



Colorado  
Legislative  
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Staff

SB16-064

## FISCAL NOTE

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

**Drafting Number:** LLS 16-0591

**Date:** February 5, 2016

**Prime Sponsor(s):** Sen. Lundberg

**Bill Status:** Senate Judiciary

**Fiscal Analyst:** Amanda Hayden (303-866-4918)

**BILL TOPIC:** DEATH PENALTY JURY DECISION RULES

Fiscal Impact Summary	FY 2016-2017	FY 2017-2018
<b>State Revenue</b>		
<b>State Expenditures</b>		
General Fund	\$596,762	\$596,762
<b>Appropriation Required:</b> \$596,762 - Judicial Department (FY 2016-17).		
<b>Future Year Impacts:</b> Ongoing impact to state expenditures.		

### Summary of Legislation

This bill changes sentencing rules in eligibility and selection of the death penalty in class 1 felony cases. Rather than a unanimous vote, the bill requires that only nine jurors agree that a defendant is eligible for the death penalty, and that only nine jurors agree in order to select the death penalty as a sentence. In the event that fewer than nine jurors agree on a sentence, the jury must be discharged and the defendant sentenced to life in prison.

### Background

Of the 31 states that permit the death penalty, 3 states (Alabama, Delaware, and Florida) do not require a unanimous vote by a jury for selection of a death sentence. No states allow for a non-unanimous vote in the eligibility phase of sentencing in capital cases.

There have been 10 death penalty cases filed in Colorado since 2002.

### Assumptions

The fiscal note is based on the following assumptions:

- that the bill will result in at least one new death penalty filing per year;
- that the bill will result in at least one new death sentence per year; and
- that the Office of the State Public Defender will handle at least one new death penalty case per year.

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. 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 lowers the burden of proof on the prosecution in both phases by replacing unanimity with a nine vote majority.

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 lowers the burden of proof on district attorneys, 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 the 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 requiring only the agreement of nine jurors, the likelihood that a defendant receives the death penalty increases. In the other three states that allow a non-unanimous vote by juries for death penalty sentencing, 77% of the juries that returned a death sentence over the last five years were not unanimous. Had unanimity been required, and all other things being equal, these cases would have resulted in 26 death sentences instead of 177.

### **State Expenditures**

**This bill will increase state General Fund expenditures by at least \$596,762 in FY 2016-17 in the Judicial Department.** These costs are in the Office of the State Public Defender; the Office of Alternate Defense Counsel and trial courts within the Judicial Department will also have increased costs and workload.

**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 sentencing phase. 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.

**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. For the purposes of this fiscal analysis, OADC plays an important role 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 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.

**Judicial Department.** Of all judicial proceedings, death penalty cases are some of the longest and most expensive. 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. Death penalty cases in Colorado since 2002 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 these increases will be addressed in the annual budget process.

### **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 takes effect August 10, 2016, if the General Assembly adjourns on May 11, 2016, as scheduled, and no referendum petition is filed. It applies to offenses committed on or after this date.

### **State Appropriations**

This bill requires an appropriation of \$596,762 from the General Fund to the Office of the State Public Defender in FY 2016-17.

### **State and Local Government Contacts**

Alternate Defense Counsel Judicial	Corrections Information Technology	District Attorneys Public Defender
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