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IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,
Appellee,

v.

KHALID EID,
Appellant.

COMMONWEALTH'S BRIEF FOR APPELLEE

Defense Appeal from the July 11, 2019 Decision of the Superior Court, at No. 1670 EDA 2017, Affirming the Convictions and Vacating the Sentences Imposed by the Court of Common Pleas of Philadelphia County, Trial Division, Criminal Section, at CP-51-CR-0003605-2016.

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(Not answered by the court below.)

II. Did defendant's prison term of 90 days to six months for violating § 1543(b)(1.1)(i) exceed the statutory limit?

(Answered in the negative by the court below.)

COUNTER-STATEMENT OF THE CASE

Defendant drove under the influence with a suspended license and crashed into a parked vehicle. The Honorable Paul P. Panepinto convicted him of driving under the influence-general impairment ("DUI") and driving under a suspended license when the suspension was the result of a prior DUI-related offense ("DUS-DUI"). The Superior Court affirmed defendant's convictions, but remanded for resentencing on the ground that the probationary terms imposed on his judgments of sentence caused his sentence to exceed the statutory limits. Today, defendant claims that the now-vacated sentence for DUS-DUI was illegal under *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016), and that the remaining prison term alone would still exceed the statutory limit were it re-imposed. He is mistaken on both accounts. Defendant was subject to enhanced penalties for refusing a breath test—not a blood test—penalties which are permissible under *Birchfield*. Furthermore, his prison term was within the six-month maximum that the Vehicle Code provides for summary DUS offenses. Accordingly, this Court should affirm the Superior Court's decision.

Facts and Procedural History

On February 25, 2015, at approximately 11:30 p.m., Officer Stephen Nagy observed a stopped black Nissan facing the wrong direction on a one-way street on the 1400 block of Levick Street in Philadelphia. The Nissan had collided with a parked car and pushed it into the front of a third car. Officer Nagy found defendant,

whose license was suspended due to a prior DUI conviction, in the driver's seat of the Nissan. The Nissan was still running. N.T. 12/5/16, 9–12, 22.

Defendant appeared disheveled, and his eyes were glassy and red. Officer Nagy asked him what had happened, but defendant refused to answer. The officer also detected an odor of alcohol emanating from defendant. Officer Nagy requested his license and registration. Defendant had difficulty getting his license out, so Officer Nagy asked him to step out of the car. N.T. 12/5/16, 12–13.

Defendant exited the car but was "very wobbly." Officer Nagy concluded that he should not have been driving and called for a police wagon, which transported him to the Accident Investigation Division (AID). While waiting for the wagon to arrive, defendant urinated on himself. N.T. 12/5/16, 13, 20.

At AID approximately two hours later, Officer Gary Harrison read him the *O'Connell* warnings and offered defendant both a breath test and a blood test.[1]

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[1] *See Commonwealth, Department of Transportation, Bureau of Traffic Safety v. O'Connell*, 555 A.2d 873 (Pa. 1989). This Court later explained the principles underpinning *O'Connell*:

> In order to guarantee that a motorist makes a knowing and conscious decision on whether to submit to testing or refuse and accept the consequence of losing his driving privileges, the police must advise the motorist that in making this decision, he does not have the right to speak with counsel, or anyone else, before submitting to chemical testing, and further, if the motorist exercises his right to remain silent as a basis for refusing to submit to testing, it will be considered a refusal and he will suffer the loss of his driving privileges[. T]he duty of the officer to provide the *O'Connell* warnings as described herein is triggered by the

Defendant immediately refused and signed a form that explained the *O'Connell* warnings. Officer Harrison read him the warnings again and requested another chemical test of breath or blood. Defendant refused a second time and signed the Pennsylvania Department of Transportation's DL-26 form acknowledging that he did not want to undergo either test.[2] Officer Harrison then observed marijuana debris in defendant's mouth at the nurse's station. Officer Harrison asked him twice more if he would submit to a blood test, but defendant refused both times. Officer Harrison also noticed that defendant's eyes were bloodshot, his pupils were dilated, and he

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> officer's request that the motorist submit to chemical sobriety testing, whether or not the motorist has first been advised of his *Miranda* rights.

Commonwealth, Dep't of Transp., Bureau of Driver Licensing v. Scott, 684 A.2d 539, 545 (Pa. 1996).

[2] This Court has previously explained the purpose of the DL-26 form:

> The DL-26 form gives a motorist notice of a police officer's request for chemical testing, including the type of testing and the consequences for refusing to submit to the requested test. The DL-26 form included the warning that if [the motorist] refused to submit to chemical testing, and was subsequently convicted of DUI pursuant to Section 3802(a), he would be subject to increased penalties equivalent to those imposed for conviction of driving with the highest rate of alcohol. The DL-26 form has subsequently been replaced by a warning compliant with *Birchfield*.

Commonwealth v. Hays, 218 A.3d 1260, 1262 n.2 (Pa. 2019) (citing 75 Pa.C.S. § 3802(a)).

had a urine stain on his pants. He was speaking at a whisper, sweating, moving slowly, and his breath smelled of alcohol. N.T. 3/2/16, 16–22.

