ALASKA LEGISLATURE COMMITTEE FILES 1985-1986 8672

3403 HJUD SB 53 - SB 74

279

5853

BILL SHEFFIELD
GOVERNOR

STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

January 15, 1985

The Honorable Don Bennett
President of the Senate
Alaska State Legislature
Pouch V
Juneau, AK 99811

Dear Senator Bennett:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill relating to the disclosure of unemployment insurance information.

The bill has two provisions. The first is in response to amendments made to the Social Security Act by the Deficit Reduction Act of 1984 (P.L. 98-369). The latter Act establishes an income and eligibility verification system under which the state must disclose unemployment insurance benefit and wage information to appropriate state and federal agencies in order to qualify for federal money for payment of administrative costs of the uremployment insurance program (42.U.S.C. sec. 1320b-7).

The system is intended to verify the eligibility of recipients of certain benefits in federally assisted state programs, such as the medicaid, food stamp, and unemployment insurance programs, among others. The bill will allow the Department of Labor to make the appropriate disclosures.

The second provision allows the department to disclose information to the Internal Revenue Service. Under federal law, the IRS has the duty to seek information necessary for enforcement of the Internal Revenue Code, and it is empowered to compel the cooperation of persons and agencies in its performance of that duty. Although under current state law the department may not voluntarily disclose unemployment insurance information to the IRS for that purpose, the Department of Law has concluded that the Department of Labor must respond to an IRS subpoena which requests such information. The proposed amendment would eliminate the need for the issuance and processing of subpoenas, a costly procedure, which has become especially burdensome due to the increasingly large number of subpoenas issued.

Section 2651(1)(2) of the Deficit Reduction Act of 1984 (98 Stat. 1151) basically requires compliance with the provisions of that Act as of April 1, 1985. Therefore, I urge your prompt and favorable consideration of this measure.

Sincerely,

Bill Sheffield

Bill Sheffield
Governor

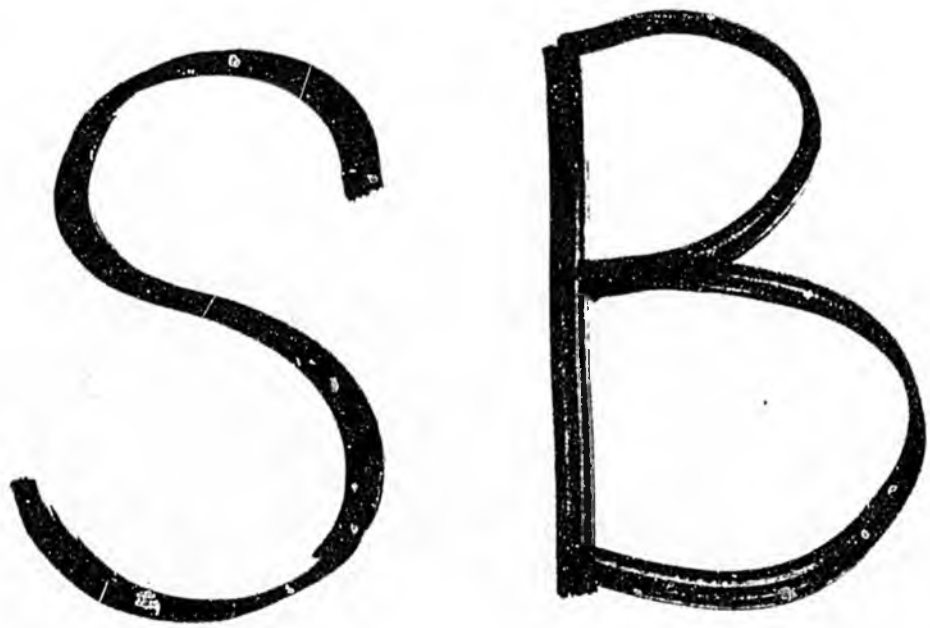
RECORDS CERTIFICATION

I, the undersigned, an employee of the State of Alaska, do hereby certify that the microfilm images on this microform are accurate reproductions of the original records of the State of Alaska as accumulated during the regular course of business, and that it is the established policy and practice of this State to microfilm its records and to dispose of the original records after microfilm reproductions have been made.

James O. Smith
Signature of Camera Operator

7/25/89
Date

02-519 (REV 8/78)


SB


67

STATE OF ALASKA
THE LEGISLATURE

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
907-465-2800

LEGISLATIVE AFFAIRS AGENCY

LEGISLATIVE REFERENCE LIBRARY

May, 1986

Copies of minuces listed below were originally included in this file. The minutes are available on the STAIRS date base CM 14. In order to save space copies of minutes have not been left in the files.

Jeanie Henry

House Judiciary 4/26/86 8:30 AM (Teleconference)

HOUSE

COMMITTEE REPORT

(7)

Date referred: 3/7/86

FURTHER REFERRALS:

DATE: _____

The JUDICIARY Committee has considered CSSB 67(Jud)

"An Act relating to arrest by a peace officer without a warrant and service of process in cases of domestic violence."

and recommends:

[ ] do pass

[ ] do not pass

[ ] do pass with attached amendment(s)

[ ] no recommendation

[ ] replace with _____ [ ] same title

[ ] new title

and recommends _____

[ ] further referral to the _____ Committee

and attaches: [ ] letter of intent
[ ] first fiscal note
[ ] new fiscal note
[ ] zero fiscal note

SIGNING DO PASS:

SIGNING OTHER RECOMMENDATIONS:

Chairman

BILL SHEFFIELD
GOVERNOR

ch67

STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

January 21, 1985

The Honorable Don Bennett
President of the Senate
Alaska State Legislature
Pouch V
Juneau, AK 99811

Dear Senator Bennett:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill that will transfer primary responsibility for the service of process for domestic violence injunctions from the state troopers to local police departments. Current law places primary responsibility for service of these court orders on the state troopers, but provides that a court may order any other peace officer to serve them if a state trooper is not available. AS 25.35.040. This bill would require local officers to serve the orders if the person to be served is present or resides within the local department's jurisdiction. If a local officer is not available, the court may direct a state trooper to serve the court order.

This change in the law is needed because the number of domestic violence orders issued by courts each year has increased dramatically since AS 25.35.010 -- 25.35.060 (formerly AS 09.55.600 -- 09.55.640) took effect in September of 1980. In Anchorage alone, the number of domestic violence orders that must be served has climbed from an average of 15 to an average of 100 a month. The vast majority of these orders (approximately 90 percent) is directed to persons who reside within municipalities that have local police departments.

In many cases, a local police officer was called to the domestic disturbance that gave rise to the need to obtain a domestic violence injunction. The officer may even have transported the victim of the assault to the local magistrate or judge to obtain the order. To require that the resulting court order be served by a state trooper whose primary patrol area is often outside of the city or borough and who has had no previous contact with the victim or the case is not an efficient use of law enforcement

resources, and may cause a delay in the service of the order. In the larger cities, service of these injunctions is made by officers in the judicial services section of the state troopers. The need to ensure adequate security in courtrooms, transport prisoners, and serve criminal arrest warrants and subpoenas severely limits the amount of time and effort a judicial services officer may devote to service of domestic violence injunctions.

In the interests of providing the quickest and best possible protection for victims of domestic violence, and of making the wisest possible use of available law enforcement resources, I urge your prompt passage of this bill.

Sincerely,

Bill Sheffield

Bill Sheffield
Governor

Prepared for Tony Knowles, Mayor

Municipality of Anchorage

Prepared by the Special Committee

on Domestic Violence,

Anchorage Women's Commission

16. Service of domestic violence restraining orders in the Municipality of Anchorage should be by the Anchorage Police Department. (Adopted 6/14/85)

The Committee adopted the philosophy that protection of victims should be the primary consideration in the Municipality of Anchorage's domestic violence intervention system. Restraining orders are civil orders and are currently served by the Alaska State Troopers as charged by State Statutes.

The APD is charged with enforcement of criminal violations. Violations of restraining orders is a criminal offense and must therefore be enforced by the Anchorage Police Department.

The system works in the following manner: APD responds to the initial abuse incident. APD often transports the victim to the court for a restraining order, and then returns to enforce violations of the restraining orders. It appears to the Committee that the same police officer should serve the domestic violence restraining order since he/she is already familiar with the subjects involved. It does not appear efficient for the officer nor for the victims to have a different officer, an Alaska State Trooper, involved in only the third of four police officer contacts.

In making this recommendation the Committee also considered the following facts: 1) of the 1300-1400 domestic violence restraining orders served in 1984, over 90% originated within the Municipality. 2) APD received 5-7 calls of domestic violence each day. 3) The APD has a backlog of 9,000 citations, if parking and traffic warrants are included. 4) The current APD contract does not allow contracting out police services such as service of subpeonas. 5) The average cost for private service of a subpeona is $26. 6) The Alaska State Troopers received an 8 person reduction to the Anchorage post since 1985.

ALASKA BAR ASSOCIATION

P.O. BOX 100279, ANCHORAGE, ALASKA 99510, (907) 272-7469

FAMILY LAW
SECTION

April 22, 1985

Senator Rodey
Alaska Senate
Senate Judiciary Committee
Juneau AK 99811

RE: Senate Bill No. 67

Dear Senator Rodey:

The Family Law Committee of the Alaska Bar Association strongly urges your support of Senate Bill 67. The Domestic Violence Act is one of the most effective legal tools available to victims of family violence. However, the effectiveness of domestic violence orders is seriously undercut when there are delays in the service of these orders upon the perpetrator of the violence. This is particularly true with domestic violence orders which are not enforceable against the respondent until the respondent has actually been served with the papers. As practitioners and judges in the area of family violence, we have seen too many occasions when the issuance of emergency restraining orders has been delayed because of the unavailability of Alaska State Troopers Judicial Services Branch to serve the papers in a timely fashion. Local law enforcement personnel are the logical people to serve the domestic violence orders. Local law enforcement personnel are also charged with enforcing the domestic violence restraining orders and therefore their service of the orders would not only assure prompter delivery of these critical papers but would also increase enforcement of the orders by alerting the officers to the orders existence from the very beginning.

Please pass Senate Bill 67 so that victims of family violence and their children can receive reliable service and enforcement of the domestic violence restraining orders.

While the Family Law Committee is encouraged by the Municipality of Anchorage's recent formation of a committee to study the multi-faceted issue of domestic violence and the Municipality's responses to domestic violence; it is still the firm belief of the Family Law Committee that the needs of the victims of family violence would be best served by the immediate passage of SB 67. The municipalities of the state

ALASKA BAR ASSOCIATION

P.O. BOX 100279, ANCHORAGE, ALASKA 99510, (907) 272-7469

FAMILY LAW
SECTION

could be given time to prepare for the onset of this new burden if the bill was given a late effective date. This would give Anchorage several months for its taskforce to assemble a total response that would increase the speed and effectiveness of the service of domestic violence papers.

Sincerely,

FAMILY LAW COMMITTEE

KARLA F. HUNTINGTON
Co-Chair

KFH/trc

cc: Full Committee

STATE OF ALASKA 1986 LEGISLATIVE SESSION
FISCAL NOTE

Revision Date : _____

REQUEST

Bill/Resolution No. : HCSCSSB67(HESS)
Title : "An Act relating to arrest by a peace officer without a warrant and service of process..."
Sponsor : Rules/Finance
Requestor : H Judiciary
Date of Request : _____

FISCAL DETAIL

Agency Affected : Public Safety
BRU : Alaska State Troopers
Components : _____

EXPENDITURES/REVENUES : (Thousands of Dollars)

OPERATING	FY 86	FY 87	FY 88	FY 89	FY 90	FY 91
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING		0	0	0	0	0
CAPITAL						
REVENUE						

FUNDING : (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL		0	0	0	0	0

POSITIONS :

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS : Attach a separate page if necessary

Prepared by : Francis C. Allan F.C.A. Phone : 269-5691
Division : Alaska State Troopers Date : 3/18/86

Approved by Commissioner : [signature] Date : 3/19/86
Agency : Public Safety

Distribution (by Agency preparing fiscal note) :
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

10/25/85

DEPARTMENT OF PUBLIC SAFETY

POSITION PAPER - HCS CSSB 67(HESS)

Support

March 18, 1986

HCSCSSB67(HESS) - "An act relating to the service of domestic violence injunctions."

It is our interpretation that this legislation will require municipal police agencies to serve domestic violence injunctions that are initiated as a result of their investigations within their jurisdiction. It will also allow peace officers to make arrests without warrants in certain cases related to domestic violence and other felonies.

Domestic violence injunctions are served by Troopers assigned to the Judicial Services section of the Alaska State Troopers. This section is also responsible for courtroom security, prisoner transportation and the service of subpoenas and warrants. The Alaska State Troopers have never received funding to cover the costs associated with the service of domestic violence orders. Thus, this increased work load falls on an already overloaded unit and the service of these orders must sometimes be subordinated to other law enforcement demands.

During the last several years the tremendous increase in the number of domestic violence orders to be served has placed a severe drain upon the manpower of the Alaska State Troopers and has caused some delay in the service of these orders. This legislation transfers the primary responsibility for the service of these injunctions from the State Troopers to local police departments. State Troopers would continue to serve these orders when local officers are not available.

The majority of domestic violence orders are served within the boundaries of political subdivisions which have their own police agencies. The local police are often more familiar with the locations and individuals involved in domestic violence situations and therefore can more safely and efficiently serve the orders.

Robert J. Sundberg
Commissioner

STATE OF ALASKA 1986 LEGISLATIVE SESSION
FISCAL NOTE

Revision Date : ____

REQUEST

Bill/Resolution No. : Hse CSCSSB67 (HESS)
Title : "An Act relating to arrest by a peace officer without a warrant and service of process in cases of dv"
Sponsor : HESS Committee
Requestor : House Judiciary
Date of Request : ____

FISCAL DETAIL

Agency Affected : Public Safety
BRU : Council on Domestic Violence and Sexual Assault
Components : ____

EXPENDITURES/REVENUES : (Thousands of Dollars)

OPERATING	FY 86	FY 87	FY 88	FY 89	FY 90	FY 91
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL						
REVENUE						

FUNDING : (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS :

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS : Attach a separate page if necessary

Prepared by : Barbara Miklos, Exec. Dir. Phone : 465-4356
Division : Council on DV & SA Date : 3/18/86

Approved by Commissioner : [signature] Date : 3/19/86
Agency : Department of Public Safety

Distribution (by Agency preparing fiscal note) :
- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

10/25/85

DEPARTMENT OF PUBLIC SAFETY

POSITION PAPER - HOUSE CS FOR CS FOR SB 67 (HESS)

March 18, 1986

Support

HOUSE CS for CS FOR SB 67 (HESS) - "An Act relating to arrest by a peace officer without a warrant and service of process in cases of domestic violence."

The Council on Domestic Violence and Sexual Assault supports HOUSE CS for CS SB 67 (HESS).

Section 1 amends AS 12.25.030(b) to allow warrantless arrests for certain domestic violence cases under municipal ordinance. It is already permissible under state statute. This change is important for the larger communities so police officers may arrest and municipal prosecutors may prosecute under municipal code.

Section 3 amends AS 25.35.040 so municipal police officers of a specific jurisdiction have the responsibility to serve domestic violence restraining orders in their jurisdiction. The Council on Domestic Violence and Sexual Assault is concerned about the rights of victims to be protected as soon as a domestic violence restraining order is issued. When available, local police officers are in the best position to respond quickly to the need to serve orders. Delays in service of the orders could mean that specific orders of no violence, no contact, etc. are not given as quickly as possible and therefore the victim is kept in jeopardy of harm for longer than necessary. If there are no local peace officers in a municipality, this revision in the legislation enables the court to designate any other peace officer as the server. Thus state peace officers could concentrate on areas with no other police protection.

Robert J. Sundberg

DEPARTMENT OF PUBLIC SAFETY

POSITION PAPER -CSSB 67(HESS)

Support

April 26, 1985

CSSB 67(HESS) - "An act relating to the service of domestic violence injunctions."

This legislation will require municipal police agencies to serve domestic violence injunctions that are initiated as a result of their investigations within their jurisdiction.

Domestic violence injunctions are served by Troopers assigned to the Judicial Services section of the Alaska State Troopers. This section is also responsible for courtroom security, prisoner transportation and the service of subpoenas and warrants. The Alaska State Troopers have never received funding to cover the costs associated with the service of domestic violence orders. Thus this increased work load falls on an already overloaded unit and the service of these orders must sometimes be subordinated to other law enforcement demands.

The majority of domestic violence orders are served within the boundaries of political subdivisions which have their own police agencies. The local police are often more familiar with the locations and individuals involved in domestic violence situations and therefore can more safely and efficiently serve the orders.

During the last two years the tremendous increase in the number of domestic violence orders to be served has placed a severe drain upon the manpower of the Alaska State Troopers and has caused some delay in the service of these orders. This legislation transfers the primary responsibility for the service of these injunctions from the State Troopers to local police departments. State Troopers would continue to serve these orders when local officers are not available.

Robert J. Sundberg
Commissioner

RECORDS CERTIFICATION

I, the undersigned, an employee of the State of Alaska, do hereby certify that the microfilm images on this microform are accurate reproductions of the original records of the State of Alaska as accumulated during the regular course of business, and that it is tha established policy and practice of this State to microfilm its records and to dispose of the original records after microfilm reproductions have been made.

