

# VIRGINIA ACTS OF ASSEMBLY -- 2003 SESSION

## CHAPTER 933

*An Act to amend and reenact §§ 18.2-268.6, 18.2-268.7, 18.2-268.8, 18.2-268.11, 46.2-341.26:6, 46.2-341.26:7, 46.2-341.26:8, and 46.2-341.26:11 of the Code of Virginia, relating to blood samples taken from DUI accuseds.*

[H 1399]

Approved March 24, 2003

**Be it enacted by the General Assembly of Virginia:**

**1. That §§ 18.2-268.6, 18.2-268.7, 18.2-268.8, 18.2-268.11, 46.2-341.26:6, 46.2-341.26:7, 46.2-341.26:8, and 46.2-341.26:11 of the Code of Virginia are amended and reenacted as follows:**

§ 18.2-268.6. Transmission of blood samples.

~~Adequate portions of the blood samples~~ *The blood sample* withdrawn pursuant to § 18.2-268.5 shall be placed in vials provided *or approved* by the Division of Forensic Science. The vials shall be sealed by the person taking the sample or at his direction. The person who seals the ~~vial~~ *vials* shall complete the prenumbered certificate of blood withdrawal ~~forms and attach one form attached to the each vial by the Division.~~ The completed withdrawal certificate for each vial shall show the name of the accused, the name of the person taking the blood sample, the date and time the blood sample was taken and information identifying the arresting or accompanying officer. ~~The officer shall initial the completed certificate.~~ The vials shall be divided between two containers *shall be placed in a container* provided by the Division, and the ~~containers~~ *container* shall be sealed to prevent tampering with the ~~vial~~ *vials*. The arresting or accompanying officer shall take possession of the ~~two containers~~ *container* as soon as the vials are placed in ~~such containers~~ *the container* and sealed, and shall promptly transport or mail ~~one of the containers~~ *the container* to the Division. Immediately after taking possession of the second container, the officer shall give to the accused a form provided by the Division which sets forth the procedure to obtain an independent analysis of the blood in the second container, and a list of the names and addresses of laboratories approved by the Division. The form shall contain a space for the accused or his counsel to direct the officer possessing the second container to forward it to an approved laboratory for analysis, if desired. If the accused directs the officer in writing on the form to forward the second container to an approved laboratory of the accused's choice, the officer shall do so.

If the accused does not direct otherwise on the form, the officer having the second container shall deliver it to the chief police officer. The chief police officer, upon receiving the container, shall retain it for a period of seventy-two hours, during which time the accused or his counsel may, in writing, on the form provided hereinabove, direct the chief police officer to mail the second container to the laboratory the accused has chosen from the approved list.

The contents of the second container shall be transmitted, tested and admitted in evidence in the same manner and in accordance with procedures established for the sample sent to the Division.

If the chief police officer having possession of the second container is not directed as herein provided to mail it within seventy-two hours after receiving the container, he shall destroy it.

§ 18.2-268.7. Transmission of blood test samples; use as evidence.

A. Upon receipt of a blood sample forwarded to the Division for analysis pursuant to § 18.2-268.6, the Division shall have it examined for its alcohol or drug or both alcohol and drug content and the Director shall execute a certificate of analysis indicating the name of the accused; the date, time and by whom the blood sample was received and examined; a statement that the seal on the vial had not been broken or otherwise tampered with; a statement that the container and vial were provided *or approved* by the Division and that the vial was one to which the completed withdrawal certificate was attached; and a statement of the sample's alcohol or drug or both alcohol and drug content. The Director shall remove the withdrawal certificate from the vial, attach it to the certificate of analysis and state in the certificate of analysis that it was so removed and attached. The certificate of analysis with the withdrawal certificate shall be returned to the clerk of the court in which the charge will be heard. The vial and blood sample shall be destroyed after completion of the analysis. A similar certificate of analysis, with the withdrawal certificate from the independent laboratory which analyzes the second blood sample on behalf of the accused, shall be returned to the clerk of the court in which the charge will be heard. The blood sample shall be destroyed after completion of the analysis by the independent laboratory. *After completion of the analysis, the Division of Forensic Science shall preserve the remainder of the blood until 90 days have lapsed from the date the blood was drawn. During this 90-day period, the accused may, by motion filed before the court in which the charge will be heard, with notice to the Division, request an order directing the Division of Forensic Science to transmit the remainder of the blood sample to an independent laboratory retained by the accused for analysis. The Division shall destroy the remainder of the blood sample if no notice of a motion to transmit the*

