

**GENERAL ASSEMBLY OF NORTH CAROLINA**

**Session 2009**

**Legislative Incarceration Fiscal Note**

**(G.S. 120-36.7)**

**BILL NUMBER:** House Bill 137 (First Edition)

**SHORT TITLE:** Capital Procedure/Severe Mental Disability.

**SPONSOR(S):** Representatives Insko, Harrison, Womble, and Luebke

	<b>FISCAL IMPACT</b>				
	<b>Yes (X)</b>	<b>No ( )</b>	<b>No Estimate Available (X)</b>		
	<b><u>FY 2009-10</u></b>	<b><u>FY 2010-11</u></b>	<b><u>FY 2011-12</u></b>	<b><u>FY 2012-13</u></b>	<b><u>FY 2013-14</u></b>
<b>EXPENDITURES</b>					
<b>GENERAL FUND</b>					
<b>Correction</b>			<b>Indeterminate fiscal impact</b>		
<b>Judicial - AOC</b>			<b>Indeterminate fiscal impact</b>		
<b>Judicial - IDS</b>			<b>Indeterminate fiscal impact</b>		
<b>Justice</b>			<b>Indeterminate fiscal impact</b>		
<b>ADDITIONAL PRISON BEDS:</b>					
<b>(cumulative)*</b>			<b>Indeterminate prison bed impact</b>		
<b>POSITIONS:</b>					
<b>(cumulative)</b>			<b>Indeterminate positions needed</b>		
<b>PRINCIPAL DEPARTMENT(S) &amp; PROGRAM(S) AFFECTED:</b> Department of Correction; Judicial Branch; Department of Justice					
<b>EFFECTIVE DATE:</b> Sections 1 and 2 become effective October 1, 2009, and apply to trials docketed to begin on or after that date. Section 3 of becomes effective October 1, 2009, and expires October 1, 2010. Section 4 of this act is effective when it becomes law.					
<i>*This fiscal analysis is independent of the impact of other criminal penalty bills being considered by the General Assembly, which could also increase the projected prison population and thus the availability of prison beds in future years. The Fiscal Research Division is tracking the cumulative effect of all criminal penalty bills on the prison system as well as the Judicial Department.</i>					

**BILL SUMMARY:**

Amends Article 100 of Chapter 15A to prohibit the death penalty for a defendant with severe mental disability at the time of the commission of the criminal offense. Upon motion of the defendant, requires the court to order a pretrial hearing to determine if the defendant has a severe mental disability when the crime was committed. If the court determines that the defendant had a severe mental disability, the court must

declare the case noncapital and the State shall not seek the death penalty. Adds new G.S. 15A-2007(e) to provide that if the court does not find in the pre-trial proceeding that a defendant has a severe mental disability, the defendant may produce evidence during the sentencing hearing regarding the disability.

The proposed bill sets a window for filing post-conviction motions: (1) if the defendant's conviction and sentence of death was entered prior to October 1, 2009 the motion must be filed on or before January 31, 2010; (2) if the defendant's trial is in progress on October 1, 2009 the motion must be filed within 150 days of the imposition of a sentence of death.

## **ASSUMPTIONS AND METHODOLOGY:**

### **General**

The proposed bill prohibits the imposition of the death penalty for defendants with severe mental disabilities. As a result, the bill will reduce the pool of defendants who are potentially eligible for the death penalty. The Office of Indigent Defense Service (IDS) reports that there are currently about 12 capital trials per year.

### **Department of Correction – Division of Prisons**

The North Carolina Sentencing and Policy Advisory Commission prepares prison population projections for each bill containing a criminal penalty. The Commission assumes for such bills that expanding existing, or creating new criminal offenses produces no deterrent or incapacitative effect on crime. Therefore, the Fiscal Research Division does not assume deterrent effects for any criminal penalty bill.

