

**HB**

**24**

# FISCAL NOTE

STATE OF ALASKA  
1996 LEGISLATIVE SESSION

BILL NO: HB 24

Revision Date: \_\_\_\_\_

Dept. Affected: Public Safety

Title: Lower alcohol limit to 0.08 for OMVI's

BRU: Alaska State Troopers

Component: Detachments

Sponsor: Representative Therriault

Requestor: H. Transportation

COMPONENT SERIAL NO. 0799

**EXPENDITURES/REVENUES: (Thousands of Dollars) (inflation not included)**

OPERATING	FY 97	FY 98	FY 99	FY 00	FY 01	FY 02
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
<b>TOTAL OPERATING</b>	-0-	-0-	-0-	-0-	-0-	-0-
<b>CAPITAL</b>	-0-	-0-	-0-	-0-	-0-	-0-
<b>CHANGE IN REVENUES ( )</b>	-0-	-0-	-0-	-0-	-0-	-0-
Revenue Code						

**FUNDING: (Thousands of Dollars)**

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program						
1006 GF/MHTIA						
Other						
<b>TOTAL</b>	-0-	-0-	-0-	-0-	-0-	-0-

Estimate of current year (FY 96) impact: \$ \_\_\_\_\_

**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.)**

This bill would have a negligible impact on the Division of Alaska State Trooper.

Prepared By: Lt. Dan Lowden Phone: 465-5505

Division: Alaska State Troopers Date: March 15, 1996

Approved by Commissioner: *Ronald L. Otte* Date: 3/19/96

Agency: Ronald L. Otte, Department of Public Safety

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# FISCAL NOTE

BILL NO. HB 24

STATE OF ALASKA  
1996 LEGISLATIVE SESSION

Revision Date: 11/30/96  
 Title: "An Act relating to the offense of operating a motor vehicle, aircraft, or watercraft while intoxicated..."  
 Sponsor: Representative Theriault  
 Requestor: (H) TRA

Department Affected: Administration  
 BRU: Public Defender Agency  
 Component: Public Defender Agency  
 COMPONENT SERIAL NO. 1631

**EXPENDITURES/REVENUES:** (Thousands of Dollars)

OPERATING EXPENDITURES	FY 97	FY 98	FY 99	FY 00	FY 01	FY 02
PERSONAL SERVICES	114.7	114.7	114.7	114.7	114.7	114.7
TRAVEL	0.0	0.0	0.0	0.0	0.0	0.0
CONTRACTUAL	7.0	7.0	7.0	7.0	7.0	7.0
SUPPLIES	2.0	2.0	2.0	2.0	2.0	2.0
EQUIPMENT	3.0	0.0	0.0	0.0	0.0	0.0
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
<b>TOTAL OPERATING</b>	<b>126.7</b>	<b>123.7</b>	<b>123.7</b>	<b>123.7</b>	<b>123.7</b>	<b>123.7</b>

CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

**FUND SOURCE:** (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	126.7	123.7	123.7	123.7	123.7	123.7
1005 GF/Program Receipts						
1037 GF/Mental Health						
OTHER						
<b>TOTAL</b>	<b>126.7</b>	<b>123.7</b>	<b>123.7</b>	<b>123.7</b>	<b>123.7</b>	<b>123.7</b>

Estimate of any current year (FY 96) cost: \$ -0-

**POSITIONS:**

FULL-TIME	2.0	2.0	2.0	2.0	2.0	2.0
PART-TIME						
TEMPORARY						

**ANALYSIS:** (Attach a separate page if necessary.)

See attached.

Prepared by: John B. Salemi, Director  
 Division: Public Defender Agency

Phone: (907) 264-4412  
 Date: \_\_\_\_\_

Approved by Commissioner: Mark Boyer  
 Agency: Department of Administration

Date: 1/31/97

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FISCAL NOTE

STATE OF ALASKA  
1996 LEGISLATIVE SESSION

BILL NO. HB 24

ANALYSIS: (continued)

HB 24 lowers the amount of alcohol which must be found in the blood in order for a person to be presumed guilty of driving while intoxicated. This proposal also changes the evidentiary presumptions with respect to this issue. See Section 1 of bill.

Significant mandatory penalties attach to a conviction for driving while intoxicated. These punishments will apply to the provisions of this bill. Because of the nature of the offense and the mandatory penalties involved, DWI cases are more likely to go to trial than other categories of offenses. This is especially true now that a third DWI is charged as a felony in Alaska. As trials are the most labor intensive facet of Public Defender work a distinct fiscal impact will be realized.

Fiscal Impact Analysis

There will be distinct fiscal impact on the Public Defender Agency if this bill becomes law. Under present law, individuals who fall into the .08%-.10% range typically are offered a reduced charge of Reckless Driving in exchange for a plea of no contest. Reckless Driving carries no significant mandatory minimum penalties, does not have the same stigma as a DWI conviction, and in other ways is a more acceptable resolution of a case, from a defendant's perspective, than is a conviction for drunk driving. If this bill passes, there will be more DWI charges and as a result, more DWI clients wishing to exercise their right to trial. With the attorneys who handle misdemeanors in Anchorage and Fairbanks already carrying caseloads of over 100 cases, it is likely additional resources will be required so that effective legal representation can be provided for these additional DWI prosecutions. It is felt that the fiscal impact can be absorbed through a combination of attorney and paralegal support. (This fiscal note differs from one submitted in 1995. The 1995 PD fiscal note was prepared before the felony DWI bill passed. Passage of this bill and its profound impact on the PD workload has changed the PD analysis of HB 24).

Budget Analysis

Anchorage:

Paralegal II	16A	\$51.5
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Palmer:

Attorney II	19A	63.2
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100	Personal Services	\$114.7
200	Travel	0.0
300	Contractual	7.0
400	Supplies	2.0
500	Equipment (one time)	<u>3.0</u>
	TOTAL	\$126.7

# FISCAL NOTE

STATE OF ALASKA  
1996 LEGISLATIVE SESSION

BILL NO. HB 24

Revision Date: \_\_\_\_\_  
 Title: An Act relating to the offense of operating a motor vehicle, aircraft, or watercraft while intoxicated...  
 Sponsor: Rep. Theriault  
 Requestor: (H) TRA

Dept. Affected: Administration  
 BRU: Office of Public Advocacy  
 Component: Office of Public Advocacy

COMPONENT SERIAL NO. 43

**EXPENDITURES/REVENUES:** (Thousands of Dollars)

OPERATING EXPENCITURES	FY 97	FY 98	FY 99	FY 00	FY 01	FY 02
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
<b>TOTAL OPERATING</b>	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES	0	0	0	0	0	0
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CHANGE IN REVENUES ( )	0	0	0	0	0	0
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**FUND SOURCE:** (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
OTHER						
<b>TOTAL</b>	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY 96) cost: \$ -0-

**POSITIONS:**

FULL-TIME						
PART-TIME						
TEMPORARY						

**ANALYSIS:** (Attach a separate page if necessary.)

There is no fiscal impact to the Office of Public Advocacy.

Prepared by: Brant McGee, Public Advocate  
 Division: Office of Public Advocacy

Phone: 274-1684  
 Date: \_\_\_\_\_

Approved by Commissioner: Mark Boyer  
 Agency: Department of Administration

Date: 11/21/96

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**STATE OF ALASKA  
1996 LEGISLATIVE SESSION**

**BILL NO: .IB 24**

Revision Date: January 25, 1996  
 Title: An Act relating to offenses for drunk driving...  
 Sponsor: Representative Therrault  
 Requestor: H. Transportation

Dept. Affected: Public Safety  
 BRU: DPS Statewide Support  
 Component: Commissioner's Office  
 COMPONENT SERIAL NO. 0523

**EXPENDITURES/REVENUES: (Thousands of Dollars) (inflation not included)**

OPERATING	FY 97	FY 98	FY 99	FY 00	FY 01	FY 02
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	0	0	0	0	0	0
CONTRACTUAL	0	0	0	0	0	0
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
<b>TOTAL OPERATING</b>	<b>-0-</b>	<b>-0-</b>	<b>-0-</b>	<b>-0-</b>	<b>-0-</b>	<b>-0-</b>

<b>CAPITAL EXPENDITURES</b>	<b>-0-</b>	<b>-0-</b>	<b>-0-</b>	<b>-0-</b>	<b>-0-</b>	<b>-0-</b>
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<b>CHANGE IN REVENUES ( )</b> Revenue Code	<b>-0-</b>	<b>-0-</b>	<b>-0-</b>	<b>-0-</b>	<b>-0-</b>	<b>-0-</b>
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**FUNDING: (Thousands of Dollars)**

1002 Federal Receipts	0	0	0	0	0	0
1003 GE Match	0	0	0	0	0	0
1004 GE	0	0	0	0	0	0
1005 GE/Program Receipts	0	0	0	0	0	0
1006 GE/MHTIA	0	0	0	0	0	0
Other	0	0	0	0	0	0
<b>TOTAL</b>	<b>-0-</b>	<b>-0-</b>	<b>-0-</b>	<b>-0-</b>	<b>-0-</b>	<b>-0-</b>

Estimate of current year (FY 96) impact: \$ \_\_\_\_\_

**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.)

No significant impact on the Department of Public Safety

Prepared By: Sandy Perry-Provost Special Assistant to the Commissioner Phone: 465-4322  
 Division: Commissioner's Office Date: 1/25/96  
 Approved by Commissioner: *Ronald L. Otte* Date: 1/25/96  
 Agency: Ronald L. Otte, Dept. of Public Safety

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# FISCAL NOTE

STATE OF ALASKA  
1996 LEGISLATIVE SESSION

BILL NO. HB 24

Revision Date: \_\_\_\_\_ Dept. Affected: Department of Law  
 Title: "...relating to the offense of operating a motor BRU: Criminal Division  
vehicle, aircraft, or watercraft while intoxicated..." Component: Criminal Division  
 Sponsor: Representative Therriault  
 Requester: Representative Therriault COMPONENT SERIAL NO. 2085

**Expenditures/Revenues**

(Thousands of Dollars)

OPERATING EXPENDITURES	FY 97	FY 98	FY 99	FY 00	FY 01	FY 02
PERSONAL SERVICES	108.7	108.7	108.7	108.7	108.7	108.7
TRAVEL	5.0	5.0	5.0	5.0	5.0	5.0
CONTRACTUAL	14.6	14.6	14.6	14.6	14.6	14.6
SUPPLIES	5.7	5.7	5.7	5.7	5.7	5.7
EQUIPMENT	15.0	0.0	0.0	0.0	0.0	0.0
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
<b>TOTAL OPERATING</b>	<b>149.0</b>	<b>134.0</b>	<b>134.0</b>	<b>134.0</b>	<b>134.0</b>	<b>134.0</b>

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES ( )						
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**FUND SOURCE**

(Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	149.0	134.0	134.0	134.0	134.0	134.0
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
<b>TOTAL</b>	<b>149.0</b>	<b>134.0</b>	<b>134.0</b>	<b>134.0</b>	<b>134.0</b>	<b>134.0</b>

Estimate of any current year (FY96) cost: \$ 0.0

**POSITIONS**

FULL-TIME	2.0	2.0	2.0	2.0	2.0	2.0
PART-TIME						
TEMPORARY						

**ANALYSIS:** (Attach a separate page if necessary)

This bill amends AS 28.35.030(a) and AS 28.35.033(a) to lower the blood alcohol limit for the crime of driving while under the influence of intoxicating liquor, a class A misdemeanor, from 0.10 percent to 0.08 percent.

