1617 HJ HB 438.

Appellants contend that a common sense construction of AS 28.35.031 and AS 28.35.032(a) requires the arrestee to be advised—before being asked to take the breathalyzer test—that he can refuse the test but that refusal will result in suspension, denial or revocation of his driver's [illegible] support of this argument, appellants rely solely on *State v. Krieg*, 7 Wash.App. 20, 497 P.2d 621 (1972). Unlike Alaska's statutory provisions, the Washington statute involved in *Krieg* explicitly required the arresting officer to inform an arrestee of his right to refuse to take the breathalyzer test.[6] Alaska's statutes do not contain such a provision. Thus, appellants, in essence, ask this court to read into the applicable Alaska statutes a requirement similar to that contained in the Washington statute.

The state contends that no "right" exists to refuse a breathalyzer test, *i. e.*, that a lawfully arrested driver has impliedly consented to such a test by operating his motor vehicle in this state. Conceding that an arrestee can withdraw his consent to take the breathalyzer test, the state contends that the arrestee "does not have a 'right' in the constitutional sense" to refuse to take the test.[7] In the state's analysis, the "only applicable" statute is AS 28.35.032(a) because AS 28.35.031 simply provides for implied consent. The state reads AS 28.35.032 as setting forth the required procedures which must be followed before a license can be suspended, revoked, or denied administratively.

The crux of the state's argument is that AS 28.35.032 does not require the trooper to inform the arrestee of the possibility of withdrawing his consent to take the breathalyzer test. In this regard, the state contends:

> There is no requirement that the trooper read the implied consent warning to the suspect unless and until the suspect refuses to take the breathalyzer. At that point the trooper does not *have* to read the implied consent warning, but if he does not, the administrative suspension will not take effect.[8] (emphasis in original).

violation of [AS 28.35.030], the Department of Public Safety shall notify the person that his license or nonresident privilege to drive a motor vehicle in the state is revoked or suspended, or that no original license or permit will be issued for three months. In the same notice the department shall inform the person that he may initiate a proceeding in the district court to rescind the department's action. The court proceeding shall be without jury and shall be limited to the issues of whether

(1) the arresting officer had reasonable grounds to believe the arrested person had been operating a motor vehicle in the state while under the influence of intoxicating liquor;

(2) the arrested person refused to submit to the breath test upon request of the officer after being advised that his refusal would result in the suspension, revocation, or denial of his license; and

(3) the accused defendant was informed fairly of the nature of the tests, the accuracy of the methods, machines, equipment involved, the expertise of the person administering the tests, or operator of the machines, and the accused given such other reasonable information as may be requested by him.

. . . . .

(d) If the person who refuses to submit to the chemical test authorized by [AS 28.35.031], within two years previous to his arrest, has been convicted in this or any other state of operating a motor vehicle while intoxicated, the period of suspension for his license, nonresident privilege to drive, or denial of original license shall be one year.

6. The statute involved in *State v. Krieg*, 7 Wash.App. 20, 497 P.2d 621 (1972), was RCW 46.20.308(1) which provided, in part:

> Such officer shall inform the person of his right to refuse the test, and of his right to have additional tests administered by any qualified person of his choosing as provided in RCW 46.61.506.

7. The state notes that the arresting officer in both cases advised appellants of their rights under *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

8. The principal authority cited by the state in support of its position is *Elliott v. Dorius*, 557 P.2d 759 (Utah 1976). In that case, appellant had been advised that if he refused to submit to a properly requested chemical test, the Utah Department of Public Safety would revoke his license for one year. Appellant argued that the Utah statute provided a specified time sequence to which the officer must adhere, *i. e.*, that the officer must first request the arrestee to submit to the test designated and following a refusal, the officer must advise the person of his rights. The Utah Supreme Court rejected this contention and explained, in part:

We think the state's argument is persuasive [9] and in accord with the legislature's intent in enacting AS 28.35.031 and AS 28.35.032(a). Although resolution of the question presented by this appeal is not free from doubt, we are not persuaded to imply a requirement that an arrestee be advised that he has the right to refuse to take a breathalyzer test. Neither AS 28.35.031 nor AS 28.35.032(a) explicitly grants or recognizes a right on the part of an arrestee to refuse to take a breathalyzer test. Nor do these statutes impose a duty upon the arresting officer to advise the driver that he has the right to refuse to take the test. Although several states have chosen to provide that the arrestee has such a right [10] and, further, that the arresting officer must inform him of his right to refuse to take the test, Alaska's legislature has not adopted such provisos.

Given the absence of a specific requirement that arrestees be advised of a right to refuse to undergo the chemical test, we conclude that it would be inappropriate for this court to engraft such a requirement onto AS 28.35.031. As we analyze the legislature's intent in enacting AS 28.35.031 and AS 28.35.032, the sections provide that the operator of a motor vehicle in Alaska has consented to chemical tests of his blood's alcohol content and that after the arrested operator refuses to take the chemical test, he must be advised of the consequences flowing from his contemplated refusal. The arrestee must be permitted to reconsider his refusal in light of that information.[11] Thus, we conclude that the superior court correctly affirmed the district court's denial of appellants' respective motions to suppress. We hold that neither AS 28.35.031 nor AS 28.35.032 requires that the arrested operator be advised he has the right to refuse to take a chemical test for the purpose of determining the alcohol content of his blood.[12]

Affirmed.

Leroy JOHNSON, Jr., Appellant,

v.

STATE of Alaska, Appellee.

No. 3346.

Supreme Court of Alaska.

April 14, 1978.

Defendant was convicted before the Superior Court, Fourth Judicial District, Fairbanks, Gerald J. Van Hoomissen, J., of sale of a narcotic drug, and he appealed. The Supreme Court, Boochever, C. J., held that: (1) where State failed to comply with

To comply with the mandate of the statute, the refusal and the advice, as to the resulting consequences, must be within the same time frame, but not necessarily within a precise sequence—they are integral to each other, and must be so administered.
Id. at 762.

9. Questions relating to the administrative consequences of an arrestee's refusal to take a breathalyzer test are not before us on this appeal. Accordingly, we do not reach such issues.

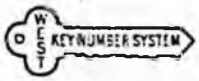
10. S.D. Codified Laws § 32-23-10; Wash.Rev. Code § 46.20.308(1). Although the Oregon statute, Or.Rev.Stat. 487.805, is not phrased in terms of a "right" to refuse, it has been construed as granting such a right. *See State v. Freymuller*, 552 P.2d 867, 868 (Or.App.1976); *State v. Amnen*, 12 Or.App. 203, 504 P.2d 1400, up.Ct. *review denied* (1973); *see also State v. Stover*, 271 Or. 132, 531 P.2d 258, 264-65 (1975).

11. Resolution of the issues raised on this appeal does not require us to determine the effect of a failure to advise the arrestee of consequences which may result from his refusal to take the test.

12. The statutes of our sister states relating to implied consent, rights thereunder, and notice requirements vary in significant degrees. We have found the various statutory differences of such significance that the plethora of case law relating to implied consent statutes was of little assistance in our analysis of AS 28.35.031 and AS 28.35.032.

However, we think it can be fairly said that any error thus committed did not appreciably affect the jury's verdict. Such being the case, it was harmless under the test of *Love v. State*, 457 P.2d 622, 631 (Alaska 1969), and not a ground for reversal. Rule 47(a), Alaska R.Crim.P.

AFFIRMED.



John W. PALMER, Appellant,

v.

STATE of Alaska, Appellee.

No. 3651.

Supreme Court of Alaska.

Dec. 28, 1979.

Defendant was convicted in the District Court, Third Judicial District, Anchorage, Alexander Bryner, J., of operating motor vehicle while under influence of intoxicating liquor and he appealed. The Superior Court, Third Judicial District, Seaborn, J. Buckalew, Jr., J., affirmed and defendant appealed. The Supreme Court, Burke, J., held that: (1) even if statements made by motorist while being given sobriety tests were testimonial in character, they were not product of type of custodial "interrogation" that required *Miranda* warnings, and (2) neither statute nor any provision of State or Federal Constitutions requires that motorist who is compelled to submit to breath test be advised of his right to obtain an independent blood-alcohol test.

Affirmed.

Rabinowitz, C. J., filed concurring opinion.

Boochever, J., filed concurring opinion.

1. Constitutional Law ⇐266.1(1)
Criminal Law ⇐388

Defendant was not entitled to be warned that his actions while breath test was being administered to him and while he performed other sobriety tests were being videotaped and he was not denied due process and fundamental fairness by absence of warning. U.S.C.A.Const. Amend. 14.

2. Constitutional Law ⇐82(7)

Constitutional right to privacy was not violated by videotaping of motorist's breath and other sobriety tests. Const. art. 1, § 22.

3. Criminal Law ⇐333(3)

Fifth Amendment offers no protection against compelling motorist to take sobriety tests. Rules of Criminal Procedure, rule 47(a); AS 28.35.033(a)(3); U.S.C.A.Const. Amend. 5.

4. Criminal Law ⇐412.2(2)

Even if statements made by motorist while being given sobriety tests were testimonial in character, they were not product of type of custodial "interrogation" that required *Miranda* warnings. Rules of Criminal Procedure, rule 47(a); AS 28.35.033(a)(3).

5. Criminal Law ⇐1169.12

Even if defendant motorist's utterances during sobriety tests were erroneously admitted into evidence, error was harmless beyond reasonable doubt, where there was no reasonable possibility that those statements contributed to jury's verdict. Rules of Criminal Procedure, rule 47(a); AS 28.35.033(a)(3).

6. Constitutional Law ⇐266(1)
Criminal Law ⇐388

Neither statute nor any provision of State or Federal Constitutions, including due process clause, requires that motorist who is compelled to submit to breath test be

alcohol. Therefore, even the testimony concerning the beer cans was technically irrelevant, absent any defense contention that the victim had been drinking. However, to avoid the possibility of unwarranted juror speculation that she might have been drinking, we think it would be a proper exercise of the trial court's discretion to admit such evidence.

advised of his right to obtain an independent blood-alcohol test. AS 28.35.030, 28.35.032(a–c); U.S.C.A.Const. Amend. 14.

7. Criminal Law ⇐665(4)

In prosecution for operating motor vehicle while under influence of intoxicating liquor, trial court did not abuse its discretion in refusing defense request to exclude arresting officer from the courtroom. AS 09.20.180, 28.35.030; Rules of Civil Procedure, rule 43(g)(3); Rules of Criminal Procedure, rule 26(a).

8. Criminal Law ⇐469

In prosecution for operating motor vehicle while under influence of intoxicating liquor, expert testimony concerning procedures used in other states and in Canada to increase or guarantee accuracy of breath alcohol test, particularly practice of administering second test to see how it compares to the first, was irrelevant and properly excluded to extent that the offered evidence merely established that other procedures were used elsewhere. AS 28.35.030.

9. Criminal Law ⇐469

In prosecution for operating motor vehicle while under influence of intoxicating liquor, while excluded testimony concerning procedures used in other states and in Canada to increase or guarantee accuracy of breath alcohol tests may have had some probative value on issue of probable accuracy of test administered to defendant, trial court did not err in excluding the evidence, where it held extensive hearings on nature and content of proffered testimony and there was no showing that the test in question suffered from any of defects to be testified to by the expert witness. AS 28.35.030.

10. Criminal Law ⇐1169.12

In prosecution for operating motor vehicle while under influence of intoxicating liquor, if there was a *Miranda* violation in admitting defendant's answer that he had "five or six beers" when asked by arresting officer how much he had to drink, the error was harmless beyond reasonable doubt, where there was no reasonable possibility that the evidence contributed to the jury's verdict. AS 28.35.03[illegible]; U.S.C.A.Const. Amend. 5.

11. Criminal Law ⇐1001

Superior court did not abuse its discretion in refusing to stay portion of district court's sentence suspending for 30 days the driver's license of defendant convicted of operating motor vehicle while under influence of intoxicating liquor. AS 28.35.030.

Peter A. Galbraith, Galbraith & Frost, Anchorage, for appellant.

Mary Anne Henry, Asst. Dist. Atty., Joseph D. Balfe, Dist. Atty., Anchorage, Avrum M. Gross, Atty. Gen., Juneau, for appellee.

Craig M. Cornish, Asst. Public Defender, Brian Shortell, Public Defender, Anchorage, for appellant/amicus curiae.

Before RABINOWITZ, C. J., and CONNOR, BOOCHEVER, BURKE and MATTHEWS, JJ.

OPINION

BURKE, Justice.

After trial by jury in the district court, John W. Palmer, appellant, was convicted of the crime of operating a motor vehicle while under the influence of intoxicating liquor. *See* AS 28.35.030. Upon entry of a final judgment he appealed to the superior court where his conviction was affirmed. This appeal followed.

I

Palmer's first contention is that the trial court erred in refusing to suppress evidence of a videotape recording made at trooper headquarters following his arrest.[1] Among other things, the recording portrayed Palmer while a breathalyzer examination was

1. District Court Judge Laurel Peterson ruled on appellant's pre-trial motion to suppress, as well as his motion to dismiss the complaint. District Court Judge Alexander Bryner presided over the trial.

being administered to him and while he performed other sobriety tests, some involving verbal skills. In support of his argument that this evidence should have been suppressed, Palmer advances several theories.

a. *Right to a warning.*

[1] Palmer contends that, as a matter of due process and fundamental fairness, he was entitled to a warning that his actions were being videotaped. *See Betts v. Brady*, 316 U.S. 455, 462, 62 S.Ct. 1252, 1256, 86 L.Ed. 1595, 1602 (1942). He cites no direct authority for this argument and we know of none. Accordingly, under the circumstances shown by the evidence in this case, we hold that no warning was required on these grounds.[2]

b. *Right of privacy.*

Palmer next contends that such a warning was required by article I, section 22, of the Constitution of the State of Alaska, which specifically guarantees to every citizen of the state a right to privacy.[3] In *Smith v. State*, 510 P.2d 793, 797 (Alaska), *cert. denied*, 414 U.S. 1086, 94 S.Ct. 603, 38 L.Ed.2d 489 (1973), prior to the adoption of article I, section 22, we considered whether there was a constitutionally protected right of privacy under the search and seizure clause of the state constitution, article I, section 14. In *Smith* we approved the test articulated by Mr. Justice Harlan in *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), for determining whether a reasonable expectation of privacy exists: "[T]here is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" *Id.* at 361, 88 S.Ct. at 516, 19 L.Ed.2d at 588 (Harlan, J., concurring). *See also Nathanson v. State*, 554 P.2d 456 (Alaska 1976). In *State v. Glass*, 583 P.2d 872, 880 (Alaska 1978), we held that the privacy amendment, Alaska Const., art. I, § 22, prohibited the electronic recording of a narcotics transaction. We concluded that the defendant's subjective expectation that his conversations with a police informant would not be secretly recorded was one that society recognized as reasonable.[4]

[2] We think the situation in the case at bar, however, is readily distinguishable. When the videotape recording was made, Palmer was already under arrest. After being transported to police headquarters, he was asked to submit to a breathalyzer examination and to perform a number of sobriety tests. Assuming, *arguendo*, that he had any actual or subjective expectation at that point that his actions would not be recorded, we are convinced that that expectation is *not* one that society is prepared to recognize as reasonable. Accordingly, we hold that there was no violation of the right of privacy guaranteed to Palmer by article I, section 22, of the state constitution.[5]

c. *Self-incrimination and duty of disclosure.*

Palmer further contends that recording his actions on videotape without his knowledge was a violation of his privilege against self-incrimination and a breach of the prosecutor's duty to disclose evidence favorable

2. No reason has been suggested to us why such a warning should not be given. Absent some demonstrated justification for the failure to do so, we think the better practice would be to advise the arrested person that his or her actions are being videotaped.

3. Alaska Const., art. 1, § 22, provides: "The right of the people to privacy is recognized and shall not be infringed. The legislature shall implement this section."

4. The holding in *Glass* was by a 4 to 1 majority. The author of the present opinion dissented.

5. Palmer also contends that it was a violation of AS 11.60.290 for the police to videotape his actions and record his voice. AS 11.60.290 provides in pertinent part: "It is unlawful for a person to (1) use an eavesdropping device to hear or record all or any part of an oral conversation without the consent of a party to the conversation[.]" This statute is clearly intended to prohibit third-party eavesdropping and is therefore not applicable to the situation in the case at bar where one of the participants recorded the conversation.

to the accused. Criminal Rule 16(b)(3) provides: "The prosecuting attorney shall disclose to defense counsel any material or information within his possession or control which tends to negate the guilt of the accused as to the offense or would tend to reduce his punishment therefor." Palmer argues that this rule, in combination with minimal requirements of due process, requires the *police* to inform one arrested for driving while intoxicated that his actions are being videotaped "so that the individual can perform at his best." This argument, in our judgment, is frivolous.

Palmer's self-incrimination argument is that, since he was not advised of either his *Miranda* rights or the fact that he was was being videotaped prior to being asked to perform the actions that were recorded, the recording, or at least the audio portion thereof, should have been suppressed. In *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), the Supreme Court of the United States held that evidence obtained as a result of custodial interrogation of an accused is inadmissible against him in a state court unless it can be demonstrated that he was advised of his fifth amendment right to remain silent and his sixth amendment right to have an attorney present during questioning: "[U]nless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him." *Id.* at 479, 86 S.Ct. at 1630, 16 L.Ed.2d at 726 (footnote omitted). In *Anchorage v. Geber*, 592 P.2d 1187, 1192 (Alaska 1979), we held that the police were not required to advise one arrested for driving while intoxicated of the right to have counsel present before they administered and videotaped certain field sobriety tests at the police station. Our opinion in that case, however, did not suggest that the *Miranda* requirements can be ignored where the tape contains evidence of statements or events to which those requirements are otherwise applicable. Thus, for example, where an accused confesses to a crime as a result of custodial interrogation by the police, a videotape recording of his confession would be inadmissible unless the interrogation leading to that confession were preceded by a proper *Miranda* warning.

In the case at bar, the videotape begins with Palmer taking the breathalyzer test. The tape then shows Palmer performing several physical tests designed to determine whether, and to what extent, he was under the influence of intoxicating liquor. The tape shows that when asked to perform the "walk the line test," Palmer complained of problems with his hip. The trooper administering the tests then informed Palmer that the breathalyzer test results indicated that he had a blood alcohol level of .16%.[6] To this, Palmer replied, "Oh no."

[3, 4] The fifth amendment offers no protection against compulsion to take the sort of tests administered to Palmer in this case. *United States v. Wade*, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967); *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966). Moreover, even if the statements made by the accused were testimonial in character, as argued by Palmer, they were not the product of the sort of custodial "interrogation" that requires a *Miranda* warning. *See Hunter v. State*, 590 P.2d 888 (Alaska 1979).

[5] Even if Palmer's utterances were erroneously admitted into evidence, however, the error was harmless beyond a reasonable doubt. Considering the statements along with the other evidence in the case, we see no reasonable possibility that those statements contributed to the jury's verdict. *See* Rule 47(a); Alaska R.Crim.P.; *Love v. State*, 457 P.2d 622, 633 (Alaska 1969).

II

[6] As 28.35.033(e) provides that a person who is required to submit to a breathalyzer examination may obtain an independent blood alcohol test:

6. When the blood alcohol level is 0.10 percent or more, it is presumed that the person was under the influence of intoxicating liquor. AS 28.35.033(a)(3).

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

Palmer was not advised of his right to obtain an independent test, and he now contends that the results of the breathalyzer examination were therefore inadmissible. The statute, however, contains no requirement that such advice be given, and we are not persuaded that it is required by any provision of the state or federal constitution. *See People v. Thornton*, 9 Mich.App. 536, 157 N.W.2d 490 (1968); *People v. Kerrigan*, 8 Mich.App. 216, 154 N.W.2d 43 (1967); *State v. Myers*, 88 N.M. 16, 536 P.2d 280 (1975); *State v. Osburn*, 13 Or.App. 92, 508 P.2d 837 (1973); *Caldwell v. Commonwealth*, 205 Va. 277, 136 S.E.2d 798 (Va. 1964). *Compare Wirz v. State*, 577 P.2d 227, 230 (Alaska 1978).[7]

III

Palmer next contends that due process requires that a person in his position be advised that he has a right to refuse to submit to a breathalyzer examination. *See* AS 28.35.032(a); *Anchorage v. Geber*, 592 P.2d 1187 (Alaska 1979).

While AS 28.35.032(a) prohibits the giving of any other blood test when the person arrested refuses to submit to a breathalyzer examination, *Anchorage v. Geber*, 592 P.2d at 1191, it does not otherwise grant or recognize a *right* on the part of the arrested person to refuse that examination.[8] Since the legislature has not imposed a specific requirement that the person be informed that he has a right to refuse the breathalyzer examination, we have held that there is no statutory requirement that such advice be given. *Wirz v. State*, 577 P.2d 227, 230 (Alaska 1978). We are equally unpersuaded that such advice is required as a matter of constitutional due process.

