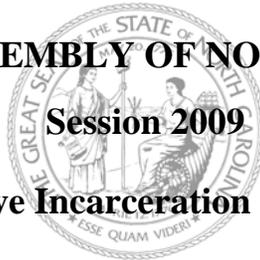


GENERAL ASSEMBLY OF NORTH CAROLINA



Session 2009

Legislative Incarceration Fiscal Note

(G.S. 120-36.7)

BILL NUMBER: Senate Bill 461 (Fourth Edition)

SHORT TITLE: North Carolina Racial Justice Act.

SPONSOR(S): Senator McKissick

FISCAL IMPACT					
	Yes (X)	No ( )	No Estimate Available (X)		
	<u>FY 2009-10</u>	<u>FY 2010-11</u>	<u>FY 2011-12</u>	<u>FY 2012-13</u>	<u>FY 2013-14</u>
<b>EXPENDITURES</b>					
<b>GENERAL FUND</b>					
Judicial - AOC	Exact amount cannot be determined; Cost estimated to be between \$2.4 million and \$6.2 million.				
Judicial – IDS	Exact amount cannot be determined; anticipated net savings				
Justice	Could be as high as \$549,380 per year				
<b>POSITIONS:</b> (cumulative)	Could require 6 additional positions (DOJ)				
<b>PRINCIPAL DEPARTMENT(S) &amp; PROGRAM(S) AFFECTED:</b> Judicial Branch; Department of Justice					
<b>EFFECTIVE DATE:</b> Section 1 of this act is effective when it becomes law and applies retroactively. The remainder 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:

**Current Law:** In 1987, the United States Supreme Court decided the case of *McCleskey v. Kemp*. In that case, a black male defendant was convicted of two counts of armed robbery and murder in the state of Georgia. The victim was a white male. McCleskey sought relief from his death sentence on the basis that the Georgia sentencing process was administered in a racially discriminatory manner in violation of the Equal Protection Clause of the United States Constitution. McCleskey supported his claim with a statistical study indicating that the death penalty in Georgia was imposed more often on black defendants and killers of white victims than on white defendants and killers of black victims. McCleskey argued that the study

indicated that black defendants who killed white victims had the greatest likelihood of receiving the death penalty. In an opinion authored by Justice Lewis Powell, the majority rejected McCleskey's claims, stating that the study failed to establish that any of the decision makers in McCleskey's specific case acted with discriminatory purpose in violation of the Equal Protection Clause.<sup>1</sup>

Under McCleskey, to prevail on a claim that the administration of the capital punishment system violates the Equal Protection Clause, the petitioner must prove that the decision makers in the petitioner's specific case acted with discriminatory purpose and statistical information about the general administration of the capital punishment system is insufficient to support an inference that any of the decision makers in the case acted with discriminatory purpose.

In response to the McCleskey decision, Congress and several state legislatures, including the North Carolina General Assembly, considered versions of the Racial Justice Act. In 1998, Kentucky became the first state to enact the Racial Justice Act. The North Carolina General Assembly last considered a similar Racial Justice Act during the 2007 Regular Session (House Bill 1291: Racial Justice Act), but did not enact it.

**Bill Analysis:** Senate Bill 461, the North Carolina Racial Justice Act, provides a process by which statistical evidence could be used to establish that race was the basis for seeking or obtaining the death penalty.

Senate Bill 461 provides that a finding that race was the basis of the decision to seek or impose the death penalty may be established if the court finds that race was a significant factor in decisions to seek or impose the death penalty in the county, the prosecutorial district, or the judicial district, at the time the death penalty was sought or imposed. Evidence relevant to establish a finding that race was a significant factor may include statistical or other evidence, including sworn testimony of members of the criminal justice system that:

- the death penalty was sought or imposed significantly more frequently for persons of one race than for persons of another race
- the death penalty was sought or imposed significantly more frequently as punishment for capital offenses against persons of one race than as punishment of capital offenses against persons of another race; or
- that race was a significant factor in decisions to exercise peremptory challenges during jury selection

The defendant would have the burden of proving that race was a significant factor in decisions to seek or impose the death penalty in the county, or the judicial district, at the time the death penalty was sought or imposed. The claim could be raised by the defendant at the pretrial conference or in postconviction proceedings, and the court would be required to schedule a hearing on the claim and set a time for the submission of evidence by both parties. If the court finds that race was a significant factor, the court would order that the death penalty not be sought or that a death sentence not be carried out and the defendant resentenced to life imprisonment without parole.

