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DELAWARE STATE SENATE
148th GENERAL ASSEMBLY

SENATE BILL NO. 40

AN ACT TO AMEND TITLE 11 OF THE DELAWARE CODE RELATING TO THE DEATH PENALTY.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE:

1 Section 1. Amend § 4209, Title 11 of the Delaware Code by making deletions as shown by strike through and
2 insertions as shown by underline as follows:

3 § 4209. Punishment, ~~procedure for determining punishment, review of punishment and method of punishment~~ for
4 first-degree murder.

5 ~~(a) Punishment for first-degree murder.—~~ Any person who is convicted of first-degree murder after the effective
6 date of this Act shall be punished ~~by death or~~ by imprisonment for the remainder of the person's natural life without benefit
7 of probation or parole or any other reduction, ~~said penalty to be determined in accordance with this section.~~

8 ~~(b) Separate hearing on issue of punishment for first-degree murder.—~~

9 ~~(1) Upon a conviction of guilt of a defendant of first-degree murder, the Superior Court shall conduct a~~
10 ~~separate hearing to determine whether the defendant should be sentenced to death or to life imprisonment without benefit of~~
11 ~~probation or parole as authorized by subsection (a) of this section. If the defendant was convicted of first-degree murder by~~
12 ~~a jury, this hearing shall be conducted by the trial judge before that jury as soon as practicable after the return of the verdict~~
13 ~~of guilty. Alternate jurors shall not be excused from the case prior to submission of the issue of guilt to the trial jury and~~
14 ~~may, but need not be, separately sequestered until a verdict on guilt is entered. If the verdict of the trial jury is guilty of~~
15 ~~first-degree murder said alternates shall sit as alternate jurors on the issue of punishment. If, for any reason satisfactory to~~
16 ~~the Court, any member of the trial jury is excused from participation in the hearing on punishment, the trial judge shall~~
17 ~~replace such juror or jurors with alternate juror or jurors. If a jury of 12 jurors cannot participate in the hearing a separate~~
18 ~~and new jury, plus alternates, shall be selected for the hearing in accordance with the applicable rules of the Superior Court~~
19 ~~and laws of Delaware, unless the defendant or defendants and the State stipulate to the use of a lesser number of jurors.~~

20 (2) If the defendant was convicted of first-degree murder by the Court, after a trial and waiver of a jury
21 trial or after a plea of guilty or nolo contendere, the hearing shall be conducted by the trial judge before a jury, plus
22 alternates, empaneled for that purpose and selected in accordance with the applicable rules of the Superior Court and laws
23 of Delaware, unless said jury is waived by the State and the defendant in which case the hearing shall be conducted, if
24 possible, by and before the trial judge who entered the finding of guilty or accepted the plea of guilty or nolo contendere.

25 (c) Procedure at punishment hearing.—

26 (1) The sole determination for the jury or judge at the hearing provided for by this section shall be the
27 penalty to be imposed upon the defendant for the conviction of first-degree murder. At the hearing, evidence may be
28 presented as to any matter that the Court deems relevant and admissible to the penalty to be imposed. The evidence shall
29 include matters relating to any mitigating circumstance and to any aggravating circumstance, including, but not limited to,
30 those aggravating circumstances enumerated in subsection (e) of this section. Notice in writing of any aggravating
31 circumstances and any mitigating circumstances shall be given to the other side by the party seeking to introduce evidence
32 of such circumstances prior to the punishment hearing, and after the verdict on guilt, unless in the discretion of the Court
33 such advance notice is dispensed with as impracticable. The record of any prior criminal convictions and pleas of guilty or
34 pleas of nolo contendere of the defendant or the absence of any such prior criminal convictions and pleas shall also be
35 admissible in evidence.

36 (2) At the hearing the Court shall permit argument by the State, the defendant and/or the defendant's
37 counsel, on the punishment to be imposed. Such argument shall consist of opening statements by each, unless waived,
38 opening summation by the State, rebuttal summation by the defendant and/or the defendant's counsel and closing
39 summation by the State.

