

HB

329

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
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Mail Stop 3101

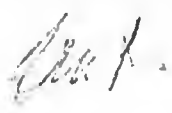
State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM

February 4, 2002

SUBJECT: Chemical tests of drivers - (HB 329)

TO: Representative Norman Rokeberg
Attn: Heather

FROM: Michael F. Ford 
Legislative Counsel

You have asked if the testing requirements imposed on a motor vehicle driver under HB 329, raise constitutional problems, because the bill repeals the requirement that an arrested driver be driving while intoxicated. As explained in this memo, I believe that the elimination of the link to intoxication may cause the bill to be struck down as an unreasonable search prohibited under the Alaska Constitution.

Under HB 329, all drivers who are arrested and who are involved in an accident that causes death or physical injury would be chemically tested to determine the presence of alcohol or drugs. The bill eliminates the requirement in existing law that the person be arrested for driving while intoxicated. The bill only requires that the driver be arrested for some offense, which may or may not be related to intoxication. The elimination of the link to some suspicion of impairment before being tested is troublesome. In Blk v. State, 3 P.3d 359 (Alaska App. 2000), the Alaska Court of Appeals held the legislature could not authorize the police to test a driver for impairment when involved in an accident that causes death or serious physical injury. Under that provision of law, AS 28.35.031(g), there was no requirement of any individualized suspicion of impairment, but also no requirement that the driver be arrested as in HB 329. The court pointed to several cases in which testing for impairment was approved, without requiring individualized suspicion of impairment. In Skinner v. Railway Labor Executives' Ass'n., 489 U.S. 602 (1989), the United States Supreme Court approved blood and breath tests by railroad companies for those employees who were involved in serious accidents or who violated safety rules. The Court ruled that these searches were reasonable under the Fourth Amendment even though there was no individualized suspicion of wrongdoing. The court stated in Skinner:

In limited circumstances, where the privacy interests implicated by the search are minimal, and where an important government interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion.

Representative Norman Rokeberg
February 4, 2002
Page 2

It appears that the Court balanced the safety needs of the public verses the employees diminished expectation of privacy in reaching this conclusion.

There are other examples where the courts have justified intruding on Fourth Amendment privacy rights of individuals in order to achieve public safety needs. In National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989), the Court approved a U.S. Customs Service ruled that mandated drug testing for certain employees involved in drug intervention or who carried a firearm. In Vernonia School Dist. 47J v. Acton, 515 U.S. (1995), the Court approved a random drug-testing program for students participating in extracurricular sports programs.

In these cases, the Courts found there were special needs beyond normal law enforcement that justified the intrusion on Fourth Amendment privacy rights. In arriving at this conclusion, the Court in Acton balanced three factors, (1) the nature of the privacy interest being intruded upon; (2) the character of the intrusion; and (3) the nature of the government's concern and the means to meet it. The question for purposes of HB 329 becomes, does the individual driver's right to privacy outweigh the government's need to eliminate impaired drivers? I have doubts that the goal of detecting impaired drivers would constitute the type of "special need" that would survive constitutional challenge, but the issue is not entirely clear. Under HB 329, the driver has been arrested, indicating some probable cause to believe that a crime has been committed. However, I believe that even with an arrest, requiring all drivers be tested without requiring some suspicion of impairment is likely the type of intrusion on privacy rights that was found impermissible under Blank.

In conclusion, I am doubtful that a suspicionless search is justified even when there is an arrest and an accident causing death or physical injury, unless there is some special societal need other than normal law enforcement. In the case of HB 329, I believe that unless some special societal need can be identified, this means that the bill would not survive constitutional challenge.

Please contact me if you have further questions.

MFF:med
02-097.med

22-LS1234\C
Ford
1/25/02

Adopted

CS FOR HOUSE BILL NO. 329(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SECOND LEGISLATURE - SECOND SESSION

BY THE HOUSE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): HOUSE JUDICIARY COMMITTEE BY REQUEST

A BILL

FOR AN ACT ENTITLED

1 "An Act requiring that a chemical test be administered to determine the presence of
2 alcohol or a substance that impairs driving ability after the commission of an offense
3 while operating a motor vehicle, aircraft, or watercraft."

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

5 * Section 1. AS 28.35.035(a) is amended to read:

6 (a) If a person is under arrest for an offense arising out of acts alleged to have
7 been committed while the person was operating a motor vehicle, aircraft, or watercraft
8 [WHILE INTOXICATED], and that arrest results from an accident that causes death
9 or physical injury to another person, a chemical test shall [MAY] be administered
10 [WITHOUT THE CONSENT OF THE PERSON ARRESTED] to determine the
11 amount of alcohol in that person's breath or blood or to determine the presence of any
12 substance that impairs the person's ability to drive [CONTROLLED
13 SUBSTANCES] in that person's blood and urine.

ALASKA STATE LEGISLATURE

HOUSE JUDICIARY COMMITTEE

Representative Norman Rokeberg, Chairman
Representative Scott Ogan, Vice-Chairman
Representative John Coghill
Representative Jeannette James
Representative Kevin Meyer
Representative Ethan Berkowitz
Representative Albert Kookesh



State Capitol
Juneau, AK 99801-1182
Telephone: (907) 465-4990
Fax: (907) 465-2040

Heather M. Nobrega
Counsel to Committee

Sponsor Statement for HB 329

The House Judiciary Committee has introduced this bill at the request of Mother's Against Drunk Driving. HB 329 will enhance law enforcement's ability to combat Alaska's pervasive problem of intoxicated and/or impaired drivers by requiring that any driver arrested for an accident that caused death or physical injury be chemically tested for drugs or alcohol.

Current law gives discretion in administering a chemical test to a driver when there has been a motor vehicle accident that causes a death or physical injury. However, in order for the test to be administered, the driver must first be under arrest for an offense arising out of acts alleged to have been committed while the person was operating a motor vehicle, aircraft, or watercraft WHILE INTOXICATED. Therefore, even though the chemical test is discretionary, the driver must be under arrest, and that arrest must be because the arresting officer had probable cause that the driver was intoxicated.

HB 329 will make the chemical test mandatory for any driver who is under arrest for an accident that caused death or physical injury to another person. The purpose of the chemical test will be to determine if there was any alcohol, or controlled substance, in the driver at the time of the accident.

In addition, the bill also removes the requirement of intoxication when the driver has been arrested. Therefore, the driver must be chemically tested when arrested for ANY offense arising out of acts alleged to have been committed while the person was operating a motor vehicle, aircraft, or watercraft, not just those that were the result of intoxication.

In deciding the breadth of this bill, the Judiciary committee was constrained by a recent Alaska Court of Appeals decision, *Blank v. State*, 3 P.3d 359 (Alaska App. 2000). In this case, the Court of Appeals struck down AS 28.35.031(g), which stated that any person who operates a vehicle, and is involved in a motor vehicle accident that causes death or serious physical injury, is implied to have given consent to a chemical test. The court found the statute unconstitutional as an unreasonable search and seizure under the Fourth Amendment to the U.S. Constitution, and Article 1, Section 14 of the Alaska Constitution.

As a result of this decision, the Judiciary committee can only broaden the scope of chemical tests following an accident, after there has been an arrest. However, the mandatory chemical testing required by HB 329, will create a powerful tool for law enforcement, and the prosecution, in identifying and catching drivers who are under the influence and a menace to society.

The Committee urges your support of this bill.

FISCAL NOTE

STATE OF ALASKA
2002 LEGISLATIVE SESSION

Fiscal Note Number: _____
 Bill Version: HB 329
 () Publish Date: _____

Revision Date/Time (Note if correction): _____ Dept. Affected: Public Safety
 Title Chemical Tests for Auto Accidents BRU AST Detachments
 Component AST Detachments
 Sponsor House Judiciary Committee
 Requester House Judiciary Committee Component No. 2325

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
Personal Services	0.0	0.0	0.0	0.0	0.0	0.0
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

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						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2002) cost: 0.0

Check this box (X) if funding for this bill is included in the Governor's FY 2003 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

This bill will have no fiscal impact for the Department of Public Safety.

