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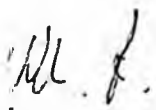
State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM

January 21, 2002

SUBJECT: Imposition of breath/blood tests (HB 329)

TO: Representative Norman Rokeberg
Attn: Heather

FROM: Michael F. Ford 
Legislative Counsel

You have asked why the legislature cannot require that all drivers involved in an automobile accident submit to a test of their alcohol breath or blood levels. As I advised you earlier, such an involuntary testing law was enacted by the legislature in 1994. (See AS 28.35.031(g)) Six years after enactment of this law, the Alaska Court of Appeals ruled that this type of testing, that is testing someone who has not been arrested, was unconstitutional. The court held that this type of search is a violation of the Fourth Amendment of the United States Constitution and of art. 1, sec. 14 of the Alaska Constitution. Blank v. State, 3 P.3d 359 (Alaska App. 2000). The provisions cited are both provisions intended to protect citizens against unreasonable searches and seizures. I have enclosed a copy of the Blank decision for your review. Therefore given this view by the Alaska Court of Appeals, it is not possible to require a driver involved in an accident be tested, unless the driver is first arrested.

Please contact me if you have further questions.

MFF:med
02-033.med

Enclosure

State Drunk Driving Laws

Mandatory Post-Fatal Accident BAC Testing

The following states require BAC tests on fatally injured drivers, passengers or pedestrians. Note the mandatory testing does not extend to all drivers or passengers involved in a fatal accident, only to those who died as a result of the accident.

STATE	MANDATORY TESTING	CITATION	PERFORMED ON
Alabama	no		
Alaska	no		
American Samoa	no		
Arizona	yes	§28-2642	driver
Arkansas	yes	§5-65-208(a)	driver, passenger & pedestrian
California	yes	Gov't Code §27491.25	driver, passenger & pedestrian
Colorado	yes	§42-4-1304	driver & pedestrian
Connecticut	yes	§14-227c	driver & pedestrian
Delaware	no		
District of Columbia	no		
Florida	no		
Georgia	possible	§45-16-27, §45-16-46	driver, passenger & pedestrian
Guam	no		
Hawaii	possible	§841-3	driver, passenger & pedestrian
Idaho	yes	§49-1314	driver & pedestrian
Illinois	yes	55 ILCS 5/3-3013	driver & pedestrian
Indiana	yes	ic9-27-5-4(a)	driver & pedestrian
Iowa	no		
Kansas	yes	§22a-237(c)	driver & pedestrian
Kentucky	possible	§189.590	driver, passenger & pedestrian
Louisiana	yes	§32:398(E) & (F)	driver, passenger & pedestrian
Maine	no		
Maryland	no		
Massachusetts	limited	Ch 38 §4A	driver
Michigan	yes	§257.625a(6)(f)	driver
Minnesota	yes	§169.09 subd 11	driver & pedestrian
Mississippi	yes	§63-11-7	driver
Missouri	yes	§§58.445, 58.447 & 58.449	driver, passenger & pedestrian
Montana	no		
Nebraska	yes	§60-6,102	driver & pedestrian
Nevada	yes	§484.394	driver, passenger & pedestrian
New Hampshire	yes	§§262-A:69-1 & 265:93	driver, passenger & pedestrian
New Jersey	yes	§26:2B-24	driver & pedestrian

New Mexico	yes	§24-11-6(B)	driver, passenger & pedestrian
New York	yes	County Code §674(3)(b)	driver & pedestrian
North Carolina	no		
North Dakota	yes	§39-20-13	driver, passenger & pedestrian
Ohio	yes	§313.13(B)	driver
Oklahoma	no		
Oregon	yes	§146.113	driver, passenger & pedestrian
Pennsylvania	yes	75 §3749	driver, passenger & pedestrian
Puerto Rico	yes	9 §1043	driver & pedestrian
Rhode Island	no		
South Carolina	yes	§17-7-80	driver & pedestrian
South Dakota	yes	§34-25-22.1	driver, passenger & pedestrian
Tennessee	discretionary	§38-7-109	driver, passenger & pedestrian
Texas	limited	Code of Criminal Procedure Art.49.10(j)	discretionary - driver
Utah	yes	§26-1-30(17)	driver & pedestrian
Vermont	no		
Virgin Islands	limited	20 §493c(m)	driver
Virginia	no		
Washington	yes	§§46.20.308(1) &46.52.065	driver & pedestrian
West Virginia	yes	§17C-5B-1	driver & pedestrian
Wisconsin	yes	§346.71(2)	driver & pedestrian
Wyoming	no		

Source: Digest of State Alcohol-Highway Safety Related Legislation, 18th Edition. (US Dept. of Transportation, National Highway Traffic Safety Administration, 2000)

3 P.3d 359 BLANK V. STATE (Ct. App. 2000) 2000 Alas. App. Lexis 70

LAURA A. BLANK, Appellant,
vs.
STATE OF ALASKA, Appellee.

Court of Appeals No. A-6541, No. 1673
COURT OF APPEALS OF ALASKA
3 P.3d 359, 2000 Alas. App. LEXIS 70
May 19, 2000, Decided

Appeal from the Superior Court, Third Judicial District, Palmer, Beverly W. Cutler, Judge. Trial Court No. 3PA-S94-2829 CR.

COUNSEL

Christine S. Schleuss, Suddock & Schleuss, Anchorage, for Appellant.
Kenneth M. Rosenstein, Assistant Attorney General, Anchorage, and Bruce M. Botelho, Attorney General, Juneau, for Appellee.

JUDGES

Before: Coats, Chief Judge, and Mannheimer and Stewart, Judges. MANNHEIMER, Judge, dissenting.

AUTHOR: STEWART

OPINION

STEWART, Judge.

Laura A. Blank struck a pedestrian, Penny McDowell, while driving home from a friend's house. Blank did not stop at the scene of the accident. McDowell died from her injuries.

The Alaska State Troopers investigated the accident and ultimately arrived at Blank's residence. During an interview with Blank in his patrol car, Trooper Bill D. Tyler performed a portable breath test on Blank that yielded a result of .082. The grand jury indicted Blank for manslaughter¹ and felony leaving the scene of an injury accident.² Blank moved to suppress her interview with Trooper Tyler, claiming that it was custodial interrogation without *Miranda*³ warnings. Blank also claimed that the portable breath test was an unauthorized search. Finally, Blank moved to suppress the evidence obtained from the service of two search warrants. Blank claimed that the warrants were based on illegally obtained evidence and on material misstatements of fact by the trooper who applied for the warrants. Superior Court Judge Beverly W. Cutler denied Blank's motions. Because we agree with Blank that the portable breath test was an unauthorized search, we reverse.

Facts and proceedings

On September 26, 1994, Penny McDowell and Diane Forster were walking on a residential street in a subdivision near Palmer. The paved roadway, edged with a narrow gravel strip, was straight and level. Forster walked on the gravel strip; McDowell on the edge of the road bed.

Blank drove up from behind the two and struck McDowell. McDowell's body landed several feet away in a ditch. The impact broke the windshield, the right side view mirror, and the right side passenger's window of Blank's car. Blank did not stop; Forster testified that she "heard the car squealing around the corner" away from the scene.

Blank's husband, Greg Blank, appeared at the scene while troopers were investigating. Mr. Blank told Trooper Tyler that his wife may have been involved in the accident. Tyler and two other officers followed Mr. Blank back to the Blank residence. At the residence, Tyler introduced himself to Laura Blank and told her that he "needed to talk to her about the accident." Tyler suggested that his patrol car was a better place for the interview and Blank went with Tyler to the patrol car.

During the interview, Blank told Tyler that she had two beers at a friend's house before driving home. Tyler administered a portable breath test that registered a blood-alcohol content of .082%. Blank agreed to go to the hospital to have a blood test, but changed her mind at the hospital. Tyler did not arrest Blank.

On September 29, 1994, Trooper Dale G. Gibson, relying on information from Tyler, obtained a search warrant to inspect Blank's car which had been impounded. On October 14, 1994, Tyler obtained a second search warrant for an additional inspection of the car. Blank's indictment for manslaughter and leaving the scene of an injury accident followed.

Judge Cutler denied Blank's pretrial motions to suppress the portable breath test result, the statement to Trooper Tyler and the evidence obtained from the execution of the search warrants. Following a mistrial, Blank was convicted on both counts at her second trial. Judge Cutler imposed a 6-year sentence with 1 year suspended for manslaughter and a suspended 2 1/2 -year consecutive term for leaving the scene of the accident. Blank now appeals her conviction.

Discussion

Was Tyler's interview custodial interrogation?

When Tyler arrived at Blank's residence, he introduced himself to Blank and told her that he "needed to talk to her about the accident." Tyler asked Blank: "Why don't you come and sit in my car[?]" Blank accompanied Tyler out to his patrol car, which was parked outside the residence, and sat in the front seat.

Tyler recorded the interview with Blank. At the start, Tyler stated that the interview was being conducted in the patrol car "only for convenience sake" and expressed concern about "the kids getting involved." Tyler advised Blank that "you're not under arrest or anything like that" and that "you're free to leave any time you want to." Blank answered Tyler's questions during the approximately hour-long interview. Towards the end, Tyler asked, "were you[] coerced, promised anything, . . . forced to make a statement or anything?" Blank answered "no" and offered another detailed recital of events. Tyler returned to his question:

TYLER: Were you forced to make a statement?

BLANK: No.

TYLER: Okay, you're doing this on your own free will?

BLANK: You bet. You bet.

Blank agreed to accompany Tyler to the hospital for a blood test. After hearing evidence on Blank's motion to suppress the statements she made during the interview with Tyler, Judge Cutler found that a reasonable person would not have thought she was in custody, and found that Blank subjectively understood she was not in custody during the interview. As support for finding that a reasonable person would not have thought they were in custody, Judge Cutler noted that police "routinely" interview drivers in a patrol car after an accident. Judge Cutler found that the length of the interview and the small number of officers present at the Blank residence were not indicative of a custodial interview. As for the interview's location in the patrol car, Judge Cutler saw the patrol car as an alternative private location. The judge found important the fact that, although Tyler suggested the patrol car as a location for the interview, it was Mr. Blank who brought the police back to the residence.

In *Hunter v. State*,⁴ the Supreme Court adopted an objective test for deciding if a person was in custody, so that *Miranda* warnings were required. *Miranda* warnings must precede police interrogation conducted under circumstances in which a "reasonable person would feel he was not free to leave and break off the questioning."⁵ The Supreme Court further indicated that:

At least three groups of facts would be relevant to this determination. The first are those facts intrinsic to the interrogation: when and where it occurred, how long it lasted, how many police were present, what the officers and the defendant said and did, the presence of actual physical restraint on the defendant or things equivalent to actual restraint such as drawn weapons or a guard stationed at the door, and whether the defendant was being questioned as a suspect or as a witness. Facts pertaining to events before the interrogation are also relevant, especially how the defendant got to the place of questioning -- whether he came completely on his own, in response to a police request, or escorted by police officers. Finally, what happened after the interrogation -- whether the defendant left freely, was detained or arrested -- may assist the court in determining whether the defendant, as a reasonable person, would have felt free to break off the questioning.⁶

Blank has not attacked Judge Cutler's findings regarding these factors. However, Blank claims that Judge Cutler erred by concluding from her findings that Blank was not in custody.

Our review of the record convinces us that Judge Cutler did not err in determining that a reasonable person in Blank's position "would have felt free to break off the questioning."⁷ The interview was conducted in Tyler's patrol car outside of Blank's residence. Although there were two other troopers at Blank's property, they were not in Tyler's patrol car during the interview. Tyler told Blank that she was free to go and was not under arrest, nor was Blank arrested that day. For purposes of *Miranda* we agree with Judge Cutler's decision that Blank was not in

custody during the interview with Tyler.

Was Blank's statement voluntary?

Blank also moved to suppress her statement to Tyler, arguing that it was involuntary. Judge Cutler denied that motion as well. We review the superior court's determination that Blank's statement was voluntary by examining the totality of the circumstances surrounding the statement.⁸ We accept the superior court's findings of historical fact unless they are clearly erroneous; but we review the record and make an independent determination of Blank's mental state and its legal significance.⁹ Factors that we consider in deciding if the State has met its burden of showing that a defendant's statement is voluntary include the defendant's age, mental status, and prior criminal experience; the length, intensity, and frequency of the questioning; the presence of physical deprivation or mistreatment; and the existence of threat or inducement.¹⁰

The record shows the following. When Tyler questioned Blank, she was thirty. She was married and had three children. She was upset about the accident. She had no known prior criminal history or experience. Tyler questioned Blank in one interview that was less than one hour long. There is nothing in the record that shows any deprivation or mistreatment. Nor is there any indication of a threat or an improper inducement. Blank argues that her will was overborne because the trooper did not inform her that McDowell was killed. But Tyler did not provide any false information or create any false impressions. He merely withheld information. After reviewing the totality of the circumstances in the record before this court, we conclude, as did the superior court, that the State sustained its burden of proving that Blank's will was not overborne and that her statement was voluntary.

Were the search warrants issued on material misstatements of fact?

The troopers seized Blank's car and took it to an impound yard in Palmer. On September 29, 1994, Trooper Dale G. Gibson applied for a warrant to search Blank's car based on his investigation and reports from Trooper Tyler. In support of the application, Gibson testified before Magistrate David L. Zwink. Magistrate Zwink found probable cause to issue the warrant. On October 14, 1994, Trooper Tyler applied for a second warrant to conduct an additional inspection of the car. District Court Judge Peter G. Ashman issued that warrant.

Blank moved to suppress the evidence obtained when the troopers served the warrants. Blank claimed that Trooper Gibson made material misstatements when applying for the first warrant. Blank also claimed that Gibson should have told the court that Blank reported consuming two beers and did not show signs of intoxication other than the odor of alcohol and "mood swings." Blank argues that the omission of this information was a material misstatement. Blank also faults Trooper Gibson for stating that there was no known reason for Blank to leave the scene of the accident and no reason for failing to avoid hitting McDowell. Blank argues these were material misstatements of fact.

Because Blank told Trooper Tyler that she was not aware that she might have struck anyone until she saw the blood on her car, she argues that Gibson's statement that she had no reason to

leave the scene was a material misstatement. Also, because Blank told Trooper Tyler that she thought she had driven around the pedestrians with enough room, Blank argues that Trooper Gibson's statement that she had no reason for failing to avoid McDowell was a material misstatement.

The parties agree that Blank's claims are governed by *State v. Malkin*.¹¹ In *Malkin*, our supreme court adopted the rule established by the U.S. Supreme Court in *Franks v. Delaware*:¹² that intentional or reckless misstatements or omissions must be excised from an application for a search warrant.¹³ Once the offending items are excised, the remainder of the application for a search warrant is scrutinized for probable cause and the warrant will be upheld if probable cause exists.¹⁴ However, if the misstatements or omissions were deliberately made and calculated to mislead the magistrate, the warrant is invalidated and the evidence suppressed.¹⁵ A misstatement or omission is material if essential to the probable cause determination.¹⁶

Judge Cutler heard Trooper Gibson's testimony on this claim at an evidentiary hearing. She found that Gibson had not deliberately omitted information when he testified in support of the warrant. Gibson learned of Blank's statements from Tyler's reports. From our review of the record, Judge Cutler's findings are not clearly erroneous. Furthermore, the record establishes that there was probable cause to issue a search warrant and nothing Blank points to is a material omission that would defeat the issuance of a warrant.

Judge Cutler also found that Trooper Gibson had not been deliberate or reckless when Gibson said that Blank had no reason for leaving the scene of the accident or for failing to avoid hitting McDowell. Furthermore, Judge Cutler concluded that those statements were not material to the issuance of the search warrant. Judge Cutler found that none of Gibson's purported misstatements or omissions were reckless or intentional. The record supports Judge Cutler's findings. We conclude that the superior court did not err in failing to suppress the evidence from the first search warrant.

Blank advances similar arguments in support of her challenge to the second search warrant for the car. The car had been in the continuous custody of the troopers since the investigation began. Because of that continuous custody, it is questionable if a warrant was required to subject the car to additional testing. In *State v. McDonald*,¹⁷ we quoted LaFave, *Search and Seizure*, for the settled principle that:

an object lawfully seized as evidence may be kept in custody pending trial and during that period "it is plainly within the realm of police investigation to subject [such an object] to scientific testing and examination" when such is done "for the purpose of determining its evidentiary value." That is, if the initial seizure was upon probable cause that the item would be of evidentiary value, it may be tested and examined for the purpose [of] maximizing its value in this respect.¹⁸

Even so, Judge Cutler considered Blank's motion and analyzed the evidence offered in support of the second warrant. Judge Cutler noted that the second warrant was "basically based

on the first warrant" and denied Blank's motion for the same reasons that she denied the motion as to the first warrant. Even though the second warrant was probably not necessary, Judge Cutler's ruling on the second warrant can be affirmed for the same reasons that we affirmed her decision on the first warrant -- the record supports her findings that none of the purported misstatements or omissions were reckless or intentional.

Finally, Blank argues that the evidence obtained from the search warrants should be suppressed because the portable breath test was an illegal search. However, if illegally obtained evidence is included in an application for a search warrant, we do not invalidate the warrant if the warrant could have been issued on the basis of the untainted evidence in the application.¹⁹

Both search warrant applications in this case included evidence that Blank struck and killed McDowell while driving her car and did not stop at the scene of the accident. Her car suffered extensive and noticeable damage. The road was straight and level with no visual obstructions. McDowell and her companion were walking along the side of the road when McDowell was struck during daylight hours. Even without the result of the portable breath test, this evidence provided probable cause to believe that Blank committed felony leaving the scene of an injury accident, manslaughter, or criminally negligent homicide. Thus, the portable breath test result was not material to the issuance of the warrants.

Was the portable breath test an authorized search?

In a criminal investigation, a breath test for alcohol is a search.²⁰ In *Leslie v. State*,²¹ we held that a police officer could administer a preliminary breath test under AS 28.35.031(b) only if the officer had probable cause to believe that the driver's ability to operate a motor vehicle was impaired by alcohol.²²

Here, Trooper Tyler had evidence that Blank left the scene of an injury accident that caused substantial and visible damage to her car. Tyler also knew that McDowell had died from her injuries. But, although there was probable cause to believe that Blank committed a crime, the State does not contend that the police had any individualized suspicion that Blank's "ability to operate a motor vehicle [was] impaired by the ingestion of alcoholic beverages[.]"²³ Moreover, the record would not support that conclusion. The record shows that Trooper Tyler noticed the odor associated with alcohol consumption, and that Blank stated that she consumed two beers at her friend's house. But the State has not identified any other evidence that Blank was impaired by alcohol.

