

No: 2561

WEST VIRGINIA LEGISLATURE

REGULAR SESSION, 1987



ENROLLED

Com. Sub. For

HOUSE BILL No. 2561

(By Delegates JORDAN + FARLEY)



Passed MARCH 14, 1987

In Effect Ninety DAYS FROM Passage

ENROLLED
COMMITTEE SUBSTITUTE
FOR
H. B. 2561
(By DELEGATES JORDAN and FARLEY)

[Passed March 14, 1987; in effect ninety days from passage.]

AN ACT to amend article two, chapter fourteen of the code of West Virginia, one thousand nine hundred thirty-one, as amended, by adding thereto a new section, designated section thirteen-a; to amend and reenact sections three, nine, fourteen, nineteen and twenty, article two-a, chapter fourteen of the code of West Virginia, one thousand nine hundred thirty-one, as amended; and to amend article eleven-a, chapter sixty-one of said code by adding thereto a new section, designated section two-a, all relating to the court of claims; claims for unjust arrest and imprisonment or conviction and imprisonment; compensation awards to victims of crimes; claim investigators; compensation and expenses; paralegals and support staff; increasing amounts awardable for emotional distress, injury claims and funeral expenses; creating a special economic loss claim payment fund and authorizing payments therefrom without prior legislative approval; required notification of victim compensation law by prosecuting attorney offices; and prohibiting prosecutors from representing claimants.

Be it enacted by the Legislature of West Virginia:

That article two, chapter fourteen of the code of West

Virginia, one thousand nine hundred thirty-one, as amended, be amended by adding thereto a new section designated section thirteen-a; that sections three, nine, fourteen, nineteen and twenty, article two-a, chapter fourteen of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted; and that article eleven-a, chapter sixty-one of said code be amended by adding thereto a new section, designated section two-a, all to read as follows:

**CHAPTER 14. CLAIMS DUE AND AGAINST
THE STATE.**

ARTICLE 2. CLAIMS AGAINST THE STATE.

§14-2-13a. Claims for unjust arrest and imprisonment or conviction and imprisonment.

1 (a) The Legislature finds and declares that innocent
2 persons who have been wrongly convicted of crimes and
3 subsequently imprisoned and innocent persons wrongly
4 arrested, charged with a crime or imprisoned, who have
5 subsequently been released when another person was
6 arrested, prosecuted and convicted of the same criminal
7 offense have been frustrated in seeking legal redress due
8 to a variety of substantive and technical obstacles in the
9 law and that such persons should have an available
10 avenue of redress over and above the existing tort
11 remedies to seek compensation for damages. The
12 Legislature intends by enactment of the provisions of
13 this section that those innocent persons who can
14 demonstrate by clear and convincing evidence that they
15 were unjustly arrested and imprisoned or unjustly
16 convicted and imprisoned be able to recover damages
17 against the state. In light of the substantial burden of
18 proof that must be carried by such persons, it is the
19 intent of the Legislature that the court, in exercising its
20 discretion as permitted by law regarding the weight and
21 admissibility of evidence submitted pursuant to this
22 section, shall, in the interest of justice, give due
23 consideration to difficulties of proof caused by the
24 passage of time, the death or unavailability of witnesses,
25 the destruction of evidence or other factors not caused
26 by such persons or those acting on their behalf.

27 (b) Any person arrested or imprisoned or convicted

28 and subsequently imprisoned for one or more felonies or
29 misdemeanors against the state which he did not
30 commit may, under the conditions hereinafter provided,
31 present a claim for damages against the state.

32 (c) In order to present the claim for unjust arrest or
33 imprisonment, claimant must establish by documentary
34 evidence that he has been arrested and imprisoned, or
35 both arrested and imprisoned and charged by warrant,
36 information or indictment for one or more felonies
37 against the state and that subsequently another person
38 was arrested or prosecuted and convicted for the same
39 criminal offense or offenses and all charges against the
40 claimant were dismissed.

