HOUSE INTERIM STUDY COMMITTEE ON CAPITAL PUNISHMENT

REPORT TO THE

2007 GENERAL ASSEMBLY

OF NORTH CAROLINA

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February 9, 2007

TO THE MEMBERS OF THE HOUSE OF REPRESENTATIVES OF THE 2007 GENERAL ASSEMBLY OF NORTH CAROLINA:

The House Interim Study Committee on Capital Punishment herewith submits to you for your consideration its report.

Respectfully submitted,

_____	_____
Representative Joe Hackney	Representative Beverly Earle
Co-chair	Co-chair

PREFACE

The House Interim Study Committee on Capital Punishment, established by the Speaker of the House of Representatives on November 9, 2005, is authorized to study all aspects of capital punishment.

The Committee is cochaired by Representative Joe Hackney and Representative Beverly Earle. The committee clerk maintains a notebook containing the committee minutes and all information presented to the committee.

HOUSE INTERIM STUDY COMMITTEE ON CAPITAL PUNISHMENT
MEMBERSHIP LIST

Rep. Joe Hackney, Co-Chair	Rep. Beverly Earle, Co-Chair
Rep. W. Pete Cunningham, Vice-Chair	Rep. Daniel McComas
Rep. Jeffrey L. Barnhart	Rep. Henry M. Michaux, Jr.
Rep. Walter G. Church, Sr.	Rep. Bill Owens
Rep. Nelson Cole	Rep. Earline W. Parmon
The Honorable Arlie F. Culp	The Honorable Wilma M. Sherrill
The Honorable Rick L. Eddins	Rep. Bonner L. Stiller
Rep. Richard B. Glazier	Rep. Ronnie N. Sutton
Rep. Pricey Harrison	Rep. Joe P. Tolson
Rep. L. Hugh Holliman	The Honorable Douglas S. Vinson
Rep. Marvin W. Lucas	Rep. William L. Wainwright
Rep. Paul Luebke	Rep. Jennifer Weiss
	Rep. Roger West
	Rep. W. A. Wilkins

COMMITTEE PROCEEDINGS

December 19, 2005

The House Select Study Committee on Capital Punishment held its first meeting on Monday, December 19, 2005, at 1:00 p.m. in Room 643 of the Legislative Office Building. Representative Joe Hackney, Co-Chair called the meeting to order. The following members of the Committee were present: Representative Beverly Earle, Co-Chair, Representatives Jeff Barnhart, Arlie Culp, Rick Eddins, Rick Glazier, Pricey Harrison, Hugh Holliman, Marvin Lucas, Paul Luebke, Danny McComas, Mickey Michaux, Earline Parmon, Bonner Stiller, Ronnie Sutton, Doug Vinson, Jennifer Weiss, Roger West and Winkie Wilkins. Copies of the meeting agenda and the Visitor Registration are attached.

Representative Hackney welcomed the members and visitors and recognized Co-Chair Earle for opening comments. She stated that the Committee was not about abolishing the death penalty, but rather an attempt to insure that the right person is punished. She said that the Committee would work to identify and correct existing flaws in the system and welcomed input from interested parties.

Co-Chair Hackney said that he felt it was appropriate to have a forum for discussion of the problems and alleged problems in the administration of the death penalty in North Carolina and welcomed comment from all sides of the issue to allow for fair review.

Representative Hackney introduced the members of the Committee. He also introduced Ms. Susan Sitze and Mr. Hal Pell who would serve as Committee Counsel, and Ms. Emily Reynolds Freeman, the Committee Clerk.

Co-Chair Hackney stated that Chief Justice Lake, who was on the agenda, had informed the Co-Chairs earlier in the day that he would be unable to attend the meeting. He noted that the Committee would be briefed on the history of capital punishment law in North Carolina, and that the Committee would hear from several people had been invited to help identify issues for study.

Mr. Pell was recognized and presented a brief history of capital punishment. His power point presentation is included in the attachments to the minutes. Mr. Pell also provided the members with copies of General Statute 14-17 and 15A-2000.

Mr. Pell offered a summary of the judicial review process. He called attention to a chart that reviewed the stages in a death penalty case. Mr. Pell noted that a jury must find an aggravating factor in order to impose a death sentence and said that those aggravating factors are prescribed by statute and may be found in Chapter 15A-2000.

Mr. Pell discussed mitigating factors that are also included in Chapter 15A-2000. He said that the state would try to prove one or more aggravating factors and the defense presents evidence relating to mitigating factors. The jury must find aggravating factors unanimously, but need not find mitigating factors unanimously. The jury must then weigh the mitigating factors and if they are insufficient to outweigh the aggravating factors, the jury may impose the death sentence.

Mr. Pell discussed the appeal process and the post-conviction process. Brief discussion followed regarding disclosure of files in the post conviction stage. Co-Chair Earle asked whether there was a penalty for not disclosing all information. Mr. Pell stated that currently there is no statute that makes this a criminal violation. Representative Harrison asked if other states provide criminal sanctions for failure to comply with disclosure. Mr. Pell said he was not aware of provisions of other states and would research that issue. Co-Chair Hackney added that the issue of disclosure would possibly be something that the Committee would like to study.

Mr. Pell continued with the discussion of the Federal Habeas Relief stage of judicial review and the clemency stage. The power point presentation is included in the attachments.

Representative Glazier requested further information regarding the reversal rate in capital cases by the 4th Circuit over the last ten years versus the other circuits in the country.

Representative Sutton requested information on both the state and federal level regarding how much time elapses once all paperwork is sent forward to the next level before that case is heard.

Representative Luebke asked if there is clarity in the constitution as to guidelines for the governor when determining clemency. Mr. Pell replied that the constitution simply states that the governor has clemency power.

Representative Eddins requested that the Committee be provided with statistics regarding the number of people who have been convicted of murder versus the number who served time and are out on parole, and statistics on the total number of people who have been convicted of first and second-degree murder for the last 10-15 years.

Representative Vinson asked for information as to why convicted murders were taken off death row. Mr. Pell replied that such information would probably require going through records of each case.

Co-Chair Hackney noted that the Committee might wish to receive general statistical information and that there may be academic studies in this area that could prove helpful. He said that if there are areas of statistical inquiry that members of the

Commission want, the request should be made to Mr. Pell. He also noted that persons outside the Commission were invited to offer suggestions to Mr. Pell.

Representative Harrison requested information regarding the number of people on death row as a result of the felony murder rule. Mr. Pell replied that the Administrative Office of the Courts does not keep statistics of felony murder convictions because they are deemed to be first-degree murder whether they are felony murder or pre-meditated deliberate murder.

Representative Barnhart requested a list of the number of people who have been sent to death row since 1977, how long each has been there, and what their current status is. He also requested information regarding what the Supreme Court looks for when reviewing murder cases.

Judge Narley Cashwell, North Carolina Superior Court, was introduced to address the Committee. Judge Cashwell requested that the record reflect that he was not before the Committee as, nor did he purport to be a representative of the North Carolina Conference of Superior Court Judges, any other group or organization of judges, or of other individual judges. He stated that he neither represented nor spoke for any of those groups or individuals and that anything that he said or any opinion he expressed was his and his alone and that he suspected may be subject to being agreed upon or disagreed with by other members of the judiciary.

Judge Cashwell stated that as a superior court judge, he had no agenda, no goal and no opinion as to whether the law of the State of North Carolina should, or should not provide for capital punishment. He noted that he is sworn to uphold and apply the law and assure a fair trial regardless of the consequences, and that as a judge he had no opinion as to what the punishment for first-degree murder or for any other crime is or should be. He said that he supports the law of the state and therefore supports the law of capital punishment because it is the law until changed by the General Assembly.

Judge Cashwell stated that he had analyzed the mandates to the Committee and some of the issues that were to be studied, and had concluded that those issues regarding capital punishment may be grouped into three areas. Those areas are the guilt phase, sentencing and post-trial or post-sentencing review. He said that based on the mandates, issues that could be studied within the area of the guilt phase are: attorney competence and the guidelines and standards for attorneys who wish to represent defendants charged with first-degree murder; the issues of prosecutorial misconduct; and the issue of the felony murder rule and its impact. He noted that there must be an objective standard or measure of competence to determine whether an attorney's conduct in a given case is competent or not. He said that in the case of Strickland v. Washington, the United States Supreme Court established standards that our Supreme Court has adopted and is a test in part of what constitutes competence. He further stated that prosecutorial misconduct should also be considered within the context of the guilt phase. He said that such

misconduct is more likely to exist in the guilt phase and is mostly centered in questions concerning the discovery of evidence or the extent to which the discovery of evidence is required of the state. He said that the enactment of expanded discovery statutes and the procedures with subsequent judicial review and interpretation would sufficiently address this issue. Judge Cashwell said consideration of the application of the felony murder rule to capital cases should be grouped within the guilt phase area. He said that the felony murder rule is a legal theory of a basis for a conviction of first-degree murder. He added that similarly, a murder based upon premeditation and deliberation is a legal theory of a basis for a conviction of first-degree murder. He said that the issue of felony murder as it applies to capital punishment should lead one to certain questions. He asked if an interpretation of this issue for study suggest the felony murder rule should be repealed as a basis for first-degree murder. He stated that he had never had a death recommendation where the only legal basis for a first-degree murder conviction was felony murder. He said that when a death recommendation has occurred, the defendant's guilt was based upon either premeditation or deliberation alone, or upon the theory of both premeditation and deliberation and felony murder. He advised the Committee to bear in mind that the rules of law and evidence, which apply at a trial upon a charge of first-degree murder, also apply at a trial upon any other criminal charge even though the penalty may be different.

Judge Cashwell said that the study of issues within the area of the sentencing phase might include competence of counsel and prosecutorial misconduct, and also disproportionate racial impact and whether or not persons not guilty of first-degree murder are on death row. He suggested that the latter two issues are in large part issues of, or pertaining to jurors. He noted that how we ensure that the pools of jurors from which a trial jury is chosen includes sufficient numbers of minority citizens so that the jury reflects the community is an issue to be determined. Regarding the question of whether the death penalty is sought more often against minorities, Judge Cashwell said it had been his experience that district attorneys seek the death penalty based on the facts of the case and its strengths or weaknesses, and on the violent criminal history of the defendant, rather than upon the race of the defendant or the victim.

Judge Cashwell said that the state has an excellent post-conviction appropriate relief statute and is experienced in thorough appellate courts, both of which have granted relief to individuals whose guilt or innocence has been in question. He pointed out that the post-conviction statute that we have in North Carolina is not constitutionally mandated by the Constitution of the United States.

Judge Cashwell said that the guilt phase and the sentencing phase of any trial are similar but are not the same and that the issues in each should be addressed carefully, but individually. He urged the committee to scrutinize the offerings of those groups and individuals who either support or oppose capital punishment and seek out the input of defense attorneys, district attorneys and judges who actually have participated in such

trials. He further urged the committee to request that the State Bar offer its thoughts on ways to address attorneys' situations who have been determined to be ineffective or incompetent, as well as of prosecutors who have engaged in misconduct with a view toward the State Bar finding a way of preventing a reoccurrence of these things.

Co-Chair Hackney asked Judge Cashwell if he felt that North Carolina had succeeded in making sure we have competent attorneys in death cases or if he felt additional legislation was necessary. He further asked if the resources were adequate for providing these competent attorneys. Judge Cashwell said that for the most part, North Carolina's creation of the Indigent Defense Services has resulted in a great job of establishing minimum standards. He said that in order to lure back those attorneys who are experienced defense attorneys more resources would be necessary.

Representative Sutton asked Judge Cashwell to comment on motions for appropriate relief and the time that elapses before they are scheduled for hearing. Judge Cashwell replied that in Wake County there have been very few motions under the current statute and that they have been moved within a matter of weeks after the paperwork has been filed. He said that he saw no problem with the committee studying the possibility of setting a mandatory time limit within which those motions should be heard.

Representative Weiss asked if Judge Cashwell had statistics regarding the number of potentially capital cases that are arraigned in Wake County in a typical year, how many cases are actually tried capitally and how many result in pleas of less than life. He replied that he did not bring any statistics, but that he was sure that the information could be obtained.

Representative Michaux asked Judge Cashwell to comment on the quality of representation particularly in capital cases noting that it is often said that the justice ones gets is the justice that one pays for. Judge Cashwell stated that in capital cases in his courtroom he did not feel that the fact that the attorneys were court appointed as opposed to being retained made a significant difference. He added that he felt it was his role as a judge to make sure that attorneys conduct a certain minimum performance. He added that the court appointed attorney is subject to monies for experts depending upon what the court allows and that the well-heeled defendant can utilize whatever resources they have.

Representative Luebke suggested that the Committee look into the situation of the make-up of jury pools.

Mr. C. Branson Vickory, III, District Attorney, 8th Prosecutorial District and President, North Carolina Conference of District Attorneys was recognized. He said that the conference has taken the position that the changes that have been made in recent years have been such that the death penalty is still a viable punishment. He said that it is

workable, it promotes justice, it protects the victims' as well as the defendants' rights and it properly punishes the worst murders.

Mr. Vickory spoke of prosecutorial misconduct and noted that district attorneys are held to a higher standard than most attorneys and have a more restrictive ethical code. He said that the role of the district attorney is to seek justice and not merely to convict. Mr. Vickory said that failure to comply or abide by discovery laws carries procedural penalties regarding the case, as well fines, judicial action with regard to whether or not the district attorney can practice in the court before a particular judge, or even as far as a jail sentence.

Mr. Vickory spoke of adequacy of counsel noting that Indigent Defense Services has helped with the creation of higher standards and has assisted in acquiring experts on behalf of defendants charged with capital crimes. He noted that the Center for Death Penalty Litigation also serves as a source for defense attorneys representing capital defendants.

Mr. Vickory said that it is the position of the district attorneys that the death penalty is imposed based purely on conduct and not on race. He said that each case is unique and has to be looked upon on its on merits and looked upon with the aggravating factors and mitigating factors in mind. He noted that general population statistics are irrelevant and that the prison population is not a reflection of the society. Mr. Vickory said that if it was a goal of the Committee to reach some type of reflection of the community, it is not something that can be addressed within the legal or judicial system. He said that the death row population is a reflection of the general prison population. He said the Supreme Court reviews every death penalty case for passion and prejudice and also for proportionality. Mr. Vickory called attention to McClesky v. Zant where the United States Supreme Court ruled that the studies related to the death penalty and race produced not statistically significant evidence that the race of the victim or the defendant play a part in either the prosecution or the jury's capital decision.

Mr. Vickory spoke of innocence issues saying there are anti-death penalty reports that have indicated that there are over 100 innocent people that have been released from death row throughout the country. He urged the Committee to review such studies closely noting that many who are released from death row are not necessarily released because they are innocent. He said that in North Carolina all evidence that has ever been presented has indicated that there has been 100 % accuracy in detecting wrongful convictions before an actual execution, and that there is no proof that any innocent person has been executed in the state.

Mr. Vickory said that the judicial review process is fair and thorough and that the appellate process takes approximately 10 years to complete addressing any procedural errors at trial, and includes numerous safeguards afforded to the defendant.

Mr. Vickory noted that the General Assembly has passed legislation that has improved the capital litigation process including post-conviction discovery, the institution of the Office of Indigent Defense Service, DA discretion in capital cases, new discovery laws and the creation of various studies. He noted the need for additional resources to assist in carrying out the requirements of the discovery laws, more manpower and needed resources to allow for "e"discovery. He added that there have been problems in the adequacy of counsel field. He suggested that any attorney who comes into court and claims during a post-conviction hearing that he has been ineffective and incompetent in representing a defendant should not be allowed to continue to represent capital defendants and said that this might be an issue for the Committee to address.

