

012372836

## HOUSE BILL NO. 2579

## AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the House Committee for Courts of Justice  
on February 3, 2001)

(Patron Prior to Substitute—Delegate McDonnell)

*A BILL to amend and reenact §§ 18.2-268.3, 29.1-738.2 and 46.2-391.2 of the Code of Virginia, relating to refusal of blood alcohol test.***Be it enacted by the General Assembly of Virginia:****That §§ 18.2-268.3, 29.1-738.2 and 46.2-391.2 of the Code of Virginia are amended and reenacted as follows:**

§ 18.2-268.3. Refusal of tests; procedures.

A. If a person, after having been arrested for a violation of §§ 18.2-51.4, 18.2-266 or § 18.2-266.1 or of a similar ordinance and after having been advised by the arresting officer that a person who operates a motor vehicle upon a public highway in this Commonwealth is deemed thereby, as a condition of such operation, to have consented to have samples of his blood and breath taken for chemical tests to determine the alcohol or drug content of his blood, and that the unreasonable refusal to do so constitutes grounds for the revocation of the privilege of operating a motor vehicle upon the highways of this Commonwealth, refuses to permit blood or breath or both blood and breath samples to be taken for such tests, the arresting officer shall take the person before a committing magistrate. *If the person is unable to be taken before a magistrate because the person is taken to a medical facility for treatment or evaluation of his medical condition, the arresting officer at a medical facility, in the presence of a witness other than a law-enforcement officer, shall again advise the person, at the medical facility, of the law requiring blood or breath samples to be taken and the penalty for refusal.* If he again so refuses after having been further advised by the magistrate *or by the arresting officer at a medical facility* of the law requiring blood or breath samples to be taken and the penalty for refusal, and so declares again his refusal in writing upon a form provided by the Supreme Court, or refuses or fails to so declare in writing and such fact is certified as prescribed below, then no blood or breath samples shall be taken even though he may later request them.

B. The form shall contain a brief statement of the law requiring the taking of blood or breath samples and the penalty for refusal, a declaration of refusal, and lines for the signature of the person from whom the blood or breath sample is sought, the date, and the signature of a witness to the signing. If the person refuses or fails to execute the declaration, the magistrate *or arresting officer at a medical facility* shall certify such fact and that the magistrate *or arresting officer at a medical facility* advised the person that a refusal to permit a blood or breath sample to be taken, if found to be unreasonable, constitutes grounds for revocation of the person's privilege to operate a motor vehicle on the highways of this Commonwealth. The magistrate shall promptly issue a warrant or summons charging the person with a violation of ~~§ 18.2-268.2~~ *subsection A of this section*. The warrant or summons shall be executed in the same manner as criminal warrants or summonses. *If the person has been taken to a medical facility for treatment or evaluation of his medical condition, the arresting officer at a medical facility may issue, on the premises of the medical facility, a summons for a violation of § 18.2-268.2 subsection A of this section in lieu of securing a warrant.*

C. Venue for the trial of the warrant or summons shall lie in the court of the county or city in which the offense of driving under the influence of intoxicants is to be tried. The executed declaration of refusal or the certificate of the magistrate *or arresting officer at a medical facility*, as the case may be, shall be attached to the warrant *or summons from the arresting officer* and shall be forwarded by the magistrate *or by the arresting officer* to the aforementioned court.

D. When the court receives the declaration or certificate and the warrant or summons charging refusal, the court shall fix a date for the trial of the warrant or summons, at such time as the court designates but subsequent to the defendant's criminal trial for driving under the influence of intoxicants.

E. The declaration of refusal or certificate of the magistrate *or arresting officer at a medical facility* shall be prima facie evidence that the defendant refused to allow a blood or breath sample to be taken to determine the alcohol or drug content of his blood. However, this shall not prohibit the defendant from introducing on his behalf evidence of the basis for his refusal. The court shall determine the reasonableness of such refusal.

§ 29.1-738.2. Consent to blood or breath test.

