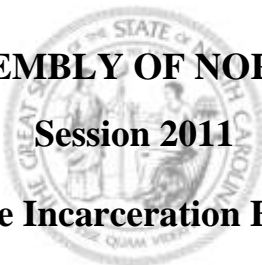


GENERAL ASSEMBLY OF NORTH CAROLINA



Session 2011

Legislative Incarceration Fiscal Note

(G.S. 120-36.7)

BILL NUMBER: House Bill 659 (Second Edition)

SHORT TITLE: Capital Procedure/Severe Mental Disability.

SPONSOR(S): Representatives Glazier, Harrison, Stevens, and McGrady

FISCAL IMPACT				
	Yes ( )	No ( )	No Estimate Available (X)	
	<u>FY 2011-12</u>	<u>FY 2012-13</u>	<u>FY 2013-14</u>	<u>FY 2014-15</u>
<b>GENERAL FUND</b>				
Correction			<i>*See Assumptions and Methodology*</i>	
Judicial- AOC			<i>*See Assumptions and Methodology*</i>	
Judicial- IDS			<i>*See Assumptions and Methodology*</i>	
Justice			<i>*See Assumptions and Methodology*</i>	
<b>TOTAL</b>				
<b>EXPENDITURES:</b>			<i>*See Assumptions and Methodology*</i>	
<b>POSITIONS:</b>				
(cumulative)			<i>*See Assumptions and Methodology*</i>	
<b>PRINCIPAL DEPARTMENT(S) &amp; PROGRAM(S) AFFECTED:</b> Department of Correction; Judicial Branch; Department of Justice.				
<b>EFFECTIVE DATE:</b> Sections 1, 2, and 4 of the act become effective October 1, 2011, and apply to trials docketed to begin on or after that date. Section 3 of the act becomes effective October 1, 2011, and expires October 1, 2012. Section 5 of the act is effective when this act 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>				

## **FISCAL SUMMARY:**

### **Pre-Trial Motions**

To provide a range of the potential cost of pre-trial motions filed under the proposed legislation, the Office of Indigent Defense Services (IDS) reports there are approximately ten to twelve actual capital trials per year in North Carolina. Three percent of ten to twelve cases is less than one hearing per year. The estimated cost for one hearing would be an average of \$10,080 (including expert and attorney time).

In addition, for each case that is declared non-capital as a result of the pre-trial hearing, the average savings for IDS would be \$80,020 or \$91,285 per case.

The Administrative Office of the Courts (AOC) estimates there will be 196 new and pending pre-trial filings in the first full year of implementation. To estimate the per case cost, AOC divided the cost of personnel \$8,850,476 (position, recurring operating costs, and expert witness fees) by 196 cases to equal \$45,156 per case.

For each case that is declared non-capital as a result of the hearing, AOC states there would be a very substantial cost offset and most likely a net savings (depending on the numbers of cases), since capital trials are far more expensive than any other method of disposition. If one trial were shifted from capital to non-capital, at a minimum the savings would equate to \$35,270 per case. If one trial were shifted from capital to a plea, at a minimum the savings would equate to \$63,275 per case.

### **Sentencing Phase Motions**

AOC and the Fiscal Research Division have no data from which to determine the number of cases in which this issue might be raised.

### **Post-Conviction Proceedings**

To provide a range of the potential cost of post-conviction proceedings, DOJ estimates that the State's cost to hire expert witnesses could be approximately \$13,000 to \$25,000 per case. Assuming 119 (75 percent of 158 death row inmates) challenge their death sentences under the proposed legislation, DOJ estimates the State could be facing costs for such expert assistance in the range of \$1,547,000 to \$2,975,000 (\$13,000 to \$25,000 per case multiplied by 119 cases).

DOJ assumes their office will take the lead on ten to 20 percent of the estimated 119 post-conviction motions, at the request of district attorneys, which would equate to 101 cases handled by AOC and 18 cases handled by DOJ. To estimate the per case cost for AOC to take the lead on 101 cases, AOC divided the cost of personnel \$5,544,362 (position, recurring operating costs, and expert witness fees) by 101 post-conviction cases to equal \$54,895 per case. To estimate the per case cost for DOJ to take the lead on 18 cases, AOC divided the cost of existing personnel \$374,276 (position and recurring operating costs) by 18 cases to equal \$20,793 per case. DOJ would cover the cost of expert witness fees for the 18 cases.