Mr. Vickory closed by reading a statement of the position taken by the district attorneys on the death penalty. The statement noted that "The Conference of District Attorneys supports the penalty of death when the district attorney, after reviewing the specific facts of the case and applying the law finds it is a just punishment to pursue, and after a jury has heard all admissible evidence and finds that the nature of the crime or the individual merits its application. This appropriate application of the death penalty promotes the effective administration of criminal justice in North Carolina. The Conference of District Attorneys encourages an honest and thorough examination of individual cases through appropriate judicial and executive review. The Conference opposes a death penalty moratorium, but supports a complete study of the procedures applicable to the death penalty process. Upon an accurate and unbiased assessment, the Conference of District Attorneys welcomes a legislative or public vote on the death penalty as a punishment for the most egregious murders." A copy of the entire statement is attached to the minutes.

A copy of the power point presentation is included in the attachments to the minutes.

Representative Holliman asked how DA discretion had affected the number of first-degree murder cases. Mr. Vickory replied that he did not have statistics on that issue, but that he was possibly trying 50% fewer. Co-Chair Hackney stated that it might be helpful for the Conference to conduct a survey to determine the number.

Representative Stiller requested that each of the speakers provide the staff with a list of their recommendations.

Mr. Malcolm Ray (Tye) Hunter, Jr., Director, Office of Indigent Defense Services was recognized. He offered comment on a few questions that had been posed by Commission members earlier in the meeting. With regard to whether anyone had been executed based only on felony murder charges, Mr. Hunter stated that there had been three such executions in the past two years. He further stated that the impact of DA discretion had resulted in the number of trials being cut in half.

Mr. Hunter stated that the death penalty is rarely used against convicted murders in North Carolina. He said that he thought that the citizens of the state desired the death penalty that is reserved for a very small group of accurately identified "worst of the worst" cases. He said that since July 1, 2001, the Indigent Defense Services has been responsible for appointing and paying defense lawyers in capital cases and that approximately 1200 cases, originally charged with murder on or after July 1, 2001, have been closed. Of those cases, less than 1% ended in death verdicts. He said that 16% resulted in a conviction, as charged, of first-degree murder and received life sentences. He said that just more than 17% of the cases charged with first-degree murder were dismissed or were acquitted. He said that statistically speaking, of the people originally charged with a warrant of first-degree murder since July 1, 2001, there is almost the same chance of having the case dismissed or acquitted as being convicted as charged. Mr. Hunter added that about 34% of the first-degree cases end up in pleas or trials to second-degree murder.

Mr. Hunter said that North Carolina has a very broad death penalty statute and almost every homicide is charged as a first-degree murder. He added that the great majority of the first-degree murders are potentially a capital case under the current statute. He said that the broad statute does not result in a large number of death verdicts. Mr. Hunter stated that a reformed and more tailored statute, that would remove from the death penalty system those cases that are not going to end up being capital cases, would result in tremendous savings of resources. He added that a tighter statute would decrease the opportunity for bias and arbitrary results. He said that there is a great opportunity for arbitrariness and bias to creep in when the minimum standards for having a case eligible to be a capital case are so low and so broad so that most intentional and some unintentional homicides are eligible. Mr. Hunter said that the current system also does not necessarily identify the "worst of the worst."

Mr. Hunter stated that currently there are 174 people on death row and that most were convicted prior to recent reforms. He said that many of the 174, if tried under recent reforms, would have not received the same verdict and that prosecutors would not have prosecuted them in the same way. He said that he would like to see the Commission take a look at this issue and determine whether there is some systematic way to look at those cases that were decided prior to recent reforms.

Mr. Jack Boger, Wade Edwards Distinguished Professor of Law, University of North Carolina at Chapel Hill was recognized. Professor Boger stated that the current capital statute is exceedingly broad and that the enactment of a narrower statute would result in avoiding the risk of arbitrariness. He suggested that the Commission review the statutes of Virginia and Massachusetts.

Professor Boger discussed racial disparities in North Carolina's statutes. He said that between July 1, 2001 and the present, there have been 128 capital trials in the state. Of that number, 75% involved African American, Native American, Latino or Asian

defendants. He said that the census shows that whites are now 72% of North Carolina's population so there is almost an inverse relationship with roughly ¾ of the population being white and ¼ of the capital trials white. Professor Boger stated that a study he conducted of all capital cases between 1993 and 1997 and found that there were 1786 non-white victims and 1806 white victims. Of the 99 death sentences imposed during that period, 66 were for those whose victims were white and 33 for those whose victims were non-white. He further stated that there were large geographical disparities among districts and not just between rural and urban districts.

Professor Boger spoke regarding post-conviction hearings that were previously held for capital defendants and questioned whether the General Assembly should reinstate a guarantee of a full and fair post-conviction evidentiary hearing.

Professor Boger commented on the Innocence Commission established under the leadership of Chief Justice Lake and noted that while it has been a positive achievement, it is not the end of the problem in capital cases. He urged the members to make sure there is a way open for innocence to be an issue that can be heard and resolved in every capital case.

Professor Boger noted that recent reforms do not apply to a vast majority of people who are currently on death row, and suggested that the Commission might wish to determine whether there needs to be some retrospective application of those reformed procedures.

Professor Boger spoke briefly regarding the problem of race discrimination and Batson v. Kentucky as a remedy. He said that the way around this is to have a statute that would say that anytime a juror is removed and challenged on racial grounds, that juror must be replaced with someone of same race.

Professor Boger referred to a study, "The Cost of Processing Murder Cases in North Carolina," by Phillip Cook of Duke University that provides much information regarding the cost of imposing the death penalty.

Co-Chair Hackney stated to the Commission that he and Co-Chair Earle to set future meetings based on various topics and welcomed the input of the members as well as interested parties.

The meeting adjourned at 4:45 p.m.

February 2, 2006

The House Select Study Committee on Capital Punishment met on Thursday, February 2, 2006, at 9:30 a.m. in Room 643 of the Legislative Office Building. Representative Joe Hackney, Co-Chair called the meeting to order. The following members of the Committee were present: Representative Beverly Earle, Co-Chair, Representatives Jeff Barnhart, Walter Church, Arlie Culp, Pete Cunningham, Rick Eddins, Pricey Harrison, Hugh Holliman, Marvin Lucas, Danny McComas, Mickey Michaux, Wilma Sherrill, Bonner Stiller, Ronnie Sutton, Joe Tolson, William Wainwright, Jennifer Weiss, and Winkie Wilkins. Copies of the meeting agenda and the Visitor Registration are attached.

Co-Chair Hackney welcomed the members and visitors to the meeting. He announced the addition of four new members to the Committee. Those members are Representatives Church, Cole, Owens and Tolson. He also stated that two handouts had been distributed. The first was a letter from the Conference of District Attorneys that responded to questions that had been raised during the December 19, 2005 meeting of the Commission and offered suggested improvements to the capital case process. A packet of information regarding inadequacy of counsel was provided by the North Carolina Academy of Trial Lawyers.

Ms. Susan Sitze, Counsel to the Committee, was recognized for an overview of statistical information that had been requested during the December meeting of the Committee. Ms. Sitze referenced handouts that each member had been given and noted that she and Hal Pell, Counsel to the Committee, had obtained some of the information that had been requested and were still in the process of gathering additional information. She noted that Mr. Pell was on active duty with the military and would not be present at the meeting. The first document discussed by Ms. Sitze showed all executions that have been carried out in North Carolina since the death penalty was reinstituted in 1977. Ms. Sitze reviewed a handout showing a list of all offenders who are currently on death row in North Carolina. She noted that the "received" date on the list did not necessarily reflect the offenders' conviction date in all cases. She said that if a defendant had been granted a new trial and was removed from death row for that trial, the date would reflect the second time the person had been placed on death row, and not the time that the crime occurred. Ms. Sitze reviewed a chart showing persons removed from death row for various reasons. A handout regarding future possible executions was briefly discussed. The document, prepared by the Office of the Attorney General, indicates current death row inmates who have completed, or are in the process of completing state and federal post-conviction proceedings, and could possibly face execution dates during 2006. Ms. Sitze discussed a packet of general statistical information regarding age, sex and race of murder victims. The information was provided by the State Bureau of Investigation and reflects statistics for the year 2004, which is the most recent year that statistics are available.

Representative Harrison asked if information had been received regarding the breakdown of the felony murder rule. Ms. Sitze replied that she was in the process of attempting to gather that information, but that it was more complicated that a straight statistical print off. Co-Chair Hackney questioned whether this would be information that would be possible for staff to obtain, or if it would require a separate survey. Ms. Sitze replied that they probably would not be able to get a totally accurate breakdown of statistics, but rather a more general idea of approximate percentages.

Co-Chair Hackney noted that the topic of the days' meeting was adequacy of counsel. He reminded the Committee that the General Assembly had reformed the process of appointment of counsel some time ago and that the remainder of the meeting would focus on how that system works, how it is funded, how well it is funded and what, if any, suggestions might be made for additional improvements.

Mr. Douglas Holbrook, Fiscal Analyst, Fiscal Research Division, was recognized to offer cost data and statistics for capital trials. A handout was distributed to the Committee and is included in the attachments to the minutes. He stated that capital trials are generally the most demanding type of case handled by the courts and that they place tremendous pressure on the prosecutor's office, on defense attorneys, on the court's time and on the Justice Department. He said that the most difficult cost factors to determine have to do with the courts system due to the complexity of their work. He referenced a study on costs of the death penalty completed by the Sanford Institute at Duke in 1993, but noted that it had become obsolete within a year of its publication. Mr. Holbrook stated that in order to better determine the court costs, an outside consultant would be needed.

Mr. Holbrook continued his presentation by commenting on Indigent Defense costs. He said that generally, capital representation for the defendant is done by the Indigent Defense Services' Capital Defender's Office. He said that if the Capital Defender's Office of the Office of Indigent Defense Services is provides representation through privately assigned counsel, they consider a case capital when a charge of murder has been entered and staff a case as if it were capital as long as there is a possibility that the trial could be capital and could involve the death penalty. He said that under current rules, the prosecutor is required to indicate whether he intends to seek the death penalty at a pre-trial conference that can take place a fair amount of time after indictment. Up until that time, the Office of Indigent Defense Services will fund 2 lawyers to staff a case either through the Capital Defender's Office or through privately assigned counsel until the point at the pre-trial conference when the District Attorney articulates whether or not the death penalty will be sought. He said that most of the work is done by the Capital Defender's Office and some is done through privately assigned counsel. If privately assigned counsel is assigned, two lawyers are staffed to the defendant at a rate of $85 per hour, whereas in any other criminal case, the rate would be $65 per hour for one lawyer. Mr. Holbrook said that the budget for the Capital Defender's Office in 2003-04 was $1.1 million and that the Office of Indigent Defense Services expended $10.7 million through

the Attorney Fee Fund for capital defense. He said that the number of cases handled by the Capital Defender's Office has grown. He said that the number of cases handled by the Fee Fund has not grown, but the costs of providing expert witnesses are included in the $10.7 million.

Mr. Holbrook said that the appellate work on the state side representing the prosecution is handled by the Department of Justice by 13 lawyers from the Capital Litigation Section with an overall budget of about $1.5 million.

Co-Chair Earle asked what determines whether a person is indigent. Mr. Holbrook replied that a person can request court-appointed counsel and a judge makes the determination based on the receipt of information that the defendant must provide. He added that in making that decision the judge will take into consideration the nature of the charge and the trial that is being faced.

Mr. Tye Hunter, Office of Indigent Defense Services, was recognized and confirmed that the decision is a judicial determination, but that if it is found that a defendant does have the resources for the defense, the Office of Indigent Defense will do all they can to insure that those resources go toward the cost of representation. He added that the process is complicated and that family members sometimes freeze assets.

Co-Chair Hackney added that everyone who is convicted and who has appointed lawyers gets a judgment entered against them automatically for the amount of the cost of that service.

Mr. Holbrook said that the Office of Indigent Defense Services has the authority to do a number of things and has a fairly aggressive process to recoup money from those who have been determined to not be indigent, or have assets available to them to defray the cost of their representation, and that they recoup several million dollars yearly, not just on capital cases, but on any type of case. Co-Chair Hackney noted that the Committee might wish to receive specifics on the amount of money that is recovered.

Representative Sherrill asked how much money is recouped. Mr. Hunter stated that they recoup about ten cents on the dollar from less serious cases, but that it is difficult to recoup any money if the defendant is sent to prison. Co-Chair Hackney added that the judgment expires after ten years.

Representative Wilkins asked if a judgment for recoupment is issued in every cased that involves indigent services and goes to final disposition in court. Mr. Holbrook replied that this is true if the defendant is found guilty.

Representative Holliman noted the drop in the number of capital cases and asked if there should not be an overall drop in allocations to the Indigent Defense Fund and to the Office of the Attorney General. Mr. Holbrook replied that the Office of the Attorney

General is still handling cases from the time that there were 60 or more yearly. He said that the Office of Indigent Defense Services is focusing more money into the Capital Defender's Office that does yield a savings, but the overall appropriation of that fund has continued to fall short each year. He said that the appellate work from previous years is stacked up and continues to require work.

Representative Eddins stated that he felt that there should be some immediate savings on the front end since there are not as many capital cases each year. Mr. Holbrook said that the Office of Indigent Defense Services has an annual report requirement regarding their expenditures, and that this year's budget added a requirement for them to look at ways to show savings.

Representative Cunningham asked how North Carolina's Indigent Defense Services compared to other states in the southeast. Mr. Holbrook replied that he did not know, and added that states differ in their requirements and in the way they conduct indigent representation making a comparison difficult. Representative Cunningham indicated that he would like to receive further information about a comparison.

Representative Cunningham asked how a decision is reached to determine the amount that is spent on each case. Mr. Holbrook replied that the General Assembly has authorized the Office of Indigent Defense Services to set rules for payment to privately assigned counsel. He added that some portion of the budget within the Office of Indigent Defense Services is for public defenders and that they are state employees whose compensation is set by the General Assembly in the budget bill.

Representative Wilkins asked if the Office of Indigent Defense Services pays for the services of private investigators. Mr. Holbrook replied that they do.

Representative Holliman asked how payment is determined for expert witnesses. Mr. Holbrook replied that there is an hourly fee set by the judges.

Co-Chair Hackney noted that there are 10 lawyers in the Department of Justice doing direct appeal and 13 lawyers doing post-conviction work for a total of 23 lawyers doing capital work.

Mr. Holbrook said that the group of 10 lawyers in the special prosecutions section handle all kinds of matters cannot determine how much of their time is being spent on capital work versus the other work that they do. He said that they do the direct appeals and that the Capital Litigation Section handles the Motions for Appropriate Relief.

Co-Chair Hackney noted that the Attorney General's Office was invited to make a presentation on today's program and declined to do so.

Representative Culp asked what accounted for the decline in the number of capital cases over recent years.

Ms. Sitze replied that the biggest factor that led to the decline is that prior to 2001, if a District Attorney charged first degree murder, there was absolutely no choice but to seek the death penalty. In 2001, the General Assembly granted prosecutors discretion in that they could still charge first-degree murder and choose not to seek the death penalty and only ask for life without parole.

Co-Chair Hackney added that many think that the improved representation provided by the Capital Defender's Office has also impacted the number of capital cases.

Mr. Robert Hurley, North Carolina Capital Defender, was recognized to address the Committee regarding quality of counsel issues. Mr. Hurley clarified a statement made by Mr. Holbrook who said that most of the representation is provided by the Capital Defender's Office. Mr. Hurley stated that most of the representation is provided by privately assigned counsel and that the Office of the Capital Defender probably handles less than 10% of the cases. He further stated that they do not automatically appoint two attorneys in first-degree murder cases. He said that they appoint two attorneys if there is a Rule 24 hearing and the state says it is going to seek the death penalty and the judge allows it, or if the prosecutor tells the first attorney that has been appointed that they plan to seek the death penalty. He said that under those circumstances, they will appoint a second attorney and that this occurs in about 30-40% of the cases.

