LEGISLATIVE RESEARCH COMMISSION

CAPITAL PUNISHMENT
MENTALLY RETARDED AND RACE BASIS

REPORT TO THE

2001 SESSION OF THE

2001 GENERAL ASSEMBLY

OF NORTH CAROLINA

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1999 - 2000

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PREFACE

The Legislative Research Commission, established by Article 6B of Chapter 120 of the General Statutes, is the general-purpose study group in the Legislative Branch of State Government. The Commission is co-chaired by the Speaker of the House of Representatives and the President Pro Tempore of the Senate and has five additional members appointed from each house of the General Assembly. Among the Commission's duties is that of making or causing to be made, upon the direction of the General Assembly, "such studies of and investigations into governmental agencies and institutions and matters of public policy as will aid the General Assembly in performing its duties in the most efficient and effective manner" (G.S. 120-30.17(1)).

The Legislative Research Commission, prompted by actions during the 1999 Session and 2000 Sessions, has undertaken studies of numerous subjects. These studies were grouped into broad categories and each member of the Commission was given responsibility for one category of study. The Cochairs of the Legislative Research Commission, under the authority of G.S. 120-30.10(b) and (c), appointed committees consisting of members of the General Assembly and the public to conduct the studies. Cochairs, one from each house of the General Assembly, were designated for each committee.

The study of Capital Punishment – Mentally Retarded and Race Basis was authorized by Section 2.1(11) a. and Section 2.1(11) b. of S.L. 1999-395. Part II of S.L. 1999-395 allows for studies authorized by that Part for the Legislative Research Commission to consider Senate Bill 334 and Senate Bill 991 in determining the nature, scope and aspects of the study. The relevant portions of Chapter 395 are included in Appendix A.

The Legislative Research Commission authorized this study under authority of G.S. 120-30.17(1) and grouped this study in its Criminal Laws area under the direction of Senator R.L. Martin. Senator Frank Ballance, Jr. and Representative Ronnie N. Sutton chaired the Committee. The full membership of the Committee is listed in Appendix B of this report. A committee notebook containing the committee minutes and all information presented to the committee will be filed in the Legislative Library by the end of the 1999-2000 biennium.

COMMITTEE PROCEEDINGS

The Capital Punishment-Mentally Retarded and Race Basis Committee met six times. At each meeting the Committee provided interested parties an opportunity to be heard on the issues and received public comment.

February 15, 2000 Meeting

The first meeting of the LRC on Capital Punishment-Mentally Retarded and Race Basis Committee was held on February 15, 2000. Following introductions and opening remarks by co-chairs Representative Ronnie Sutton and Senator Frank Ballance, the Committee adopted its operating budget. Committee Co-Counsel Susan Hayes gave an overview of Senate Bill 334 (Prohibiting Death Sentence for Mentally Retarded Persons) and Senate Bill 991 (Prohibiting Death Sentence Obtained on Basis of Race). The bills, which were introduced in the 1999 Session, are referenced in the Committee's charge.

Richard Taylor, North Carolina Academy of Trial Lawyers, discussed a resolution adopted by the Academy urging that no death penalty be carried out pending the following: competent and adequate counsel in capital cases; a procedure for the review of death sentences which is fair; elimination of discrimination based on race; and prohibition of executions of mentally retarded people. According to Mr. Taylor, Senator Patrick Leahy, a Congressman from Vermont, introduced a bill known as the "Innocence Protection Act" to enact a series of reforms to try and prevent the execution of innocent people. Senator Leahy reportedly stated that during the 24-year span since 1976 when the death penalty was reinstated in the United States, 610 people were executed. Eighty-five (85) people who were convicted and on death row were later found innocent. One out of seven people that have been on death row in the last 24 years have been found to be innocent and released. Mr. Taylor indicated that the two bills under consideration by the Committee and a moratorium on the death penalty all have the goal of preventing the execution of innocent people.

According to Mr. Taylor, Republican Governor George Ryan of Illinois declared a moratorium on executions in his state pending a review of all convictions in Illinois. Governor Ryan reportedly conducted a review that showed 50% of the death sentences in Illinois were predicated on judicial error or prosecutorial misconduct. Thirteen inmates have been freed in Illinois in the last decade; all were innocent. The most celebrated case was about an individual with an IQ of 52 -- a class of students from Northwestern University found during their research that the person was innocent. Mr. Taylor added that, in the last year, three inmates in North Carolina have been freed by virtue of being found innocent or upon a finding that evidence of their innocence was wrongly withheld by prosecutors.

Appellate Defender Tye Hunter spoke about race and the death penalty and his experiences over the past 20 years in the Appellate Defender's office. His comments suggested that race continues to play an improper part in the criminal justice system due in part to an unusual amount of discretion that decision makers have.

