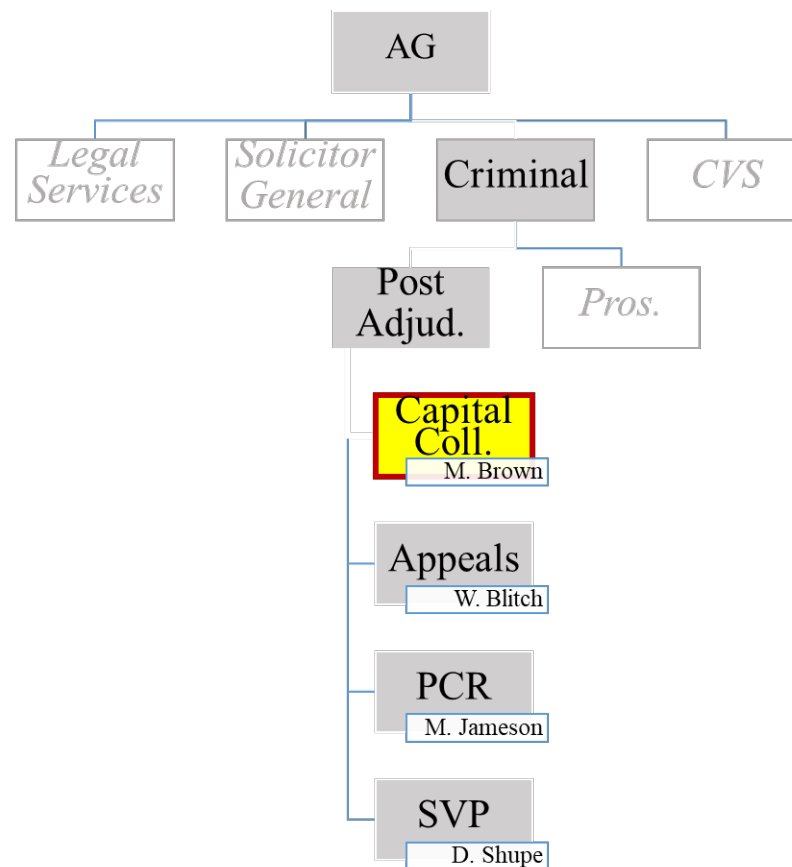




# Capital and Collateral Litigation Section





# Overview

Alan Wilson  
*Attorney General*

Don Zelenka  
*Deputy AG*

The Capital & Collateral Litigation Section coordinates

- all murder conviction direct appeals,
- all death penalty litigation after conviction and sentencing, and
- all federal habeas corpus litigation involving any S.C. state conviction (but not litigation involving conditions of confinement).

In death penalty cases, due to the complexity of the issues and process, the section retains the cases after direct appeal for post-conviction (PCR) proceedings in the circuit court; PCR appeals in the S.C. Supreme Court and U.S. Supreme Court; and federal habeas corpus litigation in the District Court, U.S. Court of Appeals, and United States Supreme Court; and any successive PCR actions or other actions challenging the conviction and sentence after exhaustion of ordinary remedies.

# Mission

Our mission is to ensure just and accurate results in criminal litigation in state and federal courts in regard to South Carolina criminal convictions, including death penalty sentences, by fairly presenting the State's position in a cogent, efficient, and persuasive manner, addressing all relevant issues concerning the conviction and sentence. The mission coexists and is informed by our roles as ministers of justice to address the confidence of the judgment.

In carrying out our mission, each case is handled with the same level of care, be it a death penalty case, or a plea to a lesser charge with a sentence of time served. The primary focus in representation for all of the section's cases is to ensure a just result under state and federal law.

# Personnel

## Attorneys

- Melody Brown, SADAG
- Ed Salter, SAAG
- Anthony Mabry, SAAG
- Joe Maye, AAG
- Mike Ross, AAG (military leave)
- Tommy Evans, AAG
- Julianna Battenfield, AAG
- Vacancy

## Support Staff

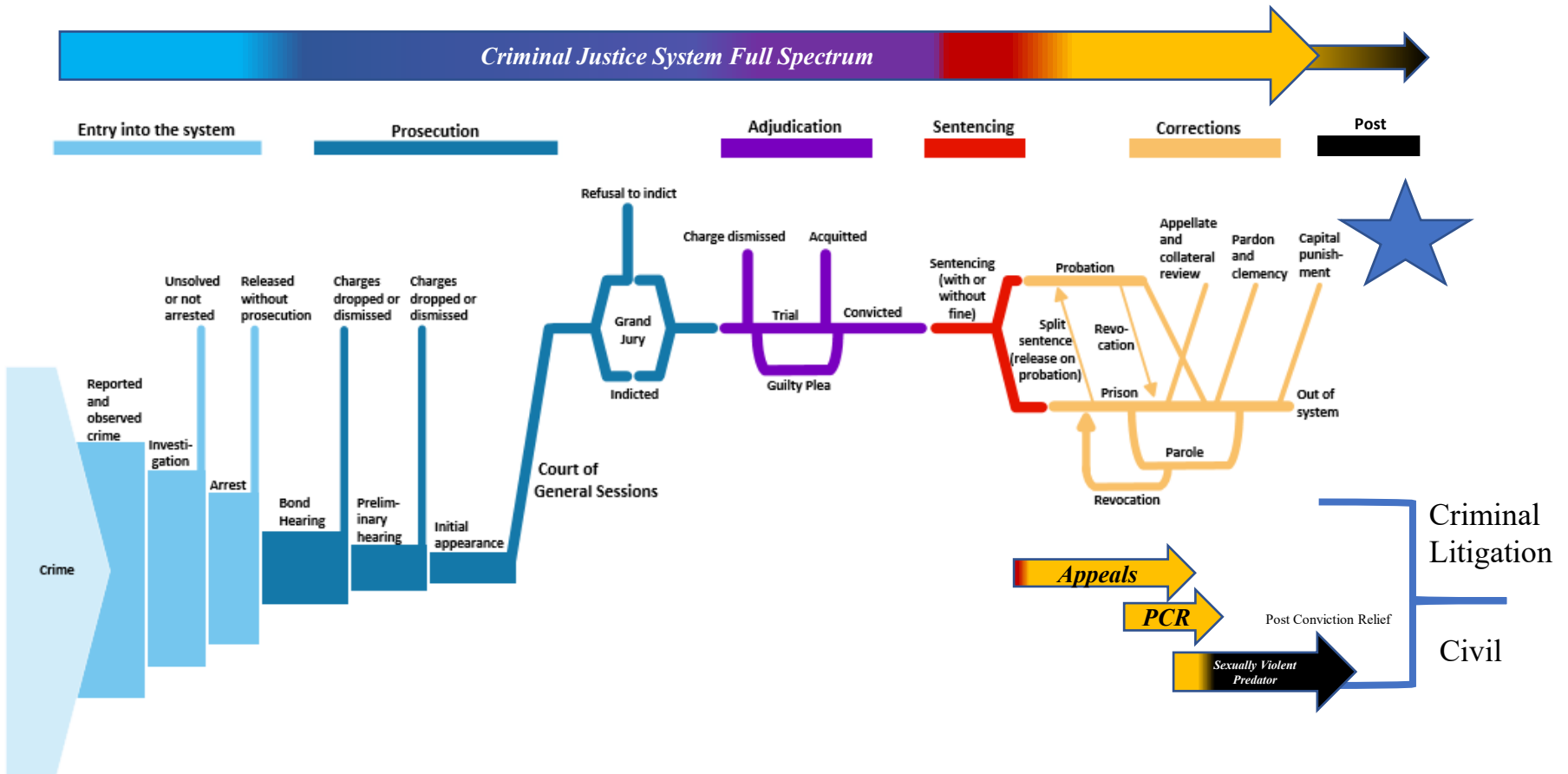
- Donna D'Alessio, LA
- Brandy Rankin, LA
- Nina Augustine, LC
- Adrienne Lowery, LC
- Sydney Grapp, Intern