Prepared by: Lt. Julia Grimes Phone 269-4532
 Division: Alaska State Troopers Date/Time 1/30/02 4:45 PM
 Approved by: Commissioner Glenn Godfrey Date 1/30/2002
 Agency: Department of Public Safety

FISCAL NOTE

STATE OF ALASKA
2002 LEGISLATIVE SESSION

Fiscal Note Number: _____
 Bill Version: HB 329
 () Publish Date: _____

Revision Date/Time (Note if correction): _____ Dept. Affected: Administration
 Title "An Act requiring a chemical test BRU Legal and Advocacy Services
after an offense while operating...." Component Public Defender Agency
 Sponsor House Judiciary by Request
 Requester House Judiciary Component No. 1631

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	*	*	*	*	*	*

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						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	*	*	*	*	*	*

Estimate of any current year (FY2002) cost: 0.0
 Check this box (X) if funding for this bill is included in the Governor's FY 2003 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

This legislation would require instead of allow (under the current law) the police to administer a chemical test for alcohol or controlled substances after an arrest for an offense arising out of acts alleged to have been committed while the person was operating a motor vehicle, aircraft, or watercraft that results in an accident causing death or physical injury. The Public Defender Agency believes that in the vast majority of cases, chemical tests are already being administered, so this bill should have minimal fiscal impact on the Agency, but the Agency does not have the necessary information to determine this, therefore an indeterminate fiscal note is submitted.

Prepared by: Barbara Brink, Director Phone (907) 334-4416
 Division: Public Defender Agency Date/Time 1/29/02 4:14 PM
 Approved by: Jim Duncan, Commissioner Date 1/29/2002
 Agency: Department of Administration

FISCAL NOTE

STATE OF ALASKA
2002 LEGISLATIVE SESSION

Fiscal Note Number: _____
 Bill Version: HB 329
 () Publish Date: _____

Revision Date/Time (Note if correction): _____ Dept. Affected: Law
 Title "... requiring that a chemical test be administered BRU Criminal Division
... after ... an offense while operating a motor vehicle, ..." Component All
 Sponsor House Judiciary Committee by Request
 Requester House Judiciary Committee Component No. _____

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

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

1002 Federal Receipts						
1003 CF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2002) cost: 0.0

Check this box (X) if funding for this bill is included in the Governor's FY 2003 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

HB 329 would require that a chemical test for alcohol or controlled substances be administered in all instances when a person is arrested for an offense resulting from driving a motor vehicle, aircraft, or watercraft, and the arrest is due to an accident that causes the death or physical injury of another person.

Passage of this legislation is not anticipated to have a significant fiscal impact on the Department of Law. The bill primarily impacts police procedure. Mandatory chemical testing may result in a few more cases being accepted for prosecution than otherwise would be, but we believe it rarely happens that the use of alcohol or controlled substances as a factor contributing to these types of accidents is not detected now.

Prepared by: Joan M. Kasson Phone (907) 465-5370
 Division Attorney General's Office Date/Time 1/25/02 2:19 PM
 Approved by: Kathryn Daughhete for Bruce M. Botelho, Attorney General Date 1/25/2002
 Agency Department of Law

FISCAL NOTE

STATE OF ALASKA
2002 LEGISLATIVE SESSION

BILL NO. HB 329

Revision Date/Time (Note if correction) _____	Dept. Affected _____
Title <u>Chemical Tests for Auto Accidents</u>	BRU <u>Alaska Court System</u>
	Component <u>Trial Courts</u>
Sponsor <u>House Judiciary</u>	
Requester <u>House Judiciary</u>	Component No. <u>768</u>

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

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						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2002) cost: 0.0

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)
The Alaska Court System does not anticipate any fiscal impact from the passage of HB 329.

Prepared by: <u>Douglas Wooliver</u>	Phone <u>463-4750</u>
Division: <u>Alaska Court System</u>	Date/Time <u>1/30/02 12:20 PM</u>
Approved by: <u>Stephanie Cole</u>	Date <u>1/30/02</u>
Agency: <u>Alaska Court System</u>	

For distribution information, call the Governor's Legislative Office



Mothers Against Drunk Driving • Juneau Chapter

211 Fourth St. Suite 102 • Juneau, AK 99801

Tuesday, January 22, 2002

RE: House Bill Number 329

Mothers Against Drunk Driving (MADD) support House Bill No. 329. MADD endorses laws that protect people from injuries or deaths caused by drunk driving.

When testing is not performed immediately, it is unknown whether alcohol was a contributing factor in a motorized vehicle crash. The "crash" becomes an "accident" and the "accident" remains a factor in our accepted norm of drunk driving.

MADD recognizes the *privilege* to operate a motorized vehicle. MADD supports the California law which states in section 23612: Any person who drives a motor vehicle is deemed to have given his or her consent to chemical testing of his or her blood or breath for the purpose of determining the alcoholic content of his or her blood, if lawfully arrested for any offense *allegedly committed* in violation of Section 23140, 23152, or 23153.

The MADD Juneau Chapter is of the opinion the concept "*allegedly committed*" includes the possibility of all motorized vehicle crashes where person(s) are injured or killed.

Sincerely,

Cindy Cashen
Volunteer

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

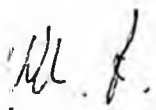
State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM

January 21, 2002

SUBJECT: Imposition of breath/blood tests (HB 329)

TO: Representative Norman Rokeberg
Attn: Heather

FROM: Michael F. Ford 
Legislative Counsel

You have asked why the legislature cannot require that all drivers involved in an automobile accident submit to a test of their alcohol breath or blood levels. As I advised you earlier, such an involuntary testing law was enacted by the legislature in 1994. (See AS 28.35.031(g)) Six years after enactment of this law, the Alaska Court of Appeals ruled that this type of testing, that is testing someone who has not been arrested, was unconstitutional. The court held that this type of search is a violation of the Fourth Amendment of the United States Constitution and of art. 1, sec. 14 of the Alaska Constitution. Blank v. State, 3 P.3d 359 (Alaska App. 2000). The provisions cited are both provisions intended to protect citizens against unreasonable searches and seizures. I have enclosed a copy of the Blank decision for your review. Therefore given this view by the Alaska Court of Appeals, it is not possible to require a driver involved in an accident be tested, unless the driver is first arrested.

Please contact me if you have further questions.

MFF:med
02-033.med

Enclosure

State Drunk Driving Laws

Mandatory Post-Fatal Accident BAC Testing

The following states require BAC tests on fatally injured drivers, passengers or pedestrians. Note the mandatory testing does not extend to all drivers or passengers involved in a fatal accident, only to those who died as a result of the accident.

STATE	MANDATORY TESTING	CITATION	PERFORMED ON
Alabama	no		
Alaska	no		
American Samoa	no		
Arizona	yes	§28-2642	driver
Arkansas	yes	§5-65-208(a)	driver, passenger & pedestrian
California	yes	Gov't Code §27491.25	driver, passenger & pedestrian
Colorado	yes	§42-4-1304	driver & pedestrian
Connecticut	yes	§14-227c	driver & pedestrian
Delaware	no		
District of Columbia	no		
Florida	no		
Georgia	possible	§45-16-27, §45-16-46	driver, passenger & pedestrian
Guam	no		
Hawaii	possible	§841-3	driver, passenger & pedestrian
Idaho	yes	§49-1314	driver & pedestrian
Illinois	yes	55 ILCS 5/3-3013	driver & pedestrian
Indiana	yes	ic9-27-5-4(a)	driver & pedestrian
Iowa	no		
Kansas	yes	§22a-237(c)	driver & pedestrian
Kentucky	possible	§189.590	driver, passenger & pedestrian
Louisiana	yes	§32:398(E) & (F)	driver, passenger & pedestrian
Maine	no		
Maryland	no		
Massachusetts	limited	Ch 38 §4A	driver
Michigan	yes	§257.625a(6)(f)	driver
Minnesota	yes	§169.09 subd 11	driver & pedestrian
Mississippi	yes	§63-11-7	driver
Missouri	yes	§§58.445, 58.447 & 58.449	driver, passenger & pedestrian
Montana	no		
Nebraska	yes	§60-6,102	driver & pedestrian
Nevada	yes	§484.394	driver, passenger & pedestrian
New Hampshire	yes	§§262-A:69-1 & 265:93	driver, passenger & pedestrian
New Jersey	yes	§26:2B-24	driver & pedestrian

New Mexico	yes	§24-11-6(B)	driver, passenger & pedestrian
New York	yes	County Code §674(3)(b)	driver & pedestrian
North Carolina	no		
North Dakota	yes	§39-20-13	driver, passenger & pedestrian
Ohio	yes	§313.13(B)	driver
Oklahoma	no		
Oregon	yes	§146.113	driver, passenger & pedestrian
Pennsylvania	yes	75 §3749	driver, passenger & pedestrian
Puerto Rico	yes	9 §1043	driver & pedestrian
Rhode Island	no		
South Carolina	yes	§17-7-80	driver & pedestrian
South Dakota	yes	§34-25-22.1	driver, passenger & pedestrian
Tennessee	discretionary	§38-7-109	driver, passenger & pedestrian
Texas	limited	Code of Criminal Procedure Art.49.10(j)	discretionary - driver
Utah	yes	§26-1-30(17)	driver & pedestrian
Vermont	no		
Virgin Islands	limited	20 §493c(m)	driver
Virginia	no		
Washington	yes	§§46.20.308(1) &46.52.065	driver & pedestrian
West Virginia	yes	§17C-5B-1	driver & pedestrian
Wisconsin	yes	§346.71(2)	driver & pedestrian
Wyoming	no		

Source: Digest of State Alcohol-Highway Safety Related Legislation, 18th Edition. (US Dept. of Transportation, National Highway Traffic Safety Administration, 2000)

3 P.3d 359 BLANK V. STATE (Ct. App. 2000) 2000 Alas. App. Lexis 70

LAURA A. BLANK, Appellant,

vs.

