

TO: Senate Judiciary Committee
House Judiciary Committee

FROM: Dennis Wygmans, Traffic Safety Resource Prosecutor, Chair, Impaired Driving Processing Task Force

RE: Final Report of Impaired Driving Processing Task Force pursuant to Section 5 of Act 41 (H. 44) (2025) (the “Act”).

DATE: November 14, 2025

Report Requirements:

Pursuant to Section 5 of Act 41 (H. 44) (2025), on or before November 15, 2025, the Task Force shall submit a written report to the Senate Committee on Judiciary and the House Committees on Judiciary.

Membership:

The Members of the Task Force are:

1. Dennis Wygmans, Traffic Safety Resource Prosecutor (Chair)
2. Thomas A. Zonay, Chief Superior Judge
3. Mandy Wooster, Executive Director of Policy Development, Department of Public Safety
4. Wade Cochran, Executive Director of Enforcement and Safety, Agency of Transportation
5. Brian Marsicovetere, Marsicovetere & Levine Law Group, P.C.
6. Sheriff Marc Poulin, Washington County
7. Sgt. Paul Ravelin, Vermont State Police
8. Sgt. Paul Locke, Milton Police Department

Report:

I. Historical and Legal Background

In Vermont, a Driving Under the Influence (DUI) arrest gives rise to certain constitutional and statutory protections related to seizures and searches. These protections are found within the Fourth, Fifth, and Sixth Amendments to the United States Constitution; Articles 10 & 11 of the Vermont Constitution; and what are commonly referred to as “implied consent” rights found within title 23.

The Fifth Amendment to the Constitution of the United States reads in part, “No person...shall be compelled in any criminal case to be a witness against himself.” The Sixth Amendment states in part, “In all criminal prosecutions, the accused shall enjoy...the assistance of counsel for his defense.” These two rights are triggered when a person is arrested and taken into custody. See *Miranda v. Arizona*, 384 U.S. 436, 478-79 (1966) (“[W]hen an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized. Procedural safeguards must be employed to protect the privilege and unless other fully effective means are adopted to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored, the following measures are required. He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.”)

Article 10 of the Constitution of the State of Vermont serves as an analogue to the Fifth and Sixth Amendments and reads in part as follows: “in all prosecutions for criminal offenses, a person hath a right to be heard by oneself and by counsel...nor can a person be compelled to give evidence against oneself...” See *State v. Fuller*, 163 Vt. 523, 527 (1995). Moreover, “the Article 10 privilege against self-incrimination and that contained in the Fifth Amendment are synonymous.” *State v. Rheume*, 2004 VT 35, ¶ 18.

The Fourth Amendment guarantees “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” More precisely, the Fourth Amendment “protects two types of expectations, one involving ‘searches’, the other ‘seizures’. A *search* occurs when an expectation of privacy that society is prepared to consider reasonable is infringed. A *seizure* of property occurs where there is some meaningful interference with an individual's possessory interests in that property.” *United States v. Jacobson*, 466 U.S. 109, 113 (1984).

Article 11 is the Vermont constitutional analogue to the 4th Amendment. It states in part, “the people have a right to hold themselves, their houses, papers, and possessions, free from search or seizure; and therefore warrants, without oath or affirmation first made, affording sufficient foundation for them, and whereby by any officer or messenger may be commanded or required to search suspected places, or to seize any person or persons, his, her or their property, not particularly described, are contrary to that right, and ought not to be granted.” “While...the Fourth Amendment and Article 11 both seek to protect our

freedom from unreasonable government intrusions into legitimate expectations of privacy... Article 11 may require greater protection than that afforded by the federal Constitution.” *State v. Bauder*, 2007 VT 16, ¶ 10 (internal citations and quotations omitted).

In legal terms there are two means of conveying consent. The first is express consent granted explicitly either verbally or in writing, such as within the context of the *Miranda* warnings. The second, is implied consent where a person has not agreed to something expressly, but their assent can be implied through their actions or based on the surrounding circumstances. Within the DUI context, “cooperation with [Breath Alcohol Concentration] testing [is] a condition of the privilege of driving on state roads and that the privilege would be rescinded if a suspected [impaired] driver refused to honor that condition.” *Birchfield v. North Dakota*, 579 U.S. 438, 447-48 (2016). Within this context implied consent is an exception to the 4th Amendment warrant requirement and a breath test based upon probable cause is a reasonable search not subject to the warrant requirement. *Id.* at 474.