**Alan Wilson**  
*Attorney General*

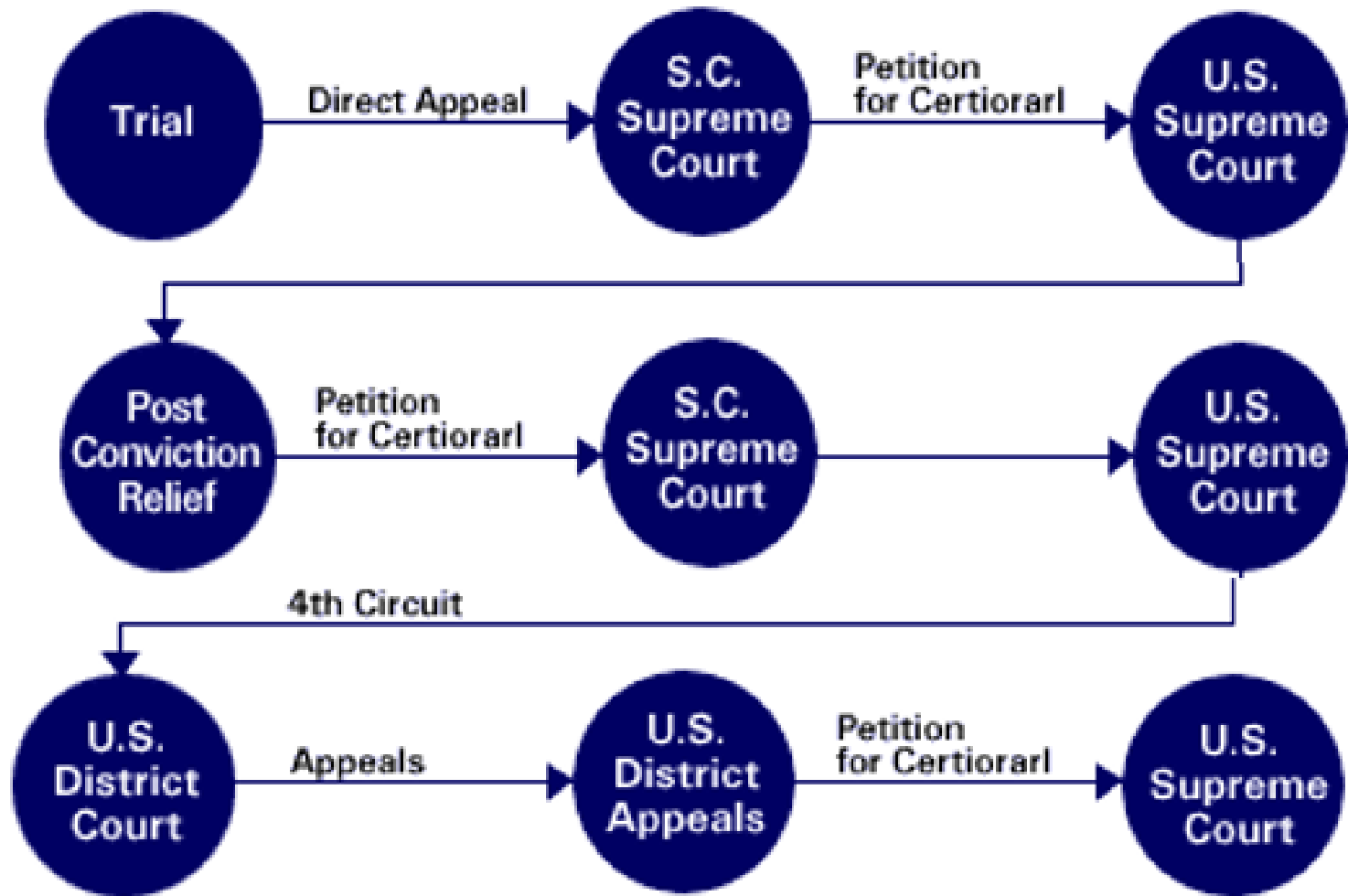
**Don Zelenka**  
*Deputy AG*

# Background



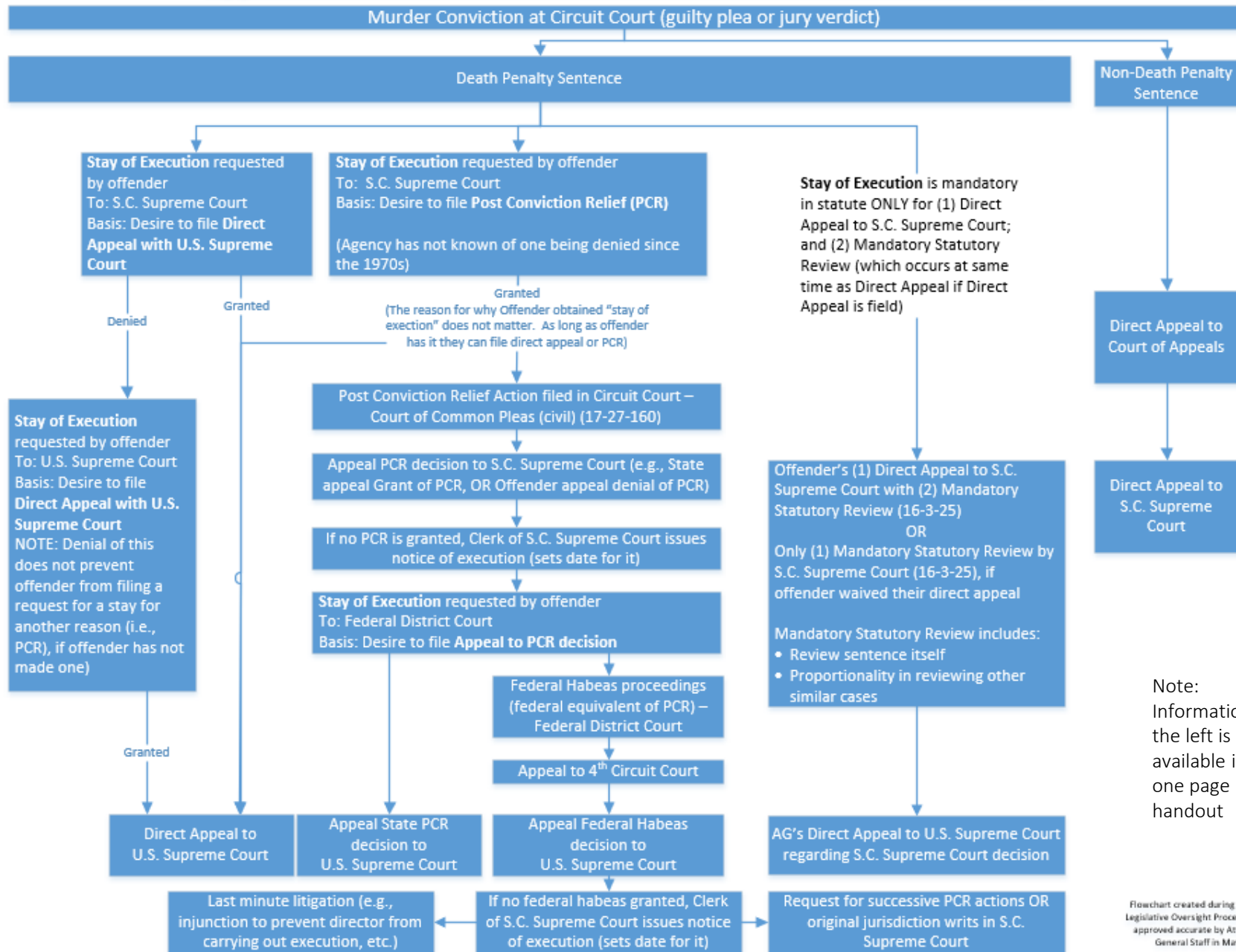
Note: This slide shows where the Attorney General's Office services fall in the criminal justice system flow chart utilized by prior state criminal justice entities under review. It only includes General Sessions because juvenile justice, summary courts, and diversion programs are not a primary function of the Attorney General's office.

