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## SENATE BILL NO. 1180

## AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the Senate Committee for Courts of Justice  
on February 2, 2011)

(Patron Prior to Substitute—Senator Marsden)

A *BILL to amend the Code of Virginia by adding a section numbered 19.2-268.3, relating to the taking and use of testimony by deposition in a criminal trial.*

**Be it enacted by the General Assembly of Virginia:**

**1. That the Code of Virginia is amended by adding a section numbered 19.2-268.3 as follows:**

*§ 19.2-268.3. Taking and use of witness testimony by deposition.*

*A. When deposition authorized. Upon written motion and notice by the Commonwealth or a defendant, when such defendant is charged with a felony that is pending for trial in a circuit court, and upon a showing that a material witness located within the Commonwealth is likely to be unavailable to testify at the trial because of his impending death, the court may, in its discretion, order that a deposition of the testimony of such witness be taken and that any designated books, papers, documents, or tangible objects, not privileged, be produced at the same time and place, if necessary, for the examination or cross-examination of the witness. The taking of the deposition of the witness shall not be allowed for discovery purposes by either the Commonwealth or the defendant.*

*B. Procedure. The court ordering the deposition shall have the authority to implement any procedure it deems necessary for the taking of the deposition authorized in subsection A. A video recording of the deposition shall be made. The deposition shall be taken before the judge who is to preside at trial, at such time and location as the judge directs. If the judge is unable to preside at such location, he shall preside over the deposition via video conferencing.*

*All parties and counsel shall have the right to be present at the deposition. Examination, cross-examination, and determination of admissibility of evidence shall proceed in the same manner as at trial. A video recording of the deposition shall be done by a person appointed by the judge who shall be independent of both the prosecution and defense. The costs of the taking of the deposition shall be paid by the party moving for such deposition. However, if the moving party is an indigent defendant, all costs associated with the deposition shall be paid from the Criminal Fund and shall be assessed to the defendant as court costs if he is convicted.*

*C. Use of deposition at trial. A video deposition taken pursuant to this section may be used at trial in lieu of live testimony of the witness if the witness is unavailable to testify because of his death. The deposition shall be admissible to the extent allowable under the rules of evidence applied as though the witness were then present and testifying. A record of the video-recorded testimony shall be made a part of the official record of the court proceedings, and shall be made in the same manner as if the witness were present and testifying. The video recording shall be retained by the court.*

*D. Jury instruction. When a deposition taken pursuant to this section is used in any form in a jury trial, the court shall instruct the jury that this procedure is employed for the convenience of the witness and that the jury should draw no inference from its use or from the physical absence of the witness at the trial.*

*E. Application. This section does not supplant any other statute, or rule of court, that authorizes the taking of evidence by videotape.*