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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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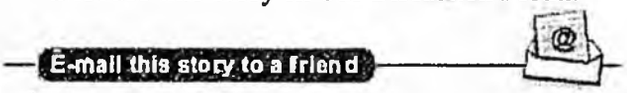

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Web posted **Tuesday, May 2, 2000**

Troopers arrest man charged in double-fatal accident

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

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

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

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

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

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

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Anchorage Daily News

3RD WRECK PINNED ON BOOZE

WOMAN CRITICALLY HURT; CRASH HIGHLIGHTS DWI ISSUE

By Larry Campbell And Lisa Demer
Daily News Reporters

(Published July 6, 2000)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

not to.

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

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

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

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Accused drunken driver charged

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

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

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

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

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

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

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

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

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

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

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

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

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

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METRO

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

BOB HALLINEN / Anchorage Daily News

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

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

By KAREN AHO
Daily News reporter

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

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

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

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

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

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

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

She doesn't remember much.

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

See Page B-2, VICTIM

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

VICTIM: Is grateful to be alive

Continued from Page B-1

was going for help," she said.

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

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

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

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

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

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

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

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

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

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

JET SKI

Continued from Pa

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CRITTERS: Man spreads smiles, mess

Continued from Page B-1

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

Driver drunk in 6-fatality July wreck

ADN Aug 2000

Chena road collision worst ever in Interior

By KAREN AHO
Daily News reporter

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

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

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

See Back Page, CHENA

CHENA: Driver, 3 others were drunk

Continued from Page A-1

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

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

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

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

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

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

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

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

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

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

Anchorage, AK

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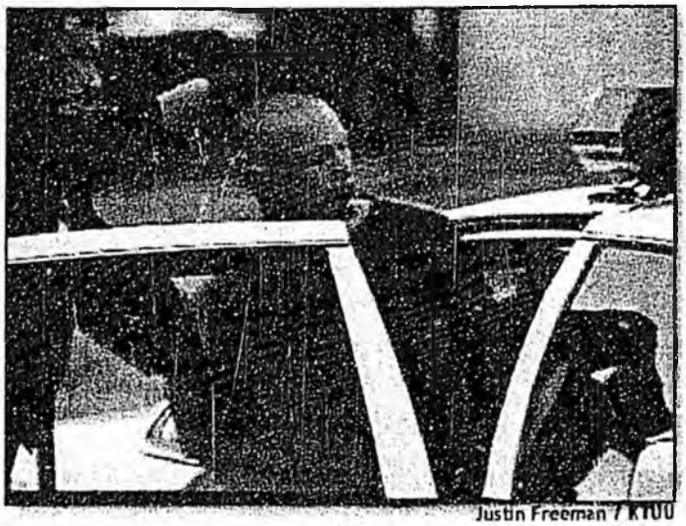

Justin Freeman / KTUU

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

Dan Fagan

Man faces 3rd DUI

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

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

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

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

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

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

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

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

MSNBC COVERAGE

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NEXT STORY →

SAM HARRAL / Fairbanks Daily News-Miner

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

DWI

The road to tragedy

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Anchorage Daily News

9 Aug 2000

Kenai Peninsula Online

Powered By

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

Woman arrested in connection with September death of Unalaska man

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

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

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

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

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

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

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

Attorney calls drunken driving sentence one of most severe ever

Two fatalities worth 22 years

By DOUG LOSHBAUGH
Peninsula Clarion

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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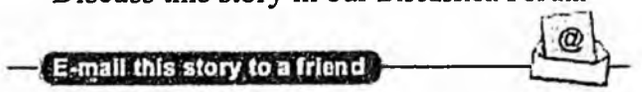

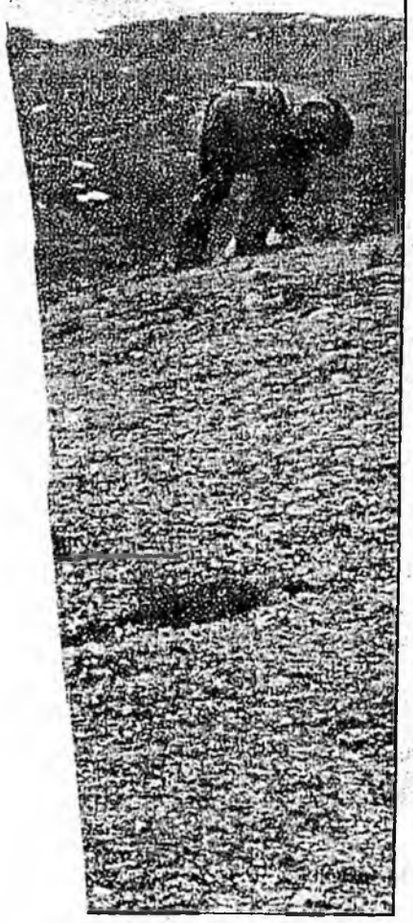

MAUREEN CLARK / The Associated Press

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

Injured women improving

ADN 14 July 2000

DWI suspect had truck, not license, police say

By LARRY CAMPBELL
Daily News reporter

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

Bowman

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

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

See Page B-2, WOMEN

Firefighters accept 5-year labor contract

By KAREN AHO
Daily News reporter

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

"The city deserves five years of labor

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

Man sentenced for killing best friend

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

New APRN pre

Paul Stankavich has t
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Stankavich succeeds

WOMEN: Crash victims' conditions improve slightly

Continued from Page B-1

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

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

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

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

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

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

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

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

All three cases remain under investigation.

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

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DENALI: Crews take whack a

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Legislature on right road with drunken-driving laws

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

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

How do we know that drunken driving was socially acceptable?

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

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

Everybody played; everybody lost.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Fairbanks Daily News-Miner

22 JAN 2001

DWI legislation

Jan. 18, 2001

To the editor:

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

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

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

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

Matt Kennebec
Fairbanks

Anchorage Daily News 23 Jan 2001

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

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

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

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

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

—Dave Glasen
Tatitlek

STAR PHOTO BY DARRELL L. BREESE

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

Local legislators get an earful

Citizens want attention given to schools, roads

By JODI STEPHENS
Alaska Star

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

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

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

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

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

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

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

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

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

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

On the subject of road projects, Sen. Randy

See EARFUL, Page 17

Alaska Star 25 Jan 2001

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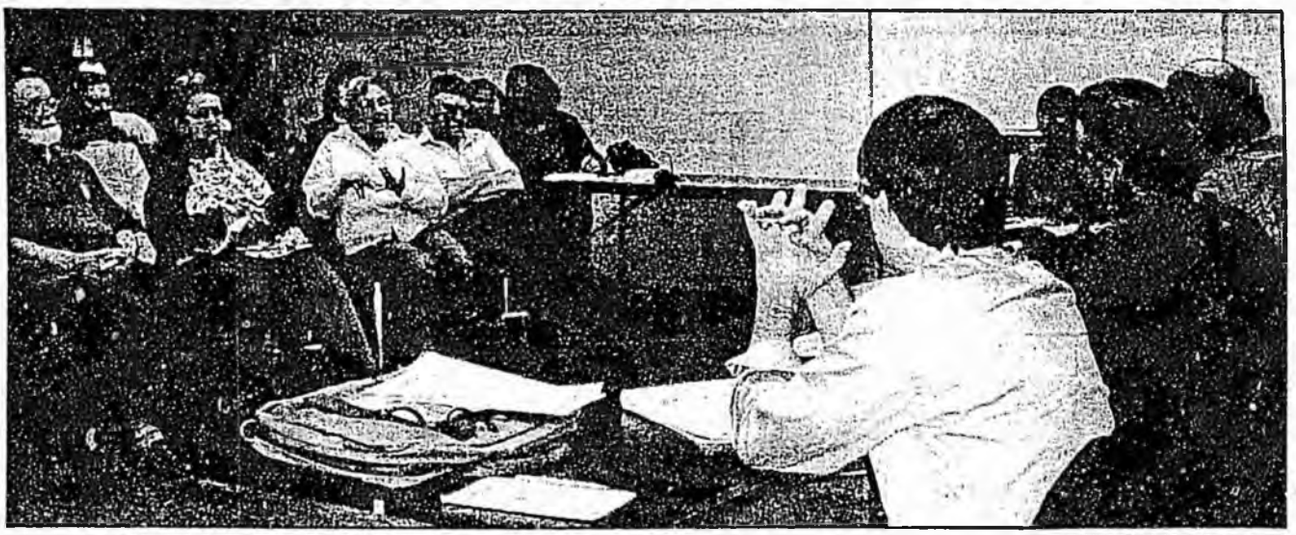

STAR PHOTO BY JODI STEPHENS

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

EARFUL:

Continued from Page 1

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

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

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

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

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

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

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

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

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

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

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York Sunday News
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Charleston Daily Mail

Taking away the keys

February 02, 2001

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

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

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

The city ordinance takes a bigger bite from repeat offenders.

