NORTH CAROLINA GENERAL ASSEMBLY

LEGISLATIVE FISCAL NOTE

BILL NUMBER: HB 1062

SHORT TITLE: No Death Penalty/Mentally Retarded

SPONSOR(S): Representative Fitch

FISCAL IMPACT: **Expenditures:** **Increase ( )** **Decrease ( )**
Revenues: **Increase ( )** **Decrease ( )**
No Impact (X**)**
No Estimate Available ( )

FUND AFFECTED: **General Fund ( )** **Highway Fund ( )** **Local Fund ( )**
Other Fund ( )

BILL SUMMARY: Adds G.S. 15A-2004 to forbid the death penalty for a mentally retarded person. Defines "mentally retarded" as being of significantly subaverage intellectual functioning (IQ 70 or below), existing concurrently with impairment in adaptive functioning, and said condition having manifested before age 18. Places on the defendant the burden of proof and persuasion to demonstrate mental retardation by a preponderance of the evidence. Provides for pretrial hearing on this issue, but the court's determination at this hearing does not preclude the defendant from raising any legal defense at trial.

EFFECTIVE DATE: October 1, 1993; applies to trials begun on or after that date.

PRINCIPAL DEPARTMENT(S)/PROGRAM(S) AFFECTED: Judicial Department; Department of Correction

JUDICIAL DEPARTMENT

FISCAL IMPACT

	FY 93-94	**FY** 94-95	**FY** 95-96	**FY** 96-97	**FY** 97-98
EXPENDITURES *	*0	*0	*0	*0	*0
RECURRING					
NON-RECURRING					
REVENUES/RECEIPTS	0	0	0	0	0
RECURRING					
NON-RECURRING					

***** Subject to qualifications explained within TECHNICAL CONSIDERATIONS and assumptions detailed below.

POSITIONS: No new positions.

ASSUMPTIONS AND METHODOLOGY: During the 1991 Session, the Judicial Department and Fiscal Research prepared a fiscal note for similar legislation (HB1005). That note predicted a substantial fiscal impact. However, as the currently proposed bill is interpreted, it differs in significant ways from HB 1005. Most important, it appears that the present bill would not affect persons already on death row (except as to cases that are remanded on some other basis for retrial or resentencing).

Non-Application to Persons on Death Row

The legislation proposed in 1991 would have applied to persons on death row. It specified that a death sentence could not be "imposed or carried out" upon a mentally retarded person (emphasis added). In contrast, the present legislation applies only prospectively. Section 2 specifies that the act would be effective October 1, 1993, and apply to trials on or after that date.

Most of the fiscal impact predicted for the 1991 legislation was for new, additional hearings for persons already on death row. The more limited, prospective application of this bill eliminates that fiscal impact. This conclusion, however, is subject to two key qualifications.

Qualifications to Absence of Fiscal Impact

I. Mentally Retarded Inmates Presently On Death Row May Still Be Executed

First, it seems likely that defendants already on death row will assert a claim for relief related to this statute (arguing, in essence, that it would be contrary to law to execute a mentally retarded person who was sentenced before October 1993, while exempting from execution a mentally retarded person who is tried thereafter). There would be some costs associated with the proceedings brought to raise that argument; however, we anticipate that such costs would be relatively small because, initially, the issue would be one of law, not requiring substantial, evidentiary hearings. However, if it is held as a result of this legislation that a mentally retarded person on death row cannot be executed, there would be fiscal impacts; the hearings for determination of mental retardation for persons on death row would be new, additional proceedings, and would be very costly. However, these hearings would only apply to a small number of inmates (four) presently sentenced to death.

II. Re-sentencing Hearings Are Inevitable As the Result Of McKoy v N.C.

The second qualification relates to resentencing hearings. For many defendants presently on death row, or convicted of capital murder, resentencing hearings will be or have already been ordered because

of the U.S. Supreme Court's decision in McKoy v. North Carolina (which held certain sentencing procedures unconstitutional). As indicated in the "TECHNICAL CONSIDERATIONS" below, it is assumed that the proposed legislation would impact on those cases. However, these are not "new" cases, since for these cases there will be resentencing hearings whether or not this bill is enacted. Based on present information, it is assumed that the bill would not significantly change the costs for such cases. That is, a defendant's mental retardation would be raised on resentencing, with or without this bill. Although some issues may receive new or different emphasis, overall there would not be a substantial increase in the work required of counsel, experts, and the court. For the most part, the following considerations, relating to new cases, apply equally to resentencing proceedings.