*remaining blood sample is received during the 90-day period.*

B. When a blood sample taken in accordance with the provisions of §§ 18.2-268.2 through 18.2-268.6 is forwarded for analysis to the Division, a report of the test results shall be filed in that office. Upon proper identification of the certificate of withdrawal, the certificate of analysis, with the withdrawal certificate attached, shall, when attested by the Director, be admissible in any court, in any criminal or civil proceeding, as evidence of the facts therein stated and of the results of such analysis. On motion of the accused, the ~~certificate prepared for the second sample shall be admissible in evidence when attested by the pathologist or by the supervisor of the approved laboratory.~~ *report of analysis prepared for the remaining blood sample shall be admissible in evidence provided the report is duly attested by a person performing such analysis and the independent laboratory that performed the analysis is accredited or certified to conduct forensic blood alcohol/drug testing by one or more of the following bodies: American Society of Crime Laboratory Directors/Laboratory Accreditation Board (ASCLD/LAB); College of American Pathologists (CAP); United States Department of Health and Human Services Substance Abuse and Mental Health Services Administration (SAMHSA); or American Board of Forensic Toxicology (ABFT).*

Upon request of the person whose blood was analyzed, the test results shall be made available to him.

The Director may delegate or assign these duties to an employee of the Division of Forensic Science. § 18.2-268.8. Fees.

Payment for withdrawing blood shall not exceed ~~twenty-five dollars~~ \$25, which shall be paid out of the appropriation for criminal charges. If the person whose blood sample was withdrawn is subsequently convicted for a violation of § 18.2-266 or § 18.2-266.1 or of a similar ordinance, or is placed under the purview of a probational, educational, or rehabilitational program as set forth in § 18.2-271.1, the amount charged by the person withdrawing the sample shall be taxed as part of the costs of the criminal case and shall be paid into the general fund of the state treasury.

~~Approved laboratories determining the alcohol content of the second blood sample shall be allowed a fee not to exceed the amount established on the Division's fee schedule and shall be paid out of the appropriation for criminal charges. Payment for determining the presence of a drug or drugs in the second sample may not exceed the amount established on the Division's fee schedule and shall be paid out of the appropriation for criminal charges.~~

If the person whose blood sample was withdrawn is subsequently convicted for violation of § 18.2-266 or § 18.2-266.1 or a similar ordinance, (i) ~~the fee paid by the Commonwealth to the laboratory for testing the second blood sample and~~ (ii) a fee of ~~twenty-five dollars~~ \$25 for testing the first blood sample by the Division shall be taxed as part of the costs of the criminal case and shall be paid into the general fund of the state treasury.

§ 18.2-268.11. Substantial compliance.

The steps set forth in §§ 18.2-268.2 through 18.2-268.9 relating to taking, handling, identifying, and disposing of blood or breath samples are procedural and not substantive. Substantial compliance shall be sufficient. Failure to comply with any steps or portions thereof, ~~or a variance in the results of the two blood tests~~ shall not of itself be grounds for finding the defendant not guilty, but shall go to the weight of the evidence and shall be considered with all the evidence in the case; however, the defendant shall have the right to introduce evidence on his own behalf to show noncompliance with the aforesaid procedures or any part thereof, and that as a result his rights were prejudiced.

§ 46.2-341.26:6. Transmission of blood samples.

A. ~~Adequate portions of the blood samples~~ *The blood sample* withdrawn pursuant to § 46.2-341.26:5 shall be placed in vials provided ~~or approved~~ by the Division of Forensic Science. The vials shall be sealed by the person taking the sample or at his direction. The person who seals the ~~vial~~ *vials* shall complete the prenumbered certificate of blood withdrawal ~~form attached forms and attach one form to the each vial by the Division.~~ The completed withdrawal certificate for each vial shall show the name of the suspect, the name of the person taking the blood sample, ~~and~~ the date and time the blood sample was taken and information identifying the arresting or accompanying officer. ~~The officer shall initial the completed certificate.~~ The vials shall be divided between two containers ~~shall be placed in a container~~ provided by the Division, and the ~~containers~~ *container* shall be sealed to prevent tampering with the ~~vial~~ *vials*. A law-enforcement officer shall take possession of the ~~two containers~~ *container* as soon as the vials are placed in such ~~containers~~ *container* and sealed, and shall promptly transport or mail ~~one of the containers~~ *the container* to the Division. Immediately after taking possession of the second container, the officer shall give to the suspect a form provided by the Division which sets forth the procedure to obtain an independent analysis of the blood in the second container, and a list of the names and addresses of laboratories approved by the Division. The form shall contain a space for the suspect or his counsel to direct the officer possessing the second container to forward that container to an approved laboratory for analysis, if desired. If the accused directs the officer in writing on the form to forward the second container to an approved laboratory of the accused's choice, the officer shall do so.

If the accused does not direct otherwise on the form, the officer having the second container shall deliver it to the chief police officer of the locality in which the case will be heard. The chief police

officer, on receiving the second container, shall retain it for a period of seventy-two hours, during which time the suspect or his counsel may, in writing, on the form provided hereinabove, direct the chief police officer to mail it to the laboratory the suspect has chosen from the approved list.

