Registry _____
5. ADF&G No. AK _____
6. Value when purchased \$ _____
7. a. Date of last reappraisal _____, 19__
- b. Value at last reappraisal \$ _____
- c. Name and address of appraiser _____
8. Estimated value today _____
9. Place and date of most recent overhauls or repairs
 _____, 19__
 _____, 19__
10. a. Name of owner _____
- b. Address of owner _____

 Tele. () _____

11. Names of others with a right, title or interest in vessel
 (e.g. Banks, NOAA, state, materialmen, supplies, crews
 wages, etc.)

Name & Address	Balance	Date Incurred	Payment Schedule
a. _____	_____	_____, 19__	\$ _____ per mo.

b. _____	_____	_____, 19__	\$ _____ per mo.

12. Insurance coverage.

FORM NO. 2 (cont.)

Names of	Insurance Company	Type of Insurance	Amount of Insurance	Premium Amount and Due Date
a. _____	_____	_____	_____	\$ ___ per ___ ; Due _____
b. _____	_____	_____	_____	\$ ___ per ___ ; Due _____
c. _____	_____	_____	_____	\$ ___ per ___ ; Due _____

13. Description of navigational equipment, fishing gear and other paraphernalia.

Item	Model No.	Serial No.	Date of Purchase	Condition
a. _____	_____	_____	_____	_____
b. _____	_____	_____	_____	_____
c. _____	_____	_____	_____	_____
d. _____	_____	_____	_____	_____
e. _____	_____	_____	_____	_____
f. _____	_____	_____	_____	_____
g. _____	_____	_____	_____	_____
h. _____	_____	_____	_____	_____
i. _____	_____	_____	_____	_____
j. _____	_____	_____	_____	_____
k. _____	_____	_____	_____	_____
l. _____	_____	_____	_____	_____

Alaska. DATED this _____ day of _____, 19__ at _____,

Signature of Operator

Operator's Printed Name

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

JUDICIAL DISTRICT AT _____

STATE OF ALASKA,)
)
 Plaintiff,)
)
 vs.)
)
 ONE RED AND WHITE PIPER)
 airplane, _____, Serial)
 Number _____ and)
 contents thereof, including)
 appurtenant instruments,)
 radios, and floats,)
 Serial No.s _____ and _____,)
 JOHN DOE and JANE DOE,)
)
 Defendants.)
 _____)

Civil No. _____

COMPLAINT FOR FORFEITURE AND DAMAGES
(AS 16.05.195)

The State of Alaska, through its Attorney General,
alleges as follows:

First Cause of Action

1. This is an action for forfeiture of Piper
N _____ [describe] and the contents of the aircraft,
including appurtenant instruments and radios. This action is
brought under AS 16.05.195.

2. On or about _____, 19____, in the
vicinity of _____,
Judicial District, State of Alaska, the above-described aircraft
was used by defendants _____
to [describe violation]

These actions constitute violations of fish and game regulations

3. AS 16.05.195 provides that aircraft and other paraphernalia or gear may be forfeited to the state upon judgment of a court of competent jurisdiction in an action in rem that the aircraft and paraphernalia or gear were used in or in aid of a violation of a fish or game statute or regulation.

4. On _____, 19___, pursuant to a seizure warrant issued on _____, 19___, the above-described aircraft, its floats and equipment were seized at _____, Alaska, _____ Judicial District, and the aircraft, floats and equipment are or will be within the jurisdiction of this court during the pendency of the proceedings in this matter.

WHEREFORE, the State of Alaska prays for:

I. Judgment forfeiting the above-described aircraft, floats, and equipment to and for the use of the State of Alaska.

II. Costs, attorney fees and such further relief as the Court may deem appropriate.

Second Cause of Action

1. The State of Alaska realleges and reaffirms the allegations of paragraphs 1 through 4 above.

2. This is an action for damages, for the value of [describe resource] taken in violation of Alaska fish and game statutes and

regulations. This action is brought under AS 16.05.195, which provides that an action for damages may be joined with an action for forfeiture of aircraft and equipment used in or in aid of a violation of an Alaska fish and game statute or regulation.

3. The defendants _____ are, and at all times relevant to this action have been, residents of _____, Alaska, _____ Judicial District.

4. On or about _____, 19____, in the vicinity of _____, _____ Judicial District, State of Alaska, defendant _____

[describe violation]

in violation of Alaska Fish and Game regulation _____

- the offense being [describe]

5. As a result of the actions of defendants _____ described above, the State of Alaska has been irreparably damaged by the illegal appropriation of _____ in an amount no less than \$ _____.

WHEREFORE the State of Alaska prays for relief as follows:

- I. Damages in an amount not less than \$ _____ said damages to be proven more specifically at trial.
- II. Costs, attorney fees and such further relief as

this Court may deem appropriate.

DATED at Anchorage, Alaska this _____ day of
_____, 19____.

ATTORNEY GENERAL

By:

Assistant Attorney General

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

_____ JUDICIAL DISTRICT AT _____

DIRECTIONS FOR SERVICE

STATE OF ALASKA,)	DATE:
)	
Plaintiff,)	COURT NO.:
)	
vs.)	SERVICE NO.:
)	
ONE RED AND WHITE _____)	
airplane, N _____, Serial)	
Number _____ and contents)	
thereof, including appurtenant)	
instruments and radios, and floats,)	
Serial Nos. _____ and _____, and)	
_____ ,)	
)	
Defendants.)	
_____)	

Nature of Writ: COMPLAINT FOR FORFEITURE AND DAMAGES
 (AS 16.05.195) and SUMMONS

SERVE: One red and white _____
 airplane, N _____ Serial
 Number _____ and contents
 thereof, including appurtenant
 instruments and radios, and floats,
 Serial Nos. _____ and _____, by
 posting a copy of this complaint
 and summons upon said aircraft,
 located at the Fish and Wildlife
 Protection hangar, State of Alaska,
 Department of Public Safety, Lake
 Hood, Anchorage, Alaska.

Please make return of service to:

 Clerk of the Superior Court
 303 K Street
 Anchorage, Alaska 99501

with copy to:

Office of the Attorney General
1031 4th Avenue, Suite 200
Anchorage, Alaska 99501

ATTORNEY GENERAL

By: Assistant Attorney General

SEIZURE WARRANT FORMS

A civil forfeiture action must be coupled with actual or constructive seizure of the res. At least one state superior court judge has ruled that filing a notice of seizure and a lis pendens in the appropriate recording office is not sufficient constructive seizure. Physical seizure or chaining or immobilizing the equipment and attaching a copy of the complaint is appropriate. An item may be seized without a warrant under AS 16.05.190, but a subsequent seizure warrant should be obtained even in such a case in order to obtain judicial approval.

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

JUDICIAL DISTRICT AT _____

Warrant to Seize

IN THE NAME OF THE STATE OF ALASKA

TO ANY PEACE OFFICER AUTHORIZED TO EXECUTE WARRANTS

Sworn testimony has been given by _____,
Alaska Fish and Wildlife Enforcement Officer, on _____,
19____, that he has reason to believe that a [describe item]
registration number _____, is at this time at or near
_____, _____ Judicial District,
State of Alaska. Pursuant to AS 16.05.170, AS 16.05.190, and
AS 16.05.195, the aircraft:

1. Is evidence of the particular crime of _____
in violation of _____ and _____.
2. Is evidence of the particular crime of _____
in violation of _____.
3. May be forfeited to the State of Alaska under AS 16.05.195, upon determination by a court of competent jurisdiction, in a proceeding in rem, that the aircraft was used in or in aid of a violation of an Alaska Fish and Game statute or regulation.

I am satisfied that there is probable cause to believe that the aircraft so described above was used in or in aid of a violation of _____

I am satisfied that there are grounds for issuance of a warrant to seize the aircraft described above under AS 16.05.170 et seq., and AS 16.05.195, as well as on the other foregoing grounds.

I am satisfied that seizure of the above-described aircraft is necessary in order to insure that the aircraft will come within the jurisdiction of this court.

FORM NO. 5 (cont.)

YOU ARE HEREBY COMMANDED to seize the aircraft designated in this warrant above, registration number _____, serving this warrant between 7:00 a.m. and 10:00 p.m. Upon seizing said aircraft, you are commanded to hold it secure pending further court order, leaving a copy of this warrant, a copy of the supporting affidavits, if any, and a receipt for the property taken, and to prepare a written inventory of the property seized and to return this warrant and bring the property before me (or a receipt thereof) within ten (10) days of this date, as required by law.

(SEAL)

DATED: _____, 19____. _____
Judge/Magistrate

RETURN

I received the attached Warrant to Seize on _____, 19__, and have executed it as follows:

On _____, 19__, at _____ (a.m.)(p.m.), I seized the property described in the warrant, and I left a copy of the warrant (with) (at) _____.

The following is an inventory of the property taken pursuant to the warrant:

This inventory was made in the presence of _____ and of _____.

I swear that this inventory is a true and detailed account of all property taken by me on the authority of this warrant.

Name and Title

SIGNED and SWORN to before me this _____, day of _____, 19__.

(SEAL)

Judge/Magistrate

NOTICE OF FORFEITURE

Vessels, airplanes, vehicles, fishing gear, hunting equipment, fish and game or parts of fish and game, including aquatic plants subject to civil forfeiture under AS 16.05.190 and .195 are typically subject to various claims of interest. To avoid allegations that persons claiming an interest in objects have been denied due process, a notice of forfeiture should be signed by the clerk of court and served upon all persons known to have an interest in the items. In addition, publication in local or industry newspapers giving notice of the criminal or civil forfeiture action provides further compliance with judicial due process standards of notice. Notice to lienholders or owners of record must also be provided before forfeiture in a criminal action, and the interest of an "innocent" lienholder who has taken all reasonable steps to insure that the item was not used illegally cannot be forfeited, State v. Rice, No. 13969 BE, (Superior Ct, Fairbanks May 16, 1979). A joint venture, however, may not be deemed an "innocent" third party. F/V American Eagle v. State, 620 P.2d 657 (Alaska 1980).

The Notice of Forfeiture summarizes the complaint and advises interested parties how to obtain copies of the complaint and how to file a claim to the res. This notice is a substitute for the more costly publication of the entire complaint.

Each Notice of Forfeiture should allow an opportunity for the interested party to obtain a hearing for release of the res. Several state supreme courts have decided the state must

take the initiative to set up this hearing. Other states conclude the hearing is not mandatory. Alaska law does not require such a hearing (the omission is a major point on appeal in the F/V American Eagle v State, 620 P.2d 105 (Alaska 1980) cert denied, and State v. Rice, 626 P.2d 104 (Alaska 1981). Because petitions for release will always be entertained by our courts, the opportunity for a hearing should be confirmed.

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

JUDICIAL DISTRICT AT _____

STATE OF ALASKA,)
)
Plaintiff,)
)
vs.)
)
THE F/V MR. WONDERFUL, its)
paraphernalia and gear, the)
proceeds of 52,349 pounds of)
king crab delivered pursuant)
to ADF&G Fish Ticket)
No. E 534219, LARRY EDFINGER)
and PAUL TATUM,)
)
Defendants.)
_____)

No. 3AN__ - __ CIV

NOTICE OF FORFEITURE

TO: The above-named defendants and all other persons claiming any right, title or interest in the F/V Mr. Wonderful, its paraphernalia and gear.

On _____, 19__ an action under AS 16.05.105. **

The complaint alleges the illegal taking, possession and transportation of king crab in waters subject to the jurisdiction of the State of Alaska on or about September 16, 1978.

You must file claim to the defendant items with the clerk of this court and with the Attorney General's Office on or

** For the forfeiture of the F/V Mr. Wonderful, its paraphernalia and gear and proceeds of 52,349 pounds of Alaska king crab landed on September 16, 1978 under ADF&G ticket No. E 534219 was commenced in the Superior Court in Anchorage.

FORM NO. 7 (cont.)

before 20 days after service by mail or personal delivery or within 30 days after the last date of publication of this notice whichever is sooner. After filing your claim you must, within twenty (20) days after receiving a copy of the complaint, file with the court and serve on the Office of the Attorney General, State of Alaska, 420 L Street, Suite 100, Anchorage, Alaska, 99501, Telephone (907) 276-3550, your answer. If you fail to do so judgment will be entered for the relief demanded in the Complaint.

DATED this _____ day of _____, 19__ at Anchorage,
Alaska.

Clerk of the Courts
303 K Street
Anchorage, Alaska 99501

RELEASES

A. AIRCRAFT.

In general, it is simpler not to release seized aircraft pending litigation unless directed otherwise by the court; however, if the case is likely to take a long time to resolve, or state storage facilities are full, it may be advisable to release under appropriate terms. A bond or other security, preferably in twice the value, should be posted in order to cover unforeseen problems and potential losses or liabilities. If an aircraft is not released, it should be carefully stored with the engine "pickled", and be kept under adequate custodial care.

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
JUDICIAL DISTRICT AT _____

STATE OF ALASKA,)
)
 Plaintiff,)
)
 vs.)
)

No. 3AN ____ - ____ CIV.

STIPULATION FOR RELEASE OF AIRCRAFT

I

This is an action for forfeiture of the above-described defendant items.

II

The known parties with an interest, right or title to the defendant items are:

1. (State of Alaska) _____
2. (Government bureaus) _____
 - a. Taxes _____
 - b. Loans _____
3. (Owner/Operator) _____
4. (Bank) _____
5. (Lienor or Mortgagor) _____
6. (Materialmen and Mechanics) _____
7. (Other) _____

III

The above-described aircraft was seized on _____, 19____, under (a warrant issued on _____ in the _____ court of _____ Alaska).

IV

It is presently in the best interests of all parties that the defendant items name in Exhibit A to this agreement be provided an opportunity to engage in lawful activities until _____, 19____, (or such time as a [district or superior] court decision on forfeiture is rendered).

THEREFORE the parties agree as follows:

1. Plaintiff, which has limited storage facilities, agrees to release, under the terms and conditions of this stipulation, the described aircraft with appurtenant instruments and radios, to the control and custody of _____, hereinafter referred to as "custodian", or his agent or designated employees. The aircraft is subject to and remains under the state's constructive seizure.
2. Custodian shall meet all obligations on the defendant items without delay. The obligations and dates of payments presently known are:

	<u>Lender</u>	<u>Total</u>	<u>Monthly Payments</u>	<u>Due Date</u>
a.	_____	_____	_____	_____
b.	_____	_____	_____	_____
c.	_____	_____	_____	_____

3. Each lender shall confirm receipt of each required payment in writing within five days of due date.

4. Custodian _____ as registered/joint-owner of the aircraft in _____, agrees to keep and maintain the aircraft within the State of Alaska and neither sell, dispose, nor otherwise encumber or diminish his ownership or equity in the aircraft unless specifically authorized by order of the court or upon stipulation with the state.

5. Custodian agrees to hold the state harmless for any damages or obligations which may occur after delivery to custodian under this agreement. Custodian agrees to abide by all orders of this court or any appellate court, interlocutory or final, and will deliver the aircraft to the state at such place and such time as may be directed to this court or any appellate court in the same or better condition as received from the state by virtue of this order, ordinary wear and tear excepted.

6. Custodian agrees to obtain insurance (hull and liability) on the items being delivered in an amount equal to their replacement value and to keep such a policy in force for the full replacement amount at all times.

7. The parties agree upon the following value of the defendant items listed in Exhibit A at the time of seizure.

<u>Date of Seizure</u>	<u>Value \$</u>
_____	_____
_____	_____

8. To secure the state's interest in the aircraft, custodian shall (post a bond in the amount of _____) or (deposit the sum of \$ _____ in cashier's check with the clerk of the court, _____, court, State of Alaska).

9. (Bond/deposit) shall be increased whenever there is an assessed increase in value of the defendant items equal to twenty percent of the value given in item number 7 above. Custodian agrees that in the event of the accidental loss of the aircraft, or substantial loss to the aircraft, or loss of the aircraft by theft or act of God, or otherwise, or his failure to return the aircraft upon court order forfeiting his interest in the aircraft, the (stipulated value of the aircraft on deposit as set forth in paragraph 7) or (bond) shall be forfeited to the State of Alaska. The state shall retain the accrued interest on the amount deposited. In the event of partial damage to the

aircraft, custodian shall either repair the damage, and restore the aircraft to the same or better condition which existed prior to the damage, to the satisfaction to the state, or forfeit that percent of the stipulated value required to restore the aircraft to the same condition which existed before the damage.

10. Custodian shall be penalized as follows for delay in delivery from the time custodian or his representative receives oral or written notice of a decision of forfeiture.

<u>Delay (Days)</u>	<u>Penalty</u>
a. 0-1	None
b. 2-3	5% of the value of paragraph _____ or the value of the returned items at time of delivery, whichever is higher.
c. 4-5	10%
d. 6-7	50%
e. More than 7	Forfeiture of bond/value on deposit.

11. Custodian shall do no act with the aircraft, nor permit nor allow any act to be done by his agents or employees that could subject it to forfeiture or seizure by this state, any other state, federal or private authorities, and agrees to keep the aircraft current in annual inspections, and to keep and maintain the aircraft in accordance with all Federal Aviation Administration regulations and directives.

12. Custodian absolves the State of Alaska, its agents and employees, of any liability for damage that might have

occurred while the aircraft was in state custody, and further agrees to receive the aircraft as is and where is at the time of release.

13. In the event that improvements are made to the aircraft during the aircraft's release, including but not limited to the addition of avionics, overhauling or replacing the engine(s), repairing or replacing mechanical parts of the aircraft, refabricating, etc., beyond ordinary maintenance including annual and 100 hours inspections, the state will reimburse the custodian for any additional fair market value over that at the time of seizure, which is directly attributable to the improvements in the aircraft at the time of forfeiture, if the aircraft is forfeited in this action. If the parties cannot agree, the fair market value for the improvements shall be determined by the court.

14. This Stipulation and Release of the aircraft becomes effective only upon two days written notice to the undersigned Assistant Attorney General and to the Department of Public Safety, Fish and Wildlife Protection, the two days to be counted excluding legal holidays and weekends. After two days' notice, the aircraft shall be released only between the hours of 8 a.m. and 4 p.m., Monday through Friday.

DATED at _____, Alaska this _____ day of
_____, 19____.

Custodian

Plaintiff

Custodian Representative

Interested Parties

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

JUDICIAL DISTRICT AT _____

State of Alaska,)
)
 Plaintiff,)
)
 vs.)
)
 F/V MR. WONDERFUL, its)
 paraphernalia and gear, the)
 proceeds of 52,349 pounds of)
 king crab delivered pursuant)
 to ADF&G Fish Ticket)
 No. E 534219, LARRY EDFINGER)
 and PAUL TATUM,)
)
 Defendants.)

No. 3AN - - CIV

STIPULATION FOR RELEASE OF VESSEL

I

This is an action for damages and forfeiture of the above-named defendant items.

II

The known parties with an interest, right, or title to the defendant items are:

1. State of Alaska _____
2. U.S. Government, NOAA _____
 - a. Taxes (fed. state) _____
 - b. Loans _____
 - c. etc. _____
3. (Owner/Operator) _____
4. (Bank) _____

- 5. (Crewmember's wage claims) _____
- 6. (Materialmen and suppliers) _____

III

It is presently in the best interest of all parties that the defendant items named in Exhibit A to this agreement have an opportunity to engage in lawful activities until _____, 19__ (or such time as a [district or superior] court decision on forfeiture is rendered).

Therefore the parties agree as follows:

1. The defendant items named in Exhibit "A" are released to the control and custody of _____, hereinafter referred to as "Custodian".

2. Custodian shall meet all obligations on the defendant items without delay. The obligations and dates of payments include:

	Lender	Total	Monthly Payment	Due Date
a.	_____	_____	_____	_____
b.	_____	_____	_____	_____
c.	_____	_____	_____	_____

3. Each lender shall confirm receipt of each required payment in writing to the state within five days of the due date.

4. No additional obligation may encumber the vessel without written permission of the state.
5. Custodian agrees to hold the state harmless for any damages or obligations that may occur after delivery to custodian under this agreement.
6. Custodian agrees to obtain insurance on the items being delivered in an amount equal to their full replacement value and to keep such a policy in force at all times.
7. The parties agree upon the following value of the defendant items listed in Exhibit A at the time of seizure.

Date of
Seizure

Total
Value

_____, 19__ \$ _____

8. Custodian posts a bond in the amount of \$ _____ to protect the interests of the state during the period of release.
9. Bond shall be increased whenever there is an increase in value of the defendant items equal to 20% of the value given in No. 7.
10. Upon a superior (district) court decision favorable to the plaintiff, the released items shall be immediately delivered to _____, Alaska within thirty (30) days of the date of the

10. court's decision. If the value of the released items exceeds the value given in paragraph 7, the bond less any penalty shall be exonerated upon delivery. If the value of the returned items is less than the value given in paragraph 7, the bond only in amount equal to the value of the returned items shall be exonerated.

11. Custodian shall be penalized as follows for delays in delivery:

	Delay (days)	Penalty
a.	0-3	None
b.	4-7	5% of the value of paragraph 7 or 5% of the value of the returned items at time of delivery, whichever is higher.
c.	7-14	10% of the value of paragraph 7 or 5% of the value of the returned items at time of delivery, whichever is higher.
d.	14-30	50% of the value of paragraph 7 or 5% of the value of the returned items at time of delivery, whichever is higher.
e.	More than 30	Forfeiture of bond in addition to defendant items.

12. Upon a judgment in favor of the defendant items, the bond shall be exonerated and any remaining defendant items returned to the custodian.

13. Custodian shall keep, maintain, and preserve the defendant items in accordance with applicable laws, regulations, and ordinances and generally accepted standards of the industry. The items shall be maintained in at least as good a condition as when seized. Improvements made with written approval of the state shall be credited to defendants and the agreed amount shall be paid or credited defendants upon a decision of forfeiture by the court.
14. In the event Custodian fails to maintain the vessel in as good a condition as when seized, the state shall repossess the vessel with or without notice. Custodian shall reimburse state for all repossession costs and maintenance, upkeep, or refurbishing costs.
15. Custodian shall keep the defendant items in the Third Judicial District unless otherwise authorized by order of this court or agreement of the parties.
16. On the first day of every month Custodian shall prepare a monthly summary, stating the location of the vessel and the activities of the defendant items, and deliver the summary to plaintiff and each interested party

17. On the first day of every month Custodian shall prepare a proposed itinerary for that month and deliver the itinerary to plaintiff and each interested party.
18. The bond securing the release of the defendant items shall be forfeited to the plaintiff upon: 1) failure to deliver in accordance with paragraph 9; 2) loss or destruction or disability to use the defendant items for a period exceeding 30 days.

Forfeiture of bond is not cause for dismissal of the lawsuit.

1(a) _____
Custodian

2. _____
Plaintiff

1(b) _____
Custodian Representative

3(a) _____
Interested Parties

3(b) _____

3(c) _____

3(d) _____

MEMORANDUM

State of Alaska

TO: Susan S. McLean
Assistant District Attorney
Kodiak

DATE: April 26, 1983

FILE NO:

TELEPHONE NO:

FROM: Sarah Elizabeth McCracken
Assistant Attorney General
Natural Resources-Anchorage

SJM
SUBJECT: Release of Crab
Pots

This is a somewhat tardy response to your February 23, 1983 memo requesting a form for the release of crab pots.

It is difficult to develop a universal agreement for release of crab pots or other gear, because the circumstances of the seizure, the nature of the gear seized and other matters may differ from case to case and require special tailoring. However, the form that is enclosed should be a good general guideline for release of crab pots and other gear (including vessels) seized in connection with district court criminal matters. It could also be modified to address civil seizure and forfeiture actions. A few comments are in order:

1. In general, when we seize a fishing vessel we do not wish to enter into a stipulation "for value" whereby the stipulation would result in substitution of the bond or other security for the vessel itself. This is because the value of a fishing vessel is likely to increase during the pendency of the action. However, crab pots and other gear are likely to depreciate in value, particularly if released and subjected to use and deterioration from the elements. Therefore, we would probably wish to enter into a stipulation for value with respect to depreciating goods such as crab pots so that we would have the benefit of the value of the crab pots when seized, rather than be left with what might be virtually worthless equipment at the end of a criminal trial or appeal. Whether equipment for which you would like to use the stipulation appreciates or depreciates should determine whether to call it a stipulation for value and whether to use the language suggested in paragraph 11.

2. Depending on the nature of the goods, you may or may not need the language in paragraph 13 (that the items will be maintained in as good a condition as when seized.) If we intend to substitute the bond anyway, that language would not be necessary. I have attempted to cover both situations in paragraph 11 by allowing the state to have the option of either retaining the goods or accepting the bond or other security as a substitution.
3. Other paragraphs in this draft may or may not be applicable, given the particular facts of a specific case. For example, there may be no need for paragraph 5 relating to obligations if it is clear that none exist for the equipment. In other cases, there may be very complicated financing, particularly if you have seized expensive gear.

I hope this will be of some use to you, and I reiterate that we would be glad to assist you as necessary in implementing these kinds of release agreements.

You may also be interested to know that the Alaska Board of Fisheries (and also the Alaska Board of Game) adopted regulations during the last regulatory meeting in March and April specifying that fish and game regulations are intended to be strict liability offenses unless otherwise provided by the regulations or statute. The Board of Fisheries regulation should be sent to the Lt. Governor's office for filing sometime within the next week or two, and hence would be in effect 30 days thereafter. We are hopeful that this action by the boards will remedy some of the problems created by the Reynolds decision.

Best regards.

SEM/jmo

cc: John Gissberg
Kathleen McGuire
Larri Spengler /

IN THE DISTRICT COURT FOR THE STATE OF ALASKA

JUDICIAL DISTRICT AT _____

STATE OF ALASKA)

v.)

Case No. _____

STIPULATION FOR VALUE AND AGREEMENT
FOR RELEASE OF [CRAB POTS]

The State of Alaska, through [DA/AG], and
[claimant/defendant] hereby stipulate and agree as follows:

1. [Claimant/defendant] is the owner of the
[vessel/gear/crabpots], ADF&G No. [_____].
2. On or about [_____, 19__], officers of the State
of Alaska, Department of Public Safety, Division of Fish
and Wildlife Protection, (hereinafter F&WP) observed
(describe violation, location, storage depth), a violation
of 5 AAC [___] and AS 16.05.920.
3. On or about [_____, 19__], officers of the F&WP
seized the [crab pots/gear] referenced in paragraph 1 of
this agreement [under authority of a seizure warrant
issued on _____/ under authority of a warrantless
search under AS 16.05.180]. The [crab pots/gear] are
presently in the state's custody at [_____],
Alaska.
4. For the mutual convenience of the parties to this
agreement the parties desire to release [crab pots/gear,
ADF&G No.] to the care and custody of [_____]
(hereinafter "Custodian.") upon the terms and conditions of

this agreement. This release agreement shall become effective when signed by the parties.

5. Custodian shall meet all obligations on the [crab pots/gear], which include:

	<u>Lenders</u>	<u>Total</u>	<u>Monthly Payment</u>	<u>Due Date</u>
a.	_____	_____	_____	_____
b.	_____	_____	_____	_____

6. Custodian may not further encumber the [crab pots/gear]
7. Custodian shall hold the State harmless for any damages or obligations that may occur after delivery to custodian under this agreement.
8. The stipulated value of the [crab pots/gear] at the date of seizure [_____, 19__], is [_____].
9. Custodian shall post [with the court], at the time this agreement is executed, a [cash bond/other security] in the amount of \$(_____) to protect the State's interests during the period of release.
10. Upon a court judgment forfeiting the [crabpots/gear] to the State, custodian shall deliver the [crab pots/gear] as soon as possible, and in no event more than 30 days after forfeiture is ordered, to [_____], Alaska.
11. If the [crab pots/gear] are returned in substantially the same condition as when released, so that their value is equal to or exceeds that set in paragraph 8 of this agreement, the bond shall be exonerated. If the value of the [crab pots/gear] at the time forfeiture is ordered is

less than the amount set in paragraph 8 of this agreement, the State may, at its option, retain the bond and any interest as a substitution for the [crab pots/gear].

12. Upon judgment [of acquittal/denying forfeiture of crabpots/gear], the bond will be exonerated and the [crab pots/gear] will be returned to custodian.
13. Custodian shall keep, maintain, and preserve the [crabpots/gear] in accordance with all applicable laws, regulations, and ordinances, and generally accepted fishing industry standards. The items shall be maintained in as good a condition as when seized.
14. Custodian shall keep the [crabpots/gear] within the [_____] Judicial District unless otherwise agreed by the State.
15. This agreement is for the purpose of release of [crab pots/gear] only, and does not constitute an admission of liability or wrongdoing by either party.
16. This agreement contains the entire agreement between the parties, and its terms are contractual and not a mere recital.
17. This agreement shall be construed under the laws of the State of Alaska.
18. If custodian breaches the terms of this agreement, the custodian must deliver the items to the State immediately.

any failure to deliver within ten days after the breach of
a terms of this agreement will automatically forfeit the
bond to the State.

Dated: _____

Assistant District Attorney

Dated: _____

[Claimant/owner]

Sec. 28.35.030. Operating a vehicle, aircraft or watercraft while intoxicated. (a) A person commits the crime of driving while intoxicated if the person operates or drives a motor vehicle or operates an aircraft or a watercraft

(1) while under the influence of intoxicating liquor, or any controlled substance listed in AS 11.71.140 — 11.71.190;

(2) when, as determined by a chemical test taken within four hours after the alleged offense was committed, there is 0.10 percent or more by weight of alcohol in the person's blood or 100 milligrams or more of alcohol per 100 milliliters of blood, or when there is 0.10 grams or more of alcohol per 210 liters of the person's breath; or

(3) while the person is under the combined influence of intoxicating liquor and another substance.

(b) Driving while intoxicated is a class A misdemeanor.

(c) Upon conviction under this section the court shall impose a minimum sentence of imprisonment of not less than 72 consecutive hours and a fine of not less than \$250 if the person has not been previously convicted in this or another jurisdiction of driving while intoxicated under this or another law or ordinance with substantially similar elements or refusal to submit to a chemical test under AS 28.35.032 or another law or ordinance with substantially similar elements. Upon conviction under this section the court shall impose a minimum sentence of imprisonment of not less than 20 consecutive days and a fine of not less than \$500 if, within the preceding 10 years, the person has been previously convicted once in this or another jurisdiction of driving while intoxicated under this or another law or ordinance with substantially similar elements or refusal to submit to a chemical test under AS 28.35.032 or another law or ordinance with substantially similar elements. Upon conviction under this section the court shall impose a minimum sentence of imprisonment of not less than 30 consecutive days and a fine of not less than \$1,000 if, within the preceding 10 years, the person has been previously convicted in this or another jurisdiction of more than one of the following offenses or has more than once been previously convicted of one of the following offenses: (1) driving while intoxicated under this or another law or ordinance with substantially similar elements; (2) refusal to submit to a chemical test under AS 28.35.032 or another law or ordinance with substantially similar elements. The execution of sentence may not be suspended nor may probation be granted except on condition that the minimum imprisonment provided in this section is served. Imposition of sentence may not be suspended. In addition, if the offense involved driving a motor vehicle for which a driver's license is required, the person's driver's license shall be revoked in accordance with AS 28.15.181 and the vehicle used in commission of the offense may be forfeited under AS 28.35.036. In addition, the court shall order, and a person convicted under this section shall undertake, for a term specified by the court, that program of

alcohol education or rehabilitation that the court, after consideration of any information compiled under (d) of this section, finds appropriate.

(d) Except as prohibited by federal law or regulation, every provider of treatment programs to which persons are ordered under (c) of this section shall supply the Alaska court system with the information regarding the condition and treatment of those persons as the supreme court may require by rule. Information compiled under this subsection is confidential and may only be used by a court in sentencing a person convicted under (c) of this section, or by an officer of the court in preparing a presentence report for the use of the court in sentencing a person convicted under (c) of this section.

(e) A person who is sentenced to imprisonment for 72 consecutive hours upon a first conviction under (c) of this section and who is not released from imprisonment after 72 hours may not bring an action against the state or a municipality or its agents, officers, or employees for damages resulting from the additional period of confinement if

(1) the employee or employees who released the person exercised due care and, in releasing the person, followed the standard release procedures of the prison facility; and

(2) the additional period of confinement did not exceed 12 hours.

(f) For purposes of this section, convictions for both driving while intoxicated and for refusal to submit to a chemical test of breath under AS 28.35.031(a), if arising out of a single transaction and a single arrest, are considered one previous conviction.

(g) In this section,

(1) "operate an aircraft" means to use, navigate, pilot, or taxi an aircraft in the airspace over this state, or upon the land or water inside this state;

(2) "operate a watercraft" means to navigate or use a vessel used or capable of being used as a means of transportation on water for recreational or commercial purposes on all waters, fresh or salt, inland or coastal, inside the territorial limits or under the jurisdiction of the state. (§ 50-5-3 ACLA 1949; am § 1 ch 107 SLA 1955; am § 1 ch 121 SLA 1967; am § 45 ch 32 SLA 1971; am § 4 ch 74 SLA 1974; am §§ 2, 3 ch 152 SLA 1978; am § 28 ch 94 SLA 1980; am § 10 ch 129 SLA 1980; am § 21 ch 45 SLA 1982; am §§ 13 — 15 ch 117 SLA 1982; am §§ 13 — 15 ch 77 SLA 1983)

Revisor's notes. — In 1984, former subsection (f) was redesignated as present subsection (g) and former subsection (g) was redesignated as present subsection (f).

Cross references. — For sentences for class A misdemeanors, see AS 12.55.035(b)(3) and 12.55.135(a).

Effect of amendments. — The first 1980 amendment, in subsection (a) as it existed prior to the second 1980 amendment, deleted "under AS 11.05.150" from

the end of the third sentence and substituted "AS 28.15.181" for "AS 28.15.210(c)" in the fourth sentence.

The second 1980 amendment rewrote the section.

The first 1982 amendment substituted "or any controlled substance listed in AS 11.71.140 — 11.71.190" for "depressant, hallucinogenic, stimulant or narcotic drug as defined in AS 17.10.230(13) and AS 17.12.150(3)" in subsection (a)(1).

breathalyzer examination where he never asked to speak to an attorney but asked whether he might need an attorney, with testimony supporting the conclusion that he wondered if he needed an attorney in order to make bail, not because he wanted advice about submitting to a breathalyzer exam, was not clearly erroneous, and superior court judge should not have reversed the conviction. Anchorage v. Erickson, Ct. App. Op. No. 417 (File No. A-512), 690 P.2d 20 (1984).

Right to counsel before breathalyzer test.

See note to AS 28.35.030 under this catchline, Van Wormer v. State, Ct. App. Op. No. 473 (File No. A-320), 699 P.2d 895 (1985).

The result of a breathalyzer test secured in violation of the right to counsel should be excluded in a civil license revocation proceeding. Whisenhunt v. State, Dep't of Pub. Safety, Sup. Ct. Op. No. 3250 (File No. S-1467), P.2d (1987).

Use of search warrant.

Implied Consent Statutes in effect at the time of the arrests of defendants in

1980 and 1981 precluded the admission into evidence of chemical sobriety test results obtained pursuant to a search warrant after the arrestees had refused to take such a test. Pena v. State, Sup. Ct. Op. No. 2851 (File Nos. 6174, 7052), 684 P.2d 864 (1984).

Chemical tests not conclusively presumed accurate. — Due process will not allow the results of a chemical test authorized under subsection (a) to be conclusively presumed accurate. Barcott v. State, Dep't of Pub. Safety, Sup. Ct. Op. No. 3212 (File No. S-1692), 741 P.2d 226 (1987).

Applied in Lawrence v. State, Ct. App. Op. No. 603 (File No. A-799), 715 P.2d 1213 (1986).

Quoted in Brown v. State, Ct. App. Op. No. 714 (File No. A-1715), 739 P.2d 182 (1987); State, Dep't of Pub. Safety v. Conley, Sup. Ct. Op. No. 3297 (File No. S-1791), P.2d (1988).

Cited in Romo v. Municipality of Anchorage, Ct. App. Op. No. 457 (File No. A-462), 697 P.2d 1065 (1985).

secutive hours and a fine of not less than \$250 if the person has not been previously convicted in this or another jurisdiction of driving while intoxicated under AS 28.35.030 or another law or ordinance with substantially similar elements or refusal to submit to a chemical test under this section or another law or ordinance with substantially similar elements. Upon conviction under this section the court shall impose a minimum sentence of imprisonment of not less than 20 consecutive days and a fine of not less than \$500 if, within the preceding 10 years, the person has been previously convicted once in this or another jurisdiction of driving while intoxicated under AS 28.35.030 or another law or ordinance with substantially similar elements or refusal to submit to a chemical test under this section or another law or ordinance with substantially similar elements. Upon conviction under this section the court shall impose a minimum sentence of imprisonment of not less than 30 consecutive days and a fine of not less than \$1,000 if, within the previous 10 years, the person has been previously convicted in this or another jurisdiction of more than one of the following offenses or has more than once been previously convicted of one of the following offenses: (1) driving while intoxicated under AS 28.35.030 or another law or ordinance with substantially similar elements; (2) refusal to submit to a chemical test under this section or another law or ordinance with substantially similar elements. The execution of sentence may not be suspended nor may probation be granted except on condition that the minimum imprisonment provided in this section is served. Imposition of sentence may not be suspended. If the offense involved driving a motor vehicle for which a driver's license is required, the person's driver's license shall be revoked under AS 28.15.181. In addition, the court shall order, and a person convicted under this section shall undertake, for a term specified by the court, that program of alcohol education or rehabilitation that the court, after consideration of any information compiled under (h) of this section, finds appropriate. The sentence imposed by the court under this subsection shall run consecutively with any other sentence of imprisonment imposed on the committed person.

(h) Except as prohibited by federal law or regulation, every provider of treatment programs to which persons are ordered under (g) of this section shall supply the Alaska court system with the information regarding the condition and treatment of those persons as the supreme court may require by rule. Information compiled under this subsection is confidential and may only be used by a court in sentencing a person convicted under (g) of this section, or by an officer of the court in preparing a pre-sentence report for the use of the court in sentencing a person convicted under (g) of this section.

(i) A person who is sentenced to imprisonment for 72 consecutive hours under (g) of this section and who is not released from imprisonment after 72 hours may not bring an action against the state or a

Sec. 28.35.032. Refusal to submit to chemical test. (a) If a person under arrest refuses the request of a law enforcement officer to submit to a chemical test under AS 28.35.031(a), after being advised by the officer that the refusal will, if that person was arrested while operating or driving a motor vehicle for which a driver's license is required, result in the denial or revocation of the license or nonresident privilege to drive, that the refusal may be used against the person in a civil or criminal action or proceeding arising out of an act alleged to have been committed by the person while operating or driving a motor vehicle or operating an aircraft or a watercraft while intoxicated, and that the refusal is a misdemeanor, a chemical test may not be given, except as provided by AS 28.35.035.

(b) [Repealed, § 25 ch 77 SLA 1983.]

(c) [Repealed, § 25 ch 77 SLA 1983.]

(d) [Repealed, § 25 ch 77 SLA 1983.]

(e) The refusal of a person to submit to a chemical test of breath under (a) of this section is admissible evidence in a civil or criminal action or proceeding arising out of an act alleged to have been committed by the person while operating or driving a motor vehicle or operating an aircraft or watercraft while intoxicated.

(f) Refusal to submit to the chemical test of breath authorized by AS 28.35.031(a) is a class A misdemeanor.

(g) Upon conviction of a person under this section, the court shall impose a minimum sentence of imprisonment of not less than 72 con-

municipality or its agents, officers, or employees for damages resulting from the additional period of confinement if

(1) the employee or employees who released the person exercised due care and, in releasing the person, followed the standard release procedures of the prison facility; and

(2) the additional period of confinement did not exceed 12 hours.

(j) For purposes of this section, convictions for both driving while intoxicated and for refusal to submit to a chemical test of breath under AS 28.35.031(a), if arising out of a single transaction and a single arrest, are considered one previous conviction. (§ 1 ch 83 SLA 1969; am § 28 ch 71 SLA 1972; am § 12 ch 129 SLA 1980; am § 17 ch 117 SLA 1982; am §§ 17 — 20, 25 ch 77 SLA 1983; am § 17 ch 60 SLA 1986)

Effect of amendments. — The 1986 amendment substituted "may" for "shall" following "chemical test" near the end of subsection (n).

NOTES TO DECISIONS

Legislative intent. — In the implied consent statutes, the legislature has gone to great lengths to avoid authorizing the police to forcibly take blood alcohol tests from defendants charged with driving while intoxicated; the legislature has, instead, provided extremely strong incentives to a defendant to take a breath test for blood alcohol by providing criminal penalties. *Base v. Municipality of Anchorage*, Ct. App. Op. No. 429 (File No. A-273), 692 P.2d 961 (1984).

Imposition of criminal penalties held constitutional. — The imposition of criminal penalties upon a motorist for his peaceful refusal to submit to a breath test does not violate his right to equal protection under the law. *Burnett v. Municipality of Anchorage*, 634 F. Supp. 1029 (D. Alaska 1986).

Implied consent. — Just as a driver's failure to cooperate in the search conducted by means of a breathalyzer test is no impediment to the classification of the proceeding as a search incident to arrest, the absence of cooperation is no bar to the characterization of the taking of breath as a consent search for which consent has already been supplied by the act of driving on Alaska roads. *Burnett v. Municipality of Anchorage*, 634 F. Supp. 1029 (D. Alaska 1986).

The implied consent statute clearly serves a legitimate state interest. All drivers lawfully stopped are treated equally, and, from the perspective of the fourth and fourteenth amendments, those

drivers are treated no differently from other sorts of persons suspected of committing criminal acts. *Burnett v. Municipality of Anchorage*, 806 F.2d 1447 (9th Cir. 1986).

