

H. B. 2855

(By Delegates Overington, Gearheart, Westfall, R. Phillips, Foster,
Householder, Blair, Walters and Moffatt)

[Introduced February 20, 2015; referred to the
Committee on the Judiciary then Finance.]

**FISCAL
NOTE**

A BILL to repeal §61-11-2 of the Code of West Virginia, 1931, as amended; to repeal §62-3-15 of said code; to amend and reenact §61-2-2 of said code; to amend said code by adding thereto seven new sections, designated §61-2-2a, §61-2-2b, §61-2-2c, §61-2-2d, §61-2-2e, §61-2-2f and §61-2-2g; and to amend said code by adding thereto four new sections, designated §62-7-4, §62-7-5, §62-7-6 and §62-7-6a, all relating to death penalty for first degree murder; procedures, standards and findings applicable to imposition thereof in certain instances including aggravating and mitigating circumstances; sentencing; providing automatic review of the death penalty by the Supreme Court of Appeals; providing for forensic deoxyribonucleic acid ("DNA") testing of biological material in death penalty cases; providing for execution of the death sentence by lethal injection; providing for delivery of sentence of death to officer retaining custody of person so sentenced; providing for transmission of indictment, order of conviction, sentence and judgment entered thereon to the warden of the state correctional facility; transfer of person sentenced to death to the state correctional facility; execution; providing presence of certain persons be requested for the

1 execution; providing for certification that sentence of death has been executed; and providing
 2 for disposition of the body.

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

4 That §61-11-2 of the Code of West Virginia, 1931, as amended, be repealed; that §62-3-15
 5 of said code be repealed; that §61-2-2 of said code be amended and reenacted; that said code be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

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

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

11 **§61-2-2. Penalty for murder in first degree.**

12 Any person convicted of murder of in the first degree shall be punished by confinement in
 13 the penitentiary for life sentenced to death if any one or more of the aggravating circumstances
 14 enumerated in section two-b of this article have been charged and found to be true without a finding
 15 of any one or more of the mitigating circumstances enumerated in section two-c of this article. Any
 16 person otherwise convicted of murder in the first degree is sentenced to confinement in a state
 17 correctional facility for life without probation or parole.

18 **§61-2-2a. Sentencing procedures for murder in the first degree.**

19 (a) Procedure in jury trials. --

20 After a verdict of murder in the first degree is recorded and before the jury is discharged, the
 21 court shall conduct a separate sentencing hearing in which the jury shall determine whether the
 22 defendant shall be sentenced to death or life imprisonment. In the sentencing hearing, evidence may

1 be presented as to any matter that the court determines relevant and admissible on the question of
2 the sentence to be imposed, including evidence relating to any of the aggravating or mitigating
3 circumstances specified in sections two-b and two-c of this article. Evidence of aggravating
4 circumstances shall be limited to those circumstances specified in section two-b of this article. After
5 the presentation of evidence, the court shall permit counsel to present argument for and against the
6 sentence of death. The court shall then instruct the jury in accordance with subsection (c) of this
7 section. Failure of the jury to unanimously agree upon a sentence does not impeach or in any way
8 affect the guilty verdict previously recorded.

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

10 If the defendant waives a jury trial or pleads guilty, the sentencing proceeding shall be
11 conducted before a jury impaneled for that purpose unless waived by the defendant with the consent
12 of the state, in which latter case the trial judge shall hear the evidence and determine the penalty in
13 the same manner as would a jury.

14 (c) Instructions to jury. --

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

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

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

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

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

6 (5) The court may, in its discretion, discharge the jury if it is of the opinion that further
7 deliberation will not result in a unanimous agreement as to the sentence, in which case the court shall
8 sentence the defendant to life imprisonment; and

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

11 **§61-2-2b. Aggravating circumstances for imposition of capital punishment.**

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

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

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

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

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

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

3 (6) The victim was a prosecution witness to a murder or other felony committed by the
4 defendant and was killed for the purpose of preventing his or her testimony against the defendant in
5 any grand jury or court proceedings;

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

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

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

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

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

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

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

20 **§61-2-2c. Mitigating circumstances for imposition of capital punishment.**

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

- 1 (1) The defendant has no significant history of prior criminal convictions;
- 2 (2) The defendant was under the influence of extreme mental or emotional disturbance at the
3 time of the commission of the murder at issue;
- 4 (3) The capacity of the defendant to appreciate the criminality of his or her conduct or to
5 conform his or her conduct to the requirements of the law was substantially impaired at the time of
6 the commission of the murder at issue;
- 7 (4) The age of the defendant at the time of the murder at issue;
- 8 (5) The defendant acted under extreme duress, or acted under the substantial domination of
9 another person at the time of the commission of the murder at issue;
- 10 (6) The victim was a participant in the defendant’s murderous conduct or consented to the
11 murderous acts;
- 12 (7) The defendant’s participation in the murder at issue was relatively minor; and
- 13 (8) Any other evidence of mitigation concerning the character and record of the defendant
14 and the circumstances of the murder.

15 **§61-2-2d. Sentencing verdict by the jury.**

16 After hearing all the evidence and arguments by counsel and after receiving the instructions
17 from the court, the jury shall deliberate and render a sentencing verdict. In rendering the verdict, the
18 jury shall set forth in writing the findings upon which the sentence is based. Based upon these
19 findings, the jury shall set forth in writing whether the sentence is death or life imprisonment without
20 probation or parole.

