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HOUSE BILL NO. 404

Offered January 12, 2022

Prefiled January 11, 2022

A BILL to amend and reenact §§ 17.1-275.5, 19.2-183, and 19.2-243 of the Code of Virginia and to amend the Code of Virginia by adding sections numbered 19.2-188.4 and 19.2-188.5, relating to admission into evidence of certain forensic medical examination reports by sexual assault nurse examiners and sexual assault forensic examiners; testimony by two-way video conferencing; notice and waiver procedures.

Patron—Delaney

Committee Referral Pending

Be it enacted by the General Assembly of Virginia:

1. That §§ 17.1-275.5, 19.2-183, and 19.2-243 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding sections numbered 19.2-188.4 and 19.2-188.5 as follows:

§ 17.1-275.5. Amounts to be added; judgment in favor of the Commonwealth.

A. The clerk shall assess, in addition to the fees provided for by § 17.1-275.1, 17.1-275.2, 17.1-275.3, 17.1-275.4, 17.1-275.7, 17.1-275.8, 17.1-275.9, 17.1-275.10, 17.1-275.11, 17.1-275.11:1, or 17.1-275.12, the following costs:

1. Any amount paid by the Commonwealth for legal representation of the defendant;
2. Any amount paid for trial transcripts;
3. Extradition costs;
4. Costs of psychiatric evaluation;
5. Costs taxed against the defendant as appellant under Rule 5A:30 of the Rules of the Supreme Court;
6. Any fee for a returned check or disallowed credit card charge assessed pursuant to subdivision A 28 of § 17.1-275;
7. Any jury costs;
8. Any assessment made pursuant to subdivision A 10 of § 17.1-275;
9. Any fees prescribed in §§ 18.2-268.8 and 46.2-341.26:8;
10. Any court costs related to an ignition interlock device;
11. Any fee for testing for HIV;
12. Any fee for processing an individual admitted to jail as prescribed in § 15.2-1613.1;
13. Any fee for courthouse security personnel as prescribed in § 53.1-120;
14. Any fee for a DNA sample as prescribed in § 19.2-310.2;
15. Reimbursement to the Commonwealth of medical fees as prescribed in § 19.2-165.1;
16. Any fee for a local criminal justice training academy as prescribed in § 9.1-106;
17. Any fee prescribed by §§ 16.1-69.48:1.01 and 17.1-275.11;
18. Any expenses charged pursuant to subsection B or F of § 19.2-187.1 or subsection B or H of § 19.2-188.5; and
19. Any fee for an electronic summons system as prescribed in § 17.1-279.1.

B. The total amount of assessments described in subsection A, including (i) the fees provided for by § 17.1-275.1, 17.1-275.2, 17.1-275.3, 17.1-275.4, 17.1-275.7, 17.1-275.8, 17.1-275.9, 17.1-275.10, 17.1-275.11, 17.1-275.11:1, or 17.1-275.12 and (ii) all other fines and costs, shall be docketed by the clerk as a judgment against the defendant in favor of the Commonwealth in accordance with § 8.01-446.

§ 19.2-183. Examination of witnesses; assistance of counsel; evidentiary matters and remedies; power to adjourn case.

A. The judge before whom any person is brought for an offense shall, as soon as may be practical, in the presence of such person, examine on oath the witnesses for and against him. Before conducting the hearing or accepting a waiver of the hearing, the judge shall advise the accused of his right to counsel and, if the accused is indigent and the offense charged be punishable by confinement in jail or the state correctional facility, the judge shall appoint counsel as provided by law.

B. At the hearing the judge shall, in the presence of the accused, hear testimony presented for and against the accused in accordance with the rules of evidence applicable to criminal trials in this Commonwealth. In felony cases, the accused shall not be called upon to plead, but he may cross-examine any witness who testifies on behalf of the Commonwealth or on behalf of any other defendant, introduce witnesses in his own behalf, and testify in his own behalf.

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59 C. A judge may adjourn a trial, pending before him, not exceeding 10 days at one time, without the
60 consent of the accused.

