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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Court : Sustained.

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

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

The Court : Yes.

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

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

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

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

The Court : All right.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Conclusion

The judgement of the district court is AFFIRMED.

DISPOSITION

The judgement of the district court is AFFIRMED.

OPINION FOOTNOTES

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

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

3 **See Id.** at 1288.

4 SLA 1980, ch. 129, § 12.

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

6 Alaska Constitution, Article I, Section 9.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

24 **Id.** at 1199.

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

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

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

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

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

30 Commentary to Evidence Rule 403, fifth paragraph.

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

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

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

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

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

36 **See id.** at 636.

37 **See id.**

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

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

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

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

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

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

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

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

46 **Id.** at 1133.

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

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

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

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

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

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

DARRYL BINGAMAN, Appellant,

vs.

MUNICIPALITY OF ANCHORAGE, Appellee.

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

<CASE SUMMARY>

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

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

COUNSEL

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

JUDGES

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

OPINION

MEMORANDUM OPINION AND JUDGMENT

STEWART, Judge.

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

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

Discussion

Excessive fine

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

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

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

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

Equal protection

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

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

Conflict with state law

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

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

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

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

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

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

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

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

Conclusion

The judgment of the district court is AFFIRMED.

DISPOSITION

The judgment of the district court is AFFIRMED.

JUDGES FOOTNOTES

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

OPINION FOOTNOTES

1 AMC § 09.28.020(C)(5).

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

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

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

5 669 N.E.2d at 304.

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

7 **See** AS 28.35.036.

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

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

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

11 **See** AS 12.55.080-085.

12 **Jackson,** 584 P.2d at 1132.

13 AS 28.35.038 provides:

Notwithstanding other provisions in this title, a municipality may adopt an ordinance providing for the impoundment or forfeiture of a motor vehicle, or aircraft, involved in the commission of an offense under AS 28.35.030, 28.35.032, or an ordinance with elements substantially similar to AS 28.35.030 or 28.35.032. An ordinance adopted under this section is not required to be consistent with this title or regulations adopted under this title.

14 **See** AS 28.01.010.

15 **See** AS 28.35.030(b)(2), (n)(2); AS 28.35.032(g)(2), (p)(2).

16 **See Millman v. State,** 841 P.2d 190, 194 (Alaska App. 1992) (citations omitted).

941 P.2d 211 HILLMAN V. MUNICIPALITY OF ANCHORAGE (Ct. App. 1997) 1997 Alas. App. Lexis 31

ALEXANDER HILLMAN, Appellant,

vs.

MUNICIPALITY OF ANCHORAGE, Appellee.

Court of Appeals No. A-6191, No. 1539
COURT OF APPEALS OF ALASKA
941 P.2d 211, 1997 Alas. App. LEXIS 31
June 20, 1997, Decided
Appeal from the District Court, Third Judicial District, Anchorage, Stephanie Rhoades, Judge. Trial Court No. 3AN-95-7977 Cr.

COUNSEL

Kelly E. Gillilan-Gibson, James E. Gorton & Associates, Anchorage, for Appellant.
James L. Walker, Assistant Municipal Prosecutor, and Mary K. Hughes, Municipal Attorney, Anchorage, for Appellee.

JUDGES

Before: Coats, Chief Judge, Mannheimer, Judge, and Joannides, District Court Judge.*
AUTHOR: MANNHEIMER

OPINION

MANNHEIMER, Judge.

Alexander Hillman pleaded no contest to driving while intoxicated, a violation of Anchorage Municipal Code § 9.28.020. Because Hillman had two prior convictions for this offense, the district court ordered forfeiture of Hillman's vehicle -- a required penalty under § 9.28.020(C)(5)(b).

Hillman alleges that his vehicle is worth $ 8000. Based on this appraisal, Hillman contends that the forfeiture of his vehicle constitutes a prohibited "excessive fine" within the meaning of the Eighth Amendment to the United States Constitution and Article I, Section 12 of the Alaska Constitution.[1] Hillman also contends that forfeiture of an $ 8000 vehicle violates Alaska law because, under AS 12.55.035(b), the maximum fine for a class A misdemeanor is $ 5000.

We assume for purposes of deciding this case that Hillman's vehicle is indeed worth $ 8000. Nevertheless, as explained below, we reject both Hillman's constitutional argument and his statutory argument. We therefore affirm the forfeiture of his vehicle.

Our jurisdiction to entertain this appeal

Before addressing the merits of Hillman's arguments, we first must answer the Municipality's

contention that Hillman has no right to appeal the forfeiture and that this court has no jurisdiction to hear Hillman's appeal. The Municipality relies on AS 22.07.020(c), which states:

> The court of appeals has jurisdiction to review ... (2) the final decision of the district court on a sentence imposed by it if the sentence exceeds 120 days of unsuspended incarceration for a misdemeanor offense.

The district court sentenced Hillman to 360 days' imprisonment with 300 days suspended, or 60 days to serve. Because Hillman received only 60 days of unsuspended incarceration, the Municipality argues that this court has no jurisdiction to hear his appeal.[2]

As we explain in more detail below, we do not interpret AS 22.07.020(c) as prohibiting this court from reviewing any aspect of a district court's sentencing decision when the defendant receives 120 days or less to serve. This court retains the right to review an illegal sentence, regardless of how much (or how little) imprisonment is imposed on the defendant.

AS 22.07.020(c) was intended to restrict this court's jurisdiction to hear sentence appeals from the district court; this jurisdictional provision complements the new restrictions on district court sentence appeals embodied in the 1995 amendments to the sentence appeal statute, AS 12.55.120. Under the 1995 amendment to AS 12.55.120(d), district court defendants may not pursue a sentence appeal unless they receive more than 120 days to serve. In this context, a "sentence appeal" is an appeal in which the defendant concedes the legality of the sentence but contends that the sentencing judge abused his or her discretion by imposing an unduly harsh punishment. **See Rozkydal v. State,** 938 P.2d 1091, 1093 (Alaska App. 1997). The legislature's simultaneous amendment of AS 22.07.020(c) -- the insertion of the phrase "if the sentence exceeds 120 days of unsuspended incarceration" -- was intended as the jurisdictional counterpart to the new restriction on sentence appeals.

Hillman's appeal, however, is not a "sentence appeal". Hillman contends that his sentence is illegal. This court continues to possess the authority to review claims that a sentence is illegal, even when the sentence does not exceed 120 days to serve. (Those readers who believe this conclusion is self-evident may skip the rest of this section.)

The current version of AS 22.07.020(c) was enacted in 1995 as part of the Alaska Legislature's re-working of various aspects of criminal procedure. See SLA 1995, ch. 79. In this 1995 session law, the legislature amended AS 12.55.120 (the sentence appeal statute) to limit the right of sentence appeal. See SLA 1995, ch. 79, §§ 7-8. Now, defendants convicted of felonies can pursue a sentence appeal only if they receive a composite sentence exceeding 2 years to serve. AS 12.55.120(a). Similarly, defendants convicted of misdemeanors in district court can pursue a sentence appeal only if they receive a composite sentence exceeding 120 days to serve. AS 12.55.120(d).

At the same time, the legislature amended three provisions of Title 22 to reflect corresponding limits on the judiciary's jurisdiction to hear sentence appeals. The legislature

amended AS 22.07.020(b), the statute governing this court's jurisdiction to hear sentence appeals from the superior court. SLA 1995, ch. 79, § 11. The legislature also amended AS 22.07.020(c), the statute governing this court's jurisdiction to hear appeals from the district court. SLA 1995, ch. 79, § 12. And, because the superior court also has jurisdiction to review decisions of the district court, the legislature amended AS 22.10.020(*f*), the statute governing the superior court's jurisdiction to hear sentence appeals from the district court. SLA 1995, ch. 79, § 13.

Recently, in **Rozkydal v. State,** 938 P.2d 1091, 1997 Alas. App. LEXIS 25, Opinion No. 1532 (Alaska App., 1997), we interpreted the revised sentence appeal. statute, AS 12.55.120. We clarified that the appeals governed by AS 12.55.120 are premised on the assumption that the defendant's sentence was lawfully imposed. In a sentence appeal, the defendant asserts that a lawful sentence is excessive - i.e., that it constitutes an abuse of sentencing discretion. Hillman, however, asserts that his sentence is illegal -- in fact, unconstitutional. Thus, Hillman's appeal is not a "sentence appeal" governed by AS 12.55.120, and his assertions of error are appealable regardless of the length of his sentence. **Rozkydal,** slip opinion at 4-5.

Although we clarified the meaning of AS 12.55.120 in **Rozkydal,** a potential problem of statutory interpretation still exists with regard to this court's jurisdictional statute. The problem is that AS 22.07.020(c) (the portion of the statute that gives this court jurisdiction over district court sentence appeals) does not specifically refer to "sentence appeals". Instead, AS 22.07.020(c) declares that this court has "jurisdiction to review ... the final decision of the district court on a sentence imposed by it if the sentence exceeds 120 days of unsuspended incarceration".

The Municipality construes this provision as encompassing more than simply the "sentence appeals" defined in **Rozkydal.** The Municipality reads AS 22.07.020(c) as barring the court of appeals from reviewing **any** aspect of a sentence imposed by the district court unless the defendant received more than 120 days to serve. We, however, do not believe that this is a sensible interpretation of the statute.

The problem is not specific to AS 22.07.020(c). Both of the sentence appeal provisions in AS 22.07.020 are potentially ambiguous. For instance, AS 22.07.020(b) gives this court jurisdiction to "hear appeals of unsuspended sentences of imprisonment ... imposed by the superior court on the grounds that the sentence is excessive or ... too lenient". This statutory language conceivably could be read as a limitation on this court's power of review -- restricting our review of superior court sentences to the issues of excessive harshness or leniency. Under such an interpretation, we would have no authority to review a superior court sentence on the ground that it was illegal or that it was imposed in an unlawful manner. However, the legislative history of both AS 22.07.020(b) and 020(c) shows that such an interpretation is mistaken.

The wording of AS 22.07.020(b) actually predates the creation of the court of appeals. This statutory provision originated in SLA 1969, ch. 117, sec. 1 -- legislation that was enacted in response to the supreme court's decision in **Bear v. State,** 439 P.2d 432 (Alaska 1968). In Bear, the supreme court held that, absent legislative authorization, it had no authority to review a lawful sentence "for abuse of discretion" -- that is, for excessive severity or leniency. **Id.** at 433, 435. The supreme court did not question its authority to decide cases in which the defendant

claimed that the sentence was illegal, or cases in which the defendant claimed that the sentencing procedures were flawed. **Id.** at 436, 438. The issue presented in **Bear** was much narrower: whether the court had the authority to hear an appeal in which the defendant conceded the legality of the sentence but argued that the sentence constituted an abuse of sentencing discretion. **Id.** The court ruled that it had no such authority.

In response, the legislature enacted a new statute, AS 12.55.120, that explicitly authorized sentence appeals. **See** SLA 1969, ch. 117, sec. 4. At the same time, the legislature added a new subsection (b) to the supreme court's jurisdictional statute (AS 22.05.010) that confirmed the supreme court's jurisdiction to hear the now-authorized sentence appeals. **See** SLA 1969, ch. 117, sec. 1. The pertinent language of former AS 22.05.010(b) vested the supreme court with "jurisdiction to hear appeals of sentences of imprisonment lawfully imposed by the superior court[] on the grounds that the sentence is excessive or too lenient".

Interpreting this jurisdictional provision in context, it is clear that the provision was not intended to limit the supreme court's review of sentences to the issues of excessive harshness or leniency. Rather, the provision was intended to expand the supreme court's power of review to include issues of excessive harshness or leniency.

In 1980, when the legislature created the court of appeals, the legislature took the sentence appeal language from the supreme court's jurisdictional statute, AS 22.05.010(b), and placed this language in AS 22.07.020(b). **See** SLA 1980, ch. 12, sec. 1. The legislature then drafted a second sentence appeal provision, AS 22.07.020(c)(2), to give this court jurisdiction over district court sentence appeals.

(A second sentence appeal provision was needed because district court litigants had never had a right of direct appeal to the supreme court; thus, no clause of the supreme court's jurisdictional statute dealt with district court sentence appeals.[3] When the court of appeals was created, the legislature chose to give district court criminal litigants the choice of appealing either to the superior court or to the court of appeals. **See** AS 22.07.020(d), enacted in SLA 1980, ch. 12, sec. 1. Thus, the legislature had to add language to AS 22.07.020 authorizing the court of appeals to hear district court sentence appeals. That language ended up in AS 22.07.020(c).)

When the legislature drafted AS 22.07.020(c), it did not use the language of the sibling provision, AS 22.07.020(b) (governing sentence appeals from the superior court). Clause (2) of AS 22.07.020(c) declares that this court has authority to review "the final decision of the district court on a sentence imposed by it". But although the legislature phrased AS 22.07.020(c)(2) differently from AS 22.07.020(b) (and differently from AS 22.10.-010 (a), the statute that vests the superior court with jurisdiction to hear district court sentence appeals), the intent of AS 22.07.020(c) appears to have been simply to vest this court with jurisdiction over district court sentence appeals.

The 1995 amendment to AS 22.07.020(c) (2) did not alter the operative language of the statute; the 1995 amendment simply appended the phrase "if the sentence exceeds 120 days of unsuspended incarceration for a misdemeanor offense". This additional language reflects the

amendment to the sentence appeal statute, AS 12.55.120(d), which now restricts district court sentence appeals to defendants whose composite time to serve exceeds 120 days.

Based on this legislative history, we conclude that AS 22.07.020(c) (2) was intended to confirm that the court of appeals has jurisdiction to hear sentence appeals from the district court. We reject the Municipality's suggestion that the statute was intended to prevent this court from reviewing any aspect of a district court sentence unless the sentence exceeds 120 days to serve.

We note that the Municipality's interpretation of AS 22.-07.020 (c) would lead to absurd results. If in fact the court of appeals lacked jurisdiction to review any aspect of a district court sentence of less than 120 days' unsuspended incarceration, then this court would presumably be powerless to intervene when a district court judge sentenced a defendant to jail for 100 days for a class B misdemeanor (a class of offense punishable by no more than 90 days' imprisonment -- see AS 12.55.135(b)), or when a district court judge sentenced a defendant to 30 days for negligent driving (an offense that is not punishable by imprisonment -- **see** AS 28.35.-045 (c); AS 28.40.050(c)-(d)).

Moreover, we note that AS 22.07.020(e) vests this court with wide-ranging discretionary jurisdiction to review appellate decisions of the superior court. The superior court is vested with plenary jurisdiction over appeals from the district court. See AS 22.10.020(d), which gives the superior court "jurisdiction in all matters appealed to it from a subordinate court". Under the Municipality's interpretation of AS 22.07.020(c), there would be many instances in which the court of appeals would lack jurisdiction to hear a direct appeal from the district court, but we would have jurisdiction to review the same issues if the defendant first appealed to the superior court and then brought a petition for hearing to this court. "In ascertaining the legislature's intent, this court 'is obliged to avoid construing statutes in a way that leads to patently absurd results or to defeat of the obvious legislative purpose behind the statute'." **Turney v. State,** 922 P.2d 283, 292 (Alaska App. 1996) (quoting **State v. Lowrence,** 858 P.2d 635, 638 (Alaska App. 1993)).

For all of these reasons, we reject the Municipality's contention that AS 22.07.020(c) (2) was intended to bar this court from correcting any and all illegalities in district court sentences of 120 days or less. Instead, we conclude that AS 22.07.020(c) (2) refers to sentence appeals from the district court, and that the statute's reference to unsuspended sentences of more than 120 days was intended to incorporate the limitation placed on district court sentence appeals by AS 12.55.120(d).

We turn now to the merits of Hillman's arguments that his forfeiture is illegal.

Is forfeiture of Hillman's vehicle an "excessive fine"?

Under Anchorage Municipal Code § 9.28.020(C)(5), if a person is convicted of driving while intoxicated for a second or subsequent time within 10 years, and if the person "has any interest in the vehicle used in the commission of the offense, the [sentencing] court shall order that ... the person's interest in the vehicle be forfeited to the [Municipality of Anchorage]". Hillman had two prior convictions, so the district court ordered his vehicle forfeited to the Municipality.

As noted above, Hillman contends that this forfeiture is unconstitutional. He claims that his vehicle is worth $ 8000, and he further claims that, when a person's offense is driving while intoxicated, the forfeiture of property worth that much is an "excessive fine" in violation of the federal and state constitutions.

The law distinguishes between **in personam** forfeitures, which are inflicted as punishment for a crime, and **in rem** forfeitures, which can be inflicted on property owners who are themselves innocent of crime, if the government proves that the property is contraband or is connected to the commission of a criminal act. **See Calero-Toledo v. Pearson Yacht Leasing Co.,** 416 U.S. 663, 684; 94 S. Ct. 2080, 2092; 40 L. Ed. 2d 452 (1974); **The Palmyra,** 25 U.S. 1, 12 Wheat. 1, 14-15; 6 L. Ed. 531 (1827). The forfeiture of Hillman's vehicle as punishment for his own criminal conduct is an **in personam** forfeiture. The United States Supreme Court has held that the Eighth Amendment's proscription on "excessive fines" extends to **in personam** forfeitures. **Alexander v. United States,** 509 U.S. 544, 558-59, 113 S. Ct. 2766, 2775-76; 125 L. Ed. 2d 441 (1993). Thus, the government's power to order forfeiture of Hillman's vehicle is potentially limited by the Eighth Amendment.

The ultimate question in assessing Hillman's Eighth Amendment claim is whether the forfeiture is grossly disproportionate to his crime. **See generally Harmelin v. Michigan.** 501 U.S. 957, 996-1005; 111 S. Ct. 2680, 2702-07; 115 L. Ed. 2d 836 (1991) (interpreting the Eighth Amendment not to require strict proportionality between a crime and a sentence, but to forbid only "extreme sentences that are grossly disproportionate to the crime"). A similar test is used for judging excessiveness of punishment under the Alaska Constitution:

> The Alaska Supreme Court has consistently held that the Alaska Constitution does not require that penalties be proportionate to the offense. Only punishments that are "so disproportionate to the offense committed as to be completely arbitrary and shocking to the sense of justice" [are] cruel and unusual under Alaska's Constitution. **See Thomas v. State,** 566 P.2d 630, 635 (Alaska 1977); **Green v. State,** 390 P.2d 433, 435 (Alaska 1964).

McNabb v. State, 860 P.2d 1294, 1298 (Alaska App. 1993).