Ken Rose, Center for Death Penalty Litigation, addressed the issue of mental retardation and the death penalty. According to Mr. Rose, public opinion polls show that a substantial majority of people oppose the death penalty for people with mental retardation, and even people who support the death penalty oppose the death penalty for those who are mentally retarded. Mr. Rose cited two reasons North Carolina should enact legislation to prevent mentally retarded people from being executed: first, mentally retarded individuals are easily led and want to please interrogators and second, they have reduced capacity to understand their actions.

Bill Farrell, Senior Deputy Attorney General in the Criminal Division, spoke briefly about the capital sentencing process. Barry McNeill, Special Deputy Attorney General in the Capital Litigation Section, presented observations regarding a bill prohibiting the death penalty for the mentally retarded and whether the current law is inadequate or should be changed. McNeill pointed out a provision in the Diagnostic & Statistical Manual of Mental Disorders (DSM4),

which states “impairment in adaptive functioning rather than low IQ are usually the presenting symptoms in individuals with mental retardation.” He stressed the need to look at how a person functions in society rather than how the person scores on an IQ test, because IQ tests can vary.

After the presentations, the chair opened the committee for discussion and questions. Tom Fewell of Chapel Hill, whose daughter was murdered in 1977, took the opportunity to express his opposition to the death penalty.

March 16, 2000 Meeting

At its second meeting, the Committee focused on the issue of the death penalty with regard to mental retardation. During its discussions, the Committee reviewed Senate Bill 334 (No Death Penalty/Mentally Retarded) from the 1999 Session of the General Assembly. The Committee heard from trial attorneys as well as psychologists and various mental health professionals, including representatives of the NC Psychological Association, the American Association on Mental Retardation and the Association for Retarded Citizens.

The Committee heard from Justice James G. Exum, former Chief Justice of the North Carolina Supreme Court. Justice Exum began his presentation by answering the question, “Why should we not want to execute the mentally retarded?” – His answer: “For the same reason that most of us would not want to execute a child.” According to Exum, a mentally retarded person under the definition contained in Legislative Proposal I (Appendix C) has the mental age of a child in all the ways that count in trying to assess criminal responsibility. Mentally retarded persons are also incapable of meeting the standard of high moral culpability that should be seen in a defendant before suggesting the death penalty. Mentally retarded persons should, however, be held responsible and punished for their crimes when they can meet the competency tests and when they are not insane. The death penalty should be reserved for the most heinous crimes, and for those most culpably responsible.

Justice Exum indicated to the Committee that if the State does not want to execute the mentally retarded, it cannot rely upon the jury system to "sift out" those who are mentally retarded by adding mental retardation as a statutory mitigating circumstance. There are two applicable statutory mitigating circumstances already on the books, mental disturbance and diminished capacity. A mentally retarded person would always have a diminished capacity; however, there are many cases on the books where juries have found the mental disturbance mitigating factor and the diminished capacity mitigating factor, and have still decided that death was appropriate.

The Committee viewed a seven-minute segment of the TV program "20/20" that dealt with the mentally retarded and the criminal justice system.

Ms. Deborah Greenblatt, Director of Carolina Legal Assistance, addressed the Committee. Ms. Greenblatt is an attorney who works exclusively with people that have mental disabilities, promoting independent living and working. Ms. Greenblatt explained that there are a number of beliefs about motivation and assumptions about motivation that exist in the criminal justice system. One is that people will fear punishment and that they will act in such a way as to decrease the likelihood that they will be punished. Another is that if there is a mitigating factor, they will identify that mitigating factor for themselves. She stated that these things are not true when it comes to a person with mental retardation. The most important motivating factor for a mentally retarded person is to be seen as not mentally retarded. As a consequence, there is a great desire to please authority figures. Mentally retarded people are no match for interrogators or investigators.

Ms. Greenblatt explained that mentally retarded people also have great difficulty with abstract thinking and language. She stated that in the criminal justice system we go back and forth into abstractions from concrete language. For the mentally retarded, it is like speaking in English and then switching to a foreign language in the middle of a sentence. They do not understand it. They respond to the parts they do understand and never acknowledge the parts that they don't understand. Examples are legal rights, warnings of Miranda rights and the right to remain silent.

Mr. Dave Richards, Executive Director of the Association for Retarded Citizens, spoke in support of legislation to exempt people with mental retardation from the death penalty. He stated that there are two reasons we need the legislation: 1) because it is easy for a mentally retarded person to find themselves in the criminal justice system and make mistakes in how they answer questions, how they think about the process, and wind up confessing to a crime they didn't commit; and 2) the State should not want to use the ultimate punishment for individuals who are not the most culpable for those crimes. Mr. Richards stated that the death penalty should not be imposed on people with mental retardation, but that they should not be exempt from accountability and punishment.

Dr. Andrew Short, a psychologist and member of the North Carolina Psychological Association, explained the three elements for assessing mental retardation in Legislative Proposal I as follows: 1) the intellectual assessment, 2) the evaluation of a person's adaptive functioning, and 3) the evidence this disability was present before the age of 18. Dr. Short stated that this is a conservative definition and is the standard definition of mental retardation used across the world in determining services for the mentally retarded. It is designed to prevent people from being stigmatized and being over-diagnosed with mental retardation. In the bill, all three elements must be present for the person to meet the criteria of mental retardation.

