

GENERAL ASSEMBLY OF NORTH CAROLINA



Session 2011

Legislative Fiscal Note

BILL NUMBER: House Bill 615 (First Edition)

SHORT TITLE: No Discriminatory Purpose in Death Penalty.

SPONSOR(S): Representatives Burr, Stevens, Ingle, and Stam

	FISCAL IMPACT				
	Yes (X)	No ()	No Estimate Available ()		
	<u>FY 2011-12</u>	<u>FY 2012-13</u>	<u>FY 2013-14</u>	<u>FY 2014-15</u>	<u>FY 2015-16</u>
GENERAL FUND					
Department of Justice (DOJ)					
Judicial- AOC					
Judicial- IDS					
No fiscal impact anticipated*					
Projected reduction in future costs*					
Indeterminate fiscal impact*					
<i>*See Assumptions and Methodology</i>					
PRINCIPAL DEPARTMENT(S) & PROGRAM(S) AFFECTED: Department of Justice; Judicial Branch.					
EFFECTIVE DATE: This act is effective when it becomes law.					

BILL SUMMARY:

The proposed legislation amends G.S. 15A-2011 (proof of racial discrimination under the NC Racial Justice Act). The act proposes a finding that race was the basis of the decision to seek or impose a death sentence may be established if the court finds the State acted with discriminatory purpose in seeking the death penalty or in selecting the jury that sentenced the defendant, or one or more of the jurors acted with discriminatory purpose in the guilt-innocence or sentencing phases of the defendant’s trial. Also, the act proposes the defendant has the burden of proving there was discriminatory purpose in seeking or imposing the death sentence in the defendant’s case, and the State may offer evidence to rebut the claims or evidence of the defendant.

In addition, the proposed legislation amends G.S. 15A-2012 (hearing procedure). The act requires a defendant to state with particularity how evidence supports a claim that there was discriminatory purpose (currently, that race was a significant factor) in decisions to seek or impose the death sentence in the defendant’s case (rather than in the county, prosecutorial district, judicial division, or the State at the time the death sentence was sought or imposed). Further, the act clarifies the court will order that a death sentence will not be sought, that the death sentence imposed will be

vacated, and that the defendant will receive a new sentencing hearing (rather than resentenced to life imprisonment without the possibility of parole) if the court finds there was a discriminatory purpose in decisions to seek or impose the death sentence.

The proposed legislation also clarifies that the act supersedes and nullifies provisions of Article 101A (appears to reference Article 101) of G.S. Chapter 15A that existed before the act's effective date and are repealed by the act. The act includes a severability clause, and specifies the act does not amend or modify the statutory or common law applicable to trial or postconviction proceedings in capital cases that existed before July 1, 2009.

The act is effective when it becomes law, and applies to all capital trials held prior to, on or after the effective date of this act, and to all capital defendants sentenced to the death penalty to, on or after the effective date of this act.

ASSUMPTIONS AND METHODOLOGY:

Department of Justice

The Department of Justice (DOJ) does not expect that the proposed legislation will have a material fiscal impact on the Department. In the original fiscal note on the Racial Justice Act (2009 SB 461), DOJ projected that the act would produce additional workload for the Capital Litigation Section amounting to six staff positions (five Attorney IVs and one Paralegal I) for a total cost of \$549,380. The Fiscal Research Division did not at the time accept the Department's estimate. However, due to the volume of appeals by the current death row population (152 appeals), the Division revised this position and now accepts DOJ's cost estimate. However, because the appellate work is limited to 152 cases, the Division does not believe the act requires recurring appropriations and permanent staff positions. The Division maintains that DOJ can use contractual resources to meet this temporary need over a three to four year period.

Judicial Branch- Administrative Office of the Courts (AOC)

As of September 30, 2010, Racial Justice Act (RJA) motions had been filed on behalf of 152 convicted offenders, and there were RJA motions filed in at least 46 cases pending trial. Most motions have not yet been heard. Hearings on many of these motions have been postponed pending the final reports from multiple studies. One study was anticipated to be completed in August 2010; it is still pending and the final release date is unknown.

AOC has used available data and estimates from knowledgeable personnel, including the Conference of District Attorneys, to estimate costs. The largest unknown factor is the timeframe for the disposition of the RJA motions pending in 198 cases, plus any future motions filed. Therefore, while this fiscal analysis lists the estimated time and costs for the current motions, the number of years over which these costs will be distributed is unknown. To a great extent, the number of years will be resource driven; disposing of all motions in one year, for example, would require twice as many personnel as disposing of the same motions over two years. In addition, it is likely that an initial round of hearings on some motions will be followed by appeals and a waiting period before hearings on more motions are conducted. In the absence of a known time frame, the

personnel-related costs below are based on the recurring costs for existing positions. One reasonable scenario is that all 152 of the post-conviction cases with RJA motions would require four years to dispose.