A defendant on death row would be allowed a period of one year from the effective date of the bill to file a motion seeking relief from his or her death sentence upon the ground that racial considerations played a

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<sup>1</sup> Excerpted from Race and the Death Penalty after McCleskey: A Case Study of Kentucky's Racial Justice Act, Washington and Lee Journal of Civil Rights and Social Justice, Fall (2005)

significant part in the decision to seek or impose a death sentence. Except as otherwise specified in the bill, the existing provisions of the State's Criminal Procedure Act regarding procedures and hearing on motions for appropriate relief would apply, including the appointment of counsel for indigent defendants and review upon appeal.

The bill provides that assistance rendered by a licensed health care professional in the execution of a person sentenced to death may not be the basis for any disciplinary measures by a health care licensing agency, and that the infliction of the death penalty by lethal injection is not to be construed as the practice of medicine.

*Analysis adopted from Bill Analysis prepared by Committee Counsel for Judiciary I.*

## **ASSUMPTIONS AND METHODOLOGY:**

### **General**

Fiscal Research requested fiscal impact analysis from the Judicial Branch (the Administrative Office of the Courts and the Office of Indigent Defense) and the Department of Justice on the "Racial Justice Act" (RJA). Because this bill creates a new motion that may be raised by the defense, these agencies do not have historical data from which they can base an estimate of costs or savings. The agencies prepared several possible scenarios and provided the estimated costs and savings for these examples. These scenarios are discussed below.

After reviewing the information provided by the Judicial Branch and the Department of Justice, Fiscal Research expects that the costs incurred by the passage of this bill may be significant but could vary widely, depending on the specific assumptions used to calculate the costs. In their respective fiscal estimates, the Judicial Branch agencies assumed a portion of all applicable cases will pursue motions under this bill while the Department of Justice provided estimates using 100% of all applicable cases. In addition, some calculations used 162 offenders on death row, while others reflected 163 offenders. Thus, Fiscal Research is not able to arrive at a single anticipated cost figure.

### **Judicial Branch - Courts**

The Administrative Office of the Courts (AOC) provided Fiscal Research with a fiscal impact analysis for this proposed bill. *AOC reports that they are unable to estimate the fiscal impact of this bill but believe that the impact would be substantial.*

AOC assumes that, according to current case law, largely considering such claims on a constitutional standard, that this bill would greatly expand the ability of defendants to raise and prove the issue of racial disparity in capital cases. Based on an AOC survey of district attorneys, there were 13 first-degree murder cases disposed with death qualified juries (meaning capital trials) during FY 2006-07. AOC does not have this data broken-down by race of the defendant. Based on Department of Correction data, as of April 13, 2009, there were 163 offenders on death row, of which 101 (62%) were non-white.

*AOC is unable to predict with any certainty the number of cases in which this issue would be raised.* However, it seems all but certain that the issue would be raised in many and probably most first-degree murder cases involving the death penalty. AOC has applied some assumptions to estimate the magnitude of the impact; these estimates are discussed below.

If this issue were raised with respect to 80% of the non-white population there would be 81 cases (80% of 101 non-white death row offenders) for which AOC would incur costs. It is possible that the percentage of the non-white population could be greater, and the issue could be raised by white inmates as well, thus increasing the number of potential cases for which AOC would incur a cost.

If, in a given year, for 13 death penalty trials, the non-white proportion is similar to distribution by race on death row (62%) and the issue is raised by 80% of those defendants, there would be seven cases. AOC believes that the number of new cases each year, however, would likely be much greater. The 13 trials on which this estimate is based is the number of capital trials, per year (not necessarily cases). AOC reports that the issue would likely be raised in cases that do not ultimately go to trial with a death qualified jury (raised pretrial). If the number of such cases were to be the same as the number that eventually do become capital trials (7 cases), the total would be 14 cases.

AOC estimates that costs would range between \$2.4 million to \$6.2 million, not including costs for appeals, appellate transcripts, and other costs for which no estimates are attempted. These estimates are for 95 cases (81 cases currently on death row + 14 new cases projected to proceed capitally), without attempting to distinguish between those that would be heard pretrial versus post-conviction, although some could be both. These costs are itemized below.

*Judges, clerks, and court reporters (in-court time only):* Although AOC has no readily available data, they estimate that with expert testimony on both sides, rebuttals, etc., it could take an overall average of some two or three court days to litigate the issues (sometimes more time and sometimes less, as for cases where the statistical issues – which would not include jury selection in the given case – are similar or the same as those raised before). That would amount to a need for one Superior Court judge, one court reporter, and one deputy clerk (in-court time at six hours per day for two days, for 95 cases would total 1,140 hours of in-court time, equal to one position – this does not include the time judges would spend on these cases in chambers, which could be considerable). The cost would be \$300,392 for the first full year.

