COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

MIDDLESEX COUNTY 2023 SITTING

No. SJC-13458

COMMONWEALTH OF MASSACHUSETTS,

APPELLANT,

V.

JOHN T. CAPPELLUCCI, JR.,

APPELLEE.

ON APPEAL FROM AN ORDER OF THE FRAMINGHAM DISTRICT COURT ALLOWING A MOTION TO SUPPRESS

BRIEF FOR THE COMMONWEALTH

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ISSUE PRESENTED

Did the motion judge err in allowing the defendant's motion to suppress the analysis of his blood, which had been drawn by the hospital for treatment purposes and later obtained with a search warrant, where the defendant is charged with OUI Causing Serious Bodily Injury under G. L. c. 90, § 24L, and the clear and unambiguous language of § 24 (1) (e) dictates that the consent requirement applies only to prosecutions for simple OUI-Liquor under § 24 (1) (a)?

STATEMENT OF THE CASE

Prior Proceedings

Following a serious head-on collision in Wayland the day prior, the Framingham District Court issued a four-count complaint on December 10, 2021, charging the defendant with OUI-Liquor Causing Serious Bodily Injury ("OUI-Liquor SBI") in violation of G. L. c. 90, § 24L; Negligent Operation so as to Endanger in violation of G. L. c. 90, § 24 (2) (a); Failure to Keep Right for an Oncoming Vehicle in violation of G. L. c. 89, § 1; and Possession of an Open Container of

Alcohol in a Motor Vehicle in violation of G. L. c. 90, § 24I (No. 2149CR2071). (RA/4,7).[1] On December 22, 2021, the Framingham District Court issued another complaint against the defendant arising out of the same incident, this one charging him with OUI-Drugs Causing Serious Bodily Injury ("OUI-Drugs SBI") in violation of G. L. c. 90, § 24L (No. 2149CR2154). (RA/14). The Commonwealth's motion to join or consolidate the complaints was allowed on February 8, 2022. (RA/4,7,14,17).

On October 5, 2022, the defendant filed a motion to suppress the State police toxicology analysis of his blood that was drawn by the hospital for purposes of medical treatment after the car crash, on the ground that he had not consented to any blood test conducted by the police. (RA/5,14,22-36). On December 7, 2022, a hearing on the defendant's motion to suppress was held before Justice David W. Cunis. (RA/5,7,8,15,17,18).

On January 6, 2023, Justice Cunis allowed the defendant's motion to suppress the blood test results

[1] References in this brief are cited as follows: to the record appendix as (RA/page) and to the transcript of the hearing on the motion to suppress as (MTR/page).

in a margin order and endorsement. (RA/5,15,22). The Commonwealth filed a motion to reconsider the allowance on January 17, 2023. (RA/6,15,19,39-42). Justice Cunis denied the Commonwealth's motion to reconsider on May 11, 2023. (RA/6,9,15,19,43-44).

The Commonwealth filed a timely notice of appeal the same day, May 11, 2023. (RA/6,9,16,20,45). On May 17, 2023, the Commonwealth applied to a single justice of this Court for leave to file an interlocutory appeal of the motion judge's ruling pursuant to Mass. R. Crim. P. 15 (a) (2) (No. SJ-2023-198). The single justice, Cypher, J., allowed the Commonwealth's application on June 22, 2023, and ordered the interlocutory appeal to proceed in the Supreme Judicial Court. The case entered on the docket of the Supreme Judicial Court the same day.

Statement of the Facts

The Motion Hearing

Three witnesses testified at the hearing on the defendant's motion to suppress: the nurse who drew the defendant's blood, the police officer on scene at the hospital, and the detective who obtained a search warrant for the vials of the defendant's blood and

secured them from the hospital for testing at the State police lab. (RA/8,18). Additionally, the State police toxicology report was entered in evidence as Exhibit 1, showing that at the time of the offense, the defendant's blood alcohol content was .09% and his blood contained fentanyl and THC. (RA/37-38; MTR/61).

At around 3:30 P.M. on the afternoon of December 9, 2021, Wayland Officer Timothy Henderson was dispatched to Concord Road, where he came upon two heavily damaged vehicles. (MTR/41-42). The officer saw the defendant on the side of the road along with a woman who appeared to be in pain. (MTR/42). While at the scene, Officer Henderson placed the defendant under arrest. (MTR/43). Ambulances arrived soon after and transported the defendant and the woman to the hospital. (MTR/42).

Because the defendant was under arrest, Officer Henderson followed his ambulance to Lahey Hospital and remained within eyesight of him during his treatment. (MTR/43-44). Sometime after the defendant arrived at the hospital, the officer asked the defendant whether he would submit to a chemical test of his breath or blood. (MTR/46-47,49). The defendant refused to submit to a test, and checked the appropriate box

("No") on the Statutory Rights and Consent Form. (MTR/46-47,49).

Melissa Carolan, a registered nurse at Lahey Hospital, attended to the defendant when he arrived in the emergency room. (MTR/5-6,8). Ambulance personnel reported to the hospital staff that the defendant had been involved in a head-on collision going about 45 miles per hour. (MTR/9). The airbags had deployed and, although the defendant was conscious and ambulatory, the staff was concerned about internal injuries. (MTR/9).

The defendant was assessed as a "Level 1" patient and a "trauma alert," meaning that he required immediate attention and that there was a specific protocol for his treatment. (MTR/8,10-11). As part of the protocol for a trauma alert, medical personnel will draw the patient's blood to ascertain, among other things, blood loss, kidney function, and toxicology to inform the patient's diagnosis and treatment. (MTR/11-12). Nurse Carolan placed an intravenous line in the defendant's arm and drew nine vials of blood solely for the purposes of medical diagnosis and treatment; she did not perform the blood draw nor order any testing at the behest of law

enforcement.[2] (MTR/12-13,21). Officer Henderson also confirmed that he never directed any medical personnel draw blood from the defendant. (MTR/44,49). The defendant's blood was then submitted to the hospital laboratory for testing. (MTR/13).

That same day, after Officer Henderson had informed her that the defendant had been arrested for OUI as a result of a crash involving serious injuries, Wayland Detective Seanna Lombardo submitted a preservation letter to Lahey Hospital requesting that the hospital preserve any blood drawn from the defendant for medical treatment purposes.[3] (MTR/53-54). The next day, Detective Lombardo obtained a search warrant for the defendant's blood, urine, and medical records in the possession of the hospital. (MTR/55). She then went to the hospital, where she secured nine vials of the defendant's blood and

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[2] On cross-examination and redirect, Nurse Carolan testified that she informs the patient that she will be placing an IV in their arm and drawing blood, and notes in the record if the patient refuses. (MTR/26-27,39). There was no indication in the defendant's medical record that he had refused the blood draw. (MTR/26,39).

[3] Detective Lombardo did not request a blood draw from the defendant, nor in her experience has the Wayland Police ever specifically asked medical personnel to draw blood. (MTR/54-55).

transported them to the State police lab in Sudbury for analysis. (MTR/55-56).

The Motion Judge's Rulings on the Motion to Suppress and Motion to Reconsider[4]

Justice Cunis's margin order allowing the defendant's motion to suppress the blood test results read as follows (RA/22):

> After hearing and review of the Moreau opinion, the court is constrained to allow this motion. Nothing in this decision, however, precludes the Commonwealth from introducing the medical records of the defendant at trial, and from using expert testimony to introduce the defendant's blood alcohol level, if such evidence can be extrapolated from the data in the records.

[4] Justice Cunis also provided the following summary in his order denying the Commonwealth's motion to reconsider, which the defendant does not appear to contest (RA/43-44):

In this case, the defendant was alleged to have operated his motor vehicle on Concord Road in Wayland when he crossed the double-yellow lines and struck another vehicle head-on, causing injury to the driver of that vehicle. The defendant (showing signs of impairment at the accident scene) was transported to the hospital, where blood was drawn by hospital staff for medical treatment purposes. Wayland Police officers obtained a search warrant for the vials of the defendant's blood, seized then from the hospital, and brought them to a state lab for testing. Results showed the defendant's blood alcohol content to be .09%, and that his blood was positive for fentanyl and THC.

The Commonwealth moved for reconsideration, arguing that the defendant's consent to the police analysis of his drawn blood was not required for the toxicology results to be admissible at his trial on charges of OUI-Liquor SBI and OUI-Drugs SBI under G. L. c. 90, § 24L; the motion judge's ruling was in fact controverted by the plain language of § 24 (1) (e), which dictates that the consent requirement applies only to simple OUI-liquor prosecutions under § 24 (1) (a) – a limitation the SJC recognized in both Commonwealth v. Bohigian, 486 Mass. 209, 214 & n.10 (2020), and Commonwealth v. Moreau, 490 Mass. 387, 392 (2022). (RA/32-33).

Justice Cunis denied the Commonwealth's motion to reconsider, stating as follows (RA/6,9,15,19,43-44):

> While the Commonwealth appears to be technically correct in arguing as it does, the Court must decline to reconsider its earlier ruling, because the result would be an absurd and unfair one: it would give [a] defendant charged with a "straight" OUI (notably, a lesser-included offense to OUI-SBI) more protections tha[n] a defendant charged with the more serious felony of OUI-SBI. This case reveals a glaring discrepancy in the OUI statutory scheme in G. L. c. 90, and it is further evidence that this statute needs significant revision in order to make it more internally consistent. The Court is constrained to deny the Commonwealth motion to reconsider.

ARGUMENT

THE MOTION JUDGE ERRED IN ALLOWING THE DEFENDANT'S MOTION TO SUPPRESS THE ANALYSIS OF HIS BLOOD, WHICH HAD BEEN DRAWN BY THE HOSPITAL FOR TREATMENT PURPOSES AND LATER OBTAINED WITH A SEARCH WARRANT, WHERE THE DEFENDANT IS CHARGED WITH OUI CAUSING SERIOUS BODILY INJURY UNDER G. L. c. 90, § 24L, AND THE CLEAR AND UNAMBIGUOUS LANGUAGE OF § 24 (1) (e) DICTATES THAT THE CONSENT REQUIREMENT APPLIES ONLY TO PROSECUTIONS FOR SIMPLE OUI-LIQUOR UNDER § 24 (1) (a).

The motion judge here erred in suppressing the State police toxicology analysis of the defendant's blood that had been drawn by the hospital for medical treatment purposes and later obtained pursuant to a search warrant. The judge's conclusion was based on an erroneous interpretation of the plain language of G. L. c. 90, § 24 (1) (e), which only requires the defendant's consent to a police-directed analysis of his blood where the results are to be admitted in a prosecution for simple OUI under § 24 (1) (a) on the issue of whether the defendant was under the influence of alcohol. The defendant here, however, is charged with OUI-Liquor SBI and OUI-Drugs SBI under G. L. c. 90, § 24L after colliding with the victim's car head-on, causing extensive injuries. Thus, the consent requirement as stated in § 24 (1) (e) does not apply to this case, and as such the State police analysis of

the defendant's blood is admissible at the defendant's upcoming trial.

