HB

4

(File 9)

HOUSE JUDICIARY COMMITTEE
HOUSE BILL 4
VEHICLE FORFEITURE
MARCH 12, 2001

CITY OF FAIRBANKS
Office of the City Attorney
800 CUSHMAN STREET
FAIRBANKS, ALASKA 99701-4615
OFFICE: 907-459-6750
FAX: 907-459-6761

RECEIVED
MAR 7 2001

February 26, 2001

Cindy @ MADD
via fax @ 463-2539

Re: City of Fairbanks DWI Forfeiture Program

Dear Cindy:

Per your request, I am glad to provide statistical data regarding the DWI forfeiture program in Fairbanks. To better understand the program, please feel free to review Article XXII, Motor Vehicle Impoundment and Forfeiture, Sections 78-961 through 78-977, of the Fairbanks City Ordinance at http://www.municode.com by selecting (1) *"on-line library,"* (2) *"Alaska"* as the state of choice, and (3) *"Fairbanks Code of Ordinances."*

Since inception of the program the second week of May 1998 (nearly 34 months), to date the City has processed 902 DWI-impounded vehicles. The program has been very effective for the City of Fairbanks in that it pays for itself by assessing a $200.00 administrative processing fee.

Of the ***902*** vehicles, (a) ***375*** were released to registered owners or lienholders as innocent parties without 30-day impoundment, (b) ***389*** were held for 30-day impoundment and released, (c) ***51*** were abandoned by the registered owner following the 30-day impoundment thus becoming the property of the towing company for unpaid fees, (d) ***3*** were retained by the Fairbanks Police Department for undercover work, (e) ***71*** were forfeited and subsequently sold at auction, and (f) ***13*** are pending forfeiture sale at the next auction.

Additionally, in 2000 I made a comparison of the Alaska State Trooper and Fairbanks Police Department DWI arrests for the Fairbanks-area vicinity; the ASTs arresting almost half again that of the FPD. If you need further information or if I can expand on reading of the ordinance, please feel free to contact me at 459-6750.

Sincerely,

OFFICE OF THE CITY ATTORNEY

Connie L. Martin, CLA
Legal Assistant/DWI Administrator

cc: Lt. Dunnigan
Alaska State Troopers
Anchorage (via fax 269-5033)

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Nenana Police Services

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181st Session

February 26, 2001

To Whom It May Concern,

I am writing this letter in support of House Bill 4's proposal of vehicle forfeiture. Currently the City of Nenana, as most communities, are seeing a number of repeat DWI offenders. The forfeiture or "the boot" is a sound, and feasible intervention and deterrence to preventing the drunk driver from continuing to operate a motor vehicle after drinking.

Currently, when we impound a vehicle for DWI or any other offense, the owner of the vehicle pays for all costs associated with the impound, including storage. It is literally between the wrecker agency and the owner, thus relieving the City of any costs associated with the impound and storage. Having the flexibility to confiscate and forfeit the vehicle will enable to the City to recover some of the enforcement costs associated with keeping these folks off the highway.

I believe this will send a message of deterrence to those who drink to not drive, and those who drive to not drink , making a big difference in removing drunk drivers off Alaska's roads. I feel the cost would be minimal if any at all, except for the person responsible for the incident and their actions.

Respectfully yours,

Milton J. Haken
Chief of Police
NA 181st Session

RECEIVED
MAR 7 2001

ROBERT K. PETITT, CHIEF

Bethel Police Department

P. O. Box 500, Bethel, AK 99559
(907) 543-3781 Fax (907) 543-5086

March 7, 2001

Cindy Cashen
MADD Juneau Chapter
211 4th Street, Suite 102
Juneau, Alaska 99801

Dear Mrs. Cashen:

I write this letter in support of House Bill 4's proposal of vehicle forfeiture. I believe that the City of Bethel can operate in a sound, feasible manner by using a flexible method of confiscating drunk driver's vehicles.

Using the "boot" as a method of preventing the drunk driver from continuing to operate the vehicle used in the crime of drunk driving is a method I believe would cut a major cost of vehicle forfeiture. The offender would pay an administrative fee to cover any necessary paperwork needed to implement this part of the sentence and would have the boot removed upon completion of sentencing. It would not be necessary to hire space to hold vehicles and any towing would be charged to the offender.

The implementation of this proposal would make a big difference in removing drunk drivers off Alaska's roads and send a message to those who drink to not drive and those who drive to not drink. I feel the cost of this program would be minimal if any at all.

Sincerely,

Robert K. Petitt
Chief of Police

cc: file

Thomas L. Clemons
CHIEF OF POLICE

A. Douglas McCloskey
LIEUTENANT

WRANGELL POLICE DEPARTMENT AND CORRECTIONAL CENTER

431 ZIMOVIA HIGHWAY
POST OFFICE BOX 531 • WRANGELL, ALASKA 99929-0531
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Via: Fax Only @ (907) 463-2539

March 12, 2001

Cindy Cashen
MADD

RE: Forfeiture of Vehicles (DWI cases)

Dear Cindy:

Recently you contacted me in reference to House Bill 4 which addresses forfeiture of owners' vehicles after being convicted of multiple DWI cases. One of the concerns was the cost of smaller Police Departments administrating such a program and not having a budget to cover these additional expenditures.

If an administrative fee is attached to this House Bill, the Wrangell Police Department would be able to have this program here. Additionally, using a "boot" to secure the vehicle at the subject's property until they have completed their alcohol assessment and treatment is obviously another approach to the problem of drunk driving.

As you are aware I am for any legislation that will continue to reduce drunk driving and keep our roads safe here in the State of Alaska.

Sincerely,

Thomas Lee Clemons
Chief of Police

Drunken drivers can't reoffend if we take away their cars

Drunken driving is two words. If somebody wants to get or stay drunk it's none of our business until they get behind the wheel. Then society can act to separate the drunk from his vehicle. Most proposed solutions are to separate the drunk from booze or society. That's impractical and expensive. Taking their vehicle, if necessary over and over, is easy and very effective. We do it occasionally but not nearly enough. Why not? I don't know, but without DWI cases there would be a lot of empty courtrooms and not near as many lawyers.

We have lots of victims of drunken drivers who have been convicted three to five times. We don't have to accept it; it's preventable.

—Alton E. Smith
Anchorage

ANCH DAILY
NEWS 2 MAR 2001

COMBATING HARDCORE DRUNK DRIVING

A SOURCEBOOK OF PROMISING STRATEGIES, LAWS & PROGRAMS

THE NATIONAL HARDCORE DRUNK DRIVER PROJECT

THE CENTURY COUNCIL

VEHICLE REGISTRATION CANCELLATION AND LICENSE PLATE SEIZURE

This sanction is used as an alternative to vehicle impoundment and is intended to result in vehicle immobilization. The plate can be administratively confiscated by a police officer during a DWI arrest, and the registration of the vehicle used in the offense may be revoked. A special plate can be issued for the vehicle if the violator obtains a conditional license or if a member of the violator's family has a regular license *(See License Plate Actions in the Enforcement section)*.

Where Are Registration Cancellation and License Plate Seizure Used?

In 20 states, vehicle registration is withdrawn upon conviction of a DWI offense or a driving-while-suspended offense that originated from a DWI charge, according to the National Hardcore Drunk Driver Project Survey. In Georgia, offenders may be subject to plate seizure on a third conviction. In Minnesota, police can seize plates of drivers who have had three or more DWIs within a five-year period. They may also confiscate the plates of any other vehicles owned by the same person.

How Effective Are Registration Cancellation and License Plate Seizure, and How Much Do They Cost?

Studies show that *administrative-based* plate seizure for hardcore drunk drivers is a low cost and effective procedure that can significantly reduce recidivism. Minnesota's administrative-based plate impoundment program showed a 50% decrease in recidivism over a two-year period when compared with DWI violators who did not experience impoundment.[22]

In general, however, license plate seizure laws are poorly enforced. A study of Minnesota offers a good comparison of judicial vs. administrative application of license plate seizures. During the 29 months when the plate seizure law was managed through the judicial system, only 465, or 6%, of the 7,698 eligible, third-time offenders had their license plates impounded. During the 21 months after the law was applied administratively in 1991, 3,136, or 68%, of the 4,593 third-time DWI offenders had vehicle plates impounded.[16]

Where to Go for More Information on Vehicle Registration Cancellation and Plate Seizure

National Highway Traffic Safety Administration. October 1996. *State Legislative Fact Sheet*. National Highway Traffic Safety Administration, U.S. Department of Transportation, Washington, D.C.

Popkin, C.L., and Wells-Parker, E. 1994. A research agenda for the specific deterrence of DWI, *J. Traffic Med.* vol. 22, no. 1.

Ross, H.L., Simon, S., and Cleary, J. 1996. License plate confiscation for persistent alcohol impaired drivers, *Accident, Analysis and Prevention.* vol. 28. no. 1: 53-61.

Simon, S.M. 1997. *Repeat DUI Offender Vehicle Immobilization Through Plate Impoundment*. Transportation Research Board.

Voas, R.B. 1995. Can administrative programs control the persistent drinking driver? *Strategies for Dealing with the Persistent Drinking Driver*. Transportation Research Board, Transportation Research Circular No. 437. Washington, D.C. National Research Council: 52-56.

VEHICLE FORFEITURE

Vehicle forfeiture allows the state to confiscate permanently the vehicle of repeat DUI/DWI offenders or those who drive repeatedly with a suspended license. A Portland, Oregon, ordinance subjects to forfeiture vehicles of offenders arrested for driving with a license suspended as a result of drunk driving, or those arrested as habitual offenders who have committed three or more serious traffic offenses, at least one of which was driving while intoxicated. The flexibility included in some forfeiture ordinances results in a de facto combination vehicle impoundment/forfeiture law.

Where Is Vehicle Forfeiture Used?

Several states have legislation that allows vehicle forfeiture but rarely use it. There are a few notable exceptions, including:

- Portland, Oregon, where, as of May 1997, 886 cars had been seized, of which 286 were permanently forfeited;
- Deschutes County, Oregon, which enacted a vehicle forfeiture ordinance in 1992. The ordinance allows drivers to regain their vehicle if they agree to pay an administrative fee and sign an agreement that forfeits their rights to the vehicle on a future arrest for DWI or driving while suspended;
- Anchorage, Alaska, which has an impoundment/forfeiture ordinance that seeks 30 days

impoundment if it is the driver's first offense, and forfeiture for a second or subsequent offense;

- Santa Barbara, California, which also has an impoundment/forfeiture ordinance for unlicensed drivers that started January 1, 1995.

How Effective Is Vehicle Forfeiture?

A 1995 study of a forfeiture program in Portland, Oregon, found that offenders whose vehicles were seized re-offended only half as often as those whose vehicles were not seized.[30] From 1990 through 1994, the recidivism rate for offenders whose cars were seized was only four percent. Police officers in Santa Barbara, the sheriff's department in Deschutes County, and Anchorage city officials all consider their impoundment/forfeiture programs to be effective.

What Is the Cost of Vehicle Forfeiture?

The 1995 study of vehicle forfeiture in Portland found that the program cost more to administer than it received from sales of seized property, although program proponents say it now operates close to break-even.

According to the Deschutes County Sheriff's Department, the vehicle forfeiture program there has returned about $150,000 to area law enforcement agencies.

In the Anchorage program, revenues from administrative fees, attorneys' fees, net auction proceeds, and vehicle return bond forfeitures covered approximately three-fourths of the costs in 1996.

From its inception in January, 1995, until mid-1997, Santa Barbara's impoundment/forfeiture program impounded 4,338 vehicles, of which 243 met the criteria for forfeiture. Each vehicle was assessed a $45 administrative fee upon release. The net receipt from the sale of forfeited vehicles – after payment of liens, towing, and release fees, and additional administrative program costs – was over $66,000. The revenue was divided between the state and the city police department.

Where to Go for More Information on Vehicle Forfeiture

Crosby, I.B. 1995. *Portland's Asset Forfeiture Program: The Effectiveness of Vehicle Seizure in Reducing Rearrest Among "Problem" Drunk Drivers*. A joint project by Reed College Public Policy Workshop and the City of Portland Bureau of Police Asset Forfeiture Unit.

Simpson, H.M., Mayhew, D.R., and Beirness, D.J. 1996. *Dealing With the Hard Core Drinking Driver*. The Traffic Injury Research Foundation, Ottawa, Canada.

National Transportation Safety Board

Washington, D.C. 20594

Safety Recommendation

Date: AUG 7 2000

In reply refer to: H-00-26

Honorable Brian Porter
Speaker of the House
Alaska House of Representatives
State Capitol
120 4th Street
Anchorage, Alaska 99801-2133

The National Transportation Safety Board is an independent Federal agency charged by Congress with investigating transportation accidents, determining their probable cause, and making recommendations to prevent similar accidents from occurring. We are providing the following information to urge you to take action on the safety recommendation in this letter. The Safety Board is vitally interested in this recommendation because it is designed to prevent accidents and save lives.

This recommendation addresses ways to reduce fatalities, injuries, and crashes involving hard core drinking drivers, a term that, as defined by the Safety Board, includes repeat offender drinking drivers (that is, offenders who have prior convictions or arrests for a Driving While Impaired [DWI] by alcohol offense) and high-BAC offenders (that is, all offenders with a blood alcohol concentration [BAC] of 0.15 percent or greater). The recommendations are derived from the Safety Board's safety report *Actions to Reduce Fatalities, Injuries, and Crashes Involving the Hard Core Drinking Driver* and are consistent with the analysis we performed and literature we reviewed in this report.[1] As a result of this review, the Safety Board has issued two safety recommendations, one of which is addressed to the Governors and Legislative Leaders of the 50 States and the Mayor and Council of the District of Columbia. Information supporting the recommendation is discussed below. The Safety Board would appreciate a response from you within 90 days addressing the actions you have taken or intend to take to implement our recommendation.

In 1984, the National Transportation Safety Board published a safety study titled *Deficiencies in Enforcement, Judicial, and Treatment Programs Related to Repeat Offender Drunk Drivers (NTSB/SS-84/04).* That study identified repeat offender drinking drivers (included under the Safety Board's category of "hard core drinking drivers") as a serious traffic safety problem.

[1] For additional information, read *Actions to Reduce Fatalities, Injuries, and Crashes Involving the Hard Core Drinking Driver,* Safety Report NTSB/SR-00/01 (Washington: National Transportation Safety Board, 2000).

of those tested to 0.90 percent).[5] In addition to deterring drinking and driving, checkpoints can be used to promote several other highway safety measures at the same time, including checking for valid driver's licenses, and safety belt use.[6] Sobriety checkpoints provide an opportunity to apprehend not only alcohol-impaired drivers but also unlicensed drivers and those who are driving on licenses suspended or revoked for DWI. Often, when licenses are checked at sobriety checkpoints, more unlicensed than impaired drivers are found.[7]

Measures that separate hard core drinking drivers from their vehicles are used in 38 States and the District of Columbia. These measures include license plate action (impoundment, confiscation, or other actions) (8 States), vehicle immobilization (6 States), vehicle impoundment (12 States and the District of Columbia), and vehicle forfeiture (28 States). License plate action was found in Minnesota to reduce recidivism by 50 percent in a 2-year study[8] The use of vehicle immobilization in Ohio reduced recidivism by 36 percent in a 1-year period.[9] In the same State, vehicle impoundment was found to reduce repeat offenses for driving while suspended or impaired by 40 percent in a 1-year period. Preliminary data from the New York City vehicle forfeiture program showed a 32.2 percent decrease in alcohol-related fatalities over an 11-month period.[10] To the extent permitted by the U.S. Constitution and applicable State laws, vehicle-based sanctions can be administratively ordered at the time of arrest. When taken, this action ensures swift and certain punishment for the DWI offense and prevents offenders from avoiding such sanctions by transferring possession of their vehicles to family members or friends. Another vehicle sanction is the use of ignition interlocks, which are devices that can prevent an impaired driver from operating a vehicle. Thirty-eight States permit the use of these devices in some manner, and at least five States have statewide ignition interlock programs; statewide programs are being developed in other States. In Maryland, ignition interlocks reduced recidivism by 65 percent in the first year of the assignment of these devices.[11] Overall, vehicle sanctions to separate the hard core drinking driver from his or her vehicle or to prevent him/her from drinking while impaired appear to be effective tools in reducing hard core drinking driver recidivism.

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[5] Insurance Institute for Highway Safety, "North Carolina Belt Use Peaks at 84 Percent; Future Gains Sought," *Status Report* 33:2 (7 Mar. 1998) 5 <http://www.highwaysafety.org/srpdfs/sr3302.pdf>.

[6] The Tennessee and North Carolina checkpoint programs also reported thousands of arrests for other offenses including stolen vehicles, illegal gun possession, drug offenses, and escaped felons. North Carolina reported 6,173 drug violators, 788 firearms violations, 403 stolen vehicles, and 273 fugitive arrests from 1993 through 1997. Lacey, Jones, and Smith, 20; Insurance Institute for Highway Safety, 5.

[7] Susan E. Martin and David F. Preusser, "Enforcement Strategies for the Persistent Drinking Driver," *Strategies for Dealing with the Persistent Drinking Driver*, ed. Barry Sweedler, Transportation Research Board Circular 437 (1995) 41.

[8] Alan Rodgers, "Effect of Minnesota's License Plate Impoundment Law on Recidivism of Multiple DWI Violators," *Alcohol, Drugs and Driving* 10: 2 (1994) 128.

[9] Robert B. Voas, A. Scott Tippetts, and Eileen Taylor, "Temporary Vehicle Immobilization: Evaluation of a Program in Ohio," *Accident Analysis and Prevention* 29: 5 (1997) 635-36.

[10] Howard Safir, George A. Grasso, and Robert F. Messner, "The New York City Police Department DWI Forfeiture Initiative," presented May 2000 at T2000 Conference of the International Council on Alcohol, Drugs, and Traffic Safety, Stockholm, Sweden.

[11] Kenneth H. Beck et. al., "Effects of Ignition Interlock License Restrictions on Drivers with Multiple Alcohol Offenses: A Randomized Trial in Maryland," *American Journal of Public Health* 89: 11 (Nov. 1999) 1698.

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House of Representatives

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MEMORANDUM

TO: Rep. Vic Kohring, Chairman
House Transportation Committee

FROM: Rep. Norman Rokeberg Norman/js

DATE: February 27, 2001

RE: HB 4
(Vehicle Forfeiture question)

During the hearing on HB 4 today, there were questions concerning vehicle forfeiture.

Attached are:

1. Appendix O - State Vehicle Forfeiture Requirements for Drunk Driving Offenses from the NCSL Transportation Series: Legislative Summary 2000.
2. Paragraph concerning vehicle forfeitures from NCSL Transportation Series: Legislative Summary: 1999.
3. Municipality of Anchorage Code regarding vehicle forfeiture
4. City of Fairbanks Code regarding vehicle forfeiture
5. City and Borough of Juneau information

Appendix O. State Vehicle Forfeiture Requirements for Drunk Driving Offenses

State	Statute	Details
Alabama	None	
Alaska	§28.35.036	Vehicle forfeited for second or subsequent DUI offence (not mandatory)
Arizona	§28-697.01(A)	Vehicle forfeited for either third or subsequent DUI offense or for a DUI while license revoked/suspended for prior DUI or if committed while transporting child under 15 years old
Arkansas	§5-65-117	(a) vehicle forfeited for fourth offense within three years, at court's discretion
California	Veh. Code §23195	Vehicle impounded 1-30 days for first offense, and 1-90 days for second or subsequent offense within 7 years
	Veh. Code §23198	Vehicle subject to forfeiture for a DUI homicide, for two or more DUI offenses within seven years, or for a serious injury-related DUI with one or more DUI offenses within seven years
	Veh. Code §22651	Vehicle may be impounded temporarily if driver is taken into custody or for minor driving with a BAC of more than .01
Colorado	None	
Connecticut	§14-227h	Vehicle impounded for 48 hours if person's driving privilege was either suspended or revoked at the time of offense
Delaware	21 §2756(c)(1)	Impoundment of vehicle, plates or registration authorized for DUI while under license suspension/revocation for DUI or implied consent refusal, 1-90 days for first offense, one year for subsequent offenses
Florida	§316.193 (6)(d)	Vehicle used in DUI offense impounded or immobilized for 10 days for first offense, 30 days for second within three years, 90 days for third within 5 years
Georgia	§40-6-391.2	Vehicle forfeited for fourth DUI if offense committed in habitual offender status based on three or more prior DUI convictions
	§40-6-391.2(i)	Court may order transfer of title to family member for demonstrated hardship for employment or family needs
Hawaii	None	
Idaho	None	
Illinois	625 ILCS 5/4-203(e)	Vehicle impounded for 12 hours if law enforcement officers "reasonably believe" release will result in another DUI offense; 2nd offense 24 hours; 3rd offense 48 hours; however, vehicle may be released sooner if owner gives consent to competent driver
Indiana	IC9-30-4-6(b)(3), & (d)(1)	Registration revoked for six months for second felony; involving a motor vehicle (second DUI)
Iowa	321J.4B (2), (5)(d), (7)(a), (7)(b)	For subsequent offenses, vehicle, registration and plates for all vehicles owned by driver may be impounded for 180 days or the period of license revocation, whichever is longer
Kansas	8-1567(p)	Plate revoked for one year for fourth or subsequent offense
Kentucky	None	
Louisiana	§14:98 (D)	Vehicle forfeited for 3rd offense or subsequent offenses, if vehicle used by offender is owned by him/her

APPENDIX O. STATE VEHICLE FORFEITURE REQUIREMENTS FOR DRUNK DRIVING OFFENSES (CONTINUED)

State	Statute	Details
Maine	29-A §2411 et seq	For subsequent offense within in 10 years, registration and plates are suspended for the same time period as their driver's license suspension
	29-A §2421	Vehicle must be forfeited for a subsequent DUI offense while already under license suspension for DUI; temporary impoundment for 8 hours upon arrest for drunk driving offense (29-A MRSA §2422)
Maryland	Trans. §16-303 §27-101 §27-111(d)	Registration suspended up to up to 120 days for driving on a suspended or revoked license for a previous DUI offense and/or vehicle can be impounded for up to 180 days
Massachusetts	None	
Michigan	1998 H.B. 4960	Provides for vehicle immobilization and forfeiture for 2nd or subsequent offenses (discretionary)
Minnesota	168041(3)	Plates may be impounded for first or subsequent offense
	168.042(1)(20	Plates and/or vehicle impounded for first or second offense within five years or for DUI child endangerment
	169.1217	Vehicle forfeited for third offense within five years, fourth offense within five years or for child endangerment and a second conviction or second revocation within five years or a third
Mississippi	63-11-30(2)(c)	Vehicle forfeited for third offense within five years
	63-11-49	Spouse may retain possession in case of hardship
Missouri	§82.1000	Permits some cities to enact vehicle impoundment or forfeiture laws
Montana	61-8-714 & 722	Vehicle must be forfeited for third or subsequent DUI offense within five years
Nebraska	None	
Nevada	§60-6, 197.01(1)(a) & (1)(b)(i)	If defendant convicted of 2nd or subsequent offense, their vehicle must be immobilized 5 days to as much as 8 months; vehicle can be released to co-owner of vehicle due to hardship
New Hampshire	261:180 III	Registration suspended for same time period as license, on second or subsequent offense
New Jersey	§39:5-30(a)	Gives licensing agency discretionary authority to suspend/revoke registration of person in violation of traffic laws or "other reasonable grounds"
New Mexico	None	Previous provisions repealed
New York	Civ Prac 1301 & 1311	Vehicle forfeited for a DUI felony (i.e. second DUI offense within ten years at the discretion of the court)
	V&T Law §1193 (2)(a) & (b)	Defendant's vehicle and registration may be suspended or revoked for same length of time as license revocation/suspension
North Carolina	20-28.2	Vehicle forfeited for DUI while on a revoked/suspended license
	§20-54.1	Registration for all vehicles owned by defendant can be revoked for time that license has been suspended/revoked

Appendix O. State Vehicle Forfeiture Requirements for Drunk Driving Offenses (continued)

State	Statute	Details
North Dakota	39-08-01(3) 39-08-01.3	Plate may be impounded for same period as license Vehicle may be forfeited for 2nd or subsequent DUI within five years
Ohio	4507.164, 4511.195, 4511.99	Plates impounded for 90 days for second offense within six years and 180 days for third offense within six years; vehicle forfeited for subsequent offense within six years
Oklahoma	47 §11-902b	Subsequent DWI offender's vehicle subject to forfeiture
Oregon	§809.700 §809.2 of chapter 1100 Laws of 1999	Vehicle impounded for second or subsequent offense or for a DUI while on a suspended or revoked license; vehicle can be forfeited if offender had prior offense with in 3 years of been convicted of murder, manslaughter, negligent homicide or assault related to operation of a vehicle
Pennsylvania	Case law	Vehicle may be forfeited for DUI offense: Commonwealth v. Crosby 568 A.2d 233 (PA Super. 1990)
Rhode Island	31-27-2(d)(3)(ii); §31-32-4(b)	Vehicle forfeited for third offense within five years If license suspended then defendant may have registration of any vehicle they own suspended; however, such registrations are not suspended if financial responsibility is provided
South Carolina	§56-5-6240	Vehicle forfeited for third or subsequent offence within 10 years; vehicle can either be owned and operated by offender or operated by offender who is resident of household of registered owner
South Dakota	§32-35-44	Registration suspended for all vehicles owned by driver for same time period license is revoked/suspended for DUI
Tennessee	55-10-403(k)(1)	Vehicle forfeited for second or subsequent offense
Texas	Tran Code §704.001	Vehicle may be forfeited after three or more DUI offenses
Utah	§41-6-44.30	Vehicle is impounded if driver arrested for DUI is the owner of the vehicle
Vermont	23 § 1213a, b	If second or subsequent offense vehicle can be immobilized for 18 months; if third offense the vehicle may be forfeited; if defendant is under 18 years old, vehicle is impounded for up to 60 days
Virginia	46.2-391.1	Registration suspended when license revoked/suspended for DUI conviction, or for driving on suspended/revoked license or for vehicular homicide
Washington	46.61.5058	Vehicle forfeited for second conviction within seven years, subject to possession by spouse in case of hardship
West Virginia	None	
Wisconsin	343.305(10m); 346.65(6)	Vehicle may be forfeited for third offense within ten years; vehicle shall be forfeited for fourth or subsequent offense within ten years
Wyoming	31-7-128(c)	Registration suspended for same period as license revocation/suspension, for subsequent DUI conviction within two years
American Samoa	None	

Appendix O. State Vehicle Forfeiture Requirements for Drunk Driving Offenses (continued)

State	Statute	Details
District of Columbia	§40-716(c-1)	Vehicle may be impounded for 24 hours for any DUI offense; if licensed registered owner of vehicle who is with offender at the time of offense, may take immediate possession of vehicle
Guam	Title 16 §9104(e)	Vehicle used in offense subject to forfeiture for third or subsequent offense, or driver's license suspended one to five years in lieu of vehicle forfeiture
Puerto Rico	None	
Virgin Islands	20 §544 (c)	Vehicle may be impounded at court's discretion if defendant fails to appear on a DUI charge

Source: *Digest of State Alcohol-Highway Safety Related Legislation*, 18th edition. 2000.

In the Virgin Islands, the department of education provides programs at all grade levels on the dangers of drinking and driving. New Mexico funds school-based alcohol abuse and drunk driving awareness programs, and additionally, provides enhanced server training requirements and stiffer penalties for selling alcohol to minors.

California has adopted the Youthful Drunk Driver Visitation Program, which requires underage drunk drivers to participate in supervised visits to hospital emergency rooms, trauma centers, or county morgue facilities. The program has an excellent history of discouraging repeat offenders and has been copied in Florida, Illinois and Iowa.

Both Connecticut and Vermont make it a crime for minors to misrepresent their age to buy alcohol and require violators to participate in alcohol treatment programs, in addition to significant fines and possible jail sentences. New Jersey not only sanctions minors attempting to purchase alcohol but also adults who buy liquor on their behalf. Both are subject to a fine of $500 and a six-month license suspension. Minors convicted of drunk driving face additional penalties and must participate in alcohol treatment programs.

Permanent forfeiture of a vehicle generally is reserved for those convicted of multiple offenses.

New Hampshire requires that first-time applicants for a driver's license be fully informed about the state's drunk driving laws, including standards, penalties and fines, administrative license revocation, implied consent requirements, and penalties for unlawful possession or transportation of alcoholic beverages by a minor.

Georgia provides for a lengthy license suspension and requires underage drunk drivers to complete a state-approved alcohol use reduction program. Tennessee has established a separate offense of Underage Driving While Drunk, punishable by a one-year license suspension and $250 fine, while Texas punishes underage drunk drivers with fines up to $2,000, 180 days in jail, or both.

Vehicle Forfeitures

Although asset forfeiture laws have long been used by states and cities to target drug dealing and a variety of other crimes, they are a relatively new mechanism for traffic safety. Thirty-five states, plus the District of Columbia, Guam and the Virgin Islands, have already enacted some sort of vehicle impoundment or forfeiture law for drunk drivers. Most of the laws provide for temporary impoundment of a convicted drunk driver's vehicle, license plates or vehicle registration; some states permit hardship exceptions where a spouse or family would be unduly harmed by the loss of their means of transportation. Permanent forfeiture of a vehicle is generally reserved for those convicted of multiple offenses. (See Appendix K for current state laws regarding vehicle impoundment and forfeiture.)

Concerns about the constitutionality of asset forfeiture laws in general have been set aside by state and federal courts, which have ruled that seizure of an "instrumentality of crime" is constitutional. In the case of drunk drivers, the instrumentality of the crime is the vehicle itself. As long as drunk driving cases receive the constitutional protections of due process, forfeiture of the vehicle is an acceptable sanction.

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ANCHORAGE

9.28.020 *Driving while intoxicated*--Prohibited; sentencing.

A. It is unlawful for any person to commit the crime of ***driving while intoxicated.***

B. A person commits the crime of ***driving while intoxicated*** if he operates, drives or is in actual physical control of a motor vehicle or operates an aircraft or a watercraft:

1. While under the influence of intoxicating liquor or depressant, hallucinogenic, stimulant or narcotic drugs as defined in AS 11.71.140--11.71.190;

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

3. While the person is under the combined influence of intoxicating liquor and a drug, or intoxicating liquor and another substance that when introduced into the body acts as a central nervous system depressant or stimulant, to a degree which renders the person incapable of driving safely;

4. While the person is under the influence of a drug, or another substance that when introduced into the body acts as a central nervous system depressant or stimulant, to a degree which renders the person incapable of driving safely; or

5. In the case of an individual operating a commercial motor vehicle, when, as determined by a chemical test taken within four hours after the alleged offense was committed, there is 0.04 percent or more by weight of alcohol in the person's blood, or 40 milligrams or more of alcohol per 100 milliliters of blood, or when there is 0.04 grams or more of alcohol per 210 liters of the person's breath.

C. Upon conviction for ***driving while intoxicated*** under this section:

1. The court shall impose a minimum sentence of imprisonment of:

a. Not less than 72 consecutive hours and a fine of not less than $250.00 if the person has not been previously convicted.

b. Not less than 20 days and a fine of not less than $500.00 if the person has been previously convicted once.

c. Not less than 60 days and a fine of not less than $1,000.00 if the person has been previously convicted twice.

d. Not less than 120 days and a fine of not less than $2,000.00 if the person has been previously convicted three times.

e. Not less than 240 days and a fine of not less than $3,000.00 if the person has been previously convicted four times.

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f. Not less than 360 days and a fine of not less than $4,000.00 if the person has been previously convicted more than four times.

2. Except in mitigated circumstances, the court shall impose more than the mandatory minimum sentence. Mitigated circumstances do not exist if any of the following circumstances are present:

a. The defendant's driving conduct caused personal injury or property damage to another.

b. The defendant failed to stop for a red light or stop sign.

c. A container of alcoholic beverage was open in the passenger compartment of the defendant's vehicle.

d. The defendant was on release under AS 12.30.020 or AS 12.30.040 or on probation for another DWI or refusal charge or conviction.

e. The defendant has been previously convicted of reckless driving or leaving the scene of an accident.

f. The defendant had a breath test result of 0.15 gram or more of alcohol per 210 liters of the defendant's breath as determined by a chemical test within four hours after the alleged offense was committed.

3. The court may not:

a. Suspend execution of sentence or grant probation except on condition that the person serve the minimum imprisonment under subsection 1 of this subsection.

b. Suspend imposition of sentence.

4. If the offense involved driving a motor vehicle for which a driver's license is required, the person's driver's license shall be revoked in accordance with AS 28.15.181. In addition, the court shall order, and a person convicted under this section shall undertake, for a term specified by the court, that program of alcohol edu ation or rehabilitation that the court, after consideration of any information compiled under subsection b of this section, finds appropriate.

5. If the person has any interest in the vehicle used in the commission of the offense, the court shall order that:

a. The vehicle be impounded for 30 days if the person has not been previously convicted; and

b. The person's interest in the vehicle be forfeited to the municipality if the person has been previously convicted.

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At sentencing, the court shall order that any vehicle return bond which has been posted to secure the release of the vehicle be forfeited to the municipality if the vehicle subject to the vehicle return bond is not returned to the custody of the municipality within five days after the sentencing. At sentencing, the court shall order that any vehicle return bond posted to secure the release of the vehicle be exonerated when the vehicle has been returned to the custody of the municipality. At sentencing, the court may also order that any proceeds of any sale, transfer, or encumbrance of the vehicle be forfeited to the municipality if the vehicle has been sold, transferred, or encumbered while the vehicle has been subject to a vehicle return bond. A vehicle ordered impounded pursuant to this subsection shall not be released until after the person seeking release of the vehicle has provided proof of ownership of the vehicle and paid or provided proof of payment of the impound fees and the storage fees. Impound fees shall include the actual cost of impound plus an administrative fee of $220.00 to offset the municipality's processing costs. Any order of impoundment or forfeiture entered under this subsection is subject to the rights of lienholders, owners, lessors, lessees, and co-owners who are not the person convicted of ***driving while intoxicated*** as those rights are adjudicated in civil proceedings under section 9.28.026. If the municipality has brought a civil action under section 9.28.026 seeking impoundment or forfeiture as against all those with an interest in the vehicle except the person charged with a violation of section 9.28.020, that civil action shall provide the sole forum in which lienholders, owners, lessors, lessees, and co-owners who claim an interest in the vehicle but are not the person charged with a violation of section 9.28.020 can seek relief.

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

E. For purposes of this chapter, the following terms shall have the meaning given in this subsection:

1. *Interest in the vehicle* means a right, claim, or title to the vehicle or a legal share in the vehicle that the oral statement of a police officer, complaint, indictment, or information alleges was used in the commission of an offense.

2. *Operate a watercraft* means to navigate or use a vessel used or capable of being used as a means of transportation on water for recreational or commercial purposes on all waters, fresh or salt, inside the territorial limits of the municipality.

3. *Physical control* means to be behind the steering apparatus of a motor vehicle, whether asleep or awake, while the engine is running or any electrical or mechanical devices are turned on, or to be in a position to exercise exclusive control over the operation of the vehicle while possessing the apparent means to start the vehicle and the apparent ability to do so.

4. *Previously convicted* means having been convicted in this or another jurisdiction, within ten years preceding the date of the present offense, of operating a motor vehicle, aircraft or watercraft while intoxicated under this section or another law or ordinance with substantially similar elements, or of refusal to submit to a chemical test under AS 28.35.032 or section 9.28.022 or another law or ordinance with substantially similar elements, except that the other law or ordinance may provide for a lower level of alcohol in the person's blood or breath than imposed under AMC 9.28.020.B.2.

F. For purposes of this section, convictions for both ***driving while intoxicated*** and for refusal to submit to a chemical test of breath under section 9.28.021, if arising out of a single transaction and a single arrest, are considered one previous conviction.

G. The court shall order a person convicted under this section to satisfy the screening, evaluation, referral and program requirements of an agency authorized by the court to make referrals for rehabilitative treatment or to provide rehabilitative treatment.

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H. A program of inpatient treatment may be required by the authorized agency under subsection G of this section only if authorized in the judgment, and may not exceed the maximum term of inpatient treatment specified in the judgment. A person who has been referred for inpatient treatment under this subsection may make a written request to the sentencing court asking the court to review the referral. The request for review shall be made within seven days of the agency's referral, and shall specifically set out the grounds upon which the request for review is based. The court may order a hearing on the request for review.

I. If a person fails to satisfy the requirements of an authorized agency under subsection H of this section, the court:

1. May impose any portion of a suspended sentence.

2. May punish the failure as contempt of court under AS 9.50.010 or as a violation of a condition of probation.

3. Shall order the revocation or suspension of the person's driver's license, privilege to drive, and privilege to obtain a license until the requirements are satisfied.

J. The magistrate or judge who sets the conditions of release for a person arrested for ***driving while intoxicated*** shall at the same time set a vehicle return bond for the vehicle alleged in an oral statement of a police officer to have been used in the commission of the offense if the records of the Alaska department of public safety, division of motor vehicles or the records of an agency with similar responsibilities in another state show that the person arrested for the offense has any interest in the vehicle. The purpose of setting a vehicle return bond is to secure the presence of the vehicle pending trial and to provide security to be forfeited along with the proceeds of a sale, transfer, or encumbrance if the defendant's interest in the vehicle is sold, transferred, or encumbered after the vehicle has been released pending trial. A person who secures the release of a vehicle pursuant to a vehicle return bond must return the vehicle to the custody of the municipality upon order of the court. If the vehicle's release has been obtained through the posting of a vehicle return bond and the vehicle is not returned pursuant to the court's order after a judgment of conviction, the municipality may, in addition to obtaining the forfeited bond funds, seize the vehicle to implement the impoundment or forfeiture ordered by the court. If the person has not been previously convicted, the magistrate or judge setting the vehicle return bond shall order that the requirement of the vehicle return bond shall automatically expire 30 days after the vehicle has been seized if the vehicle has not been released pursuant to a vehicle return bond. The vehicle return bond set under the authority of this subsection may only be posted by a person alleged to have used the vehicle in the commission of the offense of ***driving while intoxicated*** or by a person who agrees to return the vehicle upon order of the court upon penalty of forfeiture of the bond. The vehicle return bond set under the authority of this subsection may be posted at the municipality. A vehicle return bond may be posted in cash only. A vehicle return bond shall be set at a minimum of:

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1. Two hundred fifty dollars if the person has not been previously convicted.

2. Five hundred dollars if the person has been previously convicted and the vehicle is 20 years old or older.

3. One thousand dollars if the person has been previously convicted and the vehicle is 15 years old or older but less than 20 years old.

4. One thousand five hundred dollars if the person has been previously convicted and the vehicle is ten years old or older but less than 15 years old.

5. Two thousand dollars if the person has been previously convicted and the vehicle is five years old or older but less than ten years old.

6. Two thousand five hundred dollars if the person has been previously convicted and the vehicle is less than five years old.

A vehicle return bond may be set above the minimum if the vehicle appears to have unusually high value for its age. A vehicle that is or has been the subject of an order under this subsection shall not be released pending trial until the person seeking release of the vehicle has provided proof of ownership of the vehicle and paid or provided proof of payment of the vehicle return bond and towing and storage fees, including the administrative fee of $220.00 to offset the municipality's processing costs. If a vehicle has not been impounded for a longer period than the vehicle would be impounded if the person were convicted, the court shall not delete the requirement of the vehicle return bond or exonerate a posted vehicle return bond until the vehicle for which bond has been posted is returned pursuant to court order. Unless the following sentence applies, a vehicle that is or has been the subject of a vehicle return bond may only be released if the person seeking the release of the vehicle pays or provides proof of payment of the towing and storage costs, including the administrative fee of $220.00 to offset the municipality's processing costs. A vehicle may be recovered without payment of the towing and storage costs, including the administrative fee, only if a court makes a specific finding that the seizure of the vehicle was legally unjustified and such specific finding follows a contested hearing or is pursuant to a stipulation between the parties. A seizure is "legally unjustified" only if there was: (1) no reasonable suspicion for the stop of the vehicle leading to an arrest for ***driving while intoxicated*** based on the individual allegedly operating, driving, or being in actual physical control of the vehicle; or (2) no probable cause for the arrest of an individual for ***driving while intoxicated*** based on the individual allegedly operating, driving, or being in actual physical control of the vehicle.

K. The conditions of release established for a person charged with ***driving while intoxicated*** (DWI) shall include at a minimum an order that the person's interest, if any, in the vehicle alleged in an oral statement by a police officer, criminal complaint, information, or indictment to have been used in the commission of the offense be forfeited if the person does not appear as ordered. This subsection applies to any release before judgment of conviction on a charge of ***driving while intoxicated***, including any release on the person's own recognizance.

L. A vehicle that is or has been the subject of an order setting a vehicle return bond under subsection J of this section and has not been released pursuant to that order is subject to the provisions of AS 28.10.502 if no criminal complaint, information, or indictment is filed by the date and time of the scheduled arraignment alleging a violation of this section or if the count of the criminal complaint, information, or indictment alleging a violation of this section is amended upon motion of the prosecution, is dismissed by the prosecution, or is resolved by the acquittal of the person alleged to have violated this section. The provisions of chapter 9.50 do not apply to a vehicle that is or has been the subject of an order setting a vehicle return bond under subsection J of this section. Any vehicle return bond set expires on the date and time of the scheduled arraignment if no criminal complaint, information, or indictment alleging a violation of this section is filed by the date and time of the scheduled arraignment.

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1. Two hundred fifty dollars if the person has not been previously convicted.

2. Five hundred dollars if the person has been previously convicted and the vehicle is 20 years old or older.

3. One thousand dollars if the person has been previously convicted and the vehicle is 15 years old or older but less than 20 years old.

4. One thousand five hundred dollars if the person has been previously convicted and the vehicle is ten years old or older but less than 15 years old.

5. Two thousand dollars if the person has been previously convicted and the vehicle is five years old or older but less than ten years old.

6. Two thousand five hundred dollars if the person has been previously convicted and the vehicle is less than five years old.

A vehicle return bond may be set above the minimum if the vehicle appears to have unusually high value for its age. A vehicle that is or has been the subject of an order under this subsection shall not be released pending trial until the person seeking release of the vehicle has provided proof of ownership of the vehicle and paid or provided proof of payment of the vehicle return bond and towing and storage fees, including the administrative fee of $220.00 to offset the municipality's processing costs. If a vehicle has not been impounded for a longer period than the vehicle would be impounded if the person were convicted, the court shall not delete the requirement of the vehicle return bond or exonerate a posted vehicle return bond until the vehicle for which bond has been posted is returned pursuant to court order. Unless the following sentence applies, a vehicle that is or has been the subject of a vehicle return bond may only be released if the person seeking the release of the vehicle pays or provides proof of payment of the towing and storage costs, including the administrative fee of $220.00 to offset the municipality's processing costs. A vehicle may be recovered without payment of the towing and storage costs, including the administrative fee, only if a court makes a specific finding that the seizure of the vehicle was legally unjustified and such specific finding follows a contested hearing or is pursuant to a stipulation between the parties. A seizure is "legally unjustified" only if there was: (1) no reasonable suspicion for the stop of the vehicle leading to an arrest for ***driving while intoxicated*** based on the individual allegedly operating, driving, or being in actual physical control of the vehicle; or (2) no probable cause for the arrest of an individual for ***driving while intoxicated*** based on the individual allegedly operating, driving, or being in actual physical control of the vehicle.

K. The conditions of release established for a person charged with ***driving while intoxicated*** (DWI) shall include at a minimum an order that the person's interest, if any, in the vehicle alleged in an oral statement by a police officer, criminal complaint, information, or indictment to have been used in the commission of the offense be forfeited if the person does not appear as ordered. This subsection applies to any release before judgment of conviction on a charge of ***driving while intoxicated***, including any release on the person's own recognizance.

L. A vehicle that is or has been the subject of an order setting a vehicle return bond under subsection J of this section and has not been released pursuant to that order is subject to the provisions of AS 28.10.502 if no criminal complaint, information, or indictment is filed by the date and time of the scheduled arraignment alleging a violation of this section or if the count of the criminal complaint, information, or indictment alleging a violation of this section is amended upon motion of the prosecution, is dismissed by the prosecution, or is resolved by the acquittal of the person alleged to have violated this section. The provisions of chapter 9.50 do not apply to a vehicle that is or has been the subject of an order setting a vehicle return bond under subsection J of this section. Any vehicle return bond set expires on the date and time of the scheduled arraignment if no criminal complaint, information, or indictment alleging a violation of this section is filed by the date and time of the scheduled arraignment.

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M. Vehicles ordered impounded under section 9.28.020.C.5 which are not claimed at the end of the court-ordered period of impoundment may be disposed of pursuant to the provisions of AS 28.10.502. If the contents of the vehicle have not been recovered before such disposal, the contents may be disposed of with the vehicle. Personal property in a vehicle that is subject to a vehicle return bond under section 9.28.020.J and has not been released pursuant to that vehicle return bond can be recovered only by the owner of the vehicle and only upon payment of a fee charged for monitoring the recovery of such personal property. Such fee shall be set by contract between the towing and storage contractor and the municipality if it is not established by ordinance. Such fee shall be recoverable by the owner of the vehicle if a court makes a specific finding that the seizure of the vehicle was legally unjustified following a contested hearing or pursuant to a stipulation between the parties.

N. A motor vehicle that is the subject of a vehicle return bond under section 9.28.020.J and has not been released pursuant to that vehicle return bond shall be held in the custody of the police department or a private corporation authorized by the chief of police to retain custody of the motor vehicle, subject only to the orders and decrees of any court having jurisdiction over any forfeiture or impoundment proceedings. If a motor vehicle is seized under this section, the chief of police or his or her authorized designee may:

1. Remove the motor vehicle and any contents of the motor vehicle to a place designated by the court; or

2. Take custody of the motor vehicle and any contents of the motor vehicle and remove it to an appropriate location for disposition in accordance with law.