61 D. At any preliminary hearing under this section, certificates of analysis and reports prepared
62 pursuant to §§ 19.2-187 and, 19.2-188, and 19.2-188.4 shall be admissible without the testimony of the
63 person preparing such certificate or report.

64 **§ 19.2-188.4. Admission into evidence of certain forensic medical examinations.**

65 A. In any hearing or trial of any criminal offense, a forensic medical examination report conducted
66 by either a sexual assault nurse examiner or a sexual assault forensic examiner shall be admissible in
67 evidence as evidence of the facts therein stated and the results of the examination referred to therein,
68 provided that (i) the forensic medical examination report is filed with the clerk of the court hearing the
69 case at least seven days prior to the proceeding if the attorney for the Commonwealth intends to offer it
70 into evidence in a preliminary hearing or the accused intends to offer it into evidence in any hearing or
71 trial, or (ii) the requirements of subsection A of § 19.2-188.5 have been satisfied and the accused has
72 not objected to the admission of the certificate pursuant to subsection B of § 19.2-188.5.

73 B. In a hearing or trial in which the provisions of subsection A of § 19.2-188.5 do not apply, a copy
74 of such forensic medical examination report shall be mailed or delivered by the clerk or attorney for the
75 Commonwealth to counsel of record for the accused at no charge at least seven days prior to the
76 hearing or trial upon request made by such counsel to the clerk with notice of the request to the
77 attorney for the Commonwealth. The request to the clerk shall be on a form prescribed by the Supreme
78 Court and filed with the clerk at least 10 days prior to the hearing or trial. In the event that a request
79 for a copy of a forensic medical examination report is filed with the clerk with respect to a case that is
80 not yet before the court, the clerk shall advise the requester that he must resubmit the request at such
81 time as the case is properly before the court in order for such request to be effective. If, upon proper
82 request made by counsel of record for the accused, a copy of such forensic medical examination report
83 is not mailed or delivered by the clerk or attorney for the Commonwealth to counsel of record for the
84 accused in a timely manner in accordance with this section, the accused shall be entitled to continue the
85 hearing or trial.

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

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

98 **§ 19.2-188.5. Procedures for notifying accused of testimony or report of sexual assault nurse**
99 **examiner or sexual assault forensic examiner; waiver; continuances.**

100 A. In any trial and in any hearing other than a preliminary hearing, in which the attorney for the
101 Commonwealth intends to offer the results of a forensic medical examination conducted by either a
102 sexual assault nurse examiner or a sexual assault forensic examiner, the attorney for the Commonwealth
103 shall:

104 1. Provide by mail, delivery, or otherwise a copy of the forensic medical examination report and a
105 notice of the intent to introduce the report into evidence to counsel of record for the accused, or to the
106 accused if he is proceeding pro so, at no charge, no later than 28 days prior to the hearing or trial;

107 2. Provide simultaneously with the copy of the report so provided under subdivision 1 a notice to the
108 accused of his right to object to having the report admitted without the sexual assault nurse examiner or
109 a sexual assault forensic examiner who performed the examination being present and testifying;

110 3. When the attorney for the Commonwealth intends to present testimony of a sexual assault nurse
111 examiner or a sexual assault forensic examiner through two-way video conferencing, attach to the copy
112 of the report provided under subdivision 1 a notice on a page separate from the notice in subdivision 2
113 specifying that the sexual assault nurse examiner or sexual assault forensic examiner may testify by
114 two-way video conferencing and that the accused has a right to object to such two-way video testimony;
115 and

116 4. File a copy of the report and notices with the clerk of the court hearing the matter no later than
117 three business days following the day such report and notices are provided to the accused.

118 B. The accused may object in writing to admission of the report, in lieu of testimony, as evidence of
119 the facts stated therein and of the results of the examination. Such objection shall be filed with the court
120 hearing the matter, with a copy to the attorney for the Commonwealth, no more than 14 days after the

report and notices were filed with the clerk by the attorney for the Commonwealth or the objection shall be deemed waived. If timely objection is made, the report shall not be admissible into evidence unless (i) the testimony of the sexual assault nurse examiner or sexual assault forensic examiner who performed the examination is admitted into evidence describing the facts and results of the examination during the Commonwealth's case-in-chief at the hearing or trial and that sexual assault nurse examiner or a sexual assault forensic examiner 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 report. If the accused demands, at hearing or trial, the presence of the sexual assault nurse examiner or sexual assault forensic examiner who performed the 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.

