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## HOUSE BILL NO. 824

Offered January 8, 2020

Prefiled January 7, 2020

A BILL to amend and reenact § 19.2-264.3:1.3 of the Code of Virginia and to amend the Code of Virginia by adding in Article 5 of Chapter 15 of Title 19.2 a section numbered 19.2-266.4, relating to ex parte requests for expert assistance in criminal cases.

Patron—Hope

Referred to Committee for Courts of Justice

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

1. That § 19.2-264.3:1.3 of the Code of Virginia is amended and reenacted and that the Code of Virginia is amended by adding in Article 5 of Chapter 15 of Title 19.2 a section numbered 19.2-266.4 as follows:

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

A. In any case in which an indigent a 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 unless the defendant or counsel states under oath or in a sworn declaration that a need for confidentiality exists. 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. A risk that trial strategy may be disclosed unless the hearing is ex parte shall be sufficient grounds to establish a need for confidentiality.

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, by clear and convincing evidence, 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 confidential 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 Science or Division of Consolidated Laboratory Services whenever practicable. Upon receiving the defendant's or his attorney's declaration of need for confidentiality, the court shall conduct an ex parte hearing on the request for authorization to obtain expert assistance. This hearing shall occur as soon as practicable. After a hearing upon the motion, the court shall authorize the defendant or his attorney to obtain expert assistance upon a showing that the requested assistance would materially assist the defendant and is necessary in order to guarantee an adequate defense.

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 initiated by written motion and shall be on the record. Except for the initial declaration of need for confidentiality, the record of the hearings, together with all papers filed and orders entered in connection with ex parte requests for expert assistance, all payment requests submitted by experts appointed, and the identity of all experts appointed, shall be kept under seal as part of the record of the case and shall not be disclosed. Following decision on the motion, whether it is granted or denied, the motion, order or orders, and all other papers or information related to the proceedings or expert assistance sought shall remain under seal. On motion of any party, and for good cause shown, the court may unseal the foregoing 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.

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HB824

59 E. All ex parte proceedings, communications, or requests shall be transcribed and made part of the  
60 record available for appellate review or any other post-conviction review.

61 **§ 19.2-266.4. Expert assistance for indigent defendants in noncapital cases.**

62 A. In any case in which a defendant is (i) charged with a noncapital offense and (ii) found by the  
63 court to be financially unable to pay for expert assistance, the defendant or his attorney may, upon  
64 notice to the Commonwealth, move the court to hear an ex parte request for the authorization of  
65 counsel for the defendant to obtain expert assistance to assist in the preparation of the defense. No ex  
66 parte proceeding, communication, or request may be considered pursuant to this section unless the  
67 defendant or counsel states under oath or in a sworn declaration that a need for confidentiality exists. A  
68 risk that trial strategy may be disclosed unless the hearing is ex parte shall be sufficient ground to  
69 establish a need for confidentiality.

70 B. Upon receiving the defendant's or his attorney's declaration of need for confidentiality, the court  
71 shall conduct an ex parte hearing on the request for authorization to obtain expert assistance. This  
72 hearing shall occur as soon as practicable. After a hearing upon the motion, the court shall authorize  
73 the defendant or his attorney to obtain expert assistance upon a showing that the requested assistance  
74 would materially assist the defendant and is necessary in order to guarantee an adequate defense.

75 C. All ex parte proceedings conducted under this section shall be initiated by written motion and  
76 shall be on the record. Except for the initial declaration of need for confidentiality, the record of the  
77 hearings, together with all papers filed and orders entered in connection with ex parte requests for  
78 expert assistance, all payment requests submitted by experts appointed, and the identity of all experts  
79 appointed, shall be kept under seal as part of the record of the case and shall not be disclosed.  
80 Following decision on the motion, whether it is granted or denied, the motion, order or orders, and all  
81 other papers or information related to the proceedings or expert assistance sought shall remain under  
82 seal. On motion of any party, and for good cause shown, the court may unseal the foregoing records  
83 after the trial is concluded. Following final judgment and after all appeals have been exhausted, the  
84 court shall unseal all records and other material sealed pursuant to this section.

85 D. All ex parte proceedings, communications, or requests shall be transcribed and made part of the  
86 record available for appellate review or any other post-conviction review.