Dr. Short stated that the proposed bill is about people with IQs of 70 or below with very significant impairment in many areas. IQs in the 60s and 70s will show impairment in almost every type of thinking skill. These individuals will have trouble with abstract language, long and short-term memory, and understanding terms in the court system. Dr. Short also stated that people with IQs in the 60s to 70 have a much more limited understanding of the consequences of their actions, and they are less able to take into account all the factors in making decisions about actions they will take, particularly in stressful situations. These individuals are likely to be unable to exercise judgment in any significant way.

Dr. Short indicated that mentally retarded people will be less able to assist attorneys in their own defense because they have diminished ability to understand legal terms. They will not make good decisions if given alternatives, and will not realize what information is important to their case. These people will not remember crucial information.

Dr. Short addressed the issue of faking IQ tests to avoid the death penalty. It is his opinion that no one tries to fake IQ tests except in the criminal situation. The proposed bill includes a provision that requires the person to have shown evidence of mental retardation early in his or her life. Since no one generally tries to look mentally retarded early in life, people who later try to fake low IQs on IQ tests in legal situations will not succeed. There are ways to detect faking in a pattern of errors on a test, and there are batteries of tests to determine whether a person is malingering. According to Dr. Short, these tests have been very successful in sorting out people with low IQs from people who don't really have low IQs; criminals are not very good at faking a low IQ. People who qualify under the proposed bill are going to have to have some limits in their intelligence. The intelligence tests that are given are the most reliable and well-validated tests in the psychological field; they are highly reliable and accurate within five or six points. Dr. Short also indicated that even if someone was successful in faking a low IQ on a test that the person would still not be able to meet the criteria for impairment in adaptive functioning, which is determined based on reports and descriptions by teachers and persons in the community. These tests are based on how a person carries out tasks and how they live their life. There would also have to be evidence from their early years for disability. Adaptive behavior is measured by tests that have scores like IQ scores, but the data is gathered from individuals in the person's environment, not from the person themselves. Adaptive skills focus on things like self-care. Can they cook? Can they dress themselves? Are they able to communicate? Can they get a job? If a person can hold a job independently, truly live independently, that person will not qualify under the proposed bill.

Dr. Short expressed the strong support of the North Carolina Psychological Association for a bill that would eliminate the death penalty for mentally retarded persons.

Mr. James Ellis, former President of the American Association on Mental Retardation, spoke regarding the Association's finding in the late 1980's that people with mental retardation were on death row and were being executed. The first case known was John Bowden in Georgia. At the legislative session immediately following Bowden's execution, the Georgia legislature was the first to pass a bill that banned the use of the death penalty for people with mental retardation. Since that time, additional states have passed bills essentially identical to the bill under consideration by this Committee. There are now two federal laws, the first signed by President Reagan in 1988, the second signed by President Clinton in 1996. Thirteen state legislatures have passed legislation making the death penalty inapplicable to mentally retarded persons.

Mr. Ellis stated that the core of the problem has to do with why it might be that someone who is so disabled as to fall within this conservative definition of mental retardation is not identified in the system. Often the nature of the disability is not detected. It may happen in the case of someone with limited resources and somebody who has devoted his resources to one goal – making sure that nobody thinks he is "dumb." As a result, some mentally retarded persons have developed ways of hiding the character and degree of their disability. Hiding their disability has served them well from being discriminated against. These are impaired people and suddenly when they are in the criminal justice system and facing a capital charge, hiding the impairment no longer works to their advantage. In case after case, individuals continue to hide their disability from the criminal justice system, from the judge, and from their own lawyers because they don't understand it. We continue to find the problem with individuals with mental retardation finding their way onto death row. Partly because the system fails to understand what the nature of the disability is, how disabling it is, and how it relates to personal culpability and blameworthiness.

Mr. Ellis stated that while individuals with mental retardation can be punished severely and may be competent to stand trial and be punished, none of them in the bottom two and a half percent of the population in intelligence is also in the top two or three percent of the population in terms of

their understanding of the criminal act. Yet it is necessary to legislate this subject in state after state to make sure that the criminal justice system does what the people want it to do. Ellis indicated that 70 to 75 percent of the people in every poll that has been done say "we do not want to execute people with mental retardation" because of the moral understanding of what that punishment should be reserved for. These cases should be dealt with through the other penalties that are available under North Carolina law.

Dr. Nancy Laney, a psychologist with John Umstead Hospital, responded to questions from the Committee. Dr. Laney indicated that approximately two and a half percent of the population in the U.S. falls into the category of being mentally retarded. Most people with mental retardation are diagnosed through a variety of tests, records, and information supplied by family, community members, and teachers – people that interfaced with the system. This is usually done at an early age with an adequate paper trail.

The Committee provided a period of audience comment and discussion regarding the information presented and adjourned the meeting.