Other jurisdictions, most notably California and Maryland, experienced about a ten percent increase in DWI arrests in the year immediately following their lowering of the limit to 0.08 percent. Consequently, some increase in arrests will occur if the bill is approved and the amount of litigation will most probably increase. DWI defendants contest charges far more often than other misdemeanants because of the minimum, mandatory penalties, the eventual consequences on a defendant's insurance rates, and the loss of the privilege to drive. Moreover, because of the seriousness of this offense, the Department of Law seldom declines to prosecute DWI cases.

*Richard I. Peques*

Prepared by: Richard I. Peques, Director Phone: 465-3672  
 Division: Administrative Services Division Date: 1/25/96  
 Approved by Commissioner: Bruce M. Botelho, Attorney General Date: 1/25/96  
 Agency: Department of Law

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FISCAL NOTE

STATE OF ALASKA  
1996 LEGISLATIVE SESSION

BILL NO. HB 24

ANALYSIS CONTINUATION:

During FY94, 4,028 DWI complaints were referred to Department of Law prosecutors. If Alaska follows the California example, a ten percent increase would result in 400 new DWI cases statewide. The largest number of new cases would be experienced in Anchorage and the Mat-Su Valley areas.

We expect that this bill will cause us to prosecute 300 or more additional class A misdemeanors in the Third Judicial District, where the effects of the bill will be felt most. Because of staffing constraints in Anchorage, and because the Anchorage office is the hub from which prosecutors are sent to other offices to assist in times of overload, it will therefore be necessary to add one Attorney III and one Legal Secretary at Anchorage.

It should also be noted that, as a result of the approval of HB 159 last year, we anticipate a 10 percent increase in felony DWI prosecutions. In commenting on HB 159, the department estimated that we would receive about 400 felony DWI referrals. Year-to-date referrals, since the bill's July 1, 1995 effective date, have proven our estimate to be quite accurate. Consequently, DWI felony referrals will increase by 40 additional cases each year, as a result of this bill.

	<u>Attorney III</u> (22A)	<u>Legal Secretary I</u> (10B)	<u>Total</u>
Personal Services	72.3	36.4	108.7
Travel	5.0	0.0	5.0
Contractual	8.6	6.0	14.6
Supplies	3.3	2.4	5.7
Equipment	<u>6.5</u>	<u>8.5</u>	<u>15.0</u>
Total	95.7	53.3	149.0

01/25/96

09:48:23.8

## PERSONAL SERVICES EXPENDITURES NEW POSITION DETAIL REPORT

PAGE: 2

DEPARTMENT OF LAW

SCENARIO: 2

COMPONENT #: 6501020300 NAME: SOUTHCENTRAL/SOUTHWEST ALASKA

BRU NAME: CRIMINAL DIVISION

PCN	UNAUTH PCN	JOB CLASS TITLE	T S	LOCATION NAME	R C	B U	S	R&S BUDG	MOS	SALARY	PREM PAY	DENES	PER.SERV. COSTS	G. F. AMOUNT
03#006		ATTORNEY III	F	ANCHORAGE	A	XE	AA	22A	12	54103	0	10206	72310.06	

## \*\*\*\* JUSTIFICATION:

This position is needed to handle the 300 or more additional class A misdemeanors that are expected if HB24 is enacted. This bill will lower the blood alcohol content from 0.10 to 0.08 percent for driving while under the influence of alcohol, resulting in a potential increase of 10 percent in the number of DWI prosecutions handled by the Anchorage District Attorney's office and other offices in the district where the Anchorage office provides overload and relief coverage. Because of skills required to prosecute class A misdemeanors, this position should be allocated to the Attorney III level.

TRAVEL COSTS	5000.00	
CONTRACTUAL COSTS	8600.00	
SUPPLIES COSTS	3300.00	
EQUIPMENT COSTS	6500.00	
OTHER COSTS	0.00	
TOTAL COSTS	95710.06	72310.06

## \*\*\* FUNDING DETAIL:

1004 GENERAL FUND RECEIPTS 72310.06

TOTAL FUNDING 72310.06

03#007		LEGAL SECRETARY I	F	ANCHORAGE	A	GG	2A	10A	12	25127	0	11284	36411.80	
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## \*\*\*\* JUSTIFICATION:

This position is needed to handle the paperwork and witness scheduling for an additional 300 misdemeanors that are expected to be handled if HB24 is enacted. Full-time legal secretarial assistance is required due to the large number of misdemeanor trials that are expected. Preparation of legal pleadings and other documentation is appropriately handled by the Legal Secretary I classification.

TRAVEL COSTS	0.00	
CONTRACTUAL COSTS	6000.00	
SUPPLIES COSTS	2400.00	
EQUIPMENT COSTS	8500.00	
OTHER COSTS	0.00	
TOTAL COSTS	53311.80	36411.80

## \*\*\* FUNDING DETAIL:

1004 GENERAL FUND RECEIPTS 36411.80

TOTAL FUNDING 36411.80

## \*\*\*\* COMPONENT TOTALS:

FULL TIME NEW POSITIONS	5	TOTAL PERSONAL SERVICES	310390.81
PART TIME/SEASONAL NEW POSITIONS	0		
NON PERMANENT NEW POSITIONS	0	TOTAL COSTS INC. ASSOC COSTS	388990.81
OTHER.....	0		

NUMBER OF NEW POSITIONS IN COMPONENT: 5

FUNDING DATA: G.F. & G.F. MATCH: 310390.81  
OTHER FUNDS: 0.00

TOTAL FUNDING: 310390.81

CS FOR HOUSE BILL NO. 24( )  
 IN THE LEGISLATURE OF THE STATE OF ALASKA  
 NINETEENTH LEGISLATURE - FIRST SESSION

BY

Offered:

Referred:

Sponsor(s): REPRESENTATIVES THERRIAULT AND ELTON, Davies, Bunde

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to the effect of a breath test error margin in offenses under  
 2 the motor vehicle code; and providing for an effective date."

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

4 \* Section 1. AS 28.40 is amended by adding a new section to read:

5           Sec. 28.40.060. BREATH TEST ERROR MARGIN. If an offense described  
 6           under this title requires that a chemical test of the person's breath produce a particular  
 7           result and the chemical test administered is the Intoximeter 3000 or another chemical  
 8           test with a margin of error not greater than that of the Intoximeter 3000, the standards  
 9           of the statute are not affected by the test's inherent margin of error.

10 \* Sec. 2. This Act takes effect September 1, 1995.

# Alaska State Legislature

REPRESENTATIVE  
GENE THERRIALT

Mailing Address:  
119 N. Cushman, Suite 101  
Fairbanks, Alaska 99701  
(907) 488-0862  
Fax (907) 488-4271



White in Juneau  
State Capitol  
Juneau, Alaska  
99801-1182  
(907) 465-4797  
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House District 33

## House Of Representatives

### SPONSOR STATEMENT

#### HB 24

**HB 24** An Act relating to the offense of operating a commercial motor vehicle while intoxicated and the offense of operating a motor vehicle, aircraft, watercraft while intoxicated; relating to presumptions arising from the amount of alcohol in a person's breath or blood, relating to chemical testing of a person's breath; and providing for an effective date.

**SPONSOR:** Representative Gene Therriault

#### **SPONSOR STATEMENT:**

HB 24 lowers the legal definition of intoxication for the crime of driving while intoxicated from .10% to .08% blood alcohol level. This initiative would make it illegal to operate a motor vehicle, aircraft, or watercraft with a blood alcohol level of greater than .08%. Several studies have demonstrated that measurable impairment to operate a motor vehicle begins in most drivers at or below .05% blood alcohol level, and that all drivers are impaired at a blood alcohol level of .08%.

Similar legislation has been passed in several other states, and is being considered by many others. A blood alcohol threshold of .08% already exists throughout Canada, as well as in all European Nations. With alcoholism and alcohol related fatalities already taking a tremendous toll in Alaska, a reduced threshold will not only increase the odds of obtaining convictions for drunk driving, but will also increase driving safety. A study by the state of California showed that traffic fatalities were reduced by 12% after the implementation of .08 DWI laws.

According to the Department of Public Safety, Alaska receives approximately \$185,000 in section 410 Grants of Alcohol Incentive Program from the federal government. If we fail to reduce the level from .10 to .08 by October 1 of this year, we will become ineligible to receive these funds.

In December of 1993, the Supreme Court Ruled in Haynes v. Dept. of Public Safety that due to the margin of error inherent to the Intoximeter 3000 of .01, the actual level at which an operator of a motor vehicle should be convicted of drunk driving is .11. This clearly suggests an even greater need for .08% legislation.

# FACT SHEET



## STATE LEGISLATIVE

### **0.08 BAC Illegal Per Se Level**

The U.S. Department of Transportation's National Highway Traffic Safety Administration (NHTSA) encourages States to have laws that make it illegal for a person to operate a motor vehicle if he or she has a blood or breath alcohol concentration (BAC) of 0.08 or more (i.e., an illegal per se law at this level). Alcohol concentration is to be based on either the number of grams of alcohol in 100 milliliters of blood or the number of grams of alcohol in 210 liters of breath.

- As of September 1, 1993, ten States have an illegal per se law at the 0.08 level: California, Florida, Kansas, Maine, New Hampshire, New Mexico, North Carolina, Oregon, Utah and Vermont.
- Thirty-six other States and the District of Columbia have illegal per se laws at the 0.10 level.
- Four States have no illegal per se law: Maryland, Massachusetts, South Carolina and Tennessee. In addition, the Commonwealth of Puerto Rico has no such law.

#### **Key Facts**

- In 1992, 45 percent of the 39,235 motor vehicle related deaths were alcohol-related. This percentage translates into 17,699 alcohol-related deaths last year.
- Over 80 percent of drivers involved in fatal crashes with positive BACs had levels exceeding 0.08.

November  
1993

- A BAC level of 0.08 means about four drinks within one hour on an empty stomach for an average male weighing 160 pounds.

#### **Why 0.08?**

Research indicates that many drivers are impaired at low blood alcohol levels. Some research indicates that such impairment starts as low as 0.015. By the time a level of 0.08 is reached, even experienced drinkers show driving skill impairment.