IV

[7] During the trial of the case, the district court refused a defense request to exclude the arresting officer from the courtroom. *See* AS 09.20.180; Rule 43(g)(3), Alaska R.Civ.P.[9] The record convinces us that the court did not abuse its discretion in ruling as it did. Accordingly, there was no error. *See Dickens v. State*, 398 P.2d 1008 (Alaska 1965).

V

Palmer sought to introduce expert testimony concerning procedures utilized in other states and in Canada to increase or guarantee the accuracy of breathalyzer examinations, particularly the practice of administering a second test to see how it compares to the first. The techniques, methods, and standards pertaining to breathalyzer examinations in Alaska have been established by the legislature and administrative regulations adopted by the Department of

7. We also reject Palmer's suggestion in that the failure of the police to inform him of his right to an independent blood test violated Criminal Rule 16(b)(3). A similar argument, discussed in Part I(c) of this opinion, was deemed frivolous.

8. There is a statutory requirement that the arrested person be advised that refusal to submit to a breathalyzer examination may result in the suspension, revocation or denial of his driver's license by the Department of Public Safety. AS 28.35.032(b). If he is not so advised, any such action by the department can be rescinded by the district court. AS 28.35.032(c).

9. AS 09.20.180 provides: "Upon the request of either party the judge may exclude from the court room any witness of the adverse party not under examination at the time so that he may not hear the testimony of other witnesses." Similar language is contained in Civil Rule 43(g)(3), which is made applicable to criminal proceedings by Rule 26(a), Alaska R.Crim.P.

Health and Social Services. *See* AS 28.35.-033; 7 AAC 30.010–.080. In this appeal, Palmer makes no claim that the state did not comply with these techniques, methods, and standards.

[8, 9] To the extent that the evidence merely established that other procedures are utilized elsewhere, it was irrelevant and properly excluded. In any event, the district court held extensive hearings on the nature and content of the proffered testimony, and there was no showing that the breathalyzer test in question suffered from any of the defects to be testified to by the expert witness. Thus, while the excluded evidence may have had some probative value on the issue of the probable accuracy of the test administered to Palmer, we are unable to say that the district court erred in ruling as it did.

VI

After stopping Palmer's vehicle, the arresting officer, before formally placing him under arrest, asked Palmer how much he had had to drink. Palmer replied that he had had "five or six beers." This exchange occurred before Palmer was advised of his right to remain silent. At trial, Palmer's attorney moved to suppress this evidence, claiming that its introduction would violate his client's constitutional rights under *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

[10] Assuming, *arguendo*, that there was a *Miranda* violation, we conclude that the statement, if it was incriminating, merely corroborated other evidence at trial which, standing alone, would have been more than sufficient to convict Palmer of the offense charged. If it was error to admit the statement, such error was harmless beyond a reasonable doubt, since we see no reasonable possibility that that evidence contributed to the jury's verdict. *Love v. State*, 457 P.2d 622, 633 (Alaska 1969).

VII

[11] Palmer's final contention is that the superior court erred in refusing to stay that portion of the district court's sentence suspending his driver's license for a period of thirty days, pending the outcome of his appeal to this court. The decision whether to grant or deny such a stay is one that is properly left to the sound discretion of the superior court. We have determined that the court did not abuse its discretion and, therefore, conclude that there was no error.

AFFIRMED.

RABINOWITZ, Chief Justice, concurring.

I concur in the majority opinion. However, as to any violation of Palmer's constitutional rights under *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) during the initial traffic stop, my analysis differs from that employed by the majority.

Palmer alleges error in the admission of testimony that when he was initially stopped by the police, he was asked how much he had to drink and replied, "five or six beers." This statement was made prior to any giving of *Miranda* warnings or any waiver of Palmer's right to remain silent and not be questioned. The majority concludes, after assuming arguendo a *Miranda* violation occurred, that the error was harmless because it was merely cumulative, corroborating other evidence sufficient to convict. Violation of *Miranda* protections is federal constitutional error. As we stated in *Rubey v. Fairbanks*, 456 P.2d 470 (Alaska 1969), to determine whether a constitutional error is harmless, this "court must be able to declare a belief beyond a reasonable doubt that the error was harmless—that it did not contribute to the verdict obtained." *Id.* at 477.

In this case, after exhibiting erratic driving behavior, Palmer admits to having drunk "five or six beers." I think that this admission is of such importance that reasonable doubt exists as to whether it contributed to the verdict. An accused's statement as to his or her activities carries significant weight with the jury. Admitting to considerable consumption of alcohol in the context of this case amounts to an admission of one of the elements of the

charged offense. Thus, since I would find reversible error if Palmer's *Miranda* rights were violated it becomes necessary to decide whether the admission in question was uttered under circumstances amounting to custodial interrogation.

In *Hunter v. State*, 590 P.2d 888, 895 (Alaska 1979), we adopted an objective, reasonable person test for determination of custodial interrogation requiring *Miranda* warnings. In that case we held that there must be some actual indication of custody, such that a reasonable person would not feel free to leave and break off police questioning. We stated in *Hunter* that custodial determinations must be made on a case-by-case basis and outlined three groups of factors which are to be considered when examining a particular factual setting:

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

Id. at 895 (footnotes omitted). Based upon my study of the record I conclude that Palmer was not in custody at the time he was asked how much he had to drink. The arresting officer testified that the reason that he pulled Palmer's vehicle over was that it was weaving back and forth and crossing the centerline. Officer Murphy testified that once he effected a traffic stop of Palmer:

> I asked him how much he'd had to drink. He stated at that time, five or six beers. I asked him where he'd been, if this was his house, listened to him talk. I believe I asked him to walk a straight line and recite the alphabet for me at the scene. When that was completed, I arrested him for OMVI.

Thus, at the point at which Murphy asked Palmer how much he had been drinking, all the information the officer had was the weaving in Palmer's driving Murphy had observed. Such a driving pattern could have been caused by any of a number of factors, including the impairment of the driver's faculties. It was only with additional questioning, observance of Palmer's demeanor, and Palmer's performance of the field sobriety tests that Murphy concluded there was sufficient probable cause to arrest Palmer.

Therefore, I conclude that this questioning falls under the on-the-scene questioning exception to the *Miranda* rule. This court discussed the parameters of that exception in *Ripley v. State*, 590 P.2d 48 (Alaska 1979), and *Pope v. State*, 478 P.2d 801 (Alaska 1970). The purpose of the exception is to facilitate the traditional function of police officers in investigating crime. General, on-the-scene questioning to determine whether a crime has been committed does not require *Miranda* warnings. In *Pope v. State*, 478 P.2d 801, 805 (Alaska 1971), we articulated several factors considered in determining whether there was an on-the-scene questioning exception:

> But the case at bar is a strong one for applying the "on-the-scene questioning" exception to the *Miranda* warning requirement. The officer here was presented with a situation of great emergency. A crime of violence had occurred, the victim was lying on the ground dead. There was more than one person present. Both to protect his own safety and that of others, the officer had to elicit information about what had happened, and about the gun which had obviously been used in the killing.

Although the circumstances surrounding the scene of a violent crime are far different from a traffic stop the general principle is equally applicable. Police should be free to ask questions to determine what has happened. Only then can an officer exercise judgment as to what action to take. Again, each case turns on its particular facts. At some point, the on-the-scene questioning may become a custodial interrogation. *See State v. Darnell*, 8 Wash.App. 627, 508 P.2d 613, 615 (Wash.App.1973), *cert. denied*, 414 U.S. 1112, 94 S.Ct. 842, 38 L.Ed.2d 739; *United States v. LeQuire*, 424 F.2d 341, 343–44 (5th Cir. 1970).

I conclude that the circumstances in this case did not amount to custodial interrogation. Therefore, I can agree with the majority that there was no error in the admission of Palmer's statement.

BOOCHEVER, Justice, concurring.

With reference to the videotaping and recording of the sobriety tests at the police headquarters, I am of the opinion that one in defendant's position would have had no actual or subjective expectation of privacy. From all indications, the testing was performed in a public area and not in a private room which might give rise to such an expectation. Moreover, the vary nature of the testing was for the obvious purpose of making the results public. Therefore, I would rest the holding that there was no violation of Palmer's right to privacy on the lack of subjective expectation of privacy.

I am not at all sure that if the circumstances were such as to give rise to an actual and subjective expectation of privacy, that society would not be prepared to recognize such an expectation as reasonable. A sense of fairness based on a requirement of being open and above board would seem to require notification that one's actions are being videotaped and recorded, if the testing were performed under circumstances giving rise to a subjective expectation of privacy. *See State v. Glass*, 583 P.2d 872 (Alaska 1978).

I further would not speculate as to whether a *Miranda* warning would be required if the statements of the accused made during the testing are regarded as testimonial in character. The trooper indicated that the breathalyzer test results indicated that Palmer had a blood alcohol level of .16 percent, to which Palmer replied "Oh no." That exclamation could hardly be regarded as incriminating, and I find it unnecessary to make any general holding as to whether the remarks were the result of custodial interrogation so as to require a *Miranda* warning. There are too many factual variations which may arise to justify such a sweeping holding. For example, a police officer could give a false statement of a high breathalyzer reading hoping to elicit an admission of where a defendant had been drinking or some statement as to the amount consumed. Even under the circumstances here involved, had Palmer answered "I only had six drinks," a close question would be presented. There can be no dispute of the fact that Palmer was in custody.[1] The United States Supreme Court has held that direct questioning is not required to trigger the requirement of *Miranda* warnings. *Brewer v. Williams*, 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977).

SWENSON TRUCKING & EXCAVATING, INC., Appellant,

v.

TRUCKWELD EQUIPMENT COMPANY, Appellee.

No. 4238.

Supreme Court of Alaska.

Jan. 4, 1980.

Action for damages arising out of a defective weld in the original manufacture

1. *See Hunter v. State*, 590 P.2d 888 (Alaska 1979).

ANCHORAGE, a Municipal Corporation, Appellant,

v.

Arthur GEBER, Appellee.

David EARLEY, Appellant,

v.

STATE of Alaska, Appellee.

Jennie L. WILLIS, Petitioner,

v.

ANCHORAGE, a Municipal Corporation, Respondent.

ANCHORAGE, a Municipal Corporation, Petitioner,

v.

Jerry Dean BUFFINGTON, Respondent.

Nos. 4016, 4037, 3827 and 4046.

Supreme Court of Alaska.

March 30, 1979.

In four cases involving charges of operating a motor vehicle while under the influence of intoxicating liquor, appeals were taken from judgments of the Superior Court, P. J. Kalamarides, Ralph E. Moody and J. Justin Ripley, JJ. The appeals were consolidated, and the Supreme Court, Burke, J., held that: (1) in prosecuting a charge of operating a motor vehicle while under the influence of intoxicating liquor, law enforcement officials cannot utilize the results of a blood alcohol test when the blood used in performing the test was extracted from the accused against his or her will after refusal to submit to a breathalyzer examination, and (2) a person suspected of driving under the influence of intoxicating liquor has no right to have counsel present during the videotaping of field sobriety tests performed at the request of the arresting officer.

Ordered in accordance with opinion.

1. Criminal Law ⇐388

In prosecution on charge of operating a motor vehicle while under the influence of intoxicating liquor, law enforcement officials cannot utilize the results of a blood alcohol test when the blood used in performing the test was extracted from the accused against his or her will after the accused refused to submit to a breathalyzer examination. AS 28.35.031–28.35.033.

2. Criminal Law ⇐641.2

A person suspected of operating a motor vehicle while under the influence of intoxicating liquor has no right to have counsel present during the videotaping of field sobriety tests performed at the request of the arresting officer. AS 28.35.031–28.35.033.

3. Criminal Law ⇐388

In enacting the implied consent statute, the legislature intended that once a breath test had been refused, no other chemical test could be conducted. AS 28.35.032(a).

4. Criminal Law ⇐388

Statute which provides in relevant part that after a suspect has refused to submit to a "chemical test" of his or her breath, "a chemical test shall not be given," prohibits giving any "chemical test," including a test of the breath, blood or urine; statutory language did not mean merely that no other chemical test of the suspect's breath could be given; overruling *Layland v. State*, 535 P.2d 1043, to the extent that it is inconsistent.

See publication Words and Phrases for other judicial constructions and definitions.

5. Criminal Law ⇐388

The implied consent statute was intended to provide an exclusive method for obtaining direct evidence of a suspect's blood alcohol content, absent his or her express consent to the use of some other form of testing. AS 28.35.031–28.35.033.

Douglas B. Baily, Dunn, Baily & Mason, Anchorage, for appellee Geber.

593

Craig Cornish, Asst. Public Defender, Brian C. Shortell, Public Defender, Anchorage, for appellant Earley.

Roger W. DuBrock, Wade & DuBrock, Anchorage, for petitioner Willis.

Joseph W. Evans, Birch, Horton, Bittner & Monroe, Anchorage, for respondent Buffington.

Allen M. Bailey, Municipal Pros., Anchorage, Donald L. Starks, Municipal Prosecutor, Anchorage and Theodore Berns, Municipal Atty., Anchorage, for appellant, petitioner and respondent Anchorage, a Municipal Corp.

Monica Jenicek and Mary Anne Henry, Asst. Dist. Attys., Joseph D. Balfe, Dist. Atty., Anchorage, Avrum M. Gross, Atty. Gen., Juneau, for State.

Before BOOCHEVER, C. J., RABINOWITZ, and BURKE, JJ., DIMOND, Senior Justice, and COMPTON, Superior Court Judge.

OPINION

BURKE, Justice.

[1, 2] The main issue in each of four cases[1] now before us is whether, in prosecuting a charge of operating a motor vehicle while under the influence of intoxicating liquor, law enforcement officials can utilize the results of a blood alcohol test, when the blood used in performing the test was extracted from the accused against his or her will, after refusal to submit to a breathalyzer examination. A second issue, found in only one of the cases, is whether the suspect has a right to have counsel present during the video taping of field sobriety tests performed at the request of the arresting officer.[2] On the main issue, we hold that the extraction and testing of blood under these circumstances has been prohibited by the legislature's enactment of AS 28.35.031–.033 On the second issue, we hold that there is no right to have counsel present.

In separate incidents, Arthur Geber, David Earley, Jennie L. Willis and Jerry Dean Buffington were arrested on charges of operating a motor vehicle while under the influence of intoxicating liquor. Geber, Willis and Buffington were charged with violations of a municipal ordinance, section 9.28.020 of the Code of Ordinances of the Municipality of Anchorage.[3] Earley was charged with a violation of state law, AS 28.35.030.[4] After refusing to submit to

1. In the interest of judicial economy these cases have been consolidated for purposes of our review.

2. No other issue as to the legality of the videotaping has been raised.

3. Section 9.28.020 provides:
Driving While Under the Influence of Intoxicating Liquor or Drug. A person who, while under the influence of intoxicating liquor, depressant, hallucinogenic, stimulant or narcotic drugs, as defined in AS 17.10.230(13) and AS 17.12.150(3), operates, drives or is in actual physical control of an automobile, motorcycle or other motor vehicle in the municipality, upon conviction, is punishable by a fine of not more than $1,000.00 or by imprisonment for not more than one year, or by both; however upon conviction the court shall impose a sentence of at least 24 hours imprisonment. Upon a second conviction within five years after a first conviction under this section, Section 9.28.030 of this code, or under a statute of the State of Alaska or an ordinance of another municipality proscribing a similar offense, the court shall impose a minimum sentence of not less than three days. Upon a subsequent conviction within five years after a second conviction under this section, Section 9.28.030 of this code or under an Alaska Statute or ordinance of another municipality proscribing a similar offense, the court shall impose a minimum sentence of imprisonment of not less than 10 days. The execution of sentence may not be suspended nor may probation or parole be granted until the minimum imprisonment provided in this section has been served, nor may imposition of sentence be suspended, except upon the condition that the defendant be imprisoned for no less than the minimum period provided in this section, nor may the punishment provided for in this section be reduced under AS 11.05.150. In addition, the operator's license shall be revoked in accordance with AS 28.15.210(c).

4. AS 28.35.030 provides:
Driving while under the influence of intoxicating liquor or drugs. A person who, while under the influence of intoxicating liquor, depressant, hallucinogenic or stimulant drugs or narcotic drugs as defined in AS 17.10.-

breathalyzer examinations, Geber, Earley and Buffington were transported to medical facilities where, over their objection, blood samples were extracted for the purpose of testing for the presence of alcohol. Following her arrest, Willis was immediately transported to a hospital where, after initially refusing to do so, she submitted to the extraction of her blood after being informed by police that if she continued to refuse it would be taken forcibly. Thereafter, Willis was transported to the police station where she was ordered to perform certain field sobriety tests. As she performed the various tests a video tape was made of her actions. At that point she was also offered an opportunity to take a breathalyzer test but refused to do so.

The blood test performed as to each of the four defendants revealed the presence of alcohol. Each moved in district court for an order suppressing the results of the blood tests. These motions produced conflicting results in both the district and superior courts.[5] Eventually, the rulings in each case became the subject of an appeal[6] or petition for review[7] to this court.

In 1969, the legislature of Alaska enacted what is commonly known as the Alaska Implied Consent Statute. Ch. 83, § 1, SLA 1969. This enactment, codified as AS 28.35.031–.034, is entitled: "An act relating to chemical tests as to alcoholic content of blood when operating or driving a motor vehicle under the influence of intoxicating liquor." It amended AS 28.35 by adding several new sections, including the following:

AS 28.35.031. Implied consent. A person who operates or drives a motor vehicle in this state shall be considered to have given consent to *a chemical test or tests of his breath* for the purpose of determining the alcoholic content of his blood if lawfully arrested for an offense arising out of acts alleged to have been committed while the person was operating or driving a motor vehicle while under the influence of intoxicating liquor. The test or tests shall be administered at the direction of a law enforcement officer who has reasonable grounds to believe that the person was operating or driving a motor vehicle

230(13) and AS 17.12.150(3) operates or drives an automobile, motorcycle or other motor vehicle in the state, upon conviction, is punishable by a fine of not more than $1,000, or by imprisonment for not more than one year, or by both. Upon a second conviction within five years after a first conviction under this section, the court shall impose a minimum sentence of imprisonment of not less than three days. Upon a subsequent conviction within five years after a second conviction under this section, the court shall impose a minimum sentence of imprisonment of not less than 10 days. The execution of sentence may not be suspended nor may probation or parole be granted until the minimum imprisonment provided in this section has been served, nor may imposition of sentence be suspended, except upon the condition that the defendant be imprisoned for no less than the minimum period provided in this section, nor may the punishment provided for in this section be reduced under AS 11.05.150. In addition, his operator's license shall be revoked in accordance with AS 28.15.210(c).

5. Geber's motion was denied by the district court, but that ruling was reversed by the superior court on appeal. The Municipality of Anchorage then appealed the superior court's order to this court. Earley's motion to suppress was denied by the district court and that ruling was affirmed on appeal to the superior court. Earley then appealed to this court. Willis' motion to suppress the results of the blood alcohol test was denied by the district court. In addition the district court denied her motion to suppress evidence of the video tape made of her performance for the field sobriety test upon the grounds that she had been denied the right to counsel. Willis then petitioned for review of both rulings by the superior court. The petition was denied. Willis then petitioned this court for review. Her petition was granted and trial of the case stayed pending resolution of the issues presented on their merits. Buffington's motion to suppress was granted by the district court. The Municipality then filed a petition for review in superior court. Although the superior court stated in its subsequent order that the petition for review was denied, it appears that, in fact, the superior court affirmed the ruling of the district court on its merits. The Municipality then petitioned for review by this court. It appears that Buffington's trial was stayed pending our resolution of the issue presented.

6. *See* Rules 5 and 45, Alaska R.App.P.

7. *See* Rules 23 and 24, Alaska R.App.P.

593

in this state while under the influence of intoxicating liquor. [Emphasis added.]

AS 28.35.032. Refusal to submit to chemical test. (a) If a person under arrest refuses the request of a law enforcement officer to submit to a chemical test of his breath as provided in § 31 of this chapter, after being advised by the officer that his refusal will result in the suspension, denial or revocation of his license, *a chemical test shall not be given.* [Emphasis added.]

Simply stated, the question in the cases at bar is whether the language of AS 28.35.-032(a), providing that, upon a person's refusal to submit to a chemical test of his breath, "*a chemical test shall not be given,*" means that law enforcement officials are precluded from performing other chemical tests in order to determine whether alcohol is present in the person's blood.