"While" defined. — The word "while" in subsection (a) means "for." *Brown v. State*, Ct. App. Op. No. 714 (File No. A-1715), 739 P.2d 182 (1987).

Request for counsel before breathalyzer test. — District court judge's finding that defendant, convicted of driving while intoxicated under municipal code, did not request counsel prior to taking the breathalyzer examination where he never asked to speak to an attorney but asked whether he might need an attorney, with testimony supporting the conclusion that he wondered if he needed an attorney in order to make bail, not because he wanted advice about submitting to a breathalyzer exam, was not clearly erroneous, and superior court judge should not have reversed the conviction. *Anchorage v. Erickson*, Ct. App. Op. No. 417 (File No. A-512), 690 P.2d 20 (1984).

Right to counsel before breathalyzer test.

The result of a breathalyzer test secured in violation of the right to counsel should be excluded in a civil license revocation proceeding. *Whisenhunt v. State*, Dep't of Pub. Safety, Sup. Ct. Op. No. 3250 (File No. S-1467), P.2d (1987).

See note to AS 28.35.030 under this catchline, *Van Wormer v. State*, Ct. App.

Op. No. 473 (File No. A-320), 699 P.2d 895 (1985).

Right to contact counsel does not include a right to have counsel physically present while a breath test is administered. *Annas v. State*, Ct. App. Op. No. 647 (File No. A-954), 726 P.2d 552 (1986).

Admissibility of evidence of refusal.

Admission into evidence of defendant's refusal to submit to a breathalyzer test did not violate his fifth amendment right against self-incrimination, even though Alaska has made refusal to submit to a breathalyzer test a separate criminal offense. *Deering v. Brown*, 839 F.2d 539 (9th Cir. 1988).

Requirements for conviction. — The jury need not find that defendant operated a motor vehicle while under the influence of intoxicating liquor as a condition prerequisite to convicting him or her of refusal to provide a chemical breath test. *Brown v. State*, Ct. App. Op. No. 714 (File No. A-1715), 739 P.2d 182 (1987).

Probable cause to arrest is not an element of the offense of refusing a chemical test of breath. *Brown v. State*, Ct. App.

Op. No. 714 (File No. A-1715), 739 P.2d 182 (1987).

In order to convict a person of refusing to submit to a chemical test of his or her breath, the state must prove that the individual in question knew or perhaps should have known that the breath test was sought as evidence in connection with an investigation of his or her driving while intoxicated, and, second, that with that culpable mental state, he or she declined the test. *Brown v. State*, Ct. App. Op. No. 714 (File No. A-1715), 739 P.2d 182 (1987).

Admission of intoxication. — While a trial court might consider defendant's admission of intoxication in mitigation of punishment, it is not a defense to a refusal to provide a chemical breath test. *Brown v. State*, Ct. App. Op. No. 714 (File No. A-1715), 739 P.2d 182 (1987).

Conviction affirmed. — See *McCracken v. State*, Ct. App. Op. No. 399 (File No. A-214), 685 P.2d 1275 (1984).

Applied in *Skuse v. State*, Ct. App. Op. No. 582 (File No. A-885), 714 P.2d 368 (1986).

Cited in *Witt v. State*, Ct. App. Op. No. 433 (File No. A-482), 692 P.2d 976 (1984).

Sec. 28.35.033. Chemical analysis of breath or blood. (a) Upon the trial of a civil or criminal action or proceeding arising out of acts alleged to have been committed by a person while operating or driving a motor vehicle or operating an aircraft or a watercraft while intoxicated, the amount of alcohol in the person's blood or breath at the time alleged shall give rise to the following presumptions:

(1) If there was 0.05 percent or less by weight of alcohol in the person's blood, or 50 milligrams or less of alcohol per 100 milliliters of the person's blood, or 0.05 grams or less of alcohol per 210 liters of the person's breath, it shall be presumed that the person was not under the influence of intoxicating liquor.

(2) If there was in excess of 0.05 percent but less than 0.10 percent by weight of alcohol in the person's blood, or in excess of 50 but less than 100 milligrams of alcohol per 100 milliliters of the person's blood, or in excess of 0.05 grams but less than 0.10 grams of alcohol per 210 liters of the person's breath, that fact does not give rise to any presumption that the person was or was not under the influence of intoxicating liquor, but that fact may be considered with other competent evidence in determining whether the person was under the influence of intoxicating liquor.

(3) *[Repealed, § 13 ch 129 SLA 1980.]*

(4) If there was 0.10 percent or more by weight of alcohol in the person's blood, or 100 milligrams or more of alcohol per 100 milliliters

Sec. 28.35.035. Administration of chemical tests without consent. (a) If a person is under arrest for an offense arising out of acts alleged to have been committed while the person was driving a motor vehicle while intoxicated, and that arrest results from an accident that causes death or physical injury to another person, a chemical test may be administered without the consent of the person arrested to determine the amount of alcohol in that person's breath or blood.

(b) A person who is unconscious or otherwise in a condition rendering that person incapable of refusal is considered not to have withdrawn the consent provided under AS 28.35.031(a) and a chemical test may be administered to determine the amount of alcohol in that person's breath or blood. A person who is unconscious or otherwise incapable of refusal need not be placed under arrest before a chemical test may be administered.

(c) If a chemical test is administered to a person under (a) or (b) of this section, that person is not subject to the penalties for refusal to submit to a chemical test provided by AS 28.35.032 and 28.35.034. (§ 21 ch 117 SLA 1982; am § 22 ch 77 SLA 1983)

Effect of amendments. — The 1983 amendment in subsection (a) substituted "an offense . . . driving a motor vehicle" for "the crime of driving" and in subsection (b) revised the internal reference in the present first sentence and added the present second sentence.

NOTES TO DECISIONS

Stated in *Coplin v. State*, Sup. Ct. Op. No. 245 (File No. 6174), 664 P.2d 169 No. 2617 (File Nos. 5453, 5708), 259 P.2d 1206 (1983); *Pena v. State*, Ct. App. Op. (1983).

Sec. 28.35.036. Forfeiture of motor vehicle. (a) After conviction of an offense under AS 28.35.030 or AS 28.35.032 involving a motor vehicle of a type for which a driver's license is required, the state may move the court to order the forfeiture of the motor vehicle involved in the commission of the offense if the convicted person has been previously convicted in this or another jurisdiction of more than one of the following offenses or has more than once been previously convicted of one of the following offenses:

(1) driving while intoxicated under AS 28.35.030 or another law or ordinance with substantially similar elements; or

(2) refusal to submit to a chemical test under AS 28.35.032 or another law or ordinance with substantially similar elements.

(b) For purposes of this section, convictions for both driving while intoxicated and for refusal to submit to a chemical test of breath under AS 28.35.031(a), if arising out of a single transaction and a single arrest, are considered one previous conviction.

(c) Upon receipt of a motion for forfeiture, the court shall schedule a hearing on the matter and shall notify the state and the convicted

person of the time and place set for the hearing. At the hearing, the court may order the forfeiture of the motor vehicle if the court, sitting without a jury, determines by a preponderance of the evidence that the forfeiture of the motor vehicle will serve one or more of the following purposes:

(1) deterrence of the convicted person from the commission of future offenses under AS 28.35.030;

(2) protection of the safety and welfare of the public;

(3) deterrence of other persons who are potential offenders under AS 28.35.030; or

(4) expression of public condemnation of the serious or aggravated nature of the convicted person's conduct.

(d) Upon forfeiture of a motor vehicle the court shall require the surrender of the registration and certificate of title of that motor vehicle. The registration and certificate of title shall be delivered to the department.

(e) If not released under AS 28.35.037, a motor vehicle forfeited under this section may be disposed of at the discretion of the department. (§ 23 ch 77 SLA 1983)

Sec. 28.35.037. Reversion of forfeitures. (a) Upon receiving notice from the court of the time and place set for a hearing under AS 28.35.036, the state shall provide to every person who has an ascertainable ownership or security interest in the motor vehicle written notice that includes

(1) a description of the motor vehicle;

(2) the time and place of the forfeiture hearing;

(3) the legal authority under which the motor vehicle may be forfeited;

(4) notice of the right to intervene to protect the interest in the motor vehicle.

(b) At the hearing, a person who claims an ownership or security interest in the motor vehicle must establish by a preponderance of the evidence that

(1) the petitioner has an interest in the motor vehicle acquired in good faith;

(2) a person other than the petitioner was convicted of the offense that resulted in the forfeiture; and

(3) before parting with the motor vehicle, the petitioner did not know or have reasonable cause to believe that it would be used in the commission of an offense.

(c) If a person satisfies the requirements of (b) of this section, the court shall order that an amount equal to the value of the petitioner's interest in the motor vehicle be paid to the petitioner or the court shall order that the motor vehicle be released to the petitioner together with title to the motor vehicle.

(d) Forfeiture of a motor vehicle under AS 28.35.036 is without prejudice to the rights, and does not extinguish the claims of a creditor with an interest in the motor vehicle. (§ 23 ch 77 SLA 1983)

Sec. 28.35.038. Municipal impoundment and forfeiture. Notwithstanding other provisions in this title, a municipality may adopt an ordinance providing for the impoundment or forfeiture of a motor vehicle involved in the commission of an offense under AS 28.35.030, 28.35.032, or an ordinance with elements substantially similar to AS 28.35.030 or AS 28.35.032. An ordinance adopted under this section is not required to be consistent with this title or regulations adopted under this title. (§ 23 ch 77 SLA 1983)

Article 3. Reckless and Negligent Driving.

Section

- 40. Reckless driving
- 45. Negligent driving

Sec. 28.35.040. Reckless driving. (a) A person who drives a motor vehicle in the state in a manner which creates a substantial and unjustifiable risk of harm to a person or to property is guilty of reckless driving. A substantial and unjustifiable risk is a risk of such a nature and degree that the conscious disregard of it or a failure to perceive it constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation.

(b) A person convicted of reckless driving is guilty of a misdemeanor and is punishable by a fine of not more than \$1,000 or by imprisonment for not more than one year or by both.

(c) Lawfully conducted automobile, snowmobile, motorcycle or other motor vehicle racing or exhibition events are not subject to the provisions of this section. (§ 50-5-4 ACLA 1949; am § 1 ch 182 SLA 1955; am § 1 ch 70 SLA 1961; am § 2 ch 121 SLA 1967; am § 1 ch 13 SLA 1971; am § 46 ch 32 SLA 1971; am § 6 ch 74 SLA 1974)

NOTES TO DECISIONS

Codification of common-law standard of care. — This section and AS 28.35.045, defining reckless and negligent driving, do not set forth precise standards of care, but merely codify the usual common-law standard of care. *Bailey v. Lenord*, Sup. Ct. Op. No. 2308 (File No. 4696), 625 P.2d 849 (1981).

Specific conduct not proscribed. — This section and AS 28.35.045, defining reckless and negligent driving, do not proscribe specific conduct, but rather state that a person shall not drive a motor vehi-

cle in a manner which creates an unjustifiable risk. *Bailey v. Lenord*, Sup. Ct. Op. No. 2308 (File No. 4696), 625 P.2d 849 (1981).

Risks to safety of general public. — Reckless driving involves risks to the safety of the public at large. *Calder v. State*, Sup. Ct. Op. No. 2224 (File No. 4293), 619 P.2d 1026 (1980).

A defendant was not placed in double jeopardy by his conviction of the lesser included offense of reckless driving on a felony charge of assault with a dan-

gerous weapon even though a misdemeanor charge of reckless driving had already been adjudicated against him because, although the charges arose out of the same general incidents, they were based on different conduct during that incident. *Calder v. State*, Sup. Ct. Op. No. 2224 (File No. 4293), 619 P.2d 1026 (1980).

Trooper arriving at accident scene cannot arrest for reckless driving without warrant. — The Alaska legislature has classified both reckless driving and operating or driving an automobile under the influence of intoxicating liquor as misdemeanors. Thus, a state trooper who arrived at an accident scene could not arrest a driver without a warrant for either reckless driving or drunk driving since neither of these offenses was committed or attempted in his presence. *Layland v. State*, Sup. Ct. Op. No. 1150 (File No. 2264), 535 P.2d 1043 (1975), *aff'd*, Sup. Ct. Op. No. 2739, 549 P.2d 1182 (1976), overruled on other grounds, *City of Anchorage v. Geber*, Sup. Ct. Op. No. 1824 (File Nos. 3827, 4016, 4037, 4046), 592 P.2d 1192 (1979).

Sentencing considerations. — Where it was undisputed at trial that there were three people in the rear of defendant's pickup who were extremely vulnerable in case of any accident, the judge could properly consider this fact at sentencing in evaluating the extent of defendant's

recklessness, even though he could not properly consider the fact that they had died from defendant's recklessness. *Huckaby v. State*, Ct. App. Op. No. 39 (File No. 5197), 632 P.2d 975 (1981).

Considering uncounseled moving violations in sentencing held harmless error. — Any error which might have occurred by reason of the trial court's consideration of two uncounseled moving violations in determining the sentence for negligent driving was harmless where the court also considered three counseled moving violations and where it did not restrict or suspend defendant's license but imposed a fine of \$100, which was only \$25 above that suggested by defendant's counsel. *McKenzie v. State*, Sup. Ct. Op. No. 1029 (File No. 2012), 520 P.2d 791 (1975).

Sentence upheld. — Severity of defendant's offense within the crime of reckless driving and the need to deter him, to deter others, and to reaffirm societal norms justified a one-year sentence. *Huckaby v. State*, Ct. App. Op. No. 39 (File No. 5197), 632 P.2d 975 (1981).

Cited in *Hood v. Smedley*, Sup. Ct. Op. No. 800 (File No. 1406), 498 P.2d 120 (1972); *Williford v. State*, Sup. Ct. Op. No. 2751 (File No. 5986), 674 P.2d 1329 (1983); *Wilson v. State*, Ct. App. Op. No. 356 (File Nos. 7523, 7526, 7833), P.2d (1984).

Collateral references. — 7A Am. Jur. 2d, Automobiles and Highway Traffic, §§ 312 to 320.

61A C.J.S., Motor Vehicles, §§ 609 to 624.

What amounts to gross or wanton negligence in driving an automobile precluding the defense of contributory negligence, 38 ALR 1424, 72 ALR 1357, 92 ALR 1367, 119 ALR 654.

What amounts to reckless driving within statute making reckless driving of automobile a criminal offense, 86 ALR 1273, 52 ALR2d 1337.

Definiteness and certainty of statutes prohibiting, 12 ALR2d 580.

Reckless driving as lesser included offense of driving while intoxicated or similar charge, 10 ALR4th 1252.

Sec. 28.35.045. Negligent driving. (a) A person who drives a motor vehicle in the state in a manner which creates an unjustifiable risk of harm to a person or to property and who, as a result of the creation of the risk, actually endangers a person or property is guilty of negligent driving. An unjustifiable risk is a risk of such a nature and degree that a failure to avoid it constitutes a deviation from the standard of care that a reasonable person would observe in the situation. Proof that a defendant actually endangered a person or property is established by showing that, as a result of the defendant's driving,

1988
Supplemental

Chapter 35. Miscellaneous Provisions.

Article

2. Operating While Intoxicated; Implied Consent (§§ 28.35.029, 28.35.031 — 28.35.033)
3. Reckless and Negligent Driving (§ 28.35.045)
5. Miscellaneous Offenses (§§ 28.35.145, 28.35.235, 28.35.251 — 28.35.255)

Article 2. Operating While Intoxicated; Implied Consent.

Section

29. Open container
31. Implied consent

Section

32. Refusal to submit to chemical test
33. Chemical analysis of breath or blood

Sec. 28.35.029. Open container. (a) A person may not drive a motor vehicle on a highway or vehicular way or area, when there is an open bottle, can, or other receptacle containing an alcoholic beverage in the passenger compartment of the vehicle, except as provided in (b) of this section.

(b) A person may transport an open bottle, can, or other receptacle containing an alcoholic beverage

(1) in the trunk of a motor vehicle;

(2) on a motor driven cycle, or behind the last upright seat in a motor home, station wagon, hatchback, or similar trunkless vehicle, if the open bottle, can, or other receptacle is enclosed within another container;

(3) behind a solid partition that separates the vehicle driver from the area normally occupied by passengers; or

(4) if the open bottle, can, or other receptacle is in the possession of a passenger in a commercial motor vehicle.

(c) In this section

(1) "alcoholic beverage" has the meaning given in AS 04.21.080(b);

(2) "commercial motor vehicle" means a motor vehicle for which the owner receives direct monetary compensation and that has a capacity of 12 or more persons;

(3) "motor vehicle" means a vehicle for which a driver's license is required;

(4) "open" includes having a broken seal;

(5) "passenger compartment" means the area normally occupied by the driver and passengers and includes a utility or glove compartment accessible to the driver or a passenger while the motor vehicle is being operated.

(d) A person who violates (a) of this section is guilty of an infraction. (§ 1 ch 142 SLA 1988)

Sec. 28.35.030. Operating a vehicle, aircraft or watercraft while intoxicated.

NOTES TO DECISIONS

Rebuttable presumption of intoxication. — This section does not establish a conclusion that blood tests become irrelevant if taken more than four hours after the alleged violation, rather, the statute simply reflects the legislative conclusion that a blood test taken within four hours of the alleged infraction is such definitive evidence of intoxication at the time of driving, that the blood test result is sufficient to establish a rebuttable presumption of intoxication. *Williams v. State*, Ct. App. Op. No. 709 (File No. A-1631), 737 P.2d 360 (1987).

Movability of vehicle. — This section on its face, contains no "movability" requirement, and the definition of "operate" adopted in *Jacobson* contains no such requirement; and a defendant could be found guilty of driving while intoxicated even though his automobile was stuck in a mudhole and was incapable of movement. *Lathan v. State*, Ct. App. Op. No. 542 (File No. A-901), 707 P.2d 941 (1985).

Defendant was "in actual physical control" of her vehicle, where she was seated in the driver's seat behind the steering wheel, had possession of the ignition key and was attempting to put the key in the ignition; given these factors of control, it is not necessary that the engine be running. *State*, Dep't of Pub. Safety v. *Conley*, Sup. Ct. Op. No. 3297 (File No. S-1791), P.2d (1988).

Police response to what is reasonably interpreted as request for assistance justified. — A trooper's action in engaging his emergency lights and contacting a defendant, following what he reasonably interpreted to be a request for assistance from the defendant's vehicle, is permissible under U.S. Const., Amend. 4 as well as Alaska Const., Art. I, § 14. When a police officer observes facts and circumstances which he actually and reasonably concludes to be a request for contact or assistance, the officer is justified in making that contact, which would not be analyzed as an investigatory stop requiring articulable suspicion. *Crauthers v. State*, Ct. App. Op. No. 652 (File No. A-1507), 727 P.2d 9 (1986).

Subsection (c) inapplicable to airboats. — A court may not revoke the driver's license of a person convicted of

driving while intoxicated on public property in an airboat; an airboat is not a motor vehicle for which a driver's license is required. *State v. Stagno*, Ct. App. Op. No. 725 (File No. A-1585), P.2d (1987).

Cough medicines as intoxicating liquors. — Nyquil and terpin hydrate, two cough medicines, are intoxicating liquors within the common understanding of that phrase and can be the basis for a conviction of driving while intoxicated. *Lambert v. State*, Ct. App. Op. No. 441 (File No. A-403), 694 P.2d 791 (1985).

Request for counsel before breathalyzer test. — District court judge's finding that defendant, convicted of driving while intoxicated under municipal code, did not request counsel prior to taking the breathalyzer examination where he never asked to speak to an attorney but asked whether he might need an attorney, with testimony supporting the conclusion that he wondered if he needed an attorney in order to make bail, not because he wanted advice about submitting to a breathalyzer exam, was not clearly erroneous, and superior court judge should not have reversed the conviction. *Anchorage v. Erickson*, Ct. App. Op. No. 417 (File No. A-512), 690 P.2d 20 (1984).

Right to counsel before breathalyzer test.

It is only where the totality of the arrestee's words constitute a request, express or implied, for an opportunity to contract counsel for the purpose of discussing a breathalyzer examination that an opportunity to consult counsel must be provided prior to administration of the breathalyzer. Once the breathalyzer examination is completed or refused and videotaping finished, the suspect is entitled to the full use of the rights guaranteed by AS 12.25.150(b) and Criminal Rule 5(b). *Van Wurmer v. State*, Ct. App. Op. No. 473 (File No. A-320), 699 P.2d 895 (1985).

Where the judge determined, based on the evidence, that the DWI defendant's statements regarding having somebody present did not relate to a desire to consult with counsel about breathalyzer examinations or field sobriety test, but rather related to having someone present

to observe the administration of the test, perhaps a technician, to insure its validity, the judge was not clearly erroneous in concluding that the defendant did not properly invoke his Copelin rights and that the results of the breathalyzer examination should not be suppressed. *Van Wurmer v. State*, Ct. App. Op. No. 473 (File No. A-320), 699 P.2d 895 (1985).

When breathalyzer test results should be excluded. — The result of a breathalyzer test secured in violation of the right to counsel should be excluded in a civil license revocation proceeding. *Whisenhunt v. State*, Dep't of Pub. Safety, Sup. Ct. Op. No. 3250 (File No. S-1467), P.2d (1987).

Parental presence at all court proceedings is a prerequisite to conviction of a minor for a traffic offense, including driving while intoxicated. *Aiken v. State*, Ct. App. Op. No. 672 (File No. A-1498), 730 P.2d 821 (1987).

Attempted retest may be prerequisite to a motion to suppress intoximeter result on the grounds of alleged inadequacy in the magnesium perchlorate tube (MPT) retention system where the trial court expressly finds that the MPT system is properly functioning, but leaves open the possibility that retained samples might be defective in individual cases. *Ansay v. State*, Ct. App. Op. No. 598 (File No. A-829, A-831), 715 P.2d 1194 (1986).

Cost-free retest not required. — Compliance with *Serrano* does not require that defendants be furnished a cost-free retest. *Ansay v. State*, Ct. App. Op. No. 598 (File Nos. A-829, A-831), 715 P.2d 1194 (1986).

Results of police officer's self-administered intoximeter test admissible. — Where a police officer, though not under arrest for driving while intoxicated, administered himself an intoximeter test, the results of that test were properly admitted at trial even though he was not read an implied consent warning and no sample was preserved. *Lawrence v. State*, Ct. App. Op. No. 603 (File No. A-799), 715 P.2d 1213 (1986).

Preserving breath samples.
In accord with main pamphlet. See *Champion v. Department of Pub. Safety*, Sup. Ct. Op. No. 3074 (File No. S-868), P.2d (1986).

Retroactive application of *Serrano* rule. — Where a new rule serves to ensure defendants a fair trial, it must be retroactively applied at least to any case which was not finally disposed of at the

time the rule was announced, provided that the defendant raised the point in the trial court. *Farleigh v. Municipality of Anchorage*, Sup. Ct. Op. No. 3143 (File Nos. S-1162, S-1183), P.2d (1986).

Where defendant's reckless driving conviction was based on precisely the same conduct as his DWI, the offense of reckless driving must be deemed to have merged with the offense of DWI; and it is error to enter a separate judgment of conviction against the defendant on the reckless driving charge. *Kalmakoff v. Municipality of Anchorage*, Ct. App. Op. No. 588 (File No. A-920), 715 P.2d 261 (1986).

Defendant was a third DWI offender upon his 1987 conviction for driving while intoxicated, where he had been separately charged with DWI in September and November of 1985 and, pursuant to a plea agreement, was sentenced in both cases as if he were a first-time DWI offender. *State v. Waalke*, Ct. App. Op. No. 782 (File No. A-2142), P.2d (1988).

Revocation of license for operating motor vehicle in parking lot. — See *Caulkins v. State*, Dep't of Pub. Safety, Sup. Ct. Op. No. 3233 (File No. S-1586), 743 P.2d 366 (1987).

Enhanced sentences. — Before a prior conviction for an ostensibly non-criminal infraction, such as a "civil forfeiture," can properly be relied on as the sole basis for imposition of an enhanced mandatory minimum jail term, fundamental fairness under Alaska Const., art. I, § 7 requires the sentencing court to determine that the defendant was afforded the right to counsel in the prior case; an uncounseled conviction is simply too unreliable to be depended on for purposes of imposing a sentence of incarceration, whether that sentence is imposed directly or collaterally. *Pananen v. State*, Ct. App. Op. No. 551 (File Nos. A-943, A-948), 711 P.2d 528 (1985).

Conditions of probation. — Condition of probation prohibiting one who pled nolo contendere to driving while intoxicated from entering the town where he lived and worked for the term of his probation, one year, without prior written permission from the court was not a reasonable condition and was vacated. The condition was not reasonably related to the nature of the underlying offense, the condition was unnecessarily severe and restrictive, and the condition did not appear to be reasonably related to rehabilitation since there was no evidence to suggest that some endemic characteristic of the town

contributed to the probationer's criminal behavior and the condition was not reasonably related to the protection of the public. *Edison v. State*, Ct. App. Op. No. 546 (File No. A-940), 709 P.2d 510 (1985).

Applied in *Meisner v. State*, Ct. App. Op. No. 593 (File Nos. A-1083, A-1084), 715 P.2d 714 (1986); *Anna v. State*, Ct. App. Op. No. 647 (File No. A-954), 726 P.2d 552 (1986); *Yancy v. State*, Ct. App. Op. No. 687 (File Nos. A-1392, A-1413), P.2d (1987).

Quoted in *Barcott v. State*, Dep't of Pub. Safety, Sup. Ct. Op. No. 3212 (File No. S-1692), 741 P.2d 226 (1987).

Stated in *Kavorkian v. Tommy's Elbow Room, Inc.*, Sup. Ct. Op. No. 2906 (File Nos. S-62, S-79), 694 P.2d 160 (1985).

Cited in *Effenbeck v. State*, Ct. App. Op. No. 479 (File No. A-597), 700 P.2d 811 (1985); *Anderson v. State*, Ct. App. Op. No. 585 (File No. A-1028), 713 P.2d 1220 (1986); *Morris v. State*, Ct. App. Op. No. 694 (File No. A-1668), P.2d (1987); *Brown v. State*, Ct. App. Op. No. 714 (File No. A-1716), 739 P.2d 182 (1987); *Clark v. State*, Ct. App. Op. No. 716 (File No. A-1840), 738 P.2d 765 (1987); *Selig v. State*, Ct. App. Op. No. 785 (File No. A-2057), P.2d (1988).

Sec. 28.35.031. Implied consent. (a) A person who operates or drives a motor vehicle in this state or who operates an aircraft as defined in AS 28.35.030(g)(1) or who operates a watercraft as defined in AS 28.35.030(g)(2) shall be considered to have given consent to a chemical test or tests of the person's breath for the purpose of determining the alcoholic content of the person's blood or breath if lawfully arrested for an offense arising out of acts alleged to have been committed while the person was operating or driving a motor vehicle or operating an aircraft or a watercraft while intoxicated. The test or tests shall be administered at the direction of a law enforcement officer who has reasonable grounds to believe that the person was operating or driving a motor vehicle or operating an aircraft or a watercraft in this state while intoxicated.

(b) A person who operates or drives a motor vehicle in this state or who operates an aircraft or watercraft shall be considered to have given consent to a preliminary breath test for the purpose of determining the alcoholic content of the person's blood or breath. A law enforcement officer may administer a preliminary breath test at the scene of the incident if the officer has reasonable grounds to believe that a person's ability to operate a motor vehicle, aircraft, or watercraft is impaired by the ingestion of alcoholic beverages and that the person

(1) was operating or driving a motor vehicle, aircraft, or watercraft that is involved in an accident;

(2) committed a moving traffic violation or unlawfully operated an aircraft or watercraft; in this paragraph, "unlawfully" means in violation of any federal, state, or municipal statute, regulation or ordinance, except for violations that do not provide reason to believe that the operator's ability to operate the aircraft or watercraft was impaired by the ingestion of alcoholic beverages; or

(3) was operating or driving a motor vehicle in violation of AS 28.35.029(a).

(c) Before administering a preliminary breath test under (b) of this section, the officer shall advise the person that refusal may be used

against the person in a civil or criminal action arising out of the incident and that refusal is an infraction. If the person refuses to submit to the test, the test shall not be administered.

(d) The result of the test under (b) of this section may be used by the law enforcement officer to determine whether the driver or operator should be arrested.

(e) Refusal to submit to a preliminary breath test at the request of a law enforcement officer is an infraction.

(f) If a driver or operator is arrested, the provisions of (a) of this section apply. The preliminary breath test authorized in this section is in addition to any tests authorized under (a) of this section. (§ 1 ch 83 SLA 1969; am § 11 ch 129 SLA 1980; am § 16 ch 117 SLA 1982; am § 16 ch 77 SLA 1983; am §§ 1 — 4 ch 76 SLA 1985; am § 2 ch 142 SLA 1988)

Revisor's notes. — The last clause of (b)(2) of this section was enacted as AS 28.35.031(g). Reorganized in 1985.

Effect of amendments. — The 1985 amendment in subsection (b) inserted "or who operates an aircraft or watercraft" in the first sentence, inserted "aircraft, or watercraft" in the second sentence, in paragraph (1) inserted "operating or" and "aircraft, or watercraft," and in paragraph (2) added the language beginning "or un-

lawfully operated"; and in subsections (d) and (f) inserted "or operator."

The 1988 amendment, in subsection (b), deleted "or" at the end of paragraph (1), added "or" at the end of paragraph (2), and added paragraph (3).

Opinions of attorney general. — The Intoximeter 3000, an infrared alcohol breath test apparatus, is a "chemical test" under this section. 1984 Op. Att'y Gen. No. 01.

NOTES TO DECISIONS

Section constitutional. — The portable breath test authorized by this section does not constitute an unreasonable search under the fourth amendment to the United States Constitution. *Leslie v. State*, Ct. App. Op. No. 570 (File No. A-868), 711 P.2d 675 (1986).

The imposition of criminal penalties upon a motorist for his peaceful refusal to submit to a breath test does not violate his right to equal protection under the law. *Burnett*, Municipality of Anchorage, 634 F. Supp. 1029 (D. Alaska 1986).

The implied consent statute clearly serves a legitimate state interest. All drivers lawfully stopped are treated equally, and, from the perspective of the fourth and fourteenth amendments, those drivers are treated no differently from other sorts of persons suspected of committing criminal acts. *Burnett v. Municipality of Anchorage*, 806 F.2d 1447 (9th Cir. 1986).

Legislative intent. — In the implied consent statutes, the legislature has gone to great lengths to avoid authorizing the

police to take blood alcohol tests forcibly from defendants charged with driving while intoxicated; the legislature has, instead, provided extremely strong incentives to a defendant to take a breath test for blood alcohol by providing criminal penalties. *Bass v. Municipality of Anchorage*, Ct. App. Op. No. 429 (File No. A-273), 692 P.2d 961 (1984).

Consent to breathalyzer test, etc. — Just as a driver's failure to cooperate in the search conducted by means of a breathalyzer test is no impediment to the classification of the proceeding as a search incident to arrest, the absence of cooperation is no bar to the characterization of the taking of breath as a consent search for which consent has already been supplied by the act of driving on Alaska roads. *Burnett v. Municipality of Anchorage*, 634 F. Supp. 1029 (D. Alaska 1986).

Request for counsel before breathalyzer test. — District court judge's finding that defendant, convicted of driving while intoxicated under municipal code, did not request counsel prior to taking the

breathalyzer examination where he never asked to speak to an attorney but asked whether he might need an attorney, with testimony supporting the conclusion that he wondered if he needed an attorney in order to make bail, not because he wanted advice about submitting to a breathalyzer exam, was not clearly erroneous, and superior court judge should not have reversed the conviction. *Anchorage v. Erickson*, Ct. App. Op. No. 417 (File No. A-512), 690 P.2d 20 (1984).

Right to counsel before breathalyzer test.

See note to AS 28.35.030 under this catchline, *Van Wormer v. State*, Ct. App. Op. No. 473 (File No. A-320), 699 P.2d 896 (1985).

The result of a breathalyzer test secured in violation of the right to counsel should be excluded in a civil license revocation proceeding. *Whisenhunt v. State*, Dep't of Pub. Safety, Sup. Ct. Op. No. 3250 (File No. S-1467), P.2d (1987).

Use of search warrant.

Implied Consent Statutes in effect at the time of the arrests of defendants in

1980 and 1981 precluded the admission into evidence of chemical sobriety test results obtained pursuant to a search warrant after the arrestees had refused to take such a test. *Pena v. State*, Sup. Ct. Op. No. 2851 (File Nos. 6174, 7052), 684 P.2d 864 (1984).

Chemical tests not conclusively presumed accurate. — Due process will not allow the results of a chemical test authorized under subsection (a) to be conclusively presumed accurate. *Barcott v. State*, Dep't of Pub. Safety, Sup. Ct. Op. No. 3212 (File No. S-1692), 741 P.2d 226 (1987).

Applied in *Lawrence v. State*, Ct. App. Op. No. 603 (File No. A-799), 715 P.2d 1213 (1986).

Quoted in *Brown v. State*, Ct. App. Op. No. 714 (File No. A-1715), 739 P.2d 182 (1987); *State*, Dep't of Pub. Safety v. *Conley*, Sup. Ct. Op. No. 3297 (File No. S-1791), P.2d (1988).

Cited in *Romo v. Municipality of Anchorage*, Ct. App. Op. No. 457 (File No. A-462), 697 P.2d 1065 (1985).

Sec. 28.35.032. Refusal to submit to chemical test. (a) If a person under arrest refuses the request of a law enforcement officer to submit to a chemical test under AS 28.35.031(a), after being advised by the officer that the refusal will, if that person was arrested while operating or driving a motor vehicle for which a driver's license is required, result in the denial or revocation of the license or nonresident privilege to drive, that the refusal may be used against the person in a civil or criminal action or proceeding arising out of an act alleged to have been committed by the person while operating or driving a motor vehicle or operating an aircraft or a watercraft while intoxicated, and that the refusal is a misdemeanor, a chemical test may not be given, except as provided by AS 28.35.035.

(b) [Repealed, § 25 ch 77 SLA 1983.]

(c) [Repealed, § 25 ch 77 SLA 1983.]

(d) [Repealed, § 25 ch 77 SLA 1983.]

(e) The refusal of a person to submit to a chemical test of breath under (a) of this section is admissible evidence in a civil or criminal action or proceeding arising out of an act alleged to have been committed by the person while operating or driving a motor vehicle or operating an aircraft or watercraft while intoxicated.

(f) Refusal to submit to the chemical test of breath authorized by AS 28.35.031(a) is a class A misdemeanor.

(g) Upon conviction of a person under this section, the court shall impose a minimum sentence of imprisonment of not less than 72 con-

secutive hours and a fine of not less than \$250 if the person has not been previously convicted in this or another jurisdiction of driving while intoxicated under AS 28.35.030 or another law or ordinance with substantially similar elements or refusal to submit to a chemical test under this section or another law or ordinance with substantially similar elements. Upon conviction under this section the court shall impose a minimum sentence of imprisonment of not less than 20 consecutive days and a fine of not less than \$500 if, within the preceding 10 years, the person has been previously convicted once in this or another jurisdiction of driving while intoxicated under AS 28.35.030 or another law or ordinance with substantially similar elements or refusal to submit to a chemical test under this section or another law or ordinance with substantially similar elements. Upon conviction under this section the court shall impose a minimum sentence of imprisonment of not less than 30 consecutive days and a fine of not less than \$1,000 if, within the previous 10 years, the person has been previously convicted in this or another jurisdiction of more than one of the following offenses or has more than once been previously convicted of one of the following offenses: (1) driving while intoxicated under AS 28.35.030 or another law or ordinance with substantially similar elements; (2) refusal to submit to a chemical test under this section or another law or ordinance with substantially similar elements. The execution of sentence may not be suspended nor may probation be granted except on condition that the minimum imprisonment provided in this section is served. Imposition of sentence may not be suspended. If the offense involved driving a motor vehicle for which a driver's license is required, the person's driver's license shall be revoked under AS 28.15.181. In addition, the court shall order, and a person convicted under this section shall undertake, for a term specified by the court, that program of alcohol education or rehabilitation that the court, after consideration of any information compiled under (h) of this section, finds appropriate. The sentence imposed by the court under this subsection shall run consecutively with any other sentence of imprisonment imposed on the committed person.

(h) Except as prohibited by federal law or regulation, every provider of treatment programs to which persons are ordered under (g) of this section shall supply the Alaska court system with the information regarding the condition and treatment of those persons as the supreme court may require by rule. Information compiled under this subsection is confidential and may only be used by a court in sentencing a person convicted under (g) of this section, or by an officer of the court in preparing a pre-sentence report for the use of the court in sentencing a person convicted under (g) of this section.

(i) A person who is sentenced to imprisonment for 72 consecutive hours under (g) of this section and who is not released from imprisonment after 72 hours may not bring an action against the state or a

municipality or its agents, officers, or employees for damages resulting from the additional period of confinement if

(1) the employee or employees who released the person exercised due care and, in releasing the person, followed the standard release procedures of the prison facility; and

(2) the additional period of confinement did not exceed 12 hours.

(j) For purposes of this section, convictions for both driving while intoxicated and for refusal to submit to a chemical test of breath under AS 28.35.031(a), if arising out of a single transaction and a single arrest, are considered one previous conviction. (§ 1 ch 83 SLA 1969; am § 28 ch 71 SLA 1972; am § 12 ch 129 SLA 1980; am § 17 ch 117 SLA 1982; am §§ 17 — 20, 25 ch 77 SLA 1983; am § 17 ch 60 SLA 1986)

Effect of amendments. — The 1986 amendment substituted "may" for "shall" following "chemical test" near the end of subsection (a).

NOTES TO DECISIONS

Legislative Intent. — In the implied consent statutes, the legislature has gone to great lengths to avoid authorizing the police to forcibly take blood alcohol tests from defendants charged with driving while intoxicated, the legislature has, instead, provided extremely strong incentives to a defendant to take a breath test for blood alcohol by providing criminal penalties. *Base v. Municipality of Anchorage*, Ct. App. Op. No. 429 (File No. A-273), 692 P.2d 961 (1984).

Imposition of criminal penalties held constitutional. — The imposition of criminal penalties upon a motorist for his peaceful refusal to submit to a breath test does not violate his right to equal protection under the law. *Burnett v. Municipality of Anchorage*, 634 F. Supp. 1029 (D. Alaska 1986).

Implied consent. — Just as a driver's failure to cooperate in the search conducted by means of a breathalyzer test is no impediment to the classification of the proceeding as a search incident to arrest, the absence of cooperation is no bar to the characterization of the taking of breath as a consent search for which consent has already been supplied by the act of driving on Alaska roads. *Burnett v. Municipality of Anchorage*, 634 F. Supp. 1029 (D. Alaska 1986).

The implied consent statute clearly serves a legitimate state interest. All drivers lawfully stopped are treated equally, and, from the perspective of the fourth and fourteenth amendments, those

drivers are treated no differently from other sorts of persons suspected of committing criminal acts. *Burnett v. Municipality of Anchorage*, 806 F.2d 1447 (9th Cir. 1986).

"While" defined. — The word "while" in subsection (a) means "for." *Brown v. State*, Ct. App. Op. No. 714 (File No. A-1715), 739 P.2d 182 (1987).

Request for counsel before breathalyzer test. — District court judge's finding that defendant, convicted of driving while intoxicated under municipal code, did not request counsel prior to taking the breathalyzer examination where he never asked to speak to an attorney but asked whether he might need an attorney, with testimony supporting the conclusion that he wondered if he needed an attorney in order to make bail, not because he wanted advice about submitting to a breathalyzer exam, was not clearly erroneous, and superior court judge should not have reversed the conviction. *Anchorage v. Erickson*, Ct. App. Op. No. 417 (File No. A-512), 690 P.2d 20 (1984).

Right to counsel before breathalyzer test.

The result of a breathalyzer test secured in violation of the right to counsel should be excluded in a civil license revocation proceeding. *Whisenhunt v. State*, Dep't of Pub Safety, Sup. Ct. Op. No. 3250 (File No. S-1467), P.2d (1987).

See note to AS 28.35.030 under this catchline, *Van Wormer v. State*, Ct. App.

Op. No. 473 (File No. A-320), 699 P.2d 895 (1985).

Right to contact counsel does not include a right to have counsel physically present while a breath test is administered. *Annas v. State*, Ct. App. Op. No. 647 (File No. A-954), 726 P.2d 562 (1986).

Admissibility of evidence of refusal.

Admission into evidence of defendant's refusal to submit to a breathalyzer test did not violate his fifth amendment right against self-incrimination, even though Alaska has made refusal to submit to a breathalyzer test a separate criminal offense. *Deering v. Brown*, 839 F.2d 539 (9th Cir. 1988).

Requirements for conviction. — The jury need not find that defendant operated a motor vehicle while under the influence of intoxicating liquor as a condition prerequisite to convicting him or her of refusal to provide a chemical breath test. *Brown v. State*, Ct. App. Op. No. 714 (File No. A-1715), 739 P.2d 182 (1987).

Probable cause to arrest is not an element of the offense of refusing a chemical test of breath. *Brown v. State*, Ct. App.

Op. No. 714 (File No. A-1715), 739 P.2d 182 (1987).

In order to convict a person of refusing to submit to a chemical test of his or her breath, the state must prove that the individual in question knew or perhaps should have known that the breath test was sought as evidence in connection with an investigation of his or her driving while intoxicated, and, second, that with that culpable mental state, he or she declined the test. *Brown v. State*, Ct. App. Op. No. 714 (File No. A-1715), 739 P.2d 182 (1987).

Admission of intoxication. — While a trial court might consider defendant's admission of intoxication in mitigation of punishment, it is not a defense to a refusal to provide a chemical breath test. *Brown v. State*, Ct. App. Op. No. 714 (File No. A-1715), 739 P.2d 182 (1987).

