Mothers Against Drunk Driving

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PENNSYLVANIA STATE OFFICE

TO: Members of the Joint Task Force on DUI of the House Judiciary/Transportation Committees
FROM: Chief Martin Duffy, Public Policy Liaison MADD, Pennsylvania State Organization
RE: September 26, 1996 Testimony
DATE: September 24, 1996

On behalf of Mothers Against Drunk Driving, please allow me to express our appreciation for the opportunity to appear before your esteemed committee in order to address important legislative changes needed to save lives and assist victimsof drunk driving in Pennsylvania.

Our primary focus at this time is to seek passage of **Administrative License Suspension** (ALS). Thirty nine (39) states plus the District of Columbia already have ALS and it is a proven tool in the fight to save lives, approximately 60 per year. If this task force is serious about saving lives and fighting drunk driving in Pennsylvania then let's collectively focus our efforts in passing ALS by the end of this legislative session.

The voices of our victims are often times the cries of our children. Children are truly the innocent victims of drunk drivers as they are absolutely powerless and can not refuse to ride with an impaired driver, especially if that driver is a parent or guardian. Beginning in January, MADD of Pennsylvania will formulate a **Child Endangerment Package** that will focus on protecting our children as it relates to DUI. Areas being explored are: significantly increasing the penalties for individuals who are DUI with a minor child (under the age of 16) in the vehicle; primary enforcement of the safety-belt law for minors; and incorporating a protection clause for the custodial parent when he or she refuses to relinquish physical custody of the child to the intoxicated non-custodial parent.

MADD will also advocate for legislation that requires alcohol and drug testing of all drivers in all traffic crashes resulting in fatalities or serious bodily injury. MADD believes that an accurate understanding of the total alcohol involvement in traffic crashes is a priority in working towards further progress in dealing with and eliminating alcohol and drug related highway tragedies. Therefore, beginning in January, MADD will seek legislation that will require **testing of all drivers involved in fatal and serious injury traffic crashes.**

On September 20, 1996 the American Journal of Public Health reported that "nearly 600 highway deaths would be prevented if all states would lower the legal blood alcohol limit from .10 to .08." Beginning in January, MADD will be seeking legislation that **lowers the legal BAC** per se law for individuals 21 years or older, **from .10 percent to .08 percent.**

MADD actively advocates for both personal and server responsibility when consuming or serving alcohol. MADD will seek either a legislative or regulatory change that will **require alcohol servers** in Pennsylvania to **participate in training programs** approved by the Liquor Control Board.

MADD, PENNSYLVANIA

AUGUST 20, 1996

Administrative

LICENSE

Suspension

ALS

WHAT IS AN ADMINISTRATIVE REVIEW?

ALS provides for the driver arrested for DUI to request an administrative review of the suspension. The review would be limited to whether the person drove, operated, or was in actual physical control of a motor vehicle with an illegal BAC of .10 or above, or if the driver refused to submit to chemical testing. If a preponderance of the evidence shows that the driver had a BAC over the legal presumptive level, or if the driver refused chemical testing, the suspension would be upheld.

WHAT IS AN ADMINISTRATIVE HEARING?

The hearing is limited to whether, by a preponderance of evidence, the person drove, operated or was in actual physical control of a motor vehicle with a BAC of .10 or more or the person refused to submit to chemical testing. A prima facie case against the driver would be established by the sworn police report. Based on the evidence, the administrative license suspension is sustained or rescinded.

The driver arrested for DUI, may request an administrative hearing without first requesting an administrative review. However, a review is not available after a hearing.

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ALS

ADMINISTRATIVE LICENSE SUSPENSION

A SNAPSHOT OF DRUNK DRIVING IN 1994

Drunk drivers killed 523 people and injured another 12,764 men, women and children on Pennsylvania's highways during 1994. *Nationally -- 16,589 deaths /over 1,000,000 injuries.*

In another 4,035 crashes drunk drivers left behind a trail of property damage. *Nationally -- 2,113,279 property damage only (1990).*

We witnessed a total of 12,944 alcohol-related crashes during 1994. *Nationally -- 788,000 alcohol-related crashes.*

The economic loss to every man, woman and child in Pennsylvania due to alcohol-related crashes in 1994 was $91.96 for a total of $1,108,355,264. *Nationally -- $46 billion in total economic loss due to alcohol-related crashes.*

WHAT IS ADMINISTRATIVE LICENSE SUSPENSION?

ALS is a proven sanction that swiftly removes drunk drivers from our highways, deters others from driving drunk and, most importantly, saves lives.

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Now That Pennsylvania Has a Zero Tolerance Law, Why Do We Need Administrative License Suspension?

In June of 1996, the Pennsylvania General Assembly passed a law prohibiting minors from operating a vehicle with any alcohol in their systems. The law, which sets the per se level at .02 percent blood alcohol content (BAC) for drivers under 21, is known as zero tolerance. Governor Tom Ridge signed the law in July, and it became effective in August.

Since the zero tolerance law is expected to save many lives each year in Pennsylvania, it is tempting to say we do not need to do any more legislatively to prevent impaired driving. Nothing could be further from the truth. Just as the other groups in education, treatment, and law enforcement are continually working toward the ultimate goal of no impaired driving, so too does the legislature have a responsibility to work toward the same goal.

While there are many ways in which the legislature can prevent impaired driving, one of the most effective is to pass administrative license suspension (ALS). ALS is a law which applies to a driver who fails a blood, breath, or urine test with a BAC greater than .02 for minors and .10 for adults. ALS also applies to drivers who refuse the chemical test. The driver surrenders his or her license and receives a temporary license, good for 30 days. During that time the driver can request a review of or hearing on the suspension. The license suspension is 90 days; a driver in the accelerated rehabilitation disposition program (ARD) or who is later convicted of driving under the influence (DUI) in a criminal procedure will be credited with the 90-day suspension.

Why do we need ALS?

- Numerous studies show the most effective way to prevent impaired driving among all age groups is if drivers believe they will lose their licenses if they drive drunk. A state with an ALS law sends a very clear message: you drink, you drive, you lose your license. With ALS the consequences of illegal behavior are swift and sure. It will save dozens of lives each year in Pennsylvania.

- Teenage drivers in particular value their licenses as a large stepping stone between childhood and adulthood. When a zero tolerance law is coupled with ALS, it deters young people from drinking and driving.

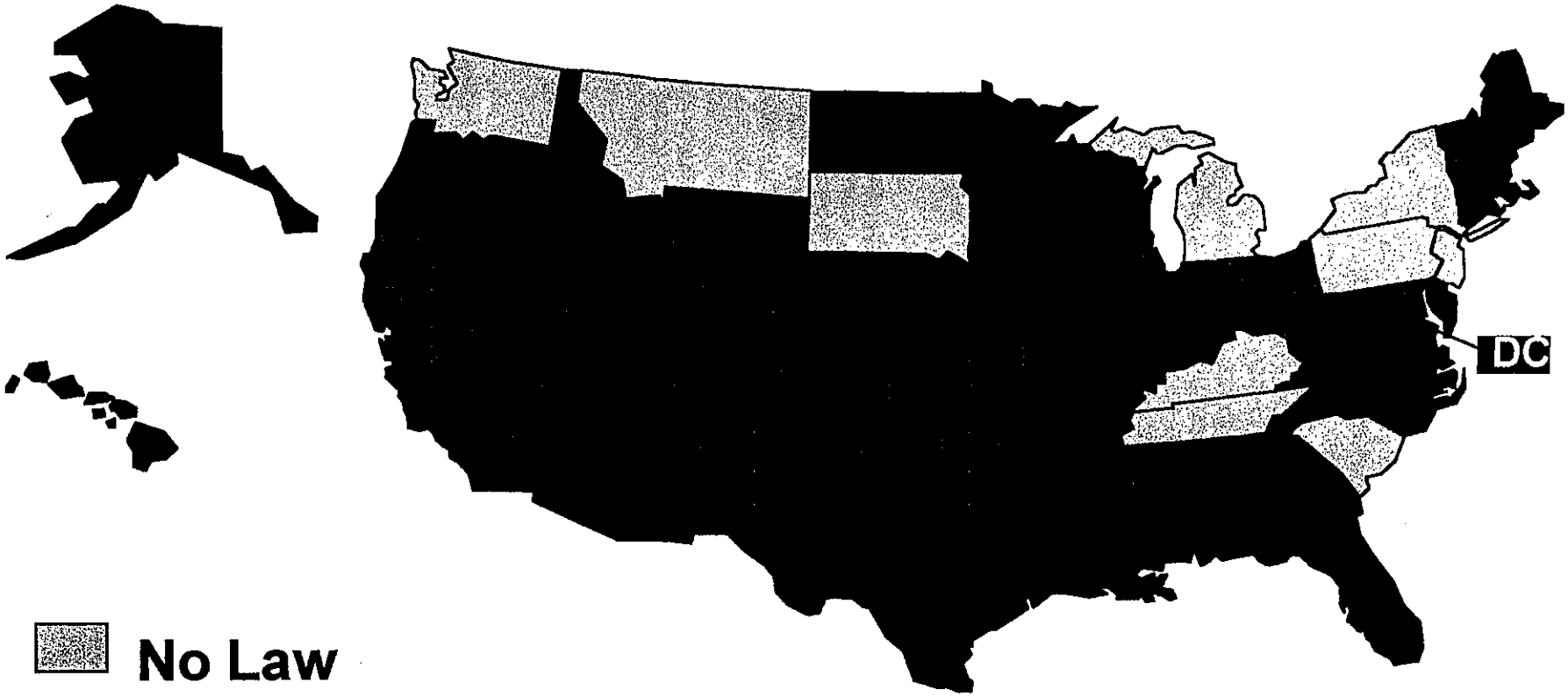
- Most alcohol-related fatalities are not caused by minors. An ALS law applies to all drivers, not just minors, and gets proven drunk drivers off the road as soon as possible.