40 (3)a. Upon the conclusion of the evidence and arguments the judge shall give the jury appropriate
41 instructions and the jury shall retire to deliberate and report to the Court an answer to the following questions:

42 1. Whether the evidence shows beyond a reasonable doubt the existence of at least 1 aggravating
43 circumstance as enumerated in subsection (e) of this section; and

44 2. Whether, by a preponderance of the evidence, after weighing all relevant evidence in
45 aggravation or mitigation which bear upon the particular circumstances or details of the commission of the offense and the
46 character and propensities of the offender, the aggravating circumstances found to exist outweigh the mitigating
47 circumstances found to exist.

48 b.1. The jury shall report to the Court its finding on the question of the existence of statutory aggravating
49 circumstances as enumerated in subsection (e) of this section. In order to find the existence of a statutory aggravating

circumstance as enumerated in subsection (e) of this section beyond a reasonable doubt, the jury must be unanimous as to the existence of that statutory aggravating circumstance. As to any statutory aggravating circumstances enumerated in subsection (e) of this section which were alleged but for which the jury is not unanimous, the jury shall report the number of the affirmative and negative votes on each such circumstance.

2. The jury shall report to the Court by the number of the affirmative and negative votes its recommendation on the question as to whether, by a preponderance of the evidence, after weighing all relevant evidence in aggravation or mitigation which bear upon the particular circumstances or details of the commission of the offense and the character and propensities of the offender, the aggravating circumstances found to exist outweigh the mitigating circumstances found to exist.

(4) In the instructions to the jury the Court shall include instructions for it to weigh and consider any mitigating circumstances or aggravating circumstances and any of the statutory aggravating circumstances set forth in subsection (e) of this section which may be raised by the evidence. The jury shall be instructed to weigh any mitigating factors against the aggravating factors.

(d) Determination of sentence.—

(1) If a jury is impaneled, the Court shall discharge that jury after it has reported its findings and recommendation to the Court. A sentence of death shall not be imposed unless the jury, if a jury is impaneled, first finds unanimously and beyond a reasonable doubt the existence of at least 1 statutory aggravating circumstance as enumerated in subsection (e) of this section. If a jury is not impaneled, a sentence of death shall not be imposed unless the Court finds beyond a reasonable doubt the existence of at least 1 statutory aggravating circumstance as enumerated in subsection (e) of this section. If a jury has been impaneled and if the existence of at least 1 statutory aggravating circumstance as enumerated in subsection (e) of this section has been found beyond a reasonable doubt by the jury, the Court, after considering the findings and recommendation of the jury and without hearing or reviewing any additional evidence, shall impose a sentence of death if the Court finds by a preponderance of the evidence, after weighing all relevant evidence in aggravation or mitigation which bears upon the particular circumstances or details of the commission of the offense and the character and propensities of the offender, that the aggravating circumstances found by the Court to exist outweigh the mitigating circumstances found by the Court to exist. The jury's recommendation concerning whether the aggravating circumstances found to exist outweigh the mitigating circumstances found to exist shall be given such consideration as deemed appropriate by the Court in light of the particular circumstances or details of the commission of the offense and the character and propensities of the offender as found to exist by the Court. The jury's recommendation shall not be binding upon the Court. If a jury has not been impaneled and if the existence of at least 1 statutory aggravating circumstance as

80 enumerated in subsection (e) of this section has been found beyond a reasonable doubt by the Court, it shall impose a
81 sentence of death if the Court finds by a preponderance of the evidence, after weighing all relevant evidence in aggravation
82 or mitigation which bears upon the particular circumstances or details of the commission of the offense and the character
83 and propensities of the offender, that the aggravating circumstances found by the Court to exist outweigh the mitigating
84 circumstances found by the Court to exist.

85 (2) Otherwise, the Court shall impose a sentence of imprisonment for the remainder of the defendant's
86 natural life without benefit of probation or parole or any other reduction.