# Assumed Process



# Actual Process

## Appeal and Post Conviction Relief Process for Murder Convictions







**Alan Wilson**  
*Attorney General*

**Don Zelenka**  
*Deputy AG*

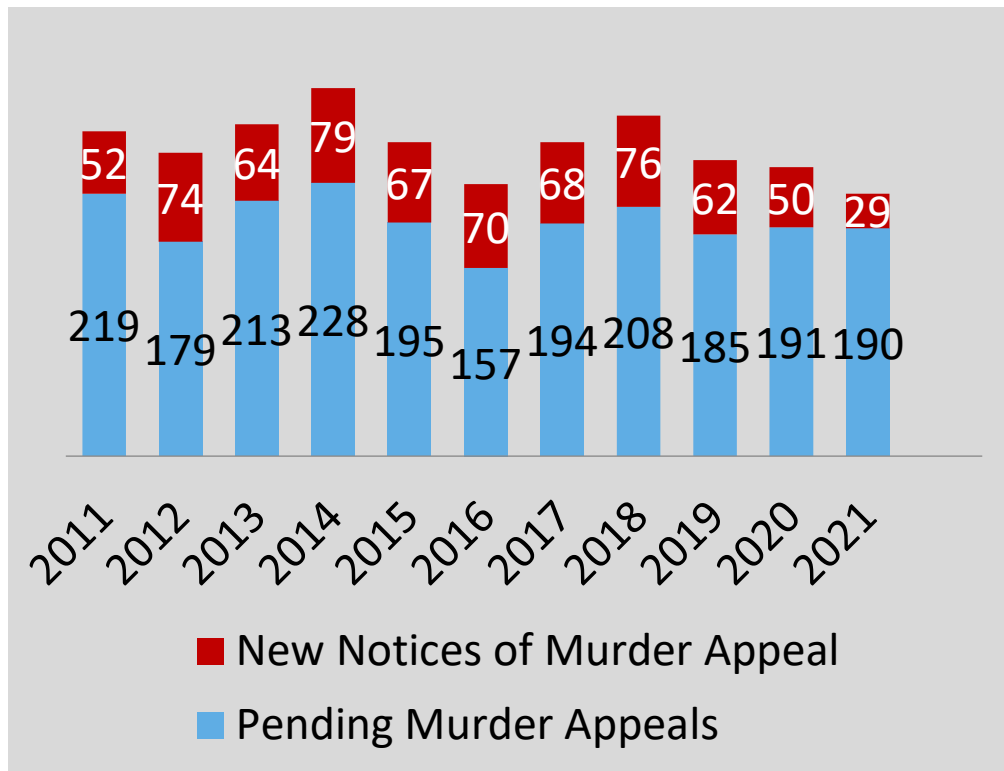
# Associated Services

The next slides only contain information on services that are associated with this section of the agency.

# Direct Appeal of Non-Death Penalty Murder Conviction/Sentence

Agency Service #101 and #102

- Represents the State in direct appeal litigation resulting from challenges to non-capital murder convictions and sentences
- Note: Cases received are unlikely to be completed the same year due to the length of time that it takes to cycle through the appellate process. Consequently, the pending cases which are carried over from the prior year should be considered in addition to the number of new cases for a total of murder direct appeals handled within the relevant time frame.



## Agency Service #101: Non-Capital Murder Convictions Briefing and Other Filings

Does law require it: Yes

Assoc. Law(s): S.C. Const. art. V, § 24; S.C. Code § 1-7-30; S.C. Code § 1-7-40

Single Unit:		Units provided	Cost per unit	Employee equivalents	Total Cost of service	% of total agency costs
Full representation after filing of a merits brief; extent of briefing and filing of other documents varies depending on progression of appeal	2016-17	68.00	\$5,571.31	3.37	\$378,849.14	1.93%
	2017-18	76.00	\$3,632.69	3.09	\$276,084.73	0.46%
	2018-19	62.00	\$4,074.74	4.00	\$252,633.79	0.38%
	2019-20	53.00	\$7,673.40	4.33	\$406,690.13	0.53%

## Agency Service #102: Non-Capital Murder Convictions Oral Arguments

Does law require it: Yes

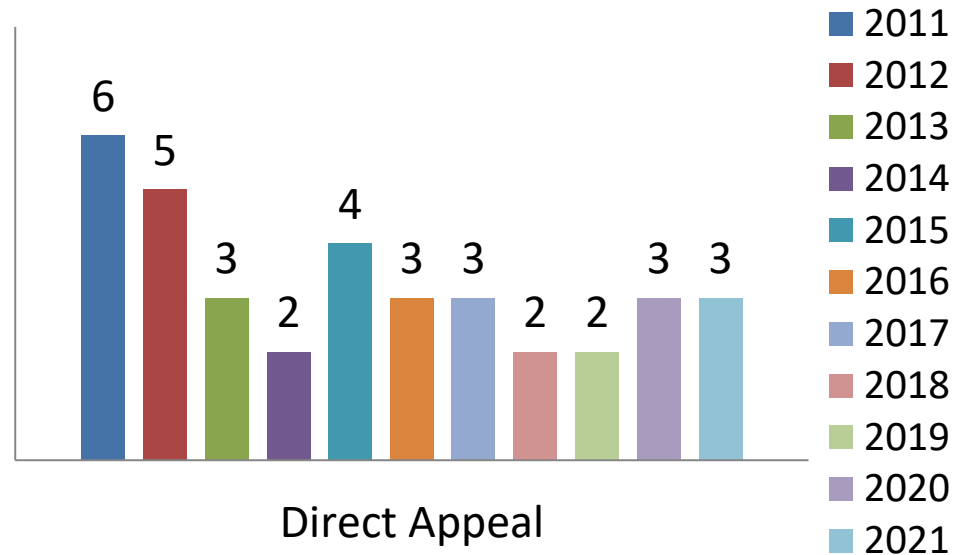
Assoc. Law(s): S.C. Const. art. V, § 24; S.C. Code § 1-7-30; S.C. Code § 1-7-40

Single Unit:		Units provided	Cost per unit	Employee equivalents	Total Cost of service	% of total agency costs
Argument made in the S.C. Supreme Court, or S.C. Court of Appeals. Note: Counsel is also provided should the case go to the Supreme Court of the United States on direct appeal	2016-17	25.00	\$1,332.49	0.35	\$33,312.28	0.17%
	2017-18	11.00	\$3,224.07	0.15	\$35,464.82	0.06%
	2018-19	14.00	\$2,246.86	0.13	\$31,455.99	0.05%
	2019-20	14.00	\$1,401.26	0.16	\$19,617.61	0.03%

# Direct Appeal – Death Penalty

Agency Service #103 and #104

- Represents the State in direct appeal litigation resulting from challenges to capital murder convictions and sentences
- As with non-capital murder appeals, murder appeals from capital cases are not often completed within the same fiscal year as they are filed; therefore, the numbers reflected may be duplicative of cases pending and waiting decision after briefing and argument



Agency Service #103: Capital Murder Convictions Briefing and Other Filings		Units provided	Cost per unit	Employee equivalents	Total Cost of service	% of total agency costs
Single Unit: Full representation after filing of a merits brief; extent of briefing and filing of other documents varies depending on progression of appeal	2016-17	3.00	\$6,277.86	0.29	\$18,833.59	0.00%
	2017-18	2.00	\$0.00	0.00	\$0.00	0.00%
	2018-19	2.00	\$1,144.95	0.00	\$2,289.89	0.00%
	2019-20	3.00	\$906.59	0.27	\$2,719.78	0.00%

Agency Service #104: Capital Murder Convictions Oral Arguments		Units provided	Cost per unit	Employee equivalents	Total Cost of service	% of total agency costs
Single Unit: Argument made in the Supreme Court of South Carolina Note: Counsel is also provided should the case go to the Supreme Court of the United States on direct appeal	2016-17	1.00	\$1,557.61	0.03	\$1,557.61	0.00%
	2017-18	0.00	Insufficient	0.00	\$0.00	0.00%
	2018-19	0.00	Insufficient	0.00	\$3,235.86	0.00%
	2019-20	0.00	Insufficient data provided.	0.00	\$0.00	0.00%