Considering protections afforded under the Constitution of Vermont, “an officer's request for an evidentiary breath test presents that unique circumstance in which the values animating Article 11 are not furthered by a warrant application.” *State v. Williams*, 2020 VT 91, ¶ 19. In other words, warrantless breath tests do not violate Article 11.

Warrantless blood tests, on the other hand, are per se unreasonable and the Supreme Court of the United States has ruled that “motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense.” *Birchfield* at 477; accord *State v. Rajda*, 2018 VT 72. In other words, the concept of implied consent is not applicable to evidentiary blood draws under the 4th Amendment. Thus, to obtain blood an investigating officer must either obtain a warrant or rely upon an exclusion to the warrant requirement, such as consent or existence of exigent circumstances. This is also true in Vermont due to the concept of legal supremacy – if it is federally unconstitutional the states cannot void the outcome under state law.

Spoilation of evidence due to the natural metabolic process over time does not alone serve as an exigency. See *Missouri v. McNeely*, 569 U.S. 121 (2013). However, the passage of time coupled with a motor vehicle crash may serve as an exigency due to other additional pressing health, safety, or law enforcement factors. See *Mitchell v. Wisconsin*, 588 U.S. 840 (2019). When an exigency exists, it would be rare for processing to occur as a matter of course, and these circumstances should be viewed as exceptions to the processing time concerns evaluated by the Task Force.

Processing DUI suspects in Vermont is also governed by so-called “implied consent” statutes. These statutes serve to inform suspects of certain statutory rights that they are entitled to when a law enforcement officer requests an evidentiary test, be it for breath or blood. Furthermore, these implied consent warnings imbue suspects with certain rights.

Vermont Traffic Safety Resource Prosecutors have collaborated with Vermont law enforcement officers in the creation of DUI investigation form affidavits, one for infrared breath testing and one for blood testing. The forms are used in virtually all DUI investigations statewide. The forms are four pages long, and the first page is used to document evidence collected roadside and the remaining three pages are used after arrest during processing of DUI suspects.

Page 2 of the forms commence with *Miranda* warnings: 1) Right to remain silent; 2) Anything said by a suspect can and will be used against them; 3) a suspect has the right to consult with an attorney before questioning and have one present for questioning; 4) if a suspect cannot afford an attorney they will be provided with a public defender at public expense; and 5) a suspect who agrees to questioning may stop the questioning at any time. Then a suspect is asked whether they understand the rights that have been explained to them and whether they would agree to speak with the investigating officer at that time.

If a suspect waives their *Miranda* rights, then the investigating officer commences with a brief interview relevant to the investigation of a DUI, such as time of operation, what a person ate, what they drank and the times relevant to consumption, biometric information, medical information, information relevant to impairment, and prior driving related convictions.

Upon completion of the interview of a suspect, or should a suspect invoke the so-called *Miranda* protections, an investigating officer informs the suspect of their so-called implied consent rights if DUI alcohol is suspected. If, however, an investigating officer suspects that a suspect is impaired by a drug other than alcohol or that they are impaired by a combination of alcohol and another drug, then a Drug Recognition Expert (DRE) may conduct a Drug Influence Evaluation. That evaluation can range in time but typically takes about forty five minutes to conduct.