STATE OF ALASKA, Appellee.

Court of Appeals No. A-6541, No. 1673

COURT OF APPEALS OF ALASKA

3 P.3d 359, 2000 Alas. App. LEXIS 70

May 19, 2000, Decided

Appeal from the Superior Court, Third Judicial District, Palmer, Beverly W. Cutler, Judge. Trial Court No. 3PA-S94-2829 CR.

COUNSEL

Christine S. Schleuss, Suddock & Schleuss, Anchorage, for Appellant.
Kenneth M. Rosenstein, Assistant Attorney General, Anchorage, and Bruce M. Botelho, Attorney General, Juneau, for Appellee.

JUDGES

Before: Coats, Chief Judge, and Mannheimer and Stewart, Judges. MANNHEIMER, Judge, dissenting.

AUTHOR: STEWART

OPINION

STEWART, Judge.

Laura A. Blank struck a pedestrian, Penny McDowell, while driving home from a friend's house. Blank did not stop at the scene of the accident. McDowell died from her injuries.

The Alaska State Troopers investigated the accident and ultimately arrived at Blank's residence. During an interview with Blank in his patrol car, Trooper Bill D. Tyler performed a portable breath test on Blank that yielded a result of .082. The grand jury indicted Blank for manslaughter¹ and felony leaving the scene of an injury accident.² Blank moved to suppress her interview with Trooper Tyler, claiming that it was custodial interrogation without *Miranda*³ warnings. Blank also claimed that the portable breath test was an unauthorized search. Finally, Blank moved to suppress the evidence obtained from the service of two search warrants. Blank claimed that the warrants were based on illegally obtained evidence and on material misstatements of fact by the trooper who applied for the warrants. Superior Court Judge Beverly W. Cutler denied Blank's motions. Because we agree with Blank that the portable breath test was an unauthorized search, we reverse.

Facts and proceedings

On September 26, 1994, Penny McDowell and Diane Forster were walking on a residential street in a subdivision near Palmer. The paved roadway, edged with a narrow gravel strip, was straight and level. Forster walked on the gravel strip; McDowell on the edge of the road bed.

Blank drove up from behind the two and struck McDowell. McDowell's body landed several feet away in a ditch. The impact broke the windshield, the right side view mirror, and the right side passenger's window of Blank's car. Blank did not stop; Forster testified that she "heard the car squealing around the corner" away from the scene.

Blank's husband, Greg Blank, appeared at the scene while troopers were investigating. Mr. Blank told Trooper Tyler that his wife may have been involved in the accident. Tyler and two other officers followed Mr. Blank back to the Blank residence. At the residence, Tyler introduced himself to Laura Blank and told her that he "needed to talk to her about the accident." Tyler suggested that his patrol car was a better place for the interview and Blank went with Tyler to the patrol car.

During the interview, Blank told Tyler that she had two beers at a friend's house before driving home. Tyler administered a portable breath test that registered a blood-alcohol content of .082%. Blank agreed to go to the hospital to have a blood test, but changed her mind at the hospital. Tyler did not arrest Blank.

On September 29, 1994, Trooper Dale G. Gibson, relying on information from Tyler, obtained a search warrant to inspect Blank's car which had been impounded. On October 14, 1994, Tyler obtained a second search warrant for an additional inspection of the car. Blank's indictment for manslaughter and leaving the scene of an injury accident followed.

Judge Cutler denied Blank's pretrial motions to suppress the portable breath test result, the statement to Trooper Tyler and the evidence obtained from the execution of the search warrants. Following a mistrial, Blank was convicted on both counts at her second trial. Judge Cutler imposed a 6-year sentence with 1 year suspended for manslaughter and a suspended 2 1/2 -year consecutive term for leaving the scene of the accident. Blank now appeals her conviction.

Discussion

Was Tyler's interview custodial interrogation?

When Tyler arrived at Blank's residence, he introduced himself to Blank and told her that he "needed to talk to her about the accident." Tyler asked Blank: "Why don't you come and sit in my car[?]" Blank accompanied Tyler out to his patrol car, which was parked outside the residence, and sat in the front seat.

Tyler recorded the interview with Blank. At the start, Tyler stated that the interview was being conducted in the patrol car "only for convenience sake" and expressed concern about "the kids getting involved." Tyler advised Blank that "you're not under arrest or anything like that" and that "you're free to leave any time you want to." Blank answered Tyler's questions during the approximately hour-long interview. Towards the end, Tyler asked, "were you[] coerced, promised anything, . . . forced to make a statement or anything?" Blank answered "no" and offered another detailed recital of events. Tyler returned to his question:

TYLER: Were you forced to make a statement?

BLANK: No.

TYLER: Okay, you're doing this on your own free will?

BLANK: You bet. You bet.

Blank agreed to accompany Tyler to the hospital for a blood test. After hearing evidence on Blank's motion to suppress the statements she made during the interview with Tyler, Judge Cutler found that a reasonable person would not have thought she was in custody, and found that Blank subjectively understood she was not in custody during the interview. As support for finding that a reasonable person would not have thought they were in custody, Judge Cutler noted that police "routinely" interview drivers in a patrol car after an accident. Judge Cutler found that the length of the interview and the small number of officers present at the Blank residence were not indicative of a custodial interview. As for the interview's location in the patrol car, Judge Cutler saw the patrol car as an alternative private location. The judge found important the fact that, although Tyler suggested the patrol car as a location for the interview, it was Mr. Blank who brought the police back to the residence.

In *Hunter v. State*,⁴ the Supreme Court adopted an objective test for deciding if a person was in custody, so that *Miranda* warnings were required. *Miranda* warnings must precede police interrogation conducted under circumstances in which a "reasonable person would feel he was not free to leave and break off the questioning."⁵ The Supreme Court further indicated that:

At least three groups of facts would be relevant to this determination. The first are those facts intrinsic to the interrogation: when and where it occurred, how long it lasted, how many police were present, what the officers and the defendant said and did, the presence of actual physical restraint on the defendant or things equivalent to actual restraint such as drawn weapons or a guard stationed at the door, and whether the defendant was being questioned as a suspect or as a witness. Facts pertaining to events before the interrogation are also relevant, especially how the defendant got to the place of questioning -- whether he came completely on his own, in response to a police request, or escorted by police officers. Finally, what happened after the interrogation -- whether the defendant left freely, was detained or arrested -- may assist the court in determining whether the defendant, as a reasonable person, would have felt free to break off the questioning.⁶

Blank has not attacked Judge Cutler's findings regarding these factors. However, Blank claims that Judge Cutler erred by concluding from her findings that Blank was not in custody.

Our review of the record convinces us that Judge Cutler did not err in determining that a reasonable person in Blank's position "would have felt free to break off the questioning."⁷ The interview was conducted in Tyler's patrol car outside of Blank's residence. Although there were two other troopers at Blank's property, they were not in Tyler's patrol car during the interview. Tyler told Blank that she was free to go and was not under arrest, nor was Blank arrested that day. For purposes of *Miranda* we agree with Judge Cutler's decision that Blank was not in

custody during the interview with Tyler.

Was Blank's statement voluntary?

Blank also moved to suppress her statement to Tyler, arguing that it was involuntary. Judge Cutler denied that motion as well. We review the superior court's determination that Blank's statement was voluntary by examining the totality of the circumstances surrounding the statement.⁸ We accept the superior court's findings of historical fact unless they are clearly erroneous; but we review the record and make an independent determination of Blank's mental state and its legal significance.⁹ Factors that we consider in deciding if the State has met its burden of showing that a defendant's statement is voluntary include the defendant's age, mental status, and prior criminal experience; the length, intensity, and frequency of the questioning; the presence of physical deprivation or mistreatment; and the existence of threat or inducement.¹⁰

The record shows the following. When Tyler questioned Blank, she was thirty. She was married and had three children. She was upset about the accident. She had no known prior criminal history or experience. Tyler questioned Blank in one interview that was less than one hour long. There is nothing in the record that shows any deprivation or mistreatment. Nor is there any indication of a threat or an improper inducement. Blank argues that her will was overborne because the trooper did not inform her that McDowell was killed. But Tyler did not provide any false information or create any false impressions. He merely withheld information. After reviewing the totality of the circumstances in the record before this court, we conclude, as did the superior court, that the State sustained its burden of proving that Blank's will was not overborne and that her statement was voluntary.

