HB 295

Department of Legislative Services

Maryland General Assembly
2013 Session

FISCAL AND POLICY NOTE

House Bill 295 (The Speaker, *et al.*) (By Request - Administration)
Judiciary

Death Penalty Repeal and Appropriation from Savings to Aid Survivors of Homicide Victims

This Administration 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 If the State has already properly filed a notice of intent to seek a death sentence, that notice must be considered withdrawn.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.

The bill also requires that beginning in fiscal 2015, the Governor must include $500,000 in the annual budget submission for the State Victims of Crime Fund. The $500,000 is to be redirected from general fund savings resulting from the repeal of the death penalty.

Fiscal Summary

State Effect: Due to the repeal of the death penalty, general fund expenditures decrease by approximately $975,000 in FY 2014 (due to the bill's effective date) and by $800,000 annually beginning in FY 2015 (reflecting the bill's mandated appropriation). Special fund revenues and expenditures increase by $500,000 annually beginning in FY 2015 due to the bill's provisions regarding the State Victims of Crime Fund. Otherwise, abolition of the death penalty is not expected to have a significant effect on overall State operations or finances. **This bill establishes a mandated appropriation beginning in FY 2015**.

(in dollars)	FY 2014	FY 2015	FY 2016	FY 2017	FY 2018
SF Revenue	$0	$500,000	$500,000	$500,000	$500,000
GF Expenditure	($975,000)	($800,000)	($800,000)	($800,000)	($800,000)
SF Expenditure	$0	$500,000	$500,000	$500,000	$500,000
Net Effect	$975,000	$800,000	$800,000	$800,000	$800,000

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: The Administration has determined that this bill has minimal or no impact on small businesses (attached). The Department of Legislative Services concurs with this assessment.

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 (SB 279) 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: Five inmates are currently on Maryland's death row. Executions in the State have been halted since the December 2006 decision by the Court of Appeals in *Evans v. State*, 396 Md. 256 (2006). In that case, the court heard arguments on an appeal of a death sentence by Vernon Evans, Jr. Evans' appeal was based on four claims, only one of which was considered to have merit by the court. The Court of Appeals upheld Evans' claim that the regulatory procedures for carrying out the death sentence, including execution by lethal injection, were adopted without the public input required by the Administrative Procedure Act (APA). The court held that DOC's protocols are ineffective until either (1) the protocols are adopted as regulations under APA or (2) the General Assembly exempts the protocols from the procedures required by APA.

In 2011, the Court of Appeals narrowly reaffirmed the preponderance of the evidence standard used by jurors to consider the impact of aggravating and mitigating circumstances during the sentencing phase of a capital case. In *Miles v. State*, 421 Md. 595 (2011), the court determined that State law already requires that a jury must find the existence of an aggravating circumstance beyond a reasonable doubt. However, since the weighing of aggravating and mitigating circumstances is not a fact-finding procedure, but a judgmental process in which the factors are balanced to determine the appropriateness of a death sentence, it is not unconstitutional for the balancing act to be based on the least stringent standard of preponderance of the evidence. The majority, quoting an earlier opinion of the court, also stated, however, that, as individual judges they might believe that a better public policy would be to require a jury to apply the most stringent standard of beyond a reasonable doubt to the weighing process, but that is a judgment for the legislature to make, and unlike its counterparts in other states, the General Assembly has chosen a different approach.

Proposed Regulations

Proposed regulations to implement the death penalty were published in the July 31, 2009 edition of the *Maryland Register*. Among other things, the proposed regulations would have:

- required 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;

- required a certified or contracted paramedic to be present to resuscitate the inmate if a stay of execution is granted; and

- permitted 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. Objections to the use of pancuronium bromide centered on the ability of this paralytic agent to completely immobilize an individual so that he or she would not be able to express pain or communicate regarding the effectiveness of the anesthetic. Pancuronium bromide is a muscle relaxant and is prohibited for use in animal euthanasia in Maryland and some other states. The regulations would have 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 about half of the 34 states that have the death penalty.) The American Medical Association Code of Medical Ethics states, however, that physicians should not participate in legally authorized executions. In 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 will not employ anesthesiologists who are not certified.

