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HOUSE OF REPRESENTATIVES
149th GENERAL ASSEMBLY

HOUSE BILL NO. 125

AN ACT TO AMEND TITLE 11 OF THE DELAWARE CODE RELATING TO THE EXTREME CRIMES
PROTECTION ACT.

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 strikethrough 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 committed by adult offenders.

5 (a) Punishment for first-degree murder. — Any person who is convicted of first-degree murder for an offense that
6 was committed after the person had reached the person's eighteenth birthday shall be punished by death or by imprisonment
7 for the remainder of the person's natural life without benefit of probation or parole or any other reduction, said penalty to be
8 determined in accordance with this section.

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

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

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

28 (c) Procedure at punishment hearing. —

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

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

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

45 1. Whether the jury unanimously finds that the evidence shows beyond a reasonable doubt the
46 existence of at least 1 aggravating circumstance as enumerated in subsection (e) of this section; ~~and~~

47 2. As to each of the aggravating circumstances alleged by the State as required by paragraph (1) of
48 this subsection, whether the jury unanimously finds that the evidence shows beyond a reasonable doubt the
49 existence of the aggravating circumstance, and;

50 3. ~~2.~~ Whether, by a preponderance of the evidence beyond a reasonable doubt, after weighing all
51 relevant evidence in aggravation or mitigation which bear upon the particular circumstances or details of

52 the commission of the offense and the character and propensities of the offender, the aggravating
53 circumstances found to exist outweigh the mitigating circumstances found to exist. In weighing all
54 relevant evidence in aggravation or mitigation, the jury shall not give any weight to any aggravating
55 circumstance unless it has unanimously determined that the evidence shows the existence of the
56 aggravating circumstance beyond a reasonable doubt. The jury shall have the discretion to give the
57 appropriate weight to any mitigating circumstance alleged by the Defendant regardless of whether its
58 existence has been proven beyond a reasonable doubt.

59 b.1. The jury shall report to the Court its finding on the question of the existence of each statutory
60 aggravating circumstances alleged by the State as required by paragraph (1) of this subsection. ~~as enumerated in~~
61 ~~subsection (e) of this section. In order to find the existence of a statutory aggravating circumstance as enumerated~~
62 ~~in subsection (e) of this section~~ In order to find the existence of any aggravating circumstance alleged by the State,
63 beyond a reasonable doubt, the jury must be unanimous as to the existence of that statutory aggravating
64 circumstance. ~~As to any statutory aggravating circumstances enumerated in subsection (e) of this section which~~
65 ~~were alleged but for which the jury is not unanimous, the jury shall report the number of the affirmative and~~
66 ~~negative votes on each such circumstance.~~

67 2. ~~The jury shall report to the Court by the number of the affirmative and negative votes its~~
68 ~~recommendation on the question as to whether, by a preponderance of the evidence, after weighing all~~
69 ~~relevant evidence in aggravation or mitigation which bear upon the particular circumstances or details of the~~
70 ~~commission of the offense and the character and propensities of the offender, the aggravating circumstances~~
71 ~~found to exist outweigh the mitigating circumstances found to exist. In order to find beyond a reasonable~~
72 ~~doubt that, after weighing all relevant evidence in aggravation or mitigation, which bear upon the particular~~
73 ~~circumstances or details of the commission of the offense and the character and propensities of the offender,~~
74 ~~the aggravating circumstances found to exist outweigh the mitigating circumstances found to exist, the jury~~
75 ~~must be unanimous in that conclusion.~~

