

Department of Legislative Services
 Maryland General Assembly
 2011 Session

FISCAL AND POLICY NOTE

House Bill 1075

(Delegate Rosenberg, *et al.*)

Judiciary

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.

If the State has already properly filed a notice of intent to seek a death sentence, that notice must be considered withdrawn.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: General fund expenditures for the Office of the Public Defender (OPD) decrease by approximately \$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 2012	FY 2013	FY 2014	FY 2015	FY 2016
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: 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: Persons charged with first degree murder, if found guilty, are subject to penalties of life imprisonment, life imprisonment without parole, or death. During the 2009 session, the General Assembly passed legislation altering the application of the death penalty in Maryland. Chapter 186 of 2009 restricted death penalty eligibility only to cases in which the State presents the court or jury with (1) biological or DNA evidence that links the defendant with the act of murder; (2) a videotaped, voluntary interrogation and confession of the defendant to the murder; or (3) a video recording that conclusively links the defendant to the murder. A defendant may not be sentenced to death if the State relies solely on evidence provided by eyewitnesses in the case.

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 defendant who was younger than age 18 at the time of the murder may not be sentenced to death. A defendant who can prove by a preponderance of the evidence that he/she was mentally retarded (intellectually disabled) at the time of the murder is also exempt from the death penalty.

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 circumstances is found, the court or jury must consider whether one or more of eight mitigating circumstances 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 circumstance and that they outweigh the mitigating circumstance, or no mitigating circumstance is 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:

History of Death Penalty Legislation in Maryland: Like other common law states, the availability of capital punishment in Maryland can be traced back to the common law of England, under which death was the mandatory punishment for murder. Reports differ as to when the earliest recorded execution in Maryland took place. Some accounts state that it took place on June 20, 1863 in St. Mary's County; others claim that it was on October 22, 1773, in Frederick County.

While debate over the use of capital punishment has been the subject of recent headlines, the State's legislature has debated the issue on many occasions over the past 200 years.

In 1809, the Maryland General Assembly divided the criminal offense of murder into varying degrees of severity, and made capital punishment a mandatory sentence for first degree murder cases only. The legislature noted that murders "differ so greatly from each other in the degree of their atrociousness that it is unjust to involve them in the same punishment." In 1908, the General Assembly enacted legislation removing death as a mandatory sentence and granted judges the authority to sentence a defendant convicted of first degree murder to life in prison instead. Subsequent legislation authorized a jury to return a verdict of "guilty without capital punishment." This verdict would preclude a judge from imposing the death penalty on a defendant.

In 1972, the U.S. Supreme Court ruled all existing death penalty statutes unconstitutional because of their arbitrary application at the time. Four years later, the court ruled that capital punishment systems featuring "guided discretion," not mandatory imposition, were permissible. Subsequently, the Maryland legislature reinstated the death penalty in 1978.

States With and Without the Death Penalty: Currently, 34 states have the death penalty. The following 16 states and the District of Columbia do not currently have a death penalty statute: Alaska, Hawaii, Illinois, Iowa, Maine, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, New York, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin. Illinois became the latest state to abolish the death penalty on March 9, 2011, when Governor Pat Quinn signed legislation abolishing capital punishment and commuted the sentences of the state's 15 death row inmates to life imprisonment without the possibility of parole. The law goes into effect on July 1, 2011.

Implementation of the death penalty was effectively halted nationwide when the U.S. Supreme Court agreed to hear the appeal in *Baze v. Rees*, 553 U.S. 35, 128 S.Ct. 1520 (2008). 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 case had 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 April 2008, the court affirmed the decision of the Kentucky Supreme Court and ruled that Kentucky's lethal injection protocol did not constitute cruel and unusual punishment. Following the decision in *Baze*, nine states carried out executions for the remainder of 2008.

Moratoriums and Studies in Maryland: 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.

On May 8, 2002, Governor Glendening imposed a moratorium on capital punishment in Maryland until the University of Maryland study was complete and reviewed and acted upon by the General Assembly.

In January 2003, the findings of the study were released. The 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. Governor Robert Ehrlich lifted the moratorium shortly after taking office in 2003.

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 Commission on Capital Punishment: 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. Chapters 430 and 431 of 2008 established the Maryland Commission on Capital Punishment to study all aspects of capital punishment as currently and historically administered in the State. The commission held five public hearings during which it heard testimony from judges, law professors, attorneys, and others with expertise in or experience with the death penalty. The commission held five additional meetings to discuss the evidence presented at the hearings. In a 13-9 vote, the commission recommended abolishing capital punishment in Maryland. Among other things, the commission found that:

- racial and geographic disparities exist in how the death penalty is applied;

- death penalty cases are more costly than nondeath penalty cases and take a greater toll on the survivors of murder victims;
- there is no persuasive evidence that the risk of execution is a deterrent to crime; and
- the unavailability of DNA evidence in some cases opens the “real possibility” of wrongly executing an innocent person.

The commission’s minority report cited the reasons below, among other things, as support for retaining the death penalty in Maryland.