A. Any person who operates a watercraft or motorboat which is underway upon waters of the Commonwealth shall be deemed thereby, as a condition of such operation, to have consented to have samples of his blood, breath, or both blood and breath taken for a chemical test to determine the alcohol, drug, or both alcohol and drug content of his blood, if such person is arrested for operating a

60 watercraft or motorboat which is underway in violation of subsection B of § 29.1-738, § 29.1-738.02, or  
61 of a similar ordinance of any county, city or town, within two hours of the alleged offense. Any person  
62 so arrested for a violation of clause (i) or (ii), or both, of subsection B of § 29.1-738, § 29.1-738.02, or  
63 of a similar ordinance, shall submit to a breath test. If the breath test is not available, or the person is  
64 physically unable to submit to the breath test, a blood test shall be given. The accused shall, prior to  
65 administration of the test, be advised by the person administering the test that he has the right to  
66 observe the process of analysis and to see the blood-alcohol reading on the equipment used to perform  
67 the breath test. If such equipment automatically produces a written printout of the breath test result, this  
68 written printout, or a copy thereof, shall be given to the accused in each case.

69 B. Any person, after having been arrested for a violation of clause (iii) or (iv) of subsection B of  
70 § 29.1-738, § 29.1-738.02, or of a similar ordinance, may be required to submit to a blood test to  
71 determine the drug or both drug and alcohol content of his blood. When a person, after having been  
72 arrested for a violation of clause (i) or (ii), or both, of subsection B of § 29.1-738, submits to a breath  
73 test, in accordance with subsection A of this section, or refuses to take or is incapable of taking such a  
74 breath test, he may be required to submit to tests to determine the drug or both drug and alcohol content  
75 of his blood if the law-enforcement officer has reasonable cause to believe the person was operating a  
76 watercraft or motorboat under the influence of any drug or combination of drugs, or the combined  
77 influence of alcohol and drugs.

78 C. If a person, after being arrested for a violation of subsection B of § 29.1-738, § 29.1-738.02, or of  
79 a similar ordinance of any county, city or town and after having been advised by the arresting officer  
80 that a person who operates a watercraft or motorboat which is underway upon the waters of the  
81 Commonwealth shall be deemed thereby, as a condition of such operation, to have consented to have a  
82 sample of his blood and breath taken for a chemical test to determine the alcohol or drug content of his  
83 blood, and that the unreasonable refusal to do so constitutes grounds for a court to order him not to  
84 operate a watercraft or motorboat which is underway upon the waters of the Commonwealth, then  
85 refuses to permit the taking of a sample of his blood or breath or both blood and breath samples for  
86 such tests, the arresting officer shall take the person arrested before a committing magistrate. *If the*  
87 *person is unable to be taken before a magistrate because the person is taken to a medical facility for*  
88 *treatment or evaluation of his medical condition, the arresting officer at a medical facility, in the*  
89 *presence of a witness other than a law-enforcement officer, shall again advise the person, at the medical*  
90 *facility, of the law requiring blood or breath samples to be taken and the penalty for refusal.* If he  
91 again so refuses after having been further advised by such magistrate *or by the arresting officer at a*  
92 *medical facility* of the law requiring a blood or breath sample to be taken and the penalty for refusal,  
93 and so declares again his refusal in writing upon a form provided by the Supreme Court of Virginia, or  
94 refuses or fails to so declare in writing and such fact is certified as prescribed in § 18.2-268.3, then no  
95 blood or breath sample shall be taken even though he may thereafter request same.

96 D. When any person is arrested for operating a watercraft or motorboat which is underway in  
97 violation of subsection B of § 29.1-738 or § 29.1-738.02, the procedures and requirements of  
98 §§ 18.2-268.1 through 18.2-268.11 shall apply, mutatis mutandis, to this section.

99 E. If the court or jury finds the defendant guilty of unreasonably refusing to permit a blood or breath  
100 sample to be taken, the court shall order such person not to operate a watercraft or motorboat which is  
101 underway for a period of twelve months for a first offense and for twenty-four months for a second or  
102 subsequent offense of refusal within five years of the first or other such refusal. However, if the  
103 defendant pleads guilty to a violation of subsection B of § 29.1-738, the court may dismiss the refusal  
104 warrant.

105 § 46.2-391.2. Administrative suspension of license or privilege to operate a motor vehicle.