87 a. Not later than 90 days before trial the defendant may file a motion with the Court alleging that
88 the defendant had a serious intellectual developmental disorder at the time the crime was committed. Upon the filing of the
89 motion, the Court shall order an evaluation of the defendant for the purpose of providing evidence of the following:

- 90 1. Whether the defendant has a significantly subaverage level of intellectual functioning;
- 91 2. Whether the defendant's adaptive behavior is substantially impaired; and
- 92 3. Whether the conditions described in paragraphs (d)(1) and (d)(2) of this section existed before
93 the defendant became 18 years of age.

94 b. During the hearing authorized by subsections (b) and (c) of this section, the defendant and the
95 State may present relevant and admissible evidence on the issue of the defendant's alleged serious intellectual
96 developmental disorder, or in rebuttal thereof. The defendant shall have the burden of proof to demonstrate by clear and
97 convincing evidence that the defendant had a serious intellectual developmental disorder at the time of the offense.
98 Evidence presented during the hearing shall be considered by the jury in making its recommendation to the Court pursuant
99 to paragraph (c)(3) of this section as to whether the aggravating circumstances found to exist outweigh the mitigating
100 circumstances found to exist. The jury shall not make any recommendation to the Court on the question of whether the
101 defendant had a serious intellectual developmental disorder at the time the crime was committed.

102 c. If the defendant files a motion pursuant to this paragraph claiming he or she had a serious
103 intellectual developmental disorder at the time the crime was committed, the Court, in determining the sentence to be
104 imposed, shall make specific findings as to the existence of a serious intellectual developmental disorder at the time the
105 crime was committed. If the Court finds that the defendant has established by clear and convincing evidence that the
106 defendant had a serious intellectual developmental disorder at the time the crime was committed, notwithstanding any other
107 provision of this section to the contrary, the Court shall impose a sentence of imprisonment for the remainder of the
108 defendant's natural life without benefit of probation or parole or any other reduction. If the Court determines that the
109 defendant has failed to establish by clear and convincing evidence that the defendant had a serious intellectual

developmental disorder at the time the crime was committed, the Court shall proceed to determine the sentence to be imposed pursuant to the provisions of this subsection. Evidence on the question of the defendant's alleged serious intellectual developmental disorder presented during the hearing shall be considered by the Court in its determination pursuant to this section as to whether the aggravating circumstances found to exist outweigh the mitigating circumstances found to exist.

d. When used in this paragraph:

1. "Adaptive behavior" means the effectiveness or degree to which the individual meets the standards of personal independence expected of the individual's age group, sociocultural background and community setting, as evidenced by significant limitations in not less than 2 of the following adaptive skill areas: communication, self-care, home living, social skills, use of community resources, self-direction, functional academic skills, work, leisure, health or safety;

2. "Serious intellectual developmental disorder" means that an individual has significantly subaverage intellectual functioning that exists concurrently with substantial deficits in adaptive behavior and both the significantly subaverage intellectual functioning and the deficits in adaptive behavior were manifested before the individual became 18 years of age; and

3. "Significantly subaverage intellectual functioning" means an intelligent quotient of 70 or below obtained by assessment with 1 or more of the standardized, individually administered general intelligence tests developed for the purpose of assessing intellectual functioning.

(4) After the Court determines the sentence to be imposed, it shall set forth in writing the findings upon which its sentence is based. If a jury is impaneled, and if the Court's decision as to whether the aggravating circumstances found to exist outweigh the mitigating circumstances found to exist differs from the jury's recommended finding, the Court shall also state with specificity the reasons for its decision not to accept the jury's recommendation.