Conviction affirmed. — See *McCracken v. State*, Ct. App. Op. No. 399 (File No. A-214), 685 P.2d 1275 (1984).

Applied in *Skuse v. State*, Ct. App. Op. No. 582 (File No. A-885), 714 P.2d 368 (1986).

Cited in *Witt v. State*, Ct. App. Op. No. 433 (File No. A-482), 692 P.2d 976 (1984).

Sec. 28.35.033. Chemical analysis of breath or blood. (a) Upon the trial of a civil or criminal action or proceeding arising out of acts alleged to have been committed by a person while operating or driving a motor vehicle or operating an aircraft or a watercraft while intoxicated, the amount of alcohol in the person's blood or breath at the time alleged shall give rise to the following presumptions:

(1) If there was 0.05 percent or less by weight of alcohol in the person's blood, or 50 milligrams or less of alcohol per 100 milliliters of the person's blood, or 0.05 grams or less of alcohol per 210 liters of the person's breath, it shall be presumed that the person was not under the influence of intoxicating liquor.

(2) If there was in excess of 0.05 percent but less than 0.10 percent by weight of alcohol in the person's blood, or in excess of 50 but less than 100 milligrams of alcohol per 100 milliliters of the person's blood, or in excess of 0.05 grams but less than 0.10 grams of alcohol per 210 liters of the person's breath, that fact does not give rise to any presumption that the person was or was not under the influence of intoxicating liquor, but that fact may be considered with other competent evidence in determining whether the person was under the influence of intoxicating liquor.

(3) *Repealed, § 13 ch 129 SLA 1980.*

(4) If there was 0.10 percent or more by weight of alcohol in the person's blood, or 100 milligrams or more of alcohol per 100 milliliters

of the person's blood, or 0.10 grains or more of alcohol per 210 liters of the person's breath, it shall be presumed that the person was under the influence of intoxicating liquor.

(b) For purposes of this chapter, percent by weight of alcohol in the blood shall be based upon milligrams of alcohol per 100 milliliters of blood.

(c) The provisions of (a) of this section may not be construed to limit the introduction of any other competent evidence bearing upon the question of whether the person was or was not under the influence of intoxicating liquor.

(d) To be considered valid under the provisions of this section the chemical analysis of the person's breath or blood shall have been performed according to methods approved by the Department of Public Safety. The Department of Public Safety is authorized to approve satisfactory techniques, methods, and standards of training necessary to ascertain the qualifications of individuals to conduct the analysis. If it is established at trial that a chemical analysis of breath or blood was performed according to approved methods by a person trained according to techniques, methods, and standards of training approved by the Department of Public Safety, there is a presumption that the test results are valid and further foundation for introduction of the evidence is unnecessary.

(e) The person tested may have a physician, or a qualified technician, chemist, registered nurse, or other qualified person of the person's own choosing administer a chemical test in addition to the test administered at the direction of a law enforcement officer. The failure or inability to obtain an additional test by a person does not preclude the admission of evidence relating to the test taken at the direction of a law enforcement officer; the fact that the person under arrest sought to obtain such an additional test, and failed or was unable so to do, is likewise admissible in evidence.

(f) Upon the request of the person who submits to a chemical test at the request of a law enforcement officer, full information concerning the test, including the results of it, shall be made available to the person or the person's attorney.

(d) To be considered valid under the provisions of this section the chemical analysis of the person's breath or blood shall have been performed according to methods approved by the Department of Public Safety. The Department of Public Safety is authorized to approve satisfactory techniques, methods, and standards of training necessary to ascertain the qualifications of individuals to conduct the analysis. If it is established at trial that a chemical analysis of breath or blood was performed according to approved methods by a person trained according to techniques, methods, and standards of training approved by the Department of Public Safety, there is a presumption that the test results are valid and further foundation for introduction of the evi-

denor is unnecessary. (§ 1 ch 83 SLA 1969; am § 6 ch 104 SLA 1971; am § 13 ch 129 SLA 1980; am §§ 18 — 20 ch 117 SLA 1982; am E.O. No. 67, § 2 (1987))

Effect of amendments. — The 1987 amendment substituted "The Department of Public Safety" for "The Department of Health and Social Services" in three places in subsection (d).

NOTES TO DECISIONS

No evidentiary privilege established. — Subsection (a) does not expressly establish an evidentiary privilege, and the Court of Appeals of Alaska stated that it would be inappropriate for the courts to construe subsection (a) as establishing such a privilege by implication. *Russell v. Municipality of Anchorage*, Ct. App. Op. No. 514 (File No. A-146) 706 P.2d 687 (1985).

Police fully satisfied their obligation to preserve evidence by preserving defendant's breath sample, even where police did not take defendant to the hospital he requested (because the state had no contract with that hospital for blood extraction), but offered to take defendant to one of two other hospitals which offer defendant refused. *Ward v. State*, Ct. App. Op. No. 685 (File No. A-1519), P.2d (1987).

Testing breathalyzer for radio frequency interference. — When a timely and appropriate challenge to admissibility of a breathalyzer test result is made, a municipality must, at a minimum, demonstrate that the breathalyzer instrument in question was tested successfully for radio frequency interference (RFI) at least once in a manner substantially complying with the manufacturer's recommendations, and that none of the conditions for retesting listed in the manufacturer's RFI advisory occurred between the time of the initial RFI test and the challenged breath test. *Thayer v. Municipality of Anchorage*, Ct. App. Op. No. 305 (File No. 7846), 686 P.2d 721 (1984).

Admission of breath test results where substantial compliance with regulations. — Even where defendant's breath test was administered by an uncertified officer on an intoximeter that was not recalibrated at 60-day intervals as required by 7 AAC 30.050, the test results were still admissible because only substantial compliance with the applicable regulations is required. *Herter v. State*,

Ct. App. Op. No. 592 (File No. A-1134), 715 P.2d 274 (1986).

Suppression of breath test results. — A defendant has the burden of showing that by virtue of some action or inaction on the part of the prosecuting authority, he was not furnished a reasonable means of verifying an adverse breath test result. Once the defendant has sustained his burden of showing that he was not furnished a reasonable means of verification, he has established a prima facie case that the breath test results should be suppressed; and in order to avoid suppression, the governmental agency in question must then prove by a preponderance of the evidence that its failure to provide the defendant an independent means of verifying the result was free of fault. *State v. Kerr*, Ct. App. Op. No. 561 (File No. A-531), 712 P.2d 400 (1985).

Waiver of objection. — In the absence of a specific reservation of the issue during the course of a trial, a party failing to object on foundational grounds to admission of blood- or breath-alcohol test results cannot later object to the application of the statutory presumption of intoxication. *Macaulay v. State*, Ct. App. Op. No. 695 (File No. A-946), P.2d (1987).

Jury should be made aware of statutory presumption. — A jury considering drunk driving, assault (involving motor vehicles), manslaughter, and negligent homicide cases should be made aware of the statutory presumption concerning intoxication in subsection (a). *Dresnek v. State*, Ct. App. Op. No. 455 (File No. A-19), 697 P.2d 1059 (1985).

Jury instructions. — In prosecution for drunk driving manslaughter and second-degree assault, the trial court did not err in instructing the jury that "it found that there was .10% or more alcohol in defendant's blood at the time of the accident, it could infer that he was under the influence of intoxicating liquor." *State v. State*, Ct. App. Op. No. 455 (File No. A-19), 697 P.2d 1059 (1985).

Cited in *Edgmon v. State*, Ct. App. Op. No. 481 (File No. A-16), 702 P.2d 643 (1985).

Sec. 28.35.035. Administration of chemical tests without consent.

NOTES TO DECISIONS

Section should not be read broadly. — In light of the fact that the legislature has gone to great lengths to avoid authorizing the police to forcibly take blood tests, this section should not be read broadly. *Bass v. Municipality of Anchorage*, Ct. App. Op. No. 429 (File No. A-273), 692 P.2d 961 (1984).

Effect of section. — The legislature has eliminated a driver's ability to refuse a chemical sobriety test when an arrestee is involved in an accident that results in the death of or injury to another person. *Pena v. State*, Sup. Ct. Op. No. 2851 (File Nos. 6174, 7052), 684 P.2d 864 (1984).

Application of subsection (b). — The fact that it was not practical to offer a defendant a breathalyzer test does not bring the case within subsection (b) of this

section; what does seem to fall within subsection (b) is a narrow class of cases where the defendant is unconscious or otherwise incapable of manifesting his intent to refuse. *Bass v. Municipality of Anchorage*, Ct. App. Op. No. 429 (File No. A-273), 692 P.2d 961 (1984).

The legislature's choice of language seems to be consistent with the theory that subsection (b) of this section was intended to apply only to situations where a blood-alcohol test could be conducted without any violence such as where an arrestee is unconscious. *Bass v. Municipality of Anchorage*, Ct. App. Op. No. 429 (File No. A-273), 692 P.2d 961 (1984).

Cited in *Herter v. State*, Ct. App. Op. No. 592 (File No. A-1134), 715 P.2d 274 (1986).

Sec. 28.35.036. Forfeiture of motor vehicle.

NOTES TO DECISIONS

Section inapplicable to airboats. — A court may not forfeit the vehicle of a person convicted of driving while intoxicated on public property in an airboat; an

airboat is not "a motor vehicle of a type for which a driver's license is required." *State v. Stagno*, Ct. App. Op. No. 725 (File No. A-1585), P.2d (1987).

Article 3. Reckless and Negligent Driving.

Section
45. Negligent driving

Sec. 28.35.040. Reckless driving.

NOTES TO DECISIONS

Defendant was "in actual physical control" of her vehicle, where she was seated in the driver's seat behind the steering wheel, had possession of the ignition key and was attempting to put the

key in the ignition; given these factors of control, it is not necessary that the engine be running. *State, Dep't of Pub. Safety v. Conley*, Sup. Ct. Op. No. 3297 (File No. S-1791), P.2d (1988).

Sec. 28.35.045. Negligent driving. (a) A person who drives a motor vehicle in the state in a manner which creates an unjustifiable risk of harm to a person or to property and who, as a result of the creation of the risk, actually endangers a person or property is guilty of negligent driving. An unjustifiable risk is a risk of such a nature and degree that a failure to avoid it constitutes a deviation from the standard of care that a reasonable person would observe in the situation. Proof that a defendant actually endangered a person or property is established by showing that, as a result of the defendant's driving,

- (1) an accident occurred;
- (2) a person, including the defendant, took evasive action to avoid an accident;
- (3) a person, including the defendant, stopped or slowed down suddenly to avoid an accident; or
- (4) a person or property, including the defendant or the defendant's property, was otherwise endangered.

(b) The offense of negligent driving is a lesser offense than, and included in, the offense of reckless driving, and a person charged with reckless driving may be convicted of the lesser offense of negligent driving.

(c) A person convicted of negligent driving is guilty of an infraction as provided under AS 28.40.050.

(d) Lawfully conducted automobile, snowmobile, motorcycle or other motor vehicle racing or exhibition events are not subject to the provisions of this section. (§ 7 ch 74 SLA 1974; am § 6 ch 241 SLA 1976; am § 19 ch 144 SLA 1977; am § 43 ch 21 SLA 1985)

Effect of amendments. — The 1985 driver's license law (AS 28.15.220(b)) at amendment deleted "and in addition, the court may limit or suspend the person's the end of subsection (c).

Article 4. Duties Following Accidents.

Sec. 28.35.050. Action of operator immediately after accident.

NOTES TO DECISIONS

Effect of intoxication on knowledge. — Trial court did not err in instructing the jurors that they could not consider defendant's intoxication in deciding whether he acted knowingly with regard to the offenses of failing to remain at the scene of an accident and failing to render assistance to an injured person. *Williams v.*

State, Ct. App. Op. No. 709 (File No. A-1631), 737 P.2d 360 (1987).

Applied in *Winslow v. State*, Ct. App. Op. No. 397 (File No. A-103), 685 P.2d 1273 (1984).

Stated in *Dunlop v. State*, Sup. Ct. Op. No. 3068 (File Nos. S-923, S-1163), 721 P.2d 604 (1986).

Sec. 28.35.000. Duty of operator to give information and render assistance.

NOTES TO DECISIONS

Ten-year sentence with five years suspended for failure to render assistance affirmed. — See *Winalow v. State*, Ct. App. Op. No. 397 (File No. A-103), 685 P.2d 1273 (1984).

Intoxication. — Trial court did not err in instructing the jurors that they could not consider defendant's intoxication in deciding whether he acted knowingly with regard to the offenses of failing to remain at the scene of an accident and

failing to render assistance to an injured person. *Williams v. State*, Ct. App. Op. No. 709 (File No. A-1631), 737 P.2d 360 (1987).

Stated in *Dunlop v. State*, Sup. Ct. Op. No. 3068 (File Nos. S-923, S-1163), 721 P.2d 604 (1986).

Cited in *Smith v. State*, Ct. App. Op. No. 729 (File No. A-1861), 739 P.2d 1306 (1987).

Article 5. Miscellaneous Offenses.

Section

145. Overtaking and passing school bus
235. Unauthorized use of handicapped parking

Section

251. Contained or confined loads
253. Anti-spray devices required
255. Penalty

Sec. 28.35.145. Overtaking and passing school bus. (a) The driver of a vehicle that approaches from any direction a school bus stopped on a highway or vehicular way or area shall stop not less than 30 feet from the school bus before reaching it when there are in operation on the school bus flashing red lights as required by regulation. The driver may not proceed until the school bus proceeds and the flashing lights are no longer illuminated.

(b) When a school bus is stopped on a highway or vehicular way or area, whether or not there are in operation on the school bus flashing red lights as required by regulation, the driver of a vehicle shall yield the right-of-way to a person crossing a highway, vehicular way, or area to embark on or disembark from the school bus, whether or not the person is crossing within a marked crosswalk.

(c) The driver of a vehicle on a highway with separate roadways is not required to stop when meeting or passing a school bus that is on a different roadway or, if upon a controlled access highway, when a school bus is stopped off the highway in a loading zone that is part of, or adjacent to, the controlled access highway, and pedestrians are not permitted to cross the highway.

(d) A driver convicted under this section is guilty of a class B misdemeanor and, in addition to other penalties as provided by law, is subject to a mandatory assessment of six demerit points under AS 28.15.221 — 28.15.261.

(e) A vehicle owner, or in the case of a leased vehicle a lessee, is guilty of an infraction as described in AS 28.40.050(d) and may be punished by a fine not to exceed \$100, if the vehicle owned or leased

by the person is operated in violation of this section. The owner or lessee may not be penalized if the vehicle was stolen, or the driver of the vehicle is convicted under (d) of this section. This subsection does not apply to a lessor of a vehicle if the lessor keeps a record of the name and address of the lessee. A violation of this subsection may not result in the loss of a driver's license or privilege to drive and does not constitute grounds for assessment of demerit points under AS 28.15.221 — 28.15.261. This subsection does not prohibit or limit the prosecution of a vehicle driver for violating (a) or (b) of this section. (§ 1 ch 8 SLA 1986; am § 10 ch 76 SLA 1987)

Effect of amendments. — The 1987 amendment, effective January 1, 1988, in the first sentence of subsection (e) inserted "is guilty of an infraction as described in AS 28.40.050(d) and" and substituted "fine" for "civil penalty."

Sec. 28.35.225. Enforcement.

NOTES TO DECISIONS

"Law enforcement officers". — Any member of the police force of an incorporated city or borough is a "law enforcement officer" for purposes of this section. *State v. Burke*, Ct. App. Op. No. 583 (File No. A-908), 714 P.2d 374 (1986).

An airport police officer is a law enforcement officer for purposes of this section. *Clark v. State*, Ct. App. Op. No. 716 (File No. A-1840), 738 P.2d 765 (1987).

Enforcement authority. — This section authorizes all "law enforcement offi-

cers" to stop any vehicle whose driver has committed a statewide traffic offense in the officer's presence, regardless not only of whether the offense was committed within the territorial limits of the jurisdiction which employed the officer, but also of whether the vehicle is in the territorial limits at the time the officer decides to make the stop. *State v. Burke*, Ct. App. Op. No. 583 (File No. A-908), 714 P.2d 374 (1986).

Sec. 28.35.235. Unauthorized use of handicapped parking. (a) A person may not park a motor vehicle in a parking place reserved for disabled or medically handicapped persons unless

(1) the person has a special permit issued by the department under AS 28.10.495;

(2) the motor vehicle displays a special license plate issued to disabled or handicapped persons under AS 28.10.181(d); or

(3) the motor vehicle displays a special license plate or permit issued to disabled or handicapped persons by another state, province, territory, or country.

(b) A person who violates this section is guilty of an infraction. Upon conviction the court shall impose a fine of not less than \$100. (§ 2 ch 11 SLA 1987)

Sec. 28.35.251. Contained or confined loads. (a) A person may not drive a motor vehicle loaded with sand, gravel, rock, or similar materials on a highway unless

(1) the load is contained or confined to prevent the load from dropping, shifting, leaking, or escaping, except that sand or other substances may be dropped, sprinkled, or sprayed for the purpose of cleaning or maintaining the highway or providing traction; and

(2) the load is subjected to treatment by methods, approved by the commissioner by regulation, designed to settle the load or remove loose material before the vehicle is driven on the highway.

(b) If a cover is used to contain or confine a load being driven on a highway, the cover shall be securely fastened to prevent the cover from becoming loose or detached, or from being a hazard to other users of the highway. (§ 1 ch 62 SLA 1986)

Sec. 28.35.253. Anti-spray devices required. A person may not drive a motor vehicle on a highway unless the vehicle is equipped with fenders, mud flaps, or other anti-spray devices adequate to prevent the vehicle from being a hazard to other users of the highway. (§ 1 ch 62 SLA 1986)

Sec. 28.35.255. Penalty. A person convicted of violating AS 28.35.251 or 28.35.253 is guilty of an infraction. (§ 1 ch 62 SLA 1986)

Chapter 37. Driver License Compact.

Article

1. General Provisions (§§ 28.37.010 — 28.37.040)
2. Compact Terms (§§ 28.37.110 — 28.37.190)

Article 1. General Provisions.

Section

10. Compact enacted
20. Licensing authority

Section

30. Expenses of administrator
40. Executive head

Sec. 28.37.010. Compact enacted. The Driver License Compact is enacted into law and entered into with all other jurisdictions legally joining in it in the form substantially contained in AS 28.37.110 — 28.37.190. (§ 18 ch 60 SLA 1986)

Sec. 28.37.020. Licensing authority. In this chapter the term "licensing authority" with reference to this state means the division of motor vehicles in the Department of Public Safety. The department shall furnish to the appropriate authority of another party state the information or documents reasonably necessary to facilitate the administration of AS 28.37.130 — 28.37.150. (§ 18 ch 60 SLA 1986)

Sec. 28.37.030. Expenses of administrator. The compact administrator provided for in AS 28.37.170 is not entitled to additional compensation on account of service as the administrator, but is entitled to expenses incurred in connection with the duties and responsibilities as the administrator, in the same manner as for expenses incurred in connection with other duties or responsibilities of the office or employment. (§ 18 ch 60 SLA 1986)

Sec. 28.37.040. Executive head. In this chapter, with reference to this state, the term "executive head" means the governor. (§ 18 ch 60 SLA 1986)

Article 2. Compact Terms.

Section	Section
110. Findings and policy statement	160. Application of other state laws
120. Compact definitions	170. Administrator of compact
130. Reports of convictions	180. Compact as law, withdrawal procedure
140. Effect of conviction in party state	190. Construction and validity, severability
150. Grounds requiring refusal to issue license	

Sec. 28.37.110. Findings and policy statement. (a) The party states find that

(1) the safety of their streets and highways is materially affected by the degree of compliance with state laws and local ordinances relating to the operation of motor vehicles;

(2) violation of a law or ordinance is evidence that the violator engages in conduct that is likely to endanger the safety of persons and property;

(3) the continuance in force of a license to drive is predicated upon compliance with laws and ordinances relating to the operation of motor vehicles, in whichever jurisdiction the vehicle is operated.

(b) It is the policy of the party states to

(1) promote compliance with the laws, ordinances, and administrative regulations relating to the operation of motor vehicles by their drivers in each of the jurisdictions where those drivers operate motor vehicles;

(2) make the reciprocal recognition of licenses to drive and eligibility for them more just and equitable by considering the overall compliance with motor vehicle laws, ordinances, and administrative regulations as a condition precedent to the continuance or issuance of a license by reason of which the licensee is authorized or permitted to operate a motor vehicle in the party states. (§ 18 ch 60 SLA 1986)

Sec. 28.37.120. Compact definitions. In this chapter

(1) "conviction" means a conviction of an offense related to the use or operation of a motor vehicle that is prohibited by state law, municipal ordinance, or administrative regulation, or a forfeiture of bail, bond or other security deposited to secure appearance by a person charged with having committed an offense described in this paragraph, and that is required to be reported to the licensing authority under AS 28.37.130;

(2) "home state" means the state that has issued and has the power to suspend or revoke the use of the license or permit to operate a motor vehicle;

(3) "state" means a state, territory, or possession of the United States, the District of Columbia, or the Commonwealth of Puerto Rico. (§ 18 ch 60 SLA 1986)

Sec. 28.37.130. Reports of convictions. The licensing authority of a party state shall report each conviction of a person from another party state occurring within its jurisdiction to the licensing authority of the home state of the licensee. The report shall clearly identify the person convicted; describe the violation specifying the section of the statute, code, or ordinance violated; identify the court in which action was taken; indicate whether a plea of guilty or not guilty was entered, or the conviction was a result of the forfeiture of bail, bond or other security; and shall include any special findings made in connection with the conviction. (§ 18 ch 60 SLA 1986)

Sec. 28.37.140. Effect of conviction in party state. (a) The licensing authority in the home state, for the purposes of suspending, revoking, or limiting the license to operate a motor vehicle, shall give the same effect to the conduct reported under AS 28.37.130 as it would if the conduct had occurred in the home state, in the case of a conviction for

(1) manslaughter or negligent homicide resulting from the operation of a motor vehicle;

(2) driving a motor vehicle while under the influence of intoxicating liquor or a narcotic drug, or under the influence of any other drug to a degree that renders the driver incapable of safely driving a motor vehicle;

(3) any felony in the commission of which a motor vehicle is used;

(4) failure to stop and render aid in the event of a motor vehicle accident resulting in the death or personal injury of another.

(b) As to another conviction, reported under AS 28.37.130, the licensing authority in the home state shall give the effect to the conduct that is provided by the laws of the home state if the offense constituting the conduct report under AS 28.37.130 has elements similar to those of the home state as defined in the home state at the time the

offense constituting the conduct report under AS 28.37.130 was committed.

(c) If the laws of a party state do not provide for offenses or violations denominated or described in precisely the words employed in (a) of this section, the party state shall construe the denominations and descriptions appearing in (a) of this section as being applicable to and identifying the offenses or violations of a substantially similar nature, and the laws of the party state shall contain the provisions necessary to ensure that full force and effect is given to this section. (§ 18 ch 60 SLA 1986)

Sec. 28.37.150. Grounds requiring refusal to issue license. Upon application for a license to drive, the licensing authority in a party state shall ascertain whether the applicant has ever held, or is the holder of a license to drive issued by another party state. The licensing authority in the state where application is made may not issue a license to drive to the applicant if

(1) the applicant has held a license, but the license has been suspended by reason, in whole or in part, of a violation, and the suspension period has not terminated;

(2) the applicant has held a license, but the license has been revoked by reason, in whole or in part, of a violation, and the revocation has not terminated; except that after the expiration of one year from the date the license was revoked, the person may make application for a new license if permitted by law; the licensing authority may refuse to issue a license to an applicant if, after investigation, the licensing authority determines that it will not be safe to grant to the person the privilege of driving a motor vehicle on the public highways;

(3) the applicant is the holder of a license to drive issued by another party state and currently in force, unless the applicant surrenders the license. (§ 18 ch 60 SLA 1986)

Sec. 28.37.160. Application of other state laws. Except as expressly required by provisions of this chapter, nothing in this chapter shall be construed to affect the right of a party state to apply any of its other laws relating to licenses to drive to any person or circumstance, nor to invalidate or prevent any driver license agreement or other cooperative arrangement between a party state and a nonparty state. (§ 18 ch 60 SLA 1986)

Sec. 28.37.170. Administrator of compact. (a) The head of the licensing authority of each party state shall be the administrator of the compact for that state. The administrators of all party states, acting jointly, shall have the power to formulate all necessary and proper procedures for the exchange of information under this compact.

(b) The administrator of each party state shall furnish to the administrator of each other party state the information or documents reasonably necessary to facilitate the administration of the compact. (§ 18 ch 60 SLA 1986)

Sec. 28.37.180. Compact as law; withdrawal procedure.

(a) The compact shall become effective as to any state in which the compact becomes effective as the law of that state.

(b) A party state may withdraw from the compact by enacting a statute repealing the compact as the law of the state, but a withdrawal may not take effect until six months after the executive head of the withdrawing state has given notice of the withdrawal to the executive heads of all other party states. Withdrawal does not affect the validity or applicability by the licensing authorities of states remaining party to the compact of any report of conviction occurring before the withdrawal. (§ 18 ch 60 SLA 1986)

Sec. 28.37.190. Construction and validity; severability. The compact shall be liberally construed so as to effectuate its purposes. The provisions of the compact are severable and if any phrase, clause, sentence, or provision of the compact is declared to be contrary to the constitution of any party state or of the United States or the applicability of it to a government, agency, person or circumstance is held invalid, the validity of the remainder of the compact and the applicability of it to any government, agency, person or circumstance shall not be affected by it. If the compact is held contrary to the constitution of any party state, the compact shall remain in full force and effect as to the remaining states and in full force and effect as to the state affected as to all severable matters. (§ 18 ch 60 SLA 1986)

Chapter 40. General Provisions.

Section 50. Penalty for violations of law, regulations, and municipal ordinances	Section 100. Definitions for title
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Sec. 28.40.050. Penalty for violations of law, regulations, and municipal ordinances. (a) It is a misdemeanor for a person to violate a provision of this title unless the violation is by this title or other law declared to be a felony or an infraction.

(b) A person convicted of a misdemeanor for a violation of a provision of this title for which another penalty is not specifically provided is punishable by a fine of not more than \$500, or by imprisonment for not more than 90 days, or by both. In addition, the privilege to drive or the registration of vehicles may be suspended or revoked.

(c) Unless otherwise specified by law a person convicted of a violation of a regulation adopted under this title, or a municipal ordinance regulating vehicles or traffic when the municipal ordinance does not correspond to a provision of this title, is guilty of an infraction and is punishable by a fine not to exceed \$300.

(d) An infraction, as provided for in (c) of this section, is not considered a criminal offense and may not result in imprisonment, nor is a fine imposed for the commission of an infraction considered a penal or criminal punishment; nor may the commission of a single infraction result in the loss of a driver's license or privilege to drive in this state except as may result from the accumulation of points under AS 28.15.221 — 28.15.261, or the registration of vehicles; nor does a person cited with an infraction have a right to trial by jury or to court-appointed counsel.

(e) [Repealed, § 5 ch 85 SLA 1987.] (§ 50-1-8 ACLA 1949; am § 12 ch 241 SLA 1976; am §§ 22, 23 ch 144 SLA 1977; am § 5 ch 85 SLA 1987)

Effect of amendments. — The 1987 amendment repealed subsection (e), concerning overweight penalties.

NOTES TO DECISIONS

Prerequisite to suspension of license or privilege to drive. — A driver's license or privilege to drive cannot properly be suspended unless the driver was in fact licensed or otherwise actually privileged to drive a motor vehicle within the state. *Roberts v. State*, Ct. App. Op. No. 478 (File No. A-342), 700 P.2d 815 (1985).
Generic penalty provision. — Subsec-

tion (b) is not a penalty provision dealing specifically with the offense of driving while license suspended; rather it is a generic penalty provision, broadly applicable to violations of all Title 28 provisions for which the specific penalties are given. *Roberts v. State*, Ct. App. Op. No. 478 (File No. A-342), 700 P.2d 815 (1985).

Sec. 28.40.100. Definitions for title. (a) Unless otherwise specifically defined or unless the context otherwise requires, in this title and in regulations adopted under this title

(1) "cancel" means the annulment or termination by formal action of the department of a certification, registration, license, permit or privilege issued or allowed under this title or regulations adopted under this title, because of an error or defect in the document issued or the application for issuance or because the person holding the document is no longer entitled to it;

(2) "commissioner" means the commissioner of public safety;

(3) "department" means the Department of Public Safety;

(4) "driver" means a person who drives or is in actual physical control of a vehicle;

(5) "driver's license", or "license" when used in relation to driver licensing, means a license, permit, or privilege to obtain a driver's

license, whether or not a person holds a valid license issued in this or another jurisdiction, to drive a motor vehicle under the laws of this state;

(6) "highway" means the entire width between the boundary lines of every way that is publicly maintained when a part of it is open to the public for purposes of vehicular travel, including but not limited to every street and the Alaska state marine highway system but not vehicular ways or areas;

(7) "motor vehicle" means a vehicle which is self-propelled except a vehicle moved by human or animal power;

(8) "motorcycle" means a vehicle having a seat or saddle for the use of the rider and designed to travel on not more than three wheels in contact with the ground; the term does not include a tractor;

(9) "motor-driven cycle" means a motorcycle, motor scooter, motorized bicycle, or similar conveyance with a motor attached and having an engine with 50 or less cubic centimeters of displacement;

(10) [Repealed, § 88 ch 74 SLA 1985.]

(11) "official traffic-control device" means a sign, signal, marking, or other device not inconsistent with this title, placed or erected by authority of a state or municipal agency or official having jurisdiction, for the purpose of traffic regulating, warning and guiding;

(12) "owner" means a person, other than a lienholder, having the property in or title to a vehicle, including but not limited to a person entitled to the use and possession of a vehicle subject to a security interest in another person, but exclusive of a lessee under a lease not intended as security;

(13) "revoke" means the termination by formal action of the department or a court of a certification, registration, license, permit or privilege issued or allowed under this title or regulations adopted under this title; the certification, registration, license, permit or privilege may not be reissued, renewed or restored during the time for which revoked; however, after that time, an application for a new certificate, registration, license, permit or privilege may be made;

(14) "roadway" means that portion of a highway designed or ordinarily used for vehicular travel, exclusive of the sidewalk, berm, or shoulder, even though the sidewalk, berm, or shoulder is used by persons riding bicycles or other human powered vehicles; and in the event that a highway includes two or more separate roadways, the term refers to each roadway separately but not to all such roadways collectively;

(15) "suspend" means the temporary withdrawal by formal action of the department or a court of a certificate, registration, license, permit or privilege issued or allowed under this title or regulations adopted under this title, effective for a period of time which must be specifically designated by the department or court;

(16) "traffic" means pedestrians, ridden or herded animals, vehicles and other conveyances either singly or together while using a highway or vehicular way or area which is open to public use for purposes of travel;

(17) "underinsured motor vehicle" means a motor vehicle licensed for highway use with respect to ownership, operation, maintenance, or use for which there is a bodily injury or property damage insurance policy or a bond applicable at the time of an accident and the amount of insurance or bond

(A) is less than the limit for uninsured and underinsured coverage of the insured's policy; or

(B) has been reduced by payments to persons other than an insured, injured in an accident, to less than the limit for uninsured and underinsured coverage of the insured's policy;

(18) "vehicle" means a device in, upon, or by which a person or property may be transported or drawn upon or immediately over a highway or vehicular way or area except devices used exclusively upon stationary rails or tracks; and

(19) "vehicular way or area" means a way, path or area, other than a highway or private property, which is designated by official traffic control devices or customary usage and which is open to the public for purposes of pedestrian or vehicular travel, and which way or area may be restricted in use to pedestrians, bicycles, or other specific types of vehicles as determined by the department or other agency having jurisdiction over the way, path or area.

(b) The commissioner shall adopt regulations to define other terms which are used in this title and in regulations adopted under this title. (§ 50-1-1 ACIA 1949; am § 3 ch 81 SLA 1973; am §§ 13, 14 ch 241 SLA 1976; am § 1 ch 135 SLA 1977; am § 14 ch 70 SLA 1984; am § 1 ch 13 SLA 1985; am § 88 ch 74 SLA 1985; am § 2 ch 130 SLA 1988)

Effect of amendments. — The first 1985 amendment in paragraph (9) of subsection (a) substituted "50 or less" for "less than 150" and deleted "or with not to exceed five brake-horsepower" at the end of the paragraph.

The second 1985 amendment repealed

paragraph (10) of subsection (a), which defined "municipality."

The 1988 amendment, effective September 1, 1988, substituted "permit, or privilege to obtain a driver's license" for "permit or privilege" in subsection (a)(5).

NOTES TO DECISIONS

Applied in *Conner v. State*, Ct. App. Op. No. 451 (File No. A-574), 696 P.2d 680 (1985); *Caulkins v. State*, Dept. of Pub. Safety, Sup. Ct. Op. No. 3233 (File No. S-1586), 743 P.2d 366 (1987).

Cited in *State v. Robertson*, Ct. App. Op. No. 774 (File No. A-2130), P.2d (1988).

Chapter 35. Miscellaneous Provisions.

Article

1. Offenses Involving Property Rights (§§ 28.35.015 — 28.35.026)
2. Operating While Intoxicated, Implied Consent (§§ 28.35.030 — 28.35.038)
3. Reckless and Negligent Driving (§§ 28.35.040, 28.35.045)
4. Duties Following Accidents (§§ 28.35.050 — 28.35.130)
5. Miscellaneous Offenses (§§ 28.35.135 — 28.35.245)

Article 1. Offenses Involving Property Rights.

Section

15. Tampering with or damaging a vehicle

Section

24. Renting a motor vehicle
26. Failure to return rental vehicle

Sec. 28.35.010. Driving a vehicle without owner's consent. [Repealed, § 21 ch 166 SLA 1978. For current law, see AS 11.46.484.]

Sec. 28.35.015. Tampering with or damaging a vehicle. A person, without the right to do so, may not tamper with a vehicle, set or attempt to set a vehicle in motion, or damage a part or component of a vehicle. (§ 5 ch 241 SLA 1976)

Collateral references. — 7A Am Jur. 2d, Automobiles and Highway Traffic, §§ 354, 355.

61A C.J.S., Motor Vehicles, § 673.
What constitutes offense of "tampering" with "motor vehicle" or contents, 42 ALR2d 624.

Validity and construction of statute making it a criminal offense to "tamper" with motor vehicle or contents, or to obscure registration plates, 57 ALR2d 606.

Sec. 28.35.020. Conviction in larceny prosecution. [Repealed, § 21 ch 166 SLA 1978.]

Sec. 28.35.024. Renting a motor vehicle. (a) A person may not rent a motor vehicle to a person unless the person renting the vehicle is properly licensed under this title or, if a nonresident, the person is properly licensed under the laws of the jurisdiction of a person's residence.

(b) A person may not rent a motor vehicle until the person has inspected the license of the person to whom the vehicle is to be rented, and has verified the identification of the licensee.

(c) Every person renting a motor vehicle shall keep a record of the registration number of the vehicle rented, the name, address and license number of the person to whom the vehicle is rented, and the date and place when and where the license of the intended driver was issued. The record shall be open to inspection by a peace officer or employee of the department acting in an official capacity.

(d) Every person renting a motor vehicle shall comply with the financial responsibility requirements of this title.

(e) [Effective June 8, 1985.] A person who rents motor vehicles to others shall provide child safety devices in sufficient quantity that all persons to whom the vehicles are to be rented can comply with the requirements of AS 28.05.095. (5 5 ch 241 SLA 1976; am § 2 ch 99 SLA 1984)

Effect of amendments. — The 1984 amendment, effective June 8, 1985, added subsection (e).
Collateral references. — 61A C.J.S., Motor Vehicles, §§ 760e, 768c

Sec. 28.35.025. Obtaining rental vehicle with intent to defraud [Repealed, § 25 ch 144 SLA 1977.]

Sec. 28.35.026. Failure to return rental vehicle. (a) A person in possession of a motor vehicle under an agreement in writing which requires the person to return the vehicle to a particular place or at a particular time who refuses or wilfully neglects to return it to the place and at the time specified in the agreement in writing with the intent to deprive the owner of the vehicle or to convert it to the person's own use, or who secretes, converts, sells or attempts to sell the vehicle or any part of it, upon conviction, punishable by imprisonment for not more than five years, or by a fine of not more than \$1,000, or by both.

(b) In this section, "wilfully neglects" means omits, fails, or forbears, with a conscious purpose to injure, or without regard for the rights of the owner, or with indifference whether a wrong is done the owner or not. (§ 1 ch 37 SLA 1964; am § 18 ch 144 SLA 1977)

NOTES TO DECISIONS

This section is not vague. *Spedel v. State*, Sup Ct Op No 584 (File No. 1014), 460 P 2d 77 (1969).

Concern of section. — All that this section is concerned with is the protection of one select group of persons in the business community — those who rent automobiles. *Spedel v. State*, Sup Ct Op No 584 (File No. 1014), 460 P 2d 77 (1969).

This section does not represent what could be classified as a "public welfare offense." The health, safety and welfare of the public is not involved. *Spedel v. State*, Sup Ct Op No 584 (File No. 1014), 460 P 2d 77 (1969).

The basic infirmity of this section prior to the 1977 amendment was apparent. — This section allowed a man to be convicted of a crime though he had acted entirely innocently, inadvertently or negligently. *Alex v. State*, Sup Ct Op No 689 (File No. 1224), 484 P 2d 677 (1971).

Under the terminology of this section prior to the 1977 amendment it was possible to be guilty of the offense when there was an entire lack of any conscious deprivation of property or intentional injury. *Alex v. State*, Sup Ct Op No 689 (File No. 1224), 484 P 2d 677 (1971).

Under this section prior to the 1977 amendment a person might suffer a felony conviction for a simple negligent failure to act. To make such an act a serious crime without regard to an awareness of wrongdoing or the intentional infliction of injury is inconsistent with the general law. To convict a person of a felony for such an act, without proving criminal intent, is to deprive such person of due process of law. *Alex v. State*, Sup Ct Op No 689 (File No. 1224), 484 P 2d 677 (1971).

If one failed to return an automobile out of neglect, without any intention to deprive the owner of his property or to convert property to his own use, or of doing

wrong to the owner, he was made guilty of a felony prior to the 1977 amendment of this section although he might have acted unwittingly or inadvertently or negligently. This was contrary to the general condition of criminal liability which required not only the doing of an act, but also the existence of a guilty mind during the commission of the act. *Alex v. State*, Sup Ct Op No 689 (File No. 1224), 484 P 2d 677 (1971).

Extent to which section was valid. — This section prior to the 1977 amendment was valid and might be utilized to impose criminal responsibility on one to the extent that he failed to return a motor vehicle "with conscious purpose to injure" the owner of the vehicle. *Spedel v. State*, Sup Ct Op No 584 (File No. 1014), 460 P 2d 77 (1969).

Extent to which section was invalid. — Under the terms of this section prior to the 1977 amendment there was no escape from a felony conviction and a possible five-year prison term for simple negligent failure to return a rented automobile at the time specified in the rental agreement. To make such an act, without consciousness of wrongdoing or intention to inflict injury, a serious crime, and criminals of those who fall within its interdiction, is inconsistent with the general law. To convict a person of a felony for such an act, without proving criminal intent, is to deprive such person of due process of law. To the extent that this section permitted that to happen, it was invalid and of no effect. However, this section was invalid and ineffective only to the extent mentioned, and not in its entirety. It was severable by virtue of AS 01.10.030. *Spedel v. State*, Sup Ct Op No 584 (File No. 1014), 460 P 2d 77 (1969).

Collateral references. — Criminal offenses in connection with rental of motor vehicles, 38 ALR2d 949

No. 1014), 460 P 2d 77 (1969).
In overturning this section, the supreme court adhered to the general rule of law and dictate of justice which requires that to constitute guilt there must be not only a wrongful act but a criminal intention. *Alex v. State*, Sup Ct Op No 689 (File No. 1224), 484 P 2d 677 (1971).

The essential purpose of *Spedel v. State*, Sup Ct Op No 584 (File No. 1014), 460 P 2d 77 (1969), was to prevent criminal liability for a serious felony from being imposed in a manner akin to strict liability, that is, without regard to the accused's awareness of his conduct and intent to commit the proscribed act. *Alex v. State*, Sup Ct Op No 689 (File No. 1224), 484 P 2d 677 (1971).

The gist of the offense under this section is failure to return an automobile with a conscious purpose to injure the owner and not mere failure to pay the rental price. Hence, the constitutional prohibition against imprisonment for debt has not been violated. *Spedel v. State*, Sup Ct Op No 584 (File No. 1014), 460 P 2d 77 (1969).

Felonious intent not inherent in offense. — By defining "wilfully neglects" as specifically, the legislature indicated that the ordinary criminal or felonious intent, as in the case of larceny, is not inherent in the offense of failing to return a rented automobile. *Spedel v. State*, Sup Ct Op No 584 (File No. 1014), 460 P 2d 77 (1969).

Quoted in *State v. Campbell*, Sup Ct Op No 1149 (File No. 2244), 536 P 2d 105 (1975).

Cited in *Kimookuk v. State*, Sup Ct Op No 1704 (File No. 3177), 584 P 2d 25 (1978).

Article 2. Operating While Intoxicated; Implied Consent.