Hillman first argues that the district court committed procedural error by summarily rejecting Hillman's "excessive fine" contention. Hillman asserts that whenever a criminal defendant alleges that he or she is being subjected to a constitutionally excessive forfeiture, the sentencing court is obliged to conduct a particularized analysis of the proportionality of that forfeiture to the defendant's conduct in committing the crime. Hillman points out that several federal appellate circuits have established criteria for judging the proportionality of a forfeiture, criteria designed to be applied on a case-by-case basis. **See United States v. Certain Real Property Located at 11869 Westshore Drive,** 70 F.3d 923 (6th Cir. 1995); **United States v. Real Property Located in El Dorado, California,** 59 F.3d 974, 985-86 (9th Cir. 1995).[4]

The federal case law that Hillman cites is not directly on point. These federal cases deal with **in rem** forfeitures -- forfeitures that are based, not on the criminal culpability of the property owner, but on the nexus between the property and criminal conduct (regardless of who committed the crime). As we pointed out above, the forfeiture of Hillman's vehicle was an **in personam** forfeiture -- a forfeiture based on Hillman's personal guilt of a criminal offense. When a court is dealing with **in personam** forfeiture, there is little point to holding a hearing on some of the criteria listed in the federal cases. For example, **El Dorado** directs a court to examine "whether the [property] owner was negligent or reckless in allowing the illegal use of [the] property" and "whether the owner was directly involved in the illegal activity". 59 F.3d at 986. Because an **in personam** forfeiture of property is premised on the defendant's conviction of a crime, these factors are self-evident.

Moreover, the federal courts agree that when a defendant claims that a forfeiture amounts to an "excessive fine", the burden is ultimately on the defendant to prove that the forfeiture is grossly disproportionate to the defendant's offense. **See 11869 Westshore Drive,** 70 F.3d at 930; **El Dorado,** 59 F.3d at 985. It thus appears that, even under the federal cases that require a "proportionality" analysis of forfeitures, a sentencing court is obliged to hold a special hearing to investigate a defendant's Eighth Amendment claim only if the defendant first alleges facts that raise a reasonable possibility that the forfeiture is constitutionally excessive.

Hillman presents no facts or cases suggesting that forfeiture of a vehicle worth $ 8000 is "grossly disproportionate" to his offense of repeat drunk driving. In fact, Hillman concedes that the most pertinent case he could find goes against him. In **State v. Ziepfel,** 107 Ohio App. 3d 646, 669 N.E.2d 299 (Ohio App. 1995), the defendant was convicted of his fourth drunk driving offense. The Ohio Court of Appeals upheld forfeiture of Ziepfel's vehicle (a particularly expensive motorcycle, valued at between $ 23,000 and $ 30,000) against Ziepfel's claim that forfeiture of this vehicle constituted an "excessive fine" under the Eighth Amendment. The court concluded that Ziepfel's case did not present "one of those rare situations where the forfeiture is so grossly disproportionate to the offense as to constitute an excessive fine". **Ziepfel,** 669 N.E.2d at 304.

Hillman concedes that **Ziepfel** may be "persuasive", but he points out that **Ziepfel** is not "binding" on this court. This is true. However, in this case, "persuasive" is sufficient. Given the fact that **Ziepfel** upheld a much greater forfeiture under similar circumstances, and given the fact that Hillman has presented nothing to suggest that his case is "one of those rare situations" where the Constitution bars the government from enforcing the penalty specified by law for his offense, we reject Hillman's contention that his case must be remanded to the trial court for a special Eighth Amendment hearing. Our ruling is the same regarding Hillman's state constitutional claim.

Hillman's remaining argument is that the amount of his forfeiture ($ 8000) exceeds the maximum monetary penalty for his offense. Hillman relies on AS 12.55.035(b)(3), which declares that a defendant convicted of a class A misdemeanor "may be sentenced to pay ... a fine of no more than ... $ 5000". Because Hillman has suffered a forfeiture of property worth $ 8000

(and has additionally been ordered to pay an unsuspended fine of $ 1500), he argues that his total monetary penalty exceeds the $ 5000 ceiling set by AS 12.55.035(b).

Hillman's argument is premised on two assumptions. First, Hillman assumes that AS 12.55.035 limits not only the penalties that can be imposed for violation of state statutes but also the penalties that municipalities can impose for violation of their own ordinances. Second, Hillman assumes that AS 12.55.035 governs (and limits) forfeitures as well as fines.

Even taking Hillman's first assumption to be true (that is, even assuming that AS 12.55 035 governs the penalties for violation of municipal ordinances), we reject Hillman's contention that AS 12.55.035 limits forfeitures. There is nothing in the statutory language to indicate this, and Hillman cites no legislative history or case authority to support his contention that the legislature used the word "fine" to mean both "fine" and "forfeiture".[5] We therefore reject Hillman's contention that AS 12.55.035(b) sets a $ 5000 limit on vehicle forfeitures imposed as a penalty for driving while intoxicated.

The judgement of the district court is AFFIRMED.

DISPOSITION

AFFIRMED.

JUDGES FOOTNOTES

* Sitting by assignment of the chief justice made pursuant to Article IV, Section 16 of the Alaska Constitution.

OPINION FOOTNOTES

1 Both provisions contain identical wording: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

2 Paradoxically, the Municipality urges us to treat Hillman's appeal as a petition for review and to reach the merits of Hillman's contentions. If, as the Municipality asserts, this court has no jurisdiction "to review" the district court's decision, then this jurisdictional limitation would seem to encompass both forms of appellate review -- appeals and petitions.

3 In **Galaktionoff v. State,** 486 P.2d 919, 920 n.3 (Alaska 1971), the supreme court noted this omission. The court nevertheless ruled that, by virtue of the clause in AS 22.05.010 (a) giving the court "final appellate jurisdiction in all actions and proceedings", the court had the authority to review decisions of the superior court in district court sentence appeals.

4 The Sixth Circuit's opinion in **11869 Westshore Drive** contains a lengthy discussion of the case law in this area. 70 F.3d at 927-930. From that discussion, it appears that the federal circuits are split on the question of whether the concept of proportionality applies to **in rem** forfeitures. Moreover, among the

federal circuits that do require proportionality of **in rem** forfeitures, the circuits use differing criteria to assess that proportionality.

5 We note that state law provides for forfeiture of a repeat drunk driver's motor vehicle or aircraft. **See** AS 28.35.036. Motor vehicles and aircraft often are worth far more than $ 5000. If the legislature had intended to limit these forfeitures to $ 5000, it seems likely that the legislature would have included language expressly and clearly establishing such a limitation.

945 P.2d 307 DAVIS V. MUNICIPALITY OF ANCHORAGE (Ct. App. 1997) 1997 Alas. App. Lexis 42

JOHN K. DAVIS, Appellant,

vs.

MUNICIPALITY OF ANCHORAGE, Appellee.

Court of Appeals No. A-6318, No. 1548
COURT OF APPEALS OF ALASKA
945 P.2d 307, 1997 Alas. App. LEXIS 42
September 19, 1997, Decided
Appeal from the District Court, Third Judicial District, Anchorage, Stephanie Rhoades, Judge. Trial Court No. 3AN-95-1273 Cr.

COUNSEL

Michael B. Logue, Gorton & Associates, Anchorage, for Appellant.
James L. Walker, Assistant Municipal Prosecutor, and Mary K. Hughes, Municipal Attorney, Anchorage, for Appellee.

JUDGES

Before: Coats, Chief Judge, Mannheimer, Judge, and Rabinowitz, Senior Supreme Court Justice.*
AUTHOR: MANNHEIMER

OPINION

MANNHEIMER, Judge.

The Municipality of Anchorage undertook an in rem forfeiture proceeding against a vehicle owned by John K. Davis. This forfeiture action was prosecuted under former Anchorage Municipal Code (AMC) 9.28.026, an ordinance which declared that any vehicle operated by an intoxicated driver, or any vehicle operated by a driver who refused to submit to a breath test, was subject to forfeiture as a "public nuisance". Based on proof that Davis had driven while intoxicated and had refused to submit to a breath test, the Municipality obtained forfeiture of Davis's vehicle. The Municipality also pursued criminal charges against Davis for these same two offenses.

In this appeal, Davis contends that once the Municipality secured forfeiture of his vehicle in the civil proceeding, the double jeopardy clauses of the federal and the Alaska constitutions prohibited the Municipality from pursuing the criminal charges against him. For the reasons explained in this opinion, we hold that the Municipality was entitled to pursue both the **in rem** forfeiture action and the criminal charges.[1]

Facts of the case

Davis was arrested in Anchorage on February 17, 1995, for driving while intoxicated and refusing to submit to a breath test. His vehicle, a 1982 Ford, was seized at the time of his arrest. While Davis awaited trial on the two criminal charges, the Municipality pursued an **in rem**

forfeiture action against the vehicle, and on May 12, 1995, Davis's vehicle was declared forfeit to the. Municipality.

Davis asked the district court to dismiss the still-pending criminal charges. He argued that the forfeiture of his vehicle amounted to a "punishment" for his acts of driving while intoxicated and refusing the breath test. Davis further contended that, because he had been punished once for these acts (by the forfeiture of his vehicle), the constitutional guarantees against double jeopardy prohibited the government from punishing him again for the same acts (by imprisonment or fine in the criminal case). **See** the Fifth Amendment to the United States Constitution and Article I, Section 9 of the Alaska Constitution.

The district court rejected Davis's arguments and refused to dismiss the criminal charge. Davis then pleaded no contest to driving while intoxicated, preserving his double jeopardy argument for appeal. **See Cooksey v. State,** 524 P.2d 1251, 1255-57 (Alaska 1974).

The forfeitures imposed under former AMC 9.28.026 were in rem forfeitures

In his brief to this court, Davis renews his argument that the forfeiture of his vehicle was a "punishment" for double jeopardy purposes. Under the United States Supreme Court's decision in **United States v. Ursery,** 518 U.S. , 116 S. Ct. 2135, 135 L. Ed. 2d 549 (1996), it is clear that forfeiture of a person's property in an **in rem** civil forfeiture proceeding does not constitute "punishment" for purposes of the federal double jeopardy clause. Davis attempts to avoid this result by arguing that vehicle forfeiture proceedings under former AMC 9.28.026 were not really **in rem** proceedings, but were instead in **personam** forfeitures, a type of forfeiture generally recognized as "punishment". **See Ursery,** 116 S. Ct. at 2147 (majority opinion) and at 2150-51 (concurring opinion of Justice Kennedy).

The law distinguishes between **in personam** forfeitures, which are inflicted as punishment for a crime, and **in rem** forfeitures, which can be inflicted on property owners who are themselves innocent of crime, if the government proves that the property is contraband or is connected to the commission of a criminal act. **See Calero-Toledo v. Pearson Yacht Leasing Co.,** 416 U.S. 663, 684; 94 S. Ct. 2080, 2092; 40 L. Ed. 2d 452 (1974); **The Palmyra,** 25 U.S. 1, 12 Wheat. 1, 14-15; 6 L. Ed. 531 (1827).

For instance, this court recently decided a case in which a defendant was subjected to an **in personam** forfeiture of his vehicle. **See Hillman v. Anchorage,** 941 P.2d 211 (Alaska App. 1997). In **Hillman,** the defendant's vehicle was forfeited, not in a separate civil action, but at his sentencing for driving while intoxicated. The forfeiture was imposed as part of the defendant's sentence pursuant to former AMC 9.28.020(C) (the statutory provision defining the penalties for driving while intoxicated), and the legal basis for the forfeiture was that the defendant had been found guilty of a crime.

Such **in personam** forfeitures, imposed as part of a person's penalty for violating a criminal statute, must be distinguished from **in rem** forfeitures, which do not depend upon proof that the property owner is guilty of a crime, but which are based on proof that the property is contraband or is connected to or derived from some dangerous or unlawful activity. This distinction was

explained in some detail by Justice Kennedy in his concurring opinion in **Ursery** :

> The key distinction is that the instrumentality-forfeiture statutes are not directed at those who carry out the crimes, but at owners who are culpable for the criminal misuse of the property. **See Austin [v. United States,** 509 U.S. 602,] 619, 125 L. Ed. 2d 488, 113 S. Ct. [2801,] 2810-2811 [(1993)] (statutory "exemptions serve to focus the provisions on the culpability of the owner"). The theory [of **in rem** forfeiture] is that the property, whether or not illegal or dangerous in nature, is hazardous in the hands of this owner because he either uses it to commit crimes, or allows others to do so. The owner can be held accountable for the misuse of the property. **Cf. One 1958 Plymouth Sedan [v. Pennsylvania,** 380 U.S. 693,] 699, 85 S. Ct. [1246,] 1250[, 14 L. Ed. 2d 170 (1965)] ("There is nothing even remotely criminal in possessing an automobile. It is only the alleged use to which this particular automobile was put that subjects [the owner] to its possible loss.") ... Since the punishment befalls any property-holder who cannot claim statutory [exemption], whether or not he committed any criminal acts, [the forfeiture] is not a punishment for a person's criminal wrongdoing.
>
> Forfeiture, then, punishes an owner by taking property involved in a crime[.] It may happen that the owner is also the wrongdoer charged with a criminal offense. But the forfeiture is not a second in **personam** punishment for the offense[.]

Ursery, 116 S. Ct. at 2150.

In **Ursery**, the Supreme Court reaffirmed that the government may pursue "parallel **in rem** civil forfeiture actions and criminal prosecutions based upon the same underlying events". The Court noted that, "in a long line of cases", it had "considered the application of the Double Jeopardy Clause to civil forfeitures" and had "consistently concluded that the Clause does not apply to such actions because they do not impose punishment." **Ursery,** 116 S. Ct. at 2140.

The question then, for double jeopardy purposes, is to distinguish civil **in rem** forfeitures from forfeitures that are "intended as punishment, so that the proceeding is essentially criminal in character". **Ursery**, 116 S. Ct. at 2141, quoting **United States v. One Assortment of 89 Firearms,** 465 U.S. 354, 362; 104 S. Ct. 1099, 1105; 79 L. Ed. 2d 361 (1984). To answer this question, the **Ursery** Court reviewed its past decisions in this area -- specifically, **Various Items of Personal Property v. United States,** 282 U.S. 577, 51 S. Ct. 282, 75 L. Ed. 558 (1931), **One Lot [of] Emerald Cut Stones v. United States,** 409 U.S. 232, 93 S. Ct. 489, 34 L. Ed. 2d 438 (1972) (per curiam), and **United States v. One Assortment of 89 Firearms, supra** -- and then reaffirmed the two-part analysis it had used in those cases:

> First, [a court must] ask whether [the legislature] intended proceedings under [the forfeiture statute] to be criminal or civil. Second, [a court must] consider whether the [forfeiture] proceedings are so punitive in fact as to "[demonstrate] that [they] may not

legitimately be viewed as civil in nature," despite [the legislature's] intent. **89 Firearms,** 465 U.S. at 366, 104 S. Ct., at 1107.

Ursery, 116 S. Ct. at 2147. Using this analysis as a guide, we conclude that the vehicle forfeitures imposed under former AMC 9.-28.026 were **in rem** forfeitures, and that forfeiture proceedings under that ordinance were civil, not criminal.

Under subsection C(3) of the ordinance, a vehicle allegedly used in connection with either of the two specified offenses (driving while intoxicated or breath test refusal) could be seized and held for impoundment or forfeiture proceedings even if no criminal charges were ever filed against the driver. In fact, seizure of the vehicle apparently did not depend on whether the court could obtain **in personam** jurisdiction over the driver. Subsection C(3) provided that any court "having jurisdiction **over the motor vehicle**" could issue an order for seizure of the vehicle if the government demonstrated probable cause to believe that the vehicle was forfeitable under AMC 9.28.026. The same subsection declared that, even in the absence of an arrest, a police officer who had probable cause to believe that a vehicle was forfeitable could temporarily seize the vehicle and hold it for up to 2 days (so that a court order could be obtained to authorize a longer seizure). Moreover, under subsection A(6), even when criminal charges were filed against the driver, the court presiding over the forfeiture action (and not the court presiding over the criminal action) remained in control of the vehicle: "Any requests for release of a vehicle during the pendency of [the] **in rem** action" had to be "brought in the forum of the **in rem** action".

Forfeiture under former AMC 9.28.026 was not premised on whether the driver of the vehicle had been convicted of a crime. Rather, subsection A(11) declared that it was "not a defense to an **in rem** proceeding brought under [AMC 9.28.026]" that the person in possession of the vehicle was acquitted or was convicted of a lesser offense. And, under subsection A(3), it was likewise no defense that a criminal proceeding against that person remained unresolved. Once the Municipality established by a preponderance of the evidence that the vehicle had been used in connection with one of the two specified offenses, subsection A(7) allowed only one defense to forfeiture -- that the vehicle owner "[was not] in possession of the vehicle and [was not] responsible for ... the act which resulted in the impoundment or forfeiture", and that the vehicle owner "did not know or have reasonable cause to believe" that the other person would operate the vehicle in violation of the law.

This analysis of former AMC 9.28.026 demonstrates that its forfeiture provisions were squarely aimed at "owners who [were] culpable for the criminal misuse of [their vehicle]", and that the forfeiture imposed by this ordinance was based on proof that the vehicle was "hazardous in the hands of this owner because either he used it to commit crimes, or allowed others to do so". **Ursery,** 116 S. Ct. at 2150. The Anchorage Municipal Assembly plainly intended the forfeiture provisions to be civil, and our analysis of those provisions demonstrates that those provisions are not "so punitive in fact" as to belie that civil categorization. **Ursery,** 116 S. Ct. at 2147.

We therefore hold that forfeitures imposed under former AMC 9.28.026 were civil **in rem** forfeitures. It follows that vehicle forfeitures under former AMC 9.28.026 were not "punishments" for purposes of the federal double jeopardy clause. **Ursery, supra.** Under federal constitutional law, the forfeiture of Davis's vehicle did not bar the Municipality of Anchorage from prosecuting Davis for the crimes of driving while intoxicated and refusing a breath test.

Davis's argument under the Alaska Constitution

Davis argues that, even if the forfeiture of his vehicle did not constitute a "punishment" under federal double jeopardy law, we should interpret the Alaska double jeopardy clause differently. Davis cites **Whitton v. State,** 479 P.2d 302, 310 (Alaska 1970), in which the Alaska Supreme Court refused to follow federal precedent and instead adopted a different test for deciding when a defendant's violation of two criminal statutes constitutes the "same offense" for double jeopardy purposes.

However, as we noted both in **State v. Zerkel,** 900 P.2d 744 (Alaska App. 1995), and in **Aaron v. Ketchikan,** 927 P.2d 335 (Alaska App. 1996), the fact that a clause of the Alaska Constitution has, on occasion, been interpreted differently from the corresponding provision of the federal Constitution does not mean that we are at liberty to ignore federal precedent at will. When a party asserts that a provision of the Alaska Constitution should be construed differently from its close federal counterpart, that party bears the burden of demonstrating "something in the text, context, or history of the Alaska Constitution that justifies this divergent interpretation". **Zerkel,** 900 P.2d at 758 n.8, citing **Abood v. League of Women Voters,** 743 P.2d 333, 340-43 (Alaska 1987); **Aaron,** 927 P.2d at 336.

Davis does not satisfy the requirement established in **Abood, Zerkel,** and **Aaron**. He argues that the Alaska Supreme Court has not followed federal law in defining "same offense" (viz., the **Whitton** decision), and he argues that the concept of double jeopardy should not be "static". But even acknowledging this to be true, Davis does not explain why civil forfeiture of a vehicle used by an intoxicated driver should be considered "Punishment" under the Alaska Constitution. Under AMC 9.28.026, the Municipality of Anchorage was authorized to institute a civil action to obtain forfeiture of movable property that was used as the instrumentality of a criminal offense. Such forfeitures have a long tradition in Anglo-American law, and they traditionally have been viewed as noncriminal. The United States Supreme Court's decision in **Ursery** affirms this traditional view. Davis asks us to reject the analysis in **Ursery,** but he provides hardly any critique of the legal reasoning underlying that decision.