41 (d) In order to present the claim for unjust arrest,
42 imprisonment or conviction and imprisonment, claimant
43 must establish by documentary evidence that (1) he has
44 been convicted of one or more felonies or misdemeanors
45 against the state and subsequently sentenced to a term
46 of imprisonment, and has served all or any part of the
47 sentence; and (2) he has been pardoned upon the ground
48 of innocence of the crime or crimes for which he was
49 sentenced and which are the grounds for the complaint;
50 or (3) his judgment of conviction was reversed or
51 vacated, and the accusatory instrument dismissed or, if
52 a new trial was ordered, either he was found not guilty
53 at the new trial or he was not retried and the accusatory
54 instrument dismissed; or (4) the statute, or application
55 thereof, on which the accusatory instrument was based
56 violated the constitution of the United States or the state
57 of West Virginia; and (5) his claim is not time barred
58 by the provisions of subdivision (h) of this section.

59 (e) The claim shall state facts in sufficient detail to
60 permit the court to find that claimant is likely to
61 succeed at trial in proving that (1) in the case of an
62 unjust arrest or imprisonment with a warrant, informa-
63 tion or indictment which was subsequently dismissed
64 that another person was arrested or prosecuted and
65 convicted for the same offense or offenses, and (2) in the
66 case of an unjust conviction and imprisonment that he
67 did not commit any of the acts charged in the accusatory
68 instrument or his acts or omissions charged in the

69 accusatory instrument did not constitute a felony or
70 misdemeanor against the state, and (3) he did not by his
71 own conduct cause or bring about his conviction. The
72 claim shall be verified. If the court finds after reading
73 the claim that claimant is not likely to succeed at trial,
74 it shall dismiss the claim, either on its own motion or
75 on the motion of the state.

76 (f) In order to obtain a judgment in his favor,
77 claimant must prove by clear and convincing evidence
78 that:

79 (1) He has been arrested and imprisoned, or both
80 arrested and imprisoned, and charged by warrant,
81 information or indictment for one or more felonies, and
82 that the charges were dismissed against him when
83 another person was subsequently charged, arrested and
84 convicted of the same felony or felonies;

85 (2) He has been convicted of one or more felonies or
86 misdemeanors against the state and subsequently
87 sentenced to a term of imprisonment, and has served all
88 or any part of the sentence; or

89 (3) (A) He has been pardoned upon the ground of
90 innocence of the crime or crimes for which he was
91 sentenced and which are the grounds for the complaint;
92 or (B) his judgment of conviction was reversed or
93 vacated, and the accusatory instrument dismissed or, if
94 a new trial was ordered, either he was found not guilty
95 at the new trial or he was not retried and the accusatory
96 instrument dismissed; or (C) the statute, or application
97 thereof, on which the accusatory instrument was based
98 violated the constitution of the United States or the state
99 of West Virginia;

100 (4) He did not commit any of the acts charged in the
101 accusatory instrument or his acts or omissions charged
102 in the accusatory instrument did not constitute a felony
103 or misdemeanor against the state; and

104 (5) He did not by his own conduct cause or bring
105 about his conviction.

106 (g) If the court finds that the claimant is entitled to
107 a judgment, it shall award damages in such sum of

108 money as the court determines will fairly and reason-
109 ably compensate him.

110 (h) Any person claiming compensation under this
111 section based on a pardon that was granted before the
112 effective date of this section or the dismissal of an
113 accusatory instrument that occurred before the effective
114 date of this section shall file his claim within two years
115 after the effective date of this section. Any person
116 claiming compensation under this section based on a
117 pardon that was granted on or after the effective date
118 of this section or the dismissal of an accusatory
119 instrument that occurred on or after the effective date
120 of this section shall file his claim within two years after
121 the pardon or dismissal.

122 (i) Any person claiming compensation under this
123 section based on the dismissal of a felony charge or
124 charges against him when another person is subse-
125 quently charged, arrested and convicted of the same
126 felony charge or charges based upon a dismissal of the
127 felony charge or charges that occurred before the
128 effective date of this section shall file his claim within
129 one year after the effective date of this section.

**ARTICLE 2A. COMPENSATION AWARDS TO VICTIMS OF
CRIMES.**

§14-2A-3. Definitions.