- Maryland is more judicious in its application of the death penalty compared to other states and compared to death penalty imposition in the State prior to 1978. The State has an extensive statutory scheme before the death penalty may be imposed, and the death penalty is sought in a low percentage of murder cases.
- Advances in technology, Maryland’s extensive review process, and post-conviction DNA reforms have reduced the chance that an innocent person may be sentenced to death as far as is humanly possible. The slight chance that this may occur does not justify repealing the death penalty.
- The death penalty does have a deterrent effect; it protects future victims and is a deterrent from committing future murders for individuals already serving life sentences. The minority report also indicated that if the death penalty is repealed, it should, at the very least, be retained for cases involving murders of correctional and police officers.

Maryland Developments: According to DPSCS, five persons are currently on Maryland’s death row. Since the State reinstated the death penalty on July 1, 1978, there have been 56 persons sentenced to death. The State has executed 314 people since 1638; five of the executions took place after July 1, 1978. The last execution in Maryland occurred in 2005. 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 DPSCS. 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). Evans' civil rights claim in the U.S. District Court of Maryland that the use of lethal injection in Maryland is cruel and unusual punishment because of the combination of chemicals used, the lack of medical expertise of correctional officers who administer the injections, and the condition of his veins after years of drug use is still pending since the case was put on hold after the Court of Appeals decision halted executions in the State.

Maryland Death Penalty Regulations: On June 24, 2009, DPSCS released the new proposed regulations. Among other things, the proposed regulations:

- require the Commissioner of Correction to ensure that individuals assigned to the lethal injection team are trained and certified to administer the authorized pharmaceuticals used during the execution process and insert intravenous catheters into the inmate, if required;
- require that two injection sites and two intravenous lines be established and that one extra syringe of each of three drugs administered be prepared as a standby;
- require a certified or contracted paramedic to be present to resuscitate the inmate if a stay of execution is granted;
- require a pre-execution examination of the inmate to determine optimal locations for the insertion of intravenous needles during the execution;
- permit the placement of an injection in an area other than the inmate's arm if a vein cannot be palpated in the arm;
- ban the use of the "cut down" procedure, in which an individual's vein is cut in order to administer an injection; and
- permit the continued use of pancuronium bromide as part of the lethal cocktail of drugs used during executions.

Death penalty opponents voiced numerous objections to the proposed regulations, particularly over the drugs administered, participation of medical personnel, and lack of specifics.

As previously stated, the regulations authorize the continued use of pancuronium bromide, a muscle relaxant, as part of the three-drug cocktail administered to an inmate

during an execution. Objections to the drug are centered on the fact that this paralytic agent completely immobilizes an individual to the point that he or she would not be able to express pain or communicate as to the effectiveness of the anesthetic. The chemical is prohibited for use in animal euthanasia in Maryland and some other states. The Administrative, Executive, and Legislative Review Committee (AELR) also questioned the continued use of three drugs when the relevant statute specifies that two drugs may be used to induce death.

The regulations also required that a physician be present to pronounce death, as well as the presence of trained or certified personnel to administer the drugs. The presence of a physician is a requirement in almost one-half of the 35 states that permit the death penalty. However, opponents raised concerns that the presence of medical personnel may create a conflict with professional ethics, since Opinion 2.06 of the American Medical Association's Code of Medical Ethics states that a physician "should not be a participant in a legally authorized execution." In February 2010, the American Board of Anesthesiologists adopted a policy to revoke the certification of any member who participates in an execution by lethal injection. While an anesthesiologist may obtain a medical license without certification, most hospitals also require anesthesiologists to be certified.

As for the lack of specifics, the regulations do not specify a limit on the time the lethal injection team can take to find an inmate's vein or qualifications for members of the lethal injection team.

In September 2009, AELR formally requested that DPSCS delay final adoption of the death penalty procedure regulations so that the committee could conduct a more detailed study of the issues. On October 12, 2009, the AELR Committee placed the regulations on hold for further study. The committee's concerns centered on whether the regulations were specific enough on the administration of lethal injections, the use of a three-drug protocol, the training of execution personnel, and whether the regulations ensure that mishandled executions will not take place. The committee's concerns echoed concerns expressed nationally regarding the administration of lethal injections.

DPSCS submitted its response to the AELR letter on May 7, 2010. Under State law, if a proposed regulation is not adopted within one year after its last publication in the *Maryland Register*, the regulations are considered withdrawn. The one-year deadline for the death penalty regulations was July 30, 2010. Since the regulations were not adopted by that date, the regulation adoption process must begin anew. As a result, DPSCS must submit a new set of proposed regulations to AELR, and another opportunity for public comment will be granted. DPSCS submitted the new regulations in October 2010, which are substantially the same as the regulations submitted in 2009.

In January 2011, Illinois-based Hospira, Inc. announced that it would no longer produce sodium thiopental, a powerful anesthetic used in lethal injections. Hospira is the only American manufacturer of sodium thiopental and had planned on making the drug at its Milan plant but was prompted to cease production following demands from the Italian Parliament that the drug not be used for executions and a determination by the company that it could not prevent the drug from being used in capital punishment. The company had stopped making the drug in August 2009, due to problems obtaining a main ingredient.