In 1969, Senator Lowell Thomas, Jr., introduced Senate Bill No. 23. It was this bill, after subsequent revisions, which was destined to become Alaska's Implied Consent Statute. As originally introduced, the bill would have amended AS 28.35 by adding, among other things, the following:

Section 28.35.031. IMPLIED CONSENT. (a) A person who operates a motor vehicle in this state shall be considered to have given consent, subject to the provisions of sec. 33 of this chapter, to *a chemical test or tests of his blood, breath or urine* for the purpose of determining the alcoholic content of his blood if lawfully arrested for an offense arising out of acts alleged to have been committed while the person was driving or in actual physical control of a motor vehicle while under the influence of intoxicating liquor. The test or tests shall be administered at the direction of a law enforcement officer having reasonable grounds to believe the person to have been driving or in actual physical control of a motor vehicle in this state while under the influence of intoxicating liquor. The Department of Public Safety shall designate which of the tests shall be administered.

(b) A person who is dead, unconscious or who is otherwise in a condition rendering him incapable of refusal, shall be considered not to have withdrawn the consent provided by (a) of this section, and the test or tests may be administered, subject to the provisions of sec. 33 of this chapter.

Section 28.35.032. REFUSAL TO SUBMIT TO CHEMICAL TEST. If a person under lawful arrest refuses, upon the request of a law enforcement officer, to submit to a chemical test designated by the Department of Public Safety as provided in sec. 31(a) of this chapter, *none may be given*; but if he does so refuse, evidence of his refusal shall be admissible in a civil or criminal action or proceeding arising out of acts alleged to have been committed while he was driving or in actual physical control of a motor vehicle in this state while under the influence of intoxicating liquor. [Emphasis added.]

S.B. 23, 6th Leg., 1st Sess. (original version Jan. 28, 1969). It should be noted that Senator Thomas' bill provided for implied consent to tests of the blood, breath or urine, and specifically stated that "none may be given" in the event of a refusal. We think it also important that his bill provided that evidence of an individual's refusal could be used in a civil or criminal proceeding arising out of the arrest.

On February 13, 1969, the Senate Health, Welfare, and Education Committee introduced a committee substitute for Senate Bill No. 23. C.S.S.B. 23, 6th Leg., 1st Sess. (Feb. 13, 1969). The committee substitute, like the original bill, provided that consent was deemed given to blood, breath or urine tests. However, a change was made in AS 28.35.032(a), dealing with refusals to submit to chemical tests. In particular, the committee substitute provided (emphasis added):

Section 28.35.032. REFUSAL TO SUBMIT TO CHEMICAL TEST. (a) If a person . . . refuses . . . to submit at least *to a chemical test of his breath* as provided in sec. 31(a) of this chapter and the acts allegedly committed while the person was operating a motor

vehicle while under the influence of intoxicating liquor did not result in an accident causing serious bodily injury or death to a person other than himself, *a chemical test shall not be given.*

The committee substitute also provided, for the first time, for license suspension or revocation for a refusal to submit to the required chemical test or tests. The period of suspension or revocation was deemed to be six months. Evidence of the individual's refusal to submit to a chemical test or tests continued to be admissible in a civil or criminal action.

On March 18, 1969, the Senate Judiciary Committee introduced yet another committee substitute for Senate Bill No. 23. C.S. S.B. 23 am, 6th Leg., 1st Sess. (Mar. 18, 1969). Under this version a driver was only "considered to have given consent to a chemical test or tests of his breath." All references to testing of blood or urine were dropped. *Id.*, sec. 28. 35.031. In addition, the license revocation or suspension period was reduced to three months and the right to use evidence of refusal in a civil or criminal action was omitted. *Id.*, sec. 28.-35.032(b). The language of AS 28.35.032(a) was changed to read:

If a person under arrest refuses the request of a law enforcement officer to submit to a chemical test of his breath as provided in sec. 31 of this chapter, after being advised by the officer that his refusal will result in a suspension, denial or revocation of his license, a chemical test shall not be given.

Senator Merdes offered an amendment to the Senate Judiciary Committee's substitute bill. His amendment would have added, at the end of AS 28.35.031, the following language:

A vehicle operator shall have the option of voluntarily taking a blood test in lieu of the chemical test of the breath if a qualified person including a physician or nurse selected by the vehicle operator, is immediately available.

On a voice vote, the amendment failed. 1969 Senate Journal 406.

A committee substitute of the House Committee on Health, Welfare and Education was introduced on April 5, 1969. H.C. S.C.S.S.B. 23, 6th Leg., 1st Sess. (April 5, 1969). The House substitute provided only for a chemical test of the breath and stated that, if there was a prior conviction for operating a motor vehicle while intoxicated within the past five years, a refusal to take the breath test would result in a one year license revocation. *Id.*, sec. 28.35.032(a) & (d).

A free conference committee was finally established to iron out the differences between the Senate and House versions of this bill, and the free conference committee's substitute bill, which was to ultimately become Alaska's Implied Consent Statute, provided for chemical tests of the breath only; contained language that once a refusal had been given to a chemical test of the breath, a chemical test should not be given; and provided that, if there was a prior conviction within two years for operating a motor vehicle while under the influence of intoxicating liquor and the individual refused the breath test, a one year license revocation would be imposed. H.C.S.C.S.S.B. 23 am F.C.C., 6th Leg., 1st Sess. (April 5, 1969).

[3, 4] The express language of AS 28.-35.032(a), coupled with the legislative history described above, leads us to the conclusion that in enacting the Implied Consent Statute the legislature intended that once a breath test had been refused no other chemical test would be allowed. We interpret the language of AS 28.35.032(a), stating that after refusal to submit to a test of the breath "a chemical test shall not be given," to mean *any* chemical test, be it of the breath, blood, urine or otherwise. Thus, we reject the state and municipality's argument that such language means only that no other chemical test of the breath shall be given.

To the extent that our holding in these cases is inconsistent with anything stated in our opinion in *Layland v. State*, 535 P.2d

1043 (Alaska 1975), the decision in that case is overruled.[8]

[5] Further comment is perhaps necessary concerning the taking of blood from Jennie L. Willis, since her refusal to take a breathalyzer examination came *after* the blood sample was extracted from her body. In our view, the fact that she had not yet refused a breath test is of no significance. As we interpret the Implied Consent Statute, it was intended to provide an exclusive method for obtaining direct evidence of a suspect's blood alcohol content, absent his or her express consent to the use of some other form of testing.

Willis also contends that, before requiring her to perform certain field sobriety tests, the police should have informed her that she had the right to have an attorney present if she could obtain his presence within a reasonable period of time. She argues that such action "is mandated by the decision of [this] court in the case of *State v. Blue [Blue v. State]*, 558 P.2d 636 (Alaska 1977)."

In *State v. Roberts*, 458 P.2d 340 (Alaska 1969), we stated that we would not be guided solely by federal authority in determining the right to counsel under the Alaska constitution, and held that a defendant was entitled to have an attorney present during the taking of handwriting exemplars. Thereafter, in *State v. Blue*, 558 P.2d 636 (Alaska 1977), we stated that there was a right to have counsel present at a pre-indictment lineup "unless exigent circumstances exist so that providing counsel would unduly interfere with a prompt and purposeful investigation." 558 P.2d at 642 (footnote omitted). We also stated that "if the suspect in custody requests an attorney at the lineup, he should be provided an opportunity to call one." *Id.* at 643 n.12.

Field sobriety tests are used to determine whether a suspect has used alcohol and, if so, the degree to which his mental and physical skills have been impaired. It is common knowledge that one's ability to perform such tests is influenced by the percentage of alcohol in his or her blood, and that that percentage diminishes with the passage of time. Such being the case, if the tests are to provide any real indicator of the degree of impairment, if any, existing at the time of the alleged offense, they must be performed as soon thereafter as possible. This fact alone distinguishes such cases from the usual lineup situation or the taking of handwriting exemplars, where the passage of a few hours would have little or no effect.

We think it would be both impractical and unreasonable to impose upon the police the requirement urged by Willis. Thus, we reject her argument that she should have been advised that she had the right to have counsel present before being asked to perform the field sobriety tests administered to her. No such requirement is mandated by any of our past decisions or any provisions of the Constitution of Alaska.

CONNOR and MATTHEWS, JJ., not participating.

8. In *Layland* we accepted a concession by the parties "that a chemical test of a driver's breath is not the exclusive means of attempting to discover and prove a driver's blood alcohol content." 535 P.2d at 1046 n.13. That concession was based on AS 28.35.033(c), which provides:

> The provisions of (a) of this section [detailing the statutory presumptions derived from breath test results] may not be construed to limit the introduction of any other competent evidence bearing upon the question of whether the person was or was not under the influence of intoxicating liquor.

In *Layland* we said, "In our view [the Implied Consent] statute does not preclude the introduction of blood test results in circumstances where the taking of the blood sample did not violate any of the accused's constitutional rights." 535 P.2d at 1046 n.13.

The issue in *Layland* was whether the warrantless taking of a driver's blood, over his objection and after his refusal to submit to a breathalyzer examination, violated the search and seizure provisions of the fourth amendment to the Constitution of the United States and art. I, § 14 of the Constitution of the State of Alaska. The limiting effect of AS 28.35.-032(a) was neither argued by the parties nor discussed in our opinion.

In retrospect we believe that the parties' concession in *Layland* was ill advised. Therefore, we will not be bound by it here.

*[384 US 757]

*ARMANDO SCHMERBER, Petitioner,

v

STATE OF CALIFORNIA

384 US 757, 16 L ed 2d 908, 86 S Ct 1826

[No. 658]

Argued April 25, 1966. Decided June 20, 1966.

SUMMARY

A defendant was convicted in the Los Angeles Municipal Court, California, of driving an automobile while under the influence of intoxicating liquor. After the defendant's arrest, while he was at a hospital receiving treatment for injuries suffered in an automobile accident, a blood sample was withdrawn by a physician at the direction of a police officer, acting without a search warrant, despite the defendant's refusal, on the advice of counsel, to consent to the blood test. The report of the chemical analysis of the test, indicating intoxication, was admitted in evidence at the trial, over the defendant's objection that the compulsory blood test and the admission of the evidence thereof violated his right to due process of law under the Fourteenth Amendment, and his privilege against self-incrimination under the Fifth Amendment, his right to counsel under the Sixth Amendment, and his right against unreasonable searches and seizures under the Fourth Amendment, insofar as such rights were secured against the states by the Fourteenth Amendment. The Appellate Department of the California Superior Court affirmed the conviction.

On certiorari, the Supreme Court of the United States affirmed. In an opinion by BRENNAN, J., expressing the views of five members of the Court, it was held that under the facts obtaining in the case at bar, the defendant's constitutional rights had not been violated by the compulsory blood test and the admission of the evidence thereof.

HARLAN, J., with the concurrence of STEWART, J., joined the Court's opinion, stating that while agreeing with the Court that the compulsory blood test involved no testimonial compulsion, he would go further and hold that apart from such consideration the case in no way implicated the Fifth Amendment.

WARREN, Ch. J., dissented on the ground that the conviction violated the due process clause of the Fourteenth Amendment.

BLACK, J., joined by DOUGLAS, J., dissented on the further ground that the defendant's constitutional right against self-incrimination had been violated.

DOUGLAS, J., in a separate opinion, dissented on the grounds that the conviction violated the due process clause of the Fourteenth Amendment, and that the compulsory blood test clearly invaded the right of privacy protected by the Fourth and Fifth Amendments.

FORTAS, J., dissented on the grounds that the privilege against self-incrimination applied, and that under the due process clause, the state, as prosecutor, had no right to extract blood from any person, over his protest.

SUBJECT OF ANNOTATION

Beginning on page 1332, infra

Physical examination or exhibition of, or tests upon, suspect or accused, as violating rights guaranteed by Federal Constitution

HEADNOTES

Classified to U. S. Supreme Court Digest, Annotated

Constitutional Law §§ 840, 854; Evidence § 681 — compulsory blood test

1. A state conviction of driving an automobile while under the influence of intoxicating liquor cannot be successfully attacked on the ground that the withdrawal of a blood sample from the defendant's body by a physician at a hospital at the direction of a police officer, after the defendant's arrest and despite his refusal, on advice of counsel, to consent to the test, and the admission in evidence of the report of the chemical analysis of the blood sample indicating intoxication, denied the defendant due process of law under the Fourteenth Amendment, where there was ample justification for the officer's conclusion that the defendant, who had been involved in an accident, was under the influence of alcohol, and the blood extraction was made in a simple, medically acceptable manner by a physician in a hospital environment; it makes no difference whether a person states unequivocally that he objects to the test or resorts to physical violence in protest or is in such condition that he is unable to protest, although it would be a different case if the police initiated the violence, refused to respect a reasonable request undergo a different form of testing, or responded to resistance with inappropriate force.

[*See annotation p. 1332, infra*]

ANNOTATION REFERENCES

Physical examination or exhibition of, or tests upon, a suspect or accused, as violating rights guaranteed by Federal Constitution. 96 L ed 194.

Admissibility in criminal case of evidence that accused refused to submit to scientific test to determine amount of alcohol in system. 87 ALR2d 370.

Requiring submission to physical examination or test as violation of constitutional rights. 164 ALR 967, 25 ALR2d 1407.

Admissibility of evidence of party's refusal to permit examination or inspection of property or person. 175 ALR 204.

Admissibility and weight of evidence based on scientific test for intoxication or presence of alcohol in system. 159 ALR 209.

Blood-grouping tests. 168 ALR [illegible] ALR2d 1066.

Admissibility of evidence obtained by illegal search and seizure. [illegible]

Federal Constitution as affecting admissibility of evidence obtained by illegal search and seizure. 84 ALR2d 939.

Modern status of rule governing admissibility of evidence by unlawful search and seizure. 50 ALR2d 531.

Right of search and seizure incident to lawful arrest without a search warrant. 32 ALR 680, 51 ALR 424, 74 ALR 1387, 82 ALR 782.

Accused's right to counsel under the Federal Constitution. 93 L ed 137, 2 L ed 2d 1644, 9 L ed 2d 1260.

Accused's constitutional right to assistance of counsel. 84 L ed 380.

Right of privacy. 133 ALR 22, 163 ALR 446, 14 ALR2d 750.

Fingerprints, palm prints, or bare footprints as evidence. 24 ALR2d 1115.

Pretrial requirement that suspect or accused wear or try on particular article of clothing. [illegible]

Witnesses §§ 88, 93.5 — self-incrimination — compulsory blood test

2. The Fifth Amendment privilege against self-incrimination, as made applicable to the states by the Fourteenth Amendment, protects an accused only from being compelled to testify against himself, or otherwise provide the state with evidence of a testimonial or communicative nature, and the withdrawal of blood from an accused by a physician at a state officer's direction despite the accused's refusal to consent thereto, and the admission in evidence of the analysis report indicating intoxication in a state prosecution for driving an automobile while under the influence of intoxicating liquor, does not involve compulsion to such ends so as to violate the privilege and render the evidence inadmissible, even though the officer's direction to administer the test over the accused's objection constituted compulsion for the purposes of the privilege, since the blood test evidence, although an incriminating product of compulsion, was neither the accused's testimony nor evidence relating to some communicative act or writing.

[*See annotation p. 1332, infra*]

Witnesses § 72 — self-incrimination — extent of privilege — noncommunicative acts

3. The Fifth Amendment privilege against self-incrimination relates only to testimonial or communicative acts on the part of the person to whom the privilege applies, and does not apply to acts noncommunicative in nature as to the person asserting the privilege, even though such acts are compelled to obtain the testimony of others.

Witnesses § 72 — self-incrimination — constitutional provisions — liberal and uniform interpretation

4. Since the manifest purpose of the constitutional provisions against self-incrimination, both of the states and of the United States, is to prohibit the compelling of testimony of a self-incriminating kind from a party or a witness, the liberal construction which [illegible] constitutional provisions for the protection of personal rights requires that the constitutional guaranties, however differently worded, should have, as far as possible, the same interpretation.

Witnesses §§ 72, 88 — self-incrimination — scope of privilege

5. The scope of the Fifth Amendment privilege against self-incrimination does not coincide with the complex of values it helps to protect, such as with regard to a government's, state or federal, respecting the inviolability of the human personality and procuring the evidence against an accused by its own independent labors.

Witnesses §§ 88, 91 — self-incrimination — scope of accused's privilege — production of papers

6. The protection of the Fifth Amendment privilege against self-incrimination reaches an accused's communications, whatever form they might take, and the compulsion of responses which are also communications, for example, compliance with a subpoena to produce one's papers.

Witnesses §§ 72, 88, 93.5 — privilege against self-incrimination — testimony — compulsory testing of person

7. The distinction that the Fifth Amendment privilege against self-incrimination is a bar against compelling "communications" or "testimony," but that compulsion which makes a suspect or accused the source of "real or physical evidence" does not violate it, although a helpful framework for analysis, is not always controlling; to compel a person to submit to testing in which an effort will be made to determine his guilt or innocence on the basis of physiological responses, whether willed or not, is to evoke the spirit and history of the Fifth Amendment, particularly the principle that the protection of the privilege is as broad as the mischief against which it seeks to guard.

[*See annotation p. 1332, infra*]

Appeal and Error §§ 1149, 1152 — reviewability of objection in trial court — self-incrimination

8. The contention in the United

States Supreme Court by a defendant who had been convicted in a state court for driving while under the influence of intoxicating liquor that his privilege against self-incrimination under the Fifth Amendment had been violated when evidence of his refusal to submit to a breathalyzer test for alcohol content was admitted at the trial, and when the prosecutor commented thereon in closing argument, is foreclosed by the defendant's failure to object at the trial on such grounds, where the trial was conducted after a Supreme Court decision making the principles of the Fifth Amendment applicable to the states.

Criminal Law § 46.6 — right to counsel — compulsory blood test — objections

9. A state conviction for driving while under the influence of intoxicating liquor cannot be successfully attacked on the ground that a state officer's compelling the defendant to submit to a blood test, notwithstanding the defendant's objection made on the advice of counsel, constituted a denial of the defendant's Sixth Amendment right to counsel, where the defendant was not entitled to assert the privilege against self-incrimination with regard to the blood test and no issue was presented as to the counsel's ability to assist the defendant in respect of any rights he did possess.

[See annotation p. 1332, infra]

Evidence § 681; Search and Seizure § 15 — compulsory blood test — state prosecution for drunken driving

10. A compulsory blood test, directed by a state officer, acting without a search warrant, to be performed upon the accused after his arrest for driving while under the influence of intoxicating liquor, does not violate the accused's right under the Fourth and Fourteenth Amendments to be free of unreasonable searches and seizures, and the chemical analysis of the test is not subject to exclusion from evidence in the state prosecution as constituting the product of an unreasonable search and seizure where the officer was justified in requiring the test without a warrant, and the means and procedures employed were reasonable in that the test was performed by a physician in a hospital according to accepted medical practices.

[See annotation p. 1332, infra]

Search and Seizure § 4; Witnesses § 72 — 4th Amendment — relationship to 5th Amendment

11. The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the state, and the values protected by the Fourth Amendment substantially overlap those which the Fifth Amendment privilege against self-incrimination helps to protect.

Search and Seizure § 11 — compulsory blood test — search and seizure of person

12. Compulsory administration of a blood test to determine alcohol content involves the broadly conceived reach of a search and seizure under the Fourth Amendment, and is subject to the constraints of the amendment, since such testing procedures plainly constitute searches of "persons," and depend antecedently upon seizures of "persons," within the meaning of that amendment.

Arrest § 2 — absence of warrant — probable cause

13. Probable cause for a state officer, acting without a warrant, to arrest a person and charge him with driving while under the influence of intoxicating liquor, exists where the officer smelled liquor on the person's breath upon arriving at the scene shortly after an accident, and observed symptoms of drunkenness at the accident site and again at a hospital within 2 hours of the accident.

Search and Seizure § 12 — search incident to lawful arrest — intrusion beyond body surface

14. Notwithstanding a lawful arrest has occurred, the interests in human dignity and privacy which the Fourth Amendment protects forbid any [illegible]

the body's surface on the mere chance that desired evidence might be obtained; in the absence of a clear indication that in fact such evidence will be found, these fundamental human interests require law officers to suffer the risk that such evidence may disappear unless there is an immediate search.

Search and Seizure § 26 — search warrant — issuance by magistrate

15. The requirement that a search warrant be obtained is a requirement that the inferences to support the search be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.

Search and Seizure § 12 — warrant — blood test for intoxication

16. An attempt by a state officer, acting without a search warrant, to secure evidence of blood alcohol content by directing a blood test, is an appropriate incident to the accused's arrest for drunken driving while being treated in a hospital for injuries suffered in an automobile accident, where the officer could reasonably have believed that he was confronted with an emergency in which the delay necessary to obtain a warrant threatened the destruction of evidence, and where there was no time to seek out a magistrate and secure a warrant, since time had to be taken to bring the accused to a hospital and to investigate the scene of the accident.

