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HOUSE BILL NO. 2007

Offered January 9, 2013

Prefiled January 9, 2013

A *BILL to amend and reenact §§ 18.2-472.1 and 19.2-187.1 of the Code of Virginia, relating to testimony by custodians of records, lab analysts, etc.; use of two-way electronic video and audio communication.*

Patron—Cline

Referred to Committee on Science and Technology

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. 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 summon and 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 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. Provide simultaneously with 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 the affidavit and notice are provided to the accused.

H. In any trial or hearing, other than a preliminary hearing, 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

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59 affidavit.

60 *H1. If timely objection is made pursuant to subsection H, the custodian of the records who issued the*
61 *affidavit shall, upon motion of the attorney for the Commonwealth, be permitted to have his testimony*
62 *taken in a room outside the courtroom and be transmitted by two-way electronic video and audio*
63 *communication. The testimony of the witness permitted to testify via two-way electronic video and audio*
64 *communication shall be transmitted into the courtroom for the defendant, jury, judge, and public to*
65 *view. The defendant shall be provided with a means of private, contemporaneous communication with*
66 *his attorney during the testimony. The two-way electronic video and audio communication system used*
67 *pursuant to this subsection shall meet the standards set forth in subsection B of § 19.2-3.1. In addition,*
68 *unless otherwise agreed by the parties and the court, (i) all orders pertaining to witnesses apply to*
69 *witnesses testifying by video conferencing; (ii) upon request, all materials read or used by the witness*
70 *during his testimony shall be identified on the video; and (iii) any witness testifying by video*
71 *conferencing shall certify at the conclusion of his testimony, under penalty of perjury, that he did not*
72 *engage in any off-camera communications with any person during his testimony. Notwithstanding any*
73 *other provision of law, none of the cost of the two-way closed-circuit television shall be assessed against*
74 *the defendant.*

75 I. Where a custodian of the records is not available for hearing or trial, *whether in person or via*
76 *two-way electronic video and audio communication*, and the attorney for the Commonwealth has used
77 due diligence to secure the presence of the person, the court shall order a continuance. Any continuances
78 ordered pursuant to this subsection shall total not more than 90 days if the accused has been held
79 continuously in custody and not more than 180 days if the accused has not been held continuously in
80 custody.

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

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

95 **§ 19.2-187.1. Procedures for notifying accused of certificate of analysis; waiver; continuances.**

96 A. In any trial and in any hearing other than a preliminary hearing, in which the attorney for the
97 Commonwealth intends to offer a certificate of analysis into evidence in lieu of testimony pursuant to §
98 19.2-187, the attorney for the Commonwealth shall:

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

102 2. Provide simultaneously with the copy of the certificate so provided under subdivision 1 a notice to
103 the accused of his right to object to having the certificate admitted without the person who performed
104 the analysis or examination being present and testifying;

105 ~~2a. When the attorney for the Commonwealth intends to present such testimony through two-way~~
106 ~~video conferencing, attach to the copy of the certificate provided under subdivision 1 a notice on a page~~
107 ~~separate from the notice in subdivision 2 specifying that the person who performed the analysis or~~
108 ~~examination may testify by two-way video conferencing and that the accused has a right to object to~~
109 ~~such two-way video testimony; and~~

110 3. File a copy of the certificate and notice with the clerk of the court hearing the matter (i) on the
111 day that the certificate and notice are provided to the accused or (ii) in the case of a breath test
112 certificate for a violation of any offense listed in subsection E of § 18.2-270, no later than three business
113 days following the day that the certificate and notice are provided to the accused.

114 B. The accused may object in writing to admission of the certificate of analysis, in lieu of testimony,
115 as evidence of the facts stated therein and of the results of the analysis or examination. Such objection
116 shall be filed with the court hearing the matter, with a copy to the attorney for the Commonwealth, no
117 more than 14 days after the certificate and notice were filed with the clerk by the attorney for the
118 Commonwealth or the objection shall be deemed waived. If timely objection is made, the certificate
119 shall not be admissible into evidence unless (i) the testimony of the person who performed the analysis
120 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. If *two-way electronic video and audio communication is not available to take the testimony of the person who performed the analysis or examination pursuant to subsection B1, and* the accused demands, at hearing or trial, the presence of the person who performed the analysis or examination and he is thereafter found guilty of the charge or charges for which he demanded the presence of such witness, \$50 for expenses related to the witness's appearance at hearing or trial shall be charged to the accused as court costs.

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

B2. *If timely objection is made pursuant to subsection B, the person who performed the analysis or examination shall, upon motion of the attorney for the Commonwealth, be permitted to have his testimony taken in a room outside the courtroom and be transmitted by two-way electronic video and audio communication. The testimony of the witness permitted to testify via two-way electronic video and audio communication shall be transmitted into the courtroom for the defendant, jury, judge, and public to view. The defendant shall be provided with a means of private, contemporaneous communication with his attorney during the testimony.* The two-way video testimony permitted by this section shall comply with the provisions of subsection B of § 19.2-3.1. In addition, unless otherwise agreed by the parties and the court, (i) all orders pertaining to witnesses apply to witnesses testifying by video conferencing; (ii) upon request, all materials read or used by the witness during his testimony shall be identified on the video; and (iii) any witness testifying by video conferencing shall certify at the conclusion of his testimony, under penalty of perjury, that he did not engage in any off-camera communications with any person during his testimony.

C. Where the person who performed the analysis and examination is not available for hearing or trial, *whether in person or via two-way electronic video and audio communication*, and the attorney for the Commonwealth has used due diligence to secure the presence of the person, the court shall order a continuance. Any continuances ordered pursuant to this subsection shall total not more than 90 days if the accused has been held continuously in custody and not more than 180 days if the accused has not been held continuously in custody.

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

E. Nothing in this section shall prohibit the admissibility of a certificate of analysis when the person who performed the analysis and examination testifies at trial or the hearing, *whether in person or via two-way electronic video and audio communication*, concerning the facts stated therein and of the results of the analysis or examination.

F. The accused in any hearing or trial in which a certificate of analysis is offered into evidence shall have the right to call the person performing such analysis or examination or involved in the chain of custody as a witness therein, 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; however, if the accused calls the person performing such analysis or examination as a witness and is found guilty of the charge or charges for which such witness is summoned, \$50 for expenses related to that witness's appearance at hearing or trial shall be charged to the accused as court costs.