

ALASKA LEGISLATURE COMMITTEE FILES 1993-1994 8672

7893 HOUSE JUDICIARY

155

The staff of the Task Force also provided the members with copies of the case of Franklin v. State, 8 Md. App. 134 (1969), which held that evidence that an individual had a drug within his biological system tends to show possession and/or control prior to taking the drug and that evidence, together with the individual's statement to a physician, is sufficient to sustain a conviction for the crime of possession of a controlled dangerous substance.

Commercial Motor Carrier Regulations

The federal commercial motor carrier regulations (see discussion on p. 17) reviewed by Mr. Rickert of the MVA also address drugged driving by commercial drivers. As with the alcohol-related driving offenses, for a first offense of driving under the influence of drugs, there would be a 1 year suspension from driving a commercial motor vehicle. For a second offense, there would be a lifetime disqualification.

Medical Advisory Board

The Task Force also received testimony from William Bricker, former Administrator of the MVA and an attorney in private practice. Mr. Bricker suggested to the Task Force that anyone who was convicted or granted probation before judgment for any drug-related offense (e.g., possession of a controlled dangerous substance) should be referred to the MVA Medical Advisory Board to determine whether the individual is fit to drive.

IMPLIED CONSENT LAW TABLE
(November 18, 1993)

State	Implied Consent Law Applies To DWI Alcohol and/or Drugs		Bodily Substances Tested				Who Selects Test?		More Than One Test Can Be Required	Statutory Citations
	Alcohol	Drugs	Blood	Breath	Urine	Saliva	Driver	Police		
AL	X		X	X	X			X	X ¹	§32-5-192(a)
AK	X			X			N/A	N/A		§28.35.031(a)
AZ	X	X	X	X	X			X	X	§26-691(A)
AR	X	X ²	X	X	X			X ²	X	§5-65-202 & 203
CA	X	X	X ²	X ²	X ²		X		X	Veh. Code §23157(a) ³⁰
CO	X	X	X ²	X ²	X ²	X ²	✓	✓	X	§42-4-1202(3)(c)
CT	X	X	X	X	X			X		§14-227b
DE	X	X	X	X	X			X	X	21 §§2740 & 2741
DC	X	X	X	X	X			X ²	X ²	§40-502(a) & (b)
FL ⁴	X ²	X ²	X ²	X ²	X ²		✓	✓	X	§316.1931(1)(a)
GA	X	X	X	X	X			X	X ²⁰	§43-3-55(a)
HI ⁵	X		X	X			X		X ¹¹	§286-108
ID	X	X	X	X	X			X ²⁰	X ²⁰	§§16-8002 & 16-8004
IL	X	X	X	X	X			X	X ¹⁰	625 ILCS 5/11-501.1(m)

IMPLIED CONSENT LAW TABLE (continued)

State	Implied Consent Law Applies to DWI Alcohol and/or Drugs		Bodily Substances Tested				Who Selects Test?		More Than One Test Can Be Required?	Statutory Citation
	Alcohol	Drugs	Blood	Breath	Urine	Saliva	Driver	Police		
IN	X	X	X	X	X	..**		X	X	§9-30-6-2
LA	X	X	X	X	X			X	X	§3211.6
KS	X	X	X	X	X	..**		X	X	§8-1001(a)
KY	X	X	X	X	X			X	X	§189A.103(1)
LA*	X	X	X	X	X	..**		X	X	§32:661
ME	X	X	X**	X**	X**			X**	X**	29 §1312
MD	X	X	X	X				X	X**	Trans. §16-205.1
MA*	X		X	X**				X**		90 §34(1)(0)
MI*	X	X	X	X	X			X**	X	§257.621o
MN	X	X	X	X	X			X**	X**	§169.123, subd. 2
MS	X		..	X	..		N/A	N/A		§63-11-3
MO	X	X	X	X	X			X**	X	§577.020
MT	X		X	X	X			X		§61-8-402(1)
NE	X	X	X	X	X			X**	X	§39-699.08(1)
NV*	X	X	X	X	X	..**		X**	X	§486.313.(1)
NH*	X	X	X	X	X			X	X	§265:84

IMPLIED CONSENT LAW TABLE (continued)

State	Implied Consent Law Applies to DWI Alcohol and/or Drugs		Bodily Substances Tested				Who Selects Test?		More Than One Test Can Be Performed?	Statutory Citations
	Alcohol	Drugs	Blood	Breath	Urine	Saliva	Driver	Police		
NE*	X	X		X			N/A	N/A		§39-4-50.2
NM	X	X	X	X				X	X	§66-8-107
NY	X	X	X	X	X	X		X	X	V&T Law §1194(b)(a)
NC	X	X	X ¹¹	X	X ¹²	X ¹³		X ¹⁴	X	§20-16.2(a)
ND	X	X	X	X	X ¹⁵	X		X	X	§39-20-01
OH	X	X	X	X	X			X	X	§4511.191(A)
OK	X	X	X ¹⁶	X ¹⁷	X ¹⁸	X ¹⁹		X ²⁰	X ²¹	47 §751
OR*	X			X			N/A	N/A		§813.100
PA*	X	X	X	X	X			X ²²	X ²³	75 §1547
PR*	X		X	X		X ²⁴	X ²⁵		X ²⁶	§ 1043
RI	X	X	X	X	X			X	X	§31-37-2.1
SC*	X	X	X	X	X			X ²⁷	X	§56-5-2850(a)
SD	X	X	X	X				X ²⁸		§32-23-10
TX	X	X	X	X	X			X		§§55-10-405(5) & -406(a)(1)
TX	X	X	X	X	X ²⁹	X ³⁰		X ³¹	X	Act. 871173, §§1 & 2(a)
UT	X	X	X	X	X			X	X ³²	§41-6-44.10(1)(a) & (b)

IMPLIED CONSENT LAW TABLE (continued)

State	Implied Consent Law Applies to DWI Alcohol and/or Drugs		Bodily Substances Tested					Who Saliva Test		Mere Taste Test Can Be Required?	Statutory Citations
	Alcohol	Drugs	Blood	Breath	Urine	Saliva	Driver	Police			
VT	X	X	X ²¹	X				X	X		21 §1302(a)
VA	X	X	X ¹	X				X ²¹	X		§18.2-188
WA	X	X ²¹	X ²¹	X				X	X ²¹		§46.20.306(1)
WV	X		X	X	X			X ²¹	X		§19C-5-4
WI	X	X	X	X	X			X	X		§340.30(7) & (9)
WY	X	X	X	X	X			X ²¹	X		§11-6-102(a)
TOTALS	82	43	48	52	37	4	4	42	40		

N/A - Not Applicable

*The law of this State limits the types of drugs/substances that can be considered for the purposes of determining whether a person has been driving while under the influence. I.e., the law does not cover driving under the influence of all drugs/substances.

**Some law provides that "other bodily substances" may be tested as well substances are not specifically identified.

T.o., more than one type of bodily substance can be tested under the State's implied consent law.

If the driver objects to a blood test, the officer shall designate one of the other tests.

Controlled Substances

Whenever a driver objects to a blood test, a breath or urine test *MAY* be used instead.

Chemical testing of blood, breath, or urine of alcohol concentrations; chemical testing of blood or urine of drug concentrations.

For alcohol concentrations, tests on blood or breath are to be performed!

For drug concentrations, tests on blood, urine or saliva are to be performed. If the test is for alcohol concentration, the driver may select either a blood or breath test. For drug driving offenses, the officer may

request the presence of a particular type of test (blood or urine). *Statute: Colorado Dept. of Revenue, 740 P.2d 64 (Colo. App. 1989)*

The law enforcement officer shall select which chemical test is to be administered. However, a person may object to a particular test on valid religious or medical grounds.

The driver is *not* to submit to two (2) chemical tests of their blood, breath or urine for alcohol or drugs.

IMPLIED CONSENT LAW TABLE (continued)

¹⁴A breath test can only be performed to determine alcohol not on retina. A urine test may be used to determine whether drugs were in a body (blood). A blood test **SHOULD** be performed on a driver who has been injured whose death test is a part of treatment at a medical facility.

¹⁵The law specifies the type of test that can be given in certain DWI situations.

¹⁶*McCaskey v. State*, 371 S.E.2d 243 (Ga. App., 1983)

¹⁷The driver may elect to submit to both blood and breath tests.

¹⁸*Wentz v. Griffler*, 744 P.2d 92 (Idaho 1987)

¹⁹*People v. Kivczak*, 516 N.E.2d 783 (Ill. App. 3 Dist. 1987), and *People v. Riosador*, 524 N.E.2d 1346 (Ill. App. 4 Dist. 1985)

²⁰Sec. 31-50L.1(f) provides that "[o]r the test may be substituted from either a blood or breath test or both has been administered."

²¹A breath test is administered unless it is unreasonable to give such test. However, a person has a "duty" to submit to either a blood or urine test to determine a category of drug in the person's system and the concentration of such drug.

²²A law enforcement officer has probable cause to believe that the person was under the influence of a specific category of drug.

²³There are limits on when a blood test can be administered.

²⁴There is an implication that the law enforcement officer subjects the test.

²⁵A person **SHOULD** have consented to tests of either blood or urine for the purpose of determining if there are other impinging substances in the person's body.

²⁶In addition to the statutory citation, see *Kiao v. King*, 691 S.W.2d 714 (Mo. App. 1985).

²⁷See also §39-659 §9.

²⁸For the purpose of determining if a person may refuse a blood test if a breath test is reasonably available. For the purpose of determining consented drug content, a person **SHOULD** submit to either a blood

or urine test or both.

²⁹A blood test is limited to persons who are unconscious or otherwise incapable of refusing a test. The officer may direct the administration of any other chemical analysis that may be effectively performed (§20-1-6.2(a)).

³⁰Test or tests of blood or breath for alcohol, test or tests of blood, urine or saliva for "prohibited substances."

³¹*People v. Dept. of Public Safety*, 785 P.2d 303 (Colo. App., 1989). The law enforcement agency specifies the type of substance that is to be tested. *People v. City of Tulsa*, 877 P.2d 917 (Okla. Ct., 1992)

³²*People v. Cook*, 522 A.2d 172 (Pa. Commw. 1987). In situations involving driving under the influence alcohol, the driver must be given time to consent to a breath test. In *State v. Cook*, the test results cannot be admitted into evidence at a DWI trial. *Cook v. Dicker*, 571 A.2d 418 (Pa. Super., 1990)

³³*People v. Orsinger*, 97 P.2d 463 (1939).

³⁴The law is not specific as to whether analysis tests can be administered.

³⁵To determine alcohol concentration, the person must be offered a breath test first; a blood test may be requested if it is not reasonably possible to obtain a breath sample. To determine a drug concentration, the person must submit to a urine test.

³⁶*State v. East*, 3100 N.W.2d 573 (S.D. 1983), and *State v. State Dept. of Public Safety*, 366 N.W.2d 472 (S.D. 1985)

³⁷Art. 6701.5, §1 also provides that a person **SHOULD** consent to give a specimen of another substance for the purpose of determining alcohol concentration. However, they are **only** required to provide either a blood or breath specimen.

³⁸*State v. State*, 711 S.W.2d 106 (Tex. App. - [14th Dist.], Houston, 1986). & *State v. Gonzalez*, 458 S.W.2d 672 (Tex. App. - San Antonio 1993)

³⁹See *In Christy v. Schweitzer*, 769 P.2d 210 (Utah App., 1989), the court held that law enforcement officers have the authority to request more than one breath test sample from a driver under the implied consent law.

IMPLIED CONSENT LAW TABLE (continued)

Under 23 Sec. 1302(a), if the law enforcement officer has "reasonable grounds" to believe that the driver was operating a motor vehicle while under the influence of drugs (controlled substances), the driver is deemed to have given consent to a blood test. See also *State v. Orndorf*, 522 A.2d 242 (Vt. 1987) where the court held that there was no need to request a breath test prior to a blood test in situations where the driver has been charged with both driving under the influence of alcohol and drugs.

Usually a person has the right to select the type of test. *Broder v. Com.*, 421 S.E.2d 674 (Va.App. 1992) However, if such a test is not available, they must submit to the other test. *Mason v. Com.*, 435 S.E.2d

544 (Va. App. 1993)

Normally, the tests are for alcohol only. However, if there has been an injury likely to cause death, a driver may be compelled to take a blood or breath test to determine the presence and/or concentration of alcohol or drugs.

In *Boyer v. Dept. of Licensing*, 756 P.2d 133 (Wash.App. 1988), the court held that a refusal to submit to any type of testing could result in license revocation.

If a person refuses to submit to a blood test, the officer shall submit either a breath or a urine test.

If the selected test is either blood or urine, the driver may select the other test. However, the officer may require a urine test if the driver is suspected of driving while under the influence of a controlled substance.

Either breath or blood tests are be administered to determine alcohol concentration. Blood tests are administered to determine the content of controlled substances.

In *People v. Fanchel*, 219 Cal.App. 882 (Cal.App. 4 Dist. 1991)

If the first test is a breath test, the police officer can request a second test of either blood or urine (318-8002107). However, the law is not clear as to whether the officer can select (1) request a second breath test or (2) a blood (urine) if the first test was urine (blood). Also, the law is not clear as to whether the officer can request a breath test after either a blood or urine test.

The law enforcement officer selects the test. However, if a person refuses submit to a blood test, the officer must offer the person an alternative test. Likewise, if a person refuses to submit to a urine test, they must be offered an alternative test. The law does not specify the type or types of alternative test or tests. *Myrdeman v. Commissioner of Public Safety*, 477 N.W.2d 539 (Minn.App. 1991)

STATE:
General Reference:

ARIZONA
Arizona Revised Statutes Annotated

Basis for a DWI Charge:

Standard DWI Offense:	Under the influence of intoxicating liquor §28-692(A)(1)
Illegal Per Se Law (BAC/BrAC Level):	0.10 ^{1&2} and Any Controlled Substance in a Person's Body ³ §28-692(A)(2) & (3)
Presumption (BAC Level):	0.10 §28-692(E)(3)
Types of Drugs/Drugs and Alcohol:	Under the influence of (1) Any Drug, a vapor releasing substance containing a toxic substance or (2) a combination of liquor, drugs or toxic vapor releasing substance if the person is impaired to the slightest degree. §28-692(A)(1)
Other:	For Commercial Motor Vehicle Operators, see p. 3-27.

Chemical Breath Tests for BAC/BrAC Level:

Preliminary Breath Test Law:	Yes §28-691.01 (Based on reasonable suspicion of a DWI offense.)
Implied Consent Law:	
Arrest Required (Yes/No):	Yes §28-691(A)
Implied Consent Law Applies to Drugs (Yes/No):	Yes §28-691(A)
Refusal to Submit to Chemical Test Admitted into Evidence:	Yes (Criminal & Civil Cases) §28-692(I)
Other Information:	Special Note: Police officers may request persons (e.g. medical facility personnel), who collect blood, urine or other bodily substances from suspected DWI offenders, to supply samples of such substances to law enforcement authorities for testing; see §28-692(J). Such samples can also be obtained via search warrants; see §28-691(D).

Chemical Tests of Other Substances for BAC Level
Which Are Authorized Under the Implied Consent Law:

Blood:	Yes §28-691
Urine:	Yes §28-691
Other:	"Other bodily substances" §28-691

¹This State's illegal per se law also makes it an offense to operate a motor vehicle with a breath alcohol concentration level of 0.10 or more. §28-692(O)

²It is a Class 1 misdemeanor for any person under 21 years old to operate a motor vehicle with any "spirituous liquor" in their body. Jail-not more than 6 mos; fine-not more than \$2,500. See §§4-244(34), 4-246(B), 13-701, 13-707, 13-301 & 13-802.