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

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

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

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

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

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

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

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

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

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

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

What price can you put on a dead wife?

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

— Doug Brown
Anchorage

Anchorage Daily News
10 Feb 2001

State traffic accidents up 8.8 percent in 1999

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

By ANN CHANDONNET
THE JUNEAU EMPIRE

Juneau Empire 11 February 2001

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

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

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

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

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

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

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

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

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

•••••

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

17 - 11

12 Jan 2001

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

FAIRBANKS
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The whole toolbox

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

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

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

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

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

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

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

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

Anchorage Daily News

Michael J. Sexton, Publisher
Patrick Dougherty, Editor
Steve Lindbeck, Associate Editor

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

OUR VIEW

When drivers are outlaws

Suspending a license isn't a strong enough deterrent

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

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

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

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

There seems to be a pattern here.

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

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

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

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

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

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

Mandatory sentences should go to drunk drivers who injure, kill

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

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

— Gladys Wilson
Anchorage

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

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

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

COUNSEL

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

JUDGES

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

OPINION

MOORE, Justice.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

DISSENT

COMPTON, Justice, dissenting.

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

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

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

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

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

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

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

OPINION FOOTNOTES

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

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

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

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

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

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

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

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

DALE M. GUNDERSEN, Petitioner,

vs.

MUNICIPALITY OF ANCHORAGE, Respondent

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

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

COUNSEL

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

JUDGES

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

OPINION

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

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

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

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

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

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

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

Lauderdale is asking for the opportunity to test the reliability or credibility of the results of the breathalyzer test. He wishes to do this by a scientific analysis of some of the components of the breathalyzer machine, that is, the ampoules, which we have held may well yield scientifically reliable data bearing on his innocence or guilt of the crime with which he is charged. A denial of the right to make such analysis, that is to say, to "cross-examine" the results of the test, would be reversible error without any need for a showing of prejudice. It would be denial of a right to a fair trial, and a fair trial is essential to affording an accused due process of law.

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

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

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

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

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

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

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

649 P.2d at 258 n.5.

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

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

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

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

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

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

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

The judgment of the court of appeals is AFFIRMED.

DISSENT

BURKE, Justice, dissenting.

I dissent.

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

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

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

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

OPINION FOOTNOTES

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

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

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

granted.

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

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

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

7 AS 28.35.033(e) provides:

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

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

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

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

DISSENT FOOTNOTES

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

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

MANUEL ROBERT PENA, JR., Appellant,

vs.

STATE OF ALASKA, Appellee.

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

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

COUNSEL

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

JUDGES

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

OPINION

BRYNER, Chief Judge. OPINION

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

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

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

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

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

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

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

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

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

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

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

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

The express language of AS 28.35.032(a), coupled with the legislative history described above, leads us to the conclusion that in enacting the Implied Consent Statute the legislature intended that once a breath test had been refused no other chemical test would be allowed.

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

We interpret the language of AS 28.35.032(a), stating that after refusal to submit to a test of the breath "a chemical test shall not be given," to mean **any** chemical test, be it of the breath, blood, urine or otherwise. Thus, we reject the state and municipality's argument that such language means only that no other chemical test of the breath shall be given.

Id. at 1191 (emphasis in original).

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

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

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

n.13.[3]

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

Given the foregoing considerations, we conclude that AS 28.35.032(a) cannot be restricted to apply solely to DWI prosecutions. To the extent that the statute, by providing that "a chemical test shall not be given" following a breathalyzer refusal, affirmatively limits the manner in which evidence of intoxication may be obtained, its limitation must apply with equal force in all prosecutions "arising out of acts alleged to have been committed while [the defendant] was operating or driving a motor vehicle while intoxicated." AS 28.35.031.

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

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

As we interpret the Implied Consent Statute, it was intended to provide an exclusive method for obtaining direct evidence of a suspect's blood alcohol content, absent his or her express consent to the use of some other form of testing.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

In conclusion, while it is evident that the Implied Consent Statute, as it read at the time of Pena's offense, prohibited any warrantless blood alcohol testing following a breathalyzer refusal, we find little to indicate that the legislature intended the statute to act as an affirmative prohibition against the independent means of using a search warrant to obtain a sample of blood from a person who has refused to submit to a breathalyzer test after being arrested for an offense arising from an act committed by him while driving under the influence of intoxicating liquor; we also find little practical or logical justification for such a prohibition. Accordingly, we decline to extend the holding of **Anchorage v. Geber** to cases in which police have obtained samples of blood for alcohol testing pursuant to lawfully issued warrants. We conclude that the seizure of Pena's blood in the present case must be upheld.

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

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

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

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

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

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

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

The conviction and sentence are AFFIRMED.

OPINION FOOTNOTES

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

DALE M. GUNDERSEN, Appellant,

vs.

MUNICIPALITY OF ANCHORAGE, Appellee

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

COUNSEL

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

JUDGES

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

OPINION

SINGLETON, Judge.

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

FACTS

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

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

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

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

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

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

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

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

GUNDERSEN: But it's not a 100%?

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

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

KOCH: The machine is 100% within its capabilities.

GUNDERSEN: 100, 90, or 80?

KOCH: It's 100% within its capabilities.

SUPPRESSION OF INTOXIMETER TEST RESULTS

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

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

Statutory Argument

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

Anchorage Municipal Code § 09.28.023(E) provides:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Constitutional Argument

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

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

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

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

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

Certainly, the police might have sought to comply with the due process requirement by attempting to preserve a breath sample, by offering some other form of independent chemical test, or by offering a choice of independent tests. Due process under the Alaska Constitution, however, requires only that Gundersen be given a reasonable opportunity to verify the Intoximeter test result. Gundersen has presented no evidence to support the conclusion that the police acted arbitrarily or unreasonably in offering him a blood test instead of a urine test or attempting to preserve a sample of his breath. Experience suggests that the preservation of accurate and reliable breath samples may be far more difficult and costly in practice than in theory. **See generally State v. Kerr,** 712 P.2d 400 (Alaska App. 1985); **Best v. Anchorage,** 712 P.2d 892 (Alaska App. 1985). Nor can we say that the drawing of blood is so intrusive a procedure as to be an unreasonable alternative **per se. See Ward v. State,** 733 P.2d at 627. We therefore conclude that Gundersen's constitutional rights under **Briggs** and **Serrano** were satisfied by the offer of assistance in obtaining an independent blood test. We stress that this

issue is resolved according to state law inasmuch as there is no due process right to an independent test under federal constitutional law. **See Trombetta,** 467 U.S. 479, 81 L. Ed. 2d 413, 104 S. Ct. 2528 .