O. Before disposing of any vehicle forfeited under this section, the chief of police or his or her designee shall make an inventory of the contents of any motor vehicle seized. Property forfeited under this section shall be disposed of by the chief of police or his or her designee in accordance with this subsection. Property forfeited under this section includes both the vehicle that is the subject of the forfeiture action and the contents of the vehicle if those contents have not been recovered before the date of the disposal. The chief of police or his or her designee may:

1. Sell the property at an auction conducted by an auctioneer not employed by the impound contractor and use the proceeds for payment of all proper expenses of seizure, custody, the costs of the auction, court costs, and municipal attorney fees, provided if such sale is arranged for by the impound contractor the municipality shall receive at least 30 percent of the proceeds of any sale of forfeited vehicles following deduction for the costs charged by the auctioneer for the auction of those vehicles regardless of whether the costs of impound and storage exceed the value of the vehicles sold;

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2. Take custody of the property and use it in the enforcement of the municipal and state criminal codes; or

3. Destroy the property.

(AO No. 267-76; AO No. 78-72; AO No. 78-230(S); AO No. 80-122; AO No. 81-75; AO No. 82-126; AO No. 83-168, 10-17-83; AO No. 89-52; AO No. 91-56(S); AO No. 91-190; AO No. 94-68(S), § 11, 8-11-94; AO No. 95-84(S-1), §§ 1--9, 4-27-95; AO No. 95-163(S), §§ 1--5, 8-8-95; AO No. 97-72, § 1, 6-10-97; AO No. 97-87, § 1, 6-3-97)

Editor's note--AO No. 97-87 occasioned by 1996 Proposition 3 Initiative enacting Chapter XXI.

Cross reference(s)--Penal code, tit. 8; drinking alcoholic beverages while driving, § 9.36.200; alcoholic beverages, ch. 10.50.

9.28.021 *Driving while intoxicated*--Implied consent to chemical test.

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 section 9.28.020.E.1 or who operates a watercraft as defined by section 9.28.020.E.2 shall be considered to have given consent to a chemical test 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, driving or in actual physical control of a motor vehicle or operating an aircraft or a watercraft while intoxicated. The test shall be administered at the direction of a law enforcement officer who has reasonable grounds 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.

(AO No. 78-72; AO No. 79-194; AO No. 80-122; AO No. 82-126; AO No. 83-168, 10-17-83; AO No. 89-52)

State law reference(s)--Implied consent, AS 28.35.031.

9.28.022 *Driving while intoxicated*--Refusal to submit to chemical tests.

A. If a person under arrest refused the request of a law enforcement officer to submit to a chemical test under section 9.28.021, 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 section 9.28.025.

B. The refusal of a person to submit to a chemical test of his or her breath under subsection A of this section is admissible evidence in a civil or criminal action or proceeding arising out of an act alleged to have been committed by the person while operating, driving or in actual physical control of a motor vehicle or operating an aircraft or watercraft while intoxicated.

C. Refusal to submit to the chemical test of breath authorized by section 9.28.021 is a misdemeanor.

D. Upon conviction for refusal to submit to chemical tests under subsection C of this section:

1. The court shall impose a minimum sentence of imprisonment of:

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FAIRBANKS

ARTICLE XXII. MOTOR VEHICLE IMPOUNDMENT AND FORFEITURE*

***Cross reference(s)--**Disposal by the department of public safety of abandoned, stolen, forfeited, seized, and found property, § 62-31 et seq.

State law reference(s)--Forfeiture of vehicle, AS 28.35.036.

Sec. 78-961. Definitions.

The following words, terms and phrases, when used in this article, shall have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:

Assessed or appraised value of a motor vehicle shall be based upon the Automobile Dealers Association Book (Blue Book) for the same or similar make and model and accessorized motor vehicle. Should there be no Blue Book value, the value shall be $500.00.

Driver means a person who drives or is in actual physical control of a vehicle.

Motor vehicle means a vehicle which is self propelled except a vehicle moved by human or animal power.

Previously convicted means having been convicted in this or another jurisdiction within ten years preceding the date of the present offense, of operating a motor vehicle, aircraft or watercraft while intoxicated under AS 28.35.030 or another law or ordinance with substantially similar elements, or a refusal to submit to a chemical test under AS 28.35.032 or another law or ordinance with substantially similar elements.

Registered owner refers to the owner of the vehicle at the time of the offense as shown in the vehicle ownership records of the state division of motor vehicles or another agency with similar responsibilities in another state, but may include subsequent good-faith purchases.

Regulated lienholder means an entity whose lien on the vehicle is a result of lending activities that are subject to regulation by any federal or state agency, commission or department.

Vehicle means a device in, upon or by which a person or property may be transported or driven upon immediately over a highway, road or other public right-of-way.

(Code 1960, § 7.22.117)

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A motor vehicle that is operated, driven or in actual physical control of an individual arrested for or charged with violation of AS 28.35.030, pertaining to ***driving while intoxicated***, or a violation of AS 28.35.032, pertaining to refusal to submit to chemical tests, may be impounded and may be forfeited to the city in accordance with this article. The purpose of this article is to protect the public by removing public nuisances and deterring ***driving while intoxicated***. A vehicle operated in violation of the aforestated statutes is declared to be a public nuisance for which the registered owners shall be legally responsible subject only to defenses set forth by law.

(Code 1960, § 7.22.101)

Sec. 78-963. Presumptions; vehicle seizure.

(a) It shall be presumed that a vehicle operated by or driven by or in the actual physical control of an individual arrested for or charged with a violation of either AS 28.35.030 or AS 28.35.032 has been so operated by the registered owner or has been operated by another person with the knowledge and consent of the registered owner.

(b) A vehicle used in the alleged violation of AS 28.35.030 or AS 28.35.032 shall be impounded for 30 days if the person driving, operating or in the actual physical control of the vehicle has not been previously convicted, and shall be forfeited to the city if the person has been previously convicted.

(c) Impoundment may occur through a seizure of the vehicle incident to an arrest at the discretion of the arresting officer or a court order.

(Code 1960, § 7.22.102)

Sec. 78-964. Jurisdiction; hearings; costs.

(a) Civil impoundment or forfeiture cases may be heard and decided by either the district court, an administrative hearing officer, or the parking authority, which throughout this article may be referred to as "the court" or "a court." Hearings before an administrative hearing officer shall take place no less than seven days and no more than 30 days after the registered owner or lienholder requests a hearing. At the request of the city or a claimant, a civil proceeding under this section shall be postponed until the conclusion of any pending criminal charges arising out of the incident giving rise to the proceeding under AS 28.35.030 and AS 28.35.032.

(b) The court shall award the prevailing party in an impoundment or forfeiture case its reasonable attorney's fees and costs. Costs shall include but are not limited to filing costs, advertising costs, police officer time required for testimony, prosecution costs, and other costs incurred in processing the case.

(Code 1960, § 7.22.103)

Sec. 78-965. Notice to lienholders and parties of record; service by publication; failure to appear.

(a) A lienholder and any party having an interest in the vehicle as shown by the vehicle ownership records by the division of motor vehicles or any agency in any state where the vehicle is registered shall be served with notice of the civil action by certified mail sent to the address of record as shown in the ownership records. In a forfeiture action, the city may serve a party of record personally or by publication if mail service is unsuccessful.

(b) Service by publication in a forfeiture proceeding shall describe the vehicle, the date and place of impoundment and a contact person, and shall be published once per week for two consecutive weeks in a newspaper of general circulation.

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(c) Any party who fails to appear within 30 days of service of notice of an impoundment or forfeiture waives the right to object to impoundment or forfeiture. Any party who requests a hearing in a civil action shall be deemed served. For actions filed in district court, district court civil rules shall apply. Requests for release of a vehicle made by a person or entity not charged with a violation of AS 28.35.030 and AS 28.35.032 must be brought in the forum of the civil action.

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(Code 1960, § 7.22.104)

Sec. 78-966. Avoidance of impoundment or forfeiture by owners and lienholders; defenses.

(a) An owner or lienholder of record may avoid impoundment or forfeiture of that person's interest if the claimant can establish by a preponderance of the evidence that:

(1) The claimant had an interest in the motor vehicle at the time of the alleged violation or which was acquired in good faith after the violation and not to avoid impoundment or forfeiture;

(2) A person other than the claimant was in possession of the vehicle and was responsible for the act which resulted in impoundment or forfeiture; and

(3) Before permitting the operator to gain custody or control of the vehicle, the claimant did not know or have reasonable cause to believe that vehicle would be operated in violation of AS 28.35.030 or AS 28.35.032.

(b) A regulated lienholder may meet the requirements of this section by filing with the court a copy of the vehicle's certificate of title or other security instrument reflecting the lien, with an affidavit stating the amount of the lien and that the lienholder is a regulated lienholder and that the lienholder was not in possession of the vehicle at the time of the act which resulted in the seizure of the vehicle.

(c) A regulated lienholder shall have no duty to inquire into the driving record of any loan applicant or any member of the loan applicant's family or household, and failure to do so shall not be usable as evidence against the regulated lienholder in any forfeiture proceeding or other civil action.

(d) A regulated lienholder's interest in a vehicle shall not be subject to forfeiture in any case where:

(1) The individual who allegedly used the vehicle in violation of AS 29.35.030 or AS 29.35.032 is not the person whose dealings with the lienholder gave rise to the lien; or

(2) The vehicle which the individual was driving, operating or was in actual physical control of at the time of the violation was not the vehicle involved in a prior conviction.

(e) An acquittal in a criminal proceeding under AS 28.35.030 or AS 28.35.032 shall constitute a defense against impoundment or forfeiture of a vehicle if the civil proceeding is based on the same conduct that forms the basis for the criminal charge.

(Code 1960, § 7.22.105)

Sec. 78-967. Presumptions; knowledge of violation.

(a) When a person other than the claimant was in possession of the vehicle and was driving with a suspended, revoked or canceled license, or without a valid driver's license, or in violation of a limited license, it shall be presumed that the claimant had reasonable cause to believe that the vehicle would be used in violation of AS 28.35.030 or AS 28.35.032. This subsection shall not apply to regulated lienholders.

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(b) Where the claimant and driver are not the same person and have a familial relationship, such as husband/wife, father/daughter, mother/stepson, etc., it shall be presumed that the claimant is responsible and that the vehicle was operated by the driver with the knowledge and consent of the claimant.

(Code 1960, § 7.22.106)

Sec. 78-968. Hearing notification.

Upon notification from the court of the time and place for a hearing in a civil action, the city shall provide to every person, unless notified by the court, who has an ascertainable ownership or security interest, written notice that includes:

(1) A description of the motor vehicle;

(2) The time and place of the forfeiture or impound hearing;

(3) The legal authority under which the vehicle may be impounded or forfeited; and

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

(Code 1960, § 7.22.107)

Sec. 78-969. Seizure; evidence; burden of proof.

(a) A seizure is legally unjustified only if there was:

(1) No reasonable suspicion for the stop of the vehicle leading to an arrest for ***driving while intoxicated*** based on the operation, driving or actual physical control of the vehicle; or

(2) No probable cause for the arrest of an individual for ***driving while intoxicated*** based on the individual's operation, driving or actual physical control of the vehicle.

(b) For purposes of proceedings in an administrative forum, the police report, which may include the narrative; accompanying documents; computer printouts from data bases operated by police agencies and/or government agencies regulating motor vehicles showing the ownership of the vehicle, the driver's license status, and the record of criminal convictions of the driver; and/or tape recordings is admissible evidence so long as it is signed with either the name, initials, badge number, or other identifying mark of an employee of the city in a statement made under oath.

(c) The burden of proof for an action under this article is preponderance of the evidence.

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(1) No reasonable suspicion for the stop of the vehicle leading to an arrest for ***driving while intoxicated*** based on the operation, driving or actual physical control of the vehicle; or

(2) No probable cause for the arrest of an individual for ***driving while intoxicated*** based on the individual's operation, driving or actual physical control of the vehicle.

(b) For purposes of proceedings in an administrative forum, the police report, which may include the narrative; accompanying documents; computer printouts from data bases operated by police agencies and/or government agencies regulating motor vehicles showing the ownership of the vehicle, the driver's license status, and the record of criminal convictions of the driver; and/or tape recordings is admissible evidence so long as it is signed with either the name, initials, badge number, or other identifying mark of an employee of the city in a statement made under oath.

(c) The burden of proof for an action under this article is preponderance of the evidence.

(Code 1960, § 7.22.108)

Sec. 78-970. Resolution agreement between city and owner/lienholder.

(a) The city may enter into an agreement with the registered owner or lienholder of the vehicle to resolve a civil impound or forfeiture action and permit release of the vehicle. Any such agreement shall include:

(1) Acceptance by the owner or lienholder of responsibility for meeting the requirements of this section;

(2) Agreement that the owner or lienholder will take reasonable steps to prevent the person arrested for or charged with a violation of AS 28.35.030 or AS 28.35.032 from operating the vehicle until properly licensed; and

(3) Agreement by the owner or lienholder that failure to fulfill the obligations under the agreement may result in forfeiture of the vehicle at the option of the city unless the lienholder is regulated and is required by law or the terms of the security agreement to relinquish possession of the vehicle upon payment of the lien or cure of any default.

(Code 1960, § 7.22.109)

Sec. 78-971. Release of motor vehicle.

A person seeking to redeem a vehicle must obtain an order authorizing release of the vehicle unless the release is made under an agreement with the city. A release shall not be granted unless the person can:

(1) Provide proof of ownership or, if a lienholder, a legal right to repossess the vehicle; and

(2) Pay or provide proof of payment of any costs imposed, including the impound fees, storage fees and any court costs imposed. The impound fee shall be the actual cost of impound plus an administrative charge to offset the city's processing costs. If the city agrees or the court finds that seizure of a vehicle was legally unjustified, the vehicle shall be released at no cost if the person seeking to reclaim the vehicle does so within five days after the court's finding. A vehicle not claimed within five days after the court's decision is subject to the provisions of AS 28.10.502, relating to towing and storage liens.

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(Code 1960. § 7.22.110)

Sec. 78-972. Bail release of motor vehicle; vehicle bond; amount of bond; costs.

(a) A person not charged with a violation of AS 28.35.030 or AS 28.35.032 may petition the court for a bail release of a motor vehicle before a civil action is filed.

(b) A vehicle return bond shall be set for each vehicle alleged in the complaint to have been used in an alleged violation of AS 28.35.030 or AS 28.35.032. The bond may be posted in cash only. The purpose of this bond is to secure the presence of the vehicle and to provide security to be forfeited if the vehicle is sold, transferred or encumbered after the vehicle has been released pending hearing. If a vehicle is not returned on a return bond, the city may forfeit the bond funds and seize the vehicle to implement the impoundment or forfeiture ordered by the court. The court may not modify the bond requirement or release a posted bond for a vehicle which has been impounded for a period less than the vehicle would have been impounded for if the person was convicted.

(c) If a person charged with a violation of AS 28.35.030 or AS 28.35.032 has no previous convictions for those statutes, the minimum vehicle return bond shall be $400.00. Where the person charged has been previously convicted of either offense, the minimum vehicle bond shall be:

20 years or older . . . $ 400.00

15--19 years . . . 1,000.00

10--14 years . . . 1,500.00

5--10 years . . . 2,000.00

0--4 years . . . 2,500.00

A vehicle return bond may be set above the minimum if the vehicle appears to have been unusually high value for its age but not to exceed twice the minimum amount.

(d) A vehicle under this section may be released pending hearing upon proof of ownership of the vehicle, payment of the vehicle return bond, and payment of towing and storage fees, including the administrative fee of $200.00 to offset the city's processing costs.

(e) The court may order all or any part of the vehicle return bond to be forfeited to the city and may also order that the proceeds of any sale, transfer or encumbrance be forfeited if the vehicle has been sold, transferred or encumbered while subject to a vehicle return bond, if the vehicle is not returned in accordance with an order entered in the case requiring impoundment or forfeiture.

(Code 1960, § 7.22.111)

Sec. 78-973. Impoundment; seizure incident to arrest; impoundment period; abandoned vehicle disposal; personal property in vehicles.

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(a) A motor vehicle that is operated, driven or in the actual physical control of a person arrested for or charged with a violation of AS 28.35.030 or AS 28.35.032 may be ordered impounded either upon conviction of the person for the offense or upon the decision of the court in a separate civil proceeding. To obtain an order for the impoundment in a contested proceeding, the city must establish by a preponderance of the evidence that the vehicle was operated, driven or in the actual physical control of a person who was acting in violation of AS 28.35.030 or AS 28.35.032.

(b) If the motor vehicle is seized incident to an arrest or otherwise prior to a conviction or court-ordered impoundment, the vehicle may not be held more than two days without a court order obtained to continue its detention. For purpose of computing the two-day period, Saturdays, Sundays and legal holidays are not to be included.

(c) A vehicle which is ordered impounded under this section shall be held for a period of 30 days. An impoundment order may be made either upon conviction of the person of a violation of AS 28.35.030 or AS 28.35.032, or upon decision of a court in a separate civil proceeding.

(d) Vehicles ordered impounded under this section, which are not claimed at the end of the 30-day court-ordered period of impoundment may be disposed of pursuant to the provisions of AS 28.10.502. If the contents of the vehicle have not been recovered before such disposal, the contents may be disposed of with the vehicle. Personal property in a vehicle that is subject to a vehicle return bond and has not been released can be removed from a vehicle only by the owner of the vehicle and only upon payment of a fee charged for monitoring such recovery of such personal property. Such fee shall be set by contract between the towing and storage contractor and the city unless established by the parking authority. The owner may recover the fee if a court makes a specific finding that the seizure of the vehicle was legally unjustified.

(Code 1960, § 7.22.112)

Sec. 78-974. Forfeiture process.

(a) A motor vehicle that is operated, driven or in the actual physical control of a person arrested or charged with a violation of AS 28.35.030 or AS 28.35.032 may be forfeited to the city either upon conviction of either offense or upon decision of a court in a separate civil proceeding. To obtain an order of forfeiture in a contested proceeding, the city must establish by a preponderance of the evidence that the vehicle was operated, driven or in the physical control of the person acting in violation of either offense and the individual has been previously convicted.

(b) A motor vehicle may be seized and towed to a secure location by a police officer or a police officer's designee upon an order issued by a court having jurisdiction over the motor vehicle upon a showing of probable cause that the motor vehicle may be forfeited or impounded under this section. Seizure without a court order may be made if:

(1) The impoundment is incident to an arrest;

(2) The motor vehicle has been ordered impounded or forfeited and that order has not yet been executed; or

(3) There is probable cause to believe that the motor vehicle was operated, driven or in the actual physical control of a person in violation of AS 28.35.030 or AS 28.35.032.

(c) A court may order impoundment of a motor vehicle subject to forfeiture in a civil action for a minimum of 30 consecutive days.

(Code 1960, § 7.22.113)

Sec. 78-975. Custody of vehicle; department of public safety; private corporations; inventory.

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(a) A motor vehicle seized for the purpose of forfeiture or impoundment should be held in the custody of the department of public safety or a private corporation authorized by the department to retain custody of the vehicle, subject only to the orders and decrees of the court having jurisdiction over any forfeiture or impoundment proceedings. When a motor vehicle is seized, the director of public safety or an authorized designee may:

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(1) Remove the motor vehicle and any contents in the vehicle to a place designated by the court; or

(2) Take custody of the motor vehicle and any contents of the vehicle and remove it to an appropriate location for disposition.

(b) Following a forfeiture the department of public safety shall make an inventory of the contents of any motor vehicle seized. Personal property can be recovered from the vehicle in the same manner as set forth in section 78-973.

(c) A person in a forfeiture action claiming an interest in the property shall file, within 30 days after service or completion of publication, a notice of claim setting out the nature of the interest, the date it was acquired, the consideration paid, and an answer to the city's allegations. If a claim and answer is not filed within the required time, the motor vehicle must be forfeited to the city without further proceedings. For a regulated lienholder, the notice of claim and answer is met by the filing of information required in section 78-966 and by adding to the affidavit a statement of the original amount of the loan giving rise to the lien and the current balance due on that loan.

(d) A claimant may petition the court for sale of a motor vehicle before final disposition of court proceedings. The court shall grant a petition for sale upon a finding that the sale is in the best interest of the city. Proceeds from the sale plus interest to the date of final disposition of the court proceedings become the subject of the forfeiture action.

(Code 1960, § 7.22.114)

Sec. 78-976. Disposition of forfeited property; return to claimant.

(a) Property forfeited under this article shall be disposed of by the department of public safety in accordance with this section. Property forfeited includes both the vehicle and its contents if those contents have not been recovered before the date of disposal. The department of public safety may:

(1) Sell the property at an auction and use the proceeds for payment of all expenses of seizure, custody, costs of auction, court costs and attorney's fees; and if such sale is arranged for by the impound contractor, the city shall receive at least 30 percent of the proceeds of any sale of forfeited vehicles following deduction for the costs charged by the auctioneer for the auction regardless of whether the costs of impound and storage exceed the value of the forfeited vehicles sold;

(2) Take custody of the property and use it in the enforcement of city and state criminal codes; or

(3) Destroy the property.

(b) When a claimant to a motor vehicle is entitled to its possession, the court shall order that:

(1) The vehicle be delivered to the claimant immediately subject to costs as described in section 78-971; or

(2) If the claimant is entitled to some value less than the total value of the motor vehicle, the claimant is entitled to receive either the value of the claimant's interest after the sale of the vehicle at an auction following deduction of the costs of the auction or, upon request and payment of the difference in value by the claimant, the motor vehicle itself.

(c) When a vehicle is sold and lienholder interest exceeds the sale price, the owner may be held responsible for the difference and the city's cost.

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(Code 1960, § 7.22.115)

Sec. 78-977. Multiple ownership on certificate of title.

In a contested forfeiture proceeding concerning a vehicle titled in the names of more than one owner on the certificate of title, the court shall proceed as follows:

(1) If one owner does not avoid forfeiture, the court may order the forfeiture of the entire interest of all the owners in a vehicle which is titled in the names of more than one owner in the disjunctive which is signified by the word "or."

(2) If such owner does not avoid forfeiture, the court shall order the forfeiture of the interest of any owner in a vehicle which is titled in the names of more than one owner in the conjunctive which is signified by the word "and." Owners of a vehicle titled in the names of more than one owner in the conjunctive are presumed to own the vehicle in equal shares. Under this subsection, the court shall order that the vehicle be sold at public auction and further order that the proceeds from the sale of the vehicle be held by the city's department of finance. After deduction of the reasonable costs of the auction, the amount of the proceeds of the auction for the sale of that vehicle which is equal to the interests of the owners whose interests have not been forfeited shall be returned to those owners if those owners apply to the department of finance within 60 days of the auction. If the owners whose interests have not been forfeited do not apply within that period, those funds become the property of the city subject to the rights of any other claimant to those funds.

(Code 1960, § 7.22.116)

Chapters 79--81 RESERVED

Chapter 82 UTILITIES*

***Cross reference(s)**--Administration, ch. 2; buildings and building regulations, ch. 10; uniform mechanical code, § 10-101 et seq.; uniform plumbing code, § 10-136 et seq.; uniform housing code, § 10-171 et seq.; National Electrical Code, § 10-276 et seq.; businesses, ch. 14; health, ch. 34; solid waste, ch. 66; streets, sidewalks and other public places, ch. 70.

ARTICLE I. IN GENERAL

Sec. 82-1. City water fluoridated.

A source of fluoride ion, approved by the state department of health, shall be added to the water supply of the city under the rules and regulations of the state department of health, such addition to be administered by Golden Heart Utilities, Inc. in a manner approved by the environmental coordinator of the city.

(Code 1960, § 10.301(a))

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(2) Order participation in such program; or

(3) Any combination of subsections (1) and (2) above. (Serial No. 85-56 § 68, 1985; Serial No. 84-80 § 3, 1984; Serial No. 71-59 § 4 (part), 1971; CBJ § 72.22.010).

72.22.045 TRAFFIC CITATION ON ILLEGALLY PARKED VEHICLE. Whenever a motor vehicle without driver is found parked, stopped or standing in violation of any of the restrictions imposed by this title the officer finding such vehicle shall take its registration number and may take any other information displayed upon or within the vehicle which may identify its user, and shall conspicuously affix to such vehicle a traffic citation on a form provided by the city and borough for the driver to answer to the charge against him in the municipal court at an appointed time within twenty days from such alleged violation specified in the citation. (Serial No. 71-59 § 4 (part), 1971; CBJ § 72.22.045).

72.22.055 VIOLATIONS RESPONSIBILITIES AND DEFENSES. (a) Every person in whose name a vehicle is registered shall be responsible for violations of any parking, standing, stopping or other nonmoving traffic violations of this title. It shall be no defense for the owner of a vehicle to such a charge that the vehicle was in the possession or control of another, unless it can be shown to the satisfaction of the court that at such time such vehicle was being used without the consent of the registered owner thereof.

(b) It shall be a defense for a vehicle owner to a charge of a failure to appear if it is shown to the court's satisfaction that the owner of such vehicle was not aware of the citation and that such vehicle was being used without the consent of the registered owner. (Serial No. 71-59 § 4 (part), 1971; CBJ § 72.22.055).

72.22.060 AUTHORITY TO IMPOUND VEHICLES – REDEMPTION OR SALE – PRESUMPTION OF ABANDONMENT. (a) Whenever any vehicle is located or is standing upon any street or alley or right-of-way in violation of the provisions of this title or any rule or regulation adopted thereto, or whenever any vehicle is found to be mechanically unsafe to operate upon any street or alley or right-of-way, or whenever the driver is arrested for an offense involving either driving under the influence of intoxicating liquor or hypnotic or narcotic drugs, reckless driving, negligent driving, or any felony, such vehicle may be removed from the city and borough streets or alleys and may be impounded at a place to be designated by the manager. The police shall, in the proper case and whenever any other provision of this title is violated, cause a complaint to be filed against the person committing such offense. When the owner or authorized representative of the owner of the vehicle claims the same, he shall be informed of the nature of the circumstances causing the impoundment of such vehicle and to obtain release thereof shall pay all towing, impoundment and storage charges. Such fees may be established, changed or abolished by the assembly by resolution. If the operator or owner of the vehicle, upon hearing before the municipal judge, is found not guilty of the violation of which he is charged, the impounded vehicle shall be released immediately to the owner without collection of fees or other charges, or if such person found not guilty has already paid impoundment towing or storage charges, the court may order the city and borough to refund part or all of such fees or charges. If the owner or operator of such vehicle is found guilty, any fine imposed under the provisions of the appropriate section of this title shall be in addition to the towing, impounding and storage charges herein prescribed.

(b) No person shall allow, permit or suffer any vehicle registered in his name to stand or park upon

or be operated upon any street in this city and borough in violation of this title or any rule or regulation adopted or issued pursuant thereto.

(c) Whenever an officer removes or has removed a vehicle from a street as authorized in this section and the officer knows or is able to ascertain from the registration records in the vehicle the name and address of the owner thereof, such officer shall immediately give or cause to be given notice in writing to such owner of the fact of such removal and the reasons therefor and of the place to which such vehicle has been removed. In the event any such vehicle is stored in a public garage, a copy of such notice shall be given to the proprietor of such garage.

(d) After a vehicle has been impounded for more than ten days, the chief of police shall cause to be sent by registered mail a notice to the owner and any lienholder thereof, if after the exercise of due diligence said owner's or lienholder's name can be ascertained. The notice shall accurately describe the vehicle, give the date the vehicle was impounded, and inform the owner that unless he reclaims the vehicle within ten days from the dispatch thereof, the vehicle shall be sold. Not less than fifteen days after the dispatch of the letter, if the letter can be sent, and in any event if such letter cannot be sent, the chief of police shall cause to be posted in three public places in the city and borough a description of the vehicle, the owner's name if known, and state the facts that the vehicle and other similar vehicles similarly described will be sold at public auction to the highest responsible bidder at a public sale under the direction of the chief of police at a specified time and place, not less than ten days after the publication of the notice of sale. The chief of police shall keep a permanent accurate record of all vehicles impounded containing date of impoundment, description of vehicle, cause for which impounded, date of redemption if redeemed, an amount paid upon redemption, date of letter to owner if owner known, notice of sale, record of sale and price paid at sale and name of purchaser.

(e) If the highest bid at public auction shall not be equal to or greater than the towing and storage charges, the city and borough may reject the bid and attempt to sell the vehicle at subsequent public auction or negotiate for private sale; provided, however, the price obtained at private sale must be equal to or greater than the highest bid at public auction.

(f) The proceeds of a sale of any impounded vehicle shall be applied first against any and all costs of the city and borough involved in towing, impounding and storing the vehicle, and in conducting any sale thereof, with any remaining proceeds paid first to the lienholder if known, to the extent of his interest if any, then to the owner if known, or if unknown into the operating fund of the police department.

(g) Notwithstanding any other provisions of this section, whenever any vehicle located or standing upon any street or alley or right-of-way is or has been involved in an accident resulting in personal injury, or property damage in an amount of five hundred dollars or more as judged by a police officer, such vehicle may be removed from the streets and impounded by the police department for a period not to exceed five days for the purpose of having the vehicle inspected by a competent mechanic to determine whether the vehicle is mechanically safe. The expense of this type of inspection impoundment shall be borne by the city and borough. (Serial No. 2000-20 § 5, 2000; Serial No. 71-59 § 4 (part), 1971; CBJ § 72.22.060).

72.22.063 VEHICLE IMMOBILIZATION. (a) The manager or his designee may, subject to the limitations contained in this section, authorize the immobilization of any motor vehicle by the use of a vehicle immobilization device which, when attached to the wheel or other part of a motor vehicle, prevents that vehicle from being driven.

(b) No vehicle may be immobilized pursuant to this section unless there has been affixed to that or

any other vehicle owned by the same person, or that person has otherwise been issued, at least two municipal parking citations and has, with respect to each such citation, failed, within the time permitted by law, to:

(1) Post or forfeit the bail specified for that offense; or

(2) Appear and answer to the charge.

(c) The owner or operator of a vehicle immobilized pursuant to this section may obtain its release by:

(1) Posting bail for each of the parking citations outstanding against the owner; and

(2) Paying the release service fee established by the manager or his designee.

(d) A vehicle immobilized pursuant to this section may not be the subject of further parking citations during the period of immobilization.

(e) If a vehicle immobilized pursuant to this section is not released within twenty-four hours, it may be impounded and shall thereafter be released only upon the posting of bail and payment of the service fee required under subsection (c) of this section and compliance by the owner or operator with Section 72.22.060.

It is unlawful for a person to purposely or recklessly and without authority, tamper with, remove, attempt to remove, damage or deface any vehicle immobilization device attached to any vehicle. (Serial No. 81-13 § 2, 1981; Serial No. 80-13 § 2, 1980).

72.22.065 AUTHORITY TO EFFECT REGULATIONS. The chief of police is hereby empowered, with approval of the assembly to make all necessary regulations to effect all provisions of this title. (Serial No. 71-59 § 4 (part), 1971; CBJ § 72.22.065).

Chapter 72.24

SNOW EMERGENCY AND REMOVAL

Sections:

Drunk Driving Sanctions:

Vehicle, Registration and License Plate Forfeiture Laws

as of January 2000

State	*Statute*	*Details*
Alabama	None	
Alaska	§28.35.036	Vehicle forfeited for second or subsequent DUI offence (not mandatory)
Amer. Samoa	None	
Arizona	§28-697.01(A)	Vehicle forfeited for either third or subsequent DUI offense or for a DUI while license revoked/suspended for prior DUI or if committed while transporting child under 15 years old.
Arkansas	§5-65-117	(a) vehicle forfeited for fourth offense within three years, at court's discretion
California	Veh. Code §23592 et.seq.	Vehicle impounded 1-30 days for first offense, and 1-90 days for second or subsequent offense within 7 years. Vehicle subject to forfeiture for a DUI homicide, for two or more DUI offenses within seven years, or for a serious injury-related DUI with one or more DUI offenses within seven years
Colorado	None	
Connecticut	§14-227h	Vehicle impounded for 48 hours if person's driving privilege was either suspended or revoked at the time of offense.
Delaware	21 §2756(c)(1)	Impoundment of vehicle, plates or registration authorized for DUI while under license suspension/revocation for DUI or implied

		consent refusal, 1-90 days for first offense, one year for subsequent offenses
District of Columbia	§40-716(c-1)	Vehicle may be impounded for 24 hours for any DUI offense. If licensed registered owner of vehicle who is with offender at the time of offense, may take immediate possession of vehicle.
Florida	§316.193 (6)(d)	Vehicle used in DUI offense impounded or immobilized for 10 days for first offense, 30 days for second within three years, 90 days for third within 5 years.
Georgia	§40-6-391.2	Vehicle forfeited for fourth DUI if offense committed in habitual offender status based on three or more prior DUI convictions
	§40-6-391.2(i)	Court may order transfer of title to family member for demonstrated hardship for employment or family needs.
Guam	Title 16 §9104(e)	Vehicle used in offense subject to forfeiture for third or subsequent offense, or driver's license suspended one to five years in lieu of vehicle forfeiture
Hawaii	None	
Idaho	None	
Illinois	625 ILCS 5/4-203(e)	Vehicle impounded for 12 hours if law enforcement officers "reasonably believe" release will result in another DUI offense; 2nd offense 24 hours; 3rd offense 48 hours. However, vehicle may be released sooner if owner gives consent to competent driver.
Indiana	IC9-30-4-6(b)(3), & (d)(1)	Registration revoked for six months for second felony; involving a motor vehicle (second DUI)
Iowa	321J.4B (2), (5)(d), (7)(a), (7)(b)	For subsequent offenses, vehicle, registration and plates for all vehicles owned by driver may be impounded for 180 days or the period of license revocation, whichever is longer.
Kansas	8-1567(p)	Plate revoked for one year for fourth or subsequent offense.

Kentucky	None	
Louisiana	§14:98 (D)	Vehicle forfeited for 3rd offense or subsequent offenses, if vehicle used by offender is owned by him/her.
Maine	29-A §2411 et seq	For subsequent offense within in 10 years, registration and plates are suspended for the same time period as their driver's license suspension
	29-A §2421	Vehicle must be forfeited for a subsequent DUI offense while already under license suspension for DUI; temporary impoundment for 8 hours upon arrest for drunk driving offense. (29-A MRSA §2422)
Maryland	Trans. §16-303 §27-101 §27-111(d)	Registration suspended up to up to 120 days for driving on a suspended or revoked license for a previous DUI offense and/or vehicle can be impounded for up to 180 days
Massachusetts	None	
Michigan	1998 H.B. 4960	Provides for vehicle immobilization and forfeiture for 2nd or subsequent offenses (discretionary)
Minnesota	168041(3)	Plates may be impounded for first or subsequent offense
	168.042(1)(20	Plates and/or vehicle impounded for first or second offense within five years or for DUI child endangerment
	169.1217	Vehicle forfeited for third offense within five years, fourth offense within five years or for child endangerment and a second conviction or second revocation within five years or a third conviction or third offense within five years
Mississippi	63-11-30(2)(c)	Vehicle forfeited for third offense within five years
	63-11-49	Spouse may retain possession in case of hardship

Missouri	§82.1000	Permits some cities to enact vehicle impoundment or forfeiture laws
Montana	61-8-714 & 722	Vehicle must be forfeited for third or subsequent DUI offense within five years.
Nebraska	None	
Nevada	§60-6, 197.01(1)(a) & (1)(b)(i)	If defendant convicted of 2nd or subsequent offense, their vehicle must be immobilized 5 days to as much as 8 months. Vehicle can be released to co-owner of vehicle due to hardship.
New Hampshire	261:180 III	Registration suspended for same time period as license, on second or subsequent offense
New Jersey	§39:5-30(a)	Gives licensing agency discretionary authority to suspend/revoke registration of person in violation of traffic laws or "other reasonable grounds."
New Mexico	None	Previous provisions repealed
New York	Civ Prac 1301 & 1311	Vehicle forfeited for a DUI felony (i.e. second DUI offense within ten years at the discretion of the court
	V&T Law §1193 (2)(a) & (b)	Defendant's vehicle and registration may be suspended or revoked for same length of time as license revocation/suspension
North Carolina	20-28.2	Vehicle forfeited for DUI while on a revoked/suspended license
	§20-54.1	Registration for all vehicles owned by defendant can be revoked for time that license has been suspended/revoked.
North Dakota	39-08-01(3)	Plate may be impounded for same period as license.
	39-08-01.3	Vehicle may be forfeited for 2nd or subsequent DUI within five years.
Ohio	4507.164, 4511.195,	Plates impounded for 90 days for second

	4511.99	offense within six years and 180 days for third offense within six years; vehicle forfeited for subsequent offense within six years.
Oklahoma	47 §11-902b	Subsequent DWI offender's vehicle subject to forfeiture
Oregon	§809.700 §809.2 of chapter 1100 Laws of 1999	Vehicle impounded for second or subsequent offense or for a DUI while on a suspended or revoked license; Vehicle can be forfeited if offender had prior offense with in 3 years of been convicted of murder, manslaughter, negligent homicide or assault related to operation of a vehicle.
Pennsylvania	Case law	Vehicle may be forfeited for DUI offense: Commonwealth v. Crosby 568 A.2d 233 (PA Super. 1990)
Puerto Rico	None	
Rhode Island	31-27-2(d)(3)(ii);	Vehicle forfeited for third offense within five years;
	§31-32-4(b)	If license suspended then defendant may have registration of any vehicle they own suspended. However, such registrations are not suspended if financial responsibility is provided.
South Carolina	§56-5-6240	Vehicle forfeited for third or subsequent offence within 10 years. Vehicle can either be owned and operated by offender or operated by offender who is resident of household of registered owner.
South Dakota	§32-35-44	Registration suspended for all vehicles owned by driver for same time period license is revoked/suspended for DUI
Tennessee	55-10-403(k)(1)	Vehicle forfeited for second or subsequent offense
Texas	Tran Code §704.001	Vehicle may be forfeited after three or more DUI offenses
Utah	§41-6-44.30	Vehicle is impounded if driver arrested for DUI is the owner of the vehicle

Vermont	23 § 1213a, b	If second or subsequent offense vehicle can be immobilized for 18 months. If third offense the vehicle may be forfeited. If defendant is under 18 years old, vehicle is impounded for up to 60 days.
Virgin Islands	20 §544 (c)	Vehicle may be impounded at court's discretion if defendant fails to appear on a DUI charge.
Virginia	46.2-391.1	Registration suspended when license revoked/suspended for DUI conviction, or for driving on suspended/revoked license or for vehicular homicide
Washington	46.61.5058	Vehicle forfeited for second conviction within seven years, subject to possession by spouse in case of hardship
West Virginia	None	
Wisconsin	343.305(10m); 346.65(6)	Vehicle may be forfeited for third offense within ten years; Vehicle shall be forfeited for fourth or subsequent offense within ten years.
Wyoming	31-7-128(c)	Registration suspended for same period as license revocation/suspension, for subsequent DUI conviction within two years.

***Source*: Digest of State Alcohol-Highway Safety Related Legislation, 18th edition.**

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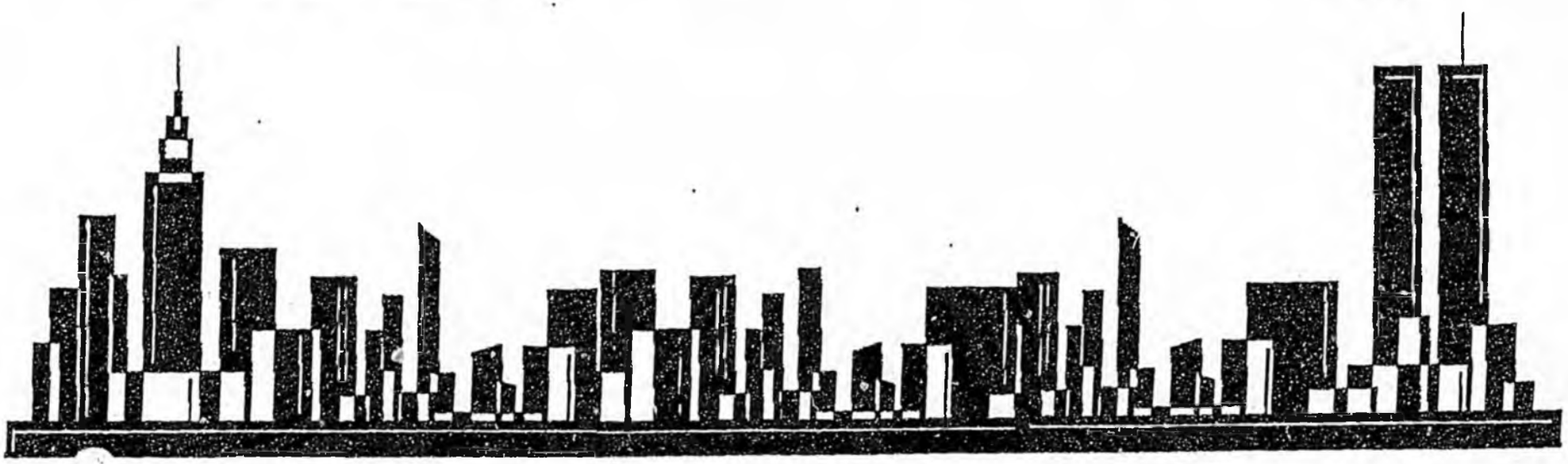
The Cutting Edge of Policing: Civil Enforcement for the 21st Century



SAVING LIVES

1993	1998
•Homicide Victims: 1927	•Homicide Victims: 629
•Shooting Victims: 5862	•Shooting Victims: 2004
•Vehicle Deaths: 536	•Vehicle Deaths: 365

From 1993 to 1998

Homicides Decreased 67%

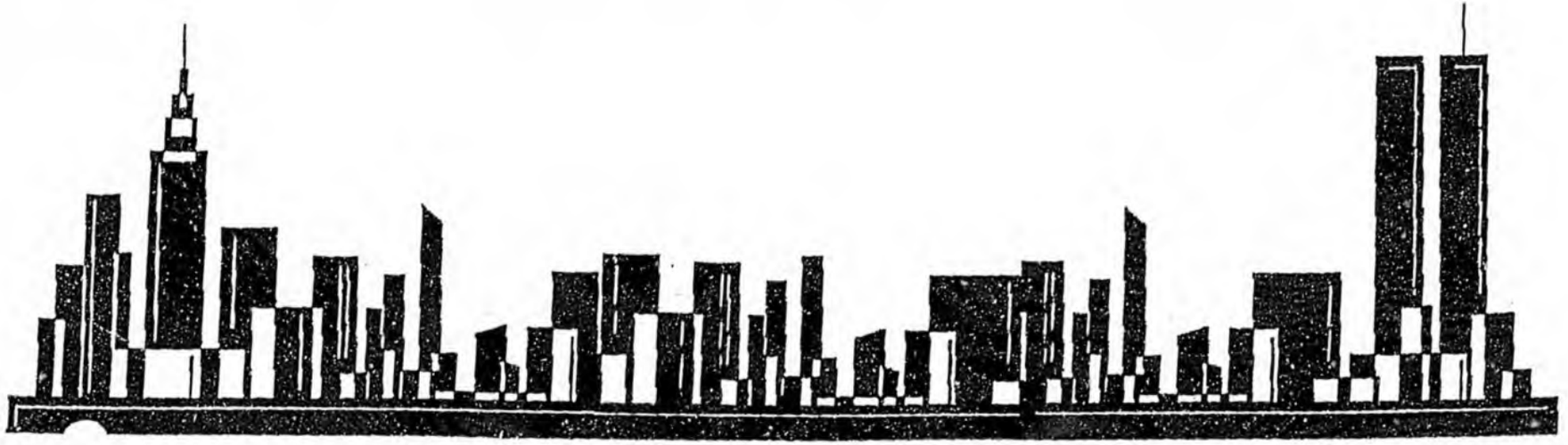
Shooting Victims Decreased 66%

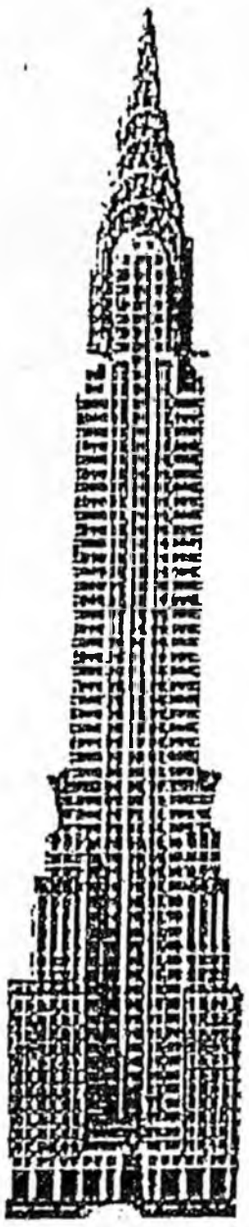
Vehicle Deaths Decreased 32%

Public Opinion Favors DWI Forfeitures

Quinnipiac College Poll of NYS registered voters,
March 24, 1999

	Good Idea	Bad Idea	No Opinion
Overall NYS:	54%	40%	6%
New York City:	56%	39%	5%
Women:	60%	32%	8%
Men:	46%	50%	3%





Overview of the Civil Enforcement Team

1 Civilian Attorney - Coordinator of the Forfeiture Unit

1 Lieutenant Attorney - DWI forfeiture coordinator

5 Staff Attorneys (3 Uniform, 2 Civilian)

3 Uniform law students

1 Civilian law school graduate

8 Police Officers performing litigation support functions

Results of the Program

Through April 12, 1999

- 672 arrests
  - 522 Intoxicated
  - 150 Impaired

- 255 Vehicles seized for forfeiture
- 74 Demands received
- 43 Forfeiture actions commenced

Results of the Program

Arrests for Driving while intoxicated and impaired
for the period February 22 to April 12

1998		1999	
TOTAL:	784	TOTAL:	672
Intoxicated:	643	Intoxicated:	522
Impaired :	141	Impaired :	150

14.3% decrease in total arrests

Results of the Program

DWI related accidents
for the period February 22 to April 12

1998	1999
248 Accidents	176 Accidents
2 Deaths	2 Deaths

29.03% decrease in accidents

Status of the Litigation

- The DWI Forfeiture Initiative began on February 21, 1999

- The New York City Civil Liberties Union has brought a constitutional challenge against Admin Code forfeiture actions as applied to DWI vehicles

- 43 DWI-related forfeiture actions have been commenced by the Civil Enforcement Unit as of April 13, 1999

DWI Forfeiture Initiative Strategy:

In each case, before a forfeiture action is commenced:

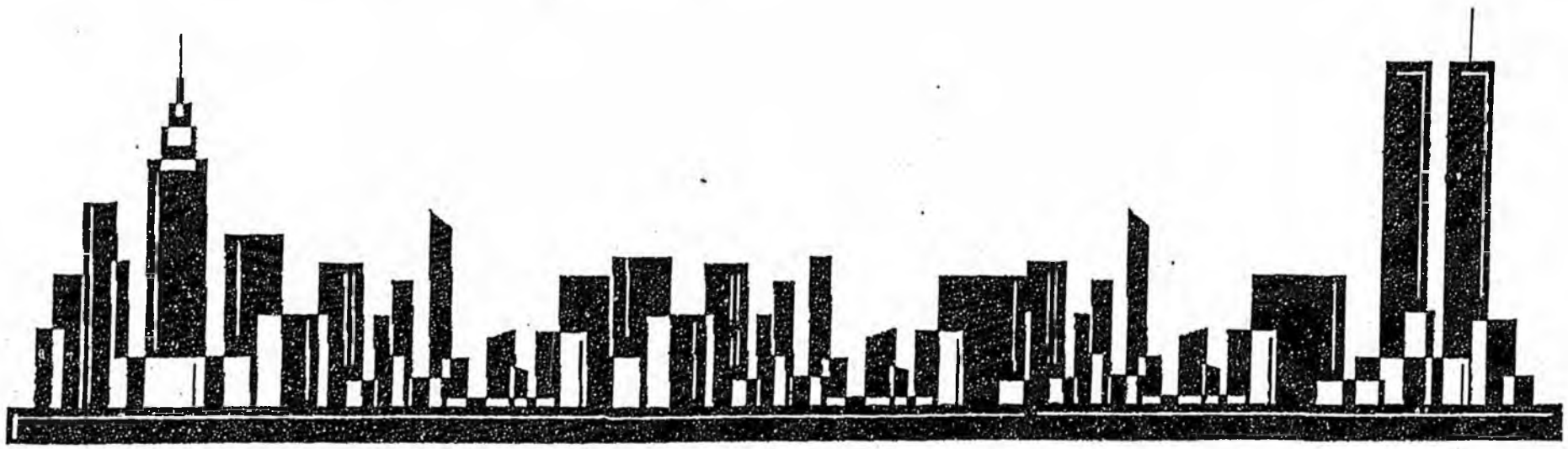
- The facts and circumstances are investigated by the Civil Enforcement Unit
- The decision to commence the action is made by a CEU supervising attorney

DWI Forfeiture Initiative Strategy:

- Once the drunken driver is arrested and his or her car seized and held for forfeiture, the defendant is given both:
  - a property receipt identifying the property
  - a notice describing forfeiture law procedure

DWI Forfeiture Initiative Strategy:

Before a vehicle is seized and held for forfeiture, a patrol supervisor (Sergeant or above) reviews the circumstances of the arrest and seizure.