April 20, 2000 Meeting

The Committee held its third meeting on April 20, 2000. The meeting focus was on the issue of race as a factor in capital cases. The Committee heard from attorneys and legal scholars, and received information regarding various studies that have been done in North Carolina and in other states. There were several presentations on issues related to racial justice, including the presence and potential impact of race as a factor in capital cases.

Charlotte Attorney Henderson Hill talked about his experiences as a resource person for trial lawyers defending persons charged with capital crimes. He shared his belief that often attorneys have entered the courtroom and recognized that the law was being unfairly applied against their

clients. He found that the most difficult part of the process could occur in jury selection – when decisions were being made to exclude members of the community from participating in trials based upon race, particularly when the juror and the defendant were both African American.

According to Mr. Hill, a fiction still exists in the courtroom that says, "although the decision is made to exclude you because of your race, we are going to pretend that race does not impact on this decision", and the courts turn a blind eye to reality. In his opinion, this fiction wears away at the integrity of the system. Mr. Hill urged the Committee to encourage the General Assembly to correct the system and to stop executions where race has played an undue part in the judgments. The point was made that it can be difficult to establish that race is a factor in death penalty cases.

UNC Law Professor John C. Boger discussed experiences related to 12 years of working with the NAACP legal defense fund, including over nine years spent on capital punishment matters. One question addressed during those years was whether race entered into the judgment of whether capital punishment should be imposed. Professor Boger asked the committee to consider recommending a version of a Racial Justice Act that would allow lawyers for the State and defense to take a look and see what is happening with regard to these cases.

According to Professor Boger, raw numbers suggest that African Americans constitute about 12 percent of the (U.S.) population. In North Carolina (where African Americans constitute approximately 22 percent of the population) 224 people are on death row and 124 (56 percent) are African Americans; thirty-eight percent are white. The point was made that gross numbers alone do not establish discrimination. Professor Boger then described two types of evidence that are generally used to establish discrimination cases: case- by-case evidence and pattern and practice evidence. He indicated that since the mid-70s there have been 28 studies of whether capital sentencing statutes appear to be racially biased. The Baldus Study found that in Georgia you would be 4.3 times more likely to get death if you were African American, and that the race of the victim was a factor -- thirty-four percent of those who killed a white person and 14 percent of those who killed a black person received a death sentence. Another study in Philadelphia during 1986-1995 showed that you were nine times more likely to receive a death sentence if you

were a black defendant. In 1990, the United States Senate requested the General Accounting Office to look at all of these studies and make a conclusion. The conclusion showed remarkable consistency across states in data sets and collection methods and indicated a pattern of racial disparities.

According to Professor Boger, North Carolina has conducted two studies. One study from the 1970s looked at FBI data and found a race of victim and defendant bias. In cases where there were two or three aggravating circumstances, 17.6 percent where white persons were victims received a death sentence and eight percent where black persons were victims received death sentences. In closing, Professor Boger urged the committee to consider the proposed Racial Justice Act (Appendix D).

Charlotte Attorney James Ferguson shared his views on how North Carolina deals with racial issues and how it affects our criminal justice system. Ferguson has been involved in litigating death penalty cases for a number of years. He indicated that in 1993 the North Carolina Bar Association joined with the Black Lawyer's Association to conduct a study of race relations in the legal profession. The study concluded in 1996 that there was a problem with race in the courtroom. He quoted from the study, "the behavior of some white judges, attorneys, and court personnel toward attorneys and judges of color as well as toward other persons of color who use the court system, evidences attitudes of discrimination and undermines the effectiveness of these judges, attorneys, and others in the courtroom." The study also concluded that people of color are underrepresented at all levels of the bench, appellate and trial courts, on the legal staff of the Attorney General, and on the faculty of the Institute of Government. In closing, Mr. Ferguson suggested that the committee consider a proposing a moratorium on executions.

The Committee also heard from G. R. Quinn of the Article III Foundation. Mr. Quinn presented information regarding race and the death penalty, and made the point that gross numbers and percentages do not establish discrimination.

September 15, 2000 Meeting

At its fourth meeting, the Committee continued its discussion of racial disparity and the death penalty.

UNC Professor Jack Boger was introduced and reiterated his endorsement of the Racial Justice Act (Appendix D). He urged a broader look into capital sentencing in North Carolina; and he urged the committee to propose a requirement that in all homicide cases, judicial districts and prosecutors be required to gather pertinent information. These offices should then refer that information to a central State depository. Collection of this information could help determine whether capital sentences were being imposed in a racially discriminatory manner.

This Committee's work has stimulated another study that will begin to look at data on capital sentencing. The North Carolina Council of Churches, together with the Common Sense Foundation has begun to carry out a study. These organizations have identified a principal investigator to carry out this study, Dr. Issac Unah, a UNC Chapel Hill Political Science Professor. Dr. Unah has designed a research strategy, drafted an extensive questionnaire, and recruited and trained a project manager and seven data collectors. These data collectors are investigating cases around the State and gathering information.

