

Brian E. Frosh, *chairman,* *Senate Judicial Proceedings Committee*

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With divisive societal, law and order and environmental issues coming before the General Assembly when it reconvenes in less than seven weeks, few legislators have more to mull than Senate Judicial Proceedings Chairman Brian E. Frosh (D-Dist. 16) of Bethesda, who is also regarded as the Senate's leading advocate for the environment.

Gazette special correspondent Margie Hyslop talked with the Democrat in his Bethesda law office this week about the death penalty, same-sex unions, assault weapons, the sniper cases and how the Senate might break a deadlock with Gov. Robert L. Ehrlich Jr. (R) over the confirmation of a secretary for the Department of the Environment. An edited transcript follows.

Q. What do you expect to be the most contentious issue or issues before the Judicial Proceedings Committee this year?

A. Tort reform ... but also we'll have a proposal on assault weapons, and, of course ... add civil unions or marriage for gay couples.

Q. Do you expect the assault weapon ban bill to clear your committee?

A. It'll be close. It'll probably be 6-5 — which way, I don't know.

Q. What are the prospects for passage of civil union or marriage for gay and lesbian couples or of measures limiting marriage to female-male couples?

A. I would guess [the legislature will consider] both. I'd say [chances of passage] are slim for either because most of the time when you have a groundbreaking proposal, it takes several years to get it through.

Q. The state budget, including that for corrections, is tight. Do you expect any further liberalization of drug laws or mandatory sentencing?

A. Last year [we approved the] medical marijuana initiative [and] I don't think that's coming back.

I'd be surprised if you saw initiatives that reduced penalties for crimes come to the Senate floor. The governor announced that he is going to be looking for alternatives to incarceration, and I think that's a worthwhile effort, but I don't think they are looking at legislation to do that. ... They have some discretion in how they house people and what kind of services they provide; they can recommend that people be recommended for

parole earlier than they might otherwise be. I have not heard that it's going to be legislated.

Q. Do you expect legislation to help ensure adequate representation for poor people charged with offenses?

A. I think there have been some studies that have come out recently that show that juveniles are unrepresented or tend to waive counsel. I think that's a unconscionable position for society to take. If we are going to subject kids to incarceration, the least we can do is provide attorneys for them.

By definition, almost, I think they should not be able to waive counsel. If they don't have the maturity to vote and they don't have the maturity to make legal decisions, then they sure don't have the maturity and understanding necessary to waive the right to have an attorney. I think we may need to look at the law with respect to representation of juveniles.

[Committee Vice Chairman]

Leo Green has been very active in terms of wanting to make sure that poor people have access to the court system and have representation. I don't know if he has a specific bill in mind this year, but it seems a logical follow on his initiatives would be ensuring that juveniles are adequately represented.

Q. What, if any, death penalty reform measures might move forward? Perhaps some reforms similar to those Illinois adopted last week?

A. Based on last [session], we're probably not looking at anything this year. Our committee reported two bills to the Senate floor

[this year]. I supported both of them. They both failed — one by one vote, one by three votes.

I really think it's imperative that we fix Maryland's death penalty statute. The most immediate problem is the standard of proof. We have this bizarre standard of proof that when the jury goes to make the ultimate decision, the decision as to whether or not they are going to put somebody to death, they make their decision based on a preponderance of the evidence — that is, whether the scales of justice are tipped one way or the other — as opposed to beyond a reasonable doubt.

I think that is totally inappropriate for the death penalty and I think it is unconstitutional. The U.S. Supreme Court has never opined on precisely this issue. The Maryland Court of Appeals has said that it does not violate the constitution, either Maryland or federal, twice now, each time on a 4-3 vote. They specifically left open the question of whether it is good policy. They said we leave to the legislature the issue of whether this is the right way to handle the death penalty. It really is offensive as applied to the death penalty. And of course the reason for that is, it's irrevocable.

Q. Given that the courts have pointed to the question of policy, are you or another legislator going to introduce a bill?

A. Unless we get an indication that there are some votes that are going to switch, I wouldn't be inclined to do it again. I don't see the administration's position on the death penalty being anything other than [keeping] the status quo.