DWI Forfeiture Initiative Strategy:

- The crime of DWI cannot be committed without a vehicle.

- The vehicle is therefore the ultimate instrumentality of DWI.

- Use of the forfeiture law is consistent with the NYPD's authority to seize weapons from criminals.

LEGAL BASIS

- The Admin. Code forfeiture statute allows forfeiture for any crime, including *first time* DWI arrests.

- In New York State, 87% of DWI deaths are caused by *first time* offenders.

- The statute has been upheld by both the New York State Court of Appeals and federal appellate courts.

LEGAL BASIS

- Admin. Code Forfeiture Law has been used more than 1000 times per year for each of the last 10 years
- Crimes include:
  - Drug and Marijuana possession and sale
  - Prostitution and Patronizing a Prostitute
  - Gambling
  - Stolen Property
  - Aggravated Unlicensed driving

LEGAL BASIS

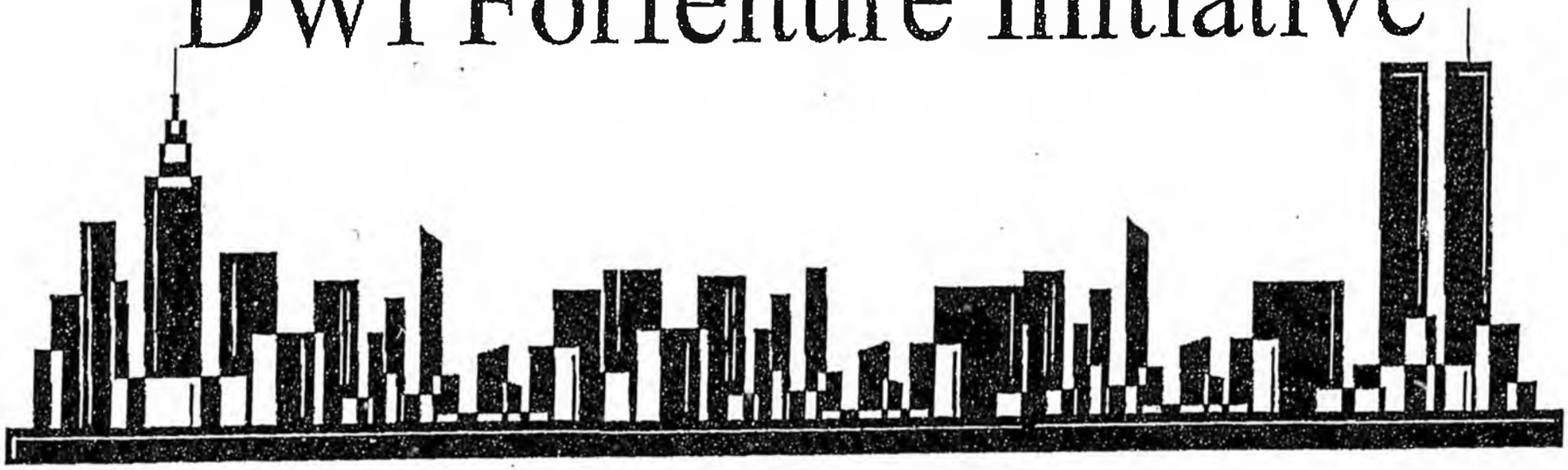
- The NYPD commences a civil law suit in State Supreme Court.

- The action seeks a declaratory judgement that the criminal defendant may not reclaim the property.

- The property is auctioned at the successful conclusion of the action.

Saving Lives

The New York City Police Department's DWI Forfeiture Initiative



LEGAL BASIS

- NYC Administrative Code § 14-140
- Allows the NYPD to bring a forfeiture action against property in its custody if:
  - it facilitated the commission of a crime, or
  - it is the proceeds of a crime

STATE LEGISLATIVE FACT SHEETS

CONTENTS

US Department of Transportation
National Highway Traffic Safety Administration

NHTSA
People Saving People
http://www.nhtsa.dot.gov

Vehicle and License Plate Sanctions

March 1999

Revoking or suspending a motorist's operators license is now a common penalty for many traffic infractions, especially those related to impaired driving. Unfortunately, many of these offenders continue to drive. It is not unusual for suspended drivers to receive additional traffic citations or be involved in crashes during periods of license suspension. As a way of reducing this problem, many states have passed laws that directly affect the offender's vehicle or license plates as a sanction for the impaired driving offense or for driving with a suspended license.

Some states now permit the vehicles of drivers convicted of certain impaired driving offenses to be impounded, immobilized (club or boot), or forfeited and sold. Other states allow the license plates to be removed and impounded. Still others allow for the use of specially marked license plates, or allow for the installment of alcohol ignition interlock devices.

Key Facts

- In 1997, 1.4 million people were arrested in the U.S. for driving under the influence (DUI) or driving while intoxicated (DWI)—more than all other reported criminal offenses except larceny and theft.
- About one-third of all drivers arrested or convicted of DWI each year are repeat DWI offenders.
- Drivers with prior DWI convictions are also overrepresented in fatal crashes and have a greater relative risk of fatal crash involvement.
- Many second- and third-time convicted DWI

offenders who had their licenses suspended accumulated traffic offenses or were involved in crashes during the suspension period. In one study, 32 percent of suspended second-time DWI offenders, and 61 percent of third-time offenders received violations or crash citations on their driving records during their suspensions.

- Many drivers do not reinstate their licenses even when eligible to do so. In one study involving first-time DWI offenders who had their licenses suspended for 90 days, 50 percent had not reinstated their licenses three years after they were eligible to be relicensed. Also, many of these offenders drive without auto insurance and do not attend treatment programs when required for reinstatement.

Legislative Status

Forty-four states have laws that can affect the vehicles or vehicle plates of offenders.

- **Vehicle Impoundment:** Overnight impoundment of the vehicle of an individual arrested for impaired driving is a typical practice in most states. Thirteen states have laws which permit longer-term impoundments for certain offenses, usually for repeat DWI offenses or for Driving While Suspended (DWS) where the original offense was related to a DWI infraction. States which impound vehicles for these types of offenses include California, Delaware, Florida, Illinois, Iowa, Michigan, Missouri, Montana, Nebraska, New York, Ohio, Oregon, and Wisconsin.

- **Suspension of Vehicle Registration:** In 19 states, vehicle registration is withdrawn upon conviction of a DWI or DWS offense where the original licensing action can be related to a DWI offense. States which can withdraw vehicle registrations for a DWI or DWS offense are Arizona, Arkansas, Delaware, Indiana, Kansas, Maine, Maryland, Michigan, Minnesota, New Hampshire, New Jersey, New York, North Dakota, Ohio, Oregon, Rhode Island, South Dakota, Virginia, and Wyoming. Some of these states have their own enforcement departments that send out investigators to pick up the license plates of these offenders. However, in general, the vehicle license plate

suspension provisions are poorly enforced.

- **Vehicle Confiscation:** Twenty-one states permit the vehicle of multiple DWI or DWS offenders to be confiscated or sold, where the original licensing action can be related to a DWI offense. These states are Alaska, Alabama, Arizona, Arkansas, California, Georgia, Maine, Minnesota, Missouri, Montana, New York, North Carolina, North Dakota, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Washington, and Wisconsin.

- **Vehicle Immobilization:** Courts can prevent a DWI or DWS offender from using his or her car by immobilizing the steering wheel (by using a club) or locking a wheel (with a boot). Currently, only Ohio uses these types of sanctions.

- **Special License Plates or Plate Markings:** Three states—Iowa, Minnesota, and Ohio—issue special license plates to permit the use of the vehicle by family members of convicted DWI offenders. Two states—Oregon and Washington—enacted laws which permitted officers to affix a zebra sticker over the annual year portion of the license plates of offenders.

- **Ignition Interlock:** The purpose of an ignition interlock is to prevent a person who has consumed alcohol from operating a vehicle. The device measures alcohol concentration in the breath and is attached to a vehicle's ignition system. Before the car can be started, a driver must blow a sample of his or her breath into the interlock device. If the driver's breath alcohol is below a specified concentration, the driver will be able to start the vehicle's engine. However, if the driver has a breath alcohol concentration above the established level, the vehicle cannot be started. Thirty-five states have laws providing for either the discretionary or mandatory use of ignition interlock devices for repeat and chronic DWI offenders. The ignition interlock is discretionary in 32 states: Alaska, Arkansas, Colorado, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Michigan, Missouri, Montana, Nebraska, Nevada, New York, North Carolina, North Dakota, Ohio, Oklahoma, Rhode Island, Tennessee, Utah, Virginia, Washington, West Virginia, and Wisconsin.

In three states—California, Oregon, and Texas—the law is mandatory under special circumstances. In some jurisdictions, interlocks may also be used for first offenders.

Recommendations for Strengthening and Increasing the Use of Vehicle and Vehicle Plate Sanctions

Interviews with state and local officials, judiciary members, and law enforcement officers suggest that while impoundment and forfeiture legislation is common, application of these laws is rare. The reasons cited include: (1) these laws are generally reserved for the relatively few multiple DWI offenders rather than the more numerous first offenders; (2) there are difficulties in dealing with nonoffender owners; (3) it is costly to store junk vehicles that are not reclaimed by their owners; and (4) judges are reluctant to punish innocent family members.

Yet some states have developed innovative ways for dealing with these problems. Minnesota experienced a twelvefold increase in the use of its license plate impoundment law when they switched from court-based to administrative enforcement of the impoundment law.

The following recommendations may help state legislators and local officials revise existing legislation or enact new legislation to increase the use and effectiveness of their laws.

- Consider legislation that provides for administrative impoundment of plates and civil forfeiture of vehicles. In general, try to avoid criminal laws providing for forfeiture, as courts rarely use them.

- Enact legislation that allows for seizure at the time of arrest if officers impound either the vehicle or plate. It is more difficult and costly to track down the offender's vehicle later, and the delay gives the offender the opportunity to transfer vehicle ownership.

- Consider legislation that makes it unlawful for the owner of a motor vehicle to allow another person to drive the vehicle unless the owner determines the person possesses a valid driver's license. Also,

require nonoffender owners to sign an affidavit stating they will not allow the offender to drive the vehicle again while the suspension is in effect.

- Establish a computerized state record-keeping system to document vehicle (impoundment and forfeiture) and license plate actions. This allows states to monitor use of the sanctions.

- Apply impoundment laws to all repeat DWI offenders and to all DWS offenders where the original infraction was for a DWI offense. This will encourage an increase in the use of impoundment since many courts do not apply this sanction to second-time DWI offenders or to first-time DWS offenders.

- Where the law provides for special license plates (e.g., family plates or license plate sticker laws), incorporate a provision that permits officers to stop the vehicle for the sole purpose of checking whether the driver is operating the vehicle while their license is under suspension.

Research and Evaluation Regarding the Effects of Vehicle and Plate Sanctions

- **Maryland ignition interlock program lowered the re-arrest rate for repeat alcohol offenders:** A Maryland study involving 1,380 repeat alcohol offenders randomly assigned participants to either an ignition interlock group or a control group that did not receive the sanction. Alcohol-related traffic re-arrest rates were tabulated for a full year. They showed that only 2.4 percent of the interlock group was re-arrested, whereas 6.7 percent of the control group was re-arrested—a statistically significant difference indicating that the interlock program reduced the risk of an alcohol traffic violation within the first year by about 65 percent. Additional analyses of post-interlock recidivism are being examined. Other research on ignition interlocks is being conducted in Illinois and Alberta (Canada). Recently, NHTSA initiated another assessment of ignition interlocks. The focus of this congressionally mandated study is to conduct additional research on the effectiveness of these devices once they have been removed from offenders' vehicles. The findings from this four-year research effort will become available in 2002.

- **Minnesota License Plate Impoundment Study:** In Minnesota, violators incurring three DWI violations in five years, or four or more in ten years, can have their license plates impounded and destroyed. An evaluation of the effects of the law found a significant decrease in recidivism for violators who had their plates impounded versus violators who did not. Violators whose license plates were impounded by the arresting officer showed a 50 percent decrease in recidivism over a two-year period (when compared with DWI violators who did not experience impoundment).

- **Ohio Impoundment and Immobilization Program:** In Franklin County (Columbus), Ohio, researchers conducted a field test to study the deterrent effects that a combined impoundment and immobilization sanctions program has on crashes and violations for multiple DUI (Driving Under the Influence) and suspended license offenders. From September 1993 to September 1995, the vehicles of nearly 1,000 offenders were impounded and then immobilized. The recidivism rates of these offenders were compared to eligible offenders who did not receive a vehicle sanction. Offenders whose vehicles were impounded and immobilized had lower rates of recidivism (7%) both during and after the termination of the sanction than offenders who managed to avoid the impoundment and immobilization sanctions (11%). The project will also provide information on methods and procedures for implementing such a program, the types of problems that may be experienced, and recommendations for solutions.

- **California Impoundment and Forfeiture Program:** NHTSA, in conjunction with the State Department of Motor Vehicles, is conducting a three-year effort to study the impact of California's new vehicle impoundment law as applied to unlicensed and suspended license offenders. The innovative 30-day impoundment law is not typical of those found in most states, but involves a civil action independent of a criminal DWS conviction for those caught driving without a license. Findings indicate that during 1995, more than 100,000 vehicles were impounded, but only 246 were seized and processed for forfeiture under the new laws. More than 6,300 unlicensed drivers and those with suspended or revoked

licenses whose vehicles were impounded were compared to about the same number of drivers in 1994 whose vehicles would have been eligible had the 1995 impoundment law been in effect. Driving records of both groups were compared for a one-year period on subsequent traffic violations and crashes. First offenders whose vehicles were impounded had an average rate of subsequent DWS or driving while unlicensed (DWU) that was 24 percent lower than those whose vehicles were not impounded. Repeat offenders had 34 percent fewer DWS or DWU convictions. Also, both first-time and repeat offenders whose vehicles were impounded had fewer crashes—there was a 25 percent reduction for first-time offenders and a 38 percent reduction for repeat offenders.

- **North Carolina Alcohol Ignition Interlock Program:** A study was conducted to determine the effectiveness of an interlock program in reducing recidivism among second-time DWI offenders. In North Carolina, these offenders are eligible to petition for a conditional license that is valid for the last two years of the four-year revocation period. Assignment of petitioners to the interlock program was based on completion of the petition and the decision of a hearing officer. The findings suggested that as compared to those receiving a full four-year hard license suspension, or those given the conditional license without an interlock, offenders receiving the interlock had a reduced rate of recidivism while the interlock was installed. However, when the interlock was removed and a valid license obtained, the recidivism rate of these drivers rose substantially. The findings from the North Carolina study support those of a research study conducted in Hamilton County (Cincinnati), Ohio. In that study, an interlock program was found to reduce recidivism while the interlock was installed on the vehicles of multiple DWI offenders, but once removed the benefits did not continue (as compared to a license suspension group). Both studies suggest that, at least for multiple DWI offenders, long-term drinking and driving behavior patterns are not impacted.

- **Zebra Tag Program in Oregon and Washington States:** In Oregon, suspended license offenders whose vehicle plates were "zebra tagged" had fewer subsequent DWI and DWS violations than

suspended offenders who did not receive the special tags. Also, among suspended license offenders, the possibility of receiving a zebra tag if re-arrested appears to reduce subsequent violations and crashes. A similar law in Washington State did not affect subsequent violations or crashes for these types of offenders; however, it was not applied to nearly as many drivers and vehicles and it was not as strongly enforced by the police. (Legislators in both states allowed the zebra tag law to expire.)

Transfer and Grant Programs

In 1998, as part of the TEA-21 Restoration Act, a new Federal program (see section 164 program) was established to encourage states to address the problem of the repeat intoxicated driver. To comply with Section 164, the state's laws must require that certain sanctions must be imposed on persons convicted more than once within a five-year period of driving while intoxicated or driving under the influence of alcohol (DWI/DUI). One of the sanctions that must be imposed is:

- that all motor vehicles of repeat intoxicated drivers be impounded or immobilized for some period of time during the driver's license suspension period, or that an ignition interlock system be installed on all motor vehicles of such drivers for some period of time after the end of the suspension period.

States that do not meet the Section 164 requirements will have a portion of their Federal-aid highway construction funds redirected into other state safety activities, beginning in fiscal year 2001.

In addition, TEA-21 modified the Section 410 grant program. Under the program, as modified by TEA-21, states that qualify for a basic grant may also qualify for supplemental grant funds by meeting one or more of six criteria. One of the six criteria is a program to reduce driving with a suspended driver's license. In order to qualify for a supplemental grant under this criterion, a state must impose one of the following sanctions on individuals convicted of driving after their license has been suspended for an alcohol-related offense: suspension of the offender's vehicle registration and return of license plates; impoundment, immobilization, forfeiture or confiscation of the offender's motor vehicles; or the use of distinctive

license plates on the offender's motor vehicle.

Information Sources

Beck, Kenneth H., et al. *The Effects of Alcohol Ignition Interlock License Restrictions on Multiple Alcohol Offenders: A Randomized Trial in Maryland.* Paper presented at the 14th International Conference on Alcohol, Drugs and Traffic Safety, Annecy, France, September 1997.

A Guide to Sentencing DUI Offenders. NHTSA and NIAAA, DOT HS 808 365, March 1996.

Model Specifications for Breath Alcohol Ignition Interlock Devices (BAIIDS). Federal Register Notice, Vol. 57, No. 67, Tuesday, April 7 (11772-11786).

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In Vehicle BAC Test Devices as a Deterrent to DUI. Unpublished NIAAA Final Report, January 1993.

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Popkin, C., et al. *An Evaluation of the Effectiveness of Sanctions for DWI in Preventing Recidivism in North Carolina.* UNC HSRC, Raleigh, NC, September 30, 1992.

Alcohol Ignition Interlock Service Support. DOT HS 807 923, Final Report, December, 1992.

De Young, N.J. An *Evaluation of the Specific Deterrent Effect of Vehicle Impoundment on Suspended, Revoked and Unlicensed Drivers in California.* DOT HS 808 727, Final Report, November 1997.

The reports and additional information are available from your State Highway Safety Office, the NHTSA Regional Office serving your State, or from NHTSA Headquarters, Traffic Safety Programs, ATTN: NTS-12, 400 Seventh Street, S.W., Washington, DC 20590; 202-366-2708.

TRAFFIC TECH

NHTSA Technology Transfer Series

Number 180 July 1998

CALIFORNIA IMPOUNDS THE VEHICLES OF MOTORISTS CAUGHT DRIVING WITHOUT A VALID LICENSE

One strategy that has been pursued to reduce the number of motor vehicle crashes in the United States has been to identify and control high risk drivers through law enforcement and court imposed sanctions against the individual. These sanctions include fines; driver license actions such as suspensions or revocations; jail, community service, and alcohol treatment.

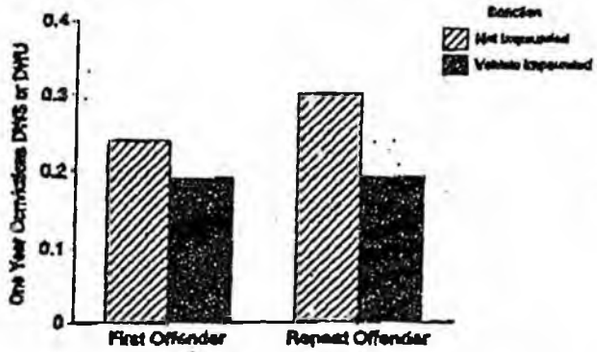
While suspending or revoking a driver's license is effective, these sanctions have limitations because they do not actually incapacitate the driver. Some studies have found that as many as 75 percent of these drivers continue to drive during periods of suspension or revocation. While other studies have shown that these individuals drive less often and more carefully during suspension and revocation periods, they still pose a threat. In California, drivers with suspended or revoked licenses have 3.7 times the fatal crash rate as the average driver.

The National Highway Traffic Safety Administration (NHTSA) sponsored a study by the California Department of Motor Vehicles to evaluate how vehicle impoundment affects the driving behavior of drivers who are unlicensed or whose licenses are suspended or revoked.

California's Impoundment Program

California began an impoundment program in January, 1995. Under the program, law enforcement officers can impound vehicles on the spot of drivers who do not have a valid license. The impoundment period lasts for 30 days. According to law enforcement agencies throughout the state, more than 100,000 vehicles are being impounded each year..

For this study, two counties (Stockton and Riverside) and two cities (San Diego and Santa Barbara) linked driver record data with vehicle impoundment data. More than 6,300 unlicensed, suspended, or revoked drivers whose vehicles were impounded were compared to about the same number of drivers in 1994 whose vehicles would have been eligible for impoundment in the new program in 1995. For one year, the driving records were gathered and compared for convictions of driving while suspended (DWS) or driving while unlicensed (DWU), total traffic convictions, and crashes for both first time and repeat offenders.



Subsequent DWS or DWU Convictions for First and Repeat Offenders

Fewer Subsequent Offenses

The graph above shows that first offenders whose vehicles were impounded had an average rate of subsequent DWS or DWU conviction that was 24 percent lower than those whose vehicles had not been impounded. Repeat offenders had 34 percent fewer DWS or DWU convictions than their control group.

U.S. Department of Transportation
National Highway Traffic Safety Administration

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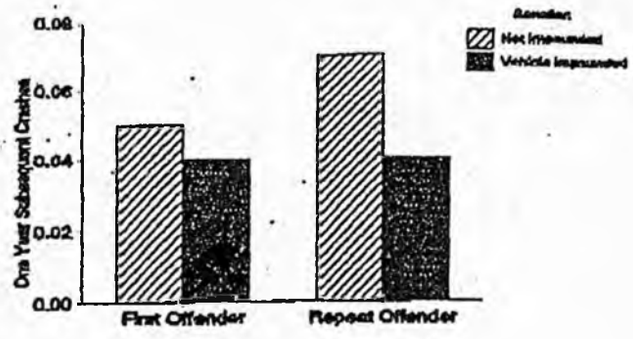
Subsequent Traffic Convictions for First and Repeat Offenders



Subsequent Crashes for First and Repeat Offenders

Fewer Subsequent Traffic Convictions

Drivers whose vehicles were impounded also had fewer subsequent traffic convictions. For first offenders, recidivism was 18 percent lower than drivers who still had access to their vehicles. The differences were even more striking for repeat offenders. Repeat offenders whose vehicles were impounded had 22 percent fewer traffic convictions than those whose vehicles had not been impounded.

Fewer Subsequent Crashes

Both first time and repeat offenders whose vehicles were impounded also had fewer crashes. The next graph shows that there was a 25 percent reduction for first time offenders and a 38 percent reduction for repeat offenders in subsequent crashes.

Vehicle Impoundment Works

Vehicle impoundment is having a positive effect on traffic safety in California, reducing the number of crashes and subsequent citations. Importantly, it appears even more effective for repeat offenders -- those high risk drivers who traditionally have been resistant to change. Removing access to the vehicle by impounding it is one way to limit driving during periods of suspension or revocation.

How To Order

For a copy of the report, ***An Evaluation of the Specific Deterrent Effect of Vehicle Impoundment on Suspended, Revoked and Unlicensed Drivers in California,*** (52 pages), write to the Office of Research and Traffic Records, NTS-31, NHTSA, 400 Seventh Street, S.W., Washington, DC 20590, or send a fax to (202) 366-7096. Marv Levy was the contract manager for this project, email: *mlevy@nhtsa.dot.gov*

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Drunken Driving

Does America need tougher laws?

In 1980, 28,000 people were killed in alcohol-related crashes. But the past 20 years have seen a sea change in attitudes toward drinking and driving. Drunken-driving deaths dropped to a record low in 1999, when "only" 15,786 people died. Encouraged by Mothers Against Drunk Driving (MADD) and other organizations, many states and the federal government have passed tough anti-drunken-driving legislation. Nonetheless, drinking and driving remains a serious national problem, and experts worry that the progress in reducing drunken driving has slowed. While safety advocates say the legal threshold for drunken driving should be lowered to a .08 percent blood-alcohol concentration, the alcoholic-beverage industry says the stricter standard would penalize responsible social drinkers.

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FREE WEB TRIAL
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DRUNKEN DRIVING

Cover: Four Vermont teenagers died in this car when they crashed on the way home from a night of drinking in Canada, where the drinking age is 18. (AP Photo/Alden Pellett)

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Drunken Driving

BY KATHY KOCH

THE ISSUES

Betsy Carlson was 22 when a drunken driver hit her. It was 8 o'clock on a November morning in 1977 as she drove to work in Glen Ellyn, Ill. But Carlson, who now walks with a cane, remembers as if it were yesterday.

"I remember the other car coming across the center yellow line and heading straight at me," she recalls.

She was in a coma for a month and a half, and then three months in the hospital learning to walk and talk again. She suffered brain damage, a broken neck, a shattered left knee, a broken jawbone, two broken wrists and multiple other injuries, some not discovered until years later.

AP Photo/Stephen J. Boitano

MADD National President Millie I. Webb urges Congress to set the national drunken-driving limit at .08 percent, at a rally on Capitol Hill on Sept. 6. Webb's nephew, in photo, and a daughter died in a crash with a drunken driver.

The driver who hit her ended up having to take a driver's re-education course. "Remember," Carlson says, "it was the 1970s, and everybody laughed about drunk driving back then."

Since then, American attitudes about drinking and driving have undergone a sea change. The states and federal government have strengthened enforcement, sponsored anti-drunken-driving campaigns and passed tougher laws covering driving while intoxicated (DWI).

All the attention drove drunken-driving deaths to a record low in 1999, when "only" 15,786 people were killed in alcohol-related crashes — a 43 percent drop from drunken-driving death tolls of the early 1980s. At the same time, the percentage of auto fatalities caused by drunken drivers dropped from 57 percent in 1982 to 38 percent last year. [1]

Such unprecedented progress is partly attributable to the public education and lobbying efforts of the highly effective grass-roots organization Mothers Against Drunk Drivers (MADD).

But MADD, which celebrates its 20th anniversary this year, says that problems remain. Alcohol-related collisions still kill 43 people a day — the equivalent of two airplane crashes a week, says Brandy Anderson, MADD's director of public policy.

"If two jetliners were crashing every week — week after week — the public outcry would be deafening," she says. "This issue should not get any less attention, especially since it's a completely preventable violent crime."

Alcohol was involved in 2.7 million car crashes in 1998, according to the Centers for Disease Control and Prevention (CDC). Moreover, the CDC says, Americans drink and drive an estimated 123 million times a year. [2]

The costs are enormous, according to the National Highway Transportation Safety Administration (NHTSA). Each drunken-driving fatality costs about $3.2 million in monetary losses — an estimated $45 billion annually — and injuries cost more than $110 billion a year. [3]

Unfortunately, progress in reducing drunk-driving fatalities has slowed. Over the past three years, America's drunken-driving crash rate has leveled off, as the easiest-to-reach drivers — social drinkers — have gotten the message.

Today, heavy drinkers, alcoholics and repeat offenders are responsible for most drunken driving and most alcohol-related accidents. During weekends, when most drunken driving occurs, very heavy drinkers — those with a blood-alcohol concentration (BAC) 50 percent above the legal limit — are involved in 65 percent of drunken-driving fatalities, according to NHTSA. And up to one-third of all alcohol-related fatalities are caused by drivers with a prior conviction.

In addition, says Julie Rochman, vice president for communications at the Insurance Institute for Highway Safety (IIHS), over the past 20 years drunken driving has increased among women, Hispanics and white males ages 21 to 34.

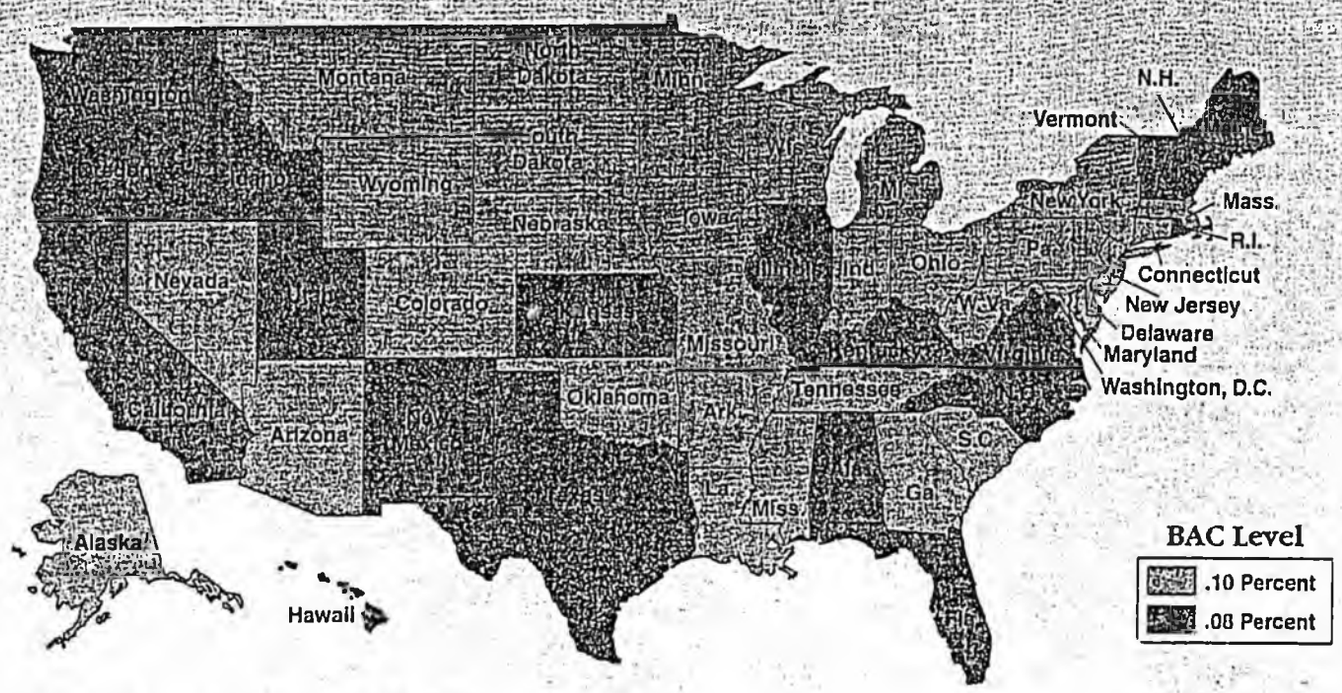
However, alcohol industry groups claim that federal statistics are overstated because NHTSA defines an "alcohol-related" traffic accident as any crash in which the BAC of anyone involved is .01 percent or greater — one-tenth the level at which most states define drunken driving. The government also classifies an accident as alcohol-related regardless of whether the driver, a pedestrian or a passenger was drinking.

The National Beer Wholesalers Association (NBWA) points out that in 1995, while 41 percent of traffic fatalities were classified as "alcohol-related," only 27.9 percent involved legally drunk drivers. "The NBWA believes federal drunk-driving statistics should accurately reflect the true dimensions of the problem," says an NBWA fact sheet.

Rick Berman, general counsel for the American Beverage Institute (ABI) — which represents family restaurant chains, says 10 percent of those included in federal drunken-driving statistics involved drunk pedestrians who walked in front of a driver. "Did

Most States Use Weaker Blood-Alcohol Threshold

Motorists in 31 states can be arrested for drunken driving if their blood-alcohol concentration reaches .10 percent. Mothers Against Drunk Driving (MADD) and other groups want state legislatures to drop the level to .08 percent, the threshold in 19 states, the District of Columbia and Puerto Rico.



Source: Mothers Against Drunk Driving, 2000

the drivers kill them or did they kill themselves?" he asks.

But emergency room doctors and nurses say drunken driving is grossly underreported, because very few injured intoxicated drivers are arrested once they enter a trauma center.

To get drunken drivers off the roads, the Clinton administration has pushed for a tougher drunken-driving standard nationwide and has set a goal of reducing alcohol-related fatalities to no more than 11,000 by 2005.

That won't be easy, safety advocates say. "The nation is barely making progress," says MADD President Millie I. Webb, herself the victim of a drunken driver. "We need tougher laws that will put the nation back in the fast lane for driving down the number of alcohol-related deaths and injuries."

But the alcohol and entertainment industries, as well as defense attorneys and civil liberties groups, stringently oppose some measures proposed for reaching the 11,000 goal.

Berman dismisses the efforts to tighten up the definition of drunken driving as a "DWI jihad" being conducted by "anti-alcohol nannies."

As the warring sides debate the issues, here are some of the questions being asked:

Should states lower the arrest threshold for drunken driving?

The administration and dozens of safety, law-enforcement, health-care and insurance groups say anyone with a BAC of .08 percent or more is too drunk to drive safely. With a .08 BAC, alcohol makes up nearly 1 percent of a person's blood.

Nineteen states and the District of Columbia and Puerto Rico have adopted that legal standard, but the rest define drunken drivers as anyone with a blood alcohol level of .10 percent — the most lenient drunken-driving threshold in the developed world.

"It is time for the U.S. to join the rest of the industrialized world by drawing the line against drunk driving at .08 BAC," says MADD's Webb, noting that even the wine- and beer-producing countries of Germany, France and Italy have lowered their BAC levels to .08 or lower.

In 1998, Congress adopted incentives for states to switch to the stricter standard. But because only two states have done so since then, supporters say the voluntary approach has failed. Instead, they prefer a measure adopted by House and Senate conferees on Oct. 3 that would deduct a portion of federal highway construction funds from states that don't adopt the stricter standard.

NHTSA, MADD and a coalition of safety groups argue that lower BAC levels are needed because:

• Peer-reviewed, scientific studies show that drivers at .08 BAC cannot brake, steer, change lanes, concentrate, monitor speed or react with appropriate skill to drive safely.

• Mature drivers with a .08 to .09 level of intoxication are 11 times more likely to be in a fatal accident than non-drinkers; for young male drivers the risk is 52 times higher.

• The .08 level is reasonable, and is a higher level of intoxication than "social drinking." To reach a .08 BAC, an average-sized man would have to drink more than four beers in an hour on an empty stomach; a woman would have to drink three.

• States adopting the stricter standard saw an average 6 to 8 percent drop in alcohol-related deaths, which would translate into 500 to 600 additional lives saved annually if all states adopted it.

But restaurant and some alcoholic beverage industry groups dispute nearly all of the above arguments for .08 BAC

Berman of the ABI says the stricter standard penalizes responsible social drinking. He says a .08 BAC would make it illegal for a 120-pound woman to drink two 6-ounce glasses of wine on an empty stomach over a two-hour period. "Not many would suggest this is alcohol abuse," he says.

Most drivers know their limits and "self-select themselves" out by not driving when they are too impaired, he says. Others can handle a car fine at a .08 BAC, he adds.

Berman contends that because any alcohol consumption affects driving abilities to some extent, lowering the limit to .08 is just the first step toward making it illegal to drive after even a single drink. He notes that several European countries have lowered their BAC limits to .02 to .05 percent.

The ABI and other alcoholic beverage industry groups argue that .08 BAC laws do not address the biggest causes of drunken-driving deaths — alcoholics, repeat offenders and those who drive at high BAC levels. Because 75 percent of alcohol-related traffic deaths involved BACs of more than .10 percent, adopting .08 BAC laws is "like lowering the speed limit to 50 mph to slow down maniacs who drive at 100 mph," Berman says.

Lowering the BAC also diverts scarce law-enforcement resources away from apprehending those high-BAC drivers, says the National Beer Wholesalers Association (NBWA).

But .08 proponents adamantly dispute critics' claim that the measure would criminalize social drinkers. They are playing a smoke-and-mirrors game," says MADD's Anderson. "We have plenty of clear, credible, peer-reviewed studies to show that drivers are too impaired to drive at .08."

As for Berman's claim that drivers know when they are too impaired to drive, she points out that about 3,500 people a year are killed by drivers with a BAC below .10. And by lowering the cutoff to .08, more .10 drivers will be arrested, she says, because police usually do not arrest drivers who are at or close to the legal limit.

Meanwhile, other opponents of .08 argue that the Senate action in June infringes on the 21st Amendment, which gives states the authority to regulate licensed beverages. "I don't believe it is the responsibility of the federal government to set these standards," said Sen. Larry E. Craig, R-Idaho, during a Senate Appropriations Committee markup June 13.[4]

But John Moulden, president of the National Commission Against Drunk Driving (NCADD) points out that all states adopted a 21-year-old drinking age law in 1984, at the urging of then-President Ronald Reagan. "Reagan was certainly no slouch when it comes to states' rights," Moulden says. "But he felt that the safety issue overrode states' rights."

Democratic Maryland state lawmaker William Bronrott argues, "This is not a states' rights issue. This is an issue of special interests vs. the public interest."

However, state and local government organizations, highway contractors and the American Automobile Association argue that states should decide how to spend highway safety and construction funds.

Since the Reagan era, says Frank Schafroth, director of state and federal relations for the National Governors' Association, states have grown increasingly opposed to restrictions being imposed on how federal funds are spent in the states. "Plus, the Senate measure would potentially divert a huge amount of money — 10 percent of federal highway funds — from state programs, and divert funds some governors feel are being used more effectively to reduce drunk driving by going after young and underage drinking drivers," he says.

As for the insurance industry, Rochman says insurers don't believe a .08 law is a silver bullet. "It's not our top priority," she says. "We believe the focus should be on effective enforcement of current laws and on repeat offenders and high-BAC drivers."

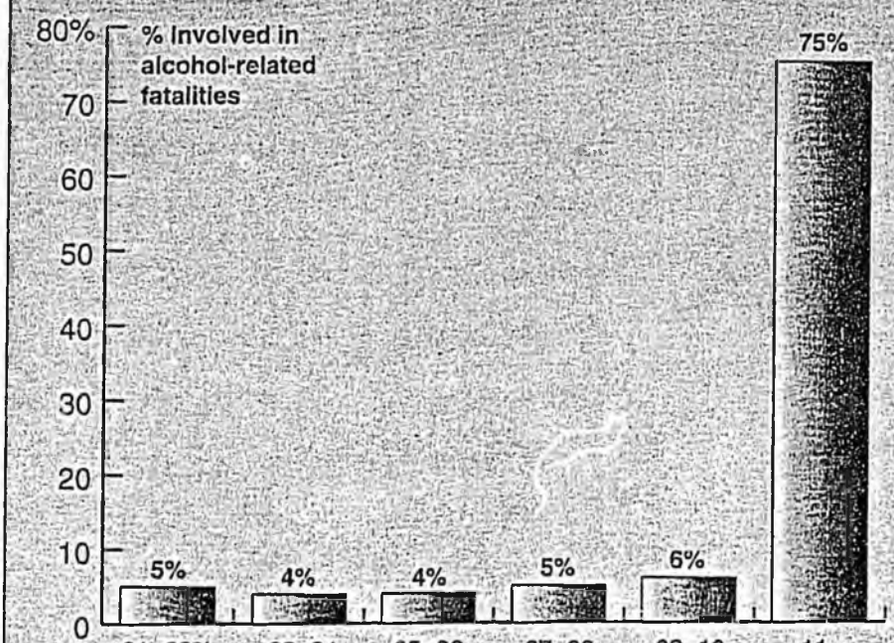
Should BAC testing be mandatory after auto accidents involving serious injuries?

When drunken-drivers are killed in car crashes, hospitals can release their blood-alcohol levels to police investigators. But if the drivers are only injured and go to a hospital emergency room (ER), their chances of being arrested or even having their BAC levels checked by police are slim to none — even if the accident caused deaths or other injuries. In fact, some studies show as few as 5 percent of injured drunken drivers admitted to trauma centers are ever charged with DWI.[5]

Breath tests are rarely given to injured drivers at the accident scene because an officer's first priorities are getting the injured to a hospital and restor-

Drunkest Drivers Cause Most Deaths

Drivers with a blood-alcohol concentration (BAC) of .11 percent or greater caused three-quarters of the nation's alcohol-related fatal traffic accidents in 1998. The alcoholic-beverage industry argues that lowering the BAC to .08 percent is pointless because drivers at the higher BAC threshold cause most alcohol-related fatalities.



Note: Percentages do not add to 100 due to rounding.

Source: The Century Council, funded by America's leading distillers; National Highway Traffic Safety Administration, Sept. 2, 1999.

ing traffic flow. And once injured drunken drivers enter an ambulance or ER, state privacy laws often protect their medical records.

"It's a huge hole in the system through which large numbers of drunk drivers are not getting detected," says Carol Bononno, an emergency nurse at the Oregon Health Sciences University Hospital.

Intoxicated drivers familiar with drunken-driving laws often escape detection by demanding to be taken to a hospital, even if they only have a scratch, says Carl A. Soderstrom, professor of surgery at the University of Maryland Medical Center in Baltimore.

"They know that once they make it to the ER, they are home free," says Stephen Simon, associate professor of clinical education at the University of Minnesota College of Law.

Yet by some estimates, Soderstrom says, 30 percent to 50 percent of injured drivers were drinking just before arriving at an emergency room, and the overwhelming majority have blood-alcohol levels well above .10 percent, which would make them legally drunk in all 50 states.

"Intoxication is so common among injured drivers, particularly on weekends and holidays, that it is not uncommon for many trauma surgeons and nurses to think that all of their patients are drunk," Soderstrom wrote recently.[6]

But privacy laws prevent ER doctors from proactively notifying police that a driver they are treating appears drunk or tested positive for alcohol. The investigating officer or witnesses must have noticed signs of drunkenness by the driver, and the officer must go to the ER and demand a blood sample that can then be tested at a police lab.

State legislators, ER professionals, police and insurance companies are debating whether ER personnel should be compelled to automatically report drunken drivers to police, just as they have been required to do for decades regarding gunshot victims and those suspected of abuse.

The debate often pits the police — anxious to get a conviction — against medical personnel anxious to protect doctor-patient confidentiality and the sanctity of medical records.

Some hospital administrators also worry that medical insurance companies may start denying reimbursement of expenses for patients who drive drunk. Some trauma centers have recently stopped automatically testing BAC levels out of fear either that they may not be reimbursed or that doctors will be tied up in court.

State legislatures are increasingly debating the issue, and eight states have recently revised their physician-patient privilege laws to either allow or require doctors to report drunken drivers.

Although some ER doctors feel they should be able to call the police to report drunken drivers, the American College of Emergency Physicians and the Emergency Nurses' Association both

support a more limited "responsive reporting" policy, in which medical personnel can answer a question or provide BAC levels, but only if asked by a law-enforcement officer.

MADD wants medical personnel to report any positive BAC test results in traffic crashes resulting in fatalities or serious injury. The group also calls for immunity from liability for medical personnel providing such information.

Requiring such reporting would provide a more realistic count of actual drunken-driving cases and would enable more victims to be compensated by state victims' compensation funds, MADD says.