Mr. Hurley stated that as the Capital Defender, he is responsible for appointing attorneys in every first-degree murder case including capital cases, is responsible for reviewing the applications of attorneys who apply to be on the capital roster, and for monitoring the performance of counsel who have been assigned to represent indigent defendants. He said that significant progress has been made since the Office of Indigent Defense Services has been established, but that the progress made at the trial level does nothing to help approximately 150 death row inmates who received the death penalty prior to the creation of IDS.

Mr. Hurley discussed the quality of counsel at the trial level and post-conviction level. He noted reasons for the improvement in the quality of counsel in North Carolina including an increase in the standards when selecting lawyers, mandatory consultation and mandatory continuing legal education as well as the fact that appointment of counsel is now done through the Office of the Capital Defender and not by the superior court judges in each county.

Mr. Hurley noted some concerns regarding maintaining the progress that has been made saying that prosecutors are over-charging and using the death penalty more than is warranted causing the Office of Indigent Defense Services and the Capital Defender's

Office to expend a fair amount of money gearing up to defend these cases which has tremendous ramifications for the budgets of their offices and the Attorney General's office. He also noted concern regarding the hourly rate paid to attorneys handling capital cases and said that the availability of lawyers is stretched too thin.

Mr. Hurley discussed the quality of counsel received by those defendants who received the death penalty prior to the Office of Indigent Defense Services coming into existence in 2001 saying that many of those defendants would not have received the death penalty if they had been provided better representation. He urged the Committee to consider what to do about the people currently on death row. He said that this is a difficult and complicated problem because of the standard a defendant must meet in order to show ineffective assistance of counsel.

Mr. Hurley said that in three recent cases since 2001, the US Supreme Court has taken a closer look at the quality of representation in capital cases and has issued three decisions that are beginning to put teeth in what is meant by effective assistance of counsel. Those cases are Williams v. Taylor, Wiggins v. Smith and Rompilla v. Beard. Mr. Hurley encouraged the Committee to study those cases when considering the kinds of reforms that need to be made to North Carolina's death penalty statute.

Mr. Hurley made the following suggestions for consideration by the Committee:

- At the trial level, reduce the number of death eligible cases by making a person eligible for the death penalty only if convicted of pre-meditated and deliberate murder

- Narrow the list of aggravating circumstances by eliminating (e)(5) a murder committed during the commission of a specified felony; (e)(6) murder committed for pecuniary gain; (e)(9) the murder was especially heinous, atrocious, or cruel;

- Make jury instructions at capital sentencing hearings more understandable;

- Increase hourly rate that attorneys make for handling death penalty cases;

- Insure that the Office of Indigent Defense Services is fully funded;

- Mandatory requirement of an evidentiary hearing for every motion for appropriate relief that is filed, if a claim of ineffective assistance of counsel is raised;

- Create a claim based on ineffective assistance of post-conviction counsel;

- Create a ground of relief based on actual innocence;

- Reduce or eliminate the defense of procedural default

Representative Weiss requested that Mr. Hurley provide his recommendations to the members of the Committee.

Representative Wilkins asked if there are any counties in the state that do not have qualified attorneys for capital defense. Mr. Hurley said that some counties do not have qualified attorneys and said that he would provide a list of those counties to the Committee. Representative Wilkins asked what is being done to attempt to recruit attorneys. Mr. Hurley replied that there is some attempt to recruit when time permits. He said that when there is not an attorney, one is brought in from surrounding counties to handle cases.

Representative Tolson asked what is needed to fully fund the Office of Indigent Defense Services. Mr. Hurley said that last year there was a shortfall of $7-8 million.

Representative Holliman asked if Mr. Hurley had received complaints of ineffective counsel since assigning attorneys to cases. Mr. Hurley said that he was not aware that any attorney he had assigned had been found to have been ineffective. However, he noted a concern regarding a case that was handled last year that may become the first to be found ineffective.

Co-Chair Hackney stated that Mr. Holbrook had checked on the recoupment of funds by the Office of Indigent Defense Services and that they collect approximately $10 million a year for indigent counsel paid and this money goes back into the general fund.

Mr. Henderson Hill, Attorney, Ferguson Stein Law Firm, Charlotte, North Carolina was recognized. Mr. Hill spoke regarding ineffective counsel and offered anecdotal comments regarding defending capital defendants both at the trial and appellate levels. Mr. Hill stated that the felony murder rule and the issue of procedural default should be studied by the Committee. He said that one of the biggest structural issues that the Committee should address is what to do about the 150 people who are on death row whose problems will not be captured, corrected or mitigated by the post-convictions system that is now in place. Mr. Hill also spoke of his concerns of race playing a part in the decision to seek death and in the selection of jurors, and urged the Committee to look at some form of the Racial Justice Act. Mr. Hill also stated that the Committee should consider a way to give victims an independent voice.

Representative Stiller commented on the racial makeup of juries, noting that in his experience, black jurors often ask to be exempted saying that they cannot judge another man. Mr. Hill responded that part of the challenge is getting the trial judges to give defense counsel enough leeway to talk with those jurors about their ability to consider the options.

Considerable discussion followed and Mr. Hill responded to several questions.

Co-Chair Hackney invited Mr. Hill to offer any proposals that he might have for the Committee to review.

Representative Stiller made a brief statement regarding the racial statistics that had been distributed to the Committee

Representative Harrison asked if Mr. Hill would offer specific recommendations regarding how to deal with racial issues.

Representative Barnhart reminded the Committee to remember as it goes forward that society, as a whole, is a stakeholder in this process.

The meeting was adjourned at 1:50 p.m.

March 21, 2006

The House Select Study Committee on Capital Punishment met on Tuesday, March 21, 2006, at 9:30 a.m. in Room 544 of the Legislative Office Building. Representative Beverly Earle, Co-Chair called the meeting to order and the following members of the Committee were present: Representative Joe Hackney, Co-Chair, Representatives Walter Church, Nelson Cole, Arlie Culp, Pete Cunningham, Rick Eddins, Pricey Harrison, Marvin Lucas, Danny McComas, Mickey Michaux, Earline Parmon, Bonner Stiller, Ronnie Sutton, Joe Tolson, Doug Vinson, Jennifer Weiss, and Winkie Wilkins. Copies of the meeting agenda and the Visitor Registration are attached.

Mr. William Hart, Senior Deputy Attorney General, Criminal Division, North Carolina Department of Justice, was recognized to provide a summary of the current law regarding felony murder. Mr. Hart spoke briefly on the historical perspective of felony murder. That history is outlined in a handout that was distributed to the members of the Committee.

Mr. Hart discussed details of current law saying that felony murder is defined as a murder which shall be committed in the perpetration or attempted perpetration of any arson, rape or a sex offense, robbery, kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon. He discussed several cases where the North Carolina Supreme Court said specific things about felony murder:

- The killing need not be intentional.
- By defining felony murder as it has, the General Assembly has, in essence, established a per se rule of accountability for deaths occurring during the commission of felonies,
- Culpable negligence will not support a charge of felony murder,

- There must be an unbroken chain of events such that the homicide is part of a series of events forming one continuous transaction,
- The defense of self-defense is generally not available to a defendant on a charge of felony murder,
- All participants in the underlying felony are guilty of and may be convicted of felony murder.

Mr. Hart stated that under current law, felony murder is punishable by death or imprisonment for life without parole.

Mr. Hart discussed issues that relate to punishment for felony murder. He said that the underlying felony that was a basis for a conviction of felony murder cannot be used as an aggravating circumstance in sentencing. He further said that if one is convicted of felony murder only, the defendant cannot be punished for the felony that served as the basis for the felony murder conviction. Mr. Hart stated that although all participants in a felony that results in death may be convicted of felony murder, not all of those convicted of felony murder are eligible for the death penalty. He said that a defendant guilty of felony murder may only be sentenced to death if that defendant individually fits one of the following categories:

- Killed or attempted to kill the victim,
- Intended that the victim be killed,
- Intended that deadly force would be used in the course of the underlying felony that supported the felony murder conviction,
- Was a major participant in the underlying felony supporting the felony murder conviction and showed a reckless indifference to human life.

Mr. Hart reviewed a few cases in which felonies have been found to properly support convictions of felony murder. Those cases are outlined in his handout.

Representative Sutton referenced the felony murder definition regarding "use of a deadly weapon" and asked Mr. Hart to distinguish between "use" and "possession" if the weapon is not used. Mr. Hart replied that possession and use are determined to be the same and referenced State v. Fields, a case before the Supreme Court of North Carolina in 1985. The Court found that "the simple fact that the felon has a weapon in his possession creates a substantial, foreseeable human risk." Representative Sutton asked if a person who had a pocket knife in his possession, but never used it in any manner and a death resulted from some other cause, would fit under the statute for merely having possession of the weapon. Mr. Hart replied that under the Fields case, the person would fit under the statute.

Referring to the definition of felony murder, Co-Chair Hackney asked if the "use of a deadly weapon" is only necessary to make felony murder for the category "or other

felony," and not for arson, rape, sex offense, robbery, kidnapping or burglary." Mr. Hart replied that this was correct. Co-Chair Hackney asked if it is felony murder if a kidnapping occurs without the use or possession of a deadly weapon and a death results. Mr. Hart replied that this correct.

Representative Harrison asked a robbery of a convenience store is committed without the use of a weapon and the store's clerk who has a pre-existing heart condition dies of a heart attack would result in felony murder? Mr. Hart replied that he was not certain, but that conceivably it could be.

Representative Harrison commented that the State of Virginia had dropped felony murder as an aggravating factor in death penalty cases and asked if Mr. Hart could comment on the trends of other states regarding felony murder. Mr. Hart said that he thought Virginia had reinstated felony murder as an aggravating factor.

Mr. Hal Pell, Committee Counsel, stated that it was his understanding that Virginia has made felony murder a first-degree non-capital offense.

Representative Wilkins asked for clarification regarding the legal definition of possession of a weapon. Mr. Hart replied that if there is a single participant, that person must have the weapon in his actual possession or constructive possession. He said that if there are multiple participants and any one of them has a weapon in their possession, that possession is attributed to all the participants.

Representative Sutton asked if a defendant who had no knowledge of a co-defendants' possession of a weapon would be guilty of possession. Mr. Hart replied that he could not answer that question without further research.

Professor Marshall Dayan, North Carolina Central University School of Law, was recognized. He briefly discussed deterrence as one of the purposes of the felony murder rule in North Carolina. He said that the courts and scholars who worked on the Model Penal Code felt that the felony murder rule did not sufficiently deter unintended homicides or at least homicides that occurred during the course of underlying felonies where injury was not part of the plan, and does not serve the function that the North Carolina Supreme Court has said is the underlying purpose for the felony murder rule.

Professor Dayan offered several examples of the use of the felony murder rule and responded to questions.

Professor Dayan stated that because the application of the death penalty for felony murder situations does not effectuate the deterrence effect that is the purpose behind the felony murder rule according to the North Carolina Supreme Court, it is his recommendation that felony murder not be capital under North Carolina law.

Co-Chair Hackney asked how many states have felony murder and in how many states is it capital.

Mr. Pell indicated that a handout that had been provided to the Committee provided that information.

The Honorable Branson Vickory, District Attorney, Eighth Prosecutorial District, and President, North Carolina Conference of District Attorneys, was recognized to speak to the Committee. Mr. Branson stated that the district attorneys fully support the felony murder rule in its present form and feel that it treats as murders those individuals who kill innocent victims during the commission of dangerous or violent felonies. He said that he felt that the legislature, in the past, has determined that these felonies that so inherently risk the lives of innocent victims and anyone else who may be in the way during the perpetration of these felonies should mandate the imposition of a first-degree murder conviction. Mr. Vickory stated that when one commits a heinous crime in which the life of an innocent person is taken, and that person is given prison for life, there is a specific deterrent effect. He offered examples of situations where a defendant would no longer be subject to first-degree murder if the first degree felony murder rule was eliminated including murder that occurs during the perpetration of a rape, a death that results during the commission of an armed robbery, death resulting from a kidnapping and drive-by shooting situations.

Representative Sutton asked if were Mr. Vickory's recommendation that the law be broadened, tightened or kept it as it currently is. Mr. Vickory replied that he thought the rule should be kept as it currently is.

Representative Eddins thanked Mr. Vickory for his comments from the standpoint of victims.

Mr. Joseph Cheshire, Attorney at Law, and speaking on behalf of the North Carolina Academy of Trial Lawyers, was recognized. Mr. Cheshire stated that he is genuinely concerned about the felony murder rule as it is applied to capital punishment and as it is applied to life without parole. He said that the felony murder rule, as applied in North Carolina is wrong on both the moral and legal level. He added that it was not his opinion that there should not be some type of felony murder rule or felony murder law, but that how it is currently applied is wrong. He discussed the five categories of criminal deaths and the punishment that could be imposed for each. He said that all of the very carefully crafted criminal laws related to the death of other people, civil or criminal, speak about the intent to do an act that directly causes the death of a person except for felony murder. Mr. Cheshire said that in felony murder there is no intent required to convict someone of first-degree murder and imprisonment for the remainder of their life, or to have them executed. He further said that it does not need to be shown that the defendant was the person who committed the act that killed the victim. Mr. Cheshire said that in North

Carolina it is possible for a person who did not kill the victim and who never contemplated the death of the victim to get the death penalty, or to receive life without parole. He spoke briefly regarding the cost of incarceration for life sentences for felony murder defendants.

Mr. Cheshire referenced the question that Representative Sutton had raised earlier regarding a defendant who had no knowledge of a co-defendant's possession of a weapon. He said that there is absolutely no question that if the person is in possession of a weapon that person can potentially be convicted of felony murder. He said that it the burden is almost shifted onto the defendant to prove that he did not know the weapon was with the co-defendant.

Mr. Cheshire said that with the current law, there is no middle ground for a jury or judge to determine what the real honest application of the punishment should be as is relates to the felony murder rule. He asked if it makes sense that there are hundreds of people in this state who intended, who thought about, who wanted to, and who went out and actually killed someone who receive second-degree plea offers and are doing periods of months and years, when someone who did not intend a murder to happen, but intended to commit a felony has to go to prison at least for the rest of his or her life?

Mr. Cheshire said that felony murder should not be a part of capital punishment. He further stated that if one commits an act that results in someone's death, there should be some responsibility for the death, but urged the Committee to carefully study what the punishment options should be as they relates to felony murder.

Representative McComas asked what Mr. Cheshire thought the solution should be. Mr. Cheshire replied that he felt there should be some type of structure for sentencing, and that there should be some way in which either a jury or judge can make a fair application of what an individual did in order to provide for fair application of punishment.

Representative Sutton asked if a district attorney has the option of offering a plea to something less than the felony murder rule. Mr. Cheshire replied that they do have that option.

Representative Glazier stated that under Model Penal Code, the culpability level, based on the intent of the actor is critical. He said that he had less concern over the felony murder rule as a rule, and that there are historic reasons for the rule. He said that he is inclined not to play with the rule to a great extent. He added that he had great concerns regarding how the rule plays into the capital punishment scheme. He said that a major issue for him is the delusional scheme of proportionality, and said that judicial review of proportionality has turned into something that is not what he felt the legislature intended.

Mr. Cheshire replied that there is no better example of the breaking down of proportionality than a person charged with felony murder that gets the death penalty.

Representative Parmon asked if a defendant's ability to pay has any influence on whether they are offered a plea bargain. Mr. Cheshire replied that the Office of Indigent Defense Services has done a good job in getting good lawyers to represent defendants in murder cases, but added that, in reality, plea bargains quite often have a direct relation to who the defendant's lawyer might be.