Rather than relying on AS 28.35.031(b) as authority for the portable breath test, the State relies on AS 28.35.031(g) which provides as follows:

A person who operates or drives a motor vehicle in this state shall be considered to have given consent to a chemical test or tests of the person's breath and blood for the purpose of determining the alcoholic content of the person's breath and blood and shall be considered to have given consent to a chemical test or tests of the person's blood and urine for the purpose of determining the presence of controlled substances in the person's blood and urine if the person is

involved in a motor vehicle accident that causes death or serious physical injury to another person. The test or tests may be administered at the direction of a law enforcement officer who has reasonable grounds to believe that the person was operating or driving a motor vehicle in this state that was involved in an accident causing death or serious physical injury to another person.

On its face, subsection (g) by stating that "the test or tests may be administered at the direction of a law enforcement officer[.]" gives a police officer the discretion to test any driver or operator of a motor vehicle involved in an accident where someone else receives serious physical injuries or is killed. Apparently, the statute allows the officer to administer the test(s) without any individualized suspicion that the driver was impaired, whether by alcohol or drugs, or even any evidence that the driver or operator caused the accident.

In a series of cases, the Supreme Court has decided that a limited group of searches without individualized suspicion that are authorized by statute or regulation, are reasonable searches under the Fourth Amendment and are based on "special needs, beyond the normal need for law enforcement[.]"²⁴ The State argues that Blank's breath test can be justified under this "special needs" exception.

In **Skinner v. Railway Labor Executives' Ass'n**,²⁵ the Supreme Court approved government-mandated blood and breath tests by railroad companies for those employees who were involved in serious accidents or had violated certain safety rules.²⁶ The Court ruled that these searches were reasonable under the Fourth Amendment even though there was no suspicion of individualized wrongdoing. As the Court stated in **Skinner** :

In limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion.²⁷

Because the railroad employees worked in a highly regulated industry, the Court balanced the employees' diminished expectation of privacy against the government's interest in ensuring the safety of an industry where the employees, like those in the nuclear industry, can cause "great human loss" when "a momentary lapse of attention can have disastrous consequences."²⁸

When "special needs" are advanced as a justification for a Fourth Amendment intrusion, the Court undertakes a context-specific inquiry, examining the competing private and public interests.²⁹ In **National Treasury Employees Union v. Von Raab**,³⁰ the Court reviewed and approved a Customs Service rule that mandated drug testing for any employee taking a position that involved direct contact with drug intervention or required the employee to carry a firearm.³¹ There, the Court decided that the country's interest in avoiding the promotion of drug users to positions where they might endanger the integrity of our Nation's borders or the life of the citizenry outweighed the limited privacy interests of employees who had a diminished expectation of privacy because of the "special, and obvious, physical and ethical demands of [their] positions."³² The Court therefore held that the searches were reasonable under the Fourth

Amendment.³³

In **Vernonia School Dist. 47J v. Acton**,³⁴ the Court approved a random drug-testing program for students participating in extracurricular sports programs.³⁵ The school district imposed that program in the face of problems at school caused by wide spread drug use among the students where the "athletes were the leaders of the drug culture."³⁶ Balanced against this concern (a) concern that the Court described as "important -- indeed, perhaps compelling"³⁷ were (1) the athletes' reduced expectation of privacy in general because they were students and schools regularly exercise their custodial responsibility for the children with examinations for physical and medical problems; and (2) the even lower expectation of privacy that a school athlete has because of the athlete's less than private experiences in the locker room.³⁸ Also, the Court noted that the testing program was relatively unobtrusive (and confidential). The Court balanced three factors in its analysis: the nature of the privacy interest which the search intrudes,³⁹ the character of the intrusion,⁴⁰ and the nature and the immediacy of the government's concern and the efficacy of the means for meeting it.⁴¹ Balancing these three factors, the **Acton** Court declared that the school district policy requiring athletes to consent to random drug testing before participating in extracurricular athletic programs was reasonable under the Fourth Amendment.⁴²

The governor's transmittal letter for the bill from which AS 28.35.031(g) arose shows that the subsection was designed for direct law enforcement. ("This proposed legislation gives police and prosecutors the tools they need . . ." ⁴³) This subsection abandons any requirement of individualized suspicion that a driver is impaired and permits the search, at the discretion of a police officer, of any driver involved in an accident where someone else suffers serious injury.

A suspicionless search program implemented for normal law enforcement, the apparent purpose of AS 28.35.031(g), does not meet the Supreme Court's "special needs" balancing test. In the cases discussed above, the Supreme Court pointed out that the suspicionless searches at issue served special societal needs other than normal law enforcement.⁴⁴ Subsection (g) addresses normal law enforcement. Even if normal law enforcement was not the apparent purpose of subsection (g), the statute would have to meet the Supreme Court's balancing test. That test requires a "context-specific inquiry, examining closely the competing private and public interests advanced by the parties."⁴⁵ And in **Skinner**, the Court stated: "In limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion."⁴⁶

In the circumstances of this case, normal law enforcement needs would not be jeopardized by requiring the government to have individualized suspicion before subjecting a person to a breath test. Although a driver involved in an accident where someone else is seriously injured can reasonably expect that police would investigate the accident, the expectation of an investigation does not lessen a driver's expectation of privacy. Certainly, a portable breath test is relatively

unobtrusive, particularly when compared to a seizure of blood. However, the need to supply the police and prosecutors with an additional tool for law enforcement that does not require individualized suspicion does not appear great. Having considered the three factors from the Supreme Court's analysis in **Acton**, we conclude that AS 28.35.031(g) permits unreasonable intrusions contrary to the Fourth Amendment.

We also reach the same conclusion under article I, section 14 of the Alaska Constitution. The Alaska Constitution restricts the legislature's authority to permit searches without a warrant.⁴⁷ Article I, section 14 provides broader protection than the Fourth Amendment, especially when it is construed together with the right to privacy provision of article I, section 22.⁴⁸

We asked for additional briefing on whether the search of Blank's breath would have been permitted under the Fourth Amendment if the police had probable cause to believe that Blank committed a crime. In its response, the State suggests that Fourth Amendment concerns with the statute could be avoided if we construe AS 28.35.031(g) to require that the police have probable cause to believe that the tested driver has committed a crime, here vehicular homicide and hit and run. We recognize that a statute can be construed in a manner that does not raise constitutional concerns.⁴⁹

However, the State's proposed construction of the statute overlooks **Layland v. State**.⁵⁰ Layland was receiving treatment at a hospital for his own injuries from a motor vehicle accident where another individual was killed. The police asked Layland for his consent to obtain a blood sample. Layland declined that request. Although the police had probable cause to arrest Layland for negligent homicide arising out of the accident, they did not arrest him. Instead, the police seized a blood sample from Layland without a warrant. Our supreme court held that the warrantless seizure of Layland's blood was unconstitutional under both the federal and the state constitutions.⁵¹

In **Schmerber v. California**,⁵² the Supreme Court held that a warrant was not required to seize blood from a driver under arrest for driving while intoxicated.⁵³ On first blush, it appeared that the Supreme Court held that the search was justified because it was incident to Schmerber's arrest. Besides the seeming requirement of an arrest, the Supreme Court required that the police have "clear indication" that the seizure of blood would provide evidence, and required that the police reasonably believe that there was an emergency because the evidence would be lost if the search was delayed for the time needed to obtain a warrant.⁵⁴ In **Layland**, the Alaska Supreme Court followed **Schmerber** and interpreted the Alaska search and seizure clause, article I, section 14, to permit a warrantless seizure of blood only if a suspect had been arrested and only if there were exigent circumstances justifying the search.⁵⁵

But later cases cast doubt on our supreme court's interpretation of **Schmerber**. It now appears that the Fourth Amendment permits a warrantless search of a suspect who has not been arrested if the police have (1) probable cause to believe that the suspect committed a crime; (2) probable cause to believe that a search of the suspect's person would produce evidence; and (3) there are

exigent circumstances requiring immediate action. In **Cupp v. Murphy**,⁵⁶ the Supreme Court approved the warrantless seizure of scrapings from under a suspect's fingernails. The suspect was not under arrest and was not arrested after the police completed the search. The Court assumed that there was probable cause that the suspect had committed a homicide by strangling the victim with his hands and found that exigent circumstances justified the immediate seizure of the fingernail scrapings because the suspect had been alerted to the police interest in the evidence and the evidence may have been destroyed if the police did not act.⁵⁷ Furthermore, in **Winston v. Lee**,⁵⁸ the Supreme Court discussed **Schmerber** and stated: "Because [**Schmerber**] fell within the exigent-circumstances exception to the warrant requirement, no warrant was necessary."⁵⁹ No mention was made in **Winston** that an arrest was required. And, in **U.S. v. Chapel**,⁶⁰ an *en banc* panel of the Ninth Circuit held that the Fourth Amendment does not require the police to arrest a motorist suspected of driving while intoxicated before the motorist's blood could be seized without a warrant. As long as the warrantless seizure meets the other requirements of **Schmerber** ((1) the police must have probable cause to believe that the suspect was driving while intoxicated; (2) the police must reasonably believe there is an emergency in which the delay in obtaining a warrant threatens the loss of evidence; (3) the procedure to obtain the evidence must be reasonable), the seizure is authorized under the Fourth Amendment.⁶¹

This approach is endorsed by Professor LaFare in his treatise on the Fourth Amendment:⁶² "The better view is . . . that a 'warrantless search is proper if the officer had probable cause to believe that a crime had been committed and probable cause to believe that evidence of the crime in question will be found' and that 'an immediate, warrantless search is necessary in order to . . . prevent the destruction or loss of evidence.'"⁶³

Nonetheless, although the Fourth Amendment may not require an arrest before the warrantless seizure of evidence from a suspect in Blank's circumstances, our supreme court in **Layland** ruled that article I, section 14 of the Alaska Constitution does require that formality.⁶⁴ The court reasoned as follows:

In our view, strict adherence to the substantially contemporaneous arrest requirement ensures to persons suspected of driving under the influence of alcohol protection from arbitrary denials of their right of privacy. Adherence to the substantially contemporaneous arrest prerequisite provides some measure of assurance that probable cause is based upon considerations independent of the blood-alcohol test results.⁶⁵

Professor LaFare maintains that our court's concern is "untenable, as the need for a court to determine that probable cause existed prior to the test is present under either rule."⁶⁶ Even so, the **Layland** court concluded that the warrantless seizure of Layland's blood could not be justified under the exigent-circumstances exception to the warrant requirement.⁶⁷ We are bound to follow the decisions of our supreme court.⁶⁸ Because Blank was not under arrest when she was searched, the portable breath test result was obtained contrary to article I, section 14 of the Alaska Constitution.

The State argues that because the portable breath test was obtained in good faith compliance with the dictates of the statute, suppression is not an appropriate remedy even if the statute is unconstitutional because the police complied with the direction of the statute.⁶⁹ But this argument is unconvincing. The statute did not mandate testing. Rather, it gave the police discretion to test a driver who was involved in an accident where someone else was seriously injured ("the test or tests may be administered at the direction of a law enforcement officer . . ."70).

The State argues that the failure to arrest Blank was harmless beyond a reasonable doubt because the record establishes that the police could have arrested Blank when the portable breath test was administered. However, we have ruled that the evidence was inadmissible under **Layland**. The State argued to the jury that Blank's blood alcohol level as shown by the portable breath test was relevant evidence to meet the burden of proof for both manslaughter and failure to render assistance. The State claimed that Blank's blood alcohol level showed that Blank was impaired and that her impairment affected her ability to perceive the risk caused by her conduct. As instructed, the jury could find that the State met its burden of proof on the mental state for each crime charged by showing that Blank failed to perceive the risk of her conduct because of her impairment. The State additionally presented expert testimony on the rate that alcohol was absorbed and metabolized, allowing inferences to be drawn from the alcohol level at the time of the portable breath test. The State also presented expert testimony regarding the influence of alcohol on cognitive and physical functions at various blood alcohol levels and evidence of a consensus in the scientific community that a person with a .08 level is too impaired to drive. Finally, the State used the .082 breath test result to attack Blank's credibility by presenting expert testimony that she could not have consumed only two beers as she reported to Trooper Tyler and obtained a .082 portable breath test result, but that she would have to have had four times the amount of beer that she reported to obtain that result. We cannot conclude that the use of the portable breath test result was harmless. Therefore, Blank's convictions must be reversed because Blank's breath test was illegally obtained and admitted at her trial.

Conclusion

The judgment of the superior court is REVERSED.

DISPOSITION

The judgment of the superior court is REVERSED.

DISSENT

MANNHEIMER, Judge, dissenting.

I agree with my colleagues that the breath test result must be suppressed. The trooper who administered the test to Blank had probable cause to believe that Blank had committed two

crimes: manslaughter and felony hit-and-run. The trooper also had probable cause to believe that the alcohol in Blank's breath (or, conversely, the absence of alcohol in her breath) would be evidence relevant to these crimes. But in **Layland v. State**,¹ the Alaska Supreme Court ruled that the existence of probable cause does not authorize a search of a motorist's breath or blood unless the motorist is arrested. As Judge Stewart explains in the majority opinion, it appears that **Layland** is based on a misinterpretation of the United States Supreme Court's decision in **Schmerber v. California**.² Even so, we are bound by **Layland**.

But though I agree that the breath test result must be suppressed, I disagree with my colleagues concerning the effect of this error on Blank's convictions. Blank was convicted of two crimes: manslaughter and felony hit-and-run (leaving the scene of an injury accident). Suppression of the breath test evidence requires reversal of Blank's manslaughter conviction, but it does not require reversal of Blank's hit-and-run conviction.

In arguing that Blank was guilty of manslaughter, the prosecutor relied heavily on the breath test result. He argued that the test result showed that Blank had been drinking more than the one beer she admitted. He also urged the jury to infer that Blank's consumption of alcohol had affected her concentration and attentiveness while driving -- that it had been a factor in causing the accident.

But when the prosecutor argued that Blank was guilty of hit-and-run, he paid almost no attention to Blank's consumption of alcohol and her possible intoxication. The prosecutor did not argue that Blank was too drunk to understand that she had hit someone.³ Rather, the prosecutor argued that the circumstances of the collision and the actions Blank took following the collision clearly demonstrated that Blank was aware that she had struck someone.

The prosecutor pointed out that Blank's vehicle struck Per nye McDowell so hard that the impact cracked the windshield, broke off the side-view mirror, and smashed out the front passenger window. He reminded the jury that one of Blank's children testified that, a few moments after the collision, Blank asked, "Did I hit somebody?", and her daughter Tori replied that she thought they had hit someone.

But despite her daughter's answer, Blank drove away from the scene -- and she drove away fast. The prosecutor asked the jury to remember the testimony given by a boy who was playing in a neighboring yard. The boy testified that he heard the collision and then, immediately afterward, he heard a woman (McDowell's friend) crying "Help, help!", and then he heard the sound of tires squealing. Blank accelerated away from the scene of the collision and (in the prosecutor's words) "made a bee-line ... to her house". She drove over ruts and boulders, wedging rocks in the undercarriage of her car. When she arrived, she put her car in the garage and closed the garage door so that the car could not be seen.

In short, the jury's decision to convict Blank of felony hit-and-run did not depend on a finding that Blank was intoxicated (or even that she had been drinking). The prosecutor argued that, intoxicated or not, Blank understood that she had struck someone. Her vehicle had suffered obvious damage, and her own daughter told her that she thought they had hit somebody. Despite

this, Blank did not stop to find out what had happened; instead, she drove away at high speed without looking back.

Given this evidence, and given the way the prosecutor argued the case, there is no reasonable possibility that the jury's hit-and-run verdict was affected by the breath test evidence.⁴ I would therefore affirm Blank's hit-and-run conviction.

OPINION FOOTNOTES

1 AS 11.41.120(a).

2 AS 28.35.060(a).

3 See *Miranda v. Arizona*, 384 U.S. 436, 443-44, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966).

4 590 P.2d 888 (Alaska 1979).

5 *Id.* at 895.

6 *Id.*

7 *Id.*

8 See *State v. Ridgely*, 732 P.2d 550, 554 (Alaska 1987).

9 See *Id.* at 554; *Troyer v. State*, 614 P.2d 313, 318 (Alaska 1980).

10 See *Sovalik v. State*, 612 P.2d 1003, 1006 (Alaska 1980).

11 722 P.2d 943 (Alaska 1986).

12 *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978).

13 See *Malkin*, 722 P.2d at 946 (citing *Franks*, 438 U.S. at 155-56).

14 See *id.*

15 See 722 P.2d at 946 n.6.

16 See *Davenport v. State*, 515 P.2d 377, 380 (Alaska 1973).

17 872 P.2d 627 (Alaska App. 1994).

18 *Id.* at 642 (quoting 3 Wayne R. LaFare, *Search and Seizure: A Treatise on the Fourth Amendment*, § 7.5(c) (3d ed. 1996) (quoting *People v. Teale*, 70 Cal. 2d 497, 75 Cal. Rptr. 172, 450 P.2d 564 (1969)) (other footnotes omitted) .

19 See *Schmid v. State*, 615 P.2d 565, 575 (Alaska 1980); *United States v. Reed*, 15 F.3d 928, 933 (9th Cir. 1994).

20 See *Burnett v. Municipality of Anchorage*, 678 P.2d 1364, 1368 (Alaska App. 1984); *Burnett v. Municipality of Anchorage*, 806 F.2d 1447, 1449 (9th Cir. 1986).

21 *Leslie v. State*, 711 P.2d 575 (Alaska App. 1986).

22 *Id.* at 577.

23 AS 28.35.031(b).

24 See *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 619, 103 L. Ed. 2d 639, 109 S. Ct. 1402 (1989) (quotations and citations omitted).

25 *Id.*

26 *Id.* at 608-13.

27 *Id.* at 624.

28 *Id.* at 628.

29 See *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665-66, 103 L. Ed. 2d 685, 109 S. Ct. 1384 (1989).

30 *Id.*

31 *Id.* at 660-65.

32 *Id.* at 679.

33 *Id.*

34 *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 115 S. Ct. 2386, 132 L. Ed. 2d 564 (1995).

35 *Id.* at 664-666.

36 *Id.* at 649.

37 *Id.* at 661.

38 *Id.* at 656-57.

39 *Id.* at 654-57.

40 *Id.* at 658-60.

41 *Id.* at 660-64.

42 *Id.* at 664-66.

43 1994 House Journal 2262-64.

