

# NORTH CAROLINA GENERAL ASSEMBLY



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## JOINT SELECT COMMITTEE ON CAPITAL TRIAL, SENTENCING, AND POST CONVICTION PROCEDURES FOR PERSONS WHO SUFFER SEVERE MENTAL DISABILITIES

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REPORT TO THE  
2009 SESSION  
of the  
2009 GENERAL ASSEMBLY

JANUARY 2009

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## **TRANSMITTAL LETTER**

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**The Joint Select Committee on Capital Trial, Sentencing, and Post Conviction Procedures for Persons Who Suffer Severe Mental Disabilities, respectfully submits the following report.**

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**Representative Verla Insko  
Co-Chair**

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**Senator Ellie Kinnaird  
Co-Chair**

<b>Marc Basnight</b> <b>President Pro Tempore,</b> <b>North Carolina Senate</b>		<b>Joe Hackney</b> <b>Speaker,</b> <b>North Carolina</b> <b>House of</b> <b>Representatives</b>
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**Joint Select Committee**  
**on Capital Trial, Sentencing, and Post Conviction Procedures for Persons**  
**Who Suffer Severe Mental Disabilities**

**Section 1. Joint Select Committee on Capital Trial, Sentencing, and Post Conviction Procedures for Persons Who Suffer Severe Mental Disabilities** (hereinafter "Committee") is established by the President Pro Tempore of the Senate and the Speaker of the House of Representatives pursuant to Rule 31 of the Rules of the Senate of the 2007 General Assembly and Rule 26(a) of the Rules of the House of Representatives of the 2007 General Assembly, as the combination of a Senate Select Committee and a House Select Committee that meet together and function as a joint committee. The Committee is authorized to meet during the session and, pursuant to G.S. 120-19.6, is authorized to meet between sessions and during recesses of the General Assembly.

**Section 2.** The Committee consists of the 10 members listed below, 5 of whom are appointed by the President Pro Tempore of the Senate and 5 of whom are appointed by the Speaker of the House of Representatives. A cochair or other member of the Committee continues to serve until a successor is appointed. A vacancy shall be filled within 30 days by the officer who made the original appointment. The Committee and the terms of the members expire when the Committee submits a final report to the General Assembly. Members serve at the pleasure of the appointing officer.

President Pro Tempore Appointments	Speaker of the House of Representatives Appointments
Senator Ellie Kinnaird, Co-Chair	Representative Verla Insko, Co-Chair
Senator Stan Bingham	Representative Pricey Harrison
Senator Charlie Dannelly	Representative Tim Moore
Senator Fletcher Hartsell	Representative Bonner L. Stiller
Senator Ed Jones	Representative William L. Wainwright

**Section 3.** The Committee shall study issues related to capital trial, sentencing, and post conviction procedures for persons who suffer severe mental disabilities.

**Section 4.** The Committee shall meet upon the call of its co-chairs. A quorum of the Committee is a majority of its members. No action may be taken except by a majority vote at a meeting at which a quorum is present.

**Section 5.** The Committee, while in the discharge of its official duties, may exercise all powers provided for under G.S. 120-19 and Article 5A of Chapter 120 of the General Statutes. The Committee may contract for professional, clerical, or consultant services, as provided by G.S. 120-32.02.

**Section 6.** Members of the Committee shall receive per diem, subsistence, and travel allowance as provided in G.S. 120-3.1.



**Section 7.** The expenses of the Committee shall be considered expenses incurred for the joint operation of the General Assembly. Individual expenses of \$5,000 or less, including per diem, travel, and subsistence expenses of members of the Committee, and clerical expenses shall be paid upon the authorization of a cochair of the Committee. Individual expenses in excess of \$5,000 shall be paid upon the written approval of a cochair of the Legislative Services Commission. All expenses of the Committee shall be paid from the Reserve for Studies of the Legislative Services Commission.