Recent research indicates that the relative fatality risk for drivers in single vehicle crashes with BACs between 0.05 and 0.09 is over 11 times greater than for drivers with a zero BAC.

Lowering the limit to 0.08 would set the boundary at a level at which driving skills are proven to be compromised for the vast majority of drivers. It is a limit which is reasonable and necessary for the driving safety of all.

#### **Life Saving Benefits of 0.08**

On January 1, 1990, California reduced the legal limit for blood alcohol concentration from 0.10 to 0.08. Six months later, it instituted an Administrative Per Se law, allowing police and driver licensing authorities to suspend the driver's license of drivers who fail or refuse an alcohol test. NHTSA studied the effects of these laws, and found that while the study could not quantify the separate effects of each law, alcohol-related fatalities declined by 12 percent in the year following enactment of the 0.08 law. A survey of 1,600 California drivers in May, 1991 disclosed that eight out of ten were aware that the BAC limit had become stricter. In addition, half of the survey respondents who drink alcohol indicated they are less likely to drive after drinking, as a result of the lowered limit.

## Impact on the Criminal Justice System

California found that the lowered limit had little impact on court administrators or judges. The main impact has been on prosecutors' decisions concerning whether cases should be filed. Previously, DWI arrestees with BACs below 0.12 typically were allowed to plea to reduced charges. Since the limit was changed, this plea-bargain "cut off" has dropped to about 0.10 percent. No increases have been reported in the proportion of DWI defendants pleading guilty, requesting jury trials or appealing convictions.

## Who Supports 0.08?

The following organizations support a BAC limit of 0.08 or lower.

- American Medical Association
- American Association of Neurological Surgeons

- Association for the Advancement of Automotive Medicine
- American Spinal Injury Association
- National Safety Council
- National Committee on Uniform Traffic Laws and Ordinances
- National Commission Against Drunk Driving
- National Highway Traffic Safety Administration
- Mothers Against Drunk Driving (MADD)
- Remove Intoxicated Drivers (RID)
- Insurance Institute for Highway Safety

A number of countries have BAC limits of 0.08 or below. For example, Austria, Canada, Denmark, France, Italy, New Zealand, Spain, Switzerland, and the United Kingdom have an 0.08 limit, while Finland, Iceland, Japan, the Netherlands, and Norway have an 0.05 limit. In 1990 Sweden lowered its BAC limit to 0.02. Australian states have adopted either 0.08 or 0.05 limits.

## States with BAC Per Se Laws (as of October 1993)



## **Intermodal Surface Transportation Efficiency Act (ISTEA) of 1991**

ISTEA provides incentive grants to States that achieve at least five of the following six criteria:

- An expedited administrative procedure for suspending the license of drunk drivers;
- A law setting a 0.10 blood alcohol concentration as evidence of driving while intoxicated (after three years, it must drop to 0.08);
- A statewide sobriety checkpoint program;
- A self-sustaining drunk driving prevention program;
- A program to prevent drivers under age 21 from obtaining alcoholic beverages; and
- A mandatory sentence of 48 consecutive hours in jail or not less than 10 days community service for any person convicted of DWI more than once in any 5-year period.

States can also earn supplemental grants, one of which is based on meeting the 0.08 BAC criteria in the first three years of the incentive program.

## **Additional Sources of Information**

Driving Under the Influence: A Report to Congress on Alcohol Limits. NHTSA, Report Number DOT HS 807 879, October 1992.

The Effects Following the Implementation of an 0.08 BAC Limit and an Administrative Per Se Law in California. NHTSA, Report Number DOT HS 807 777, August 1991.

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These reports and additional information are available from your State Highway Safety Office, the NHTSA Regional Office serving your State, or from NHTSA Headquarters, Traffic Safety Programs, ATTN: NTS-20, 400 7th Street, S.W., Washington, D.C. 20590, 202/366-9588.

Danny J. HAYNES, Appellant,

v.

STATE of Alaska, DEPARTMENT OF PUBLIC SAFETY, Appellee.

No. S-4677.

Supreme Court of Alaska.

Dec. 30, 1993.

Driver appealed revocation of his driver's license by Department of Public Safety. The Superior Court, First Judicial District, Ketchikan, Thomas E. Schulz, J., affirmed. Driver appealed. The Supreme Court, Burke, J., held that chemical breath test reading or result (which could be reduced below level of .10 grams per 210 liters) of driver's breath, by applying margin of error inherent to particular test used, could not serve as basis for license revocation, and extrinsic evidence of intoxication did not mitigate inherent error.

Reversed and remanded.

Matthews, J., dissented and filed opinion in which Rabinowitz, C.J., joined.

1. Automobiles ⇨144.2(3)

Supreme Court reviews hearing officer's decision to revoke driver's license for driving while intoxicated (DWI) independent of superior court's decision, as superior court acts as intermediate court of appeal.

2. Appeal and Error ⇨842(1)

Where issues presented in appeal are purely questions of law, Supreme Court is not bound by lower court's decision, and will adopt rule of law that is most persuasive in light of precedent, reason, and policy.

3. Automobiles ⇨144.2(9.1)

Hearing officer may not consider evidence regarding driver's appearance and behavior in determining whether driver's breath alcohol level was over .10 grams, for purposes of determining whether driver's license should be revoked. AS 28.35.030(a)(2); AS 28.15.165(c) (1991).

4. Automobiles ⇨144.1(1.11)

Legislature has power to require revocation of driver's license on basis of particular test result or reading, despite its inherent margin of error, when legislature expressly considers that margin and deems it sufficiently negligible such that it may be disregarded.

5. Automobiles ⇨144.1(1.11), 332

Driver commits offense of driving while intoxicated (DWI) when his or her actual alcohol blood level exceeds .10 grams per 210 liters of breath, as opposed to when test reads in excess of such level, and thus fact finder is required to consider test's inherent margin of error before rendering decision; legislature did not consider margin of error inherent to testing device in setting legal limit. AS 28.35.030(a)(2), 28.35.033(d).

6. Automobiles ⇨144.1(1.11)

Constitutional Law ⇨287.3

In proceeding to revoke driver's license for driving while intoxicated (DWI), absent express legislative intent to the contrary, failure to apply inherent margin of error of particular testing device in favor of person subject to license revocation violates due process of law. Const. Art. 1, § 7.

7. Automobiles ⇨144.2(1)

Driver's license is important property interest, and driver has constitutional right to meaningful hearing before state can suspend his license. Const. Art. 1, § 7.

8. Automobile ⇨144.2(10.5)

In proceeding to revoke driver's license for driving while intoxicated (DWI), chemical breath test reading or result which may be reduced below level of .10 grams per 210 liters of person's breath, by applying margin of error inherent to particular test used, cannot serve as basis for license revocation, and extrinsic evidence of intoxication does not mitigate inherent error.

Michael P. Heiser, Keene & Currall, Ketchikan, for appellant.

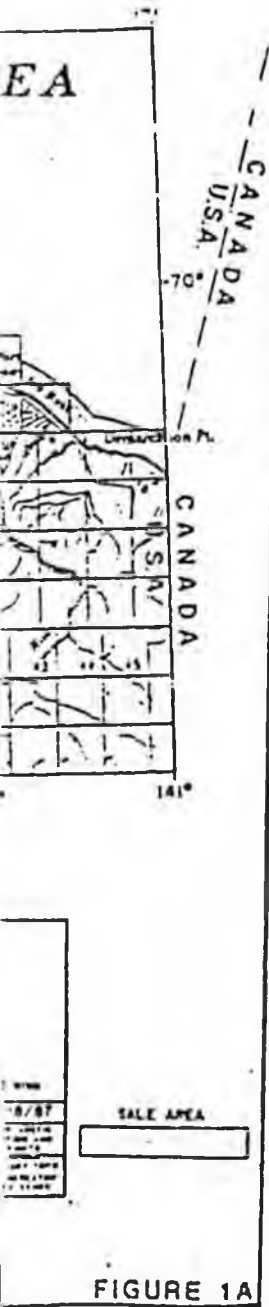


FIGURE 1A

Dan N. Branch, Asst. Atty. Gen., Ketchikan, Charles E. Cole, Atty. Gen., Juneau, for appellee.

Before RABINOWITZ, C.J., and BURKE, MATTHEWS, COMPTON and MOORE, JJ.

### PINION

BURKE, Justice.

#### I. FACTUAL AND PROCEDURAL BACKGROUND

Danny Haynes was arrested for driving while intoxicated. Following his arrest, Haynes submitted to an "Intoximeter 3000" breath analysis, which chemically tests for the presence of alcohol. See AS 28.35.031 ("A person who operates or drives a motor vehicle in this state . . . shall be considered to have given consent to a chemical test or tests of the person's breath. . . ."). The Intoximeter 3000 breath test produced a reading of .106 grams of alcohol per 210 liters of breath. The Intoximeter 3000 has a recognized margin of error of .01 grams per 210 liters of breath. Therefore, Haynes' actual breath alcohol content, as measured by the Intoximeter 3000, may have been as high as .116 or as low as .096.

An alcohol level of .10 grams or more per 210 liters of the person's breath is required for the Department of Public Safety (the Department) to revoke a driver's license. AS 28.15.165(c); AS 28.35.030(a)(2). Applied in Haynes' favor, the .01 margin of error would equate to an actual result of .096 grams, a reading below the statutory minimum of .10 required for revocation. The hearing officer considered the margin of error inherent in Haynes' '06 test result, but declined to apply it in Haynes' favor. Instead, the hearing officer relied on the arresting officers' testimony that Haynes' personal appearance and behavior indicated that he was intoxicated, to find it more probable

than not that Haynes' breath alcohol content was .10 or higher at the time of the test. Consequently, the Department revoked Haynes' license. The superior court affirmed the Department's revocation order, and this appeal followed.

#### II. DISCUSSION

##### A. Standard of Review

[1, 2] We review the hearing officer's decision to revoke Haynes' driver's license independent of the superior court's decision, as the superior court was acting as an intermediate court of appeal. *Jager v. State*, 537 P.2d 1100, 1106 (Alaska 1975); *State v. Marathon Oil Co.*, 528 P.2d 293, 298 (Alaska 1974). Because the issues presented in this appeal are purely questions of law, we are not bound by the lower court's decision. Rather, we will "adopt the rule of law that is most persuasive in light of precedent, reason, and policy. *Guin v. Ha*, 591 P.2d 1281, 1284 n. 6 (Alaska 1979).