This Court reviews questions of statutory interpretation de novo. Commonwealth v. Moreau, 490 Mass. 387, 389 (2022). "The meaning of a statute must, in the first instance, be sought in [the] language in which the act is framed, and if that is plain, ... the sole function of the courts is to enforce it according to its terms." Id., quoting Commonwealth v. Bohigian, 486 Mass. 209, 213 (2020) (internal quotation omitted). "Where the meaning of a statute is at issue, [this Court begins] with the canon of statutory construction that the primary source of insight into the intent of the Legislature is the language of the statute. ... [I]f the language is clear and unambiguous, it is conclusive as to the intent of the Legislature, and [this Court] enforce[s] the plain wording unless it would yield an absurd or unworkable result." DiMasi v. Secretary of Commonwealth, 491 Mass. 186, 191-192 (2023).

Here, the motion judge erred in ignoring the clear and unambiguous language of § 24 (1) (e) and in concluding that it would yield an "absurd and unfair" result. Section 24 (1) (e) reads as follows:

In any prosecution for a violation of paragraph (a), evidence of the percentage, by weight, of **alcohol** in the defendant's blood at the time of the alleged offense, as shown by chemical test or analysis of his blood or as indicated by a chemical test or analysis of his breath, **shall be admissible and deemed relevant to the determination of the question of whether such defendant was at such time under the influence of intoxicating liquor**; provided, however, that if such test or analysis was made by or at the direction of a police officer, it was made with the consent of the defendant, the results thereof were made available to him upon his request and the defendant was afforded a reasonable opportunity, at his request and at his expense, to have another such test or analysis made by a person or physician selected by him; and provided, further, that blood shall not be withdrawn from any party for the purpose of such test or analysis except by a physician, registered nurse or certified medical technician.

Evidence that the defendant failed or refused to consent to such test or analysis shall not be admissible against him in a civil or criminal proceeding, but shall be admissible in any action by the registrar under paragraph (f) or in any proceedings provided for in section twenty-four N.

If such evidence is that such percentage was five one-hundredths or less, there shall be a permissible inference that such defendant was not under the influence of intoxicating liquor, and he shall be released from custody forthwith, but the officer who placed him under arrest shall not be liable for false arrest if such police officer had reasonable grounds to believe that the person arrested had been operating a motor vehicle upon any such way or place while under the influence of intoxicating liquor; provided, however, that in an instance where a defendant is under the age of twenty-one and such evidence is that the percentage, by weight, of alcohol in the defendant's blood is two one-hundredths or greater, the officer who placed him under arrest shall, in accordance with subparagraph (2) of paragraph (f), suspend such defendant's license or permit and take all other actions directed therein, if such evidence is that such percentage was more than five one-hundredths but less than eight one-hundredths there shall be no permissible inference.

> A certificate, signed and sworn to, by a chemist of the department of the state police or by a chemist of a laboratory certified by the department of public health, which contains the results of an analysis made by such chemist of the percentage of alcohol in such blood shall be prima facie evidence of the percentage of alcohol in such blood.

G. L. c. 90, § 24 (1) (e) (emphasis added).

The first full sentence of the statute plainly requires the defendant's consent to the police-directed analysis of his blood for alcohol content ("BAC"), in order for such evidence to be admissible on the issue of whether the defendant was under the influence of liquor, regardless of whether the blood is first drawn at the behest of police or by a third party (e.g., a hospital) for medical treatment purposes. See Moreau, 490 Mass. at 392. But the very first clause of this sentence clearly and unambiguously limits the consent requirement to prosecutions under § 24 (1) (a), or simple OUI; it does not extend to more serious OUI-related offenses such as OUI-SBI under § 24L, nor to the analysis of the defendant's blood for any substances other than alcohol.

Indeed, this Court in Commonwealth v. Bohigian expressly recognized that the consent requirement of §

24 (1) (e) does not extend to an OUI-SBI prosecution under § 24L: "Section 24 (1) (e) applies only to prosecutions under § 24 (1) (a), which prohibits simple OUI. Had the defendant been charged under § 24 (1) (a), he would have been able to argue that the BAC evidence was inadmissible because his blood was taken without his consent 'at the direction of a police officer.' G. L. c. 90, § 24 (1) (e). However, as the defendant additionally was charged in violation of §24L (OUI causing serious bodily injury), § 24 (1) (e) had no bearing at all on the admissibility of the BAC evidence with regard to this more serious charge."[5] 486 Mass. 209, 213-214 & n.10 (2020) (emphasis added). See also id. at 218 n.18 ("§ 24 (1) (e) applies only to prosecutions under § 24 (1) (a), i.e., OUI. Because the defendant additionally was charged under § 24L (OUI causing serious bodily injury), the defendant

[5] In Bohigian, this Court examined how a test for blood alcohol content ("BAC") is actually to be conducted in the first place (i.e., how blood is to be drawn from the defendant), as dictated by § 24 (1) (f) (1), the implied consent statute applicable to those arrested for OUI-Liquor. This Court concluded that, while the plain language of that section allows for the suspension of a license upon the arrestee's refusal to submit to a test for BAC, it precludes the drawing of blood upon such refusal against the arrestee's will, even with a search warrant. 486 Mass. at 214-218.

did not benefit from the limited protection of § 24 (1) (e).").[6] Two years later, this Court reiterated in Commonwealth v. Moreau that the express terms of § 24 (1) (e) limit its reach concerning the admissibility of BAC evidence to simple OUI-Liquor prosecutions under § 24 (1) (a): "The plain language of the statute, the absence of any record of legislative intent to contradict that plain language, and our decision in Bohigian control here. Where a 'chemical test or analysis' of the defendant's blood is 'made by or at the direction of a police officer,' including where the blood is first withdrawn independently by a third party, the defendant's consent is required for the resulting BAC evidence to be admissible in a prosecution under § 24 (1) (a)." 490 Mass. at 393-394 (emphasis added).

Likewise, the consent requirement of § 24 (1) (e) does not extend to any OUI-Drugs-related offenses, as the section by its plain terms refers to the admissibility of evidence of "alcohol" in the blood as relevant to the question of whether the defendant was

[6] This Court also noted that "[t]he same could be said for any defendant facing an OUI-related prosecution that is more serious than simple OUI." Bohigian, 486 Mass. at 214 n.10.

"under the influence of intoxicating liquor." See id. at 392 ("where the Commonwealth wishes to have admitted BAC evidence arising from testing or analysis of a defendant's blood done 'by or at the direction of' police"). "Section 24 (1) (e) provides the conditions under which 'evidence of the percentage, by weight, of alcohol in the defendant's blood at the time of the alleged offense, as shown by [a] chemical test or analysis of his blood ... shall be admissible' in prosecutions for operating a motor vehicle while under the influence of alcohol pursuant [to] § 24 (1) (a)."[7] Id. at 389 (emphasis added). The statute is silent as to the admissibility of any analysis for substances other than alcohol on the issue of whether the defendant was under the influence of a particular drug. Thus, suppression of the defendant's blood test

[7] That the test results referenced in § 24 (1) (e) only pertain to blood alcohol content, and thus only to prosecutions for OUI-Liquor and not OUI-Drugs, finds further support in Commonwealth v. Mandell, 61 Mass. App. Ct. 526, 529 (2004), where the Appeals Court observed that § 24 (1) (e) establishes a "permissible inference" that a defendant is not under the influence of alcohol if his blood alcohol level was five one-hundredths percent or less (thereby requiring that he be released from custody), whereas "there appears to be no recognized level at which a suspect is presumed not to be under the influence of marijuana or narcotics drugs." Id. (emphasis in original).

results here – which revealed the presence of fentanyl and THC – is not supported by the plain language of the statute.

Indeed, the motion judge conceded that the Commonwealth's interpretation of the statute was "technically correct," yet took umbrage with the plain language as "absurd and unfair" because it provides more protections to a driver charged with the less serious offense of simple OUI. But, by extending the statutory consent requirement of § 24 (1) (e) beyond the statute's clear and unambiguous terms to more serious offenses than simple OUI-Liquor prosecutions and to OUI-Drugs-related offenses, the motion judge ignored the strict tenets of statutory construction that dictated this Court's holdings in both Moreau and Bohigian. Moreau, 490 Mass. at 389 ("The meaning of a statute must, in the first instance, be sought in language in which the act is framed, and if that is plain, ... the sole function of the courts is to enforce it according to its terms.") See Commonwealth v. Palmer, 464 Mass. 773, 778 (2013) ("in interpreting a statute, [w]e will not add words to a statute that the Legislature did not put there, either by inadvertent omission or be design") (internal

quotations omitted). In Commonwealth v. Mandell, for example, the Appeals Court refused to read into the plain language of G. L. c. 263, § 5A – which expressly provides for the right to an independent medical examination only for those in custody charged with operating under the influence of liquor – the same right for those arrested for OUI-Drugs. 61 Mass. App. Ct. 526, 527-528 (2004). Here, had the Legislature intended that § 24 (1) (e) apply to more serious iterations of OUI-Liquor and OUI-Drugs, it simply could have added the pertinent sections to the first sentence of the statute, and included the substances proscribed by § 24 (1) (a) instead of merely referring to alcohol content. Indeed, the Legislature has not hesitated to do so with regard to the applicability of other sections within chapter 90. See, e.g., G. L. c. 90, § 23 (punishing operation of motor vehicle "in violation of paragraph (a) of subdivision (1) of section 24, sections 24G or 24L, subsection (a) of section 8 of chapter 90B, sections 8A or 8B of chapter 90B or section 13 ½ of chapter 265" while license is suspended or revoked "pursuant to paragraph (a) of subdivision (1) of section 24, sections 24G or 24L, subsection (a) of section 8 of chapter

90B, sections 8A or 8B of chapter 90B or section 13 ½ of chapter 265"); G. L. c. 90, § 24N (requiring judge to immediately suspend license "[u]pon the issuance of a complaint alleging a violation of paragraph (a) of subdivision (1) of section twenty-four or a violation of section twenty-four G or twenty-four L of this chapter, or a violation of paragraph (1) of subsection (a) of section eight, or a violation of section eight A or section eight B of chapter ninety B"). But in all the decades since 1961 that § 24 (1) (e) has been in existence, the Legislature has left the clause limiting the consent provision to prosecutions for simple OUI unchanged.[8] "This is a strong indication that the Legislature approved of the court's statutory construction of [this] provision[]." Bohigian, 486 Mass. at 216 (observing that Legislature has amended § 24 (1) (e) & (1) (f) (1) seven times since Appeals Court decision regarding involuntary blood draws, but statutory language requiring consent remained

[8] Section 24 (1) (e) , added by St. 1961, c. 340, enacted for the first time a statutory presumption that a person was under the influence of liquor when his BAC exceeded a set limit, tying the enforcement of § 24 to an accurate determination of the defendant's BAC and allowing admission of that evidence to establish impairment. See Bohigian, 486 Mass. at 229 (Lowy, J., dissenting).

unchanged). "We are not free to add language to a statute for the purpose of interpreting it according to what we might imagine to be the Legislature's objective. ... Rather, where the language of a statute is clear and unambiguous, it is conclusive as to legislative intent." Mandell, 61 Mass. App. Ct. at 528 (internal quotations omitted). Yet that is precisely what the trial court has done here by erroneously broadening the reach of § 24 (1) (e), when neither the plain language of the statute nor this Court's interpretations thereof support such a construction.

