NORTH CAROLINA GENERAL ASSEMBLY

LEGISLATIVE FISCAL NOTE

BILL NUMBER: SB 173 **(5th Edition)**

SHORT TITLE: No Death Penalty/Mentally Retarded

SPONSOR(S): Senator Ballance

FISCAL IMPACT

Yes (X) **Section 3** | **No (X)** **Sections 1 and 2** | **No Estimate Available (X)** **All Sections**

	FY 2001-02	FY 2002-03	FY 2003-04	FY 2004-05	FY 2005-06
REVENUES	-- -Not Applicable---				
EXPENDITURES	No estimate available but fiscal impact varies; see below				

1. Department of Correction – All Sections: No fiscal impact (no affect on incarceration in first 11 years)

2. Judicial Branch – Sections 1 and 2: No estimate available but no fiscal impact and could be reduction in costs if capital case workload decreases. Section 3 (retroactive) No estimate available but will be some fiscal impact; fiscal impact not likely to be significant. Same assumptions apply for the Office of Indigent Defense Services

3. Department of Justice – Sections 1 and 2: No estimate available but no fiscal impact and could be reduction in costs if capital case workload decreases. Section 3 (retroactive): No estimate available but will be some fiscal impact; fiscal impact not likely to be significant.

POSITIONS: 0

PRINCIPAL DEPARTMENT(S) & PROGRAM (S) AFFECTED: Judicial Branch; Office of Indigent Defense Services; Department of Correction; Department of Justice

EFFECTIVE DATE: Sections 1 and 2 are effective October 1, 2001 for trials docketed to begin on or after that date. Section 3 (retroactive application) is effective October 1, 2001 and expires October 1, 2002. Section 4 (effective dates) is effective when it becomes law.

BILL SUMMARY:
Section 1: Adds new GS 15A-2004, providing that no defendant who is mentally retarded shall be sentenced to death. The criteria and procedures in subsections (a) through (d) are the same in the fourth and fifth edition. To qualify as mentally retarded, a defendant must have an IQ of 70 as measured by a standardized intelligence quotient test existing concurrently with impairment in adaptive functioning manifesting before the age of 18. Section 1 provides for a pre-trial hearing to determine whether defendant is mentally retarded and to declare the case non-capital if defendant is so found. The burden of proof rests upon the defendant to demonstrate mental retardation by a preponderance of the evidence. Section 1 applies to trials docketed on or after October 1, 2001.

Other subsections of Section 1 and other sections of the bill are substantially different in the fifth edition. Section 1 in the fifth edition no longer includes appeal rights for either side to the Court of Appeals after the pre-trial hearing nor the requirement that the intelligence quotient test must have been administered before the commission of the alleged crime.

The fifth edition adds language in Section 1 authorizing the court to submit a special issue to the jury to consider if the defendant is mentally retarded, as defined in SB 173, at the time of sentencing. This edition also allows the jury to consider other evidence during sentencing if the defendant does not meet the definition of mentally retarded in SB 173 and use that evidence to determine aggravating or mitigating factors when sentencing a defendant.

Sections 2, 3, and 4: This edition deletes the previous Sections 2, 3, and 4 which gave the District Attorney the discretion to decide whether to try a first degree murder case capitally or non-capitally, even if evidence of an aggravating factor exists, and if the defendant chooses to plead guilty to first degree murder ("D.A. Discretion" is now a ratified bill, HB 1117).

The fifth edition of SB 173 adds a new Section 2, which requires the court to give appropriate instructions to the jury regarding the statutory provisions of this bill. Section 2 requires a unanimous verdict of the jury on the sentence recommendation; if a unanimous verdict is not rendered in a reasonable period of time, the judge shall impose a sentence of life imprisonment.

Section 3 is a new statute making the application of this bill retroactive. Section 3 of SB 173 allows inmates sentenced to death on or before October 1, 2001 to file a motion for a determination of a defendant's mental retardation. (This group of defendants would include all inmates on death row as of October 1, 2001 and those defendants whose trials are in progress on October 1, 2001). All such motions must be filed by October 1, 2002. Upon such motion, the court shall conduct a hearing. If the court determines the defendant is mentally retarded, the court shall declare the defendant ineligible for the death penalty and will convert the sentence to life imprisonment.

Section 4 sets out effective dates.

