**NORTH CAROLINA GENERAL ASSEMBLY**
**LEGISLATIVE FISCAL NOTE**

**BILL NUMBER:** Senate Bill 29

**SHORT TITLE:** Capital Cases/Revise Appeals Process

**SPONSOR(S):** Senator Odom

**FISCAL IMPACT:** **Expenditures: Increase (x) Alternatives 2&3 Decrease( )**
**Revenues: Increase ( ) Decrease ( )**
**No Impact (x) Alternative 1**
**No Estimate Available ( )**

**FUNDS AFFECTED:** **General Fund (**x**) Highway Fund ( ) Local Fund ( )**
**Other Fund ( )**

**BILL SUMMARY:** SB 29 makes several changes in the criminal procedure rules to shorten the time allowed for appellate review.

Section 1 of the bill amends G.S. 15A-1415 by placing a 120 day time limit on filing Motions for Appropriate Relief in all criminal cases. Previously, a Motion for Approporiate Relief could be filed at any time if the issue raised was one of the issues listed in the statute. The bill sets out particular events that trigger the 120 day time limit. The list of issues upon which a motion may be raised is the same except that a motion based on newly discovered evidence that could not have been discovered with due diligence which directly bears on guilt or innocence may be raised outside the 120 day time limit, unless the State shows that the delay has prejudiced their ability to respond to the motion. The bill allows a 30 day extension for filing the motion if good cause is shown. If a motion is filed alleging ineffective assistance of counsel, the attorney-client privilege is deemed waived. Any amendments to the Motion for Appropriate Relief must be made with leave of the court and for good cause.

Section 2 of the bill amends G.S. 15A-1419 which specifies the situations in which a court is required to deny a Motion for Appropriate Relief. The bill removes the exclusion of motions based upon deprivation of the right to counsel and of failure of the court to advise defendants of that right and adds failure to file the motion in a timely manner pursuant to the changes made in Section 1 of the bill. The court is required to deny the motion unless in the interest of justice and for good cause shown prejudice resulted from a meritorious claim. The bill adds to this subsection new language requiring a defendant to show the motion is in the interest of justice by proving by clear and convincing evidence that but for the constitutional error and in view of the newly discovered evidence, no reasonable fact finder would have found the defendant guilty or eligible for the death penalty. Good cause is shown by a defendant proving by clear and convincing evidence that failure to raise the claim previously is 1) the result of State action in violation of the U.S. or North Carolina

Constitution, or 2) the result of recognition of a new federal or state right that is retroactively applicable, or 3) based on a factual predicate that could not have been discovered through the exercise of due diligence at a time that it could have been presented in a previous claim. Ineffective assistance of counsel of prior postconviction counsel is not sufficient. Prejudice may only be shown by establishing by clear and convincing evidence that an error during trial or sentencing worked to the defendant's actual and substantial disadvantage raising a reasonable probability that a different result would have occurred but for the error. The bill declares that new rules of state law or procedure will be prospective unless the rule places the defendant's conduct beyond the reach of criminal law or prohibits the imposition of punishment for a class of defendants because of their status or offense.

Section 3 of the bill recodifies G.S. 15-217.1, Filing petition with the clerk, delivery to the district attorney, and review of peitition by judge, as G.S. 15A-1420(b1).