³Except in cases where a person was impaired in the "slightest degree," a person is not guilty of this offense if they are legally entitled to use these drugs. §28-692(B)

STATE:
General Reference:

CALIFORNIA
West's Annotated California Codes

Basis for a DWI Charge:

Standard DWI Offense:	Under the influence of an alcoholic beverage Veh. Code §§23152 & 23153
Illegal Per Se Law (BAC/BrAC Level):	0.08 ^{1&2} Veh. Code §§23152(b) and 23153(b)
Presumption (BAC Level):	0.08 Veh. Code §23155(3)
Types of Drugs/Alcohol and Drugs:	Under the influence of (1) Any Drug or (2) a Combination of Alcohol and Any Drug ³ Veh. Code §§23152 & 23153
Other:	For Commercial Motor Vehicle Operators, see p. 3-45. For bicycle riders, see the Special Note below.

Chemical Breath Tests for BAC/BrAC Level:

Preliminary Breath Test Law:	Yes Veh. Code §23157(n) (Note: A PST may be conducted without legislative authority. A.G. Opinion 88-1102, Oct. 26, 1989)
Implied Consent Law:	
Arrest Required (Yes/No):	Yes Veh. Code §23157
Implied Consent Law Applies to Drugs (Yes/No):	Yes Veh. Code §23157(a)(1)
Refusal to Submit to Chemical Test Admitted into Evidence:	Yes (Criminal & Civil Cases) Veh. Code §23157(a)(4)
Other Information:	A person, who has been arrested for a DWI offense, may be compelled to submit to a blood test for either alcohol concentration or the presence of drugs. See <i>Mercer v. Department of Motor Vehicles</i> , 809 P.2d 404 (Cal. 1991).

Chemical Tests of Other Substances for BAC Level Which Are Authorized Under the Implied Consent Law:

Blood:	Yes Veh. Code §23157
Urine:	Yes Veh. Code §23157
Other:	None

¹Special juvenile offense at 0.05 (Standard: Percent by weight of alcohol in the blood); see Veh. Code §23140(a).

²The regular standards for BAC and BrAC (respectively grams of alcohol per 100 milliliters of blood and grams of alcohol per 210 liters of breath) are used for the illegal per se offense.

³Note: It is illegal to be under the influence of certain "controlled substances" irrespective of whether the offender was operating a motor vehicle. Health and Safety Code §11550

Special Note: Under Veh. Code §21200.5, it is illegal to ride a bicycle on the highways while under the influence of either alcohol or drugs. This section provides that a person committing this offense may be fined not more than \$250. This section further provides that a person under 21 years old, who commits this offense, is subject to license suspension under Veh. Code §13202.5; see the Special Note on p. 3-50 for details on this license suspension.

STATE:

COLORADO

General Reference:

Colorado Revised Statutes

Basis for a DWI Charge:

Standard DWI Offense:

Under the influence of alcohol/Impaired by the consumption of alcohol §42-4-1202(1)(a) & (b) 0.10¹ §42-4-1202(1.5)(a)

Illegal Per Se Law (BAC/BrAC Level):

0.10¹ §42-4-1202(1.5)(a)

Presumption (BAC Level):

>0.05—Driving while impaired 0.10—Driving under the influence §42-4-1202(2)(b) & (c)

Types of Drugs/Drugs and Alcohol:

(1) Any Drug or (2) a Combination of Alcohol and Drugs² (applies to both driving under the influence and driving while impaired)

Other:

§§42-4-1202(1)(a) & 42-4-1202(1)(b)

For Commercial Motor Vehicle Operators, see p. 3-63.

Chemical Breath Tests for BAC/BrAC Level:

Preliminary Breath Test Law:

Yes §42-4-1202(2.5)

Implied Consent Law:

Arrest Required (Yes/No):

No Only probable cause is required; an actual arrest is not necessary. §42-4-1202(3)(a)(II) & III

Implied Consent Law Applies to

Drugs (Yes/No):

Yes §42-4-1202(3)(a)(III)

Refusal to Submit to Chemical Test

Admitted into Evidence:

Yes (Criminal Cases) §42-4-1202(3)(e)

Other Information:

A persons's blood may be taken from them by force if there is probable cause that they committed criminally negligent homicide with a motor vehicle, vehicle homicide, assault in the third degree with a motor vehicle or vehicle assault. §42-4-1202(3)(a)(IV)

Chemical Tests of Other Substances for BAC Level

Which Are Authorized Under the Implied Consent Law:

Blood:

Yes (Alc. & Drugs) §42-4-1202(3)(a)(II) & (III)

Urine:

Yes (For Drugs only) §42-4-1202(3)(a)(III)

Other:

Saliva (For Drugs only) §42-4-1202(3)(a)(III)

¹This State's illegal per se law also makes it an offense to operate a motor vehicle with a breath alcohol concentration level of 0.10 or more.

²A "drug" is defined as either a substance, that is intended to cure or prevent disease, listed in the U.S. Pharmacopoeia, or a controlled substance; see §§12-27-303(7) & (13) and 42-4-1202(1)(d).

STATE:
General Reference:

FLORIDA
Florida Statutes Annotated

Basis for a DWI Charge:

Standard DWI Offense:	Under the influence of alcoholic beverages ¹ §316.193(1)(a)
Illegal Per Se Law (BAC/BrAC Level):	0.10 ^{1&2} §§316.193(1)(b) & 316.1932(b)1
Presumption (BAC Level):	None
Types of Drugs/Drugs and Alcohol:	Under the influence of a Controlled Substance/Chemical Substance listed in §877.111 §§316.193(1)(a) & 316.1931
Other	1) A BAC/BrAC level of 0.10 ³ is prima facie evidence of driving under the influence §316.1934(2)(c) 2) See the Special Note below. 3) For Commercial Motor Vehicle Operators, see p. 3-100. 4) A person arrested for a DWI offense cannot be released from custody until (1) they are no longer under the influence of alcohol or other chemical substance, (2) their BAC level is less than 0.05 or (3) eight (8) hrs have elapsed from the time of their arrest. §316.193(9)

¹The offense of "driving under the influence" includes (1) driving under the influence of alcoholic beverages or (2) driving with a blood or breath level of 0.10 or more. See §316.193(1)(a) & (b) and State v. Rolle, 560 So.2d 1154 (Fla. 1990).

²This State's illegal per se law also makes it an offense to operate a motor vehicle with a breath alcohol concentration level of 0.10 or more. The standard definitions of BAC and BrAC are used; see §316.1932(b)1.

³Standard: Percent by weight of alcohol in either the blood or breath. §316.1934(2)(c)

Special Note: A jury instruction, that was based on a verbatim reading of §316.1934(2)(c), was held to be unconstitutional in that it created a mandatory "irrebuttable" presumption that shifted the burden of proof of the DWI offense to the defendant; see Wilhelm v. State, 568 So.2d 1 (Fla. 1990). Notwithstanding this case, the statutory language itself has been held constitutional in a prior decision; see State v. Rolle, 560 So.2d 1154 (Fla. 1990). Note: A Federal court has held in similar circumstances that there was no constitutional infirmity. However, the Federal court did express its concern that a jury could be confused with the term "prima facie". Despite this concern, the court felt that no unconstitutional mandatory presumption had been created when this instruction was viewed in conjunction with the other jury instructions that were given. See Santiago Sanchez Defuentes v. Dugger, 923 F.2d 801 (11th Cir. 1991).

Chemical Breath Tests for BAC/BrAC Level:

Preliminary Breath Test Law:	No
Implied Consent Law: Arrest Required (Yes/No):	Yes §316.1932(1)(a) Note: Under §316.1932(1)(c), an arrest is not a prerequisite to the taking of a blood sample if the driver is taken to a medical facility for treatment as a result of an accident. See <i>Kenson v. State</i> , 577 So.2d 694 (Fla.App. 3 Dist. 1991).
Implied Consent Law Applies to Drugs (Yes/No):	Yes §316.1932(1)(a) ¹
Refusal to Submit to Chemical Test Admitted into Evidence:	Yes (Criminal Cases) §§316.1932(1)(a) & 316.1932(1)(b)
Other Information:	A blood test may be given a driver without their consent <u>only</u> if they have been involved in an accident resulting in either death or serious bodily injury. See §316.1933(1) and <i>Carbone v. State</i> , 564 So.2d 1253 (Fla.App. 4 Dist. 1990), and <i>State v. Perez</i> , 531 So.2d 961 (Fla. 1988).

Chemical Tests of Other Substances for BAC Level
Which Are Authorized Under the Implied Consent Law:

Blood:	Yes-Limited A blood test, for the purposes of implied consent, may be taken only if the driver appears for treatment at a medical facility and the administration of a breath/urine test is impractical or impossible. §316.1932(1)(b)
Urine:	Yes-Limited Under §316.1932(1)(a), there is an implied consent to submit to a urine test for the purpose of detecting the presence of controlled substances.
Other:	None

Adjudication of DWI Charges:

Mandatory Adjudication Law (Yes/No):	Yes Applies only to DWI manslaughter/veh homicide offs; see §316.656.
Anti-Plea Bargaining Statute (Yes/No):	Yes Only applies if BAC level is 0.20 or more or for DWI manslaughter/veh homicide offs; see §316.656.
Pre-Sentencing Investigation Law (PSI) (Yes/No):	Yes A person convicted of a DWI offense may be referred to substance abuse evaluation; see §316.193(5).

¹The implied consent law, as applied to driving while under the influence of drugs, provides only for the testing of urine.

STATE:

IDAHO

General Reference:

General Laws of Idaho Annotated

Basis for a DWI Charge:

Standard DWI Offense:	Under the influence of alcohol §18-3004(1)(a)
Illegal Per Se Law (BAC/BrAC Level):	0.10 ¹ §18-3004(1)(a)
Presumption (BAC Level):	None
Types of Drugs/Drugs and Alcohol:	Under the influence of (1) Any Drug, (2) Intoxicating Substance or (3) a Combination of Any Drug and Alcohol §§18-3004(1)(a) & 18-8004(5)
Other:	For Commercial Motor Vehicle Operators, see below.

Chemical Breath Tests for BAC/BrAC Level:

Preliminary Breath Test Law:	No
Implied Consent Law:	
Arrest Required (Yes/No):	No ²
Implied Consent Law Applies to Drugs (Yes/No):	Yes §18-8002(1)
Refusal to Submit Chemical Test Admitted into Evidence:	Yes (Criminal Cases) State v. Bock, 328 P.2d 1065 (1958)
Other Information:	Under §18-8002(6)(b), a law enforcement officer may order a "qualified person" to withdraw blood from a driver for evidential purposes in cases where there is probable cause to believe that such driver has committed either a DWI aggravated/homicide offense. Comment: This provision appears to allow law enforcement officers to obtain a blood sample via force.

¹This State's illegal per se law also makes it an offense to operate a motor vehicle with either (1) a breath alcohol concentration level of 0.10 or more or (2) a urine alcohol concentration of 0.10 or more.

²The police need only "reasonable grounds" of a DWI off before the implied consent law is applicable; see §18-8002(1). However, §18-8002(4)(b) appears to indicate that "probable cause" is needed.

DWI Offenses and Commercial Motor Vehicles (CMV)/Commercial Driver's Licenses (CDL): A person is "disqualified" from operating a CMV for 1 yr. (mand.) (3 yrs (mand.) if transporting hazardous materials) if, while driving a CMV, they (1) have a BAC/BrAC/"Bodily Substance" level of 0.04 or more, (2) are under the influence of alcohol or a controlled substance or (3) refuse to submit to a chemical test for an alcohol concentration. For either (1) a subsequent violation or (2) a combination of two or more violations of any of the above listed items, the "disqualification" is for life (mand.). A person, who operates a CMV with an alcohol concentration of 0.04 or more or while under the influence of alcohol/drugs, is subject to DWI criminal sanctions. In addition, a CMV operator who has any "detectable" amount of alcohol in their system must be placed "out-of-service" for 24 hours. See §§49-105(6), 49-104(9), 49-335 (Reference is made to 49 CFR part 393.), 18-8002(3)(a), 18-8004(1)(b) & (c), 18-8004(4) and 18-8005(2) & (3).

Chemical Tests of Other Substances for BAC Level
Which Are Authorized Under the Implied Consent Law:

Blood:	Yes §§18-8002(1) & 18-8004
Urine:	Yes §§18-8002(1) & 18-8004
Other:	None

Adjudication of DWI Charges:

Mandatory Adjudication Law (Yes/No):	No
Anti-Plea Bargaining Statute (Yes/No):	No
Pre-Sentencing Investigation Law (PSI) (Yes/No):	Yes (Alcohol Evaluation) §18-8005(9)

Sanctions for Refusal to Submit to a
Chemical Test:

Refusal to Take a Preliminary Breath Test:

Criminal Sanctions (Fine/Jail):	N/A
Administrative Licensing Action (Susp/Rev):	N/A
Other:	N/A

Refusal to Take Implied Consent

Chemical Test:

Criminal Sanction (Fine/Jail):	No
Administrative Licensing Action (Susp/Rev):	<u>1st Refusal</u> -180 dys susp (mand); <u>2nd Refusal</u> (w/n 5 yrs)-1 yr susp (mand) §18-8002(3)(c), (4)(b) & (4)(c)
Other:	None

Sanctions Following a Conviction for a DWI Offense:

Criminal Sanctions:

Imprisonment:	<u>1st off</u> Misd-Not more than 6 mos; <u>2nd off</u> (w/n 5 yrs) Misd-10 dys to 1 yr; <u>3rd & sub off</u> (w/n 5 yrs) or <u>4th or sub. off</u> (w/n 10 yrs); Felony-Not more than 5 years Aggravated DWI where there is bodily harm/ disfigurement-Not more than 5 years See §§18-8005 & 18-8006.
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Mandatory Minimum Term:

1st off Misd-None; 2nd off (w/n 5 yrs) Misd- 10 dys (must serve 48 con. hrs)¹; 3rd & sub off (w/n 5 yrs) or 4th or sub. off (w/n 10 yrs) Felony-30 dys¹ Aggravated DWI off where there is bodily harm/disfigurement-30 dys¹ See §§18-8005 & 18-8006.

¹Historical Note: Under Art. 5, §13 of the State's constitution, the legislature may provide for mandatory minimum sanctions. This constitutional provision indirectly abrogated the Idaho Supreme Court's decision in State v. McCoy, 486 P.2d 247 (Idaho 1971), that had voided a statute requiring mandatory sanctions.

STATE:
General Reference:

ILLINOIS
Smith/Hurd Illinois Annotated Statutes

Basis for a DWI Charge:

Standard DWI Offense:	Under the influence of alcohol Ch. 95%, §11-501(a)(2)
Illegal Per Se Law (BAC/BrAC Level):	0.10 ¹ or Any Amount of Cannabis/Controlled Substance ² Ch. 95%, §11-501(a)(1) & (5)
Presumption (BAC Level):	0.10 Ch. 95%, §§11-501.2(b)(3) & 11-501.6(e)(3)
Types of Drugs/Drugs and Alcohol:	Under the influence of (1) Any Drug or (2) a Combination of Any Drug and Alcohol See Ch. 95%, §11-501(a)(3) & (4).
Other:	For Commercial Motor Vehicle Operators. see p. 3-147.

Chemical Breath Tests for BAC/BrAC Level:

Preliminary Breath Test Law:	Yes-Limited ³ Ch. 95%, §11-501.5
Implied Consent Law:	
Arrest Required (Yes/No):	Yes Ch. 95%, §11-501.1 See the Special Note below.
Implied Consent Law Applies to Drugs (Yes/No):	Yes Ch. 95%, §11-501.1(a)
Refusal to Submit to Chemical Test Admitted into Evidence:	Yes (Criminal Cases) See Ch. 95%. §§11-501.2(c) & 11-501.6(f) and <i>People v.</i> <i>Thomas</i> , 558 N.E.2d 656 (Ill.App. 2 Dist. 1990). A BAC (blood test) test may be taken by force for a DWI offense (injury or non injury related) as long as the police have "probable cause" of such offense. See <i>People v. Byrd</i> , 574 N.E.2d 1269 (Ill.App. 4 Dist. 1991); and <i>People v.</i> <i>Yant</i> , 570 N.E.2d 3 (Ill.App. 2 Dist. 1991).
Other Information:	

¹This State's illegal per se law also makes it an offense to operate a motor vehicle with a breath alcohol concentration level of 0.10 or more. Ch. 95%, §11-501.2(a)(5)

²As found in the blood or urine "resulting from unlawful use or consumption." 95%,
§11-501(a)(5)

³Before a PBT can be administered, a law enforcement officer must have probable cause to believe that the driver is violating the DWI law. The test is given prior to an actual DWI arrest for the purpose of assisting the officer in determining whether to require a chemical (evidentiary) test under the implied consent law.