On March 2, 2016, defendant was tried before the Honorable Henry Lewandowski III in the Municipal Court of Philadelphia. After hearing testimony from Officers Nagy and Harrison, Judge Lewandowski convicted defendant of DUI-general impairment and driving under a suspended license. Defendant appealed to the Court of Common Pleas for a trial *de novo*.

One month later, the Supreme Court of the United States issued its decision in *Birchfield v. North Dakota*, which held that warrantless *blood draws* could not be performed pursuant to the exception to the Fourth Amendment's warrant requirement for a search incident to a lawful arrest or under the guise of implied consent laws that punish a motorist's refusal with criminal sanctions. 136 S. Ct. at 2185–86. A warrantless *breath* test, on the other hand, could be administered as a search incident to a lawful arrest for drunk driving. *Id.* at 2185.

The trial *de novo* was held before Judge Panepinto on December 5, 2016, almost six months after *Birchfield* was decided. Judge Panepinto heard testimony from Officer Nagy. The Commonwealth admitted Officer Harrison's sworn testimony from the Municipal Court trial because he had since passed away.

After hearing closing arguments, Judge Panepinto convicted defendant of DUI-general impairment and DUS-DUI. The DUI offense was his second such

conviction and graded as a misdemeanor.[3] Defendant was convicted of DUS-DUI under 75 Pa.C.S. § 1543(b)(1.1)(i), which provides an enhanced penalty for motorists whose licenses are suspended due to a prior DUI-related offense and who refuse a breath test.

The case was later transferred to the Honorable Pamela Pryor Dembe. On April 26, 2017, Judge Dembe sentenced defendant to two concurrent terms of 90 days to six months of imprisonment and two years of probation.

The Superior Court affirmed defendant's convictions. The court reviewed the sufficiency of the evidence and upheld defendant's DUS-DUI conviction under § 1543(b)(1.1)(i), finding he had refused both a breath test and a blood test. Superior Ct. Op. at 10. However, the court vacated his sentences for DUI and DUS-DUI and remanded for resentencing because the concurrent two-year probationary terms attached to each judgment exceeded the statutory limit of six months for each offense.

On March 3, 2020, this Court granted allowance of appeal.

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[3] The trial court found defendant was subject to enhanced penalties under 75 Pa.C.S. § 3803(b)(1) and (4) because he had refused breath testing and caused an accident that resulted in damage to a vehicle. The sentencing court ultimately imposed the enhanced penalty for DUI-accident resulting in damage to a vehicle, which provides for a six-month maximum penalty. *See id.* § 3803(b)(1).

SUMMARY OF ARGUMENT

Defendant's judgment of sentence for DUS-DUI under 75 Pa.C.S. § 1543(b)(1.1)(i) does not violate *Birchfield v. North Dakota*. After administering the *O'Connell* warnings, Officer Harrison validly requested a breath test, which defendant then refused. Defendant misconstrues the record when he claims he refused the breath test before being read the *O'Connell* warnings, as the opinions of the courts below each confirm. Defendant notes that Judge Panepinto, who sat as the fact-finder, did not write the trial court opinion. However, *Birchfield* was decided over five months before trial. Therefore, without any evidence to the contrary, the law presumes that Judge Panepinto complied with governing authority in finding defendant in violation of § 1543(b)(1.1)(i).

Defendant's prison sentence of 90 days to six months under Section 1543(b)(1.1)(i) of the Vehicle Code did not exceed the statutory limit. The plain language of § 1543(b)(1.1)(i) requires that first-time violators be imprisoned for a mandatory *minimum* of 90 days. In contrast, the maximum penalty under § 1543(b)(1.1)(i) is set forth in Section 6503 of the Vehicle Code, which provides for prison terms of up to six months for second or subsequent violations of 75 Pa.C.S. § 1543(a) (DUS where the suspension is not related to a prior DUI). The development of the statutes penalizing DUS demonstrates that they are in pari

materia, and thus the six-month maximum in § 6503 (which had previously explicitly covered § 1543 in its entirety), applies to paragraph (b)(1.1)(i).

Defendant's assertion that Section 1543 of the Vehicle Code is subject to 42 Pa.C.S. § 9756(b)(1) of the Sentencing Code, which generally requires that each criminal sentence be indeterminate with a minimum term that is no more than half its maximum term, leads to the same conclusion. If § 9756(b)(1) were applicable to summary DUS-DUI offenses as defendant asserts, the statutes would demand a maximum sentence double the 90-day mandatory minimum—of 180 days (or six months) of imprisonment—the constitutional limit for summary offenses.

ARGUMENT

I. Defendant's judgment of sentence under 75 Pa.C.S. § 1543(b)(1.1)(i) for driving under a suspended license is consistent with *Birchfield v. North Dakota* because he refused a valid breath test following his lawful arrest for drunk driving.