[*See annotation p. 1332, infra*]

Search and Seizure § 12 — compulsory blood test incident to arrest

17. Under the reasonableness requirements of the Fourth Amendment, a compulsory blood test, required by a state officer of a person arrested for driving while intoxicated, is a reasonable test in view of the minimal extraction of blood, the effectiveness and widespread use of such test, and the virtual absence of risk, trauma, or pain for most persons, and the performance of the test is done in a reasonable manner where the blood is taken by a physician in a hospital environment according to accepted medical practices.

[*See annotation p. 1332, infra*]

Point from Separate Opinion

Constitutional Law § 101 — zone of privacy

18. A zone of privacy which the government may not force a person to surrender is marked by the Fifth Amendment, and the Fourth Amendment recognizes such right when it guarantees the right of the people to be secure in their persons. [From separate opinion by Douglas, J.]

APPEARANCES OF COUNSEL

Thomas M. McGurrin argued the cause for petitioner.

Edward L. Davenport argued the cause for respondent.

Briefs of Counsel, p 1330, infra.

OPINION OF THE COURT

*[384 US 758]

[1]Mr. Justice Brennan delivered the opinion of the Court.

Petitioner was convicted in Los Angeles Municipal Court of the criminal offense of driving an automobile while under the influence of intoxicating liquor.[1] He had been arrested at a hospital while receiving treatment for injuries suffered in an accident involving the automobile that he had apparently been driving.[2] At the direction of a police officer, a blood sample was then

withdrawn from petitioner's body *[384 US 759] by a physician at the hospital. *The chemical analysis of this sample revealed a percent by weight of alcohol in his blood at the time of the offense which indicated intoxication, and the report of this analysis was admitted in evidence at the trial. Petitioner objected to receipt of this evidence of the analysis on the ground that the blood had been withdrawn despite his refusal, on the advice of his counsel, to consent to the test. He contended that in that circumstance the withdrawal of the blood and the admission of the analysis in evidence denied him due process of law under the Fourteenth Amendment, as well as specific guarantees of the Bill of Rights secured against the States by that Amendment: his privilege against self-incrimination under the Fifth Amendment; his right to counsel under the Sixth Amendment; and his right not to be subjected to unreasonable searches and seizures in violation of the Fourth Amendment. The Appellate Department of the California Superior Court rejected these contentions and affirmed the conviction.[3] In view of constitutional decisions since we last considered these issues in Breithaupt v Abram, 352 US 432, 1 L ed 2d 448, 77 S Ct 408—see Escobedo v Illinois, 378 US 478, 12 L ed 2d 977, 84 S Ct 1758; Malloy v Hogan, 378 US 1, 12 L ed 2d 653, 84 S Ct 1489, and Mapp v Ohio, 367 US 643, 6 L ed 2d 1081, 81 S Ct 1684, 84 ALR2d 933—we granted certiorari. 382 US 971, 15 L ed 2d 464, 86 S Ct 542. We affirm.

I.

The Due Process Clause Claim.

[1] Breithaupt was also a case in which police officers caused blood to be withdrawn from the driver of an automobile involved in an accident, and in which there was ample justification for the officer's conclusion that the driver was under the influence of alcohol. There, as here, the extraction was made by a physician in a simple, medically acceptable manner in a hospital environment. *[384 US 760] *There, however, the driver was unconscious at the time the blood was withdrawn and hence had no opportunity to object to the procedure. We affirmed the conviction there resulting from the use of the test in evidence, holding that under such circumstances the withdrawal did not offend "that 'sense of justice' of which we spoke in Rochin v California, 342 US 165 [96 L ed 183, 72 S Ct 205, 25 ALR2d 1396]." 352 US, at 435, 1 L ed 2d at 450. Breithaupt thus requires the rejection of petitioner's due process argument, and nothing in the circumstances of this case[4] or in supervening events persuades us that this aspect of Breithaupt should be overruled.

---

struck a tree. Both petitioner and his companion were injured and taken to a hospital for treatment.

3. This was the judgment of the highest court of the State in this proceeding since certification to the California District Court of Appeals was denied. See Edwards v California, 314 US 160, 86 L ed 119, 62 S Ct 164.

[illegible] 4. [illegible] unequivocally that he objects or resorts to physical violence in protest or is in such condition that he is unable to protest." Breithaupt v Abram, 352 US at 441, 1 L ed 2d at 454 (Warren, C. J., dissenting). It would be a different case if the police initiated the violence, refused to respect a reasonable request to undergo a different form of testing [illegible]

[illegible]

II.

The Privilege Against Self-Incrimination Claim.

[2, 3] Breithaupt summarily rejected an argument that the withdrawal of blood and the admission of the analysis report involved in that state case violated the Fifth Amendment privilege of any person not to "be compelled in any criminal case to be a witness against himself," citing Twining v New Jersey, 211 US 78, 53 L ed 97, 29 S Ct 14. But that case, holding that the protections of the Fourteenth Amendment do not embrace this Fifth Amendment privilege, has been succeeded by Malloy v Hogan, 378 US 1, 8, 12 L ed 2d 653, 659, 84 S Ct 1489. We there held that "[t]he Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement—the right of a person to remain silent unless he chooses to speak in the unfettered exercise of

*[384 US 761]

his own will, *and to suffer no penalty . . . for such silence." We therefore must now decide whether the withdrawal of the blood and admission in evidence of the analysis involved in this case violated petitioner's privilege. We hold that the privilege protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature,[5] and that the withdrawal of blood and use of the analysis in question in this case did not involve compulsion to these ends.

[4] It could not be denied that in requiring petitioner to submit to the withdrawal and chemical analysis of his blood the State compelled him to submit to an attempt to discover evidence that might be used to prosecute him for a criminal offense. He submitted only after the police officer rejected his objection and directed the physician to proceed. The officer's direction to the physician to administer the test over petitioner's objection constituted compulsion for the purposes of the privilege. The critical question, then, is whether petitioner was thus compelled "to be a witness against himself."[6]

*[384 US 762]

[5] *If the scope of the privilege

---

[3] 5. A dissent suggests that the report of the blood test was "testimonial" or "communicative," because the test was performed in order to obtain the testimony of others, communicating to the jury facts about petitioner's condition. Of course, all evidence received in court is "testimonial" or "communicative" if these words are thus used. But the Fifth Amendment relates only to acts on the part of the person to whom the privilege applies, and we use these words subject to the same limitations. A nod or head-shake is as much a "testimonial" or "communicative" act in this sense as are spoken words. [illegible] the terms as we use them do not apply to evidence of acts not communicative in nature as to the person asserting the privilege, even though, [illegible] such acts may be compelled to obtain the testimony of others.

[4] 6. Many state constitutions, including those of most of the original Colonies, phrase the privilege in terms of compelling a person to give "evidence" against himself. But our decision cannot turn on the Fifth Amendment's use of the word "witness." "[A]s the manifest purpose of the constitutional provisions, both of the States and of the United States, is to prohibit the compelling of testimony of a self-incriminating kind from a party or a witness, the liberal construction which must be placed upon constitutional provisions for the protection of personal rights would seem to require that the constitutional guaranties, however differently worded, should have as far as possible the same [illegible]." Counselman v Hitchcock, 142 US 547, 562, 35 L ed 1110, 1114, 12 S Ct 195, 8 Wigmore, Evidence (McNaughton rev. 1961).

[16L-ed-2d]

coincided with the complex of values it helps to protect, we might be obliged to conclude that the privilege was violated. In Miranda v Arizona, 384 US 436, 16 L ed 694, 715, 86 S Ct 1602, 10 ALR3d 974, the Court said of the interests protected by the privilege: "All these policies point to one overriding thought: the constitutional foundation underlying the privilege is the respect a government—state or federal—must accord to the dignity and integrity of its citizens. To maintain a 'fair state-individual balance,' to require the government 'to shoulder the entire load' . . . to respect the inviolability of the human personality, our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth." The withdrawal of blood necessarily involves puncturing the skin for extraction, and the percent by weight of alcohol in that blood, as tablished by chemical analysis, is evidence of criminal guilt. Compelled submission fails on one view to respect the "inviolability of the human personality." Moreover, since it enables the State to rely on evidence forced from the accused, the compulsion violates at least one meaning of the requirement that the State procure the evidence against an accused "by its own independent labors."

As the passage in Miranda implicitly recognizes, however, the privilege has never been given the full scope which the values it helps

*[384 US 763]

to protect suggest. History *and a long line of authorities in lower courts have consistently limited its protection to situations in which the State seeks to submerge those values by obtaining the evidence against an accused through "the cruel, simple expedient of compelling it from his own mouth. . . . In sum, the privilege is fulfilled only when the person is guaranteed the right 'to remain silent unless he chooses to speak in the unfettered exercise of his own will.'" Ibid. The leading case in this Court is Holt v United States, 218 US 245, 54 L ed 1021, 31 S Ct 2. There the question was whether evidence was admissible that the accused, prior to trial and over his protest, put on a blouse that fitted him. It was contended that compelling the accused to submit to the demand that he model the blouse violated the privilege. Mr. Justice Holmes, speaking for the Court, rejected the argument as "based upon an extravagant extension of the Fifth Amendment," and went on to say: "[T]he prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material. The objection in principle would forbid a jury to look at a prisoner and compare his features with a photograph in proof." 218 US, at 252–253, 54 L ed at 1022.

7. Compare Wigmore's view, "that the privilege is limited to testimonial disclosures. It was directed at the employment of legal process to extract from the person's own lips an admission of guilt, which would thus take the place of sworn [illegible]" [illegible] accepted the Wigmore formulation in People v Trujillo, 32 Cal 2d 105, 194 P2d [illegible] (1948); with specific regard to blood tests, see People v Haussler, 47 Cal 2d 351, 303 P2d [illegible] (1956); People v Duran, 49 [illegible]

[6] It is clear that the protection of the privilege reaches an accused's communications, whatever form

*[384 US 764]

they might *take, and the compulsion of responses which are also communications, for example, compliance with a subpoena to produce one's papers. Boyd v United States, 116 US 616, 29 L ed 746, 6 S Ct 524. On the other hand, both federal and state courts have usually held that it offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture.[8] The distinction which has emerged, often expressed in different ways, is that the privilege is a bar against compelling "communications" or "testimony," but that compulsion which makes a suspect or accused the source of "real or physical evidence" does not violate it.

[7] Although we agree that this distinction is a helpful framework for analysis, we are not to be understood to agree with past applications in all instances. There will be many cases in which such a distinction is not readily drawn. Some tests seemingly directed to obtain "physical evidence," for example, lie detector tests measuring changes in body function during interrogation, may actually be directed to eliciting responses which are essentially testimonial. To compel a person to submit to testing in which an effort will be made to determine his guilt or innocence on the basis of physiological responses, whether willed or not, is to evoke the spirit and history of the Fifth Amendment. Such situations call to mind the principle that the protection of the privilege "is as broad as the mischief against which it seeks to guard," Counselman v Hitchcock, 142 US 547, 562, 35 L ed 1110, 1114, 12 S Ct 195.

*[384 US 765]

[2, 8] *In the present case, however, no such problem of application is presented. Not even a shadow of testimonial compulsion upon or enforced communication by the accused was involved either in the extraction or in the chemical analysis. Petitioner's testimonial capacities were in no way implicated; indeed, his participation, except as a donor, was irrelevant to the results of the test, which depend on chemical analysis and on that alone.[9] Since the blood test evidence, although an in-

8. The cases are collected in 8 Wigmore, Evidence § 2265 (McNaughton rev. 1961). See also United States v Chibbaro, 361 F2d 365 (CA3d Cir 1966); People v Graves, 64 Cal 2d 208, 49 Cal Rptr 386, 388, 411 P2d 114 (1966); Weintraub, Voice Identification, Writing Exemplars and the Privilege Against Self-Incrimination, 10 Vand L Rev 485 (1957).

9. This conclusion would not necessarily govern had the State tried to show that the accused had incriminated himself [illegible] to forgo the advantage of any testimonial products of administering the test—products which would fall within the privilege. Indeed, there may be circumstances in which the pain, danger, or severity of an operation would almost inevitably cause a person to prefer confession to undergoing the "search," and nothing we say today should be taken as establishing the permissibility of compulsion in that case. But no such situation is presented in this case. See text at n. 13 infra.

[illegible]

criminating product of compulsion, was neither petitioner's testimony nor evidence relating to some communicative act or writing by the petitioner, it was not inadmissible on privilege grounds.

III.

The Right to Counsel Claim.

[9] This conclusion also answers petitioner's claim that in compelling him to submit to the test in face of the fact that his objection was made

*[384 US 766]

on the advice of counsel, *he was denied his Sixth Amendment right to the assistance of counsel. Since petitioner was not entitled to assert the privilege, he has no greater right because counsel erroneously advised him that he could assert it. His claim is strictly limited to the failure of the police to respect his wish, reinforced by counsel's advice, to be left inviolate. No issue of counsel's ability to assist petitioner in respect of any rights he did possess is presented. The limited claim thus made must be rejected.

IV.

The Search and Seizure Claim.

[10] In Breithaupt, as here, it was also contended that the chemical analysis should be excluded from evidence as the product of an unlawful search and seizure in violation of the Fourth and Fourteenth Amendments. The Court did not decide whether the extraction of blood in that case was unlawful, but rejected the claim on the basis of Wolf v Colorado, 338 US 25, 93 L ed 1782, 69 S Ct 1359. That case had held that the Constitution did not require, in state prosecutions for state crimes, the exclusion of evidence obtained in violation of the Fourth Amendment's provisions. We have since overruled Wolf in that respect, holding in Mapp v Ohio, 367 US 643, 6 L ed 2d 1081, 81 S Ct 1684, 84 ALR2d 933, that the exclusionary rule adopted for federal prosecutions in Weeks v United States, 232 US 383, 58 L ed 652, 34 S Ct 341, LRA1915B 834, must also be applied in criminal prosecutions in state courts. The question is squarely presented therefore, whether

*[384 US 767]

*the chemical analysis introduced in evidence in this case should have been excluded as the product of an unconstitutional search and seizure.

[11] The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State. In Wolf we recognized "[t]he security of one's privacy against arbitrary intrusion by the police" as being "at the core of the Fourth Amendment" and "basic to a free society." 338 US, at 27, 93 L ed at 1785. We reaffirmed that broad view of the Amendment's purpose in applying the federal exclusionary rule to the States in Mapp.

[12] The values protected by the Fourth Amendment thus substantially overlap those the Fifth Amendment helps to protect. History and precedent have required that we today reject the claim that the Self-Incrimination Clause of the

---

a comment by the prosecutor in closing argument upon his refusal to answer

Fifth Amendment requires the human body in all circumstances to be held inviolate against state expeditions seeking evidence of crime. But if compulsory administration of a blood test does not implicate the Fifth Amendment, it plainly involves the broadly conceived reach of a search and seizure under the Fourth Amendment. That Amendment expressly provides that "[t]he right of the people to be secure in their *persons*, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." (Emphasis added.) It could not reasonably be argued, and indeed respondent does not argue, that the administration of the blood test in this case was free of the constraints of the Fourth Amendment. Such testing procedures plainly constitute searches of "persons," and depend antecedently upon seizures of "persons," within the meaning of that Amendment.

Because we are dealing with intrusions into the human body rather than with state interferences with property relationships or private

*[384 US 768]

papers—"houses, papers, and *effects"—we write on a clean slate. Limitations on the kinds of property which may be seized under warrant,[10] as distinct from the procedures for search and the permissible scope of search,[11] are not instructive in this context. We begin with the assumption that once the privilege against self-incrimination has been found not to bar compelled intrusions into the body for blood to be analyzed for alcohol content, the Fourth Amendment's proper function is to constrain, not against all intrusions as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner. In other words, the questions we must decide in this case are whether the police were justified in requiring petitioner to submit to the blood test, and whether the means and procedures employed in taking his blood respected relevant Fourth Amendment standards of reasonableness.

[13] In this case, as will often be true when charges of driving under the influence of alcohol are pressed, these questions arise in the context of an arrest made by an officer without a warrant. Here, there was plainly probable cause for the officer to arrest petitioner and charge him with driving an automobile while under the influence of intoxicating liquor.[12] The police officer who ar-

*[384 US 769]

rived *at the scene shortly after the accident smelled liquor on petitioner's breath, and testified that peti-

10. See, e. g., Gouled v United States, 255 US 298, 65 L ed 647, 41 S Ct 261; Boyd v United States, 116 US 616, 29 L ed 746, 6 S Ct 524; contra, People v Thayer, 63 Cal 2d 635, 408 P2d 108 (1965); State v Bisaccia, 45 NJ 504, 213 A2d 185 (1965); Note, Evidentiary Searches: The Rule and the Reason, 51 Geo LJ 673 (1963).

11. See, e. g., Silverman v United States, 365 US 505, 5 L ed 2d 734, 81 S Ct 679, 97 ALR2d 1277; Abel v United

12. California law authorizes a peace officer to arrest "without a warrant . . . [w]henever he has reasonable cause to believe that the person to be arrested has committed a felony, whether or not a felony has in fact been committed." Cal Penal Code § 836. Although petitioner was ultimately prosecuted for a misdemeanor, he was subject to prosecution for the felony since a [illegible] in his car was injured in the [illegible] Cal V

tioner's eyes were "bloodshot, watery, sort of a glassy appearance." The officer saw petitioner again at the hospital, within two hours of the accident. There he noticed similar symptoms of drunkenness. He thereupon informed petitioner "that he was under arrest and that he was entitled to the services of an attorney, and that he could remain silent, and that anything that he told me would be used against him in evidence."

[14] While early cases suggest that there is an unrestricted "right on the part of the Government, always recognized under English and American law, to search the person of the accused when legally arrested to discover and seize the fruits or evidences of crime," Weeks v United States, 232 US 383, 392, 58 L ed 652, 655, 34 S Ct 341, LRA1915B 834; People v Chiagles, 237 NY 193, 142 NE 583 (1923) (Cardozo, J.), the mere fact of a lawful arrest does not end our inquiry. The suggestion of these cases apparently rests on two factors—first, there may be more immediate danger of concealed weapons or of destruction of evidence under the direct control of the accused, United States v Rabinowitz, 339 US 56, 72–73, 94 L ed 653, 663, 664, 70 S Ct 430 (Frankfurter, J., dissenting); second, once a search of the arrested person for weapons is permitted, it would be both impractical and unnecessary to enforcement of the Fourth Amendment's purpose to attempt to confine the search to those objects alone. People v Chiagles, 237 NY, at 197–198, 142 NE, at 584. Whatever the validity of these considerations in general, they have little applicability with respect to searches involving intrusions beyond the [illegible]

[illegible] US [illegible]

surface. The interests in human [illegible]

Fourth Amendment protects forbid any such intrusions on the mere chance that desired evidence might be obtained. In the absence of a clear indication that in fact such evidence will be found, these fundamental human interests require law officers to suffer the risk that such evidence may disappear unless there is an immediate search.

[15] Although the facts which established probable cause to arrest in this case also suggested the required relevance and likely success of a test of petitioner's blood for alcohol, the question remains whether the arresting officer was permitted to draw these inferences himself, or was required instead to procure a warrant before proceeding with the test. Search warrants are ordinarily required for searches of dwellings, and, absent an emergency, no less could be required where intrusions into the human body are concerned. The requirement that a warrant be obtained is a requirement that the inferences to support the search "be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." Johnson v United States, 333 US 10, 13–14, 92 L ed 436, 440, 68 S Ct 367; see also Aguilar v Texas, 378 US 108, 110–111, 12 L ed 2d 723, 725, 726, 84 S Ct 1509. The importance of informed, detached and deliberate determinations of the issue whether or not to invade another's body in search of evidence of guilt is indisputable and great.

[16] The officer in the present [illegible]

"the destruction of evidence." Preston v United States, 376 US 364, 367, 11 L ed 2d 777, 780, 84 S Ct 881. We are told that the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system. Particularly in a case such as this, where
*[384 US 771]
time had *to be taken to bring the accused to a hospital and to investigate the scene of the accident, there was no time to seek out a magistrate and secure a warrant. Given these special facts, we conclude that the attempt to secure evidence of blood-alcohol content in this case was an appropriate incident to petitioner's arrest.

[17] Similarly, we are satisfied that the test chosen to measure petitioner's blood-alcohol level was a reasonable one. Extraction of blood samples for testing is a highly effective means of determining the degree to which a person is under the influence of alcohol. See Breithaupt v Abram, 352 US, at 436, note 3, 1 L ed 2d at 451. Such tests are a commonplace in these days of periodic physical examinations[13] and experience with them teaches that the quantity of blood extracted is minimal, and that for most people the procedure involves virtually no risk, trauma, or pain. Petitioner is not one of the few who on grounds of fear, concern for health, or religious scruple might prefer some other means of testing, such as the "breathalyzer" test petitioner refused, see n. 9, supra. We need not decide whether such wishes would have to be respected.[14]

Finally, the record shows that the test was performed in a reasonable manner. Petitioner's blood was taken by a physician in a hospital environment according to accepted medical practices. We are thus not presented with the serious questions which would arise if a search involving use of medical technique, even of
*[384 US 772]
the most *rudimentary sort, were made by other than medical personnel or in other than a medical environment—for example, if it were administered by police in the privacy of the stationhouse. To tolerate searches under these conditions might be to invite an unjustified element of personal risk of infection and pain.

