

1 TO THE HOUSE OF REPRESENTATIVES:

2 The Committee on Judiciary to which was referred House Bill No. 237
3 entitled “An act relating to saliva testing” respectfully reports that it has
4 considered the same and recommends that the bill be amended by striking out
5 all after the enacting clause and inserting in lieu thereof the following:

6 **Sec. 1. LEGISLATIVE INTENT; DRUG RECOGNITION EXPERTS**

7 It is the intent of the General Assembly that the State have a sufficient
8 number of drug recognition experts available to screen all drivers suspected of
9 operating in violation of 23 V.S.A. § 1201. To this end, there are many
10 categories of professionals associated with drug recognition that can be trained
11 to recognize impairment in drivers under the influence of drugs other than, or
12 in addition to, alcohol. It is the intent of the General Assembly that Vermont
13 expand the type of professionals qualified to become drug recognition experts
14 to include professions other than law enforcement.

15 Sec. 2. 23 V.S.A. § 1200 is amended to read:

16 § 1200. DEFINITIONS

17 As used in this subchapter:

18 * * *

19 (3) “Evidentiary test” means a breath, saliva, or blood test which
20 indicates the person’s alcohol concentration or the presence of other drug and
21 which is intended to be introduced as evidence.

1 * * *

2 (11) “Preliminary screening” means a breath or saliva test administered by
3 a law enforcement officer for the purpose of deciding whether an arrest should
4 be made and whether to request an evidentiary test. The results of a
5 preliminary screening shall not be introduced as evidence of impairment in any
6 court proceeding. A preliminary saliva screening result detecting the presence
7 of a drug shall not, by itself, constitute grounds for probable cause for an
8 arrest.

9 Sec. 3. 23 V.S.A. § 1201 is amended to read:

10 § 1201. OPERATING VEHICLE UNDER THE INFLUENCE OF ALCOHOL
11 OR OTHER SUBSTANCE; CRIMINAL REFUSAL; ENHANCED
12 PENALTY FOR BAC OF 0.16 OR MORE

13 (a) A person shall not operate, attempt to operate, or be in actual physical
14 control of any vehicle on a highway:

15 (1) when the person’s alcohol concentration is:

16 (A) 0.08 or more; or

17 (B) 0.02 or more if the person is operating a school bus as defined in
18 subdivision 4(34) of this title; or

19 (C) 0.04 or more if the person is operating a commercial vehicle as
20 defined in subdivision 4103(4) of this title; or

21 (2) when the person is under the influence of alcohol; or

1 (a)(1) Implied consent. Every person who operates, attempts to operate, or
2 is in actual physical control of any vehicle on a highway in this State is deemed
3 to have given consent to an evidentiary test of that person's breath for the
4 purpose of determining the person's alcohol concentration or the presence of
5 other drug in the blood. The test shall be administered at the direction of a law
6 enforcement officer.

7 (2) Blood test. If breath testing equipment is not reasonably available or
8 if the officer has reason to believe that the person is unable to give a sufficient
9 sample of breath or saliva for testing or if the law enforcement officer has
10 reasonable grounds to believe that the person is under the influence of a drug
11 other than alcohol, the person is deemed to have given consent to the taking of
12 an evidentiary sample of blood. If in the officer's opinion the person is
13 incapable of decision or unconscious or dead, it is deemed that the person's
14 consent is given and a sample of blood shall be taken. A blood test sought
15 pursuant to this subdivision (2) shall be obtained pursuant to subsection (f) of
16 this section.

17 (3) Saliva test. If the law enforcement officer has reasonable grounds to
18 believe that the person is under the influence of a drug other than alcohol, or
19 under the combined influence of alcohol and a drug, the person is deemed to
20 have given consent to the taking of an evidentiary sample of saliva. Any saliva
21 test administered under this section shall be used only for the limited purpose

1 of detecting the presence of a drug in the person's body, and shall not be used
2 to extract DNA information.

3 (4) Evidentiary test. The evidentiary test shall be required of a person
4 when a law enforcement officer has reasonable grounds to believe that the
5 person was operating, attempting to operate, or in actual physical control of a
6 vehicle in violation of section 1201 of this title.

7 ~~(4)~~(5) Fatal collision or incident resulting in serious bodily injury. The
8 evidentiary test shall also be required if the person is the surviving operator of
9 a motor vehicle involved in a fatal incident or collision or an incident or
10 collision resulting in serious bodily injury and the law enforcement officer has
11 reasonable grounds to believe that the person has any amount of alcohol or
12 other drug in his or her system.

13 (b) A refusal to take a breath or saliva test may be introduced as evidence in
14 a criminal proceeding.

15 * * *

16 (f) If a blood test is sought from a person pursuant to subdivision (a)(2) of
17 this section, or if a person who has been involved in an accident or collision
18 resulting in serious bodily injury or death to another refuses an evidentiary test,
19 a law enforcement officer may apply for a search warrant pursuant to Rule 41
20 of the Vermont Rules of Criminal Procedure to obtain a sample of blood for an
21 evidentiary test. If a blood sample is obtained by search warrant, the fact of the

1 refusal may still be introduced in evidence, in addition to the results of the
2 evidentiary test. Once a law enforcement official begins the application process
3 for a search warrant, the law enforcement official is not obligated to
4 discontinue the process even if the person later agrees to provide an
5 evidentiary ~~breath~~ sample. The limitation created by Rule 41(g) of the
6 Vermont Rules of Criminal Procedure regarding blood specimens shall not
7 apply to search warrants authorized by this section.

8 (g) The Defender General shall provide statewide 24-hour coverage seven
9 days a week to assure that adequate legal services are available to persons
10 entitled to consult an attorney under this section.

11 Sec. 5. 23 V.S.A. § 1203 is amended to read:

12 § 1203. ADMINISTRATION OF TESTS; RETENTION OF TEST AND
13 VIDEOTAPE

14 (a) A breath or saliva test shall be administered or taken only by a person
15 who has been certified by the Vermont Criminal Justice Training Council to
16 operate the breath or saliva testing equipment being employed. In any
17 proceeding under this subchapter, a person's testimony that he or she is
18 certified to operate the breath testing equipment employed shall be prima facie
19 evidence of that fact.

