SENATE DOCKET, NO. 440 FILED ON: 1/19/2011

SENATE . . . . . No. 1795

The Commonwealth of Massachusetts

PRESENTED BY:

Bruce E. Tarr

To the Honorable Senate and House of Representatives of the Commonwealth of Massachusetts in General Court assembled:

The undersigned legislators and/or citizens respectfully petition for the adoption of the accompanying bill:

An Act increasing protection against drivers under the influence of drugs..

PETITION OF:

NAME:	DISTRICT/ADDRESS:
Bruce E. Tarr	
Michael R. Knapik	
Richard J. Ross	*Norfolk, Bristol, and Middlesex*
Robert L. Hedlund	
Benjamin Swan	*11th Hampden*

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SENATE . . . . . No. 1795

By Mr. Tarr, petition (accompanied by bill, Senate, No. 1795) of Tarr, Swan, Ross and other members of the General Court for legislation to increase protection against drivers under the influence of drugs [Joint Committee on Transportation].

[SIMILAR MATTER FILED IN PREVIOUS SESSION
SEE SENATE, NO. *1964* OF 2009-2010.]

The Commonwealth of Massachusetts

In the Year Two Thousand Eleven

An Act increasing protection against drivers under the influence of drugs..

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

SECTION 1. This bill may be known as the "Drug Test Consent Bill".

SECTION 2. Section 1 of Chapter 90 of the General Laws is hereby amended by inserting, after the definition of "Department", the following new paragraph:

"Drugs", any substance except alcohol which, when ingested or otherwise introduced into the body, impairs the ability of a person to drive, and whose impairing effect is known or should be known to the ingesting person.

SECTION 3. Section 24(f) of Chapter 90 of the General Laws is hereby amended by striking the subsection in its entirety and replacing it with the following paragraph: "(f)

9 (1) Whoever operates a motor vehicle upon any way or in any place to which the public
10 has right to access, or upon any way or in any place to which the public has access as invitees or
11 licensees, shall be deemed to have consented to submit to chemical tests or analyses of his
12 breath, urine or blood in the event that he is arrested for operating a motor vehicle while under
13 the influence of intoxicating liquor or drugs; provided, however, that no such person shall be
14 deemed to have consented to a blood test or tests unless such person has been brought for
15 treatment to a medical facility licensed under the provisions of section 51 of chapter 111; and
16 provided, further, that no person who is afflicted with hemophilia or any other condition
17 requiring the use of anticoagulants shall be deemed to have consented to a withdrawal of blood.
18 Such test or tests shall be administered at the direction of a police officer, as defined in section 1
19 of chapter 90C, having reasonable grounds to believe that the person arrested has been operating
20 a motor vehicle upon such way or place while under the influence of intoxicating liquor or drugs.
21 If the person arrested refuses to submit to any tests or analyses, after having been informed that
22 his license or permit to operate motor vehicles or right to operate motor vehicles in the
23 commonwealth shall be suspended for a period of at least 180 days and up to a lifetime loss, for
24 each refusal, no such test or analysis shall be made absent an order of a court, and he shall have
25 his license or right to operate suspended in accordance with this paragraph for a period of 180
26 days for each refusal; provided, that each suspension for a refusal under this section shall run
27 consecutively; provided, further, that any person who is under the age of 21 years or who has
28 been previously convicted of or assigned to an alcohol or controlled substance education,
29 treatment, or rehabilitation program for a violation under this section, subsection (a) of section
30 24G, operating a motor vehicle with a percentage by weight of blood alcohol of eight one-
31 hundredths or greater, or while under the influence of intoxicating liquor or drugs in violation of

