



**Colorado
Legislative
Council
Staff**

HB16-1233

**FINAL
FISCAL NOTE**

FISCAL IMPACT: State Local Statutory Public Entity Conditional No Fiscal Impact

Drafting Number: LLS 16-0579
Prime Sponsor(s): Rep. Ransom

Date: June 28, 2016
Bill Status: Postponed Indefinitely
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BILL TOPIC: CHANGES TO DEATH PENALTY TRIALS

Fiscal Impact Summary	FY 2016-2017	FY 2017-2018
State Revenue		
State Expenditures		
General Fund		\$652,067
Appropriation Required: None.		
Future Year Impacts: Ongoing increase in state expenditures.		

NOTE: This bill was not enacted into law; therefore, the impacts identified in this analysis do not take effect.

Summary of Legislation

This bill changes sentencing procedures for class 1 felonies starting February 1, 2017. The bill splits the sentencing hearing that takes place after a defendant is convicted into two distinct phases and makes the following changes to procedure.

Aggravation phase. The bill specifies that in the first phase of sentencing, the aggravation phase, the jury must unanimously find the presence of at least one aggravating factor. If the jury cannot agree unanimously that either one aggravating factor has been proven or that no aggravating factors have been proven, the court must dismiss the jury and impanel a new jury. The new jury must consider only the aggravating factors that the first jury could not rule out by unanimous vote. If the second jury cannot reach a unanimous verdict about the presence of at least one aggravating factor, the court must impose a sentence of life without parole.

Penalty phase. During the penalty phase, which must take place immediately after a unanimous finding on at least one aggravating factor, the defense must prove the existence of mitigating circumstances beyond a reasonable doubt. When determining whether to impose a sentence of death or life in prison, the sentencing jury or judge (if the defendant has waived his or her right to a jury trial) can only consider aggravating factors or mitigating circumstances that have been proven. If the jury cannot agree unanimously on a sentence during the penalty phase, the court must dismiss the jury and impanel a new jury. If the new jury cannot reach a unanimous verdict, the court must impose a sentence of life without parole.

Background

Under current law, in order for the prosecution to seek the death penalty, it must prove beyond a reasonable doubt the presence of at least one aggravating factor. The jury must agree unanimously that at least one aggravating factor is present and that there are insufficient mitigating circumstances to outweigh the aggravating factor. The defense may offer evidence of, and the jury may consider, any mitigating factors deemed relevant to the argument for mercy. The defense is not required to prove such mitigating factors. In the event that the jury cannot agree unanimously that at least one aggravating factor is present or on the appropriate sentence, the court must sentence the defendant to life without parole.

Assumptions

The fiscal note is based on the following assumptions:

- the bill will result in at least one new death penalty filing per year;
- the bill will result in at least one new death sentence per year;
- the Office of the State Public Defender will handle at least one new death penalty case per year; and
- the bill will result in one additional jury being impaneled during the penalty phase of sentencing in at least one case per year and trial costs will increase.

These assumptions are described in greater detail below.

Increased filings. The decision to charge a defendant with a capital crime and to seek the death penalty rests entirely with the district attorney of each judicial district. The main factor district attorneys consider when deciding to seek death is whether or not a crime was heinous enough to merit a death sentence. Under current law, the burden of proof lies on the prosecution in two distinct phases of death penalty cases. First, in the eligibility phase, prosecutors must convince a jury that at least one aggravating factor was present during commission of the crime and that any mitigating factors do not outweigh the aggravating factor(s). Second, the prosecution must convince the jury that death is the proper sentence. The bill does two things to lower the burden of proof on district attorneys. First, it allows prosecutors a second chance to convince a jury, both in the aggravation phase and in the penalty phase. Second, it shifts the burden of proof to the defense to prove beyond a reasonable doubt that any mitigating factors outweigh aggravation such that life in prison rather than the death penalty is the proper sentence.

When determining which sentence to pursue, district attorneys also weigh several secondary factors. Among these are the wishes of the victim's or victims' families, the resources at the prosecutors' disposal, and the strength of the evidence. Prosecutors who believe the evidence is not strong enough to convince a jury that a defendant is guilty and deserves death are not likely to expend the immense resources necessary to litigate a death penalty case. Because the bill allows district attorneys more than one chance to convince a jury, it changes a crucial element of the consideration behind seeking death versus life in prison.

Senate Bill 95-54 illustrates how changes in sentencing rules can affect the number of capital cases filed by district attorneys. SB 95-54 changed sentencing procedures to require a three-judge panel, instead of a jury, to make sentencing decisions in death penalty cases. In the five years prior to the law change, 9 death penalty cases (an average of 1.6 per year) were filed; five and a half years after the bill became law, 21 death penalty cases (an average of 3.8 per year) had been filed, a 138 percent increase in the average number of cases filed per year.