We recognize that, in recent times, both the Congress and various state legislatures have greatly increased the scope and severity of **in rem** forfeitures in an attempt to deter not only criminals but also non-criminals who countenance the use of their property by criminals. See Justice Stephens's dissent in **Ursery**, 116 S. Ct. at 2153. There are constitutional limits to such forfeitures; **in rem** forfeitures are governed by the Eighth Amendment's prohibition on excessive fines. **Austin v. United States,** 509 U.S. 602, 113 S. Ct. 2801, 125 L. Ed. 2d 488 (1993). Moreover, it is possible that the Alaska Constitution may place additional limitations on

forfeitures of non-traditional scope or severity. However, Davis's case does not raise these issues.

The judgement of the district court is AFFIRMED.

DISPOSITION

AFFIRMED.

JUDGES FOOTNOTES

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

OPINION FOOTNOTES

1 Since the time of this litigation, the Municipality of Anchorage has amended AMC 9.28.026. The current version of the ordinance contains several changes that are arguably material to a double jeopardy analysis. We express no opinion concerning the current version of AMC 9.28.026.

Only the Westlaw citation is currently available.

NOTICE: UNPUBLISHED OPINION

Court of Appeals of Alaska.

Mark E. HAYNES, Appellant,
v.
STATE of Alaska, Appellee.

Nos. A-6593, 3818.

May 13, 1998.

Appeal from the District Court, First Judicial District, Ketchikan, Thomas M. Jahnke, Judge.

Michael J. Zelensky, Ketchikan, for Appellant.

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

Before: COATS, Chief Judge, and MANNHEIMER and STEWART, Judges.

MEMORANDUM OPINION AND JUDGEMENT

MANNHEIMER, Judge.

*1 Mark E. Haynes was arrested in Ketchikan on November 24, 1994 and charged with both driving while intoxicated, AS 28.35.030(a), and driving with a suspended license, AS 28.15.291(a). He submitted to a chemical test of his breath, which showed his blood-alcohol level to be .186 percent.

The State of Alaska commenced criminal proceedings against Haynes. At the same time, based on Haynes's breath test result, the Department of Public Safety took administrative action against Haynes's (already suspended) driver's license. *See* AS 28.15.165-166. In addition, the City of Ketchikan impounded Haynes's vehicle and held it pending the outcome of a forfeiture proceeding (*Ketchikan v. One 1985 Maroon Ford Bronco,* No. 1KE-94-1146 Civ.) brought under Ketchikan Municipal Ordinance 10.40.045. [FN1] (This forfeiture proceeding never went to judgement; it was ultimately dismissed by agreement of the parties, with each side bearing its own costs.)

FN1. This ordinance allows the City to obtain forfeiture of vehicles used by persons who either drive while intoxicated or (having been arrested for driving while intoxicated) refuse the breath test, if they have a prior conviction for either of these offenses within the previous five years.

Haynes filed a motion in his criminal case seeking dismissal of the count charging him with driving while intoxicated. He argued that, because the State had taken administrative action against his driver's license, he had already suffered one "punishment" for his act of driving while intoxicated, and thus any additional punishment that might ultimately be imposed on him in the criminal prosecution would amount to an illegal second punishment for purposes of the double jeopardy clauses of the United States and Alaska Constitutions. The district court denied Haynes's motion, and he ultimately pleaded no contest to the charge of driving while intoxicated, reserving his right to appeal the district court's denial of his double jeopardy claim. *See Cooksey v. State,* 524 P.2d 1251, 1255-57 (Alaska 1974). In return for Haynes's plea, the State dismissed the charge of driving with a suspended license.

This was not a valid *Cooksey* plea. Haynes's double jeopardy attack, even if successful, would not have affected the validity of the count charging Haynes with driving while his license was suspended. *See State v. Zerkel,* 900 P.2d 744, 746 n. 1 (Alaska App.1995). From the record of the district court proceedings, it appears that the State's only reason for dismissing this count was to facilitate Haynes's no contest plea by insuring that Haynes's double jeopardy argument would be dispositive of the entire case, as required by *Cooksey.* We have repeatedly disapproved of such plea arrangements. *See Wells v. State,* 945 P.2d 1248, 1250 (Alaska App.1997); *Spinka v. State,* 863 P.2d 251 (Alaska App.1993).

Nevertheless, because this appellate case has been pending so long (since the autumn of 1995), we exercise our authority to treat Haynes's appeal as a petition for review, which we now grant. *See Juneau v. Thibodeau,* 595 P.2d 626, 631 (Alaska 1979); *Moore v. State,* 895 P.2d 507, 509 n. 2 (Alaska App.1995). We therefore turn to the merits of Haynes's appellate argument.

*2 Haynes attacks his DWI conviction on double jeopardy grounds, but his current double jeopardy argument is substantially different from the one he presented to the district court. With respect to the double jeopardy claim that Haynes did raise in the district court, we affirm the district court's ruling (its

refusal to dismiss the DWI charge against Haynes). With respect to the double jeopardy claim that Haynes raises for the first time on appeal, we conclude that this claim is not preserved.

In the district court, Haynes argued that the DWI charge should be dismissed because the State had already taken administrative action against his driver's license (based on Haynes's breath-test reading of .186 percent blood-alcohol). Relying on a line of federal cases commencing with *United States v. Halper,* 490 U.S. 435, 109 S.Ct. 1892, 104 L.Ed.2d 487 (1989), Haynes argued that the administrative action against his license constituted a "punishment" for double jeopardy purposes; thus, because he had already been punished once for his act of driving while intoxicated, any punishment he received in the criminal prosecution would constitute an unconstitutional second punishment for the same offense.

We rejected an identical argument in *State v. Zerkel,* 900 P.2d at 757-58. Moreover, since our decision in *Zerkel,* the United States Supreme Court has substantially limited the authority of the cases Haynes relied on. *See Hudson v. United States,* 522 U.S. 93, 118 S.Ct. 488, 139 L.Ed.2d 450 (1997); *United States v. Ursery,* 518 U.S. 267, 116 S.Ct. 2135, 135 L.Ed.2d 549 (1996). Finally, we have rejected an analogous argument under the double jeopardy clause of the Alaska Constitution. *See Aaron v. Ketchikan,* 927 P.2d 335 (Alaska App.1996). We therefore uphold the district court's refusal to dismiss Haynes's case.

On appeal, however, Haynes advances a substantially different argument. He asserts that the double jeopardy problem was created by the City of Ketchikan's civil lawsuit seeking forfeiture of his vehicle. As explained above, this civil lawsuit was ultimately dismissed by stipulation of the parties. However, Haynes contends that the forfeiture of his vehicle, had it occurred, *would have been* a punishment for double jeopardy purposes, and therefore, because the City's forfeiture action was pending at the same time as the State's criminal prosecution, the criminal prosecution should have been dismissed on double jeopardy grounds.

Alternatively, Haynes argues that the City's impoundment of his vehicle pending the resolution of the forfeiture proceeding--essentially, a pre-judgement attachment of the disputed property--constituted a punishment for double jeopardy purposes, and therefore any further punishment imposed in the criminal proceeding would have been unconstitutional.

*3 Our previous decisions in this area-- *Zerkel, Aaron,* and *Davis v. Anchorage,* 945 P.2d 307 (Alaska App.1997) (holding that forfeiture of a vehicle in an *in rem* civil proceeding does not constitute punishment for double jeopardy purposes)--strongly suggest that both of Haynes's arguments are mistaken. However, we need not reach the merits of Haynes's arguments because neither of them was preserved.

In his district court pleading, Haynes adverted to the fact that the City of Ketchikan had filed a civil forfeiture action against his vehicle and had impounded the vehicle pending resolution of that lawsuit. However, when Haynes stated the basis of his claim for relief, he focused exclusively on the fact that the State had taken administrative action against his driver's license. And, when the district court issued its ruling on Haynes's motion to dismiss, the district court addressed only the argument that administrative suspension or revocation of a driver's license constituted punishment for double jeopardy purposes.

Haynes never sought reconsideration of the district court's ruling, nor did he take any other action to alert the district court that he believed the court had neglected to rule on one of his claims. This being the case, even if Haynes had meant to raise a double jeopardy claim based on the City of Ketchikan's action against his vehicle, any such claim would now be waived. *See Marino v. State,* 934 P.2d 1321, 1327 (Alaska App.1997); *Erickson v. State,* 824 P.2d 725, 733 (Alaska App.1991) (when the trial court overlooks or neglects to rule on a litigant's claim for relief, the litigant must press the court for a ruling or the claim will be deemed waived).

In his brief to this court, Haynes implicitly recognizes that he faces a procedural difficulty. He argues that, "to the extent [his] double jeopardy arguments might not have been, or were inadequately, presented [to the district court], such failure is not fatal to this appeal" because "the constitutional protection against double jeopardy is ordinarily not forfeited by failure to raise an objection at trial". It is true that double jeopardy claims ordinarily can not be forfeited by inaction. *See Menna v. New York,* 423 U.S. 61, 63 n. 2, 96 S.Ct. 241, 242 n. 2, 46 L.Ed.2d 195 (1975); *Horton v. State,* 758 P.2d 628, 632 (Alaska App.1988). However, this does not excuse a litigant from the rule that, absent plain error, a claim

must be presented to the trial court before it can be raised on appeal. Because Haynes did not ask the district court to decide either his vehicle forfeiture claim or his vehicle impoundment claim, and because these claims can not be decided as matters of plain error, Haynes can not raise these contentions on appeal. [FN2]

FN2. In *Horton*, this court allowed the defendant to argue for the first time on appeal that, under the double jeopardy clause, two of his convictions should merge because they were based on the same criminal act. However, given this court's ruling that it was the State's burden to establish that the two counts were based on distinct acts, *id.*, 758 P.2d at 632, Horton's double jeopardy claim amounted to an attack on the sufficiency of the State's trial evidence to establish two separate offenses.
Sufficiency of the evidence to establish separate offenses is a legal determination based on the existing trial record; appellate courts can determine this question *de novo*. Thus, the specific double jeopardy claim that Horton raised could be decided under the rubric of "plain error". *See Shafer v. State*, 456 P.2d 466, 468 (Alaska 1969) (holding that, even though a defendant does not object to the sufficiency of the State's evidence at trial by seeking a judgement of acquittal, this claim can nevertheless be considered on appeal as a matter of plain error); *Mustafoski v. State*, 867 P.2d 824, 829 n. 1 (Alaska App.1994) (holding that an appellate court can independently review a trial court's ruling on the validity of an indictment when the issue was litigated solely on the pleadings and the pre-existing grand jury record). Haynes, on the other hand, raises double jeopardy claims that hinge on factual and legal issues that were not litigated in the trial court. Moreover, the proper decision of his claims is not obvious from the existing record. *See Hansen v. State*, 845 P.2d 449, 457 (Alaska App.1993); *Marrone v. State*, 653 P.2d 672, 676 (Alaska App.1982) (holding that when there is no clear legal answer to the defendant's claim, the defendant has failed to establish plain error). Thus, Haynes's claims do not constitute "plain error", and he can not raise them for the first time on appeal.

To conclude: We uphold the district court's ruling on the double jeopardy claim that Haynes preserved--the claim that the Department of Public Safety's administrative action against Haynes's driver's license precluded the State from prosecuting Haynes for driving while intoxicated. We find that Haynes failed to preserve the other double jeopardy claims that he raises in this appeal (claims based on the City of Ketchikan's *in rem* forfeiture action against his vehicle).

*4 The judgement of the district court is AFFIRMED.

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NOTICE: UNPUBLISHED OPINION

Court of Appeals of Alaska.

Beth C. BLANCHARD, Appellant,
v.
MUNICIPALITY OF ANCHORAGE, Appellee.
Ruth A. LEMBKE, Appellant,
v.
MUNICIPALITY OF ANCHORAGE, Appellee.
Quentin C. QUALLE, Appellant,
v.
MUNICIPALITY OF ANCHORAGE, Appellee.
Kristina K. BARTLETT, Appellant,
v.
MUNICIPALITY OF ANCHORAGE, Appellee.
Harry D. MODESETTE, Appellant,
v.
MUNICIPALITY OF ANCHORAGE, Appellee.
Robert M. McGHEE, Appellant,
v.
MUNICIPALITY OF ANCHORAGE, Appellee.
William R. GREENEWALD, Appellant,
v.
MUNICIPALITY OF ANCHORAGE, Appellee.
Arthur A. MITCHELL, Jr., Appellant,
v.
MUNICIPALITY OF ANCHORAGE, Appellee.
Christopher CALVERT, Appellant,
v.
MUNICIPALITY OF ANCHORAGE, Appellee.
Robert C. MURRAY, Appellant,
v.
MUNICIPALITY OF ANCHORAGE, Appellee.

Nos. A-6046, A-5979, A-6380, A-5977, A-6057, A-6382, A-5978, A-6347.

Dec. 10, 1997.

Appeals from the District Court, Third Judicial District, Anchorage, William H. Fuld, John R. Lohff, Gregory J. Motyka, James N. Wanamaker, and Michael L. Wolverton, Judges.

Eugene B. Cyrus, Eagle River, for Appellants Blanchard, Lembke, Qualle, McGhee, Greenewald, Mitchell, and Calvert.

William P. Bryson, Anchorage, for Appellants Modessette and Murray.

Michael B. Logue, Gorton & Associates, Anchorage, for Appellant Bartlett.

James L. Walker, Assistant Municipal Prosecutor, and Mary K. Hughes, Municipal Attorney, Anchorage, for Appellee.

Before: COATS, Chief Judge, MANNHEIMER, Judge, and RABINOWITZ, Senior Supreme Court Justice. [FN*]

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

MEMORANDUM OPINION AND JUDGEMENT

MANNHEIMER, Judge.

*1 Each of the ten defendants in this consolidated appeal was charged with driving while intoxicated, Anchorage Municipal Code (AMC) 9.28.020. While these criminal charges were pending, the Alaska Department of Public Safety administratively revoked all ten defendants' operator's licenses (based on the same incidents). In addition, pursuant to former AMC 9.28.026, the Municipality of Anchorage impounded the vehicles that the defendants had been driving. All of the defendants had to pay money to the Municipality to reclaim their vehicles, and the Municipality retained possession of some of these vehicles for up to thirty days. [FN1]

FN1. Appellant Lembke's case actually comprises three different DWI prosecutions. In the first prosecution (No. A-5977), Lembke's vehicle was impounded but was soon released after she paid $161.75 to the Municipality. In the second prosecution (No. A-5978), Lembke's vehicle was impounded for 30 days and then released after Lembke paid a $60 fee. In the third prosecution (No. A-5979), the Municipality commenced forfeiture proceedings against the vehicle; this time, Lembke paid $750 to settle the proceedings and regain the vehicle.

Subsequently, the defendants asked the district court to dismiss the criminal charges against them. The defendants asserted that the revocation of their driver's licenses or the impoundment of their vehicles (or both) constituted "punishment" for double jeopardy purposes under either the Fifth Amendment to the federal Constitution or Article I, Section 11 of the Alaska Constitution. The defendants contended that, because they had already suffered these

punishments, the Municipality was now precluded from prosecuting them for driving while intoxicated. The district court denied the defendants' motions, and ultimately the defendants all pleaded no contest to driving while intoxicated, reserving their right to litigate these double jeopardy claims. *See Cooksey v. State*, 524 P.2d 1251, 1255-57 (Alaska 1974).

The double jeopardy issues

Our decisions in *State v. Zerkel*, 900 P.2d 744 (Alaska App.1995) (decided under the federal Constitution), and *Aaron v. Ketchikan*, 927 P.2d 335 (Alaska App.1996) (decided under the Alaska Constitution), answer the defendants' contention that the administrative revocation of their driver's licenses insulated them from subsequent criminal prosecution for driving while intoxicated. We thus uphold the district court's rulings on this issue.

As to the defendants' contention that civil impoundment of their vehicles under former AMC 9.28.026 insulated them from subsequent criminal prosecution, that contention is answered by our recent decision in *Davis v. Anchorage*, --- P.2d ----, Opinion No. 1548 (Alaska App., September 19, 1997). In *Davis*, we examined former AMC 9.28.026 and we concluded that, under that statute, an *in rem* civil forfeiture of the vehicle operated by an intoxicated driver was not "punishment" for double jeopardy purposes under either the federal or the Alaska constitutions.

Several of the defendants in the present appeal argue that impoundment (that is, temporary retention) of a vehicle should be viewed differently from forfeiture. These defendants argue that forfeiture of a vehicle can be classified as "remedial" because the act of forfeiture permanently removes a dangerous object from the community, while impoundment must be "punitive" because it accomplishes only an inconvenience to the owner. This argument is premised on a misunderstanding of the rationale behind civil forfeiture. [FN2]

> FN2. It is also premised on a misunderstanding of what happened in civil forfeiture proceedings. As exemplified by defendant Lembke's case, a vehicle owner who faced forfeiture proceedings could resolve the case by paying money to the Municipality. See footnote 1. Further, under former AMC 9.28.026(C)(9)(a), even when a vehicle was declared forfeit, the Anchorage Chief of Police was authorized to sell the vehicle at auction-- thus returning it to the community, where it might conceivably again be used by an intoxicated driver.

*2 It is true that older cases discussing *in rem* forfeitures indulge in the legal fiction that the object itself is the "offender". Moreover, former AMC 9.28.026 declared that any vehicle used by an intoxicated driver constituted a "nuisance" to be abated. Such statements might indeed lead one to conclude that there was something about the vehicles themselves that was intrinsically dangerous or injurious to the public welfare. However, as we explained in *Davis*, the forfeiture provisions of AMC 9.28.026

> were squarely aimed at "owners who [were] culpable for the criminal misuse of [their vehicle]", and that the forfeiture imposed by this ordinance was based on proof that the vehicle was "hazardous in the hands of this owner because either he use[d] it to commit crimes, or allow[ed] others to do so".

Davis, slip opinion at 8 (quoting *United States v. Ursery*, 518U.S. 267, ----, 116 S.Ct. 2135, 2150, 135 L.Ed.2d 549 (1996) (concurring opinion of Justice Kennedy)). In other words, the Municipality was entitled to institute impoundment or forfeiture proceedings against the vehicles used by intoxicated drivers because, at least presumptively, the owners of those vehicles had engaged in behavior that put the public at risk--either by driving their own vehicles while intoxicated, or by lending their vehicles to other people who were intoxicated.

With the purpose of AMC 9.28.026 thus clarified, it can be seen that impoundment and forfeiture are simply two different forms of the same remedial sanction--taking a vehicle out of the hands of a person who is apt to allow the vehicle to be used dangerously. Impoundment is a temporary dispossession, forfeiture a permanent dispossession, but both serve the same remedial end. We therefore conclude that our decision in *Davis* controls the impoundment as well as the forfeiture of vehicles under former AMC 9.28.026.

