HB

4

(File 1)

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 February 28, 2001

SUBJECT: CSHB 4(TRA) (Work Order No. 22-LS0046\S)

TO: Representative Vic Kohring, Chair
House Transportation Committee
Attn: Sharon

FROM: Michael F. Ford
Legislative Counsel

I wanted to bring an issue to your attention regarding CSHB 4(TRA). In sec. 27, AS 28.35.030(b)(1) is amended to repeal certain minimum sentences for repeat offenders. I believe that given the changes to AS 28.35.030(n) in sec. 31 of the bill, the material repealed on page 17, lines 14 - 29 should be reinserted. In short, there may be repeat offenders who would not be subject to punishment under AS 28.35.030(n), and who should therefore be subject to punishment under the existing misdemeanor provisions of AS 28.35.030(b)(1)(C) - (F).

Also, defining "controlled substance" to include "inhalants" in all of AS 28 is likely to confuse or mislead people because inhalants are not controlled substances, though they may be intoxicating. It would be better to amend the appropriate statutes to include inhalants.

Please contact me if you have further questions.

MFF:glc
01-205.glc

HOUSE BILL 4 AND YOU
THE HIGHLIGHTS OF A LITTLE BILL
OMNIBUS DRUNK DRIVING AMENDMENTS

- Lower BAC to .08

- Changes DWI to DUI
  If want to make sure that inhalants are covered, need to leave at DWI; otherwise would have to add reference and bill would grow. Mike is doing amendments both ways.

- Provides a diversion program, with jail time (amendment), for .08 to .0999

- Phases in a ten-year "look back" provision

- Increased sentences and fines:

Offense	Current Fine/Jail	Proposed Fine/Jail
Misdemeanor:		
1st	not more than $250/72 hours	$1500/72 hours
2nd	not more than $500/20 days	$3,000+/30 days or 20 days in jail and 80 hours community service
3rd	not more than $1,000/60 days+	not less than $4,000/60 days+
4th	not more than $2,000/120 days+	not less than $5,000/120 days+
5th	not more than $3,000/240 days+	not less than $6,000/240 days +
6th	not more than $4,000/360 days+	not less than $7,000/360 days+

Felony: 3rd DWI within 5 years
Class C Felony

Previous twice	not less than $5,000/120 days	not less than $10,000/240 days
Previous three	not less than $5,000/240 days	not less than $10,000/480 days
Previous four+	not less than $5,000/ 360 days	not less than $10,000/2 years

- Mandates treatment while incarcerated
- DUI manslaughter, 7 years first felony conviction
- "reasonable grounds" to "probable grounds" as per court case
- Reinstatement fees for driver's license, DUI and refusal within the last ten year: $200 if revoked once; $500 if revoked two or more times
- Enabler statute: Class A misdemeanor, revoke driver's license 30 days, $1000 minimum fine, alcoholism program if more than once.
- Revokes registration for any vehicle of person convicted of felony DUI; surrender of registration plates
- Permits judge, prosecutor, defendant, agency involved in treatment to obtain past treatment records
- Mandates payment of up to $2,000 to state for treatment
- Mandates payment of up to $2,000 to state for incarceration costs
- Lowers impairment from .05 to .04
- Establishes Alaska Repeat Offender Status System

MAJOR POLICY DECISIONS

- 2nd misdemeanor offense: impoundment - would cause DPS fiscal note to increase
- 2nd misdemeanor offense: forfeiture
- 3rd offense - forfeiture - civil vs. criminal forfeiture

Civil forfeiture - 22 pages and sets forth procedure. Probably increase Law fiscal note

- **Treatment of offenders differently in different parts of the state, municipal v. state law**
- **PFDs**

  Current felons and misdemeanants twice convicted PFDs go into pool for violent crimes compensation, Council on Domestic Violence and Sexual Assault grants, Department of Corrections for incarceration and probation programs. Do we want to now take PFDs from first and second offenders drunk drivers' PFD and put into pool and then add ASAP and treatment to pool? Or do we want to take first and second offender drunk drivers' PFDs and direct to ASAP and treatment programs?

Subject: HB4
Date: Mon, 26 Mar 2001 10:15:48 -0800
From: "buddy4" <buddy4@alaska.net>
To: <Representative_Norman_Rokeberg@legis.state.ak.us>,
<Representative_Scott_Ogan@legis.state.ak.us>,
<Representative_Jeannette_James@legis.state.ak.us>,
<Representative_Keven_Meyer@legis.state.ak.us>,
<Representative_Albert_Kookesh@legis.state.ak.us>,
<Representative_John_Coghill@legis.state.ak.us>,
<Representative_Ethan_Berkowitz@legis.state.ak.us>

Please print this and distribute to all members

Judiciary Committee,

The section from **HB 4** refers to the provision that exempts people with a .08BAC to a .10BAC from jail if there are no extenuating circumstances. THIS IS NOT ACCEPTABLE. Since .08 BAC is legally impaired, the sanction should be the same as it is with .10 BAC. As 21 states have lowered the percent of intoxication to drive, jail is still part of the sanction. It is not ok to drink to impairment and get on the roads with my family and me. Why are so many policy makers afraid to look at alcohol honestly and accept that some people cannot control their drinking, that we cannot predict who those people will be BUT we have a responsibility to protect the public from these people on the public roads. I'm tired of hearing that it costs too much to implement. Pass an increased excise tax to cover the costs.

Community service has never impressed a seasoned drinker and we are not funding a compliance program adequately ASAP that insures that these people comply with the sanctions. You only have one chance to make a first impression with a problem drinker. There isn't a man, woman, or child in America that dosen't know Not to drink and drive EXCEPT problem drinkers who don't care. Send a message that the public comes first!

Joan Diamond, 5700 Rabbit Creek Rd, Anchorage 99516

Sec. 27. AS 28.35.030(b) is amended to read:

except that 12 if 13 (i) there were no aggravating circumstances 14 associated with the acts upon which the conviction is based and, as 15 determined by a chemical test taken within four hours after the 16 alleged offense was committed, there is 0.08 percent but not more 17 than 0.1 percent by weight of alcohol in the person's blood or 80 18 milligrams but not more than 100 milligrams of alcohol per 100 19 milliliters of blood, or when there is 0.08 grams but not more than 20 0.10 grams of alcohol per 210 liters of the person's breath, the 21 **court shall suspend the execution of the sentence of imprisonment** 22 upon the condition that the person successfully completes one year 23 of probation during which the person does not commit an alcohol- 24 related offense or a traffic offense, the person successfully 25 completes the program requirements imposed under (h) of this 26 section, the person pays the cost of treatment required under (h) of 27 this section, the person performs three days of community service, 28 and the person pays the fine imposed by the court under this 29 subparagraph; upon determination by the court that the person 30 has satisfied the terms of probation, the court shall discharge the 31 defendant; however, if the court determines that the terms of

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MEMORANDUM January 15, 2001

SUBJECT: Driving while intoxicated (HB 4)

TO: Representative Norman Rokeberg
Attn: Janet

FROM: Michael F. Ford
Legislative Counsel

You asked for an explanation as to why the phrase "reasonable grounds" was changed to "probable cause" in sections 12, 16, 17, 28, 29, and 30 of HB 4. These changes occurred as a result of a request made by you in a memo dated November 6, 2000, that AS 28.35.031 be amended to reflect the decision by the Alaska Court of Appeals in Leslie v. State, 711 P.2d 575 (Alaska App. 1986). In that case the court construed the phrase "reasonable grounds" to be the equivalent of "probable cause" in AS 28.35.031. In order to be consistent in the terms used, we also changed all other sections in title 28 in which the same language appeared.

Please contact me if you have further questions.

MFF:lmb:glc
01-017.lmb

Subject: Rough Estimate of New Revenue Under HB 4
Date: Wed, 14 Mar 2001 10:11:05 -0900
From: Doug Wooliver <dwooliver@courts.state.ak.us>
To: "'Janet_Seitz@legis.state.ak.us'" <Janet_Seitz@legis.state.ak.us>

Janet, as you requested, we have tried to come up with a projection of revenues that would be generated with the proposed changes to AS28. As we discussed yesterday, our computer system is not suited for gathering this type of information. Although our fiscal operations staff spent several hours on this project, they want to emphasize that the revenue projections are very rough and based on less than complete information. Nevertheless, we will give you what we have.

This information was collected from the data generated through RUG (a computer system that tracks some case related information). This database does not contain all of the fine information, some of which is on paper records. That said, here's the process they used.

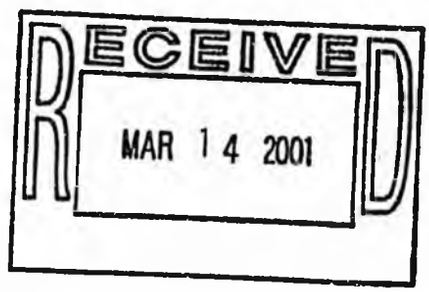
1) Downloaded and analyzed charges information found in RUG
2) Reviewed fines information entered in RUG
3) Reviewed suspended fines information
4) Arrived at "net fines receivable"
5) Assumed a collection rate of 35% as there is no collection effort apart from PFD process and law dept.
6) Applied new "fine rates" to existing charges information
7) Added projected new charges information (est. 330 felonies, 1000 misdemeanors) to arrive at estimated revenue related to increased caseload. Factored in fine suspension information and a 35% collection rate.

Based on these estimates and assumptions our fiscal staff estimates that the increased fines reflected in HB 4 will result in an increase of at least $300,000 in revenue.

The methodology employed was sound. The accuracy of the data is not. In summary, our comfort level with these numbers is not high.

Despite the weakness of our numbers, I hope this information is at least somewhat helpful. It is possible that one of the executive branch agencies will have a more accurate revenue projection. I am sorry we cannot be of more help.

Doug



adn.com
Anchorage Daily News

Driver who killed boys pleads

HEARING: Mothers, grandparents of two youths watch as man pleads no contest.

By Molly Brown
Anchorage Daily News

(Published March 20, 2001)

The mothers and grandmother of two boys killed last summer by a drunken driver held up pictures of their sons and grandsons in Anchorage Superior Court on Monday as Robert Richardson pleaded no contest to second-degree murder and first-degree assault.

For the first time, grandparents David and Patsy Glasen looked at the driver of a pickup that crossed the center line and slammed into their car on Portage Glacier Road. The crash sent the Glasens to the hospital with serious injuries. And also for the first time, Patty Kramer, mother of Kenneth Kramer, 11, and Sue Johnson, mother of Kevin Blake, 15, put a face to the man who killed their sons.

Richardson, 36, barely looked up.

He was originally charged with driving while intoxicated, two counts of manslaughter and first-degree assault.

On July 12 Richardson drove his red Ford F-150 pickup down Portage road. He ran off the road; a tow truck pulled his vehicle out of hood-deep water. About 20 minutes later he hit the Glasens and their grandchildren. After the accident, Richardson told an officer he had drunk about a six-pack of beer, according to charging documents. His blood-alcohol level was 0.175, nearly twice the .10 legal driving limit. Richardson thought he was near Wasilla, charging documents said.

Blake and Kramer and their grandparents were on their way to Whittier to go fishing. Blake was driving with a learner's permit, his grandfather at his side. Kramer sat behind Blake in the back seat, next to his grandmother.

Both boys died instantly.

"My mom and dad always say how they wish it was them who had died," Johnson said as tears rolled down her face. "I really miss him so much."

Johnson flew to Anchorage from Tatitlek with her two daughters for Monday's short hearing, and the Glasens flew in from Cordova. Kramer and her son drove into town from Palmer. Kramer today planned to go to Cordova, where her son and his father are buried side by side. Today Kenneth Kramer should have turned 12.

"This whole thing," Kramer said. "Just don't drink and drive."

"This whole thing is so preventable," Johnson said. "Somebody has got to do something."

They held up pictures so no one would forget. They also displayed bumper stickers that urged people to remember the two boys before they drink and drive. The bumper stickers are plastered on cars and walls in the Mat-Su area, Valdez, Cordova and as far away as Michigan, Johnson said.

"Maybe they will see it and stop and go: 'Man, I am not going to drive. I'm going to take a cab,' " Johnson said.

David Glasen has written letters to state legislators, urging stricter DWI punishments and education programs for youngsters. Glasen endured a broken hip and leg in the crash and was released from the hospital in October. He goes to therapy three times a week and walks with a cane.

"No matter what the sentence is for Mr. Richardson, it's not going to bring my grandsons back," he said. "This was preventable."

Richardson's sentencing is scheduled for June 26. He faces 10 to 99 years in prison for the murder charge and at least five years for assault.

Reporter Molly Brown can be reached at mbrown@adn.com or 257-4343.

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Anchorage Daily News

Driver who hit woman on trail pleads no contest

DWI: Elderly accident victim underwent 15 surgeries.

By Molly Brown
Anchorage Daily News

(Published March 14, 2001)

The accused drunken driver who steered his pickup down a South Anchorage bike trail and struck an elderly woman out walking her dog last summer pleaded no contest on Tuesday to first-degree assault and leaving the scene of an accident.

Alfred Meyer, a twice-convicted drunken driver, had also been charged with DWI and driving without a license. His blood-alcohol level was 0.22, prosecutors said, more than twice the legal driving limit. Under a plea agreement, those misdemeanor charges will be dismissed at a sentencing hearing in June, said assistant district attorney Bob Linton.

Tuesday's hearing lasted about 10 minutes. Meyer, 37 and free on bail, was remanded into custody as his friends and family members tearfully watched. Donna Dobson watched, too, sitting for the first time in the same room as the man who changed her life.

Dobson, her husband, Bobby, and their toy poodle, Tiny, were walking on a pathway near O'Malley Road and the Old Seward Highway the evening of June 24. She was still recovering from knee surgery, and supported herself with the help of a cane and her husband. As they approached a bend in the trail, a 1989 Chevrolet pickup with Meyer at the wheel rounded the curve. Dobson's husband tried to push her out of the way, but the truck hit her.

Dobson, 70, was knocked out of her shoes, and landed face first in weeds and water 20 feet away, according to charging documents. The pickup also landed in the pond. Meyer and a passenger refused to help and left the scene as Hobson's husband pulled his wife from the water, police said. Meyer was arrested a short time later outside a nearby store.

Hobson spent five weeks at the hospital and underwent 15 surgeries. She suffered two broken hips, a broken leg, a punctured lung, a broken pelvis, broken tailbone and broken ribs, according to family members.

On Tuesday, she walked with a cane but said she was happy to have survived.

"It's nice to be alive and walking," she said.

The cane is necessary for balance when she leaves home. She said she can no longer take long walks on the trail.

She expressed sympathy for Meyer's friends and family who have to say goodbye to their husband, father and friend, but said she hopes Meyer's jail time will get his attention.

"He could have killed me," she said.

Meyer could be sentenced to prison for five to 20 years on the felony assault charge, and up to 10 years for leaving the scene.

Dobson and her husband filed a civil suit against Meyer and Amtal Corp., an Alaska company that owns Muffler City. Meyer is president of Amtal and manager of Muffler City, according to a complaint filed in court. Meyer was driving a company truck when he hit Dobson.

Meyer's was one of four high-profile cases involving suspected drunken drivers last summer.

Jessie Withrow, a college student, died in July after being struck by a pickup while riding her bicycle on a sidewalk at Minnesota Drive and West Northern Lights Boulevard. Russell D. Carlson, 39, was charged with second-degree murder, DWI and driving with a revoked license in that case. He has seven previous DWIs and is scheduled for trial in May, according to the District Attorney's office.

Days later, two other young women were hospitalized after colliding with a pickup heading the wrong way on East Northern Lights Boulevard. Albert T. Bowman, who has five previous DWIs, pleaded no contest to injuring the two women and will be sentenced later this year.

In mid-July, Robert Richardson killed two young boys and injured their grandparents when he drove his pickup into a car, according to charging documents. He is scheduled to change his plea next week, according to court records.

Reporter Molly Brown can be reached at mbrown@adn.com or 257-4343.

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Two-time offender indicted in DWI accident

By MOLLY BROWN
Daily News reporter

An Anchorage man with two prior convictions of drunken driving was indicted Friday on charges of first-degree assault, leaving the scene of an accident and driving while intoxicated, according to the district attorney's office.

Alfred Meyer, 36, is accused of driving a truck down a bike trail on June 24, hitting 69-year-old Donna Hobson and throwing her 20 feet into a pond, where she landed face down.

Witnesses told police that the truck was moving at a speed of 30 to 40 mph. It skidded, in an attempt to avoid hitting Hobson, and spun into the same pond.

Meyer was driving a 1989 Chevrolet pickup owned by Muffler City, where he worked as a general manager.

Hobson's husband asked Meyer and the passenger with him to help his wife, but the two men refused, Anchorage police said. Bob Hobson ran to call for help, and the two men were gone when he returned.

Police eventually tracked Meyer to the Sports Authority parking lot and described him as extremely intoxicated based on the smell of alcohol.

Hobson spent five weeks in the hospital and underwent 15 surgeries on her lower left leg. She suffered two broken hips, a broken leg, a punctured lung, a broken pelvis, a broken tailbone and broken ribs, according to family members.

Meyer, whose blood-alcohol level was not available, was convicted of DWI in 1990 and 1991.

Reporter Molly Brown can be reached at mbrown@adn.com.

ADN 2 Sept 2000

ALASKA NETWORK ON
DOMESTIC VIOLENCE AND SEXUAL ASSAULT
130 Seward, Rm 209 Juneau, Alaska 99801

fax cover sheet

Date: 3/16/01

Number of pages including cover: 4

TO:	FAX Number:
Rep. Kohring, Judiciary Committee	465-3040

From: Lauree Hugonin
Executive Director

MEMO:
Comment on PFD Felon find question
posed during Committee today to DOC
LH

Telephone replies may be directed to (907) 586-3650.
Fax replies may be directed to (907) 463-4493.
If you receive this transmission in error, please notify us immediately.
Thank you

ALASKA NETWORK ON DOMESTIC VIOLENCE AND SEXUAL ASSAULT

130 Seward, Rm 209
Juneau, Alaska 99801

(907) 586-3650 ph
(907) 463-4493 fx

To: Representative Rokeberg
From: Lauree Hugonin
Date: 3/16/01
Re: PFD Felon/Misdemeanant Funds

I understand that the Judiciary Committee had a question concerning the distribution of the pfd felon/misdemeanant funds.

According to AS 43.23.028 (4) an individual is not eligible for a dividend when (A) during the qualifying year the individual was convicted of a felony; (B) during all or part of the qualifying year, the individual was incarcerated as a result of the conviction of a (i) felony; or (ii) misdemeanor if the individual has been convicted of two or more prior crimes.

The funds can be distributed to the violent crimes compensation board for payments to crime victims; the council on domestic violence and sexual assault for grants for the operation of domestic violence and sexual assault programs; or to the department of corrections for incarceration and probation programs.

There is not a percentage allocation in the statute nor is there a prescribed formula or way to disperse the funds between the three groups. After the amount has been determined by the permanent fund dividend division of the department of revenue, OMB allocates the funds in the governor's budget and the co-chairs of the Senate and House Finance Committee allocates the funds to the budget subcommittees for Public Safety and Corrections. Sometimes the legislative allocations meet the Governor's request and sometimes the legislature reallocates the funds between the three organizations.

I've supplied the memo from the permanent fund dividend division upon which OMB and the legislature has relied for FY02 allocations.

Senator Halford's SB105 would add the office of victims rights to the list of organizations which could receive the pfd felon funds and the bill also enlarges the pool of felons/misdemeanants from whom the pfd would be taken.

I hope this information is useful and would be happy to answer any questions.

MEMORANDUM

STATE OF ALASKA
DEPARTMENT OF REVENUE
PERMANENT FUND DIVIDEND DIVISION

TO: Annalee McConnell, Director
Office of Management and Budget

DATE: December 4, 2000

FILE: d:\nanci\felons\00felon memo

THRU: Wilson L. Condon
Commissioner

TELEPHONE: (907) 465-2323

SUBJECT: FY2002 Dividend Fund Amount Available For Appropriation To Public Safety And Corrections

FROM: Nanci A. Jones, Director

Here is our determination of the amount that would have been paid in FY2001 as permanent fund dividends to individuals who were ineligible for dividends because of criminal activity in calendar year 1999. The law makes ineligible anyone who, during the dividend qualifying year, was sentenced for a felony conviction or was incarcerated either as the result of a felony conviction, or a misdemeanor conviction if the individual had two prior convictions.

The Department of Corrections provided a list of 7,307 individuals who fit these criteria. We have determined, based on their most recent PFD applications, that 4,578 would have been eligible in FY2001. Thus, the total amount that would have been paid is:

Number		*PFD Amount*		*Total Amount*
4,578	x	$1,963.86	=	$8,990,551

Under AS 43.23.028(a)(6), this is the total amount that can be appropriated for FY2002 from the Dividend Fund to the Department of Public Safety, Crime Victim Compensation Fund and the Council on Domestic Violence and Sexual Assault as well as the Department of Corrections without triggering disclosure. Any additional amount appropriated from the dividend fund will be disclosed on the 2001 dividend warrant and direct deposit advice stub as required by AS 43.23.028(a)(3).

The number of individuals who would have been eligible was computed by starting with the felon lists provided by the Departments of Corrections and Public Safety in 2000. We first excluded those individuals who were later determined not to have been incarcerated in 1999. We then estimated how many were likely to have been eligible had they not been incarcerated. We did this by matching the lists against the 1988 through 2000 PFD masterfile. To insure that ineligible nonresidents were not included in the computation, we excluded from the list:

1. those whose most recent 1988-1999 application before statutory-ineligibility had been denied for another reason; or

2. those who had not filed for any year in 1988-1999.

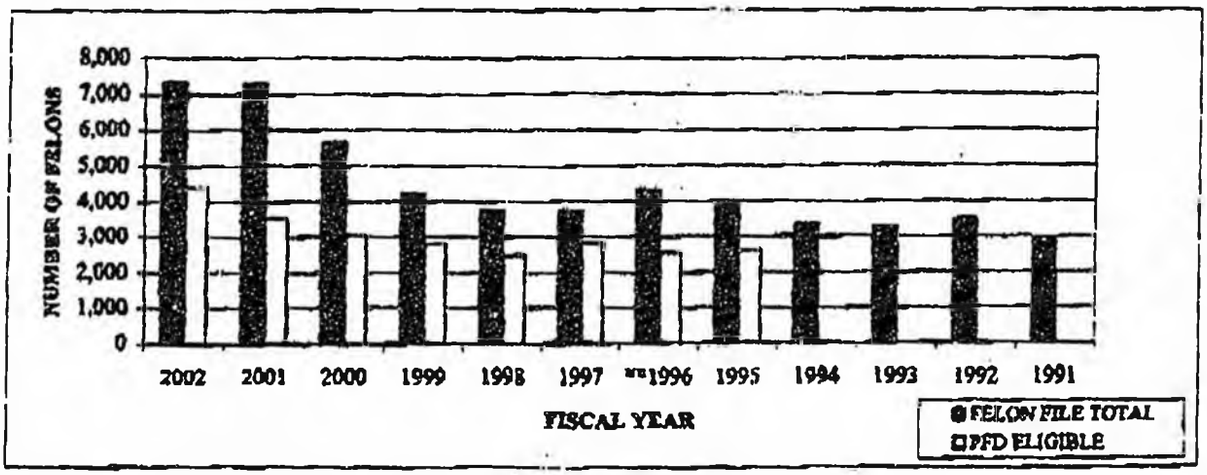
Enclosure: Detailed summary of felon file eligibility for dividend appropriations.

DEPARTMENT OF REVENUE
PERMANENT FUND DIVIDEND DIVISION
FELON FILE ELIGIBILITY FOR DIVIDEND APPROPRIATION TO PUBLIC SAFETY AND CORRECTIONS
INCEPTION TO DATE

FISCAL YEAR	DIVIDEND YEAR	FELON FILE TOTAL	PFD ELIGIBLE	PERCENT ELIGIBLE	CALENDAR YEAR INCARCERATED	APPROPRIATION MAXIMUM	APPROPRIATION % INCREASE
2002	2000	7,307	4,578	63%	1999	8,990,551	0.150
2001	1999	7,273	4,416	61%	1998	7,815,613	0.453
2000	1998	5,649	3,492	62%	1997	5,380,753	0.362
1999	1997	4,207	3,048	72%	1996	3,951,654	0.245
1998	1996	3,726	2,807	75%	1995	3,173,619	0.302
1997	1995	3,753	2,462	66%	1994	2,438,119	-0.129
**1996	1994	4,319	2,846	66%	1993	2,800,179	0.157
1995	1993	3,886	2,648	68%	1992	2,419,224	0.004
1994	1992	3,342	2,650	79%	1991	2,408,659	0.000
1993	1991	3,255	*	*	1990	*	*
1992	1990	3,478	*	*	1989	*	*
1991	1989	2,914	*	*	1988	*	*

NOTES
* program model was not in place - tape match was not publicized.

** In FY 1996, the number of felons was overstated. The correction was made in FY 1997.



The felon eligibility file for dividend appropriation maximums for fiscal years 1991 through 1999 are from felons who were incarcerated as a result of a conviction of a felony.

Starting in fiscal year 2000, the file includes felons who were incarcerated, convicted and sentenced, and individuals who were incarcerated as a result of a conviction of a misdemeanor if these individuals have been convicted of two or more prior crimes.

dwl4
chdwl0301.xls
cbrower
3/15/01

Currently (3/15/01) Incarcerated Inmates Charged with A DWI Offense
DWI Offenses included: DWI - Under the Influence, MOA - Driving Under the Influence

Offense Summary	In-State Inst	Out-of-State Inst	CRCs	Offsite Superv	Totals
Felony DWI	4	0	4	3	11
Felony DWI + At Least 1 Felony	98	21	15	5	139
Felony DWI + At Least 1 Misd	35	4	11	0	50
Totals Felony DWIs	*137*	*25*	*30*	*8*	*200*
Misd DWI	12	0	30	6	48
Misd DWI + At Least 1 Felony	94	12	15	3	124
Misd DWI + At Least 1 Misd	71	3	49	9	132
Totals Misd DWIs	*177*	*15*	*94*	*18*	*304*
Grand Totals	**314**	**40**	**124**	**26**	**504**

probdemo
lzdwi800.xls
lzaugg
8/24/00

Individuals Currently (8/24/00) Listed as Under Supervision

Primary Offense: Felony DWI/OMVI - Alcohol

Office	# Individuals	
ANCHORAGE	216	5
FAIRBANKS	46	2
JUNEAU	13	
KENAI	21	2
PALMER	68	12
Grand Count	**364**	

ALASKA STATE LEGISLATURE
House of Representatives

COMMITTEE ASSIGNMENTS:

JUDICIARY COMMITTEE, CHAIRMAN
LABOR & COMMERCE COMMITTEE, MEMBER
LEGISLATIVE COUNCIL, MEMBER
SPECIAL COMMITTEE ON ECONOMIC DEVELOPMENT & TOURISM, MEMBER

website: http:\\www.akrepublicans.org\Rokeberg.htm

INTERIM:
716 WEST 4TH AVENUE, SUITE 350
ANCHORAGE, AK 99501
PHONE: (907) 269-0117
FAX: (907) 269-0119

SESSION:
ALASKA STATE CAPITOL
JUNEAU, AK 99801-1182
PHONE: (907) 465-4968
FAX: (907) 465-2040

Representative Norman Rokeberg

e-mail: Representative_Norman_Rokeberg@legis.state.ak.us

SPONSOR STATEMENT
CSHB 4 (TRA)

An Act relating to offenses involving operating a motor vehicle, aircraft, or watercraft while under the influence of an alcoholic beverage or controlled substance; relating to court records of a conviction involving a violation of the Alaska Uniform Vehicle Code or an other law, regulation, or ordinance regulating the driving of vehicles; relating to implied consent to take a chemical test; relating to registration of motor vehicles; relating to presumptions arising from the amount of alcohol in a person's breath or blood; relating to the definition of 'controlled substance' for purposes of the Alaska Uniform Vehicle Code; and providing for an effective date

All reasonable and responsible Alaskans can agree that driving drunk is inappropriate behavior. Drunk drivers can and do kill, maim, cause untold grief, pain, and cost fellow Alaskans money. Why should an Alaskan be afraid to drive a vehicle on Alaska's roads? The drunk driver needs to be separated from his or her vehicle and if the drunk won't separate themselves from that vehicle then it is up to the State to provide public safety for the rest of its citizens by accomplishing just that.

Over the past year, Alaska has seen the devastating results of poor decisions made by repeat offender drunk drivers. Even with all the educational promotion (don't drink and drive; use it, lose it; use a designated driver), the message is still not getting across to repeat offenders and many young people. It is unfortunate that most of the time these individuals are not caught and, when they are, it is apparent that some of them are not getting the message: DO NOT DRINK AND DRIVE.

CSHB 4 (TRA) would increase fines and jail time for repeat offender drunk drivers. It would lower the blood alcohol content limit from .10 to .08. It mandates that the offender get treatment, pay for treatment (or a part of it), and get treatment while in jail -- no more sitting around and watching television while you serve your three days or whatever.

The cost to implement the provisions of CSHB 4 (TRA) is going to be high. But can we balance the cost to the state to that of a human being. What does the life of a loved one cost? What does the treatment of an injured person cost? These offenders also drive around without a license and are uninsured so there is little to

remote possibility that the injured Alaskan citizen will ever get reimbursed or receive non-state assistance with their costs. One of the main issues facing the legislature in this instance is the people's wish to maintain budget discipline -- a stand that I have been proud to maintain over the years. BUT in this instance, it is time to pay for the safety of our families. The fiscal impact will be great. If it saves one life, or saves one Alaskan from injury -- isn't it worth it?

Sections 37, 44, and 45 are intended to address opinions in several appellate court cases.

Drunk driving cases confront the police with a wide variety of situations, and they should have the tools needed to obtain necessary physical evidence of intoxication. In some cases, time becomes of the essence due to the delays (often caused by complications at the scene of an accident or the conduct of the drivers) in getting drivers to a location where a breath test can be administered. When this happens, or if the breath testing equipment is not functioning, these and other exigent circumstances should allow police to obtain a blood test. In other instances, the police may wish to present the matter to a judge for a warrant.

In *Sosa v. State*, 4 P.3 d 951 (Alaska 2000), the Alaska Supreme Court held that the implied consent statutes provide the exclusive means for obtaining evidence of a driver's intoxication. The court reasoned that because AS 28.35.035 permits blood tests only under two specified circumstances (where a crash results in a fatality or serious injury, and where a defendant is unconscious or otherwise incapable of refusal) the statutes, by implication, prohibit blood tests under any other circumstances. Accordingly, in *Sosa* itself the Supreme Court held that the fact that their Intoximeter was broken did not justify the Bethel police in obtaining a warrant for defendant Juan Sosa's blood. The warrant was invalid, and the evidence obtained as a result of the warrant had to be suppressed.

Section 37 adds a new section to AS 28.35.031, providing that the implied consent statute was not intended to prevent the police search warrants. This makes it clear that the legislature has adopted the view expressed by Justice Compton in his dissenting opinion in *Pena v. State*, 684 P. 2d 684, 868 (Alaska 1984). Justice Compton said: "There simply is nothing in the [implied consent] statutes to indicate that the legislature contemplated restricting searches pursuant to warrant, which derive from the statutory authority of the court, rather than the power of an officer to search an individual at the time of arrest."

Section 45 adds a new section to AS 28.35.035, authorizing the police to obtain a blood sample where exigent circumstances prevent the police mentioned by the Alaska Court of Appeals in *Bass v. Municipality of Anchorage v. State*, 692 P.2d 961, 961 (Alaska App. 1984). In *Bass* the court justified its very narrow construction of AS 28.35.035 by saying: "Certainly it would have been easy for the legislature to say that the police could forcibly take a blood sample where there were exigent circumstances which prevented the police from administering a breath test."

The concept of searches made under exigent circumstances is well-established. Because physical evidence of intoxication disappears rapidly with the passage of time, it is the intent of this section that, if the state can prove the police were unable to take a breath sample within a reasonable period of time, they would be allowed to draw blood.

These provisions thus allow the police to obtain blood test evidence of intoxication using the implied-consent procedure in Section 45 when time is of the essence, the testing equipment is not functioning, or there are other exigent circumstances. Section 37 provides an alternative so the police can, in their discretion, use the traditional method of obtaining a search warrant to obtain evidence.

Please support this legislation and let's separate the drunk from the vehicle!

ED 2:02/28/01

ALASKA STATE LEGISLATURE
House of Representatives

COMMITTEE ASSIGNMENTS:

JUDICIARY COMMITTEE, CHAIRMAN
LABOR & COMMERCE COMMITTEE, MEMBER
LEGISLATIVE COUNCIL, MEMBER
SPECIAL COMMITTEE ON ECONOMIC DEVELOPMENT & TOURISM, MEMBER

website: http:\\www.akrepublicans.org\Rokeberg.htm

INTERIM:
716 WEST 4TH AVENUE, SUITE 350
ANCHORAGE, AK 99501
PHONE: (907) 269-0117
FAX: (907) 269-0119

SESSION:
ALASKA STATE CAPITOL
JUNEAU, AK 99801-1182
PHONE: (907) 465-4968
FAX: (907) 465-2040

Representative Norman Rokeberg

e-mail: Representative_Norman_Rokeberg@legis.state.ak.us

SECTIONAL ANALYSIS
CSHB 4 (TRA)

An Act relating to offenses involving operating a motor vehicle, aircraft, or watercraft while under the influence of an alcoholic beverage or controlled substance; relating to court records of a conviction involving a violation of the Alaska Uniform Vehicle Code or another law, regulation, or ordinance regulating the driving of vehicles; relating to implied consent to take a chemical test; relating to registration of motor vehicles; relating to presumption arising from the amount of alcohol in a person's breath or blood; and providing for an effective date.

Prepared by Representative Norman Rokeberg

Section 1: Finding and intent section.

Section 2: Changes references from driving "while intoxicated" to driving "while under the influence of an alcoholic beverage or controlled substance."

Section 3: Changes references from driving "while intoxicated" to driving "while under the influence of an alcoholic beverage or controlled substance."

Section 4: Adds new subsection setting forth that the presumptive sentence for manslaughter as a result of driving while under the influence of an alcoholic beverage or controlled substance is seven years.

Section 5: Changes references from driving "while intoxicated" to driving "while under the influence of an alcoholic beverage or controlled substance."

Section 6: Requires the department of administration to refuse to register a vehicle if the applicant does not have a valid driver's license due to suspension or revocation or fails to register the vehicle using the applicant's first, middle, and last name or a business name.

Section 7: Changes references from driving "while intoxicated" to driving "while under the influence of an alcoholic beverage or controlled substance."

Section 8: Changes references from driving "while intoxicated" to driving "while under the influence of an alcoholic beverage or controlled substance."

Section 9: Changes references from driving "while intoxicated" to driving "while under the influence of an alcoholic beverage or controlled substance."

Section 10: Changes references from driving "while intoxicated" to driving "while under the influence of an alcoholic beverage or controlled substance." Repeals the phrase "reasonable grounds" and replaces it with "probable cause" for purposes of the commercial motor vehicle implied consent law.

Section 11: Changes references from driving "while intoxicated" to driving "while under the influence of an alcoholic beverage or controlled substance."

Section 12: Provides for minimum periods of driver's license revocation after a person has been convicted of D.U.I. or convicted of refusing to take a breath test after being arrested for D.U.I.

Section 13: Requires that the court shall furnish the Division of Motor Vehicles with information on a driving conviction by the end of the following business day.

Section 14: Technical amendment relating to the authority of the court to grant limited driver's license privileges following a conviction for D.U.I.

Section 15: Creates a provision that allows a person with a revoked driver's license to obtain limited driver's license privileges following a conviction for D.U.I. or refusal to take a breath test. Mandates that any such license shall require that the vehicle be equipped with an ignition interlock device during the period of such limited license.

Section 16: Requires a person who loses their driver's license for D.U.I. or refusal to take a breath test to meet the alcoholism screening, evaluation, referral, and program requirements under AS 28.35.030(h) imposed under AS 28.15.1819(a)(5) or (8) in order to have license reissued.

Section 17: Doubles driver's license reinstatement fees for those convicted of D.U.I.

Section 18: Creates a new crime relating to knowingly allowing a person who has been convicted of felony D.U.I. to drive a vehicle you own or control. Defines the crime as a class A misdemeanor and provides minimum penalties.

Section 19: Technical amendments relating to driving with a canceled, suspended, or revoked driver's license, or in violation of a license limitation.

Section 20: Changes references from driving "while intoxicated" to driving "while under the influence of an alcoholic beverage or controlled substance."

Section 21: Repeals the phrase "reasonable grounds" and replaces it with "probable cause" for purposes of the commercial motor vehicle implied consent law. Also changes references to "driving while intoxicated" to "driving while under the influence of an alcoholic beverage or controlled substance."

Section 22: Repeals the phase "reasonable grounds" and replaces it with "probable cause" for the purposes of the commercial motor vehicle implied consent law.

Section 23: Changes a reference to driving "while intoxicated" to driving "while under the influence of an alcoholic beverage or controlled substance." Also changes references to "intoxicating liquor" to "alcoholic beverage".

Section 24: Changes a reference to "intoxicating liquor" to "alcoholic beverage".

Section 25: Changes references from driving "while intoxicated" to driving "while under the influence of an alcoholic beverage or controlled substance."

Section 26: Changes references to driving "while intoxicated" to driving "while under the influence of an alcoholic beverage or controlled substance." Adds "an alcoholic beverage" to list of items that constitutes crime of driving while "under the influence of an alcoholic beverage or controlled substance". Reduces the legal limit for being intoxicated from 0.10 to 0.08 percent of alcohol in a person's blood.

Section 27: Changes references to driving "while intoxicated" to driving "while under the influence of an alcoholic beverage or controlled substance." Changes the penalties for D.U.I.

Section 28: Changes law to establish that treatment providers must provide the judge, prosecutor, defendant, and an agency involved in the defendant's treatment with information and reports concerning the defendant's past and present assessment, treatment, and progress. Such information may only be used in connection with court proceedings involving the defendant or the defendant's treatment and is otherwise confidential.

Section 29: Amends law to provide that Department of Health and Social Services shall establish standard for clinically appropriate treatment programs required under AS 28.35.030(h). Increases the limit imposed on cost of imprisonment required to be paid by a person convicted of D.U.I. Specifies that, as much as possible, treatment shall occur while incarcerated. Establishes that "cost of treatment" does not include costs incurred as a result of treatment not required under this subsection.

Section 30: Increases the limit imposed on the cost of imprisonment required to be paid by a person convicted of D.U.I. Specifies that imprisonment for a person convicted of D.U.I. cannot be served at a residential treatment facility or a hopsital.

Section 31: Changes references to driving "while intoxicated" to driving "while under the influence of an alcoholic beverage or controlled substance." Phases in a 10-year look back period and establishes that a person is guilty of a class C felony if convicted a third time since January 1, 1996, and within 10 years preceding the date of the offense. Increases the penalties for a conviction under this section, including jail time, fine, loss of driver's license, and forfeiture of the vehicle, watercraft or aircraft used in the offense. Revokes vehicle registration for all vehicles owned by the person convicted. Permits a co-owner to register the vehicle in that person's name.

Section 32: Changes references to driving " while intoxicated" to driving "while under the influence of an alcoholic beverage or controlled substance."

Section 33: Adds provisions relating to restoration of a driver's license following a D.U.I conviction and relating to failure to satisfy alcoholism treatment requirements. Establish procedure for surrender of registration plate for any vehicle registered or co-registered in convicted person's name.

Section 34: Makes technical amendments relating to implied consent law. Changes references to driving " while intoxicated" to driving "while under the influence of an alcoholic beverage or controlled substance." Repeals the phrase "reasonable grounds" and replaces it with "probable cause" for the purposes of the implied consent law.

Section 35: Repeals the phrase "reasonable grounds" and replaces it with "probable cause" for the purposes of administering a breath test under the implied consent law.

Section 36: Repeals the phrase "reasonable grounds" and replaces it with "probable cause" for purposes of administering a breath or blood test under the implied consent law when there is a motor vehicle accident that causes death or serious physical injury.

Section 37: Adds new section providing that the implied consent statute was not intended to prevent the police search warrants.

Section 38: Changes references to driving "while intoxicated" to driving "while under the influence of an alcoholic beverage or controlled substance."

Section 39: Changes reference to driving "while intoxicated" to driving "while under the influence of an alcoholic beverage or controlled substance."

Section 40: Changes reference to driving "while intoxicated" to driving "while under the influence of an alcoholic beverage or controlled substance."

Section 41: Changes references to driving "while intoxicated" to driving "while under the influence of an alcoholic beverage or controlled substance." Also changes certain presumptions applicable to civil or criminal action involving a person alleged to have driven while under the influence of an alcoholic beverage or controlled substance.

Section 42: Requires the police to inform a person undergoing a chemical test for intoxication of their right to have an independent chemical test and requires the department to make reasonable and good-faith efforts to assist the person to obtain an independent test.

Section 43: Changes reference to driving "while intoxicated" to driving "while under the influence of an alcoholic beverage or controlled substance."

Section 44: Conforming amendment to Section 45.

Section 45: Adds new section authorizing the police to obtain a blood sample where exigent circumstances prevent the police from administering a breath test.

Section 46: Requires the state to seek forfeiture of motor vehicle used in committing a D.U.I. or breath test offense. Changes reference to driving "while intoxicated" to driving "while under the influence of an alcoholic beverage or controlled substance."

Section 47: Adds new provision requiring registration of felony repeat D.U.I. offenders.

Section 48: Adds definition of 'controlled substance' to include inhalants for purposes of D.U.I. laws.

Section 49: Changes reference to driving "while intoxicated" to driving "while under the influence of an alcoholic beverage or controlled substance."

Section 50: Applicability section.

Section 51: Section 47 effective date is July 1, 2002.

Section 52: With exception of Section 47, all other sections take effect July 1, 2001.

Full report: http://www.ci.anchorage.ak.us/Mayor/

Final Report
of the
DUI Prevention Task Force

Municipality of Anchorage

October 30, 2000

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October 30, 2000

Statement of Intent

The intent of this DUI Task Force has been to fashion realistic recommendations that fulfill its mandate to advise the Mayor and the Assembly on appropriate action necessary to prevent and deter drunken driving in Anchorage. The Task Force addressed many potentially effective suggestions regarding drunken driving prevention and deterrence. Some proved polarizing, complex, and not subject to immediate implementation. Research, testimony, and debate eventually produced consensus as to the recommendations. While the majority of the recommendations were the product of pure consensus, certain elements within the report met with objections by one or two members. As a whole, however, the entire Task Force endorses the report.

It is our intent to provide you simple, not simplistic, guidance in dealing with the problem of drunken driving in Anchorage. You will find no footnotes and few data quotes to complicate the recommendations. As chairmen, we can assure you that the Task Force has done its homework. The Task Force was appointed as a reflection of the community, and the consensus reached in this report should be a good measure of how the recommendations will be embraced by the citizens of Anchorage.

Joe Murdy
Co-Chairman

Bob Bailey
Co-Chairman

Executive Summary

A special citizen's task force on DUI (Driving Under the Influence) was proposed by Mayor George Wuerch and created by a resolution of the Anchorage Assembly on July 18, 2000. The Task Force was created to advise the Mayor and the Assembly on appropriate legislative action necessary to prevent and deter drunken driving in Anchorage. The Task Force consisted of twenty original members, two ex-officio members, two alternates, and one replacement member.

Original Task Force members were co-chairmen Bob Bailey and Joe Murdy, Charlotte Phelps, Marti Greeson, Obed Nelson, Gail Schubert, Judge Elaine Andrews, Jewel Jones, Denise Henderson, Ron Perkins, Jack Amon, John Richard, Janet Seitz, Paul Reid, Curtis Thayer, Rob Heun, Jasmyne Thea Faulk, Bob Young, Bill Chadwick, and Leslie Ridle. Ex-officio members were Chief Duane Udland and Municipal Attorney Bill Greene. Alternate members were Karen Rogina and Denise Trutanic. Judge Andrews eventually withdrew from the task force and was replaced by Wendy Lyford. Assistant Municipal Prosecutor Carmen Clarkweeks provided valuable legal interpretations of state and municipal law.

The Task Force had an organizational meeting in July 2000, and began work sessions in August 2000. Ten full Task Force meetings were held, including one meeting dedicated solely to public testimony in which twenty-two citizens testified. Those testifying were James Gay, Cheryl Mann, Gary T. Spezialy, Dennis Kalpakoff, Joseph Young, Shannon McBride, Rep Norm Rokeberg, Michelle Villard, John Wood, Dan Coffey, Pat Knowles, Jim Messick, Nelson Page, Bill Herman, Don Grasse, Kelly Gillilan-Gibson, Barbara Bennett, Ken Smith, Janet McCabe, Cliff Lamb, Mike Krukar and Philip Petree. One meeting was devoted to an overview of DUI Courts as the Task Force was interested in this concept and its potential. All full Task Force meetings were electronically recorded.

The Task Force's charter outlined the following issues to address:

- State and/or municipal legislation to prevent and deter drunken driving, particularly those previously convicted of driving under the influence of alcohol;
- Enforcement of existing laws and ordinances;
- Other government programs;
- Other organizations, both public and private, that can be of assistance.

The Task Force created three subcommittees to carry out its work in the following areas:

- Current Laws Subcommittee - examined current laws on the books, addressed issues of enforcement and sentencing without additional legislation;
- Courts Subcommittee - examined alternative legal venues for prosecuting offenders, such as DWI and Drug Courts;
- Alternative Solutions Subcommittee - examined what additional can be done to address the problem of drinking and driving, and considered sentencing alternatives.

The subcommittees held several meetings and then presented reports to the full Task Force. The subcommittee reports can be found in the Addendum to this report. These reports generated a composite list of twenty-five subcommittee recommendations that functioned as discussion points for the full task force. The Task Force used a consensus model to develop final recommendations from the discussion points. The final recommendations contained in this Final Report are not presented in any particular order indicating priority.

Summary of Task Force Recommendations

The Task Force addressed the broad spectrum of legislative modifications, enforcement issues, potential government programs, and other types of public and private organizations within the scope of the charter statement and reached consensus on the following recommendations:

State and Municipal Legislative Recommendations

- Change the legal designation from DWI (Driving While Intoxicated) to DUI (Driving Under the Influence)
- Update present statutes to reflect subsequent court decisions
- Make third and subsequent DUIs felonies by eliminating "look back" provisions
- Identify enhancements for charging and sentencing considerations
- Graduate Blood Alcohol Concentration (BAC) levels and penalties from.08, and consider modifying AS 28.35.032, Refusal To Submit To A Chemical Test, to reflect the graduated penalty implications
- Require a valid driver's license and proof of insurance to register a vehicle
- Adopt a mandatory impoundment and forfeiture procedure at the state level
- Explore the feasibility of a centralized clearinghouse for licenses and investigate the expanded options provided by technological advances for tracking licenses whose holders have convictions for certain alcohol related offenses
- Require mandatory alcohol awareness training and a victim's panel as a prerequisite for a obtaining a valid resident driver's license
- Provide parameters for monitored, certifiable residential treatment in sentencing when enhancement factors are present
- Offer screening, mandatory alcohol education, and mandatory alcohol assessment during incarceration for DUI
- Provide for monitored alcohol treatment and ensure certifiable minimum standards in all DUI treatment programs
- Adopt Alaska Criminal Justice Assessment Commission recommendation #15 that the state should encourage the expansion of the Department of Health and Social Services Alcohol Safety Action Program (ASAP) through legislation and funding
- Recognize that halfway houses are not appropriate for repeat offenders and analyze halfway house administration
- Adopt Alaska Criminal Justice Assessment Commission recommendation #8 which relates to underage drinkers
- Make AS 04.16.050, Possession, Control, or Consumption by Persons Under 21 a misdemeanor and provide for alcohol treatment or counseling, peer options such as Youth Court, and parental/guardian notification
- Repeal AMC 10.50.015(H), Solicit the Purchase, Attempt to Purchase, or Possess Intoxicating Liquor, and require these offenses be charged under a revised AS 04.16.050

- Establish and fund a DUI Court
- Make As 28.05.095, Use of Seat Belts and Child Safety Devices Required, a primary law

Enforcement Recommendations

- Encourage focused enforcement of youthful offenders
- Encourage the state to enforce and prosecute AS 28.35.280, Minor Operating a Vehicle After Consuming
- Establish a Report Every Drunk Driver Immediately (REDDI) program in Anchorage
- Expand "Drunk Busters" program, and initiate year round saturation patrols
- Streamline drunken driver arrest processing procedures
- Initiate safety checkpoints when deemed appropriate by law enforcement
- Implement ignition interlock devices as a condition of probation for DUI offenders after their driving privileges have been reinstated

Other Government Programs

- Increase alcohol server mandatory training from every three years to every two years
- Establish media awareness campaigns that target the "uncaught offender"
- Establish mandatory alcohol education and awareness programs in schools
- Study alternative forms of transportation between Girdwood and Anchorage
- Establish an umbrella group to facilitate continued coordination, compilation and exchange of data, and exchange of materials between interested groups and organizations

Public/Private Organizations

- Establish a Responsible Hospitality Institute Chapter in Anchorage

LEGISLATIVE RESEARCH REPORT

NOVEMBER 28, 2000

REPORT NUMBER 01.023

FEDERAL HIGHWAY FUNDING AND STATE DWI LAWS

PREPARED FOR REPRESENTATIVE NORMAN ROKEBERG

BY PATRICIA YOUNG, LEGISLATIVE ANALYST

You asked for an explanation of the connection between federal highway dollars and a state's drinking and driving laws. Specifically, you asked whether Alaska has foregone federal funding opportunities as a result of not having enacted certain provisions regarding open containers and repeat offenders. If so, you wished to know how long the state has foregone such revenue and the amount of funding that has been "lost." Additionally, you asked for an explanation of the funding consequences of the recent federal requirement concerning a blood alcohol concentration standard of 0.08 percent.

