

**Quarterly Report of the
Office of Indigent Defense Services:
Racial Justice Act Motions and Spending
October 1, 2011 through December 31, 2011**

Submitted to the North Carolina General Assembly
Pursuant to Session Law 2009-464
And Upon Request of the Fiscal Research Division

Submitted January 19, 2012

**Quarterly Report of the Office of Indigent Defense Services:
Racial Justice Act Motions and Spending**

October 1, 2011 through December 31, 2011

TABLE OF CONTENTS

I. Introduction	1
II. Statistical Study	1
III. Timing of RJA Motions	1
IV. IDS Policies and Reporting Systems—Methodology and Limitations	2
A. RJA Motions Filed—Methodology and Limitations	2
B. RJA Expenditures—Methodology and Limitations	2
V. RJA Motions Filed Between October 1, 2011 and December 31, 2011	3
VI. RJA Expenditures Between October 1, 2011 and December 31, 2011	3
A. Attorney Expenditures	3
B. Expert and Support Expenditures	4
C. Total Expenditures	4

APPENDICES

Form IDS-032, RJA Motions Reporting	Appendix A
Form IDS-031, RJA Fee Application Addendum	Appendix B

Quarterly Report of the Office of Indigent Defense Services: Racial Justice Act Motions and Spending

October 1, 2011 through December 31, 2011

(Submitted January 19, 2012)

I. Introduction:

The North Carolina Racial Justice Act (“RJA”), Session Law 2009-464, provides that no person shall be subject to a death sentence or executed pursuant to a judgment that was sought or obtained on the basis of race. The RJA creates a right to raise a claim that race was a significant factor in the decision to seek or impose a death sentence in the county, district, or division at the time the death sentence was sought or imposed. The claim can be raised in a pre-trial motion that must be filed within 10 days of the Rule 24 hearing, on appeal in capital cases, or in capital post-conviction. For claims raised in post-conviction, they had to be filed within one year of the effective date of the act (or by August 10, 2010). Evidence that may support such a claim includes, but is not limited to, statistical evidence and the testimony of criminal justice system actors. The prosecution may offer rebuttal evidence, including evidence of remedial programs implemented prior to the defendant’s trial.

Via an email to the IDS Fiscal Officer dated September 21, 2009, the legislative Fiscal Research Division directed the Office of Indigent Defense Services (“IDS”) to submit quarterly reports “on the number of motions filed and the detailed costs incurred to meet the requirements of” the RJA. This quarterly report covering the time period between October 1, 2011 and December 31, 2011 is due by March 1, 2012. Subsequent quarterly reports are to be submitted every three months.

II. Statistical Study:

Catherine M. Grosso and Barbara O’Brien, Ph.D., Assistant Professors of Law at the Michigan State University College of Law, have conducted a statewide statistical study in North Carolina on race and the death penalty. The “charge and sentencing” portion of the study involved collecting, coding, and analyzing data on prosecutorial charging decisions and jury sentencing decisions in cases since 1990 in which the defendant was capitally tried and the verdict was death or life, as well as death-eligible cases where the defendant was not capitally tried. The “jury selection” portion of the study involved collecting, coding, and analyzing data on peremptory strikes and race in cases where the defendant is currently on death row. The Grosso-O’Brien study is an independent study, and the direct costs of the study were covered by non-State grant funds. Preliminary results were available before the post-conviction filing deadline of August 10, 2010.

III. Timing of RJA Motions:

Motions may be filed pursuant to the RJA at a number of different stages in capital litigation. First, in potentially capital cases at the trial level, claims should be raised within 10 days of the Rule 24 hearing. In cases that had already been through a Rule 24 hearing when the RJA went

into effect, counsel may have filed a motion to reopen the Rule 24 hearing to investigate and litigate a RJA claim. Second, there are currently 12 capital defendants with pending direct appeals in the Supreme Court of North Carolina or pending certiorari petitions in the United States Supreme Court, seven of whom filed a RJA claim before the August 10, 2010 post-conviction filing deadline. Five of the defendants pending on direct appeal were convicted and sentenced to death after the August 10, 2010 filing deadline. To the extent possible, the appointed appellate counsel have been handling the RJA litigation in those cases. In addition, on an ongoing basis, defendants who did not prevail in a RJA claim at the trial level and who were sentenced to death may seek review of that decision on direct appeal. Third, the defendants who were on death row and in post conviction on August 10, 2010 had an August 10, 2010 deadline for filing a substantive RJA claim.

