

Department of Legislative Services
 Maryland General Assembly
 2008 Session

FISCAL AND POLICY NOTE

House Bill 1328
 Judiciary

(Delegate Rosenberg, *et al.*)

Criminal Law - Death Penalty - Repeal

This bill repeals the death penalty and all provisions relating to it, including those relating to its administration and post death sentencing proceedings. A person found guilty of murder in the first degree must be sentenced to imprisonment for life or imprisonment for life without the possibility of parole.

The bill also provides that an inmate who has been sentenced to death before the bill's October 1, 2008 effective date and who has not been executed, may not be executed and will be considered as having received a sentence of life imprisonment without the possibility of parole. If the State has already properly filed a notice of intent to seek a death sentence, that notice must be considered withdrawn. In such instance, the State must also be considered to have properly filed notice to seek a sentence of life imprisonment without the possibility of parole.

Fiscal Summary

State Effect: Decrease in general fund expenditures for the Office of the Public Defender (OPD) of about \$1.3 million annually. Otherwise, abolition of the death penalty is not expected to have a significant effect on overall State operations or finances.

(in dollars)	FY 2009	FY 2010	FY 2011	FY 2012	FY 2013
Revenues	\$0	\$0	\$0	\$0	\$0
GF Expenditure	(1,300,000)	(1,300,000)	(1,300,000)	(1,300,000)	(1,300,000)
Net Effect	\$1,300,000	\$1,300,000	\$1,300,000	\$1,300,000	\$1,300,000

Note:() = decrease; GF = general funds; FF = federal funds; SF = special funds; - = indeterminate effect

Local Effect: Minimal. While some State's Attorneys' offices prosecute more death penalty cases than others, and the cost of bringing capital cases tends to be significantly higher than noncapital cases, the bill is not expected to have a significant effect on staffing levels or operational expenses of any one office.

Small Business Effect: None.

Analysis

Current Law: Maryland is a common law State, and has had a death penalty since it became a sovereign State. Persons charged with first degree murder, if found guilty, are subject to penalties of life imprisonment, life imprisonment without parole, or death. Decisions to seek the death penalty are made by local State's Attorneys. The State is required to provide a person charged with first degree murder with written notice of an intention to seek the death penalty at least 30 days prior to trial.

A separate sentencing proceeding is required to be conducted as soon as practicable after completion of a trial to determine whether the death penalty will be imposed. A court or jury, in considering the imposition of the death penalty, must first consider whether any of 10 aggravating circumstances exist beyond a reasonable doubt. If the presence of one or more aggravating factors is found, the court or jury must consider whether one or more of eight mitigating factors exist and whether the aggravating circumstances outweigh the mitigating circumstances by a preponderance of the evidence. If a court or jury finds the existence of aggravating factors and that they outweigh the mitigating factors, or no mitigating factors are found, a death sentence may be imposed. The Court of Appeals is required to review the death sentence on the record. Implementation of the death penalty must be carried out by the Division of Correction (DOC) in the Department of Public Safety and Correctional Services (DPSCS).

Background: Political and social arguments for and against the use of capital punishment have persisted over many years both nationally and in Maryland. Although questions about the use of the death penalty previously focused on the morality of state-sanctioned killing, more attention is now being paid to the ability of government to administer the system fairly – without racial, geographic, or socioeconomic inequities – and in a way that minimizes the risk of executing innocent persons. On March 1, 2005, in the case, *Roper v. Simmons*, 543 U.S. 551 (2005) the U.S. Supreme Court held that imposition of the death penalty against a person who was younger than the age of 18 (when he/she committed a death penalty-eligible crime) violates the constitutional prohibition against cruel and inhuman punishment.

States With and Without the Death Penalty: Currently, 37 states have the death penalty and as of 2008, 36 states use a lethal injection process for execution. Nebraska used the electric chair as its method of execution until February 2008, when the Nebraska Supreme Court ruled that electrocution violated the U.S. Constitution's prohibition against cruel and unusual punishment; however the state could impose the death penalty.

The execution method that the state will employ in light of that decision has not yet been determined.

The following 13 states and the District of Columbia do not currently have a death penalty statute: Alaska, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, New Jersey, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin. Some consideration of adding a death penalty has taken place in states that do not currently have it. In Wisconsin, a nonbinding referendum on the death penalty was put on the ballot in the November 2006 election. Over 50% of voters approved reinstatement of the death penalty as long as DNA evidence confirmed the conviction. Legislation to reinstate the death penalty has also been under consideration. Other states that have considered reinstatement of the death penalty include Minnesota and North Dakota.

In 2007, legislation was enacted in New Jersey that repealed the death penalty. In 2005, New Jersey became the first state to impose a death penalty moratorium through legislation. The moratorium legislation required a study commission to examine the fairness and expense of the state's death penalty. The New Jersey Death Penalty Study Commission issued its report in January 2007 and recommended that the state's death penalty be repealed and replaced with the penalty of life without the possibility of parole. The legislature accepted the commission's recommendation and passed legislation which was signed by the Governor, making New Jersey the first state to legislatively repeal its death penalty in recent history. The New Hampshire legislature passed legislation repealing the state's death penalty in 2000, but the Governor vetoed the legislation. Legislation to repeal the death penalty has passed the New Mexico House and was favorably reported out of legislative committees in Colorado and Nebraska.

