

# OFFICE OF THE CAPITAL DEFENDER (OCD)

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PRESENTATION TO IDS SUBCOMMITTEE OF JPS OVERSIGHT COMMITTEE

Presented by Robert E. Sharpe, Jr., Interim Capital Defender

January 26, 2016

# Introductions

- Robert E. Sharpe, Jr., Interim Capital Defender
- Served in US Army Reserve and NC Army National Guard (8 years)
- Admitted to NC Bar in 1997 and started Capital work shortly thereafter (19 years)
- Practiced in Alamance County in private practice
- Represented over 35 clients charged with first-degree murder
- Served as Interim Capital Defender since August 1, 2015 (5+ months)

# This Presentation Will Cover:

- Cases Covered by IDS and OCD Policies
- OCD Duties, Staff, and Composition
- Capital Defense Spending in N.C.
- Funding for Experts
- The Future of Capital Defense in N.C.

# CASES COVERED BY IDS AND OCD POLICIES

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DEFINITION OF “POTENTIALLY” CAPITAL  
CASES

# Definition of Potentially Capital Cases

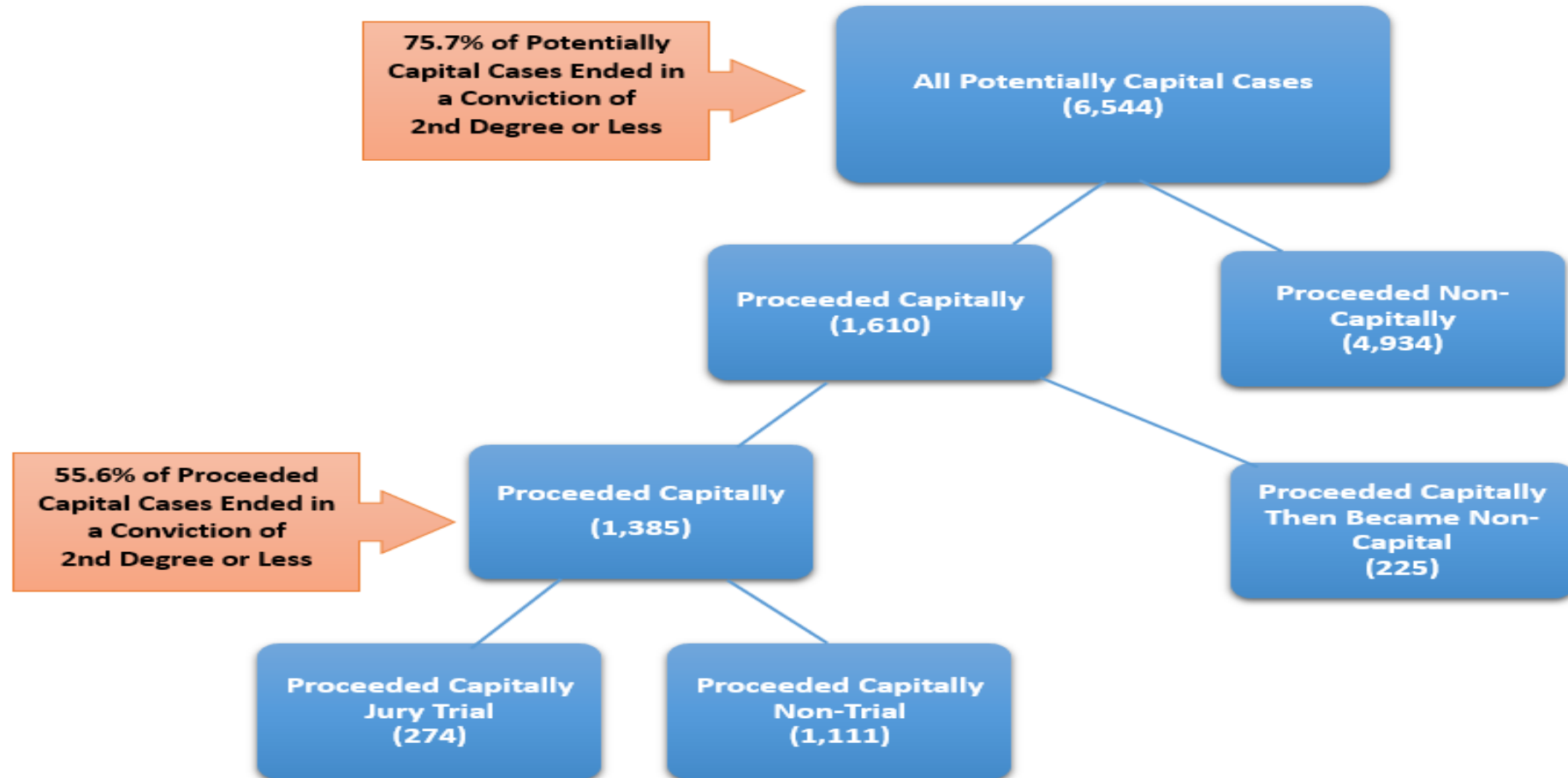
- IDS Rule 2A.1(a): A potentially capital case is “any first-degree murder charge or charge of murder where the degree is undesignated, except cases in which the defendant was under 18 years of age at the time of the offense and not potentially punishable by death.”
  - First-Degree Murder
  - Or Undesignated Form of Murder
  - Potentially Punishable by Death
  - Where Defendant is 18 years of age or older at the time of offense
- N.C. has more than 1,000 pending potentially capital cases at any given time
  - This includes cases that have been declared capital at a Rule 24 hearing with two attorneys assigned simultaneously
  - Also includes cases that have not been declared capital (which might be declared capital at some point in the future)

