

**Department of Legislative Services**  
Maryland General Assembly  
2002 Session

**FISCAL NOTE**

Senate Bill 629

(Senator Frosh, *et al.*)

Judicial Proceedings

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**Death Penalty - Sentencing - Standard of Proof**

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This bill raises the standard of proof from a preponderance of the evidence to beyond a reasonable doubt for determining whether aggravating circumstances outweigh mitigating circumstances in the sentencing phase of a capital case.

The bill's provisions apply retroactively to include any case in which a death sentence has been imposed but not carried out as of the bill's October 1, 2002 effective date.

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**Fiscal Summary**

**State Effect:** This change is procedural in nature and is not expected to have any material impact on governmental operations or finances.

**Local Effect:** None -- see above.

**Small Business Effect:** None.

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**Analysis**

**Current Law:** In the sentencing phase of a capital case, the court or jury must first determine beyond a reasonable doubt whether any aggravating circumstances (as enumerated by statute) exist. If the court or jury finds that one or more aggravating circumstances exist, it then must determine by a preponderance of the evidence whether any mitigating circumstances (as enumerated by statute) exist. If the court or jury finds that one or more mitigating circumstances exist, it must then determine by a

preponderance of the evidence whether the aggravating circumstances outweigh the mitigating circumstances.

Recent State caselaw (*Borchardt v. State*, 367 Md. 91 (2001)) reaffirmed that Maryland's statute governing the sentencing phase of a capital case -- and specifically the preponderance of the evidence standard in determining whether aggravating circumstances outweigh mitigating circumstances -- is constitutionally sound. In May 2000, Robert Borchardt was convicted of two counts each of premeditated first degree murder, first degree felony murder, and robbery with a deadly weapon for stabbing a couple to death in the couple's home during the course of a robbery. At a separate sentencing hearing, the jury imposed sentences of death for the murder convictions. Mr. Borchardt challenged the constitutionality of the burden of proof for weighing aggravating circumstances versus mitigating circumstances, particularly in light of the controversial U.S. Supreme Court opinion of *Apprendi v. N.J.*

In *Apprendi*, which was not a death penalty case, the U.S. Supreme Court issued a 5-4 decision holding that: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime *beyond the prescribed statutory maximum*, must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi v. N.J.*, 530 U.S. 466, 490 (emphasis added). The *Apprendi* court specifically found unconstitutional a New Jersey "hate crime" statute that permitted a trial court to add to or enhance a maximum statutory prison term if the trial judge found by a preponderance of the evidence that "the defendant in committing the crime acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity." N.J. Stat. Ann. § 2C:44-3(e) (2000).

The *Borchardt* court held that Maryland's preponderance of the evidence standard in determining whether aggravating circumstances outweigh mitigating circumstances meets due process requirements and is therefore constitutional. First, the Court of Appeals noted that it had consistently found this provision to meet constitutional due process standards in cases prior to *Apprendi*, leaving only the question of whether the *Apprendi* decision overruled its prior findings. The court then noted that the majority opinion in *Apprendi* unequivocally stated that "its decision did not render invalid State capital sentencing schemes...that allowed the judge, not sitting as the trier of fact, to find and weigh specific aggravating factors" without specifying a reasonable doubt standard. *Borchardt* at 121-22. The court further noted that the statutory maximum penalty for first degree murder is a death sentence; the weighing of circumstances does not (and could not) "enhance" the sentence beyond the prescribed maximum. Therefore, the actual holding of *Apprendi* is not applicable to Maryland's capital sentencing statute.

A February 7, 2002 decision of the Maryland Court of Appeals, in a case that was briefed and argued before the court prior to its filing of the *Borchardt* decision, follows the holding of *Borchardt*. The court again held that the *Apprendi* decision does not apply to Maryland's capital sentencing scheme. *Baker v. State*, 2002 Md. Lexis 44 (2002).

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### **Additional Information**

**Prior Introductions:** None.

**Cross File:** None.

**Information Source(s):** State's Attorneys' Association, Judiciary (Administrative Office of the Courts), Office of the Public Defender, Department of Public Safety and Correctional Services, Department of Legislative Services

**Fiscal Note History:** First Reader - March 8, 2002  
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