Kansas, New Hampshire, New Jersey, New York, and South Dakota, as well as the U.S. military, have not executed anyone since reinstatement of the death penalty by the U.S. Supreme Court in 1976. In 2004, the death penalty statutes in New York and Kansas were found unconstitutional by those states' highest courts. The U.S. Supreme Court upheld the constitutionality of the Kansas death penalty statute in 2006. Reinstatement of the New York death penalty statute, however, requires legislation. The New York Assembly has considered numerous bills to reinstate the death penalty since its court decision, but attempts to pass death penalty legislation have been unsuccessful to date.

Death Penalty Moratoriums and Studies: Implementation of the death penalty has been effectively halted nationwide since the U.S. Supreme Court agreed to hear the appeal in *Baze v. Rees* (No. 07-5439). In September 2007, the court agreed to consider the constitutionality of the lethal injection process as administered in Kentucky. Two death row inmates, Ralph Baze and Thomas Clyde Bowling, Jr., sued Kentucky in 2004 claiming that the state's lethal injection process amounted to cruel and unusual punishment. The Kentucky Supreme Court upheld the procedure's constitutionality. The

U.S. Supreme Court heard oral arguments in this case on January 7, 2008. The case has wide-ranging implications because the Kentucky procedures for lethal injection are substantially similar to the procedures used in many other states, including those used in Maryland.

In at least 13 other states, (Arkansas, California, Delaware, Florida, Kentucky, Missouri, New Jersey, North Carolina, Ohio, Oklahoma, South Dakota, Tennessee, and Texas) the lethal injection process has been subject to state or federal constitutional challenge on either procedural or due process grounds (as in Maryland) or on the humaneness of the procedure itself (as in California).

In 2000, Illinois Governor George Ryan instituted a moratorium on the death penalty in Illinois. In January 2003, before leaving office, Governor Ryan commuted the sentences of 167 inmates to life imprisonment due to grave concerns about the equity of the death penalty in Illinois. Illinois has enacted legislation requiring sweeping changes in death penalty procedures. However, Illinois Governor Rod Blagojevich has indicated that the death penalty moratorium will continue and is in its eighth year. Illinois, Maryland, and New Jersey are the only states that have officially instituted death penalty moratoriums. The Maryland moratorium was also implemented through executive action and ended when Governor Robert Ehrlich took office in January 2003.

In 2000, Governor Parris Glendening authorized \$225,000 for a study of racial disparity and fairness issues by the Criminology Department at the University of Maryland College Park. The study was released in January 2003 and included data collection from a wide variety of sources searching for and identifying certain case characteristics for all capital cases tried in the State since the reintroduction of capital punishment in 1978 until December 1999. The University of Maryland study found that the race of the offender did not have a significant impact in the death penalty process. However, the jurisdiction where the murder was prosecuted and the race of the victim did affect application of the death penalty. Generally, the early decisions made by prosecutors, specifically whether a case is eligible for the death penalty and the decision to retain or drop pursuit of a death sentence, were major factors in determining who faced execution.

Similar studies of the equity of death penalty implementation have been conducted in Arizona, California, Connecticut, Illinois, Indiana, Nebraska, Nevada, North Carolina, and Virginia. Virginia's study of its death penalty system, released in January 2003, found there was no untoward disparity based on race or any other factor that impaired administration of its death penalty.

Maryland Developments and the Use of Lethal Injection: In Maryland, since the death penalty was reinstated on July 1, 1978, there have been 53 persons sentenced to death (representing imposition of 78 death sentences). To date, 5 persons have been executed, 3 in the 1990s, 1 in 2004, and 1 in 2005. According to DPSCS, there are 5 persons

currently on Maryland's death row. According to the *Espy Database* of the Death Penalty Information Center, Maryland has executed 314 people since 1638, when the earliest recorded execution took place. A warrant signed for the February 6, 2006 execution of Vernon L. Evans, Jr. was stayed by the Maryland Court of Appeals. In 2006, the court heard arguments on Evan's appeal based on four claims:

- mitigating evidence about Evan's abusive childhood was not investigated by his previous attorneys or presented at trial;
- prosecutors improperly used their challenges to dismiss, based on race, 8 of 10 potential jurors who were black;
- the application of the death penalty is biased by race and geography, as documented in the University of Maryland study of the death penalty; and
- the regulatory procedures for carrying out the death sentence, including execution by lethal injection, were adopted without the public input required by law.

The Maryland Court of Appeals did not find merit in the first three claims. The court did rule, however, that the procedures for lethal injection were implemented without the input required by the Administrative Procedure Act. The court held that the DOC protocols are ineffective until either (1) the protocols are adopted as regulations under the Administrative Procedure Act; or (2) the General Assembly exempts the protocols from the procedures required by the Act. To date, new regulations to adopt the protocols have not been issued by the Department of Public Safety and Correctional Services. As a result, implementation of the death penalty has effectively been halted in Maryland since the ruling in *Evans v. State*, 395 Md. 256 (2006).