Over the years, the combination of laws, education, treatment, and enforcement has prevented needless suffering in Pennsylvania. Passage of ALS is yet another necessary tool in the fight to save lives.

Administrative License Suspension Coalition of Pennsylvania
September, 1996

National Transportation Safety Board

States with Administrative License Revocation Laws



No Law

Law For Test Failure and Refusal

As of April 24, 1996

ADMINISTRATIVE LICENSE REVOCATION/DOUBLE JEOPARDY UPDATE AS OF AUGUST 6, 1996

The following is a list of the decisions where the courts have uniformly held that administrative license revocation is a remedial measure and not punishment in the sense of double jeopardy and thus does not violate the double jeopardy clause of the various state constitutions.

State Supreme Courts

1. **New Mexico:**
   State ex. rel. Schwartz, 904 P.2d 1004 (N.M. 1995)

2. **Maryland:**
   State of Maryland v. Jones, 666 A.2d 128 (Md. 1995) (Maryland Court of Appeals) *The Maryland Court of Appeals is the highest court in Maryland.

3. **New Hampshire:**
   State of New Hampshire v. Cassady, 662 A.2d 955, (N.H. 1995)

4. **Maine:**
   State of Maine v. Savard, 659 A.2d 1265 (Me 1995)

5. **Hawaii:**
   State of Hawaii v. Higa, 897 P.2d 928, (Haw. 1995)

6. **Kansas**
   State of Kansas v. Mertz, 1995 Kan. LEXIS 149 (Kan. Dec. 8, 1995)

7. **Massachusetts**
   Luk v. Commonwealth, 421 Mass. 415 (Mass. Nov. 17, 1995)

8. **Connecticut**
   State of Connecticut v. Hickham, 235 Conn. 614 (Conn. Dec. 1995)

9. **Minnesota**
   State of Minnesota v. Hanson, No. c1-95-531, 1996 Minn. Lexis 8 (Minn. Jan. 19, 1996)

10. **Iowa**
    State of Iowa v. Kocher, No. 369/95-348, 1996 Iowa Sup. LEXIS 17 (Iowa Jan. 17, 1996)

11. **Nebraska**
    State of Nebraska v. Hansen, 249 Neb. 177 (Neb. Jan. 26, 1996.)

12. **Idaho**
State of Idaho v. Talavera, 1995 Ida. LEXIS 156 (Idaho Nov. 3, 1995)

13. **North Dakota**
State of North Dakota v. Zimmerman, 539 N.W.2d 49 (N.D. 1995)

14. **Vermont**
State of Vermont v. Becker, 1995 Vt. LEXIS 98 (Vt. Sept. 20, 1995)

15. **Ohio**
The State of Ohio v. Gustafson; The State of Ohio v. Miller et.a.
Case Nos. 95-1271, 95-1303, 95-1304, 95-1307, 95-1377, 95-1466
Decided July 30, 1966.

16. **Colorado**
State of Colorado v. John Denver; Decided July, 1996; Unpublished decision

State Appeals Courts

1. **Texas:**
Ex Parte James Martin Tharp, 1995 Tex App. LEXIS 3255 (Tex. Ct. App. Dec. 21); *Voisinet v. State of Texas*, 1995 Tex. App. LEXIS 2465 (October 12, 1995); *Hubbard v. State of Texas*, 1995 Tex App. LEXIS 1653 (Unpublished July 20, 1995)

2. **Minnesota**
State of Minnesota v. Parker, C4-95-426, 1995 Minn. App. LEXIS 1226 (Minn. Ct. App. September 26, 1995); *State of Minnesota v. Spilde*, 536 N.W.2d 639, 1995 Minn. App. LEXIS 1151 (Minn. Ct. App. 1995); *State of Minnesota v. Hanson*, 532 N.W.2d 598 (Minn. Ct. App. 1995)

3. **Ohio**
State of Ohio v. Sims, Nos CA 94-12-215, 94-12-217, 95-02-025, 95-02-033, CA 95-04-064, 1995 Ohio App. 3415 (Ohio Ct. App. 12th District August 21, 1995); *State of Ohio v. Miller*, 1995 Ohio App. LEXIS 1971 (Ohio Ct. App. May 12, 1995).

4. **Alaska**
State of Alaska v. Zerkel, 900 P.2d 744, 1995 Alaska App. LEXIS 38 (Alaska Ct. App. 1995).

5. **California**
Baldwin v. Department of Motor Vehicles, 35 Cal. App. 4th 1630, 42 Cal. Rptr.2d 422 (Cal. Ct. App. June 23, 1995).

6. **Arizona**
Snow v. Superior Court of the State of Arizona, Case No. 1 CA-SA 950102 (Ariz. June 6, 1995).

7. **Florida**
Davidson v. MacKinnon, 656 So.2d 223, 1995 Fla. App. LEXIS 5922 (June 2, 1995).

8. **Nebraska**
State of Nebraska v. Young, 3 Neb. App. 539; 530 N.W.2d 269 (Neb. Ct. App. 1995).

9. **Georgia**
Nolen v. The State, Ga. Court of Appeals, A95A1570, October 2, 1995; *Moore v. The State*, Ga. Court of Appeals, A95A1727, October 2, 1995.

10. **Virginia**
Tench v. The State of Virginia, Virginia Court of Appeals, October 25, 1995.

11. **New York**
The New York Court of Appeals is the highest court in New York and has ruled in support of ALS law in New York. Citation is not available at this time.

The conflicting decisions arising out of appellate courts in Ohio have not been resolved by the Ohio Supreme Court which has ruled that there is no double jeopardy violation.

The following is a list of the states where cases are currently pending on the appellate level.

State Supreme Courts

1. Missouri
2. California

State Appeals Courts

1. Wisconsin

Note: The U.S. Supreme Court accepted cert on two property forfeiture cases from the 9th and 6th Circuit Courts of Appeal. The State of Massachusetts through the Attorney General filed an amicus brief and made reference to drunk driving cases therein. Advocates for Highway and Auto Safety and MADD also filed an amicus brief in this case. In the summer of 1996, the Court ruled that the civil forfeiture provisions did not violate the double jeopardy clause of the U.S. Constitution.

In addition, the defendant in the Maryland case cited above which denied the double jeopardy argument applied for cert to the U.S. Supreme Court. Cert was denied letting the lower court decision upholding administrative license revocation stand.

Effects of Administrative License Revocation (ALR) on Employment

National Highway Traffic Safety Administration
Contract No. DTNH22-93-C-05002

KETRON Division of the Bionetics Corporation
350 Technology Drive, Malvern, PA 19355

Presented by Kathleen Y. Knoebel
and Dr. H. Laurence Ross

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Project Objectives

- Determine the impact on the employment of first offenders of short-term (30-45 days) ALR
- Determine the impact on the employment of multiple offenders of longer-term (6 months to a year) ALR
- Determine the effects of alcohol-related crashes and injuries on the employment of crash-involved persons (i.e., innocent drivers, passengers, and pedestrians)

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Research Approach

Current ALR laws vary widely by state, but can be characterized as falling into one of the following four general ALR categories:

- ALR/90+ Day Mandatory Suspension (6 states)
- ALR/30-60 Day Mandatory Suspension (18 states)
- ALR/Immediate Hardship License (15 states)
- No ALR (12 states)

Pages 4 through 7 of Final Report contain information on the ALR laws for all 50 states and Washington, DC as of 1/1/96.