James A. O. Smith
Signature of Camera Operator

7/25/89
Date

02-519 (REV 8/78)


SB
69

STATE OF ALASKA
THE LEGISLATURE

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

LEGISLATIVE AFFAIRS AGENCY

LEGISLATIVE REFERENCE LIBRARY

May, 1986

Copies of minutes listed below were originally included in this file. The minutes are available on the STAIRS date base CM 14. In order to save space copies of minutes have not been left in the files.

Jeanie Henry

House Judiciary	5/6/86	1:30 pm
" "	5/7/86	1:30 pm
" "	5/8/86	8:00 Am

HOUSE

COMMITTEE REPORT

(7)
Date referred: 4/1/86

FURTHER REFERRALS: FINANCE

DATE: _____

The JUDICIARY Committee has considered CSSB 69(Jud)am

"An Act relating to licensing and regulation of the sale and distribution of alcoholic beverages; and providing for an effective date."

and recommends:

[ ] do pass

[ ] do not pass

[ ] do pass with attached amendment(s)

[ ] no recommendation

[ ] replace with _____ [ ] same title
[ ] new title

and recommends _____

[ ] further referral to the _____ Committee

and attaches: [ ] letter of intent
[ ] first fiscal note
[ ] new fiscal note
[ ] zero fiscal note

SIGNING DO PASS:

SIGNING OTHER RECOMMENDATIONS:

Chairman

STATE OF ALASKA 1986 LEGISLATIVE SESSION
FISCAL NOTE

Revision Date: ———

REQUEST

Bill/Resolution No.: HCS CSSB 69 (Jud)
Title: Issuance, renewal, continuation, and transfer of liquor licenses.

Sponsor: House Judiciary Comm. (original)
Requestor: House Judiciary Comm
Date of Request: April 21, 1986

FISCAL DETAIL

Agency Affected: Department of Revenue
BRU: Alcoholic Beverage Control Board

Components: ———

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 86	FY 87	FY 88	FY 89	FY 90	FY 91
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE	---	1,278.0	1,300.0	1,300.0	1,300.0	1,300.0

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: Attach a separate page if necessary

General fund revenues realized from increase to wholesale license fees at lines 26-28, page 2.

Prepared by: Patrick L. Sharrock, Director — Phone: 277-8638
Division: Alcoholic Beverage Control Board — Date: April 23, 1986

Approved by Commissioner: Mary A. Nordale — Date: 4/24/86
Agency: Department of Revenue

Distribution (by Agency preparing fiscal note):
- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

10/25/85

STATE OF ALASKA 1986 LEGISLATIVE SESSION
FISCAL NOTE

Revision Date : _____

REQUEST

Bill/Resolution No. : CSSB 69(Jud)am
Title : Regulating sale of alcoholic beverages

Sponsor : Rules/Request of Governor
Requestor : _____
Date of Request : _____

FISCAL DETAIL

Agency Affected : Revenue
BRU : Consumer Protection

Components : Alcoholic Beverage Control

EXPENDITURES/REVENUES : (Thousands of Dollars)

OPERATING	FY 86	FY 87	FY 88	FY 89	FY 90	FY 91
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING		0	0	0	0	0
CAPITAL		0	0	0	0	0
REVENUE		0	0	0	0	0

FUNDING : (Thousands of Dollars)

GENERAL FUND		0	0	0	0	0
FEDERAL FUNDS		0	0	0	0	0
OTHER		0	0	0	0	0
TOTAL		0	0	0	0	0

POSITIONS :

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

ANALYSIS : Attach a separate page if necessary

Prepared by : Jan Faiks, Co-chairman
Division : Senate Finance Committee
Phone : 465-4523
Date : 2/10/86

Approved by Commissioner : _____
Agency : _____
Date : _____

Distribution (by Agency preparing fiscal note) :
- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

10/25/85

Proposed "Letter of Intent" to S.B. 69

It is the intention of the legislature that the Alcohol Beverage Control Board in granting licenses under Section 04.11.400(g) take into consideration not only the population size of the community but the number of existing hotel rooms as well. In communities [redacted] where there is a small population size but an abundance of hotel rooms, the board shall hold applicants to the maximum requirement of 50 rooms rather than the minimum requirement of 10 rooms.

124

MEMORANDUM State of Alaska

TO: Jim Ayers, Director
Legislative Relations
Office of the Governor

DATE: April 8, 1986

FILE NO:

TELEPHONE NO: 465-4322

FROM: Robert J. Sundberg
Commissioner
Department of Public Safety

SUBJECT: Alaska Compliance with FDOT Published Rule on National Drinking Age

It has been brought to my attention that the State of Alaska is not in compliance with federal regulations concerning alcohol beverage content limit. The State's content limit is one percent, AS 04.21.080 (b)(1), in which anything less does not come under the control of the Alcohol Beverage Control Board (ABC). The federal limit is one-half of one percent.

One of the Governo 's bills, SB 69, relating to liquor law changes, has passed ut of the Senate and is now in the House, and could be mended to corporate a change of the now one percent limitati n to that of one-half of one percent, thus bringing the State under compliance. Failure to comply could result in a withholding of Federal-aid highway funds.

Find attached copy of Federal Register Vol. 51, No. 58, dated March 26, 1986 which contains the new regulations, and a letter to Governor Bill Sheffield dated March 26, 1986 from R.A. Barnhart and Diane K. Steed.

Attachments: a/s

US Department
of Transportation

National Highway
Traffic Safety
Administration

The Administrator

400 Seventh St., S.W.
Washington, D.C. 20590

MAR 20 1986

RECEIVED
MAR 28 1986
HIGHWAY SAFETY

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

The Honorable William J. Sheffield
Governor of Alaska
State Capitol
Juneau, AK 99811

Dear Governor Sheffield:

On July 17, 1984, President Reagan signed legislation which strongly encourages States to have laws prohibiting the purchase and public possession of alcoholic beverages by anyone under 21 years of age by withholding a portion of Federal-aid highway funds from States without such laws (23 U.S.C. 158). In enacting this legislation, both Congress and the President recognized that raising the drinking age results in a decrease in both the number of traffic crashes and in the number of fatalities.

The National Highway Traffic Safety Administration and the Federal Highway Administration ("the Agencies") have issued a final rule (copy enclosed) which implements and clarifies the statute. That rule provides that the Agencies notify each State by March 28, 1986 of their preliminary review of the State's statutes for compliance or non-compliance with the statute for fiscal year 1987. Our review of Alaska's laws reveals that although the State has established 21 as the minimum age for the purchase and public possession of alcoholic beverages, the State's laws do not conform with the Federal statute which defines an alcoholic beverage as having an alcoholic content of "not less than one-half of one percent" by volume.

Based on the above, it appears that Alaska is not in compliance with the statute and its implementing regulation and is, therefore, subject to a withholding of five percent of its apportionment under sections 104(b)(1), 104(b)(2), 104(b)(5) and 104(b)(6) of Title 23 of the United States Code on October 1, 1986.

~~AS.28~~
AS.04.21.080 (b) (1)

$ 7,650,000

Get it together!
SAFETY BELTS SAVE LIVES

If you disagree with this preliminary finding, you may, within 30 days of your receipt of this letter, submit documentation which demonstrates that Alaska is in compliance with the Federal statute. The Agencies' final determination of compliance or non-compliance will be sent to you by May 30, 1986. Additionally, if at any time Alaska comes into compliance with the Federal statute, you may submit a copy of the applicable State laws and any funds that have not lapsed will be returned.

If we can be of any assistance, please do not hesitate to contact us.

Sincerely,

R.A. Barnhart
Administrator, Federal
Highway Administration

Diane K. Steed
Administrator, National Highway
Traffic Safety Administration

Enclosure

By direction of the Commission.

Benjamin I. Berman,

Acting Secretary.

[FR Doc. 86-6559 Filed 3-25-86; 8:45 am]

BILLING CODE 6750-01-M

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

Federal Highway Administration

23 CFR Part 1208

[Docket No. 85-12; Notice 2]

National Minimum Drinking Age

AGENCIES: National Highway Traffic Safety Administration (NHTSA), Federal Highway Administration (FHWA), DOT.

ACTION: Final rule.

SUMMARY: This rule clarifies the provisions which a State must incorporate or have incorporated into its laws in order to prevent the withholding of a portion of its Federal-aid highway funds for noncompliance with the National Minimum Drinking Age. This rule implements section 6 of Pub. L. 98-363.

EFFECTIVE DATE: This rule becomes effective March 26, 1986.

FOR FURTHER INFORMATION CONTACT:

NHTSA: Mr. George Reagle, Associate Administrator for Traffic Safety Programs, National Highway Traffic Safety Administration, 400 Seventh Street, S.W., Washington, D.C. 20590 (202-426-0837) or Kathleen C. DeMeter, Office of Chief Counsel, National Highway Traffic Safety Administration, 400 Seventh Street, S.W., Washington, D.C. 20590 (202-426-1834).

FHWA: Mr. R. Clarke Bennett, Director, Office of Highway Safety, Federal Highway Administration, 400 Seventh Street, S.W., Washington, D.C. 20590 (202-426-1153) or Mr. David Oliver, Office of Chief Counsel, Federal Highway Administration, 400 Seventh Street, S.W., Washington, D.C. 20590 (202-426-0825).

SUPPLEMENTARY INFORMATION: On July 17, 1984, the President signed Public Law 98-363, which strongly encourages States to have laws prohibiting the purchase and public possession of alcoholic beverages by anyone under 21 years of age by withholding a portion of Federal-aid highway funds from States without such laws (23 U.S.C. 158, hereinafter called the National Minimum Drinking Age). The statute requires the Secretary of Transportation to withhold a portion of Federal-aid highway funds from any State whose laws permit the purchase or public possession of any alcoholic beverage by a person who is less than 21 years of age. If any such State does not enact a new law or amend its existing laws to make age 21 the legal minimum drinking age by October 1, 1986 (fiscal year 1987), five percent of its Federal-aid highway apportionment under 23 U.S.C. 104(b)(1), 104(b)(2), 104(b)(5), and 104(b)(6), which are primary system, secondary system, Interstate system (including resurfacing, restoring, rehabilitating and reconstructing funds) and urban system funds, shall be withheld. If by October 1, 1987 (fiscal year 1988) no such law is adopted or amendments made, ten percent of its fiscal year 1988 Federal-aid highway apportionment under these sections will be withheld. Responsibility for administering the program has been delegated jointly to the National Highway Traffic Safety Administration and the Federal Highway Administration (the "Agencies"). 50 FR 43165 (October 24, 1985).

The Notice of Proposed Rulemaking (NPRM), which was issued on September 24, 1985 (50 FR 39140, September 27, 1985), sought comments on several issues that the Agencies were considering adopting in the final rule. The Agencies received comments from 17 States, State agencies and private organizations. Although most of the commenters support a national minimum drinking age of 21, many of those comments raised serious concerns about the ability of States that already have age 21 statutes to satisfy various particular provisions contained in the NPRM. As a result of these comments, and as a result of the Agencies' preliminary review of existing State minimum drinking age statutes, the Agencies have made several amendments to the proposal as it appeared in the NPRM. The issues which were addressed in the NPRM and additional changes made in the final rule are discussed below.

In analyzing the legislative history of the National Minimum Drinking Age, the Agencies believe that Congress did not intend to cause States, especially those that already had a minimum drinking age of 21, to lose a portion of their Federal-aid highway funds merely because of a technical, non-substantive difference between a State law and the literal language of the Federal law. Indeed, the legislative history of the statute suggests that Congress did not believe that this law would generally have any adverse affect on States which had already enacted 21 drinking age laws.

For example, Representative Howard, the sponsor of the age-21 legislation in the House of Representatives, said "The amendment I am offering would encourage those States *that have not yet done so* to raise their minimum drinking age to 21." (Emphasis supplied). (130 Cong. Rec. H5395, daily ed. June 7, 1984). During the Senate consideration of the age-21 legislation, Senator Danforth, one of the sponsors in the Senate, was engaged in a colloquy with Senator Leahy. Senator Leahy said, "But the Senator's amendment is *not penalizing any State which is already at 21.* It penalizes those below [21]." Senator Danforth responded, "Right." Senator Leahy then stated, "To that extent, the benefit of it, the not being penalized, *goes automatically to any State at 21.*" (Emphasis supplied). (130 Cong. Rec. S8219, daily ed., June 26, 1984). This sentiment was echoed several more times during the debates in both Houses of Congress.

Other comments made during the debate in both the House and Senate strongly support the agencies' conclusion that Congress considered it unlikely that the highway fund withholding sanctions would ever need to be applied. For example, Representative Anderson, who chairs the Surface Transportation Subcommittee of the House Public Works and Transportation Committee, discussed the highway funds withholding sanctions provided by the Clean Air Act and the National Maximum Speed Limit law as analogies to the age-21 legislation, and noted, "To date, the sanctioning process has never been used, indicating its effectiveness *and the unlikelihood that it will have to be employed.*" (Emphasis supplied.) (130 Cong. Rec. H5395, daily ed., June 7, 1984). Senator Lautenberg, one of the Senate sponsors of the age-21 legislation, said in response to a question from Senator Baucus, "As the Senator is aware, the Department of Transportation is always most reluctant to impose sanctions upon States whenever it can be reasonably avoided. If in fact, by fiscal year 1987, . . . if the State could not practically comply through the use of its normal and general procedures for amending its constitution and its statutes, *then all evidence would suggest that the Department should take this into account in its imposition of sanctions.*" (Emphasis supplied.) (130 Cong. Rec., S8214, daily ed., June 26, 1984). Thus, both House and Senate debates reflect a sense that Congress did not think it likely that the sanctions would need to be imposed and, in any event, that the

Department should administer the sanctions reasonably and flexibly.

Therefore, the Agencies are adopting the position that States which can demonstrate that their non-conformities are technical and non-substantive and which are otherwise in compliance, or that through actual practice provide compliance, will satisfy the requirements of the regulation and not have any of their Federal-aid funds withheld for such non-conformities. The procedure to be followed by States that believe they have technical, non-substantive non-conformities is set forth in Section 1208.6(b) of the final rule and is further described below under the subsection entitled "Technical Non-conformities".

Additionally, several New York State agencies (the Governor's Traffic Safety Committee, the Division of Alcoholism and Alcohol Abuse, the Department of Transportation and the Department of Motor Vehicles) requested an interpretation that any State which adopted a minimum drinking age of 21 prior to the adoption of the final rule be "grandfathered" from its application, without further consideration of the provisions in the rule. The NHTSA and FHWA recognize that a number of States acted promptly and decisively before the issuance of this rule to address the problem of drinking by individuals under age 21, and that others have age 21 laws that predate the Federal statute. Despite the fact that some Congressmen assumed that these States would comply with the Federal statute, the NHTSA and FHWA are constrained by the language of the statute and, where there are substantive non-conformities, cannot exempt from its application those States that do not meet its provisions.

Alcoholic Beverage

As noted in the NPRM, the definition of "alcoholic beverage" is prescribed in the Federal statute itself and that definition is incorporated into the final rule. No commenters addressed the definition; however, a review of existing State statutes revealed that a number of States have variations in their definitions that may not satisfy the Federal statute. Some State statutes are considerably out of compliance, such as those that appear to allow individuals under age 21 to purchase or possess 3.2 beer. Other State laws reflect technical drafting differences, such as defining an alcoholic beverage as having an alcoholic content of "*more than* one-half of one percent", whereas the Federal statute definition includes those beverages with an alcoholic content of "*not less than* one-half of one percent" by volume. (Emphasis added.)

Since the definition is prescribed by Federal statute and not subject to regulatory amendment, the Agencies do not have the authority to change the definition. However, the Agencies believe that certain definitional differences are technical and non-substantive. For example, the Agencies do not believe that a State law that defines alcohol as *more than* one-half of one percent is substantively different from the statutory definition of one-half of one percent *or more*. Therefore, the Agencies will consider a State law that defines alcohol as more than one-half of one percent to be in compliance with the statutory definition of alcohol without any need for further submissions by the State. However, if a State does not define 3.2 beer, for instance, as an alcoholic beverage, and permits individuals under age 21 to purchase or publicly possess 3.2 beer, this difference is substantive and would result in a withholding of Federal-aid highway funds for noncompliance.

However, the Agencies also believe that while some State statutes have substantive definitional differences from the Federal statute, their practices may in fact serve to prohibit the purchase or public possession of all "alcoholic beverages" by persons under age 21. The Agencies will, therefore, accept additional documentation from States to indicate whether their actual practices are in conformance with the Federal statute. Actual practice may be demonstrated by regulation, Attorney General opinions or appropriate evidence, as provided in § 1208.6 of the regulation. It should be noted that any finding of compliance based on actual practice rather than statutory language will be conditioned on that practice being continued.

Public Possession

The phrase "public possession" was not defined in the statute and the Agencies defined it in the NPRM to mean "the possession of any alcoholic beverage for any reason, including consumption, on any street or highway or in any public place or in any place open to the public." The Agencies specifically excluded from that proposed definition the possession of alcohol for an established religious purpose and the selling, transporting, delivering, serving or other handling of an alcoholic beverage in pursuance of a person's employment. No commercial objected to the exemption for employment purposes.