32 subsection (b) of said section 24G, section 24L or subsection (a) of section 8 of chapter 90B,
33 section 8A or 8B of said chapter 90B, section 11 of chapter 90F, or section 13 1/2 of chapter 265
34 or a like violation by a court of any other jurisdiction shall have his license or right to operate
35 suspended forthwith for a period of 3 years for each refusal; provided, further, that any person
36 previously convicted of or assigned to an alcohol or controlled substance education, treatment, or
37 rehabilitation program for 2 such violations shall have his license or right to operate suspended
38 forthwith for a period of 5 years for each refusal; and provided, further, that a person previously
39 convicted of or assigned to an alcohol or controlled substance education, treatment, or
40 rehabilitation program for 3 or more such violations shall have his license or right to operate
41 suspended forthwith for life based upon each refusal. If a person refuses to submit to any such
42 tests or analyses after having been convicted of or assigned to an alcohol or controlled substance
43 education, treatment, or rehabilitation program for a violation of section 24L, the registrar shall
44 suspend his license or right to operate for 10 years for each refusal unless a longer suspension
45 has been ordered pursuant to this section, in which case a suspension of 10 years shall run
46 consecutively with the previous suspension. If a person refuses to submit to any such tests or
47 analyses after having been convicted of or assigned to an alcohol or controlled substance
48 education, treatment, or rehabilitation program for a violation of subsection (a) of section 24G,
49 operating a motor vehicle with a percentage by weight of blood alcohol of eight one-hundredths
50 or greater, or while under the influence of intoxicating liquor in violation of subsection (b) of
51 said section 24G, or section 13 1/2 of chapter 265, the registrar shall revoke his license or right to
52 operate for life. If a person refuses to take any test under this paragraph, the police officer shall:

53 (i) immediately, on behalf of the registrar, take custody of such person's license if said
54 license was issued by the commonwealth;

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

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

60 The police officer before whom any such refusal was made shall, within 24 hours,
61 prepare a report of each refusal. Each report shall be made in a format approved by the registrar
62 and shall be made under the penalties of perjury by the police officer before whom such refusal
63 was made. Each report shall set forth the grounds for the officer's belief that the person arrested
64 had been operating a motor vehicle on a way or place while under the influence of intoxicating
65 liquor or drugs and shall state that such person had refused to submit to one or more chemical
66 tests or analyses when requested by the officer to do so, such refusal or refusals having been
67 witnessed by another person other than the defendant. Each report shall identify the police
68 officer who requested the chemical test or analysis and the other person witnessing the refusal.
69 Each report shall be sent forthwith to the registrar along with a copy of the notice of intent to
70 suspend in a form, including electronic or otherwise, that the registrar deems appropriate. A
71 license which has been confiscated pursuant to this subparagraph shall be disposed of in a
72 manner prescribed by the registrar. The report shall constitute prima facie evidence of the facts
73 set forth therein at any administrative hearing regarding the suspension specified in this section.

74 The suspension of a license or right to operate shall become effective immediately upon
75 receipt of the notification of suspension from the police officer. A suspension for a refusal of
76 either a chemical test or analysis of breath, urine or blood shall run consecutively and not

77 concurrently, both as to any additional suspension periods arising from the same incident, and as
78 to each other.

79 No license or right to operate shall be restored under any circumstances and no restricted
80 or hardship permits shall be issued during the suspension period imposed by this paragraph;
81 provided, however, that the defendant may immediately, upon the entry of a not guilty finding or
82 dismissal of all charges under this section, section 24G, section 24L, or section 13 1/2 of chapter
83 265, and in the absence of any other alcohol or drug related charges pending against said
84 defendant, apply for and be immediately granted a hearing before the court which took final
85 action on the charges for the purpose of requesting the restoration of said license. At said
86 hearing, there shall be a rebuttable presumption that said license be restored, unless the
87 commonwealth shall establish, by a fair preponderance of the evidence, that restoration of said
88 license would likely endanger the public safety. In all such instances, the court shall issue written
89 findings of fact with its decision.

90 (2) If a person's blood alcohol percentage is not less than eight one-hundredths or the
91 person is under twenty-one years of age and his blood alcohol percentage is not less than two
92 one-hundredths, or if a person is under the influence of marijuana, narcotic drugs, depressants, or
93 stimulant substances, such police officer shall do the following:

94 (i) immediately and on behalf of the registrar take custody of such person's drivers
95 license or permit issued by the commonwealth;

