

WEST VIRGINIA LEGISLATURE

2023 REGULAR SESSION

Introduced

House Bill 2594

FISCAL
NOTE

By Delegates Phillips, Hott, Jennings, Honaker,
Brooks, Pinson, Jeffries, Longanacre, and Dean

[Introduced January 17, 2023; Referred to the
Committee on Jails and Prisons then the Judiciary]

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

Be it enacted by the Legislature of West Virginia:

CHAPTER 61. CRIMES AND THEIR PUNISHMENT.

ARTICLE 2. CRIMES AGAINST THE PERSON.

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

1 ~~Murder of the first degree shall be punished by confinement in the penitentiary for life.~~

2 (a) Any person convicted of murder in the first degree may be sentenced to death if any
 3 one or more of the aggravating circumstances enumerated in §61-2-2a have been clearly stated
 4 and included in the indictment or the presentment by which the person was charged. Upon

5 conviction or adjudication of guilt of a defendant of murder in the first degree where aggravating
6 circumstances are included in the indictment or presentment by which the person was charged,
7 the court shall conduct a separate sentencing proceeding pursuant to the provisions of §62-3-15 of
8 this code.

9 (b) Any person otherwise convicted of murder in the first degree shall be sentenced to
10 confinement in a state correctional facility as otherwise provided in in §62-3-15a of this code.

§61-2-2a. Aggravating circumstances for imposition of death penalty.

1 (a) Before a prosecuting attorney may seek the imposition of a death penalty for a
2 conviction of murder in the first degree, the indictment or presentment by which a defendant is
3 charged must include aggravating circumstances which shall be limited to the following:

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

7 (2) The victim was a judicial officer, a correctional officer, an emergency responder, a law-
8 enforcement officer, a law-enforcement official, a probation officer, or a parole officer, while such
9 person was acting in the lawful performance of his or her duties;

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

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

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

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

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

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

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

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

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

28 (12) The defendant has been convicted of another federal or state offense, committed
29 either before or at the time of the murder at issue, for which a sentence of life imprisonment or
30 death could be imposed, or the defendant was serving a sentence of life imprisonment for any
31 reason at the time of the commission of the murder.

32 (b) A finding of aggravated circumstances may not be based on circumstantial evidence
33 but requires some physical evidence, such as forensic DNA evidence, or an uncoerced
34 confession.

35 (c) For purposes of this section:

36 (1) "Judicial officer" means a member of the judiciary, a prosecuting attorney or his or her
37 assistants, or a member of the West Virginia State Bar who is directly or indirectly involved in
38 litigation involving the accused or the victim.

39 (2) "Correctional officer" means correctional employees or contractors of the Division of
40 Corrections and Rehabilitation or any county or municipal governing body responsible for
41 enforcing rules and laws necessary for the control and management of correctional units and
42 juvenile facilities and assigned to and working at an institution managed by the Commissioner of
43 the Division of Corrections and Rehabilitation as described in §15A-3-12 of this code or a county or
44 municipal correctional facility;

45 (3) "Emergency responder" means a paid or volunteer firefighter or emergency medical

46 services personnel;

47 (4) "Law-enforcement officer" has the same meaning as that term is defined in §30-29-1 of
48 this code;

49 (5) "Law-enforcement official" has the same meaning as that term is defined in §30-29-1 of
50 this code;

51 (6) "Parole officer" means those persons hired by the Division of Corrections and
52 Rehabilitation as parole officers pursuant to the provisions of §15A-7-3 of this code; and

53 (7) "Probation officer" means those persons appointed by the circuit courts as probation
54 officers pursuant to the provisions of §62-12-5 of this code.

§61-2-2b. Mitigating circumstances for imposition of capital punishment.

1 When a prosecuting attorney seeks the imposition of the death penalty upon a defendant's
2 conviction of murder in the first degree, the trier of fact shall consider mitigating circumstances
3 which shall include the following:

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

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

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

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

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

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

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

16 (8) Any other evidence of mitigation concerning the character and record of the defendant

17 and the circumstances of the murder.

§61-2-2c. Sentencing verdict by the jury.

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

§61-2-2d. Recording sentencing verdict; imposing sentence.