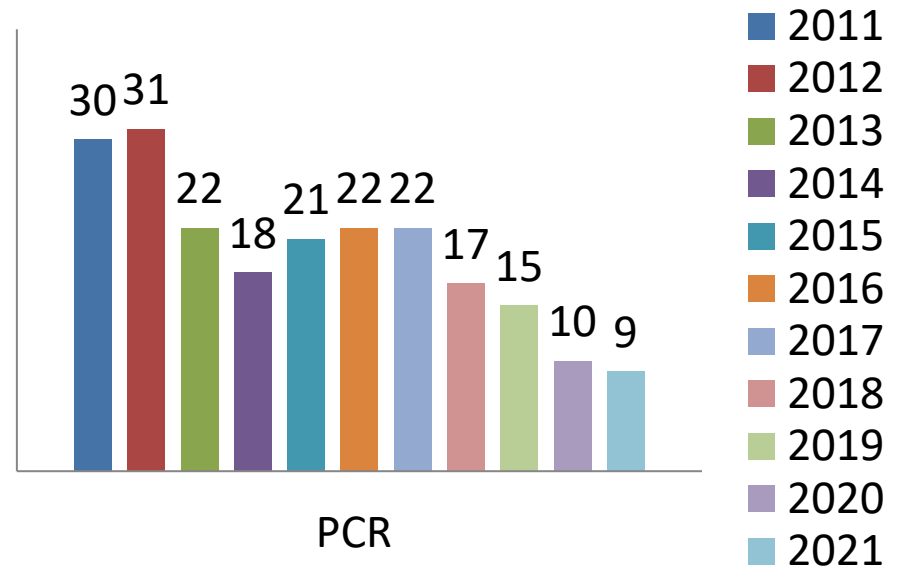
Does law require it: Yes

Assoc. Law(s): S.C. Const. art. V, §24; S.C. Code § 1-7-30; S.C. Code § 1-7-40; S.C. Code § 16-3-25

# Post Conviction Relief – Death Penalty

Agency Service #105 and #106

- Represents the State in post-conviction relief actions challenging capital murder convictions and sentences
- Trend is the number of capital cases in state PCR review is dropping as state cases transition from state review to federal review.
- While nine cases are at the PCR level, five are successive PCRs



## Agency Service #105: Capital Cases Pending; Returns, Discovery and Evidentiary hearing preparations

Does law require it: Yes

Assoc. Law(s): S.C. Const. art. V, § 24; S.C. Code § 1-7-30; S.C. Code § 1-7-40; S.C. Code § 17-27-160; S.C. Code § 17-27-150 (B)

	Units provided	Cost per unit	Employee equivalents	Total Cost of service	% of total agency costs
2016-17	22.00	\$3,656.36	0.80	\$80,439.87	0.41%
2017-18	17.00	\$5,555.34	1.03	\$94,440.83	0.16%
2018-19	15.00	\$4,499.98	0.99	\$67,499.63	0.10%
2019-20	10.00	\$5,143.83	0.60	\$51,438.29	0.07%

## Agency Service #106: Capital Case Evidentiary Hearings and Post-hearing Briefing and/or Proposed Orders

Does law require it: Yes

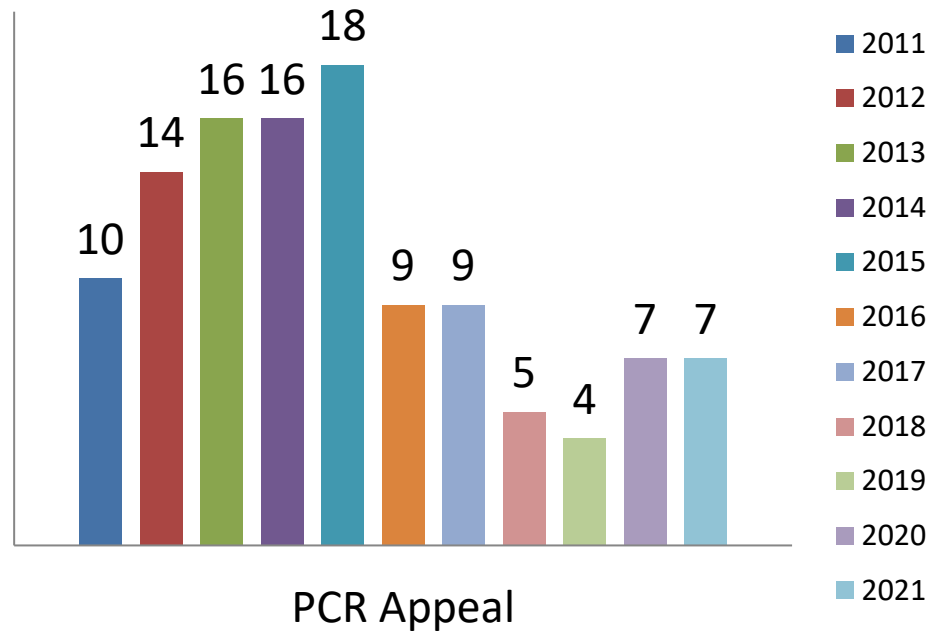
Assoc. Law(s): S.C. Const. art. V, § 24; S.C. Code § 1-7-30; S.C. Code § 1-7-40; S.C. Code § 17-27-160

	Units provided	Cost per unit	Employee equivalents	Total Cost of service	% of total agency costs
2016-17	9.00	\$9,624.60	1.91	\$86,621.40	0.44%
2017-18	3.00	\$39,594.37	1.24	\$118,783.10	0.20%
2018-19	6.00	\$27,807.21	0.85	\$166,843.26	0.25%
2019-20	2.00	\$41,238.77	0.89	\$82,477.53	0.11%

# Post Conviction Relief Appeals – Death Penalty

Agency Service #107 and #108

- Represents the State in post-conviction relief action appeals challenging the denial of relief in capital post-conviction actions; or, alternatively, challenging the grant of relief in capital post-conviction relief actions when appropriate
- The trend is that the number of capital cases in state PCR review is dropping as state cases transition from state review to federal review. Further, appellate review is only available by the discretionary process instituted by petition. Several cases have been presented by petition with the unit filing a return but no further briefing when the petition is denied. Where no formal briefing is required, no oral argument is generally required



## Agency Service #107: Capital Cases; Return and further briefing

Does law require it: Yes

Assoc. Law(s): S.C. Const. art V, § 24; S.C. Code § 1-7-30; S.C. Code § 1-7-40; S.C. Code § 17-27-160; S.C. Code § 17-27-100

	Units provided	Cost per unit	Employee equivalents	Total Cost of service	% of total agency costs
2016-17	9.00	\$5,916.21	0.73	\$53,245.91	0.27%
2017-18	5.00	\$14,754.51	0.91	\$73,772.53	0.17%
2018-19	4.00	\$15,869.17	0.51	\$63,476.66	0.09%
2019-20	7.00	\$0.00	0.59	\$0.00	0.00%

## Agency Service #108: Capital Cases Oral Arguments

Does law require it: Yes

Assoc. Law(s): S.C. Const. art V, § 24; S.C. Code § 1-7-30; S.C. Code § 1-7-40; S.C. Code § 17-27-160; S.C. Code § 17-27-100

	Units provided	Cost per unit	Employee equivalents	Total Cost of service	% of total agency costs
2016-17	1.00	\$1,137.55	0.00	\$1,137.55	0.10%
2017-18	0.00	Insufficient	0.00	\$0.00	0.00%
2018-19	0.00	Insufficient	0.00	\$1,003.31	0.00%
2019-20	0.00	Insufficient data provided.	0.00	\$59,069.07	0.08%

Advice and assistance to Circuit Solicitors;

Advice and consultation with other prosecuting or related entities;

Advice and assistance within Agency;

Training presentations;

Miscellaneous Agency assignments

- Difficult to quantify aid and advice generally; however, there is an in-house appellate review committee which meets weekly and requires two attorneys to expend multiple hours each week to prepare and attend.
- Further, the Capital Unit receives special project assignments to handle non-capital PCR terms to assist the AG's PCR division