Defendant claims that his sentence under 75 Pa.C.S. § 1543(b)(1.1)(i) is illegal because he was allegedly punished for refusing a blood test. Br. for Appellant at 13.[4] He is mistaken. Defendant was subject to the paragraph's enhanced penalty based on his refusal of a *breath* test. Because a warrantless breath test "is categorically valid under the search-incident-to-arrest exception to the warrant requirement, . . . a motorist has 'no right to refuse it,' and criminal penalties may be imposed upon the failure to submit to it." *Commonwealth v. Olson*, 218 A.3d 863, 870 (Pa. 2019) (quoting *Birchfield*, 136 S. Ct. at 2186).

Defendant asserts that he could not have been punished for refusing a breath test because he supposedly did so before Officer Harrison administered the *O'Connell* warnings. Br. for Appellant at 6–7 n.6, 13 n.11. To the contrary, Officer Harrison testified that upon first observing defendant, he read a form explaining the

[4] Unlike 75 Pa.C.S. § 3803(b), which was amended following *Birchfield* to restrict criminal penalties for refusals of blood testing to instances where the request was made "pursuant to a valid search warrant," § 1543(b)(1.1)(i) has not yet been so amended. It states that a person who commits DUS-DUI and who "refuses testing of blood or breath" may be subject to an enhanced criminal penalty. A bill to amend § 1543(b)(1.1)(i) is currently being considered by the General Assembly. *See* S.B. 773, 204th Gen. Assemb., Reg. Sess. (Pa. 2019).

O'Connell warnings and offered defendant a chemical test of either breath or blood. N.T. 3/2/16, 16–18. Defendant "refused immediately" and signed the form. *Id.* at 18–19. The officer read him another form containing the *O'Connell* warnings, the DL-26, and again requested breath and blood tests, but defendant refused and signed the second form. *Id.* at 17, 19.

Defendant's argument misapprehends Officer Harrison's testimony at the initial Municipal Court trial. Officer Harrison stated that "initially, [he] offered [defendant] a breath or a blood" test, and "[t]hen after [he] noticed the marijuana, it was a blood test that [defendant] refused." N.T. 3/2/16, 19. He did not testify that he read the *O'Connell* warnings only after defendant refused a breath test. Indeed, when asked what action he took upon first observing defendant, Officer Harrison replied, "I read [defendant] the O'Connell [w]arnings." *Id.* at 16. Thus, defendant was read the warnings, which encompassed both breath and blood testing, before he refused a breath and blood test. Officer Harrison then observed marijuana in defendant's mouth at the nurse's station and offered another blood test, as a breath test would not have detected that substance. After defendant declined yet again, Officer Harrison deemed him "a refusal," more than twenty minutes after Officer Harrison first administered the *O'Connell* warnings. *Id.* at 16, 19.[5]

[5] The Commonwealth notes that an argument defendant himself made before the Superior Court, which he does not reprise before this Court, in fact served to undercut his position. In his Superior Court brief, defendant reproduced a scanned

Defendant is correct that had he been sentenced solely for the refusal of a blood test, the enhanced penalty would violate *Birchfield*. But he was not so sentenced. As defendant himself acknowledges, *see* Br. for Appellant, 13 n.11, the legality of his sentence turns on the factual determination of whether he refused a *breath* test before or after being read the *O'Connell* warnings. *Compare Commonwealth v. Monarch*, 200 A.3d 51, 57 (Pa. 2019) (enhanced mandatory minimum sentence was invalid where appellant refused warrantless breath and blood tests because the jury was specifically instructed to consider whether appellant "did not or did refuse the testing of blood" and specifically found appellant "did refuse testing of blood").

In this case, the courts below found that the evidence proved defendant violated § 1543(b)(1.1)(i) because he refused a breath test beyond a reasonable doubt. *See* Trial Ct. Op. at 4 ("[Defendant] had repeatedly refused to submit to a breathalyzer test prior to Officer Harrison's discovery of the debris in [defendant]'s

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image of the signed DL-26. Superior Court Br. for Appellant, 5/31/18, 7. He argued that a handwritten line running across the word "breath" on the form purportedly shows that he was offered only a blood test after being read the *O'Connell* warnings. *Id.* at 26. Yet, even a cursory visual examination showed that the line was merely a continuation of a single circle encompassing both the words "blood" *and* "breath." Furthermore, the pre-printed text of the form states, "I am requesting that you submit to a chemical test of," after which Officer Harrison hand-wrote "blood/breath." The form defendant relied on below instead demonstrates that he refused a breath test after being told the *O'Connell* warnings, thus exposing him to the enhanced penalty for DUS-DUI.

mouth."); Superior Ct. Op. at 2 ("Officer Harrison administered *O'Connell* warnings to [defendant] and instructed him about the ramifications of a chemical test refusal. [Defendant] refused to take a breath or blood test" (footnote omitted)).[6] Defendant asks this Court to repudiate those record-based factual findings which, as was required, "view[ed] all the evidence and all reasonable inferences arising therefrom in the light most favorable to the Commonwealth as the verdict winner[.]" *Commonwealth v. Small*, 741 A.2d 666, 671 (Pa. 1999).

