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SENATE BILL NO. 106

Offered January 13, 2010

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A BILL to amend and reenact §§ 18.2-268.7, 18.2-472.1, 19.2-187, and 19.2-187.1 of the Code of Virginia, relating to affidavits and certificates of analysis.

Patron—McDougle

Referred to Committee for Courts of Justice

Be it enacted by the General Assembly of Virginia:

1. That §§ 18.2-268.7, 18.2-472.1, 19.2-187, and 19.2-187.1 of the Code of Virginia are amended and reenacted as follows:

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

A. Upon receipt of a blood sample forwarded to the Department for analysis pursuant to § 18.2-268.6, the Department 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 Department 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.

B. After completion of the analysis, the Department 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 Department, request an order directing the Department to transmit the remainder of the blood sample to an independent laboratory retained by the accused for analysis. If the accused intends to offer an independent analysis of the sample at trial, he shall give a written copy of the analysis to the attorney for the Commonwealth no later than 14 days prior to trial. The Department 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.

C. 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 Department, 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 as evidence of the facts therein stated and of the results of such analysis (i) in any criminal proceeding, provided the requirements of subsection A of § 19.2-187.1 have been satisfied and the accused has not objected to the admission of the certificate pursuant to subsection B of § 19.2-187.1, or (ii) in any civil proceeding. On motion of the accused, the 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 Department.

§ 18.2-472.1. Providing false information or failing to provide registration information; penalty; prima facie evidence.

A. Any person subject to Chapter 9 (§ 9.1-900 et seq.) of Title 9.1, other than a person convicted of a sexually violent offense or murder as defined in § 9.1-902, who knowingly fails to register or reregister, or who knowingly provides materially false information to the Sex Offender and Crimes Against Minors Registry is guilty of a Class 1 misdemeanor. A second or subsequent conviction for an offense under this subsection is a Class 6 felony.

B. Any person convicted of a sexually violent offense or murder, as defined in § 9.1-902, who knowingly fails to register or reregister, or who knowingly provides materially false information to the

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59 Sex Offender and Crimes Against Minors Registry is guilty of a Class 6 felony. A second or subsequent
60 conviction for an offense under this subsection is a Class 5 felony.

61 C. A prosecution pursuant to this section shall be brought in the city or county where the offender
62 can be found or where the offender last registered or reregistered or, if the offender failed to comply
63 with the duty to register, where the offender was last convicted of an offense for which registration or
64 reregistration is required.

65 D. At any preliminary hearing pursuant to this section, an affidavit from the State Police issued as
66 required in § 9.1-907 shall be admitted into evidence as prima facie evidence of the failure to comply
67 with the duty to register or reregister and a copy of such affidavit shall be provided to the registrant or
68 his counsel seven days prior to hearing or trial by the attorney for the Commonwealth.

69 E. The accused in any preliminary hearing in which an affidavit from the State Police issued as
70 required in § 9.1-907 is offered into evidence pursuant to this section shall have the right to call a
71 custodian of records issuing the affidavit and examine him in the same manner as if he had been called
72 as an adverse witness. Such witness shall be summoned and appear at the cost of the Commonwealth.

73 F. At any trial or hearing other than a preliminary hearing conducted pursuant to this section, an
74 affidavit from the State Police issued as required in § 9.1-907 shall constitute prima facie evidence of
75 the failure to comply with the duty to register or reregister, provided the requirements of subsection G
76 have been satisfied and the accused has not objected to the admission of the affidavit pursuant to
77 subsection H.

78 G. If the attorney for the Commonwealth intends to offer the affidavit into evidence *in lieu of*
79 *testimony* at a trial or hearing, other than a preliminary hearing, he shall:

80 1. Provide by mail, delivery, or otherwise, a copy of the affidavit to counsel of record for the
81 accused, or to the accused if he is proceeding pro se, at no charge, no later than 28 days prior to the
82 hearing or trial;

83 2. ~~Attach to~~ *Send simultaneously with* the copy of the affidavit so provided under subdivision 1 a
84 notice to the accused of his right to object to having the affidavit admitted without the presence and
85 testimony of a custodian of the records; and

86 3. File a copy of the affidavit and notice with the clerk of the court hearing the matter on the day
87 that the affidavit and notice are provided to the accused.