The Administrative, Executive, and Legislative Review Committee (AELR) also questioned the continued use of three drugs when the authorizing statute specifies that two drugs may be used to induce death. As for the lack of specifics, the regulations did not specify a limit on the time the lethal injection team could 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, AELR placed the regulations on hold for further study. The regulations were withdrawn by operation of law, and the withdrawal notice was published in the October 22, 2010 issue of the *Maryland Register*. DPSCS then resubmitted proposed death penalty regulations that were published in the November 19, 2010 issue of the *Maryland Register*.

AELR informed DPSCS that it was dissatisfied with the reissuance of the regulations as they were substantially similar to the proposed regulations issued in 2009. The committee had already indicated strong concerns about their content, including (1) the use of a three drug protocol when the governing statute specifies two drugs; (2) the lack of specificity with regard to the procedures contained in the department's Lethal Injection Checklist, including the strength of dosages and the personnel responsible for preparation of injection syringes; (3) the absence of contingency plans in the event the execution did not proceed as planned; and (4) how DPSCS planned to address its reliance on sodium thiopental since the drug was no longer available for purchase in the United States.

By correspondence dated February 9, 2011, DPSCS informed AELR that the death penalty regulations proposed in November 2010 were being withdrawn due to the unavailability of sodium thiopental. DPSCS stated that it would resubmit the proposed regulations after review and modification in light of that development. To date, DPSCS has not resubmitted the regulations.

Status of the Death Penalty Nationally

Thirty-three states have the death penalty. According to a December 2012 report by the Death Penalty Information Center, there were 3,170 inmates on death row in the United States as of April 2012, including inmates in the custody of the federal government and the U.S. military. Five of these death row inmates are in Maryland, giving Maryland the sixth smallest death row population in the nation. Forty-three inmates were executed in the United States in 2012, with Texas accounting for 15 of those executions. Seventy-seven inmates received death sentences in 2012, which is virtually equal to the 76 death sentences imposed in 2011, but a decrease from the 104 death sentences imposed in 2010. Connecticut enacted legislation to repeal its death penalty in 2012, making it the most recent state to abolish the death penalty.

State Victims of Crime Fund

The State Board of Victim Services within the Governor's Office of Crime Control and Prevention (GOCCP) consists of 22 members and is chaired by the Governor or the Governor's designee. The board is responsible for developing the informational pamphlets that notify victims of the rights, services, and procedures available before and after the filing of a charging document, other than an indictment or information in the circuit court, and after the filing of an indictment or information in circuit court.

However, the primary function of the board is to administer the State Victims of Crime Fund and provide technical support for efforts to assist victims of crime through a victim services coordinator who is appointed by the Executive Director of GOCCP.

The State Victims of Crime Fund is a special continuing, nonlapsing fund that receives funding primarily from Criminal Injuries Compensation costs. The State Board of Victim Services administers the fund to (1) carry out Article 47 of the Maryland Declaration of Rights and other laws designed to help crime victims; (2) assist other agencies and persons providing services to crime victims; and (3) support child advocacy centers established by GOCCP, which provide support services to victims. Grants provided by the board and administrative costs are paid from this fund. Grants are required to be equitably distributed among all purposes of the fund. According to the *Maryland State Board of Victim Services Biennial Report FY 2011 – FY 2012*, the fund received approximately $838,000 from costs imposed in the District Court and circuit

courts and made grant awards totaling $1,065,594 during fiscal 2012 for direct services to crime victims.

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 are directly affected by abolition of the death penalty include the Judiciary, the Office of the Attorney General (OAG), the Office of the Public Defender (OPD), and DOC in DPSCS.