For these reasons, we uphold the defendants' convictions for driving while intoxicated.

Lembke's sentence appeal

Defendant Lembke raises one additional issue that is germane solely to her case; she challenges the severity of her sentence. As indicated in footnote 1, Lembke was convicted of three different episodes of driving while intoxicated. District Judge John R. Lohff sentenced Lembke to a composite term of 360 days to serve (1260 days with 900 days suspended).

We will first summarize the facts of Lembke's three cases and then analyze her sentence.

Just after midnight on October 14, 1994, Lembke was stopped for speeding and for flashing her headlights; this stop ultimately turned into an arrest for driving while intoxicated. A twelve-pack of beer was found in Lembke's car. Her blood-alcohol level tested at .195 percent.

Lembke was released on bail pending her trial. Among the conditions of pre- trial release, the court required Lembke to obey all laws and to refrain from consuming alcohol.

*3 On February 24, 1995, again just after midnight, Lembke was stopped for speeding and for weaving; again, this stop ultimately became an arrest for DWI. On this occasion, Lembke refused to submit to a breath test, but she appeared to be highly intoxicated.

Based on this second incident, Lembke was charged with a second DWI. She was also charged with refusing to submit to a breath test, AMC 9.28.022(C), driving while her license was revoked, AMC 9.12.010(B), and violating the conditions of her release in the still-pending 1994 DWI case (because she had consumed alcoholic beverages and because she had broken the law by driving without a valid driver's license).

Lembke was again released on bail. Four weeks later, on March 19, 1995, again just after midnight, the police received three REDDI ("Report Every Drunk Driver Immediately") reports concerning Lembke. Acting on these reports, an officer followed Lembke's car and observed it weaving into different lanes of traffic. The officer stopped Lembke, and again Lembke was arrested for DWI. Lembke's blood-alcohol level on this occasion was .268 percent. [FN3]

> FN3. In addition to driving while intoxicated, Lembke also had some cocaine in her possession. (She conceded this at her sentencing hearing.) Apparently, however, Lembke was never charged with this felony.

Based on this incident, Lembke was charged with a third DWI. She was also again charged with driving while her license was revoked. This time, Lembke was unable to make bail. She remained in custody until March 30th, when the court released her to an in-patient alcohol treatment program.

Four months later, Lembke reached a plea agreement with the Municipality: Lembke pleaded no contest to the three counts of driving while intoxicated, as well as the additional count of violating the conditions of her release; the Municipality dismissed the two counts charging Lembke with driving while her license was revoked, as well as the count charging Lembke with refusing to take the breath test.

Lembke had two prior DWI convictions from 1979, for which she served 3 days and 10 days in jail. However, because these two prior convictions were more than 10 years old, Lembke was a first offender for purposes of the mandatory minimum sentences set forth in AMC 9.28.020(C). That is, she faced a mandatory minimum sentence of 3 days' imprisonment for each of her three current DWI's. *See* AMC 9.28.020(C)(1)(a).

Judge Lohff sentenced Lembke in all three cases simultaneously. At the sentencing hearing, Lembke and other witnesses (including Lembke's alcoholism counselor) testified concerning Lembke's alcoholism, her rehabilitative efforts, and her progress. Lembke's counselor at the Breakthrough Chemical Dependency Program testified that Lembke had received in-patient treatment for several days (from March 30th through April 5th), then day-patient treatment for another two weeks (April 6th through April 21st), before being released to the out-patient program. At the time of her sentencing, Lembke had completed 17 weeks of out-patient therapy; the full program is 40 weeks long, so Lembke had 23 weeks left.

While Lembke's counselor thought that Lembke demonstrated a good attitude toward therapy, she evaluated Lembke's chances for successful rehabilitation as "average"--both because Lembke had a serious alcohol problem and also because Lembke had "some other issues that she needs to deal with". The counselor agreed that Lembke's successful rehabilitation would require a "substantial investment of ... time and energy".

*4 In his sentencing remarks, Judge Lohff declared that Lembke, by committing three DWI offenses so close together in time, had exhibited "an extreme degree" of "poor judgement". Lembke's blood-alcohol levels (on the two occasions when it had been measured) had substantially exceeded the legal limit; Judge Lohff found that these high blood-alcohol levels indicated an extreme degree of impairment.

Moreover, Judge Lohff pointed out that Lembke's second and third offenses were committed while Lembke was awaiting trial on other DWI charges. (We also note, although Judge Lohff did not specifically mention this point, that Lembke committed her second and third offenses when she was on bail release and had been ordered to refrain both from drinking and from driving.)

Based on the circumstances of Lembke's current offenses, as well as the fact that Lembke had twice before been convicted of driving while intoxicated, Judge Lohff concluded that the 3-day mandatory minimum sentence for Lembke's present offenses would be "clearly and ridiculously inadequate [to express] community condemnation" of Lembke's conduct. Judge Lohff explained that he viewed Lembke's conduct as approaching "worst offender status", and he declared that he intended to impose "aggravated" sentences.

On the other hand, Judge Lohff declined to find Lembke a "worst offender". The judge expressly considered Lembke's rehabilitation as a sentencing goal, and he acknowledged that Lembke had made "good progress" toward rehabilitation. However, Judge Lohff believed that the facts of Lembke's case called on him to emphasize the sentencing goals of community condemnation, protection of the public, and deterrence. The judge declared that he wished to do everything possible to prevent Lembke from repeating her offenses.

In the first DWI case, Judge Lohff sentenced Lembke to 360 days with 320 days suspended; in the second DWI case, Judge Lohff sentenced Lembke to 360 days with 240 days suspended; and in the third DWI case, Judge Lohff sentenced Lembke to 360 days with 180 days suspended. In addition, Lembke received 180 days with 160 days suspended for violating the conditions of her release. Judge Lohff imposed all of these sentences consecutively, resulting in a composite sentence of 1260 days with 900 days suspended, or 360 days to serve.

On appeal, Lembke argues that Judge Lohff failed to adequately address her progress toward rehabilitation, exemplified by her success during four months of alcohol therapy, and that he failed to give sufficient weight to her rehabilitative prospects. However, the record shows that Judge Lohff gave specific attention to Lembke's rehabilitation and her efforts in the treatment program. The judge simply concluded that, in light of the circumstances, other sentencing goals should take priority.

Lembke's treatment counselor, while she praised Lembke's attitude and efforts in therapy, evaluated Lembke's prospects as only "average". Weighed against this "average" prospect for rehabilitation was Lembke's past record of DWI offenses and her serious string of present offenses. Within the space of half a year, Lembke committed three DWI's. The second and third of these offenses were committed while Lembke was on bail release--living under court order not to drink and not to drive (because her driver's license had been revoked). Such recidivism is a substantial aggravating factor. *Compare Bush v. State,* 678 P.2d 423, 425-26 (Alaska App.1984), and *Rosa v. State,* 633 P.2d 1027, 1032-33 (Alaska App.1981) (upholding aggravated sentences for defendants who continued to sell cocaine while released on bail in connection with cocaine charges).

*5 Lembke argues that Judge Lohff should not have viewed her three DWI offenses as three separate crimes, since Lembke committed all three before she had been sentenced on even the first one. Lembke argues that, because she did not go through conviction and sentencing until after she had committed all three offenses, she "did not have the opportunity to follow through with rehabilitation". Thus, Lembke concludes, it was unfair for Judge Lohff to treat her as if she were, in essence, a third offender.

The record shows that Judge Lohff understood that Lembke was not a third offender. He specifically declared that Lembke faced only a first offender's minimum sentence (72 hours' imprisonment) for each of the three DWI convictions. However, the fact that Lembke was a first offender for purposes of determining the mandatory minimum sentence does not mean that Judge Lohff was obliged to treat her as a first offender for all sentencing purposes. A sentencing judge may consider a defendant's criminal history and past convictions regardless of whether those past convictions affect the defendant's status for purposes of applying a presumptive term or a mandatory minimum term. *See State v. Peel,* 843 P.2d 1249, 1251 n. 2 (Alaska App.1992); *Burnette v. Anchorage,* 823 P.2d 10, 14 n. 4 (Alaska App.1991).

Judge Lohff declared that one of his specific sentencing goals was to ensure that Lembke was deterred from continuing to drive while intoxicated. The record shows that Lembke was unable or unwilling to refrain from driving while intoxicated even after her misconduct was forcefully brought to

her attention by her 1979 convictions, by her arrests in October 1994 and March 1995, by the formal proceedings instituted against her, and by the court's bail conditions. Given this record, we conclude that Judge Lohff could reasonably choose to accentuate the aggravated nature of Lembke's course of conduct over Lembke's average potential for rehabilitation. *Asitonia v. State*, 508 P.2d 1023, 1026 (Alaska 1973); *Ting v. Anchorage*, 929 P.2d 673, 675 (Alaska App.1997) (a sentencing judge is primarily responsible for weighing the various sentencing goals under the particular facts of the defendant's case).

This court has affirmed even more severe sentences for defendants who were sentenced for a series of DWI's, even when the later offenses were committed before the defendant had been sentenced on the earlier charges. For instance, in *Raymond v. Anchorage*, 698 P.2d 669 (Alaska App.1985), this court affirmed a composite sentence of 460 days to serve for two counts of DWI and two counts of driving with a revoked license. These charges arose from incidents that occurred only six days apart, but the defendant had two earlier DWI convictions. And in *Wilson v. State*, 680 P.2d 1173, 1177, 1179 (Alaska App.1984), this court affirmed a composite sentence of 3 years, 9 months for three incidents that gave rise to two DWI convictions as well as convictions for reckless driving and refusing to submit to a breath test. The reckless driving and breath-test refusal charges stemmed from an incident that occurred four days before the defendant was sentenced for the second DWI.

*6 Having independently examined the record, we conclude that the 360-day composite term imposed by Judge Lohff is not clearly mistaken. *McClain v. State*, 519 P.2d 811, 813-14 (Alaska 1974).

Conclusion

The judgements of conviction entered against these ten defendants are AFFIRMED. Additionally, in Lembke's appeal, the district court's sentencing decision is AFFIRMED.

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NOTICE: UNPUBLISHED OPINION

Court of Appeals of Alaska.

MUNICIPALITY OF ANCHORAGE, Appellant,
v.
David W. SHAFFER, Appellee.

No. A-5917.

June 4, 1997.

Appeal from the District Court, Third Judicial District, Anchorage, William H. Fuld, Judge.

James L. Walker, Assistant Municipal Prosecutor, and Mary K. Hughes, Municipal Attorney, Anchorage, for Appellant.

Jason A. Steen, Gorton & Associates, Anchorage, for Appellee.

Before: COATS, Chief Judge, MANNHEIMER, Judge, and JOANNIDES, District Court Judge. [FN**]

FN** Sitting by assignment of the chief justice made pursuant to Article IV, Section 16 of the Alaska Constitution.

MEMORANDUM OPINION AND JUDGEMENT [FN*]

FN* Entered pursuant to Appellate Rule 214 and the Guidelines for Publication of Court of Appeals Decisions (Court of Appeals Order No. 3).

MANNHEIMER, Judge.

*1 David W. Shaffer was arrested by the Anchorage police for driving while intoxicated. At the time of his arrest, Shaffer was driving a 1985 Subaru with Virginia license plates; this vehicle was impounded. Because Shaffer had a prior conviction for refusing to submit to a breath test, the Municipality of Anchorage commenced forfeiture proceedings against the Subaru under former Anchorage Municipal Code § 9.28.026(C).

The vehicle was not registered to Shaffer, but Shaffer contacted the Municipality and submitted a copy of the certificate of title, which showed that he had recently purchased the car. However, after making this contact with the Municipality, Shaffer never filed an answer to the Municipality's forfeiture complaint. The administrative hearing officer ultimately granted default judgement to the Municipality.

Based on the forfeiture of the Subaru, Shaffer asked the district court to dismiss the driving while intoxicated charge. Shaffer argued that the forfeiture of his vehicle constituted a punishment for his act of drunk driving, and thus any further punishment that might be imposed in the pending criminal action would violate the constitutional guarantee against double jeopardy. The district court agreed with Shaffer and dismissed the DWI charge. The Municipality now appeals the district court's ruling.

This case is controlled by our recent decision in *Anchorage v. Skagen,* 920 P.2d 284 (Alaska App.1996). In *Skagen,* we held that a civil forfeiture proceeding against a defendant's vehicle does not constitute a "jeopardy" for purposes of the double jeopardy clause if the defendant does not enter an appearance and formally contest the forfeiture. 920 P.2d at 286-87. Shaffer never entered an appearance when the Municipality sought forfeiture of his vehicle. Thus, the district court erred when it ruled that Shaffer had been placed in jeopardy in that forfeiture proceeding.

Shaffer attempts to avoid this result by pointing out that, even though he never filed an answer to the Municipality's forfeiture complaint, he did contact the Municipality to notify them that he was the true owner of the vehicle. Shaffer argues that this act of notification distinguishes his case from *Skagen.* It does not.

In *Skagen,* we discussed an analogous federal case, *United States v. Castro,* 78 F.3d 453 (9th Cir.1996). The defendant in *Castro* was charged with drug offenses; he was also notified that the government would be seeking forfeiture of some property he owned. Castro filed notice that he intended to contest the forfeiture, but the notice was filed late and it failed to include all the necessary forms. The Drug Enforcement Agency notified Castro of these deficiencies and extended him another opportunity to contest the forfeiture. Castro refiled the paperwork, but again it was not in proper form. (Castro failed to submit his pleadings under oath.) The government informed Castro that his pleadings were again deficient, and they gave him a third opportunity to contest the forfeiture. This time, Castro failed to

respond. *Castro,* 78 F.3d at 454-55.

*2 On appeal from his criminal convictions, Castro argued that the criminal judgement against him constituted a second punishment because the government had already obtained forfeiture of his property. The Ninth Circuit disagreed. "Merely asserting that the property belonged to him, without complying with the requirements for filing a claim of ownership, is not legally sufficient[,]" the court said. *Id.* at 456. The court additionally noted that Castro, despite his assertion of ownership, had never actually sought to re-open the forfeiture proceedings or obtain a modification of the default judgement:

> [The defendant's] failure to file a petition for remission or mitigation ... reveals that, even when he had the opportunity to challenge ... the forfeiture and assert his interest, he weighed the worth of asserting a claim against any risks associated with doing so and ultimately decided not to assert a claim of ownership.

Castro, 78 F.3d at 457.

Shaffer, like the defendants in *Skagen* and *Castro,* notified the government that he was the owner of the property but did not pursue this asserted ownership interest by answering the forfeiture complaint. Thus, Shaffer's case is governed by our decision in *Skagen:* the default forfeiture of an unclaimed vehicle did not inflict a punishment on Shaffer.

The judgement of the district court is REVERSED and the driving while intoxicated charge against Shaffer is reinstated. This case is remanded to the district court for further proceedings on that charge.

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920 P.2d 284 MUNICIPALITY OF ANCHORAGE V. SKAGEN (Ct. App. 1996) 1996 Alas. App. Lexis 26

MUNICIPALITY OF ANCHORAGE, Petitioner,

vs.

WILLIAM M. SKAGEN, Respondent.

No. 1474, Court of Appeals Nos. A-5765 & 5795
COURT OF APPEALS OF ALASKA
920 P.2d 284, 1996 Alas. App. LEXIS 26
June 21, 1996, Decided
Petition for Review from the District Court, Third Judicial District, Anchorage, William H. Fuld, Judge. Trial Court No. 3AN-94-2872 Cr.

COUNSEL

James L. Walker, Assistant Municipal Prosecutor, Mary K. Hughes, Municipal Attorney, Anchorage, for Petitioner.

Frederick T. Slone, Kasmar and Slone, Anchorage, for Respondent.

JUDGES

Before: Bryner, Chief Judge, and Coats and Mannheimer, Judges.

AUTHOR: MANNHEIMER

OPINION

MANNHEIMER, Judge.

William M. Skagen was charged with two violations of the Anchorage Municipal Code: driving while intoxicated, AMC § 9.28.-020A, and refusing to take a breath test, AMC § 9.28.022C. While Skagen awaited trial, the Municipality commenced a civil forfeiture proceeding against his automobile pursuant to AMC § 9.28.026C.[1] Skagen (who was the registered owner of the vehicle) failed to enter an appearance in the forfeiture action. As a consequence, the Municipality obtained a default judgement of forfeiture against the vehicle.

After the vehicle was forfeited to the Municipality, Skagen filed a motion seeking dismissal of the two criminal charges pending against him. Skagen asserted that the forfeiture of his vehicle, based on his acts of driving while intoxicated and refusing to take the breath test, constituted a "punishment" for double jeopardy purposes. Because he had already suffered this punishment, Skagen argued, the double jeopardy clause of the Federal Constitution barred the Municipality from prosecuting him for these two crimes.

District Court Judge William H. Fuld agreed with Skagen in part. He ruled that the forfeiture of Skagen's vehicle constituted a punishment for double jeopardy purposes, but he found that the vehicle forfeiture had been based solely on Skagen's refusal to take the breath test, not his act of driving while intoxicated. For this reason, Judge Fuld dismissed the breath-test refusal charge but he maintained the driving while intoxicated charge.

The Municipality filed a petition for review, asking us to reinstate the breath-test refusal charge. Skagen filed a cross-petition, asking us to dismiss the driving while intoxicated charge. We granted both petitions, and we now hold that the Municipality is entitled to pursue both of the criminal charges.

There is support for Skagen's assertion that the forfeiture of a vehicle based on criminal acts of the driver constitutes a "punishment" for federal double jeopardy purposes. **See One 1958 Plymouth Sedan v. Pennsylvania,** 380 U.S. 693, 699; 85 S. Ct. 1246, 1250; 14 L. Ed. 2d 170 (1965), cited in **Austin v. United States,** 509 U.S. 602, 113 S. Ct. 2801, 2811; 125 L. Ed. 2d 488 (1993), and **United States v. Perez,** 70 F.3d 345 (5th Cir. 1995). There is also legal authority against Skagen. **See City of New Hope v. One 1986 Mazda 626,** 546 N.W.2d 300 (Minn. App. 1996) (holding that the forfeiture of a vehicle operated by an intoxicated driver does not constitute "punishment" for double jeopardy purposes, and that such a forfeiture can be imposed in addition to the criminal penalties for DWI); **State v. Johnson,** 667 So. 2d 510 (La. 1996) (holding that the forfeiture of a vehicle used in drug offenses does not, **per se,** constitute "punishment" for double jeopardy purposes -- that, with the possible exception of extraordinarily valuable vehicles, such a forfeiture can be imposed irrespective of whether the owner has already been convicted and sentenced for the drug offenses); **State v. One 1989 Ford F-150 Pickup,** 888 P.2d 1036 (Okla. App. 1995) (indicating that the forfeiture of a vehicle used in drug offenses does not constitute "punishment" for double jeopardy purposes). **See also United States v. Salinas,** 65 F.3d 551, 553-54 (6th Cir. 1995), and **United States v. Tilley,** 18 F.3d 295, 300 (5th Cir. 1994), **cert. denied** U.S. , 115 S. Ct. 574, 130 L. Ed. 2d 490 (forfeiture of property purchased with the proceeds of illegal narcotics transactions is not "punishment" for double jeopardy purposes).

