

Department of Legislative Services
Maryland General Assembly
2009 Session

FISCAL AND POLICY NOTE
Revised

Senate Bill 279

(Senator Gladden and the President, *et al.*) (By Request -
Administration)

Judicial Proceedings

Judiciary

Criminal Law - Death Penalty - Evidence

This Administration bill restricts the death penalty to cases in which the State presents the court or jury with (1) biological evidence 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. The bill prohibits a defendant from being sentenced to death if the State relies solely on evidence provided by eyewitnesses in its case.

If the State has already properly filed a notice of intent to seek a death sentence in a case that does not qualify for the death penalty under the bill, that notice must be considered withdrawn. In such instance, the State must also be considered to have properly filed a notice to seek a sentence of life imprisonment without the possibility of parole.

Fiscal Summary

State Effect: Potential minimal decrease in expenditures for the Office of the Public Defender (OPD) as a result of the reduction in the number of death penalty cases that may be litigated.

Local Effect: Potential minimal decrease in expenditures for State's Attorneys due to a reduction in the number of death penalty cases that may be litigated and the significant difference in costs associated with capital cases compared to noncapital cases.

Small Business Effect: A small business impact statement was not provided by the Administration in time for inclusion in this fiscal note. A revised fiscal note will be issued when the Administration's assessment becomes available.

Analysis

Bill Summary: The bill expresses that it is the intent of the General Assembly that expanded victim services for survivors of homicide victims be funded by savings resulting from the restrictions on the death penalty included in the bill. The bill also requires the Governor's Office for Crime Control and Prevention (GOCCP) to submit a report to the House Judiciary and Senate Judicial Proceedings committees on how these services should be expanded. The report is due by November 1, 2009. GOCCP is to administer federal funds received under the Victims of Crime Act.

Current Law: 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 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 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, 36 states have the death penalty. The following 14 states and the District of Columbia do not currently have a death penalty statute: Alaska, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, New Jersey, New York, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin. In 2007, New Jersey became the first state in recent history to legislatively repeal its death penalty. Legislation to end capital punishment has been introduced in eight states this year (Colorado, Kansas, Maryland, Montana, Nebraska, New Hampshire, New Mexico, and Washington). The New Mexico House of Representatives voted on February 11, 2009 to repeal the death penalty. The New Hampshire legislature passed legislation repealing the state's death penalty in 2000, but the Governor vetoed the legislation.

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.

Kansas, New Hampshire, New Jersey, and New York, 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. The subsequent elimination of the death penalty in New York in 2006 and New Jersey in 2007 have precluded any more executions in those states. 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 State 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.

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. ___, 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. Thirty-five of 36 states (Nebraska is the exception) use lethal injection as their method of capital punishment.

Moratoriums and Studies in Other States: Illinois and New Jersey are the only states other than Maryland to have implemented formal moratoriums on 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. Legislation repealing the death penalty was enacted in 2007, as noted above.

In 2000, Illinois Governor George Ryan instituted a moratorium on the death penalty. 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, but the moratorium is still in effect.

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 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 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 police officers.

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 are directly affected by restriction of the death penalty include the Judiciary, the Office of the Attorney General (OAG), OPD, DOC in DPSCS, GOCCP, and the Department of Human Resources (DHR).

Judiciary and the OAG: The Judiciary may experience a reduction in appeals, but may 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 may be reallocated without any appreciable impact on overall operations or finances.

Office of the Public Defender: OPD may be able to reduce operating expenditures which normally occur with litigating capital cases, such as panel attorneys, expert witnesses, transcripts, and investigations. OPD intends to retain its Capital Defense Division, which litigates capital cases, consults with district-level public defenders who are litigating capital cases, and handles some administrative duties related to the litigation of these cases. The extent to which fewer capital cases may be litigated due to the bill's restrictions cannot be reliably determined at this time.

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

In 2008, DOC advised 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 currently five inmates on death row. 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, once administrative regulations are promulgated, 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 9 years each.

There might be an initial savings if fewer inmates are maintained on death row, but instead are maintained at a maximum security facility. However, any potential savings may not be realized because the inmate who is not executed, but instead sentenced to life, most likely remains incarcerated beyond the average nine-year stay of a death row inmate. There is no reliable way to predict how long such an inmate may be housed. The savings that are realized from the lower cost of housing a maximum security inmate are likely to dissipate because that inmate may remain at DOC for many years. Accordingly, this bill is expected to have a negligible effect on the budgetary needs or operations of DOC.

GOCCP and the Department of Human Resources: The bill designates GOCCP as the administrating agency of federal funds received under the Victims of Crime Act (VOCA). Currently, these funds are administered by the Department of Human Resources. GOCCP advises that that it is able to administer the funds with existing resources, since allocations to the State of VOCA funds include a 5% administrative allowance. GOCCP further advises that administering federal and State funds is a primary function of the office, and the office currently administers 686 active grants totaling over \$111 million. It is assumed that any personnel at DHR currently assigned to administer VOCA funds will be transferred to other divisions of the department. In addition, GOCCP advises that it can produce the report on victim services with existing budgeted resources.

Expansion of Victim Services: The bill states the intent of the General Assembly that expanded victims services for survivors of homicides be funded by savings resulting from the restriction of the death penalty. If the full amount of realized savings is transferred to these services, special fund expenditures for the State Victims of Crime Fund increase minimally.

Local Fiscal Effect: As stated before, the extent to which capital cases may decrease as a result of the bill cannot be reliably determined at this time. However, it is assumed that there will be an overall reduction in the number of death penalty cases in the State. There

are five death penalty cases currently pending in the State, one of which is from Baltimore County. Baltimore County advises that its case may not qualify for the death penalty under the bill as amended.

Additional Information

Prior Introductions: Several bills to repeal the death penalty have been introduced in previous years. 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: HB 316 (Delegate Rosenberg and the Speaker, *et al.*) (By Request - Administration) - Judiciary.

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

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