88 H. The accused may object in writing to admission of the affidavit, in lieu of testimony, as evidence
89 of the facts stated therein. Such objection shall be filed with the court hearing the matter, with a copy to
90 the attorney for the Commonwealth, no more than 14 days after the affidavit and notice were filed with
91 the clerk by the attorney for the Commonwealth, or the objection shall be deemed waived. If timely
92 objection is made, the affidavit shall not be admissible into evidence unless (i) the objection is waived
93 by the accused or his counsel in writing or before the court, or (ii) the parties stipulate before the court
94 to the admissibility of the affidavit.

95 I. Where a custodian of the records is not available for hearing or trial and the attorney for the
96 Commonwealth has used due diligence to secure the presence of the person, the court shall order a
97 continuance. Any continuances ordered pursuant to this subsection shall total not more than 90 days if
98 the accused has been held continuously in custody and not more than 180 days if the accused has not
99 been held continuously in custody.

100 J. Any objection by counsel for the accused, or the accused if he is proceeding pro se, to timeliness
101 of the receipt of notice required by subsection G shall be made before hearing or trial upon his receipt
102 of actual notice unless the accused did not receive actual notice prior to hearing or trial. A showing by
103 the Commonwealth that the notice was mailed, delivered, or otherwise provided in compliance with the
104 time requirements of this section shall constitute prima facie evidence that the notice was timely
105 received by the accused. If the court finds upon the accused's objection made pursuant to this
106 subsection, that he did not receive timely notice pursuant to subsection G, the accused's objection shall
107 not be deemed waived and if the objection is made prior to hearing or trial, a continuance shall be
108 ordered if requested by either party. Any continuance ordered pursuant to this subsection shall be subject
109 to the time limitations set forth in subsection I.

110 K. For the purposes of this section any conviction for a substantially similar offense under the laws
111 of (i) any foreign country or any political subdivision thereof, or (ii) any state or territory of the United
112 States or any political subdivision thereof, the District of Columbia, or the United States shall be
113 considered a prior conviction.

114 § 19.2-187. Admission into evidence of certain certificates of analysis.

115 In any hearing or trial of any criminal offense or in any proceeding brought pursuant to Chapter 22.1
116 (§ 19.2-386.1 et seq.) of this title, a certificate of analysis of a person performing an analysis or
117 examination, duly attested by such person, shall be admissible in evidence as evidence of the facts
118 therein stated and the results of the analysis or examination referred to therein, provided (i) the
119 certificate of analysis is filed with the clerk of the court hearing the case at least seven days prior to the
120 proceeding if the attorney for the Commonwealth intends to offer it into evidence in a preliminary

121 hearing or the accused intends to offer it into evidence in any hearing or trial, or (ii) the requirements of
 122 subsection A of § 19.2-187.1 have been satisfied and the accused has not objected to the admission of
 123 the certificate pursuant to subsection B of § 19.2-187.1, when any such analysis or examination is
 124 performed in any laboratory operated by the Division of Consolidated Laboratory Services or the
 125 Department of Forensic Science or authorized by such Department to conduct such analysis or
 126 examination, or performed by a person licensed by the Department of Forensic Science pursuant to
 127 § 18.2-268.9 or 46.2-341.26:9 to conduct such analysis or examination, or performed by the Federal
 128 Bureau of Investigation, the federal Postal Inspection Service, the federal Bureau of Alcohol, Tobacco
 129 and Firearms, the Naval Criminal Investigative Service, the National Fish and Wildlife Forensics
 130 Laboratory, the federal Drug Enforcement Administration, or the United States Secret Service
 131 Laboratory.

132 In a hearing or trial in which the provisions of subsection A of § 19.2-187.1 do not apply, a copy of
 133 such certificate shall be mailed or delivered by the clerk or attorney for the Commonwealth to counsel
 134 of record for the accused at no charge at least seven days prior to the hearing or trial upon request made
 135 by such counsel to the clerk with notice of the request to the attorney for the Commonwealth. The
 136 request to the clerk shall be on a form prescribed by the Supreme Court and filed with the clerk at least
 137 10 days prior to the hearing or trial. In the event that a request for a copy of a certificate is filed with
 138 the clerk with respect to a case that is not yet before the court, the clerk shall advise the requester that
 139 he must resubmit the request at such time as the case is properly before the court in order for such
 140 request to be effective. If, upon proper request made by counsel of record for the accused, a copy of
 141 such certificate is not mailed or delivered by the clerk or attorney for the Commonwealth to counsel of
 142 record for the accused in a timely manner in accordance with this section, the accused shall be entitled
 143 to continue the hearing or trial.

