

Dec - 28 2018

Robert R. Carr  
Clerk, U.S. District CourtUNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF KENTUCKYCRIMINAL JUSTICE ACT PLAN

General Order 18-26

## I. AUTHORITY

- A. Pursuant to 18 U.S.C. § 3006A, the Criminal Justice Act of 1964 (“CJA”), as amended, and in accordance with the *Guidelines for Administering the CJA and Related Statutes: Volume 7A; Guide to Judiciary Policy – Defender Services* (“CJA Guidelines”), the Judges of the United States District Court for the Eastern District of Kentucky adopt this amended plan for furnishing representation in federal court as defined by law. This CJA Plan, which addresses eligible persons in qualifying circumstances, includes the provision of counsel and investigative, expert, and other services necessary for adequate representation, all as defined in and subject to the CJA and the CJA Guidelines.

## II. STATEMENT OF POLICY

## A. Objectives

- i. The principal objective of this CJA Plan is to pursue the goal of equality before the law for all persons in matters addressed by the Plan. This Plan, therefore, shall be administered so that those accused of crime, or otherwise eligible for services pursuant to the CJA and/or the Sixth Amendment, will not be deprived of any element of representation necessary to an effective and constitutional defense based on financial ability to afford adequate representation.
- ii. A second objective of the Plan, and one designed to further the principal objective, is to regulate the size and composition of the CJA Panel of Attorneys. Such regulation will insure that Panel attorneys have adequate skill and experience necessary for effective representation in federal court, will facilitate proper training and professional development of Panel members, and will permit adequate assignment opportunities for each Panel member.
- iii. The Plan also seeks to articulate the requirements and policies of this District, relative to the CJA, in compliance with the Act and CJA Guidelines.

## B. Compliance

- i. The Court, its Clerk, and the attorneys appointed under the CJA shall comply with the CJA, the CJA Guidelines, and the terms of this Plan. In the event of any conflict, the terms of the CJA, and then the provisions of the CJA Guidelines, control over the terms of the CJA Plan.

- ii. The Clerk shall maintain and keep current a copy of this Plan and the CJA Guidelines for the use of members of the CJA Panel. The Clerk also shall post an electronic copy of this Plan for public access on the Court's website.

### III. PROVISION OF REPRESENTATION

#### A. Mandatory Appointment of Counsel

- i. Absent waiver of the right to counsel, pursuant to the Criminal Justice Act, 18 U.S.C. § 3006A(a)(1), representation shall be provided in this District for any financially eligible person that:
  - a. is charged with a felony or a Class A misdemeanor;
  - b. is a juvenile alleged to have committed an act of juvenile delinquency as defined in 18 U.S.C. § 5031 (*see* 18 U.S.C. § 5034 (on appointment of counsel); Guide, Vol. 7A, § 320.50 (on appointment of a guardian ad litem));
  - c. is charged with a violation of probation;
  - d. is entitled to appointment of counsel in parole proceedings;
  - e. is under arrest, when such representation is required by law;
  - f. is charged with a violation of supervised release or faces a modification, reduction, or enlargement of a condition, or extension or revocation of a term of supervised release;
  - g. is subject to a mental condition hearing under 18 U.S.C. chapter 313;
  - h. is entitled to appointment of counsel under the Sixth Amendment to the United States Constitution or faces loss of liberty in a case and federal law requires the appointment of counsel;
  - i. is in custody as a material witness;
  - j. is seeking to set aside or vacate a death sentence in proceedings under 28 U.S.C. §§ 2254 or 2255;
  - k. is entitled to appointment of counsel in connection with prisoner transfer proceedings under 18 U.S.C. § 4109;
  - l. is by statute or law otherwise entitled to such appointment.