44 See *Skinner*, 489 U.S. at 619; *Von Raab*, 489 U.S. at 665; *Vernonia*, 515 U.S. at 653; *Chandler v. Miller*, 520 U.S. 305, 313-14, 137 L. Ed. 2d 513, 117 S. Ct. 1295 (1977).

45 *Chandler*, 520 U.S. at 314.

46 *Skinner*, 489 U.S. at 624.

47 See *Woods & Rohde, Inc. v. Alaska Dep't of Labor*, 565 P.2d 138, 150-52 (Alaska 1977) (striking down a statute that authorized warrantless inspections of workplaces because it violated article I, section 14 of the Alaska Constitution).

48 See *State v. Ricks*, 816 P.2d 125, 127 (Alaska 1991); *Rohde*, 565 P.2d at 150-51.

49 See *Kenai Peninsula Borough v. Cook Inlet Region, Inc.*, 807 P.2d 487, 498 (Alaska 1991).

50 535 P.2d 1043 (Alaska 1975), overruled on other grounds by *Anchorage v. Geber*, 592 P.2d 1187, 1191-92 & n.8 (Alaska 1979).

51 *Layland*, 535 P.2d at 1044-45 & 1050.

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

53 *Id.* at 771-72.

54 *Id.* at 770-71.

55 See *Layland*, 535 P.2d at 1045, 1048-49.

56 *Cupp v. Murphy*, 412 U.S. 291, 93 S. Ct. 2000, 36 L. Ed. 2d 900 (1973).

57 *Id.* at 296.

58 *Winston v. Lee*, 470 U.S. 753, 105 S. Ct. 1611, 84 L. Ed. 2d 662 (1985).

59 *Id.* at 759.

60 55 F.3d 1416 (9th Cir. 1995).

61 See *id.* at 1418-19.

62 See 3 Wayne R. LaFare, *Search and Seizure: A Treatise on the Fourth Amendment*, § 5.4(b), at 155-63 (3d ed. 1996).

63 *Id.* at 160-61 (footnotes omitted).

64 See *Layland*, 535 P.2d at 1048-50; *Municipality of Anchorage v. Ray*, 854 P.2d 740, 749-50 (Alaska App. 1993).

65 *Layland*, 535 P.2d at 1049.

66 3 Wayne R. LaFare, *Search and Seizure*, § 5.4(b), at 162.

67 *Layland*, 535 P.2d at 1050.

68 See *Harrison v. State*, 791 P.2d 359, 363 (Alaska App. 1990).

69 See *Illinois v. Krull*, 480 U.S. 340, 350, 94 L. Ed. 2d 364, 107 S. Ct. 1160 (1987).

70 See AS 28.35.031(g).

DISSENT FOOTNOTES

1 535 P.2d 1043, 1047-49 (Alaska 1975).

2 384 U.S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966).

3 See AS 11.81.900(a)(2), which allows the State to prove the culpable mental state of "knowingly" by proving that the defendant would have known of the relevant circumstance but for the defendant's intoxication.

4 See *Love v. State*, 457 P.2d 622, 629-631 (Alaska 1969) (the improper admission of evidence at a criminal trial does not require reversal of a conviction unless the evidence substantially influenced the jury's decision).

Sec. 28.35.031. Implied consent.

(a) A person who operates or drives a motor vehicle in this state or who operates an aircraft as defined in AS 28.35.030(o)(2) or who operates a watercraft as defined in AS 28.35.030(o)(3) shall be considered to have given consent to a chemical test or tests of the person's breath for the purpose of determining the alcoholic content of the person's blood or breath if lawfully arrested for an offense arising out of acts alleged to have been committed while the person was operating or driving a motor vehicle or operating an aircraft or a watercraft while intoxicated or if lawfully arrested under AS 28.35.280 for the offense of minor operating a vehicle after consuming alcohol. The test or tests shall be administered at the direction of a law enforcement officer who has reasonable grounds to believe that the person was operating or driving a motor vehicle or operating an aircraft or a watercraft in this state while intoxicated or that the person was a minor operating a vehicle after consuming alcohol.

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

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

(2) committed a moving traffic violation or unlawfully operated an aircraft or watercraft; in this paragraph, "unlawfully" means in violation of any federal, state, or municipal statute, regulation, or ordinance, except for violations that do not provide reason to believe that the operator's ability to operate the aircraft or watercraft was impaired by the ingestion of alcoholic beverages; or

(3) was operating or driving a motor vehicle in violation of AS 28.35.029(a).

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

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

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

(f) If a driver or operator is arrested, the provisions of (a) of this section apply. The preliminary breath test authorized in this section is in addition to any tests authorized under (a) of

this section.

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

(h) Nothing in this section shall be construed to restrict searches or seizures under a warrant issued by a judicial officer, in addition to a test permitted under this section.

(§ 1 ch 83 SLA 1969; am § 11 ch 129 SLA 1980; am § 16 ch 117 SLA 1982; am § 16 ch 77 SLA 1983; am §§ 1 - 4 ch 76 SLA 1985; am § 2 ch 142 SLA 1988; am § 7 ch 55 SLA 1994; am § 8 ch 143 SLA 1996; am § 12 ch 63 SLA 2001)

Revisor's notes. The last clause of (b)(2) of this section was enacted as AS 28.35.031(g). Reorganized in 1985.

In 1995, in subsection (a), "AS 28.35.030(o)(2)" was substituted for "AS 28.35.030(m)(2)" and "AS 28.35.030(o)(3)" was substituted for "AS 28.35.030(m)(3)" to reflect the 1995 relettering of AS 28.35.030(m) as AS 28.35.030(o).

Effect of amendments. The 1994 amendment, effective August 22, 1994, added subsection (g).

The 1996 amendment, effective November 8, 1996, in subsection (a), added "or if lawfully arrested under AS 28.35.280 for the offense of minor operating a vehicle after consuming alcohol" at the end of the first sentence and "or that person was a minor operating a vehicle after consuming alcohol" at the end of the second sentence.

The 2001 amendment, effective July 4, 2001, added subsection (h).

Editor's notes. Section 22, ch. 143, SLA 1996 provides that "[s]ections 1-13 and 17-21 of this Act apply only to acts committed on or after November 8, 1996 except that to the extent that the amendments made by §§ 6, 7, 10, 11, and 18-21 of this Act involve prior convictions, those prior convictions may have occurred before, on, or after November 8, 1996."

Legislative history reports. For Governor's transmittal letter on HB 445 (from which ch. 55, SLA 1994, which enacted (g) of this section, derived), see 1994 House Journal 2262-2263.

Opinions of attorney general. The Intoximeter 3000, an infrared alcohol breath test apparatus, is a "chemical test" under this section. 1984 Op. Att'y Gen. No. 01.

NOTES TO DECISIONS

Section constitutional. - The portable breath test authorized by this section does not constitute an

unreasonable search under the fourth amendment to the United States Constitution. *Leslie v. State*, 711 P.2d 575 (Alaska Ct. App. 1986).

The imposition of criminal penalties upon a motorist for his peaceful refusal to submit to a breath test does not violate his right to equal protection under the law. *Burnett v. Municipality of Anchorage*, 634 F. Supp. 1029 (D. Alaska 1986), *aff'd*, 806 F.2d 1447 (9th Cir. 1986).

The implied consent statute clearly serves a legitimate state interest. All drivers lawfully stopped are treated equally, and, from the perspective of the fourth and fourteenth amendments, those drivers are treated no differently from other sorts of persons suspected of committing criminal acts. *Burnett v. Municipality of Anchorage*, 634 F. Supp. 1029 (D. Alaska 1986), *aff'd*, 806 F.2d 1447 (9th Cir. 1986).

Subsection (g) unconstitutional. - Having considered the three factors from the Supreme Court's analysis in *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 115 S. Ct. 2386, 132 L. Ed. 2d 564 (1995), the court concluded that subsection (g) permits unreasonable intrusions contrary to the Fourth Amendment of the U.S. Constitution and to Alaska Const., art. I, § 14. *Blank v. State*, 3 P.3d 359 (Alaska 2000).

Seizure of vehicle in absence of probable cause. - To the extent that AS 28.35.070 authorizes seizure of a vehicle in the absence of probable cause to believe that a crime has occurred, it is potentially unconstitutional for the same reasons as subsection (g). *Schoenthaler v. State*, P.2d (Alaska Ct. App. 2000).

Legislative intent. - In the implied consent statutes, the legislature has gone to great lengths to avoid authorizing the police to take blood alcohol tests forcibly from defendants charged with driving while intoxicated; the legislature has, instead, provided extremely strong incentives to a defendant to take a breath test for blood alcohol by providing criminal penalties. *Bass v. Municipality of Anchorage*, 692 P.2d 961 (Alaska Ct. App. 1984).

Applicability. - This section does not apply to everyone who is in police custody under circumstances that amount to a fourth amendment arrest. It applies only to persons lawfully arrested on the specific charge of operating a motor vehicle while intoxicated. *Longley v. State*, 776 P.2d 339 (Alaska Ct. App. 1989).

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

Just as a driver's failure to cooperate in the search conducted by means of a breathalyzer test is no impediment to the classification of the proceeding as a search incident to arrest, the absence of cooperation is no bar to the characterization of the taking of breath as a consent search for which consent has already been supplied by the act of driving on Alaska roads. *Burnett v. Municipality of Anchorage*, 634 F. Supp. 1029 (D. Alaska 1986), *aff'd*, 806 F.2d 1447 (9th Cir. 1986).

Analysis of this section and AS 28.35.032 demonstrates the legislature's intention that drivers be considered to have consented to a chemical test for determining the alcohol content of their blood and that refusal on the driver's part to submit to such a test will trigger certain specified consequences. *Wirz v. State*, 577 P.2d 227 (Alaska 1978).

As the supreme court analyzes the legislature's intent in enacting this section and AS 28.35.032, the sections provide that the operator of a motor vehicle in Alaska has consented to chemical tests of his blood's alcohol content and that after the arrested operator refuses to take the chemical test, he must be advised of the consequences flowing from his contemplated refusal. The arrestee must be permitted to reconsider his refusal in light of that information. *Wirz v. State*, 577 P.2d 227 (Alaska 1978).

The warnings contained in this section and AS 28.35.032(a) are designed to prompt a motorist to give consent to a breath test by making sure he understands the consequences of refusal, and they do not impliedly limit the government's introduction of evidence concerning field sobriety tests. *McCormick v. Municipality of Anchorage*, P.2d (Alaska Ct. App. 2000).

Motorists can't choose testing method. - The due process clause does not confer on motorists the right to control or dictate the form of chemical testing. *Hamilton v. Municipality of Anchorage*, 878 P.2d 653 (Alaska Ct. App. 1994).

Application of case law. - *Municipality of Anchorage v. Serrano*, 649 P.2d 256 (Alaska Ct. App. 1982), and *Cooley v. Municipality of Anchorage*, 649 P.2d 251 (Alaska Ct. App. 1982), apply to only three categories of cases: (1) cases formally joined with those decided in *Serrano* and *Cooley*; (2) cases in which suppression had already been ordered on or before August 6, 1982; and (3) cases in which breathalyzer tests were administered after August 6, 1982. *State v. Lamb*, 649 P.2d 971 (Alaska Ct. App. 1982).

Statutes do not explicitly grant right to refuse test. - Neither this section nor AS 28.35.032(a) explicitly grants or recognizes a right on the part of an arrestee to refuse to take a breathalyzer test. *Wirz v. State*, 577 P.2d 227 (Alaska 1978).

One required to take a breathalyzer test under this section does not have any statutory or constitutional right to refuse to take it. *Pears v. State*, 672 P.2d 903 (Alaska Ct. App. 1983), rev'd on other grounds, 698 P.2d 1198 (Alaska 1985).

Nor do they impose a duty upon the arresting officer to advise the driver that he has the right to refuse to take the test. *Wirz v. State*, 577 P.2d 227 (Alaska 1978).

Neither this section nor AS 28.35.032 requires that the arrested operator be advised he has the right to refuse to take a chemical test for the purpose of determining the alcohol content of his blood. *Wirz v. State*, 577 P.2d 227 (Alaska 1978).

One required to take a breathalyzer test under this section does not have to be advised that he does not have to take examination. *Pears v. State*, 672 P.2d 903 (Alaska Ct. App. 1983), rev'd on other grounds, 698 P.2d 1198 (Alaska 1985).

And the supreme court would not imply a requirement that an arrestee be advised that he has the right to refuse to take a breathalyzer test. *Wirz v. State*, 577 P.2d 227 (Alaska 1978).

Given the absence of a specific requirement that arrestees be advised of a right to refuse to undergo the chemical test, it would be inappropriate for this court to engraft such a requirement onto this section. *Wirz v. State*, 577 P.2d 227 (Alaska 1978).

Although several states have chosen to provide that the arrestee has a right to refuse to take a breathalyzer test and, further, that the arresting officer must inform him of such right, Alaska's legislature has not adopted such provisos. *Wirz v. State*, 577 P.2d 227 (Alaska 1978).

Advice to arrestee confused about rights. - Where an arrested person refuses to submit to a breathalyzer test, the administering officer must inquire into the nature of the refusal and, if it appears that the refusal is based on a confusion about the person's rights, the officer must clearly advise that person that the rights contained in the Miranda warning do not apply to the breathalyzer examination. *Graham v. State*, 633 P.2d 211 (Alaska 1981).

Warnings of consequences of refusal. - While evidence of the warnings given regarding the consequences of refusal to take a breathalyzer test may have been relevant to the issue of mens rea, the absence of more detailed warnings regarding penalties for refusal did not deprive defendant of due

process or warrant a directed verdict of acquittal in his favor. *Svedlund v. Municipality of Anchorage*, 671 P.2d 378 (Alaska Ct. App. 1983), construing municipal ordinance.

Motorist under arrest upon being read the form. - When motorist was read the implied consent form informing him that he was under arrest for driving while intoxicated, he was under arrest as that term is defined in AS 12.25.160, and therefore, was under arrest for Criminal Rule 45 purposes. *Longley v. State*, 776 P.2d 339 (Alaska Ct. App. 1989).

Waiver of right to challenge breath test. - A defendant waives his constitutional right to challenge the results of an intoximeter test despite his intoxication where he is read a notice form advising him of his right to obtain an independent test of his blood alcohol level by having a sample of blood drawn at a police chosen medical facility, where he checks the appropriate box in the notice form declining the independent test, and where he appears to know what he is doing. *Gundersen v. Municipality of Anchorage*, 792 P.2d 673 (Alaska 1990).

Refusal irrelevant after administration of breath test. - Revocation of her driver's license was improper where driver could not be deemed to have refused the breath test after officers actually administered a breath test and obtained potentially probative evidence. *State v. Shakespeare*, 4 P.3d 322 (Alaska 2000).

Police officer had probable cause to arrest a driver for driving while intoxicated, where the driver was stopped for speeding, failed to pass a horizontal gaze nystagmus (HGN) test but passed four other field sobriety tests, and exhibited several signs of intoxication, including the odor of alcohol, watery and bloodshot eyes, unsteady balance, "bouncy" gait, confusion, talkativeness, and difficulty in showing vehicle registration. *State v. Grier*, 791 P.2d 627 (Alaska Ct. App. 1990).

Breath test illegally obtained. - Defendant's convictions were reversed because defendant's breath test was illegally obtained and admitted at her trial where the police did not have any individualized suspicion that defendant's ability to operate a motor vehicle was impaired by the ingestion of alcoholic beverages. *Blank v. State*, 3 P.3d 359 (Alaska 2000).

This section and AS 28.35.032 do not contemplate an evidentiary use of the fact of refusal to submit to a breathalyzer test. *Puller v. Municipality of Anchorage*, 574 P.2d 1285 (Alaska 1978).

Preservation of breath samples. - Due process clause of the Alaska Constitution requires prosecution to make reasonable efforts to preserve breath samples or to take other steps to allow defendant to verify results of breathalyzer test. *Municipality of Anchorage v. Serrano*, 649 P.2d 256 (Alaska Ct. App. 1982).

Request for counsel before breathalyzer test. - District court judge's finding that defendant, convicted of driving while intoxicated under municipal code, did not request counsel prior to taking the breathalyzer examination where he never asked to speak to an attorney but asked whether he might need an attorney, with testimony supporting the conclusion that he wondered if he needed an attorney in order to make bail, not because he wanted advice about submitting to a breathalyzer exam, was not clearly erroneous, and superior court judge should not have reversed the conviction. *Anchorage v. Erickson*, 690 P.2d 20 (Alaska Ct. App. 1984).

Right to counsel before breathalyzer test. - When a person is arrested for operating a motor vehicle in violation of state or local drunken driving ordinances, and requests to contact an attorney, the arrestee must be afforded a reasonable opportunity to do so before being required to decide whether or not to submit to a breathalyzer test; and where arrestee is denied that opportunity, subsequently obtained evidence, whether in form of test results or of refusal to take test, must be suppressed. *Copelin v. State*, 659 P.2d 1206 (Alaska 1983), cert. denied, 469 U.S. 1017, 105 S. Ct. 430, 83 L. Ed. 2d 357 (1984).

The statutory right to contact and consult with counsel prior to being required to decide whether or not

to submit to a breathalyzer test is not an absolute one, which might involve a delay long enough to impair testing results, but rather a limited one of reasonable time and opportunity that can be reconciled with the implied consent statutes. *Copelin v. State*, 659 P.2d 1206 (Alaska 1983), cert. denied, 469 U.S. 1017, 105 S. Ct. 430, 83 L. Ed. 2d 357 (1984).

A person suspected of driving while intoxicated had a statutory right to contact an attorney before deciding whether or not to submit to a breathalyzer test if (1) he requested an opportunity to contact an attorney, and (2) granting the request would not involve a delay long enough to impair test results. *Svedlund v. Municipality of Anchorage*, 671 P.2d 378 (Alaska Ct. App. 1983).

A breathalyzer exam is not a "critical stage" at which the constitution requires counsel's presence. *Svedlund v. Municipality of Anchorage*, 671 P.2d 378 (Alaska Ct. App. 1983).

While a defendant has a statutory right to contact counsel, where he never requested an opportunity to contact counsel and there was nothing in the record to show that the police affirmatively interfered with any attempt by defendant to obtain counsel, he was not denied right to counsel. *Svedlund v. Municipality of Anchorage*, 671 P.2d 378 (Alaska Ct. App. 1983).

