

SUBSEQUENT OFFENSE

The defendant is charged with being a subsequent offender. Section _____ of Chapter _____ of our General Laws provides that a person who is convicted of _____ [underlying offense] _____ shall be punished as a subsequent offender if, prior to the date of that offense, he (she) had been convicted of (the same) (a like) offense.

The defendant was convicted of _____ [underlying offense] _____ that occurred on _____ [date of underlying offense] _____ when (you returned a verdict of guilty) (a verdict of guilty was returned) (a finding of guilty was entered) (the defendant pleaded guilty to that offense). You are therefore to treat this fact as undisputed and proved. You must now go on to determine whether the Commonwealth has proved the charge that this was a subsequent offense.

The defendant has pleaded not guilty to the charge that this was a subsequent offense. He (she) is presumed to be innocent of the charge that it was a subsequent offense, and the burden is on the Commonwealth to prove that it was.

In order to prove that the defendant is guilty of being a subsequent offender, the Commonwealth must prove beyond a reasonable doubt that

prior to the date when the defendant committed [underlying offense] , this same defendant had previously been convicted of (the same) (a like) offense.

If this is not the same jury that returned a guilty verdict on the underlying offense, here instruct on Reasonable Doubt (Instruction 2.180).

The word “conviction” refers to the entry of a guilty verdict by a jury or a guilty finding by a judge.

SUPPLEMENTAL INSTRUCTIONS

1. CWOFF and program assignment in OUI cases.

A prior conviction may also be shown by proving that this same defendant was previously assigned by a court to an alcohol or controlled substance education, treatment or rehabilitation program, and that the program assignment was made because of a like offense.

G.L. c. 90, § 24D. *Commonwealth v. Murphy*, 389 Mass. 316, 451 N.E.2d 95 (1983).

2. “Like offense” in another state.

I instruct you, as a matter of law, that the offense known as _____ in the state of

_____ is a like offense to the offense of _____ *[underlying offense]*
here in Massachusetts.

To prove that the defendant was previously convicted of (a like) (the same) offense, the Commonwealth must prove beyond a reasonable doubt that the person who is now in the courtroom is the same person as the person previously convicted.

Identity cannot be proved simply by showing that this defendant has the same name — even the identical name — as a person previously convicted. The Commonwealth must prove the common identity of this defendant and the other person — that they are in fact the same person — beyond a reasonable doubt.

You should consider all the evidence and any reasonable inferences you draw from the evidence in determining whether common identity has been proved.

After considering all of the evidence, if you determine that the Commonwealth has proved beyond a reasonable doubt that, prior to the date of this offense, the defendant had previously been convicted of (the same) (a like) offense, then you should find the defendant guilty of being a

subsequent offender. If you determine that the Commonwealth has not proved that the defendant had previously been convicted of (the same) (a like) offense, then you must find the defendant not guilty.

SUPPLEMENTAL INSTRUCTIONS

1. If conviction may have been obtained without counsel or waiver of counsel.

If

there is evidence that the defendant did not have an attorney represent him (her) when he (she) was previously convicted of (a like) (the same) offense and that he (she) did not waive his (her) right to be represented by an attorney, the Commonwealth must also prove beyond a reasonable doubt that the defendant was in fact either represented by an attorney when he (she) was previously convicted of (a like) (the same) offense or waived his (her) right to be represented by an attorney.

The Commonwealth may prove this in various ways, such as offering court documents which name an attorney as representing the defendant or which indicate that the defendant signed a waiver of attorney or chose not to hire an attorney.

The defendant is not required to present any evidence. It is up to the Commonwealth to prove beyond a reasonable doubt that the defendant was either represented by an attorney or waived his (her) right to be represented.

See Commonwealth v. Saunders, 435 Mass. 691, 696 (2002); Commonwealth v. McMullin, 76 Mass. App. Ct. 904, 905 (2010).

2. If more than one prior offense is alleged.

The Commonwealth alleges that, prior to the date of this offense, the defendant had previously been convicted _____ times of (the same) (a like) offense. It is for you to determine from the evidence whether the Commonwealth has proved any prior convictions beyond a reasonable doubt, and if so, how many.