Despite the allure of this double jeopardy issue, we conclude that we need not resolve it to decide Skagen's case. The federal circuits uniformly hold that, even when the government files suit to obtain forfeiture of property based on a person's criminal acts, the double jeopardy clause is not implicated when the forfeiture is entered by default after the defendant fails to file an appearance in the forfeiture action and assert an interest in the property.

For instance, in **United States v. Washington,** 69 F.3d 401 (9th Cir. 1995), government agents arrested Washington for narcotics offenses and seized over $ 1000 from him. When the government commenced forfeiture proceedings against this money, "Washington decided [on the advice of counsel] not to file a claim stating his interest in the seized money". 69 F.3d at 402.

After the money was forfeited to the government, Washington sought dismissal of the drug charges against him. He relied on **United States v. $ 405,089.23 in U.S. Currency,** 33 F.3d 1210 (9th Cir. 1994), a case in which the Ninth Circuit held that the forfeiture of money connected with narcotics offenses constituted "punishment" for double jeopardy purposes, thus prohibiting the government from later trying the defendant on criminal charges arising from the same conduct. However, the Ninth Circuit found that Washington's case was not governed by **U.S. Currency:**

> [While] criminal [prosecution] and civil forfeiture proceedings based on the same facts may subject a defendant to double jeopardy[,] jeopardy does not attach ... whenever the Government seizes property.
>
> In the recent decision in **[United States v.] Cretacci,** [62 F.3d 307, 310-11 (9th Cir. 1995)], we concluded that an owner who receives notice of an intended forfeiture and fails to claim an ownership interest in the property has effectively abandoned that interest. Because abandonment constitutes a relinquishment of all rights in the property, we held in **Cretacci** that the taking of such property imposes no "punishment" on the former owner and thus does not place him or her in jeopardy.
>
> . . .
>
> Washington failed to contest the propriety of the seizure [of the money] by filing a claim of ownership [or] by filing a petition for remission or mitigation. Under **Cretacci,** the Government's forfeiture of the monies found on Washington's person therefore imposed no punishment on him and he thus was never placed in jeopardy. Accordingly, we reject Washington's claim that his subsequent criminal prosecution constitutes double jeopardy.

United States v. Washington, 69 F.3d at 403-04 (citations omitted).

Accord: United States v. James, 78 F.3d 851, 855 (3rd Cir. 1996); **United States v. Wilson,** 77 F.3d 105, 111 (5th Cir. 1996); **United States v. Pena,** 67 F.3d 153, 156 (8th Cir. 1995); **United States v. Ruth,** 65 F.3d 599, 603-04 (7th Cir. 1995), **cert. denied,** 116 S. Ct. 1548 (1996); **United States v. Baird,** 63 F.3d 1213, 1217-1220 (3rd Cir. 1995), **cert. denied,** 116 S. Ct. 909, 133 L. Ed. 2d 841 (1996); **United States v. Arreola-Ramos,** 60 F.3d 188, 192 (5th Cir. 1995); **United States v. Torres,** 28 F.3d 1463, 1465-66 (7th Cir. 1994), **cert. denied** 115 S. Ct. 669, 130 L. Ed. 2d 603 (1994).

Skagen, like the defendants in **Washington** and the cases cited in the last paragraph, failed to enter an appearance in the civil forfeiture action. With no one appearing to contest the forfeiture, the Municipality obtained the vehicle by default. Under the foregoing cases, Skagen was not placed in jeopardy in the forfeiture proceeding (because he was never a party to that proceeding), nor was Skagen "punished" by the forfeiture of the vehicle (because he failed to claim an interest in it).

Skagen claims that his failure to file an appearance in the forfeiture action stemmed from the

fact that he was never properly notified of the proceeding. Skagen asserts that the Municipality sent the notice of impending forfeiture to the wrong address. Skagen further contends that the Municipality then compounded its error: having failed to elicit any response through its letter to Skagen, the Municipality proceeded to serve Skagen by publication -- but it published the notice in a newspaper in Eagle River, not in Anchorage where Skagen was residing.

Assuming that Skagen could prove that he never received proper notice of the forfeiture action, he might be entitled to have the forfeiture set aside under Civil Rule 60.[2] So far, however, it appears that Skagen has chosen to take no action. Thus, Skagen's position in the district court (and his position on appeal) is that he might wish to assert an interest in the vehicle, and he might be entitled to have the default set aside if he succeeded in re-opening the forfeiture proceeding. These possibilities remain speculative because Skagen has done nothing to pursue them.

A judgement remains valid until it is shown to be invalid. The fact that a person claims that there is a compelling reason to set aside a judgement does not invalidate that judgement until the person's claim is proved in a judicial proceeding. See Civil Rule 60(b): "A motion [for relief from judgment] does not affect the finality of a judgment or suspend its operation." For the present, both the district court and this court must assume that the default forfeiture entered against Skagen's vehicle was valid -- that Skagen received notice, and that he knowingly refrained from claiming an interest in the vehicle.

Moreover, even if we accepted Skagen's assertions of fact as true, this would leave Skagen in the position of claiming that his current criminal prosecution should be deemed a second jeopardy because Skagen might choose to subject himself to another punishment in the future. That is, Skagen asserts that he is entitled to have the forfeiture proceeding re-opened at some future time and, when it is re-opened, he would be entitled to assert an ownership interest in the vehicle (an act that could arguably make any renewed forfeiture order a "punishment" for double jeopardy purposes). None of these events has occurred yet.

The Ninth Circuit recently considered an analogous case in **United States v. Castro,** 78 F.3d 453 (9th Cir. 1996). The defendant in **Castro** was charged with drug offenses and he was also notified that the government would be seeking forfeiture of some property he owned. Castro filed notice that he intended to contest the forfeiture, but the notice was filed late and it failed to include all the necessary forms. The Drug Enforcement Agency notified Castro of these deficiencies and extended him another opportunity to contest the forfeiture. Castro refiled the paperwork, but again it was not in proper form. (Castro failed to submit his pleadings under oath.) The government informed Castro that his pleadings were again deficient, and they gave him a third opportunity to contest the forfeiture. This time, Castro failed to respond. **Castro,** 78 F.3d at 454-55.

On appeal from his criminal convictions, Castro argued that the criminal judgement against him constituted a second punishment because the government had already obtained forfeiture of his property. The Ninth Circuit disagreed. "Merely asserting that the property belonged to him, without complying with the requirements for filing a claim of ownership, is not legally sufficient[,]" the court said. **Id.** at 456. The court additionally noted that Castro, despite his

assertion of ownership, had never actually sought to re-open the forfeiture proceedings or obtain a modification of the default judgement:

> [The defendant's] failure to file a petition for remission or mitigation ... reveals that, even when he had the opportunity to challenge ... the forfeiture and assert his interest, he weighed the worth of asserting a claim against any risks associated with doing so and ultimately decided not to assert a claim of ownership.

Castro, 78 F.3d at 457.

Skagen, like the defendant in **Castro,** asserts that he is the owner of the forfeited property, but he has done nothing to pursue this asserted ownership interest. The cases unanimously hold that the default forfeiture of the unclaimed vehicle did not inflict a punishment on Skagen.

Skagen's double jeopardy claim will not be ripe until such time, if any, as Skagen chooses to assert an interest in the vehicle and succeeds in re-opening the forfeiture proceeding. If, at that time, judgement has already been entered against Skagen on either or both of the criminal charges, Skagen would have an arguable double jeopardy defense to the forfeiture. If, on the other hand, the forfeiture action is re-opened, Skagen unsuccessfully contests the forfeiture, and the forfeiture is re-imposed before judgement is entered against Skagen on the criminal charges, then Skagen would have an arguable double jeopardy defense to any continuation of the criminal charges.

These potential future scenarios have no bearing on our resolution of the present case. As things currently stand, Skagen's vehicle was forfeited by default after Skagen failed to assert an interest in it, and Skagen has yet to take any action to seek a re-opening of the forfeiture proceeding. Under these facts, Skagen must be deemed to have abandoned his interest in the vehicle, and the default forfeiture of that vehicle did not inflict any punishment on him. Moreover, Skagen has not been tried on the criminal charges. Thus, Skagen has not yet been subjected to any punishment, much less double punishment, for his alleged acts of driving while intoxicated and refusing the breath test.

We therefore REVERSE the district court's dismissal of the breath-test refusal charge, and we AFFIRM the district court's refusal to dismiss the driving while intoxicated charge. We remand Skagen's case to the district court for further proceedings on these two criminal charges.

DISPOSITION

District court's dismissal of breath-test refusal charge REVERSED, and district court's refusal to dismiss driving while intoxicated charge AFFIRMED. Case remanded to district court for further proceedings.

OPINION FOOTNOTES

1 This ordinance empowers the Municipality to institute a civil action seeking impoundment or forfeiture of any motor vehicle "that [was] operated, driven[,] or in the actual physical control of an individual arrested for or charged with ... driving while intoxicated, or ... refusal to submit to a chemical [breath] test[]". In cases in which the vehicle belongs to someone other than the person who was driving it, the ordinance creates a presumption that the vehicle was operated "with the knowledge and consent of the registered owners". The ordinance then continues:

A vehicle so operated [that is, a vehicle operated by a person who violated either the driving while intoxicated ordinance or the breath test refusal ordinance] is declared to be a public nuisance for which the registered owners hold legal responsibility[,] subject only to the defenses ... set forth [below].

The ordinance allows the Municipality to seek a 30-day impoundment of the vehicle if the driver has not been previously convicted of either DWI or breath-test refusal. If the driver has previously been convicted of either of these offenses, the Municipality can seek forfeiture of the vehicle. AMC § 9.28.026A(1).

2 We note, however, that Civil Rule 60 requires such a motion to be made "within a reasonable time". The forfeiture order was entered in August 1994, and Skagen was aware of what had happened at least by February 1995. (On February 10, 1995, Skagen filed a pleading in the district court asserting that the forfeiture had occurred without proper notice to him).

900 P.2d 744 STATE V. ZERKEL (Ct. App. 1995) 1995 Alas. App. Lexis 38

STATE OF ALASKA, Appellant, vs. KYLE J. ZERKEL, Appellee. CONSOLIDATED WITH: JEHU MARISCAL, Petitioner, v. STATE OF ALASKA, Respondent. STATE OF ALASKA, Appellant, v. KENNETH HARRIS, Appellee. STATE OF ALASKA, Appellant, v. HOWARD JERUE, JR., Appellee. MUNICIPALITY OF ANCHORAGE, Appellant, v. ROBERT D. BECK, Appellee. MUNICIPALITY OF ANCHORAGE, Appellant, v. MARCUS L. CHOQUETTE, Appellee. MUNICIPALITY OF ANCHORAGE, Appellant, v. RICKY A. HOFF, Appellee. MUNICIPALITY OF ANCHORAGE, Appellant, v. IRVING J. IGTANLOC, Appellee. MUNICIPALITY OF ANCHORAGE, Appellant, v. MATTHEW P. KETCHUM, Appellee. MUNICIPALITY OF ANCHORAGE, Appellant, v. RACHEL M. KONAHOK-McVEY, Appellee. MUNICIPALITY OF ANCHORAGE, Appellant, v. HAROLD D. JOHNSON, JR., Appellee. MUNICIPALITY OF ANCHORAGE, Appellant, v. ROBERT C. MURRAY, Appellee. MUNICIPALITY OF ANCHORAGE, Appellant, v. Danny P. Shadle, Appellee.

Nos. 1424, A-5773, A-5739, A-5774, A-5775, A-5776, A-5777, A-5778, A-5779, A-5780, A-5781, A-5783, A-5784, and A-5785
COURT OF APPEALS OF ALASKA
900 P.2d 744, 1995 Alas. App. LEXIS 38
July 28, 1995, Decided
Appeals and petition for review from the District Court, Third Judicial District, Anchorage, Sigurd E. Murphy and Michael L. Wolverton, Judges. Trial Court No. 3AN-94-8450 Cr. Trial Court No. 3AN-95-288 Cr. Trial Court No. 3AN-94-2890 Cr. Trial Court No. 3AN-94-1534 Cr. Trial Court No. 3AN-94-8096 Cr. Trial Court No. 3AN-94-8561 Cr. Trial Court No. 3AN-94-9330 Cr. Trial Court No. 3AN-94-7412 Cr. Trial Court No. 3AN-94-8080 Cr. Trial Court No. 3AN-94-9333 Cr. Trial Court No. 3AN-94-7831 Cr. Trial Court No. 3AN-94-9036 Cr. Trial Court No. 3AN-94-4667 Cr.

Petition for Rehearing Denied August 14, 1995, Reported at: 1995 Alas. App. LEXIS 46.

COUNSEL

Eric A. Johnson, Assistant Attorney General, Office of Special Prosecutions and Appeals, Anchorage, and Bruce M. Botelho, Attorney General, Juneau, for Appellant/Respondent State of Alaska.

James L. Walker, Assistant Municipal Prosecutor, and Mary K. Hughes, Municipal Attorney, Anchorage, for Appellant Municipality of Anchorage.

Frederick T. Slone, Kasmar and Slone, P.C., Anchorage, for Appellees Harris, Jerue, and Hoff. G. Blair McCune, Assistant Public Defender, and John B. Salemi. Public Defender, Anchorage, for Petitioner Mariscal.

Eugene B. Cyrus, Anchorage, for Appellee Zerkel. Michael B. Logue, James E. Gorton & Associates, Anchorage, for Appellees Beck and Choquette. William B. Oberly, Anchorage, for Appellee Igtanloc. Michael J. Keenan, Anchorage, for Appellee Ketchum. William D. Artus, Anchorage, for Appellee Konahok-McVey. W. Grant Callow, II, Anchorage, for Appellee Johnson. Ben J. Esch, Garretson & Esch, Anchorage, for Appellee Murray. Richard D. Kibby, Anchorage, for Appellee Shadle.

JUDGES

Before: Bryner, Chief Judge, and Coats and Mannheimer, Judges. BRYNER, Chief Judge, concurring.
AUTHOR: MANNHEIMER

OPINION

MANNHEIMER, Judge.

These consolidated appeals all involve defendants who were arrested for driving while intoxicated. In each case, the defendant either refused to take the breath test required by AS 28.35.031(a) or else took the test and the test results showed that the defendant's blood-alcohol level was .10 percent or higher. Based on either the defendant's refusal to take the test or the defendant's test result, the Department of Public Safety conducted administrative proceedings under AS 28.15.165-166 and, ultimately, revoked each defendant's driver's license.

At the same time, each defendant was also facing criminal prosecution in the district court. (Some of the defendants were prosecuted by the State of Alaska; the others were prosecuted by the Municipality of Anchorage.) Each defendant was charged with either driving while intoxicated (DWI), AS 28.35.030(a), or refusing to submit to a breath test, AS 28.35.032(f), or both. Moreover, a few of the defendants had been driving even though their licenses previously had been suspended or revoked. These defendants, in addition to being charged with DWI and/or breath-test refusal, were also charged with driving while their license was suspended or revoked (DWLS or DWLR), AS 28.15.291(a).

After the defendants lost their driver's licenses (or had their license revocations extended) in the Department of Public Safety's administrative proceedings, they filed motions asking the district court to dismiss the pending criminal prosecutions. In each case, the defendants asserted that the pending criminal prosecutions violated the double jeopardy clause - the constitutional guarantee that no person be placed in jeopardy more than once for the same offense. See the Fifth and Fourteenth Amendments to the United States Constitution, and Article I, Section 9 of the Alaska Constitution. The defendants argued that, because they had already lost their driver's licenses for the same conduct that formed the basis of the criminal prosecutions (either testing at .10 percent blood alcohol or higher, or refusing the breath test), they had already been punished once for this conduct and could not be punished again.

With one exception (file number A-5739), the district court granted the defendants' motions and dismissed the criminal prosecutions.[1] The State and the Municipality of Anchorage now appeal those dismissals. In file number A-5739, the district court denied the defendant's motion to dismiss, and we granted the defendant's petition to review the district court's decision. For the reasons explained in this opinion, we reinstate the prosecutions that were dismissed and we affirm the district court's refusal to dismiss the prosecution in file number A-5739.

The defendants' double jeopardy argument rests on a trio of cases decided by the United States Supreme Court: **United States v. Halper,** 490 U.S. 435, 109 S.Ct. 1892, 104 L. Ed. 2d

487 (1989); **Austin v. United States,** U.S. , 113 S.Ct. 2801, 125 L. Ed. 2d 488 (1993); and **Montana Department of Revenue v. Kurth Ranch,** U.S. , 114 S.Ct. 1937, 128 L. Ed. 2d 767 (1994). In these cases, the Supreme Court expanded the scope of the double jeopardy clause, construing it to protect people from the imposition of certain "penalties", "forfeitures", and "taxes" - monetary impositions that traditionally had not been considered criminal punishments.

For purposes of analyzing the defendants' argument, it makes the most sense to begin by discussing **United States v. Halper.**

The Supreme Court's Decision in Halper

The defendant in **Halper** perpetrated a scheme of Medicare fraud. Halper was the manager of a laboratory that performed medical procedures covered by Medicare. He submitted 65 claims in which he falsely described the medical procedure that his laboratory had performed, so that the government paid him $ 12.00 per procedure instead of $ 3.00. Thus, Halper defrauded the government of $ 585 (65 times $ 9.00). **Halper,** 490 U.S. at 437, 109 S.Ct. at 1895-96.

Halper was criminally prosecuted and convicted of 65 counts of fraud; he was sentenced to 2 years' imprisonment and a $ 5000 fine. 490 U.S. at 437, 109 S.Ct. at 1896. The federal government then commenced a civil action against Halper under the federal False Claims Act, 31 U.S.C. §§ 3729-3731. Under Section 3729 of this act, a person who submits a false claim against the government is "liable to the United States Government for a civil penalty of $ 2000, [plus] an amount equal to 2 times the amount of damages the Government sustains because of the [false claim], and [the] costs of the civil action". The federal district court construed this statute to require a separate $ 2000 penalty for each of Halper's false claims; thus, the court believed itself obligated to impose a total penalty of $ 130,000 (65 times $ 2000) for fraudulent claims involving only $ 585. **Halper,** 490 U.S. at 438, 109 S.Ct. at 1896-97.

The federal district court refused to impose this penalty. The court ruled that such a penalty would constitute a second punishment (in violation of the double jeopardy clause) because the penalty so exceeded the government's actual loss. 490 U.S. at 439-440, 109 S.Ct. at 1896-97. The government appealed.

The Supreme Court noted that the double jeopardy clause embodies three distinct protections: the protection against a successive prosecution after a defendant has been acquitted, the protection against a successive prosecution after the defendant has been convicted, and the protection against multiple punishments for the same offense. **Halper,** 490 U.S. at 440, 109 S.Ct. at 1897. Because "proceedings and penalties under the civil False Claims Act are indeed civil in nature", 490 U.S. at 442, 109 S.Ct. at 1898, the proceedings against Halper under the False Claims Act did not constitute a successive prosecution. Rather, the Court declared, "the third of [the double jeopardy] protections [is] the one at issue here". 490 U.S. at 440, 109 S.Ct. at 1897. "The sole question here is whether the statutory penalty authorized by the civil False Claims Act ... constitutes a second 'punishment' for the purpose of [the] double jeopardy [clause]." 490 U.S. at 441, 109 S.Ct. at 1898.