For purposes of this report, we focus on measures relating to driving while intoxicated (DWI) addressed by Congress in the Transportation Equity Act for the 21st Century, the current federal authorization for surface transportation programs. After a brief summary, we address each provision, and its impact on transportation and highway safety funding in Alaska, individually. We consolidate the data in Table One.

907-465-3991
907-465-3908 (fax)

Alaska Legislature
Legislative Research Services
www.legis.state.ak.us/research/home.htm

State Capitol
Juneau, AK 99801

SUMMARY

In order to encourage states to adopt and enforce specific anti-drunk driving laws, Congress authorized two incentive grant programs and two transfer provisions as part of the Transportation Equity Act for the 21st Century (TEA-21) in 1998.[1] These provisions are in effect from federal fiscal year 1998 through 2003. More recently, President Clinton signed into law a sanction provision to take effect in federal fiscal year 2004, for states that fail to adopt and enforce a 0.08 percent blood alcohol concentration (BAC) standard by that time.

Under the two incentive programs authorized by TEA-21, grant funds are available to states that have enacted specific drunk driving countermeasures (Section 410) and to states that have enacted a 0.08 percent BAC standard (Section 163). The countermeasures incentive under Section 410—with different eligibility criteria—was available under ISTEA, the predecessor of TEA-21. Alaska qualified for funding under the ISTEA version of the program, and because of a delayed effective date, received approximately $200,500 during 1998. With the change in requirements, however, the state no longer qualifies, and as a result, "lost" approximately $127,000 in 1999. Section 410 is a broad program with numerous eligibility requirements and several variables in the funding formula. According to Mary Moran, director of the state's highway safety program, qualification demands more staff resources than are presently available. Thus, even if the state were to qualify, she would not apply with the program's current staffing level.

Potential funding under the Section 163 incentive program is significantly more substantial than that available under Section 410. Because Alaska has not implemented the 0.08 BAC standard needed to qualify for funding under this section, since 1998, the state has foregone approximately $2.3 million that could have been used for any transportation project eligible for federal assistance. The state will continue to "lose" approximately $700,000 to $800,000 during each year through 2003 unless lawmakers choose to lower the BAC from 0.10 percent to 0.08.

The transfer provisions require states to implement specific provisions regarding open containers (Section 154) and minimum penalties for repeat offenders (Section 164) by October of 2000. Because Alaska's laws do not conform precisely to the federal requirements of either provision, 1.5 percent of the state's highway construction funds will be transferred to the highway safety program for each of the provisions during FY 2001—a combined total of approximately $5.2 million. Another 1.5 percent for each provision will be transferred for fiscal year 2002 if the state has not complied with the federal requirements; the transferred amounts double to three percent for each provision during fiscal year 2003 and each year thereafter that the state has not complied.

Lastly, beginning with federal fiscal year 2004, the U.S. Department of Transportation will begin to withhold a percentage of the highway funds apportioned to states that continue to resist implementing the 0.08 BAC standard for *per se* DWI (Section 163[a]). According to federal estimates, if Alaska has not implemented such a standard by FY 2004, the state will lose 2

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[1] The Transportation Equity Act for the 21st Century (TEA-21), enacted June 9, 1998, as Public Law 105-178, authorized federal surface transportation programs for the six-year period of 1998-2003. The Act reauthorized existing National Highway Traffic Safety Administration programs, including the DWI countermeasures incentive grant program under Section 410. Additionally, TEA-21 created the incentive grant program for 0.08 BAC under Section 163. The TEA-21 conferees also agreed upon two provisions for transfer of a portion of a state's highway construction funds to its highway safety program if the state fails to establish and enforce minimum penalties for repeat drunk driving (Section164) and for open containers in the passenger compartment of a vehicle (Section 154). These two initiatives, omitted from the conference report, were restored to TEA-21 by the TEA-21 Restoration Act, on July 22, 1998, as Public Law 105-206.

percent, or approximately $3.6 million of its 2004 funding. The annual penalty would rise by an additional 2 percent each year to an estimated $14.3 million by FY 2007. States that implement the standard before the end of FY 2007, however, will recover the withheld funding.

INCENTIVE GRANT—ALCOHOL-IMPAIRED DRIVING COUNTERMEASURES (SECTION 410)

As part of the Transportation Equity Act for the 21st Century, Congress authorized approximately $220 million for grants under Section 410, to encourage states to adopt and implement programs to reduce traffic safety problems resulting from individuals driving under the influence of alcohol.[2] The program includes two basic grant options. States may qualify for both basic grants, and those that qualify for either can also apply for supplemental grants.

The Section 410 program was in place under the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA). Congress reauthorized the program with TEA-21 but amended the eligibility requirements and delayed the effective date until FY 1999. According to Mary Moron, director of the Alaska Highway Safety Office, the amendments, to a large extent, reversed the eligibility requirements for the basic and the supplemental grants. As a result, although Alaska qualified under ISTEA, the state no longer does so.

Prior to the eligibility change, Alaska qualified for basic grant funding because criteria such as videotaping of drunk drivers by police, an on-going DWI-prevention program, and the use of passive alcohol sensors (breath tests) by police were in place. Because the shift did not become effective until 1999, Alaska received approximately $200,500 during 1998. Since the shift, however, those criteria pertain to the supplemental grants, rather than to the basic ones. Because a state must qualify for a basic grant to apply for a supplemental grant, Alaska is currently ineligible for all Section 410 funding. Had Alaska qualified, the state would have received approximately $127,000 in 1999 to support anti-drunk driving programs. Because of the high number of variables involved in Section 410 funding, Ms. Moran is unable to estimate the amount that Alaska "lost" in 2000. Specific details of the current Section 410 program follow.[3]

> *Section 410 Eligibility*: States have two options for qualifying for the basic Section 410 grant funding. States that qualify for a basic grant may apply for supplemental grants:
>
> *Basic Grant A—implement at least 5 of the following 7 criteria:*
>
> - Administrative license revocation;
> - A program to prevent drivers under age 21 from obtaining alcoholic beverages;
> - A program for intensive impaired driving law enforcement;

[2] 23 USC 410, Alcohol-Impaired Driving Countermeasures.

[3] Federal Highway Administration, "TEA-21 Fact Sheet: Alcohol-Impaired Driving Countermeasures Incentive Grants," September 14, 1998; available at *http://www.fhwa.dot.gov/tea21/factsheets/n_410.htm* (accessed 10/10/2000).

- A graduated licensing law with nighttime driving restrictions and zero tolerance;
- A program to target drivers with high BAC;
- Young adult drinking programs to reduce impaired driving by individuals age 21 through 34;
- An effective system for increasing the rate for BAC of drivers in fatal accidents—beginning in FY2001, the testing rate must be above the national average.

Basic Grant B—demonstrate both of the following:

- A reduction in the percentage of fatally injured drivers with 0.10 BAC or greater, in each of the last 3 years; and
- A percentage of fatally injured drivers with 0.10 BAC or greater that is lower than the national average for each of the last 3 years.

Supplemental Grants—implement any of the following:

- Videotaping of drunk drivers by police;
- A self-sustaining impaired driving prevention program;
- Laws to reduce driving with suspended license;
- Use of passive alcohol sensors by police;
- Effective system for tracking information on drunk drivers;
- Other innovative programs.

Distribution of Funds: Beginning in FY 1999, qualifying states receive up to 25% of their FY 1997 Section 402 apportionment for each basic grant; supplemental grants may not exceed 10% of funding made available for Section 410.

Program Administration: The federal share for Section 410 shall not exceed 75% in the 1st and 2nd years in which a state receives a grant, 50% in the 3rd and 4th years, and 25% in the 5th and 6th years. States may use Section 410 grant funds only to implement and enforce impaired driving programs.

At present, Alaska meets at least two of the seven program criteria for basic grant A. The state must meet at least five in order to qualify for funding. According to Ms. Moran, Alaska's eligibility in regard to some criteria is debatable: the state might qualify, for example, in regard to programs for reducing alcohol-impaired driving by young adults. Similarly, the state might qualify in regard to the rate of BAC testing of drivers involved in fatal crashes if the rate is above the national

average.[4] Alaska's DWI countermeasures scheme does not qualify in regard to the following basic grant A criteria:

Administrative license revocation. Alaska qualified in regard to this criterion until state lawmakers reduced the duration of license revocation for minors driving after consuming alcohol from 90 days, one year, and three years for first, second, and third or subsequent revocations to 30 days, 60 days, 90 days, and one year for first, second, third, and fourth or subsequent revocations, respectively.[5] Although other provisions still qualify, the revocation scheme as a whole now does not.

Graduated licensing law with nighttime restrictions and zero tolerance. Although the state has a graduated licensing system in place and an absolute zero tolerance law (rather than the federally required 0.02 BAC), Alaska's system does not satisfy the federal requirements in the following ways:

- Program eligibility requires that all occupants must be properly restrained. Alaska law refers only to proper restraint of children under the age of 16.[6]

- Program eligibility requires that, absent a state-approved exception, a person authorized to drive under a learner's permit or an intermediate driver's license may not drive during some period of the night unless a licensed driver who is 21 years of age or older is in the vehicle. Alaska law has no nighttime restriction.[7]

- Program eligibility requires that holders of learner's permits and intermediate licenses must remain crash and conviction free. In addition to the revocation provisions noted above, Alaska law addresses license revocation for minors between the ages of 13 and 17 who are convicted of or adjudicated as delinquent for misconduct involving a controlled substance, or for offenses involving the illegal use or possession of a firearm.[8]

Program targeting drivers with high BAC (a system of graduated sanctions for DWI offenders with higher than average BAC).

In regard to basic grant B, according to Ms. Moran, the state is close to qualifying for both criteria. She notes, however, that applying for and monitoring either of the Section 410 grant possibilities require a substantial amount of effort. Even if the state could qualify today, she concludes, she would not apply because she lacks sufficient staff to handle the paperwork.

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[4] Testing the BAC of all drivers involved in crashes that result in fatalities—regardless of whether the drivers survive—would provide highly useful data, according to Ms. Moran.

[5] AS 28.15.183(d), Administrative Revocation of License to Drive; changed by Chapter 88, SLA 1999.

[6] AS 28.05.095, Use of Seat Belt and Child Safety Devices Required.

[7] AS 28.15.051-055, Instruction Permits and Provisional Driver's License.

[8] AS 28.15.185, Court Revocation of a Minor's License to Drive.

INCENTIVE GRANT—0.08 BAC (SECTION 163)

Along with the reauthorization of Section 410 funding, Congress authorized a new incentive program under Section 163.[9] Section 163 provides a total of $500 million in incentive grant funds for states that enact and enforce laws providing that any person with a BAC of 0.08 percent or greater while operating a motor vehicle will be deemed to have committed a *per se* offense of driving while intoxicated. These funds may be used for highway safety or highway construction—any project eligible for assistance under Title 23 U.S.C. No matching state dollars are required. Program particulars follow.[10]

Section 163 Eligibility: Any state that has in effect and is enforcing a 0.08 BAC law, before the end of the fiscal year, is eligible to receive incentive funds for that fiscal year. To be eligible, a state's law must meet six basic elements:

- It must apply to all drivers;
- It must set a BAC level of no more than 0.08;
- It must establish driving at 0.08 BAC as an offense that is illegal *per se*;
- It must provide for primary enforcement of the law (rather than requiring probable cause that another violation has been committed before allowing enforcement of the 0.08 BAC law);
- It must apply to the criminal code and, in states with administrative license revocation (ALR) laws, to the ALR law as well; and
- It must be deemed to be equivalent to the state's standard DWI offense.

Distribution of Funds: Available funding each year is apportioned among all eligible states. According to the Section 402 formula—

- 75 % based on the ratio of the state's population in the latest federal census to the total population in all states.
- 25 % based on the ratio of the public road miles in the state to the total public road miles in all states.

The apportionment to each state is no less than one-half of one percent.

Program Administration: The federal share of a project funded under Section 163 is 100 percent. States may use Section 163 grant funds for any project eligible for federal funding under Title 23.

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[9] 23 USC 163, Safety Incentives to Prevent Operation of Motor Vehicles by Intoxicated Persons.

[10] Federal Highway Administration, "TEA-21 Fact Sheet: Safety Incentives to Prevent Operation of Motor Vehicles by Intoxicated Persons," September 14, 1998; available at *http://www.fhwa.dot.gov/tea21/factsheets/n_163.htm* (accessed 10/10/2000).

Because Alaska's BAC standard is 0.10 percent, Alaska has not qualified for Section 163 incentive funding. Had Alaska lawmakers lowered the BAC limit to 0.08 and had that law been in effect before the end of 1998, Alaska would have received approximately $762,500 for that year. Had the state qualified in 1999 or 2000, the funding received would have been approximately the same. As Ms. Moran notes, although federal authorization for the program has increased slightly each year, the number of states that qualify has also increased. Nevertheless, at this point, the state has foregone roughly $2.3 million in funding that could have been used for any project eligible for assistance under Title 23. If the state certifies with the U.S. Department of Transportation before the end of September, 2001, that Alaska has enacted and is enforcing a conforming law, Alaska could receive an estimated $700,000 to $800,000 a year in Section 163 funds for federal fiscal years 2001 through 2003.[11]

TRANSFER PROGRAMS—OPEN CONTAINER (SECTIONS 154) AND REPEAT OFFENDER (SECTION 164)

In addition to the incentive funding programs, Congress authorized two new programs in which a percentage of a state's highway construction funds (National Highway System, Surface Transportation Program, and Interstate Maintenance) will be transferred to its highway safety program if that state has not enacted or does not enforce specific provisions to counter alcohol-impaired driving by October 1, 2000.[12] These programs have identical funding consequences. The penalty for each is transfer of 1.5 percent of a state's construction funds for FY 2001 and 2002, and 3 percent for each year thereafter. The funds transferred to the safety program must be used for alcohol-impaired driving countermeasures, for DWI law enforcement, or for hazard elimination programs. Projects funded with the transferred funds do not require state matching funds.

SECTION 154—OPEN CONTAINER REQUIREMENTS

For the purposes of Section 154, a state must have in effect a law that prohibits the possession of any open alcoholic beverage container, or the consumption of any alcoholic beverage, in the passenger area of any motor vehicle on a public highway or the right-of-way of a public highway in the state.[13]

U.S. Department of Transportation officials deem Alaska's open container law as nonconforming because of ambiguous wording in regard to motor cycles. The problematic portion of AS 28.35.029 reads as follows:

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

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[11] Mary Moran, director, Alaska Highway Safety Office, (907) 465-4374.

[12] 23 USC 154. Open Container Requirements; and 23 USC 164, Minimum Penalties for Repeat Offenders for DWI or DUI.

[13] Federal Highway Administration, "TEA-21 Fact Sheet: Open Container Requirements," September 14, 1998; available at *http://www.fhwa.dot.gov/tea21/factsheets/n_154.htm* (accessed 10/25/2000).

(1) in the trunk of a motor vehicle;

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

State officials have attempted to persuade federal officials that the provision was intended to mean—and is enforced as meaning—that a person may transport an open bottle on a motor cycle only if it is enclosed within another container. Federal officials maintain, however, that the provision could be interpreted to mean that a person may transport an open bottle on a motor cycle. Under this view, the phrase "if the open bottle . . . is enclosed . ." could have been intended—and could be interpreted—to refer to "motor home, station wagon, hatchback, or similar trunkless vehicle" without also referring to "motor cycle." As a result, federal officials conclude that Alaska law does not meet Section 154 requirements.

SECTION 164—MINIMUM PENALTIES FOR REPEAT DWI OFFENDERS

To meet the requirements of Section 164, a state must have in effect a law that provides, as a minimum penalty, that an individual convicted of a second or subsequent DWI offense shall be subject to the following penalties.[14]

- License suspension for not less than one year;
- Impoundment or immobilization of each of the individual's motor vehicles, or installation of an ignition interlock system on each of the individual's motor vehicles;
- Assessment of the individual's degree of alcohol abuse and treatment as appropriate; and
- Receiving, for a 2nd offense, assignment of not less than 30 days community service, or not less than 5 days imprisonment; and for a 3rd or subsequent offense, an assignment of not less than 60 days of community service, or not less than 10 days imprisonment.

Alaska's statutory provisions meet Section 164 requirements except in regard to impoundment and immobilization of a repeat offender's vehicles and the installation of ignition interlock devices. Alaska law provides that the state may order the forfeiture of a vehicle involved in a DWI offense, but forfeiture is not mandatory, and it applies only in third or subsequent offences. Further, the sanction applies only to the vehicle used in the offense, rather than to all vehicles owned by the offender.[15] As with vehicle forfeiture, the installation of ignition interlock devices is authorized but not mandatory and would not be required in all vehicles owned by an offender. Additionally, installation of such devices applies only in cases wherein the offender receives probation.[16]

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[14] Federal Highway Administration, "TEA-21 Fact Sheet: Minimum Penalties for Repeat Offenders for DWI or DUI," September 14, 1998; available at *http://www.fhwa.dot.gov/tea21/factsheets/n_164.htm* (accessed 10/10/2000).

[15] AS 28.35.036, Forfeiture of Vehicle or Aircraft.

[16] AS 12.55.102, Alcohol Related Offenses.

As noted earlier, in order to avoid transfer of highway construction funds, states must have met the requirements by October 1, 2000, the beginning of federal fiscal year 2001. As a result of not meeting the requirements for Sections 154 and 164, a total of approximately $5.2 million in funds that would have gone for highway construction in Alaska will be transferred to the state's safety program. The same percentage will be transferred for fiscal year 2002 if the state has not complied with the federal provisions; the transferred amounts double to three percent for fiscal years 2003 and each year thereafter that the state has not complied.

SANCTION--0.08 BAC [SECTION 163(A)]

As you know, on October 23, 2000, President Clinton signed into law a national standard for drunk driving. The act requires states to implement laws providing that any person driving with a blood alcohol concentration of 0.08 percent or greater is deemed to have committed a *per se* offense of driving while intoxicated. Currently, 31 states, including Alaska, define *per se* drunken driving at 0.10 percent BAC.

Under the act, states have until October 1, 2003, to pass a 0.08 BAC *per se* law. Those that do not will face the withholding of 2 percent of their highway construction funds in federal fiscal year 2004, with the penalty increasing by an additional 2 percent each year for a total of 8 percent in FY 2007. States that implement the standard by 2007 will recoup the withheld funding. Based on estimated FY 2003 apportionments, the U.S. Department of Transportation foresees the possibility of up to approximately $36 million withheld from Alaska by the end of FY 2007 if the state does not pass a conforming BAC law.

We consolidate data and information on each of the TEA-21alcohol-related programs—incentives, transfers, and sanctions—in Table One, "Federal Highway Funding and Alcohol Related Program."

I hope this information is useful to you. Please do not hesitate to contact us if you have questions or need additional information.

Table One: Federal Highway Funding and Alcohol-Related Programs

(dollars in thousands)

Programs	Fiscal Year						Comments
	1998	1999	2000	2001	2002	2003	
Section 410 DWI Countermeasures Incentive Grants	200 [a]	127 [b]	no estimate	no estimate	no estimate	no estimate	Congress amended eligibility requirements beginning in FY 1999; as a result, Alaska no longer qualifies. The federal share decreases from 75% in the 1st and 2nd years a state receives a Section 410 grant, to 50% in the 3rd and 4th years, and 25% in the 5th and 6th years. States may use Section 410 grant funds only to implement and enforce impaired driving programs.
Section 163 0.08 BAC Incentive Grants	762 [b]	762 [b]	762 [b]	700-800 [c]	700-800 [c]	700-800 [c]	As a result of not having a 0.08 BAC law in effect, Alaska has forgone approximately $2.3 million in Section 163 grant funds between FY 1998 and FY 2000. A similar amount could be gained or forgone through FY 2003. States may use Section 163 funds for any project eligible for federal assistance under Title 23.
Section 154 Open Container Transfer	not applicable	not applicable	not applicable	2,581 [d]	2,581 [e]	5,162 [e]	Federal officials deem Alaska's open container law to be nonconforming because of ambiguous wording. On October 1, 2000, therefore, an amount equal to 1.5% of the funds apportioned to Alaska for NHS, STP, and IM is to be transferred to the Highway Safety Program. As similar amount will be transferred if the state's law does not conform at the beginning of federal FY 2002; the transferred amount increases to 3% for FY 2003 and thereafter. Section 154 transferred funds must be used for DWI countermeasures, enforcement of DWI and related laws, or for hazard elimination.
Section 164 Repeat Offender Transfer	not applicable	not applicable	not applicable	2,581 [d]	2,581 [e]	5,162 [e]	Alaska's minimum penalties for repeat DWI offenders does not comply with federal requirements because forfeiture of vehicles or the installation of ignition interlock devices is not mandatory and because such provisions do not apply to all vehicles owned by the offender. Transfer of funds is identical to that under Section 154--1.5% of NHS, STP, and IM funding for states out of compliance in FY 2001 and FY 2002; 3% thereafter. Section 164 transferred funds must be used for alcohol-impaired driving countermeasures or enforcement of DWI and related laws.

	Fiscal Year						Comments
	2004	2005	2006	2007	2008	2009	
Section 163(a) Sanction	3,581 [f]	7,162 [f]	10,743 [f]	14,324 [f]	14,324 [f]	14,324 [f]	States that have not complied with the 0.08 BAC standard by October 1, 2003, will have 2% of their federal apportionment withheld. The withheld amount will increase by 2% each year until reaching 8% for FY 2007 and thereafter. States that implement a conforming law before the end of FY 2007 will recoup the withheld funds.

Notes and Sources:

(a) Funding Alaska received. National Highway Safety Administration, "FY 1998 Section 410 Grant"; available at *http://www.nhtsa.dot.gov/nhtsa/whatsup/tea21/tea21programs/410$.98.html* (accessed 11/17/2000).

(b) Funding Alaska did not receive. Estimate provided by Mary Moran, director, Alaska Highway Safety Office, (907) 465-4374.

(c) Funding Alaska could receive if laws conforming to federal requirements are enacted and enforced. Estimate provided by Mary Moran.

(d) Funding already transferred from highway construction (National Highway System, Surface Transportation Program, and Interstate Maintenance) to the Alaska Highway Safety Office. Federal Highway Administration, "Transfers Pursuant to 23 USC 154 (Open Container Requirements)"; available at *http://www.nhtsa.dot.gov/nhtsa/whatsup/tea21/tea21programs/154.html* and *http://www.nhtsa.dot.gov/nhtsa/whatsup/tea21/tea21programs/164.html* (accessed 11/26/2000).

(e) Funding that will be tranferred from highway construction to the Alaska Highway Safety Office unless laws conforming to federal requiremins are enacted and enforced. Estimates provided by Mary Moran.

(f) Funding that will be withheld from Alaska's highway apportionment if the state does not have a 0.08 BAC law in force by October 1, 2003; based on estimated FY 2003 apportionment, after distribution of minimum guarantee funds, and calculating penalties of 2% in FY 2004, and an additional 2% each year up to 8% in FY 2007 and thereafter. Withheld funding can be recouped if the state passes a conforming law by the end of FY 2007. Federal Highway Administration, "Annual Core Apportionments and Potential Penalties Under Sec. 163(a) for FY 2004 and Thereafter"; available at *http://www.nhtsa.dot.gov/nhtsa/whatsup/tea21/tea21programs/08$_SANCTION.html* (accessed 11/9/2000).

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106TH CONGRESS
2D SESSION

H. R. 5394

Making appropriations for the Department of Transportation and related agencies for the fiscal year ending September 30, 2001, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

OCTOBER 5, 2000

Mr. WOLF introduced the following bill; which was referred to the Committee on Appropriations

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A BILL

Making appropriations for the Department of Transportation and related agencies for the fiscal year ending September 30, 2001, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for the Department of Transportation and related agencies for the fiscal year ending September 30, 2001, and for other purposes, namely:

TITLE I

DEPARTMENT OF TRANSPORTATION

OFFICE OF THE SECRETARY

SALARIES AND EXPENSES

For necessary expenses of the Office of the Secretary, $63,245,000: *Provided*, That not more than 52 percent of the funds made available under this heading shall be obligated and not more than 224 full time equivalent staff years funded through the end of the second quarter of fiscal year 2001: *Provided further*, That funds in excess of 52 percent and 224 full time equivalent staff years shall be available only if the Secretary transmits a request to the House and Senate Committees on Appropriations for these additional funds: *Provided further*, That not to exceed $60,000 for allocation within the Department for official reception and representation expenses as the Secretary may determine: *Provided further*, That not more than $15,000 of the official reception and representation funds shall be available for obligation prior to January 20, 2001.

OFFICE OF CIVIL RIGHTS

For necessary expenses of the Office of Civil Rights, $8,140,000.

That all information submitted in such reports shall be current as of the last day of the preceding quarter.

SEC. 351. Notwithstanding any other provision of law, beginning in fiscal year 2004, the Secretary shall withhold 2 percent of the amount required to be apportioned for Federal-aid highways to any State under each of paragraphs (1), (3), and (4) of section 104(b) of title 23, United States Code, if a State has not enacted and is not enforcing a provision described in section 163(a) of chapter 1 of title 23, United States Code, in fiscal year 2005, the Secretary shall withhold 4 percent of the amount required to be apportioned for Federal-aid highways to any State under each of paragraphs (1), (3), and (4) of section 104(b) of title 23, United States Code, if a State has not enacted and is not enforcing a provision described in section 163(a) of title 23, United States Code; in fiscal year 2006, the Secretary shall withhold 6 percent of the amount required to be apportioned for Federal-aid highways to any State under each of paragraphs (1), (3), and (4) of section 104(b) of title 23, United States Code, if a State has not enacted and is not enforcing a provision described in section 163(a) of title 23, United States Code; and beginning in fiscal year 2007, and in each fiscal year thereafter, the Secretary shall withhold 8 percent of the amount required to be apportioned for Federal-aid high-

c.t. 2003

ways to any State under each of paragraphs (1), (3), and (4) of section 104(b) of title 23, United States Code, if a State has not enacted and is not enforcing a provision described in section 163(a) of title 23, United States Code. If within four years from the date the apportionment for any State is reduced in accordance with this section the Secretary determines that such State has enacted and is enforcing a provision described in section 163(a) of chapter 1 of title 23, United States Code, the apportionment of such State shall be increased by an amount equal to such reduction. If at the end of such four-year period, any State has not enacted and is not enforcing a provision described in section 163(a) of title 23, United States Code, any amounts so withheld shall lapse.

SEC. 352. (a) IN GENERAL.—Notwithstanding any other provision of law, including the Surplus Property Act of 1944 (58 Stat. 765, chapter 479; 50 U.S.C. App. 1622 et seq.), the Secretary of Transportation (or the appropriate Federal officer) may waive, without charge, any of the terms contained in any deed of conveyance described in subsection (b) that restrict the use of any land described in such a deed that, as of the date of enactment of this Act, is not being used for the operation of an airport or for air traffic. A waiver made under the preceding

not protect the scenic, historical, recreational, cultural, natural, and archaeological integrity of a highway and adjacent areas.

(e) Savings clause. The Secretary shall not withhold any grant or impose any requirement on a State as a condition of providing a grant or technical assistance for any scenic byway unless the requirement is consistent with the authority provided in this chapter [23 USCS §§ 101 et seq.].

(f) Federal share. The Federal share of the cost of carrying out a project under this section shall be 100 percent, except that, in the case of any scenic byway project along a public road that provides access to or within Federal or Indian land, a Federal land management agency may use funds authorized for use by the agency as the non-Federal share.

(Added June 9, 1998, P. L. 105-178, Title I, Subtitle B, § 1219(a), 112 Stat. 219.)

§ 163. Safety incentives to prevent operation of motor vehicles by intoxicated persons

(a) General authority. The Secretary shall make a grant, in accordance with this section, to any State that has enacted and is enforcing a law that provides that any person with a blood alcohol concentration of 0.08 percent or greater while operating a motor vehicle in the State shall be deemed to have committed a per se offense of driving while intoxicated (or an equivalent per se offense).

(b) Grants. For each fiscal year, funds authorized to carry out this section shall be apportioned to each State that has enacted and is enforcing a law meeting the requirements of subsection (a) in an amount determined by multiplying—

(1) the amount authorized to carry out this section for the fiscal year; by

(2) the ratio that the amount of funds apportioned to each such State under section 402 for such fiscal year bears to the total amount of funds apportioned to all such States under section 402 for such fiscal year.

(c) Use of grants. A State may obligate funds apportioned under subsection (b) for any project eligible for assistance under this title.

(d) Federal share. The Federal share of the cost of a project funded under this section shall be 100 percent.

(e) Authorization of appropriations. (1) In general. There are authorized to be appropriated out of the Highway Trust Fund (other than the Mass Transit Account) to carry out this section $55,000,000 for fiscal year 1998, $65,000,000 for fiscal year 1999, $80,000,000 for fiscal year 2000, $90,000,000 for fiscal year 2001, $100,000,000 for fiscal year 2002, and $110,000,000 for fiscal year 2003.

(2) Availability of funds. Notwithstanding section 118(b)(2), the funds authorized by this subsection shall remain available until expended.

(Added June 9, 1998, P. L. 105-178, Title I, Subtitle D, § 1404(a), 112 Stat. 240.)

§ 164. Minimum penalties for repeat offenders for driving while intoxicated or driving under the influence

(a) Definitions. In this section, the following definitions apply:

(1) Alcohol concentration. The term "alcohol concentration" means grams of alcohol per 100 milliliters of blood or grams of alcohol per 210 liters of breath.

(2) Driving while intoxicated; driving under the influence. The terms "driving while intoxicated" and "driving under the influence" mean driving or being in actual physical control of a motor vehicle while having an alcohol concentration above the permitted limit as established by each State.

(3) License suspension. The term "license suspension" means the suspension of all driving privileges.

(4) Motor vehicle. The term "motor vehicle" means a vehicle driven or drawn by mechanical power and manufactured primarily for use on public highways, but does not include a vehicle operated solely on a rail line or a commercial vehicle.

(5) Repeat intoxicated driver law. The term "repeat intoxicated driver law" means a State law that provides, as a minimum penalty, that an individual convicted of a second or subsequent offense for driving while intoxicated or driving under the influence after a previous conviction for that offense shall—

(A) receive a driver's license suspension for not less than 1 year;

(B) be subject to the impoundment or immobilization of each of the individual's motor vehicles or the installation of an ignition interlock system on each of the motor vehicles;

(C) receive an assessment of the individual's degree of abuse of alcohol and treatment as appropriate; and

(D) receive—

(i) in the case of the second offense—

(I) an assignment of not less than 30 days of community service; or

From DOT.

Responses to Statements Regarding .08 BAC Laws

Statement: Most state legislatures have looked at the research evidence and have concluded that .08 laws are not effective. In New Jersey, for example, a Task Force concluded that there is no evidence that .08 laws result in reductions in alcohol-related fatalities.

Response: The research with regard to the effectiveness of .08 BAC laws is consistent and persuasive. At least eight studies have indicated that these laws are associated with reductions in alcohol-related crashes, fatalities, and injuries, particularly in conjunction with administrative license revocation (ALR) laws.

The New Jersey Task Force reviewed only four early studies of the effects of .08 BAC laws and concluded that the results were "mixed." Since that time, four additional comprehensive studies have been conducted. Together with the four original studies, these studies provide consistent and even more persuasive evidence of the effectiveness of .08 BAC laws, both alone and in conjunction with other laws and activities.

A 1999 GAO review of seven of these eight studies concluded that there are "*strong indications that .08 BAC laws in combination with other drunk driving laws ... can save lives*" (p2). GAO also stated that "*.. we and DOT reach essentially the same conclusion regarding the effectiveness of .08 BAC laws, both by themselves and in combination with other measures*" (p24).

While the studies of effectiveness have been persuasive, effectiveness is not the primary basis for supporting a .08 BAC law. **The primary reasons for supporting such a law are that, at .08 BAC, virtually everyone is impaired in important skills related to driving and their risk of being involved in a fatal crash is greatly increased.** Several states have recognized this. In New Mexico, for example, a State Task Force carefully reviewed only the evidence of impairment and crash risk at .08 BAC. Following this review, New Mexico chose to enact a .08 BAC law.

Statement: The Government Accounting Office (GAO) has recently conducted a critical review of the .08 studies and has concluded that these laws are not effective in reducing alcohol-related fatalities.

Response: This statement is not correct! The GAO report stated that there are "*strong indications that .08 BAC laws in combination with other drunk driving laws (particularly license revocation laws), sustained public education and information efforts, and vigorous and consistent enforcement can save lives*" (p2).

Statement: The GAO study concluded that "the evidence does not conclusively establish that

.08 laws, by themselves, result in reductions in the number and severity of alcohol-related crashes.

Response: No research is ever conclusive in an "unequivocal" sense. Neither are laws ever implemented "by themselves." The combination of strong laws, highly visible enforcement, and strong public information is the key to reducing alcohol-related fatalities. NHTSA has maintained that the evidence of the effectiveness of .08 BAC laws is consistent and persuasive, particularly in conjunction with the administrative license revocation (ALR) laws, already enacted in 40 states.

The GAO report confirms this relationship and further states that *"although we characterize the strength of the study results differently, we and DOT reach essentially the same conclusion regarding the effectiveness of .08 BAC laws, both by themselves and in combination with other measures"* (p24).

Statement: We keep hearing that enactment of .08 BAC laws in all states would result in 500 lives being saved every year. The GAO report looked at the study that made this estimate and found it to be groundless.

Response: At the time of the GAO study, two studies had independently formulated estimates of lives saved. A Boston University study estimated that 500-600 additional lives would be saved if all states adopted .08 BAC laws. An NHTSA (50-state) study used a more detailed analysis and estimated that 590 lives would be saved -- a very similar estimate. While GAO criticized the Boston University Study for not describing how it arrived at its estimate, GAO did not criticize the elaborate and detailed methodology of the NHTSA 50-state study.

Further, a new Boston University study was recently published. This study evaluated the effectiveness of .08 BAC laws enacted in six states in 1993 and 1994 and concluded that, overall, these states experienced a 5-6 percent greater decline in measures of alcohol-related crashes, compared with six nearby states that did not lower their BAC limits. This study estimated that, if all states adopted a .08 BAC law, 400-500 fewer fatalities would occur annually.

Advocates of .08 BAC laws have used the mid-point of these three estimates and have projected that, if all states were to adopt .08 BAC laws, an additional 500 lives would be saved each year. This estimate of 500 lives saved is well within the confidence boundaries of all of the estimates made to date.

Statement: .08 BAC laws make criminals out of normal social drinkers.

Response: Impairment and crash risk are the issues - not how many drinks it may take to get to .08 BAC. Scores of studies have been conducted which indicate that, at .08 BAC virtually everyone is impaired in important skills related to driving and that, at that level, the risk of being involved in a fatal crash is many times greater than at .00 BAC.

Statement: ".08 BAC legislation will not affect problem drinker drivers who have high BAC levels."

Response: The research shows that .08 laws not only reduce the incidence of impaired driving at lower BACs, they also reduce the incidence of impaired driving at higher BACs (i.e., over .10). A .08 law serves as a general deterrent to drinking and driving. It sends a message that the state is getting tougher on impaired driving, and it makes many people think twice about getting behind the wheel after they've had too much to drink. A .08 BAC law is a key component of an overall program to reduce impaired driving. While problem drinkers do account for a significant part of the problem, most fatally injured drinking drivers (70-80%) have no prior alcohol-related offenses.

A comprehensive anti-DWI program must use all available laws and programs to reduce fatalities.

Statement: ".08 is just the first step toward even lower BACs and eventually another attempt at prohibition."

Response: The notion that safety organizations seek a return to prohibition is unfounded. Although there is strong research evidence that driving-related skills begin to deteriorate below .08 BAC, most safety advocates have adopted .08 BAC as a reasonable and acceptable compromise that will save lives, prevent injuries and reduce costs to society.

US DEPARTMENT OF TRANSPORTATION
FEDERAL HIGHWAY ADMINISTRATION
ANNUAL CORE APPORTIONMENTS AND POTENTIAL PENALTIES UNDER SEC. 163(a)
FOR FY 2004 AND THEREAFTER*
(Assuming Various Rates of Penalty)

State	IM / STP / NHS Total	.08 BAC adopted as Legal Standard	2% Penalty	4% Penalty	6% Penalty	8% Penalty
Alaska	**179,048,339**	-	**3,580,967**	**7,161,934**	**10,742,900**	**14,323,867**
Washington	297,631,829	X	0	0	0	0
Oregon	221,819,579	X	0	0	0	0
Idaho	140,668,319	X	0	0	0	0
Wyoming	156,383,521	-	3,127,670	6,255,341	9,383,011	12,510,682

- Based on estimated FY 2003 apportionments, after distribution of Minimum Guarantee funds

Alaska Highway Safety Office, ADOT&PF 01/01

Web posted **Friday, April 21, 2000**

Two die in 2-car wreck

By McKIBBEN JACKINSKY
Peninsula Clarion

A two-vehicle accident at Mile 37.5 of the Seward Highway, just north of the Sterling Highway cutoff, claimed the lives of two men and injured two others on Wednesday.

Killed were Martin John Richard, 50, and Ladd E. Macaulay, 57, both of Juneau.

Injured were Steven Gregory McGee, 49, also of Juneau, and Michael J. Glaser, 43, of Crown Point.

Alaska State Troopers reported that shortly after 4 p.m., Glaser was drivir[illegible] older model Chevrolet crew cab southbound on the Seward Highw[illegible]. The pickup crossed the center line, striking a northbound Toyota Camry head on.

The pickup then rolled on its side, trapping Glaser, the sole occupant.

The Toyota, a rental vehicle, hit the side of the surrounding mountain, trapping the three occupants, Richard, Macaulay and McGee.

Richard, who had been driving the Toyota, and Macaulay, the backseat passenger. were pronounced dead at the scene.

McGee and Glaser were transported to Central Peninsula General H[illegible]pital.

Richard had served as director of Alaska's Division of Invest-ments since 1986 and was a 21-year state employee. He was married to Barbara J. "Jill" Richard, a nurse. The two had no children.

Macaulay was a loan officer with the Division of Investments and previously served as director of the Douglas Island Pink and Chum fish hatchery in the Juneau area.

He is survived by his wife, Linda, a state employee, and two sons and two daughters.

According to a press release from Gov. Tony Knowles, Martin, Macaulay and McGee had been inspecting hatcheries on the Kenai Peninsula. They were returning to Anchorage at the time of the accident.

McGee, a biologist, has been with Alaska's Department of Fish and Game for 17 years. His wife, Bonnie, is a teacher at Floyd Dryden Middle School in Juneau. They have two children.

Bonnie Nichols, a spokesperson for Central Peninsula General Hospital, reported that McGee had suffered broken facial bones, contusions and bruises. Information on **Glaser**'s injuries was unavailable.

Nichols said both McGee and **Glaser** were in fair condition.

"We reach out with our sympathies and condolences to the family and friends of Martin Richard and Ladd Macaulay, two dedicated state employees who enriched the state through their public service, their commitment to their families, their love of Alaska, and numerous other personal contributions," said Knowles in a press release on Thursday. He ordered state flags be lowered to half-staff.

Rep. Gail Phillips, R-Homer, worked with Richard on financing issues for limited entry fishery programs and boat loans.

"The state of Alaska suffered a tragedy ... with the senseless loss of two longtime, well-respected state employees," said Phillips. "(Their deaths) will have a profound impact on the Department of Commerce.

"My deepest sympathy and condolences go to both families and friends," Phillips said. "Our prayers and hopes are for the speedy recovery for Fish and Game employee Steven McGee, who was also seriously injured in this tragedy."

Sen. Jerry Ward, R-Anchorage, said the Senate remembered Richard and Macaulay with a moment of silence on Thursday.

"Everybody is really quite devastated about this," said Ward. "My prayers and wishes go out to (their families)."

Greg Wilkinson, information officer for the Alaska State Troopers, said alcohol is being investigated as a contributing factor of the accident. The troopers are asking for anyone who may have witnessed either the pickup truck or the Toyota to contact the troopers in Soldotna, at 262-4453, or Seward, at 224-3346.

The Chevrolet crew cab was described by Wilkinson as yellow, but rusty

and dirty. **Glaser**, the driver of the pickup, may have picked up a hitchhiker at some point on his drive. Troopers would like to contact that person, as well.

Wilkinson described the Toyota Camry as a late model four-door, brown in color.

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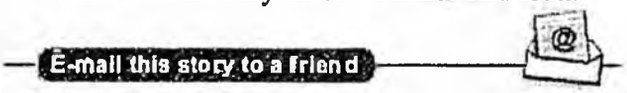

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Web posted **Tuesday, May 2, 2000**

Troopers arrest man charged in double-fatal accident

ANCHORAGE (AP) -- Alaska State Troopers on Monday arrested a man charged with two counts of second-degree murder resulting from an accident on the Seward Highway.

Michael J. **Glaser**, 43, is charged with the deaths of Martin John Richard, 50, of Juneau, and Ladd E. Macaulay, 57, of Juneau. He also is charged with one count of assault for causing injuries to Steven Gregory Mcgee, 49, of Juneau.

An investigation determined that **Glaser**'s blood alcohol following the April 19 crash was .258, more than two-and-half times above the legal driving limit of .10.

Glaser was arrested Monday morning after being released from Alaska Regional Hospital. A Kenai grand jury issued a $75,000 cash only bail warrant on Friday. **Glaser** was being held at Cook Inlet Pre-Trial Facility.

Glaser was driving a pick-up truck when it crossed the center line at milepost 37.5 of the Seward Highway. The truck struck a car, killing Richard and Macaulay. McGee was injured. **Glaser** also was hospitalized.

If convicted, **Glaser** could be sentenced up to 99 years for each second-degree murder charge and 20 years for first-degree assault.

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Anchorage Daily News

3RD WRECK PINNED ON BOOZE

WOMAN CRITICALLY HURT; CRASH HIGHLIGHTS DWI ISSUE

By Larry Campbell And Lisa Demer
Daily News Reporters

(Published July 6, 2000)

A young Anchorage woman was hospitalized in critical condition Wednesday following the third collision in the past two weeks involving drunken driving suspects with previous DWI convictions.

Gloria B. Steelman, 19, suffered massive head injuries when the Ford Escort in which she was riding collided with a pickup headed the wrong way on Northern Lights Boulevard early Wednesday morning. Steelman, an East High graduate, was in intensive care Wednesday at Alaska Regional Hospital. The Escort's driver, Jacqueline Fetherolf, 20, a Chugiak High graduate and University of Alaska Anchorage student, was listed in stable condition with less severe injuries at Providence Alaska Medical Center.

Police charged the pickup driver, Albert T. Bowman, 48, with two counts of first-degree assault, driving while intoxicated and driving with a revoked license. He was held at Cook Inlet Pre-Trial Facility in lieu of $80,000 bail.

Witnesses said Bowman turned east off the Seward Highway into the oncoming traffic lanes of Northern Lights shortly after midnight Tuesday. At the same time, Steelman and Fetherolf were headed west to the Village Inn restaurant, according to a friend following in another car.

The truck and Escort collided nearly head-on. Another vehicle traveling west behind the Escort also hit the compact car.

The crash was the third alcohol-related tragedy in the past two weeks.

Monday night Jessie Withrow, a college student home for the summer, was struck by a pickup while riding her bicycle on a sidewalk along Minnesota Drive and West Northern Lights Boulevard. She died the next afternoon at Providence. Russell D. Carlson, 39, was charged with manslaughter, driving while intoxicated, driving with a revoked license and child endangerment for having two children in the truck with him, including a 2-year-old.

And on June 24, 69-year-old Donna Hobson suffered broken bones and internal injuries when she was knocked down by a pickup that careered onto the bike trail on which she was walking in South Anchorage. Charged with first-degree assault, leaving the scene of an accident and drunken driving was Alfred W. Meyer, 36. Blood tests show his alcohol level at 0.22, more than twice the 0.10 level considered too drunk to drive, police said.

Despite passage in recent years of more stringent drunken driving laws, state justice officials say chronic

drinkers remain on the street. And the law allows it. The same thing is happening across the nation, according to the National Transportation Safety Board, which last month released a report on the problem of chronic drunken drivers.

Current law jacks up jail time with every DWI conviction - three days on the first conviction, 20 days on the second, 60 days on the third and at least 360 days for five or more. Under a provision added in 1995, those who rack up three or more convictions in a five-year period can get even more time.

But court records show that with each of the three men currently charged, their DWI convictions never amassed to the critical point in any five-year span since the 1995 provision was added. And even if they had, the minimum sentence for any number of DWI convictions, within five years or not, is 360 days.

Bowman has been convicted of five previous DWIs, all more than a decade ago. His most recent conviction was in 1990. He received two months in jail, was ordered to spend up to 90 days in a residential alcohol treatment program, and lost his driver's license for 10 years.

Carlson's criminal history includes 19 criminal convictions stretching back to 1979 and includes seven drunken driving convictions as well as convictions for negligent driving and reckless driving.

At the time of Monday's wreck, he was on probation for a 1998 DWI and his driver's license was revoked. At his October 1998 sentencing, prosecutor Ben Walters warned: "This man, unless he changes his ways, is going to kill himself or someone else pretty soon."

At sentencing, District Court Judge Natalie Finn said because most of the prior DWIs occurred years earlier, the sentence was fair: six months in jail, $3,000 in fines, five years' probation, alcohol treatment, and the loss of his driver's license for another year. It was already revoked until 2006.

Carlson also has two pending child abuse cases against him from May and June. In both cases, police said he was intoxicated and unable to care for young children in his charge, including his 5-month-old son. Police who visited his home on June 1 found him on the couch with a bottle of vanilla extract, the baby screaming in a crib and a 2-year-old and 4-year-old hungry and running about the house, according to a charging document.

In 1990, Meyer was convicted of drunken driving and sentenced to five days in jail after an accident in Anchorage. He lost his license for 90 days. In 1991, he was convicted again after police found his truck stuck in a snowbank. He received 20 days in jail, lost his license for a year and was ordered to complete an alcohol treatment program.

Even when offenders are sentenced, they don't always spend the time in jail, said John Novak, chief assistant district attorney in Anchorage. Increasingly in recent years, defendants have been able to substitute time spent in alcohol treatment programs for time behind bars, Novak said. And the time in a treatment program can count even if it's done before a defendant is sentenced.

"That's what we're commonly seeing now," Novak said. "And it's frustrating. Jail time and treatment time are becoming confused."

People who work with criminals and alcohol problems say the specter of drunken driving has fallen out of general public consciousness in recent years. A spate of concentrated attention by lawmakers, police and citizens groups in the mid- and late-1980s helped reduce some of the problem.

But what remains are the chronics, the ones who keep getting behind the wheel after a judge has told them

not to.

In May a small group pulled together, made up of state social service workers, Mothers Against Drunk Driving, the state Alcohol Safety Action Program, churches and other interested people. The goal was to take the drunken driving problem from obscurity to the forefront again.

"We've realized this for a long time that there's a part of the problem that's not getting the attention it needs," said Linda Hornstein, MADD president. "People have got to start realizing that anytime they're on the street, this kind of thing could happen to them."

Reporters Larry Campbell and Lisa Demer can be reached at lcampbell@adn.com and ldemer@adn.com. Daily News reporter Mike Hinman contributed to this story.

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Accused drunken driver charged

JO C. GOODE / *The Frontiersman* / July 25, 2000
Email this story.

ANCHORAGE An Anchorage man accused of killing a Palmer boy and his cousin, and injuring their grandparents while driving drunk near Portage, was arraigned Friday on manslaughter charges in Anchorage District Court.

Robert Richardson, 35, was arrested after his release Thursday from Alaska Regional Hospital, where he hao been treated for a ruptured aorta, severed fingertip and a broken leg injuries he sustained in the July 12 crash that killed Kenneth Kramer, 11, of Palmer, and his cousin, Kevin Blake, 15, of Tatitlek.