Defendant urges this Court to decide differently because the trial court opinion was not authored by Judge Panepinto, who presided over the December 5, 2016 trial *de novo*. Br. for Appellant at 6–7 n.6. Contrary to defendant's assertion, however, the trial *de novo* was held over five months *after Birchfield* was decided. Therefore, without anything in the record showing Judge Panepinto did not appreciate the holding in *Birchfield*, it must be presumed that his decision adhered to the law at the time of trial and that he properly convicted defendant under § 1543(b)(1.1)(i) based on his refusal to comply with a breathalyzer test. *See, e.g., Commonwealth v.*

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[6] The Commonwealth acknowledges that the part of the Superior Court's opinion which analyzes defendant's *Birchfield* claim based on defendant's refused blood test is inaccurate. *See* Superior Ct. Op. at 9–10. Nonetheless, the Superior Court also found the evidence sufficient based on the refused breath test. *Id.* at 10 ("[Officer Harrison] requested that [defendant] take a breath or blood test, but [defendant] refused. Thus, we conclude that [defendant]'s challenge to the sufficiency of evidence supporting his DUS conviction lacks merit[.]" (internal citation omitted)).

Hairston, 84 A.3d 657, 667 (Pa. 2014) ("We presume that trial courts know the law, and there is nothing in this record to suggest that this trial court did not understand its duty to weigh the evidence in accord with the Rules of Evidence.").

Further, as this Court has recognized, defendant's refused blood test would still have been admissible at the trial *de novo* solely to prove consciousness of guilt under Section 1547(e) of the Vehicle Code, which provides that in any "criminal proceeding in which the defendant is charged with a violation of section 3802 or any other violation of this title arising out of the same action, the fact that the defendant refused to submit to chemical testing . . . may be introduced in evidence along with other testimony concerning the circumstances of the refusal." 75 Pa.C.S. § 1547(e); *see, e.g.*, *Commonwealth v. Bell*, 211 A.3d 761, 776 (Pa. 2019) ("[T]he 'evidentiary consequence' provided by Section 1547(e) for refusing to submit to a warrantless blood test — the admission of that refusal at a subsequent trial for DUI — remains constitutionally permissible post-*Birchfield*."). Defendant's judgment for violation of 75 Pa.C.S. § 1543(b)(1.1)(i) should be affirmed.

II. Defendant's prison term of 90 days to six months did not exceed the statutory limit for a violation of 75 Pa.C.S. § 1543(b)(1.1)(i).

In the Superior Court, defendant claimed his sentence of 90 days to six months' imprisonment plus two years of probation for DUS-DUI exceeded the maximum sentence allowed under 75 Pa.C.S. § 1543(b)(1.1)(i), arguing that the statute mandated a flat 90-day sentence. Superior Court Br. for Appellant, 5/31/18, 31–32. He was correct in part. He could not be sentenced to a maximum of more than six months of imprisonment, and therefore the Superior Court properly vacated the probationary portion of his sentence. Now, however, defendant contends the statute's language calling for "imprisonment for a period of not less than 90 days" somehow sets forth a *maximum* penalty of 90 days. From this flawed premise he goes on to argue that the 90-day to six-month prison term the court imposed here was illegal. Defendant's argument flouts the plain language of the statute. Applying the rules of statutory construction, it is clear the legislature mandated that a person in violation of paragraph (b)(1.1)(i) be sentenced to at least a 90-day prison term up to a maximum of six months.

A. Section 1543(b)(1.1)(i) requires a mandatory minimum penalty of 90 days of imprisonment for first-time violators.

Section 1543 prohibits driving while a motorist's operating privilege is suspended or revoked (DUS), a summary offense. 75 Pa.C.S. §1543(a). The statute provides enhanced penalties where the motorist's license is suspended due to a prior DUI-related offense (DUS-DUI generally). *Id.* § 1543(b)(1).[7] Defendant committed a summary offense under paragraph (b)(1.1), which provides an additional penalty where the motorist commits DUS-DUI and refuses a breath test. *Id.* § 1543(b)(1.1).

Paragraph (b)(1.1) states that a person "shall, upon a first conviction, be guilty of a summary offense and shall be sentenced to pay a fine of $1,000 and to undergo imprisonment for a period of not less than 90 days." *Id.* § 1543(b)(1.1)(i). Subsequent violations, however, are graded as misdemeanors and are punished by terms of imprisonment "not less than six months" for a second violation, and "not less than two years" for any further offense. *Id.* § 1543(b)(1.1)(ii)-(iii). These terms of "not less than" a period of years plainly provide mandatory minimum penalties.

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[7] A first violation of § 1543(b)(1) is graded as a summary offense, subject to a mandatory prison term of "not less than 60 days nor more than 90 days." 75 Pa.C.S. § 1543(b)(1)(i). In 2018, the paragraph was amended to provide increased penalties for recidivist offenders. The paragraph currently states that a person who commits a second violation (also a summary offense) shall undergo imprisonment for a period "not less than 90 days." *Id.* § 1543(b)(1)(ii). In contrast, a third or subsequent violation constitutes a third-degree misdemeanor that shall be punished by term of imprisonment "not less than six months." *Id.* § 1543(b)(1)(iii).