IDS states there will likely be no more than 16 (or ten percent) of the 158 inmates on death row who qualify for the post-conviction motion. For post-conviction cases, IDS believes that more time will be necessary to investigate and prepare a claim than for cases at the trial level. The estimated cost for one case would be an average of \$15,120 (including expert and attorney time). Therefore, the total cost would be \$241,920 (\$15,120 per case multiplied by 16 cases).

Overall, the Fiscal Research Division is not able to provide a more definite fiscal impact of the proposed legislation, due to the significant difference between the number of cases and the cost per case between the various agencies. However, Fiscal Research believes the pre-trial motions granted under the proposed legislation will potentially reduce court costs by eliminating the need for more lengthy and expensive trials in those cases where the defendants are found to have a severe mental disability. Also, given the restricted pool of persons eligible for the post-conviction proceeding, Fiscal Research believes DOJ's and AOC's cost estimates are overstated.

#### **BILL SUMMARY:**

The proposed legislation amends Article 100, Capital Punishment, of Chapter 15A of the General Statutes to provide for sentencing procedures and post-conviction review for defendants with a severe mental disability who commit an offense punishable by death.

Section 1 adds new G.S. 15A-2007 to prohibit a defendant determined to have a severe mental disability at the time of the commission of a criminal offense from being sentenced to death. The act defines severe mental disability to mean any mental disability or defect that significantly impairs a person's capacity to do any of the following: (1) appreciate the nature, consequences, or wrongfulness of the person's conduct; (2) exercise rational judgment in relation to conduct; or (3) conform the person's conduct to the requirement of the law.

In addition, the act specifies that a mental disability manifested primarily by repeated criminal conduct or attributable solely to the acute effects of alcohol or other drugs does not, standing alone, constitute a severe mental disability. The act also clarifies that the defendant must demonstrate by clear and convincing evidence that the mental disability was manifested before the defendant's alleged conduct at the time of the offense to meet the test of severe mental disability.

The proposed legislation requires the court to hold a pretrial hearing, upon motion of the defendant, to determine if the defendant had a severe mental disability at the time of the commission of the offense. The act prohibits anyone found to be under the influence of a severe mental disability at the time of the commission of the criminal offense from asserting a defense of not guilty by reason of insanity.

The act specifies that if the court does not find that defendant had a severe mental disability at the time of the offense during the pre-trial hearing, the defendant may introduce evidence of the disability during the sentencing hearing.

Section 2 states the court shall give appropriate instructions in those cases in which evidence of the defendant's severe mental disability requires the consideration by the jury of the provisions of G.S. 15A-2007.

Section 3 enacts new G.S. 15A-2008 to allow a defendant who has been convicted of first degree murder and sentenced to death to request a post-conviction determination of severe mental disability.

Section 4 enacts new G.S. 15A-960 to prohibit an insanity defense if: (1) prior alcohol use, prior drug use, or both are the sole cause of the psychosis; or (2) voluntary intoxication, a voluntary drugged condition, or both combined are the sole support for the defense.

Sections 1, 2, and 4 of the act become effective October 1, 2011, and apply to trials docketed to begin on or after that date. Section 3 of this act becomes effective October 1, 2011, and expires October 1, 2012. Section 5 of the act is effective when the act becomes law.

*SOURCE: BILL DIGEST H.B. 659 (04/06/0201).*

## **ASSUMPTIONS AND METHODOLOGY:**

### **General**

The proposed legislation 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 Services (IDS) reports there are approximately ten to twelve actual capital trials per year in North Carolina.

### **Department of Correction- Division of Prisons**

The 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.

In FY2009-10, two offenders received a sentence of death. Their mental status at the time of the offenses is not known. It is also not known how many offenders may be found to have a severe mental disability under the proposed bill. This bill would have no short-term impact. Since a life sentence under Structured Sentencing means for the rest of the person's natural life, any impact will come from the difference between the length of time the average inmate with a death sentence spends in prison prior to execution compared to the length of time the average inmate will remain in prison on a sentence of life without parole.