1 As used in this article, the term:

2 (a) "Claimant" means any of the following persons,
3 whether residents or nonresidents of this state, who
4 claim an award of compensation under this article:

5 (1) A victim;

6 (2) A dependent, spouse or minor child of a deceased
7 victim; or in the event that the deceased victim is a
8 minor, the parents, legal guardians and siblings of the
9 victim;

10 (3) A third person other than a collateral source who
11 legally assumes or voluntarily pays the obligations of a
12 victim, or of a dependent of a victim, which obligations
13 are incurred as a result of the criminally injurious

14 conduct that is the subject of the claim;

15 (4) A person who is authorized to act on behalf of a
16 victim, dependent or a third person who is not a
17 collateral source.

18 (b) "Collateral source" means a source of benefits or
19 advantages for economic loss otherwise compensable
20 that the victim or claimant has received, or that is
21 readily available to him, from any of the following
22 sources:

23 (1) The offender, except any restitution received from
24 the offender pursuant to an order by a court of law
25 sentencing the offender or placing him on probation
26 following a conviction in a criminal case arising from
27 the criminally injurious act for which a claim for
28 compensation is made;

29 (2) The government of the United States or any of its
30 agencies, a state or any of its political subdivisions, or
31 an instrumentality of two or more states;

32 (3) Social security, medicare and medicaid;

33 (4) State-required, temporary, nonoccupational dis-
34 ability insurance; other disability insurance;

35 (5) Workers' compensation;

36 (6) Wage continuation programs of any employer;

37 (7) Proceeds of a contract of insurance payable to the
38 victim or claimant for loss that was sustained because
39 of the criminally injurious conduct;

40 (8) A contract providing prepaid hospital and other
41 health care services or benefits for disability;

42 (9) That portion of the proceeds of all contracts of
43 insurance payable to the claimant on account of the
44 death of the victim which exceeds twenty-five thousand
45 dollars.

46 (c) "Criminally injurious conduct" means conduct that
47 occurs or is attempted in this state which by its nature
48 poses a substantial threat of personal injury or death,
49 and is punishable by fine or imprisonment or death, or

50 would be so punishable but for the fact that the person
51 engaging in the conduct lacked capacity to commit the
52 crime under the laws of this state. Criminally injurious
53 conduct does not include conduct arising out of the
54 ownership, maintenance or use of a motor vehicle,
55 except when the person engaging in the conduct
56 intended to cause personal injury or death, or except
57 when the person engaging in the conduct committed
58 negligent homicide, driving under the influence of
59 alcohol, controlled substances or drugs, or reckless
60 driving.

61 (d) "Dependent" means an individual who received
62 over half of his support from the victim. For the purpose
63 of determining whether an individual received over half
64 of his support from the victim, there shall be taken into
65 account the amount of support received from the victim
66 as compared to the entire amount of support which the
67 individual received from all sources, including support
68 which the individual himself supplied. The term
69 "support" includes, but is not limited to, food, shelter,
70 clothing, medical and dental care and education. The
71 term "dependent" includes a child of the victim born
72 after his death.

73 (e) "Economic loss" means economic detriment con-
74 sisting only of allowable expense, work loss and
75 replacement services loss. If criminally injurious
76 conduct causes death, economic loss includes a depend-
77 ent's economic loss and a dependent's replacement
78 services loss. Noneconomic detriment is not economic
79 loss; however, economic loss may be caused by pain and
80 suffering or physical impairment.

81 (f) "Allowable expense" means reasonable charges
82 incurred or to be incurred for reasonably needed
83 products, services and accommodations, including those
84 for medical care, prosthetic devices, eye glasses,
85 dentures, rehabilitation and other remedial treatment
86 and care.

87 Allowable expense includes a total charge not in
88 excess of two thousand dollars for expenses in any way
89 related to funeral, cremation and burial. It does not

90 include that portion of a charge for a room in a hospital,
91 clinic, convalescent home, nursing home or any other
92 institution engaged in providing nursing care and
93 related services in excess of a reasonable and customary
94 charge for semiprivate accommodations, unless accom-
95 modations other than semiprivate accommodations are
96 medically required.

