

Department of Legislative Services  
Maryland General Assembly  
2013 Session

**FISCAL AND POLICY NOTE**

House Bill 1043  
Judiciary

(Delegate McDonough, *et al.*)

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**Criminal Law - Death Penalty - Multiple Murders**

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This bill establishes that when a defendant commits more than one murder in the first degree arising out of the same incident (1) the State is not required to give the defendant notice of its intention to seek the death penalty and the aggravating circumstances on which it intends to rely and (2) a separate sentencing proceeding must be held as soon as practicable after a defendant is found guilty of murder in the first degree to determine if the defendant must be sentenced to death.

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**Fiscal Summary**

**State Effect:** Potential significant increase in expenditures for the Office of the Public Defender if the bill results in more death penalty cases.

**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.

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**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 (SB 279) 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. 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 DOC's protocols are ineffective until either (1) the protocols are adopted as regulations under APA or (2) the General Assembly exempts the protocols from the procedures required by 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*, 421 Md.

595 (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 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 would have 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 (AELR) Committee 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 resubmit the proposed regulations after review and modification in light of that development. To date, DPSCS has not resubmitted the regulations.

**State Expenditures:** General fund expenditures may increase significantly for the Office of the Public Defender (OPD) to handle additional death penalty cases resulting from the bill.

One of the aggravating circumstances considered by a court or jury in a death penalty case is whether the defendant committed more than one murder in the first degree arising out of the same incident. However, a defendant found guilty of first degree murder may only be sentenced to death if the State gives written notice of its intention to seek the death penalty at least 30 days before trial. Thus, the bill's repeal of the notice

requirement in multiple murder cases may result in the death penalty being considered in all cases for which a defendant committed more than one first degree murder arising out of the same incident.

OPD advises that the annual cost of litigating capital cases is significantly more than if the same cases are tried as noncapital cases.

*Department of Public Safety and Correctional Services*

In June 2010, DOC transferred Maryland's five death row inmates from the Maryland Correctional Adjustment Center to the North Branch Correctional Institution (NBIC) in Allegany County. DOC has historically advised 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.

**Additional Comments:** Although this fiscal and policy note references DOC, the Department of Legislative Services notes that DPSCS implemented a major reorganization during fiscal 2012. As a result of the reorganization, DOC, the Division of Parole and Probation, the Patuxent Institution, and the Division of Pretrial Detention and Services no longer exist within the department by those names as separate budgetary units.

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### **Additional Information**

**Prior Introductions:** None.

**Cross File:** None.

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

**Fiscal Note History:** First Reader - February 12, 2013  
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