HB 949

Department of Legislative Services

Maryland General Assembly
2012 Session

FISCAL AND POLICY NOTE

House Bill 949 (Delegate Rosenberg, *et al.*)
Judiciary

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

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 If the State has already properly filed a notice of intent to seek a death sentence, that notice must be considered withdrawn.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

The bill also requires that beginning in fiscal 2014, 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 repeal of the death penalty.

Fiscal Summary

State Effect: General fund expenditures decrease by approximately $1.3 million in FY 2013 and by $800,000 annually beginning in FY 2014. Special fund revenues and expenditures increase by $500,000 annually beginning in FY 2014 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.

(in dollars)	FY 2013	FY 2014	FY 2015	FY 2016	FY 2017
SF Revenue	$0	$500,000	$500,000	$500,000	$500,000
GF Expenditure	($1,300,000)	($800,000)	($800,000)	($800,000)	($800,000)
SF Expenditure	$0	$500,000	$500,000	$500,000	$500,000
Net Effect	$1,300,000	$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: 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: Five inmates are currently on Maryland's death row. In October 2011, the Office of the Attorney General advised that since enactment of Chapter 186 of 2009, there are five active cases (two in Anne Arundel County, two in Baltimore County, and one in Prince George's County) in which a prosecutor has formally filed notice of the State's intention to seek the death penalty and one case pending notification (in Garrett County). A jury in one of the Baltimore County cases returned a sentenced of life with the possibility of parole for the murder for hire of a Towson gas station owner. On February 28, 2012, a jury in Anne Arundel County sentenced a defendant convicted of the 2006 murder of an officer in the House of Correction in Jessup to life without the possibility of parole.

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 the Division of Correction's protocols are ineffective until either (1) the protocols are adopted as regulations under the APA; or (2) the General Assembly exempts the protocols from the procedures required by the 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*, 2011 WL 4363914 (Md. App. Sept. 20, 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 new 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 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 re-submit the proposed regulations after review and modification in light of that development. DPSCS has not re-submitted the regulations.

Status of the Death Penalty Nationally

Thirty-four states have the death penalty. According to a December 2011 report by the Death Penalty Information Center, there are 3,251 inmates on death row in the United States, 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 seventh smallest death row population in the nation. Forty-three inmates were executed in the United States in 2011, with Texas accounting for 13 of those executions. Seventy-eight inmates received death sentences in 2011, a decrease from the 104 death sentences imposed in 2010. Illinois enacted legislation to repeal its death penalty in 2011, 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 the Governor's Office of Crime Control and Prevention.

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) to assist other agencies and persons providing services to crime victims; and (3) to support child advocacy centers established by the Governor's Office of Crime Control and Prevention, which provide support services to victims. Grants 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 Annual Report FY 2009 – FY 2010*, the fund received approximately $800,000 from costs imposed in the District Court and circuit courts and made grants awards totaling $735,529 during fiscal 2010.

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), 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. Beginning in fiscal 2014, 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 requirement under the bill that the Governor include $500,000 from savings from the death penalty repeal in the annual budget submission. This estimate assumes that (1) the Governor's annual submission for the State Victims of Crime Fund will be approved and included in the final budget; and (2) GOCCP will award grants or incur expenditures that will account for all of the $500,000 transferred to the fund as a result of the bill.

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. 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 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 would be able to eliminate its Aggravated Homicide Division, 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 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 2014, corresponding with an increase in special fund expenditures of $500,000 per year beginning in fiscal 2014.

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.

Judiciary and 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.

Additional Information

Prior Introductions: Several bills to repeal the death penalty have been introduced in previous legislative sessions. SB 837 of 2011 was referred to the Senate Rules Committee, but no further action was taken. HB 1075 of 2011 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. HB 225 of 2007 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 872 (Senator Gladden, *et al.*) - Judicial Proceedings.

Information Source(s): Commission on Criminal Sentencing Policy, Department of Budget and Management, 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, Death Penalty Information Center, *Baltimore Sun*, Department of Legislative Services

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Analysis by: Amy A. Devadas

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