It is only where the totality of the arrestee's words constitute a request, express or implied, for an opportunity to contract counsel for the purpose of discussing a breathalyzer examination that an opportunity to consult counsel must be provided prior to administration of the breathalyzer. Once the breathalyzer examination is completed or refused and videotaping finished, the suspect is entitled to the full use of the rights guaranteed by AS 12.25.150(b) and Criminal Rule 5(b). *Van Wormer v. State*, 699 P.2d 895 (Alaska Ct. App. 1985).

Where the judge determined, based on the evidence, that the DWI defendant's statements regarding having somebody present did not relate to a desire to consult with counsel about breathalyzer examinations or field sobriety test, but rather related to having someone present to observe the administration of the test, perhaps a technician, to insure its validity, the judge was not clearly erroneous in concluding that the defendant did not properly invoke his Copelin rights and that the results of the breathalyzer examination should not be suppressed. *Van Wormer v. State*, 699 P.2d 895 (Alaska Ct. App. 1985).

The result of a breathalyzer test secured in violation of the right to counsel should be excluded in a civil license revocation proceeding. *Whisenhunt v. State*, Dep't of Pub. Safety, 746 P.2d 1298 (Alaska 1987).

Trooper's failure to read yellow pages listing of attorneys to defendant when he knew defendant did not have his glasses, and failure to advise defendant regarding persons he might call for assistance, did not violate defendant's right to speak with an attorney prior to deciding whether to submit to a breath test. *Saltz v. State*, Dep't of Pub. Safety, 942 P.2d 1151 (Alaska 1997).

Miranda rights. - Defendant's constitutional rights were not violated by not informing him of his Miranda rights prior to asking him to take a breathalyzer exam. *Svedlund v. Municipality of Anchorage*, 671 P.2d 378 (Alaska Ct. App. 1983), construing municipal law.

Videotape recording of defendant while a breathalyzer examination was being administered to him and while he performed other sobriety tests, made at state trooper headquarters following defendant's arrest for operating a motor vehicle while under the influence of intoxicating liquor [now driving while intoxicated], did not violate defendant's right to privacy under Alaska Const., art. I, § 22. *Palmer v. State*, 604 P.2d 1106 (Alaska 1979). But see, *Copelin v. State*, 659 P.2d 1206 (Alaska 1983), cert. denied, 469 U.S. 1017, 105 S. Ct. 430, 83 L. Ed. 2d 357 (1984), and *Yerrington v. Anchorage*, 675 P.2d 649 (Alaska Ct. App. 1983).

The Implied Consent Statute was intended to provide an exclusive method for obtaining

direct evidence of a suspect's blood alcohol content, absent his or her express consent to the use of some other form of testing. *Anchorage v. Geber*, 592 P.2d 1187 (Alaska 1979).

Right to independent test after refusal of breath test. - A person arrested for driving while intoxicated is entitled by the Alaska Constitution to an independent chemical test even if that person refuses to take the statutorily prescribed breath test. *Snyder v. State*, 930 P.2d 1274 (Alaska 1996).

Due process requires opportunity for independent test. - Since the results of an intoximeter test provide the state with potentially incriminating evidence at the risk of criminal penalties, due process requires that the defendant be given an opportunity to challenge the reliability of the evidence with an independent test. *Gundersen v. Municipality of Anchorage*, 792 P.2d 673 (Alaska 1990).

Motorist was denied due process and his breath test results should have been suppressed, where his minimal ability to speak and understand English prevented him from understanding the arresting officer's explanation of his right to obtain independent testing of the intoximeter result. *Ahtuanguaruk v. State*, 820 P.2d 310 (Alaska Ct. App. 1991).

Opportunity for drawing of blood at police-selected facility preserves defendant's right to independent test. - A form notice notifying the defendant of the right to challenge the results of an intoximeter test by having a sample of blood drawn at a local medical facility chosen by the police satisfies the defendant's right to obtain an independent test of his own choosing performed by a physician of his own choosing because the drawing of blood is a reasonable alternative test procedure and because the defendant made no allegation that the police-selected facility would not administer a reliable test. *Gundersen v. Municipality of Anchorage*, 792 P.2d 673 (Alaska 1990).

Unavailability of breath testing device no reason for blood draw. - In two specific circumstances Alaska's implied consent statutes permit a driver's blood to be drawn for chemical testing for evidence of driving while intoxicated, and those circumstances do not include unavailability of a breath testing device. *Sosa v. State*, 4 P.3d 951 (Alaska 2000).

No other chemical test allowed after breath test refused. - The express language of AS 28.35.032(a), coupled with the legislative history of this section, leads to the conclusion that in enacting the Implied Consent Statute the legislature intended that once a breath test had been refused no other chemical test would be allowed. *Anchorage v. Geber*, 592 P.2d 1187 (Alaska 1979) decided prior to the enactment of AS 28.35.035, authorizing the administration of a chemical test without consent in certain circumstances.

In prosecuting a charge of operating a motor vehicle while under the influence of intoxicating liquor [now driving while intoxicated], law enforcement officials cannot utilize the results of a blood alcohol test, when the blood used in performing the test was extracted from the accused against his or her will, after refusal to submit to a breathalyzer examination. *Anchorage v. Geber*, 592 P.2d 1187 (Alaska 1979) decided prior to the enactment of AS 28.35.035, authorizing the administration of a chemical test without consent in certain circumstances.

Use of search warrant. - The implied consent statute does not constitute an affirmative prohibition against the independent means of using a search warrant to obtain a sample of blood from a person who has refused to submit to a breathalyzer test after being arrested for an offense arising from an act committed by him while driving under the influence of intoxicating liquor. *Pena v. State*, 664 P.2d 169 (Alaska Ct. App. 1983), rev'd on other grounds, 684 P.2d 864 (Alaska 1984).

Implied Consent Statutes in effect at the time of the arrests of defendants in 1980 and 1981 precluded the admission into evidence of chemical sobriety test results obtained pursuant to a search warrant after the arrestees had refused to take such a test. *Pena v. State*, 684 P.2d 864 (Alaska 1984).

Limitation for purposes other than DWI prosecutions. - AS 28.35.032(a) cannot be restricted to

apply solely to driving while intoxicated prosecutions, and to the extent that the statute, by providing that "a chemical test shall not be given" following a breathalyzer refusal, affirmatively limits the manner in which evidence of intoxication may be obtained, its limitation must apply with equal force in all prosecutions arising out of acts alleged to have been committed while the defendant was operating or driving a motor vehicle while intoxicated." *Pena v. State*, 664 P.2d 169 (Alaska Ct. App. 1983), rev'd on other grounds, 684 P.2d 864 (Alaska 1984).

This section does not apply just to the offense of driving while intoxicated but also to any offense which arose out of acts which were committed while a person was driving while intoxicated. *Pears v. State*, 672 P.2d 903 (Alaska Ct. App. 1983), rev'd on other grounds, 698 P.2d 1198 (Alaska 1985).

"Chemical test" means any chemical test. - The language of AS 28.35.032(a) stating that after refusal to submit to a test of the breath, "a chemical test shall not be given," meant any chemical test, be it of the breath, blood, urine or otherwise, and not just a chemical test of the breath. *Anchorage v. Geber*, 592 P.2d 1187 (Alaska 1979).

Defendant should be permitted to check the specific ampoules used in his breathalyzer test. *Lauderdale v. State*, 548 P.2d 376 (Alaska 1976).

Since they could be evidence of propriety of test. - The test and reference ampoules could be probative evidence of the propriety or impropriety of the breathalyzer test. *Lauderdale v. State*, 548 P.2d 376 (Alaska 1976).

Denial of right to analyze components is reversible error. - Where defendant was charged with operating a motor vehicle while intoxicated, denial of the right to make an analysis of some of the components of the breathalyzer machine, that is to say, to "cross-examine" the results of the test, would be reversible error without any need for a showing of prejudice. It would be a denial of a right to a fair trial, and a fair trial is essential to affording an accused due process of law. *Lauderdale v. State*, 548 P.2d 376 (Alaska 1976).

Discretion of district court properly exercised in requiring production of ampoules used in breathalyzer test. - See *Lauderdale v. State*, 548 P.2d 376 (Alaska 1976).

District court was correct in suppressing results of breathalyzer test where state unable to produce ampoules used in test. - See *Lauderdale v. State*, 548 P.2d 376 (Alaska 1976).

State need not necessarily preserve breath sample. - The state need not preserve a defendant's breath sample where it provides the defendant with a reasonable opportunity to obtain an independent test by giving the defendant clear and express notice of his right to an independent test and by offering assistance in obtaining the test. *Gundersen v. Municipality of Anchorage*, 792 P.2d 673 (Alaska 1990).

Chemical tests not conclusively presumed accurate. - Due process will not allow the results of a chemical test authorized under subsection (a) to be conclusively presumed accurate. *Barcott v. State, Dep't of Pub. Safety*, 741 P.2d 226 (Alaska 1987).

Rule announced generally to have prospective effect but also to have partial retroactive effect. - See *Lauderdale v. State*, 548 P.2d 376 (Alaska 1976).

Jury demonstration of intoximeter test. - Where the main issue at trial was whether defendant, an asthmatic, was physically capable of blowing enough air into an intoximeter machine to trigger the mechanism and run the breath test, the trial judge did not abuse his discretion when he allowed the jurors in to go to the local police station and blow into the intoximeter. *Bowlin v. State*, 823 P.2d 676 (Alaska Ct. App. 1991).

Applied in *Nelson v. State*, 650 P.2d 426 (Alaska Ct. App. 1982); *Lawrence v. State*, 715 P.2d 1213

(Alaska Ct. App. 1986).

Quoted in Simpson v. Municipality of Anchorage, 635 P.2d 1197 (Alaska Ct. App. 1981); Lundquist v. Department of Pub. Safety, 674 P.2d 780 (Alaska 1983); Jensen v. State, 667 P.2d 188 (Alaska Ct. App. 1983); Brown v. State, 739 P.2d 182 (Alaska Ct. App. 1987); State, Dep't of Pub. Safety v. Conley, 754 P.2d 232 (Alaska 1988); Haynes v. State, Dep't of Pub. Safety, 865 P.2d 753 (Alaska 1993).

Stated in Javed v. Department of Pub. Safety, 921 P.2d 620 (Alaska 1996).

Cited in Coleman v. State, 658 P.2d 1364 (Alaska Ct. App. 1983); Romo v. Municipality of Anchorage, 697 P.2d 1065 (Alaska Ct. App. 1985); Cunningham v. State, 768 P.2d 634 (Alaska Ct. App. 1989); Thorne v. Department of Pub. Safety, 774 P.2d 1326 (Alaska 1989); State v. Zerkel, 900 P.2d 744 (Alaska Ct. App. 1995); Snyder v. State, 31 P.3d 770 (Alaska 2001).

Collateral references. 60 C.J.S., Motor Vehicles, § 164.113.

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

Validity, construction and application of statutes proscribing driving with blood-alcohol level in excess of established percentage, 54 ALR4th 149.

Challenges to use of breath tests for drunk drivers based on claim that partition or conversion ratio between measured breath alcohol and actual alcohol is inaccurate, 90 ALR4th 155.

HB

330

HOUSE COMMITTEE REPORT

(7)

Date Referred to Committee: January 16, 2002

FURTHER REFERRALS: Finance

Date of Committee Action: 2-11-02

The JUDICIARY Committee considered:

HB 330

HOUSE BILL NO. 330

PROVIDING ALCOHOL TO PERSONS UNDER 21

"An Act relating to providing alcoholic beverages to a person under 21 years of age."

Recommends it be replaced with CS HB 330 (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
- I-AA
- LAW
- LWF
- MVA
- DNR
- DPS
- REV
- DOT
- UA

<u>NEW FISCAL NOTES</u>				
*For Chief Clerk's Office Use Only				
List by Dept(s):	*FN#	Fiscal	Indet.	Zero
ADM			✓	
LAW				✓
COR			✓	

<u>PREVIOUS FISCAL NOTES</u>				
List by Dept(s):	FN#	Fiscal	Indet.	Zero

<u>Signing with recommendations</u>	Printed Last Name	DP	DNP	NR	AM
	Berkowitz			✓	
	Mayer	✓			
	Coghill	✓			
	JOGAN	✓			
	TAMES			✓	
Chair:	Rotelby	✓			
Chair:	Rotelby	✓			

Conceptual Amendment #1. ADOPTED - after Version "D"

(2) the person who receives the alcoholic beverage negligently causes death or serious physical injury to another while under the influence of the alcoholic beverage received in violation of this section; in this paragraph "serious physical injury" has the meaning given in AS 11.81.900, and "negligently" means acting with civil negligence.

Department of Law
Suggestion

*Adopted
2-11-02*

CS FOR HOUSE BILL NO. 330(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SECOND LEGISLATURE - SECOND SESSION

BY THE HOUSE JUDICIARY COMMITTEE

**Offered:
Referred:**

Sponsor(s): HOUSE JUDICIARY COMMITTEE BY REQUEST

A BILL

FOR AN ACT ENTITLED

1 **"An Act relating to providing alcoholic beverages to a person under 21 years of age."**

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

3 *** Section 1. AS 04.16.051(d) is amended to read:**

4 (d) A person acting with criminal negligence who violates this section is guilty
5 of a class C felony if

6 **(1)** [.] within the five years preceding the violation, the person has
7 been previously convicted under

8 **(A)** [(1)] this section; or

9 **(B)** [(2)] a law or ordinance of this or another jurisdiction with
10 elements substantially similar to this section; or

11 **(2) the person under 21 years of age who receives the alcoholic**
12 **beverage acts, while under the influence of the alcoholic beverage received in**
13 **violation of this section, with civil negligence and causes serious physical injury to**
14 **or the death of another person; in this paragraph, "serious physical injury" has**
15 **the meaning given in AS 11.81.900.**

THE
FOLLOWING
DOCUMENT(S)
ARE
POOR
ORIGINAL
COPIES

Effect of amendments. — The 1995 amendment, effective September 13, 1995, added subsection (b).
Editor's notes. — Section 6, ch. 81, SLA 1995

provides that subsection (b), added by § 1, ch. 81, SLA 1995, "applies to an offense committed on or after September 13, 1995."

NOTES TO DECISIONS

Double jeopardy. — Administrative revocation of a minor's license to drive under AS 28.15.183 is not "punishment" for double jeopardy purposes; thus, a minor whose license was revoked under that section could still be prosecuted for the offense of minor consuming. *Rexford v. State*, 941 P.2d 906 (Alaska Ct. App. 1997), overruled on other grounds, *State v. Esmailka*, 961 P.2d 432 (Alaska Ct. App. 1998).

Even if revocation of a minor's driver's license under AS 28.15.183 is unconstitutional, the minor is not immunized from prosecution for illegal use of alcoholic beverages under this section; the aggrieved minor's remedy is to attack the license revocation. *State v. Esmailka*, 961 P.2d 432 (Alaska Ct. App. 1998).

Right to jury trial. — Minors charged with this offense are entitled to a jury trial and to court-

appointed counsel if they are indigent. *State v. District Court*, 927 P.2d 1295 (Alaska Ct. App. 1996).

Comparative negligence. — A licensee who violates this section is not entitled to assert the comparative fault of the minor/consumer, in an action for damages resulting from the unlawful sale of intoxicating liquor. *Loeb v. Rasmussen*, 822 P.2d 914 (Alaska 1991).

Stated in *Shamberg v. State*, 762 P.2d 488 (Alaska Ct. App. 1988); *Martin-Wilson v. State*, Ct. App. Op. No. 4226 (File No. A-7354), P.2d (Alaska Ct. App. 2000).

Cited in *M.O.W. v. State*, 645 P.2d 1229 (Alaska Ct. App. 1982); *Alfred v. State*, 758 P.2d 130 (Alaska Ct. App. 1988); *State v. Simpson*, 946 P.2d 890 (Alaska Ct. App. 1997).

Sec. 04.16.051. Furnishing or delivery of alcoholic beverages to persons under the age of 21. (a) A person may not furnish or deliver an alcoholic beverage to a person under the age of 21 years.

(b) This section does not prohibit the furnishing or delivery of an alcoholic beverage

(1) by a parent to the parent's child, by a guardian to the guardian's ward, or by a person to the legal spouse of that person if the furnishing or delivery occurs off licensed premises; or

(2) by a licensed physician or nurse to a patient in the course of administering medical treatment.

(c) Acts unlawful under AS 11.51.130 are not made legal by (b) of this section.

(d) A person acting with criminal negligence who violates this section is guilty of a class C felony if, within the five years preceding the violation, the person has been previously convicted under

(1) this section; or

(2) a law or ordinance of this or another jurisdiction with elements substantially similar to this section. (§ 3 ch 131 SLA 1980; am § 9 ch 109 SLA 1983; am §§ 7, 8 ch 156 SLA 1988; am § 1 ch 50 SLA 1989; am § 1 ch 46 SLA 1994)

Effect of amendments. — The 1994 amendment, effective July 1, 1994, added subsection (d).

Legislative history reports. — For Senate letter

of intent relating to the amendments to (a) and (b) of this section by secs. 7 and 8, ch. 156, SLA 1988 (HCS CSSB 371 (Jud) am H), see 1988 Senate Journal 2939.

NOTES TO DECISIONS

Contributory negligence. — Fact that injured party violated this section by providing liquor to minor causing accident does not mitigate liability of seller of liquor in violation of AS 04.16.052. *Morris v. Farley Enters., Inc.*, 661 P.2d 167 (Alaska 1983).

Comparative negligence. — A licensee who violates this section is not entitled to assert the comparative fault of the minor/consumer, in an action for damages resulting from the unlawful sale of intoxicating liquor. *Loeb v. Rasmussen*, 822 P.2d 914 (Alaska 1991).

Double jeopardy violation. — Trial court violated defendant's double jeopardy rights by sentencing him for both contributing to the delinquency of a minor and for furnishing alcohol to a minor for the single act of furnishing alcohol to the minor, where

defendant engaged in only a single criminal act which violated two separate statutes and the two counts should have merged. *Newsome v. State*, 792 P.2d 689 (Alaska Ct. App. 1989).

Exceptions as affirmative defenses. — At a minimum, the exceptions specified under subsection (b) are "defenses" to criminal liability; that is, if a defendant wishes to invoke one of these exceptions, then at the very least the defendant must affirmatively raise the exception and point to some evidence from which a reasonable jury could decide that issue in his or her favor. Accordingly, where defendant presented no evidence that he had received his alcoholic beverages from a parent, guardian, or spouse, his conviction was affirmed. *Trout v. State*, 866 P.2d 1323 (Alaska Ct. App. 1994).