The Supreme Court held that, under the facts of a particular case, the "civil penalty

authorized by the Act may be so extreme and so divorced from the Government's damages and expenses as to constitute a punishment" for double jeopardy purposes. **Halper,** 490 U.S. at 442, 109 S.Ct. at 1898.

> [A] civil as well as a criminal sanction [may constitute] punishment when the sanction as applied in the individual case serves the goals of punishment[,] ... the twin aims of retribution and deterrence. ... [A] civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment [for purposes of double jeopardy analysis]. ... We therefore hold that under the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or [as] retribution.

Halper, 490 U.S. at 448-49, 109 S.Ct. at 1901-02 (internal citations omitted).

The Court expressly disavowed any intention of limiting civil penalties to the precise measure of the government's loss. Instead, the Court recognized that "the process of affixing a sanction that compensates the Government for all its costs inevitably involves an element of rough justice"; the Court pointed out that it had previously upheld statutes that imposed "reasonable liquidated damages" or "fixed-penalties" plus "double-damages". 490 U.S. at 449, 109 S.Ct. at 1902.

> We cast no shadow on these time-honored judgments. What we announce now is a rule for the rare case, the case such as the one before us, where a fixed-penalty provision subjects a prolific but small-gauge offender to a sanction overwhelmingly disproportionate to the damages he has caused.

Halper, 490 U.S. at 449, 109 S.Ct. at 1902.

The Court declared that, whenever a defendant has already suffered a criminal penalty for illegal conduct and the government later seeks to impose a civil penalty for the same conduct, the defendant may raise the argument that "the civil penalty sought in the subsequent proceeding bears no rational relation to the goal of compensating the Government for its loss". Such a defendant would be "entitled to an accounting of the Government's damages and costs to determine if the penalty sought in fact constitutes a second punishment". The trial judge would then use this accounting to determine "the size of the civil sanction the Government may receive without crossing the line between remedy and punishment". **Halper,** 490 U.S. at 449-450, 109 S.Ct. at 1902.[2]

Halper's Definition of the Distinction Between "Remedial" and "Punitive" Sanctions, and the Supreme Court's Later Refusal to Limit Itself to this Definition

Turning to the case before us now, the defendants argue that, under **Halper,** the revocation of a driver's license must be viewed as a "punishment" rather than a "remedy". The defendants rely on the fact that the Supreme Court worded the test for distinguishing a remedial sanction from a punitive sanction in terms of whether "the civil penalty sought [by the government] bears [any] rational relation to the goal of compensating the government for its loss". The defendants point out that the government will rarely suffer a monetary loss on account of a defendant's breath-test result or on account of a defendant's refusal to take a breath test. Moreover, even if the government could prove some monetary damage from the arrested driver's conduct, the act of revoking that person's operator's license does essentially nothing toward accomplishing the goal of compensating the government for the monetary loss that might attend the driver's taking or refusing the breath test. Thus, the defendants conclude, the revocation of a driver's license must be classified as a "punishment" rather than a "remedy".

The defendants' argument ignores the factual context of **Halper. Halper** involved a civil proceeding instituted against a person who defrauded the government of money, and it involved a monetary penalty imposed on that person, ostensibly to compensate the government for its loss. In such a situation, the Supreme Court could readily frame the test for a "remedy" in terms of whether the monetary penalty imposed on Halper in the civil proceeding bore any relation to the monetary harm the government had suffered.

But there are other remedies besides restoration of lost money. According to **Webster's New World Dictionary** (Third College Edition, 1988), p. 1135, a "remedy" is "anything that corrects, counteracts, or removes an evil or wrong". In its specialized legal sense, "remedy" is defined as "a means ... by which violation of a right is **prevented** or compensated for". **Id.** (Emphasis added.) Thus, restraining orders, injunctions, orders granting rescission, declaratory judgements concerning the constitutionality or construction of statutes, and coercive fines or imprisonment imposed under a court's civil contempt power are all "remedies". Dan B. Dobbs, **Handbook on the Law of Remedies** (1973), pp. 1-2. **See Helvering v. Mitchell,** 303 U.S 391, 399; 58 S.Ct. 630, 633; 82 L.Ed. 917 (1938) ("Remedial sanctions may be of varying types").

The Supreme Court's later decisions in **Austin v. United States** and in **Montana Department of Revenue v. Kurth Ranch** confirm that the "compensation ... for ... loss" phrasing used in **Halper** was not intended to be the sole criterion for determining whether a sanction should be deemed "punitive" or "remedial". In both **Austin** and **Kurth Ranch,** the Supreme Court used completely different criteria for evaluating whether the challenged sanction was "remedial" or "punitive".

In **Austin,** the defendant was convicted of drug offenses. In a contemporaneous civil action, the government sought forfeiture of the defendant's mobile home and his auto body shop under 21 U.S.C. § 881(a), a federal statute authorizing forfeiture of conveyances and real property used to commit or facilitate the commission of drug offenses. **Austin,** 113 S.Ct. at 2803.

The defendant claimed that such a forfeiture violated the Eighth Amendment's prohibition on "excessive fines", while the government argued that the "excessive fines" clause only applied to

criminal sentences. The Supreme Court held that "fines" for purposes of the Eighth Amendment encompassed not only criminal fines but also any forfeiture that constituted a "punishment". **Id.** at 2806 & 2810.

However, rather than using **Halper's** formulation and asking whether the forfeiture could reasonably be construed as compensating the government for loss, the **Austin** Court embarked on an extended examination of the historical roots of forfeiture as a penalty. **Austin,** 113 S.Ct. at 2806-2810. The Court concluded that, with the exception of the forfeiture of contraband, forfeiture was traditionally viewed as a type of punishment, and the Court found nothing "in [the forfeiture] provisions [of 21 U.S.C. § 881(a)] or their legislative history to contradict the historical understanding of forfeiture as punishment." **Id.** at 2810.

> Concededly, we have recognized that the forfeiture of contraband itself may be characterized as remedial because it removes dangerous or illegal items from society. **See United States v. One Assortment of 89 Firearms,** 465 U.S. 354, 364, 104 S.Ct. 1099, 1105, 79 L. Ed. 2d 361 (1984). [We have], however, previously rejected [the] government's attempt to extend that reasoning to [the forfeiture of] conveyances used to transport illegal liquor. **See One 1958 Plymouth Sedan v. Pennsylvania,** 380 U.S. 693, 699, 85 S.Ct. 1246, 1250, 14 L. Ed. 2d 170 (1965). In that case [we] noted: "There is nothing even remotely criminal in possessing an automobile." **Ibid.** The same, without question, is true of the properties involved here, and the Government's attempt to characterize these properties as "instruments" of the drug trade must meet the same fate as Pennsylvania's effort to characterize the 1958 Plymouth Sedan as "contraband".

Austin, 113 S.Ct. at 2811. The Court continued:

> Fundamentally, even assuming that §§ 881-(a)(4) and (a)(7) serve some remedial purpose, the Government's argument must fail. "A civil sanction that cannot fairly be said **solely** to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term." **Halper,** 490 U.S. at 448, 109 S.Ct. at 1902 (emphasis added). In light of the historical understanding of forfeiture as punishment, the clear focus of §§ 881(a)(4) and (a)(7) on the culpability of the owner, and the evidence that Congress understood those provisions as serving to deter and to punish, we cannot conclude that forfeiture under §§ 881(a)(4) and (a)(7) serves solely a remedial purpose. We therefore conclude that forfeiture under these provisions constitutes "payment to a sovereign as punishment for some offense" [citation omitted], and, as such, is subject to the limitations of the Eighth Amendment's Excessive Fines Clause.

Austin, 113 S.Ct. at 2812 (footnote omitted).

Thus, **Austin** did not rely on **Halper's** "compensation for loss" test when evaluating whether

the forfeiture of a drug offender's house and business was "remedial" or "punitive". Rather, the Supreme Court examined "the historical understanding of forfeiture", the "focus of [the forfeiture statute] on the culpability of the [property] owner", and the "evidence that [the legislature] understood [the forfeiture] provisions as serving to deter and punish". **Id.**

In **Montana Department of Revenue v. Kurth Ranch**, the Supreme Court made the limitations of the **Halper** test even more explicit. **Kurth Ranch** involved a Montana family who used their farm for the cultivation of marijuana. Each family member was prosecuted for either possessing or conspiring to possess marijuana with intent to sell. 114 S.Ct. at 1942. In addition, the county instituted a forfeiture action against the cash and equipment used in the marijuana operation. **Id.** Then, the State of Montana filed suit to collect that state's tax on illegal drugs. Under Montana law, this tax was assessed at ten percent of the market value of the illegal drugs, or $ 100 per ounce of marijuana and $ 250 per ounce of hashish, whichever was greater. **Id.** at 1941.

According to the State of Montana's calculations, the Kurth family's tax liability for possessing illegal drugs was almost $ 900,000. This tax assessment prompted the Kurth family to file for bankruptcy protection. **Id.** at 1942-43. The bankruptcy court first decided that the proper tax assessment was only $ 181,000. Then, the bankruptcy court ruled that even this lesser tax liability was unconstitutional because collection of the tax would violate the double jeopardy clause. **Id.** at 1943. Following two more adverse rulings in higher federal courts, the State of Montana brought its case to the Supreme Court.

The Supreme Court recognized that its decision in **Halper** "does not decide the ... question whether Montana's tax should be characterized as punishment". **Kurth Ranch,** 114 S.Ct. at 1944. "Whereas fines, penalties, and forfeitures are readily characterized as [punitive] sanctions, taxes are typically different because they are usually motivated by revenue-raising rather than punitive purposes." **Id.** at 1946.

> Tax statutes serve a purpose quite different from civil penalties, and **Halper's** method of determining whether the exaction was remedial or punitive "simply does not work in the case of a tax statute". [Citing with approval an assertion in Chief Justice Rehnquist's dissenting opinion, 114 S.Ct. at 1950] Subjecting Montana's drug tax to **Halper's** test for civil penalties is therefore inappropriate.
>
> **Kurth Ranch,** 114 S.Ct. at 1948.

For example, the Supreme Court recognized that when evaluating a tax law it would not make sense to apply **Halper's** broad statement that a civil penalty should be deemed "punishment" if the penalty ineluctably served a "deterrent" purpose. The Court noted that "many taxes ... such as [the] taxes on cigarettes and alcohol" are obviously "motivated to some extent by an interest in deterrence". 114 S.Ct. at 1946. Thus, the Court conceded, "neither a high rate of taxation nor an obvious deterrent purpose automatically marks [Montana's] tax [as] a form of punishment". **Id.** "While a high tax rate and deterrent purpose lend support to the

characterization of the drug tax as punishment, these features, in and of themselves, do not necessarily render the tax punitive." **Id.** at 1947.

The Court then noted several "unusual features" of the Montana tax statute that "set [it] apart from most taxes". First, liability under Montana's tax law "is conditioned on the commission of a crime ... and is exacted only after the taxpayer has been arrested for the precise conduct that gives rise to the tax obligation in the first place." 114 S.Ct. at 1947. Next, the Court noted that taxes on illegal activities "differ ... from mixed-motive taxes that governments impose both to deter a disfavored [but legal] activity and to raise money". **Id.**

> By imposing cigarette taxes, for example, a government wants to discourage smoking. But because the product's benefits - such as creating employment, satisfying consumer demand, and providing tax revenues - are regarded as outweighing the [product's] harm, [the] government will allow the manufacture, sale, and use of cigarettes as long as the manufacturers, sellers, and smokers pay high taxes that reduce consumption and increase government revenue. [But these] justifications vanish when the taxed activity is completely forbidden, for the legitimate revenue-raising purpose that might support such a tax could be equally well served by increasing the fine imposed upon conviction.

Kurth Ranch, 114 S.Ct. at 1947 (footnote omitted).

Finally, the Supreme Court noted that Montana's marijuana and hashish tax "is exceptional" because, "although it purports to be a species of property tax[,] ... it is levied on goods that the taxpayer neither owns nor possesses when the tax is imposed" - goods that presumably have already been destroyed before the tax is assessed. The Court concluded:

> A tax on [the] "possession" of goods that no longer exist and that the taxpayer never lawfully possessed has an unmistakable punitive character. This tax, imposed on criminals and no others, departs so far from normal revenue laws as to become a form of punishment.

Kurth Ranch, 114 S.Ct. at 1948.

Thus, in **Kurth Ranch,** the Supreme Court again refused to employ **Halper's** "compensation for loss" test when deciding whether Montana's marijuana and hashish taxes were "remedial" or "punitive". The Court recognized that, in the context of taxation, it did not make sense to try to gauge the government's "loss" from the defendant's activity, nor was it fruitful to ask whether the tax was intended to deter the defendant from engaging in the taxed activity (since many traditional taxes have precisely this aim). Rather, the Supreme Court asked whether Montana's tax "departed so far from normal revenue laws as to become a form of punishment".

We therefore reject the defendants' argument that a license revocation must be "punitive since it does not compensate the government for monetary loss. Just as the Supreme Court did in

Austin and **Kurth Ranch,** we, too, conclude that **Halper's** "compensation for loss" formula simply does not apply in the context of the case before us.

Rather, as the Supreme Court did in **Austin** and **Kurth Ranch,** we will examine the historical background and understanding Of license revocation to determine whether license revocation has traditionally been viewed as punitive or remedial, and we will examine the structure and operation of Alaska's license revocation statutes to determine what goals these statutes advance.

Administrative Revocation of Driver's Licenses for Driving Offenses Has Traditionally Been Viewed as Remedial, not Punitive

The defendants argue that a driver's license is a form of property and that revocation of the license is tantamount to a forfeiture of property. The defendants then rely upon **Austin** and **United States v. $ 405,089.23 in U.S. Currency,** 33 F.3d 1210 (9th Cir. 1994), for the proposition that any forfeiture of property imposed as a penalty for the commission of a crime constitutes "punishment" for purposes of the double jeopardy clause.

The due process clauses of both the Fourteenth Amendment to the United States Constitution and Article I, Section 7 of the Alaska Constitution protect "life", "liberty", and "property.[3] To insure that citizens receive fair treatment in a broad range of their dealings with government, both the United States Supreme Court and the Alaska Supreme Court have employed a broad definition of "property" in due process cases.

For example, the Alaska Supreme Court has classified a driver's license as "an important property interest" for purposes of Alaska's due process clause; the state must therefore grant a hearing to a driver before his or her license can be revoked. **Graham v. State,** 633 P.2d 211, 216 (Alaska 1981). The United States Supreme Court has similarly ruled that a driver's license is "property" for purposes of the Fourteenth Amendment. State governments must observe certain procedural formalities before they can take away a person's driver's license.

> This is but an application of the general proposition that [the due process clause] limits state power to terminate an entitlement[,] whether the entitlement is denominated a "right" or a "privilege".
>
> **Bell v. Burson,** 402 U.S. 535, 539; 91 S.Ct. 1586, 1589; 29 L. Ed. 2d 90 (1971).[4]

Nevertheless, a driver's license obviously is not "property" in the everyday sense. The word "license" means "a formal permission to do something; especially, authorization by law to do some specified thing". **Webster's New World Dictionary** (Third College Edition 1988), p. 779. A driver's license authorizes a person to operate motor vehicles. The license can not be purchased (except from the government), and it can not be sold or transferred or inherited. The physical object that we often call a "driver's license" is only a piece of plastic that stands as evidence of the real license - the government's authorization. If the government has revoked a person's

authorization to drive, that person's continued possession of the piece of plastic means nothing.

Thus, revocation of a person's license to drive motor vehicles can not easily be equated with forfeiture of a person's land, money, or other tangible possessions. Revocation of a driver's license is not the equivalent of a "payment to a sovereign", **Austin,** 113 S.Ct. at 2812, for it does not diminish the driver's wealth. Rather, license revocation is akin to a restraining order or injunction, protecting the public from future harm by depriving an unsafe or irresponsible driver of his or her authority to continue to operate motor vehicles.[5]

The government regulates many activities and occupations. The rationale for this system of regulation is that the public is exposed to an unacceptable risk of harm if the activity or occupation is performed incompetently, recklessly, dishonestly, or with intent to injure. Under these regulatory schemes, a person must obtain a license to pursue the regulated activity or occupation, and the government possesses the power to revoke the license of someone whose conduct demonstrates his or her unfitness to continue in that activity or occupation. Driver's licenses are perhaps the most familiar example, but attorney's licenses to practice law are similarly regulated (see Alaska Bar Rule 15, which lists the grounds on which an attorney's license may be revoked), and Title 8 of the Alaska Statutes contains license revocation provisions for many other professions.[6]

In many instances, the conduct that demonstrates a person's unfitness to pursue the regulated activity or occupation is also potentially criminal. Nevertheless, courts have traditionally declared that administrative action to revoke a license is distinct from any possible criminal prosecution, and administrative revocation of the person's license is not considered punishment for a crime.

For example, in **Baker v. Fairbanks,** 471 P.2d 386 (Alaska 1970), the Alaska Supreme Court extended the right of jury trial to a defendant in any "criminal prosecution". The court defined "criminal prosecution" to encompass any offense for which a conviction "may result in the [defendant's] loss of a valuable license, such as a driver's license or a license to pursue a common calling, occupation, or business." 471 P.2d at 402. Nevertheless, the court was careful to explain that administrative proceedings were not "criminal prosecutions" even though they might result in revocation of a license:

> This [definition of "criminal prosecution"] does not cover revocation of licenses pursuant to administrative proceedings where lawful criteria other than criminality are a proper concern in protecting public welfare and safety, as the basis of revocation or suspension in such instances is not that one has committed a criminal offense, but that the individual is not fit to be licensed, apart from considerations of only guilt or innocence of crime.

Baker, 471 P.2d at 402 n.28. Twenty years later, in **Wik v. Department of Public Safety,** 786 P.2d 384, 387 (Alaska 1990), the Alaska Supreme Court echoed this view: "A [driver's] license is not suspended to visit additional punishment on an offender, 'but in order to protect the

public against incompetent and careless drivers.'" (quoting **Robinson v. Texas Department of Public Safety,** 586 S.W.2d 604, 606 (Tex. Civ. App. 1979)).

Even after **Halper,** judicial consideration of this issue remains unchanged. A person who loses a professional license in an administrative proceeding is not subjected to "punishment" for double jeopardy purposes, even though the revocation or suspension is based on misconduct that could be (or has been) prosecuted as a criminal offense. **See Loui v. Board of Medical Examiners,** 78 Haw. 21, 889 P.2d 705, 711 (Hawaii 1995) ("While the imposition of the one-year revocation of Loui's license to practice medicine [for the attempted rape of his medical assistant] may 'carry the sting of punishment' ... it is clear that the statute in question is not designed to 'punish' Loui; rather, it is designed to protect the public from unfit physicians."); **Kvitka v. Board of Registration In Medicine,** 407 Mass. 140, 551 N.E.2d 915, 918 n.4 (Mass. 1990), **cert. denied,** 498 U.S. 823, 111 S.Ct. 74, 112 L. Ed. 2d 47 (1990) ("revocation of a physician's license [for unlawfully dispensing controlled substances] is considered to be remedial under the double jeopardy clause").