Does law require it: Yes

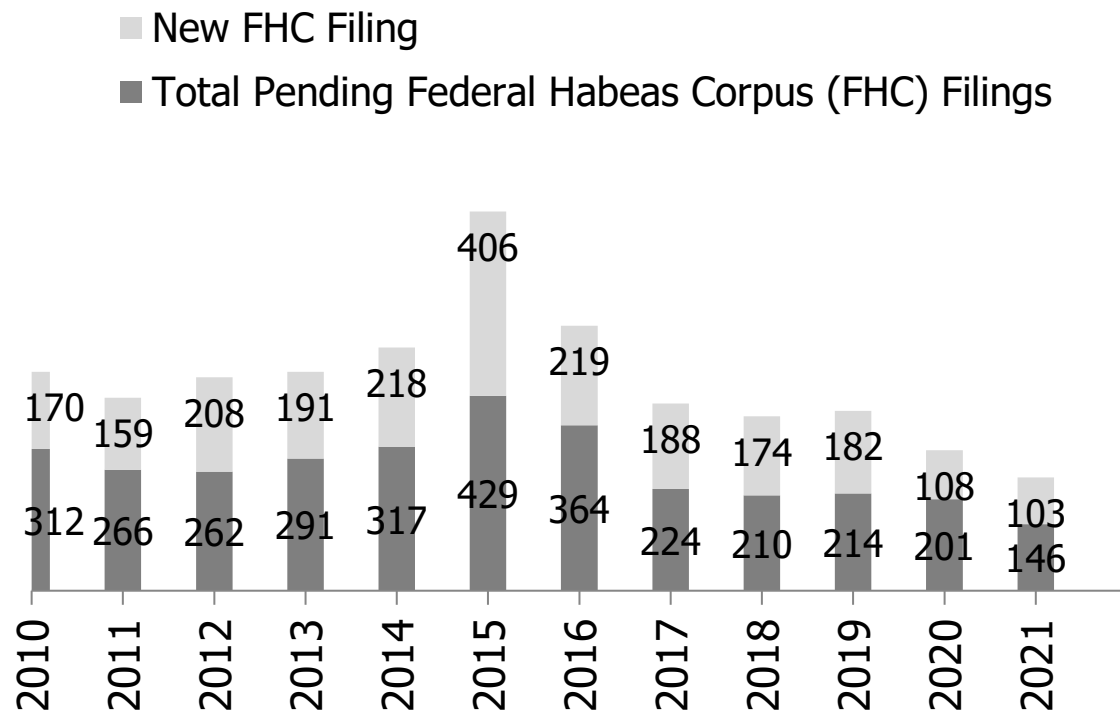
Assoc. Law(s): S.C. Const. art V, § 24; S.C. Code § 1-7-30; S.C. Code § 1-7-40; S.C. Code § 1-7-100

	Units provided	Cost per unit	Employee equivalents	Total Cost of service	% of total agency costs
2016-17	Not provided	Insufficient	2.08	\$106,848.04	0.54%
2017-18	Not provided	Insufficient	2.26	\$217,805.53	0.37%
2018-19	Not provided	Insufficient	1.07	\$184,240.38	0.28%
2019-20	Not provided	Insufficient	0.59	\$151,757.40	0.20%

# Represent the Warden/custodian in federal habeas actions - pre-trial detention issues or criminal convictions and sentences

Agency Service #110

- Habeas rules provide that either the warden or other custodial individual, or the attorney general, may be named as the respondent in a habeas action
- As with direct appeal and post-conviction relief actions, cases are not generally addressed and closed the same year they are filed. For federal habeas actions, the average pending number is 216. No separate files are opened for federal habeas appeals; however, most non-capital federal habeas appeals do not require additional briefing or argument. Counsel continues to provide representation on appeal where additional filings are necessary whether in the Fourth Circuit Court of Appeals and/or in the Supreme Court of the United States



Does law require it: Yes

Assoc. Law(s): S.C. Const. art V, § 24; S.C. Code § 1-7-30; S.C. Code § 1-7-40; S.C. Code § 1-7-80(1); 28 U.S.C. § 2241; 28 U.S.C. § 2254; Rule 2, Rules Governing Section 2254 Cases in United States District Courts

		Units provided	Cost per unit	Employee equivalents	Total Cost of service	% of total agency costs
Single Unit	2016-17	188.00	\$2,248.91	3.27	\$422,794.90	2.15%
New Federal Habeas	2017-18	174.00	\$1,603.45	2.79	\$278,999.60	0.47%
Corpus Filings	2018-19	182.00	\$1,386.63	4.65	\$252,367.36	0.38%
	2019-20	108.00	\$1,333.77	5.59	\$144,047.20	0.19%



**Alan Wilson**  
*Attorney General*

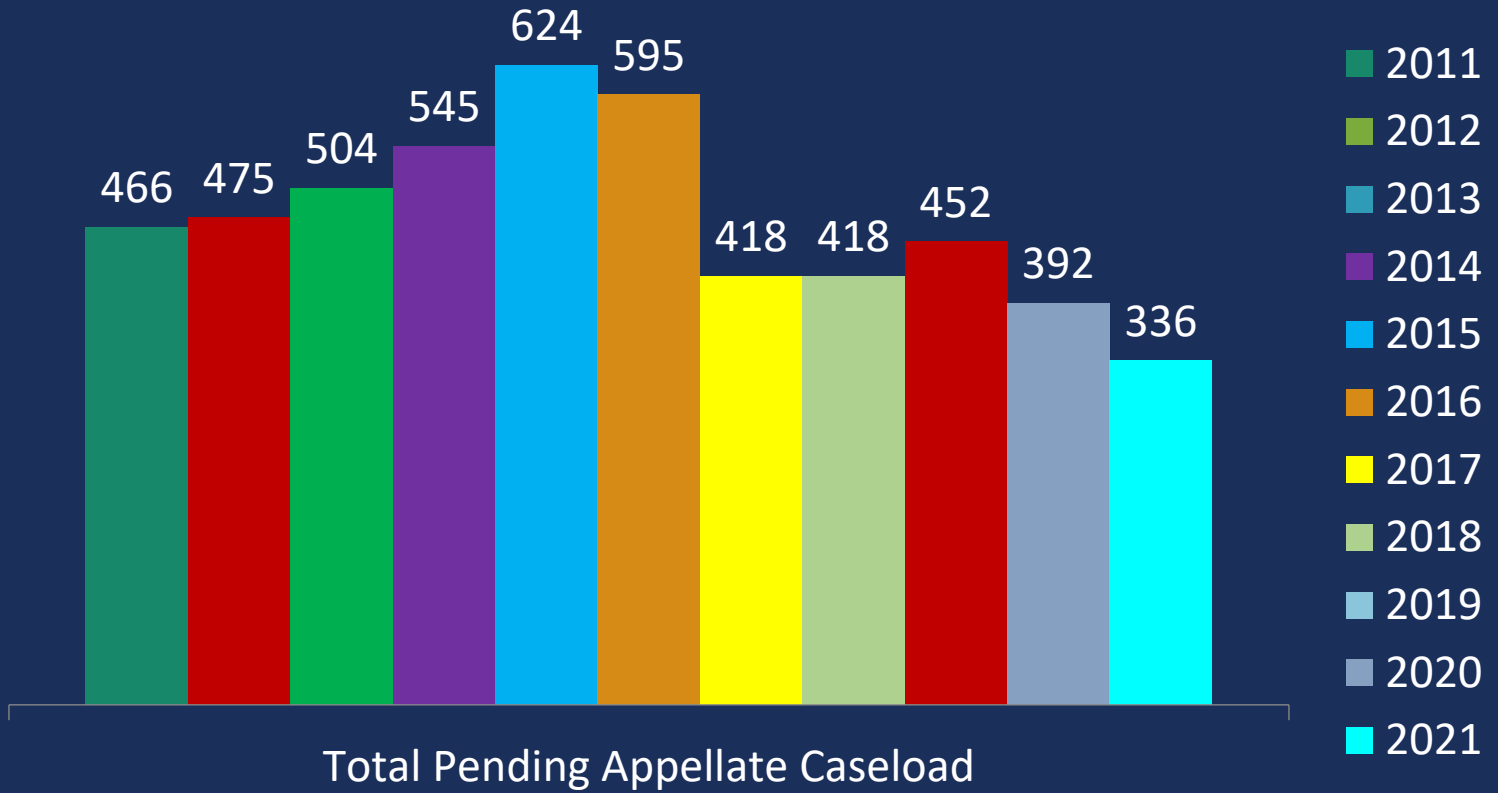
**Don Zelenka**  
*Deputy AG*

# Associated Performance Measures

The next slides only contain information on performance measures that are associated with services covered earlier in this presentation.