Commission staff indicated that over the last five fiscal years, there have been less than 10 death sentences imposed per year and it is not known how many offenders could be found to have a severe mental disability under the proposed bill. Since under Structured Sentencing a "life sentence" means for the rest of the person's natural life, the long-term impact of the bill would be the result of the difference between the length of time the average death row inmate spends in prison *prior to execution* (which was 12.4 years for death row inmates executed from Calendar Year 1998 through Calendar Year 2008) versus the length of time the average inmate will remain in prison on a sentence of life without parole. *The build-up over the years of more and more persons serving life sentences would have substantial long-term impact.*

In addition, there would be an immediate prison impact for current death row inmates who are found to have a severe mental disability and who had exhausted the post-conviction appeal process and could be scheduled for execution.<sup>1</sup> They would receive a life sentence under the proposed bill. Of the approximately 160 inmates currently in prison with a death sentence, 81 have been there longer than the average time to execution of 12.4 years.

### **Pre-Trial Motions – Judicial Branch**

The Administrative Office of the Courts (AOC) provides Fiscal Research with a fiscal impact analysis for most criminal penalty bills. For such bills, fiscal impact is typically based on the assumption that court time will increase due to anticipated increases in trials and corresponding increases in workload for judges, clerks, and prosecutors. This increased court time is also expected to result in greater expenditures for jury fees and indigent defense.

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<sup>1</sup> There a last execution in North Carolina was August 18, 2006.

The pre-trial motions granted under the bill could potentially reduce court costs by eliminating the need for more lengthy and expensive court trials in those cases where the defendants are found to have a severe mental disability. However, the bill could result in additional costs in those capital cases where defendants who do not have a severe mental disability would seek a pre-trial hearing as part of their defense. It is assumed that in cases in which the death penalty is being sought, defense counsel must assert every reasonable defense on behalf of a client, and in any case where an argument of “severe mental disability” can be made, it will be made. This statement is not intended to imply that a defense attorney will *always* assert the issue.

AOC and IDS differ in their estimate of the number of people who qualify for this pre-trial motion. IDS staff reported that of the 1,203 pending murder cases proceeding at this time, only 231 are proceeding capitally and that many of these will proceed without a capital trial. There are currently about 12 capital trials per year. Therefore, it is likely that these pre-trial hearings will only be conducted in one to three cases per year. IDS estimates that each pre-trial motion will require an average of 24 hours of attorney time and 6 hours of expert time. IDS believes this to be an accurate estimate of time required, since capital defendants with symptoms of mental illness are already receiving mental health evaluations the additional expert time would only be that necessary to draft an affidavit and testify in those cases in which a hearing was granted. For an expert, at an average of \$250 per hour, six hours results in a cost of \$1,500. For private assigned counsel, paid at \$95 an hour, 24 hours of attorney time costs \$2,280. For Public Defenders (PD) and Assistant Public Defenders (APD) the cost is \$1,414. For Assistant Capital Defenders (ACD), the cost is \$2,025. Assuming the higher PAC rate, each pre-trial motion would cost on average \$3,780. These figures do not include costs incurred by AOC or the Attorney General’s office.

AOC cannot project the number of cases in which a pre-trial motion would be filed under this bill, or the number of hearings that would be held on these motions. Thus AOC cannot project the total costs of the potential cases arising from this bill. AOC estimates that each pre-trial motion would require one full day of in-court time and an average of 24 hours of preparation time for two prosecutors, resulting in an average cost of \$3,962 for each pre-trial motion. These figures do not include costs incurred by IDS or the Attorney General’s office.

AOC staff indicated that for cases being tried capitally, this new pre-trial motion would be made in addition to other defenses raised in the case (such as insanity or reduced capacity defenses). This could result in additional work for defense counsel, prosecutors, and the court, but the number of motions may be few. Additionally, if and to the extent that cases being tried capitally now become non-capital because of this bill, there would be a substantial net savings for such cases since capital trials are far more expensive than any other method of disposition. In cases that begin as capital but eventually become non-capital, the costs of these new motions would in general be new, additional work. However, there could be an offset to these additional costs, if in some cases a successful motion on the basis of “severe mental disability” makes a case non-capital sooner, obviating the need for other pre-trial motions, preparation time, or negotiations that under current law lead to the case becoming non-capital (that is, often leading to a guilty verdict). For these reasons, savings cannot be estimated.