##### B. Consideration of Other Factors

[3] Alaska Statute 28.15.165(c) provides that the Department of Public Safety may revoke a person's license if "a chemical test under AS 28.35.031(a) produced a result described in AS 28.35.030(a)(2)." AS 28.15.165(c) (emphasis added). Alaska Statute 28.35.030(a)(2) provides that a person commits the crime of driving while intoxicated (DWT) if a breath analysis reveals that the person's breath sample contains .10 grams or more of alcohol per 210 liters of the person's breath. AS 28.35.030(a)(2). Alaska Statute 28.15.165(c) does not provide for consideration of other factors or circumstances, such as the appearance and behavior of the individual, in determining whether the person's breath did, in fact, contain the requisite level of alcohol.<sup>1</sup> AS 28.15.165(c). Therefore, the hearing offi-

1. AS 28.15.165(c) refers to the circumstances surrounding the arrest, but not for the purpose of determining the accuracy of a particular chemical test. The statute provides:

Upon receipt of a sworn report of a law enforcement officer that a chemical test under AS 28.35.031(a) produced a result described in AS 28.35.030(a)(2) or that a person refused to submit to a chemical test under AS 28.35.031(a),

that notice under (a) of this section was provided to the person, and that contains a statement of the circumstances surrounding the arrest and the grounds upon which the officer's belief that the person was driving while intoxicated a motor vehicle for which a driver's license is required was based, the department shall revoke the person's license. . . .

AS 28.15.165(c) (emphasis added).

cer should not have considered evidence regarding Haynes' appearance and behavior in determining whether his actual breath alcohol level was over .10 grams. The officers' testimony regarding Haynes' appearance and behavior does not provide support for license revocation pursuant to AS 28.15.165(c).<sup>3</sup>

C. Margin of Error

[4] The legislature has the power to require the revocation of a driver's license on the basis of a particular test result or reading, despite its inherent margin of error, when the legislature expressly considers that margin and deems it sufficiently negligible such that it may be disregarded.<sup>4</sup> In such circumstances, the test result is considered tolerably inaccurate, and, therefore, the Department may revoke a license on the basis of the test result without regard to the test's margin of error.

In *Barcott v. Department of Public Safety*, 741 P.2d 226 (Alaska 1987), we addressed the issue of whether the hearing officer must consider the inherent margin of error in a chemical analysis designed to test the presence of alcohol in a person's breath.<sup>4</sup> In the course of our analysis, we examined how courts in other jurisdictions interpreted their own DWI statutes with regard to the issue of inherent margin of error in a chemical blood/breath alcohol test. *Id.* at 229. Essentially, the courts' analyses hinged on whether the particular court interpreted its jurisdictional DWI statute to create an offense upon a test reading in excess of their statutory limit or upon an actual level of alcohol in excess of the limit. Courts that interpret their DWI statutes to create an offense upon a test

reading in excess of the statutory limit presume that the legislature considered the inherent risk of error in the chemical analysis and found it to be tolerably inaccurate; thus, the courts did not require the fact finder to consider the inherent margin of error of a particular testing device.<sup>5</sup> See *State v. Rucker*, 297 A.2d 400, 402-03 (Del.Super.Ct.1972); *Nugent v. Iowa Dep't of Transp.*, 390 N.W.2d 125, 128 (Iowa 1986); *Schildgen v. Comm'r of Pub. Safety*, 363 N.W.2d 800, 801 (Minn.App. 1985); *State v. Lentini*, 240 N.J.Super. 330, 573 A.2d 464, 466-67 (N.J.Super.Ct.App.Div.1990); *Slagle v. State*, 570 S.W.2d 916, 919 (Tex.Crim.App.1978). In contrast, courts that interpret their DWI statute to create an offense upon an actual level of alcohol do not presume that their legislature considered the inherent margin of error of a chemical test; thus, those courts require the fact finder to consider the inherent margin of error before rendering a decision. See *State v. Boehmer*, 1 Haw.App. 44, 613 P.2d 916, 918-19 (1980); *State v. Bjornsen*, 201 Neb. 709, 271 N.W.2d 839, 840 (1978); *State v. Prestier*, 7 Ohio Misc.2d 36, 455 N.E.2d 24, 27 (Ohio Mun.Ct.1982); *State v. Keller*, 36 Wash.App. 110, 672 P.2d 412, 414 (1983).

[5] In *Barcott*, we adopted the latter reasoning and held that there was no evidence or indication that the Alaska Legislature considered the margin of error inherent to the Intoximeter 3000. *Id.* at 230. The legislature did not specifically approve the Department's use of the Intoximeter 3000 test, but rather authorized the Department to approve satisfactory techniques, methods, and standards of performing the analysis. AS 28.35-

2. Were we to allow extrinsic evidence to overcome the margin of error inherent in the test result, the department could revoke the license of a driver testing well below .10, if the extrinsic evidence was sufficiently persuasive to convince the Department that the driver's "true" breath alcohol content was .10 or higher when the test was performed. Although it is doubtful that the legislature intended AS 28.15.165(c) to operate in this fashion, such a result is possible employing the reasoning of the hearing officer in this case.

3. An "acceptable" margin of error is one having reasonable limits. A greater margin of error could not be conveniently ignored, without inviting a constitutional challenge.

4. The Intoximeter 3000 was the instrument utilized to perform the breath test in *Barcott*, as well. 741 P.2d at 227.

5. These courts do, however, consider deficiencies in the administration of the test and/or operation of the device which may tend to support a defendant's argument that the machine did not, in fact, produce a test result above the legal limit.

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Other Factors

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033(d); *Barcott*, 741 P.2d at 230.<sup>6</sup> There is no indication that the legislature considered the .01 margin of error inherent to the Intoximeter 3000 in setting the legal limit at .10 grams per 210 liters of the person's breath. Therefore, we do not interpret AS 28.35.030(a)(2) as creating an offense for violation of the statutory .10 grams per 210 liters of breath, without regard to the margin of error inherent to the particular testing device utilized. In Alaska, a driver commits a DWI offense when his or her actual alcohol level exceeds .10 grams per 210 liters of breath.

#### D. Due Process

[6,7] The question, then, is whether the margin of error *must* be applied in Haynes' favor. As a matter of statutory interpretation, we answer this question in the affirmative. It is well established that

[a] driver's license is an important property interest, and the driver has a constitutional right to a meaningful hearing before the state can suspend his license. As in a criminal prosecution for driving while intoxicated, the breath test is of central importance in the administrative license revocation proceeding. The ability of the defendant to evaluate these tests is critical to his ability to present his case.

*Barcott*, 741 P.2d at 228 (quoting *Champion v. Dep't of Public Safety*, 721 P.2d 131, 133 (Alaska 1986)). In *Barcott*, we held that the hearing officer violated the appellant's right to due process<sup>7</sup> when he failed to consider the inherent inaccuracy of the Intoximeter 3000 breath test in determining that a test

reading of .10 satisfied the statutory requirements to revoke the appellant's license. Thus, we reversed the decision and remanded the case to the Department for further proceedings consistent with the opinion.<sup>8</sup> *Barcott*, 741 P.2d at 230.

Given the .01 margin of error inherent to the Intoximeter 3000, a test reading of .106 could equate to a .096 actual test result. If the .01 margin of error is not applied in Haynes' favor, the deprivation of an important property interest could result where the actual breath test result was below .10 grams. Absent express legislative intent to the contrary, we hold that failure to apply the inherent margin of error of a particular testing device in favor of the person subject to license revocation violates due process of law as guaranteed by the Alaska Constitution.<sup>9</sup> Alaska Const. art. I, § 7.

[8] In summary, we hold that a chemical breath test reading or result which may be reduced below the level of .10 grams per 210 liters of the person's breath, by applying the margin of error inherent in the particular test used, cannot serve as the basis for a license revocation under AS 28.15.165(c). Extrinsic evidence of intoxication does not mitigate the inherent error; the error remains, and must be applied to the test reading. In light of the .01 acknowledged margin of error in the breath test administered to Danny Haynes in the case at bar, the Department was not authorized to revoke Haynes' driver's license under AS 28.15.165(c). The decision of the hearing officer is

inherent to another type of testing device may be more or less than .01. See, e.g., *People v. Campos*, 138 Cal.App.3d Supp. 1, 188 Cal.Rptr. 366 (Cal.App. Dep't Super.Ct. 1982) (.005 margin of error); *People v. Cansel*, 137 Misc.2d 260, 520 N.Y.S.2d 509, 519 (N.Y. Crim. Ct. 1987) (.001 margin of error). The Alaska Legislature had not set forth a "margin of error" standard. See AS 28.35.033(d). Thus, the Department may, at some point in the future, adopt a testing procedure or device which has a higher or lower margin of error than the Intoximeter 3000. Were we to presume that the legislature intended the .10 statutory level to reflect a test reading instead of an actual test result, we would be sanctioning a varying statutory level, depending upon the device utilized.

6. This observation is not intended to suggest that the Department's use of the Intoximeter 3000 is unauthorized. See *Barcott*, 741 P.2d at 230.

7. Article I, section 7 of the Alaska Constitution provides:

No person shall be deprived of life, liberty, or property, without due process of law. The right of all persons to fair and just treatment in the course of legislative and executive investigations shall not be infringed.

Alaska Const. art. I, § 7.

8. The issue of whether the margin of error *must* be applied in favor of the defendant was not before this court in *Barcott*. Thus, it would have been premature to address the issue at that time.

9. Although the margin of error inherent to the Intoximeter 3000 is .01, the margin of error

REVERSED and the case is REMANDED for further proceedings consistent with this opinion.

MATTHEWS, J., and RABINOWITZ, C.J., dissent.

MATTHEWS, Justice, joined by RABINOWITZ, Chief Justice, dissenting.

### I.

Under AS 28.15.165(a) and (c), the Department of Public Safety is required to revoke the driver's license of a person driving a motor vehicle where a chemical test administered to the person "produces a result described in AS 28.35.030(a)(2) ..." namely, "0.10 grams or more of alcohol per 210 liters of the person's breath..." Today's opinion construes this statutory system to mean that the department must revoke the driver's license of a driver who is administered a chemical test where the test produces a result of .11 grams or more of alcohol. This result is required, according to the majority opinion, because "[a]s a matter of statutory construction" (Slip Op. 7, 8) there is no evidence that the legislature considered the .01 margin for error inherent in the testing device.<sup>1</sup>

"Where a statute's meaning appears clear and unambiguous ... the party asserting a different meaning bears a correspondingly heavy burden of demonstrating contrary legislative intent." *University of Alaska v. Geistauts*, 666 P.2d 424, 428 n. 5 (Alaska 1983) (quoted in *Lagos v. City and Borough of Sitka*, 823 P.2d 641, 643 (Alaska 1991)).

1. The majority thus has adopted what one journal has called the "discount approach": the breath test reading is reduced to the lowest level possible given the margin for error. Note, *Is DWI DOA?: Admissibility of Breath Testing Evidence in the Wake of Recent Challenges to Breath Testing Devices*, 20 Sw.U.L.Rev., 247, 272-78 (1991). According to this article, the discount approach was very briefly employed by courts in Nebraska and New Jersey, but now has been judicially overruled in both of those states. *Id.* at 273-74, 276. Neither the article nor the majority opinion mention any jurisdiction which currently uses the discount approach.