Soderstrom, whose trauma center tests the BAC levels of 95 percent of its patients, says such testing is essential for the proper medical and pain management of emergency cases, and to identify chronic alcohol abusers who should be referred for treatment.

But he agrees with NCADD's voluntary policy — at least for now — because of the high percentage of judges who only slap drunken drivers on the wrist. "Before one mandates that doctors and nurses report drunk drivers and spend lots of time involved in court cases, we need higher drunk-driving conviction rates in this country," he says.

The University of Minnesota's Simon argues, however, that testing all injured drivers, regardless of whether they appear to have been drinking, is "an inappropriate use of limited resources."

Should police confiscate the vehicles of drunken drivers?

Since February 1999, New York City has confiscated cars of those arrested for drunken driving, and two Long Island counties (Nassau and Suffolk) have adopted similar policies.

Although police in New York and more than 20 other states were already allowed to confiscate the cars of repeat offenders, Mayor Rudolph W. Giuliani ordered police to also seize cars of first-time offenders. And just to make sure New Yorkers understood that he was serious, the mayor said the city might pursue permanent confiscation of some cars, even if the drivers were acquitted. By the end of the first year, police had seized 1,458 cars and begun forfeiture actions on 827. [7]

"We wanted to do everything we possibly could to make people think a second, third, fourth or fifth time . . . before getting behind the wheel of a car" and convince them that driving while intoxicated "is a grave, grave error and a crime," he wrote recently. [8]

Further, the mayor said, cracking down on first-time offenders was justified because first-time offenders cause 70 percent of drunken-driving fatalities in the United States.

Giuliani's get-tough policy seems to be working. During the first 11 months of the program, DWI crashes in New York City dropped more than 17 percent, and the number of DWI fatalities declined 18 percent, compared to the same period the previous year, Giuliani points out. "The number of people we've had to arrest for DWI has fallen by 24 percent," he wrote. [9]

MADD strongly supports the program. "These drunken drivers are using their cars as 4,000-pound weapons and are causing a tremendous amount of carnage on our streets and highways," said Maureen Fisher Ricardella, head of the New York City chapter. [10]

But Norman Siegel, executive director of the New York Civil Liberties Union, says the New York law violates the Constitution's innocent-until-proven-guilty clause. Moreover, he says, it severely penalizes innocent drivers who may be deprived of their cars for months while trying to prove their innocence.

Civil libertarians also question the disproportionate punishments resulting from the one-size-fits-all law, under which one motorist might lose a $40,000 car while another might forfeit a car worth only $1,000 for the same offense.

Siegel challenged the law last year, but a state judge ruled on May 19, 1999, that his group had not demonstrated that it was "unconstitutional, contrary to law or arbitrary and capricious." But Siegel vowed to continue the challenge, if necessary all the way to the U.S. Supreme Court. "We continue to believe the initiative is unfair and excessive," he said. [11]

Generally speaking, the Supreme Court has upheld the use of forfeiture by prosecutors, who have used similar statutes to seize the property of drug traffickers. "The idea of going at people through their property has a long history," said Daniel C. Richman, a professor at Fordham Law School. "I think seizing cars on DWI-related theories is state-of-the-art forfeiture law." [12] ■

BACKGROUND

Drunken Charioteers

There have been drunken drivers as long as there have been vehicles. An intoxicated Noah had difficulty maneuvering the ark, and drunken charioteers caused problems in Roman times. [13]

In the 19th century, the problem was intoxicated railroad engineers. In 1843, the New York Central Railroad prohibited employees from drinking while on duty, according to James B. Jacobs, author of *Drunk Driving, an American Dilemma.* [14]

By the turn of the century, after the automobile arrived on the scene, alcohol began playing an unprecedented role in serious and fatal traffic injuries. "Inebriates and moderate drinkers are the most incapable of all persons to

drive power motor wagons," said the authors of a 1904 article in the *Quarterly Journal of Inebriety*. [15]

By 1910, states had begun adding drunken-driving offenses to their traffic codes. But federal attention and resources were not mobilized to attack the problem until 1966, when NHTSA's precursor, the National Highway Safety Bureau, was established. A 1968 report by the fledgling agency found that alcohol use by drivers and pedestrians caused 25,000 deaths and 800,000 accidents a year. [16]

First Major Initiative

Two years later, in 1970, NHTSA launched the first major federal initiative against drunken driving — the $88 million Alcohol Safety Action Project — a mix of stepped-up enforcement, rehabilitation and public-information campaigns in 35 cities. DWI arrests in some jurisdictions jumped more than 300 percent, and tens of thousands of drivers received treatment at rehab centers. But the program was not renewed after studies couldn't confirm that it was reducing drunken driving. [17]

By the early 1980s, NHTSA mandated that states enact anti-drunken-driving strategies in order to qualify for federal highway funds. About the same time, two grass-roots victims' organizations cropped up, one on each coast. Remove Intoxicated Drivers (RID) was founded in Schenectady, N.Y., in 1978, and MADD two years later in Sacramento, Calif.

Both groups received federal grants and plenty of press and TV coverage. In 1983 NBC aired a documentary about the life of Candy Lightener, the founder of MADD, whose daughter was killed by a chronic drunken driver. MADD's membership rolls promptly doubled.

In 1982, President Reagan appointed a Presidential Commission on Drunk Driving, which in a 1983 report made more than 50 recommendations, including raising the legal drinking age to 21. In 1984, Congress did just that, passing the Minimum Uniform Drinking Age Act. The law saves about 1,000 lives a year, according to NHTSA.

Since then, pressured by federal legislation linking highway funds to adoption of stricter drunken-driving laws, states have passed a variety of sanctions — including mandatory jail terms, increased fines and automatic and lengthier license suspensions. Others have restricted plea-bargaining or imposed home detention with electronic monitoring.

The policies have paid off. From 1970 to 1986, DWI arrests nationwide increased nearly 223 percent. Between 1982 and 1998, the proportion of traffic deaths involving alcohol dropped 18 percent. [18]

Progress Slows

In 1994, however, the decline in DWI arrests began to slow down, and alcohol-related traffic deaths leveled off. Safety advocates say a variety of trends contributed to the slowdown, including a shift in the national mood — toward more states' rights — following the Republican takeover of Congress. Congress now insists that states be granted greater freedom to decide how to spend federal highway safety dollars.

In addition, safety advocates say, other social issues — such as crime, drugs and violence — have captured the public's attention, while aggressive driving and air bags became the "hot" traffic-safety issues.

Nonetheless, in 1995 NHTSA set the ambitious goal of reducing alcohol-related driving fatalities from the current level of 15,786 deaths to 11,000 by 2005. But safety advocates fear that will be difficult to attain because the attention of legislators, the public and the media has waned.

Plus, the restaurant and alcohol industries have spread large amounts of money around state capitols and Congress. According to a recent study by Common Cause, alcohol interests gave $22.7 million in campaign contributions to members of Congress and the national political parties in the past 10 years. And, the citizens' lobbying group says, alcohol interests spent another $22 million on salaries and entertainment expenses for lobbyists just between 1997 and the first half of 1999. [19]

In addition, in 1998 restaurant and alcohol-related businesses donated another $12.5 million to governors and state legislators in the 33 states tracked by the National Institute on Money in State Politics. Most of that money went to California, Illinois and Texas. [20]

The growing political strength of the opponents of anti-drunken-driving laws became evident in 1998, when MADD was handed a major political loss. After intense lobbying by alcohol and restaurant groups, Congress adopted a compromise provision that provided incentives — rather than sanctions — for states to move to the stricter .08 BAC standard. Since then, only two states have adopted the tougher standard. [21]

Meanwhile, during the past four years, proposed .08 legislation has been killed in numerous states, leading MADD's Webb to charge that lawmakers have "buckled under pressure from alcohol industry lobbyists."

"In the early days in the fight against drunk driving, MADD, the hospitality industry and law enforcement marched in lock step against drunk driving," Berman says. Since then, he says, advocates of .08 have launched a "holy war" against moderate drinkers, instead of focusing on hard-core alcoholics. "The issue has split our united front." ■

Chronology

CURRENT SITUATION

Action in Congress

The debate over whether states should have to adopt the stricter .08 percent drunken-driving standard was one of several thorny issues that delayed adoption of a $58 billion transportation spending bill. After weeks of bitter lobbying, a compromise .08 provision was adopted by House-Senate conferees on Oct. 3.

The compromise, offered by Senate Majority Whip Don Nickles, R-Okla., would delay implementation of the .08 requirement until 2004. States that don't adopt the stricter standard by then would lose 2 to 8 percent of their highway construction funds each year that they are not in compliance. If a state adopts the .08 standard by fiscal 2007, it would recover the lost funds.

"This is a victory for the American people — a triumph of the public interest over special interests," said Sen. Frank Lautenberg, D-N.J., who had championed the Senate's original version. "Today we put the brakes on drunk driving and saved hundreds of lives by making .08 the standard for every state."

During the fight, money poured in to campaign coffers from the alcohol industry. According to the Center for Responsive Politics, the alcohol industry contributed $6 million in the current election cycle, up one-third from the 1995-96 cycle. Anheuser-Busch Companies Inc. contributed more than $1 million to the total. [22]

NCADD's Moulden attributed Congress' action in part to public outrage over the recent Ford-Firestone tire controversy. "When the American public

1970s-1980s

Drunken-driving victims' groups turn public opinion against drinking and driving. Federal government mandating that states enact anti-drunken-driving strategies to qualify for highway funds.

1970
First major federal initiative against drunken driving — the $88 million Alcohol Safety Action Project — is launched. DWI arrests jump more than 300 percent in some jurisdictions.

1978
Remove Intoxicated Drivers is founded in Schenectady, N.Y.

1980
Mothers Against Drunk Drivers (MADD) is founded in Sacramento, Calif., later changed to Mothers Against Drunk Driving.

1983
Commission on Drunk Driving appointed by President Reagan makes more than 50 recommendations, including raising the legal drinking age to 21. TV movie about MADD boosts group's growth. Utah becomes first state to pass a .08 BAC law.

July 17, 1984
National Minimum Drinking Age Act sets 21 as the minimum drinking age nationwide.

1990s-Present

Federal government steps up its campaign against underage drinking and drunken driving.

1994
DWI arrests slow down, and alcohol-related traffic deaths level off.

January 1995
Administration establishes a goal of reducing alcohol-related driving fatalities to no more than 11,000 by 2005.

July 1995
A provision sponsored by Rep. Scott L. Klug, R-Wis., allowing states to lower their drinking age without losing federal highway funds, is defeated.

May 1996
Legislation authored by Klug to sever the link between a state's drinking age and federal highway funds dies in committee.

1998
Congress offers incentive grants to pressure states to reduce the legal blood-alcohol level from .10 percent to .08 percent. States that don't go along by 2001 would lose federal highway money.

June 15, 2000
Senate adopts measure mandating states to adopt the .08 BAC standard or lose about $1 billion in highway construction funds. MADD celebrates its 20th birthday, with 3 million members and supporters. Alcohol-related fatalities represent 38 percent of total fatalities, down from 55 percent in 1980.

How Hard-Core Drunken Drivers Get Off Easy

The family was driving home in DuPage County, Ill., after a wedding on Aug. 12, when suddenly a white van crashed through their minivan's windshield, remembers 7-year-old Kanwarjot Dhami. He and his sister Prinkia survived, but not their parents and grandparents.

The driver of the white van had a revoked license and a blood-alcohol concentration (BAC) twice the legal limit. In fact, two years earlier, he had been charged with drunken driving on the same road.[1]

In Illinois and around the country, such incidents have led to public demands for a crackdown on hard-core drunken drivers — those who repeatedly drive with BAC levels of .15 percent or above. An average-sized man would need to consume seven drinks in an hour to reach the .15 level.

Hard-core drunken drivers cause much of the slaughter on America's highways, according to a recent National Transportation Safety Board (NTSB) study. In 1998, 17 people were killed *every day* in collisions involving such drivers — at an estimated cost of at least $5.3 billion.[2]

High-BAC drivers make up only 1 percent of all drivers on weekend nights but are involved in nearly half of the fatal crashes during those hours. And 35 percent to 40 percent of drinking drivers killed in traffic collisions had at least one prior driving while intoxicated (DWI) conviction.

But across the country, many state laws and judges repeatedly grant such offenders multiple "second" chances. They do not consider them as felons and often do not require them to serve jail time.

Safety advocates say many judges are reluctant to send drunken drivers to already crowded jails or revoke a drivers' license or confiscate a car for fear it will prevent them or other family members from getting to work.

The NTSB and a variety of safety groups recommend a variety of proven-effective measures to get hard-core drunken drivers off the road. For instance, The Century Council, a think tank funded by America's leading distillers, recommends saturation patrols and sobriety checkpoints, statewide DWI reporting systems and increasing the penalties for refusing a breathalyzer or blood-alcohol test. "Without statewide reporting systems, police officers don't know from one county to the next whether someone is a repeat offender," says William P. Georges, the council's vice president for traffic safety.

Among other things, the group also recommends administrative license revocation (ALR) — on-the-spot suspension of suspected drunken drivers' licenses if they fail or refuse a sobriety test. ALR is the "single most effective action a state can take to reduce alcohol-related crashes and fatalities," Georges says. States with ALR laws typically see a 6 percent to 9 percent reduction in alcohol-related traffic fatalities, he says.

Chronic drunken drivers should be forced to undergo alcoholism treatment, Georges says, and there must be intensive supervision after the treatment is finished. Finally, safety advocates recommend graduated penalties, which increase according to the driver's BAC levels and multiplicity of offenses.

The biggest obstacle to such crackdowns, says William Bronrott, a Democratic Maryland legislator, is "the old-boy attitude that, 'There but for the grace of God go I.' "

John Moulden, president of the National Commission Against Drunk Driving, agrees. "The problem isn't a lack of legislation, but the absence of our collective commitment and political will to use the statutes and countermeasures we already have."

Sukhminder Dhami, whose niece and nephew were orphaned in the DuPage County crash, has her own suggestion for getting the repeat drunken driver who killed her family off the road. "He should be hanged," said the immigrant from India.[3]

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[1] "Man formally charged in traffic collision that killed four people in Hanover Park," *The Associated Press*, Aug. 14, 2000.

[2] "Actions to Reduce Fatalities, Injuries, and Crashes Involving the Hard Core Drinking Driver," National Transportation Safety Board, June 2000.

[3] Jeff Coen and Noreen S Ahmed Ullah, "Youngsters Awaken to Family's Nightmare; 2 Generations Killed in Crash Tied to DUI, *Chicago Tribune*, Aug. 15, 2000, p. 4.

gets turned on to a highway-safety issue," he says, "the groundswell can swamp any economic interest involved."

The ABI's Berman, who says that "emotion won out over evidence," hasn't given up the fight. "This is still a very contentious issue and a lot of state highway administrators are upset about it. Maybe the four-year delay will allow people more time to reflect on it."

Underage Drinking

The Century Council, a research group funded by distillers, calls youth drinking "one of society's most serious health concerns."[23] Alcohol-related traffic fatalities among drivers under age 21 declined by 60 percent from 1982 to 1998; still, in 1998, 2,730 young drivers were involved in fatal crashes. To combat the problem, the council supports zero-tolerance laws for underage drunken drivers.

The council also supports administrative license revocation (ALR), because 90 percent of teenagers say they would not drink and drive if it meant losing their license. Under ALR, teens caught driving with illegal BACs lose their license on the spot.

Besides pushing for .08 BAC laws, MADD has expanded its mission to stop

Continued on p. 804

At Issue:

Should states lower the BAC arrest threshold for drunken driving to .08 percent?

MILLIE I. WEBB
National President, Mothers Against Drunk Driving

WRITTEN FOR THE CQ RESEARCHER, OCTOBER 2000

Most Americans support lowering the legal drunken-driving limit to .08 percent blood-alcohol concentration (BAC), according to a new Gallup survey. No reasonable person would want to get on the road or in the car with a .08 percent BAC driver.

Although it's never safe to get behind the wheel after drinking, scientific research shows that virtually everyone is impaired at the .08 level. No matter how many drinks it takes to get to a .08 BAC, driving skills — braking, steering and reaction time — are seriously impaired at that level.

A 170-pound man would have to consume four drinks in an hour on an empty stomach before reaching .08. A 137-pound woman would reach .08 after three drinks. The risk of a fatal crash is at least 11 times greater at .08 BAC.

Opponents argue that .08 doesn't address the real problem. I am living proof that they are wrong. My family was destroyed by a crash caused by a .08 driver, which killed my 4-year-old daughter Lori and baby nephew Mitchell. The crash also caused my husband and me to suffer severe injuries and burns and caused the premature birth and legal blindness of my other daughter, Kara. After two dozen surgeries and two funerals, I can tell you firsthand of the importance of passing .08. One precious life lost is one too many. We can save 500 lives each year if every state passes .08.

Although .08 may seem like common sense to most of us, 31 states still define intoxicated driving as .10 BAC — the most lenient definition of drunken driving in the industrialized world.

The alcohol lobby has worked hard to keep .08 at bay, despite widespread public support. Since 1996, .08 bills have been killed in more than three dozen states as lawmakers buckled under pressure from the alcohol and hospitality industries. The .08 laws aren't getting passed at the state level, and federal incentive grants provide little real incentive.

There is no magic wand to solve the drunken-driving problem. It demands a comprehensive solution with strong law-enforcement efforts, public awareness and effective legislation, including the all-important .08 laws.

Congress has the opportunity to save lives and eliminate "blood borders" between states by passing a federal drunken-driving limit of .08 BAC. Congress and states'-rights supporter Ronald Reagan took the same approach in passing the federal 21 drinking-age law.

There is a time to put the public's interest ahead of the special interests. The time is now.

RICK BERMAN
General Counsel, American Beverage Institute

WRITTEN FOR THE CQ RESEARCHER, OCTOBER 2000

The "one drink equals impairment" crowd is taking us through the looking glass one more time. These anti-alcohol nannies are once again trying to get the federal government to withhold highway money used for building safer roads from states that refuse to arrest moderate drinkers who drive.

Consider the following from Candy Lightner, founder of Mothers Against Drunk Driving: "I worry that the movement I helped create has lost direction. [Focusing on .08 BAC legislation] ignores the real core of the problem."

The General Accounting Office, commenting on the most widely cited study supporting .08, called the three-page study "unfounded." After the California Department of Motor Vehicles and the University of North Carolina studied their own states' .08 laws, both found no effect on drunken driving.

Of course, the National Highway Traffic Safety Administration (NHTSA) and MADD believe otherwise. In 1997, NHTSA Deputy Administrator Phillip Recht told a Senate committee of a study that found 12 percent fewer drunken-driving fatalities resulting from California's .08 law. He didn't mention that the 12 percent figure was only a 1991 prediction. It proved to be false one year later. The real figure, 6.1 percent, actually was slightly worse than the improvement experienced by the rest of the country.

When NHTSA was confronted with its own calculation that under .08 laws, a 120-pound woman would be facing jail after having two 6-ounce glasses of wine over two hours, the agency denied it was possible — until NHTSA's own department head acknowledged it was true.

The Washington Post also has been on an anti-drunken-driving jihad for years. Describing the .08 level of impairment, the *Post* suggests arrest and imprisonment are warranted. However, the *Post* has a different view when it comes to cell phone use, even though *The New England Journal of Medicine* called cell phone users more dangerous than .08 drivers. On this impairment, the *Post* timidly suggests some new restrictions "wouldn't be a bad thing."

The drunken-driving problem of the early 1980s has evolved dramatically. People in control of their drinking behavior obey the new laws. Drunken driving exists today at a new level — what Katherine Prescott, past president of MADD, labeled "a hard core of alcoholics who do not respond to public appeals." Passing new laws aimed at everyone else is truly a Lewis Carroll knockoff.

Continued from p. 802

underage drinking. Young people are involved in more fatal crashes involving alcohol than any other segment of the population, and as the youthful population continues to grow, so does alcohol usage among teenagers. Binge drinking is becoming increasingly popular among high schoolers, MADD says.

OUTLOOK

'Stuck in Neutral'?

Reaching the administration's goal of reducing alcohol-related traffic deaths to 11,000 by 2005 may prove to be a daunting task, safety advocates say. From 1982 to 1999, alcohol-related fatalities dropped an astonishing 37 percent. Reaching the new goal would require an additional 31 percent drop — in half the time.

Complacency may threaten that goal. "When it comes to drunk driving," says the NCADD's Moulden, "our outrage has tempered, and our efforts seem to have run out of steam. Absent the media coverage of earlier years, some people — including state and national legislators — think we have solved this problem."

"We're stuck in neutral on drunken driving," says Jackie Gillan, vice president of Advocates for Highway and Auto Safety, a coalition of insurers, citizens' groups and safety organizations. "We're not making the kind of gains that we should."

Money may also threaten the goal of lowering the death toll, says MADD's Anderson. "The interest groups that oppose stricter state BAC laws are very well-funded and very powerful," she says.

Bronrott, who has followed the issue as both a congressional staffer and now as a Maryland legislator, agrees. "Believe me, legislator-lobbyist relationships are a lot more chummy in the state capitols than they are in Washington," he says. The alcohol industry in particular "has more leverage at the state level than at the federal level."

Given those ties, he says, "without federal action requiring states to adopt a .08 sanction bill, we will never get all 50 states to adopt a .08 level."

At the moment, industry analysts say, specialty beer and wine sales are up, because of the booming economy and the growth in the 21- to 34-year-old population, which drinks more beer. And as restaurants continue to serve super-size beverages, the amount of alcohol per drink has doubled in some cases.

Nonetheless, over the long term, the ABI's Berman says, "Americans are drinking less alcohol per capita than they did 20 years ago."

Whatever happens with the .08 BAC laws, MADD's Webb says the real long-term problem is getting judges and prosecutors to change the way they treat repeat offenders, as well as first-time drunken drivers.

"With more efforts at educating judges," she says, "we'll eventually have a judicial system that is more accountable."

Carlson, the Illinois housewife hit by a drunken driver, isn't waiting for lawmakers to make changes. For 20 years, she has been telling schoolchildren and police officers — in gruesome detail — how drunken drivers can destroy lives.

"I want to scare the hell out of them" she says. "Kids pass out on me all the time. I even had three state police officers pass out once." ■

Notes

[1] According to National Highway Traffic Safety Administration (NHTSA) figures.

[2] Daniel Hungerford, et al., "Screening for Alcohol Problems May Lessen the Risk," Centers for Disease Control and Prevention, Issue Forum: Drunk Driving, *The Washington Post*, Dec. 13, 1999.

[3] Injury costs include $40 billion in health care, car damages, legal fees and court costs, and $70 billion in lost quality-of-life, according to NHTSA's Web site: www.nhtsa.dot.gov/people/injury/alcohol/scost/us.htm.

[4] Quoted in Jeff Plungis, "Senate Passes Lean Transportation Bill, Expecting It to Bulk Up in Conference," *CQ Weekly*, June 17, 2000.

[5] Stephen Simon, "Medical Staff Reporting of Alcohol Levels Should be Mandatory," Issue Forum: Drunk Driving, *The Washington Post*, Dec. 13, 1999.

[6] Carl A. Soderstrom, "Testing Injured Drivers for Blood Alcohol Content is Valuable," Issue Forum: Drunk Driving, *The Washington Post*, Dec. 13, 1999.

[7] Juan Forero, "Police Ease Car Seizures in Some Drunken Driving Cases," *The New York Times*, January 21, 2000.

[8] Rudolph W. Giuliani, "Policy Makes Progress in the Fight Against Drunk Driving," Issue Forum: Drunk Driving, *The Washington Post*, Dec. 13, 1999.

[9] *Ibid.*

[10] Quoted in Michael Cooper, "Driving Drunk To Mean Loss Of the Vehicle," *The New York Times*, Jan. 22, 1999.

[11] Kit R. Roane, "City Wins Ruling on DWI Crackdown," *The New York Times*, May 20, 1999.

[12] Quoted in Alan Finder, "Drive Drunk, Lose the Car? Principle Faces a Test," *The New York Times*, Feb. 24, 1999.

[13] "Epidemiology of Alcohol-Related Accidents and the Grand Rapids Study," *Forensic Science Review*, Jan. 2000.

[14] James B. Jacobs, *Drunk Driving, an American Dilemma*, University of Chicago Press, 1989, p. xiv.

[15] Quoted in *Forensic Science Review*, *op cit.*

[16] "Alcohol and Highway Safety," Department of Transportation, 1968.

[17] Jacobs, *op cit.*, p. xv.

[18] *Ibid.*, p. xviii.

[19] "Paying the Price: How Tobacco Gun, Gambling and Alcohol Interests Block Common Sense Solutions to Some of the Nation's Most Urgent Problems," *Common Cause*, June 15, 2000.

[20] According to their Web site, at www.followthemoney.org/database.

[21] For details, see 1998 *CQ Almanac*, p. 24-3.

[22] *Ibid.*

[23] The Century Council, "Looking Back, Moving Forward," March 2000, p. 6.

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Selected Sources Used

Books

Jacobs, James B., Drunk Driving, an American Dilemma, *University of Chicago Press*, 1989.

Jacobs examines the rise of drunken driving and ways to control it through deterrence, insurance surcharges, tort liability, public education and rehabilitation.

Articles

Finder, Alan, "Drive Drunk, Lose the Car? Principle Faces a Test," *The New York Times*, Feb. 24, 1999.

Finder discusses how the U.S. Supreme Court has generally upheld the use of property forfeiture, such as New York City's new law to confiscate the cars of drunken drivers.

Giuliani, Rudolph W., "Policy Makes Progress in the Fight Against Drunk Driving," *The Washington Post*, Dec. 13, 1999.

The mayor of New York City defends his new policy of confiscating the vehicles of drunken drivers, using the legal principle that private property used in a crime can be confiscated.

Plungis, Jeff, "Transportation Bill Conference Driven by National Drunken Driving Standard, Limitation on Truckers' Road Hours," *CQ Weekly*, Aug. 5, 2000.

Reporter Plungis discusses how the transportation bill conference is deadlocked over the issues of forcing states to adopt a .08 BAC and stopping federal regulators from limiting truck drivers' hours of service.

Simon, Stephen, "Medical Staff Reporting of Alcohol Levels Should be Mandatory," *The Washington Post*, Dec. 13, 1999.

An associate professor of clinical education at the University of Minnesota College of Law argues that emergency medical staff should be required or at least allowed to report drunken drivers who are injured in crashes.

Soderstrom, Carl A., "Testing Injured Drivers for Blood Alcohol Content is Valuable," *The Washington Post*, Dec. 13, 1999.

A professor of surgery at the University of Maryland Medical Center in Baltimore argues that checking the BAC of injured drivers is valuable for medical purposes, but he stops short of recommending that medical personnel should be required to report such information to police.

Studies

"Alcohol and Highway Safety," U.S. Department of Transportation, 1968.

The first federal study on alcohol consumption and driver impairment found that alcohol use by drivers and pedestrians caused 25,000 deaths and 800,000 accidents.

"Paying the Price: How Tobacco, Gun, Gambling and Alcohol Interests Block Common Sense Solutions to Some of the Nation's Most Urgent Problems," Common Cause, June 15, 2000.

A study of campaign contributions shows that alcohol interests gave $22.7 million in campaign contributions to members of Congress and the national political parties from 1989 to 1999.

Stewart, Kathryn, "On DWI Laws in Other Countries," National Highway Traffic Safety Administration, March 2000.

A comprehensive study compares laws governing drunken driving in 22 countries.

FOR MORE INFORMATION

Advocates for Highway and Auto Safety, 750 1st St., N.E., Suite 901, Washington, D.C. 20002; (202) 408-1711; www.saferoads.org. A coalition of insurers and public health and safety organizations.

American Beverage Institute, 1775 Pennsylvania Ave., N.W., Suite 1200, Washington, D.C. 20006; (800) 843-8877; www.abionline.org. Represents restaurants that serve alcohol, including America's largest family restaurant chains.

The Century Council, 1310 G St., N.W., Suite 600, Washington, D.C. 20005; (202) 637-0077; www.centurycouncil.org. A think tank funded by America's leading distillers that seeks to reduce drunken driving.

Insurance Institute for Highway Safety, 1005 N. Glebe Road, Suite 800, Arlington, Va. 22201; (703) 247-1500; www.hwysafety.org. Researches how to prevent motor-vehicle crashes and injuries.

Mothers Against Drunk Driving, P.O. Box 541688, Dallas, Texas 75354-1688; (800) GET-MADD; www.madd.org. More than 600 chapters nationwide fight drunken driving and support victims of alcohol-related crimes.

National Beer Wholesalers Association, 1100 S. Washington St., Alexandria, Va., 22314-4494; (703) 683-4300; www.nbwa.org. Acts as an advocate for more than 2,900 independent beer wholesalers.

The Next Step

Drunken Driving

"Alcohol Blood Test Ruled OK," *Chicago Tribune*, Aug. 18, 2000, p. A3.

Requiring a man arrested for drunken driving to take a blood test did not violate his constitutional rights, a Wisconsin state appeals court ruled. The ruling by the 4th District Court of Appeals was the second in two weeks upholding the state's implied-consent law. The law requires drivers stopped for drunken driving to submit to a blood or breath test or lose their driver's license.

"Senate OKs National Blood-Alcohol Limit," *Los Angeles Times*, June 16, 2000, p. A25.

The Senate voted to set the first-ever national blood-alcohol standard for drunken driving. The $54.7-billion spending bill to fund highway, rail, aviation and Coast Guard programs in fiscal year 2001 would require states to adopt a .08 percent blood-alcohol content level as their legal intoxication standard. Those failing to do so by 2004 would begin losing part of their highway trust fund money.

Heinzmann, David, "Plan Would Put Officers in Taverns; State's Attorney Wants Cops to Help Stop Drunks From Driving," *Chicago Tribune*, July 8, 2000, p. A5.

Will County State's Attorney James Glasgow is proposing to require employees of businesses that hold liquor licenses to take a course on handling drunken patrons. Glasgow said he also would encourage police departments to have a plainclothes officer available to go to a bar if the manager calls police. The officer would talk drunken customers out of driving or arrest them for attempted drunken driving if they resist.

Holmes, Steven A., "Bid to Toughen Drinking Law Holds Up Transportation Bill," *The New York Times*, Sept. 26, 2000, p. A1.

A major fight has erupted in Congress over a proposal to compel states to adopt a more stringent standard for drunken driving, under the threat of losing millions of dollars in federal highway aid. The fight has held up agreement on a huge transportation spending bill that provides money for highways and mass transit systems and also pays for air traffic controllers, the Coast Guard and the National Transportation Safety Board.

Long, Ray, and Douglas Holt, "Reforming DUI Laws Easier Said Than Done," *Chicago Tribune*, Sept. 1, 2000, p. B1.

The political landscape in Illinois and very practical problems with implementing some of the reforms in drunken-driving laws suggested by Illinois Secretary of State Jesse White make approval anything but a certainty. White's "tough love" program would require a sentence of jail time or community service for anyone caught driving drunk while on a suspended or revoked license or anyone found guilty of driving with a blood-alcohol level of twice the .08 legal limit.

Nathan, Sara, "Police Officers to Set Up Sobriety Checks," *USA Today*, June 30, 2000. p. B1.

Mothers Against Drunk Driving, Nationwide Insurance, the Department of Transportation and law-enforcement officers launched an anti-drunken-driving education campaign and announced a blitz of sobriety checkpoints on roads nationwide during the Fourth of July weekend. The National Safety Council predicts that 645 people will die in traffic accidents that weekend, half from alcohol-related accidents.

Repeat Offenders

"Engler Targets Drunk Drivers," *Chicago Tribune*, Dec. 14, 1999, p. A3.

Republican Michigan Gov. John Engler said that the state's tough, new drunken-driving laws targeted at repeat offenders have allowed officers to confiscate an average of 51 license plates a day. On Oct. 1, 32 new state laws went into effect aimed at those who have two or more drunken-driving convictions in seven years. More than 100,000 licensed drivers in Michigan have been convicted of drunken driving in the past seven years.

"Man Faces 10th DUI Charge," *Chicago Tribune*, July 18, 2000, p. A3.

A Wisconsin man convicted nine times of driving while drunk was ordered to stand trial for a 10th drunken charge, this one a felony count of driving while intoxicated. Brian J. Britz, 43, has had his license revoked or suspended 18 times since 1982.

"New York City To Seize Cars of DUI Suspects," *Chicago Tribune*, Feb. 22, 1999, p. A11.

New York will become the first city in the United States to seize vehicles on the spot of drivers suspected of drunken driving, including first-time offenders. If a suspect is convicted of driving while intoxicated, the vehicle will be auctioned off by police. If the suspect is acquitted, the car will likely be returned, but city lawyers would have the ability to keep the car through a civil action. Twenty-two states allow municipal officials to seize the cars of drunken drivers, but almost all of those involve repeat offenders.

Borchmann, Phil, "Five DUI Victims Detail Anguish To Offenders; Drunken Drivers Get Emotional Earful From Panels," *Chicago Tribune*, July 13, 1999, p. A1.

Several nights a month in courthouses around the state, panels are convened with the purpose of stirring the emotions of DUI offenders. The sessions feature family members of those killed or seriously injured in drunken-

driving crashes, or drivers who have caused someone else's death. Those who work regularly with DUIs estimate that 80 percent of offenders are never caught again.

Halladay, Jessie, "Loose Laws on DWIs Will Cost States," *USA Today*, Sept. 7, 2000, p. A7.

More than half the states can expect to lose federal highway money because they haven't toughened drunken-driving laws. The loss of highway construction money will come as a result of a 1998 law, in which Congress required states to ban motorists from having open bottles and cans of alcohol in their autos and to impose tougher penalties on people convicted of multiple drunken-driving violations.

Higgins, Michael, and Ray Long, "State To Unveil Plan for Stiffer DUI Penalties; Measures Target Repeat Offenders," *Chicago Tribune*, Aug. 31, 2000, p. A1.

Illinois Secretary of State Jesse White is expected to propose a plan to crack down on drunken driving, particularly targeting repeat offenders and people who still drive after their licenses have been taken away. White wants to expand a program that makes some offenders take a breath test in their car before their ignition will work.

Hilkevitch, Jon, "Drunken Drivers Get Hard-Core Attention," *Chicago Tribune*, July 3, 2000, p. A1.

Amid indications that a federal goal of reducing alcohol-related highway deaths will not be met, new initiatives are being proposed to stop hard-core drinkers from getting behind the wheel. A two-year safety board investigation has determined that without a comprehensive national program, the Transportation Department's goal to cut alcohol-related fatal crashes to 11,000 or less annually by 2005 won't be achieved.

Parsons, Christi, "State Moves To Widen Use of Anti-DUI Ignition Locks," *Chicago Tribune*, March 25, 1999, p. A1.

Convicted drunken drivers in Illinois may soon have to take a breath test each time they climb behind the wheel of a car. Senators voted 56-1 in favor of a major expansion in the use of ignition-interlock devices, which make it impossible for drivers to start their vehicles without first blowing into a breath detector attached to the steering column.

Shaver, Katherine, and David S. Fallis, "Plenty of Blame, Few Remedies: Legislators, Judges at Odds on Drunken Driving," *The Washington Post*, Sept. 26, 2000, p. A1.

Maryland is about to forfeit $7.5 million in federal road-building funds because the state legislature has not complied with congressional mandates to ban open alcohol containers for everyone in cars and stiffen penalties for repeat drunken drivers. In a study of drunken-driving cases handled in Montgomery County courts, *The Washington Post* found that drivers who had killed others or driven drunk repeatedly faced little jail time.

Sipress, Alan, "U.S. May Cut Road Aid Over DWI Laws," *The Washington Post*, May 16, 2000, p. B1.

Two years after Congress told states to restrict open alcohol containers in cars and crack down on repeat drunken drivers, only nine have fully complied, raising the prospect that most will be penalized millions of dollars in highway construction money.

Teen Drinking and Driving

"Alcohol Warning Sought in Anti-Drug Ads," *Los Angeles Times*, May 15, 1999, p. A10.

A House Appropriations subcommittee voted to require the federal government's five-year, $1-billion youth anti-drug advertising campaign to include anti-alcohol messages as well. By a voice vote, lawmakers approved an amendment requiring the White House Office of National Drug Control Policy to include the ads against underage drinking.

"Data Suggest Teens Not Getting Message on Drunken Driving," *Chicago Tribune*, April 30, 1999, p. A3.

Rates of teenagers who drink and drive dropped dramatically in the last decade, but the reductions have leveled off, says a new study that is raising concern among alcohol experts. Drunken driving among teens fell about 40 percent between 1984 and 1997, says the study by Patrick O'Malley of the University of Michigan. But progress seems to have peaked in 1992, O'Malley reported in the *American Journal of Public Health*.

Burke, Rhonda Hetrick, "Schools Take Aim at Teen Drinking," *Chicago Tribune*, May 6, 1999, p. A3.

Prom and graduation are milestones often marked with parties. Because of the temptation to drink alcohol at many such events, area schools have made drunken-driving dramatizations and alcohol abuse education an annual rite of spring in McHenry County, Ill. The McHenry Area Youth Commission recently formed a 14-member task force of community and school leaders who have made it their mission for this year to educate students and parents about the dangers of underage drinking.

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MUNICIPALITY OF ANCHORAGE

OFFICE OF THE MUNICIPAL ATTORNEY

MAR 13 2001

MEMORANDUM

DATE: March 13, 2001

TO: HEATHER

FROM: Richard K. Payne, Assistant Municipal Attorney RKP

SUBJECT: **HB 4**; Request for Citation List From House Judiciary Committee

QUESTION: You have requested that we address the following question:

The House Judiciary Committee requested a copy of several case citations that were discussed in testimony provided by Richard K. Payne, Assistant Municipal Attorney, on March 12, 2001.

The following is the case citation list requested by the Committee Chair:

1. *McCormick v. Municipality of Anchorage*, 999 P.2d 155 (Alaska App. 2000).
2. *Bingaman v. Municipality of Anchorage*, 2000 WL 124801 (Alaska App. 2000).
3. *Hillman v. Municipality of Anchorage*,941 P.2d 211 (Alaska App. 1997).
4. *Davis v. Municipality of Anchorage*, 945 P.2d 307 (Alaska App. 1997).
5. *Haynes v. State*, 1998 WL 238563 (Alaska App. 1998).
6. *Blanchard v. Municipality of Anchorage*, 1997 WL 759676 (Alaska App. 1997).
7. *Municipality of Anchorage v. Shaffer*, 1997 WL 295618 (Alaska App. 1997).
8. *Municipality of Anchorage v. Skagen*, 920 P.2d 284 (Alaska App. 1996)
9. *State v. Zerkel*, 900 P.2d 744 (Alaska App. 1995).

999 P.2d 155 MCCORMICK V. MUNICIPALITY OF ANCHORAGE (Ct. App. 2000)
2000 Alas. App. Lexis 35

JOHN McCORMICK, Appellant,
vs.
MUNICIPALITY OF ANCHORAGE, Appellee.

Court of Appeals No. A-6557, No. 1667
COURT OF APPEALS OF ALASKA
999 P.2d 155, 2000 Alas. App. LEXIS 35
March 10, 2000, Decided

<CASE SUMMARY>

Appeal from the District Court, Third Judicial District, Anchorage, John R. Lohff, Judge. Trial Court No. 3AN-96-1024 Cr.

Rehearing Granted March 10, 2000, Reported at: 2000 Alas. App. LEXIS 34.

This Opinion Substituted on Grant of Modified Rehearing for Withdrawn Opinion of January 28, 2000, Previously Reported at: 2000 Alas. App. LEXIS 9.

COUNSEL

Frederick T. Slone, Kasmar and Slone, Anchorage, for Appellant.
Benjamin O. Walters, Jr., Deputy Municipal Prosecutor, and Mary K. Hughes, Municipal Attorney, Anchorage, for Appellee.

JUDGES

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

OPINION

MANNHEIMER, Judge.

John McCormick was involved in a motor vehicle accident. When the police arrived on the scene, an officer asked McCormick to perform field sobriety tests. McCormick agreed to perform a horizontal gaze nystagmus test, and the results from all six segments of the test indicated that McCormick was under the influence of alcohol. The officer next asked McCormick to perform two other tests: the turn-and-walk test, and the stand-on-one-leg test. McCormick refused to perform these tests. The officer then arrested McCormick for driving under the influence.

At McCormick's trial, the Municipality introduced evidence that McCormick had refused to perform the latter two field sobriety tests. In this appeal, McCormick contends that the Municipality should not have been allowed to introduce evidence of, or comment on,

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McCormick's refusal to perform these two field sobriety tests.

At the police station, McCormick submitted to a breath test. He then exercised his right to obtain an independent blood test at a local hospital. Hospital personnel drew two vials of McCormick's blood. Soon thereafter, McCormick's attorney contacted the hospital and directed them to send both vials to a laboratory in Colorado. The Municipality was not notified of this action.

Some months later, thinking that the blood sample was still at the hospital, the Municipality obtained a search warrant for the blood sample, contacted the hospital, and discovered that the blood had been sent away at the defense attorney's direction. The Municipality then applied to the district court for an order directing the defense attorney to surrender any unused blood to the Municipality for testing. The district court issued this order. A portion of the blood was sent to the Municipality; when tested, this blood yielded a result of .125 percent alcohol. This test result was introduced at McCormick's trial.

On appeal, McCormick contends that the district court should not have ordered McCormick's attorney to surrender the remaining blood. McCormick argues that the Alaska Constitution bars a court from ordering a DWI defendant to produce a portion of the blood drawn during an independent test; he contends that any such order impermissibly burdens the defendant's due process right to an independent test. McCormick also contends that, because the blood in question was in the possession of his attorney or his attorney's agents (the laboratory in Colorado), the district court's order infringed McCormick's attorney-client privilege.

In addition, McCormick contends that the district court improperly prohibited him from arguing to the jury that they should distrust the government's blood-test results because McCormick's blood sample might have been mishandled or improperly preserved by the Colorado laboratory.

Finally, McCormick challenges one aspect of his sentence: the forfeiture of his vehicle.

For the reasons explained here, we reject all of McCormick's contentions and we affirm his conviction.

Can the government introduce evidence of, and comment on, a motorist's refusal to perform field sobriety tests after the motorist is validly stopped on suspicion of driving while intoxicated?

As described above, McCormick refused to perform two of the field sobriety tests requested by the police officer. Before trial, McCormick asked the district court to exclude all evidence of his refusal to perform these two tests and to prohibit the government from commenting on McCormick's refusal. The district court denied this request.

On appeal, McCormick renews his argument that the Municipality should not have been allowed to mention his refusal to perform the two field sobriety tests. McCormick advances three theories as to why this evidence was inadmissible.

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McCormick first argues that the Alaska Legislature did not intend for the government to be able to use evidence of a motorist's refusal to consent to field sobriety tests. He points out that, in AS 28.35.032(e), the legislature has expressly allowed the government to use evidence of a motorist's refusal to submit to a breath test.[1] McCormick argues that the lack of any similar statute concerning field sobriety tests means that the legislature did not intend for the government to be able to use evidence of a motorist's refusal to perform field sobriety tests.

We do not interpret AS 28.35.032(e) as impliedly limiting the government's ability to introduce evidence of a motorist's refusal to take field sobriety tests. Rather, this statute was enacted in order to make sure that the government could introduce evidence of a motorist's refusal to submit to a breath test.

AS 28.35.032(e) was apparently passed in response to the Alaska Supreme Court's decision in **Puller v. Anchorage.**[2] In **Puller,** the supreme court interpreted a former version of AS 28.35.032 that did not expressly state that a motorist's refusal to take a breath test could be used as evidence against them. The court held that, in the absence of an express provision allowing the government to use evidence of a motorist's refusal, the court would presume that the legislature intended to bar the government from using this evidence.[3] Two years later, the legislature enacted AS 28.35.032(e).[4]

Both **Puller** and AS 28.35.032(e) are based on the premise that a motorist's refusal to submit to the statutorily mandated breath test is a peculiar kind of evidence that should be treated differently for policy reasons. The government exerts unusual coercion on motorists to submit to the breath test, so unusual procedural safeguards should be satisfied before the government is allowed to use evidence of a motorist's refusal to take the test. But this policy is itself atypical. Ordinarily, the government does not need statutory authorization to introduce circumstantial evidence of a person's intoxication.

Both the **Puller** court and the legislature (when it enacted AS 28.35.032(e) in response to the **Puller** decision) treated breath-test refusal as **sui generis** -- as a special type of evidence unto itself. Once the supreme court decided **Puller,** it is hardly surprising that the legislature perceived the need to enact a special statute to authorize the use of this type of evidence. But the enactment of this statute does not imply that the legislature intended to bar evidence that an arrested motorist declined to cooperate with investigative efforts in some other way.

For this reason, we conclude that AS 28.35.032(e) should not be read as broadly as McCormick suggests. This statute does not prohibit the government from introducing evidence of a motorist's refusal to perform field sobriety tests.[5]

McCormick next asserts that he was exercising his right against self-incrimination under the Alaska Constitution[6] when he refused to perform the two field sobriety tests. McCormick contends that the Municipality should have been barred from introducing evidence of his refusal

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to take the tests because this evidence constituted an adverse comment on his invocation of the right not to incriminate himself.