20 (b) Only a physician, licensed nurse, medical technician, physician
21 assistant, medical technologist, or laboratory assistant acting at the request of a

1 law enforcement officer may withdraw blood for the purpose of determining
2 the presence of alcohol or other drug. This limitation does not apply to the
3 taking of a breath or saliva sample.

4 (c) When ~~a breath test which is intended to be introduced in evidence is~~
5 ~~taken with a crimper device or when~~ blood or saliva is withdrawn at an
6 officer's request, a sufficient amount of ~~breath~~ saliva or blood, as the case may
7 be, shall be taken to enable the person to have made an independent analysis of
8 the sample, and shall be held for at least 45 days from the date the sample was
9 taken. At any time during that period the person may direct that the sample be
10 sent to an independent laboratory of the person's choosing for an independent
11 analysis. The Department of Public Safety shall adopt rules providing for the
12 security of the sample. At no time shall the defendant or any agent of the
13 defendant have access to the sample. A preserved sample of breath shall not be
14 required when an infrared breath-testing instrument is used. A person tested
15 with an infrared breath-testing instrument shall have the option of having a
16 second infrared test administered immediately after receiving the results of the
17 first test.

18 (d) In the case of a breath, saliva, or blood test ~~administered using an~~
19 ~~infrared breath testing instrument~~, the test shall be analyzed in compliance with
20 rules adopted by the Department of Public Safety. The analyses shall be
21 retained by the State. A sample is adequate if the infrared breath testing

1 instrument analyzes the sample and does not indicate the sample is deficient.
2 ~~Analysis~~ An analysis of the person's ~~breath~~ saliva or blood which is available
3 to that person for independent analysis shall be considered valid when
4 performed according to methods approved by the Department of Public Safety.
5 The analysis performed by the State shall be considered valid when performed
6 according to a method or methods selected by the Department of Public Safety.
7 The Department of Public Safety shall use rule making procedures to select its
8 method or methods. Failure of a person to provide an adequate breath or saliva
9 sample constitutes a refusal.

10 (e) [Repealed.]

11 (f) When a law enforcement officer has reason to believe that a person may
12 be violating or has violated section 1201 of this title, the officer may request
13 the person to provide a sample of breath or saliva for a preliminary screening
14 test using a device approved by the Commissioner of Public Safety for this
15 purpose. The person shall not have the right to consult an attorney prior to
16 submitting to this preliminary ~~breath alcohol~~ screening test. The results of this
17 preliminary screening test may be used for the purpose of deciding whether an
18 arrest should be made and whether to request an evidentiary test and shall not
19 be used in any court proceeding except on those issues. Following the
20 screening₂ test additional tests may be required of the operator pursuant to the
21 provisions of section 1202 of this title.

1 (g) The Office of the Chief Medical Examiner shall report in writing to the
2 Department of Motor Vehicles the death of any person as the result of an
3 accident involving a vehicle and the circumstances of such accident within five
4 days of such death.

5 (h) A Vermont law enforcement officer shall have a right to request a
6 breath, saliva or blood sample in an adjoining state or country under this
7 section unless prohibited by the law of the other state or country. If the law in
8 an adjoining state or country does not prohibit an officer acting under this
9 section from taking a breath, saliva, or blood sample in its jurisdiction,
10 evidence of such sample shall not be excluded in the courts of this State solely
11 on the basis that the test was taken outside the State.

12 (i)(1) The Commissioner of Public Safety shall adopt emergency rules
13 relating to the operation, maintenance, and use of preliminary alcohol
14 screening devices for use by law enforcement officers in enforcing the
15 provisions of this title. The ~~commissioner~~ Commissioner shall consider
16 relevant standards of the National Highway Traffic Safety Administration in
17 adopting such rules. Any preliminary alcohol screening device authorized for
18 use under this title shall be on the qualified products list of the National
19 Highway Traffic Safety Administration.

20 (2) The Commissioner shall adopt rules pursuant to 3 V.S.A. chapter 25
21 relating to the operation, maintenance, and use of saliva testing devices for use

1 by law enforcement officers in enforcing the provisions of this title, and the
2 training required for officers to use such devices. The Commissioner shall
3 consider relevant standards of the National Highway Traffic Safety
4 Administration in adopting such rules. Any saliva testing device authorized
5 for use under this title shall be determined by at least two peer reviewed
6 studies to be a reliably accurate method of detecting the presence of drug
7 metabolites in the body.

8 * * *

9 Sec. 6. 23 V.S.A. § 1203a(b) is amended to read:

10 (b) Arrangements for a blood test shall be made by the person submitting to
11 the evidentiary breath or saliva test, by the person's attorney, or by some other
12 person acting on the person's behalf unless the person is detained in custody
13 after administration of the evidentiary test and upon completion of processing,
14 in which case the law enforcement officer having custody of the person shall
15 make arrangements for administration of the blood test upon demand but at the
16 person's own expense.

17 Sec. 7. 23 V.S.A. § 1204 is amended to read:

18 § 1204. PERMISSIVE INFERENCES

19 (a) Upon the trial of any civil or criminal action or proceeding arising out of
20 acts alleged to have been committed by a person while operating, attempting to

1 operate, or in actual physical control of a vehicle on a highway, the person's
2 alcohol concentration shall give rise to the following permissive inferences:

3 (1) If the person's alcohol concentration at that time was less than 0.08,
4 such fact shall not give rise to any presumption or permissive inference that the
5 person was or was not under the influence of alcohol, but such fact may be
6 considered with other competent evidence in determining whether the person
7 was under the influence of alcohol.

8 (2) If the person's alcohol concentration at that time was 0.08 or more, it
9 shall be a permissive inference that the person was under the influence of
10 alcohol in violation of subdivision 1201(a)(2) or (3) of this title.

11 (3) If the person's alcohol concentration at any time within two hours of
12 the alleged offense was 0.10 or more, it shall be a permissive inference that the
13 person was under the influence of alcohol in violation of subdivision
14 1201(a)(2) or (3) of this title.