Application to New Cases (Trials on or after October 1, 1993)

Costs of Additional Pretrial Hearings Offset by Fewer Capital Trials

Under the bill, there would be additional pretrial hearings brought to determine whether a defendant is mentally retarded. In some cases (probably, very few), the defendant will be found mentally retarded and, in some of those cases, the defendant would otherwise have been tried capitally. Since the costs of a capital trial greatly exceed the costs of a non-capital trial, the additional costs for additional initial hearings are offset by a "savings" from having fewer capital trials.
Based on present information, it is estimated that the offset would balance, leading to no net fiscal impact. In reaching this conclusion, it is useful again to compare the present bill to the legislation that was introduced in 1991.

With respect to "new" capital cases (i.e., defendants not already on death row), the fiscal note prepared in 1991 reached the following conclusion:

"If one looks at only new capital cases, and the procedures this bill would require for arguably mentally retarded defendants, it is possible that the actual costs due to the initial hearings, extra expert witnesses, and additional trial costs could be offset due to a cost savings from capital trials avoided."

Additional Considerations Supporting Cost Offset

Based on some differences between the 1991 bill and the present legislation, and some additional considerations, such offset seems more likely under the present bill:

- Under the 1991 legislation, the defendant was only required to produce evidence of mental retardation. The State then had the burden to prove the absence of mental retardation, beyond a reasonable doubt. The present bill gives the defendant the burden of production and persuasion, by a preponderance of the evidence. This procedural

simplification suggests that the pretrial hearings may be less costly.

-Superior court judges have reported that funds are allowed for defense experts, particularly psychiatric experts, more often now than in even the recent past. This practice suggests that the expert witnesses needed to prove mental retardation would not be new, additional witnesses, and that at least in part, the expenses for those witnesses, and the counsel and court time devoted to the issues, would be incurred anyway (for example, for proving mitigating circumstances in the sentencing hearing, or proving diminished capacity for guilt/innocence).

-Based on updated experience reported by other states with similar legislation, pretrial motions are brought in relatively few cases, and very few defendants are found to be mentally retarded. Assuming the practice in North Carolina is similar, the additional costs for pretrial hearings would be lower than previously estimated, and it would be more likely for the additional costs to be offset by avoided capital trials. However, it is not possible to predict exactly what the practice will be in North Carolina since. If the defense brings unsuccessful motions under this bill routinely, in a large number of cases, there would be substantial fiscal impact on the Judicial Branch.

Additional Qualification

Although this note assumes that additional costs under this bill will be substantially offset, improved data are expected to be available soon. Under a grant from the State Justice Institute, the Duke University Institute of Public Policy will shortly complete a study on the costs of capital cases in North Carolina. This study will provide the best data available nationwide on the costs of capital litigation. Thus, re-examination of assumptions made in this fiscal note could be warranted at that time.

DEPARTMENT OF CORRECTION

FISCAL IMPACT

	FY 93-94	**FY** 94-95	**FY** 95-96	**FY** 96-97	**FY** 97-98
EXPENDITURES	0	0	0	0	0
RECURRING					
NON-RECURRING					
REVENUES/RECEIPTS	0	0	0	0	0
RECURRING					
NON-RECURRING					

POSITIONS: No new positions.

ASSUMPTIONS AND METHODOLOGY: The first assumption in determining the fiscal impact of this bill on the Department of Correction is the assumption that a mentally retarded defendant who prior to this

bill would have received the death penalty, will now receive a life sentence. Based on this assumption, it is further assumed that said inmate may be paroled after serving twenty years of the life sentence. (Note that twenty years is the minimum time requirement that must be served by a Class A Felon previously eligible to receive the death penalty but sentenced to life imprisonment under this bill.)

Over the past ten years, the average number of inmates admitted to death row has been approximately 15 inmates per year. (Note that while this average is based on a total of 148 new death row admissions for the same ten year period, an uncalculated number of inmates have been removed due to the appeals process.) Of the 80 inmates presently sentenced to the death penalty and occupying death row, 4 inmates or 5% have been tested to have an IQ below 70 and would presumably be classified as mentally retarded under this bill. Assuming the same rate of mental retardation among future Class A Felons that previously would have been sentenced to death, it is estimated that approximately one new inmate per year would receive a life sentence instead of the death penalty. The cost associated with one additional life sentence and one fewer death sentence per year is as follows.