Although McCormick's argument is purportedly based on our state constitution, he fails to cite Alaska case law. Instead, he cites three Oregon cases construing the Oregon Constitution.[7] But even Oregon has rejected the claim that the right against self-incrimination protects a motorist from performing non-testimonial field sobriety tests -- that is, tests which involve only demonstrations of physical coordination and ability to concentrate.[8] The majority of states agree with this conclusion.[9]

The Alaska Supreme Court has held that field sobriety tests are typically non-testimonial. In **Palmer v. State**[10], the defendant (who had been arrested for DWI) argued that the government should not have been allowed to introduce a videotape made at the police station. This videotape showed the defendant taking a breath test and performing various field sobriety tests.[11] On appeal, the defendant contended that the videotape of the sobriety tests should have been suppressed because he was never advised of his **Miranda** rights.[12] The supreme court rejected this contention, declaring that "the fifth amendment offers no protection against compulsion to take the sort of tests administered to [the defendant] in this case."[13]

It is possible to argue that, even though the **taking** of field sobriety tests is non-testimonial, a motorist's **refusal** to take the tests should be deemed a testimonial communication that is protected by the privilege against self-incrimination. But courts from other states have consistently rejected this contention. These courts hold that a defendant's refusal to take field sobriety tests is not testimonial; rather, the refusal (whether verbal or non-verbal) is conduct from which one may draw an incriminatory inference.[14]

McCormick provides no authority suggesting that the self-incrimination clause of the Alaska Constitution should be construed any differently. Accordingly, we hold that Article I, Section 9 of the Alaska Constitution does not bar the government from introducing evidence of a motorist's refusal to perform non-testimonial field sobriety tests.

Finally, McCormick argues that field sobriety tests constitute a "search" for purposes of the Fourth Amendment to the United States Constitution and Article I, Section 14 of the Alaska Constitution. He contends that, because field sobriety tests are a "search", a motorist necessarily possesses a constitutional right to refuse to cooperate in this search, and the constitution therefore bars any comment on a motorist's assertion of this right of refusal.

McCormick provides scant legal authority to support his assertion that field sobriety tests are a "search". He cites two cases from Oregon, but these were decided under the Oregon Constitution.[15] He also cites one decision of this court holding that a **breath** test is a "search" for constitutional purposes.[16]

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Our own research shows that several state courts (in addition to Oregon) have held that field sobriety tests are "searches".[17] But, with two exceptions[18], all of these states treat field sobriety tests as a form of **Terry** stop.[19] Under this view, a police officer does not need probable cause before asking a motorist to perform field sobriety tests. Rather, the officer can conduct field sobriety tests based on a reasonable suspicion that the motorist is driving while intoxicated.[20]

In McCormick's case, it is fairly clear that by the time the officer asked McCormick to perform the turn-and-walk test and the stand-on-one-leg test, the officer had reasonable suspicion to believe that McCormick was driving while intoxicated. McCormick does not argue to the contrary. Indeed, because McCormick was arrested just after he refused to perform these two field sobriety tests, and because McCormick does not contest the legality of his arrest, McCormick implicitly concedes that the officer already had probable cause to arrest him when the officer asked McCormick to perform these two field sobriety tests. Thus, even if we accepted McCormick's premise that field sobriety tests are a "search" for constitutional purposes, the circumstances of McCormick's case justified the officer in conducting this search.

But in McCormick's case, the search was not "conducted" -- or, at least, it was not conducted to completion. McCormick refused to perform the two physical coordination tests. We are not faced with the issue of whether the results of the tests are admissible. Rather, we are asked to decide whether the Municipality could introduce evidence of McCormick's refusal to take the two tests.

Although there is some disagreement among the states on this issue, most courts hold that a motorist has no constitutional right to refuse field sobriety tests as long as the requested field sobriety tests are non-testimonial (that is, the motorist is not required to supply verbal information but is merely required to demonstrate physical coordination and ability to concentrate), and as long as the officer's request for field sobriety tests is supported by the requisite reasonable suspicion (or, in Oregon and Colorado, by the requisite probable cause).[21] In reaching this conclusion, courts generally rely on the rule that a lawfully-arrested suspect has no constitutional right to withhold blood and tissue samples or to refuse to demonstrate the physical characteristics of their body.[22]

McCormick does not dispute any of this; indeed, his brief does not discuss any of this. Instead, he asserts that it does not matter if he was legally obliged to perform the field sobriety tests. McCormick relies on **Elson v. State** for the proposition that the government can not rely on evidence of a defendant's refusal to consent to a search, regardless of whether the search is legal or illegal.[23] In **Elson,** the supreme court ruled that, even when a search is ultimately shown to be legal, the government should not be allowed to rely on evidence that the defendant refused to consent to the search. The court reasoned that if evidence of the defendant's non-cooperation were allowed, this might "inhibit individuals from exercising the right to refuse consent to some future illegal search".[24]

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But in **Srala v. Anchorage**[25] this court held that **Elson** did not apply to a case very similar to McCormick's. The defendant in **Srala** was arrested for driving while intoxicated and later refused to allow a blood test. At trial, the government introduced evidence of the defendant's refusal. On appeal, the defendant argued that introduction of this evidence was barred by **Elson,** but this court ruled that **Elson** was distinguishable from Srala's case:

> The present case is readily distinguishable from **Elson.** In contrast to **Elson,** a person legally arrested for driving while intoxicated does not have a fourth amendment right to refuse a breath or blood test. The only fourth amendment right such a person has is the right to be free of arrest on less than probable cause. [citations omitted] Consequently, [the government's] comment on the refusal of an offered blood test does not chill the exercise of fourth amendment rights. Srala was lawfully under arrest for DWI and had no constitutional right to refuse a search incident to his arrest aimed at establishing his blood alcohol level. **See Schmerber v. California,** 384 U.S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966). To the extent that Srala had a right to refuse a blood test, ... that right was a limited statutory right. [citations omitted] Evidence of his refusal thus did not amount to an impermissible comment on the exercise of a constitutional right.
>
> **Srala,** 765 P.2d at 105.[26]

We applied similar reasoning in **Svedlund v. Anchorage**[27], where we upheld the constitutionality of a municipal ordinance making it a crime for a person lawfully arrested for DWI to refuse to take a breath test. We concluded that this law did not violate a motorist's Fourth Amendment rights because the breath test is a search incident to arrest -- and thus, if the motorist is lawfully arrested, the motorist has no Fourth Amendment right to assert.[28]

Using **Srala, Burnett,** and **Svedlund** as guides, even if field sobriety tests are a "search", it appears that McCormick's only Fourth Amendment right was the right not to be asked to perform field sobriety tests unless the surrounding circumstances had already given the officer a reasonable suspicion that McCormick was driving while intoxicated. And if McCormick had no constitutional right to refuse to perform the field sobriety tests, then the constitution did not bar the government from introducing evidence that McCormick refused the tests. The admission of this evidence would not chill the future assertion of constitutional rights, because no constitutional right is at issue.

We admit that this issue is complex and that the resolution we have indicated here may not be entirely free from doubt. But we conclude that we need not resolve this issue in McCormick's case. As we indicated before, McCormick's briefing of this question is extremely terse. He devotes precisely one paragraph to this entire search and seizure issue. And although he cites **Elson,** he does not mention **Srala, Burnett,** or **Svedlund.**

Given the complexity of this issue, we find that McCormick's briefing is inadequate to allow meaningful review. Accordingly, we deem the issue waived.[29]

In addition to his constitutional challenge, McCormick also argues that evidence of his

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refusal to take the two field sobriety tests should have been excluded under Evidence Rule 403 because it was more prejudicial than probative. McCormick contends that this evidence was unfairly prejudicial because "there was a real danger that the jury [might conclude] that McCormick's refusal to perform balance tests indicated that he was intoxicated."

This asserted "unfair prejudice" is, in fact, the proper probative value of the evidence. McCormick's refusal to perform the balance tests does not directly tend to prove his intoxication, but it does tend to prove McCormick's belief that he would be unable to satisfactorily perform the tests. From McCormick's refusal to take the two field sobriety tests, the jury could reasonably infer that McCormick believed he was under the influence of intoxicants.

This inference was not "prejudicial" for purposes of Evidence Rule 403. To the extent that McCormick's refusal to perform the field sobriety tests suggests that McCormick was conscious of his own intoxication, this evidence does not "[tend] to suggest decision on an improper basis".[30] Rather, this inference was a proper subject for the jury's consideration.

For all of the above reasons, we hold the admission of evidence that McCormick refused to perform the final two field sobriety tests does not require reversal of McCormick's conviction.

Did the district court violate McCormick's right to due process when the court ordered McCormick to turn over a portion of McCormick's blood sample to the Municipality so that the Municipality could test the blood for alcohol content?

Shortly after McCormick's arrest, his blood was drawn at an Anchorage hospital. Several months later, the Municipality obtained a search warrant to test McCormick's blood sample. The Municipality served this warrant on the hospital, only to discover that McCormick's attorney had earlier directed the hospital to send the entire blood sample to a laboratory in Colorado. At the Municipality's request, the district court ordered McCormick to relinquish any unused portion of the blood sample to the Municipality. The Municipality tested the blood and introduced the test result at McCormick's trial. On appeal, McCormick argues that the district court violated his right to due process when the court ordered him to relinquish the blood to the Municipality.

McCormick's argument is premised on two legal principles. First, motorists arrested for DWI have a due process right to have a sample of their blood preserved so that this blood will later be available as a potential means of rebutting the government's evidence that the motorist was intoxicated or had a blood-alcohol level of .10 percent or greater.[31] Second, unless the motorist chooses to have blood drawn, the government has no authority to draw blood from them.[32]

Based on these principles of law, McCormick argues that motorists who choose to have a sample of their blood drawn should not have to face the possibility that the government will later obtain and test a portion of this blood sample. McCormick contends that motorists will be deterred from exercising their due process right to have a sample of their blood preserved if they know that this blood may one day become available to the government. According to McCormick, if courts are allowed to issue subpoenas and search warrants for the blood, this will "have a severe chilling effect on the exercise of [a motorist's] constitutional due process rights".

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McCormick's argument is answered by this court's decisions in **Cunningham v. State**[33] and **Birch v. State**[34] .

The defendant in **Cunningham** was arrested for driving while intoxicated. After he submitted to a breath test, he was informed that he had a right to an independent blood test. Cunningham exercised this right; he was transported to a hospital, where his blood was drawn and stored. Later, the State of Alaska obtained a search warrant for this blood; a state laboratory technician tested the blood for alcohol content, and the test result was used against Cunningham at his trial.[35]

On appeal, Cunningham argued that when a motorist exercises the right to an independent blood test, the resulting blood sample should be used only for the motorist's benefit and the State should not be able to obtain access to the blood. We rejected this argument. We noted that a motorist's right to an "independent" blood test does not mean that the resulting blood sample is privileged; rather, it means that the motorist is entitled to have the sample tested by people and methods that are not subject to government manipulation.[36] We further noted that, although Alaska statutes forbid the government from obtaining a blood sample from a non-consenting motorist, no statute bars the government from using court process to obtain and test the blood sample of a motorist who does consent to a blood test.[37]

In **Birch,** the facts were similar to **Cunningham** except that the arrested motorist consulted an attorney before deciding to have a blood sample drawn and preserved. On appeal, Birch argued that the resulting blood sample was protected by the attorney-client privilege, but we rejected this argument. We held that, although the attorney-client privilege would protect the results of any defense-initiated testing of the blood sample, the sample itself was not privileged. Thus, if the court issued a search warrant for the blood, the government could seize a portion of the sample, test it, and use the results against the motorist.[38]

McCormick's case is different from **Cunningham** and **Birch** in one respect. McCormick's blood sample was not in the hands of a hospital or other third party; rather, it was being held by a laboratory hired by McCormick's attorney. But in **Morrell v. State,** the Alaska Supreme Court held that a defense attorney has no privilege to take delivery of physical evidence from third parties and then withhold the physical evidence from the government.[39] Based on this court's decisions in **Cunningham** and **Birch,** and based on the supreme court's decision in **Morrell,** we hold that the district court acted lawfully when it ordered McCormick's attorney to surrender the unused portion of the blood sample so that the blood could be tested by the Municipality.

Did the district court violate McCormick's right to due process when the court prohibited McCormick's attorney from arguing to the jury that the government's blood sample might have been tainted, or its alcohol content altered, while the blood was in the possession and control of McCormick's agents?

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As explained above, shortly after McCormick's arrest, his blood was drawn at an Anchorage hospital. A few days later, at the direction of McCormick's attorney (and unbeknownst to the Municipality), the blood was shipped to a laboratory in Colorado so that it could be tested by defense experts. Several months later, when the Municipality discovered that the blood was gone, the Municipality applied for a court order directing the defense attorney to return the blood to Anchorage so that it could be tested by the Municipality. At McCormick's trial, the Municipality introduced the result of this second blood test. That blood test showed McCormick's blood contained .125 percent alcohol.

As the parties were preparing for opening statements at McCormick's trial, the defense attorney asked the trial judge to preclude the Municipality from introducing evidence of this blood test. McCormick's attorney argued that, because the blood had been in the possession of the Colorado laboratory for several months, the Municipality could not establish a proper chain of custody for this evidence. The defense objection was based on Alaska Evidence Rule 901(a). This rule states that "whenever the prosecution in a criminal case offers ... [physical] evidence which is of such a nature ... as to be susceptible to adulteration, contamination, modification, ... or other changes in form attributable to accident, carelessness, error or fraud", the prosecution must, as a foundational matter, "demonstrate [to a] reasonable certainty that the evidence is ... free of [these] possible taints".

Defense Attorney : I would move to ... to exclude evidence related to the blood on the assumption that the prosecution is not going to be able to provide any kind of evidence with respect to the chain of custody of the blood once it [was sent to Colorado] until it was returned to [Anchorage], and to ensure ... [the] integrity [of the] blood sample. ... Our position would be that [the blood evidence] simply shouldn't come in because the prosecution is going to be unable to link the chain of custody [during this] time [.]

Now, the court could either do one of two things, I suppose. [The court could rule] that since [the blood] was sent out [of state] at the request of the defense, ... perhaps that should excuse the prosecution from establishing the integrity of the sample between the time that it left [Anchorage] and the time that it was returned 10 months later. Or, the court could preclude the prosecution from seeking to admit it. But I just wanted to get a ruling on [this issue] now, because if the court is inclined not to allow the blood [evidence] ... based on that [chain of custody] issue alone, ... then ... I'd ask for an order precluding the prosecution from even talking about the blood in [their] opening [statement].

The real issue here is just whether or not the [blood] test evidence [will] be admissible over [our] objection [based on] the lack of chain of custody.

The trial judge ruled that, given the facts of the case -- particularly, the fact that the blood had been sent to Colorado at the behest of McCormick's attorney and had been stored there in the custody of a laboratory hired by the defense attorney -- the Municipality would be excused from establishing the integrity of the blood sample during the months it was in the custody of the defendant's agents.

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The Court : I find [that the blood evidence] will be [admissible]. I find [that] it should be. ... I find that, because the only entity that would be able to address the issue of [the integrity of the blood sample] is [under] the control of [the defense attorney] and Mr. McCormick, [the government] does not have to address the issues of chain of custody with respect to the time [the blood sample] left the [Anchorage hospital] lab and the time it came back to the lab. ... They should not be put in the position of having to necessarily fili that link of the chain, because it wasn't a chain link that they put in place in the first place.

This issue came up again when the defense attorney was delivering his summation to the jury. During his summation, McCormick's attorney attempted to cast doubt on the validity of the Municipality's blood test by pointing out that the jury had heard no evidence concerning the methods used to preserve the blood during its transportation and its months of storage and handling in Colorado. The municipal prosecutor immediately objected:

Defense Attorney : Now, the blood test. What we have is a situation where Mr. McCormick had his blood drawn willingly. He was requested to do so, and he did it. And the blood was shipped out of state. We don't know what it was -- [.] ... [It has been] stipulated that it's the same blood that came back, but we do not know what happened to the blood while it was gone. Absolutely no ...

Prosecutor : I object to this, Your Honor ...

The Court : Sustained.

McCormick's attorney offered no counter-argument at the time. However, after the parties completed their summations to the jury, the defense attorney responded to the court's ruling:

Defense Attorney : [An] issue, Your Honor, [that] I wanted to bring up is there was an objection during my closing [argument], when I was attempting to argue that nobody knows what happened to this ... blood while it was at the lab out of state.

The Court : Yes.

Defense Attorney : And my understanding of your prior rulings on this issue is that you were going to instruct the jury that ... [the] blood sample that was sent out of the state was the same sample that came back ... to [Anchorage]. But ... I did not understand there to be any preclusion from arguing as to what may or may not have happened to that sample in the interim.

The Court : ... In my view, there was a preclusion as to ... what was done to [the blood] at the lab [in Colorado]. ... [The prosecutor] requested [that], if [the integrity of the blood sample was going to be disputed], then we'd need to get into the issue of your sending it out [of state], that you sent out two samples instead of one, that the lab was [of your choosing] -- if there was some problem with what the lab did, it's because it was a lab that you selected, [whether] you ... selected a good lab or a bad lab. All of those sorts of issues were precluded by basically saying that this is the same sample that came back [to Anchorage], and we're not going to discuss what happened [to the blood] when it ... went out, or ... what happened [when] it was out of state. So,

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... in my view, ... there was a preclusion of discussion of those issues. And maybe that wasn't as clear as it should have been, but that was ... part and parcel of [my ruling] -- all of that ball of wax.

Defense Attorney : Okay. All right. I didn't understand that to be the case. That's why I started arguing to that effect.

The Court : All right.

On appeal, McCormick argues that the trial judge's ruling denied him due process of law. McCormick contends that, because the Municipality relied on the result of the Anchorage blood test, McCormick was entitled to attack that test result by pointing out, first, that the blood sample was tested many months after it was drawn from McCormick's body, and second, that the Municipality failed to present evidence concerning the precautions (if any) that were taken to ensure the chemical integrity of the blood sample during this time.

From the portions of the record quoted above, it is clear that McCormick did not preserve this issue in the district court. At the beginning of trial, McCormick's attorney attempted to exclude the blood evidence, arguing that the Municipality would be unable to prove that the blood sample had not become tainted or altered during the many months that it was in the hands of the defense attorney's agents (the Colorado laboratory). But the trial judge excused the Municipality from establishing the integrity of the blood sample during the months that it was in Colorado. The judge noted that the break in the chain of custody was caused by McCormick, and that the blood was held in the custody of the defendant's agents. McCormick has not challenged this ruling on appeal.

At the end of trial, the defense attorney attempted to use this ruling against the government -- by asking the jury to view the Municipality's blood-test evidence with suspicion because the Municipality had introduced no evidence to establish the integrity of the blood while it was stored in Colorado. The trial judge sustained the prosecutor's objection to this argument. When McCormick's attorney later asserted that his argument had been proper, the trial judge responded that the defense attorney's argument was precluded by the earlier chain-of-custody ruling. Hearing this, the defense attorney did not disagree with the trial judge, nor did he seek reconsideration of that prior ruling. He merely stated, "Okay. All right. I didn't understand that to be the case."

In other words, McCormick's attorney never told the trial judge that he believed the judge's ruling was wrong, nor did he assert that the judge had imposed an unconstitutional restriction on McCormick's argument to the jury. McCormick thus failed to preserve an objection to the trial judge's ruling regarding the scope of his argument.[40] This being so, McCormick can prevail on appeal only if he demonstrates that the trial judge's ruling was plain error.[41]

We find no plain error here. The trial judge ruled at the beginning of McCormick's trial that the Municipality would be excused from establishing the integrity of the blood sample during its

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transportation to and from Colorado and during t' e many months that it was stored there by a laboratory working under contract for the defense attorney. In reliance on this ruling, the Municipality did not introduce evidence pertaining to the shipment, storage, and testing of the blood sample during its Colorado sojourn. Then, in final argument, the defense attorney tried to take unfair advantage of this ruling -- by arguing to the jury that they should view the government's evidence with suspicion because the government made no attempt to account for the integrity of the blood sample while it was in Colorado.

We are not saying that McCormick had no right to question whether the blood sample might have become tainted while it was in the hands of his own agents. But McCormick chose not to litigate this issue. Instead, he accepted the trial judge's ruling that the government was excused from establishing the integrity of the sample during those months. McCormick implicitly concedes that the ruling was correct or, at least, that it was a proper exercise of the judge's discretion. Under these circumstances, the trial judge did not violate McCormick's right to procedural fairness when he precluded McCormick from attacking the sufficiency of the government's proof on this issue during final argument.

Does the mandatory forfeiture provision of AMC § 9.28.020(C)(5) violate state law?

At McCormick's sentencing, the district court ordered forfeiture of the motor vehicle he drove while intoxicated. This forfeiture was ordered pursuant to AMC § 9.28.020(C)(5)(b), an ordinance that governs sentencing for the municipal crime of driving while intoxicated. This ordinance declares that if a defendant has previously been convicted of driving while intoxicated (or breath-test refusal) within the preceding ten years[42], and if the defendant has any interest in the vehicle that was used in the commission of the offense, the court shall order forfeiture of the defendant's interest in the vehicle.

McCormick claims that this provision of municipal law violates the Alaska Constitution. He points out that, when a defendant is convicted of DWI under state law, the sentencing court has the power to order forfeiture of the defendant's vehicle only if the defendant has previously been convicted two or more times.[43] Moreover, while the sentencing court has the power to order forfeiture of the defendant's vehicle, forfeiture is not mandatory.[44] Based on these differences in the sentencing provisions of state and municipal law, McCormick argues that the municipal forfeiture provision violates the rule that state law takes precedence over municipal law.

McCormick relies on the Alaska Supreme Court's decision in **Kodiak v. Jackson.**[45] In **Jackson,** the supreme court struck down a provision of a municipal assault statute which required a mandatory minimum sentence of imprisonment for a person convicted of assaulting a police officer. The court held that this mandatory minimum punishment was inconsistent with the power to suspend sentences of imprisonment given to sentencing judges by state statute (AS 12.55.080 - 085).[46] McCormick argues that the rule applied in **Jackson** likewise calls for invalidation of the Anchorage forfeiture provision.

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However, **Jackson** itself recognizes that a municipal ordinance is not necessarily illegal simply because it is inconsistent with state law. Rather, as **Jackson** acknowledges, the true test is whether the municipal ordinance is irreconcilably at odds with state law, so that enforcement of the municipal provision defeats the operation of state law.[47]

That is not the case here. The Alaska Legislature has enacted AS 28.35.038, which specifically provides that, "notwithstanding other provisions of [Title 28], a municipality may adopt an ordinance providing for the impoundment or forfeiture of a motor vehicle ... involved in the commission of [DWI or breath-test refusal]", and that such an ordinance "is not required to be consistent with [Title 28 of the Alaska Statutes] or regulations adopted under [that] title". Because the legislature has explicitly granted municipalities the power to enact forfeiture ordinances that are inconsistent with the corresponding provisions of state law, municipalities do not violate state law when they exercise this power.[48]

McCormick presents an alternative argument. He contends that, even though AS 28.35.038 may authorize municipalities to impose harsher forfeitures than would be imposed under state law for the offense of driving while intoxicated, AS 28.35.038 only authorizes municipalities to ignore the provisions of Title 28 and the state regulations promulgated under it. The statute says nothing about authorizing municipalities to ignore the provisions of Title 12 -- specifically, the provisions of AS 12.55.080 and 085 that empower sentencing judges to suspend the imposition or the execution of sentence.

It is true that AS 28.35.038 does not specifically mention these two provisions of Title 12. However, the statute must be interpreted in the context of the various DWI and breath-test refusal statutes contained in AS 28.35. As we recently stated,

The guiding principle of statutory construction is to ascertain and implement the intent of the legislature. When a statutory provision is part of a larger framework, even seemingly unambiguous language must be interpreted in the context of the other portions of the [whole]. **Millman v. State,** 841 P.2d 190, 194 (Alaska App. 1992).

Sakeagak v. State, 952 P.2d 278, 284 (Alaska App. 1998).

With regard to the offenses of driving while intoxicated and refusing to submit to a breath test, the Alaska Legislature has enacted a series of escalating mandatory minimum punishments (both imprisonment and fines) for all offenders, even first offenders. Thus, for these two crimes, the legislature has taken away a sentencing court's power to suspend imposition of sentence and has substantially abridged a sentencing court's power to suspend execution of sentence.

Municipalities are generally authorized under AS 28.01.010 to enact traffic laws consistent with Title 28. Because of this authorization, a municipality does not violate the sentencing provisions of AS 12.55.080 - 085 if it follows the lead of the Alaska Legislature and enacts mandatory jail sentences and mandatory fines for the offenses of DWI and breath-test refusal.

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We must interpret AS 28.35.038 against this backdrop. Had the legislature never enacted AS 28.35.038, municipalities would still be authorized to impose vehicle impoundments and forfeitures for the offenses of driving while intoxicated and refusing a breath test, providing these impoundments and forfeitures were consistent with the corresponding state penalties. By enacting AS 28.35.038, it appears that the legislature intended to authorize municipalities to impose impoundments and forfeitures for these two offenses that are harsher than those that can be imposed under state law.

In his brief to this court, McCormick suggests that the final sentence of AS 28.35.038 was not intended to authorize municipalities to impose harsher penalties than the ones provided under state law. McCormick suggests instead that the purpose of that final sentence was to authorize municipalities to make impoundment and forfeiture of vehicles a part of the punishment for violations of municipal DWI and breath-test refusal laws.

McCormick's interpretation ignores AS 28.01.010, which authorizes municipalities to enact their own traffic laws, so long as those laws are consistent with state law. As indicated above, we believe that even if AS 28.35.038 had never been enacted, municipalities would have been authorized to enact sentencing provisions for DWI and breath-test refusal that included discretionary forfeiture of vehicles.

McCormick's interpretation also overlooks the first sentence of AS 28.35.038, which declares that municipalities may adopt ordinances "providing for the impoundment or forfeiture of a motor vehicle ... involved in the commission of **an offense under AS 28.35.030, 28.35.032, or an ordinance with elements substantially similar to AS 28.35.030 or 28.35.032.**" That is, AS 28.35.038 not only authorizes municipalities to adopt ordinances for the forfeiture of a vehicle used in violation of a municipal DWI or breath-test refusal law; the statute also expressly authorizes municipalities to adopt ordinances for the forfeiture of vehicles used in violation of the **state** DWI or breath-test refusal laws.

Given this legislative context, we conclude that the purpose of the final sentence of AS 28.35.038 is to authorize municipalities to enact vehicle impoundment and vehicle forfeiture laws that are harsher than their state-law counterparts. We further conclude that these harsher penalties can include the mandatory forfeiture of a vehicle involved in either the offense of driving while intoxicated or the offense of breath-test refusal. The legislature has enacted mandatory minimum punishments for these two offenses, thus restricting the courts' authority to suspend sentence for these two crimes. Given this legislative policy, and given our conclusion that the final sentence of AS 28. 35.038 was intended to authorize municipalities to impose even more onerous impoundments and forfeitures, we conclude that the legislature's failure to specifically mention AS 12.55.080 - 085 in the wording of AS 28.35.038 does not manifest a legislative intent to bar municipalities from enacting mandatory forfeitures.

McCormick raises two final attacks on the mandatory forfeiture provision. First, he notes that his vehicle was worth more than $ 5000, and that he received a separate fine ($ 1500 with $ 750 suspended). McCormick therefore argues that he was subjected to a total monetary penalty exceeding the maximum fine for driving while intoxicated ($ 5000). We rejected this same

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$=P4932*169 argument in **Hillman v. Anchorage.**[49] In **Hillman,** we held that a vehicle forfeiture is not the equivalent of a fine, nor is a vehicle forfeiture to be combined with a fine for purposes of determining whether a defendant's fine exceeds the $ 5000 limit. We reaffirm our decision in **Hillman.**

Second, McCormick asserts that forfeiture of a $ 5000 vehicle is grossly disproportionate to the offense of driving while intoxicated, and that therefore the forfeiture represents an "excessive fine" of the kind prohibited by the Eighth Amendment.[50]

In **Hillman,** we held that forfeiture of a vehicle worth $ 8000 did not represent an excessive punishment for a defendant convicted of his third DWI. We noted that the Ohio courts had upheld the forfeiture of a vehicle valued at between $ 23,000 and $ 30,000 when the defendant$=P7021*48 was convicted of his fourth DWI.[51] Here, McCormick is a repeat DWI offender who has suffered forfeiture of a vehicle worth $ 5000. This forfeiture is not so "grossly disproportionate" as to run afoul of the Eighth Amendment.

Conclusion

The judgement of the district court is AFFIRMED.

DISPOSITION

The judgement of the district court is AFFIRMED.

OPINION FOOTNOTES

1 AS 28.35.032(e) reads: "The refusal of a person to submit to a chemical test authorized under AS 28.33.031(a) or AS 28.35.031(a) or (g) is admissible evidence in a civil or criminal action or proceeding arising out of an act alleged to have been committed by the person while operating ... a motor vehicle or ... aircraft or watercraft while intoxicated."

2 574 P.2d 1285 (Alaska 1978).

3 **See Id.** at 1288.

4 SLA 1980, ch. 129, § 12.

5 We note that courts from other states have reached this same conclusion. **See, e.g., State v. Wright,** 116 N.M. 832, 867 P.2d 1214, 1216-17 (N.M. App. 1993), **cert. denied,** 117 N.M. 121, 869 P.2d 820 (N.M. 1994); **City of Seattle v. Stalsbroten,** 138 Wn.2d 227, 978 P.2d 1059, 1064 (Wash. 1999).

6 Alaska Constitution, Article I, Section 9.

7 **State v. Fish,** 321 Ore. 48, 893 P.2d 1023 (Or. 1995); **State v. Gilmour,** 136 Ore. App. 294, 901 P.2d 894 (Or. App. 1995); **State v. Green,** 68 Ore. App. 518, 684 P.2d 575 (Or. App. 1984).

8 **See State v. Nielsen,** 147 Ore. App. 294, 936 P.2d 374, 379-380, 382-83 (Or. App. 1997).

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9 See **State v. Superior Court,** 154 Ariz. 275, 742 P.2d 286, 289 (Ariz. App. 1987); **State v. Taylor,** 648 So. 2d 701, 704 (Fla. 1995); **People v. Roberts,** 115 Ill. App. 3d 384, [illegible] N.E.2d 451, 453-54, 71 Ill. Dec. 16 (Ill. App. 1983); **Commonwealth v. Blais,** 428 Mass. 294, 701 N.E.2d 314, 318 (Mass. 1998) ("It is well-settled that roadside sobriety tests are considered analogous to physical (as opposed to testimonial) evidence."); **State v. Wright,** 116 N.M. 832, 867 P.2d 1214, 1215-17 (N.M. App. 1994) (listing cases); **State v. Hoenscheid,** 374 N.W.2d 128, 130 (S.D. 1985); **Farmer v. Commonwealth,** 12 Va. App. 337, 404 S.E.2d 371, 373 (Va. App. 1991); **City of Seattle v. Stalsbroten,** 138 Wn.2d 227, 978 P.2d 1059, 1062 (Wash. 1999); **State v. Mallick,** 210 Wis. 2d 427, 565 N.W.2d 245, 246-48 (Wis. App. 1997).

10 604 P.2d 1106 (Alaska 1979).

11 **Id.** at 1107-08.

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

13 **Palmer,** 604 P.2d at 1109.

14 See the cases listed in footnote 7, **supra.**

15 **State v. Nagel,** 320 Ore. 24, 880 P.2d 451, 455 (Or. 1994); **State v. Lowe,** 144 Ore. App. 313, 926 P.2d 332, 334 (Or. App. 1996).

16 **Leslie v. State,** 711 P.2d 575, 576-77 (Alaska App. 1986,

17 See **State v. Superior Court,** 149 Ariz. 269, 718 P.2d 171, 176 (Ariz. 1986); **People v. Carlson,** 677 P.2d 310, 316-17 (Colo. 1984); **State v. Lamme,** 19 Conn. App. 594, 563 A.2d 1372, 1374 (Conn. App. 1989), **aff'd,** 216 Conn. 172, 579 A.2d 484 (Conn. 1990); **State v. Taylor,** 648 So. 2d 701, 703 (Fla. 1995); **State v. Golden,** 171 Ga. App. 27, 318 S.E.2d 693, 696 (Ga. App. 1984); **State v. Wyatt,** 67 Haw. 293, 687 P.2d 544, 550-54 (Haw. 1984); **State v. Ferreira,** 133 Idaho 474, 988 P.2d 700, 705 (Idaho App. 1999); **State v. Stevens,** 394 N.W.2d 388, 390-91 (Iowa 1986), **cert. denied,** 479 U.S. 1057, 93 L. Ed. 2d 986, 107 S. Ct. 935 (1987); **State v. Little,** 468 A.2d 615, 617 (Me. 1983); **Commonwealth v. Blais,** 428 Mass. 294, 701 N.E.2d 314, 316-17 (Mass. 1998); **Hulse v. State,** 1998 MT 108, 961 P.2d 75, 86-87, 289 Mont. 1 (Mont. 1998); **Dixon v. State,** 103 Nev. 272, 737 P.2d 1162, 1163-64 (Nev. 1987); **People v. Califano,** 255 A.D.2d 701, 680 N.Y.S.2d 700, 701 (N.Y. App. 1998); **State v. Gray,** 150 Vt. 184, 552 A.2d 1190, 1193-95 (Vt. 1988).

18 **State v. Nagel,** 320 Ore. 24, 880 P.2d 451 (Oregon 1994), and **People v. Carlson,** 677 P.2d 310 (Colorado 1984).

19 See **Terry v. Ohio,** 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

20 See **Superior Court,** 718 P.2d at 176; **Lamme,** 563 A.2d at 1374; **Taylor,** 648 So. 2d at 703; **Blais,** 701 N.E.2d at 317; **Hulse,** 961 P.2d at 86-87; **County of Dane v. Campshure,** 204 Wis. 2d 27, 552 N.W.2d 876, 878-79 (Wis. App. 1996).

21 See **Superior Court,** 742 P.2d at 288; **Taylor,** 648 So. 2d at 703-04; **Wyatt,** 687 P.2d at 549; **Blais,** 701 N.E.2d at 317; **State v. Wright,** 116 N.M. 832, 867 P.2d 1214, 1217 (N.M. App. 1993); **Stalsbroten,** 978 P.2d at 1062; **Campshure,** 552 N.W.2d at 878-79.

22 See, e.g., **Superior Court,** 742 P.2d at 289; **State v. Burns,** 661 So. 2d 842, 849 (Fla. App. 1995); **Stalsbroten,** 978 P.2d at 1062.

23 659 P.2d 1195, 1199 (Alaska 1983).

24 **Id.** at 1199.

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25 765 P.2d 103 (Alaska App. 1988).

26 **See also Burnett v. Anchorage,** 678 P.2d 1364, 1369-1370 (Alaska App. 1984) (rejecting the contention that **Elson** bars the government from relying on evidence that a lawfully arrested defendant refused to take a breath test).

27 671 P.2d 378, 384 (Alaska App. 1983).

28 **See id. See also Jensen v. State,** 667 P.2d 188 (Alaska App. 1983) (upholding the constitutionality of a nearly identical state statute).

29 **See Katmailand, Inc. v. Lake and Peninsula Borough,** 904 P.2d 397, 402 n.7 (Alaska 1995); **Wren v. State,** 577 P.2d 235, 237 n.2 (Alaska 1978); **Kristich v. State,** 550 P.2d 796, 804 (Alaska 1976); **Lewis v. State,** 469 P.2d 689, 691-92 (Alaska 1970).

30 Commentary to Evidence Rule 403, fifth paragraph.

31 **See Snyder v. State,** 930 P.2d 1274 (Alaska 1996); **Anchorage v. Serrano,** 649 P.2d 256 (Alaska App. 1982).

32 **See State v. Pena,** 684 P.2d 864 (Alaska 1984). The **Pena** decision was later modified by the enactment of AS 28.35.035, but this statute does not apply to McCormick's case.

33 768 P.2d 634 (Alaska App. 1989).

34 825 P.2d 901 (Alaska App. 1992).

35 **Cunningham,** 768 P.2d at 634-35.

36 **See id.** at 636.

37 **See id.**

38 **Birch,** 825 P.2d at 902-03.

39 575 P.2d 1200, 1210-11 (Alaska 1978).

40 **Hagans, Brown, & Gibbs v. First Nat'l Bank of Anchorage,** 783 P.2d 1164, 1166 n.2 (Alaska 1989) ("Issues not properly raised ... at trial are not properly before this court on appeal."); **Wettanen v. Cowper,** 749 P.2d 362, 364 (Alaska 1988).

41 **Burford v. State,** 515 P.2d 382, 383 (Alaska 1973); **Lumbermens Mutual Casualty Co. v. Continental Casualty Co.,** 387 P.2d 104, 109, 111-12 (Alaska 1963).

42 AMC § 9.28.020(E)(4) limits relevant convictions to those within the ten years preceding the date of the present offense.

43 **See** AS 28.35.036(a).

44 **See** AS 28.35.036(c).

45 584 P.2d 1130 (Alaska 1978).

46 **Id.** at 1133.

47 **Id.** at 1132 (quoting **Jefferson v. State,** 527 P.2d 37, 43 (Alaska 1974)).

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48 For the same reason, the Anchorage forfeiture provision does not violate AS 28.01.010(a), which states that "[a] municipality may not enact an ordinance that is inconsistent with the provisions of this title or the regulations adopted under this title."

49 941 P.2d 211, 217 (Alaska App. 1997).

50 **See Alexander v. United States,** 509 U.S. 544, 558-59; 113 S. Ct. 2766, 2775-76; 125 L. Ed. 2d 441 (1993) (holding that **in personam** forfeitures are limited by the Eighth Amendment); **Harmelin v. Michigan,** 501 U.S. 957, 996-1005; 111 S. Ct. 2680, 2702-07, 115 L. Ed. 2d 836 (1991) (interpreting the Eighth Amendment to forbid only "extreme sentences that are grossly disproportionate to the crime").

51 **Hillman,** 941 P.2d at 217.

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2000 Alas. App. LEXIS 13 BINGAMAN V. MUNICIPALITY OF ANCHORAGE (Ct. App. 2000)

DARRYL BINGAMAN, Appellant,

vs.

MUNICIPALITY OF ANCHORAGE, Appellee.

Court of Appeals No. A-6765, No. 4179
COURT OF APPEALS OF ALASKA
2000 Alas. App. LEXIS 13
February 02, 2000, Decided

<CASE SUMMARY>

CASE STATUS: MEMORANDUM DECISIONS OF THIS COURT DO NOT CREATE LEGAL PRECEDENT. SEE ALASKA APPELLATE GUIDELINES FOR PUBLICATION OF COURT OF APPEALS DECISIONS. ACCORDINGLY, THIS MEMORANDUM DECISION MAY NOT BE CITED FOR ANY PROPOSITION OF LAW, NOR AS AN EXAMPLE OF THE PROPER RESOLUTION OF ANY ISSUE.

Appeal from the District Court, Third Judicial District, Anchorage, Natalie K. Finn, Judge. Trial Court No. 3AN-M95-9688CR.

COUNSEL

Michael B. Logue, Gorton & Associates, Anchorage, for Appellant.
Thane R. Mathis, Assistant Municipal Prosecutor, and Mary K. Hughes, Municipal Attorney, Anchorage, for Appellee.

JUDGES

Before: Mannheimer and Stewart, Judges, and Rabinowitz, Senior Supreme Court Justice* . (Coats, Chief Judge, not participating.)
AUTHOR: STEWART

OPINION

MEMORANDUM OPINION AND JUDGMENT

STEWART, Judge.

Darryl Bingaman pleaded no contest to driving while intoxicated (DWI) under Anchorage Municipal Code § 09.28.020. He received a seventy-day term to serve and a $ 1,200 fine to pay. Since he had prior$=P7021*2 DWI convictions, the vehicle that Bingaman was driving on December 15, 1995, was forfeited under the mandatory provisions of the municipal forfeiture ordinance.[1] Bingaman argued in the district court that the forfeiture requirement was illegal because it was a violation of equal protection. He also claimed that the combination of the fines

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imposed and the forfeiture violated the excessive fine clauses of both the Alaska and the United States constitutions. On appeal, he also argues that the municipal forfeiture ordinance was fatally inconsistent with state law.[2] We conclude that Bingaman's arguments fail, and affirm.

Discussion

Excessive fine

Bingaman contends that the forfeiture of his vehicle, worth about $ 18,500 according to pleadings in the district court, in conjunction with the $ 1,200 fine imposed constitutes a prohibited "excessive fine" within the meaning of the Eighth Amendment to the United States Constitution and article I, section 12 of the Alaska Constitution. He asks us to reconsider our decision in **Hillman v. Anchorage**[3] where we upheld the municipal forfeiture ordinance against a similar attack. The only factor that distinguishes Bingaman's case from **Hillman** is that Bingaman's vehicle was apparently worth more than the vehicle in **Hillman.**

In **Hillman,** we were persuaded by the decision in **State v. Ziepfel,**[4] where the Ohio Court of Appeals upheld forfeiture of Ziepfel's vehicle (a motorcycle valued at more than $ 23,000) against his claim that forfeiture of this vehicle constituted an "excessive fine" under the Eighth Amendment.$=P7021*4 That court concluded that Ziepfel's case did not present "one of those rare situations where the forfeiture is so grossly disproportionate to the offense as to constitute an excessive fine."[5]

Bingaman has advanced no convincing reason for us to reconsider **Hillman.** The total amount of Bingaman's fine and forfeiture is less than Ziepfel's. Therefore, we reject Bingaman's contention that the application of the forfeiture ordinance in his case violates the excessive fines provision of the Eighth Amendment to the United States Constitution and article I, section 12 of the Alaska Constitution.

Our decision in **Hillman** also rejected Bingaman's contention here that the maximum fine of $ 5,000 for violation of AS 28.35.030 establishes an upper limit for a fine and forfeiture under a municipal prosecution.[6] Accordingly, we reject that claim as well.

Equal protection

Bingaman argues that the application of the municipal forfeiture ordinance violates equal protection under state and federal law because the municipal ordinance mandates forfeiture for an offender with Bingaman's history, while under state law, forfeiture is discretionary.[7] But in **Wester v. State,**[8] the supreme court rejected Wester's claim that his prosecution under a state statute that provided a more severe penalty than a municipal ordinance that also applied to his conduct violated equal protection. "A defendant has no constitutional right to elect which of two

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applicable statutes shall be the basis of his indictment and prosecution."[9] Bingaman's prosecution under the municipal code does not violate equal protection.

Conflict with state law

Bingaman argues that the municipal forfeiture provisions exceed and are inconsistent with sentencing limits set by state law. First, Bingaman relies on **Kodiak v. Jackson,**[10] which struck down the portion of a municipal assault ordinance that required a mandatory minimum term to serve because the required minimum was inconsistent with the power of judges to suspend sentences.[11] He maintains that the required forfeiture under the municipal forfeiture ordinance is inconsistent with the permitted forfeiture under AS 28.35.038. We addressed and rejected the arguments Bingaman raises in **McCormick** v. **Anchorage,** 2000 Alas. App. LEXIS 9, P.2d , Op. No. 1658 (Alaska App., January 28, 2000).

But **Jackson** recognizes that inconsistency alone does not mandate a conclusion of illegality. The ultimate question is whether the enforcement of the municipal ordinance frustrates the operation of state law.[12]

Alaska Statute 28.35.038 specifically permits the adoption of a municipal forfeiture ordinance that is inconsistent with Title 28.[13] Since the legislature specifically permitted the present inconsistency, the municipal forfeiture ordinance does not frustrate the operation of state law.

Next, Bingaman contends that AS 28.35.038 was passed only to allow municipalities to include vehicle forfeiture provisions in their ordinances consistent with state forfeiture. We disagree. Even without the passage of AS 28.35.038, municipalities would be authorized to enact forfeiture provisions that are consistent with state law.[14] Furthermore, AS 28.35.038 permits a municipality to enact an ordinance that forfeits vehicles used in violation of both state **and** municipal DWI law, an expansion of forfeiture under state law. We reject Bingaman's argument that AS 28.35.038 should be read to limit the scope of the municipal forfeiture ordinance.

Finally, Bingaman contends that mandatory forfeiture conflicts with the power of a judge to suspend sentences under AS 12.55.080-085 and that AS 28.35.038 does not empower a municipality to limit the sentencing discretion of a trial court.

While AS 28.35.038 does not refer to those sections of Title 12, the statute must be interpreted in the context of the scheme the legislature has developed to address the problem of intoxicated drivers. The legislature has developed an escalating series of mandatory minimum sentencing requirements starting with first offenders, including imprisonment, fines, and license revocations. Those provisions underscore an intent to abridge a sentencing court's discretion to suspend the imposition or execution of a sentence.[15]

When interpreting any statute, the primary guiding principle is to ascertain and implement

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legislative intent. When a statute is part of a larger framework, what may appear to be a patently unambiguous provision must be interpreted in the context of the other portions of the statutory framework.[16] In this context, we interpret the final sentence of AS 28.35.038 to permit a municipality to enact a forfeiture provision that is broader than state law. We also conclude that the absence of a reference to AS 12.55.080-085 did not exhibit a legislative intent to limit municipalities to discretionary forfeitures. Therefore, we conclude that the municipal forfeiture provision is consistent with state legislation and does not run afoul of **Kodiak v. Jackson,** supra.

Conclusion

The judgment of the district court is AFFIRMED.

DISPOSITION

The judgment of the district court is AFFIRMED.

JUDGES FOOTNOTES

* Sitting by assignment made pursuant to article IV, section 11 of the Alaska Constitution and Administrative Rule 23(a).

OPINION FOOTNOTES

1 AMC § 09.28.020(C)(5).

2 Bingaman also argued that the forfeiture provision is inconsistent with AS 12.55.005 because it could lead to disparate sentences when compared to forfeitures under state law. He also claimed that the forfeiture and fine resulted in a monetary penalty that was disproportionate to the offense. We conclude that both of those arguments are excessive sentence claims that are not in this court's jurisdiction. **See** AS 12.55.120(d); AS 22.07.020(c)(2).

3 941 P.2d 211 (Alaska App. 1997).

4 107 Ohio App. 3d 646, 669 N.E.2d 299 (Ohio App. 1995).

5 669 N.E.2d at 304.

6 Bingaman had two prior DWI convictions. If those two convictions occurred in the five years prior to his present case, we note that he could have been prosecuted under AS 28.35.030(n)(2) for a class C felony. The maximum potential fine for a class C felony is $ 50,000. **See** AS 12.55.035(b)(2).

7 **See** AS 28.35.036.

8 528 P.2d 1179, 1185 (Alaska 1974).