**Section 8.** The Legislative Services Officer shall assign professional and clerical staff to assist the Committee in its work. The Director of Legislative Assistants of the House of Representatives and the Director of Legislative Assistants of the Senate shall assign clerical support staff to the Committee.

**Section 9.** The Committee may meet at various locations around the State in order to promote greater public participation in its deliberations.

**Section 10.** The Committee shall submit a final report on the results of its study, including any proposed legislation, to the members of the Senate and the House of Representatives, on or before January 27, 2009, by filing a copy of the report with the Office of the President Pro Tempore of the Senate, the Office of the Speaker of the House of Representatives, and the Legislative Library. The Committee shall terminate on January 27, 2009, or upon the filing of its final report, whichever occurs first.

Effective this 3<sup>rd</sup> day of December, 2008.

	
Marc Basnight	Joe Hackney
President Pro Tempore of the Senate	Speaker of the House of Representatives

12/03/2008

## **SUMMARY OF COMMITTEE PROCEEDINGS**

The Joint Select Committee on Capital Trial, Sentencing, and Post Conviction Procedures for Persons Who Suffer Severe Mental Disabilities met January 13, 2009 and January 15, 2009.

### **January 13, 2009**

The committee met January 13, 2009 at 12:30 PM in Room 1027 of the Legislative Building. Senator Kinnaird, Co-chair of the committee welcomed members and called the meeting to order by recognizing Hal Pell to deliver the Charge to Committee.

Senator Kinnaird introduced the first speaker, John Tote, Executive Director of the MHA of NC, followed by a presentation by James Ellis, Professor of Law at the University of New Mexico.

Senator Kinnaird introduced Carl Fox, Senior Resident Superior Court Judge of District 15B. Presentations were then given by Dr. George Corbin, a practicing forensic psychiatrist at North Raleigh Psychiatry and Dr. Holly Rogers, a staff psychiatrist at Counseling and Psychological Services for Duke University.

The Committee discussed the issue of dealing with the death penalty for people with severe mental illnesses according to remarks made by the speakers. Senator Kinnaird adjourned the meeting at 3:50 PM.

### **January 15, 2009**

The committee met January 15, 2009 at 2:00 PM in Room 1124 of the Legislative Building. Representative Insko, Co-chair of the committee called the meeting to order and recognized Kris Parks for her work with the Mental Health community.

Representative Insko introduced Kimberly Stevens, Attorney from Winston Salem.

Following the presentation, Representative Insko appointed Dr. Rogers to follow up on additional answers for the committee. Representative Insko adjourned the meeting at 3:45 PM.

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## SUMMARY OF PROCEEDINGS

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### JOINT SELECT COMMITTEE ON CAPITAL TRAIL, SENTENCING, AND POST CONVICTION PROCEDURES FOR PERSONS WHO SUFFER SEVERE MENTAL DISABILITIES

TUESDAY JANUARY 13, 2009  
ROOM 1027 LEGISLATIVE BUILDING  
12:30 PM

The Joint Select Committee on Capital Trail, Sentencing, and Post Conviction Procedures for Persons Who Suffer Severe Mental Disabilities met Tuesday January 13 at 12:30 in room 1027 of the Legislative Building. Thursday January 15, 2009 at 2:00 in room 1124 of the Legislative Building.

Senator Ellie Kinnaird presided. Members present on January 13 were Senators Stan Bingham, Charlie Dannelly, Fletcher Hartsell Jr., Ed Jones and Representatives Pricey Harrison, Tim Moore, Bonner Stiller, and William Wainwright. Staff members present were Hal Pell, Emily Johnson and Denise Thomas. A copy of the roll denoting members present is attached to the minutes (Attachment A) along with a copy of the visitor registration and agenda sheet (Attachments B and C).

Senator Ellie Kinnaird called the meeting to order and introduced the Sergeant at Arms staff.

Sen. Kinnaird recognized Hal Pell to deliver the Charge to Committee. Mr. Pell said the charge is a broad general charge. The committee shall submit a final report by Jan twenty seven and committee terminates on that date. (Attachment D).