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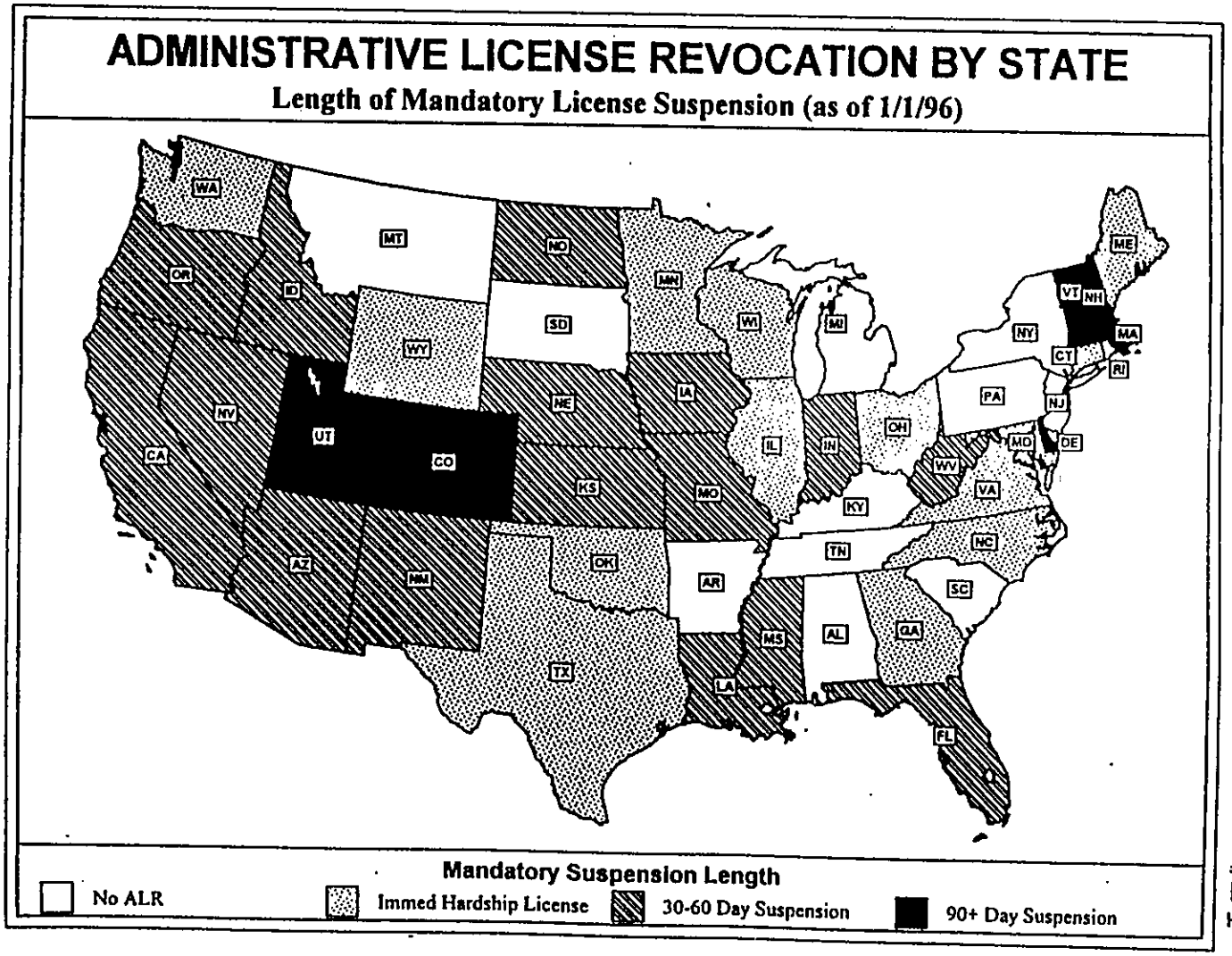
ALR Laws By State (1/1/96)



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Jurisdictions Selected

- *Delaware*: automatic ALR for 90 days for persons arrested for DUI & failing the mandated breath test
- *California*: suspension period of 120 days with hardship license available after 30 days
- *Maryland*: formal suspension of 45 days, but hardship license available without any period of "hard" suspension
- *Pennsylvania*: non-ALR jurisdiction, license revocation only after criminal process conviction

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Study Design

- Compare employment & income effects of license revocation on DUI offenders with the employment & income effects of injury-producing DUI crashes on victims, pedestrians, non-impaired drivers, & their passengers
- Select similar socio-demographic areas and proximate locations (where possible) to maximize comparability; can not use a true random assignment experiment in a legal environment
- Determine impact of increasing lengths of ALR (causal variable) on employment

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Selected Counties

- *New Castle County, Delaware* (90 days complete suspension)
- *Marin County, California* (hardship license after 30 days)
- *Anne Arundel County, Maryland* (immediate hardship license)
- *Chester County, Pennsylvania* (comparison state-no ALR)

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DUI Offender Survey

- Requested cooperation from treatment & education programs to which DUI offenders are mandated
- Designed paper & pencil questionnaire for classroom administration, including Spanish version
- Goal was to complete 200 interviews in each county:
  - 150 with first offenders
  - 50 with multiple offenders
- Data collection required 73 visits to 7 different facilities from June to October, 1994
- Total of 812 completed surveys used in analysis:
  - 579 with first offenders
  - 233 with multiple offenders

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Crash Victim Survey

- Selected comparison group of people other than the impaired drivers involved in alcohol-related injury crashes
- Mail survey-600 questionnaires distributed (25% returned)
- In California & Delaware, state records were used to identify qualifying crashes and their victims
- A victim population could not be identified in Maryland
- In Pennsylvania, the county DA's office DUI arrest records were scanned to locate those involved in crashes; victims selected from accident reports on file
- Total of 146 completed surveys used in analysis

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Research Findings

- Who are the DUI Offenders & Their Victims?
  - DUI offenders atypical of general population
  - DUI offenders disproportionately male, living without families, less educated, more working class, heavy drinkers in conjunction with driving
  - DUI offenders not importantly different (from victims or general public) in average age & racial composition
  - Victim populations are socio-demographically close to the general population

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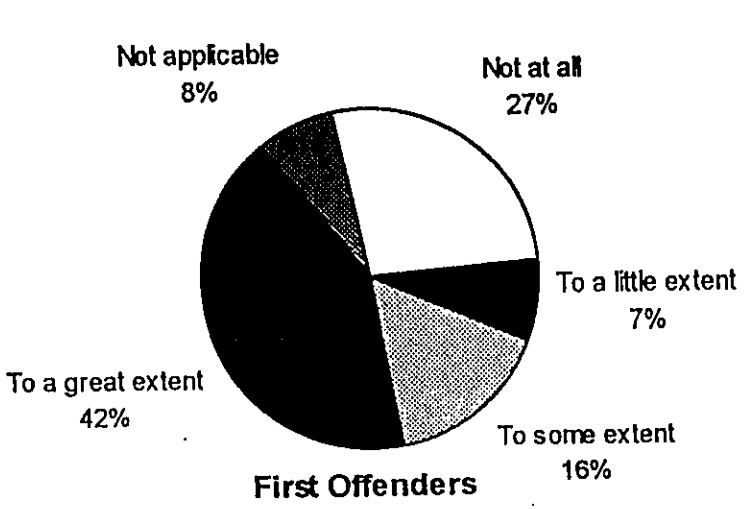
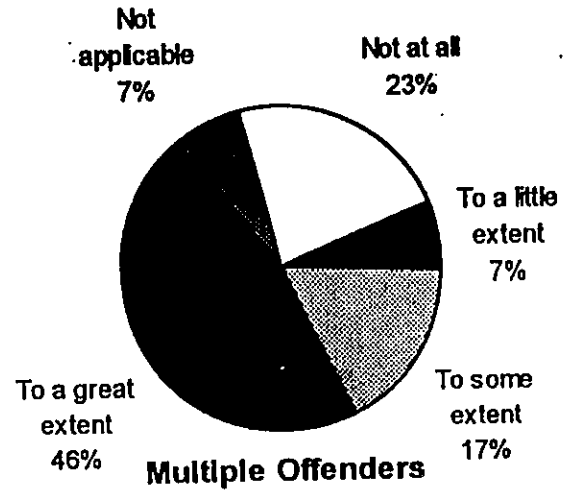
Impact on Jobs for DUI Offenders

① DUI offenders were asked to rate the extent that their loss of license has interfered with work. Nearly half reported "to a great extent."

- Mostly people requiring use of a car for work
- Multiple offenders more likely to report a significant interference





Loss of License Interference With Work

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Impact on Jobs for DUI Offenders

② DUI offenders were asked to report start & end dates & average income for the jobs they held from 1992-1994. A monthly impact analysis was performed which compared the change in income after DUI arrest in each of the three ALR states to the change in income after DUI arrest in the non-ALR comparison state.

- It was theorized that an effect on employment for first & multiple offenders should be evident in the first three months following the arrest (time period of immediate license revocation afforded by ALR).

- No significant impact on earnings in direction expected (ALR income should be less than non-ALR income if ALR does, in fact, have a detrimental effect on employment).

