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## SENATE BILL NO. 796

## AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the Senate Committee for Courts of Justice  
on February 1, 2013)

(Patron Prior to Substitute—Senator Garrett)

A BILL to amend and reenact § 19.2-271.2 of the Code of Virginia, relating to testimony of husband and wife in criminal cases; exception.

Be it enacted by the General Assembly of Virginia:

1. That § 19.2-271.2 of the Code of Virginia is amended and reenacted as follows:

§ 19.2-271.2. Testimony of husband and wife in criminal cases (Subsection (b) of Supreme Court Rule 2:504 derived from this section).

A. In criminal cases husband and wife shall be allowed, and, subject to the rules of evidence governing other witnesses, may be compelled to testify in behalf of each other, but neither shall be compelled to be called as a witness against the other, except (i) in the case of a prosecution for an offense committed by one against the other, against a minor child of either, or against the property of either; (ii) in any case where either is charged with forgery of the name of the other or uttering or attempting to utter a writing bearing the allegedly forged signature of the other; or (iii) in any proceeding relating to a violation of the laws pertaining to criminal sexual assault (§§ 18.2-61 through 18.2-67.10), crimes against nature (§ 18.2-361) involving a minor as a victim and provided the defendant and the victim are not married to each other, incest (§ 18.2-366), or abuse of children (§§ 18.2-370 through 18.2-371). The failure of either husband or wife to testify, however, shall create no presumption against the accused, nor be the subject of any comment before the court or jury by any attorney.

~~Except in the prosecution for a criminal offense as set forth in (i), (ii) or (iii) above, in B.~~ In any criminal proceeding, a person has a privilege to refuse to disclose, and to prevent anyone else from disclosing, any confidential communication between his spouse and him during their marriage, regardless of whether he is married to that spouse at the time he objects to disclosure.

However, a person may not prevent his spouse from disclosing a confidential communication in (i) a criminal prosecution as set forth in clauses (i), (ii), or (iii) of subsection A; (ii) a case in which the court finds, by a preponderance of the evidence at a hearing conducted apart from the trial, that both spouses conspired or acted jointly in the commission of the crime charged; or (iii) in a hearing conducted pursuant to clause (ii) of this paragraph.

C. For the purposes of this section, "confidential communication" means a communication made privately by a person to his spouse that is not intended for disclosure to any other person.