Two commenters, however, expressed concern over the religious exemption. The Wholesale Beer Distributors of Texas feared that the exemption would lead to subterfuge applications by allegedly religious institutions, and the Texas Alcoholic Beverage Commission was concerned that the rule contained no definition of "religious purpose." The Agencies are not convinced that individuals or groups would use this exemption to circumvent the statute's application, nor do they believe that the lack of a definition in the rule will defeat the exemption's application. For years States have enforced statutes that define religion for purposes of tax exemption with relatively little difficulty, and the Agencies expect they will apply similar definitions to "established religious purpose" for enforcement of their laws under this rule. Moreover, States concerned about an exemption for an "established religious purpose" are not required by the Federal statute to provide such an exemption and should not feel compelled to adopt such an exemption. The Texas Alcoholic Beverage Commission also asked whether a religious purpose could take place in a public facility. The exemption in the final rule for an "established religious purpose" is a blanket exemption, not limited to private facilities.

Furthermore, the Agencies requested comments on other parameters of the phrase "public possession." For example, they noted that several States have statutes that regulate private clubs similarly to other licensed business establishments and that some States permit minors to drink in public when accompanied by a parent, spouse or legal guardian age 21 or older.

Of the six organizations and individuals that commented on this issue, four (the Governor of Texas, Wholesale Beer Distributors of Texas, Texas Alcoholic Beverage Commission and the National Licensed Beverage Association) indicated their support for a provision exempting minors when accompained by a parent, spouse or guardian of legal drinking age. The Agencies' preliminary review of State laws indicated that Texas is one of 17 States that have such an exemption. Several of these 17 States had enacted their age-21 laws prior to the enactment of the Federal statute, and, as noted above, the legislative history suggests that Congress did not anticipate sanctions against existing age-21 laws. For example, Senator Evans of Washington stated during the debate on the age-21 legislation, "Now, we will not be affected by either of these proposals in the State of Washington. We already have a 21-year-old drinking law." (130 Cong. Rec. S8220, daily ed., June 26.

1984). Washington has had a 21 drinking age since 1934, which provides an exemption for minors accompanying a parent, guardian or spouse. The National Licensed Beverage Association further asserted that to adopt an exemption for religious purposes but not for this purpose would be arbitrary. Likewise, the Texas Alcoholic Beverage Commission (TABC) stated that the deliberate inclusion of certain exemptions and exclusion of other potential exemptions is capricious and unrelated to the intent of the statute. The TABC stated that strict inflexible adherence to the language of the Federal statute is not necessary to further legislative intent, which was to reduce drunk driving. The State of Florida and Senator Frank Lautenberg of New Jersey, one of the sponsors of the National Minimum Drinking Age, both supported the provision as it appeared in the NPRM.

As noted above, the Agencies have reviewed the legislative history of the National Minimum Drinking Age, and concluded that Congress passed the statute not to withhold funds but rather to reduce the deaths and crippling injuries attributed to drunk driving by individuals under age 21 (130 Cong. Rec. S8206–8248 (daily ed. June 26, 1984) and H5394–5408 (daily ed. June 7, 1984)). Congress clearly envisioned that, with a few exceptions, such as the military exemption, those States which had already established the minimum legal drinking age were complying with the spirit of the Federal law. Therefore, the Agencies are providing certain exemptions that a State may allow under its laws without risking the loss of Federal-aid highway funds.

As proposed in the NPRM, the Agencies are exempting the public possession of alcoholic beverages for religious purposes and for job-related purposes when the selling, transporting, delivery, serving or other handling of an alcoholic beverage is in pursuance of a person's employment by a duly licensed manufacturer, wholesale or retailer of alcoholic beverages. Additionally, the Agencies are exempting the public possession of alcoholic beverages by minors when accompanied by a parent, spouse or legal guardian age 21 or older. Although the agencies had proposed not to adopt such an exemption, they have reconsidered their position in light of the comments and their preliminary review of State statues. Since the purpose of the Federal statute is to control drunk driving, the Agencies believe that this purpose will continue to be served because those individuals over 21 who have some responsibility toward the underage individual can ensure that the younger person in their company will not drive. Futher, as noted above, many States providing such an exemption enacted their age-21 statutes prior to enactment of the Federal statute, and the Agencies do not believe that Congress intended to apply sanctions to those States because of such an exemption. A preliminary review of State statutes revealed that some States also have an exemption for the use of alcoholic beverage when administered by a licensed physician or pharmacist for medicinal purposes. The Agencies see the validity in allowing such an exemption when medical judgment dictates that the use of an alcoholic beverage is a valid treatment for a medical condition and are, therefore, providing an exemption for "public possession" related to such use.

The Statute's use of the word "public" indicates that Congress chose not to require drinking age restrictions on possession in private settings. Consequently, the Agencies believe that Congress did not intend to extend the provisions of the Federal statute to cover possession in private establishments such as clubs. The Agencies emphasize, however, that any place which is *de facto* open to the public, such as a private club which admits persons upon the role requirement of payment of a nominal monetary membership fee or other equivalent consideration, is not considered private for purposes of this rule. Furthermore, the Agencies do not encourage such exemptions and remind States that they are not required by the Federal statute to permit a private club exemption (or any other exemption allowed by this rule).

The Agencies note that although Congress used the word "public" to modify the word "possession", it did not use a similar modification for "purchase". The Agencies, therefore, believe that Congress intended to extend the provisions of the Federal statute to include the purchase of alcoholic beverages in private clubs. In support of this, the Agencies preliminary review of State statutes indicates that many States apply their liquor laws to private clubs and these clubs operate much the same as public establishments that serve alcohol. Compliance with this requirement should not, therefore, create any difficulties for the States.

A preliminary review of the State laws also uncovered two States that have exemptions for educational purposes. The Agencies are unclear as to what is encompassed by those statutes; however, the Agencies will afford those States the opportunity to submit additional justification demonstrating the validity of the exemption. Two additional States have exemptions for the possession and transport for personal use, family and guests. Those States will also be afforded the opportunity to demonstrate the validity of that exemption. This information should be submitted in accordance with the procedures set forth in section 1208.6(b) of the final rule.

The NPRM noted that the legislative debate on this statute in both the House and the Senate included extensive discussions of whether individuals serving in the Armed Forces of the United States should be exempt from the provisions of the National Minimum Drinking Age. As expressed in the NPRM, the legislative history is clear that Congress views both drinking and driving to be privileges which are subject to reasonable regulation in the interests of public health and safety. Furthermore, there was concern that permitting a blanket exclusion within a State for members of the military would continue the problem of "blood borders". Consequently, the final rule, like the NPRM, contains no exemption for military personnel. It should be noted that State drinking age laws do not generally apply to alcohol consumed on premises controlled by the military and the scope of this rule extends only to State laws concerning those jurisdictions within the control of the States. The Agencies are, however, encouraged that the Department of Defense has taken substantial steps toward limiting the consumption of alcoholic beverages on military premises by individuals under age 21.

One commenter opposed excluding homes from the coverage of the regulation, but the Agencies would like to reiterate that homes are not covered by the plain language of the statute itself which refers to "public possession". In response to a concern raised by the Texas Alcoholic Beverage Commission which indicated that Texas law prohibits drinking by minors in private homes when parents are not there, the Agencies would like to point out that the States should not feel limited to the parameters set forth in this rule, but that they may include additional prohibitions.

Purchase

One commenter noted that the definition of "purchase" as used in the NPRM was meaningless because of the use of the word "purchase" in defining the word. The Agencies agree and have

redefined "purchase" in the final rule to mean "to acquire by the payment of money or other consideration."

The American Medical Association indicated that the definition of "purchase" should also include "sale". The Agencies considered the issue of whether the Statute requires that State law prohibit "sale" as well as "purchase." The Agencies also considered whether the statutory requirement that "purchase" be prohibited was satisfied if "sale" of alcoholic beverages to minors was prohibited.

On its face, the Federal statutory phrase does not include "sale" and there is no legislative history suggesting that "sale" must be prohibited. Additionally, the Agencies are aware of no State with 21 as the legal minimum drinking age which has a statute prohibiting the purchase of alcoholic beverages, but not the sale, thus rendering this addition unnecessary. In view of the language and legislative history of the statute, the Agencies have determined that it is neither necessary nor appropriate to require States to prohibit "sale" as well as "purchase and public possession." However, the Agencies will consider a statute that prohibits sale of an alcoholic beverage to an underage person, instead of purchase by such a person, to be in compliance with the Federal statute's requirement to prohibit purchase.

Purchase or Public Possession

As noted by the commenters from New York, section 158(a) of the Federal statute states that funds shall be withheld if the "purchase *or* public possession" by someone under age 21 is lawful, thus implying that both purchase and public possession must be prohibited in order to be in compliance and avoid a withholding of funds. However, section 158(b) states that any withheld funds are to be returned if a State makes unlawful the "purchase *or* public possession," which could be read as implying that if a State makes unlawful either the purchase or public possession it will have all withheld funds returned. These commenters support the disjunctive requirements as expressed in section 158(b), stressing that it should be up to each individual State as to how to achieve an acceptable age-21 drinking law. The commenters expressed their belief that Congress did not intend to dictate the specific manner in which States should control access to alcoholic beverages.

In light of Congress' apparent preference for a prohibition on both purchase and public possession, as evidenced by the withholding provisions of section 158(a), the Agencies believe that Congress did not intend to accept statutes that prohibit only one but not the other. Therefore, the final rule automatically accepts statutes requiring both. However, because of the ambiguity of the statute and the Agencies' desire to be as flexible as possible, the final rule also permits States to submit additional justification of either-or laws.

In view of the comments submitted to the NPRM, the Agencies appreciate that some States may be able to effectively control drinking by underage individuals with statutes that prohibit only the possession of alcoholic beverages. An individual cannot purchase an alcoholic beverage without also being in possession of it, therefore, possession appears to reach both aspects of the underage drinking problem that Congress wanted to eliminate. The Agencies are, however, requiring additional justification from those States which regulate possession and not purchase to show that their statutes are interpreted and enforced in such a manner that this limitation does not pose a detriment to controlling underage drinking. Such justification should be submitted in accordance with § 1208.6(b) of the final rule.

As to the converse situation, the Agencies are not convinced that statutes which prohibit only purchase, but not public possession, are sufficient to effectively control underage drinking. An individual in such a State could consume an alcoholic beverage in public, provided he or she did not purchase it. Thus, a major problem which Congress intended to control would still exist. However, the Agencies will entertain additional support for such laws on a State-by-State basis pursuant to the procedure set forth in § 1208.6(b) of the final rule.

Technical Non-conformities

If a State receives an initial notification of non-compliance pursuant to § 1208.6(a) of the final rule and believes that the items identified are technical non-conformities only, the State will have the opportunity to submit documentation demonstrating that the technical non-conformity is non-substantive and has little, if any, impact on the goal of prohibiting purchase and public possession of alcoholic beverages by those under 21. This information should be submitted in accordance with the procedures set forth in § 1208.6(b) of the final rule.

Apportionment of Withheld Funds

In the NPRM the Agencies noted that they sought the advice of the Office of Management and Budget (OMB) on the issue of how long the withheld funds would remain available for apportionment. OMB interpreted the interaction of the laws governing the National Minimum Drinking Age (23 U.S.C. 158) and the Federal-aid highway program funding (23 U.S.C. 118(b)) to mean that withheld funds would be subject to the standard periods of availability for Federal-aid highway funds. The Florida Department of Community Affairs expressed its belief that section 118(b) should not apply and that Congress intended for the funds to be returned at any time a State came into compliance. The National Licensed Beverage Association stated its belief that legislative intent was to make the funds available for a six-year period (four-year availability subsequent to the two fiscal years during which withholdings can take place). Senator Lautenberg, on the other hand, supported the NPRM's reading of the availability of funds and noted that the Senate on July 31, 1985, approved legislation (S. 1529) clarifying and confirming this interpretation. (The Agencies note, however, that the legislation has not been enacted into law as of the issuance of this rule.) The Agencies are retaining in the final rule the language as it appeared in the NPRM.

Grandfathering

The question was raised whether a State which adopts a minimum drinking age of 21 prior to the adoption of the final rule, but which also provides "grandfather" rights to continue drinking privileges for those persons under age 21, could in turn be "grandfathered" from the absolute age-21 requirement in the Federal statute. The statute provides that the Secretary "shall withhold" funds if the purchase or public possession of alcoholic beverages by a person under age 21 is lawful on October 1, 1986, and October 1, 1987, which would at first indicate that a State with under-21 "grandfather" rights in effect on those dates would be subject to withholding. However, the statute also provides that withheld funds are to be restored to the States as soon as all under-21 drinking is prohibited (i.e., when those "grandfather" rights expire).

The agencies have determined that no useful purpose would be served by withholding funds from an otherwise complying State merely by the presence of such "grandfather" rights, if the scheduled expiration of those rights would automatically trigger the restoration of funds. A preliminary

review of the five States which currently have "grandfather" provisions in the age-21 laws indicates that in all but one State all such rights will have expired—i.e., no further under-21 drinking would be permitted—by October 1, 1987. Since no withheld funds would have lapsed by that date for those four States, any withheld funds would at that point be restored, as long as the State was otherwise in compliance. The Agencies have determined that such withholding and subsequent return of funds would not further the purposes of the statute, and would also result in unnecessary administrative burdens on both the Federal government and the States. The Agencies do not, however, believe that it is consistent with the intent of Congress to allow States to retain funds which would have lapsed prior to the date on which the funds are to be restored. Accordingly, the Agencies will consider any State which has enacted a grandfather provision whose scheduled expiration would result in full restoration of funds to be in compliance, provided the State is otherwise in compliance with the National Minimum Drinking Age.

Notification of Compliance

The NPRM specified that each State would be notified of the Agencies' preliminary reviews of State statutes by March 1, 1986, and March 1, 1987, and of their final determinations of compliance by May 1, 1986 and May 1, 1987. Three commenters recommended changes in this time schedule to allow States to demonstrate compliance at later dates. The Agencies believe that the request to permit a State to demonstrate compliance at any time is reasonable. However, they also recognize some lead time is needed to review all State laws in the degree of detail necessary to make determinations of compliance. Therefore, States will be notified of the Agencies' preliminary reviews by March 28, 1986, and March 28, 1987, and of their final determinations by May 30, 1986 and May 30, 1987. Any State that has been notified of compliance in 1986 will not again be notified in 1987, provided its statute remains unchanged. Should any State found not to be in compliance subsequently change its laws or regulations such that it feels it is in compliance, that state may submit substantiating documentation at any time.

Every effort will be made to work closely with States that have apparent compliance problems in order that they will have adequate opportunity to comply with the rule before the withholding of any funds is required to take place.

Regulatory Evaluation

The agencies have determined that this rulemaking should be classified as significant under the Department's regulatory policies and procedures. The Agencies have not prepared a regulatory evaluation because the regulatory impact is not greater than $100 million. In addition, any economic impact that may occur is not attributable to this regulation, but will be instead the result of the Federal statute and of State decisions on whether to conform with the Federal Statute. The Agencies have determined that since this rule will not have an annual impact of $100 million on the economy, it is not a major rule within the meaning of Executive Order 12291.

Regulatory Flexibility Act

The Texas Alcoholic Beverage Commission requested that the Agencies prepare a Regulatory Flexibility Analysis pursuant to the Regulatory Flexibility Act (Public Law 98–354). The Agencies, however, certify that this rulemaking action will not have a significant economic impact on a substantial number of small entities. Any economic impact on liquor stores or other establishments will be the result of State decisions on whether to enact statutes that conform with the Federal statute. Such decisions are not mandated by this regulation. Therefore, preparation of a Regulatory Flexibility analysis is not necessary.

List of Subjects in 23 CFR Part 1208

Alcohol, Highway safety.

In consideration of the foregoing, a new Part 1208 is added to Title 23 of the Code of Federal Regulations to read as follows:

PART 1208—NATIONAL MINIMUM DRINKING AGE

Sec.

Authority: 23 U.S.C. 158

§ 1208.1 Scope.

This part prescribes the requirements necessary to implement 23 U.S.C. 158, which establishes the National Minimum Drinking Age.

§ 1208.2 Purpose.

The purpose of this part is to clarify the provisions which a State must have incorporated into its laws in order to prevent the withholding of Federal-aid highway funds for noncompliance with the National Minimum Drinking Age.

§ 1208.3 Definitions.

As used in this part:

"Alcoholic beverage" means beer, distilled spirits and wine containing one-half of one percent or more of alcohol by volume. Beer includes, but is not limited to, ale, lager, porter, stout, sake, and other similar fermented beverages brewed or produced from malt, wholly or in part or from any substitute therefor. Distilled spirits include alcohol, ethanol or spirits or wine in any form, including all dilutions and mixtures thereof from whatever process produced.

"Public possession" means the possession of any alcoholic beverage for any reason, including consumption on any street or highway or in any public place or in any place open to the public (including a club which is *de facto* open to the public). The term does not apply to the possession of alcohol for an established religious purpose; when accompanied by a parent, spouse or legal guardian age 21 or older; for medical purposes when prescribed or administered by a licensed physician, pharmacist, dentist, nurse, hospital or medical institution; in private clubs or establishments; or to the sale, handling, transport, or service in dispensing of any alcoholic beverage pursuant to lawful employment of a person under the age of twenty-one years by a duly licensed manufacturer, wholesaler, or retailer of alcoholic beverages.