#### B. Discretionary Appointment of Counsel

- i. Whenever a federal judicial officer determines that the interests of justice so require, representation may be provided in this District for a financially eligible person that:
  - a. is charged with a Class B or C misdemeanor or an infraction for which a sentence to confinement is authorized;
  - b. is seeking relief, other than to set aside or vacate a death sentence, under 28 U.S.C. §§ 2241, 2254, or 2255;
  - c. is charged with civil or criminal contempt and faces a loss of liberty;
  - d. has been called as a witness before a grand jury, a federal court, the Congress, or a federal agency or commission which has the power to compel testimony, and there



- is reason to believe, either prior to or during testimony, that the witness could be subject to a criminal prosecution, a civil or criminal contempt proceeding, or faces a loss of liberty;
- e. the United States Attorney has proposed for processing under a pretrial diversion program;
- f. is held for international extradition under 18 U.S.C. chapter 209; or
- g. faces an ancillary proceeding in a circumstance for which representation under the CJA may be appropriate as provided in the CJA Guidelines and as outlined in Section III.C.

### C. Ancillary Matters

- i. Representation may be furnished for financially eligible persons in “ancillary matters appropriate to the proceedings” under 18 U.S.C. § 3006A(c).
- ii. In determining whether a matter is ancillary to the proceedings, the Court should consider whether the matter, or the issues of law or fact in the matter, arose from, or are the same as or closely related to, the facts and circumstances surrounding the principal criminal charge.
- iii. In determining whether representation in an ancillary matter is appropriate to the proceedings, the Court should consider whether such representation is reasonably necessary to accomplish, among other things, one of the following objectives:
  - a. to protect a Constitutional right;
  - b. to contribute in some significant way to the defense of the principal criminal charge;
  - c. to aid in preparation for the trial or disposition of the principal criminal charge;
  - d. to enforce the terms of a plea agreement in the principal criminal charge;
  - e. to preserve the claim of the CJA client to an interest in real or personal property subject to a civil forfeiture proceeding under 21 U.S.C. § 881, 19 U.S.C. § 1602 or similar statutes, which property, if recovered by the CJA client, may be considered for reimbursement under 18 U.S.C. § 3006A(f) and Guide, Vol. 7A, § 210.40.30; or
  - f. to effectuate the return of real or personal property belonging to the CJA client which may be subject to a motion for return of property under Fed. R. Crim. P. 41(g), which property, if recovered by the CJA client, may be considered for reimbursement under 18 U.S.C. § 3006A(f) and Guide, Vol. 7A, § 210.40.30.
- iv. The scope of representation in the ancillary matter should extend only to the part of the ancillary matter that relates to the principal criminal charge and to the correlative objective sought to be achieved in providing the representation (*e.g.*, a CJA defendant in a criminal stock-fraud case should be represented by CJA counsel at the defendant’s deposition in a parallel civil fraud action for the limited purpose of advising the defendant concerning the defendant’s Fifth Amendment rights).

- v. Representation in an ancillary matter is compensable as part of the representation in the principal matter for which counsel has been appointed and is not considered a separate appointment for which a separate compensation maximum would be applicable under § 230.23.10(g).
- vi. A Panel attorney appointed under the CJA may obtain, through an *ex parte* application to the Court, a preliminary determination that the representation to be provided in an ancillary matter is appropriate to the principal criminal proceeding and compensable under 18 U.S.C. § 3006A(c), the CJA Guidelines, and this Plan. However, failure to obtain such a preliminary determination does not bar the Court from approving compensation for representation in an ancillary matter, provided that the services and compensation related thereto are justified in a memorandum submitted by the attorney to the Court at the conclusion of the principal criminal matter and the presiding judicial officer finds that such representation was appropriate.