# Why We Must Assign Qualified Capital Trial Counsel

- NC General Statutes create broad death penalty scheme
- Rule 24 of the General Rules of Practice
  - DA shall request pretrial conference no later than 10 days after superior court obtains jurisdiction
  - Pretrial conference within 45 days thereafter
  - Conference may be continued for reasonable time
  - Time limits are not enforced, and DAs retain authority to declare cases capital
- ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases “apply from the moment the client is taken into custody and extend to all stages of every case in which the jurisdiction may be entitled to seek the death penalty, including initial and ongoing investigation, pretrial proceedings, trial, etc.”

# How Cases Proceed

(Disposed Cases, FY02 to FY16 YTD)



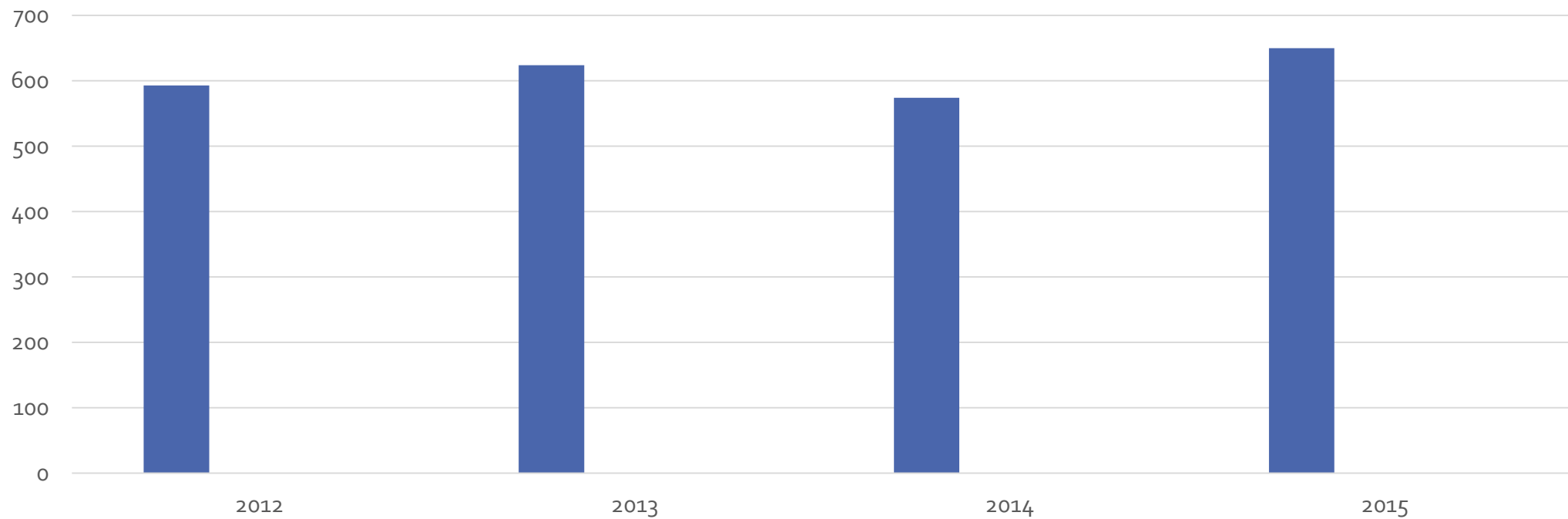
# Types of Capital Counsel Appointments

1. Initial Appointment
2. Substitute Appointment: Attorney Ethical Conflict
3. Second Attorney Required by Law (Declared Capital)