See also United States v. Hudson, 14 F.3d 536, 541-42 (10th Cir. 1994) (an administrative order barring defendants from future banking activities was not "punishment" for their illegal activities); **United States v. Payne,** 2 F.3d 706, 710-11 (6th Cir. 1993) (suspension of a mail carrier for illegal conduct was not "punishment" for double jeopardy purposes); **United States v. Furlett,** 974 F.2d 839, 844 (7th Cir. 1992) (A commodities broker defrauded his clients. In an administrative proceeding, his license to deal commodities was revoked. He was later indicted for conspiracy, mail fraud, obstruction of justice, and subornation of perjury. The broker objected that this criminal prosecution violated the double jeopardy clause. Held: the administrative order prohibiting the broker from engaging in commodities trading was not "punishment" for purposes of the double jeopardy clause); **United States v. Bizzell,** 921 F.2d 263, 267 (10th Cir. 1990) (Two contractors committed fraud in the sale of various properties whose mortgages were held by the Department of Housing and Urban Development (HUD). The Tenth Circuit ruled that an order barring the two contractors from participating in HUD contracts for 18 and 24 months was not "punishment" for their fraudulent conduct. The court said, "Removal of persons whose participation in those programs is detrimental to public purposes is remedial by definition.").

Courts view administrative suspension or revocation of a driver's license in exactly the same way. The license revocation is "remedial" for double jeopardy purposes. **State v. Savard,** A.2d , 1995 WL 354210, *3 (Maine, June 6, 1995) ("We analogize the driver's license to professional licensing and certification, which, if abused, may be revoked in the name of public safety."); **State v. Higa,** P.2d , 1995 WL 297073, *6 (Hawaii, May 17, 1995) ("Hawaii's [administrative license revocation] proceedings serve legitimate, nonpunitive, and purely remedial functions."); **State v. Funke,** 531 N.W.2d 124, 126 (Iowa 1995) ("This court has traditionally regarded the civil proceedings under our habitual [driving] offender statute as remedial, not punitive, in nature. We have repeatedly observed that the license suspension of habitual offenders is designed not to punish the offender but to protect the public.") (internal quotation omitted) (citation omitted); **Davidson v. MacKinnon,** So. 2d , 1995 WL 325955, *2 (Fla. App., June 2, 1995) ("The administrative remedy of suspending a driver's license

because of drunk driving or other related behavior ... continues to be primarily for the purpose of enhancing safe driving on the public highways. Its effect is remedial in a general or universal sense, because it removes dangerous drivers from the highways. And, it can also be viewed as remedial for the individual driver involved, since[,] in an intoxicated state, a driver poses a serious danger to him or herself, as well as to others. As such, [revocation of an intoxicated driver's license] is no more punitive than denying a person who is legally blind a driver's license. Both will live longer and healthier lives if they do not drive."); **State v. Young,** 3 Neb. App. 539, 530 N.W.2d 269, 278 (Neb. App. 1995) ("The purpose of license revocation is to protect the public, and not to punish the licensee. The revocation of a driver's license is not a penalty for the violation of the statutes or ordinances involved. ... Civil license revocation is therefore remedial and not a punishment, even though the loss of a driver's license in our society carries a considerable 'sting'.") (internal quotation and citation omitted); **Johnson v. State,** 95 Md. App. 561, 622 A.2d 199, 205 (Md. App. 1993) ("We believe that **Halper** leaves undisturbed cases, such as the one at bar, that have found the revocation of voluntarily granted privileges to be civil in nature, not punitive, and merely remedial."); **Butler v. Department of Public Safety and Corrections,** 609 So. 2d 790, 797 (La. 1992) ("Butler's license suspension, in contrast to Halper's fine, bears a rational relationship to the legitimate governmental purpose of promoting public safety on Louisiana highways."); **State v. Strong,** 158 Vt. 56, 605 A.2d 510, 514 (Vt. 1992) ("A 'bright line' has developed because the nonpunitive purpose of the license suspension is so clear and compelling."); **Freeman v. State,** 611 So. 2d 1260, 1261 (Fla. App. 1992), **cert. denied,** U.S , 114 S.Ct. 415, 126 L. Ed. 2d 361 (1993) ("The purpose of the statute providing for revocation of a driver's license upon conviction of a licensee for driving while intoxicated is to provide an administrative remedy for public protection and not for punishment of the offender."); **State v. Maze,** 16 Kan. App. 2d 527, 825 P.2d 1169, 1174 (Kan. App. 1992) ("The revocation of a driver's license is part of a civil / regulatory scheme that serves a vastly different governmental purpose from criminal punishment. Our State's interest is to foster safety by temporarily removing from public thoroughfares those licensees who have exhibited dangerous behavior[.]"); **Ellis v. Pierce,** 230 Cal. App. 3d 1557, 282 Cal.Rptr. 93, 95 (Cal. App. 1991) ("Just as the purpose of attorney disbarment or suspension is to protect the public by keeping unfit lawyers from practicing law, the long-range purpose of a driver's license suspension is to protect the public by keeping unfit drivers from driving."); **State v. Nichols,** 169 Ariz. 409, 819 P.2d 995, 999 (Ariz. App. 1991) ("The suspension of the license of an individual found guilty of [driving while intoxicated] 'is not a criminal penalty to punish the driver but a civil and administrative remedy to protect the public from the impaired driver.'") (quoting **Loughran v. Superior Court,** 145 Ariz. 56, 699 P.2d 1287, 1289 (Ariz. 1985).[7]

Administrative Revocation of a License to Pursue a Regulated Profession or Activity Can Serve Deterrent Purposes and Still Be "Remedial"

From the above authorities, it is clear that administrative suspension or revocation of a driver's license has traditionally been viewed, not as punishment for a driver's criminal offenses or traffic violations, but as remedial action prompted by the need to protect the public by removing dangerous drivers from the roads. The defendants in this appeal nevertheless argue that, despite this historical understanding, administrative license revocation must now be viewed

as "punishment" under **Halper, Austin,** and **Kurth Ranch.** The defendants rely on the following language from **Halper:**

> The determination whether a given civil sanction constitutes punishment [for double jeopardy purposes] requires a particularized assessment of the penalty imposed and the purposes that the penalty may fairly be said to serve. ... [A civil] sanction constitutes punishment when the sanction[,] as applied in the individual case[,] serves the goals of punishment.
>
> These goals are familiar[:] the twin aims of retribution and deterrence. ... From these premises, it follows that a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment[.]

Halper, 490 U.S. at 448, 109 S.Ct. at 1901-02 (reiterated in **Austin,** 113 S.Ct. at 2812).

The defendants point out that the possibility of having one's driver's license revoked obviously serves to deter people from driving while intoxicated and from refusing to take the breath test. This has been recognized by the Alaska Supreme Court. See **Lundquist v. Department of Public Safety,** 674 P.2d 780, 785 (Alaska 1983), where the supreme court declared that administrative revocation of a driver's license for refusal to take the breath test is "a nonviolent means of compelling submission to a test that provides evidence of intoxication".

Because of this deterrent purpose and effect, the defendants argue, administrative revocation of a driver's license serves one of the goals of punishment and therefore must be deemed "punishment" under **Halper** and **Austin.** We conclude, however, that the defendants have read **Halper** and **Austin** too broadly. As explained in more detail below, we conclude that when the legislature employs a licensing scheme to regulate a profession or an activity affecting the public health or safety, a statute that authorizes a regulatory body to revoke these licenses is "remedial" for double jeopardy purposes even though the law serves to deter licensees from engaging in conduct that is inconsistent with their duties as licensees or that is inconsistent with the public welfare.

The statutes challenged in the present appeal allow administrative revocation of a person's driver's license if that person has a blood-alcohol level of .10 percent or greater, or if that person refuses to take the breath test. As phrased by the Supreme Court in **Halper,** the question this court faces is whether administrative license revocation on these two bases is "so divorced from any remedial goal that it constitutes 'punishment' [under] double jeopardy analysis." **Halper,** 490 U.S. at 443, 109 S.Ct. at 1899. We have no difficulty concluding that substantial remedial purposes underlie the challenged statutes.

A person who operates a motor vehicle when his or her blood-alcohol level is .10 percent or

higher poses a clear danger to the public welfare. A person's willingness to engage in such dangerous conduct justifies the inference that his or her continued authorization to drive will likewise pose a danger to the public. The government may act to remedy this danger by revoking the person's driver's license.

While one might suspect that drivers who refuse the breath test believe themselves to be intoxicated, the Alaska Supreme Court has declared that a different remedial goal justifies revoking a driver's license on account of a breath-test refusal. Under Alaska law, all persons who apply for a driver's license are deemed to have consented to a police-administered chemical test of their breath if they are ever lawfully arrested for driving while intoxicated. AS 28.35.031(a). If a driver refuses to take this breath test, then (regardless of whether the driver is actually intoxicated or not) the driver has broken his or her agreement with the government, and the government can revoke his or her license. **Lundquist,** 674 P.2d at 783 & 785.

For these reasons, we conclude that the administrative revocation of the defendants' driver's licenses is premised on remedial goals. We further conclude that the remedial character of administrative license revocation is not defeated by the fact the license revocation statutes also play a role in deterring misconduct.

We accept the defendants' assertion that administrative revocation of a driver's license may serve to deter that driver from future misconduct and may have a deterrent effect on other drivers who contemplate either driving while intoxicated or refusing the breath test. Indeed, it would be naive to suggest that the legislature did not hope to deter misconduct when it enacted the statutes that allow administrative revocation of licenses - not only driver's licenses, but also the many professional and business licenses covered by Title 8. It is obvious that deterrence of misconduct will be one practical effect of any regulatory scheme that allows the government to revoke a license that authorizes a person to drive motor vehicles or to pursue a livelihood. But this deterrent purpose does not mean that administrative revocation of these licenses is "punishment" for purposes of the double jeopardy clause.

True, **Halper** declares that if a civil monetary penalty can not be explained wholly in terms of remedial goals but must be explained, at least in part, as serving the goal of deterrence, then that civil monetary penalty constitutes "punishment" for double jeopardy purposes. But the monetary penalty at issue in **Halper** was ostensibly intended to compensate the government for monetary loss stemming from Halper's fraud. In such a context, the Supreme Court could justifiably state that the government's declared aim of restitution had to be divorced from the aim of deterrence.

In **Kurth Ranch,** on the other hand, the Supreme Court acknowledged that other types of non-punitive sanctions could legitimately include deterrent aspects. Analyzing the double jeopardy status of Montana's tax on illegal drugs, the Supreme Court recognized that normal taxes are often intended, at least in part, to deter people from engaging in the taxed activity. The Court therefore declared that the **Halper** test did not apply to the situation before it. Instead of asking whether Montana's tax was intended to deter people from using illegal drugs, the Supreme Court asked instead whether Montana's tax "departed so far from normal revenue laws as to become a form of punishment". **Kurth Ranch,** 114 S.Ct. at 1948.

Returning to administrative revocation of driver's licenses, the courts that have dealt most cogently with this problem have acknowledged that revocation of a driver's license based on the driver's misconduct does have a deterrent aspect. Nevertheless, these courts have held that administrative revocation remains "remedial". **See State v. Savard,** A.2d , 1995 WL 354210, *4 (Me., June 6, 1995) ("Although we acknowledge that any suspension may have a deterrent effect on the law-abiding public, our analysis does not focus on that perspective. In the eyes of the defendant[,] even remedial sanctions may carry a 'sting of punishment.'") (quoting **Halper,** 490 U.S. at 447 & n.7; 109 S.Ct. at 1901 & n.7); **State v. Strong,** 605 A.2d at 513 ("Although there is an element of deterrence to the summary suspension of an operator's license, this element is present in any loss of a license or privilege[;] [it] is not the primary focus of this statutory scheme."); **Butler v. Department of Public Safety,** 609 So. 2d at 797 ("While this court recognizes that the Implied Consent Law, like the Motor Vehicle Habitual Offender Law, is to some extent deterrent ... because the statute attempts to discourage the repetition of criminal acts, this court has previously stated that ... deterrence may be a valid objective of a regulatory statute. The statute's primary effect is remedial; it removes those drivers from our state highways who have been proven to be reckless or hazardous.") (internal citation omitted).

We, too, conclude that administrative revocation of a driver's license is "remedial" even though it may have a deterrent goal and may achieve some deterrent effect. We hold that, when the government employs a licensing scheme to regulate a profession or an activity that affects the public welfare, administrative revocation or suspension of that license can legitimately serve to deter conduct and still remain "remedial" for double jeopardy purposes so long as the revocation or suspension is based on conduct that bears a direct relation to the government's regulatory goals or to the proper administration and enforcement of the regulatory scheme.

Our conclusion is consistent with, and based upon, the Supreme Court's decisions in **Austin** and **Kurth Ranch.** In **Austin,** the Supreme Court acknowledged that, even though most forfeitures are understood as "punitive", the forfeiture of dangerous substances and contraband is "remedial". **Austin,** 113 S.Ct. at 2811. Implicit in **Austin's** treatment of these remedial forfeitures is the idea that forfeiture of dangerous substances or contraband remains "remedial" even though such a forfeiture or the threat of such a forfeiture (that is, the threat of losing property that one has paid money for) may deter people from purchasing or dealing in dangerous substances or contraband. What was implicit in **Austin** was made explicit in **Kurth Ranch.** There, the Supreme Court acknowledged that a proceeding to collect taxes is normally not "punishment" even though one legitimate purpose of taxation is deterrence of a disfavored activity. **Kurth Ranch,** 114 S.Ct. at 1946-47.

Reading **Halper, Austin,** and **Kurth Ranch** together, the Supreme Court has said that deterrence is not a legitimate goal of the kind of civil penalty at issue in **Halper** (a penalty designed to achieve "rough" restitution for monetary loss), but deterrence can be a legitimate component of other sorts of non-punitive sanctions. Just as the Supreme Court declined to unreflectively apply the **Halper** test in **Austin** and **Kurth Ranch,** we conclude that **Halper's** statements about deterrence do not govern the cases before us.

Administrative license revocation is premised on substantial remedial purposes. Even though administrative license revocation has always contained an element of deterrence, the case law demonstrates that it has traditionally been viewed as remedial rather than punitive. We conclude that administrative license revocation continues to be a "remedial" sanction, not a "punitive" sanction, for purposes of the federal double jeopardy clause.[8] Therefore, the administrative revocation of the defendants' licenses is no impediment to their later prosecution for driving while intoxicated, refusing the breath test, or both.[9]

Conclusion

In the appeals brought by the State of Alaska and the Municipality of Anchorage, the judgements of the district court are REVERSED. In the petition for review (file number A-5739), the judgement of the district court is AFFIRMED. All of these cases are remanded to the district court for further proceedings on the complaints or informations filed against the defendants.

CONCURRENCE

Bryner, Chief Judge, concurring.

I agree with the court's opinion and I write separately only to emphasize what I see as its core rationale. Whenever the public welfare justifies regulating an activity by implementing and enforcing a licensing requirement, the state will necessarily have a legitimate regulatory - that is, non-punitive - interest in encouraging compliance with the regulations upon which the original issuance and continued validity of the license are conditioned. Conversely, the state will necessarily have a legitimate regulatory interest in deterring noncompliance with these regulations. Thus, in the particular context of a licensed activity, enforcement efforts by the state will always play an essentially remedial role, even if one of the avowed purposes of those efforts is deterrence.

This is not to say that all measures aimed at deterring noncompliance with the laws regulating a licensed activity must be deemed non-punitive. The imposition of sanctions having no direct connection to the regulation of the licensed activity certainly might be deemed punitive in some cases. But the sanction of suspending or revoking a license for noncompliance with the conditions governing its very issuance or continued existence necessarily bears an inherent relationship to the remedial goal of restoring regulatory compliance. Indeed, it is difficult to conceive of any sanction that could more directly remedy a licensee's noncompliance with the regulations governing a licensed activity than suspending or revoking the license itself. Accordingly, under the standards set out in **Halper, Austin,** and **Kurth Ranch,** the sanction at issue in the current cases - suspension or revocation of a driver's license for violation of the laws governing the licensed activity of driving - is necessarily remedial, not punitive.

OPINION FOOTNOTES

1 It appears that the district court acted inadvertently when it dismissed the charges of driving with a suspended or revoked license. The defendants' motions addressed only the double jeopardy implications

of the DWI and/or breath-test refusal charges. The district court's written decision was likewise limited to this issue.

Driving with a suspended or revoked license is a separate offense from refusing to take a breath test or driving with a blood-alcohol level of .10 percent or higher. Whether or not the administrative revocation of the defendants' licenses constituted "punishment" for the latter two offenses, the defendants charged with driving with a suspended or revoked license had not previously faced sanctions (either civil or criminal) for that conduct. Those charges should not have been dismissed.

2 In their brief, the defendants argue that any "sanction" is necessarily punitive - that a sanction can never be "remedial" for purposes of federal double jeopardy analysis. However, as exemplified by the just-quoted portion of **Halper,** (in which the Court refers to the permissible "size of the **civil sanction** the Government may receive") (emphasis added), the Supreme Court has not chosen to employ the word "sanction" in the limited sense suggested by the defendants. Rather, throughout the **Halper** opinion, the Court uses the word "sanction" in its broader sense of "whatever a court does to someone".

Halper repeatedly refers to sanctions as capable of being **either** punitive or remedial. For example, when discussing its previous decision in **Helvering v. Mitchell** (which held that the statutory fifty-percent penalty on delinquent taxes was not a second criminal punishment), the **Halper** Court said:

Whether the statutory sanction was criminal in nature, the **[Mitchell]** Court held, was a question of statutory interpretation; and, applying traditional canons of construction, the Court had little difficulty concluding that ... the deficiency sanction was in fact remedial[.] Since "in the civil enforcement of a remedial sanction there can be no double jeopardy", **id.** at 404, 58 S.Ct. at 636, the Court rejected Mitchell's claim.

Mitchell... makes clear that the Government may impose both a criminal and a civil sanction with respect to the same act or omission[.]

Halper, 490 U.S. at 442-43, 109 S.Ct. at 1898-99 (discussing **Helvering v. Mitchell,** 303 U.S. 391, 58 S.Ct. 630, 82 L. Ed. 917 (1938)) (internal citations omitted).

3 The pertinent portion of the Fourteenth Amendment declares, "nor shall any state deprive any person of life, liberty, or property without due process of law". The pertinent portion of Article I, Section 7 states, "No person shall be deprived of life, liberty, or property without due process of law."