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

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

101 (iii) immediately report action taken under this paragraph to the registrar. Each report
102 shall be made in a format approved by the registrar and shall be made under the penalties of
103 perjury by the police officer. Each report shall set forth the grounds for the officer's belief that
104 the person arrested has been operating a motor vehicle on any way or place while under the
105 influence of intoxicating liquor or drugs and that the person's blood alcohol percentage was not
106 less than .08 or that the person was under the influence of drugs, or that the person was under 21
107 years of age at the time of the arrest and whose blood alcohol percentage was not less than .02.
108 The report shall indicate that the person was administered one or more tests or analyses, that the
109 operator administering the tests or analyses was trained and certified in the administration of the
110 tests or analyses, that the test or tests were performed in accordance with the regulations and
111 standards promulgated by the secretary of public safety, that the equipment used for the test or
112 tests was regularly serviced and maintained and that the person administering the test or tests had
113 every reason to believe the equipment was functioning properly at the time the test of tests were
114 administered. Each report shall be sent forthwith to the registrar along with a copy of the notice
115 of intent to suspend, in a form, including electronic or otherwise, that the registrar deems
116 appropriate. A license or right to operate confiscated under this clause shall be forwarded to the
117 registrar forthwith.

118 The license suspension shall become effective immediately upon receipt by the offender
119 of the notice of intent to suspend from a police officer. The license to operate a motor vehicle

120 shall remain suspended until the disposition of the offense for which the person is being
121 prosecuted, but in no event shall such suspension pursuant to this subparagraph exceed 30 days.

122 In any instance where a defendant is under the age of twenty-one years and such evidence
123 is that the percentage, by weight, of alcohol in the defendant's blood is two one-hundredths or
124 greater and upon the failure of any police officer pursuant to this subparagraph, to suspend or
125 take custody of the driver's license or permit issued by the commonwealth, and, in the absence of
126 a complaint alleging a violation of paragraph (a) of subdivision (1) or a violation of section
127 twenty-four G or twenty-four L, the registrar shall administratively suspend the defendant's
128 license or right to operate a motor vehicle upon receipt of a report from the police officer who
129 administered such chemical test or analysis of the defendant's blood pursuant to subparagraph
130 (1). Each such report shall be made on a form approved by the registrar and shall be sworn to
131 under the penalties of perjury by such police officer. Each such report shall set forth the grounds
132 for the officer's belief that the person arrested had been operating a motor vehicle on a way or
133 place while under the influence of intoxicating liquor and that such person was under twenty-one
134 years of age at the time of the arrest and whose blood alcohol percentage was two one-
135 hundredths or greater. Such report shall also state that the person was administered such a test or
136 analysis, that the operator administering the test or analysis was trained and certified in the
137 administration of such test, that the test was performed in accordance with the regulations and
138 standards promulgated by the secretary of public safety, that the equipment used for such test
139 was regularly serviced and maintained, and that the person administering the test had every
140 reason to believe that the equipment was functioning properly at the time the test was
141 administered. Each such report shall be endorsed by the police chief as defined in section one of
142 chapter ninety C, or by the person authorized by him, and shall be sent to the registrar along with

143 the confiscated license or permit not later than ten days from the date that such chemical test or
144 analysis of the defendant's blood was administered. The license to operate a motor vehicle shall
145 thereupon be suspended in accordance with section twenty-four P.

146 (g) Any person whose license, permit or right to operate has been suspended under
147 subparagraph (1) of paragraph (f) shall, within fifteen days of suspension, be entitled to a hearing
148 before the registrar which shall be limited to the following issues: (i) did the police officer have
149 reasonable grounds to believe that such person had been operating a motor vehicle while under
150 the influence of intoxicating liquor or drugs upon any way or in any place to which members of
151 the public have a right of access or upon any way to which members of the public have a right of
152 access as invitees or licensees, (ii) was such person placed under arrest, and (iii) did such person
153 refuse to submit to such tests or analyses. If, after such hearing, the registrar finds on any one of
154 the said issues in the negative, the registrar shall forthwith reinstate such license, permit or right
155 to operate. The registrar shall create and preserve a record at said hearing for judicial review.
156 Within thirty days of the issuance of the final determination by the registrar following a hearing
157 under this paragraph, a person aggrieved by the determination shall have the right to file a
158 petition in the district court for the judicial district in which the offense occurred for judicial
159 review. The filing of a petition for judicial review shall not stay the revocation or suspension.
160 The filing of a petition for judicial review shall be had as soon as possible following the
161 submission of said request, but not later than thirty days following the submission thereof.
162 Review by the court shall be on the record established at the hearing before the registrar. If the
163 court finds that the department exceeded its constitutional or statutory authority, made an
164 erroneous interpretation of the law, acted in an arbitrary and capricious manner, or made a

165 determination which is unsupported by the evidence in the record, the court may reverse the
166 registrar's determination.