#### IV. ADMINISTRATION OF THE CRIMINAL JUSTICE ACT

##### A. CJA Committee

- i. Subject to the supervision of the Court, a CJA Committee shall oversee administration of this Plan and governance of the CJA Panel created by this Plan. The CJA Committee shall be comprised of two United States District Judges of the Court (active or senior status, as the Court deems appropriate), a United States Magistrate Judge of the Court, the Panel Representative/Resource Counsel for the District, and three (3) attorneys admitted to the bar of the Court as selected and appointed by the Court. The Court shall appoint an attorney from each of the three divisions of the Court. Although not required, it is preferred that such attorneys be members of the CJA Panel.
- ii. The United States District Judges, the United States Magistrate Judge, and the Panel Representative/Resource Counsel for the District shall serve on the Committee for such length of time as the Court may determine. The attorneys serving on the Committee shall be appointed for staggered three-year terms, with one attorney appointed initially for a three-year term, a second attorney appointed initially for a two-year term, and the remaining attorney appointed initially for a one-year term. All appointments following the original appointments provided in the preceding sentence shall be for three years. Appointments to the Committee are revocable at any time by a majority vote of the judges of the Court. A successor appointed during the term of his/her predecessor appointee shall serve out the term of the predecessor appointee before potentially being appointed to a full term. Attorneys serving on the Committee may be re-appointed and may serve more than one term, as the Court deems proper.
- iii. The Court shall designate a District Judge on the Committee to act as the Committee's Chair, but said person may delegate functions to other members of the Committee as the Chair deems appropriate. Further, the Court may, as the CJA Committee's



development and performance over time warrant, reassign the Chair position to another Committee member.

- iv. Subject to oversight by the Court, the Committee shall have the responsibility for managing the CJA Panel, including the following powers and responsibilities:
  - a. Reviewing and evaluating applications by attorneys for admission to the CJA Panel and making recommendations thereon to the Court;
  - b. Recommending whether attorneys admitted to the CJA Panel should be removed for any reason, including, but not limited to, poor service, misconduct, incompetence, mental or physical incapacity, or failure to comply with applicable training and continuing legal education requirements;
  - c. Recommending requirements for and planning and providing for educational and professional-training opportunities to members of the CJA Panel in accordance with principles identified by the Court, including those this Plan otherwise authorizes or requires;
  - d. Reviewing, at the request of and to assist any judicial officer, submitted payment vouchers for reasonableness and compliance with appropriate Administrative Office guidelines and/or CJA Guidelines;
  - e. Investigating complaints against or involving members of the CJA Panel, and recommending to the Court appropriate disciplinary sanctions, including admonition, reprimand, suspension from the CJA Panel, and/or removal from the CJA Panel;
  - f. Identifying, evaluating, and defining any operational difficulties encountered in the administration of the CJA Panel and making recommendations to the Court for appropriate administrative changes;
  - g. Recruiting members to the CJA Panel and conducting or coordinating educational programs and initiatives concerning the mission, purpose, constitutional underpinnings, and history of the Criminal Justice Act;
  - h. Acting as a resource for assignments or queries by the Court that may assist any of the judges on matters pertinent to the CJA Panel; and
  - i. Such other powers and responsibilities as are necessary and proper to the management and regulation of the CJA Panel.
- v. The Committee shall meet at least twice per year and at any time the Court asks the Committee to consider an issue.
- vi. The Committee shall report annually to the Chief Judge, in the form directed by the Chief Judge, concerning the operation and effectiveness of the CJA Panel and Plan and the Committee's duties, and the Committee shall periodically review the Plan itself and make recommendations to the Court for any changes or amendments. The annual report shall include in its review of the Panel, among other topics, an assessment of the size of the CJA Panel, recruitment efforts for qualified attorneys, and recurring issues or difficulties encountered by Panel members or CJA clients. The annual report may include any recommendations of necessary or appropriate changes on these, or other relevant, topics.

- vii. The Clerk of Court, or his or her designee, shall be an ex officio, non-voting member of the Committee. The Committee will be permitted to use the staff of the Clerk, or a designee of the Clerk or the Court, for clerical and record-keeping support.
- viii. Service on the Committee shall be without separate compensation, and nothing herein shall be construed as creating or vesting any right or privilege. The Court may reimburse Committee members for expenses incurred in performing reasonable and necessary duties in service to the Committee.