Does constitutional due process require that an independent test be furnished free of charge to indigents? In **Evitts v. Lucey,** 469 U.S. 387, 395, 401-02, 83 L. Ed. 2d 821, 105 S. Ct. 830 (1985), the Supreme Court suggested that states may be under a constitutional duty to safeguard rights given by statute even if those rights are not independently mandated by the constitution. The courts that have considered this issue have concluded that neither constitutional due process nor equal protection of the laws under the United States Constitution requires that independent tests be furnished free of charge to indigents even though the state affords a right to an independent test. **See, e.g., Scarborough v. Kellum,** 525 F.2d 931, 933 (5th Cir. 1976); **Capler v. City of Greenville, Mississippi,** 422 F.2d 299, 301 (5th Cir. 1970); **Smith v. Cada,** 114 Ariz. 510, 562 P.2d 390, 392-93 (Ariz. App. 1977); **Commonwealth v. Tessier,** 371 Mass. 828, 360 N.E.2d 304, 305-06 (Mass. 1977); **cf. State v. Coy,** 48 Ore. App. 267, 616 P.2d 1194, 1195 (Or. App. 1980) (police officer's statement that blood test was available only at defendant's expense did not mislead defendant into thinking he had no right to refuse breath test).

It is not necessary for us to decide whether the Alaska Constitution guarantees a free independent test to indigents because there is nothing in the record to suggest that Gundersen is indigent. **See State v. Alcorn,** 125 N.H. 672, 484 A.2d 1176, 1180 (N.H. 1984). Gundersen does not point to anything in the record implying that he was personally discouraged from obtaining an independent test. There is no evidence suggesting that he is indigent, would prefer a urine test, or had special confidence in some other health professional.

Gundersen asks this court to adopt a prophylactic rule, from which he would incidentally benefit, suppressing Intoximeter evidence in order to coerce the municipality into a more complete advisement of the right to an independent test. Arguably, more people would avail themselves of the right to such a test if they knew it was completely free, included urine tests, and could be performed by any health professional. We do not believe that valuable evidence of a serious crime should be suppressed in pursuit of such speculative goals, particularly when independent tests, if obtained, would more often than not corroborate rather than undermine prosecution evidence.

JURY INSTRUCTIONS

Gundersen next argues that the trial court erred by failing to give his proposed jury instruction, which quoted AMC § 09.,8.023(E) in part, and then concluded:

If you find that the officer failed to properly advise the defendant of his rights to an independent chemical test, you may consider that fact as a factor bearing on the credibility of the officer and accuracy of the breath test administered by the officer or at his direction.

The trial court is under a duty to fully instruct the jury on the elements of the offense and any available defenses. Whether or not a particular instruction should be given is within the trial court's discretion. **Buchanan v. State,** 561 P.2d 1197, 1207 (Alaska 1977). The court has broad

discretion regarding instructions on the credibility of witnesses. **Id.** The statutory warnings are not elements of the offense, and an inaccurate warning does not constitute a defense. It may, however, be relevant to the defendant's " **mens rea.** " **Brown v. State,** 739 P.2d 182, 185-86 (Alaska App. 1987).

We conclude that the trial court did not abuse its discretion by rejecting Gundersen's proposed instruction. We recognize that AMC § 09.28.023(E) provides in part: "[T]he fact that the person under arrest sought to obtain such an additional test and failed or was unable to do so is likewise admissible in evidence." **See also State ex re. McDougal v. Corcoran,** 735 P.2d at 771 (holding that such evidence is admissible against the defendant). Here, however, it does not appear that Gundersen sought but failed to obtain an additional test. Nor does it appear from the record that Gundersen offered evidence establishing a nexus between the warnings he did receive and the credibility of the officer or the validity of the officer's test. **Cf. Trombetta,** 467 U.S. at 489 (accuracy of "intoxilizer" test, as shown in the record, indicates a low probability that preserved breath samples would exculpate suspected drunk driver).

In the absence of some evidence to the contrary, an independent test would as likely corroborate as invalidate the municipality's test. **See, e.g., Best v. Anchorage,** 749 P.2d 375, 382 (Alaska App. 1988). This is not a case in which there is some evidence of a bad faith attempt by the municipality to discourage Gundersen from obtaining an independent test. Such evidence, if present, might support an inference that the officers lacked confidence in the integrity of their own test, justifying a spoliation instruction. **See, e.g., Williams v. State,** 629 P.2d 54, 64 n.22 (Alaska 1981); **Putnam v. State,** 629 P.2d 35, 43 (Alaska 1980). **See also State v. Hansen,** 156 Ariz. 291, 751 P.2d 951, 955 (Ariz. 1988) (discussing circumstances under which spoliation instruction is warranted). There is nothing in this record to suggest that the municipality intentionally or negligently failed to produce the strongest evidence available to it, or that an independent test, if obtained, would have been exculpatory. **See Fletcher v. Anchorage,** 650 P.2d 417, 418 (Alaska App. 1982). We therefore decline to follow **People v. Alvarado,** 181 Cal. App. 3d Supp. 1, 226 Cal. Rptr. 329, 331 (Cal. Super. 1986) (supporting giving an instruction similar to the one requested by Gundersen). In our view, Gundersen's proposed instruction would only have led to jury speculation.

Gundersen next argues that the trial court erred in failing to give his instruction permitting the jury to consider whether the person administering his breath test complied with the relevant procedures.[6] The court gave the following instruction:

There has been evidence in this case that the defendant submitted to a breath test.

If you find that [the] defendant took a breath test within four hours of the offense alleged and that an accurate result was obtained, you may infer from such result that the defendant's breath alcohol content at the time of the test was equal to or less than the defendant's breath alcohol content at the time he operated a motor vehicle.

However, if there is other evidence that the breath test did not produce a result which accurately reflected the defendant's alcohol level at the time of the test, or that the defendant's

breath alcohol level may have been less than such result at the time he operated a motor vehicle; then you must consider all of the facts and circumstances in evidence in determining whether the defendant's breath alcohol content was .10 grams of alcohol per 210 liters of breath or greater at the time he operated a motor vehicle, no longer relying exclusively on the results of the breath test.

The trial court was within its discretion in giving this instruction rather than Gundersen's. **Buchanan,** 561 P.2d at 1207. In our view, the instruction given more accurately reflects the law and permitted the defendant to argue that the breath test administered by the police was improperly administered and therefore inaccurate. We note that Gundersen does not point to any specific evidence suggesting that, as his proposed instruction stated, "the person administering the test [failed to comply] with all of the required test procedures and safeguards."

The judgment of the district court is AFFIRMED.[7]

DISSENT

BRYNER, Chief Judge, dissenting.

I am unable to agree with the majority's disposition of Gundersen's principal argument -- that he was affirmatively misled concerning his statutory right to obtain an independent test conducted by a person of his own choosing.

Gundersen was arrested for DWI after being involved in an automobile accident in Anchorage. He was given an Intoximeter test and registered a reading of .264. No separate sample of Gundersen's breath was taken or preserved. After Gundersen had taken the Intoximeter test, however, an Anchorage police officer read him a "Notice of Right to an Independent Test." The notice stated:

You are . . . under arrest for the offense of driving while intoxicated. You have provided a sample of your breath for analysis on the Intoximeter 3000. You also have a right to obtain an independent test of your blood alcohol level. If you wish to have an independent test you will be transferred to a local medical facility where a sample of your blood will be drawn by qualified personnel at no charge to you. The blood sample will be stored at the medical facility for a period of 60 days. It will be your responsibility to make arrangements for analysis of your blood sample. The analysis itself will be done at your own expense. At this time you must decide whether or not you want an independent test performed. A refusal to decide will be taken [as] a waiver of your right to obtain an independent test. . . . I would like you to verbally answer whether you do or do not want a separate test, then check the box, read aloud the box that you've checked and sign here at the bottom, sir. Do you have any questions about the form, Mr. Gundersen?

Gundersen declined the offer of an independent test.

Prior to trial, Gundersen moved to suppress the results of the Intoximeter test, alleging, **inter alia,** that his rights under the Alaska Constitution had been violated by the municipality's failure either to preserve a separate breath sample or to inform him fully of the statutory right to an

independent chemical test of his own choosing. District Court Judge Natalie K. Finn denied Gundersen's motion, finding that the offer of an independent blood test that had been communicated to Gundersen was sufficient to protect his constitutional and statutory rights. Gundersen argues on appeal that the district court erred in its ruling.