This article also demonstrates that the problem we are confronted with today is only the tip of the margin for error iceberg. Because of individual physiological differences, the ratio used to

This means that the plainer the language of the statute, the more convincing the evidence of contrary legislative intent must be. *State v. Alex*, 646 P.2d 203, 208 n. 4 (Alaska 1982). Here the statute is plain in that it precisely defines the minimum test result which mandates license revocation. Since, as the majority opinion points out, there is no legislative history indicating that the legislature intended to use a different minimum level, we are required to construe the statute to mean what it says. I do not believe that it is right to say that a statute does not mean what it appears to mean because there is no legislative history indicating that the apparent plain meaning of the statute is the actual meaning. That is what today's opinion does.

### II.

While I think the above correctly identifies the logical flaw in the majority opinion, I should add that it also over-simplifies the problems presented by this case. There are two related problems which we should face. The first is that this court has never defined the elements of the license revocation offense. They should be defined. The second is that our prior decision in *Barcott v. State, Dep't of Public Safety*, 741 P.2d 226 (Alaska 1987), is poorly reasoned and based on an erroneous assumption regarding the elements of the license revocation offense. It should be overruled. The following discussion addresses these problems.

#### A. Elements of the License Revocation Offense

The critical debate here is whether a failing test result alone is all that is required to

convert breath alcohol concentrations into blood alcohol concentrations—the partition ratio—currently fixed at 1 to 2100, is not universal and may yield improperly high results in some individuals. *Id.* at 260; see *Cooley v. Municipality of Anchorage*, 649 P.2d 251, 254 n. 7 (Alaska App. 1982) (expert testimony indicated breathalyzer yielded improperly high results in 14% of cases). A lower partition ratio can skew breathalyzer readings significantly. For example, the Nebraska Supreme Court reduced a defendant's breath test reading by 52.35% because of the possibility that his partition ratio was 1:1,100 rather than 1:2,100. See *State v. Burling*, 224 Neb. 725, 400 N.W.2d 872 (1987) (following discount approach subsequently abandoned in *State v. Babcock*, 227 Neb. 649, 419 N.W.2d 527, 530 (1988)).

revoke a driver's license or whether a failing test result and an illegal blood or breath alcohol level are needed.<sup>2</sup> To fully understand this question our statutes which define the criminal offense of driving while intoxicated as well as the license revocation offense must be examined.

The statutory provisions which govern this case are AS 28.15.165, 28.15.166, and 28.35.030(a). Under AS 28.15.165(a) if a chemical test given to a driver "produces a result described in AS 28.35.030(a)(2)" a notice must be given to the driver that the Department of Public Safety intends to revoke the driver's license to operate a motor vehicle. (Emphasis added.) License revocation follows unless the driver makes a request for review under AS 28.15.166 within seven days after receipt of the notice. When a request for review is made, the driver is entitled to a hearing before a hearing officer designated by the Commissioner of Public Safety. AS 28.15.166(f). The issues to be determined at the hearing are expressly limited as follows:

(g) The hearing under this section shall be limited to the issues of whether the arresting officer has reasonable grounds to believe that the person was driving a motor vehicle while intoxicated and whether ... (2) the chemical test ... produced a result described in AS 28.35.030(a)(2).

AS 28.15.166(g) (emphasis added). If both of these issues are determined in the affirmative by a preponderance of the evidence the license is revoked. AS 28.15.166(j). If one or both of the issues are determined in the negative the license is not revoked. *Id.* Alaska Statute 28.35.030(a)(2) describes the "result" referred to in AS 28.15.165(a) and AS 28.15.166(g)(2). It provides:

(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

2. The second footnote in today's majority opinion suggests that if non-test evidence of intoxication were allowed even a driver who passed a test might suffer a license revocation. However, such a result would not be possible as long as the elements of the offense include a failing test score and an illegal alcohol level. Of course, if a failing test result alone suffices, non-test evidence of intoxication is irrelevant.

(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[.] AS 28.35.030(a)(2).

The primary function of AS 28.35.030(a)(2) is to express the elements of one of three ways in which a person may commit the crime of driving while intoxicated.<sup>3</sup> Although the elements of the subsection (a)(2) DWI offense have never been defined by this court or by the court of appeals, the court of appeals has interpreted language in a municipal ordinance similar to AS 28.35.030(a)(2). See *Erickson v. Municipality of Anchorage*, 662 P.2d 963, 967 (Alaska App.1983). The court construed the ordinance to require the driver's actual breath alcohol level to be above legal levels at the time of operation of a motor vehicle. *Id.* at 967. According to the plurality of the court, an elevated test result was intended to be presumptive proof of an actual illegal alcohol level. *Id.* Judge Singleton wrote a concurring opinion in which he expressed the view that a bad test result alone—so long as the driver had not consumed alcohol between the time that he drove and was tested—was the essence of the offense. *Id.* at 970 (Singleton, J., concurring). Judge Singleton stated: "The jury need not determine the precise blood alcohol level that existed at any given time while the defendant was operating his vehicle." *Id.* at 968. This difference of opinion is reflected in the case law of other jurisdictions.

Some courts read their DWI statute, as Judge Singleton did, to create an offense of registering a blood/breath alcohol test reading in excess of the statutory limit. See

3. The other two means are driving (1) while under the influence of intoxicating liquor or controlled substance or (3) while under the combined influence of intoxicating liquor and another substance. AS 28.35.030(a)(1) and (3).

*Nugent v. Iowa Dep't of Transp.*, 390 N.W.2d 125, 128 (Iowa 1986); *Schildgen v. Commissioner of Pub. Safety*, 363 N.W.2d 800, 801 (Minn.App.1985); *State v. Lentini*, 240 N.J.Super. 330, 573 A.2d 464, 465-67 (N.J.Super.App.Div.1990). If a properly administered test registers a result at or above the statutory level the offense is automatic.<sup>4</sup> Under this view, any margin of error or inherent inaccuracy in the testing technology can be seen as tolerated by the legislature which prescribed the statutory requirements of the offense. See *State v. Rucker*, 297 A.2d 400, 403 (Del.Super.1972); *Slagle v. State*, 570 S.W.2d 916, 919 (Tex.1978). Thus, evidence concerning the testing equipment's margin of error is irrelevant because such evidence tends to prove the individual's actual alcohol content and does not shed light upon the proper functioning or use of the testing equipment.

Under a second approach, courts read their DWI statute, as the plurality of the court of appeals did in *Erickson*, to require an actual blood or breath alcohol content at or above the statutory level. See e.g., *People v. Campos*, 138 Cal.App.3d Supp. 1, 188 Cal. Rptr. 366, 368 (Cal.Super.1982); *State v. Prestier*, 455 N.E.2d 24, 27 (Ohio Mun.1982). Under this view, the results of a chemical sobriety test are treated as a means of proving actual alcohol content. Thus, the inherent margin of error for any testing equipment is relevant to the issue of the accuracy of the test equipment's measurement of actual alcohol content. Courts in these jurisdictions admit and permit the utilization of non-test evidence of intoxication. E.g., *State v. Babcock*, 227 Neb. 649, 419 N.W.2d 527 (1988); *State v. Gates*, 7 Haw.App. 440, 777 P.2d 717, 720-21 (1989); *State v. Brockway*, 2 Ohio App.3d 227, 441 N.E.2d 602 (1981); *State v. Keller*, 36 Wash.App. 110, 672 P.2d 412, 413-14 (1983).

While AS 28.35.030(a)(2) is ambiguous with respect to the necessary elements of the crime of DWI, does the ambiguity carry

4. Importantly, even these courts recognize that the test must be "properly administered." Any evidence that the test equipment fails to meet legal operating or maintenance requirements or that the officer administering the test failed to follow proper procedures may, of course, be ad-

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through to the conduct necessary to give rise to an administrative license revocation under AS 28.15.165 and .166? Today's majority opinion states that the criminal DWI offense requires an actual alcohol level at or above statutory limits, and implies that an illegal actual alcohol level is also needed for license revocation. I disagree with the latter conclusion. It seems to me that the most straightforward reading of our statutes is that all that is required for license revocation is a failing test result based on a properly administered test. Alaska Statute 28.15.165(a) requires only "a chemical test" properly administered which "produces a result" at or above statutory limits. Use of the term "result" in .165(a) rather than language which suggests the need for illegal levels of alcohol present in the person's blood or breath, as in AS 28.35.030(a)(2), points to this conclusion. Moreover, the fact that by the express terms of AS 28.15.166(g) the issue at the license revocation hearing is limited to whether the chemical test "produced a result" at illegal levels also suggests that the test result itself is the critical element.

As noted above, in jurisdictions where an actual level of alcohol is critical, evidence of intoxication independent of the test result is admissible. Today's opinion concludes that no evidence other than the test result may be admitted to prove actual alcohol levels. This is an accurate reading of the limitation imposed by AS 28.15.166(g)(2) but that limitation only makes sense if the test result rather than actual alcohol level is the critical fact for determination. One must ask why a legislature would enact a statutory scheme in which actual levels of alcohol are critical and then preclude the state from employing non-test evidence which tends to prove that such levels exceeded legal limits in particular cases? The answer is that this would be a very odd thing for a legislature to do. No rationale for a system weighted so artificially and heavily in favor of the drinking driver can readily be hypothesized. Thus, the legis-

mitted to prove that, in fact, an individual never actually produced a test result above the legal limit. Note, however, that this argument takes the position that this particular test result was unreliable, not that the testing method *per se* is inaccurate.

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peals, the court of  
guage in a municipi-  
AS 28.35.030(a)(2).  
ity of Anchorage,  
App.1983). The  
nce to require the  
hol level to be  
ne of operation of  
7. According to  
an elevated test  
presumptive proof  
level. *Id.* Judge  
ring opinion in  
v that a bad test  
e driver had not  
the time that he  
s the essence of  
leton, J., concur-  
ted: "The jury  
se blood alcohol  
n time while the  
vehicle." *Id.* at  
on is reflected in  
fictions.

DWI statute, as  
te an offense of  
cohol test read-  
ory limit. See

Driving (1) while  
ng liquor or con-  
under the com-  
liquor and anothe-  
(1) and (3).

lature probably intended that the critical element for license revocation was merely a failing test result.