(e) Aggravating circumstances.—

(1) In order for a sentence of death to be imposed, the jury, unanimously, or the judge where applicable, must find that the evidence established beyond a reasonable doubt the existence of at least 1 of the following aggravating circumstances which shall apply with equal force to accomplices convicted of such murder:

a. The murder was committed by a person in, or who has escaped from, the custody of a law-enforcement officer or place of confinement.

b. The murder was committed for the purpose of avoiding or preventing an arrest or for the purpose of effecting an escape from custody.

c. ~~The murder was committed against any law enforcement officer, corrections employee, firefighter, paramedic, emergency medical technician, fire marshal or fire police officer while such victim was engaged in the performance of official duties.~~

d. ~~The murder was committed against a judicial officer, a former judicial officer, Attorney General, former Attorney General, Assistant or Deputy Attorney General or former Assistant or Deputy Attorney General, State Detective or former State Detective, Special Investigator or former Special Investigator, during, or because of, the exercise of an official duty.~~

e. ~~The murder was committed against a person who was held or otherwise detained as a shield or hostage.~~

f. ~~The murder was committed against a person who was held or detained by the defendant for ransom or reward.~~

g. ~~The murder was committed against a person who was a witness to a crime and who was killed for the purpose of preventing the witness's appearance or testimony in any grand jury, criminal or civil proceeding involving such crime, or in retaliation for the witness's appearance or testimony in any grand jury, criminal or civil proceeding involving such crime.~~

h. ~~The defendant paid or was paid by another person or had agreed to pay or be paid by another person or had conspired to pay or be paid by another person for the killing of the victim.~~

i. ~~The defendant was previously convicted of another murder or manslaughter or of a felony involving the use of, or threat of, force or violence upon another person.~~

j. ~~The murder was committed while the defendant was engaged in the commission of, or attempt to commit, or flight after committing or attempting to commit any degree of rape, unlawful sexual intercourse, arson, kidnapping, robbery, sodomy, burglary, or home invasion.~~

k. ~~The defendant's course of conduct resulted in the deaths of 2 or more persons where the deaths are a probable consequence of the defendant's conduct.~~

l. ~~The murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, use of an explosive device or poison or the defendant used such means on the victim prior to murdering the victim.~~

m. ~~The defendant caused or directed another to commit murder or committed murder as an agent or employee of another person.~~

n. The defendant was under a sentence of life imprisonment, whether for natural life or otherwise, at the time of the commission of the murder.

o. The murder was committed for pecuniary gain.

p. The victim was pregnant.

q. The victim was particularly vulnerable due to a severe intellectual, mental or physical disability.

r. The victim was 62 years of age or older.

s. The victim was a child 14 years of age or younger, and the murder was committed by an individual who is at least 4 years older than the victim.

t. At the time of the killing, the victim was or had been a nongovernmental informant or had otherwise provided any investigative, law enforcement or police agency with information concerning criminal activity, and the killing was in retaliation for the victim's activities as a nongovernmental informant or in providing information concerning criminal activity to an investigative, law enforcement or police agency.

u. The murder was premeditated and the result of substantial planning. Such planning must be as to the commission of the murder itself and not simply as to the commission or attempted commission of any underlying felony.

v. The murder was committed for the purpose of interfering with the victim's free exercise or enjoyment of any right, privilege or immunity protected by the First Amendment to the United States Constitution, or because the victim has exercised or enjoyed said rights, or because of the victim's race, religion, color, disability, national origin or ancestry.

(2) In any case where the defendant has been convicted of murder in the first degree in violation of any provision of § 636(a)(2)–(6) of this title, that conviction shall establish the existence of a statutory aggravating circumstance and the jury, or judge where appropriate, shall be so instructed. This provision shall not preclude the jury, or judge where applicable, from considering and finding the statutory aggravating circumstances listed in this subsection and any other aggravating circumstances established by the evidence.