[10] We thus conclude that the present record shows no violation of petitioner's right under the Fourth and Fourteenth Amendments to be free of unreasonable searches and seizures. It bears repeating, however, that we reach this judgment only on the facts of the present record. The integrity of an individual's person is a cherished value of our society. That we today hold that the Constitution does not forbid the States minor intrusions into an individual's body under stringently limited conditions in no way indicates that it permits more substantial intrusions, or intrusions under other conditions.

Affirmed.

---

13. "The blood test procedure has become routine in our everyday life. It is a [illegible] for those going into the military [illegible] as well as [illegible] through the same, though a longer, routine in becoming blood donors." Breithaupt v Abram, 352 US at 436, 1 L ed 2d at 451.

14. See [illegible]

Mr. Jus
Justice St

In joini
desire to a
While agr
the taking
no testimo
go further
this consid
implicates
Cf. my dis
of Mr. Jus
Arizona. 3
740, 758. 1

Mr. Chi
senting.

While t
constitutio
believe it i
iterate m
Breithaupt
440, 1 L e
408, as the
this convic

*Mr. Jus
Justice Do

I would
viction. I a
the Fourte
applicable
Amendmen
person
in any crim
against hi
agree wit
California
tioner's c
self-incrimi
him, again
doctor to
in order to
and [illegible]
[illegible]

Mr. Justice Harlan, whom Mr. Justice Stewart joins, concurring.

In joining the Court's opinion I desire to add the following comment. While agreeing with the Court that the taking of this blood test involved no testimonial compulsion, I would go further and hold that apart from this consideration the case in no way implicates the Fifth Amendment. Cf. my dissenting opinion and that of Mr. Justice White in Miranda v Arizona, 384 US 504, 526, 16 L ed 2d 710, 753, 10 ALR3d 974.

Mr. Chief Justice Warren, dissenting.

While there are other important constitutional issues in this case, I believe it is sufficient for me to reiterate my dissenting opinion in Breithaupt v Abram, 352 US 432, 440, 1 L ed 2d 448, 453, 77 S Ct 408, as the basis on which to reverse this conviction.

*[384 US 773]

*Mr. Justice Black, with whom Mr. Justice Douglas joins, dissenting.

I would reverse petitioner's conviction. I agree with the Court that the Fourteenth Amendment made applicable to the States the Fifth Amendment's provision that "No person . . . shall be compelled in any criminal case to be a witness against himself . . . " But I disagree with the Court's holding that California did not violate the petitioner's constitutional right against self-incrimination when it compelled him, against his will, to allow a doctor to puncture his blood vessels in order to extract a sample of blood and analyze it for alcoholic content, and then used that analysis as evidence to convict petitioner of a crime. I think that such compelled [petitioner] to submit to an attempt to discover evidence [in his blood] that might be [and was] used to prosecute him for a criminal offense." To reach the conclusion that compelling a person to give his blood to help the State convict him is not equivalent to compelling him to be a witness against himself strikes me as quite an extraordinary feat. The Court, however, overcomes what had seemed to me to be an insuperable obstacle to its conclusion by holding that ". . . the privilege protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature, and that the withdrawal of blood and use of the analysis in question in this case did not involve compulsion to these ends." (Footnote omitted.)

I cannot agree that this distinction and reasoning of the Court justify denying petitioner his Bill of Rights' guarantee that he must not be compelled to be a witness against himself.

*[384 US 774]

*In the first place it seems to me that the compulsory extraction of petitioner's blood for analysis so that the person who analyzed it could give evidence to convict him had both a "testimonial" and a "communicative nature." The sole purpose of this project which proved to be successful was to obtain "testimony" from some person to prove that petitioner had alcohol in his blood at the time of the incident. And the purpose [illegible]

jury that petitioner was more or less drunk.

I think it unfortunate that the Court rests so heavily for its very restrictive reading of the Fifth Amendment's privilege against self-incrimination on the words "testimonial" and "communicative." These words are not models of clarity and precision as the Court's rather labored explication shows. Nor can the Court, so far as I know, find precedent in the former opinions of this Court for using these particular words to limit the scope of the Fifth Amendment's protection. There is a scholarly precedent, however, in the late Professor Wigmore's learned treatise on evidence. He used "testimonial" which, according to the latest edition of his treatise revised by McNaughton, means "communicative" (8 Wigmore, Evidence § 2263 (McNaughton rev 1961), p. 378), as a key word in his vigorous and extensive campaign designed to keep the privilege against self-incrimination "within limits the strictest possible." 8 Wigmore, Evidence § 2251 (3d ed 1940), p. 318. Though my admiration for Professor Wigmore's scholarship is great, I regret to see the word he used to narrow the Fifth Amendment's protection play such a major part in any of this Court's opinions.

I am happy that the Court itself refuses to follow Professor Wigmore's implication that the Fifth

*[384 US 775]

Amendment "goes no further than to bar the use of forced self-incriminating statements coming from a "person's own lips." It concedes, as it must so long as Boyd v United States, 116 US 616, 29 L ed 746, 6 S Ct 524, stands, that the Fifth Amendment [illegible]

extract a human being's blood to convict him of a crime because of the blood's content but proscribes compelled production of his lifeless papers. Certainly there could be few papers that would have any more "testimonial" value to convict a man of drunken driving than would an analysis of the alcoholic content of a human being's blood introduced in evidence at a trial for driving while under the influence of alcohol. In such a situation blood, of course, is not oral testimony given by an accused but it can certainly "communicate" to a court and jury the fact of guilt.

The Court itself, 384 US at page 764, 16 L ed 2d at page 916, expresses its own doubts, if not fears, of its own shadowy distinction between compelling "physical evidence" like blood which it holds does not amount to compelled self-incrimination, and "eliciting responses which are essentially testimonial." And in explanation of its fears the Court goes on to warn that

"To compel a person to submit to testing [by lie detectors for example] in which an effort will be made to determine his guilt or innocence on the basis of physiological responses, whether willed or not, is to evoke the spirit and history of the Fifth Amendment. Such situations call to mind the principle that the protection of the privilege 'is as broad as the mischief against which it seeks to guard.' Counselman v Hitchcock, 142 US 547, 562 [35 L ed 1110, 1114, 12 S Ct 195]."

A basic error in the Court's holding and opinion is its failure to give the Fifth Amendment's protection

*[384 US 776]

opinions of this Court have declared it ought to have.

The liberal construction given the Bill of Rights' guarantee in Boyd v United States, supra, which Professor Wigmore criticized severely, see 8 Wigmore, Evidence, § 2264 (3d ed 1940), pp. 366–373, makes that one among the greatest constitutional decisions of this Court. In that case, at pp. 634–635, 29 L ed at p. 752, all the members of the Court decided that civil suits for penalties and forfeitures incurred for commission of offenses against the law, ". . . are within the reason of criminal proceedings for all the purposes of . . . that portion of the Fifth Amendment which declares that no person shall be compelled in any criminal case to be a witness against himself; . . . within the meaning of the Fifth Amendment to the Constitution . . . ."†

Obviously the Court's interpretation was not completely supported by the literal language of the Fifth Amendment. Recognizing this the Court announced a rule of constitutional interpretation that has been generally followed ever since, particularly in judicial construction of Bill of Rights guarantees:

"A close and literal construction [of constitutional provisions for the security of persons and property] deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy en-

*[illegible]

United States, supra, 116 US at p. 635, 29 L ed at p. 752.

The Court went on to say, 116 US at page 637, 29 L ed at p. 753, that to require "an owner to produce his private books and papers, in order to prove his breach of the laws, and thus to establish the forfeiture of his property, is surely compelling him to furnish evidence against himself." The Court today departs from the teachings of Boyd. Petitioner Schmerber has undoubtedly been compelled to give his blood "to furnish evidence against himself," yet the Court holds that this is not forbidden by the Fifth Amendment. With all deference I must say that the Court here gives the Bill of Rights' safeguard against compulsory self-incrimination a construction that would generally be considered too narrow and technical even in the interpretation of an ordinary commercial contract.

The Court apparently, for a reason I cannot understand, finds some comfort for its narrow construction of the Fifth Amendment in this Court's decision in Miranda v Arizona, 384 US 436, 16 L ed 2d 694, 86 S Ct 1602, 10 ALR3d 974. I find nothing whatever in the majority opinion in that case which either directly or indirectly supports the holding in this case. In fact I think the interpretive constitutional philosophy used in Miranda, unlike that used in this case, gives the Fifth Amendment's prohibition against compelled self-incrimination a broad and liberal construction in line with the wholesome admonitions in the Boyd case. The closing sentence in the Fifth Amendment section of the [illegible]

* A majority of the [illegible] Fourth Amendment [illegible]

the unsoundness of what the Court here holds. That sentence reads:

"Since the blood test evidence, although an incriminating product of compulsion, was neither petitioner's testimony nor evidence relating to some communicative act or writing by the petitioner, it was not inadmissible on privilege grounds."

*[384 US 778]

*How can it reasonably be doubted that the blood test evidence was not in all respects the actual equivalent of "testimony" taken from petitioner when the result of the test was offered as testimony, was considered by the jury as testimony, and the jury's verdict of guilt rests in part on that testimony? The refined, subtle reasoning and balancing process used here to narrow the scope of the Bill of Rights' safeguard against self-incrimination provides a handy instrument for further narrowing of that constitutional protection, as well as others, in the future. Believing with the Framers that these constitutional safeguards broadly construed by independent tribunals of justice provide our best hope for keeping our people free from governmental oppression, I deeply regret the Court's holding. For the foregoing reasons as well as those set out in concurring opinions of Black and Douglas, JJ., in Rochin v California, 342 US 165, 174, 177, 96 L ed 183, 191, 192, 72 S Ct 205, 25 ALR2d 1396, and my concurring opinion in Mapp v Ohio, 367 US 643, 661, 6 L ed 2d 1081, 1093, 81 S Ct 1684, 84 ALR2d 933, and the dissenting opinions in Breithaupt v Abram, 352 US 432, 440, 442, 1 L ed 2d 448, 453, 455, 77 S Ct 408, I dissent from the Court's holding and opinion in this case.

Mr. Justice Douglas, dissenting.

I adhere to the views of The Chief Justice in his dissent in Breithaupt v Abram, 352 US 432, 440, 1 L ed 2d 448, 453, 77 S Ct 408, and to the views I stated in my dissent in that case (id., 442, 1 L ed 2d 455) and add only a word.

We are dealing with the right of privacy which, since the Breithaupt case, we have held to be within the penumbra of some specific guarantees of the Bill of Rights. Griswold v Connecticut, 381 US 479, 14 L ed 2d 510, 85 S Ct 1678. Thus, the Fifth Amendment marks "a zone of privacy" which the Government may not force a person to surrender. Id., 484, 14 L ed 2d 515. Likewise the Fourth Amendment recognizes that right when it guarantees the right

*[384 US 779]

of the people to be *secure "in their persons." Ibid. No clearer invasion of this right of privacy can be imagined than forcible blood-letting of the kind involved here.

Mr. Justice Fortas, dissenting.

I would reverse. In my view, petitioner's privilege against self-incrimination applies. I would add that, under the Due Process Clause, the State, in its role as prosecutor, has no right to extract blood from an accused or anyone else, over his protest. As prosecutor, the State has no right to commit any kind of violence upon the person, or to utilize the results of such a tort, and the extraction of blood, over protest, is an act of violence. Cf. Chief Justice Warren's dissenting opinion in Breithaupt v Abram, 352 US 432, 440, 1 L ed 2d 448, 453, 77 S Ct 408.

EDITOR'S NOTE

SUMMARY OF PRIMARY POINTS REGARDING

CSSSHB 438 (Judiciary)

1. Page 2, lines 4-9 infer that in setting bail and release conditions, "danger to the community" can only be considered by the court in cases of drunk driving. Deletion of line 4 cures this potential problem.

2. Page 2, lines 28-29 requires mandatory license revocation only for drunk driving, thus making a significant change in current law, which requires mandatory revocation for other offenses.

3. Page 6, line 18 requires a sentence of 120 consecutive hours for a first offense drunk driving. This type of sentence is difficult to administer by the division of corrections.

4. Page 6, lines 28-29 make a third drunk driving offense a felony. Felony procedures such as grand jury, preliminary hearing and a twelve-person jury are inappropriate for drunk driving cases, especially if the mandatory penalty is only 120 days. This type of penalty could be accommodated as a misdemeanor.

5. Page 9, lines 24-25 make refusal to take a breathalyzer a misdemeanor. This provision is constitutional. Page 10, lines 6-10, permits the nonconsensual taking of

blood. This provision is also constitutional. However, together they constitute an unconstitutional scheme when applied to simple drunk driving cases. A different situation arises for negligent homicide and felony assault cases involving drinking drivers.

6. Page 10, lines 9-10 creates confusion as to what the remedy will be for a violation of constitutional rights, especially in light of page 1, lines 22-23. This provision could lead to the exclusion of reliable evidence in a serious criminal case.

7. Page 10, lines 21-22, 28-29, and page 11, lines 1-2, and line 7, should keep the existing language "under the influence of intoxicating liquor." The offense in AS 28.35.030 is entitled Driving While Intoxicated, but one of the legal elements of the offense is being "under the influence of intoxicating liquor." AS 28.35.030 does not say anything about being "intoxicated" and 28.35.033 should be consistent. This is a technical point of drafting.

8. Page 12, lines 10-17 should be more clearly drafted. If blood may be drawn from an unconscious person then the provision should simply state that. If an unconscious person commits the crime of refusing to take a breathalyzer then it should clearly say so. (This latter result is undoubtedly unconstitutional.

POSITION PAPER/Department of Health & Social Services

SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 438

"An act relating to the administration of chemical blood tests to persons arrested for certain offenses involving motor vehicles."

Overview:

SSHB No. 438 requires a blood test for alcohol content for persons arrested for an alleged crime while driving under the influence of intoxicating liquor if the crime is a homicide or assault. If enacted, SSHB No. 438 would tend to increase the number of OMVI convictions in Alaska in instances when death or injury resulted from the drinking and driving behavior. It would also increase the subsquent referral to programs for alcohol screening and diagnosis of persons who are involved in accidents and deaths when driving a motor vehicle while under the influence of alcohol.

Presently many persons charged with an OMVI offense are refusing to take a breathalyzer test. Lack of blood alcohol content (BAC) as evidence in OMVI trial has contributed to many not guilty verdicts being returned by juries even though substantial other evidence may have been presented in the case.

Division of Public Health Laboratory Program Impact:

Including blood testing for alcohol as an addition to the alcohol breath testing program would have an impact on the Division of Public Health laboratory program. Regulations governing techniques, methods, and standards would have to be promulagated, non-state laboratories and technicians certified, and a proficiency program, and a records system established. This program would be designed to be under central state control to ensure state-wide consistency and accuracy.

POSITION PAPER/Department of Health & Social Services

Department's Position:

The Department of Health and Social Services supports legislation which would tend to prevent this most dangerous behavior with its significant cost to the state in terms of death, injury, and property damage.

Recommended by: Robert L. Cole

Robert L. Cole
Coordinator
Office of Alcoholism
and Drug Abuse

Date: 1-22-82

Recommended by: E. S. Rabeau

E. S. Rabeaul, M.D.
Director
Division of Public Health

Date: 1-22-82

Approved by: Helen D. Beirne

Helen D. Beirne
Commissioner
Department of Health and
Social Services

Date: 1-23-82

THE LEGISLATURE OF THE STATE OF ALASKA
TWELFTH LEGISLATURE

FISCAL NOTE

I. REQUEST
Bill/Resolution No. SSHB 438 DWI
Title Administration of blood tests to persons arrested for offenses involving
Requested by Health & Social Services Date 1/19/82

II. FISCAL DETAIL
Agency Affected Health & Social Services
Program Category Affected Public Health
BRU, Program, Or Subprogram(s) Affected Laboratories
(Note: If more than one budget component is affected, separate line-item amounts and funding for each component in the analysis section.)

EXPENDITURES (Thousands of Dollars)

	FY 82	FY 83	FY 84	FY 85	FY 86	FY 87
100 PERSONAL SERVICES	-0-	16.9	18.0	19.3	20.7	22.1
200 TRAVEL	-0-	4.8	5.8	6.9	8.3	10.0
300 CONTRACTUAL	-0-	9.0	9.9	10.9	12.0	13.2
400 COMMODITIES	-0-	5.0	6.0	7.2	8.6	10.4
500 EQUIPMENT	-0-	25.0	2.5	2.5	2.5	2.5
600 LAND & STRUCTURES						
700 GRANTS,CLAIMS,ETC.						
TOTAL	-0-	60.7	42.2	46.8	52.1	58.2

FUNDING (Thousands of Dollars)

GENERAL FUND	-0-	60.7	42.2	46.8	52.1	58.2
FEDERAL FUNDS						
OTHER (Specify Source)						

POSITIONS

FULL TIME	-0-	.5	.5	.5	.5	.5
PART TIME						
TEMPORARY						

III. ANALYSIS (See Fiscal Note Preparation Instruction, Section III)

A chemist will be required to perform proficiency testing and on-site inspections of an estimated five laboratories requesting certification. Travel funds are provided for both training of laboratory personnel and on-site inspections conducted annually. Gas chromatographic equipment and supplies for its operation are necessary for validation of proficiency test samples and training programs.

Harry Colvin

IV. DATE 1/22/82 PREPARED BY Harry J. Colvin, Ph D
AGENCY Health & Social Services/Laboratories
PHONE 465-3077

Original: Legislative Finance
cc: Budget and Management
Prime Sponsor (First Legislator Named)
33-001 (Rev. 12/81)

ANALYSIS BY BILL SECTION OF CSSSHB438

February 18, 1982

SEC. NO.	PAGE & LINE	ANALYSIS OF SECTION
1	1;13	Exempts "health care providers" from battery charges brought by defendants who are the subject of non-consensual blood tests - AS 09.65.095(a).
2	1;23	Allows a magistrate or judge, as a condition to release (usually at first bail hearing) to hold the drunk driver's license, until he sobers up (a common practice now). Requires the judge to hold the license until the case is concluded, if he found probable cause to believe that the drunk driver had been convicted of D.W.I. within the prior three years. Police officers should usually have access to driving records for this purpose. - AS 12.30.020(b).
3	1;29	Allows the accused to request cancellation of that condition and return of the license, at the District Court arraignment (within 10 days in Anchorage). - AS 12.30.020(i).
4	2;10	Revises 28.15.181 on Revocations of licenses, to use new language in AS 28.15.181(a)(1) - (7) [e.g., "AS 11.41.100-11.41.250" instead of "manslaughter and negligent homicide"]
	2;28	Sets a clear maximum revocation period of 10 years, minimum remains at 30 days, - AS 28.15.181(b).
	3;4	Leaves a minimum one year revocation for 2nd offense in 5 years, but sets it at three year revocation if within 1 year period or if had three or more within the 5 years. - AS 28.15.181(c)(d).

	3;15		Allows a court on first conviction only (as present law) to issue a "certificate of limited driving privileges." First, license must be revoked for at least 60 days, and defendant have shown need by a preponderance of evidence. The need might include "necessary health care to the person or a member of his immediate family" (not in present law).
	4;2		Provides for "other jurisdiction" revocations as evidentiary and that all revocation periods to run consecutively.
5	4		Revises 28.15.191(c) to make certain all license actions under 28.15.181 are revocations, not suspensions, so all tests must be retaken. Does not apply to point suspensions or safety responsibility suspensions.
6	4;18		Specifies criteria and mechanics of issuance of certificate for limited driving privileges by the court. Revises AS 28.15.191(d).
7	4;25		Amends AS 28.15.201 to avoid conflicts with AS 28.15.181 revocations.
8	5;2		Repeals and re-inacts 28.15.211.Basically makes clear that (unlike "suspensions" for points, etc.) a revocation under 28.15.181 requires all new tests and also "proof of financial responsibility.
9	6;1		Repeals and re-inacts 28.35.030 - the "D.W.I." statute. No changes in elements of the crime. Basic changes are at these subsections and pages:
	6;14	(b)	Third and subsequent D.W.I. is C felony. First and second still A misdemeanor.

