

Department of Legislative Services
Maryland General Assembly
2006 Session

FISCAL AND POLICY NOTE

House Bill 809
 Judiciary

(Delegate Kelley, *et al.*)

Criminal Law - Death Penalty - Repeal

This bill repeals the death penalty and all provisions relating to the death penalty, including provisions relating to administration of the death penalty and provisions relating to proceedings after death sentences have been imposed. 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, 2006 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 If the State has already properly filed a notice of intent to seek a death sentence, that notice must be considered withdrawn.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 2007	FY 2008	FY 2009	FY 2010	FY 2011
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 result in a significant impact to 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 for 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: There are currently 38 states with the death penalty. Thirty-seven states use a lethal injection process for execution and one state (Nebraska) uses electrocution as its primary method of execution.

The following 12 states and the District of Columbia do not currently have a death penalty statute: Alaska, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin. No state has repealed its death penalty in recent history, although there has been some consideration of adding a death penalty in states that do not currently have it. The states of 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 has agreed to undertake a review of the Kansas death penalty statute. Reinstatement of the New York death penalty statute, however, requires legislation. The New York Assembly held public hearings in 2005 on new death penalty legislation, but the legislation was defeated in committee.

Death Penalty Moratoriums and Studies: 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 it is now entering its sixth 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 2005, New Jersey became the first state to impose a death penalty moratorium through legislation. The moratorium legislation requires a study commission to examine the fairness and expense of the state's death penalty. Findings must be reported to the Governor in November 2006. The moratorium is effective until January 15, 2007.

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 Nebraska, Illinois, Indiana, North Carolina, and Virginia. Virginia's study of its death penalty system was released in January 2003. That study found there was no untoward disparity based on race or any other factor that impaired administration of its death penalty.

Maryland Developments and Other Trends: 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, five persons have been executed, three in the 1990s, one in 2004 and one in 2005. According to DPSCS, there are seven persons currently on Maryland's death row. According to the *Baltimore Sun*, Maryland has executed 314 people since 1773, 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. Arguments regarding the stay are expected in May 2006. The court has agreed to hear arguments 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 decision by the Maryland Court of Appeals to hear arguments about protocols implementing the execution procedure itself may indicate another new trend in reexamination of the death penalty – the idea that the death penalty procedure (that is, lethal injection in 37 out of 38 death penalty states) may be subject to legal challenge. In February 2006, the impending execution of a convicted rapist-murderer in California was called off. A U.S. District Court judge in California declared that California's three stage cocktail of sedative, paralytic drug, and heart-stopping chemical (the same protocol used in the 37 states that use lethal injection) could mask, rather than eliminate an inmate's

pain during an execution. Prison officials intended to go forward with the execution by having a licensed medical professional administer the procedure, but could not find a medical professional willing to administer the lethal drugs. The execution was called off until a hearing could be held. A hearing on the lethal injection process in California is set for May 2006. To date, no method of execution has ever been held unconstitutional by the U.S. Supreme Court.

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 Office of the Attorney General: 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, although the personnel from that unit would be reassigned within the agency. A savings of about \$1.3 million would accrue from elimination of the Capital Defense Division. The fiscal 2007 allowance for the Capital Defense Division is \$1,042,705. Additional savings would occur from the release and/or elimination of panel attorneys, expert witnesses, transcripts, and investigations, which normally occur with capital cases. 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 \$53,000, (including overhead) compared to about \$22,200 for a maximum security inmate. There are seven inmates on death row currently. The length of time on death row varies; however, three of the current death row inmates have been there for 19 years. There is no way to precisely determine if and when any of the seven 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 666 and HB 1159 of 2005. SB 666 was heard in the Senate Judicial Proceedings Committee, but received no further action. HB 1159 was heard in the House Judiciary Committee, but was then withdrawn. This bill is also a reintroduction of HB 521 of 2004, which was heard in the House Judiciary Committee, but received no further action. It is a reintroduction of SB 544 of 2003, which received an unfavorable report from the Senate Judicial Proceedings Committee. A similar bill, HB 102 of 2001, received an unfavorable report from the House Judiciary Committee.

Cross File: SB 349 (Senator Gladden, *et al.*) – Judicial Proceedings.

Information Source(s): State's Attorneys' Association, Judiciary (Administrative Office of the Courts), Office of the Public Defender, Commission on Criminal Sentencing Policy, Office of the Attorney General, Department of Public Safety and Correctional Services, Death Penalty Information Center, University System of Maryland, *The Washington Post*, *The Los Angeles Times*, *The Baltimore Sun*, Department of Legislative Services

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Analysis by: Karen D. Morgan

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