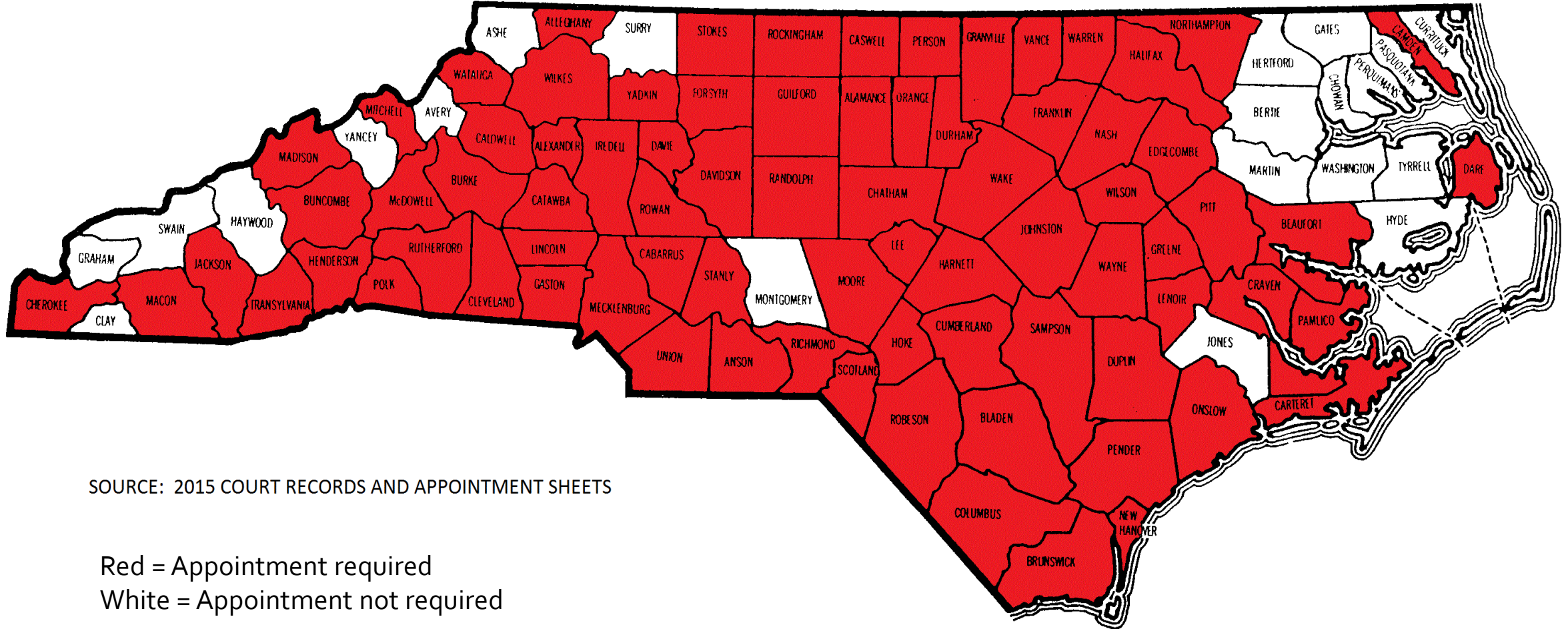


# The Need for Capital Counsel is Steady BETWEEN 574-650 PER YEAR

# ATTORNEY APPOINTMENTS  
BY CALENDAR YEAR



## 2015 - COUNTIES THAT REQUIRED A CAPITAL QUALIFIED ATTORNEY



SOURCE: 2015 COURT RECORDS AND APPOINTMENT SHEETS

# OFFICE OF THE CAPITAL DEFENDER

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DUTIES

STAFF

COMPOSITION

# Duties of Capital Defender

- Supervise and Manage full-time litigators and support staff in 4 regional offices (Buncombe, Durham, Forsyth, and New Hanover)
- Maintain Capital Rosters of Qualified Attorneys. Includes assistant capital defenders (ACDs), public defenders / assistant public defenders (PDs and APDs), and private assigned counsel (PAC)
- Appoint Qualified Counsel in all potentially capital cases at the trial level
- Approve or deny expert funding requests in all potentially capital cases at the trial level
  - IDS Director approves or denies expert funding in cases declared exceptional
- Recruit, Support, and Train Qualified Capital Trial Counsel

# IDS Rule 2A.1 (App.)

## **Lead Counsel**

To be eligible to be appointed as lead counsel in a capital case, an attorney must demonstrate that he or she has the required legal knowledge and skill necessary for representation as lead counsel in a capital case and will apply that knowledge and skill with appropriate thoroughness and preparation . . . .

[Unless granted a waiver, a] candidate for appointment must demonstrate that he or she:

- (i) has at least six years of criminal or civil litigation experience; or has at least four years of concentrated criminal litigation experience as a public defender, prosecutor, or attorney in a capital defense organization;
- (ii) is familiar with ethics requirements, current criminal practice and procedure in North Carolina, and capital jurisprudence established by the Supreme Court of the United States and Supreme Court of North Carolina;
- (iii) has participated as trial counsel in at least ten jury trials to verdict or to hung jury;
- (iv) has tried a capital case to verdict or to hung jury as lead defense counsel; or has tried two capital cases to verdict or to hung jury as associate defense counsel; or has represented to disposition at the trial level defendants in four homicides cases; and
- (v) has substantial familiarity with and experience in the use of expert witnesses and scientific and medical evidence, including mental health, social history, and pathology evidence.