Were the search warrants issued on material misstatements of fact?

The troopers seized Blank's car and took it to an impound yard in Palmer. On September 29, 1994, Trooper Dale G. Gibson applied for a warrant to search Blank's car based on his investigation and reports from Trooper Tyler. In support of the application, Gibson testified before Magistrate David L. Zwink. Magistrate Zwink found probable cause to issue the warrant. On October 14, 1994, Trooper Tyler applied for a second warrant to conduct an additional inspection of the car. District Court Judge Peter G. Ashman issued that warrant.

Blank moved to suppress the evidence obtained when the troopers served the warrants. Blank claimed that Trooper Gibson made material misstatements when applying for the first warrant. Blank also claimed that Gibson should have told the court that Blank reported consuming two beers and did not show signs of intoxication other than the odor of alcohol and "mood swings." Blank argues that the omission of this information was a material misstatement. Blank also faults Trooper Gibson for stating that there was no known reason for Blank to leave the scene of the accident and no reason for failing to avoid hitting McDowell. Blank argues these were material misstatements of fact.

Because Blank told Trooper Tyler that she was not aware that she might have struck anyone until she saw the blood on her car, she argues that Gibson's statement that she had no reason to

leave the scene was a material misstatement. Also, because Blank told Trooper Tyler that she thought she had driven around the pedestrians with enough room, Blank argues that Trooper Gibson's statement that she had no reason for failing to avoid McDowell was a material misstatement.

The parties agree that Blank's claims are governed by *State v. Malkin*.¹¹ In *Malkin*, our supreme court adopted the rule established by the U.S. Supreme Court in *Franks v. Delaware*:¹² that intentional or reckless misstatements or omissions must be excised from an application for a search warrant.¹³ Once the offending items are excised, the remainder of the application for a search warrant is scrutinized for probable cause and the warrant will be upheld if probable cause exists.¹⁴ However, if the misstatements or omissions were deliberately made and calculated to mislead the magistrate, the warrant is invalidated and the evidence suppressed.¹⁵ A misstatement or omission is material if essential to the probable cause determination.¹⁶

Judge Cutler heard Trooper Gibson's testimony on this claim at an evidentiary hearing. She found that Gibson had not deliberately omitted information when he testified in support of the warrant. Gibson learned of Blank's statements from Tyler's reports. From our review of the record, Judge Cutler's findings are not clearly erroneous. Furthermore, the record establishes that there was probable cause to issue a search warrant and nothing Blank points to is a material omission that would defeat the issuance of a warrant.

Judge Cutler also found that Trooper Gibson had not been deliberate or reckless when Gibson said that Blank had no reason for leaving the scene of the accident or for failing to avoid hitting McDowell. Furthermore, Judge Cutler concluded that those statements were not material to the issuance of the search warrant. Judge Cutler found that none of Gibson's purported misstatements or omissions were reckless or intentional. The record supports Judge Cutler's findings. We conclude that the superior court did not err in failing to suppress the evidence from the first search warrant.

Blank advances similar arguments in support of her challenge to the second search warrant for the car. The car had been in the continuous custody of the troopers since the investigation began. Because of that continuous custody, it is questionable if a warrant was required to subject the car to additional testing. In *State v. McDonald*,¹⁷ we quoted LaFave, *Search and Seizure*, for the settled principle that:

an object lawfully seized as evidence may be kept in custody pending trial and during that period "it is plainly within the realm of police investigation to subject [such an object] to scientific testing and examination" when such is done "for the purpose of determining its evidentiary value." That is, if the initial seizure was upon probable cause that the item would be of evidentiary value, it may be tested and examined for the purpose [of] maximizing its value in this respect.¹⁸

Even so, Judge Cutler considered Blank's motion and analyzed the evidence offered in support of the second warrant. Judge Cutler noted that the second warrant was "basically based

on the first warrant" and denied Blank's motion for the same reasons that she denied the motion as to the first warrant. Even though the second warrant was probably not necessary, Judge Cutler's ruling on the second warrant can be affirmed for the same reasons that we affirmed her decision on the first warrant -- the record supports her findings that none of the purported misstatements or omissions were reckless or intentional.

Finally, Blank argues that the evidence obtained from the search warrants should be suppressed because the portable breath test was an illegal search. However, if illegally obtained evidence is included in an application for a search warrant, we do not invalidate the warrant if the warrant could have been issued on the basis of the untainted evidence in the application.¹⁹

Both search warrant applications in this case included evidence that Blank struck and killed McDowell while driving her car and did not stop at the scene of the accident. Her car suffered extensive and noticeable damage. The road was straight and level with no visual obstructions. McDowell and her companion were walking along the side of the road when McDowell was struck during daylight hours. Even without the result of the portable breath test, this evidence provided probable cause to believe that Blank committed felony leaving the scene of an injury accident, manslaughter, or criminally negligent homicide. Thus, the portable breath test result was not material to the issuance of the warrants.

Was the portable breath test an authorized search?

In a criminal investigation, a breath test for alcohol is a search.²⁰ In *Leslie v. State*,²¹ we held that a police officer could administer a preliminary breath test under AS 28.35.031(b) only if the officer had probable cause to believe that the driver's ability to operate a motor vehicle was impaired by alcohol.²²

Here, Trooper Tyler had evidence that Blank left the scene of an injury accident that caused substantial and visible damage to her car. Tyler also knew that McDowell had died from her injuries. But, although there was probable cause to believe that Blank committed a crime, the State does not contend that the police had any individualized suspicion that Blank's "ability to operate a motor vehicle [was] impaired by the ingestion of alcoholic beverages[.]"²³ Moreover, the record would not support that conclusion. The record shows that Trooper Tyler noticed the odor associated with alcohol consumption, and that Blank stated that she consumed two beers at her friend's house. But the State has not identified any other evidence that Blank was impaired by alcohol.

Rather than relying on AS 28.35.031(b) as authority for the portable breath test, the State relies on AS 28.35.031(g) which provides as follows:

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 and blood for the purpose of determining the alcoholic content of the person's breath and blood and shall be considered to have given consent to a chemical test or tests of the person's blood and urine for the purpose of determining the presence of controlled substances in the person's blood and urine if the person is

involved in a motor vehicle accident that causes death or serious physical injury to another person. The test or tests may 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 in this state that was involved in an accident causing death or serious physical injury to another person.

On its face, subsection (g) by stating that "the test or tests may be administered at the direction of a law enforcement officer[.]" gives a police officer the discretion to test any driver or operator of a motor vehicle involved in an accident where someone else receives serious physical injuries or is killed. Apparently, the statute allows the officer to administer the test(s) without any individualized suspicion that the driver was impaired, whether by alcohol or drugs, or even any evidence that the driver or operator caused the accident.

In a series of cases, the Supreme Court has decided that a limited group of searches without individualized suspicion that are authorized by statute or regulation, are reasonable searches under the Fourth Amendment and are based on "special needs, beyond the normal need for law enforcement[.]"²⁴ The State argues that Blank's breath test can be justified under this "special needs" exception.

In **Skinner v. Railway Labor Executives' Ass'n**,²⁵ the Supreme Court approved government-mandated blood and breath tests by railroad companies for those employees who were involved in serious accidents or had violated certain safety rules.²⁶ The Court ruled that these searches were reasonable under the Fourth Amendment even though there was no suspicion of individualized wrongdoing. As the Court stated in **Skinner** :

In limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion.²⁷

Because the railroad employees worked in a highly regulated industry, the Court balanced the employees' diminished expectation of privacy against the government's interest in ensuring the safety of an industry where the employees, like those in the nuclear industry, can cause "great human loss" when "a momentary lapse of attention can have disastrous consequences."²⁸

When "special needs" are advanced as a justification for a Fourth Amendment intrusion, the Court undertakes a context-specific inquiry, examining the competing private and public interests.²⁹ In **National Treasury Employees Union v. Von Raab**,³⁰ the Court reviewed and approved a Customs Service rule that mandated drug testing for any employee taking a position that involved direct contact with drug intervention or required the employee to carry a firearm.³¹ There, the Court decided that the country's interest in avoiding the promotion of drug users to positions where they might endanger the integrity of our Nation's borders or the life of the citizenry outweighed the limited privacy interests of employees who had a diminished expectation of privacy because of the "special, and obvious, physical and ethical demands of [their] positions."³² The Court therefore held that the searches were reasonable under the Fourth

