

Department of Legislative Services
Maryland General Assembly
2018 Session

FISCAL AND POLICY NOTE
First Reader

Senate Bill 346

(Senator Cassilly, *et al.*)

Judicial Proceedings

Criminal Law - Death Penalty - Reinstatement

This bill (1) reinstates the death penalty for first-degree murder cases meeting specified criteria; (2) makes corresponding changes in State law to reflect reinstatement of the death penalty; (3) establishes procedural requirements in these cases; and (4) requires that, if a defendant is sentenced to death, the court before which the defendant is tried and convicted must sentence the defendant to death by intravenous administration of a lethal quantity of a combination of heroin and fentanyl or other similar drug.

Fiscal Summary

State Effect: General fund expenditures increase by at least \$25,000 in FY 2019 to purchase equipment; general fund expenditures further increase minimally to litigate death penalty cases; the frequency and timing of these cases cannot be reliably predicted. Revenues are not affected.

Local Effect: Litigation expenditures for State's Attorneys' offices may increase, depending on case volume and existing resources. Revenues are not affected.

Small Business Effect: None.

Analysis

Bill Summary: A defendant found guilty of first-degree murder may only be sentenced to death (1) if, at least 30 days before trial, the State gave written notice to the defendant of its intention to seek a death sentence and each aggravating circumstance on which the State intends to rely; (2) with respect to provisions in the bill pertaining to aggravating circumstances, the defendant was a principal in the first degree or solicited, conspired with,

or acted in concert with a principal in the first degree; and (3) the sentence of death is imposed in accordance with specified requirements.

If the State gave notice of its intention to seek a sentence of death in accordance with the bill's requirements, a separate sentencing proceeding must be held as soon as practicable after a defendant is found guilty of first-degree murder to determine if the defendant must be sentenced to death. This sentencing proceeding must be conducted (1) before the jury that determined the defendant's guilt; (2) before a jury impaneled for this purpose if the defendant was convicted based on a guilty plea, convicted after a bench trial, because the court discharged the jury that convicted the defendant for good cause, or because a court of competent jurisdiction remanded the case for resentencing following a review of the original sentence of death; or (3) if the defendant waives a jury sentencing proceeding before the court. The bill also specifies the type of evidence admissible in a sentencing proceeding.

Aggravating and Mitigating Circumstances

In determining a sentence, the court or jury must consider whether any of the following aggravating circumstances exists beyond a reasonable doubt:

- one or more persons committed at least two acts of first-degree murder during a single incident or "mass attack," as defined in the bill;
- one or more person committed at least two acts of first-degree murder in a series of murders;
- the defendant committed the murder (1) while charged with a crime punishable by death or life imprisonment; (2) after being convicted of, but before being sentenced for, a crime punishable by death or life imprisonment; or (3) while under a sentence of death or life imprisonment;
- the victim of the murder was a witness to a crime punishable by death or by life imprisonment;
- the victim was a law enforcement officer or a guard or an officer of a correctional facility and was performing official duties when the murder occurred; or
- the defendant committed the murder while committing a violation of Title 10, Subtitle 3 of the Criminal Law Article (hate crimes).

If the court or jury does not find that one or more of these aggravating circumstances exists beyond a reasonable doubt, it must state that conclusion in writing and a death sentence may not be imposed. However, if the court or jury does find that one or more of these aggravating circumstances exists beyond a reasonable doubt, it must then consider whether any of the following mitigating circumstances exists based on a preponderance of the evidence:

- the defendant has not been previously found guilty of a “crime of violence” (as defined in the bill), entered a guilty plea or a plea of *nolo contendere* to a crime of violence, or received probation before judgment for a crime of violence;
- the victim was a participant in the conduct of the defendant or consented to the act that caused the victim’s death;
- the defendant acted under substantial duress, domination, or provocation of another, but not so substantial as to constitute a complete defense to the prosecution;
- the murder was committed while the capacity of the defendant to appreciate the criminality of the defendant’s conduct or to conform that conduct to the requirements of law was substantially impaired due to emotional disturbance, mental disorder, or mental incapacity;
- the defendant was of a youthful age at the time of the murder;
- the act of the defendant was not the sole proximate cause of the victim’s death;
- it is unlikely that the defendant will engage in further criminal activity that would be a continuing threat to society; or
- any other fact that the court or jury specifically sets forth in writing as a mitigating circumstance in the case.

