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SENATE BILL NO. 387

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the House Committee for Courts of Justice
on March 8, 2010)

(Patrons Prior to Substitute—Senators Obenshain and Stuart [SB 149])

A *BILL to amend and reenact §§ 19.2-3.1 and 19.2-187.1 of the Code of Virginia, relating to certificates of analysis; video conferencing.*

Be it enacted by the General Assembly of Virginia:

1. That §§ 19.2-3.1 and 19.2-187.1 of the Code of Virginia are amended and reenacted as follows:

§ 19.2-3.1. Personal appearance by two-way electronic video and audio communication; standards.

A. Where an appearance is required or permitted before a magistrate, intake officer or, prior to trial, before a judge, the appearance may be by (i) personal appearance before the magistrate, intake officer or judge or (ii) use of two-way electronic video and audio communication. If two-way electronic video and audio communication is used, a magistrate, intake officer or judge may exercise all powers conferred by law and all communications and proceedings shall be conducted in the same manner as if the appearance were in person. If two-way electronic video and audio communication is available for use by a district court for the conduct of a hearing to determine bail or to determine representation by counsel, the court shall use such communication in any such proceeding that would otherwise require the transportation of a person from outside the jurisdiction of the court in order to appear in person before the court. Any documents transmitted between the magistrate, intake officer, or judge and the person appearing before the magistrate, intake officer, or judge may be transmitted by electronically transmitted facsimile process or other electronic method. The facsimile or other electronically generated document may be served or executed by the officer or person to whom sent, and returned in the same manner, and with the same force, effect, authority, and liability as an original document. All signatures thereon shall be treated as original signatures.

B. Any two-way electronic video and audio communication system used for an appearance shall meet the following standards:

1. The persons communicating must simultaneously see and speak to one another;

2. The signal transmission must be live, real time;

3. The signal transmission must be secure from interception through lawful means by anyone other than the persons communicating; and

4. Any other specifications as may be promulgated by the Chief Justice of the Supreme Court.

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

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

1. Provide by mail, delivery, or otherwise, a copy of the certificate 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 certificate so provided under subdivision 1 a notice to the accused of his right to object to having the certificate admitted without the person who performed the analysis or examination being present and testifying;

2a. *When the attorney for the Commonwealth intends to present such testimony through two-way video conferencing, attach to the copy of the certificate provided under subdivision 1 a notice on a page separate from the notice in subdivision 2 specifying that the person who performed the analysis or examination may testify by two-way video conferencing and that the accused has a right to object to such two-way video testimony; and*

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

B. The accused may object in writing to admission of the certificate of analysis, in lieu of testimony, as evidence of the facts stated therein and of the results of the analysis or examination. 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 certificate 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 certificate shall not be admissible into evidence unless (i) the testimony of the person who performed the analysis or examination is admitted into evidence describing the facts and results of the analysis or examination during the Commonwealth's case-in-chief at the hearing or trial and that person is present and subject to cross-examination by the accused, (ii) the objection is waived by the accused or his counsel in writing or before the court, or (iii) the parties stipulate before the court to the admissibility of the certificate.

60 *B1. When the attorney for the Commonwealth gives notice to the accused of intent to present*
61 *testimony by two-way video conferencing, the accused may object in writing to the admission of such*
62 *testimony and may file an objection as provided in subsection B. The provisions of subsection B shall*
63 *apply to such objection mutatis mutandis.*

64 *B2. The two-way video testimony permitted by this section shall comply with the provisions of*
65 *subsection B of § 19.2-3.1. In addition, unless otherwise agreed by the parties and the court, (i) all*
66 *orders pertaining to witnesses apply to witnesses testifying by video conferencing; (ii) upon request, all*
67 *materials read or used by the witness during his testimony shall be identified on the video; and (iii) any*
68 *witness testifying by video conferencing shall certify at the conclusion of his testimony, under penalty of*
69 *perjury, that he did not engage in any off-camera communications with any person during his testimony.*

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

75 *D. Any objection by counsel for the accused, or the accused if he is proceeding pro se, to timeliness*
76 *of the receipt of notice required by subsection A shall be made before hearing or trial upon his receipt*
77 *of actual notice unless the accused did not receive actual notice prior to hearing or trial. A showing by*
78 *the Commonwealth that the notice was mailed, delivered, or otherwise provided in compliance with the*
79 *time requirements of this section shall constitute prima facie evidence that the notice was timely*
80 *received by the accused. If the court finds upon the accused's objection made pursuant to this*
81 *subsection, that he did not receive timely notice pursuant to subsection A, the accused's objection shall*
82 *not be deemed waived and if the objection is made prior to hearing or trial, a continuance shall be*
83 *ordered if requested by either party. Any continuance ordered pursuant to this subsection shall be subject*
84 *to the time limitations set forth in subsection C.*

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