Representative Michaux asked how the felony murder rule could be structured so as to not be as arbitrary as it currently is. Mr. Cheshire replied that one suggestion would be to give a judge who hears a case or takes a plea some ability to make a decision of where a person should fit within the sentence. He offered to present the staff with additional suggestions at a later time.

Representative Glazier asked Mr. Cheshire to also give thought to changes that should be made in the proportionality provision of the death penalty statute addressing what types of cases should be included in the proportionality pool that currently are not.

Representative Stiller commented that the Committee might look into the level of culpability of the associates when more than one person is involved in a crime. He requested that Mr. Cheshire give thought as to whether this would be something decided by jurors after hearing the case, or by the judge because of the level of training that may be required to discern through the facts.

A handout that was distributed to the members by Mr. Cheshire is included in the attachments to the minutes.

Mr. George Brown, North Carolina Citizens for Felony Murder Rule Change, was recognized to address the Committee. Mr. Brown stated that his organization supports repeal of the felony murder rule. He noted that a person who has committed a murder could still be charged with second-degree murder, manslaughter or first-degree murder, if warranted. He said that the difference would be that the district attorney will have to prove it, which is a situation that does not exist under the current felony murder rule. Mr. Brown stated that the penalties are "all over the road" where murder is concerned, but not with the felony murder rule. He discussed several cases and the penalties associated with each. The cases are summarized in a handout that was distributed to the Committee members is attached.

Ms. Ramona Stafford, North Carolina Victim's Assistance Network, was recognized to address the Committee. Ms. Stafford shared the personal experience of the murder of her husband in 1993 and spoke in support of victim's rights. Ms. Stafford stated that victims do not deserve to have their lives violently taken and murders should not be

permanent guests in our prisons. She said that the death penalty is the way for society to validate the ultimate value of human life. Ms. Stafford said that the North Carolina Victim's Assistance Network supports the felony murder rule in its current form and recommends that no changes be made.

Mr. Pell was recognized and called the members' attention to the handout that was distributed earlier in the meeting. He referenced page 4 regarding the ways the felony murder rule is treated in other jurisdictions. He noted that some states treat felony murder as second-degree murder, some as manslaughter. He pointed out a chart showing the states that treat felony murder as first-degree murder. Mr. Pell also stated that the State of Virginia does treat the felony murder rule as first-degree murder, but in Virginia, first-degree murder is not a capital offense. He noted that it had been suggested by a speaker in an earlier meeting that the Virginia statute might serve as a guide if the Committee decides to make changes in, or narrow the application of, the felony murder rule. Mr. Pell said that Virginia makes thirteen specific offenses, each requiring pre-meditation and deliberation, as capital murder. He said that the felony murder rule is first-degree murder and their statute makes it a Class II penalty. Mr. Pell stated that in Virginia, a conviction of first-degree murder under the felony murder rule would subject the defendant to a term of twenty years minimum sentence and life without parole as a maximum sentence.

Representative Sutton asked if judges in Virginia have a sentencing chart or is sentencing totally at the discretion of the judge. Mr. Pell replied that he thought that sentencing was judge discretionary.

The meeting was adjourned at 12:00.

April 27, 2006

The House Select Study Committee on Capital Punishment met on Thursday, April 27, 2006, at 10:00 a.m. in Room 1228 of the Legislative Building. Representative Joe Hackney, Co-Chair called the meeting to order and the following members of the Committee were present: Representative Beverly Earle, Co-Chair, Representatives Walter Church, Nelson Cole, Arlie Culp, Pricey Harrison, Hugh Holliman, Marvin Lucas, Mickey Michaux, Bill Owens, Bonner Stiller, Ronnie Sutton, Joe Tolson, William Wainwright, Jennifer Weiss, Roger West and Winkie Wilkins. Copies of the meeting agenda and the Visitor Registration are attached.

Following welcoming comments, Cochair Hackney stated that he did not believe that the Committee would be in a position to make recommendations for the Short Session of the General Assembly. He said that it was the feeling of the cochairs to make

recommendations late in the year for the long session in 2007, and added that the Committee is to report on or before December 31, 2006.

Cochair Hackney reminded the members that the Committee had been charged with looking at the process for judicial review of the merits of constitutional claims in State post-conviction and federal habeas corpus proceedings.

Mr. Hal Pell, Committee Counsel, was recognized to comment on the Judicial Review of Death Penalty Cases chart showing the steps in the appellate process that had been distributed to the members.

Mr. Barry McNeill, Special Deputy Attorney General, North Carolina Department of Justice was recognized. Mr. McNeill discussed the process that death penalty cases go through and the way that his office is set up to handle those cases. He said that in North Carolina, the average time from the time that a defendant has received the latest sentencing until the time an execution is carried out is ten years and four months. He noted that the national average is very much the same. Mr. McNeill said that the answer as to why it takes this much time lies in the process that is often referred to as "super due process." He said that the current death penalty statute that was enacted in 1977 and amended in 1996, attempts to provide a defendant with one full and complete round of going through not only the direct appeal, but also the motion for appropriate relief, review of that motion for appropriate relief in the North Carolina Supreme Court by petition for Writ of Certiorari, and sometimes a petition to the United States Supreme Court for a second-time review of the post-conviction proceedings in state court. He said the case then moves to the next stage called the federal Habeas Corpus stage which is a federal post-conviction proceeding. From there, a case goes on appeal to the U. S. Court of Appeals for the Fourth Circuit and back to the U. S. Supreme Court again.

Mr. McNeill said that in order for a case to get to the post-conviction stage, it must first get through direct review by the North Carolina Supreme Court and the U.S. Supreme Court. According to the latest available numbers (2003), the North Carolina Supreme Court sent back death penalty cases 42% of the time for resentencing, and 14% of the time for new trials in the over 400 cases they reviewed. He added that the 42% was misleading because approximately 44 cases had to go back for resentencing as a result of McCoy, leaving a more accurate figure of 16% for the rate of reversal by the North Carolina Supreme Court on direct appeal for resentencing.

Mr. McNeill called attention to a handout that was distributed, and highlighted several things in the report. He stated that in the post-conviction stage a defendant is statutorily afforded two attorneys at which point the Capital Litigation Section of the Office of the Attorney General ordinarily becomes involved. He noted that they try to keep a local prosecutor involved, if possible. He said that last year, the office filed 18 answers to motions for appropriate relief and handled 5 evidentiary hearings in MAR matters, 2 Federal evidentiary hearings and 6 appeals to the U.S. Court of Appeals for the Fourth Circuit. He said that their section currently has 161 cases that are divided between

12 attorneys with a typical caseload of as few as 8 cases to as many as 15 or more for each attorney in addition to motions that they are constantly filing or responding to

Discussion followed regarding whether there is a timetable for courts to rule on appeals and reviews. Mr. McNeill stated that there really is no timetable in state court. Representative Holliman asked if other states have such limits. Mr. McNeill said that he was not aware of other states having imposed time limitations in state post-conviction proceedings, but that there are other ways in which states can go about in helping to move the cases along.

There was also discussion regarding whether or not there is a time limit for a judge to hear a motion for appropriate relief once it has been filed at the Superior Court level. It was asked if it is true that once a judge hears a motion, there is no time limit in which he has to rule. Mr. McNeill replied that this is correct.

Mr. Tye Hunter, Director, Office of Indigent Defense Services, was recognized. Mr. Hunter discussed the Indigent Defense Services' standards and procedures for appointment of post-conviction counsel. He pointed out that these procedures were effective July 1, 2001 and that the procedures do not apply to a majority of the cases still on post-conviction. Mr. Hunter said that since that date, IDS has had good standards for appointment of counsel at trial, at appeal and at post-conviction, but since those standards did not exist prior to July 1, 2002 he suggested that the Committee take into consideration that group of people who were sentenced and whose cases were partially reviewed prior to that time and think about a process for them.

Mr. Hunter said that under IDS standards, an attorney must demonstrate that he or she has the required legal knowledge and skill necessary for representation as post-conviction counsel in a capital case and will apply that knowledge and skill with appropriate thoroughness and preparation. He stated that the lawyers must have five years of criminal or civil trial experience, at least five years of criminal or five years of criminal/civil appellate experience, or have at least five years of state or federal post-conviction experience and must be familiar with ethics requirements and current criminal practice and procedure in North Carolina. He discussed many additional requirements including familiarity and experience in the use of expert witnesses and scientific and medical evidence including mental health, social history and pathology.

Mr. Hunter stated that the $85 hourly rate that was set in 1994 is not adequate and suggested that it be raised by $10 an hour. He said that since 2001, 175 lawyers have been appointed to handle 92 capital post-conviction cases.

Mr. Hunter urged the Committee to consider ways to remove procedural bars and allow cases to be argued on their merits. He stated that there has been no genuine proportionality review in North Carolina for 15 years and suggested that the Committee

look into this. Mr. Hunter stated that the statute specifically provides that there is no right to effective assistance of post-conviction counsel and that this is another example of a procedural matter that is getting in the way of determining justice in capital cases. He said that there should be a way to guarantee assistance of counsel if lawyers make errors.

Mr. Hunter was asked if IDS would be able to handle cases if a mechanism was put into place to expedite the process. He replied that it would depend upon that way in which the process was accomplished and suggested that removal of some of the procedural bar issues would speed things up with motions of appropriate relief.

Mr. Gordon Widenhouse, a post-conviction defense counsel, was recognized. He discussed the Kenneth Rouse case that illustrated some of the reforms that he thought the Committee should propose. Court documents related to this case were distributed to the Committee. He suggested several reforms to make judicial review of claims in state post-conviction proceedings fairer and more reliable. Among his recommendations was a requirement of an evidentiary hearing in state court and to have a hearing on the merits of the claims. Additional suggestions were the creation of a standard that would guarantee quality effective counsel and the right to appeal the denial of a motion for appropriate relief to the state supreme court.

Mr. Paul Green, a post-conviction defense counsel, was recognized. Mr. Green related experiences with death penalty cases. He spoke of procedural pitfalls at every stage of the post-conviction process that can bring about procedural default. He recommended that at the first post-conviction stage, trial counsel be allowed to make a showing to the court that they are unable to get affidavits or information to investigate or support claims, and allow subpoena power either for deposition or requests for documents, or allow for an evidentiary hearing. He expressed support for not barring later consideration of claims if the first post-conviction attorney has made errors such as missing a deadline. Mr. Green also discussed appellate review of the denial of a motion for appropriate relief.

Brief discussion followed regarding actual innocence not being grounds for relief in and of itself. Mr. Green stated that it is very hard to know, and harder to prove, if someone is "actually innocent."

There was also discussion regarding the amount of time that mandatory evidentiary hearings might add to the process. Mr. Widenhouse noted that he thought mandatory evidentiary hearings might move the process along more quickly. He said that if some of the default requirements were eliminated there would be no need for the constant search for affidavits, etc. and could help move toward a hearing with some sort of speed where the judge could adjudicate on the merits of the issue.

Mr. McNeill was recognized and commented on procedural default. He said procedural default rules in both capital and non-capital cases encourages the raising up of

claims at the earliest possible time either at trial, at direct appeal or in the first motion for appropriate relief. He said that without this, the defendant is at liberty to wait until the first motion for appropriate relief to raise a claim that could have been raised at trial or on direct appeal. He said that without a procedural default rule, the defendants are then going to be able to go back and raise a second motion for appropriate relief, or a third or a fourth motion for appropriate relief because there is no impediment to them doing so.

Mr. Ken Rose, Director, Center for Death Penalty Litigation, was recognized. Mr. Rose stated that the safety net to catch mistakes made in trials is badly frayed and that often the system is unable to remedy the problems. He cited problems of incompetent counsel and of persons who were the victims of race. He said that two questions the Committee must address are: (1) Why does the system fail to catch mistakes and allow persons with serious problems in their cases to be executed, and (2) What reforms can be put into place that will better sort out the problem cases. Mr. Rose stated that the one realistic shot at relief is at the motion for appropriate relief and that this is where the focus of reform should be concentrated. He spoke of four problems at the motion for appropriated relief stage: (1) cases being heard by elected judges subject to popular will; (2) inadequate system of internal controls; (3) incompetent defense counsel; (4) and no right to evidentiary hearings. Mr. Rose urged the Committee to consider three specific reforms: (1) create a right to the effective assistance of post-conviction counsel; (2) allow mandatory hearings for the first-time motions for appropriate relief; (3) permit automatic appeal in post-conviction cases. A handout of recommendations is included in the attachments to the minutes.
An additional handout was distributed to the members and is attached to the minutes.

The Honorable James M. Webb, Superior Court Judge, was recognized. Judge Webb briefly reviewed the process for judicial review of death penalty cases in North Carolina. He shared with the Committee suggestions he had received from colleagues who recommended that motions for appropriate relief be abolished and that the system be fixed on the front end. Judge Webb then suggested some "front-end fixes." He said that instead of appointing two counsels at state expense at the MAR stage, require the appointment of two counsel on the direct appeal from the trial level to the Supreme Court of North Carolina, and then when a motion for appropriate relief is filed, only allow for the appointment of one counsel to file and argue that at the Superior Court level. He said that this would require an amendment of 7A-451(c). Judge Webb stated that there was a concern among some of his colleagues regarding the appointment by IDS of attorneys to perfect the motions of appropriate relief saying that some think that there are talented and able attorneys that are not being included in this legal work. He said that they feel that a limited pool of attorneys drives up costs of MARs and that the legislature should take a look at the cost and how much money is being spent on these attorneys. Judge Webb recommended that the complete files be made available to the defendant's direct appellate counsel at the direct appeal stage. He further suggested that on direct appeal,

the Supreme Court of North Carolina be required to consider whether or not there had been ineffective assistance of counsel claims.

Judge Webb encouraged the Committee to not enact legislation that would eliminate procedural bars. He stated that he did not endorse the idea of requiring as a matter of right, an appeal from MARs to the Supreme Court of North Carolina, or that MAR evidentiary hearings be made mandatory.

A packet of information regarding the post-conviction process in capital cases was made available to the members by the North Carolina Academy of Trial Lawyers and is attached to the minutes.

Following brief Committee discussion, the meeting was adjourned at 1:00 p.m.

November 21, 2006

The House Select Study Committee on Capital Punishment met on Tuesday, November 21, 2006, at 10:00 a.m. in Room 1228 of the Legislative Building. Representative Joe Hackney, Co-Chair called the meeting to order and the following members of the Committee were present: Representative Beverly Earle, Co-Chair, Representatives Nelson Cole, Arlie Culp, Rick Eddins, Pricey Harrison, Hugh Holliman, Paul Luebke, Danny McComas, Mickey Michaux, Earline Parmon, Wilma Sherrill, Ronnie Sutton, and Winkie Wilkins. Copies of the meeting agenda and the Visitor Registration are attached.

Co-Chair Hackney welcomed the members and visitors. He reviewed the charge to the Committee and briefly commented on the topics that had been discussed at previous meetings. He noted that the topic for discussion at this meeting would be prosecutorial misconduct as a factor in the imposition of the death penalty. He further noted that the Committee would meet on December 13 for a discussion of disproportionate racial impact from any aspect of capital case processing and whether there is discrimination in capital sentencing on the basis of the victim or defendant's race.