	6;17	(c)	Increases from 72 to 120 hours mandatory 1st sentence. And from Consecutive 10 days to 20 days consecutive for 2nd D.W.I. in 5 years.
	6;23	(d)	Exception to (c) - 60 days consecutive mandatory for 2nd D.W.I. in one year. New deterrance for first year.
	6;77	(e)	This is the C felony. - Third conviction, regardless of period. Minimum mandatory sentence of 120 days.
	7;2	(f)	"Safety clause" for the minimum mandatory, preventing suspension, S.I.S. to avoid the terms.
	7;7	(g)	License revocation per 28.15.181, and alcohol rehabilitation required - in present 28.35.030.
	7;14	(h)	"Catch all" clause for use of other jurisdiction D.W.I. convictions.
	7;19	(i)	Rehabilitation records rule - in present 28.35.030.
10	7;28		Revises 28.35.032(a) - the actual "breath test" statute. Housekeeping changes.
11	8;10		Revises 28.35.032(b) to tell arrested person refusal to give breath sample will result in one year revocation, up from 3 months in present law.
12	9;10		Revises 28.35.032(d) to increase from one year to two years the revocation period for refusal, if arrested person was convicted of D.W.I. within previous 2 years. One year enhancement in present law.
13	9;17		Housekeeping changes.

14	9;27	Amends 28.35.032 to make breath test refusal a B misdemeanor and require 72 consecutive hours imprisonment, consecutive to any other conviction. The "safety clauses" on suspensions and S.I.S. are included. Also at (h) the constitutional blood testing for <u>all</u> D.W.I.'s is <u>allowed</u>, <u>not required</u>.
15	10;11	Housekeeping - puts back in 28.35.033(a)(4) which was apparently unintentionally repealed earlier.
16	11;8	Sec. 16 - Housekeeping
	11 (line 13)	Sec. 17 - Housekeeping - H.S.S. to set standards for analysis, etc. of the blood for alcohol.
17	11;26	Revises 28.35.034 to increase revocation periods to one year and two years for breath test refusal, up from three months and one year under current law. Delete District Court ability to give a limited license for breath test refusal revocation.
18	12;10	Allows blood sample to be taken from unconscious drunk driver.
20	12;18	Defines "chemical test" appropriately to deal with new breath testing devices which actually test alcohol in the <u>breath</u>, not blood.

TWO SUGGESTED AMENDMENTS TO CSSSHB483

February 18, 1982

1. Rewrite * Sec. 2 as follows:

LINE 23, PAGE 1 -

* Sec. 2 AS 12.30.020(b) is amended by adding a new paragraph to read:

(7) require the person to surrender his driver's license to the peace officer or to the court for a specified period of hours in order to enable the arrested person to become sufficiently sober to operate a motor vehicle, if the person is charged with an offense involving driving while intoxicated. However, if the judicial officer finds probable cause to believe that the person has been convicted of an offense involving driving while intoxicated within the three years prior to his appearance, the judicial officer shall order the license held by the officer or the court until the conclusion of the case charged, and shall order the person not to operate any motor vehicle.

LINE 4, PAGE 2 - delete all after "(j)"

3/1/82
Colvin

Received
11:56 a.m.
March 3, 1982
House Jud. Com.

Original sponsor: Meekins

IN THE HOUSE BY THE JUDICIARY COMMITTEE

CS FOR SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 438 (Judiciary)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWELFTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to operating or driving a motor vehicle while intoxicated."

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

* Section 1. AS 09.65.095(a) is amended to read:

(a) No civil or criminal action arising out of battery may be brought against a health care provider for the act of taking a blood sample if the sample is taken

(1) at the request of a police officer <u>under the circumstances specified in AS 28.35.035 or</u> when the arresting officer has a search warrant or court order authorizing the taking of the blood sample; and

(2) without the use of excessive or unreasonable force.

* Sec. 2. AS 28.15.181(a)(5) is amended to read:

(5) <u>operating or</u> driving [OR OPERATING] a motor vehicle while <u>intoxicated</u> [UNDER THE INFLUENCE OF ALCOHOL OR ANOTHER DRUG];

* Sec. 3. AS 28.15.181(b) is amended to read:

(b) A court convicting a person of an offense under (a)(1) - (7) of this section shall revoke that person's driver's license for a period of not less than 30 days for the first conviction, unless the court determines that the person's ability to earn a livelihood would be severely impaired and a limitation under AS 28.15.201 can be placed on the license which will enable the person to earn a livelihood without excessive risk or danger to the public. If a court limits a person's license under this subsection, it shall do so for a period of not less

than 30 days, unless the person is convicted of an offense under (a)(5) of this section, in which case the court shall revoke the person's license, but may grant that person limited license privileges for a period of not less than 60 days. Upon a subsequent conviction of a person for any offense under (a) of this section, the court shall revoke the person's license and may not grant him any limited license privileges for the following periods:

(1) not less than one year for the second conviction; and

(2) not less than three years for a third or subsequent conviction.

* Sec. 4. AS 28.15.201(c) is amended to read:

(c) After the termination of a limitation as shown on the certificate issued under (b) of this section, a person on whom a limitation was imposed is no longer bound by the limitation and may apply for a duplicate license under AS 28.15.141 or, if otherwise eligible, for a new license if the license was revoked for conviction of an offense under AS 28.15.181(a)(5) and limited license privileges were granted under AS 28.15.181(b).

* Sec. 5. AS 28.15.211(a)(4) is amended to read:

(4) one year [THREE MONTHS] from the date on which the license was revoked for refusal to submit to a chemical test as required in AS 28.35.032; however, if the person who refuses to submit to the chemical test, within two years previous to his arrest, has been convicted in this or another jurisdiction of driving a motor vehicle while intoxicated, the period of revocation for his license of privilege to drive is two years [ONE YEAR].

* Sec. 6. AS 28.35.030(c) is amended to read:

(c) Upon conviction under this section the court shall impose a minimum sentence of imprisonment of not less than 120 [THREE] consecu-

tive hours [DAYS]. Upon a second [SUBSEQUENT] conviction within five years after a conviction of driving while intoxicated in this or any other state [UNDER THIS SECTION], the court shall impose a minimum sentence of imprisonment of not less than 20 [10] consecutive days unless the subsequent conviction is within one year of the previous conviction, in which case the court shall impose a minimum sentence of imprisonment of not less than 60 consecutive days. Upon a third conviction under this section after two previous convictions of driving while intoxicated in this or any other state, the court shall impose a minimum sentence of imprisonment of not less than 120 consecutive days. The execution of sentence may not be suspended nor may probation be granted until the minimum imprisonment provided in this section has been served. Imposition of sentence may not be suspended, except upon the condition that the defendant be imprisoned for no less than the minimum period provided in this section. In addition, his operator's license shall be revoked in accordance with AS 28.15.181. In addition, a person convicted under this statute shall undertake, for a term specified by the court, that program of alcohol education or rehabilitation which the court, after consideration of any information compiled under (d) of this section, finds appropriate.

* Sec. 7. AS 28.35.030 is amended by adding a new subsection to read:

(e) A person who is sentenced to imprisonment for 120 consecutive hours upon a first conviction under (c) of this section and who is not released from imprisonment after 120 hours may not bring an action against the state or a municipality or its agents, officers, or employees for damages resulting from the additional period of confinement if

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

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

* Sec. 8. AS 28.35.032(a) is amended to read:

(a) If a person under arrest refuses the request of a law enforcement officer to submit to a chemical test of his breath as provided in AS 28.35.031, after being advised by the officer that his refusal will result in the [SUSPENSION,] denial or revocation of his license or his nonresident privilege to drive, [AND] that the refusal may be used against him in a civil or criminal action or proceeding arising out of an act alleged to have been committed by him while operating or driving a motor vehicle while intoxicated [UNDER THE INFLUENCE OF INTOXICATING LIQUOR], and that the refusal is a misdemeanor, a chemical test shall not be given, except as provided by AS 28.35.035.

* Sec 9. AS 28.35.032(b) is amended to read:

(b) Upon receipt of a sworn report of a law enforcement officer that a person has refused to submit to a chemical test authorized under AS 28.35.031, containing a statement of the circumstances surrounding the arrest and the grounds upon which his belief was based that the person was operating or driving a motor vehicle in violation of AS 28.-35.030, the Department of Public Safety shall notify the person that his license or nonresident privilege to drive or operate a motor vehicle in the state is revoked [OR SUSPENDED,] or that no original license or permit will be issued for one year, or for two years if (d) of this section applies [THREE MONTHS]. In the same notice the department shall inform the person that he may initiate a proceeding in the district court to rescind the department's action. The court proceeding shall be without jury and shall be limited to the issues of whether

(1) the arresting officer had reasonable grounds to believe the arrested person had been operating or driving a motor vehicle in the

state while intoxicated [UNDER THE INFLUENCE OF INTOXICATING LIQUOR];

(2) the arrested person refused to submit to the breath test upon request of the officer after being advised that his refusal would result in the [SUSPENSION,] revocation [,] or denial of his license or nonresident privilege to drive and that the refusal is a misdemeanor; and

(3) the accused defendant was informed fairly of the nature of the tests, the accuracy of the methods, machines, equipment involved, the expertise of the person administering the tests, or operator of the machines, and the accused given such other reasonable information as may be requested by him.

* Sec. 10. AS 28.35.032(d) is amended to read:

(d) If the person who refuses to submit to the chemical test authorized by AS 28.35.031, within two years previous to his arrest, has been convicted in this or any other state of operating or driving a motor vehicle while intoxicated, the period of revocation [SUSPENSION] for his license, nonresident privilege to drive, or denial of original license shall be two years [ONE YEAR].

* Sec. 11. AS 28.35.032(e) is amended to read:

(e) The refusal of a person to submit to a chemical test of his breath under (a) of this section is admissible evidence in a civil or criminal action or proceeding arising out of an act alleged to have been committed by the person while operating or driving a motor vehicle while intoxicated [UNDER THE INFLUENCE OF INTOXICATING LIQUOR].

* Sec. 12. AS 28.35.032 is amended by adding new subsections to read:

(f) Refusal to submit to a chemical test of breath under (a) of this section is a class B misdemeanor.

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

72 consecutive hours. The sentence imposed by the court under this subsection shall run consecutively with any other sentence of imprisonment imposed on that person.

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

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

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

* Sec. 13. AS 28.35.033(a) is amended to read:

(a) Upon the trial of a civil or criminal action or proceeding arising out of acts alleged to have been committed by a person while operating or driving a motor vehicle <u>while intoxicated</u> [UNDER THE INFLUENCE OF INTOXICATING LIQUOR], the amount of alcohol in the person's blood or breath at the time alleged shall give rise to the following presumptions:

(1) If there was 0.05 percent or less by weight of alcohol in the person's blood, or 50 milligrams or less of alcohol per 100 milliliters of his blood, or 0.05 grams or less of alcohol per 210 liters of his breath, it shall be presumed that the person was not <u>intoxicated</u> [UNDER THE INFLUENCE OF INTOXICATING LIQUOR].

(2) If there was in excess of 0.05 percent but less than 0.10 percent by weight of alcohol in the person's blood, or in excess of 50 but less than 100 milligrams of alcohol per 100 milliliters of his blood, or in excess of 0.05 grams but less than 0.10 grams of alcohol

per 210 liters of his breath, that fact does not give rise to any presumption that the person was or was not intoxicated [UNDER THE INFLUENCE OF INTOXICATING LIQUOR], but that fact may be considered with other competent evidence in determining whether the person was intoxicated [UNDER THE INFLUENCE OF INTOXICATING LIQUOR].

(3) (repealed)

(4) If there was 0.10 percent or more by weight of alcohol in the person's blood, or 100 milligrams or more of alcohol per 100 milliliters of his blood, or 0.10 grams or more of alcohol per 210 liters of his breath it shall be presumed that the person was intoxicated.

* Sec. 14. AS 28.35.034 is amended to read:

Sec. 28.35.034. PERIOD OF REVOCATION. A person whose license or permit to operate or drive a motor vehicle has been [SUSPENDED OR] revoked under the provisions of AS 28.35.032 shall surrender his license or permit to the department on receipt of notice of the revocation. Such a person is ineligible for an operator's license or permit for one year [THREE MONTHS] following the date on which the license or permit was received by the department, or for two years if AS 28.35.032-(d) applies, unless the district court finds that extenuating circumstances exist which would cause extreme hardship, in which case the [SUSPENSION OR] revocation may be modified by the grant of limited license privileges if the person is otherwise eligible for limited license privileges [OR NULLIFIED]. After the [THREE MONTHS'] period of ineligibility has expired the person may make application for a new license as provided by law.

* Sec. 15. AS 28.35 is amended by adding a new section to read:

Sec. 28.35.035. ADMINISTRATION OF CHEMICAL TESTS WITHOUT CONSENT. (a) If a person is under arrest for the crime of driving while intoxicated and that arrest results from an accident that causes death or

bodily injury to another person, a chemical breath or blood test may be administered without the consent of the person arrested. to determine the amount of alcohol in the person's blood.

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

(c) If a chemical test is administered to a person under (a) or (b) of this section, that person is not subject to the penalties for refusal to submit to a chemical test provided by AS 28.35.032 and 28.35.034.

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
907-465-3800

M E M O R A N D U M

February 17, 1982

SUBJECT: CS for SSHB 438

TO: Representative Ramona L. Barnes
Chairman, House Judiciary Committee

FROM: Diane T. Colvin
Legislative Counsel

Attached please find a draft of the Committee Substitute you requested for Sponsor Substitute for HB 438. We were instructed to prepare a draft "word-for-word" from the materials you submitted to us. We have followed these instructions and made purely technical changes only. Because of this, the bill has not been checked for internal inconsistencies, grammatical errors, and legal problems. From our cursory examination, it appears that there are such problems with the bill. We have not attempted to deal with these problems because of the instructions given to us and the time constraints involved.

If we can be of assistance, please notify us.

DTC:ljb

Attachment

Colvin 77

WORK DRAFT

Original sponsor: Meekins

IN THE HOUSE BY THE JUDICIARY COMMITTEE

CS FOR SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 438 (Judiciary)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWELFTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act revising laws relating to revocation of drivers' licenses for certain offenses, including driving while intoxicated, and for refusal to take a chemical breath test for alcohol, and revising the driving while intoxicated law, and specifying procedures for chemical tests of blood for alcohol."

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

* Section 1. AS 09.65.095(a) is amended to read:

(a) No civil or criminal action arising out of battery may be brought against a health care provider for the act of taking a blood sample if the sample is taken

(1) at the request of a police officer under the circumstances specified in AS 28.35.032(a) or 28.35.035 when a chemical test of blood may be administered without a person's consent or when the arresting officer has a search warrant or court order authorizing the taking of the blood sample; and

(2) without the use of excessive or unreasonable force.

* Sec. 2. AS 12.30.020(b) is amended by adding a new paragraph to read:

(7) require the person to surrender his driver's license to the peace officer or to the court for a specified period of hours in order to enable the arrested person to become sufficiently sober to operate a motor vehicle, if the person is charged with an offense involving driving while intoxicated. However, if the judicial officer finds probable cause to believe that the person has been convicted of an offense involving driving while intoxicated within the three years prior to his appearance, the judicial officer shall order the license held by the officer or the court until the conclusion of the case charged, and shall order the person not to operate any motor vehicle.

* Sec. 3. A

LA-L 20A

(i) A person who is required to surrender his driver's license under (b)(7) of this section may move the court at his next court appearance to review that requirement.

(j) [redacted] "danger to other persons and the community", as used in this section, includes danger that may result from offenses against the person, offenses against property, offenses against public order, and offenses relating to operation of aircraft or a motor vehicle, as defined by AS 28.35.260(a)(7).

* Sec. 4. AS 28.15.181 is repealed and reenacted to read:

Sec. 28.15.181. COURT REVOCATIONS AND LIMITATIONS. (a) The following are grounds for the immediate revocation of an operator's or driver's license or a nonresident privilege to drive:

(1) conviction of a crime under AS 11.41.100 - 11.41.250 if the crime was committed while operating or driving a motor vehicle; [redacted]

(2) a felony in the commission of which the person convicted was operating or driving a motor vehicle; [redacted]

(3) failure to stop and give aid as required under the laws of this state when a motor vehicle accident results in the death or personal injury of another;

(4) perjury or committing the crime of unsworn falsification under a law relating to motor vehicles;

(5) operating or driving a motor vehicle while intoxicated;

(6) reckless driving; or

(7) using a motor vehicle in unlawful flight to avoid arrest by a peace officer.

(b) A court convicting a person of an offense under (a) [redacted] of this section shall revoke that person's driver's license or

nonresident privilege to drive or shall order the denial of issuance of a driver's license or permit for a period of not less than 30 days nor more than 10 years, except as provided in (c) and (d) of this section.

(c) If the person was convicted of an offense under (a) of this section within five years previous to the present offense, the court shall order revocation or denial of issuance of a license or permit for a period of not less than one year, except as provided in (d) of this section.

(d) If the person was convicted of an offense under (a) of this section within one year previous to the present offense or if the person was convicted of two or more of these offenses within the five years previous to the present offense, the court shall order revocation or denial of issuance of a license or a permit for not less than three years.

(e) If the person has no prior convictions under (a) of this section within five years previous to the present offense, the court may, after the license has been revoked or issuance denied, issue a certificate of limited driving privileges to him. The certificate may restrict the person to operation of a motor vehicle only at certain times, on certain days, and on certain highways and vehicular ways or areas. The court may not issue a certificate of limited driving privileges under this section unless it finds, by a preponderance of the evidence, that the person's ability to earn a livelihood would be severely impaired or that the availability of presently necessary health care to the person or a member of his immediate family would be severely impaired. If the court issues a certificate of limited driving privileges, the revocation or denial period and the period of certification shall be for not less than 60 days. Any certificate of limited driving privileges may, for good cause, be cancelled by the issuing court during

the revocation or denial period.

(f) A court revoking or denying issuance of a license under (b), (c), or (d) of this section shall consider a prior conviction for an offense committed in another jurisdiction if that offense has elements substantially identical to those of a comparable offense under (a) of this section.

(g) A period of revocation imposed on a person by a court under (a) of this section shall run consecutive to any other period of license revocation or suspension imposed on that person by the court or by the department.

* Sec. 5. AS 28.15.191(c) is amended to read:

(c) A court which [SUSPENDS,] revokes [,] or limits a driver's license shall require the surrender of the license, and shall immediately forward it to the department with the record of conviction and notification of the effective date of the [SUSPENSION,] revocation or limitation of driving privileges as determined under AS 28.15.181 and 28.15.211 [AS 28.15.211(b)].

* Sec. 6. AS 28.15.191(d) is repealed and reenacted to read:

(d) A court which issues a certificate of limited driving privileges shall specify the period of 60 days or longer prescribed by AS 28-15.181, and shall specify limitations on days, hours, routes, and purposes of driving under the certificate. A copy of the certificate of limited driving privileges shall be forwarded to the department immediately.

* Sec. 7. AS 28.15.201 is amended by adding a new subsection to read:

(d) This section does not apply to cases in which the driver's license or nonresident privilege to drive has been revoked or denial of issuance of a driver's license has been ordered and a certificate of limited driving privileges has been issued after revocation or denial

under AS 28.15.181.

* Sec. 3. AS 28.15.211 is repealed and reenacted to read:

Sec. 28.15.211. PERIODS OF SUSPENSION OR REVOCATION; OPPORTUNITY FOR HEARING AND SURRENDER OF LICENSE. (a) Except for a point system suspension or revocation under AS 28.15.221 - 28.15.261 and unless provided otherwise by law, and unless the suspension or revocation was for a cause which has been removed, a person whose driver's license or privilege to drive a motor vehicle in this state has been suspended or revoked may not apply for a new license nor may his driving privilege be restored until the expiration of the period specified by the court or the department in accordance with this title.

(b) A suspension or revocation of a driver's license imposed by a court takes effect on the date of final judgment, except that if another suspension or revocation of license is in effect on the date of final judgment, the effective date of the last imposed suspension or revocation is at the end of the last day of the previous suspension or revocation.

(c) At the end of a period of suspension, the person whose license has been suspended may apply to the department and, upon payment of the proper fee, be issued a duplicate driver's license if he is otherwise entitled to the license under this title.

(d) At the end of a period of revocation, a person whose driver's license has been revoked may apply to the department for the issuance of a new license, but shall submit to reexamination and pay all required fees.

(e) At the end of a period of suspension or revocation under this chapter, the department may not issue a driver's license or a duplicate driver's license to the licensee until he has complied with AS 28.20 relating to proof of financial responsibility.