And, contrary to the motion judge's assertion, there is nothing "absurd" or "unfair" about the Legislature crafting a statute to allow law enforcement to investigate a serious car crash by obtaining a search warrant, based upon probable cause, for samples of the defendant's blood that have already been drawn for purposes of medical treatment in cases where the defendant's impaired driving has resulted in severe injuries to the victim, or where there is suspected impairment by substances other than alcohol such that a toxicology report is necessary to confirm the presence of a particular drug. It is well within

the purview of the Legislature to balance the rights of drivers against the severity or complexity of the crime, and to determine that in crimes more serious than a simple "run of the mill" OUI-Liquor prosecution under § 24 (1) (a), or in an OUI-Drugs prosecution, the driver's consent to an analysis of his blood is not statutorily required, and a valid search warrant may instead be obtained to analyze blood drawn by the hospital for treatment purposes.[9] See Moreau, 490 Mass. at 395-396 ("It is beyond the power of this court to undermine that balancing by rewriting the statute as the [trial judge] proposes"). See, e.g., G. L. c. 90C, § 2 (statute providing defense for failure of officer to give copy of citation to violator at time and place of violation, except where

[9] Even if, as the motion judge suggests, the clear language of the statute creates a potential anomaly – a point with which the Commonwealth disagrees -- this Court is not free to add language to attempt to divine the Legislature's intent. In the absence of any record of legislative intent that directly contradicts that plain language, see Moreau, 490 Mass. at 393-394, "[t]his rule of statutory interpretation applies even where we recognize a potential unfairness within a statute's clear language. ... It also applies even where we recognize that a statute creates a potential anomaly," Mandell, 61 Mass. App. Ct. at 528 (internal quotations omitted).

complaint or indictment relates to automobile law violation which resulted in death).

Further support for the clear limitation of the consent requirement of § 24 (1) (e) to simple OUI-Liquor prosecutions can be found in the stark contrast between the first and second full sentences of the statute. The plain language of the second full sentence – that evidence of the defendant's refusal to consent to such test or analysis "shall not be admissible against [the defendant] in a civil or criminal proceeding" – expressly provides for an expansive prohibition of such refusal evidence that is applicable to criminal prosecutions for any offense -- whereas the first sentence, which contains the consent provision, expressly limits its application to simple OUI prosecutions under paragraph (a). With this dichotomy between the first two full sentences of § 24 (1) (e), there can be no doubt that the Legislature purposely limited the consent requirement to simple OUI-Liquor prosecutions while extending the proscription of refusal evidence to any OUI-related prosecution.

A review of § 24 (1) (e) "in tandem with" the following section, § 24 (1) (f) (1) (the "implied

consent" statute) examined in Bohigian, lends further support for the limited application of the consent requirement of § 24 (1) (e) to defendants charged with simple OUI under § 24 (1) (a). As this Court observed, § 24 (1) (e) describes the conditions under which BAC evidence is admissible in OUI prosecutions under § 24 (1) (a), whereas § 24 (1) (f) (1) explains how the blood test is to be performed in the first place, e.g., the drawing of blood, in the instance where a person has been arrested for OUI-Liquor. Bohigian, 486 Mass. at 214 n.11. Section 24 (1) (f) (1) dictates that, by driving on public roads, a driver implicitly consents to a test for blood alcohol content if arrested for OUI; however, if the arrestee "withdraws" that consent (i.e., refuses to submit to a BAC test), no such test may be performed at all, and the arrestee's license is then suspended for at least six months. Id. at 211-212.

But unlike § 24 (1) (e), which is expressly limited to "any prosecution for a violation of paragraph (a)," § 24 (1) (f) (1) does not refer to a particular section under which the defendant is charged, but rather generally to a person "arrested for operating a motor vehicle while under the

influence of intoxicating liquor." The proscription against forced, involuntary blood draws in § 24 (1) (f) (1) is thus not limited to prosecutions for simple OUI; it applies to any person arrested for any OUI-Liquor-related offense: "Quite apart from § 24 (1) (e), § 24 (1) (f) (1) flatly and unambiguously prohibits blood draws without consent for the purposes of analyzing BAC, regardless of who directs it." Bohigian, 486 Mass. at 214. The objective rationale of § 24 (1) (f) (1) requiring the arrestee's consent even where police have obtained a search warrant – to avoid the confrontation that may result from a forced blood draw of a person in custody as well as safety concerns for both the patient and medical personnel – logically applies to any OUI-Liquor-related investigation. See id. at 216-217. Thus, in Bohigian, while the defendant "did not benefit from the limited protection of § 24 (1) (e)" because was charged with OUI-SBI, id. at 218 n.18, § 24 (1) (f) (1) nonetheless operated to exclude the BAC test results after a forced blood draw against his will.[10]

[10] In contrast, the defendant in Moreau was charged with simple OUI under § 24 (1) (a) (1) after a single car crash. See id. at 388. Thus, he was able to benefit from the limited protection of § 24 (1) (e)

The motion judge's refusal to adhere to the clear and unambiguous language of § 24 (1) (e), and instead extend its consent requirement to the defendant's prosecution for OUI-Liquor SBI and OUI-Drugs SBI under § 24L, was error. Contrary to the motion judge's conclusion, the express limitation of this provision to prosecutions for simple OUI-Liquor is neither absurd nor unfair, but rather a reflection of the Legislature's authority to balance the rights of drivers against the seriousness of the crime. The defendant's blood here was drawn by the hospital for medical treatment purposes and lawfully obtained by the police pursuant to a valid search warrant based upon probable cause, which the defendant does not contest. By it plain terms, § 24 (1) (e) does not additionally require the defendant's consent for the analysis of his blood to be admissible at his upcoming trial. This Court should reverse the District Court's suppression order and allow the toxicology results to be admitted in evidence.

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where he did not consent to a police-directed analysis of his blood.

CONCLUSION

For the foregoing reasons, the Commonwealth respectfully requests that this Court reverse the District Court order allowing the defendant's motion to suppress.

Respectfully Submitted
For the Commonwealth,

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Dated: August 18, 2023

ADDENDUM

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COMMONWEALTH OF MASSACHUSETTS
FRAMINGHAM DISTRICT COURT

MIDDLESEX, SS. Docket Nos. 2149CR2071
2149CR2154

COMMONWEALTH

v.

JOHN T. CAPPELLUCCI, JR.

MOTION TO SUPPRESS BLOOD TEST RESULTS
PURSUANT TO G.L. c. 90 § 24(e)(1) and *Comm. v. Moreau*

NOW COMES THE DEFENDANT, through his counsel, Mark W. Helwig, and moves that the evidence against him, *to wit* nine (9) vials of blood and their toxicology results, be suppressed. As reason therefore, the vials were seized and tested in violation of G.L. c. 90 § 24(1)(e) and the Supreme Judicial Court's recent decision in *Commonwealth v. Eric J. Moreau*, ___ Mass. ____ (No. SJC-13168, July 29, 2022 slip op.), as more fully argued in the attached Memorandum of Law.

RESPECTFULLY SUBMITTED

DATED: October 5, 2022

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Counsel for the Defendant,
JOHN T. CAPPELLUCCI, JR.

After hearing and review of the Moreau opinion, the court is constrained to allow this motion. Nothing in this decision, however, precludes the Commonwealth from introducing the medical records of the defendant at trial, and from using expert testimony to introduce the defendant's blood alcohol level, if such evidence can be extrapolated from data in the records.

So ordered, RA'is J.J. 1/6/23

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS.

FRAMINGHAM DISTRICT COURT
NO 2149 CR 2071
NO. 2149 CR 2154

COMMONWEALTH OF MASSACHUSETTS

V.

JOHN T. CAPPELLUCCI, JR

DECISION ON COMMONWEALTH'S MOTION TO RECONDISER ALLOWANCE OF DEFENDANT'S MOTION TO SUPPRESS

In the above-numbered complaints the defendant is charged with operating under the influence of alcohol causing serious injury (OUI-SBI) (G.L. c. 90, §24L) and negligent operation of a motor vehicle (No. 2149CR2071), and in a separate complaint with operating under the influence of drugs causing serious injury (also G.L. c. 90, § 24L) (No. 2149CR2154). In this case, the defendant was alleged to have operated his motor vehicle on Concord Road in Wayland when he crossed the double-yellow lines and struck another vehicle head-on, causing injury to the driver of that vehicle. The defendant (showing signs of impairment at the accident scene) was transported to the hospital, where blood was drawn by hospital staff for medical treatment purposes. Wayland Police officers obtained a search warrant for the vials of the defendant's blood, seized them from the hospital, and brought them to a state lab for testing. Results showed the defendant's blood alcohol content to be .09%, and that his blood was positive for fentanyl and THC.

The Court allowed a motion to suppress the blood alcohol test results pursuant to Commonwealth v Moreau, 490 Mass. 387 (2022), where the SJC ruled that blood *testing or*

analysis – apart from the *drawing* of the blood – conducted at the behest of the police, is admissible only if the defendant had consented to such tests or analysis, citing G.L. c. 90, § 24(1)(e). Here, the blood draw was not conducted at the request of the police, but the blood analysis was, and without the defendant's consent.

The Commonwealth argues that Moreau and G.L. c. 90, § 24(1)(e) do not apply because, as the first sentence of § 24(1)(e) plainly states, that section applies only to prosecutions for straight OUI under G.L. c. 90, § 24(1)(a); the defendant here is charged with OUI-SBI pursuant to G.L. c. 90, § 24L, to which § 24(1)(e) does not expressly apply.

While the Commonwealth appears to be technically correct in arguing as it does, the Court must decline to reconsider its earlier ruling, because the result would be an absurd and unfair one: it would give defendant charged with a "straight" OUI (notably, a lesser-included offense to OUI-SBI) more protections that a defendant charged with the more serious felony offense of OUI-SBI. This case reveals a glaring discrepancy in the OUI statutory scheme in G.L. c. 90, and it is further evidence that this statute needs significant revision on order to make it more internally consistent. The Court is constrained to deny the Commonwealth's motion to reconsider.

So ordered,

5/11/23
Date

Justice CUNIS

STATUTORY ADDENDUM

G. L. c. 89, § 1. Meeting vehicles

When persons traveling with vehicles meet on a way, each shall reasonably drive his vehicle to the right of the middle of the traveled part of such way, so that the vehicles may pass without interference, except that the department of highways may modify such restriction by pavement markings on state highways, on ways leading thereto and on all main highways between cities and towns. The department may by permit, revocable upon notice, authorize cities and towns to modify such restriction by pavement markings. All markings shall be in accordance with accepted standards of engineering practice, as provided in section two of chapter eighty-five.
The provisions of this section shall not be construed as prohibiting a vehicle from crossing a solid center pavement marking line or lines in making a left turn into or from a private way.

