

1 **H. B. 2526**

2  
3 (By Delegate Overington, Barker, J. Miller, Duke,  
4 Hall, Householder, Howell, R. Phillips, Andes,  
5 Savilla and Snuffer)  
6

7 [Introduced January 18, 2011; referred to the  
8 Committee on the Judiciary then Finance.]

**FISCAL  
NOTE**

9  
10 A BILL to repeal §61-11-2 of the Code of West Virginia, 1931, as  
11 amended; to repeal §62-3-15 of said code; to amend and reenact  
12 §61-2-2 of said code; to amend said code by adding thereto  
13 seven new sections, designated §61-2-2a, §61-2-2b, §61-2-2c,  
14 §61-2-2d, §61-2-2e, §61-2-2f and §61-2-2g; and to amend said  
15 code by adding thereto four new sections, designated §62-7-4,  
16 §62-7-5, §62-7-6 and §62-7-6a, all relating to death penalty  
17 for first degree murder; procedures, standards and findings  
18 applicable to imposition thereof in certain instances  
19 including aggravating and mitigating circumstances;  
20 sentencing; providing automatic review of the death penalty by  
21 the Supreme Court of Appeals; providing for forensic  
22 deoxyribonucleic acid ("DNA") testing of biological material  
23 in death penalty cases; providing for execution of the death  
24 sentence by lethal injection; providing for delivery of  
25 sentence of death to officer retaining custody of person so  
26 sentenced; providing for transmission of indictment, order of

1 conviction, sentence and judgment entered thereon to the  
 2 warden of the state correctional facility; transfer of person  
 3 sentenced to death to the state correctional facility;  
 4 execution; providing presence of certain persons be requested  
 5 for the execution; providing for certification that sentence  
 6 of death has been executed; and providing for disposition of  
 7 the body.

8 *Be it enacted by the Legislature of West Virginia:*

9 That §61-11-2 of the Code of West Virginia, 1931, as amended,  
 10 be repealed; that §62-3-15 of said code be repealed; that §61-2-2  
 11 of said code be amended and reenacted; that said code be amended by  
 12 adding thereto seven new sections, designated §61-2-2a, §61-2-2b,  
 13 §61-2-2c, §61-2-2d, §61-2-2e, §61-2-2f and §61-2-2g; and that said  
 14 code be amended by adding thereto four new sections, designated  
 15 §62-7-4, §62-7-5, §62-7-6 and §62-7-6a, all to read as follows:

16 **CHAPTER 61. CRIMES AND THEIR PUNISHMENT.**

17 **ARTICLE 2. CRIMES AGAINST THE PERSON.**

18 **§61-2-2. Penalty for murder in first degree.**

19 Any person convicted of murder of in the first degree shall  
 20 be punished by confinement in the penitentiary for life sentenced  
 21 to death if any one or more of the aggravating circumstances  
 22 enumerated in section two-b of this article have been charged and  
 23 found to be true without a finding of any one or more of the

1 mitigating circumstances enumerated in section two-c of this  
2 article. Any person otherwise convicted of murder in the first  
3 degree is sentenced to confinement in a state correctional facility  
4 for life without probation or parole.

5 **§61-2-2a. Sentencing procedures for murder in the first degree.**

6 (a) Procedure in jury trials. --

7 After a verdict of murder in the first degree is recorded and  
8 before the jury is discharged, the court shall conduct a separate  
9 sentencing hearing in which the jury shall determine whether the  
10 defendant shall be sentenced to death or life imprisonment. In the  
11 sentencing hearing, evidence may be presented as to any matter that  
12 the court determines relevant and admissible on the question of the  
13 sentence to be imposed, including evidence relating to any of the  
14 aggravating or mitigating circumstances specified in sections two-b  
15 and two-c of this article. Evidence of aggravating circumstances  
16 shall be limited to those circumstances specified in section two-b  
17 of this article. After the presentation of evidence, the court  
18 shall permit counsel to present argument for and against the  
19 sentence of death. The court shall then instruct the jury in  
20 accordance with subsection (c) of this section. Failure of the  
21 jury to unanimously agree upon a sentence does not impeach or in  
22 any way affect the guilty verdict previously recorded.

23 (b) Procedure in nonjury trials and guilty pleas. --

24 If the defendant waives a jury trial or pleads guilty, the

1 sentencing proceeding shall be conducted before a jury impaneled  
2 for that purpose unless waived by the defendant with the consent of  
3 the state, in which latter case the trial judge shall hear the  
4 evidence and determine the penalty in the same manner as would a  
5 jury.