The intent of the proposed legislation appears to be to apply the new statutory language to future motions as well as motions already filed under current G.S. 15A-2011 and 15A-2012. If the legislation is interpreted to apply to motions already filed, the analysis in the following sections applies. If the legislation is interpreted to apply only to future motions, the bulk of the cost reductions will not be realized, as the motions already filed are the source of most of the workload. In either case, AOC anticipates litigation and appeals regarding the question of whether the proposed legislation will apply to motions already filed. AOC cannot project the cost of such litigation.

In the original fiscal note on the Racial Justice Act (2009 SB 461), AOC was unable to estimate the fiscal impact of the bill but believed that the impact would be substantial. However, AOC now has access to data that was not available in 2009, and the table below estimates costs and workload for motions filed to date under the current RJA and the proposed legislation (does not include Indigent Defense Services costs):

Type of Cost	Current Statute	Proposed (Assumes Retroactive Application)
RJA Motions:		
In-Court Time:	\$52,991 per case <i>Estimated time 2 – 3 weeks per hearing. Conservative estimate of 12 days of court time and average position costs for the following: superior court judge, senior ADA (x2), other ADA, victim-witness legal assistant, deputy clerk, and court reporter.</i>	\$35,327 per case <i>Estimated time 1 - 2 weeks per hearing. Estimate of 8 days of court time and average position costs for the following: superior court judge, senior ADA (x2), other ADA, victim-witness legal assistant, deputy clerk, and court reporter. (A typical hearing on a motion for appropriate relief ranges from 3 to 10 days and may involve multiple issues.)</i>
DA staff out-of-court time:	\$19,378 for first case in district, half as much for additional cases <i>Estimate two hours out of court for every hour in court for ADA, VWLA time equal to in-court, collapsed in part to district because a significant portion of the workload will be done on the district, rather than the case, level.</i>	\$10,224 per case <i>Estimate 1.5 hours out of court for every hour in court, VWLA time equal to in-court. (May not have to prepare to rebut statistical evidence.)</i>
DA staff non-case specific preparation:	\$17,191 per district in first full year of costs <i>Average of 12 hours/month for 6 months of processing motions and 72 hours/month for 6 months of gathering data on murder cases. Based on reported workload for Jul. 1 – Sept. 30, 2010</i>	

Type of Cost	Current Statute	Proposed (Assumes Retroactive Application)
Conference of DAs:	Approximately \$175,000 per year <i>One contract statistician, two temporary resource prosecutors, and time spent by other Conference of DAs staff. Based on hours for Jul. 1 – Oct. 31, 2010.</i>	
Expert witness fees:	More than \$50,000 per case, potential decrease in later cases <i>\$50,000 is based on pre-trial expenditures for a race-related motion in Durham County. Costs will likely increase in trial phase. Note: \$50,000 per RJA motion/case would far exceed the Judicial Department’s annual budget for expert witnesses. In FY 2009-10, expert witness expenses on all cases statewide were less than \$350,000.</i>	Unknown; at a minimum, half the cost of expenditures under current statute <i>Potentially lower than under current statute if the judge does not permit introduction of statistical evidence by defense.</i>
Judge out-of-court time:	Varies per defendant; cannot be predicted with any certainty <i>Judges who have cases with RJA motions report a range of hours; anticipate at least 5 hours per defendant. Most motions have not yet been heard, thus the time spent to date has been only a few hours per defendant in most cases.</i>	Varies per defendant; cannot be predicted with any certainty <i>Judges who have cases with RJA motions report a range of hours; anticipate at least 5 hours per defendant. Most motions have not yet been heard, thus the time spent to date has been only a few hours per defendant in most cases.</i>
Clerk staff out-of-court time:	At least \$7,000; cannot be predicted with any certainty <i>Some clerks offices have reported time in excess of 100 hours. Some report little to no time, or no motions.</i>	Unknown
Print costs:	Could exceed \$1,500 in some counties <i>\$1,500 to copy and ship Cumberland County repository to partially fulfill discovery requests. Other counties cannot be extrapolated.</i>	Unknown
New Sentencing Hearings:		