Section	Section
30. Operating a vehicle, aircraft or watercraft while intoxicated	35. Administration of chemical tests without consent
31. Implied consent	36. Forfeiture of motor vehicle
32. Refusal to submit to chemical test	37. Retention of forfeitures
33. Chemical analysis of blood	38. Municipal impoundment and forfeiture
34. Surrender of license or permit	

Sec. 28.35.030. Operating a vehicle, aircraft or watercraft while intoxicated. (a) A person commits the crime of driving while intoxicated if the person operates or drives a motor vehicle or operates an aircraft or a watercraft

(1) while under the influence of intoxicating liquor, or any controlled substance listed in AS 11.71.140 — 11.71.190;

(2) when, as determined by a chemical test taken within four hours after the alleged offense was committed, there is 0.10 percent or more by weight of alcohol in the person's blood or 100 milligrams or more of alcohol per 100 milliliters of blood, or when there is 0.10 grams or more of alcohol per 210 liters of the person's breath; or

(3) while the person is under the combined influence of intoxicating liquor and another substance.

(b) Driving while intoxicated is a class A misdemeanor.

(c) Upon conviction under this section the court shall impose a minimum sentence of imprisonment of not less than 72 consecutive hours and a fine of not less than \$250 if the person has not been previously convicted in this or another jurisdiction of driving while intoxicated under this or another law or ordinance with substantially similar elements or refusal to submit to a chemical test under AS 28.35.032 or another law or ordinance with substantially similar elements. Upon conviction under this section the court shall impose a minimum sentence of imprisonment of not less than 20 consecutive days and a fine of not less than \$500 if, within the preceding 10 years, the person has been previously convicted once in this or another jurisdiction of driving while intoxicated under this or another law or ordinance with substantially similar elements or refusal to submit to a chemical test under AS 28.35.032 or another law or ordinance with substantially similar elements. Upon conviction under this section the court shall impose a minimum sentence of imprisonment of not less than 30 consecutive days and a fine of not less than \$1,000 if, within the preceding 10 years, the person has been previously convicted in this or another jurisdiction of more than one of the following offenses: (1) driving while intoxicated under this or another law or ordinance with substantially similar elements; (2) refusal to submit to a chemical test under AS 28.35.032 or another law or ordinance with substantially similar elements. The execution of sentence may not be suspended nor may probation be granted except on condition that the minimum imprisonment provided in this section is served. Imposition of sentence may not be suspended. In addition, if the offense involved driving a motor vehicle for which a driver's license is required, the person's driver's license shall be revoked in accordance with AS 28.15.181 and the vehicle used in commission of the offense may be forfeited under AS 28.35.036. In addition, the court shall order, and a person convicted under this section shall undertake, for a term specified by the court, that program of

alcohol education or rehabilitation that the court, after consideration of any information compiled under (d) of this section, finds appropriate.

(d) Except as prohibited by federal law or regulation, every provider of treatment programs to which persons are ordered under (c) of this section shall supply the Alaska court system with the information regarding the condition and treatment of those persons as the supreme court may require by rule. Information compiled under this subsection is confidential and may only be used by a court in sentencing a person convicted under (c) of this section, or by an officer of the court in preparing a presentence report for the use of the court in sentencing a person convicted under (c) of this section.

(e) A person who is sentenced to imprisonment for 72 consecutive hours upon a first conviction under (c) of this section and who is not released from imprisonment after 72 hours may not bring an action against the state or a municipality or its agents, officers, or employees for damages resulting from the additional period of confinement if

(1) the employee or employees who released the person exercised due care and, in releasing the person, followed the standard release procedures of the prison facility; and

(2) the additional period of confinement did not exceed 12 hours.

(f) For purposes of this section, convictions for both driving while intoxicated and for refusal to submit to a chemical test of breath under AS 28.35.031(a), if arising out of a single transaction and a single arrest, are considered one previous conviction.

(g) In this section,

(1) "operate an aircraft" means to use, navigate, pilot, or taxi an aircraft in the airspace over this state, or upon the land or water inside this state;

(2) "operate a watercraft" means to navigate or use a vessel used or capable of being used as a means of transportation on water for recreational or commercial purposes on all waters, fresh or salt, inland or coastal, inside the territorial limits or under the jurisdiction of the state. (§ 60-5-3 ACLA 1949; am § 1 ch 107 SLA 1955; am § 1 ch 121 SLA 1967; am § 45 ch 32 SLA 1971; am § 4 ch 74 SLA 1974; am §§ 2, 3 ch 152 SLA 1978; am § 28 ch 94 SLA 1980; am § 10 ch 129 SLA 1980; am § 21 ch 45 SLA 1982; am §§ 13 — 15 ch 117 SLA 1982; am §§ 13 — 15 ch 77 SLA 1983)

Reviser's notes. — In 1984, former subsection (f) was redesignated as present subsection (g) and former subsection (g) was redesignated as present subsection (f).

Cross references. — For sentences for class A misdemeanors, see AS 12.55.035(b)(3) and 12.55.135(a).

Effect of amendments. — The first 1980 amendment, in subsection (a) as it existed prior to the second 1980 amendment, deleted "under AS 11.05.150" from

the end of the third sentence and substituted "AS 28.15.181" for "AS 28.15.210(c)" in the fourth sentence.

The second 1980 amendment rewrote the section.

The first 1982 amendment substituted "or any controlled substance listed in AS 11.71.140 — 11.71.190" for "depressant, hallucinogenic, stimulant or narcotic drug as defined in AS 17.10.200(1)" and AS 17.12.150(3)" in subsection (a)(1).

Add
(3)

The second 1982 amendment added "or operates an aircraft or a watercraft" to the end of the introductory language of subsection (a), and in subsection (c), substituted "72 consecutive hours" for "three consecutive days" at the end of the first sentence, substituted "of driving while intoxicated in this or any other state or conviction of refusal to submit to a chemical test of breath under AS 28.35.032" for "under this section" in the second sentence, and added the language beginning "unless the subsequent conviction is within one year" to the end of the second sentence. The amendment also added subsections (e) and (g).

The 1983 amendment in paragraph

(a)(2) inserted ", as determined, offense was committed," rewrite subsection (c) and added subsection (f).

Editor's notes. — For declaration of legislative purpose, see § 1, ch. 45, S.L.A. 1982 in the 1982 Temporary and Special Acts and Resolves.

Opinions of attorney general. — The term "public street or highway" is sufficiently broad to include subdivision streets dedicated to the public. 1965 Op. Att'y Gen., No. 10.

The Department of Public Safety may enforce this section and AS 28.35.040 on subdivision roads under public use. 1965 Op. Att'y Gen., No. 10.

NOTES TO DECISIONS

Legislative history. — See Van Brunt v. State, Ct. App. Op. No. 149 (File No. 6046, 6064, 6189), 653 P.2d 343 (1982).

This section was not enacted in violation of the one-subject rule. Van Brunt v. State, Ct. App. Op. No. 98 (File No. 6046, 6064, 6189), 646 P.2d 872 (1982).

The prohibition on driving while under the "combined influence of intoxicating liquor and another substance" is so vague that it fails to proscribe an activity apart from subsection (a)(1), and it cannot be given any construction that would correct this failure. Willford v. State, Sup. Ct. Op. No. 2751 (File No. 5986), 674 P.2d 1329 (1983).

The meaning of "combined influence" is clear. Willford v. State, Sup. Ct. Op. No. 2751 (File No. 5986), 674 P.2d 1329 (1983).

The term "another substance" is unconstitutionally vague because a person is given no notice as to what substances, when used in combination with alcohol, are prohibited. Willford v. State, Sup. Ct. Op. No. 2751 (File No. 5986), 674 P.2d 1329 (1983).

The word "drug" cannot be substituted for "substance," which is not defined under the driving while intoxicated laws, since under the dictionary definitions, "substance" is not synonymous with "drug," but is a much broader term, encompassing all matter, not just medicinal substances. Willford v. State, Sup. Ct. Op. No. 2751 (File No. 5986), 674 P.2d 1329 (1983).

Constitutionality of warrantless arrests for violations. — AS 12.25.033, which permits a police officer to arrest a defendant for violation of this section on probable cause but without a warrant, does not violate Alaska Const., art. I, § 14

prohibiting unreasonable searches and seizures and the corresponding provisions of the federal constitution because these constitutional provisions are not offended by warrantless searches or arrests based on exigent circumstances and the legislature has determined that exigent circumstances exist where there is probable cause to believe a suspect is driving while intoxicated. Proctor v. State, Ct. App. Op. No. 83 (File No. 5718), 643 P.2d 5 (1982).

1980 amendment enacted constitutionally. — The 1980 version of this section, which with three other amendments to the driving while intoxicated statute, was added to a bill changing various state liquor laws (Senate Bill 365, ch. 129, S.L.A. 1980) by the free conference committee, was not enacted in violation of Alaska Const., art. II, § 14 since the constitutional requirement that bills be read three times does not extend to an amended bill when the amendments do not change the subject of the bill. Van Brunt v. State, Ct. App. Op. No. 149 (File No. 6046, 6064, 6189), 653 P.2d 343 (1982).

And in accordance with Uniform Rule 42(b). — The 1980 version of this section, which with three other amendments to the driving while intoxicated law was added to Senate Bill 365 (ch. 129, S.L.A. 1980) by the free conference committee, was not enacted in violation of Rule 42(b) of the Uniform Rules of the Alaska State Legislature since the amendment was "germane" to the bill, which changed various state liquor laws. Van Brunt v. State, Ct. App. Op. No. 149 (File No. 6046, 6064, 6189), 653 P.2d 343 (1982).

This section prohibits a person who is under the influence of intoxicating liquor being in actual physical control

of a vehicle with its motor running. Jacobson v. State, Sup. Ct. Op. No. 1282 (File No. 2478), 551 P.2d 935 (1976).

Reasonable suspicion of intoxication. — Police officer's suspicion that driver was possibly intoxicated and posed an imminent danger while driving was reasonable. Larson v. State, Ct. App. Op. No. 292 (File No. 7167), 669 P.2d 1334 (1983).

The words "operate" and "drive" have differing connotations and refer to different acts. Jacobson v. State, Sup. Ct. Op. No. 1282 (File No. 2478), 551 P.2d 935 (1976).

As a general proposition, it appears that "to operate" includes a larger class of activities than "to drive." While one who drives a vehicle must necessarily in that process operate it, the reverse is not necessarily so. Jacobson v. State, Sup. Ct. Op. No. 1282 (File No. 2478), 551 P.2d 935 (1976).

A conviction under subsection (a) of this section cannot be based on the use of a drug which had not been specifically designated by regulation as a drug which carried criminal sanctions for its use while driving. Crutchfield v. State, Sup. Ct. Op. No. 2207 (File No. 4474), 627 P.2d 196 (1980).

Right to counsel guaranteed. — When convicted for violating this section, a person may receive a fine of not more than \$1,000 or a term of imprisonment for not more than one year, or both. Therefore, such case is one in which the right to counsel is guaranteed an accused by the Alaska Constitution. Gregory v. State, Sup. Ct. Op. No. 1269 (File No. 2467), 550 P.2d 374 (1976).

Right to counsel before breathalyzer test. — When a person is arrested for operating a motor vehicle in violation of state or local drunken driving ordinances, and requests to contact an attorney, the arrestee must be afforded a reasonable opportunity to do so before being required to decide whether or not to submit to a breathalyzer test, and where arrestee is denied that opportunity, subsequently obtained evidence, whether in form of test results or of refusal to take test, must be suppressed. Copelin v. State, Sup. Ct. Op. No. 2617 (File Nos. 5453, 5708), 659 P.2d 1206 (1983).

The statutory right to contact and consult with counsel prior to being required to decide whether or not to submit to a breathalyzer test is not an absolute one, which might involve a delay long enough to impair testing results, but, rather, a

limited one of reasonable time and opportunity that can be reconciled with the implied consent statutes. Copelin v. State, Sup. Ct. Op. No. 2617 (File Nos. 5453, 5708), 659 P.2d 1206 (1983).

No right to counsel during video taping of field sobriety tests. — A person suspected of operating a motor vehicle while under the influence of intoxicating liquor (now driving while intoxicated) has no right to have counsel present during the video taping of field sobriety tests performed at the request of the arresting officer. Anchorage v. Geber, Sup. Ct. Op. No. 1824 (File Nos. 4016, 4037, 3827, 4046), 592 P.2d 1187 (1979); Copelin v. State, Ct. App. Op. No. 343 (File No. A-35), 676 P.2d 608 (1984).

Field sobriety tests distinguished from lineups or taking of handwriting exemplars. — See Anchorage v. Geber, Sup. Ct. Op. No. 1824 (File Nos. 4016, 4037, 3827, 4046), 592 P.2d 1187 (1979).

Presumption in breathalyzer result. — Under the wording of AS 28.35.033, the breathalyzer result is clearly viewed as the presumptive equivalent of the amount of alcohol in the person's blood "at the time alleged", in other words, at the time the offense was committed, not just when the breathalyzer examination was administered. Doyle v. State, Ct. App. Op. No. 43 (File No. 5115), 633 P.2d 306 (1981).

To be charged under this section rather than city of Anchorage Municipal Code 8.28.020 when both provisions apply to the same general facts does not constitute an arbitrary application of the law violative of constitutional safeguards of equal protection. Wester v. State, Sup. Ct. Op. No. 1106 (File No. 2169), 528 P.2d 1178 (1974), cert. denied, 423 U.S. 836, 96 S. Ct. 60, 46 L. Ed. 2d 54 (1975).

When blood-alcohol tests should be suppressed. — Blood-alcohol test findings should be suppressed where the blood was withdrawn from a conscious nonconsenting person without an arrest substantially contemporaneous with the taking. Layland v. State, Sup. Ct. Op. No. 1150 (File No. 2264), 535 P.2d 1043 (1975), aff'd, Sup. Ct. Op. No. 2739, 549 P.2d 1182 (1976), overruled on other grounds, City of Anchorage v. Geber, Sup. Ct. Op. Nos. 3827, 4016, 4037, 4046, 592 P.2d 1192 (1979).

In prosecuting a charge of operating a motor vehicle while under the influence of intoxicating liquor (now driving while intoxicated) law enforcement officials cannot utilize the results of a blood alcohol test, when the blood used in performing

the test was extracted from the accused against his or her will, after refusal to submit to a breathalyzer examination. *Anchorage v Geber*, Sup Ct Op No 1824 (File Nos 4016, 4037, 3827, 4046), 592 P.2d 1187 (1979). See notes to AS 28.35.031 - 28.35.033.

Trooper arriving at accident scene cannot arrest for drunk driving without warrant. — The Alaska legislature has classified both reckless driving and operating or driving an automobile under the influence of intoxicating liquor as misdemeanors. Thus, a state trooper who arrived at an accident scene could not arrest a driver without a warrant for either reckless driving or drunk driving since neither of these offenses was committed or attempted in his presence. *Layland v. State*, Sup Ct. Op. No. 1150 (File No 2264), 535 P.2d 1043 (1975), aff'd, Sup Ct. Op. No 2739, 549 P.2d 1182 (1976), overruled on other grounds, *City of Anchorage v Gebot*, Sup Ct. Op. Nos 3827, 4016, 4037, 4046, 592 P.2d 1192 (1979).

The fact that a man consumed from seven to ten ounces of whiskey during an 18-hour period was not shown by the evidence to necessarily cause him to be intoxicated. *Bertram v Harris*, Sup Ct. Op. No. 393 (File No 677), 423 P.2d 909 (1967).

Effect of alcohol consumption after accident a jury question. — The issue of whether and to what extent defendant's consumption of alcohol after the accident but before a breathalyzer examination affected his breathalyzer result was a question which was properly left for the jury. *Doyle v. State*, Ct. App. Op. No. 43 (File No 5115), 633 P.2d 306 (1981).

State need not show that defendants knew they were intoxicated. — The state need not show that defendants actually knew that they were under the influence of intoxicating liquor or that their blood or breath alcohol levels were in excess of 0.10. *Van Drunt v. State*, Ct. App. Op. No. 98 (File Nos. 6046, 6061, 6189), 646 P.2d 872 (1982).

Preserving breath samples. — Due process clause of the Alaska Constitution requires prosecution to make reasonable efforts to preserve breath samples or to take other steps to allow defendant to verify results of breathalyzer test. *Municipality of Anchorage v Serrano*, Ct. App. Op. No. 115 (File Nos 6447, 6724, 6725), 649 P.2d 258 (1982).

Preservation of blood sample. — Where blood sample was taken by and was

in possession of hospital where defendant sought treatment following car accident, and where, on the facts of the case, both defendant and state had opportunity to preserve the sample, trial court did not err in ruling that the blood test results were admissible even though the state had not sought preservation of the blood sample. *Bradley v. State*, Ct. App. Op. No. 248 (File No. 7335), 662 P.2d 993 (1983).

Blood tests as business records. — Results of a hospital blood alcohol test are admissible as business records in driving while intoxicated prosecution upon proper foundation. *Bradley v. State*, Ct. App. Op. No. 248 (File No. 7335), 662 P.2d 993 (1983).

Evidence that defendant drove erratically and appeared intoxicated to arresting officers was properly admitted since such evidence would tend to corroborate a breathalyzer reading showing an elevated blood alcohol level. *Byrne v. State*, Ct. App. Op. No. 169 (File No. 6375), 654 P.2d 795 (1982).

Effect of charges for other violations. — Although defendant had been convicted of leaving the scene of an accident and acquitted of failing to exercise care to avoid colliding with another vehicle, collateral estoppel did not preclude defendant's subsequent prosecution for operating a motor vehicle under the influence of intoxicating liquor. *Miller v. State*, Ct. App. Op. No. 135 (File No. 5429), 652 P.2d 494 (1982).

Lesser included offenses. — Defendant's prior conviction for leaving the scene of an accident and his acquittal for failure to exercise care to avoid colliding with another vehicle did not bar his prosecution for operating a motor vehicle under the influence of intoxicating liquor under the state and federal constitutional provisions prohibiting placing a criminal defendant twice in jeopardy since the state could not have discovered the evidence necessary to convict defendant of operating a motor vehicle under the influence of intoxicating liquor prior to his trial for leaving the scene and failing to avoid the accident on the exercise of due diligence. *Miller v. State*, Ct. App. Op. No. 135 (File No. 5429), 652 P.2d 494 (1982).

Enhanced license revocation. — Conviction under another state's statute may be used for purposes of enhanced license revocation under AS 28.15.181(b). *Carter v. State*, Ct. App. Op. No. 010 (File No. 5144), 625 P.2d 313 (1981).

Application of three-year license revocation provision of AS 28.15.181(b) to

defendant whose prior two OMTI (operating a motor vehicle while under the influence of intoxicating liquor or drug) convictions were in 1974 and 1976 did not violate the constitutional prohibitions against ex post facto laws. *Carter v. State*, Ct. App. Op. No. 010 (File No. 5144), 625 P.2d 313 (1981).

Local ordinances. — Municipality's ordinance which sought to impose criminal sanctions against persons who drove after consuming alcohol on the sole basis of the quantity of alcohol consumed and without regard to the existence or lack of existence of any actual influence or impairment in driving related to alcohol consumption was inconsistent with the state's statutory framework for drunk driving, under which the crucial element for imposition of criminal penalties was the existence of actual influence or impairment and thus invalid. *Simpson v. Municipality of Anchorage*, Ct. App. Op. No. 57 (File Nos 4945, 4946, 5288), 635 P.2d 1197 (1981).

For case construing this section and former AS 28.15.210(c). — See *Danka v. State*, Sup Ct. Op. No. 2216 (File No. 4952), 619 P.2d 720 (1980).

Evidence held sufficient to support verdict of guilty. — See *Beck v. State*, Sup Ct. Op. No. 310 (File No. 611), 478 P.2d 996 (1965).

Conviction under this section admissible as evidence in proving negligence in subsequent civil action. — See *Scott v. Robertson*, Sup Ct. Op. No. 1678 (File No. 3436), 581 P.2d 669 (1978).

Sentence upheld. — Sentence of 120 days' incarceration, three years' license revocation, and a \$1,000 fine was not excessive for offense of driving while intoxicated. *Kennedy v. State*, Ct. App. Op. No. 215 (File No. 6830), 657 P.2d 859 (1983).

Applied in *Deere v. United States*, 268 F.2d 912 (9th Cir. 1959), *State v. Gibson*, Sup Ct. Op. No. 1215 (File No. 2415), 543 P.2d 406 (1975), *Wirz v. State*, Sup Ct. Op. No. 1593 (File No. 3516), 577 P.2d 227 (1978), *Leibetter v. State*, Sup Ct. Op. No. 1682 (File No. 3500), 681 P.2d 1129 (1978).

Collateral references. — 7A Am Jur 2d, Automobiles and Highway Traffic, § 296 et seq.; 19 Am Jur Trials, pp 123-229; 17 Am Jur POF 2d, pp 1-50.

61A C.J.S., Motor Vehicles, §§ 37, 625 to 637.
Driving automobile while intoxicated as

State v. Guarderas, Sup Ct. Op. No. 1782 (File No. 3738), 689 P.2d 870 (1979), *Keel v. State*, Sup Ct. Op. No. 2063 (File No. 4408), 609 P.2d 555 (1980), *Nelson v. State*, Ct. App. Op. No. 129 (File No. 6222), 650 P.2d 426 (1982), *Ahsogack v. State*, Ct. App. Op. No. 147 (File No. 6601), 652 P.2d 505 (1982), *Metzker v. State*, Ct. App. Op. No. 208 (File No. 5919), 658 P.2d 147 (1983), *Coleman v. State*, Ct. App. Op. No. 229 (File No. 7215), 658 P.2d 1364 (1983), *Wilson v. State*, Ct. App. Op. No. 356 (File Nos 7523, 7526, 7833), P.2d (1984).

Quoted in *City of Fairbanks v. Schrock*, Sup Ct. Op. No. 567 (File No. 1032), 457 P.2d 242 (1969), *Solberg v. State*, Sup Ct. Op. No. 1478 (File No. 3199), 568 P.2d 1 (1977), *Elson v. State*, Sup Ct. Op. No. 1606 (File No. 3495), 577 P.2d 698 (1978).

Stated in *Godwin v. State*, Sup Ct. Op. No. 1278 (File No. 2793), 554 P.2d 463 (1976), *Williams v. State*, Sup Ct. Op. No. 2180 (File No. 4367), 616 P.2d 881 (1980), *Pascua v. State*, Ct. App. Op. No. 40 (File No. 5154), 633 P.2d 1033 (1981).

Cited in *Gullarde v. State*, Sup Ct. Op. No. 794 (File No. 1606), 497 P.2d 93 (1972), *State v. Nease*, Superior Court, 1st Jud. Dist., Cr. No. 72-23 (1972), *Ravin v. State*, Sup Ct. Op. No. 1156 (File No. 2135), 637 P.2d 494 (1975), *Layland v. State*, Sup Ct. Op. No. 1263 (File No. 2739), 549 P.2d 1182 (1978), *City of Kodiak v. Jackson*, Sup Ct. Op. No. 1741 (File No. 3480), 584 P.2d 1130 (1978), *Westdahl v. State*, Sup Ct. Op. No. 1818 (File No. 3928), 592 P.2d 1214 (1979), *Graham v. State*, Sup Ct. Op. No. 2403 (File No. 4092), 633 P.2d 211 (1981), *Ketler v. State*, Ct. App. Op. No. 47 (File Nos 5069, 5118), 634 P.2d 561 (1981), *City of Anchorage v. Richards*, Ct. App. Op. No. 173 (File Nos 6387, 6459, 6504, 6510), 654 P.2d 797 (1982), *Creary v. State*, Ct. App. Op. No. 252 (File Nos 6777, 6778), 663 P.2d 226 (1983), *Jensen v. State*, Ct. App. Op. No. 271 (File No. 7488), 667 P.2d 188 (1983), *State v. Moran*, Ct. App. Op. No. 277 (File No. 7614), 667 P.2d 734 (1983).

a substantive criminal offense, 42 ALR 1498, 49 ALR 1392, 68 ALR 1350, 142 ALR 555.

Effect of statute on civil liability of person driving automobile while under influence of liquor, 56 ALR 327.

Degree or nature of intoxication for

purposes of statute or ordinance making it a criminal offense to operate an automobile while in that condition, 142 ALR 555

What is a "motor vehicle" within statutes making it an offense to drive while intoxicated, 66 ALR2d 1146

Right to trial by jury in criminal prosecution for driving while intoxicated or similar offense, 16 ALR1d 1373

Driving under the influence, or when addicted to the use, of drugs as criminal offense, 17 ALR1d 816

Applicability, to operation of motor vehicle on private property, of legislation making drunken driving a criminal offense, 29 ALR3d 938

What amounts to violation of drunken driving statute in officer's "presence" or "view" so as to permit warrantless arrest, 74 ALR1d 1138

What constitutes driving, operating, or being in control of motor vehicle for purposes of driving while intoxicated statute or ordinance, 93 ALR3d 7

Reckless driving as lesser included offense of driving while intoxicated or similar charge, 10 ALR4th 1252

Denial of accused's request for initial contact with attorney — drunk driving cases, 18 ALR4th 705

Sec. 28.35.031. Implied consent. (a) A person who operates or drives a motor vehicle in this state or who operates an aircraft as defined in AS 28.35.030(g)(1) or who operates a watercraft as defined by AS 28.35.030 (g)(2) shall be considered to have given consent to a chemical test or tests of the person's breath for the purpose of determining the alcoholic content of the person's blood or breath if lawfully arrested for an offense arising out of acts alleged to have been committed while the person was operating or driving a motor vehicle or operating an aircraft or a watercraft while intoxicated. The test or tests shall be administered at the direction of a law enforcement officer who has reasonable grounds to believe that the person was operating or driving a motor vehicle or operating an aircraft or a watercraft in this state while intoxicated.

(b) A person who operates or drives a motor vehicle in this state shall be considered to have given consent to a preliminary breath test for the purpose of determining the alcoholic content of the person's blood or breath. A law enforcement officer may administer a preliminary breath test at the scene of the incident if the officer has reasonable grounds to believe that a person's ability to operate a motor vehicle is impaired by the ingestion of alcoholic beverages and that the person

- (1) was driving a motor vehicle that is involved in an accident, or
- (2) committed a moving traffic violation.

(c) Before administering a preliminary breath test under (b) of this section, the officer shall advise the person that refusal may be used against the person in a civil or criminal action arising out of the incident and that refusal is an infraction. If the person refuses to submit to the test, the test shall not be administered.

(d) The result of the test under (b) of this section may be used by the law enforcement officer to determine whether the driver should be arrested.

(e) Refusal to submit to a preliminary breath test at the request of a law enforcement officer is an infraction.

(f) If a driver is arrested, the provisions of (a) of this section apply. The preliminary breath test authorized in this section is in addition to any tests authorized under (a) of this section. (§ 1 ch 83 SLA 1969, am § 11 ch 129 SLA 1980; am § 16 ch 117 SLA 1982; am § 16 ch 77 SLA 1983)

Effect of amendments. — The 1980 amendment, in present subsection (a), inserted "or breath" in the first sentence and substituted "intoxicated" for "under the influence of intoxicating liquor" in the first and second sentences.

The 1982 amendment, in present subsection (a), inserted the language

beginning "or who operates an aircraft" and ending "described by AS 28.35.030 (f)(2)" in the first sentence and inserted "or operating an aircraft or a watercraft" in the first and second sentences.

The 1983 amendment added subsections (b), (c), (d), (e), and (f).

NOTES TO DECISIONS

Editor's notes. — *Anchorage v. Geber*, Sup. Ct. Op. No. 1824 (File No. 4016, 4037, 3827, 4046), 692 P.2d 1187 (1979), and other cases cited in the notes below, were decided prior to the enactment of AS 28.35.035, which authorizes the administration of a chemical test without consent in certain circumstances to determine the amount of alcohol in breath or blood.

Consent to breathalyzer test when driver operates motor vehicle in state. — It is clear from this section that a driver consents to take the breathalyzer test when he operates a motor vehicle in the State of Alaska. *State v. Nease*, Superior Court, 1st Jud. Dist., Cr. No. 72-23 (1972).

Analysis of this section and AS 28.35.032 demonstrates the legislature's intention that drivers be considered to have consented to a chemical test for determining the alcohol content of their blood and that refusal on the driver's part to submit to such a test will trigger certain specified consequences. *Wirz v. State*, Sup. Ct. Op. No. 1593 (File No. 3516), 577 P.2d 227 (1978).

As the supreme court analyzes the legislature's intent in enacting this section and AS 28.35.032, the sections provide that the operator of a motor vehicle in Alaska has consented to chemical tests of his blood's alcohol content and that after the arrested operator refuses to take the chemical test, he must be advised of the consequences flowing from his contemplated refusal. The arrestee must be permitted to reconsider his refusal in light of that information. *Wirz v. State*, Sup. Ct. Op. No. 1593 (File No. 3516), 577 P.2d 227 (1978).

Application of case law. — *Munk-*

ipality of Anchorage v. Serrano, Ct. App. Op. No. 115 (File No. 6275), 649 P.2d 256 (1982), and *Cooley v. Municipality of Anchorage*, Ct. App. Op. No. 114 (File No. 5859, 6112, 6151), 649 P.2d 251 (1982), apply to only three categories of cases: (1) cases formally joined with those decided in *Serrano* and *Cooley*, (2) cases in which suppression had already been ordered on or before August 6, 1982, and (3) cases in which breathalyzer tests were administered after August 6, 1982. *State v. Lamb*, Ct. App. Op. No. 118 (File No. 7071), 649 P.2d 971 (1982).

Statutes do not explicitly grant right to refuse test. — Neither this section nor AS 28.35.032(a) explicitly grants or recognizes a right on the part of an arrestee to refuse to take a breathalyzer test. *Wirz v. State*, Sup. Ct. Op. No. 1593 (File No. 3516), 577 P.2d 227 (1978).

One required to take a breathalyzer test under this section does not have any statutory or constitutional right to refuse to take it. *Pearcy v. State*, Ct. App. Op. No. 309 (File No. 6783), 672 P.2d 903 (1984).

Nor do they impose a duty upon the arresting officer to advise the driver that he has the right to refuse to take the test. *Wirz v. State*, Sup. Ct. Op. No. 1593 (File No. 3516), 577 P.2d 227 (1978).

Neither this section nor AS 28.35.032 requires that the arrested operator be advised he has the right to refuse to take a chemical test for the purpose of determining the alcohol content of his blood. *Wirz v. State*, Sup. Ct. Op. No. 1593 (File No. 3516), 577 P.2d 227 (1978).

One required to take a breathalyzer test under this section does not have to be

advised that he does not have to take examination *Pears v. State*, Ct App Op No 309 (File No 6783), 672 P 2d 903 (1983).

And the supreme court would not imply a requirement that an arrestee be advised that he has the right to refuse to take a breathalyzer test. *Wirz v. State*, Sup Ct Op No 1593 (File No 3516), 577 P 2d 227 (1978).

Given the absence of a specific requirement that arrestees be advised of a right to refuse to undergo the chemical test, it would be inappropriate for this court to engraft such a requirement onto this section. *Wirz v. State*, Sup Ct Op No 1593 (File No 3516), 577 P 2d 227 (1978).

Although several states have chosen to provide that the arrestee has a right to refuse to take a breathalyzer test and, further, that the arresting officer must inform him of such right, Alaska's legislature has not adopted such provision. *Wirz v. State*, Sup Ct Op No 1593 (File No 3516), 577 P 2d 227 (1978).

Advice to arrestee confused about rights. — Where an arrested person refuses to submit to a breathalyzer test, the administering officer must inquire into the nature of the refusal and, if it appears that the refusal is based on a confusion about the person's rights, the officer must clearly advise that person that the rights contained in the *Miranda* warning do not apply to the breathalyzer examination. *Graham v. State*, Sup Ct Op No 2403 (File No 4092), 633 P 2d 211 (1981).

Warnings of consequences of refusal. — While evidence of the warnings given regarding the consequences of refusal to take a breathalyzer test may have been relevant to the issue of mens rea, the absence of more detailed warnings regarding penalties for refusal did not deprive defendant of due process or warrant a directed verdict of acquittal in his favor. *Svedlund v. Municipality of Anchorage*, Ct App Op No 301 (File No 7581), 671 P 2d 378 (1983), construing municipal ordinance.

This section and AS 28.35.032 do not contemplate an evidentiary use of the fact of refusal to submit to a breathalyzer test. *Miller v. Municipality of Anchorage*, Sup Ct Op No 1575 (File No 3232), 574 P 2d 1265 (1978).

Preservation of breath samples. — Due process clause of the Alaska Constitution requires prosecution to make reasonable efforts to preserve breath sample or to take other steps to allow defendant to verify results of breathalyzer test. *Municipality of Anchorage v. Serrano*, Ct App Op No 115 (File Nos 6147, 6724, 6725), 649 P 2d 256 (1982).

Right to counsel before breathalyzer test. — When a person is arrested for operating a motor vehicle in violation of state or local drunken driving ordinances, and requests to contact an attorney, the arrestee must be afforded a reasonable opportunity to do so before being required to decide whether or not to submit to a breathalyzer test, and where arrestee is denied that opportunity, subsequently obtained evidence, whether in form of test results or of refusal to take test, must be suppressed. *Copelin v. State*, Sup Ct Op No 2617 (File Nos 5453, 5708), 259 P 2d 1206 (1983).

The statutory right to contact and consult with counsel prior to being required to decide whether or not to submit to a breathalyzer test is not an absolute one, which might involve a delay long enough to impair testing results, but rather a limited one of reasonable time and opportunity that can be reconciled with the implied consent statutes. *Copelin v. State*, Sup Ct Op No 2617 (File Nos 5453, 5708), 259 P 2d 1206 (1983).

A person suspected of driving while intoxicated had a statutory right to contact an attorney before deciding whether or not to submit to a breathalyzer test if (1) he requested an opportunity to contact an attorney, and (2) granting the request would not involve a delay long enough to impair test results. *Svedlund v. Municipality of Anchorage*, Ct App Op No 301 (File No 7581), 671 P 2d 378 (1983).

A breathalyzer exam is not a "critical stage" at which the constitution requires counsel's presence. *Svedlund v. Municipality of Anchorage*, Ct App Op No 301 (File No 7581), 671 P 2d 378 (1983).

While a defendant has a statutory right to contact counsel, where he never requested an opportunity to contact counsel and there was nothing in the record to show that the police affirmatively interfered with any attempt by defendant to obtain counsel, he was not denied right to counsel. *Svedlund v. Municipality of Anchorage*, Ct App Op No 301 (File No 7581), 671 P 2d 378 (1983).

Miranda rights. — Defendant's constitutional rights were not violated by not informing him of his *Miranda* rights prior to asking him to take a breathalyzer exam. *Svedlund v. Municipality of Anchorage*, Ct App Op No 301 (File No 7581), 671 P 2d 378 (1983), construing municipal law.

Videotape recording of defendant while a breathalyzer examination was being administered to him and while he performed other sobriety tests, made at state trooper headquarters following defendant's arrest for operating a motor vehicle while under the influence of intoxicating liquor (now driving while intoxicated), did not violate defendant's right to privacy under Alaska Const., art. I, § 22. *Palmer v. State*, Sup Ct Op No 2002 (File No 3651), 604 P 2d 1106 (1979).

The Implied Consent Statute was intended to provide an exclusive method for obtaining direct evidence of a suspect's blood alcohol content, absent his or her express consent to the use of some other form of testing. *Anchorage v. Geber*, Sup Ct Op No 1824 (File Nos 4016, 4037, 3827, 4046), 592 P 2d 1187 (1979).

No other chemical test allowed after breath test refused. — The express language of AS 28.35.032(a), coupled with the legislative history of the Implied Consent Statute, leads to the conclusion that in enacting the Implied Consent Statute the legislature intended that once a breath test had been refused no other chemical test would be allowed. *Anchorage v. Geber*, Sup Ct Op No 1824 (File Nos 4016, 4037, 3827, 4046), 592 P 2d 1187 (1979).

In prosecuting a charge of operating a motor vehicle while under the influence of intoxicating liquor (now driving while intoxicated), law enforcement officials cannot utilize the results of a blood alcohol test, when the blood used in performing the test was extracted from the accused against his or her will, after refusal to submit to a breathalyzer examination. *Anchorage v. Geber*, Sup Ct Op No 1824 (File Nos 4016, 4037, 3827, 4046), 592 P 2d 1187 (1979).

Use of search warrant. — The implied consent statute does not constitute an affirmative prohibition against the independent means of using a search warrant to obtain a sample of blood from a person who has refused to submit to a breathalyzer test after being arrested for an offense arising from an act committed by him while driving under the influence of intoxicating liquor. *Pena v. State*, Ct App Op No 245 (File No 6174), 664 P 2d 169 (1983).

Limitation for purposes other than DWI prosecutions. — AS 28.35.032(a) cannot be restricted to apply solely to driving while intoxicated prosecutions, and to the extent that the statute, by providing that "a chemical test shall not be

given" following a breathalyzer refusal, affirmatively limits the manner in which evidence of intoxication may be obtained, its limitation must apply with equal force in all prosecutions "arising out of acts alleged to have been committed while the defendant was operating or driving a motor vehicle while intoxicated." *Pena v. State*, Ct App Op No 245 (File No 6174), 664 P 2d 169 (1983).

This section does not apply just to the offense of driving while intoxicated but also to any offense which arose out of acts which were committed while a person was driving while intoxicated. *Pena v. State*, Ct App Op No 309 (File No 6783), 672 P 2d 903 (1983).

"Chemical test" means any chemical test. — The language of AS 28.35.032(a) stating that after refusal to submit to a test of the breath, "a chemical test shall not be given," means any chemical test, be it of the breath, blood, urine or otherwise, and not just a chemical test of the breath. *Anchorage v. Geber*, Sup Ct Op No 1824 (File Nos 4016, 4037, 3827, 4046), 592 P 2d 1187 (1979).

Defendant should be permitted to check the specific ampoules used in his breathalyzer test. *Lauderdale v. State*, Sup Ct Op No 1254 (File No 2761), 548 P 2d 376 (1976).

Since they could be evidence of propriety of test. — The test and reference ampoules could be probative evidence of the propriety or impropriety of the breathalyzer test. *Lauderdale v. State*, Sup Ct Op No 1254 (File No 2761), 548 P 2d 376 (1976).

Denial of right to analyze components is reversible error. — Where defendant was charged with operating a motor vehicle while intoxicated, denial of the right to make an analysis of some of the components of the breathalyzer machine, that is to say, to "cross examine" the results of the test, would be reversible error without any need for a showing of prejudice. It would be a denial of a right to a fair trial, and a fair trial is essential to affording an accused due process of law. *Lauderdale v. State*, Sup Ct Op No 1254 (File No 2761), 548 P 2d 376 (1976).

Discretion of district court properly exercised in requiring production of ampoules used in breathalyzer test. — See *Lauderdale v. State*, Sup Ct Op No 1254 (File No 2761), 548 P 2d 376 (1976).

District court was correct in suppressing results of breathalyzer test where state unable to produce ampoules used in test. — See *Lauderdale*

v. State, Sup. Ct. Op. No. 1254 (File No. 2761), 548 P.2d 376 (1976).

Rule announced generally to have prospective effect but also to have partial retroactive effect. — See *Lauderdale v. State*, Sup. Ct. Op. No. 1254 (File No. 2761), 548 P.2d 376 (1976).

Applied in *Nelson v. State*, Ct. App. Op. No. 129 (File No. 6222), 650 P.2d 426 (1982).

Quoted in *Simpson v. Municipality of*

Anchorage, Ct. App. Op. No. 57 (File No. 4945, 4916, 5288), 635 P.2d 1197 (1981); *Lundquist v. Department of Pub. Safety*, Sup. Ct. Op. No. 2761 (File No. 7075), 674 P.2d 780 (1983); *Jensen v. State*, Ct. App. Op. No. 271 (File No. 7488), 667 P.2d 188 (1983).

Cited in *Coleman v. State*, Ct. App. Op. No. 229 (File No. 7215), 658 P.2d 1364 (1983).

Collateral references. — 60 C.J.S., Motor Vehicles, § 164.16
Duty of law enforcement officer to offer

suspect chemical sobriety test under implied consent law, 95 ALR2d 710

Sec. 28.35.032. Refusal to submit to chemical test. (a) If a person under arrest refuses the request of a law enforcement officer to submit to a chemical test under AS 28.35.031(a), after being advised by the officer that the refusal will, if that person was arrested while operating or driving a motor vehicle for which a driver's license is required, result in the denial or revocation of the license or nonresident privilege to drive, that the refusal may be used against the person in a civil or criminal action or proceeding arising out of an act alleged to have been committed by the person while operating or driving a motor vehicle or operating an aircraft or a watercraft while intoxicated, and that the refusal is a misdemeanor, a chemical test shall not be given, except as provided by AS 28.35.035.

(b) [Repealed, § 25 ch 77 SLA 1983.]

(c) [Repealed, § 25 ch 77 SLA 1983.]

(d) [Repealed, § 25 ch 77 SLA 1983.]

(e) The refusal of a person to submit to a chemical test of breath under (a) of this section is admissible evidence in a civil or criminal action or proceeding arising out of an act alleged to have been committed by the person while operating or driving a motor vehicle or operating an aircraft or watercraft while intoxicated.

(f) Refusal to submit to the chemical test of breath authorized by AS 28.35.031(a) is a class A misdemeanor.