G. L. c. 90, § 24. Driving while under influence of intoxicating liquor, etc.; second and subsequent offenses; punishment; treatment programs; reckless and unauthorized driving; failure to stop after collision

(1) (a) (1) Whoever, upon any way or in any place to which the public has a right of access, or upon any way or in any place to which members of the public have access as invitees or licensees, operates a motor vehicle with a percentage, by weight, of alcohol in their blood of eight one-hundredths or greater, or while under the influence of intoxicating liquor, or of marijuana, narcotic drugs, depressants or stimulant substances, all as defined in section one of chapter ninety-four C, or while under the influence from smelling or inhaling the fumes of any substance having the property of releasing toxic vapors as defined in section 18 of chapter 270 shall be punished by a fine of not less than five hundred nor more than five thousand dollars or by imprisonment for not more than two and one-half years, or both such fine and imprisonment.

There shall be an assessment of $250 against a person who is convicted of, is placed on probation for, or is granted a continuance without a finding for or otherwise pleads guilty to or admits to a finding of sufficient facts of operating a motor vehicle while under the influence of intoxicating liquor, marijuana, narcotic drugs, depressants or stimulant substances under this section; provided, however, that but $187.50 of the amount collected under this assessment shall be deposited monthly by the court with the state treasurer for who shall deposit it into the Head Injury Treatment Services Trust Fund, and the remaining amount of the assessment shall be credited to the General Fund. The assessment shall not be subject to reduction or waiver by the court for any reason.

There shall be an assessment of $50 against a person who is convicted, placed on probation or granted a continuance without a finding or who otherwise pleads guilty to or admits to a finding of sufficient facts for operating a motor vehicle while under the influence of intoxicating liquor or under the influence of marihuana, narcotic drugs, depressants or stimulant substances, all as defined by section 1 of chapter 94C, pursuant to this section or section 24D or 24E or subsection (a) or (b) of section 24G or section 24L. The assessment shall not be subject to waiver by the court for any reason. If a person against whom a fine is assessed is sentenced to a correctional facility and the assessment has not been paid, the court shall note the assessment on the mittimus. The monies collected pursuant to the fees established by this paragraph shall be transmitted monthly by the courts to the state treasurer who shall then deposit, invest and transfer the monies, from time to time, into the Victims of Drunk Driving Trust Fund established in section 66 of chapter 10. The monies shall then be administered, pursuant to said section 66 of said chapter 10, by the victim and witness assistance board for the purposes set forth in said section 66. Fees paid by an individual into the Victims of Drunk Driving Trust Fund pursuant to this section shall be in addition to, and not in lieu of, any other fee imposed by the court pursuant to this chapter or any other chapter. The administrative office of the trial court shall file a report detailing the amount of funds imposed and collected

pursuant to this section to the house and senate committees on ways and means and to the victim and witness assistance board not later than August 15 of each calendar year.

If the defendant has been previously convicted or assigned to an alcohol or controlled substance education, treatment, or rehabilitation program by a court of the commonwealth or any other jurisdiction because of a like violation preceding the date of the commission of the offense for which he has been convicted, the defendant shall be punished by a fine of not less than six hundred nor more than ten thousand dollars and by imprisonment for not less than sixty days nor more than two and one-half years; provided, however, that the sentence imposed upon such person shall not be reduced to less than thirty days, nor suspended, nor shall any such person be eligible for probation, parole, or furlough or receive any deduction from his sentence for good conduct until such person has served thirty days of such sentence; provided, further, that the commissioner of correction may, on the recommendation of the warden, superintendent, or other person in charge of a correctional institution, or the administrator of a county correctional institution, grant to an offender committed under this subdivision a temporary release in the custody of an officer of such institution for the following purposes only: to attend the funeral of a relative; to visit a critically ill relative; to obtain emergency medical or psychiatric services unavailable at said institution; to engage in employment pursuant to a work release program; or for the purposes of an aftercare program designed to support the recovery of an offender who has completed an alcohol or controlled substance education, treatment or rehabilitation program operated by the department of correction; and provided, further, that the defendant may serve all or part of such thirty day sentence to the extent such resources are available in a correctional facility specifically designated by the department of correction for the incarceration and rehabilitation of drinking drivers.

If the defendant has been previously convicted or assigned to an alcohol or controlled substance education, treatment, or rehabilitation program by a court of the commonwealth, or any other jurisdiction because of a like offense two times preceding the date

of the commission of the offense for which he has been convicted, the defendant shall be punished by a fine of not less than one thousand nor more than fifteen thousand dollars and by imprisonment for not less than one hundred and eighty days nor more than two and one-half years or by a fine of not less than one thousand nor more than fifteen thousand dollars and by imprisonment in the state prison for not less than two and one-half years nor more than five years; provided, however, that the sentence imposed upon such person shall not be reduced to less than one hundred and fifty days, nor suspended, nor shall any such person be eligible for probation, parole, or furlough or receive any deduction from his sentence for good conduct until he shall have served one hundred and fifty days of such sentence; provided, further, that the commissioner of correction may, on the recommendation of the warden, superintendent, or other person in charge of a correctional institution, or the administrator of a county correctional institution, grant to an offender committed under this subdivision a temporary release in the custody of an officer of such institution for the following purposes only: to attend the funeral of a relative, to visit a critically ill relative; to obtain emergency medical or psychiatric services unavailable at said institution; to engage in employment pursuant to a work release program; or for the purposes of an aftercare program designed to support the recovery of an offender who has completed an alcohol or controlled substance education, treatment or rehabilitation program operated by the department of correction; and provided, further, that the defendant may serve all or part of such one hundred and fifty days sentence to the extent such resources are available in a correctional facility specifically designated by the department of correction for the incarceration and rehabilitation of drinking drivers.

If the defendant has been previously convicted or assigned to an alcohol or controlled substance education, treatment, or rehabilitation program by a court of the commonwealth or any other jurisdiction because of a like offense three times preceding the date of the commission of the offense for which he has been convicted the defendant shall be punished by a fine of not less than one thousand five hundred nor more than twenty-five thousand dollars and by

imprisonment for not less than two years nor more than two and one-half years, or by a fine of not less than one thousand five hundred nor more than twenty-five thousand dollars and by imprisonment in the state prison for not less than two and one-half years nor more than five years; provided, however, that the sentence imposed upon such person shall not be reduced to less than twelve months, nor suspended, nor shall any such person be eligible for probation, parole, or furlough or receive any deduction from his sentence for good conduct until such person has served twelve months of such sentence; provided, further, that the commissioner of correction may, on the recommendation of the warden, superintendent, or other person in charge of a correctional institution, or the administrator of a county correctional institution, grant to an offender committed under this subdivision a temporary release in the custody of an officer of such institution for the following purposes only: to attend the funeral of a relative; to visit a critically ill relative; to obtain emergency medical or psychiatric services unavailable at said institution; to engage in employment pursuant to a work release program; or for the purposes of an aftercare program designed to support the recovery of an offender who has completed an alcohol or controlled substance education, treatment or rehabilitation program operated by the department of correction; and provided, further, that the defendant may serve all or part of such twelve months sentence to the extent that resources are available in a correctional facility specifically designated by the department of correction for the incarceration and rehabilitation of drinking drivers.

If the defendant has been previously convicted or assigned to an alcohol or controlled substance education, treatment or rehabilitation program by a court of the commonwealth or any other jurisdiction because of a like offense 4 times preceding the date of the commission of the offense for which the defendant has been convicted, the defendant shall be punished by a fine of not less than $2,000 nor more than $50,000 and by imprisonment for not less than 2 and one-half years or by a fine of not less than $2,000 nor more than $50,000 and by imprisonment in the state prison for not less than 2 and one-half years nor more than 5 years; provided, however, that

the sentence imposed upon such person shall not be reduced to less than 24 months, nor suspended, nor shall any such person be eligible for probation, parole, or furlough or receive any deduction from his or her sentence for good conduct until he or she shall have served 24 months of such sentence; provided, further, that the commissioner of correction may, on the recommendation of the warden, superintendent, or other person in charge of a correctional institution, or the administrator of a county correctional institution, grant to an offender committed under this subdivision a temporary release in the custody of an officer of such institution for the following purposes only: to attend the funeral of a relative; to visit a critically ill relative; to obtain emergency medical or psychiatric services unavailable at said institution; to engage in employment pursuant to a work release program; or for the purposes of an aftercare program designed to support the recovery of an offender who has completed an alcohol or controlled substance education, treatment or rehabilitation program operated by the department of correction; and provided further, that the defendant may serve all or part of such 24 months sentence, to the extent that resources are available, in a correctional facility specifically designated by the department of correction for the incarceration and rehabilitation of drinking drivers.

If the defendant has been previously convicted or assigned to an alcohol or controlled substance education, treatment or rehabilitation program by a court of the commonwealth or any other jurisdiction because of a like offense 5 times preceding the date of the commission of the offense for which the defendant has been convicted, the defendant shall be punished by a fine of not less than $2,000 nor more than $50,000 and by imprisonment for not less than 2 and one-half years or by a fine of not less than $2,000 nor more than $50,000 and by imprisonment in the state prison for not less than 2 and one-half years nor more than 5 years; provided, however, that the sentence imposed upon such person shall not be reduced to less than 24 months, nor suspended, nor shall any such person be eligible for probation, parole or furlough or receive any deduction from his or her sentence for good conduct until he or she shall have served 24 months of such sentence; provided

further, that the commissioner of correction may, on the recommendation of the warden, superintendent, or other person in charge of a correctional institution, or the administrator of a county correctional institution, grant to an offender committed under this subdivision a temporary release in the custody of an officer of such institution for the following purposes only: to attend the funeral of a relative; to visit a critically ill relative; to obtain emergency medical or psychiatric services unavailable at said institution; to engage in employment pursuant to a work release program; or for the purposes of an aftercare program designed to support the recovery of an offender who has completed an alcohol or controlled substance education, treatment or rehabilitation program operated by the department of correction; and provided further, that the defendant may serve all or part of such 24 months sentence, to the extent that resources are available, in a correctional facility specifically designated by the department of correction for the incarceration and rehabilitation of drinking drivers.

If the defendant has been previously convicted or assigned to an alcohol or controlled substance education, treatment or rehabilitation program by a court of the commonwealth or any other jurisdiction because of a like offense 6 times preceding the date of the commission of the offense for which defendant has been convicted, the defendant shall be punished by a fine of not less than $2,000 nor more than $50,000 and by imprisonment in the state prison for not less than 3 and one-half years nor more than 8 years; provided, however, that the sentence imposed upon such person shall not be reduced to less than 36 months, nor suspended, nor shall any such person be eligible for probation, parole or furlough or receive any deduction from his or her sentence for good conduct until he or she shall have served 36 months of such sentence; provided further, that the commissioner of correction may, on the recommendation of the warden, superintendent, or other person in charge of a correctional institution, or the administrator of a county correctional institution, grant to an offender committed under this subdivision a temporary release in the custody of an officer of such institution for the following purposes only: to attend the funeral of a relative; to visit a critically ill relative; to

obtain emergency medical or psychiatric services unavailable at said institution; to engage in employment pursuant to a work release program; or for the purposes of an aftercare program designed to support the recovery of an offender who has completed an alcohol or controlled substance education, treatment or rehabilitation program operated by the department of correction; and provided further, that the defendant may serve all or part of such 36 months sentence, to the extent that resources are available, in a correctional facility specifically designated by the department of correction for the incarceration and rehabilitation of drinking drivers.