## **Associate Counsel**

To be eligible to be appointed as associate counsel in a capital case, an attorney must demonstrate that he or she has the required legal knowledge and skill necessary for representation as associate counsel in a capital case and will apply that knowledge and skill with appropriate thoroughness and preparation . . . .

[Unless granted a waiver, a] candidate for appointment must demonstrate that he or she:

- (i) has at least three years of criminal or civil litigation experience;
- (ii) is familiar with ethics requirements, current criminal practice and procedure in North Carolina, and capital jurisprudence established by the Supreme Court of the United States and Supreme Court of North Carolina;
- (iii) has participated as trial counsel in at least four jury trials to verdict or to hung jury; or has spent two years in practice in a capital defense organization; and
- (iv) has substantial familiarity with scientific and medical evidence, including mental health, social history, and pathology evidence.

# Preference for Salaried Attorneys (When Possible)

- Since 2013, IDS has expanded OCD and has had a policy of appointing salaried employees (local PDs and ACDs) whenever possible
  - Goal has been to provide qualified counsel in most cost-effective manner
- Includes regional ACDs
  - *See, e.g.,* § 18A.2 of S.L. 2013-360 : IDS may use portion of existing funds “for the establishment of regional public defender programs” and “to create positions within existing public defender programs to handle cases in adjacent counties or districts”
- Increase in OCD budget over past few years is part of this emphasis and has led to corresponding decreases in PAC expenditures in potentially capital cases

# Preference for In-County Attorneys

## (When Possible)

- Increasing focus on not appointing out-of-county attorneys when qualified in-county attorneys are available
- But sometimes have to go to adjacent counties or further:
  - In some counties (especially rural counties), no qualified attorneys on roster
  - Sometimes multiple co-defendants make out-of-county counsel necessary

# OCD Structure and Staffing

Main Office in Durham

Satellite offices in Buncombe, Forsyth, and New Hanover

- 1 CAPITAL DEFENDER (CD)
- 1 DEPUTY CAPITAL DEFENDER (DCD)
- 14 ASSISTANT CAPITAL DEFENDERS (ACD)
- 1 VACANT ACD
- 1 ACD WITH CONSULTATION COORDINATION DUTIES
- 1 LEGAL ASSISTANT, CONSULTATION COORDINATOR (part-time)
- 1 LEGAL ASSISTANT, CASE COORDINATOR
- 6 INVESTIGATORS
- 3 LEGAL ASSISTANTS