* Sec. 9. AS 28.35.030 is repealed and reenacted to read:

〈Sec. 28.35.030. DRIVING WHILE INTOXICATED. (a) A person commits the crime of driving while intoxicated if he operates or drives a motor vehicle

(1) while under the influence of intoxicating liquor, depressant, hallucinogenic, stimulant, or narcotic drugs, as defined in AS 17.10.230(13) and AS 17.12.151(3);

(2) when there is 0.10 percent or more by weight of alcohol in his blood or 100 milligrams or more of alcohol per 100 milliliters of his blood, or when there is 0.10 grams or more of alcohol per 210 liters of his breath; or

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

(b) Driving while intoxicated is a class A misdemeanor, except that the third or subsequent conviction under this section shall be a class C felony and be punished according to (e) of this section.

(c) Upon the first conviction under this section, the court shall impose a minimum sentence of imprisonment for not less than 120 consecutive hours. Upon a subsequent offense within five years after a conviction under this section, except as provided in (d) and (e) of this section, the court shall impose a minimum sentence of imprisonment of not less than 20 consecutive days.

(d) Upon a subsequent offense within one year after a conviction under this section, except as provided in (e) of this section, the court shall impose a minimum sentence of imprisonment of not less than 60 consecutive days.

(e) Upon the third conviction under this section, regardless of the period between convictions, the person shall be guilty of a class C felony and the court shall impose a definite term of imprisonment of not

less than 120 consecutive days.

(f) The execution of sentence may not be suspended nor may probation be granted until the minimum imprisonment provided in this section has been served. Imposition of sentence may not be suspended, except upon the condition that the defendant be imprisoned for not less than the minimum period provided in this section.

(g) A person convicted under this section shall have his operator's license or nonresident privilege to drive revoked or shall be denied issuance of a license, in accordance with AS 28.15.181. In addition, a person convicted under this section shall undertake, for a term specified by the court, that program of alcohol education or rehabilitation which the court, after consideration of any information compiled under (i) of this section, finds appropriate.

(h) A court imposing a sentence of imprisonment under (c), (d), or (e) of this section shall consider a prior out-of-state conviction for operating or driving a motor vehicle while intoxicated if the prior offense upon which the conviction is based would have been a violation of this section if committed in this state.

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

* Sec. 10. AS 28.35.032(a) is amended to read:

(a) If a person under arrest refuses the request of a law enforce-

ment officer to submit to a chemical test of his breath as provided in AS 28.35.031, after being advised by the officer that his refusal will result in the [SUSPENSION,] denial or revocation of his license or his nonresident privilege to drive, [AND] that the refusal may be used against him in a civil or criminal action or proceeding arising out of an act alleged to have been committed by him while operating or driving a motor vehicle while intoxicated [UNDER THE INFLUENCE OF INTOXICATING LIQUOR], and that the refusal is a misdemeanor, a chemical test may [SHALL NOT] be given in accordance with (h) of this section.

* Sec. 11. AS 28.35.032(b) is amended to read:

(b) Upon receipt of a sworn report of a law enforcement officer that a person has refused to submit to a chemical breath test authorized under AS 28.35.031, containing a statement of the circumstances surrounding the arrest and the grounds upon which his belief was based that the person was operating or driving a motor vehicle in violation of AS 28.35.030, the Department of Public Safety, regardless of whether a chemical test of blood has been subsequently administered to the person, shall notify the person that his license or nonresident privilege to drive or operate a motor vehicle in the state is revoked [OR SUSPENDED], or that no original license or permit will be issued for one year, except as provided in (d) of this section [THREE MONTHS]. In the same notice the department shall inform the person that he may initiate a proceeding in the district court to rescind the department's action. The court proceeding shall be without jury and shall be limited to the issues of whether

(1) the arresting officer had reasonable grounds to believe the arrested person had been operating or driving a motor vehicle in the state while intoxicated [UNDER THE INFLUENCE OF INTOXICATING LIQUOR];

(2) the arrested person refused to submit to the breath test

upon request of the officer after being advised that his refusal would result in the [SUSPENSION,] revocation [,] or denial of his license or nonresident privilege to drive and that the refusal is a misdemeanor; and

(3) the accused defendant was informed fairly of the nature of the tests, the accuracy of the methods, machines, equipment involved, the expertise of the person administering the tests, or operator of the machines, and the accused given such other reasonable information as may be requested by him.

* Sec. 12. AS 28.35.032(d) is amended to read:

(d) If the person who refuses to submit to the chemical test of his breath authorized by AS 28.35.031, within two years previous to his arrest, has been convicted in this or any other state of operating or driving a motor vehicle while intoxicated, the period of revocation [SUSPENSION] for his license, nonresident privilege to drive, or denial of original license shall be two years [ONE YEAR].

* Sec. 13. AS 28.35.032(e) is amended to read:

(e) The refusal of a person to submit to a chemical test of his breath under (a) of this section is admissible evidence in a civil or criminal action or proceeding arising out of an act alleged to have been committed by the person while operating or driving a motor vehicle while intoxicated [UNDER THE INFLUENCE OF INTOXICATING LIQUOR].

* Sec. 14. AS 28.35.032 is amended by adding new subsections to read:

(f) Refusal to submit to a chemical test of breath under (a) of this section is a class B misdemeanor.

(g) Upon conviction of a person under (f) of this section, the court shall impose a minimum sentence of imprisonment of not less than 72 consecutive hours. The sentence imposed by the court under this subsection shall run consecutive to any other sentence of imprisonment

imposed on that person. The execution of sentence may not be suspended nor may probation be granted until the minimum imprisonment provided in this section has been served. Imposition of sentence may not be suspended, except upon the condition that the defendant be imprisoned for not less than the minimum period provided in this section.

(h) If a person is arrested for a crime alleged to have been committed by him while operating or driving a motor vehicle while intoxicated, a chemical test of his blood may be administered without his consent [redacted]

* Sec. 15. AS 28.35.033(a) is amended to read:

(a) Upon the trial of a civil or criminal action or proceeding arising out of acts alleged to have been committed by a person while operating or driving a motor vehicle <u>while intoxicated</u> [UNDER THE INFLUENCE OF INTOXICATING LIQUOR], the amount of alcohol in the person's blood or breath at the time alleged shall give rise to the following presumptions:

(1) If there was 0.05 percent or less by weight of alcohol in the person's blood, or 50 milligrams or less of alcohol per 100 milliliters of his blood, or 0.05 grams or less of alcohol per 210 liters of his breath, it shall be presumed that the person was not [redacted] [UNDER THE INFLUENCE OF INTOXICATING LIQUOR].

(2) If there was in excess of 0.05 percent but less than 0.10 percent by weight of alcohol in the person's blood, or in excess of 50 but less than 100 milligrams of alcohol per 100 milliliters of his blood, or in excess of 0.05 grams but less than 0.10 grams of alcohol per 210 liters of his breath, that fact does not give rise to any presumption that the person was or was not <u>intoxicated</u> [UNDER THE INFLUENCE OF INTOXICATING LIQUOR], but that fact may be considered with other

competent evidence in determining whether the person was intoxicated [UNDER THE INFLUENCE OF INTOXICATING LIQUOR].

(3) (repealed)

(4) If there was 0.10 percent or more by weight of alcohol in the person's blood, or 100 milligrams or more of alcohol per 100 milliliters of his blood, or 0.10 grams or more of alcohol per 210 liters of his breath it shall be presumed that the person was intoxicated.

* Sec. 16. AS 28.35.033(b) is amended to read:

(b) For purposes of this chapter [SECTION], percent by weight of alcohol in the blood shall be based upon milligrams of alcohol per 100 cubic centimeters of blood.

* Sec. 17. AS 28.35.033 is amended to add a new subsection (e), as follows:

(e) To be considered valid under the provisions of this section the chemical analysis of the person's blood shall be performed according to methods approved by the American Medical Association , and if it is established at trial that a chemical analysis of blood was performed according to methods so approved there is a presumption that the test results are valid and further foundation for introduction of the evidence is unnecessary.

Existing subsections (e) and (f) of AS 28.35.033 are redesignated (f) and (g) respectively.

* Sec. 18. AS 28.35.034 is amended to read:

Sec. 28.35.034. PERIOD OF REVOCATION. A person whose license or permit to operate or drive a motor vehicle has been [SUSPENDED OR] revoked under the provisions of AS 28.35.032 shall surrender his license or permit to the department on receipt of notice of the revocation.

Such a person is ineligible for an operator's license or permit for one year [THREE MONTHS] following the date on which the license or permit was received by the department, except that if AS 28.35.032(d) applies, the period of ineligibility is two years [, UNLESS THE DISTRICT COURT FINDS THAT EXTENUATING CIRCUMSTANCES EXIST WHICH WOULD CAUSE EXTREME HARDSHIP, IN WHICH CASE THE SUSPENSION OR REVOCATION MAY BE MODIFIED OR NULLIFIED]. After the [THREE MONTHS'] period of ineligibility has expired the person may make application for a new license as provided by law. During the period of ineligibility no certificate of limited driving privileges may be issued and no court may order a modification or nullification of the revocation.

* Sec. 19. AS 28.35 is amended by adding a new section to read:

Sec. 28.35.035. PERSONS INCAPABLE OF REFUSING OR TAKING TESTS. A person who is unconscious or otherwise in a condition rendering him incapable of refusing a chemical test of breath, if [redacted] arrested for an offense arising out of acts alleged to have been committed while the person was operating or driving a motor vehicle while intoxicated, is nonetheless subject to a chemical test of his blood.

* Sec. 20. AS 28.35.260(a) is amended by adding a new paragraph to read:

(19) "chemical test" means a test administered to determine the amount of alcohol in a person's breath or blood.

MEMORANDUM State of Alaska

TO: Barry Stern
Assistant Attorney General
Juneau

DATE: January 12, 1982

FILE NO:

TELEPHONE NO:

FROM: Dwayne W. McConnell
District Attorney

SUBJECT: AS 05.25.060(b)
AS 12.25.033

Recently we prosecuted two individuals for Operating a Watercraft While Under the Influence of Intoxicating Liquor under AS 05.25.060(b). The incident was quite serious in that two boats ran into each other in the Kuskokwim River. Several people were dumped into the water and one person was seriously injured. After review of the case it was determined that nothing beyond an operating a watercraft while under the influence charge could be proved.

The incident occurred on the portion of the river closest to the downtown area of Bethel. The police immediately responded and talked with the eventual defendants as they were hauled from the rescue boat. These two individuals were recently tried and the court determined that the arrest that occurred of both individuals was illegal arrests. The court therefore suppressed all statements after the arrest. It was argued that AS 12.25.033 was applicable and therefore the officers had up to eight hours to arrest the defendants. The court strickly construed the statute and said it was only applicable to driving while inxtoxicated under AS 28.35.030.

While the merits of the judge's decision can be argued, it would seem clear that the problems of arresting a person in operating a watercraft while under the influence as well as driving while intoxicated are basically the same. It would appear that it might be wise to amend AS 12.25.033 to include the watercraft statutes or to amend the sections concerning operating watercraft while under the influence.

While driving while intoxicated cases can result in serious injury, I think it is fair to say that in a watercraft incident the consequences more often than not are more serious. It would also seem appropriate that the penalty provisions should be changed, AS 05.25.090 to make this violation a class A misdemeanor and possibly a minimum mandatory sentence would seem appropriate.

cc: Helene Antel

SUMMARY OF PRIMARY POINTS REGARDING

CSSSHB 438 (Judiciary)

1. Page 2, lines 4-9 infer that in setting bail and release conditions, "danger to the community" can only be considered by the court in cases of drunk driving. Deletion of line 4 cures this potential problem.

2. Page 2, lines 28-29 requires mandatory license revocation only for drunk driving, thus making a significant change in current law, which requires mandatory revocation for other offenses.

3. Page 6, line 18 requires a sentence of 120 consecutive hours for a first offense drunk driving. This type of sentence is difficult to administer by the division of corrections.

4. Page 6, lines 28-29 make a third drunk driving offense a felony. Felony procedures such as grand jury, preliminary hearing and a twelve-person jury are inappropriate for drunk driving cases, especially if the mandatory penalty is only 120 days. This type of penalty could be accommodated as a misdemeanor.

5. Page 9, lines 24-25 make refusal to take a breathalyzer a misdemeanor. This provision is constitutional. Page 10, lines 6-10, permits the nonconsensual taking of

blood. This provision is also constitutional. However, together they constitute an unconstitutional scheme when applied to simple drunk driving cases. A different situation arises for negligent homicide and felony assault cases involving drinking drivers.

6. Page 10, lines 9-10 creates confusion as to what the remedy will be for a violation of constitutional rights, especially in light of page 1, lines 22-23. This provision could lead to the exclusion of reliable evidence in a serious criminal case.

7. Page 10, lines 21-22, 28-29, and page 11, lines 1-2, and line 7, should keep the existing language "under the influence of intoxicating liquor." The offense in AS 28.35.030 is entitled Driving While Intoxicated, but one of the legal elements of the offense is being "under the influence of intoxicating liquor." AS 28.35.030 does not say anything about being "intoxicated" and 28.35.033 should be consistent. This is a technical point of drafting.

8. Page 12, lines 10-17 should be more clearly drafted. If blood may be drawn from an unconscious person then the provision should simply state that. If an unconscious person commits the crime of refusing to take a breathalyzer then it should clearly say so. (This latter result is undoubtedly unconstitutional.

TWO SUGGESTED AMENDMENTS TO CSSSHB483

February 18, 1982

1. Rewrite * Sec. 2 as follows:

LINE 23, PAGE 1 -

* Sec. 2 AS 12.30.020(b) is amended by adding a new paragraph to read:

(7) require the person to surrender his driver's license to the peace officer or to the court for a specified period of hours in order to enable the arrested person to become sufficiently sober to operate a motor vehicle, if the person is charged with an offense involving driving while intoxicated. However, if the judicial officer finds probable cause to believe that the person has been convicted of an offense involving driving while intoxicated within the three years prior to his appearance, the judicial officer shall order the license held by the officer or the court until the conclusion of the case charged, and shall order the person not to operate any motor vehicle.

LINE 4, PAGE 2 - delete all after "(j)"

Barry Stern + Support bill.

Introduced: 4/10/81
Referred: Judiciary

IN THE HOUSE BY MEEKINS

SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 438

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWELFTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act relating to the administration of chemical blood tests to persons arrested for certain offenses involving motor vehicles."

Dillingham

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

* Section 1. AS 09.65.095(a) is amended to read:

(a) No civil or criminal action arising out of battery may be brought against a health care provider for the act of taking a blood sample if the sample is taken

(1) at the request of a police officer <u>under the circumstances specified in AS 28.35.032(a) or 28.35.035 when a chemical test of his blood may be administered without a person's consent or</u> when the arresting officer has a search warrant or court order authorizing the taking of the blood sample; and

(2) without the use of excessive or unreasonable force.

* Sec. 2. AS 28.35.032(a) is amended to read:

(a) If a person under arrest refuses the request of a law enforcement officer to submit to a chemical test of his breath as provided in AS 28.35.031, after being advised by the officer that his refusal will result in the suspension, denial or revocation of his license and that the refusal may be used against him in a civil or criminal action or proceeding arising out of an act alleged to have been committed by him while operating or driving a vehicle under the influence of intoxicating liquor, a chemical test <u>may</u> [SHALL] not be given <u>except under (f) of this section</u>.

* Sec. 3. AS 28.35.032(b) is amended to read:

(b) Upon receipt of a sworn report of a law enforcement officer that a person has refused to submit to a chemical <u>breath</u> test authorized under AS 28.35.031, containing a statement of the circumstances surrounding the arrest and the grounds upon which his belief was based that the person was operating or driving a motor vehicle in violation of AS 28.35.030, the Department of Public Safety<u>, regardless of whether a chemical test of blood has been subsequently administered to the person,</u> shall notify the person that his license or nonresident privilege to drive or operate a motor vehicle in the state is revoked or suspended, or that no original license or permit will be issued for three months. In the same notice the department shall inform the person that he may initiate a proceeding in the district court to rescind the department's action. The court proceeding shall be without jury and shall be limited to the issues of whether

(1) the arresting officer had reasonable grounds to believe the arrested person had been operating or driving a motor vehicle in the state while under the influence of intoxicating liquor;

(2) the arrested person refused to submit to the breath test upon request of the officer after being advised that his refusal would result in the suspension, revocation, or denial of his license; and

(3) the accused defendant was informed fairly of the nature of the tests, the accuracy of the methods, machines, equipment involved, the expertise of the person administering the tests, or operator of the machines, and the accused given such other reasonable information as may be requested by him.

* Sec. 4. AS 28.35.032(d) is amended to read:

(d) If the person who refuses to submit to the chemical test <u>of his breath</u> authorized by AS 28.35.031, within two years previous to his

arrest, has been convicted in this or any other state of operating or driving a motor vehicle while intoxicated, the period of suspension for his license, nonresident privilege to drive, or denial of original license shall be one year.

H.S.S.

* Sec. 5. AS 28.35.032 is amended by adding a new subsection to read:

Property Damage should be extended to this.

(f) If a person is arrested for a crime alleged to have been committed by him while operating or driving a vehicle under the influence of intoxicating liquor and the crime is a homicide under AS 11.41.-120(a)(1) or 11.41.130 or an assault under AS 11.41.210(a)(3) or 11.41.-230(a)(1) or (2), a chemical test of his blood may be administered without his consent if the taking of the blood sample occurs after or substantially contemporaneously with his arrest and in a manner which does not violate the constitutional rights of the accused.

Barry Stevens

* Sec. 6. AS 28.35.033(d) is amended to read:

(d) To be considered valid under the provisions of this section the chemical analysis of the person's breath or blood shall have been performed according to methods approved by the Department of Health and Social Services. The Department of Health and Social Services is authorized to approve satisfactory techniques, methods, and standards of training necessary to ascertain the qualifications of individuals to conduct the analysis. If it is established at trial that a chemical analysis of breath or blood was performed according to approved methods by a person trained according to techniques, methods and standards of training approved by the Department of Health and Social Services, there is a presumption that the test results are valid and further foundation for introduction of the evidence is unnecessary.

* Sec. 7. AS 28.35 is amended by adding a new section to read:

Sec. 28.35.035. PERSONS INCAPABLE OF REFUSING OR TAKING TESTS. A person who is unconscious or otherwise in a condition rendering him

incapable of refusing a chemical test of breath is considered not to have withdrawn the consent furnished under AS 28.35.031 if lawfully arrested for an offense arising out of acts alleged to have been committed while the person was operating the vehicle under the influence of intoxicating liquor, and a chemical test of the breath may be administered. A person who is in a condition rendering him incapable of being administered a chemical test of his breath may be administered a chemical test of his blood without his consent if lawfully arrested for an offense arising out of acts alleged to have been committed while the person was operating a vehicle under the influence of intoxicating liquor.

* Sec. 8. AS 28.35.260(a) is amended by adding a new paragraph to read:

(19) "chemical test" means a test administered to determine the amount of alcohol in a person's blood.

M E M O R A N D U M

DATE: January 21, 1981

TO: Representative Russ Meekins

FROM: Cynthia Whalin

SUBJECT: Sponsor Substitute For HB 438

This bill will allow the taking of blood samples for the purpose of analizing the alcohol content of the blood in cases where the crime of Driving While Intoxicated has resulted in a motor vehicle accident causing a physical injury or homicide AND the offender has refused to take the Breathalizer Test.

The rate of refusals to take the breathalizer test has been increasing steadily even though the penalty is a 90 day revocation of driving privileges.

1973	3 %	Refusal Rate
1975	10%	" "
1976	16%	" "
1977	30%	" "

During a 14 month period from March 1977 through May 1978 the Municipality of Anchorage took involuntary blood samples from persons who refused to take the breathalizer test. Following are the results:

Average Breathalizer Results	.18 %
Breathalizer Refusers - Blood Analysis	.254%

The crime of Driving While Intoxicated is seriously compounded when the result is injury or death of an innocent victim. This, coupled with the raising rate of refusals to take the breathalizer test and with the extremely high blood alcohol content of refusers results in a serious injustice which should be resolved.

STATE OF ALASKA
DEPARTMENT OF LAW
OFFICE OF THE DISTRICT ATTORNEY

JAY S. HAMMOND, GOVERNOR

604 Barnette St., Rm. 247
Fairbanks, Alaska 99701
(907) 452-1565

January 19, 1982

Mr. Bill Cook
House Judiciary Committee
Pouch V
Juneau, Alaska 99811

RE: Admissibility of blood test results after refusal to take a breathalyzer test

Dear Mr. Cook:

It is my understanding that legislation is being proposed concerning the use of the breathalyzer and blood tests as investigative tools in cases concerning certain crimes committed by the use of a motor vehicle.

The breathalyzer is now used to determine if a person has too high a blood alcohol content in "drunk driving cases". However, it frequently occurs that a person will refuse to submit to a breathalyzer test in an effort to prohibit the collection of evidence in the proof of such a case. State law specifically prohibits the involuntary seizure of a blood sample from a person charged with DWI after such person has refused a breathalyzer test.