If the defendant has been previously convicted or assigned to an alcohol or controlled substance education, treatment or rehabilitation program by a court of the commonwealth or any other jurisdiction because of a like offense 7 times preceding the date of the commission of the offense for which the defendant has been convicted, the defendant shall be punished by a fine of not less than $2,000 nor more than $50,000 and by imprisonment in the state prison for not less than 3 and one-half years nor more than 8 years; provided, however, that the sentence imposed upon such person shall not be reduced to less than 36 months, nor suspended, nor shall any such person be eligible for probation, parole or furlough or receive any deduction from his or her sentence for good conduct until he or she shall have served 36 months of such sentence; provided further, that the commissioner of correction may, on the recommendation of the warden, superintendent or other person in charge of a correctional institution, or the administrator of a county correctional institution, grant to an offender committed under this subdivision a temporary release in the custody of an officer of such institution for the following purposes only: to attend the funeral of a relative; to visit a critically ill relative; to obtain emergency medical or psychiatric services unavailable at said institution; to engage in employment pursuant to a work release program; or for the purposes of an aftercare program designed to support the recovery of an offender who has completed an alcohol or controlled substance education, treatment or rehabilitation program operated by the department of correction; and provided further, that the defendant may serve all or part of such 36 months

sentence, to the extent that resources are available, in a correctional facility specifically designated by the department of correction for the incarceration and rehabilitation of drinking drivers.

If the defendant has been previously convicted or assigned to an alcohol or controlled substance education, treatment or rehabilitation program by a court of the commonwealth or any other jurisdiction because of a like offense 8 or more times preceding the date of the commission of the offense for which the defendant has been convicted, the defendant shall be punished by a fine of not less than $2,000 nor more than $50,000 and by imprisonment in the state prison for not less than 4 and one-half years nor more than 10 years; provided, however, that the sentence imposed upon such person shall not be reduced to less than 48 months, nor suspended, nor shall any such person be eligible for probation, parole or furlough or receive any deduction from his or her sentence for good conduct until he or she shall have served 48 months of such sentence; provided further, that the commissioner of correction may, on the recommendation of the warden, superintendent, or other person in charge of a correctional institution, or the administrator of a county correctional institution, grant to an offender committed under this subdivision a temporary release in the custody of an officer of such institution for the following purposes only: to attend the funeral of a relative; to visit a critically ill relative; to obtain emergency medical or psychiatric services unavailable at said institution; to engage in employment pursuant to a work release program; or for the purposes of an aftercare program designed to support the recovery of an offender who has completed an alcohol or controlled substance education, treatment or rehabilitation program operated by the department of correction; and provided further, that the defendant may serve all or part of such 48 months sentence, to the extent that resources are available, in a correctional facility specifically designated by the department of correction for the incarceration and rehabilitation of drinking drivers.

A prosecution commenced under the provisions of this subparagraph shall not be placed on file or continued without a finding except for dispositions under section twenty-four D. No trial shall be commenced on a complaint alleging a violation of this subparagraph,

nor shall any plea be accepted on such complaint, nor shall the prosecution on such complaint be transferred to another division of the district court or to a jury-of-six session, until the court receives a report from the commissioner of probation pertaining to the defendant's record, if any, of prior convictions of such violations or of assignment to an alcohol or controlled substance education, treatment, or rehabilitation program because of a like offense; provided, however, that the provisions of this paragraph shall not justify the postponement of any such trial or of the acceptance of any such plea for more than five working days after the date of the defendant's arraignment. The commissioner of probation shall give priority to requests for such records.
At any time before the commencement of a trial or acceptance of a plea on a complaint alleging a violation of this subparagraph, the prosecutor may apply for the issuance of a new complaint pursuant to section thirty-five A of chapter two hundred and eighteen alleging a violation of this subparagraph and one or more prior like violations. If such application is made, upon motion of the prosecutor, the court shall stay further proceedings on the original complaint pending the determination of the application for the new complaint. If a new complaint is issued, the court shall dismiss the original complaint and order that further proceedings on the new complaint be postponed until the defendant has had sufficient time to prepare a defense.
If a defendant waives right to a jury trial pursuant to section twenty-six A of chapter two hundred and eighteen on a complaint under this subdivision he shall be deemed to have waived his right to a jury trial on all elements of said complaint.
(2) Except as provided in subparagraph (4) the provisions of section eighty-seven of chapter two hundred and seventy-six shall not apply to any person charged with a violation of subparagraph (1) and if said person has been convicted of or assigned to an alcohol or controlled substance education, treatment or rehabilitation program because of a like offense by a court of the commonwealth or any other jurisdiction preceding the commission of the offense with which he is charged.
(3) Notwithstanding the provisions of section six A of chapter two hundred and seventy-nine, the court may

order that a defendant convicted of a violation of subparagraph (1) be imprisoned only on designated weekends, evenings or holidays; provided, however, that the provisions of this subparagraph shall apply only to a defendant who has not been convicted previously of such violation or assigned to an alcohol or controlled substance education, treatment or rehabilitation program preceding the date of the commission of the offense for which he has been convicted.

(4) Notwithstanding the provisions of subparagraphs (1) and (2), a judge, before imposing a sentence on a defendant who pleads guilty to or is found guilty of a violation of subparagraph (1) and who has not been convicted or assigned to an alcohol or controlled substance education, treatment or rehabilitation program by a court of the commonwealth or any other jurisdiction because of a like offense two or more times of the date of the commission of the offense for which he has been convicted, shall receive a report from the probation department of a copy of the defendant's driving record, the criminal record of the defendant, if any, and such information as may be available as to the defendant's use of alcohol and may, upon a written finding that appropriate and adequate treatment is available to the defendant and the defendant would benefit from such treatment and that the safety of the public would not be endangered, with the defendant's consent place a defendant on probation for two years; provided, however, that a condition for such probation shall be that the defendant be confined for no less than fourteen days in a residential alcohol treatment program and to participate in an out patient counseling program designed for such offenders as provided or sanctioned by the division of alcoholism, pursuant to regulations to be promulgated by said division in consultation with the department of correction and with the approval of the secretary of health and human services or at any other facility so sanctioned or regulated as may be established by the commonwealth or any political subdivision thereof for the purpose of alcohol or drug treatment or rehabilitation, and comply with all conditions of said residential alcohol treatment program. Such condition of probation shall specify a date before which such residential alcohol treatment program shall be attended and completed.

Failure of the defendant to comply with said conditions and any other terms of probation as imposed under this section shall be reported forthwith to the court and proceedings under the provisions of section three of chapter two hundred and seventy-nine shall be commenced. In such proceedings, such defendant shall be taken before the court and if the court finds that he has failed to attend or complete the residential alcohol treatment program before the date specified in the conditions of probation, the court shall forthwith specify a second date before which such defendant shall attend or complete such program, and unless such defendant shows extraordinary and compelling reasons for such failure, shall forthwith sentence him to imprisonment for not less than two days; provided, however, that such sentence shall not be reduced to less than two days, nor suspended, nor shall such person be eligible for furlough or receive any reduction from his sentence for good conduct until such person has served two days of such sentence; and provided, further, that the commissioner of correction may, on the recommendation of the warden, superintendent, or other person in charge of a correctional institution, or of the administrator of a county correctional institution, grant to an offender committed under this subdivision a temporary release in the custody of an officer of such institution for the following purposes only: to attend the funeral of a relative; to visit a critically ill relative; to obtain emergency medical or psychiatric services unavailable at said institution; or to engage in employment pursuant to a work release program. If such defendant fails to attend or complete the residential alcohol treatment program before the second date specified by the court, further proceedings pursuant to said section three of said chapter two hundred and seventy-nine shall be commenced, and the court shall forthwith sentence the defendant to imprisonment for not less than thirty days as provided in subparagraph (1) for such a defendant.

The defendant shall pay for the cost of the services provided by the residential alcohol treatment program; provided, however, that no person shall be excluded from said programs for inability to pay; and provided, further, that such person files with the court, an affidavit of indigency or inability to pay and that investigation by the probation officer confirms such

indigency or establishes that payment of such fee would cause a grave and serious hardship to such individual or to the family of such individual, and that the court enters a written finding thereof. In lieu of waiver of the entire amount of said fee, the court may direct such individual to make partial or installment payments of the cost of said program.

(b) A conviction of a violation of subparagraph (1) of paragraph (a) shall revoke the license or right to operate of the person so convicted unless such person has not been convicted of or assigned to an alcohol or controlled substance education, treatment or rehabilitation program because of a like offense by a court of the commonwealth or any other jurisdiction preceding the date of the commission of the offense for which he has been convicted, and said person qualifies for disposition under section twenty-four D and has consented to probation as provided for in said section twenty-four D; provided, however, that no appeal, motion for new trial or exceptions shall operate to stay the revocation of the license or the right to operate. Such revoked license shall immediately be surrendered to the prosecuting officer who shall forward the same to the registrar. The court shall report immediately any revocation, under this section, of a license or right to operate to the registrar and to the police department of the municipality in which the defendant is domiciled. Notwithstanding the provisions of section twenty-two, the revocation, reinstatement or issuance of a license or right to operate by reason of a violation of paragraph (a) shall be controlled by the provisions of this section and sections twenty-four D and twenty-four E.

(c) (1) Where the license or right to operate has been revoked under section twenty-four D or twenty-four E, or revoked under paragraph (b) and such person has not been convicted of a like offense or has not been assigned to an alcohol or controlled substance education, treatment or rehabilitation program because of a like offense by a court of the commonwealth or any other jurisdiction preceding the date of the commission of the offense for which he has been convicted, the registrar shall not restore the license or reinstate the right to operate to such person unless the prosecution of such person has been terminated in favor of the defendant, until one year

after the date of conviction; provided, however, that such person may, after the expiration of three months from the date of conviction, apply for and shall be granted a hearing before the registrar for the purpose of requesting the issuance of a new license for employment or educational purposes, which license shall be effective for not more than an identical twelve hour period every day on the grounds of hardship and a showing by the person that the causes of the present and past violations have been dealt with or brought under control, and the registrar may, in his discretion, issue such license under such terms and conditions as he deems appropriate and necessary; and provided, further, that such person may, after the expiration of six months from the date of conviction, apply for and shall be granted a hearing before the registrar for the purpose of requesting the issuance of a new license on a limited basis on the grounds of hardship and a showing by the person that the causes of the present and past violations have been dealt with or brought under control and the registrar may, in his discretion, issue such a license under such terms and conditions as he deems appropriate and necessary. In all such cases where the defendant operated a motor vehicle with a percentage, by weight, of alcohol in their blood of fifteen one-hundredths or greater, the registrar may place a restriction on a hardship license granted by the registrar under this subparagraph requiring that such person have an ignition interlock device installed on each vehicle owned, each vehicle leased and each vehicle operated by the licensee for the duration of the hardship license.