In determining whether and how many times this defendant was previously convicted of [offense] , you should consider all of the evidence and any reasonable inferences you choose to draw from that evidence. If the Commonwealth has proved one or more prior offenses, you should return a verdict reflecting the total number of prior convictions proved beyond a reasonable doubt.

In such cases, appropriate modifications should be made in the basic instruction to refer to prior offenses in the plural. See also Commonwealth v. Bowden, 447 Mass. 593, 855 N.E.2d 758 (2006) (proof of prior conviction for third offense OUI sufficient to establish all three prior convictions).

3. If this is the same jury that returned a guilty verdict on the underlying offense.

All of my instructions on the law at the first trial apply fully and equally here. I remind you that the complaint alleging that the defendant is a subsequent offender is not any evidence of guilt. The defendant is presumed to be innocent until proven guilty beyond a reasonable doubt. The burden falls entirely on the Commonwealth to prove that this conviction for [underlying offense] is in fact a subsequent conviction for this defendant. The burden of proof never shifts to the defendant. The defendant has no burden to prove anything nor to introduce any evidence.

You may not consider any evidence that was introduced in the first trial. None of that evidence is relevant to the determination you must make now: whether the Commonwealth has proved beyond a reasonable doubt that the defendant was previously convicted of (the same) (a like) offense. You may only consider the evidence introduced during this second trial in

which it is alleged that the conviction is a subsequent offense.

NOTES:

1. **Bifurcated proceeding required by G.L. c. 278, § 11A.** “If a defendant is charged with a crime for which more severe punishment is provided for second and subsequent offenses, and the complaint or indictment alleges that the offense charged is a second or subsequent offense, the defendant on arraignment shall be inquired of only for a plea of guilty or not guilty to the crime charged, and that portion of the indictment or complaint that charges, or refers to a charge that, said crime is a second or subsequent offense shall not be read in open court. If such defendant pleads not guilty and is tried before a jury, no part of the complaint or indictment which alleges that the crime charged is a second or subsequent offense shall be read or shown to the jury or referred to in any manner during the trial; provided, however, that if a defendant takes the witness stand to testify, nothing herein contained shall prevent the impeachment of his credibility by evidence of any prior conviction, subject to the provisions of [G.L. c. 233, § 21]. If a defendant pleads guilty or if there is a verdict or finding of guilty after trial, then before sentence is imposed, the defendant shall be further inquired of for a plea of guilty or not guilty to that portion of the complaint or indictment alleging that the crime charged is a second or subsequent offense. If he pleads guilty thereto, sentence shall be imposed; if he pleads not guilty thereto, he shall be entitled to a trial by jury of the issue of conviction of a prior offense, subject to all of the provisions of law governing criminal trials. A defendant may waive trial by jury. The court may, in its discretion, either hold the jury which returned the verdict of guilty of the crime, the trial of which was just completed, or it may order the impaneling of a new jury to try the issue of conviction of one or more prior offenses. Upon the return of a verdict, after the separate trial of the issue of conviction of one or more prior offenses, the court shall impose the sentence appropriate to said verdict.” The defendant is not entitled to have a new jury seated to try the subsequent offense allegation merely because the first jury has just convicted him of the underlying offense. *Commonwealth v. Means*, 71 Mass. App. Ct. 788, 797-798, 886 N.E.2d 754, 761 (2008).

2. **Subsequent offense allegation required in complaint.** A defendant may not be subjected to enhanced punishment which is statutorily provided for a subsequent offense unless the prior offenses have been alleged in the complaint and proved beyond a reasonable doubt. *Commonwealth v. Fortier*, 258 Mass. 98, 100, 155 N.E. 8, 9 (1927); *McDonald v. Commonwealth*, 173 Mass. 322, 326-327, 53 N.E. 874, 874-875 (1899), judgment aff’d, 180 U.S. 311, 21 S.Ct. 389 (1901); *Tuttle v. Commonwealth*, 2 Gray 505, 506 (1854). A statute providing otherwise would be unconstitutional under Art. 12 of the Massachusetts Declaration of Rights. *Commonwealth v. Harrington*, 130 Mass. 35, 36 (1880).