B. Responsibility of the Court

- i. Although this Plan establishes the CJA Committee to exercise administrative responsibility for management of the CJA Plan and to advise the Court in matters concerning the CJA Panel and the District's CJA compliance, the Court retains the ultimate responsibility for management and operation of the CJA Panel and may modify, override, or affirmatively direct action by the Committee.

V. CRIMINAL JUSTICE ACT PANEL

A. Limitation on the Size of the CJA Panel

- i. The Committee shall, from time to time, evaluate and manage the proper size of the CJA Panel to ensure that each Panel attorney receives enough appointments to maintain proficiency in federal criminal practice and that the CJA Panel is sufficient to meet the District's needs. If the Committee determines that it is necessary to reduce the size of the CJA Panel, such reduction shall first be accomplished through attrition, and only thereafter through other means as determined by the Committee. Nothing herein shall be construed as creating or vesting any right to be admitted to or to remain a member of the CJA Panel. Membership on the CJA Panel is at the discretion of the Committee and ultimately the Court.

B. Membership of the CJA Panel

- i. Panel attorneys shall be members of the bar of this District. In addition to bar membership, the Panel attorneys should have, in the judgment of the Committee, sufficient prior federal and/or state criminal trial experience, significant prior involvement in serious or complex criminal cases, adequate knowledge of the Sentencing Guidelines and the Bail Reform Act, and adequate knowledge of other relevant areas of criminal practice.
- ii. When the Committee announces an application period, an attorney may apply for admission to the CJA Panel by following the process the Committee describes. Additions to the CJA Panel shall consist of attorneys recommended by the Committee



based on that attorney's application and any other relevant information, and thereafter approved by the Court.

- iii. From time to time, the Committee shall consider the list of CJA Panel attorneys and the number of cases the Panel will likely be required to handle, and, if necessary, shall reduce the Panel by recommendation to the Court or elect to receive applications as part of Panel expansion.
- iv. The Committee shall also designate appropriately qualified attorneys on the Panel as approved for complex cases.

#### C. Evaluation of the CJA Panel and Mandatory CLE

- i. The Committee shall design an evaluation method that effectively gathers adequate relevant information to permit assessment of Panel members. Said method should reflect input on performance from the Court and other sources deemed appropriate by the Committee. The Committee and the Clerk shall also formulate a method for recording when any Panel attorney has refused to accept an appointment, and the reason for that refusal.<sup>1</sup> Information about refusals shall be forwarded by the Clerk at the Committee's request.
- ii. The Committee shall evaluate the performance of each CJA Panel attorney formally every three (3) years, and the Committee shall choose a suitable evaluation method. The purpose of this evaluation is to determine whether each attorney should remain a member of the CJA Panel. The Committee shall consider judicial evaluations, the attorney's compliance with the mandatory CLE requirements of this Plan, the number of cases the attorney has refused to accept during the evaluation period, the reasons for any refusal, and any other relevant information presented to or gathered in investigation by the Committee. The Committee shall provide the Court with the names of those attorneys that, in the view of the Committee, should not continue as members of the CJA Panel for another three (3) year-period. The Court shall consider and act on the recommendation of the Committee and issue an appropriate notice to each attorney as necessary or appropriate. The responsibility for initiating this process rests with the Committee and there is no need for a Panel member to reapply for appointment.
- iii. In the event the Committee perceives that an attorney should not continue as a member of the Panel, the Committee may, in advance of any recommendation to the Court, give the attorney an opportunity to respond to any deficiencies or reasons that the Committee identifies as justifying the attorney's removal. The provision of such opportunity rests in the discretion of the Committee and no Panel member has a right to membership or any particular process in granting or withdrawing Panel membership. The judges of the

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<sup>1</sup> The Court recognizes that other practice obligations may, from time to time, impact a Member's ability to accept assignments. Any Member may contact any Committee judge to discuss periodic unavailability for assignments and any recurrent need to decline CJA work, and the Committee may give guidance to the Member.