Amendment.³³

In **Vernonia School Dist. 47J v. Acton**,³⁴ the Court approved a random drug-testing program for students participating in extracurricular sports programs.³⁵ The school district imposed that program in the face of problems at school caused by wide spread drug use among the students where the "athletes were the leaders of the drug culture."³⁶ Balanced against this concern (a) concern that the Court described as "important -- indeed, perhaps compelling"³⁷ were (1) the athletes' reduced expectation of privacy in general because they were students and schools regularly exercise their custodial responsibility for the children with examinations for physical and medical problems; and (2) the even lower expectation of privacy that a school athlete has because of the athlete's less than private experiences in the locker room.³⁸ Also, the Court noted that the testing program was relatively unobtrusive (and confidential). The Court balanced three factors in its analysis: the nature of the privacy interest which the search intrudes,³⁹ the character of the intrusion,⁴⁰ and the nature and the immediacy of the government's concern and the efficacy of the means for meeting it.⁴¹ Balancing these three factors, the **Acton** Court declared that the school district policy requiring athletes to consent to random drug testing before participating in extracurricular athletic programs was reasonable under the Fourth Amendment.⁴²

The governor's transmittal letter for the bill from which AS 28.35.031(g) arose shows that the subsection was designed for direct law enforcement. ("This proposed legislation gives police and prosecutors the tools they need . . ." ⁴³) This subsection abandons any requirement of individualized suspicion that a driver is impaired and permits the search, at the discretion of a police officer, of any driver involved in an accident where someone else suffers serious injury.

A suspicionless search program implemented for normal law enforcement, the apparent purpose of AS 28.35.031(g), does not meet the Supreme Court's "special needs" balancing test. In the cases discussed above, the Supreme Court pointed out that the suspicionless searches at issue served special societal needs other than normal law enforcement.⁴⁴ Subsection (g) addresses normal law enforcement. Even if normal law enforcement was not the apparent purpose of subsection (g), the statute would have to meet the Supreme Court's balancing test. That test requires a "context-specific inquiry, examining closely the competing private and public interests advanced by the parties."⁴⁵ And in **Skinner**, the Court stated: "In limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion."⁴⁶

In the circumstances of this case, normal law enforcement needs would not be jeopardized by requiring the government to have individualized suspicion before subjecting a person to a breath test. Although a driver involved in an accident where someone else is seriously injured can reasonably expect that police would investigate the accident, the expectation of an investigation does not lessen a driver's expectation of privacy. Certainly, a portable breath test is relatively

unobtrusive, particularly when compared to a seizure of blood. However, the need to supply the police and prosecutors with an additional tool for law enforcement that does not require individualized suspicion does not appear great. Having considered the three factors from the Supreme Court's analysis in **Acton**, we conclude that AS 28.35.031(g) permits unreasonable intrusions contrary to the Fourth Amendment.

We also reach the same conclusion under article I, section 14 of the Alaska Constitution. The Alaska Constitution restricts the legislature's authority to permit searches without a warrant.⁴⁷ Article I, section 14 provides broader protection than the Fourth Amendment, especially when it is construed together with the right to privacy provision of article I, section 22.⁴⁸

We asked for additional briefing on whether the search of Blank's breath would have been permitted under the Fourth Amendment if the police had probable cause to believe that Blank committed a crime. In its response, the State suggests that Fourth Amendment concerns with the statute could be avoided if we construe AS 28.35.031(g) to require that the police have probable cause to believe that the tested driver has committed a crime, here vehicular homicide and hit and run. We recognize that a statute can be construed in a manner that does not raise constitutional concerns.⁴⁹

However, the State's proposed construction of the statute overlooks **Layland v. State**.⁵⁰ Layland was receiving treatment at a hospital for his own injuries from a motor vehicle accident where another individual was killed. The police asked Layland for his consent to obtain a blood sample. Layland declined that request. Although the police had probable cause to arrest Layland for negligent homicide arising out of the accident, they did not arrest him. Instead, the police seized a blood sample from Layland without a warrant. Our supreme court held that the warrantless seizure of Layland's blood was unconstitutional under both the federal and the state constitutions.⁵¹

In **Schmerber v. California**,⁵² the Supreme Court held that a warrant was not required to seize blood from a driver under arrest for driving while intoxicated.⁵³ On first blush, it appeared that the Supreme Court held that the search was justified because it was incident to Schmerber's arrest. Besides the seeming requirement of an arrest, the Supreme Court required that the police have "clear indication" that the seizure of blood would provide evidence, and required that the police reasonably believe that there was an emergency because the evidence would be lost if the search was delayed for the time needed to obtain a warrant.⁵⁴ In **Layland**, the Alaska Supreme Court followed **Schmerber** and interpreted the Alaska search and seizure clause, article I, section 14, to permit a warrantless seizure of blood only if a suspect had been arrested and only if there were exigent circumstances justifying the search.⁵⁵

But later cases cast doubt on our supreme court's interpretation of **Schmerber**. It now appears that the Fourth Amendment permits a warrantless search of a suspect who has not been arrested if the police have (1) probable cause to believe that the suspect committed a crime; (2) probable cause to believe that a search of the suspect's person would produce evidence; and (3) there are

exigent circumstances requiring immediate action. In **Cupp v. Murphy**,⁵⁶ the Supreme Court approved the warrantless seizure of scrapings from under a suspect's fingernails. The suspect was not under arrest and was not arrested after the police completed the search. The Court assumed that there was probable cause that the suspect had committed a homicide by strangling the victim with his hands and found that exigent circumstances justified the immediate seizure of the fingernail scrapings because the suspect had been alerted to the police interest in the evidence and the evidence may have been destroyed if the police did not act.⁵⁷ Furthermore, in **Winston v. Lee**,⁵⁸ the Supreme Court discussed **Schmerber** and stated: "Because [**Schmerber**] fell within the exigent-circumstances exception to the warrant requirement, no warrant was necessary."⁵⁹ No mention was made in **Winston** that an arrest was required. And, in **U.S. v. Chapel**,⁶⁰ an *en banc* panel of the Ninth Circuit held that the Fourth Amendment does not require the police to arrest a motorist suspected of driving while intoxicated before the motorist's blood could be seized without a warrant. As long as the warrantless seizure meets the other requirements of **Schmerber** ((1) the police must have probable cause to believe that the suspect was driving while intoxicated; (2) the police must reasonably believe there is an emergency in which the delay in obtaining a warrant threatens the loss of evidence; (3) the procedure to obtain the evidence must be reasonable), the seizure is authorized under the Fourth Amendment.⁶¹

This approach is endorsed by Professor LaFare in his treatise on the Fourth Amendment:⁶² "The better view is . . . that a 'warrantless search is proper if the officer had probable cause to believe that a crime had been committed and probable cause to believe that evidence of the crime in question will be found' and that 'an immediate, warrantless search is necessary in order to . . . prevent the destruction or loss of evidence.'"⁶³

Nonetheless, although the Fourth Amendment may not require an arrest before the warrantless seizure of evidence from a suspect in Blank's circumstances, our supreme court in **Layland** ruled that article I, section 14 of the Alaska Constitution does require that formality.⁶⁴ The court reasoned as follows:

In our view, strict adherence to the substantially contemporaneous arrest requirement ensures to persons suspected of driving under the influence of alcohol protection from arbitrary denials of their right of privacy. Adherence to the substantially contemporaneous arrest prerequisite provides some measure of assurance that probable cause is based upon considerations independent of the blood-alcohol test results.⁶⁵

Professor LaFare maintains that our court's concern is "untenable, as the need for a court to determine that probable cause existed prior to the test is present under either rule."⁶⁶ Even so, the **Layland** court concluded that the warrantless seizure of Layland's blood could not be justified under the exigent-circumstances exception to the warrant requirement.⁶⁷ We are bound to follow the decisions of our supreme court.⁶⁸ Because Blank was not under arrest when she was searched, the portable breath test result was obtained contrary to article I, section 14 of the Alaska Constitution.

The State argues that because the portable breath test was obtained in good faith compliance with the dictates of the statute, suppression is not an appropriate remedy even if the statute is unconstitutional because the police complied with the direction of the statute.⁶⁹ But this argument is unconvincing. The statute did not mandate testing. Rather, it gave the police discretion to test a driver who was involved in an accident where someone else was seriously injured ("the test or tests may be administered at the direction of a law enforcement officer . . ."70).

