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SENATE BILL NO. 1257

Offered January 11, 2017

Prefiled January 10, 2017

A BILL to amend and reenact §§ 19.2-3.1, 19.2-187, and 19.2-187.1 of the Code of Virginia, relating to two-way video testimony; forensic analysis and examination.

Patron—Chafin

Referred to Committee for Courts of Justice

Be it enacted by the General Assembly of Virginia:

1. That §§ 19.2-3.1, 19.2-187, 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.

C. Nothing in this section shall be construed as requiring a locality to purchase a two-way electronic video and audio communication system. Any decision to purchase such a system is at the discretion of the locality.

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

A. In any hearing or trial of any criminal offense or in any proceeding brought pursuant to Chapter 22.1 (§ 19.2-386.1 et seq.), a certificate of analysis of a person performing an analysis or examination, duly attested by such person, shall be admissible in evidence as evidence of the facts therein stated and the results of the analysis or examination referred to therein, provided *that* (i) the certificate of analysis is filed with the clerk of the court hearing the case at least seven days prior to the proceeding if the attorney for the Commonwealth intends to offer it into evidence in a preliminary hearing or the accused intends to offer it into evidence in any hearing or trial, or (ii) 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, when any such analysis or examination is performed in any laboratory operated by the Division of Consolidated Laboratory Services or the Department of Forensic Science or authorized by such Department to conduct such analysis or examination, or performed by a person licensed by the Department of Forensic Science pursuant to § 18.2-268.9 or 46.2-341.26:9 to conduct such analysis or examination, or performed by the Federal Bureau of Investigation, the United States Postal Service, the federal Bureau of Alcohol, Tobacco and Firearms, the Naval Criminal Investigative Service, the National Fish and Wildlife Forensics Laboratory, the federal Drug Enforcement Administration, the Forensic Document Laboratory of the U.S. Department of Homeland Security, or the U.S. Secret Service Laboratory.

B. In a hearing or trial in which the provisions of subsection A of § 19.2-187.1 do not apply, a copy

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SB1257

59 of such certificate shall be mailed or delivered by the clerk or attorney for the Commonwealth to
60 counsel of record for the accused at no charge at least seven days prior to the hearing or trial upon
61 request made by such counsel to the clerk with notice of the request to the attorney for the
62 Commonwealth. The request to the clerk shall be on a form prescribed by the Supreme Court and filed
63 with the clerk at least 10 days prior to the hearing or trial. In the event that a request for a copy of a
64 certificate is filed with the clerk with respect to a case that is not yet before the court, the clerk shall
65 advise the requester that he must resubmit the request at such time as the case is properly before the
66 court in order for such request to be effective. If, upon proper request made by counsel of record for the
67 accused, a copy of such certificate is not mailed or delivered by the clerk or attorney for the
68 Commonwealth to counsel of record for the accused in a timely manner in accordance with this section,
69 the accused shall be entitled to continue the hearing or trial.

70 C. The certificate of analysis of any examination conducted by the Department of Forensic Science
71 relating to a controlled substance or marijuana shall be mailed or forwarded by personnel of the
72 Department of Forensic Science to the attorney for the Commonwealth of the jurisdiction where such
73 offense may be heard. The attorney for the Commonwealth shall acknowledge receipt of the certificate
74 on forms provided by the laboratory.

75 Any such certificate of analysis purporting to be signed, either by hand or by electronic means, by
76 any such person shall be admissible as evidence in such hearing or trial without any proof of the seal or
77 signature or of the official character of the person whose name is signed to it. The attestation signature
78 of a person performing the analysis or examination may be either hand or electronically signed.