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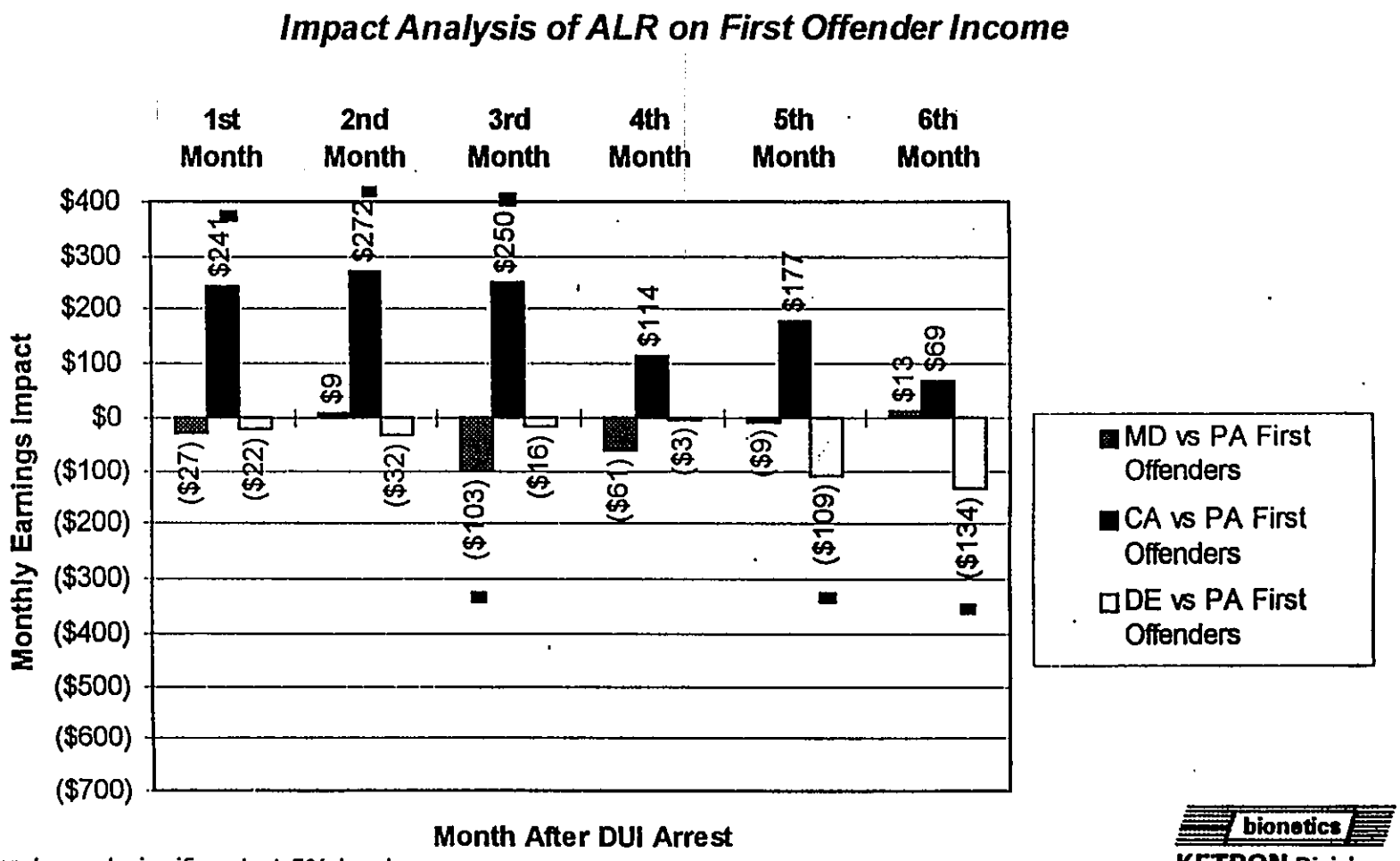
Impact on Jobs for DUI Offenders



■ Impact significant at 5% level.

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Impact on Jobs for DUI Offenders

③ DUI offenders were asked how much income they lost per week as a direct result of their DUI arrest. T-test of difference of percent reduction in income between ALR & non-ALR performed.

Difference in Percent Reduction in Income Between ALR and Non-ALR States

Group 1 Description	Group 1 % Reduction in Income	Group 2 Description	Group 2 % Reduction in Income	Significance Probability
PA first offenders	10.5%	MD first offenders	7.4%	.2945
PA first offenders	10.5%	CA first offenders	14.6%	.1543
PA first offenders	10.5%	DE first offenders	8.2%	.3609
PA multiple offenders	11.8%	MD multiple offenders	12.0%	.9707
PA multiple offenders	11.8%	CA multiple offenders	19.4%	.1595
PA multiple offenders	11.8%	DE multiple offenders	14.3%	.6409

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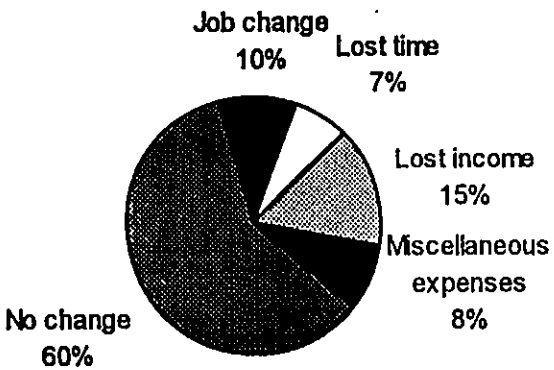
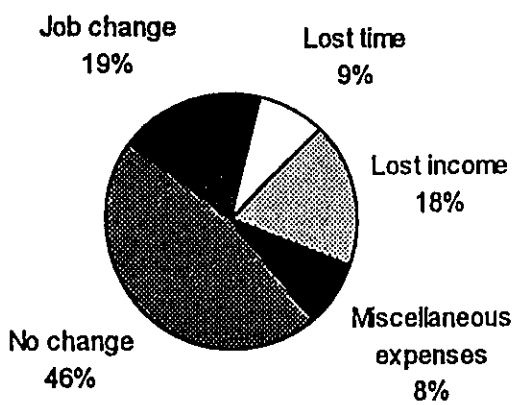
Impact on Jobs for DUI Offenders

④ DUI offenders were asked to describe the effect of their recent DUI arrest on their employment. Open-ended responses were coded into categories & summarized.

– Over 55% stated there was no change



First Offenders



Multiple Offenders

DUI Arrest Effect on Employment & Income

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Impact on Jobs for DUI Offenders

⑤ Measured the impact of ALR on employment by the change in the DUI offender's activity from the month before arrest to the month after.

Activity the Month After DUI Arrest for Those Working the Month Before Arrest

	Activity the Month After Arrest								Total Working Month Before Arrest
	Working		Attending School		Unemployed		Other		
	No.	%	No.	%	No.	%	No.	%	
DUI offenders in non-ALR state working the month before arrest	175	94	4	2	8	4	3	1	190
DUI offenders in ALR states working the month before arrest	472	94	5	1	20	4	3	1	500
All DUI offenders working the month before arrest	647	94	9	1	28	4	6	1	690

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Impact on Jobs for DUI Offenders

⑥ A regression analysis was conducted to predict income based on an array of explanatory variables.

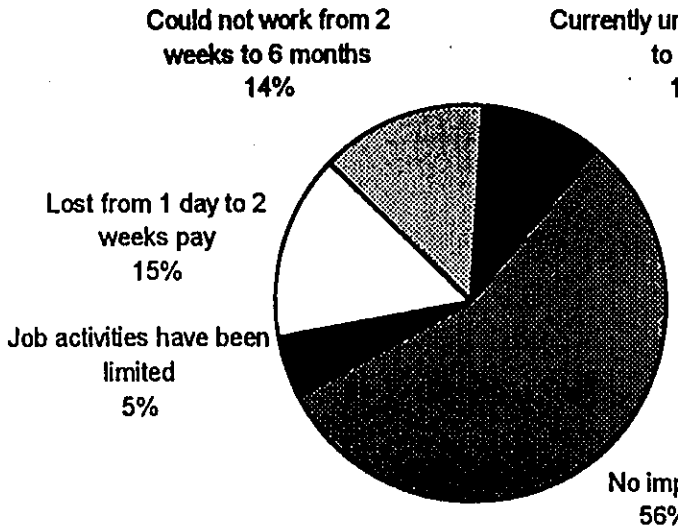
- Found a strong significant relationship between income and: age; gender; marital status; and education.
- No relationship found between income & state (when other variables controlled for), therefore level of ALR had no impact on income.

Summary: Most analyses showed that the earnings of DUI offenders in ALR states were **not** disproportionately reduced when compared to the earnings of DUI offenders in the non-ALR state.

Impact on Jobs for Crash Victims

① Crash victims were asked to describe the effect of the DUI crash on their employment. Open ended-responses were coded into categories.

- Employment of DUI crash victims was not impacted more by the experience (over 56% reported no impact)
- Due to self-selection bias, the more seriously injured/impacted crash victims would have responded to the survey



Changes in Employment/Income of Victims as a Result of DUI Crash

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Impact on Jobs for Crash Victims

② Crash victims were asked how much income they lost per week as a direct result of their DUI crash. T-test of difference of percent reduction in income between DUI crash victims & DUI offenders performed.

- Percent reduction actually greater for DUI offenders (12.0%) when compared to DUI crash victims (7.6%), however difference not significant at 5% level.

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Impact on Jobs for Crash Victims

③ Measured the impact of the crash on employment by the change in the victim's activity from the month before crash to the month after.