If the court or jury finds that one or more mitigating factors exists, it must determine by a preponderance of the evidence whether the aggravating circumstances outweigh the mitigating circumstances. If the aggravating circumstances do not outweigh the mitigating circumstances, a death sentence may not be imposed. A death sentence must be imposed if the court or jury finds that the aggravating circumstances outweigh the mitigating circumstances. If the decision is by a jury, the decision to impose the death penalty must be unanimous. The court must impose a death sentence if a jury decides that a death sentence must be imposed.

If the jury cannot come to an agreement within a reasonable amount of time, the court may not impose a death sentence. If the sentencing proceeding is conducted before a court without a jury, the court must determine whether a death sentence must be imposed, in accordance with the bill’s requirements. If the court or jury determines that a death sentence may not be imposed and the State gave notice of intention to seek a sentence of life imprisonment without the possibility of parole, a determination must be made concerning life imprisonment without the possibility of parole. If the court or jury determines that a death sentence may not be imposed, and the State did not give notice of intention to seek a sentence of life imprisonment without the possibility of parole, the court must impose a sentence of life imprisonment.

If the State gave notice of its intention to seek a sentence of life imprisonment without the possibility of parole but did not give notice of its intention to seek the death penalty, the court must conduct a separate sentencing proceeding as soon as practicable to determine

whether the defendant must be sentenced to imprisonment for life without the possibility of parole or to imprisonment for life.

If the State gave notice of its intention to seek the death penalty and its intention to seek a sentence of life imprisonment without the possibility of parole, but the court or jury determines that the death sentence may not be imposed, the court or jury must determine whether the defendant must be sentenced to imprisonment for life without the possibility of parole or imprisonment for life. In this situation, a determination by a jury to impose a sentence of imprisonment for life without the possibility of parole must be unanimous. If the jury finds that a sentence of imprisonment for life without the possibility of parole must be imposed, the court must impose a sentence of imprisonment for life without the possibility of parole. If the jury is unable to come to an agreement regarding a sentence of imprisonment for life without the possibility of parole within a reasonable amount of time, the court must impose a sentence of imprisonment for life.

Peremptory Challenges, Review by the Court of Appeals, Rights of Victim's Representative

The bill reenacts statutory provisions that existed prior to repeal of the death penalty regarding (1) peremptory challenges; (2) reviews of death sentences by the Court of Appeals; and (3) the right of a victim's representative to address the jury in a death penalty sentencing proceeding.

Current Law: A person convicted of first-degree murder may be punished by imprisonment for life, with or without the possibility of parole. Chapter 156 of 2013 repealed the death penalty in Maryland and made corresponding changes to applicable statutory provisions.

A defendant convicted of murder in the first degree may be sentenced to life imprisonment without the possibility of parole only if the State gives written notice to the defendant at least 30 days before trial of its intention to seek a sentence of imprisonment for life without the possibility of parole.

Under § 2-304 of the Criminal Law Article, if the State gives this notice, the court must conduct a separate sentencing proceeding as soon as practicable after the defendant is found guilty of murder in the first degree to determine whether the defendant must be sentenced to life imprisonment or life imprisonment without the possibility of parole. In *Bellard v. State*, 452 Md. 467 (2017), the Maryland Court of Appeals affirmed a decision by the Maryland Court of Special Appeals and determined that under § 2-304 of the Criminal Law Article, when the State gives notice of its intent to seek a sentence of life imprisonment without the possibility of parole and a defendant is subsequently convicted of first-degree murder, the trial court, not the jury, determines whether to impose a sentence of life imprisonment without the possibility of parole.

Background:

According to the National Conference of State Legislatures, as of February 2, 2017, 31 states authorize capital punishment. Though Nebraska's legislature abolished the death penalty in 2015, it was reinstated in a statewide vote in 2016.

Lethal injection is the primary method of execution in the 31 states in which capital punishment is still available. Several of these states also have secondary methods of execution. The use of lethal injections in capital punishment, particularly the protocols implemented by states, has been the subject of extensive litigation.

In *Baze v. Rees*, 553 U.S. 35, 128 S.Ct. 1520 (2008), the U.S. Supreme Court affirmed a decision by the Kentucky Supreme Court and ruled that Kentucky's three-drug lethal injection protocol did not constitute cruel and unusual punishment. The case had wide-ranging implications because the Kentucky procedures for lethal injection were substantially similar to the procedures used in many other states, including those used in Maryland at the time.

In *Glossip v. Gross*, 576 U.S. ____ (2015), the U.S. Supreme Court held in a 5 to 4 decision that the petitioners, a group of Oklahoma death row inmates, did not establish a likelihood of success on the merits of their claim that use of midazolam as the initial drug in a three-drug lethal injection protocol constitutes cruel and unusual punishment under the Eighth Amendment to the U.S. Constitution.