Ms. Katherine Jean, Counsel, North Carolina State Bar was recognized to address the Committee. Ms. Jean stated that the Grievance Committee of the State Bar is the part of the State Bar that investigates potential attorney misconduct. She said that alleged misconduct can come to the attention of the State Bar in a number of ways including a formal grievance, anonymous letters, phone calls, or newspaper articles. She said that once alleged misconduct comes to the attention of the State Bar, a grievance file is opened by the director of investigations and is assigned to a staff attorney who reviews the grievance and conducts any investigation that is necessary to insure that the State Bar has the pertinent information that is necessary to make an informed decision. She said

that the investigation usually includes issuing a letter of notice to the attorney informing the attorney of what the allegation is and requesting a written response from the attorney. Ms. Jean said that assistance is offered in the development of the file by a team made up mostly of retired FBI, SBI and Treasury Department investigators. At the conclusion of the investigation, the staff attorney develops a written report for the Grievance Committee explaining what the grievance is about, what the investigation has revealed and offers a recommendation of the attorneys' opinion as to what the ultimate action should be on the matter. She said that in cases involving alleged misconduct that would not warrant disbarment or a suspension, the Grievance Committee is empowered to issue discipline. Ms. Jean said that the Grievance Committee does not have the power to suspend an attorney's license or to disbar an attorney. In cases where the Grievance Committee believes that disbarment or suspension of license might be an appropriate outcome, they act instead as a grand jury, and will review the evidence and determine whether there is probable cause to believe that misconduct sufficient to warrant suspension of the license or disbarment has occurred. The committee will then refer the case to the Disciplinary Hearing Commission which is an independent tribunal that holds trials regarding alleged attorney misconduct and has the power to suspend a license or to disbar an attorney.

Ms. Jean said the State Bar receives most allegations of alleged prosecutorial misconduct in non-capital cases from the defendant or members of the defendant's family. She said that during the last eighteen months only one grievance has occurred alleging prosecutorial misconduct in a non-capital case in which the State Bar was notified by someone other than the defendant. She said that the opposite is true in grievances in capital murder prosecutions alleging prosecutorial misconduct. In 2005-2006, the State Bar opened four grievance files involving allegations that a prosecutor engaged in misconduct in a capital murder prosecution. She said that they have not received any complaints in 2005-2006 directly from a defendant charged with a capital offense or from a member of the defendant's family. She said that in three of the four grievances opened by the State Bar in 2005-2006, the State Bar was the complaining party and that the fourth case was brought to the attention of the State Bar by the defendant's post-conviction defense counsel. She said that in all four cases, the allegation was that the prosecutor failed to turn over exculpatory materials that the prosecutor was required by law to turn over, or that the prosecutor failed to correct allegedly false testimony by a prosecution witness. Ms. Jean noted that the North Carolina Supreme Court recently approved a change to Rule 3.8 of the Rules of Professional Conduct that requires the prosecutor to make a reasonably diligent inquiry to determine what exculpatory or mitigating evidence is available or is in the prosecutor's possession and to turn that evidence over.

Co-Chair Hackney asked if there is a statute of limitations on the filing of a grievance. Ms. Jean replied that a review of the statute of limitations is currently before the North Carolina Court of Appeals. Currently, the statute states that a grievance must

be initiated within six years of the misconduct unless it is a grievance alleging some sort of misconduct that involves concealment by the respondent attorney.

Co-Chair Earle noted that many defendants may be uneducated and unable to report prosecutorial conduct on their own and questioned whether the defense counsel are doing their job in reporting misconduct.

Representative Sherrill asked if defendants are instructed of their opportunity to file a grievance against an attorney. Ms. Jean replied that there is a means by which inmates in the North Carolina prison system become aware of the State Bar and its investigatory function, but that she is unaware of any formal effort that the State Bar makes to inform inmates of the existence of the services.

There was brief review of standards and requirements for attorneys that are appointed to represent defendants in capital cases. Co-Chair Hackney stated that those guidelines were the result of significant reforms recommended by a study commission and put into place since 2001.

Representative Parmon noted that defendants convicted in capital cases prior to 2001 may have had an attorney that did not meet those standards now in place.

Representative Holliman asked if a prosecutor is required to turn over what he has in his possession, does it also apply to investigators and law enforcement. Ms. Jean replied it is the State Bar's position that a reasonable and diligent inquiry must be made to determine what evidence is in the possession of any law enforcement and turn the evidence over.

Hal Pell, Committee Counsel, asked if the State Bar monitors judicial proceedings to determine whether any judicial proceedings have found improper misconduct of the prosecutor. Ms. Jean replied that the State Bar does not have the manpower to be able to have someone in the courtrooms or going through the court files in all the counties of the state. She said that they rely upon judges, defense attorneys or the newspaper or other sources to let them know. She said that they would welcome the situation in which the clerk of court or the judge, upon granting a new trial in a capital murder case, would send such notice to the State Bar.

Representative Sherrill asked how that could be accomplished and Ms. Jean replied that she thought legislation could be enacted. Representative Sherrill requested that staff consider this when compiling their recommendations.

Representative Luebke expressed concern regarding geographical disparity with regard to imposition of the death penalty, and asked what standards might be put into place to end this discrepancy.

Ms. Susan Sitze, Committee Counsel was recognized to briefly remind the Committee of the change that was made in rules of prosecutory discretion. She said that previously if a district attorney brought a first-degree murder case, it was automatic that they had to seek the death penalty. The law was changed around 2000 so that a prosecutor has an option of still bringing a first-degree murder case, but not asking for the death penalty.

Representative Luebke stated that his question was not about the quality of defense counsel, but about the fact that we do not have sufficient standards so that the prosecuting attorney in one county or another has the same standards by which to judge. Co-Chair Hackney noted that it is not in the pervue of the State Bar to second guess the discretion of prosecutors in seeking the death penalty.

Mr. Tom Lock, District Attorney, 11th District, was recognized to address the Committee. Mr. Lock stated that he had tried over 24 capital cases with 12 resulting in sentences of death. He commented on the numerous motions for appropriate relief resulting from those trials saying that he had been accused of prosecutorial misconduct. He said that examination of those claims indicate that they are not "misconduct" at all, but claims of neglect, oversight or error. Mr. Lock spoke briefly about prosecutorial misconduct versus ineffective assistance of counsel noting that when a prosecutor makes a mistake such as failing to deliver a document in discovery, or makes an overzealous jury argument, those mistakes are labeled "prosecutorial misconduct" implying something intentional or malicious. He urged the Committee to refrain from using the term "prosecutorial misconduct," and instead use the terms "prosecutorial neglect or prosecutorial error." Mr. Lock stated that he felt true prosecutorial misconduct is exceedingly rare and that most claims of misconduct result in the failure to provide complete discovery which usually is unintentional. He said that while the General Assembly has gone to great lengths to remedy these errors by requiring, since 2004, complete open file discovery in all criminal cases prior to trial, it has not gone far enough to assist in full and complete compliance with the discovery requirements.. He said that adequate resources in terms of personnel, technology and training have not been provided.

Mr. Lock stated that there is no epidemic of prosecutorial misconduct in North Carolina and that very few death sentences have been set aside as a result of misconduct. He said that prosecutors are answerable to the State Bar, and are the only group of lawyers who are subject to an additional set of rules that are applicable to them in addition to all the rules that apply to other lawyers. He further noted that prosecutors are subject to oversight of the courts, sometimes to civil liability, and that elected district attorneys are answerable to the voting public. Mr. Lock stated that to the extent that there may be concern about prosecutorial behavior, the best way to improve the quality of prosecution and the quality of justice is to provide prosecutors with the resources needed to at least place prosecutors on an equal footing with the criminal defense bar. He urged

support for raising salaries especially for the assistant district attorneys, for more support staff, and to expedite the implementation of the automated discovery systems.

Co-Chair Hackney asked what the starting salary is for assistant attorneys. Mr. Lock replied that it is $34 600.

Representative Sutton noted that there is some public perception that there is not a balanced playing field between the district attorney's office and the defense bar noting the resources available to the district attorney such as the SBI, the sheriff's department, all law enforcement. Mr. Lock replied that such claims are often made in open court. He said that 20 years ago there may have been a fair amount of merit to that, but that now in most serious cases, and certainly in capital cases, defense lawyers have private investigators and have access to a number of defense experts, and that the playing field is much more level.

Representative Wilkins asked how one goes about grooming young assistant district attorneys to handle capital cases. Mr. Lock replied that he thought a prosecutor should have at least two or three years of experience in superior court before being assigned to a capital case. He added that he assigns two prosecutors to every capital case with one being very senior. He said that an assistant prosecutor would be "second chair" for at least two or three cases before moving up to "first chair" on a capital case.

Co-Chair Earle asked what is in place to address intentional misconduct. Mr. Lock stated that he would dismiss a prosecutor if intentional misconduct was discovered on his staff and would report that person to the State Bar who would likely revoke the license of the prosecutor. He also said that it is highly likely that in such instances, the defendant would be granted a new trial.

Ms. Sitze stated that there are some statutory requirements regarding discovery that require prosecutors to turn over their open file except for their work product.

Dr. James E. Coleman, Jr., Duke University School of Law was recognized. Dr. Coleman stated that the work of the Committee will help to answer the question of whether the death penalty promotes justice in North Carolina or whether it undermines it. He spoke of prosecutors in several cases who were revered for what they had done in correcting injustices noting that when prosecutors stand up to the high standards of being ministers of justice, they are revered. He said that prosecutorial misconduct is not always a matter of good faith negligence, but sometimes intentional misconduct and willful blindness in failing to pursue facts that might suggest that something is wrong. Dr. Coleman spoke of a few cases of prosecutorial misconduct, noting that some of them were discovered long after they occurred and were examples what he thought were unprincipled exercise of discretion. He stressed the need for a change in culture rather than a change in pay.

Representative Sherrill asked what Dr. Coleman would recommend to bring about a change in culture. Dr. Coleman replied that this was a difficult subject and that he had no recommendation. Representative Sherrill asked if Dr. Coleman was advocating the abolishment of the death penalty as a way to change the culture. Dr. Coleman replied that he was not, and that he accepted that the state has the death penalty and would continue to have it until the people of North Carolina, the General Assembly and the Governor decide it has outlived its usefulness. He said that if North Carolina continues to have the death penalty, we must make sure that it promotes justice and is not administered in a way that undermines justice, but that when prosecutors engage in misconduct there should be consequences.

Representative Michaux asked Dr. Coleman to comment regarding inappropriate public comments that are made about capital cases by prosecutors. Dr. Coleman said that rule 3.6 makes it clear that prosecutors should not make statements in criminal cases that are intended to disparage a defendant or to turn the community against a defendant in advance of a trial.

Representative Culp asked if murder is the only crime that is subject to capital punishment.

Ms. Sitze replied that first-degree murder is the only crime that is subject to the death penalty. She added that in order for a jury to impose a death sentence there must be at least one aggravating factor.

Attorney Joseph B. Cheshire, V., was recognized to address the Committee. Mr. Cheshire stated that in the state of North Carolina, the service of justice has been greatly failed by not properly funding our courts, district attorneys, defense lawyers and law enforcement officers. He said that the people in the criminal justice system and the civil justice system should not be competing for money, but rather should be on the same team to see that justice is done. He said, however, that it cannot be expected, whether we have a moratorium or not, that all will act perfectly or that all will act alike and that this cannot be legislated or mandated, He said that we must recognize that that there are gross exceptions to the good people on both sides that must be dealt with.

Mr. Cheshire discussed several cases where prosecutorial misconduct occurred, and said that there is, and has historically been, a double standard as it relates to that misconduct. He suggested that Committee look at the statistics showing the counties having the most people on death row and see how those cases have been tried. Mr. Cheshire suggested that consideration should be given to creating a system similar to that in the federal courts where a panel of people looks at a case before it is tried and determines whether it is an appropriate case for the death penalty in order to bring about some consistency throughout the state.

Mr. Cheshire stated that without passage of legislation requiring the openness of the prosecutor's file, little would be known about prosecutorial misconduct. He praised recent efforts of the General Assembly, but stated that there are still holes that need to be fixed, and urged the Committee to resist any effort to roll back the open discovery law. Mr. Cheshire stated that he thought the people of North Carolina probably want the death penalty, but that they want the death penalty for people who really deserve it in a fair fight where everything is on the table and everyone sees what it is and where every argument is dealt with fairly. He said that the state needs a change in the political climate that surrounds the death penalty to make it a judicial and justice issue rather than a political issue.

Representative Harrison asked if any adjustment was needed regarding open file discovery law. Mr. Cheshire replied that there may be a need for tweaking as it relates to what law enforcements' role and obligation is to the district attorneys. He further added that to some extent, there is a need for judges to enforce what is already in place.

Representative Holliman asked why proportionality does not give consistency across with state with regard to imposing the death penalty. Mr. Cheshire replied that it may give consistency as to a few cases, but it does not stop whether one county prosecutes everybody for death and another prosecutes no one.

Representative Luebke asked what Mr. Cheshire would recommend for people who are on death row now who were tried and convicted prior to the establishment of the Indigent Defense Services. Mr. Cheshire replied that beyond the funding of attorneys who can go back and look into those cases, there is little that he felt could be done. Representative Luebke asked if there is a need for a review of those cases. Mr. Cheshire said that he would have no objection to such review.

Representative Sherrill asked if such review did not already exist. Mr. Pell said that the state funds counsel for motions for appropriate relief.

Ms. Jean was again recognized to offer a recommendation to the Committee. She said that the State Bar would welcome legislation that would put the burden on someone in the county, whether it be the presiding judge or the clerk of superior court, to notify the State Bar when a capital murder conviction had been set aside.

There was brief discussion regarding whether the work of the Committee would have any effect on the recently established Innocence Commission. Representative Sherrill asked if consideration should be given to expanding the responsibility of the Innocence Commission.

Representative Harrison asked if the Committee planned to explore the topic of mental competency. Co-Chair Hackney noted that because of the limited number of

meetings before the Session begins, and because of the magnitude and complexity of the subject, the Committee would not have the time to visit that topic and give it justice. Representative Sherrill suggested that the Committee recommend a study committee to look at the issue.

Representative Cole expressed support for the establishment of a panel to look at cases before they are tried to determine whether they are appropriate cases for the death penalty. Co-Chair Hackney noted that there are two aspects for such a panel. He noted that it could look forward to new cases as they come along, and another application would be to review pre-IDS death sentence cases.

Mr. Pell noted that during an earlier meeting of the Committee, it was suggested that consideration be given to narrowing the death penalty statute much like has been done in the State of Virginia to allow for more consistent application of the death penalty.

Representative Sherrill expressed interest in the panel suggested by Mr. Cheshire. She questioned how such a panel would be appointed and how consistency among those on the panel could be assured. She said that she would like to hear from the district attorneys about such a panel.

Representative Parmon asked if Mr. Cheshire thought there would be a lot of political resistance to appointing prosecutors. Mr. Cheshire stated that he would be open to appointing prosecutors.

The meeting was adjourned at 12:30 p.m.

December 13, 2006

The House Select Study Committee on Capital Punishment met on Wednesday, December 13, 2006, at 1:00 p.m. in Room 643 of the Legislative Office Building. Representative Beverly Earle, Cochair called the meeting to order and the following members of the Committee were present: Representative Joe Hackney, Co-Chair, Representatives Jeff Barnhart, Nelson Cole, Pete Cunningham, Rick Eddins, Pricey Harrison, Hugh Holliman, Marvin Lucas, Paul Luebke, Bonner Stiller, Ronnie Sutton, Joe Tolson, Jennifer Weiss and Winkie Wilkins. Copies of the meeting agenda and the Visitor Registration are attached.

Following opening remarks from Cochair Earle, Mr. Barry McNeill, Special Deputy Attorney General, North Carolina Department of Justice was recognized to begin the discussion of race and how it relates to capital punishment. Mr. McNeill spoke regarding the current safeguards in the law both by case law and statute that help protect the system against racial bias entering into the trial and sentencing of cases. Mr. McNeill

discussed safeguards in the charging decision by the prosecutor, the indictment by the Grand Jury, appointment of counsel to represent capitally-tried defendants, jury selection, trial procedure, appellate review by the state and federal courts, post-conviction review and clemency review by the governor. Those safeguards are detailed in a handout that was distributed to the members of the Committee and is attached to the minutes.