The State argues that the failure to arrest Blank was harmless beyond a reasonable doubt because the record establishes that the police could have arrested Blank when the portable breath test was administered. However, we have ruled that the evidence was inadmissible under **Layland**. The State argued to the jury that Blank's blood alcohol level as shown by the portable breath test was relevant evidence to meet the burden of proof for both manslaughter and failure to render assistance. The State claimed that Blank's blood alcohol level showed that Blank was impaired and that her impairment affected her ability to perceive the risk caused by her conduct. As instructed, the jury could find that the State met its burden of proof on the mental state for each crime charged by showing that Blank failed to perceive the risk of her conduct because of her impairment. The State additionally presented expert testimony on the rate that alcohol was absorbed and metabolized, allowing inferences to be drawn from the alcohol level at the time of the portable breath test. The State also presented expert testimony regarding the influence of alcohol on cognitive and physical functions at various blood alcohol levels and evidence of a consensus in the scientific community that a person with a .08 level is too impaired to drive. Finally, the State used the .082 breath test result to attack Blank's credibility by presenting expert testimony that she could not have consumed only two beers as she reported to Trooper Tyler and obtained a .082 portable breath test result, but that she would have to have had four times the amount of beer that she reported to obtain that result. We cannot conclude that the use of the portable breath test result was harmless. Therefore, Blank's convictions must be reversed because Blank's breath test was illegally obtained and admitted at her trial.

Conclusion

The judgment of the superior court is REVERSED.

DISPOSITION

The judgment of the superior court is REVERSED.

DISSENT

MANNHEIMER, Judge, dissenting.

I agree with my colleagues that the breath test result must be suppressed. The trooper who administered the test to Blank had probable cause to believe that Blank had committed two

crimes: manslaughter and felony hit-and-run. The trooper also had probable cause to believe that the alcohol in Blank's breath (or, conversely, the absence of alcohol in her breath) would be evidence relevant to these crimes. But in **Layland v. State**,¹ the Alaska Supreme Court ruled that the existence of probable cause does not authorize a search of a motorist's breath or blood unless the motorist is arrested. As Judge Stewart explains in the majority opinion, it appears that **Layland** is based on a misinterpretation of the United States Supreme Court's decision in **Schmerber v. California**.² Even so, we are bound by **Layland**.

But though I agree that the breath test result must be suppressed, I disagree with my colleagues concerning the effect of this error on Blank's convictions. Blank was convicted of two crimes: manslaughter and felony hit-and-run (leaving the scene of an injury accident). Suppression of the breath test evidence requires reversal of Blank's manslaughter conviction, but it does not require reversal of Blank's hit-and-run conviction.

In arguing that Blank was guilty of manslaughter, the prosecutor relied heavily on the breath test result. He argued that the test result showed that Blank had been drinking more than the one beer she admitted. He also urged the jury to infer that Blank's consumption of alcohol had affected her concentration and attentiveness while driving -- that it had been a factor in causing the accident.

But when the prosecutor argued that Blank was guilty of hit-and-run, he paid almost no attention to Blank's consumption of alcohol and her possible intoxication. The prosecutor did not argue that Blank was too drunk to understand that she had hit someone.³ Rather, the prosecutor argued that the circumstances of the collision and the actions Blank took following the collision clearly demonstrated that Blank was aware that she had struck someone.

The prosecutor pointed out that Blank's vehicle struck Per nye McDowell so hard that the impact cracked the windshield, broke off the side-view mirror, and smashed out the front passenger window. He reminded the jury that one of Blank's children testified that, a few moments after the collision, Blank asked, "Did I hit somebody?", and her daughter Tori replied that she thought they had hit someone.

But despite her daughter's answer, Blank drove away from the scene -- and she drove away fast. The prosecutor asked the jury to remember the testimony given by a boy who was playing in a neighboring yard. The boy testified that he heard the collision and then, immediately afterward, he heard a woman (McDowell's friend) crying "Help, help!", and then he heard the sound of tires squealing. Blank accelerated away from the scene of the collision and (in the prosecutor's words) "made a bee-line ... to her house". She drove over ruts and boulders, wedging rocks in the undercarriage of her car. When she arrived, she put her car in the garage and closed the garage door so that the car could not be seen.

In short, the jury's decision to convict Blank of felony hit-and-run did not depend on a finding that Blank was intoxicated (or even that she had been drinking). The prosecutor argued that, intoxicated or not, Blank understood that she had struck someone. Her vehicle had suffered obvious damage, and her own daughter told her that she thought they had hit somebody. Despite

this, Blank did not stop to find out what had happened; instead, she drove away at high speed without looking back.

Given this evidence, and given the way the prosecutor argued the case, there is no reasonable possibility that the jury's hit-and-run verdict was affected by the breath test evidence.⁴ I would therefore affirm Blank's hit-and-run conviction.

OPINION FOOTNOTES

1 AS 11.41.120(a).

2 AS 28.35.060(a).

3 See *Miranda v. Arizona*, 384 U.S. 436, 443-44, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966).

4 590 P.2d 888 (Alaska 1979).

5 *Id.* at 895.

6 *Id.*

7 *Id.*

8 See *State v. Ridgely*, 732 P.2d 550, 554 (Alaska 1987).

9 See *Id.* at 554; *Troyer v. State*, 614 P.2d 313, 318 (Alaska 1980).

10 See *Sovalik v. State*, 612 P.2d 1003, 1006 (Alaska 1980).

11 722 P.2d 943 (Alaska 1986).

12 *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978).

13 See *Malkin*, 722 P.2d at 946 (citing *Franks*, 438 U.S. at 155-56).

14 See *id.*

15 See 722 P.2d at 946 n.6.

16 See *Davenport v. State*, 515 P.2d 377, 380 (Alaska 1973).

17 872 P.2d 627 (Alaska App. 1994).

18 *Id.* at 642 (quoting 3 Wayne R. LaFare, *Search and Seizure: A Treatise on the Fourth Amendment*, § 7.5(c) (3d ed. 1996) (quoting *People v. Teale*, 70 Cal. 2d 497, 75 Cal. Rptr. 172, 450 P.2d 564 (1969)) (other footnotes omitted) .

19 See *Schmid v. State*, 615 P.2d 565, 575 (Alaska 1980); *United States v. Reed*, 15 F.3d 928, 933 (9th Cir. 1994).

20 See *Burnett v. Municipality of Anchorage*, 678 P.2d 1364, 1368 (Alaska App. 1984); *Burnett v. Municipality of Anchorage*, 806 F.2d 1447, 1449 (9th Cir. 1986).

21 *Leslie v. State*, 711 P.2d 575 (Alaska App. 1986).

22 *Id.* at 577.

23 AS 28.35.031(b).

24 See *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 619, 103 L. Ed. 2d 639, 109 S. Ct. 1402 (1989) (quotations and citations omitted).

25 *Id.*

26 *Id.* at 608-13.

27 *Id.* at 624.

28 *Id.* at 628.

29 See *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665-66, 103 L. Ed. 2d 685, 109 S. Ct. 1384 (1989).

30 *Id.*

31 *Id.* at 660-65.

32 *Id.* at 679.

33 *Id.*

34 *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 115 S. Ct. 2386, 132 L. Ed. 2d 564 (1995).

35 *Id.* at 664-666.

36 *Id.* at 649.

37 *Id.* at 661.

38 *Id.* at 656-57.

39 *Id.* at 654-57.

40 *Id.* at 658-60.

41 *Id.* at 660-64.

42 *Id.* at 664-66.

43 1994 House Journal 2262-64.

44 See *Skinner*, 489 U.S. at 619; *Von Raab*, 489 U.S. at 665; *Vernonia*, 515 U.S. at 653; *Chandler v. Miller*, 520 U.S. 305, 313-14, 137 L. Ed. 2d 513, 117 S. Ct. 1295 (1977).

45 *Chandler*, 520 U.S. at 314.

46 *Skinner*, 489 U.S. at 624.

47 See *Woods & Rohde, Inc. v. Alaska Dep't of Labor*, 565 P.2d 138, 150-52 (Alaska 1977) (striking down a statute that authorized warrantless inspections of workplaces because it violated article I, section 14 of the Alaska Constitution).

48 See *State v. Ricks*, 816 P.2d 125, 127 (Alaska 1991); *Rohde*, 565 P.2d at 150-51.

49 See *Kenai Peninsula Borough v. Cook Inlet Region, Inc.*, 807 P.2d 487, 498 (Alaska 1991).

50 535 P.2d 1043 (Alaska 1975), overruled on other grounds by *Anchorage v. Geber*, 592 P.2d 1187, 1191-92 & n.8 (Alaska 1979).

51 *Layland*, 535 P.2d at 1044-45 & 1050.

52 *Schmerber v. California*, 384 U.S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966).

53 *Id.* at 771-72.

54 *Id.* at 770-71.

55 See *Layland*, 535 P.2d at 1045, 1048-49.

56 *Cupp v. Murphy*, 412 U.S. 291, 93 S. Ct. 2000, 36 L. Ed. 2d 900 (1973).