Sec. 04.21.080. Definitions. (a) In this title

(1) a person acts with "criminal negligence" with respect to a result or to a circumstance described by a provision of law defining an offense when the person fails to perceive a substantial and unjustifiable risk that the result will occur or that the circumstance exists; the risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation;

(2) a person acts "knowingly" with respect to conduct or to a circumstance described by a provision of law defining an offense when the person is aware that the person's conduct is of that nature or that the circumstance exists; when knowledge of the existence of a particular fact is an element of an offense, that knowledge is established if a person is aware of a substantial probability of its existence, unless the person actually believes it does not exist; a person who is unaware of conduct or a circumstance of which the person would have been aware had the person not been intoxicated acts knowingly with respect to that conduct or circumstance;

(3) a person acts "recklessly" with respect to a result or to a circumstance described by a provision of law defining an offense when the person is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists; the risk must be of such a nature and degree that disregard of it constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation; a person who is unaware of a risk of which the person would have been aware had the person not been intoxicated acts recklessly with respect to that risk.

(b) In this title

(1) "alcoholic beverage" means a spirituous, vinous, malt, or other fermented or distilled liquid, whatever the origin, that is intended for human consumption as a beverage and that contains one-half of one percent or more of alcohol by volume, whether produced commercially or privately; however, in an area that has adopted a local option under AS 04.11.491, "alcoholic beverage" means a spirituous, vinous, malt, or other fermented or distilled liquid, whatever the origin, that is intended for human consumption as a beverage by the person who possesses or attempts to possess it and that contains alcohol in any amount if the liquid is produced privately, or that contains one-half of one percent or more of alcohol by volume, if the liquid is produced commercially;

(2) "board" means the Alcoholic Beverage Control Board;

(3) "bottling" means to put into a bottle, can, or other container;

(4) "community work" means and is limited to work on projects designed to reduce or eliminate environmental damage, protect the public health, or improve public land, forests, parks, roads, highways, facilities, or education; community work may not confer a private benefit on a person except as may be incidental to the public benefit;

(5) "designated premises" means any or all designated portions of a building or structure, rooms or enclosures in the building or structure, or real estate leased, used, controlled, or operated by a licensee for the purpose for which the permit is issued by the board at the location of the site for which the permit is issued;

(6) "director" means the director of the Alcoholic Beverage Control Board;

(7) "distributing point" means a location where alcoholic beverages are distributed from a warehouse;

(8) "drunken person" means a person whose physical or mental conduct is substantially impaired as a result of the introduction of an alcoholic beverage into the person's body and who exhibits those plain and easily observed or discovered outward manifestations of behavior commonly known to be produced by the overconsumption of alcoholic beverages;

(9) "established village" means an area that does not contain any part of an incorporated city or another established village and that is

(A) an unincorporated or more permanent

(B) an unincorporated permanent resident;

(i) is on a road system of a unified municipality

(ii) is not on a road within the limits of a unified municipality

(10) "foreign limitation" means

(11) [See delayed meaning given in AS 04.21.080]

(12) "licensed premises" means a structure, rooms or enclosures controlled, or operated and licensed by the board

(13) "limited liability" means

(14) "limited liability corporation" means a limited liability corporation

(15) [See delayed meaning given in AS 04.21.080]

(16) "local government" means a traditional village or a traditional village

Alaska Native Claims Settlement Act, AS 38 ch 74 SLA 1990; and

203 SLA 1990; and 115 SLA 2000)

Delayed amendments until January 1, 2001, (b)(11) "foreign limitation" meaning given in AS 04.21.080

(15) "limited liability corporation" means a corporation that is registered with the State

Revisor's notes. — as (b)(12). Renumbered 1986 to alphabetize the

Paragraphs (b)(10), (b)(11), (b)(12), (13), and (14)

bered in 1999, at which time they were renumbered as (b)(12) through (b)(16) to alphabetize

Cross references. — provides that the 2000 amendments do "not affect an action accrued before January 1, 2001"

Effect of amendments effective June 29, 1999: minor stylistic change: beginning with "however"

The 1995 amendments to subsection (b), in part, were adopted under AS 04.11.491

tion under AS 04.11.491

"Licensed premises" means a structure, rooms or enclosures controlled, or operated and licensed by the board

application encompassing the structure, rooms or enclosures

FISCAL NOTE

STATE OF ALASKA
2002 LEGISLATIVE SESSION

Fiscal Note Number: _____
 Bill Version: HB 330
 () Publish Date: _____

Revision Date/Time (Note if correction): _____ Dept. Affected: Administration
 Title "An Act relating to providing alcohol BRU Legal and Advocacy Services
to a minor...." Component Public Defender Agency
 Sponsor House Judiciary by Request
 Requester (H) JUD Component No. 1631

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
Personal Services	*	*	*	*	*	*
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	*	*	*	*	*	*

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--Do not abbreviate)						
TOTAL	*	*	*	*	*	*

Estimate of any current year (FY2002) cost: 0.0
 Check this box (X) if funding for this bill is included in the Governor's FY 2003 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)
 See attached.

Prepared by: Barbara Brink, Director Phone (907) 334-4416
 Division Public Defender Agency Date/Time 2/11/02 8:17 AM
 Approved by: Jim Duncan, Commissioner Date 2/11/2002
 Agency Department of Administration

FISCAL NOTE

STATE OF ALASKA
2002 LEGISLATIVE SESSION

BILL NO. HB 330

ANALYSIS CONTINUATION

This legislation would increase the penalty from an A misdemeanor to a C felony for furnishing alcohol to a person under 21 years of age if the person under 21 who receives the alcohol injures or causes the death of another person and the injury or death occurs while the person under 21 was under the influence of the alcohol received. This bill is broadly worded to include any "injury." With such broad language it is likely to have a fiscal impact on the Agency, by increasing the workload of attorneys. Increasing the charge from a misdemeanor to a felony increases the workload, however it is not possible to determine what percentage of cases that the Agency currently represents people charged with furnishing alcohol to persons under 21, resulted in the person under 21, who received the alcohol, injuring another person. There is no way to gather that information therefore an indeterminate fiscal note is submitted. The Agency has serious concerns regarding determinations of what constitutes an "injury" as well as determinations of causation when time and intervening or superseding factors exist.

FISCAL NOTE

STATE OF ALASKA
2002 LEGISLATIVE SESSION

Fiscal Note Number: _____
Bill Version: HB 330
() Publish Date: _____

Revision Date/Time (Note if correction): _____ Dept. Affected: Law
Title "An Act relating to providing alcoholic beverages to a person under 21 years of age." BRU Criminal Division
Sponsor House Judiciary Committee by Request Component 1st-4th Judicial Districts; Criminal Appeals/Special Litigation
Requester House Judiciary Committee Component No. 2198-99;2201/03/61/79

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
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--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2002) cost: 0.0
Check this box (X) if funding for this bill is included in the Governor's FY 2003 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*
HB 330 creates a new class C felony. The new crime would be providing an alcoholic beverage to someone under 21, if the recipient of the alcoholic beverage then injures or causes the death of another person while under the influence of that alcoholic beverage.

The Department of Law anticipates little fiscal impact to the Criminal Division from passage of this bill.

Prepared by: Joan M. Kasson Phone (907) 465-5370
Division Attorney General's Office Date/Time 2/8/02 3:25 PM
Approved by: Kathryn Daughhettee for Bruce M. Botelho, Attorney General Date 2/8/2002
Agency Department of Law

FISCAL NOTE

STATE OF ALASKA
2002 LEGISLATIVE SESSION

BILL NO. _____

ANALYSIS CONTINUATION

FISCAL NOTE

STATE OF ALASKA
2002 LEGISLATIVE SESSION

Fiscal Note Number: _____
 Bill Version: HB 330
 () Publish Date: _____

Revision Date/Time (Note if correction): _____ Dept. Affected: Corrections
 Title "An Act relating to providing alcoholic beverages to a person under 21 years of age." BRU Administration and Operations
 Component All
 Sponsor House Judiciary Committee
 Requester House Judiciary Committee Component No. 694

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	***	***	***	***	***	***

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--Do not abbreviate)						
TOTAL	***	***	***	***	***	***

Estimate of any current year (FY2002) cost: 0.0
 Check this box (X) if funding for this bill is included in the Governor's FY 2003 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

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

This bill would make it a C felony for someone to provide alcohol to a person under the age of 21 and the person who receives the alcohol injures or causes the death of another person while under the influence of the provided alcohol.

This bill could have a significant impact on the Department of Corrections as it is currently written. Injury is a very broad term and could be interpreted to mean someone who has been punched in the nose. We have no way of knowing how broadly it would be interpreted or how difficult it would be to prosecute, nor do we know how often an injury is involved in these cases. We do know it occurs. Anytime misdemeanants are elevated to felons, not only are sentences likely to increase, but probation also becomes a requirement and an additional fiscal impact.

Prepared by: Candace Brower Phone 465-4652
 Division Commissioner's Office Date/Time 2/8/02 4:09 PM
 Approved by: Margaret Pugh, Commissioner Date 2/8/02
 Agency Department of Corrections

ALASKA STATE LEGISLATURE

HOUSE JUDICIARY COMMITTEE

Representative Norman Rokeberg, Chairman
Representative Scott Ogan, Vice-Chairman
Representative John Coghill
Representative Jeannette James
Representative Kevin Meyer
Representative Ethan Berkowitz
Representative Albert Kookesh



State Capitol
Juneau, AK 99801-1182
Telephone: (907) 465-4990
Fax: (907) 465-2040

Heather M. Nobrega
Counsel to Committee

MEMORANDUM

TO: House Judiciary Committee Members

FROM: Heather M. Nobrega, Counsel *HMN*
House Judiciary Committee

DATE: February 8, 2002

RE: Forthcoming CS for HB 330

Just a quick note to let you know that there is a committee substitute coming for this bill. I am working on the final language with legal, and will have the CS ready at the meeting on Monday.

ALASKA STATE LEGISLATURE

HOUSE JUDICIARY COMMITTEE

Representative Norman Rokeberg, Chairman
Representative Scott Ogan, Vice-Chairman
Representative John Coghill
Representative Jeannette James
Representative Kevin Meyer
Representative Ethan Berkowitz
Representative Albert Kookesh



State Capitol
Juneau, AK 99801-1182
Telephone: (907) 465-4990
Fax: (907) 465-2040

Heather M. Nobrega
Counsel to Committee

Sponsor Statement for HB 330

The House Judiciary Committee was requested to introduce this bill by Mothers Against Drunk Driving. HB 330 creates tougher penalties for adults who furnish alcohol to minors, who then go on to cause injury or death.

On July 9, 2001, Anchorage Police Officer Justin Wollam, and three others were killed when driver Robert Esper crossed the median of the Glenn Highway, and collided head-on with Officer Wollam's patrol car during the early hours of the morning. Esper was suspected of driving while intoxicated.

It was later discovered that Robert Esper, age 19, had a blood alcohol level of .091. The legal limit, at the time of the accident, was .10 BAC, but has since been lowered to .08 BAC. In investigating the events leading up to the tragic and deadly accident, police discovered that Esper, and his underage friends, had been drinking at a party where alcohol was provided by two adults, Ronald Frank and Michael Hunter.

Frank and Hunter were arrested and charged with multiple counts of contributing to the delinquency of a minor, and furnishing alcohol to a minor. Both are class A misdemeanors subject to imprisonment of not more than one year, and a fine of no more than \$5000. Frank pled to two counts of furnishing, and Hunter pled to one count of furnishing. They are scheduled to be sentenced on February 20.

HB 330 would increase the penalty, for an adult who furnishes a minor alcohol, to a class C felony, if the minor causes death or physical injury while under the influence of the alcohol that was furnished by the adult. A class C felony carries a sentence of not more than five years, and a fine of no more than \$50,000.

It is important that those individuals like Ronald Frank and Michael Hunter, who purchase alcohol for minors, be appropriately punished when those minors go on to hurt or kill someone while under the influence of alcohol. HB 330 creates those appropriate penalties and is intended to further dissuade adults from supplying alcohol to minors.

The committee urges your support of this bill.

Furnishing Alcohol to Minors

	1999	2000	2001	
Arrests - Misdemeanor	310	400	379	
Arrests - Felony	2	5	8	
Convictions - Misdemeanor	124	201	145	
Convictions - Felony	1	2	1	
Sex of Arrestees - Male	261	293	301	61%
Sex of Arrestees - Female	51	111	90	17%
Average Age at Arrest	25	29	26	27

Source:

DPS Criminal History files updated as of March 4, 2002.

Offenses:

DPS offense code 9931, AS 04.16.051, AS 04.16.052, AS 04.16.060

Prepared by DPS March 5, 2002

adn.com

Anchorage Daily News

Second man to be charged in fatal crash

FOUR DEAD:31-year-old bought alcohol for party, police say.

By Lucas Wall
Anchorage Daily News

(Published: July 25, 2001)

Anchorage police Tuesday cited a second man for providing alcohol to teens at a July 8 party before the fatal car crash that killed an Anchorage police officer and three teenagers.

Michael Hunter, 31, will be charged with two counts of contributing to the delinquency of a minor and two counts of furnishing alcohol to a minor, according to police. He received a summons to appear in court Aug. 28.

Hunter's phone is disconnected, and he could not be reached.

Detective Everett Robbins said Hunter picked up two girls the evening of July 8 and brought them to the trailer owned by his wife, Leona, in the 7100 block of Lake Otis Parkway. Leona Hunter was working that night and hired the girls to come over and clean the trailer, Robbins said. Contrary to earlier reports, the girls were not baby-sitting that night. Robbins said they were scheduled to baby-sit for Leona Hunter the next day.

She left money for the girls at the trailer, which Robbins said they gave to Michael Hunter, asking him to buy them alcohol. Hunter went to a nearby Tesoro station, Robbins said, where he bought alcohol and brought it back to the trailer. The Hunters are separated, he said, and Michael Hunter returned to his trailer to sleep.

Police arrested Ronald Frank, 30, two weeks ago and charged him with five counts of furnishing alcohol to a minor and four counts of contributing to the delinquency of a minor. He remains at the Sixth Avenue Correctional Center in lieu of \$8,000 bail. Frank and Hunter are friends, Robbins said, and they attended a barbecue together the afternoon of July 8.

Robbins said Hunter has been cooperative and admitted to buying alcohol for the girls. Hunter wasn't jailed, he said, because he wasn't at the party at the trailer later that night.

"He wasn't promoting the party as Ronny had done," Robbins said. "He claims he wasn't aware of the party. He was thinking (the two girls) were just going to be home for the evening."

The party was attended by several other youths. After leaving the party with six others, 19-year-old Robert Esper drove erratically through the city for about half an hour before crashing head-on into a police car driven by officer Justin Wollam on the Glenn Highway. The crash killed the officer, Esper, and two other teens.

With Hunter's arrest, police are starting to wind down the criminal investigation into the crash.

"There are no other suspects we're looking at this time," Robbins said.

A separate internal investigation into how police handled the attempts to stop Esper continues.

Reporter Lucas Wall can be reached at lwall@adn.com or 907 257-4321.

Close Window

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Arrest made in collision

RONALD FRANK; Man is to face charges in providing alcohol to teens

By **LUCAS WALL**
Anchorage Daily News

Police on Thursday arrested a 30-year-old Anchorage man they say provided alcohol Saturday night to a group of youths including those involved in a fatal head-on collision with Anchorage police officer Justin Wollam. Ronald Frank will be charged with seven counts of contributing to the delinquency of a minor and one count of reckless endangerment. He was in the Sixth Avenue Correctional Center under \$8,000 bail Thursday night.

Detective Everett Robbins said Frank cooperated with police after his arrest and acknowledged buying the alcohol for minors at a liquor store sometime after 10 p.m. Sunday.

Frank was convicted of driving while intoxicated in August, according to state records.

Robert Esper, the driver of the 1985 Chevy Blazer that collided with Wollam's patrol car, had attended a party that night with several other youths and drank liquor and other alcoholic beverages provided by Frank, Robbins told reporters Thursday evening. The party took place at a residence some where on Lake Otis Parkway, Robbins said. He would not identify the owner of the home or the address.

Six young people were injured in the party, Robbins said. A 16-year-old girl was killed by a car that was driven by a man who was not identified.

ADN 13 July 2001

CRASH: Man arrested

Continued from A-1
facing Frank is a Class A misdemeanor that carries a penalty of up to one year in prison. Robbins briefed reporters on Wollam's family, friends and co-workers gathered downtown passengers near Arctic Boulevard and Garner Street. Two were apprehended by police. The third, led by police announced Thursday he has turned himself in.

Brian Nichols, 18, has not been charged in connection with Monday's incident. Because he has outstanding juvenile warrants, he was taken to McLaughlin Youth Center.

Esper continued driving erratically, ending up northbound in the southbound lanes of the Clear Highway, where he collided head-on with Wollam's patrol car just before 1 a.m. Wollam, 28, and Esper's passengers were killed as well as two of Esper's passengers.

Frank deserves some blame for what happened, Robbins said.

He provided the alcohol to minors, which caused this deadly tragedy, he said. Apparently Frank knew some of the minors will be returned to his home town of Danbury, Texas. Mo-

answer many questions about Frank's actions at the party because detectives are still interviewing people who were involved.

Some of the minors will be taken to Alaska and placed in a home where they will be supervised. Robbins said. ARD officers will be on the line of work.

Robbins said he can answer many questions about Frank's actions at the party because detectives are still interviewing people who were involved.

Esper was drinking, toxicology confirms

.091: Reading short of legal limit, but driving warranted charges, police say.

By LUCAS WALL
Anchorage Daily News

Toxicology results released by police Wednesday show the 19-year-old man who crashed head-on into an Anchorage police officer last month had a blood-alcohol content of .091.