Using the estimated annual savings of litigating capital cases as noncapital cases, general fund expenditures for OPD decrease by $1.3 million annually, as discussed below. Due to the bill's effective date, general fund expenditures decrease by $975,000 in fiscal 2014. Overall general fund expenditures decrease by $800,000 annually beginning in fiscal 2015, reflecting the bill's mandated appropriation of $500,000 annually in general funds to the State Victims of Crime Fund. Beginning in fiscal 2015, special fund revenues and expenditures for GOCCP (the administrative agency for the State Victims of Crime Fund) increase by $500,000 annually due to the bill's requirement that the Governor include $500,000 from savings from the death penalty repeal in the annual budget submission for the fund.

The Office of the Public Defender

OPD advises 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 ($975,000 in fiscal 2014 due to the bill's October 1, 2013 effective date). 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 (AHD).

OPD's Capital Defense Division was disbanded as a separate budget program in fiscal 2010 and renamed the Aggravated Homicide Division. 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 provide litigation support in all areas of representation. AHD has worked on over 20 aggravated homicide cases, including cases in which death notices were considered and filed.

If the death penalty is repealed, OPD is able to eliminate its AHD, although the personnel from that unit would be reassigned within the agency to those OPD districts with the most excessive circuit court caseloads.

Governor's Office of Crime Control and Prevention

Assuming that the Governor's inclusion of $500,000 in general funds in the annual budget submission for the State Victims of Crime Fund is approved, special fund revenues for GOCCP increase by $500,000 annually beginning in fiscal 2015, with a corresponding increase in special fund expenditures each year. This assumes that GOCCP awards grants or incurs expenditures equal to the mandated appropriation each year.

Department of Public Safety and Correctional Services

In June 2010, DOC transferred Maryland's five death row inmates from the Maryland Correctional Adjustment Center 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.

Judiciary and Office of the Attorney General

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

Additional Comments: Although this fiscal and policy note references DOC, the Department of Legislative Services notes that DPSCS implemented a major reorganization during fiscal 2012. As a result of the reorganization, DOC, the Division of Parole and Probation, the Patuxent Institution, and the Division of Pretrial Detention and Services no longer exist within the department by those names as separate budgetary units.

Additional Information

Prior Introductions: Several bills to repeal the death penalty have been introduced in previous legislative sessions. SB 872 of 2012 received an unfavorable report from the Senate Judicial Proceedings Committee. Its cross file, HB 949, received a hearing in the House Judiciary Committee but was later withdrawn. SB 837 of 2011 was referred to the Senate Rules Committee, but no further action was taken. Its cross file, HB 1075, received a hearing in the House Judiciary Committee, but no further action was taken. 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. Its cross file, HB 225, received a hearing in the House Judiciary Committee, but no further action was taken. Similar legislation was considered in the 2001 and 2003 through 2006 legislative sessions.

Cross File: SB 276 (The President, *et al.*) (By Request - Administration) - Judicial Proceedings.

Information Source(s): Office of the Public Defender, State's Attorneys' Association, Office of the Attorney General, Judiciary (Administrative Office of the Courts), Governor's Office of Crime Control and Prevention, Department of Budget and Management, Maryland State Commission on Criminal Sentencing Policy, Department of Public Safety and Correctional Services, Death Penalty Information Center, Maryland State Board of Victim Services, Department of Legislative Services

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ncs/kdm

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ANALYSIS OF ECONOMIC IMPACT ON SMALL BUSINESSES

TITLE OF BILL: Death Penalty Repeal and Appropriation from Savings to Aid Survivors of Homicide Victims

BILL NUMBER: SB 276 / HB 295

PREPARED BY:

PART A. ECONOMIC IMPACT RATING

This agency estimates that the proposed bill:

__X__ WILL HAVE MINIMAL OR NO ECONOMIC IMPACT ON MARYLAND SMALL BUSINESS

OR

___ WILL HAVE MEANINGFUL ECONOMIC IMPACT ON MARYLAND SMALL BUSINESSES

PART B. ECONOMIC IMPACT ANALYSIS

The proposed legislation will have no impact on small business in Maryland.