Court retain full, complete, and final discretion concerning Panel membership. The Court may direct the Committee to evaluate further its recommendation as to Panel membership.

- iv. Any Panel Member may request temporary inactive status for, *e.g.*, current workload, family, or personal health reasons. The Member may make the request informally to any Committee judge. The Committee will decide the request. If granted, the Committee also may return the Member to active status (in the same position as before the inactivity period) at any time, if requested by the Member.
- v. CJA Panel members must notify the chair of the CJA Committee within thirty (30) days when any licensing authority, grievance committee, or administrative body has taken action against them, or when a finding of contempt, sanction, or reprimand has been issued against the Panel member by any state or federal court.
- vi. CJA Panel members must have the facilities, resources, and technological capability to effectively and efficiently manage assigned cases. CJA Panel members must comply with the requirements of electronic filing and eVoucher. CJA Panel members must know and abide by procedures related to requests for investigative, expert, and other services.
- vii. To maintain continued eligibility to serve on the CJA Panel, each Panel attorney shall, if requested, certify to the Committee that he or she has attended at least nine (9) hours of continuing legal education every three (3) years focused on federal criminal law and procedure. Failure of an attorney to comply with this CLE requirement may result in removal from the CJA Panel. Each year, the Court will sponsor or participate in a full day skills seminar for CJA Panel attorneys. Each CJA Panel attorney must attend at least one (1) skills seminar every two (2) years. The hours spent at the skills seminar will apply toward the mandatory CLE requirement. In addition, and from time to time, the Committee and/or the Court will offer additional CLE for Panel attorneys at various locations throughout the District. All CLE offered to Panel attorneys by the Committee and/or the Court shall be free of charge.
- viii. Notwithstanding the requirements in any other section of this Plan, a Panel attorney may be removed from the panel at any time by a majority vote of the district judges. A Panel member may formally withdraw from consideration for prospective appointments at any time, but reinstatement to the panel shall only be with Committee approval and leave of Court.

#### D. Mentorship Panel

- i. The Committee may provide for or create a Mentorship Panel, as the Committee deems appropriate. Should the Committee establish a mentorship program, participation shall not be mandatory for membership on the CJA Panel and completion of the mentorship program will not guarantee membership on the CJA Panel.



#### E. Complex Cases

- i. In its discretion, the Committee may classify certain Panel attorneys as qualified for appointment to complex cases, such as death-penalty prosecutions, habeas actions, cases involving intense media or public interest, cases potentially involving difficult or unusual clients, cases involving Class A or B felonies, or other complex or difficult appointment scenarios. The appointing judicial officer shall assess and decide whether a matter qualifies as complex for these purposes. Attorneys approved for complex cases may be appointed to any case, but in any complex case, the Court shall appoint complex-qualified counsel.
- ii. In order to be considered for complex cases, an attorney shall have been licensed to practice law at least five (5) years and shall have tried to a jury at least five (5) federal criminal trials, or at least one (1) federal criminal trial and at least four (4) complex state criminal trials. Notwithstanding these minimum qualifications, an attorney may apply to the Committee for approval to handle complex cases by describing any special circumstances, experience, or qualifications that may justify such approval. Further, meeting the minimum qualifications does not assure eligibility to handle complex cases. Nothing herein shall be construed in any way as a basis for finding ineffective assistance of counsel. The “complex” label and qualification are matters of Court or Committee discretion.
- iii. The Court encourages CJA counsel appointed to cases of unusual complexity that are likely to become extraordinary in terms of cost to develop a case budget consistent with Guide, Vol. 7, Part A, Ch. 2, § 230.26.