Since subsequent offense provisions do not create separate offenses but sentencing enhancements, a subsequent offense allegation may appear either within the charging language of the underlying offense or in the format of a separate count within the same complaint. *Commonwealth v. Fernandes*, 430 Mass. 517, 722 N.E.2d 406 (1999) (reference to defendant as “having been previously convicted of a similar offense” is sufficient allegation of prior offense); *Commonwealth v. Gonzalez*, 22 Mass. App. Ct. 274, 283-285, 493 N.E.2d 516, 522-523 (1986) (indictment that “further alleges this to be the second and subsequent offense” is sufficient allegation of prior offense). If the statute does not provide for enhanced punishment for a subsequent offense, any such allegation in the complaint should be stricken. See *Commonwealth v. Markarian*, 250 Mass. 211, 213, 145 N.E. 305, 306 (1924). If the subsequent-offense allegation is charged in a separate count, it operates in conjunction with the substantive count and the sentence must pertain to both counts; the judge should not file the substantive count and impose sentence on the subsequent-offense-allegation count. *Commonwealth v. Lopez*, 55 Mass. App. Ct. 741, 742 n.1, 774 N.E.2d 667, 669 n.1 (2002).

If the Commonwealth fails to prove the subsequent offense, the defendant may only be convicted and sentenced as a first offender. *Commonwealth v. Barney*, 258 Mass. 609, 610, 155 N.E. 600, 601 (1927). However, as a matter of discretion, a judge may always consider prior convictions as a reason to sentence on the severe end of the range of first-offense penalties. *Commonwealth v. Baldwin*, 24 Mass. App. Ct. 200, 205-206, 509 N.E.2d 4 (1987).

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3. **Sentencing must await resolution of subsequent offense allegation.** A judge is not to impose sentence when the defendant is convicted of the underlying offense, but is to await completion of the separate trial on whether it is a subsequent offense. *Commonwealth v. Jarvis*, 68 Mass. App. Ct. 538, 863 N.E.2d 567 (2007). If a subsequent offense is charged in a separate count, one sentence is to be imposed on both counts; the judge should not file the count charging the underlying offense and impose sentence on the count with the subsequent offense allegation. *Commonwealth v. Lopez*, 55 Mass. App. Ct. 741, 742 n.1, 774 N.E.2d 667, 669 n.1 (2002).

4. **Judge's option whether to impanel different jury.** The judge should inquire whether the defendant pleads guilty or not guilty to that portion of the complaint that alleges a subsequent offense. If the defendant pleads not guilty, the "court may, in its discretion, either hold the jury which returned the verdict of guilty of the crime, the trial of which was just completed, or it may order the impaneling of a new jury to try the issue of conviction of one or more prior offenses." G.L. c. 278, § 11A. The defendant is not entitled to a new jury merely based on speculation that the first jury may be biased because it has just convicted him of the underlying offense. *Commonwealth v. Means*, 71 Mass. App. Ct. 788, 797, 886 N.E.2d 754, 761 (2008).

5. **Guilty plea or bench trial on subsequent offense allegation.** If the defendant pleads guilty as to the subsequent offense allegation, the judge must conduct a colloquy and find a knowing and voluntary waiver of the right to trial on that issue. A defendant may not stipulate to a subsequent offense through counsel. *Commonwealth v. Orben*, 53 Mass. App. Ct. 700, 706-707, 761 N.E.2d 991, 997-998 (2002). If the defendant also pleaded guilty to the underlying offense, only an abbreviated colloquy is necessary; the judge need not repeat the preliminary questions but must make clear that they apply here as well. The prosecutor should set forth the facts of the prior offenses, and the judge should further inquire as to whether the defendant committed the acts described, whether his plea to them is voluntary, and so on. When satisfied that the plea is voluntary, made with an understanding of its consequences, and that sufficient facts warrant a finding of guilty on the subsequent offense portion of the charge, the judge may then impose sentence. *Commonwealth v. Pelletier*, 449 Mass. 392, 397-398, 868 N.E.2d 613, 618 (2007).

If the defendant was tried and convicted by a jury on the underlying offense and then waives jury trial on the subsequent offense portion of the complaint, both a written jury waiver and a jury waiver colloquy are required and their absence is fatal. A stipulation by counsel to a bench trial of the subsequent offense allegation is insufficient. *Commonwealth v. Dussault*, 71 Mass. App. Ct. 542, 883 N.E.2d 1243 (2008).