97 (g) "Work loss" means loss of income from work that
98 the injured person would have performed if he had not
99 been injured and expenses reasonably incurred or to be
100 incurred by him to obtain services in lieu of those he
101 would have performed for income, reduced by any
102 income from substitute work actually performed or to
103 be performed by him, or by income he would have
104 earned in available appropriate substitute work that he
105 was capable of performing but unreasonably failed to
106 undertake.

107

108 (h) "Replacement services loss" means expenses
109 reasonably incurred or to be incurred in obtaining
110 ordinary and necessary services in lieu of those the
111 injured person would have performed, not for income
112 but for the benefit of himself or his family, if he had
113 not been injured.

114 (i) "Dependent's economic loss" means loss after a
115 victim's death of contributions of things of economic
116 value to his dependents, not including services they
117 would have received from the victim if he had not
118 suffered the fatal injury, less expenses of the dependents
119 avoided by reason of the victim's death.

120 (j) "Dependent's replacement service loss" means loss
121 reasonably incurred or to be incurred by dependents
122 after a victim's death in obtaining ordinary and
123 necessary services in lieu of those the victim would have
124 performed for their benefit if he had not suffered the
125 fatal injury, less expenses of the dependents avoided by
126 reason of the victim's death and not subtracted in
127 calculating dependent's economic loss.

128 (k) "Noneconomic detriment" means sorrow, mental

129 anguish, and solace which may include society, compan-
130 ionship, comfort, guidance, kindly offices and advice.

131 (l) "Victim" means a person who suffers personal
132 injury or death as a result of any one of the following:
133 (1) Criminally injurious conduct; (2) the good faith effort
134 of the person to prevent criminally injurious conduct; or
135 (3) the good faith effort of the person to apprehend a
136 person that the injured person has observed engaging
137 in criminally injurious conduct, or who such injured
138 person has reasonable cause to believe has engaged in
139 such criminally injurious conduct immediately prior to
140 the attempted apprehension.

141 (m) "Contributory misconduct" means any conduct of
142 the claimant, or of the victim through whom the
143 claimant claims an award, that is unlawful or intention-
144 ally tortious and that, without regard to the conduct's
145 proximity in time or space to the criminally injurious
146 conduct has a casual relationship to the criminally
147 injurious conduct that is the basis of the claim.

**§14-2A-9. Claim investigators; compensation and ex-
penses; paralegals and support staff.**

1 The court of claims is hereby authorized to hire not
2 more than two claim investigators to be employed
3 within the office of the clerk of the court of claims, who
4 shall carry out the functions and duties set forth in
5 section twelve of this article. Claim investigators shall
6 serve at the pleasure of the court of claims and under
7 the administrative supervision of the clerk of the court
8 of claims. The compensation of claim investigators shall
9 be fixed by the court, and such compensation, together
10 with travel, clerical and other expenses of the clerk of
11 the court of claims relating to a claim investigator
12 carrying out his duties under this article, including the
13 cost of obtaining reports required by the investigator in
14 investigating a claim, shall be payable from the crime
15 victims compensation fund as appropriated for such
16 purpose by the Legislature.

17 The court of claims is hereby authorized to hire as
18 support staff such paralegal or paralegals and secretary
19 or secretaries to be employed within the office of the

20 clerk of the court of claims, necessary to carry out the
21 functions and duties of this article. Such support staff
22 shall serve at the will and pleasure of the court of claims
23 and under the administrative supervision of the clerk of
24 the court of claims.

**§14-2A-14. Grounds for denial of claim or reduction of
award; maximum awards; awards for
emotional distress; mental anguish, etc.**

1 (a) Except as provided in subsection (b), section ten
2 of this article, the judge or commissioner shall not
3 approve an award of compensation to a claimant who
4 did not file his application for an award of compensation
5 within two years after the date of the occurrence of the
6 criminally injurious conduct that caused the injury or
7 death for which he is seeking an award of compensation.

8 (b) An award of compensation shall not be approved
9 if the criminally injurious conduct upon which the claim
10 is based was not reported to a law-enforcement officer
11 or agency within seventy-two hours after the occurrence
12 of the conduct, unless it is determined that good cause
13 existed for the failure to report the conduct within the
14 seventy-two hour period.