Sen. Kinnaird recognized John Tote.

Sen. Kinnaird introduced the first speaker, John Tote, Executive Director of MHA of NC, an advocacy and provider organization working on behalf of the mentally ill. (Attachment E)

Mr. Tote: North Carolina has one of the most stringent “not guilty by reason of insanity” laws in the nation. At the same time North Carolina is a leader in the nation in dealing with restrictions on capital punishment for people with mental retardation. This bill restricting capital crimes for people with severe mental illness is an extension of North Carolina’s existing law for people with mental retardation.

Both issues deal with people with severe mental impairment. This bill would level the playing field for all people with severe mental impairment.

Defendants will have to meet a very stringent threshold that they had a severe impairment at the time of the crime. They will have to prove they had the impairment at the time of the crime; their impairment will have to be confirmed by mental health professionals that are highly skilled at diagnosing mental illness and level of impairment.

Less than 1% of all people convicted of a capital crime actually receive the death penalty. This past year only one person in NC was sentenced to death. We have a growing consensus that the death penalty shall be reserved for the worst of the worst and that people with severe mental disabilities are not the worst of the worst.

Sen. Kinnaird introduced Professor James Ellis, Professor of Law at the University of New Mexico. Professor Ellis argued the Atkins mental retardation case before the US Supreme. He won the case which is the law of the land. We are using the mental retardation case as a model for the bill on exempting the death penalty for people with severe mental illness.

NC had the most dramatic impact on the U.S. Supreme Court as it heard the Atkins case because North Carolina was one of the original litigants. The case was half way through the briefing when NC passed their mental retardation statute. When North Carolina pulled out as one of the litigants, the significance was not lost on the Court.

The goal with regard to this legislation is to find a workable solution to the problem of people who have severe mental illness who find themselves charged with a capital offense. The first duty is to protect the public but also to attempt fairness in the cases with people who may have severe mental illness and to reserve the death penalty should be reserved for the people who are at the highest level of culpability. A major consideration is how to take the resources devoted to capital punishment and direct it toward the people who are most responsible for their actions.

The centerpiece of North Carolina's legislation which has served as a model to other states in how to make it work is: NC chose to make available a pre trial determination rather than delaying it to the trial or after the trial, involvement of good expert evaluation early in the process and having them inform directly the court of their clinical findings, and the focus on negotiation and consensus rather than on partisan litigation. These features help reduce the cost of contentious litigation.

These features work for mental retardation and can also be used as a model for the legislation regarding the mentally ill. The issue of mental illness in the proposal before you deals with people whose impairment is extraordinarily substantial and global. It requires the drafters and lawyers and courts to draw a line at which point a person would be exempted from the death penalty – a very small subset of the mentally ill.

The vast majority of people with mental illness or even severe mental illness never come into contact with the court system. But, severe mental illness can have a direct impact on

the thinking and the actions of a mentally ill person and when that person comes into contact with the criminal courts in a case involving homicide, their severe mental illness will affect their culpability. The question is how to figure out when the impact on the culpability of the defendant is such that the death penalty should not be considered and the top penalty should be life without possibility of parole.

In the mental retardation case, the Supreme Court said that people with mental retardation -- because of characteristics of their disability -- don't warrant the death penalty. That same inquiry with regard to people with severe mental illness produces the same results -- the understanding of their actions may be sufficient to allow conviction, but the mental illness has such an impact on their thoughts and action, they are not among the worst of the worst -- those people whose culpability is the highest.

Three doctrines exist that involve mental illness as it affects criminal cases:

- Competence to stand trial. Every state has the provision that mental illness can be so severe that they cannot understand their actions or assist counsel cannot be tried or convicted unless treatment will restore them to competence. This takes some people out of the criminal procedure.
- Insanity defense: A person who is competent to stand trial may be still be eligible for acquittal if their mental illness so impaired their understanding of the nature of their action that they cannot be convicted.
- Competence to be executed: Some people on death row who acquired mental illness while in prison may be so impaired they cannot understand what the punishment is all about. These people cannot be executed.