The analysis of Gundersen's argument begins with the recognition that it addresses two separate rights. The first right arises under the Alaska Constitution's guarantees of confrontation and due process and was initially recognized by the Alaska Supreme Court in **Lauderdale v. State,** 548 P.2d 376 (Alaska 1976). There, the court, in order to provide a means of confronting and cross-examining breathalyzer evidence, required the police to preserve and make available for inspection ampoules used in administering individual breathalyzer tests.

The second right springs from Anchorage Municipal Code (AMC) § 09.28.023(E) and its counterpart under state law, AS 28.35.033(e), which permit an individual arrested for DWI, after submitting to an Intoximeter test, to choose any qualified person to administer an independent chemical test:

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

Though in many respects the constitutional and statutory rights are closely related, they are nevertheless conceptually independent and require separate consideration. Here, it is necessary to consider only Gundersen's statutory right. This court has previously noted that the primary concern of the statutory right is much the same as the underlying concern of the **Lauderdale/Serrano** constitutional requirement: "to provide a defendant with an independent basis for challenging a breathalyzer fading." **Ward v. State,** 733 P.2d 625, 627 (Alaska App. 1987), **rev'd on other grounds,** 758 P.2d 87 (Alaska 1988).

Nevertheless, the precise scope of the statutory right significantly differs from that of the constitutional right. In one respect, the statutory right is narrower than the constitutional requirement, since the statute imposes no obligation on the police to assist DWI arrestees in obtaining an independent test. In another respect, however, the statutory right is broader than the constitutional right, because the statute expressly extends to the accused the choice of any competent form of independent testing and any qualified person to administer the independent test. See **Whisenhunt v. State,** 746 P.2d 1298, 1299 (Alaska 1987).

In **Palmer v. State,** 604 P.2d 1106 (Alaska 1979), the Alaska Supreme Court held that the police need not expressly advise persons who a re arrested for DWI of their statutory right to an independent chemical test of their own choosing. In this appeal, Gundersen questions whether the holding in **Palmer** remains valid under current DWI and implied consent statutes. This issue

need not be decided, for it is evident that, when the police do undertake to provide information concerning the right to independent chemical testing, the information must, at a minimum, be reasonably accurate and complete, so that arrestees are not misled as to the nature and scope of their statutory rights.

Our past decisions have recognized as much. In **Ward,** 733 P.2d 625, Ward was arrested for DWI and underwent an Intoximeter test. A sample of his breath vas preserved to provide an opportunity for independent testing. In addition, the police offered to transport Ward to either of two Anchorage hospitals to have a blood sample drawn and preserved for later testing. He declined to be tested at either of the two hospitals suggested by the police and insisted on being taken to a third hospital. The police refused to comply with this request.

On appeal, Ward claimed that the failure by the police to take him to a hospital of his choice deprived him of both his constitutional and statutory rights to an independent test. Finding that the police had satisfied Ward's due process rights under **Lauderdale** and **Serrano** by preserving a sample of his breath, this court rejected his constitutional claim.

We separately held that Ward had not been denied his statutory right to an independent chemical test of his own choice. In so doing, we reasoned that, having complied with the **Lauderdale/Serrano** requirement by preserving a separate breath sample, the police had no obligation to assist Ward in effectuating his statutory right to obtain an independent chemical test of his own choice. We found that, even though the police had declined to help Ward obtain the independent test of his choice, they had apparently neither said nor done anything to discourage him from obtaining that test on his own accord.

Implicit in our holding in **Ward** is the conclusion that Ward's statutory right to an independent test would have been violated had he actually been deterred in any significant way from obtaining an independent test of his own choosing.[1]

Following the issuance of this court's opinion in his case, Ward petitioned the Alaska Supreme Court for hearing, challenging, among other things, our conclusion that the police did not interfere with his right to an independent test. The supreme court reversed this court's decision. In reversing, the supreme court agreed with Ward's contention that the police conduct in his case had interfered with his right to an independent test. Emphasizing the fact that, under the statutory language, "Ward had the right, to have a blood test performed by 'a . . . qualified person of [his] own choosing . . .,'" the supreme court concluded that "the Troopers denied Ward the right to obtain such a test after they had agreed to transport him to [Alaska Native Medical Center]. This was a violation of Ward's right under AS 28.35.033(e)." **Ward,** P.2d Op. , No. 3347 at 8.

The supreme court's decision in **Ward** thus made explicit what this court's previous decision left implicit: although the police may have no affirmative duty to provide information or assistance, once they do advise or assist persons arrested for DWI in obtaining an independent test, any significant restriction of the right to have the test performed by a person of the arrested person's own choosing will constitute a violation of the statutory guarantee. **Id.** The appropriate

remedy for such violations is the suppression of the Intoximeter test results. **Id.** at 9-11.

If it was not clear before the supreme court's decision in **Ward,** it certainly seems clear now that the advice read to Gundersen by the police in the present case directly contravened the statutory guarantee of an independent test of choice. In the present case, as in **Ward,** the police extended a limited offer of assistance in securing an independent chemical test. In contrast to **Ward,** however, the present case involved more than a limited offer of assistance: the advice contained in the "Notice of Right to an Independent Test" strongly suggested that the exclusive option open to Gundersen for obtaining an independent chemical test was an immediate blood test in police custody, at a hospital of the municipality's choosing. The notice that was read to Gundersen purported to define his "right to obtain an independent test," without any attempt to make it clear that the limited right described in that notice was not Gundersen's only right. The notice seemingly left Gundersen a single choice, stating, "if you wish to have an independent test **you will be transferred to a local medical facility where a sample of your blood will be drawn. . .**" (emphasis added). The notice did not inform Gundersen that his failure to request the offered blood test would result only in the loss of police assistance; instead, it flatly told him that refusal to immediately request the offered test would amount to a waiver of his right to any independent testing:

At this time you must decide whether or not you want an independent test performed. A refusal to decide will be taken [as] a waiver of your right to obtain an independent test.

By effectively characterizing the offer of an immediate blood test as Gundersen's sole opportunity for an independent test, the "Notice of Right to an Independent Test" was substantially misleading. If Gundersen had previously been unaware of his right to an independent test, he would have had little reason to disbelieve the unduly restricted explanation of that right given by the police. Even if Gundersen had been generally aware of the statutory right to an independent test, he would almost certainly have been led to conclude that his right was the limited right described in the notice. Because the notice described a test that was to be conducted in a facility chosen by the police and under circumstances virtually assuring police access to the test results, Gundersen might well have decided to decline the offer without giving any thought to the desirability of a test conducted by a person of his own choosing. Having been informed that he must either request the test immediately or waive his right to an independent test altogether, Gundersen would thereafter have had no reason or motivation to seek an independent test on his own. Thus, the effect of the improper notice could only have been to discourage Gundersen from making any effort to obtain an independent test of his own choosing.

The majority of the court reaches a contrary conclusion. In defense of its holding, the majority, on the one hand, trivializes the significance of the statutory right to an independent test of the defendant's choosing and, on the other hand, suggests that Gundersen has failed to show prejudice: "If Gundersen was in fact confused about his rights and misled by the police, the burden was on him to prove this." In support of this latter contention, the majority cites **Graham v. State,** 633 P.2d 211, 215 (Alaska 1981). **Graham,** however, is inapposite.

Graham was an appeal from an administrative revocation of a driver's license; the revocation

was based on Graham's refusal to take a breath test following her arrest for DWI On appeal, Graham argued that there is an inherent potential for confusion when a person arrested for DWI is as bed to submit to a breath test after being given **Miranda** warnings describing the right to remain silent and the right to immediate appointment of counsel. Graham maintained that her refusal could not be used as a basis for revoking her license, because her arresting officer did not explain that her **Miranda** rights did not apply to the statutory required breath test.