"Every statute shall be construed, if possible, to give effect to all its provisions." *Commonwealth v. Zortman*, 23 A.3d 519, 525 (Pa. 2011) (citing 1 Pa.C.S. § 1921(a)). When an appellate court "is called upon to interpret a statute, [its] overriding purpose is to ascertain and effectuate the legislative intent underlying the statute." *Commonwealth v. Samuel*, 961 A.2d 57, 61 (Pa. 2008). "The best indication of the General Assembly's intent may be found in the plain language of the statute." *Commonwealth v. Popielarcheck*, 190 A.3d 1137, 1140 (Pa. 2018). "[T]he words of a statute shall be construed according to rules of grammar and according to their common and approved usage." *Zortman*, 23 A.3d at 525 (citing 1 Pa.C.S. § 1903(a)). This Court only looks "beyond the plain meaning of the statute where the words of the statute are unclear or ambiguous." *Id.* (citing 1 Pa.C.S. § 1921(c)).

Section 1543(b)(1.1)(i) requires that a first-time violator shall be imprisoned for a "period of not less than 90 days." The use of the term "not less than" demonstrates that the penalty is a mandatory minimum. *See, e.g., Commonwealth v. O'Brien*, 514 A.2d 618, 620 (Pa. Super. 1986) ("The words 'not less than' used in the statute unambiguously connote a minimum term of imprisonment. It strains all notions of common sense to suggest that 'not less than' can reasonably be interpreted as meaning 'maximum.'"); *Commonwealth v. Madeira*, 982 A.2d 81, 84 (Pa. Super.

2009) ("[P]ursuant to *O'Brien,* the words 'not less than' have acquired a peculiar and appropriate meaning and they shall be construed according to such meaning.").

Defendant asserts the term "not less than" may be construed as imposing a mandatory *maximum* penalty. Br. for Appellant at 35–36.[8] However, this Court already considered this language in *Commonwealth v. Koskey*, 812 A.2d 509 (Pa. 2002), when reviewing a sentence imposed under a prior version of § 1543(b)(1) (DUS-DUI generally). At that time, paragraph (b)(1) mandated a sentence of "not less than 90 days." In affirming a flat 90-day sentence under the predecessor statute to § 1543(b)(1.1)(i), the Court found that "the plain language of the statutory scheme

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[8] Defendant points to other sentencing laws that use the word "minimum," but unlike the statute at issue here, none of the statutes he cites are in the Vehicle Code. Br. for Appellant at 30–31 n.15. By contrast, Section 3815 of the Vehicle Code (relating to mandatory sentencing) explicitly refers to the penalties set forth in § 3804 as "mandatory minimum term[s]" regardless of the latter's use of the term "not less than." 75 Pa.C.S. §§ 3804, 3815(b)(1); *see also Popielarcheck*, 190 A.3d at 1139 (characterizing mandated term following "not less than" language under § 3804 as the minimum penalty). The recently amended version of Section 9763 of the Sentencing Code also refers to the "mandatory minimum term[s] of imprisonment" set forth in Sections 1543(b) and 3804. 42 Pa.C.S. § 9763(a), (c).

Additionally, the same "not less"-"not more" phraseology is employed throughout the Vehicle Code with regard to mandatory fines. The General Assembly provided no reason to presume it meant one thing when it mandated a prison term "not less" than a period of time, but another when it required payment "not less" than a certain sum. Even defendant concedes he cannot reconcile the language in § 1543 without attributing the omitted maximum to legislative blunder. Br. for Appellant at 31–32 n.16. This argument, in addition to his corollary proposal that this Court conjure the 90-day minimum as the maximum statutory limit, Br. for Appellant at 36, contravenes the presumption that the legislature "intend[ed] the entire statute to be effective and certain." 1 Pa.C.S. § 1922(2).

required sentencing courts to adhere to the mandatory minimum sentencing guidelines for violations of Section 1543(b)(1)[.]" 812 A.2d at 511; *see also Commonwealth v. Yale*, 657 A.2d 987, 988 (Pa. Super. 1995) ("[A] violation of 75 Pa.C.S. § 1543(b) requires a mandatory minimum sentence of ninety days imprisonment, plus fines.").

The same penalty term found in paragraph (b)(1) was later included in paragraph (b)(1.1)(i) when § 1543 was amended in 2002. *See* Act of Oct. 4, 2002, P.L. 845, No. 123, § 3 (eff. Dec. 3, 2002).[9] *Koskey*'s holding thus applies to the successor statute's indistinguishable language. *See Hous. Auth. of Cty. of Chester v. Pennsylvania State Civil Serv. Comm'n*, 730 A.2d 935, 946 (Pa. 1999) ("When the meaning of a word or phrase is clear when used in one section, it will be construed to mean the same thing in another section of the same statute."). Accordingly, the plain language of paragraph (b)(1.1) mandates a minimum penalty of 90 days' imprisonment for a first violation.[10]

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[9] *Koskey* was decided on December 18, 2002, fifteen days after the amendment became effective. Koskey's own offenses were of course subject to the statute in effect at the time of his crimes.