According to the North Carolina Department of Correction (DOC), 35 people were executed between January 1, 1998 and August 18, 2006 (the date of the last execution in the state). These offenders spent an average of 12.4 years in prison before execution.

There are currently 158 inmates in prison under a death sentence. This group has been on death row an average of 12.8 years. The 18 offenders sentenced to death since FY 2005-06 ranged from about 22 to 55 years of age at the time of prison admission, with an average age of about 35 years. If these offenders had been sentenced to life without parole and lived to age 65, the average time served would be about 30 years.

The difference between average time to execution (12.4 years) and average time to be served on a life without parole sentence (30 years) is 17.6 years. Therefore, if the proposed bill were enacted, an offender convicted of first degree murder who is sentenced life without parole instead of death due to a severe mental disability would spend an average of 17.6 years longer in prison than he or she would have spent until execution. The build-up over the years of more and more persons serving life sentences would have substantial long-term impact, if a large number of offenders were determined to have a severe mental disability at the time of the offense for which they would have received the death sentence.

### **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.

The pre-trial motions granted under the proposed legislation will potentially reduce court costs by eliminating the need for more lengthy and expensive trials in those cases where the defendants are found to have a severe mental disability. AOC and IDS differ in their estimate of the number of offenders who would qualify for the pre-trial motion.

IDS believes that a full evidentiary hearing probably will be held prior to trial only in cases that are likely to go to an actual capital trial, or that now are resolved shortly before the start of a capital trial. So, there would be a limited pool of cases in which there is likely to be a hearing.

AOC states there were 374 defendants charged with first degree murder (Class A felony) and an additional 328 defendants charged with murder, offense class unspecified, for a total of 702 potential capital cases filed in 2010. Based on a 2008 IDS report, approximately 28 percent of potentially capital cases actually proceed capitally (although a much smaller number ultimately result in capital trials). Using this percentage, and applying it to all 702 filings (IDS only tracks those with indigent defendants) AOC assumes that 197 murder cases filed each year will proceed capitally.

**IDS Impact:** Defense attorneys representing defendants who face a capital trial, and for whom there is compelling evidence of severe mental disability that manifested prior to the offense, presumably are already investigating this evidence and already have a qualified mental health expert examining the defendant and preparing to testify about the mental disability. Thus, the additional costs that will be incurred are those associated with preparing for and conducting the

hearing required by the bill. It is difficult to predict the amount of defense attorney and expert time that would be associated with those hearings. For instance, the hearings may be relatively short and involve few witnesses, or they may take several days and involve expert testimony from both the defense and prosecution. IDS estimates that preparing for and conducting a hearing in a trial-level case in which a hearing is granted would take an average of 32 additional hours of time for each of the two appointed attorneys (for a total of 64 hours of defense attorney time), plus 16 hours for a mental health expert.

For private assigned counsel (PAC) paid at the current capital rate of \$95 an hour, 64 hours of attorney time would cost \$6,080 per hearing. For Public Defenders and Assistant Public Defenders, the average cost would be \$3,771 per hearing. For Assistant Capital Defenders, the average cost would be \$5,402 per hearing. For a mental health expert, at an average rate of \$250 per hour, 16 hours would cost \$4,000 per hearing. Thus, assuming the higher PAC rate, each hearing would cost an average of \$10,080 (including expert and attorney time).

According to IDS, approximately three percent of the general population suffers from the type of severe mental disability that is contemplated by this bill. However, IDS is not able to predict the number of defendants that would file a motion warranting a hearing. The defendants in cases that currently result in capital trials may mirror the general population in terms of severe mental disability, or they may over- or under-represent the general population. It is also difficult to predict whether any defendants with compelling evidence of severe mental disability would forgo a pre-trial hearing to avoid the waiver of an insanity defense pursuant to proposed G.S. 15A-2007(d).

To provide a range of the potential cost of the proposed legislation, IDS reports there are approximately ten to twelve actual capital trials per year in North Carolina. Three percent of ten to twelve cases is less than one hearing per year. Therefore, the estimated cost for one hearing would be an average of \$10,080 (including expert and attorney time).