ASSUMPTIONS AND METHODOLOGY:

Overall

Sections 1 and 2
Regarding the fiscal impact of this bill for trials docketed to begin on or after October 1, 2001; the only potentially significant cost is for the new pre-trial hearings outlined in Section 1. However, as discussed in the fiscal note on the fourth edition of SB 173, a reliable estimate of the fiscal impact of these hearings cannot be provided because it is unknown how many defendants accused of first-degree murder will meet the definition of mental retardation used in this bill. Discussions with mental health and criminal justice professionals indicated that 2% is a commonly accepted estimate of the percentage of the general population that is mentally retarded and as high as 5% for the criminal population. Given these percentages, the number of mentally retarded capital defendants is likely to be low.

It was further noted that while a specific population or cost estimate cannot be determined, no fiscal impact is likely - - the savings by avoiding a capital trial and appeals in even a few instances would more than offset the costs of any number of pretrial hearings. *The likelihood of no fiscal impact and possible savings is enhanced by changes to Section 1 in the fifth edition, which add opportunities at various stages of the legal process to determine whether a defendant is mentally retarded.*

Section 3 (Retroactive application)
More problematic is the effect of the new Section 3, which retroactively applies this Act to inmates currently on death row and defendants in capital trials that are in progress on or after October 1, 2001. This change to the bill has the potential for significant fiscal impact since there is the possibility that a new hearing will be required for the 221 inmates on death row and defendants in trials already in progress after that date. However, for the reasons outlined below, it is likely that while there could be fiscal impact, it will not be significant. These reasons include:

1. *Hearings vs. Other Lawsuits*: According to the Attorney General Office's, the strong possibility exists that if SB 173 does not apply retroactively that a significant number of lawsuits could be filed by N.C. inmates under the equal protection clause of the Constitution. Challenges are even more likely if the U.S. Supreme Court determines that mentally retarded defendants and inmates should not be subject to the death penalty. A new hearing to consider the issue of mental retardation is likely to require less court time and cost than court proceedings to consider challenges to SB 173 if retroactive application is not included in the bill.

2. Inmates on death row file motions for appropriate relief on a variety of issues; the issue of whether the inmate is mentally retarded would be just one of many motions filed by a defendant on death row (however, the time frame of October 1, 2001 to October 1, 2002 could cause a more severe impact on resources).

3. *Volume of Cases*: The number of motions and hearings could be relatively small. If one applies the same percentage of 2% and 5% to the 221 inmates, the number of inmates would be 4 and 11 respectively. This is a relatively small number of inmates. Further, DOC reports that three inmates currently on death row have scored 70 or below on a test that meets criteria of this bill. (**NOTE**: DOC tests each inmate for developmental disabilities; if the inmate scores 70 or below, he is tested again; if he scores 70 or below a second time, he is given a standardized intelligence quotient test that meets the criteria in SB 173. Three inmates on death row have taken all three tests and scored 70 or below on each).

A caveat to the assumption of limited fiscal impact is the uncertainty as to whether Section 3 will result in a new hearing for most inmates on death row –221 potential hearings. Section 3 states that upon a motion, the court shall conduct a hearing to determine if the defendant is mentally retarded. Section 3 does not specify procedures for determining the validity of these motions, unlike the procedures stated in G.S. 15A-1420 for capital case motions for appropriate relief. Appropriate affidavits or other documentary evidence must support the MAR's.

Overall, three scenarios are likely for the fiscal impact of Section 3 and all are dependent on how many motions are filed and how many are granted.

Under scenario number one, there could be a savings. This scenario assumes that a relatively small number of motions are filed and hearings granted because of the low estimated population of mentally retarded inmates on death row. This also assumes that costs of new hearings are offset by avoiding the cost of more expensive litigation if SB 173 were not retroactive. *In essence, this would be no fiscal impact*.

Scenario number two assumes that without statutory court procedures for these motions, that a number of motions will be filed and granted for hearing, resulting in the use of considerable Judicial Branch and Attorney General resources. *Under this scenario, the fiscal impact could be significant.*

Scenario number three assumes there will be fiscal impact but that it will not be significant. This scenario assumes the actual effect of Section 3 will be something in-between scenario's one and two and is the scenario considered most likely by Fiscal Research, after discussions with various officials. *Given that Section 3 establishes a new motion and hearing, that many of the 221 death row inmates file a number of motions, and that no procedures are stated for dismissing frivolous motions, it is likely there will be some increase in time and cost of the Judicial Branch, Office of Indigent Defense Services, and the Attorney General's Office. However, the cost is not likely to be significant* because of the small number of inmates likely to be mentally retarded and the likelihood that the court, absent statutory direction, will apply existing procedures that will result in the dismissal of many frivolous motions and avoid lengthy hearings (and thus the high cost of various court and executive branch resources) in most cases.