Even with these three doctrines, the bill before you is still necessary because there still may be people with severe mental illness sentenced to death despite the impact of their illness on their actions.

Under this legislation, a person with severe mental illness can still be punished; they can be punished severely. They cannot be sentenced to death; but, there is no impairment in the State's ability to protect the public. The only issues are culpability and retributive purposes for this person's actions.

In this country, we reserve the death penalty for those who most deserve it. The position of this legislation is that the death penalty is inappropriate for people with severe mental illness due to the impact of their mental illness on their ability to understand and conform their actions to the requirement of law.

While this bill tracks the mental retardation bill, it differs in some important respects. A person with mental retardation has had it from birth and it is life-long; it is not a changing condition. Mental illness often is a changing condition. This legislation addresses that by focusing on the person's mental condition at time at which the crime occurred.

Anyone whose actions may have been affected by the use of alcohol or drugs is excluded from this law as are those whose actions may be due directly to their mental illness such



as pyromania, personality disorder, etc. This bill deals only with severe mental illness that is independent of the crimes and that is independent of any responsibility this person has for their illness. The illnesses covered by this law include schizophrenia and other mental conditions – listed in the text - that so severely impact the person’s thinking and understanding at the time of their crime that it reduces the level of their culpability. Examples: a command from God, the person they were killing was not a human being, etc. These individuals did not cause their illness, they are less culpable and the public can be protected.

Another aspect is that if someone has acted because of their delusional believe, the prospect that they may face the death penalty can have no deterrent influence on them. Similarly, exempting these people from the death penalty will not affect the deterrence of the death penalty on anyone else.

The bill is better than the one passed by Connecticut and if passed other states will look to North Carolina “because it much more carefully focuses the pretrial determination on the impact of this person mental illness on their actions and more carefully crafts the definition of mental illness on those who are the least culpable.”

Sen. Kinnaird asked for questions.

**Senator Jones:**

**Would this person be sent to a mental institution?**

No, this person if convicted would be punished by other penalties including life without parole.

**Would this person be integrated into the rest of the prison population?**

No, they would be segregated to protect them and the other prison population. They should also receive treatment in prison.

Kinnaird: 40% of the people in our prison system have mental illness and many of these are first diagnosed with mental illness when they enter the prison population. The incidence of mental illness among our juvenile population is very high and they have not been picked up before they entered the correction system.

**Senator Bingham:**

**What would be the possibility of a person recovering from mental illness or having mental illness for only 3 months?**

A person can have a severe breakdown and will have only one occurrence in their life. Other people have manifestations of their mental illness all their lives.

**How many other states have this legislation?**

Just one: Connecticut; but that law does not have all the protections in it as the one before you.

Sen. Kinnaird introduced Carl Fox, Senior Resident Superior Court Judge of District 15B. Judge Fox was District Attorney for 20 year; assistant prosecutor for 6 years ad judge almost four years.

Judge Fox starts with the premise that the State should not be executing people who are mentally ill.

Judge Fox gave an overview of how capital procedures proceed.

The first step is the Rule 24 hearing when the judge determines whether the case can proceed capitally - based on mental competence. Next is the guilt/innocence phase. Evidence of diminished capacity can be presented in this phase or in the sentencing phase.

(Attachment F) (Sen. Kinnaird referred members to a handout in their packet)

This law would introduce a hearing before the trial, similar to the Rule 24 hearing, when evidence can be presented as to whether or not the person suffers from a severe mental illness and whether the case can proceed as a capital trial.

Judge Fox discussed several examples.

This bill would save a lot of time and money because of the appeals and length of appeals. This procedure would make sense and would provide protection for people who have severe mental disorders.

Judge Fox discussed the unlikelihood of anyone being able to fake a severe mental illness.