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

§61-2-2e. Review of death sentence.

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

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

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

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

14 (2) Whether the evidence supports the jury's or judge's finding of a statutory aggravating

15 circumstance; and

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

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

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

24 (1) Affirm the sentence of death; or

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

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

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

§61-2-2f. DNA testing in death penalty cases.

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

5 (1) Is related to the investigation or prosecution that resulted in the judgment;
6 (2) Is in the actual or constructive possession of the state; and
7 (3) Was not previously subjected to DNA testing, or can be subjected to retesting with new
8 DNA techniques that provide a reasonable likelihood of more accurate and probative results.

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

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

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

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

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

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

25 (1) Shall dismiss the application; and

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

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

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

31 and

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

33 (A) Vacating and setting aside the judgment;

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

35 (C) Resentencing the applicant; or

36 (D) Granting a new trial.

37 (i) Nothing in this section shall be construed to limit the circumstances under which a
38 person may obtain DNA testing or other post-conviction relief under any other provision of law.

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

§61-11-2. Capital punishment abolished.

1 [Repealed.]

CHAPTER 62. CRIMINAL PROCEDURE.

ARTICLE 3. TRIAL OF CRIMINAL CASES.

§62-3-15. Verdict and sentence in murder cases. Verdict and sentence in cases of murder in the first degree with aggravating circumstances.

1 If a person indicted for murder be found by the jury guilty thereof, they shall in their verdict
2 find whether he or she is guilty of murder of the first degree or second degree. If the person
3 indicted for murder is found by the jury guilty thereof, and if the jury find in their verdict that he or
4 she is guilty of murder of the first degree, or if a person indicted for murder pleads guilty of murder
5 of the first degree, he or she shall be punished by imprisonment in the penitentiary for life, and he
6 or she, notwithstanding the provisions of article twelve, chapter sixty-two of this code, shall not be
7 eligible for parole: *Provided*, That the jury may, in their discretion, recommend mercy, and if such
8 recommendation is added to their verdict, such person shall be eligible for parole in accordance

9 ~~with the provisions of said article twelve, except that, notwithstanding any other provision of this~~
10 ~~code to the contrary, such person shall not be eligible for parole until he or she has served fifteen~~
11 ~~years: *Provided, however,* That if the accused pleads guilty of murder of the first degree, the court~~
12 ~~may, in its discretion, provide that such person shall be eligible for parole in accordance with the~~
13 ~~provisions of said article twelve, and, if the court so provides, such person shall be eligible for~~
14 ~~parole in accordance with the provisions of said article twelve in the same manner and with like~~
15 ~~effect as if such person had been found guilty by the verdict of a jury and the jury had~~
16 ~~recommended mercy, except that, notwithstanding any provision of said article twelve or any other~~
17 ~~provision of this code to the contrary, such person shall not be eligible for parole until he or she has~~
18 ~~served fifteen years~~

19 (a)(1) If a person indicted for murder with aggravating circumstances is found by the jury
20 guilty thereof or is adjudicated guilty by the court without a jury, the court shall, prior to the
21 discharge of the jury, if applicable, conduct a separate sentencing hearing in which the jury or the
22 court shall determine whether the defendant shall be sentenced to death or life imprisonment. In
23 the sentencing hearing, evidence may be presented as to any matter that the court determines
24 relevant and admissible on the question of the sentence to be imposed, including evidence
25 relating to any of the aggravating or mitigating circumstances specified in §61-2-2a and in §61-2-
26 2b of this code.

27 (2) After the presentation of evidence, the court shall permit counsel for the state and the
28 defendant to present argument for and against the sentence of death. If a sentence of death is to
29 be imposed, then the court shall then instruct the jury in accordance with §62-3-15(c) of this code.

30 (b) *Procedure in nonjury trials for first degree murder. --*

31 If the defendant waives a jury trial, and is found guilty, the sentencing proceeding shall be
32 conducted before a jury impaneled for that purpose unless waived by the defendant with the
33 consent of the state, in which latter case the trial judge shall hear the evidence and determine the
34 penalty in the same manner as would a jury.

