

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

April 1, 2012 through June 30, 2012

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

Submitted August 14, 2012

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I. Introduction:

The original North Carolina Racial Justice Act (“RJA”), Session Law 2009-464, provided 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 original RJA created 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, division, or State at the time the death sentence was sought or imposed. Evidence that could support such a claim included, but was not limited to, statistical evidence and the testimony of criminal justice system actors. The claim could have been raised in a pre-trial motion that must have been 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).

Effective July 2, 2012, Session Law 2012-136 amended the RJA to provide that no person shall be subject to a death sentence or executed if race was a significant factor in the decision to seek or impose the death penalty in the defendant’s case at the time the death sentence was sought or imposed. For purposes of the revised act, “at the time the death sentence was sought or imposed” is defined as between 10 years prior to the commission of the offense and two years after the imposition of the death sentence. The revised act further 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 or district, but not the division or State. Evidence that can support such a claim includes, but is not limited to, statistical evidence and the testimony of criminal justice system actors; however, statistical evidence alone is insufficient to establish a claim. The revised act provides that claims can be raised at the Rule 24 hearing or in post-conviction. Finally, the revised act provides that a person who filed a post-conviction claim pursuant to Session Law 2009-464 shall have 60 days from the effective date of the revised act (or by August 31, 2012) to amend or otherwise modify the motion.

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 April 1, 2012 and June 30, 2012 is due by September 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 was 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. Since that time, there have been some additional coding costs funded by IDS as a result of discovery that the State provided in anticipation of the first RJA hearing, which was held in Cumberland County between January 30, 2012 and February 15, 2012 and which resulted in the defendant being resentenced to life without parole.

Session Law 2012-136 limits the requisite statistical showing to the county or district and, thus, impacts the sample size that is needed to make statistically significant findings. In addition, it changes the relevant time frame for a claim, including expanding the time frame to the late 1970s or early 1980s for some defendants on death row. As a result of those changes, significant additional funding will be needed to expand the statistical study that was previously completed.

III. 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. 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 generally only require attorneys to report original pleadings pursuant to the RJA. Other than amendments that are necessitated by Session Law 2012-136, if attorneys subsequently amend RJA claims that were previously filed, they are not required to notify IDS of the amendment. IDS will be directing post-conviction attorneys to notify IDS of Session Law 2012-36 amendments.

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 and 155 defendants on death row with cases pending on direct appeal or in capital post-conviction. 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. It can 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.

IV. RJA Motions Filed Between April 1, 2012 and June 30, 2012:

IDS may not have complete data on the motions filed during the fourth quarter of fiscal year 2011-12 for the reasons cited in Section III.A., above.

To IDS’ knowledge, the following chart represents the only RJA motions that were filed across the State in potentially capital cases at the trial level between April 1, 2012 and June 30, 2012:

County	# Cases Represented	Motions to Preclude Death Penalty (Based on Grosso Study)	Motions to Preclude Death Penalty (Based on Other Studies)
Chatham	1	1	1
Cumberland	2	2	2
Edgecombe	1	1	1
Halifax	2	2	2
Stokes	1	1	1

To IDS’ knowledge, no new RJA motions were filed across the State in capital appeals or capital post-conviction cases between April 1, 2012 and June 30, 2012.

V. RJA Expenditures Between April 1, 2012 and June 30, 2012:

A. Attorney Expenditures:

IDS may not have complete data on the actual costs incurred as a result of the RJA during the fourth quarter of fiscal year 2011-12 for the reasons cited in Section III.B., above.

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

During the fourth quarter of fiscal year 2011-12, IDS paid attorneys a total of \$23,172 in fees plus \$1,309.24 in expenses associated with RJA investigation, motions preparation, and litigation in four different capital post-conviction cases that were pending in four different counties (Cumberland, Forsyth, Johnston, and Wilson). Thus, the average payment in cases at the post-conviction level during the fourth quarter of fiscal year 2011-12 was \$6,120.31.

B. Expert and Support Expenditures:

During the fourth quarter of fiscal year 2011-12, IDS also paid a total of \$18,750 in expert and support fees and no expenses associated with the RJA. Those payments were made in one capital post-conviction case that was pending in Cumberland County.

C. Total Expenditures:

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

Trial Attorney Fees:	\$ 0.00
Trial Attorney Expenses:	\$ 0.00
Appellate Attorney Fees:	\$ 0.00
Appellate Attorney Expenses:	\$ 0.00
Post-Conviction Attorney Fees:	\$23,172.00
Post-Conviction Attorney Expenses:	\$ 1,309.24
<u>Expert and Support Payments:</u>	<u>\$18,750.00</u>
Total:	\$43,231.25

APPENDIX A

STATE OF NORTH CAROLINA _____ County		Form IDS-032 (Rev. 08/12) ▶ File Nos.					
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, including any amended motions required by Session Law 2012-136. • 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 Susan Perry, IDS Legal Associate, by facsimile to (919) 354-7201 or by email to Susan.D.Perry@nccourts.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) <table style="width: 100%; border: none;"> <tr> <td style="width: 50%; vertical-align: top;"> ☐ 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 ☐ RJA Amended Motion Pursuant to Session Law 2012-136 ☐ Other (describe below) </td> <td style="width: 50%; vertical-align: top;"> Date Filed: _____ Date Filed: _____ Date Filed: _____ Date Filed: _____ Date Filed: _____ Date Filed: _____ Date Filed: _____ Date Filed: _____ </td> </tr> </table>						☐ 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 ☐ RJA Amended Motion Pursuant to Session Law 2012-136 ☐ Other (describe below)	Date Filed: _____ Date Filed: _____ Date Filed: _____ Date Filed: _____ Date Filed: _____ Date Filed: _____ Date Filed: _____ Date Filed: _____
☐ 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 ☐ RJA Amended Motion Pursuant to Session Law 2012-136 ☐ Other (describe below)	Date Filed: _____ 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 _____ County		Form IDS-031 (Rev. 08/12) ▶ 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, as amended by Session Law 2012-136. 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 ☐ RJA Amended Motion Pursuant to Session Law 2012-136 ☐ Other (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 <i>Report All Time In Decimals, Not Minutes</i>	
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	