Alaska State Troopers say the boys died shortly before 5 p.m. July 12 after an intoxicated Richardson crossed the center line on Portage Valley Road in his Ford F-150 and smashed into the drivers side of a compact Ford Aspire which Blake was driving.

Blake, who was driving with a learners permit, apparently swerved to avoid Richardsons oncoming truck, but had little time, his grandfather, David Glasen, said.

David Glasen, 61, and the boys grandmother, Patsy Glasen, 57, both of Tatitlek, were injured in the crash.

Blood tests in Anchorage soon after the crash revealed Richardson had a blood-alcohol level of 0.175, according to court documents. The legal limit in Alaska is 0.10.

Two days later, Richardson was charged with two counts of manslaughter, driving while intoxicated (DWI), and two counts of first-degree assault.

Richardson is being held at Cook Inlet Pre-Trial Facility in lieu of $100,000 cash bail.

Last Tuesday, David Glasen underwent 14 hours of surgery to repair damage to his hip and pelvis at Providence Alaska Medical Center. Patsy Glasen, who suffered head injuries, was released from Providence Medical Center.

Also last Tuesday, Kenneth Kramer was laid to rest in Cordova. The 11-year-old was buried with his father, Darryl Kramer, who passed away in January.

Richardsons truck was pulled out of a Portage Lake by a tow truck just 20 minutes before the fatal collision. Richardson managed to travel about 1-1/2 miles toward the Seward Highway before he slammed into the familys compact sedan, according to troopers.

Richardson allegedly told Trooper Barry Wilson at the crash site that he had consumed a six-pack of beer earlier that day and was on his way from Anchorage to Wasilla. According to Wilson, Richardson said he thought he was near Wasilla.

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METRO

SATURDAY, July 29, 2000 ★ ANCHORAGE DAILY NEWS • www.adn.com SECTION B

BOB HALLINEN / Anchorage Daily News

Donna Hobson rests in her hospital bed on her last day in the hospital on Friday. She was hit on a bike path by a driver who has been charged with first-degree assault, felony hit and run, and driving while intoxicated.

Hit-run victim on bike path recalls 'outlandish' accident

By KAREN AHO
Daily News reporter

Five weeks after being hit on a bike path by a suspected drunken driver, 69-year-old Donna Hobson rolled out of Providence Alaska Medical Center on Friday in a wheelchair.

Her left leg will never be the same, but she's not feeling sorry for herself. She said the accident was so outlandish and so devastating that she's just grateful to be alive.

"I feel God's given me another chance, given me a message," she said before her release.

"I don't know what it is ...," she added, laughing.

Hobson had been walking with her husband, Bob, on a bike path near O'Malley Road and the Old Seward Highway the evening of June 24. She was still recovering from knee surgery, so she supported herself with a cane in one hand and her husband's hand in the other, both tucked inside his warm pocket. He walked their miniature poodle, Tiny.

As they approached an alder-lined bend, a pickup suddenly rounded the curve. The driver swerved out of control in an apparent effort to miss the pond, she said, and came fast at them.

Her husband tried to push her out of the way, but somewhat delicately because of her knee. Both they and the dog ended up in the pond, but Hobson was hit. She flew out of her shoes and landed face down in weeds and water some 20 feet away.

She doesn't remember much.

"It seems like I had a vision of crinkled tin in front of my eyes, all that metal. And everything going black. And he told me to lay still and he

See Page B-2, VICTIM

"We can all take lessons from the ani...

VICTIM: Is grateful to be alive

Continued from Page B-1

was going for help," she said.

Her husband later told her that she kept saying she hurt. Paramedics said she kept asking, "What happened?" which is common for trauma victims.

The pickup got stuck in the pond, and the driver and his passenger fled, refusing to help Hobson pull his wife from the water or call for help, police said. A K-9 tracked a scent and found two men hiding behind a Dumpster outside Sports Authority, Hobson said.

"They thought it was all fun and games. Police said they were laughing about it when they found them," she said.

Alfred W. Meyer, who police identify as the driver, is charged with first-degree assault, felony hit and run, and driving while intoxicated. Police said Meyer, 36, has two prior convictions for DWI.

Hobson underwent 15 surgeries on her lower left leg. She thinks it got tangled in the pickup's metal. The tissue was so crushed, doctors thought they would have to amputate. But enough muscle and nerve remained. Over a two-week period, doctors stripped and cleaned what was left, then wrapped the thin portion that remained with a long patch of skin cut from her thigh.

She'll wear a brace from her heel to her thigh for the rest of her life. But she will be able to walk. Slowed circulation through the calf will leave her left foot permanently swollen.

Her pelvis, fractured on both sides along with bones in her lower back, is slowly healing on its own. A tube inserted in her chest helped her punctured lung recover.

"I thought that I would just be devastated — oh, another day at the hospital — but I felt so fortunate that I came through it that I felt a sense of peace about it," she said.

"I'm angry at them at getting their kicks for taking a joy ride down the bike trail," she said. "I guess if he stops drinking and learns something from it then it's not in vain. ... Some people, they just can't seem to get away from their drinking."

□ Reporter Karen Aho can be reached at kaho@adn.com or 257-4450.

JET SKI

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CRITTERS: Man spreads smiles, mess

Continued from Page B-1

"We can all take lessons from the old... Pied Piper of th

Driver drunk in 6-fatality July wreck

ADN Aug 2000

Chena road collision worst ever in Interior

By KAREN AHO
Daily News reporter

A July auto accident that killed six people east of Fairbanks, making it the deadliest crash in Interior memory, can now join another list: that of crashes blamed on drinking and driving.

Alaska State Troopers said Saturday that the driver of the pickup that slammed head-on into another pickup on Chena Hot Springs Road had a blood-alcohol level nearly three times the legal limit for driving. His three passengers, all of whom were thrown from the truck and pronounced dead at the scene, also were highly intoxicated, troopers said.

Two Army soldiers who were killed when the pickup crossed into their lane

See Back Page, CHENA

CHENA: Driver, 3 others were drunk

Continued from Page A-1

had not been drinking, troopers said. They also died on the road. Their wives were critically injured.

The alcohol test results from the July 2 crash, forwarded to troopers Friday by the state medical examiner's office, put a spike in a recent run of crashes blamed on drunken driving, especially in Southcentral.

In the Anchorage area alone, four people have been killed and six seriously injured by suspected drunken drivers since June.

Troopers say they would like to step up patrols but have limited manpower. Federal grants aimed at seat belt enforcement are paying overtime of extra officers on the street. Some posts are juggling shifts to hit peak drunken driving hours.

"It is frustrating because I know they're there. If I could get out there more, if my guys could get out there more, we could arrest more," trooper Sgt. Lee Oly said. "There's only so much blood you can get out of a turnip."

In a state House committee meeting Thursday, officials spent three hours addressing the problem. Among draft bills being discussed for the next legislative session: lowering the blood-alcohol level for driving to 0.08, lengthening minimum prison sentences and requiring alcohol-purchase ID cards that mark past convictions.

In the crash outside Fairbanks, the driver had come from a Fairbanks bar, trooper Capt. Mike Stickler said Saturday.

Jacky L. Moore, 39, had a blood-alcohol level of 0.27 percent, nearly three times the 0.10 legal limit for driving, troopers said. Passengers Christy Simon, 29; Harvey Grau, 27p; and Kristine Fuit, 47, were "highly intoxicated," a troopers press release said.

Christopher McFadin, 21, and Bruno Guglielmi, 24, soldiers at Fort Wainwright, were killed. Their wives, Teri Jo McFadin, 18, and Krystal Guglielmi, 22, were seriously injured.

❑ Reporter Karen Aho can b reached at kaho@adn.com or 25 4450.

Anchorage, AK

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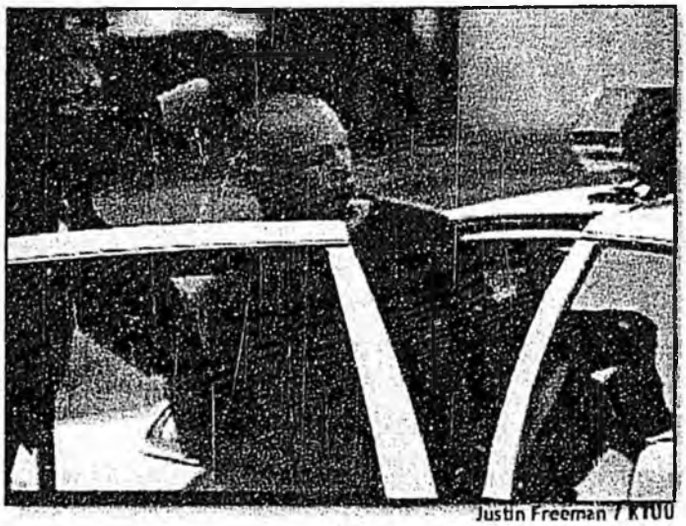

Justin Freeman / KTUU

Robert Mersing is loaded into a police car, following the crash.

Dan Fagan

Man faces 3rd DUI

Anchorage, Aug. 9- One year ago, 22-year-old Robert Allan Mersing was arrested for drunken driving. A month ago, he was arrested again for drunken driving. Then on Tuesday night, for the third time in a year, Mersing found himself once again handcuffed and headed to jail for allegedly driving drunk.

POLICE SAY MERSING'S THIRD drunken driving incident could have easily been the most dangerous. Eric Quint's young daughter was playing in their yard by a fence just minutes before police say Mersing came speeding and crashing into the fence.

"After hearing so much in the press recently about drinking and driving, it really scares me actually," Quint said. "It really does."

Police say Mersing failed his sobriety test and refused to take a blood alcohol test. He also was uncooperative with police and at one point refused to spread his legs and be searched. After a while, police spread Mersing's legs for him.

One witness says Mersing told police he had been through this before and that it was no big deal. But it was a big deal for neighbors who saw it all. After Mersing crashed into the fence, he then ran over a nearby stop sign. Two neighbors approached his car when it became disabled because of an air bag.

"He hit the stop sign, then we got a hold of him and we pulled him out of the car and grabbed the keys, threw them up on the roof of the car," neighbor Clint Belcher said.

"He would have ran," Vic Shincke said. "He would have ran."

Mersing was charged with DWI and driving with a suspended license. His license was suspended because of his two DWI arrests.

MSNBC COVERAGE

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NEXT STORY →

SAM HARRAL / Fairbanks Daily News-Miner

Alaska State Troopers investigate a three-vehicle accident on Chena Hot Springs Road on July 2. Six people were pronounced dead at the scene, and two more suffered critical injuries.

DWI

The road to tragedy

Now we know the truth about the crash on Chena Hot Springs Road near Fairbanks last month: The driver of the pickup that caused the head-on collision was drunk as a skunk.

Because Jacky L. Moore, 39, chose to leave a bar and drive with a blood-alcohol level nearly three times the legal limit, six people, including Mr. Moore, are dead.

The young soldiers in the pickup Mr. Moore crashed into had not been drinking. They were two more innocent victims of an intoxicated driver in a summer of intoxicated drivers and innocent victims.

The soldiers' wives were seriously injured. They have to try to recover physically while somehow accepting that, at 18 and 22, they are widows.

What must keep them awake nights is the knowledge that this tragedy could have been avoided if Mr. Moore had called a cab. Or if the bartender had insisted Mr. Moore leave his keys and arranged a ride for him.

There are at least three parties involved in creating a drunken driver: the driver, the person providing the booze, and a community that tolerates the behavior.

Anchorage, like many Alaska towns and cities, in effect tolerates drunken driving.

Bad bars aren't the only contributors to the problem, but they play a part.

"We're not trying to get bars to stop selling people their 10th or 11th drink," Anchorage Police Department officer Derek Hsieh says. "We're trying to get them to stop at the 14th or 15th drink."

Think about being on the road with somebody who has had 14 drinks.

Of three high-profile Anchorage drunken driving cases this summer, one driver came from an "entertainment establishment," one had been drinking at home, and one picked up booze at a liquor store and drank in his vehicle.

Inspector John Bilyeu of the Alcoholic Beverage Control Board says 90 percent to 95 percent of liquor sellers are law-abiding businesses doing their best to follow rules. "It's that 5 to 10 percent that are doing anything to make a buck" who cause problems, Bilyeu says.

Officer Hsieh and Inspector Bilyeu agree that long-term, consistent enforcement is the key to producing responsible liquor sellers and drinkers.

"Our community has known about this problem for a long time," officer Hsieh says. "We've missed an opportunity to be proactive and now we're being reactive."

Let's be reactive in a way that's most likely to produce the results we want. Drunks by definition have no judgment. Society must step in when they stagger and fall — before others die needlessly.

As officer Hsieh says, this community needs to "make a commitment to stand by the standards we're going to set in the short term and live by them for the long term."

We don't need vigilantes gathering under the tree to hang each convicted killer. We need to stop relatively harmless drunks — whether first-time social drinkers or hard-core alcoholics — before they become killers.

At a minimum we need strict, consistent enforcement of liquor laws and adequate police and trooper highway and street patrols. We need to consider a lower blood-alcohol limit, alcohol-purchase ID cards, and any other reasonable idea.

Selling, buying and drinking alcohol is a right that society should only tolerate if done responsibly. And responsibly means at the very least not drinking and driving.

If we don't prepare to deal with drivers who drink, we're really preparing for more, more and more drunken driving tragedies.

❑ **Editor's note:** The Alcohol Task Force next meets at 4 p.m. Thursday in the Assembly conference room, suite 160, at City Hall.

Anchorage Daily News

9 Aug 2000

Kenai Peninsula Online

Powered By

Web posted **Thursday, October 19, 2000**

Woman arrested in connection with September death of Unalaska man

UNALASKA (AP) -- A 29-year-old woman is behind bars in connection with the hit-and-run death of an Unalaska man in September.

Alya S. Landt is charged with manslaughter, criminally negligent homicide, tampering with evidence and **drunk driving**. She was arrested Monday in Unalaska following a six-week investigation.

Police said Landt accidently ran over Robert Shapsnikoff on Sept. 3 after a night of heavy drinking. Landt then allegedly concocted a story to cover up the incident.

According to charging documents, Landt, Shapsnikoff and Innocent "Ty" Dushkin were drinking together at an Unalaska bar. Afterward, Shapsnikoff reportedly walked away from the bar, and Landt and Dushkin left soon afterward in her rental truck.

Police said Landt and Dushkin initially told officers they found Shapsnikoff injured in the road. But Duskin reportedly changed his story after an autopsy revealed the victim died of injuries consistent with a vehicle accident. Dushkin has not been charged.

Landt was being held Thursday on $100,000 bond.

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Web posted **Thursday, November 16, 2000**

Attorney calls drunken driving sentence one of most severe ever

Two fatalities worth 22 years

By DOUG LOSHBAUGH
Peninsula Clarion

A Crown Point man drew 22 years in prison Tuesday for the drunken driving deaths of two prominent Juneau residents and the injury of a third.

Michael **Glaser**, 44, entered guilty pleas Tuesday in Kenai Superior Court on two counts of second-degree murder and one count of first-degree assault stemming from the April 19 accident that killed Martin John Richard, 50, and Ladd E. Macaulay, 57, and injured Steven Gregory McGee, 49, all of Juneau.

Judge Jonathan Link sentenced **Glaser** to 30 years in prison with 15 years suspended for each murder count and eight years in prison with three years suspended for the assault count. He ordered **Glaser** to serve 10 years for each murder count and three years for the assault count concurrently, and to serve five years for each murder count and two years for the assault count consecutively. That complicated formula amounts to a sentence of 22 years in prison.

However, it appears **Glaser** could be eligible for parole after 14 years, said his attorney, John M. Murtagh. Link also sentenced **Glaser** to 10 years probation.

Glaser originally pleaded not guilty to all three charges. On Tuesday, though, he felt changing his pleas was "the right thing to do," Murtagh said.

"He wanted to accept responsibility for his actions," Murtagh said.

According to court documents, **Glaser** told the victims' families he is "very sorry for what has happened," and he "will never drink again and put (him)self in this position."

Glaser reportedly had a .258 blood-alcohol level, two-and-one-half times the legal limit, at the time of the accident.

Richard, Macaulay and McGee, three state of Alaska employees, were returning to Anchorage in a rented Toyota Camry after visiting peninsula hatcheries. **Glaser** was southbound on the Seward Highway in an older model Chevrolet crew cab. The pickup crossed the center line at Mile 37.5 Seward Highway, struck the Camry head on, and rolled on its side, trapping **Glaser**.

The Camry was shoved against a mountainside, trapping the three occupants. Richard and Macaulay were pronounced dead at the scene.

Richard was director of the Division of Investments for the state Department of Community and Economic Development. Macaulay was a loan officer with the division.

McGee and **Glaser** were injured. **Glaser** underwent ankle reconstruction and was arrested May 1, following his release from Alaska Regional Hospital in Anchorage.

Murtagh said he argued during Tuesday's sentencing hearing that the mandatory 10-year sentence would be sufficient. **Glaser** already has been through residential treatment and offered to help Mothers Against Drunk Driving, the Seward Police and other groups teaching about the possible consequences of drunken driving.

"He doesn't need to be in prison because he is a danger to the public or for rehabilitation," Murtagh said. "The only reason to put him in prison is for punishment or to deter the public."

According to court documents, though, John Wolfe, assistant district attorney, said **Glaser** had a blood alcohol of .247 two hours after the accident, and suggested **Glaser**'s efforts at rehabilitation should be low on the list of criteria considered for sentencing.

"The most important was community condemnation and reaffirmation of societal norms," Wolfe said Wednesday. "The public strongly condemns people who drink and drive, then injure or kill people."

Deterring others from drinking and driving is the next most important consideration, Wolfe said, and a longer sentence might better catch the public's attention. The Legislature recently changed the minimum sentence for second-degree murder from five years to 10. Wolfe argued that **Glaser** should be sentenced to seven years for the assault, since that involved a deadly weapon.

"My argument was that the sentences should all be consecutive," he said.

The two 10-year minimum sentences plus the seven years for assault would total 27 years.

Murtagh said the sentence **Glaser** did receive is the most severe he is aware of in Alaska for a drunken driving fatality.

"I don't believe Mr. **Glaser** is the most serious offender," he said. "The theory is that people who drink and drive will get the message. I think that is a very tough use of anyone's life."

He said he has not yet seen Link's written judgment, and **Glaser** has not yet decided whether to appeal the sentence.

"If the sentence leads people not to drink and drive, it might be appropriate, but that's always speculative," Murtagh said.

Wolfe said **Glaser** is among the first to be sentenced under the recent changes to the law. **Glaser** made a bad decision and was well aware of the potential consequences. **Glaser** took two lives and hurt several others, he said.

Peninsula Clarion staff and The Associated Press contributed to this story.

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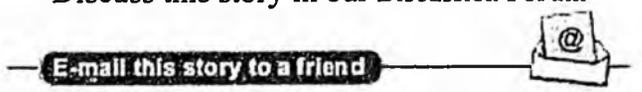

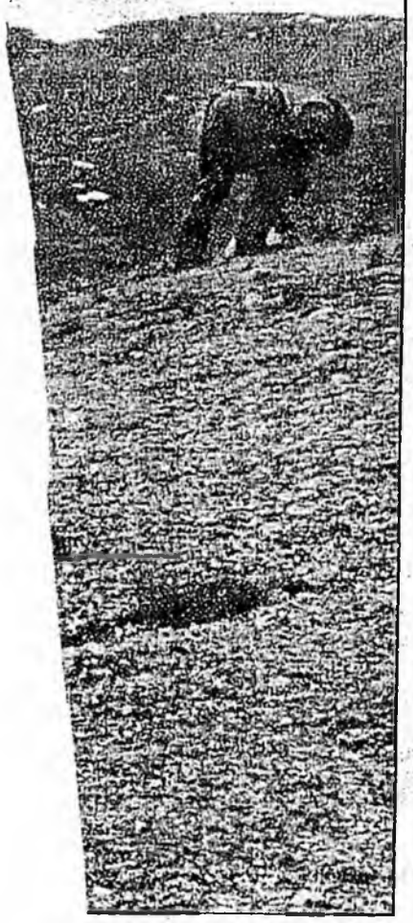

MAUREEN CLARK / The Associated Press

are brought into the park
ch summer. **Below:** John
native weeds in the park.

Injured women improving

ADN 14 July 2000

DWI suspect had truck, not license, police say

By LARRY CAMPBELL
Daily News reporter

Two young Anchorage women showed slight signs of improvement Thursday after being seriously injured in a collision with a suspected repeat drunken driver.

Bowman

Gloria Steelman, 19, was listed in critical but stable condition at Alaska Regional Hospital with severe head injuries. Steelman had been riding in a car driven by Jacqueline Fetherolf, 20. Fetherolf was listed in serious condition Thursday at Providence Alaska Medical Center.

The two were struck early Wednesday morning by a pickup driving the wrong way down East Northern Lights Boulevard. Police charged the truck driver, Albert T. Bowman, 48, with two counts of first-degree assault, driving while intoxicated and

See Page B-2, WOMEN

Firefighters accept 5-year labor contract

By KAREN AHO
Daily News reporter

Anchorage firefighters have voted to accept a five-year labor contract with the city.

"The city deserves five years of labor

gunman as a white
140 to 150 pounds, with blond hair and a mustache. He was driving a dark sport utility vehicle, possibly red or maroon. Carr lived in Anchorage but owned about an acre of undeveloped land off Knik Goose Bay Road. Anyone with information is asked to call troopers at 428-7200.

Man sentenced for killing best friend

FAIRBANKS — A 26-year-old Fairbanks man has been sentenced to 99 years in prison for killing his best friend. Adam Hamilton, 26, was convicted of first-degree murder by a jury in March for the Nov. 24 killing of David Dixon of Fairbanks. Dixon was stabbed in the neck, chest and back at his home. Hamilton was covered with blood when he was arrested shortly after the attack, according to police. The victim's

New APRN pre

Paul Stankavich has t
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has 33 years of exper
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Stankavich succeeds

WOMEN: Crash victims' conditions improve slightly

Continued from Page B-1

driving with a revoked license. Bowman has been convicted of five previous DWIs.

Anchorage police Detective Everett Robbins said Thursday that the truck Bowman was driving was registered to him, even though he didn't have a valid drivers' license. There's no law that bars someone without a license from owning a car or truck or any motor vehicle.

Robbins is also investigating two similar recent cases in which, like Bowman, the suspects charged with drunken driving have a history of previous convictions.

Earlier this week Russell D. Carlson, 39, was charged with manslaughter, driving while intoxicated and driving with a revoked license after the truck he was driving struck 20-year-old Jessie Withrow in Spenard. Carlson's criminal history includes seven previous drunken-driving convictions as well as convictions for negligent driving and reckless driving.

The truck Carlson was driving Monday evening belonged to someone who was out of town. Carlson ended up behind the wheel when a man with whom Carlson had been riding decided he was too drunk to drive and let Carlson take the wheel, Robbins said.

Late last month 69-year-old Donna Hobson suffered broken bones and internal injuries when she was knocked down by a pickup driving on a South Anchorage bike trail.

Alfred W. Meyer, 36, was charged with first-degree assault, leaving the scene of an accident and drunken driving. He had drunken-driving convictions in 1990 and 1991.

Meyer works as general manager of the Muffler City shop downtown, Robbins said. He was driving a company-owned truck.

All three cases remain under investigation.

❑ Reporter Larry Campbell can be reached at lcampbell@adn.com.

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DENALI: Crews take whack a

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Legislature on right road with drunken-driving laws

Without sounding preachy, it is important to acknowledge and endorse attempts in the Alaska Legislature to toughen the state's drunken driving laws.

Barely a generation ago, drinking and driving bore the imprimatur of social acceptance – as long as no one got hurt. The problem was, people kept getting hurt. With more people drinking and more people driving as the U.S. population surged after World War II, more were killed or injured because of those who followed socially acceptable practices with little consideration of the consequences.

How do we know that drunken driving was socially acceptable?

By the mild penalties imposed on offenders in general and repeat offenders in particular.

Far too often and for far too long, drunken driving was excused as a boys-will-be-boys exercise. Asking a man to give up his car keys even when he was falling-down drunk was considered an affront to his masculinity. If fewer women were drinking and driving in the years immediately after World War II, the feminist movement and increasing numbers of women in the workforce helped eliminate gender distinctions about alcohol consumption.

Everybody played; everybody lost.

Still, judges, jurors, prosecutors and defendants played a wink-wink game of pretending to impose penalties on people who pretended to have learned a lesson.

Inevitably, survivor-victims and the relatives and friends of those who did not survive demanded an end to wink-wink justice.

Like smoking or smoking in public places, getting drunk and driving drunk have had society's full attention for a while.

Tolerance has declined, but a segment of the Legislature believes there is more to be done in the name of involuntary social responsibility.

We favor the move to make it more difficult for offenders to become repeat offenders. Removing some of the spontaneous opportunities whereby offenders can purchase alcohol is a start. It is right that they should be required to produce distinctive identification that tips off a retail clerk to a drunken driving history.

Those who purchase alcohol for someone prohibited from buying it rightfully should be doing so at some legal risk to themselves.

And, just as citizens may lose driving, hunting, fishing and voting privileges based on criminal behavior, it is not unreasonable to prohibit convicted drunk drivers from consuming alcohol for a specified period of time. Tough to enforce, but not unreasonable.

Lowering the legal threshold for intoxication from 0.10 blood-alcohol content to 0.08 is a must. To refuse is stubborn folly that will cost Alaska a bushel of federal highway dollars.

Raising the cost of drinking has been proposed and also must be considered.

Consideration and dollars also should be given for alcohol-related education.

Alcohol remains a favorite mood modifier. It still slows reflexes. As with so much else in life, people don't always know when to quit.

Teens need to have access to information about alcohol's physical effects. The information needs to be presented in an unbiased manner – without sounding preachy, as we said from the top.

There is a need as well for educating those who may have grown up in an alcohol culture, who are offenders and who are likely to become repeat offenders. Believe it or not, they may never have heard the facts.

The road to social responsibility is long. We should do what we can to ensure the safest journey possible.

Fairbanks Daily News-Miner

22 JAN 2001

DWI legislation

Jan. 18, 2001

To the editor:

Legislators wishing to toughen the stance against drunk drivers should tweak the existing laws before enacting new ones that will have little or no deterrent effect.

If I understand correctly three DWI's in five years qualifies you for a felony DWI. A dedicated drunk driver can space out his/her convictions every two years and rack up as many as 20 or so DWI's over a lifetime, with none of them being a felony.

Second DWI convictions average 15 days in jail and $500-1,500 in fines. This plus a chunk of the lawyer's fee can be covered by a single year's dividend so how much of a deterrent can it be? The third conviction and every conviction after that should be a felony with the fine and mandatory minimum sentence doubled each time until a lesson has been learned or we never see the offender again.

Giving people who have demonstrated a total disregard for the consequences and penalties for drunk driving a break of any kind for avoiding detection for a set period of time is ridiculous. Toughen this portion of the law and give our local lawyers fewer repeat offenders to defend and fewer ambulances to chase.

Matt Kennebec
Fairbanks

Anchorage Daily News 23 Jan 2001

Pick up your phones and pens a join the battle against drunken driving

Alaskans, our state Legislature is in Juneau for the 2001 session. If you are interested in getting drunken drivers off Alaska's roads and highways, please call your representatives and senators and demand a change in state laws concerning drunken driving. The present laws are not working. If we are going to stop drunken drivers, the punishment has to be severe enough to get their attention, severe enough that a person will think about it and not do it.

I am going to call my senator and representative and ask for zero tolerance, 18 months in jail, loss of license for five years, a $3,000 fine and loss of vehicle. If a drunken driving accident results in death, the charge against the drunken driver should be second-degree murder. If you think this punishment is too severe, then you have not suffered the loss of a loved one because of drunken driving.

On July 12, a little after 5 p.m., I lost two grandsons, 11 and 15 years old, to a drunken driver on the new toll road between Whittier and Portage. As I lay in the hospital after the accident, going over and over it in my mind, the one thing that stood out so clearly was that every drunken driving accident is 100 percent preventable.

It is up to each person who drinks to decide whether to drive or not to drive. If he or she chooses to drive, he or she also chooses the consequences of the decision. Being drunk is no excuse!

—Dave Glasen
Tatitlek

STAR PHOTO BY DARRELL L. BREESE

Anchorage Police respond to a van rollover at Mile 9 of Eagle River Road on Monday afternoon. Nobody was injured. Police had to close the road for about an hour until the wreck was removed. The accident was one of at least 20 caused by icy roads this past week. More than 50 "vehicles in distress" were also reported. (See page 5.)

Local legislators get an earful

Citizens want attention given to schools, roads

By JODI STEPHENS
Alaska Star

The state exit exam, a new high school, drunk driving and local service districts were on the minds of 15 residents attending Saturday's town hall meeting with Chugiak-Eagle River legislators.

Sen. Randy Phillips and Reps. Pete Kott and Fred Dyson came in person, while Rep. Vic Kohring took part via speaker phone from Juneau. Sen. Rick Halford was in Washington, D.C., for the presidential inauguration.

On the topic of high school exit exams, Kott said he favors a delay in implementing the tests, now set to face all seniors in spring 2002. "I'm just not sure how long we should delay it. Four years? Or is two years enough?"

Dyson took an opposing view. "A lot of people who are lobbying for a delay have a dog in the fight. I'm not sure I'm going to learn a lot more hearing from the professional teachers lobby." He quoted Commissioner of Education Shirley Holloway as stating, "There's 60 or 70 schools out there who know they haven't been doing the job, and they're embarrassed about the figures coming out in the light."

Audience member Gail Dial urged adults to take the sample exam on the Internet. Referring to the language sections, she said, "The writing section is not that complicated. If kids can't handle that, we're doing them a real disservice. I think you really shouldn't have a diploma if you can't pass that test." However, she added, "maybe the math part is too hard; not everyone is going to be able to do advanced geometry or advanced algebra."

Judith Fetherolf took a harder line. "Algebra should be a minimum for math standards," she said. "Without a certain level of skills, you're going to have a hard time finding a job to support yourself. There aren't alternatives to college anymore."

Fetherolf's daughter Jackie, a 1998 Chugiak High School graduate, spoke of her own experience. "It's really easy to graduate, You're encouraged not to take hard classes ... You shouldn't lower the standards so everyone can graduate."

"Whether or not we continue the testing, we have to identify the weaknesses in our schools," Dyson said, adding that he'd like more comments from parents, especially on how to make the tests fair to disabled students.

The subject of drunk driving also brought lengthy discussion. "The number of people uninsured in this state is enormous," said Fetherolf, whose daughter's car was hit by a drunk driver last July and who now faces a $60,000 lien to pay medical expenses for a badly injured passenger. "You're looking at the state cost but you're not looking at the overall costs to the people of this state," she told the legislators.

Kott said he's introduced legislation to reduce Alaska's legal blood alcohol limit from the present .1 to .08, explaining that the lower standard is a federal mandate without which Alaska stands to lose $7.5 million in 2004. Kott said his House Bill 17 may be rolled into an omnibus bill by Rep. Norm Rokeberg (R-Anchorage) which is working its way through the House.

On the subject of road projects, Sen. Randy

See EARFUL, Page 17

Alaska Star 25 Jan 2001

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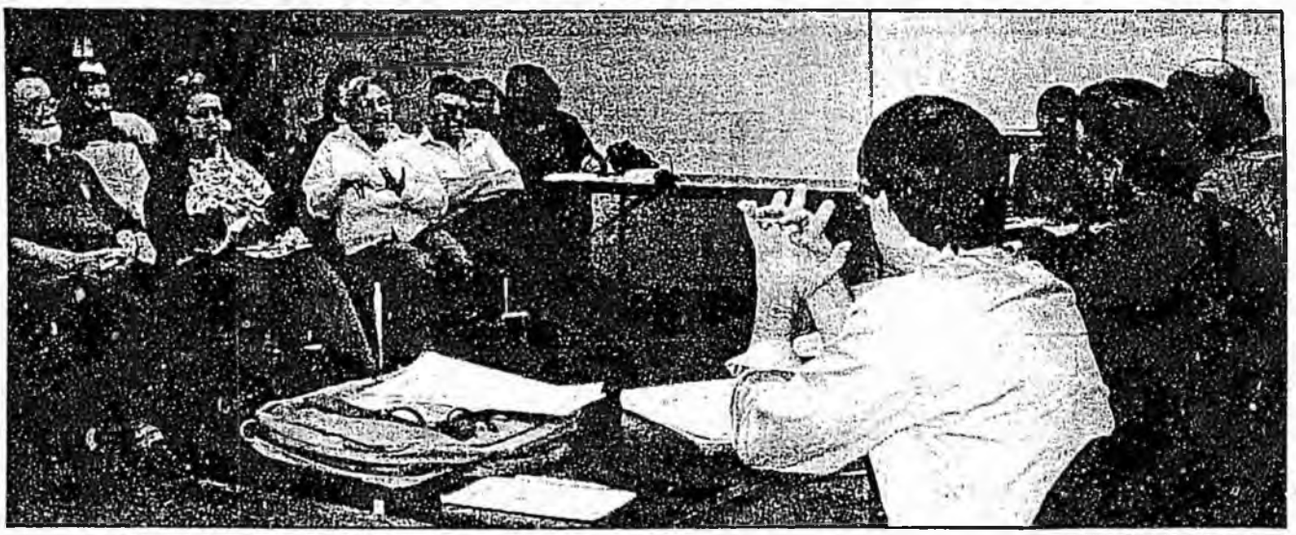

STAR PHOTO BY JODI STEPHENS

Sen. Randy Phillips, Rep. Pete Kott and Rep. Fred Dyson listen as local road board member Gail Dial makes a point about service areas at the Saturday town hall meeting.

EARFUL:

Continued from Page 1

Phillips expressed frustration that Eagle River priorities are constantly losing funding to Anchorage projects that run over budget or that are deemed more important. "I'm coming up with some legislation to deal with that. If it says No. 1 or 2 (on the city's funding list), it's going to get done," Phillips said.

The need to protect local service districts, which provide road maintenance, parks programs and fire protection, also brought heated comments – all in favor of HB 13, a bill sponsored by Rep. Con Bunde (R-Anchorage). Similar to a measure passed last year but vetoed by the governor, the bill aims to prevent boroughs and municipalities from taking over limited service areas formed, and paid for, by local voters.

Bunde's substitute bill adds volunteer fire departments to the list of service districts that may not be abolished, amended or merged without a majority vote of the people affected.

Chugiak Volunteer Fire Department assistant chief Bruce Bartley said the bill would ensure that cities "can't do an end run around it, dissolve a service area and recreate it." Such moves typically mean higher rates and less service within the former district, he said. During his 18 years with CVFD, he said, the push to professionalize the Chugiak force "has come and gone," with the latest attempt being to take over emergency medical services.

Phillips asked interested audience members to keep tabs on the legislation and "make very sure which draft of the bill you want. We went through this drill last year. If you have any objections, let us know what the pitfalls are."

The budgets for local parks and roads also came in for debate, with Gail Dial saying she and fellow road board members "are never allowed to see the whole (road) budget, just what our contractor's costs are. We have no idea how much money we've got or where it's going."

Anchorage Assembly member Anna Fairclough said she has asked municipal finance officer Kate Giard to research Chugiak-Eagle River property tax assessments and how much goes to parks and roads, and report to local board members in March.

As the discussion turned to the need for a new high school, Fairclough urged legislators to obtain a 70/30 match for the project, having the state pay 70 percent so voters would only have to approve a $12 million bond this spring. "If we'd had 2,400 more votes, we could have passed it last year," Fairclough said, referring to a $42 million bond that narrowly failed last April. "People realize that Chugiak-Eagle River has been shortchanged."

Phillips stopped short of promising state money for the project, but said, "The high school is going to be my No. 1 priority this session."

Future public meetings with local legislators are set for Feb. 17, March 3 and April 7.

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York Sunday News
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West Virginia
Charleston Daily Mail

Taking away the keys

February 02, 2001

In May 1998 the city of Fairbanks began seizing vehicles from drunk drivers.

In addition to the fines and other drunk driving penalties mandated by state law, the city's ordinance provides for impounding vehicles used by offenders for a minimum of 30 days.

The most recent statistics available show 870 vehicles have been impounded as a result of individuals caught driving while intoxicated. If first-time offenders are involved, or 10 years has passed since the driver's last DWI conviction, those cars and trucks sit parked for a month, if not in an official impoundment yard than in private storage facilities approved by the city. If nothing else, these seizures idled the hundreds of vehicles used by drunk drivers for weeks at a time, hopefully giving drivers inconvenienced in this manner a sobering lesson.

The city ordinance takes a bigger bite from repeat offenders.

If the owner was operating the vehicle at the time of the repeat offense, if he or she was present in the vehicle when the violation occurred, or can be otherwise proven to have been aware that a drunk with a DWI conviction, anywhere in the country, in the last decade was at the wheel, Fairbanks tough policy directs the city to pursue forfeiture of the vehicle.

The local forfeiture ordinance has resulted in the forced auction of 72 vehicles to date, with another 12 "ready for sale," according to Connie Martin, the legal assistant employed on a part-time basis to run the city's program.

In cases where the vehicle involved in a DWI arrest is owned by someone other than the driver, Martin notes, the city gives the innocent party the option of reclaiming their vehicle following impoundment. The cost of such redemptions generally runs between $200-$260, depending upon the progress of the legal paperwork.

The state also has a similar law on the books providing for seizure and forfeiture of vehicles from repeat drunk drivers. There is one whopping difference: vehicle forfeiture is an option for state prosecutors, rather than a mandate.

House Bill 39, introduced at the opening of the session by Rep. Pete Kott, R-Eagle River, would have, among other things, changed that policy, replacing the word "may" in the state's vehicle forfeiture law with "shall."

In committee this week HB 39's forfeiture provision was dropped as too expensive.

Every lawmaker should prudently address the costs associated with proposed legislation. In this instance, however, Fairbanks' experience suggests the modest cost of pursuing vehicle forfeitures amounts to a solid investment against drunk driving.

That's the view you'll hear from Martin, the paralegal who handles, on a less-than-full-time basis, the vehicle seizure program in Alaska's second largest city.

"In some cases it might cost a little more than the vehicle is worth, but this program isn't about making money," she said. "It's about getting those drivers off the street."

Money is no object; Alaskans are fed up with drunk drivers

Wonderful! Rep. Pete Kott introduces a reasonable measure to address the absurd DWI problem in our state, then he finds out that it would actually cost money to implement, so he waters it down ("Kott trims costly parts from drunken driving bill," Feb. 3). Amazing. I always thought this was one area that Republicans were good at ... you know, law and order stuff.

What price can you put on a dead wife?

The state Legislature needs to address the carnage wrought by drunken drivers, no matter what the cost. What price can you put on a dear wife, husband or child? We need representatives who actually "represent" the will of the people, and I think the vast majority of citizens in Alaska are fed up with drunken drivers.

— Doug Brown
Anchorage

Anchorage Daily News
10 Feb 2001

State traffic accidents up 8.8 percent in 1999

■ *January, February are most dangerous months in Juneau*

By ANN CHANDONNET
THE JUNEAU EMPIRE

Juneau Empire 11 February 2001

A report recently issued by the Alaska Department of Transportation and Public Facilities shows traffic accidents in the state increased significantly in 1999.

According to "1999 Alaska Traffic Accidents," there were 14,691 traffic accidents that calendar year, an increase of 8.8 percent over 1998. Twenty-eight percent of the accidents resulted in injuries; 0.5 percent resulted in fatal injuries (77 victims).

Thirty-four of those 77 died in accidents that were classified as alcohol- or drug-related. Twenty-nine of them might have survived had they been wearing seatbelts or using other safety equipment.

The percentage of accidents involving either injuries or fatalities increased in four of the eight largest boroughs in 1999: Juneau, Mat-Su, Kodiak and the Kenai Peninsula. The fatalities in Alaska are slightly below the fatalities per million licensed drivers in the entire United States.

The most prevalent type of collision in Alaska was the angle collision, a crash type associated with turning, passing and failure to yield situations. The second most prevalent was the rear end collision. Typical of situations involving unsafe speed and driver inattention.

New Year's weekend was the most dangerous time to drive, followed closely by Thanksgiving. December, January and February were the most accident-prone months. Most fatalities occurred between 2 and 3:59 a.m. and between 8 and 9:59 p.m.

In the greater Juneau area in 1999, according to the report, 961 people were injured in vehicle accidents, 17 of them seriously. Two died.

Juneau had most of its accidents in the months of January and February; the least in April and August. Statewide, accidents happened less under rainy conditions than under cloudy and clear conditions.

Property-damage-only accidents were unchanged in Juneau, but total accidents increased for 1999 due to higher numbers of injury and fatal accidents.

•••••

A. Chandonnet can be reached at achandonnet@juneauempire.com.

17 - 11

12 Jan 2001

Brian O'Donoghue, Opinion Page Editor: 459-7574;e-mail:letters@newsminer.com

FAIRBANKS
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The whole toolbox

Lowering the state's drunken driving standard from .1 blood-alcohol content to .08 won't do much to stop the most dangerous, habitual offenders whose intoxication at the scene of horrific accidents sadly registers two or three times the legal limit.

Suspensions, likewise, are insufficient to protect the law-abiding public from individuals with a history of ignoring such paper penalties.

Incarceration, confiscation of vehicles, and mandatory participation in alcohol treatment programs offer better means for protecting the law-abiding public from the careening path of repeat offenders.

On the other hand, individuals inclined to mix drinking with driving are likely to sip more cautiously if lawmakers lower the state's intoxication standard. The specter of a mandatory stay in jail, stiff financial penalties and the irritations of a significant period of license suspension might be the deciding factor in passing up that 'one for the road' that slows a generally responsible individual's reactions to a dangerous, potentially tragic degree.

All of the above-suggested approaches to curbing drunken driving and more are before lawmakers this session. At last count, there were nine House or Senate bills with provisions addressing the subject from various angles.

The point here is that no mandatory jail sentence or fine, no single adjustment of the state's intoxication standard, and no one approach to treatment can be expected to achieve the goal of protecting law-abiding Alaskans from the threats posed by drunken drivers.

The only long-term solution is in educating all Alaskans about the public dangers and personal risks that go with taking the wheel in a drunken or impaired state. That's the mission this society thrusts upon its law officers. It's up to lawmakers to give troopers, police and public safety officers all the necessary legal leverage, backed by sufficient funding, to rid our roads of drunken drivers.

Alcohol abuse is so pervasive in Alaska—the mission requires a full assortment of prosecutorial tools and treatment programs.

Anchorage Daily News

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Patrick Dougherty, Editor
Steve Lindbeck, Associate Editor

Founded in 1946 by Norman C. Brown
Fuller A. Cowell, Publisher, 1993-1999 Katherine Fanning, Editor and Publisher, 1971-1983
Gerald E. Grilly, Publisher, 1984-1993 Lawrence Fanning, Editor and Publisher, 1967-1971

OUR VIEW

When drivers are outlaws

Suspending a license isn't a strong enough deterrent

When cocaine user Scott Sunderland ran off a city road last year, rolling his truck and killing his wife, he was driving even though his license had been suspended.

When drunken driver William Rust crushed a 29-year-old mother of two with his Ford Bronco back in 1995, he was driving even though his license had been suspended.

When Daniel James Bushey, hopped up on cocaine and booze, sped through a downtown intersection in 1994 and killed a mother and her 10-year-old daughter, he was driving even though his license had been suspended.

When 18-year-old Morris King spent a night in 1992 guzzling beer and wine coolers and speeding through red lights for fun, killing two 22-year-old women, he was driving even though his license had been suspended.

There seems to be a pattern here.

Sometimes a suspended license is no stiffer a punishment than the paper it is written on.

Sometimes a suspended license is no stiffer a punishment than the paper it is written on. Last year, Anchorage police issued 4,266 citations for driving without a license. The vast majority of those were given to people driving with suspended licenses; and the vast majority of those had lost their licenses for DWIs. As Messrs. Sunderland, Rust, Bushey and King demonstrate, these outlaw drivers can inflict disaster on innocents.

Suspending driver's licenses does not do enough to protect innocent motorists from mayhem. People tempted to drive with suspended licenses need to face sterner consequences. Assemblyman Dick Traini has an excellent proposal to do just that. He wants people who drive with suspended licenses to forfeit their cars to the city, just as drunken drivers do. First offense, a 30-day impound. Second offense, bye-bye car.

In DWI cases last year, the city seized 1,600 cars. Impounding cars for driving with a suspended license will make it even more difficult for dangerous drivers to get back on the streets.

Seizing cars in such cases does raise legitimate questions about due process and the rights of innocent owners. Where a relative or bank owns an interest in the car, the city is willing to negotiate an appropriate settlement or the case can go to court. To get the car back in the meantime, owners can post a bond. The city's goal is to terminate the ownership of the violator while protecting the innocent owner's rights.

Processing all the new seizure cases may seem like an expensive proposition. But the current program basically pays for itself through fees the violator is charged for police time and work by the city attorney. And cracking down on drivers with suspended licenses is a good investment in public safety.

Mandatory sentences should go to drunk drivers who injure, kill

Are you really tired of drunk drivers? The answer is simple. Write or telephone your state legislators and ask them to enact minimum mandatory drunk driving laws. Many other states have in place laws that carry five-year minimum mandatory jail sentences for each person killed in drunk driving accidents. Alaska could go a step further to include a two-year minimum mandatory jail sentence for each person injured in a drunk driving accident. While we're at it, let's make this law include all the people using illegal drugs that impair driving as much or more than alcohol.

Minimum mandatory sentences mean the legislative command must be unequivocal since courts hesitate to find their judicial discretion curtailed. The Legislature normally provides explicitly for the mandatory sentence by stating a certain minimum sentence be imposed and that it may not be suspended nor may the defendant be released on probation or parole until that minimum term has been served. Write your legislator today.

— Gladys Wilson
Anchorage

684 P.2d 864 PENA V. STATE (S. Ct. 1984)

MANUEL R. PENA, JR. Appellant/Petitioner,
vs.
STATE OF ALASKA, Appellee/Respondent; RICHARD RYCHART, Appellant/Petitioner, v. STATE OF ALASKA, Appellee/Respondent.

File Nos. 6174, 7052, No. 2851
SUPREME COURT OF ALASKA
684 P.2d 864
July 20, 1984
Petitions for Hearing from the Court of Appeals, Appeal from the Superior Court of the State of Alaska, Third Judicial District, S. J. Buckalew, Jr., Judge, and the Fourth Judicial District, James R. Blair, Judge.

COUNSEL

George E. Weiss, George E. Weiss & Associates, Anchorage, for Appellant/Petitioner, Manuel R. Pena, Jr. Fleur Roberts, Cowper & Madson, Fairbanks, for Appellant/Petitioner, Richard Rychart. David Mannheimer, Assistant Attorney General, Anchorage, and Norman C. Gorsuch, Attorney General, Juneau, for Appellee/Respondent.

JUDGES

Before: Burke, Chief Justice, Rabinowitz, Matthews, Compton and Moore, Justices.
COMPTON, Justice, dissenting.
AUTHOR: MOORE

OPINION

MOORE, Justice.

On September 2, 1980, an automobile driven by Manuel R. Pena, Jr. collided with an automobile driven by Chris Scisente resulting in the death of Billy S. Downey, a passenger in Scisente's vehicle. Anchorage police officers investigating the accident, suspecting that Pena had been drinking arrested Pena; took him to the police station, and requested that he take a breathalyzer test. Pena refused to take the test and the police obtained a search warrant authorizing the taking of a sample of Pena's blood. Pena was then taken to the Alaska Hospital where the blood was drawn. The sample revealed the presence of .21% alcohol in Pena's blood.

The facts behind Rychart's appeal are similar to Pena's. On August 15, 1981, a vehicle driven by Rychart was involved in an accident with another vehicle. Benjamin Coffin, a passenger in Rychart's automobile, died as a result of the collision. On the way to the hospital, police asked Rychart if he would submit to a breath or blood test to determine his blood alcohol content, and he refused. Police later placed Rychart under arrest and pursuant to a search warrant directed emergency room technicians to draw a sample of Rychart's blood. This sample showed that Rychart's blood contained .17% alcohol. Both Pena and Rychart were charged with manslaughter. Results of the chemical sobriety tests were admitted into evidence at each trial over defense objections. Pena and Rychart were convicted and both appealed their convictions. In

Pena v. State, 664 P.2d 169 (Alaska App., 1983), the court of appeals upheld Pena's conviction, ruling that the test results were properly admitted into evidence. On May 11, 1983 the court of appeals issued a summary disposition denying Rychart's appeal in light of the **Pena** decision.