B. *Barcott v. State, Dept of Public Safety*

As in this case, the driver in *Barcott v. State, Dept of Public Safety*, 741 P.2d 226 (Alaska 1987), was tested by an Intoximeter 3000. The test indicated a .10 alcohol level and the driver's license was suspended. *Id.* at 227. *Barcott* claimed that the administrative hearing officer denied him due process of law by refusing to consider the device's .01 inherent margin for error. *Id.* We agreed and remanded for further proceedings. *Id.*

The *Barcott* opinion is unclear as to whether a failing test result produced by a properly administered test was sufficient for license revocation or whether a failing test and an illegal alcohol breath or blood level are required. There is much in the opinion which suggests that the court assumed that both a failing test result and an illegal level of alcohol were essential. Throughout the opinion the controlling issue is framed in terms of the hearing officer's refusal to consider evidence of the margin for error, not that the margin for error was necessarily dispositive. See *id.*

The rehearing history of *Barcott* as reflected in the public records of this court, but not in the published opinion, makes clear that our decision was based on the assumption that actual alcohol content was relevant. When the original *Barcott* opinion was issued the final sentence read: "The decision of the hearing officer is reversed." The State filed a petition for rehearing, contending that the reversal without a remand instruction amounted to a finding by this court that revocation of *Barcott's* license was not permissible under any circumstances and, therefore, *Barcott's* license had to be restored without the State having an opportunity to

present its case to a hearing officer. The court granted the State's petition and added the current remand language: "and the case is remanded to the department for further proceedings consistent with this opinion." *Id.* at 230. The only sensible explanation for this action is that the *Barcott* court assumed that a driver's actual alcohol level was an element of the license revocation offense, therefore the State should be allowed on remand to present evidence of the driver's actual alcohol level in addition to the test score.

Given my conclusion that a failing test result alone is the critical element in license revocation cases and that a driver's actual alcohol level is irrelevant, *Barcott's* holding that it is a violation of due process not to consider a testing device's inherent margin for error is plainly wrong. Drunken driving is a social problem of considerable magnitude. The legislature can respond to this problem by making it an offense to drive when a test of the driver's blood or breath yields a given test reading as long as there is a reasonable relationship between the level established by the legislature and driver impairment. In setting a level, a certain testing margin of error is tolerable within reasonable limits. Clearly the legislature could prohibit driving with an actual alcohol content of .09.<sup>5</sup> Thus, there is no reason to condemn as fundamentally unfair, and therefore unconstitutional, a license revocation procedure in which a driver is sanctioned for a test reading of between .10 and .109, given a .01 margin for error.

If, on the other hand, actual alcohol level is the critical element, I agree that it would be unfair not to permit consideration of the testing device's margin for error. However, it is one thing to allow consideration of a device's margin for error along with other evidence bearing on the issue of intoxication.<sup>6</sup>

5. A number of states have established an .08% blood alcohol level at or above which a driver is *per se* guilty of DWI. Cal.Veh.Code § 23152(b) (West Supp.1990); Me.Rev.Stat. Ann. tit. 29, § 1312-B(1)(B) (West Supp.1989); Or.Rev.Stat. § 813.010(1)(a) (1987); Utah Code Ann. § 41-6-44(1)(a) (1988). Congress has encouraged all states to adopt a .04% level for commercial vehicle drivers, 49 U.S.C.App. § 2707(f)(4) (Supp.

1990) and Alaska has complied. AS 28.33.030(a).

6. It is well settled that non-test evidence by either lay witnesses or trained police officers concerning a party's intoxication is admissible. *Loof v. Sanders*, 686 P.2d 1205, 1213 (Alaska 1984). In addition to observation evidence concerning intoxication, non-test evidence of intoxication

This is what we did in *Barcott*. It is another and much more questionable thing to conclude that whenever a test result is such that considering the margin for error an innocent alcohol level is possible, there can be no license revocation because no other evidence of intoxication can be received. This conclusion is strange not only because there is no apparent purpose for the limitation, but also because no other jurisdiction in which actual alcohol level is critical employs such a limitation.

established the point at and above which a test score is to be regarded as failing. That point is .10. The majority opinion errs in changing that point to .11 where an Intoximeter 3000 is used. Under our view of the plain meaning rule of statutory construction, the apparent plain meaning of a statute cannot be changed except where there exists compelling legislative history that a different meaning was intended. By relying on the absence of legislative history to alter the plain meaning of the current statutory system, today's opinion stands the plain meaning rule on its head.

III.

In conclusion, I would affirm the decision of the superior court which affirmed the revocation of Haynes' driver's license. The critical requirement for license revocation is a properly given test which produces a failing score. *Barcott*, which assumes otherwise, should be overruled. The legislature has

may include independent quantitative evidence as to the amount of drinking the driver has done before the arrest. This is sometimes very persuasive, as was the case in *State v. Keller*, 36 Wash. App. 110, 672 P.2d 412, 414 (1983), where the

defendant admitted drinking "six beers and two tequilas" prior to driving.



ring officer. The petition and added age: "and the case tment for further with this opinion." ble explanation for ott court assumed hol level was a . evocation offense, ld be allowed on ce of the driver's ition to the test

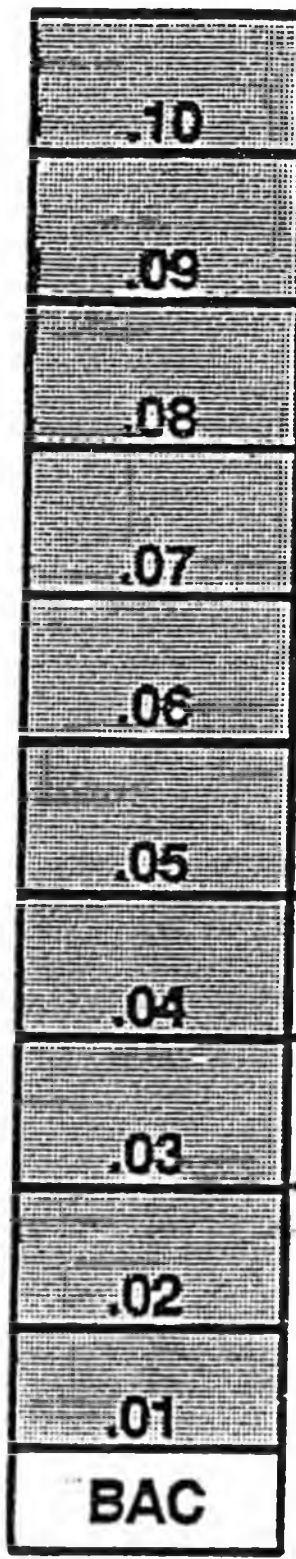
at a failing test element in license a driver's actual *Barcott's* holding e process not to inherent margin Drunken driving nsiderable magni- respond to this offense to drive s blood or breath as long as there is etween the level re and driver im- el, a certain test- erable within rea- e legislature could ctual alcohol con- is no reason to unfair, and there- ense revocation is sanctioned for 10 and .109, given

al alcohol level is e that it would be sideration of the error. However, nsideration of a along with other e of intoxication.<sup>6</sup> plied. AS 28.33.

est evidence by ei- police officers con- s admissible. *Loof* 213 (Alaska 1984). idence concerning ce of intoxication

1993

LEGISLATIVE ADMINISTRATION DIVISION



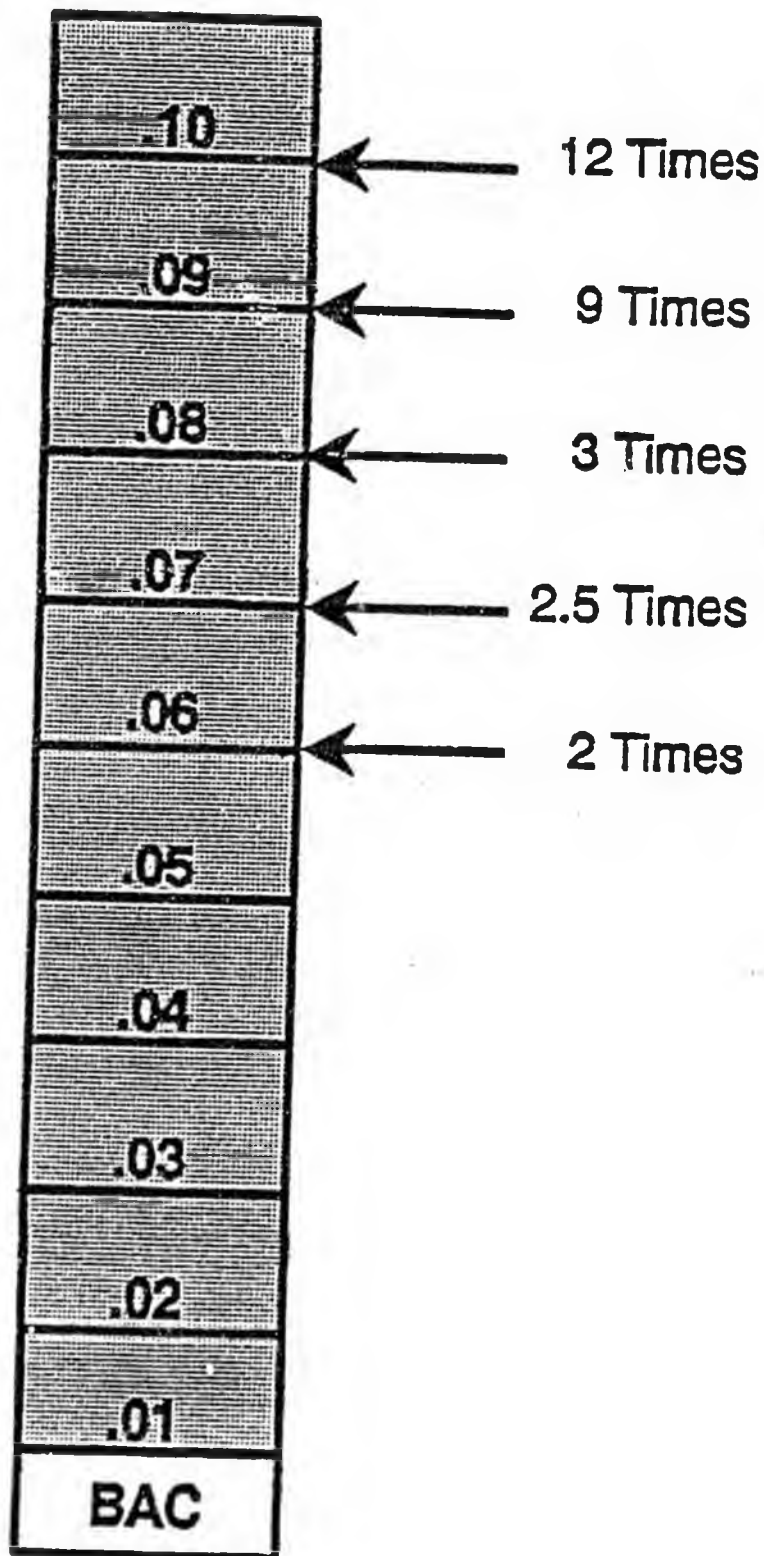
Concentrated Attention, Speed Control, Braking, Steering, Gear Changing, Lane Tracking, Judgment