*Prosecutorial time:* Prosecutorial preparation time would be substantial. If prosecutorial preparation time would amount to three times the amount of in-court time, the total hours would be the 1,140 in-court hours, plus 3,420 preparation hours, for a total of 4,560 hours. Since these are capital cases, assuming two prosecutors would be appointed (or involved for the State), and assuming the second prosecutor would only spend half that amount of time (or 2,280 hours), the total hours for both attorneys would come to 6,840 hours. The Attorney General and not the District Attorneys would handle much of the work (at least for the post-conviction cases). However, even for cases handled by the Attorney General, substantial District Attorney time would be required, since the cases would be litigating prosecutorial practices. At 6,840 hours there would be need for some six positions, or \$534,975 in the first year.

*Expert witnesses:* AOC initially reported that the cost for expert witnesses would be approximately \$10,000 per case, however, there is a current case in Durham County in which the defendant is challenging the death penalty on a basis similar to that proposed in this legislation. Experts for the State charge \$150 to \$250 per hour and are paid to review the data of the other experts and the basis of the opinions. Costs for the State's expert in the Durham County case have already approached \$25,000 in advance of a possible hearing, and total costs are estimated to be around \$50,000. At \$50,000 per case, 95 cases would cost \$4.75 million in State expert witness time.

The costs for appeals (for defense counsel, the appellate court, production of transcripts, etc.) would also be substantial.

AOC reports that with any cases involving current death row inmates where the court overturned the death sentence and ordered a new trial, the costs for the new trial would be substantial, and if it proceeded on retrial as a capital trial, the costs would be very substantial. On the other hand, to the extent a pretrial hearing resulted in a ruling that causes a case to proceed non-capitally, where it might otherwise have proceed capitally, the subsequent costs for that case would be considerably less.

While these estimates are rough and there is no certainty regarding the time-frame in which the issues might be raised, AOC believes that it is likely that this bill would result in substantial costs to the courts, prosecution, and indigent defense.

**Judicial Branch – Office of Indigent Defense Services**

The Office of Indigent Defense Services (IDS) reported to Fiscal Research that they are *not able to provide a reliable figure of anticipated costs or savings that would result from the passage of this bill*; however, they believe that *there will likely be a net savings associated with implementing the bill*.

IDS recommends launching a coordinated statewide statistical study by an independent research entity to produce a baseline of data that may be disaggregated for purposes of analyzing racial discrimination claims by county, district, and division. IDS would seek outside sources of funding, possibly from a not-for-profit foundation, for the study and thus expects that the underlying statistical analysis that will be needed to support claims under the RJA will be available to defense counsel at no cost.

IDS can not offer a qualified estimate of the number of cases that will be litigated under the RJA before the statewide statistical study is complete. If the statewide study does not demonstrate racial discrimination, IDS does not expect there to be any further litigation under the RJA. If, on the other hand, the study demonstrates substantial racial discrimination, the following analysis attempts to provide some educated guesses about the fiscal impact of this legislation. Because it will not be possible to file claims until after the statewide study is complete, IDS assumes that the associated expenditures and savings will not begin until FY 2010-11.

The table below shows the breakdown of the portion of death row defendants by race.

<b>Race of Defendants on Death Row</b>	<b>Number of Defendants on Death Row</b>	<b>Percent of Death Row Population</b>
White	62	38%
Black	88	54%
Indian	9	5.5%
Other	4	2.5%
<b>Total</b>	<b>163</b>	<b>100%</b>

Source: NC Department of Correction

As shown in the chart above, 54% of North Carolina’s death row population is black. The agency has provided a scenario of costs associated with this bill. Assuming that 82 post conviction and 8 pre-trial claims are made under this bill, IDS anticipates costs of \$128,267 annually for post-conviction work and around \$50,000 for pretrial work. These cost estimates include attorney time, consulting with the sociologists who performed the statewide statistical study, and investigator time.

Using this scenario, IDS expects the RJA to generate a net savings of \$263,053 for FY 2010-11 through 2012-13 and \$141,320 for FY 2013-14 and beyond. The post-conviction savings estimation accounts for savings on additional post-conviction litigation in state court that would no longer be necessary, including costly ineffective assistance of counsel litigation. In addition, the State will save the entire cost of federal habeas litigation by the Attorney General’s office in the cases receiving relief. The pre-trial savings estimation accounts for shortened capital litigation in each case that processed without a capital trial, either through a plea or a non-capital trial. IDS anticipates a savings in averted costs of direct appeal and post-conviction litigation.

