COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

WORCESTER, ss. SJC-13168

COMMONWEALTH

v.

ERIC MOREAU

BRIEF FOR THE DEFENDANT-APPELLANT
ON APPEAL FROM THE
GARDNER DISTRICT COURT

ANN GRANT
BBO# 690035

ATTORNEY FOR ERIC MOREAU

COMMITTEE FOR PUBLIC
COUNSEL SERVICES
Public Defender Division
75 Federal Street, 6th Floor
Boston, MA 02110
(617) 482-6212
agrant@publiccounsel.net

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ISSUE PRESENTED

G.L. c. 90, § 24(1)(e), states that when a chemical "test or analysis" of a defendant's blood-alcohol content is "made by or at the direction of police," it is admissible only if the defendant consents. Here, police obtained a warrant to seize blood drawn from the defendant by hospital personnel and then tested it in the State Police Crime Lab without the defendant's consent. Are the results of that test admissible in the prosecution of the defendant?

STATEMENT OF THE CASE

On October 14, 2020, a complaint issued summonsing Eric Moreau for arraignment on December 7, 2020. On that date, he was charged in Gardner District Court with operation of a motor vehicle under the influence of liquor, ("OUI"), in violation of G.L. c. 90, § 24(1)(a)(1) and negligent operation of a motor, vehicle in violation of G.L. c. 90, § 24(2)(a).[1] (R.3). On July 6, 2021, Mr. Moreau filed a motion to suppress the results of the blood-alcohol content analysis conducted by the State Police Crime Lab. (R.4). That motion was denied on July 23, 2021. (R.4). On August 20, 2021, Mr. Moreau filed an application for leave to file an interlocutory appeal pursuant to Mass. R. Crim. P.15(a)(2). The Commonwealth assented to Mr. Moreau's application via letter to the Court on September 2, 2021. The application was allowed (Wendlandt, J.) on September 7, 2021, and ordered to proceed to the Supreme Judicial Court. It was entered in this Court on September 8, 2021.

[1] "R." refers to the record appendix and "A." refers to the addendum to this brief. The transcript of the hearing on Mr. Moreau's motion to suppress will be cited as (Tr._).

STATEMENT OF FACTS

On September 29, 2020, Officer Joshua Willis of the Gardner Police Department responded to reports that a motor vehicle struck a tree in the vicinity of 377 Park Street. (A.15, R.5). The officer observed the operator of the vehicle, later identified as Eric Moreau, to be unsteady on his feet, glassy eyed, and slurring his speech. (A.15, R.5). He was transported to the Heywood Hospital for treatment. (A.15, R.5). Officer Willis sent a preservation of evidence letter to the hospital and then obtained a search warrant for Mr. Moreau's blood. (A.15, R.5). The warrant was executed and the samples were analyzed for blood-alcohol content, ("BAC"), by the State Police Crime Lab. (A.15, R.5). The Commonwealth presented no evidence that Mr. Moreau consented to have his blood tested by police for blood alcohol content. (Tr.8).

ARGUMENT

According to the plain statutory language of G.L. c. 90, § 24(1)(e) and in keeping with the Legislature's intent, for a blood-alcohol content "test or analysis" done "by or at the direction of police" to be admissible in an OUI prosecution, the defendant must consent to such test or analysis. There is no warrant exception.

a. A blood-alcohol content test done by or at the direction of police without the consent of the defendant is inadmissible at an OUI prosecution, regardless of whether police obtained a warrant.

The motion judge denied Mr. Moreau's motion to suppress the BAC results on the theory that the OUI statute only prohibits police from *drawing* a defendant's blood without his consent but does not prohibit police from *testing* a defendant's blood without his consent pursuant to a warrant, so long as the blood was drawn by a third party. This was error. See *Meyer v. Veolia Energy N.*

Am., 482 Mass. 208, 211 (2019)("'[Q]uestions of statutory construction are questions of law, to be reviewed de novo'"), quoting *Bridgewater State Univ. Found. V. Assessors of Bridgewater*, 463 Mass. 154, 156 (2012); *Concord v. Water Dep't of Littleton*, 487 Mass. 56, 60 (2021). The motion judge incorrectly interpreted the statutory language and failed to follow this Court's holding in *Commonwealth v. Bohigian*, 486 Mass. 212, 213 (2020), that there is no warrant exception.