79 D. *Any testimony offered by either party in a preliminary hearing or sentencing hearing, or offered*
80 *by the accused in any hearing other than a trial, from a person who performed an analysis or*
81 *examination that resulted in a certificate of analysis may be presented by two-way video conferencing.*
82 *The two-way video testimony permitted by this section shall comply with the provisions of subsection B*
83 *of § 19.2-3.1. In addition, unless otherwise agreed by the parties and the court, (i) all orders pertaining*
84 *to witnesses apply to witnesses testifying by video conferencing; (ii) upon request, all materials read or*
85 *used by the witness during his testimony shall be identified on the video; and (iii) any witness testifying*
86 *by video conferencing shall certify at the conclusion of his testimony, under penalty of perjury, that he*
87 *did not engage in any off-camera communications with any person during his testimony.*

88 E. For the purposes of this section and §§ 19.2-187.01, 19.2-187.1, and 19.2-187.2, the term
89 "certificate of analysis" includes reports of analysis and results of laboratory examination.

90 F. *Nothing in this section shall be construed as requiring a locality to purchase a two-way electronic*
91 *video and audio communication system. Any decision to purchase such a system is at the discretion of*
92 *the locality.*

93 **§ 19.2-187.1. Procedures for notifying accused of certificate of analysis; waiver; continuances.**

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

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

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

103 2a. When the attorney for the Commonwealth intends to present such testimony through two-way
104 video conferencing, attach to the copy of the certificate provided under subdivision 1 a notice on a page
105 separate from the notice in subdivision 2 specifying that the person who performed the analysis or
106 examination may testify by two-way video conferencing and that the accused has a right to object to
107 such two-way video testimony; and

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

112 B. The accused may object in writing to admission of the certificate of analysis, in lieu of testimony,
113 as evidence of the facts stated therein and of the results of the analysis or examination. Such objection
114 shall be filed with the court hearing the matter, with a copy to the attorney for the Commonwealth, no
115 more than 14 days after the certificate and notice were filed with the clerk by the attorney for the
116 Commonwealth or the objection shall be deemed waived. If timely objection is made, the certificate
117 shall not be admissible into evidence unless (i) the testimony of the person who performed the analysis
118 or examination is admitted into evidence describing the facts and results of the analysis or examination
119 during the Commonwealth's case-in-chief at the hearing or trial and that person is present and subject to
120 cross-examination by the accused, (ii) the objection is waived by the accused or his counsel in writing

121 or before the court, or (iii) the parties stipulate before the court to the admissibility of the certificate. If
122 the accused demands, at hearing or trial, the presence of the person who performed the analysis or
123 examination and he is thereafter found guilty of the charge or charges for which he demanded the
124 presence of such witness, \$50 for expenses related to the witness's appearance at hearing or trial shall be
125 charged to the accused as court costs.

126 B1. ~~When~~ *Except as provided in subsection D of § 19.2-187, when* the attorney for the
127 Commonwealth gives notice to the accused of intent to present testimony by two-way video
128 conferencing, the accused may object in writing to the admission of such testimony and may file an
129 objection as provided in subsection B. The provisions of subsection B shall apply to such objection
130 mutatis mutandis.

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

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

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

152 E. Nothing in this section shall prohibit the admissibility of a certificate of analysis when the person
153 who performed the analysis and examination testifies at trial or the hearing concerning the facts stated
154 therein and of the results of the analysis or examination.

155 F. The accused in any hearing or trial in which a certificate of analysis is offered into evidence shall
156 have the right to call the person performing such analysis or examination or involved in the chain of
157 custody as a witness therein, and examine him in the same manner as if he had been called as an
158 adverse witness. Such witness shall be summoned and appear at the cost of the Commonwealth;
159 however, if the accused calls the person performing such analysis or examination as a witness and is
160 found guilty of the charge or charges for which such witness is summoned, \$50 for expenses related to
161 that witness's appearance at hearing or trial shall be charged to the accused as court costs.

162 G. *Nothing in this section shall be construed as requiring a locality to purchase a two-way*
163 *electronic video and audio communication system. Any decision to purchase such a system is at the*
164 *discretion of the locality.*