(2) Where the license or the right to operate of a person has been revoked under paragraph (b) and such person has been previously convicted of or assigned to an alcohol or controlled substance education, treatment or rehabilitation program by a court of the commonwealth or any other jurisdiction because of a like violation preceding the date of the commission of the offense for which such person has been convicted, the registrar shall not restore the license or reinstate the right to operate of such person unless the prosecution of such person has been terminated in favor of the defendant, until two years after the date of the conviction; provided, however, that such person may, after the expiration of 1 year from the date of

conviction, apply for and shall be granted a hearing before the registrar for the purpose of requesting the issuance of a new license for employment or education purposes, which license shall be effective for not more than an identical twelve hour period every day on the grounds of hardship and a showing by the person that the causes of the present and past violations have been dealt with or brought under control and that such person shall have successfully completed the residential treatment program in subparagraph (4) of paragraph (a) of subdivision (1), or such treatment program mandated by section twenty-four D, and the registrar may, in his discretion, issue such license under such terms and conditions as he deems appropriate and necessary; and provided, further, that such person may, after the expiration of 18 months from the date of conviction, apply for and shall be granted a hearing before the registrar for the purpose of requesting the issuance of a new license on a limited basis on the grounds of hardship and a showing by the person that the causes of the present and past violations have been dealt with or brought under control and the registrar may, in his discretion, issue such a license under such terms and conditions as he deems appropriate and necessary. A mandatory restriction on a hardship license granted by the registrar under this subparagraph shall be that such person have an ignition interlock device installed on each vehicle owned, each vehicle leased and each vehicle operated by the licensee for the duration of the hardship license.

(3) Where the license or right to operate of any person has been revoked under paragraph (b) and such person has been previously convicted or assigned to an alcohol or controlled substance education, treatment or rehabilitation program because of a like offense by a court of the commonwealth or any other jurisdiction two times preceding the date of the commission of the crime for which he has been convicted or where the license or right to operate has been revoked pursuant to section twenty-three due to a violation of said section due to a prior revocation under paragraph (b) or under section twenty-four D or twenty-four E, the registrar shall not restore the license or reinstate the right to operate to such person, unless the prosecution of such person has terminated in favor of the defendant, until eight years after the date of

conviction; provided however, that such person may, after the expiration of two years from the date of the conviction, apply for and shall be granted a hearing before the registrar for the purpose of requesting the issuance of a new license for employment or education purposes, which license shall be effective for not more than an identical twelve hour period every day, on the grounds of hardship and a showing by the person that the causes of the present and past violations have been dealt with or brought under control and the registrar may, in his discretion, issue such license under such terms and conditions as he deems appropriate and necessary; and provided, further, that such person may, after the expiration of four years from the date of conviction, apply for and shall be granted a hearing before the registrar for the purpose of requesting the issuance of a new license on a limited basis on the grounds of hardship and a showing by the person that the causes of the present and past violations have been dealt with or brought under control and the registrar may, in his discretion, issue such a license under such terms and conditions as he deems appropriate and necessary. A mandatory restriction on a hardship license granted by the registrar under this subparagraph shall be that such person have an ignition interlock device installed on each vehicle owned, each vehicle leased and each vehicle operated by the licensee for the duration of the hardship license.

(3 ½) Where the license or the right to operate of a person has been revoked under paragraph (b) and such person has been previously convicted of or assigned to an alcohol or controlled substance education, treatment or rehabilitation program by a court of the commonwealth or any other jurisdiction because of a like violation three times preceding the date of the commission of the offense for which such person has been convicted, the registrar shall not restore the license or reinstate the right to operate of such person unless the prosecution of such person has been terminated in favor of the defendant, until ten years after the date of the conviction; provided, however, that such person may, after the expiration of five years from the date of the conviction, apply for and shall be granted a hearing before the registrar for the purpose of requesting the issuance of a new license for employment or education purposes which

license shall be effective for an identical twelve hour period every day on the grounds of hardship and a showing by the person that the causes of the present and past violations have been dealt with or brought under control and the registrar may, in his discretion, issue such license under such terms and conditions as he deems appropriate and necessary; and provided, further, that such person may, after the expiration of eight years from the date of conviction, apply for and shall be granted a hearing before the registrar for the purpose of requesting the issuance of a new license on a limited basis on the grounds of hardship and a showing by the person that the causes of the present and past violations have been dealt with or brought under control and the registrar may, in his discretion, issue such a license under the terms and conditions as he deems appropriate and necessary. A mandatory restriction on a hardship license granted by the registrar under this subparagraph shall be that such person have an ignition interlock device installed on each vehicle owned, each vehicle leased and each vehicle operated by the licensee for the duration of the hardship license.

(3 ¾) Where the license or the right to operate of a person has been revoked under paragraph (b) and such person has been previously convicted of or assigned to an alcohol or controlled substance education, treatment or rehabilitation program by a court of the commonwealth or any other jurisdiction because of a like violation four or more times preceding the date of the commission of the offense for which such person has been convicted, such person's license or right to operate a motor vehicle shall be revoked for the life of such person, and such person shall not be granted a hearing before the registrar for the purpose of requesting the issuance of a new license on a limited basis on the grounds of hardship; provided, however, that such license shall be restored or such right to operate shall be reinstated if the prosecution of such person has been terminated in favor of such person. An aggrieved party may appeal, in accordance with the provisions of chapter thirty A, from any order of the registrar of motor vehicles under the provisions of this section.

(4) In any prosecution commenced pursuant to this section, introduction into evidence of a prior

conviction or a prior finding of sufficient facts by either certified attested copies of original court papers, or certified attested copies of the defendant's biographical and informational data from records of the department of probation, any jail or house of corrections, the department of correction, or the registry, shall be prima facie evidence that the defendant before the court had been convicted previously or assigned to an alcohol or controlled substance education, treatment, or rehabilitation program by a court of the commonwealth or any other jurisdiction. Such documentation shall be self-authenticating and admissible, after the commonwealth has established the defendant's guilt on the primary offense, as evidence in any court of the commonwealth to prove the defendant's commission of any prior convictions described therein. The commonwealth shall not be required to introduce any additional corrobating[1] evidence, nor live witness testimony to establish the validity of such prior convictions.

(d) For the purposes of subdivision (1) of this section, a person shall be deemed to have been convicted if he pleaded guilty or nolo contendere or admits to a finding of sufficient facts or was found or adjudged guilty by a court of competent jurisdiction, whether or not he was placed on probation without sentence or under a suspended sentence or the case was placed on file, and a license may be revoked under paragraph (b) hereof notwithstanding the pendency of a prosecution upon appeal or otherwise after such a conviction. Where there has been more than one conviction in the same prosecution, the date of the first conviction shall be deemed to be the date of conviction under paragraph (c) hereof.

(e) In any prosecution for a violation of paragraph (a), evidence of the percentage, by weight, of alcohol in the defendant's blood at the time of the alleged offense, as shown by chemical test or analysis of his blood or as indicated by a chemical test or analysis of his breath, shall be admissible and deemed relevant to the determination of the question of whether such defendant was at such time under the influence of intoxicating liquor; provided, however, that if such test or analysis was made by or at the direction of a police officer, it was made with the consent of the defendant, the results thereof were made available to

him upon his request and the defendant was afforded a reasonable opportunity, at his request and at his expense, to have another such test or analysis made by a person or physician selected by him; and provided, further, that blood shall not be withdrawn from any party for the purpose of such test or analysis except by a physician, registered nurse or certified medical technician. Evidence that the defendant failed or refused to consent to such test or analysis shall not be admissible against him in a civil or criminal proceeding, but shall be admissible in any action by the registrar under paragraph (f) or in any proceedings provided for in section twenty-four N. If such evidence is that such percentage was five one-hundredths or less, there shall be a permissible inference that such defendant was not under the influence of intoxicating liquor, and he shall be released from custody forthwith, but the officer who placed him under arrest shall not be liable for false arrest if such police officer had reasonable grounds to believe that the person arrested had been operating a motor vehicle upon any such way or place while under the influence of intoxicating liquor; provided, however, that in an instance where a defendant is under the age of twenty-one and such evidence is that the percentage, by weight, of alcohol in the defendant's blood is two one-hundredths or greater, the officer who placed him under arrest shall, in accordance with subparagraph (2) of paragraph (f), suspend such defendant's license or permit and take all other actions directed therein, if such evidence is that such percentage was more than five one-hundredths but less than eight one-hundredths there shall be no permissible inference. A certificate, signed and sworn to, by a chemist of the department of the state police or by a chemist of a laboratory certified by the department of public health, which contains the results of an analysis made by such chemist of the percentage of alcohol in such blood shall be prima facie evidence of the percentage of alcohol in such blood.

(f) (1) Whoever operates a motor vehicle upon any way or in any place to which the public has right to access, or upon any way or in any place to which the public has access as invitees or licensees, shall be deemed to have consented to submit to a chemical test or analysis of his breath or blood in the event that

he is arrested for operating a motor vehicle while under the influence of intoxicating liquor; provided, however, that no such person shall be deemed to have consented to a blood test unless such person has been brought for treatment to a medical facility licensed under the provisions of section 51 of chapter 111; and provided, further, that no person who is afflicted with hemophilia, diabetes or any other condition requiring the use of anticoagulants shall be deemed to have consented to a withdrawal of blood. Such test shall be administered at the direction of a police officer, as defined in section 1 of chapter 90C, having reasonable grounds to believe that the person arrested has been operating a motor vehicle upon such way or place while under the influence of intoxicating liquor. If the person arrested refuses to submit to such test or analysis, after having been informed that his license or permit to operate motor vehicles or right to operate motor vehicles in the commonwealth shall be suspended for a period of at least 180 days and up to a lifetime loss, for such refusal, no such test or analysis shall be made and he shall have his license or right to operate suspended in accordance with this paragraph for a period of 180 days; provided, however, that any person who is under the age of 21 years or who has been previously convicted of a violation under this section, subsection (a) of section 24G, operating a motor vehicle with a percentage by weight of blood alcohol of eight one-hundredths or greater, or while under the influence of intoxicating liquor in violation of subsection (b) of said section 24G, section 24L or subsection (a) of section 8 of chapter 90B, section 8A or 8B of said chapter 90B, or section 13 ½ of chapter 265 or a like violation by a court of any other jurisdiction or assigned to an alcohol or controlled substance education, treatment or rehabilitation program by a court of the commonwealth or any other jurisdiction for a like offense shall have his license or right to operate suspended forthwith for a period of 3 years for such refusal; provided, further, that any person previously convicted of, or assigned to a program for, 2 such violations shall have the person's license or right to operate suspended forthwith for a period of 5 years for such refusal; and provided, further, that a person previously convicted of, or assigned to a program for, 3 or more such violations shall have the

person's license or right to operate suspended forthwith for life based upon such refusal. If a person refuses to submit to any such test or analysis after having been convicted of a violation of section 24L, the restistrar[2] shall suspend his license or right to operate for 10 years. If a person refuses to submit to any such test or analysis after having been convicted of a violation of subsection (a) of section 24G, operating a motor vehicle with a percentage by weight of blood alcohol of eight one-hundredths or greater, or while under the influence of intoxicating liquor in violation of subsection (b) of said section 24G, or section 13 ½ of chapter 265, the registrar shall revoke his license or right to operate for life. If a person refuses to take a test under this paragraph, the police officer shall:

(i) immediately, on behalf of the registrar, take custody of such person's license or right to operate issued by the commonwealth;

(ii) provide to each person who refuses such test, on behalf of the registrar, a written notification of suspension in a format approved by the registrar; and

(iii) impound the vehicle being driven by the operator and arrange for the vehicle to be impounded for a period of 12 hours after the operator's refusal, with the costs for the towing, storage and maintenance of the vehicle to be borne by the operator.