Rep. Stiller:

**In rule 24, can the judge determine to go forward or not to go forward because of mental illness?**

No, they cannot, the Rule 24 hearing is based only on aggravating factors. If one aggravating factor is present, the judge must rule the case must go forward as a capital crime.

Stiller:

**After the defendant is found guilty, the jury can come back with a variety sentences**

No, just two sentences, life imprisonment or death.

Stiller: At that point, does the jury decide whether or not the person has any mental illness that mitigates the crime?

Yes

Stiller:

**If we change this, wouldn't the judge make the determination before the trial rather than having the jury make the determination after the trial?**

Yes. But it make sense to do it pre trial because it would affect only very few cases and for those cases, the pre trial determination would save a lot of time and money. A judge would make this determination in only the clearest cases.

Stiller:

**Would we retain the post trial determination, if the judge determined the case could go forward, would a jury still be able to make a post trial determination?**

Yes

Staff: The jury can find a mitigating factor but still find an aggravating factor that outweighs any mitigating factors. Also, at the end the jury could also make the call that a defendant has a serious mental illness.

Stiller:

**If the judge ruled this case could go forward, wouldn't it set up a conflict if the jury tried to introduce mental illness as a mitigating factor?**

Not likely, the jury would likely not be aware of the judges ruling.

Moore:

**This bill would introduce two opportunities for mental illness to be introduced?**

Yes.

Bingham:

**What do you mean by dramatic savings?**

Judge Fox discussed the jury pool and the time it takes to seat a jury, attorney fees, etc.

**Sen. Jones:**

**Are we finding a person is so mentally ill they are not guilty?**

Fox: No. We may convict a person of murder even if they are mentally ill. They end up in prison.

Sen. Kinnaird asked Hal Pell, Research Staff, to explain the bill (Attachment G).

Sen. Kinnaird introduced Dr. George Corbin, a practicing forensic psychiatrist at North Raleigh Psychiatry. (Attachment H)

Sen. Kinnaird introduced Dr. Holly Rogers (Attachment I)

Sen. Kinnaird adjourned the meeting at 3:50 pm.

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Senator Ellie Kinnaird  
Co-Chair

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Representative Verla Insko  
Co-Chair

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Gina Insko  
Committee Assistant

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## SUMMARY OF PROCEEDINGS

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### JOINT SELECT COMMITTEE ON CAPITAL TRAIL, SENTENCING, AND POST CONVICTION PROCEDURES FOR PERSONS WHO SUFFER SEVERE MENTAL DISABILITIES

THURSDAY JANUARY 15, 2009  
ROOM 1124 LEGISLATIVE BUILDING  
2:00 PM

The Joint Select Committee on Capital Trail, Sentencing, and Post Conviction Procedures for Persons Who Suffer Severe Mental Disabilities met Thursday January 15, 2009 at 2:00 in room 1124 of the Legislative Building.

Representative Verla Insko presided. Members present were Senators Stan Bingham, Fletcher Hartsell Jr., Ed Jones and Representatives Pricey Harrison, Tim Moore, and Bonner Stiller. Staff members present were Hal Pell, Emily Johnson and Denise Thomas. A copy of the roll denoting members present is attached to the minutes (Attachment A) along with a copy of the visitor registration and agenda sheet (Attachments B and C).

Rep. Insko called the meeting to order. Sen. Kinnaird recognized Kris Parks for her work with the Mental Health community.

Rep. Insko announced the Committee has requested that the Conference of District Attorneys make a statement and to participate. They are not meeting again until February so they are unavailable to make a statement before Session begins. They will testify during the committee process.

Rep. Insko proposed that the Committee authorize Staff to write the report with no recommendations. The report would be a record of committee proceedings with no recommendations. When the bill is introduced all comments that have been heard in the meeting and from Conference of District Attorneys and anyone else that want to testify would be on record before a formal vote was taken on the bill. The final Bill will be sent out in a draft. The Committee will vote on this proposal at the end of today's meeting.