Pena and Rychart appeal their convictions arguing that, in light of Alaska's Implied Consent Statutes, results of the non-consensual chemical sobriety tests were improperly admitted into evidence. In 1969 the Alaska Legislature passed the Alaska Implied Consent Statute, which at the time of Pena's and Rychart's arrests provided in part:

AS 28.35.031 **IMPLIED CONSENT.** 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 his breath for the purpose of determining the alcoholic content of his blood 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 while under the influence of intoxicating liquor. 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 in this state while under the influence of intoxicating liquor.

AS 28.35.032 **REFUSAL TO SUBMIT TO CHEMICAL TEST.** (a) If a person under arrest refuses the request of a law enforcement officer to submit to a chemical test of his breath . . . after being advised by the officer that his refusal will result in the suspension, denial or revocation of his license, a chemical test shall not be given.

We agree with appellants that the Implied Consent Statutes that were in effect at the time of their arrests preclude the admission into evidence of chemical sobriety test results obtained pursuant to a search warrant after the arrestee has refused to take such a test. Alaska's Implied Consent Statutes provide that a driver impliedly consents to being subjected to chemical sobriety tests and creates penalties for a driver's refusal to submit to this testing.[1] The penalty for refusing the test, at the time of the arrests in this case, was a three-month suspension of the suspect's driver's license.[2]

The Implied Consent Statute states that, if the driver refuses to submit to a chemical sobriety test, "a chemical test shall not be given." AS 28.35.032. In **Anchorage v. Geber,** 592 P.2d 1187 (Alaska 1979), we interpreted this language to prohibit the administration of any chemical test, including a test of the blood or urine, once a suspect has refused a breath test. In **Geber,** police officers arrested appellants for driving while intoxicated. Samples of the appellants' blood were taken over their objections and the results were used to convict the appellants at their individual trials. We held that the language in AS 28.35.032 precluded the admission of the test results into evidence. 592 P.2d at 1191. We further noted that 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." 592 P.2d at 1192.[3]

In the case at bar, the court of appeals held that **Geber** does not control the instant cases because **Geber** only addresses the question of the admissibility of non-consensual test results obtained as a search incident to arrest. **Pena v. State,** 664 P.2d 169, 174 (Alaska App., 1983).

The court ruled that non-consensual test results obtained pursuant to a search warrant are distinguishable and that the Implied Consent Statute does not preclude their admission into evidence. The court of appeals reasoned that to suppress the blood test results would inhibit the goals behind the Implied Consent Statute of reducing the incidence of drunk driving.

We find no reason to draw the distinction drawn by the court of appeals. The Implied Consent Statute provides the exclusive authority for the administration of police- =7 Initiated[4] chemical sobriety tests to a driver arrested for acts allegedly committed while operating a motor vehicle. The statute clearly provides that after a driver refuses to submit to a chemical sobriety test the driver shall be penalized by the sanctions established in AS 28.35.032 but that no test shall be given. This applies equally to preclude chemical sobriety tests performed pursuant to search warrants as it does to tests performed as searches incident to arrest.

In 1982 and 1983, after the arrests of Pena and Rychart, the legislature enacted and amended the Implied Consent Statute by passing AS 28.35.035, which provides:

ADMINISTRATION OF CHEMICAL TESTS WITHOUT CONSENT. (a) If a person is under arrest for an offense arising out of the acts alleged to have been committed while the person was driving a motor vehicle while intoxicated, and that arrest results from an accident that causes death or physical injury to another person, a chemical test may be administered without the consent of the person arrested to determine the amount of alcohol in that person's breath or blood.[5]

Thus, the legislature has eliminated the driver's ability to refuse a chemical sobriety test[6] in situations, such as in the case at bar, when the arrestee is involved in an accident that results in the death of or injury to another person.

DISSENT

COMPTON, Justice, dissenting.

The language of Alaska's Implied Consent Statutes, as they read at the time of Pena's and Rychart's arrests, demonstrates that the statutes were intended to apply only in the context of searches incident to arrest. A person was deemed to consent to testing when "lawfully arrested." AS 28.35.031. The tests were to be given "at the direction of a law enforcement officer," **id.**, and sanctions accrued when "a person under arrest refuse[d] the request of a law enforcement officer to submit to a chemical test . . . ." AS 28.35.032(a).

There is simply nothing in the statutes to indicate that the legislature contemplated restricting searches pursuant to warrant, which derive from the statutory authority of the court, rather than the power of an officer to search an individual at the time of arrest. Numerous reasons have been advanced for the existence of implied consent statutes, but there is none which would support the majority's application of the prohibition against nonconsensual blood testing to searches performed pursuant to warrant.

As we noted in **Lundquist v. Department of Public Safety,** 674 P.2d 780, 783 (Alaska 1983), the legislature's purpose in enacting the Implied Consent Statutes is not clear. There we explained that such statutes were originally intended to aid police in obtaining evidence of intoxication at a time when the United States Supreme Court had put in doubt the constitutionality of non-consensual searches for evidence inside an individual's body. However, many states, including Alaska, did not pass such laws until after the Supreme Court had made clear in **Schmerber v. California,** 384 U.S. 757, 16 L. Ed. 2d 908, 86 S. Ct. 1826 (1966), that forcibly extracting blood for the purpose of determining a driver's blood alcohol content did not offend the Constitution. In **Lundquist** we found convincing one commentator's statement that "the most likely explanation for the wide-spread adoption of implied consent by the states despite the **Schmerber** decision is that the implied consent language was familiar and had been approved by the courts." **Id.** at 783, quoting Note, **Driving While Intoxicated and the Right to Counsel: The Case Against Implied Consent,** 58 Texas L. Rev. 935, 944 (1980). Another related explanation is that in 1967 the federal Department of Transportation promulgated regulations requiring some form of implied consent law before a state could establish its eligibility to receive federal highway funds. **See** Note, **supra** at 942-43. The federal regulations were written after **Schmerber,** and did not require a provision prohibiting testing if no consent was given, 33 Fed. Reg. 16,562 (1968), but it is not too difficult to imagine that states, in the 10 process of complying with the federal regulations, would look to pre-**Schmerber** implied consent statutes as models.

Other courts, in interpreting implied consent laws enacted after **Schmerber,** have decided that their purpose is to prevent the violent confrontations that might arise between police officers and drunken motorists if the officers attempted to administer, or have administered, chemical tests by force. **See** Note, **supra** at 941-2. Appellant Rychart asserts that this is the purpose of Alaska's Implied Consent Statutes, and that it is served equally by limiting searches incident to arrest and searches pursuant to warrant. When a search warrant has been issued by a neutral magistrate, however, much of the potential for conflict is reduced. The accused is made aware that a judicial officer has ordered the search; he therefore knows he is not being singled out for persecution by a police officer. Citizens are expected to submit peacefully to such court orders. As the State notes in its brief on appeal, the distinction is similar to that made by "knock and announce statutes," which are also intended to reduce the likelihood of violence between police officers and suspects. **See Lockwood v. State,** 591 P.2d 969, 971 (Alaska 1979).

Thus, there is no conceivable purpose in extending the provisions of AS 28.35.032 to searches pursuant to warrant. Further, to proscribe the use of search warrants as a means of obtaining evidence of a driver's insobriety, would be to place allegedly drunken drivers in an exalted class of criminal defendants, protected by the law from every means of obtaining the most important evidence against them. It is incredible that the legislature could have intended such a result. The 1982 amendment to the implied consent statutes permitting chemical tests to be administered over a defendant's objections in cases where another party has been killed or seriously injured, AS 28.35.035, supports this conclusion, because it indicates that the legislature did not intend such a result even in the context of a search incident to arrest.

The language of AS 09.65.095 provides additional evidence that searches pursuant to warrant were intended to be outside the scope of the prohibition contained in AS 28.35.032. At the time of Pena's and Rychart's arrests, it protected health care providers from civil or criminal actions for battery arising from the act of taking a blood sample when an arresting officer had "a search warrant or court order authorizing the taking of the blood sample." After the 1982 amendments to the Implied Consent Statutes, AS 09.65.095 was also amended to include protection for health care providers who acted "at the request of a police officer under the circumstances specified in AS 28.35.035." Thus, the legislature saw the taking of blood samples at the request of a police officer, which was legitimized under the circumstances described in AS 28.35.035 in 1982, to be distinguishable from the taking of blood samples at the direction of a judicial officer or court.

In short, I see every reason "to draw the distinction drawn by the court of appeals," **Pena v. State, 684 P.2d 864, 867, Op. No. at 6 (Alaska , 1984), in this case, and cannot agree with this court's conclusion that the implied consent statutes in effect at the time of the defendants' arrests precluded the "admission into evidence of chemical sobriety test results obtained pursuant to a search warrant after the arrestee has refused to take such a test." Pena v. State, 684 P.2d at 866, Op. No. at 4. Therefore, I dissent from the order reversing the defendants' convictions and remanding the cases for new trials.**

OPINION FOOTNOTES

1 The California Supreme Court, speaking of California's Implied Consent Statute, noted that "the effect of this legislation is to equip peace officers with an instrument of enforcement not involving physical compulsion." People v. Superior Court, 6 Cal. 3d 757, 493 P.2d 1145, 1150, 100 Cal. Rptr. 281 (Cal. 1972). **See also,** State v. Bellino, 390 A.2d. 1014 (Me. 1978).

2 The 1982 and 1983 amendments to AS 28.35.032 make the refusal to submit to testing a misdemeanor and provide that this refusal can be used against the driver as evidence in any criminal or civil proceeding arising out of acts the driver allegedly committed while operating a motor vehicle.

3 In Layland v. State, 535 P.2d 1043 (Alaska 1975), we accepted the parties' concession that the Implied Consent Statute does not preclude admitting into evidence results of chemical sobriety tests if the taking of the samples did not violate the accused's constitutional rights. 535 P.2d at 1046 n. 13. The issue in **Layland** was whether the admission of results of a non-consensual, warrantless, blood test not performed as a search incident to arrest violated the accused's rights under the federal and state constitutions; the limiting effect of the Implied Consent Statute was not argued. In **Geber,** we noted that the parties' concession in **Layland** was ill-advised and we overruled **Layland** to the extent that it was inconsistent with **Geber.** 592 P.2d at 1191, 1192 n. 8.

4 Results of chemical sobriety tests performed by medical personnel for medical purposes are admissible against a defendant even after the defendant has refused officers' requests to consent to a chemical sobriety test. Nelson v. State, 650 P.2d 426 (Alaska App. 1982). However, the court in **Nelson** recognized that, once a suspect refuses police requests to consent to a chemical sobriety test, police may not direct medical personnel to administer such a test. 650 P.2d at 427.

5 Because Pena's accident took place in 1980 and Rychart's in 1981, this amended statute does not apply to their case.

6 The court of appeals supported its conclusion by noting that this court has stated that the Implied Consent Statute does not create a "right" of a driver to refuse to submit to chemical testing. 664 P.2d at

176, citing Copelin v. State, 659 P.2d 1206 (Alaska 1983), and Palmer v. State, 604 P.2d 1106 (Alaska 1979). These cases, however, did not involve situations where the driver refused to be tested. In **Copelin** the issue addressed was whether a driver could consult his attorney before deciding whether to submit to the test. **Palmer** involved the question of whether a driver must be advised of his right to have an independent blood test administered. The Implied Consent Statute does not create a right to refuse testing that is exercisable at no cost. Instead, the statute creates a "power" (not a "right") that extracts a penalty upon the driver when exercised. Copelin v. State, 659 P.2d 1206, 1212-1213.

792 P.2d 673 GUNDERSEN V. MUNICIPALITY OF ANCHORAGE (S. Ct. 1990) 1990 Alas. Lexis 72

DALE M. GUNDERSEN, Petitioner,

vs.

MUNICIPALITY OF ANCHORAGE, Respondent

No. 3610, File No. S-3219 3AN-M-86-6349 Criminal
SUPREME COURT OF ALASKA
792 P.2d 673, 1990 Alas. LEXIS 72
June 15, 1990
Petition for Hearing from the Court of Appeals, State of Alaska, on Appeal from the District Court, Third Judicial District, Anchorage, Natalie K. Finn, Judge. CA File No. A-2112.

Rehearing Denied July 30, 1990. Reported at 792 P.2d 673. Released for Publication August 2, 1990.

COUNSEL

William Grant Callow, Anchorage, for Petitioner.
Elaine Vondrasek, Assistant Municipal Prosecutor, and Richard D. Kibby, Municipal Attorney, Anchorage, for Respondent.

JUDGES

Matthews, Chief Justice, Rabinowitz, Compton Justices. MOORE, Justice. BURKE, Justice, dissenting.
AUTHOR: MOORE

OPINION

This case involves the scope of a person's due process right to challenge the result of a breath test that the police administer after the person is arrested for driving while intoxicated. We have held that in order to introduce the result of the police-administered breath test in evidence, due process requires that the state preserve a sample of the defendant's breath for independent testing. The issue in this case is whether the state may satisfy a defendant's due process rights without preserving his breath sample if it provides notice of his right to an independent test and offers assistance in obtaining one. The defendant, Dale M. Gundersen, claims that the results of his breath test should have been suppressed because the notice and offer of assistance he received was constitutionally deficient. The court of appeals disagreed and affirmed his conviction. We affirm.

The essential facts of this case are not in dispute.[1] On September 10, 1986, Gundersen was arrested for driving while intoxicated in violation of Anchorage Municipal Code ("AMC") 9.28.020. At the police station, Officer David Koch of the Anchorage Police Department administered a chemical test of Gundersen's breath using the Intoximeter 3000 machine. The Intoximeter test registered a reading of .264 grams of alcohol per 210 liters of breath. No sample of Gundersen's breath was taken or preserved. After Gundersen took the Intoximeter test, Koch read him the following "Notice of Right to an Independent Test":

You are . . . under arrest for the offense of driving while intoxicated. You have provided a sample of your breath for analysis on the Intoximeter 3000. You also have a right to obtain an independent test of your blood alcohol level. If you wish to have an independent test you will be transferred to a local medical facility where a sample of your blood will be drawn by qualified personnel at no charge to you. The blood sample will be stored at the medical facility for a period of 60 days. It will be your responsibility to make arrangements for analysis of your blood sample. The analysis itself will be done at your own expense. At this time you must decide whether or not you want an independent test performed. A refusal to decide will be taken [as] a waiver of your right to obtain an independent test.

Gundersen told Koch: "I do not want to receive the blood test" and checked the appropriate box on the notice form.

Gundersen moved to suppress the results of the Intoximeter test. The district court denied the motion. At trial, the Intoximeter test result was admitted in evidence. Gundersen was convicted of driving while intoxicated in violation of AMC 9.28.020.

Gundersen appealed the conviction to the court of appeals contending that the trial court erred in refusing to suppress the results of his Intoximeter test. Gundersen argued, in part, that the Intoximeter results should have been suppressed because the form notice that Officer Koch read to him was inadequate to satisfy both his due process right to challenge the Intoximeter results and his statutory right to an independent test under AMC 9.28.023(E). In **Gundersen v. Municipality of Anchorage**, 762 P.2d 104 (Alaska App. 1988), the court of appeals rejected these and other arguments and affirmed Gundersen's conviction.[2] We granted Gundersen's petition for hearing to clarify the source and the scope of a defendant's due process right to challenge the result of a police-administered breath test. Gundersen does not appeal the court of appeals' rejection of his claim that the form notice violated his statutory right to an independent test under AMC 9.28.023(E). We express no opinion on this issue.[3]

We first recognized a due process right to challenge the result of a police-administered breath test in **Lauderdale v. State**, 548 P.2d 376 (Alaska 1976). We held that due process requires that in order to introduce the breath test result, the police must give the defendant a reasonable opportunity to challenge the test result. We concluded that the police denied Lauderdale due process by failing to preserve a sample of his breath for independent testing:

Lauderdale is asking for the opportunity to test the reliability or credibility of the results of the breathalyzer test. He wishes to do this by a scientific analysis of some of the components of the breathalyzer machine, that is, the ampoules, which we have held may well yield scientifically reliable data bearing on his innocence or guilt of the crime with which he is charged. A denial of the right to make such analysis, 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 denial of a right to a fair trial, and a fair trial is essential to affording an accused due process of law.

548 P.2d at 381 (footnotes omitted). In holding that due process requires the police to

preserve breath samples, we did not indicate whether we were interpreting the due process clause of the fourteenth amendment of the Federal Constitution or the due process clause of the Alaska Constitution.

The constitutional source of the holding is significant in light of the United States Supreme Court's decision in **California v. Trombetta,** 467 U.S. 479, 81 L. Ed. 2d 413, 104 S. Ct. 2528 (1984). In **Trombetta,** the Court held "that the Due Process Clause of the Fourteenth Amendment does not require that law enforcement agencies preserve breath samples in order to introduce breath-analysis tests at trial." 467 U.S. at 491. The Court reasoned that a breath sample failed to meet the standard of constitutional materiality set forth in **United States v. Agurs,** 427 U.S. 97, 109-19, 49 L. Ed. 2d 342, 96 S. Ct. 2392 (1976): "evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." 467 U.S. at 489. The Court first concluded that "the chances are extremely low that preserved samples would have been exculpatory." **Id.** The Court considered that the high accuracy of the Intoxilyzer[4] would mean that a preserved breath sample would simply confirm the original test result "in all but a tiny fraction of cases." **Id.** Second, even assuming that the breath sample was exculpatory, the Court found that there were readily available alternative means of demonstrating innocence. The three ways the Intoxilyzer might malfunction, faulty calibration, extraneous interference with machine measurements, and operator error, all can be proven without resort to breath samples. For example, a defendant may inspect the machine for faulty calibration, introduce evidence of factors interfering with the proper operation of the machine, and cross-examine the police officer who administered the test in order to raise doubts about whether the test was properly administered. 467 U.S. at 490. At the same time, the Court recognized that "state courts and legislatures, of course, remain free to adopt more rigorous safeguards governing the admissibility of scientific evidence than those imposed by the Federal Constitution." 467 U.S. at 491 n.12 (citing **Lauderdale v. State,** 548 P.2d 376 (Alaska 1976)).

Today, we reaffirm our holding in **Lauderdale** under the due process clause of the Alaska Constitution. A positive Intoximeter test result is the single most important piece of evidence against a defendant accused of driving while intoxicated. We recognize that the Intoximeter is ordinarily an accurate machine and that there are alternative methods of challenging the test result such as cross-examining the operator and inspecting the machine. However, we do not believe these opportunities to challenge the test result are necessarily sufficient given the state's coercive power to subject a person arrested for driving while intoxicated to the Intoximeter test under the implied consent statute.[5] Since a defendant must provide the state with potentially incriminating evidence at the risk of criminal penalties, we hold that due process requires that the defendant be given an opportunity to challenge the reliability of that evidence in the simplest and most effective way possible, that is, an independent test.[6]

Gundersen argues that since the state failed to preserve a breath sample, his Intoximeter test result should have been suppressed. The Municipality counters that its notice and offer of assistance is a constitutionally adequate substitute for preserving breath samples under the court of appeals' decision in **Municipality of Anchorage v. Serrano,** 649 P.2d 256 (Alaska App.

1982). In **Serrano,** the court addressed the issue whether due process permits the state to introduce Intoximeter evidence if the police did not preserve a sample of the defendant's breath at the time of testing. The court concluded that "due process does require the state and the municipality to take reasonable steps to attempt to preserve breath samples for defendants for their independent analysis **or to provide some other alternative check of the breathalyzer results."** 649 P.2d at 259 (emphasis added). The court explained that "effective compliance" with AS 28.35.033(e) which establishes a defendant's right to an independent test would be one permissible alternative to preserving breath samples:[7]

We believe that effective compliance with AS 28.35.033(e) would constitute an acceptable alternative to routine preservation of breath samples. In order to establish effective compliance with AS 28.35.033(e), however, we believe that the prosecution would, at a minimum, have to show the following: (1) that the officer who administered the breathalyzer test clearly and expressly informed the defendant of his right to secure an independent test under AS 28.35.033(e); (2) that if the defendant requested an independent test, the officer . . . made reasonable and good-faith efforts to assist the defendant in obtaining access to a person qualified to perform an independent examination; and (3) that persons qualified to conduct independent tests or to preserve blood or breath samples for the purpose of conducting independent tests were in fact available in the area where the breathalyzer test was administered.

649 P.2d at 258 n.5.

We agree with the **Serrano** court that clear and express notice of a defendant's statutory right to an independent test under these conditions satisfies the requirements of due process. In **Lauderdale,** we held that the state violated Lauderdale's due process rights by failing to preserve a breath sample because he was denied a reasonable opportunity to obtain an independent test to challenge the result of the police-administered test. However, it is not necessary to preserve a breath sample in order to provide a defendant with a reasonable opportunity to obtain an independent test. While the state may provide this opportunity by preserving the defendant's breath sample for later independent testing, it also may provide this opportunity by notifying a defendant of his right to an independent test and assisting the defendant in obtaining one.

We recognize that a person may waive his constitutional right to challenge the Intoximeter test if he has to choose to exercise that right while in police custody. No such choice is necessary if the breath sample is preserved for later testing. However, we do not believe that having to make a choice while in police custody so diminishes the value of the notice of the right to an independent test that it makes it an unreasonable opportunity to challenge the accuracy of the Intoximeter test result. We agree with the court of appeals that if the police choose not to preserve a breath sample, due process requires that they give clear and express notice of a defendant's right to an independent test and offer assistance in obtaining one in order to introduce police-administered test results at trial.[8]

A defendant's waiver of this due process right essential to a fair trial is valid only if it is knowingly and intelligently made. **See Thessen v. State,** 454 P.2d 341, 343 (Alaska 1969); **see also Schneckloth v. Bustamonte,** 412 U.S. 218, 235-241, 36 L. Ed. 2d 854, 93 S. Ct. 2041

(1973) (knowing and intelligent waiver standard applied to those rights guaranteed to a criminal defendant to preserve a fair trial). Justice Burke correctly observes that "an accused may be intoxicated to such an extent that a knowing and intelligent waiver [of his due process right] is precluded." **Infra** p. 17. Justice Burke concludes that since a person charged with driving while intoxicated frequently will be intoxicated, "the probability of an involuntary waiver of the accused's due process rights is high." **Id.** Thus, Justice Burke would adopt a prophylactic rule requiring the state to preserve an accused's breath sample to protect his due process rights. **Id.**

We do not believe such a prophylactic rule is necessary. We have held that a defendant's waiver of his due process rights is effective despite his intoxication so long as "he knew what he was doing." **Thessen,** 454 P.2d at 345; **see also People v. Moore,** 20 Cal. App. 3d 444, 97 Cal. Rptr. 601, 603-04 (Cal. App. 1971); **State v. Pease,** 129 Vt. 70, 271 A.2d 835, 838 (Vt. 1970). Although Gundersen does not allege that his waiver was invalid because he was intoxicated, we observe that Gundersen's insightful questions to the arresting officer concerning the accuracy of the Intoximeter test indicate that he knew what he was doing. **See Gundersen,** 762 P.2d at 107. A defendant's ability to challenge the introduction of Intoximeter evidence on the ground that he was so intoxicated that he did not know what he was doing adequately protects his due process right to challenge the Intoximeter test.

Gundersen challenges the adequacy of the form notice under the due process clause of the Alaska Constitution on the ground that it did not inform him of the full scope of his statutory right under AMC 9.28.023(E) to obtain an independent test of his own choosing performed by a physician of his own choosing.[9] The police offered Gundersen only a blood test and implied that it would be administered at a facility chosen by the police. Gundersen argues that this notice violated his due process right to a reasonable opportunity to challenge the accuracy of the Intoximeter test result because he was neither given a choice of independent tests nor a choice of medical facilities.

We conclude that the notice read to Gundersen satisfied due process. First, we agree with the court of appeals that the drawing of blood is not "so intrusive a procedure as to be an unreasonable alternative **per se.**" 762 P.2d at 112. Therefore, that Gundersen was not given his choice of reasonable tests did not deny him his due process right to a reasonable opportunity to obtain an independent test. Similarly, without any allegation that the police-selected facility would not administer a reliable test, that Gundersen was not given his choice of reasonable facilities at which to take the test also did not deny him due process. We hold that the notice and offer of assistance given to Gundersen complied with his due process right to challenge the result of the police-administered Intoximeter test.[10]

The judgment of the court of appeals is AFFIRMED.

DISSENT

BURKE, Justice, dissenting.

I dissent.

Today the court recognizes that "[a] positive Intoximeter test result is the single most important piece of evidence against a defendant accused of driving while intoxicated," and holds that "due process requires that the defendant be given an opportunity to challenge" the reliability of such evidence by obtaining an independent test.

Dale Gundersen was arrested because he appeared to be too intoxicated to drive. Thereafter, he was tested and the test results showed him to have a blood alcohol content of .24. It is generally accepted that a person with a blood alcohol content between .15 and .20 is "obviously intoxicated."[1] Given these circumstances, it is questionable whether Gundersen was cognizant enough to understand a hurried recitation of his "rights," and difficult to accept that he "waived" those rights.

In the area of confessions, the state must show -- by a preponderance of the evidence -- the voluntariness of a confession. **Sprague v. State,** 590 P.2d 410, 413 (Alaska 1979); **Schade v. State,** 512 P.2d 907, 916-17 (Alaska 1973). A primary indicium of voluntariness are the defendant's capacities to understand both his rights and the consequences of waiving those rights. **Miranda v. Arizona,** 384 U.S. 436, 444, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966); **see also Zinermon v. Burch,** U.S. , Op. No. 87-1965 at 20-21 (February 27, 1990) (procedural due process violated where state officials allowed a mentally incompetent patient to sign an "informed consent" form for hospital admission). This court, and the court of appeals, have recognized the principle that an accused may be intoxicated to such an extent that a knowing and intelligent waiver is precluded. **Sprague,** 590 P.2d at 414; **Hampton v. State,** 569 P.2d 138, 141-43 (Alaska 1977); **Thessen v. State,** 454 P.2d 341, 345 (Alaska 1969); **Van Cleve v. State,** 649 P.2d 972, 976 (Alaska App. 1982).

In cases where the defendant's intoxication is merely incidental to the underlying crime, the majority's case-by-case review for involuntariness is appropriate. **See Phillips v. State,** 625 P.2d 816, 817 n.5 (Alaska 1980). In cases where intoxication is an essential element of the crime charged, such as driving while intoxicated, the probability of an involuntary waiver of the accused's due process rights is high. The burden on the state to preserve a breath sample is, on the other hand, minimal. I would, therefore, as a prophylactic rule, require the state to take and preserve a breath sample for the defendant's later use. Whether the sample ultimately proves exculpatory, or inculpatory, is inapposite. What is important is the state's respect for the individual's capacity to understand and appreciate the nature of the due process rights afforded an accused.

OPINION FOOTNOTES

1 In his petition for hearing, Gundersen stipulated to the court of appeals' statement of the facts of the case. **See Gundersen v. Municipality of Anchorage,** 762 P.2d 104, 107 (Alaska App. 1988).

2 The court of appeals subsequently denied Gundersen's petition for rehearing. **Gundersen v. Municipality of Anchorage,** 769 P.2d 436 (Alaska App. 1989).

3 With respect to Gundersen's other points on appeal, the petition for hearing was improvidently

granted.

4 The Omicron Intoxilyzer which was used to test Trombetta's breath is an infrared detection device operating on the same principle as the Intoximeter 3000 used by the Anchorage police. The primary difference between the machines is that the Intoximeter 3000 incorporates a computer making its operation more automatic. 2 R. Erwin, **Defense of Drunk Driving Cases** § 19.03 at 19-47 (3d ed. 1989).

5 AS 28.35.031; AMC 9.28.021. Under AS 28.35.031 and the corresponding municipal ordinance, AMC 9.28.021, a person arrested for driving while intoxicated is deemed to have consented to an Intoximeter test. The state has no duty to advise him that he has a right to refuse to take the test. **Wirz v. State,** 577 P.2d 227, 230 (Alaska 1978). If the arrested driver refuses to take the test, his driver's license may be revoked and he is subject to criminal penalties. AS 28.35.031(e); AS 28.35.032.

6 In **Lauderdale,** the precise issue presented was whether the police violated due process by failing to preserve a breath sample that it already had collected. In this case, the police did not collect a breath sample at all. Although in most cases a duty to collect evidence imposes a more substantial burden on law enforcement than a duty to preserve evidence already collected, the distinction is trivial in light of the technology of the Intoximeter test. The failure of the police to collect a breath sample in the first instance is simply a policy choice. **See Garcia v. District Court,** 197 Colo. 38, 589 P.2d 924, 929-30 (Colo. 1979). In this case, to hold that due process is violated only if the police fail to preserve a breath sample already collected would allow the state to circumvent a defendant's right to challenge the breath test result simply by choosing not to collect a breath sample. Therefore, we clarify our holding in **Lauderdale** that the right to challenge a police-administered breath test is violated if the police fail to collect and preserve a breath sample or otherwise provide a reasonable opportunity to obtain an independent test as discussed below.

7 AS 28.35.033(e) provides:

The person tested may have a physician, or a qualified technician, chemist, registered nurse or other qualified person of the person's own choosing administer a chemical test in addition to the test administered at the direction of a law enforcement officer. The failure or inability to obtain an additional test by a person does not preclude the admission of evidence relating to the test taken at the direction of a law enforcement officer; the fact that the person under arrest sought to obtain such an additional test, and failed or was unable to do so, is likewise admissible in evidence.

8 In **Palmer v. State,** 604 P.2d 1106 (Alaska 1979), we held that advice of a person's statutory right to an independent test is not "required by any provision of the state or federal constitution." 604 P.2d at 1110. We modify that statement to the extent that it is inconsistent with our holding in this case.

9 AMC 9.28.023(E) is in all material respects identical to AS 28.35.033(e). **See supra** note 7.

10 Gundersen's argument that his due process right was violated because his statutory rights "become part of the 'process' that is 'due'" is frivolous. Gundersen's authority for this proposition, **Blue Chip Stamps v. Manor Drug Stores,** 421 U.S. 723, 749, 44 L. Ed. 2d 539, 95 S. Ct. 1917 (1973), does not even address the question. The portion of the case that Gundersen cites refers to the judiciary's obligation to enforce a right which Congress creates. Specifically, the Court held that if Congress legislates the elements of a private cause of action for damages arising under the antifraud provision of section 10(b) of the Securities Exchange Act of 1934, the judiciary must administer the law: "the Judiciary may not circumscribe a right which Congress has conferred because of any disagreement it might have with Congress about the wisdom of creating so expansive a liability." **Id.** That the judiciary must enforce rights created by Congress does not imply that the rights created acquire constitutional significance.

DISSENT FOOTNOTES

1 **New York Public Library Desk Reference,** 650 (1989).

664 P.2d 169 PENA V. STATE (Ct. App. 1983)

MANUEL ROBERT PENA, JR., Appellant,

vs.

STATE OF ALASKA, Appellee.

No. 6174
COURT OF APPEALS OF ALASKA
664 P.2d 169
May 06, 1983

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Seaborn J. Buckalew, Jr., Judge.

COUNSEL

George E. Weiss, Whittier, for Appellant.
Donald W. McClintock, Assistant Attorney General, Anchorage, and Wilson L. Condon, Attorney General, Juneau, for Appellee.

JUDGES

Before: Bryner, Chief Judge, Coats and Singleton, Judges.
AUTHOR: BRYNER

OPINION

BRYNER, Chief Judge. OPINION

Manuel Robert Pena, Jr., appeals his conviction and sentence for manslaughter. See AS 11.41.120(a)(1). There is little dispute as to the facts relating to the principal issue raised on appeal.

Shortly before 11 p.m. on September 2, 1980, a pickup truck driven by Pena collided with an automobile at the intersection of C Street and Potter Road in Anchorage. Pena had been driving south on C Street, while the other automobile, driven by Chris Sciscente, was headed west on Potter Road when the collision occurred. Billy S. Downey, a passenger in Sciscente's automobile, was killed.

Anchorage police officers called to the scene of the accident observed that Pena had apparently been drinking; Pena was arrested and taken to the police station, where he refused a request to take a breathalyzer examination. Police then obtained a search warrant authorizing seizure of a sample of Pena's blood for testing. Pena was taken to the Alaska Hospital at approximately 2:45 a.m. on September 3, 1980, where a sample of his blood was drawn.

The state ultimately charged Pena with manslaughter, and his case proceeded to trial before a jury beginning on March 2, 1981. During trial, evidence was admitted by the state showing that Pena's blood sample was found to contain an alcohol level of.213%. A pathologist from the Alaska Hospital, Dr. Probst, testified that the .213% reading would have yielded a blood alcohol level of.273% at the time of the fatal collision, about four hours before the blood sample was

drawn. Dr. Probst also testified about the deleterious effect on a person's ability to drive of such substantial quantities of alcohol. On March 10, 1981, Pena's jury returned a verdict finding him guilty as charged.

Pena's primary argument on appeal is that evidence of his blood alcohol level was improperly obtained and should therefore have been suppressed at trial. Pena does not rely on constitutional grounds to challenge the validity of the warrant authorizing seizure of his blood; the issue that he raises is strictly one of statutory construction. Specifically, Pena's argument is predicated on the assertion that seizure and testing of blood after a refusal to submit to a breathalyzer test is prohibited by the Alaska Implied Consent Statute, AS 28.35.031-.034.The two crucial provisions of this statute for purposes of Pena's claim are contained in AS 28.35.031 and AS 28.35.032(a). At the time of Pena's offense, these provisions stated:

AS 28.35.031. **Implied Consent.** 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 his breath for the purpose of determining the alcoholic content of his 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 while intoxicated.** The test or tests shall be administered at the direction of a law enforcement officer who has reasonable grounds to believe that the person who operating or driving a motor vehicle in this state while intoxicated. [Emphasis added.]

AS 28.35.032. **Refusal to Submit to Chemical Test.** (a) **If a person under arrest refuses** the request of a law enforcement officer **to submit to a chemical test of his breath** as provided in AS 28.35.031, after being advised by the officer that his refusal will result in the suspension, denial or revocation of his license and that the refusal may be used against him in a civil or criminal action or proceeding arising out of an act alleged to have been committed by him while operating or driving a vehicle under the influence of intoxicating liquor, **a chemical test shall not be given.** [Emphasis added.]

In asserting his claim on appeal, Pena relies on the interpretation given to these provisions by the Alaska Supreme Court in **Anchorage v. Geber,** 592 P.2d 1187 (Alaska 1979).[1] **Geber** involved four separate cases in which motorists had been subjected to warrantless, non-consensual blood alcohol tests after being arrested for driving while intoxicated (DWI). The defendants relied upon AS 28.35.032(a), contending that the breathalyzer test was the only proper means by which police could have obtained evidence of blood alcohol content.

The supreme court characterized the issue presented in **Geber** as follows:

[T]he question in the cases at bar is whether the language of AS 28.35.032(a), providing that, upon a person's refusal to submit to a chemical test of his breath, **"a chemical test shall not be given,"** means that law enforcement officials are precluded from performing other chemical tests in order to determine whether alcohol is present in the person's blood.

Id. at 1190 (emphasis in original). After a review of the legislative history of the Alaska Implied Consent Statute, the court concluded:

The express language of AS 28.35.032(a), coupled with the legislative history described above, leads us 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.

Id. at 1191. In reaching this conclusion, the court expressly rejected the argument that a blood test was not a "chemical test" within the meaning of AS 28.35.032(a):

We interpret 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," to mean **any** chemical test, be it of the breath, blood, urine or otherwise. Thus, we reject the state and municipality's argument that such language means only that no other chemical test of the breath shall be given.

Id. at 1191 (emphasis in original).

The state argues vigorously that **Geber** 's interpretation of AS 28.35.032(a) should be applied only to prosecutions for DWI and that the **Geber** holding should not be extended to felony charges arising out of incidents involving drunk driving. We fail to perceive any basis for the narrow reading of AS 28.35.032(a) proposed by the state.

It is manifest that the provisions of the Implied Consent Statute are not restricted to DWI prosecutions. Instead, by the express and unequivocal terms of the statute itself, implied consent applies to all cases in which a person is "lawfully arrested for an offense arising out of acts alleged to have been committed while the person was operating or driving a motor vehicle while intoxicated." AS 28.35.031. The language of AS 28.35.032(a), which expressly prohibits any additional chemical tests to determine blood alcohol levels from being given once a breathalyzer test has been refused, specifically applies in all cases in which "a person under arrest refuses the request of a law enforcement officer to submit to a chemical test of his breath **as provided in AS 28.35.031**...." AS 28.35.032(a) (emphasis added). Thus, the plain language of the Implied Consent Statute leaves little room to distinguish between treatment of DWI cases and cases involving more serious crimes predicated upon a person's operation of a vehicle while intoxicated.[2]

At least one prior decision of the Alaska Supreme Court also militates against limiting application of AS 28.35.032(a) to DWI prosecutions. In **Layland v. State,** 535 P.2d 1043 (Alaska 1975), the court considered whether results of a warrantless blood test taken from the defendant were admissible in a negligent homicide prosecution. A sample of Layland's blood was drawn without his consent following an automobile accident that involved a fatality; Layland was not under arrest when his blood was taken. In deciding the case, the court expressly considered whether the taking of Layland's blood could be justified by reliance on the Implied Consent Statute. The court noted that the provisions of AS 28.35.031 authorized only a chemical test of the breath and, furthermore, that they required a lawful arrest prior to testing. Since neither condition was satisfied in the case, the court concluded that Layland could not be deemed to have impliedly consented to have his blood drawn for testing. In so holding, the **Layland** court attributed no importance whatsoever to the fact that the defendant had been charged with the felony offense of negligent homicide instead of with DWI, a misdemeanor. **See id.** at 1046 &

n.13.[3]

Relevant case law from other jurisdictions also weighs against distinguishing between DWI cases and prosecutions for more serious offenses in applying the admonition of AS 28.35.032(a) that "a chemical test shall not be given" following a breathalyzer refusal. Courts that have distinguished between DWI cases and felonies predicated on the offense of driving while intoxicated have in almost all instances done so on the basis of implied consent statutes that referred only to DWI prosecutions or on the basis of statutes whose legislative history affirmatively indicated an intent to restrict the scope of implied consent to DWI prosecutions. **See, e.g., People v. Sanchez,** 173 Colo. 188, 476 P.2d 980, 982 (Colo. 1970); **State v. Singleton,** 174 Conn. 112, 384 A.2d 334, 336 (Conn. 1977); **People v. Moselle,** 57 N.Y.2d 97, 439 N.E.2d 1235, 1239, 454 N.Y.S.2d 292, (N.Y. 1982); **State v. Heintz,** 34 Ore. App. 175, 578 P.2d 447, 448-49 (Or. App.), **modified on other grounds,** 35 Ore. App. 155, 580 P.2d 1064 (Or. App. 1978), **aff'd,** 286 Ore. 239, 594 P.2d 385, 392-93 (Or. 1979); **State v. Krieg,** 7 Wash. App. 20, 497 P.2d 621, 624-25 (Wash. App. 1972).[4]

Given the foregoing considerations, we conclude that AS 28.35.032(a) cannot be restricted to apply solely to DWI prosecutions. 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." AS 28.35.031.

In the present case it is undisputed that Pena's manslaughter charge was predicated on the allegation that he caused the fatal accident on September 2, 1980, by driving his truck while under the influence of intoxicating liquor. Therefore, the Implied Consent Statute applies to Pena's case to the same extent that it would if he had simply been charged with DWI. We must, however, separately consider whether the restrictions of AS 28.35.032(a) against further testing after a breathalyzer refusal apply to situations where a blood sample is obtained by the police not in reliance upon the implied consent of the accused, but pursuant to a lawfully issued search warrant.

The Alaska Supreme Court has never squarely considered this question, since **Layland v. State** and **Anchorage v. Geber** -- the court's prior decisions discussing the permissible scope of authority under the Implied Consent Statute to take samples of blood for chemical testing -- both involved warrantless seizures of blood. We recognize, however, that a forceful case can be made for the proposition that this question was resolved in **Anchorage v. Geber.** For the holding of the court in that case was couched in broad language, seemingly not restricted to cases involving warrantless seizures of blood:

As we interpret the Implied Consent Statute, it 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.

592 P.2d at 1192. **See also State v. Hitchens,** 294 N.W.2d 686 (Iowa 1980).[5]

As we have previously noted, no constitutional issue is presented, and the sole question is one of statutory construction. Though the question is extremely close and the countervailing arguments very strong, we are nevertheless inclined to hold that the result in **Geber** is not controlling in the present case. We believe that **Geber** is susceptible of a narrower reading than its broad language would at first glance suggest. **Anchorage v. Geber** involved warrantless seizures of blood; however, the seizures in **Geber** had occurred following lawful arrests for DWI. The primary issue considered in **Geber** was whether a warrantless blood sample taken after a breathalyzer refusal constituted a "chemical test" within the contemplation of AS 28.35.032(a). Despite the sweeping language of its holding, nothing in **Geber** indicates that the court gave consideration to the independent question of whether a lawfully issued warrant could properly be used to justify a seizure of blood for purposes of performing blood alcohol testing.

To the contrary, a close reading of the case leaves the impression that the court's chief concern was with defining the extent to which a warrantless seizure of blood, undertaken after a breathalyzer refusal could be deemed to be justified by reliance on the implied consent of the defendant. In this regard it is evident that **Geber** held the provisions of AS 28.35.032(a) to act as a complete prohibition. It is far from clear, however, that the court in **Geber** intended to go farther by holding that AS 28.35.032(a) acted to prohibit all forms of chemical testing for alcohol other than the breathalyzer, even when -- as in the case of lawfully issued search warrants -- the authority for conducting such tests is predicated on a source entirely independent of the Implied Consent Statute.

Moreover, **Geber** 's treatment of **Layland v. State** seems consistent with a narrow reading of the case. In **Layland,** 535 P.2d at 1046 & n.13, the supreme court suggested that a warrantless seizure of blood in connection with an offense arising from an act committed while a person was driving under the influence of alcohol might be authorized by the terms of the Alaska Implied Consent Statute as long as the person whose blood was seized had formally been arrested, as required by AS 28.35.031, and as long as the warrantless seizure was carried out in compliance with constitutional requirements.[6]

By overruling the discussion in **Layland** which seemed to intimate that a warrantless seizure of blood might, in certain circumstances, be authorized by the Implied Consent Statute, **Geber** only emphasized its conclusion that implied consent cannot be invoked to justify chemical tests of blood alcohol obtained by any means other than the breathalyzer. There is nothing that compels an inference that the court in **Geber,** by overruling **Layland,** intended to establish a rule affirmatively prohibiting law enforcement officers form seizing samples of blood for chemical testing in cases where their authority to make such seizures arises from a source entirely separate from and independent of the implied consent statute.

We believe that the narrow interpretation of **Geber** is the proper one. Construing the holding in the case to constitute a sweeping prohibition against the use of lawfully issued search warrants in all cases where a breathalyzer test has been refused would in essence amount to a ruling that AS 28.35.032(a) works a partial repeal by implication of AS 12.35.020(4), which expressly authorizes the issuance of warrants for the seizure of any property which "constitutes evidence of

a particular crime or tends to show that a certain person has committed a particular crime." Yet under well-settled principles of statutory construction, implied repeal is disfavored; one legislative enactment will not be presumed to impliedly repeal another in the absence of clear legislative intent or inconsistency so fundamental as to be fatal. **See Hafling v. Inlandboatmen's Union of Pacific,** 585 P.2d 870 (Alaska 1978).

Here, it cannot be said that the implied consent limitation contained in AS 28.35.032(a) is fundamentally inconsistent with the provisions authorizing issuance of search warrants for evidence of crime that are contained in AS 12.35.020. Both statutory provisions can be given full effect by reading AS 28.35.032(a) to restrict the use of chemical tests other than a breathalyzer only in situations where the implied consent statute is relied on as the exclusive source of authority for subjecting a person to alcohol testing. In short, we do not think it can be said that by enacting the Implied Consent Statute the legislature has clearly manifested an intent to abrogate the traditional and long-accepted procedure of obtaining evidence by reliance on search warrants duly issued by a judge or magistrate.

Furthermore, it would seem to serve little purpose to preclude seizure and testing of blood samples pursuant to a search warrant. As the state correctly observes in its brief, the policy of avoiding physical confrontations, which underlies the Implied Consent Statute's limitation on testing, carries little force when a lawfully issued search warrant is obtained. By the time a warrant has been secured the process of arrest will normally have been completed, and the potential for physical confrontation typically associated with an arrest situation will no longer exist. More significantly, an arrestee who is faced with a warrant for seizure of his blood is confronted not so much by the physical threat of an individual officer -- whose actions he may well perceive as both biased and arbitrary -- as by the legal compulsion of a formal order issued by the court. Realistically, there seems to be little reason to fear the consequences of confrontation in such circumstances to a greater extent than they are feared in any other case requiring execution of a warrant for the search of a person.

We are unpersuaded by the reasoning of cases such as **State v. Hitchens** on this point. In **Hitchens,** the court reasoned that administrative revocation of a driver's license following a breathalyzer refusal served as a "trade-off" for the potential loss of evidence to the state resulting from the refusal. This **quid pro quo** was seen as justifying as absolute restriction against any form of testing other than the breathalyzer. Thus, in the view of the court, a person who is willing to suffer revocation of his license was given "the right to refuse a breathalyzer." We think this reasoning is strained. The prohibition against additional testing embodied in AS 28.35.032(a) is a recognition that it is unrealistic to extend the concept of implied consent to situations in which the forceful taking of blood or breath would be required. It hardly seems accurate, however, to assert that the legislature viewed an administrative license revocation as the equivalent of a potential DWI conviction. It seems even more apparent that a license revocation was not viewed as a fair "trade-off" for a potential manslaughter conviction.

It is significant that the Alaska Supreme Court, contrary to the position of the court in **State v. Hitchens,** has expressly rejected the notion that AS 28.35.032(a) creates a "right to refuse a breathalyzer test." **See Palmer v. State,** 604 P.2d 1106, 1110 (Alaska 1979). **See also Coleman**

v. State, 658 P.2d 1364, 1365 (Alaska App. 1983).

Quite recently, the Alaska Supreme Court has given a relatively circumspect reading to **Geber** 's holding that no right to refuse the breathalyzer test existed. In **Copelin v. State,** 659 P.2d 1206, , Op. No. 2617 at 15-16 (Alaska 1983), the supreme court recognized the existence of a "right to refuse" in the sense that an arrested person has the power to refuse. The court in **Copelin** reasoned that, since a person has the power to refuse, and since, under AS 28.35.031, further testing is prohibited after a breathalyzer refusal, the Implied Consent Statute in effect allows defendants a choice between taking the breathalyzer test or refusing it and suffering the consequences. **Id.** at 16 & n.17. The existence of this choice, according to the court, justified allowing a person arrested for DWI to contact an attorney before taking the breathalyzer test.

However, we do not regard the court's holding in **Copelin** as weighing against the position that we adopt in the present case. In **Copelin,** the court did not overrule its earlier statement in **Geber** that there is no right to refuse a breathalyzer test. To the contrary, the court expressly acknowledged that, as a constitutional and statutory matter, no "right" existed. Similarly, while indicating that the structure of the Implied Consent Statute allows defendants a choice as to taking the test, the court never indicated that administrative sanctions for a breathalyzer refusal were intended as a "trade-off" for the test. Nor did the court indicate any view concerning the permissibility of obtaining a blood test pursuant to a duly issued search warrant -- a means entirely independent of the Implied Consent Statute.

A broad reading of **Geber** could, moreover, lead to anomalous results. Armed with the knowledge that a breathalyzer refusal would deprive them of potentially crucial evidence, law enforcement officers investigating crimes arising from the operation of a motor vehicle under the influence of intoxicating liquor, especially in the most serious situations, could be expected to avoid the chance of a breathalyzer refusal by postponing any arrest until a warrant authorizing seizure and testing of blood is obtained and served. Thus, extending the holding in **Geber** to preclude the use of of search warrants as a means of obtaining blood would only encourage officers to alter their handling of investigations by circumventing the restrictions of the implied consent provision.

In conclusion, while it is evident that the Implied Consent Statute, as it read at the time of Pena's offense, prohibited any warrantless blood alcohol testing following a breathalyzer refusal, we find little to indicate that the legislature intended the statute to act as 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; we also find little practical or logical justification for such a prohibition. Accordingly, we decline to extend the holding of **Anchorage v. Geber** to cases in which police have obtained samples of blood for alcohol testing pursuant to lawfully issued warrants. We conclude that the seizure of Pena's blood in the present case must be upheld.

Pena has raised one additional issue that merits discussion.[7] Upon conviction, Pena was sentenced by Judge Seaborn Buckalew to serve three years' imprisonment, with all but nine

months of the sentence suspended. As a special condition of his suspended sentence, Pena was required to pay $4,100 in restitution to Chris Sciscente, the driver of the automobile with which he had collided. On appeal, Pena contends that the restitution order is illegal.

AS 12.55.100(a)(2) controls awards of restitution when imposed as a condition of suspended sentences or probation. This statute provides, in relevant part:

[T]he defendant may be required... to make restitution or reparation to aggrieved parties for actual damages or loss caused by the crime for which the conviction was had....