(f) Method and imposition of sentence of death. — The imposition of a sentence of death shall be upon such terms and conditions as the trial court may impose in its sentence, including the place, the number of witnesses which shall not exceed 10, and conditions of privacy, and shall occur between the hours of 12:01 a.m. and 3:00 a.m. on the date set by the trial court. The trial court shall permit one adult member of the immediate family of the victim, as defined in § 4350(e) of this title, or the victim's designee, to witness the execution of a sentence of death pursuant to the rules of the court, if the

198 family provides reasonable notice of its desire to be so represented. Punishment of death shall, in all cases, be inflicted by
199 intravenous injection of a substance or substances in a lethal quantity sufficient to cause death and until such person
200 sentenced to death is dead, and such execution procedure shall be determined and supervised by the Commissioner of the
201 Department of Correction. The administration of the required lethal substance or substances required by this section shall
202 not be construed to be the practice of medicine and any pharmacist or pharmaceutical supplier is authorized to dispense
203 drugs to the Commissioner or the Commissioner's designee, without prescription, for carrying out the provisions of this
204 section, notwithstanding any other provision of law. Such sentence may not be carried out until final review thereof is had
205 by the Delaware Supreme Court as provided for in subsection (g) of this section. The Court or the Governor may suspend
206 the execution of the sentence until a later date to be specified, solely to permit completion of the process of judicial review
207 of the conviction.

208 If the execution of the sentence of death as provided above is held unconstitutional by a court of competent jurisdiction,
209 then punishment of death shall, in all cases, be inflicted by hanging by the neck. The imposition of a sentence of death shall
210 be upon such terms and conditions as the trial court may impose in its sentence, including the place, the number of
211 witnesses and conditions of privacy. Such sentence may not be carried out until final review thereof is had by the Delaware
212 Supreme Court as provided in subsection (g) of this section. The Court or the Governor may suspend the execution of the
213 sentence until a later date to be specified, solely to permit completion of the process of judicial review of the conviction.

214 (g) Automatic review of death penalty by Delaware Supreme Court. —

215 (1) Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the
216 recommendation on and imposition of that penalty shall be reviewed on the record by the Delaware Supreme Court. Absent
217 an appeal having been taken by the defendant upon the expiration of 30 days after the sentence of death has been imposed,
218 the Clerk of the Superior Court shall require a complete transcript of the punishment hearing to be prepared promptly and
219 within 10 days after receipt of that transcript the clerk shall transmit the transcript, together with a notice prepared by the
220 clerk, to the Delaware Supreme Court. The notice shall set forth the title and docket number of the case, the name of the
221 defendant, the name and address of any attorney and a narrative statement of the judgment, the offense and the punishment
222 prescribed. The Court shall, if necessary, appoint counsel to respond to the State's positions in the review proceedings.

223 (2) The Supreme Court shall limit its review under this section to the recommendation on and imposition
224 of the penalty of death and shall determine:

225 a. Whether, considering the totality of evidence in aggravation and mitigation which bears upon
226 the particular circumstances or details of the offense and the character and propensities of the offender, the death penalty

227 was either arbitrarily or capriciously imposed or recommended, or disproportionate to the penalty recommended or imposed
228 in similar cases arising under this section.

229 b. Whether the evidence supports the jury's or the judge's finding of a statutory aggravating
230 circumstance as enumerated in subsection (c) of this section and, where applicable, § 636(a)(2)-(6) of this title.

231 (3) The Supreme Court shall permit the defendant and the State to submit briefs within the time provided
232 by the Court, and permit them to present oral argument to the Court.

233 (4) With regard to review of the sentence in accordance with this subsection, the Court shall:

234 a. Affirm the sentence of death.

235 b. Set aside the sentence of death and remand for correction of any errors occurring during the
236 hearing and for imposition of the appropriate penalty. Such errors shall not affect the determination of guilt and shall not
237 preclude the reimposition of death where appropriately determined after a new hearing on punishment.

238 c. Set forth its findings as to the reasons for its actions.

239 (h) Ordinary review not affected by section. — Any error in the guilt phase of the trial may be raised as provided
240 by law and rules of court and shall be in addition to the review of punishment provided by this section.

241 This act shall apply to all defendants tried, retried, sentenced or re-sentenced after July 15, 2003.

SYNOPSIS

This Act eliminates capital punishment, except for those convicted of first-degree murder before the effective date of this Act. The procedures for determining punishment, review of punishment, and method of punishment for first-degree murder related to capital punishment would still apply to those convicted of first-degree murder before the effective date of this Act.

Author: Senator Peterson