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## SENATE BILL NO. 939

## AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the Senate Committee for Courts of Justice  
on February 2, 2009)

(Patron Prior to Substitute—Senator Watkins)

A BILL to amend the Code of Virginia by adding sections numbered 19.2-264.3:1.3 and 19.2-264.3:4, relating to appointment of experts to assist in the defense of indigent defendants in capital cases.

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia is amended by adding sections numbered 19.2-264.3:1.3 and 19.2-264.3:4 as follows:

§ 19.2-264.3:1.3. Expert assistance for indigent defendants in capital cases.

A. In any case in which an indigent defendant (i) is charged with a capital offense and (ii) is found by the court to be financially unable to pay for expert assistance, the defendant or his attorney may, upon notice to the Commonwealth, move in circuit court for the court to designate another judge in the same circuit to hear an ex parte request for the appointment of a qualified expert to assist in the preparation of the defendant's defense. No ex parte proceeding, communication, or request may be considered pursuant to this section unless a proper showing is made in an adversarial proceeding before the trial judge demonstrating a particularized need for confidentiality. Any such proceeding, communication, or request shall be transcribed and made part of the record available for appellate review or any other post conviction review.

B. The motion for the appointment of a qualified expert shall be in writing, filed under seal, and shall be heard ex parte as soon as practicable by the designated judge. Upon hearing the ex parte request, the designated judge shall find independently a particularized need for confidentiality has been demonstrated before considering the request for expert services. After a hearing upon the motion, the court may order the appointment of a qualified expert upon a showing that the provision of the requested expert services would materially assist the defendant in preparing his defense and the lack of such assistance would result in a fundamentally unfair trial. Any expert appointed pursuant to this subsection shall be compensated in accordance with § 19.2-332. The designated judge shall direct requests for scientific investigations to the Department of Forensic Services or Division of Consolidated Laboratory Services whenever practicable.

C. All ex parte hearings conducted under this section shall be on the record, and the record of the hearings, together with all papers filed and orders entered in connection with ex parte requests for expert assistance, shall be kept under seal as part of the record of the case. Following decision on the motion, whether it is granted or denied, the motion shall remain under seal. The record shall be available for appellate and post conviction review. On motion of any party, and for good cause shown, the court may unseal the record after the trial is concluded. Following final judgment and after all appeals have been exhausted, the court shall unseal all records and other material sealed pursuant to this section. No ex parte ruling by a designated judge pursuant to this section in a proceeding where the Commonwealth is excluded shall be the subject of a claim of error on appeal, or form the basis for relief in any post conviction litigation on behalf of the defendant.

D. This section does not apply to the appointment of a mental health expert pursuant to § 19.2-264.3:1 or 19.2-264.3:1.2.

§19.2-264.3:4 Notice of expert testimony in capital case.

Whenever the defendant, defendant's attorney, or the attorney for the Commonwealth in a capital case intends to introduce expert opinion testimony at trial, the defendant, defendant's attorney or the attorney for the Commonwealth shall notify the opposing party in writing of such party's intention to present such testimony at least 60 days before the trial. The written notice shall include copies of any written reports of the witness, a summary of the proposed expert testimony that describes the witness's opinions and the basis and reasons for those opinions, and the witness's qualifications and contact information.