Section 4 of the bill amends G.S. 15A-1420 by adding to the procedural requirments for filing the motion that it be made in timely fashion. The bill deletes the subsection (b1), formerly G.S. 15-217.1, and in its place adds a new section regarding the filing of the motion with the clerk and its review by a court. Subsection (b1), formerly G.S. 15-217.1, which has been deleted, required the motion to be filed with the clerk of the county in which the person was tried. The clerk then delivered a copy to the district attorney. The clerk then placed the motion on the criminal docket and brings the motion to the attention of the resident judge or any judge holding court in that county. The judge then reviews the petition and makes orders appropriate to the issue of appointment of counsel and payment of costs and time and place of the hearing. The judge was authorized to order the defendant to be brought before the court and order the district attorney to answer the motion at a specified time. These portions are deleted by the bill and replaced with requirments as follows. The motion is filed with the clerk where the defendant was indicted, and a copy is served on the district attorney. The attorney general is also to be served if the matter is a capital case. The clerk is to place the matter on the criminal docket and bring it to the attention of the judge holding court in that county. In noncapital cases the judge reviews the order and makes findings regarding appointment of counsel and payment of costs and if the state should file an answer. In capital cases the court is directed to order the state to file an answer within 60 days. If a hearing is required, the district attorney or attorney general is directed to calendar the case without unnecessary delay. In capital cases the hearing is to be held within 60 days of the filing of the state's answer and can be continued for good cause shown. The bill further states that the defendant has no right to attend the hearing where only questions of law are to be argued.

Section 5 of the bill amends G.S. 15-194 regarding the setting of an execution date after final proceedings have occurred. The bill declares that the defendant has no right to be present at the hearing if the defendant is represented by counsel. The bill reduces the date the court may set the execution date from not less than 60 days from the date of the hearing to not less than 30 days from the date of the hearing and from not more than 90 days from the hearing to not more than 45 days from the date of the hearing. The bill further establishes that when a motion for appropriate relief is heard and denied the court shall set the execution date at that time under the same time requirments. The bill states that if counsel is appointed to litigate a motion for appropriate relief for an indigent capital defendant, the execution shall be stayed until disposition of the motion.

Section 6 of the bill amends G.S. 15A-1441 to require that capital cases be given priority on direct appeal and in State postconviction proceedings.

Section 7 of the bill amends G.S.15A-1443 by limiting previous standards of proof for defendants to direct appeal issues. It establishes a new standard for postconviction motions that a defendant must show error by clear and convincing evidence and that the error had a substantial and injurious effect or influence in determining the jury's verdict.

Section 8 of the bill adds a new subsection to G.S. 7A-451 that deals with appointment of counsel and requires that a request for counsel to be appointed for representation of defendants on motions for appropriate relief must be made within 10 days from the latest list of final acts by the N.C Supreme Court or the U.S. Supreme Court, unless no criminal or mixed session of court is being held in that county during the 10 day period. The bill further provides that counsel who has previously represented the defendant in a matter related to the claim, may not represent the defendant in this matter unless the defendant waives future allegations of ineffective assistance.

Section 9 of the bill requires the Administrative Office of the Courts to study the cost and feasibility of computer-aided transcription for capital cases with the goal of delivery within 30 days of receipt of the order for a transcript.

Section 9 of the bill becomes effective upon ratification, the remainder becomes effective for any case that becomes final on or after the date of ratification.

**EFFECTIVE DATE:** Effective for any case that becomes final on or after date of ratification. Section 9 of the bill is effective upon ratification.

**PRINCIPAL DEPARTMENT(S)/PROGRAM(S) AFFECTED:** 1. Judicial Department -- Indigent Defense; Superior Court; and District Attorneys 2. Department of Justice

**FISCAL IMPACT**

| | FY | FY | FY | FY | FY |
|---|---|---|---|---|---|
| **EXPENDITURES** | | | | | |
| **RECURRING** | See attached tables - Alternatives 1, 2, and 3. | | | | |
| **NON-RECURRING** | | | | | |
| **REVENUES/RECEIPTS** | | | | | |
| **RECURRING** | | | | | |
| **NON-RECURRING** | | | | | |

**POSITIONS:**

**ASSUMPTIONS AND METHODOLOGY:**

Capital post-conviction proceedings now take many years to complete (majority of time in federal court). Senate Bill 29 mandates completion of the State post-conviction process within a short time-frame compared to present practice (see "Bill Summary" above).