15 (b) The foregoing provisions shall not be construed as limiting the
16 introduction of any other competent evidence bearing upon the question
17 whether the person was under the influence of alcohol or under the combined
18 influence of alcohol and another drug, nor shall they be construed as requiring
19 that evidence of the amount of alcohol or drug in the person's blood, breath,
20 urine, or saliva must be presented.

1 Sec. 8. EFFECTIVE DATE

2 This act shall take effect on July 1, 2018.

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7

8 (Committee vote: _____)

9

10

Representative _____

11

FOR THE COMMITTEE

1 TO THE HOUSE OF REPRESENTATIVES:

2 The Committee on Judiciary to which was referred House Bill No. 237
3 entitled “An act relating to saliva testing” respectfully reports that it has
4 considered the same and recommends that the bill be amended by striking out
5 all after the enacting clause and inserting in lieu thereof the following:

6 **Sec. 1. LEGISLATIVE INTENT; DRUG RECOGNITION EXPERTS**

7 It is the intent of the General Assembly that the State have a sufficient
8 number of drug recognition experts available to screen all drivers suspected of
9 operating in violation of 23 V.S.A. § 1201. To this end, there are many
10 categories of professionals associated with drug recognition that can be trained
11 to recognize impairment in drivers under the influence of drugs other than, or
12 in addition to, alcohol. It is the intent of the General Assembly that Vermont
13 expand the type of professionals qualified to become drug recognition experts
14 to include professions other than law enforcement.

15 Sec. 2. 23 V.S.A. § 1200 is amended to read:

16 § 1200. DEFINITIONS

17 As used in this subchapter:

18 * * *

19 (3) “Evidentiary test” means a breath, saliva, or blood test which
20 indicates the person’s alcohol concentration or the presence of other drug and
21 which is intended to be introduced as evidence.

1 * * *

2 (11) “Preliminary screening” means a breath or saliva test administered by
3 a law enforcement officer for the purpose of deciding whether an arrest should
4 be made and whether to request an evidentiary test. The results of a
5 preliminary screening shall not be introduced as evidence of impairment in any
6 court proceeding. A preliminary saliva screening result detecting the presence
7 of a drug shall not, by itself, constitute grounds for probable cause for an
8 arrest.

9 Sec. 3. 23 V.S.A. § 1201 is amended to read:

10 § 1201. OPERATING VEHICLE UNDER THE INFLUENCE OF ALCOHOL
11 OR OTHER SUBSTANCE; CRIMINAL REFUSAL; ENHANCED
12 PENALTY FOR BAC OF 0.16 OR MORE

13 (a) A person shall not operate, attempt to operate, or be in actual physical
14 control of any vehicle on a highway:

15 (1) when the person’s alcohol concentration is:

16 (A) 0.08 or more; or

17 (B) 0.02 or more if the person is operating a school bus as defined in
18 subdivision 4(34) of this title; or

19 (C) 0.04 or more if the person is operating a commercial vehicle as
20 defined in subdivision 4103(4) of this title; or

21 (2) when the person is under the influence of alcohol; or

1 (a)(1) Implied consent. Every person who operates, attempts to operate, or
2 is in actual physical control of any vehicle on a highway in this State is deemed
3 to have given consent to an evidentiary test of that person's breath for the
4 purpose of determining the person's alcohol concentration or the presence of
5 other drug in the blood. The test shall be administered at the direction of a law
6 enforcement officer.

7 (2) Blood test. If breath testing equipment is not reasonably available or
8 if the officer has reason to believe that the person is unable to give a sufficient
9 sample of breath or saliva for testing or if the law enforcement officer has
10 reasonable grounds to believe that the person is under the influence of a drug
11 other than alcohol, the person is deemed to have given consent to the taking of
12 an evidentiary sample of blood. If in the officer's opinion the person is
13 incapable of decision or unconscious or dead, it is deemed that the person's
14 consent is given and a sample of blood shall be taken. A blood test sought
15 pursuant to this subdivision (2) shall be obtained pursuant to subsection (f) of
16 this section.

17 (3) Saliva test. If the law enforcement officer has reasonable grounds to
18 believe that the person is under the influence of a drug other than alcohol, or
19 under the combined influence of alcohol and a drug, the person is deemed to
20 have given consent to the taking of an evidentiary sample of saliva. Any saliva
21 test administered under this section shall be used only for the limited purpose

1 of detecting the presence of a drug in the person's body, and shall not be used
2 to extract DNA information.

3 (4) Evidentiary test. The evidentiary test shall be required of a person
4 when a law enforcement officer has reasonable grounds to believe that the
5 person was operating, attempting to operate, or in actual physical control of a
6 vehicle in violation of section 1201 of this title.

7 ~~(4)~~(5) Fatal collision or incident resulting in serious bodily injury. The
8 evidentiary test shall also be required if the person is the surviving operator of
9 a motor vehicle involved in a fatal incident or collision or an incident or
10 collision resulting in serious bodily injury and the law enforcement officer has
11 reasonable grounds to believe that the person has any amount of alcohol or
12 other drug in his or her system.

13 (b) A refusal to take a breath or saliva test may be introduced as evidence in
14 a criminal proceeding.

15 * * *

16 (f) If a blood test is sought from a person pursuant to subdivision (a)(2) of
17 this section, or if a person who has been involved in an accident or collision
18 resulting in serious bodily injury or death to another refuses an evidentiary test,
19 a law enforcement officer may apply for a search warrant pursuant to Rule 41
20 of the Vermont Rules of Criminal Procedure to obtain a sample of blood for an
21 evidentiary test. If a blood sample is obtained by search warrant, the fact of the

1 refusal may still be introduced in evidence, in addition to the results of the
2 evidentiary test. Once a law enforcement official begins the application process
3 for a search warrant, the law enforcement official is not obligated to
4 discontinue the process even if the person later agrees to provide an
5 evidentiary ~~breath~~ sample. The limitation created by Rule 41(g) of the
6 Vermont Rules of Criminal Procedure regarding blood specimens shall not
7 apply to search warrants authorized by this section.