"Purchase" means to acquire by the payment of money or other consideration.

§ 1208.4 Adoption of National Minimum Drinking Age.

(a) The Secretary shall withhold five percent of the amount required to be apportioned to any State under each of sections 104(b)(1), 104(b)(2), 104(b)(5) and 104(b)(6) of title 23 of the United States Code on the first day of the fiscal year succeeding the fiscal year beginning after September 30, 1985, in which the purchase or public possession in such State of any alcoholic beverage by a person who is less than twenty-one years of age is lawful.

(b) The Secretary shall withhold ten percent of the amount required to be apportioned to any State under each of

sections 104(b)(1), 104(b)(2), 104(b)(5) and 104(b)(6) of title 23 of the United States Code on the first day of the fiscal year succeeding the second fiscal year beginning after September 30, 1985, in which the purchase or public possession in such State of any alcoholic beverage by a person who is less than twenty-one years of age is lawful.

§ 1208.5 Apportionment of withheld funds.

Funds withheld pursuant to § 1208.4 shall be apportioned to a State, subject to the availability of such funds under 23 U.S.C. 118(b), if such State makes unlawful the purchase and public possession of any alcoholic beverage by a person who is less than twenty-one years of age.

§ 1208.6 Notification of compliance.

(a) Each State will be notified by certified mail of NHTSA's and FHWA's preliminary review of its statutes for compliance or non-compliance with 23 U.S.C. 158 for fiscal year 1987 by March 28, 1986. States with apparent compliance problems for fiscal year 1987 will be notified of NHTSA's and FHWA's preliminary review of their statutes for compliance or non-compliance for fiscal year 1988 by March 28, 1987.

(b) If NHTSA and FHWA initially find the State has apparent compliance problems, the notice shall state the reasons for those problems and shall inform the State that it may, within 30 days of its receipt of the notification, submit documentation showing why it is in compliance. Such documentation shall be submitted to the Director, Office of Alcohol and State Programs, NHTSA, 400 Seventh Street, S.W., Washington, D.C. 20590.

(c) Each State will be notified by certified mail of NHTSA's and FHWA's final determination of the State's compliance or non-compliance with 23 U.S.C. 158 for fiscal year 1987 by May 30, 1986. States found in non-compliance for fiscal year 1987 will be notified of NHTSA's and FHWA's final determination of compliance or non-compliance for fiscal year 1988 by May 30, 1987.

Issued on: March 24, 1986.

Diane K. Steed,

National Highway Traffic Safety Administrator.

R.A. Barnhart,

Federal Highway Administrator.

[FR Doc. 86-6576 Filed 3-24-86; 4:00 pm]

BILLING CODE 4910-59-M

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1 and 602

[T.D. 8068]

Income Taxes; Stock Acquisitions; Temporary Regulations Under Section 338(h)(10) of the Internal Revenue Code of 1954 and Extension of Time To Make Certain Elections

Correction

In the issue of Thursday, March 13, 1986, on page 8671 in the second column, a correction to FR Doc. 86-60 appeared. Make the following changes in correction 2c. In the third line, "5" should read "7" and in the third and fourth lines, the section symbol should have been a dollar sign.

BILLING CODE 1505-01-M

DEPARTMENT OF THE INTERIOR

Minerals Management Service

30 CFR Part 252

Outer Continental Shelf (OCS) Oil and Gas Information Program

AGENCY: Minerals Management Service, Interior.

ACTION: Final rule.

SUMMARY: This rule amends the definition of "area adjacent to a State" to deem the States of New York and Rhode Island adjacent to the North Atlantic Planning Area even though the States do not physically border that particular planning area.

EFFECTIVE DATE: April 25, 1986.

FOR FURTHER INFORMATION CONTACT: David A. Schuenke; Chief, Rules, Orders, and Standards Branch; Offshore Rules and Operations Division; Minerals Management Service; 12203 Sunrise Valley Drive; Mail Stop 646; Reston, Virginia 22091; Telephone (703) 860-7918 or (FTS) 928-7918.

SUPPLEMENTARY INFORMATION: Section 26 of the Outer Continental Shelf Lands Act (OCSLA) permits the Governor of any affected State to designate an official to inspect any privileged data and information received by the Department of the Interior (DOI) regarding activity adjacent to the State. The information is used to evaluate any impacts on the State caused by the offshore activity. The OCSLA does not define the phrase "area adjacent to a State"; therefore, the rules were amended effective April 13, 1984 (published March 22, 1984, 49 FR 10666), to deem a State adjacent to an OCS planning area for the purpose of inspection of privileged data and information within the planning area if the State borders on any portion of the planning area. The 1984 definition also deemed the Navarin Basin Planning Area as adjacent to the State of Alaska even though it does not physically border on Alaska because Alaska is the first State landward of the planning area.

Comments were received in response to the 1984 solicitation and in separate communications to DOI that certain States would be affected by activity in planning areas on which they do not border and, therefore, would not be permitted to inspect data and information from those areas under the 1984 rule. It is anticipated that Rhode Island will be used as an onshore support area for activities in the North Atlantic Planning Area and would be affected, and New York would be affected because of tankering into New York harbor. Therefore, on October 24, 1985 (50 FR 43256), the Minerals Management Service (MMS) proposed to deem them adjacent to the North Atlantic Planning Area as well as the Mid-Atlantic Planning Area on which they do border.

Comments

Three timely comments were received in response to the notice of proposed rulemaking. Two were from the regulated industry, and one was from an affected State

Difference Between Proposed and Final rule

There is no difference between the proposed rule and the final rule.

Discussion of Comments

The commenters represented opposite views. The industry commenters disagreed with the inclusion of the two States into the definition of area adjacent while the State agreed. The industry expressed the opinion that the provisions of the OCSLA were designed to protect the confidentiality of proprietary and privileged data and information with very circumscribed methods under which they could be disseminated. While DOI agrees that such data and information should only be disseminated under protective conditions, States that might be affected by offshore activities need to be apprised of those activities. States need to be able to prepare for onshore impacts on the community and on public services. The States' need to know and

BILL SHEFFIELD
GOVERNOR

069

STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

January 21, 1985

The Honorable Don Bennett
President of the Senate
Alaska State Legislature
Pouch V
Juneau, AK 99811

Dear Senator Bennett:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill relating to the licensing and regulation of the sale and distribution of alcoholic beverages.

This bill, which was requested by the Alcoholic Beverage Control Board, includes mostly technical, housekeeping amendments to AS 04.11, "Licensing," and a technical amendment to AS 04.16, "Regulation of Sales and Distribution." The most substantive of the amendments made by this bill are at sec. 2 and sec. 12.

Section 2 of the bill increases from 30 days to 90 days the minimum number of days for which all businesses with liquor licenses must operate each year. Businesses that do not operate for the minimum period are denied license renewal unless the premises are under construction or cannot be operated for another reason that is not the fault of the owner.

Section 12 of the bill amends the definition of the term "established village" to allow for ready determination of the boundaries of such a village. Before 1983, these boundaries were determined by drawing a circle, with a five-mile radius, around a U.S. post office. That provision was deleted as part of an extensive revision to the definition in 1983, and under present law there is no clear way of determining village boundaries. The attached bill restores the five-mile-radius method of determining the boundaries, and also makes provision for villages that do not have a U.S. post office. Several provisions of AS 04 cannot be adequately implemented in the absence of readily determinable village boundaries. These provisions include: (1) AS 04.11.480, under which a village council may "protest" the issuance of a liquor license inside the

sb 69

village; (2) AS 04.11.400, under which the number of licenses that may be issued inside a village is based upon the size of the population residing inside the village; and (3) AS 04.11.490 -- 04.11.502, under which established villages may, on the approval of a majority of residents within the village, exercise a "local option" restricting or prohibiting the sale or importation of alcohol inside the village and within a fixed distance beyond the "perimeter" of the village. The selection of five miles as the length of the radius is based on previous law. The substitution of any other reasonable distance would also resolve the problems this section of the bill is intended to resolve.

Section 1 of the attached bill deletes from AS 04.11.240(b) the requirement that requests for special events permits be received by the board 10 days before the event. The 10-day requirement is often impossible to meet and is unnecessary.

Section 9 of the bill amends AS 04.11.506(b)(1) to give the board the option of using certified mail rather than registered mail to notify all package stores in the state of the results of local option elections under AS 04.11.496. The present requirement is too costly and unnecessary.

The other amendments in the bill are more technical in nature and either add or remove cross references to other sections of AS 04.11 and 04.16; eliminate inconsistencies between sections (such as between AS 04.11.330(a) [denial of license renewal] and AS 04.11.320(a) [denial of initial license]); or eliminate unnecessary, confusing, or repetitive language (such as in AS 04.11.500(c), in which the deleted language is covered by AS 04.11.500(b)).

I join with the board in urging passage of this bill.

Sincerely,

Bill Sheffield

Bill Sheffield
Governor

4/1

HOUSE
COMMITTEE REPORT

(7)

JUDICIARY

Date referred: 2/11/86

FURTHER REFERRALS: FINANCE

DATE: _____

The COMMUNITY AND REGIONAL AFFAIRS Committee has considered CSSB 69(Jud)am

"An Act relating to licensing and regulation of the sale and distribution of alcoholic beverages; and providing for an effective date."

and recommends:

[ ] do pass

[ ] do not pass

[ ] do pass with attached amendment(s)

[ ] no recommendation

[X] replace with HCS CSSB 69(c&RA) [X] same title

[ ] new title

and recommends do pass

[ ] further referral to the _____ Committee

and attaches: [ ] letter of intent
[ ] first fiscal note
[ ] new fiscal note
[ ] zero fiscal note

SIGNING DO PASS:

Bob E. Gill

Peter Johnson

F. Kay Wallis

Peter Johnson

Chairman

SIGNING OTHER RECOMMENDATIONS:

No rec

A.V. Marrou Do Not Pass

(UNREASONABLE RESTRICTION OF FREE TRADE)

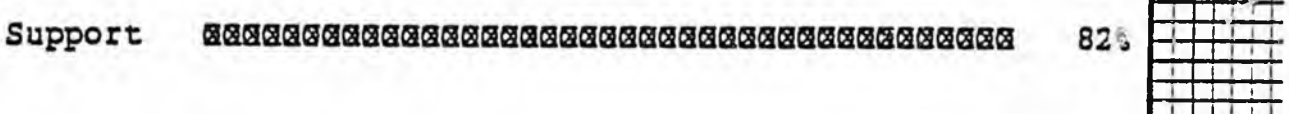
Ross E. Gill No Rec

QUESTION:

Would you support or oppose a five percent Municipal sales tax on alconolic beverages if the money went to the Department of Public Safety for increased police and fire protection, and alcohol and drug abuse services?"

(ANCHORAGE ONLY)

RESPONSE:



DITTMAN RESEARCH CORPORATION/APRIL 1986

ALASKA COUNCIL ON PREVENTTION OF
ALCOHOL & DRUG ABUSE
APRIL 1986

	DO NEED	DO NOT NEED
Work for:		
Federal government.....	97%	3%
State government.....	93%	7%
Local government.....	92%	5%
Private sector.....	88%	10%
Not working.....	94%	6%
Time in Community:		
Less than 1 year.....	97%	3%
1 - 4 years.....	89%	11%
5 - 9 years.....	94%	6%
10 - 14 years.....	92%	5%
15 years plus.....	88%	10%

Within the Anchorage Municipality, support is widespread for a 5% sales tax if the proceeds are dedicated to increased police and fire protection and alconol and drug abuse services...

"Would you support or oppose a five percent Municipal sales tax on alcoholic beverages if the money went to the Department of Public Safety for increased police and fire protection, and alcohol and drug abuse services?"

Support.....82%
Oppose.....18%

Demographically, support is greatest among women, Democrats, younger people, and local government workers, while length of residency would not appear to be a factor...

	SUPPORT	OPPOSE
Region:		
Anchorage.....	82%	18%
Political Party:		
Democrat.....	88%	10%
Republican.....	76%	24%
Libertarian.....	100%	
Non-partisan.....	76%	24%
Not registered.....	91%	9%

ALASKA COUNCIL ON PREVENTION
OF ALCOHOL & DRUG ABUSE
APRIL 1986

	SUPPORT	OPPOSE
Sex:		
Male	75%	24%
Female	90%	10%
Age:		
18 - 24 years	87%	13%
25 - 40 years	86%	13%
41 - 55 years	77%	23%
56 years plus	70%	30%
Income:		
0 - $20,000	83%	17%
$20,000 - $40,000	82%	18%
$40,000 - $60,000	78%	20%
$60,000 plus	88%	12%
Work for:		
Federal government	71%	29%
State government	82%	18%
Local government	100%	
Private sector	82%	17%
Not working	84%	16%
Time in Community:		
Less than 1 year	97%	3%
1 - 4 years	89%	11%
5 - 9 years	94%	6%
10 - 14 years	92%	5%
15 years plus	88%	10%

****

Overall, there is a clear feeling of need related to alcohol and drug abuse prevention services on a statewide basis, and in Anchorage, the need is demonstrated by strong support for a 5% tax to provide increased funding.

19 general wholesale licenses in the State

3 gross below $100,000

2 gross between $100,000 and $150,000

1 grosses between $150,000 and $200,000

1 grosses between $500,000 and $600,000

12 gross over 1 million dollars.

3 gross between 1 and 2 million dollars

2 gross betwwen 5 and 6 million dollars

1 grosses between 7 and 8 million dollars

1 grosses between 9 and 10 million dollars

1 grosses between 11 and 12 million dollars

1 grosses between 14 and 15 million dollars

1 grosses between 17 and 18 million dollars

1 grosses between 20 and 21 million dollars

1 grosses between 42 and 43 million dollars

7 wholesale malt beverage and wine licenses

2 gross between $20,000 and $50,000

4 gross between $100,000 and $150,000

1 grosses between $200,000 and $400,000

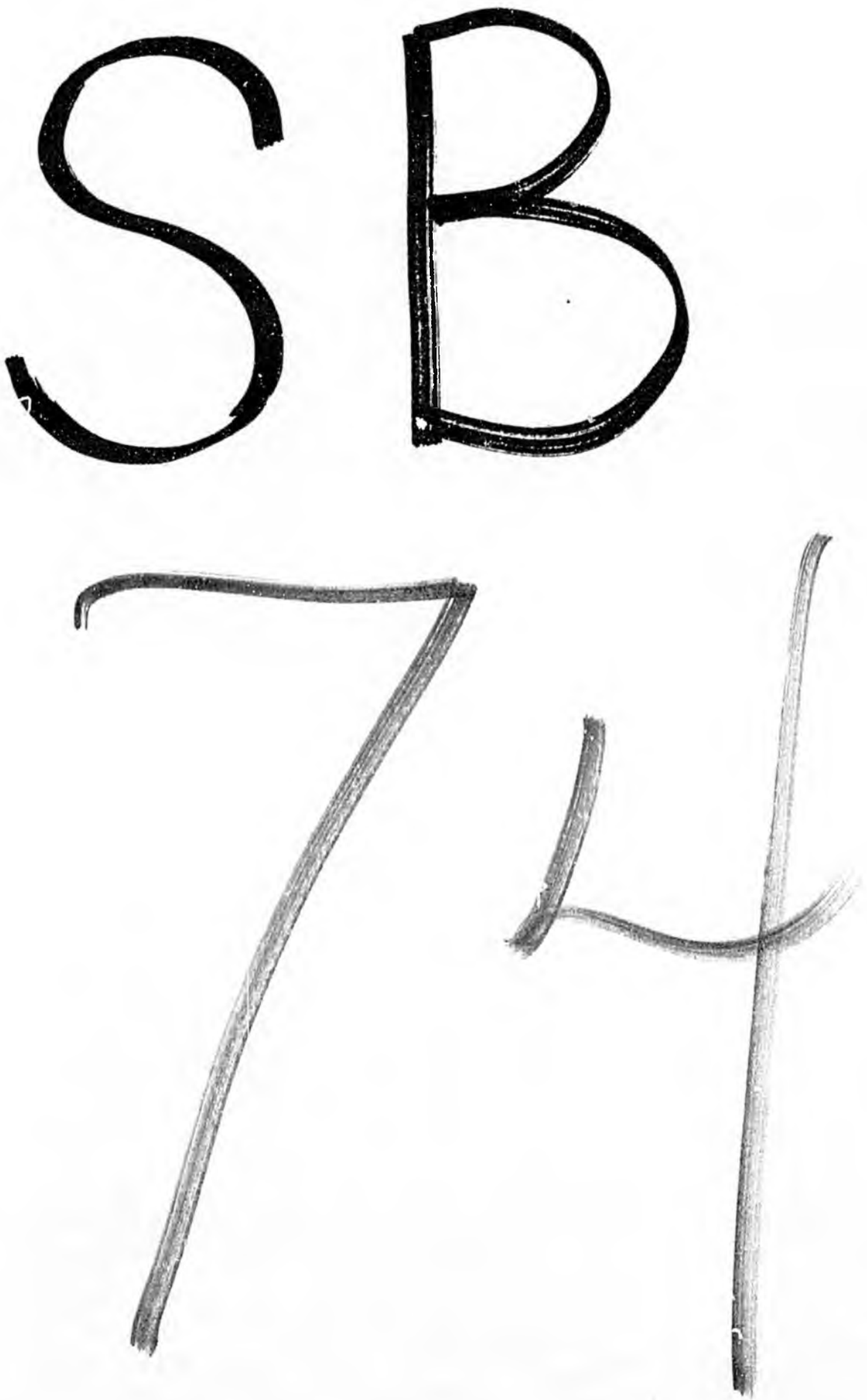
RECORDS CERTIFICATION

I, the undersigned, an employee of the State of Alaska, do hereby certify that the microfilm images on this microform are accurate reproductions of the original records of the State of Alaska as accumulated during the regular course of business, and that it is the established policy and practice of this State to microfilm its records and to dispose of the original records after microfilm reproductions have been made.