The cases being studied are from 1993-1997. This committee will look at every capital case in which juries imposed life imprisonment or the death penalty. A sample of all the other capital cases will be also be available. More than 500 cases will be studied. Dr. Unah expects to have data available by the end of November. During December and January he plans to conduct analyses and to have a preliminary report available to this committee by mid-February.

The Charlotte Observer has reported its own study regarding defendant-victim combinations in North and South Carolina from 1990 to present. This report concluded that a marked disparity exists. Twenty-six percent of all persons on death row, seven percent of all homicides, were among black defendants who killed white victims. Twenty-nine percent of all persons on death

row, fifty-six percent of all homicides, were among black defendants who killed black victims. This still does not answer the question, is racism the explanation for these disparities?

The questionnaire in Dr. Unah's study will ask the following questions, "What were the aggravating circumstances?" "What were the statutory mitigating circumstances?" What were the non-statutory mitigating circumstances?" What are the socio-economics of the defendant and the victim?" What were the special features of the crime?" "What was the strength of the evidence?" This report is expected to identify whether or not there are serious racial disparities in the sentencing system in the State.

The following points were discussed following Professor Boger's presentation:

- Jury Selection is a complicated process. It is possible to have a racial dimension, but this data is not kept.

- Dr. Unah's study will only indirectly look at prosecutorial discretions.

- The U. S. Department of Justice's statistics were discussed.

- The Capital Punishment Committee will need to adopt its report by mid-December or early January.

Mental Retardation and the Death Penalty. Uses of DNA Testing
Professor Richard Rosen, UNC School of Law

Professor Rosen was introduced and discussed the racial composition of juries that impose the death penalty. Historically, in cases where the defendant was a black person and the victim was a white person, we would believe we would usually end up with an all or mostly white person jury. This was true in the late 60 and 70s. Data needs to be collected to determine if this is true

today. The legislature could require courtroom clerks to record the race of those who sit on capital cases. This collection would involve very little effort and money and would help determine whether the perception of racial disproportionment of juries is true.

Professor Rosen discussed the execution of mentally retarded defendants and cited the case of Earl Washington, Jr. Mr. Washington, a 22-year-old mentally retarded African American resident of Virginia, had a history of trying to please those in authority. In 1982, Rebecca Lynn Williams, a white woman from Culpepper, was raped and murdered. Mrs. Williams lived long enough to tell her husband and the police that a single black man committed this crime. There were suspects, but no one was arrested. A year later, in Warrenton, Mr. Washington was arrested for attacking a 78-year-old female neighbor. He broke into the neighbor's house to steal a gun and hit her with a chair. After his arrest, Mr. Washington was brought to the police station and interrogated. He confessed to five separate crimes: (1) sexually assaulting his neighbor as well as assaulting her; (2) three other sexual offenses in Culpepper in the last year, and (3) the murder of Ms. Williams. At his preliminary hearing of assaulting the 78-year-old, Mr. Washington's confession proved untrue. The 78-year-old neighbor testified that there had been no sexual assault. That charge was dropped. It turned out that Mr. Williams was not guilty of the three other sexual offenses to which he confessed. The police dropped all three charges.

Mr. Washington was interrogated for over two days on the murder charge of Ms. Williams. He was asked whether the victim was white or black, and he told the police that the victim was black. The police said, "you mean she really was white, wasn't she," and he said, "yes, she was white." He told the police that nobody else was there when it happened and the police said to him, "but don't you remember, her two children were there. Mr. Williams replied, "Yes, they were there." Mr. Washington told the police that he had stabbed her twice until they informed him she had been stabbed 38 times--he then changed his story. Mr. Washington's whole method of going through life was to please those who were questioning him, and he was willing to do it in this case.

Mr. Washington's conviction was upheld based upon his confession, and the fact that he identified a shirt as his own that had been found somewhat connected to the scene of the crime. He testified at trial that he really didn't commit this crime, but nobody believed him because there was a record of the interrogation of his confession. In 1993, the Federal courts upheld his conviction despite semen stains found at the scene of the crime, which did not match his. Given the technology, the State was able to put up a witness that said this evidence was not conclusive.

After his conviction was affirmed and while he was on his way to being executed, DNA Testing was agreed to. Semen stains were tested. It was concluded that in all likelihood the stains did not come from him and did not come from the victim's husband. Based upon that evidence, Governor Wilder of Virginia commuted his death penalty.

Technology has improved. This year his attorneys asked, and the Governor of Virginia agreed, to use new DNA technology that can isolate portions of stains to determine which come from the victim and which come from other people. Mr. Washington's attorneys are awaiting the results of that test. His attorneys are confident that not only will his life have been spared, but that he will walk free.

Dr. Rosen stated that mentally retarded individuals are susceptible to police suggestivity and that mentally retarded defendants are uniquely unable to help their defense. He further stated that Mr. Washington was fortunate to have a large Washington firm take his case and prove his innocence. Mr. Washington was also fortunate to be alive in 1993 when new DNA technology was invented and that the murder involved a rape.