35 (c) Special death penalty instructions to jury. --

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

38 (1) The aggravating circumstances specified in §61-2-2a of this code for which any
39 evidence has been presented;

40 (2) Mitigating circumstances, including those specified in section in §61-2-2b of this code,
41 for which any evidence has been presented;

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

44 (4) The sentence shall be a sentence of death if the jury unanimously finds at least one
45 aggravating circumstance specified in §61-2-2a of this code and no mitigating circumstance or if
46 the jury unanimously finds one or more aggravating circumstances which outweigh all mitigating
47 circumstances. The sentence shall be life imprisonment without probation or parole in all other
48 cases;

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

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

§62-3-15a. Verdict and sentence in murder cases.

1 Except as set forth in §62-3-15 of this code, if a person indicted for murder is found by the
2 jury guilty thereof, they shall in their verdict find whether he or she is guilty of murder of the first
3 degree or second degree. If the person indicted for murder is found by the jury guilty thereof, and if
4 the jury find in their verdict that he or she is guilty of murder of the first degree, or if a person
5 indicted for murder pleads guilty of murder of the first degree, he or she shall be punished by
6 imprisonment in the penitentiary for life, and he or she, notwithstanding the provisions of §62-12-1

7 et seq. of this code, shall not be eligible for parole: *Provided*, That the jury may, in their discretion,
 8 recommend mercy, and if such recommendation is added to their verdict, such person shall be
 9 eligible for parole in accordance with the provisions of §62-12-1 et seq. of this code, except that,
 10 notwithstanding any other provision of this code to the contrary, such person shall not be eligible
 11 for parole until he or she has served fifteen years: *Provided, however*, That if the accused pleads
 12 guilty of murder of the first degree, the court may, in its discretion, provide that such person shall
 13 be eligible for parole in accordance with the provisions of §62-12-1 et seq. of this code, and, if the
 14 court so provides, such person shall be eligible for parole in accordance with the provisions of §62-
 15 12-1 et seq. of this code in the same manner and with like effect as if such person had been found
 16 guilty by the verdict of a jury and the jury had recommended mercy, except that, notwithstanding
 17 any provision of §62-12-1 et seq. of this code or any other provision of this code to the contrary,
 18 such person shall not be eligible for parole until he or she has served 15 years.

ARTICLE 7. EXECUTION OF SENTENCES; STAYS.

§62-7-4. Execution of death sentence.

1 Sentences of death may not be executed sooner than three months after the sentence is
 2 pronounced. The sentence of death shall, in every case, be executed by lethal injection. The
 3 sentence shall be executed within the walls of a state correctional facility within an enclosure
 4 prepared for that purpose and constructed so as to exclude public view. The execution shall be
 5 performed under the direction of the superintendent of the state correctional facility and the
 6 authorities in control thereof. The superintendent of the state correctional facility or, in the case of
 7 his or her death, absence or inability to act, the Commissioner of Corrections and Rehabilitation
 8 shall be the executioner. In carrying out the execution of sentence, the superintendent or the
 9 Commissioner of Corrections and Rehabilitation may secure the services and advice of any
 10 person or persons either the superintendent or the Commissioner may consider appropriate.

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

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

§62-7-6. Record of execution.

1 The superintendent or Commissioner of Corrections and Rehabilitation who executes the
2 sentence of death shall certify to the clerk of the circuit court, by which the sentence was imposed,
3 that the sentence has been executed. The clerk of the circuit court shall file the certificate with the
4 papers of the case and enter the certificate and papers upon the records of the court.

§62-7-6a. Disposition of body of executed convicted person.

1 If the friends or relatives of the convicted person make a request in writing to the
2 superintendent at any time within two days after the sentence of death has been executed, the
3 body of the convicted person shall be returned to the friends or relatives, in any county in the state,

4 for burial. The superintendent may draw his or her order on the Auditor of the state for whatever
5 sum is necessary to pay for transportation of the body, to be paid out of funds appropriated to the
6 Division of Corrections and Rehabilitation. If no request is made by friends or relatives, the body
7 shall be disposed of as provided for other convicted persons who die within a state correctional
8 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 a heading or the present law and underscoring indicates new language that would be added.