If we are going to use the

death penalty in Maryland, we ought to do everything we possibly can to make sure it is meted out fairly and that it is not meted out based on factors like race or geography.

One of the potential remedies that has been suggested, not as a cure-all, but as a way of ameliorating the disparities, is to give Maryland's highest court the ability to examine the proportionality, to look at the facts of the case and determine whether the death penalty is appropriate or not — not based on whether the prosecution touched all the bases, whether the defendant had competent counsel, whether the sentence meets the strict legal requirements, but based on the totality of the circumstances whether this particular person ought to be put to death or ought to serve life without parole. Give the Court of Appeals one last shot at modifying the sentence.

Something similar was in the code 10 years ago and was taken out. Leo Green proposed something this year that would have essentially reinstated the old language [giving the court authority to look at proportionality by reference to other cases in its final review].

I don't have high hopes for death penalty reform. If the House moved something, then I could see taking another run at it. Or if senators changed their minds.

There are a number of other things that probably ought to be done. Look at the list of aggravating factors that a jury weighs to determine whether a defendant ought to be put to death. They include kidnapping, killing a policeman, rape, etc. What Illinois did was narrow the aggravating factors to three or four.

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Another problem with Maryland's death penalty statute is the snipers would not be death-eligible, or at least arguably not death-eligible, in Maryland because the killings did not arise out of the same set of circumstances.

Q. Any thoughts on how John Allen Muhammad and Lee Boyd Malvo came to be tried in Virginia instead of Maryland?

A. I think it was a political decision and I think the Justice Department wanted them tried in Virginia because they were clearly eligible for the death penalty in Virginia. ...

Without judging the guilt or innocence of Muhammad and Malvo, if anybody were deserving of the death penalty it would be the people who committed the sniper crimes. Those were cold-blooded, heinous crimes. The snipers gave every indication that they were going to continue to kill people until they were either caught or paid off. If you are going to have the death penalty, it seems to me those folks ought to be eligible for it.

Q. How about mitigating circumstances for juveniles being subjected to the system?

A. Malvo would not have been eligible for the death penalty in Maryland because he [was] a juvenile [at the time of the crimes] and I think that's appropriate.

Q. Could Maryland go without a confirmed secretary of environment for another year?

A. No. It would be violative of our constitution for the governor not to submit a nominee, and it would be bad for the state and bad for the Department of the Environment.

Q. But nothing prevents the governor from submitting a nominee that again is found unacceptable by the Senate.

A. That's right.

Q. What happens if the deadlock remains?

A. There's no reason why the deadlock should remain. There are lots of Republicans that I could name who'd make good secretaries of the environ-

ment. I hope the governor will submit somebody whose name perhaps meets his requirements for party registration, but also somebody who's going to be a steward of the environment and a protector of the Chesapeake Bay.

Q. Name some folks that you and other environmentally concerned senators would find acceptable.

A. Vernon Boozer, who was a senator from Baltimore County and minority leader [from 1997 through 1998], is somebody that I would be delighted to see as secretary of environment.

Martin Madden [a former senator who represented parts of Prince George's and Howard counties and was minority leader from 1999 through 2001] was somebody I thought would be confirmable.

Both saw a broad array of environmental issues from a legislative perspective and had to analyze and make decisions on those issues.

Q. Has the acting secretary of the environment, Kendi P. Philbrick, gotten enough on-the-job experience that he might be acceptable?

A. It's an open question, but I would say there are some serious drawbacks to his candidacy. ... I think if [Senate President] Mike Miller is not going to support him, he's in for a tough fight.

Q. How do you see legislation that relates to growth and development playing out next year?

A. The governor has an initiative on Maryland's voluntary clean-up and brownfields programs. I sponsored legislation that created and modified those programs.

From what I understand, he wants to make it easier for polluters to get grants and low-interest loans from the state and to make it easier to get through the voluntary clean-up program, which sounds to me like they want to reduce the clean-up standards.

I haven't seen their bill, but I think that's the wrong direction to go. ... If the state were at all aggressive about enforcing existing laws on pollution, especially on toxic pollution, you'd get a lot more people in the program very fast.

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