### **Sentencing Phase Motions – Judicial Branch**

This bill creates a new G.S. 15A-2007(e) that provides that if the court does not find in the pre-trial proceeding that the defendant had a severe mental disability at the time of the commission of the offense, the defendant may introduce evidence during the sentencing hearing regarding the disability. A jury finding of a severe mental disability would result in a case being declared non-capital. *AOC has no data from*

*which to estimate the number of cases in which the matter of severe mental disability would be raised at sentencing, although it may be that the same issues are already presented for mitigation under current law (see G.S. 15A-2000(f)(2) and (f)(6)). Nonetheless, the amendments appear to offer an expansion to existing law, and expanded issues and proceedings in capital sentencing would translate into increased workload for the court, prosecution, and defense.*

### **Post-Conviction Proceedings**

The proposed bill would allow current death row inmates to file a motion seeking relief from a death sentence on the ground that he/she had a severe mental disability. Unlike the potential costs for some pre-trial motions, the post-conviction motions would not generally result in a cost savings because the case has already been tried capitally, and costs for appeals and motions for appropriate relief will already have been incurred in many of these cases. Some of the current death row inmates would be expected to file a motion seeking relief on the grounds of having a severe mental disability but must do so no later than January 31, 2010.

IDS estimates that approximately 12% of the current death row inmates will have a statutory mitigating factor submitted to and considered by the jury in reaching a death verdict. Thus, IDS projects that 12% of the current death row inmates will receive a hearing. AOC has no data from which to offer an estimate of the potential number of the current death row inmates that will file a post-conviction motion, however they do believe that this number may be significant. The Department of Justice (DOJ) staff reviewed the case files of the convicted offenders currently on death row and found that in at least 75% of these cases one of the statutory mitigating factors was submitted to and considered by the jury in reaching a death verdict. Based on this review, DOJ estimates that more than 75% of the current death row inmates may file post conviction motions.

### **Judicial Branch**

AOC and IDS staff indicated that they would expect a fiscal impact as a result of the post-conviction procedures set forth in the bill.

IDS reported that most defendants on death row, or facing a capital trial, will not be able to support a claim of severe mental disability with the required affidavit because they simply do not have a severe mental disability. Indeed, perhaps the best indicator of the outer limits of the pool of death sentenced inmates who might be able to file a motion under this bill are defendants for whom the jury made a finding of mitigating circumstances under G.S. 15A-2000(f)(6). The (f)(6) mitigator requires proof that “the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired.” A recent study by the Common Sense Foundation examined the prevalence of mental illness among defendants sentenced to death. IDS has been provided a breakdown of some of the findings, with include a determination that 19 inmates were sentenced to death with a finding of the (f)(6) mitigating circumstance. This equals roughly 12% of the inmates on death row. To get a finding of (f)(6), a defendant is only required to persuade a single juror of the existence of this circumstance by the preponderance of the evidence. It is responsible to believe that defendants who could not persuade even a single juror to find the existence of the (f)(6) circumstance would have no basis for presenting a claim that they suffered a severe mental disability. Indeed, the 12% figure may overstate the number of inmates who may litigate this issue as the (f)(6) mitigating circumstance is less demanding than the requirements of proving substantial mental illness in the bill, and includes impairment caused by substance abuse or other causes unrelated to a mental disability.

Based upon this study, IDS estimates that the outer limit of the number of new inmates currently sentenced to death who might litigate a claim under the new law is 19. Hearings would not be held in every case, as a court may determine that the motion is inadequate to require a hearing. In addition, experience with motions made under the then newly-enacted mental retardation bill shows that any hearings that are held are likely to be spread out over five to six years, meaning that IDS could expect three to four hearings a year in post-conviction cases. The litigation of these motions would not require extensive additional work for counsel who are already representing the defendant and are already investigating legal issues related to the defendants' mental health.