Police initially suspected Robert Esper was driving while intoxicated when an offi-

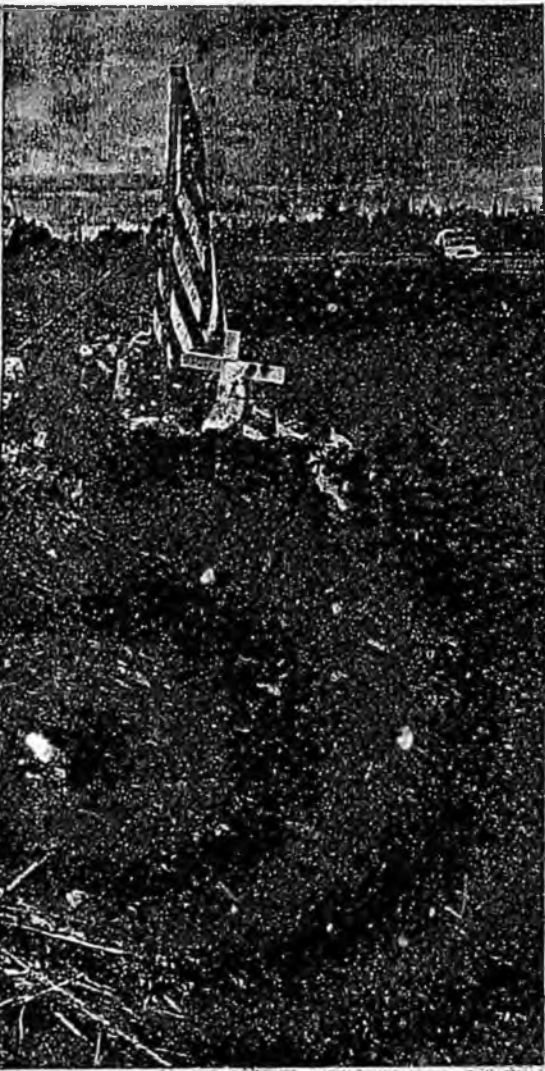
cer attempted to stop him about 3:20 a.m. July 9 near the 7200 block of Lake Otis Parkway. Esper and nine other teens had attended a get-together at a nearby trailer that night where alcohol was present.

"Based on his initial driving behavior and his erratic driving, the officer suspected he was a drunken driver," said Detective Everett Robbins. "This confirms her initial observations."

See Back Page, ESPER



Robert Esper was the driver of the Chevrolet Blazer that killed officer Justin Wollam and three teens, including himself July 9.



ERIK HILL / Anchorage Daily News

Flowers, stuffed animals, birthday balloons, religious tokens and other items adorn the Glenn Highway memorials to crash victims Makayla Lewis, Robert Esper, Heidi Weilbacher and officer Justin Wollam on Tuesday.

ESPER: Teenager had .091 blood-alcohol level

Continued from A-1

Esper fled from police for more than half an hour before ending up running into officer Justin Wollam on the wrong side of the Glenn Highway. Wollam, Esper and two passengers in Esper's Chevrolet Blazer, Makayla Lewis and Heidi Weilbacher, died.

Police reported Weilbacher, 14, had a blood-alcohol content of .088. No alcohol was found in Lewis' blood, and none of the teenagers tested positive for drug use.

Robbins said if police had stopped Esper that night, he could have been charged with DWI even though he was slightly below the presumptive legal limit of .10. Drivers are considered impaired if their BAC is higher than .04, Everett said, and if they are driving in a dangerous manner they can still be considered intoxicated even if they haven't reached .10. People's alcohol tolerance levels are different,

"I'm sorry for all the losses. I wish it could have been handled better totally so there wouldn't have been any losses."

Teenager's father, Robert Esper

he said, and that affects how they drive after drinking. The Legislature, under threat of losing federal funds, this year lowered the state's presumptive legal limit for DWI to .08. Esper would have been considered legally drunk under the new standard, which takes effect Sept. 1.

All those legalisms aside, Everett said, "minors shouldn't

have any alcohol at all."

Ronald Frank and Michael Hunter have been charged with providing the alcohol to the minors and contributing to their delinquency that night. The district attorney's office is still reviewing the case against the two men and further charges are possible, Robbins said.

Esper's father, Robert, said he didn't have much to say about Wednesday's release.

"I'm sorry for all the losses," he said. "I wish it could have been handled better totally so there wouldn't have been any losses."

Police have been criticized by some, including 15-year-old Ashley Shetters and her mother, for their handling of the attempt to stop Esper that night. Shetters was one of three teens who got out of Esper's Chevrolet Blazer in a trailer park before the crash.

Robbins said the account of events Shetters gave in an interview with the Daily News

last week is a little different than the statement she gave police after the crash. Her account is more exaggerated than what she originally told police, Robbins said, and conflicts with what 15-year-old Savannah Fielding told police. Fielding is the only person who survived the crash.

"Her story does not jive exactly with what Shetters is saying," Robbins said. "There's conflicting information, and I'm going to leave it at that. What am I going to say? She's entitled to her own opinion. There's more than just one person's statement here, and you have to weigh it all out."

Robbins would not discuss what Fielding told police about the events leading up to the collision. Fielding's family has declined to speak publicly about that night.

Reporter Lucas Wall can be reached at lwall@adn.com or 257-4321.



Mothers Against Drunk Driving • Juneau Chapter
211 Fourth St. Suite 102 • Juneau, AK 99801

January 22, 2002

HOUSE BILL NO. 330 "An Act relating to providing alcoholic beverages to a person under 21 years of age." BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA: * **Section 1.** AS 04.16.051(d) is amended to read: (d) A person acting with criminal negligence who violates this section is guilty of a class C felony if **(1)** [,] within the five years preceding the violation, the person has been previously convicted under **(A)** [(1)] this section; or **(B)** [(2)] a law or ordinance of this or another jurisdiction with elements substantially similar to this section; or **(2) the person under 21 years of age who receives the alcoholic beverage injures or causes the death of another person and the injury or death occurs while the person under 21 years of age was under the influence of an alcoholic beverage received in violation of this section.**

Mothers Against Drunk Driving (MADD) supports House Bill Number 330. MADD supports laws, which save lives from injuries or death due to drunk driving.

House Bill 330 will make the sale of alcohol to minors a felony, thereby increasing fines and jail time.

House Bill 330, by becoming law, will send a message out to Alaskans that our children are valuable and if harmed, severe consequence will occur. House Bill 330 supports and joins Alaskans in their attempt to change the current accepted norm of underage drinking.

Sincerely,

Cindy Cashen
Volunteer

Subject: [Fwd: HB 329 and 330]

Date: Mon, 21 Jan 2002 10:40:27 -0900

From: Representative Norman Rokeberg <Representative_Norman_Rokeberg@legis.state.ak.us>

Organization: Alaska State Legislature

To: Heather_Nobrega@legis.state.ak.us

For our files.

Janet

Subject: HB 329 and 330

Date: Sun, 20 Jan 2002 16:29:45 -0800

From: "David W. Rochford" <rochfor@concentric.net>

To: <Representative_Norman_Rokeberg@Legis.state.ak.us>

CC: "MADD Anchorage Chapter" <madd@corecom.net>

Dear Representative Rokeberg

I am writing in support of HB 329 and 330.

I am a police officer with the Anchorage Police Department and have 30 years of police experience (20 years with APD).

HB329

I agree that chemical testing should be required for all persons arrested as the bill describes. It would also be helpful if this requirement extended to all drivers involved in a collision which involved death or an injury which required medical treatment. Also, there should be a requirement that treating physicians inform law enforcement if a person being treated has alcohol or drugs in their system, and what the reported level or concentration is. This requirement would only apply if the person being treated was the driver of a motor vehicle, or is the suspect in a crime. Many people are injury while driving while intoxicated and are never prosecuted. The reason is that police officers are often not in a position to make a determination as to the suspect's state of sobriety by virtue of the fact that the person is receiving emergency treatment or is in surgery and can not be observed by the officer until it is too late. I have personally seen suspects fake unconsciousness to avoid detection of alcohol impairment by me.

Additionally, the wording "controlled substance" should be replaced with "any drug" or better yet, "any substance that impairs...". The problem with "controlled substance" is that it requires that the substance appear on the state's list of controlled substances. There are many substances that impair driving which are not on this list. Toluene, paint thinner, and gasoline fumes are primary examples. No matter how complete a list is, someone will get intoxicated on something that was overlooked on the list and escape prosecution. The other problem with using the "controlled substance" wording is that it requires that a specific drug be identified and named. This is not always possible. We may be able to prove to a jury that the driver is impaired by an unknown substance, or a substance we suspect, but we can not convict with out a blood test which is positive for a controlled substance. Even then, there may be a problem proving that the controlled substance detected in the blood was the drug or substance causing the impairment. This wording seriously needs to be changed.

The law was recently changed to allow law enforcement to obtain a search warrant for a person's blood in a DWI case if we can articulate drug involvement. This law has been a great help and I have already obtained search warrants and obtained valuable evidence using this law. However, a law like California enacted would be even more helpful. California extended the implied consent law to include a blood and/or urine testing if the arresting officer suspects drug use, and articulates the suspicion in his

police report. This would save valuable time lost while applying for a search warrant. Some drugs clear from the blood stream quickly and the time spent getting a warrant could make the difference between getting a positive blood test and a negative one. Also, such a law should include blood AND urine, since we cannot know ahead of time if the drugs will be found in the blood or urine or both blood and urine.

Also, I should put in a pitch for the Drug Recognition Program which I spoke of at the DWI training you attended at the APD training center. The laws pertaining to driving under the influence of drugs are useless without having officers trained to enforce these laws. This program still has not been established here in Alaska.

I also support HB 330

The tragic death of my friend and co worker, Justin Wollam, is testimony enough of the need for this law. If an adult knew he might be charged with a felony, he might reconsider providing alcohol to minors.

Respectfully,
Dave Rochford
Anchorage P.D.

HB

332

22-LS1290\C
Lauterbach
2/8/02

*ADOPTED
2.11.02*

CS FOR HOUSE BILL NO. 332(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SECOND LEGISLATURE - SECOND SESSION

BY THE HOUSE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): REPRESENTATIVE BUNDE

A BILL

FOR AN ACT ENTITLED

1 "An Act extending the termination date of the Council on Domestic Violence and Sexual
2 Assault and relating to the council's duties; and providing for an effective date."

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

4 * Section 1. AS 18.66.050 is amended to read:

5 **Sec. 18.66.050. Duties of the council.** The council shall

6 (1) hire an executive director, and the executive director shall hire
7 [NECESSARY] staff that is authorized by the legislature in the budget documents
8 relating to the council; *Concept. Amendment #2. delete - WITHDRAWN*

9 (2) elect one of its members as presiding officer;

10 (3) in consultation with authorities in the field, develop, implement,
11 maintain, and monitor domestic violence, sexual assault, and crisis intervention and
12 prevention programs, including educational programs, films, and school curricula on
13 the cause, prevention, and treatment of domestic violence and sexual assault;

14 (4) coordinate services provided by the Department of Law, the

*Conceptual
Amendment
#1
ADOPTED
MAY*

1 Department of Education and Early Development, the Department of Public Safety,
2 the Department of Health and Social Services, and other state agencies and community
3 groups dealing with domestic violence, sexual assault, and crisis intervention and
4 prevention, and provide technical assistance as requested by those state agencies and
5 community groups;

6 (5) develop and implement a standardized data collection system on
7 domestic violence, sexual assault, and crisis intervention and prevention;

8 (6) conduct public hearings and studies on issues relating to violence,
9 including domestic violence and sexual assault, and on issues relating to the role of
10 crisis intervention and prevention;

11 (7) receive and dispense state and federal money and award grants and
12 contracts from appropriations for the purpose to qualified local community entities for
13 domestic violence, sexual assault, and crisis intervention and prevention programs;

14 (8) oversee and audit domestic violence, sexual assault, and crisis
15 intervention and prevention programs that receive money under this chapter;

16 (9) provide fiscal and technical assistance to plan, organize, implement
17 and administer domestic violence, sexual assault, and crisis intervention and
18 prevention programs;

19 (10) make an annual report to the governor on the activities of the
20 council, plans of the council for new services and programs, and concerns of the
21 council, including recommendations for legislation necessary to carry out the purposes
22 of this chapter; the council shall notify the legislature that the report is available;

23 (11) adopt regulations in accordance with AS 44.62 (Administrative
24 Procedure Act) to carry out the purposes of this chapter and to protect the health,
25 safety, well-being, and privacy of persons receiving services financed with grants or
26 contracts under this chapter;

27 (12) consult with the Department of Health and Social Services in the
28 formulation of standards and procedures for the delivery of services to victims of
29 domestic violence by health care facilities and practitioners of healing arts and
30 personnel in those facilities as required in AS 18.66.300;

31 (13) consult with the Alaska Police Standards Council and other police

1 training programs in the state to develop training programs regarding domestic
2 violence for police officers and for correction, probation, and parole officers;

3 (14) consult with public employers, the Alaska Supreme Court, school
4 districts, and prosecuting authorities who are required by AS 18.66.300 - 18.66.310 to
5 provide continuing education courses in domestic violence to employees.

6 * **Sec. 2.** AS 44.66.010(a)(11) is amended to read:

7 (11) Council on Domestic Violence and Sexual Assault
8 (AS 18.66.010) -- June 30, 2006 [2002];

9 * **Sec. 3.** This Act takes effect immediately under AS 01.10.070(c).

Alaska State Legislature

DURING SESSION
STATE CAPITOL, ROOM 501
JUNEAU, AK 99801-1182
(907) 465-4843 (800) 892-4843
FAX: (907) 465-3871

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

WEB SITE
<http://www.akirepublicans.org/BLnde.htm>

REPRESENTATIVE CON BUNDE

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

District 18

CHAIR: HOUSE SPECIAL COMMITTEE ON EDUCATION
VICE-CHAIR: HOUSE FINANCE COMMITTEE

SPONSOR STATEMENT HB 332

“An Act extending the termination date of the Council on Domestic Violence and Sexual Assault; and providing for an effective date.”

The Council on Domestic Violence and Sexual assault is the state policymaking board charged with planning and coordinating services for victims of domestic violence or sexual assault. House Bill 332 extends the sunset of The Council on Domestic Violence and Sexual Assault until June 30, 2006.

The Council on Domestic Violence and Sexual Assault provides services for families of victims and for perpetrators of these crimes by providing crisis intervention and prevention programs throughout Alaska. State, federal and private funds are used to pay for the programs provided by the Council.

Last fiscal year alone, more than 7,000 Alaska women and children sought immediate safety in shelters throughout the state, totaling more than 50,000 shelter nights. There were also more than 2,000 victims of sexual assault who sought services through the state. The first priority of all programs is the immediate safety and crisis intervention for the victim. Other services provided include: information on and referral to needed services such as housing or public assistance, medical advocacy, legal advocacy, safety checks, clothing and food, transportation, and personal and group support.

The Council continues to work with victim advocates, law enforcement, prosecution, corrections, and batterers intervention program staff, among others, to increase safety for victims, increase reporting by victims, train all those involved in the community response to the victims of domestic violence and sexual assault, and to hold perpetrators accountable for their violence. Through these cooperative efforts, the Council on Domestic Violence and Sexual Assault plays a crucial role in helping to break the cycle of violence that tears Alaskan families and communities apart.

FISCAL NOTE

STATE OF ALASKA
2002 LEGISLATIVE SESSION

Fiscal Note Number: _____
Bill Version: HB 332
() Publish Date: _____

Revision Date/Time (Note if correction): _____ Dept. Affected: Public Safety
Title An Act extending the termination date of the BRU Victims for Justice
Council on Domestic Violence & S/A.... Component Victims for Justice
Sponsor Representative Bunde
Requester House Judiciary Committee Component No. 2216

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims	246.0	246.0	246.0	246.0	246.0	246.0
Miscellaneous						
TOTAL OPERATING	246.0	246.0	246.0	246.0	246.0	246.0

CAPITAL EXPENDITURES						
-----------------------------	--	--	--	--	--	--

CHANGE IN REVENUES ()						
-------------------------------	--	--	--	--	--	--

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	246.0	246.0	246.0	246.0	246.0	246.0
1007 Inter-Agency Receipts						
1050 Permanent Fund Dividend Fund						
Other (Specify Type--Do not abbreviate)						
TOTAL	246.0	246.0	246.0	246.0	246.0	246.0

Estimate of any current year (FY2002) cost: 0.0
Check this box (X) if funding for this bill is included in the Governor's FY 2003 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

This component and BRU were established by the legislature as a separate pass-thru award. Should the legislation extending the Council not pass, this grant would need to be transferred to another agency.

Prepared by: Susan Scudder, Executive Director Phone (907) 465-4356
Division: Council on Domestic Violence and Sexual Assault Date/Time 2/4/02 11:28 AM
Approved by: Commissioner Glenn Godfrey Date 2/4/2002
Agency: Department of Public Safety

FISCAL NOTE

STATE OF ALASKA
2002 LEGISLATIVE SESSION

Fiscal Note Number: _____
 Bill Version: HB 332
 () Publish Date: _____

Revision Date/Time (Note if correction): _____ Dept. Affected: Public Safety
 Title An Act extending the termination date of the BRU Batterers Intervention Program
Council on Domestic Violence & S/A.... Component Batterers Intervention Program
 Sponsor Representative Bunde
 Requester House Judiciary Committee Component No. 2241

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims	320.0	320.0	320.0	320.0	320.0	320.0
Miscellaneous						
TOTAL OPERATING	320.0	320.0	320.0	320.0	320.0	320.0

CAPITAL EXPENDITURES						
-----------------------------	--	--	--	--	--	--

CHANGE IN REVENUES ()						
-------------------------------	--	--	--	--	--	--

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	120.0	120.0	120.0	120.0	120.0	120.0
1007 Inter-Agency Receipts						
1050 Permanent Fund Dividend Fund	200.0	200.0	200.0	200.0	200.0	200.0
Other (Specify Type--Do not abbreviate)						
TOTAL	320.0	320.0	320.0	320.0	320.0	320.0

Estimate of any current year (FY2002) cost: 0.0
 Check this box (X) if funding for this bill is included in the Governor's FY 2003 budget proposal: X

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

Should the legislation extending the Council not pass, functions of the Batterer's Intervention Program (BIP) would need to be transferred to the Department of Corrections.