6. **Prior convictions must precede subsequent offense, not just subsequent conviction.** The OUI statute defines a subsequent offender as a defendant who was "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 [this] offense" (G.L. c. 90, § 24[1][a][1]) (emphasis added). This requires that the prior conviction must have preceded the subsequent offense and not merely the subsequent conviction. *Commonwealth v. Hernandez*, 60 Mass. App. Ct. 416, 802 N.E.2d 1059 (2004). This is true also of drug offenses under G.L. c. 94C. See *Bynum v. Commonwealth*, 429 Mass. 705, 711 N.E.2d 138 (1999). In prosecutions for other subsequent offenses, the precise wording of the statute should be examined.

7. **"Like offense."** A "like offense" or "like violation" is determined by the elements of the offense, not the penalty. *Commonwealth v. Corbett*, 422 Mass. 391, 396-397, 663 N.E.2d 259 (1996) (irrelevant that 3rd offense OUI is felony while 1st and 2nd offenses are misdemeanors); *Commonwealth v. Becker*, 71 Mass. App. Ct. 81, 879 N.E.2d 691 (2008) (irrelevant that Massachusetts offense of indecent assault and battery is felony, while similar NY offense of 3rd degree sexual abuse is misdemeanor). See also *Commonwealth v. Valiton*, 432 Mass. 647, 655-656, 737 N.E.2d 1257 (2000) (prior delinquency charge qualifies as prior offense).

8. **Identity of defendant.** Mere identity of names is not enough to prove a prior conviction. *Commonwealth v. Koney*, 421 Mass. 295, 301-302, 657 N.E.2d 210, 214 (1995). See also *Commonwealth v. Maloney*, 447 Mass. 577, 582, 855 N.E.2d 765, 770 (2006).

9. **Methods of proving prior offense and identity of defendant.** In prosecutions under G.L. c. 90, § 24:

"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 corroborating evidence, nor live witness testimony to establish the validity of such prior convictions."

G.L. c. 90, § 24(1)(c)(4). This does not limit the ways in which the Commonwealth may prove a prior offense. *Bowden, supra* (prior version of statute); *Commonwealth v. Maloney*, 447 Mass. 577, 855 N.E.2d 765 (2006) (current version of statute).

In OUI and other prosecutions, see also G.L. c. 90, § 30 ("[c]ertified copies of such records [of 'all applications and of all certificates and licenses issued' and of 'all convictions of persons charged with violations of the laws relating to motor vehicles'] of the registrar, attested by the registrar or his authorized agent, shall be admissible as evidence in any court of the commonwealth to prove the facts contained therein"); G.L. c. 233, § 76 ("[c]opies of books, papers, documents and records in any department of the commonwealth or of any city or town, authenticated by the attestation of the officer who has charge of the same, shall be competent evidence in all cases equally with the originals thereof"); Mass. R. Crim. P. 40(a)(1) (an "official record . . . may be evidenced by a copy attested by the officer having legal custody the record, or by his deputy"); Mass. G. Evid. § 902(b) (2008-2009) (same). With respect to court records from another state, see G. L. c. 233, § 69 (records and court proceedings of a court of another state or of the United States may be authenticated "by the attestation of the clerk or other officer who has charge of the records under its seal"); Mass. G. Evid. § 902(a) (2008-2009) (same).

An "attested copy" is one "which has been examined and compared with the original, with a certificate or memorandum of its correctness, signed by the persons who have examined it. Thus, to qualify as an 'attested' copy, there must be a written and signed certification that it is a correct copy. The attestation of an official having custody of an official record is the assurance given by the certifier that the copy submitted is accurate and genuine as compared to the original." *Commonwealth v. Deramo*, 436 Mass. 40, 47, 762 N.E.2d 815, 821 (2002) (photocopy of original attestation insufficient).