Type of Cost	Current Statute	Proposed (Assumes Retroactive Application)
In-Court Time:		\$90,000 per case in which a new sentencing hearing is held <i>Estimated time 3 – 4 weeks per hearing (rough estimate; considerable variation). Conservative estimate of 18 days of court time and average position costs for the following: superior court judge, senior ADA (x2), other ADA, victim-witness legal assistant, deputy clerk, and court reporter. Also includes jury fees.</i>
DA staff out-of-court time:		\$29,067 per case in which a new sentencing hearing is held <i>Estimate two hours out of court for every hour in court for ADA, VWLA time equal to in-court.</i>
Expert witness fees:		Unknown; at a minimum, half the cost of expenditures under current statute (see RJA motions section) <i>In FY 2009-10, expert witness expenses on all cases statewide were less than \$350,000.</i>
Other:		
Timeframe:		Additional delay due to new (replacement) motions, including new filings for discovery under the new statute.
Other litigation:		Costs unknown. <i>Anticipate litigation and appeals regarding whether the proposed legislation will apply to motions already filed.</i>

Cost Summary: Overall, costs under the current S.L. 2009-464 are anticipated to exceed \$23 million. Costs under the amendments proposed in this legislation are anticipated to exceed \$14 million. While the proposed legislation has the potential to reduce future costs, there will not be any actual savings, as no additional resources were appropriated to the courts for the implementation of S.L. 2009-464. For each new sentencing hearing held as a result of the proposed legislation, costs will increase. While there is a great variation in the duration of capital resentencing hearings, a potential average cost per hearing is approximately \$90,000.

Judicial Branch- Indigent Defense Services (IDS)

The Office of Indigent Defense Services (IDS) reported to the Fiscal Research Division that they are unable to provide a reliable figure of anticipated costs or savings that would result from the proposed legislation. However, IDS staff believes that the following factors will need to be considered in determining the likely fiscal impact:

1. **Current status of RJA litigation and expenditures under existing law:** At this point, IDS has already paid for the work associated with attorneys investigating and filing post-conviction RJA claims, and additional expenditures should be modest until evidentiary hearings are scheduled and conducted. Since the passage of the RJA, there appear to be only three cases moving toward active litigation this calendar year—two consolidated cases in Forsyth County and one case in Durham County.
2. **Section 1:** The proposed amendments to the RJA would only affect the pending cases where statistical evidence that race was a factor in the decision to seek or impose the death penalty is the sole or primary basis for the claim. IDS believes there are a number of other pending cases that would continue to be litigated, because they also raise constitutional race-based claims. According to IDS records, which rely on self-reporting by the attorneys and may not be comprehensive, IDS-appointed attorneys filed RJA motions that also included constitutional race-based claims in 7 cases at the trial level, 3 cases on direct appeal, and 35 cases in post-conviction. IDS does not know how many of the post-conviction cases involved successor motions for appropriate relief where a constitutional claim may be procedurally barred.
3. **Sections 1 and 5:** It is not clear to IDS staff what new rights may be created by this new version of the RJA. While it appears to track the current constitutional law, IDS believes that defendants will continue to investigate the intent and motivations of prosecutors, both through discovery requests and evidentiary hearings. Some attorneys may have already investigated the prosecution’s intent in the context of a potential constitutional race-based claim and others will continue to explore such claims. Without reviewing all of the filed pleadings, IDS is unable to determine how many RJA claims included defendant-specific evidence.
4. **Section 1, § 15A-2012(a)(3):** Under the proposed legislation, if the court finds that there was a discriminatory purpose in the decision to seek or impose the death sentence in the defendant’s case, the court shall order a new sentencing hearing. To the extent that judges find evidence of discriminatory purpose in any cases, there will be additional costs associated with the new sentencing hearings. A resentencing hearing typically costs as much as a retrial because, in practice, the prosecution needs to present evidence of guilt to the sentencing phase jury. Based on a study that IDS published in 2008, the average cost to IDS of a capital trial is approximately \$104,000. In the pool of cases included in that study, there were only four resentencing cases with all fees known. For the one resentencing case that again ended in death, total defense costs were \$214,074. For the three resentencing cases that ended in life without parole, the average total defense cost was \$130,789.
5. **Section 2:** If the RJA is amended as proposed or repealed, IDS believes there will be litigation to determine the effect of the amendments or repeal for defendants who already filed a claim under the RJA as it currently exists. With respect to cases at the trial level, those defendants who have already filed a claim will likely raise an *ex post facto* argument. With respect to defendants on direct appeal and in post-conviction, those defendants who have already filed a claim will likely raise an argument that the current version of the RJA created a due process right upon which they relied. IDS does not know whether any of that litigation would be successful, but expects defendants to raise and litigate those claims, which will generate additional costs.

SOURCES OF DATA: Department of Justice; Administrative Office of the Courts; Conference of District Attorneys; Office of Indigent Defense Services

TECHNICAL CONSIDERATIONS: None

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