8 (g) The Defender General shall provide statewide 24-hour coverage seven
9 days a week to assure that adequate legal services are available to persons
10 entitled to consult an attorney under this section.

11 Sec. 5. 23 V.S.A. § 1203 is amended to read:

12 § 1203. ADMINISTRATION OF TESTS; RETENTION OF TEST AND
13 VIDEOTAPE

14 (a) A breath or saliva test shall be administered or taken only by a person
15 who has been certified by the Vermont Criminal Justice Training Council to
16 operate the breath or saliva testing equipment being employed. In any
17 proceeding under this subchapter, a person's testimony that he or she is
18 certified to operate the breath testing equipment employed shall be prima facie
19 evidence of that fact.

20 (b) Only a physician, licensed nurse, medical technician, physician
21 assistant, medical technologist, or laboratory assistant acting at the request of a

1 law enforcement officer may withdraw blood for the purpose of determining
2 the presence of alcohol or other drug. This limitation does not apply to the
3 taking of a breath or saliva sample.

4 (c) When ~~a breath test which is intended to be introduced in evidence is~~
5 ~~taken with a crimper device or when~~ blood or saliva is withdrawn at an
6 officer's request, a sufficient amount of ~~breath~~ saliva or blood, as the case may
7 be, shall be taken to enable the person to have made an independent analysis of
8 the sample, and shall be held for at least 45 days from the date the sample was
9 taken. At any time during that period the person may direct that the sample be
10 sent to an independent laboratory of the person's choosing for an independent
11 analysis. The Department of Public Safety shall adopt rules providing for the
12 security of the sample. At no time shall the defendant or any agent of the
13 defendant have access to the sample. A preserved sample of breath shall not be
14 required when an infrared breath-testing instrument is used. A person tested
15 with an infrared breath-testing instrument shall have the option of having a
16 second infrared test administered immediately after receiving the results of the
17 first test.

18 (d) In the case of a breath, saliva, or blood test ~~administered using an~~
19 ~~infrared breath testing instrument~~, the test shall be analyzed in compliance with
20 rules adopted by the Department of Public Safety. The analyses shall be
21 retained by the State. A sample is adequate if the infrared breath testing

1 instrument analyzes the sample and does not indicate the sample is deficient.
2 ~~Analysis~~ An analysis of the person's ~~breath~~ saliva or blood which is available
3 to that person for independent analysis shall be considered valid when
4 performed according to methods approved by the Department of Public Safety.
5 The analysis performed by the State shall be considered valid when performed
6 according to a method or methods selected by the Department of Public Safety.
7 The Department of Public Safety shall use rule making procedures to select its
8 method or methods. Failure of a person to provide an adequate breath or saliva
9 sample constitutes a refusal.

10 (e) [Repealed.]

11 (f) When a law enforcement officer has reason to believe that a person may
12 be violating or has violated section 1201 of this title, the officer may request
13 the person to provide a sample of breath or saliva for a preliminary screening
14 test using a device approved by the Commissioner of Public Safety for this
15 purpose. The person shall not have the right to consult an attorney prior to
16 submitting to this preliminary ~~breath alcohol~~ screening test. The results of this
17 preliminary screening ~~test~~ may be used for the purpose of deciding whether an
18 arrest should be made and whether to request an evidentiary test and shall not
19 be used in any court proceeding except on those issues. Following the
20 screening₂ ~~test~~ additional tests may be required of the operator pursuant to the
21 provisions of section 1202 of this title.

1 (g) The Office of the Chief Medical Examiner shall report in writing to the
2 Department of Motor Vehicles the death of any person as the result of an
3 accident involving a vehicle and the circumstances of such accident within five
4 days of such death.

5 (h) A Vermont law enforcement officer shall have a right to request a
6 breath, saliva or blood sample in an adjoining state or country under this
7 section unless prohibited by the law of the other state or country. If the law in
8 an adjoining state or country does not prohibit an officer acting under this
9 section from taking a breath, saliva, or blood sample in its jurisdiction,
10 evidence of such sample shall not be excluded in the courts of this State solely
11 on the basis that the test was taken outside the State.

12 (i)(1) The Commissioner of Public Safety shall adopt emergency rules
13 relating to the operation, maintenance, and use of preliminary alcohol
14 screening devices for use by law enforcement officers in enforcing the
15 provisions of this title. The ~~commissioner~~ Commissioner shall consider
16 relevant standards of the National Highway Traffic Safety Administration in
17 adopting such rules. Any preliminary alcohol screening device authorized for
18 use under this title shall be on the qualified products list of the National
19 Highway Traffic Safety Administration.

20 (2) The Commissioner shall adopt rules pursuant to 3 V.S.A. chapter 25
21 relating to the operation, maintenance, and use of saliva testing devices for use

1 by law enforcement officers in enforcing the provisions of this title, and the
2 training required for officers to use such devices. The Commissioner shall
3 consider relevant standards of the National Highway Traffic Safety
4 Administration in adopting such rules. Any saliva testing device authorized
5 for use under this title shall be determined by at least two peer reviewed
6 studies to be a reliably accurate method of detecting the presence of drug
7 metabolites in the body.

8 * * *

9 Sec. 6. 23 V.S.A. § 1203a(b) is amended to read:

10 (b) Arrangements for a blood test shall be made by the person submitting to
11 the evidentiary breath or saliva test, by the person's attorney, or by some other
12 person acting on the person's behalf unless the person is detained in custody
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15 make arrangements for administration of the blood test upon demand but at the
16 person's own expense.

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18 § 1204. PERMISSIVE INFERENCES

19 (a) Upon the trial of any civil or criminal action or proceeding arising out of
20 acts alleged to have been committed by a person while operating, attempting to

1 operate, or in actual physical control of a vehicle on a highway, the person's
2 alcohol concentration shall give rise to the following permissive inferences:

3 (1) If the person's alcohol concentration at that time was less than 0.08,
4 such fact shall not give rise to any presumption or permissive inference that the
5 person was or was not under the influence of alcohol, but such fact may be
6 considered with other competent evidence in determining whether the person
7 was under the influence of alcohol.