Historical Note: Under Ch. 95, §11-501.6(a), which is now void, a law enforcement officer could request that a person, via "implied consent", submit to a chemical test of their blood, breath or urine for alcohol or drug content based only on "probable cause" that the person was responsible for an accident that resulted in either an injury or a death. There was no requirement that there be "probable cause" of an offense (e.g. DWI). Because of this deficiency, the Illinois Supreme Court declared Ch. 95, §11-501.6 unconstitutional under both the State and Federal constitutions. *King v. Ryan, Secretary of State*, ___ N.E.2d ___ (Ill. 1992) (1992 Ill. LEXIS 138) The sanctions for refusal to submit to this test were the same as for refusal under the regular implied consent law. Ch. 95, §§116-206(a)(3) & 11-501.1

Chemical Tests of Other Substances for BAC Level
Which Are Authorized Under the Implied Consent Law:

Blood:	Yes Ch. 92%, §11-501.1
Urine:	Yes Ch. 95%, §11-501.1
Other:	None

Adjudication of DWI Charges:

Mandatory Adjudication Law (Yes/No):	No
Anti-Plea Bargaining Statute (Yes/No):	No ¹
Pre-Sentencing Investigation Law (PSI) (Yes/No):	Yes Ch. 95%, §11-501(e)

Sanctions for Refusal to Submit to a
Chemical Test:

Refusal to Take a Preliminary Breath Test:

Criminal Sanctions (Fine/Jail):	None
Administrative Licensing Action (Susp/Rev):	None
Other:	None

Refusal to Take Implied Consent

Chemical Test:

Criminal Sanction (Fine/Jail):	None
Administrative Licensing Action (Susp/Rev):	1st refusal-Susp for 6 mos (Note: A Judicial Driving Permit is available; see Footnote No. 2 (under Admin. per se) on p. 3-145 for details.) Also, restricted driving privileges are available under 95%, §16-206(c)(3): <u>subsequent refusals</u> ² (w/n 5 yrs)-Susp for 2 yrs: (6 mos mandatory; a restricted license may be issued after this 6 month period.) See Footnote No. 4 on p. 3-146. Ch. 95%, §16-206(c)(3), 6-206.1, 6-208.1 and 11-501.1

Other:	None
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Criminal Sanctions:

Imprisonment:	<u>1st & 2nd offs</u> (Class A misd)-Less than 1 yr; <u>subsequent offs</u> ³ (Class 4 felony)-1-3 yrs Ch. 38, §§1005-8-1(a)(7) & 1005-8-3(a)(1) and Ch. 95%, §11-501. See Footnote No. 2 on p. 3-145.
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¹Note: A defendant cannot obtain deferred judgement and be placed on supervision if within the past 10 years they have either (1) been convicted of DWI, (2) pleaded guilty to or stipulated facts supporting the conviction of a DWI off charge or (3) received supervision for a prior DWI off. Ch. 38, §§1005-6-1(c) and 1005-6-1(d)

²Or a refusal where the person has had a previous DWI offense conviction or admin. per se violation (w/n 5 yrs). Ch. 95%, §11-500

³This offense is defined as "Aggravated Driving Under the Influence of Alcohol or Drugs or a Combination of Both". Ch. 95%, §11-501(d)

STATE:
General Reference:

INDIANA
Burn's Indiana Statutes Annotated

Basis for a DWI Charge:

Standard DWI Offense	Operating a vehicle while intoxicated IC9-30-5-2 (The term "intoxicated" is defined as under the influence of alcohol, drugs, etc.; see IC9-13-2-86.)
Illegal Per Se Law (BAC Level)	0.10 ¹ IC9-30-5-1(a) or Any Amount of a Controlled Substance ² IC9-30-5-1(b)
Presumption (BAC Level): Types of Drugs/Drugs and Alcohol:	0.10 ³ Under the influence of (1) Any Drug, (2) a Controlled Substance or (3) Any Combination of Alcohol and Drugs IC9-30-5-2 & IC9-13-2-86
Other:	0.10 BAC is also prima facie evidence of intoxication IC9-13-2-131 See Footnote No. 4 concerning school bus operators. For Commercial Motor Vehicle Operators, see p. 3-156.

Chemical Breath Tests for BAC Level:

Preliminary Breath Test Law:	No (Note: PBT law, formally IC9-4.5-3, repealed by P.L. 143 enacted in 1983.)
Implied Consent Law: Arrest Required (Yes/No):	No (A request for a test must be based on probable cause. However, an actual arrest is not required. See IC9-30-6-2 and Clark v. State, 372 N.E.2d 185 (Ind. 1978).)
Implied Consent Law Applies to Drugs (Yes/No):	Yes IC9-30-6-2
Refusal to Submit to Chemical Test Admitted into Evidence:	Yes (Criminal & Civil Cases) IC9-30-6-1(b)
Other Information:	In accidents where there has been either a fatality or a serious injury, a blood sample may be obtained from a driver suspected of DWI via force. IC9-30-6-6(g)

¹Standard: Percent by weight of alcohol in the blood. IC9-30-5-1(a)

²This State's illegal per se law also makes it an offense (Class C Misd) for a person to operate a motor vehicle with any amount of a controlled substance in their blood. Exception: It is a defense to this offense if it is shown that the defendant was using a controlled substance via a valid prescription. IC9-30-5-1(c)

³Under IC9-30-5-15(b)(2), a chemical test indicating a BAC level of 0.10 is to be taken as a presumption of such BAC level.

⁴It is a Class A Misd. to consume either alcohol or a controlled substance within six (6) hours of operating a school bus. IC20-2.1-3-1.5 Sanctions: Jail-not more than 1 yr; fine-not more than \$5,000. IC35-50-2-7 & IC35-50-3-1

THE
FOLLOWING
DOCUMENTS
ARE
POOR
ORIGINAL
COPIES

STATE:
General References:

NEBRASKA
Revised Statutes of Nebraska and
Nebraska Administrative Code (NAC)

Basis for a DWI Charge:

Standard DWI Offense:	Under the influence of alcoholic liquor §39-669.07(1)(a)
Illegal Per Se Law (BAC/BrAC Level):	0.10 ¹ §39-669.07(1)(b) & (c)
Presumption (BAC Level):	None
Types of Drugs/Drugs and Alcohol:	Under the influence of Any Drug §39-669.07(1)(a)
Other:	For Commercial Motor Vehicle Operators, see p. 3-287.

Chemical Breath Tests for BAC/BrAC Level:

Preliminary Breath Test Law:	Yes §39-669.08(3)
Implied Consent Law:	
Arrest Required (Yes/No):	Yes §39-669.08(2)
Implied Consent Law Applies to Drugs (Yes/No):	Yes §39-669.08(1)
Refusal to Submit to Chemical Test Admitted into Evidence:	Yes §39-669.08(9) (Criminal Cases) and State v. Romell, 204 N.W.2d 573 (1973)
Other Information:	A driver, who has been involved in an accident and where there is reasonable grounds that the driver is DWI, may be required to submit to a chemical test to determine if they have either alcohol or drugs in their system. Injury or death is not a prerequisite for this requirement. ² §39-669.08(9)

Chemical Tests of Other Substances for BAC Level
Which Are Authorized Under the Implied Consent Law:

Blood:	Yes §39-669.08(1)
Urine:	Yes §39-669.08(1)
Other:	None

Adjudication of DWI Charges:

Mandatory Adjudication Law (Yes/No):	No ³
Anti-Plea Bargaining Statute (Yes/No):	No
Pre-Sentencing Investigation Law (PSI) (Yes/No):	Yes ⁴ Alcohol assessment (screening) for either a 1st offender or a sub. offender who has not received such an assessment. §39-669.07(8)

¹This State's illegal per se law also makes it an offense to operate a motor vehicle with a breath alcohol concentration level of 0.10 or more. Note: illegal per se based on alcohol concentration in urine was repealed. Sec. 4 of L.B. 291 enacted in 1992

²A surviving driver (or pedestrian under 16 years old), who is involved in an accident where there has been a fatality, shall be required to submit to a BAC chemical test. The results of such test, however, can only be used for statistical purposes. §§39-6,104.08 & 39-6,104.09

³Note: Under §29-3604, pretrial diversion of DWI cases is prohibited.

⁴"A court may order a presentence investigation in any case." §29-2251(2) & (3)

STATE:
General Reference:

NEVADA
Nevada Revised Statutes

Basis for a DWI Charge:

Standard DWI Offense:	Under the influence of intoxicating liquor §484.379(1)(a)
Illegal Per Se Law (BAC/BrAC Level):	0.10 ^{1&2} §§484.0135 & 484.379(1)(b)
Presumption (BAC/BrAC Level):	0.10 §484.381(2)(c) & (d)(c)
Types of Drugs/Drugs and Alcohol:	Under the influence of (1) A Controlled Substance, (2) a Combination of Intoxicating Liquor and a Controlled Substance or (3) Any Chemical, Poison, Organic Solvent and Any Compound or a Combination of These. §484.379(2)
Other:	For Commercial Motor Vehicle Operators, see below.

Chemical Breath Tests for BAC/BrAC Level:

Preliminary Breath Test Law:	Yes §484.382
Implied Consent Law:	
Arrest Required (Yes/No):	No ³ §484.383(1)
Implied Consent Law Applies to Drugs (Yes/No):	Yes §484.383(1)
Refusal to Submit to Chemical Test Admitted into Evidence:	Yes (Criminal Cases) §484.389

¹This State's illegal per se law also makes it an offense to operate a motor vehicle with a breath alcohol concentration level of 0.10 or more. §484.0135

²Special Note: Sec. 484.381(1) provides for a presumption related to illegal per se. This provision states that if the chemical test indicates a BAC level of 0.10 or more such result shall be "presumed to be no less than the amount present at the time of the alleged violation." A Federal appellate court has held that this statutory provision does not create an unconstitutional mandatory conclusive presumption on its "face". However, a State trial court applied this presumption as if it were a mandatory conclusive presumption. Such application was held to be unconstitutional. *McLean v. Moran*, 963 F.2d 1306 (9th Cir. 1992)

³Only "reasonable grounds" are needed not an actual arrest.

DWI Offenses and Commercial Motor Vehicles (CMV)/Commercial Driver's Licenses (CDL): The State's Public Service Commission and Department of Motor Vehicles and Public Safety have promulgate regulations that adopt by reference 49 CFR Parts 383 and 392. Under 49 CFR §383.51, a person is "disqualified" from operating a CMV for 1 yr. (mand.) (3 yrs (mand.) if transporting hazardous materials) if, while driving a CMV, they (1) have a BAC/BrAC level of 0.04 or more, (2) are under the influence of alcohol or a controlled substance or (3) refuse to submit to a chemical test for an alcohol concentration. For either (1) a subsequent violation or (2) a combination of two or more violations of any of the above listed items, the "disqualification" is for life (mand.). Under 49 CFR §392.5, a CMV operator who has any "detectable" amount of alcohol in their system must be placed "out-of-service" for 24 hours. In addition, it is misdemeanor to violate a regulation. The sanctions for this offense are a jail term of not more than 6 mos and/or a fine of at least \$100 (mand.) but not more than \$1,000. Note: A person, who violates a regulation, may also be liable for a civil penalty which is not to exceed \$10,000. See §§463.908, 706.173, 706.756 & 706.771, HAC §706.247 and 49 USC Appx §2901 et seq.

STATE:
General Reference:

NEW JERSEY
New Jersey Statutes Annotated

Basis for a DWI Charge:

Standard DWI Offense:	Under the influence of intoxicating liquor §39:4-50(a) See the Special Note below.
Illegal Per Se Law (BAC Level):	0.10 ^{1,2,3} §39:4-50(a) <u>Under 21 Years Old</u> -0.01 but less than 0.10 ⁴ §39:4-50.14
Presumption (BAC Level):	None
Types of Drugs/Drugs and Alcohol:	Under the influence of (1) A Narcotic (2) A Hallucinogenic Drug or (3) A Habit-Producing Drug §39:4-50(a)
Other:	For Comm. Motor Vehicle Operators, see p. 3-315.

Chemical Breath Tests for BAC Level:

Preliminary Breath Test Law:	No
Implied Consent Law:	
Arrest Required (Yes/No):	Probably Yes Under §39:4-50.2(a), a driver's license can only be revoked when the refusal is based on an arrest. However, see §39:4-50.2(a) where only "reasonable grounds" seems to be required.
Drugs (Yes/No):	No
Refusal to Submit to Chemical Test Admitted into Evidence:	Yes (Criminal Cases) State v. Stever, 527 A.2d 408 (N.J. 1987)
Other Information:	(1) An "involuntary" blood (not breath) sample may be obtained from a person who has been arrested for a DWI offense; i.e., a blood sample may be taken by "force". State v. Dyrí, 478 A.2d 390 (N.J. 1984), and State v. Woomer, 483 A.2d 637 (N.J. Super. A.D. 1984) (2) Tests for alcohol shall be made on automobile drivers who survive traffic accidents fatal to others. §26:2B-24 and State v. Figueroa, 515 A.2d 242 (N.J. Super. A.D. 1986), certif. den. 516 A.2d 204

¹Standard: Percent by weight of alcohol in the blood. §39:4-50(a)

²In State v. Downie, 569 A.2d 242 (N.J. 1990), the N.J. Supreme Court held that breathalyzer results must be given "judicial notice". The court felt that this was in keeping with the legislature's policy of measuring alcohol in the brain for the purpose of determining whether a person was DWI. Comment: The practical end result of this decision was to in effect create a "judicial" illegal per se law based on BrAC; see the dissenting opinion.

³See State v. Lentini, 573 A.2d 464 (N.J. Super. A.D. 1990).

Special Note: Under separate statutory provisions, it is illegal for a person to drive a motor vehicle while under the influence of intoxicating liquor, any narcotic or any habit forming drug (1) on "vehicle crossings" (bridges and tunnels) operated by the Port of New York Authority, (2) on any "project" of the New Jersey Expressway Authority or (3) on any "project" of the New Jersey Turnpike Authority. §§27:12C-37(B), 27:12C-37J, 27:23-26, 29:23-32, 32:1-154.3, 32:1-154.9 & 32:1-154.10 It is illegal to operate a motorized bicycle while under the influence of intoxicating liquor, any narcotic or any habit forming drug. §39:4-14.3g The law provides that a violation of these provisions results in the same sanctions as for violating the regular DWI law. §39:4-50

⁴The only sanctions for this offense are community service and forfeiture of driving privileges.

STATE:
General Reference:

OKLAHOMA
Oklahoma Statutes Annotated

Basis for a DWI Charge:

Standard DWI Offense:	(1) Under the influence of alcohol and (2) Impaired by the consumption of alcohol 47 §§751(A) & 11-902(A)(2)
Illegal Per Se Law (BAC/BrAC Level):	0.10 ¹ 47 §§756(d) & 11-902(A)(1)
Presumption (BAC Level):	None
Types of Drugs/Drugs and Alcohol:	Under the influence of (1) Intoxicating Substances or (2) a Combination of These and Alcohol ² 47 §11-902(A)(3) & (4)
Other:	0.10 BAC level is also <u>prima facie</u> evidence that a person was under the influence of alcohol 47 §756(c) >0.05 and <0.10 is evidence of Driving While Impaired 47 §756(b) For Commercial Motor Vehicle Operators, see below.