B. The contents of the second container shall be transmitted, tested and admitted in evidence in the same manner and in accordance with the procedures established for the sample sent to the Division; however, an analysis of the second blood sample to determine the presence of a drug or drugs shall not be performed unless an analysis of the first blood sample by the Division has indicated the presence of such drug or drugs.

C. If the chief police officer having possession of the second container is not directed to mail it within seventy-two hours after receiving the container, he shall destroy such container.

§ 46.2-341.26:7. Transmission of samples.

A. Upon receipt of a blood sample forwarded to the Division for analysis pursuant to § 46.2-341.26:6, the Division shall have it examined for its alcohol or drug content, and the Director shall execute a certificate of analysis indicating the name of the suspect; the date, time, and by whom the blood sample was received and examined; a statement that the seal on the vial had not been broken or otherwise tampered with; a statement that the container and vial were provided *or approved* by the Division and that the vial was one to which the completed withdrawal certificate was attached; and a statement of the sample's alcohol or drug content. The Director or his representative shall remove the withdrawal certificate from the vial, attach it to the certificate of analysis and state in the certificate of analysis that it was so removed and attached. The certificate of analysis with the withdrawal certificate shall be returned to the clerk of the court in which the charge will be heard. ~~The vial and blood sample shall be destroyed after completion of the analysis. A similar certificate of analysis, with the withdrawal certificate from the independent laboratory which analyzes the second blood sample on behalf of the suspect, shall be returned to the clerk of the court in which the case will be heard. The blood sample shall be destroyed after completion of the analysis by the independent laboratory.~~ *After completion of the analysis, the Division of Forensic Science shall preserve the remainder of the blood until 90 days have lapsed from the date the blood was drawn. During this 90-day period, the accused may, by motion filed before the court in which the charge will be heard, with notice to the Division, request an order directing the Division of Forensic Science to transmit the remainder of the blood sample to an independent laboratory retained by the accused for analysis. The Division shall destroy the remainder of the blood sample if no notice of a motion to transmit the remaining blood sample is received during the 90-day period.*

B. When a blood sample taken in accordance with the provisions of §§ 46.2-341.26:2 through 46.2-341.26:6 is forwarded for analysis to the Division, a report of the test results shall be filed in that office. ~~On~~ *Upon* proper identification of the certificate of withdrawal, the certificate of analysis, with the withdrawal certificate attached, shall, when attested by the Director, be admissible in any court, in any criminal or civil proceeding, as evidence of the facts therein stated and of the results of such analysis. ~~On motion of the accused, the certificate prepared for the second sample shall be admissible in evidence when attested by the pathologist or by the supervisor of the approved laboratory.~~ *report of analysis prepared for the remaining blood sample shall be admissible in evidence provided the report is duly attested by a person performing such analysis and the independent laboratory that performed the analysis is accredited or certified to conduct forensic blood alcohol/drug testing by one or more of the following bodies: American Society of Crime Laboratory Directors/Laboratory Accreditation Board (ASCLD/LAB); College of American Pathologists (CAP); United States Department of Health and Human Services Substance Abuse and Mental Health Services Administration (SAMHSA); or American Board of Forensic Toxicology (ABFT).*

Upon request of the person whose blood or breath was analyzed, the test results shall be made available to him.

*The Director may delegate or assign these duties to an employee of the Division of Forensic Science.*

§ 46.2-341.26:8. Fees.

Payment for withdrawing blood shall not exceed ~~twenty-five dollars~~ \$25, which shall be paid out of the appropriation for criminal charges. ~~Laboratories determining the alcohol content of the second blood sample shall be allowed no more than twenty-five dollars, which shall be paid out of the appropriation for criminal charges.~~ Payment for determining the presence of a drug or drugs in the second sample may not exceed the amount established on the Division's fee schedule and shall be paid out of the appropriation for criminal charges.

If the person whose blood sample was withdrawn is subsequently convicted for violation of § 46.2-341.24 or § 46.2-341.31, any fees paid by the Commonwealth to the person withdrawing the sample and to the laboratory for testing the blood sample shall be taxed as part of the costs of the criminal case and shall be paid into the general fund of the state treasury.

§ 46.2-341.26:11. Substantial compliance.

The steps set forth in §§ 46.2-341.26:2 through 46.2-341.26:9 relating to taking, handling, identifying, and disposing of blood or breath samples are procedural and not substantive. Substantial compliance shall be sufficient. Failure to comply with any steps or portions thereof, ~~or a variance in the~~

results of the two blood tests shall not of itself be grounds for finding the defendant not guilty, but shall go to the weight of the evidence and shall be considered with all the evidence in the case; however, the defendant shall have the right to introduce evidence on his own behalf to show noncompliance with the aforesaid procedures or any part thereof, and that as a result his rights were prejudiced.