As a result of Hospira's announcement, DPSCS withdrew its regulations in February 2011. The department plans to resubmit the regulations at some point in the future. According to news reports, the department's supply of sodium thiopental has expired.

The situation is not unique to Maryland. Sodium thiopental was in short supply prior to Hospira's announcement, resulting in the delay of executions in multiple states. In February 2011, a federal judge rejected a lawsuit by a Georgia death row inmate requesting a halt to his execution until more information about the state's supply of sodium thiopental is made available. The inmate claimed that using expired sodium thiopental may cause him excruciating pain. Attorneys for Georgia argued that the state's supply will not expire until February 2014, and that the lawsuit was an attempt by the inmate to commute his sentence. The execution has been stayed pending additional DNA testing.

In February 2011, 13 states requested assistance from the U.S. Department of Justice in identifying an appropriate source for sodium thiopental or making supplies of the drug held by the federal government available to states. Several states, including California and Arizona, obtained sodium thiopental from British suppliers. However, officials in Britain have demanded that future shipments to the United States not be used for capital punishment. The German health ministry has asked German pharmaceutical companies not to sell sodium thiopental to the United States. Several states are looking at alternative drugs. In 2010, Oklahoma opted to use pentobarbital in lethal injections.

State Fiscal Effect: Prosecutions, defenses, and appellate proceedings attributable to capital cases are far more costly than litigation for other criminal cases. 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 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 has historically advised that the annual cost of litigating capital cases is approximately \$1.9 million. If the same cases are tried as noncapital cases, the cost to the office is approximately \$650,000, resulting in savings of approximately \$1.3 million annually. Additional savings may 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 Aggravated Homicide Division.

OPD's Capital Defense Division (CDD) was disbanded as a separate budget program in fiscal 2010 and renamed the Aggravated Homicide Division (AHD). AHD is under the umbrella of OPD District Operations. AHD provides (1) direct trial representation to clients who face the death penalty and (2) instruction and support to all OPD attorneys statewide who represent persons charged with capital offenses. AHD also provides training, consultation, and resources to assist the capital defense team in all areas of representation. AHD is currently working on 13 cases, including providing direct representation in three death penalty cases and providing consultation/support in two death penalty cases. The remaining 11 cases are eligible for the death penalty, but the State has either opted not to pursue the death penalty or is contemplating filing a death notice. One death penalty case is currently being handled by two panel attorneys. OPD typically employs panel attorneys when there is a conflict of interest.

If the death penalty is repealed, OPD would be able to eliminate its Aggravated Homicide Division, although the personnel from that unit would be reassigned within the agency.

Department of Public Safety and Correctional Services: In June 2010, DOC transferred Maryland's five death row inmates from the Maryland Correctional Adjustment Center (MCAC) to the North Branch Correctional Institution (NBIC) in Allegany County. DOC advises that due to the reduced overhead at NBIC, the cost to maintain a death row inmate at NBIC is comparable to the cost of maintaining a maximum security inmate at NBIC. The annual cost (including overhead) to maintain an inmate at the facility is approximately \$35,000 per year. Considering that three of Maryland's five death row inmates have been incarcerated for over 26 years, replacing the death penalty with a sentence of life imprisonment with or without the possibility of parole is expected to have a negligible effect on the budgetary needs or operations of DOC.

Additional Information

Prior Introductions: Several bills to repeal the death penalty have been introduced in previous legislative sessions. HB 316 of 2009, received a hearing in the House Judiciary Committee, but no further action was taken. SB 645/HB 1328 of 2008 received hearings

in the Senate Judicial Proceedings and House Judiciary Committees, respectively, but no further action was taken. SB 211 of 2007 received an unfavorable report from the Senate Judicial Proceedings Committee. HB 225 of 2007 received a hearing in the House Judiciary Committee, but no further action was taken. SB 349/HB 809 of 2006 received hearings in the Senate Judicial Proceedings and House Judiciary committees, respectively, but no further action was taken. SB 666 of 2005 was heard in the Senate Judicial Proceedings Committee, but no further action was taken. HB 1159 of 2005 received a hearing in the House Judiciary Committee, but was later withdrawn. HB 521 of 2004 received a hearing in the House Judiciary Committee, but no further action was taken. SB 544 of 2003 received an unfavorable report from the Senate Judicial Proceedings Committee. HB 102 of 2001 received an unfavorable report from the House Judiciary Committee.

Cross File: SB 837 (Senator Gladden, *et al.*) - Rules.

Information Source(s): Commission on Criminal Sentencing Policy, Governor's Office, Judiciary (Administrative Office of the Courts), Office of the Public Defender, Department of Public Safety and Correctional Services, State's Attorneys' Association, Maryland Citizens Against State Executions, Death Penalty Information Center, Reuters, CNN, *Atlanta Journal Constitution*, *Washington Post*, *Baltimore Sun*, SFGate.com/Associated Press, msnbc.com, Department of Legislative Services

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