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

80 (d) Determination of sentence. —

81 (1) ~~If a jury is impaneled, the Court shall discharge that jury after it has reported its findings and~~
82 ~~recommmendation to the Court.~~ A sentence of death shall not be imposed unless the jury, if a jury is impaneled, first
83 finds unanimously and beyond a reasonable doubt the existence of at least 1 statutory aggravating circumstance as
84 enumerated in subsection (e) of this section, and then also finds unanimously and beyond a reasonable doubt after
85 weighing all relevant evidence in aggravation or mitigation which bears upon the particular circumstances or details of
86 the commission of the offense and the character and propensities of the offender, that the aggravating circumstances
87 unanimously found to exist beyond a reasonable doubt outweigh the mitigating circumstances found to exist. If a jury
88 is not impaneled, a sentence of death shall not be imposed unless the Court finds beyond a reasonable doubt the
89 existence of at least 1 statutory aggravating circumstance as enumerated in subsection (e) of this section, and then
90 makes a specific finding as to each of the aggravating circumstances alleged by the State as required by paragraph (1)
91 of this subsection, whether the evidence shows beyond a reasonable doubt the existence of the aggravating
92 circumstance, and then also finds beyond a reasonable doubt after weighing all relevant evidence in aggravation or
93 mitigation which bears upon the particular circumstances or details of the commission of the offense and the character
94 and propensities of the offender, that the aggravating circumstances found to exist beyond a reasonable doubt outweigh
95 the mitigating circumstances found to exist. If a jury has been impaneled and if the jury finds unanimously and beyond
96 a reasonable doubt the existence of at least 1 statutory aggravating circumstance as enumerated in subsection (e) of this
97 section and has been found beyond a reasonable doubt by the jury, the Court, after considering the findings and
98 recommmendation of the jury and without hearing or reviewing any additional evidence, it also finds unanimously and
99 beyond a reasonable doubt after weighing all relevant evidence in aggravation or mitigation which bears upon the
100 particular circumstances or details of the commission of the offense and the character and propensities of the offender,
101 that the aggravating circumstances unanimously found to exist beyond a reasonable doubt outweigh the mitigating
102 circumstances found to exist, the Court may shall impose a sentence of death, if the Court finds by a preponderance of
103 the evidence, after weighing all relevant evidence in aggravation or mitigation which bears upon the particular
104 circumstances or details of the commission of the offense and the character and propensities of the offender, that the
105 aggravating circumstances found by the Court to exist outweigh the mitigating circumstances found by the Court to
106 exist. The jury's recommendation concerning whether the aggravating circumstances found to exist outweigh the
107 mitigating circumstances found to exist shall be given such consideration as deemed appropriate by the Court in light
108 of the particular circumstances or details of the commission of the offense and the character and propensities of the
109 offender as found to exist by the Court. The jury's recommendation shall not be binding upon the Court. If a jury has
110 not been impaneled and if the existence of at least 1 statutory aggravating circumstance as enumerated in subsection (e)

111 of this section has been found beyond a reasonable doubt by the Court, ~~it shall impose a sentence of death if the Court~~
112 ~~finds by a preponderance of the evidence,~~ and the Court also finds beyond a reasonable doubt, after weighing all
113 relevant evidence in aggravation or mitigation which bears upon the particular circumstances or details of the
114 commission of the offense and the character and propensities of the offender, that the aggravating circumstances found
115 ~~by the Court~~ to exist beyond a reasonable doubt outweigh the mitigating circumstances found ~~by the Court~~ to exist, the
116 Court may impose a sentence of death.

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

119 (3)a. Not later than 90 days before trial the defendant may file a motion with the Court alleging that the
120 defendant had ~~a serious intellectual developmental disorder~~ an intellectual disability at the time the crime was
121 committed. Upon the filing of the motion, the Court shall order an evaluation of the defendant for the purpose of
122 providing evidence of the following:

123 1. Whether the defendant has a significantly subaverage level of intellectual functioning;
124 2. Whether the defendant's adaptive behavior is substantially impaired; and
125 3. Whether the conditions described in paragraphs ~~(d)(1) and (d)(2)~~ (d)(3)a.1 and (d)(3)a.2 of this
126 section existed before the defendant became 18 years of age.