James O. Smith
Signature of Camera Operator

7/25/89
Date

02-519 (REV 8/78)


SB
774

STATE OF ALASKA
THE LEGISLATURE

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

LEGISLATIVE AFFAIRS AGENCY

LEGISLATIVE REFERENCE LIBRARY

May, 1986

Copies of minutes listed below were originally included in this file. The minutes are available on the STAIRS date base CM 14. In order to save space copies of minutes have not been left in the files.

Jeanie Henry

House Judiciary	5-11-85	1:00 pm
" "	5-12-85	3:00 pm

Edwards ✓ -

AMENDMENT #1

Offered in the HOUSE By Clocksin

TO: CSSB 74(Jud) am

Page 1, lines 9 - 22, delete all material.

Page 1, line 23, delete "* Sec. 2." and insert "* Section 1."

Page 2, lines 5 - 7, delete all material.

Renumber remaining bill section accordingly.

Edwards.

A M E N D M E N T

Offered in the HOUSE By Sund

TO: CSSB 74(Jud) am

Page 1, after line 8, insert new bill sections to read:

"* Section 1. AS 28.15.181(c) is amended to read:

(c) A court convicting a person of an offense described in (a)(5) or (8) of this section arising out of the operation of a motor vehicle for which a driver's license is required shall revoke that person's driver's license. The revocation may be concurrent with or consecutive to an administrative revocation under AS 28.15.165. The court may not, except as provided in (e) and (g) of this section, grant limited license privileges for the following periods:

(1) not less than 90 days if, within the preceding 10 years, the person has not previously been convicted of an offense

(A) described in (a)(5) or (8) of this section; or

(B) under a law or ordinance in another jurisdiction with elements substantially similar to an offense described in (a)(5) or (8) of this section;

(2) not less than one year if, within the preceding 10 years, the person has been previously convicted of one offense

(A) described in (a)(5) or (8) of this section; or

(B) under a law or ordinance in another jurisdiction with elements substantially similar to an offense described in (a)(5) or (8) of this section;

(3) not less than 10 years if, within the preceding 10 years, the person has been previously convicted of more than one of the following offenses or has more than once been previously convicted of one of the following offenses:

(A) an offense described in (a)(5) or (8) of this section; or

(B) an offense under another law or ordinance in another jurisdiction with elements substantially similar to an offense described in (a)(5) or (8) of this section.

* Sec. 2. AS 28.15.181 is amended by adding a new subsection to read:

(g) A court revoking a driver's license under (c) of this section, or sustaining the action of the department under AS 28.15.165(c), may grant limited license privileges during the period of revocation in which the person provides satisfactory evidence of a work-related need and abstinence from the use of alcohol and drugs, if the court first determines that

(1) the person has, since the date of arrest in the case before the court, enrolled in and successfully completed an alcohol or drug treatment program specifically recommended in the case by the state office of alcoholism and drug abuse or its representative agency;

(2) consistent with the opinion of the director of the person's alcohol or drug treatment program, a limitation under AS 28.15.201 can be placed on the license that will permit the person to earn a livelihood without excessive danger to the public;

(3) the person's ability to earn a livelihood will be

severely impaired without the limited license;

(4) the person intends to abstain from the use of alcohol and nonprescribed controlled substances described in AS 11.71;

(5) the person intends to satisfactorily participate in a drug and alconol monitoring program that

(A) is approved by the office of alcoholism and drug abuse or its representative agency; and

(B) represents to the court that it will require the person to submit to a testing schedule approved by the court and will immediately report to the court the person's failure to abstain or to submit to a required test."

Page 1, line 9:

Delete "* Section 1." and insert "* Sec. 3."

Renumber succeeding bill sections accordingly.

Commentary: CSSB 74 (Jud)

Section 1 of CSSB 74 (Jud) transfers administrative and regulatory authority for the state's alcohol breath testing program from the Department of Health and Social Services (DHSS) to the Department of Public Safety (DPS). This transfer would improve the administration of Alaska's breath testing program by eliminating unnecessary confusion, expense, and duplication of effort, and would help to ensure that the state's breath test program is conducted in the most efficient and legally defensible manner.

Transfer of the breath test program to the DPS was one of the secondary recommendations made by the Governor's Task Force on Drunk Driving in January of this year. In the interests of consolidation of resources and administrative efficiency, both DPS Commissioner Robert Sundberg and DHSS Commissioner John Pugh have recommended that the transfer be made. This change is also supported by the Department of Law.

Under existing law, DHSS possesses regulatory authority for the state's breath test program. Much of the responsibility for the actual administration and day-to-day functioning of the program rests with DPS, however. Historically, DPS has purchased and distributed the breath test instruments, repaired the instruments, purchased and distributed necessary supplies, and conducted the training of breath test operators and supervisor-instructors. This defacto division of functions between the two departments has led to some unfortunate difficulties in the administration of the present program. Since there is no one office or agency with clear administrative oversight authority over the breath test program, some uncertainty about areas of responsibility and lines of authority has developed. Occasionally some necessary duties have "fallen between the cracks." As a direct result of this lack of a centralized oversight authority prosecutors have had to dismiss numerous DWI prosecutions and have had to defend scores of DWI cases on appeal.

Alaska's first "implied consent" statute (requiring all persons suspected of drunken driving to consent to a chemical test to determine blood alcohol content) was adopted in 1969. AS 28.35.033(d) made the Department of Health and Social Services (at that time called the Department of Health and Welfare) responsible for approving "satisfactory techniques, methods, and standards of training" for analysis of the alcohol content of a DWI arrestee's breath sample. This responsibility was given to DHSS at that time because there was no other state agency which had

either the facilities or the technical expertise to perform this function.

In 1978 a state forensic crime laboratory was established in the Department of Public Safety to provide essential scientific support services to local law enforcement officers and state troopers throughout the state. Since that time the state crime laboratory has performed a steadily increasing array of scientific functions and analyses. The laboratory now employs four full time chemists who routinely analyze suspected controlled substances and have testified in numerous criminal trials. In recent years laboratory personnel have begun conducting analyses of diverse crime scene evidence, including physical evidence in arson cases, urine and blood testing, foot print comparisons, and some limited fiber, trace, and serological analyses.

In 1983 and 1984 the legislature appropriated 5½ million dollars to DPS to build and equip a sophisticated new crime laboratory facility in Anchorage. Construction of that facility is underway, and is expected to be complete by September of this year. The new laboratory will provide expanded testing capabilities in the areas of forensic chemistry, serology, toxicology, firearms identification, and trace evidence identification.

In light of this expansion of the public safety laboratory, it makes administrative and public policy sense to transfer the responsibility for administration of Alaska's alcohol breath testing program to the DPS laboratory. Transfer of this function to the DPS laboratory would be consistent with the national trend in DWI law enforcement and breath testing. Currently, over half of the states in the country have placed full administrative responsibility for their alcohol breath test programs with their departments of public safety. Several of these states, such as Texas, Minnesota, New York, New Jersey, and Michigan, have sophisticated programs which serve as models for other states. In only about ¼ of the states does administrative oversight authority for the state breath test program remain in the department of public health.

Section 3 of CSSB 74 (Jud) provides that existing breath test regulations will remain in effect until new regulations are adopted by the Department of Public Safety, and section 4 establishes a special effective date of July 1, 1985. This special effective date has been included because it will be necessary to transfer some resources from DHSS to DPS when the bill takes effect. July 1st is the beginning of the new fiscal year, and a convenient point at which to transfer positions.

[illegible]
[illegible] LAKESIDE APTS
[illegible]

ALASCOM

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UNITED STATES POSTAL SERVICE
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REPRESENTATIVE [illegible] MILLER
CHAIRMAN HOUSE JUDICIARY COMMITTEE
POUCH V JUNEAU AK 99811

18 1985

DEAR REPRESENTATIVE MILLER:

AS A [illegible] ADMINISTRATOR, I WISH TO [illegible]
[illegible]
[illegible].

I [illegible] SYSTEM [illegible]
[illegible]
[illegible] COMMITTEE. I [illegible] SUPPORT [illegible]
[illegible].
[illegible]
[illegible].

SINCERELY

[illegible] DAVIS
DIRECTOR
ALASKA DEPARTMENT OF PUBLIC SAFETY
[illegible]

I CONFIRM IT. PLEASE DELIVER.
[illegible]

[illegible] 10:56 EST
[illegible]

[illegible]
REPRESENTATIVE [illegible] MILLER
CHAIRMAN, HOUSE JUDICIARY COMMITTEE
POUCH V JUNEAU ALASKA 99811
[illegible]

NNNN

MGMCOMP MGM

TO REPLY BY MAILGRAM, SEE INSTRUCTIONS ON REVERSE SIDE.

Form L-01342 1601557

Sec. 28.35.030. Operating a vehicle, aircraft or watercraft while intoxicated. (a) A person commits the crime of driving while intoxicated if the person operates or drives a motor vehicle or operates an aircraft or a watercraft

(1) while under the influence of intoxicating liquor, or any controlled substance listed in AS 11.71.140 — 11.71.190;

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

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

(b) Driving while intoxicated is a class A misdemeanor.

(c) Upon conviction under this section the court shall impose a minimum sentence of imprisonment of not less than 72 consecutive hours and a fine of not less than $250 if the person has not been previously convicted in this or another jurisdiction of driving while intoxicated under this or another law or ordinance with substantially similar elements or refusal to submit to a chemical test under AS 28.35.032 or another law or ordinance with substantially similar elements. Upon conviction under this section the court shall impose a minimum sentence of imprisonment of not less than 20 consecutive days and a fine of not less than $500 if, within the preceding 10 years, the person has been previously convicted once in this or another jurisdiction of driving while intoxicated under this or another law or ordinance with substantially similar elements or refusal to submit to a chemical test under AS 28.35.032 or another law or ordinance with substantially similar elements. Upon conviction under this section the court shall impose a minimum sentence of imprisonment of not less than 30 consecutive days and a fine of not less than $1,000 if, within the preceding 10 years, the person has been previously convicted in this or another jurisdiction of more than one of the following offenses or has more than once been previously convicted of one of the following offenses: (1) driving while intoxicated under this or another law or ordinance with substantially similar elements; (2) refusal to submit to a chemical test under AS 28.35.032 or another law or ordinance with substantially similar elements. The execution of sentence may not be suspended nor may probation be granted except on condition that the minimum imprisonment provided in this section is served. Imposition of sentence may not be suspended. In addition, if the offense involved driving a motor vehicle for which a driver's license is required, the person's driver's license shall be revoked in accordance with AS 28.15.181 and the vehicle used in commission of the offense may be forfeited under AS 28.35.036. In addition, the court shall order, and a person convicted under this section shall undertake, for a term specified by the court, that program of

alcohol education or rehabilitation that the court, after consideration of any information compiled under (d) of this section, finds appropriate.

(d) Except as prohibited by federal law or regulation, every provider of treatment programs to which persons are ordered under (c) 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 (c) 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 (c) of this section.

(e) A person who is sentenced to imprisonment for 72 consecutive hours upon a first conviction under (c) 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.

(f) For purposes of this section, convictions for both driving while intoxicated and for refusal to submit to a chemical test of breath under AS 28.35.031(a), if arising out of a single transaction and a single arrest, are considered one previous conviction.

(g) In this section,

(1) "operate an aircraft" means to use, navigate, pilot, or taxi an aircraft in the airspace over this state, or upon the land or water inside this state;

(2) "operate a watercraft" means to navigate or use a vessel used or capable of being used as a means of transportation on water for recreational or commercial purposes on all waters, fresh or salt, inland or coastal, inside the territorial limits or under the jurisdiction of the state. (§ 50-5-3 ACLA 1949; am § 1 ch 107 SLA 1955; am § 1 ch 121 SLA 1967; am § 45 ch 32 SLA 1971; am § 4 ch 74 SLA 1974; am §§ 2, 3 ch 152 SLA 1978; am § 28 ch 94 SLA 1980; am § 10 ch 129 SLA 1980; am § 21 ch 45 SLA 1982; am §§ 13 — 15 ch 117 SLA 1982; am §§ 13 — 15 ch 77 SLA 1983)

Revisor's notes. — In 1984, former subsection (f) was redesignated as present subsection (g) and former subsection (g) was redesignated as present subsection (f).

Cross references. — For sentences for class A misdemeanors, see AS 12.55.035(b)(3) and 12.55.135(a).

Effect of amendments. — The first 1980 amendment, in subsection (a) as it existed prior to the second 1980 amendment, deleted "under AS 11.05.150" from the end of the third sentence and substituted "AS 28.15.181" for "AS 28.15.210(c)" in the fourth sentence.

The second 1980 amendment rewrote the section.

The first 1982 amendment substituted "or any controlled substance listed in AS 11.71.140 — 11.71.190" for "depressant, hallucinogenic, stimulant or narcotic drug as defined in AS 17.10.230(13) and AS 17.12.150(3)" in subsection (a)(1).

Section 2 of the bill addresses a problem which has surfaced as a result of the Court of Appeals decision in Bass v. Municipality of Anchorage, Op. No. 429 (Alaska Ct. App., December 14, 1984). Bass overturned his car in a one-car accident in September of 1983. When the police arrived at the scene of the accident Bass appeared to be extremely intoxicated. Bass had been injured in the accident, and so was immediately taken to a hospital. Because Bass was required to remain at the hospital for several hours, he could not be taken to the police station for a breath test.

After consulting with the municipal prosecutor, the investigating officer asked Bass to provide a sample of his blood for analysis to determine alcohol content. Bass refused, but a blood sample was taken over his objections. The sample was taken under the authority of AS 28.35.-035(b), which allows a blood alcohol test to be administered to a DWI suspect who is "unconscious or otherwise in a condition rendering that person incapable" of refusing a breath test.

The appellate court held that Bass, who was injured and hospitalized but not unconscious, did not fall under the "narrow language" of AS 28.35.035 and therefore suppressed the result of the defendant's blood alcohol test (0.243). The amendment to AS 28.35.035(b) contained in section 2 of this bill would plug this "loophole" and allow collection of essential evidence of the blood alcohol level of a DWI suspect who cannot be transported to the police station for a breath test.

purposes of statute or ordinance making it a criminal offense to operate an automobile while in that condition, 142 ALR 555.

What is a "motor vehicle" within statutes making it an offense to drive while intoxicated, 66 ALR2d 1146.

Right to trial by jury in criminal prosecution for driving while intoxicated or similar offense, 16 ALR3d 1373.

Driving under the influence, or when addicted to the use, of drugs as criminal offense, 17 ALR3d 815.

Applicability, to operation of motor vehicle on private property, of legislation making drunken driving a criminal offense, 29 ALR3d 938.

What amounts to violation of drunken driving statute in officer's "presence" or "view" so as to permit warrantless arrest, 74 ALR3d 1138.

What constitutes driving, operating, or being in control of motor vehicle for purposes of driving while intoxicated statute or ordinance, 93 ALR3d 7.

Reckless driving as lesser included offense of driving while intoxicated or similar charge, 10 ALR4th 1252.

Denial of accused's request for initial contact with attorney — drunk driving cases, 18 ALR4th 705.

Sec. 28.35.031. Implied consent. (a) A person who operates or drives a motor vehicle in this state or who operates an aircraft as defined in AS 28.35.030(g)(1) or who operates a watercraft as defined by AS 28.35.030 (g)(2) shall be considered to have given consent to a chemical test or tests of the person's breath for the purpose of determining the alcoholic content of the person's blood or breath if lawfully arrested for an offense arising out of acts alleged to have been committed while the person was operating or driving a motor vehicle or operating an aircraft or a watercraft while intoxicated. The test or tests shall be administered at the direction of a law enforcement officer who has reasonable grounds to believe that the person was operating or driving a motor vehicle or operating an aircraft or a watercraft in this state while intoxicated.

(b) A person who operates or drives a motor vehicle in this state shall be considered to have given consent to a preliminary breath test for the purpose of determining the alcoholic content of the person's blood or breath. A law enforcement officer may administer a preliminary breath test at the scene of the incident if the officer has reasonable grounds to believe that a person's ability to operate a motor vehicle is impaired by the ingestion of alcoholic beverages and that the person

(1) was driving a motor vehicle that is involved in an accident; or

(2) committed a moving traffic violation.

(c) Before administering a preliminary breath test under (b) of this section, the officer shall advise the person that refusal may be used against the person in a civil or criminal action arising out of the incident and that refusal is an infraction. If the person refuses to submit to the test, the test shall not be administered.