Activity the Month After DUI Crash for Those Working the Month Before Crash

	Activity the Month After Crash								Total Working Month Before Crash
	Working		Attending School		Unemployed		Disabled		
	No.	%	No.	%	No.	%	No.	%	
DUI crash victims in PA working the month before crash	37	79	1	2	2	4	7	15	47
DUI crash victims in CA working the month before crash	14	56	0	0	1	4	10	40	25
DUI crash victims in DE working the month before crash	27	71	3	8	0	0	8	21	38
All DUI crash victims working the month before crash	78	71	4	4	3	2	25	23	110

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Research Findings

- Driving While Revoked
  - Many respondents admitted to driving to work & for other social functions (38% said they drove on the most recent day they worked)
  - Overall, 46% admitted driving for some reason
  - Majorities of first & multiple offenders rated the risk of being caught as low (55% said not at all likely to be caught)

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Research Findings

- The Functioning of ALR Systems
  - Maryland drivers more frequently attended the administrative hearings & were frequently rewarded by getting their licenses returned
  - A third of first offenders were ignorant of the possibility of ALR at the time of their offense
  - Most DUI offenders (approximately 85%) indicated they were very likely to get their license back when suspension/revocation period ended

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Research Findings

- Other Findings Related to Safety Among DUI Offenders
  - Multiple offenders were more likely to fail to wear safety belts/than first offenders (40% not belted versus 30% for first offenders)
  - Bulk of arrests (66%) were a result of a moving violation; 17% resulted from accident involvement
  - Most offenders lived in households with other employed persons (66%); even if DUI offender lost employment, could depend on other employed household members

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Research Findings

- Administration of Surveys to Spanish Speaking DUI Offenders
  - Needs of Spanish speaking DUI offenders may not be adequately addressed by current alcohol education & treatment programs--very different in terms of culture, education, employment, & driving experience
  - This group often illiterate in Spanish as well as English; not able to complete paper-and-pencil survey on own
  - Conception of jobs & employment does not correspond with the understanding of some segments of society; work a different "job" every day; never possessed a driver's license; live in company dorms & do not commute to work

Research Findings

- Victim Survey Results
  - Over 75% of the victims were the driver of another vehicle involved in the crash
  - Only 15% of victims required hospitalization; half did not require medical attention
  - Most of the damage was to the vehicles (57% vehicles could not be driven away)
  - Larger percent of crash victims was employed in professional jobs than DUI offenders (27% versus 16%)
  - Both groups reported almost identical weekly reduction in income as a result of the DUI event ($100/week)

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Summary

- The major finding of this study is that ALR does **not** have a major impact on the DUI offender's job & income
  - Main consequence is the need to find alternate transportation (e.g., family & co-workers)
  - Lost income is uncommon
  - DUI offenders continue to drive while unlicensed, since this group views the risk of apprehension as low (they may, however, drive more safely)

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Summary

- Alcohol-involved crashes have a great impact on seriously injured victims
  - However, proportion of DUI crashes producing serious injury is quite low
  - Most DUI is crash-free & most crashes do not involve injury
  - Vast bulk of impact of DUI falls on the offenders, not the victims

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Summary

- Method of obtaining information from DUI offenders at alcohol highway safety schools & alcohol treatment programs worked very well for both first & multiple offenders
  - Schools & treatment centers very cooperative
  - A very high participation rate was obtained from the DUI offenders

Summary

- Administrative license systems differ in their efficiency
  - In some places, hearings are almost routinely requested & they often result in return of the license (Maryland)
  - In other, few requests are made & few are successful in canceling the penalty (California & Delaware)

Recommendations

Policy recommendations based on these findings are:

❶ There is no reason to fear loss of jobs and income from administrative license revocation as great as 90 days for first offenders. Since such revocation has safety benefits, it is recommended to continue NHTSA support for the adoption of administrative license revocation policies.

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Recommendations

- There is no strong reason to prefer one form of ALR over another, from the viewpoint of minimizing economic consequences. However, from the viewpoint of avoiding the temptation for evasion, it may be best to consider making hardship licenses available to first offenders after 30 days.

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Recommendations

❸ Because the population perceives the risk of apprehension for unlicensed driving as very low, more should be done in the way of sobriety checkpoints and other enforcement to increase the rate of detection, and such efforts should be widely publicized.

❹ End the requirement for police attendance at administrative hearings, and accept sworn depositions instead.

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Recommendations

❺ States should facilitate license reinstatement at the end of the sanction period.

❻ Since the public is still not familiar with administrative license revocation, more resources should be devoted to publicizing the threat of this remedial action. Increased general deterrence is a likely consequence.

ADMINISTRATIVE LICENSE SUSPENSION CONSTITUTIONAL SAFEGUARDS

I. Introduction

Public concern for the problem of drunk driving has led numerous state legislatures including Delaware, Minnesota, Missouri, Colorado, Illinois and North Carolina to adopt a variety of laws directed at increasing safety on our public highways. Over the past decade a number of statutes have been enacted which are aimed at promptly getting the drunken driver off the road. At the forefront of this movement are statutes which enable a state to suspend summarily a person's driver's license upon a showing, at an administrative hearing, of probable cause to believe that the person was operating a motor vehicle under the influence of alcohol. As early as 1982, legal scholars were analyzing the constitutional concerns relating to the movement for administrative suspension of driver's licenses as a remedy to the problem of drunken drivers. University of Denver Law Professor, John H. Reese, in a paper presented at the 14th Annual Institute on Motor Vehicle and Traffic Law, Summary Suspension of Driver Licenses of Drunken Drivers - Constitutional Dimensions, provided an early model for analysis which is still

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instructive. The following is a summary of Professor Reese's salient points in this regard.[1]

II. Property Interest in One's Driving License

The United States Supreme Court has recognized the fact that once a driver's license has been granted to an individual he acquires a property interest in that license.

Once licenses are issued, their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involves state action that adjudicates important rights of the licensees. In such cases the licenses are not to be taken away without the procedural due process required by the Fourteenth Amendment. Bell v. Burson, 402 U.S. 535, 539, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971).

Since a person clearly has a property interest in the continued possession of a driver's license, it therefore must be

[1] The focus of this paper is the procedural due process concerns of a summary driver's license suspension. Because the law is relatively settled that civil sanctions do not give rise to constitutional infirmity based on "double jeopardy," the issue of whether a summary suspension coupled with a criminal prosecution for drunk driving violates the Double Jeopardy Clause is beyond the scope of this discussion. A civil driver's license suspension does not violate the Double Jeopardy Clause when there is also a criminal prosecution arising from the same drunk driving incident. Krall v. Commonwealth of Pennsylvania, 903 F. Supp. 858, 862-63 (E.D. Pa. 1995).

determined whether summary suspension procedures meet the requirements of procedural due process.

III. The Standard for Due Process

The concept of "due process" requires that where a property interest is at stake, one's property will not be taken without a) notice; and b) an opportunity to be heard. The test which the courts have relied upon to determine whether a particular statutory scheme comports with due process is that which was set out by the U.S. Supreme Court in Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).

Although the test originally applied in Mathews was used to determine what type of hearing was necessary prior to the deprivation of a property interest, later cases have used the same test in order to determine whether any hearing is needed before the government may act. The test is expressed in the following language from Mathews:

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interests

> through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and, finally, the government's interest, including the function involved and the fiscal or administrative burdens that the additional procedures would entail. Mathews, 424 U.S. at 334-35.

Implicit in the Mathews analysis is the consideration of two additional factors. The first of these, related to the nature of the private interest affected, is the degree of deprivation which the private party will suffer. The Court has indicated that the severity of deprivation can be determined by examining two factors: the degree to which the private parties may be compensated for their loss of property and how long they will be deprived of their property until some type of a post-deprivation hearing is afforded. Mackey v. Montrym, 443 U.S. 1, 99 S.Ct. 2612, 61 L.Ed.2d 321 (1978). Secondly, when considering the nature of the government's interest, it is also proper to consider whether or not that interest would be defeated or severely limited by the time delay which is inherent in the provision of a hearing.

A. **The Government's Interest in Maintaining Highways**

Applying the Mathews analysis to the situation whereby a driver's license is suspended summarily when a driver is arrested for drunk driving suggests that the Supreme Court would allow such action. The Supreme Court has several times recognized that the maintenance of highway safety and the prevention of automobile accidents are an important State interest. "Far more substantial than the administrative burden is the important public interest in safety on the roads and highways, and the prompt removal of the safety hazard." Dixon v. Love, 431 U.S. 105, 114, 97 S.Ct. 1723, 52 L.Ed.2d 172 (1977). More recent cases have directly analogized the suspension of a driver's license upon refusal to take alcohol blood-level tests to situations in which broad police powers are invoked summarily to preserve public health and safety through seizure of property. "We have traditionally accorded the states great leeway in adopting summary procedures to protect public health and safety. States surely have at least as much interest in removing drunken drivers from their highways as in summarily seizing mislabeled drugs or destroying spoiled food stuffs." Mackey v. Montrym, 443 U.S. at 17 (1978); see also Occhibone v. Commonwealth of Pennsylvania, 669 A.2d 326, 328 (Pa. 1995).

B. The Nature of the Private Harm as a Result of Summary Suspension

In order to apply the Mathews v. Eldridge analysis to driver's license suspensions, the nature of the private interest must also be examined. The Court has recognized that while the property interest which a driver holds in his driver's license is important, it is not of the same magnitude as are other interests, i.e., disability payments. "Unlike the Social security recipients in Eldridge, who at least could obtain retroactive payments if their claims were subsequently sustained, a licensee is not made entirely whole if his suspension or revocation is later vacated. On the other hand, a driver's license may not be so vital and essential as are social insurance payments on which the recipient may depend for his very subsistence." Dixon v. Love, 431, U.S. at 113.

The degree to which a driver may suffer such irrevocable harm will depend, to a large extent, upon the length of time the driver is without a license prior to the hearing. "The duration of any potentially wrongful deprivation of a property interest is an important factor in assessing the impact of official action on the private interest involved." Mackey v. Montrym, 433 U.S. at 12 (1978). Therefore, in order for a summary suspension to comply with the Mathews v. Eldridge due

process standard, the State should provide some type of post-suspension hearing promptly. This approach has been followed in virtually all States which allow such summary suspensions.