IV. IDS Policies and Reporting Systems—Methodology and Limitations:

After being directed by the Fiscal Research Division on September 21, 2009 to report the number of motions filed pursuant to the RJA and the detailed costs incurred as a result of the act, IDS staff took a number of steps to design and implement systems for tracking and reporting this data.

A. RJA Motions Filed—Methodology and Limitations:

With respect to motions filed, IDS staff designed a new form (IDS-032), which defense attorneys have been directed to complete and submit within 10 days of filing any motion(s) pursuant to the RJA. That form is attached to this report as Appendix A. In potentially capital cases at the trial level, attorneys are required to submit that form to the Office of the Capital Defender. In capital cases at the appellate and post-conviction levels, attorneys are required to submit that form to the Center for Death Penalty Litigation (“CDPL”). The Office of the Capital Defender and CDPL have been tracking those motions in an Excel spreadsheet, and providing that data to IDS on a quarterly basis. However, as with any system that relies on self-reporting, IDS cannot guarantee that the information it receives from attorneys across the State is accurate, comprehensive, and timely. In addition, IDS’ policies governing RJA litigation only require attorneys to report original pleadings pursuant to the RJA. If attorneys subsequently amend RJA claims that were previously filed, they are not required to notify IDS of the amendment.

B. RJA Expenditures—Methodology and Limitations:

With respect to costs incurred, IDS staff designed a new fee application addendum (form IDS-031), which defense attorneys have been directed to attach to any fee application that includes time associated with the RJA. That form is attached to this report as Appendix B. In addition, IDS modified its existing in-house Access database to track all of the financial data. However, there are three significant limitations on IDS’ ability to track and report complete and timely financial data associated with the RJA. First, the IDS Rules provide that attorneys must submit final fee applications within one year of final case disposition at the applicable case phase. Most, but not all, capital attorneys also submit interim fee applications on a periodic basis. IDS does not have the ability to track or report costs incurred in “real time,” and can only track and report actual expenditures as they are made, which is dependent on when the attorneys submit their fee applications. There are currently more than 1,000 pending potentially capital cases at the trial level across the State, 12 capital defendants pending on direct appeal, and 146 pending capital

post-conviction cases. IDS does not have the staff or resources to get time estimates from all of the attorneys in those cases on a “real time” basis.

Second, IDS has never before asked attorneys to report time associated with specific legal issues, so this requirement is new. It can also be very challenging in many cases for attorneys to segregate their time on a RJA claim from their time on other claims, including constitutional race-based claims, that are being litigated simultaneously. IDS’ policies inform counsel that “[t]ime should only be attributed to the RJA if counsel would not have done the work but for the enactment of the RJA. If counsel would have spent the same time in the investigation or preparation of a constitutional race-based claim, the time should not be attributed to the RJA.” Despite that guidance, it is often very difficult for attorneys to segregate their time working on intertwined substantive claims.

Third, IDS is not tracking or reporting the significant time spent by IDS staff developing, implementing, and maintaining systems to comply with the General Assembly’s directive to submit quarterly reports, including the time spent by IDS legal staff developing policies, systems, and forms, and the time spent by IDS research and technology staff developing spreadsheets and revising the IDS Access database to capture this data. In addition, IDS is not tracking or reporting the time associated with attorneys complying with these new policies and reporting requirements.

V. RJA Motions Filed Between October 1, 2011 and December 31, 2011:

IDS may not have complete data on the motions filed during the second quarter of fiscal year 2011-12 for the reasons cited in Section IV.A., above. However, to IDS’ knowledge, no new RJA motions were filed across the State in potentially capital cases at the trial level, capital appeals, or capital post-conviction cases between October 1, 2011 and December 31, 2011.