Rep. Insko recognized Kimberly Stevens, attorney from Winston Salem. (Attachment J) Ms. Stevens said approximately 1% of the 1600 some capital cases in NC since 2001 received the death penalty. When we look at who are among the worst of the offenders that issue turns on the offenders culpability. The US Supreme Court has addressed the issue of culpability and applied it in terms in both retribution and deterrence. Those offenders who deserve or can be the subject of retribution are those offenders who are capable of engaging in a calculus that weighs out in cold blooded fashion the full

consequence of their behavior. That definition does not and can not be applied to the severe mentally ill.

The judge has the opportunity to declare the case a non capital case. There have been nine pre-trial hearings in the seven years since North Carolina General Statute 15A-2005, deals with the mentally retarded, was enacted.

Ms. Stevens answered questions from the Committee on her presentation.

**Sen. Jones:**

**If this law is taking place now why do we need this law?**

Ms. Stevens replied that the law we passed was for the people with mental retardation and not mental illness.

**Sen. Jones:**

**What is the cost?**

A pre-trial hearing would outweigh the cost associated with post conviction litigation. In the 1993 cost study by Philip Cook, each execution cost approximately 2.3 million more than those not sentenced to death. (See: Philip J. Cook, Ph.D. and Donna B. Slawson, M.A., J.D., "The Costs of Processing Murder Cases in North Carolina", Terry Sanford Institute of Public Policy, Duke University, May 1993.

**Sen. Jones:**

**How would the family of the victim get closure?**

The convicted person would be in prison for the rest of their life and not eligible for parole. In most cases the family has closure.

**Sen. Bingham:**

**Is a copy of the Cook study available?**

Sen. Kinnaird replied that the study would be brought to the Committee meetings.

**Sen. Bingham:**

**Is mental illness curable?**

Mental illness may be treated, severe mental illness is not curable.

**Sen. Kinnaird:**

**Who is in the courtroom during a capital trial?**

There are 300 potential jurors, a judge, and clerk for the judge, courtroom clerk, law enforcement, prosecutor, prosecutor assistant, two defense attorneys, and witnesses.

**Rep. Insko:**

**Questioned the pre-trial process.**

Sen. Kinnaird responded there is currently no pre-trial process that exempts a person with severe mental illness unless that person has mental retardation.

**Sen. Hartsell:**

**Does a judge have the qualifications to make a decision if the person has severe mental illness?**

Yes, the judge does have the qualifications.

**Rep. Stiller:**

**How would the state of mind of the offender at the time of the crime be determined and what is the timeline for having the offender evaluated?**

The capital defender office is notified immediately. They send out lead council. The capital defender may appoint even a second council. The US Supreme Court has mandated what is required of capital defense attorneys. A trained mental health professional will be called to evaluate the client. They are brought in fairly close to when the crime was committed.

**Rep. Stiller:**

**If this law was created, could a death row inmate file a petition to be eligible for an evaluation to determine severe mentally illness at the time of the crime? If they do send it in, are the petition investigated?**

Most if not all death row inmates are represented by council. The law says their claim must be supported by appropriate affidavits. The client must have expert opinions and records on file.

**Sen. Hartsell:**

**What extent does the definition of severe mental ill differs from that of the M'Naughton Rule?**

Hal Pell gave the definition of the M'Naughton Rule.

Ms. Steven followed up to discuss the difference between M'Naughton Rule and the new legislation.

Rep. Insko recognized Dr. Rogers to follow up on additional answers from questions from the Committee.

Rep. Insko asked for a motion to authorized Staff to prepare a report based on the preceding with no recommendation as to the bill. The motion was made and passed.

Rep. Insko adjourned the meeting at 3:45 pm.

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Senator Ellie Kinnaird  
Co-Chair

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Representative Verla Insko  
Co-Chair

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Gina Insko  
Committee Assistant