Though it is not unconstitutional to draw and test a defendant's blood without consent pursuant to a warrant or in exigent circumstances, the Legislature created a statutory scheme which provides more protection than the Constitution when defendants are charged with OUI. *Bohigian*, 486 Mass. at 216; G.L. c. 90, § 24. The applicable consent provision of the OUI statute, § 24(1)(e), states in relevant part: "[i]n 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...shall be admissible and deemed relevant...*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*[.]" G.L. c. 90, 24(1)(e), emphasis added.[2] The statute thus plainly requires the defendant's consent to the BAC test or analysis by police or the BAC results are inadmissible. And this consent requirement cannot be read to apply only to blood *draws*. "Test" and "analysis" are clearly intended to have

[2] The other consent provision in the statute, § 24(1)(f)(1), also known as the "implied consent" provision, states that any driver who is arrested for OUI is deemed to have given consent unless the person withdraws consent by refusing to submit to a test or analysis. At that point, "no such test or analysis shall be made." G.L.c. 90, § 24(1)(f)(1). Because Mr. Moreau was never under arrest, this provision does not apply to him.

their plain meanings[3] because the statute says that a "chemical test or analysis of [the person's] blood" results in "evidence of the percentage, by weight, of alcohol in the defendant's blood at the time of the alleged offense." G.L.c. 90, §24(1)(e).

The facts and precise consent provision at issue in *Bohigian* differ from this case: the defendant there was subjected to a forcible blood draw and the consent provision at issue was § 24(1)(f)(1).[4] Nonetheless, this Court determined that the plain language of both consent provisions, § 24(1)(f)(1) *and* § 24(1)(e), proscribed a warrant exception. The Court explained that using a warrant as "an alternative to obtaining consent....ignores the plain statutory language that creates a blanket prohibition against blood draws without consent in the context of OUI prosecutions....Both [24(1)(f)(1) and 24(1)(e)] require consent for OUI blood draws, and neither makes an exception for, or even mentions, warrants." *Id.* at 213. Because the "making" of a blood test or analysis requires two distinct acts, drawing a person's blood and then testing it for BAC, the Court logically determined that there could be no warrant exception for an unconsented to blood *draw* under § 24(1)(e), even though the words "test or analysis" appear in

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[3] To "test" is to employ "a means of testing: such as...a procedure, reaction, or reagent used to identify or characterize a substance or constituent." Merriam-Webster Dictionary, available at https://www.merriam-webster.com/dictionary/test (last visited October 8, 2021). "Analysis" is "the identification or separation of ingredients of a substance" or "a statement of the constituents of a mixture." *Id.*, available at https://www.merriam-webster.com/dictionary/analysis (last visited October 8, 2021).

[4] The defendant in *Bohigian* was charged with G.L.c. 90, § 24L, OUI causing serious bodily injury. *Bohigian*, 486 Mass. at 213. Section 24(1)(e) therefore did not apply to him with respect to that charge, as it only applies to OUI prosecutions pursuant to § 24(1)(a)(1), OUIs without injuries, also known as "simple" OUIs. *Id.*

that section and the words "blood draw" do not. As a result, the defendant's consent is required if police are to draw his blood *and* if police test it for BAC.

A BAC test by police without Mr. Moreau's consent is inadmissible at his prosecution for OUI; a warrant cannot overcome his lack of consent and that the hospital drew his blood for medical purposes is irrelevant. See *Bohigian*, 486 Mass. at 213 ("[t]he 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"), internal citations omitted. Mr. Moreau's motion to suppress should have been allowed.

b. The plain language of 24(1)(e) does not lead to absurd results or contravene the Legislature's clear intent; to the contrary, it is consistent with that intent, with other provisions of the statute, and with the protection of privacy rights.