The court in **Graham** agreed that the refusal to take a breath test cannot be used against a defendant when it results from confusion between the scope of **Miranda** rights and the duties imposed by the implied consent statute. Nevertheless, a majority of the court held that Graham had the burden of establishing that her refusal had actually resulted from confusion over the nature of her rights. After reviewing the record, the majority concluded that Graham had failed to meet this burden.

Under the circumstances in **Graham,** where there was an inherent possibility of confusion between two apparently contradictory demands, the requirement that the accused demonstrate prejudice in a subsequent administrative proceeding for the revocation of her license is understandable. It makes good sense to expect that most individuals who refuse to take a breath test in mistaken reliance on their **Miranda** rights will either change their mind or make their confusion known when expressly given the requisite implied consent warning. It is not unreasonable to require those individuals who persist in their refusal to take the test without expressing any confusion as to their rights to make an affirmative allegation and showing of actual confusion before administrative action against their license is precluded.

The only relevant issue in such circumstances is what actually motivated the defendant's decision not to take the test. For example, if Graham had demonstrated that she was actually confused as to the scope of her rights when she refused the breathalyzer, she presumably would not have been required to make an additional showing that she would have submitted to the test had she not been confused.

In contrast, under the circumstances of the present case, the issue of prejudice does not hinge on what actually did happen. The question of what actually motivated a person to decline an offer of assistance in obtaining an independent test is not determinative. Prejudice could be established by showing either that the incorrect advice actually led the accused to decline police assistance in obtaining an independent test or that the accused might have elected to seek independent testing -- either with police assistance or on his own accord after release on bail -- had correct advice been given or had no advice been given at all.

The danger inherent in "Notice of Right to an Independent Test" is not that it might confuse but rather that it might mislead. The logical response of a person exposed to the incorrect advice contained in the notice would be to believe it and to make a choice based on the assumption that the advice was correct. No confusion whatsoever would be involved. The only people who might be confused would be those rare individuals who were expressly aware of the specific scope of the statutory right to an independent test.

In opposition to the situation in **Graham,** there is no reason to expect that persons who have been misled as to the scope of their statutory right to an independent test would be in any position to recognize the conflict between the advice contained in the "Notice of Right to an Independent Test" and the provisions of the law creating the right to an independent test of choice. The possibility that misleading advice has been given will not even occur to most people until a later date, when they first come into contact with an informed attorney. By that time, the question of whether any prejudice resulted from the misleading advice will involve little more than subjective, after-the-fact speculation about what might have happened had the police done things otherwise.

While on occasion something said or done at the time an independent test was refused might make it clear that the defendant would have declined independent testing under any conceivable circumstances, in virtually all other cases defendants could honestly state that they might have made a different choice with respect to independent testing had different advice been given by the police. The purely conjectural, **post hoc,** and subjective context within which the issue of prejudice would almost inevitably have to be decided would predictably reduce the process of establishing prejudice to a hollow, formalistic ritual in which the defendant would be paraded to the stand to testify confidently that things might have been different if they had been different.

The artificiality of attempting to determine actual prejudice in this situation is one of the chief reasons why no showing of prejudice has been deemed necessary in analogous situations involving incorrect or misleading advice. In the area of **Miranda** rights, for example, violations have consistently been found to require reversal without any need to ask whether any actual harm resulted to the accused. **See, e.g., Webb v. State,** 756 P.2d 293 (Alaska 1988).

In the present case, Gundersen undoubtedly could have testified at his suppression hearing that he might have elected to have an independent test performed by a person of his own choosing but for the improperly restricted advice that he was given by the police. In all likelihood he did not so testify because his attorney -- guided by the analogous area of **Miranda** cases and unaware of any prior decisions adopting a contrary rule in the circumstances of the present case -- perceived no need for a **pro forma** testimonial claim of harm.

It seems doubly unfair for the majority of the court to announce a procedural rule requiring proof of prejudice and to fault Gundersen for failing to comply with that rule. The rule did not exist until today. If the majority of this court were truly convinced of the need for a showing of prejudice in cases such as this, the appropriate measure would be a remand to allow Gundersen to testify on the issue. As it is, it appears to me that the majority of the court is doing little more than embracing a strained application of an ill-conceived procedural technicality in order to justify the conviction of a person whom the court perceives to be obviously guilty.

Because there is an inherent risk that the misleading notice may in fact have discouraged Gundersen from seeking an independent chemical test of his own choosing, I would hold that the notice violated his rights under AMC § 09.28.023(e) and that the violation required suppression of his Intoximeter result.

JUDGES FOOTNOTES

* Sitting by assignment made pursuant to article IV, section 16 of the Alaska Constitution.

OPINION FOOTNOTES

1 AMC § 09.28.023(F) provides:

Upon the request of the person who submits . . a chemical test at the request of a law enforcement officer, full information concerning the test, including the results of it, shall be made available to him or her or his or her attorney.

This ordinance refers to the police test, not the right to an independent test.

2 In **Ward,** the court held that the police had prevented Ward from obtaining an independent test. Ward requested an independent test at the Alaska Native Medical Center (ANMC) Initially, a trooper agreed to transport Ward to ANMC, but enroute was ordered to come back because the state had no contract with ANMC. The court found that this constituted interference with Ward's right to an independent test and suppressed evidence of his Intoximeter test. Here, Gundersen neither requested an independent test nor specified an entity or individual to perform the test. Consequently, the trial court was not clearly erroneous in concluding that the police did not prevent Gundersen from exercising his statutory right.

3 The advice regarding an independent test was apparently prompted by our decision in **Anchorage v. Serrano,** 649 P.2d 256, 258 (Alaska App. 1982), rather than by the ordinance or comparable statute.

4 The dissent disputes this point, attempting to draw a distinction between being confused and being misled, terms which in context appear synonymous. Essentially, the dissent argues that the issue in this case is not whether Gundersen was misled or confused, but whether the warning given creates a risk that other potential recipients might be misled or confused into giving up a right that they would have asserted if no warning at all had been given. To prevent this potential harm, the dissent is prepared to adopt a prophylactic rule mandating suppression of presumably accurate and material evidence. In the view of the dissent, failure to adopt a purely prophylactic rule "trivializes the significance of the statutory right to an independent test of the defendant's choosing . . . ."

The dissent commits two significant errors. First, it only deals superficially with **Palmer** and **Graham.** Neither case is an aberration; both are consistent with the weight of authority. Read together, **Graham** and **Palmer** clearly indicate that a person who is confused by warnings regarding independent tests must prove prejudice. The law in other jurisdictions is in accord.

Second, and more important, the right in question is a legislative rignt and the legislature has already balanced that right against the possible loss of material evidence and concluded that in the absence of proven interference, material evidence should not be suppressed. AMC § 09.28.023(E). We are simply carrying out legislative intent.

5 In **Lanier,** the court considered a related question, which constitutional rights must be personally waived by a defendant and which may be waived by his or her attorney without consultation. The court viewed the question as primarily one of federal constitutional law guided by **Fay v. Nola,** 372 U.S. 391, 9 L. Ed. 2d 837, 83 S. Ct. 822 (1963). **Lanier,** 486 P.2d. at 986. The court concluded that in the absence of extraordinary circumstances counsel could waive a defendant's rights during trial but that the defendant would have to join in the waiver of pretrial and post-trial rights. **Id.** at 988. The weakening of the authority

of **Fay v. Noia,** noted in **Lanier,** 486 P.2d at 985-86, has continued in the years since **Lanier** was decided in 1971. **See Westen, supra** Pg. 1. It is not necessary for us to explore this issue further, however, because this case does not involve the purported waiver or forfeiture of a constitutional right by counsel.

6 Gundersen's proposed instruction read as follows:

When a chemical test is given, and testimony concerning the result is admitted into evidence, you are not conclusively bound by the result of such evidence. To determine the reliability of such evidence, you should weigh and consider whether or not the person administering the test complied with all the required test procedures and safeguards. If the evidence relating to said test leaves you with a reasonable doubt as to its accuracy, you may ignore the results of such test.