Prepared by: Susan Scudder, Executive Director Phone (907) 465-4356
 Division: Council on Domestic Violence and Sexual Assault Date/Time 2/4/02 11:31 AM
 Approved by: Commissioner Glenn Godfrey Date 2/4/2002
 Agency: Department of Public Safety

FISCAL NOTE

STATE OF ALASKA
2002 LEGISLATIVE SESSION

Fiscal Note Number: _____
 Bill Version: HB 332
 () Publish Date: _____

Revision Date/Time (Note if correction): _____ Dept. Affected: Public Safety
 Title An Act extending the termination date of the BRU Council on Domestic Violence & S/A
Council on Domestic Violence & S/A... Component Council on Domestic Violence & S/A
 Sponsor Representative Bunde
 Requester House Judiciary Committee Component No. 521

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
Personal Services	519.5	519.5	519.5	519.5	519.5	519.5
Travel	61.5	61.5	61.5	61.5	61.5	61.5
Contractual	1,250.1	1,250.1	1,250.1	1,250.1	1,250.1	1,250.1
Supplies	12.3	12.3	12.3	12.3	12.3	12.3
Equipment	6.2	6.2	6.2	6.2	6.2	6.2
Land & Structures	0.0	0.0	0.0	0.0	0.0	0.0
Grants & Claims	7,875.6	7,875.6	7,875.6	7,875.6	7,875.6	7,875.6
Miscellaneous	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL OPERATING	9,725.2	9,725.2	9,725.2	9,725.2	9,725.2	9,725.2

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

1002 Federal Receipts	3,488.6	3,488.6	3,488.6	3,488.6	3,488.6	3,488.6
1003 GF Match						
1004 GF	567.2	567.2	567.2	567.2	567.2	567.2
1007 Inter-Agency Receipts	1,664.6	1,664.6	1,664.6	1,664.6	1,664.6	1,664.6
1050 Permanent Fund Dividend Fund	4,004.8	4,004.8	4,004.8	4,004.8	4,004.8	4,004.8
Other (Specify Type--Do not abbreviate)						
TOTAL	9,725.2	9,725.2	9,725.2	9,725.2	9,725.2	9,725.2

Estimate of any current year (FY2002) cost: 0.0

Check this box (X) if funding for this bill is included in the Governor's FY 2003 budget proposal: X

POSITIONS

Full-time	8					
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

Should the legislation extending the Council not pass, functions of the Batterer's Intervention Program (BIP) would need to be transferred to the Department of Corrections. Additionally, the functions of the Victims for Justice pass-thru grant would need to be transferred to another agency.

Prepared by: Susan Scudder, Executive Director Phone (907) 465-4356
 Division Council on Domestic Violence and Sexual Assault Date/Time 2/4/02 11:53 AM
 Approved by: Commissioner Glenn Godfrey Date 2/4/2002
 Agency Department of Public Safety



Alaska Division of Legislative Audit Audit Digest #12-20014-02



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SUMMARY OF: A Special Report on the Department of Public Safety, Council on Domestic Violence and Sexual Assault, Sunset Review, October 31, 2001.

PURPOSE OF THE REPORT

In accordance with the intent of Titles 24 and 44 of the Alaska Statutes (sunset legislation), we have reviewed the activities of the Council on Domestic Violence and Sexual Assault (council) to determine whether it was operating in the best interest of the public and if it should be statutorily continued in operation. As required by AS 44.66.060(a), the committee of reference shall consider this report during the legislative oversight process to determine whether the council should be reestablished. Currently, under AS 44.66.010(a)(11) the council will terminate on June 30, 2002, and will have one year from that date to conclude its operation.

REPORT CONCLUSIONS

Under AS 18.66, the Council on Domestic Violence and Sexual Assault is authorized to provide for the State's planning and coordination of the full range of services to victims, their families, and perpetrators of domestic violence and sexual assault. Combating domestic violence and sexual assault is identified as an ongoing priority at both the state and national level.

Aside from the operational concerns addressed in this report, the council is serving a public need and is operating in the public's interest. Currently, AS 44.66.010(a)(11) requires that the council be terminated on June 30, 2002. We recommend the legislature extend the council's termination date to June 30, 2006.

FINDINGS AND RECOMMENDATIONS

Recommendation No. 1

The legislature should amend the Council on Domestic Violence and Sexual Assault's statutes related to appointment of council members.

The Network on Domestic Violence and Sexual Assault (Network) both recommends public members to serve on the council and receives grant funds from the council for a legal advocacy project. An apparent conflict of interest exists when a council member reviews, evaluates, approves, and monitors a grant to the same non-profit corporation which was responsible for recommending that individual to the council membership.

Recommendation No. 2

The council should define and communicate clear and distinctive roles for the council members and staff in dealing with the Network. The council should adhere to these roles in their federal grant oversight of the Network.

Review of the council's grant information identified some impropriety with the Network for FY 01, specifically relating to modification by the Network of the final grant agreement; unsupported requests for reimbursement; and exclusion from on-site monitoring.

Recommendation No. 3

The legislature should amend AS 18.66.050 referring to the council hiring staff, and the council should address personnel issues and promote strong leadership by the executive director.

Alaska Statute 18.66.050(1) states that "[t]he council shall hire an executive director and necessary staff." This statute adds confusion to the council's lines of authority. In order for the executive director to have authority over the staff, it is critical for staff to have only one leader. Administrative weaknesses were identified throughout the course of our fieldwork. These weaknesses primarily relate to lines of authority and lack of definitive duties, policies, and procedures.

Recommendation No. 4

The council should address statutory responsibilities that relate to consultation with the Department of Health and Social Services (AS 18.66.050 (12)) and other entities and organizations (AS 18.66.050 (14)).

Both of these statutes discuss the council working with other agencies and public employers to develop standards, procedures, and continuing education courses.

Recommendation No. 5

Council members and the executive director should consult with the Department of Education and Early Development, school district representatives, and grantees who have worked toward curriculum development to create a comprehensive standardized curriculum to be used within the schools across the state.

The council's approach to domestic violence and sexual assault education within the school districts is inconsistent and inadequate. There is a need for a more coordinated effort towards education in school districts throughout the state.



* Requires Acrobat Reader

October 31, 2001

Members of the Legislative Budget
and Audit Committee:

In accordance with the provisions of Title 24 of the Alaska Statutes, the attached report is submitted for your review.

DEPARTMENT OF PUBLIC SAFETY
COUNCIL ON DOMESTIC VIOLENCE
AND SEXUAL ASSAULT

October 31, 2001

12-20014-02

This audit was conducted as required by AS 44.66.050 and under the authority of AS 24.20.271(1). Alaska Statute 44.66.050(c) lists criteria to be used to assess the demonstrated public need for a given board, commission, agency, or program subject to the sunset review process. Currently under AS 44.66.010(a)(11), the Council on Domestic Violence and Sexual Assault is scheduled to termination June 30, 2002. The council would have one year from that date to conclude operations.

In our opinion, the termination date for the Council on Domestic Violence and Sexual Assault should be extended. The council serves a public need and is operating in the public's interest. We recommend that the legislature extend the council's termination date to June 30, 2006.

The audit was conducted in accordance with generally accepted government auditing standards. Fieldwork procedures utilized in the course of developing the findings and discussion presented in this report are discussed in the Objectives, Scope, and Methodology section.

Pat Davidson, CPA
Legislative Auditor

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OBJECTIVES, SCOPE, AND METHODOLOGY

In accordance with the intent of Titles 24 and 44 of the Alaska Statutes (sunset legislation), we have reviewed the activities of the Council on Domestic Violence and Sexual Assault (council) to determine whether it was operating in the best interest of the public and if it should be statutorily continued in operation. As required by AS 44.66.050(a), the committee of reference shall consider this report during the legislative oversight process to determine whether the council should be reestablished. Currently, under AS 44.66.010(a)(11) the council will terminate on June 30, 2002, and will have one year from that date to conclude its operation.

Objectives

There are two central, interrelated objectives of our report. They are:

1. To determine if the termination date of the council should be extended.
2. To determine if the council is operating in the public's interest. The assessment of the operations, and performance of the council, was based upon AS 44.66.050(c). This statute sets out criteria that are to be used in determining a demonstrated public need for the council.

Scope and Methodology

Our audit reviewed the operation and activities of the Council on Domestic Violence and Sexual Assault for the period of FY 99 through the date of our report.

During the course of our examination, we reviewed and evaluated the following:

- Applicable statutes and regulations.
- Budget documents, session laws, and other legislative information related to the council's operations.
- The executive director's reading files.
- Minutes of council meetings.
- Grantee on-site monitoring performance and fiscal reviews prepared by council staff.
- Statistical reports submitted by grantees.
- Financial reports from the State Accounting System.
- Other documents related to the council's operations and mission, as necessary.

In addition, we interviewed:

- Various council members and staff.
- Council grantees, school districts, judges, state troopers, police officers, and other individuals with whom council staff and council members consult and coordinate.
- Individuals from other state agencies.
- Council staff.

ORGANIZATION AND FUNCTION

The Council on Domestic Violence and Sexual Assault (council) was established in the Department of Public Safety in 1981 by Alaska Statute 18.66. This statute gives the council the authority " ... to provide for planning and coordination of services to victims of domestic violence or sexual assault or to their families and to perpetrators of domestic violence and sexual assault and to provide for crisis intervention and prevention programs. "

The council consists of seven members, four of whom are the commissioners, or their designees, of the Departments of Public Safety, Health and Social Services, Education and Early Development, and Law. The balance of the council is comprised of persons from the public appointed at the governor's discretion.

By statute, before making appointments, the governor receives recommendations from and consults with the Alaska Network on Domestic Violence and Sexual Assault (a non-profit, private organization).¹

Council Members

As of September 20, 2001

Barbara Thompson, DEED, Chair
Cindy Cooper, DOLaw, Vice Chair
Mary Scheetz-Freymiller, Public Member
Diane Disanto, DHSS
Del Smith, Public Safety
Tammy Young, Public Member*
Shirley Dean, Public Member*

*terms expired August 1, 2001 however no replacement to date

The council is staffed by an executive director, an administrative manager, three project coordinators, a statistical technician, an administrative assistant and an administrative clerk. The council is authorized to receive and disperse both state and federal funds. Traditionally a large part of the council's responsibilities involve administering grants made to local community organizations for domestic violence, sexual assault, and crisis intervention and prevention programs. Grant administration includes providing technical assistance and monitoring the activities of the various grantees and contractors.

The community programs funded by the council provide a variety of services to the public. Most importantly, their efforts are directed toward providing victims a safe environment either through housing at a community shelter, or the use of a network of designated "safe homes". Additionally, the programs are involved in educating and counseling the victim about domestic violence and sexual assault issues and providing batterers' intervention services.

The council's coordination role and responsibilities with other state and local agencies is extensive. In FY 02 the council approved funding to 21 community-based victim services programs, seven community-based batterers' intervention programs, and three prison-based batterers' programs. (See Appendix A.)

¹ The Alaska Network on Domestic Violence and Sexual Assault is comprised of 20 programs, many of which are council funded programs. The network does annual training for members, acts as a legislative lobbying group, and sits as a non-voting member on council committees.

Many of the grants issued by the council are supported by federal funds. Federal funds are received by the council from sources such as:

- Family Violence Prevention and Services Grants (CFDA 93.671)
US Department of Health and Human Services

The Family Violence Prevention Services Act provides federal funding to all states. This funding is used for domestic violence programs throughout Alaska. The programs receiving grants provide assistance to victims of domestic violence and their children. These programs operate shelter facilities which are staffed around the clock and provide a full spectrum of services, including basic food and immediate shelter, crisis intervention, counseling, and medical/legal/personal advocacy.

- Crime Victims Assistance (CFDA 16.575)
US Department of Justice

This grant authorizes financial compensation for victims of crime and financial support for state and local agencies that provide services to crime victims. This fund is a U.S. Treasury account generated entirely by the fines and penalties levied against criminals convicted of federal crimes. The majority of this funding is awarded directly to programs that provide services to victims of domestic violence, sexual assault and other violent crimes. In addition to funding programs, a portion of this grant is used to fund a Victim Services Coordinator position with the Department of Corrections.

- Violence Against Women Act (CFDA 16.588)
US Department of Justice

The grant services combine a series of federal sanctions and initiatives as well as national, state, and local resources to improve the response to crimes against women. These funds are delineated to four specific areas: prosecution, law enforcement, victim services, and discretionary. In April 1995, Governor Knowles designated the council as the lead agency for the coordination and management of the Violence Against Women Act funds for the State of Alaska.

To accomplish this mission, the statewide Violence Against Women Planning and Implementation Committee was created. The membership of the Planning and Implementation Committee includes representatives from the court system; Department of Corrections; Maternal, Child and Family Health, Department of Health and Social Services; Department of Law; Department of Public Safety; Alaska Network on Domestic Violence and Sexual Assault; Alaska Judicial Council; and Violence Against Indian Women grantee. The council is responsible for funding distribution and subrecipient monitoring of these projects.

REPORT CONCLUSIONS

Under AS 18.66, the Council on Domestic Violence and Sexual Assault (council) is authorized to provide for the State's planning and coordination of the full range of services to victims, their families, and perpetrators of domestic violence and sexual assault. Combating domestic violence and sexual assault is identified as an ongoing priority at both the state and national level.

Aside from the operational concerns addressed in this report, the council is serving a public need and is operating in the public's interest. Currently, AS 44.66.010(a)(11) requires that the council be terminated on June 30, 2002. We recommend the legislature extend the council's termination date to June 30, 2006.

The Alaska Network on Domestic Violence and Sexual Assault (Network), a nonprofit organization, and the council often work jointly or contractually on statewide projects to strengthen the state's response to violence against women. This joint effort has had a positive impact. However, we recommend that the council reconsider the nature of its working relationship with Network.

The council needs to establish clear and distinctive roles for the council members and staff, and the Network. These roles must be consistent with the governor's directive for the council's programmatic and administrative oversight of federal funding. As a recipient of council funds, it is inappropriate for the Network to have a legally mandated role in recommending the public members of the council to the governor for selection. (See Recommendations Nos. 1 and 2.)

Statutory changes implemented July 1, 1996, significantly increased the scope of the council's responsibilities. Between FY 98 and FY 01, the council's budgeted staff increased from four to eight positions. However, the council has been unable to or ineffective in addressing some of their statutory responsibilities, in part due to administrative shortcomings. (See Recommendations Nos. 3, 4 and 5.)

Other council weaknesses addressed in recent legislative audits and not readdressed in this audit include the following:

1. Department of Public Safety, Council on Domestic Violence and Sexual Assault, Batterer Intervention Programs February 9, 2001 (Audit Control Number 12-4606-01).

The Batterer Intervention Programs audit contained five recommendations relating to the council. These recommendations primarily addressed the following concerns:

- Due to a lack of data, none of the specific operational questions concerning batterers and the effectiveness of batterer intervention programs could be fully answered.

- Due to the absence of written procedures, council staff was not able to perform their job duties consistently and successfully. Specifically, the council does not have policies and procedures in reviewing, evaluating, and monitoring batterer intervention programs.
- Batterers are not adequately monitored, either not attending, or not completing batterer intervention programs, and programmatic noncompliance issues are not being fully addressed.

2. Statewide Single Audit for Fiscal Year Ended June 30, 2000 – July 16, 2001 (Audit Control Number 02-40001-01).

The statewide single audit contained five recommendations to the executive director of the council. These recommendations primarily addressed the need to improve the monitoring and management of federal funds being provided to subrecipient grantees.

FINDINGS AND RECOMMENDATIONS

Recommendation No. 1

The legislature should amend the Council on Domestic Violence and Sexual Assault's statutes related to appointment of council members.

The Network on Domestic Violence and Sexual Assault (Network) both recommends public members to serve on the council and receives grant funds from the council. The council consists of four state officials and three public members appointed by the governor. Alaska Statute 18.66.020(a)(1) relating to the appointment of public members states:

The council consists of three persons appointed by the governor after consultation with the Network on Domestic Violence and Sexual Assault, a nonprofit corporation; The Network on Domestic Violence and Sexual Assault shall submit a list to the governor of persons recommended for appointment.

In addition, AS 18.66.020(b) states, in part:

...A vacancy on the council shall be filled for the unexpired term by appointment by the governor after consultation with the Network on Domestic Violence.

The council annually grants funds to the Network for a legal advocacy project. Grant monies are provided by federal funds associated with the Violence Against Women Act (VAWA). The council awarded VAWA funding to the Network as shown in Exhibit 1 (right) for FY 00 through FY 02.

An apparent conflict of interest exists when a council member reviews, evaluates, approves, and monitors a grant to the same non-profit corporation which was responsible for recommending that individual to the council membership.

The apparent conflict of interest continues because the council member would likely benefit from ongoing support from the Network when being considered for reappointment to the council. This situation may result in inappropriate decisions by the council, as the Network will be interested in the sustainability of their agency.

Exhibit 1 Violence Against Women Act Grants to the Network on Domestic Violence and Sexual Assault	
<u>Grant</u>	<u>Amount</u>
<u>FY 00:</u>	
00-VAWA-01	\$ 109,142
00-VAWA-02	<u>233,143</u>
Total FY 00:	\$ <u>342,285</u>
<u>FY 01:</u>	
01-VAWA-01	\$ 73,842
01-VAWA-02	<u>235,874</u>
Total FY 01:	\$ <u>309,716</u>
<u>FY 02:</u>	
02-VAWA-01	\$ <u>356,626</u>

The appearance of a personal conflict of interest on the part of the council's public members may arise from a combination of elements.

- The Network has a specific legally mandated role in the selection and retention of public members to the council.
- The Network is a subgrantee of the council and therefore competes with other programs for council funding.

Potentially biased questions in the Network's "*Interview Questions for Council on Domestic Violence and Sexual Abuse Public Member Applicants*" read as: "What do you see as the role of the council public member in relation to the Network?" Examples of specialized treatment for the Network are discussed in Recommendation 2.

It is entirely appropriate for the governor to consult with any interested parties when making appointments to the council. However, it is the statutory mandate for the governor to consult with the Network, over the appointment of public members, when the Network itself is a subgrantee of the council that raises an appearance of a conflict of interest.

Therefore, we recommend the legislature amend the AS 18.66.020 to 1) eliminate the mandate for the Network to recommend individuals to the governor for appointment to the council, and 2) eliminate the requirement for the governor to consult with the Network on the appointment or reappointment of the council's public members.

Recommendation No. 2

The council should define and communicate clear and distinctive roles for the council members and staff in dealing with the Network. The council should adhere to these roles in their federal grant oversight of the Network.

As stated in Recommendation No. 1, the council annually grants monies to the Network for a legal advocacy project using federal VAWA funds. Review of council grant information identified some impropriety as follows:

1. For FY 01, the Network modified the final grant contract prohibiting the council from reviewing all records (limiting the council's review to financial records only). Such modification is in violation of the federal Common Rule for Uniform Administrative Requirements for Grants (A-102).
2. For FY 00, requests for reimbursement from the Network were not supported by sufficient documentation of expenditures. Council staff disbursed funds based on these requests, which is in violation of federal allowable cost principles (A-87).
3. For FY 00 and FY 01, the Network was excluded from the monitoring schedule established by the council. This is in violation of federal Common Rule (A-102) requirements codified at 28 CFR 66.40.

Each of these actions severely limited the council's review of the Network's activities. This limitation affected the council's ability to carry out its responsibility outlined in a letter from Governor Knowles dated April 15, 1995. In this letter, the governor designates "...*Council on Domestic Violence and Sexual Assault (council) as the state agency in Alaska that will have programmatic and administrative oversight of Violence Against Women Act funds.*" In making this designation, the governor required that "[i]n developing its plan for use of Violence Against Women Act funds, the council must actively involve the Network on Domestic Violence and Sexual Assault in all stages of the process."