Given it is speculative as to how many motions will be filed and hearings held, a specific cost estimate of the fiscal impact of this bill is not available.

Department of Correction

Given that it is unknown how many defendants that could be sentenced to death will be classified as mentally retarded**, the fiscal impact on the Department of Correction (DOC) in the short and long term cannot be determined at this time. However, it is clear that there will be no cost in the five-year fiscal note horizon.**

The key issue is the difference between the lengths of time the average inmate will spend on death row before execution versus the length of time the average inmate will remain in prison on a sentence of life without parole. According to information from DOC, there are currently 221 inmates with a death sentence. Sixteen people have been executed since the passage of the 1977 Death Penalty provision and through the end of CY 2000. From CY 1995 through CY 2000, 10 people were executed. For these executions, the average time on death row prior to execution was almost 11 years**. If individuals were convicted of first-degree murder, but not sentenced to death, they would still take up a prison bed during that timeframe. Therefore there would be no fiscal impact on DOC for at least the first eleven years of this bill.**

Although SB 173 has no short-term fiscal impact on DOC, there could be long-term fiscal impact based on information from the North Carolina Sentencing and Policy Advisory Commission. Of the 23 offenders who were sentenced to death in FY 1999/2000, the age range was from 19 to 50. Since a life sentence under Structured Sentencing means for the rest of the person's natural life, if these persons had been sentenced to life without parole and lived to age 65, the average time served would have been 33.7 years. Thus, SB 173 would affect the long-term incarceration rate and create the need for more prison beds.

These conclusions apply to Section 3, retroactive application, given the small number of death row inmates likely to be determined mentally retarded and converted to a life sentence.

Judicial Branch

Section 1 and 2

Under the bill in Section 1, there is potential for additional pretrial hearings to determine whether a defendant is mentally retarded. Again, there is no clear way to estimate the number of offenders that will meet the definition of mentally retarded. For speculative purposes, if one applied the 2% general population figures to 377 first-degree murder cases where the death penalty was initially sought (1998-99 AOC figures excluding public defender cases), the projected number would be 8 cases. If one assumes 5% because of nature of an offender population, the total would be 19 cases annually.

This is a relatively small number of cases. If one assumed this number of cases, the AOC cannot project how many motions would be successful. Further, since the costs of a capital trial greatly exceed the costs of a non-capital trial, the additional costs for more hearings could be at least offset by a "savings" from having fewer capital trials. Capital cases are considerably more expensive in terms of court time, trial preparation, jury fees and indigent defense costs than other proceedings.

Section 3
The Judicial Department cannot estimate the number of motions to be filed or hearings to be held. The cost to Judicial as well as the new Office of Indigent Defense Services (OIDS) will depend on volume. The Department did speculate that if a relatively small number of motions are filed and successful (20 motions, 12 successful) that the savings could offset the cost by foregoing potential litigation. However, FRD assumes there will be minor fiscal impact on Judicial and OIDS as explained on pages 3 and 4 of this Note.

Department of Justice

Section 1 and 2
The Department of Justice/Capital Litigation Section in the Attorney General's Office represents the State in appeals of capital cases. While DOJ would not be affected by pre-trial hearings, it is likely that these hearings will eventually result in fewer capital cases that will be appealed and could result in savings to DOJ.

Section 3
The Attorney General's Office would represent the State in all retroactive cases, thus potentially increasing cost and workload. As with the Judicial Department, the fiscal impact on the Attorney General's Office in the Department of Justice is dependent on the number of motions filed and subsequent hearings, which cannot be determined. However, it is assumed there will be minor fiscal impact as explained on pages 3 and 4 of this Note.

TECHNICAL CONSIDERATIONS: Section 3, subsection (d) may need to refer to the new Office of Indigent Defense Services to appoint counsel for the defendant. The OIDS was established July 1, 2001.

SOURCES: Department of Correction; Judicial Department; North Carolina Sentencing and Policy Advisory Commission; Department of Justice/Attorney General's Office; and, Office of Indigent Defense Services

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