7 Gundersen also argues that the trial court erred in instructing the jury as follows:

The defendant has been charged with one criminal offense, driving while intoxicated, which may be proven in either of two ways: the municipality must prove beyond a reasonable doubt that defendant drove either while under the influence of intoxicating liquor or with a level of .10 grams of alcohol per 210 liters of his breath. You must be unanimous in your verdict. You need not be unanimous, however, on which of the two theories the municipality has proven It is sufficient that each of you is convinced of defendant's guilt beyond a reasonable doubt under one theory or the other.

The trial court relied on **State v. James,** 698 P.2d 1161, 1165 (Alaska 1985). We have upheld giving this instruction. **Ward v. State,** 733 P.2d 625, 627 (Alaska App. 1987), **rev'd on other grounds,** 758 P.2d 87, 89-92 (Alaska 1988). The supreme court affirmed that decision insofar as it upheld the use of this instruction **Ward,** Op. at 11-15. Gundersen asks that we reconsider **Ward,** making arguments considered and rejected in that case. The Alaska Supreme Court's decision is binding on us regarding those arguments.

He points out, however, that in two decisions we have struck down a prior version of Anchorage's .10 blood alcohol level ordinance on the ground that it was inconsistent with the provisions of state law, then existing, which permitted conviction for driving under the influence, but did not permit conviction for a .10 blood alcohol level. **See, e.g., Anderson v. Anchorage,** 645 P.2d 205, 213 (Alaska App. 1982); **Simpson v. Anchorage,** 635 P.2d 1197, 1205 (Alaska App. 1981). We believe those cases are distinguishable. Essentially, they were directed at the power of Home Rule municipalities to legislate in areas in which the state has also legislated. We are satisfied that the state legislature and the municipal assembly, in enacting identical prohibitions, have determined, as a legislative fact, that a person with .10 grams of alcohol per 210 liters of breath is driving under the influence of alcohol because, as a matter of law, the use of the person's physical or mental abilities is so impaired that he or she no longer has the ability to operate a vehicle with the caution characteristic of a person of ordinary prudence who is not under the influence of alcohol.

In summary, we are satisfied that the legislature and the municipal assembly intended that the two approaches to driving while intoxicated would simply be variant ways of proving the same thing.

DISSENT FOOTNOTES

1 Likewise, in **Anchorage v. Serrano,** while recognizing that the prosecution's constitutional duty to provide a reliable means of verifying the Intoximeter might be satisfied by offering to assist the accused in securing an independent test, we emphasized that it would then be necessary to clearly and expressly inform the accused of the statutory right to an independent test of the accused's choosing. **Serrano,** 649 P.2d at 256 n.5 (Alaska App. 1982).

4 P.3d 951 SOSA V. STATE (S. Ct. 2000) 2000 Alas. Lexis 62

JUAN SOSA, Petitioner,

vs.

STATE OF ALASKA, Respondent.

Supreme Court No. S-8840, No. 5283
SUPREME COURT OF ALASKA
4 P.3d 951, 2000 Alas. LEXIS 62
June 16, 2000, Decided

<CASE SUMMARY>

Petition for Hearing from the Court of Appeals of the State of Alaska, on Appeal from the Superior Court of the State of Alaska, Fourth Judicial District, Bethel, Dale O. Curda, Judge. Court of Appeals No. A-6569. Superior Court No. 4BE-S96-187 CR.

COUNSEL

Quinlan Steiner, Assistant Public Defender, and Barbara K. Brink, Public Defender, Anchorage, for Petitioner.

Kenneth M. Rosenstein, Assistant Attorney General, Office of Special Prosecutions and Appeals, Anchorage, and Bruce M. Botelho, Attorney General, Juneau, for Respondent.

JUDGES

Before: Matthews, Chief Justice, Eastaugh, Fabe, Bryner, and Carpeneti, Justices.
AUTHOR: EASTAUGH

OPINION

EASTAUGH, Justice.

I. INTRODUCTION

In two specific circumstances Alaska's implied consent statutes permit a driver's blood to be drawn for chemical testing for evidence of driving while intoxicated (DWI). Those circumstances do not include unavailability of a breath testing device.[1] **Because no functioning breath testing device was then available, a magistrate issued a search warrant permitting Juan Sosa's blood to be drawn after he was arrested for DWI. Can Sosa be charged with evidence tampering for defying the warrant, when neither exceptional circumstance specified by statute was present? We hold that he cannot. Because the warrant could not legally permit a blood draw to support a DWI charge, his refusal cannot constitute evidence tampering. We therefore vacate his conviction.**

II. FACTS AND PROCEEDINGS

A Bethel police officer arrested Juan Sosa for DWI and took him to the police station. Because the station's chemical breath testing device was malfunctioning, the officer did not ask Sosa to submit to a chemical breath test; instead, the officer obtained a search warrant from a magistrate. The search warrant allowed "Any Peace Officer" to seize a sample of Sosa's blood.[2] **When approached and shown the warrant, Sosa twice refused to submit to a blood test; at one point he assumed a combative stance and stated that he would fight rather than submit to a blood draw. The police officers relented and did not draw Sosa's blood.**

The state charged Sosa with felony DWI, reckless driving, refusal to submit to a chemical test, and tampering with physical evidence by refusing to submit to the blood test. It did not charge Sosa with assault or ask the court to hold him in contempt for defying the search warrant. The trial court dismissed the refusal charge, but a jury convicted Sosa of the three remaining counts. The superior court denied Sosa's motion for judgment of acquittal on the evidence tampering charge, and the court of appeals affirmed. This court then granted Sosa's petition for hearing on the issue of the validity of the evidence tampering charge.

III. DISCUSSION

A. Standard of Review

We review interpretations of statutes de novo,[3] **adopting the rule of law that is most persuasive in light of precedent, reason, and policy.**[4] **We review Sosa's claims of error for plain error because he failed to raise them in the trial court.**[5] **Plain error exists "where an obvious mistake has been made which creates a high likelihood that injustice has resulted."**[6]

B. Exceptions to the Prohibition on Chemical Blood Tests

The Alaska legislature constructed a comprehensive statutory scheme, commonly known as the implied consent statutes,[7] **to govern chemical testing of DWI arrestees. Under these statutes, any driver "shall be considered to have given consent to a chemical test or tests of the person's breath."**[8] **The statutes also state that the driver shall be deemed to have consented to blood** testing in two specific and limited circumstances: (1) if the driver "is involved in a motor vehicle accident that causes death or serious physical injury to another person,"[9] **or (2) if the driver is "unconscious or otherwise . . . incapable of refusal."**[10] **The implied consent statutes describe no other circumstance as a basis for implying consent for a blood test; they contain no general language implying consent to a blood draw except in the two circumstances specified.**

The state, however, argues that we should recognize an implicit exception when breath testing devices malfunction. It contends that the legislature could not have intended to leave police with no means to obtain direct evidence of drivers' intoxication when mechanical

breakdowns prevent breath testing.

The statutes do not explicitly permit unconsented blood draws if breath testing machines malfunction or are otherwise unavailable, and we decline to create an implicit exception to cover that situation. "The Implied Consent Statute provides the exclusive authority for the administration of police-initiated chemical sobriety tests to a driver arrested for acts allegedly committed while operating a motor vehicle."[11] **"Where a statute's meaning appears clear and unambiguous, . . . the party asserting a different meaning bears a correspondingly heavy burden of demonstrating contrary legislative intent."[12] The state has discussed no legislative history at all and has referred us to no facts that would cause us to question the plain language of these statutes. We find it significant that the legislature chose to specify only two limited exceptions, despite the conspicuously foreseeable possibility that a breath-testing machine might sometimes be unavailable, especially in a remote location.**

We therefore reject the state's argument, decline to create an implicit exception to the implied consent statutes, and hold that Sosa cannot be deemed to have impliedly consented to a blood test.