Tracking, Divided Attention, Coordination, Comprehension, Eye Movement

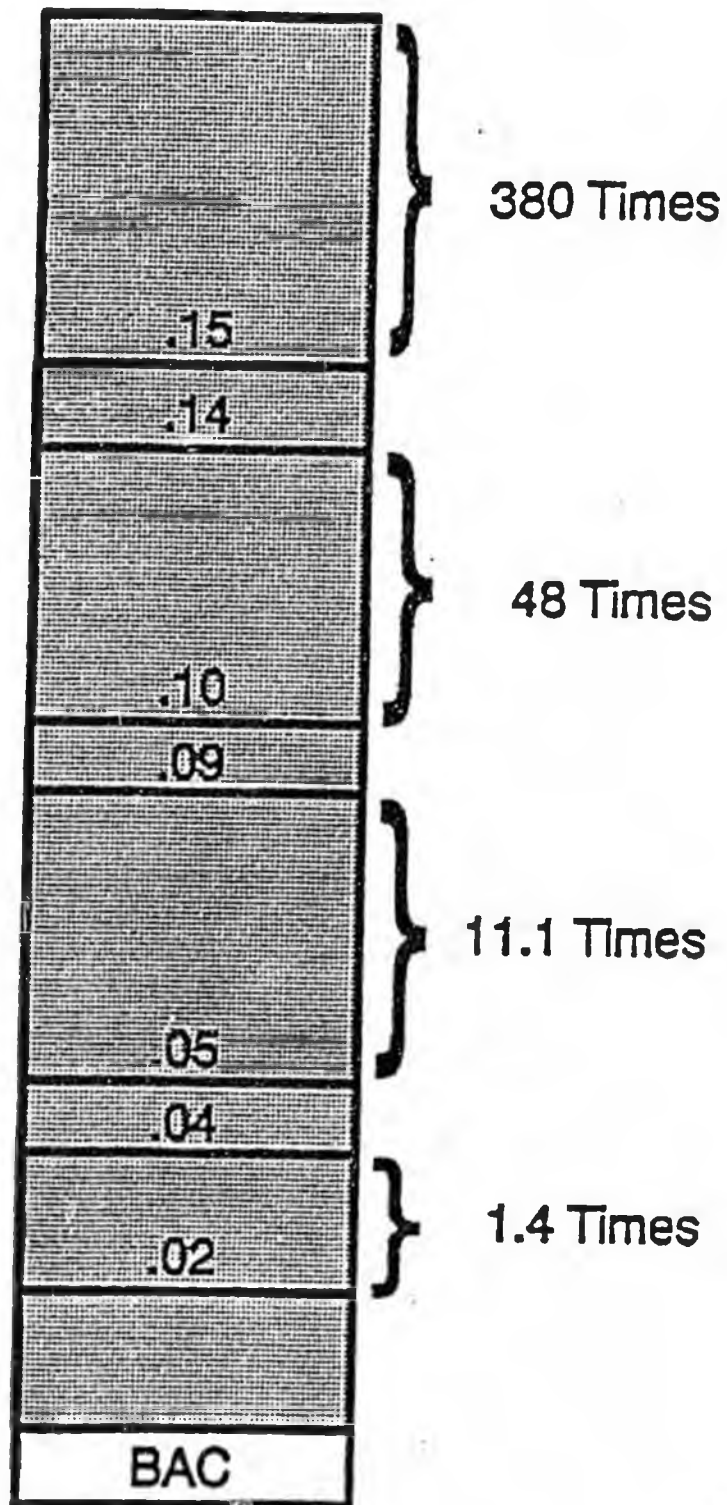
Simple Reaction Time, Emergency Response

Choice Reaction Time

# BAC and Impairment

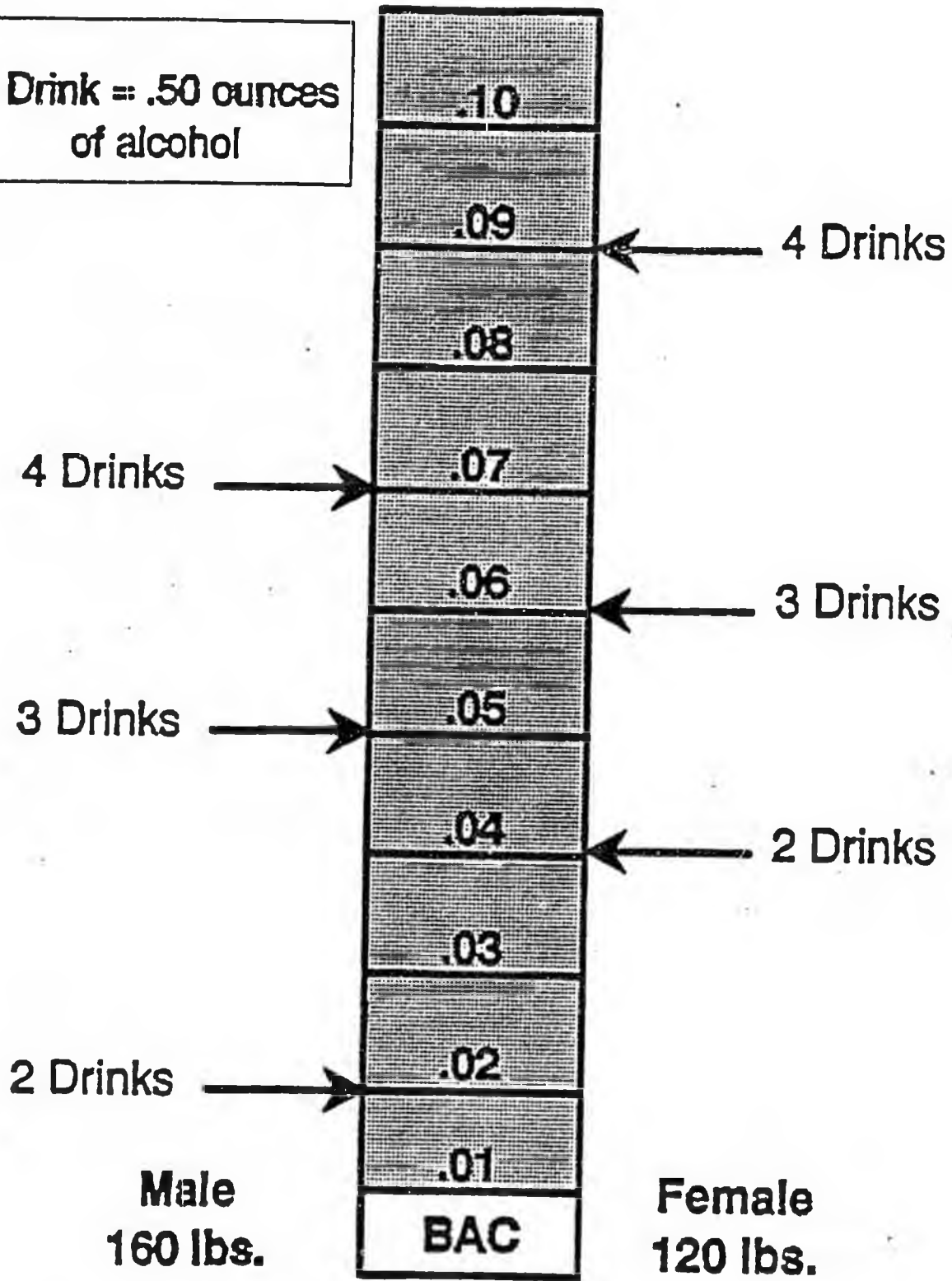


**BAC and Crash Risk**



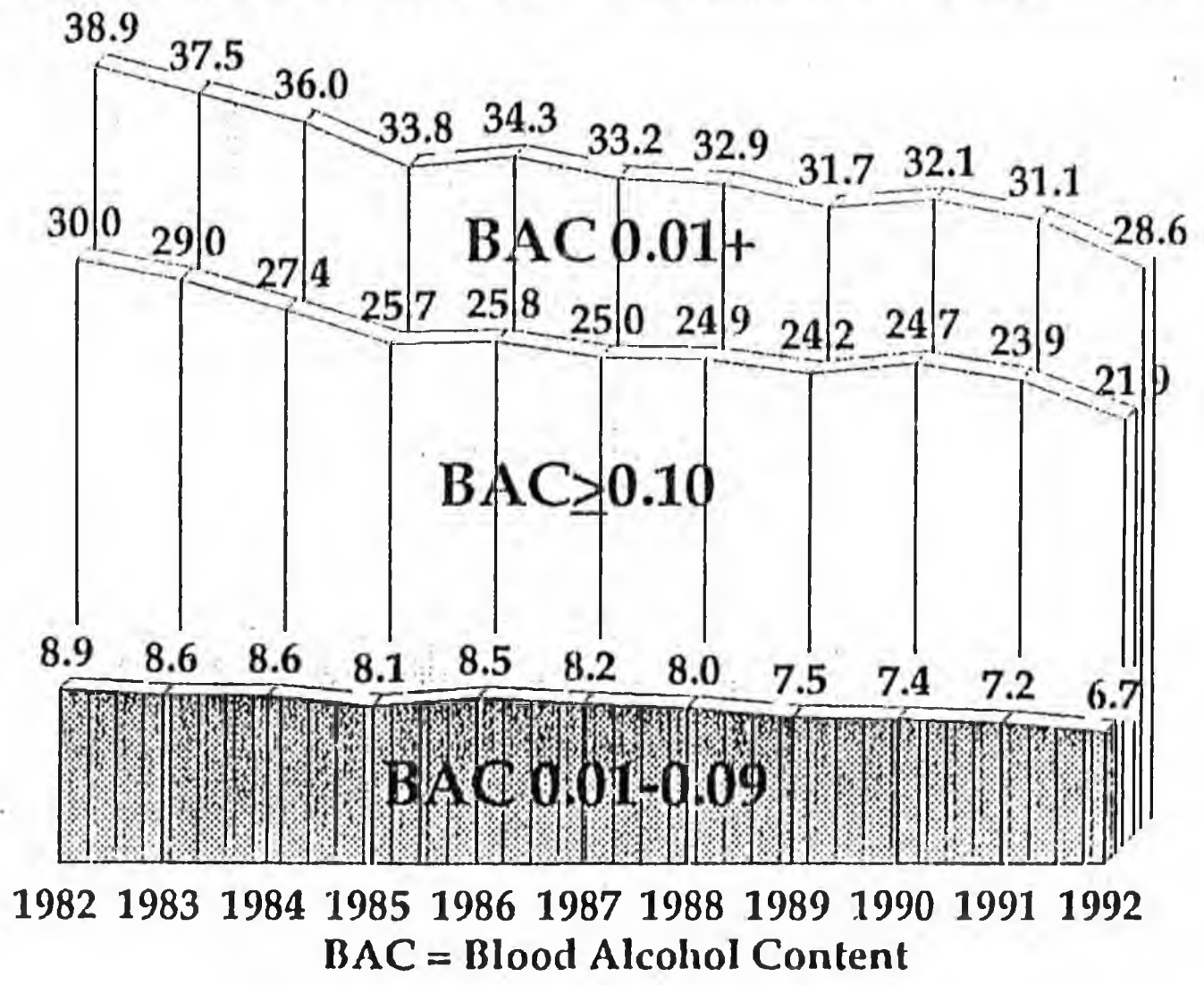
**Relative Fatality Risk for Drivers in  
Single Vehicle Crashes by BAC  
(Zador, IIHS, 1991)**