15 (c) The judge or commissioner shall not approve an
16 award of compensation to a claimant who is the offender
17 or an accomplice of the offender who committed the
18 criminally injurious conduct, nor to any claimant if the
19 award would unjustly benefit the offender or his
20 accomplice. Unless a determination is made that the
21 interests of justice require that an award be approved
22 in a particular case, an award of compensation shall not
23 be made to the spouse of, or to a person living in the
24 same household with, the offender or accomplice of the
25 offender, or to the parent, child, brother or sister of the
26 offender or his accomplice.

27 (d) A judge or commissioner, upon a finding that the
28 claimant or victim has not fully cooperated with
29 appropriate law enforcement agencies, or the claim
30 investigator, may deny a claim, reduce an award of
31 compensation, and may reconsider a claim already
32 approved.

33 (e) An award of compensation shall not be approved
34 if the injury occurred while the victim was confined in
35 any state, county or city jail, prison or correctional
36 facility.

37 (f) After reaching a decision to approve an award of
38 compensation, but prior to announcing such approval,
39 the judge or commissioner shall require the claimant to
40 submit current information as to collateral sources on
41 forms prescribed by the clerk of the court of claims. The
42 judge or commissioner shall reduce an award of
43 compensation or deny a claim for an award of compen-
44 sation that is otherwise payable to a claimant to the
45 extent that the economic loss upon which the claim is
46 based is or will be recouped from other persons,
47 including collateral sources, or if such reduction or
48 denial is determined to be reasonable because of the
49 contributory misconduct of the claimant or of a victim
50 through whom he claims. If an award is reduced or a
51 claim is denied because of the expected recoupment of
52 all or part of the economic loss of the claimant from a
53 collateral source, the amount of the award or the denial
54 of the claim shall be conditioned upon the claimant's
55 economic loss being recouped by the collateral source:
56 *Provided*, That if it is thereafter determined that the
57 claimant will not receive all or part of the expected
58 recoupment, the claim shall be reopened and an award
59 shall be approved in an amount equal to the amount of
60 expected recoupment that it is determined the claimant
61 will not receive from the collateral source, subject to the
62 limitation set forth in subsection (g) of this section.

63 (g) Except in the case of death, compensation payable
64 to a victim and to all other claimants sustaining
65 economic loss because of injury to that victim shall not
66 exceed thirty-five thousand dollars in the aggregate.
67 Compensation payable to a victim of criminally injur-
68 ious conduct which causes permanent injury may
69 include, in addition to economic loss, an amount up to
70 fifteen thousand dollars for emotional distress and pain
71 and suffering which are proximately caused by such
72 conduct. Compensation payable to all claimants because
73 of the death of the victim shall not exceed fifty thousand

74 dollars in the aggregate, but may include, in addition
75 to economic loss, compensation to the claimants specified
76 in paragraph (2), subdivision (a), section three of this
77 article, for sorrow, mental anguish and solace.

§14-2A-19. Attorney and witness fees.

1 (a) As part of an order, the court, or a judge or
2 commissioner thereof, shall determine and award
3 reasonable attorney's fees, commensurate with services
4 rendered, and reimbursement for reasonable and
5 necessary expenses actually incurred, to be paid from
6 the crime victims compensation fund to the attorney
7 representing a claimant in a proceeding under this
8 article. Attorney's fees and reimbursement may be
9 denied upon a finding that the claim or appeal is
10 frivolous. Awards of attorney's fees and reimbursement
11 shall be in addition to awards of compensation, and
12 attorney's fees and reimbursement may be awarded
13 whether or not an award of compensation is approved.
14 An attorney shall not contract for or receive any larger
15 sum than the amount allowed under this section. In no
16 event may a prosecuting attorney or assistant prosecut-
17 ing attorney represent any victim seeking compensation
18 under this article.

19 (b) Each witness called by the court to appear in a
20 hearing on a claim for an award of compensation shall
21 receive compensation and expenses in an amount equal
22 to that received by witnesses in civil cases as provided
23 in section sixteen, article one, chapter fifty-nine of this
24 code to be paid from the crime victims compensation
25 fund.

