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SENATE BILL NO. 806

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the Senate Committee on the Judiciary
on February 5, 2020)

(Patron Prior to Substitute—Senator Morrissey)

A BILL 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 and to repeal § 19.2-264.3:1.3 of the Code of Virginia, relating to ex parte requests for expert assistance in criminal cases.

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 a section numbered 19.2-266.4 as follows:

§ 19.2-266.4. *Expert assistance for indigent defendants.*

A. In any case in which a defendant is (i) charged with a felony offense or a Class 1 misdemeanor and (ii) determined to be indigent by the court pursuant to § 19.2-159, the defendant or his attorney may, upon notice to the Commonwealth, move the circuit court to designate another judge in the same circuit to hear an ex parte request for 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 the defendant or his attorney states 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 grounds to establish a need for confidentiality.

B. Upon receiving the defendant's or his attorney's declaration of need for confidentiality, the designated ex parte judge 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 and upon a showing that the provision of the requested expert services would materially assist the defendant in preparing his defense and the denial of such services would result in a fundamentally unfair trial, the court shall order the appointment of a qualified expert. 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.

C. All ex parte hearings conducted under this section shall be 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 a 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 records after the trial is concluded.

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.

2. That § 19.2-264.3:1.3 of the Code of Virginia is repealed.