State Fiscal Effect: Prosecutions, defenses, and appellate proceedings attributable to capital cases are far more costly than litigation for other criminal cases. There are also measurable costs associated with maintaining a "death row" within the State correctional system, and with actual executions. The State entities that would be directly affected by abolition of the death penalty include the Judiciary, the Office of the Attorney General (OAG), OPD, and DOC in DPSCS.

Judiciary and the OAG: The Judiciary would experience a reduction in appeals, but would not experience a significant fiscal or operational impact as a result. The resulting decrease in appeals would also impact OAG, but any related existing litigation resources would be reallocated without any appreciable impact on overall operations or finances.

The Office of the Public Defender: OPD would be able to eliminate its Capital Defense Division for a savings of about \$1.3 million annually, although the personnel from that unit would be reassigned within the agency. The fiscal 2009 allowance for the Capital Defense Division is \$958,479. The elimination of nonpersonnel related operating expenses would save the office about \$400,000 annually. Additional savings of up to

\$1.5 million annually could occur from the release and/or elimination of panel attorneys, expert witnesses, transcripts, and investigations, which normally occur with capital cases and are budgeted outside of the Capital Defense Division. OPD advises that historically, the annual cost of litigating capital cases has been about \$1.9 million. If the same cases were tried as noncapital cases, the cost to the office would be about \$650,000, resulting in savings of about \$1.3 million annually.

If the death penalty is abolished, the division would continue working on pending cases, but would otherwise begin to close its operations. It is noted that this unit is generally administrative in nature and rarely litigates death penalty cases. That function is performed via staff attorneys in the field offices and/or panel attorneys. It is also noted, however, that subjecting defendants to life imprisonment or life imprisonment without parole for the same offenses, instead of a death sentence, would still require substantial resources.

Department of Public Safety and Correctional Services: For DOC, any savings realized by the elimination of “Max Level II” (death row) at the Maryland Correctional Adjustment Center (MCAC) and the potential elimination of costs associated with executions would be generally offset by the expense of longer stays in DOC facilities.

DOC advises that the average annual cost of maintaining a death penalty inmate is about \$46,810, (including overhead) compared to about \$39,316 for a maximum security inmate. There are five inmates on death row now. The length of time on death row varies; however, three of the current death row inmates have been there over 20 years. There is no way to precisely determine if and when any of the five death sentences might be carried out due to the lengthy appeals process. By way of illustration, the three death row inmates executed by Maryland in the 1990s had stays of 12, 10, and 4 years, respectively, averaging about 8 years each.

There might be an initial savings if inmates no longer had to be maintained on death row, but instead were maintained at a maximum security facility. However, any potential savings would probably not be realized because the inmate who is not executed, but instead sentenced to life, would most likely remain incarcerated beyond the average eight-year stay of a death row inmate. There is no reliable way to predict how long such an inmate would be housed. The savings that could be realized from the lower cost of housing a maximum security inmate would dissipate because that inmate could remain at DOC for many years.

If this bill is enacted, DOC would place the death penalty inmates in a maximum security facility and convert death row to regular housing at MCAC.

Accordingly, this bill is expected to have a negligible effect on the budgetary needs or operations of DOC.

Additional Information

Prior Introductions: This bill is a reintroduction of SB 211/HB 225 of 2007. SB 211 received an unfavorable report from the Senate Judicial Proceedings Committee and HB 225 was heard in Judiciary, but received no further action. This bill is a reintroduction of SB 349/HB 809 of 2006. SB 349 was heard in Judicial Proceedings, but received no further action. Likewise, HB 809 was heard in Judiciary, but received no further action. This bill is also a reintroduction of SB 666/HB 1159 of 2005. SB 666 was heard in Judicial Proceedings, but received no further action. HB 1159 was heard in Judiciary, but was then withdrawn. This bill is a reintroduction of HB 521 of 2004, which was heard in Judiciary, but received no further action. It is a reintroduction of SB 544 of 2003, which received an unfavorable report from Judicial Proceedings. A similar bill, HB 102 of 2001, received an unfavorable report from Judiciary.

Cross File: SB 645 (Senator Gladden, *et al.*) – Judicial Proceedings.

Information Source(s): State’s Attorneys’ Association, Judiciary (Administrative Office of the Courts), Office of the Public Defender, University System of Maryland, Commission on Criminal Sentencing Policy, Office of the Attorney General, Department of Public Safety and Correctional Services, Death Penalty Information Center, *stateline.org*, Human Rights Watch, University System of Maryland, *The Washington Post*, *The Los Angeles Times*, *The New York Times*, *The Baltimore Sun*, *The Associated Press*, Department of Legislative Services

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mll/jr

Analysis by: Karen D. Morgan

Direct Inquires to:
(410) 946-5510
(301) 970-5510