6 (c) Instructions to jury. --

7 Before retiring to determine the imposition of sentence, the  
8 jury shall be instructed by the court as to the following:

9 (1) The aggravating circumstances specified in section two-b  
10 of this article for which any evidence has been presented;

11 (2) Mitigating circumstances, including those specified in  
12 section two-c of this article, for which any evidence has been  
13 presented;

14 (3) Aggravating circumstances must be proved by the state  
15 beyond a reasonable doubt. Mitigating circumstances must be proved  
16 by the defendant by a preponderance of the evidence;

17 (4) The sentence shall be a sentence of death if the jury  
18 unanimously finds at least one aggravating circumstance specified  
19 in section two-b of this article and no mitigating circumstance or  
20 if the jury unanimously finds one or more aggravating circumstances  
21 which outweigh all mitigating circumstances. The sentence shall be  
22 life imprisonment without probation or parole in all other cases;

23 (5) The court may, in its discretion, discharge the jury if it  
24 is of the opinion that further deliberation will not result in a

1 unanimous agreement as to the sentence, in which case the court  
2 shall sentence the defendant to life imprisonment; and

3 (6) The court shall instruct the jury on any other matter that  
4 may be just and proper under the circumstances.

5 **§61-2-2b. Aggravating circumstances for imposition of capital**  
6 **punishment.**

7 When a defendant is convicted of murder in the first degree,  
8 aggravating circumstances shall be limited to the following:

9 (1) The murder occurred when the defendant was incarcerated,  
10 or under order of incarceration in a municipal, county or state  
11 correctional institution, or if the murder occurred while defendant  
12 was an escaped convict;

13 (2) The victim was a fireman, peace officer, correctional  
14 officer, parole officer, judicial officer or any individual who was  
15 killed in the performance of his or her duty;

16 (3) The defendant paid, or was paid by, another person or had  
17 contracted to pay, or to be paid by, another person or had  
18 conspired to pay, or to be paid by, another person to kill the  
19 victim;

20 (4) The victim was being held by the defendant for ransom or  
21 reward or as a shield or hostage;

22 (5) The death of the victim occurred while the defendant was  
23 engaged in the hijacking of an aircraft;

24 (6) The victim was a prosecution witness to a murder or other

1 felony committed by the defendant and was killed for the purpose of  
2 preventing his or her testimony against the defendant in any grand  
3 jury or court proceedings;

4 (7) The defendant committed the murder while in the commission  
5 of a felony;

6 (8) In the commission of the offense the defendant knowingly  
7 created a grave risk of death to another person in addition to the  
8 victim of the offense;

9 (9) The murder was especially heinous, atrocious or cruel,  
10 manifesting exceptional depravity;

11 (10) The murder was the result of or was contributed to by the  
12 defendant's use of a controlled substance;

13 (11) The defendant has a significant history of felony  
14 convictions involving the use or threat of violence to the person;

15 (12) The defendant has been convicted of another federal or  
16 state offense, committed either before or at the time of the murder  
17 at issue, for which a sentence of life imprisonment or death could  
18 be imposed, or the defendant was serving a sentence of life  
19 imprisonment for any reason at the time of the commission of the  
20 murder; and

21 (13) The defendant has been convicted of another crime under  
22 the provisions of chapter sixty-a of this code at the time of the  
23 commission of the murder at issue.

24 **§61-2-2c. Mitigating circumstances for imposition of capital**

1                    **punishment.**

2            When a defendant is convicted of murder in the first degree,  
3 mitigating circumstances include the following:

4            (1) The defendant has no significant history of prior criminal  
5 convictions;

6            (2) The defendant was under the influence of extreme mental or  
7 emotional disturbance at the time of the commission of the murder  
8 at issue;

9            (3) The capacity of the defendant to appreciate the  
10 criminality of his or her conduct or to conform his or her conduct  
11 to the requirements of the law was substantially impaired at the  
12 time of the commission of the murder at issue;

13           (4) The age of the defendant at the time of the murder at  
14 issue;

15           (5) The defendant acted under extreme duress, or acted under  
16 the substantial domination of another person at the time of the  
17 commission of the murder at issue;

18           (6) The victim was a participant in the defendant's murderous  
19 conduct or consented to the murderous acts;

20           (7) The defendant's participation in the murder at issue was  
21 relatively minor; and

22           (8) Any other evidence of mitigation concerning the character  
23 and record of the defendant and the circumstances of the murder.

24 **§61-2-2d. Sentencing verdict by the jury.**

1 After hearing all the evidence and arguments by counsel and  
2 after receiving the instructions from the court, the jury shall  
3 deliberate and render a sentencing verdict. In rendering the  
4 verdict, the jury shall set forth in writing the findings upon  
5 which the sentence is based. Based upon these findings, the jury  
6 shall set forth in writing whether the sentence is death or life  
7 imprisonment without probation or parole.