167 Any person whose license or right to operate has been suspended pursuant to
168 subparagraph (2) of paragraph (f) on the basis of chemical analysis of his breath, urine or blood
169 may within ten days of such suspension request a hearing and upon such request shall be entitled
170 to a hearing before the court in which the underlying charges are pending or if the individual is
171 under the age of twenty-one and there are no pending charges, in the district court having
172 jurisdiction where the arrest occurred, which hearing shall be limited to the following issues:
173 whether a blood test administered pursuant to paragraph (e) within a reasonable period of time
174 after such chemical analysis of his breath, shows that the percentage, by weight, of alcohol in
175 such person's blood was less than eight one-hundredths or, relative to such person under the age
176 of twenty-one was less than two one-hundredths; whether reasonable grounds existed for the
177 arrest; and the reliability or validity of the machines, personnel, and procedures used in the
178 chemical analysis or analyses. If the court finds that such a blood test shows that such percentage
179 was less than eight one-hundredths or, relative to such person under the age of twenty-one, that
180 such percentage was less than two one-hundredths, or that there did not exist reasonable grounds
181 for the arrest, or that the chemical analysis or analyses were not reliable or valid, the court shall
182 restore such person's license, permit or right to operate and shall direct the prosecuting officer to
183 forthwith notify the criminal history systems board and the registrar of such restoration.

184 SECTION 4. Section 24(e) of Chapter 90 of the General Laws is hereby amended by
185 striking the subsection in its entirety and replacing it with the following paragraph:

186 (e) In any prosecution for a violation of paragraph (a), evidence of the percentage, by
187 weight, of alcohol in the defendant's blood at the time of the alleged offense, or evidence of the
188 presence of drugs, as shown by chemical test or analysis of his blood, urine, or breath, shall be
189 admissible and deemed relevant to the determination of the question of whether such defendant
190 was at such time under the influence of intoxicating liquor or drugs; provided, however, that if
191 such test or analysis was made by or at the direction of a police officer, it was made with the
192 consent of the defendant, the results thereof were made available to him upon his request and the
193 defendant was afforded a reasonable opportunity, at his request and at his expense, to have
194 another such test or analysis made by a person or physician selected by him; and provided,
195 further, that blood shall not be withdrawn from any party for the purpose of such test or analysis
196 except by a physician, registered nurse or other qualified medical personnel. Evidence that the
197 defendant failed or refused to consent to such test or analysis shall not be admissible against him
198 in a civil or criminal proceeding, but shall be admissible in any action by the registrar under
199 paragraph (f) or in any proceedings provided for in section twenty-four N. In the case of a test
200 for the presence of alcohol, if such evidence is that such percentage was five one-hundredths or
201 less, there shall be a permissible inference that such defendant was not under the influence of
202 intoxicating liquor, and he shall be released from custody forthwith, but the officer who placed
203 him under arrest shall not be liable for false arrest if such police officer had reasonable grounds
204 to believe that the person arrested had been operating a motor vehicle upon any such way or
205 place while under the influence of intoxicating liquor; provided, however, that in an instance
206 where a defendant is under the age of twenty-one and such evidence is that the percentage, by
207 weight, of alcohol in the defendant's blood is two one-hundredths or greater, the officer who
208 placed him under arrest shall, in accordance with subparagraph (2) of paragraph (f), suspend

209 such defendant's license or permit and take all other actions directed therein, if such evidence is
210 that such percentage was more than five one-hundredths but less than eight one-hundredths there
211 shall be no permissible inference. A certificate, signed and sworn to, by a chemist of the
212 department of the state police or by a chemist of a laboratory certified by the department of
213 public health, which contains the results of an analysis made by such chemist of the percentage
214 of alcohol in such blood or urine or of the presence drugs shall be prima facie evidence of the
215 percentage of alcohol in such blood or of the presence of drugs.