Chemical Breath Tests for BAC/BrAC Level:

Preliminary Breath Test Law:	No
Implied Consent Law:	
Arrest Required (Yes/No):	Yes 47 §751(A)
Implied Consent Law Applies to Drugs (Yes/No):	Yes 47 §751(A)
Refusal to Submit to Chemical Test Admitted into Evidence:	Yes (Criminal Cases) 47 §756
Other Information:	Note: (1) Under 47 §753, a mandatory chemical test may be ordered in situations where there is probable cause that a person has been operating a motor vehicle while DWI and such operation has caused either death or serious physical injury to another person. (2) Also, under 47 §10-104(3), a mandatory chemical for alcohol/drugs may be ordered in traffic accident situations where the driver (person to be tested) has been cited for a traffic offense.

¹This State's illegal per se law also makes it an offense to operate a motor vehicle with a breath alcohol concentration level of 0.10 or more.

²The impaired offense applies only to the use of alcohol (not other drugs). The sanctions given for driving while under the influence includes both alcohol and drug driving violations.

DWI Offenses and Commercial Motor Vehicles (CMV)/Commercial Driver's Licenses (CDL): A person is "disqualified" from operating a CMV for not less than 1 yr. (1 yr. mand.) (not less than 3 yrs (3 yrs mand.) if transporting hazardous materials). If while operating a CMV, they (1) have a BAC/BrAC level of 0.04 or more, (2) are under the influence of alcohol or an intoxicating substance or (2) refuse to submit to a chemical test for an alcohol concentration. For either (1) a second "conviction" or (2) a combination of two "convictions" of any of the above listed items, the "disqualification" is for life (10 yrs mand.). See 47 §6-205.2.

STATE:
General Reference:

SOUTH DAKOTA
South Dakota Codified Laws

Basis for a DWI Charge:

Standard DWI Offense:	Under the influence of an alcoholic beverage §32-23-1(2)
Illegal Per Se Law (BAC Level):	0.10 ¹ §32-23-1(1)
Presumption (BAC Level):	0.10 ¹ §32-23-7 (Note: §32-23-7 applies this presumption to the veh homicide off.)
Types of Drugs/Drugs and Alcohol:	Under the influence of (1) Any Substance, (2) Any Controlled Drug, (3) Marijuana or (4) a Combination of These Substances and an Alcoholic Beverage §32-23-1(3) & (4)
Other:	For Commercial Motor Vehicle Operators, see p. 3-431.

Chemical Breath Tests for BAC Level:

Preliminary Breath Test Law:	Yes §32-23-1.2
Implied Consent Law:	
Arrest Required (Yes/No):	Yes §32-23-10
Implied Consent Law Applies to Drugs (Yes/No):	Yes §32-23-10
Refusal to Submit to Chemical Test Admitted into Evidence:	Yes §§19-13-28.1 & 32-23-10.1 ² (Criminal Cases)
Other Information:	Chemical test required for persons who have been arrested for a third or subsequent DWI offense which constitutes a felony. "Force" may be used to obtain a blood sample. §32-23-10, State v. Heinrich, 449 N.W.2d 25 (S.D. 1989), State v. Lanier, 452 N.W.2d 144 (S.D. 1990), and State v. Sickler, 456 N.W.2d 70 (S.D. 1992)

Chemical Tests of Other Substances for BAC Level
Which Are Authorized Under the Implied Consent Law:

Blood:	Yes §32-23-10
Urine:	No §32-23-10
Other:	"Other bodily substances" §32-23-10

Adjudication of DWI Charges:

Mandatory Adjudication Law (Yes/No):	No
Anti-Plea Bargaining Statute (Yes/No):	No (Note: An illegal per se charge may be reduced or dismissed <u>only</u> when written reasons for such have been filed with the court. §32-23-1.3)

¹Based on percent by weight of alcohol in the blood. However, under §32-3-7, there is a provision that "[p]ercent by weight of alcohol in the blood shall be based upon milligrams of alcohol per 1.0 cubic centimeters of whole blood or 2100 cubic centimeters of deep lung breath."

²This statute was held constitutional in South Dakota v. Neville, 459 U.S. 553 (1981).

STATE:
General Reference:

UTAH
Utah Code Annotated

Basis for a DWI Charge:

Standard DWI Offense:	Under the influence of alcohol §41-6-44(1)(a)
Illegal Per Se Law (BAC/BrAC Level):	0.08 ¹ §41-6-44(1)(a) & (2)
Presumption (BAC Level):	None
Types of Drugs/Drugs and Alcohol:	Under the influence of (1) Any Drug or (2) a Combination of Any Drug and Alcohol §41-6-44(1)(a)
Other:	For Commercial Motor Vehicle Operators, see o. 3-461.

Chemical Breath Tests for BAC/BrAC Level:

Preliminary Breath Test Law:	No
Implied Consent Law:	
Arrest Required (Yes/No):	Yes §41-6-44.10(2)
Implied Consent Law Applies to Drugs (Yes/No):	Yes §41-6-44.10(1)
Refusal to Submit to Chemical Test Admitted into Evidence:	Yes (Criminal and Civil Cases) §41-6-44.10(8)
Other Information:	A driver may be compelled to submit to a chemical test if they have been placed under arrest either (1) for a DWI offense and there is reason to believe that another person may die as a result of the offense or (2) for a vehicle homicide alcohol related offense. §76-5-207(6)(b) & (7)(a)

Chemical Tests of Other Substances for BAC Level
Which Are Authorized Under the Implied Consent Law:

Blood:	Yes §41-6-44.10
Urine:	Yes §41-6-44.10
Other:	None

Adjudication of DWI Charges:

Mandatory Adjudication Law (Yes/No):	No (Note: A Magistrate may not grant diversion in a DWI case. §77-2-9)
Anti-Plea Bargaining Statute (Yes/No):	No (Note: If the defendant pleads guilty or <u>nolo contendere</u> to reckless driving as a substitute for a DWI charge, the prosecution must state for the record whether alcohol or drugs were related to the pleaded off. §41-6-44(10))
Pre-Sentencing Investigation Law (PSI) (Yes/No):	Yes §41-6-44(4) & (5) (Assessment)

¹This State's illegal per se law also makes it an offense to operate a motor vehicle with a breath alcohol concentration level of 0.08 or more.

Sanctions for Refusal to Submit to a
Chemical Test:

Refusal to Take a Preliminary Breath Test:

Criminal Sanctions (Fine/Jail):	N/A
Administrative Licensing Action (Susp/Rev):	N/A
Other:	N/A

Refusal to Take Implied Consent:

Chemical Test:

Criminal Sanction (Fine/Jail):	None
Administrative Licensing Action (Susp/Rev):	Rev for 1 yr ¹ Mandatory §41-6-44.10(2)(b) (Note: No hardship license may be issued for revs based on a test refusal. §41-2-19(d))
Other:	None

Sanctions Following a Conviction for a DWI Offense:

Criminal Sanctions:

Imprisonment:

Term (Day, Month, Years,
Etc.):

1st off and 2nd off (w/n 5 yrs)-Class B misd.-
not more than 6 mos; 3rd & sub off (w/n 6 yrs)
if one or more of the previous offs occurred
prior to 4/23/90-Class B misd. - not more than 6
mos; 3rd off (w/n 6 yrs) if two of the previous
offs occurred after 4/23/90-Class A misd. - not
more than 1 yr; 4th & sub off (w/n 6 yrs) if the
three previous offs occurred after 4/23/90-3rd
Degree felony - not more than 5 yrs

A DWI off-where there is an injury related to
negligent action-Class A misd.- not more than 1
yr §§41-6-44(3)(a), 76-3-203(3) & 76-3-204

Mandatory Minimum Term:

1st off-48 cons hrs; 2nd off (w/n 5 yrs)-240
cons hrs; subsequent off² (w/n 6 yrs)-720 hrs
DWI related injury off-48 cons hrs

¹This sanction also applies to persons under 21 years old who refuse to submit to a chemical test to determine if they have violated §41-6-44.4(1). This section provides for administrative (licensing) actions against such persons who drive a vehicle with any amount of alcohol in their body.

²This mandatory sanction (i.e., jail or community service alternative) may not apply to 3rd offenses (w/n 6 yrs) if two of the previous offs occurred after 4/23/90 and to 4th & sub offenses (w/n 6 yrs) if the three previous offs occurred after 4/23/90. The law provides that for these offenses "[e]nrollment in and completion of a chemical dependency rehabilitation program approved by the court may be a sentencing alternative to incarceration or community service if the program provides intensive care or inpatient treatment and long-term closely supervised follow through after the treatment." §41-6-44(6)(c)(II) & (7)(c)

STATE:
General Reference:

WASHINGTON
Revised Code of Washington Annotated

Basis for a DWI Charge:

Standard DWI Offense:	Under the influence of or affected by intoxicating liquor §§46.61.502(3) & 46.61.504(3)
Illegal Per Se Law (BAC/BrAC Level):	0.10 ¹ §§46.61.502(1) & (2) and 46.61.504(1) & (2)
Presumption (BAC Level):	None
Types of Drugs/Drugs and Alcohol:	Under the influence of (1) Any Drug or (2) a Combination of Intoxicating Liquor and Any Drug §§46.61.502(3) & (4) and 46.61.504(3) & (4)
Other:	For Commercial Motor Vehicle Operators, see p. 3-495.

Chemical Breath Tests for BAC/BrAC Level:

Preliminary Breath Test Law:	No
Implied Consent Law:	
Arrest Required (Yes/No):	Yes §46-20-308
Implied Consent Law Applies to Drugs (Yes/No):	No ³
Refusal to Submit to Chemical Test Admitted into Evidence:	Yes (Criminal Cases) §46.61.517 ²
Other Information:	Special Note: A person may be administered either a breath or blood test without their consent, if they have been arrested for either (1) vehicle homicide, (2) vehicle assault or (3) DWI where there has been an injury related accident which may result in death. §46.20.308 ³ & State v. Schulze, 804 P.2d 566 (Wash. 1991)

Chemical Tests of Other Substances for BAC Level Which Are Authorized Under the Implied Consent Law:

Blood:	Yes
Urine:	No
Other:	None

¹This State's illegal per se law also makes it an offense to operate a motor vehicle with a breath alcohol concentration level of 0.10 or more.

²See State v. Zwicker, 713 P.2d 1101 (Wash. 1986), which limited such evidence to situations where the defendant initially raises the issue of a blood alcohol test by contesting the credibility or competence of police procedures.

³Under §46.20.308(3), if there is an injury likely to cause death, a person may be compelled to submit to a test for drugs as well as for alcohol.

Adjudication of DWI Charges:

Mandatory Adjudication Law (Yes/No):	No ¹
Anti-Plea Bargaining Statute (Yes/No):	No ¹
Pre-Sentencing Investigation Law (PSI) (Yes/No):	Yes Permissive authorization, but not mandatory; see §46.61.515.

Sanctions for Refusal to Submit to a
Chemical Test:

Refusal to take a Preliminary Breath Test:

Criminal Sanctions (Fine/Jail):	N/A
Administrative Licensing Action (Susp/Rev):	N/A
Other:	N/A

Refusal to Take Implied Consent

Chemical Test:

Criminal Sanction (Fine/Jail):	None
Administrative Licensing Action (Susp/Rev):	<u>1st refusal</u> -Rev for 1 yr (Mandatory); <u>2nd refusal</u> (w/n 5 yrs) Rev for 2 yrs (Mandatory) §§46.20.308 and 46.20.311(!)
Other:	None

Sanctions Following a Conviction for a DWI Offense:

Criminal Sanctions:

Imprisonment:

Term (Day, Month, Years,
Etc.):

1st off - 24 hrs - 1 yr; 2nd and Subsequent off
(w/n 5 yrs) - 7 dys - 1 yr; 2nd and Subsequent
off but offender has no license or because their
license was either suspended or revoked - 90 dys
- 1 yr Veh Assault (Drunk driving related
injury C1 C felony) - Not more than 5 yrs
§§9A.20.021(1)(c), 46.61.502, .504, .515, .522
See Miscellaneous Sanctions on p. 3-496.
Mandatory Minimum Term: 1st off - 24 cons hrs^{1&2}; 2nd and Subsequent
offs (w/n 5 yrs) - 7 dys^{2&3}; 2nd and Subsequent
off but offender has no license or because their
license was either suspended or revoked - 90
dys See Miscellaneous Sanctions on p. 3-496.

Mandatory Minimum Term:

¹The State has a deferred prosecution program for DWI offenses. A person is eligible for this program only once in every five (5) years. The program provides for alcohol treatment for a two year period. Upon successful completion of the program. The court shall dismiss the charges pending against the defendant. §10.05.010 et seq.

²May be suspended only if jail would impose a risk to defendant's physical or mental well-being.

³With 48 con. hrs. §46.61.515(1)

Special Note: The Washington Supreme Court has held that DWI offenses are not felonies. State v. Elgin, 825 P.2d 314 (Wash. 1992)

H B

4 5 9

8-LS1682J ✓
Cramer
3/14/94

CS FOR HOUSE BILL NO. 459()
IN THE LEGISLATURE OF THE STATE OF ALASKA
EIGHTEENTH LEGISLATURE - SECOND SESSION

BY

Offered:
Referred:

Sponsor(s): HOUSE LABOR AND COMMERCE COMMITTEE

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to minimum wage and overtime compensation claims."

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

3 * Section 1. AS 23.10.110(a) is amended to read:

4 (a) An employer who violates a provision of AS 23.10.060 or 23.10.065 is
5 liable to an employee affected in the amount of unpaid minimum wages, or unpaid
6 overtime compensation, as the case may be, and, except as provided in (d) - (f) of
7 this section, in an additional equal amount as liquidated damages.

8 * Sec. 2. AS 23.10.110(c) is amended to read:

9 (c) The court in an action brought under this section shall, in addition to a
10 judgment awarded to the prevailing party [PLAINTIFF], allow costs of the action and
11 reasonable attorney fees to be determined according to court rule. When the
12 commissioner is the prevailing party in an action brought under this section, the
13 commissioner shall remit the recovered attorney fees [PAID BY THE
14 DEFENDANT. THE ATTORNEY FEES IN THE CASE OF ACTIONS BROUGHT

1 UNDER THIS SECTION BY THE COMMISSIONER SHALL BE REMITTED BY
2 THE COMMISSIONER] to the Department of Revenue. The commissioner may not
3 be required to pay the filing fee or other costs. The commissioner in case of suit has
4 power to join various claimants against the same employer in one cause of action.

5 * Sec. 3. AS 23.10.110 is amended by adding new subsections to read:

6 (d) In an action under (a) of this section to recover unpaid minimum wages,
7 unpaid overtime compensation, or liquidated damages, if the employer shows to the
8 satisfaction of the court that the act or omission giving rise to the action was made in
9 good faith and that the employer had reasonable grounds for believing that the act or
10 omission was not in violation of AS 23.10.050 - 23.10.150, the court may decline to
11 award liquidated damages or may award an amount of liquidated damages less than
12 the amount set out in (a) of this section. The court shall, in a manner consistent with
13 applicable federal and state law, determine whether good faith has been established.
14 This subsection does not apply to an action brought under this section by the
15 commissioner.

16 (e) The commissioner may supervise the payment of the unpaid minimum
17 wages or unpaid overtime compensation owing to an employee under AS 23.10.060
18 or 23.10.065. Payment in full in accordance with an agreement by an employee to
19 settle a claim for unpaid minimum wages, unpaid overtime compensation, or liquidated
20 damages constitutes a waiver of any right the employee may have under (a) of this
21 section to unpaid minimum wages, unpaid overtime compensation, or liquidated
22 damages.

