



SPONSOR: Rep. Smyk & Rep. Carson & Sen. Ennis & Sen. Lawson  
& Sen. Pettyjohn  
Reps. Dukes, Morris, D. Short, Spiegelman,  
Vanderwende; Sen. Wilson

HOUSE OF REPRESENTATIVES  
150th GENERAL ASSEMBLY

HOUSE BILL NO. 165

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- except that no person who is convicted upon a verdict of “guilty, but mentally  
9 ill” as set forth in § 401 of this Title shall be punished by death.

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

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

21 alternates, shall be selected for the hearing in accordance with the applicable rules of the Superior Court and laws  
22 of Delaware, unless the defendant or defendants and the State stipulate to the use of a lesser number of jurors.

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

29 (c) Procedure at punishment hearing. —

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

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

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

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

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

51                   2. ~~3.~~ Whether, by a preponderance of the evidence beyond a reasonable doubt, after weighing all  
52 relevant evidence in aggravation or mitigation which bear upon the particular circumstances or details of  
53 the commission of the offense and the character and propensities of the offender, the aggravating  
54 circumstances found to exist outweigh the mitigating circumstances found to exist. In weighing all  
55 relevant evidence in aggravation or mitigation, the jury shall not give any weight to any aggravating  
56 circumstance unless it has unanimously determined that the evidence shows the existence of the  
57 aggravating circumstance beyond a reasonable doubt. The jury shall have the discretion to give the  
58 appropriate weight to any mitigating circumstance alleged by the Defendant regardless of whether its  
59 existence has been proven beyond a reasonable doubt.

60           b.1. The jury shall report to the Court its finding on the question of the existence of each statutory aggravating  
61 circumstances alleged by the State as required by paragraph (1) of this subsection, as enumerated in subsection (e) of this  
62 section. In order to find the existence of a statutory aggravating circumstance as enumerated in subsection (e) of this  
63 section In order to find the existence of any aggravating circumstance alleged by the State, beyond a reasonable doubt, the  
64 jury must be unanimous as to the existence of that statutory aggravating circumstance. As to any statutory aggravating  
65 circumstances enumerated in subsection (e) of this section which were alleged but for which the jury is not unanimous, the  
66 jury shall report the number of the affirmative and 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 relevant~~  
69 ~~evidence in aggravation or mitigation which bear upon the particular circumstances or details of the commission of~~  
70 ~~the offense and the character and propensities of the offender, the aggravating circumstances found to exist~~  
71 ~~outweigh the mitigating circumstances found to exist. In order to find beyond a reasonable doubt that, after~~  
72 ~~weighing all relevant evidence in aggravation or mitigation, which bear upon the particular circumstances or~~  
73 ~~details of the commission of the offense and the character and propensities of the offender, the aggravating~~  
74 ~~circumstances found to exist outweigh the mitigating circumstances found to exist, the jury must be unanimous in~~  
75 ~~that conclusion.~~

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

111 the existence of at least 1 statutory aggravating circumstance as enumerated in subsection (e) of this section has  
112 been found beyond a reasonable doubt by the Court, ~~it shall impose a sentence of death if the Court finds by a~~  
113 ~~preponderance of the evidence, and the Court also finds beyond a reasonable doubt,~~ after weighing all relevant  
114 evidence in aggravation or mitigation which bears upon the particular circumstances or details of the commission  
115 of the offense and the character and propensities of the offender, that the aggravating circumstances found ~~by the~~  
116 ~~Court~~ to exist beyond a reasonable doubt outweigh the mitigating circumstances found ~~by the Court~~ to exist, the  
117 Court may impose a sentence of death.

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

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

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

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

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

150 d. When used in this paragraph:

- 151 1. "Adaptive behavior" means the effectiveness or degree to which the individual meets the standards of personal  
152 independence expected of the individual's age group, sociocultural background and community setting, as evidenced by  
153 significant limitations in not less than 2 of the following adaptive skill areas: communication, self-care, home living, social  
154 skills, use of community resources, self-direction, functional academic skills, work, leisure, health or safety;
- 155 2. "~~Serious intellectual developmental disorder~~" "Intellectual disability" means that an individual has significantly  
156 subaverage intellectual functioning that exists concurrently with substantial deficits in adaptive behavior and both the  
157 significantly subaverage intellectual functioning and the deficits in adaptive behavior were manifested before the individual  
158 became 18 years of age; and
- 159 3. "Significantly subaverage intellectual functioning" ~~means an intelligent quotient of 70 or below obtained by assessment~~  
160 with 1 or more of the standardized, performance that is two or more standard deviations from the mean score, and  
161 accounting for the standard error of measurement on standardized, individually administered general intelligence tests  
162 developed for the purpose of assessing intellectual functioning.