Where the plain language of the statute does not contravene the Legislature's intent or lead to absurd results, it must be "construed as written." See, e.g., *Casseaus v. E. Bus Co.*, 478 Mass. 786, 787-788 (2018). The Legislature clearly intended to create protections for OUI defendants that exceed those protections enshrined by the Constitution and the Declaration of Rights. See *Bohigian*, 486 Mass. at 216 ("[i]t is well within the Legislature's authority" to provide protections "over and above" those granted by the Federal and State constitutions.) And it was not absurd for the Legislature to do so.

The history of the statute supports that the Legislature understood the protection it was granting: it first enacted § 24(1)(e), which rendered inadmissible any BAC test or analysis done by police without a defendant's consent, and later, enacted § 24(1)(f)(1), which threatened arrested defendants with license loss if they refused to consent, effectively creating a cudgel that police could wield in

appropriate circumstances.[5] And when the Appeals Court interpreted § 24(1)(e) and § 24(1)(f)(1) to require actual consent in *Commonwealth v. Davidson*, 27 Mass. App. Ct. 846, 848 (1989), abrogated on other grounds by *Missouri v. McNeely,* 569 U.S. 141, 150 (2013), the Legislature demonstrated its approval of that construction by not amending the consent language despite making other amendments to the statute seven different times. *Bohigian*, 486 Mass. at 215-216.

That the Legislature intended to grant the defendant a right to consent to BAC testing by police is also made clear from another right protected by the statute. See *Commonwealth v. Morgan*, 476 Mass. 768, 777 (2017) ("In construing a statute, we strive to discern and effectuate the intent of the Legislature. The plain language of the statute, read *as a whole*, provides the primary insight into that intent."), emphasis added. Under § 24(1)(e), if police obtain BAC test results with the defendant's consent, they are nonetheless only admissible if "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[.]" That statutory protection is important because BAC levels can be conclusive proof of guilt or innocence in OUI prosecutions, and at the same time, BAC evidence is "fleeting." See *Commonwealth v. Douglas*, 75 Mass. App. Ct. 643, 651 (2009) (OUI statute contains "conclusive inference" of intoxication for anyone who operates a motor vehicle with a BAC of 0.08 or higher); *Commonwealth v. Hampe*, 419 Mass. 514, 517, 519 (1997) (alcohol metabolizes in a person's system over time). Thus, a defendant who might want to challenge the reliability of the police lab's BAC test needs to act quickly to obtain his own scientific testing. But

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[5] Section 24(1)(e) was enacted in 1961 and § 24(1)(f)(1) was enacted in 1967. *Bohigian*, 486 Mass. at 229 (Lowy, J., dissenting).

if the Court were to read a warrant exception into § 24(1)(e), it would effectively repeal the additional language granting the defendant a right to his own test. Police could simply obtain a warrant rather than request a defendant's consent and never trigger the requirement that they provide the defendant with an independent testing opportunity. C.f. *Hampe*, 419 Mass. at 520-521 (where Legislature has "expressed clearly its concern that the right of a defendant to an independent examination under [G.L.c. 263, § 5A] be protected," the Court could not require anything less than the statute demanded or it would effectively "repeal" the statute.)[6]

In addition, there is a valid reason for the Legislature to require actual consent before police test or analyze a defendant's blood for BAC. See *Bohigian*, 486 Mass. at 216 (avoiding physical confrontations during forced blood draws is a "valid reason" for the Legislature to require the defendant's actual consent to draw blood). The involuntary collection of a blood sample is a search and seizure of constitutional dimension because the individual's right to privacy is implicated. *Landry v. Attorney General*, 429 Mass. 336, 343-345 (1999). And this Court has recognized that "technological advances have made it possible to discover from minute blood samples genetic and medical information of a most invasive and personal nature," and that there is "some concern that [] samples could be misused at some point in the future to search for and disclose private genetic information."[7] *Id.* at 353-354, n.20. It is thus unsurprising that the

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[6] The protection of G.L.c. 263, § 5A, which requires OUI defendants to be notified of their right to an independent medical examination, only applies to defendants in custody.

