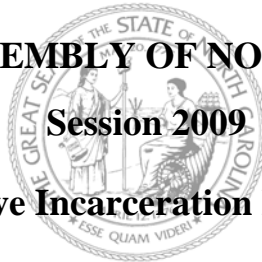


**GENERAL ASSEMBLY OF NORTH CAROLINA**



**Session 2009**

**Legislative Incarceration Fiscal Note**

**(G.S. 120-36.7)**

**BILL NUMBER:** Senate Bill 461 (Fifth Edition)

**SHORT TITLE:** North Carolina Racial Justice Act.

**SPONSOR(S):** Senator McKissick

	<b>FISCAL IMPACT</b>				
	<b>Yes (X)</b>	<b>No ( )</b>	<b>No Estimate Available (X)</b>		
	<b><u>FY 2009-10</u></b>	<b><u>FY 2010-11</u></b>	<b><u>FY 2011-12</u></b>	<b><u>FY 2012-13</u></b>	<b><u>FY 2013-14</u></b>
<b>EXPENDITURES</b>					
<b>GENERAL FUND</b>					
<b>Judicial – AOC</b>					<b>Indeterminate fiscal impact</b>
<b>Judicial – IDS</b>					<b>Indeterminate fiscal impact</b>
<b>Justice</b>					<b>Indeterminate fiscal impact</b>
<b>POSITIONS:</b>					
<b>(cumulative)</b>					<b>Indeterminate additional positions needed</b>
<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:**

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 post conviction 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 re-sentenced 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 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 SB 461 fiscal impact analyses from the Administrative Office of the Courts (AOC, the Office of Indigent Defense (OIDS), and the Department of Justice (DOJ). Because the bill creates a new motion that may be raised by the defense, the agencies do not have historical data from which they can base an estimate of costs or savings. Based upon information provided by the agencies, Fiscal Research expects that the potential costs of SB 461 could be significant, but is not able to estimate the cost.

### **Judicial Branch – Administrative Office of the Courts (AOC)**

The Administrative Office of the Courts 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, SB 461 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 (e.g. capital trials) in FY 2006-07. AOC does not have data on the racial-ethnic identity of these 13 defendants. Department of Correction data indicate that as of April 13, 2009, of the 163 offenders on death row, 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 is likely that the racial justice issue would be raised in most first-degree murder cases involving the death penalty. If, in a given year, for 13 capital 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 pre-trial hearings. AOC believes that the number of new cases each year, however, would likely be higher because the issue would be raised in cases that proceed capitally at some point but ultimately do not result in a capital trial (raised pretrial). If the number of cases were to be equal to the number that eventually do become capital trials (7 cases), the result would be 14 cases annually that would raise a claim that would require a pre-trial hearing under SB 461. If all 100 of the current non-white death row inmates raise the issue, that would result in an additional 100 motions for post-conviction hearings that would be filed in the 12-month period following enactment. It is possible that the issue could be raised by white inmates as well, thus increasing the number of potential cases for which AOC would incur a cost.

The potential fiscal impact of SB 461 on AOC is discussed below:

- *Judges, clerks, and court reporters (in-court time only):* AOC estimates that with expert testimony on sides, rebuttals, etc., hearings would range from 2 to 3 days in court, on average. Therefore the estimated annual 14 pre-trial hearings could be accommodated without additional court room resources. However, the 100 post-conviction hearings that could be filed in the first year would result in 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 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 for 100 post-conviction cases would be approximately \$300,000 for the first full year. However, because there are a limited number of post-conviction cases that could result from this bill, Fiscal Research does not recommend that new permanent positions be authorized for this purpose.
- *Expert witnesses:* AOC used data from a current Durham County case in which the defendant is challenging the death penalty on a basis similar to that proposed in SB 461 to estimate expert witness costs. In this case, experts for the State charge \$150 to \$250 per hour 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. *If it is assumed that on average the expert witness cost of each hearing would be \$50,000, AOC would spend \$5 million for the State's expert witnesses for the post-conviction hearings.*
- *Appeals.* AOC indicates that in cases involving current death row inmates where the court overturns the death sentence and ordered a new trial, the costs for the new trial (for defense counsel, the appellate court, production of transcripts, etc.) would be substantial.
- *Prosecutorial time:* Prosecutorial preparation time could be substantial and would include reviews of existing case files and other documents, interviews, and statistical analyses. However, AOC was unable to estimate the amount of additional prosecutorial resources that would be needed to carry out the requirements of SB 461.

While they are unable to provide an estimate of the fiscal impact of SB 461, AOC staff believes that it is likely that this bill would result in substantial trial costs, including prosecution and indigent defense. On the other hand, to the extent that a pretrial hearing resulted in a ruling that causes a case to proceed non-capitally, where it might otherwise have proceeded capitally, and the subsequent costs for that case would be considerably less.

### **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.*

### **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 claims resulting from SB 461 for all 162 current convicted death row inmates while those claims are pending in the trial court, in addition to the appellate responsibilities that the Attorney General has by statute. As presently written, the bill 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, SB 461 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 bill 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 SB 461.

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 SB 461 challenging their death sentences. Because the local District Attorneys and their offices may be necessary witnesses to the litigation under SB 461 (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.

Based on the types of evidence that a defendant can use to raise a claim under SB 461, DOJ estimates that it would take over thirty work days to prepare for and hold a hearing in an average case claiming racial disparity. The 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, DOJ estimated that the Capital Litigation Section would need five additional Attorney IVs and an additional Paralegal I for a total annual cost of \$549,380. However, because DOJ did not provide detailed time and cost data, the Fiscal Research Division is unable to determine if the \$549,380 is a valid estimate. DOJ's cost estimate is for the maximum 162 post-conviction hearings that could be filed, all of which must be filed in the first 12 months following enactment of the bill. However, because there are only 162 possible post-conviction hearings involving DOJ that could result under SB 461, Fiscal Research recommends that only time-limited DOJ attorney and paralegal positions be authorized for this purpose.

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

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