127 b. During the hearing authorized by subsections (b) and (c) of this section, the defendant and the State
128 may present relevant and admissible evidence on the issue of the defendant's alleged ~~serious intellectual~~
129 ~~developmental disorder~~ intellectual disability, or in rebuttal thereof. The defendant shall have the burden of proof
130 to demonstrate by clear and convincing evidence that the defendant had ~~a serious intellectual developmental~~
131 ~~disorder~~ an intellectual disability at the time of the offense. Evidence presented during the hearing shall be
132 considered by the jury in making its ~~recommendation~~ determination ~~to the Court~~ pursuant to paragraph (c)(3) of
133 this section as to whether the aggravating circumstances unanimously found to exist outweigh beyond a reasonable
134 doubt the mitigating circumstances found to exist. The jury shall not make any ~~recommendation~~ determination ~~to~~
135 ~~the Court~~ on the question of whether the defendant had ~~a serious intellectual developmental disorder~~ an intellectual
136 disability at the time the crime was committed.

137 c. If the defendant files a motion pursuant to this paragraph claiming he or she had ~~a serious intellectual~~
138 ~~developmental disorder~~ an intellectual disability at the time the crime was committed, the Court, in determining
139 the sentence to be imposed, shall make specific findings as to the existence of ~~a serious intellectual developmental~~
140 ~~disorder~~ an intellectual disability at the time the crime was committed. If the Court finds that the defendant has

141 established by clear and convincing evidence that the defendant had a ~~serious intellectual developmental disorder~~
142 an intellectual disability at the time the crime was committed, notwithstanding any other provision of this section
143 to the contrary, the Court shall impose a sentence of imprisonment for the remainder of the defendant's natural life
144 without benefit of probation or parole or any other reduction. If the Court determines that the defendant has failed
145 to establish by clear and convincing evidence that the defendant had a ~~serious intellectual developmental disorder~~
146 an intellectual disability at the time the crime was committed, the Court shall proceed to determine the sentence to
147 be imposed pursuant to the provisions of this subsection. Evidence on the question of the defendant's alleged
148 ~~serious intellectual developmental disorder~~ intellectual disability presented during the hearing shall be considered
149 by the Court in its determination pursuant to this section as to whether the aggravating circumstances found to
150 exist beyond a reasonable doubt outweigh the mitigating circumstances found to exist.

151 d. When used in this paragraph:

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

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

161 3. "Significantly subaverage intellectual functioning" means ~~an intelligent quotient of 70 or below~~
162 obtained by assessment with 1 or more of the standardized, performance that is two or more standard
163 deviations from the mean score, and accounting for the standard error of measurement on standardized,
164 individually administered general intelligence tests developed for the purpose of assessing intellectual
165 functioning.

166 (4) After the Court determines the sentence to be imposed, it shall set forth in writing the findings upon which
167 its sentence is based. ~~If a jury is impaneled, and if the Court's decision as to whether the aggravating circumstances~~
168 ~~found to exist outweigh the mitigating circumstances found to exist differs from the jury's recommended finding, If a~~
169 jury is impaneled and unanimously concludes that the aggravating circumstances unanimously found beyond a
170 reasonable doubt to exist outweigh beyond a reasonable doubt the mitigating circumstances found to exist and the

171 Court imposes a sentence of imprisonment for the remainder of the person's natural life without benefit of probation or
172 parole or any other reduction, the Court shall also state with specificity the reasons for its decision not to accept the
173 jury's recommendation determination.

174 (e) Aggravating circumstances. —

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

212 o. The murder was committed for pecuniary gain.

213 p. The victim was pregnant.

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

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

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

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

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

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

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

SYNOPSIS

This act will be known as the Extreme Crimes Protection Act.

This Act revises Delaware's death penalty statute to ensure its compliance with the United States Constitution, as interpreted by the United State Supreme Court in *Hurst v. Florida*, and by the Delaware Supreme Court in *Rauf v. State*. In accord with those cases, this Act will require that before a death sentence can be imposed, a jury (unless the Defendant waives their right to one) must first determine unanimously and beyond a reasonable doubt:

that at least 1 statutory aggravating circumstance exists;

which (if any) statutory and non-statutory aggravating circumstances alleged by the State exist; and

whether all of the aggravating circumstances found to exist outweigh all of the mitigating circumstances found to exist.

This Act also revises Delaware's death penalty statute to comply with the United State Supreme Court's holding in *Hall v. Florida*, interpreting standards set forth in *Atkins v. Virginia*. This Act adopts the term "intellectual disability" used by the United State Supreme Court.