Pena insists that Sciscente cannot properly be deemed one of the "aggrieved parties" to "the crime for which the conviction was had." We disagree.

Under AS 12.55.100(a)(2), consideration of the precise crime for which Pena was convicted is of paramount importance in determining whether Sciscente was an aggrieved party. Pena's conviction was for the crime of manslaughter. This offense was alleged to have resulted from a collision caused by Pena's recklessness in operating his pickup truck while under the influence of intoxicating liquor. Sciscente was injured and his passenger killed in the collision. Under the circumstances, property damages and injuries directly sustained by Sciscente were unquestionably the consequence of precisely the same conduct and intent on Pena's part as the conduct and intent that caused the death with which Pena was charged and which led to Pena's conviction. Since it was uncontested that Sciscente was the driver of the car with which Pena collided, Pena's conviction of the manslaughter of Sciscente's passenger necessarily encompasses, both as a matter of fact and of law,[8] the injuries directly caused to Sciscente and to his property.

Sciscente was therefore an aggrieved party under AS 12.55.100(a)(2), since it is manifest that the injuries and damage he suffered were directly caused by the crime for which Pena was convicted. We hold that the restitution order imposed by Judge Buckalew was authorized under AS 12.55.100(a)(2).

The conviction and sentence are AFFIRMED.

OPINION FOOTNOTES

1 The statutory language considered by the court in **Geber** differed slightly from the language applicable to Pena's case. In the interim between the **Geber** decision and the date of commission of Pena's offense, the legislature amended AS 28.35.031 and AS 28.35.032 to provide that a person's refusal to take a breathalyzer test could be admitted in evidence at trial. Neither Pena nor the state has argued that the amendments have any impact upon the issue decided by the court in **Ceber.** For the purpose of disposing of the issue raised in this appeal, we consider the version of the Implied Consent Statute applicable to Pena to be substantially identical to that considered in **Geber.**

2 The state argues that AS 28.35.032(b) provides a basis for distinguishing between DWI prosecutions and more serious charges arising from a defendant's conduct of driving while intoxicated. AS 28.35.032(b) provides, in relevant part:

(b) Upon receipt of a sworn report of a law enforcement officer that a person as refused to submit to a

chemical test authorized under AS 28.35.031, containing a statement of the circumstances surrounding the arrest and **the grounds upon which his belief was based that the person was operating or driving a motor vehicle in violation of AS 28.35.030** [Alaska's DWI statute], the Department of Public Safety shall notify the person that his license or nonresident privilege to drive or operate a motor vehicle in the state is revoked or suspended.... [Emphasis added.]

The state contends that the fact that this provision refers only to Alaska's DWI statute as a basis for suspending or revoking a license for refusal to submit to a breathalyzer signifies that the legislature intended to limit the effect of the implied consent provisions only to misdemeanor DWI prosecutions. This contention is without merit. When read in context, the limited reference in AS 28.35.032(b) to prosecutions under Alaska's DWI statute merely indicates a recognition of the fact that, regardless of whether the defendant is ultimately charged with DWI or with a more serious offense such as manslaughter, there will always be probable cause to arrest for DWI if the defendant was originally "lawfully arrested for an offense arising out of acts alleged to have been committed while... operating or driving a motor vehicle while intoxicated."

3 The supreme court's decision in **Anchorage v. Geber** is also illuminating. The result reached by the court in **Geber** was inconsistent with portions of the court's prior holding in **Layland** that discussed the scope of Alaska's Implied Consent Statute. Although the court could easily have distinguished the **Geber** case from its holding in **Layland** based on the fact that **Layland** involved a felony prosecution for negligent homicide, as to which implied consent would not apply, it chose not to do so; instead, the court expressly overruled the inconsistent language of the **Layland** case, thereby implying that AS 28.35.032(a) applies to felony prosecutions. Anchorage v. Geber, 592 P.2d at 1192 n.8.

4 In this regard, the state's position is severely undercut by the legislature's recent enactment of AS 28.35.035, which expressly provides that a nonconsensual test for blood alcohol content may be administered in cases where the defendant is under arrest for driving while intoxicated and the arrest results from an accident causing death or physical injury to another person. Implicit in the enactment of AS 28.35.035 is the conclusion that, under prior law, no exemption from the provisions of AS 28.35.031 existed for cases potentially involving charges more serious than driving while intoxicated.

5 As Pena correctly argues in his brief. **State v. Hitchens** supports the view that **Geber** should be construed to be dispositive in the present case. In **Hitchens,** the Iowa Supreme Court interpreted an implied consent statute that was essentially identical to AS 28.35.032(a). The case involved a prosecution for manslaughter in which a blood test was obtained pursuant to a search warrant issued after the defendant refused to take a breathalyzer examination. The court concluded that the statutory provision against giving any further chemical test after the breathalyzer refusal precluded the use of warrant to obtain blood for chemical testing. The court cited **Anchorage v. Geber** as directly supporting its conclusion. **See** State v. Hitchens, 294 N.W.2d at 688.

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

7 Pena has also raised an array of issues that do not require full discussion. These issues, and our disposition of them, are as follows:

(a) Pena complains that six instructions given to the jury by the trial judge were improper. Our holding that Pena's blood test was admissible resolves his claim as to three of these instructions. The remaining three instructions set out and defined the elements of the lesser-included offense of negligent homicide. Because Pena's jury convicted him of manslaughter, the greater offense, any error as to the lesser-included offense instructions would at most be harmless. Christie v. State, 580 P.2d 310, 320 (Alaska 1978).

(b) Pena asserts that the trial court improperly refused to suppress certain statements that he made to police following his arrest. Though the issue is noted in Pena's opening brief, it is not discussed. Pena asserts that the issue was adequately briefed in a prior petition for review to this court, which he

incorporated by reference in his brief. Examination of the referenced petition reveals that the suppression issue was not in fact raised therein. We hold that the issue has been abandoned by Pena's failure to brief it. Condon v. State, 498 P.2d 276, 281 n.3 (Alaska 1972).

(c) Pena alleges error in the trial court's denial of his motion to dismiss the indictment against him. The issue has not been briefed, and we therefore deem it abandoned. Condon v. State, **id.**

(d) Pena contends that the trial judge erred in refusing to grant a motion for mistrial made after the jury indicated that it was deadlocked. The judge denied the motion, and after inquiring of the jury, submitted a supplemental instruction defining recklessness. Pena also asserts that the court committed error in giving this supplemental instruction; he contends that the instruction was equivalent to an **Allen** charge and that it was especially objectionable because the jury had violated the court's instructions by indicating the number of jurors voting for acquittal and conviction. Having reviewed the record, we find no abuse of discretion by the trial judge in failing to grant the requested mistrial or in submitting a supplemental instruction on recklessness to the jury. **See** Des Jardins v. State, 551 P.2d 181, 189 (Alaska 1976); Koehler v. State, 519 P.2d 442, 449 (Alaska 1974).

(e) Pena challenges admission of a group of more than 60 photographs taken at the accident scene and used in evidence at trial. He objects to the group generically, without specifying separate grounds applicable to particular photographs. Pena's objection is based upon the contention that the photographs were cumulative, potentially distracting and prejudicial, and basically irrelevant to any contested issue at trial. Upon examination, the bulk of the photographs appear to be mundane, although some of the photographs depict the deceased immediately following the accident. The challenged photographs were extensively relied upon by witnesses to illustrate their testimony concerning the manner in which the collision occurred, the condition of the vehicles involved in the collision, and the conditions prevailing at the scene of the accident. The photographs were offered into evidence to assist the jury in attempting to form their own judgment as to the manner in which the collision occurred. We hold that the trial court did not abuse its discretion in admitting the photographs into evidence. Valentine v. State, 617 P.2d 751, 754 (Alaska 1980); Watson v. State, 387 P.2d 289, 294 (Alaska 1963).

(f) Pena urges that the trial judge erred in excluding testimony of a defense witness offered to establish Pena's good character. Pena has not briefed this issue, and we deem it abandoned. Condon v. State, 498 P.2d at 281 n.3.

(g) Pena asserts that the trial judge erred in refusing to award costs and attorney's fees to him as a result of the prosecution's filing of a superseding indictment in his case. We find this issue to be frivolous.

(h) Pena maintains that the trial judge erred in refusing to grant a mistrial or continuance when the prosecution presented, for the first time at trial, documentary evidence concerning a traffic signal located at the scene of the collision. We conclude that this issue was not properly preserved at trial, since Pena's counsel was given the opportunity to talk to and consult with the witness who produced the documentary evidence. In fact, Pena's counsel was given access to the documents and to the state's witness over the course of the afternoon and evening immediately after the documentary evidence came to light. The following morning, at trial, Pena's counsel failed to renew his motion for mistrial or to request any further continuance. We find, additionally, that this issue has not adequately been briefed on appeal, and we conclude that the record before us fails to establish any prejudice to Pena resulting from the untimely production of the challenged documents.

(i) Pena claims that his trial was "fraught with constitutional error" and that the cumulative impact of the error required reversal of his conviction. He relies for this contention either on the individual claims of error that he has separately raised and that we have rejected or on claims of error that he has not briefed. We find no merit to this claim.

8 **Cf.** DeSacia v. State, 469 P.2d 369 (Alaska 1970) (jury verdicts finding the defendant guilty of one count and not guilty of another held fatally inconsistent where defendant was charged with two counts of

manslaughter in connection with an automobile accident in which both the driver and the passenger of the automobile that defendant collided with were killed).

762 P.2d 104 GUNDERSEN V. MUNICIPALITY OF ANCHORAGE (Ct. App. 1988)
1988 Alas. App. Lexis 91

DALE M. GUNDERSEN, Appellant,

vs.

MUNICIPALITY OF ANCHORAGE, Appellee

No. 849, File No. A-2112
COURT OF APPEALS OF ALASKA
762 P.2d 104, 1988 Alas. App. LEXIS 91
September 30, 1988. As amended November 15, 1988.
Appeal from the District Court of the State of Alaska, Third Judicial District, Anchorage, Natalie Finn and John D. Mason, Judges.

COUNSEL

William Grant Callow, Anchorage, for Appellant.
John E. McConnaughy, III, Assistant Municipal Prosecutor, and Jerry Wertzbaugher, Municipal Attorney, Anchorage, for Appellee.

JUDGES

Before: Bryner, Chief Judge, Singleton, Judge, and Stewart, District court Judge.* [Coats, Judge, not participating.] BRYNER, Chief Judge, dissenting.
AUTHOR: SINGLETON

OPINION

SINGLETON, Judge.

Dale M. Gundersen was convicted by a jury of driving while intoxicated. Anchorage Municipal Code (AMC) § 09.28.020. He appeals, contending that the trial court erred in refusing to suppress the results of his Intoximeter test. He also challenges the trial court's ruling on jury instructions. We affirm.

FACTS

Gundersen was arrested for driving while intoxicated after the vehicle he was driving collided with a parked car and he failed certain field sobriety tests. He was given an Intoximeter test and it registered a reading of .264 grams. of alcohol per 210 liters of breath. No separate sample of Gundersen's breath was taken or preserved. After Gundersen had taken the Intoximeter test, however, Anchorage Police Officer David Koch read him a "Notice of Right to an Independent Test." The notice stated:

You are . . . under arrest for the offense of driving while intoxicated. You have provided a sample of your breath for analysis on the Intoximeter 3000. You also have a right to obtain an independent test of your blood alcohol level. If you wish to have an independent test you will be transferred to a local medical facility where a sample of your blood will be drawn by qualified personnel at no charge to you. The blood sample will be stored at the medical facility for a period

of 60 days. It will be your responsibility to make arrangements for analysis of your blood sample. The analysis itself will be done at your own expense. At this time you must decide whether or not you want an independent test performed. A refusal to decide will be taken [as] a waiver of your right to obtain an independent test. . . . I would like you to verbally answer whether you do or do not want a separate test, then check the box, read aloud the box that you have checked and sign here at the bottom, sir. Do you have any questions about the form, Mr. Gundersen?

Gundersen declined the offer of an independent test. Thereafter, the following dialogue occurred:

GUNDERSEN: I'm kind of wondering about the reasoning of the test.

[OFFICER] KOCH: The reason that we offer the blood test is so that you will have the means . . . As it says you can check the accuracy of my machine by the blood test. If you want to be able to check the accuracy, if you doubt the accuracy of the machine, anything like that. . . .

GUNDERSEN: They're not a 100% though. The machine itself?

KOCH: Well, the machine is an extremely accurate machine.

GUNDERSEN: But it's not a 100%?

KOCH: It's acceptable within limits. It's like any other machine, sir.

GUNDERSEN: Okay. But it's not a 100% is what I'm asking.

KOCH: The machine is 100% within its capabilities.

GUNDERSEN: 100, 90, or 80?

KOCH: It's 100% within its capabilities.

SUPPRESSION OF INTOXIMETER TEST RESULTS

Gundersen argues that his Intoximeter test should have been suppressed for a number of reasons. First, he contends that the police either intentionally or negligently misinformed him of the scope of his right to an independent chemical test of his blood alcohol level. Specifically, he argues that the form notice read by the arresting officer was incomplete because it did not make it clear to Gundersen that he could have any health professional of his choosing administer the test, and that a urine test or separate breath test could have been obtained, if he wished, in place of a blood test. Next, he argues that the form warning discouraged him from obtaining an independent test by telling him that while a blood sample would be drawn at no expense, he would have to pay for an independent test of that sample. In Gundersen's view, the officer should also have told him that if he could not afford to pay for the test, one would be provided at no charge. Finally, Gundersen contends that the officer's statement about the accuracy of the machine was incomplete because it did not mention the machine's margin of error. For all these reasons, he contends that the trial court should have suppressed his Intoximeter results.

At the outset, it is important to recognize that Gundersen's arguments rest on two slightly different rights. The first right springs from AMC § 09.28.023(E), and its identical counterpart under state law, AS 28.35.033(e), which permit an individual arrested for driving while intoxicated, after having submitted to an Intoximeter test, to choose any qualified person to administer an independent chemical test. Similar rights arise under the Alaska Constitution. We will address Gundersen's statutory rights first, and then proceed to a discussion of his constitutional rights.

Statutory Argument

Gundersen was arrested for driving while intoxicated. He was therefore subject to the municipality's "implied consent law," which required him to submit to a police administered chemical test of his breath or blood. AMC § 09.28.021; **Svedlund v. Anchorage,** 671 P.2d 378 (Alaska App. 1983). Once he submitted to a chemical test of his breath or blood, he became eligible to have an independent test of his own choosing.

Anchorage Municipal Code § 09.28.023(E) provides:

The person tested may have a physician, or a qualified technician, chemist, registered nurse or other qualified person of his or her own choosing administer a chemical test in addition to the test administered at the direction of a law enforcement officer. The failure or inability to obtain an additional test by a person does not preclude the admission of evidence relating to the test taken at the direction of a law enforcement officer; the fact that the person under arrest sought to obtain such an additional test, and failed or was unable to do so, is likewise admissible in evidence.

Similar statutes exist in many jurisdictions and have generated a substantial amount of litigation. Some statutes expressly require that the defendant be given notice that he is entitled to an independent test. Others, including Alaska's, do not require such notice. It is generally agreed that the statutory right to an independent sobriety test is actually a motorist's right to be free of police interference when obtaining such a test by his own efforts and at his own expense. There is no statutory right to police assistance in obtaining the test. **See Weatherford v. State,** 286 Ark. 376, 692 S.W.2d 605, 606 (Ark. 1985); **Commonwealth v. Alano,** 388 Mass. 871, 448 N.E.2d 1122, 1124-26 (Mass. 1983). The statutes normally do not require that indigents be furnished independent tests at public expense. **See Williford v. State,** 284 Ark. 449, 683 S.W.2d 228, 229 (Ark. 1985). Moreover, whether the police have substantially interfered with a defendant's opportunity to obtain an independent test is a question of fact to be decided by the trial judge. **See, e.g., Cunningham v. State,** 255 Ga. 35, 334 S.E.2d 656, 658-59 (Ga. 1985). Cases interpreting similar statutes are discussed in An notation, **Drunk Driving: Motorist's Right to Private Sobriety Test,** 45 A.L.R.4th 11-76 (1987 & Supp. 1988).

Alaska law is in accord with these authorities. In **Palmer v. State,** 604 P.2d 1106 (Alaska 1979), the Alaska Supreme Court indicated that the police are under no duty to inform a defendant of his or her right to an independent test.[1] Implicitly, the statutory right in Alaska, like the statutory right in other jurisdictions, is the right of the motorist to be free of police

interference when obtaining an independent test at his or her own expense. **See, e.g., Ward v. State,** P.2d Op. No. 3347 (Alaska, June 17, 1988).[2]

In the instant case, Gundersen was informed of his right to an independent test.[3] He was offered assistance in obtaining a blood sample at municipal expense. He was also informed that any test of the blood sample would be at his expense. Clearly, the form advice of rights does not completely parallel the terms of the ordinance. In order to prevail, however, Gundersen must establish that the warning he received constituted interference, **i.e.,** prevented him from obtaining an independent test that he would have obtained had he received no warning at all. Since this is a question of fact, we will overturn the trial court's decision only if convinced that it is clearly erroneous. **Esmailka v. State,** 740 P.2d 466, 470 (Alaska App. 1987).

There is nothing in the record to suggest that Gundersen wished a urine test or additional breath test as opposed to a blood test. Gundersen argues that he was "put off" because the form warning indicated that a retest would be at his expense. The ordinance does not, however, provide for retests at public expense. Thus, it is not clear that the warning was inaccurate in this respect. In any event, if Gundersen was in fact confused about his rights and misled by the police, the burden was on him to prove this. **See, e.g., Graham v. State,** 633 P.2d 211, 215 (Alaska 1981) (defendant motorist has the burden of showing that he or she was in fact confused by warnings given by the police).[4] **Cf. Barnhart v. Kansas Dept. of Revenue,** 243 Kan. 209, 755 P.2d 1337, 1341 (Kan. 1988) (defendant must prove insufficient notice of right to independent test adversely affected his subsequent actions); **accord Wimmer v. Motor Vehicles Div.,** 75 Ore. App. 287, 706 P.2d 182, 184 (Or. App. 1985).

Gundersen's contention that the police officer's statement regarding the one hundred percent accuracy of the Intoximeter somehow misled him into giving up his right to an independent test is meritless. Gundersen had already indicated that he did not want an independent test before this conversation took place. Moreover, given the substantial Intoximeter reading Gundersen received and the circumstances of his accident, it is pure speculation that more information regarding the machine's margin of error would have persuaded Gundersen to seek an independent test. We note that the state is entitled to discover the results of any independent test actually obtained. Consequently, we should not jump to the conclusion that accused drunk drivers will readily seek independent tests. Such tests could well be used against them at trial. **See Ward v. State,** 733 P.2d 625, 626-27 (Alaska App. 1987), **rev'd on other grounds, Ward v. State,** P.2d Op. No. 3347 (Alaska, June 17, 1988); **Russell v. Anchorage,** 706 P.2d 687, 692-93 (Alaska App. 1985). **Accord State ex re. McDougall v. Corcoran,** 153 Ariz. 157, 735 P.2d 767, 771 (Ariz. 1987); **State v. Strong,** 504 So.2d 758, 760 (Fla. 1987). The trial court was not clearly erroneous in holding that Gundersen failed to meet his burden of proving that the police warning constituted an interference which prevented him from obtaining an independent test.

In a related argument, Gundersen contends that his waiver of his statutory right to an independent test was not knowing, intelligent, or voluntary. In Gundersen's view, the record would not support a finding of waver. The trial court did not directly address this contention but implicitly held that Gundersen forfeited his right to an independent test by not making timely

efforts to obtain one. Gundersen fails to recognize the distinction between waiver and forfeiture.

A true waiver is "an intentional relinquishment or abandonment of a known right or privilege." **Johnson v. Zerbst,** 304 U.S. 458, 464, 82 L. Ed. 1461, 58 S. Ct. 1019 (1938). In contrast, a forfeiture is the loss of a right through failure to timely assert it. We have discussed the distinctions between waiver and forfeiture in a number of cases. **See Mekiana v. State,** 707 P.2d 918, 920 (Alaska App. 1985), **rev'd on other grounds,** 726 P.2d 189 (Alaska 1986); **State v. R.H.,** 683 P.2d 269, 281-82 (Alaska App. 1984); **Wilson v. State,** 680 P.2d 1173, 1175-76 (Alaska App. 1984); **Lemon v. State,** 654 P.2d 277, 279 (Alaska App. 1982), **and see Andrew v. State,** 694 P.2d 168, 172-74 (Alaska App. 1985) (Singleton, J., concurring) **See also** Rubin, **Toward a General Theory of Waiver,** 28 U.C.L.A. L. Rev. 478 (1981) (hereinafter Rubin); **Westen, Away From Waiver: A Rationale For the Forfeiture of Constitutional Rights in Criminal Procedure,** 75 Mich. L. Rev. 1214 (1977) (hereinafter Westen); Tigar, **Forward: Waiver of Constitutional Rights: Disquiet in the Citadel,** 84 Harvard L. Rev. 1 (1970); Westen & Mandell, **To Talk, to Balk, or to Lie: The Emerging Fifth Amendment Doctrine of the "Preferred Response",** 19 Amer. Crim. L. Rev. 521 (1982).

The term "waiver" is frequently used by Alaska courts to refer to both true waivers and forfeitures. **Andrew,** 694 P.2d at 172. The Alaska Supreme Court has never developed a general theory for distinguishing between those rights which may be forfeited and those that must be waived. **But see Lanier v. State,** 486 P.2d 981, 983-88 (Alaska 1971) (distinguishing between waivers during trial and pre-trial and post-trial waivers).[5] Although it has been suggested that rights created by rule or statute may be forfeited, but rights derived from the constitution must be waived, the case law does not support this distinction. In a number of situations the Alaska Supreme Court has permitted forfeiture of some constitutional rights but required waiver of others. The refusal to find all errors affecting a constitutional right to be plain error, **per se,** under Alaska Criminal Rule 47(b), indicates that some constitutional rights may be forfeited. **See, e.g., Gilbert v. State,** 598 P.2d 87, 92 (Alaska 1979). **See also Moreau v. State,** 588 P.2d 275, 280 and nn. 14-15 (Alaska 1978) (court ordinarily refuses to consider errors regarding suppression motions unless preserved in the trial court, **i.e.,** applying forfeiture rules) In addition, a plea of guilty or **nolo contendere** will effectively forfeit many constitutional rights of a defendant. **Barrett v. State,** 544 P.2d 830, 833-34 (Alaska 1975) (incantation of constitutional rights not required for valid plea if circumstances show plea was voluntary). **See also Westen, supra,** at 1215-39.

The primary distinction between waver and forfeiture lies in the requirement that a party have knowledge of his or her rights. If the courts require a showing that defendants must have had knowledge of their right before treating their actions as depriving them of that right, then it is applying a waiver rule. In contrast, if defendants may lose their rights without knowing that they exist, then the court is permitting forfeiture. **See, e.g., Rubin, supra,** at 496-98.

In the case of pretrial rights, where a person is not normally represented by an attorney, a requirement that the defendant have knowledge of his right before he can be held to have lost it invariably requires some type of a warning. This is the context in which **Miranda** operates. **See**

Miranda v. Arizona, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966). In **Palmer v. State,** 604 P.2d 1106 (Alaska 1979) the Alaska Supreme Court made it clear that no warning of the right to an independent test was required. The supreme court clearly intended to apply a forfeiture rule, rather than a waiver rule, to the statutory right to an independent test. Although it is less clear why the court reached this conclusion, other jurisdictions have almost universally reached the same result. See Annot. 45 A.L.R.4th 11 **et seq**.

A number of reasons may explain the use of a forfeiture rule. In choosing whether to permit forfeiture or require waiver of a given right, the court must balance the significance of the possible loss of the affected right, in the context in which it arises, against the burden to the administration of justice resulting from a requirement of proof of the defendant's actual knowledge of the right. In striking such a balance, the courts should require waver if the right is crucial to a fair trial, but permit forfeiture if the right is less significant.

Applying this balancing test to a defendant's right to an independent chemical test to determine blood alcohol level, a number of factors must be considered. First, there is a strong public interest in identifying and neutralizing drunk drivers. Courts have recognized the danger presented by drunk drivers in a number of cases. See, **e.g., Tulowetzke v. State,** 743 P.2d 368 (Alaska 1987); **Ebona v. State,** 577 P.2d 698 (Alaska 1978). Second, the Intoximeter and other state administered blood tests are considered to have substantial value as evidence in proving drunk driving. **Wester v. State,** 528 P.2d 1179, 1183 (Alaska 1974), **cert. denied,** 423 U.S. 836, 46 L. Ed. 2d 54, 96 S. Ct. 60 (1975). Third, there is a corresponding likelihood that an independent test, if performed, will corroborate rather than invalidate the states test. See **California v. Trombetta,** 467 U.S. 479, 489, 81 L. Ed. 2d 413, 104 S. Ct. 2528 (1984); **Best v. Anchorage,** 749 P.2d 375, 381-82 (Alaska App. 1988). Finally, there is the difficulty of proving knowledge of the right to an independent test, particularly when the person whose knowledge is in question is **prima facie** intoxicated. If warnings are required, there would be a substantial increase in litigation over their content. The more guilty a person is of drunk driving, **i.e.**, the more intoxicated the person is, the better the argument becomes that he or she could not understand or was confused or misled by any warnings given.

These considerations may well have led the Alaska Supreme Court in **Palmer,** as well as the Alaska legislature and the Anchorage Municipal Assembly, in enacting respectively the statute and the ordinance, to conclude that a statutory right to an independent test should be available but that it should be forfeited if not demanded. Authorities from other jurisdictions appear to be in accord. Controversies over warnings should not, under this theory, result in the suppression of valuable evidence. See, **e.g.**, AMC § 09.28.023(E) (" . . . the failure or inability to obtain an additional test by a person does not preclude the admission of evidence relating to the test taken at the direction of a law enforcement officer").

Constitutional Argument

We next turn to Gundersen's rights under the Alaska Constitution. In a criminal case, the municipality is under a constitutional due process obligation to make available to the defense evidence in its possession that is both favorable to the accused and material to guilt or

punishment. **See Brady v. Maryland,** 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963). The United States Constitution does not establish a right to an independent chemical test in drunk driving cases. **Trombetta,** 467 U.S. 479, 81 L. Ed. 2d 413, 104 S. Ct. 2528 . In contrast, Alaska courts have held that the state constitution requires that the police must obtain and preserve a breath sample, or provide some other means of independently verifying the accuracy of the results of the police-administered chemical test of the driver's blood or breath. **See Briggs v. State,** 732 P.2d 1078, 1080 (Alaska 1987); **Champion v. Department of Public Safety,** 721 P.2d 131, 132 (Alaska 1986); **Lauderdale v. State,** 548 P.2d 376, 381 (Alaska 1976); **Anchorage v. Serrano,** 649 P.2d 256, 258-59 (Alaska App. 1982).

This obligation exists independently of the statutes and ordinances previously discussed. An independent test obtained under the ordinance or statute would nevertheless probably satisfy the constitutional obligation. The police did not retain a breath sample in this case. In **Serrano,** however, we recognized that the independent verification requirement might be satisfied in a variety of ways. M suggested that one way to satisfy the requirement would be for the police to offer the accused assistance in obtaining an independent chemical test as provided for under AS 28.35.033(e) and AMC § 09.28.023(E). **Serrano,** 649 P.2d at 258 n.5.

Because the sole function of the **Brandy/Serrano** due process requirement is to assure the accused an accurate and objective means of verifying the Intoximeter test results, compliance can be achieved by offering individuals arrested for driving while intoxicated any means of verification that is reasonable and at least roughly comparable in accuracy and reliability with the testing of a breathalyzer ampoule or preserved Intoximeter breath sample. The underlying concern of the state constitutional requirement implies no need to provide the accused with a choice of different tests or a choice of qualified persons to administer the test.

In the instant case, the police did not seek to preserve a sample of Gundersen's breath. Instead, they made an effort to comply with the **Serrano** requirement by offering to take Gundersen to a local hospital to have a blood sample drawn at the expense of the municipality by qualified hospital personnel. It is undisputed that the blood sample would have provided Gundersen with a reliable and accurate means of verifying his Intoximeter result.

Certainly, the police might have sought to comply with the due process requirement by attempting to preserve a breath sample, by offering some other form of independent chemical test, or by offering a choice of independent tests. Due process under the Alaska Constitution, however, requires only that Gundersen be given a reasonable opportunity to verify the Intoximeter test result. Gundersen has presented no evidence to support the conclusion that the police acted arbitrarily or unreasonably in offering him a blood test instead of a urine test or attempting to preserve a sample of his breath. Experience suggests that the preservation of accurate and reliable breath samples may be far more difficult and costly in practice than in theory. **See generally State v. Kerr,** 712 P.2d 400 (Alaska App. 1985); **Best v. Anchorage,** 712 P.2d 892 (Alaska App. 1985). Nor can we say that the drawing of blood is so intrusive a procedure as to be an unreasonable alternative **per se. See Ward v. State,** 733 P.2d at 627. We therefore conclude that Gundersen's constitutional rights under **Briggs** and **Serrano** were satisfied by the offer of assistance in obtaining an independent blood test. We stress that this

issue is resolved according to state law inasmuch as there is no due process right to an independent test under federal constitutional law. **See Trombetta,** 467 U.S. 479, 81 L. Ed. 2d 413, 104 S. Ct. 2528 .

Does constitutional due process require that an independent test be furnished free of charge to indigents? In **Evitts v. Lucey,** 469 U.S. 387, 395, 401-02, 83 L. Ed. 2d 821, 105 S. Ct. 830 (1985), the Supreme Court suggested that states may be under a constitutional duty to safeguard rights given by statute even if those rights are not independently mandated by the constitution. The courts that have considered this issue have concluded that neither constitutional due process nor equal protection of the laws under the United States Constitution requires that independent tests be furnished free of charge to indigents even though the state affords a right to an independent test. **See, e.g., Scarborough v. Kellum,** 525 F.2d 931, 933 (5th Cir. 1976); **Capler v. City of Greenville, Mississippi,** 422 F.2d 299, 301 (5th Cir. 1970); **Smith v. Cada,** 114 Ariz. 510, 562 P.2d 390, 392-93 (Ariz. App. 1977); **Commonwealth v. Tessier,** 371 Mass. 828, 360 N.E.2d 304, 305-06 (Mass. 1977); **cf. State v. Coy,** 48 Ore. App. 267, 616 P.2d 1194, 1195 (Or. App. 1980) (police officer's statement that blood test was available only at defendant's expense did not mislead defendant into thinking he had no right to refuse breath test).

It is not necessary for us to decide whether the Alaska Constitution guarantees a free independent test to indigents because there is nothing in the record to suggest that Gundersen is indigent. **See State v. Alcorn,** 125 N.H. 672, 484 A.2d 1176, 1180 (N.H. 1984). Gundersen does not point to anything in the record implying that he was personally discouraged from obtaining an independent test. There is no evidence suggesting that he is indigent, would prefer a urine test, or had special confidence in some other health professional.

Gundersen asks this court to adopt a prophylactic rule, from which he would incidentally benefit, suppressing Intoximeter evidence in order to coerce the municipality into a more complete advisement of the right to an independent test. Arguably, more people would avail themselves of the right to such a test if they knew it was completely free, included urine tests, and could be performed by any health professional. We do not believe that valuable evidence of a serious crime should be suppressed in pursuit of such speculative goals, particularly when independent tests, if obtained, would more often than not corroborate rather than undermine prosecution evidence.

JURY INSTRUCTIONS

Gundersen next argues that the trial court erred by failing to give his proposed jury instruction, which quoted AMC § 09.,8.023(E) in part, and then concluded:

If you find that the officer failed to properly advise the defendant of his rights to an independent chemical test, you may consider that fact as a factor bearing on the credibility of the officer and accuracy of the breath test administered by the officer or at his direction.

The trial court is under a duty to fully instruct the jury on the elements of the offense and any available defenses. Whether or not a particular instruction should be given is within the trial court's discretion. **Buchanan v. State,** 561 P.2d 1197, 1207 (Alaska 1977). The court has broad

discretion regarding instructions on the credibility of witnesses. **Id.** The statutory warnings are not elements of the offense, and an inaccurate warning does not constitute a defense. It may, however, be relevant to the defendant's " **mens rea.** " **Brown v. State,** 739 P.2d 182, 185-86 (Alaska App. 1987).

We conclude that the trial court did not abuse its discretion by rejecting Gundersen's proposed instruction. We recognize that AMC § 09.28.023(E) provides in part: "[T]he fact that the person under arrest sought to obtain such an additional test and failed or was unable to do so is likewise admissible in evidence." **See also State ex re. McDougal v. Corcoran,** 735 P.2d at 771 (holding that such evidence is admissible against the defendant). Here, however, it does not appear that Gundersen sought but failed to obtain an additional test. Nor does it appear from the record that Gundersen offered evidence establishing a nexus between the warnings he did receive and the credibility of the officer or the validity of the officer's test. **Cf. Trombetta,** 467 U.S. at 489 (accuracy of "intoxilizer" test, as shown in the record, indicates a low probability that preserved breath samples would exculpate suspected drunk driver).

In the absence of some evidence to the contrary, an independent test would as likely corroborate as invalidate the municipality's test. **See, e.g., Best v. Anchorage,** 749 P.2d 375, 382 (Alaska App. 1988). This is not a case in which there is some evidence of a bad faith attempt by the municipality to discourage Gundersen from obtaining an independent test. Such evidence, if present, might support an inference that the officers lacked confidence in the integrity of their own test, justifying a spoliation instruction. **See, e.g., Williams v. State,** 629 P.2d 54, 64 n.22 (Alaska 1981); **Putnam v. State,** 629 P.2d 35, 43 (Alaska 1980). **See also State v. Hansen,** 156 Ariz. 291, 751 P.2d 951, 955 (Ariz. 1988) (discussing circumstances under which spoliation instruction is warranted). There is nothing in this record to suggest that the municipality intentionally or negligently failed to produce the strongest evidence available to it, or that an independent test, if obtained, would have been exculpatory. **See Fletcher v. Anchorage,** 650 P.2d 417, 418 (Alaska App. 1982). We therefore decline to follow **People v. Alvarado,** 181 Cal. App. 3d Supp. 1, 226 Cal. Rptr. 329, 331 (Cal. Super. 1986) (supporting giving an instruction similar to the one requested by Gundersen). In our view, Gundersen's proposed instruction would only have led to jury speculation.

Gundersen next argues that the trial court erred in failing to give his instruction permitting the jury to consider whether the person administering his breath test complied with the relevant procedures.[6] The court gave the following instruction:

There has been evidence in this case that the defendant submitted to a breath test.

If you find that [the] defendant took a breath test within four hours of the offense alleged and that an accurate result was obtained, you may infer from such result that the defendant's breath alcohol content at the time of the test was equal to or less than the defendant's breath alcohol content at the time he operated a motor vehicle.

However, if there is other evidence that the breath test did not produce a result which accurately reflected the defendant's alcohol level at the time of the test, or that the defendant's

breath alcohol level may have been less than such result at the time he operated a motor vehicle; then you must consider all of the facts and circumstances in evidence in determining whether the defendant's breath alcohol content was .10 grams of alcohol per 210 liters of breath or greater at the time he operated a motor vehicle, no longer relying exclusively on the results of the breath test.

The trial court was within its discretion in giving this instruction rather than Gundersen's. **Buchanan,** 561 P.2d at 1207. In our view, the instruction given more accurately reflects the law and permitted the defendant to argue that the breath test administered by the police was improperly administered and therefore inaccurate. We note that Gundersen does not point to any specific evidence suggesting that, as his proposed instruction stated, "the person administering the test [failed to comply] with all of the required test procedures and safeguards."

The judgment of the district court is AFFIRMED.[7]

DISSENT

BRYNER, Chief Judge, dissenting.

I am unable to agree with the majority's disposition of Gundersen's principal argument -- that he was affirmatively misled concerning his statutory right to obtain an independent test conducted by a person of his own choosing.

Gundersen was arrested for DWI after being involved in an automobile accident in Anchorage. He was given an Intoximeter test and registered a reading of .264. No separate sample of Gundersen's breath was taken or preserved. After Gundersen had taken the Intoximeter test, however, an Anchorage police officer read him a "Notice of Right to an Independent Test." The notice stated:

You are . . . under arrest for the offense of driving while intoxicated. You have provided a sample of your breath for analysis on the Intoximeter 3000. You also have a right to obtain an independent test of your blood alcohol level. If you wish to have an independent test you will be transferred to a local medical facility where a sample of your blood will be drawn by qualified personnel at no charge to you. The blood sample will be stored at the medical facility for a period of 60 days. It will be your responsibility to make arrangements for analysis of your blood sample. The analysis itself will be done at your own expense. At this time you must decide whether or not you want an independent test performed. A refusal to decide will be taken [as] a waiver of your right to obtain an independent test. . . . I would like you to verbally answer whether you do or do not want a separate test, then check the box, read aloud the box that you've checked and sign here at the bottom, sir. Do you have any questions about the form, Mr. Gundersen?

Gundersen declined the offer of an independent test.

Prior to trial, Gundersen moved to suppress the results of the Intoximeter test, alleging, **inter alia,** that his rights under the Alaska Constitution had been violated by the municipality's failure either to preserve a separate breath sample or to inform him fully of the statutory right to an

independent chemical test of his own choosing. District Court Judge Natalie K. Finn denied Gundersen's motion, finding that the offer of an independent blood test that had been communicated to Gundersen was sufficient to protect his constitutional and statutory rights. Gundersen argues on appeal that the district court erred in its ruling.

The analysis of Gundersen's argument begins with the recognition that it addresses two separate rights. The first right arises under the Alaska Constitution's guarantees of confrontation and due process and was initially recognized by the Alaska Supreme Court in **Lauderdale v. State,** 548 P.2d 376 (Alaska 1976). There, the court, in order to provide a means of confronting and cross-examining breathalyzer evidence, required the police to preserve and make available for inspection ampoules used in administering individual breathalyzer tests.

The second right springs from Anchorage Municipal Code (AMC) § 09.28.023(E) and its counterpart under state law, AS 28.35.033(e), which permit an individual arrested for DWI, after submitting to an Intoximeter test, to choose any qualified person to administer an independent chemical test:

The person tested may have a physician, or a qualified technician, chemist, registered nurse, or other qualified person of his or her own choosing administer a chemical test in addition to the test administered at the direction of a law enforcement officer. The failure or inability to obtain an additional test by a person does not preclude the admission of evidence relating to the test taken at the direction of a law enforcement officer; the fact that the person under arrest sought to obtain such an additional test, and failed or was unable to do so, is likewise admissible in evidence.

Though in many respects the constitutional and statutory rights are closely related, they are nevertheless conceptually independent and require separate consideration. Here, it is necessary to consider only Gundersen's statutory right. This court has previously noted that the primary concern of the statutory right is much the same as the underlying concern of the **Lauderdale/Serrano** constitutional requirement: "to provide a defendant with an independent basis for challenging a breathalyzer fading." **Ward v. State,** 733 P.2d 625, 627 (Alaska App. 1987), **rev'd on other grounds,** 758 P.2d 87 (Alaska 1988).

Nevertheless, the precise scope of the statutory right significantly differs from that of the constitutional right. In one respect, the statutory right is narrower than the constitutional requirement, since the statute imposes no obligation on the police to assist DWI arrestees in obtaining an independent test. In another respect, however, the statutory right is broader than the constitutional right, because the statute expressly extends to the accused the choice of any competent form of independent testing and any qualified person to administer the independent test. See **Whisenhunt v. State,** 746 P.2d 1298, 1299 (Alaska 1987).

In **Palmer v. State,** 604 P.2d 1106 (Alaska 1979), the Alaska Supreme Court held that the police need not expressly advise persons who a re arrested for DWI of their statutory right to an independent chemical test of their own choosing. In this appeal, Gundersen questions whether the holding in **Palmer** remains valid under current DWI and implied consent statutes. This issue

need not be decided, for it is evident that, when the police do undertake to provide information concerning the right to independent chemical testing, the information must, at a minimum, be reasonably accurate and complete, so that arrestees are not misled as to the nature and scope of their statutory rights.

Our past decisions have recognized as much. In **Ward,** 733 P.2d 625, Ward was arrested for DWI and underwent an Intoximeter test. A sample of his breath vas preserved to provide an opportunity for independent testing. In addition, the police offered to transport Ward to either of two Anchorage hospitals to have a blood sample drawn and preserved for later testing. He declined to be tested at either of the two hospitals suggested by the police and insisted on being taken to a third hospital. The police refused to comply with this request.

On appeal, Ward claimed that the failure by the police to take him to a hospital of his choice deprived him of both his constitutional and statutory rights to an independent test. Finding that the police had satisfied Ward's due process rights under **Lauderdale** and **Serrano** by preserving a sample of his breath, this court rejected his constitutional claim.

We separately held that Ward had not been denied his statutory right to an independent chemical test of his own choice. In so doing, we reasoned that, having complied with the **Lauderdale/Serrano** requirement by preserving a separate breath sample, the police had no obligation to assist Ward in effectuating his statutory right to obtain an independent chemical test of his own choice. We found that, even though the police had declined to help Ward obtain the independent test of his choice, they had apparently neither said nor done anything to discourage him from obtaining that test on his own accord.

Implicit in our holding in **Ward** is the conclusion that Ward's statutory right to an independent test would have been violated had he actually been deterred in any significant way from obtaining an independent test of his own choosing.[1]

Following the issuance of this court's opinion in his case, Ward petitioned the Alaska Supreme Court for hearing, challenging, among other things, our conclusion that the police did not interfere with his right to an independent test. The supreme court reversed this court's decision. In reversing, the supreme court agreed with Ward's contention that the police conduct in his case had interfered with his right to an independent test. Emphasizing the fact that, under the statutory language, "Ward had the right, to have a blood test performed by 'a . . . qualified person of [his] own choosing . . .,'" the supreme court concluded that "the Troopers denied Ward the right to obtain such a test after they had agreed to transport him to [Alaska Native Medical Center]. This was a violation of Ward's right under AS 28.35.033(e)." **Ward,** P.2d Op. , No. 3347 at 8.

The supreme court's decision in **Ward** thus made explicit what this court's previous decision left implicit: although the police may have no affirmative duty to provide information or assistance, once they do advise or assist persons arrested for DWI in obtaining an independent test, any significant restriction of the right to have the test performed by a person of the arrested person's own choosing will constitute a violation of the statutory guarantee. **Id.** The appropriate

remedy for such violations is the suppression of the Intoximeter test results. **Id.** at 9-11.

If it was not clear before the supreme court's decision in **Ward,** it certainly seems clear now that the advice read to Gundersen by the police in the present case directly contravened the statutory guarantee of an independent test of choice. In the present case, as in **Ward,** the police extended a limited offer of assistance in securing an independent chemical test. In contrast to **Ward,** however, the present case involved more than a limited offer of assistance: the advice contained in the "Notice of Right to an Independent Test" strongly suggested that the exclusive option open to Gundersen for obtaining an independent chemical test was an immediate blood test in police custody, at a hospital of the municipality's choosing. The notice that was read to Gundersen purported to define his "right to obtain an independent test," without any attempt to make it clear that the limited right described in that notice was not Gundersen's only right. The notice seemingly left Gundersen a single choice, stating, "if you wish to have an independent test **you will be transferred to a local medical facility where a sample of your blood will be drawn. . .**" (emphasis added). The notice did not inform Gundersen that his failure to request the offered blood test would result only in the loss of police assistance; instead, it flatly told him that refusal to immediately request the offered test would amount to a waiver of his right to any independent testing:

At this time you must decide whether or not you want an independent test performed. A refusal to decide will be taken [as] a waiver of your right to obtain an independent test.

By effectively characterizing the offer of an immediate blood test as Gundersen's sole opportunity for an independent test, the "Notice of Right to an Independent Test" was substantially misleading. If Gundersen had previously been unaware of his right to an independent test, he would have had little reason to disbelieve the unduly restricted explanation of that right given by the police. Even if Gundersen had been generally aware of the statutory right to an independent test, he would almost certainly have been led to conclude that his right was the limited right described in the notice. Because the notice described a test that was to be conducted in a facility chosen by the police and under circumstances virtually assuring police access to the test results, Gundersen might well have decided to decline the offer without giving any thought to the desirability of a test conducted by a person of his own choosing. Having been informed that he must either request the test immediately or waive his right to an independent test altogether, Gundersen would thereafter have had no reason or motivation to seek an independent test on his own. Thus, the effect of the improper notice could only have been to discourage Gundersen from making any effort to obtain an independent test of his own choosing.

The majority of the court reaches a contrary conclusion. In defense of its holding, the majority, on the one hand, trivializes the significance of the statutory right to an independent test of the defendant's choosing and, on the other hand, suggests that Gundersen has failed to show prejudice: "If Gundersen was in fact confused about his rights and misled by the police, the burden was on him to prove this." In support of this latter contention, the majority cites **Graham v. State,** 633 P.2d 211, 215 (Alaska 1981). **Graham,** however, is inapposite.

Graham was an appeal from an administrative revocation of a driver's license; the revocation

was based on Graham's refusal to take a breath test following her arrest for DWI On appeal, Graham argued that there is an inherent potential for confusion when a person arrested for DWI is as bed to submit to a breath test after being given **Miranda** warnings describing the right to remain silent and the right to immediate appointment of counsel. Graham maintained that her refusal could not be used as a basis for revoking her license, because her arresting officer did not explain that her **Miranda** rights did not apply to the statutory required breath test.

The court in **Graham** agreed that the refusal to take a breath test cannot be used against a defendant when it results from confusion between the scope of **Miranda** rights and the duties imposed by the implied consent statute. Nevertheless, a majority of the court held that Graham had the burden of establishing that her refusal had actually resulted from confusion over the nature of her rights. After reviewing the record, the majority concluded that Graham had failed to meet this burden.

Under the circumstances in **Graham,** where there was an inherent possibility of confusion between two apparently contradictory demands, the requirement that the accused demonstrate prejudice in a subsequent administrative proceeding for the revocation of her license is understandable. It makes good sense to expect that most individuals who refuse to take a breath test in mistaken reliance on their **Miranda** rights will either change their mind or make their confusion known when expressly given the requisite implied consent warning. It is not unreasonable to require those individuals who persist in their refusal to take the test without expressing any confusion as to their rights to make an affirmative allegation and showing of actual confusion before administrative action against their license is precluded.

The only relevant issue in such circumstances is what actually motivated the defendant's decision not to take the test. For example, if Graham had demonstrated that she was actually confused as to the scope of her rights when she refused the breathalyzer, she presumably would not have been required to make an additional showing that she would have submitted to the test had she not been confused.

In contrast, under the circumstances of the present case, the issue of prejudice does not hinge on what actually did happen. The question of what actually motivated a person to decline an offer of assistance in obtaining an independent test is not determinative. Prejudice could be established by showing either that the incorrect advice actually led the accused to decline police assistance in obtaining an independent test or that the accused might have elected to seek independent testing -- either with police assistance or on his own accord after release on bail -- had correct advice been given or had no advice been given at all.

The danger inherent in "Notice of Right to an Independent Test" is not that it might confuse but rather that it might mislead. The logical response of a person exposed to the incorrect advice contained in the notice would be to believe it and to make a choice based on the assumption that the advice was correct. No confusion whatsoever would be involved. The only people who might be confused would be those rare individuals who were expressly aware of the specific scope of the statutory right to an independent test.

In opposition to the situation in **Graham,** there is no reason to expect that persons who have been misled as to the scope of their statutory right to an independent test would be in any position to recognize the conflict between the advice contained in the "Notice of Right to an Independent Test" and the provisions of the law creating the right to an independent test of choice. The possibility that misleading advice has been given will not even occur to most people until a later date, when they first come into contact with an informed attorney. By that time, the question of whether any prejudice resulted from the misleading advice will involve little more than subjective, after-the-fact speculation about what might have happened had the police done things otherwise.

While on occasion something said or done at the time an independent test was refused might make it clear that the defendant would have declined independent testing under any conceivable circumstances, in virtually all other cases defendants could honestly state that they might have made a different choice with respect to independent testing had different advice been given by the police. The purely conjectural, **post hoc,** and subjective context within which the issue of prejudice would almost inevitably have to be decided would predictably reduce the process of establishing prejudice to a hollow, formalistic ritual in which the defendant would be paraded to the stand to testify confidently that things might have been different if they had been different.

The artificiality of attempting to determine actual prejudice in this situation is one of the chief reasons why no showing of prejudice has been deemed necessary in analogous situations involving incorrect or misleading advice. In the area of **Miranda** rights, for example, violations have consistently been found to require reversal without any need to ask whether any actual harm resulted to the accused. **See, e.g., Webb v. State,** 756 P.2d 293 (Alaska 1988).