8 **§61-2-2e. Recording sentencing verdict; imposing sentence.**

9 Whenever the jury agrees upon a sentencing verdict, it shall  
10 be received and recorded by the court. The court shall thereafter  
11 impose upon the defendant the sentence fixed by the jury. In any  
12 case in which the death penalty is imposed, execution shall be by  
13 lethal injection.

14 **§61-2-2f. Review of death sentence.**

15 (a) Whenever the death penalty is imposed, and upon the  
16 judgment becoming final in the circuit court, the sentence shall  
17 automatically be reviewed on the record by the Supreme Court of  
18 Appeals. The clerk of the circuit court, within ten days after  
19 receiving the transcript, shall transmit the entire record and  
20 transcript to the Supreme Court of Appeals together with a notice  
21 prepared by the clerk and a report prepared by the circuit judge.  
22 The notice shall set forth the title and docket number of the case,  
23 the name of the defendant and the name and address of his or her  
24 attorney, a narrative statement of the judgment, the offense and



1 the punishment prescribed. The report shall be in a standard form  
2 prepared and supplied by the Supreme Court of Appeals.

3 (b) The Supreme Court of Appeals shall consider the punishment  
4 as well as any errors enumerated by way of appeal.

5 (c) With regard to the sentence, the Supreme Court of Appeals  
6 shall determine:

7 (1) Whether the sentence of death was imposed under the  
8 influence of passion, prejudice or any other arbitrary factor;

9 (2) Whether the evidence supports the jury's or judge's  
10 finding of a statutory aggravating circumstance; and

11 (3) Whether the sentence of death is excessive or  
12 disproportionate to the penalty imposed in similar cases,  
13 considering both the crime and the defendant.

14 (d) Both the defendant and the state shall have the right to  
15 submit briefs within the time limitations set forth in the rules by  
16 the Supreme Court of Appeals, and to present oral argument to the  
17 Supreme Court of Appeals.

18 (e) The Supreme Court of Appeals shall render a written  
19 decision which shall include a reference to those similar cases  
20 which it took into consideration. The Supreme Court of Appeals,  
21 with regard to review of death sentences, shall:

22 (1) Affirm the sentence of death; or

23 (2) Set the sentence aside and remand the case for  
24 resentencing by the circuit judge based on the record and argument

1 of counsel. The records of those similar cases referred to by the  
2 Supreme Court of Appeals in its written decision shall be provided  
3 to the resentencing judge for his or her consideration.

4 (f) The Supreme Court of Appeals may employ an appropriate  
5 staff and establish methods to compile any cases or information  
6 considered by the chief justice to be appropriate and relevant to  
7 the statutory questions concerning the validity of the sentence.

8 (g) The sentence review shall be in addition to direct appeal,  
9 if taken, and the review and appeal shall be consolidated for  
10 consideration. The Supreme Court of Appeals shall render its  
11 decision on legal errors enumerated, the factual substantiation of  
12 the verdict and the validity of the sentence.

13 **§61-2-2g. DNA testing in death penalty cases.**

14 (a) Notwithstanding any other provision of law to the  
15 contrary, a person in custody pursuant to the judgment of a court  
16 of this state in which the death penalty has been imposed may, at  
17 any time after conviction, apply to the court that entered the  
18 judgment for forensic deoxyribonucleic acid ("DNA") testing of any  
19 biological material that:

20 (1) Is related to the investigation or prosecution that  
21 resulted in the judgment;

22 (2) Is in the actual or constructive possession of the state;  
23 and

24 (3) Was not previously subjected to DNA testing, or can be

1 subjected to retesting with new DNA techniques that provide a  
2 reasonable likelihood of more accurate and probative results.

3 (b) The court shall notify the state of an application made  
4 under subsection (a) of this section and shall afford the state an  
5 opportunity to respond.

6 (c) Upon receiving notice of an application made under  
7 subsection (a) of this section, the state shall take such steps as  
8 are necessary to ensure that any remaining biological material that  
9 was secured in connection with the case is preserved pending the  
10 completion of proceedings under this section.

11 (d) The court shall order DNA testing pursuant to an  
12 application made under subsection (a) of this section upon a  
13 determination that testing may produce noncumulative, exculpatory  
14 evidence relevant to the claim of the applicant that the applicant  
15 was wrongfully convicted or sentenced.

16 (e) The cost of DNA testing ordered under subsection (d) of  
17 this section shall be borne by the state or the applicant, as the  
18 court may order in the interests of justice, if it is shown that  
19 the applicant is not indigent and possesses the means to pay.

20 (f) The court may at any time appoint counsel for an indigent  
21 applicant under this section.