8 (2) If the person's alcohol concentration at that time was 0.08 or more, it
9 shall be a permissive inference that the person was under the influence of
10 alcohol in violation of subdivision 1201(a)(2) or (3) of this title.

11 (3) If the person's alcohol concentration at any time within two hours of
12 the alleged offense was 0.10 or more, it shall be a permissive inference that the
13 person was under the influence of alcohol in violation of subdivision
14 1201(a)(2) or (3) of this title.

15 (b) The foregoing provisions shall not be construed as limiting the
16 introduction of any other competent evidence bearing upon the question
17 whether the person was under the influence of alcohol or under the combined
18 influence of alcohol and another drug, nor shall they be construed as requiring
19 that evidence of the amount of alcohol or drug in the person's blood, breath,
20 urine, or saliva must be presented.

1 Sec. 8. EFFECTIVE DATE

2 This act shall take effect on July 1, 2018.

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8 (Committee vote: _____)

9

10

Representative _____

11

FOR THE COMMITTEE

1 TO THE HOUSE OF REPRESENTATIVES:

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21 which is intended to be introduced as evidence.

1 * * *

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3 a law enforcement officer for the purpose of deciding whether an arrest should
4 be made and whether to request an evidentiary test. The results of a
5 preliminary screening shall not be introduced as evidence of impairment in any
6 court proceeding. A preliminary saliva screening result detecting the presence
7 of a drug shall not, by itself, constitute grounds for probable cause for an
8 arrest.

9 Sec. 3. 23 V.S.A. § 1201 is amended to read:

10 § 1201. OPERATING VEHICLE UNDER THE INFLUENCE OF ALCOHOL
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12 PENALTY FOR BAC OF 0.16 OR MORE

13 (a) A person shall not operate, attempt to operate, or be in actual physical
14 control of any vehicle on a highway:

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18 subdivision 4(34) of this title; or

19 (C) 0.04 or more if the person is operating a commercial vehicle as
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13 incapable of decision or unconscious or dead, it is deemed that the person's
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15 pursuant to this subdivision (2) shall be obtained pursuant to subsection (f) of
16 this section.

17 (3) Saliva test. If the law enforcement officer has reasonable grounds to
18 believe that the person is under the influence of a drug other than alcohol, or
19 under the combined influence of alcohol and a drug, the person is deemed to
20 have given consent to the taking of an evidentiary sample of saliva. Any saliva
21 test administered under this section shall be used only for the limited purpose

1 of detecting the presence of a drug in the person's body, and shall not be used
2 to extract DNA information.

3 (4) Evidentiary test. The evidentiary test shall be required of a person
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5 person was operating, attempting to operate, or in actual physical control of a
6 vehicle in violation of section 1201 of this title.

7 ~~(4)~~(5) Fatal collision or incident resulting in serious bodily injury. The
8 evidentiary test shall also be required if the person is the surviving operator of
9 a motor vehicle involved in a fatal incident or collision or an incident or
10 collision resulting in serious bodily injury and the law enforcement officer has
11 reasonable grounds to believe that the person has any amount of alcohol or
12 other drug in his or her system.

13 (b) A refusal to take a breath or saliva test may be introduced as evidence in
14 a criminal proceeding.

15 * * *

16 (f) If a blood test is sought from a person pursuant to subdivision (a)(2) of
17 this section, or if a person who has been involved in an accident or collision
18 resulting in serious bodily injury or death to another refuses an evidentiary test,
19 a law enforcement officer may apply for a search warrant pursuant to Rule 41
20 of the Vermont Rules of Criminal Procedure to obtain a sample of blood for an
21 evidentiary test. If a blood sample is obtained by search warrant, the fact of the

1 refusal may still be introduced in evidence, in addition to the results of the
2 evidentiary test. Once a law enforcement official begins the application process
3 for a search warrant, the law enforcement official is not obligated to
4 discontinue the process even if the person later agrees to provide an
5 evidentiary ~~breath~~ sample. The limitation created by Rule 41(g) of the
6 Vermont Rules of Criminal Procedure regarding blood specimens shall not
7 apply to search warrants authorized by this section.

8 (g) The Defender General shall provide statewide 24-hour coverage seven
9 days a week to assure that adequate legal services are available to persons
10 entitled to consult an attorney under this section.

11 Sec. 5. 23 V.S.A. § 1203 is amended to read:

12 § 1203. ADMINISTRATION OF TESTS; RETENTION OF TEST AND
13 VIDEOTAPE

14 (a) A breath or saliva test shall be administered or taken only by a person
15 who has been certified by the Vermont Criminal Justice Training Council to
16 operate the breath or saliva testing equipment being employed. In any
17 proceeding under this subchapter, a person's testimony that he or she is
18 certified to operate the breath testing equipment employed shall be prima facie
19 evidence of that fact.

20 (b) Only a physician, licensed nurse, medical technician, physician
21 assistant, medical technologist, or laboratory assistant acting at the request of a

1 law enforcement officer may withdraw blood for the purpose of determining
2 the presence of alcohol or other drug. This limitation does not apply to the
3 taking of a breath or saliva sample.

4 (c) When ~~a breath test which is intended to be introduced in evidence is~~
5 ~~taken with a crimper device or when~~ blood or saliva is withdrawn at an
6 officer's request, a sufficient amount of ~~breath~~ saliva or blood, as the case may
7 be, shall be taken to enable the person to have made an independent analysis of
8 the sample, and shall be held for at least 45 days from the date the sample was
9 taken. At any time during that period the person may direct that the sample be
10 sent to an independent laboratory of the person's choosing for an independent
11 analysis. The Department of Public Safety shall adopt rules providing for the
12 security of the sample. At no time shall the defendant or any agent of the
13 defendant have access to the sample. A preserved sample of breath shall not be
14 required when an infrared breath-testing instrument is used. A person tested
15 with an infrared breath-testing instrument shall have the option of having a
16 second infrared test administered immediately after receiving the results of the
17 first test.

