

# WEST VIRGINIA LEGISLATURE

## 2017 REGULAR SESSION

**Introduced**

### **House Bill 2715**

**FISCAL  
NOTE**

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HIGGINBOTHAM, DEAN AND MAYNARD

[Introduced February 27, 2017; Referred  
to the Committee on the Judiciary then Finance.]

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

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

1 That §61-11-2 of the Code of West Virginia, 1931, as amended, be repealed; that §62-3-  
 2 15 of said code be repealed; that §61-2-2 of said code be amended and reenacted; that said code  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

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

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

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

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

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

1           (a) Procedure in jury trials. --

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

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

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

18           (c) Instructions to jury. --

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

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

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

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

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

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

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

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

1 (a) When a defendant is convicted of murder in the first degree, aggravating  
2 circumstances shall be limited to the following:

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

6 (2) The victim was a fireman, peace officer, correctional officer, parole officer, judicial  
7 officer or any other public servant killed while in the performance of his or her official duty;

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

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

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

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

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

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

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

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

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

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

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

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.

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

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

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

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

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

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

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

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

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

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

**§61-2-2d. 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.

**§61-2-2e. 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.  
3 In any case in which the death penalty is imposed, execution shall be by lethal injection.

**§61-2-2f. 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 ten 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  
6 docket number of the case, the name of the defendant and the name and address of his or her  
7 attorney, a narrative statement of the judgment, the offense and the punishment prescribed. The  
8 report shall 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 by the Supreme Court of Appeals, and to present oral argument  
20 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  
35 the sentence.

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

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

## CHAPTER 62. CRIMINAL PROCEDURE.

### ARTICLE 7. EXECUTION OF SENTENCES; STAYS.

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

1           Sentence of death, except for insurrection or rebellion, may not be executed sooner than  
2 three months after the sentence is pronounced. The sentence of death shall, in every case, be  
3 executed by lethal injection. The sentence shall be executed within the walls of a state correctional  
4 facility within an enclosure prepared for that purpose and constructed so as to exclude public  
5 view. The execution shall be performed under the direction of the warden of the state correctional  
6 facility and the authorities in control thereof. The warden of the state correctional facility or, in the  
7 case of his or her death, absence or inability to act, the Commissioner of Corrections shall be the  
8 executioner. In carrying out the execution of sentence, the warden or the Commissioner of  
9 Corrections may secure the services and advice of any person or persons either considers  
10 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  
3 of the convict sentenced to death until he or she is delivered to a properly authorized guard sent  
4 by the warden for the removal of the convict to the state correctional facility. The clerk of the court  
5 shall also forthwith transmit to the warden of the state correctional facility a copy of the indictment,  
6 order of conviction and the sentence and judgment entered thereon. As soon as possible after  
7 receipt of the copies the warden shall send a guard or guards to remove the convict to the state  
8 correctional facility. Unless a suspension of execution is ordered, the execution shall take place

9 at the time and in the manner prescribed in the sentencing order. At the execution there may be  
 10 present those officers, guards and assistants as the warden or Commissioner of Corrections  
 11 considers appropriate. The warden or the commissioner, as the case may be, shall request the  
 12 presence of the prosecuting attorney of the county wherein the conviction occurred, the clerk of  
 13 the circuit court thereof, twelve respectable citizens, including a physician and representatives of  
 14 the press as may be considered appropriate. The counsel of the convict, or any clergymen the  
 15 convict may desire and any of the convict's relations may be permitted to attend.

**§62-7-6. Record of execution.**

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

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

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