[10] Section 1543(b)(1.1)(ii), which defines a second violation of paragraph (b)(1.1) as a third-degree misdemeanor (a grading which is not at issue in the instant case involving a summary offense), is instructive. That subparagraph mandates a minimum term of imprisonment of "not less than" six months for the third-degree misdemeanor it covers. 75 Pa.C.S. § 1543(b)(1.1)(ii). Under defendant's interpretive theory, that statute's use of the phrase "not less than" six months would mean that the statutory *maximum* for the third-degree misdemeanor at issue was six

B. The lack of an explicitly stated maximum penalty for a first violation of § 1543(b)(1.1)(i) does not invalidate the statute.

Defendant agrees that the language in paragraph (b)(1.1) "suggests a floor, not a ceiling." Br. for Appellant at 29. He goes on to suggest that the absence of such an explicit "ceiling" in § 1543(b)(1.1)(i) renders it fatally vague. To the contrary, when reviewing Section 1543 of the Vehicle Code in conjunction with Section 6503 of the Vehicle Code (relating to subsequent convictions of certain offenses), it is clear that where a maximum sentence for a summary DUS-DUI offense is unspecified, the statutory limit is six months of imprisonment. Section 6503 expressly sets a six-month maximum sentence for repeated DUS violations under § 1543(a). The history of the statutes' development demonstrates that the maximum term also covers summary DUS-DUI offenses under § 1543(b).

"[I]n determining whether language is clear and unambiguous, [a court] must assess it in the context of the overall statutory scheme, construing all sections with reference to each other, not simply examining language in isolation. Statutes that are in pari materia – meaning that 'they relate to the same person or things or to

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months. That interpretation, however, would create an irreconcilable conflict with 18 Pa.C.S. § 1104(3), which sets the statutory maximum penalty for a third-degree misdemeanor as *one year*. The same conflict would also arise under subparagraph (iii), which states that a third or subsequent violation constitutes a first-degree misdemeanor punishable by "not less than two years." 75 Pa.C.S. § 1543(b)(1.1)(iii). But the maximum sentence for a first-degree misdemeanor is *five years*. 18 Pa.C.S. § 1104(1).

the same class of persons or things' – must be construed as one statute to the extent possible. 1 Pa.C.S. § 1932." *Commonwealth v. Foster*, 214 A.3d 1240, 1247–48 (Pa. 2019) (internal citation and quotation marks omitted).

Section 6503 mandates that a person who commits a second or subsequent DUS violation under § 1543(a)—a summary offense—may be sentenced to a term of imprisonment of "not more than six months." 75 Pa.C.S. § 6503(a)-(a.1). *See, e.g.*, *Commonwealth v. Lyons*, 576 A.2d 1105, 1105 (Pa. Super. 1990) (*en banc*) ("[A] second violation of 75 Pa.C.S. § 1543(a) is a summary offense."); *Commonwealth v. Postie*, 110 A.3d 1034, 1043 (Pa. Super. 2015) (twentieth conviction under § 1543(a) graded as a summary offense). Section 6503 thus clearly sets a maximum term for the class of offenses it covers.

The history of the statutes penalizing DUS demonstrates that § 1543(b)(1.1)(i) (which grades a first violation as a summary offense) cannot be considered in isolation from the penalty provision of § 6503, and therefore § 6503's six-month maximum also applies to paragraph (b)(1.1).

Before December 3, 2002, the recidivist penalties under § 6503 were not limited to repeat offenders of § 1543(a). Rather, the former version of § 6503 called for terms of "imprisonment for not more than six months" for all second or subsequent convictions under "Section 1543 (relating to driving while operating privilege is suspended or revoked)." *See* Act of Dec. 21, 1998, P.L. 1126, No. 151,

§ 58. In 2002, an amendment narrowing § 6503's explicit terms to § 1543(a) was passed under the same bill which introduced paragraph (b)(1.1). *See* S.B. 238, 185th Gen. Assemb., Reg. Sess. (Pa. 2002); P.L. 845, No. 123, §§ 3, 10.1. Notably, that legislation left intact the mandatory minimum penalty of "not less than 90 days" for DUS-DUI violations under § 1543(b)(1)—identical to the penalty mandated under the newly-enacted paragraph (b)(1.1)(i)—without stating an explicit maximum term for subsequent violations. *See* P.L. 845, No. 123, § 3.

The simultaneous amendments to Sections 1543(b) and 6503 reveal the General Assembly's intent that the statutory maximum penalty for a summary offense under § 1543(b)(1) and (b)(1.1)(i) be six months. A contrary interpretation would have exposed individuals who commit multiple DUS-DUI offenses under § 1543(b)(1)—in addition to first-time violators of paragraph (b)(1.1)—to *less* liability than those who commit multiple offenses under the arguably less serious § 1543(a), where the suspension is unrelated to a DUI.