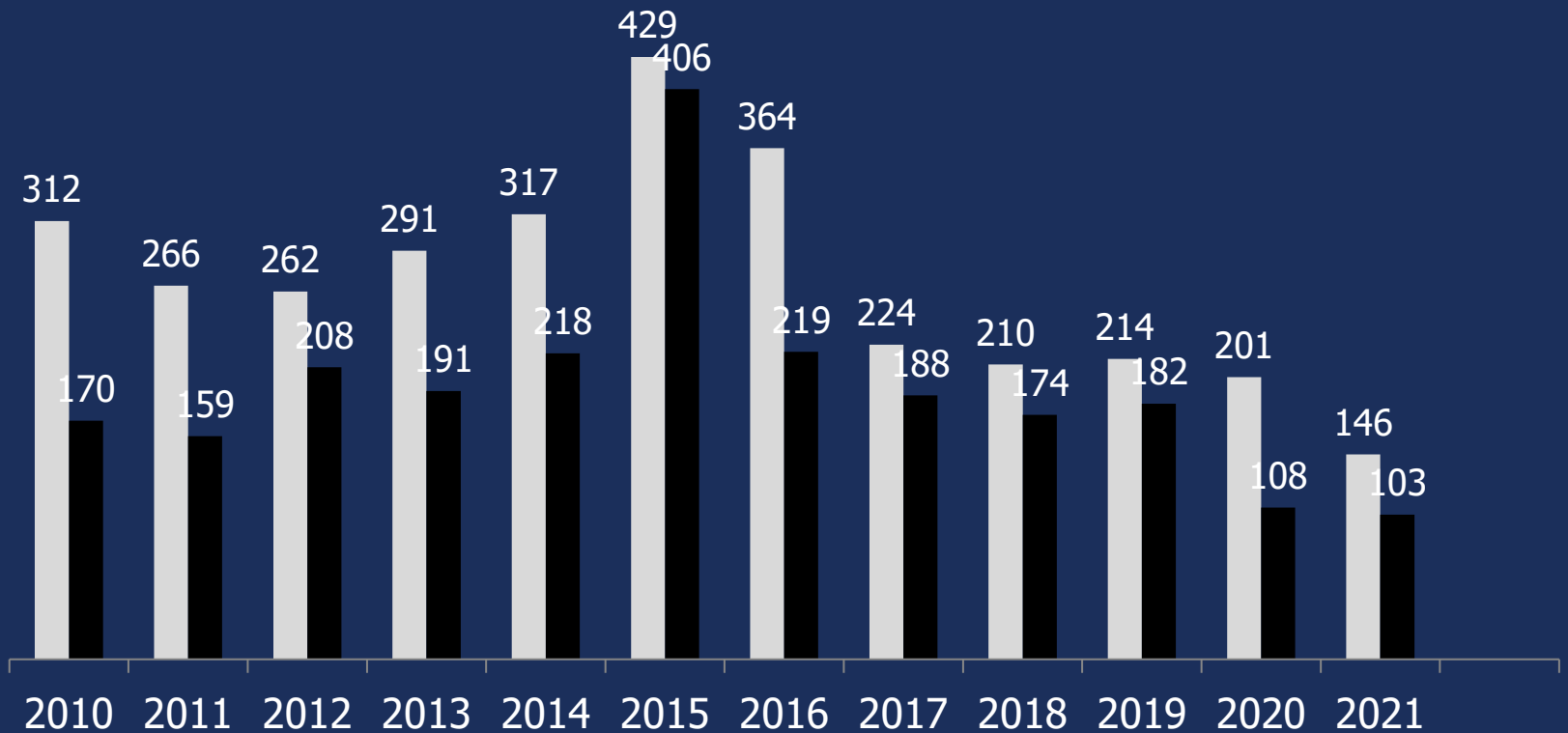
# TOTAL PENDING APPELLATE CASELOAD



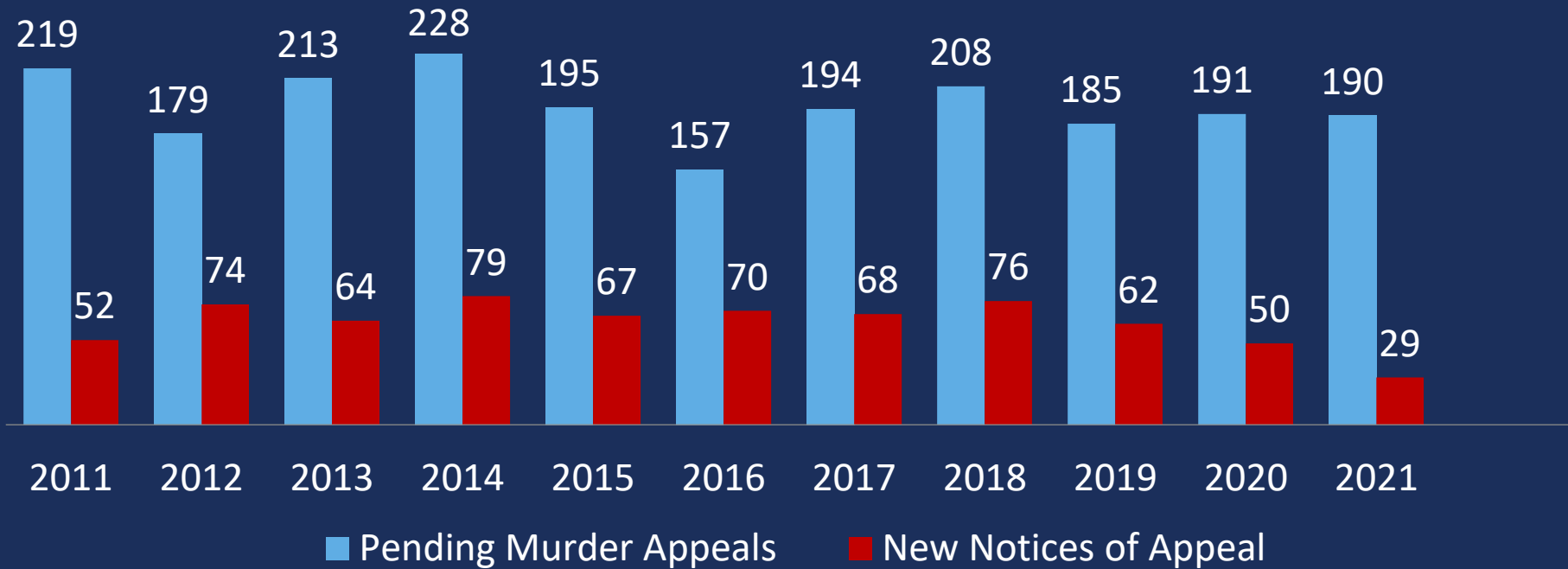
# Federal Habeas Corpus Trends

■ Total Pending Federal Habeas Corpus (FHC) Filings

■ New FHC Filing



# MURDER APPEALS



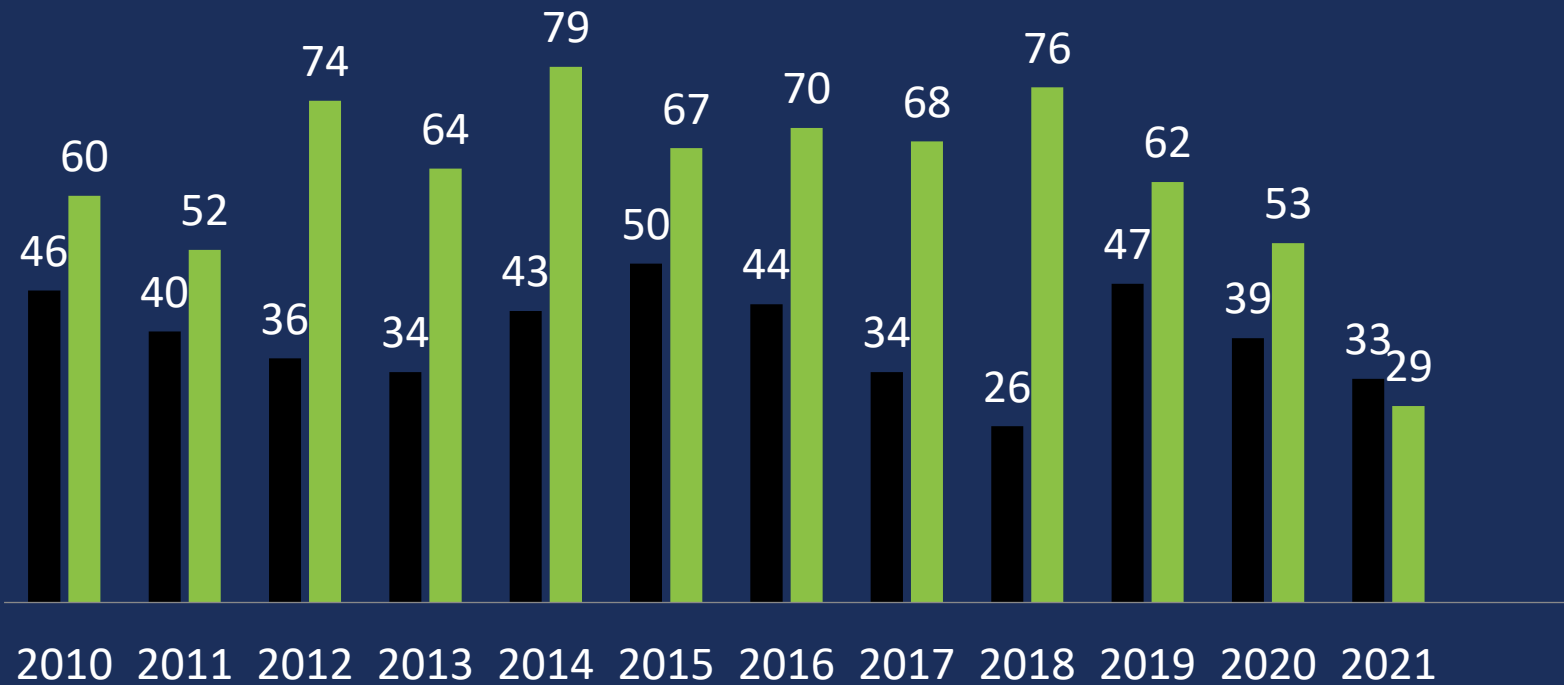
**\*\*2021 Note\*\***

*original jurisdiction petitions: 11*  
*adjusted murder appeal new cases:*  
**40**