1 Drink = .50 ounces  
of alcohol



**Number of Drinks and BAC In One  
Hour of Drinking**

**Percentage of Drivers Involved in Fatal Crashes Involving Drivers with Positive Blood Alcohol Concentration**



**Effectiveness  
of  
.08 Per Se**

- NHTSA Evaluated Effects of .08 in California
- Results:
  - 81% knew BAC limit was stricter
  - Increase in DUI arrests
  - 12% reduction in A/R fatalities
  - Some of effects due to ALR

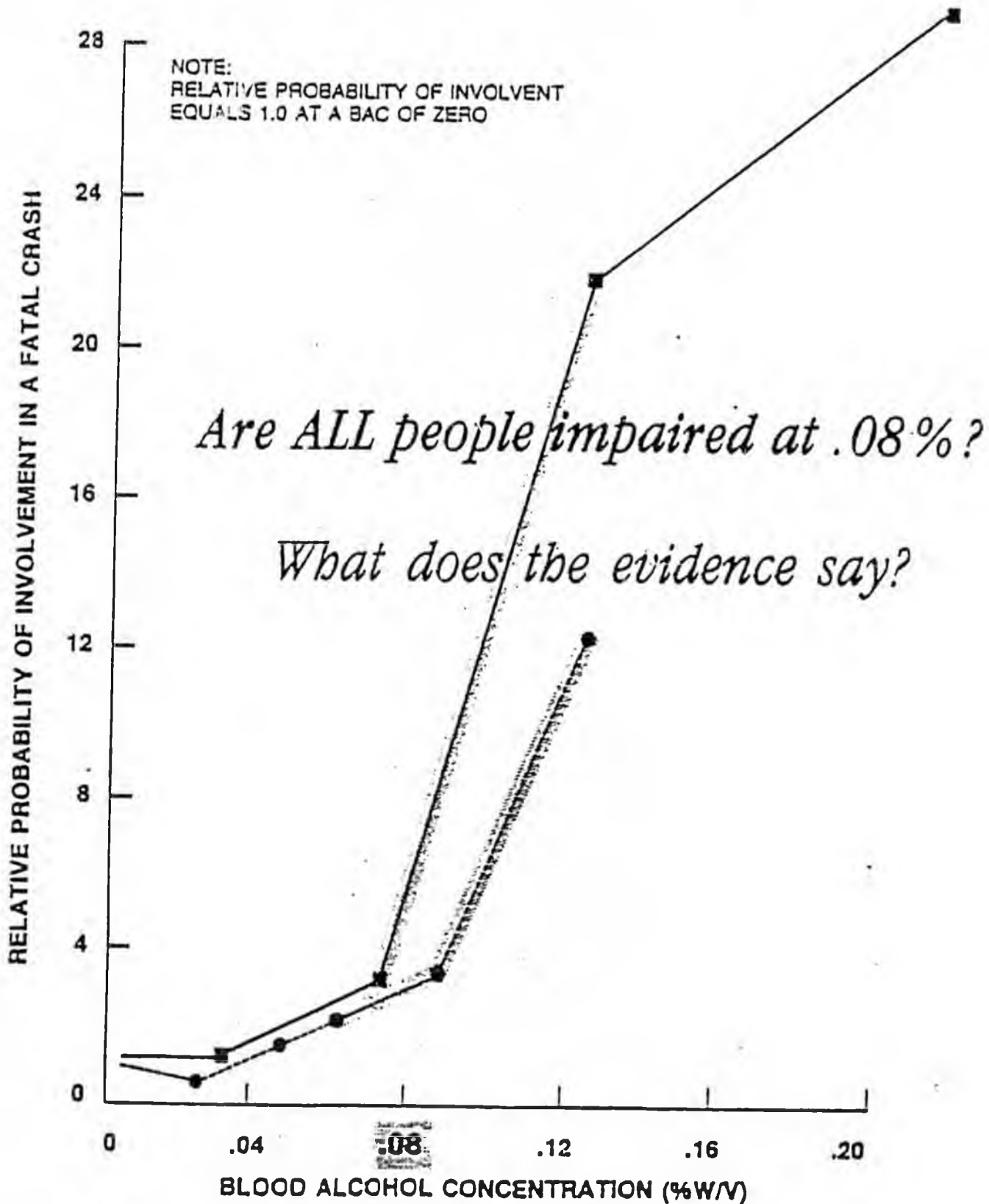
## **.08 Per Se**

*Will .08 be cost effective?*

The costs associated with the increased DWI arrests that will occur will be more than offset by **lives saved** due to reductions in alcohol-related fatalities. Eventually, reductions in drinking and driving should also occur and arrests will go back down.

# Relative Probability of Involvement In Fatal Crashes for Drivers with BACs at Given Levels

RL



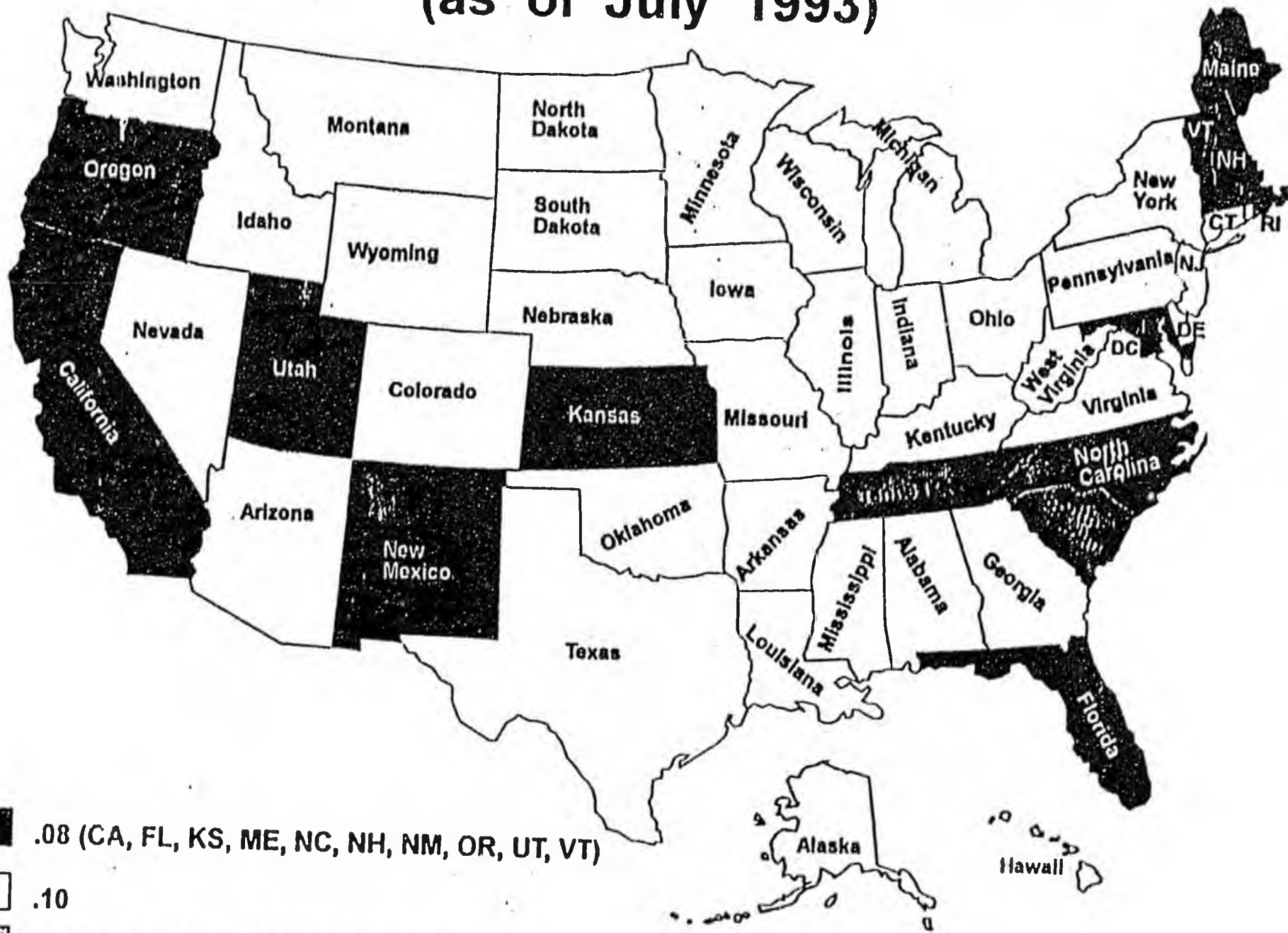
GRAND RAPIDS, MICHIGAN, 300 FATAL OR SERIOUS CRASHES (Hurst 1974) ■ VERMONT, 108 FATAL CRASHES (Hurst 1974)




COMPLIMENTS OF  
SENATOR BILL LEONARD

## BAC Limits in Other Countries

<u>Country</u>	<u>Illegal Per Se</u>
Canada	.08
Great Britain	.08
Australia	.05 - .08
Austria	.08
Switzerland	.08
Netherlands	.05
Norway	.05
Finland	.05
Sweden	.02

# States with BAC Per Se Laws (as of July 1993)



-  .08 (CA, FL, KS, ME, NC, NH, NM, OR, UT, VT)
-  .10
-  No Per Se Law (MA, MD, SC, TN)

Alaska State Legislature  
House of Representatives

3111 C STREET  
ANCHORAGE, ALASKA 99503-3957  
561-7007

WHILE IN SESSION:  
ALASKA STATE CAPITOL  
UNIVERSITY CENTER  
FAIRBANKS, ALASKA 99701-1182  
465-4968



DISTRICT 11:  
SAND LAKE  
SPENARD  
TAKU-CAMPBELL

Representative Jim Nordlund

	# OF DRINKS TO .10 BAC (1HR PERIOD)	#OF DRINKS TO .08 BAC (1HR PERIOD)
FEMALE 100 LBS.	2	2
FEMALE 140 LBS.	3	3
FEMALE 180 LBS.	4	3
MALE 120 LBS.	3	3
MALE 160 LBS.	5	4
MALE 200 LBS.	6	5
MALE 240 LBS.	7	6

\* Information from the "Controlled Drinking Guide" published by The Alaska Center for Responsible Alcohol Control