(d) The result of the test under (b) of this section may be used by the law enforcement officer to determine whether the driver should be arrested.

(e) Refusal to submit to a preliminary breath test at the request of a law enforcement officer is an infraction.

(f) If a driver is arrested, the provisions of (a) of this section apply. The preliminary breath test authorized in this section is in addition to any tests authorized under (a) of this section. (§ 1 ch 83 SLA 1969; am § 11 ch 129 SLA 1980; am § 16 ch 117 SLA 1982; am § 16 ch 77 SLA 1983)

Effect of amendments. — The 1980 amendment, in present subsection (a), inserted "or breath" in the first sentence and substituted "intoxicated" for "under the influence of intoxicating liquor" in the first and second sentences.

The 1982 amendment, in present subsection (a), inserted the language beginning "or who operates an aircraft" and ending "described by AS 28.35.030 (f)(2)" in the first sentence and inserted "or operating an aircraft or a watercraft" in the first and second sentences.

The 1983 amendment added subsections (b), (c), (d), (e), and (f).

NOTES TO DECISIONS

Editor's notes. — Anchorage v. Geber, Sup. Ct. Op. No. 1824 (File Nos. 4016, 4037, 3827, 4046), 592 P.2d 1187 (1979), and other cases cited in the notes below, were decided prior to the enactment of AS 28.35.035, which authorizes the administration of a chemical test without consent in certain circumstances to determine the amount of alcohol in breath or blood.

Consent to breathalyzer test when driver operates motor vehicle in state. — It is clear from this section that a driver consents to take the breathalyzer test when he operates a motor vehicle in the State of Alaska. State v. Nease, Superior Court, 1st Jud. Dist., Cr. No. 72-23 (1972).

Analysis of this section and AS 28.35.032 demonstrates the legislature's intention that drivers be considered to have consented to a chemical test for determining the alcohol content of their blood and that refusal on the driver's part to submit to such a test will trigger certain specified consequences. Wirz v. State, Sup. Ct. Op. No. 1593 (File No. 3516), 577 P.2d 227 (1978).

As the supreme court analyzes the legislature's intent in enacting this section and AS 28.35.032, the sections provide that the operator of a motor vehicle in Alaska has consented to chemical tests of his blood's alcohol content and that after the arrested operator refuses to take the chemical test, he must be advised of the consequences flowing from his contemplated refusal. The arrestee must be permitted to reconsider his refusal in light of that information. Wirz v. State, Sup. Ct. Op. No. 1593 (File No. 3516), 577 P.2d 227 (1978).

Application of case law. — Municipality of Anchorage v. Serrano, Ct. App. Op. No. 115 (File No. 6275), 649 P.2d 256 (1982), and Cooley v. Municipality of Anchorage, Ct. App. Op. No. 114 (File Nos. 5859, 6112, 6151), 649 P.2d 251 (1982), apply to only three categories of cases: (1) cases formally joined with those decided in Serrano and Cooley; (2) cases in which suppression had already been ordered on or before August 6, 1982; and (3) cases in which breathalyzer tests were administered after August 6, 1982. State v. Lamb, Ct. App. Op. No. 119 (File No. 7071), 649 P.2d 971 (1982).

Statutes do not explicitly grant right to refuse test. — Neither this section nor AS 28.35.032(a) explicitly grants or recognizes a right on the part of an arrestee to refuse to take a breathalyzer test. Wirz v. State, Sup. Ct. Op. No. 1593 (File No. 3516), 577 P.2d 227 (1978).

One required to take a breathalyzer test under this section does not have any statutory or constitutional right to refuse to take it. Pears v. State, Ct. App. Op. No. 309 (File No. 6783), 672 P.2d 903 (1983).

Nor do they impose a duty upon the arresting officer to advise the driver that he has the right to refuse to take the test. Wirz v. State, Sup. Ct. Op. No. 1593 (File No. 3516), 577 P.2d 227 (1978).

Neither this section nor AS 28.35.032 requires that the arrested operator be advised he has the right to refuse to take a chemical test for the purpose of determining the alcohol content of his blood. Wirz v. State, Sup. Ct. Op. No. 1593 (File No. 3516), 577 P.2d 227 (1978).

One required to take a breathalyzer test under this section does not have to be

v. State, Sup. Ct. Op. No. 1254 (File No. 2761), 548 P.2d 376 (1976).

Rule announced generally to have prospective effect but also to have partial retroactive effect. — See Lauderdale v. State, Sup. Ct. Op. No. 1254 (File No. 2761), 548 P.2d 376 (1976).

Applied in Nelson v. State, Ct. App. Op. No. 129 (File No. 6222), 650 P.2d 426 (1982).

Quoted in Simpson v. Municipality of Anchorage, Ct. App. Op. No. 57 (File Nos. 4945, 4946, 5288), 635 P.2d 1197 (1981); Lundquist v. Department of Pub. Safety, Sup. Ct. Op. No. 2763 (File No. 7075), 674 P.2d 780 (1983); Jensen v. State, Ct. App. Op. No. 271 (File No. 7488), 667 P.2d 188 (1983).

Cited in Coleman v. State, Ct. App. Op. No. 229 (File No. 7215), 658 P.2d 1364 (1983).

Collateral references. — 60 C.J.S., Motor Vehicles, § 164.16.

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

Sec. 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 under AS 28.35.031(a), after being advised by the officer that the refusal will, if that person was arrested while operating or driving a motor vehicle for which a driver's license is required, result in the denial or revocation of the license or nonresident privilege to drive, that the refusal may be used against the person in a civil or criminal action or proceeding arising out of an act alleged to have been committed by the person while operating or driving a motor vehicle or operating an aircraft or a watercraft while intoxicated, and that the refusal is a misdemeanor, a chemical test shall not be given, except as provided by AS 28.35.035.

(b) *[Repealed, § 25 ch 77 SLA 1983.]*

(c) *[Repealed, § 25 ch 77 SLA 1983.]*

(d) *[Repealed, § 25 ch 77 SLA 1983.]*

(e) The refusal of a person to submit to a chemical test of 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 or operating an aircraft or watercraft while intoxicated.

(f) Refusal to submit to the chemical test of breath authorized by AS 28.35.031(a) is a class A misdemeanor.

(g) Upon conviction of a person under this section, the court shall impose a minimum sentence of imprisonment of not less than 72 consecutive hours and a fine of not less than $250 if the person has not been previously convicted in this or another jurisdiction of driving while intoxicated under AS 28.35.030 or another law or ordinance with substantially similar elements or refusal to submit to a chemical test under this section or another law or ordinance with substantially similar elements. Upon conviction under this section the court shall impose a minimum sentence of imprisonment of not less than 20 consecutive days and a fine of not less than $500 if, within the preceding

10 years, the person has been previously convicted once in this or another jurisdiction of driving while intoxicated under AS 28.35.030 or another law or ordinance with substantially similar elements or refusal to submit to a chemical test under this section or another law or ordinance with substantially similar elements. Upon conviction under this section the court shall impose a minimum sentence of imprisonment of not less than 30 consecutive days and a fine of not less than $1,000 if, within the previous 10 years, the person has been previously convicted in this or another jurisdiction of more than one of the following offenses or has more than once been previously convicted of one of the following offenses: (1) driving while intoxicated under AS 28.35.030 or another law or ordinance with substantially similar elements; (2) refusal to submit to a chemical test under this section or another law or ordinance with substantially similar elements. The execution of sentence may not be suspended nor may probation be granted except on condition that the minimum imprisonment provided in this section is served. Imposition of sentence may not be suspended. If the offense involved driving a motor vehicle for which a driver's license is required, the person's driver's license shall be revoked under AS 28.15.181. In addition, the court shall order, and a person convicted under this section shall undertake, for a term specified by the court, that program of alcohol education or rehabilitation that the court, after consideration of any information compiled under (h) of this section, finds appropriate. The sentence imposed by the court under this subsection shall run consecutively with any other sentence of imprisonment imposed on the committed person.

(h) 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 pre-sentence report for the use of the court in sentencing a person convicted under (g) of this section.

(i) 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.

(j) For purposes of this section, convictions for both driving while intoxicated and for refusal to submit to a chemical test of breath under

AS 28.35.031(a), if arising out of a single transaction and a single arrest, are considered one previous conviction. (§ 1 ch 83 SLA 1969; am § 28 ch 71 SLA 1972; am § 12 ch 129 SLA 1980; am § 17 ch 117 SLA 1982; am §§ 17 — 20, 25 ch 77 SLA 1983)

Effect of amendments. — The 1980 amendment, in subsection (a), inserted the language beginning "and that the refusal may" and ending "under the influence of intoxicating liquor", in subsection (b), inserted "or driving" in the first sentence and in paragraph (1) and "or operate" in the first sentence, in subsection (c), inserted "or drive" in the last sentence, and in subsection (d) inserted "or driving" and substituted "denial of" for "denial or." The amendment also added subsection (e).

The 1982 amendment, in subsection (a), inserted "if that person was arrested while operating or driving a motor vehicle," substituted "license or nonresident privilege to drive" for "license and" and "motor vehicle or operating an aircraft or a watercraft while intoxicated, and that the refusal is a misdemeanor" for "vehicle under the influence of intoxicating liquor," and added "except as provided by AS 28.35.035" to the end; in subsection (b), substituted "intoxicated" for "under the influence of intoxicating liquor" in paragraph (1) and inserted "or nonresident privilege to drive and that the refusal is a misdemeanor" in paragraph (2); in subsection (d), deleted "within two years previous to his arrest" following "AS 28.35.031" and inserted "or of refusal to submit to a chemical test of breath under this section" and "or revocation"; in subsection (e), substituted "motor vehicle or operating an aircraft or watercraft while intoxicated" for "vehicle under the influence of intoxicating liquor" at the end; and added subsections (f)-(i).

The 1983 amendment, in subsection (a), modified the internal reference following "submit to a chemical test," inserted "for which a driver's license is required" following "driving a motor vehicle," and deleted "suspension," preceding "denial or revocation"; repealed subsections (b), (c), and (d); in subsection (f), revised the internal reference; rewrote subsection (g); and added subsection (j).

Legislative history reports. — For report on ch. 71, SLA 1972 (HCSSB 38[illegible] am H), see 1972 House Journal, p. 898.

NOTES TO DECISIONS

Editor's notes. — Anchorage v. Geber, Sup. Ct. Op. No. 1824 (File Nos. 4016, 4037, 3827, 4046), 592 P.2d 1187 (1979), cited in the notes below, was decided prior to the enactment of AS 28.35.035, which authorizes the administration of a chemical test without consent in certain circumstances to determine the amount of alcohol in breath or blood.

Purpose of section. — This section, which directs the Department of Public Safety to suspend or revoke the licenses of those who refuse to submit to a breath-analysis, is merely an internal operating procedure that provides a sanction for those persons who refuse to submit to the test in order to compel submission to a test that provides evidence of intoxication; and although this section may have the effect of keeping the roads safe from drunk drivers by suspending the licenses of those who refuse the test, this was not an intended statutory purpose. Lundquist v. Department of Pub. Safety, Sup. Ct. Op. No. 2763 (File No. 7075), 674 P.2d 780 (1983).

The Implied Consent Statute was intended to provide an exclusive method for obtaining direct evidence of a suspect's blood alcohol content, absent his or her express consent to the use of some other form of testing. Anchorage v. Geber, Sup. Ct. Op. No. 1824 (File Nos. 4016, 4037, 3827, 4046), 592 P.2d 1187 (1979).

Constitutionality of subsection (f). — Subsection (f) of this section is reasonably related to the public purpose of obtaining evidence of drunk driving. Jensen v. State, Ct. App. Op. No. 271 (File No. 7488), 667 P.2d 188 (1983).

Subsection (f) of this section is sufficiently analogous to a statute punishing concealment of evidence such as AS 11.56.610 to satisfy substantive due process. Jensen v. State, Ct. App. Op. No. 271 (File No. 7488), 667 P.2d 188 (1983).

Subsection (f) of this section does not violate the prohibition against cruel and unusual punishment since imposing punishment for refusal to take a breathalyzer test serves the legitimate public goals of deterring such conduct and ensuring that such conduct will not benefit a defendant and the penalty does not result in subjecting a defendant to punishment out of proportion to the conduct in which he has engaged. Jensen v. State, Ct. App. Op. No. 271 (File No. 7488), 667 P.2d 188 (1983).

Punishing a refusal to take a breathalyzer test bears a fair and substantial relation to the legitimate governmental objective of gathering evidence of possible drunken driving and does not deny equal protection. Svedlund v. Municipality of Anchorage, Ct. App. Op. No. 301 (File No. 7581), 671 P.2d 378 (1983), construing municipal provision nearly identical to subsection (f) of this section.

Miranda rights. — Defendant's constitutional rights were not violated by not informing him of his Miranda rights prior to asking him to take a breathalyzer exam. Svedlund v. Municipality of Anchorage, Ct. App. Op. No. 301 (File No. 7581), 671 P.2d 378 (1983), construing municipal law.

No other chemical test allowed after breath test refused. — The express language of subsection (a), coupled with the legislative history of the Implied Consent Statute, leads to the conclusion that in enacting the Implied Consent Statute the legislature intended that once a breath test had been refused no other chemical test would be allowed. Anchorage v. Geber, Sup. Ct. Op. No. 1824 (File Nos. 4016, 4037, 3827, 4046), 592 P.2d 1187 (1979).

The language of this section 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. Anchorage v. Geber, Sup. Ct. Op. No. 1824 (File Nos. 4016, 4037, 3827, 4046), 592 P.2d 1187 (1979).

In prosecuting a charge of operating a motor vehicle while under the influence of intoxicating liquor (now driving while intoxicated), law enforcement officials cannot utilize the results of a blood alcohol test, when the blood used in performing the test was extracted from the accused against his or her will, after refusal to submit to a breathalyzer examination. Anchorage v. Geber, Sup. Ct. Op. No. 1824 (File Nos. 4016, 4037, 3827, 4046), 592 P.2d 1187 (1979).

"Chemical test" means any chemical test. — The language of subsection (a) stating that after refusal to submit to a test of the breath, "a chemical test shall not be given," means any chemical test, be it of the breath, blood, urine or otherwise, and not just a chemical test of the breath. Anchorage v. Geber, Sup. Ct. Op. No. 1824 (File Nos. 4016, 4037, 3827, 4046), 592 P.2d 1187 (1979).

There is no due process requirement that a person be advised of the right to refuse to submit to a breathalyzer examination. Palmer v. State, Sup. Ct. Op. No. 2002 (File No. 3651), 604 P.2d 1106 (1979).

While subsection (a) of this section prohibits the giving of any other blood test when the person arrested refuses to submit to a breathalyzer examination, it does not otherwise grant or recognize a right on the part of the arrested person to refuse that examination. Palmer v. State, Sup. Ct. Op. No. 2002 (File No. 3651), 604 P.2d 1106 (1979).

Right to refuse test is only to protect against forcible submission to test. — The right of refusal contained in subsection (a) is to only protect an individual from being physically forced to submit to the test. State v. Nease, Superior Court, 1st Jud. Dist., Cr. No. 72-23 (1972).

There is no right involved requiring assistance of counsel. — The right to refuse to take the breathalyzer test under subsection (a) is only to protect a person from being physically forced to submit to the test, and since there is implied consent to the test under AS 28.35.031, there is no right that can be knowingly waived which would require the assistance of counsel. State v. Nease, Superior Court, 1st Jud. Dist., Cr. No. 72-23 (1972).

The results of the breathalyzer test are nontestimonial in nature, therefore the provisions of Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A.L.R.3d 974 (1966) do not apply. State v. Nease, Superior Court, 1st Jud. Dist., Cr. No. 72-23 (1972).

Where a driver operated a motor vehicle in the State of Alaska and was lawfully arrested for operating a motor vehicle while under the influence of intoxicating liquor, such driver had no right to refuse taking the breathalyzer test, and such a test does not violate an individual's right against self-incrimination. Therefore, the absence of counsel is immaterial since the driver had no rights which counsel might have assisted him in asserting. State v. Nease, Superior Court, 1st Jud. Dist., Cr. No. 72-23 (1972).

Right to counsel before breathalyzer test. — When a person is arrested for operating a motor vehicle in violation of state or local drunken driving ordinances,

Duty to public. — This section does not create a duty by the Department of Public Safety toward the public which, if breached, can form the basis of a civil action for negligence against the department. Lundquist v. Department of Pub. Safety, Sup. Ct. Op. No. 2763 (File No. 7075), 674 P.2d 780 (1983).

Limitation for purposes other than DWI prosecutions. — AS 28.35.032(a) cannot be restricted to apply solely to driving while intoxicated prosecutions, and to the extent that the statute, by providing that "a chemical test shall not be given" following a breathalyzer refusal, affirmatively limits the manner in which evidence of intoxication may be obtained, its limitation must apply with equal force in all prosecutions "arising out of acts alleged to have been committed while the defendant was operating or driving a motor vehicle while intoxicated." Penn v. State, Ct. App. Op. No. 345 (File No. 6174), 664 P.2d 169 (1983).

Former subsection (b) construed. — See Graham v. State, Sup. Ct. Op. No. 2403 (File No. 4092), 633 P.2d 211 (1981).