As reflected in the table above, there would not be a significant cost difference over the first five years to house an additional inmate sentenced to life. This is due the fact that both a death row inmate and an inmate serving a life sentence would be housed in maximum confinement for the initial five year period. Data reveals that a Class A Felon serving a life sentence can be expected to serve 29%, of the minimum 20 year term before parole eligibility or 5.8 years in maximum security confinement. Likewise, data collected on the 4 executions performed in the past decade suggests that the average time an inmate sentenced to death spends on death row (also maximum security confinement) is approximately 6.9 years. [Note this average is derived from periods of 4.3 years, 5.9 years, 6.0 years, and 11.2 years, indicating that a substantially longer period (i.e., 11.2 years) may exist for some death row felons.] Thus, for the period of this note, costs would be similar. The Department of Correction estimates the average cost for maximum security inmates on a system-wide basis to be $85.38 per inmate per day. The average cost of maximum security inmates housed at Central Prison (where death row inmates are most likely to be housed) is estimated to be $87.72 per inmate per day.

Over a longer time frame, the following cost comparisons can be made. Assuming that a death row inmate is housed in Central Prison maximum security confinement for the average period of 2,504 days or about 6.9 years, the overall cost of confinement is approximately $219,650 added to estimated execution costs of $3,882 for a total of $223,532. Assuming that an inmate serves 20 years of a life sentence before being paroled, the following costs would be incurred according to the average time life-sentenced inmates presently in the system spend in various custody levels;

- maximum custody x 2117 days x $85.38/day = $180,749

- close custody x 2044 days x $68.28/day = $139,564
- medium custody x 1971 days x $59.41/day = $117,097
- minimum custody x 1168 days x $44.53/day = $52,011

Total $489,421

Hence, over an extended period of time, the estimated costs of confining a mentally retarded Class A Felon for a period of 20 years before parole eligibility are approximately $265,889 greater than those costs estimated to confine and execute an inmate sentenced to death after the estimated average of 6.9 years.

SOURCES OF DATA: Administrative Office of the Courts, Division of Research and Planning; Department of Correction, Division of Research and Planning, Central Prison - Warden's Office, Division of Prisons - Mental Health Services; Office of the State Controller

TECHNICAL CONSIDERATIONS: The following additional information has been submitted by the Administrative Office of the Courts and has relevance to this fiscal note:

"Two aspects of the proposed statute seem ambiguous. First, it is not clear what paragraph (b) adds to the substantive effect of the bill, that is not already provided for in paragraph (c). Second, it is not clear whether the statute is intended to apply in cases that are remanded for resentencing.

"As to the first ambiguity, paragraph (b) states: 'Notwithstanding any provision of law to the contrary, no defendant who is mentally retarded shall be sentenced to death.' In comparison, paragraph (c) grants a right to bring a pretrial motion and then specifies the consequence of a finding that the defendant is mentally retarded: the defendant cannot be sentenced to death ('the court shall declare the case noncapital...') It could be argued that paragraph (b) gives some right to raise the issue of mental retardation through some procedure, or at some time, in addition to the pretrial motion procedure specified in paragraph (c).

"For purposes of this fiscal note, we interpret the bill as making the motion procedure under paragraph (c) the only new way to raise the issue of mental retardation. Consideration should be given to clarifying the intent of subparagraph (b), or to deleting it, if it is not intended to create rights or procedures different from paragraph (c). If paragraph (b) were construed to create some rights in addition to those created in paragraph (c), there could be significant additional fiscal impact.

"The second ambiguity is whether the motion procedure is intended to be available in resentencing proceedings. Arguably, the word 'trial' in paragraph (c) is used in a narrow way, to

refer to the guilt/innocence phase of a capital trial. If the term 'trial' has that limited meaning, in the absence of some other provision in the statute, the procedures in paragraph (c) would not apply in a case that is remanded only for resentencing. However, a narrow interpretation of the word "trial" may not be justified, because capital resentencing proceedings are often referred to as 'trials'.

"For purposes of this fiscal note, we assume that the term 'trial' does not have a narrow meaning, and that the motion procedures in paragraph (c) would be available in a resentencing proceeding. Consideration should be given to clarifying this provision.

"[Amendments consistent with out interpretation of the bill would delete paragraph (b) and add a clarification to paragraph (c) along the lines of: 'For purposes of this section, the term trial shall include resentencing proceedings ordered by a court of competent jurisdiction.']"

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