# IDS COMMISSION

13 MEMBERS  
4 YEAR TERMS

## IDS EX. DIRECTOR

BUDGETARY OVERSIGHT

## CAPITAL DEFENDER

IMPLEMENT POLICY

### DURHAM

1 CD, 1 DCD,  
1 ATTY.-OPEN,  
1 CONSULT ATTY.,  
6 LAWYERS,  
6 SUPPORT STAFF,  
1 PART TIME

### BUNCOMBE

2 LAWYERS,  
1 PARALEGAL

### FORSYTH

3 LAWYERS  
1 INVESTIGATOR

### NEW HANOVER

3 LAWYERS  
1 INVESTIGATOR

# OCD is National Model

November 19, 2004

CONGRESSIONAL RECORD—SENATE

S11613

the statistics and evidence show is the single most frequent cause of wrongful  
established a centralized, independent  
appointing authority known as the In-  
on the appointing entity. The under-  
lying purpose of the scheme is to help

“Several States--including North Carolina and New York have--acted in recent years to establish statewide systems to deliver effective representation. North Carolina, for example, has established a centralized, independent appointing authority known as the Indigent Defense Services Commission. The Commission appoints a statewide Capital Defender who is accountable to the Commission but not accountable to the judiciary or to the political branches of government. The Capital Defender compiles and maintains a roster of private lawyers and public defenders who are qualified to try capital cases. The Capital Defender appoints two defense lawyers for each capital defendant. He may appoint himself and his staff, or he may appoint lawyers from the roster. The trial judge has no role whatsoever in the appointment of counsel. Congress viewed the North Carolina system as a national model for establishing an effective capital counsel system.”

recent years to establish statewide systems to deliver effective representation. North Carolina, for example, has  
ties in North Carolina and New York. For example, the Act explicitly states that sitting prosecutors may not serve  
ance with section 421(e)(2)(F)(ii). That provision requires, among other things, that public defenders be compensated

# CAPITAL DEFENSE SPENDING IN N.C.

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OCD, PRIVATE COUNSEL, and EXPERTS

# Expensive Cases are the Exception

- Total case costs (PAC and PAC EXPERTS):
  - 50% cost less than \$18,500
  - 75% cost less than \$37,500
  - 90% cost less than \$74,046
- Total Expert costs (incl. Investigators and Mitigation Specialists):
  - 1 in 5 cases (21.3%) have no expert costs
  - 53.7% have expert costs that total less than \$5,000
  - 72% have expert costs that total less than \$10,000
- Source: FY15 Capital Trial Case Study: Potentially Capital Case Costs at the Trial Level (IDS Nov. 2015) (examining cases disposed between FY07 and FY15 through April 29, 2015)

# Cost Control Policies

- Reduced PAC hourly rate (\$85/\$75) after case declared non-capital or 12 months have passed since warrant date without capital declaration
- Exceptional case policy:
  - For cases with warrant dates on or after January 2009, set pre-trial spending limits for attorneys (\$35,000), investigators (\$10,000), and mitigation specialists (\$10,000) unless IDS Director declares a case “exceptional” under certain enumerated criteria
  - Once declared exceptional, additional expert requests go to IDS Director and attorneys must bill quarterly
- Pretrial budgets:
  - Since FY13, requiring re-trial budgets in the most serious and costly potentially capital cases

# Funding for Potentially Capital Cases at the Trial Level (FY15 Actual Demand)

Potentially Capital Type	FY15 Amount	% of Potentially Capital at Trial Level	% of Overall IDS
OCD & Experts Used	\$3,450,148	22.7%	2.8%
PAC	\$8,040,774	52.9%	6.4%
PAC Experts	\$3,706,170	24.4%	2.9%
<b>Potentially Capital Trial Total</b>	<b>\$15,197,092</b>	<b>100%</b>	<b>12.2%</b>

*Note: Excludes local PD Office share of potentially capital case costs because not quantified*

IDS would have to reduce potentially capital spending by approximately \$5.74 million to cover a mere \$5 increase in non-capital PAC hourly rates