C. The Risk of Error Inherent in Summary Procedures

Finally, the third part of the Mathews analysis must be applied to determine the likelihood of an erroneous deprivation as a result of summary driver's license suspensions and whether an alternative method would suffice. The U. S. Supreme Court seems to be convinced that the risk of such an erroneous deprivation is small in relation to the important governmental interest which is served by removing a drunk driver from the highways. In Mackey v. Montrym, 443 U.S. 1, even the existence of a factual dispute as to whether the defendant had refused a breathalyzer test did not shake the Court's confidence in the initial report of an arresting officer. "...[w]hen disputes as to historical facts do arise, we are not persuaded that the risk of error inherent in the statute's initial reliance on the representation of the reporting officer is so substantial in itself as to require that the Commonwealth stay its hand pending the outcome of any evidentiary hearing necessary to resolve questions of credibility or conflicts in the evidence." Mackey v. Montrym, 443 U.S. at 15.

IV. Mackey v. Montrym - The U.S. Supreme Court's Guidance in this Arena

The U.S. Supreme Court case of Mackey v. Montrym, 443 U.S. 1 (1978), involved the summary suspension of an individual's driver's license for refusing to submit to an alcohol breath-analysis test following his arrest for driving under the influence. In accordance with the relevant Massachusetts statutory provision, the arresting officer certified to the registrar of motor vehicles that he had probable cause to believe that Montrym had been operating his automobile while under the influence of alcohol and that Montrym had refused to take a breathalyzer test. The registrar then summarily suspended Montrym's license.

Chief Justice Burger, writing for the majority, upheld the constitutionality of the Massachusetts law, holding it to be a valid exercise of legislative authority in advance of the cause of highway safety. The Court applied the three-step analysis used in Mathews v. Eldridge in coming to his conclusion. This included an examination of: (1) the nature of the private interest being abrogated by governmental action; (2) the possibility that the summary suspension of Montrym's driver's license would result in an erroneous deprivation; and (3) the

importance of the governmental interest being advanced by the use of summary procedures.

In addition to ruling favorably for the state on all three parts of the Mathews analysis, the majority was unable to distinguish Mackey from Dixon v. Love, 431 U.S. 105 (1977), an earlier case which involved the summary administrative revocation of a driver's license. In Dixon, the Court upheld summary suspension and distinguished it from the earlier driver license suspension case Bell v. Burson, 402 U.S. 535 (1971) which concerned the constitutionality of a Georgia statute mandating the suspension of a driver's license when its holder was involved in an accident but failed to post a sufficient bond to cover any potential civil liability for damages. Unlike Bell, both Dixon and Mackey concern a matter about which the State has a great deal of concern; namely, highway safety. This factor fully distinguishes Bell v. Burson, where the only purpose of the Georgia statute there under consideration was "to obtain security from which to pay any judgments against the licensee resulting from the accident," Bell v. Burson, 402 U.S. at 540. Dixon and Mackey, however, both "...involve the constitutionality of a statutory scheme for administrative suspension of a driver's license for statutorily defined cause without a presuspension hearing. In each, the sole question presented is the appropriate timing of the legal process due a licensee. And, in both cases,

that question must be determined by reference to the factors set forth in Eldridge." Mackey v. Montrym, 443 U.S. at 11.

In Mackey, much of the majority's support for the Massachusetts statute was based on the fact that under the Massachusetts law a driver whose license was suspended was provided with an immediate post-suspension hearing before the registrar if he so desired. In the majority's judgment, this provision of the statute was relevant to two factors of the Mathews analysis. First, by minimizing the amount of time during which Montrym could be wrongfully deprived of his license, the Court felt that the first factor of the Mathews analysis, the degree of private harm suffered as a result of the summary action, would be minimized. Second, the majority also felt that providing a prompt post-suspension hearing would minimize the charge that a license would be suspended erroneously, the second factor of the Mathews analysis.

While the Mackey Court felt that providing a prompt post-suspension hearing was a major factor in allowing the Massachusetts statute to stand, it did not feel that the fact that the suspension was predicated wholly upon the report of the arresting officer was a threat to the statute's constitutionality. Rather, the Court seemed to feel that the arresting police officer would be in a better position to

determine if the driver had been violating the drunk-driving laws than would the registrar. "The officer whose report triggers a driver's suspension is a trained observer and investigator. He is, by reason of his training and experience, well suited for the role the statute accords him in the presuspension process." Mackey v. Montrym, 443 U.S. at 14. Also see Barry v. Barchi, 443 U.S. 55, 99 S.Ct. 2642, 61 L.Ed.2d 365. Any abuse of discretion by the police in regard to the presuspension process would expose the officer to personal liability for any harm suffered by the licensee. This, the Court felt, was a sufficient safeguard to minimize the risk that a license would be suspended erroneously.

Balanced against what the Mackey Court saw as a minimal deprivation of property and a low risk of error is the strong governmental interest in highway safety. The Court firmly acknowledged the statute' s relation to the "paramount interest the Commonwealth has in preserving the safety of its public highways..." Mackey v. Montrym, 443 U.S. at 17. The result in Mackey was that the Court upheld the summary suspension of Montrym driver's license despite the lack of a presuspension hearing.

V. Proposed Legislation (House Bill 2300, Printer's Number 2859, 1995)

The basic elements of due process, notice and a meaningful opportunity to be heard were addressed by House Bill 2300, Printer's Number 2859. A copy of which is annexed hereto with minor modification. Moreover, the sole question here is likely to be that upon which Dixon and Mackey turned: the timing of legal process. The proposed administrative license suspension ("ALS") legislation would amend Title 75 of the Pennsylvania Consolidated Statutes at §§ 1584 and 1585, to describe in detail the nature of notice of suspension which may be served personally by a police officer or by the Department of Transportation by mail.

Any person who would receive a notice of suspension under the provisions of the proposed ALS legislation could request an administrative review. As drafted, the proposed legislation would require the Department of Transportation to complete an administrative review prior to the effective date of the suspension order if the request for the review is received by the Department within eight (8) days following service of the notice of suspension. Where the request for administrative review is received by the Department more than eight days following service of the notice of suspension, the Department

would be required to make a determination within 30 days following the receipt of the request for review. A full administrative hearing may be requested by a person who has received a notice of suspension. Under the proposed ALS provisions, if the Department cannot conduct a hearing where so requested within 30 days of a request for hearing, a temporary license would be mandated. The Department would be required to issue a temporary license until the hearing is conducted.

VI. Conclusion

The proposed ALS legislation meets the constitutional requirements for due process as articulated by the U.S. Supreme Court in Mackey because it provides for timely administrative review or hearing in connection with the minimal deprivation of a driver's property interest in his/her driver's license.

What Did the Supreme Court Do to Our DUI Law?

Overview

On 30 July 1996, the Supreme Court of Pennsylvania, Western District, decided an appeal on the DUI conviction of David Barud. The court found unconstitutionally vague a provision of the DUI law, enacted in 1992 in response to the Commonwealth vs. Jarman decision. The Court concluded that Title 75, section 3731(a)(5), unnecessarily encompasses both lawful and unlawful conduct, fails to provide a reasonable standard for drivers to gauge their conduct, encourages discriminatory enforcement, and fails to require proof that a driver's BAC (blood alcohol content) exceeded the legal limit at the time of driving.

The Facts of the Case

On 15 December 1993 at 2:20 a.m., Officer Szurlej was monitoring traffic when he saw Barud drive about 12 feet past a stop sign before stopping. Szurlej followed Barud for a quarter of a mile and then pulled him over.

Barud was arrested at 2:34 a.m. and consented to a blood test which was taken at 2:55 a.m., approximately 35 minutes after the stop. Barud's BAC was .15%. He told Szurlej he drank seven beers between 7:00 p.m. and 2:00 a.m.

Szurlej charged Barud with one count of DUI, 3731(a)(1), incapable of safe driving; one count of DUI, 3731(a)(5), BAC of .10% or greater within three hours of driving; and a summary offense for failing to stop at a stop sign.

The Appeal

Barud appealed, claiming that 3731(a)(5) violates the due process guarantees of the U.S. and Pennsylvania Constitutions, which provide that an accused cannot be punished for conduct unless the law gives clear notice of the kind of conduct which is not permitted. Barud claimed 3731(a)(5) violated due process because it fails to require the state to prove that BAC at time of testing reflects BAC at time of driving and it doesn't allow the defendant the defense that he wasn't at .10% BAC at the time of driving.

The Court's Findings

The Court found 3731(a)(5) captures both legal and illegal activity by not requiring proof that a driver's BAC was .10% or greater *at the time of driving*. For example, a driver can be operating a vehicle with a BAC below .10 and if tested at that time would not be exceeding the legal limit. However, since BAC rises for a period of time after drinking, the same driver's BAC could be .10% or greater within three hours of driving. The driver would

exceed the legal limit if tested and be DUI under 3731(a)(5) without actually having driven at .10% or greater.

Conclusion

Despite news reports seemingly to the contrary, it is still illegal to drive under the influence in Pennsylvania. All provisions of our DUI law, except 3731(a)(5), are intact. The Court has not disturbed the ability of law enforcement to prosecute DUI offenders under the remaining parts of the DUI law.

In its decision the Court pointed to statutes like California's which would allow for a three-hour rule and be constitutional by requiring the state to show a connection between BAC at time of testing and BAC at time of driving and also allow a defendant to show his BAC was not .10% or greater while driving.

Clearly, the crux of the Barud decision is to highlight the need for properly drawn DUI laws in Pennsylvania that prevent drunk driving thereby saving lives. The lesson of the Supreme Court decision is that laws which attempt to make DUI convictions easier for police and prosecutors at the expense of criminalizing conduct which has not been declared illegal will not withstand scrutiny by the Court.