VI. RJA Expenditures Between October 1, 2011 and December 31, 2011:

A. Attorney Expenditures:

IDS may not have complete data on the actual costs incurred as a result of the RJA during the second quarter of fiscal year 2011-12 for the reasons cited in Section IV.B., above. However, during the second quarter of fiscal year 2011-12, IDS paid attorneys a total of \$1,225.50 in fees and no expenses associated with RJA investigation, motions preparation, and litigation in three different potentially capital cases at the trial level that were pending in three different counties around the State (Cumberland, Robeson, and Wake). Thus, the average payment in cases at the trial level during the second quarter of fiscal year 2011-12 was \$408.50.

During the second quarter of fiscal year 2011-12, IDS did not pay any attorney fees or expenses associated with RJA investigation, motions preparation, or litigation in capital cases on direct appeal.

During the second quarter of fiscal year 2011-12, IDS paid attorneys a total of \$45,942.95 in fees plus \$9,076.30 in expenses associated with RJA investigation, motions preparation, and litigation

in 12 different capital post-conviction cases that were pending in 11 different counties (Alexander, Beaufort, Cumberland, Forsyth, Gaston, Iredell, Johnston, Moore, Onslow, Union, and Wayne). Thus, the average payment in cases at the post-conviction level during the second quarter of fiscal year 2011-12 was \$3,828.58.

B. Expert and Support Expenditures:

During the second quarter of fiscal year 2011-12, IDS also paid a total of \$16,722.32 in expert and support fees and expenses associated with the RJA. Those payments were made in one potentially capital case at the trial level that was pending in Stanly County and three different capital post-conviction cases that were pending in three different counties (Cumberland, Forsyth, and Wayne).

C. Total Expenditures:

In sum, the total expenditures during the second quarter of fiscal year 2011-12 were as follows:

Trial Attorney Fees:	\$ 1,225.50
Trial Attorney Expenses:	\$ 0.00
Appellate Attorney Fees:	\$ 0.00
Appellate Attorney Expenses:	\$ 0.00
Post-Conviction Attorney Fees:	\$45,942.95
Post-Conviction Attorney Expenses:	\$ 9,076.30
<u>Expert and Support Payments:</u>	<u>\$16,722.32</u>
Total:	\$72,967.07

APPENDIX A

STATE OF NORTH CAROLINA _____ County		Form IDS-032 (Rev. 06/11) ▶ <i>File Nos.</i>	
Name Of Indigent Defendant		RJA MOTIONS REPORTING FORM POTENTIALLY CAPITAL CASES AT THE TRIAL LEVEL CAPITAL CASES ON DIRECT APPEAL CAPITAL POST-CONVICTION CASES	
INSTRUCTIONS: Private appointed counsel, public defenders, appellate defenders, and capital defenders who represent a defendant in a potentially capital case at the trial level, capital case on direct appeal, or capital post-conviction case must complete and submit this form within 10 days of filing any motion associated with the North Carolina Racial Justice Act ("RJA"), Session Law 2009-464. - If this case is pending at the trial level, counsel must submit this form to Robert Manner Hurley, Capital Defender, by facsimile to (919) 354-7221 or by email to Robert.M.Hurley@nccourts.org. - If this case is pending at the appellate or post-conviction level, counsel must submit this form to Barrie Wallace, Center for Death Penalty Litigation, by facsimile to (919) 956-9547 or by email to Barrie@cdpl.org.			
		I. CASE INFORMATION	
Case Phase (check one) ☐ Trial Level ☐ Direct Appeal ☐ Post-Conviction			
		II. RJA MOTIONS FILED	
Motions Filed Pursuant To RJA (check all that apply) ☐ RJA Discovery Motion ☐ Motion to Continue Pursuant to RJA ☐ Motion to Extend Time to File RJA Claim ☐ Motion to Reopen Rule 24 Hearing to Investigate RJA Claim ☐ RJA Motion to Preclude Death Penalty (Based on <u>Grosso</u> Study) ☐ Check here if substantive motion included constitutional race-based claims in addition to RJA claims ☐ RJA Motion to Preclude Death Penalty (Based on <u>Other</u> Studies) ☐ Check here if substantive motion included constitutional race-based claims in addition to RJA claims ☐ Other (describe below) Date Filed: _____ Date Filed: _____ Date Filed: _____ Date Filed: _____ Date Filed: _____ Date Filed: _____ Date Filed: _____			
		III. ATTORNEY INFORMATION	
Date	Name Of Counsel Completing This Form	Signature Of Counsel Completing This Form	Is Counsel A District Coordinator? ☐ Yes ☐ No