18 (d) In the case of a breath, saliva, or blood test ~~administered using an~~
19 ~~infrared breath testing instrument~~, the test shall be analyzed in compliance with
20 rules adopted by the Department of Public Safety. The analyses shall be
21 retained by the State. A sample is adequate if the infrared breath testing

1 instrument analyzes the sample and does not indicate the sample is deficient.
2 ~~Analysis~~ An analysis of the person's ~~breath~~ saliva or blood which is available
3 to that person for independent analysis shall be considered valid when
4 performed according to methods approved by the Department of Public Safety.
5 The analysis performed by the State shall be considered valid when performed
6 according to a method or methods selected by the Department of Public Safety.
7 The Department of Public Safety shall use rule making procedures to select its
8 method or methods. Failure of a person to provide an adequate breath or saliva
9 sample constitutes a refusal.

10 (e) [Repealed.]

11 (f) When a law enforcement officer has reason to believe that a person may
12 be violating or has violated section 1201 of this title, the officer may request
13 the person to provide a sample of breath or saliva for a preliminary screening
14 test using a device approved by the Commissioner of Public Safety for this
15 purpose. The person shall not have the right to consult an attorney prior to
16 submitting to this preliminary ~~breath alcohol~~ screening test. The results of this
17 preliminary screening test may be used for the purpose of deciding whether an
18 arrest should be made and whether to request an evidentiary test and shall not
19 be used in any court proceeding except on those issues. Following the
20 screening₂ test additional tests may be required of the operator pursuant to the
21 provisions of section 1202 of this title.

1 (g) The Office of the Chief Medical Examiner shall report in writing to the
2 Department of Motor Vehicles the death of any person as the result of an
3 accident involving a vehicle and the circumstances of such accident within five
4 days of such death.

5 (h) A Vermont law enforcement officer shall have a right to request a
6 breath, saliva or blood sample in an adjoining state or country under this
7 section unless prohibited by the law of the other state or country. If the law in
8 an adjoining state or country does not prohibit an officer acting under this
9 section from taking a breath, saliva, or blood sample in its jurisdiction,
10 evidence of such sample shall not be excluded in the courts of this State solely
11 on the basis that the test was taken outside the State.

12 (i)(1) The Commissioner of Public Safety shall adopt emergency rules
13 relating to the operation, maintenance, and use of preliminary alcohol
14 screening devices for use by law enforcement officers in enforcing the
15 provisions of this title. The ~~commissioner~~ Commissioner shall consider
16 relevant standards of the National Highway Traffic Safety Administration in
17 adopting such rules. Any preliminary alcohol screening device authorized for
18 use under this title shall be on the qualified products list of the National
19 Highway Traffic Safety Administration.

20 (2) The Commissioner shall adopt rules pursuant to 3 V.S.A. chapter 25
21 relating to the operation, maintenance, and use of saliva testing devices for use

1 by law enforcement officers in enforcing the provisions of this title, and the
2 training required for officers to use such devices. The Commissioner shall
3 consider relevant standards of the National Highway Traffic Safety
4 Administration in adopting such rules. Any saliva testing device authorized
5 for use under this title shall be determined by at least two peer reviewed
6 studies to be a reliably accurate method of detecting the presence of drug
7 metabolites in the body.

8 * * *

9 Sec. 6. 23 V.S.A. § 1203a(b) is amended to read:

10 (b) Arrangements for a blood test shall be made by the person submitting to
11 the evidentiary breath or saliva test, by the person's attorney, or by some other
12 person acting on the person's behalf unless the person is detained in custody
13 after administration of the evidentiary test and upon completion of processing,
14 in which case the law enforcement officer having custody of the person shall
15 make arrangements for administration of the blood test upon demand but at the
16 person's own expense.

17 Sec. 7. 23 V.S.A. § 1204 is amended to read:

18 § 1204. PERMISSIVE INFERENCES

19 (a) Upon the trial of any civil or criminal action or proceeding arising out of
20 acts alleged to have been committed by a person while operating, attempting to

1 operate, or in actual physical control of a vehicle on a highway, the person's
2 alcohol concentration shall give rise to the following permissive inferences:

3 (1) If the person's alcohol concentration at that time was less than 0.08,
4 such fact shall not give rise to any presumption or permissive inference that the
5 person was or was not under the influence of alcohol, but such fact may be
6 considered with other competent evidence in determining whether the person
7 was under the influence of alcohol.

8 (2) If the person's alcohol concentration at that time was 0.08 or more, it
9 shall be a permissive inference that the person was under the influence of
10 alcohol in violation of subdivision 1201(a)(2) or (3) of this title.

11 (3) If the person's alcohol concentration at any time within two hours of
12 the alleged offense was 0.10 or more, it shall be a permissive inference that the
13 person was under the influence of alcohol in violation of subdivision
14 1201(a)(2) or (3) of this title.

15 (b) The foregoing provisions shall not be construed as limiting the
16 introduction of any other competent evidence bearing upon the question
17 whether the person was under the influence of alcohol or under the combined
18 influence of alcohol and another drug, nor shall they be construed as requiring
19 that evidence of the amount of alcohol or drug in the person's blood, breath,
20 urine, or saliva must be presented.

1 Sec. 8. EFFECTIVE DATE

2 This act shall take effect on July 1, 2018.

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8 (Committee vote: _____)

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11

Representative _____

FOR THE COMMITTEE

1 TO THE HOUSE OF REPRESENTATIVES:

2 The Committee on Judiciary to which was referred House Bill No. 237
3 entitled “An act relating to saliva testing” respectfully reports that it has
4 considered the same and recommends that the bill be amended by striking out
5 all after the enacting clause and inserting in lieu thereof the following:

6 **Sec. 1. LEGISLATIVE INTENT; DRUG RECOGNITION EXPERTS**

7 It is the intent of the General Assembly that the State have a sufficient
8 number of drug recognition experts available to screen all drivers suspected of
9 operating in violation of 23 V.S.A. § 1201. To this end, there are many
10 categories of professionals associated with drug recognition that can be trained
11 to recognize impairment in drivers under the influence of drugs other than, or
12 in addition to, alcohol. It is the intent of the General Assembly that Vermont
13 expand the type of professionals qualified to become drug recognition experts
14 to include professions other than law enforcement.