(g) Upon conviction of a person under this section, the court shall impose a minimum sentence of imprisonment of not less than 72 consecutive hours and a fine of not less than \$250 if the person has not been previously convicted in this or another jurisdiction of driving while intoxicated under AS 28.35.030 or another law or ordinance with substantially similar elements or refusal to submit to a chemical test under this section or another law or ordinance with substantially similar elements. Upon conviction under this section the court shall impose a minimum sentence of imprisonment of not less than 20 consecutive days and a fine of not less than \$500 if, within the preceding

10 years, the person has been previously convicted once in this or another jurisdiction of driving while intoxicated under AS 28.35.030 or another law or ordinance with substantially similar elements or refusal to submit to a chemical test under this section or another law or ordinance with substantially similar elements. Upon conviction under this section the court shall impose a minimum sentence of imprisonment of not less than 30 consecutive days and a fine of not less than \$1,000 if, within the previous 10 years, the person has been previously convicted in this or another jurisdiction of more than one of the following offenses or has more than once been previously convicted of one of the following offenses: (1) driving while intoxicated under AS 28.35.030 or another law or ordinance with substantially similar elements; (2) refusal to submit to a chemical test under this section or another law or ordinance with substantially similar elements. The execution of sentence may not be suspended nor may probation be granted except on condition that the minimum imprisonment provided in this section is served. Imposition of sentence may not be suspended. If the offense involved driving a motor vehicle for which a driver's license is required, the person's driver's license shall be revoked under AS 28.15.181. In addition, the court shall order, and a person convicted under this section shall undertake, for a term specified by the court, that program of alcohol education or rehabilitation that the court, after consideration of any information compiled under (h) of this section, finds appropriate. The sentence imposed by the court under this subsection shall run consecutively with any other sentence of imprisonment imposed on the committed person.

(h) Except as prohibited by federal law or regulation, every provider of treatment programs to which persons are ordered under (g) of this section shall supply the Alaska court system with the information regarding the condition and treatment of those persons as the supreme court may require by rule. Information compiled under this subsection is confidential and may only be used by a court in sentencing a person convicted under (g) of this section, or by an officer of the court in preparing a pre-sentence report for the use of the court in sentencing a person convicted under (g) of this section.

(i) A person who is sentenced to imprisonment for 72 consecutive hours under (g) of this section and who is not released from imprisonment after 72 hours may not bring an action against the state or a municipality or its agents, officers, or employees for damages resulting from the additional period of confinement if

(1) the employee or employees who released the person exercised due care and, in releasing the person, followed the standard release procedures of the prison facility; and

(2) the additional period of confinement did not exceed 12 hours.

(j) For purposes of this section, convictions for both driving while intoxicated and for refusal to submit to a chemical test of breath under

AS 28.35.031(a), if arising out of a single transaction and a single arrest, are considered one previous conviction. (4 1 ch 83 SLA 1969; am § 28 ch 71 SLA 1972; am § 12 ch 129 SLA 1980; am § 17 ch 117 SLA 1982; am §§ 17 — 20, 25 ch 77 SLA 1983)

Effect of amendments. — The 1980 amendment, in subsection (a), inserted the language beginning "and that the refusal may" and ending "under the influence of intoxicating liquor", in subsection (b), inserted "or driving" in the first sentence and in paragraph (1) and "or operate" in the first sentence, in subsection (c), inserted "or drive" in the last sentence, and in subsection (d) inserted "or driving" and substituted "denial of" for "denial or". The amendment also added subsection (e).

The 1982 amendment, in subsection (a), inserted "if that person was arrested while operating or driving a motor vehicle," substituted "license or nonresident privilege to drive" for "license and" and "motor vehicle or operating an aircraft or a watercraft while intoxicated, and that the refusal is a misdemeanor" for "vehicle under the influence of intoxicating liquor," and added "except as provided by AS 28.35.035" to the end, in subsection (b), substituted "intoxicated" for "under the influence of intoxicating liquor" in paragraph (1) and

inserted "or nonresident privilege to drive and that the refusal is a misdemeanor" in paragraph (2), in subsection (d), deleted "within two years previous to his arrest" following "AS 28.35.031" and inserted "or of refusal to submit to a chemical test of breath under this section" and "or revocation"; in subsection (e), substituted "motor vehicle or operating an aircraft or watercraft while intoxicated" for "vehicle under the influence of intoxicating liquor" at the end, and added subsections (f)-(ii).

The 1983 amendment, in subsection (a), modified the internal reference following "submit to a chemical test," inserted "for which a driver's license is required" following "driving a motor vehicle," and deleted "suspension," preceding "denial or revocation", repealed subsections (b), (c), and (d), in subsection (f), revised the internal reference, rewrote subsection (g), and added subsection (j).

Legislative history reports. — For report on ch 71, SLA 1972 (HCSRB 383 am II, see 1972 House Journal, p. 898.

NOTES TO DECISIONS

Editor's notes. — *Anchorage v. Geber*, Sup Ct Op No 1824 (File Nos 4016, 4037, 3827, 4046), 592 P 2d 1187 (1979), cited in the notes below, was decided prior to the enactment of AS 28.35.035, which authorizes the administration of a chemical test without consent in certain circumstances to determine the amount of alcohol in breath or blood.

Purpose of section. — This section, which directs the Department of Public Safety to suspend or revoke the licenses of those who refuse to submit to a breath analysis, is merely an internal operating procedure that provides a sanction for those persons who refuse to submit to the test in order to compel submission to a test that provides evidence of intoxication, and although this section may have the effect of keeping the roads safe from drunk drivers by suspending the licenses of those who refuse the test, this was not an intended statutory purpose. *Lundquist v. Department of Pub. Safety*, Sup Ct Op No 2763 (File No 7075), 674 P 2d 780 (1983).

The Implied Consent Statute was intended to provide an exclusive method for obtaining direct evidence of a suspect's blood alcohol content, absent his or her express consent to the use of some other form of testing. *Anchorage v. Geber*, Sup Ct Op No 1824 (File Nos 4016, 4037, 3827, 4046), 592 P 2d 1187 (1979).

Constitutionality of subsection (f). — Subsection (f) of this section is reasonably related to the public purpose of obtaining evidence of drunk driving. *Jensen v. State*, Ct App Op No 271 (File No 7488), 667 P 2d 188 (1983).

Subsection (f) of this section is sufficiently analogous to a statute punishing concealment of evidence such as AS 11.56.610 to satisfy substantive due process. *Jensen v. State*, Ct App Op No 271 (File No 7488), 667 P 2d 188 (1983).

Subsection (f) of this section does not violate the prohibition against cruel and unusual punishment since imposing punishment for refusal to take a breathalyzer test serves the legitimate public goals of

detering such conduct and ensuring that such conduct will not benefit a defendant and the penalty does not result in subjecting a defendant to punishment out of proportion to the conduct in which he has engaged. *Jensen v. State*, Ct App Op No 271 (File No 7488), 667 P 2d 188 (1983).

Punishing a refusal to take a breathalyzer test bears a fair and substantial relation to the legitimate governmental objective of gathering evidence of possible drunken driving and does not deny equal protection. *Svedlund v. Municipality of Anchorage*, Ct App Op No 301 (File No 7581), 671 P 2d 378 (1983), construing municipal provision nearly identical to subsection (f) of this section.

Miranda rights. — Defendant's constitutional rights were not violated by not informing him of his Miranda rights prior to asking him to take a breathalyzer test. *Svedlund v. Municipality of Anchorage*, Ct App Op No 301 (File No 7581), 671 P 2d 378 (1983), construing municipal law.

No other chemical test allowed after breath test refused. — The express language of subsection (a), coupled with the legislative history of the Implied Consent Statute, leads to the conclusion that in enacting the Implied Consent Statute the legislature intended that once a breath test had been refused no other chemical test would be allowed. *Anchorage v. Geber*, Sup Ct Op No 1824 (File Nos 4016, 4037, 3827, 4046), 592 P 2d 1187 (1979).

The language of this section providing that, upon a person's refusal to submit to a chemical test of his breath, "a chemical test shall not be given," means that law enforcement officials are precluded from performing other chemical tests in order to determine whether alcohol is present in the person's blood. *Anchorage v. Geber*, Sup Ct Op No 1824 (File Nos 4016, 4037, 3827, 4046), 592 P 2d 1187 (1979).

In prosecuting a charge of operating a motor vehicle while under the influence of intoxicating liquor (now driving while intoxicated), law enforcement officials cannot utilize the results of a blood alcohol test, when the blood used in performing the test was extracted from the accused against his or her will, after refusal to submit to a breathalyzer examination. *Anchorage v. Geber*, Sup Ct Op No 1824 (File Nos 4016, 4037, 3827, 4046), 592 P 2d 1187 (1979).

"Chemical test" means any chemical test. — The language of subsection (a) stating that after refusal to submit to a test of the breath, "a chemical test shall

not be given," means any chemical test, be it of the breath, blood, urine or otherwise, and not just a chemical test of the breath. *Anchorage v. Geber*, Sup Ct Op No 1824 (File Nos 4016, 4037, 3827, 4046), 592 P 2d 1187 (1979).

There is no due process requirement that a person be advised of the right to refuse to submit to a breathalyzer examination. *Palmer v. State*, Sup Ct Op No 2002 (File No 3651), 604 P 2d 1106 (1979).

While subsection (a) of this section prohibits the giving of any other blood test when the person arrested refuses to submit to a breathalyzer examination, it does not otherwise grant or recognize a right on the part of the arrested person to refuse that examination. *Palmer v. State*, Sup Ct Op No 2002 (File No 3651), 604 P 2d 1106 (1979).

Right to refuse test is only to protect against forcible submission to test. — The right of refusal contained in subsection (a) is to only protect an individual from being physically forced to submit to the test. *State v. Nease*, Superior Court, 1st Jud. Dist., Ct No 72-23 (1972).

There is no right involved requiring assistance of counsel. — The right to refuse to take the breathalyzer test under subsection (a) is only to protect a person from being physically forced to submit to the test, and since there is implied consent to the test under AS 28.35.031, there is no right that can be knowingly waived which would require the assistance of counsel. *State v. Nease*, Superior Court, 1st Jud. Dist., Ct No 72-23 (1972).

The results of the breathalyzer test are nontestimonial in nature, therefore the provisions of *Miranda v. Arizona*, 384 U.S. 436, 86 S Ct 1602, 16 L Ed 2d 694, 10 A.L.R.3d 974 (1969) do not apply. *State v. Nease*, Superior Court, 1st Jud. Dist., Ct No 72-23 (1972).

When a driver operated a motor vehicle in the State of Alaska and was lawfully arrested for operating a motor vehicle while under the influence of intoxicating liquor, such driver had no right to refuse taking the breathalyzer test, and such a test does not violate an individual's right against self incrimination. Therefore, the absence of counsel is immaterial since the driver had no rights which counsel might have assisted him in asserting. *State v. Nease*, Superior Court, 1st Jud. Dist., Ct No 72-23 (1972).

Right to counsel before breathalyzer test. — When a person is arrested for operating a motor vehicle in violation of state or local drunken driving ordinances,

and requests to contact an attorney, the arrestee must be afforded a reasonable opportunity to do so before being required to decide whether or not to submit to a breathalyzer test, and where arrestee is denied that opportunity, subsequently obtained evidence, whether in form of test results or of refusal to take test, must be suppressed. *Copelin v. State*, Sup. Ct. Op. No. 2617 (File Nos. 5453, 5704), 259 P.2d 1206 (1953).

The statutory right to contact and consult with counsel prior to being required to decide whether or not to submit to a breathalyzer test is not an absolute one, which might involve a delay long enough to impair testing results, but rather a limited one of reasonable time and opportunity that can be reconciled with the implied consent statutes. *Copelin v. State*, Sup. Ct. Op. No. 2617 (File Nos. 5453, 5704), 259 P.2d 1206 (1953).

A person suspected of driving while intoxicated had a statutory right to contact an attorney before deciding whether or not to submit to a breathalyzer test if (1) he requested an opportunity to contact an attorney, and (2) granting the request would not involve a delay long enough to impair test results. *Svedlund v. Municipality of Anchorage*, Ct. App. Op. No. 301 (File No. 7581), 671 P.2d 378 (1983).

A breathalyzer exam is not a "critical stage" at which the constitution requires counsel's presence. *Svedlund v. Municipality of Anchorage*, Ct. App. Op. No. 301 (File No. 7581), 671 P.2d 378 (1983).

While a defendant has a statutory right to contact counsel, where he never requested an opportunity to contact counsel and there was nothing in the record to show that the police affirmatively interfered with any attempt by defendant to obtain counsel, he was not denied right to counsel. *Svedlund v. Municipality of Anchorage*, Ct. App. Op. No. 301 (File No. 7581), 671 P.2d 378 (1983).

Analysis of AS 28.35.031 and this section demonstrates the legislature's intention that drivers be considered to have consented to a chemical test for determining the alcohol content of their blood and that refusal on the driver's part to submit to such a test will trigger certain specified consequences. *Wirtz v. State*, Sup. Ct. Op. No. 1593 (File No. 3516), 577 P.2d 227 (1978).

As the supreme court analyzes the legislature's intent in enacting AS 28.35.031 and this section, the sections provide that the operator of a motor vehicle in Alaska has consented to chemical tests of his

blood's alcohol content and that after the arrested operator refuses to take the chemical test, he must be advised of the consequences flowing from his contemplated refusal. The arrestee must be permitted to reconsider his refusal in light of that information. *Wirtz v. State*, Sup. Ct. Op. No. 1593 (File No. 3516), 577 P.2d 227 (1978).

Statutes do not explicitly grant right to refuse test. — Neither AS 28.35.031 nor subsection (a) of this section explicitly grants or recognizes a right on the part of an arrestee to refuse to take a breathalyzer test. *Wirtz v. State*, Sup. Ct. Op. No. 1593 (File No. 3516), 577 P.2d 227 (1978).

Nor do they impose a duty upon the arresting officer to advise the driver that he has the right to refuse to take the test. *Wirtz v. State*, Sup. Ct. Op. No. 1593 (File No. 3516), 577 P.2d 227 (1978).

Neither AS 28.35.031 nor this section requires that the arrested operator be advised he has the right to refuse to take a chemical test for the purpose of determining the alcohol content of his blood. *Wirtz v. State*, Sup. Ct. Op. No. 1593 (File No. 3516), 577 P.2d 227 (1978).

Although several states have chosen to provide that the arrestee has a right to refuse to take a breathalyzer test and, further, that the arresting officer must inform him of such right, Alaska's legislature has not adopted such provisions. *Wirtz v. State*, Sup. Ct. Op. No. 1593 (File No. 3516), 577 P.2d 227 (1978).

And the supreme court would not imply a requirement that an arrestee be advised that he has the right to refuse to take a breathalyzer test. *Wirtz v. State*, Sup. Ct. Op. No. 1593 (File No. 3516), 577 P.2d 227 (1978).

Given the absence of a specific requirement that arrestees be advised of a right to refuse to undergo the chemical test, it would be inappropriate for this court to engraft such a requirement onto AS 28.35.031. *Wirtz v. State*, Sup. Ct. Op. No. 1593 (File No. 3516), 577 P.2d 227 (1978).

This section seems to require that there at least be a reasonable attempt to communicate to a defendant the consequences of a failure to take the breathalyzer examination. *Williford v. State*, Ct. App. Op. No. 148 (File No. 5986), 653 P.2d 319 (1982). Also, see now AS 28.35.011(c) requiring an officer to advise on consequences of refusal.

This section clearly contemplates a warning of the specified consequences attendant upon a refusal. — While evidence of the warnings given regarding the consequences of refusal to take a

breathalyzer test may have been relevant to the issue of *mens rea*, the absence of more detailed warnings regarding penalties for refusal did not deprive defendant of due process or warrant a directed verdict of acquittal in his favor. *Svedlund v. Municipality of Anchorage*, Ct. App. Op. No. 301 (File No. 7581), 671 P.2d 378 (1983), construing municipal ordinance.

No privilege against self-incrimination. — A refusal to take a blood alcohol test, after a police officer has lawfully requested it, is not an act covered by the officer, and thus is not protected by the state or federal privilege against self-incrimination. *Svedlund v. Municipality of Anchorage*, Ct. App. Op. No. 301 (File No. 7581), 671 P.2d 378 (1983), construing municipal provision.

Purpose of subsection (a). — The purpose of the provision in subsection (a) of this section, that evidence of refusal to submit to a breathalyzer test is admissible at trial if the defendant was lawfully under arrest for driving while intoxicated at the time of his refusal, is to assure that individuals arrested for driving while intoxicated do not benefit from failure to comply with the requirements of Alaska's implied consent statute, AS 28.35.031. *Coleman v. State*, Ct. App. Op. No. 229 (File No. 7215), 658 P.2d 1364 (1983).

Admissibility of evidence of refusal. — Even though this section makes the refusal to take the breathalyzer examination admissible, it does not make the refusal admissible without regard to the other evidence rules, and to be admissible, evidence of refusal is required to be relevant, and the probative value of the evidence should not be outweighed by its prejudicial impact. *Williford v. State*, Ct. App. Op. No. 148 (File No. 5986), 653 P.2d 319 (1982).

Whether evidence of a refusal to take a breathalyzer examination is admissible is committed to the discretion of the trial court. *Williford v. State*, Ct. App. Op. No. 148 (File No. 5986), 653 P.2d 319 (1982).

Defendant's refusal to take the breathalyzer test did not give rise to a constitutional claim of privilege since even assuming the breathalyzer refusal could have been deemed to have amounted to a testimonial statement, this statement could not properly have been considered privileged since defendant had no legal right to make it. *Coleman v. State*, Ct. App. Op. No. 229 (File No. 7215), 658 P.2d 1364 (1983).

By its holding that admission of evi-

dence of defendant's refusal to take a breathalyzer test did not violate defendant's constitutional right against self-incrimination, the court did not mean to indicate that evidence of breathalyzer refusal is *per se* admissible in all cases — as with other types of circumstantial evidence, admissibility of breathalyzer refusal should be determined pursuant to Evidence Rules 401-403, on a case-by-case basis, by weighing probative value against potential for unfair prejudice. *Coleman v. State*, Ct. App. Op. No. 229 (File No. 7215), 658 P.2d 1364 (1983).

Officer must advise arrestee confused about rights. — Where an arrested person refuses to submit to a breathalyzer test, the administering officer must inquire into the nature of the refusal and, if it appears that the refusal is based on a confusion about the person's rights, the officer must clearly advise that person that the rights contained in the *Miranda* warning do not apply to the breathalyzer examination. *Graham v. State*, Sup. Ct. Op. No. 2403 (File No. 4092), 633 P.2d 211 (1981).

But burden on arrestee to show confusion in fact. — Where defendant *mirrored* refusal to submit to a breathalyzer test based on a confusion about her rights, the burden was on the defendant to show that she was in fact confused. *Graham v. State*, Sup. Ct. Op. No. 2403 (File No. 4092), 633 P.2d 211 (1981).

Evidence of refusal to take the breathalyzer was not error where the evidence did have possible probative value. *Williford v. State*, Ct. App. Op. No. 148 (File No. 5986), 653 P.2d 319 (1982).

Admissibility of chemical test taken for diagnostic purposes. — Where a blood test was administered for medical diagnostic purposes independent of the police, the blood test is admissible as evidence even though the defendant has previously refused to submit to a breathalyzer examination. *Nelson v. State*, Ct. App. Op. No. 129 (File No. 6222), 650 P.2d 426 (1982).

Use of search warrant. — The implied consent statute does not constitute an affirmative prohibition against the independent means of using a search warrant to obtain a sample of blood from a person who has refused to submit to a breathalyzer test after being arrested for an offense arising from an act committed by him while driving under the influence of intoxicating liquor. *Long v. State*, Ct. App. Op. No. 245 (File No. 6174), 664 P.2d 162 (1983).

Duty to public. — This section does not create a duty by the Department of Public Safety toward the public which, if breached, can form the basis of a civil action for negligence against the department. *Lundquist v. Department of Pub. Safety*, Sup. Ct. Op. No. 2263 (File No. 7075), 674 P.2d 780 (1983).

Limitation for purposes other than DWI prosecutions. — AS 28.35.032(a) cannot be restricted to apply solely to driving while intoxicated prosecutions, and to the extent that the statute, by providing that "a chemical test shall not be given" following a breathalyzer refusal,

affirmatively limits the manner in which evidence of intoxication may be obtained, its limitation must apply with equal force in all prosecutions "arising out of acts alleged to have been committed while the defendant was operating or driving a motor vehicle while intoxicated." *Pena v. State*, Ct. App. Op. No. 245 (File No. 6174), 664 P.2d 169 (1983).

Former subsection (b) construed. — See *Graham v. State*, Sup. Ct. Op. No. 2403 (File No. 4092), 633 P.2d 211 (1981).

Cited in *Wilson v. State*, Ct. App. Op. No. 356 (File Nos. 7523, 7526, 7833), P.2d 11984.

Collateral references. — 7A Am. Jur. 2d, *Automobiles and Highway Traffic*, §§ 122 to 132, 141.

61C J.S., *Motor Vehicles*, § 164 16, 61A C.J.S., *Motor Vehicles*, § 593(1).

Requiring submission to physical examination or test as violation of constitutional rights, 25 ALR2d 1407.

Admissibility in criminal case of evidence that accused refused to submit to scientific test to determine amount of alcohol in system, 87 ALR2d 370, 26 ALR4th 1112.

Suspension or revocation of driver's license for refusal to take sobriety test. 88 ALR2d 1084.

Request before submitting to chemical sobriety test to communicate with counsel as refusal to take test. 97 ALR2d 852.

Request for prior administration of additional test as constituting refusal to submit to chemical sobriety test under implied consent law. 88 ALR2d 572.

Sec. 28.35.033. Chemical analysis of blood. (a) Upon the trial of a civil or criminal action or proceeding arising out of acts alleged to have been committed by a person while operating or driving a motor vehicle or operating an aircraft or a watercraft while intoxicated, the amount of alcohol in the person's blood or breath at the time alleged shall give rise to the following presumptions:

(1) If there was 0.05 percent or less by weight of alcohol in the person's blood, or 50 milligrams or less of alcohol per 100 milliliters of the person's blood, or 0.05 grams or less of alcohol per 210 liters of the person's breath, it shall be presumed that the person was not under the influence of intoxicating liquor.

(2) If there was in excess of 0.05 percent but less than 0.10 percent by weight of alcohol in the person's blood, or in excess of 50 but less than 100 milligrams of alcohol per 100 milliliters of the person's blood, or in excess of 0.05 grams but less than 0.10 grams of alcohol per 210 liters of the person's breath, that fact does not give rise to any presumption that the person was or was not under the influence of intoxicating liquor, but that fact may be considered with other competent evidence in determining whether the person was under the influence of intoxicating liquor.

(3) *(Repealed, § 13 ch 129 SLA 1980.)*

(4) If there was 0.10 percent or more by weight of alcohol in the person's blood, or 100 milligrams or more of alcohol per 100 milliliters of the person's blood, or 0.10 grams or more of alcohol per 210 liters of the person's breath, it shall be presumed that the person was under the influence of intoxicating liquor.

(b) For purposes of this chapter, percent by weight of alcohol in the blood shall be based upon milligrams of alcohol per 100 milliliters of blood.

(c) The provisions of (a) of this section may not be construed to limit the introduction of any other competent evidence bearing upon the question of whether the person was or was not under the influence of intoxicating liquor.

(d) To be considered valid under the provisions of this section the chemical analysis of the person's breath or blood shall have been performed according to methods approved by the Department of Health and Social Services. The Department of Health and Social Services is authorized to approve satisfactory techniques, methods, and standards of training necessary to ascertain the qualifications of individuals to conduct the analysis. If it is established at trial that a chemical analysis of breath or blood was performed according to approved methods by a person trained according to techniques, methods and standards of training approved by the Department of Health and Social Services, there is a presumption that the test results are valid and further foundation for introduction of the evidence is unnecessary.

(e) The person tested may have a physician, or a qualified technician, chemist, registered nurse, or other qualified person of the person's own choosing administer a chemical test in addition to the test administered at the direction of a law enforcement officer. The failure or inability to obtain an additional test by a person does not preclude the admission of evidence relating to the test taken at the direction of a law enforcement officer; the fact that the person under arrest sought to obtain such an additional test, and failed or was unable so to do, is likewise admissible in evidence.

(f) Upon the request of the person who submits to a chemical test at the request of a law enforcement officer, full information concerning the test, including the results of it, shall be made available to the person or the person's attorney. (5 1 ch 83 SLA 1969; am § 6 ch 104 SLA 1971; am § 13 ch 129 SLA 1980; am §§ 18 — 20 ch 117 SLA 1982)

Effect of amendments. — The 1980 amendment, in subsection (a), inserted "or driving" and "or breath" in the introductory paragraph, deleted "as shown by chemical analysis of the person's breath" following "time alleged" in the introductory paragraph, inserted the language beginning "or 50 milligrams" and ending "210 liters of his breath" in para-

graph (1), inserted the language beginning "or in excess of 50" and ending "210 liters of his breath" in paragraph (2), and repealed paragraph (3), which read "If there was 0.10 percent or more by weight of alcohol in the person's blood, it shall be presumed that the person was under the influence of intoxicating liquor."

The 1982 amendment, in subsection (a), substituted "or operating an aircraft or a watercraft while intoxicated" for "under the influence of intoxicating liquor" in the introductory language and added para-

graph (4), in subsection (b), substituted "this chapter" for "this section" and "100 milliliters" for "100 cubic centimeters", and in subsection (d), inserted "or blood" in the first and third sentences.

NOTES TO DECISIONS

Editor's notes. — Anchorage v. Geber, Sup. Ct. Op. No. 1824 (File Nos. 3827, 4016, 4037, 4046), 592 P.2d 1187 (1979), cited in the notes below, was decided prior to the enactment of AS 28.35.035, which authorizes the administration of a chemical test without consent in certain circumstances to determine the amount of alcohol in breath or blood.

The Implied Consent Statute was intended to provide an exclusive method for obtaining direct evidence of a suspect's blood alcohol content, absent his or her express consent to the use of some other form of testing. Anchorage v. Geber, Sup. Ct. Op. No. 1824 (File Nos. 3827, 4016, 4037, 4046), 592 P.2d 1187 (1979).

No other chemical test allowed after breath test refused. — The express language of AS 28.35.032(a), coupled with the legislative history of the Implied Consent Statute, leads to the conclusion that in enacting the Implied Consent Statute the legislature intended that once a breath test had been refused no other chemical test would be allowed. Anchorage v. Geber, Sup. Ct. Op. No. 1824 (File Nos. 3827, 4016, 4037, 4046), 592 P.2d 1187 (1979).

In prosecuting a charge of operating a motor vehicle while under the influence of intoxicating liquor, law enforcement officials cannot utilize the results of a blood alcohol test, which the blood used in performing the test was extracted from the accused against his or her will, after refusal to submit to a breathalyzer examination. Anchorage v. Geber, Sup. Ct. Op. No. 1824 (File Nos. 3827, 4016, 4037, 4046), 592 P.2d 1187 (1979).

"Chemical test" means any chemical test. — The language of AS 28.35.032(a) stating that after refusal to submit to a test of the breath, "a chemical test shall not be given," means any chemical test, be it of the breath, blood, urine or otherwise, and not just a chemical test of the breath. Anchorage v. Geber, Sup. Ct. Op. No. 1824 (File Nos. 3827, 4016, 4037, 4046), 592 P.2d 1187 (1979).

Alaska legislature has specified the foundational facts necessary for the admissibility of a chemical analysis of

breath in subsection (d). *Wester v. State*, Sup. Ct. Op. No. 1106 (File No. 2159), 528 P.2d 1179 (1974), cert. denied, 423 U.S. 836, 96 S. Ct. 60, 46 L. Ed. 2d 54 (1975).

This section does not specify the method of proof of the foundational facts, which is controlled by the applicable rules of evidence. *Wester v. State*, Sup. Ct. Op. No. 1106 (File No. 2159), 528 P.2d 1179 (1974), cert. denied, 423 U.S. 836, 96 S. Ct. 60, 46 L. Ed. 2d 54 (1975).

Rigid proof of such facts not required. — With the increasing acceptance and reliability of the breathalyzer has come a relaxation of any notion of rigid proof of foundational facts. *Wester v. State*, Sup. Ct. Op. No. 1106 (File No. 2159), 528 P.2d 1179 (1974), cert. denied, 423 U.S. 836, 96 S. Ct. 60, 46 L. Ed. 2d 54 (1975).

Effect of last sentence of subsection (d). — The last sentence of subsection (d) merely defines the elements that must be proved before breathalyzer test results may be admitted into evidence; it does not make those results unassailable. Indeed, the statute creates only a presumption of the test's validity. *Keel v. State*, Sup. Ct. Op. No. 2063 (File No. 4408), 609 P.2d 555 (1980).

Compliance with "Breathalyzer Operational Checklist" required. — The approved methods of administering the breathalyzer, established by the Department of Health and Social Services in accord with subsection (d) of this section, are set forth in 7 Alaska Administrative Code, § 30.020. Completion of the "Breathalyzer Operational Checklist" is the first of 13 procedures established for proper test administration. Completion of the checklist is required under subsection (d) of this section; however, absolute compliance in completing the checklist is not required in order to render the test results valid and admissible in evidence. *Oveson v. Municipality of Anchorage*, Sup. Ct. Op. No. 1554 (File No. 3434), 574 P.2d 801 (1978).

Effect of compliance with "Breathalyzer Operational Checklist".

The "Breathalyzer Operational Checklist" is a simplified method of estab-

lishing the admissibility of the evidence. It furnished the court with a clear record that all the substantive test procedures were accomplished, thereby minimizing the possibilities of human error and failed memory. This then warrants the presumption under subsection (d) of this section that the results are valid without any additional showing of foundational facts. If the checklist is not complete, the presumption of validity is inapplicable. But it does not necessarily follow that the test results are, therefore, automatically inadmissible. *Oveson v. Municipality of Anchorage*, Sup. Ct. Op. No. 1554 (File No. 3434), 574 P.2d 801 (1978).

Where there has been substantial compliance with the "Breathalyzer Operational Checklist" provision of 7 AAC § 30.020(1), and where the record demonstrates that the test was properly performed, the test results are admissible under subsection (d) of this section. *Oveson v. Municipality of Anchorage*, Sup. Ct. Op. No. 1554 (File No. 3434), 574 P.2d 801 (1978).

Where the checklist for administering the breathalyzer test was complete but for one checkmark, all other pertinent data were filled in, and there was uncontroverted testimony that the step in question was performed despite the failure to check off the box representing that step, once the trier of fact believed the evidence that the step in question was performed, a proper foundation was laid to find the results valid under subsection (d) of this section. *Oveson v. Municipality of Anchorage*, Sup. Ct. Op. No. 1554 (File No. 3434), 574 P.2d 801 (1978).

Compliance with the 15-minute observation period of 7 AAC § 30.020(2) prior to the administration of the breathalyzer test is a requirement for the admissibility of the test results. *Wester v. State*, Sup. Ct. Op. No. 1106 (File No. 2159), 528 P.2d 1179 (1974), cert. denied, 423 U.S. 836, 96 S. Ct. 60, 46 L. Ed. 2d 54 (1975).

Where substantial compliance with the 15-minute provision is established on the record, a prima facie showing of the foundational fact of the observation period necessary to establish admissibility is satisfied. *Wester v. State*, Sup. Ct. Op. No. 1106 (File No. 2159), 528 P.2d 1179 (1974), cert. denied, 423 U.S. 836, 96 S. Ct. 60, 46 L. Ed. 2d 54 (1975); *Oveson v. Municipality of Anchorage*, Sup. Ct. Op. No. 1554 (File No. 3434), 574 P.2d 801 (1978).

A clerical error by the breathalyzer

test operator ought not to render the results inadmissible without a showing that the validity of the results is tainted. *Oveson v. Municipality of Anchorage*, Sup. Ct. Op. No. 1554 (File No. 3434), 574 P.2d 801 (1978).

Merely assertion that ingestion was hypothetically possible ought not to vitiate the observation period foundational fact so as to render the breathalyzer test results inadmissible. *Wester v. State*, Sup. Ct. Op. No. 1106 (File No. 2159), 528 P.2d 1179 (1974), cert. denied, 423 U.S. 836, 96 S. Ct. 60, 46 L. Ed. 2d 54 (1975).

Personal testimony not necessary as to breathalyzer calibration or ampoule certification. — While it is required that a qualified witness explain the functional effect of the chemical testing, personal testimony is not required as to the calibration of the instrument or the accuracy of the ampoules. *Wester v. State*, Sup. Ct. Op. No. 1106 (File No. 2159), 528 P.2d 1179 (1974), cert. denied, 423 U.S. 836, 96 S. Ct. 60, 46 L. Ed. 2d 54 (1975).

A defendant can guarantee the reliability of the results of a breathalyzer test by retesting the ampoules. The ampoules are preserved and the amount of fluid and the chemical composition of the control ampoule are not significantly altered by performance of the test. *Oveson v. Municipality of Anchorage*, Sup. Ct. Op. No. 1554 (File No. 3434), 574 P.2d 801 (1978).

Defendant should be permitted to check the specific ampoules used in his breathalyzer test. *Lauderdale v. State*, Sup. Ct. Op. No. 1254 (File No. 2761), 548 P.2d 376 (1976).

Since they could be evidence of propriety of test. — The test and reference ampoules could be probative evidence of the propriety or impropriety of the breathalyzer test. *Lauderdale v. State*, Sup. Ct. Op. No. 1254 (File No. 2761), 548 P.2d 376 (1976).

Denial of right to analyze components is reversible error. — Where defendant was charged with operating a motor vehicle while intoxicated, denial of the right to make an analysis of some of the components of the breathalyzer machine, that is to say, to "cross-examine" the results of the test, would be reversible error without any need for a showing of prejudice. It would be a denial of a right to a fair trial, and a fair trial is essential to affording an accused due process of law. *Lauderdale v. State*, Sup. Ct. Op. No. 1254 (File No. 2761), 548 P.2d 376 (1976).

Discretion of district court properly exercised in requiring production of ampoules used in breathalyzer test. — See *Lauderdale v. State*, Sup Ct Op No 1254 (File No 2761), 548 P 2d 376 (1978).

District court was correct in suppressing results of breathalyzer test where state unable to produce ampoules used in test. — See *Lauderdale v. State*, Sup Ct Op No 1254 (File No 2761), 548 P 2d 376 (1976).

Rule announced generally to have prospective effect but also to have partial retroactive effect. — See *Lauderdale v. State*, Sup Ct Op No 1254 (File No 2761), 548 P 2d 376 (1976).

This section contains no requirement that advice of the right to obtain an independent blood alcohol test be given, and it is not required by any provision of the state or federal constitution. *Palmer v. State*, Sup Ct Op No 2002 (File No 3651), 604 P 2d 1106 (1979).

Cross-examination improperly restricted. — In a prosecution for operation of a motor vehicle while intoxicated, the court improperly restricted defendant's cross-examination of the person who administered the breathalyzer test when it sustained the state's objection to defendant's line of inquiry, where defendant was seeking through his attempted questioning to raise doubts in the jury's mind regarding the reliability of the test. *Keel v. State*, Sup Ct Op No 2063 (File No 4408), 609 P 2d 555 (1980).

Presumption in breathalyzer result. — Under the wording of this section, the breathalyzer result is clearly viewed as the presumptive equivalent of the amount of alcohol in the person's blood "at the time alleged", in other words, at the time that the offense was committed, not just when the breathalyzer examination was administered. *Doyle v. State*, Ct App Op No 43 (File No 5115), 633 P 2d 306 (1981).

Substantial compliance with regulations. — Under subsection (d), even if the state does not strictly comply with the regulations, it can still show that it has substantially complied with the regulations in order to establish a sufficient foundation to admit the breathalyzer examination. *Ahwagack v. State*, Ct App Op No 147 (File No 6601), 652 P 2d 505 (1982).

Results of the breathalyzer test were admissible even though the records for the breathalyzer instrument showed that it had been calibrated at an interval of 61 days instead of within 60 days as required by 7 AAC § 30.050. *Ahwagack v. State*, Ct

App Op No 147 (File No 6601), 652 P 2d 505 (1982).

Breathalyzer packet admissible as evidence. — The admission of the breathalyzer packet as a foundation for the introduction of breathalyzer evidence in a drunk driving case is the introduction of a public record of factual findings recorded in the regular course of official business, made independently and well in advance of any particular prosecution, and does not violate the defendant's right to confrontation under the 6th amendment. *State v. Huggins*, Ct App Op No 127 (File Nos. 6535, 6595), 659 P 2d 613 (1982).

Documents referred to as a breathalyzer packet were admissible under the public records exception to the hearsay rule. *State v. Huggins*, Ct App Op No 127 (File Nos. 6535, 6595), 659 P 2d 613 (1982).

Effect of alcohol consumption after accident is jury question. — The issue of whether and to what extent defendant's consumption of alcohol after the accident but before a breathalyzer examination affected his breathalyzer result was a question which was properly left for the jury. *Doyle v. State*, Ct App Op No 43 (File No 5115), 633 P 2d 306 (1981).

Applied in *Catlett v. State*, Sup Ct Op No 1752 (File No 3213), 585 P 2d 553 (1978); *Erickson v. Municipality of Anchorage*, Ct App Op No 238 (File No 7058), 662 P 2d 963 (1983).

Quoted in *Godwin v. State*, Sup Ct Op No 1276 (File No 2793), 554 P 2d 453 (1976); *Simpson v. Municipality of Anchorage*, Ct App Op No 57 (File Nos. 4945, 4946, 5288), 635 P 2d 1197 (1981); *Coolley v. Municipality of Anchorage*, Ct App Op No 114 (File Nos. 5859, 6112, 6151), 649 P 2d 251 (1982).

Stated in *Wren v. State*, Sup Ct Op No 1698 (File No 3156), 577 P 2d 235 (1978); *Lyle v. State*, Sup Ct Op No 1844 (File No 3162), 600 P 2d 1357 (1979); *O'Leary v. State*, Sup Ct Op No 2003 (File No 3466), 604 P 2d 1099 (1979); *Municipality of Anchorage v. Serrano*, Ct App Op No 115 (File Nos. 6447, 6724, 6726), 649 P 2d 256 (1982).

Cited in *Sullivan v. Municipality of Anchorage*, Sup Ct Op No 1617 (File No 3357), 577 P 2d 1070 (1978); *Reeves v. State*, Sup Ct Op No 1924 (File No 3161), 599 P 2d 727 (1978); *Nygren v. State*, Sup Ct Op No 2164 (File No 4219), 616 P 2d 20 (1980); *Graham v. State*, Sup Ct Op No 2403 (File No 4092), 633 P 2d 211 (1981); *Morris v. Farley Enters., Inc.*, Sup Ct Op No 2630

(File Nos. 6013, 6042), 661 P 2d 167 (1983); *Pena v. State*, Ct App Op No 245 (File No. 6174), 664 P 2d 169 (1983).

Collateral references. — 7A Am Jur 2d, *Automobiles and Highway Traffic*, § 1361, 376 to 380.

61A C.J.S., *Motor Vehicles*, § 633(2).
Admissibility and weight of evidence based on scientific test for intoxication or presence of alcohol in system, 127 ALR 1513, 159 ALR 209.

Degree or nature of intoxication for purposes of statute making it a criminal offense to operate an automobile while in that condition, 142 ALR 555.

Validity, construction, and application of legislation creating presumption of intoxication or the like from presence of specified percentage of alcohol in blood, 46 ALR2d 1176, 16 ALR3d 748.

Qualification as expert to testify as to findings or results of scientific test to determine alcoholic content of blood, 77 ALR2d 971.

Constitutional right of one charged with intoxication to summon a physician at accused's own expense to make test for alcohol in system, 78 ALR2d 905.

Admissibility in criminal case of blood alcohol test where blood was taken from unconscious driver, 72 ALR3d 325.

Necessity and sufficiency of proof that tests of blood alcohol concentration were conducted in conformance with prescribed methods, 96 ALR3d 745.

Admissibility in criminal case of blood alcohol test where blood was taken despite defendant's objection or refusal to submit to test, 14 ALR4th 690.

Destruction of ampoule used in alcohol breath test as warranting suppression of result of test, 19 ALR4th 509.

Sec. 28.35.034. Surrender of license or permit. A person whose license or permit to operate or drive a motor vehicle has been revoked under AS 28.15.165 or AS 28.15.181 shall surrender the license or permit to the department on receipt of notice of the revocation. After the period of revocation has expired, the person may make application for a new license as provided by law. (§ 1 ch 83 SLA 1969, am § 14 ch 129 SLA 1980; am § 21 ch 77 SLA 1983)

Effect of amendments. — The 1980 amendment inserted "operate or" in the first sentence.

The 1983 amendment in the first sentence deleted "suspended or" preceding "revoked," revised the internal reference,

and made a minor word change, deleted the former second sentence, regarding a three-month suspension of an operator's license, and in the last sentence substituted "period of revocation" for "three months' period."

NOTES TO DECISIONS

Quoted in *Graham v. State*, Sup Ct Op No 2403 (File No. 4092), 633 P 2d 211 (1981).

Cited in *Anchorage v. Geber*, Sup Ct

Op No 1824 (File Nos. 4016, 4037, 3827, 4046), 592 P 2d 1187 (1979); *Pena v. State*, Ct App Op No 245 (File No 6174), 664 P 2d 169 (1983).

Collateral references. — 7A Am Jur 2d, *Automobiles and Highway Traffic*, § 141.

60 C.J.S., *Motor Vehicles*, § 164 24.

Sec. 28.35.035. Administration of chemical tests without consent. (a) If a person is under arrest for an offense arising out of acts alleged to have been committed while the person was driving a motor vehicle while intoxicated, and that arrest results from an accident that causes death or physical injury to another person, a chemical test may be administered without the consent of the person arrested to determine the amount of alcohol in that person's breath or blood.

(b) A person who is unconscious or otherwise in a condition rendering that person incapable of refusal is considered not to have withdrawn the consent provided under AS 28.35.031(a) and a chemical test may be administered to determine the amount of alcohol in that person's breath or blood. A person who is unconscious or otherwise incapable of refusal need not be placed under arrest before a chemical test may be administered.

