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## SENATE BILL NO. 806

Offered January 8, 2020

Prefiled January 8, 2020

A *BILL to amend the Code of Virginia by adding in Article 5 of Chapter 15 of Title 19.2 sections numbered 19.2-266.4 and 19.2-266.5, relating to ex parte requests for investigative assistance or expert assistance in noncapital cases.*

Patrons—Morrissey and Deeds; Delegate: Hope

Referred to Committee on the Judiciary

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

**1. That the Code of Virginia is amended by adding in Article 5 of Chapter 15 of Title 19.2 sections numbered 19.2-266.4 and 19.2-266.5 as follows:**

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

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

B. 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 investigative services. 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 investigative services upon a showing that the requested services would materially assist the defendant and are necessary in order to guarantee an adequate defense and that the lack of such confidential investigative services would result in a fundamentally unfair trial.

C. All ex parte hearings conducted in circuit court under this section shall be on the record, and the record of the hearings, together with all papers filed and orders entered in any court in connection with ex parte requests for investigative 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. 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.

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

**§ 19.2-266.5. Expert assistance for indigent defendants in noncapital cases.**

A. In any case in which a defendant is (i) charged with a noncapital offense and (ii) 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 the court to hear an ex parte request for the appointment of a qualified expert to assist in the preparation of the 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.

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 judge. Upon hearing the ex parte request, the judge shall find, by clear and convincing evidence, that a particularized need for confidentiality has been demonstrated before considering the request for expert services. After a hearing on 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 that the lack of such confidential expert 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 judge shall direct requests for scientific investigations to the Department of Forensic Science or the Division of Consolidated Laboratory Services whenever practicable.

C. All ex parte hearings conducted in circuit court under this section shall be on the record, and the record of the hearings, together with all papers filed and orders entered in any court 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.

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59 *On motion of any party, and for good cause shown, the court may unseal the record after the trial is*  
60 *concluded. Following final judgment and after all appeals have been exhausted, the court shall unseal*  
61 *all records and other material sealed pursuant to this section.*  
62 *D. All ex parte proceedings, communications, or requests shall be transcribed and made part of the*  
63 *record available for appellate review or any other post-conviction review.*