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9 **Id.** (quoting **Hutcherson v. United States,** 120 U.S. App. D.C. 274, 345 F.2d 964, 967 (D.C. App. 1965)).

10 584 P.2d 1130 (Alaska 1978).

11 **See** AS 12.55.080-085.

12 **Jackson,** 584 P.2d at 1132.

13 AS 28.35.038 provides:

Notwithstanding other provisions in this title, a municipality may adopt an ordinance providing for the impoundment or forfeiture of a motor vehicle, or aircraft, involved in the commission of an offense under AS 28.35.030, 28.35.032, or an ordinance with elements substantially similar to AS 28.35.030 or 28.35.032. An ordinance adopted under this section is not required to be consistent with this title or regulations adopted under this title.

14 **See** AS 28.01.010.

15 **See** AS 28.35.030(b)(2), (n)(2); AS 28.35.032(g)(2), (p)(2).

16 **See Millman v. State,** 841 P.2d 190, 194 (Alaska App. 1992) (citations omitted).

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941 P.2d 211 HILLMAN V. MUNICIPALITY OF ANCHORAGE (Ct. App. 1997) 1997 Alas. App. Lexis 31

ALEXANDER HILLMAN, Appellant,

vs.

MUNICIPALITY OF ANCHORAGE, Appellee.

Court of Appeals No. A-6191, No. 1539
COURT OF APPEALS OF ALASKA
941 P.2d 211, 1997 Alas. App. LEXIS 31
June 20, 1997, Decided
Appeal from the District Court, Third Judicial District, Anchorage, Stephanie Rhoades, Judge. Trial Court No. 3AN-95-7977 Cr.

COUNSEL

Kelly E. Gillilan-Gibson, James E. Gorton & Associates, Anchorage, for Appellant.
James L. Walker, Assistant Municipal Prosecutor, and Mary K. Hughes, Municipal Attorney, Anchorage, for Appellee.

JUDGES

Before: Coats, Chief Judge, Mannheimer, Judge, and Joannides, District Court Judge.*
AUTHOR: MANNHEIMER

OPINION

MANNHEIMER, Judge.

Alexander Hillman pleaded no contest to driving while intoxicated, a violation of Anchorage Municipal Code § 9.28.020. Because Hillman had two prior convictions for this offense, the district court ordered forfeiture of Hillman's vehicle -- a required penalty under § 9.28.020(C)(5)(b).

Hillman alleges that his vehicle is worth $ 8000. Based on this appraisal, Hillman contends that the forfeiture of his vehicle constitutes a prohibited "excessive fine" within the meaning of the Eighth Amendment to the United States Constitution and Article I, Section 12 of the Alaska Constitution.[1] Hillman also contends that forfeiture of an $ 8000 vehicle violates Alaska law because, under AS 12.55.035(b), the maximum fine for a class A misdemeanor is $ 5000.

We assume for purposes of deciding this case that Hillman's vehicle is indeed worth $ 8000. Nevertheless, as explained below, we reject both Hillman's constitutional argument and his statutory argument. We therefore affirm the forfeiture of his vehicle.

Our jurisdiction to entertain this appeal

Before addressing the merits of Hillman's arguments, we first must answer the Municipality's

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contention that Hillman has no right to appeal the forfeiture and that this court has no jurisdiction to hear Hillman's appeal. The Municipality relies on AS 22.07.020(c), which states:

> The court of appeals has jurisdiction to review ... (2) the final decision of the district court on a sentence imposed by it if the sentence exceeds 120 days of unsuspended incarceration for a misdemeanor offense.

The district court sentenced Hillman to 360 days' imprisonment with 300 days suspended, or 60 days to serve. Because Hillman received only 60 days of unsuspended incarceration, the Municipality argues that this court has no jurisdiction to hear his appeal.[2]

As we explain in more detail below, we do not interpret AS 22.07.020(c) as prohibiting this court from reviewing any aspect of a district court's sentencing decision when the defendant receives 120 days or less to serve. This court retains the right to review an illegal sentence, regardless of how much (or how little) imprisonment is imposed on the defendant.

AS 22.07.020(c) was intended to restrict this court's jurisdiction to hear sentence appeals from the district court; this jurisdictional provision complements the new restrictions on district court sentence appeals embodied in the 1995 amendments to the sentence appeal statute, AS 12.55.120. Under the 1995 amendment to AS 12.55.120(d), district court defendants may not pursue a sentence appeal unless they receive more than 120 days to serve. In this context, a "sentence appeal" is an appeal in which the defendant concedes the legality of the sentence but contends that the sentencing judge abused his or her discretion by imposing an unduly harsh punishment. **See Rozkydal v. State,** 938 P.2d 1091, 1093 (Alaska App. 1997). The legislature's simultaneous amendment of AS 22.07.020(c) -- the insertion of the phrase "if the sentence exceeds 120 days of unsuspended incarceration" -- was intended as the jurisdictional counterpart to the new restriction on sentence appeals.

Hillman's appeal, however, is not a "sentence appeal". Hillman contends that his sentence is illegal. This court continues to possess the authority to review claims that a sentence is illegal, even when the sentence does not exceed 120 days to serve. (Those readers who believe this conclusion is self-evident may skip the rest of this section.)

The current version of AS 22.07.020(c) was enacted in 1995 as part of the Alaska Legislature's re-working of various aspects of criminal procedure. See SLA 1995, ch. 79. In this 1995 session law, the legislature amended AS 12.55.120 (the sentence appeal statute) to limit the right of sentence appeal. See SLA 1995, ch. 79, §§ 7-8. Now, defendants convicted of felonies can pursue a sentence appeal only if they receive a composite sentence exceeding 2 years to serve. AS 12.55.120(a). Similarly, defendants convicted of misdemeanors in district court can pursue a sentence appeal only if they receive a composite sentence exceeding 120 days to serve. AS 12.55.120(d).

At the same time, the legislature amended three provisions of Title 22 to reflect corresponding limits on the judiciary's jurisdiction to hear sentence appeals. The legislature

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amended AS 22.07.020(b), the statute governing this court's jurisdiction to hear sentence appeals from the superior court. SLA 1995, ch. 79, § 11. The legislature also amended AS 22.07.020(c), the statute governing this court's jurisdiction to hear appeals from the district court. SLA 1995, ch. 79, § 12. And, because the superior court also has jurisdiction to review decisions of the district court, the legislature amended AS 22.10.020(*f*), the statute governing the superior court's jurisdiction to hear sentence appeals from the district court. SLA 1995, ch. 79, § 13.

Recently, in **Rozkydal v. State,** 938 P.2d 1091, 1997 Alas. App. LEXIS 25, Opinion No. 1532 (Alaska App., 1997), we interpreted the revised sentence appeal. statute, AS 12.55.120. We clarified that the appeals governed by AS 12.55.120 are premised on the assumption that the defendant's sentence was lawfully imposed. In a sentence appeal, the defendant asserts that a lawful sentence is excessive - i.e., that it constitutes an abuse of sentencing discretion. Hillman, however, asserts that his sentence is illegal -- in fact, unconstitutional. Thus, Hillman's appeal is not a "sentence appeal" governed by AS 12.55.120, and his assertions of error are appealable regardless of the length of his sentence. **Rozkydal,** slip opinion at 4-5.

Although we clarified the meaning of AS 12.55.120 in **Rozkydal,** a potential problem of statutory interpretation still exists with regard to this court's jurisdictional statute. The problem is that AS 22.07.020(c) (the portion of the statute that gives this court jurisdiction over district court sentence appeals) does not specifically refer to "sentence appeals". Instead, AS 22.07.020(c) declares that this court has "jurisdiction to review ... the final decision of the district court on a sentence imposed by it if the sentence exceeds 120 days of unsuspended incarceration".

The Municipality construes this provision as encompassing more than simply the "sentence appeals" defined in **Rozkydal.** The Municipality reads AS 22.07.020(c) as barring the court of appeals from reviewing **any** aspect of a sentence imposed by the district court unless the defendant received more than 120 days to serve. We, however, do not believe that this is a sensible interpretation of the statute.

The problem is not specific to AS 22.07.020(c). Both of the sentence appeal provisions in AS 22.07.020 are potentially ambiguous. For instance, AS 22.07.020(b) gives this court jurisdiction to "hear appeals of unsuspended sentences of imprisonment ... imposed by the superior court on the grounds that the sentence is excessive or ... too lenient". This statutory language conceivably could be read as a limitation on this court's power of review -- restricting our review of superior court sentences to the issues of excessive harshness or leniency. Under such an interpretation, we would have no authority to review a superior court sentence on the ground that it was illegal or that it was imposed in an unlawful manner. However, the legislative history of both AS 22.07.020(b) and 020(c) shows that such an interpretation is mistaken.

The wording of AS 22.07.020(b) actually predates the creation of the court of appeals. This statutory provision originated in SLA 1969, ch. 117, sec. 1 -- legislation that was enacted in response to the supreme court's decision in **Bear v. State,** 439 P.2d 432 (Alaska 1968). In Bear, the supreme court held that, absent legislative authorization, it had no authority to review a lawful sentence "for abuse of discretion" -- that is, for excessive severity or leniency. **Id.** at 433, 435. The supreme court did not question its authority to decide cases in which the defendant

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claimed that the sentence was illegal, or cases in which the defendant claimed that the sentencing procedures were flawed. **Id.** at 436, 438. The issue presented in **Bear** was much narrower: whether the court had the authority to hear an appeal in which the defendant conceded the legality of the sentence but argued that the sentence constituted an abuse of sentencing discretion. **Id.** The court ruled that it had no such authority.

In response, the legislature enacted a new statute, AS 12.55.120, that explicitly authorized sentence appeals. **See** SLA 1969, ch. 117, sec. 4. At the same time, the legislature added a new subsection (b) to the supreme court's jurisdictional statute (AS 22.05.010) that confirmed the supreme court's jurisdiction to hear the now-authorized sentence appeals. **See** SLA 1969, ch. 117, sec. 1. The pertinent language of former AS 22.05.010(b) vested the supreme court with "jurisdiction to hear appeals of sentences of imprisonment lawfully imposed by the superior court[] on the grounds that the sentence is excessive or too lenient".

Interpreting this jurisdictional provision in context, it is clear that the provision was not intended to limit the supreme court's review of sentences to the issues of excessive harshness or leniency. Rather, the provision was intended to expand the supreme court's power of review to include issues of excessive harshness or leniency.

In 1980, when the legislature created the court of appeals, the legislature took the sentence appeal language from the supreme court's jurisdictional statute, AS 22.05.010(b), and placed this language in AS 22.07.020(b). **See** SLA 1980, ch. 12, sec. 1. The legislature then drafted a second sentence appeal provision, AS 22.07.020(c)(2), to give this court jurisdiction over district court sentence appeals.

(A second sentence appeal provision was needed because district court litigants had never had a right of direct appeal to the supreme court; thus, no clause of the supreme court's jurisdictional statute dealt with district court sentence appeals.[3] When the court of appeals was created, the legislature chose to give district court criminal litigants the choice of appealing either to the superior court or to the court of appeals. **See** AS 22.07.020(d), enacted in SLA 1980, ch. 12, sec. 1. Thus, the legislature had to add language to AS 22.07.020 authorizing the court of appeals to hear district court sentence appeals. That language ended up in AS 22.07.020(c).)

When the legislature drafted AS 22.07.020(c), it did not use the language of the sibling provision, AS 22.07.020(b) (governing sentence appeals from the superior court). Clause (2) of AS 22.07.020(c) declares that this court has authority to review "the final decision of the district court on a sentence imposed by it". But although the legislature phrased AS 22.07.020(c)(2) differently from AS 22.07.020(b) (and differently from AS 22.10.-010 (a), the statute that vests the superior court with jurisdiction to hear district court sentence appeals), the intent of AS 22.07.020(c) appears to have been simply to vest this court with jurisdiction over district court sentence appeals.

The 1995 amendment to AS 22.07.020(c) (2) did not alter the operative language of the statute; the 1995 amendment simply appended the phrase "if the sentence exceeds 120 days of unsuspended incarceration for a misdemeanor offense". This additional language reflects the

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amendment to the sentence appeal statute, AS 12.55.120(d), which now restricts district court sentence appeals to defendants whose composite time to serve exceeds 120 days.

Based on this legislative history, we conclude that AS 22.07.020(c) (2) was intended to confirm that the court of appeals has jurisdiction to hear sentence appeals from the district court. We reject the Municipality's suggestion that the statute was intended to prevent this court from reviewing any aspect of a district court sentence unless the sentence exceeds 120 days to serve.

We note that the Municipality's interpretation of AS 22.-07.020 (c) would lead to absurd results. If in fact the court of appeals lacked jurisdiction to review any aspect of a district court sentence of less than 120 days' unsuspended incarceration, then this court would presumably be powerless to intervene when a district court judge sentenced a defendant to jail for 100 days for a class B misdemeanor (a class of offense punishable by no more than 90 days' imprisonment -- see AS 12.55.135(b)), or when a district court judge sentenced a defendant to 30 days for negligent driving (an offense that is not punishable by imprisonment -- **see** AS 28.35.-045 (c); AS 28.40.050(c)-(d)).

Moreover, we note that AS 22.07.020(e) vests this court with wide-ranging discretionary jurisdiction to review appellate decisions of the superior court. The superior court is vested with plenary jurisdiction over appeals from the district court. See AS 22.10.020(d), which gives the superior court "jurisdiction in all matters appealed to it from a subordinate court". Under the Municipality's interpretation of AS 22.07.020(c), there would be many instances in which the court of appeals would lack jurisdiction to hear a direct appeal from the district court, but we would have jurisdiction to review the same issues if the defendant first appealed to the superior court and then brought a petition for hearing to this court. "In ascertaining the legislature's intent, this court 'is obliged to avoid construing statutes in a way that leads to patently absurd results or to defeat of the obvious legislative purpose behind the statute'." **Turney v. State,** 922 P.2d 283, 292 (Alaska App. 1996) (quoting **State v. Lowrence,** 858 P.2d 635, 638 (Alaska App. 1993)).

For all of these reasons, we reject the Municipality's contention that AS 22.07.020(c) (2) was intended to bar this court from correcting any and all illegalities in district court sentences of 120 days or less. Instead, we conclude that AS 22.07.020(c) (2) refers to sentence appeals from the district court, and that the statute's reference to unsuspended sentences of more than 120 days was intended to incorporate the limitation placed on district court sentence appeals by AS 12.55.120(d).

We turn now to the merits of Hillman's arguments that his forfeiture is illegal.

Is forfeiture of Hillman's vehicle an "excessive fine"?

Under Anchorage Municipal Code § 9.28.020(C)(5), if a person is convicted of driving while intoxicated for a second or subsequent time within 10 years, and if the person "has any interest in the vehicle used in the commission of the offense, the [sentencing] court shall order that ... the person's interest in the vehicle be forfeited to the [Municipality of Anchorage]". Hillman had two prior convictions, so the district court ordered his vehicle forfeited to the Municipality.

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As noted above, Hillman contends that this forfeiture is unconstitutional. He claims that his vehicle is worth $ 8000, and he further claims that, when a person's offense is driving while intoxicated, the forfeiture of property worth that much is an "excessive fine" in violation of the federal and state constitutions.

The law distinguishes between **in personam** forfeitures, which are inflicted as punishment for a crime, and **in rem** forfeitures, which can be inflicted on property owners who are themselves innocent of crime, if the government proves that the property is contraband or is connected to the commission of a criminal act. **See Calero-Toledo v. Pearson Yacht Leasing Co.,** 416 U.S. 663, 684; 94 S. Ct. 2080, 2092; 40 L. Ed. 2d 452 (1974); **The Palmyra,** 25 U.S. 1, 12 Wheat. 1, 14-15; 6 L. Ed. 531 (1827). The forfeiture of Hillman's vehicle as punishment for his own criminal conduct is an **in personam** forfeiture. The United States Supreme Court has held that the Eighth Amendment's proscription on "excessive fines" extends to **in personam** forfeitures. **Alexander v. United States,** 509 U.S. 544, 558-59, 113 S. Ct. 2766, 2775-76; 125 L. Ed. 2d 441 (1993). Thus, the government's power to order forfeiture of Hillman's vehicle is potentially limited by the Eighth Amendment.

The ultimate question in assessing Hillman's Eighth Amendment claim is whether the forfeiture is grossly disproportionate to his crime. **See generally Harmelin v. Michigan.** 501 U.S. 957, 996-1005; 111 S. Ct. 2680, 2702-07; 115 L. Ed. 2d 836 (1991) (interpreting the Eighth Amendment not to require strict proportionality between a crime and a sentence, but to forbid only "extreme sentences that are grossly disproportionate to the crime"). A similar test is used for judging excessiveness of punishment under the Alaska Constitution:

> The Alaska Supreme Court has consistently held that the Alaska Constitution does not require that penalties be proportionate to the offense. Only punishments that are "so disproportionate to the offense committed as to be completely arbitrary and shocking to the sense of justice" [are] cruel and unusual under Alaska's Constitution. **See Thomas v. State,** 566 P.2d 630, 635 (Alaska 1977); **Green v. State,** 390 P.2d 433, 435 (Alaska 1964).

McNabb v. State, 860 P.2d 1294, 1298 (Alaska App. 1993).

Hillman first argues that the district court committed procedural error by summarily rejecting Hillman's "excessive fine" contention. Hillman asserts that whenever a criminal defendant alleges that he or she is being subjected to a constitutionally excessive forfeiture, the sentencing court is obliged to conduct a particularized analysis of the proportionality of that forfeiture to the defendant's conduct in committing the crime. Hillman points out that several federal appellate circuits have established criteria for judging the proportionality of a forfeiture, criteria designed to be applied on a case-by-case basis. **See United States v. Certain Real Property Located at 11869 Westshore Drive,** 70 F.3d 923 (6th Cir. 1995); **United States v. Real Property Located in El Dorado, California,** 59 F.3d 974, 985-86 (9th Cir. 1995).[4]

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The federal case law that Hillman cites is not directly on point. These federal cases deal with **in rem** forfeitures -- forfeitures that are based, not on the criminal culpability of the property owner, but on the nexus between the property and criminal conduct (regardless of who committed the crime). As we pointed out above, the forfeiture of Hillman's vehicle was an **in personam** forfeiture -- a forfeiture based on Hillman's personal guilt of a criminal offense. When a court is dealing with **in personam** forfeiture, there is little point to holding a hearing on some of the criteria listed in the federal cases. For example, **El Dorado** directs a court to examine "whether the [property] owner was negligent or reckless in allowing the illegal use of [the] property" and "whether the owner was directly involved in the illegal activity". 59 F.3d at 986. Because an **in personam** forfeiture of property is premised on the defendant's conviction of a crime, these factors are self-evident.

Moreover, the federal courts agree that when a defendant claims that a forfeiture amounts to an "excessive fine", the burden is ultimately on the defendant to prove that the forfeiture is grossly disproportionate to the defendant's offense. **See 11869 Westshore Drive,** 70 F.3d at 930; **El Dorado,** 59 F.3d at 985. It thus appears that, even under the federal cases that require a "proportionality" analysis of forfeitures, a sentencing court is obliged to hold a special hearing to investigate a defendant's Eighth Amendment claim only if the defendant first alleges facts that raise a reasonable possibility that the forfeiture is constitutionally excessive.

Hillman presents no facts or cases suggesting that forfeiture of a vehicle worth $ 8000 is "grossly disproportionate" to his offense of repeat drunk driving. In fact, Hillman concedes that the most pertinent case he could find goes against him. In **State v. Ziepfel,** 107 Ohio App. 3d 646, 669 N.E.2d 299 (Ohio App. 1995), the defendant was convicted of his fourth drunk driving offense. The Ohio Court of Appeals upheld forfeiture of Ziepfel's vehicle (a particularly expensive motorcycle, valued at between $ 23,000 and $ 30,000) against Ziepfel's claim that forfeiture of this vehicle constituted an "excessive fine" under the Eighth Amendment. The court concluded that Ziepfel's case did not present "one of those rare situations where the forfeiture is so grossly disproportionate to the offense as to constitute an excessive fine". **Ziepfel,** 669 N.E.2d at 304.

Hillman concedes that **Ziepfel** may be "persuasive", but he points out that **Ziepfel** is not "binding" on this court. This is true. However, in this case, "persuasive" is sufficient. Given the fact that **Ziepfel** upheld a much greater forfeiture under similar circumstances, and given the fact that Hillman has presented nothing to suggest that his case is "one of those rare situations" where the Constitution bars the government from enforcing the penalty specified by law for his offense, we reject Hillman's contention that his case must be remanded to the trial court for a special Eighth Amendment hearing. Our ruling is the same regarding Hillman's state constitutional claim.

Hillman's remaining argument is that the amount of his forfeiture ($ 8000) exceeds the maximum monetary penalty for his offense. Hillman relies on AS 12.55.035(b)(3), which declares that a defendant convicted of a class A misdemeanor "may be sentenced to pay ... a fine of no more than ... $ 5000". Because Hillman has suffered a forfeiture of property worth $ 8000

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(and has additionally been ordered to pay an unsuspended fine of $ 1500), he argues that his total monetary penalty exceeds the $ 5000 ceiling set by AS 12.55.035(b).

Hillman's argument is premised on two assumptions. First, Hillman assumes that AS 12.55.035 limits not only the penalties that can be imposed for violation of state statutes but also the penalties that municipalities can impose for violation of their own ordinances. Second, Hillman assumes that AS 12.55.035 governs (and limits) forfeitures as well as fines.

Even taking Hillman's first assumption to be true (that is, even assuming that AS 12.55 035 governs the penalties for violation of municipal ordinances), we reject Hillman's contention that AS 12.55.035 limits forfeitures. There is nothing in the statutory language to indicate this, and Hillman cites no legislative history or case authority to support his contention that the legislature used the word "fine" to mean both "fine" and "forfeiture".[5] We therefore reject Hillman's contention that AS 12.55.035(b) sets a $ 5000 limit on vehicle forfeitures imposed as a penalty for driving while intoxicated.

The judgement of the district court is AFFIRMED.

DISPOSITION

AFFIRMED.

JUDGES FOOTNOTES

* Sitting by assignment of the chief justice made pursuant to Article IV, Section 16 of the Alaska Constitution.

OPINION FOOTNOTES

1 Both provisions contain identical wording: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

2 Paradoxically, the Municipality urges us to treat Hillman's appeal as a petition for review and to reach the merits of Hillman's contentions. If, as the Municipality asserts, this court has no jurisdiction "to review" the district court's decision, then this jurisdictional limitation would seem to encompass both forms of appellate review -- appeals and petitions.

3 In **Galaktionoff v. State,** 486 P.2d 919, 920 n.3 (Alaska 1971), the supreme court noted this omission. The court nevertheless ruled that, by virtue of the clause in AS 22.05.010 (a) giving the court "final appellate jurisdiction in all actions and proceedings", the court had the authority to review decisions of the superior court in district court sentence appeals.

4 The Sixth Circuit's opinion in **11869 Westshore Drive** contains a lengthy discussion of the case law in this area. 70 F.3d at 927-930. From that discussion, it appears that the federal circuits are split on the question of whether the concept of proportionality applies to **in rem** forfeitures. Moreover, among the

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federal circuits that do require proportionality of **in rem** forfeitures, the circuits use differing criteria to assess that proportionality.

5 We note that state law provides for forfeiture of a repeat drunk driver's motor vehicle or aircraft. **See** AS 28.35.036. Motor vehicles and aircraft often are worth far more than $ 5000. If the legislature had intended to limit these forfeitures to $ 5000, it seems likely that the legislature would have included language expressly and clearly establishing such a limitation.

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945 P.2d 307 DAVIS V. MUNICIPALITY OF ANCHORAGE (Ct. App. 1997) 1997 Alas. App. Lexis 42

JOHN K. DAVIS, Appellant,

vs.

MUNICIPALITY OF ANCHORAGE, Appellee.

Court of Appeals No. A-6318, No. 1548
COURT OF APPEALS OF ALASKA
945 P.2d 307, 1997 Alas. App. LEXIS 42
September 19, 1997, Decided
Appeal from the District Court, Third Judicial District, Anchorage, Stephanie Rhoades, Judge. Trial Court No. 3AN-95-1273 Cr.

COUNSEL

Michael B. Logue, Gorton & Associates, Anchorage, for Appellant.
James L. Walker, Assistant Municipal Prosecutor, and Mary K. Hughes, Municipal Attorney, Anchorage, for Appellee.

JUDGES

Before: Coats, Chief Judge, Mannheimer, Judge, and Rabinowitz, Senior Supreme Court Justice.*
AUTHOR: MANNHEIMER

OPINION

MANNHEIMER, Judge.

The Municipality of Anchorage undertook an in rem forfeiture proceeding against a vehicle owned by John K. Davis. This forfeiture action was prosecuted under former Anchorage Municipal Code (AMC) 9.28.026, an ordinance which declared that any vehicle operated by an intoxicated driver, or any vehicle operated by a driver who refused to submit to a breath test, was subject to forfeiture as a "public nuisance". Based on proof that Davis had driven while intoxicated and had refused to submit to a breath test, the Municipality obtained forfeiture of Davis's vehicle. The Municipality also pursued criminal charges against Davis for these same two offenses.

In this appeal, Davis contends that once the Municipality secured forfeiture of his vehicle in the civil proceeding, the double jeopardy clauses of the federal and the Alaska constitutions prohibited the Municipality from pursuing the criminal charges against him. For the reasons explained in this opinion, we hold that the Municipality was entitled to pursue both the **in rem** forfeiture action and the criminal charges.[1]

Facts of the case

Davis was arrested in Anchorage on February 17, 1995, for driving while intoxicated and refusing to submit to a breath test. His vehicle, a 1982 Ford, was seized at the time of his arrest. While Davis awaited trial on the two criminal charges, the Municipality pursued an **in rem**

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forfeiture action against the vehicle, and on May 12, 1995, Davis's vehicle was declared forfeit to the. Municipality.

Davis asked the district court to dismiss the still-pending criminal charges. He argued that the forfeiture of his vehicle amounted to a "punishment" for his acts of driving while intoxicated and refusing the breath test. Davis further contended that, because he had been punished once for these acts (by the forfeiture of his vehicle), the constitutional guarantees against double jeopardy prohibited the government from punishing him again for the same acts (by imprisonment or fine in the criminal case). **See** the Fifth Amendment to the United States Constitution and Article I, Section 9 of the Alaska Constitution.

The district court rejected Davis's arguments and refused to dismiss the criminal charge. Davis then pleaded no contest to driving while intoxicated, preserving his double jeopardy argument for appeal. **See Cooksey v. State,** 524 P.2d 1251, 1255-57 (Alaska 1974).

The forfeitures imposed under former AMC 9.28.026 were in rem forfeitures

In his brief to this court, Davis renews his argument that the forfeiture of his vehicle was a "punishment" for double jeopardy purposes. Under the United States Supreme Court's decision in **United States v. Ursery,** 518 U.S. , 116 S. Ct. 2135, 135 L. Ed. 2d 549 (1996), it is clear that forfeiture of a person's property in an **in rem** civil forfeiture proceeding does not constitute "punishment" for purposes of the federal double jeopardy clause. Davis attempts to avoid this result by arguing that vehicle forfeiture proceedings under former AMC 9.28.026 were not really **in rem** proceedings, but were instead in **personam** forfeitures, a type of forfeiture generally recognized as "punishment". **See Ursery,** 116 S. Ct. at 2147 (majority opinion) and at 2150-51 (concurring opinion of Justice Kennedy).

The law distinguishes between **in personam** forfeitures, which are inflicted as punishment for a crime, and **in rem** forfeitures, which can be inflicted on property owners who are themselves innocent of crime, if the government proves that the property is contraband or is connected to the commission of a criminal act. **See Calero-Toledo v. Pearson Yacht Leasing Co.,** 416 U.S. 663, 684; 94 S. Ct. 2080, 2092; 40 L. Ed. 2d 452 (1974); **The Palmyra,** 25 U.S. 1, 12 Wheat. 1, 14-15; 6 L. Ed. 531 (1827).

For instance, this court recently decided a case in which a defendant was subjected to an **in personam** forfeiture of his vehicle. **See Hillman v. Anchorage,** 941 P.2d 211 (Alaska App. 1997). In **Hillman,** the defendant's vehicle was forfeited, not in a separate civil action, but at his sentencing for driving while intoxicated. The forfeiture was imposed as part of the defendant's sentence pursuant to former AMC 9.28.020(C) (the statutory provision defining the penalties for driving while intoxicated), and the legal basis for the forfeiture was that the defendant had been found guilty of a crime.

Such **in personam** forfeitures, imposed as part of a person's penalty for violating a criminal statute, must be distinguished from **in rem** forfeitures, which do not depend upon proof that the property owner is guilty of a crime, but which are based on proof that the property is contraband or is connected to or derived from some dangerous or unlawful activity. This distinction was

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explained in some detail by Justice Kennedy in his concurring opinion in **Ursery** :

> The key distinction is that the instrumentality-forfeiture statutes are not directed at those who carry out the crimes, but at owners who are culpable for the criminal misuse of the property. **See Austin [v. United States,** 509 U.S. 602,] 619, 125 L. Ed. 2d 488, 113 S. Ct. [2801,] 2810-2811 [(1993)] (statutory "exemptions serve to focus the provisions on the culpability of the owner"). The theory [of **in rem** forfeiture] is that the property, whether or not illegal or dangerous in nature, is hazardous in the hands of this owner because he either uses it to commit crimes, or allows others to do so. The owner can be held accountable for the misuse of the property. **Cf. One 1958 Plymouth Sedan [v. Pennsylvania,** 380 U.S. 693,] 699, 85 S. Ct. [1246,] 1250[, 14 L. Ed. 2d 170 (1965)] ("There is nothing even remotely criminal in possessing an automobile. It is only the alleged use to which this particular automobile was put that subjects [the owner] to its possible loss.") ... Since the punishment befalls any property-holder who cannot claim statutory [exemption], whether or not he committed any criminal acts, [the forfeiture] is not a punishment for a person's criminal wrongdoing.
>
> Forfeiture, then, punishes an owner by taking property involved in a crime[.] It may happen that the owner is also the wrongdoer charged with a criminal offense. But the forfeiture is not a second in **personam** punishment for the offense[.]

Ursery, 116 S. Ct. at 2150.

In **Ursery**, the Supreme Court reaffirmed that the government may pursue "parallel **in rem** civil forfeiture actions and criminal prosecutions based upon the same underlying events". The Court noted that, "in a long line of cases", it had "considered the application of the Double Jeopardy Clause to civil forfeitures" and had "consistently concluded that the Clause does not apply to such actions because they do not impose punishment." **Ursery,** 116 S. Ct. at 2140.

The question then, for double jeopardy purposes, is to distinguish civil **in rem** forfeitures from forfeitures that are "intended as punishment, so that the proceeding is essentially criminal in character". **Ursery**, 116 S. Ct. at 2141, quoting **United States v. One Assortment of 89 Firearms,** 465 U.S. 354, 362; 104 S. Ct. 1099, 1105; 79 L. Ed. 2d 361 (1984). To answer this question, the **Ursery** Court reviewed its past decisions in this area -- specifically, **Various Items of Personal Property v. United States,** 282 U.S. 577, 51 S. Ct. 282, 75 L. Ed. 558 (1931), **One Lot [of] Emerald Cut Stones v. United States,** 409 U.S. 232, 93 S. Ct. 489, 34 L. Ed. 2d 438 (1972) (per curiam), and **United States v. One Assortment of 89 Firearms, supra** -- and then reaffirmed the two-part analysis it had used in those cases:

> First, [a court must] ask whether [the legislature] intended proceedings under [the forfeiture statute] to be criminal or civil. Second, [a court must] consider whether the [forfeiture] proceedings are so punitive in fact as to "[demonstrate] that [they] may not

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legitimately be viewed as civil in nature," despite [the legislature's] intent. **89 Firearms,** 465 U.S. at 366, 104 S. Ct., at 1107.

Ursery, 116 S. Ct. at 2147. Using this analysis as a guide, we conclude that the vehicle forfeitures imposed under former AMC 9.-28.026 were **in rem** forfeitures, and that forfeiture proceedings under that ordinance were civil, not criminal.

Under subsection C(3) of the ordinance, a vehicle allegedly used in connection with either of the two specified offenses (driving while intoxicated or breath test refusal) could be seized and held for impoundment or forfeiture proceedings even if no criminal charges were ever filed against the driver. In fact, seizure of the vehicle apparently did not depend on whether the court could obtain **in personam** jurisdiction over the driver. Subsection C(3) provided that any court "having jurisdiction **over the motor vehicle**" could issue an order for seizure of the vehicle if the government demonstrated probable cause to believe that the vehicle was forfeitable under AMC 9.28.026. The same subsection declared that, even in the absence of an arrest, a police officer who had probable cause to believe that a vehicle was forfeitable could temporarily seize the vehicle and hold it for up to 2 days (so that a court order could be obtained to authorize a longer seizure). Moreover, under subsection A(6), even when criminal charges were filed against the driver, the court presiding over the forfeiture action (and not the court presiding over the criminal action) remained in control of the vehicle: "Any requests for release of a vehicle during the pendency of [the] **in rem** action" had to be "brought in the forum of the **in rem** action".

Forfeiture under former AMC 9.28.026 was not premised on whether the driver of the vehicle had been convicted of a crime. Rather, subsection A(11) declared that it was "not a defense to an **in rem** proceeding brought under [AMC 9.28.026]" that the person in possession of the vehicle was acquitted or was convicted of a lesser offense. And, under subsection A(3), it was likewise no defense that a criminal proceeding against that person remained unresolved. Once the Municipality established by a preponderance of the evidence that the vehicle had been used in connection with one of the two specified offenses, subsection A(7) allowed only one defense to forfeiture -- that the vehicle owner "[was not] in possession of the vehicle and [was not] responsible for ... the act which resulted in the impoundment or forfeiture", and that the vehicle owner "did not know or have reasonable cause to believe" that the other person would operate the vehicle in violation of the law.

This analysis of former AMC 9.28.026 demonstrates that its forfeiture provisions were squarely aimed at "owners who [were] culpable for the criminal misuse of [their vehicle]", and that the forfeiture imposed by this ordinance was based on proof that the vehicle was "hazardous in the hands of this owner because either he used it to commit crimes, or allowed others to do so". **Ursery,** 116 S. Ct. at 2150. The Anchorage Municipal Assembly plainly intended the forfeiture provisions to be civil, and our analysis of those provisions demonstrates that those provisions are not "so punitive in fact" as to belie that civil categorization. **Ursery,** 116 S. Ct. at 2147.

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We therefore hold that forfeitures imposed under former AMC 9.28.026 were civil **in rem** forfeitures. It follows that vehicle forfeitures under former AMC 9.28.026 were not "punishments" for purposes of the federal double jeopardy clause. **Ursery, supra.** Under federal constitutional law, the forfeiture of Davis's vehicle did not bar the Municipality of Anchorage from prosecuting Davis for the crimes of driving while intoxicated and refusing a breath test.

Davis's argument under the Alaska Constitution

Davis argues that, even if the forfeiture of his vehicle did not constitute a "punishment" under federal double jeopardy law, we should interpret the Alaska double jeopardy clause differently. Davis cites **Whitton v. State,** 479 P.2d 302, 310 (Alaska 1970), in which the Alaska Supreme Court refused to follow federal precedent and instead adopted a different test for deciding when a defendant's violation of two criminal statutes constitutes the "same offense" for double jeopardy purposes.

However, as we noted both in **State v. Zerkel,** 900 P.2d 744 (Alaska App. 1995), and in **Aaron v. Ketchikan,** 927 P.2d 335 (Alaska App. 1996), the fact that a clause of the Alaska Constitution has, on occasion, been interpreted differently from the corresponding provision of the federal Constitution does not mean that we are at liberty to ignore federal precedent at will. When a party asserts that a provision of the Alaska Constitution should be construed differently from its close federal counterpart, that party bears the burden of demonstrating "something in the text, context, or history of the Alaska Constitution that justifies this divergent interpretation". **Zerkel,** 900 P.2d at 758 n.8, citing **Abood v. League of Women Voters,** 743 P.2d 333, 340-43 (Alaska 1987); **Aaron,** 927 P.2d at 336.

Davis does not satisfy the requirement established in **Abood, Zerkel,** and **Aaron**. He argues that the Alaska Supreme Court has not followed federal law in defining "same offense" (viz., the **Whitton** decision), and he argues that the concept of double jeopardy should not be "static". But even acknowledging this to be true, Davis does not explain why civil forfeiture of a vehicle used by an intoxicated driver should be considered "Punishment" under the Alaska Constitution. Under AMC 9.28.026, the Municipality of Anchorage was authorized to institute a civil action to obtain forfeiture of movable property that was used as the instrumentality of a criminal offense. Such forfeitures have a long tradition in Anglo-American law, and they traditionally have been viewed as noncriminal. The United States Supreme Court's decision in **Ursery** affirms this traditional view. Davis asks us to reject the analysis in **Ursery,** but he provides hardly any critique of the legal reasoning underlying that decision.

We recognize that, in recent times, both the Congress and various state legislatures have greatly increased the scope and severity of **in rem** forfeitures in an attempt to deter not only criminals but also non-criminals who countenance the use of their property by criminals. See Justice Stephens's dissent in **Ursery**, 116 S. Ct. at 2153. There are constitutional limits to such forfeitures; **in rem** forfeitures are governed by the Eighth Amendment's prohibition on excessive fines. **Austin v. United States,** 509 U.S. 602, 113 S. Ct. 2801, 125 L. Ed. 2d 488 (1993). Moreover, it is possible that the Alaska Constitution may place additional limitations on

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forfeitures of non-traditional scope or severity. However, Davis's case does not raise these issues.

The judgement of the district court is AFFIRMED.

DISPOSITION

AFFIRMED.

JUDGES FOOTNOTES

* Sitting by assignment made pursuant to Article IV, Section 11 of the Alaska Constitution and Administrative Rule 23(a).

OPINION FOOTNOTES

1 Since the time of this litigation, the Municipality of Anchorage has amended AMC 9.28.026. The current version of the ordinance contains several changes that are arguably material to a double jeopardy analysis. We express no opinion concerning the current version of AMC 9.28.026.

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NOTICE: UNPUBLISHED OPINION

Court of Appeals of Alaska.

Mark E. HAYNES, Appellant,
v.
STATE of Alaska, Appellee.

Nos. A-6593, 3818.

May 13, 1998.

Appeal from the District Court, First Judicial District, Ketchikan, Thomas M. Jahnke, Judge.

Michael J. Zelensky, Ketchikan, for Appellant.

Kenneth M. Rosenstein, Assistant Attorney General, Office of Special Prosecutions and Appeals, Anchorage, and Bruce M. Botelho, Attorney General, Juneau, for Appellee.

Before: COATS, Chief Judge, and MANNHEIMER and STEWART, Judges.

MEMORANDUM OPINION AND JUDGEMENT

MANNHEIMER, Judge.

*1 Mark E. Haynes was arrested in Ketchikan on November 24, 1994 and charged with both driving while intoxicated, AS 28.35.030(a), and driving with a suspended license, AS 28.15.291(a). He submitted to a chemical test of his breath, which showed his blood-alcohol level to be .186 percent.

The State of Alaska commenced criminal proceedings against Haynes. At the same time, based on Haynes's breath test result, the Department of Public Safety took administrative action against Haynes's (already suspended) driver's license. *See* AS 28.15.165-166. In addition, the City of Ketchikan impounded Haynes's vehicle and held it pending the outcome of a forfeiture proceeding (*Ketchikan v. One 1985 Maroon Ford Bronco,* No. 1KE-94-1146 Civ.) brought under Ketchikan Municipal Ordinance 10.40.045. [FN1] (This forfeiture proceeding never went to judgement; it was ultimately dismissed by agreement of the parties, with each side bearing its own costs.)

FN1. This ordinance allows the City to obtain forfeiture of vehicles used by persons who either drive while intoxicated or (having been arrested for driving while intoxicated) refuse the breath test, if they have a prior conviction for either of these offenses within the previous five years.

Haynes filed a motion in his criminal case seeking dismissal of the count charging him with driving while intoxicated. He argued that, because the State had taken administrative action against his driver's license, he had already suffered one "punishment" for his act of driving while intoxicated, and thus any additional punishment that might ultimately be imposed on him in the criminal prosecution would amount to an illegal second punishment for purposes of the double jeopardy clauses of the United States and Alaska Constitutions. The district court denied Haynes's motion, and he ultimately pleaded no contest to the charge of driving while intoxicated, reserving his right to appeal the district court's denial of his double jeopardy claim. *See Cooksey v. State,* 524 P.2d 1251, 1255-57 (Alaska 1974). In return for Haynes's plea, the State dismissed the charge of driving with a suspended license.

This was not a valid *Cooksey* plea. Haynes's double jeopardy attack, even if successful, would not have affected the validity of the count charging Haynes with driving while his license was suspended. *See State v. Zerkel,* 900 P.2d 744, 746 n. 1 (Alaska App.1995). From the record of the district court proceedings, it appears that the State's only reason for dismissing this count was to facilitate Haynes's no contest plea by insuring that Haynes's double jeopardy argument would be dispositive of the entire case, as required by *Cooksey.* We have repeatedly disapproved of such plea arrangements. *See Wells v. State,* 945 P.2d 1248, 1250 (Alaska App.1997); *Spinka v. State,* 863 P.2d 251 (Alaska App.1993).

Nevertheless, because this appellate case has been pending so long (since the autumn of 1995), we exercise our authority to treat Haynes's appeal as a petition for review, which we now grant. *See Juneau v. Thibodeau,* 595 P.2d 626, 631 (Alaska 1979); *Moore v. State,* 895 P.2d 507, 509 n. 2 (Alaska App.1995). We therefore turn to the merits of Haynes's appellate argument.

*2 Haynes attacks his DWI conviction on double jeopardy grounds, but his current double jeopardy argument is substantially different from the one he presented to the district court. With respect to the double jeopardy claim that Haynes did raise in the district court, we affirm the district court's ruling (its

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refusal to dismiss the DWI charge against Haynes). With respect to the double jeopardy claim that Haynes raises for the first time on appeal, we conclude that this claim is not preserved.

In the district court, Haynes argued that the DWI charge should be dismissed because the State had already taken administrative action against his driver's license (based on Haynes's breath-test reading of .186 percent blood-alcohol). Relying on a line of federal cases commencing with *United States v. Halper,* 490 U.S. 435, 109 S.Ct. 1892, 104 L.Ed.2d 487 (1989), Haynes argued that the administrative action against his license constituted a "punishment" for double jeopardy purposes; thus, because he had already been punished once for his act of driving while intoxicated, any punishment he received in the criminal prosecution would constitute an unconstitutional second punishment for the same offense.

We rejected an identical argument in *State v. Zerkel,* 900 P.2d at 757-58. Moreover, since our decision in *Zerkel,* the United States Supreme Court has substantially limited the authority of the cases Haynes relied on. *See Hudson v. United States,* 522 U.S. 93, 118 S.Ct. 488, 139 L.Ed.2d 450 (1997); *United States v. Ursery,* 518 U.S. 267, 116 S.Ct. 2135, 135 L.Ed.2d 549 (1996). Finally, we have rejected an analogous argument under the double jeopardy clause of the Alaska Constitution. *See Aaron v. Ketchikan,* 927 P.2d 335 (Alaska App.1996). We therefore uphold the district court's refusal to dismiss Haynes's case.

On appeal, however, Haynes advances a substantially different argument. He asserts that the double jeopardy problem was created by the City of Ketchikan's civil lawsuit seeking forfeiture of his vehicle. As explained above, this civil lawsuit was ultimately dismissed by stipulation of the parties. However, Haynes contends that the forfeiture of his vehicle, had it occurred, *would have been* a punishment for double jeopardy purposes, and therefore, because the City's forfeiture action was pending at the same time as the State's criminal prosecution, the criminal prosecution should have been dismissed on double jeopardy grounds.

Alternatively, Haynes argues that the City's impoundment of his vehicle pending the resolution of the forfeiture proceeding--essentially, a pre-judgement attachment of the disputed property--constituted a punishment for double jeopardy purposes, and therefore any further punishment imposed in the criminal proceeding would have been unconstitutional.

*3 Our previous decisions in this area-- *Zerkel, Aaron,* and *Davis v. Anchorage,* 945 P.2d 307 (Alaska App.1997) (holding that forfeiture of a vehicle in an *in rem* civil proceeding does not constitute punishment for double jeopardy purposes)--strongly suggest that both of Haynes's arguments are mistaken. However, we need not reach the merits of Haynes's arguments because neither of them was preserved.

In his district court pleading, Haynes adverted to the fact that the City of Ketchikan had filed a civil forfeiture action against his vehicle and had impounded the vehicle pending resolution of that lawsuit. However, when Haynes stated the basis of his claim for relief, he focused exclusively on the fact that the State had taken administrative action against his driver's license. And, when the district court issued its ruling on Haynes's motion to dismiss, the district court addressed only the argument that administrative suspension or revocation of a driver's license constituted punishment for double jeopardy purposes.

Haynes never sought reconsideration of the district court's ruling, nor did he take any other action to alert the district court that he believed the court had neglected to rule on one of his claims. This being the case, even if Haynes had meant to raise a double jeopardy claim based on the City of Ketchikan's action against his vehicle, any such claim would now be waived. *See Marino v. State,* 934 P.2d 1321, 1327 (Alaska App.1997); *Erickson v. State,* 824 P.2d 725, 733 (Alaska App.1991) (when the trial court overlooks or neglects to rule on a litigant's claim for relief, the litigant must press the court for a ruling or the claim will be deemed waived).