Based on these factors, the fiscal note assumes that under this bill, district attorneys will file more death penalty cases. However, the fiscal note also assumes that defendants will be more inclined to plea bargain given the increased likelihood of eligibility for a death sentence. As a result of these countervailing factors, the fiscal note estimates at least one additional case filed per year.

Additional death sentences. In addition to the increase in filings, the fiscal note assumes that at least one additional defendant per year will be found guilty and sentenced to death in capital trials. By giving prosecutors two chances in both phases of sentencing to convince a jury to impose death, the likelihood that a defendant receives the death penalty increases.

State Expenditures

This bill will increase state General Fund expenditures by at least \$652,067 in FY 2017-18 and future years in the Judicial Department. These costs are in the Office of the State Public Defender and the trial courts. The Office of Alternate Defense Counsel will also have increased costs and workload in the out years.

Table 1. Expenditures Under HB16-1233		
	FY 2016-2017	FY 2017-2018
Office of the State Public Defender		596,762
Judicial Department		55,305
Total		\$652,067

Office of the State Public Defender (OSPD). State-appointed defense counsel litigate the vast majority of death penalty cases. The fiscal note assumes that OSPD will provide representation in at least one additional death penalty case per year. Costs to OSPD will increase by an average estimated \$596,762 per case to litigate the initial trial and the sentencing trial. These costs represent the amount above what OSPD would have incurred to litigate a case where the prosecution seeks a sentence of life without parole. In death penalty cases, in order to comply with legal standards, the defense must consist of at least a five-member legal team of two trial attorneys, one criminal investigator, one mitigation specialist, and one fact investigator. In addition to personal costs, the defense incurs mandated costs related to the process of discovery, expert testimony, and obtaining records and transcripts. The fiscal note assumes cost will start in FY 2017-18; should any costs be incurred between the effective date of the bill, February 1, 2017, and the start of FY 2017-18, the fiscal note assumes OSPD will request additional appropriations through the annual budget process.

Judicial Department. Capital cases require higher level attorney, clerical, judicial, and investigative personnel, more courtroom security, more jurors, more pre-trial motions and hearings, and longer trials. Any increase in death penalty cases filed will result in increased workload and costs in the Judicial Department as courts handle longer, more complicated trials and the lengthy appeals process. Since 2002, death penalty cases in Colorado have required six times more court days than a comparable life without parole prosecution for felony murders. Because of the many factors that affect death penalty trial costs, costs are not uniform across judicial districts, and there is very little data available from which to make an estimate, the fiscal note has not estimated the increased trial costs to the Judicial Department. To the extent that any increase in workload and costs cannot be absorbed within existing appropriations, the fiscal note assumes that the Judicial Department will request an increase in appropriations through the annual budget process.

Increased sentencing trial costs. Trial costs during the sentencing hearing for all death penalty cases are likely to increase under the bill. If the jury cannot make a unanimous finding during the aggravation phase or the penalty phase, the court must impanel a new jury. The approximate cost to the Judicial Department for juries in death penalty cases is \$55,305. Of the last six death penalty cases that went to jury trials for sentencing, four did not find unanimously for death. The fiscal note assumes that in at least one death penalty case that goes to trial each year, a new jury will be impaneled during the penalty phase of the sentencing trial, increasing costs by \$55,305 in FY 2017-18. Should any costs be incurred between the effective date of the bill, February 1, 2017, and the start of FY 2017-18, the fiscal note assumes the Judicial Department will request additional appropriations through the annual budget process.

Office of the Alternate Defense Counsel (OADC). In the event that a defendant is deemed indigent and the OSPD has a conflict of interest, OADC must provide representation. For informational purposes, costs to OADC to represent a defendant in a death penalty case average \$542,014 per case. These costs represent the amount above what OADC would have incurred to litigate a case where the prosecution seeks a sentence of life without parole. OADC will also incur additional costs during the appeals process, because by law their office must provide representation for death penalty appeals. All defendants sentenced to death enter the unitary appeal process. Because death penalty cases in Colorado take on average three years to go from the pre-trial to sentencing phase, these costs are not expected until out years and are not included in this fiscal analysis. Only two cases to date have begun the unitary appeal process, and because they are still pending, confidentiality requirements prohibit OADC from reporting the costs. It should be noted, however, that the length and complexity of the process entails significant expenses to the state.

Local Government Impact

The bill will increase costs to district attorneys' offices that choose to file and litigate more death penalty cases. Because the choice to seek the death penalty rests entirely with each individual district attorney and because costs vary from district to district, the precise impact at the local level cannot be determined.

Effective Date

The bill was postponed indefinitely by the House State, Veterans, and Military Affairs Committee on February 29, 2016.

State and Local Government Contacts

Alternate Defense Counsel
Information Technology

Corrections
Judicial

District Attorneys
Public Defenders