[7] A suspicion that Massachusetts' government actors cannot be trusted to competently and fairly handle evidence in their possession such that access to such evidence should be limited is justified. See *Commonwealth v. Ananias*, Mass.

Legislature did not grant, or intend to grant, pretrial access by police to an individual's blood without their consent when it was drawn by medical personnel after an alleged violation of G.L. c. 90, § 24(1)(a)(1). *See McDonald v. United States*, 335 U.S. 451, 455–456 (1948) ("The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. Power is a heady thing; and history shows that the police acting on their own cannot be trusted.").

CONCLUSION

The plain language of G.L. c. 90, § 24(1)(e), requires that a defendant consent to a test or analysis of his blood by or at the direction of police or such evidence will be inadmissible in a prosecution for OUI; there is no warrant exception. In addition, the legislative history, the statutory right to an independent test, and privacy concerns support the conclusion that the Legislature chose its language carefully and intentionally when enacting the statute. Mr. Moreau did not consent to police testing his blood for BAC. Thus, the trial court erred when it denied his motion to suppress; the BAC test results should be suppressed and the case remanded for further proceedings.

Super. No. 1201CR3898, *1 (2019) (The Office of Alcohol Testing, a unit within the Massachusetts State police Crime Lab, withheld evidence that a breath test machine was scientifically unreliable necessitating the review of many years of OUI convictions); *Comm. for Pub. Counsel Servs. v. Attorney Gen.*, 480 Mass. 700, 701-702 (2018) (remedy required after "egregious governmental misconduct" at the State Laboratory Institute in Amherst involving evidence tampering by chemist and "deceptive withholding of exculpatory evidence by members of the Attorney General's office.")

Respectfully Submitted,

/s/ Ann Grant
BBO#690035

ATTORNEY FOR ERIC MOREAU

COMMITTEE FOR PUBLIC
COUNSEL SERVICES
Public Defender Division
75 Federal Street, 6th Floor
Boston, MA 02110
(617) 482-6212
agrant@publiccounsel.net

Dated: November 16, 2021

ADDENDUM

COMMONWEALTH OF MASSACHUSETTS
DISTRICT COURT DEPARTMENT

WORCESTER, SS.

GARDNER DIVISION
DOCKET NO. 2063CR788

COMMONWEALTH

VS.

ERIC MOREAU

DECISION ON DEFENDANT'S MOTION TO SUPPRESS

On July 21, 2021 the Court held a hearing on the Defendant's Motion to Suppress Blood Test and the Court makes the following findings on the Statement of Facts, Ruling of Law, and Order.

1. Statement of Facts

On September 29, 2020, Officer Willis of the Gardner Police Department (herein after "Officer") was dispatched to 377 Parker Street, Gardner, MA concerning a collision involving the Defendant hitting a tree. The Defendant admitted to the Officer that he was the operator of the vehicle. The Officer observed the Defendant being unsteady on his feet, glassy eyes, and slurred speech. The Officer testified that the Defendant was transported to Heywood Hospital.

The Officer forwarded a preservation of evidence letter to the hospital and then received a search warrant to obtain Defendant's blood sample. Upon receiving the warrant, the Officer executed the warrant and took the Defendant's blood sample to the State lab for testing.

2. Rulings of Law

The issue is whether the Police violated the Defendant's rights under G.L. c. 90s., 24(1)(e) and G.L. c. 90, § 24(1)(f)(1) by not obtaining consent to submit his blood to the State lab.