## Department of Justice

The Department of Justice (DOJ) reported to Fiscal Research that *the Department anticipates a significant fiscal impact should the proposed bill be passed into law.*

In preparing their analysis, DOJ assumes that the Department will receive requests from the District Attorneys to handle all claims resulting from the RJA for all 162 convicted murderers currently on death row while those claims are pending in the trial court, in addition to the appellate responsibilities that the Attorney General has by statute.

If DOJ's Criminal Division were to have responsibility to handle these claims in the trial court as well as in the appellate courts, the Capital Litigation Section would need five additional Attorney IV's and a Paralegal I at a cost of \$549,380 per year. The Division did not provide further detail as to the process by which these estimates were constructed.

As the bill is presently written, the RJA allows all current death row inmates regardless of race to file a motion alleging that race was a significant factor in decisions to seek or impose the sentence of death in the county, the prosecutorial district, or the judicial division at the time the death sentence was sought or imposed. Therefore, the RJA goes much further than current case law, *McCleskey v. Kemp*, 481 U.S. 279 (1987), which requires that "to prevail under the *Equal Protection Clause*, [a defendant] must prove that the decision-makers in *his* case acted with discriminatory purpose." *Id.* at 292 (emphasis in original). The RJA provides for relief (vacating the defendant's death sentence to a sentence of life imprisonment without the possibility of parole) if the defendant proves that race was a significant factor in, not necessarily the defendant's own case, but in the decision to seek or impose the sentence of death in other defendants' cases in the county, the prosecutorial district, or the judicial division at the time the death sentence was sought or imposed in the defendant's own case. As such, even non-minority capital-charged criminal defendants and non-minority current death row defendants, in addition to all minority capital-charged criminal defendants and minority current death row defendants could challenge their death sentences under the RJA.

Therefore, for purposes of the current fiscal estimates, DOJ assumes that all 162 current death row inmates can, and ultimately will, file motions under the RJA challenging their death sentences. Because the local District Attorneys and their offices may be necessary witnesses to the litigation under the RJA (to testify why they sought the death penalty in specific cases, or whether they implanted any programs prior to the defendant's trial for the purpose of eliminating racial disparities, N.C. General Statute 15A-2011(c), it further is assumed that the local District Attorneys will request the assistance of the Attorney General's Office, specifically the Capital Litigation/Federal Habeas Section, to handle the litigation under the RJA.

Based on the types of evidence that a defendant can use to raise a claim under the RJA, it would take over thirty work days to prepare for and hold a hearing in an average case claiming racial disparity. That work would include:

1. A review of the report prepared by any statistical expert hired by the defense;
2. A review of any factual data collected by the expert;
3. A review of data showing prosecutorial decisions in the county in question, other counties in that district, and other districts in the Judicial Division;
4. Interviews of the District Attorney, Assistant District Attorneys, and any former District Attorney or District Attorneys who handled capital cases during the relevant time period in the county at issue, the district, and any district in the Judicial Division;
5. Consultation with a statistical expert hired by the State to review relevant data
6. Legal research
7. Preparation of motions, responses, and briefs for the trial court level
8. Appearance at a hearing which would take at least several days

9. Preparation of legal documents at the appellate level

10. Appearance at any appellate arguments.

To handle this additional workload, the Capital Litigation Section would need five additional Attorney IVs and an additional Paralegal I.

In a case in Durham County in which the defendant is challenging the death penalty on a basis similar to that in the RJA, the statistical expert hired by the State has already billed the State for \$24,000 in time spent, at \$150 per hour, just reviewing the defense materials and preparing for a possible hearing. The hearing has not yet been held. Under the RJA, each case will have different data that defense and prosecution experts will have to consider and evaluate. Thus, it is assumed that similar expense will be required for each of the 163 inmates currently on death row. DOJ submitted an estimate for the total, just for pre-hearing time, of at least \$4,000,000 (no further cost detail was provided). That amount will not be money that will come from DOJ's budget, however. Orders would be sought in the trial courts to authorize expert expense, and funds to pay those experts would come from the Administrative Office of the Courts.

**SOURCES OF DATA:** Administrative Office of the Courts; Office of Indigent Defense; Department of Justice

**TECHNICAL CONSIDERATIONS:** None

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**DATE:** June 18, 2009



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