106 A. If a breath test is taken pursuant to § 18.2-268.2 or any similar ordinance of any county, city or  
107 town and the results show a blood alcohol content of 0.08 percent or more by weight by volume or 0.08  
108 grams or more per 210 liters of breath, or the person refuses to submit to the breath test in violation of  
109 § 18.2-268.3 or any similar local ordinance, and upon issuance of a petition or summons, or upon  
110 issuance of a warrant by the magistrate, for a violation of §§ 18.2-51.4, *or 18.2-266, or any*  
111 *substantially similar local ordinance, or upon the issuance of a warrant or summons by the magistrate*  
112 *or by the arresting officer at a medical facility for a violation of § 18.2-268.3, or any similar local*  
113 ordinance, the person's license shall be suspended immediately for seven days or in the case of (i) an  
114 unlicensed person, (ii) a person whose license is otherwise suspended or revoked, or (iii) a person whose  
115 driver's license is from a jurisdiction other than the Commonwealth, such person's privilege to operate a  
116 motor vehicle in the Commonwealth shall be suspended immediately for seven days.

117 A law-enforcement officer, acting on behalf of the Commonwealth, shall serve a notice of suspension  
118 personally on the arrested person. When notice is served, the arresting officer shall promptly take  
119 possession of any driver's license held by the person and issued by the Commonwealth and shall  
120 promptly deliver it to the magistrate. Any driver's license taken into possession under this section shall  
121 be forwarded promptly by the magistrate to the clerk of the general district court or, as appropriate, the

122 court with jurisdiction over juveniles of the jurisdiction in which the arrest was made together with any  
123 petition, summons or warrant, the results of the breath test, if any, and the report required by subsection  
124 B. A copy of the notice of suspension shall be forwarded forthwith to both (i) the general district court  
125 or, as appropriate, the court with jurisdiction over juveniles of the jurisdiction in which the arrest was  
126 made and (ii) the Commissioner. Transmission of this information may be made by electronic means.

127 The clerk shall promptly return the suspended license to the person at the expiration of the seven-day  
128 suspension. Whenever a suspended license is to be returned under this section or § 46.2-391.4, the  
129 person may elect to have the license returned in person at the clerk's office or by mail to the address on  
130 the person's license or to such other address as he may request.

131 B. Promptly after arrest and service of the notice of suspension, the arresting officer shall forward to  
132 the magistrate a sworn report of the arrest that shall include (i) information which adequately identifies  
133 the person arrested and (ii) a statement setting forth the arresting officer's grounds for belief that the  
134 person violated § 18.2-51.4 or § 18.2-266 or a similar local ordinance or refused to submit to a breath  
135 test in violation of § 18.2-268.3 or a similar local ordinance. The report required by this subsection shall  
136 be submitted on forms supplied by the Supreme Court.

137 C. Any person whose license or privilege to operate a motor vehicle has been suspended under  
138 subsection A may, during the period of the suspension, request the general district court or, as  
139 appropriate, the court with jurisdiction over juveniles of the jurisdiction in which the arrest was made to  
140 review that suspension. The court shall review the suspension within the same time period as the court  
141 hears an appeal from an order denying bail or fixing terms of bail or terms of recognizance, giving this  
142 matter precedence over all other matters on its docket. If the person proves to the court by a  
143 preponderance of the evidence that the arresting officer did not have probable cause for the arrest, that  
144 the magistrate did not have probable cause to issue the warrant, or that there was not probable cause for  
145 issuance of the petition, the court shall rescind the suspension, and the clerk of the court shall forthwith  
146 (i) return the suspended license, if any, to the person unless the license has been otherwise suspended or  
147 revoked, (ii) deliver to the person a notice that the suspension under § 46.2-391.2 has been rescinded,  
148 and (iii) forward to the Commissioner a copy of the notice that the suspension under § 46.2-391.2 has  
149 been rescinded. Otherwise, the court shall affirm the suspension. If the person requesting the review fails  
150 to appear without just cause, his right to review shall be waived.

151 The court's findings are without prejudice to the person contesting the suspension or to any other  
152 potential party as to any proceedings, civil or criminal, and shall not be evidence in any proceedings,  
153 civil or criminal.

154 D. If a person whose license or privilege to operate a motor vehicle is suspended under subsection A  
155 is convicted under § 18.2-51.4 or § 18.2-266 or any similar local ordinance during the seven-day  
156 suspension imposed by subsection A, and if the court decides to issue the person a restricted permit  
157 under subsection E of § 18.2-271.1, such restricted permit shall not be issued to the person before the  
158 expiration of the seven-day suspension imposed under subsection A.