(c) If a chemical test is administered to a person under (a) or (b) of this section, that person is not subject to the penalties for refusal to submit to a chemical test provided by AS 28.35.032 and 28.35.034. (§ 21 ch 117 SLA 1982; am § 22 ch 77 SLA 1983)

Effect of amendments. — The 1983 amendment in subsection (a) substituted "an offense . . . driving a motor vehicle" for "the crime of driving" and in subsection (b) revised the internal reference in the present first sentence and added the present second sentence.

NOTES TO DECISIONS

Noted in *Copelin v. State*, Sup. Ct. Op. No. 245 (File No. 6174), 664 P.2d 169 (1983); *Pena v. State*, Ct. App. Op. No. 2617 (File Nos. 5453, 5708), 259 P.2d 11983 (1983).

Sec. 28.35.036. Forfeiture of motor vehicle. (a) After conviction of an offense under AS 28.35.030 or AS 28.35.032 involving a motor vehicle of a type for which a driver's license is required, the state may move the court to order the forfeiture of the motor vehicle involved in the commission of the offense if the convicted person has been previously convicted in this or another jurisdiction of more than one of the following offenses or has more than once been previously convicted of one of the following offenses:

- (1) driving while intoxicated under AS 28.35.030 or another law or ordinance with substantially similar elements; or
- (2) refusal to submit to a chemical test under AS 28.35.032 or another law or ordinance with substantially similar elements.

(b) For purposes of this section, convictions for both driving while intoxicated and for refusal to submit to a chemical test of breath under AS 28.35.031(a), if arising out of a single transaction and a single arrest, are considered one previous conviction.

(c) Upon receipt of a motion for forfeiture, the court shall schedule a hearing on the matter and shall notify the state and the convicted

person of the time and place set for the hearing. At the hearing, the court may order the forfeiture of the motor vehicle if the court, sitting without a jury, determines by a preponderance of the evidence that the forfeiture of the motor vehicle will serve one or more of the following purposes:

- (1) deterrence of the convicted person from the commission of future offenses under AS 28.35.030;
- (2) protection of the safety and welfare of the public;
- (3) deterrence of other persons who are potential offenders under AS 28.35.030; or
- (4) expression of public condemnation of the serious or aggravated nature of the convicted person's conduct.

(d) Upon forfeiture of a motor vehicle the court shall require the surrender of the registration and certificate of title of that motor vehicle. The registration and certificate of title shall be delivered to the department.

(e) If not released under AS 28.35.037, a motor vehicle forfeited under this section may be disposed of at the discretion of the department. (§ 23 ch 77 SLA 1983)

Sec. 28.35.037. Remission of forfeitures. (a) Upon receiving notice from the court of the time and place set for a hearing under AS 28.35.036, the state shall provide to every person who has an ascertainable ownership or security interest in the motor vehicle written notice that includes

- (1) a description of the motor vehicle;
- (2) the time and place of the forfeiture hearing;
- (3) the legal authority under which the motor vehicle may be forfeited;
- (4) notice of the right to intervene to protect the interest in the motor vehicle.

(b) At the hearing, a person who claims an ownership or security interest in the motor vehicle must establish by a preponderance of the evidence that

- (1) the petitioner has an interest in the motor vehicle acquired in good faith;
- (2) a person other than the petitioner was convicted of the offense that resulted in the forfeiture; and
- (3) before parting with the motor vehicle, the petitioner did not know or have reasonable cause to believe that it would be used in the commission of an offense.

(c) If a person satisfies the requirements of (b) of this section, the court shall order that an amount equal to the value of the petitioner's interest in the motor vehicle be paid to the petitioner or the court shall order that the motor vehicle be released to the petitioner together with title to the motor vehicle.

(d) Forfeiture of a motor vehicle under AS 28.35.036 is without prejudice to the rights, and does not extinguish the claims of a creditor with an interest in the motor vehicle. (§ 23 ch 77 SLA 1983)

Sec. 28.35.038. Municipal impoundment and forfeiture. Notwithstanding other provisions in this title, a municipality may adopt an ordinance providing for the impoundment or forfeiture of a motor vehicle involved in the commission of an offense under AS 28.35.030, 28.35.032, or an ordinance with elements substantially similar to AS 28.35.030 or AS 28.35.032. An ordinance adopted under this section is not required to be consistent with this title or regulations adopted under this title. (§ 23 ch 77 SLA 1983)

Article 3. Reckless and Negligent Driving.

Section

40. Reckless driving
45. Negligent driving

Sec. 28.35.040. Reckless driving. (a) A person who drives a motor vehicle in the state in a manner which creates a substantial and unjustifiable risk of harm to a person or to property is guilty of reckless driving. A substantial and unjustifiable risk is a risk of such a nature and degree that the conscious disregard of it or a failure to perceive it constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation.

(b) A person convicted of reckless driving is guilty of a misdemeanor and is punishable by a fine of not more than \$1,000 or by imprisonment for not more than one year or by both.

(c) Lawfully conducted automobile, snowmobile, motorcycle or other motor vehicle racing or exhibition events are not subject to the provisions of this section. (§ 50-5-4 ACLA 1949; am § 1 ch 182 SLA 1955; am § 1 ch 70 SLA 1961; am § 2 ch 121 SLA 1967; am § 1 ch 13 SLA 1971; am § 46 ch 32 SLA 1971; am § 6 ch 74 SLA 1974)

NOTES TO DECISIONS

Codification of common-law standard of care. — This section and AS 28.35.045, defining reckless and negligent driving, do not set forth precise standards of care, but merely codify the usual common-law standard of care. *Bailey v Lenord*, Sup. Ct. Op. No. 2308 (File No. 4696), 625 P.2d 849 (1981).

Specific conduct not proscribed. — This section and AS 28.35.045, defining reckless and negligent driving, do not proscribe specific conduct, but rather state that a person shall not drive a motor vehi-

cle in a manner which creates an unjustifiable risk. *Bailey v Lenord*, Sup. Ct. Op. No. 2308 (File No. 4696), 625 P.2d 849 (1981).

Risks to safety of general public. — Reckless driving involves risks to the safety of the public at large. *Calder v State*, Sup. Ct. Op. No. 2224 (File No. 4293), 619 P.2d 1026 (1980).

A defendant was not placed in double jeopardy by his conviction of the lesser included offense of reckless driving on a felony charge of assault with a dan-

gerous weapon even though a misdemeanor charge of reckless driving had already been adjudicated against him because, although the charges arose out of the same general incidents, they were based on different conduct during that incident. *Calder v State*, Sup. Ct. Op. No. 2224 (File No. 4293), 619 P.2d 1026 (1980).

Trooper arriving at accident scene cannot arrest for reckless driving without warrant. — The Alaska legislature has classified both reckless driving and operating or driving an automobile under the influence of intoxicating liquor as misdemeanors. Thus, a state trooper who arrived at an accident scene could not arrest a driver without a warrant for either reckless driving or drunk driving since neither of these offenses was committed or attempted in his presence. *Layland v State*, Sup. Ct. Op. No. 1150 (File No. 2264), 635 P.2d 1043 (1975), aff'd, Sup. Ct. Op. No. 2739, 649 P.2d 1182 (1978), overruled on other grounds, *City of Anchorage v Geber*, Sup. Ct. Op. No. 1824 (File Nos. 3827, 4016, 4037, 4046), 692 P.2d 1192 (1979).

Sentencing considerations. — Where it was undisputed at trial that there were three people in the rear of defendant's pickup who were extremely vulnerable in case of any accident, the judge could properly consider this fact at sentencing in evaluating the extent of defendant's

recklessness, even though he could not properly consider the fact that they had died from defendant's recklessness. *Huckaby v State*, Ct. App. Op. No. 39 (File No. 5197), 632 P.2d 975 (1981).

Considering uncounseled moving violations in sentencing held harmless error. — Any error which might have occurred by reason of the trial court's consideration of two uncounseled moving violations in determining the sentence for negligent driving was harmless where the court also considered three counseled moving violations and where it did not restrict or suspend defendant's license but imposed a fine of \$100, which was only \$25 above that suggested by defendant's counsel. *McKenzie v State*, Sup. Ct. Op. No. 1029 (File No. 2012), 620 P.2d 791 (1974).

Sentence upheld. — Severity of defendant's offense within the crime of reckless driving and the need to deter him, to deter others, and to reaffirm societal norms justified a one-year sentence. *Huckaby v State*, Ct. App. Op. No. 39 (File No. 5197), 632 P.2d 975 (1981).

Cited in *Hood v Smedley*, Sup. Ct. Op. No. 800 (File No. 1406), 498 P.2d 120 (1972); *Williford v State*, Sup. Ct. Op. No. 2751 (File No. 5986), 674 P.2d 1329 (1983); *Wilson v State*, Ct. App. Op. No. 356 (File Nos. 7523, 7526, 7833), P.2d 11984.

Collateral references. — 7A Am. Jur. 2d, Automobiles and Highway Traffic, §§ 312 to 320.

61A C.J.S., Motor Vehicles, §§ 609 to 624.

What amounts to gross or wanton negligence in driving an automobile precluding the defense of contributory negligence, 38 ALR 1424, 72 ALR 1367, 92 ALR 1367, 119 ALR 654.

What amounts to reckless driving within statute making reckless driving of automobile a criminal offense, 86 ALR 1273, 52 ALR2d 1337.

Definiteness and certainty of statutes prohibiting, 12 ALR2d 680.

Reckless driving as lesser included offense of driving while intoxicated or similar charge, 10 ALR4th 1252.

Sec. 28.35.045. Negligent driving. (a) A person who drives a motor vehicle in the state in a manner which creates an unjustifiable risk of harm to a person or to property and who, as a result of the creation of the risk, actually endangers a person or property is guilty of negligent driving. An unjustifiable risk is a risk of such a nature and degree that a failure to avoid it constitutes a deviation from the standard of care that a reasonable person would observe in the situation. Proof that a defendant actually endangered a person or property is established by showing that, as a result of the defendant's driving,

- (1) an accident occurred;
 (2) a person, including the defendant, took evasive action to avoid an accident;
 (3) a person, including the defendant, stopped or slowed down suddenly to avoid an accident; or
 (4) a person or property, including the defendant or the defendant's property, was otherwise endangered.

(b) The offense of negligent driving is a lesser offense than, and included in, the offense of reckless driving, and a person charged with reckless driving may be convicted of the lesser offense of negligent driving.

(c) A person convicted of negligent driving is guilty of an infraction as provided under AS 28.40.050, and in addition, the court may limit or suspend the person's driver's license under AS 28.15.220(b).

(d) Lawfully conducted automobile, snowmobile, motorcycle or other motor vehicle racing or exhibition events are not subject to the provisions of this section. (§ 7 ch 74 SLA 1974; am § 6 ch 241 SLA 1976; am § 19 ch 144 SLA 1977)

Revisor's notes. — AS 28.15.220, referred to in (c) of this section, was repealed in 1978. The present provisions for discretionary court limitation of licenses are found in AS 28.15.201. The

present provisions for mandatory suspension of licenses for certain violations (AS 28.15.181) do not include a violation of this section in the grounds for suspension.

NOTES TO DECISIONS

Codification of common-law standard of care. — This section and AS 28.35.040, defining reckless and negligent driving, do not set forth precise standards of care, but merely codify the usual common-law standard of care. *Bailey v. Lenord*, Sup. Ct. Op. No. 2308 (File No. 4696), 625 P.2d 449 (1981).

Specific conduct not proscribed. — This section and AS 28.35.040, defining reckless and negligent driving, do not proscribe specific conduct, but rather state that a person shall not drive a motor vehicle in a manner which creates an

unjustifiable risk. *Bailey v. Lenord*, Sup. Ct. Op. No. 2308 (File No. 4696), 625 P.2d 449 (1981).

Negligent driving is an infraction, not an offense for double jeopardy purposes, and pleading no contest to negligent driving does not preclude a subsequent prosecution for the offense of second-degree assault. *Carlson v. State*, Ct. App. Op. No. 339 (File No. 7338), 676 P.2d 603 (1984).

Cited in *Ward v. State*, Sup. Ct. Op. No. 2151 (File No. 5986), 674 P.2d 1329 (1983).

Collateral references. — 7A Am. Jur. 2d, Automobiles and Highway Traffic, §§ 321, 322.

61A C.J.S., Motor Vehicles, § 612.

Article 4. Duties Following Accidents.

Section	Section
50. Action of operator immediately after accident	90. Rendering of report by others
60. Duty of operator to give information and render assistance	100. Form of reports
70. Examination or impounding before repair	110. Penalty for giving false information in report or failing to report
80. Immediate notice of accident	120. Use of accident reports in evidence
	130. False report or destruction of evidence

Sec. 28.35.050. Action of operator immediately after accident.

(a) An operator of a vehicle involved in an accident resulting in injury to or death of a person shall immediately stop the vehicle at the scene of the accident or as close to it as possible and return to, and remain at, the scene until the operator has fulfilled the requirements of AS 28.35.060.

(b) The operator of a vehicle involved in an accident resulting only in damage to a vehicle driven or attended by a person shall immediately stop the vehicle at the scene of the accident or as close to it as possible and return to, and remain at, the scene of the accident until the operator has fulfilled the requirements of AS 28.35.060.

(c) The operator of a vehicle involved in an accident resulting only in damage to a vehicle which is unattended shall immediately stop at the scene of the accident and undertake reasonable means and efforts to locate and notify the operator or owner of the damaged unattended vehicle of the name and address of the operator and owner of the vehicle striking the unattended vehicle. If the operator or owner of the unattended vehicle cannot be located then the operator shall leave in a conspicuous place in or upon the unattended vehicle, a writing stating the name and address of the operator and of the owner of the vehicle which struck the unattended vehicle and setting forth a statement of the circumstances of the accident. (§ 50-5-5 a, b ACLA 1949; am § 1 ch 69 SLA 1960)

NOTES TO DECISIONS

Both this section and AS 28.35.060 define the duties of drivers of motor vehicles "involved in an accident." *Drahosh v. State*, Sup. Ct. Op. No. 485 (File No. 849), 442 P.2d 44 (1968).

And constitute an interlocking statutory scheme. — It is apparent from a reading of AS 28.35.050(a) and AS 28.35.060(a) that together they constitute an interlocking statutory scheme proscribing conduct commonly known as "hit and run" driving. *Drahosh v. State*, Sup. Ct. Op. No. 485 (File No. 849), 442 P.2d 44 (1968).

Separate offenses. — Leaving the

scene of an accident is a separate and distinct offense from the crime of failure to render assistance. *Drahosh v. State*, Sup. Ct. Op. No. 485 (File No. 849), 442 P.2d 44 (1968).

Violations of subsection (a) are punishable under AS 28.35.230. *Drahosh v. State*, Sup. Ct. Op. No. 485 (File No. 849), 442 P.2d 44 (1968).

Quoted in *Miller v. State*, Ct. App. Op. No. 335 (File No. 6429), 652 P.2d 494 (1982).

Cited in *Atchak v. State*, Ct. App. Op. No. 036 (File No. 4435), 640 P.2d 135 (1981).

Collateral references. — 7A Am Jur 2d, Automobiles and Highway Traffic, §§ 289 to 295

61A C.J.S., Motor Vehicles, §§ 674 to 683

Constitutionality, construction, and effect of statute in relation to conduct of driver of automobile after happening of an accident, 16 ALR 1425, 66 ALR 1228, 101 ALR 911

Failure to stop or other conduct after

automobile accident as supporting claim for exemplary damages, 156 ALR 1115

Applicability of criminal "hit-and-run" statute to accidents occurring on private property, 77 ALR2d 1171

Necessity and sufficiency of showing in a criminal prosecution under a "hit-and-run" statute accused's knowledge of accident, injury, or damage, 23 ALR3d 497

Sec. 28.35.060. Duty of operator to give information and render assistance. (a) The operator of a vehicle involved in an accident resulting in injury to or death of a person or damage to a vehicle which is driven or attended by a person shall give the operator's name, address, and vehicle license number to the person struck or injured, or the operator or occupant, or the person attending, and the vehicle collided with and shall render to any person injured reasonable assistance, including making of arrangements for attendance upon the person by a physician and transportation, in a manner which will not cause further injury, to a hospital for medical treatment if it is apparent that treatment is desirable. Under no circumstances is the giving of assistance or other compliance with the provisions of this paragraph evidence of the liability of an operator for the accident.

(b) Except as provided in (c) of this section, a person who fails to comply with any of the requirements of this section is, upon conviction, punishable by imprisonment for not more than one year, or by a fine of not more than \$500, or by both. This provision does not apply to a person incapacitated by the accident to the extent that the person is physically incapable of complying with the requirement.

(c) A person who fails to comply with a requirement of this section regarding assisting an injured person is, upon conviction, punishable by imprisonment for not more than 10 years, or by a fine of not more than \$10,000, or by both. This provision does not apply to a person incapacitated by the accident to the extent that the person is physically incapable of complying with the requirement. (S 50-5-5 c, d ACLA 1949; am §§ 1, 2 ch 85 SLA 1968)

NOTES TO DECISIONS

This section does not codify a common-law crime but rather creates a new statutory offense. *Kimoktoak v. State*, Sup. Ct. Op. No. 1704 (File No. 3177), 584 P.2d 25 (1978)

On its face, this section appears constitutionally defective for its

failure to require criminal intent, or more particularly, for its failure to require that a person knowingly fails to render assistance. *Kimoktoak v. State*, Sup. Ct. Op. No. 1704 (File No. 3177), 584 P.2d 25 (1978)

On its face this section does not require that a person have knowledge of the accident or of the fact that injuries have resulted to be guilty of a serious crime. Thus the statute appears to hold a person strictly liable for failure to render assistance even if he is unaware of any wrongdoing, i.e., unaware of the circumstances giving rise to the duty and thus unaware that he is in fact failing to do the required act. *Kimoktoak v. State*, Sup. Ct. Op. No. 1704 (File No. 3177), 584 P.2d 25 (1978).

But the requisite intent may be read into the statute by implication. *Kimoktoak v. State*, Sup. Ct. Op. No. 1704 (File No. 3177), 584 P.2d 25 (1978)

The legislature intended that criminal liability under this section attach only where the operator of a motor vehicle knowingly fails to stop and render assistance. The statute requires an affirmative course of action to be taken by the driver and it necessarily follows that one must be aware of the facts giving rise to this affirmative duty in order to perform such a duty. *Kimoktoak v. State*, Sup. Ct. Op. No. 1704 (File No. 3177), 584 P.2d 25 (1978).

When criminal liability under subsection (c) attaches. — Criminal liability under subsection (c) of this section attaches to a driver who leaves the scene of an accident where the state can prove by direct or circumstantial evidence that the driver actually knew of the injury or that he knew that the accident was of such a nature that one would reasonably anticipate that it resulted in injury to a person. *Kimoktoak v. State*, Sup. Ct. Op. No. 1704 (File No. 3177), 584 P.2d 25 (1978)

Intoxication. — Where one is charged with failure to render assistance under this section, and where there is evidence of intoxication, the jury may consider the fact that the accused was intoxicated in determining whether he had the requisite knowledge. *Kimoktoak v. State*, Sup. Ct. Op. No. 1704 (File No. 3177), 584 P.2d 25 (1978)

No error in manner in which state permitted to argue element of knowledge to jury. — See *Atchak v. State*, Ct. App. Op. No. 036 (File No. 4435), 640 P.2d 135 (1981)

Collateral references. — 7A Am Jur 2d, Automobiles and Highway Traffic,

Instruction that the jury could find knowledge of injury "where the circumstances were such that they would lead a reasonably prudent person to assume that an accident resulting in injury" must have occurred was erroneous, since it is not the reasonable person who is on trial but the defendant and it is the defendant's knowledge which must be proved and not that of a hypothetical reasonable person. *Kimoktoak v. State*, Sup. Ct. Op. No. 1704 (File No. 3177), 584 P.2d 25 (1978)

Where the trial court's final instruction on the elements of the offense of failure to render aid adequately apprised the jury of all necessary elements with the exception of the element of knowledge, but two additional instructions specifically addressing the element of knowledge conformed precisely to the requirements of *Kimoktoak v. State*, Sup. Ct. Op. No. 1704 (File No. 3177), 584 P.2d 25 (1978), no error was committed by the court in instructing the jury. *Atchak v. State*, Ct. App. Op. No. 036 (File No. 4435), 640 P.2d 135 (1981)

The crime of leaving the scene of an accident is not amenable to civil compromise. *Hensel v. State*, Sup. Ct. Op. No. 1755 (File No. 3719), 585 P.2d 878 (1978)

The act constituting the crime of leaving the scene of an accident is the failure to stop and make the necessary exchanges of information or assistance after the accident has occurred. This omission is not one which causes injury to the private citizen within the meaning of the civil compromise statutes. Settlement of the claim for injuries resulting from the accident cannot settle the state's claim for a violation of its laws. *Hensel v. State*, Sup. Ct. Op. No. 1755 (File No. 3719), 585 P.2d 878 (1978)

Ten-year sentence for failure to render assistance affirmed. — See *Rosendahl v. State*, Sup. Ct. Op. No. 1807 (File No. 4087), 591 P.2d 538 (1979)

Applied in *Lupro v. State*, Sup. Ct. Op. No. 1960 (File No. 2987), 603 P.2d 468 (1979)

Quoted in *Thibedeau v. State*, Sup. Ct. Op. No. 2182 (File No. 4325), 617 P.2d 759 (1980); *Miller v. State*, Ct. App. Op. No. 135 (File No. 5429), 652 P.2d 494 (1982)

61A C.J.S., Motor Vehicles, §§ 674 to 683

Violation of statute requiring one

involved in an accident to stop and render aid as affecting civil liability, 80 A.L.R.2d 299.

Sufficiency of compliance with requirement of criminal "hit and run" statute that motorist identify himself, 48 A.L.R.3d 685.

Sec. 28.35.070. Examination or impounding before repair. A person may not make or have made repairs to damage or injury to a motor vehicle which could have been caused by collision with a person or property without first notifying the Department of Public Safety, chief of police, or in the absence of these, the nearest policeman or other peace officer, who shall immediately examine the vehicle and make a full report subscribed by the person in whose custody the vehicle then is. A copy of the report shall be mailed or delivered to the Department of Public Safety. If no official is within 10 miles of the place where the vehicle is brought for repair, then no notice or examination is required. If there is ground for suspecting that the vehicle was involved in a collision with a person, the vehicle shall be impounded at the expense of the owner, for which the custodian shall have a lien, and shall be accessible only to officers detailed to the investigation of the case until released. If, however, there is no reason to suspect that the damage to the motor vehicle was caused by collision with a person or property, the repair of the vehicle may be authorized by the officer in charge of the investigation at any time after the expiration of 24 hours thereafter. (§ 50-5-5 f ACLA 1949; am § 2 ch 123 SLA 1959)

NOTES TO DECISIONS

Appellate in *Lupro v. State*, Sup. Ct. Op. No. 11 (File No. 2987), 603 P.2d 468 (1979).

Collateral references. — 38 Am. Jur. 2d, *Garages, and Parking and Filling Stations*, §§ 140, 144 to 151; 61A C.J.S., *Motor Vehicles*, § 725, 748(d), (e).

Lien for storage of automobile, 31 A.L.R. 834, 48 A.L.R.2d 894.

Lien for towing or storage, ordered by public officer, of motor vehicle, 85 A.L.R.3d 199.

Sec. 28.35.080. Immediate notice of accident. (a) The driver of a vehicle involved in an accident resulting in bodily injury to or death of a person or total property damage to an apparent extent of \$500 or more shall immediately by the quickest means of communication give notice of the accident to the local police department if the accident occurs within a municipality, otherwise to the Department of Public Safety.

(b) The driver of a vehicle involved in an accident resulting in bodily injury to or death of a person or total property damage to an apparent extent of \$500 or more shall, within 10 days after the accident, forward

a written report of the accident to the Department of Public Safety and to the local police department if the accident occurs within a municipality. A report is not required under this subsection if the accident is investigated by a peace officer.

(c) The form of accident report required under (b) of this section can be obtained from any local police department or the Department of Public Safety.

(d) The Department of Public Safety may require the driver of a vehicle involved in an accident of which a report must be made to file supplemental reports whenever the original report is insufficient in the opinion of the department.

(e) Every law enforcement officer who, in the regular course of duty, investigates a motor vehicle accident for which a report must be made, either at the time of and at the scene of the accident or thereafter by interviewing the participants or witnesses, shall, within 24 hours after completing the investigation, forward a written report of the accident to the Department of Public Safety.

(f) An accident report is not required under this section from a person who is physically incapable of making the report during the period of incapacity. (§§ 50-5-5 f, g ACLA 1949; added by § 3 ch 123 SLA 1959; am §§ 2, 3 ch 69 SLA 1960; §§ 50-5-5 h, i, j ACLA 1949; added by § 3 ch 123 SLA 1959; am § 20 ch 144 SLA 1977)

NOTES TO DECISIONS

Self-incrimination. — Appellant's admission that he was driving vehicle in question at time of accident was not inadmissible under the fifth amendment to the United States Constitution and Alaska Const., art. I, § 9 as being compelled by this section, since this section does not require any incriminating information, but merely requires a person who is involved in an accident covered by the statute to give notice of the accident to the appropriate police department. *Creary v. State*, Ct. App. Op. No. 252 (File Nos. 6777, 6778), 663 P.2d 226 (1983).

Investigating officer's written report of an accident is not admissible in evidence under this section. *Menard v. Acevedo*, Sup. Ct. Op. No. 364 (File No. 636), 418 P.2d 766 (1966).

Admissibility of investigating officer's observations. — Although under

AS 28.35.120 a written report itself is generally inadmissible, the police officer who investigates the accident may testify to the observations which he made in preparing the report, and his observations would include any statements which were made to him in the course of the investigation that were otherwise admissible, including the statement of a defendant that he was the driver of the vehicle in question. *Creary v. State*, Ct. App. Op. No. 252 (File Nos. 6777, 6778), 663 P.2d 226 (1983).

Applied in *Adkins v. Lester*, Sup. Ct. Op. No. 1107 (File No. 2078), 530 P.2d 11 (1974); *Kapa Transp., Inc. v. Henry*, Sup. Ct. Op. No. 1527 (File No. 2926), 572 P.2d 72 (1977); *Rutherford v. State*, Sup. Ct. Op. No. 2001 (File No. 3453), 605 P.2d 14 (1979).

Collateral references. — 7A Am. Jur. 2d, *Automobiles and Highway Traffic*, § 160; 61A C.J.S., *Motor Vehicles*, § 674.

Admissibility of report of operator filed pursuant to law, respecting automobile accident. 69 A.L.R. 905.

Failure to comply with statute requiring suspension or tolling of statute of limitation, 10 ALR2d 564
one involved in automobile accident to stop or report, as affecting question as to

Sec. 28.35.090. Rendering of report by others. (a) Whenever the driver of a vehicle is physically incapable of giving an immediate notice of an accident as required in AS 28.35.080 and there was another occupant in the vehicle at the time of the accident capable of doing so, the occupant shall make or give the notice not given by the driver.

(b) Whenever the driver is physically incapable of making a written report of an accident as required in AS 28.35.080 and the driver is not the owner of the vehicle, then the owner of the vehicle involved in the accident shall within five days after learning of the accident make the report not made by the driver. (§ 50-5-5 j ACLA 1949; am § 3 ch 123 SLA 1959)

Sec. 28.35.100. Form of reports. (a) The Department of Public Safety shall prepare and upon request supply to police departments, coroners, local peace officers, garages and other suitable agencies or individuals, forms for accident reports. The written reports by persons involved in accidents and by investigating officers shall require sufficiently detailed information to disclose the cause of the accident, conditions existing at the time of the accident, and the persons and vehicles involved.

(b) Every accident report required to be made in writing shall be made on the appropriate form approved by the department and shall contain all of the information required unless not available. (§ 50-5-5 k ACLA 1949; added by § 3 ch 123 SLA 1959)

NOTES TO DECISIONS

Quoted in *Creary v. State*, Ct. App. Op. No. 252 (File Nos. 6777, 6778), 663 P.2d 226 (1983).

Sec. 28.35.110. Penalty for giving false information in report or failing to report. (a) A person who gives information in reports as required in AS 28.35.080 knowing or having reason to believe that the information is false is punishable by a fine of not more than \$1,000, or by imprisonment for not more than one year, or by both.

(b) The department shall suspend the license or permit to drive and the nonresident operating privileges of a person failing to report an accident as provided in AS 28.35.080 until the report is filed. The department may extend the suspension by not more than 30 days. A person failing to make a report as required in AS 28.35.080 is guilty of a misdemeanor and upon conviction is punishable by a fine of not more than \$200, or by imprisonment for not more than 90 days, or by both. (§ 50-5-5 l, m ACLA 1949; added by § 3 ch 123 SLA 1959)

NOTES TO DECISIONS

Cited in *Creary v. State*, Ct. App. Op. No. 252 (File Nos. 6777, 6778), 663 P.2d 226 (1983).

Collateral references. — 7A Am. Jur. 2d, *Automobiles and Highway Traffic*, § 160.

61A C.J.S., *Motor Vehicles*, § 674.

Sec. 28.35.120. Use of accident reports in evidence. A report made in accordance with this chapter may not be used in evidence in a criminal or civil action arising out of the accident that is the subject of the report. (§ 4 ch 123 SLA 1959)

NOTES TO DECISIONS

Investigating officer's written report of an accident is not admissible in evidence under this section. *Menard v. Acevedo*, Sup. Ct. Op. No. 364 (File No. 636), 418 P.2d 766 (1966).

This section bars admission into evidence of an investigating police officer's report made in connection with a traffic accident. *Adkins v. Lester*, Sup. Ct. Op. No. 1107 (File No. 2078), 630 P.2d 11 (1974).

Policies underlying statutes barring the use of accident reports as evidence. — See *Adkins v. Lester*, Sup. Ct. Op. No. 1107 (File No. 2078), 630 P.2d 11 (1974).

This section by its specific terms bars only the report's use in evidence. *Adkins v. Lester*, Sup. Ct. Op. No. 1107 (File No. 2078), 630 P.2d 11 (1974).

This section does not prohibit the oral testimony or expert opinions of an investigator which are also contained in an automobile accident report. *Adkins v. Lester*, Sup. Ct. Op. No. 1107 (File No. 2078), 630 P.2d 11 (1974).

In view of Alaska's established rule favoring admission of expert opinion testimony, it would seem wise not to exclude such expert testimony simply because the witness prepared the written report which is barred by the statute. *Adkins v. Lester*, Sup. Ct. Op. No. 1107 (File No. 2078), 630 P.2d 11 (1974).

Although under this section a written report itself is generally inadmissible, the police officer who investigates the accident

may testify to the observations which he made in preparing the report, and his observations would include any statements which were made to him in the course of the investigation that were otherwise admissible, including the statement of a defendant that he was the driver of the vehicle in question. *Creary v. State*, Ct. App. Op. No. 252 (File Nos. 6777, 6778), 663 P.2d 226 (1983).

Although a state trooper had little independent recollection of the accident, he could rely upon his report as a proper basis for his testimony in a negligence action. It was still his testimony and not the report itself which was placed in evidence. *Kapa Transp., Inc. v. Henry*, Sup. Ct. Op. No. 1527 (File No. 2928), 572 P.2d 72 (1977).

Where a state trooper was permitted to refer to his accident report in order to recreate for the jury a diagram of the scene of the accident which he had prepared as part of his investigation and he was also permitted to read from his report the statement he took from one of the two witnesses to the accident, this testimony was properly admitted. *Kapa Transp., Inc. v. Henry*, Sup. Ct. Op. No. 1527 (File No. 2928), 572 P.2d 72 (1977).

Testimony of witnesses named in report. — The holding that this section does not bar oral testimony or expert opinions of an investigator which are also contained in an automobile accident report clearly overrules any implication in *Mare v. Jung*, Sup. Ct. Op. No. 170 (File No.

306), 385 P.2d 579 (1963) that witnesses named in the report would not be able to testify before the court. The doctrine of "fruit of the poisonous tree" is simply not applicable to this type of a situation. *Aokins v. Lester*, Sup. Ct. Op. No. 1107 (File No. 2078), 530 P.2d 11 (1974).
 Memoranda prepared by state trooper investigating another

trooper's involvement in an accident were not inadmissible police investigatory reports in terms of this section's language and purpose. *Rutherford v. State*, Sup. Ct. Op. No. 2001 (File No. 3453), 605 P.2d 16 (1979).
 Quoted in *Wester v. State*, Sup. Ct. Op. No. 1106 (File No. 2159), 628 P.2d 1179 (1974).

Collateral references. — 8 Am. Jur. 2d, Automobiles and Highway Traffic, § 1046.
 61A C.J.S., Motor Vehicles, § 616(19)

Admissibility of report of operator filed pursuant to law, respecting automobile accident, 69 A.L.R. 905

Sec. 28.35.130. False report or destruction of evidence. An officer or person who knowingly makes or subscribes a false report concerning an investigation of a vehicle or damage or injury caused by a vehicle, as provided in this chapter, is guilty of perjury. A person who destroys, obliterates, conceals or removes, or who aids, abets, or assists in the destruction, obliteration, concealment, or removal from a vehicle, of evidence showing or tending to show that the vehicle collided with a person or property, is punishable by a fine of not more than \$500, or by imprisonment for not more than six months, or by both. (§ 50-5-6 ACLA 1949)

Article 5. Miscellaneous Offenses.

Section	Section
135 Unlawful to knowingly make false statement, application, or certification	180 Disobedience to signals of officer regulating traffic unlawful
140 Unlawful obstruction or blocking of traffic	182 Stopping at direction of peace officer
155 Operation of vehicle with certain tires prohibited	225 Enforcement
	245 Motorcycle helmet

Sec. 28.35.135. Unlawful to knowingly make false statement, application, or certification. (a) A person may not knowingly make a false affidavit, statement, or representation, or affirm falsely with respect to a matter or fact required to be set out under this title, nor may the person use a name other than the person's true name. A person convicted of violating this section is guilty of unsworn falsification and is punishable as prescribed by law.

(b) A person who has a certification, registration, title, license, or other form issued under this title, or who has applied for a certification, registration, license, or other form, and who changes the person's name or moves from the address shown on the department's records or forms, shall notify the department in writing of the change in name or address within 30 days. (§ 7 ch 241 SLA 1976, am § 43 ch 102 SLA 1980)

Cross references. — For crime of unsworn falsification, see AS 11.56.110, for penalties, see AS 12.05.035(b)(3) and 12.05.135(a).

Effect of amendments. — The 1980

amendment substituted "unsworn falsification" for "perjury" following "is guilty of" near the middle of the second sentence in subsection (a).

Sec. 28.35.140. Unlawful obstruction or blocking of traffic. A person may not purposely obstruct or block traffic on any roadway by any means. However, a service vehicle such as a bus, garbage truck, tow truck or ambulance may make brief stops on a roadway, which stops on the roadway are necessary in the performance of its services. (§ 50-5-7 ACLA 1949; am § 1 ch 174 SLA 1970)

NOTES TO DECISIONS

This law pertains to roads of sufficient width and condition to permit vehicles to pass, without injury to their tires or other parts, and without danger of collision. *Vogler v. Ureimann*, 12 Alaska 19, 78 F. Supp. 575 (1) Alaska (1948).

On a two lane highway, even a one foot obstruction could easily cause a following car to swerve into the opposite lane to clear a parked vehicle. This would interfere with the normal flow of traffic and amount to a violation under this section. *Beaumaster v. Crandall*, Sup. Ct. Op. No. 1589 (File No. 2845), 576 P.2d 988 (1978).

This section is not an exclusive list of service vehicles. *Beaumaster v. Crandall*, Sup. Ct. Op. No. 1589 (File No. 2845), 576 P.2d 988 (1978).

A driver, while not operating a professional service vehicle, may be engaged in the same activity as a service vehicle would have been. *Beaumaster v. Crandall*, Sup. Ct. Op. No. 1589 (File No. 2845), 576 P.2d 988 (1978).

Such as pulling over to aid occupants of overturned car. — This section describes service vehicles as buses, garbage trucks, tow trucks or ambulances, but a reasonable construction of the statute would hold that one who pulled his car over to the side of the road in an emergency situation in order to aid the occupants of an overturned car, was acting in a service capacity. *Beaumaster v. Crandall*, Sup. Ct. Op. No. 1589 (File No. 2845), 576 P.2d 988 (1978).

A person who pulled over to the side of the road in an emergency situation in order to aid the occupants of an overturned car, apparently parking as far over on the right as he could given the snow conditions and the presence of a ditch on the side of the road, and who also turned his emergency flasher lights on, was entitled to make a brief stop on the roadway as necessary in the performance of Samaritan efforts. *Beaumaster v. Crandall*, Sup. Ct. Op. No. 1589 (File No. 2845), 576 P.2d 988 (1978).

Collateral references. — 7A Am. Jur. 2d, Automobiles and Highway Traffic, § 277.
 61A C.J.S., Motor Vehicles, § 684

Stopping vehicle on traveled portion of highway as affecting responsibility for collision between vehicles. 131 A.L.R. 562

Sec. 28.35.150. Unlawful to interfere with or destroy official traffic control device or highway construction; action by state for damages [Repealed, § 25 ch 144 SLA 1977.]

Sec. 28.35.155. Operation of vehicle with certain tires prohibited. (a) It is unlawful to operate a motor vehicle with studded

tires or tires with chains attached on a paved highway or road from May 1 through September 15, inclusive, north of 60° North Latitude and from April 15 through September 30, inclusive, south of 60° North Latitude. The commissioner of public safety shall by emergency order provide for additional lawful operating periods based on unusual seasonal or weather conditions. An emergency order adopted under this section is not subject to the Administrative Procedure Act (AS 44.021). Upon application a special individual traction permit may be issued allowing the operation of a motor vehicle with studded tires or chains at any time at the discretion of the vehicle owner. The fee for the special individual permit is one-third of the annual registration fee applicable to that class of vehicle under AS 28.10.421. The department may provide an appropriate sticker or other device identifying the vehicle to which the permit applies.

(b) In this section "studded tire" means a tire with metal studs or spikes imbedded in the periphery of the tire surface, and protruding not more than one-fourth inch from the tire surface. (§ 9 ch 241 SLA 1976; am § 29 ch 94 SLA 1980)

Effect of amendments. — The 1980 amendment substituted "registration fee" for "license tax" near the middle of the first sentence of subsection (a), and substituted "AS 28.10.421" for "AS 28.10.200" at the end of the next to last sentence of subsection (a).

Sec. 28.35.160. Unlawful injury to or destruction of traffic regulations or guidance device. [Repealed, § 25 ch 144 SLA 1977.]

Sec. 28.35.170. Operation with more than three persons in driver's seat. [Repealed, § 20 ch 241 SLA 1976.]

Sec. 28.35.180. Disobedience to signals of officer regulating traffic unlawful. A driver of a vehicle may not refuse to obey a lawful order or direction of a peace officer, fireman, or authorized flagman regulating and directing traffic. A peace officer or fireman regulating or directing traffic shall, upon request of a driver, produce evidence of authorization unless the officer or fireman is wearing in view the badge or uniform of office. (§ 50-5-11 ACLA 1949; am § 10 ch 241 SLA 1976)

Sec. 28.35.182. Stopping at direction of peace officer. (a) A person driving or operating a vehicle or motor vehicle, or operating an aircraft or watercraft, shall stop as soon as practical and in a reasonably safe manner under the circumstances, if requested or signalled to do so for a lawful purpose by a peace officer.

(b) If the peace officer is driving or operating a vehicle or motor vehicle or is operating an aircraft or watercraft when making the request or giving the signal to stop, the peace officer's vehicle, motor vehicle, aircraft or watercraft must be marked appropriately so that a reasonable person would recognize it as one related to law enforcement,

or it must meet lighting and audible signalling requirements of law for law enforcement vehicles. If the peace officer is not driving or operating a vehicle or motor vehicle, or operating an aircraft or watercraft, the officer shall wear the uniform of office or display a badge or other symbol of authority so as to be reasonably identifiable as a peace officer.

(c) A person who knowingly fails to stop in violation of (a) of this section is guilty of a class B misdemeanor.

(d) In this section

(1) "lawful purpose" includes making an arrest or issuing a citation, preventing personal injury or property damage in an emergency, and investigating a situation when the peace officer has a reasonable suspicion that imminent public danger exists or that serious harm has recently occurred;

(2) "signal" means a hand motion, audible mechanical or electronic noise device, visual light device, or combination of them, used in a manner that a reasonable person would understand to mean that the peace officer intends that the person stop. (§ 1 ch 66 SLA 1984)

Sec. 28.35.190. Penalty for violation of certain sections. [Repealed, § 47 ch 32 SLA 1971.]

Sec. 28.35.200. Unlawful operation of vehicles. [Repealed, § 20 ch 241 SLA 1976.]

Sec. 28.35.210. Seizure of unsafe or defectively equipped vehicles. [Repealed by implication by AS 28.05.091, enacted by § 6 ch 178 SLA 1978.]

Sec. 28.35.220. Action by state for damages. [Repealed, § 20 ch 241 SLA 1976.]

Sec. 28.35.225. Enforcement. All law enforcement officers in this state and employees of the department designated by the commissioner shall enforce this title and regulations adopted under this title. The state troopers shall advise and instruct all other law enforcement officers in the state concerning the requirements of this title and regulations adopted under this title. (§ 11 ch 241 SLA 1976; am § 7 ch 54 SLA 1979)

Sec. 28.35.230. [Renumbered as AS 28.40.050.]

Sec. 28.35.240. Duty to obey school patrol. [Repealed, § 3 ch 68 SLA 1964.]

Sec. 28.35.245. Motorcycle helmet. (a) After January 1, 1978, motorcycle helmets may not be manufactured or sold in Alaska that do not conform to standards established by regulation by the commissioner of public safety. The regulations shall provide for helmets that allow normal peripheral vision and hearing and minimize neck injuries

§ 28.35.250

ALASKA STATUTES

§ 28.40.050

to the wearer potentially caused by the helmet. The adoption of these regulations shall be under the provisions of the Administrative Procedure Act (AS 44.62).