Mr. McNeill said that there are various ways that claims of racial prejudice or racial bias come up in trials or appellate courts regarding the selection of the jury or prejudicial evidence. He noted examples such as a juror making a racial slur, or a claim that all the members of a jury ended up being of one race or another. He said that he thought such claims are episodic and not systematic of the system, and that when such claims are investigated, they generally are proven to be unfounded.

Mr. McNeill said that several studies show that executions deter murders and that murder rates increase substantially during moratoriums. He offered to furnish copies of those studies to the members of the Committee. Representative Luebke and Cunningham requested copies of the studies and Representative Luebke asked Mr. McNeill to elaborate on his statement. Mr. McNeill said that studies conducted primarily by economists at various universities throughout the country since 2001, and have been published and subjected to peer review, have concluded consistently that the execution of individuals deters anywhere from 3 to 28 innocent people from being murdered. He said the studies also held that in states where a moratorium was put into place, murder rates climbed. Representative Luebke pointed out that this is a correlation and not causality. Mr. McNeill said that the economists attempt to take as many variables into consideration as they can and that there are consistent findings in the studies. He encouraged the Committee to review the studies.

Mr. McNeill briefly discussed the percentages of defendants executed in North Carolina to date, as well as those who have been sentenced to death. He noted that 39% are white, 54% are black, 5% are Indian and 2% are listed as "other." He called attention to a research bulletin included in his handout that was prepared by the Department of Correction in March 2006 stating that as of December 2005, North Carolina's general prison population was 35,620 inmates. Of this general population, 35% were white, 58% were black and 7% were of other races. He noted that the general population essentially mirrors the racial statistics of North Carolina's death row.

Mr. McNeill stated that, in his personal opinion, racial bias on a systemic or systematic scale, has not been apparent to him, and has not been shown to have been apparent, through statistics or otherwise, in North Carolina capital trials or sentencing. He said that racial prejudice or the study of racial prejudice is not a compelling reason for a moratorium on capital punishment in North Carolina.

Co-chair Earle asked how the crime rate, as it relates to deaths, compares to states that do not have capital punishment. Mr. McNeill was unable to offer a definite answer.

Co-chair Earle noted that a statistical update had been provided by the staff and was distributed to the members.

Professor Emeritus Elliott M. Cramer, University of North Carolina at Chapel Hill, was recognized to discuss statistical evidence of racial discrimination in the death penalty. Professor Cramer stated that in the past, there can be no doubt that there has been a history of racial discrimination in the death penalty in North Carolina. He said that it should be a concern of the Committee as to whether this pattern of discrimination is ongoing. He briefly discussed the history of executions in North Carolina and referenced a handout showing the number of blacks and the number of whites that were executed from 1910 until 2006. Professor Cramer noted that from 1984 through 2006, there was a reversal from previous years having more whites executed than blacks. He noted that critics of the death penalty can no longer claim that there is discrimination in that African-Americans are more likely to be executed than whites. He said that statistical studies have shown the opposite. He discussed the nature of the racial characteristics for executions noting the number of executions for whites who murdered whites, blacks who murdered whites, blacks who murdered blacks, etc. He stated that his studies reveal that cross-racial homicides are particularly aggravated and he would expect those homicides to be more likely to result in the death penalty. Those statistics are found in his handout.

Professor Cramer discussed several cases and death penalty studies. More detail of these studies may be found in Professor Cramer's remarks that are attached to the minutes.

Representative Luebke assumed to chair in the absence of the Cochairs for part of the meeting. He noted that one of the speakers scheduled to make a presentation to the Committee had a later commitment, and asked if Professor Cramer would pause and allow that speaker to address the Committee.

Mr. Ben David, 5th Prosecutorial District, Conference of District Attorneys, was recognized. Mr. David began his comments by reminding the Committee that he enforces the laws that are enacted by the General Assembly and that he takes that obligation very seriously. He said that race should play absolutely no role in the prosecution of any case, let alone a death penalty case. He further stated that there are procedures in place in our criminal justice system to see that if errors are made or if bias is present, it is captured, is exhaustively reviewed and that appropriate actions are taken. Mr. David related his experience of being wrongfully accused as being racist. His experience is summarized in a handout that was distributed to the members of the Committee. Mr. David stated that as a prosecutor he has to make tough decisions and must follow the law. He said that there must be agreement, even among those who

oppose the death penalty, that we should be fighting the law and not the people who uphold the law. He said that if it is determined that race is injected into the system, or wrongful accusations are made, it should not be tolerated. He said that if the discussion is about fairness, it is only fair that the entire process is considered, and that one takes a look at both sides. An additional handout was distributed to the Committee and is attached.

Professor Cramer was recognized to continue his presentation. He stated that he was agnostic on the issue of the abolishment of the death penalty. He said that he is committed to the proper use of statistical methodology and that he does not believe there is any statistical support for the view that the death penalty discriminates against African-Americans or anyone else. He said that he did not think that the science of statistics has anything to contribute to the debate and that death penalty opponents would do better to focus on the morality of the death penalty and the remote possibility of executing an innocent person.

Professor Jack Boger, Dean and Wade Edwards Distinguished Professor of Law, UNC-CH School of Law, was recognized. Professor Boger noted that he had addressed the Committee at its December 19, 2005 meeting at which time he stated that the most important long-term contribution to the discussion of the death penalty might be less the views that any of the members ultimately reached on particular questions, than the capacity to bring forward new evidence on this matter. He urged the Committee to gather solid reliable evidence on the issue of racial discrimination in capital sentencing.

Professor Boger discussed various capital sentencing studies and they are detailed in a handout that was provided to the members of the Committee. He said that in most of the studies, the clear answer has been that race does matter. He said that the studies should raise enough questions in the minds of the members to carry out an independently commissioned examination of the death penalty.

Representative Sutton asked if Professor Boger could offer a solution to the General Assembly to address the problem of discrimination by juries when they are in the back room deliberating a case. Professor Boger replied that the way juries are selected needs to be addressed more vigorously and that cutting down on allowing the changing of venue to different racially composed counties might make a difference. He also suggested narrowing of the category of cases that are death eligible.

Representative Sutton asked Professor Boger to offer a process of how the General Assembly can attempt to control what a jury does in their deliberations once they are determined that there is going to be some discrimination. Professor Boger replied that balance on the jury would provide more ears when someone on the jury makes discriminating comments. He suggested a statute stating that when a juror is removed another juror of the same race must be put into the jury box. Representative Sutton

replied there could still be a problem if the initial twelve jurors are comprised of eleven whites and one black and the defendant is black.

Cochair Earle commented that there appears to be discrimination with regard to discretion on the part of the prosecutors as to what charge is made against a defendant. Professor Boger said that he felt there is too much discretion. He again urged the Committee to conduct its own study.

Representative Cunningham, noting a need for a study, asked Professor Cramer to comment. Professor Cramer stated that he was persuaded, having spent many hours on other studies, it would be impossible to draw any valid conclusions because there are so many variables that are impossible to quantify and allow for.

Representative Sutton stated that he thought we sometimes have our priorities wrong. He said that no matter how reprehensible or how heinous the crime, even when defendants admit their guilt and there is no question of their sanity, some of the most brilliant minds in the state still spend the scarce resources we have trying to find a way to prevent their execution, which is what the jury decided should happen. He said that this seems to be counter productive use of our assets.

Mr. Jonathan Broun, North Carolina Center for Death Penalty Litigation, was recognized. Mr. Broun said that while race should not play a role in the death penalty, it is happening in North Carolina. He said that racism can be blatant, subtle, intentional, and can be subconscious. He said it sometimes can be something involving events that happened years before the crime and the trial. Mr. Broun spoke of how race affects a prosecutor's decision in the charges that are made and how it affects jury selection. Mr. Broun spoke of cases showing how race influences the death penalty.

Mr. Broun recommended that the Committee consider the passage of a racial justice act that allows for challenges for relief if it can be shown that there has been racial discrimination on anyone's part, either before or after a trial that led to a death sentence. He also recommended that objectivity be added to the process, whether by narrowing the statute or by the elimination of simply allowing the death penalty for felony murder. He recommended considering the passage of a moratorium. He advocated studying race and its impact in a calm manner and that the only way to do so is under the calm of a moratorium. Two handouts were distributed to the members of the Committee.

Dr. William Barber, President, North Carolina NAACP, was recognized. Dr. Barber stated that moratorium resolutions have been passed by more than eleven hundred businesses and organization throughout the state and that a moratorium petition has yielded well over forty thousand signatures. He said that the NAACP originated from the pain of capital punishment being used legally and illegally to perpetuate and preserve racial inequality. Dr. Barber said the organization has always been opposed to killing people as one of the tools of justice. He noted that African-Americans are not soft on

crime and that most are quite conservative regarding crime issues. He said that while African-Americans make up only thirteen percent of the overall population, forty-two percent of the people currently on death row are black. Dr. Barber said that African-Americans are also over represented in the number of people on death row who are later found to be innocent. He stated that the United States Supreme Court said that there is a unique opportunity for racial prejudice to operate, but remain undetected, in trials of African-Americans where the jury is forced to make a highly subjective unique individualized judgment regarding the punishment that a particular person deserves. He said the court found that it remains an unfortunate factor in our society that violent crimes perpetuated against members of other racial or ethnic groups often raise a reasonable possibility that racial prejudice would influence the jury.

Dr. Barber said that there is a need for a study, but that it must be done correctly, funded in a proper manner and that the right issues are faced. He said that in the process of such a study, a moratorium must be put into place. He further stated that historically the NAACP has always held the position of abolition of the death penalty. Dr. Barber requested that the position of the NAACP be included in the record:
Ensure that government and states place a moratorium on utilization of capital punishment until race and ethnicity is no longer statistically significant in predicting sentencing and execution.

Cochair Earle announced that the Committee would meet in early January to review recommendations. She urged the members to contact the staff with suggestions for the recommendations. She further noted that the next meeting would include time for a public hearing.

The meeting was adjourned at 4:00 p.m.

PUBLIC HEARING

January 4, 2007

The House Select Study Committee on Capital Punishment held a public hearing to allow interested parties an opportunity to offer additional input to the Committee on Thursday, January 4, 2007, at 1:00 p.m. in Room 643 of the Legislative Office Building. Representative Joe Hackney, Cochair called the meeting to order and the following members of the Committee were present: Representatives Jeff Barnhart, Nelson Cole, Pete Cunningham, Hugh Holliman, Paul Luebke, Mickey Michaux, Earline Parmon, Ronnie Sutton, Jennifer Weiss and Winkie Wilkins. A copy of the Visitor Registration is attached.

Father David McBriar, Ecumenical Officer, Catholic Diocese of Raleigh was recognized. Father McBriar, a member of the North Carolina Coalition for a Moratorium on the Death Penalty spoke of several cases which he said illustrate some of the problems with the administration of the death penalty. He encouraged the Committee to recommend a two year moratorium on the death penalty to allow time for further study the issue. His comments are attached.

Ms. Catherine Macri, an attorney, spoke in favor of a moratorium on executions in order to critically examine the death penalty process. She stated that one of the most compelling reasons to enact a moratorium is the lack of certainty in the capital prosecution system and the possibility of wrongful conviction. Ms. Macri's comments are attached.

Ms. Megan Merz, Director, The Franciscan Coalition of Justice and Peace at the Catholic Community of St. Francis of Assisi, was recognized and spoke in support of a two year moratorium on executions in order to enact the reforms that will result in a capital punishment process that is safer and fairer. Her comments are attached.

Mr. David Work, Executive Director Emeritus, North Carolina Pharmacy Board was recognized. Mr. Work noted that he was not speaking on behalf of the Pharmacy Board. He discussed the process involved administering the drugs used in executions and spoke of a several ways in which an execution can be botched. He urged the Committee to recommend a moratorium.

Mr. Thomas Maher, Director, Center for Death Penalty Litigation, was recognized. Mr. Maher urged the Committee to consider further study of several topics. He discussed the issues of mental illness and the death penalty and said that preventing the execution of those with serious mental illness should be a priority in any reform of the death penalty in North Carolina. Mr. Maher noted recent reforms that have improved the system and said that carrying out death sentences that were imposed prior to those reforms is simply not justice. He urged serious consideration for reforms that will ensure not only that future juries impose a sentence of death only after a full and fair trial, and only upon those for whom a sentence of life without the possibility of parole is not adequate punishment, but also that executions are not carried out when the death sentence would not have been imposed under our current system. Mr. Maher said that North Carolina should, at a minimum, consider reforms that would reduce the risk of an innocent defendant's execution. He said that such reforms could include a requirement that in a capital case, a sentence of death not be imposed unless there is reliable forensic evidence that proves the defendant's involvement in the murder. Mr. Maher's comments are attached to the minutes. Also attached to the minutes are three reports referenced in Mr. Maher's comments.

Ms. Teri L. Kaasa was recognized. Ms., a social psychologist and former trial consultant specializing in capital cases spoke of inequities that occur in the courtroom

when selecting a jury and said that jurors often do not understand the instructions that are given to them. She urged the Committee to recommend a moratorium on executions in North Carolina. Ms. Kassa's comments are attached. Also attached is a copy of Ms. Kaasa's graduate thesis and dissertation regarding how well jurors comprehend the instructions that are routinely used to tell them how to go about deciding between a sentence of death and a sentence of life without parole.

Reverend Mark Creech, Executive Director of the Christian Action League of North Carolina was the next speaker. Reverend Creech stated that it is the command of God that the state be given and should use its right to execute in order to protect innocent human life from aggressors who fail to respect its value. He said that steps should be taken to insure that capital punishment is being administered fairly and that problems within our system can be corrected without failing to expedite justice. Reverend Creech's comments are attached to the minutes.

Mr. Wayne Uber, whose twin brother was murdered in 1995, urged the Committee to make recommendations that will not undermine the authority or reputations of officers of the court. He advocated for recommendations that include as many preventative measures as possible saying that investing in prevention of premeditated murders before they occur represents the best means to deal with the problem of capital crime. Mr. Uber's comments are attached.

Ms. Shirley Burns, of Hope Mills, NC was the next speaker. Ms. Burns noted that she was speaking from two perspectives. Ms. Burns stated that her son, Marcus Robinson, was scheduled for execution in twelve days for a murder committed in 1991. She also told the Committee that another son was murdered eight months ago. She asked that the Committee acknowledge that there is a problem with the death sentencing act and she urged them to not act hastily, but to consider and weigh its pros and cons.

Reverend Duane Beck, Pastor, Raleigh Mennonite Church spoke in support of a moratorium on the death penalty to allow for further study of the issue. Reverend Beck spoke of the issue of poverty and the color of one's skin as it relates to limiting the justice that is available to all people. He spoke of restorative justice as it takes into consideration the victim as well as the perpetrator. He noted the need to find ways not just to be punitive, but also to explore ways to restore life victims as well as perpetrators. Reverend Beck said that the Mennonite Church has supported the abolition of the death penalty for fifty years.

Mr. David Mills, Common Sense Foundation, Raleigh, North Carolina spoke of death row injustices noting people on death row in North Carolina who were represented by attorneys at the trial level who did not meet today's minimum standards for qualifications as a defense attorney. He also addressed the issue of deterrence and said that statistics overwhelmingly show that the death penalty is not a deterrent against crime.

Mr. Mills distributed a research report that was developed by the Common Sense Foundation. The report is attached to the minutes.

Mr. David Zoppo, a University of North Carolina student, stated that the sword of the devil can never be used as a tool of the righteous. He said that North Carolina's capital punishment system is riddled with flaws, inconsistencies and outright injustices. He said that capital punishment cases are not only riddled with corruption and prejudicial error, but are also arbitrarily pursued by state attorneys. He said that the system is long overdue for a review urged the Committee to recommend a moratorium, if not outright abolition. Mr. Zoppo's comments are attached.