This fiscal note provides three alternative scenarios for the fiscal impact of Senate Bill 29 for the 1995-97 biennium:

Alternative 1 - No Fiscal Impact
Alternative 2 - Maximum Fiscal Impact
Alternative 3 - Minimum Fiscal Impact

**For Alternatives 2 and 3, which identify potential fiscal impact, a five year estimate is not provided.** According to the Administrative Office of the Courts (AOC), any estimate beyond 1995-97 is extremely speculative. The AOC indicates, and Fiscal Research concurs, that any potential costs during 1995-97 due to SB 29 may be offset by savings in later years. This is possible since shorter timeframes for handling capital cases may reduce resource needs.

Assumptions and methodology and a fiscal impact table are presented for each alternative. A key assumption that applies to each alternative is that SB 29 would apply to cases in post-conviction status on or after the date of SB 29 ratification, not to cases already in post-conviction. Therefore, it is assumed that SB 29 will only apply to capital cases in which the U.S. Supreme Court's decision on State direct appeals occurs on or after the bill's effective date (SB 29 states that effective date is date of ratification; July 1, 1995 is used for purposes of this note). (Note: SB 29 also applies to other appeals, but most Motions for Appropriate Relief are for capital cases)

Potential fiscal impact for each alternative is based on several of the SB 29 provisions. These are:

1. Current law allows nine (9) grounds for filing of Motions of Appropriate Relief (MAR) anytime after the verdict. Section 1 of SB 29 would require that, for eight (8) of nine of these grounds, that MAR's be filed within 120 days. SB 29 also allows for an extension up to 30 days for "good cause."

2. Current law lists three (3) general grounds for denial of an MAR; Section 2 of SB 29 adds a fourth ground for denial of relief -- failure to file a timely MAR (within 120 days). A judge's discretionary authority to grant time extensions beyond 120 days is also somewhat limited by SB 29.

3. Section 3 of SB 29 rewrites current law for post-conviction review proceedings to: (1) require the State to respond within 60 days to a judge's ruling on the MAR and (2) require the district attorneys to calendar a hearing within 60 days after the State has responded.

4. Section 8 of SB 29 requires a defendant to apply for defense counsel (if indigent) within 10 days of the last of a list of procedural events (corresponding to the 120 day limit). The bill also requires the district attorney to arrange for the defendant to appear in superior court within the 10 day limit.

The primary thrust of SB 29 is to change present MAR practice from a series of motions potentially spanning years to one motion that must raise all possible grounds for relief. According to the AOC elapsed time would be compressed to about 265 days for the average case once the bill is ratified.

Alternative 1 -- No Fiscal Impact

Alternative 1 assumes that, under SB 29, cases in the post-conviction stage on or after the date of ratification would move ahead of existing capital post conviction cases and some other superior court cases in many instances. This action and the likely resulting adjustment of workload and staff assignments is considered necessary by the AOC and the Attorney General's Office in order to meet new time limits. However, under Alternative 1 there would be no new cost since the resources (attorneys, judges, etc.) necessary to comply with new time limits of SB 29 would be diverted from other cases. However, Alternative 1 would result in delays in other superior court cases and increase court backlog.

**Alternative 2 - Maximum Fiscal Impact**

| | FY 95-96 | FY 96-97 | FY 97-98 | FY 98-99 | FY 99-00 |
|---|---|---|---|---|---|
| Expenditures | $1,166,697 | $1,143,585 | Cannot be determined - may increase or decrease | | |
| Receipts | -0- | -0- | | | |
| Positions | 9 | 9 | | | |

Assumptions and Methodology for Alternative 2:

Like Alternative 1, Alternative 2 assumes that under SB 29, capital post-conviction cases after October 1, 1995 would move ahead of other cases in many instances and cause a general shifting of workload to meet new time demands. **However, Alternative 2 then assumes that if SB 29 is to be implemented without causing delay in other superior court caseloads, including current post-conviction caseloads, additional resources would be needed.**

As of January 25, 1995, there were 17 capital cases pending before the U. S. Supreme Court for review of direct state appeal. It is largely this pool of cases that will be affected by SB 29 during the 1995-1997 biennium.