15 Sec. 2. 23 V.S.A. § 1200 is amended to read:

16 § 1200. DEFINITIONS

17 As used in this subchapter:

18 * * *

19 (3) “Evidentiary test” means a breath, saliva, or blood test which
20 indicates the person’s alcohol concentration or the presence of other drug and
21 which is intended to be introduced as evidence.

1 * * *

2 (11) “Preliminary screening” means a breath or saliva test administered by
3 a law enforcement officer for the purpose of deciding whether an arrest should
4 be made and whether to request an evidentiary test. The results of a
5 preliminary screening shall not be introduced as evidence of impairment in any
6 court proceeding. A preliminary saliva screening result detecting the presence
7 of a drug shall not, by itself, constitute grounds for probable cause for an
8 arrest.

9 Sec. 3. 23 V.S.A. § 1201 is amended to read:

10 § 1201. OPERATING VEHICLE UNDER THE INFLUENCE OF ALCOHOL
11 OR OTHER SUBSTANCE; CRIMINAL REFUSAL; ENHANCED
12 PENALTY FOR BAC OF 0.16 OR MORE

13 (a) A person shall not operate, attempt to operate, or be in actual physical
14 control of any vehicle on a highway:

15 (1) when the person’s alcohol concentration is:

16 (A) 0.08 or more; or

17 (B) 0.02 or more if the person is operating a school bus as defined in
18 subdivision 4(34) of this title; or

19 (C) 0.04 or more if the person is operating a commercial vehicle as
20 defined in subdivision 4103(4) of this title; or

21 (2) when the person is under the influence of alcohol; or

1 (a)(1) Implied consent. Every person who operates, attempts to operate, or
2 is in actual physical control of any vehicle on a highway in this State is deemed
3 to have given consent to an evidentiary test of that person's breath for the
4 purpose of determining the person's alcohol concentration or the presence of
5 other drug in the blood. The test shall be administered at the direction of a law
6 enforcement officer.

7 (2) Blood test. If breath testing equipment is not reasonably available or
8 if the officer has reason to believe that the person is unable to give a sufficient
9 sample of breath or saliva for testing or if the law enforcement officer has
10 reasonable grounds to believe that the person is under the influence of a drug
11 other than alcohol, the person is deemed to have given consent to the taking of
12 an evidentiary sample of blood. If in the officer's opinion the person is
13 incapable of decision or unconscious or dead, it is deemed that the person's
14 consent is given and a sample of blood shall be taken. A blood test sought
15 pursuant to this subdivision (2) shall be obtained pursuant to subsection (f) of
16 this section.

17 (3) Saliva test. If the law enforcement officer has reasonable grounds to
18 believe that the person is under the influence of a drug other than alcohol, or
19 under the combined influence of alcohol and a drug, the person is deemed to
20 have given consent to the taking of an evidentiary sample of saliva. Any saliva
21 test administered under this section shall be used only for the limited purpose

1 of detecting the presence of a drug in the person's body, and shall not be used
2 to extract DNA information.

3 (4) Evidentiary test. The evidentiary test shall be required of a person
4 when a law enforcement officer has reasonable grounds to believe that the
5 person was operating, attempting to operate, or in actual physical control of a
6 vehicle in violation of section 1201 of this title.

7 ~~(4)~~(5) Fatal collision or incident resulting in serious bodily injury. The
8 evidentiary test shall also be required if the person is the surviving operator of
9 a motor vehicle involved in a fatal incident or collision or an incident or
10 collision resulting in serious bodily injury and the law enforcement officer has
11 reasonable grounds to believe that the person has any amount of alcohol or
12 other drug in his or her system.

13 (b) A refusal to take a breath or saliva test may be introduced as evidence in
14 a criminal proceeding.

15 * * *

16 (f) If a blood test is sought from a person pursuant to subdivision (a)(2) of
17 this section, or if a person who has been involved in an accident or collision
18 resulting in serious bodily injury or death to another refuses an evidentiary test,
19 a law enforcement officer may apply for a search warrant pursuant to Rule 41
20 of the Vermont Rules of Criminal Procedure to obtain a sample of blood for an
21 evidentiary test. If a blood sample is obtained by search warrant, the fact of the

1 refusal may still be introduced in evidence, in addition to the results of the
2 evidentiary test. Once a law enforcement official begins the application process
3 for a search warrant, the law enforcement official is not obligated to
4 discontinue the process even if the person later agrees to provide an
5 evidentiary ~~breath~~ sample. The limitation created by Rule 41(g) of the
6 Vermont Rules of Criminal Procedure regarding blood specimens shall not
7 apply to search warrants authorized by this section.

8 (g) The Defender General shall provide statewide 24-hour coverage seven
9 days a week to assure that adequate legal services are available to persons
10 entitled to consult an attorney under this section.

11 Sec. 5. 23 V.S.A. § 1203 is amended to read:

12 § 1203. ADMINISTRATION OF TESTS; RETENTION OF TEST AND
13 VIDEOTAPE

14 (a) A breath or saliva test shall be administered or taken only by a person
15 who has been certified by the Vermont Criminal Justice Training Council to
16 operate the breath or saliva testing equipment being employed. In any
17 proceeding under this subchapter, a person's testimony that he or she is
18 certified to operate the breath testing equipment employed shall be prima facie
19 evidence of that fact.

20 (b) Only a physician, licensed nurse, medical technician, physician
21 assistant, medical technologist, or laboratory assistant acting at the request of a

1 law enforcement officer may withdraw blood for the purpose of determining
2 the presence of alcohol or other drug. This limitation does not apply to the
3 taking of a breath or saliva sample.