If a case that would otherwise have gone to a capital trial is declared non-capital as a result of the hearing, there would be off-setting savings. According to IDS' FY 2007 Capital Trial Case Study, available at [www.ncids.org](http://www.ncids.org), the average cost of an actual capital trial is \$104,462. In comparison, the average cost of a non-capital trial is \$24,442, and the average cost of a plea in a case that proceeded non-capitally is \$13,177. Thus, for each case that is declared non-capital as a result of the hearing, the average savings for IDS would be \$80,020 or \$91,285. To the extent that any of these defendants would have received a sentence of death, IDS would also save the costs of a capital appeal and post-conviction proceedings.

**AOC Impact:** AOC assumes that 197 murder cases filed each year will proceed capitally under the proposed legislation. However, many of these cases are not disposed in the same year in which they were filed. Thus, in terms of district attorney preparation time, in the first year or two there will be a combination of already pending cases and new filings impacted. For pending cases, AOC divided the existing cases over the first three fiscal years (50 percent, 25 percent, and 25 percent of 197 cases) and assumed that no more than half of the cases filed in the first fiscal year will have impact in the same fiscal year.

For the new cases, AOC based their analysis on the Department of Justice’s estimate that 75 percent of death penalty conviction cases have a mental health issue raised as a mitigating circumstance at sentencing (75 percent of 197). For the purposes of AOC’s analysis, that same percentage is applied to estimate new pre-trial and trial level motions.

**Potential Number of Motions:**

<b>Pre-Sentencing Motions: Timeframe Scenario</b>	<b>FY2012</b>	<b>FY2013</b>	<b>FY2014</b>	<b>FY2015</b>	<b>FY2016</b>
Pending (estimate based on IDS report)	98	49	49		
New	74	147	147	147	147
<b>Total</b>	<b>171</b>	<b>196</b>	<b>196</b>	<b>147</b>	<b>147</b>

According to AOC, for cases that proceeded capitally but were not tried capitally under current law, the costs of these new motions would be additional work. However, there could be an offset to this additional workload, if in some cases a successful motion on the basis of severe mental disability makes a case non-capital sooner, removing 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 plea). Since the timing of this motion related to other motions will not be at the discretion of the courts, AOC was not able to project the potential offset.

AOC estimates that each hearing will add, over the course of a year, the following preparation workload: 96 hours of time for senior assistant district attorneys (ADA), 40 hours of time for Victim Witness Legal Assistants (VWLA), and 72 hours of time for district attorney (DA) investigators.

Based on the preparation workloads, each hearing will require five days in court (DOJ estimates six days for post-conviction), impacting time for superior court judges, court reporters, deputy clerks, senior assistant district attorneys, victim witness legal assistants, and district attorney investigators.

<b>Description</b>	<b>Time</b>
Superior Court Judge	5 days
Court Reporter	5 days
Deputy Clerk	5 days
Sr. Assistant District Attorney	5 days in court (2 ADAs), 96 hours prep
Victim Witness Legal Assistant	5 days in court, 40 hours prep
DA Investigator	5 days in court, 72 hours prep

(Note: preparation time would be spread over the course of a year.)

In the first full year of implementation (FY 2012-13), AOC states that five superior court judges, four court reporters, four deputy clerks, 20 senior assistant district attorneys, 11 victims witness legal assistants, and 13 district attorney investigators for a total of 57 positions and a cost of \$8.3 million would be needed to implement the pre-sentencing motions under the proposed legislation.

The table below shows the salaries, benefits, nonrecurring expenses for office furniture and equipment, operating costs such as supplies and training, expert witness fees, and inflationary increases associated with the additional positions required to handle the increased workload anticipated from the proposed legislation.