It is "assume[d] that the legislature did not intend an absurd result." *Commonwealth v. Jenner*, 681 A.2d 1266, 1273 (Pa. 1996) (citing 1 Pa.C.S. § 1922(1)). The drunk driving statues were enacted to set greater penalties for DUI-related suspension offenders. *Commonwealth v. Hill*, 549 A.2d 583, 586 (Pa. Super. 1988) ("The purpose of the drunk driving statutes is to protect the public from the tremendous hazard created by intoxicated motor vehicle operators both by

facilitating the compilation of evidence of drunk driving and, by punishing, more stringently, those persons who violate the drunk driving laws. Consequently, the legislature has enacted enhanced mandatory penalties applicable to all DUI-related suspension offenders.").[11] The evolution of the DUS statutes thus demonstrates that the language in § 6503 was limited to § 1543(a) violations *only because the legislature already understood that the statutory maximum penalty for a violation of paragraphs (b)(1) and (b)(1.1)(i) was six months' imprisonment*. *See, e.g.*, *Commonwealth v. Bell*, 645 A.2d 211, 217–18 (Pa. 1994) (statute setting forth mandatory minimum sentences was not unconstitutionally vague, although the statute provided no maximum sentences, where maximum sentences which "further[ed] the intent of the legislature" could be reasonably implied from other statutory provisions).

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[11] Just prior to the Pennsylvania Senate's vote on the amendments to Sections 1543 and 6503, one proponent of enhancing the penalties for recidivist DUS-DUI offenders spoke as follows:

> What we are trying to do with this legislation, by toughening the Vehicle Code, is to prevent these things from happening, to get people who are habitual offenders and are drinking and driving and who have cross-addictions and other drugs in their bodies off the highways and show them we are serious about saving lives[.]

Third Consideration and Final Passage of S.B. 238, Pa. S. Reg. Sess. No. 61 (Dec. 5, 2001) (statement of Sen. Tomlinson of Bucks County). *See* 1 Pa.C.S. § 1921(c)(7) (contemporaneous legislative history relevant in ascertaining the General Assembly's intent).

Although the penalty under paragraph (b)(1) has since been amended, the language in paragraph (b)(1.1)(i) has remained unaltered, and its maximum penalty should likewise be considered unchanged. *See Commonwealth v. Ramos*, 83 A.3d 86, 91 (Pa. 2013) ("[W]e also presume that when enacting legislation, the General Assembly is familiar with extant law."); *St. Elizabeth's Child Care Ctr. v. Dep't of Pub. Welfare*, 963 A.2d 1274, 1278 (Pa. 2009) (considering the legislature's lack of activity in determining its intent).

The legislature's intent in setting the statutory maximum at six months is also evident from the recent amendment to § 1543(b)(1). *See* 1 Pa.C.S. § 1921(c)(8) (providing that when the words of the statute are not explicit, the General Assembly's intention may be ascertained through legislative interpretations of the statute). In 2004, the punishment set forth in paragraph (b)(1) was reduced to "not less than 60 days nor more than 90 days." Act of Sept. 30, 2003, P.L. 120, No. 24, § 9 (eff. Feb. 1, 2004). However, that revision lacked a specific penalty for recidivist offenders. This changed with an amendment that went into effect after the parties completed briefing in the Superior Court. Act of Oct. 24, 2018, P.L. 925, No. 153, § 1 (eff. Dec. 24, 2018). Now, § 1543(b)(1) explicitly requires the mandatory sentence of "not less than 90 days" of imprisonment for second violations of that paragraph, defined as a summary offense. 75 Pa.C.S. § 1543(b)(1)(ii). To hold the statutory *maximum* for summary DUS-DUI offenses at 90 days—as defendant would

have it—would perpetuate the illogic of treating repeat DUS offenders more leniently where the reason for the suspension is *not* DUI-related.[12]

Defendant also argues that Section 1543 of the Vehicle Code is subject to the Sentencing Code's general requirement that each criminal sentence be indeterminate with a minimum term that is no more than half its maximum term, 42 Pa.C.S. § 9756(b)(1). His own argument, however, would simply lead to the same result. As will be explained below, Section 1543 of the Vehicle Code does not fall within the Sentencing Code's general requirement of indeterminate sentences—but, regardless, reading the statutes in pari materia would necessitate a maximum sentence of double the 90-day mandatory minimum, *i.e.*, 180 days, or six months, of imprisonment.

This maximum conforms with the constitutional limit for a summary traffic offense, which may not exceed six months. *Baldwin v. New York*, 399 U.S. 66, 69 (1970) ("[N]o offense can be deemed 'petty' for purposes of the right to trial by jury where imprisonment for more than six months is authorized."). Indeed, § 6503 was

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[12] The Commonwealth acknowledges that the amendment revising paragraph (b)(1) became effective subsequent to defendant's offenses and thus does not directly apply to him. The Commonwealth relies upon the current form of § 1543 only to the extent it may reveal what the intended maximum penalty for a summary DUS-DUI offense was before the amendment, for the amendment did not alter the maximum sentence for summary DUS-DUI offenses under § 1543(b)(1.1)(i). *See* 1 Pa.C.S. § 1953 ("Whenever a section or part of a statute is amended, the amendment shall be construed as **merging into the original statute, become a part thereof,** and replace the part amended, and the remainder of the original statute and the amendment shall be read together and viewed as one statute passed at one time[.]" (emphasis added)).

amended in 1986 to reduce the maximum sentence from one year to six months for the precise purpose of bringing it within the constitutional limit. *Commonwealth v. Sperry*, 577 A.2d 603, 605 n.3 (Pa. Super. 1990) (*en banc*) ("Following the 1986 amendment, the statute[, § 6503,] provided for a maximum prison term of six months, to comply with the decision in *Baldwin v. New York*[.]"); *see also Blanton v. City of N. Las Vegas, Nev.*, 489 U.S. 538, 543–45 (1989) (holding that offenses carrying a maximum prison term of six months or less are presumed to be "petty" for purposes of the Sixth Amendment, and therefore DUI offense providing a maximum penalty of six months' imprisonment and a $1,000 fine was presumed to be a petty offense and did not entitle violators to a jury trial).