Dr. Rosen stated that a large percentage of murder cases do not involve evidence susceptible to DNA testing, but we need a bill that allows testing in any case in which the evidence is present.

The following points were discussed following Dr. Rosen's presentation:

- It is impossible to have a foolproof criminal justice system due to misconduct and mistakes of human beings that sometimes lead to wrongful convictions.

- Investigating claims of wrongful convictions is difficult because many times wrongful convictions are never uncovered.

- The courts are not able to solely handle the problem of wrongful convictions. The problem needs to be investigated by the legislative arena and by the citizens.

- Dr. Rosen agreed to supply the committee with a list of cases to study of individuals on death row that he feels should not be there.

- There is a definite need for legislation regarding DNA testing in capital cases.

- The jury selection process could be improved by taking more of a representative of the community.

- There was discussion on mentally retarded individuals generally knowing right from wrong and whether they understand the consequences of their actions. There was discussion about whether someone with mental retardation is the culpable person that deserves the death penalty.

Support for Moratorium
Attorney James E. Ferguson, Charlotte

Attorney Ferguson was introduced and stated that there was a growing crisis in the system administering the death penalty. The North Carolina Academy of Trial Lawyers has called for a moratorium on the death penalty in North Carolina. As president of the Academy, Mr. Ferguson

asked the Committee to recommend a moratorium on the death penalty in North Carolina until the obvious flaws in the system can be corrected.

Mr. Ferguson stated that from articles in the Charlotte Observer the evidence is substantial that there is no consistency and predictability in administering the death sentence. Someone might receive the death penalty because of location; who the prosecutor is in a case and whether that prosecutor conformed his or her conduct to the law; who the defense lawyer is and whether he or she was capable of providing the kind of defense the defendant was entitled to; or on the basis of race.

The discussions of whether or not the committee can finalize a report by December suggests a need for a moratorium on the death penalty. As time passes, people are still moving toward the death chamber.

A survey by the Justice Project of Washington, D.C. has just released a conclusion that 80 percent of the people in the nation support some reform of the death penalty. Sixty-four percent support suspending executions entirely until issues on fairness in capital punishment can be resolved. This is consistent with a survey in North Carolina released this week by the KPC Research Group in Raleigh. That survey concluded that eighty-two percent of people in North Carolina believe there is a possibility that some innocent people are presently on death row. Ten percent believe there is no person who is innocent on death row.

The question is whether or not we proceed when eighty-two percent of the people surveyed question the fairness of the system. This same survey found that when asked, "What do you think is the appropriate penalty for someone who is convicted of first degree murder?, forty-one percent answered, "the death penalty." Forty-eight percent said, "life without parole."

The Observer poll stated that sixty-two percent of North Carolinians believe that there should be a moratorium on the death penalty when there exists a possibility of sentencing innocent people

to death. A poll commissioned by the North Carolina Academy of Trial Lawyers concluded that fifty-nine percent of North Carolinians believe there should be a moratorium on the death penalty.

The KPC poll stated that when asked whether there should be a ban on the death penalty for the mentally retarded, fifty-eight percent said, "there should be such a ban."

Mr. Ferguson said that two years ago he would not have been able to state the tide of opinion is rolling in this direction. Now people are now recognizing that the death penalty that they thought they believed in does not exist. It is a system that is supposed to operate to select only those who are guilty of the most heinous crimes and those who are the most deserving of death. This does not exist.

As these revelations take place, people begin to question whether we ought to continue with a system that takes it toll on the poor and on the innocent. People want to come up with a system that eliminates the risks that one will be sentenced to death who is innocent.

Mr. Ferguson stated that all of the statistics are consistent with the NBC News Wall Street Poll of July. He stated that today the call for a moratorium is more urgent than last spring; and he urged this committee to broaden its scope to consider a moratorium on the death penalty until these issues of flaws in the administration of the death penalty can be addressed.

The following points were discussed following Mr. Ferguson's presentation:

- Mr. Ferguson answered the question that it would not be undermining the system by placing a moratorium on the death penalty. The purpose of a moratorium would be to address and correct the flaws and improve the system.

- It would be important for prosecutors and others who support the death penalty to be involved in this examination of the flaws and making recommendations.

- Reasons for removing people from juries were discussed.

- It would be better if a moratorium could be passed legislatively because the legislature could prescribe what needs to be done (i.e. studies, etc.).

- Senator Ballance and Representative Sutton requested that the presenters submit their findings to this committee's staff so that they may prepare recommendations for the committee's review.

- Representative Sutton challenged the committee to keep in mind the key issue of mental retardation and the death penalty and suggested that something should be done regarding this issue before January.

- Regarding the mental retardation issue, the criteria that is accepted outside the courtroom needs to be used in defining mental retardation (i.e., IQ levels and history of inability to adapt). A procedure needs to be provided for raising this issue and making a decision before trial.