Position Type		FY2011-12	FY2012-13	FY2013-14	FY2014-15	FY2015-16
		(Eff. Oct. 1)				
Number of Motions		171	196	196	147	147
Inflation*			8.87%	8.68%	6.64%	5.24%
Superior Court Judge	Sal. & Ben.	\$487,878	\$885,255	\$962,095	\$520,273	\$547,535
	FTE	4	5	5	3	3
Court Reporter	Sal. & Ben.	\$138,098	\$267,285	\$290,485	\$196,357	\$206,646
	FTE	3	4	4	3	3
Deputy Clerk	Sal. & Ben.	\$116,643	\$169,319	\$184,016	\$124,388	\$130,906
	FTE	4	4	4	3	3
Sr. Assistant District Attorney	Sal. & Ben.	\$1,684,571	\$2,717,025	\$2,952,863	\$1,996,029	\$2,100,621
	FTE	18	20	20	15	15
Victim Witness Legal Assistant	Sal. & Ben.	\$331,283	\$587,755	\$638,773	\$418,703	\$440,643
	FTE	9	11	11	8	8
DA Investigator	Sal. & Ben.	\$541,494	\$851,535	\$925,449	\$641,610	\$675,231
	FTE	12	13	13	10	10
<b>Subtotal Court Personnel</b>		<b>\$3,299,967</b>	<b>\$5,478,174</b>	<b>\$5,953,680</b>	<b>\$3,897,360</b>	<b>\$4,101,582</b>
<b>Other Costs</b>						
Inflation*			3.05%	2.99%	2.47%	2.49%
Expert Witness Fees (R)		\$2,225,730	\$2,627,991	\$2,706,568	\$1,963,797	\$2,012,695
Other Operating (R)		\$453,519	\$710,875	\$732,130	\$514,539	\$527,351
Other Operating (NR)		\$215,664	\$33,436			
<b>Total</b>	<b>R</b>	<b>\$6,194,880</b>	<b>\$8,850,476</b>	<b>\$9,392,378</b>	<b>\$6,375,696</b>	<b>\$6,641,628</b>
	<b>NR</b>	<b>\$215,664</b>	<b>\$33,436</b>	<b>-</b>	<b>-</b>	<b>-</b>
	<b>FTE</b>	<b>50</b>	<b>57</b>	<b>57</b>	<b>42</b>	<b>42</b>

\*Positions were inflated based on the Moody's economy.com (Jan. 2011) inflation rate estimates for salaries and wages. Operating expense inflation estimates based on consumer price index projections provided by Moody's economy.com (Jan. 2011).

AOC concludes that the proposed legislation would equate to \$8,883,912 in the first full year of implementation. To provide a range of the potential cost of the proposed legislation, AOC estimates there will be 196 new and pending pre-sentencing filings in FY 2012-13. To estimate the per case cost, AOC divided the cost of personnel \$8,850,476 (position, recurring operating costs, and expert witness fees) by 196 cases to equal \$45,156 per case.

For cases tried capitally under current law, AOC believes that very few or no trials would become non-capital by virtue of the severe mental disability motion that the proposed legislation would authorize. Since the new pre-trial motion would be made in addition to other issues raised in the case, such as insanity or reduced capital defenses, AOC states the pre-trial motion could result in additional work for defense counsel, prosecutors, and the court, with no offset.

If cases being tried capitally now do become non-capital instead because of the bill, AOC states there would be a very substantial cost offset and most likely a net savings (depending on the numbers of cases), since capital trials are far more expensive than any other method of disposition. AOC cannot project whether such savings will occur in any given year. If one trial were shifted



from capital to non-capital in any year, at a minimum the savings would include a reduction in jury fees and court time for at least one week of superior court for a superior court judge, court reporter, deputy clerk, two senior assistant district attorneys, a victim witness legal assistant, and a district attorney investigator. Since only one senior assistant district attorney would be assigned to a non-capital trial, rather than two, there would be additional workload savings for another assistant district attorney. The example below assumes a three-week capital trial compared to a two-week non-capital trial.

Jury compensation, set in G.S. 7A-312, is \$12 for the first day, \$20 for days two to five, and \$40 for additional days. Jury costs for non-capital criminal trials are based on an estimated jury pool of 30 for the first day and, for subsequent days, the 12-person jury plus two alternates. Thus, for non-capital criminal cases, jury costs come to \$360 for the first day, \$280 for the days two to five, and \$560 for the days over five. For capital trials, jury pools and the number of alternates vary considerably and tend to be substantially larger than jury pools for other criminal trials. Thus, jury expenses can be expected to exceed the typical non-capital trial jury costs. AOC estimated savings if the capital trial had an initial jury pool of 100 and four alternates, and the trial lasted an additional week compared to the non-capital trial.

Using as an example a three-week capital trial compared to a two-week non-capital trial, and an example of a jury pool of 100 with four jury alternates compared to a jury pool of 30 with two jury alternates, the offsetting workload and fee reductions would be as shown below.