Regardless, defendant's reliance on the general rule of Section 9756(b)(1) of the Sentencing Code—providing that courts should generally impose a minimum and maximum criminal sentence, and that the minimum shall not exceed half the maximum—is misplaced here, where the Sentencing Code and Vehicle Code establish a separate sentencing scheme for summary DUS-DUI offenses. Although "the minimum-maximum rule of § 9756(b) is a longstanding concept in our Commonwealth, it is a statutory and not a constitutional provision." *Bell*, 645 A.2d at 217. The rules of statutory construction instruct that a special provision in a statute "shall prevail and shall be construed as an exception to the general provision, unless the general provision shall be enacted later and it shall be the manifest intention of

the General Assembly that such general provision shall prevail." 1 Pa.C.S. § 1933. In this case, "the minimum-maximum provision of Section 9756(b)(1) is the general provision because it applies to all criminal sentences." *Ramos*, 83 A.3d at 92.

Section 9756(c.1) of the Sentencing Code expressly authorizes flat sentences of up to 90 days for DUS-DUI offenders (including misdemeanor offenders) receiving restrictive conditions of probation under 42 Pa.C.S. § 9763(c). 42 Pa.C.S. § 9756(c.1).[13] Moreover, this Court repeatedly affirmed flat sentences for *summary* DUS-DUI offenders even before they became eligible for restrictive probation (also called intermediate punishment) in 2000. *See Koskey*, 812 A.2d at 510–12 & n.2 (affirming flat 90-day sentence for § 1543(b)(1) violation and acknowledging change in the law making DUS-DUI offenders eligible for intermediate punishment even though appellant had been ineligible because the change occurred after he was convicted and sentenced); *Commonwealth v. Lockridge*, 810 A.2d 1191, 1192 (Pa. 2002) (affirming flat 90-day prison term for § 1543(b) violation); *Jenner*, 681 A.2d at 1268–70 & n.4 (in joint appeal, affirming judgments of sentence imposing flat prison terms of a "mandatory ninety days" for

[13] Section 9756(c.1) was amended after the Superior Court issued its decision in this case. Act of Dec. 18, 2019, P.L. 776, No. 115, § 4 (imd. effective). However, the previous version of paragraph (c.1) had also applied to criminal sentences imposed under § 9763(c), which provides restrictive probation conditions for DUI and DUS-DUI offenders.

violating § 1543(b) in addition to flat 180-day term for repeated violation); *see also Commonwealth v. Ball*, 146 A.3d 755, 758 & n.4 (Pa. 2016) (noting appellee had been sentenced to a flat 30-day sentence as a habitual offender of § 1543(a) and therefore "sentenced accordingly pursuant to 75 Pa.C.S. § 6503(a.1)"); *Commonwealth v. Kerbacher*, 594 A.2d 655, 656 & n.3 (Pa. 1991) (affirming flat two-month prison term for repeated violation of § 1543(a)).[14]

Accordingly, the rules of statutory construction and precedent from this Court dictate that the minimum penalty a court may impose for a violation of § 1543(b)(1.1)(i) is a flat 90-day prison term, and a court in its discretion may impose a maximum term of up to six months. Therefore, this Court should affirm the Superior Court's decision remanding for resentencing after striking the two-year probationary period following defendant's prison term of 90 days to six months.

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[14] The exception to the minimum-maximum rule was explicitly upheld in *Commonwealth v. Klingensmith*, 650 A.2d 444 (Pa. Super. 1994). The Superior Court affirmed a flat 90-day sentence under the former version of § 1543(b)(1), which at that time set forth a punishment for DUS-DUI generally of imprisonment for "not less than 90 days." *Id.* at 461. Paragraph (b)(1.1)(i) was subsequently added in a 2002 amendment and mandated an identical punishment of "not less than 90 days" for committing DUS-DUI and failing a chemical test. P.L. 845, No. 123, § 3. Thus, because paragraph (b)(1.1)(i) mirrored the language in former paragraph (b), it may be presumed that the legislature intended for sentences under paragraph (b)(1.1)(i) to be imposed in conformity with *Klingensmith*. *See In re Lock's Estate*, 244 A.2d 677, 682–83 (Pa. 1968).

CONCLUSION

For the foregoing reasons and those stated in the opinions of the courts below, the Commonwealth requests that this Court affirm the decision of the Superior Court and remand for resentencing.

Respectfully submitted,

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