In the present case, Gundersen undoubtedly could have testified at his suppression hearing that he might have elected to have an independent test performed by a person of his own choosing but for the improperly restricted advice that he was given by the police. In all likelihood he did not so testify because his attorney -- guided by the analogous area of **Miranda** cases and unaware of any prior decisions adopting a contrary rule in the circumstances of the present case -- perceived no need for a **pro forma** testimonial claim of harm.

It seems doubly unfair for the majority of the court to announce a procedural rule requiring proof of prejudice and to fault Gundersen for failing to comply with that rule. The rule did not exist until today. If the majority of this court were truly convinced of the need for a showing of prejudice in cases such as this, the appropriate measure would be a remand to allow Gundersen to testify on the issue. As it is, it appears to me that the majority of the court is doing little more than embracing a strained application of an ill-conceived procedural technicality in order to justify the conviction of a person whom the court perceives to be obviously guilty.

Because there is an inherent risk that the misleading notice may in fact have discouraged Gundersen from seeking an independent chemical test of his own choosing, I would hold that the notice violated his rights under AMC § 09.28.023(e) and that the violation required suppression of his Intoximeter result.

JUDGES FOOTNOTES

* Sitting by assignment made pursuant to article IV, section 16 of the Alaska Constitution.

OPINION FOOTNOTES

1 AMC § 09.28.023(F) provides:

Upon the request of the person who submits . . a chemical test at the request of a law enforcement officer, full information concerning the test, including the results of it, shall be made available to him or her or his or her attorney.

This ordinance refers to the police test, not the right to an independent test.

2 In **Ward,** the court held that the police had prevented Ward from obtaining an independent test. Ward requested an independent test at the Alaska Native Medical Center (ANMC) Initially, a trooper agreed to transport Ward to ANMC, but enroute was ordered to come back because the state had no contract with ANMC. The court found that this constituted interference with Ward's right to an independent test and suppressed evidence of his Intoximeter test. Here, Gundersen neither requested an independent test nor specified an entity or individual to perform the test. Consequently, the trial court was not clearly erroneous in concluding that the police did not prevent Gundersen from exercising his statutory right.

3 The advice regarding an independent test was apparently prompted by our decision in **Anchorage v. Serrano,** 649 P.2d 256, 258 (Alaska App. 1982), rather than by the ordinance or comparable statute.

4 The dissent disputes this point, attempting to draw a distinction between being confused and being misled, terms which in context appear synonymous. Essentially, the dissent argues that the issue in this case is not whether Gundersen was misled or confused, but whether the warning given creates a risk that other potential recipients might be misled or confused into giving up a right that they would have asserted if no warning at all had been given. To prevent this potential harm, the dissent is prepared to adopt a prophylactic rule mandating suppression of presumably accurate and material evidence. In the view of the dissent, failure to adopt a purely prophylactic rule "trivializes the significance of the statutory right to an independent test of the defendant's choosing . . . ."

The dissent commits two significant errors. First, it only deals superficially with **Palmer** and **Graham.** Neither case is an aberration; both are consistent with the weight of authority. Read together, **Graham** and **Palmer** clearly indicate that a person who is confused by warnings regarding independent tests must prove prejudice. The law in other jurisdictions is in accord.

Second, and more important, the right in question is a legislative rignt and the legislature has already balanced that right against the possible loss of material evidence and concluded that in the absence of proven interference, material evidence should not be suppressed. AMC § 09.28.023(E). We are simply carrying out legislative intent.

5 In **Lanier,** the court considered a related question, which constitutional rights must be personally waived by a defendant and which may be waived by his or her attorney without consultation. The court viewed the question as primarily one of federal constitutional law guided by **Fay v. Nola,** 372 U.S. 391, 9 L. Ed. 2d 837, 83 S. Ct. 822 (1963). **Lanier,** 486 P.2d. at 986. The court concluded that in the absence of extraordinary circumstances counsel could waive a defendant's rights during trial but that the defendant would have to join in the waiver of pretrial and post-trial rights. **Id.** at 988. The weakening of the authority

of **Fay v. Noia,** noted in **Lanier,** 486 P.2d at 985-86, has continued in the years since **Lanier** was decided in 1971. **See Westen, supra** Pg. 1. It is not necessary for us to explore this issue further, however, because this case does not involve the purported waiver or forfeiture of a constitutional right by counsel.

6 Gundersen's proposed instruction read as follows:

When a chemical test is given, and testimony concerning the result is admitted into evidence, you are not conclusively bound by the result of such evidence. To determine the reliability of such evidence, you should weigh and consider whether or not the person administering the test complied with all the required test procedures and safeguards. If the evidence relating to said test leaves you with a reasonable doubt as to its accuracy, you may ignore the results of such test.

7 Gundersen also argues that the trial court erred in instructing the jury as follows:

The defendant has been charged with one criminal offense, driving while intoxicated, which may be proven in either of two ways: the municipality must prove beyond a reasonable doubt that defendant drove either while under the influence of intoxicating liquor or with a level of .10 grams of alcohol per 210 liters of his breath. You must be unanimous in your verdict. You need not be unanimous, however, on which of the two theories the municipality has proven It is sufficient that each of you is convinced of defendant's guilt beyond a reasonable doubt under one theory or the other.

The trial court relied on **State v. James,** 698 P.2d 1161, 1165 (Alaska 1985). We have upheld giving this instruction. **Ward v. State,** 733 P.2d 625, 627 (Alaska App. 1987), **rev'd on other grounds,** 758 P.2d 87, 89-92 (Alaska 1988). The supreme court affirmed that decision insofar as it upheld the use of this instruction **Ward,** Op. at 11-15. Gundersen asks that we reconsider **Ward,** making arguments considered and rejected in that case. The Alaska Supreme Court's decision is binding on us regarding those arguments.

He points out, however, that in two decisions we have struck down a prior version of Anchorage's .10 blood alcohol level ordinance on the ground that it was inconsistent with the provisions of state law, then existing, which permitted conviction for driving under the influence, but did not permit conviction for a .10 blood alcohol level. **See, e.g., Anderson v. Anchorage,** 645 P.2d 205, 213 (Alaska App. 1982); **Simpson v. Anchorage,** 635 P.2d 1197, 1205 (Alaska App. 1981). We believe those cases are distinguishable. Essentially, they were directed at the power of Home Rule municipalities to legislate in areas in which the state has also legislated. We are satisfied that the state legislature and the municipal assembly, in enacting identical prohibitions, have determined, as a legislative fact, that a person with .10 grams of alcohol per 210 liters of breath is driving under the influence of alcohol because, as a matter of law, the use of the person's physical or mental abilities is so impaired that he or she no longer has the ability to operate a vehicle with the caution characteristic of a person of ordinary prudence who is not under the influence of alcohol.

In summary, we are satisfied that the legislature and the municipal assembly intended that the two approaches to driving while intoxicated would simply be variant ways of proving the same thing.

DISSENT FOOTNOTES

1 Likewise, in **Anchorage v. Serrano,** while recognizing that the prosecution's constitutional duty to provide a reliable means of verifying the Intoximeter might be satisfied by offering to assist the accused in securing an independent test, we emphasized that it would then be necessary to clearly and expressly inform the accused of the statutory right to an independent test of the accused's choosing. **Serrano,** 649 P.2d at 256 n.5 (Alaska App. 1982).

4 P.3d 951 SOSA V. STATE (S. Ct. 2000) 2000 Alas. Lexis 62

JUAN SOSA, Petitioner,

vs.

STATE OF ALASKA, Respondent.

Supreme Court No. S-8840, No. 5283
SUPREME COURT OF ALASKA
4 P.3d 951, 2000 Alas. LEXIS 62
June 16, 2000, Decided

<CASE SUMMARY>

Petition for Hearing from the Court of Appeals of the State of Alaska, on Appeal from the Superior Court of the State of Alaska, Fourth Judicial District, Bethel, Dale O. Curda, Judge. Court of Appeals No. A-6569. Superior Court No. 4BE-S96-187 CR.

COUNSEL

Quinlan Steiner, Assistant Public Defender, and Barbara K. Brink, Public Defender, Anchorage, for Petitioner.

Kenneth M. Rosenstein, Assistant Attorney General, Office of Special Prosecutions and Appeals, Anchorage, and Bruce M. Botelho, Attorney General, Juneau, for Respondent.

JUDGES

Before: Matthews, Chief Justice, Eastaugh, Fabe, Bryner, and Carpeneti, Justices.
AUTHOR: EASTAUGH

OPINION

EASTAUGH, Justice.

I. INTRODUCTION

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 (DWI). Those circumstances do not include unavailability of a breath testing device.[1] **Because no functioning breath testing device was then available, a magistrate issued a search warrant permitting Juan Sosa's blood to be drawn after he was arrested for DWI. Can Sosa be charged with evidence tampering for defying the warrant, when neither exceptional circumstance specified by statute was present? We hold that he cannot. Because the warrant could not legally permit a blood draw to support a DWI charge, his refusal cannot constitute evidence tampering. We therefore vacate his conviction.**

II. FACTS AND PROCEEDINGS

A Bethel police officer arrested Juan Sosa for DWI and took him to the police station. Because the station's chemical breath testing device was malfunctioning, the officer did not ask Sosa to submit to a chemical breath test; instead, the officer obtained a search warrant from a magistrate. The search warrant allowed "Any Peace Officer" to seize a sample of Sosa's blood.[2] **When approached and shown the warrant, Sosa twice refused to submit to a blood test; at one point he assumed a combative stance and stated that he would fight rather than submit to a blood draw. The police officers relented and did not draw Sosa's blood.**

The state charged Sosa with felony DWI, reckless driving, refusal to submit to a chemical test, and tampering with physical evidence by refusing to submit to the blood test. It did not charge Sosa with assault or ask the court to hold him in contempt for defying the search warrant. The trial court dismissed the refusal charge, but a jury convicted Sosa of the three remaining counts. The superior court denied Sosa's motion for judgment of acquittal on the evidence tampering charge, and the court of appeals affirmed. This court then granted Sosa's petition for hearing on the issue of the validity of the evidence tampering charge.

III. DISCUSSION

A. Standard of Review

We review interpretations of statutes de novo,[3] **adopting the rule of law that is most persuasive in light of precedent, reason, and policy.**[4] **We review Sosa's claims of error for plain error because he failed to raise them in the trial court.**[5] **Plain error exists "where an obvious mistake has been made which creates a high likelihood that injustice has resulted."**[6]

B. Exceptions to the Prohibition on Chemical Blood Tests

The Alaska legislature constructed a comprehensive statutory scheme, commonly known as the implied consent statutes,[7] **to govern chemical testing of DWI arrestees. Under these statutes, any driver "shall be considered to have given consent to a chemical test or tests of the person's breath."**[8] **The statutes also state that the driver shall be deemed to have consented to blood** testing in two specific and limited circumstances: (1) if the driver "is involved in a motor vehicle accident that causes death or serious physical injury to another person,"[9] **or (2) if the driver is "unconscious or otherwise . . . incapable of refusal."**[10] **The implied consent statutes describe no other circumstance as a basis for implying consent for a blood test; they contain no general language implying consent to a blood draw except in the two circumstances specified.**

The state, however, argues that we should recognize an implicit exception when breath testing devices malfunction. It contends that the legislature could not have intended to leave police with no means to obtain direct evidence of drivers' intoxication when mechanical

breakdowns prevent breath testing.

The statutes do not explicitly permit unconsented blood draws if breath testing machines malfunction or are otherwise unavailable, and we decline to create an implicit exception to cover that situation. "The Implied Consent Statute provides the exclusive authority for the administration of police-initiated chemical sobriety tests to a driver arrested for acts allegedly committed while operating a motor vehicle."[11] **"Where a statute's meaning appears clear and unambiguous, . . . the party asserting a different meaning bears a correspondingly heavy burden of demonstrating contrary legislative intent."[12] The state has discussed no legislative history at all and has referred us to no facts that would cause us to question the plain language of these statutes. We find it significant that the legislature chose to specify only two limited exceptions, despite the conspicuously foreseeable possibility that a breath-testing machine might sometimes be unavailable, especially in a remote location.**

We therefore reject the state's argument, decline to create an implicit exception to the implied consent statutes, and hold that Sosa cannot be deemed to have impliedly consented to a blood test.

C. Sosa's Refusal to Comply with the Search Warrant

The state argues that even if Sosa is not deemed to have impliedly consented to the blood test, he had no right to disobey the warrant. According to the state, when the police officers served Sosa with the warrant authorizing a blood draw, he had an obligation to permit the blood draw, regardless of the underlying legality of the attempted search. The state directs us to **Elson v. State.[13] In that case, a driver physically resisted a police "pat down" by grabbing the hand of the arresting officer when he reached into Elson's pocket to remove what he thought was a knife.[14] When the state later charged Elson with cocaine possession, Elson attempted to exclude evidence of his physical resistance to the search.[15] We upheld the superior court's admission of the evidence of Elson's resistance and held that "a private citizen may not use force to resist a peaceful search . . . regardless of whether the search is ultimately determined to be illegal."[16]**

Sosa told the officers that he would not permit a blood draw and insisted that they go away so he could sleep. The superior court found that Sosa resisted the blood draw by threatening to fight if the officers attempted to draw his blood.

The rationale underlying **Elson** was promotion of orderly settlement of disputes and avoidance of violent self-help.[17] **We were concerned with the "danger of escalating violence" in situations where a citizen physically resisted arrest and provoked a potentially violent confrontation with police.[18]**

We need not consider whether Sosa's conduct would have been admissible as evidence of assault, had he been so charged.[19] **The issue here is whether Sosa could be charged with evidence tampering.[20] Sosa argues that conviction for tampering with evidence "is irreconcilable with the legislature's prohibition on the production of that evidence. This argument does not address the admissibility of evidence."**

We agree with Sosa. There are three closely related reasons. First, to permit an evidence tampering charge for his refusal to permit the blood draw is equivalent to prosecuting him for violating the implied consent statutes, i.e., for refusing to submit himself to a test he is deemed to have impliedly consented to take. Because the implied consent statutes are the legislature's comprehensive regime for implying consent and for punishing a failure to comply with the statutes, a refusal to be tested should be punished in accordance with the implied consent statutes, and not under the tampering statute.

Second, as contemplated by the implied consent statutes, a refusal to give a blood (or breath) sample may only be prosecuted if the driver had a duty to give the sample. There is no prosecutable refusal unless the person refuses to give a sample when legally obliged to do so. The implied consent statutes define the driver's legal obligation. It would be remarkable if a tampering charge could lie for declining to produce evidence which the statutes do not allow the state to demand in the factual circumstances of Sosa's arrest. Thus, where the only ostensible authority for ordering Sosa's blood drawn is the very statutory regime which does **not** punish him for withholding his consent, his refusal may not be the basis for an evidence tampering charge.

Third, evidence tampering requires interference by force, threat, or deception with the production of physical evidence.[21] **But Sosa was entitled to peacefully refuse to comply under these circumstances; had he refused peacefully, his blood could not properly have been drawn, and if it had been drawn despite his refusal, the implied consent statutes would not have regarded it as evidence supporting the DWI charges. Therefore, his conduct, even if not peaceful, could not be regarded as having causally interfered with production of evidence of DWI. This is not merely the equivalent of conduct that prevents production of evidence which turns out to be inadmissible, and whose admissibility cannot be determined until later.[22] Here the complete inutility of the test results as evidence was readily knowable given the complete absence of facts that might have brought either statutory exception into play. Sosa's warrant facially violated the implied consent statutes.[23] Had the officers subdued Sosa and drawn his blood for testing, the unlawfulness of the warrant would have made the test results unusable.**

In enacting the implied consent statutes, the legislature carefully balanced the privacy interests of DWI arrestees against the state's interest in collecting evidence. Permitting the state to charge Sosa with evidence tampering in this situation would upset that balance. Sosa cannot be charged with evidence tampering for having refused to submit to this unlawful search.

D. **Preservation of Issue**

The state argues that Sosa's failure to challenge the validity of the warrant in the trial court precludes consideration of its validity on appeal. Our resolution of the merits demonstrates that it was plain error to permit the state to proceed on the tampering charge, and we consider claims of plain error regardless of whether the parties argued them in the trial court.[24]

The state nonetheless argues that **Moreau v. State** [25] **should control. In Moreau**, we refused to consider an exclusionary rule argument because the defendant had not raised the issue in the trial court by asking that court to suppress the evidence.[26]

Moreau does not control here. First, **Moreau** applies to improper police conduct, not to a statutory violation based on an invalid warrant.[27] **Second, the exclusionary rule cannot apply here. Because no blood was drawn and no tests were conducted, there was no evidence to suppress. Sosa had no reason, much less an obligation, to challenge the warrant in the trial court. Had Sosa acceded to the unlawful warrant and his blood had been drawn, we assume for discussion's sake that he would have been obliged to challenge the warrant in the trial court.**[28] **But absent evidence subject to exclusion, a Moreau** hearing would have been pointless. **Moreau** does not preclude Sosa from raising the issue in this petition.

IV. CONCLUSION

For these reasons, we VACATE Sosa's conviction for evidence tampering.

DISPOSITION

Sosa's conviction VACATED for evidence tampering.

OPINION FOOTNOTES

1 **See** AS 28.35.031, .032, .035.

2 The excerpt does not contain the warrant.

3 **See Boone v. Gipson**, 920 P.2d 746, 748 (Alaska 1996).

4 **See M.R.S. v. State**, 897 P.2d 63, 66 (Alaska 1995).

5 **See Moreau v. State**, 588 P.2d 275, 279 (Alaska 1978).

6 **Broeckel v. State, Dep't of Corrections**, 941 P.2d 893, 897 (Alaska 1997) (quoting **Miller v. Sears**, 636 P.2d 1183, 1189 (Alaska 1981)).

7 **See** AS 28.35.031, .032, .035.

8 AS 28.35.031(a) (emphasis added).

9 AS 28.35.031(g). Subsection (g) provides:

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.

(Emphasis added.)

10 AS 28.35.035(b). Subsection (b) provides:

A person who is unconscious or otherwise in a condition rendering that person **incapable of refusal** is considered not to have withdrawn the consent provided under AS 28.33.031(a) or AS 28.35.031(a) or (g) and **a chemical test may be administered to determine the amount of alcohol in that person's** breath or **blood** or to determine the presence of controlled substances in that person's blood and urine. A person who is unconscious or otherwise incapable of refusal need not be placed under arrest before a chemical test may be administered.

(Emphasis added.)

11 **Pena v. State**, 684 P.2d 864, 867 (Alaska 1984). **See also Bass v. Municipality of Anchorage**, 692 P.2d 961, 964 (Alaska App. 1984) (concluding that, based on **Pena**, "it therefore seems clear that the municipality can justify forcibly taking the blood sample from Bass only if the taking falls under AS 28.35.035(b)").

12 **University of Alaska v. Tumeo**, 933 P.2d 1147, 1152 (Alaska 1997).

13 659 P.2d 1195 (Alaska 1983).

14 **See id.**

15 **See id.**

16 **Id.** at 1200.

17 **See id.** (citing **United States v. Ferrone**, 438 F.2d 381, 390 (3d Cir. 1971)).

18 **Id.**

19 See AS 11.41.230(a)(3) (a person commits the crime of fourth-degree assault if "by words or other conduct that person recklessly places another person in fear of imminent physical injury.").

20 AS 11.56.610(a)(3) provides that "A person commits the crime of tampering with physical evidence if the person . . . prevents the production of physical evidence in an official proceeding or a criminal investigation by the use of force, threat, or deception against anyone . . . ."

21 See AS 11.56.610(a)(3).

22 **Cf. Brown v. State**, 739 P.2d 182, 184 (Alaska App. 1987).

23 As we stated in **Pena**, a warrant cannot override the statute: "The Implied Consent Statute . . . applies equally to preclude chemical sobriety tests performed pursuant to search warrants as it does to tests performed as searches incident to arrest." **Pena**, 684 P.2d at 867.

24 **See State Farm Ins. Co. v. Raymer**, 977 P.2d 706, 711 (Alaska 1999) (stating that "we will not consider new arguments not raised in the trial court, unless the issues establish plain error").

25 588 P.2d 275 (Alaska 1978).

26 Id. at 280.

27 **See id.**

28 **See id.**

711 P.2d 575 LESLIE V. STATE (Ct. App. 1986)

MICHAEL LESLIE, Appellant,

vs.

STATE OF ALASKA, Appellee.

No. 570
COURT OF APPEALS OF ALASKA
711 P.2d 575
January 03, 1986
Appeal from the District Court of the State of Alaska, Third Judicial District, Palmer, Steven K. Green, Magistrate.

COUNSEL

Gary R. Letcher, Birch, Horton, Bittner, Pestinger & Anderson, Anchorage, for Appellant.
Robert D. Bacon, Assistant Attorney General, Office of Special Prosecutions and Appeals, Anchorage, and Norman C. Gorsuch, Attorney General, Juneau, for Appellee.

JUDGES

Before: Bryner, Chief Judge, Coats and Singleton, Judges.
AUTHOR: COATS

OPINION

COATS, Judge. **OPINION**

Alaska Statute 28.35.031(b) authorizes police in certain situations to administer a preliminary breath test. That statute provides:

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

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

(2) committed a moving traffic violation.

Under AS 28.35.031(c) the officer who administers the test must advise the person to whom he wishes to administer the preliminary breath test that refusal to take the test is an infraction. See AS 28.35.031(e) (refusal to submit to the preliminary breath test is an infraction).

The facts of the present case can be stated briefly. A state trooper observed Leslie speeding on the Glenn Highway, and while following in his patrol vehicle clocked Leslie's speed at 64 mph. When he stopped Leslie for the speeding violation, he noticed signs of intoxication and administered a set of field sobriety tests. At some point the trooper asked Leslie to take the preliminary breath test, but Leslie declined. The trooper was apparently convinced that he had

probable cause to arrest for driving while intoxicated but another car came by at an extremely excessive speed, almost sideswiping the trooper's vehicle, so the trooper simply cited Leslie for speeding and refusing the breath test, and then instructed Leslie's passenger, who was sober, to take over the driving duties.

Leslie was prosecuted for failure to take the preliminary breath test. He moved to dismiss, arguing that the statute unconstitutionally interfered with his rights under the fourth and fifth amendments to the United States Constitution. These motions were denied, Leslie was convicted and fined $150.

Leslie first argues that the administration of a breath test is a search under the fourth amendment to the United States Constitution. In **Burnett v. Anchorage,** 678 P.2d 1364, 1368 (Alaska App. 1984), **cert. denied,** 469 U.S. 859, 105 S. Ct. 190, 83 L. Ed. 2d 123 (1984), and **Svedlund v. Anchorage,** 671 P.2d 378, 384 (Alaska App. 1983), this court assumed, without deciding, that administering a breath test is a search. Upon further reflection we believe that requiring a suspect to submit to a breath test is a sufficient intrusion by a law enforcement officer that we should regard it as a search. **See** I W. LaFave, Search and Seizure: **A Treatise on the Fourth Amendment.** § 2.1(a) at 221-24 (1978); **Pooley v. State,** 705 P.2d 1293 (Alaska App. 1985) (discussing whether a "dog sniff" is a search under the fourth amendment). We therefore agree with Leslie that administration of a breath test is a search.

Leslie next contends that the portable breath test authorized by AS 28.35.031 constitutes an unreasonable search under the fourth amendment to the United States Constitution. We disagree. In reading AS 28.35.031, we apply the rule of statutory construction that "ambiguities in penal statutes must be narrowly read and construed strictly against the government." **Cassell v. State,** 645 P.2d 219, 222 (Alaska App. 1982). We note that AS 28.35.031(a) provides that:

Implied consent. (a) 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 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 . . . while intoxicated. **The test or tests shall be administered at the direction of a law enforcement officer who has reasonable grounds to believe that the person was operating or driving a motor vehicle . . . in this state while intoxicated.** [Emphasis supplied.]

Neither AS 28.35.031(a) nor AS 28.35.031(b) define what "reasonable grounds" is. However, in AS 28.35.031(a) the statute applies "reasonable grounds" to a situation where the police have lawfully arrested a defendant. In order to lawfully arrest a defendant, the police would need to establish probable cause. We also note that the legislature did not use the term "reasonable suspicion," a standard somewhat less stringent than probable cause and one which has been used to justify an investigative stop. **Terry v. Ohio,** 392 U.S. 1 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968); **Coleman v. State,** 553 P.2d 40, 43 (Alaska 1976).

What "reasonable grounds" means must also be looked at from the perspective that the statute

does authorize a search. In light of this background we construe "reasonable grounds" be the equivalent of probable cause.[1] Thus we construe AS 28.35.031(b) to authorize an officer to administer a preliminary breath test only where he has probable cause "to believe that a person's ability to operate a motor vehicle is impaired by the ingestion of alcoholic beverages" and, in addition, probable cause to believe that the person "is driving a motor vehicle that is involved in an accident; or . . . committed a moving traffic violation."

Under this interpretation an officer must have probable cause to arrest a defendant for driving while under the influence before he can lawfully administer a preliminary breath test. We believe that it is reasonable for the statute to authorize an officer to administer a preliminary breath test under these circumstances. Even though the officer may have probable cause to arrest for driving while under the influence, many times the physical signs that an officer relies on in determining that a driver is intoxicated are misleading. Authorizing the officer to administer a preliminary breath test appears to us to be a reasonable step to take to confirm or dispel the officer's observations. We therefore believe that AS 28.35.031(b) does not authorize an unreasonable search. **See Burnett,** 678 P.2d at 1370 (holding a statute penalizing refusal to take breath test not violative of fourth or fifth amendments).

Leslie next argues that AS 28.35.031 is unconstitutional since it requires him to give an advance waiver of his fourth amendment rights as a condition of the privilege to drive. This is the same argument which we disposed of in upholding the "implied consent" statute which requires a motorist to consent to take a breathalyzer examination when he is "lawfully arrested for an offense arising out of acts alleged to have been committed while [he was driving while intoxicated]." AS 28.35.032(a). **McCracken v. State,** 685 P.2d 1275 (Alaska App. 1984). There is no constitutional right to refuse to submit to a breathalyzer examination. **McCracken** at 1278 (Singleton, J., concurring). We have held in the present case that the officer was authorized under AS 12.35.031 t 'minister the preliminary breath test. As in **McCracken,** the legal fiction of Leslie's "implied consent" is not a constitutional issue.

Leslie next argues that administration of the preliminary breath test violates his constitutional privilege against self-incrimination. We have previously rejected similar contentions in **Svedlund v. Anchorage,** 671 P.2d 378, 383-84 (Alaska App. 1983) and **Coleman v. State,** 658 P.2d 1364 (Alaska App. 1983). **See also South Dakota v. Neville,** 459 U.S. 553, 564, 103 S. Ct. 916, 923, 74 L. Ed. 2d 748, 759 (1983). We similarly reject Leslie's argument.

The conviction is AFFIRMED.

OPINION FOOTNOTES

1 We note that several other jurisdictions have construed the terms "reasonable grounds" and "probable ca se" as synonymous in arrest situations. **See** State v. Davis, 98 Ill. App. 3d 461, 424 N.E.2d 630, 634, 53 Ill. Dec. 839 (Ill. App. 1981); State v. Davis, 190 Mont. 285, 620 P.2d 1209, 1212 (Mont. 1980); State v. Middleton, 170 Conn. 601, 368 A.2d 66, 67 (Conn. 1976); Beyer v. Young, 32 Colo. App. 273, 513 P.2d 1086, 1088 (Colo. 1973).

692 P.2d 961 BASS V. MUNICIPALITY OF ANCHORAGE (Ct. App. 1984)

MICHAEL BASS, Appellant,

vs.

MUNICIPALITY OF ANCHORAGE, Appellee.

File No. A-273, No. 429
COURT OF APPEALS OF ALASKA
692 P.2d 961
December 14, 1984
Appeal from the District Court of the State of Alaska, Third Judicial District, Anchorage, John D. Mason, Judge.

COUNSEL

John T. Maltas, Assistant Public Defender, Kenai, Sen K. Tan, Assistant Public Defender, Anchorage, and Dana Fabe, Public Defender, Anchorage, for Appellant. Shelley K. Owens and James A. Crary, Assistant Municipal Prosecutors, Allen M. Bailey, Municipal Prosecutor, and Jerry Wertzbaugher, Municipal Attorney, Anchorage, for Appellee.

JUDGES

Before: Bryner, Chief Judge, Coats and Singleton, Judges.
AUTHOR: COATS

OPINION

COATS, Judge. Opinion

Anchorage Police Officer Baker was dispatched to a single-car, injury accident in the area of Spenard Road at 3:00 a.m. on September 3, 1983. Baker saw Michael Bass being escorted back to the scene of the accident by an airport security officer. Bass's vehicle was overturned. Baker was told by a security officer that Bass had been in an accident, had fled the scene on foot, and had been pursued by the officer.

Baker asked Bass what happened and was told that Bass's vehicle went out of control and rolled when Bass swerved to avoid hitting another car. Baker observed the strong odor of alcohol, slurred speech and unsteadiness as Bass stood in the area. According to Baker, Bass was also extremely belligerent and noncooperative with paramedic rescue personnel at the scene of the accident.

Baker observed that Bass needed immediate medical attention. He noted that Bass had a hand injury which would require stitching and had hit his chest hard against the steering wheel. Bass was taken to Providence Hospital for treatment.

Baker arrived at the hospital emergency room at about 3:45 a.m. Upon arrival, he spoke to hospital personnel and learned that Bass had a lacerated hand which would require stitching and a severely bruised chest, with possibly some broken ribs. Baker was told that the hospital personnel did not anticipate knowing whether Bass would actually be admitted for at least two

hours.

Baker then apparently called the municipal prosecutor, Allen Bailey, and explained that (1) because of the severity of Bass's injuries, Baker did not know when Bass's treatment would be completed; (2) even if Bass was not admitted, it would be several hours before a breathalyzer test could be done, and (3) based on what Baker was told about Bass's chest injuries, Baker was unsure whether Bass could blow into a breathalyzer sufficiently to give an accurate reading. Bailey advised Baker to obtain a blood sample.

When Baker informed Bass that blood would be drawn, Bass objected. He said that he was not going to have his blood drawn and started to walk out of the hospital. Baker then placed Bass under arrest, handcuffed him, and placed him back on the gurney. Officer Honnen assisted Baker in restraining Bass, putting Bass in a wristlock to assist Baker in handcuffing Bass. Honnen and Baker then restrained Bass, holding him onto the gurney while the laboratory technician drew blood from him. Baker admitted that there was some bleeding from Bass's lacerations at this time and that Baker was aware that Bass might have had cracked ribs, but that they restrained him as gently as they could.

Bass, on the other hand, indicated that the officers forced him down on the floor, dragged him over to the gurney, and inflicted so much pain that he could not move. He said he protested throughout the procedure. After the blood was drawn, Bass was issued a citation and the officers left him at the hospital. Bass's blood alcohol level was 0.243.

Both parties agree that Bass was conscious and alert at the time of the extraction of his blood. He actually walked into the hospital himself. He understood what was going on around him and verbalized his refusal to consent to the extraction.

On January 1, 1984, Bass moved to suppress the results of the blood-alcohol test. He based his motion upon the ground that he was not unconscious or otherwise in a condition rendering him incapable of refusing which would permit the nonconsensual extraction of his blood under AS 28.35.035(b).

District Court Judge John D. Mason denied Bass's motion, making extensive factual findings. Judge Mason interpreted AS 28.35.035(b), which allows nonconsensual blood testing where a person is in a condition rendering him incapable of refusal, to include "a person being hospitalized as a result of incidents that have occurred" who "cannot fairly be offered a breathalyzer test." Judge Mason refused to suppress the results of the blood test. After a jury trial in which the results of his test were admitted into evidence, Bass was convicted of driving while intoxicated in violation of AMC 9.28.020. Bass now appeals to this court and argues that Judge Mason erred in not suppressing the results of the blood test. We reverse.

This case requires us to analyze the state statutes which authorize the police to initiate blood alcohol tests following an arrest for driving while intoxicated.[1] Under the state statutes, a person who drives a motor vehicle in the state implicitly consents to submit to a breath test to determine the amount of alcohol in his blood if he is lawfully arrested for driving while intoxicated. AS 28.35.031(a)[2] If one arrested for driving while intoxicated refuses to take a blood test, after being

informed of the consequences of such refusal, "a chemical test shall not be given, except as provided by AS 28.35.035." AS 28.35.032.[3] AS 28.35.035 provides in part:

Administration of chemical tests without consent.

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

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

In **Pena v. State,** 684 P.2d 864 (Alaska 1984), the supreme court held that "the Implied Consent Statute provides the exclusive authority for the administration of police-initiated chemical sobriety tests to a driver arrested for acts allegedly committed while operating a motor vehicle."[4] **Id.** at 867 (footnote omitted). It therefore seems clear that the municipality can justify forcibly taking the blood sample from Bass only if the taking falls under AS 28.35.035(b).

It seems clear to us that AS 28.35.035(b) does not apply to this case. In the implied consent statutes, the legislature has gone to great lengths to avoid authorizing the police to forcibly take blood alcohol tests from defendants charged with driving while intoxicated. The legislature has, instead, provided extremely strong incentives to a defendant to take a breath test for blood alcohol by providing criminal penalties. The legislature has provided for giving breath tests without the cooperation of the defendant only in two situations. In AS 28.35.035(a), the statute provides that if a person is under arrest for driving while intoxicated and the arrest results from an accident which caused death or physical injury to another person, a chemical test of the defendant's blood alcohol may be administered without consent. The policy behind this provision seems clear. If the driving while intoxicated offense is of the most serious type, involving death or physical injury, the legislature will allow taking a blood-alcohol test without consent.

The other situation in which the legislature has authorized taking a blood-alcohol test under AS 28.35.035 is where a person . . . is unconscious or otherwise in a condition rendering that person incapable of refusal." The trial judge read this statute broadly. He found that Bass needed to be at the hospital for treatment and that the police could not give a breath test at the hospital. He also found that there was a possibility that, even if offered a breath test, the defendant would not physically be able to take it because of his injuries. He concluded that Bass was "in a condition rendering [him] incapable of refusal."

We believe that, in light of the fact that the legislature has gone to great lengths to not

authorize the police to forcibly take blood tests, AS 28.35.035 should not be read broadly. Certainly it would have been easy for the legislature to say that the police could forcibly take a blood alcohol test if there were exigent circumstances which prevented the police from administering a breath test. The narrow language which the legislature chose precludes this interpretation. Therefore, the fact that it was not practical to offer Bass a breathalyzer test does not bring this case within AS 28.35.035(b). What does seem to fall within AS 28.35.035(b) is a narrow class of cases where the defendant is unconscious or otherwise incapable of manifesting his intent to refuse. In these cases the police would be able to take a blood test without the person's contemporaneous consent, but without having to use any violent means to obtain the blood-alcohol test. We note that the legislature did not say in AS 28.35.035(b) that the police could take a blood alcohol test **without consent** as it did in AS 28.35.035(a). Rather, the legislature said that "a person who is unconscious or **otherwise in a condition incapable of refusal** is considered **not to have withdrawn the consent provided under AS 28.35.031(a).** " (Emphasis supplied.) The legislature's choice of language seems to us to be consistent with the theory that AS 28-35-035(b) was intended to apply only to situations where a blood-alcohol test could be conducted without any violence such as where an arrestee is unconscious. A person who is unconscious is considered not to have withdrawn his implied consent and a blood-alcohol test can thus be administered under AS 28.35.035(b). This language does not seem to apply to a person in Bass's position, who definitely refused to consent to the blood test and resisted the test. Under these circumstances, we conclude that AS 28.35.035(b) did not authorize the police to initiate a blood-alcohol test, even if Bass was physically incapable of taking a breath test. We hold that Bass was not "a person who [was] unconscious or otherwise in a condition incapable of refusal" for purposes of AS 28.35.035(b). Therefore, the police should not have forced Bass to have the blood sample drawn and Judge Mason should have suppressed the evidence.

The municipality argues that the evidence against Bass at trial was strong, and that admission of the blood test result was, if error, harmless. We disagree. The blood alcohol test result of 0.243 was admitted at trial and could certainly have been critical evidence for this charge of driving while intoxicated.

The conviction is REVERSED.

OPINION FOOTNOTES

1 Municipality of Anchorage ordinances also address this situation. They are virtually identical to the state statutes. Implied consent statute AS 28.35.031(a) is equivalent to AMC 9.28.021(A), which provides:

A person who operates, drives or is in actual physical control of a motor vehicle within the municipality or who operates an aircraft as defined by AMC 9.28.020E.1 or who operates a watercraft as defined by AMC 9.28.020E.2 shall be considered to have given consent to a chemical test or tests of his or her breath for the purpose of determining the alcoholic content of his or her blood or breath if lawfully arrested for an offense arising out of acts alleged to have been committed while the person was operating, driving or in actual physical control of a motor vehicle or operating an aircraft or a watercraft while intoxicated. The test or tests shall be administered at the direction of a law enforcement officer who has reasonable ground to believe that the person was operating, driving, or in actual physical control of a motor vehicle or operating an aircraft or a watercraft in the municipality while intoxicated.

AS 28.35.032(a), "Refusal to submit to chemical test," is equivalent to AMC 9.28.022(A), which provides:

If a person under arrest refuses the request of a law enforcement officer to submit to a chemical test under AMC 9.28.021A, after being advised by the officer that the refusal will, if that person was arrested while operating or driving a motor vehicle for which a driver's license is required, result in the denial or revocation of the license or nonresident privilege to drive, that the refusal may be used against the person in a civil or criminal action or proceeding arising out of an act alleged to have been committed by the person while operating or driving a motor vehicle or operating an aircraft or a watercraft while intoxicated, and that the refusal is a misdemeanor, a chemical test shall not be given, except as provided by AMC 9.28.025.

AS 28.35.035(a) and (b) have municipal code counterparts in AMC 9.28.025(A) and (B), which provide:

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

B. A person who is unconscious or otherwise in a condition rendering that person incapable of refusal is considered not to have withdrawn the consent provided under AMC 9.28.021Aand AS 28.35.031 (a), and a chemical test may be administered to determine the amount of alcohol in that person's breath or blood. A person who is unconscious or otherwise incapable of refusal need not be placed under arrest before a chemical test may be administered.

The motion and the arguments of both parties below, as well as the court's findings and ruling, referred to the state statutes. We thus refer to those statutes in this opinion. No party has suggested that the municipal ordinances would differ in application from the state statutes.

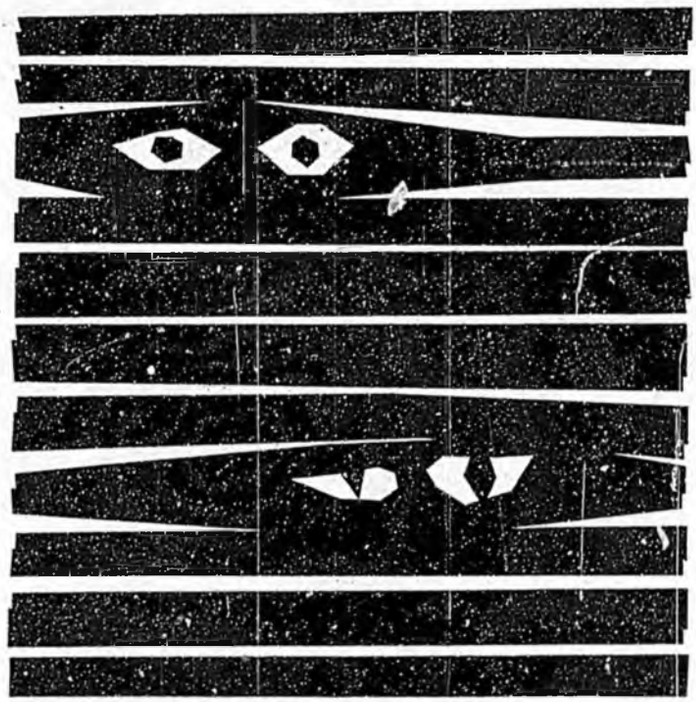
2 AS 28.35.031(a) provides:

Implied Consent. (a) 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 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 . . . while intoxicated. The test or tests shall be administered at the direction of a law enforcement officer who has reasonable grounds to believe that the person was operating or driving a motor vehicle . . . in this state while intoxicated.

3 AS 28.35.032(a) provides:

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

4 The only exception to this principle would be consent to the blood-alcohol test. Consent is not an issue in this case.



ALASKA'S GREATEST HIDDEN TAX:

The Negative Consequences of Alcohol & Other Drug Abuse and Dependence

State of Alaska
Advisory Board on Alcoholism and Drug Abuse
ANNUAL REPORT - February 2001

Who are we?

The Advisory Board on Alcoholism and Drug Abuse has 15 members. There are 14 public members appointed by the Governor to four-year terms. The Director of the Division of Alcoholism and Drug Abuse serves ex officio as the 15th member. State law requires that one member be licensed to practice medicine in the state; one member be admitted to practice law in the state, four members who are chronic alcoholics in recovery; three members who are substance abuse treatment professionals who represent public or private providers of prevention or treatment services; and five members who have a special interest in the personal and community problems associated with alcohol and other drug abuse and dependency.

What do we do?

The Advisory Board is required by law to act in an advisory capacity to the Legislature, the Governor and state agencies in matters regarding special problems affecting mental health that alcohol and other drug abuse and dependency many present. The Board follows educational research and offers public information that raises public awareness of the social problems and legal processes affecting the rehabilitation of alcoholics and drug abusers. It advocates for the development of prevention, treatment and rehabilitation programs. The Board reviews and advises the Commissioner of Health and Social Services on grant proposals and provides funding recommendations to the Mental Health Trust Authority concerning the integrated comprehensive mental health program for chronic alcoholics suffering from psychosis in accordance with state law:
AS 47.30.056(b)(3).

How may we help you?

- Call us at (907) 465-8920, or toll free at 888-464-8920
- Visit us at 240 Main Street, Suite 101, Juneau, AK 99801
- Write to us at PO Box 110608, Juneau AK 99811-0608
- E-Mail us through our Executive Director:
  Pam_Watts @ health.state.ak.us
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Anne Kinter, Chair
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Cheryl Mann, Recorder/Treasurer
Anchorage

Sebastian Cowboy
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Melinda Freemon
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Donna Galbreath, M.D.
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Alice Johnstone
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Gerry Knasiak
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Agnes Sweetsir
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Valerie Therrien, Esq.
Fairbanks

Cristy Willer Tilden
Dillingham

Orie Williams
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Ernie Turner
Juneau

You may not realize it, but everbody pays for the negative consequences of alcohol and other drug abuse and dependence.

A conservative estimate is $399 in public sector expenses for every Alaskan. That was $250 million for FY98. This is a hidden "tax" on individuals and communities. It needs to be viewed in the clear light of day.

Much of that expense is incurred because there are not enough consistent efforts to prevent, intervene or support recovery in thousands of Alaskans of all ages.

An increase in the excise tax on alcohol would help to reduce consumption and to generate revenue to offset these expenses. Public awareness of the scope of the problem and commitment to healthy lifestyles are other necessary aspects of positive change.

The 2000 Annual Report of the Advisory Board focuses on research, strategies and legislative, regulatory and policy changes that will make Alaska a healthier and safer place to live. Implementation of these changes over time will also significantly reduce public sector expenses. That's good for individuals, families, communities and pocketbooks. ■

STRATEGIES TO REDUCE THE NEGATIVE CONSEQUENCES OF ALCOHOL AND OTHER DRUG ABUSE

1. Support community-based processes that build partnerships and provide more effective prevention and treatment services.
2. Encourage activities and initiatives that will change community standards and emphasize healthy lifestyles.
3. Distribute useful and effective information to targeted populations.
4. Promote the benefits of treatment, recovery and sober lifestyle.
5. Encourage traditional and alternative social activities that are alcohol and other drug free.
6. Advocate for positive change through legal and regulatory initiatives.
7. Ensure the delivery of quality services by offering appropriate continuing education and training for chemical dependency treatment professionals.
8. Expand awareness of substance abuse issues for allied health professionals, educators and other helping agents.
9. Use education strategies to help youth improve critical life and social skills.
10. Identify people with problems as early as possible and refer them for appropriate treatment.
11. Improve interdisciplinary coordination and collaboration at local, regional and statewide levels.
12. Support a continuum of care for chronic alcoholics with psychosis that focuses on intervention, treatment and the client's long-term life domain requirements.
13. Develop sufficient resources to meet community needs for appropriate levels of treatment for adults, youth and special populations.
14. Identify and remove barriers that prevent clients from entering treatment.
15. Support community efforts to establish involuntary commitment procedures and to use them when appropriate.
16. Provide appropriate services for underserved Alaskans.
17. Use relevant research to identify and incorporate key variables that contribute to successful treatment outcomes.
18. Address the treatment needs of persons in the criminal justice system.

-Results Within Our Reach, State of Alaska Plan for Alcohol and Drug Abuse Services, 1999-2003

MISSION STATEMENT

In partnership with the public, the Advisory Board on Alcoholism and Drug Abuse plans and advocates for policies, programs and services that help Alaskans achieve healthy and productive lives, free from the devastating effects of the abuse of alcohol and other substances. ■

Today I also ask for your help and partnership in addressing the often irreversible harm caused by alcohol abuse.

Alaska leads the nation in alcohol abuse. Statistics show that eighty percent of all crimes are committed by individuals under the influence of alcohol or drugs. The cost to the state runs in the millions of dollars.

--The Honorable Ted Stevens
United State Senator

Joint Session of the Second Session of the Twenty-First Alaska State Legislature
March 16, 2000
Juneau, Alaska

TABLE OF CONTENTS

ALASKA'S ALCOHOL INDEX

Year 2000

Enough alcohol was sold in Alaska in FY99 to add up to 516 drinks for every man, woman and child. That's based on an Alaska population of 627,000 and 323,689,076 drinks of beer, wine or spirits.
State of Alaska, Departments of Labor and Revenue.

Approximately 30% of Alaskan adults don't drink.

The negative consequences of alcohol abuse generate costs to the U.S. taxpayer at about 77 cents a drink. In Alaska, that meant at least $249 million in FY99.
NIAAA - "The Economic Cost of Alcohol and Drug Abuse in the U.S."
A national study just released by the Center for Addictions and Substance Abuse at Columbia University ups the number substantially. In a state by state analysis, it calculated Alaska's cost of substance abuse at $374 million in FY98. This included the negative consequences of tobacco as well as alcohol and other drugs.

The current Alaska excise tax on alcohol has not been changed 1983, even for inflation. Alaskans who drink pay a little over three cents tax on a beer or a glass of wine, and a little over four cents on a shot of hard liquor. This raised about $12 million in state revenue in FY99.
State of Alaska, Department of Revenue

You can do the math: $249 million - $12 million = a gap of $$237 million.

Alaska ranks first among all states in alcohol mortality.
How Does Alaska Stack Up?

Alaska's arrest rate for driving under the influence (DUI) and Alaska's rate of alcohol-related vehicle fatalities are among the highest in the nation.
How Does Alaska Stack Up?

Substance Abuse among elders is a much bigger problem than most people realize. Up to 17% of the older population abuse alcohol, prescription and non-prescription drugs. Fifteen to 25 percent of people over 65 have significant symptoms of mental illness. Depression is often part of the problem. Alcohol is a depressant that makes matters worse.
NCOA/SAMHSA

As many as *half* of people with serious mental illnesses develop alcohol or other drug problems at some point in their lives.
Mental Health: A Report of the Surgeon General

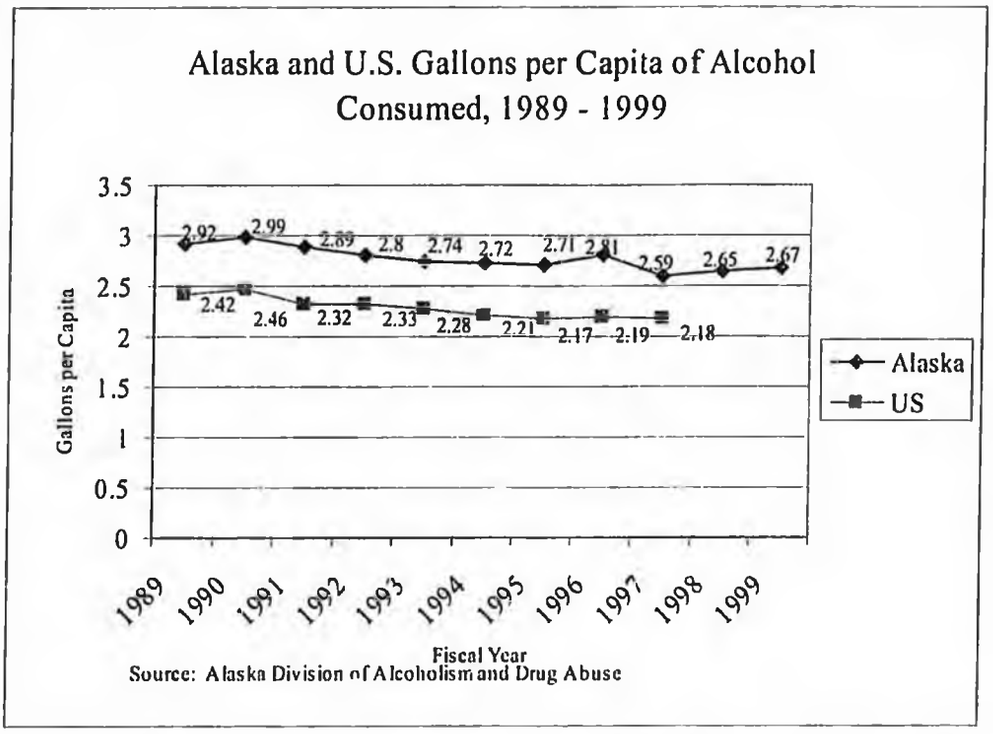
In many Alaskan communities beer is cheaper than milk, fruit juice or brand name soft drinks.