November 21, 2000 Meeting

At its fifth meeting the Committee conducted a review of all the information previously received by the Committee, and engaged in an open discussion of proposed findings and recommendations for the Committee's report.

The Committee adopted findings and recommendations regarding the issues of mental retardation, racial justice, and a moratorium on the death penalty.

December 19, 2000

The Committee met and adopted its final report containing its findings and recommendations to the Legislative Research Commission.

FINDINGS AND RECOMMENDATIONS

I. MENTAL RETARDATION ISSUE

Findings

The Committee makes the following findings regarding the application of the death penalty to mentally retarded persons:

1. There is a consensus in the medical community regarding the definition of mental retardation. A person is mentally retarded if he or she has "significantly sub average intellectual functioning, existing concurrently with impairment in adaptive functioning, and manifested before the age of 18". The term "significantly sub average intellectual functioning" indicates an intelligence quotient (I.Q.) of 70 or below on an individually administered standardized I.Q. test.

2. There is an emerging consensus in the United States that mentally retarded persons should not be subject to the death penalty. The practice of executing the mentally retarded has been forbidden for federal offenses. In addition, 13 of the 38 states that have capital punishment forbid the execution of persons suffering from mental retardation.

3. Mentally retarded persons with an I.Q. of 70 or below are in the lowest two to three percent of the population in intelligence. In addition, persons with mental retardation exhibit deficits in maturity and life skills.

4. The State of North Carolina does not allow a person who commits a capital crime while under the age of 17 to be sentenced to death. A person suffering from mental retardation, with an I.Q. of 70 or below, has a mental age of 12 or under.

5. Persons who suffer from mental retardation are some of our most disabled and most vulnerable citizens. Mental retardation affects both intellectual functioning (the ability to learn) and adaptive functioning (the ability to function in the everyday world). A mentally retarded person generally has limited reasoning ability, a tendency to act impulsively, and problems with memory and attention. Also, mentally retarded persons are often highly suggestible and solicitous toward authority figures.

Recommendation

The Committee recommends that the General Assembly enact Legislative Proposal I: AN ACT TO PROVIDE THAT A MENTALLY RETARDED PERSON CONVICTED OF FIRST DEGREE MURDER SHALL NOT BE SENTENCED TO DEATH.
http://www.ncga.state.nc.us/html2001/bills/AllVersions/Senate/S173v2.html
http://www.ncleg.net/html2001/bills/AllVersions/House/H141v1.html

II. RACIAL JUSTICE ISSUE

Findings

The Committee makes the following findings regarding the application of the death penalty to racial minorities:

1. More than a decade ago, the Supreme Court of North Carolina proclaimed that the people of North Carolina will not tolerate the corruption of their juries by racism and have recognized that the judicial system of a democratic society must operate evenhandedly if it is to command the respect and support of those subject to its jurisdiction.

2. Study after study has shown that persons convicted of murdering white victims face a substantially greater risk of being sentenced to death than do persons convicted of murdering people of color. The most well-known and comprehensive inquiry into the role of racial bias in capital sentencing is the Baldus Study, which examined homicides in Georgia in the 1970s. The Baldus study found that when all other factors are taken into account, a defendant is 4.3 times more likely to receive the death penalty if the victim is white. Two studies undertaken in North Carolina reached similar conclusions. One study from the 1970s looked at FBI data and reported evidence of bias based on the race of victim and defendant. When two or three aggravating circumstances were present, 17.6% of the cases where white persons were victims resulted in a death sentence and 8% where black persons were victims resulted in death sentences.

3. African Americans are consistently under-represented on capital juries in North Carolina. Prosecutors in capital cases have excluded African American jurors on the grounds that they attended historically African American colleges such as North Carolina A& T State University and Shaw University. African American jurors have been dismissed from jury service in death penalty cases for displaying what the prosecutor perceived to be a “militant” attitude.

4. North Carolina has executed three African Americans since reinstatement of the death penalty in 1977. The three men were condemned to die by all white juries or juries that included one member of their race; 34 of the 36 jurors who sentenced the men to die were white.

5. There exists historical evidence that minorities have been given the death penalty disproportionately in North Carolina. Documents submitted to the Committee indicate that of the 362 people put to death between 1910 and 1961, 283 (78%) were black. However, in recent years the question of whether – or to what extent - race is a significant factor in capital sentencing has become less clear. Indeed, of the 16 persons executed in North Carolina from the time the death penalty was reinstated in 1977 until December 19, 2000, 13 were white and 3 were black.

6. Raw numbers suggest African-Americans constitute about 22 percent of the population of this State, yet as of November 16, 2000, 121 (56%) of the 215 inmates on North Carolina's death row are black. Although these numbers are compelling, the Committee finds that it is difficult to establish that race is a factor in death penalty cases, and that statistics alone do not indicate discrimination or racial bias.

7. The causes for racial disparity in capital sentencing are uncertain, but the significance is clear.

8. Professors at the University of North Carolina at Chapel Hill are directing a comprehensive examination of racial bias in capital sentencing in North Carolina. Preliminary results are expected to be available early in 2001.