If, due to the proposed legislation, a case was disposed by plea rather than by trial, savings would be substantially greater. The actual workload reduction would depend on the point in the pre-trial process at which the hearing is held and the defendant is found to have a severe mental illness. If that hearing occurred early in the process, rather than immediately preceding the trial itself, the savings would be greater.

Example of potential workload offset and fee savings, using an illustrative scenario:

Description	Shift to Non-Capital Trial	Savings	Shift to Plea	Savings
<b>Monetary Value of Workload Offset</b>				
One superior court judge	5 days	\$3,747	15 days	\$11,241
One court reporter	5 days	\$1,218	15 days	\$3,653
One deputy clerk	5 days	\$880	15 days	\$2,640
One senior assistant district attorney	15 days	\$2,476	15 days	\$7,428
One senior assistant district attorney	5 days	\$7,428	15 days	\$7,428
One victim witness legal assistant	5 days	\$1,128	15 days	\$3,384
One DA investigator	5 days	\$1,194	15 days	\$3,581
<b>Subtotal</b>		<b>\$18,070</b>		<b>\$39,355</b>
<b>Fee Savings</b>				
Jury Fees		\$4,200		\$10,920
Expert Witness Fees*		\$13,000		\$13,000+
<b>Subtotal</b>		<b>\$17,200</b>		<b>\$23,920+</b>
<b>Total</b>		<b>\$35,270</b>		<b>\$63,275+</b>

\*Actual expert witness savings is unknown.

### **Sentencing Phase Motions -- Judicial Branch**

According to AOC, new G.S. 15A-2007(e) 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 and the Fiscal Research Division have no data from which to estimate the number of cases in which the matter of severe mental disability would be raised at sentencing. AOC states that 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 Department of Justice (DOJ) and Judicial Branch**

The proposed legislation would allow current death row inmates to file a motion seeking relief from a death sentence on the ground that they had a severe mental disability at the time of the commission of a criminal offense. DOJ and AOC differ from IDS in their estimate of the number of death row inmates who would qualify for the post-conviction motions.

In their estimate, DOJ estimates that 75 percent of the convicted murderers currently on death row may file post-conviction motions under the provisions of the proposed legislation. Based on DOJ's projections that 75 percent of the 158 convicted murderers currently on death row may file a post-conviction motion, AOC expects that there will be additional work in 119 or more capital cases already in post-conviction.

According to IDS, because the bill requires a defendant to show by clear and convincing evidence<sup>1</sup> or by a preponderance of the evidence<sup>2</sup> that they have a severe mental disability that manifested prior to the commission of the crime, which must be supported by affidavits, most death-sentenced defendants will not be able to file a credible post-conviction claim. IDS states there will likely be no more than 16 (or ten percent) of the 158 inmates on death row who qualify for the post-conviction motion.

**DOJ Impact:** Based on the amount of time spent on average in handling capital case post-conviction claims of mental retardation, DOJ estimates over 30 work days to prepare for and hold a hearing in an average case claiming severe mental disability. The additional work would include: (1) a review of the entire 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 entire 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 they would need five additional Attorney IVs and an additional Paralegal I.

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<sup>1</sup> See proposed G.S. 15A-2007(a)(2) and (c).

<sup>2</sup> See proposed G.S. 15A-2007(f).

Position Classification	FTE	Social Security	Retirement	Health	Total Salary & Benefits
Attorney IV	5	\$35,573	\$48,872	\$24,650	\$574,094
Paralegal I	1	\$2,525	\$3,468	\$4,930	\$43,923
<b>Total:</b>	<b>6</b>	<b>\$38,097</b>	<b>\$52,340</b>	<b>\$29,580</b>	<b>\$618,017</b>

Given the restricted pool of persons eligible for the post-conviction proceeding, the Fiscal Research Division rejects DOJ's estimate that six new permanent positions (five attorneys and one paralegal) will be required. DOJ could either assign these cases to existing staff or use contract attorneys.

In addition, DOJ estimated the cost to hire expert witnesses. DOJ's estimate was based 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 \$250 to \$300 per hour (mental retardation evaluations by expert forensic psychologists retained by the State generally range from \$5,000 to \$10,000 per case, depending upon the complexity). If the proposed bill becomes law, the determination of severe mental disability will necessitate the involvement of forensic psychologists and forensic psychiatrists. Forensic psychiatrists retained by the State generally charge \$250 to \$450 per hour, and evaluations range from \$10,000 to over \$20,000 per case, depending upon the complexity. The expected severe mental disability could require a psychologist (at a range of approximately \$5,000 to \$10,000 per case) and a psychiatrist (at a range of approximately \$8,000 to \$15,000 per case).