APPENDIX B

STATE OF NORTH CAROLINA		Form IDS-031 (Rev. 06/11)	
_____ County		▶ File Nos.	
Name Of Indigent Defendant		RJA FEE APPLICATION ADDENDUM POTENTIALLY CAPITAL CASES AT THE TRIAL LEVEL CAPITAL CASES ON DIRECT APPEAL CAPITAL POST-CONVICTION CASES	
INSTRUCTIONS: Private appointed counsel, public defenders, appellate defenders, and capital defenders who represent a defendant in a potentially capital case at the trial level, capital case on direct appeal, or capital post-conviction case must complete this form and attach it to any fee application that is submitted to the IDS Office that includes time or expenses incurred as a result of the North Carolina Racial Justice Act ("RJA"), Session Law 2009-464. If counsel fails to attach this form to a fee application that includes time or expenses incurred as a result of the RJA, the fee application will be returned to counsel unpaid.			
		I. FEE APPLICATION INFORMATION	
Case Phase (check one) ☐ Trial Level ☐ Direct Appeal ☐ Post-Conviction		Beginning Date THIS Fee Requested	Ending Date THIS Fee Requested
		II. RJA MOTIONS FILED THIS FEE APPLICATION	
Motions Filed Pursuant To RJA This Fee Requested (check all that apply) ☐ RJA Discovery Motion ☐ Motion to Continue Pursuant to RJA ☐ Motion to Extend Time to File RJA Claim ☐ Motion to Reopen Rule 24 Hearing to Investigate RJA Claim ☐ RJA Motion to Preclude Death Penalty (Based on <u>Grosso</u> Study) ☐ Check here if substantive motion included constitutional race-based claims in addition to RJA claims ☐ RJA Motion to Preclude Death Penalty (Based on <u>Other</u> Studies) ☐ Check here if substantive motion included constitutional race-based claims in addition to RJA claims ☐ Other (describe below or attach additional page) Date Filed: _____ Date Filed: _____ Date Filed: _____ Date Filed: _____ Date Filed: _____ Date Filed: _____ Date Filed: _____			
		III. SUBSTANTIVE RJA EVIDENTIARY HEARING THIS FEE APPLICATION	
Does This Fee Application Include Time For An Evidentiary Hearing On A Substantive RJA Motion? ☐ Yes (complete the rest of Section III.) ☐ No (skip to Section IV.)			
RJA Hearing Date	Result Of RJA Hearing ☐ Relief Granted ☐ Relief Denied ☐ Other (describe):		
		IV. TRIAL LEVEL RJA SAVINGS	
If This Case Is Pending At The Trial Level And It Has Been Declared Non-Capital Do you believe the RJA was a factor in getting that non-capital declaration? ☐ Yes ☐ No			
If This Case Is Pending At The Trial Level And The Client Accepted A Plea Offer Do you believe the RJA was a factor in getting that plea offer? ☐ Yes ☐ No			
		V. ATTORNEY TIME & EXPENSES THIS FEE APPLICATION	
Report All Time In Decimals, Not Minutes			
Is Counsel A District Coordinator? ☐ Yes ☐ No	1. Time Billed For RJA Training (10/30/09) _____ . _____	2. Time Billed For RJA District Coordinator Meeting(s) _____ . _____	
3. Time Billed For RJA Investigation And Motions _____ . _____	4. Time Billed For RJA Hearing _____ . _____	➔	Total RJA Time Billed (Sum Of 1-4) _____ . _____
RJA Expenses (e.g., copies) \$	Date	Name Of Counsel Completing This Form	Signature Of Counsel Completing This Form
		VI. IDS OFFICE USE ONLY	
IDS Database No.	IDS Fee App No.	Notes	