Nearly 60,000 Alaskans misuse, abuse or are addicted to alcohol. About 14,000 seek alcohol prevention or treatment services in programs that receive state funds.
State of Alaska, Division of Alcoholism and Drug Abuse

The prevalence of alcohol dependence and alcohol abuse in Alaska is just about twice the national average. About 7% nationally, and nearly 14% for Alaska.
Gallup Corporation Telephone Survey for the State of Alaska Division of Alcoholism and Drug Abuse

Alaska has the highest incidence of Fetal Alcohol Syndrome (FAS) in the world. FAS is totally preventable. Lifetime costs for an FAS birth are at least $1.4 million.
State of Alaska, Department of Health and Social Services

Where It All Begins: Per Capita Consumption



What We Know About Alaskan Drinking Patterns

Alaskan drinking patterns have some regional differences that were identified in the Alaska Adult Household Telephone Survey conducted by the Gallup Organization for the State Division of Alcoholism and Drug Abuse in 1999. When alcohol dependence is examined, the survey revealed that 9.7% of Alaskans age 18 and over meet that criteria. This is more than double the national number, 4.38%.

If you divide Alaska into four regions the percentage of persons who are alcohol dependent looks like this:

Southeast:	10.5%
Bush:	11.9%
Gulf Coast:	8.5%
Urban	9.5%

From this survey, we also know that 4.1% of Alaskans statewide abuse alcohol, and are at risk for dependence. The study shows that more than 58,000 Alaskans are either courting or experiencing the negative consequences that inevitably accompany alcohol abuse and dependence. ■

What About Alaska's Visitors?

There is no current definitive analysis of how much of Alaska's alcohol consumption is related to the 1.4 million visitors to the state in 1999. It is reasonable to estimate that the visitors reflect U.S. adult drinking patterns. A preliminary analysis indicates that perhaps 10% of Alaska's alcohol consumption is related to the visitor industry. At the core of this analysis is an average visit length of 11.5 days. The Advisory Board will continue to seek additional information, but we know that the great majority of the negative consequences are homegrown, not visitor-related. ■

Frequently Asked Questions about Alcohol and Its Impact

To solve complex problems we need a common language and a common frame of reference. We repeat this popular "FAQ" with minor changes based on current research.

What do we mean by alcoholism?

Alcoholism, also known as "alcohol dependence," is a disease that includes alcohol craving and continued drinking despite repeated alcohol-related problems, such as losing a job or getting into trouble with the law. It includes three or more of the following:

Tolerance – a need for either significantly increased amounts of alcohol to feel its effects, or markedly reduced effect with the continued use of the same amount of alcohol.

Withdrawal – either symptoms of withdrawal such as nausea, sweating, shakiness, and anxiety when alcohol use is stopped, or use of alcohol to avoid withdrawal symptoms such as drinking in the morning to avoid symptoms.

Drinking more than intended – in larger amounts or over a longer time than intended.

Unsuccessful efforts to cut down or quit – or continuing desire to control drinking.

Much time spent drinking or recovering from the effects of drinking.

Reduction in other activities such as important social, occupational, or recreational activities because of drinking.

Continued drinking even when health is impacted – evidenced by knowledge that one's physical or emotional health as been damaged by drinking, yet continuing to use alcohol.

For clinical and research purposes, formal diagnostic criteria for alcoholism have been developed. They are included in the *Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition,* published by the American Psychiatric Association, as well as in the *International Classification of Diseases*, published by the World Health Organization.

Is alcoholism a disease?

Yes. Alcoholism is a chronic, often progressive disease with symptoms that include a strong need to drink despite negative consequences, such as serious job or health problems. Like many other diseases, it has a generally predictable course, has recognized symptoms, and is influenced by both genetic and environmental factors that are being increasingly well defined.

Is alcoholism inherited?

Alcoholism tends to run in families, and genetic factors explain this pattern. Currently, researchers are on the way to finding the genes that influence vulnerability to alcoholism. A person's environment, such as the influence of friends, stress levels, and the ease of obtaining alcohol, also may influence drinking and the development of alcoholism. Still other factors, such as social support, may help to protect even high-risk people from alcohol problems.

Risk, however, is not destiny. A child of an alcoholic parent will not automatically develop alcoholism. A person with no family history of alcoholism can become alcohol dependent.

Can alcoholism be cured?

Not yet. Alcoholism is a treatable disease, and medication has also become available to help prevent relapse, but a cure has not yet been found. This means that even if an alcoholic has been sober for a long time and has regained health, he or she may relapse and must continue to avoid all alcoholic beverages.

Are there any medications for alcoholism?

Yes. Two different types of medications are commonly used to treat alcoholism. The first is tranquilizers, called benzodiazepenes, e.g., Valium, Librium, which are used only during the first few days of treatment to help patients safely withdraw from alcohol.

A second type of medication is used to help people remain sober. Medicine for this purpose is naltrexone. When used together with counseling, this medication lessens the craving for alcohol in many people and helps prevent a return to heavy drinking. Another older medication is disulfram (Antabuse), which discourages drinking by causing nausea, vomiting, and other unpleasant physical reactions when alcohol is used. The SAMHSA website has background information on newer medications. See p. 24.

Does alcoholism treatment work?

Alcoholism treatment is effective in many cases. Studies show that many alcoholics remain sober one year after treatment, while others have periods of sobriety alternating with relapses. Still others are unable to stop drinking for any length of time. A recent study on Alaska treatment outcomes shows 56% of outpatients and 42.% of inpatients abstained from alcohol for a year after treatment.

Many clients who are unable to avoid relapse are now being treated successfully with a combination of naltrexone and treatment. Persons with co-occurring mental illness and substance abuse or dependency may also benefit from this regimen. Treatment outcomes for alcoholism compare favorably with outcomes for many other chronic medical conditions such as diabetes. The longer one abstains from alcohol, the more likely one is to remain sober.

It is important to remember that many people relapse once or several times before achieving long-term sobriety. Relapses are common and do not mean that a person has failed or cannot eventually recover from alcoholism. If a relapse occurs, it is important to try to stop drinking again and to get whatever help is needed to abstain from alcohol. Ongoing support from family members and others can be important in recovery. Completion of aftercare/continuing care is another critical element for successful recovery.

Does a person have to be an alcoholic to experience problems from alcohol?

No. Even if you are not alcoholic, abusing alcohol can have negative results, such as failure to meet major work, school or family responsibilities because of drinking; alcohol-related legal trouble; automobile crashes due to drinking; and a variety of alcohol-related medical problems. Under some circumstances, problems can result even from moderate drinking - for example, when driving, during pregnancy, or when taking certain medications.

Are certain groups of people more likely to develop alcohol problems than other groups are?

Yes. Nearly 14 million people in the United State—1 in every 13 adults—abuse alcohol or are alcoholic. However, more men than women are alcohol dependent or experience alcohol-related problems. In addition, rates of alcohol problems are highest among young adults ages 18-29 and lowest among adults 65 years and older. Among major U.S. ethnic groups rates of alcoholism and alcohol-related problems vary. Alaska has the second highest rate of alcohol consumption in the nation, behind Wisconsin. One study ranks Alaska 5th in alcohol-related problems, and first in alcohol-related mortality.

How can you tell whether you or someone close to you has an alcohol problem?

A good first step is to answer the brief questionnaire below, developed by Dr. John Ewing. (To help remember these questions, note that the first letter of a key word in each questions spells "CAGE.")

Have you ever felt you could
Cut down on your drinking?
Have people
Annoyed you by criticizing your drinking?
Have you ever felt bad or
Guilty about your drinking?
Have you ever had a drink first thing in the morning to steady your nerves or get rid of a hangover
(**E**ye opener)?

One "yes" answer suggests a possible alcohol problem. More than one "yes" answer means it is highly likely that a problem exists. If you think that you or someone you know might have an alcohol problem, it is important to see a qualified chemical dependency provider, or healthcare provider right away. He or she can help determine whether a drinking problem exists and, if so, suggest the best course of action. Resource telephone numbers are listed on page 24 of this report.

If I have trouble with drinking, can't I simply reduce my alcohol use without stopping altogether?

That depends. If you are diagnosed as an alcoholic, the answer is "no." Studies show that nearly all alcoholics who try to merely *cut down* on drinking are unable to do so indefinitely. Instead, *cutting out* alcohol (that is, abstaining) is nearly always necessary for successful recovery. However, if you are not alcoholic but have had alcohol-related problems, you may be able to limit the amount you drink. If you cannot always stay within your limit, you will need to stop drinking altogether.

If an alcoholic is unwilling to seek help, is there any way to get him or her into treatment?

This can be a challenging situation. An alcoholic cannot be forced to get help except under certain circumstances, such as when a violent incident or other criminal action results in police being called or following a medical emergency, a formal or informal intervention with the alcoholic, or through the Title 47 Involuntary Commitment Statute. This doesn't mean, however, that you have to wait for a crisis to make an impact. Based on clinical experience, many alcoholism treatment specialists recommend the following steps to help an alcoholic accept treatment:

Stop all "rescue missions." Family members often try to protect an alcoholic from the results of his or her behavior by making excuses to others about his or her drinking and by getting him or her out of alcohol-related jams. It is important to stop all such rescue attempts immediately, so that the alcoholic will fully experience the harmful effects of his or her drinking—and thereby become more motivated to stop.

Time your intervention. Plan to talk with the drinker shortly after an alcohol-related problem has occurred—for example, a serious family argument in which drinking played a part or an alcohol-related accident. Also choose a time when he or she is sober, when both of you are in a calm frame of mind, and when you can speak privately. If you choose not to use this informal route, seek professional help from a qualified chemical dependency provider experienced in conducting interventions. Remember that your safety is a primary consideration.

Be specific. Tell the family member that you are concerned about his or her drinking and want to be supportive in getting help. Backup your concern with examples of the ways in which his or her drinking has caused problems for both of you, including the most recent incident.

State the consequences. Tell the family member that until he or she gets help, you will carry out consequences—not to punish the drinker, but to protect yourself from the harmful effects of the drinking. These may range from refusing to go with the person to any alcohol-related social activities to moving out of the house. Do not make any threats you are not prepared to carry out.

Be ready to help. Gather information in advance about local and regional treatment options. If the person is willing to seek help, call immediately for an appointment with a treatment program counselor. Offer to go with the family member on the first visit to a treatment program and/or AA meeting.

Call on a friend. If the family member still refuses to get help, ask a friend to talk with him or her, using the steps described above. A friend who is a recovering alcoholic may be particularly persuasive, but any caring, nonjudgmental friend may be able to make a difference. The intervention of more than one person, more than one time, is often necessary to persuade an alcoholic person to seek help.

Find strength in numbers. With the help of a qualified chemical dependency counselor or healthcare provider, some families join with other relatives and friends to confront an alcoholic as a group. While this approach may be effective, it should only be attempted under the guidance of a provider who is experienced in this kind of group intervention.

Get support. Whether or not the alcoholic family member seeks help, you may benefit from the encouragement and support of other people in your situation. Support groups offered in some communities include Al-Anon, which holds regular meetings for spouses and other significant adults in an alcoholic's life, and Alateen, for children of alcoholics. These groups help family members understand that they are not responsible for an alcoholic's drinking and that they need to take steps to take care of themselves, regardless of whether the alcoholic family member chooses to get help.

What is a safe level of drinking?

Most adults can drink moderate amounts of alcohol—up to two drinks per day for men and one drink per day for women and older people—and avoid alcohol-related problems. (One drink equals one 12-ounce bottle of bear, one 5-ounce glass or wine, or 1 ounce of spirits.)

However, certain people should not drink at all. They include women who are pregnant

or trying to become pregnant; people who plan to drive or engage in other activities requiring alertness and skill; people taking certain medications, including certain over-the-counter medicines; people with medical conditions that can be worsened by drinking; recovering alcoholics; and people under the age of 21.

Is it safe to drink during pregnancy?

No. Drinking during pregnancy can have a number of harmful effects on the newborn, ranging from mental retardation, physical and cognitive abnormalities, and hyperactivity to learning and behavioral problems. Most of these disorders last into adulthood. Fetal Alcohol Syndrome (FAS) is the only 100% preventable birth defect. Alaska has the highest rate of FAS in the nation and by some standards, the world. While we don't yet know exactly how much alcohol is required to cause these problems, we do know that they are 100-percent preventable if a woman does not drink at all during pregnancy. Therefore, for women who are pregnant or are trying to become pregnant the safest course is to abstain from alcohol.

As you get older, does alcohol affect your body differently?

Yes. As a person ages, certain mental and physical functions tend to decline, including vision, hearing and reaction time. Moreover, other physical changes associated with aging can make older people feel "high" and cause impairment after drinking fairly small amounts of alcohol. Many older persons take a variety of prescribed and over-the-counter medications which can have harmful effects if combined with alcohol. These combined factors make older people more likely to have alcohol-related falls, automobile crashes, and other kinds of accidents.

Does alcohol affect a woman's body differently from a man's body?

Yes. Women become more intoxicated than men after drinking the same amount of alcohol, even when differences in body weight are taken into account. This is because women's bodies have proportionately less water than men's bodies. Because alcohol mixes with body water, a given amount of alcohol becomes more highly concentrated in a woman's body than in a man's. Men metabolize alcohol more quickly than women for that same reason. That's why the recommended drinking limit for women is lower than for men.

I have heard that alcohol is good for your heart. Is this true?

Several studies have reported that moderate drinkers—those who have one or two drinks per day—are less likely to develop heart disease than people who do not drink any alcohol or who drink larger amounts. Small amounts of alcohol may help protect against coronary heart disease by raising levels of "good" HDL cholesterol and by reducing the risk of blood clots in the coronary arteries. Recent studies indicate that grape juice may have the same protective factors as wine. The American Heart Association is recommending "calisthenics rather than cabernet" because of alcohol's other health risks.

If you are a nondrinker, you should not start drinking only to benefit your heart. Protection against coronary heart disease may be obtained through regular physical activity and a low-fat diet. And if you are pregnant, planning to become pregnant, have been diagnosed as alcoholic, or have any medical condition that could make alcohol use harmful, you should not drink.

Even for those who can drink safely and choose to do so, moderation is the key. Heavy drinking can actually increase the risk of heart failure, stroke and high blood pressure, as well as cause may other medical problems, such as liver cirrhosis.

If I am taking over-the-counter or prescription medication, do I have to stop drinking?

Possibly. More than 100 medications interact with alcohol, leading to increased risk of illness, injury and, in some cases, death. The effects of alcohol are increased by medications that slow down the central nervous system, such as sleeping pills, antihistamines, antidepressants, anti-anxiety drugs, and some painkillers. In addition, medicines for certain disorders, including diabetes and heart disease, can be dangerous if used with alcohol. If you are taking any over-the-counter or prescription medications, ask your doctor or pharmacist whether you can safely drink alcohol.

January 1998 - http://www@niaaa.nih.gov
with minor revisions by the Advisory Board on Alcoholism and Drug Abuse.

What's the Price Tag for Investing in Treatment?

Fiscal Year	State Treatment Grants	Medicaid Payments	Client Admissions	Average Cost Treatment Episode	Consumer Price Index
1992	$ 22,755,000	$ -	5,415	$ 4,202	128.2
1993	$ 21,331,000	$ -	9,144	$ 2,333	132.2
1994	$ 21,531,000	$ -	9,735	$ 2,212	135.0
1995	$ 20,411,000	$ 948,000	9,044	$ 2,362	138.9
1996	$ 19,812,000	$ 1,752,000	10,186	$ 2,117	142.7
1997	$ 20,219,000	$ 2,674,000	11,117	$ 2,059	144.8
1998	$ 21,188,000	$ 2,500,000	10,245	$ 2,093	146.9
1999	$ 19,953,000	$ 2,880,000	9,619	$ 2,374	148.4

Source: Alaska Division of Alcoholism and Drug Abuse, Department of Labor

This table shows the evidence of decreased or "flat" funding that has eroded treatment capacity throughout the state. Some specialized programs for women with children, incarcerated women, and adolescents have increased service capacity, usually driven by federal funding. However, the public treatment capacity for the typical client needing treatment continues to lag behind demonstrated need. Frequently these are clients who are engaging in behaviors and drinking patterns that have significant negative consequences.

What are the Savings from Investment in Treatment?

National Cost Savings from Substance Abuse Treatment Nears $1.7 Billion

	Before Treatment (in Millions)	After Treatment (in Millions)	Benefits to Society (in Millions)
Health Care Costs	$ 672.2	$ 653.2	$ 24.90
Earnings	$ 1,166.4	$ 1,550.0	$ 383.60
Crime-Related Costs	$ 3,215.8	$ 922.2	$ 2,293.50
Total Benefits	$ -		$ 2,702.10
Treatment Costs	$ -		$ 1,004.40

Source: U.S. DHSS, Substance Abuse and Mental Health Services Administration

This table shows the highlights of a recently released national study that examined the benefits of substance abuse treatment. Determining what these numbers are for Alaska continues to be a high priority for the Advisory Board. Of particular interest to policy makers is the remarkable reduction in crime-related costs after treatment. Early assessment and treatment whenever appropriate will continue to be a high priority for the Board. This is one of the most effective strategies that policymakers can use to reduce negative consequences.

What's the Price Tag for Alcohol's Negative Consequences?

We can be a little more precise than the late Senator Dirksen's famous quip, but the Advisory Board and many policy makers share a common frustration when it comes to putting a price tag on alcohol's negative consequences to Alaskans and their communities. The Advisory Board has learned that a comprehensive study to determine the full extent of costs is far outside the Board's budget. A small grant from the Alaska Mental Health Trust Authority will help frame the updating of two previous Alaska studies. One was completed in 1975 and the most recent one, "The Impact of Alcohol and Other Drug Abuse in Alaska," was completed in 1989.

> **"A few hundred million here, a few hundred million there. Pretty soon it starts to sound like real money."**
>
> *attributed to Senator Everet M. Dirksen, (R) IL 1896-1969*

It is the Board's hope that policy makers across departments and divisions will collaborate to provide the data necessary to give all Alaskans a clear and comprehensive picture of what alcohol's negative consequences cost families, communities and the state.

Without our own Alaskan data collection and rigorous analysis, we are left estimating Alaska's costs based on national studies. The national costs of substance abuse are reviewed in studies released as recently as last month. The picture is not pretty, and we can conclude that Alaska's economic impacts are higher than the national average because Alaska's alcohol consumption is significantly higher than the national average. Because we don't have current data, we have opted for a conservative estimate based on national data: $250 million a year in public sector costs. In the meantime, the National Institutes of Health continue to develop a research agenda that encourages work on the effects of beverage prices, alcohol taxation and local regulation. Their last comprehensive study, 'The Economic Costs of Alcohol and Drug Abuse in the United States - 1992," estimated an economic cost to the country of $246 billion.

Here are some things all policymakers should know:

How does the cost of treatment for a woman of childbearing age compare with the lifetime expense of a Fetal Alcohol Syndrome birth (estimated at $1.4 million).

How does the cost of a public inebriate's frequent need for protective custody (estimated at $1,000 an incident) compare with long term care?

How does the cost of active prevention programs to discourage underage drinking compare with a year of confinement and treatment at a youth detention center? It costs at least $60,000/year to operate one detention center bed, and average length of stay can exceed one year.

How does the cost of recidivism for alcohol related crimes compare with intensive outpatient and continuing care costs to sustain good treatment outcomes?

If you think such an effort would help all Alaskans make good decisions about local and state policies and funding, we'd like to hear from you. An array of ways of contact us appear on the inside cover.

What Can We Learn From Recent Research?

10th Special Report to the U.S. Congress on Alcohol and Health

This 450-page comprehensive study of the relationship between alcohol and health was presented to the U.S. Congress at the end of last year. It offers current research findings on everything from measuring the health risks and benefits of alcohol to the role alcohol plays in violence, both for offenders and victims. Capitalizing on the growing body of research on how the brain functions, it includes the neurobiological and neurobehavioral mechanisms of chronic alcohol drinking, including the lasting changes that may occur to the brain.

There are new findings on genetic linkages and the psychosocial factors relating to a family history of alcoholism. Medical consequences are reviewed, including unique risks to women, alcohol-related breast cancer, and the dangers of prenatal exposure to alcohol.

Also of special interest to the Advisory Board are the chapters with economic perspectives. They include the effects of changes in alcohol prices and taxes, cost research on alcoholism treatment and economic costs of alcohol abuse. The growing body of research on the effects of alcohol advertising is also reviewed.

Treatment research findings emphasize the value of early screening and brief interventions. The report recognizes the systemic nature of the alcohol abuse problem in the nation. Its findings will be helpful in guiding the Advisory Board's planning efforts. ■

Barriers to Alcoholism and Other Drug Abuse Treatment for Women: Comparing Alaska Native and Non-Native Women

Advisory Board past chair Cheryl Mann, Ph.D., shared the content of her recent dissertation with the Board and Alaska Mental Health Trust during their funding deliberations last fall. She is currently a professor at the University of Alaska/Anchorage. She reviewed her findings from a survey of more than 200 women who were mothers and who required treatment for alcoholism or both alcohol and other drug dependency. Of the sample, half were Alaska Native and half were not. About half had been court ordered into treatment.

She found that Alaska Native women were more likely to be single, older, unemployed, have high school or less educational level, live in a village, be addicted to alcohol, have previously been to treatment, to and be court ordered into treatment more frequently than their non-Native counterparts. This unique look at Alaskan treatment needs provides the Board significant data for its planning responsibilities. It was agreed that policy makers and service providers should consider how to make more services available to women, both residential and outpatient.

Many heads nodded as Dr. Mann spoke of the need for more low cost services which were geographically accessible, and would address the unique needs of this high risk population. ■

Shoveling Up: The Impact of Substance Abuse on State Budgets

This is a three-year, state-by-state study released January 29, 2001 by the National Center of Addiction and Substance Abuse at Columbia University.

All together, states spent $81.3 billion, or about 13% of their budgets, dealing with the effects of drug, alcohol and tobacco abuse. This is about as much as states spend on higher education, the study found. The center's president, Joseph A. Califano Jr., lamented that only about 4% of the amount spent, or $3 billion, was for prevention and treatment programs.

Total spending by the states in 1998 was $620 billion, with 13.1 percent related to substance abuse.

Responding to the report the White House Office of National Drug Control Policy said it demonstrates the need for a "balanced strategy." "We cannot simply arrest our way out of the problem," acting director Edward H. Jurith commented in a statement about the report.

About Alaska: The study concluded that Alaska spends $532/person on government programs related to substance abuse, including tobacco, a total budget bite of $324 million. The study included expenditures in adult corrections, juvenile justice, education, health, child and family assistance, mental health, and developmental disabilities that are directly related to substance abuse. This was 9.8% of the state budget in FY98. Of these expenditures, only one-half of one percent (.5%) was dedicated to prevention and treatment services. ■

Handbook on Health Economics, Volume I. (in publication)

The Advisory Board is indebted to one of the country's most respected researchers on the relationship between alcohol consumption and taxation. Philip J. Cook, a professor at the Sanford Institute for Public Policy at Duke University. He shared an advance copy of Chapter 30 in the Handbook of Health Economics which examines trends and patterns in alcohol consumption, demand for alcoholic beverages in different populations, the consequences of alcohol consumption and taxation, the effect of drinking on productivity and an evaluation of alcohol taxation and other alcohol-control measures.

Professor Cook includes this portrayal of overall U.S. consumption by his research colleague D. Gerstein:

"If you put 10 drinking-age adults in a room, their annual consumption of absolute ethanol (pure beverage alcohol) would look roughly like this:

- There would be 3 nondrinkers.
- There would be 3 people drinking one gallon between themselves.
- There would be 1 person drinking 1.5 gallons.
- There would be 1 person drinking 3 gallons.
- There would be 1 person drinking 6 gallons.
- There would be 1 person drinking 15 gallons."

Cook pointed out that if the person drinking 15 gallons could be encouraged to cut his/her drinking to 6 gallons, then overall U.S. alcohol consumption would fall by one third. ■

What Can Be Done to Make Things Better?

Advisory Board on Alcoholism and Drug Abuse (ABADA)
LEGISLATIVE ADVOCACY PLATFORM FOR 2001

1. POLICY MAKING GOALS

ABADA advocates for public policies and legislation that recognize the diseases of alcoholism and other drug dependency as preventable and treatable, and view effective service delivery as a critical component of a healthy future for all Alaskans and their communities.

- **ABADA supports a statutory change to Title 47.37 Involuntary Commitment Statute to enable Physicians Assistants and Advanced Nurse Practitioners in rural communities to complete the required certificates of necessity where licensed physicians are not available.**
- **ABADA supports legislation to include inhalants In the Title 47.37 Involuntary Commitment Statute.**

2. REGULATORY AND ACCESS ISSUES

ABADA advocates for public policies and regulations that reduce overall consumption of alcohol, tobacco and other drugs, thereby helping to eliminate the negative consequences of substance abuse in Alaskan communities.

- **ABADA supports legislation to reduce the legal limit for the presence of alcohol while operating a motor vehicle from .10 to .08 BAC.**

3. REVENUE AND FUNDING ISSUES

ABADA advocates for revenue development and allocation that ensures adequate substance abuse service delivery to support healthy families and communities.

- **ABADA supports an increased excise tax on alcohol to match the cost of negative consequences of alcohol to the state and its residents.**

4. PREVENTION ISSUES

ABADA fosters community norms and standards that promote healthy lifestyles for Alaskans of all ages.

- **ABADA supports an Underage Drinking Initiative aimed at establishing a Juvenile Alcohol Safety Action Program to screen, assess and monitor minors cited for consuming or possessing alcohol, and**
- **Modifying state statutes to enhance opportunities for education and treatment in lieu or as part of sanctions for underage drinking or possession.**
- **ABADA supports development of additional alcohol and other drug treatment capacity for youth.**

5. TREATMENT ISSUES

ABADA supports access to a continuum of substance abuse services appropriate to the needs of Alaskans of all ages and in all regions.

- **ABADA supports the development of adequate resources to provide substance abuse/dependency treatment services to all Alaskans in need.**

6. CRIMINAL JUSTICE ISSUES

ABADA advocates for substance abuse intervention and treatment for offenders to reduce recidivism and to support positive transition back to communities.

- **ABADA supports implementation of the strategies outlined in the "Final Report of the Alaska Criminal Justice Assessment Commission, (ACJAC) Alcohol Policy Committee."**

7. QUALITY AND PERFORMANCE MEASURE ACCOUNTABILITY

ABADA advocates for accountability in service delivery, including a reliance on positive outcomes as a measurement of success.

- **ABADA supports adequate funding for management information system improvement necessary to measure service delivery effectiveness.**

8. PARTNERSHIP DEVELOPMENT

ABADA advocates for and participates in partnerships that leverage resources, maximize service delivery, minimize duplication, and enhance the health of all Alaskans.

Some Key Facts About .08 BAC Legislation

Why .08? We look to the National Highway Traffic Safety Administration for an overview of the issue. The following is excerpted from their January 2000 "State Legislative Fact Sheet."

When Congress passed a $58 billion Transportation Appropriations bill last fall it virtually made .08 BAC the law of the land. Twenty states already have adopted the .08 Blood Alcohol Content (BAC) limit. Other states have four years to do so before highway funding is reduced.

Virtually all drivers are substantially impaired at .08 BAC. Laboratory and test-track research shows that the vast majority of drivers, even experienced drinkers, are impaired at .08 with regard to critical driving skills. Braking, steering, lane changing, judgment and divided attention, among other measures, are all affected significantly at .08. Performance diminishes at a rate as high as 60 to 70% at .08 BAC according to these studies.

Opposition to .08 legislation generally includes the following claims:

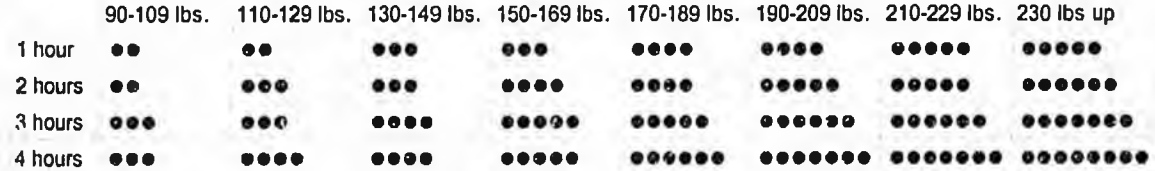
The legislation will not affect high BAC problem-drinker drivers. A recent national study showed that .08 laws reduce fatal crash involvements of drivers with both low BACs and high BACs by 8%. The legislation lowers the bar for the amount of alcohol that is illegal in driving and sends that message to all potential drinking drivers, even those who typically reach very high BACs.

The .08 law will overburden the criminal justice system and jails. When California lowered its BAC limit to .08, no increases were reported in the proportion of DWI defendants pleading guilty, requesting jury trials, or appealing convictions. There was little impact on court administrators or judges. The main impact was on prosecutors' decisions concerning whether cases should be filed. Previously, DWI arrests with BACs below 0.12 typically were allowed to plead to reduced charges. Since the limit was changed, this plea-bargain "cut off" has dropped to about 0.10 BAC.

People who have a glass or two of wine with dinner will be at risk for a DWI conviction. An average male weighing 170 pounds must consume more than four beers within one hour on an empty stomach to reach a .08 BAC level. The average 135 pound female would have to drink three beers in one hour on an empty stomach to reach a .08 BAC.

Note: Each dot = 1 drink. One drink is: one 12 ounce beer, 1 ounce spirits or one 5 ounce glass of wine.

Alcohol Beverage Consumption in One Hour on Empty Stomach required to Reach .08 BAC



Source: U.S. Department of Transportation

A Gallery of Advocates for Successful Substance Abuse Treatment

Testimony to substance abuse treatment success came from fourteen Alaskans pictured here in the gallery of the House of Representatives last March. In an advocacy project sponsored by the Substance Abuse Directors Association (SADA) and funded with a small projects grant from the Alaska Mental Health Trust Authority, legislators and and other policy makers heard first hand about the difficult but ultimately empowering road to recovery taken by these individuals. The highly successful effort, called "Meeting the Challenge," was coordinated by SADA executive director Mary Rosenzweig, fourth from left, front row.

Nobody Tells the Story Better Than Someone Who's Been There

The March 2000 visit to Juneau by 14 recovering Alaskans was met with respect and gratitude by elected officials and other policy makers. Success breeds success, and the Substance Abuse Director's Association (SADA) is again sponsoring a March visit to Juneau so that a few of Alaska's thousands of recovering persons can speak for the importance and benefit of substance abuse treatment.

> "Looking back over a family filled with addiction....My family has been affected by at least two generations of alcoholism, perhaps more. Even though I am not an alcoholic you might say my roots are in the bottle."

This voice of advocacy is relatively new. Participants made a decision to tell others the story of their journey to recovery. Most recovering addicts are proud of their success but not everyone is ready to share that story with perfect strangers. The Advisory Board is grateful to participants in "Meeting the Challenge."

This effort is coordinated by SADA executive director Mary Rosenzwieg, with a small projects grant from the Alaska Mental Health Trust Authority.

For the second year, participating substance abuse programs around Alaska are working with interested persons recovering from addictions, or their family members, to help them make their individual voices count.The project includes a self-advocacy skill building workshop to stress the importance of being involved in policy-making decisions.

> "I excelled in high school athletics and was co-captain of the varsity basketball team (the Mighty Nanooks), which was a dream I pursued since my childhood. By the time I was a junior I was able to purchase liquor at the local liquor store."

Once participants are in Juneau they are welcomed by a team of local advocates and senior policymakers. But their real value is in the one to one conversations with legislators and staff whose votes affect funding for service delivery.

While substance abuse is a systemic problem, the system has been affected one substance abuser at a time. The Advisory Board's guiding principles are well served as these courageous Alaskans speak out. **--Contact SADA at 1-907 770-2927**

Who Is At Greatest Risk?

ABADA Planning Efforts Focused on High Risk Alaskans

Along with legislative advocacy, the Advisory Board's major efforts are dedicated to making funding recommendations for service delivery that match the needs of Alaskans. These recommendations are made to the Alaska Mental Health Trust Authority (AMHTA), to the Governor, and to the Department of Health and Social Services. Recommendations that were high priorities for this year fell into these categories:

Beneficiaries of the Trust

These are Alaska's most impaired late-stage alcoholics. Damage can be irreversible. Both organ function and brain function have been diminished. Long term treatment capacity expansion is needed for this high risk group. About 1,500 received services in public programs in FY99. The Advisory Board views any Alaskan who is alcohol dependent as a Trust beneficiary. Research shows that more than 9% of Alaskans age 18 and over are alcohol dependent.

Underage Drinkers

Alaska's pervasive alcohol culture in many communities puts young people at serious risk. Research shows that if a young person doesn't drink before the legal age of 21 the chances of becoming an alcoholic are greatly reduced.

Alcohol-free social activities and other prevention activities are vital to the health of any community.

Treatment for Women with Children

The Board has continued to advocate for treatment expansion for women with children, especially in hub communities. Some expansion has occurred but more is needed. Rural women in particular often went without treatment because they feared losing custody of their children.

Needs of Frail Elders

About 17% of older Americans have problems with alcohol. Pilot projects in Fairbanks and Southeast, in collaboration with the Alaska Commission on Aging and the Trust, will help us to learn how best to deliver services to them.■

50 cents a brew - 2001

A brief look at some retail beer prices in Anchorage over the last 20 years:

<u>June 1981</u>
Major brands unit cost: 33 to 46 cents
Other brands unit cost: 32 cents

<u>June 1983</u>
Major brands unit cost: 37 to 56 cents
Other brands unit cost: 37 cents

<u>June 1985</u>
Major brands unit cost: 38 to 58 cents
Other brands unit cost: 35 cents

<u>Fast forward to 2001</u>
Major brands unit cost: 54 to 73 cents
Other brands unit cost: 36 to 40 cents

Source: Anchorage Times and Anchorage Daily News retail advertisers

Closing the Gap Between Tax Revenue and the Costs of Negative Consequences

VARIOUS TAX INCREASE SCENARIOS

Basis for calculations	Beer	Wine	Spirits	All
Gallons sold in Alaska in FY99	13,979,490	1,380,535	1,087,720	
Alaska tax per gallon since 1983	$ 0.35	$ 0.85	$ 5.60	
Standard drink amount	12 ounces	5 ounces	1 ounce	
Drinks per gallon	10.667	25.6	128	
Current Alaska tax per drink	$ 0.0328	$ 0.0332	$ 0.0438	
FY99 drinks in this category	149,119,220	35,341,696	139,228,160	323,689,076
Actual FY99 Revenue	$ 4,892,770	$ 1,173,088	$ 6,091,190	$ 12,157,048
Calculations of various increases	Beer Revenue	Wine Revenue	Spirits Revenue	All Revenue
Revenue @ 5 cent increase	$ 12,347,071	$ 2,940,429	$ 13,059,601	$ 28,347,101
Revenue @ 10 cent increase	$ 19,803,032	$ 4,707,514	$ 20,021,009	$ 44,531,555
Revenue @ 15 cent increase	$ 27,258,993	$ 6,474,599	$ 26,982,417	$ 60,716,009
Revenue @ 20 cent increase	$ 34,714,954	$ 8,241,684	$ 33,943,825	$ 76,900,463

Data source: Alaska Department of Revenue
Data calculations: Advisory Board on Alcoholism and Drug Abuse

Note: Revenue projections do not reflect the probable decrease in consumption based on price sensitivity.

A History of Alcoho' Tax in Alaska

	Liquor per gallon	Wine per gallon	Beer per gallon
1933		$0.05	$0.05
1937	$0.50	$0.15	$0.05
1941	$1.00	$0.15	$0.05
1945	$1.60	$0.15	$0.05
1946	$2.00	$0.15	$0.05
1947	$3.00	$0.25	$0.10
1957	$3.50	$0.50	$0.25
1961	$4.00	$0.60	$0.25
1983	$5.60	$0.85	$0.35
2001	?	?	?

Source: Alaska Department of Revenue

What's the Effect of Inflation?

In 1983, a dollar was a dollar when you filled your marketbasket in Anchorage. Today, you're paying $1.48 for the same marketbasket in Anchorage. But when people purchase alcoholic beverages, they're getting a bargain. The tax is still at the 1983 level.

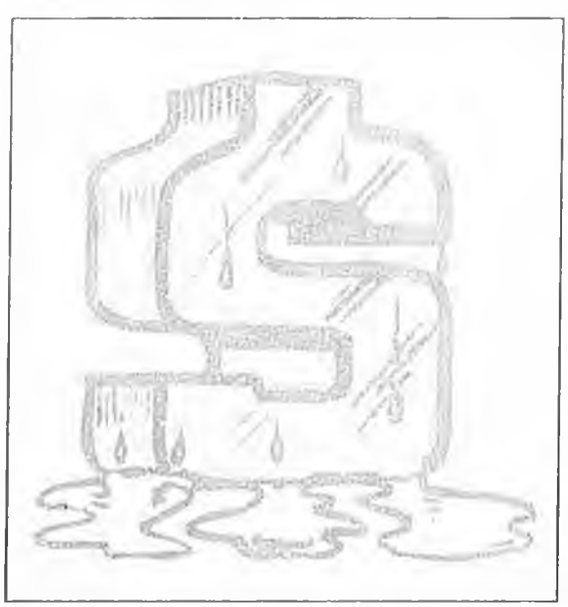
A sound tax increase strategy could occur in 3 steps: 1) correct for inflation, 2) set the increase at a level that will make a significant reduction in the gap between current revenue and the cost of negative consequences to the taxpayer. 3) Index the increase to the Anchorage CPI.

The table on page 19 shows in detail where a potential $40 million increase in revenues to the general fund was lost because the alcohol excise tax was not indexed to the Consumer Price Index.

Alcoholic Beverages Tax Revenue with and without CPI Adjustment

FY	Revenue	CPI	Revenue with CPI	Difference
1984	$ 14,042,369		$ 14,042,369	$ -
1985	$ 13,808,198	2.40%	$ 14,139,594	$ 331,396
1986	$ 13,161,742	1.90%	$ 13,733,699	$ 571,957
1987	$ 12,623,044	0.40%	$ 13,224,278	$ 601,234
1988	$ 11,862,337	0.40%	$ 12,477,047	$ 614,710
1989	$ 11,609,067	2.90%	$ 12,564,761	$ 955,694
1990	$ 12,439,104	6.20%	$ 14,297,845	$ 1,858,741
1991	$ 12,133,800	4.60%	$ 14,588,478	$ 2,454,678
1992	$ 12,088,139	3.40%	$ 15,027,721	$ 2,939,582
1993	$ 11,897,280	3.10%	$ 15,248,953	$ 3,351,673
1994	$ 11,995,612	2.10%	$ 15,645,517	$ 3,649,905
1995	$ 11,967,193	2.90%	$ 16,114,831	$ 4,147,638
1996	$ 11,986,770	2.70%	$ 16,577,006	$ 4,590,236
1997	$ 11,551,755	1.50%	$ 16,215,036	$ 4,663,281
1998	$ 11,749,709	1.50%	$ 16,740,295	$ 4,990,586
1999	$ 12,157,508	1.00%	$ 17,494,516	$ 5,337,008
	$ 197,033,627		$ 238,131,946	$ 41,098,319

Note: The current tax rate went into effect on July 8, 1983 (FY84). Data for FY90-FY99 is from Department of Revenue annual reports. Prior data is from computer files. CPI data is from the Bureau of Labor Statistics, Anchorage, Alaska CPI-U. Annual revenue amounts might differ from those calculated from gallons because of penalties, interest adjustments or timing issues. The table assumes that the tax rates on alcoholic beverages increased with the CPI index after the change in tax rates in FY84. No adjustment was made for change in consumption as a result of higher prices. No adjustment was made for timing differences between fiscal data in gallons and CPI calendar years.



A Common Sense Approach to Maintaining Service Levels

A case may be made for "lost revenue" because the alcohol excise tax was not tied to the Consumer Price Index when it went into effect in 1983. If the purpose of the tax was to pay for government services, then the buying power of that tax has gradually "melted down" over the past 17 years. While an increase in tax revenue cannot be specifically dedicated to addressing the negative consequences of substance abuse, policymakers must be mindful of the current high cost of doing nothing, and the opportunity a tax increase represents to address unmet needs.

Encouraging Communities To Work for Healthy Change

There's a reason for the opening phrase in the Advisory Board mission statement: "In partnership with the public..." Surveys, community testimony, focus groups, and a lot of listening have verified to the Board that alcohol is everybody's problem, and everyone must be involved in creating the solution.

Last year included a number of benchmark activities that support positive change: the work of the Alaska Criminal Justice Assessment Commission (ACJAC), the work of the DUI Prevention Task Force of the Municipality of Anchorage, and the Mayor's Blue Ribbon Task Force in Barrow are only a few. There is strong alignment between the findings of these groups and the strategies for positive change that appear in "Results Within Our Reach," the state plan for substance abuse service delivery developed by the Advisory Board in partnership with stakeholder representation from all over Alaska. (See p. 2.)

Advisory Board members and staff were warmly welcomed by stakeholders in both Nome and Barrow as part of a rural outreach program made possible in part by a grant from the Alaska Mental Health Trust Authority. These intensive day and a half meetings in each community proved that local leaders and policymakers are keenly interested in addressing community problems relating to alcohol. The Advisory Board teams of five members learned firsthand from more than 120 residents in Nome and Barrow. They visited treatment programs, senior programs, and heard from 30 village Rural Human Services workers. Judges, physicians, public safety, and elected officials joined in.

In assessing planning priorities based on this information, the Board has responded to the community support for coalition building to more effectively address the problems of public inebriates. Testimony and discussion with physicians, judges, tribal leaders, and a broad range of service providers reinforced the lack of consistent community efforts to deal with this problem.

In partnership with the public, the Advisory Board on Alcoholism and Drug Abuse plans and advocates for policies, programs and services that help Alaskans achieve healthy and productive, lives, free from the devastating effects of the abuse of alcohol and other substances.

The Advisory Board has asked the Alaska Mental Health Trust Authority for support for community coalition building that includes building local expertise about the use of Alaska's Involuntary Commitment statute. The "community readiness" for such coalitions was demonstrated frequently in both Nome and Barrow. Board members and staff added additional chairs to informal discussion sessions that included a number of local stakeholders who had never met one another.

There is no more effective way for the Advisory Board to fulfill its statuatory responsibility than to advocate at every level for programs and support that empower communities, champion a culture than is not heavily influenced by alcohol, and create a more productive and healthy Alaska. ■

Glossary of Terms

Abuse of alcohol, other drugs, or inhalants: A persistent pattern of use of alcohol, other drugs or inhalants with which health consequences and/or impairment in social functioning are associated. This is different from dependence, which has such manifestations as craving, tolerance and physical dependence. Abuse is any use of a legal or illegal drug or substance that causes physical, mental, emotional or social harm, whether mild or severe.

Addict: A person who is physically dependent on one or more psychoactive substances, whose chronic use has produced tolerance, who cannot control his or her intake, and who would have withdrawal symptoms if drug use were discontinued.

Alcohol: The active ingredient in beer, wine and distilled spirits; ethyl alcohol or ethanol.

Alcohol Dependence: A psychic and usually physical state resulting from taking alcohol. It is characterized by behavioral and other responses that always include compulsion to take alcohol on a continuous or periodic basis in order to experience its psychic effects, and sometimes to avoid the discomfort of its absence. The person may or may not have developed a tolerance for alcohol. A person may be dependent on alcohol and other drugs. "Alcohol dependence" is often used interchangeably with the term "alcoholism."

Alcoholism: A primary, chronic disease with genetic, psychosocial and environmental factors influencing its development and manifestations. The disease is often progressive and fatal. It is characterized by continuous or periodic impaired control over drinking, preoccupation with the drug alcohol, use of alcohol despite adverse consequences, and distortions in thinking, most notably denial. Each of these symptoms may be continuous or periodic.

- Primary refers to the nature of alcoholism as a disease entity, in addition to, and separate from other pathophysiologic states which may be associated with it. It suggests that alcoholism, as an addiction, is not a symptom of an underlying disease state.

- Disease means an involuntary disability. It represents the sum of the abnormal phenomena displayed by a group of individuals. These phenomena are associated with a specific common set of characteristics by which these individuals differ from the norm, and which places them at a disadvantage. Use of the term involuntary in defining disease is descriptive of this state as a discrete entity that is not deliberately pursued. It does not suggest passivity in the recovery process nor does use of the term imply the abrogation of responsibility in the legal sense.

- Often progressive and fatal means that the disease persists over time with physical, emotional, and social changes that are often cumulative and may progress as drinking continues. Alcoholism causes premature death through overdose, organic complications involving the brain, liver, heart and many other organs, and by contributing to suicide, homicide, motor vehicle crashes and other traumatic events.

- Impaired control means the inability to limit alcohol use or to consistently limit, on drinking occasions, the duration of the drinking episode, the quantity of alcohol consumed, and/or the behavioral consequences.

- Preoccupation used in association with alcohol use indicates excessive, focused attention given to the drug alcohol, its effects, and/or its use. The relative value thus assigned by the individual often leads to a diversion of energies away from important life concerns.

- Adverse consequences are alcohol-related problems or impairments in such areas as physical health (e.g., alcohol withdrawal syndromes, liver disease, gastritis, anemia, and neurological disorders,) psychologic functioning (e.g., impairments in cognition, changes in mood and behavior,) interpersonal functioning (e.g., marital problems, child abuse, troubled social relationships,) occupational functioning (e.g., scholastic or job problems,) and legal, financial or spiritual problems.

- Denial is used here not in the psychoanalytic sense of a single psychological defense mechanism disavowing the significance of events, but more broadly to include a range of psychological maneuvers that decrease awareness of the fact that alcohol use is the cause of a person's problems rather than a solution to those problems. Denial becomes an integral part of the disease and is nearly always a major obstacle to recovery.

ASAM: The American Society of Addiction Medicine, a national medical specialty society of physicians dedicated to improving the treatment of alcoholism and other drug dependencies.

ASAM Placement Criteria: American Society of Addiction Medicine Patient Placement Criteria for the Treatment of Psychoactive Substance Use Disorders, a clinical guide for matching patients diagnosed as having a substance use disorder to appropriate levels of care based on an assessment of:

1. acute intoxication and/or withdrawal potential;
2. biomedical conditions and complications;
3. emotional/behavioral conditions and complications;
4. treatment acceptance/resistance;
5. relapse potential;
6. recovery environment.

Beneficiary (AMHTA): The beneficiaries of the Alaska Mental Health Trust Authority are Alaskans who experience mental illness; mental retardation or similar disabilities; chronic alcoholism with psychosis and/or Alzheimer's disease or related dementia.

Binge Drinking: Having five or more drinks on an occasion one or more times in the past month.

Chemical Dependency: Physiological or physical dependence on a psychoactive substance.

Chronic Alcoholic with Psychosis: As defined in AS 47.30.056(b)(3), this group includes persons with the following disorders:

1. alcohol withdrawal delirium (delirium tremens);
2. alcohol hallucinosis;
3. alcohol amnestic disorder;
4. dementia associated with alcoholism;
5. alcohol-induced organic mental disorder;
6. alcoholic depressive disorder;
7. other severe and persistent disorders associated with a history of prolonged or excessive drinking or episodes of drinking out of control and manifested by behavioral changes and symptoms similar to those manifested by persons with disorders listed in this subsection.

Chronic Drinking: An average of 60 or more drinks a month.

Culturally Sensitive: Awareness of unique aspects and nuances of one's own culture and of other cultures.

Detoxification: Treatment to restore physiologic function after it has been seriously disturbed by the overuse of alcohol or other drugs.

Drug Dependence: A psychic and sometimes physical state resulting from taking a drug. It is characterized by behavioral and other responses. These always include a compulsion to take a drug on a continuous or periodic basis in order to experience its psychic effects, and sometimes to avoid the discomfort of its absence. The person may or may not have developed a tolerance for the drug. A person may be dependent on more than one drug.