Prior to its repeal, § 2-303 of the Criminal Law Article specified that a sentence of death must be carried out by intravenous administration of a lethal quantity of an ultrashort-acting barbiturate or other similar drug in combination with a chemical paralytic agent. The Department of Public Safety and Correctional Services (DPSCS) had adopted a three-drug protocol. In *Evans v. State*, 395 Md. 256 (2006), the Maryland Court of Appeals held that the State's lethal injection 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. While the State made efforts to pursue new regulations for lethal injection protocols, none were promulgated prior to the death penalty repeal in 2013.

State Expenditures: General fund expenditures increase by at least \$25,000 in fiscal 2019 only for DPSCS to purchase equipment. General fund expenditures also increase minimally for the Office of the Attorney General (OAG) and the Office of the Public Defender (OPD) for litigation-related expenditures in death penalty cases. The frequency and timing of such cases cannot be reliably predicted.

According to DPSCS, the death chamber space is still intact at the Metropolitan Transition Center Hospital and costs for lethal injection-related equipment are as much as \$25,000. DPSCS advises that most states with capital punishment are going to a single-dose injection system, which can cost up to \$20,000 per injection and may be extremely difficult to find. This analysis assumes the cost associated with each injection is incurred on an as-needed basis. DPSCS advises that, due to reduced overhead at North Branch Correctional Institution (NBCI), the cost to maintain a death row inmate at NBCI is comparable to the cost of maintaining a maximum security inmate at NBCI. The annual cost (including overhead) to maintain an inmate at the facility is approximately \$50,193. Accordingly, DPSCS expenditures related to housing inmates are not expected to be materially affected in the short term, particularly given Maryland's experience with death penalty cases.

Prior to repeal of the death penalty in 2013, there were five inmates on Maryland's death row. According to a 2013 report by the Death Penalty Information Center, Maryland had the seventh smallest death row population in the nation. The most recent execution in the State had been in December 2005, in part due to deliberations over lethal injection protocols.

OPD advises that it cannot estimate the precise fiscal impact of the bill without knowing the number of cases to which the bill will apply, but that the impact is significant. According to the office, death penalty cases require the office to hire mental health experts, mitigation experts, and/or social workers. According to OPD, a capital case resulting in a death sentence costs approximately \$3 million, which is \$1.9 million more than a case in which the death penalty is not sought. However, OPD's \$3 million figure includes \$1.3 million in prison costs, which are not the responsibility of the office. While the office contends that a death penalty case costs \$1.7 million to litigate, the office did not provide a breakdown of these costs, including information on how much of these costs are attributable to salaries for existing personnel and fixed costs that the office will incur regardless of whether it is litigating any death penalty cases.

The Department of Legislative Services advises that litigation-related expenditures for OPD increase minimally given (1) the relatively few number of cases to which the bill's provisions will likely apply given case volume prior to the death penalty repeal and (2) the maintenance of OPD personnel before and after the death penalty repeal.

Following changes to the death penalty statute during the 2009 legislative session, OPD's Capital Defense Division was disbanded as a separate program in fiscal 2010 and renamed the Aggravated Homicide Division (AHD). AHD is under the umbrella of OPD District Operations. At that time, AHD provided (1) direct trial representation to clients who faced the death penalty and (2) instruction and support to all OPD attorneys statewide who represented persons charged with capital offenses. AHD also provided training, consultation, and resources to provide litigation support in all areas of representation.

Following the repeal of the death penalty in 2013, OPD did not eliminate personnel; AHD personnel were absorbed into other functions and continue to litigate high-level homicide cases.

OAG represents the State in appeals of capital cases. Given the relatively few cases to which the bill is likely to apply, general fund expenditures for OAG for litigation-related expenses increase minimally as a result of the bill.

The bill is not expected to materially affect the finances of the Judiciary.

Local Expenditures: Local expenditures may increase to litigate death penalty cases. However, any such increase is dependent on case volume and existing resources, which varies by jurisdiction.

The Maryland State's Attorneys' Association did not respond to a request for information.

Additional Information

Prior Introductions: None.

Cross File: None.

Information Source(s): Governor's Office; Maryland State Commission on Criminal Sentencing Policy; Judiciary (Administrative Office of the Courts); Office of the Public Defender; Maryland Department of Health; Department of Public Safety and Correctional Services; National Conference of State Legislatures; Death Penalty Information Center; United States Supreme Court; Department of Legislative Services

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