Therefore, DOJ estimates that the State's cost to hire expert witnesses could be approximately \$13,000 to \$25,000 per case. Assuming 119 death row inmates challenge their death sentences under the proposed legislation, DOJ estimates the State could be facing costs for such expert assistance in the range of \$1,547,000 to \$2,975,000 (\$13,000 to \$25,000 per case multiplied by 119 cases).

**IDS Impact:** For many defendants on death row, the existence of evidence of serious mental disability that manifested prior to the commission of the crime has already been investigated and, in all likelihood, those defendants have already been examined by a qualified mental health professional. However, it is likely that the trial-level investigation and examination of severe mental disability will be less complete in cases that have been pending for years or decades. Thus, the investigation may need to be expanded and additional mental health evaluations may need to be done. According to IDS, the cost from the bill would be the additional attorney and expert time in completing the investigation and examination of the defendant and preparing and litigating any claims contained in a motion for appropriate relief.

For post-conviction cases, IDS believes that more time will be necessary to investigate and prepare a claim than for cases at the trial level. IDS estimates that preparing for and conducting a hearing in any post-conviction case in which a hearing is granted would take an average of 48 additional hours of time for each of the two appointed attorneys (for a total of 96 hours of defense attorney time), plus 24 hours for a mental health expert. For private assigned counsel (PAC) paid at the current capital rate of \$95 an hour, 96 hours of attorney time would cost \$9,120 per hearing. For a

mental health expert, at an average rate of \$250 per hour, 24 hours would cost \$6,000 per hearing. Thus, assuming the higher PAC rate, each hearing would cost an average of \$15,120 (including attorney and expert time). The total cost would be \$241,920 (\$15,120 per case multiplied by 16 cases).

In the event that a death-sentenced defendant is resentenced to life without parole as a result of a successful claim under this bill, and that the defendant had additional claims that would have required additional post-conviction litigation, there would be off-setting savings from avoiding that litigation. IDS concludes that the amount of these savings would depend on how far along in post-conviction proceedings the case was, and the complexity of any other claims that would be rendered moot when the defendant is granted relief. IDS states it is not possible to quantify these potential savings.

**AOC Impact:** AOC expects a fiscal impact as a result of the post-conviction procedures created by the proposed legislation. According to AOC, current death row inmates could file a motion seeking relief from a death sentence on the grounds that the inmate had a severe mental disability. AOC stated the post-conviction motions would not generally result in a cost savings, because costs for appeals and motions for appropriate relief will already have been incurred in many of these cases.

Based on DOJ's projections that 75 percent of the 158 convicted murderers currently on death row may file a post-conviction motion, AOC expects that there will be additional work in 119 or more capital cases in post-conviction. The additional work will include responding to a new motion that will require additional preparation (reading trial transcript, police reports, and medical records), legal research, filing of documents, consultation with experts, interviewing witnesses and preparation for hearing, and hearing.

Typically, the Attorney General's office handles these responses for the State, with assistance from local district attorneys. However, AOC states that with the passage of S.L. 2009-464 (North Carolina Racial Justice Act), the Attorney General's office indicated that it did not have the resources to handle these motions, leaving the responsibility with district attorneys' offices. With the volume of 119 new motions in post-conviction cases, AOC anticipates a similar response from the Attorney General's office.

DOJ provided cost estimates assuming their office were to take the lead on ten to 20 percent of the post-conviction motions, at the request of district attorneys, which would equate to 101 cases handled by AOC and 18 cases handled by DOJ.

For the 101 cases without the Attorney General's Office as lead, AOC states they will need additional personnel to implement the post-conviction proceedings including three superior court judges, three court reporters, three deputy clerks, 18 senior assistant district attorneys, six victim witness legal assistants (VWLA), and eight district attorney (DA) investigators for a total of 41 positions and a cost of \$5,684,741 in the first full year of implementation. The total cost includes non-recurring expenses for office furniture and equipment, as well as operating expenses for supplies and training. In addition, AOC indicates the post-conviction cases will require an

estimated \$1.3 million in expert witness fees (101 cases multiplied by \$13,000 for two experts per case).