Dually-Diagnosed: Persons suffering from co-occurring mental illness and alcohol or other drug abuse or dependence.

Early Intervention: Services designed to identify individuals who are at high risk for developing alcohol or other drug-related problems. These services are also directed toward persons who are experiencing adverse effects of alcohol or other drug use but are not dependent. Services seek to modify alcohol or drug use behaviors and attitudes.

Fetal Alcohol Syndrome (FAS): Fetal Alcohol Syndrome and other alcohol-related birth defects (ARBD) refer to a group of physical and mental birth defects resulting from a woman's alcohol consumption during pregnancy. FAS is the leading known cause of mental retardation and is 100 percent preventable. ARBD is similar to FAS but lacks the physical symptoms of FAS. ARND may include neurological abnormalities, development delays, intellectual impairments and learning/behavior disabilities are similar to, and sometimes more severe than, those of FAS.

Inhalants: Any volatile substance that can produce an intoxicating state when inhaled. A volatile substance becomes a gas at normal room temperature. Examples include common household products such as fast-drying glues and cements; paints, lacquers and varnishes; thinner and removers; lighter and dry cleaning fluids; kerosene, gasoline, lantern and stove fuel; fingernail, shoe and furniture polish; typewriter correction fluids; felt-tip pens; aerosol products; refrigerants such as freon.

Involuntary Commitment: A legal process defined in Alaska law (AS 47.37.190) whereby a person addicted to alcohol or other drug abuser may be committed to a treatment facility without the person's permission if the person lacks self control in using alcohol and presents a danger to others or is incapacitated by alcohol.

Misuse of alcohol, drugs or inhalants: Use of alcohol, other drugs, or inhalants in a way that is illegal or deviates from medically accepted use.

Sobriety: A positive, healthy and productive way of life, free from the negative effects of alcohol or other drug misuse or abuse.

Tolerance: Physiologic adaptation to the effect of a drug, diminishing the effect of constant dosages.

Treatment Capacity: Amount of substance abuse services that are readily accessible. ■

Sources and Resources

The following are only a few of the very broad range of references and resources available to those with an interest in eliminating the negative consequences of alcohol and drug abuse.

Toll Free Numbers

National Council on Alcoholism and Drug Dependence - 1-888-654-4673

State Division of Alcoholism and Drug Abuse - 1-888-654-4673

State Advisory Board on Alcoholism and Drug Abuse - 1-888-464-8920

Websites

Alaska State Library bibliography on Alcohol and Drug Abuse Treatment. Call 907 465-2916 to request a free copy. Also available from http://www.educ.state.ak.us/lam/library.html.

Alaska Prevention Partnership. http://www.alaskaprevention.com

Alcoholics Anonymous. http://www.alcoholics-anonymous.org/

Center for Science in the Public Interest "Booze News" http://www.cspinet.org

Center for Substance Abuse Prevention maintains a Clearinghouse on Alcohol and Drug Information at 1-800-729-6686. Its website may be reached at http://www.health.org.

Division on Alcoholism and Drug Abuse. The final reports of federally-funded research projects relating to prevalence in Alaska are available. (907) 465-2071 or 1-800-478-2072. http://www.hss.state.ak.us/dada/

Dual Diagnosis Website, focuses on mental illness, drug addiction and alcoholism. http://www.erols.com/ksciacca/

Higher Education Center for Alcohol and other Drug Prevention, sponsored by the U. S. Department of Education. http://www.edc.org/hec/

Join Together Online Organizations working together to combat substance abuse and violence. http://www.jointogether.org/

National Institute on Alcohol Abuse and Alcoholism. Offers a wealth of information, publications and databases on both treatment and prevention. http://silk.nih.gov/niaaa1/

The National Library of Medicine, PubMed. A very large range of medical topics, including Clinical Alerts of the National Institutes of Health, a journal database browser and links to many other sources. http://www.ncbi.nlm.nih.gov/pubmed/

National Council on Alcoholism and Drug Dependence. http://www.ncadd.org

National Organization for Fetal Alcohol Syndrome. http://www.nofas.org/

Substance Abuse and Mental Health Services Administration. http://www.samhsa.gov

Printed at Juneau, Alaska
at a cost of $1.43 per copy.

Additional copies are available upon request.
Call (907) 465-8920 or 1-888-464-8920.

DOC Inmate Substance Abuse Treatment Program

A Continuum of Care

Overview

Research indicates that drugs or alcohol, and sometimes both, play a role in the crimes of 80% of the country's 1.7 million inmates. In Alaska it estimated that at least 85% of the inmate population has a problem with substance abuse. Inmates who are alcohol and drug abusers are more likely to be reincarcerated again and again, as substance use is tightly associated with recidivism. Prisoners can be rehabilitated with appropriate treatment for substance abuse and addiction, and continuing aftercare once they leave prison.

It is DOC's belief, supported by the Alaska Legislature, that it has a responsibility to provide a continuum of care to inmates who are in its custody, so that public safety will be enhanced upon their release to the community. There is an Inmate Substance Abuse Treatment (ISAT) Program in each of DOC's thirteen institutions, as well as at the Pt. MacKenzie work farm. DOC contracts with state approved community treatment providers for the delivery of all of its substance abuse programs.

Programs vary due to the different functions and location of the correctional facilities. For example, a pre-trial facility with a rapid turnover, such as the Ketchikan Correctional Center, has an ISAT education program staffed by a part-time ISAT Counselor. In contrast, Spring Creek Correctional Center, a sentenced long-term facility with a relatively slow population turnover, provides institutional outpatient treatment through two full-time ISAT Counselors. The ISAT continuum of care consists of the following components:

I. Orientation

Orientation services are provided at the Sixth Avenue Correctional Center and the Mat-Su Pre-trial Correctional Center. Both of these programs up until recently were twenty hour a week substance abuse education programs. Due to a lack of resources the programs were cut substantially. Orientation at the Sixth Avenue Correctional Center consists of a men's group and a women's group once a week. The inmates are given information on community resources for substance abuse treatment and support services. They are also given information on how to access substance abuse treatment in sentenced facilities. Orientation at the Mat-Su Pre-trial consists of equipping correctional staff with resource manuals and substance abuse treatment referral information to provide to the inmates.

Sixth Avenue	Clitheroe Center	5 hours (taken from CIPT)
Mat-Su Pretrial	Akeela Treatment Services	3 hours (taken from PCC)

II. Education

The ISAT education programs are designed for the short-term high turnover inmate population. They provide inmates with information on chemical dependency as well as prepare them for treatment in a sentenced facility or in the community. The education level of care is offered at the following institutions by the following providers:

Ketchikan	City of Ketchikan Gateway	1 half-time ISAT Counselor
Palmer	Akeela Treatment Services	2 full-time ISAT Counselors
Yukon-Kuskokwim	Akeela Treatment Services	1 full-time ISAT Counselor

III. Education with an Introduction to Treatment

Education with an introduction to treatment is the level of care that offers more than substance abuse education, but does not include complete outpatient treatment. It is provided at the following institution by the following treatment agencies:

Cook Inlet Pre-Trial	Clitheroe Center	1 full-time ISAT Counselor
Fairbanks	RCAOA (FNA)	2 full-time ISAT Counselors

IV. Outpatient Substance abuse Treatment (in institution)

Inmates who are clinically assessed by ISAT Counselors as needing an outpatient level of care are eligible to receive treatment. It consists of education, primary care, and aftercare. Outpatient care is provided at the following institutions by the following treatment agencies:

Lemon Creek	Gastineau Human Services	1 full-time ISAT Counselor
Meadow Creek	Clitheroe Center	1 full-time ISAT Counselor
Spring Creek	Akeela Treatment Services	2 full-time ISAT Counselors*
Wildwood	Akeela Treatment Services	2 full-time ISAT Counselors
Point MacKenzie	Akeela Treatment Services	2 full-time ISAT Counselors

* One ISAT Counselor works with the adult inmate population, and the other ISAT Counselor works in the Youthful Offender Program.

V. Intensive Outpatient Treatment (in institution)

The intensive outpatient treatment program at Anvil Mountain is a culturally relevant pilot program designed specifically for the Alaska Natives in the Nome region. Ten inmates start and finish the program together. This is the only outpatient model where the inmates live in a dorm together.

Anvil Mountain	Intermountain Services	1 full-time ISAT Counselor

VI. Residential Substance Abuse Treatment Services

DOC opened its forty-eight bed Residential Substance Abuse Treatment Program for female offenders at the Hiland Mountain Correctional Center in November of 1998. It is an intensive six to twelve month program set apart from the general population. Three couselor positions and a Social Worker III position are funded through federal RSAT dollars with a twenty-six percent match from the state. The program was developed by adding on to the existing two and a half ISAT Counselor positions at the facility.

DOC opened it's forty-two bed Residential Substance Abuse Treatment Program for male offenders at the Wildwood Correctional Center on October 16, 20001. It is also an intensive six to twelve month program set apart from the general population. All of the treatment staff are funded through federal RSAT dollars with a twenty-six percent match from the state.

Hiland Mountain	Clitheroe Center	2.5 ISAT Counselors (3.0 RSAT Counselors)
Wildwood	Akeela Treatment Services	(6.0 RSAT Counselors)

Continuum of Care Summary Information

Total number of ISAT positions	17 full-time, 2 half-time
Total number of RSAT positions	9.0 full-time
Total number of ISAT treatment providers	6

For further information please call Sarah Williams, Program Coordinator, at 269-7417.

HMCC Women's RSAT Program
Two Year Outcome Report

The Hiland Mountain Correctional Center (HMCC) Women's Residential Substance Abuse Treatment (RSAT) Program began November 1, 1998. It is an intensive six to twelve month therapeutic community for women with serious substance abuse problems and related criminal histories. Special features of the program include an RSAT Social Worker, a Transition Counselor, and a component called Living in New Knowledge Successfully (LINKS) for women with children. The Salvation Army Clitheroe Center is the contract treatment provider for the program. The program consists of Inmate Substance Abuse Treatment (ISAT) positions that are state funded and RSAT positions that are federally funded with a twenty-six percent state match.

This outcome report indicates the re-incarceration rates for twenty RSAT Program graduates compared to twenty women who needed the program but did not receive it for various reasons, the most common being not enough time left to serve. The graduates and the comparison group were tracked from the day they left Hiland Mountain Correctional Center for six months into the community. The results clearly indicate that participation in the RSAT Program slowed down the re-incarceration rate.

Number of women who were re-incarcerated in the first six months following release.
Non participants 9
RSAT graduates 6

Total number of re-incarcerations in the first six months following release.
Non participants 17 (4 individuals had more than once re-incarceration.)
RSAT graduates 6

Number of women who were re-incarcerated with new misdemeanor charges.
Non participants 6
RSAT graduates 1

Total number of new misdemeanor charges.
Non participants 11 (3 individuals had more than 1)
RSAT graduates 1

Number of women who were re-incarcerated with new felony charges.
Non participants 4
RSAT graduates 1

Total number of new felony charges.
Non participants 5 (1 individual had 2 new felony charges.)
RSAT graduates 1

The new felony charges for the non participants all involved the possession or selling of controlled substances with the exception of 1 assault. The new felony charge for the RSAT graduate was for assault. For both groups, re-incarcerations not involving new felony or misdemeanor charges were for probation/parole/furlough/electronic monitoring/bail bond violations and non-criminal holds.

Hiland Mountain Correctional Center (HMCC)
Women's Residential Substance Abuse Treatment (RSAT) Program

Two Year Outcome Report

Date treatment program began---------- November 1, 1998
Date of study----------November 1, 2000
Number of RSAT graduates studied----------twenty
Number of women in the comparison group----------twenty

Thirty-five women completed the program between November 1, 1998 and November 1,2000. Of these women, twenty completed the program and then spent six months in the community. The re-incarceration rate of the graduates was studied after they had been in the community for six months. The other fifteen women were either still in the institution or had been in the community for less than six months so were not included in the study.

The comparison group consisted of twenty women who needed the program and did not get it due to lack of time. Their incidents of re-incarceration were also studied for the six-month period after they had been released from HMCC.

The results of the study clearly indicate that participation in the RSAT Program reduced the re-incarceration rate.

Results

RSAT graduates:
During the six months in the community six women were re-incarcerated. The six women committed a total of one new felony offense and one a new misdemeanor offense. **The six women had a total of six re-incarcerations.** (None of the six were re-incarcerated more than once.) The other re-incarcerations that did not involve new crimes were due to violations of community supervision.

Comparison group:
During the six months in the community nine women were re-incarcerated. The nine women committed a total of four new felony offenses and eleven new misdemeanor offenses. **The nine women had a total of seventeen re-incarcerations.** (Some of the women were re-incarcerated more than once.) The other re-incarcerations that did not involve new crimes were due to violations of community supervision.

For further information please call Sarah Williams, Program Coordinator, at 269-7417.

The National Center on
Addiction and Substance Abuse
at Columbia University

152 West 57th Street
New York, NY 10019-3310

phone (212) 841-5200
fax (212) 956-8020
http://www.casacolumbia.org

Shoveling Up:
The Impact of Substance Abuse on State Budgets

January 2001

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Foreword and Accompanying Statement by Joseph A. Califano, Jr. Chairman and President

Substance abuse and addiction is the elephant in the living room of American society. Too many of our citizens deny or ignore its presence. Abuse and addiction involving illegal drugs, alcohol and cigarettes are implicated in virtually every domestic problem our nation faces: crime; cripplers and killers like cancer, heart disease, AIDS and cirrhosis; child abuse and neglect; domestic violence; teen pregnancy; chronic welfare; the rise in learning disabled and conduct disordered children; and poor schools and disrupted classrooms. Every sector of society spends hefty sums of money shoveling up the wreckage of substance abuse and addiction. Nowhere is this more evident than in the public spending of the states.

The heaviest burden of substance abuse and addiction on public spending falls on the states and programs of localities that states support. Of the two million prisoners in the United States, more than 1.8 million are in state and local institutions. States run the Medicaid programs where smoking and alcohol abuse impose heavy burdens in cancer, heart disease and chronic and debilitating respiratory ailments and where drug use is the largest cause of new AIDS cases. States fund and operate child welfare systems--social services, family courts, foster care and adoption agencies--where at least 70 percent of the cases of abuse and neglect stem from alcohol- and drug-abusing parents. The states are responsible for welfare systems that are overburdened with drug- and alcohol-abusing mothers and their children. State courts handle the lion's share of drunk driving and drug sale and possession cases. States pour billions of dollars into elementary and secondary public school systems that are more expensive to operate because of drug- and alcohol-abusing parents and teenagers.

Governors and state legislatures have the largest financial, social and political interest in preventing and treating all substance abuse and addiction, whether it involves alcohol, tobacco or illegal drugs, and especially among children and teens. While the federal government has heavy responsibilities to fund biomedical research, classify and regulate chemical substances and interdict illegal drugs, the brunt of failure to prevent and treat substance abuse and the cost of coping with the wreckage of this problem falls most heavily on the backs of governors and state legislatures across America.

For three years, The National Center on Addiction and Substance Abuse at Columbia University has been scouring the fine print of 1998 budgets of the states in an unprecedented effort to measure the impact of substance abuse and addiction on their health, social service, criminal justice, education, mental health, developmentally disabled and other programs in 16 budget categories. Forty-five of the states, the District of Columbia and Puerto Rico responded to our survey--the most extensive and sophisticated ever conducted in this field--and answered the endless questions of our staff. Based on an exhaustive analysis of the data collected, we also estimated the total costs of substance abuse to the budgets of the five states (Indiana, Maine, New Hampshire, North Carolina and Texas) that did not respond to our inquiries.

The results are stunning, especially given that in every case we made the most conservative assumptions about the burden that substance abuse imposes on state budgets. Four findings are particularly striking. In 1998:

- Of the $620 billion total the states spent, $81.3 billion--a whopping 13.1 percent–was used to deal with substance abuse and addiction.

- Of every such dollar states spent, 96 cents went to shoveling up the wreckage of substance abuse and addiction and only four cents was used to prevent and treat it.

- The states spend 113 times as much to clean up the devastation substance abuse and addiction visit on children as they do to prevent and treat it.

- Each American paid $277 per year in state taxes to deal with the burden of substance abuse and addiction in their social programs and only $10 a year for prevention and treatment.

- Of the $453.5 billion states spent in the 16 budget categories of public programs we examined, $81.3 billion--17.9 percent--was linked to substance abuse and addiction.

This report is a clarion call for a revolution in the way governors and state legislators think about and confront substance abuse and addiction. States that want to reduce crime, slow the rise in Medicaid spending, move more mothers and children from welfare to work and responsible and nurturing family life must shift from shoveling up the wreckage to preventing children and teens from abusing drugs, alcohol and nicotine and treating individuals who get hooked.

The next great opportunity to reduce crime is to provide treatment and training to drug and alcohol abusing prisoners who will return to a life of criminal activity unless they leave prison substance free and, upon release, enter treatment and continuing aftercare. The remaining welfare rolls are crowded with individuals suffering from substance abuse and addiction. The biggest opportunity to cut Medicaid costs is by preventing and treating substance abuse and addiction. Governors who want to curb child abuse, teen pregnancy and domestic violence in their states must face up to this reality: unless they prevent and treat alcohol and drug abuse and addiction, their other well intentioned efforts are doomed.

The choice for governors and state legislators is this: either continue to tax their constituents for funds to shovel up the wreckage of alcohol, drug and nicotine abuse and addiction or recast their

priorities to focus on preventing and treating such abuse and addiction.

State spending on children is the cruelest misallocation of taxpayer funds. We know that a child who gets through age 21 without smoking, abusing alcohol or using illegal drugs is virtually certain never to do so. It is a slap in the face of this knowledge for states to spend 113 times more to shovel up the wreckage of children savaged by substance abuse and addiction in social, criminal justice and education programs than they spend to encourage children to stay away from these substances and treat those who ignore that advice.

This unprecedented report looks behind the traditional budget labels--education, criminal justice, transportation, health care, child welfare, welfare, mental health--to detect just how many of their taxpayer dollars the states spend to deal with the financial burden that unprevented and untreated substance abuse and addiction impose on public programs. It is our hope that exposing these heretofore hidden costs will encourage governors and state legislatures to make sensible investments in comprehensive efforts to reduce the use of tobacco, alcohol and illegal drugs, particularly by children.

States spend some $25 billion a year shoveling up after the savage impact of substance abuse on our children. The largest share is spent on the burden of substance abuse to the education system--$16.5 billion; another $5.3 billion is spent for children who are victims of child abuse and neglect; nearly $3 billion is spent for substance-involved youth in the state juvenile justice systems. By comparison, pennies are spent to prevent these problems. This is perhaps the worst example of current investment policies because of the enormous payoff that could be realized by preventing addiction in the first place.

Children are key to the lasting success of any effort to curb the costs of substance abuse. Prevention and treatment efforts, especially those directed to children, must cover all substances. First, sale of any of these substances to children is illegal, and for good reason. Second, tobacco, alcohol and illegal drugs all affect the dopamine systems in the brain and, with repeated use, can change the structure of the brain itself resulting in cravings and addiction. Finally, most individuals who fall prey to abuse and addiction are involved with more than one substance.

What this report reveals for the first time is that the biggest bang for the buck in terms of taming the costs of social programs will come to those states that curb substance abuse and addiction. The return is not simply in reduced state spending. It also comes in reduced crime--and most importantly in reduced human suffering not only for the addict and abuser, but for parents and children, classmates, friends and neighbors. And, it can be counted in positive economic benefits to states from productive, law-abiding, taxpaying citizens.

Addiction is a disease--a chronic, relapsing one--that, untreated, has nasty and costly social consequences: illness, disability, death, learning disabilities, poor school performance, child abuse and neglect, domestic violence, crime--to name a few. Our fear of these consequences often leads us to respond with tough sanctions. It is of course important to hold individuals accountable for their conduct. But the first line of defense is prevention and we can do a much better job at it. Treatment is no sure bet, but success rates of good programs exceed those of many long shot cancer therapies on which we spend millions of dollars. And if we fail to treat the disease, there is little hope of stemming these consequences.

America is not the Garden of Eden and the challenge to state executives and legislators is to balance the importance of holding individuals accountable for their actions with the need to provide treatment for this disease that causes and aggravates so many social problems. It is our hope that this report will help these public officials find that balance

Governors and state legislators (as well as mayors, city councils and county officials) hold critical keys to the future of our nation. It is the

states, in concert with local governments, which face day-to-day the tasks of moving individuals from welfare to work, reshaping our prison and criminal justice systems, dealing with child abuse and neglect, responding to highway accidents, assuring public safety, administering mental health programs, and helping with the process of educating our children. Successfully accomplishing these tasks will require many different programs and strategies. What this report makes clear is that these programs and strategies will be of limited value if they fail to deal with substance abuse and addiction. Energetic, effective and comprehensive efforts to prevent substance abuse and addiction and treat those who fall prey to these problems hold the promise of freeing up billions of dollars of state funds for other pressing needs and reducing the burden on taxpayers.

This undertaking has been CASA's most ambitious public policy analysis. To accomplish it we convened an extraordinary advisory panel of distinguished public officials, researchers and representatives of the National Governors' Association, the National Conference of State Legislatures, the National Association of State Budget Officers and the National Association of State Alcohol and Drug Abuse Directors. We assembled a team of experts in economics, epidemiology and state government budgeting and finance. We reviewed some 400 articles, books and other publications on substance abuse and public spending. We extensively interviewed state budget officers, devised a survey instrument and tested it in California, Florida and New York in order to refine it before sending it to all the states. The survey captured 1998 spending in 16 budget categories for the 47 responding jurisdictions.

Some caveats are appropriate. The complexity of this unprecedented effort means that this report should be regarded as a work in progress that will be refined in the future; that complexity has led us in every case to use the most conservative assumptions.

In several areas, such as public housing, higher education and state employee healthcare, because of lack of data, we were unable to assess the impact of substance abuse and addiction, and this report contains no costs in these areas.

As a result, this report significantly underestimates the impact of substance abuse on state budgets.

This report covers only state costs. It does not cover federal matching funds that states spend (e.g., on Medicaid and welfare); federal government costs; the spending of local governments (which bear most of the law enforcement burden), the costs to parochial and private schools and other private sector costs (such as employee health care, lost productivity and facility security) which are the subject of ongoing CASA analyses.

Finally, the human suffering of addicts, abusers and their families and friends are incalculable.

This report continues CASA's ongoing Analysis of the Impact of Substance Abuse and Addiction on America's Systems and Populations. We expect that it will form the basis of a forthcoming conference on substance abuse and state budgets as part of our series of *CASACONFERENCES.*

The report contains a list of the seasoned experts who served on our advisory board and worked as our consultants, who made an invaluable contribution. We are greatly indebted to each of them. Let me single out particularly Dall W. Forsythe, Ph.D., at the Rockefeller Institute, former budget director of New York State and director of public finance with Lehman Brothers who helped to structure the project and the report; Brian Roherty, former executive director of the National Association of State Budget Officers and former budget director in Minnesota who opened the doors of many state budget offices; and Donald Boyd, director, and Deborah Elwood, former senior researcher, at the Fiscal Studies Program, Rockefeller Institute of Government, who helped to design and administer the state survey and analyze the data it elicited. With regret we note that one of our advisors, Gloria Timmer, former executive director of the National Association of State

Budget Officers, whose expert advise and good spirit enriched our work, died last year.

Susan E. Foster, M.S.W., CASA's Vice President and Director of Policy Research and Analysis, is the principal investigator and staff director for this effort. She was ably assisted by CASA Research Associate Darshna P. Modi, M.P.H. and data analyst, Liz Peters. David Man, Ph.D., CASA's librarian, and library assistants Barbara Kurzweil and Ivy Truong were a big help. Jane Carlson, as usual, tackled the administrative chores with efficiency and good spirit.

For the financial support that made this undertaking possible, the Board of Directors of CASA and our staff of professionals extend our appreciation to The Starr Foundation, The Robert Wood Johnson Foundation, the Carnegie Corporation of New York, Primerica Financial Services, the National Institute on Drug Abuse, the National Institute on Alcohol Abuse and Alcoholism and The Abercrombie Foundation.

While many people contributed to this effort, the findings and opinions expressed herein are the responsibility CASA.

Joseph A. Califano, Jr.

Chapter I
Introduction and Executive Summary

In 1998, states* spent $620 billion of their own funds to operate state government and provide public services such as education, Medicaid, child welfare, mental health and highway safety. A stunning 13.1 percent of that amount--$81.3 billion--went to shoveling up the wreckage of substance abuse and addiction, a problem that too many of us prefer to deny or ignore.

Substance abuse and addiction is the elephant in the living room of state government, overwhelming social service systems, impeding education, causing illness, injury, death and crime, savaging our children--and slapping a heavy tax on citizens of every state.

This $81.3 billion is only part of the cost tobacco, alcohol, illicit and prescription drug abuse and addiction visits on America. It does not include the financial toll such abuse extracts from federal or local spending or the hefty private costs such as lost productivity or premature death. These costs far exceed the burden on state budgets. And, there is no way to measure the cost of human suffering--destroyed lives, broken families, addicted children.

This report is the result of an intensive three year analysis of the impact of substance abuse on state budgets. As part of this unprecedented study, CASA convened an advisory panel of distinguished public officials, researchers and representatives of the National Governors' Association, the National Conference of State Legislatures, the National Association of State Budget Officers and the National Association of State Alcohol and Drug Abuse Directors. To provide additional guidance, CASA formed a team of consultants with vast experience in economics, epidemiology and state government finance and budgeting.

CASA conducted an extensive review of some 400 articles and publications linking substance

* Including the District of Columbia and Puerto Rico.

abuse to public spending. We examined state programs designed to prevent and treat substance abuse or deal with its consequences and consulted with state budget and program officials to understand how these programs are financed. Four other CASA studies documenting the costs of substance abuse to entitlement programs, aid to families and children, prisons and jails and child welfare informed our work, and we built on our detailed assessment of the cost of substance abuse to New York City.[1]

To develop and refine our methodology for this study, CASA selected five states that would provide a cross section in terms of demographics, budgeting practices and data availability--California, Florida, Minnesota, New Jersey and Vermont. CASA conducted detailed site visits in these states between March and August of 1998, and consulted with scores of state officials.

Based on this extensive research, CASA, working with the Fiscal Studies Program of the Rockefeller Institute of Government, developed a survey of substance abuse-related spending for all 50 states, the District of Columbia and Puerto Rico. We pretested it in California, Florida and New York. The survey was administered in September of 1998, and captured spending in 16 budget categories for 47 responding jurisdictions.*

This report reveals for the first time the pervasive impact of substance abuse on state budgets: how little each state spends on prevention and treatment and how much each devotes to shoulder the burden of failure to prevent substance abuse and treat those who are substance abusers and addicts. Among the findings of this report are these:

- State governments spent $81.3 billion in 1998 to deal with substance abuse. This amounts to more than 13 cents of every state budget dollar. Substance abuse is among the largest costs in state budgets, although its impact is hidden in departments and activities that do not wear the substance abuse label.

- Each American paid $277 per year in state taxes to deal with the burden of substance abuse and addiction in their social programs and only $10 a year for prevention and treatment.

- Of every dollar states spend on substance abuse:

  - 95.8 cents goes to pay for the burden of this problem on public programs. Untreated substance abuse increases, for example, the cost of every state's criminal justice system; elementary and secondary schools; Medicaid; child welfare, juvenile justice and mental health systems; highways; and state payrolls. These costs totaled $77.9 billion in 1998.

  - Only 3.7 cents goes to fund prevention, treatment and research programs aimed at reducing the incidence and consequences of substance abuse. State spending for prevention, treatment and research amounted to $3 billion in 1998.

  - One-half of one cent covers costs of collecting alcohol and tobacco taxes and regulating alcohol and tobacco products. Regulation and taxation is an untapped resource to help control spending on the consequences of alcohol and tobacco abuse and addiction. State spending on regulation and compliance was $433 million in 1998.

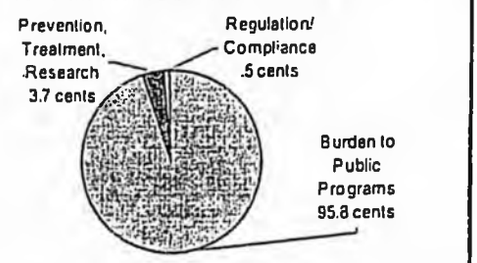
- States spent $24.9 billion in 1998 on the costs of substance abuse to children--an amount comparable to the entire state budget of Pennsylvania. For every $113 states spend on the consequences of substance abuse just for our children, they only spend one dollar on prevention or treatment.

* Indiana, Maine, New Hampshire, North Carolina and Texas did not participate in the survey.

- States spent $30.7 billion in 1998 on the burden of substance abuse on the justice system--for incarceration, probation and parole, juvenile justice and criminal and family court costs of substance-involved offenders. These costs total 4.9 percent of state budgets, more than 10 times the amount that states spent in total for substance abuse treatment and prevention.

Figure 1.A

The Substance Abuse Dollar



- Other areas of significant state spending for failing to prevent or treat substance abuse include:
  - $16.5 billion in education (2.7 percent of state spending),
  - $15.2 billion in health (2.4 percent of state spending),
  - $7.7 billion in child and family assistance (1.2 percent of state spending), and
  - $5.9 billion in mental health and developmental disabilities (0.9 percent of state spending).
- States spend more on the problem of substance abuse than they do on Medicaid ($70.3 billion or 11.3 percent of state budgets) or on transportation ($51.4 billion or 8.3 percent of state budgets). They spend as much on substance abuse as on higher education ($81.3 billion or 13.1 percent of state budgets).
- The drug linked to the largest percentage of state substance abuse costs is alcohol. At least $9.2 billion is spent on alcohol alone, $7.4 billion on tobacco alone and $1.1 billion on illicit drug use only. The remaining spending, $63.6 billion, could not be differentiated by drug, but most of this amount is linked to both alcohol and illegal drug abuse.
- States collected $4.0 billion in alcohol and $7.4 billion in tobacco taxes in 1998 for a total of $11.4 billion. For each dollar in alcohol and tobacco taxes that hit state coffers, states spent $7.13 on the problem of alcoholism and drug addiction--$6.83 to cope with the burden, $0.26 for prevention and treatment and $0.04 to collect taxes and run licensing boards. Few states dedicate revenues to the burden of untreated substance abuse or use alcohol and tobacco tax increases as a way to reduce use by teens.
- On average, of every $100.00 states spend on substance abuse they spend $95.80 on the burden of substance abuse to public programs compared to $3.70 for prevention, treatment and research ($0.50 is spent on regulation and compliance), but state spending varies widely. The proportion spent on shoveling up the wreckage compared to prevention and treatment ranges from to $89.71 vs. $10.22 in North Dakota to $99.94 vs. $0.06 in Colorado. (Table 1.1)

Next Steps

By providing a map of state substance abuse spending, this study establishes a base against which policymakers can judge how to get the biggest bang for their buck. Many studies have demonstrated that carefully designed treatment and prevention initiatives are cost-effective tools in reducing substance abuse and related state costs. For example, Oregon estimated their return on every dollar spent on treatment services to be a $5.62 savings in state costs,

Table 1.1
For Every $100.00 States Spend on Substance Abuse:[a]
[ranked by spending on prevention, treatment and research]

State	Amount Spent on Burden to Public Program	Amount Spent on Prevention, Treatment and Research
North Dakota	$89.71	$10.22
Oregon	91.21	8.61
Delaware	93.72	6.27
Arizona	93.60	6.02
New York	93.96	5.81
Alaska	95.02	4.98
Oklahoma	94.61	4.87
California	95.30	4.32
District of Columbia	95.70	4.30
Washington	91.91	3.79
Massachusetts	96.41	3.59
Illinois	96.45	3.42
Connecticut	96.88	3.12
Nebraska	90.92	3.07
Missouri	96.63	3.04
Idaho	96.71	2.93
South Dakota	97.08	2.92
Pennsylvania	97.03	2.91
Puerto Rico	97.12	2.88
Minnesota	97.13	2.82
Montana	96.75	2.82
Maryland	97.13	2.71
Alabama	93.40	2.67
Mississippi	97.45	2.55
Florida	96.80	2.46
New Jersey	97.06	2.45
Wyoming	96.58	2.42
New Mexico	97.52	2.35
West Virginia	95.80	2.30
Vermont	96.67	2.24
Utah	97.97	2.02
Hawaii	97.99	1.99
Virginia	97.78	1.57
Iowa	98.23	1.56
Kansas	98.38	1.43
Ohio	98.40	1.42
Kentucky	98.62	1.38
Louisiana	98.29	1.36
Nevada	98.68	1.28
Tennessee	98.63	0.96
Arkansas	98.87	0.88
Wisconsin	99.43	0.55
South Carolina	99.69	0.26
Rhode Island	99.60	0.24
Michigan	99.71	0.07
Colorado	99.94	0.06
Georgia[b]	NA	NA
Average[c]	$95.76	$3.70

[a] The difference between the sum of the columns is the amount spent on regulation/compliance.
[b] Spending on prevention and treatment was not included in survey response.
[c] Throughout this report, "Total" or "Average" refers to the 50 states, Puerto Rico and the District of Columbia.

primarily in the areas of corrections, health and welfare. Since investments in prevention and treatment take time to mature, they will not immediately reduce spending on substance abuse. State policymakers will be challenged to consider the value of returns to the state beyond the two to four year election window; however, over the long run the payoff for taxpayers can be enormous.

To reduce the burden imposed on public programs, CASA recommends a revolution in the way governors and state legislators think about and confront substance abuse and addiction:

- **Investment in prevention and treatment.** The most significant opportunity to reduce the burden of substance abuse on public programs is through targeted and effective prevention programs. If we can keep children from smoking cigarettes, using illicit drugs and abusing alcohol until they are 21, they are virtually certain never to do so. Treatment is also a cost-effective intervention as it both reduces the costs to state programs in the short term and avoids future costs. States should make targeted interventions on selected populations that hold promise for high return:

  - Prisoners whose substance abuse problems make them more likely to return to the criminal justice systems after parole or release.

  - Clients in the mental health system whose substance abuse problems increase the probability that they will cycle back into mental hospitals or emergency rooms.

  - Parents of children in the foster care system whose abuse of alcohol or drugs interferes with their ability to care for their children at home.

- Welfare recipients whose substance abuse interferes with their ability to be self-supportive.

- Youth in the juvenile justice system who are substance-involved.

- Children of substance-abusing individuals in the criminal justice system who have an increased likelihood of both abusing substances and committing crimes.

- Children of substance-abusing parents who have a higher likelihood of both abusing substances and neglecting and abusing their own children.

- Children of substance-abusing welfare recipients who have a greater likelihood of both abusing substances and being on welfare.

- Substance-abusing pregnant women and their partners.

- Alcohol- and drug-involved drivers.

- **Expansion of use of state powers of legislation, regulation and taxation to reduce the impact of substance abuse.** States have available a range of legislative, regulatory and tax powers to reduce the impact of substance abuse on state budgets. For example, states can:

  - Eliminate mandatory sentences for drug and alcohol abusers and addicts. When prisoners are required to serve their entire sentence without the option of parole or early release, the state loses the carrot of early release that can help persuade them to enter treatment and the stick of parole that can motivate them upon release to continue treatment and aftercare.

  - Require treatment for substance-abusing individuals in state-funded programs: prisons, probation, parole, welfare, juvenile justice, education, mental health, child welfare. Also require treatment for substance-abusing state employees and for those convicted of alcohol- and drug-related traffic violations. Coerced treatment is as effective as voluntary treatment and threat of incarceration or loss of benefits can provide the needed incentive to move toward recovery.[2] 1999 NIDA

  - Increase taxes on alcohol and tobacco. Increases in price for alcohol and tobacco lead to decreases in the amount people, especially youth consume.[3] California has combined a $.75 tax increase per pack of cigarettes with a public health campaign to achieve a 14 percent decrease in lung cancer over the past 10 years,[4] and Maine's doubling of tobacco taxes and anti-smoking campaign have yielded a 27 percent decline in smoking among high school students.[5] As early as 1981, a study showed that a 10 percent increase in the real price of cigarettes leads to a 12 percent decrease in consumption among 12- to 17-year olds.[6] Other studies have shown that a one percent increase in the price of beer results in a one percent decrease in traffic fatalities,[7] and that doubling of the federal beer tax would reduce total robberies by 4.7 percent and murders and rapes by three percent.[8]

  - Step up regulation and enforcement of the prohibition of alcohol and tobacco sales to minors. Point of sale inspections, tougher sanctions against offending retailers, and establishing a licensing system for tobacco sale, can reduce regular cigarette use among 12- to 13-year olds by 44 to 69 percent.[9] By rigorous enforcement, Louisiana reduced the number of stores selling tobacco products to minors from 75 percent in 1996 to seven percent in 1999.[10]

  - Include questions about substance abuse on licensing examinations for teachers,

social workers, health care professionals, corrections and juvenile justice staff and court personnel.

- Dedicate taxes from tobacco and alcohol sales to prevention, treatment and coping with the burden of substance abuse and addiction.

- **Management for better results.** States should set targets for reducing the impact of substance abuse on their budgets and install management practices to achieve them.

  - Train teachers, health care workers, social service, criminal and juvenile justice staff and court personnel to implement comprehensive screening for substance abuse in programs that bear a significant burden in coping with its consequences. For example, CASA's research shows that even though at least 70 percent of child welfare cases are caused or exacerbated by alcohol and drug abuse, case workers are not properly trained to assess and screen parents for such abuse.

  - Assure that individuals who screen positive are given full assessments and receive timely, appropriate and effective treatment, including relapse management.

  - Establish systems to measure the cost-effectiveness of prevention and treatment programs, including regulatory and tax policies aimed at curbing use, in order to concentrate resources on interventions that will provide the highest return on investment for the states and the greatest benefits for individuals.

  - Require state agencies to report on the short and long term results of substance abuse-related investment strategies in the budget process. The state budget process is the only context in state government where the impact of a problem can be viewed across budget categories. If investments are to succeed, budget officers and policymakers will track the returns across budget categories and examine projected versus actual returns on investments in current budget and out years.

  - Place responsibility for managing state substance abuse-related investments in a designated state agency.

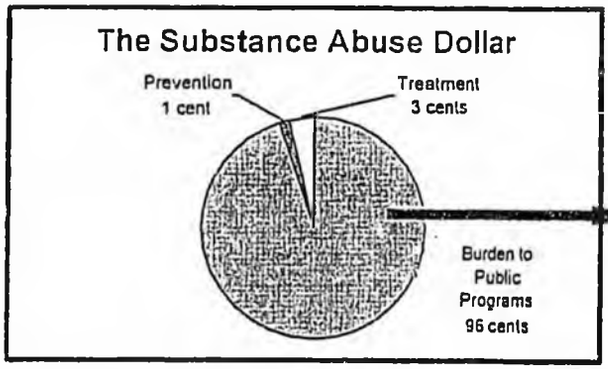
  - Invest in research and evaluation of cost-effective substance abuse prevention and treatment policies and programs.

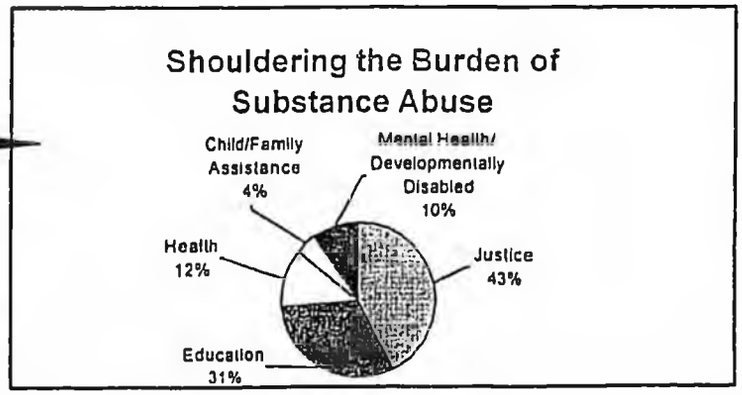
> *I will exert presidential leadership to send the clear and consistent message that drug abuse is dangerous and wrong. And I will help marshal resources at every level starting with parents, schools and communities closest to the needs of young Americans--to turn back the tide of drug abuse.*"
>
> --Governor George W. Bush
> Texas

Alaska

Summary of State Spending on Substance Abuse (1998)*

	State Spending by Category ($000)	Spending Related to Substance Abuse			
		Amount ($000)	Percent	As Percent of State Budget	Per Capita
Affected Programs:	*$1,250,424.0*	*$307,734.3*		*9.4*	*$504.44*
Justice	156,363.0	131,470.0		4.0	215.93
Adult Corrections	155,000.0	130,501.1	84.2		
Juvenile Justice	1,363.0	968.9	71.1		
Judiciary	NA	NA	NA		
Education (Elementary/Secondary)	773,000.0	94,235.2	12.2	2.9	154.78
Health	150,000.0	38,307.3	25.5	1.2	62.92
Child/Family Assistance	98,353.0	13,580.2		0.4	22.30
Child Welfare	NA	NA	NA		
Income Assistance	98,353.0	13,580.2	13.8		
Mental Health/Developmentally Disabled	72,708.0	30,141.6		0.9	49.51
Mental Health	49,796.0	28,150.3	56.5		
Developmentally Disabled	22,912.0	1,991.4	8.7		
Public Safety	NA	NA	NA	NA	NA
State Workforce	NA	NA	NA	NA	NA
Regulation/Compliance:	*NA*	*NA*	*NA*	*NA*	*NA*
Licensing and Control	NA	NA			
Collection of Taxes	NA	NA			
Prevention, Treatment and Research:	*16,140.0*	*16,140.0*	*100.0*	*0.5*	*26.51*
Prevention	4,847.0	4,847.0			
Treatment	11,293.0	11,293.0			
Research	0	0			
Total		*$323,874.3*		*9.8*	*$531.95*





Total State Budget	$3,291 M
♦ Substance Abuse	$ 324 M
♦ Medicaid	$ 150 M
♦ Transportation	$ 411 M
♦ Higher Education	$ 392 M
Population	.609 M

* Numbers may not add due to rounding. Tobacco and alcohol tax revenue total $45,026,000; $73.95 per capita.

Chapter I

Notes

[1] The National Center on Addiction and Substance Abuse (CASA) at Columbia University. (1996)
[2] National Institute on Drug Abuse. (1999)
[3] Abel, E. L. (1998); Grossman, M., Chaloupka, F.J., & Sirtalan, I. (1998)
[4] Associated Press. (December 1, 2000)
[5] Nacelewicz, T. (September 30, 2000)
[6] Lewit, E. M., Coate, D., & Grossman, M. (1981)
[7] Ruhm, C. J. (1996)
[8] Grossman, M., Sindelar, J. L., Mullahy, J., & Anderson, R. (1993).
[9] Abel, E. L. (1998); Grossman, M., Chaloupka, F.J., & Sirtalan, I. (1998)
[10] Ritea, S. (November 10, 1999)
[11] Bush-Cheney 2000. (2000)

Inmate Substance Abuse Treatment (ISAT) Increment

There are several serious problems associated with failing to provide any budget increments since 1993 to the ISAT Programs:

Experienced ISAT Counselors are knowledgeable regarding security concerns and working with criminal personalities. It would not benefit DOC, the inmate population or the treatment providers to replace senior counselors with new and inexperienced ones in order to save money.

Funding for the ISAT contracts has not kept current with the cost of living, yet DOC is asking providers to produce the same product.

Salaries of treatment personnel in the institutions have not kept up with those of their colleagues in non-institutional based programs.

Providers have placed less and less of the available contract dollars in administrative and training costs in order to attempt to adequately compensate for direct service costs. Their ability and willingness to do this is stretched to the breaking point.

The Association of Substance Abuse Directors, representing the fifty-eight state funded substance abuse programs in Alaska, has increasing concerns about the potential for diminishing ISAT program efficacy unless changes are made.

The judicial system, the DOC, and treatment providers recognize that substance abuse plays a major role in crime and recidivism rates. If DOC has no other option but to decrease substance abuse treatment in institutions, increased law enforcement, judicial, and correctional costs will result.

DOC is losing experienced contractors for many of the reasons listed above. The Seward Life Action Council, the Mat-Su Recovery Center, theYukon-Kuskokwim Health Corporation, and the Norton Sound Health Corporation have provided the ISAT Programs for many years and have recently opted out of their contracts because they can no longer subsidize DOC programs. When agencies must use their own funds to be able to provide ISAT services, the non-DOC community services they provide are then short-changed.

DOC believes competition amongst vendors is healthy. But when an agency has to decide whether or not it can afford to do business with DOC, competition is diminished.

DOC appreciates the services of local providers in areas where it has institutions. Some providers can no longer deliver the services to the institutions in their communities due to budget concerns.

For further information please call Sarah Williams, Program Coordinator, at 269-7414.

Dept of Corrections

Subject: HB 4 (Version CSHB 4) - Omnibus Drunk Driving Amendments
Date: Sat, 10 Mar 2001 22:43:35 -0900
From: "Michele Czajkowski" <michelec@gci.net>
To: <Representative_Albert_Kookesh@legis.state.ak.us>,
<Representative_Ethan_Berkowitz@legis.state.ak.us>,
<Representative_Kevin_Meyer@legis.state.ak.us>,
<Representative_John_Coghill@legis.state.ak.us>,
<Representative_Jeannette_James@legis.state.ak.us>,
<Representative_Scott_Ogan@legis.state.ak.us>,
<Representative_Norman_Rokeberg@legis.state.ak.us>

Dear Representative Rokeberg and Members of the House Judiciary Committee:

I am contacting you regarding House Bill 4 (version CSHB 4), the Omnibus Drunk Driving Amendments Bill/

HB 4 will be a useful tool in the fight against drunk driving as it will help prevent inebriates who choose to drink and drive from harming (or worse, killing) responsible drivers who inadvertently get in their way.

Representative Rokeberg has done an excellent job, crafting this very comprehensive piece of legislation. It comes at a time when the Anchorage community, and the greater community of Alaska, is looking towards the Legislature for some answers regarding this horrific problem. And it is a horrific problem - just look at the death toll this past summer. All of those deaths could have been prevented if it weren't for the careless and irresponsible actions of those few who choose to drink and drive.

By supporting HB 4, you will be giving communities the tools to stop the death and destruction caused by drunk drivers and drivers under the influence. Please help!

Respectfully,
Michele Czajkowski

Pickup hits, kills bicyclist

Police say man drunk had 6 previous DWIs

By LISA DEMER
Daily News reporter

An Anchorage man with six previous drunken driving convictions was driving drunk when he struck and killed a college student riding her bicycle on the sidewalk along Minnesota Drive late Monday, Anchorage police said.

Jessie Withrow died Tuesday in Anchorage.

Russell D. Carlson, 39, who had a 2-year-old child in the truck with him, was charged with manslaughter, child abuse, driving while intoxicated and driving while his license was revoked, according to police.

The bicyclist was Jessie Withrow, who grew up in Anchorage and

See Back Page, BICYCLIST

BICYCLIST: Student enjoyed friends, family, music

Continued from Page A-1

was a dean's list student at Bates College in Lewiston, Maine. She was pronounced dead at Providence Alaska Medical Center on Tuesday afternoon.

Police Lt. Bob Griffiths said Carlson had six DWI convictions in Alaska. Details about those cases were not available Tuesday because of the July Fourth holiday.

The crash happened about 11:30 p.m. Carlson was driving a white full-size pickup, police spokesman Ron McGee said.

Witnesses told police that Carlson was weaving and driving fast while heading south on Minnesota. He ran into a Ford Explorer that had stopped for a red light on Northern Lights Boulevard, then went on the sidewalk and struck Withrow on her bike, according to police. His truck then went into the parking lot of the Aurora Village Shopping Center and crashed into three parked cars, police said.

The 2-year-old child and another man in the truck were not hurt, police said. The relationship between Carlson and the child wasn't clear.

Family friends of the young woman who died described her as exceptionally bright and creative.

"Jessie was a very unusual child. It was like she was way grown up beyond her years. She was destined to do great things. The world is going to be a cheated place for the fact she was not able to achieve her potential," said Susan Peck, who has a daughter close to Withrow and who is a friend of Withrow's mother, Wendy.

Withrow wrote for Perfect World, the teen-oriented pages in the Anchorage Daily News. She sang with her mother at the Renaissance Festival and the Anchorage Folk Festival. She served on the Anchorage Youth Court, helping kids who had gotten in trouble. In 1998, she graduated with honors from Steller Secondary School and won a scholarship to Bates College, a liberal arts school. She was home for summer break and would have been a junior, studying English.

"Her friends, her family and her music were the things she enjoyed the most," said another family friend, Ray Booker.

Carlson is being held at Cook Inlet Pre-Trial Facility on $100,000 bail.

Reporter Lisa Demer can be reached at ldemer@adn.com and 257-4390.