THE PENNSYLVANIA ALS COALITION
AUGUST 7, 1996

[J-114-1995]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 64 W.D. Appeal Docket 1994
Appellant,	:	
	:	Direct appeal from the order of the Court of Common Pleas of Allegheny County, Criminal Division, dated September 19, 1994, at No. CC 9402512
vs.	:	
DAVID M. BARUD,	:	
	:	ARGUED: September 18, 1995
Appellee.	:	

OPINION OF THE COURT

MR. JUSTICE CASTILLE DECIDED: JULY 30, 1996

The issue presented in this appeal is whether the newly enacted Driving Under the Influence statute, 75 Pa. C.S. § 3731(a)(5), which imposes criminal penalties on individuals who have a blood alcohol content ("BAC") equal to or in excess of .10% within three hours of driving, violates the due process guarantees of the United States and Pennsylvania Constitutions. Because, § 3731(a)(5) unnecessarily encompasses both lawful and unlawful conduct; fails to provide a reasonable standard by which a person may gauge their conduct; encourages arbitrary and discriminatory enforcement; and fails to require proof that a person's BAC actually exceeded the legal limit at the time of driving; we conclude that 75 Pa. C.S. § 3731(a)(5) is unconstitutional.

The facts of this case establish the following: On December 15, 1993, at approximately 2:20 a.m., Officer Szurlej of Reserve Township, Allegheny County, was monitoring traffic at the

intersection of Spring Garden Avenue and Mount Troy Road when he observed appellee approach the intersection and drive his vehicle 12 to 15 feet past a stop sign before bringing the vehicle to a complete stop. Officer Szurlej followed appellee in his police cruiser for about a quarter of a mile before activating his emergency lights and pulling appellee over to the side of the road. Appellee on his own volition exited his vehicle, stumbled, and then began to walk toward Officer Szurlej. Officer Szurlej ordered appellee back to his car, approached the vehicle and observed that the vehicle's registration and inspection stickers were expired. Upon speaking with appellee, the officer noticed that appellee's speech was slurred, that his eyes were bloodshot and that he smelled strongly of alcohol. Officer Szurlej administered three field sobriety tests, all of which appellee failed.

Appellee was placed under arrest for Driving Under the Influence at 2:34 a.m. and subsequently consented to a blood test which was taken at 2:55 a.m., approximately thirty-five minutes after the stop. The test later revealed a BAC of 0.15%. After being informed of his Miranda rights, appellee waived his right to remain silent and informed the officer that he had consumed seven beers between the hours of 7:00 p.m. and 2:00 a.m.

The Commonwealth charged appellee with: (1) one count of driving under the influence of alcohol in violation of 75 Pa. C.S. § 3731(a)(1) (incapable of safe driving); (2) one count of driving under the influence of alcohol in violation of § 3731(a)(5), the

statute at issue here; and (3) a summary offense for failing to stop at a stop sign. On May 20, 1994, appellee filed omnibus pre-trial motions, including a motion to dismiss the second count alleging that 75 Pa. C.S. § 3731(a)(5) violated the due process clause of the U.S. Constitution and Article I, Section 9 of the Pennsylvania Constitution. Following a hearing in the Court of Common Pleas of Allegheny County, the trial court issued an opinion and order granting appellee's pre-trial motion dismissing the second count, holding that 75 Pa. C.S. § 3731(a)(5) was unconstitutional. The trial court further denied the remainder of appellee's pre-trial motions and denied the Commonwealth's motion to amend the criminal information.[1] This direct appeal followed.[2]

The issue raised in this appeal is whether § 3731(a)(5) of the Motor Vehicle Code violates the substantive due process guarantees of the United States and Pennsylvania Constitutions.[3] Appellee claims

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[1] On January 31, 1995, the Office of the Attorney General intervened in this matter pursuant to Pa. R.A.P. 521(b).

[2] This Court accepted jurisdiction over this appeal by virtue of 42 Pa. C.S. § 722(7) which provides that this Court shall have exclusive jurisdiction of appeals from final orders of the courts of common pleas in cases where any statute has been held invalid as repugnant to the Constitution of the United States or the Constitution of this Commonwealth.

[3] The Fifth Amendment to the United States Constitution provides in pertinent part: "No person shall ... be deprived of life, liberty, or property without due process of law ...." U.S. Const. amend. V.

Article 1, § 9, of the Pennsylvania Constitution provides in relevant part: "Nor can an accused be deprived of this life, liberty, or property unless by the judgment of his peers or the law of the land." Pa. Const. art. I, § 9.

(continued...)

that § 3731(a)(5) violates substantive due process because it is void for vagueness and is overbroad, that it is not rationally related to the state's interest in curbing DUI offenders, and that the statute fails to provide a rebuttable presumption that the accused's BAC at the time of testing accurately reflects their BAC at the time of driving and fails to provide for an affirmative defense requiring the state to prove that the accused's BAC was at least .10% at the time of driving.

Generally, this amended driving under the influence statute, § 3731(a)(5), makes it an offense under the Motor Vehicle Code to have a BAC of .10% or greater within three hours after a person drove, operated or was in actual physical control of the movement of a motor vehicle. Section 3731(a)(5) provides in relevant part:

> § 3731 Driving under influence of alcohol or controlled substance
>
> (a) Offense defined.-- A person shall not drive, operate or be in actual physical control of the movement of any vehicle:
>
> * * *
>
> (5) if the amount of alcohol by weight in the blood of the person is 0.10% or greater at the time of a chemical test of a sample of the person's breath, blood or urine, which sample is:
>
> (i) obtained within three hours after the

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[3](...continued)

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution states in part: "No State shall ... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. XIV, § 1.

> person drove, operated or was in actual physical control of the vehicle ....

The statute also provides for a defense to charges under § 3731(a)(5) if the accused can establish by a preponderance of evidence that he or she consumed enough alcohol after the last instance in which the person drove which caused their BAC to rise above .10% at the time of testing. Section 3731(a.1) states in full:

> (a.1) Defense. -- It shall be a defense to a prosecution under subsection (a)(5) if the person proves by a preponderance of evidence that the person consumed alcohol after the last instance in which he drove, operated or was in actual physical control of the vehicle and that the amount of alcohol by weight in his blood would not have exceeded 0.10% at the time of the test but for such consumption.

75 Pa. C.S. § 3731(a)(5).

At the outset, we note that it is evident that § 3731(a)(5) was enacted in response to this Court's decisions in Commonwealth v. Jarman, 529 Pa. 92, 601 A.2d 1229 (1992) and Commonwealth v. Modaffare, 529 Pa. 101, 601 A.2d 1233 (1992), in which this Court found that there was insufficient evidence to sustain the defendants' convictions for operating a motor vehicle with a BAC of .10% or greater in violation of 75 Pa. C.S. § 3731(a)(4) (BAC of .10% or greater) of the Motor Vehicle Code.[4] In both Jarman and Modaffare,

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[4] The legislative history behind the enactment of § 3731(a)(5) provides:

> The SPEAKER. On that question, the Chair recognizes Mr. Blaum.
> MR. BLAUM. Thank you, Mr. Speaker.
> Mr. Speaker, this is an agreed-to amendment which will correct some court cases which the Supreme Court has handed down which have damaged the DUI (driving under the influence) and underage

(continued...)

which were decided on the same day, the defendants were arrested for driving while under the influence of alcohol and were subsequently transported to area hospitals for the administration of a blood test. Jarman's blood test, which was taken approximately one hour after he was stopped, revealed a BAC of .114%. Jarman, 529 Pa. at 94, 601 A.2d at 1229. Modaffare revealed a BAC of .108% approximately one hour and fifty minutes after he was stopped. Modaffare, 529 Pa. at 103, 601 A.2d at 1234. At trial, the Commonwealth's expert witnesses testified that the defendants' BAC may not have peaked until after the defendants had operated their motor vehicles since a person's blood alcohol level steadily rises after drinking until a peak is reached some 60 to 90 minutes after the drinking has ceased. Jarman, 529 Pa. at 96, 601 A.2d at 1231; Modaffare, 529 Pa. at 105, 601 A.2d at 1234. See also, Commonwealth v. Gonzalez, 519 Pa. 116, 130, 546 A.2d 26, 33 (1988) ("[g]enerally, it takes from 30 to 90 minutes for alcohol to be fully absorbed and reach its peak level") (citation omitted). This Court concluded that because: (1) there was a significant delay between the time the defendants were stopped and the time that their BAC was tested and (2) that the blood test revealed that the defendants' BAC only minimally exceeded .10% at the time of testing, the evidence was insufficient to prove that the defendants' BAC was equal to or greater than .10% at the time of

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[4](...continued)
drinking laws of Pennsylvania.

House Legislative Journal, 11/17/92, House Bill 355, page 1853.

driving. Jarman, 529 Pa. at 97, 601 A.2d at 1231; Modaffare, 529 Pa. at 106-07, 601 A.2d at 1236. Subsequent to this Court's decisions in Jarman and Modaffare, this Court held that where a person's blood alcohol test reveals levels of alcohol significantly above the legal threshold (.10%) and where there was a not a significant lapse of time between the time when the driver was stopped and when the blood test was administered, the Commonwealth was not required to present expert testimony to prove that a driver operated a vehicle with a BAC of .10% or greater. Commonwealth v. Yarger, 538 Pa. 329, 648 A.2d 529 (1994). *See also* Commonwealth v. Loeper, __ Pa. __, 663 A.2d 669 (1995) (holding that where evidence is insufficient to support a conviction under § 3731(a)(4) (BAC of .10% or greater) and defendant has not also been charged with violating § 3731(a)(1) (incapable of safe driving), additional evidence of the defendant's alleged intoxication is not relevant to determining whether defendant violated (a)(4)).