(b) A person who has reached the age of majority as defined by AS 25.20.010 may not be required to wear a helmet while operating a motorcycle if the person is the holder of a license which, under regulations adopted under AS 28.15.041, is classified singly as a license to operate a motorcycle. (§ 1 ch 230 SLA 1976)

Collateral references. — 7A Am. Jur.
2d, Automobiles and Highway Traffic,
§ 210.

Sec. 28.35.250. Application of law. [Repealed, § 20 ch 241 SLA 1976.]

Sec. 28.35.260. [Renumbered as AS 28.40.100.]

Sec. 28.35.270. [Renumbered as AS 28.40.110.]

P O S I T I O N P A P E R

HB 26 - "AN ACT RELATING TO MOTOR VEHICLE FORFEITURE"

Alaska ranks third highest per capita nationwide in alcohol-related accident fatalities. After HB 6 was signed into law in September 1983, the prosecution was given the option to request the confiscation of a vehicle for second time DWI offenders. In Fairbanks, during a recent three year period, only one person has been ordered to forfeit their car. Alaska statistics show that in 1985, there were 365 drunk driving accidents involving third time offenders. During the first 11 months of 1986, this figure increased to 412 drunk driving accidents. These alarming statistics led me to introduce this legislation.

The purpose of HB 26 is to strengthen the original legislative intent of AS 28.35.036 by stating that "... the state shall [may] move the court to order the forfeiture of the motor vehicle..." The primary intent of HB 26 is to limit drunk driving fatalities. This legislation may also act as a deterrent by convincing first time DWI offenders that they will no longer have their vehicle if they are convicted of a second time DWI offense.

Under the proposal in AS 28.35.037 (Remission of Forfeitures) an offender can go to court in order to retrieve his or her car, thereby protecting third party interests in the motor vehicle. The offender must follow the statutory guidelines and present relevant arguments to the judge. Sec. 28.35.037(c) states that if the person satisfies these requirements, the court shall order that the motor vehicle and title be released. Otherwise, the vehicle will be auctioned or turned over to Public Safety for police use.

It is routine practice of Alaska game wardens to immediately confiscate cars, trucks and guns when a hunting violation is charged, prior to completion of the violator's due process proceedings. It is my opinion that the protection of human life should be considered at least as important in state law as a hunting or parking violation.

COMPARISON OF PROPOSED PENALTIES FOR DWI OFFENDERS

	<u>Current law</u>	<u>C/S</u> <u>HB 53(Trans)</u>	<u>HB 26</u>	<u>HB 2</u>
1st DWI	3 days in jail 90 day loss/license \$250 fine	3 days in jail 90 day loss/license Earn back last 60 \$250 fine		ILS court option
2nd DWI	20 days in jail 1 year loss/license \$500 fine	20 days in jail 1 year loss license Earn back last 60 days \$500 fine		ILS court option
3rd DWI	30 days in jail 10 yr loss/license \$1000 fine	60 days in jail 10 yr loss/license Earn back last 5 years \$1000 fine	forfeiture of vehicle	ILS court option
4th	30 days in jail 10 yr loss/license \$1000 fine	120 days in jail 10 yr loss license \$2000 fine		ILS court option
5th	30 days in jail 10 yr loss/license \$1000 fine	Class C felony		ILS court option
6th DWI	30 days in jail 10 yr loss/license \$1000 fine	Class C felony		ILS court option

TANANA CHIEFS CONFERENCE, INC.
Board of Directors
Resolution No. 89-114

DRIVING WHILE INTOXICATED

WHEREAS, there are several bills before the Alaska legislature to stiffen penalties for driving while intoxicated (DWI); and

WHEREAS, stiffer penalties for driving when intoxicated contribute to the region's efforts in the fight against alcohol.

NOW THEREFORE BE IT RESOLVED that the Tanana Chiefs Conference Board of Directors support the following proposed legislation:

HB 53 - Making the 4th DWI offense a felony rather than the 5th and relaxing penalties for the 2nd and 3rd offenses if the person gets treatment for alcohol abuse.

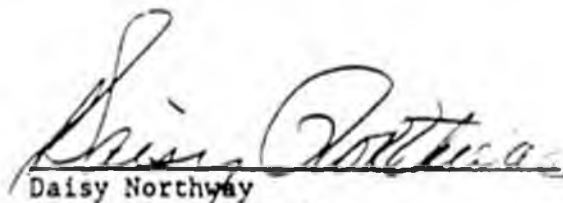
HB 26 - Requiring the forfeiture of a vehicle when convicted of a third DWI within 10 years, but giving the Court some discretion if the vehicle is owned or owned in part by another person.

HB 2 - Allowing Courts to order as a condition of probation, that a person convicted of an offense involving alcohol may not operate a vehicle unless equipped with an ignition interlock "device".

NOW THEREFORE BE IT RESOLVED that the Tanana Chiefs Conference Board of Directors recommend that language be included in the bill limiting the application of this bill to areas with facilities in place for installation and maintenance of the devices.

C E R T I F I C A T I O N

I hereby certify that this resolution was duly passed by the Tanana Chiefs Conference, Inc. Board of Directors on March 16, 1989 at Fairbanks, Alaska and a quorum was duly established.



Daisy Northway
Secretary-Treasurer

Tanana Chiefs Conference, Inc

Submitted by: Alcohol Workshop

FISCAL NOTE

REQUEST:

Revision Date: _____ Agency Affected: Public Safety
Title: An Act relating to motor BRU: Alaska State Troopers
vehicle forfeiture
Sponsor: Representative Koponen Component: Detachments
Requestor: House Judiciary

EXPENDITURES/REVENUES: (Thousands of Dollars) (Inflation not included)

OPERATING	*FY 91	FY 92	FY 93	FY 94	FY 95	FY 96
PERSONAL SERVICES	137.9	137.9	137.9	137.9	137.9	137.9
TRAVEL	4.0	4.0	4.0	4.0	4.0	4.0
CONTRACTUAL	193.0	193.0	193.0	193.0	193.0	193.0
SUPPLIES	6.0	6.0	6.0	6.0	6.0	6.0
EQUIPMENT	46.4	-0-	-0-	-0-	-0-	-0-
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	387.3	340.9	340.9	340.9	340.9	340.9

CAPITAL	-0-	-0-	-0-	-0-	-0-	-0-
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REVENUE	-0-	-0-	-0-	-0-	-0-	-0-
---------	-----	-----	-----	-----	-----	-----

FUNDING: (Thousands of Dollars)

GENERAL FUND	387.3	340.9	340.9	340.9	340.9	340.9
FEDERAL FUNDS						
OTHER/PROG RCPT						
TOTAL	387.3	340.9	340.9	340.9	340.9	340.9

POSITIONS:

FULL-TIME	2	2	2	2	2	2
PART-TIME	1	1	1	1	1	1
TEMPORARY	0	0	0	0	0	0

ANALYSIS: (Attach a separate page if necessary)

See attached.

*If this legislation is passed during late FY 90, the earliest that AST could begin operations would be at the beginning of FY 91.

Prepared by: Francis C. Allan
Division: Alaska State Troopers

Phone: 269-5691
Date: 12/19/89

Approved by Commissioner: Arthur English
Agency: Department of Public Safety

Date: 1-8-90
Page 1 of 8

Handwritten: 12/24/89

Department of Public Safety

Summary of Fiscal Impact - CSHB 26 (Trans)

Forfeiture of the motor vehicle of a repeat DWI offender is allowed under existing law (AS 28.35.030(c)). This bill makes forfeiture of the motor vehicle mandatory upon a third DWI conviction within 10 years. The Department of Law has developed guidelines for the preliminary investigation necessary to allow successful forfeiture of a motor vehicle. Among the additional tasks a law enforcement officer must perform are:

- 1) check the criminal and driving record of each DWI arrestee to determine if the present offense would be his or her third conviction; the written record must be attached to the police report and forwarded to the prosecutor's office;
- 2) Division of Motor Vehicles (DMV) title records must be checked to determine the owner of the subject vehicle, and a certified copy of the title record obtained; and
- 3) If the vehicle is jointly owned, the officer must investigate the circumstances surrounding the offender's possession of the vehicle at the time of the offense, as this information will be required at the "remission" hearing under AS 28.35.037; this information must be added to the police report.

The Department of Law estimates that 250-300 vehicles per year will be subject to forfeiture under the provisions of this bill. This fiscal note is based upon the conservative estimate of 250 vehicles. The Department of Public Safety estimates that enforcement of this new law will require a substantial amount of staff time. This additional time will fall into three general areas: (1) locating and impounding the vehicle in question, (2) investigating the extent to which co-owners were aware of, or involved in, the offense and, (3) processing the vehicle administratively.

Locating and Impounding Vehicles

Troopers will likely spend up to seven hours performing this task. This estimate is based upon the Trooper having to travel to the location where the vehicle is most likely to be found, traveling from point to point to track down the vehicle, and time spent waiting for tow trucks and completing the impound procedures. This does not include those instances where the convicted owner may be attempting to conceal the location of the vehicle from authorities or transfer the vehicle to someone else.

Department of Public Safety
Summary of Fiscal Impact - CSHB 26 (Trans)

Investigation of Co-Owners' Knowledge

This bill allows co-owners of a forfeited vehicle to have a hearing before the court. At this "remission" hearing the forfeited vehicle can be awarded to a person claiming an interest in it, if the interest was acquired in good faith and the person did not know or have reasonable cause to believe that the offender would use the vehicle to commit the offense (AS 28.35.037(b)). This means the investigating officers must go to the offender's home and interview the spouse/parent/roommate whose name also appears on the vehicle title to determine the circumstances surrounding the offender's use of the vehicle at the time of the offense. To guard against attempts to fraudulently transfer ownership of the vehicle after the offense, the title status at the time of the offense must also be investigated.

Administrative Processing

This time will include completion of the necessary documents and other records needed to keep track of the seizure and disposal of each vehicle. This procedure will most likely take two or more hours per vehicle.

As under existing law, forfeited vehicles are to be disposed of at the discretion of the Department of Public Safety. After discussion with the Department of Administration, it has been decided that (except for a very small number of vehicles that could be used in undercover investigations) these vehicles will be turned over to the Department of Administration for disposal under AS 44.71.010. Therefore, the costs associated with ultimate disposal of the vehicles (auction, salvage, etc.) are not addressed in this fiscal note.

Additional Costs

The bill provides a 90-day period during which persons who claim to have a financial interest in the vehicle may seek remission of forfeiture. An additional 30 days is anticipated before a hearing will likely be held. During this 120-day time period the Department of Public Safety would be responsible for daily storage charges of approximately five dollars per day. Over the course of one year this could total \$150,000. (120 X 250 X \$5.00).

An average charge for towing a vehicle in the Anchorage area is approximately \$75.00. 250 vehicles would result in towing fees estimated at \$18,750.

Department of Public Safety
Summary of Fiscal Impact - CSHB 26 (Trans)

Estimated Additional Personnel

PERSONAL SERVICES COSTS

		<u>Personal Services</u>	<u>Total Position Costs</u>
State Trooper	12 mos.	\$ 59.9	\$ 99.1
State Trooper	12 mos.	\$ 59.9	\$ 99.1
Admin. Asst. I	6 mos.	\$ 18.1	\$ 20.3
TOTAL		<u>\$137.9</u>	<u>\$218.5</u>

An average number of hours worked during a 12 month period equals approximately 1,988. Estimated additional personnel resources required to manage this function were based upon these numbers.

Equipment

Equipment is needed in the first year only.

Department of Public Safety
 Division of Alaska State Troopers
 CSHB 26 (Trans)
 Fiscal Note Summary
 FY 91

	<u>State Trooper 12 mos.</u>	<u>State Trooper 12 mos.</u>	<u>Admin. Asst. 6 mos</u>	<u>Other Costs</u>	<u>Total</u>
Personal Services	59.9	59.9	18.1	-	137.9
Travel	2.0	2.0	-	-	4.0
Contractual	11.5	11.5	1.2	168.8*	193.0
Supplies	2.5	2.5	1.0	-	6.0
Equipment	<u>23.2</u>	<u>23.2</u>	<u>-</u>	<u>-</u>	<u>46.4</u>
Total	<u>99.1</u>	<u>99.1</u>	<u>20.3</u>	<u>168.8</u>	<u>387.3</u>

*\$18.8 for towing and 150.0 for storage.

Position Title State Trooper		No. of Positions 1	Range/Step 76/A	Barg. Unit PSEA
Time Status PFT	Staff Months 12	Location Statewide		Election District
		Justification		
Type of Expenditure		Amount		
1	2	3		
Salary*	42,495	////////////////////		
Benefits*	17,367	////////////////////		
Premium Pay (Included in Above)	////////////////////	////////////////////		
Other	////////////////////	////////////////////		
Total Personal Services	////////////////////	59.9		
Travel		2.0		
Contractual		11.5		
Commodities		2.5		
Equipment		23.2		
Other				
Total Cost		99.1		
Funding Source for Total Cost				
Federal Receipts	1002			
G.F. Match	1003			
General Fund	1004	99.1		
Program Receipts/GF	1005			
I-A Receipts	1007			
CIP Receipts	1061			
Other				
* Personal Services Salary and Benefits Costs are from the FY91 PACS.				

The Department estimates that approximately thirteen hours of time will be needed on each of approximately 250 impounds. The current staff of AST is unable to absorb this increased workload without additional staffing. This new position is a commissioned State Trooper assigned to road patrol, which would include DWI enforcement. The location of this position is not yet determined, but its addition to AST will offset the workload increase throughout the state. The position would become active on July 1, 1990. Equipment, consisting primarily of a patrol vehicle, would be needed in FY 91 only.

REQUEST FOR
NEW POSITION

AGENCY Department of Public Safety
 BRU Alaska State Troopers
 COMPONENT Detachments

Page 6 of 8
 Revised Date

FY 91

Position Title State Trooper			No. of Positions 1	Range/Step 76/A	Barg. Unit PSEA
Time Status PFT	Staff Months 12		Location Statewide		Election District
Type of Expenditure			Amount		
1	2	3			
Salary*	42,495	////////////////////			
Benefits*	17,367	////////////////////			
Premium Pay (Included in Above)	////////////////////	////////////////////			
Other	////////////////////	////////////////////			
Total Personal Services	////////////////////	59.9			
Travel		2.0			
Contractual		11.5			
Commodities		2.5			
Equipment		23.2			
Other					
Total Cost		99.1			
Funding Source for Total Cost					
Federal Receipts	1002				
G.F. Match	1003				
General Fund	1004	99.1			
Program Receipts/GF	1005				
I-A Receipts	1007				
CIP Receipts	1061				
Other					
* Personal Services Salary and Benefits Costs are from the FY91 PACS.					
Justification					
The Department estimates that approximately thirteen hours of time will be needed on each of approximately 250 impounds. The current staff of AST is unable to absorb this increased workload without additional staffing. This new position is a commissioned State Trooper assigned to road patrol, which would include DWI enforcement. The location of this position is not yet determined, but its addition to AST will offset the workload increase throughout the state. The position would become active on July 1, 1990. Equipment, consisting primarily of a patrol vehicle, would be needed in FY 91 only.					

REQUEST FOR
NEW POSITION

AGENCY Department of Public Safety
 BRU Alaska State Troopers
 COMPONENT Detachments

Page 7 of 8
 Revised Date

FY 91

Position Title Administrative Assistant I		No. of Positions 1	Range/Step 12/A	Barq. Unit ASEA
Time Status PPT	Staff Months 6	Location Anchorage		Election District 6-16
Type of Expenditure		Justification		
		This position will prepare records involving seized vehicles and their later disposition. The Department is estimating that it will take approximately two hours of administrative effort per seizure. Because the legal responsibilities may require a working knowledge above that found in a typical clerical employee, an Administrative Assistant I is requested. Because the workload is insufficient in this program alone to warrant a fully-funded position, only six months funding is requested.		
	Amount			
1	2	3		
Salary*	12,432	////////////////////		
Benefits*	5,695	////////////////////		
Premium Pay (Included in Above)	////////////////////	////////////////////		
Other	////////////////////	////////////////////		
Total Personal Services	////////////////////	18.1		
Travel		—		
Contractual		1.2		
Commodities		1.0		
Equipment				
Other				
Total Cost		20.3		
Funding Source for Total Cost				
Federal Receipts	1002			
G.F. Match	1003			
General Fund	1004	20.3		
Program Receipts/GF	1005			
I-A Receipts	1007			
CIP Receipts	1061			
Other				
* Personal Services Salary and Benefits Costs are from the FY91 PACS.				

REQUEST FOR
NEW POSITION

AGENCY Department of Public Safety
 BRU Alaska State Troopers
 COMPONENT Detachments

Page 8 of 8
 Revised Date

FY 91

FISCAL NOTE

REQUEST:

Revision Date: January 17, 1990
Title: An Act relating to motor
vehicle forfeiture.
Sponsor: House Transportation
Requestor: House Judiciary

Agency Affected: Department of Administration
BRU: General Services and Supply
Components: Property Management

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 91	FY 92	FY 93	FY 94	FY 95	FY 96
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	0	0	0	0	0	0
CONTRACTUAL	*	*	*	*	*	*
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	*	*	*	*	*	*
CAPITAL	0	0	0	0	0	0
REVENUE	0	0	0	0	0	0

FUNDING: (Thousands of Dollars)

GENERAL FUND	*	*	*	*	*	*
FEDERAL FUNDS	0	0	0	0	0	0
OTHER 1034	0	0	0	0	0	0
TOTAL	*	*	*	*	*	*

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

ANALYSIS: (Attach a separate page if necessary)

* The fiscal impact in FY 90 would be the same as other years.
If the Surplus Property Section of Department of Administration disposed of the forfeited vehicles, we estimate disposal costs to be approximately \$100.00 per vehicle with proceeds from sales deposited into the general fund.

Prepared by: Robert J. Link, Director *Robert J. Link* Phone: 465-2250
Division: General Services and Supply *General Services and Supply* Date: 1/17/90
Approved by Commissioner: Frank S. Baxter *Frank S. Baxter* Date: 1/23/90
Agency: Department of Administration

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

FISCAL NOTE

REQUEST:

Revision Date: _____
Title: "An Act relating to motor vehicle forfeiture"
Sponsor: Koponen
Requestor: Transportation Committee

Agency Affected: Dept. of Administration
BRU: Public Defender Agency
Components: Third Judicial District

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY91	FY 92	FY 93	FY 94	FY 95	FY 96
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary) FY 90 impact is zero.
Vehicle forfeiture is a mandatory sanction under the provisions of this bill; therefore, clients of the Public Defender Agency convicted of said offense will not be entitled to litigate the issue. Any litigation regarding vehicle forfeiture will occur between the Department of Law and any person or entity other than the defendant who claims an ownership

Prepared by: John B. Salemi, Public Defender Phone: 279-7541
Division: Public Defender Agency Date: _____

Approved by Commissioner: Frank Baxter Date: 1/23/90
Agency: Department of Administration

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. CSHB 26

interest in the vehicle. Under these circumstances there will be no fiscal impact with respect to the Public Defender Agency.

As an aside, the Public Defender Agency feels this is an inappropriate sanction. While condoning harsh penalties for DWI offenders, this sanction will often serve to punish members of the family or social unit who have not been involved in wrongdoing. An extreme example might be a family unit with three or four children where both spouses work and rely on the family vehicle for transportation. Forfeiture of the vehicle not only punishes the criminal defendant, but the spouse and children of the family unit. This form of transportation is an essential facet of everyday life for most families. It affects employment, social life, children's participation in extracurricular activities at school, etc. It seems a better approach to increase the mandatory minimum jail sentence for a third time DWI offender rather than forfeit the vehicle. The enhanced minimum jail sentence is a direct sanction on the offender with less impact on the family unit.

FISCAL NOTE

REQUEST:

Revision Date: _____
 Title: "An Act relating to motor vehicle forfeiture."
 Sponsor: Kobonen
 Requestor: House Judiciary

Agency Affected: Administration
 BRU: Office of Public Advocacy

Components: _____

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY91	FY 92	FY 93	FY 94	FY 95	FY 96
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0

CAPITAL	0	0	0	0	0	0
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REVENUE	0	0	0	0	0	0
---------	---	---	---	---	---	---

FUNDING: (Thousands of Dollars)

GENERAL FUND	0	0	0	0	0	0
FEDERAL FUNDS						
OTHER						
TOTAL	0	0	0	0	0	0

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

FY90 impact: is zero.

Prepared by: Baxter Brant McGee, Public Advocate

Division: Office of Public Advocacy

Approved by Commissioner: Frank Baxter

Agency: Department of Administration

Phone: 274-1684

Date: 1/22/90

Date: 1/23/90

Distribution (by preparer):

Legislative Finance
 Legislative Sponsor
 Requestor
 Office of Management and Budget
 Impacted Agency(ies)

FISCAL NOTE

REQUEST:

Revision Date: January 17, 1990
 Title: "An Act relating to motor vehicle forfeiture."
 Sponsor: House Transportation
 Requestor: House Judiciary

Agency Affected: Department of Law
 BRU: Prosecution
 Components: Third Judicial District

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 91	FY 92	FY 93	FY 94	FY 95	FY 96
PERSONAL SERVICES	106.1	109.2	112.5	115.9	119.4	123.0
TRAVEL	3.6	3.7	3.8	3.9	4.0	4.1
CONTRACTUAL	37.6	38.7	39.9	41.1	42.4	43.7
SUPPLIES	11.7	7.4	7.6	7.8	8.0	8.2
EQUIPMNT	11.0	-0-	-0-	-0-	-0-	-0-
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	169.9	159.0	163.8	168.7	173.8	179.0

CAPITAL						
---------	--	--	--	--	--	--

REVENUE						
---------	--	--	--	--	--	--

FUNDING: (Thousands of Dollars)

GENERAL FUND	169.9	159.0	163.8	168.7	173.8	179.0
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME	2	2	2	2	2	2
PART-TIME	1	1	1	1	1	1
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

Please see the attached analysis.

Prepared by: Richard I. Pegues, Director
 Division: Administrative Services
 Approved by Commissioner: Douglas B. Bailly, Attorney General
 Agency: Department of Law

Phone: 465-3672
 Date: January 17, 1990
 Date: January 17, 1990

Distribution (by preparer):

Legislative Finance
 Legislative Sponsor
 Requestor
 Office of Management and Budget
 Impacted Agency(ies)

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. CSHB 26 (Trans)

The committee substitute for HB 26 makes three revisions to the original bill.

First, Section 3 is revised to prescribe the manner in which the Department of Public Safety may dispose of forfeited vehicles. These include: selling the motor vehicle and depositing the proceeds into the general fund; taking custody of the property and authorizing its use by the state or another political subdivision of the state; or destroying property that is harmful to the public.

Second, Section 4 is revised to require, upon forfeiture of a motor vehicle, that the state shall provide written notice within 30 days to each person with an ascertainable ownership or security interest in the motor vehicle, other than the person convicted of the offense resulting in forfeiture. The 30 day notification limit was not included in the original bill.

Third, Section 5 is revised to require that when a person with an ownership or security interest requests remission, the court shall schedule a hearing "in a timely manner" to determine if remission of forfeiture shall be ordered. The phrase "in a timely manner" was not included in the original bill.

None of these revisions change the impact the bill will have on the Department of Law. The amount of revenue that might be earned is unknown. It is possible that forfeiture revenues will offset or be greater than the cost of the mandatory forfeiture program. It is just as possible, however, that these revenues will be substantially less than the cost of such a program. To the extent that revisions contained in the committee substitute hasten the entire forfeiture and remission process, the workload demands on the department's legal staff will likely increase. The department's original fiscal analysis follows below.

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill Resolution No. CSHB 26 (Trans)

This bill amends AS 28.35 to provide that the court shall order the forfeiture of the motor vehicle involved when a person is convicted for a third, or subsequent time, for driving while intoxicated or refusal to submit to a chemical test. Under existing law, the state has the option of seeking forfeiture, but it is not currently mandated to do so.

The bill also provides that the state shall provide written notice to each person with an ascertainable ownership or security interest in the motor vehicle, other than the person convicted of the offense resulting in the forfeiture, advising of the forfeiture and advising of the person's right to intervene to protect an interest in the motor vehicle. The state must, in the same written notice, also advise that failure to seek remission of forfeiture within 90 days will extinguish the rights of the person to the vehicle. The bill further provides that the court shall schedule a hearing to determine if remission of forfeiture shall be ordered, if a person with an ownership or security interest in the forfeiture vehicle, other than the person convicted, makes a request for a hearing within the 90-day notification period.

During 1988, 528 drivers had their drivers' licenses revoked for ten years, indicating that nearly this number of persons had been convicted of driving while intoxicated three or more times. The number of ten year license revocations increased by nearly 10% in 1988. About 60% of all DWI prosecutions are handled by the state, and the remainder are handled by municipal prosecutors in Anchorage, Fairbanks, Juneau, and Ketchikan. Moreover, the Department of Law prosecutes 96% of all state DWI arrests, and the department's DWI conviction rate is over 80%. Consequently, the department believes that it will be involved in about 250 to 300 motor vehicle forfeitures, if this bill is enacted.

In the event of a forfeiture, the state must give actual written notice to a person with an ascertainable interest in the motor vehicle. Basic due process considerations will also require publication of legal notices, because many persons hold security interests in motor vehicles that are not readily ascertainable from title documents. As a consequence, the department will be substantially involved with the division of motor vehicles and persons with ownership or security interests, in determining the extent ownership and security interests, notifying those with such interests, and preparing for and attending remission hearings. This high volume of work cannot be absorbed with our present staff. The department believes that the addition of one part-time attorney, one full-time paralegal assistant, and one full-time clerk typist will be necessary to carry-out the bill's forfeiture provisions.

Motor vehicle forfeiture will undoubtedly result in some revenue to the state. However, it should be pointed out that forfeited vehicles with the highest value are those that are most likely to involve a third-party ownership or security interest. Conversely, vehicles having the least value are those that are most likely not to have a third-party interest. In this latter event, the actual cost of forfeiture, storage, and disposal may be substantially greater than the value of the forfeited vehicle.

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill Resolution No. CSHB 26 (Trans)

CSHB 26 Fiscal Analysis

Funding Summary

	<u>Atty III</u>	<u>P/A II</u>	<u>Clerk Typist III</u>	<u>Total</u>
71000	32.4	44.3	29.3	106.0
72000	1.8	1.8	-0-	3.6
73000	28.6	4.8	4.2	37.6
74000	3.9	4.5	3.3	11.7
75000	1.5	1.5	8.0	11.0
	-----	-----	-----	-----
Total	68.2	56.9	44.8	169.9

Costs beyond FY91 include a 3% annual inflation factor.

1.	POSITION TITLE Attorney III				RANGE/STEP 22A	BARC. UNIT PX	PAGE/LINE	GOV.	APPROV.	DISAPP
2.	TYPE OF POSITION PPT	STAFF MONTHS 12	RP NUMBER	PCN NUMBER	BRU PRIORITY	LOCATION EBA-Anchorage	ELECTION DISTRICT 8	LEG.		
3.	CONTINUATION LEVEL				JUSTIFICATION:					
4.	TYPE OF EXPENDITURE			ADDITION						
	1	2		3						
	PERSONAL SERVICES									
5.	Salary			24,570						
6.	Benefits			3,889						
7.	Supplemental Benefits			1,590						
8.	Fixed Benefits			2,322						
9.	TOTAL PERSONAL SERVICES		01	32,371						
10.	Travel	02		1,800						
11.	Contractual	03		28,600						
12.	Commodities	04		3,900						
13.	Equipment	05		1,500						
14.	Other									
15.	TOTAL COST			68,171						
	RECEIPT CODE	FUNDING SOURCE								
16.		Federal Receipts 1002								
17.		G.F. Match 1003								
18.		General Funds 1004		68,171						
19.		I-A Receipts 1005								
20.		Program Receipts 1020								
21.		Other								
FOR B&M USE ONLY										
KEY NUMBER										

JUSTIFICATION:

This position is needed in Anchorage, and other southcentral locations, to handle the 250 to 300 forfeiture and remission actions mandated by CSHB 26. Court hearings involve third party ownership or security interests. This bill will generate a large volume of new legal transactions requiring the part-time services of at least one attorney. Although these transactions are often complicated, they rarely involve complex legal issues. Allocation of the position to the sub-journey level of Attorney III is therefore recommended. Position support costs include 25.0 to publish forfeiture legal notices.

REQUEST FOR
NEW POSITION

AGENCY Department of Law

BRU Prosecution

COMPONENT Third Judicial District

FY 91

Page 1 of 3

Revised Date

1.	POSITION TITLE Paralegal Assistant II				RANGE/STEP 16A	BARG. UNIT 1 GGU	PAGE/LINE	GOV.	APPROV.	DISAPP
2.	TYPE OF POSITION PFT	STAFF MONTHS 12	RP NUMBER	PCN NUMBER	BRU PRIORITY	LOCATION EBA-Anchorage	ELECTION DISTRICT 8	LEG.		
3.	CONTINUATION LEVEL				JUSTIFICATION:					
4.	TYPE OF EXPENDITURE				AMOUNT					
	1		2		3					
	PERSONAL SERVICES									
5.	Salary		32,424							
6.	Benefits		5,133							
7.	Supplemental Benefits		2,098							
8.	Fixed Benefits		4,644							
9.	TOTAL PERSONAL SERVICES		01		44,299					
10.	Travel		02		1,800					
11.	Contractual		03		4,800					
12.	Commodities		04		4,500					
13.	Equipment		05		1,500					
14.	Other									
15.	TOTAL COST				56,899					
	RECEIPT CODE				FUNDING SOURCE					
16.					Federal Receipts 1002					
17.					G.F. Match 1003					
18.					General Funds 1004 56,899					
19.					I-A Receipts 1005					
20.					Program Receipts 1028					
21.					Other					
FOR BSM USE ONLY										
FY NUMBER										

JUSTIFICATION:

This position is needed in Anchorage, and other southcentral locations, to assist with the 250 to 300 vehicle forfeiture actions mandated by CSHB 26. Title and records searches to verify any ownership or security interest, legal notification, and preparation of all necessary documentation will be required. This level of work is most appropriately allocated to the Paralegal Assistant II class.

REQUEST FOR
NEW POSITION

AGENCY Department of Law
 BRU Prosecution
 COMPONENT Third Judicial District

FY 91

Page 2 of 3

Revised Date

1.	POSITION TITLE Clerk Typist III				RANGE/STEP BB	BARG. UNIT CGU	PAGE/LINE	GOV.	APPROV.	DISAPP
2.	TYPE OF POSITION PFT	STAFF MONTHS 12	RP NUMBER	PCN NUMBER	BRU PRIORITY	LOCATION EBA-Anchorage	ELECTION DISTRICT 8	LEG.		
3.	CONTINUATION LEVEL				JUSTIFICATION:					
4.	TYPE OF EXPENDITURE			AMOUNT	<p>This clerical position is needed to assist the attorney and the paralegal to handle the 250 to 300 vehicle forfeiture actions mandated by CSIB 26. A very large volume of routine documents will be generated by this work, including motions, notices to persons with ownership or security interest, or correspondence between the parties. Because this work will not usually involve higher level legal instruments, such as briefs, allocation to the Clerk Typist III level is recommended.</p>					
	1	2	3							
	PERSONAL SERVICES									
5.	Salary		20,136							
6.	Benefits		3,188							
7.	Supplemental Benefits		1,303							
8.	Fixed Benefits		4,644							
9.	TOTAL PERSONAL SERVICES	01		29,271						
10.	Travel	02		-0-						
11.	Contractual	03		4,200						
12.	Commodities	04		3,300						
13.	Equipment	05		8,000						
14.	Other									
15.	TOTAL COST			44,771						
	RECEIPT CODE	FUNDING SOURCE								
16.		Federal Receipts 1002								
17.		G.F. Match 1003								
18.		General Funds 1004		44,771						
19.		I-A Receipts 1005								
20.		Program Receipts 1028								
21.		Other								
FOR D&M USE ONLY										
KEY NUMBER										

REQUEST FOR
NEW POSITION

AGENCY Department of Law
BRU Prosecution
COMPONENT Third Judicial District

FY 91

Page 3 of 3
Revised Date

STATE OF ALASKA 1989 LEGISLATIVE SESSION
FISCAL NOTE

REQUEST:

Bill Version: HB 26
Publish Date: 1/9/89

Revision Date:
Title: An act relating to motor
vehicle forfeiture
Sponsor: Koponen
Requestor: House Transportation

Agency Affected: Alaska Court System
BRU: Trial Courts

Components:

EXPENDITURES/REVENUES (Thousands of Dollars)						
	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
OPERATING						
Personal Services		60.4	60.4	60.4	60.4	60.4
Travel						
Contractual						
Supplies						
Equipment		10.8				
Land & Structures						
Grants & Claims						
TOTAL OPERATING	0.0	71.2	60.4	60.4	60.4	60.4

CAPITAL

REVENUE

FUNDING (Thousands of Dollars)						
General Funds	0.0	71.2	60.4	60.4	60.4	60.4
Federal Funds						
Other						
TOTAL	0.0	71.2	60.4	60.4	60.4	60.4

POSITIONS						
Full-time						
Part-time		3.0	3.0	3.0	3.0	3.0
Temporary						

ANALYSIS: (Attach a separate page if necessary)

See attached analysis.

Prepared by: *Jan St. Sandberg*
 Division: Alaska Court System Phone: 264-8228
 Date: 01/30/89

Approved by: *Arthur H. Snowden, II*
 Agency: Alaska Court System Date: 01/30/89

- Distribution (by preparer):
- Legislative Finance
 - Legislative Sponsor
 - Requestor
 - Office of Management & Budget
 - Impacted Agency(ies)
 - Senate Secretary

Alaska Court System

HB 26 - An act relating to Motor Vehicle Forfeiture

Fiscal Note Analysis

Personal Services:	Salary	Benefits	Total
Law Clerk I, Range 13D Anchorage, PPT - 6 months	\$14,670	\$5,865	\$20,535
Pro Tem District Court Judge, Anchorage, PPT - 6 months	8,352	8,277	16,629
Law Clerk I, Range 13D Fairbanks, PPT - 6 months	16,908	6,355	23,263 -----
Total Personal Services			60,427
Equipment (one-time funding)			10,782 -----
Total First Year Funding			\$71,209 =====

ALASKA COURT SYSTEM
HB 26 - ANALYSIS

This measure would require the court to order forfeiture of motor vehicles in every case specified under AS 28.35.030(c). Under current law, the state has discretion to file a forfeiture motion, and the court can act only if a motion is filed.

According to statistics provided by the Department of Law, forfeitures would be ordered in approximately 250-300 cases annually, primarily in Anchorage and Fairbanks. It is assumed that spouses or lienholders will assert an interest in approximately 90% of the cases. Approximately one-half of these cases are expected to be highly contested. Based on information previously provided by the Department of Law, in-court time for these motions is assumed to average two hours. This legislation will also impact case processing. Law clerks must review paperwork and prepare the files for disposition by the judges. Given the volume of anticipated cases, it is assumed that one additional permanent part-time law clerk and one part-time pro tem judge for the district court in Anchorage and one permanent part-time law clerk in Fairbanks would be required.

FISCAL NOTE

REQUEST: _____

Revision Date: _____ Agency Affected: Public Safety
 Title: "An Act relating to motor
vehible forfeiture." BRU: Alaska State Troopers
 Sponsor: Representative Koponen Component: Detachments
 Requestor: House Transportation

EXPENDITURES/REVENUES: (Thousands of Dollars) (Inflation not included)

OPERATING	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
PERSONAL SERVICES		139.9	139.9	139.9	139.9	139.9
TRAVEL		4.0	4.0	4.0	4.0	4.0
CONTRACTUAL		193.0	193.0	193.0	193.0	193.0
SUPPLIES		6.0	6.0	6.0	6.0	6.0
EQUIPMENT		46.4				
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	389.3	342.9	342.9	342.9	342.9

CAPITAL	-0-	-0-	-0-	-0-	-0-	-0-
---------	-----	-----	-----	-----	-----	-----

REVENUE	-0-	-0-	-0-	-0-	-0-	-0-
---------	-----	-----	-----	-----	-----	-----

FUNDING: (Thousands of Dollars)

GENERAL FUND		389.3	342.9	342.9	342.9	342.9
FEDERAL FUNDS						
OTHER						
TOTAL	-0-	389.3	342.9	342.9	342.9	342.9

POSITIONS:

FULL-TIME	0	2	2	2	2	2
PART-TIME	0	1	1	1	1	1
TEMPORARY	0	0	0	0	0	0

ANALYSIS: (Attach a separate page if necessary)

See attached.

Prepared by: Francis C. Allan
 Division: Alaska State Troopers

Phone: 269-5691
 Date: 1/27/89

Approved by Commissioner: Arthur English
 Agency: Department of Public Safety

Date: 1-30-89

Department of Public Safety

Summary of Fiscal Impact - HB 26

Forfeiture of the motor vehicle of a repeat DWI offender is allowed under existing law (AS 28.35.030(c)). This bill makes forfeiture of the motor vehicle mandatory upon a third DWI conviction within 10 years. The Department of Law has developed guidelines for the preliminary investigation necessary to allow successful forfeiture of a motor vehicle. Among the additional tasks a law enforcement officer must perform:

- 1) a check of the criminal and driving record of each DWI arrestee, to determine if the present offense would be his or her third conviction; the written record must be attached to the police report and forwarded to the prosecutor's office;
- 2) Division of Motor Vehicles (DMV) title records must be checked to determine the owner of the subject vehicle, and a certified copy of the title record obtained;
- 3) if the vehicle is jointly owned, the officer must investigate the circumstances surrounding the offender's possession of vehicle at the time of the offense, as this information will be required at the "remission" hearing under AS 28.35.037; this information must be added to the police report;
- 4) if DMV records show a lien against a vehicle title the lien holder must be contacted, and the present extent of his financial interest determined; this information must be added to the police report.

The Department of Law estimates that 250 vehicles per year will be subject to forfeiture under the provisions of this bill. The Department of Public Safety estimates that enforcement of this new law will require a substantial amount of staff time. This additional time will fall into three general areas: (1) locating and impounding the vehicle in question, (2) investigating title history for lien holders and co-owners and, (3) processing the vehicle administratively.

Locating and Impounding Vehicles

Troopers will likely spend up to seven hours performing this task. This estimate includes having to travel to the location where the vehicle is most likely to be found, traveling from point to point tracking down the vehicle, and time spent waiting for tow trucks and completing the impound procedures. This does not include those instances where the convicted owner may be attempting to conceal the location of the vehicle from authorities or transfer the vehicle to someone else.

Department of Public Safety
Summary of Fiscal Impact - HB 26

Investigation of Title History

This bill would allow persons having a claim against the vehicle to have a hearing before the court. Establishing legitimate lien holders and co-owners will likely require personal contact with those claiming an interest in the vehicle, obtaining written statements, and research of existing records. This process could well take six or more hours per vehicle.

Administrative Processing

This time will include completing the necessary documents and other records that this bill will necessitate as a result of seizure and disposal of each vehicle. This procedure will most likely take two or more hours per vehicle.

Additional Costs

The bill provides a 90-day period during which persons who claim to have a financial interest in the vehicle may seek remission of forfeiture. An additional 30 days is anticipated before a hearing will likely be held. During this 120-day time period the Department of Public Safety would be responsible for daily storage charges of approximately five dollars per day. Over the course of one year this could total \$150,000. (120 X 250 X \$5.00)

An average charge for towing a vehicle in the Anchorage area is approximately \$75.00. 250 vehicles would result in towing fees estimated at \$18,750.

Estimated Additional Personnel

PERSONAL SERVICES COSTS:

		<u>Personal Services</u>	<u>Total Position Costs</u>
State Trooper	12 mos.	\$ 60.7	\$ 99.9
State Trooper	12 mos.	60.7	99.9
Admin. Asst. I	6 mos.	18.5	20.7
TOTAL		<u>\$139.9</u>	<u>\$220.5</u>

An average number of hours worked during a 12-month period equals approximately 1922. Estimated additional personnel resources required to manage this function were based upon these numbers.

Equipment

Equipment is needed in the first year only.

Department of Public Safety
 Division of Alaska State Troopers
 HB 26
 Fiscal Note Summary
 FY90

	<u>State Trooper 12 mos.</u>	<u>State Trooper 12 mos.</u>	<u>PPT Admin. Asst. 6 mos</u>	<u>Other Costs</u>	<u>Total</u>
Personal Services	60.7	60.7	18.5	-	139.9
Travel	2.0	2.0	-	-	4.0
Contractual	11.5	11.5	1.2	168.8*	193.0
Supplies	2.5	2.5	1.0	-	6.0
Equipment	<u>23.2</u>	<u>23.2</u>	<u>-</u>	<u>-</u>	<u>46.4</u>
Total	<u>99.9</u>	<u>99.9</u>	<u>20.7</u>	<u>168.8</u>	<u>389.3</u>

*\$18.8 for towing and \$150.0 for storage.