C. Except as provided in subsection C of § 19.2-188.4, 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*.

D. 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.

E. Where the sexual assault nurse examiner or sexual assault forensic examiner who performed the examination is not available for hearing or trial and the attorney for the Commonwealth has used due diligence to secure the presence of such examiner, 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.

F. Any objection by counsel for the accused, or by 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 E.

G. Nothing in this section shall prohibit the admissibility of a forensic medical examination report when the sexual assault nurse examiner or a sexual assault forensic examiner testifies at trial or the hearing concerning the facts stated therein and of the results of the examination.

H. The accused in any hearing or trial in which a forensic medical examination report is offered into evidence shall have the right to call the sexual assault nurse examiner or a sexual assault forensic examiner 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 sexual assault nurse examiner or a sexual assault forensic examiner 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.

I. 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.

§ 19.2-243. Limitation on prosecution of felony due to lapse of time after finding of probable cause; misdemeanors; exceptions.

Where a district court has found that there is probable cause to believe that an adult has committed a felony, the accused, if he is held continuously in custody thereafter, shall be forever discharged from prosecution for such offense if no trial is commenced in the circuit court within five months from the date such probable cause was found by the district court; and if the accused is not held in custody but has been recognized for his appearance in the circuit court to answer for such offense, he shall be forever discharged from prosecution therefor if no trial is commenced in the circuit court within nine months from the date such probable cause was found.

If there was no preliminary hearing in the district court, or if such preliminary hearing was waived

182 by the accused, the commencement of the running of the five and nine months periods, respectively, set
183 forth in this section, shall be from the date an indictment or presentment is found against the accused.

184 If an indictment or presentment is found against the accused but he has not been arrested for the
185 offense charged therein, the five and nine months periods, respectively, shall commence to run from the
186 date of his arrest thereon.

187 Where a case is before a circuit court on appeal from a conviction of a misdemeanor or traffic
188 infraction in a district court, the accused shall be forever discharged from prosecution for such offense if
189 the trial de novo in the circuit court is not commenced (i) within five months from the date of the
190 conviction if the accused has been held continuously in custody or (ii) within nine months of the date of
191 the conviction if the accused has been recognized for his appearance in the circuit court to answer for
192 such offense.

193 The provisions of this section shall not apply to such period of time as the failure to try the accused
194 was caused:

195 1. By his insanity or by reason of his confinement in a hospital for care and observation;

196 2. By the witnesses for the Commonwealth being enticed or kept away, or prevented from attending
197 by sickness or accident;

198 3. By the granting of a separate trial at the request of a person indicted jointly with others for a
199 felony;

200 4. By continuance granted on the motion of the accused or his counsel, or by concurrence of the
201 accused or his counsel in such a motion by the attorney for the Commonwealth, or by the failure of the
202 accused or his counsel to make a timely objection to such a motion by the attorney for the
203 Commonwealth, or by reason of his escaping from jail or failing to appear according to his
204 recognizance;

205 5. By continuance ordered pursuant to subsection I or J of § 18.2-472.1 or, subsection C or D of
206 § 19.2-187.1, or subsection E or F of § 19.2-188.5;

207 6. By the inability of the jury to agree in their verdict; or

208 7. By a natural disaster, civil disorder, or act of God.

209 But the time during the pendency of any appeal in any appellate court shall not be included as
210 applying to the provisions of this section.

211 For the purposes of this section, an arrest on an indictment or warrant or information or presentment
212 is deemed to have occurred only when such indictment, warrant, information, or presentment or the
213 summons or capias to answer such process is served or executed upon the accused and a trial is deemed
214 commenced at the point when jeopardy would attach or when a plea of guilty or nolo contendere is
215 tendered by the defendant. The lodging of a detainer or its equivalent shall not constitute an arrest under
216 this section.