4 (c) When ~~a breath test which is intended to be introduced in evidence is~~
5 ~~taken with a crimper device or when~~ blood or saliva is withdrawn at an
6 officer's request, a sufficient amount of ~~breath~~ saliva or blood, as the case may
7 be, shall be taken to enable the person to have made an independent analysis of
8 the sample, and shall be held for at least 45 days from the date the sample was
9 taken. At any time during that period the person may direct that the sample be
10 sent to an independent laboratory of the person's choosing for an independent
11 analysis. The Department of Public Safety shall adopt rules providing for the
12 security of the sample. At no time shall the defendant or any agent of the
13 defendant have access to the sample. A preserved sample of breath shall not be
14 required when an infrared breath-testing instrument is used. A person tested
15 with an infrared breath-testing instrument shall have the option of having a
16 second infrared test administered immediately after receiving the results of the
17 first test.

18 (d) In the case of a breath, saliva, or blood test ~~administered using an~~
19 ~~infrared breath testing instrument~~, the test shall be analyzed in compliance with
20 rules adopted by the Department of Public Safety. The analyses shall be
21 retained by the State. A sample is adequate if the infrared breath testing

1 instrument analyzes the sample and does not indicate the sample is deficient.
2 ~~Analysis~~ An analysis of the person's ~~breath~~ saliva or blood which is available
3 to that person for independent analysis shall be considered valid when
4 performed according to methods approved by the Department of Public Safety.
5 The analysis performed by the State shall be considered valid when performed
6 according to a method or methods selected by the Department of Public Safety.
7 The Department of Public Safety shall use rule making procedures to select its
8 method or methods. Failure of a person to provide an adequate breath or saliva
9 sample constitutes a refusal.

10 (e) [Repealed.]

11 (f) When a law enforcement officer has reason to believe that a person may
12 be violating or has violated section 1201 of this title, the officer may request
13 the person to provide a sample of breath or saliva for a preliminary screening
14 test using a device approved by the Commissioner of Public Safety for this
15 purpose. The person shall not have the right to consult an attorney prior to
16 submitting to this preliminary ~~breath alcohol~~ screening test. The results of this
17 preliminary screening test may be used for the purpose of deciding whether an
18 arrest should be made and whether to request an evidentiary test and shall not
19 be used in any court proceeding except on those issues. Following the
20 screening₂ test additional tests may be required of the operator pursuant to the
21 provisions of section 1202 of this title.

1 (g) The Office of the Chief Medical Examiner shall report in writing to the
2 Department of Motor Vehicles the death of any person as the result of an
3 accident involving a vehicle and the circumstances of such accident within five
4 days of such death.

5 (h) A Vermont law enforcement officer shall have a right to request a
6 breath, saliva or blood sample in an adjoining state or country under this
7 section unless prohibited by the law of the other state or country. If the law in
8 an adjoining state or country does not prohibit an officer acting under this
9 section from taking a breath, saliva, or blood sample in its jurisdiction,
10 evidence of such sample shall not be excluded in the courts of this State solely
11 on the basis that the test was taken outside the State.

12 (i)(1) The Commissioner of Public Safety shall adopt emergency rules
13 relating to the operation, maintenance, and use of preliminary alcohol
14 screening devices for use by law enforcement officers in enforcing the
15 provisions of this title. The ~~commissioner~~ Commissioner shall consider
16 relevant standards of the National Highway Traffic Safety Administration in
17 adopting such rules. Any preliminary alcohol screening device authorized for
18 use under this title shall be on the qualified products list of the National
19 Highway Traffic Safety Administration.

20 (2) The Commissioner shall adopt rules pursuant to 3 V.S.A. chapter 25
21 relating to the operation, maintenance, and use of saliva testing devices for use

1 by law enforcement officers in enforcing the provisions of this title, and the
2 training required for officers to use such devices. The Commissioner shall
3 consider relevant standards of the National Highway Traffic Safety
4 Administration in adopting such rules. Any saliva testing device authorized
5 for use under this title shall be determined by at least two peer reviewed
6 studies to be a reliably accurate method of detecting the presence of drug
7 metabolites in the body.

8 * * *

9 Sec. 6. 23 V.S.A. § 1203a(b) is amended to read:

10 (b) Arrangements for a blood test shall be made by the person submitting to
11 the evidentiary breath or saliva test, by the person's attorney, or by some other
12 person acting on the person's behalf unless the person is detained in custody
13 after administration of the evidentiary test and upon completion of processing,
14 in which case the law enforcement officer having custody of the person shall
15 make arrangements for administration of the blood test upon demand but at the
16 person's own expense.

17 Sec. 7. 23 V.S.A. § 1204 is amended to read:

18 § 1204. PERMISSIVE INFERENCES

19 (a) Upon the trial of any civil or criminal action or proceeding arising out of
20 acts alleged to have been committed by a person while operating, attempting to

1 operate, or in actual physical control of a vehicle on a highway, the person's
2 alcohol concentration shall give rise to the following permissive inferences:

3 (1) If the person's alcohol concentration at that time was less than 0.08,
4 such fact shall not give rise to any presumption or permissive inference that the
5 person was or was not under the influence of alcohol, but such fact may be
6 considered with other competent evidence in determining whether the person
7 was under the influence of alcohol.

8 (2) If the person's alcohol concentration at that time was 0.08 or more, it
9 shall be a permissive inference that the person was under the influence of
10 alcohol in violation of subdivision 1201(a)(2) or (3) of this title.

11 (3) If the person's alcohol concentration at any time within two hours of
12 the alleged offense was 0.10 or more, it shall be a permissive inference that the
13 person was under the influence of alcohol in violation of subdivision
14 1201(a)(2) or (3) of this title.

15 (b) The foregoing provisions shall not be construed as limiting the
16 introduction of any other competent evidence bearing upon the question
17 whether the person was under the influence of alcohol or under the combined
18 influence of alcohol and another drug, nor shall they be construed as requiring
19 that evidence of the amount of alcohol or drug in the person's blood, breath,
20 urine, or saliva must be presented.

1 Sec. 8. EFFECTIVE DATE

2 This act shall take effect on July 1, 2018.

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8 (Committee vote: _____)

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Representative _____

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FOR THE COMMITTEE