It is not possible to predict how many of those cases will result in affirmed death sentences, or how soon. Although it may be unlikely for all of these cases to be in state post-conviction status within the next one to two years, for Alternative 2 it is assumed all 17 cases will result in additional capital MAR's during the 1995-97 biennium.

The 17 cases now before the U. S. Supreme Court are not the only possible pool for additional hearings. There are some 63 capital cases before the N. C. Supreme Court, and some of these could reach U. S. Supreme Court review and go into State post-conviction during the next two years. Additional trial court cases that result in death sentences add to the Supreme Court's caseload of pending capital appeals; although appeals take some time, it is possible for some of these cases to go into post-conviction status before the end of the 1995-1997 biennium.

The fiscal impact chart above summarizes the cost impact of Alternative 2.

The specific assumptions and methodology for Alternative 2 are:

(1) It is assumed that the attorney time for defense counsel will average 350 hours per attorney in each capital MAR (current average). SB 29 contemplates raising all issues in one motion. It is likely that the one motion will be more complex and that total attorney hours could be as high or higher than current practice. However, the current average is used since there is no reliable method for determining the average number of hours for MAR practice under this bill. (Data for cases analyzed in a study by the Duke University Institute of Public Policy reported 391 hours devoted to state post-conviction in one case, and 251 hours in another).

(2) It is assumed that two attorneys will be appointed in each case. This is the practice now in almost all cases and is allowed under SB 29 if the circumstances of the case warrant their appointment. The need for two attorneys in every case seems likely since MAR practice under SB 29 will involve one complex motion on a prompt timetable.

(3) It is estimated that in-court time for the hearings will average two weeks (10 court days). The Attorney General's office estimated a somewhat longer average time and the Appellate Defender estimated a somewhat shorter average length of hearing. The two week estimate may be low; under SB 29, the "average" capital MAR hearing may increase in length because all issues are to be raised in the one motion.

(4) It is anticipated that an additional position in the Appellate Defenders Office will be needed to handle attorney recruitment
for the additional cases and to provide the increased level of assistance that will be required to meet the shorter time-frame for preparation and litigation of the motion. The additional MAR's and the quickened pace of their disposition is likely to strain the availability of able attorneys willing to accept appointment as counsel for indigent defendants. To meet the 10-day limit for appointment of counsel, recruitment would need to begin before the U. S. Supreme Court disposes of the case.

Workload is only one factor that justifies the need for an additional position. Members of the private bar who handle capital cases have in several settings expressed the view that capital representation is difficult work and that the available lawyer pool is too small. In some districts, very few attorneys remain on the capital appointment lists, and it has been necessary to seek defense counsel from other districts.

Also, such work can consume an attorney's practice and result in economic loss because the fees paid by the state (generally $85 per hour) are lower than what these experienced attorneys are paid for other cases. **(Note: The 1994 General Assembly provided funds to raise hourly fees from about $65 to $85 dollars an hour for indigent counsel in capital cases but the rate is still well below the average private attorney rate of about $120 an hour, according to the AOC).**

Finally, the need to recruit counsel was discussed in a February, 1995 study by the Attorney General "Recommendations to Reduce Cost and Delay in Capital Cases", in which measures similar to the time limits in SB 29 were recommended. This report noted that appointment of post-conviction counsel has in some instances caused delays in capital cases and that recruitment of qualified attorneys has proven difficult. The report recommended that judges be given the authority to appoint an attorney if one cannot be recruited.

Calculations of costs for Alternative 2 for 1995-96 are as follows:

(1) Indigent Defense/Private Attorneys -- Legal fees for capital indigent cases average $85 per hour. AOC estimates each case will require an average of 700 hours per MAR or 350 hours per attorney (700 hours times 17 MAR's = 11,900 hours times $85 per hour = $1,011,500 for 19995-97). Amount would be $505,750 per year. This estimate assumes that the Appellate Defender's Office could not handle the additional cases.