C. Sosa's Refusal to Comply with the Search Warrant

The state argues that even if Sosa is not deemed to have impliedly consented to the blood test, he had no right to disobey the warrant. According to the state, when the police officers served Sosa with the warrant authorizing a blood draw, he had an obligation to permit the blood draw, regardless of the underlying legality of the attempted search. The state directs us to **Elson v. State.[13] In that case, a driver physically resisted a police "pat down" by grabbing the hand of the arresting officer when he reached into Elson's pocket to remove what he thought was a knife.[14] When the state later charged Elson with cocaine possession, Elson attempted to exclude evidence of his physical resistance to the search.[15] We upheld the superior court's admission of the evidence of Elson's resistance and held that "a private citizen may not use force to resist a peaceful search . . . regardless of whether the search is ultimately determined to be illegal."[16]**

Sosa told the officers that he would not permit a blood draw and insisted that they go away so he could sleep. The superior court found that Sosa resisted the blood draw by threatening to fight if the officers attempted to draw his blood.

The rationale underlying **Elson** was promotion of orderly settlement of disputes and avoidance of violent self-help.[17] **We were concerned with the "danger of escalating violence" in situations where a citizen physically resisted arrest and provoked a potentially violent confrontation with police.[18]**

We need not consider whether Sosa's conduct would have been admissible as evidence of assault, had he been so charged.[19] **The issue here is whether Sosa could be charged with evidence tampering.[20] Sosa argues that conviction for tampering with evidence "is irreconcilable with the legislature's prohibition on the production of that evidence. This argument does not address the admissibility of evidence."**

We agree with Sosa. There are three closely related reasons. First, to permit an evidence tampering charge for his refusal to permit the blood draw is equivalent to prosecuting him for violating the implied consent statutes, i.e., for refusing to submit himself to a test he is deemed to have impliedly consented to take. Because the implied consent statutes are the legislature's comprehensive regime for implying consent and for punishing a failure to comply with the statutes, a refusal to be tested should be punished in accordance with the implied consent statutes, and not under the tampering statute.

Second, as contemplated by the implied consent statutes, a refusal to give a blood (or breath) sample may only be prosecuted if the driver had a duty to give the sample. There is no prosecutable refusal unless the person refuses to give a sample when legally obliged to do so. The implied consent statutes define the driver's legal obligation. It would be remarkable if a tampering charge could lie for declining to produce evidence which the statutes do not allow the state to demand in the factual circumstances of Sosa's arrest. Thus, where the only ostensible authority for ordering Sosa's blood drawn is the very statutory regime which does **not** punish him for withholding his consent, his refusal may not be the basis for an evidence tampering charge.

Third, evidence tampering requires interference by force, threat, or deception with the production of physical evidence.[21] **But Sosa was entitled to peacefully refuse to comply under these circumstances; had he refused peacefully, his blood could not properly have been drawn, and if it had been drawn despite his refusal, the implied consent statutes would not have regarded it as evidence supporting the DWI charges. Therefore, his conduct, even if not peaceful, could not be regarded as having causally interfered with production of evidence of DWI. This is not merely the equivalent of conduct that prevents production of evidence which turns out to be inadmissible, and whose admissibility cannot be determined until later.[22] Here the complete inutility of the test results as evidence was readily knowable given the complete absence of facts that might have brought either statutory exception into play. Sosa's warrant facially violated the implied consent statutes.[23] Had the officers subdued Sosa and drawn his blood for testing, the unlawfulness of the warrant would have made the test results unusable.**

In enacting the implied consent statutes, the legislature carefully balanced the privacy interests of DWI arrestees against the state's interest in collecting evidence. Permitting the state to charge Sosa with evidence tampering in this situation would upset that balance. Sosa cannot be charged with evidence tampering for having refused to submit to this unlawful search.

D. **Preservation of Issue**

The state argues that Sosa's failure to challenge the validity of the warrant in the trial court precludes consideration of its validity on appeal. Our resolution of the merits demonstrates that it was plain error to permit the state to proceed on the tampering charge, and we consider claims of plain error regardless of whether the parties argued them in the trial court.[24]

The state nonetheless argues that **Moreau v. State** [25] **should control. In Moreau**, we refused to consider an exclusionary rule argument because the defendant had not raised the issue in the trial court by asking that court to suppress the evidence.[26]

Moreau does not control here. First, **Moreau** applies to improper police conduct, not to a statutory violation based on an invalid warrant.[27] **Second, the exclusionary rule cannot apply here. Because no blood was drawn and no tests were conducted, there was no evidence to suppress. Sosa had no reason, much less an obligation, to challenge the warrant in the trial court. Had Sosa acceded to the unlawful warrant and his blood had been drawn, we assume for discussion's sake that he would have been obliged to challenge the warrant in the trial court.**[28] **But absent evidence subject to exclusion, a Moreau** hearing would have been pointless. **Moreau** does not preclude Sosa from raising the issue in this petition.

IV. CONCLUSION

For these reasons, we VACATE Sosa's conviction for evidence tampering.

DISPOSITION

Sosa's conviction VACATED for evidence tampering.

OPINION FOOTNOTES

1 **See** AS 28.35.031, .032, .035.

2 The excerpt does not contain the warrant.

3 **See Boone v. Gipson**, 920 P.2d 746, 748 (Alaska 1996).

4 **See M.R.S. v. State**, 897 P.2d 63, 66 (Alaska 1995).

5 **See Moreau v. State**, 588 P.2d 275, 279 (Alaska 1978).

6 **Broeckel v. State, Dep't of Corrections**, 941 P.2d 893, 897 (Alaska 1997) (quoting **Miller v. Sears**, 636 P.2d 1183, 1189 (Alaska 1981)).

7 **See** AS 28.35.031, .032, .035.

8 AS 28.35.031(a) (emphasis added).

9 AS 28.35.031(g). Subsection (g) provides:

A person who operates or drives a motor vehicle in this state **shall be considered to have given consent to a chemical test or tests of the person's** breath and **blood** for the purpose of determining the alcoholic content of the person's breath and blood and shall be considered to have given consent to a chemical test or tests of the person's blood and urine for the purpose of determining the presence of controlled substances in the person's blood and urine **if the person is involved in a motor vehicle accident that causes death or serious physical injury to another person.** The test or tests may be administered at the direction of a law enforcement officer who has reasonable grounds to believe that the person was operating or driving a motor vehicle in this state that was involved in an accident causing death or serious physical injury to another person.

(Emphasis added.)

10 AS 28.35.035(b). Subsection (b) provides:

A person who is unconscious or otherwise in a condition rendering that person **incapable of refusal** is considered not to have withdrawn the consent provided under AS 28.33.031(a) or AS 28.35.031(a) or (g) and **a chemical test may be administered to determine the amount of alcohol in that person's** breath or **blood** or to determine the presence of controlled substances in that person's blood and urine. A person who is unconscious or otherwise incapable of refusal need not be placed under arrest before a chemical test may be administered.

(Emphasis added.)

11 **Pena v. State**, 684 P.2d 864, 867 (Alaska 1984). **See also Bass v. Municipality of Anchorage**, 692 P.2d 961, 964 (Alaska App. 1984) (concluding that, based on **Pena**, "it therefore seems clear that the municipality can justify forcibly taking the blood sample from Bass only if the taking falls under AS 28.35.035(b)").

12 **University of Alaska v. Tumeo**, 933 P.2d 1147, 1152 (Alaska 1997).

13 659 P.2d 1195 (Alaska 1983).

14 **See id.**

15 **See id.**

16 **Id.** at 1200.

17 **See id.** (citing **United States v. Ferrone**, 438 F.2d 381, 390 (3d Cir. 1971)).

18 **Id.**

19 See AS 11.41.230(a)(3) (a person commits the crime of fourth-degree assault if "by words or other conduct that person recklessly places another person in fear of imminent physical injury.").

20 AS 11.56.610(a)(3) provides that "A person commits the crime of tampering with physical evidence if the person . . . prevents the production of physical evidence in an official proceeding or a criminal investigation by the use of force, threat, or deception against anyone . . . ."