22 (g) If the results of DNA testing conducted under this section  
23 are unfavorable to the applicant, the court:

24 (1) Shall dismiss the application; and

1 (2) In the case of an applicant who is not indigent, may  
 2 assess the applicant for the cost of such testing.

3 (h) If the results of DNA testing conducted under this section  
 4 are favorable to the applicant, the court shall:

5 (1) Order a hearing, notwithstanding any provision of law that  
 6 would bar such a hearing; and

7 (2) Enter any order that serves the interests of justice,  
 8 including an order:

9 (A) Vacating and setting aside the judgment;

10 (B) Discharging the applicant if the applicant is in custody;

11 (C) Resentencing the applicant; or

12 (D) Granting a new trial.

13 (i) Nothing in this section shall be construed to limit the  
 14 circumstances under which a person may obtain DNA testing or other  
 15 postconviction relief under any other provision of law.

16 (j) Notwithstanding any other provision of law, the state  
 17 shall preserve any biological material secured in connection with  
 18 a death penalty case for such period of time as a person remains  
 19 incarcerated awaiting execution under a death penalty sentence.

20 **CHAPTER 62. CRIMINAL PROCEDURE.**

21 **ARTICLE 7. EXECUTION OF SENTENCES; STAYS.**

22 **§62-7-4. Execution of death sentence.**

23 Sentence of death, except for insurrection or rebellion, may  
 24 not be executed sooner than three months after the sentence is

1 pronounced. The sentence of death shall, in every case, be  
2 executed by lethal injection. The sentence shall be executed  
3 within the walls of a state correctional facility within an  
4 enclosure prepared for that purpose and constructed so as to  
5 exclude public view. The execution shall be performed under the  
6 direction of the warden of the state correctional facility and the  
7 authorities in control thereof. The warden of the state  
8 correctional facility or, in the case of his or her death, absence  
9 or inability to act, the Commissioner of Corrections shall be the  
10 executioner. In carrying out the execution of sentence, the warden  
11 or the Commissioner of Corrections may secure the services and  
12 advice of any person or persons either considers appropriate.

13 **§62-7-5. Certificate of death sentence and indictment to be sent**  
14 **to warden; transfer of convict to a state correctional**  
15 **facility; persons present at execution.**

16 The clerk of the court which pronounces the sentence of death  
17 shall, as soon as possible after sentence, deliver a certified copy  
18 of the sentence to the sheriff, who shall retain the custody of the  
19 convict sentenced to death until he or she is delivered to a  
20 properly authorized guard sent by the warden for the removal of the  
21 convict to the state correctional facility. The clerk of the court  
22 shall also forthwith transmit to the warden of the state  
23 correctional facility a copy of the indictment, order of conviction  
24 and the sentence and judgment entered thereon. As soon as possible

1 after receipt of the copies the warden shall send a guard or guards  
2 to remove the convict to the state correctional facility. Unless  
3 a suspension of execution is ordered, the execution shall take  
4 place at the time and in the manner prescribed in the sentencing  
5 order. At the execution there may be present those officers,  
6 guards and assistants as the warden or Commissioner of Corrections  
7 considers appropriate. The warden or the commissioner, as the case  
8 may be, shall request the presence of the prosecuting attorney of  
9 the county wherein the conviction occurred, the clerk of the  
10 circuit court thereof, twelve respectable citizens, including a  
11 physician and representatives of the press as may be considered  
12 appropriate. The counsel of the convict, or any clergymen the  
13 convict may desire and any of the convict's relations may be  
14 permitted to attend.

15 **§62-7-6. Record of execution.**

16 The warden or Commissioner of Corrections who executes the  
17 sentence of death shall certify to the clerk of the circuit court,  
18 by which the sentence was imposed, that the sentence has been  
19 executed. The clerk of the circuit court shall file the  
20 certificate with the papers of the case and enter the certificate  
21 and papers upon the records of the court.

22 **§62-7-6a. Disposition of body of executed convict.**

23 If the friends or relatives of the convict make a request in  
24 writing to the warden at any time within two days after the

1 sentence of death has been executed, the body of the convict shall  
2 be returned to the friends or relatives, in any county in the  
3 state, for burial. The warden may draw his or her order on the  
4 Auditor of the state for whatever sum is necessary to pay for  
5 transportation of the body, to be paid out of funds appropriated to  
6 the Division of Corrections. If no request is made by friends or  
7 relatives, the body shall be disposed of as provided for other  
8 convicts who die within a state correctional facility.

NOTE: The purpose of this bill is to provide for a death penalty and procedures and standards applicable thereto, and automatic review of the penalty, for commission of murder in the first degree. Procedures for carrying out the death sentence are established.

Strike-throughs indicate language that would be stricken from the present law, and underscoring indicates new language that would be added.