9. State laws should be designed to ensure fairness in all capital cases, and the same standards should be applied regardless of the race of the defendant or the victim.

Recommendation:

The Committee recommends that the General Assembly enact Legislative Proposal II: AN ACT TO PROVIDE FOR THE FAIR AND RELIABLE IMPOSITION OF CAPITAL SENTENCES.

http://www.ncga.state.nc.us/html2001/bills/AllVersions/Senate/S171v1.html
http://www.ncleg.net/html2001/bills/AllVersions/House/H140v1.html

III. DEATH PENALTY MORATORIUM ISSUE

Findings

The Committee makes the following findings regarding the application of the death penalty:

1. Even one unmerited execution is too many to be tolerated.

2. Significant questions have been raised regarding the fairness of the State's capital punishment system.

3. Delaying executions does not equal releasing death row inmates or overturning jury verdicts.

4. Since reinstatement of the death penalty in 1977, three innocent persons have been removed from the list of those to be executed.

5. A delay would permit the State to systematically examine other significant deficiencies in the capital punishment system not examined by this committee.

6. The interests of justice and fairness outweigh the State's interests in continuing to conduct executions at this time

Recommendations:

1. The Committee recommends that the General Assembly enact Legislative Proposal III: AN ACT TO ESTABLISH A MORATORIUM ON CARRYING OUT THE DEATH PENALTY.

http://www.ncga.state.nc.us/html2001/bills/AllVersions/Senate/S172v1.html

2. The Committee recommends that the moratorium remain in place until such time that the State implements policies that ensure that death penalty cases are administered fairly and impartially.

3. The Committee recommends that during the period of the moratorium, all matters relating to the administration of the death penalty be studied and analyzed to determine whether administration of the death penalty is consistent with constitutional principles and requirements of fairness, justice, equality and due process.

4. The Committee recommends that matters studied during the period of the moratorium shall include the following:

    a. The adequacy of representation of capital defendants.

    b. Whether innocent persons have been sentenced to death and the reasons these wrongful convictions have occurred.

    c. Whether mentally retarded persons should be sentenced to death.

    d. Procedures to ensure that persons sentenced to death have access to forensic evidence and modern testing of such evidence, including DNA testing, when such testing could result in new evidence of innocence.

    e. Procedures to identify and eradicate prosecutorial misconduct.

    f. Racial disparities in capital charging, prosecuting and sentencing decisions.

    g. Disproportionality in capital charging, prosecuting.

    h. Any other law or procedure to ensure that death penalty cases are administered fairly and impartially, in accordance with the Constitution.

APPENDIX A

SESSION LAWS 1999 - 395

AN ACT TO AUTHORIZE STUDIES BY THE LEGISLATIVE RESEARCH COMMISSION, TO CREATE VARIOUS STUDY COMMISSIONS, TO DIRECT STATE AGENCIES AND LEGISLATIVE OVERSIGHT COMMITTEES AND COMMISSIONS TO STUDY SPECIFIED ISSUES, AND TO AMEND OTHER LAWS.

The General Assembly of North Carolina enacts:

PART I.-----TITLE

Section 1. This act shall be known as "The Studies Act of 1999".

PART II.-----LEGISLATIVE RESEARCH COMMISSION

Section 2.1. The Legislative Research Commission may study the topics listed below. When applicable, the bill or resolution that originally proposed the issue or study and the name of the sponsor is listed. Unless otherwise specified, the listed bill or resolution refers to the measure introduced in the 1999 Regular Session of the 1999 General Assembly. The Commission may consider the original bill or resolution in determining the nature, scope, and aspects of the study. The following groupings are for reference only:

…

(11) Criminal laws issues:

a. Prohibiting death sentence for mentally retarded persons (S.B. 334 - Ballance).

b. Prohibiting death sentence obtained on basis of race (S.B. 991 - Ballance).

PART XXII.-----BILL AND RESOLUTIONS REFERENCES

Section 22.1. The listing of the original bill or resolution in this act is for reference purposes only and shall not be deemed to have incorporated by reference any of the substantive provisions contained in the original bill or resolution.

PART XXIII.-----EFFECTIVE DATE AND APPLICABILITY

Section 23.1. Except as otherwise specifically provided, this act becomes effective July 1, 1999. If a study is authorized both in this act and the Current Operations Appropriations Act of 1999, the study shall be implemented in accordance with the Current Operations Appropriations Act of 1999 as ratified.

In the General Assembly read three times and ratified this the 21st day of July, 1999.

s/ Dennis A. Wicker
President of the Senate

s/ James B. Black
Speaker of the House of Representatives

s/ James B. Hunt, Jr.
Governor

Approved 9:03 p.m. this 5th day of August, 1999

APPENDIX B

CAPITAL PUNISHMENT - MENTALLY RETARDED AND RACE BASIS COMMITTEE (LRC)

1999-2001

S.L. 1999-395

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