In his brief to this court, Haynes implicitly recognizes that he faces a procedural difficulty. He argues that, "to the extent [his] double jeopardy arguments might not have been, or were inadequately, presented [to the district court], such failure is not fatal to this appeal" because "the constitutional protection against double jeopardy is ordinarily not forfeited by failure to raise an objection at trial". It is true that double jeopardy claims ordinarily can not be forfeited by inaction. *See Menna v. New York,* 423 U.S. 61, 63 n. 2, 96 S.Ct. 241, 242 n. 2, 46 L.Ed.2d 195 (1975); *Horton v. State,* 758 P.2d 628, 632 (Alaska App.1988). However, this does not excuse a litigant from the rule that, absent plain error, a claim

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must be presented to the trial court before it can be raised on appeal. Because Haynes did not ask the district court to decide either his vehicle forfeiture claim or his vehicle impoundment claim, and because these claims can not be decided as matters of plain error, Haynes can not raise these contentions on appeal. [FN2]

FN2. In *Horton*, this court allowed the defendant to argue for the first time on appeal that, under the double jeopardy clause, two of his convictions should merge because they were based on the same criminal act. However, given this court's ruling that it was the State's burden to establish that the two counts were based on distinct acts, *id.*, 758 P.2d at 632, Horton's double jeopardy claim amounted to an attack on the sufficiency of the State's trial evidence to establish two separate offenses.
Sufficiency of the evidence to establish separate offenses is a legal determination based on the existing trial record; appellate courts can determine this question *de novo*. Thus, the specific double jeopardy claim that Horton raised could be decided under the rubric of "plain error". *See Shafer v. State*, 456 P.2d 466, 468 (Alaska 1969) (holding that, even though a defendant does not object to the sufficiency of the State's evidence at trial by seeking a judgement of acquittal, this claim can nevertheless be considered on appeal as a matter of plain error); *Mustafoski v. State*, 867 P.2d 824, 829 n. 1 (Alaska App.1994) (holding that an appellate court can independently review a trial court's ruling on the validity of an indictment when the issue was litigated solely on the pleadings and the pre-existing grand jury record). Haynes, on the other hand, raises double jeopardy claims that hinge on factual and legal issues that were not litigated in the trial court. Moreover, the proper decision of his claims is not obvious from the existing record. *See Hansen v. State*, 845 P.2d 449, 457 (Alaska App.1993); *Marrone v. State*, 653 P.2d 672, 676 (Alaska App.1982) (holding that when there is no clear legal answer to the defendant's claim, the defendant has failed to establish plain error). Thus, Haynes's claims do not constitute "plain error", and he can not raise them for the first time on appeal.

To conclude: We uphold the district court's ruling on the double jeopardy claim that Haynes preserved--the claim that the Department of Public Safety's administrative action against Haynes's driver's license precluded the State from prosecuting Haynes for driving while intoxicated. We find that Haynes failed to preserve the other double jeopardy claims that he raises in this appeal (claims based on the City of Ketchikan's *in rem* forfeiture action against his vehicle).

*4 The judgement of the district court is AFFIRMED.

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NOTICE: UNPUBLISHED OPINION

Court of Appeals of Alaska.

Beth C. BLANCHARD, Appellant,
v.
MUNICIPALITY OF ANCHORAGE, Appellee.
Ruth A. LEMBKE, Appellant,
v.
MUNICIPALITY OF ANCHORAGE, Appellee.
Quentin C. QUALLE, Appellant,
v.
MUNICIPALITY OF ANCHORAGE, Appellee.
Kristina K. BARTLETT, Appellant,
v.
MUNICIPALITY OF ANCHORAGE, Appellee.
Harry D. MODESETTE, Appellant,
v.
MUNICIPALITY OF ANCHORAGE, Appellee.
Robert M. McGHEE, Appellant,
v.
MUNICIPALITY OF ANCHORAGE, Appellee.
William R. GREENEWALD, Appellant,
v.
MUNICIPALITY OF ANCHORAGE, Appellee.
Arthur A. MITCHELL, Jr., Appellant,
v.
MUNICIPALITY OF ANCHORAGE, Appellee.
Christopher CALVERT, Appellant,
v.
MUNICIPALITY OF ANCHORAGE, Appellee.
Robert C. MURRAY, Appellant,
v.
MUNICIPALITY OF ANCHORAGE, Appellee.

Nos. A-6046, A-5979, A-6380, A-5977, A-6057, A-6382, A-5978, A-6347.

Dec. 10, 1997.

Appeals from the District Court, Third Judicial District, Anchorage, William H. Fuld, John R. Lohff, Gregory J. Motyka, James N. Wanamaker, and Michael L. Wolverton, Judges.

Eugene B. Cyrus, Eagle River, for Appellants Blanchard, Lembke, Qualle, McGhee, Greenewald, Mitchell, and Calvert.

William P. Bryson, Anchorage, for Appellants Modessette and Murray.

Michael B. Logue, Gorton & Associates, Anchorage, for Appellant Bartlett.

James L. Walker, Assistant Municipal Prosecutor, and Mary K. Hughes, Municipal Attorney, Anchorage, for Appellee.

Before: COATS, Chief Judge, MANNHEIMER, Judge, and RABINOWITZ, Senior Supreme Court Justice. [FN*]

FN* Sitting by assignment made pursuant to Article IV, Section 11 of the Alaska Constitution and Administrative Rule 23(a).

MEMORANDUM OPINION AND JUDGEMENT

MANNHEIMER, Judge.

*1 Each of the ten defendants in this consolidated appeal was charged with driving while intoxicated, Anchorage Municipal Code (AMC) 9.28.020. While these criminal charges were pending, the Alaska Department of Public Safety administratively revoked all ten defendants' operator's licenses (based on the same incidents). In addition, pursuant to former AMC 9.28.026, the Municipality of Anchorage impounded the vehicles that the defendants had been driving. All of the defendants had to pay money to the Municipality to reclaim their vehicles, and the Municipality retained possession of some of these vehicles for up to thirty days. [FN1]

FN1. Appellant Lembke's case actually comprises three different DWI prosecutions. In the first prosecution (No. A-5977), Lembke's vehicle was impounded but was soon released after she paid $161.75 to the Municipality. In the second prosecution (No. A-5978), Lembke's vehicle was impounded for 30 days and then released after Lembke paid a $60 fee. In the third prosecution (No. A-5979), the Municipality commenced forfeiture proceedings against the vehicle; this time, Lembke paid $750 to settle the proceedings and regain the vehicle.

Subsequently, the defendants asked the district court to dismiss the criminal charges against them. The defendants asserted that the revocation of their driver's licenses or the impoundment of their vehicles (or both) constituted "punishment" for double jeopardy purposes under either the Fifth Amendment to the federal Constitution or Article I, Section 11 of the Alaska Constitution. The defendants contended that, because they had already suffered these

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punishments, the Municipality was now precluded from prosecuting them for driving while intoxicated. The district court denied the defendants' motions, and ultimately the defendants all pleaded no contest to driving while intoxicated, reserving their right to litigate these double jeopardy claims. *See Cooksey v. State*, 524 P.2d 1251, 1255-57 (Alaska 1974).

The double jeopardy issues

Our decisions in *State v. Zerkel*, 900 P.2d 744 (Alaska App.1995) (decided under the federal Constitution), and *Aaron v. Ketchikan*, 927 P.2d 335 (Alaska App.1996) (decided under the Alaska Constitution), answer the defendants' contention that the administrative revocation of their driver's licenses insulated them from subsequent criminal prosecution for driving while intoxicated. We thus uphold the district court's rulings on this issue.

As to the defendants' contention that civil impoundment of their vehicles under former AMC 9.28.026 insulated them from subsequent criminal prosecution, that contention is answered by our recent decision in *Davis v. Anchorage*, --- P.2d ----, Opinion No. 1548 (Alaska App., September 19, 1997). In *Davis*, we examined former AMC 9.28.026 and we concluded that, under that statute, an *in rem* civil forfeiture of the vehicle operated by an intoxicated driver was not "punishment" for double jeopardy purposes under either the federal or the Alaska constitutions.

Several of the defendants in the present appeal argue that impoundment (that is, temporary retention) of a vehicle should be viewed differently from forfeiture. These defendants argue that forfeiture of a vehicle can be classified as "remedial" because the act of forfeiture permanently removes a dangerous object from the community, while impoundment must be "punitive" because it accomplishes only an inconvenience to the owner. This argument is premised on a misunderstanding of the rationale behind civil forfeiture. [FN2]

> FN2. It is also premised on a misunderstanding of what happened in civil forfeiture proceedings. As exemplified by defendant Lembke's case, a vehicle owner who faced forfeiture proceedings could resolve the case by paying money to the Municipality. See footnote 1. Further, under former AMC 9.28.026(C)(9)(a), even when a vehicle was declared forfeit, the Anchorage Chief of Police was authorized to sell the vehicle at auction-- thus returning it to the community, where it might conceivably again be used by an intoxicated driver.

*2 It is true that older cases discussing *in rem* forfeitures indulge in the legal fiction that the object itself is the "offender". Moreover, former AMC 9.28.026 declared that any vehicle used by an intoxicated driver constituted a "nuisance" to be abated. Such statements might indeed lead one to conclude that there was something about the vehicles themselves that was intrinsically dangerous or injurious to the public welfare. However, as we explained in *Davis*, the forfeiture provisions of AMC 9.28.026

> were squarely aimed at "owners who [were] culpable for the criminal misuse of [their vehicle]", and that the forfeiture imposed by this ordinance was based on proof that the vehicle was "hazardous in the hands of this owner because either he use[d] it to commit crimes, or allow[ed] others to do so".

Davis, slip opinion at 8 (quoting *United States v. Ursery*, 518U.S. 267, ----, 116 S.Ct. 2135, 2150, 135 L.Ed.2d 549 (1996) (concurring opinion of Justice Kennedy)). In other words, the Municipality was entitled to institute impoundment or forfeiture proceedings against the vehicles used by intoxicated drivers because, at least presumptively, the owners of those vehicles had engaged in behavior that put the public at risk--either by driving their own vehicles while intoxicated, or by lending their vehicles to other people who were intoxicated.

With the purpose of AMC 9.28.026 thus clarified, it can be seen that impoundment and forfeiture are simply two different forms of the same remedial sanction--taking a vehicle out of the hands of a person who is apt to allow the vehicle to be used dangerously. Impoundment is a temporary dispossession, forfeiture a permanent dispossession, but both serve the same remedial end. We therefore conclude that our decision in *Davis* controls the impoundment as well as the forfeiture of vehicles under former AMC 9.28.026.

For these reasons, we uphold the defendants' convictions for driving while intoxicated.

Lembke's sentence appeal

Defendant Lembke raises one additional issue that is germane solely to her case; she challenges the severity of her sentence. As indicated in footnote 1, Lembke was convicted of three different episodes of driving while intoxicated. District Judge John R. Lohff sentenced Lembke to a composite term of 360 days to serve (1260 days with 900 days suspended).

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We will first summarize the facts of Lembke's three cases and then analyze her sentence.

Just after midnight on October 14, 1994, Lembke was stopped for speeding and for flashing her headlights; this stop ultimately turned into an arrest for driving while intoxicated. A twelve-pack of beer was found in Lembke's car. Her blood-alcohol level tested at .195 percent.

Lembke was released on bail pending her trial. Among the conditions of pre- trial release, the court required Lembke to obey all laws and to refrain from consuming alcohol.

*3 On February 24, 1995, again just after midnight, Lembke was stopped for speeding and for weaving; again, this stop ultimately became an arrest for DWI. On this occasion, Lembke refused to submit to a breath test, but she appeared to be highly intoxicated.

Based on this second incident, Lembke was charged with a second DWI. She was also charged with refusing to submit to a breath test, AMC 9.28.022(C), driving while her license was revoked, AMC 9.12.010(B), and violating the conditions of her release in the still-pending 1994 DWI case (because she had consumed alcoholic beverages and because she had broken the law by driving without a valid driver's license).

Lembke was again released on bail. Four weeks later, on March 19, 1995, again just after midnight, the police received three REDDI ("Report Every Drunk Driver Immediately") reports concerning Lembke. Acting on these reports, an officer followed Lembke's car and observed it weaving into different lanes of traffic. The officer stopped Lembke, and again Lembke was arrested for DWI. Lembke's blood-alcohol level on this occasion was .268 percent. [FN3]

> FN3. In addition to driving while intoxicated, Lembke also had some cocaine in her possession. (She conceded this at her sentencing hearing.) Apparently, however, Lembke was never charged with this felony.

Based on this incident, Lembke was charged with a third DWI. She was also again charged with driving while her license was revoked. This time, Lembke was unable to make bail. She remained in custody until March 30th, when the court released her to an in-patient alcohol treatment program.

Four months later, Lembke reached a plea agreement with the Municipality: Lembke pleaded no contest to the three counts of driving while intoxicated, as well as the additional count of violating the conditions of her release; the Municipality dismissed the two counts charging Lembke with driving while her license was revoked, as well as the count charging Lembke with refusing to take the breath test.

Lembke had two prior DWI convictions from 1979, for which she served 3 days and 10 days in jail. However, because these two prior convictions were more than 10 years old, Lembke was a first offender for purposes of the mandatory minimum sentences set forth in AMC 9.28.020(C). That is, she faced a mandatory minimum sentence of 3 days' imprisonment for each of her three current DWI's. *See* AMC 9.28.020(C)(1)(a).

Judge Lohff sentenced Lembke in all three cases simultaneously. At the sentencing hearing, Lembke and other witnesses (including Lembke's alcoholism counselor) testified concerning Lembke's alcoholism, her rehabilitative efforts, and her progress. Lembke's counselor at the Breakthrough Chemical Dependency Program testified that Lembke had received in-patient treatment for several days (from March 30th through April 5th), then day-patient treatment for another two weeks (April 6th through April 21st), before being released to the out-patient program. At the time of her sentencing, Lembke had completed 17 weeks of out-patient therapy; the full program is 40 weeks long, so Lembke had 23 weeks left.

While Lembke's counselor thought that Lembke demonstrated a good attitude toward therapy, she evaluated Lembke's chances for successful rehabilitation as "average"--both because Lembke had a serious alcohol problem and also because Lembke had "some other issues that she needs to deal with". The counselor agreed that Lembke's successful rehabilitation would require a "substantial investment of ... time and energy".

*4 In his sentencing remarks, Judge Lohff declared that Lembke, by committing three DWI offenses so close together in time, had exhibited "an extreme degree" of "poor judgement". Lembke's blood-alcohol levels (on the two occasions when it had been measured) had substantially exceeded the legal limit; Judge Lohff found that these high blood-alcohol levels indicated an extreme degree of impairment.

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Moreover, Judge Lohff pointed out that Lembke's second and third offenses were committed while Lembke was awaiting trial on other DWI charges. (We also note, although Judge Lohff did not specifically mention this point, that Lembke committed her second and third offenses when she was on bail release and had been ordered to refrain both from drinking and from driving.)

Based on the circumstances of Lembke's current offenses, as well as the fact that Lembke had twice before been convicted of driving while intoxicated, Judge Lohff concluded that the 3-day mandatory minimum sentence for Lembke's present offenses would be "clearly and ridiculously inadequate [to express] community condemnation" of Lembke's conduct. Judge Lohff explained that he viewed Lembke's conduct as approaching "worst offender status", and he declared that he intended to impose "aggravated" sentences.

On the other hand, Judge Lohff declined to find Lembke a "worst offender". The judge expressly considered Lembke's rehabilitation as a sentencing goal, and he acknowledged that Lembke had made "good progress" toward rehabilitation. However, Judge Lohff believed that the facts of Lembke's case called on him to emphasize the sentencing goals of community condemnation, protection of the public, and deterrence. The judge declared that he wished to do everything possible to prevent Lembke from repeating her offenses.

In the first DWI case, Judge Lohff sentenced Lembke to 360 days with 320 days suspended; in the second DWI case, Judge Lohff sentenced Lembke to 360 days with 240 days suspended; and in the third DWI case, Judge Lohff sentenced Lembke to 360 days with 180 days suspended. In addition, Lembke received 180 days with 160 days suspended for violating the conditions of her release. Judge Lohff imposed all of these sentences consecutively, resulting in a composite sentence of 1260 days with 900 days suspended, or 360 days to serve.

On appeal, Lembke argues that Judge Lohff failed to adequately address her progress toward rehabilitation, exemplified by her success during four months of alcohol therapy, and that he failed to give sufficient weight to her rehabilitative prospects. However, the record shows that Judge Lohff gave specific attention to Lembke's rehabilitation and her efforts in the treatment program. The judge simply concluded that, in light of the circumstances, other sentencing goals should take priority.

Lembke's treatment counselor, while she praised Lembke's attitude and efforts in therapy, evaluated Lembke's prospects as only "average". Weighed against this "average" prospect for rehabilitation was Lembke's past record of DWI offenses and her serious string of present offenses. Within the space of half a year, Lembke committed three DWI's. The second and third of these offenses were committed while Lembke was on bail release--living under court order not to drink and not to drive (because her driver's license had been revoked). Such recidivism is a substantial aggravating factor. *Compare Bush v. State,* 678 P.2d 423, 425-26 (Alaska App.1984), and *Rosa v. State,* 633 P.2d 1027, 1032-33 (Alaska App.1981) (upholding aggravated sentences for defendants who continued to sell cocaine while released on bail in connection with cocaine charges).

*5 Lembke argues that Judge Lohff should not have viewed her three DWI offenses as three separate crimes, since Lembke committed all three before she had been sentenced on even the first one. Lembke argues that, because she did not go through conviction and sentencing until after she had committed all three offenses, she "did not have the opportunity to follow through with rehabilitation". Thus, Lembke concludes, it was unfair for Judge Lohff to treat her as if she were, in essence, a third offender.

The record shows that Judge Lohff understood that Lembke was not a third offender. He specifically declared that Lembke faced only a first offender's minimum sentence (72 hours' imprisonment) for each of the three DWI convictions. However, the fact that Lembke was a first offender for purposes of determining the mandatory minimum sentence does not mean that Judge Lohff was obliged to treat her as a first offender for all sentencing purposes. A sentencing judge may consider a defendant's criminal history and past convictions regardless of whether those past convictions affect the defendant's status for purposes of applying a presumptive term or a mandatory minimum term. *See State v. Peel,* 843 P.2d 1249, 1251 n. 2 (Alaska App.1992); *Burnette v. Anchorage,* 823 P.2d 10, 14 n. 4 (Alaska App.1991).

Judge Lohff declared that one of his specific sentencing goals was to ensure that Lembke was deterred from continuing to drive while intoxicated. The record shows that Lembke was unable or unwilling to refrain from driving while intoxicated even after her misconduct was forcefully brought to

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her attention by her 1979 convictions, by her arrests in October 1994 and March 1995, by the formal proceedings instituted against her, and by the court's bail conditions. Given this record, we conclude that Judge Lohff could reasonably choose to accentuate the aggravated nature of Lembke's course of conduct over Lembke's average potential for rehabilitation. *Asitonia v. State*, 508 P.2d 1023, 1026 (Alaska 1973); *Ting v. Anchorage*, 929 P.2d 673, 675 (Alaska App.1997) (a sentencing judge is primarily responsible for weighing the various sentencing goals under the particular facts of the defendant's case).

This court has affirmed even more severe sentences for defendants who were sentenced for a series of DWI's, even when the later offenses were committed before the defendant had been sentenced on the earlier charges. For instance, in *Raymond v. Anchorage*, 698 P.2d 669 (Alaska App.1985), this court affirmed a composite sentence of 460 days to serve for two counts of DWI and two counts of driving with a revoked license. These charges arose from incidents that occurred only six days apart, but the defendant had two earlier DWI convictions. And in *Wilson v. State*, 680 P.2d 1173, 1177, 1179 (Alaska App.1984), this court affirmed a composite sentence of 3 years, 9 months for three incidents that gave rise to two DWI convictions as well as convictions for reckless driving and refusing to submit to a breath test. The reckless driving and breath-test refusal charges stemmed from an incident that occurred four days before the defendant was sentenced for the second DWI.

*6 Having independently examined the record, we conclude that the 360-day composite term imposed by Judge Lohff is not clearly mistaken. *McClain v. State*, 519 P.2d 811, 813-14 (Alaska 1974).

Conclusion

The judgements of conviction entered against these ten defendants are AFFIRMED. Additionally, in Lembke's appeal, the district court's sentencing decision is AFFIRMED.

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Only the Westlaw citation is currently available.

NOTICE: UNPUBLISHED OPINION

Court of Appeals of Alaska.

MUNICIPALITY OF ANCHORAGE, Appellant,
v.
David W. SHAFFER, Appellee.

No. A-5917.

June 4, 1997.

Appeal from the District Court, Third Judicial District, Anchorage, William H. Fuld, Judge.

James L. Walker, Assistant Municipal Prosecutor, and Mary K. Hughes, Municipal Attorney, Anchorage, for Appellant.

Jason A. Steen, Gorton & Associates, Anchorage, for Appellee.

Before: COATS, Chief Judge, MANNHEIMER, Judge, and JOANNIDES, District Court Judge. [FN**]

FN** Sitting by assignment of the chief justice made pursuant to Article IV, Section 16 of the Alaska Constitution.

MEMORANDUM OPINION AND JUDGEMENT [FN*]

FN* Entered pursuant to Appellate Rule 214 and the Guidelines for Publication of Court of Appeals Decisions (Court of Appeals Order No. 3).

MANNHEIMER, Judge.

*1 David W. Shaffer was arrested by the Anchorage police for driving while intoxicated. At the time of his arrest, Shaffer was driving a 1985 Subaru with Virginia license plates; this vehicle was impounded. Because Shaffer had a prior conviction for refusing to submit to a breath test, the Municipality of Anchorage commenced forfeiture proceedings against the Subaru under former Anchorage Municipal Code § 9.28.026(C).

The vehicle was not registered to Shaffer, but Shaffer contacted the Municipality and submitted a copy of the certificate of title, which showed that he had recently purchased the car. However, after making this contact with the Municipality, Shaffer never filed an answer to the Municipality's forfeiture complaint. The administrative hearing officer ultimately granted default judgement to the Municipality.

Based on the forfeiture of the Subaru, Shaffer asked the district court to dismiss the driving while intoxicated charge. Shaffer argued that the forfeiture of his vehicle constituted a punishment for his act of drunk driving, and thus any further punishment that might be imposed in the pending criminal action would violate the constitutional guarantee against double jeopardy. The district court agreed with Shaffer and dismissed the DWI charge. The Municipality now appeals the district court's ruling.

This case is controlled by our recent decision in *Anchorage v. Skagen,* 920 P.2d 284 (Alaska App.1996). In *Skagen,* we held that a civil forfeiture proceeding against a defendant's vehicle does not constitute a "jeopardy" for purposes of the double jeopardy clause if the defendant does not enter an appearance and formally contest the forfeiture. 920 P.2d at 286-87. Shaffer never entered an appearance when the Municipality sought forfeiture of his vehicle. Thus, the district court erred when it ruled that Shaffer had been placed in jeopardy in that forfeiture proceeding.

Shaffer attempts to avoid this result by pointing out that, even though he never filed an answer to the Municipality's forfeiture complaint, he did contact the Municipality to notify them that he was the true owner of the vehicle. Shaffer argues that this act of notification distinguishes his case from *Skagen.* It does not.

In *Skagen,* we discussed an analogous federal case, *United States v. Castro,* 78 F.3d 453 (9th Cir.1996). The defendant in *Castro* was charged with drug offenses; he was also notified that the government would be seeking forfeiture of some property he owned. Castro filed notice that he intended to contest the forfeiture, but the notice was filed late and it failed to include all the necessary forms. The Drug Enforcement Agency notified Castro of these deficiencies and extended him another opportunity to contest the forfeiture. Castro refiled the paperwork, but again it was not in proper form. (Castro failed to submit his pleadings under oath.) The government informed Castro that his pleadings were again deficient, and they gave him a third opportunity to contest the forfeiture. This time, Castro failed to

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respond. *Castro,* 78 F.3d at 454-55.

*2 On appeal from his criminal convictions, Castro argued that the criminal judgement against him constituted a second punishment because the government had already obtained forfeiture of his property. The Ninth Circuit disagreed. "Merely asserting that the property belonged to him, without complying with the requirements for filing a claim of ownership, is not legally sufficient[,]" the court said. *Id.* at 456. The court additionally noted that Castro, despite his assertion of ownership, had never actually sought to re-open the forfeiture proceedings or obtain a modification of the default judgement:

> [The defendant's] failure to file a petition for remission or mitigation ... reveals that, even when he had the opportunity to challenge ... the forfeiture and assert his interest, he weighed the worth of asserting a claim against any risks associated with doing so and ultimately decided not to assert a claim of ownership.

Castro, 78 F.3d at 457.

Shaffer, like the defendants in *Skagen* and *Castro,* notified the government that he was the owner of the property but did not pursue this asserted ownership interest by answering the forfeiture complaint. Thus, Shaffer's case is governed by our decision in *Skagen:* the default forfeiture of an unclaimed vehicle did not inflict a punishment on Shaffer.

The judgement of the district court is REVERSED and the driving while intoxicated charge against Shaffer is reinstated. This case is remanded to the district court for further proceedings on that charge.

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920 P.2d 284 MUNICIPALITY OF ANCHORAGE V. SKAGEN (Ct. App. 1996) 1996 Alas. App. Lexis 26

MUNICIPALITY OF ANCHORAGE, Petitioner,

vs.

WILLIAM M. SKAGEN, Respondent.

No. 1474, Court of Appeals Nos. A-5765 & 5795
COURT OF APPEALS OF ALASKA
920 P.2d 284, 1996 Alas. App. LEXIS 26
June 21, 1996, Decided
Petition for Review from the District Court, Third Judicial District, Anchorage, William H. Fuld, Judge. Trial Court No. 3AN-94-2872 Cr.

COUNSEL

James L. Walker, Assistant Municipal Prosecutor, Mary K. Hughes, Municipal Attorney, Anchorage, for Petitioner.

Frederick T. Slone, Kasmar and Slone, Anchorage, for Respondent.

JUDGES

Before: Bryner, Chief Judge, and Coats and Mannheimer, Judges.

AUTHOR: MANNHEIMER

OPINION

MANNHEIMER, Judge.

William M. Skagen was charged with two violations of the Anchorage Municipal Code: driving while intoxicated, AMC § 9.28.-020A, and refusing to take a breath test, AMC § 9.28.022C. While Skagen awaited trial, the Municipality commenced a civil forfeiture proceeding against his automobile pursuant to AMC § 9.28.026C.[1] Skagen (who was the registered owner of the vehicle) failed to enter an appearance in the forfeiture action. As a consequence, the Municipality obtained a default judgement of forfeiture against the vehicle.

After the vehicle was forfeited to the Municipality, Skagen filed a motion seeking dismissal of the two criminal charges pending against him. Skagen asserted that the forfeiture of his vehicle, based on his acts of driving while intoxicated and refusing to take the breath test, constituted a "punishment" for double jeopardy purposes. Because he had already suffered this punishment, Skagen argued, the double jeopardy clause of the Federal Constitution barred the Municipality from prosecuting him for these two crimes.

District Court Judge William H. Fuld agreed with Skagen in part. He ruled that the forfeiture of Skagen's vehicle constituted a punishment for double jeopardy purposes, but he found that the vehicle forfeiture had been based solely on Skagen's refusal to take the breath test, not his act of driving while intoxicated. For this reason, Judge Fuld dismissed the breath-test refusal charge but he maintained the driving while intoxicated charge.

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The Municipality filed a petition for review, asking us to reinstate the breath-test refusal charge. Skagen filed a cross-petition, asking us to dismiss the driving while intoxicated charge. We granted both petitions, and we now hold that the Municipality is entitled to pursue both of the criminal charges.

There is support for Skagen's assertion that the forfeiture of a vehicle based on criminal acts of the driver constitutes a "punishment" for federal double jeopardy purposes. **See One 1958 Plymouth Sedan v. Pennsylvania,** 380 U.S. 693, 699; 85 S. Ct. 1246, 1250; 14 L. Ed. 2d 170 (1965), cited in **Austin v. United States,** 509 U.S. 602, 113 S. Ct. 2801, 2811; 125 L. Ed. 2d 488 (1993), and **United States v. Perez,** 70 F.3d 345 (5th Cir. 1995). There is also legal authority against Skagen. **See City of New Hope v. One 1986 Mazda 626,** 546 N.W.2d 300 (Minn. App. 1996) (holding that the forfeiture of a vehicle operated by an intoxicated driver does not constitute "punishment" for double jeopardy purposes, and that such a forfeiture can be imposed in addition to the criminal penalties for DWI); **State v. Johnson,** 667 So. 2d 510 (La. 1996) (holding that the forfeiture of a vehicle used in drug offenses does not, **per se,** constitute "punishment" for double jeopardy purposes -- that, with the possible exception of extraordinarily valuable vehicles, such a forfeiture can be imposed irrespective of whether the owner has already been convicted and sentenced for the drug offenses); **State v. One 1989 Ford F-150 Pickup,** 888 P.2d 1036 (Okla. App. 1995) (indicating that the forfeiture of a vehicle used in drug offenses does not constitute "punishment" for double jeopardy purposes). **See also United States v. Salinas,** 65 F.3d 551, 553-54 (6th Cir. 1995), and **United States v. Tilley,** 18 F.3d 295, 300 (5th Cir. 1994), **cert. denied** U.S. , 115 S. Ct. 574, 130 L. Ed. 2d 490 (forfeiture of property purchased with the proceeds of illegal narcotics transactions is not "punishment" for double jeopardy purposes).

Despite the allure of this double jeopardy issue, we conclude that we need not resolve it to decide Skagen's case. The federal circuits uniformly hold that, even when the government files suit to obtain forfeiture of property based on a person's criminal acts, the double jeopardy clause is not implicated when the forfeiture is entered by default after the defendant fails to file an appearance in the forfeiture action and assert an interest in the property.

For instance, in **United States v. Washington,** 69 F.3d 401 (9th Cir. 1995), government agents arrested Washington for narcotics offenses and seized over $ 1000 from him. When the government commenced forfeiture proceedings against this money, "Washington decided [on the advice of counsel] not to file a claim stating his interest in the seized money". 69 F.3d at 402.

After the money was forfeited to the government, Washington sought dismissal of the drug charges against him. He relied on **United States v. $ 405,089.23 in U.S. Currency,** 33 F.3d 1210 (9th Cir. 1994), a case in which the Ninth Circuit held that the forfeiture of money connected with narcotics offenses constituted "punishment" for double jeopardy purposes, thus prohibiting the government from later trying the defendant on criminal charges arising from the same conduct. However, the Ninth Circuit found that Washington's case was not governed by **U.S. Currency:**

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> [While] criminal [prosecution] and civil forfeiture proceedings based on the same facts may subject a defendant to double jeopardy[,] jeopardy does not attach ... whenever the Government seizes property.
>
> In the recent decision in **[United States v.] Cretacci,** [62 F.3d 307, 310-11 (9th Cir. 1995)], we concluded that an owner who receives notice of an intended forfeiture and fails to claim an ownership interest in the property has effectively abandoned that interest. Because abandonment constitutes a relinquishment of all rights in the property, we held in **Cretacci** that the taking of such property imposes no "punishment" on the former owner and thus does not place him or her in jeopardy.
>
> . . .
>
> Washington failed to contest the propriety of the seizure [of the money] by filing a claim of ownership [or] by filing a petition for remission or mitigation. Under **Cretacci,** the Government's forfeiture of the monies found on Washington's person therefore imposed no punishment on him and he thus was never placed in jeopardy. Accordingly, we reject Washington's claim that his subsequent criminal prosecution constitutes double jeopardy.

United States v. Washington, 69 F.3d at 403-04 (citations omitted).

Accord: United States v. James, 78 F.3d 851, 855 (3rd Cir. 1996); **United States v. Wilson,** 77 F.3d 105, 111 (5th Cir. 1996); **United States v. Pena,** 67 F.3d 153, 156 (8th Cir. 1995); **United States v. Ruth,** 65 F.3d 599, 603-04 (7th Cir. 1995), **cert. denied,** 116 S. Ct. 1548 (1996); **United States v. Baird,** 63 F.3d 1213, 1217-1220 (3rd Cir. 1995), **cert. denied,** 116 S. Ct. 909, 133 L. Ed. 2d 841 (1996); **United States v. Arreola-Ramos,** 60 F.3d 188, 192 (5th Cir. 1995); **United States v. Torres,** 28 F.3d 1463, 1465-66 (7th Cir. 1994), **cert. denied** 115 S. Ct. 669, 130 L. Ed. 2d 603 (1994).

Skagen, like the defendants in **Washington** and the cases cited in the last paragraph, failed to enter an appearance in the civil forfeiture action. With no one appearing to contest the forfeiture, the Municipality obtained the vehicle by default. Under the foregoing cases, Skagen was not placed in jeopardy in the forfeiture proceeding (because he was never a party to that proceeding), nor was Skagen "punished" by the forfeiture of the vehicle (because he failed to claim an interest in it).

Skagen claims that his failure to file an appearance in the forfeiture action stemmed from the

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fact that he was never properly notified of the proceeding. Skagen asserts that the Municipality sent the notice of impending forfeiture to the wrong address. Skagen further contends that the Municipality then compounded its error: having failed to elicit any response through its letter to Skagen, the Municipality proceeded to serve Skagen by publication -- but it published the notice in a newspaper in Eagle River, not in Anchorage where Skagen was residing.

Assuming that Skagen could prove that he never received proper notice of the forfeiture action, he might be entitled to have the forfeiture set aside under Civil Rule 60.[2] So far, however, it appears that Skagen has chosen to take no action. Thus, Skagen's position in the district court (and his position on appeal) is that he might wish to assert an interest in the vehicle, and he might be entitled to have the default set aside if he succeeded in re-opening the forfeiture proceeding. These possibilities remain speculative because Skagen has done nothing to pursue them.

A judgement remains valid until it is shown to be invalid. The fact that a person claims that there is a compelling reason to set aside a judgement does not invalidate that judgement until the person's claim is proved in a judicial proceeding. See Civil Rule 60(b): "A motion [for relief from judgment] does not affect the finality of a judgment or suspend its operation." For the present, both the district court and this court must assume that the default forfeiture entered against Skagen's vehicle was valid -- that Skagen received notice, and that he knowingly refrained from claiming an interest in the vehicle.

Moreover, even if we accepted Skagen's assertions of fact as true, this would leave Skagen in the position of claiming that his current criminal prosecution should be deemed a second jeopardy because Skagen might choose to subject himself to another punishment in the future. That is, Skagen asserts that he is entitled to have the forfeiture proceeding re-opened at some future time and, when it is re-opened, he would be entitled to assert an ownership interest in the vehicle (an act that could arguably make any renewed forfeiture order a "punishment" for double jeopardy purposes). None of these events has occurred yet.

The Ninth Circuit recently considered an analogous case in **United States v. Castro,** 78 F.3d 453 (9th Cir. 1996). The defendant in **Castro** was charged with drug offenses and he was also notified that the government would be seeking forfeiture of some property he owned. Castro filed notice that he intended to contest the forfeiture, but the notice was filed late and it failed to include all the necessary forms. The Drug Enforcement Agency notified Castro of these deficiencies and extended him another opportunity to contest the forfeiture. Castro refiled the paperwork, but again it was not in proper form. (Castro failed to submit his pleadings under oath.) The government informed Castro that his pleadings were again deficient, and they gave him a third opportunity to contest the forfeiture. This time, Castro failed to respond. **Castro,** 78 F.3d at 454-55.

On appeal from his criminal convictions, Castro argued that the criminal judgement against him constituted a second punishment because the government had already obtained forfeiture of his property. The Ninth Circuit disagreed. "Merely asserting that the property belonged to him, without complying with the requirements for filing a claim of ownership, is not legally sufficient[,]" the court said. **Id.** at 456. The court additionally noted that Castro, despite his

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assertion of ownership, had never actually sought to re-open the forfeiture proceedings or obtain a modification of the default judgement:

> [The defendant's] failure to file a petition for remission or mitigation ... reveals that, even when he had the opportunity to challenge ... the forfeiture and assert his interest, he weighed the worth of asserting a claim against any risks associated with doing so and ultimately decided not to assert a claim of ownership.

Castro, 78 F.3d at 457.

Skagen, like the defendant in **Castro,** asserts that he is the owner of the forfeited property, but he has done nothing to pursue this asserted ownership interest. The cases unanimously hold that the default forfeiture of the unclaimed vehicle did not inflict a punishment on Skagen.

Skagen's double jeopardy claim will not be ripe until such time, if any, as Skagen chooses to assert an interest in the vehicle and succeeds in re-opening the forfeiture proceeding. If, at that time, judgement has already been entered against Skagen on either or both of the criminal charges, Skagen would have an arguable double jeopardy defense to the forfeiture. If, on the other hand, the forfeiture action is re-opened, Skagen unsuccessfully contests the forfeiture, and the forfeiture is re-imposed before judgement is entered against Skagen on the criminal charges, then Skagen would have an arguable double jeopardy defense to any continuation of the criminal charges.

These potential future scenarios have no bearing on our resolution of the present case. As things currently stand, Skagen's vehicle was forfeited by default after Skagen failed to assert an interest in it, and Skagen has yet to take any action to seek a re-opening of the forfeiture proceeding. Under these facts, Skagen must be deemed to have abandoned his interest in the vehicle, and the default forfeiture of that vehicle did not inflict any punishment on him. Moreover, Skagen has not been tried on the criminal charges. Thus, Skagen has not yet been subjected to any punishment, much less double punishment, for his alleged acts of driving while intoxicated and refusing the breath test.

We therefore REVERSE the district court's dismissal of the breath-test refusal charge, and we AFFIRM the district court's refusal to dismiss the driving while intoxicated charge. We remand Skagen's case to the district court for further proceedings on these two criminal charges.

DISPOSITION

District court's dismissal of breath-test refusal charge REVERSED, and district court's refusal to dismiss driving while intoxicated charge AFFIRMED. Case remanded to district court for further proceedings.

OPINION FOOTNOTES

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1 This ordinance empowers the Municipality to institute a civil action seeking impoundment or forfeiture of any motor vehicle "that [was] operated, driven[,] or in the actual physical control of an individual arrested for or charged with ... driving while intoxicated, or ... refusal to submit to a chemical [breath] test[]". In cases in which the vehicle belongs to someone other than the person who was driving it, the ordinance creates a presumption that the vehicle was operated "with the knowledge and consent of the registered owners". The ordinance then continues:

A vehicle so operated [that is, a vehicle operated by a person who violated either the driving while intoxicated ordinance or the breath test refusal ordinance] is declared to be a public nuisance for which the registered owners hold legal responsibility[,] subject only to the defenses ... set forth [below].

The ordinance allows the Municipality to seek a 30-day impoundment of the vehicle if the driver has not been previously convicted of either DWI or breath-test refusal. If the driver has previously been convicted of either of these offenses, the Municipality can seek forfeiture of the vehicle. AMC § 9.28.026A(1).

2 We note, however, that Civil Rule 60 requires such a motion to be made "within a reasonable time". The forfeiture order was entered in August 1994, and Skagen was aware of what had happened at least by February 1995. (On February 10, 1995, Skagen filed a pleading in the district court asserting that the forfeiture had occurred without proper notice to him).

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900 P.2d 744 STATE V. ZERKEL (Ct. App. 1995) 1995 Alas. App. Lexis 38

STATE OF ALASKA, Appellant, vs. KYLE J. ZERKEL, Appellee. CONSOLIDATED WITH: JEHU MARISCAL, Petitioner, v. STATE OF ALASKA, Respondent. STATE OF ALASKA, Appellant, v. KENNETH HARRIS, Appellee. STATE OF ALASKA, Appellant, v. HOWARD JERUE, JR., Appellee. MUNICIPALITY OF ANCHORAGE, Appellant, v. ROBERT D. BECK, Appellee. MUNICIPALITY OF ANCHORAGE, Appellant, v. MARCUS L. CHOQUETTE, Appellee. MUNICIPALITY OF ANCHORAGE, Appellant, v. RICKY A. HOFF, Appellee. MUNICIPALITY OF ANCHORAGE, Appellant, v. IRVING J. IGTANLOC, Appellee. MUNICIPALITY OF ANCHORAGE, Appellant, v. MATTHEW P. KETCHUM, Appellee. MUNICIPALITY OF ANCHORAGE, Appellant, v. RACHEL M. KONAHOK-McVEY, Appellee. MUNICIPALITY OF ANCHORAGE, Appellant, v. HAROLD D. JOHNSON, JR., Appellee. MUNICIPALITY OF ANCHORAGE, Appellant, v. ROBERT C. MURRAY, Appellee. MUNICIPALITY OF ANCHORAGE, Appellant, v. Danny P. Shadle, Appellee.

Nos. 1424, A-5773, A-5739, A-5774, A-5775, A-5776, A-5777, A-5778, A-5779, A-5780, A-5781, A-5783, A-5784, and A-5785
COURT OF APPEALS OF ALASKA
900 P.2d 744, 1995 Alas. App. LEXIS 38
July 28, 1995, Decided
Appeals and petition for review from the District Court, Third Judicial District, Anchorage, Sigurd E. Murphy and Michael L. Wolverton, Judges. Trial Court No. 3AN-94-8450 Cr. Trial Court No. 3AN-95-288 Cr. Trial Court No. 3AN-94-2890 Cr. Trial Court No. 3AN-94-1534 Cr. Trial Court No. 3AN-94-8096 Cr. Trial Court No. 3AN-94-8561 Cr. Trial Court No. 3AN-94-9330 Cr. Trial Court No. 3AN-94-7412 Cr. Trial Court No. 3AN-94-8080 Cr. Trial Court No. 3AN-94-9333 Cr. Trial Court No. 3AN-94-7831 Cr. Trial Court No. 3AN-94-9036 Cr. Trial Court No. 3AN-94-4667 Cr.

Petition for Rehearing Denied August 14, 1995, Reported at: 1995 Alas. App. LEXIS 46.

COUNSEL

Eric A. Johnson, Assistant Attorney General, Office of Special Prosecutions and Appeals, Anchorage, and Bruce M. Botelho, Attorney General, Juneau, for Appellant/Respondent State of Alaska.

James L. Walker, Assistant Municipal Prosecutor, and Mary K. Hughes, Municipal Attorney, Anchorage, for Appellant Municipality of Anchorage.

Frederick T. Slone, Kasmar and Slone, P.C., Anchorage, for Appellees Harris, Jerue, and Hoff. G. Blair McCune, Assistant Public Defender, and John B. Salemi. Public Defender, Anchorage, for Petitioner Mariscal.

Eugene B. Cyrus, Anchorage, for Appellee Zerkel. Michael B. Logue, James E. Gorton & Associates, Anchorage, for Appellees Beck and Choquette. William B. Oberly, Anchorage, for Appellee Igtanloc. Michael J. Keenan, Anchorage, for Appellee Ketchum. William D. Artus, Anchorage, for Appellee Konahok-McVey. W. Grant Callow, II, Anchorage, for Appellee Johnson. Ben J. Esch, Garretson & Esch, Anchorage, for Appellee Murray. Richard D. Kibby, Anchorage, for Appellee Shadle.

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JUDGES

Before: Bryner, Chief Judge, and Coats and Mannheimer, Judges. BRYNER, Chief Judge, concurring.
AUTHOR: MANNHEIMER

OPINION

MANNHEIMER, Judge.

These consolidated appeals all involve defendants who were arrested for driving while intoxicated. In each case, the defendant either refused to take the breath test required by AS 28.35.031(a) or else took the test and the test results showed that the defendant's blood-alcohol level was .10 percent or higher. Based on either the defendant's refusal to take the test or the defendant's test result, the Department of Public Safety conducted administrative proceedings under AS 28.15.165-166 and, ultimately, revoked each defendant's driver's license.

At the same time, each defendant was also facing criminal prosecution in the district court. (Some of the defendants were prosecuted by the State of Alaska; the others were prosecuted by the Municipality of Anchorage.) Each defendant was charged with either driving while intoxicated (DWI), AS 28.35.030(a), or refusing to submit to a breath test, AS 28.35.032(f), or both. Moreover, a few of the defendants had been driving even though their licenses previously had been suspended or revoked. These defendants, in addition to being charged with DWI and/or breath-test refusal, were also charged with driving while their license was suspended or revoked (DWLS or DWLR), AS 28.15.291(a).

After the defendants lost their driver's licenses (or had their license revocations extended) in the Department of Public Safety's administrative proceedings, they filed motions asking the district court to dismiss the pending criminal prosecutions. In each case, the defendants asserted that the pending criminal prosecutions violated the double jeopardy clause - the constitutional guarantee that no person be placed in jeopardy more than once for the same offense. See the Fifth and Fourteenth Amendments to the United States Constitution, and Article I, Section 9 of the Alaska Constitution. The defendants argued that, because they had already lost their driver's licenses for the same conduct that formed the basis of the criminal prosecutions (either testing at .10 percent blood alcohol or higher, or refusing the breath test), they had already been punished once for this conduct and could not be punished again.

With one exception (file number A-5739), the district court granted the defendants' motions and dismissed the criminal prosecutions.[1] The State and the Municipality of Anchorage now appeal those dismissals. In file number A-5739, the district court denied the defendant's motion to dismiss, and we granted the defendant's petition to review the district court's decision. For the reasons explained in this opinion, we reinstate the prosecutions that were dismissed and we affirm the district court's refusal to dismiss the prosecution in file number A-5739.

The defendants' double jeopardy argument rests on a trio of cases decided by the United States Supreme Court: **United States v. Halper,** 490 U.S. 435, 109 S.Ct. 1892, 104 L. Ed. 2d

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487 (1989); **Austin v. United States,** U.S. , 113 S.Ct. 2801, 125 L. Ed. 2d 488 (1993); and **Montana Department of Revenue v. Kurth Ranch,** U.S. , 114 S.Ct. 1937, 128 L. Ed. 2d 767 (1994). In these cases, the Supreme Court expanded the scope of the double jeopardy clause, construing it to protect people from the imposition of certain "penalties", "forfeitures", and "taxes" - monetary impositions that traditionally had not been considered criminal punishments.