(2) In order to provide state district attorney resources at a level comparable to private defense counsel, it is estimated that six additional Assistant District Attorney's would be needed. The cost would be $378,636 for 1995-96 and $373,008 for 1996-97. This assumes that prosecutors should be able to devote the same time to the case as would the defense (11,900 hours for the 17 cases comes to 297.5 weeks of work at 40 hours per week, which is six positions at 48 work weeks per year, allowing 11 days for holidays and nine days for sick and vacation leave).

(3) For superior court judges and deputy clerks, the 10 in-court days for 17 hearings translates into the need for one position each. The position cost for one superior court judge is $143,996 for 1995-96 and $128,229 for 1996-97. For a deputy clerk, the cost is $24,529 in 1995-96 and $23,754 for 96-97.

(4) For contracted court reporters for 1995-96, costs for in-court reporting are based on $80 a day for 10 days as well as transcript production. Overall cost is $50,788 in 1995-96 and $50,787 in 1996-97.

(5) The position costs for an additional Appellate Defender are $62,998 for 1995-96 and $62,057 for 1996-97.

**ALTERNATIVE 3 - MINIMUM FISCAL IMPACT**

| | FY 95-96 | FY 96-97 | FY 97-98 | FY 98-99 | FY 99-00 |
|---|---|---|---|---|---|
| Expenditures | $376,885 | $376,885 | Cannot be determined - May increase or decrease | | |
| Receipts | 0 | 0 | | | |
| Positions* | 1 | 1 | | | |

* Assumes temporary employees would be used approximating 2 ADA's and 1/3 of a superior court judge; only one permanent position, an attorney in the Apellate Defenders Office, would be needed.

Assumptions and Methodology for Alternative 3:

Alternative 3 basically assumes handling 8 MAR's rather than 17 used for Alternative 2, over the 1995-97 biennium and makes several other assumptions to determine the minimum fiscal impact of this bill. The assumptions are:

1. The number of additional hearings are reduced from seventeen to eight (this reduces all other estimates);

2. The manhours needed for Assistant District Attorney's is reduced to 60% of those predicted for the defense (on the assumption that A.D.A.'s would need to spend less time defending the motion than the defense will spend presenting it since preparing an MAR requires more research and fact-finding than responding to an MAR);

3. The amount for deputy clerks was eliminated due to reduced workload; and,

4. There would be no need for court transcription of the proceedings until after the 1995-97 biennium on the assumption that the original transcript would suffice initially.

The ongoing need for additional assistance to recruit and train post-conviction counsel (Appellate Defender position) seems evident under any scenario.

Under Alternative 3 it is anticipated that the resources would be to provide for:

1. Private attorneys for indigent defense -- $238,000 per year.

2. Temporary Assistant District Attorneys (two positions) -- $97,216 in 95-96 and $97,216 in 96-97.

3. Emergency superior court judges (workhours comparable to 1/3 of a judge) -- $38,469 in 95-96 and $38,469 in 96-97.

4. Court reporting requirements -- $3,200 each year.

It is expected under Alternative 3 that the additional temporary personnel would be assigned to other caseloads, freeing up time for experienced personnel to handle the capital MARs.

Given the uncertainty over the number of cases, however, the AOC recommends authorization of a reserve fund equal to the amount of fiscal impact for Alternative 3. However, if necessary, it is likely the AOC could request use of State Contingency and Emergency funds.

**DEPARTMENT OF JUSTICE**

**NO FISCAL IMPACT**

Assumptions and Methodology:

Department of Justice officials indicate that shorter timeframes established by SB 29 can be met with existing Attorney General staff since three (3) additional personnel were funded by the General Assembly in 1994 for the Capital Litigation Section. **This belief however also is based on the premise that additional resources and efforts would be undertaken by district attorneys in capital cases as discussed in the Judicial section of this note. Otherwise, additional Justice resources would be needed to implement SB 29.**

**SOURCES OF DATA:** Judicial Department, Department of Justice

**TECHNICAL CONSIDERATIONS:** None

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**[FRD#003]**