57 *Id.* at 296.

58 *Winston v. Lee*, 470 U.S. 753, 105 S. Ct. 1611, 84 L. Ed. 2d 662 (1985).

59 *Id.* at 759.

60 55 F.3d 1416 (9th Cir. 1995).

61 See *id.* at 1418-19.

62 See 3 Wayne R. LaFare, *Search and Seizure: A Treatise on the Fourth Amendment*, § 5.4(b), at 155-63 (3d ed. 1996).

63 *Id.* at 160-61 (footnotes omitted).

64 See *Layland*, 535 P.2d at 1048-50; *Municipality of Anchorage v. Ray*, 854 P.2d 740, 749-50 (Alaska App. 1993).

65 *Layland*, 535 P.2d at 1049.

66 3 Wayne R. LaFare, *Search and Seizure*, § 5.4(b), at 162.

67 *Layland*, 535 P.2d at 1050.

68 See *Harrison v. State*, 791 P.2d 359, 363 (Alaska App. 1990).

69 See *Illinois v. Krull*, 480 U.S. 340, 350, 94 L. Ed. 2d 364, 107 S. Ct. 1160 (1987).

70 See AS 28.35.031(g).

DISSENT FOOTNOTES

1 535 P.2d 1043, 1047-49 (Alaska 1975).

2 384 U.S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966).

3 See AS 11.81.900(a)(2), which allows the State to prove the culpable mental state of "knowingly" by proving that the defendant would have known of the relevant circumstance but for the defendant's intoxication.

4 See *Love v. State*, 457 P.2d 622, 629-631 (Alaska 1969) (the improper admission of evidence at a criminal trial does not require reversal of a conviction unless the evidence substantially influenced the jury's decision).

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(o)(2) or who operates a watercraft as defined in AS 28.35.030(o)(3) 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 or if lawfully arrested under AS 28.35.280 for the offense of minor operating a vehicle after consuming alcohol. 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 or that the person was a minor operating a vehicle after consuming alcohol.

(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.

(g) 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 and blood for the purpose of determining the alcoholic content of the person's breath and blood and shall be considered to have given consent to a chemical test or tests of the person's blood and urine for the purpose of determining the presence of controlled substances in the person's blood and urine if the person is involved in a motor vehicle accident that causes death or serious physical injury to another person. The test or tests may 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 in this state that was involved in an accident causing death or serious physical injury to another person.

(h) Nothing in this section shall be construed to restrict searches or seizures under a warrant issued by a judicial officer, in addition to a test permitted under 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; am § 7 ch 55 SLA 1994; am § 8 ch 143 SLA 1996; am § 12 ch 63 SLA 2001)

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

In 1995, in subsection (a), "AS 28.35.030(o)(2)" was substituted for "AS 28.35.030(m)(2)" and "AS 28.35.030(o)(3)" was substituted for "AS 28.35.030(m)(3)" to reflect the 1995 relettering of AS 28.35.030(m) as AS 28.35.030(o).

Effect of amendments. The 1994 amendment, effective August 22, 1994, added subsection (g).

The 1996 amendment, effective November 8, 1996, in subsection (a), added "or if lawfully arrested under AS 28.35.280 for the offense of minor operating a vehicle after consuming alcohol" at the end of the first sentence and "or that person was a minor operating a vehicle after consuming alcohol" at the end of the second sentence.

The 2001 amendment, effective July 4, 2001, added subsection (h).

Editor's notes. Section 22, ch. 143, SLA 1996 provides that "[s]ections 1-13 and 17-21 of this Act apply only to acts committed on or after November 8, 1996 except that to the extent that the amendments made by §§ 6, 7, 10, 11, and 18-21 of this Act involve prior convictions, those prior convictions may have occurred before, on, or after November 8, 1996."

Legislative history reports. For Governor's transmittal letter on HB 445 (from which ch. 55, SLA 1994, which enacted (g) of this section, derived), see 1994 House Journal 2262-2263.

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*, 711 P.2d 575 (Alaska Ct. App. 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 v. Municipality of Anchorage*, 634 F. Supp. 1029 (D. Alaska 1986), *aff'd*, 806 F.2d 1447 (9th Cir. 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*, 634 F. Supp. 1029 (D. Alaska 1986), *aff'd*, 806 F.2d 1447 (9th Cir. 1986).

Subsection (g) unconstitutional. - Having considered the three factors from the Supreme Court's analysis in *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 115 S. Ct. 2386, 132 L. Ed. 2d 564 (1995), the court concluded that subsection (g) permits unreasonable intrusions contrary to the Fourth Amendment of the U.S. Constitution and to Alaska Const., art. I, § 14. *Blank v. State*, 3 P.3d 359 (Alaska 2000).

Seizure of vehicle in absence of probable cause. - To the extent that AS 28.35.070 authorizes seizure of a vehicle in the absence of probable cause to believe that a crime has occurred, it is potentially unconstitutional for the same reasons as subsection (g). *Schoenthaler v. State*, P.2d (Alaska Ct. App. 2000).

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*, 692 P.2d 961 (Alaska Ct. App. 1984).

Applicability. - This section does not apply to everyone who is in police custody under circumstances that amount to a fourth amendment arrest. It applies only to persons lawfully arrested on the specific charge of operating a motor vehicle while intoxicated. *Longley v. State*, 776 P.2d 339 (Alaska Ct. App. 1989).

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).

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), *aff'd*, 806 F.2d 1447 (9th Cir. 1986).

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*, 577 P.2d 227 (Alaska 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*, 577 P.2d 227 (Alaska 1978).

The warnings contained in this section and AS 28.35.032(a) are designed to prompt a motorist to give consent to a breath test by making sure he understands the consequences of refusal, and they do not impliedly limit the government's introduction of evidence concerning field sobriety tests. *McCormick v. Municipality of Anchorage*, P.2d (Alaska Ct. App. 2000).

Motorists can't choose testing method. - The due process clause does not confer on motorists the right to control or dictate the form of chemical testing. *Hamilton v. Municipality of Anchorage*, 878 P.2d 653 (Alaska Ct. App. 1994).

Application of case law. - *Municipality of Anchorage v. Serrano*, 649 P.2d 256 (Alaska Ct. App. 1982), and *Cooley v. Municipality of Anchorage*, 649 P.2d 251 (Alaska Ct. App. 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*, 649 P.2d 971 (Alaska Ct. App. 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*, 577 P.2d 227 (Alaska 1978).

One required to take a breathalyzer test under this section does not have any statutory or constitutional right to refuse to take it. *Pears v. State*, 672 P.2d 903 (Alaska Ct. App. 1983), rev'd on other grounds, 698 P.2d 1198 (Alaska 1985).

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*, 577 P.2d 227 (Alaska 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*, 577 P.2d 227 (Alaska 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*, 672 P.2d 903 (Alaska Ct. App. 1983), rev'd on other grounds, 698 P.2d 1198 (Alaska 1985).

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*, 577 P.2d 227 (Alaska 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*, 577 P.2d 227 (Alaska 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 provisos. *Wirz v. State*, 577 P.2d 227 (Alaska 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*, 633 P.2d 211 (Alaska 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*, 671 P.2d 378 (Alaska Ct. App. 1983), construing municipal ordinance.

Motorist under arrest upon being read the form. - When motorist was read the implied consent form informing him that he was under arrest for driving while intoxicated, he was under arrest as that term is defined in AS 12.25.160, and therefore, was under arrest for Criminal Rule 45 purposes. *Longley v. State*, 776 P.2d 339 (Alaska Ct. App. 1989).

Waiver of right to challenge breath test. - A defendant waives his constitutional right to challenge the results of an intoximeter test despite his intoxication where he is read a notice form advising him of his right to obtain an independent test of his blood alcohol level by having a sample of blood drawn at a police chosen medical facility, where he checks the appropriate box in the notice form declining the independent test, and where he appears to know what he is doing. *Gundersen v. Municipality of Anchorage*, 792 P.2d 673 (Alaska 1990).

Refusal irrelevant after administration of breath test. - Revocation of her driver's license was improper where driver could not be deemed to have refused the breath test after officers actually administered a breath test and obtained potentially probative evidence. *State v. Shakespeare*, 4 P.3d 322 (Alaska 2000).

Police officer had probable cause to arrest a driver for driving while intoxicated, where the driver was stopped for speeding, failed to pass a horizontal gaze nystagmus (HGN) test but passed four other field sobriety tests, and exhibited several signs of intoxication, including the odor of alcohol, watery and bloodshot eyes, unsteady balance, "bouncy" gait, confusion, talkativeness, and difficulty in showing vehicle registration. *State v. Grier*, 791 P.2d 627 (Alaska Ct. App. 1990).