Cited in Wilson v. State, Ct. App. Op. No. 356 (File Nos. 7523, 7526, 7833), P.2d (1984).

Collateral references. — 7A Am. Jur. 2d, Automobiles and Highway Traffic, §§ 122 to 132, 141.

60 C.J.S., Motor Vehicles, § 164.16; 61A C.J.S., Motor Vehicles, § 593(1).

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

Admissibility in criminal case of evidence that accused refused to submit to scientific test to determine amount of alcohol in system, 87 ALR2d 370, 26 ALR4th 1112.

Suspension or revocation of driver's license for refusal to take sobriety test, 88 ALR2d 1064.

Request before submitting to chemical sobriety test to communicate with counsel as refusal to take test, 97 ALR3d 852.

Request for prior administration of additional test as constituting refusal to submit to chemical sobriety test under implied consent law, 98 ALR3d 572.

Sec. 28.35.033. Chemical analysis of blood. (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 or operating an aircraft or a watercraft while intoxicated, 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 the person's blood, or 0.05 grams or less of alcohol per 210 liters of the person's breath, it shall be presumed that the person was not 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 the person's blood, or in excess of 0.05 grams but less than 0.10 grams of alcohol per 210 liters of the person's breath, that fact does not give rise to any presumption that the person was or was not under the influence of intoxicating liquor, but that fact may be considered with other competent evidence in determining whether the person was under the influence of intoxicating liquor.

(3) *[Repealed, § 13 ch 129 SLA 1980.]*

(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 the person's blood, or 0.10 grams or more of alcohol per 210 liters of the person's breath, it shall be presumed that the person was under the influence of intoxicating liquor.

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

(c) The provisions of (a) of this section 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.

(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.

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

(f) Upon the request of the person who submits to a chemical test at the request of a law enforcement officer, full information concerning the test, including the results of it, shall be made available to the person or the person's attorney. (§ 1 ch 83 SLA 1969; am § 6 ch 104 SLA 1971; am § 13 ch 129 SLA 1980; am §§ 18 — 20 ch 117 SLA 1982)

Effect of amendments. — The 1980 amendment, in subsection (a), inserted "or driving" and "or breath" in the introductory paragraph, deleted "as shown by chemical analysis of the person's breath" following "time alleged" in the introductory paragraph, inserted the language beginning "or 50 milligrams" and ending "210 liters of his breath" in paragraph (1), inserted the language beginning "or in excess of 50" and ending "210 liters of his breath" in paragraph (2), and repealed paragraph (3), which read: "If there was 0.10 percent or more by weight of alcohol in the person's blood, it shall be presumed that the person was under the influence of intoxicating liquor."

Discretion of district court properly exercised in requiring production of ampoules used in breathalyzer test. — See Lauderdale v. State, Sup. Ct. Op. No. 1254 (File No. 2761), 548 P.2d 376 (1976).

District court was correct in suppressing results of breathalyzer test where state unable to produce ampoules used in test. — See Lauderdale v. State, Sup. Ct. Op. No. 1254 (File No. 2761), 548 P.2d 376 (1976).

Rule announced generally to have prospective effect but also to have partial retroactive effect. — See Lauderdale v. State, Sup. Ct. Op. No. 1254 (File No. 2761), 548 P.2d 376 (1976).

This section contains no requirement that advice of the right to obtain an independent blood alcohol test be given, and it is not required by any provision of the state or federal constitution. Palmer v. State, Sup. Ct. Op. No. 2002 (File No. 3651), 604 P.2d 1106 (1979).

Cross-examination improperly restricted. — In a prosecution for operation of a motor vehicle while intoxicated, the court improperly restricted defendant's cross-examination of the person who administered the breathalyzer test when it sustained the state's objection to defendant's line of inquiry, where defendant was seeking through his attempted questioning to raise doubts in the jury's mind regarding the reliability of the test. Keel v. State, Sup. Ct. Op. No. 2063 (File No. 4408), 609 P.2d 555 (1980).

Presumption in breathalyzer result. — Under the wording of this section, the breathalyzer result is clearly viewed as the presumptive equivalent of the amount of alcohol in the person's blood "at the time alleged"; in other words, at the time that the offense was committed, not just when the breathalyzer examination was administered. Doyle v. State, Ct. App. Op. No. 43 (File No. 5115), 633 P.2d 306 (1981).

Substantial compliance with regulations. — Under subsection (d), even if the state does not strictly comply with the regulations, it can still show that it has substantially complied with the regulations in order to establish a sufficient foundation to admit the breathalyzer examination. Ahsogaek v. State, Ct. App. Op. No. 147 (File No. 6601), 652 P.2d 505 (1982).

Results of the breathalyzer test were admissible even though the records for the breathalyzer instrument showed that it had been calibrated at an interval of 61 days instead of within 60 days as required by 7 AAC § 30.050. Ahsogaek v. State, Ct. App. Op. No. 147 (File No. 6601), 652 P.2d 505 (1982).

Breathalyzer packet admissible as evidence. — The admission of the breathalyzer packet as a foundation for the introduction of breathalyzer evidence in a drunk driving case is the introduction of a public record of factual findings recorded in the regular course of official business, made independently and well in advance of any particular prosecution, and does not violate the defendant's right to confrontation under the 6th amendment. State v. Huggins, Ct. App. Op. No. 127 (File Nos. 6535, 6595), 659 P.2d 613 (1982).

Documents referred to as a breathalyzer packet were admissible under the public records exception to the hearsay rule. State v. Huggins, Ct. App. Op. No. 127 (File Nos. 6535, 6595), 659 P.2d 613 (1982).

Effect of alcohol consumption after accident is jury question. — The issue of whether and to what extent defendant's consumption of alcohol after the accident but before a breathalyzer examination affected his breathalyzer result was a question which was properly left for the jury. Doyle v. State, Ct. App. Op. No. 43 (File No. 5115), 633 P.2d 306 (1981).

Applied in Catlett v. State, Sup. Ct. Op. No. 1752 (File No. 3213), 585 P.2d 553 (1978); Erickson v. Municipality of Anchorage, Ct. App. Op. No. 238 (File No. 7058), 662 P.2d 963 (1983).

Quoted in Godwin v. State, Sup. Ct. Op. No. 1276 (File No. 2793), 554 P.2d 453 (1976); Simpson v. Municipality of Anchorage, Ct. App. Op. No. 57 (File Nos. 4945, 4946, 5288), 635 P.2d 1197 (1981); Cooley v. Municipality of Anchorage, Ct. App. Op. No. 114 (File Nos. 5859, 6112, 6151), 649 P.2d 251 (1982).

Stated in Wren v. State, Sup. Ct. Op. No. 1598 (File No. 3156), 577 P.2d 235 (1978); Lyle v. State, Sup. Ct. Op. No. 1944 (File No. 3162), 600 P.2d 1357 (1979); O'Leary v. State, Sup. Ct. Op. No. 2003 (File No. 3466), 604 P.2d 1099 (1979); Municipality of Anchorage v. Serrano, Ct. App. Op. No. 115 (File Nos. 6447, 6724, 6725), 649 P.2d 256 (1982).

Cited in Sullivan v. Municipality of Anchorage, Sup. Ct. Op. No. 1617 (File No. 3357), 577 P.2d 1070 (1978); Reeves v. State, Sup. Ct. Op. No. 1924 (File No. 3161), 599 P.2d 727 (1979); Nygren v. State, Sup. Ct. Op. No. 2164 (File No. 4219), 616 P.2d 20 (1980); Graham v. State, Sup. Ct. Op. No. 2403 (File No. 4092), 633 P.2d 211 (1981); Morris v. Farley Enterp., Inc., Sup. Ct. Op. No. 2636 (File Nos. 6013, 6042), 661 P.2d 167 (1983); Pena v. State, Ct. App. Op. No. 245 (File No. 6174), 664 P.2d 169 (1983).

Collateral references. — 7A Am. Jur. 2d, Automobiles and Highway Traffic, §§ 361, 375 to 380.

61A C.J.S., Motor Vehicles, § 633(2).

Admissibility and weight of evidence based on scientific test for intoxication or presence of alcohol in system, 127 ALR 1513, 159 ALR 209.

Degree or nature of intoxication for purposes of statute making it a criminal offense to operate an automobile while in that condition, 142 ALR 555.

Validity, construction, and application of legislation creating presumption of intoxication or the like from presence of specified percentage of alcohol in blood, 46 ALR2d 1176, 16 ALR3d 748.

Qualification as expert to testify as to findings or results of scientific test to determine alcoholic content of blood, 77 ALR2d 971.

Constitutional right of one charged with intoxication to summon a physician at accused's own expense to make test for alcohol in system, 78 ALR2d 905.

Admissibility in criminal case of blood alcohol test where blood was taken from unconscious driver, 72 ALR3d 325.

Necessity and sufficiency of proof that tests of blood alcohol concentration were conducted in conformance with prescribed methods, 96 ALR3d 745.

Admissibility in criminal case of blood alcohol test where blood was taken despite defendant's objection or refusal to submit to test, 14 ALR4th 690.

Destruction of ampoule used in alcohol breath test as warranting suppression of result of test, 19 ALR4th 509.

Sec. 28.35.034. Surrender of license or permit. A person whose license or permit to operate or drive a motor vehicle has been revoked under AS 28.15.165 or AS 28.15.181 shall surrender the license or permit to the department on receipt of notice of the revocation. After the period of revocation has expired, the person may make application for a new license as provided by law. (§ 1 ch 83 SLA 1969; am § 14 ch 129 SLA 1980; am § 21 ch 77 SLA 1983)

Effect of amendments. — The 1980 amendment inserted "operate or" in the first sentence.

The 1983 amendment in the first sentence deleted "suspended or" preceding "revoked," revised the internal reference, and made a minor word change; deleted the former second sentence, regarding a three-month suspension of an operator's license; and in the last sentence substituted "period of revocation" for "three months' period."

NOTES TO DECISIONS

Quoted in Graham v. State, Sup. Ct. Op. No. 2403 (File No. 4092), 633 P.2d 211 (1981).

Cited in Anchorage v. Geber, Sup. Ct. Op. No. 1824 (File Nos. 4016, 4037, 3827, 4046), 592 P.2d 1187 (1979); Pena v. State, Ct. App. Op. No. 245 (File No. 6174), 664 P.2d 169 (1983).

Collateral references. — 7A Am. Jur. 2d, Automobiles and Highway Traffic, § 141.

60 C.J.S., Motor Vehicles, § 164.24.

Sec. 28.35.035. Administration of chemical tests without consent. (a) If a person is under arrest for an offense arising out of acts alleged to have been committed while the person was driving a motor vehicle while intoxicated, and that arrest results from an accident that causes death or physical injury to another person, a chemical test may be administered without the consent of the person arrested to determine the amount of alcohol in that person's breath or blood.

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

(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. (§ 21 ch 117 SLA 1982; am § 22 ch 77 SLA 1983)

Effect of amendments. — The 1983 amendment in subsection (a) substituted "an offense . . . driving a motor vehicle" for "the crime of driving" and in subsection (b) revised the internal reference in the present first sentence and added the present second sentence.

NOTES TO DECISIONS

Stated in Copelin v. State, Sup. Ct. Op. No. 2617 (File Nos. 5453, 5708), 259 P.2d 1206 (1983); Pena v. State, Ct. App. Op. No. 245 (File No. 6174), 664 P.2d 169 (1983).

Sec. 28.35.036. Forfeiture of motor vehicle. (a) After conviction of an offense under AS 28.35.030 or AS 28.35.032 involving a motor vehicle of a type for which a driver's license is required, the state may move the court to order the forfeiture of the motor vehicle involved in the commission of the offense if the convicted person has been previously convicted in this or another jurisdiction of more than one of the following offenses or has more than once been previously convicted of one of the following offenses:

(1) driving while intoxicated under AS 28.35.030 or another law or ordinance with substantially similar elements; or

(2) refusal to submit to a chemical test under AS 28.35.032 or another law or ordinance with substantially similar elements.

(b) For purposes of this section, convictions for both driving while intoxicated and for refusal to submit to a chemical test of breath under AS 28.35.031(a), if arising out of a single transaction and a single arrest, are considered one previous conviction.

(c) Upon receipt of a motion for forfeiture, the court shall schedule a hearing on the matter and shall notify the state and the convicted

person of the time and place set for the hearing. At the hearing, the court may order the forfeiture of the motor vehicle if the court, sitting without a jury, determines by a preponderance of the evidence that the forfeiture of the motor vehicle will serve one or more of the following purposes:

(1) deterrence of the convicted person from the commission of future offenses under AS 28.35.030;

(2) protection of the safety and welfare of the public;

(3) deterrence of other persons who are potential offenders under AS 28.35.030; or

(4) expression of public condemnation of the serious or aggravated nature of the convicted person's conduct.

(d) Upon forfeiture of a motor vehicle the court shall require the surrender of the registration and certificate of title of that motor vehicle. The registration and certificate of title shall be delivered to the department.

(e) If not released under AS 28.35.037, a motor vehicle forfeited under this section may be disposed of at the discretion of the department. (§ 23 ch 77 SLA 1983)

Sec. 28.35.037. Remission of forfeitures. (a) Upon receiving notice from the court of the time and place set for a hearing under AS 28.35.036, the state shall provide to every person who has an ascertainable ownership or security interest in the motor vehicle written notice that includes

(1) a description of the motor vehicle;

(2) the time and place of the forfeiture hearing;

(3) the legal authority under which the motor vehicle may be forfeited;

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

(b) At the hearing, a person who claims an ownership or security interest in the motor vehicle must establish by a preponderance of the evidence that

(1) the petitioner has an interest in the motor vehicle acquired in good faith;

(2) a person other than the petitioner was convicted of the offense that resulted in the forfeiture; and

(3) before parting with the motor vehicle, the petitioner did not know or have reasonable cause to believe that it would be used in the commission of an offense.

(c) If a person satisfies the requirements of (b) of this section, the court shall order that an amount equal to the value of the petitioner's interest in the motor vehicle be paid to the petitioner or the court shall order that the motor vehicle be released to the petitioner together with title to the motor vehicle.

...moot.[1] The terms of the March ... settlement agreement resolved ... over the Alatna Street easement ... agreed to waive any claim of int... to the Alatna Street easement, ... or alternate access to its property ... easement along Pioneer Drive. ... agreement, Gavora contracted ... rights it had to the easement. ... eal No. 5934, challenging Gavora's ... to the Alatna Street easement.

[3] Furthermore, Gavora signed ... sfaction of Judgment" on March ... The general rule is that a payment ... action operates as a discharge ... ent.[2]

[O]nce a judgment has been ... fully satisfied according to its ... becomes extinguished, a dead thing ... is no longer a judgment in the ... a judgment fixes and finally estab... the rights and obligations of the par... thereto.

Mitchell v. Lindly, 351 P.2d 1063, ... Okla.1960), quoting *Sweeney v. Block Bo... Lumber Co.*, 4 La.App. 244 (La.App. ...

[4] The judgment which fixed and ... blished Gavora's rights in the Alat... reet easement is now "extinguished," ... ad thing." To preclude this extinguis... dgment from operating in any future ... n between the parties, as res judicata, ... adopt the federal practice which is to ... verse or vacate the judgment below and ... mand the case, with directions to dismiss ... complaint. *United States v. Munsing... ear, Inc.*, 340 U.S. 36, 39, 71 S.Ct. 104, ... 95 L.Ed. 36, 41 (1950).[4] This practice ...

1. Even though the parties have not raised the issue of mootness themselves, this court has the power to dismiss moot appeals. *Johnson v. State*, 491 P.2d 759, 761 (Alaska 1971).

2. *See* 47 Am.Jur.2d *Judgments* § 992 (1969).

See generally Comment, *Disposition of Moot Cases by the United States Supreme Court*, 23 U.Chi.L.Rev. 77 (1955). *See also Paul v. Mesa Depots, Inc.*, 62 Cal.2d 129, 41 Cal.Rptr. 468, 396 P.2d 924 (1964); *Moon v. Investment Bd.*, 102 Idaho 131, 627 P.2d 310 (1981); *People ex rel. Cowdelman v. Weaver*, 50 Ill.2d 237, 278 N.E.2d 81 (1972); *Rio Arriba County Bd. of Ed. v. Martinez*, 74 N.M. 674, 397 P.2d 471 (1964); *Merhish v. H.A. Folsom & Assoc.*, 646 P.2d 731 (Utah 1982); *Board of Trustees v. Bell*, 662 P.2d 410 (Wyo.1983).

intended to "prevent a judgment, unreviewable because of mootness, from spawning any legal consequences."[5]

Accordingly, without commenting on the merits, we vacate the judgment which restored the Alatna Street easement to Gavora and remand the case to the superior court, with directions to dismiss Gavora's complaint.

In view of this ruling, the companion appeal, No. S-251, challenging the superior court's denial of Valdez's Civil Rule 60(b) Motion to Amend or Vacate the Judgment, is also moot, since the city has now obtained the relief sought by that motion. The appeal, therefore, will be dismissed.

The judgment in Appeal No. 5934 is VACATED and the case REMANDED, with directions. Appeal No. S-251 is DISMISSED.

Michael BASS, Appellant,

v.

MUNICIPALITY OF ANCHORAGE, Appellee.

No. A-273.