With the preceding case law in mind, we begin our analysis by recognizing that there is a strong presumption in the law that legislative enactments do not violate the constitution. Commonwealth v. Mikulan, 504 Pa. 244, 247, 470 A.2d 1339, 1340 (1983); Snider v. Thornburgh, 496 Pa. 159, 166, 436 A.2d 593, 596 (1981). Moreover, there is a heavy burden of persuasion upon one who challenges the constitutionality of a statute. Commonwealth v. Mikulan, *supra*. While penal statutes are to be strictly construed, the courts are not required to give the words of a criminal statute their narrowest

meaning or disregard the evident legislative intent of the statute. Commonwealth v. Wooten, 519 Pa. 45, 53, 545 A.2d 876, 880 (1988). A statute, therefore, will only be found unconstitutional if it "clearly, palpably and plainly" violates the constitution. Commonwealth v. Mikulan, *supra*.

I. Void for Vagueness and Overbreadth

Appellee contends that § 3731(a)(5) is void for vagueness and overbreadth. "As generally stated, the void for vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." Mikulan, *supra* at 251, 470 A.2d at 1342, *quoting*, Kolender v. Lawson, 461 U.S. 352, 357 (1983). *See* Commonwealth v. Burt, 490 Pa. 173, 177-78, 415 A.2d 89, 91 (1980), *quoting*, Colautti v. Franklin, 439 U.S. 379, 390 (1979) (a statute is void for vagueness if it "'fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute'"). Due process requirements are satisfied if the statute provides reasonable standards by which a person may gauge their future conduct. Commonwealth v. Heinbaugh, 467 Pa. 1, 6, 354 A.2d 244, 246 (1976), *citing*, United States v. Powell, 423 U.S. 87, 94 (1975).

A statute is "overbroad" if by its reach it punishes constitutionally protected activity as well as illegal activity. Grayned v. City of Rockford, 408 U.S. 104, 114 (1972); Commonwealth

v. Stanbach, 356 Pa. Super. 5, 25, 514 A.2d 114, 124 (1986), *appeal denied*, 517 Pa. 589, 534 A.2d 769 (1987). The language of the statute in question literally encompasses a variety of protected lawful conduct. Id. *See* Adler v. Montefiore Hospital Association of Western Pennsylvania, 453 Pa. 60, 311 A.2d 634 (1973), *cert. denied*, 414 U.S. 1131 (1974), *quoting*, NAACP v. Alabama, 377 U.S. 288, 307 (1969) ("'a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.'") (citations omitted).

We conclude that § 3731(a)(5) is void for vagueness and overbreadth. First, without requiring any proof that the person actually exceeded the legal limit of .10% at the time of driving, the statute sweeps unnecessarily broadly into activity which has not been declared unlawful in this Commonwealth, that is, operating a motor vehicle with a BAC below .10%. If, for example, a person was operating a motor vehicle with a BAC below the legal limit and he were pulled over at that time, the evidence could not sustain a charge for driving under the influence as determined by a blood alcohol test since his BAC was under the legal limit. However, if that same person's BAC rises above .10% within three hours after driving, he may now be prosecuted for driving under the influence of alcohol under the amendment to the statute in question since the statute eliminates the requirement that the Commonwealth must establish that the accused actually exceeded the legal BAC limit at

the time of actual operation of the vehicle.

Second, the amendment has the effect of creating significant confusion as to exactly what level of alcohol in the blood is prohibited under the Motor Vehicle Code. Prior to the amendment, the Motor Vehicle Code provided for a bright line rule whereby a person could be prosecuted for operating a vehicle with a BAC of .10% or greater. See § 3731(a)(4). The current version, however, could actually be interpreted as creating two circumstances in which a person could be prosecuted: either where a person had an actual BAC of .10% at the time of driving (under § 3731(a)(4)), or where a person has a BAC which is *somewhere* below .10% at the time of driving but which rises above .10% within three hours after driving (under § 3731(a)(5)). Clearly, this does not provide a reasonable standard by which an ordinary person may contemplate their future conduct. As the learned trial court below pointed out, "How is a citizen to know when their lawful action (drinking and driving) ripens into criminal conduct? How can one predict when and whether a 0.10% alcohol level will be reached within three hours of driving?" Commonwealth v. Barud, 143 P.L.J. 7 (1995).

Indeed, the most glaring deficiency of § 3731(a)(5) is that the statute completely fails to require any proof that the accused's blood alcohol level actually exceeded the legal limit at the time of driving. Rather, the statute criminalizes a blood alcohol level in excess of the legal limit up to three hours after the last instance in which the person operated a motor vehicle and without any regard

for the level of intoxication at the time of operation. Thus, a person may be prosecuted under § 3731(a)(5) even though his or her blood alcohol level did not actually rise above the legal limit of .10% until after the last instance in which he or she drove.

The Commonwealth argues that this statute should be upheld on the basis that it provides a mechanism for an individual to rebut the presumption that they were operating a vehicle while below the legal limit of .10% BAC. While it is clear that the intent of the amendment was to cure those instances in which a persons' BAC barely exceeded the legal limit at the time of testing, the statute fails to provide for any mechanism, as do many other jurisdictions, whereby the accused may either: (1) rebut the state's presumption that their BAC at the time of testing accurately reflected their BAC at the time of driving or (2) produce competent evidence that he or she was below the legal limit at the time of driving (other than consumption after the fact) thereby requiring the Commonwealth to prove beyond a reasonable doubt that the defendant's BAC exceeded the legal limit at the time of driving. As currently enacted, however, the statute does not even require any proof that the person had a BAC above the legal limit at the time of driving, thereby criminalizing conduct which has not been declared criminal by the legislature.[5]

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[5] We note that appellee also contends that 75 Pa. C.S. § 3731(a)(5) violates the equal protection guarantees of both the United States Constitution and the Pennsylvania Constitution. In examining an equal protection claim, we must first examine the threshold question of whether the statute actually creates a classification. McCusker v. WCAB (Rushton Mining Co.), 536 Pa. 380, 385, 639 A.2d 776, 778 (continued...)

In the instant matter, § 3731(a)(5) imposes absolute liability on the accused regardless of any evidence to the contrary.[6] Thus, as enacted, the statute precludes the admission of competent evidence

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[5](...continued)
(1994); Commonwealth v. Parker White Metal Co., 512 Pa. 74, 84, 515 A.2d 1358, 1363 (1986). Here, appellee fails to demonstrate what classifications the statute creates or what group of persons receive disparate treatment under the statute. Accordingly, no equal protection analysis is warranted.

[6] The only exception being that under § 3731(a.1), the defendant may attempt to prove by a preponderance of the evidence that he or she did not consume alcohol until after he or she last drove. *Compare* Cal. Vehicle Code § 23152(b) ("it is a rebuttable presumption that the person had 0.08 percent or more, by weight, of alcohol in his or her blood at the time of driving the vehicle if the person had 0.08 percent or more, by weight, of alcohol in his or her blood at the time of the performance of a chemical test within three hours after the driving"); Conn. Gen. Stat. § 14-227a(c)(6) (presumption that chemical analysis established the ratio of alcohol in the blood of the defendant at the time of offense may by rebutted); Ind. Code § 9-30-6-15 ("the trier of fact shall presume that the person charged with the offense had at least ten-hundredths percent (0.10%) by weight of alcohol in their person's blood at the time the person operated the vehicle. However, this presumption is rebuttable."); Ariz. Rev. Stat. Ann. § 28-692(B) (it is an affirmative defense to a charge of having a BAC of .10% or more within two hours of driving if the defendant produces some credible evidence that his BAC at the time of driving was below .10%); S.C. Code Ann § 56-5-2950(a)(3) ("[i]f there was at the time [.10%] or more by weight of alcohol in the person's blood, it may be inferred that the person was under the influence of alcohol. The provisions of this section should not be construed as limiting the introduction of any other competent evidence bearing upon the question of whether or not the person was under the influence of alcohol...") (emphasis added); Wis. Stat. § 885.235 (provisions relating to the admissibility of chemical test for alcohol content shall not be construed as limiting the introduction of any other competent evidence). *See also* People v. Mertz, 68 N.Y.2d 136, 146, 497 N.E.2d 657, 662, 506 N.Y.S.2d 290, 295 (1986) (concluding that under per se statute, proof of BAC of .10% or more within two hours after arrest establishes *prima facie* evidence of driving under the influence which together with other evidence of intoxication is sufficient to sustain a conviction, absent evidence from which the trier of fact could conclude that the defendant was under .10% at the time of driving such as expert testimony).

that an accused's BAC was actually below the legal limit at the time of driving. This is a result we cannot uphold. See Jarman, *supra*; Modaffare, *supra*.

Accordingly, because we find that § 3731(a)(5) clearly, palpably and plainly violates both the Constitutions of the United States and of this Commonwealth, the order of the trial court is hereby affirmed.

Senior Justice Montemuro did not participate in the decision of this case.