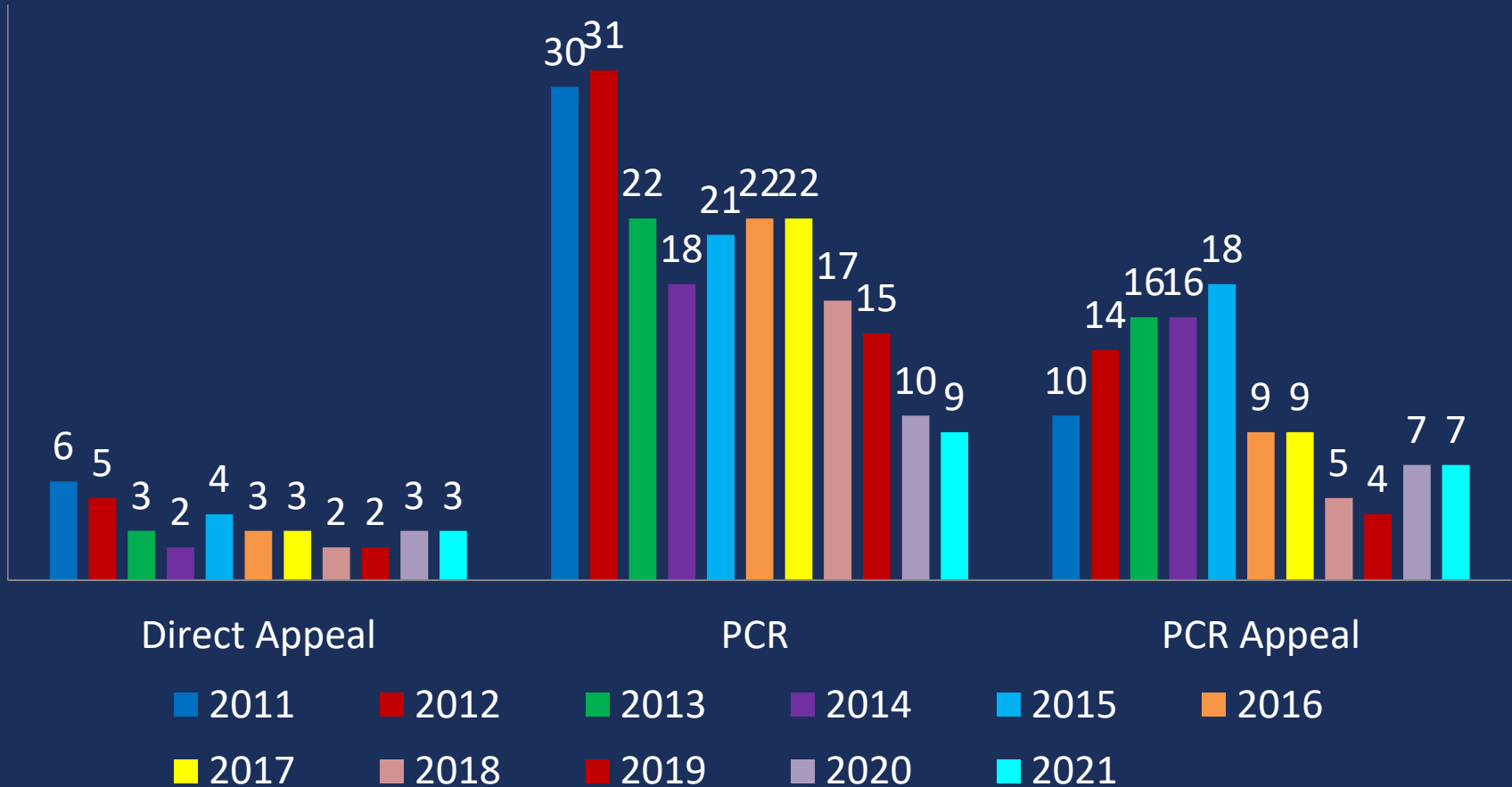
# MURDER APPEALS

## Briefing Lag Trends

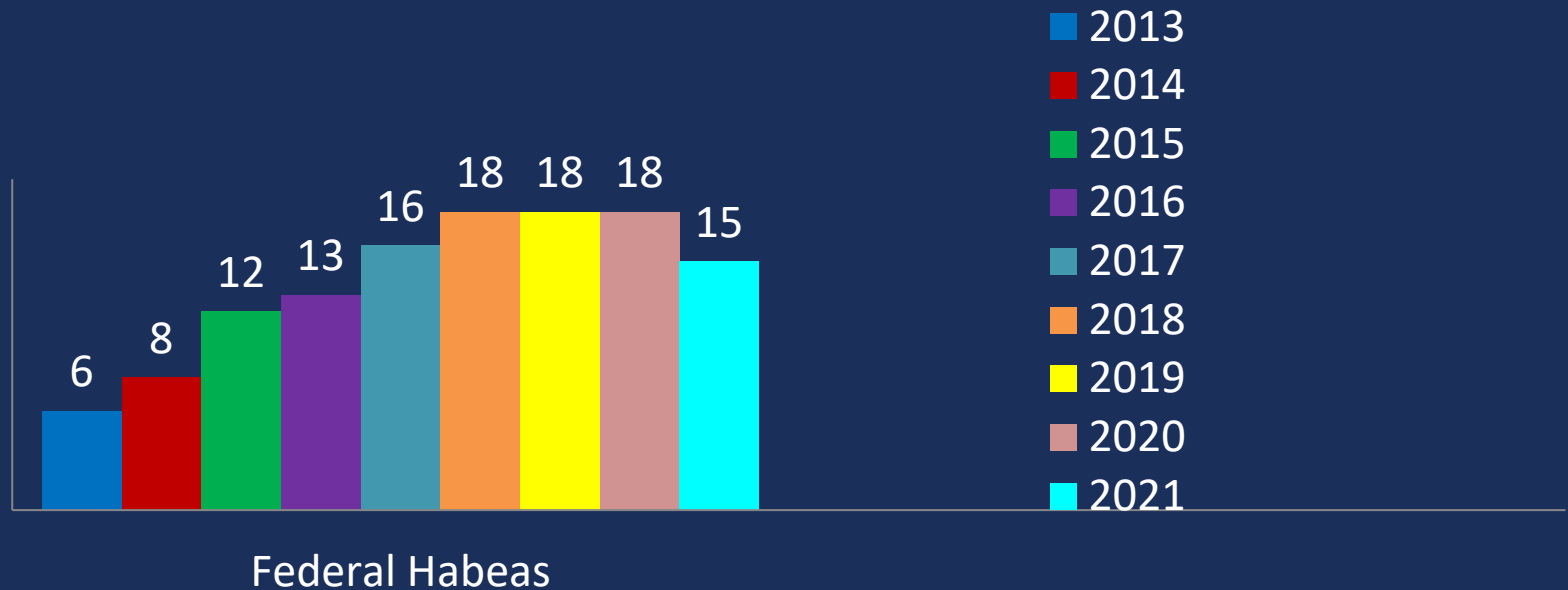
■ Merit Briefs - IBOA   ■ New Appeals



# DEATH PENALTY CASE STATUS



# DEATH PENALTY CASE STATUS



# Federal Habeas Corpus Death Penalty Case Status

## District Court:

2019- 11

2020- 7

2021- 6

## 2021 DISTRICT COURT BREAKDOWN

Stayed: 4 (Aleksey; Robertson; Stone; Woods)

Briefing: 2 (Bryant (Sumter); Stanko (Horry))

## COA4:

2019-7

2020-8\*

[\* ALSO THREE IN SUPREME COURT (MOORE, SIGMON, OWENS) – TOTAL 18 ON PRIOR GRAPH]

2021-9

## 2021 FOURTH CIRCUIT COURT OF APPEALS BREAKDOWN

Stayed:	1	(Alkebulanyahh)
Argued, Waiting Opinion:	2	(Mahdi, Stokes)
En Banc Argument ordered:	1	(Bryant)
Briefed, Set for Argument:	2	(Allen, Bowman)
Briefed, Waiting Argument:	1	(Wood)
Briefing:	1	(Bixby)
Opinion, Waiting SCOTUS:	1	(Terry)

\*\* 2021 Note\*\*

Concentration in Fourth Circuit - cases moving faster – one ready for SCOTUS (Terry);  
Estimating 2-3 more in next term (Mahdi, Stokes, Bryant)



**Alan Wilson**  
*Attorney General*

**Don Zelenka**  
*Deputy AG*

# Associated Successes and Concerns

The next slides only contain information on services that are associated with this section of the agency.



# Successes and Concerns

## Successes

### Capital Litigation

- Moving capital cases;
- Creating responses to end-stage litigation (expedited)

### Direct Appeal, Federal Habeas, Non-capital PCR:

- Moving cases at consistent rate; adjustment of work flow; continued full work load;
- Sharing non-capital case load; excellent briefs by criminal appeals attorneys when non-capital murder cases shared among sections

## Concerns

### Capital Litigation

- Time for concentration in capital litigation

### Direct Appeal, Federal Habeas, Non-capital PCR:

- COVID impact

# Needs

## Legislation

- Capital PCR Statute:
  - Expansion of PCR counsel qualifications (consistent with Federal Statute);
  - Provisions to encourage compliance with expedited provisions in statute;
  - Mandate consequences for Ineffective Assistance finding
- Kidnapping Statute:
  - Revisit sentencing provision;
  - Avoid unintended sentencing reduction;
  - Unnecessary appeals could be eliminated;
  - Avoid unnecessary resentencing if murder conviction vacated;
  - End avoidance of sentence for separate crime

## Other

- Opt in to Expedited Procedures in Federal Habeas
  - (shorten district court time at least six months; provides additional defenses)



# Capital Litigation - Law Recommendations

The next slides only contain information on recommendations for law changes that are associated with this section of the agency.

# LAW CHANGE RECOMMENDATION #12

- Law: S.C. Code Section 16-3-910 Kidnapping
- Current Law: Whoever shall unlawfully seize, confine, inveigle, decoy, kidnap, abduct or carry away any other person by any means whatsoever without authority of law, except when a minor is seized or taken by his parent, is guilty of a felony and, upon conviction, must be imprisoned for a period not to exceed thirty years unless sentenced for murder as provided in Section 16-3-20.
- Recommendation: Remove the final phrase: “unless sentenced for murder as provided in Section 16-3-20.”
- Basis for Recommendation: The same result may be reached by designating concurrent service. Deleting the language leaves discretion with the sentencing judge to impose sentence as the crime demands. Proposed change would avoid unintended time cuts; unnecessary appeals; additional sentencing proceedings where murder conviction vacated; and would end the ability to avoid a penalty for the crime.
- Others Potentially Impacted: Crime Victims, Victim Services and Advocates

## Section 16-3-910.

Whoever shall unlawfully seize, confine, inveigle, decoy, kidnap, abduct or carry away any other person by any means whatsoever without authority of law, except when a minor is seized or taken by his parent, is guilty of a felony and, upon conviction, must be imprisoned for a period not to exceed thirty years ~~unless sentenced for murder as provided in Section 16-3-20.~~