IDS assumes that there will be four hearings a year for post-conviction cases and that each of these hearings will cost the same as a pre-trial proceeding, \$3,780 each. These figures do not include costs incurred by AOC or the Attorney General's office. IDS staff notes that in many cases the claim of severe mental disability will simply be included as a claim in an existing post-conviction motion. *Although there may be some offset savings in the event that a defendant obtains relief on the basis of severe mental disability, and thereby avoids further post-conviction litigation, this cost savings can not be estimated.*

AOC has no independent data from which to offer an estimate, for purposes of planning for potential additional workload and costs, the total number of defendants who may raise the issue would be more relevant than the number who may successfully raise the issue. AOC estimates that post-conviction motions on old cases are assumed to require more time than pre-trial motions on current and new cases. Each post-conviction motion is estimated to require two days of in-court time. For recent cases in which the prosecutor who was involved in the case handles the post-conviction, it is estimated that 24 hours of preparation time, and potentially 48 hours, is needed for one prosecutor to assist the Attorney General. This would result in a minimum per case cost of \$6,660 for two days of court time and 24 hours of attorney prep time. For older cases or for prosecutors unfamiliar with the case, AOC estimates two weeks of preparation time. The bill specifies that the post-conviction motions must be filed before January 31, 2010 if the defendant's conviction was entered before October 1, 2009, or 150 days within sentencing if the trial was in progress on October 1, 2009. Thus, AOC projects that, in effect, the bill would likely concentrate much of the costs for these motions into the first two years, depending on how much time elapses between when the motions are filed and when cases are heard.

#### The Department of Justice

The Attorney General's Office submitted a fiscal impact for the costs related to the proposed post-conviction motions. In their estimate, the DOJ assumes that 75% of the 160 defendants, 120, currently on death row may file post-conviction motions under the provisions of the proposed bill.

Based on the amount of time spent on average in handling capital case post-conviction claims of mental retardation, DOJ estimates 30 work days to prepare for and hold a hearing in a "severe mental disability" case. The additional work would include: (1) a review of the trial transcript except for jury selection; (2) a review of mental health and other medical records that were available at the time of trial; (3) a review of the investigative file that was available at trial; (4) a review of the defendant's medical file while incarcerated in the Department of Correction; (5) consultation with mental health experts; (6) a review of any new test results and reports by any new experts that examine defendant or provide an opinion; (7) interviews of witnesses; (8) legal research; (9) preparation of legal documents; and (10) appearance at a hearing on the issue. To handle this additional workload, the Capital Litigation Section estimates that they would need five additional Attorney IVs and one additional Paralegal I.

DOJ based their estimate on their experience, to date, handling present death row mental retardation cases. Mental retardation cases involve testing and evaluation by forensic psychologists, who generally charge between \$250 and \$300 per hour (mental retardation evaluations by expert forensic psychologists retained by the State generally range between \$5,000 and \$10,000 per case, depending on the complexity). If the proposed bill becomes law, the determination of “severe mental disability” will require forensic psychologists, and also forensic psychiatrists. Forensic psychiatrists retained by the State generally charge \$250 to \$450 per hour, and evaluations range from \$10,000 to more than \$20,000 per case, depending upon complexity. The expected “severe mental disability” could require both a psychologist (at a range of approximately \$5,000 to \$10,000 per case) and a psychiatrist (at a rate of approximately \$8,000 to \$15,000 per case). Therefore, the State’s costs to hire expert witnesses could be approximately \$13,000 to \$25,000 per case.

DOJ projects that 75% of the persons currently on death row will request a hearing; however, this estimate differs from the estimates provided by AOC and IDS. Given the restricted pool of persons eligible for the post-conviction proceeding, Fiscal Research rejects DOJ’s estimate that five new *permanent* attorney positions will be required. DOJ could either assign these cases to existing staff or use contract attorneys.

**SOURCES OF DATA:** Administrative Office of the Courts; Office of Indigent Defense Services; NC Sentencing and Policy Advisory Commission; Department of Justice

**TECHNICAL CONSIDERATIONS:** None

**FISCAL RESEARCH DIVISION: (919) 733-4910**

**PREPARED BY:** Danielle Seale, Denise Thomas

**APPROVED BY:** Marilyn Chism, Director  
Fiscal Research Division



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**Signed Copy Located in the NCGA Principal Clerk's Offices**