It too often occurs that a person who is DWI has also committed a greater offense during the DWI by placing a victim in fear of death due to the dangerous way in which a vehicle is driven, or by the killing of a victim by a drunk driver who is driving a vehicle in a dangerous manner. In such cases, the drunk driver may refuse a breathalyzer test and likewise refuse thereafter to submit to the giving of a sample of his blood. Frequently such person will claim that a seizure of his blood pursuant to a search warrant is in violation of his "right" not to have evidence of a blood sample seized after he has refused a breathalzyer. Whether such a "right" exists is raised by the fact that in DWI cases blood cannot be seized after refusal of

a breathalyzer. It is often argued that since blood cannot be seized in a DWI case, neither can it lawfully be seized in any case where a motor vehicle is used in the commission of a crime.

I understand that legislation is being proposed that would clear up any confusion by expressly providing that in instances of certain crimes other than DWI, the seizure of a blood sample pursuant to a search warrant would not make the test results inadmissible even though a breathalyzer test may have been refused. I understand that such proposal includes assault crimes committed by the use of an automobile and the crime of manslaughter that is often committed by the use of an automobile.

I urge that murder committed by the use of a motor vehicle also be included with the listing of crimes for which blood tests results are admissible, even though a breathzlyzer has been refused, if the blood sample is obtained pursuant to a search warrant. In support of this position let me cite the facts of a recent murder conviction wherein the defendant killed two women and seriously injured a third while DWI. In this case, the defendant consented both to the breathalyzer and to the taking of a blood sample, but it could have been the other way. Here are the facts:

On Monday night, October 5, 1981, the defendant went to a bar to watch Monday night football and to "have a few drinks" while he was there. While at the bar the defendant had three drinks called Margarita grande which were simply the "giant versions" of the drink otherwise known as a Margarita. While still at the same bar, the defendant thereafter had one or two beers. Next he had a drink called a "Jellybean" which is a mixture of a liqueur known as anisette and of another liqueur having a coffee flavor. These drinks were consumed by the defendant during the early evening hours in an approximate two hour period.

After the defendant left the bar, he went to another bar where, during approximately one hour, he drank two more drinks called White Russians. Having had seven or eight drinks all totaled, the defendant then left the second bar. While crossing the street with his keys visible in his hand, the defendant was seen by two police officers who saw the defendant staggering toward his pickup truck. Anticipating that the defendant intended to drive the vehicle, the officers stopped the defendant and warned him that he was in no condition to operate the vehicle. The defendant assured the police officers that he would not drive and walked off in the opposite direction of his vehicle. After the police officers drove out of sight, the defendant immediately returned to his pickup truck and drove it away. Minutes after, the crime occurred.

During the defendant's driving from the first bar, he was personally observed to have: gone through one yield sign without bothering to look or slow for any possible traffic; intentionally run one stop sign; run a red light at a major traffic intersection; and to have tailgated a vehicle within approximately one foot to show his displeasure that the motorist ahead was not going fast enough to suit the defendant.

During the defendant's driving from the second bar, he was personally observed to have: speeded down an interior city street; run over or nearly run over a curb in making a fast turn at an intersection; intentionally run another stop sign; intentionally run a second red light; and to have intentionally run a third red light at a speed of approximately 50 to 60 mph after passing stopped cars by passing on the right side of the roadway.

Finally, the defendant approached a fourth red light at a major intersection where, without bothering to slow down or apply any brakes, he ran through the red light and broadsided a car with three females in it and knocked the car 146 feet down the road at a right angle to the original direction of travel of the car.

The driver of the car, Gladys Kavorkian, died almost instantly since the force of the impact caused her heart to sever from its main artery, the aorta. The right front passenger, 15 year old Tanya Brantingham, was crushed in the wreckage when the right front portion of the car was caved in clamping her feet and also causing a crushing head injury resulting in death due to tremendous brain damage.

The rear seat passenger, 20 year old Sarah Kavorkian, daughter of Gladys Kavorkian, was seriously injured with the major injury being numerous lacerations about her head and face which required almost six hours of initial surgery but leaving several scars after well over a hundred stitches.

After the impact the defendant was observed walking around his wrecked vehicle using profanity and loudly complaining about the damage to his own vehicle. A bystander admonished the defendant that he should be more concerned with the condition of the injured people than with his truck. The defendant replied, "To hell with them, I don't have to make payments on them."

A breathalyzer test showed that the defendant's blood alcohol (as measured by his breath) was a .17%, well in excess of the .10% required to prove DWI. A corroborating blood alcohol test done by analyzing a sample of the defendant's blood (taken over an hour later) confirmed a blood alcohol of .16%.

The defendant was convicted for the murders under A.S. 11.41.110 (a) (2) for "intentionally performing an act resulting in the death of another person under circumstances manifesting an extreme indifference to the value of human life". It was argued that the intentional driving while intoxicated and the driving in the manner that the defendant drove all justified a verdict under the above murder statute where a death resulted in connection with the use of a motor vehicle.

These matters are submitted for your consideration in proposing legislation as indicated.

Sincerely,

HARRY L. DAVIS
DISTRICT ATTORNEY

By: Bill D. Murphree
Bill D. Murphree
Assistant District Attorney

BDM:lp

Drunk driver guilty of murder by auto

By DEBBIE CARTER
Staff Writer

A speeding automobile can be a murder weapon in the hands of a drunk driver, a Fairbanks jury decided Tuesday when it found a young Fairbanks man guilty of murder.

After deliberating [illegible] hours, jurors found Richard Pears, 20, guilty of two counts of second-degree murder and of felony assault stemming from the October deaths of two women.

Pears is the first person in Alaska to be convicted of murder relating to a traffic death under the state's two-year old criminal code, prosecutors say.

Previously, a driver charged in connection with a traffic death was usually accused of manslaughter, a less serious charge.

Superior Court Judge Jay Hodges is required to sentence Pears to at least five years in jail. Sentencing has been set for March 5.

Pears' lawyer, Dick Madson, said he will probably wait until after the sentencing before deciding whether to appeal the conviction.

The charges reflect a tougher stance by authorities against drunk drivers and accidents.

As one state prosecutor put it after the verdict was read: "It's a bad day for drunk drivers."

Killed in the Oct. 5 accident in Graehl were Gladys Kavorkian, 55, and Tonya Brantingham, 15. Kavorkian's 20-year-old daughter, Sarah, was permanently scarred in the accident and seriously injured.

Kavorkian's husband, Ralph, who attended the five-day trial and waited in the courthouse as jurors deliberated, was emotional after the verdict was read.

"I think the guy's a murderer," he said. "I don't think the weapon makes any difference. I'm glad he's off the streets."

Kavorkian is an administrator at the Fairbanks jail.

After reading the verdict, Superior Court Judge Jay Hodges raised Pears' bail from $25,000 to $45,000.

A witness in a car, stopped at the intersection where the accident occurred, testified that Pears' truck ran a red light and was traveling 50 to 60 mph when it struck the small car carrying three women at Third Street and the Steese.

During the trial, two city police officers testified that Pears was told not to drive minutes before the fatal accident.

Pears told the jury he may have blacked out before the accident—possibly because he had been drinking.

He said he drove in spite of the warning by police because he felt he was capable of driving. During his testimony, he was remorseful about the women's deaths but showed little emotion.

He said he prayed after hearing about the deaths.

A test following the accident showed that Pears' blood alcohol level was almost twice the legal standard needed to prove someone is intoxicated.

To prove a person guilty of second-degree murder, jurors must decide that a person intentionally performed an act manifesting "extreme indifference to the value of human life," which causes the death of another.

Under the old state laws, unless someone swerved to run down a pedestrian, it was extremely difficult to prove "intent," an ingredient needed before finding someone guilty of murder, prosecutors say.

THE LEGISLATURE OF THE STATE OF ALASKA
TWELFTH LEGISLATURE

FISCAL NOTE

I. REQUEST
Bill/Resolution No. CSSS HB 438 (Judiciary)
Title Driving or Operating a Motor Vehicle While Intoxicated
Requested by House Judiciary Committee Date 02-02-82

II. FISCAL DETAIL
Agency Affected Law
Program Category Affected Administration of Justice
BRU, Program, Or Subprogram(s) Affected Prosecution
(Note: If more than one budget component is affected, separate line-item amounts and funding for each component in the analysis section.)

EXPENDITURES (Thousands of Dollars)

	FY 82	FY 83	FY 84	FY 85	FY 86	FY 87
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 COMMODITIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS,CLAIMS,ETC.						
TOTAL	0	0	0	0	0	0

FUNDING (Thousands of Dollars)

GENERAL FUND	0	0	0	0	0	0
FEDERAL FUNDS						
OTHER (Specify Source)						

POSITIONS

FULL TIME	0	0	0	0	0	0
PART TIME						
TEMPORARY						

III. ANALYSIS (See Fiscal Note Preparation Instruction, Section III)

This bill makes several significant amendments to the state laws pertaining to driving while intoxicated, including making it a class B misdemeanor to refuse a breathalyzer and authorizing the forcible taking of blood after a person refuses a breathalyzer. It can be expected that these and other provisions in the bill will result in additional appeals testing the constitutionality of these sections. Additionally, there is the distinct possibility that the number of guilty pleas for Driving While Intoxicated will decrease in view of the generally more severe penalties specified, and that with the corresponding increase in trials a need for additional attorney positions may arise. While this possibility is speculative and consequently no additional positions have been requested at this time, any legislative action diminishing the resources available to the department in FY 83, coupled with the enactment of this and other crime bills requiring a greater prosecution effort will severely hamper the department's overall ability to prosecute criminal offenses.

IV. DATE 02-03-82 PREPARED BY Dan Hickey, Chief Prosecutor
AGENCY Department of Law
PHONE 465-3429

Original: Legislative Finance
cc: Budget and Management
Prime Sponsor (First Legislator Named)
33-001 (Rev. 12/81)

THE LEGISLATURE OF THE STATE OF ALASKA
TWELFTH LEGISLATURE

FISCAL NOTE

I. REQUEST
Bill/Resolution No. Sponsor Substitute for House Bill No. 438
Title "An Act relating to....chemical blood tests...."
Requested by _____ Date _____

II. FISCAL DETAIL
Agency Affected Department of Public Safety
Program Category Affected Administration of Justice
BRU, Program, Or Subprogram(s) Affected Alaska State Troopers
(Note: If more than one budget component is affected, separate line-item amounts and funding for each component in the analysis section.)

EXPENDITURES (Thousands of Dollars)

	FY 82	FY 83	FY 84	FY 85	FY 86	FY 87
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 COMMODITIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS,CLAIMS,ETC.						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

FUNDING (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER (Specify Source)						
	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS

FULL TIME						
PART TIME						
TEMPORARY						
	-0-	-0-	-0-	-0-	-0-	-0-

III. ANALYSIS (See Fiscal Note Preparation Instruction, Section III)

No Fiscal Impact.

IV. DATE February 2, 1982 PREPARED BY Francis C. Allan
AGENCY Department of Public Safety
PHONE 269-5509

Francis C. Allan

Original: Legislative Finance
cc: Budget and Management

THE LEGISLATURE OF THE STATE OF ALASKA
TWELFTH LEGISLATURE

FISCAL NOTE

I. REQUEST
Bill/Resolution No. HB 438
Title Administration of Chemical Blood Tests
Requested by House Judiciary Committee Date 2/9/82

II. FISCAL DETAIL
Agency Affected Alaska Court System
Program Category Affected Administration of Justice
BRU, Program, Or Subprogram(s) Affected
(Note: If more than one budget component is affected, separate line-item amounts and funding for each component in the analysis section.)

EXPENDITURES (Thousands of Dollars)

	FY 82	FY 83	FY 84	FY 85	FY 86	FY 87
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 COMMODITIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS,CLAIMS,ETC.						
TOTAL		-0-	-0-	-0-	-0-	-0-

FUNDING (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER (Specify Source)						

POSITIONS

FULL TIME						
PART TIME						
TEMPORARY						

III. ANALYSIS (See Fiscal Note Preparation Instruction, Section III)

IV. DATE 2/11/82 PREPARED BY Richard P. Barrier
AGENCY Alaska Court System
PHONE 264-0545

Original: Legislative Finance
cc: Budget and Management
Prime Sponsor (First Legislator Named)

33-001 (Rev. 12/81)

THE LEGISLATURE OF THE STATE OF ALASKA
TWELFTH LEGISLATURE

FISCAL NOTE

I. REQUEST (Judiciary)
Bill/Resolution No. CS for Sponsor Substitute for House Bill No. 438
Title "An Act revising laws relating to ...driving while intoxicated.."
Requested by House Judiciary Committee Date February 17, 1982

II. FISCAL DETAIL
Agency Affected Health & Social Services
Program Category Affected Offender Confinement Reformation & Supervision
BRU, Program, Or Subprogram(s) Affected Adult Confinement
(Note: If more than one budget component is affected, separate line-item amounts and funding for each component in the analysis section.)

EXPENDITURES (Thousands of Dollars)

	FY 82	FY 83	FY 84	FY 85	FY 86	FY 87
100 PERSONAL SERVICES			256.2	274.2	293.3	313.9
200 TRAVEL		.5	2.8	3.1	3.3	3.6
300 CONTRACTUAL		13.0	41.1	44.8	48.8	53.2
400 COMMODITIES		33.9	67.2	73.2	79.8	87.0
500 EQUIPMENT						
600 LAND & STRUCTURES		1794.0				
700 GRANTS,CLAIMS,ETC.		7.7	16.8	18.3	20.0	21.8
TOTAL	-0-	1849.1	384.1	413.6	445.2	479.5

FUNDING (Thousands of Dollars)

GENERAL FUND	-0-	1849.1	384.1	413.6	445.2	279.5
FEDERAL FUNDS						
OTHER (Specify Source)						

POSITIONS

FULL TIME	-0-	-0-	6	6	6	6
PART TIME						
TEMPORARY						

III. ANALYSIS (See Fiscal Note Preparation Instruction, Section III)

A. Enactment of this bill will have a significant fiscal impact on the Division of Adult Corrections. The major thrust of this proposed legislation is to lengthen the minimum sentences for persons convicted of driving while intoxicated. Amendments to the section of the statute addressing driving with a cancelled, suspended, or revoked liscense will result in a fiscal impact, also.

Minimum sentence length for first time drunk driving offenders is increased from 3 consecutive days to 120 consecutive hours. Second time drunk drivers will receive minimum sentences based on the time between their first and second offense. If the second offense is within one year of the first offense, the minimum sentence will increase from 10 consecutive days to 60 consecutive days. If the second offense occurs within five years, the minimum sentence will

IV. DATE February 19, 1982 PREPARED BY Roger C. Lange Roger C. Lange
AGENCY Division of Adult Corrections
PHONE 465-3376

Original: Legislative Finance
cc: Budget and Management
Prime Sponsor (First Legislator Named)
33-001 (Rev. 12/81)

increase from 10 consecutive days to 20 consecutive days. The proposed statute does not address second offenses taking place after five years from the first offense, so it is assumed that these offenders would receive a minimum sentence of 120 consecutive hours. Upon a third conviction for driving while intoxicated, the minimum sentence would increase from 10 consecutive days to 120 consecutive days.

B. The data used in estimating numbers of offenders for driving while intoxicated is from the master plan data base and current commitment cards. There were an estimated 18,000 admissions into the Alaska correctional system during 1981. The commitment cards give the offenses for which the persons were charged and average length of sentences. Estimates used in computing this fiscal note are as follows:

1. 21.7% of all admissions into state correctional centers are for driving while intoxicated.

2. There are approximately 18,000 admissions per year into state correctional centers. This results in approximately 3,900 DWI admissions.

3. Of the 18,000 admissions, approximately 45% are second admissions for the same offense. Subsequent admissions would include circumstances such as transfer to another state correctional center, readmission of a person who was previously released on his own recognizance or bail, etc. Therefore, there are approximately 55% unduplicated admissions for persons arrested for DWI. This results in 2,145 individual unduplicated cases per year.

4. Approximately 75% of the DWI arrests are for first time offenders, 25% are repeat offenders. Therefore, there are 1,609 first time offenders and 536 repeat offenders annually for driving while intoxicated.

5. First time offenders now serve an average of 55 hours in confinement. This is equal to approximately 10 person-years of confinement. Repeat offenders now serve an average of 206 hours in confinement. This is equal to approximately 12.6 person-years of confinement. Therefore, approximately 22.6 beds are currently occupied full time by DWI offenders.

C. Fiscal Impact if CS Sponsor Substitute for House Bill No. 438 (Judiciary) is enacted:

1. Assumptions
   a. There will be no significant change in the length of time presentenced DWI offenders spend in confinement.
   b. There will be no significant change in the number of persons arrested for first time DWI offences.
   c. The number of repeat offenders will decline somewhat under the proposed legislation and will stabilize at approximately 75% of the present number of offenders (approximately 400 per year). Of the repeat offenders, it is estimated that 350 would be second offenders, the remaining 50 would be for third and subsequent offenses.

      It is also estimated that of the 350 second offenders, 300 would be convicted for offenses at least one year after the first offense and 50 would be convicted for a second offense within one year of the first conviction.

d. Additional time served for convictions of traffic offenses while a person's driving license is suspended or revoked due to prior DWI offense is not amenable to accurate forecasting, but is assumed to result in a modest increase in confinement beds. However, due to the uncertainty in the deterent effect percentage for repeat offenders, no additional beds are included in this fiscal note specifically for this section of the bill.

e. The average sentence length for offenders are estimated to be:

First offenders 96 hours (120 hour minimum sentence, no suspension, no probation until minimum sentence is served. Good time of one day was considered applicable in all cases.)

Second offenders -

(1) Second offense after one year from first conviction - 15 days (20 days minimum sentence, no suspension, no probation until minimum sentence served. Good time of one day for three served was considered applicable in all cases.)

(2) Second offense within one year of first conviction - 45 days (60 days minimum sentence, no suspension, no probation until minimum sentence is served. Good time of one day for three served was considered applicable in all cases.)

Third/Subsequent offenders - 90 days (120 days minimum sentence, no suspension, no probation until minimum sentence is served. Good time of one day for three was considered applicable in all cases).

f. Additional beds required -

(1) 1,609 offenders X 96 Hours ÷ 365 ÷ 24 equals approximately 17.6 beds, less 10 beds now utilized by first offenders equals 7.6 new beds.

(2) Second offenders -

(a) Within one year -

50 offenders X 45 days ÷ 365 = 6.2 beds

(b) After one year

300 offenders X 15 days ÷ 365 = 12.3 beds

(c) Total beds = 6.2 + 12.3 less 12.6 beds now utilized by second offenders = 5.9 new beds.

(3) Third/Subsequent offenders - 50 offenders X 90 days ÷ 365 days = 12.3 new beds.

(4) Therefore, it is estimated that 26 new beds will be needed in the state correctional system if this proposed legislation is enacted.

(5) A significant impact will be experienced during the first year that this law is in force. This will result in overcrowded conditions within the existing state facilities if a temporary alternative cannot be provided.

g. No statistics are available regarding the number of persons who now refuse to take chemical breath tests. Therefore, no fiscal impact can be estimated for Sec. 28.35.032(g) which requires a consecutive 72 hour sentence for imprisonment for refusal to submit to a chemical test of breath.

D. Estimated Costs - If traditional incarceration methods are mandated or envisioned in the act. (These costs are displayed on page 1 of this fiscal note.)

1. Capital Expenditures

It would be anticipated that a 26 minimum to medium security beds would need to be constructed. Based on the fast track construction method utilized and cost per bed at the Palmer Addition, and considering one year of inflation at 15%, it is estimated that the cost will be $69,000 per bed. Therefore, capital expenditures are estimated to be:

26 X $69,000 = $1,794,000

It is assumed that the 26 beds identified would be incorporated into a new facility which would take into consideration the new bed needs resulting from legislation passed this session.

2. Operating Costs

a. Personal Services -

It is estimated that a total of 6 new Correctional Officer II positions would be needed to provide security and supervision for the additional inmates. It is noted that the identified positions would not include any support functions such as administration, food service, maintenance, or nursing.

Estimated cost for FY 1984 was computed using the 1982 negotiated salary schedule with 7% inflation added for all subsequent fiscal years.

b. All other expenditure Categories -

The continuation budget for Palmer Correctional Center was used as a basis for estimating operational costs, since it serves the approximate classification of inmates as would be served in the new facility. The figures were adjusted to reflect 26 inmates as compared to the 100 inmates budgeted for continuation of the existing Palmer Correctional Center. A 9% inflation factor was utilized for all fiscal years after FY 1983. Operational costs itemized for FY 1983 are for the additional food, clothing, and medical costs related to the increased inmate population.

c. No expenditures are shown for FY 1982, as it is assumed the new law would go into effect July 1, 1982.