144 The certificate of analysis of any examination conducted by the Department of Forensic Science
 145 relating to a controlled substance or marijuana shall be mailed or forwarded by personnel of the
 146 Department of Forensic Science to the attorney for the Commonwealth of the jurisdiction where such
 147 offense may be heard. The attorney for the Commonwealth shall acknowledge receipt of the certificate
 148 on forms provided by the laboratory.

149 Any such certificate of analysis purporting to be signed by any such person shall be admissible as
 150 evidence in such hearing or trial without any proof of the seal or signature or of the official character of
 151 the person whose name is signed to it.

152 *For the purposes of this section and §§ 19.2-187.01 through 19.2-187.2, the term "certificate of*
 153 *analysis" includes affidavits and reports of examination.*

154 § 19.2-187.1. Procedures for notifying accused of certificate of analysis; waiver; continuances.

155 A. In any trial and in any hearing other than a preliminary hearing, in which the attorney for the
 156 Commonwealth intends to offer a certificate of analysis into evidence *in lieu of testimony* pursuant to
 157 § 19.2-187, the attorney for the Commonwealth shall:

158 1. Provide by mail, delivery, or otherwise, a copy of the certificate to counsel of record for the
 159 accused, or to the accused if he is proceeding pro se, at no charge, no later than 28 days prior to the
 160 hearing or trial;

161 2. ~~Attach to~~ *Send simultaneously with* the copy of the certificate so provided under subdivision 1 a
 162 notice to the accused of his right to object to having the certificate admitted without the person who
 163 performed the analysis or examination being present and testifying; and

164 3. File a copy of the certificate and notice with the clerk of the court hearing the matter on the day
 165 that the certificate and notice are provided to the accused.

166 B. The accused may object in writing to admission of the certificate of analysis, in lieu of testimony,
 167 as evidence of the facts stated therein and of the results of the analysis or examination. Such objection
 168 shall be filed with the court hearing the matter, with a copy to the attorney for the Commonwealth, no
 169 more than 14 days after the certificate and notice were filed with the clerk by the attorney for the
 170 Commonwealth or the objection shall be deemed waived. If timely objection is made, the certificate
 171 shall not be admissible into evidence unless (i) the testimony of the person who performed the analysis
 172 or examination is admitted into evidence describing the facts and results of the analysis or examination
 173 during the Commonwealth's case-in-chief at the hearing or trial and that person is present and subject to
 174 cross-examination by the accused, (ii) the objection is waived by the accused or his counsel in writing
 175 or before the court, or (iii) the parties stipulate before the court to the admissibility of the certificate.

176 C. Where the person who performed the analysis and examination is not available for hearing or trial
 177 and the attorney for the Commonwealth has used due diligence to secure the presence of the person, the
 178 court shall order a continuance. Any continuances ordered pursuant to this subsection shall total not
 179 more than 90 days if the accused has been held continuously in custody and not more than 180 days if
 180 the accused has not been held continuously in custody.

181 D. Any objection by counsel for the accused, or the accused if he is proceeding pro se, to timeliness

182 of the receipt of notice required by subsection A shall be made before hearing or trial upon his receipt
183 of actual notice unless the accused did not receive actual notice prior to hearing or trial. A showing by
184 the Commonwealth that the notice was mailed, delivered, or otherwise provided in compliance with the
185 time requirements of this section shall constitute prima facie evidence that the notice was timely
186 received by the accused. If the court finds upon the accused's objection made pursuant to this
187 subsection, that he did not receive timely notice pursuant to subsection A, the accused's objection shall
188 not be deemed waived and if the objection is made prior to hearing or trial, a continuance shall be
189 ordered if requested by either party. Any continuance ordered pursuant to this subsection shall be subject
190 to the time limitations set forth in subsection C.

191 E. The accused in any hearing or trial in which a certificate of analysis is offered into evidence shall
192 have the right to call the person performing such analysis or examination or involved in the chain of
193 custody as a witness therein, and examine him in the same manner as if he had been called as an
194 adverse witness. Such witness shall be summoned and appear at the cost of the Commonwealth.