The police officer before whom such refusal was made shall, within 24 hours, prepare a report of such refusal. Each report shall be made in a format approved by the registrar and shall be made under the penalties of perjury by the police officer before whom such refusal was made. Each report shall set forth the grounds for the officer's belief that the person arrested had been operating a motor vehicle on a way or place while under the influence of intoxicating liquor, and shall state that such person had refused to submit to a chemical test or analysis when requested by the officer to do so, such refusal having been witnessed by another person other than the defendant. Each report shall identify the police officer who requested the chemical test or analysis and the other person witnessing the refusal. Each report shall be sent forthwith to the registrar along with a copy of the notice of intent to suspend in a form, including electronic or otherwise, that the registrar deems appropriate. A license or right to

operate which has been confiscated pursuant to this subparagraph shall be forwarded to the registrar forthwith. The report shall constitute prima facie evidence of the facts set forth therein at any administrative hearing regarding the suspension specified in this section.
The suspension of a license or right to operate shall become effective immediately upon receipt of the notification of suspension from the police officer. A suspension for a refusal of either a chemical test or analysis of breath or blood shall run consecutively and not concurrently, both as to any additional suspension periods arising from the same incident, and as to each other.
No license or right to operate shall be restored under any circumstances and no restricted or hardship permits shall be issued during the suspension period imposed by this paragraph; provided, however, that the defendant may immediately, upon the entry of a not guilty finding or dismissal of all charges under this section, section 24G, section 24L, or section 13 ½ of chapter 265, and in the absence of any other alcohol related charges pending against said defendant, apply for and be immediately granted a hearing before the court which took final action on the charges for the purpose of requesting the restoration of said license. At said hearing, there shall be a rebuttable presumption that said license be restored, unless the commonwealth shall establish, by a fair preponderance of the evidence, that restoration of said license would likely endanger the public safety. In all such instances, the court shall issue written findings of fact with its decision.
(2) If a person's blood alcohol percentage is not less than eight one-hundredths or the person is under twenty-one years of age and his blood alcohol percentage is not less than two one-hundredths, such police officer shall do the following:
(i) immediately and on behalf of the registrar take custody of such person's drivers license or permit issued by the commonwealth;
(ii) provide to each person who refuses the test, on behalf of the registrar, a written notification of suspension, in a format approved by the registrar; and
(iii) immediately report action taken under this paragraph to the registrar. Each report shall be made in a format approved by the registrar and shall be

made under the penalties of perjury by the police officer. Each report shall set forth the grounds for the officer's belief that the person arrested has been operating a motor vehicle on any way or place while under the influence of intoxicating liquor and that the person's blood alcohol percentage was not less than .08 or that the person was under 21 years of age at the time of the arrest and whose blood alcohol percentage was not less than .02. The report shall indicate that the person was administered a test or analysis, that the operator administering the test or analysis was trained and certified in the administration of the test or analysis, that the test was performed in accordance with the regulations and standards promulgated by the secretary of public safety, that the equipment used for the test was regularly serviced and maintained and that the person administering the test had every reason to believe the equipment was functioning properly at the time the test was administered. Each report shall be sent forthwith to the registrar along with a copy of the notice of intent to suspend, in a form, including electronic or otherwise, that the registrar deems appropriate. A license or right to operate confiscated under this clause shall be forwarded to the registrar forthwith.

The license suspension shall become effective immediately upon receipt by the offender of the notice of intent to suspend from a police officer. The license to operate a motor vehicle shall remain suspended until the disposition of the offense for which the person is being prosecuted, but in no event shall such suspension pursuant to this subparagraph exceed 30 days.

In any instance where a defendant is under the age of twenty-one years and such evidence is that the percentage, by weight, of alcohol in the defendant's blood is two one-hundredths or greater and upon the failure of any police officer pursuant to this subparagraph, to suspend or take custody of the driver's license or permit issued by the commonwealth, and, in the absence of a complaint alleging a violation of paragraph (a) of subdivision (1) or a violation of section twenty-four G or twenty-four L, the registrar shall administratively suspend the defendant's license or right to operate a motor vehicle upon receipt of a report from the police

officer who administered such chemical test or analysis of the defendant's blood pursuant to subparagraph (1). Each such report shall be made on a form approved by the registrar and shall be sworn to under the penalties of perjury by such police officer. Each such report shall set forth the grounds for the officer's belief that the person arrested had been operating a motor vehicle on a way or place while under the influence of intoxicating liquor and that such person was under twenty-one years of age at the time of the arrest and whose blood alcohol percentage was two one-hundredths or greater. Such report shall also state that the person was administered such a test or analysis, that the operator administering the test or analysis was trained and certified in the administration of such test, that the test was performed in accordance with the regulations and standards promulgated by the secretary of public safety, that the equipment used for such test was regularly serviced and maintained, and that the person administering the test had every reason to believe that the equipment was functioning properly at the time the test was administered. Each such report shall be endorsed by the police chief as defined in section one of chapter ninety C, or by the person authorized by him, and shall be sent to the registrar along with the confiscated license or permit not later than ten days from the date that such chemical test or analysis of the defendant's blood was administered. The license to operate a motor vehicle shall thereupon be suspended in accordance with section twenty-four P.

(g) Any person whose license, permit or right to operate has been suspended under subparagraph (1) of paragraph (f) shall, within fifteen days of suspension, be entitled to a hearing before the registrar which shall be limited to the following issues: (i) did the police officer have reasonable grounds to believe that such person had been operating a motor vehicle while under the influence of intoxicating liquor upon any way or in any place to which members of the public have a right of access or upon any way to which members of the public have a right of access as invitees or licensees, (ii) was such person placed under arrest, and (iii) did such person refuse to submit to such test or analysis. If, after such hearing, the registrar finds on any one of the said issues in the negative, the registrar shall

forthwith reinstate such license, permit or right to operate. The registrar shall create and preserve a record at said hearing for judicial review. Within thirty days of the issuance of the final determination by the registrar following a hearing under this paragraph, a person aggrieved by the determination shall have the right to file a petition in the district court for the judicial district in which the offense occurred for judicial review. The filing of a petition for judicial review shall not stay the revocation or suspension. The filing of a petition for judicial review shall be had as soon as possible following the submission of said request, but not later than thirty days following the submission thereof. Review by the court shall be on the record established at the hearing before the registrar. If the court finds that the department exceeded its constitutional or statutory authority, made an erroneous interpretation of the law, acted in an arbitrary and capricious manner, or made a determination which is unsupported by the evidence in the record, the court may reverse the registrar's determination.

Any person whose license or right to operate has been suspended pursuant to subparagraph (2) of paragraph (f) on the basis of chemical analysis of his breath may within ten days of such suspension request a hearing and upon such request shall be entitled to a hearing before the court in which the underlying charges are pending or if the individual is under the age of twenty-one and there are no pending charges, in the district court having jurisdiction where the arrest occurred, which hearing shall be limited to the following issue; whether a blood test administered pursuant to paragraph (e) within a reasonable period of time after such chemical analysis of his breath, shows that the percentage, by weight, of alcohol in such person's blood was less than eight one-hundredths or, relative to such person under the age of twenty-one was less than two one-hundredths. If the court finds that such a blood test shows that such percentage was less than eight one-hundredths or, relative to such person under the age of twenty-one, that such percentage was less than two one-hundredths, the court shall restore such person's license, permit or right to operate and shall direct the prosecuting officer to forthwith notify the department of criminal

justice information services and the registrar of such restoration.

(h) Any person convicted of a violation of subparagraph (1) of paragraph (a) that involves operating a motor vehicle while under the influence of marihuana, narcotic drugs, depressants or stimulant substances, all as defined in section one of chapter ninety-four C, or while under the influence from smelling or inhaling the fumes of any substance having the property of releasing toxic vapors as defined in section 18 of chapter 270, may, as part of the disposition in the case, be ordered to participate in a driver education program or a drug treatment or drug rehabilitation program, or any combination of said programs. The court shall set such financial and other terms for the participation of the defendant as it deems appropriate.

(2) (a) Whoever upon any way or in any place to which the public has a right of access, or any place to which members of the public have access as invitees or licensees, operates a motor vehicle recklessly, or operates such a vehicle negligently so that the lives or safety of the public might be endangered, or upon a bet or wager or in a race, or whoever operates a motor vehicle for the purpose of making a record and thereby violates any provision of section seventeen or any regulation under section eighteen, or whoever without stopping and making known his name, residence and the register number of his motor vehicle goes away after knowingly colliding with or otherwise causing injury to any other vehicle or property, or whoever loans or knowingly permits his license or learner's permit to operate motor vehicles to be used by any person, or whoever makes false statements in an application for such a license or learner's permit, or whoever knowingly makes any false statement in an application for registration of a motor vehicle or whoever while operating a motor vehicle in violation of section 8M, 12A or 13B, such violation proved beyond a reasonable doubt, is the proximate cause of injury to any other person, vehicle or property by operating said motor vehicle negligently so that the lives or safety of the public might be endangered, shall be punished by a fine of not less than twenty dollars nor more than two hundred dollars or by imprisonment for not less than two weeks nor more than two years, or both; and whoever uses a motor vehicle without authority knowing

that such use is unauthorized shall, for the first offense be punished by a fine of not less than fifty dollars nor more than five hundred dollars or by imprisonment for not less than thirty days nor more than two years, or both, and for a second offense by imprisonment in the state prison for not more than five years or in a house of correction for not less than thirty days nor more than two and one half years, or by a fine of not more than one thousand dollars, or by both such fine and imprisonment; and whoever is found guilty of a third or subsequent offense of such use without authority committed within five years of the earliest of his two most recent prior offenses shall be punished by a fine of not less than two hundred dollars nor more than one thousand dollars or by imprisonment for not less than six months nor more than two and one half years in a house of correction or for not less than two and one half years nor more than five years in the state prison or by both fine and imprisonment. A summons may be issued instead of a warrant for arrest upon a complaint for a violation of any provision of this paragraph if in the judgment of the court or justice receiving the complaint there is reason to believe that the defendant will appear upon a summons.

There shall be an assessment of $250 against a person who, by a court of the commonwealth, is convicted of, is placed on probation for or is granted a continuance without a finding for or otherwise pleads guilty to or admits to a finding of sufficient facts of operating a motor vehicle negligently so that the lives or safety of the public might be endangered under this section, but $250 of the $250 collected under this assessment shall be deposited monthly by the court with the state treasurer, who shall deposit it in the Head Injury Treatment Services Trust Fund, and the remaining amount of the assessment shall be credited to the General Fund. The assessment shall not be subject to reduction or waiver by the court for any reason.
(a ½) (1) Whoever operates a motor vehicle upon any way or in any place to which the public has right of access, or upon any way or in any place to which members of the public shall have access as invitees or licensees, and without stopping and making known his name, residence and the registration number of his motor vehicle, goes away after knowingly colliding

with or otherwise causing injury to any person not resulting in the death of any person, shall be punished by imprisonment for not less than six months nor more than two years and by a fine of not less than five hundred dollars nor more than one thousand dollars.