Description	Position Cost		Time	FTE	Expenditures		
	R	NR			R	NR	Total
Superior Court Judge	\$183,654	\$6,553	6 days	3	\$487,878		\$487,878
Court Reporter	\$68,625	\$4,857	6 days	3	\$184,131		\$184,131
Deputy Clerk	\$45,652	\$2,620	6 days	3	\$116,643		\$116,643
Senior ADA	\$144,852	\$3,739	6 days in court (2 ADAs), 192 hours prep	18	\$2,246,094		\$2,246,094
VWLA	\$57,481	\$5,155	5 days in court, 40 hours prep	6	\$294,474		\$294,474
DA Investigator	\$70,691	\$4,219	5 days in court, 72 hours prep	8	\$481,328		\$481,328
Expert Witness Fees			\$13,000 per case (2 experts)		\$1,309,425		\$1,309,425
Other Operating					\$424,389	\$140,379	
<b>Total</b>				<b>41</b>	<b>\$5,544,362</b>	<b>\$140,379</b>	<b>\$5,684,741</b>

To estimate the per case cost for AOC to take the lead on 101 cases, AOC divided the cost of personnel \$5,544,362 (position, recurring operating costs, and expert witness fees) by 101 post-conviction cases to equal \$54,895 per case.

For the 18 cases with the Attorney General’s Office as lead, AOC states the cost is projected as the monetary value of the time required for existing personnel to conduct the work for a total of three positions and a cost of \$374,276 in the first full year of implementation. The total cost also includes operating expenses.

Description	Position Cost	Time	FTE	Expenditures
Superior Court Judge	\$201,263	6 days	0.5	\$100,632
Court Reporter	\$75,913	6 days	0.5	\$37,957
Deputy Clerk	\$50,206	6 days	0.5	\$25,103
Senior ADA	\$144,852	6 days in court, 64 hours prep	1.0	\$144,852
VWLA	\$57,481	6 days	0.5	\$28,741
Operating Costs				\$36,993
<b>Total</b>			<b>3.0</b>	<b>\$374,276</b>

To estimate the per case cost for DOJ to take the lead on 18 cases, AOC divided the cost of existing personnel \$374,276 (position and recurring operating costs) by 18 cases to equal \$20,793 per case. In these cases, DOJ would cover the expert witness fees.

However, given the restricted pool of persons eligible for the post-conviction proceeding, the Fiscal Research Division believes these costs will be significantly less.

Because of the discrepancies between the number of cases estimated by DOJ, AOC, and IDS, the Fiscal Research Division asked for the per case cost for each agency. The following tables show the estimated pre-trial and post-conviction costs for all agencies based on the number of cases.

### Pre-Trial Motions

	Cost per Hearing	Number of Hearings	
Agency		1	196
IDS	\$10,080	\$10,080	\$1,975,680
AOC*	\$45,156	\$45,156	\$8,850,476

### Post-Conviction Proceedings

	Cost per Case	Number of Cases	
Agency		16	119
DOJ	\$13,000	\$39,000	\$312,000
AOC	\$54,895	\$776,014	\$4,725,947
IDS	\$15,120	\$241,920	\$28,788,480
<b>Total</b>	<b>\$83,015</b>	<b>\$1,056,934</b>	<b>\$33,826,427</b>

The post-conviction cost for DOJ assumes that they take the lead on 20 percent of the cases. For the 20 percent of cases that DOJ takes, AOC incurs a reduced per case cost - \$20,793 per case if DOJ is taking the lead; \$54,895 for all other cases. In the table above, the 16 case scenario assumes DOJ takes three cases while AOC takes 13. The 119 case scenario assumes DOJ takes the lead in 24 cases while AOC takes 77.

**SOURCES OF DATA:** Department of Correction; Administrative Office of the Courts; Office of Indigent Defense Services; North Carolina Sentencing and Policy Advisory Commission; Department of Justice; and *SOURCE: BILL DIGEST H.B. 659 (04/06/201)*.

**TECHNICAL CONSIDERATIONS:** None

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**DATE:** June 1, 2011



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