Implied consent rights are statutory and can be found within 23 V.S.A. § 1202. Pursuant Subsection (d) of the statute, when an investigating officer makes a request for an evidentiary sample of breath or blood¹, that officer must inform a suspect that (1) as a law enforcement officer a request for an evidentiary sample of breath or blood may be

¹ The Statute also permits saliva testing. However, the Vermont Forensic Lab is not presently equipped to engage in saliva testing.

requested to determine whether the suspect is under the influence of alcohol or another drug; (2) a refusal to submit to the request may result in a six month license suspension; (3) the result of an evidentiary test may result in a license suspension and a criminal charge; (4) they have a limited right to consult an attorney at taxpayer expense for 30 minutes, including the time to contact the attorney, to assist them in deciding whether to submit to the test, and the right to an independent test at their own expense at specifically listed facilities; (5) a right to a second evidentiary breath test upon receipt of the result of the first test; (6) if they refuse the test the fact of refusal may be used against them at trial, whether or not a warrant was requested, that they may be charged with criminal refusal if they have been convicted of DUI beforehand and refuse to submit to the test, if they are the involved in a crash where another person suffered serious bodily injury or death and the law enforcement officer had a reasonable belief that they had any amount of alcohol or drugs in their system and the results could be offered against them at trial; and that if they refuse to submit to an evidentiary test after a judge has issued a search warrant they may be charged with criminal refusal. Typically, this portion of processing lasts approximately fifteen minutes.

While most states require law enforcement officers to read these warnings to an impaired suspect, some states – such as Colorado – provide drivers with these warnings in print at the time a person is licensed or relicensed to drive in addition to providing them online. If the second test referenced in (5), above, was mandatory, then the detention times for those who request the second test would be lessened by up to a few minutes. *Miranda* warnings must remain as should the investigatory questions. Our Supreme Court has found that the provision of legal counsel to assist a person to decide whether to provide an evidentiary test is especially important and we cannot disagree even though it adds approximately one-half hour to processing times. It may be, however, that the provision of implied consent rights is more appropriate for counsel to provide than for law enforcement. Finally, law enforcement must provide transportation to suspects who wish to access their independent test right when a suspect is either unable to obtain a ride from another person or will be further detained in protective custody. However, this so rarely occurs, it is of little concern when evaluating overall detention times.

After this admonishment, a suspect is asked whether they wish to speak to an attorney. If a suspect responds affirmatively, then they are provided up to 30 minutes to discuss whether to submit to the request to submit to an evidentiary test, depending upon how much time passed from the point that they were asked whether they wanted to speak to an attorney.

Once the legal consultation has completed an investigating officer inquires whether the suspect will submit to an evidentiary breath test. If the suspect responds in the affirmative

and a breath test has been requested, then a fifteen-minute observation period takes place to ensure that the suspect has not burped, belched, or vomited within fifteen minutes of providing a breath sample. Then the suspect provides a breath sample, less than a minute later a result is provided to the suspect, and they are asked whether they want to provide a second breath sample. If the suspect does provide a second breath sample, then less than a minute later the second result is provided.

The fifteen minute observation period ensures that a suspect does not have any mouth alcohol that may increase a breath test result. The Vermont Forensic Lab maintains our breath testing equipment and has informed us that although the breath testing equipment can detect mouth alcohol the fifteen minute observation period provides a failsafe and is a supported best practice in the breath testing scientific community.

After breath testing, biographical information such as suspect's address, driver license information, and DUI offending history is collected. A suspect may arrange for a person to pick them up, will be provided with information about obtaining an independent blood draw and be released. Most DUI alcohol investigations follow this process and take approximately two hours to complete. However, if evidential breath testing equipment is not reasonably available or a suspect is incapable of providing a breath sample, then a warrant for blood must be applied for unless a suspect consents to provide a blood sample. "Only a physician, licensed nurse, medical technician, physician assistant, medical technologist, laboratory assistant, intermediate or advanced emergency medical technician, or paramedic acting at the request of a law enforcement officer may, at a medical facility, police or fire department, or other safe and clean location as determined by the individual withdrawing blood, withdraw blood for the purpose of determining the presence of alcohol or another drug." 23 V.S.A. § 1203(b)(1). "Any withdrawal of blood shall not be taken at roadside, and a law enforcement officer, even if trained to withdraw blood, acting in that official capacity may not withdraw blood for the purpose of determining the presence of alcohol or another drug." *Id.* This means that it matters which uniform an officer is wearing at the time of the blood draw notwithstanding their qualifications to draw blood.