Mr. Scott Bass, Nazareth House, Raleigh, North Carolina said that as an ordained minister and as a licensed marriage and family therapist he had worked with many who had lost loved ones to violence and other traumatic events and has never seen anecdotal, clinical or research evidence that indicates that the death penalty helps the families of victims to heal. He stated that he felt the death penalty prolongs and exacerbates their pain. He said that the death penalty traumatizes an additional family in a way that is very similar way that a murder traumatizes the family of a murder victim. He stated that there are other and better ways of protecting society than by putting a person to death. He urged the Committee to recommend an end to the death penalty.

Mr. Carnell Robinson, Chair, North Carolina Black Leadership Caucus said that the death penalty does not deter crime. He appealed to members of the Committee to recommend that the death penalty be abolished in North Carolina. He urged the members to join him in asking that the governor declare a moratorium by executive order.

Mr. Jeremy Collins, North Carolina Coalition for a Moratorium, stated that recent polling shows that the people of North Carolina support a moratorium on executions by a 2 to 1 margin. He said that the evidence is clear that the system is broken and a two year moratorium on executions is a responsible approach to the systemic flaws of the capital punishment system. He urged the Committee to take the opportunity to pause executions and study the system.

The meeting was adjourned at 2:45 p.m.

February 5, 2007

The House Interim Study Committee on Capital Punishment was opened by Speaker Joe Hackney. He began by thanking all the formers members for returning for

the meeting and asked, Representative Beverly Earle, Co-Chair if she had any opening remarks. She declined making remarks. Speaker Hackney stated that he had re-constituted the committee exactly as it had been appointed by Speaker Black with no changes so that the committee could finish their work.

The following members were present**:** Speaker Hackney, Co-Chair, Representative Beverly Earle, Co-Chair, Representative Barnhart, Representative Coe, Representative Culp , Representative Eddins, Representative Glazier, Representative Harrison, Representative Holliman, Representative Lucas, Representative Luekbe, Representative McComas, Representative Parmon, Representative Sherrill, Representative Sutton, Representative Tolson, Representative Weiss, Representative West, and Representative Wilkins.

Speaker Hackney asked the first presenter to come before the committee to present for fifteen minutes. The presenter was Ms. Mel L. Chilton; Executive Director of the North Carolina Victim Assistance Network began by introducing herself. She thanked the committee for the opportunity to come before them to present her issues that began over 32 years ago, and how it has been a life sentence for her and her family. She talked about two points of concerns.

- Each of the topics of concern raised by this committee is addressed and is dealt with by the courts on a case by case basis: Prosecutorial Misconduct, Racial Bias, Ineffective Assistance of Counsel, Felony murder
- It has also been my observation the agenda has contained a two to one ratio of supporters for a moratorium in each meeting.

NCVAN strongly opposes a moratorium on capital punishment and adopted a Resolution on May 12, 2003. The North Carolina Department of Correction Public Access Information on Mr. James Primes, offender in the case of Ms. Mel Chilton's mother.

*Recommendations from the North Carolina Victims Assistance Network**:***

- Funding NCVAN recommends the committee focus providing law enforcement, prosecutors, and judges with the resources they need to ensure the investigations, prosecution and justice is served. The disproportion in funding of the Indigent Defense Fund vs. the State is unacceptable.
- Additionally, we recommend committee the review the Deterrent Studies from universities across the United States in regard to saving innocent lives.

Mr. Dick Adams, President of the NCVAN and advocate for victims of violent crimes. He stated that he spoke with Speaker Hackney at the beginning of the Study Commission on the Death Penalty Moratorium and expressed a desire to speak at the conclusion of the study. He thanked the Speaker for this opportunity. He spoke of a young man who worked hard to receive a four-year college degree and just three months after turning twenty-one years old, he was gunned down for a few hundred dollars. He stated that each of you were elected to serve the state by your constituents and then selectively appointed to serve on the commission prompted by a very small percentage of

anti-death penalty advocates whose ultimate goal is to abolish the death penalty in North Carolina. He stated that a two-year moratorium would indeed accomplish the mission of the very small percentage of active anti-death penalty advocates. Again, he thanked the commission for allowing him to speak.

Ramona Stafford, Member, Board of Directors, of NCVAN, thanked the committee for allowing her to share why she believes a moratorium would be a major miscarriage of justice for crime victims. Her voice is in loving memory of Steve Stafford, and it speaks for a growing number of crime victims across North Carolina. Briefly, she stated that she was a homicide survivor fro Forsyth County. Her husband was murdered in 1993 by en evil individual, Robbie Lyons in an attempted armed robbery of their business. Twelve jurors sentenced Lyons to death. Her mission was to see that Lyons was executed, and speak against Hall's release in parole hearings each year. Hall was a co-defendant that made sure the cash drawer was open why Lyons rushed in shooting. She stated that Lyons had no remorse for his crimes and that his only concern was for himself and his insatiable appetite for violence. Lyons attempted to attack the trial judge in Forsyth by throwing a rolodex at him. He also attacked a guard and had some seventy infractions while on death row.

In closing remarks, she stated that the majority of the people of NC support the death penalty. Citizens of this state and crime victims want justice and punishment for murderers who commit heinous acts against an innocent person. Crime victims need a conclusion to the criminal process.

At this time the Speaker stated that the committee move to discuss possible recommendations. Here are the recommendations:

Recommendation #1

Short Title: proportionality review

A BILL TO BE ENTITLED

AN ACT TO PROVIDE THAT THE SUPREME COURT IN CONDUCTING THE PROPORTIONALITY REVIEW REQUIRED BY LAW SHALL CONSIDER NOT ONLY THOSE CAPITAL CASES IN WHICH THE DEATH PENALTY WAS IMPOSED BUT ALSO FACTUALLY SIMILAR CASES IN WHICH THE SENTENCE OF LIFE IMPRISONMENT WAS IMPOSED.

Representative Rick Glazier moved for adoption of the Proportionality Review recommendation. A few more comments were made and a vote was taken at this time. By a showing of hands, the draft bill failed and will not be recommended.

Recommendation #2

Short Title: report new trial to state bar

A BILL TO BE ENTITLED

AN ACT TO REQUIRE THE CLERK OF COURT TO REPORT CERTAIN ORDERS TO THE NORTH CAROLINA STATE BAR.

Representative Ronnie Sutton move to adopt this recommendation. By a showing of hands the bill was recommended.

Recommendation #3

Short Title: LEO provide info to DA for discovery

A BILL TO BE ENTITLED

AN ACT INSURE DISTRICT ATTORNEYS RECEIVE ALL NECESSARY INFORMATION FROM LAW ENFORCEMENT AGENCIES.

Representative Wilma Sherrill moved to recommend this draft bill. By a showing of hands the recommendation was recommended.

Recommendation #4

Short Title: racial discrimination vacate death sentence

A BILL TO BE ENTITLED

AN ACT TO CLARIFY THAT RACIAL DISCRIMINATION IS A PERMISSIBLE GROUNDS FOR APPEAL AT ANY TIME IN A CAPITAL CASE.

Representative Earline Parmon moved that this recommendation be adopted. By a showing of hands the recommendation was adopted for recommendation.

Recommendation #5

Short Title: Capital Murder Statue.

A BILL TO BE ENTITLED

AN ACT TO CREATE A CAPITAL MURDER STATUTE, TO AMEND THE HOMICIDE STATUTES, AND TO AMEND THE CAPITAL SENTENCING LAWS.

Representative Ronnie Sutton stated that this bill is not ready to become law, and should be recommended that this recommendation be sent to a judiciary committee for the purpose of further discussion and modification. It was so noted by the Speaker that this is an incomplete draft. With comments made by Representative Wilkins that this recommendation be studied, Representative Sutton withdrew his original motion, and accepted the motion by Representative Wilkins for this recommendation to be studied. The motion was adopted.

Representative Rick Glazier made a motion to take out a portion of the bill to become a separate bill. On page 3 lines 14, 15, 16, to be taken out so that we may be incompliance with a US Supreme Court decision. The motion was adopted, by a showing of hands.

Recommendation #6

Short Title: Felony Murder

A BILL TO BE ENTITLED

AN ACT TO CREATE THE STATUTORY OFFENSE OF FELONY MURDER.

Representative Pricey Harrison moved to approve this recommendation. After further discussion, Representative Harrison withdrew her motion. Representative Paul Luebke made a new motion. The motion was for this recommendation to be added to the study agenda to be studied by a committee. The motion was adopted by a showing of hands.

Recommendation #7

Short Title: Amend MAR procedure.

A BILL TO BE ENTITLED

AN ACT TO AMEND THE PROCEDURE FOR MOTIONS FOR APPROPRIATE RELIEF IN CAPITAL CASES.

Representative Ronnie Sutton made a motion to adopt this recommendation, but on line 17, page 2, after the word rulings, to insert "without unnecessary delay, and in no case, no more than 180 days upon receipt". The motion was adopted as amended.

General Study Recommendations

The House Select Committee on Capital Punishment recommends that a committee be appointed to study the following issues:

a) How juries are selected in capital cases and ways to insure minority representation on a jury when the defendant belongs to a minority race;
b) Mental competency issues related to capital cases;
c) Racial discrimination in capital sentencing.
d) Capital Murder; and
e) Felony Murder Rule

The House Select Committee on Capital Punishment recommends that the Sentencing Commission study possible changes to the laws regarding what offenses are subject to capital punishment, and the effect to such changes on the criminal justice system of the State.

The House Select Committee on Capital Punishment recommends that appropriations be made by the General Assembly for the following purposes:

a) To raise the hourly rate paid by the State for post-conviction defense counsel from $95 per hour to $105 per hour;
b) To increase the salaries of assistant district attorneys;
c) To provide more support staff to district attorneys; and
d) To expedite the implementation of automated discovered

> A motion was made by Representative Ronnie Sutton to accept these recommendations with a change to add assistant public defenders on line b.

With a voice vote, the motion was adopted.

Lethal Injection

With much discussion on the lethal injection issue, it was agreed upon by the committee to let the process go through the courts waiting their decision.

Speaker Hackney thanked the committee for all their hard works doing this process. He declared this process complete and the meeting was adjourned.

ATTACHMENTS

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2007

H **D**

HOUSE DRH70208-RK-25A (02/05)

Short Title:	Execution/Change Age.	(Public)
Sponsors:	Representatives Earle, Glazier, and Harrison (Primary Sponsors).	
Referred to:		

A BILL TO BE ENTITLED

AN ACT TO AMEND THE FIRST DEGREE MURDER STATUTE TO CONFORM WITH THE UNITED STATES SUPREME COURT RULING IN ROPER V. SIMMONS THAT THE EXECUTION OF A DEFENDANT WHO WAS UNDER EIGHTEEN YEARS OF AGE AT THE TIME OF THE MURDER IS UNCONSTITUTIONAL AS RECOMMENDED BY THE HOUSE INTERIM STUDY COMMITTEE ON CAPITAL PUNISHMENT.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 14-17 reads as rewritten:

"**§ 14-17. Murder in the first and second degree defined; punishment.**

A murder which shall be perpetrated by means of a nuclear, biological, or chemical weapon of mass destruction as defined in G.S. 14-288.21, poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate, and premeditated killing, or which shall be committed in the perpetration or attempted perpetration of any arson, rape or a sex offense, robbery, kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon shall be deemed to be murder in the first degree, a Class A felony, and any person who commits such murder shall be punished with death or imprisonment in the State's prison for life without parole as the court shall determine pursuant to G.S. 15A-2000, except that any such person who was under ~~17~~18 years of age at the time of the murder shall be punished with imprisonment in the State's prison for life without parole. ~~Provided, however, any person under the age of 17 who commits murder in the first degree while serving a prison sentence imposed for a prior murder or while on escape from a prison sentence imposed for a prior murder shall be punished with death or imprisonment in the State's prison for life without parole as the court shall determine pursuant to G.S. 15A-2000.~~ All other kinds of murder, including that which shall be proximately caused by the unlawful distribution of opium or any synthetic or natural salt, compound, derivative, or

preparation of opium, or cocaine or other substance described in G.S. 90-90(1)d., or methamphetamine, when the ingestion of such substance causes the death of the user, shall be deemed murder in the second degree, and any person who commits such murder shall be punished as a Class B2 felon."

SECTION 2. This act is effective when it becomes law.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2007

H **D**

HOUSE DRH70207-RK-22A (01/31)

Short Title:	Capital Murder Statute.	(Public)
Sponsors:	Representative Earle.	
Referred to:		

A BILL TO BE ENTITLED

AN ACT TO CREATE A CAPITAL MURDER STATUTE, TO AMEND THE HOMICIDE STATUTES, AND TO AMEND THE CAPITAL SENTENCING LAWS AS RECOMMENDED BY THE HOUSE INTERIM STUDY COMMITTEE ON CAPITAL PUNISHMENT.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 14-17 is repealed.

SECTION 2. Article 6 of Chapter 14 of the General Statutes is amended by adding a new section to read:

"**§ 14-17.2 Capital murder; punishment.**

(a) The following offenses shall constitute capital murder:

(1) The willful, deliberate, and premeditated killing of any person for pecuniary benefit, or in the commission of a kidnapping, when the kidnapping was committed with the intent to extort money for a pecuniary benefit.

(2) The willful, deliberate, and premeditated killing of any person by another for hire.

(3) The willful, deliberate, and premeditated killing of any person by a person in the custody of a law enforcement officer, the Department of Correction, the Department of Juvenile Justice and Delinquency Prevention, or any local confinement facility as defined in G.S. 153A-217 or G.S. 153A-230.1, or while in the custody of an employee thereof.

(4) The willful, deliberate, and premeditated killing of any person in the commission of robbery or attempted robbery.

(5) The willful, deliberate, and premeditated killing of any person in the commission of, or subsequent to, an offense in violation of Article 7A

of Chapter 14 of the General Statutes, or in attempting to commit such offense.

(6) The willful, deliberate, and premeditated killing of a State or local law enforcement officer, or any law enforcement officer of another state or the United States, employee of the Department of Correction, jailer, fireman, judge or justice, former judge or justice, prosecutor or former prosecutor, juror or former juror, or witness or former witness against the defendant, while engaged in the performance of his or her official duties or because of the exercise of his or her official duties.

(7) The willful, deliberate, and premeditated killing of more than one person as a part of the same act or transaction or more than one person within a three-year period.

(8) The willful, deliberate, and premeditated killing of any person in the commission of, or attempted commission of, the trafficking of a controlled substance, in violation of Chapter 90 of the General Statutes, when such killing is for the purpose of furthering the commission, or attempted commission, of such offense.

(9) The willful, deliberate, and premeditated killing of any person by another pursuant to the direction or order of one who is engaged in a continuing criminal enterprise, as defined in G.S. 90-95.1.

(10) The willful, deliberate, and premeditated killing of a pregnant woman by one who knows that the woman is pregnant and has the intent to cause the involuntary termination of the woman's pregnancy without a live birth.

(11) The willful, deliberate, and premeditated killing of a person under the age of 14 by a person age 21 or older.

(12) The willful, deliberate, and premeditated killing of any person by another in the commission of, or attempted commission of, an act of terrorism as defined in 18 U.S.C. § 2331(5).

(13) The willful, deliberate, and premeditated killing of any person committed by a person who had been previously convicted of another capital felony or had been previously adjudicated delinquent in a juvenile proceeding for committing an offense that would be a capital felony if committed by an adult.

(14) The willful, deliberate, and premeditated killing of any person committed by a person who had been previously convicted of a felony involving the use or threat of violence to the person or had been previously adjudicated delinquent in a juvenile proceeding for committing an offense that would be a Class A, B1, B2, C, D, or E felony involving the use or threat of violence to the person if the offense had been committed by an adult.

(15) The willful, deliberate, and premeditated killing of any person where the murder is especially heinous, atrocious, or cruel.