The attesting signature may be either holographic, stamped or printed. G.L. c. 218, § 14 (District Court clerks may use facsimile signature for criminal records except for search warrants and process authorizing arrests or commitments); G.L. c. 221, § 17 (Massachusetts court clerks may use facsimile signature for writs, summonses, subpoenas, and orders of notice or attachment, except executions); *Commonwealth v. Johnson*, 32 Mass. App. Ct. 355, 357, 589 N.E.2d 328, 330 (1992) ("It is a well established principle that in the absence of a statutory directive, a signature may be affixed in many different ways. It may be written by hand or it may be stamped, printed, or affixed by other means"). See *Commonwealth v. Apalakis*, 396 Mass. 292, 486 N.E.2d 669 (1985) (temporary driver's license "bearing a stamped facsimile of the registrar's signature . . . served as a temporary license until a regular photographic license could be obtained"); *Foss v. Wexler*, 242 Mass. 277, 282, 136 N.E. 243, 245 (1922) ("In the absence of statute or regulation to the contrary, we cannot say that the licenses are invalid because the signature of the commissioners was made by their duly authorized agent with a rubber stamp"); *Commonwealth v. Michael J. English*, 72 Mass. App. Ct. 1120, 894 N.E.2d 1181, 2008 WL 4539475 (No. 07-P-1503, Oct. 14, 2008) (unpublished opinion under Appeals Court Rule 1:28) (in OUI trial, Registrar's rubber-stamped signature sufficient to authenticate RMV records); *Commonwealth v. King*, 35 Mass. App. Ct. 221, 222 n.3, 617 N.E.2d 1036, 1037 n.3 (1993) (rejecting challenge to drug analysis certificate because it "carried the stamped signature rather than the handwritten signature of the notary").

Nasser v. State, 646 N.E.2d 673, 676-677 (Ind. Ct. App. 1995), held that it is not necessary for each page in a document to be separately attested if one page incorporates the others, or if the pages are numbered, or if from the context it is otherwise "clear that all of the pages are part of the same document." *Bates v. State*, 650 N.E.2d 754 (Ind. Ct. App. 1995), held that a court clerk's attestation on the first page of a record of conviction was sufficient to cover a second page that was not numbered and did not bear the defendant's name or docket number, where similar information in DMV records confirmed that the second page of the court record was a continuation of the first. No Massachusetts appellate court has considered the issue.

10. **Representation by counsel on earlier convictions.** A defendant generally is presumed to have been represented by (or to have waived) counsel in prior proceedings that resulted in a conviction, and the

Commonwealth need not come forward with proof on the point unless the defendant first makes a showing that the conviction was obtained without representation by or waiver of counsel. *Commonwealth v. McMullin* 76 Mass. App. Ct. 904, 905 (2010). Among the ways this may be done are a judge's entry on the complaint that the nonindigent defendant did not want counsel or had failed to retain counsel after a reasonable period, or probation records indicating counsel's name at the time of the prior conviction. *Commonwealth v. Savageau*, 42 Mass. App. Ct. 518, 520-522, 678 N.E.2d 1193, 1195-1196 (1997) (collecting cases with sufficient evidence of waiver).

11. **Commonwealth entitled to proceed on subsequent offense.** A judge does not have discretion to prevent the Commonwealth from proceeding on the subsequent offense portion of the charge, effectively reducing the charge to a first offense over the prosecutor's objection. *Commonwealth v. Pelletier*, 449 Mass. 392, 868 N.E.2d 613 (2007).

12. **Operating after OUI-related license loss does not require bifurcation.** A charge of operating a motor vehicle after an OUI-related license loss (G.L. c. 90, § 23, second par.) does not require a bifurcated trial under G.L. c. 278, § 11A. *Commonwealth v. Blake*, 52 Mass. App. Ct. 526, 755 N.E.2d 290 (2001).

13. **Jury verdict slips.** Two alternative jury verdict slips are appended to this instruction. The first alternative (Instruction 2.541, One Prior Offense Verdict Slip) requires the jury to determine *whether* the defendant is guilty or not guilty as a subsequent offender, while the second alternative (Instruction 2.542, Several Prior Offenses Verdict Slip) also requires the jury to determine the *number* of prior offenses. When the defendant is charged with more than one prior offense, the second alternative verdict slip should be used.

14. **Proof of prior subsequent conviction(s).** "A judgment of conviction for a third offense may appropriately be relied on to establish culpability for the first two offenses." *Commonwealth v. Bowden*, 447 Mass. 593, 855 N.E.2d 758, 763 (2006).