§14-2A-20. Procedure for certification and payment of claims.

1 (a) The clerk shall certify to the department of
2 finance and administration, on or before the twentieth
3 day of November of each year, a list of all claims
4 pursuant to this article for which the court has made
5 a final determination and approved an award since the
6 last such certificate.

7 (b) The governor shall include in his proposed budget

8 bill and revenue estimates:

9 (1) An estimate of the balance and receipts anticipated
10 in the crime victims compensation fund,

11 (2) An itemized report of the approved awards
12 recommended by the court to the Legislature,

13 (3) Such recommendations to the Legislature for
14 appropriations from the crime victims compensation
15 fund as he may deem appropriate for the payment of
16 fees, costs and expenses incurred, due or payable at any
17 time from such fund, and

18 (4) Such recommendations to the Legislature for
19 appropriations for the payment of claims arising under
20 this article, whether accrued and determined by the
21 court and included in the itemization of awards
22 mentioned in this section or arising during the ensuing
23 fiscal year.

24 (c) The Legislature shall, by general law, provide for
25 the authorization to pay the itemized awards arising
26 under this article or so much thereof as may be deemed
27 appropriate or for awards arising during the ensuing
28 fiscal year and provide by appropriation from the crime
29 victims compensation fund for the payment of such
30 awards authorized and for the payment of fees, costs and
31 expenses as from time to time may be appropriate. The
32 clerk shall certify each authorized award and the
33 amount thereof and make requisition upon the crime
34 victims compensation fund relating thereto to the
35 auditor. The auditor shall issue his warrant to the
36 treasurer without further examination or review of the
37 claim except for the question of a sufficient unexpended
38 balance in the appropriation: *Provided*, That the state
39 treasurer shall establish within his office a special
40 economic loss claim payment fund, with funds which are
41 transferred from the crime victims compensation fund
42 by an annual line item appropriation from the
43 Legislature.

44 In any case where the court has made a final award
45 which includes a sum for economic loss, the court shall
46 as part of its award order that the state auditor pay that

47 portion of the award which is for economic loss
48 forthwith from the economic loss claim fund, notwith-
49 standing the fact that the Legislature has not yet
50 considered or authorized said award. Said award and
51 order may provide that payment be made to a claimant
52 or to a third party for economic losses of the claimant
53 and said award and order may provide for the payment
54 for actual economic losses which are prospective as well
55 as those which have already been incurred.

56 The clerk of the court shall certify the economic loss
57 award and payment order to the auditor who shall
58 proceed as set forth herein and issue his warrant to the
59 treasurer for payment of the economic loss award,
60 subject to the availability of funds in the economic loss
61 claim payment fund.

CHAPTER 61. CRIMES AND THEIR PUNISHMENT.

ARTICLE 11A. VICTIM PROTECTION ACT OF 1984.

§61-11A-2a. Notification of crime victims compensation fund.

1 Whenever the prosecuting attorney's office presents a
2 case to a grand jury or proceeds in the circuit court on
3 an information, the prosecutor or assistant prosecutor
4 shall within thirty days following said presentment or
5 information notify in writing each victim of the alleged
6 offense of the existence and basic provisions of article
7 two-a, chapter fourteen of this code. Nothing in this
8 section shall be construed as precluding the prosecuting
9 attorney's office from other notification to victims of
10 crime, or as creating a cause of action for damages
11 against any prosecuting attorney or their staff, or
12 against the state of West Virginia or any of its political
13 subdivisions.

The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

Bruce O. Williams

Chairman Senate Committee

Lyle Satter

Chairman House Committee

Originating in the House.

Takes effect ninety days from passage.

Todd C. Willis

Clerk of the Senate

Donald L. Hoop

Clerk of the House of Delegates

Ron Turbill

President of the Senate

Robert C. Clark

Speaker of the House of Delegates

The within *approved* this the *1st*
April day of _____, 1987.

Arthur Shaffer, Jr.

Governor

PRESENTED TO THE
GOVERNOR

Date 3/26/87
Time 2:34 p.m.

RECEIVED

197 APR - 2 11:11:35

OFFICE OF THE
SECRETARY OF THE ARMY