23 (f) In a settlement that is not supervised by the department or the court, an
24 employee is entitled to liquidated damages under (a) of this section unless the
25 employee and the employer enter into a written settlement agreement in which the
26 employee expressly waives the right to receive liquidated damages. The waiver must
27 be knowing and voluntary. A waiver may not be considered to be knowing and
28 voluntary unless the settlement agreement

- 29 (1) is written in a manner calculated to be understood by the employee;
30 (2) specifically waives rights or claims arising under AS 23.10.110(a);
31 (3) advises the employee to consult with an attorney or with the

1 department before entering into the agreement;

2 (4) allows the employee at least seven calendar days to consider
3 whether to accept the offer of settlement; and

4 (5) provides for a period of at least five days after the employee enters
5 into the agreement in which the employee may revoke the agreement; the settlement
6 agreement may not become effective or enforceable until the revocation period has
7 expired.

8 * Sec. 4. APPLICATION OF ACT. (a) AS 23.10.110(e), added by sec. 3 of this Act,
9 applies to agreements entered into on or after the effective date of this Act.

10 (b) AS 23.10.110(f), added by sec. 3 of this Act, applies to written agreements entered
11 into on or after the effective date of this Act.

12 (c) Except as provided in (a) and (b) of this section, to the extent constitutionally
13 permitted, this Act applies to actions commenced before, on, or after the effective date of this
14 Act that have not resulted in the entry of a final judgment before the effective date of this Act.

Sponsor Statement HB 459

OVERVIEW

This legislation addresses the awarding of punitive damages in claims of underpaid overtime compensation or statutory minimum wages under the Alaska Wage and Hour Act (AWHA). State statute imposes the payment of unpaid minimum wages or overtime compensation to an employee by an employer who has violated provisions of the AWHA. In addition to this, the employer may be liable for mandatory liquidated damages of an equal amount (AS 23.10.110(a)).

The Alaska Supreme Court in McKeown v. Kinney Shoe Corp., 820 P.2d 1068 (Alaska 1991), ruled that liquidated damages are **mandatory** and that any individual settlements out of court that did not include liquidated damages were invalid.

Prior to the Kinney Shoe ruling, an employee with a claim for underpaid overtime or minimum wages had a few options for redress. One, they could file complaint with the Alaska Dept. of Labor, who was able to negotiate a settlement. Two, the employer could attempt to reach a private settlement with the employer in question. In either of these cases, a settlement could be reached for an amount below full liquidated damages. Finally, if a settlement could not be reached in the above options, the case could be taken to court, where liquidated damages would be awarded in full if the case was found for the plaintiff.

As the law stands currently, an employer who is in violation of the state's minimum wage or overtime compensation laws is automatically liable for liquidated damages, regardless of the circumstances. Though this is intended as a to the employer in these instances, it creates an imbalance in certain situations. Under the current law, an employer who makes an "honest mistake" is punished as severely as an employer who knowingly violates the law. In these situations, the employer either takes his case to court, facing the possibility of paying full liquidated damages plus court costs or settling out of court for the claim plus full liquidated damages.

The Federal Labor Standards Act, upon which the AWHHA is based, contains identical language to AS 23.10.110(a), but also contains the following language:

. . . if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing his act or omission was not in violation of the Fair Labor Standards Act, . . . the court may in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in [29 U.S. Code § 216].

29 U.S. Code § 260

This additional language in the FLSA creates some flexibility for employers when an honest mistake is made. The discretion is left to the courts to decide to award partial or no liquidated damages where the employer shows it acted in good faith and it had a reasonable basis for believing it was not violating the law.

HB 459 also adds a provision in Section 2 that provides the payment of court costs and attorney fees to the prevailing party in a claim decided by the court. Previous statute only provided payment of these costs to the plaintiff (employee) in these cases. This change would help to prevent erroneous claims against an employer from being brought to the court. If the Commissioner of Labor was the prevailing party in an action under this section, any court or attorney fees awarded would be remitted to the Division of Revenue for deposit into the General Fund. The House State Affairs committee added some further clarification to this provision in their committee substitute, by adding the word "recovered." (Page 1, line 14 now reads " . . . commissioner shall remit the recovered attorney fees to the Dept. of Revenue.")

The goal of HB 459 is to change the state standards regarding the awarding of liquidated damages to be congruent with the federal standards. This results in a more equitable situation for both parties; protection is still provided to the employee and flexibility is afforded to the employer who makes a mistake in good faith, providing they meet the burden of proof.

Sponsor Statement CSHB 459 (JUD)

OVERVIEW

This legislation addresses the awarding of punitive damages in claims of underpaid overtime compensation or statutory minimum wages under the Alaska Wage and Hour Act (AWHA). State statute imposes the payment of unpaid minimum wages or overtime compensation to an employee by an employer who has violated provisions of the AWHA. In addition to this, the employer may be liable for mandatory liquidated damages of an equal amount (AS 23.10.110(a)).

The Alaska Supreme Court in McKeown v. Kinney Shoe Corp., 820 P.2d 1068 (Alaska 1991), ruled that liquidated damages are mandatory and that any individual settlements out of court that did not include liquidated damages were invalid.

Prior to the Kinney Shoe ruling, an employee with a claim for underpaid overtime or minimum wages had a few options for redress. One, they could file complaint with the Alaska Dept. of Labor, who was able to negotiate a settlement. Two, the employer could attempt to reach a private settlement with the employer in question. In either of these cases, a settlement could be reached for an amount below full liquidated damages. Finally, if a settlement could not be reached in the above options, the case could be taken to court, where liquidated damages would be awarded in full if the case was found for the plaintiff.

As the law stands currently, an employer who is in violation of the state's minimum wage or overtime compensation laws is automatically liable for liquidated damages, regardless of the circumstances. Though this is intended as a *to defendant* to the employer in these instances, it creates an imbalance in certain situations. Under the current law, an employer who makes an "honest mistake" is punished as severely as an employer who knowingly violates the law. In these situations, the employer either takes his case to court, facing the possibility of paying full liquidated damages plus court costs or settling out of court for the claim plus full liquidated damages.

The Federal Labor Standards Act, upon which the AWhA is based, contains identical language to AS 23.10.110(a), but also contains the following language:

. . . if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing his act or omission was not in violation of the Fair Labor Standards Act, . . . the court may in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in [29 U.S. Code § 216].

29 U.S. Code § 260

This additional language in the FLSA creates some flexibility for employers when an honest mistake is made. The discretion is left to the courts to decide to award partial or no liquidated damages where the employer shows it acted in good faith and it had a reasonable basis for believing it was not violating the law.

CSHB 459 (JUD) also adds a provision in Section 2 that provides the payment of court costs and attorney fees to the prevailing party in a claim decided by the court. Previous statute only provided payment of these costs to the plaintiff (employee) in these cases. This change would help to prevent erroneous claims against an employer from being brought to the court. If the Commissioner of Labor was the prevailing party in an action under this section, any court or attorney fees awarded would be remitted to the Division of Revenue for deposit into the General Fund. The House State Affairs committee added some further clarification to this provision in their committee substitute, by adding the word "recovered." (Page 1, line 14 now reads ". . . commissioner shall remit the recovered attorney fees to the Dept. of Revenue.")

CSHB 459 (JUD) would also provide some protection to the employee during a compensation claim in settlements that are not supervised by the Dept. of Labor or the courts. In Section 3 (f), an employee may enter into a written settlement agreement with the employer waiving the right to receive full or any liquidated damages. CSHB 459 (JUD) requires that this settlement meets five qualifications: (1) the settlement is written in a manner that is understood by the employee; (2) specifically waives the rights or claims in AS 23.10110(a); (3) advises the employee to consult with an attorney or with the Dept. of Labor before entering the agreement;

(4) allows the employee seven days to consider the settlement and (5) gives the employee 5 days after they enter into the settlement to revoke agreement.

The goal of HB 459 is to change the state standards regarding the awarding of liquidated damages to be congruent with the federal standards. This results in a more equitable situation for both parties; protection is still provided to the employee and flexibility is afforded to the employer who makes a mistake in good faith, providing they meet the burden of proof.

Court award partial
or no damages

change court fee pymt
whoever loses pays

Sec. (e) written settlements

FISCAL NOTE

STATE OF ALASKA
1994 LEGISLATIVE SESSION

BILL NO : CSHB 459 (STA)

Revision Date: _____
 Title: Damages and attorney fees for
unpaid wages
 Sponsor: House Labor & Commerce
 Requestor: House Judiciary

Department Affected: Labor
 BRU: Labor Standards & Safety
 Component: Wage & Hour
 COMPONENT SERIAL NO. 345

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 95	FY 96	FY 97	FY 98	FY 99	FY 00
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL						
---------	--	--	--	--	--	--

REVENUE FUND SOURCE:						
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FUNDING: (Thousands of Dollars)

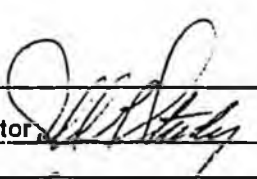
1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipt						
1006 GF/MHTIA						
Other						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

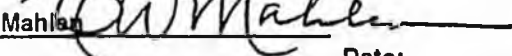
POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year (FY94) impact: \$ None

ANALYSIS: (Attach a separate page if necessary)

Prepared by: Donald G. Study, CSP, Director  Phone: 465-6003
 Division: Labor Standards & Safety Date: 3/16/94

Approved by Commissioner: Charles W. Mahler 
 Agency: Department of Labor Date: 3/16/94

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FISCAL NOTE

No. 1

Bill Version: HB 459

(H) Publish Date: 2/23/94

STATE OF ALASKA
194 LEGISLATIVE SESSION

BILL NO :

Revision Date: _____

Department Affected: Labor

Title: Damages and attorney fees for
unpaid wages

BRU: Labor Standards & Safety

Component: Wage & Hour

Sponsor: House Labor & Commerce

Requestor: House Labor & Commerce

COMPONENT SERIAL NO. 345

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 95	FY 96	FY 97	FY 98	FY 99	FY 00
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL						
---------	--	--	--	--	--	--

REVENUE						
FUND SOURCE:						

FUNDING: (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipt						
1006 GF/MHTIA						
Other						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year (FY94) impact: \$ None

ANALYSIS: (Attach a separate page if necessary)

Prepared by: Donald G. Study, CSP, Director Phone: 465-6003

Division: Labor Standards & Safety Date: 2/22/94

Approved by Commissioner: Charles W. Mahlen

Agency: Department of Labor Date: 2/22/94

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HOUSE COMMITTEE REP

(7)

Date Referred: March 11, 1994

FURTHER REFERRALS:

Date of Committee Action: _____

The JUDICIARY Committee considered:

HB 459

HOUSE BILL NO. 459

DAMAGES & ATTORNEY FEES FOR UNPAID WAGES

"An Act relating to liquidated damages and attorney fees for minimum wage and overtime compensation claims."

RECOMMENDATIONS:

be replaced with CSHB 459 (JUD) the same title
 a new title

have attached amendments(s)

do pass

do not pass

no recommendations

individual recommendations

additional referral to the _____ Committee

ADOPTS: _____ letter of Intent

ATTACHES NEW FISCAL NOTE(s): (Dept)

APPROVES PREVIOUS: (Dept/Date)

fiscal impact _____

fiscal note(s) _____

zero fiscal note _____

zero fiscal note(s) _____

SIGNING DO PASS	DP	OTHER RECOMMENDATIONS	DNP	NR	AM
<i>Laird Phillips</i>	<input checked="" type="checkbox"/>	<i>Rep. Davidson</i>	<input checked="" type="checkbox"/>		
<i>Annemette James</i>	<input checked="" type="checkbox"/>	<i>Steve D. ...</i>	<input checked="" type="checkbox"/>		
<i>Brian D. ...</i>	<input checked="" type="checkbox"/>	<i>Joseph ...</i>		<input checked="" type="checkbox"/>	
<i>[Signature]</i>	<input checked="" type="checkbox"/>				

Brian D. ...
 CHAIRMAN'S SIGNATURE

DIVISION OF LEGAL SERVICES

LEGISLATIVE AFFAIRS AGENCY STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2079
Mail Stop 3101

130 Seward Street, Suite 409
Juneau, Alaska 99801-2105

MEMORANDUM

March 14, 1994

SUBJECT: Sectional Summary of CSHB 459(). (Minimum wage and overtime compensation claims)

TO: Representative Eldon Mulder

FROM: Teresa B. Cramer *TC*
Legislative Counsel

You have requested a sectional summary of the above-described bill. As a preliminary matter, note that a sectional summary of a bill should not be considered an authoritative interpretation of the bill and the bill itself is the best statement of its contents.

Section 1 applies the exceptions enacted in section 3 of the bill to the general rule established in the statute that employers who violate the overtime wage or minimum wage requirements are liable for liquidated damages in the amount of the unpaid minimum wage or overtime compensation.

Sec. 2 permits the court to award attorney fees to the prevailing party, as determined by court rule, rather than only providing for attorney fees for a prevailing plaintiff.

Sec. 3 adds new provisions to permit the court to decline to award liquidated damages or to award an amount less than the amount required under AS 23.10.-110(a), which is amended by sec. 1 of this bill. The court may do so if the employer shows to the satisfaction of the court that the employer acted in good faith and that the employer had reasonable grounds for believing that it was not violating the minimum wage or overtime requirements. This waiver does not apply to an action brought by the Commissioner of Labor.

Under subsection (e), the commissioner is permitted to supervise the payment of unpaid minimum wage or overtime claims including settlements. Under bill Sec. 4(a), subsection (e) applies to agreements entered into on or after the effective date of the Act.

Representative Eldon Mulder

March 14, 1994

Page 2

Subsection (f) permits an employee to waive the right to liquidated damages in a written settlement agreement with the employer. The settlement must meet standards listed in the subsection. Under bill Sec. 4(b), subsection (f) applies to written agreements entered into on or after the effective date of the Act.

Sec. 4 addresses how to apply the provisions of the Act. As noted in the discussion above, Sec. 4(a) and (b) apply the settlement provisions to agreements entered into on or after the date the Act takes effect. Under Sec. 4(c), to the extent constitutionally permitted, the rest of the Act applies to actions in which a final judgement has not been entered on the date the Act takes effect.

TC:pl
94-201.plm

DIVISION OF LEGAL SERVICES

LEGISLATIVE AFFAIRS AGENCY STATE OF ALASKA

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

130 Seward Street, Suite 409
Juneau, Alaska 99801-2105

MEMORANDUM

February 18, 1994

SUBJECT: Sectional Summary of HB 459. (Liquidated damages and attorney fees for minimum wage and overtime compensation claims)

TO: Representative Eldon Mulder

FROM: Teresa B. Cramer *TBC*
Legislative Counsel

You have requested a sectional summary of the above-described bill. As a preliminary matter, note that a sectional summary of a bill should not be considered an authoritative interpretation of the bill and the bill itself is the best statement of its contents.

Section 1 applies the exceptions enacted in section 3 of the bill to the general rule established in the statute that employers who violate the overtime wage or minimum wage requirements are liable for liquidated damages in the amount of the unpaid minimum wage or overtime compensation.

Sec. 2 permits the court to award attorney fees to the prevailing party, as determined by court rule, rather than only providing for attorney fees for a prevailing plaintiff.

Sec. 3 adds new provisions to permit the court to decline to award liquidated damages or to award an amount less than the amount required under AS 23.10-110(a), which is amended by sec. 1 of this bill. The court may do so if the employer shows to the satisfaction of the court that the employer acted in good faith and that the employer had reasonable grounds for believing that it was not violating the minimum wage or overtime requirements. This waiver does not apply to an action brought by the Commissioner of Labor.

Under subsection (e), the commissioner is permitted to supervise the payment of unpaid minimum wage or overtime claims including settlements. Under Sec. 4(a), this subsection applies to agreements entered into on or after the effective date of the Act.

Representative Eldon Mulder
February 18, 1994
Page 2

Subsection (f) permits an employee to waive the right to liquidated damages in a written settlement agreement with the employer. Under Sec. 4(b), this applies to written agreements entered into on or after the effective date of the Act.