# OCD Budget

## (Subset of Potentially Capital Case Funding)

- OCD expenses include all personnel and operating plus cost of outside experts utilized by offices

FY15 Cost Type	FY15 Amount	FY15 %
Attorney Personnel Costs	\$2,069,988	60%
Non-Attorney Personnel Costs	\$591,912	17%
Outside Expert Costs (incl. mitigation)	\$341,983	10%
Other Case-Related Costs	\$248,378	7%
Operating Costs	\$197,906	6%
Total	<b>\$3,450,147</b>	

# OCD Attorney Personnel Costs: Details

Type	Amount
Average attorney salary (w/o longevity)	\$89,147
Range of attorney salaries (w/o longevity)	\$66,000 to \$111,437
Average years of creditable Judicial Branch service	10 years +



# OCD Expansion Has Decreased Attorney Costs on Potentially Capital Cases at Trial Level

Fiscal Year	OCD Spending (excluding outside experts)	PAC Spending (attorneys only)	Total OCD + PAC
FY11	\$1,980,696	\$10,465,154	\$12,445,850
Fy12	\$2,103,368	\$10,342,214	\$12,445,582
FY13	\$2,604,458	\$8,430,557	\$11,035,015
FY14	\$2,538,179	\$8,759,611	\$11,297,790
FY15	\$3,108,164	\$7,881,951	\$10,990,115

# OCD “Value Added”

- OCD ensures competent representation in potentially capital cases:
  - Monitoring performance of counsel, such as:
    - Case consults
    - Trial calendar meetings
  - Training and support
- All minimize likelihood of expensive ineffective assistance of counsel (IAC) claims and wrongful convictions

# Individual ACD Caseloads

- On average, ACDs with no administrative duties have **6 to 8** pending potentially capital cases at any given time
  - Can include a mix of cases that are proceeding capitally and proceeding non-capitally
- Caseloads are limited to ensure that ACDs provide constitutionally competent representation and to avoid scheduling conflicts
- Capital Defender attempts to assign ACDs to the most complex and challenging cases

# Capital Attorney Caseloads in Other Jurisdictions

Jurisdiction	Caseload
Texas Regional Public Defender for Capital Cases	Maximum of 6 pending potentially capital cases
Mississippi Office of Capital Defense Counsel	5 to 6 pending cases
Indiana	By court rule, no more than 3 cases at a time
Phoenix, Arizona public defender office's capital attorneys	No more than 3 cases at a time
Portland, Oregon public defender office's capital attorneys	Currently carry 4 pending cases

# FUNDING FOR EXPERTS

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# Right to Expert Funding

- Indigent capital defendants are constitutionally and statutorily entitled to assistance of appropriate experts
  - *Ake v. Oklahoma*, 470 U.S. 68 (1985); *State v. Ballard*, 333 N.C. 515 (1993)
  - G.S. 7A-450(b): “Whenever a person . . . is determined to be an indigent person entitled to counsel, it is the responsibility of the State to provide him with counsel and the other necessary expenses of representation.”
  - G.S. 7A-454: “Fees for the services of an expert witness . . . for an indigent person and other necessary expenses of counsel shall be paid by the State in accordance with rules adopted by [IDS].”

# Types of Experts

- Experts = those traditionally viewed as “experts” (e.g., psychologist, DNA expert)
- Also includes investigators, mitigation specialists, paralegals, and other support services
  - Lower hourly rates than attorneys so cost effective to utilize them
  - *Rompilla v. Beard*, 545 U.S. 374 (2005) (counsel ineffective for failing to conduct thorough mitigation investigation in capital case)

# Expert Funding Policies and Practices

- Same expert hourly rates as prosecutors under joint AOC and IDS hourly rate schedule
- IDS Rule 2D.1: “Defense counsel will be required to make at least as specific an application to retain experts as would be required by a fair but exacting trial judge applying G.S. 7A-450(b) and *Ake v. Oklahoma* and its progeny.”
- OCD denies funding requests when not justified:
  - Looking at unique expert types in all potentially capital cases that have been disposed since IDS was created, OCD authorized fewer expert funds than counsel requested 38.4% of the time



# THE FUTURE OF CAPITAL DEFENSE IN N.C.

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# Continue Doing Good Job Overseeing Potentially Capital Cases

- September 2015 SOG Survey of all District and Superior Court Judges
  - 135 Respondents: 81 District Court Judges and 54 Superior Court Judges
  - About 35% response rate
- “What is your overall level of satisfaction with IDS's administration of indigent representation in potentially capital cases?”