The council has complied with the governor's condition to actively involve the Network in the development of the VAWA plan. However, the council must keep in mind that the governor designated the council to have programmatic and administrative oversight of VAWA funds. As the pass-through agency for the federal VAWA funding, the council bears ultimate responsibility for the administration of those funds. Without adequate oversight, errors or improprieties may be committed by grantees and not detected by the council.

The Network and the council often work jointly or contractually on statewide projects to strengthen the state's response to violence against women. These joint efforts have a positive impact. However, in its working relationship with the Network, we recommend that the council define clear and distinctive roles for the council members and staff. These roles should be defined in manner consistent with federal grant requirements and the governor's directive for programmatic and administrative oversight.

Recommendation No. 3

The legislature should amend AS 18.66.050 referring to the council hiring staff, and the council should address personnel issues and promote strong leadership by the executive director.

Alaska Statute 18.66.050(1) states that "[t]he council shall hire an executive director and necessary staff." This statute adds confusion to the council's lines of authority. In order for the executive director to have authority over the staff, it is critical for staff to have only one leader.

Administrative weaknesses were identified throughout the course of our fieldwork. These weaknesses primarily relate to lines of authority and job responsibilities, and are further explained below:

1. Confusion regarding lines of authority. Confusion exists regarding lines of authority between council members, the executive director, council staff and representatives of the Network. Staff members have apprised the council members about their concerns with the council organizational structure and travel restrictions due to budgetary concerns without going through the executive director.

Additionally, staff identified instances when the council members directly contacted them without first going through the executive director. Finally, the council's staff

may directly contact, or be contacted by, Network personnel regarding a specific issue or responsibility without the knowledge of the executive director.

Because so many individuals affect the responsibilities of council staff, it is imperative that the council set the priorities and policies, and the executive director manage the staff to ensure these priorities and policies are addressed. This will allow the council members to observe the program functioning as a whole, not on a microscopic level. An executive director with strong leadership abilities, whose administration is supported by all council members, would help to establish clear lines of authority.

2. Lack of definitive duties, policies and procedures. The three associate coordinator positions have broad position descriptions that are identical.² The position descriptions state that:

"Because of the limited number of staff, the on-going responsibilities assigned to any one position may be focused in one program area; however, the staff is expected to know and be able to perform or assist with the activities in any program areas."

With broad position descriptions, more specific directives defined in an agency procedure or desk manual are critical to ensure that personnel have a clear understanding of their responsibilities and priorities. Not only did we find that staff members were having difficulty addressing their responsibilities, a lack of prioritizing was also evident. These coordinator positions are responsible for the development, coordination, evaluation/monitoring and technical assistance of new and existing programs to ensure regulatory and policy compliance.

Between FY 98 and FY 01, the council's budgeted staff has increased 100% (from four to eight individuals). As stated in AS 18.66.050, the council's broad statute regarding the hiring of staff adds to the confusion with lines of authority. Although the council may hire the staff, the staff report to the executive director and should take direction solely from the executive director. The executive director needs strong leadership skills that emphasize teamwork and open communication among the council staff. For the executive director, leadership skills are as critical as program background in domestic violence and sexual assault.

Explicit documentation of each individual's responsibilities would allow the executive director of the council to hold staff accountable for their actions and their job duties. The council members should also provide clear guidance to the executive director and work through the executive director when addressing issues with the staff.

We recommend that the legislature change AS 18.66.050 to state:

² Position control numbers 12-0087, 12-0071 and 12-0070 have the same description of duties.

“[t]he council shall hire an executive director, and the executive director shall hire staff as identified in budgetary documents.”

We recommend that the council promote and support strong leadership authority with the executive director. We also recommend that the executive director develop council personnel policies, procedures, and desk manuals (or update position description questionnaires) to describe the tasks of the individuals in each position. Once staff roles are established, the executive director should provide cross-training and encourage communication and teambuilding.

Recommendation No. 4

The council should address statutory responsibilities that relate to consultation with the Department of Health and Social Services (AS 18.66.050 (12)) and other entities and organizations (AS 18.66.050 (14)).

The council's statute was amended effective July 1, 1996 to include new requirements. Two of these new requirements have not been addressed. Alaska Statute 18.66.050(12) and (14) state that the council shall:

(12) consult with the Department of Health and Social Services in the formulation of standards and procedures for delivery of services to victims of domestic violence by health care facilities and practitioners of healing arts and personnel in those facilities as required in AS 18.66.300.

(14) consult with public employers, the Alaska Supreme Court, school districts, and prosecuting authorities who are required by AS 18.66.300 – 18.66.310 to provide continuing education courses in domestic violence to employees.

Both of these statutes discuss the council working with other agencies and public employers to develop standards, procedures, and continuing education courses. However, due to personnel deficiencies (see Recommendation No. 3) and lack of prioritization, the council has been unable to fully address these areas. We recommend that the council prioritize their responsibilities and determine a means to efficiently implement AS 18.66.050(12) and AS 18.66.050(14).

Recommendation No. 5

Council members and the executive director should consult with the Department of Education and Early Development, school district representatives, and grantees who have worked toward curriculum development to create a comprehensive standardized curriculum to be used within the schools across the state.

The council's approach to domestic violence and sexual assault education within the school districts is inconsistent and inadequate. There is a need for a more coordinated effort towards

education in school districts throughout the state. The council has left the responsibility for education in the schools to the grantees. The grantees have varying degrees of success in gaining access to their local schools, and use a variety of methods in attempting to address the need for domestic violence and sexual assault education within the schools.

Alaska Statute 18.66.050 states, in part, that:

The council shall (3) in consultation with authorities in the field, develop, implement, maintain, and monitor domestic violence, sexual assault, and crisis intervention and prevention programs, including education programs....and school curricula on the cause, prevention, and treatment of domestic violence and sexual assault. [emphasis added]

The council has avoided developing and implementing a standardized curriculum in an attempt to respect the autonomy of its victim services grantees. This has been the council's overall strategy in victim services program issues, where the individual grantees are better able to assess the needs of their communities. The grantees each have their own method of approaching education within their local schools. Some grantees simply send advocates to speak to a classroom when invited by the teacher. Other grantees have attempted to develop a K-12 curriculum for use within their local schools.

Development of a standardized curriculum can be an overwhelming task for a small or rural program whose resources are already stretched to the limit. Many grantees lack the expertise needed to approach the development of a curriculum for children that covers such extremely sensitive subjects as domestic violence and sexual assault.

We recommend the council consult with the Department of Education and Early Development, school district representatives, and grantees who have worked toward curriculum development to create a comprehensive standardized curriculum to be used within the schools across the state.

Prior Sunset Audit Recommendation No. 1

The Council on Domestic Violence and Sexual Assault's (council) executive director should continue to improve administrative procedures to adequately satisfy duties of the council.

Prior Finding

Due to increasing responsibilities and a limited number of staff positions, the council experienced deficiencies in carrying out its administrative and statutory responsibilities during FY 97. The lack of staff availability to carry out the full scope of the council's duties was further aggravated by staff turnover and extended illnesses. Weaknesses identified were as follows:

1. Data collected from grantees has not been processed since February 1997.

2. The annual report to the governor for FY 96 had not been completed.
3. On-site monitoring of grantees was not performed and reported in a timely manner.

Current Status

Administrative weaknesses continue to exist, though to a lesser degree than existed during the prior sunset audit. The current status of the prior year sunset recommendation is as follows:

1. Data collection - substantially implemented. The council implemented a statewide data collection system in July 2000. Some grantees expressed dissatisfaction with the new data system and felt that the forms were confusing and had too many categories. Some grantees feel that the system requires duplicative work by grantee staff. There are concerns on the validity of the data and how to measure outcomes. However, others feel that the system is easy, accurate and provides consistent data reporting. Overall, there is a critical need for coordinated statewide standardized measurement and recording of statistical data across agency lines. Statistics are needed to accurately provide information to decision makers.
2. Timeliness of annual reports – some improvement. Although reports prior to FY 00 have been untimely, the annual report for FY 00 was completed timely and posted on the council website.
3. On-site monitoring – some improvement. An on-site monitoring schedule has been established and on-site monitoring of most grantees has been performed. However, while the council has improved in the consistency and timeliness of their on-site monitoring, this monitoring was limited to primarily programmatic issues. The council failed to monitor its grantees who were subrecipients of federal grant funds for compliance with federal requirements. Weaknesses regarding federal compliance subrecipient monitoring issues were identified in the Statewide Single Audit for Fiscal Year Ended June 30, 2000 (Audit Control Number 02-40001-01).

ANALYSIS OF PUBLIC NEED

The following analysis of the council's activities relates to the public need factors defined in the "sunset" law, AS 44.66.050. These analyses are not intended to be comprehensive, but address those areas we were able to cover within the scope of our review.

Determine the extent to which the board, commission, or agency has operated in the public interest.

The council has awarded and administered grant funds to local community organizations and programs that provide services to victims of domestic violence and sexual assault, batterer intervention services to perpetrators of domestic violence, and crisis intervention and prevention programs. Although the presentation element of the funding meeting is not generally accepted and approved by all the grantees, the council's grant award process is objective, and grantees are treated equally in the process. Public participation was encouraged, and legislative intent was considered in the funding process. The council strives to treat urban and rural participants fairly throughout the grant award process. The council exercises oversight and performs on-site audits of most grant recipients. However, some exceptions were identified for the Alaska Network on Domestic Violence and Sexual Assault. (See Recommendation No. 2.)

The council coordinates the efforts of many state and community agencies working toward a comprehensive statewide system to combat domestic violence and sexual assault. Overall, we conclude that the council is performing its coordination duties.

The council provides technical assistance in various forms to state agencies, law enforcement agencies, grantees, and community groups on a regular basis.

The council has provided funds to assist in the development of training materials and participation in training events relating to domestic violence and sexual assault. This training has been used by law enforcement officers, prosecutors, and judicial officers. Upon request, council staff is available to state and local law enforcement agencies to consult on training matters.

The council produces public service announcements for distribution statewide, and provides domestic violence and sexual assault education on a local level through its grantees. The council maintains a lending library with educational and reference materials available that are both adequate and appropriate to address the cause, prevention, and treatment of domestic violence and sexual assault.

The council consults with the Department of Health and Social Services, Section of Maternal Child and Family Health, on the Alaska Family Violence Prevention Project (AFVPP) to increase awareness and community capacity to prevent and intervene in family violence. AFVPP provides multidisciplinary training and technical assistance on family violence for

health and social service providers and communities across the state. During the last year, in collaboration with the council, AFVPP conducted domestic violence/child abuse workshops in fifteen rural communities across the state. Although they have collaborated on issues such as this, the council and AFVPP have not addressed the statutory mandate in AS 18.66.050(12). (See Recommendation No. 4.)

Determine the extent to which the operations of the board has been impeded or enhanced by existing statutes, procedures, and practices, which it has adopted, and any other matter, including budgetary, resource, and personnel matters.

There are a variety of issues that have had an impact on the operations of the council. Our primary concerns involve the following:

1. Personnel issues. For some time, the council has been facing personnel issues resulting from new positions, new statutory and federal grant responsibilities, and turnover. The executive director should develop council personnel policies, procedures, and desk manuals to describe the tasks of the individuals in each position and to adjust for increased responsibilities and other changes. There also were other personnel issues that existed between the former executive director and council staff (See Recommendation No. 3).
2. Statutes related to composition of the council. The council should consider including a representative from the Department of Corrections as either a full council member, or as an advisor, to increase awareness of batterer programs. Some council members would also like to see additional public members. Because the Network has been receiving grant funds from the council, the legislature should consider amending AS 18.66.020 by 1) removing the clause that requires the Network to make recommendations for public members on the council to the governor, and 2) delete the requirement that the governor consult with the council regarding initial and reappointment of public members to the council. (See Recommendation No. 1.)
3. Program reporting requirements. AS 18.66.050(10) requires the council to submit an annual report to the governor, and notify the legislature about the availability of the report. Although the statute is silent if such a report is to be based on the calendar or fiscal year, customarily the council has submitted reports on a fiscal year basis. Although the reports for FY 97 through FY 99 were not provided to the governor in a timely manner, the FY 00 annual report was. (See Prior Sunset Audit Recommendation No. 1)
4. Data collection process. The council implemented a statewide data collection system in July 2000. Some grantees expressed dissatisfaction with the new data system and felt that the forms were confusing and had too many categories. Some grantees feel that the system requires duplicative work by grantee staff. There are concerns on the validity of the data and how to measure outcomes. However, others feel that the system is easy, accurate and provides consistent data reporting. Overall, there is a

critical need for coordinated statewide standardized measurement and recording of statistical data across agency lines. Statistics are needed to accurately provide information to decision makers. (See Prior Sunset Audit Recommendation No. 1.)

Determine the extent to which the board has recommended statutory changes that are generally of benefit to the public interest.

The council is generally asked by other agencies to review statutory changes contained in proposed legislation. Typically, council members and staff review and comment on proposed legislation rather than developing and seeking support for its own measures. The council discusses pertinent bills and decides which legislation the council should support, remain neutral, or oppose. The executive director develops, analyzes, and testifies on bills at the direction of the council. The Network is also actively involved in domestic violence and sexual assault related legislation, and provides an update of pertinent legislation at council meetings.

Determine the extent to which the board, commission or agency has encouraged interested persons to report to it concerning the effect of its regulations and decisions on the effectiveness of services, economy of service, and availability of services that it has provided.

The council encourages interested parties to comment on its decisions or regulations by publicly announcing its meetings. The council holds at least four meetings per year, normally in Anchorage or Juneau. Meetings held in Juneau are typically teleconferenced statewide. The council also encourages input from the Network regarding its policies.

Determine the extent to which the board has encouraged public participation in the making of its regulations and decisions.

The council encourages public participation by advertising meetings and teleconferences and by posting the council's meeting schedule on their website. Time is provided on the agenda of every public meeting for public comment. The council works with the Network and their membership in the development of regulations and policy decisions.

Determine the efficiency with which public inquiries or complaints regarding the activities of the board, commission, or agency filed with it, with the department to which a board or commission is administratively assigned, or with the Office of the Ombudsman have been processed and resolved.

We found no problems in this area. Complaint procedures are in place, followed when complaints are made, and files are maintained. No complaint activity was noted.

Determine the extent to which state personnel practices, including affirmative action requirements, have been complied with by the board to its own activities and the area of activity or interest.

No complaints against the council were identified.

Determine the extent to which statutory, regulatory, budgeting or other changes are necessary to enable the board to better serve the interest of the public and to comply with the factors enumerated in this subsection.

The council has left the responsibility for education within the schools to their grantees. The grantees have varying degrees of success in gaining access to their local schools and use a variety of methods in attempting to address the need for domestic violence and sexual assault education within the schools. There is a need for a more coordinated effort towards education in school districts across the state. The council should consult with the Department of Education and Early Development, school district representatives and grantees who have worked toward curriculum development to create a comprehensive standardized curriculum to be used within schools across the state. (See Recommendation No. 5.)

Identify the problems or the needs that the programs and activities of the council are intended to address.

Per AS 18.66.010, the council's purpose is to provide for planning and coordination of services to victims of domestic violence or sexual assault or to their families, to perpetrators of domestic violence and sexual assault, and to provide for crisis intervention and prevention programs.

Identify any other programs having similar, conflicting or duplicate objectives.

One of the council's major objectives is the coordination of agencies, both state and local, that share the similar objective of combating the effects of domestic violence and sexual assault. No other agency is in a position to have an impact on this issue in this manner. Its existence is to help ensure that the various agencies work together to effectively respond to Alaska's high rate of domestic violence and sexual assault.

Appendix A
 Council on Domestic Violence and Sexual Assault
 Schedule of Grants Awarded FY 99 through FY 02
 (unaudited)

	<u>FY 99</u>	<u>FY 00</u>	<u>FY 01</u>	<u>FY 02</u>
Victim Services Grants				
Advocates for Victims of Violence (Valdez)	\$ 204,810	\$ 209,810	\$ 212,970	\$ 213,181
Abused Women's Aid in Crisis (Anchorage)	792,900	753,255	795,605	795,816
Aiding Women from Abuse and Rape Emergencies (Juneau)	486,725	481,925	489,430	489,641
Arctic Women in Crisis (Barrow)	239,655	-0-	242,360	242,571
Alaska Women's Resource Center (Anchorage)	194,920	190,120	197,625	197,836
Bering Sea Women's Group (Nome)	417,790	417,790	420,495	420,706
Cordova Family Resource Center	48,505	41,505	51,210	51,421
Emmonak Women's Center	147,025	150,525	153,685	180,885
Kenai/Soldotna Women's Resource and Crisis Center	394,485	388,595	397,190	669,296
Kodiak Women's Resource and Crisis Center	261,410	257,182	264,115	397,401
North Slope Borough	-0-	232,655	-0-	-0-
Safe and Fear-Free Environment (Dillingham)	317,200	317,200	319,905	264,326
Sitkans Against Family Violence	300,485	298,094	303,190	320,116
Seward Life Action Council	74,895	73,787	77,600	303,401
South Peninsula Women's Services (Homer)	246,175	242,251	248,880	77,811
Standing Together Against Rape (Anchorage)	383,790	376,114	386,495	249,091
Tundra Women's Coalition (Bethel)	564,885	566,385	569,545	386,706
Unalaskans Against Sexual Assault and Family Violence	120,085	120,085	122,790	584,547
Victims for Justice (Anchorage)	72,545	68,918	72,078	123,001
Valley Women's Resource Center (Palmer)	415,570	407,259	418,275	26,078
Interior Alaska Center for Non- Violent Living (formerly Women in Crisis - Counseling and Assistance - Fairbanks)	666,380	661,580	669,085	418,486
Women in Safe Homes (Ketchikan)	494,265	489,465	496,972	497,183
Total Victim Services Grants	<u>\$ 6,844,500</u>	<u>\$ 6,744,500</u>	<u>\$ 6,909,500</u>	<u>\$ 6,909,500</u>
Community Based Batterer Intervention Programs				
Male Awareness Program (Anchorage)	\$ 90,000	\$ 80,000	\$ 80,000	\$ -0-
Sound Alternatives (Cordova)	11,000	11,000	11,000	15,000
South Peninsula Women's Services (Homer)	27,000	23,000	23,000	27,000
	<u>FY 99</u>	<u>FY 00</u>	<u>FY 01</u>	<u>FY 02</u>