21 See AS 11.56.610(a)(3).

22 **Cf. Brown v. State**, 739 P.2d 182, 184 (Alaska App. 1987).

23 As we stated in **Pena**, a warrant cannot override the statute: "The Implied Consent Statute . . . applies equally to preclude chemical sobriety tests performed pursuant to search warrants as it does to tests performed as searches incident to arrest." **Pena**, 684 P.2d at 867.

24 **See State Farm Ins. Co. v. Raymer**, 977 P.2d 706, 711 (Alaska 1999) (stating that "we will not consider new arguments not raised in the trial court, unless the issues establish plain error").

25 588 P.2d 275 (Alaska 1978).

26 Id. at 280.

27 **See id.**

28 **See id.**

711 P.2d 575 LESLIE V. STATE (Ct. App. 1986)

MICHAEL LESLIE, Appellant,

vs.

STATE OF ALASKA, Appellee.

No. 570
COURT OF APPEALS OF ALASKA
711 P.2d 575
January 03, 1986
Appeal from the District Court of the State of Alaska, Third Judicial District, Palmer, Steven K. Green, Magistrate.

COUNSEL

Gary R. Letcher, Birch, Horton, Bittner, Pestinger & Anderson, Anchorage, for Appellant.
Robert D. Bacon, Assistant Attorney General, Office of Special Prosecutions and Appeals, Anchorage, and Norman C. Gorsuch, Attorney General, Juneau, for Appellee.

JUDGES

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

OPINION

COATS, Judge. **OPINION**

Alaska Statute 28.35.031(b) authorizes police in certain situations to administer a preliminary breath test. That statute provides:

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

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

(2) committed a moving traffic violation.

Under AS 28.35.031(c) the officer who administers the test must advise the person to whom he wishes to administer the preliminary breath test that refusal to take the test is an infraction. See AS 28.35.031(e) (refusal to submit to the preliminary breath test is an infraction).

The facts of the present case can be stated briefly. A state trooper observed Leslie speeding on the Glenn Highway, and while following in his patrol vehicle clocked Leslie's speed at 64 mph. When he stopped Leslie for the speeding violation, he noticed signs of intoxication and administered a set of field sobriety tests. At some point the trooper asked Leslie to take the preliminary breath test, but Leslie declined. The trooper was apparently convinced that he had

probable cause to arrest for driving while intoxicated but another car came by at an extremely excessive speed, almost sideswiping the trooper's vehicle, so the trooper simply cited Leslie for speeding and refusing the breath test, and then instructed Leslie's passenger, who was sober, to take over the driving duties.

Leslie was prosecuted for failure to take the preliminary breath test. He moved to dismiss, arguing that the statute unconstitutionally interfered with his rights under the fourth and fifth amendments to the United States Constitution. These motions were denied, Leslie was convicted and fined $150.

Leslie first argues that the administration of a breath test is a search under the fourth amendment to the United States Constitution. In **Burnett v. Anchorage,** 678 P.2d 1364, 1368 (Alaska App. 1984), **cert. denied,** 469 U.S. 859, 105 S. Ct. 190, 83 L. Ed. 2d 123 (1984), and **Svedlund v. Anchorage,** 671 P.2d 378, 384 (Alaska App. 1983), this court assumed, without deciding, that administering a breath test is a search. Upon further reflection we believe that requiring a suspect to submit to a breath test is a sufficient intrusion by a law enforcement officer that we should regard it as a search. **See** I W. LaFave, Search and Seizure: **A Treatise on the Fourth Amendment.** § 2.1(a) at 221-24 (1978); **Pooley v. State,** 705 P.2d 1293 (Alaska App. 1985) (discussing whether a "dog sniff" is a search under the fourth amendment). We therefore agree with Leslie that administration of a breath test is a search.

Leslie next contends that the portable breath test authorized by AS 28.35.031 constitutes an unreasonable search under the fourth amendment to the United States Constitution. We disagree. In reading AS 28.35.031, we apply the rule of statutory construction that "ambiguities in penal statutes must be narrowly read and construed strictly against the government." **Cassell v. State,** 645 P.2d 219, 222 (Alaska App. 1982). We note that AS 28.35.031(a) provides that:

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

Neither AS 28.35.031(a) nor AS 28.35.031(b) define what "reasonable grounds" is. However, in AS 28.35.031(a) the statute applies "reasonable grounds" to a situation where the police have lawfully arrested a defendant. In order to lawfully arrest a defendant, the police would need to establish probable cause. We also note that the legislature did not use the term "reasonable suspicion," a standard somewhat less stringent than probable cause and one which has been used to justify an investigative stop. **Terry v. Ohio,** 392 U.S. 1 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968); **Coleman v. State,** 553 P.2d 40, 43 (Alaska 1976).

What "reasonable grounds" means must also be looked at from the perspective that the statute

does authorize a search. In light of this background we construe "reasonable grounds" be the equivalent of probable cause.[1] Thus we construe AS 28.35.031(b) to authorize an officer to administer a preliminary breath test only where he has probable cause "to believe that a person's ability to operate a motor vehicle is impaired by the ingestion of alcoholic beverages" and, in addition, probable cause to believe that the person "is driving a motor vehicle that is involved in an accident; or . . . committed a moving traffic violation."

Under this interpretation an officer must have probable cause to arrest a defendant for driving while under the influence before he can lawfully administer a preliminary breath test. We believe that it is reasonable for the statute to authorize an officer to administer a preliminary breath test under these circumstances. Even though the officer may have probable cause to arrest for driving while under the influence, many times the physical signs that an officer relies on in determining that a driver is intoxicated are misleading. Authorizing the officer to administer a preliminary breath test appears to us to be a reasonable step to take to confirm or dispel the officer's observations. We therefore believe that AS 28.35.031(b) does not authorize an unreasonable search. **See Burnett,** 678 P.2d at 1370 (holding a statute penalizing refusal to take breath test not violative of fourth or fifth amendments).

Leslie next argues that AS 28.35.031 is unconstitutional since it requires him to give an advance waiver of his fourth amendment rights as a condition of the privilege to drive. This is the same argument which we disposed of in upholding the "implied consent" statute which requires a motorist to consent to take a breathalyzer examination when he is "lawfully arrested for an offense arising out of acts alleged to have been committed while [he was driving while intoxicated]." AS 28.35.032(a). **McCracken v. State,** 685 P.2d 1275 (Alaska App. 1984). There is no constitutional right to refuse to submit to a breathalyzer examination. **McCracken** at 1278 (Singleton, J., concurring). We have held in the present case that the officer was authorized under AS 12.35.031 t 'minister the preliminary breath test. As in **McCracken,** the legal fiction of Leslie's "implied consent" is not a constitutional issue.

Leslie next argues that administration of the preliminary breath test violates his constitutional privilege against self-incrimination. We have previously rejected similar contentions in **Svedlund v. Anchorage,** 671 P.2d 378, 383-84 (Alaska App. 1983) and **Coleman v. State,** 658 P.2d 1364 (Alaska App. 1983). **See also South Dakota v. Neville,** 459 U.S. 553, 564, 103 S. Ct. 916, 923, 74 L. Ed. 2d 748, 759 (1983). We similarly reject Leslie's argument.

The conviction is AFFIRMED.

OPINION FOOTNOTES

1 We note that several other jurisdictions have construed the terms "reasonable grounds" and "probable ca se" as synonymous in arrest situations. **See** State v. Davis, 98 Ill. App. 3d 461, 424 N.E.2d 630, 634, 53 Ill. Dec. 839 (Ill. App. 1981); State v. Davis, 190 Mont. 285, 620 P.2d 1209, 1212 (Mont. 1980); State v. Middleton, 170 Conn. 601, 368 A.2d 66, 67 (Conn. 1976); Beyer v. Young, 32 Colo. App. 273, 513 P.2d 1086, 1088 (Colo. 1973).