163 (4) After the Court determines the sentence to be imposed, it shall set forth in writing the findings upon  
164 which its sentence is based. ~~If a jury is impaneled, and if the Court's decision as to whether the aggravating~~  
165 ~~circumstances found to exist outweigh the mitigating circumstances found to exist differs from the jury's~~  
166 ~~recommended finding.~~ If a jury is impaneled and unanimously concludes that the aggravating circumstances  
167 unanimously found beyond a reasonable doubt to exist outweigh beyond a reasonable doubt the mitigating  
168 circumstances found to exist and the Court imposes a sentence of imprisonment for the remainder of the person's  
169 natural life without benefit of probation or parole or any other reduction, the Court shall also state with specificity  
170 the reasons for its decision not to accept the jury's recommendation.

171 (e) *Aggravating circumstances.* —

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

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

177 b. a. The murder was committed for the purpose of avoiding or preventing an arrest or for the  
178 purpose of effecting an escape from the custody of a law enforcement officer or a place of confinement,  
179 or by a person in the custody of a law enforcement officer or a place of confinement.

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

183 d. c. The murder was committed against a any currently-serving or former Governor, Lieutenant  
184 Governor, member of the General Assembly, judicial officer, a former judicial officer, Attorney General,  
185 former Attorney General, Assistant or Deputy Attorney General or former Assistant or Deputy Attorney  
186 General, State Detective or former State Detective, Special Investigator or former Special Investigator,  
187 during, or because of, the exercise of an the victim's official duty.

188 ~~e. d. The murder was committed against a person who was held or otherwise detained by the~~  
189 ~~defendant as a shield, or hostage, or for ransom or reward.~~

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

192 g. e. The murder was committed against a person who was a witness to a crime or who had been  
193 a nongovernmental informant or had otherwise provided any investigative, law enforcement, or police  
194 agency with information concerning criminal activity and who was killed for the purpose of preventing  
195 the witness's appearance or testimony in any grand jury, criminal or civil proceeding involving such  
196 crime, or in retaliation for the witness's appearance or testimony in any grand jury, criminal or civil  
197 proceeding involving such crime, or in retaliation for the victim's activities as a nongovernmental  
198 informant or in providing information concerning criminal activity to an investigative law enforcement,  
199 or police agency.

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

202                   i. f. ~~The defendant was previously convicted of another murder or manslaughter or of a felony~~  
203 ~~involving the use of, or threat of, force or violence upon another person~~ any degree of rape or kidnapping  
204 or the intentional or reckless infliction of serious physical injury upon another person by means of a  
205 firearm or other deadly weapon, or an attempt to commit any of the crimes herein enumerated.

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

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

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

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

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

218                   o. ~~The murder was committed for pecuniary gain.~~

219                   p. l. ~~The victim was pregnant.~~

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

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

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

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

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

233                    o. The murder was committed for the purpose of interfering with the victim's free exercise or  
234 enjoyment of any right, privilege or immunity protected by the First Amendment to the United States  
235 Constitution, or because the victim has exercised or enjoyed said rights, or because of the victim's race,  
236 religion, color, disability, national origin or ancestry. (1) In order for a sentence of death to be imposed,  
237 the jury, unanimously, or the judge where applicable, must find that the evidence established beyond a  
238 reasonable doubt the existence of at least 1 of the following aggravating circumstances which shall apply  
239 with equal force to accomplices convicted of such murder.

#### 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.

This Act recognizes developing trends in death penalty jurisprudence and the American Bar Association's Resolution 122A (2006), of August 8, 2006, by prohibiting the imposition of the death penalty upon a person who has been found "guilty, but mentally ill", as defined by Title 11 § 401.

This Act also narrows the scope of the most commonly used statutory aggravating circumstances - those applicable in cases involving defendants with previous convictions for violent felonies and murders committed during the commission of other enumerated felonies. Several other statutory aggravating circumstances have been combined to eliminate duplication, eliminated entirely, or otherwise clarified.