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Re: Fiscal Note Racial Justice Act (RJA)

Here are my thoughts on the RJA problems:

The AOC fiscal note on prospective DA costs is wrong. The estimate is too low. I support the idea conveyed by the title of the bill, but the courts have dealt with these issues already. I don't have the staff to fairly meet the future defense motions on the RJA for the reasons that follow. If it passes, everyone we have put on death row would get life since I don't have the time to adequately prepare to have 11 re-hearings on my capital cases on death row. Plus, if I win the motions (which I should), all will be re-appealed for another decade. That is cruel to the families of the murder victims.

In my 19 years as DA, we have disposed of over 450 murder cases; sent 20 to death row, executed 3 and have 11 awaiting execution. We also have a half dozen capital cases getting ready to be tried. We put so many people on death row that they put a Capital Defender's Office in Forsyth County. They are staffed by two excellent attorneys, the Rabil brothers, one of whom worked for me as an ADA for 17 years and put several on death row himself as an ADA. All 11 defendants awaiting execution had a fair trial and there is no residual doubt of their guilt in any case. They all committed the murders.

I expect **everyone in the State on death row to file a RJA motion**, all 160+, since the Caucasians have a better argument than African-Americans as whites are over-represented on death row if you look at the Caucasian population of first and second degree murderers in the DOC.

To reconstruct why we decided one case was capital over another murder case that happened 20 or 40 years ago will be incredibly expensive and perhaps impossible. The process begins by **requiring someone in my staff to stop what they are doing and find all our old murder files**. However, they have been moved by the County several times for lack of storage space and are now not kept in order, some just randomly sitting in boxes with no index to them. The county, last week, refused to fix the electrical movable shelving units for us so we could put our files in numerical order on the shelves, so I can't even begin to access all of my files yet.

We would then have to **put all the pages of each murder file that we can find back together in new notebooks** since the files were dumped unceremoniously in boxes since we never can get enough notebooks and had to recycle all the notebooks after the trial

was over. This is done by turning a 3-ring notebook upside down and letting the pages fall into a box, hopefully in order. I reconstituted a file once in the “Silk Plant Forest,” a non-capital assault case; it took 2 - 3 legal assistants two whole weeks to organize the file and put it back in notebooks, doing nothing else. Some of our capital files are much larger and have 5,000 to 15,000 pages of materials.

We then would need to **supplement our file from the law enforcement agency’s files** or microfiche. How long it takes the cops to print out 5,000 to 15,000 pages and **who will pay for the copies is unknown to me**. Sometimes there is only limited or no microfiche such as in the case of the true murderer in Darryl Hunt’s case.

We would need to **run criminal records on all the witnesses** to determine their creditability at the time of the trial if their criminal records were not in our old files.

Many of our **older police officers** become detectives in their final years in the department. We would have to find them, if they are still alive, **and talk to them** about what they recall of the case and why it went capital or not.

We would **have to interview some key witnesses at the time** to decide if we thought they were able at that time to project to a jury their statements which may not look too strong on paper. Of course, if the prosecutor is available, he might remember each witness, but I doubt it.

We would need to interview the ADAs who handled the case.

We will need to interview some of the victims’ family, some of whom may not have wanted us to seek the death penalty or who we guessed would testify for the defense at sentencing that they didn’t want the death penalty. This may have been a key factor whether we decided to go capital or not years ago. These folks end up the day before execution begging the Governor to commute the sentence to life.

We would have to **go to the Clerk’s vault for all cases on appeal to review all the physical evidence to see how strong the evidence was**. If it is **an old case, all the evidence would likely have been destroyed**. What do we do then?

We would have to **read all the stuff to decide how strong a case we had at that time**. **What was the law at that time** that allowed certain evidence to be presented? **I would also need several thousand notebooks** to hold all these materials.

Our first capital case conviction was **Carl Steven Mosley**, a serial murderer rapist. It is a 1991 case. It is still in the federal appeals process. His DNA was in one of two young women he murdered. He tried to kill a third woman who testified for us. He is white, middle class with an average IQ and was 3 credit hours away from completing his law enforcement certification from Surry County Community College. His father was a minister. Could he be exempted from the bill? He deserves death. He worked to earn it. **Apparently, he is going to outlive me** and I never murdered two young women.