Court of Appeals of Alaska.

Dec. 14, 1984.

Defendant was convicted in the District Court, Third Judicial District, Anchorage, John D. Mason, J., of driving while intoxicated, and he appealed. The Court of Appeals, Coats, J., held that statute, which authorized police to forcibly take blood alcohol test where person was unconscious or otherwise in condition rendering that person incapable of refusal, did not authorize police to initiate blood alcohol test on defendant who had been in car accident and who needed immediate medical attention since defendant definitely refused to consent to blood test.

Reversed.

1. Criminal Law ⇐388

Statute, which authorizes police to forcibly take blood alcohol test where person is unconscious or otherwise in condition rendering that person incapable of refusal, should not be read broadly, since statute was intended to apply only to situations where blood alcohol test could be conducted without any violence, such as where an arrestee is unconscious. AS 28.35.035(b).

2. Criminal Law ⇐388

Statute, which authorized police to forcibly take blood alcohol test where person was unconscious or otherwise in condition rendering that person incapable of refusal, did not authorize police to initiate blood alcohol test on defendant who had been in car accident and who needed immediate medical attention since defendant definitely refused to consent to blood test and resisted the test, even if defendant was physically incapable of taking breath test and even though it was not practical to offer breath test. AS 28.35.035(b).

3. Criminal Law ⇐1169.1(7)

Erroneous admission of defendant's blood test result was not harmless error since evidence could have been critical evidence for charge of driving while intoxicated.

John T. Maltas, Asst. Public Defender, Kenai, Sen K. Tan, Asst. Public Defender, Anchorage, and Dana Fabe, Public Defender, Anchorage, for appellant.

5. *Munsingwear*, 340 U.S. at 41, 71 S.Ct. at 107, 95 L.Ed. at 42.

Shelley K. Owens and James A. Crary, Asst. Municipal Prosecutors, Allen M. Bailey, Municipal Prosecutor, and Jerry Wertzbaugher, Municipal Atty., Anchorage, for appellee.

Before BRYNER, C.J., and COATS and SINGLETON, JJ.

OPINION

COATS, Judge.

Anchorage Police Officer Baker was dispatched to a single-car, injury accident in the area of Spenard Road at 3:00 a.m. on September 3, 1983. Baker saw Michael Bass being escorted back to the scene of the accident by an airport security officer. Bass's vehicle was overturned. Baker was told by a security officer that Bass had been in an accident, had fled the scene on foot, and had been pursued by the officer.

Baker asked Bass what happened and was told that Bass's vehicle went out of control and rolled when Bass swerved to avoid hitting another car. Baker observed the strong odor of alcohol, slurred speech and unsteadiness as Bass stood in the area. According to Baker, Bass was also extremely belligerent and noncooperative with paramedic rescue personnel at the scene of the accident.

Baker observed that Bass needed immediate medical attention. He noted that Bass had a hand injury which would require stitching and had hit his chest hard against the steering wheel. Bass was taken to Providence Hospital for treatment.

Baker arrived at the hospital emergency room at about 3:45 a.m. Upon arrival, he spoke to hospital personnel and learned that Bass had a lacerated hand which would require stitching and a severely bruised chest, with possibly some broken ribs. Baker was told that the hospital personnel did not anticipate knowing whether Bass would actually be admitted for at least two hours.

Baker then apparently called the municipal prosecutor, Allen Bailey, and explained that (1) because of the severity of Bass's injuries, Baker did not know when Bass's treatment would be completed; (2) even if Bass was not admitted, it would be several hours before a breathalyzer test could be done, and (3) based on what Baker was told about Bass's chest injuries, Baker was unsure whether Bass could blow into a breathalyzer sufficiently to give an accurate reading. Bailey advised Baker to obtain a blood sample.

When Baker informed Bass that blood would be drawn, Bass objected. He said that he was not going to have his blood drawn and started to walk out of the hospital. Baker then placed Bass under arrest, handcuffed him, and placed him back on the gurney. Officer Honnen assisted Baker in restraining Bass, putting Bass in a wristlock to assist Baker in handcuffing Bass. Honnen and Baker then restrained Bass, holding him onto the gurney while the laboratory technician drew blood from him. Baker admitted that there was some bleeding from Bass's lacerations at this time and that Baker was aware that Bass might have had cracked ribs, but that they restrained him as gently as they could.

Bass, on the other hand, indicated that the officers forced him down on the floor, dragged him over to the gurney, and inflicted so much pain that he could not move. He said he protested throughout the procedure. After the blood was drawn, Bass was issued a citation and the officers left him at the hospital. Bass's blood alcohol level was 0.243.

Both parties agree that Bass was conscious and alert at the time of the extraction of his blood. He actually walked into the hospital himself. He understood what was going on around him and verbalized his refusal to consent to the extraction.

On January 1, 1984, Bass moved to suppress the results of the blood-alcohol test. He based his motion upon the ground that he was not unconscious or otherwise in a condition rendering him incapable of refusing which would permit the nonconsensual extraction of his blood under AS 28.35.035(b).

District Court Judge John D. ... nied Bass's motion, making extu ... tual findings. Judge Mason inter ... 28.35.035(b), which allows non ... blood testing where a person is ... tion rendering him incapable of ... include "a person being hospita ... result of incidents that have occu ... cannot fairly be offered a bn ... test." Judge Mason refused to ... the results of the blood test. At ... trial in which the results of his ... admitted into evidence, Bass was ... of driving while intoxicated in vi ... AMC 9.28.020. Bass now appe...

Municipality of Anchorage ordinan... dress this situation. They are virtua... to the state statutes. Implied consen... 28.35.031(a) is equivalent to AMC ... which provides:

"A person who operates, drives or ... physical control of a motor vehicl... municipality or wh... operates an ... defined by AMC 9.2...020E.1 or wi... a watercraft as defined by AMC ... shall be considered to have given c... chemical test or tests of his or her ... the purpose of determining the alc... tent of his or her blood or breath ... arrested for an offense arising ... alleged to have been committed ... person was operating, driving or ... physical control of a motor vehicl... ing an aircraft or a watercraft whil... ed. The test or tests shall be admi... the direction of a law enforcem... who has reasonable ground to beli... person was operating, driving, or ... physical control of a motor vehicl... ing an aircraft or a watercraft in t... pality while intoxicated.

AS 28.35.032(a), "Refusal to submit t... test," is equivalent to AMC 9.28.02... provides:

If a person under arrest refuses th... a law enforcement officer to su... chemical test under AMC 9.28.021... ing advised by the officer that the r... if that person was arrested while o... driving a motor vehicle for which ... license is required, result in the ... revocation of the license or nonres... lege to drive, that the refusal ma... against the person in a civil or crim... or proceeding arising out of an act... have been committed by the pe... operating or driving a motor vehic... ating an aircraft or a watercraft w... cated, and that the refusal is a mis... a chemical test shall not be given, ... provided by AMC 9.28.025.

District Court Judge John D. Mason denied Bass's motion, making extensive factual findings. Judge Mason interpreted AS 28.35.035(b), which allows nonconsensual blood testing where a person is in a condition rendering him incapable of refusal, to include "a person being hospitalized as a result of incidents that have occurred" who "cannot fairly be offered a breathalyzer test." Judge Mason refused to suppress the results of the blood test. After a jury trial in which the results of his test were admitted into evidence, Bass was convicted of driving while intoxicated in violation of AMC 9.28.020. Bass now appeals to this court and argues that Judge Mason erred in not suppressing the results of the blood test. We reverse.

This case requires us to analyze the state statutes which authorize the police to initiate blood alcohol tests following an arrest for driving while intoxicated.[1] Under the state statutes, a person who drives a motor vehicle in the state implicitly consents to submit to a breath test to determine the amount of alcohol in his blood if he is lawfully arrested for driving while intoxicated. AS 28.35.031(a).[2] If one arrested for driving while intoxicated refuses to

1. Municipality of Anchorage ordinances also address this situation. They are virtually identical to the state statutes. Implied consent statute AS 28.35.031(a) is equivalent to AMC 9.28.021(A), which provides:

> A person who operates, drives or is in actual physical control of a motor vehicle within the municipality or who operates an aircraft as defined by AMC 9.28.020E.1 or who operates a watercraft as defined by AMC 9.28.020E.2 shall be considered to have given consent to a chemical test or tests of his or her breath for the purpose of determining the alcoholic content of his or her blood or breath if lawfully arrested for an offense arising out of acts alleged to have been committed while the person was operating, driving or in actual physical control of a motor vehicle or operating an aircraft or a watercraft while intoxicated. The test or tests shall be administered at the direction of a law enforcement officer who has reasonable ground to believe that the person was operating, driving, or in actual physical control of a motor vehicle or operating an aircraft or a watercraft in the municipality while intoxicated.

AS 28.35.032(a), "Refusal to submit to chemical test," is equivalent to AMC 9.28.022(A), which provides:

> If a person under arrest refuses the request of a law enforcement officer to submit to a chemical test under AMC 9.28.021A, after being advised by the officer that the refusal will, if that person was arrested while operating or driving a motor vehicle for which a driver's license is required, result in the denial or revocation of the license or nonresident privilege to drive, that the refusal may be used against the person in a civil or criminal action or proceeding arising out of an act alleged to have been committed by the person while operating or driving a motor vehicle or operating an aircraft or a watercraft while intoxicated, and that the refusal is a misdemeanor, a chemical test shall not be given, except as provided by AMC 9.28.025.

AS 28.35.035(a) and (b) have municipal code counterparts in AMC 9.28.025(A) and (B), which provide:

> A. If a person is under arrest for an offense arising out of acts alleged to have been committed while the person was driving a motor vehicle, and that arrest results from an accident that causes death or physical injury to another person, a chemical test may be administered without the consent of the person arrested to determine the amount of alcohol in that person's breath or blood.
>
> B. A person who is unconscious or otherwise in a condition rendering that person incapable of refusal is considered not to have withdrawn the consent provided under AMC 9.28.021A and AS 28.35.031(a), and a chemical test may be administered to determine the amount of alcohol in that person's breath or blood. A person who is unconscious or otherwise incapable of refusal need not be placed under arrest before a chemical test may be administered.

The motion and the arguments of both parties below, as well as the court's findings and ruling, referred to the state statutes. We thus refer to those statutes in this opinion. No party has suggested that the municipal ordinances would differ in application from the state statutes.

2. AS 28.35.031(a) provides:

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

take a blood test, after being informed of the consequences of such refusal, "a chemical test shall not be given, except as provided by AS 28.35.035." AS 28.35.032[3]. AS 28.35.035 provides in part:

Administration of chemical tests without consent.

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

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

In *Pena v. State*, 684 P.2d 864 (Alaska 1984), the supreme court held that "[t]he Implied Consent Statute provides the exclusive authority for the administration of police-initiated chemical sobriety tests to a driver arrested for acts allegedly committed while operating a motor vehicle."[4] *Id.* at 867 (footnote omitted). It therefore seems clear that the municipality can justify forcibly taking the blood sample from Bass only if the taking falls under AS 28.35.035(b).

It seems clear to us that AS 28.35.035(b) does not apply to this case. In the implied consent statutes, the legislature has gone to great lengths to avoid authorizing the police to forcibly take blood alcohol tests from defendants charged with driving while intoxicated. The legislature has, instead, provided extremely strong incentives to a defendant to take a breath test for blood alcohol by providing criminal penalties. The legislature has provided for giving breath tests without the cooperation of the defendant only in two situations. In AS 28.35.035(a), the statute provides that if a person is under arrest for driving while intoxicated and the arrest results from an accident which caused death or physical injury to another person, a chemical test of the defendant's blood alcohol may be administered without consent. The policy behind this provision seems clear. If the driving while intoxicated offense is of the most serious type, involving death or physical injury, the legislature will allow taking a blood-alcohol test without consent.

The other situation in which the legislature has authorized taking a blood-alcohol test under AS 28.35.035 is where "a person ... is unconscious or otherwise in a condition rendering that person incapable of refusal." The trial judge read this statute broadly. He found that Bass needed to be at the hospital for treatment and that the police could not give a breath test at the hospital. He also found that there was a possibility that, even if offered a breath test, the defendant would not physically be able to take it because of his injuries. He concluded that Bass was "in a ... rendering [him] incapable of refu

[1,2] We believe that, in ligh fact that the legislature has gone lengths to not authorize the polic bly take blood tests, AS 28.35.0 not be read broadly. Certainly have been easy for the legislatu that the police could forcibly take alcohol test if there were exigen stances which prevented the pol administering a breath test. Th language which the legislature cl cludes this interpretation. There fact that it was not practical to ol a breathalyzer test does not bring within AS 28.35.035(b). What doc fall within AS 28.35.035(b) is a nar of cases where the defendant i scious or otherwise incapable of ming his intent to refuse. In these police would be able to take a b without the person's contemporan sent, but without having to use an means to obtain the blood-alcohol t bote that the legislature did not s 28.35.035(b) that the police coul blood alcohol test *without consent* in AS 28.35.035(a). Rather, the le said that "a person who is uncon *otherwise in a condition incapa fusal* is considered *not to have wi the consent provided under A 031(a)*." (Emphasis supplied.) Th ture's choice of language seems to consistent with the theory that A 035(b) was intended to apply only tions where a blood-alcohol test conducted without any violence where an arrestee is unconscious. son who is unconscious is consider have withdrawn s implied conse blood-alcohol test can thus be adm under AS 28.35.035(b). This langu not seem to apply to a person i position, who definitely refused to to the blood test and resisted Under these circumstances, we that AS 28.35.035(b) did not auth police to initiate a blood-alcohol tes Bass was physically incapable of breath test. We hold that Bass w

3. AS 28.35.032(a) provides:
Refusal to submit to chemical test. (a) If a person under arrest refuses the request of a law enforcement officer to submit to a chemical test under AS 28.35.031(a), after being advised by the officer that the refusal will, if that person was arrested while operating or driving a motor vehicle for which a driver's license is required, result in the denial or revocation of the license or nonresident privilege to drive, that the refusal may be used against the person in a civil or criminal action or proceeding arising out of an act alleged to have been committed by the person while operating or driving a motor vehicle or operating an aircraft or a watercraft while intoxicated, and that the refusal is a misdemeanor, a chemical test shall not be given, except as provided by AS 28.35.035.

4. The only exception to this principle would be consent to the blood-alcohol test. Consent is not an issue in this case.

concluded that Bass was "in a condition rendering [him] incapable of refusal."

[1, 2] We believe that, in light of the fact that the legislature has gone to great lengths to not authorize the police to forcibly take blood tests, AS 28.35.035 should not be read broadly. Certainly it would have been easy for the legislature to say that the police could forcibly take a blood alcohol test if there were exigent circumstances which prevented the police from administering a breath test. The narrow language which the legislature chose precludes this interpretation. Therefore, the fact that it was not practical to offer Bass a breathalyzer test does not bring this case within AS 28.35.035(b). What does seem to fall within AS 28.35.035(b) is a narrow class of cases where the defendant is unconscious or otherwise incapable of manifesting his intent to refuse. In these cases the police would be able to take a blood test without the person's contemporaneous consent, but without having to use any violent means to obtain the blood-alcohol test. We note that the legislature did not say in AS 28.35.035(b) that the police could take a blood alcohol test *without consent* as it did in AS 28.35.035(a). Rather, the legislature said that "a person who is unconscious or *otherwise in a condition incapable of refusal* is considered *not to have withdrawn the consent provided under AS 28.35.031(a).*" (Emphasis supplied.) The legislature's choice of language seems to us to be consistent with the theory that AS 28.35.035(b) was intended to apply only to situations where a blood-alcohol test could be conducted without any violence such as where an arrestee is unconscious. A person who is unconscious is considered not to have withdrawn his implied consent and a blood-alcohol test can thus be administered under AS 28.35.035(b). This language does not seem to apply to a person in Bass's position, who definitely refused to consent to the blood test and resisted the test. Under these circumstances, we conclude that AS 28.35.035(b) did not authorize the police to initiate a blood-alcohol test, even if Bass was physically incapable of taking a breath test. We hold that Bass was not "a person who [was] unconscious or otherwise in a condition incapable of refusal" for purposes of AS 28.35.035(b). Therefore, the police should not have forced Bass to have the blood sample drawn and Judge Mason should have suppressed the evidence.

[3] The municipality argues that the evidence against Bass at trial was strong, and that admission of the blood test result was, if error, harmless. We disagree. The blood alcohol test result of 0.243 was admitted at trial and could certainly have been critical evidence for this charge of driving while intoxicated.

The conviction is REVERSED.

Ronald WILLIAMSON, Appellant,

v.

STATE of Alaska, Appellee.

No. 6950.

Court of Appeals of Alaska.

Dec. 21, 1984.

Defendant was convicted in the Superior Court, Thi d Judicial District, Anchorage, J. Justin Ripley, J., of manslaughter, as lesser included offense of second-degree murder, and two counts of tampering with physical evidence, and he appealed. The Court of Appeals, Bryner, C.J., held that: (1) trial court committed reversible error in admitting, under coconspirator's exception to hearsay rule, testimony by state witness that defendant's alleged accomplice had said that defendant left bar to commit robbery (2) testimony of defense witness that he had a homosexual encounter with victim one year previously was admissible as probative of defendant's self-defense testimo-