For purposes of analyzing the defendants' argument, it makes the most sense to begin by discussing **United States v. Halper.**

The Supreme Court's Decision in Halper

The defendant in **Halper** perpetrated a scheme of Medicare fraud. Halper was the manager of a laboratory that performed medical procedures covered by Medicare. He submitted 65 claims in which he falsely described the medical procedure that his laboratory had performed, so that the government paid him $ 12.00 per procedure instead of $ 3.00. Thus, Halper defrauded the government of $ 585 (65 times $ 9.00). **Halper,** 490 U.S. at 437, 109 S.Ct. at 1895-96.

Halper was criminally prosecuted and convicted of 65 counts of fraud; he was sentenced to 2 years' imprisonment and a $ 5000 fine. 490 U.S. at 437, 109 S.Ct. at 1896. The federal government then commenced a civil action against Halper under the federal False Claims Act, 31 U.S.C. §§ 3729-3731. Under Section 3729 of this act, a person who submits a false claim against the government is "liable to the United States Government for a civil penalty of $ 2000, [plus] an amount equal to 2 times the amount of damages the Government sustains because of the [false claim], and [the] costs of the civil action". The federal district court construed this statute to require a separate $ 2000 penalty for each of Halper's false claims; thus, the court believed itself obligated to impose a total penalty of $ 130,000 (65 times $ 2000) for fraudulent claims involving only $ 585. **Halper,** 490 U.S. at 438, 109 S.Ct. at 1896-97.

The federal district court refused to impose this penalty. The court ruled that such a penalty would constitute a second punishment (in violation of the double jeopardy clause) because the penalty so exceeded the government's actual loss. 490 U.S. at 439-440, 109 S.Ct. at 1896-97. The government appealed.

The Supreme Court noted that the double jeopardy clause embodies three distinct protections: the protection against a successive prosecution after a defendant has been acquitted, the protection against a successive prosecution after the defendant has been convicted, and the protection against multiple punishments for the same offense. **Halper,** 490 U.S. at 440, 109 S.Ct. at 1897. Because "proceedings and penalties under the civil False Claims Act are indeed civil in nature", 490 U.S. at 442, 109 S.Ct. at 1898, the proceedings against Halper under the False Claims Act did not constitute a successive prosecution. Rather, the Court declared, "the third of [the double jeopardy] protections [is] the one at issue here". 490 U.S. at 440, 109 S.Ct. at 1897. "The sole question here is whether the statutory penalty authorized by the civil False Claims Act ... constitutes a second 'punishment' for the purpose of [the] double jeopardy [clause]." 490 U.S. at 441, 109 S.Ct. at 1898.

The Supreme Court held that, under the facts of a particular case, the "civil penalty

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authorized by the Act may be so extreme and so divorced from the Government's damages and expenses as to constitute a punishment" for double jeopardy purposes. **Halper,** 490 U.S. at 442, 109 S.Ct. at 1898.

> [A] civil as well as a criminal sanction [may constitute] punishment when the sanction as applied in the individual case serves the goals of punishment[,] ... the twin aims of retribution and deterrence. ... [A] civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment [for purposes of double jeopardy analysis]. ... We therefore hold that under the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or [as] retribution.

Halper, 490 U.S. at 448-49, 109 S.Ct. at 1901-02 (internal citations omitted).

The Court expressly disavowed any intention of limiting civil penalties to the precise measure of the government's loss. Instead, the Court recognized that "the process of affixing a sanction that compensates the Government for all its costs inevitably involves an element of rough justice"; the Court pointed out that it had previously upheld statutes that imposed "reasonable liquidated damages" or "fixed-penalties" plus "double-damages". 490 U.S. at 449, 109 S.Ct. at 1902.

> We cast no shadow on these time-honored judgments. What we announce now is a rule for the rare case, the case such as the one before us, where a fixed-penalty provision subjects a prolific but small-gauge offender to a sanction overwhelmingly disproportionate to the damages he has caused.

Halper, 490 U.S. at 449, 109 S.Ct. at 1902.

The Court declared that, whenever a defendant has already suffered a criminal penalty for illegal conduct and the government later seeks to impose a civil penalty for the same conduct, the defendant may raise the argument that "the civil penalty sought in the subsequent proceeding bears no rational relation to the goal of compensating the Government for its loss". Such a defendant would be "entitled to an accounting of the Government's damages and costs to determine if the penalty sought in fact constitutes a second punishment". The trial judge would then use this accounting to determine "the size of the civil sanction the Government may receive without crossing the line between remedy and punishment". **Halper,** 490 U.S. at 449-450, 109 S.Ct. at 1902.[2]

Halper's Definition of the Distinction Between "Remedial" and "Punitive" Sanctions, and the Supreme Court's Later Refusal to Limit Itself to this Definition

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Turning to the case before us now, the defendants argue that, under **Halper,** the revocation of a driver's license must be viewed as a "punishment" rather than a "remedy". The defendants rely on the fact that the Supreme Court worded the test for distinguishing a remedial sanction from a punitive sanction in terms of whether "the civil penalty sought [by the government] bears [any] rational relation to the goal of compensating the government for its loss". The defendants point out that the government will rarely suffer a monetary loss on account of a defendant's breath-test result or on account of a defendant's refusal to take a breath test. Moreover, even if the government could prove some monetary damage from the arrested driver's conduct, the act of revoking that person's operator's license does essentially nothing toward accomplishing the goal of compensating the government for the monetary loss that might attend the driver's taking or refusing the breath test. Thus, the defendants conclude, the revocation of a driver's license must be classified as a "punishment" rather than a "remedy".

The defendants' argument ignores the factual context of **Halper. Halper** involved a civil proceeding instituted against a person who defrauded the government of money, and it involved a monetary penalty imposed on that person, ostensibly to compensate the government for its loss. In such a situation, the Supreme Court could readily frame the test for a "remedy" in terms of whether the monetary penalty imposed on Halper in the civil proceeding bore any relation to the monetary harm the government had suffered.

But there are other remedies besides restoration of lost money. According to **Webster's New World Dictionary** (Third College Edition, 1988), p. 1135, a "remedy" is "anything that corrects, counteracts, or removes an evil or wrong". In its specialized legal sense, "remedy" is defined as "a means ... by which violation of a right is **prevented** or compensated for". **Id.** (Emphasis added.) Thus, restraining orders, injunctions, orders granting rescission, declaratory judgements concerning the constitutionality or construction of statutes, and coercive fines or imprisonment imposed under a court's civil contempt power are all "remedies". Dan B. Dobbs, **Handbook on the Law of Remedies** (1973), pp. 1-2. **See Helvering v. Mitchell,** 303 U.S 391, 399; 58 S.Ct. 630, 633; 82 L.Ed. 917 (1938) ("Remedial sanctions may be of varying types").

The Supreme Court's later decisions in **Austin v. United States** and in **Montana Department of Revenue v. Kurth Ranch** confirm that the "compensation ... for ... loss" phrasing used in **Halper** was not intended to be the sole criterion for determining whether a sanction should be deemed "punitive" or "remedial". In both **Austin** and **Kurth Ranch,** the Supreme Court used completely different criteria for evaluating whether the challenged sanction was "remedial" or "punitive".

In **Austin,** the defendant was convicted of drug offenses. In a contemporaneous civil action, the government sought forfeiture of the defendant's mobile home and his auto body shop under 21 U.S.C. § 881(a), a federal statute authorizing forfeiture of conveyances and real property used to commit or facilitate the commission of drug offenses. **Austin,** 113 S.Ct. at 2803.

The defendant claimed that such a forfeiture violated the Eighth Amendment's prohibition on "excessive fines", while the government argued that the "excessive fines" clause only applied to

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criminal sentences. The Supreme Court held that "fines" for purposes of the Eighth Amendment encompassed not only criminal fines but also any forfeiture that constituted a "punishment". **Id.** at 2806 & 2810.

However, rather than using **Halper's** formulation and asking whether the forfeiture could reasonably be construed as compensating the government for loss, the **Austin** Court embarked on an extended examination of the historical roots of forfeiture as a penalty. **Austin,** 113 S.Ct. at 2806-2810. The Court concluded that, with the exception of the forfeiture of contraband, forfeiture was traditionally viewed as a type of punishment, and the Court found nothing "in [the forfeiture] provisions [of 21 U.S.C. § 881(a)] or their legislative history to contradict the historical understanding of forfeiture as punishment." **Id.** at 2810.

> Concededly, we have recognized that the forfeiture of contraband itself may be characterized as remedial because it removes dangerous or illegal items from society. **See United States v. One Assortment of 89 Firearms,** 465 U.S. 354, 364, 104 S.Ct. 1099, 1105, 79 L. Ed. 2d 361 (1984). [We have], however, previously rejected [the] government's attempt to extend that reasoning to [the forfeiture of] conveyances used to transport illegal liquor. **See One 1958 Plymouth Sedan v. Pennsylvania,** 380 U.S. 693, 699, 85 S.Ct. 1246, 1250, 14 L. Ed. 2d 170 (1965). In that case [we] noted: "There is nothing even remotely criminal in possessing an automobile." **Ibid.** The same, without question, is true of the properties involved here, and the Government's attempt to characterize these properties as "instruments" of the drug trade must meet the same fate as Pennsylvania's effort to characterize the 1958 Plymouth Sedan as "contraband".

Austin, 113 S.Ct. at 2811. The Court continued:

> Fundamentally, even assuming that §§ 881-(a)(4) and (a)(7) serve some remedial purpose, the Government's argument must fail. "A civil sanction that cannot fairly be said **solely** to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term." **Halper,** 490 U.S. at 448, 109 S.Ct. at 1902 (emphasis added). In light of the historical understanding of forfeiture as punishment, the clear focus of §§ 881(a)(4) and (a)(7) on the culpability of the owner, and the evidence that Congress understood those provisions as serving to deter and to punish, we cannot conclude that forfeiture under §§ 881(a)(4) and (a)(7) serves solely a remedial purpose. We therefore conclude that forfeiture under these provisions constitutes "payment to a sovereign as punishment for some offense" [citation omitted], and, as such, is subject to the limitations of the Eighth Amendment's Excessive Fines Clause.

Austin, 113 S.Ct. at 2812 (footnote omitted).

Thus, **Austin** did not rely on **Halper's** "compensation for loss" test when evaluating whether

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the forfeiture of a drug offender's house and business was "remedial" or "punitive". Rather, the Supreme Court examined "the historical understanding of forfeiture", the "focus of [the forfeiture statute] on the culpability of the [property] owner", and the "evidence that [the legislature] understood [the forfeiture] provisions as serving to deter and punish". **Id.**

In **Montana Department of Revenue v. Kurth Ranch**, the Supreme Court made the limitations of the **Halper** test even more explicit. **Kurth Ranch** involved a Montana family who used their farm for the cultivation of marijuana. Each family member was prosecuted for either possessing or conspiring to possess marijuana with intent to sell. 114 S.Ct. at 1942. In addition, the county instituted a forfeiture action against the cash and equipment used in the marijuana operation. **Id.** Then, the State of Montana filed suit to collect that state's tax on illegal drugs. Under Montana law, this tax was assessed at ten percent of the market value of the illegal drugs, or $ 100 per ounce of marijuana and $ 250 per ounce of hashish, whichever was greater. **Id.** at 1941.

According to the State of Montana's calculations, the Kurth family's tax liability for possessing illegal drugs was almost $ 900,000. This tax assessment prompted the Kurth family to file for bankruptcy protection. **Id.** at 1942-43. The bankruptcy court first decided that the proper tax assessment was only $ 181,000. Then, the bankruptcy court ruled that even this lesser tax liability was unconstitutional because collection of the tax would violate the double jeopardy clause. **Id.** at 1943. Following two more adverse rulings in higher federal courts, the State of Montana brought its case to the Supreme Court.

The Supreme Court recognized that its decision in **Halper** "does not decide the ... question whether Montana's tax should be characterized as punishment". **Kurth Ranch,** 114 S.Ct. at 1944. "Whereas fines, penalties, and forfeitures are readily characterized as [punitive] sanctions, taxes are typically different because they are usually motivated by revenue-raising rather than punitive purposes." **Id.** at 1946.

> Tax statutes serve a purpose quite different from civil penalties, and **Halper's** method of determining whether the exaction was remedial or punitive "simply does not work in the case of a tax statute". [Citing with approval an assertion in Chief Justice Rehnquist's dissenting opinion, 114 S.Ct. at 1950] Subjecting Montana's drug tax to **Halper's** test for civil penalties is therefore inappropriate.
>
> **Kurth Ranch,** 114 S.Ct. at 1948.

For example, the Supreme Court recognized that when evaluating a tax law it would not make sense to apply **Halper's** broad statement that a civil penalty should be deemed "punishment" if the penalty ineluctably served a "deterrent" purpose. The Court noted that "many taxes ... such as [the] taxes on cigarettes and alcohol" are obviously "motivated to some extent by an interest in deterrence". 114 S.Ct. at 1946. Thus, the Court conceded, "neither a high rate of taxation nor an obvious deterrent purpose automatically marks [Montana's] tax [as] a form of punishment". **Id.** "While a high tax rate and deterrent purpose lend support to the

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characterization of the drug tax as punishment, these features, in and of themselves, do not necessarily render the tax punitive." **Id.** at 1947.

The Court then noted several "unusual features" of the Montana tax statute that "set [it] apart from most taxes". First, liability under Montana's tax law "is conditioned on the commission of a crime ... and is exacted only after the taxpayer has been arrested for the precise conduct that gives rise to the tax obligation in the first place." 114 S.Ct. at 1947. Next, the Court noted that taxes on illegal activities "differ ... from mixed-motive taxes that governments impose both to deter a disfavored [but legal] activity and to raise money". **Id.**

> By imposing cigarette taxes, for example, a government wants to discourage smoking. But because the product's benefits - such as creating employment, satisfying consumer demand, and providing tax revenues - are regarded as outweighing the [product's] harm, [the] government will allow the manufacture, sale, and use of cigarettes as long as the manufacturers, sellers, and smokers pay high taxes that reduce consumption and increase government revenue. [But these] justifications vanish when the taxed activity is completely forbidden, for the legitimate revenue-raising purpose that might support such a tax could be equally well served by increasing the fine imposed upon conviction.

Kurth Ranch, 114 S.Ct. at 1947 (footnote omitted).

Finally, the Supreme Court noted that Montana's marijuana and hashish tax "is exceptional" because, "although it purports to be a species of property tax[,] ... it is levied on goods that the taxpayer neither owns nor possesses when the tax is imposed" - goods that presumably have already been destroyed before the tax is assessed. The Court concluded:

> A tax on [the] "possession" of goods that no longer exist and that the taxpayer never lawfully possessed has an unmistakable punitive character. This tax, imposed on criminals and no others, departs so far from normal revenue laws as to become a form of punishment.

Kurth Ranch, 114 S.Ct. at 1948.

Thus, in **Kurth Ranch,** the Supreme Court again refused to employ **Halper's** "compensation for loss" test when deciding whether Montana's marijuana and hashish taxes were "remedial" or "punitive". The Court recognized that, in the context of taxation, it did not make sense to try to gauge the government's "loss" from the defendant's activity, nor was it fruitful to ask whether the tax was intended to deter the defendant from engaging in the taxed activity (since many traditional taxes have precisely this aim). Rather, the Supreme Court asked whether Montana's tax "departed so far from normal revenue laws as to become a form of punishment".

We therefore reject the defendants' argument that a license revocation must be "punitive since it does not compensate the government for monetary loss. Just as the Supreme Court did in

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Austin and **Kurth Ranch,** we, too, conclude that **Halper's** "compensation for loss" formula simply does not apply in the context of the case before us.

Rather, as the Supreme Court did in **Austin** and **Kurth Ranch,** we will examine the historical background and understanding Of license revocation to determine whether license revocation has traditionally been viewed as punitive or remedial, and we will examine the structure and operation of Alaska's license revocation statutes to determine what goals these statutes advance.

Administrative Revocation of Driver's Licenses for Driving Offenses Has Traditionally Been Viewed as Remedial, not Punitive

The defendants argue that a driver's license is a form of property and that revocation of the license is tantamount to a forfeiture of property. The defendants then rely upon **Austin** and **United States v. $ 405,089.23 in U.S. Currency,** 33 F.3d 1210 (9th Cir. 1994), for the proposition that any forfeiture of property imposed as a penalty for the commission of a crime constitutes "punishment" for purposes of the double jeopardy clause.

The due process clauses of both the Fourteenth Amendment to the United States Constitution and Article I, Section 7 of the Alaska Constitution protect "life", "liberty", and "property.[3] To insure that citizens receive fair treatment in a broad range of their dealings with government, both the United States Supreme Court and the Alaska Supreme Court have employed a broad definition of "property" in due process cases.

For example, the Alaska Supreme Court has classified a driver's license as "an important property interest" for purposes of Alaska's due process clause; the state must therefore grant a hearing to a driver before his or her license can be revoked. **Graham v. State,** 633 P.2d 211, 216 (Alaska 1981). The United States Supreme Court has similarly ruled that a driver's license is "property" for purposes of the Fourteenth Amendment. State governments must observe certain procedural formalities before they can take away a person's driver's license.

> This is but an application of the general proposition that [the due process clause] limits state power to terminate an entitlement[,] whether the entitlement is denominated a "right" or a "privilege".
>
> **Bell v. Burson,** 402 U.S. 535, 539; 91 S.Ct. 1586, 1589; 29 L. Ed. 2d 90 (1971).[4]

Nevertheless, a driver's license obviously is not "property" in the everyday sense. The word "license" means "a formal permission to do something; especially, authorization by law to do some specified thing". **Webster's New World Dictionary** (Third College Edition 1988), p. 779. A driver's license authorizes a person to operate motor vehicles. The license can not be purchased (except from the government), and it can not be sold or transferred or inherited. The physical object that we often call a "driver's license" is only a piece of plastic that stands as evidence of the real license - the government's authorization. If the government has revoked a person's

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authorization to drive, that person's continued possession of the piece of plastic means nothing.

Thus, revocation of a person's license to drive motor vehicles can not easily be equated with forfeiture of a person's land, money, or other tangible possessions. Revocation of a driver's license is not the equivalent of a "payment to a sovereign", **Austin,** 113 S.Ct. at 2812, for it does not diminish the driver's wealth. Rather, license revocation is akin to a restraining order or injunction, protecting the public from future harm by depriving an unsafe or irresponsible driver of his or her authority to continue to operate motor vehicles.[5]

The government regulates many activities and occupations. The rationale for this system of regulation is that the public is exposed to an unacceptable risk of harm if the activity or occupation is performed incompetently, recklessly, dishonestly, or with intent to injure. Under these regulatory schemes, a person must obtain a license to pursue the regulated activity or occupation, and the government possesses the power to revoke the license of someone whose conduct demonstrates his or her unfitness to continue in that activity or occupation. Driver's licenses are perhaps the most familiar example, but attorney's licenses to practice law are similarly regulated (see Alaska Bar Rule 15, which lists the grounds on which an attorney's license may be revoked), and Title 8 of the Alaska Statutes contains license revocation provisions for many other professions.[6]

In many instances, the conduct that demonstrates a person's unfitness to pursue the regulated activity or occupation is also potentially criminal. Nevertheless, courts have traditionally declared that administrative action to revoke a license is distinct from any possible criminal prosecution, and administrative revocation of the person's license is not considered punishment for a crime.

For example, in **Baker v. Fairbanks,** 471 P.2d 386 (Alaska 1970), the Alaska Supreme Court extended the right of jury trial to a defendant in any "criminal prosecution". The court defined "criminal prosecution" to encompass any offense for which a conviction "may result in the [defendant's] loss of a valuable license, such as a driver's license or a license to pursue a common calling, occupation, or business." 471 P.2d at 402. Nevertheless, the court was careful to explain that administrative proceedings were not "criminal prosecutions" even though they might result in revocation of a license:

> This [definition of "criminal prosecution"] does not cover revocation of licenses pursuant to administrative proceedings where lawful criteria other than criminality are a proper concern in protecting public welfare and safety, as the basis of revocation or suspension in such instances is not that one has committed a criminal offense, but that the individual is not fit to be licensed, apart from considerations of only guilt or innocence of crime.

Baker, 471 P.2d at 402 n.28. Twenty years later, in **Wik v. Department of Public Safety,** 786 P.2d 384, 387 (Alaska 1990), the Alaska Supreme Court echoed this view: "A [driver's] license is not suspended to visit additional punishment on an offender, 'but in order to protect the

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public against incompetent and careless drivers.'" (quoting **Robinson v. Texas Department of Public Safety,** 586 S.W.2d 604, 606 (Tex. Civ. App. 1979)).

Even after **Halper,** judicial consideration of this issue remains unchanged. A person who loses a professional license in an administrative proceeding is not subjected to "punishment" for double jeopardy purposes, even though the revocation or suspension is based on misconduct that could be (or has been) prosecuted as a criminal offense. **See Loui v. Board of Medical Examiners,** 78 Haw. 21, 889 P.2d 705, 711 (Hawaii 1995) ("While the imposition of the one-year revocation of Loui's license to practice medicine [for the attempted rape of his medical assistant] may 'carry the sting of punishment' ... it is clear that the statute in question is not designed to 'punish' Loui; rather, it is designed to protect the public from unfit physicians."); **Kvitka v. Board of Registration In Medicine,** 407 Mass. 140, 551 N.E.2d 915, 918 n.4 (Mass. 1990), **cert. denied,** 498 U.S. 823, 111 S.Ct. 74, 112 L. Ed. 2d 47 (1990) ("revocation of a physician's license [for unlawfully dispensing controlled substances] is considered to be remedial under the double jeopardy clause").

See also United States v. Hudson, 14 F.3d 536, 541-42 (10th Cir. 1994) (an administrative order barring defendants from future banking activities was not "punishment" for their illegal activities); **United States v. Payne,** 2 F.3d 706, 710-11 (6th Cir. 1993) (suspension of a mail carrier for illegal conduct was not "punishment" for double jeopardy purposes); **United States v. Furlett,** 974 F.2d 839, 844 (7th Cir. 1992) (A commodities broker defrauded his clients. In an administrative proceeding, his license to deal commodities was revoked. He was later indicted for conspiracy, mail fraud, obstruction of justice, and subornation of perjury. The broker objected that this criminal prosecution violated the double jeopardy clause. Held: the administrative order prohibiting the broker from engaging in commodities trading was not "punishment" for purposes of the double jeopardy clause); **United States v. Bizzell,** 921 F.2d 263, 267 (10th Cir. 1990) (Two contractors committed fraud in the sale of various properties whose mortgages were held by the Department of Housing and Urban Development (HUD). The Tenth Circuit ruled that an order barring the two contractors from participating in HUD contracts for 18 and 24 months was not "punishment" for their fraudulent conduct. The court said, "Removal of persons whose participation in those programs is detrimental to public purposes is remedial by definition.").

Courts view administrative suspension or revocation of a driver's license in exactly the same way. The license revocation is "remedial" for double jeopardy purposes. **State v. Savard,** A.2d , 1995 WL 354210, *3 (Maine, June 6, 1995) ("We analogize the driver's license to professional licensing and certification, which, if abused, may be revoked in the name of public safety."); **State v. Higa,** P.2d , 1995 WL 297073, *6 (Hawaii, May 17, 1995) ("Hawaii's [administrative license revocation] proceedings serve legitimate, nonpunitive, and purely remedial functions."); **State v. Funke,** 531 N.W.2d 124, 126 (Iowa 1995) ("This court has traditionally regarded the civil proceedings under our habitual [driving] offender statute as remedial, not punitive, in nature. We have repeatedly observed that the license suspension of habitual offenders is designed not to punish the offender but to protect the public.") (internal quotation omitted) (citation omitted); **Davidson v. MacKinnon,** So. 2d , 1995 WL 325955, *2 (Fla. App., June 2, 1995) ("The administrative remedy of suspending a driver's license

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because of drunk driving or other related behavior ... continues to be primarily for the purpose of enhancing safe driving on the public highways. Its effect is remedial in a general or universal sense, because it removes dangerous drivers from the highways. And, it can also be viewed as remedial for the individual driver involved, since[,] in an intoxicated state, a driver poses a serious danger to him or herself, as well as to others. As such, [revocation of an intoxicated driver's license] is no more punitive than denying a person who is legally blind a driver's license. Both will live longer and healthier lives if they do not drive."); **State v. Young,** 3 Neb. App. 539, 530 N.W.2d 269, 278 (Neb. App. 1995) ("The purpose of license revocation is to protect the public, and not to punish the licensee. The revocation of a driver's license is not a penalty for the violation of the statutes or ordinances involved. ... Civil license revocation is therefore remedial and not a punishment, even though the loss of a driver's license in our society carries a considerable 'sting'.") (internal quotation and citation omitted); **Johnson v. State,** 95 Md. App. 561, 622 A.2d 199, 205 (Md. App. 1993) ("We believe that **Halper** leaves undisturbed cases, such as the one at bar, that have found the revocation of voluntarily granted privileges to be civil in nature, not punitive, and merely remedial."); **Butler v. Department of Public Safety and Corrections,** 609 So. 2d 790, 797 (La. 1992) ("Butler's license suspension, in contrast to Halper's fine, bears a rational relationship to the legitimate governmental purpose of promoting public safety on Louisiana highways."); **State v. Strong,** 158 Vt. 56, 605 A.2d 510, 514 (Vt. 1992) ("A 'bright line' has developed because the nonpunitive purpose of the license suspension is so clear and compelling."); **Freeman v. State,** 611 So. 2d 1260, 1261 (Fla. App. 1992), **cert. denied,** U.S , 114 S.Ct. 415, 126 L. Ed. 2d 361 (1993) ("The purpose of the statute providing for revocation of a driver's license upon conviction of a licensee for driving while intoxicated is to provide an administrative remedy for public protection and not for punishment of the offender."); **State v. Maze,** 16 Kan. App. 2d 527, 825 P.2d 1169, 1174 (Kan. App. 1992) ("The revocation of a driver's license is part of a civil / regulatory scheme that serves a vastly different governmental purpose from criminal punishment. Our State's interest is to foster safety by temporarily removing from public thoroughfares those licensees who have exhibited dangerous behavior[.]"); **Ellis v. Pierce,** 230 Cal. App. 3d 1557, 282 Cal.Rptr. 93, 95 (Cal. App. 1991) ("Just as the purpose of attorney disbarment or suspension is to protect the public by keeping unfit lawyers from practicing law, the long-range purpose of a driver's license suspension is to protect the public by keeping unfit drivers from driving."); **State v. Nichols,** 169 Ariz. 409, 819 P.2d 995, 999 (Ariz. App. 1991) ("The suspension of the license of an individual found guilty of [driving while intoxicated] 'is not a criminal penalty to punish the driver but a civil and administrative remedy to protect the public from the impaired driver.'") (quoting **Loughran v. Superior Court,** 145 Ariz. 56, 699 P.2d 1287, 1289 (Ariz. 1985).[7]

Administrative Revocation of a License to Pursue a Regulated Profession or Activity Can Serve Deterrent Purposes and Still Be "Remedial"

From the above authorities, it is clear that administrative suspension or revocation of a driver's license has traditionally been viewed, not as punishment for a driver's criminal offenses or traffic violations, but as remedial action prompted by the need to protect the public by removing dangerous drivers from the roads. The defendants in this appeal nevertheless argue that, despite this historical understanding, administrative license revocation must now be viewed

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as "punishment" under **Halper, Austin,** and **Kurth Ranch.** The defendants rely on the following language from **Halper:**

> The determination whether a given civil sanction constitutes punishment [for double jeopardy purposes] requires a particularized assessment of the penalty imposed and the purposes that the penalty may fairly be said to serve. ... [A civil] sanction constitutes punishment when the sanction[,] as applied in the individual case[,] serves the goals of punishment.
>
> These goals are familiar[:] the twin aims of retribution and deterrence. ... From these premises, it follows that a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment[.]

Halper, 490 U.S. at 448, 109 S.Ct. at 1901-02 (reiterated in **Austin,** 113 S.Ct. at 2812).

The defendants point out that the possibility of having one's driver's license revoked obviously serves to deter people from driving while intoxicated and from refusing to take the breath test. This has been recognized by the Alaska Supreme Court. See **Lundquist v. Department of Public Safety,** 674 P.2d 780, 785 (Alaska 1983), where the supreme court declared that administrative revocation of a driver's license for refusal to take the breath test is "a nonviolent means of compelling submission to a test that provides evidence of intoxication".

Because of this deterrent purpose and effect, the defendants argue, administrative revocation of a driver's license serves one of the goals of punishment and therefore must be deemed "punishment" under **Halper** and **Austin.** We conclude, however, that the defendants have read **Halper** and **Austin** too broadly. As explained in more detail below, we conclude that when the legislature employs a licensing scheme to regulate a profession or an activity affecting the public health or safety, a statute that authorizes a regulatory body to revoke these licenses is "remedial" for double jeopardy purposes even though the law serves to deter licensees from engaging in conduct that is inconsistent with their duties as licensees or that is inconsistent with the public welfare.

The statutes challenged in the present appeal allow administrative revocation of a person's driver's license if that person has a blood-alcohol level of .10 percent or greater, or if that person refuses to take the breath test. As phrased by the Supreme Court in **Halper,** the question this court faces is whether administrative license revocation on these two bases is "so divorced from any remedial goal that it constitutes 'punishment' [under] double jeopardy analysis." **Halper,** 490 U.S. at 443, 109 S.Ct. at 1899. We have no difficulty concluding that substantial remedial purposes underlie the challenged statutes.

A person who operates a motor vehicle when his or her blood-alcohol level is .10 percent or

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higher poses a clear danger to the public welfare. A person's willingness to engage in such dangerous conduct justifies the inference that his or her continued authorization to drive will likewise pose a danger to the public. The government may act to remedy this danger by revoking the person's driver's license.

While one might suspect that drivers who refuse the breath test believe themselves to be intoxicated, the Alaska Supreme Court has declared that a different remedial goal justifies revoking a driver's license on account of a breath-test refusal. Under Alaska law, all persons who apply for a driver's license are deemed to have consented to a police-administered chemical test of their breath if they are ever lawfully arrested for driving while intoxicated. AS 28.35.031(a). If a driver refuses to take this breath test, then (regardless of whether the driver is actually intoxicated or not) the driver has broken his or her agreement with the government, and the government can revoke his or her license. **Lundquist,** 674 P.2d at 783 & 785.

For these reasons, we conclude that the administrative revocation of the defendants' driver's licenses is premised on remedial goals. We further conclude that the remedial character of administrative license revocation is not defeated by the fact the license revocation statutes also play a role in deterring misconduct.

We accept the defendants' assertion that administrative revocation of a driver's license may serve to deter that driver from future misconduct and may have a deterrent effect on other drivers who contemplate either driving while intoxicated or refusing the breath test. Indeed, it would be naive to suggest that the legislature did not hope to deter misconduct when it enacted the statutes that allow administrative revocation of licenses - not only driver's licenses, but also the many professional and business licenses covered by Title 8. It is obvious that deterrence of misconduct will be one practical effect of any regulatory scheme that allows the government to revoke a license that authorizes a person to drive motor vehicles or to pursue a livelihood. But this deterrent purpose does not mean that administrative revocation of these licenses is "punishment" for purposes of the double jeopardy clause.

True, **Halper** declares that if a civil monetary penalty can not be explained wholly in terms of remedial goals but must be explained, at least in part, as serving the goal of deterrence, then that civil monetary penalty constitutes "punishment" for double jeopardy purposes. But the monetary penalty at issue in **Halper** was ostensibly intended to compensate the government for monetary loss stemming from Halper's fraud. In such a context, the Supreme Court could justifiably state that the government's declared aim of restitution had to be divorced from the aim of deterrence.

In **Kurth Ranch,** on the other hand, the Supreme Court acknowledged that other types of non-punitive sanctions could legitimately include deterrent aspects. Analyzing the double jeopardy status of Montana's tax on illegal drugs, the Supreme Court recognized that normal taxes are often intended, at least in part, to deter people from engaging in the taxed activity. The Court therefore declared that the **Halper** test did not apply to the situation before it. Instead of asking whether Montana's tax was intended to deter people from using illegal drugs, the Supreme Court asked instead whether Montana's tax "departed so far from normal revenue laws as to become a form of punishment". **Kurth Ranch,** 114 S.Ct. at 1948.

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Returning to administrative revocation of driver's licenses, the courts that have dealt most cogently with this problem have acknowledged that revocation of a driver's license based on the driver's misconduct does have a deterrent aspect. Nevertheless, these courts have held that administrative revocation remains "remedial". **See State v. Savard,** A.2d , 1995 WL 354210, *4 (Me., June 6, 1995) ("Although we acknowledge that any suspension may have a deterrent effect on the law-abiding public, our analysis does not focus on that perspective. In the eyes of the defendant[,] even remedial sanctions may carry a 'sting of punishment.'") (quoting **Halper,** 490 U.S. at 447 & n.7; 109 S.Ct. at 1901 & n.7); **State v. Strong,** 605 A.2d at 513 ("Although there is an element of deterrence to the summary suspension of an operator's license, this element is present in any loss of a license or privilege[;] [it] is not the primary focus of this statutory scheme."); **Butler v. Department of Public Safety,** 609 So. 2d at 797 ("While this court recognizes that the Implied Consent Law, like the Motor Vehicle Habitual Offender Law, is to some extent deterrent ... because the statute attempts to discourage the repetition of criminal acts, this court has previously stated that ... deterrence may be a valid objective of a regulatory statute. The statute's primary effect is remedial; it removes those drivers from our state highways who have been proven to be reckless or hazardous.") (internal citation omitted).

We, too, conclude that administrative revocation of a driver's license is "remedial" even though it may have a deterrent goal and may achieve some deterrent effect. We hold that, when the government employs a licensing scheme to regulate a profession or an activity that affects the public welfare, administrative revocation or suspension of that license can legitimately serve to deter conduct and still remain "remedial" for double jeopardy purposes so long as the revocation or suspension is based on conduct that bears a direct relation to the government's regulatory goals or to the proper administration and enforcement of the regulatory scheme.

Our conclusion is consistent with, and based upon, the Supreme Court's decisions in **Austin** and **Kurth Ranch.** In **Austin,** the Supreme Court acknowledged that, even though most forfeitures are understood as "punitive", the forfeiture of dangerous substances and contraband is "remedial". **Austin,** 113 S.Ct. at 2811. Implicit in **Austin's** treatment of these remedial forfeitures is the idea that forfeiture of dangerous substances or contraband remains "remedial" even though such a forfeiture or the threat of such a forfeiture (that is, the threat of losing property that one has paid money for) may deter people from purchasing or dealing in dangerous substances or contraband. What was implicit in **Austin** was made explicit in **Kurth Ranch.** There, the Supreme Court acknowledged that a proceeding to collect taxes is normally not "punishment" even though one legitimate purpose of taxation is deterrence of a disfavored activity. **Kurth Ranch,** 114 S.Ct. at 1946-47.

Reading **Halper, Austin,** and **Kurth Ranch** together, the Supreme Court has said that deterrence is not a legitimate goal of the kind of civil penalty at issue in **Halper** (a penalty designed to achieve "rough" restitution for monetary loss), but deterrence can be a legitimate component of other sorts of non-punitive sanctions. Just as the Supreme Court declined to unreflectively apply the **Halper** test in **Austin** and **Kurth Ranch,** we conclude that **Halper's** statements about deterrence do not govern the cases before us.

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Administrative license revocation is premised on substantial remedial purposes. Even though administrative license revocation has always contained an element of deterrence, the case law demonstrates that it has traditionally been viewed as remedial rather than punitive. We conclude that administrative license revocation continues to be a "remedial" sanction, not a "punitive" sanction, for purposes of the federal double jeopardy clause.[8] Therefore, the administrative revocation of the defendants' licenses is no impediment to their later prosecution for driving while intoxicated, refusing the breath test, or both.[9]

Conclusion

In the appeals brought by the State of Alaska and the Municipality of Anchorage, the judgements of the district court are REVERSED. In the petition for review (file number A-5739), the judgement of the district court is AFFIRMED. All of these cases are remanded to the district court for further proceedings on the complaints or informations filed against the defendants.

CONCURRENCE

Bryner, Chief Judge, concurring.

I agree with the court's opinion and I write separately only to emphasize what I see as its core rationale. Whenever the public welfare justifies regulating an activity by implementing and enforcing a licensing requirement, the state will necessarily have a legitimate regulatory - that is, non-punitive - interest in encouraging compliance with the regulations upon which the original issuance and continued validity of the license are conditioned. Conversely, the state will necessarily have a legitimate regulatory interest in deterring noncompliance with these regulations. Thus, in the particular context of a licensed activity, enforcement efforts by the state will always play an essentially remedial role, even if one of the avowed purposes of those efforts is deterrence.

This is not to say that all measures aimed at deterring noncompliance with the laws regulating a licensed activity must be deemed non-punitive. The imposition of sanctions having no direct connection to the regulation of the licensed activity certainly might be deemed punitive in some cases. But the sanction of suspending or revoking a license for noncompliance with the conditions governing its very issuance or continued existence necessarily bears an inherent relationship to the remedial goal of restoring regulatory compliance. Indeed, it is difficult to conceive of any sanction that could more directly remedy a licensee's noncompliance with the regulations governing a licensed activity than suspending or revoking the license itself. Accordingly, under the standards set out in **Halper, Austin,** and **Kurth Ranch,** the sanction at issue in the current cases - suspension or revocation of a driver's license for violation of the laws governing the licensed activity of driving - is necessarily remedial, not punitive.

OPINION FOOTNOTES

1 It appears that the district court acted inadvertently when it dismissed the charges of driving with a suspended or revoked license. The defendants' motions addressed only the double jeopardy implications

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of the DWI and/or breath-test refusal charges. The district court's written decision was likewise limited to this issue.

Driving with a suspended or revoked license is a separate offense from refusing to take a breath test or driving with a blood-alcohol level of .10 percent or higher. Whether or not the administrative revocation of the defendants' licenses constituted "punishment" for the latter two offenses, the defendants charged with driving with a suspended or revoked license had not previously faced sanctions (either civil or criminal) for that conduct. Those charges should not have been dismissed.

2 In their brief, the defendants argue that any "sanction" is necessarily punitive - that a sanction can never be "remedial" for purposes of federal double jeopardy analysis. However, as exemplified by the just-quoted portion of **Halper,** (in which the Court refers to the permissible "size of the **civil sanction** the Government may receive") (emphasis added), the Supreme Court has not chosen to employ the word "sanction" in the limited sense suggested by the defendants. Rather, throughout the **Halper** opinion, the Court uses the word "sanction" in its broader sense of "whatever a court does to someone".

Halper repeatedly refers to sanctions as capable of being **either** punitive or remedial. For example, when discussing its previous decision in **Helvering v. Mitchell** (which held that the statutory fifty-percent penalty on delinquent taxes was not a second criminal punishment), the **Halper** Court said:

Whether the statutory sanction was criminal in nature, the **[Mitchell]** Court held, was a question of statutory interpretation; and, applying traditional canons of construction, the Court had little difficulty concluding that ... the deficiency sanction was in fact remedial[.] Since "in the civil enforcement of a remedial sanction there can be no double jeopardy", **id.** at 404, 58 S.Ct. at 636, the Court rejected Mitchell's claim.

Mitchell... makes clear that the Government may impose both a criminal and a civil sanction with respect to the same act or omission[.]

Halper, 490 U.S. at 442-43, 109 S.Ct. at 1898-99 (discussing **Helvering v. Mitchell,** 303 U.S. 391, 58 S.Ct. 630, 82 L. Ed. 917 (1938)) (internal citations omitted).

3 The pertinent portion of the Fourteenth Amendment declares, "nor shall any state deprive any person of life, liberty, or property without due process of law". The pertinent portion of Article I, Section 7 states, "No person shall be deprived of life, liberty, or property without due process of law."

4 Alaska's due process clause affords drivers greater procedural protection than drivers enjoy under federal constitutional law. Although the Fourteenth Amendment requires states to provide a hearing to a person whose driver's license is revoked because of a breath-test refusal, states may nevertheless summarily revoke the person's license at the time of the breath-test refusal and schedule the hearing later. **Mackey v. Montrym,** 443 U.S. 1, 99 S.Ct. 2612, 61 L. Ed. 2d 321 (1979). Under the Alaska Constitution, on the other hand, a driver is entitled to demand a hearing before the revocation. **Graham,** 633 P.2d at 216.

The defendants in this case argue that the license revocation procedure codified in AS 28.15.165-166 can not possibly be "remedial" because the statutes do not impose immediate license revocation on a driver who refuses to take the breath test or who tests at .10 or greater. The defendants argue that these statutes can not be intended to rid the highways of dangerous drivers because the statutes allow a driver to keep his or her license for at least 7 days (longer, if the driver requests a hearing). However, both the 7-day grace period and the continuing authorization to drive pending the administrative hearing appear to be directly attributable to the Alaska Supreme Court's decision in **Graham.**

5 Moreover, even if we were to draw an analogy between revocation of a driver's license and forfeiture of tangible property, this does not lead to the conclusion that the government inflicts' punishment" (for purposes of the double jeopardy clause) whenever the government revokes a person's driver's license for

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driving misconduct. Not all forfeitures of property are punitive. A forfeiture can be "remedial" if it is limited to seizing items that are themselves unlawful or dangerous.

For example, in **Austin,** the Court expressly distinguished forfeiture of contraband from forfeiture of a contraband dealer's home or business property:

We have recognized that the forfeiture of contraband itself may be characterized as remedial because it removes dangerous or illegal items from society. **See United States v. One Assortment of 89 Firearms,** 465 U.S. 354, 364, 104 S.Ct. 1099, 79 L. Ed. 2d 361 (1984).

Austin, 113 S.Ct. at 2811. - The Court in **Austin** concluded that forfeiture of a contraband dealer's home and business could only be viewed as "payment to a sovereign as punishment for [his or her] offense". **Id.** at 2812. But neither **Austin** nor **Kurth Ranch** questions the pre-existing rule that forfeiture of dangerous items themselves is a "remedial" sanction.

Thus, even if we were to liken revocation of a driver's license to forfeiture of property, the closest forfeiture analogy would be forfeiture of contraband - forfeiture of items that are themselves hazardous to the public welfare. When a person's conduct shows that he or she is unwilling to abide by the terms of a driver's license, or shows that he or she can not be trusted to drive safely, then that person's continuing authorization to drive is itself a hazard to the public welfare, a potential instrument of public harm. Revocation or "forfeiture" of this authorization is remedial.

6 Under AS 8.04.450, the Board of Public Accountancy may revoke the license of an accountant for violation of the statutes and regulations governing the profession, as well as for "dishonesty or gross negligence in the practice of public accounting", for conviction of any felony, and for conviction of any crime "an essential element of which is dishonesty or fraud". Under AS 8.06.070, the Department of Commerce and Economic Development may revoke an acupuncturist's license for "deceit, fraud, or intentional misrepresentation in the course of providing professional services", as well as for conviction of "a felony or other crime that affects the licensee's ability to continue to practice competently and safely". **And see** AS 8.11.080 (similar license revocation provisions for audiologists); AS 8.20.170 (chiropractors); AS 8.32.160 (dental hygienists); AS 8.36.315 (dentists); AS 8.45.060 (naturopaths); AS 8.64.326 (physicians, podiatrists, and osteopaths); AS 8.68.270 (nurses); AS 8.70.155 (nursing home administrators); AS 8.72.240 (optometrists); AS 8.80.261 (pharmacists); AS 8.84.120 (physical therapists and occupational therapists); AS 8.86.204 (psychologists); AS 8.87.210 (real estate appraisers); AS 8.98.235 (veterinarians).

See also AS 8.18.123 (contractors can have their licenses revoked for "engaging in fraudulent practices"); AS 8.40.170 (similar provision for electrical administrators); AS 8.40.320 (mechanical administrators); AS 8.42.090 (morticians); AS 8.48.111 (architects); AS 8.54.500 (hunting guides), AS 8.55.130 (hearing aid dealers); AS 8.62.150 (marine pilots); AS 8.71.170 (dispensing opticians); AS 8.88.071 (real estate brokers).

7 the only reported case to the contrary is **Johnson v. State Hearing Examiner's Office,** 838 P.2d 158 (Wyo. 1992), involving a statute that called for automatic suspension of a minor's driver's license if the minor was convicted of consuming alcohol. The Wyoming Supreme Court ruled that this statute subjected the minor to an unlawful second punishment. The Wyoming court decided this constitutional question even though the issue was "generally not briefed by the litigants" and even though the Wyoming court could find "only one **Halper** case ... of [any] relevance" (the California Court of Appeal's decision in **Ellis v. Pierce,** supra). **Johnson,** 838 P.2d at 179.

8 In one exhortatory paragraph that cites no pertinent legal authority, the defendants urge us to declare that administrative revocation of driver's licenses constitutes "punishment" for purposes of the double jeopardy clause of the Alaska Constitution (Article I, Section 9), even if we conclude that administrative revocation is remedial for purposes of the Federal Constitution.

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When a defendant asserts that the Alaska Constitution affords greater protection than the corresponding provision of the Federal Constitution, it is the defendant's burden to demonstrate something in the text, context, or history of the Alaska Constitution that justifies this divergent interpretation. **See e.g., Abood v. League of Women Voters,** 743 P.2d 333, 340-43 (Alaska 1987); **State v. Wassillie,** 606 P.2d 1279, 1281-82 (Alaska 1980); **Annas v. State,** 726 P.2d 552, 556 n.3 (Alaska App. 1986); **State v. Dankworth,** 672 P.2d 148, 151 (Alaska App. 1983). Given the defendants' inadequate briefing, this argument is waived.

9 Our resolution of this issue makes it unnecessary for us to address the Municipality of Anchorage's argument that the Municipality is a distinct sovereign government, separate from the State of Alaska, for purposes of the double jeopardy clause. **See,** however, **Waller v. Florida,** 397 U.S. 387, 90 S.Ct. 1184, 25 L. Ed. 2d 435 (1970) (a state and its municipalities are not separate sovereigns for double jeopardy purposes), and Article X of the Alaska Constitution.

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