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SENATE BILL NO. 149

Offered January 13, 2010

Prefiled January 11, 2010

A *BILL to amend and reenact §§ 18.2-472.1 and 19.2-187.1 of the Code of Virginia, relating to admission into evidence of certificates of analysis and affidavits.*

Patron—Stuart

Referred to Committee for Courts of Justice

Be it enacted by the General Assembly of Virginia:

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

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

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

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

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

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

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

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

2. Attach to the copy of the affidavit so provided under subdivision 1 a notice to the accused of his right to object to having the affidavit admitted without the presence and testimony of a custodian of the records; and

3. File a copy of the affidavit and notice with the clerk of the court hearing the matter on the day ~~that~~ *or within two days after* the affidavit and notice are provided to the accused.

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

I. Where a custodian of the records is not available for hearing or trial and the attorney for the

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SB149

59 Commonwealth has used due diligence to secure the presence of the person, the court shall order a
60 continuance. Any continuances ordered pursuant to this subsection shall total not more than 90 days if
61 the accused has been held continuously in custody and not more than 180 days if the accused has not
62 been held continuously in custody.

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

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

77 § 19.2-187.1. Procedures for notifying accused of certificate of analysis; waiver; continuances.

78 A. In any trial and in any hearing other than a preliminary hearing, in which the attorney for the
79 Commonwealth intends to offer a certificate of analysis *in lieu of the testimony of the analyst or breath*
80 *test operator* into evidence pursuant to § 19.2-187, the attorney for the Commonwealth shall:

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

84 2. Attach to the copy of the certificate so provided under subdivision 1 a notice to the accused of his
85 right to object to having the certificate admitted without the person who performed the analysis or
86 examination being present and testifying; and

87 3. File a copy of the certificate and notice with the clerk of the court hearing the matter on the day
88 ~~that~~ *or within two days after* the certificate and notice are provided to the accused.

89 B. The accused may object in writing to admission of the certificate of analysis, in lieu of testimony,
90 as evidence of the facts stated therein and of the results of the analysis or examination. Such objection
91 shall be filed with the court hearing the matter, with a copy to the attorney for the Commonwealth, no
92 more than 14 days after the certificate and notice were filed with the clerk by the attorney for the
93 Commonwealth or the objection shall be deemed waived. If timely objection is made, the certificate
94 shall not be admissible into evidence unless (i) the testimony of the person who performed the analysis
95 or examination is admitted into evidence describing the facts and results of the analysis or examination
96 during the Commonwealth's case-in-chief at the hearing or trial and that person is present *or with the*
97 *consent of the accused and the Commonwealth, by two-way video conferencing*, and subject to
98 cross-examination by the accused, (ii) the objection is waived by the accused or his counsel in writing
99 or before the court, or (iii) the parties stipulate before the court to the admissibility of the certificate.

100 C. Where the person who performed the analysis and examination is not available for hearing or trial
101 and the attorney for the Commonwealth has used due diligence to secure the presence of the person, the
102 court shall order a continuance. Any continuances ordered pursuant to this subsection shall total not
103 more than ~~90 days~~ *five months* if the accused has been held continuously in custody and not more than
104 ~~180 days~~ *nine months* if the accused has not been held continuously in custody.

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

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