Law enforcement agencies throughout the state have attempted to partner with emergency medical treatment providers to have blood draws conducted at their respective agencies, however, most providers are unwilling for two reasons. First, providers have determined that the collection of evidence of a crime conflicts with their stated purpose to treat patients in need of emergency aid. Second, there is no statutory waiver of liability for providing such a service. It should be noted that the fee \$75 limit under 1203 does not serve as a sufficient inducement to overcome these impediments. Thus, this has led to the

transportation of suspects to hospitals in most cases to conduct blood draws. Such transport adds at least an hour to the process as suspects need to be transported to a hospital, a qualified person to conduct the draw must be identified, and the draw must take place. This is a cumbersome process that extends detention times, may lead to the elimination of alcohol or other impairing drugs from a suspect's blood, takes law enforcement officers away from engaging in any other duties, and pulls medical personnel from treating patients to collect evidence for criminal investigations.

I. Recommendations

A. Law enforcement phlebotomy program

Several states have created law enforcement phlebotomy programs to address the issues associated with hospital based evidential blood draws raised above. Some of these programs are decades old, such as in Arizona, and others are in their infancy, such as in Missouri. Some on the task force predict having law enforcement officers draw blood may lead to an increase in search warrant applications as suspects may be apprehensive about law enforcement officers drawing their blood. Others suggest these predictions undervalue the deterrent effect the longer civil suspensions have had on test refusal in Vermont and a suspect's desire to end the detention as soon as possible. There is little research on the matter, although some states (Arizona, Texas, and Idaho) reported a decrease in test refusals when they added law enforcement phlebotomists. One method that could be implemented to determine whether warrant applications would increase with the use of law enforcement phlebotomists is to establish a pilot program in a jurisdiction with enough DUI cases that have historically involved blood draws to render statistically valid conclusions.

Implementing a law enforcement phlebotomy program will take time, effort, and money. Some of the costs are a part of our present blood testing program. For example, collection tubes are already purchased by the Vermont Forensic Lab (VFL) and the instruments were purchased more than a decade ago, but officers would have to be trained, and agencies would have to be outfitted with equipment. In Arizona the cost is roughly \$250 per trained officer. Officers in Vermont would have to be trained for this purpose, unless they are already certified to draw blood. While it is known that some Vermont officers are already certified to draw blood there is no information as to how many. It appears that this education may be obtained in Vermont at an unknown cost. The VFL is already equipped to test blood.

B. Evidentiary Saliva Program

As noted above, Vermont law also permits the collection of evidential saliva. 23 V.S.A. §§ 1202(a)(3), 23 V.S.A. § 1202(f)(2), and 1203(b)(2). The collection of saliva is subject to the same statutory warrant requirements for the collection of blood. 23 V.S.A. § 1202(f)(2). Any person approved by the Vermont Criminal Justice Counsel may collect evidential blood and it may be collected anywhere other than roadside.² 23 V.S.A. § 1203(b)(2). By eliminating the use of specially qualified individuals from the process and allowing law enforcement officers to collect saliva samples detention times could be cut by an hour or more. Establishing an evidential saliva program would not eliminate the necessity of an evidential blood program because sometimes a saliva sample may not be collectable and there are a few impairing compounds for which confirmation saliva testing is ineffective.

Implementing a saliva testing program would be less costly to train law enforcement officers and equip law enforcement agencies but would present a tremendous cost to the VFL in terms of new equipment, supplies, and personnel. The equipment and supply costs would be roughly \$800,000.00 and it is believed that the VFL would have to add two chemists to their staff. Furthermore, the program would take up to five years to implement before the first evidential test could be run.

1. Minimize the length of a law enforcement encounter for a suspect:

The task force observes that one of the most time-consuming aspects of the investigation of DUI cases is when a law enforcement officer must transport a suspect to a hospital solely to obtain an evidentiary sample of blood. Implementing a law enforcement phlebotomy program and/or a saliva testing program may significantly reduce the length of a law enforcement encounter.

2. Minimize the processing and paperwork requirements for the law enforcement officer:

The task force has no recommendations to limit the amount of paperwork in DUI cases.

² It should be noted that the collection of saliva roadside could provide more accurate information relevant to impairment than any of our presently used evidential processes.