What happens on **Blanche Taylor Moore**, a white female serial murderer on death row since 1988? Do I go back through all the murder cases to 1968 or earlier to look at all the previous murder files for transcripts? **Who knows where these files are or if the ADA or cops are even alive?**

If there are any **pre-Batson cases** (before 1983), we will need to determine **the racial makeup of the jury**, if we can **find the trial transcript**. Even if it was **post Batson**, the bill **still allows the defense to allege a pattern of racial disparity** again even after the courts ruled on it. However, **once a murder sentence is completed, we destroy the files to save storage space. How do I reconstruct what I don't have?**

We would probably also have to **read the NC Supreme Court opinions** for the capital case arguments **plus all the federal appeals** to see what arguments, if any, were made about the facts and the evidence to **get a complete picture** of our case as it existed shortly before trial to decide why it was capital. **Is the Attorney General going to copy the opinions for us?**

We attempted a case reconstruction and analysis once. This case totally preoccupied whatever extra time there was every day for myself and my senior assistant over a 1 ½ year period, plus a lot of my extra time for 2 ½ years before; thousands and thousands of hours and it wasn't even a murder case.

Keep in mind, the RJA will require us to find and **hire a statistician to explain our specific numbers to us** and then **teach us how to cross examine the defense statistician**. We have no institutional experience on statistics. We have learned about mental health issues, but we have spent years and years in trials learning and perfecting our techniques. The juries don't buy a lot of psychological stuff anyway, so even if my ADA doesn't do a good job of cross-examining one of the psychologist, he won't lose the case. That is not the case in the RJA instance since a judge will hear it non-jury. Therefore, my ADA must be mathematically competent to cross-examine the defense expert statistician. **It won't be a fair fight for one of my lawyers to cross a statistician.** None of them are math wizzes. **What about the judge?**

I believe the **2007 AOC survey that is the basis of the fiscal note is inaccurate.** The **DA response was not thorough enough to form the basis for this bill.**

No DA has any surplus time now to do anything like I predict above, so what good is a fiscal note? I have 10 ADAs handling violent and murder cases out of my staff of 25 ADAs. We have about 48 murders pending and had 27 filed in 2008-09. We disposed of 6 by trial, 3 pled as charged, and 15 pled to lesser charges. We handle over 3,000 felony cases a year and send about 1,000 men to prison a year. District Court is 85,000 cases a year. **We can't do any more than we are doing now unless you want us to give away the courthouse or hire more staff.** When would I hear 11 RJA motions? My guess is that I would need at **least 4 "fill in" senior ADAs** to help run two concurrent sessions of Superior Court to try my cases while some of the rest of my staff of ADAs spends a year

getting prepared, plus we would need **two investigators** and **four legal assistants**. By the way, **there is no pool of senior “fill in” ADAs anywhere**.

Just the physical amassing of over 450 murder files from the DA and law enforcement could take months. More months to collate them and more months to interview people and more months to collate all the information and more months to feed all this to a statistician and some amount of time to get caught up to speed on the math.

In conclusion, **the present AOC estimate of 9 days preparation is too low to be valid. The fiscal note is way too low for DA costs.**

If the defense loses, they will appeal to the State Supreme Court and then Federal Habeas. That's another \$250,000 in attorney's fees per case and the **victim's family has to go through another 10 years of not seeing justice completed.**

Even if the DAs don't have to do all of the above, **the defense will have to do all of this** to figure out what happened before they can ethically file a motion. **What will that cost?**

This bill, if it passes, has incredibly costly collateral consequences. I would rather give the money to the schools.

The real reason for this bill is eradication of the death penalty. Apparently, **the Racial Justice Bill is not about Race or Justice.**

Crime will not stop while I look over 450 old murder cases to reconstruct what we did 20 or 40 years ago. **A retroactive bill would effectively end the death penalty and dilute the work we do for our current victims.**

Tom Keith