Sec. 4 addresses how to apply the provisions of the Act. As noted in the discussion above, Sec. 4(a) and (b) apply the settlement provisions to agreements entered into on or after the date the Act takes effect. Under Sec. 4(c), to the extent constitutionally permitted, the rest of the Act applies to actions in which a final judgement has not been entered on the date the Act takes effect.

TBC:gc
94-137.glc

BILL NO: House Bill No. 459

DATE: February 21, 1994

TITLE: Damages And Atty Fees For Unpaid Wages

CONTACT: Arbe Williams
465-2700

House Bill No. 459 would substantially alter the punitive penalties that currently exist for violations of the Alaska Wage and Hour Act. Section 3 would provide for a "good faith" exception to penalties except where actions are brought by the Commissioner of Labor. In addition, the commissioner and private parties would be authorized to negotiate a settlement that excludes part or all of the liquidated damages. Section 4 would apply the amendments to the Act to cases currently in litigation in the courts.

The interest to address liquidated damages is the result of a recent Alaska Supreme Court case involving Kinney Shoes wherein the Court found that individual settlement agreements that did not include liquidated damages were void. This has resulted, for all parties to such disputes, including the Department of Labor, in the mandatory inclusion of liquidated damages in any settlements reached. Prior to the Kinney Shoes decision parties could, and did, waive some or all liquidated damages if convinced that it was appropriate and in the best interest of the settlement. If a claim could not be settled administratively and court action was required, liquidated damages were automatically awarded if the case came to trial and the plaintiff prevailed.

The liquidated damage penalty created in AS 23.10.110 has been determined by the courts to be a punitive penalty designed to deter employers from violating the minimum wage and overtime obligations imposed by state law. This bill would eliminate automatic liquidated damages. The bill attempts to provide an exception for those cases brought by the Department of Labor but the department is advised that the courts would not look at those cases differently. A "good faith" effort does not require that the employer act to inform oneself of the law. Without an effective and guaranteed deterrent, employers will chance getting caught in violation of the laws because the odds would be good that the worst that will happen is that they will be forced to pay the wages they were liable to pay in the first place.

Before the Kinney decision, the department, and private parties, had the ability to negotiate settlements that included some portion of the liquidated damages using the certainty that a court would award 100% liquidated damages as leverage for settlement. Thus, settlement did not rely on an overburdened court system for relief in each and every case. Less than 1% of the department's claims ended up in court and fewer actually came to trial. In addition, there were no complaints with the process until the Kinney Shoe case removed the parties' ability to settle for less than 100% of damages.

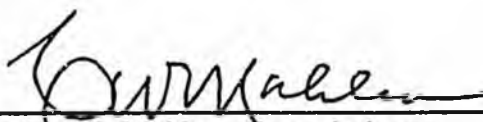
The Department of Labor supports encouraging the settlement of wage claims outside the court system and would propose to amend House Bill No. 459 to define "good faith" to include affirmative action taken by the employer to comply with state law. This amendment would

POSITION PAPER/Department of Labor

encourage compliance with the Alaska Wage and Hour Act, would provide an incentive to settle wage claims, and would reduce the burden on the courts to enforce the state's laws.

In addition, the Department would propose that the inclusion of Section 4 be reconsidered. This section affects those claimants whose cases are currently before the courts but have not been decided; those employees would be treated differently than those who filed during the same period but whose cases have been decided. All employees should be assured that they are provided equal protection under the law.

APPROVED:



Charles W. Mahlen, Commissioner

DATE: 2/22/94

POSITION PAPER/Department of Labor

DAVIS WRIGHT TREMAINE

Law Offices

SUITE 1450 • 550 WEST 7TH AVENUE • ANCHORAGE, ALASKA 99501
(907) 557-5310

FROM: Parry Grover, Davis Wright Tremaine

DATE: February 2, 1994

RE: Analysis of proposed House Bill relating to liquidated damages and attorney fees for minimum wage and overtime compensation claims

This bill corrects two serious shortcomings with respect to the liquidated damages provision of the Alaska Wage & Hour Act (AWHA), AS 23.10.110(a):

1. It restores to the Commissioner of the Alaska Department of Labor the authority to settle minimum wage and overtime claims without assessing liquidated damages, and it authorizes settlements outside court; and
2. It grants the courts discretion in private AWHA litigation to award partial or no liquidated damages if the employer proves he acted in good faith and reasonably.

Neither action has been legally permissible since the Alaska Supreme Court's decision in McKeown v. Kinney Shoe Corp., 820 P.2d 1068 (Alaska 1991).

The policy underlying AWHA is to require employers who fail to pay their employees minimum wages or overtime compensation the unpaid minimum wages or overtime compensation which are due, and an equal amount as liquidated damages. This policy is drawn from the federal Fair Labor Standards Act (FLSA) which contains similar liquidated damages provisions.

Unlike the FLSA, however, AS 23.10.110(a) has been interpreted by the Alaska Supreme Court as mandating payment of liquidated damages in every case, regardless of whether the employer acted reasonably and in good faith. The FLSA allows the court to waive liquidated damages in whole or in part if the employer makes that showing. Moreover, prior to Kinney Shoe, the Commissioner felt he had authority in appropriate cases to settle claims without requiring payment of liquidated damages. Since that decision, the Commissioner has been required to recover liquidated damages in every case.

This bill does not remove the liquidated damages provision in AWHA. Rather, it restores the Commissioner's pre-Kinney Shoe settlement authority, and it grants the courts power to waive

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BACK - UP

liquidated damages in cases where federal law allows that discretion.

The following analysis of Sections 3 and 4 of the bill summarizes how this bill corrects AWA:

Subsection 3(d). This provision incorporates the FLSA standard under which a court may decline to award liquidated damages where the employer proves it acted reasonably and in good faith. See 29 U.S. Code § 260. Subsection (d) applies only to private AWA litigation. It does not affect the Commissioner's enforcement and settlement powers.

For example, an employer might incorrectly believe an employee is exempt from overtime compensation because of advice from the Department of Labor given under a good faith misunderstanding of certain facts. After trial, the court would require the employer to pay the overtime compensation, but could decide to award partial or no liquidated damages depending on circumstances of the case. It will be the employer's burden to persuade the court not to award liquidated damages.

Subsection 3(e). This provision was requested by the Commissioner. It likewise is drawn from the FLSA, 29 U.S. Code § 216, and is intended to restore the Commissioner's pre-Kinney Shoe authority to settle AWA cases without requiring payment of liquidated damages. If the Commissioner finds it necessary to sue the employer in court and prevails at trial, an award of full liquidated damages is required under AS 23.10.110(a). Employers thus will have a powerful inducement to accept reasonable settlement proposals advanced by the Commissioner.

Subsection 3(f). This provision allows AWA settlements made outside of court which expressly waive liquidated damages to be respected judicially. The Kinney Shoe court held that private settlements are void. The court's decision has had the effect, albeit perhaps unintended, of increasing resort to litigation. There is language in the decision which strongly suggests that only those settlements approved by a court are valid. It is poor public policy to encourage litigation and to discourage private settlements of claims.

Section 4. This effective date provision distinguishes between private AWA litigation and enforcement of AWA by the Commissioner. Restoration of the Commissioner's settlement authority (Subsection 3(e)) and authority for private AWA settlements (Subsection 3(f)) are tied to the effective date of the Act. The good faith and reasonable grounds defense to liquidated damages will become available in pending private court proceedings which have not gone to final judgment prior to the effective date of the Act, and to future actions.

ARCTECH SERVICES


February 22, 1994

Representative Eldon Mulder
State Capitol, Rm. #116
Juneau, Alaska 99801-1182

Dear Representative Mulder,

I urge you to support House Bill 459. Passage of this legislation will allow the Department of Labor to settle wage and hour claims and allowing for a more fair and equitable settlement for the parties involved.

Sincerely,



M. Kathryn Thomas

OUR LADY OF COMPASSION CARE CENTER

4900 EAGLE STREET
ANCHORAGE, ALASKA 99503-7446
PHONE: (907) 562-2281



February 16, 1994

Members of The State House Labor and Commerce Committee:

Reps. Bill Hudson, Chairman
Joe Green, vice Chairman
Eldon Mulder
Brian Porter
Bill Williams
Joe Sitton
Jerry Mackie

I wanted to let you know that Our Lady of Compassion Care Center wholeheartedly supports the passage of HB 459. This legislation brings much needed reform to Alaska's wage and hour statute by once again allowing for negotiated settlements and allowing the State Department of Labor (DOL) and the Alaska Courts the flexibility to mitigate what are now mandatory liquidated damages provided the employer can prove his or her error was made in "good faith". The current law, as interpreted by the Alaska Supreme Court in its "Kenny Shoe" decision, strips the DOL of its previous flexibility with regard to settlements and liquidated damages, voids private settlements, and creates a "double or nothing" situation whereby the only options open to the employer are:

1. paying the costs of an outright victory in court, or
2. paying double whatever the claim is regardless of the circumstances.

The bill will not make it easy for employers to avoid paying overtime claims or liquidated damages. It will simply provide that in cases where employers can demonstrate they have made "honest mistakes" the Department or the Courts may take this into consideration when deciding whether and how much liquidated damages are awarded. The Fair Labor Standards Act, upon which the Alaska statute is based, provides the flexibility in federal law that HB 459 seeks to allow in state law. In addition, the states of California, Oregon, and Washington already have very similar provision on their books. I can think of no reason Alaska employers should be placed under a more burdensome standard than the thousands of businesses on the rest of the Pacific Coast. Please give HB 459 your support and move it out of the Labor and Commerce Committee as soon as possible. I look forward to working you to achieve final passage of this critically important legislation.

Sincerely,


Melissa A. Wright, Director Human Resources



February 16, 1994

Representative Bill Hudson, Chairman
House Labor and Commerce Committee
Room 101
State Capitol
Juneau, AK 99801-1182

Dear Chairman Hudson:

We strongly support the passage of HB 459. This legislation reforms Alaska's wage and hour statute by again allowing for negotiated settlements and allowing the State Department of Labor (DOL) and the Alaska Courts the flexibility to mitigate what are now mandatory liquidated damages, provided the employer can prove his or her error was made in "good faith."

The current law, as interpreted by the Alaska Supreme Court in its "Kenny Shoe" decision, strips the DOL of its previous flexibility with regard to settlements and liquidated damages, voids private settlements and creates a "double or nothing" situation whereby the employers most likely end up paying double whatever the claim is regardless of the circumstances.

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Please give HB 459 your support and move it out of the Labor and Commerce Committee as soon as possible. We look forward to working with you to accomplish the goals of this important legislation.

Sincerely,

WESTMARK HOTELS, INC.


Al Parrish
President

tkw

cc: Rep. Joe Green Rep. Eldon Mulder
Rep. Brian Porter Rep. Bill Williams
Rep. Joe Sitton Rep. Jerry Mackie

Carlisle

ENTERPRISES, INC.

900 Aurora Avenue • Fairbanks, Alaska 99701 • (907) 451-7155

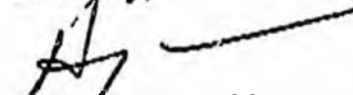
February 21, 1994

Rep. Eldon Mulder
Fax: 465-3518

Dear Eldon:

I wanted to let you know that I strongly support the passage of HB 459. We need the flexibility regarding liquidated damages that this bill allows. The present mandatory liquidated damages can actually hold up the resolution of claims, especially when an "error" has been made in good faith. Again I urge you to support passage of this bill. Thanks.

Sincerely,



Harry McDonald
President

HM/jd

**CARR
GOTTSTEIN**

FOODS CO.

6411 A Street Anchorage, Alaska 99518

Ph: (907) 561-1944

February 21, 1994

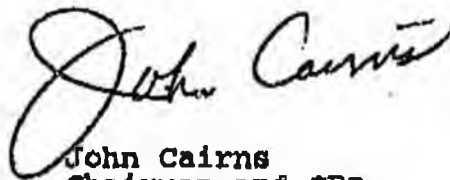
To All Members of The State House Labor and Commerce Committee

Reps: Bill Hudson (Chairman)
Joe Green (Vice Chairman)
Eldon Mulder
Brian Porter
Bill Williams
Joe Sitton
Jerry Mackie

We wanted to let you know we wholeheartedly support the passage of HB 459. This legislation brings much needed reform to Alaska's wage and hour statute by once again allowing for negotiated settlements and allowing the State Department of Labor (DOL) and the Alaska Courts the flexibility to mitigate what are now mandatory liquidated damages provided the employer can prove his or her error was made in "good faith". The current law, as interpreted by the Alaska Supreme Court in its "Kinney Shoe" decision, strips the DOL of its previous flexibility with regard to settlements and liquidated damages, voids private settlements, and creates a "double or nothing" situation whereby the only options open to the employer are 1. paying the costs of an outright victory in court, or 2. paying double whatever the claim is regardless of the circumstances.

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Please give HB 459 your support and move it out of the Labor and Commerce Committee as soon as possible. We look forward to working with you to achieve final passage of this critically important legislation.



John Cairns
Chairman and CEO

February 17, 1994

Representative Bill Hudson, Chairman
House Labor and Commerce Committee
Capitol Building
Juneau, Alaska

Subject: Statement of Support for House Bill 459

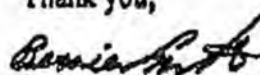
Dear Representative Hudson:

Tesoro Alaska Petroleum Company supports passage of HB 459. This bill will rectify an anomaly that currently exists between state law and the Fair Labor Standards Act. Current Alaska Wage and Hour law provides for mandatory liquidated damages when employers are found to have erred under state law, irrespective of the circumstances.

The proposed bill will not eliminate liquidated damages from future awards made under state Wage and Hour law. If passed, the new law would restore flexibility for the trier of facts when an employer has proven that its error was made in "good faith." A similar approach is used in the Federal Wage and Hour laws, as well as the comparable laws of California, Oregon, and Washington.

If you have any questions or, if we can be of assistance, please contact me. We hope HB 459 will be moved out of Committee soon and believe it's final passage will benefit the State.

Thank you,



Bernie Smith

cc: Representative Joe Green, (Vice Chairman)
Representative Eldon Mulder
Representative Brian Porter
Representative Bill Williams
Representative Joe Sitton
Representative Jerry Mackle

February 16, 1994

Representative Bill Hudson, Chairman
House Labor and Commerce Committee
Room 101
State Capitol
Juneau, AK 99801-1182

Dear Chairman Hudson:

We strongly support the passage of HB 459. This legislation reforms Alaska's wage and hour statute by again allowing for negotiated settlements and allowing the State Department of Labor (DOL) and the Alaska Courts the flexibility to mitigate what are now mandatory liquidated damages, provided the employer can prove his or her error was made in "good faith."

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Please give HB 459 your support and move it out of the Labor and Commerce Committee as soon as possible. We look forward to working with you to accomplish the goals of this important legislation.

Sincerely,

WESTMARK HOTELS, INC.