(16) The willful, deliberate, and premeditated killing of any person where the defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person.

(17) The willful, deliberate, and premeditated killing of any person where the murder for which the defendant stands convicted was part of a course of conduct in which the defendant engaged and which included the commission by the defendant of other crimes of violence against another person or persons.

(b) An offense under this section shall be deemed to be a Class A felony, and any person who commits capital murder shall be punished with death or imprisonment in the State's prison for life without parole, as the court shall determine pursuant to G.S. 15A-2000, except as provided in subsection (c) of this section.

(c) Any person who commits an offense in violation of this section who was under 18 years of age at the time of the capital murder shall be punished with imprisonment in the State's prison for life without parole."

SECTION 3. Article 6 of Chapter 14 of the General Statutes is amended by adding a new section to read:

"**§ 14-17.3. First degree murder; punishment.**

(a) Murder, other than capital murder, by means of a nuclear, biological, or chemical weapon of mass destruction as defined in G.S. 14-288.21, poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate, and premeditated killing, or which shall be committed in the perpetration or attempted perpetration of any arson, rape or a sex offense, robbery, kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon, except as provided in G.S. 14-17.2, shall be deemed murder in the first degree.

(b) An offense under this section shall be a Class A felony, and any person who commits first degree murder shall be punished with imprisonment in the State's prison for life without parole."

SECTION 4. Article 6 of Chapter 14 of the General Statutes is amended by adding a new section to read:

"**§ 14-17.4. Second degree murder; punishment.**

Any murder other than capital murder or first degree murder, including that which shall be proximately caused by the unlawful distribution of opium or any synthetic or natural salt, compound, derivative, or preparation of opium, or cocaine or other substance described in G.S. 90-90(1)d., or methamphetamine, when the ingestion of such substance causes the death of the user, shall be deemed murder in the second degree, and any person who commits such murder shall be punished as a Class B2 felon."

SECTION 5. G.S. 15A-2000(e) reads as rewritten:

"(e) Aggravating Circumstances. – Aggravating circumstances which may be considered shall be limited to the ~~following:~~ factors enumerated in this subsection. The penalty of death shall not be imposed unless the State shall prove beyond a reasonable doubt at least one of the following:

(1) There is a probability based upon evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense of which he is accused that he would commit criminal acts of violence that would constitute a continuing serious threat to society.

(2) The defendant's conduct in committing the offense was outrageously or wantonly vile, horrible, or inhuman, in that it involved torture, depravity of mind, or aggravated battery to the victim.

~~(1) The capital felony was committed by a person lawfully incarcerated.~~

~~(2) The defendant had been previously convicted of another capital felony or had been previously adjudicated delinquent in a juvenile proceeding for committing an offense that would be a capital felony if committed by an adult.~~

~~(3) The defendant had been previously convicted of a felony involving the use or threat of violence to the person or had been previously adjudicated delinquent in a juvenile proceeding for committing an offense that would be a Class A, B1, B2, C, D, or E felony involving the use or threat of violence to the person if the offense had been committed by an adult.~~

~~(4) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.~~

~~(5) The capital felony was committed while the defendant was engaged, or was an aider or abettor, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any homicide, robbery, rape or a sex offense, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.~~

~~(6) The capital felony was committed for pecuniary gain.~~

~~(7) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.~~

~~(8) The capital felony was committed against a law enforcement officer, employee of the Department of Correction, jailer, fireman, judge or justice, former judge or justice, prosecutor or former prosecutor, juror or former juror, or witness or former witness against the defendant, while engaged in the performance of his official duties or because of the exercise of his official duty.~~

~~(9) The capital felony was especially heinous, atrocious, or cruel.~~

~~(10) The defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person.~~

~~(11) The murder for which the defendant stands convicted was part of a course of conduct in which the defendant engaged and which included the commission by the defendant of other crimes of violence against another person or persons.~~"

SECTION 6. G.S. 15A-2005(h) reads as rewritten:

"(h) The provisions of this section do not preclude the sentencing of a mentally retarded offender to any other sentence authorized by ~~G.S. 14-17~~ 14-17.2 for the crime of ~~murder in the first degree.~~ capital murder."

SECTION 7. This act becomes effective December 1, 2007, and applies to offenses committed on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions. If any provision of this act or its application is held invalid, the invalidity does not affect other provisions or applications of this act that can be given effect without the invalid provisions or application, and to this end the provisions of this act are severable.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2007

H **D**

HOUSE DRH30194-RK-21A (01/31)

Short Title:	Felony Murder.	(Public)
Sponsors:	Representatives Earle and Harrison (Primary Sponsors).	
Referred to:		

A BILL TO BE ENTITLED

AN ACT TO CREATE THE STATUTORY OFFENSE OF FELONY MURDER AS RECOMMENDED BY THE HOUSE INTERIM STUDY COMMITTEE ON CAPITAL PUNISHMENT.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 14-17 reads as rewritten:

"**§ 14-17. Murder in the first and second degree defined; felony murder; punishment.**

(a) A murder which shall be perpetrated by means of a nuclear, biological, or chemical weapon of mass destruction as defined in G.S. 14-288.21, poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate, and premeditated ~~killing,~~ killing ~~or which shall be committed in the perpetration or attempted perpetration of any arson, rape or a sex offense, robbery, kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon~~ shall be deemed to be murder in the first degree, a Class A felony, and any person who commits such murder shall be punished with death or imprisonment in the State's prison for life without parole as the court shall determine pursuant to G.S. 15A-2000, except that any such person who was under ~~17~~18 years of age at the time of the murder shall be punished with imprisonment in the State's prison for life without parole. ~~Provided, however, any person under the age of 17 who commits murder in the first degree while serving a prison sentence imposed for a prior murder or while on escape from a prison sentence imposed for a prior murder shall be punished with death or imprisonment in the State's prison for life without parole as the court shall determine pursuant to G.S. 15A-2000.~~

(b) Unless a person's conduct is covered under some other provision of law providing greater punishment, a murder which shall be committed in the perpetration or attempted perpetration of any arson, rape or sex offense, robbery, kidnapping, burglary,

or other felony committed or attempted with the use of a deadly weapon shall be deemed to be felony murder, and any person who commits such murder shall be punished with imprisonment in the State's prison for life without parole.

(c) ~~All other kinds of murder,~~ A murder not described in subsection (a) or (b) of this section, including that which shall be proximately caused by the unlawful distribution of opium or any synthetic or natural salt, compound, derivative, or preparation of opium, or cocaine or other substance described in G.S. 90-90(1)d., or methamphetamine, when the ingestion of such substance causes the death of the user, shall be deemed murder in the second degree, and any person who commits such murder shall be punished as a Class B2 felon."

SECTION 2. This act becomes effective December 1, 2007, and applies to offenses committed on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2007

H **D**

HOUSE DRH60140-SA-17 (01/31)

Short Title:	Report New Trial to State Bar.	(Public)
Sponsors:	Representatives Earle and Glazier (Primary Sponsors).	
Referred to:		

A BILL TO BE ENTITLED

AN ACT TO REQUIRE THE CLERK OF COURT TO REPORT CERTAIN ORDERS TO THE NORTH CAROLINA STATE BAR AS RECOMMENDED BY THE HOUSE INTERIM STUDY COMMITTEE ON CAPITAL PUNISHMENT.

The General Assembly of North Carolina enacts:

SECTION 1. Chapter 15A of the General Statutes is amended by adding a new section to read:

"**§ 15A-1384. Reports of certain orders in capital case.**

When the court orders a new hearing or new trial in a capital case due to the misconduct of the prosecution or defense counsel, the clerk of court shall ensure that a written copy of that order is given to the North Carolina State Bar."

SECTION 2. This act becomes effective December 1, 2007, and applies to orders of a new hearing or new trial occurring on or after that date.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2007

H **D**

HOUSE DRH60141-SA-15 (02/01)

Short Title:	Racial Discrimination Vacate Death Sentence.	(Public)
Sponsors:	Representatives Earle and Glazier (Primary Sponsors).	
Referred to:		

A BILL TO BE ENTITLED

AN ACT TO CLARIFY THAT RACIAL DISCRIMINATION IS A PERMISSIBLE GROUNDS FOR APPEAL AT ANY TIME IN A CAPITAL CASE AS RECOMMENDED BY THE HOUSE INTERIM STUDY COMMITTEE ON CAPITAL PUNISHMENT.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 15A-1446(d) reads as rewritten:

"(d) Errors based upon any of the following grounds, which are asserted to have occurred, may be the subject of appellate review even though no objection, exception or motion has been made in the trial division.

(1) Lack of jurisdiction of the trial court over the offense of which the defendant was convicted.

(2) Lack of jurisdiction of the trial court over the person of the defendant.

(3) The criminal pleading charged acts which, at the time they were committed, did not constitute a violation of criminal law.

(4) The pleading fails to state essential elements of an alleged violation, as required by G.S. 15A-924(a)(5).

(5) The evidence was insufficient as a matter of law.

(6) The defendant was convicted under a statute that is in violation of the Constitution of the United States or the Constitution of North Carolina.

(7) Repealed by Session Laws 1977, 2nd Sess., c. 1147, s. 28.

(8) The conduct for which the defendant was prosecuted was protected by the Constitution of the United States or the Constitution of North Carolina.

(9) Subsequent admission of evidence from a witness when there has been an improperly overruled objection to the admission of evidence on the

ground that the witness is for a specified reason incompetent or not qualified or disqualified.

(10) Subsequent admission of evidence involving a specified line of questioning when there has been an improperly overruled objection to the admission of evidence involving that line of questioning.

(11) Questions propounded to a witness by the court or a juror.

(12) Rulings and orders of the court, not directed to the admissibility of evidence during trial, when there has been no opportunity to make an objection or motion.

(13) Error of law in the charge to the jury.

(14) The court has expressed to the jury an opinion as to whether a fact is fully or sufficiently proved.

(15) The defendant was not present at any proceeding at which his presence was required.

(16) Error occurred in the entry of the plea.

(17) The form of the verdict was erroneous.

(18) The sentence imposed was unauthorized at the time imposed, exceeded the maximum authorized by law, was illegally imposed, or is otherwise invalid as a matter of law.

(19) A significant change in law, either substantive or procedural, applies to the proceedings leading to the defendant's conviction or sentence, and retroactive application of the changed legal standard is required.

(20) A sentence of death was imposed and there is evidence that racial discrimination occurred in:

a. The decision by the district attorney to seek the death penalty;

b. The decision by the jury to impose the death penalty; or

c. Any other portion of the trial or sentencing phase resulting in the imposition of the death penalty."

SECTION 2. This act becomes effective December 1, 2007, and applies to all appeals filed on or after that date.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2007

H **D**

HOUSE DRH30193-SA-14 (02/01)

Short Title:	LEO Provide Info to DA for Discovery.	(Public)
Sponsors:	Representatives Earle, Glazier, and Harrison (Primary Sponsors).	
Referred to:		

A BILL TO BE ENTITLED

AN ACT TO ENSURE DISTRICT ATTORNEYS RECEIVE ALL NECESSARY INFORMATION FROM LAW ENFORCEMENT AGENCIES AS RECOMMENDED BY THE HOUSE INTERIM STUDY COMMITTEE ON CAPITAL PUNISHMENT.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 15A-903 reads as rewritten:

"**§ 15A-903. Disclosure of evidence by the State – Information subject to disclosure.**

(a) Upon motion of the defendant, the court must order the State to:

(1) Make available to the defendant the complete files of all law enforcement and prosecutorial agencies involved in the investigation of the crimes committed or the prosecution of the defendant. The term "file" includes the defendant's statements, the codefendants' statements, witness statements, investigating officers' notes, results of tests and examinations, or any other matter or evidence obtained during the investigation of the offenses alleged to have been committed by the defendant. Oral statements shall be in written or recorded form. The defendant shall have the right to inspect and copy or photograph any materials contained therein and, under appropriate safeguards, to inspect, examine, and test any physical evidence or sample contained therein.

(2) Give notice to the defendant of any expert witnesses that the State reasonably expects to call as a witness at trial. Each such witness shall prepare, and the State shall furnish to the defendant, a report of the results of any examinations or tests conducted by the expert. The State shall also furnish to the defendant the expert's curriculum vitae, the

expert's opinion, and the underlying basis for that opinion. The State shall give the notice and furnish the materials required by this subsection within a reasonable time prior to trial, as specified by the court.

(3) Give the defendant, at the beginning of jury selection, a written list of the names of all other witnesses whom the State reasonably expects to call during the trial. Names of witnesses shall not be subject to disclosure if the State certifies in writing and under seal to the court that to do so may subject the witnesses or others to physical or substantial economic harm or coercion, or that there is other particularized, compelling need not to disclose. If there are witnesses that the State did not reasonably expect to call at the time of the provision of the witness list, and as a result are not listed, the court upon a good faith showing shall allow the witnesses to be called. Additionally, in the interest of justice, the court may in its discretion permit any undisclosed witness to testify.

(b) If the State voluntarily provides disclosure under G.S. 15A-902(a), the disclosure shall be to the same extent as required by subsection (a) of this section.

(c) A law enforcement agency shall make available to the State the complete files related to the investigation of the crimes committed or the prosecution of the defendant for compliance with this section and any disclosure under G.S. 15A-902(a)."

SECTION 2. This act becomes effective December 1, 2007, and applies to cases where the trial date set pursuant to G.S. 7A-49.4 is on or after that date.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2007

H **D**

HOUSE DRH30195-RK-23A (01/02)

Short Title:	Amend MAR Procedure.	(Public)
Sponsors:	Representative Earle.	
Referred to:		

A BILL TO BE ENTITLED

AN ACT TO AMEND THE PROCEDURE FOR MOTIONS FOR APPROPRIATE RELIEF IN CAPITAL CASES AS RECOMMENDED BY THE HOUSE INTERIM STUDY COMMITTEE ON CAPITAL PUNISHMENT.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 15A-1420(b1) reads as rewritten:

"(b1) Filing Motion With Clerk; Review of Motion by Judge.

(1) The proceeding shall be commenced by filing with the clerk of superior court of the district wherein the defendant was indicted a motion, with service on the district attorney in noncapital cases, and service on both the district attorney and Attorney General in capital cases.

(2) The clerk, upon receipt of the motion, shall place the motion on the criminal docket.

a. In noncapital cases, ~~The~~ the clerk shall promptly bring the motion, or a copy of the motion, to the attention of the resident judge or any judge holding court in the county or district.

b. In capital cases, the clerk shall bring the motion, or a copy of the motion, to the attention of the senior resident superior court judge or his designee within five days of the filing of the motion. The senior resident superior court judge is authorized to assign the motion to any superior court judge, in accordance with G.S. 15A-1413(a). The assigned superior court judge shall hold all hearings and make all rulings in the case, unless the senior resident superior court judge reassigns the motion to another superior court judge.

c. In capital cases, not withstanding any other provision of law, the judge assigned to the motion shall be empowered to issue any orders or rulings in the matter while out of term, session, or county, and may hold a hearing in the superior court district during any regular session of the court, or a special session of the court, ordered pursuant to G.S. 7A-46.

(3) In noncapital cases, the judge shall review the motion and enter an order whether the defendant should be allowed to proceed without the payment of costs, with respect to the appointment of counsel, and directing the State, if necessary, to file an answer.

(4) In capital cases, the judge assigned pursuant to subdivision (2) of this subsection shall review the motion and enter an order within 20 days of the filing of the motion that ~~directing~~ directs the State to file its answer within 60 days of the date of the order. If a hearing is necessary, the judge shall calendar the case for hearing without unnecessary ~~delay.~~delay, and enter its order no later than 180 days following the hearing."

SECTION 2. This act becomes effective December 1, 2007, and applies to motions for appropriate relief filed on or after that date.