21 **§61-2-2e. Recording sentencing verdict; imposing sentence.**

22 Whenever the jury agrees upon a sentencing verdict, it shall be received and recorded by the

1 court. The court shall thereafter impose upon the defendant the sentence fixed by the jury. In any
2 case in which the death penalty is imposed, execution shall be by lethal injection.

3 **§61-2-2f. Review of death sentence.**

4 (a) Whenever the death penalty is imposed and upon the judgment becoming final in the
5 circuit court, the sentence shall automatically be reviewed on the record by the Supreme Court of
6 Appeals. The clerk of the circuit court, within ten days after receiving the transcript, shall transmit
7 the entire record and transcript to the Supreme Court of Appeals together with a notice prepared by
8 the clerk and a report prepared by the circuit judge. The notice shall set forth the title and docket
9 number of the case, the name of the defendant and the name and address of his or her attorney, a
10 narrative statement of the judgment, the offense and the punishment prescribed. The report shall be
11 in a standard form prepared and supplied by the Supreme Court of Appeals.

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

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

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

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

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

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

1 the Supreme Court of Appeals.

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

5 (1) Affirm the sentence of death; or

6 (2) Set the sentence aside and remand the case for resentencing by the circuit judge based on
7 the record and argument of counsel. The records of those similar cases referred to by the Supreme
8 Court of Appeals in its written decision shall be provided to the resentencing judge for his or her
9 consideration.

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

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

17 **§61-2-2g. DNA testing in death penalty cases.**

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

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

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

2 (3) Was not previously subjected to DNA testing, or can be subjected to retesting with new
3 DNA techniques that provide a reasonable likelihood of more accurate and probative results.

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

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

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

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

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

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

19 (1) Shall dismiss the application; and

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

22 (h) If the results of DNA testing conducted under this section are favorable to the applicant,

1 the court shall:

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

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

4 (A) Vacating and setting aside the judgment;

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

6 (C) Resentencing the applicant; or

7 (D) Granting a new trial.

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

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

13 **CHAPTER 62. CRIMINAL PROCEDURE.**

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

15 **§62-7-4. Execution of death sentence.**

16 Sentence of death, except for insurrection or rebellion, may not be executed sooner than three
17 months after the sentence is pronounced. The sentence of death shall, in every case, be executed by
18 lethal injection. The sentence shall be executed within the walls of a state correctional facility within
19 an enclosure prepared for that purpose and constructed so as to exclude public view. The execution
20 shall be performed under the direction of the warden of the state correctional facility and the
21 authorities in control thereof. The warden of the state correctional facility or, in the case of his or
22 her death, absence or inability to act, the Commissioner of Corrections shall be the executioner. In

1 carrying out the execution of sentence, the warden or the Commissioner of Corrections may secure
2 the services and advice of any person or persons either considers appropriate.

3 **§62-7-5. Certificate of death sentence and indictment to be sent to warden; transfer of convict**
4 **to a state correctional facility; persons present at execution.**

5 The clerk of the court which pronounces the sentence of death shall, as soon as possible after
6 sentence, deliver a certified copy of the sentence to the sheriff, who shall retain the custody of the
7 convict sentenced to death until he or she is delivered to a properly authorized guard sent by the
8 warden for the removal of the convict to the state correctional facility. The clerk of the court shall
9 also forthwith transmit to the warden of the state correctional facility a copy of the indictment, order
10 of conviction and the sentence and judgment entered thereon. As soon as possible after receipt of
11 the copies the warden shall send a guard or guards to remove the convict to the state correctional
12 facility. Unless a suspension of execution is ordered, the execution shall take place at the time and
13 in the manner prescribed in the sentencing order. At the execution there may be present those
14 officers, guards and assistants as the warden or Commissioner of Corrections considers appropriate.
15 The warden or the commissioner, as the case may be, shall request the presence of the prosecuting
16 attorney of the county wherein the conviction occurred, the clerk of the circuit court thereof, twelve
17 respectable citizens, including a physician and representatives of the press as may be considered
18 appropriate. The counsel of the convict, or any clergymen the convict may desire and any of the
19 convict's relations may be permitted to attend.

20 **§62-7-6. Record of execution.**

21 The warden or Commissioner of Corrections who executes the sentence of death shall certify
22 to the clerk of the circuit court, by which the sentence was imposed, that the sentence has been

1 executed. The clerk of the circuit court shall file the certificate with the papers of the case and enter
2 the certificate and papers upon the records of the court.

3 **§62-7-6a. Disposition of body of executed convict.**

4 If the friends or relatives of the convict make a request in writing to the warden at any time
5 within two days after the sentence of death has been executed, the body of the convict shall be
6 returned to the friends or relatives, in any county in the state, for burial. The warden may draw his
7 or her order on the Auditor of the state for whatever sum is necessary to pay for transportation of the
8 body, to be paid out of funds appropriated to the Division of Corrections. If no request is made by
9 friends or relatives, the body shall be disposed of as provided for other convicts who die within a
10 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.

§61-2-2a, §61-2-2b, §61-2-2c, §61-2-2d, §61-2-2e, §61-2-2f, §61-2-2g; §62-7-4, §62-7-5, §62-7-6 and §62-7-6a, are new; therefore, it has been completely underscored.