Al Parrish
President

tkw

cc: Rep. Joe Green Rep. Eldon Mulder
Rep. Brian Porter Rep. Bill Williams
Rep. Joe Sitton Rep. Jerry Mackle

OUR LADY OF COMPASSION CARE CENTER

600 CALIF STREET
ANCHORAGE ALASKA 99501-7440
PHONE (907) 561-2446
February 16, 1994



Members of The State House Labor and Commerce Committee:

- Reps. Bill Hudson, Chairman
- Joe Green, vice Chairman
- Eldon Mulder
- Brian Porter
- Bill Williams
- Joe Sitton
- Jerry Mackie

I wanted to let you know that Our Lady of Compassion Care Center wholeheartedly supports the passage of HB 459. This legislation brings much needed reform to Alaska's wage and hour statute by once again allowing for negotiated settlements and allowing the State Department of Labor (DOL) and the Alaska Courts the flexibility to mitigate what are now mandatory liquidated damages provided the employer can prove his or her error was made in "good faith". The current law, as interpreted by the Alaska Supreme Court in its "Kenny Shoe" decision, strips the DOL of its previous flexibility with regard to settlements and liquidated damages, voids private settlements, and creates a "double or nothing" situation whereby the only options open to the employer are:

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Sincerely,
Leisa A. Wright
Leisa A. Wright

Director Human Resources

cc: C. J. Bane

H B

4 6 0

MIKE NAVARRE
REPRESENTATIVE

DISTRICT 9

ALASKA STATE LEGISLATURE
HOUSE OF REPRESENTATIVES

DURING SESSION
STATE CAPITOL
JUNEAU, AK 99801-1182
(907) 465-3779

HOME ADDRESS
BOX 169 — KENAI, AK 99611
(907) 262-7842

MEMORANDUM

TO: Representative Brian Porter, Chairman, House Judiciary Committee

FROM: Representative Mike Navarre *Mike*

SUBJECT: Request for hearing on House Bill 460

DATE: February 18, 1994

Received

FEB 24 1994

REP BRIAN PORTER

.....

I would like to request a hearing for House Bill 460, "An Act relating to bail for various felonies if the defendant has certain previous felony convictions." When this legislation becomes law it prevents persons from being released on bail prior to sentencing or when pending appeal when a person has been convicted of sexual assault in the second and third degrees, sexual abuse of a minor in the second and third degrees and stalking in the first degree.

Thank you for your consideration.

MIKE NAVARRE

REPRESENTATIVE

DISTRICT 9

ALASKA STATE LEGISLATURE
HOUSE OF REPRESENTATIVES

DURING SESSION
STATE CAPITOL
JUNEAU, AK 99801-1182
(907) 465-3779

HOME ADDRESS
Box 169 — KENAI, AK 99611
(907) 262-7042

SPONSOR STATEMENT

February 22, 1994

TO: Representative Brian Porter, Chairman, House Judiciary Committee

FROM: Representative Mike Navarre

SUBJECT: House Bill 460

.....

In October 1993 a man allegedly raped and assaulted two women in Anchorage. The perpetrator had been convicted and sentenced for a felony drug offense and yet he was still free. He had a long criminal record that included convictions for three rapes and two vehicle thefts in California. In Alaska, he had been convicted for gambling, carrying a concealed weapon, fourth degree assault, trespassing and possession of cocaine. His criminal record indicates a violent past and a threat of being a danger to the community. In spite these facts, the defendant was released on \$5,000.00 bail pending appeal. The lives of two women and their families are forever changed because of these circumstances.

House Bill 460 simply adds to the list of crimes and circumstances for which bail is not allowed under AS 12.30.40(b). It will prevent a persons release on bail either before sentencing or pending appeal where the person has been previously convicted of sexual abuse of a minor in the second and third degrees and stalking in the first degree.

FISCAL NOTE

STATE OF ALASKA
1994 LEGISLATIVE SESSION

BILL NO. HB 460

Revision Date: February 18, 1994
Title: "...bail after conviction...if defendent has certain previous felony convictions."
Sponsor: Representative Navarre
Requestor: Representative Navarre

Department Affected: Department of Law
BRU: Prosecution
Component: All
COMPONENT SERIAL NO. 0085 through 0090

EXPENDITURES/REVENUES:

OPERATING	FY 95	FY 96	FY 97	FY 98	FY 99	FY 00
PERSONAL						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND &						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-

CAPITAL						
---------	--	--	--	--	--	--

REVENUE						
---------	--	--	--	--	--	--

FUNDING:

1002 Federal						
1003 GF Match						
1004 GF						
1005 GF/Program						
1006 GF/MHTIA						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

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

Estimate of current year (FY94) impact: -0-

ANALYSIS: (Attach a separate page if necessary.)
Please see the attached analysis.

Prepared by: Richard I. Pecues, Director Phone: 465-3672
Division: Administrative Services Division Date: February 18, 1994
Approved by Commissioner: Bruce M. Botelho, Attorney General
Agency: Department of Law Date: February 18, 1994

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For further information, contact the Department of Law, Legislative Office

FISCAL NOTE

STATE OF ALASKA
1994 LEGISLATIVE SESSION

BILL NO. HB 460

ANALYSIS CONTINUATION:

This bill would prohibit bail after conviction and before sentencing or pending appeal if the person has been convicted of an offense that is an unclassified or a class A felony; or a class B or class C felony if the person has been previously convicted of an offense that is an unclassified felony, a class A felony, or stalking in the first degree, sexual assault in the second or third degrees, and sexual abuse of a minor in the second or third degrees. In most cases, courts usually deny bail under these circumstances. However, the bill removes the courts' existing authority to grant bail in these circumstances. In any event, these are sentencing provisions that occur after conviction and, consequently, there will not be a fiscal impact for the Department of Law.

FISCAL NOTE

STATE OF ALASKA
1994 LEGISLATIVE SESSION

BILL NO. HB 460

Revision Date: _____ Dept. Affected: Administration
 Title: "An Act relating to bail after conviction" BRU: Public Defender Agency
 Component: Public Defender Agency
 Sponsor: Rep. Navarro
 Requestor: (H) Jud COMPONENT SERIAL NO. 1631

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY95	FY96	FY97	FY98	FY99	FY00
PERSONAL SERVICES	0.0	0.0	0.0		0.0	0.0
TRAVEL	0.0	0.0	0.0		0.0	0.0
CONTRACTUAL	0.0	0.0	0.0	0.0	0.0	0.0
SUPPLIES	0.0	0.0	0.0	0.0	0.0	0.0
EQUIPMENT	0.0	0.0	0.0	0.0	0.0	0.0
LAND & STRUCTURES	0.0	0.0	0.0	0.0	0.0	0.0
GRANTS, CLAIMS	0.0	0.0	0.0	0.0	0.0	0.0
MISCELLANEOUS	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES	0.0	0.0	0.0	0.0	0.0	0.0
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CHANGE IN REVENUES ()	0.0	0.0	0.0	0.0	0.0	0.0
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FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts	0.0	0.0	0.0	0.0	0.0	0.0
1003 GF Match	0.0	0.0	0.0	0.0	0.0	0.0
1004 GF	0.0	0.0	0.0	0.0	0.0	0.0
1005 GF/Program Receipts	0.0	0.0	0.0	0.0	0.0	0.0
1006 GF/MHTIA	0.0	0.0	0.0	0.0	0.0	0.0
Other	0.0	0.0	0.0	0.0	0.0	0.0
Total	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of current year (FY94) cost: none

POSITIONS:

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

ANALYSIS: (Attach a separate page if necessary)

Prepared by: John Salemi, Director Phone: 264-4400
 Division: Public Defender Agency Date: _____
 Approved by Commissioner: Nancy Bear Usera Date: 2/18/94
 Agency: Administration

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FISCAL NOTE

STATE OF ALASKA
1994 LEGISLATIVE SESSION

BILL NO. HB 460

Revision Date: _____ Dept. Affected: Administration
 Title: "An Act relating to bail after conviction" BRU: Office of Public Advocacy
 Component: Office of Public Advocacy
 Sponsor: Rep. Navane
 Requestor: (H) Jud COMPONENT SERIAL NO. 43

Expenditures/Revenues

(Thousands of Dollars)

OPERATING EXPENDITURES	FY95	FY96	FY97	FY98	FY99	FY00
PERSONAL SERVICES	0.0	0.0	0.0	0.0	0.0	0.0
TRAVEL	0.0	0.0	0.0	0.0	0.0	0.0
CONTRACTUAL	0.0	0.0	0.0	0.0	0.0	0.0
SUPPLIES	0.0	0.0	0.0	0.0	0.0	0.0
EQUIPMENT	0.0	0.0	0.0	0.0	0.0	0.0
LAND & STRUCTURES	0.0	0.0	0.0	0.0	0.0	0.0
GRANTS, CLAIMS	0.0	0.0	0.0	0.0	0.0	0.0
MISCELLANEOUS	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES	0.0	0.0	0.0	0.0	0.0	0.0
CHANGE IN REVENUES ()	0.0	0.0	0.0	0.0	0.0	0.0

FUND SOURCE

(Thousands of Dollars)

1002 Federal Receipts	0.0	0.0	0.0	0.0	0.0	0.0
1003 GF Match	0.0	0.0	0.0	0.0	0.0	0.0
1004 GF	0.0	0.0	0.0	0.0	0.0	0.0
1005 GF/Program Receipts	0.0	0.0	0.0	0.0	0.0	0.0
1006 GF/MHTIA	0.0	0.0	0.0	0.0	0.0	0.0
Other	0.0	0.0	0.0	0.0	0.0	0.0
Total	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of current year (FY94) cost: none

POSITIONS:

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

ANALYSIS: (Attach a separate page if necessary)

Prepared by: Brant McGee, Public Advocate Phone: 274-1684
 Division: Office of Public Advocacy Date: _____
 Approved by Commissioner: Nancy Bear Usura Date: 2/18/94
 Agency: Administration

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FISCAL NOTE

STATE OF ALASKA
1994 LEGISLATIVE SESSION

BILL NO. SB 228

Revision Date: _____ Dept. Affected: Corrections
 Title: No bail for felons with previous BRU: Statewide Operations
convictions Component: Institutions
 Sponsor: Sen. Salo
 Requestor: Senate Judiciary COMPONENT SERIAL NO. 694-1884

Expenditures/Revenues

(Thousands of Dollars)

OPERATING EXPENDITURES	FY 95	FY 96	FY 97	FY 98	FY 99	FY 00
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0

CAPITAL EXPENDITURES	0	0	0	0	0	0
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CHANGE IN REVENUES ()	0	0	0	0	0	0
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FUND SOURCE

(Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004-GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
TOTAL	0	0	0	0	0	0

Estimate of any current year (FY94) cost: 0

POSITIONS

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

Please see the attached fiscal analysis.

Prepared by: Diane Schenker, Special Assistant Phone: 465-4643/786-2147
 Division: Office of the Commissioner Date: 3/1/94
 Approved by Commissioner: J. Frank Prewitt, Jr. Date: 3/1/94
 Agency: Department of Corrections

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Fiscal Note/DOC

SB 228

March 1, 1994

Page 2 of 2

The bill would preclude an offender who has been convicted of a class B or C felony from being released on bail before sentencing or pending appeal if the offender had previously been convicted of an unclassified or class A felony, or certain sex offenses or stalking.

Assumptions

1. It is assumed that offenders convicted of class B or C felonies with the types of prior records applicable in the bill would be sentenced to some period of incarceration. Most will fall under presumptive sentencing statutes. The department reviewed 100 such cases, and found that 100% of the cases resulted in sentences of incarceration.
2. Since time served in custody prior to sentencing counts as time served on the sentence, the total time served will remain the same whether it is interrupted or delayed by posting bail or not.
3. The only impact on the department would be in cases in which the felon would receive bail under current law, then win an appeal which would result in no period of incarceration; under the bill the felon would have spent the appeal period incarcerated. According to the Clerk of the Court of Appeals, approximately 451 cases were appealed in 1992 (366 felonies and 85 misdemeanors.) Approximately 15% of the appeals resulted in reversals. This would be about 55 reversals per year for felony cases. Most reversals result in reduction in sentence length rather than overturning a conviction. Because the number of cases in which an appeal would result in no period of incarceration is assumed to be extremely small, and because there is no assurance that those cases would be released on bail pending appeal under current law, no measurable fiscal impact is expected.
4. If the department is able to gather more detailed data on the outcome of appeals referenced above, and the data indicates a significant number of appeals resulting in no period of incarceration, the fiscal note will be revised.

FISCAL NOTE

STATE OF ALASKA
1994 LEGISLATIVE SESSION

BILL NO: HB 460

Revision Date: _____ Dept. Affected: Public Safety
 Title: "An act relating to bail after conviction,
certain felony convictions" BRU: Alaska State Troopers
 Component: Detachments

Sponsor: Representative Navarre
 Requestor: Representative Navarre COMPONENT SERIAL NO. 799

EXPENDITURES/REVENUES: (Thousands of Dollars) (inflation not included)

OPERATING	FY 95	FY 96	FY 97	FY 98	FY 99	FY 00
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL EXPENDITURES	-0-	-0-	-0-	-0-	-0-	-0-
CHANGE IN REVENUES ()	-0-	-0-	-0-	-0-	-0-	-0-
<small>Revenue Code</small>						

FUNDING: (Thousands of Dollars)

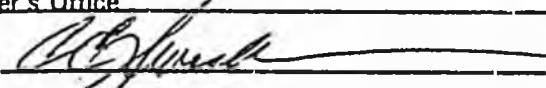
1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

Estimate of current year (FY 94) impact: \$ _____

POSITIONS:

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

ANALYSIS: (Attach a separate page if necessary.)
 No fiscal impact upon the Alaska State Troopers is anticipated.

Prepared By: Lee Ann Lucas Phone: 465-4322
 Division: Commissioner's Office Date: 2/21/94
 Approved by Commissioner:  Date: 2/24/94
 Agency: Richard L. Burton, Dept. of Public Safety

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Man sought in assaults on 2 women

Police launching a search for knife-wielding suspect

S.J. KOMARNITSKY
Daily News reporter

Anchorage police are searching for a 36-year-old man they say assaulted one woman and raped another at knifepoint early Wednesday morning.

Police have charged Leonard John Hoffman with one count of third-degree assault and four counts of first-degree sexual assault and have issued a warrant for his arrest.

According to court documents, Hoffman allegedly assaulted the first woman shortly after midnight at her Anchorage home. The woman told police she knew Hoffman and let him in. But, she told police, he grabbed her face, pushed her onto a couch and then threatened her with a knife.

He then broke off the attack and drove her vehicle to a second woman's residence in a mobile home park off Boniface Parkway, Capt. Shirley Warner said.

According to court documents, the second woman told police Hoffman is her sister's boyfriend. She let him in after he told her he had been beaten up. The woman said Hoffman had scratches on his arm and she tried to bandage it. She told police he then smoked what appeared to be marijuana.

Meanwhile, he made several trips between the resi-



Special to the News

Police describe Leonard John Hoffman as 6-foot, 230 pounds, with brown hair and brown eyes.

dence and the vehicle. As he went to leave one time, he suddenly grabbed her, pulled out a knife and dragged her into the bedroom, she said. He then raped her, she said.

The woman told officers she ran out of the mobile home about 1:30 a.m. when Hoffman went to get some food in a microwave. She called police from a neighbor's residence. Police staked out the mobile home for about four hours, at-

Please see Page E-5,
WARRANT

WARRANT: Man sought in attacks

Continued from Page E-1

tempting to make contact. But Hoffman had apparently snuck out after the woman left, Warner said.

Hoffman is considered extremely dangerous and possibly armed, Warner said.

Hoffman has a long criminal record including convictions in California for three rapes and two vehicle thefts.

In Alaska, Hoffman has been convicted for gambling, carrying a concealed weapon, fourth-degree assault, trespassing and possession of cocaine, according to court records.

Last December, he was also charged with four counts of sexual assault for allegedly tying up and raping a woman to whom he offered a ride. Those charges were later dropped for lack of evidence.

In June, he was sentenced to three years in jail for drug possession. He was released on bail after he appealed the conviction.

Sgt. Walt Monegan said police are familiar with Hoffman. And although they didn't step up patrols Wednesday night, all officers had been briefed on him and a picture was being circulated.

"Right now, we are keeping our eyes out ... and following up on any possible sightings," Monegan said.

He said officers also were watching Hoffman's usual haunts. That included his last reported residence on West 26th Street.

Police describe Hoffman as 6 foot, 230 pounds, with brown hair and brown eyes. He often uses the aliases Leonard J. Samano and Leo Hoffman or combinations of the two. He is considered dangerous and anyone spotting him should call the Anchorage Police Department 786-8900.