Breath test illegally obtained. - Defendant's convictions were reversed because defendant's breath test was illegally obtained and admitted at her trial where the police did not have any individualized suspicion that defendant's ability to operate a motor vehicle was impaired by the ingestion of alcoholic beverages. *Blank v. State*, 3 P.3d 359 (Alaska 2000).

This section and AS 28.35.032 do not contemplate an evidentiary use of the fact of refusal to submit to a breathalyzer test. *Puller v. Municipality of Anchorage*, 574 P.2d 1285 (Alaska 1978).

Preservation of 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*, 649 P.2d 256 (Alaska Ct. App. 1982).

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*, 690 P.2d 20 (Alaska Ct. App. 1984).

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*, 659 P.2d 1206 (Alaska 1983), cert. denied, 469 U.S. 1017, 105 S. Ct. 430, 83 L. Ed. 2d 357 (1984).

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*, 659 P.2d 1206 (Alaska 1983), cert. denied, 469 U.S. 1017, 105 S. Ct. 430, 83 L. Ed. 2d 357 (1984).

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*, 671 P.2d 378 (Alaska Ct. App. 1983).

A breathalyzer exam is not a "critical stage" at which the constitution requires counsel's presence. *Svedlund v. Municipality of Anchorage*, 671 P.2d 378 (Alaska Ct. App. 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*, 671 P.2d 378 (Alaska Ct. App. 1983).

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 Wormer v. State*, 699 P.2d 895 (Alaska Ct. App. 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 Wormer v. State*, 699 P.2d 895 (Alaska Ct. App. 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*, 746 P.2d 1298 (Alaska 1987).

Trooper's failure to read yellow pages listing of attorneys to defendant when he knew defendant did not have his glasses, and failure to advise defendant regarding persons he might call for assistance, did not violate defendant's right to speak with an attorney prior to deciding whether to submit to a breath test. *Saltz v. State, Dep't of Pub. Safety*, 942 P.2d 1151 (Alaska 1997).

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*, 671 P.2d 378 (Alaska Ct. App. 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*, 604 P.2d 1106 (Alaska 1979). But see, *Copelin v. State*, 659 P.2d 1206 (Alaska 1983), cert. denied, 469 U.S. 1017, 105 S. Ct. 430, 83 L. Ed. 2d 357 (1984), and *Yerrington v. Anchorage*, 675 P.2d 649 (Alaska Ct. App. 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*, 592 P.2d 1187 (Alaska 1979).

Right to independent test after refusal of breath test. - A person arrested for driving while intoxicated is entitled by the Alaska Constitution to an independent chemical test even if that person refuses to take the statutorily prescribed breath test. *Snyder v. State*, 930 P.2d 1274 (Alaska 1996).

Due process requires opportunity for independent test. - Since the results of an intoximeter test provide the state with potentially incriminating evidence at the risk of criminal penalties, due process requires that the defendant be given an opportunity to challenge the reliability of the evidence with an independent test. *Gundersen v. Municipality of Anchorage*, 792 P.2d 673 (Alaska 1990).

Motorist was denied due process and his breath test results should have been suppressed, where his minimal ability to speak and understand English prevented him from understanding the arresting officer's explanation of his right to obtain independent testing of the intoximeter result. *Ahtuanguaruk v. State*, 820 P.2d 310 (Alaska Ct. App. 1991).

Opportunity for drawing of blood at police-selected facility preserves defendant's right to independent test. - A form notice notifying the defendant of the right to challenge the results of an intoximeter test by having a sample of blood drawn at a local medical facility chosen by the police satisfies the defendant's right to obtain an independent test of his own choosing performed by a physician of his own choosing because the drawing of blood is a reasonable alternative test procedure and because the defendant made no allegation that the police-selected facility would not administer a reliable test. *Gundersen v. Municipality of Anchorage*, 792 P.2d 673 (Alaska 1990).

Unavailability of breath testing device no reason for blood draw. - In two specific circumstances, Alaska's implied consent statutes permit a driver's blood to be drawn for chemical testing for evidence of driving while intoxicated, and those circumstances do not include unavailability of a breath testing device. *Sosa v. State*, 4 P.3d 951 (Alaska 2000).

No other chemical test allowed after breath test refused. - The express language of AS 28.35.032(a), coupled with the legislative history of this section, 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*, 592 P.2d 1187 (Alaska 1979) decided prior to the enactment of AS 28.35.035, authorizing the administration of a chemical test without consent in certain circumstances.

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*, 592 P.2d 1187 (Alaska 1979) decided prior to the enactment of AS 28.35.035, authorizing the administration of a chemical test without consent in certain circumstances.

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*, 664 P.2d 169 (Alaska Ct. App. 1983), rev'd on other grounds, 684 P.2d 864 (Alaska 1984).

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*, 684 P.2d 864 (Alaska 1984).

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*, 664 P.2d 169 (Alaska Ct. App. 1983), rev'd on other grounds, 684 P.2d 864 (Alaska 1984).

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. *Pears v. State*, 672 P.2d 903 (Alaska Ct. App. 1983), rev'd on other grounds, 698 P.2d 1198 (Alaska 1985).

"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," meant any chemical test, be it of the breath, blood, urine or otherwise, and not just a chemical test of the breath. *Anchorage v. Geber*, 592 P.2d 1187 (Alaska 1979).

Defendant should be permitted to check the specific ampoules used in his breathalyzer test. *Lauderdale v. State*, 548 P.2d 376 (Alaska 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*, 548 P.2d 376 (Alaska 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*, 548 P.2d 376 (Alaska 1976).

Discretion of district court properly exercised in requiring production of ampoules used in breathalyzer test. - See *Lauderdale v. State*, 548 P.2d 376 (Alaska 1976).

District court was correct in suppressing results of breathalyzer test where state unable to produce ampoules used in test. - See *Lauderdale v. State*, 548 P.2d 376 (Alaska 1976).

State need not necessarily preserve breath sample. - The state need not preserve a defendant's breath sample where it provides the defendant with a reasonable opportunity to obtain an independent test by giving the defendant clear and express notice of his right to an independent test and by offering assistance in obtaining the test. *Gundersen v. Municipality of Anchorage*, 792 P.2d 673 (Alaska 1990).

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*, 741 P.2d 226 (Alaska 1987).

Rule announced generally to have prospective effect but also to have partial retroactive effect. - See *Lauderdale v. State*, 548 P.2d 376 (Alaska 1976).

Jury demonstration of intoximeter test. - Where the main issue at trial was whether defendant, an asthmatic, was physically capable of blowing enough air into an intoximeter machine to trigger the mechanism and run the breath test, the trial judge did not abuse his discretion when he allowed the jurors in to go to the local police station and blow into the intoximeter. *Bowlin v. State*, 823 P.2d 676 (Alaska Ct. App. 1991).

Applied in *Nelson v. State*, 650 P.2d 426 (Alaska Ct. App. 1982); *Lawrence v. State*, 715 P.2d 1213

(Alaska Ct. App. 1986).

Quoted in Simpson v. Municipality of Anchorage, 635 P.2d 1197 (Alaska Ct. App. 1981); Lundquist v. Department of Pub. Safety, 674 P.2d 780 (Alaska 1983); Jensen v. State, 667 P.2d 188 (Alaska Ct. App. 1983); Brown v. State, 739 P.2d 182 (Alaska Ct. App. 1987); State, Dep't of Pub. Safety v. Conley, 754 P.2d 232 (Alaska 1988); Haynes v. State, Dep't of Pub. Safety, 865 P.2d 753 (Alaska 1993).

Stated in Javed v. Department of Pub. Safety, 921 P.2d 620 (Alaska 1996).

Cited in Coleman v. State, 658 P.2d 1364 (Alaska Ct. App. 1983); Romo v. Municipality of Anchorage, 697 P.2d 1065 (Alaska Ct. App. 1985); Cunningham v. State, 768 P.2d 634 (Alaska Ct. App. 1989); Thorne v. Department of Pub. Safety, 774 P.2d 1326 (Alaska 1989); State v. Zerkel, 900 P.2d 744 (Alaska Ct. App. 1995); Snyder v. State, 31 P.3d 770 (Alaska 2001).

Collateral references. 60 C.J.S., Motor Vehicles, § 164.113.

Duty of law enforcement officer to offer suspect chemical sobriety test under implied consent law, 95 ALR3d 710.

Validity, construction and application of statutes proscribing driving with blood-alcohol level in excess of established percentage, 54 ALR4th 149.

Challenges to use of breath tests for drunk drivers based on claim that partition or conversion ratio between measured breath alcohol and actual alcohol is inaccurate, 90 ALR4th 155.