Position Title State Trooper		No. of Positions 1	Range/Step 76/A	Barg. Unit PSEA	
Time Status PFT	Staff Months 12	Location Statewide		Election District	
Type of Expenditure		Justification			
Amount		<p>The Department estimates that approximately thirteen hours of time will be needed on each of approximately 250 impounds. The current staff of AST is unable to absorb this increased workload without additional staffing. This new position is a commissioned State Trooper assigned to road patrol, which would include DWI enforcement. The location of this position is not yet determined, but its addition to AST will offset the workload increase throughout the state. The position would become active on July 1, 1989. Equipment, consisting primarily of a patrol vehicle, would be needed in FY 90 only.</p>			
1	2				3
Salary*	42,495				////////////////////
Benefits*	18,241				////////////////////
Premium Pay (Included in Above)	////////////////////				////////////////////
Other	////////////////////				////////////////////
Total Personal Services	////////////////////				60.7
Travel					2.0
Contractual					11.5
Commodities					2.5
Equipment					23.2
Other					
Total Cost		99.9			
Funding Source for Total Cost					
Federal Receipts	1002				
G.F. Match	1003				
General Fund	1004				
Program Receipts/GF	1005	99.9			
I-A Receipts	1007				
CIP Receipts	1061				
Other					

REQUEST FOR
NEW POSITION

AGENCY Department of Public Safety
 BRU Alaska State Troopers
 COMPONENT Detachments

Page 5 of 7
 Revised Date

FY 90

Position Title State Trooper			No. of Positions 1	Range/Step 76/A	Barg. Unit PSEA
Time Status PFT	Staff Months 12		Location Statewide		Election District
			Justification		
Type of Expenditure			Amount		
1	2	3			
Salary*	42,495	////////////////////			
Benefits*	18,241	////////////////////			
Premium Pay (Included in Above)	////////////////////	////////////////////			
Other	////////////////////	////////////////////			
Total Personal Services	////////////////////	60.7			
Travel		2.0			
Contractual		11.5			
Commodities		2.5			
Equipment		23.2			
Other					
Total Cost		99.9			
Funding Source for Total Cost					
Federal Receipts	1002				
G.F. Match	1003				
General Fund	1004				
Program Receipts/GF	1005	99.9			
I-A Receipts	1007				
CIP Receipts	1061				
Other					

The Department estimates that approximately thirteen hours of time will be needed on each of approximately 250 impounds. The current staff of AST is unable to absorb this increased workload without additional staffing. This new position is a commissioned State Trooper assigned to road patrol, which would include DWI enforcement. The location of this position is not yet determined, but its addition to AST will offset the workload increase throughout the state. The position would become active on July 1, 1989. Equipment, consisting primarily of a patrol vehicle, would be needed in FY 90 only.

REQUEST FOR
NEW POSITION

AGENCY Department of Public Safety
 BR// Alaska State Troopers
 COMPONENT Detachments

Page 6 of 7
 Revised Date

FY 90

Position Title Administrative Assistant I		No. of Positions 1	Range/Step 12/A	Barg. Unit ASEA
Time Status PPT	Staff Months 6	Location Anchorage		Election District 6-16
Type of Expenditure		Amount		
1	2	3		
Salary*	12,432	////////////////////		
Benefits*	6,046	////////////////////		
Premium Pay (Included in Above)	////////////////////	////////////////////		
Other	////////////////////	////////////////////		
Total Personal Services	////////////////////	18.5		
Travel		-		
Contractual		1.2		
Commodities		1.0		
Equipment				
Other				
Total Cost		20.7		
Funding Source for Total Cost				
Federal Receipts	1002			
G.F. Match	1003			
General Fund	1004	20.7		
Program Receipts/GF	1005			
I-A Receipts	1007			
CIP Receipts	1061			
Other				
Justification				
This position will prepare records involving seized vehicles and their later disposition. The Department is estimating that it will take approximately two hours of administrative effort per seizure. Because the legal responsibilities may require a working knowledge above that found in a typical clerical employee, an Administrative Assistant I is requested. Because the workload is insufficient in this program alone to warrant a fully-funded position only six months funding is requested.				

REQUEST FOR
NEW POSITION

AGENCY Department of Public Safety
 BRU Alaska State Troopers
 COMPONENT Detachments

Page 7 of 7
Revised Date

FY 90

BILL NO: HB 26

DATE: January 27, 1989

TITLE: "An Act relating to motor
vehicle forfeiture."

CONTACT: Gayle A. Horetski
Deputy Commissioner
465-4322

DEPARTMENT OF
PUBLIC SAFETY

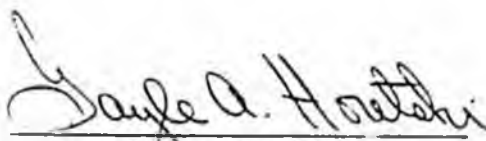
House Bill 26 makes forfeiture of the motor vehicle mandatory upon the driver's third DWI conviction within 10 years.

Drunk drivers are a serious problem in Alaska. In over 50% of all traffic related fatalities occurring on Alaska's highways, one or more of the persons involved in the accident has been drinking. Statistics show that a substantial number of persons arrested for DWI have previously been convicted for the same offense.

Although the Department of Public Safety is in favor of any reasonable measures which might act as a deterrent to repeat DWI offenders, the mandatory nature of the sanction in this bill presents practical problems, and would be very costly to enforce; these costs are outlined in the Department's fiscal note on the bill.

One practical problem is that a substantial number of vehicles are owned and registered to more than one person in the household, i.e., husband and wife. If forfeiture is ordered following conviction of one of the owners (e.g.: the husband), it is expected that the other owner (the wife) will usually be able to meet the requirements of proposed AS 28.35.037(b), thereby retaining the vehicle. The convicted owner would quite likely continue to have access to the vehicle upon demand, although his name would no longer be on the title.

Although the Department of Public Safety supports the imposition of significant sanctions against those who endanger lives and property through drunk driving, we believe that the practical problems in enforcing the mandatory forfeiture provision and the significant additional cost involved outweigh the possible deterrent benefits of the bill.


for Arthur English
Commissioner

FISCAL NOTE

REQUEST:

Revision Date: _____
Title: "An Act relating to motor vehicle forfeiture."
Sponsor: Repr. Koponen
Requestor: House Transportation

Agency Affected: Department of Law
BRU: Prosecution
Components: Third Judicial District

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
PERSONAL SERVICES		107.5	110.7	114.0	117.4	122.0
TRAVEL		3.6	3.7	3.8	3.9	4.0
CONTRACTUAL		37.6	38.7	39.9	41.1	42.4
SUPPLIES		11.7	7.4	7.6	7.8	8.0
EQUIPMENT		11.0	-0-	-0-	-0-	-0-
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING		171.4	160.5	165.3	170.2	176.4

CAPITAL						
---------	--	--	--	--	--	--

REVENUE						
---------	--	--	--	--	--	--

FUNDING: (Thousands of Dollars)

GENERAL FUND		171.4	160.5	165.3	170.2	176.4
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME		2	2	2	2	2
PART-TIME		1	1	1	1	1
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

Please see the attached analysis.

Richard I. Pegues

Prepared by: Richard I. Pegues, Director
Division: Administrative Services

Phone: 465-3672
Date: January 27, 1989

Approved by Commissioner: Richard I. Pegues / FOR /
Grace Berg Schaible, Atty. Gen.
Agency: Department of Law

Date: January 27, 1989

Distribution (by preparer):

- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. HB 26

This bill amends AS 28.35 to provide that the court shall order the forfeiture of the motor vehicle involved when a person is convicted for a third, or subsequent time, for driving while intoxicated or refusal to submit to a chemical test. Under existing law, the state has the option of seeking forfeiture, but it is not currently mandated to do so.

The bill also provides that the state shall provide written notice to each person with an ascertainable ownership or security interest in the motor vehicle, other than the person convicted of the offense resulting in the forfeiture, advising of the forfeiture and advising of the person's right to intervene to protect an interest in the motor vehicle. The state must, in the same written notice, also advise that failure to seek remission of forfeiture within 90 days will extinguish the rights of the person to the vehicle. The bill further provides that the court shall schedule a hearing to determine if remission of forfeiture shall be ordered, if a person with an ownership or security interest in the forfeiture vehicle, other than the person convicted, makes a request for a hearing within the 90-day notification period.

During 1988, 528 drivers had their drivers' licenses revoked for 10 years, indicating that nearly this number of persons had been convicted of driving while intoxicated three or more times. The number of 10 year license revocations increased by nearly 10% in 1988. About 60% of all DWI prosecutions are handled by the state, and the remainder are handled by municipal prosecutors in Anchorage, Fairbanks, Juneau, and Ketchikan. Moreover, the Department of Law prosecutes 96% of all state DWI arrests, and the department's DWI conviction rate is over 80%. Consequently, the department believes that it will be involved in about 250 to 300 motor vehicle forfeitures, if this bill is enacted.

In the event of a forfeiture, the state must give actual written notice to person with an ascertainable interest in the motor vehicle. Basic due process considerations will also require publication of legal notices, because many persons hold security interests in motor vehicles that are not readily ascertainable from title documents. As a consequence, the department will be substantially involved with the division of motor vehicles and persons with ownership or security interests, in determining the extent ownership and security interests, notifying those with such interests, and preparing for and attending remission hearings. This high volume of work cannot be absorbed with our present staff. The department believes that the addition of one part-time attorney, one full-time paralegal assistant, and one full-time clerk typist will be necessary to carry-out the bill's forfeiture provisions.

Motor vehicle forfeiture will undoubtedly result in some revenue to the state. However, it should be pointed out that forfeited vehicles with the highest value are those that are most likely to involve a third-party ownership or security interest. Conversely, vehicles having the least value are those that are most likely not to have a third-party interest. In this latter event, the actual cost of forfeiture, storage, and disposal may be substantially less than the value of the forfeited vehicle.

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. HB 26

HB 26 Fiscal Analysis

Funding Summary

	<u>Atty III</u>	<u>P/A II</u>	<u>Clerk Typist III</u>	<u>Total</u>
71000	32.7	44.9	29.9	107.5
72000	1.8	1.8	-0-	3.6
73000	28.6	4.8	4.2	37.6
74000	3.9	4.5	3.3	11.7
75000	5	1.5	8.0	11.0
	<hr/>	<hr/>	<hr/>	<hr/>
Total	68.5	57.5	45.4	171.4

Costs beyond FY 90 include a 3 per cent annual inflation factor.

Position Title Attorney III		No. of Positions 1	Range/Step 22A	Barg. Unit PX
Time Status PPT	Staff Months 12	Location Anchorage		Election District 8
Type of Expenditure		Justification		
1	2	This position is needed in Anchorage, and other southcentral locations, to handle the 250 to 300 forfeiture and remission actions mandated by HB 26. Court hearings involve third party ownership or security interests. This bill will generate a large volume of new legal transactions requiring the part-time services of at least one attorney. Although these transactions are often complicated, they rarely involve complex legal issues. Allocation of the position to the sub-journey level of Attorney III is therefore recommended. Position support costs include 25.0 to publish forfeiture legal notices.		
Salary	24,570			
Benefits	8,099			
Premium Pay				
Other				
Total Personal Services		32,669		
Travel		1,800		
Contractual		28,600		
Commodities		3,900		
Equipment		1,500		
Other				
Total Cost		68,469		
Funding Source for Total Cost				
Federal Receipts	1002			
G. F. Match	1003			
General Fund	1004	68,469		
I-A Receipts	1006			
CIP Receipts	1061			
Other				

Request For
New Position

Agency Department of Law
BRU Prosecution
Component Third Judicial District

Page 1 of 3
Revised Date

FY 90

Position Title Paralegal Assistant II		No. of Positions 1	Range/Step 16A	Barg. Unit GGU
Time Status PFT	Staff Months 12	Location EBA - Anchorage		Election District 8
Type of Expenditure		Amount		
1	2	3		
Salary	32,424			
Benefits	12,493			
Premium Pay				
Other				
Total Personal Services		44,917		
Travel		1,800		
Contractual		4,800		
Commodities		4,500		
Equipment		1,500		
Other				
Total Cost		57,517		
Funding Source for Total Cost				
Federal Receipts	1002			
G. F. Match	1003			
General Fund	1004	57,517		
I-A Receipts	1006			
CIP Receipts	1061			
Other				

Justification
This position is needed in Anchorage, and other southcentral locations, to assist with the 250 to 300 vehicle forfeiture actions mandated by HB 26. Title and records searches to verify any ownership or security interest, legal notification, and preparation of all necessary documentation will be required. This level of work is most appropriately allocated to the Paralegal Assistant II class.

**Request For
New Position**

Agency Department of Law
 BRU Prosecution
 Component Third Judicial District

Page 2 of 3
 Revised Date

FY 90

Position Title Clerk Typist III		No. of Positions 1	Range/Step 8B	Barg. Unit GGU
Time Status PFT	Staff Months 12	Location EBA - Anchorage		Election District 8
Justification				
<p>This clerical position is needed to assist the attorney and the paralegal handle the 250 to 300 vehicle forfeiture actions mandated by HB 26. A very large volume of routine documents will be generated by this work, including motions, notices to persons with ownership or security interest, or correspondence between the parties. Because this work will not usually involve higher level legal instruments, such as briefs, allocation to the Clerk Typist III level is recommended.</p>				
Type of Expenditure		Amount		
1	2	3		
Salary	20,136			
Benefits	9,768			
Premium Pay				
Other				
Total Personal Services		29,904		
Travel		-0-		
Contractual		4,200		
Commodities		3,300		
Equipment		8,000		
Other				
Total Cost		45,404		
Funding Source for Total Cost				
Federal Receipts 1002				
G. F. Match 1003				
General Fund 1004		45,404		
I-A Receipts 1006				
CIP Receipts 1061				
Other				

**Request For
New Position**

Agency Department of Law
 BRU Prosecution
 Component Third Judicial District

Page 3 of 3
 Revised Date

FY 90

FISCAL NOTE

REQUEST:

Revision Date: _____
Title: "An Act relating to motor vehicle forfeiture."
Sponsor: Rep. Koponen
Requestor: _____

Agency Affected: Department of Corrections
BRU: _____
Components: _____

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE	0	0	0	0	0	0

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	0	0	0	0	0	0

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

This legislation will have no fiscal impact upon the Department of Corrections.

Susan E. Knighton

Prepared by: Susan E. Knighton, Director
Division: Administrative Services

Phone: 465-3376
Date: 1-23-89

Approved by Commission: *Henry Barnett*
Agency: Department of Corrections

Date: 1-23-89

Distribution (by preparer):

- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

**STATE OF ALASKA 1989 LEGISLATIVE SESSION
FISCAL NOTE**

ce

No. 1

REQUEST:

Bill Version: CSHB 26 (TRSP)
Publish Date: HOUSE 2/8/89

Revision Date:
Title: An act relating to motor
vehicle forfeiture
Sponsor: Koponan
Requestor: House Transportation

Agency Affected: Alaska Court System
BRU: Trial Courts

Components:

EXPENDITURES/REVENUES:	(Thousands of Dollars)					
	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
OPERATING						
Personal Services		60.4	60.4	60.4	60.4	60.4
Travel						
Contractual						
Supplies						
Equipment		10.8				
Land & Structures						
Grants & Claims						
TOTAL OPERATING	0.0	71.2	60.4	60.4	60.4	60.4

CAPITAL

REVENUE

FUNDING:	(Thousands of Dollars)					
General Funds	0.0	71.2	60.4	60.4	60.4	60.4
Federal Funds						
Other						
TOTAL	0.0	71.2	60.4	60.4	60.4	60.4

POSITIONS:						
Full-time						
Part-time		3.0	3.0	3.0	3.0	3.0
Temporary						

ANALYSIS: (Attach a separate page if necessary)

See attached analysis.

Prepared by: *Jan Strandberg*
Jan Strandberg, General Counsel
Division: Alaska Court System

Phone: 264-8228
Date: 02/01/89

Approved by: *Arthur H. Snowden, II*
Arthur H. Snowden, II, Administrative Director
Agency: Alaska Court System

Date: 02/01/89

- Distribution (by preparer):
- Legislative Finance
 - Legislative Sponsor
 - Requestor
 - Office of Management & Budget
 - Impacted Agency(ies)
 - Senate Secretary

Alaska Court SystemCSHB 26 (TRSP)
HOUSE 2/8/89An act relating to Motor Vehicle ForfeitureFiscal Note Analysis

Personal Services:	Salary	Benefits	Total
Law Clerk I, Range 13D Anchorage, PPT - 6 months	\$14,670	\$5,865	\$20,535
Pro Tem District Court Judge, Anchorage, PPT - 6 months	8,352	8,277	16,629
Law Clerk I, Range 13D Fairbanks, PPT - 6 months	16,908	6,355	23,263

Total Personal Services			60,427
Equipment (one-time funding)			10,782

Total First Year Funding			\$71,209
			=====

ALASKA COURT SYSTEM
ANALYSIS

This measure would require the court to order forfeiture of motor vehicles in every case specified under AS 28.35.030(c). Under current law, the state has discretion to file a forfeiture motion, and the court can act only if a motion is filed.

According to statistics provided by the Department of Law, forfeitures would be ordered in approximately 250-300 cases annually, primarily in Anchorage and Fairbanks. It is assumed that spouses or lienholders will assert an interest in approximately 90% of the cases. Approximately one-half of these cases are expected to be highly contested. Based on information previously provided by the Department of Law, in-court time for these motions is assumed to average two hours. This legislation will also impact case processing. Law clerks must review paperwork and prepare the files for disposition by the judges. Given the volume of anticipated cases, it is assumed that one additional permanent part-time law clerk and one part-time pro tem judge for the district court in Anchorage and one permanent part-time law clerk in Fairbanks would be required.

STATE OF ALASKA
1989 LEGISLATIVE SESSION

BILL VERSION: CSHB 26 (TRSP)
PUBLISH DATE: HOUSE 2/8/89

FISCAL NOTE

REQUEST:

Revision Date: 2/6/89 Agency Affected: Public Safety
Title: "An Act relating to motor vehicle forfeiture." BRU: Alaska State Troopers
Sponsor: Representative Koponen Component: Detachments
Requestor: House Transportation

EXPENDITURES/REVENUES: (Thousands of Dollars) (Inflation not Included)

OPERATING	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
PERSONAL SERVICES		139.9	139.9	139.9	139.9	139.9
TRAVEL		4.0	4.0	4.0	4.0	4.0
CONTRACTUAL		192.0	193.0	193.0	193.0	193.0
SUPPLIES		6.0	6.0	6.0	6.0	6.0
EQUIPMENT		46.4				
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	389.3	342.9	342.9	342.9	342.9

CAPITAL	-0-	-0-	-0-	-0-	-0-	-0-
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REVENUE	-0-	-0-	-0-	-0-	-0-	-0-
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FUNDING: (Thousands of Dollars)

GENERAL FUND		389.3	342.9	342.9	342.9	342.9
FEDERAL FUNDS						
OTHER						
TOTAL	-0-	389.3	342.9	342.9	342.9	342.9

POSITIONS:

FULL-TIME	0	2	2	2	2	2
PART-TIME	0	1	1	1	1	1
TEMPORARY	0	0	0	0	0	0

ANALYSIS: (Attach a separate page if necessary)

See attached.

Prepared by: Francis C. Allan
Division: Alaska State Troopers

Phone: 269-5691
Date: 2/6/89

Approved by Commissioner: S.A.H. Arthur English
Agency: Department of Public Safety

Date: 2/6/89

Department of Public Safety

Summary of Fiscal Impact

Forfeiture of the motor vehicle of a repeat DWI offender is allowed under existing law (AS 28.35.030(c)). This bill makes forfeiture of the motor vehicle mandatory upon a third DWI conviction within 10 years. The Department of Law has developed guidelines for the preliminary investigation necessary to allow successful forfeiture of a motor vehicle. Among the additional tasks a law enforcement officer must perform:

- 1) a check of the criminal and driving record of each DWI arrestee, to determine if the present offense would be his or her third conviction; the written record must be attached to the police report and forwarded to the prosecutor's office;
- 2) Division of Motor Vehicles (DMV) title records must be checked to determine the owner of the subject vehicle, and a certified copy of the title record obtained; and
- 3) If the vehicle is jointly owned, the officer must investigate the circumstances surrounding the offender's possession of the vehicle at the time of the offense, as this information will be required at the "remission" hearing under AS 28.35.037; this information must be added to the police report.

The Department of Law estimates that 250-300 vehicles per year will be subject to forfeiture under the provisions of this bill. This fiscal note is based upon the conservative estimate of 250 vehicles. The Department of Public Safety estimates that enforcement of this new law will require a substantial amount of staff time. This additional time will fall into three general areas: (1) locating and impounding the vehicle in question, (2) investigating the extent to which co-owners were aware of or involved in the offense and, (3) processing the vehicle administratively.

Locating and Impounding Vehicles

Troopers will likely spend up to seven hours performing this task. This estimate includes having to travel to the location where the vehicle is most likely to be found, traveling from point to point tracking down the vehicle, and time spent waiting for tow trucks and completing the impound procedures. This does not include those instances where the convicted owner may be attempting to conceal the location of the vehicle from authorities or transfer the vehicle to someone else.

Investigation of Co-Owners' Knowledge

This bill allows co-owners of a forfeited vehicle to have a hearing before the court. At this "remission" hearing the forfeited vehicle can be awarded to a person claiming an interest in it, if the interest was acquired in good faith and the person did not know or have reasonable

Department of Public Safety
Summary of Fiscal Impact

cause to believe that the offender would use the vehicle to commit the offense (AS 28.35.037(b)). The investigating officers thus must go to the offender's home and interview the spouse/parent/roommate whose name also appears on the vehicle title to determine the circumstances surrounding the offender's use of the vehicle at the time of the offense. To guard against attempts to fraudulently transfer ownership of the vehicle after the offense, the title status at the time of the offense must also be investigated. This process could well take six or more hours per vehicle.

Administrative Processing

This time will include completing the necessary documents and other records needed to keep track of the seizure and disposal of each vehicle. This procedure will most likely take two or more hours per vehicle.

As under existing law, forfeited vehicles are to be disposed of at the discretion of the Department of Public Safety. After discussion with the Department of Administration it has been decided that (except for a very small number of vehicles that could be used in undercover investigations) these vehicles will be turned over to the Department of Administration for disposal under AS 44.71.010. Thus, the costs associated with ultimate disposal of the vehicles (auction, salvage, etc.) are not addressed in this fiscal note.

Additional Costs

The bill provides a 90-day period during which persons who claim to have a financial interest in the vehicle may seek remission of forfeiture. An additional 30 days is anticipated before a hearing will likely be held. During this 120-day time period the Department of Public Safety would be responsible for daily storage charges of approximately five dollars per day. Over the course of one year this could total \$150,000. (120 X 250 X \$5.00)

An average charge for towing a vehicle in the Anchorage area is approximately \$75.00. 250 vehicles would result in towing fees estimated at \$18,750.

Estimated Additional Personnel

PERSONAL SERVICES COSTS:

		<u>Personal Services</u>	<u>Total Position Costs</u>
State Trooper	12 mos.	\$ 60.7	\$ 99.9
State Trooper	12 mos.	60.7	99.9
Admin. Asst. I	6 mos.	18.5	20.7
TOTAL		<u>\$139.9</u>	<u>\$220.5</u>

Department of Public Safety
Summary of Fiscal Impact

An average number of hours worked during a 12-month period equals approximately 1922. Estimated additional personnel resources required to manage this function were based upon these numbers.

Equipment

Equipment is needed in the first year only.

Department of Public Safety
Division of Alaska State TroopersFiscal Note Summary
FY90

	State Trooper <u>12 mos.</u>	State Trooper <u>12 mos.</u>	PPT Admin. Asst. <u>6 mos.</u>	Other Costs	<u>Total</u>
Personal Services	60.	60.7	18.5	-	139.9
Travel	2.0	2.0	-	-	4.0
Contractual	11.5	11.5	1.2	168.8*	193.0
Supplies	2.5	2.5	1.0	-	6.0
Equipment	<u>23.2</u>	<u>23.2</u>	<u>-</u>	<u>-</u>	<u>46.4</u>
Total	<u>99.9</u>	<u>99.9</u>	<u>20.7</u>	<u>168.8</u>	<u>389.3</u>

*\$18.8 for towing and \$150.0 for storage.

Position Title State Trooper		No. of Positions 1	Range/Step 76/A	Barg. Unit PSEA
Time Status PFT	Staff Months 12	Location Statewide		Election District
Type of Expenditure		Amount		
1	2	3		
Salary*	42,495	////////////////////		
Benefits*	18,241	////////////////////		
Premium Pay (Included in Above)	////////////////////	////////////////////		
Other	////////////////////	////////////////////		
Total Personal Services	////////////////////	60.7		
Travel		2.0		
Contractual		11.5		
Commodities		2.5		
Equipment		23.2		
Other				
Total Cost		99.9		
Funding Source for Total Cost				
Federal Receipts	1002			
G.F. Hatch	1003			
General Fund	1004			
Program Receipts/GF	1005	99.9		
I-A Receipts	1007			
CIP Receipts	1061			
Other				
Justification				
<p>The Department estimates that approximately thirteen hours of time will be needed on each of approximately 250 impounds. The current staff of AST is unable to absorb this increased workload without additional staffing. This new position is a commissioned State Trooper assigned to road patrol, which would include DWI enforcement. The location of this position is not yet determined, but its addition to AST will offset the workload increase throughout the state. The position would become active on July 1, 1989. Equipment, consisting primarily of a patrol vehicle, would be needed in FY 90 only.</p>				

6
OF
8

REQUEST FOR
NEW POSITION

Department of Public Safety
 UOU Alaska State Troopers
 COMPONENT Detachments

Page 6 of 8
 Revised Date

FY 90

No. 2
 CSHB 26 (TRSP)
 HOUSE 2/8/89

Position Title State Trooper		No. of Positions 1	Range/Step 76/A	Barg. Unit PSEA
Time Status PFT	Staff Months 12	Location Statewide		Election District
Type of Expenditure		Amount		
1	2	3		
Salary*	42,495	////////////////////		
Benefits*	18,241	////////////////////		
Premium Pay (Included in Above)	////////////////////	////////////////////		
Other	////////////////////	////////////////////		
Total Personal Services	////////////////////	60.7		
Travel		2.0		
Contractual		11.5		
Commodities		2.5		
Equipment		23.2		
Other				
Total Cost		99.9		
Funding Source for Total Cost				
Federal Receipts	1002			
G.F. Match	1003			
General Fund	1004			
Program Receipts/GF	1005	99.9		
I-A Receipts	1007			
CIP Receipts	1061			
Other				
Justification				
<p>The Department estimates that approximately thirteen hours of time will be needed on each of approximately 250 impounds. The current staff of ASf is unable to absorb this increased workload without additional staffing. This new position is a commissioned State Trooper assigned to road patrol, which would include DWI enforcement. The location of this position is not yet determined, but its addition to AST will offset the workload increase throughout the state. The position would become active on July 1, 1989. Equipment, consisting primarily of a patrol vehicle, would be needed in FY 90 only.</p>				

7 OF 8

REQUEST FOR
NEW POSITION

AGENCY Department of Public Safety
 BRU Alaska State Troopers
 COMPONENT Detachments

Page 7 of 8
 Revised Date

FY 90

No. 2
 CSRB 26 (TRSP)
 HOUSE 2/8/89

Position title Administrative Assistant I		No. of Positions 1	Range/Step 12/A	Barg. Unit ASEA
Time Status PPT	Staff Months 6	Location Anchorage		Election District 6-16
Justification				
This position will prepare records involving seized vehicles and their later disposition. The Department is estimating that it will take approximately two hours of administrative effort per seizure. Because the legal responsibilities may require a working knowledge above that found in a typical clerical employee, an Administrative Assistant I is requested. Because the workload is insufficient in this program alone to warrant a fully-funded position only six months funding is requested.				
Type of Expenditure		Amount		
1	2	3		
Salary*	12,432	////////////////////		
Benefits*	6,046	////////////////////		
Premium Pay (Included in Above)	////////////////////	////////////////////		
Other	////////////////////	////////////////////		
Total Personal Services	////////////////////	18.5		
Travel		—		
Contractual		1.2		
Commodities		1.0		
Equipment				
Other				
Total Cost		20.7		
Funding Source for Total Cost				
Federal Receipts	1002			
G.F. Match	1003			
General Fund	1004	20.7		
Program Receipts/GF	1005			
I-A Receipts	1007			
CIP Receipts	1061			
Other				

8 OF 8

REQUEST FOR
NEW POSITION

AGENCY Department of Public Safety
 BRU Alaska State Troopers
 COMPONENT Detachment

Page 8 of 8
 Revised Date

FY 90

CSHB 26 (TRSP)
 HOUSE 2/8/89
 No. 2

FISCAL NOTE

REQUEST:

Revision Date: January 30, 1989
Title: "An Act relating to motor vehicle forfeiture."
Sponsor: Repr. Koponen
Requestor: House Transportation

Agency Affected: Department of Law
BRU: Prosecution
Components: Third Judicial District

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
PERSONAL SERVICES		107.5	110.7	114.0	117.4	122.0
TRAVEL		3.6	3.7	3.8	3.9	4.0
CONTRACTUAL		37.6	38.7	39.9	41.1	42.4
SUPPLIES		11.7	7.4	7.6	7.8	8.0
EQUIPMENT		11.0	-0-	-0-	-0-	-0-
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING		171.4	160.5	165.3	170.2	176.4

CAPITAL						
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REVENUE						
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FUNDING: (Thousands of Dollars)

GENERAL FUND		171.4	160.5	165.3	170.2	176.4
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME		2	2	2	2	2
PART-TIME		1	1	1	1	1
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

This revision corrects a typographical in the narrative section of the analysis.

Prepared by: Richard I. Pegues, Director
Division: Administrative Services
Approved by Commissioner: Grace Berg Schaible, Atty. Gen.
Agency: Department of Law

Phone: 465-3672
Date: January 30, 1989
Date: January 30, 1989

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

CONTINUATION of FISCAL NOTE ANALYSIS

CSHB, 26 (TRSP)
HOUSE 2/8/89

For Bill/Resolution No. _____

This bill amends AS 28.35 to provide that the court shall order the forfeiture of the motor vehicle involved when a person is convicted for a third, or subsequent time, for driving while intoxicated or refusal to submit to a chemical test. Under existing law, the state has the option of seeking forfeiture, but it is not currently mandated to do so.

The bill also provides that the state shall provide written notice to each person with an ascertainable ownership or security interest in the motor vehicle, other than the person convicted of the offense resulting in the forfeiture, advising of the forfeiture and advising of the person's right to intervene to protect an interest in the motor vehicle. The state must, in the same written notice, also advise that failure to seek remission of forfeiture within 90 days will extinguish the rights of the person to the vehicle. The bill further provides that the court shall schedule a hearing to determine if remission of forfeiture shall be ordered, if a person with an ownership or security interest in the forfeiture vehicle, other than the person convicted, makes a request for a hearing within the 90-day notification period.

During 1988, 528 drivers had their drivers' licenses revoked for 10 years, indicating that nearly this number of persons had been convicted of driving while intoxicated three or more times. The number of 10 year license revocations increased by nearly 10% in 1988. About 60% of all DWI prosecutions are handled by the state, and the remainder are handled by municipal prosecutors in Anchorage, Fairbanks, Juneau, and Ketchikan. Moreover, the Department of Law prosecutes 96% of all state DWI arrests, and the department's DWI conviction rate is over 80%. Consequently, the department believes that it will be involved in about 250 to 300 motor vehicle forfeitures, if this bill is enacted.

In the event of a forfeiture, the state must give actual written notice to person with an ascertainable interest in the motor vehicle. Basic due process considerations will also require publication of legal notices, because many persons hold security interests in motor vehicles that are not readily ascertainable from title documents. As a consequence, the department will be substantially involved with the division of motor vehicles and persons with ownership or security interests, in determining the extent ownership and security interests, notifying those with such interests, and preparing for and attending remission hearings. This high volume of work cannot be absorbed with our present staff. The department believes that the addition of one part-time attorney, one full-time paralegal assistant, and one full-time clerk typist will be necessary to carry-out the bill's forfeiture provisions.

Motor vehicle forfeiture will undoubtedly result in some revenue to the state. However, it should be pointed out that forfeited vehicles with the highest value are those that are most likely to involve a third-party ownership or security interest. Conversely, vehicles having the least value are those that are most likely not to have a third-party interest. In this latter event, the actual cost of forfeiture, storage, and disposal may be substantially greater than the value of the forfeited vehicle.

FISCAL NOTE

REQUEST:

Revision Date: _____
 Title: "An Act relating to motor vehicle
 forfeiture"
 Sponsor: Representative Koponen
 Requestor: House

Agency Affected: Dept. of Administration
 BRU: Public Defender Agency
 Components: Third Judicial District

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-

CAPITAL						
---------	--	--	--	--	--	--

REVENUE						
---------	--	--	--	--	--	--

FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

As vehicle forfeiture is a mandatory sanction under the provisions of this bill, it appears clients of the Public Defender Agency will not be entitled to litigate the issue. Subsequent litigation following forfeiture will
 (Continued over)

Prepared by: John B. Salemi Acting Public Defender Phone: 279-7541
 Division: Public Defender Agency Date: 1/26/89

Approved by Commissioner: John Andrews Date: 1/29/89
 Agency: Department of Administration

Distribution (by preparer):
 Legislative Finance
 Legislative Sponsor
 Requestor
 Office of Management and Budget
 Impacted Agency(ies)

CONTINUATION of FISCAL NOTE ANALYSIS

CSHB 26 (TRSP)
HOUSE 2/8/89

For Bill/Resolution No. _____

likely occur between the Department of Law and any person or entity other than the defendant who claims an ownership interest in the vehicle. Therefore, we anticipate no fiscal impact with respect to our agency.

ce

FISCAL NOTE

REQUEST:

Revision Date: _____
Title: "An Act relating to motor vehicle forfeiture."
Sponsor: Rep. Koponen
Requestor: House Judiciary

Agency Affected: Administration
BRU: Office of Public Advocacy
Components: _____

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0

CAPITAL						
---------	--	--	--	--	--	--

REVENUE						
---------	--	--	--	--	--	--

FUNDING: (Thousands of Dollars)

GENERAL FUND	0	0	0	0	0	0
FEDERAL FUNDS						
OTHER						
TOTAL	0	0	0	0	0	0

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

Prepared by: *Brant McGee*
Division: Office of Public Advocacy

Phone: 274-1684
Date: 1/26/89

Approved by Commissioner: *John Andrews*
Agency: Department of Administration

Date: 1/27/89

Distribution (by preparer):

- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

cl

FISCAL NOTE

REQUEST: _____

Revision Date: _____ Agency Affected: Department of Corrections
 Title: "An Act relating to motor vehicle
forfeiture." BRU: _____
 Sponsor: Rep. Koponen Components: _____
 Requestor: _____

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0

CAPITAL	0	0	0	0	0	0
----------------	---	---	---	---	---	---

REVENUE	0	0	0	0	0	0
----------------	---	---	---	---	---	---

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	0	0	0	0	0	0

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

This legislation will have no fiscal impact upon the Department of Corrections.

Susan E. Knighton

Prepared by: Susan E. Knighton, Director Phone: 465-3376
 Division: Administrative Services Date: 1-23-89
 Approved by Commission: *Theresa M. Sarnett* Date: 1-23-89
 Agency: Department of Corrections

- Distribution (by preparer):
 Legislative Finance
 Legislative Sponsor
 Requestor
 Office of Management and Budget
 Impact: 1 Agency(ies)

STEVE COWPER, GOVERNOR

STATE OF ALASKA
DEPARTMENT OF PUBLIC SAFETY

OFFICE OF THE COMMISSIONER

P.O. BOX N
JUNEAU, ALASKA 99811-1200
PHONE: 465-4322

March 11, 1987

The Honorable Niilo Koponen
Alaska State Legislature
P.O. Box V
Juneau, AK 99811

Dear Representative Koponen:

At the request of your staff, 24 convictions for driving while intoxicated (DWI) were randomly selected for analysis.

The results are as follows:

Four of the 24 vehicles involved, or 16.6 percent, were driven by the owners. There were no lien holders or other registered owners.

Eleven of the 24, or 45.8 percent, were not driven by the registered owners; however, two of the drivers had the same last name as the registered owner.

Of the 11 apparently loaned vehicles, eight, or 72.7 percent, had no lien holder.

Five of the 24, or 20.8 percent, were driven by the owner; no others were listed on the registration, but there was a lien holder.

One of the 24, or four percent, was driven by the registered owner; others were listed as registered owners, but there was no lien holder.

Three of the 24, or 12.5 percent, were driven by the registered owner; other persons were listed as registered owners, and there was a lien holder listed.

Thirteen of the 24, or 54 percent, had no lien holder.

One vehicle, or 4 percent, was a model year between 1960 and 1969.

Twelve vehicles, or 50 percent, were model years between 1970 and 1979.

The Honorable Niilo Koponen

-2-

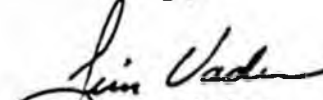
March 11, 1987

Eleven vehicles, or 46 percent, were model years between 1980 and 1986.

Of the 11 loaned vehicles, eight, or 72.7 percent, were model years between 1970 and 1979.

I trust this information will be of service to you.

Sincerely,


James D. Vaden
Deputy Commissioner

Attachment

<u>Year</u>	<u>Make</u>	<u>Driven by Registered Owner?</u>	<u>Others Listed on Registration? (more than 1)</u>	<u>Lien Holder</u>
1978	Chevrolet P.U.	Yes	No	No
1981	Subaru	Yes	No	No
1969	Chevrolet	Yes	No	No
1976	Buick	Yes	No	No
1972	Volkswagen	No	Yes	No
1971	Toyota	No	No	No
1974	Pontiac	No	No	No
1975	Buick	No	No	No
1970	Chevrolet	No	No	No
1973	Chevrolet	No	No	No
1974	Mercury	No	No	No
1976	Datsun	No	No	No
1985	Subaru	No (SLN) ¹	No	Yes
1984	Ford	No (SLN) ¹	Yes	Yes
1984	Chevrolet	No	Yes	Yes
1985	Dodge P.U.	Yes	No	Yes
1984	Chevrolet	Yes	No	Yes
1986	Chevrolet	Yes	No	Yes
1984	Chevrolet	Yes	No	Yes
1978	Chevrolet	Yes	No	Yes
1977	Plymouth	Yes	Yes ²	No
1984	Dodge	Yes	Yes ²	Yes
1982	Ford P.U.	Yes	Yes ²	Yes
1986	Toyota	Yes	Yes	Yes

1 - (SLN) Driver's registered owner had same last name
2 - Appeared to be spouses

STATE OF ALASKA
THE LEGISLATURE

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
907 465 3800

LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM

January 26, 1989

SUBJECT: Sectional analysis - HB 26
TO: Representative Niilo Koponen
FROM: Michael F. Ford
Legislative Counsel

The following is a section by section analysis of HB 26:

Section 1 - Requires forfeiture of a vehicle used in the commission of the offense of driving while intoxicated, if the person has been convicted more than once for the offense within the preceding ten years. Provides that the forfeiture is subject to remission under AS 28.35.037.

Section 2 - Requires forfeiture of a vehicle used by a person who refused to submit to a chemical test of blood under AS 28.35.032, if the person has been convicted more than once within the preceding ten years of driving while intoxicated or refusal to take the chemical test of blood.

Section 3 - Establishes procedures for forfeiture and provides for extinguishment of third party rights to the motor vehicle. Allows the department to dispose of a forfeited vehicle.

Section 4 - Requires that notice of forfeiture be given to third parties.

Section 5 - Allows a third party to request a court hearing on remission of forfeiture.

Section 6 - Repealer.

MF:kb
wkk1/082

STATE OF ALASKA
THE LEGISLATURE

POUCH Y STATE CAPITOL
JUNEAU ALASKA 99811
907 465 1800

LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM

December 8, 1988

SUBJECT: Motor Vehicle Forfeiture
(W.O. No. 16-0324A)

TO: Representative Niilo Koponen

FROM: Michael F. Ford *M.F.*
Legislative Counsel

The attached work draft is, with one exception, identical to CSHB 52(Jud) that was approved by the House Judiciary committee during the last session.

The version of CSHB 52(Jud) approved by the Judiciary committee contained an amendment to section 3, adding a new subsection (d) to AS 28.35.036. This subsection was, I believe, intended to ensure that convictions for driving while drunk and for refusing the breath test would be considered a single conviction, if both occurred during the same incident. Similar language occurs in AS 28.35.030(f) and AS 28.35.032(j). The manner in which AS 28.35.036 was repealed and reenacted made the addition of subsection (d) meaningless. There is no longer any required consideration of multiple convictions in that section. As every statute is presumed to have a meaning, I have deleted that subsection in order to avoid raising an implication that the court may reexamine the issue of multiple convictions at the hearing on remission of forfeiture.

Enclosure

MFF:gc
WKG4/098

HOUSE COMMITTEE REPORT

2/8

(5)

Date Referred: January 9, 1989

FURTHER REFERRALS: JUDICIARY

Date of Committee Action: 1/31/89

*added → Finance
2/8/89*

The TRANSPORTATION Committee recommends that:

HOUSE BILL NO. 26 [FORFEITURE OF VEHICLE]
"An Act relating to motor vehicle forfeiture."

HB 26

[] be replaced with c/s HB 26 (Transportation) [] the same title
[] have attached amender(s) [] a new title

[] have attached amender(s)

- [] do pass
- [] do not pass
- [] no recommendation
- [] individual recommendations
- [] additional referral to the _____ Committee

ADOPTS: _____ letter of intent

ATTACHES NEW FISCAL NOTE(S):

APPROVES PREVIOUS:

- 3 [] fiscal impact *Court - Public Safety - and Law*
- 2 [] zero fiscal note *Admin - corrections*
- 1 [] zero with analysis *Admin*

- [] fiscal note(s) published: _____
- [] zero fiscal notes(s) published: _____

SIGNING DO PASS:

SIGNING OTHER THAN DO PASS:
(Do Not Pass, No Recommendation, Amend)

Alvin L. Erman (PS fiscal note should be revised downward)

Bill Hudson - No Rec.

Richard Stoney (FOSTER)
RESERVATIONS: does not address multi-owned comm. vessels or pay-BX143

Bette Cato

Bette Cato
Chairman's signature