THE
FOLLOWING
DOCUMENTS
ARE
POOR
ORIGINAL
COPIES

DATE: SUNDAY October 17, 1993

PAGE: 91

EDITION: FINAL

SECTION: Metro

LENGTH: Short

SOURCE: By S.J. KOMARNITSKY Daily News reporter

SUSPECT IN RAPES ARRESTED

Acting on a tip, police arrested Leonard Hoffman and another man early Saturday morning at a Wasilla apartment where they were staying.

Police had been looking for Hoffman since Wednesday, when he allegedly assaulted one Anchorage woman and raped another at knife-point. Police had asked for the public's help in finding the 36-year-old Hoffman, who they said was dangerous and possibly armed.

Trooper spokesman Steve Wilhelm said a Crime Stoppers tip led police to the apartment building on the Seward-Meridian Parkway where Hoffman was staying.

When confronted, Hoffman initially gave troopers a fake name, Wilhelm said. But then he admitted who he was and gave up without a struggle.

Another man staying at the apartment also was arrested on an unrelated charge, Wilhelm said. The man, whom Wilhelm would not identify, also had a

RANK 2 OF 2, PAGE 2 OF 2, DB AD3, DOCUMENT 291639
warrant for

his arrest, he said. Wilhelm did not know the relationship between the men or how Hoffman traveled from Anchorage to Wasilla.

Hoffman is charged with four counts of first-degree sexual assault and one count of third-degree assault. He has a long criminal record, including convictions in California for three rapes and two vehicle thefts. In Alaska, he has been convicted of gambling, fourth-degree assault, carrying a concealed weapon, trespassing and possession of cocaine, according to court records.

In June, he was sentenced to three years in jail for drug possession. He was out on bail appealing that conviction when the latest attacks occurred.

In a court appearance Saturday, his bail was set at \$75,000 with a court-approved third-party custodian.

Leonard Hoffman, birthdata unknown, was found guilty by a jury of fourth-degree misconduct involving a controlled substance, and the following charges were dismissed: two counts of third-degree assault, and one count each of second-degree sexual assault, first-degree sexual assault and kidnapping. Sentenced to three years in prison, with recommendation for substance abuse treatment and counseling. Judge Souter.

Exempt From VRA Certif.

IN THE DISTRICT/SUPERIOR COURT FOR THE STATE OF ALASKA
AT ANCHORAGE

deft

(x) STATE OF ALASKA)
 () MUNICIPALITY OF ANCHORAGE)
)
 Plaintiff,)
)
 vs.)
)
 Leonard J. Hoffman)
 aob:4/29/57)
 SS#574-30-4503)
 Defendant.)

CASE NO. 3AN-S 93-7782 CR
 ARREST WARRANT

To Any Peace Officer Or Other Authorized Person:

You are commanded to arrest the defendant and bring the defendant before the nearest available judicial officer without unnecessary delay to answer to a complaint ~~information/indictment~~ charging the defendant with violation of
A.S. 11.41.220(a)(1) and four counts 11.41.410(a)(1)
 (statute or ordinance)
Assault 3° and four counts Sexual assault 1°
 (offense)

Bail is set at \$ 75,000 . The defendant may not be released until the court approves a third party custodian and/or conditions of release.



[Signature]
 Judge/Deputy Clerk, as ordered, on the record
 by Judge W. L. ...
 Date 10/13/93

Sex: M Race: W Ht: 6' Wt: 230# Hair: BRN Eyes: BRN
 DOB: 4-29-57 OL/ID AK 6058879 SSN 574-30-4503
 Last Known Address: 1414 West 26th. phone: _____
 Place of Employment: _____ phone: _____

RETURN

I received the above warrant on _____ 19____, and executed it by arresting the defendant and serving the defendant with a copy of this warrant in _____, Alaska, on _____, 19____.

Return Date _____ Signature of Peace Officer _____ Type or Print Name _____

10

IN THE DISTRICT COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

STATE OF ALASKA,)
)
 Plaintiff,)
)
 vs.)
 Leonard J. Hoffman)
)
 DOB: 4/29/57)
 AK ID/OL: 6058879)
 SSN:574-30-4503)
 ATN:)
 Defendant.)

Filed in the Trial Courts
STATE OF ALASKA THIRD DISTRICT
IN ANCHORAGE

OCT 13 1993

BY _____ Deputy

Court No. 3AN-S93-7782 Cr.

COMPLAINT

COUNT ONE
ASSAULT IN THE THIRD DEGREE
AS 11.41.220(A)(1)

COUNT TWO
SEXUAL ASSAULT IN THE FIRST DEGREE
AS 11.41.410(A)(1)

COUNT THREE
SEXUAL ASSAULT IN THE FIRST DEGREE
AS 11.41.410(A)(1)

COUNT FOUR
SEXUAL ASSAULT IN THE FIRST DEGREE
AS 11.41.410(A)(1)

COUNT FIVE
SEXUAL ASSAULT IN THE FIRST DEGREE
AS 11.41.410(A)(1)

THE COMPLAINANT CHARGES IN COUNT ONE:

that on or about October 13, 1993, at or near Anchorage, in the Third Judicial District, State of Alaska, Leonard J. Hoffman did recklessly place another, M.B., in fear of imminent serious physical injury by means of a dangerous instrument.

All of which is a class C felony offense, being contrary to and in violation of AS 11.41.220(a)(1), and against the peace and dignity of the State of Alaska.

THE COMPLAINANT CHARGES IN COUNT TWO:

that on or about October 13, 1993, at or near Anchorage, in the Third Judicial District, State of Alaska, Leonard J. Hoffman did knowingly and unlawfully engage in sexual penetration with another person, K.V., without K.V.'s consent, by penetrating her anus with his finger.

All of which is an unclassified felony offense, being contrary to and in violation of AS 11.41.410(a)(1), and against the peace and dignity of the State of Alaska.

THE COMPLAINANT CHARGES IN COUNT THREE:

that on or about October 13, 1993, at or near Anchorage, in the Third Judicial District, State of Alaska, Leonard J. Hoffman did knowingly and unlawfully engage in sexual penetration with another person, K.V., without K.V.'s consent, by penetrating her vagina with his finger.

All of which is an unclassified felony offense, being contrary to and in violation of AS 11.41.410(a)(1), and against the peace and dignity of the State of Alaska.

THE COMPLAINANT CHARGES IN COUNT FOUR:

that on or about October 13, 1993, at or near Anchorage, in the Third Judicial District, State of Alaska, Leonard J. Hoffman did knowingly and unlawfully engage in sexual penetration with another person, K.V., without K.V.'s consent, by penetrating her vagina with his penis.

All of which is an unclassified felony offense, being contrary to and in violation of AS 11.41.410(a)(1), and against the peace and dignity of the State of Alaska.

THE COMPLAINANT CHARGES IN COUNT FIVE:

that on or about October 13, 1993, at or near Anchorage, in the Third Judicial District, State of Alaska, Leonard J. Hoffman did knowingly and unlawfully engage in sexual penetration with another person, K.V., without K.V.'s consent, by penetrating her mouth with his penis.

All of which is an unclassified felony offense, being contrary to and in violation of AS 11.41.410(a)(1), and against the peace and dignity of the State of Alaska.

I, Robert M. Gray, state under oath that this complaint is based

on information and belief derived from my investigation in this matter.

M.B. reports that just after midnight, in the early morning hours of October 13, 1993, she was at her home in Anchorage, when the defendant, who she knows as an acquaintance, came to see her. While at her home, the defendant suddenly grabbed her face with his hand, splitting her lip, and pushed her face into the couch. He then ripped her panties off, stuffed them in her mouth, and held up a knife as if he were going to stab her. He told her he had killed two back men already tonight with a baseball bat. M.B. said he suddenly stopped and began to frantically try to make telephone calls. She suggested to him that he could take her car, and he left. M.B. said she struggled with him during the above encounter, and scratched his face and bit his finger.

K.V. reports that around 12:30 a.m. on October 13, 1993, she was at her home in Anchorage, when the defendant, whom she knows as a boyfriend of her sister, came to her home. She said he wanted in, that some black guys had beaten him up. She observed injuries on him and invited him in and tried to bandage up his arm, using an Ace bandage.

K.V. said he smoked what appeared to be marijuana, after he offered her some, and she declined. She said he went back and forth to his car several times. She said one time as he was leaving, he grabbed her, pulling her shirt off, and pulled out a knife, which he used to cut off her bra. He then dragged her into the bedroom. He tied her hands above her head, using the Ace bandage she had given him earlier. He told her, "I have nothing to lose. I'm going to kill you." He told her he had an Uzi in the car. He then forced his finger into her anus. He continued to assault her by forcing his finger into her vagina. He forced his penis into her vagina. He grabbed her hair and forced her mouth onto his penis. During these assaults, he was rubbing the knife around her breasts.

Afterward, K.V. tried to pretend everything was okay, because she was still afraid that the defendant would carry through on his threat to kill her. She offered to make him some food, and managed to escape to call the police when he went to the microwave to get his food. She said he followed her, cursing, but she managed to get away.

BAIL INFORMATION

The defendant is known to me as a convicted sexual assault felon in California. I am also aware that he is currently out on bail pending appeal on a drug conviction.

DATED this 13 day of October, 1993, at Anchorage,
Alaska.

Det Robert M. Kelly #0512
Inv.
Anchorage Police Department

SUBSCRIBED AND SWORN to before me this 13th day of
October, 1993, at Anchorage, Alaska.

[Signature]
Judge, Magistrate

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NOTES TO DECISIONS

Alaska's Bail Reform Act provides for expeditious review of bail determinations. *Carman v. State*, 564 P.2d 361 (Alaska 1977).

The need for rapid review of bail orders is reflected in this section. *Martin v. State*, 517 P.2d 1389 (Alaska 1974).

The supreme court has implemented this section by the adoption of Appellate

Rule 206(b) and Appellate Rule 207. *Griffith v. State*, 641 P.2d 228 (Alaska Ct. App. 1982).

Applied in *Gilbert v. State*, 540 P.2d 485 (Alaska 1975); *A.M. v. State*, 653 P.2d 346 (Alaska Ct. App. 1982).

Quoted in *Stiegele v. State*, 685 P.2d 1255 (Alaska Ct. App. 1984).

Sec. 12.30.040. Release after conviction. (a) A person who has been convicted of an offense and is awaiting sentence, or who has filed an appeal shall be treated in accordance with the provisions of AS 12.30.020 unless the court has reason to believe that no one or more conditions of release will reasonably assure the appearance of the person as required or prevent the person from posing a danger to other persons and the community. If that determination is made, the person may be remanded to custody. This section does not affect the right of a person appealing from a judgment of conviction from a district court to the superior court to be released on bail pending appeal under Rule 603(b) of the Rules of Appellate Procedure.

(b) Notwithstanding the provisions of (a) of this section, if a person has been convicted of an offense which is an unclassified felony or a class A felony, the person may not be released on bail either before sentencing or pending appeal. (Sec. 3.02 ch 34 SLA 1962; am § 1 ch 20 SLA 1966; am § 3 ch 24 SLA 1966; am § 3 ch 39 SLA 1974; am § 36 ch 102 SLA 1980; am § 15 ch 45 SLA 1982; am § 42 ch 6 SLA 1984)

NOTES TO DECISIONS

Application of section is limited. — This section, which provides for release after trial, is limited in application to convicted persons awaiting sentence or whose appeal is pending. *Martin v. State*, 517 P.2d 1389 (Alaska 1974).

Application of Alaska Constitution bail clause. — The bail clause of the Alaska Constitution does not apply after the conviction of a person accused of a crime. *State v. Wassillie*, 606 P.2d 1279 (Alaska 1980).

Factors in deciding whether to remand to custody. — In making the determination "that no one or more conditions of release will reasonably assure the appearance of the person as required or prevent the person from posing a danger to other persons and the community," the trial court can consider the facts of the crime of which the defendant was convicted and the likely sentence which he

will receive in determining the risk of flight and violence which he presents. *Muzzana v. State*, 653 P.2d 658 (Alaska Ct. App. 1982).

Where the trial court did not make the findings required by subsection (a) of this section as a prerequisite to denying bail after conviction, the court of appeals reversed the decision and remanded for further findings. *Muzzana v. State*, 653 P.2d 658 (Alaska Ct. App. 1982).

Power of trial court to grant bail in derogation of subsection (b). — Although there is an inherent power in the trial courts to grant bail where no statute or constitutional provision expressly authorizes or prohibits it, since the legislature has here specifically forbidden bail to those convicted of unclassified felonies and class A felonies and the supreme court has enacted a rule which the court of appeals has construed to be consistent

with that legislative action, the trial court has no inherent authority to grant bail in derogation of subsection (b). *Stiegele v. State*, 685 P.2d 1255 (Alaska Ct. App. 1984).

Applicability of 1982 amendment. — Provision of current subsection (b) that "if a person has been convicted of an offense which is an unclassified felony or a class A felony, the person may not be released on bail either before sentencing or pending appeal," does not apply to defendants whose convictions occurred before its effective date of January 1, 1983, and it was error to revoke defendant's bail on the basis of this provision where defendant had been convicted prior to January 1, 1983. *Kwallek v. State*, 658 P.2d 794 (Alaska Ct. App. 1983).

The 1982 amendment of subsection (b), effective January 1, 1983, did not apply to defendant arrested prior to January 1, 1983 but convicted after that date. *Parker v. State*, 667 P.2d 1272 (Alaska Ct. App. 1983).

No conflict exists between subsection (b) and *Crim. R. 4a(a)*, which provides that a defendant in a criminal proceeding is entitled to bail pursuant to AS 12.30.010-.080, since *Crim. R. 41(a)* adopted by reference subsequent amendments, including the 1982 amendments to subsection (b). *Stiegele v. State*, 685 P.2d 1255 (Alaska Ct. App. 1984).

Constitutionality of subsection (b). — For constitutionality of subsection (b) prior to 1982 amendment, see *Griffith v. State*, 641 P.2d 228 (Alaska Ct. App. 1982). See also *Walker v. State*, 652 P.2d

88 (Alaska 1982); *Muzzana v. State*, 653 P.2d 658 (Alaska 1982).

Subsection (b), which denies release or bail before sentencing or pending appeal to persons convicted of an unclassified or class A felony, is not an unconstitutional invasion of the supreme court's rule-making power since it does not conflict with any supreme court rule. *Stiegele v. State*, 685 P.2d 1255 (Alaska Ct. App. 1984).

This section does not deny substantive due process or equal protection rights since the average member of the class comprised of those convicted of unclassified felonies and class A felonies will serve a longer sentence and therefore present a greater risk of flight than the average offender convicted of a class B felony or a lesser offense and, in addition, it would not have been unreasonable for the legislature to conclude that the average unclassified or class A offender is more dangerous than the average class B or C offender, and therefore, a legitimate basis exists for the legislative classification distinguishing unclassified and class A felonies from class B felonies. *Stiegele v. State*, 685 P.2d 1255 (Alaska Ct. App. 1984).

Applied in *Nighswonger v. State*, 680 P.2d 105 (Alaska Ct. App. 1984).

Quoted in *Dobrova v. State*, 674 P.2d 834 (Alaska Ct. App. 1984).

Stated in *Walker v. Huston*, 689 F.2d 901 (9th Cir. 1982).

Cited in *Kelly v. State*, 663 P.2d 967 (Alaska Ct. App. 1983); *Dyer v. State*, 666 P.2d 438 (Alaska Ct. App. 1983).

Collateral references. — Constitutional right to bail pending appeal from conviction. 19 ALR 807; 77 ALR 1235.

Sec. 12.30.050. Release of material witnesses. If it appears by affidavit that the testimony of a person is material in a criminal proceeding, and it is shown that it may become impracticable to secure the presence of the person by subpoena, a judicial officer shall impose conditions of release under AS 12.30.020. No material witness shall be detained because of inability to comply with any condition of release if the testimony of the witness can adequately be secured by deposition. Release may be delayed for a reasonable period of time for the deposition of the witness to be taken. (§ 1 ch 20 SLA 1966)

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