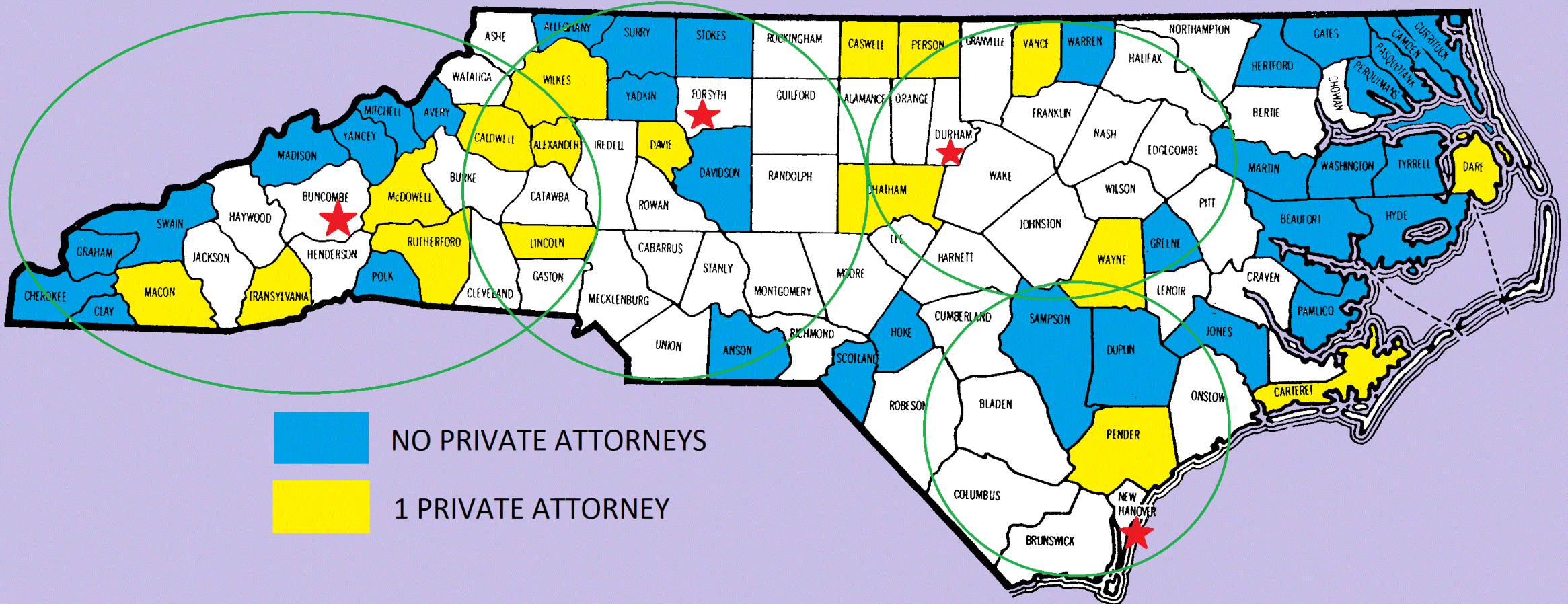


# Continue Improving Where Needed

- Most common judicial concerns were too many out-of-county attorney appointments and too many cases assigned to the same attorneys
- Same concerns have been expressed by legislators
- Current focus on recruiting new attorneys to:
  - Maximize use of in-county counsel whenever possible
  - Recruit, train, and support next generation



# WE NEED MORE PRIVATE CAPITAL TRIAL ATTORNEYS





# Best Way to Have Real Impact on Costs

- Narrow NC's broad capital punishment statute so it is clear that more cases are not potentially death-eligible from the start
- For example:
  - Eliminate felony murder as a ground for the death penalty (amend G.S. 14-7)
  - Eliminate extremely broad statutory aggravating factors, such as "especially heinous, atrocious, or cruel (G.S. 15A-2000(e)(9))
  - Binding non-capital declarations