# LAW CHANGE RECOMMENDATION #13

- Law: S.C. Code Section 17-27-160 (B)
- Current Law: Capital case post-conviction relief procedures
- Recommendation: To expand the pool of available, qualified attorneys; to place limits on the number of circuit court cases assigned to one attorney at a given time; and place additional qualification and training requirements on attorneys previously found ineffective in capital cases before that attorney is allowed to receive an appointment in a capital post-conviction relief case.
- Basis for Recommendation: To protect the goal of expedited proceedings under this section by **expanding the pool of attorneys that may be appointed to represent a death-sentenced inmate in post-conviction relief**; to promote the goal of expedited proceedings by **limiting the number of cases assigned to any one attorney while the cases are still in circuit court**; and, to promote qualified and fair appointments by **requiring an attorney who is found ineffective to meet additional requirements before that attorney may be appointed to another case pursuant to this section.**
- Others Potentially Impacted: None

## **Section 17-27-160.**

(B) Upon receipt of the application for post-conviction relief, the counsel for the respondent shall file a return within thirty days after receipt of the application  
S.C. Code Ann. § 17-27-160

If the applicant is indigent and desires representation by counsel, two counsel shall be immediately appointed to represent the petitioner in this action. At least one of the attorneys appointed to represent the applicant must have previously represented a death-sentenced inmate in state or federal post-conviction relief proceedings or (1) must meet the minimum qualifications set forth in Section 16-3-26(B) and Section 16-3-26(F) and (2) have successfully completed, within the previous two years, not less than twelve hours of South Carolina Bar approved continuing legal education and/or professional training primarily involving advocacy in the field of capital appellate and/or post-conviction defense. The Supreme Court may promulgate additional standards for qualifications of counsel in capital post-conviction proceedings.

The court may not appoint an attorney as counsel under this section if the attorney represented the applicant at trial or in a direct appeal unless the applicant and the attorney request appointment on the record or the court finds good cause to make the appointment.

**Section 17-27-160. (B) (cont.)**

The court may not appoint an attorney as counsel under this section if the attorney has two or more appointments in capital PCR actions currently pending in the circuit court at the time the appointment of counsel is being made pursuant to S.C. Code § 17-27-160 (B);

The court may not appoint an attorney as counsel under this section if the attorney was found ineffective in a separate proceeding, in any court, for a period of five years from the finding, and may be considered for appointment at the conclusion of the period of five years only after qualification by additional training in capital trial and/or post-conviction relief of no less than twelve hours in the two years prior to appointment, and be appointed along with another attorney who must satisfy the requirement of having previously represented a death-sentenced in state or federal post-conviction relief proceedings.

Counsel appointed in these cases shall be compensated from the funding provided in Section 16-3-26 in the same manner and rate as appointed trial counsel, provided that Section 16-3-26(I) shall not apply to counsel appointed in post-conviction relief proceedings. Appointed counsel on appeal from state post-conviction relief cases shall be funded and compensated from the funds established for representation of indigents on appeal by the Office of Appellate Defense pursuant to Chapter 4, Title 17. Nothing in this section shall preclude an out-of-state attorney from appearing pro hac vice.