(2) Whoever operates a motor vehicle upon any way or in any place to which the public has a right of access or upon any way or in any place to which members of the public shall have access as invitees or licensees and without stopping and making known his name, residence and the registration number of his motor vehicle, goes away to avoid prosecution or evade apprehension after knowingly colliding with or otherwise causing injury to any person shall, if the injuries result in the death of a person, be punished by imprisonment in the state prison for not less than two and one-half years nor more than ten years and by a fine of not less than one thousand dollars nor more than five thousand dollars or by imprisonment in a jail or house of correction for not less than one year nor more than two and one-half years and by a fine of not less than one thousand dollars nor more than five thousand dollars. The sentence imposed upon such person shall not be reduced to less than one year, nor suspended, nor shall any person convicted under this paragraph be eligible for probation, parole, or furlough or receive any deduction from his sentence until such person has served at least one year of such sentence; provided, however, that the commissioner of correction may on the recommendation of the warden, superintendent or other person in charge of a correctional institution, or the administrator of a county correctional institution, grant to an offender committed under this paragraph, a temporary release in the custody of an officer of such institution for the following purposes only: to attend the funeral of a relative; to visit a critically ill relative; to obtain emergency medical or psychiatric services unavailable at said institution or to engage in employment pursuant to a work release program.

(3) Prosecutions commenced under subparagraph (1) or (2) shall not be continued without a finding nor placed on file.

(b) A conviction of a violation of paragraph (a) or paragraph (a ½) of subdivision (2) of this section shall be reported forthwith by the court or magistrate

to the registrar, who may in any event, and shall unless the court or magistrate recommends otherwise, revoke immediately the license or right to operate of the person so convicted, and no appeal, motion for new trial or exceptions shall operate to stay the revocation of the license or right to operate. If it appears by the records of the registrar that the person so convicted is the owner of a motor vehicle or has exclusive control of any motor vehicle as a manufacturer or dealer or otherwise, the registrar may revoke the certificate of registration of any or all motor vehicles so owned or exclusively controlled.

(c) The registrar, after having revoked the license or right to operate of any person under paragraph (b), in his discretion may issue a new license or reinstate the right to operate to him, if the prosecution has terminated in favor of the defendant. In addition, the registrar may, after an investigation or upon hearing, issue a new license or reinstate the right to operate to a person convicted in any court for a violation of any provision of paragraph (a) or (a ½) of subdivision (2); provided, however, that no new license or right to operate shall be issued by the registrar to: (i) any person convicted of a violation of subparagraph (1) of paragraph (a ½) until one year after the date of revocation following his conviction if for a first offense, or until two years after the date of revocation following any subsequent conviction; (ii) any person convicted of a violation of subparagraph (2) of paragraph (a ½) until three years after the date of revocation following his conviction if for a first offense or until ten years after the date of revocation following any subsequent conviction; (iii) any person convicted, under paragraph (a) of using a motor vehicle knowing that such use is unauthorized, until one year after the date of revocation following his conviction if for a first offense or until three years after the date of revocation following any subsequent conviction; and (iv) any person convicted of any other provision of paragraph (a) until sixty days after the date of his original conviction if for a first offense or one year after the date of revocation following any subsequent conviction within a period of three years. Notwithstanding the forgoing, a person holding a junior operator's license who is convicted of operating a motor vehicle recklessly or negligently

under paragraph (a) shall not be eligible for license reinstatement until 180 days after the date of his original conviction for a first offense or 1 year after the date of revocation following a subsequent conviction within a period of 3 years. The registrar, after investigation, may at any time rescind the revocation of a license or right to operate revoked because of a conviction of operating a motor vehicle upon any way or in any place to which the public has a right of access or any place to which members of the public have access as invitees or licensees negligently so that the lives or safety of the public might be endangered. The provisions of this paragraph shall apply in the same manner to juveniles adjudicated under the provisions of section fifty-eight B of chapter one hundred and nineteen.

(3) The prosecution of any person for the violation of any provision of this section, if a subsequent offence, shall not, unless the interests of justice require such disposition, be placed on file or otherwise disposed of except by trial, judgment and sentence according to the regular course of criminal proceedings; and such a prosecution shall be otherwise disposed of only on motion in writing stating specifically the reasons therefor and verified by affidavits if facts are relied upon. If the court or magistrate certifies in writing that he is satisfied that the reasons relied upon are sufficient and that the interests of justice require the allowance of the motion, the motion shall be allowed and the certificate shall be filed in the case. A copy of the motion and certificate shall be sent by the court or magistrate forthwith to the registrar.

(4) In any prosecution commenced pursuant to this section, introduction into evidence of a prior conviction or prior finding of sufficient facts by either original court papers or certified attested copy of original court papers, accompanied by a certified attested copy of the biographical and informational data from official probation office records, shall be prima facie evidence that a defendant has been convicted previously or assigned to an alcohol or controlled substance education, treatment, or rehabilitation program because of a like offense by a court of the commonwealth one or more times preceding the date of commission of the offense for which said defendant is being prosecuted.

G. L. c. 90, § 24L. Serious bodily injury by motor vehicle while under influence of intoxicating substance; penalties

(1) Whoever, upon any way or in any place to which the public has a right of access, or upon any way or in any place to which members of the public have access as invitees or licensees, operates a motor vehicle with a percentage, by weight, of alcohol in their blood of eight one-hundredths or greater, or while under the influence of intoxicating liquor, or marihuana, narcotic drugs, depressants, or stimulant substances, all as defined in section one of chapter ninety-four C, or while under the influence from smelling or inhaling the fumes of any substance having the property of releasing toxic vapors as defined in section 18 of chapter 270, and so operates a motor vehicle recklessly or negligently so that the lives or safety of the public might be endangered, and by any such operation so described causes serious bodily injury, shall be punished by imprisonment in the state prison for not less than two and one-half years nor more than ten years and by a fine of not more than five thousand dollars, or by imprisonment in a jail or house of correction for not less than six months nor more than two and one-half years and by a fine of not more than five thousand dollars.

The sentence imposed upon such person shall not be reduced to less than six months, nor suspended, nor shall any person convicted under this subsection be eligible for probation, parole, or furlough or receive any deduction from his sentence until such person has served at least six months of such sentence; provided, however, that the commissioner of correction may, on the recommendation of the warden, superintendent, or other person in charge of a correctional institution, or of the administrator of a county correctional institution, grant to an offender committed under this subsection a temporary release in the custody of an officer of such institution for the following purposes only: to attend the funeral of a relative; to visit a critically ill relative; to obtain emergency medical or psychiatric services unavailable at said institution; or to engage in employment pursuant to a

work release program. Prosecutions commenced under this subdivision shall neither be continued without a finding nor placed on file.
The provisions of section eighty-seven of chapter two hundred and seventy-six shall not apply to any person charged with a violation of this subdivision.
(2) Whoever, upon any way or in any place to which the public has a right of access or upon any way or in any place to which members of the public have access as invitees or licensees, operates a motor vehicle with a percentage, by weight, of alcohol in their blood of eight one-hundredths or greater, or while under the influence of intoxicating liquor, or of marihuana, narcotic drugs, depressants or stimulant substances, all as defined in section one of chapter ninety-four C, or while under the influence from smelling or inhaling the fumes of any substance having the property of releasing toxic vapors as defined in section 18 of chapter 270, and by any such operation causes serious bodily injury, shall be punished by imprisonment in a jail or house of correction for not more than two and one-half years, or by a fine of not less than three thousand dollars, or both.
(3) For the purposes of this section "serious bodily injury" shall mean bodily injury which creates a substantial risk of death or which involves either total disability or the loss or substantial impairment of some bodily function for a substantial period of time.
(4) The registrar shall revoke the license or right to operate of a person convicted of a violation of subdivision (1) or (2) for a period of two years after the date of conviction. No appeal, motion for new trial or exception shall operate to stay the revocation of the license or the right to operate; provided, however, such license shall be restored or such right to operate shall be reinstated if the prosecution of such person ultimately terminates in favor of the defendant.

G. L. c. 90, § 24*I*. Possession of alcoholic beverages in motor vehicles

(a) As used in this section, the following words shall have the following meanings:

"Open container," a bottle, can or other receptacle used to contain a liquid that has been opened or has a broken seal or the contents of which have been partially removed or consumed; provided, however, that a bottle resealed pursuant to section 12 of chapter 138 shall not be considered an open container; provided further, that a resealed bottle shall not be transported in the passenger area.
"Passenger area," the area designed to seat the driver and passengers while the motor vehicle is in operation and any area that is readily accessible to the driver or a passenger while in a seated position including, but not limited to, the glove compartment; provided, however, that the passenger area shall not include a motor vehicle's trunk or a locked glove compartment or, if a motor vehicle is not equipped with a trunk, the area behind the last upright seat or an area not normally occupied by the driver or passenger.
(b) Whoever, upon any way or in any place to which the public has a right of access, or upon any way or in any place to which members of the public have access as invitees or licensees, possesses an open container of alcoholic beverage in the passenger area of any motor vehicle shall be punished by a fine of not less than $100 nor more than $500.
(c) This section shall not apply to (1) the passengers of a motor vehicle designed, maintained and used for the transportation of persons for compensation, or (2) the living quarters of a house coach or house trailer.
(d) Notwithstanding this section, the driver of any motor vehicle, including but not limited to a house coach or house trailer, shall not possess an open container of alcoholic beverage.

G. L. c. 263, § 5A. Driving while intoxicated; right to medical examination; notice

A person held in custody at a police station or other place of detention, charged with operating a motor vehicle while under the influence of intoxicating liquor, shall have the right, at his request and at his expense, to be examined immediately by a physician selected by him. The police official in charge of such station or place of detention, or his designee, shall inform him of such right immediately upon being booked, and shall afford him a reasonable opportunity

to exercise it. Such person shall, immediately upon being booked, be given a copy of this section unless such a copy is posted in the police station or other place of detention in a conspicuous place to which such person has access.

CERTIFICATE OF COMPLIANCE
Mass. R. A. P. 16 (k)

Re: Commonwealth v. John T. Cappellucci, Jr.,
No. SJC-13458

I, Melissa W. Johnsen, hereby certify that the brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to: Mass. R. A. P. 16 (a) (6)(pertinent findings or memorandum of decision); Mass. R. A. P. 16 (e) (references to the record); Mass. R. A. P. 16 (f) (reproduction of statutes, rules, regulations); Mass. R. A. P. 16 (h) (length of briefs); Mass. R. A. P. 18 (appendix to the briefs); and Mass. R. A. P. 20 (form of briefs, appendices, and other papers).

Signed under the pains and
penalties of perjury,

By: \s\ Melissa W. Johnsen
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Dated: August 18, 2023

CERTIFICATE OF SERVICE

Re: Commonwealth v. John T. Cappellucci, Jr.,
No. SJC-13458

I, Melissa W. Johnsen, hereby certify that on this day I served the Commonwealth's brief and Record Appendix on the defendant by causing PDF copies to be sent via the Tylerhost system to his attorney:

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