General Laws c. 90, § 24 (1) (e), works in tandem with G.L. c. 90, § 24 (1) (f) (1). Section 24 (1) (e) requires that where a test of a Defendant's breath or blood to determine alcohol content is made by or at the direction of a police officer, it must be done with the Defendant's

consent in order for the results to be admissible in a prosecution for OUI under G.L. c. 90, § 24 (1) (a). "Nothing prevents the police from seeking a warrant for a blood test when there is sufficient time to do so in the particular circumstances . . ." *Birchfield v. North Dakota*, 136 S. Ct. 2160, at 2185.

In this case there was not any testimony that the Officer ordered or directed that a blood sample be taken from the Defendant. There was testimony that the Officer was not present at the hospital, while the Defendant was receiving services. The Officer correctly obtained a search warrant to obtain the blood sample from the hospital. The Defendant did not offer any exhibits, testimony, or third-party testimony that he had refused to take the blood sample. There was no affidavit submitted and signed by the Defendant stating that he had refused to take a blood sample at the hospital.

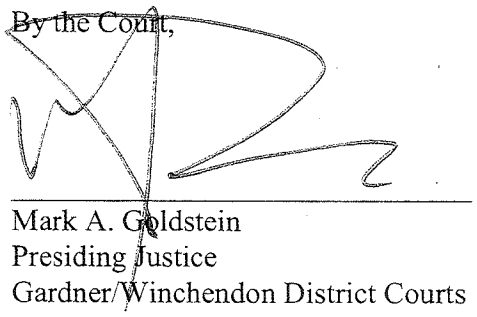
The Defendant relies on the holdings of *Commonwealth v. Bohigian, 486 Mass. 209 (2020)* which is clearly not applicable to the facts in this case. In that case, the Defendant repeatedly objected to having his blood drawn. The Defendant's arms and legs were restrained by troopers as the nurse drew two vials of blood at the direction of the trooper; quite a different set of facts then this case.

Order

Since there was no evidence submitted that the drawing of blood sample was at the request or direction of the Officer and that there was not any evidence suggesting that the Defendant had refused to have his blood drawn, the Motion to Suppress is DENIED.

Dated: July 23, 2021

By the Court,



Mark A. Goldstein
Presiding Justice
Gardner/Winchendon District Courts

G.L. c. 90, § 24(1)(a)(1)

> (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.
>
> ....

G.L. c. 90, § 24(1)(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.

G.L. ch. 90, § 24(1)(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.

G.L. ch. 90, § 24(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.

G.L. ch. 90, § 24L

(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. ch. 263, § 5A

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.

Mass. R. Crim. P. 15(a)(2)

> Right of Interlocutory Appeal....*Right of Appeal Where Motion to Suppress Evidence Determined.* A defendant or the Commonwealth shall have the right and opportunity to apply to a single justice of the Supreme Judicial Court, in the form and manner prescribed by a standing order of that court, for leave to appeal an order determining a motion to suppress evidence prior to trial. If the single justice determines that the administration of justice would be facilitated, the justice may grant that leave and may hear the appeal or may order it to the full Supreme Judicial Court or to the Appeals Court for determination.

CERTIFICATE OF COMPLIANCE

I, the undersigned, do hereby certify that this brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to: Rule 16(a)(13) (addendum); Rule 16(e) (references to the record); Rule 20 (form and length of briefs, appendices, and other documents); and Rule 21 (redaction). This brief is set in 14-point Athelas font, and contains 2,474 non-excluded words, as determined through use of the "Word Count" feature in Microsoft Word 2010.

/s/ Ann Grant
Ann Grant

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that I have today made service on counsel for the Commonwealth by directing that a copy of the attached brief and associated record appendix be sent via the Odyssey File and Service E-Filing system to:

Donna-Marie Haran
Office of the District Attorney/Worcester
225 Main Street
Worcester, MA 01608

/s/ Ann Grant
BBO#690035

ATTORNEY FOR ERIC MOREAU

COMMITTEE FOR PUBLIC
COUNSEL SERVICES
Public Defender Division
75 Federal Street, 6th Floor
Boston, MA 02110
(617) 482-6212
agrant@publiccounsel.net