4 Alaska's due process clause affords drivers greater procedural protection than drivers enjoy under federal constitutional law. Although the Fourteenth Amendment requires states to provide a hearing to a person whose driver's license is revoked because of a breath-test refusal, states may nevertheless summarily revoke the person's license at the time of the breath-test refusal and schedule the hearing later. **Mackey v. Montrym,** 443 U.S. 1, 99 S.Ct. 2612, 61 L. Ed. 2d 321 (1979). Under the Alaska Constitution, on the other hand, a driver is entitled to demand a hearing before the revocation. **Graham,** 633 P.2d at 216.

The defendants in this case argue that the license revocation procedure codified in AS 28.15.165-166 can not possibly be "remedial" because the statutes do not impose immediate license revocation on a driver who refuses to take the breath test or who tests at .10 or greater. The defendants argue that these statutes can not be intended to rid the highways of dangerous drivers because the statutes allow a driver to keep his or her license for at least 7 days (longer, if the driver requests a hearing). However, both the 7-day grace period and the continuing authorization to drive pending the administrative hearing appear to be directly attributable to the Alaska Supreme Court's decision in **Graham.**

5 Moreover, even if we were to draw an analogy between revocation of a driver's license and forfeiture of tangible property, this does not lead to the conclusion that the government inflicts' punishment" (for purposes of the double jeopardy clause) whenever the government revokes a person's driver's license for

driving misconduct. Not all forfeitures of property are punitive. A forfeiture can be "remedial" if it is limited to seizing items that are themselves unlawful or dangerous.

For example, in **Austin,** the Court expressly distinguished forfeiture of contraband from forfeiture of a contraband dealer's home or business property:

We have recognized that the forfeiture of contraband itself may be characterized as remedial because it removes dangerous or illegal items from society. **See United States v. One Assortment of 89 Firearms,** 465 U.S. 354, 364, 104 S.Ct. 1099, 79 L. Ed. 2d 361 (1984).

Austin, 113 S.Ct. at 2811. - The Court in **Austin** concluded that forfeiture of a contraband dealer's home and business could only be viewed as "payment to a sovereign as punishment for [his or her] offense". **Id.** at 2812. But neither **Austin** nor **Kurth Ranch** questions the pre-existing rule that forfeiture of dangerous items themselves is a "remedial" sanction.

Thus, even if we were to liken revocation of a driver's license to forfeiture of property, the closest forfeiture analogy would be forfeiture of contraband - forfeiture of items that are themselves hazardous to the public welfare. When a person's conduct shows that he or she is unwilling to abide by the terms of a driver's license, or shows that he or she can not be trusted to drive safely, then that person's continuing authorization to drive is itself a hazard to the public welfare, a potential instrument of public harm. Revocation or "forfeiture" of this authorization is remedial.

6 Under AS 8.04.450, the Board of Public Accountancy may revoke the license of an accountant for violation of the statutes and regulations governing the profession, as well as for "dishonesty or gross negligence in the practice of public accounting", for conviction of any felony, and for conviction of any crime "an essential element of which is dishonesty or fraud". Under AS 8.06.070, the Department of Commerce and Economic Development may revoke an acupuncturist's license for "deceit, fraud, or intentional misrepresentation in the course of providing professional services", as well as for conviction of "a felony or other crime that affects the licensee's ability to continue to practice competently and safely". **And see** AS 8.11.080 (similar license revocation provisions for audiologists); AS 8.20.170 (chiropractors); AS 8.32.160 (dental hygienists); AS 8.36.315 (dentists); AS 8.45.060 (naturopaths); AS 8.64.326 (physicians, podiatrists, and osteopaths); AS 8.68.270 (nurses); AS 8.70.155 (nursing home administrators); AS 8.72.240 (optometrists); AS 8.80.261 (pharmacists); AS 8.84.120 (physical therapists and occupational therapists); AS 8.86.204 (psychologists); AS 8.87.210 (real estate appraisers); AS 8.98.235 (veterinarians).

See also AS 8.18.123 (contractors can have their licenses revoked for "engaging in fraudulent practices"); AS 8.40.170 (similar provision for electrical administrators); AS 8.40.320 (mechanical administrators); AS 8.42.090 (morticians); AS 8.48.111 (architects); AS 8.54.500 (hunting guides), AS 8.55.130 (hearing aid dealers); AS 8.62.150 (marine pilots); AS 8.71.170 (dispensing opticians); AS 8.88.071 (real estate brokers).

7 the only reported case to the contrary is **Johnson v. State Hearing Examiner's Office,** 838 P.2d 158 (Wyo. 1992), involving a statute that called for automatic suspension of a minor's driver's license if the minor was convicted of consuming alcohol. The Wyoming Supreme Court ruled that this statute subjected the minor to an unlawful second punishment. The Wyoming court decided this constitutional question even though the issue was "generally not briefed by the litigants" and even though the Wyoming court could find "only one **Halper** case ... of [any] relevance" (the California Court of Appeal's decision in **Ellis v. Pierce,** supra). **Johnson,** 838 P.2d at 179.

8 In one exhortatory paragraph that cites no pertinent legal authority, the defendants urge us to declare that administrative revocation of driver's licenses constitutes "punishment" for purposes of the double jeopardy clause of the Alaska Constitution (Article I, Section 9), even if we conclude that administrative revocation is remedial for purposes of the Federal Constitution.

When a defendant asserts that the Alaska Constitution affords greater protection than the corresponding provision of the Federal Constitution, it is the defendant's burden to demonstrate something in the text, context, or history of the Alaska Constitution that justifies this divergent interpretation. **See e.g., Abood v. League of Women Voters,** 743 P.2d 333, 340-43 (Alaska 1987); **State v. Wassillie,** 606 P.2d 1279, 1281-82 (Alaska 1980); **Annas v. State,** 726 P.2d 552, 556 n.3 (Alaska App. 1986); **State v. Dankworth,** 672 P.2d 148, 151 (Alaska App. 1983). Given the defendants' inadequate briefing, this argument is waived.

9 Our resolution of this issue makes it unnecessary for us to address the Municipality of Anchorage's argument that the Municipality is a distinct sovereign government, separate from the State of Alaska, for purposes of the double jeopardy clause. **See,** however, **Waller v. Florida,** 397 U.S. 387, 90 S.Ct. 1184, 25 L. Ed. 2d 435 (1970) (a state and its municipalities are not separate sovereigns for double jeopardy purposes), and Article X of the Alaska Constitution.

HB

13

HOUSE COMMITTEE REPORT

(7)

Date Referred to Committee: January 31, 2001 **FURTHER REFERRALS: Finance**

Date of Committee Action: 2/14/01

The JUDICIARY Committee considered: **SSHB 13**

SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 13 SERVICE AREAS:VOTER APPROVAL/TAX ZONES

"An Act relating to municipal service areas and providing for voter approval of the formation, alteration, or abolishment of certain service areas."

Recommends it be replaced with CS SSHB 13 (JUD) [✓] **Same Title** |] **New Title**

For Senate Bills with new title: [ ] Technical Title [ ] New Title: HCR_____

[ ] attach amendments
[ ] add new referral to _____ Committee
[ ] Letter of Intent _____Committee

List of Abbrev. For Depts.:
ADM
CED
COR
CRT
EED
DEC
DFG
GOV
HSS
LAA
LAW
LWF
MVA
DNR
DPS
REV
DOT
UA

NEW FISCAL NOTES *For Chief Clerk's Office Use Only				
FN# *	List by Dept(s):	Fiscal	Indet.	Zero

PREVIOUS FISCAL NOTES				
List by Dept(s):	FN #	Fiscal	Indet.	Zero
CED	1			✓

Signing with recommendations	Printed Name	DP	DNP	NR	AM
Scott Ogan	Ogan			✓	
Albert Kookesh	Kookesh		✓		
[illegible]	James				
John Coghill	Coghill	✓			
Kim Meyer	Meyer			✓	
Ed Berkowitz	Berkowitz		✓		
					✓
Chair: Norman Rokeberg	Rokeberg			✓	
Chair:					

AMENDMENT

OFFERED IN THE HOUSE by Representative Berkowitz

TO: CS SS HB 13

Page 1, line 4 through page 2, line 23

Delete all material

Renumber following sections accordingly

FAILED.

22-LS0164\F
Cook
2/3/01

CS FOR SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 13( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SECOND LEGISLATURE - FIRST SESSION

BY

Offered:
Referred:

Sponsor(s): REPRESENTATIVE BUNDE, Kohring, Dyson, Halcro, Fate, Coghill

A BILL

FOR AN ACT ENTITLED

"An Act relating to municipal service areas and providing for voter approval of the formation, alteration, or abolishment of certain service areas."

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

*** Section 1.** AS 29.10.200 is amended by adding a new paragraph to read:

(60) AS 29.35.450 (voter approval of alteration or abolishment of service areas).

*** Sec. 2.** AS 29.35.450(a) is amended to read:

(a) A service area to provide special services in a borough **or unified municipality** may be established, operated, altered, or abolished by ordinance**, subject to (c) of this section. Special services include services not provided by the unified municipality or a higher or different level of services**. Special services include services not provided **by a borough** on an areawide or nonareawide basis in the borough [,] or a higher or different level of **services** [SERVICE] than that provided on an areawide or nonareawide basis. **A** [THE] borough may include a city in a

New Text Underlined [DELETED TEXT BRACKETED]

service area if

(1) the city agrees by ordinance; or

(2) approval is granted by a majority of voters residing in the city, and by a majority of voters residing inside the boundaries of the proposed service area but outside of the city.

*** Sec. 3.** AS 29.35.450 is amended by adding new subsections to read:

(c) If voters reside within a service area that provides road or fire protection services, abolishment of the service area is subject to approval by the majority of the voters residing in the service area who vote on the question. A service area that provides road or fire protection services in which voters reside may not be abolished and replaced by a larger service area unless that proposal is approved, separately, by a majority of the voters who vote on the question residing in the existing service area and by a majority of the voters who vote on the question residing in the area proposed to be included within the new service area but outside of the existing service area. A service area that provides road or fire protection services in which voters reside may not be altered or combined with another service area unless that proposal is approved, separately, by a majority of the voters who vote on the question and who reside in each of the service areas or in the area outside of service areas that is affected by the proposal. This subsection does not apply to a proposed change to a service area that provides fire protection services that would result in increasing the number of parcels of land in the service area or successor service area if the increase is no more than six percent.

(d) This section applies to a home rule or general law municipality.

*** Sec. 4.** AS 29.35.470 is amended by adding a new subsection to read:

(b) The assembly may by ordinance establish, alter, and abolish differential tax zones within a service area to provide and levy property taxes for a different level of services than that provided generally in the service area.

FISCAL NOTE

STATE OF ALASKA
2001 LEGISLATIVE SESSION

Fiscal Note Number: 1
Bill Version: SSHB 13
(H) Publish Date: 1/31/01

Revision Date/Time (Note if correction): 1/25/2001 1:20PM
Title: SERVICE AREAS: VOTER APPROVAL/ TAX ZONES
Sponsor: Representative Bunde
Requester: House CRA Committee

Dept. Affected: DCED
BRU: Com. Asst.& Econ. Dev.
Component: Community and Business Development
Component Number: 2486

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2001) cost: 0.0

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

This legislation provides for voter approval of the formation, alteration, or abolishment of certain municipal service areas. This legislation would have no fiscal impact on the department.

Prepared by: Pat Poland, Director — Phone 907-269-4580
Division: DCED, Community & Business Development — Date/Time 1/25/2001 1:20PM
Approved by: Commissioner Deborah B. Sedwick — Date 1/25/2001
Agency: Department of Community & Economic Development

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WEB SITE
http://www.akrepublicans.org/Bunde.htm

REPRESENTATIVE CON BUNDE
District 19

VICE-CHAIR: HOUSE FINANCE COMMITTEE
MEMBER: LEGISLATIVE BUDGET & AUDIT COMMITTEE

DURING INTERIM
716 W. FOURTH AVE.
ANCHORAGE, AK 99501-2133
(907) 269-0181
FAX: (907)269-0184

E-MAIL
Representative_Con_Bunde@legis.state.ak.us

SPONSOR STATEMENT

SSHB 13

" An Act relating to municipal service areas and providing for voter approval of the formation, alteration. or abolishment of certain service areas."

Alaska's Constitution provides for maximum local self-government (Art. X sec. 1) and for the creation, alteration, or abolishment of service areas subject to the provisions of law (Art. X sec. 5).

AS 29.35.450 codifies these Constitutional provisions and establishes the mechanism by which service areas are created, altered, and abolished.

Alaska has approximately 200 service areas; in these areas the local residents use private contractors for necessary services and assess themselves to pay for a desired level of service.

HB 133 amends, AS 29.35.450 to support local control by clearly identifying whom should vote on the abolishment and alteration of a service area under three scenarios:

1. **Abolishment of a service area.**
   Subject to approval by the majority of the voters residing in the service area.

2. **Abolishment and replacement of a service area.**
   Must be approved separately by a majority of voters inside an existing service area and by a majority of the voters residing in the proposed service area <u>BUT OUTSIDE</u> the existing service area.

3. **Alteration of service area or combining it with another service area.**
   Must be approved, separately, by a majority of the voters who vote on the question and who reside in each of the service areas or in a proposed service area affected by the proposal.

This proposed legislation would settle a long time debate about who is entitled to vote during the creation, alteration or abolishment of a service area. This legislation has support throughout service areas in Alaska and I urge the favorable consideration of this committee.

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(907) 465-4843 (800) 892-4843
FAX: (907) 465-3871

WEB SITE
http://www.akrepublicans.org/Bunde.htm

REPRESENTATIVE CON BUNDE
District 18

VICE-CHAIR: HOUSE FINANCE COMMITTEE
MEMBER: LEGISLATIVE BUDGET & AUDIT COMMITTEE

DURING INTERIM
716 W. FOURTH AVE.
ANCHORAGE, AK 99501-2133
(907) 269-0181
FAX: (907)269-0184

E-MAIL
Representative_Con_Bunde@legis.state.ak.us

Sectional Analysis
SSHB 13

"An Act relating to municipal service areas and providing for voter approval of the formation, alteration, or abolishment of certain service areas."

Sec. 1. This adds AS 29.35.450 to the list of statutes that apply as limitations on the power to home rule municipalities. The result of this is to require home rule municipalities to adhere to AS 29.10.450, which now applies only to general law municipalities.

Sec. 2. This addresses service areas in unified municipalities and contains a cross-reference to subsection (c), added in this draft. There are three unified municipalities in the state: Anchorage, Juneau, and Sitka.

Sec. 3. This adds subsection (c) to AS 29.10. 450 which requires, before a service area is expanded, a separate vote to be held in the area of the existing service area and in the area proposed to be added. A separate vote is also required when a service area is altered or combined with another service area. Before the service area change may occur it must be approved in each of the areas that votes separately on the question. This section does not apply when a fire service area is increased in size by no more than 6% or to a second class borough with a population that is under 60,000.

Sec. 4. Adds a new subsection to AS 29.35.470, which is not a home rule limitation. This allows borough assemblies to set up differential tax zones in service areas, so that different rates of taxes may be levied in different portions of a service area. Under existing law, only cities set up differential tax zones.

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MEMORANDUM January 25, 2001

SUBJECT: Municipal service areas; Art. X, sec. 5 of the State Constitution (SSHB 13)

TO: Representative Con Bunde
Attn: Patti Swenson

FROM: Tamara Brandt Cook
Director TBC

SSHB 13 provides for voter approval of formation of or certain changes to municipal service areas. You ask whether the requirement of voter approval with respect to service areas runs afoul of Art. X, sec. 5 of the state constitution. The provision of concern is "Service areas to provide special services within an organized borough may be established, altered, or abolished **by the assembly, subject to the provisions of law or charter**.

The extent of the constitutional power granted to the assembly and the degree that the power may be limited by law or charter under this provision has not been squarely addressed by the Supreme Court. However, a recent case suggests that the power of the assembly may be limited by a charter provision imposing a requirement of voter approval. Area G Home and Landowners Organization, Inc. (HALO) v. Anchorage, 927 P.2d 728 (Alaska 1996) U.S. *cert. denied* 137 L.Ed 2 821, 117 S.C. 1694). That case involved the application of a charter provision requiring voter approval of certain changes to service areas. The court held that the charter provision permitting expansion of a service area upon approval of a majority of those voting within the area affected permitted the municipality to expand its police service area by abolishing its old service area and creating a new service area that included a region that had previously voted against expansion, without giving residents of that included region a separate vote on the expansion. In reaching its decision the court considered both the charter and Art. X, sec. 5. While the application of a voter approval requirement in the charter was the focus of the case, the court never suggested that the requirement of voter approval itself was prohibited under Art. X, sec. 5.

Recall the language of Art. X, sec. 5 making the power of an assembly over service areas "subject to the provisions of law or charter." If, as the court appears to have decided, a charter can impose a requirement of voter approval in these situations, then it appears under the language of the constitution that the law may also impose a such a requirement, as will be done if HB 13 is enacted. While the precise question was not decided, based

on the reasoning in the HALO case, I do not think that a court would find HB 13 unconstitutional under Art. X, sec. 5.

TBC:glc
01-059.glc

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MEMORANDUM January 26, 2001

SUBJECT: Differential Tax Zones (SSHB 13)

TO: Representative Con Bunde
Attn: Patti Swenson

FROM: Tamara Brandt Cook
Director TBC

Bill section 4 of SSHB 13 adds a new provision that states: "The assembly may by ordinance establish, alter, and abolish differential tax zones within a service area to provide and levy property taxes for a different level of services than that provided generally in the service area." You ask if differential tax zones are unconstitutional. While it is possible, that under certain facts, a particular differential tax zone may be problematical, I am aware of no constitutional problem that generally arises in connection with differential tax zones. (Op. Att'y Gen, December 8, 1986, pointing out in connection with a differential tax zone the requirement of a rational relationship between the benefits conferred and the additional costs imposed on the taxpayer)

The language in the bill is almost identical to a provision that has existed for many years: AS 29.45.580 allowing cities to establish differential tax zones. That provision became the subject of litigation when the City of Valdez imposed a tax on oil and gas property that was higher than the tax imposed on other property and claimed it could do so by treating the oil and gas property as a differential tax zone. The court concluded that Valdez could not impose higher taxes on oil and gas property, because another provision, AS 43.56.010(d), specifically prohibits a municipal tax rate on oil and gas property that is higher than that on other property. Because AS 43.56.010(d) is specific to oil and gas property whereas AS 29.45.580 is generally applicable to all property, the court decided that AS 43.56.010(d) controlled. While the precise issue of the constitutionality of differential tax zones was not addressed, the court took a close look at AS 29.45.580 and made no suggestion that the statute suffers from constitutional infirmity. (City of Valdez v. State, Dept. of Community and Regional Affairs, 793 P.2d 532 (Alaska 1990))

Assuming that a city may be authorized to establish differential tax zones without creating a constitutional problem, then it would seem that the legislature could permit a differential tax zone to be established in a service area as well. Note that the assembly has explicit constitutional authority to impose a tax in a service area and that the tax revenue must be used "to finance the special services." (Art. X, sec. 5, Constitution of

the State of Alaska) Any tax levied in a differential tax zone would, I believe, be subject to this provision and have to be used for the special services in that tax zone.

TBC:lmb
01-027.lmb