#### VI. ASSIGNMENT OF CASES TO CJA PANEL ATTORNEYS AND DETERMINATION OF NEED FOR COUNSEL

- A. Upon a defendant entering federal custody,<sup>2</sup> a federal law-enforcement official or an attorney for the United States (as applicable), or either’s delegate, must promptly notify—telephonically or electronically—the appropriate Court personnel (usually the appropriate Magistrate Judge or his/her staff) of the arrest and any known information concerning counsel status (e.g., whether defendant has retained counsel and any known counsel conflicts). Court personnel, in turn, will notify, *inter alia*, the Clerk’s Office and the United States Probation Office of the arrest and, in cases in which the defendant is expected to request appointment of counsel, direct Clerk personnel to perform the preliminary CJA case assignment (*i.e.*, “make the CJA draw”) in accordance with the established procedures

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<sup>2</sup> This Section does not purport to comprehensively address every possible scenario in which the CJA or the Sixth Amendment requires or authorizes appointment of counsel. Instead, this Section establishes the process for providing CJA counsel to a defendant who has entered federal custody. A judicial officer retains discretion to appoint CJA counsel in other, appropriate circumstances.

for making such assignment.<sup>3</sup> Court personnel, in consultation with the involved judicial officer, will inform the Clerk's Office of the level of anticipated appointment: limited, regular, or complex. In cases in which the Court learns that the defendant has retained counsel, Court personnel will notify Clerk staff of that fact and retained counsel's identity.

- B. The Clerk shall maintain a master list of CJA Panel attorneys, specifically noting those attorneys approved for complex cases. All CJA Panel members are approved for regular and limited appointments. There may be a single CJA Panel for the Eastern District of Kentucky from which case assignments will be made.<sup>4</sup> The Clerk shall maintain statistics regarding the number of cases each Panel attorney has handled in the preceding three (3) years, and these statistics shall be made available upon request to a judicial officer or designee who is considering an appointment. If a Panel member repeatedly refuses assignments, the Committee and/or the Court shall make further inquiry as appropriate, and take further proper action, up to and including potential removal of the member from the CJA Panel.
- C. Prior to a defendant's initial appearance before the Magistrate Judge (or other judicial officer), the United States Probation Office shall, if applicable, coordinate with the drawn CJA or retained counsel to arrange to conduct a pretrial/bond interview and (if the defendant anticipates requesting appointed counsel) ensure completion of a financial affidavit (Form CJA 23). Unless impracticable, the United States Probation Office will not conduct the bond interview or have the defendant complete a financial affidavit outside the presence of the drawn CJA or retained counsel. The affidavit will be provided to the Magistrate Judge or other judicial officer for purposes of aiding a determination of the defendant's qualification for appointed counsel under the CJA.
- D. In cases in which the defendant has not retained counsel, the Magistrate Judge or other judicial officer, considering the financial affidavit and after making any other proper inquiry he or she deems appropriate, will make a determination of financial eligibility under the applicable standard. If the judicial officer finds that the defendant qualifies, and if the defendant requests appointment of counsel, the judicial officer will formally appoint the drawn lawyer.

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<sup>3</sup> The involved judicial officer retains discretion, in appropriate circumstances, considering, for example, the nature and / or complexity of a case, a particular defendant's circumstances, an attorney's experience, geography, timing exigencies, and any other relevant factor, to direct the appointment of a particular CJA attorney in a particular case.

<sup>4</sup> Although one CJA Panel exists for the District, the Clerk may maintain sub-panels, divided by Court Division. The Court may assign members to one or more sub-panels, depending on docket needs and member consent. A judicial officer retains discretion to appoint a Panel member not listed for a particular Division to a case in such a Division, if the judicial officer believes it necessary.



## VII. APPOINTMENT OF COUNSEL IN NON-CAPITAL CASES

### A. The Judicial Officer

- i. In every case in which appointment of counsel pursuant to 18 U.S.C. § 3006A(a)(1) and/or the Sixth Amendment is required or appropriate, the judicial officer shall appoint counsel promptly, if the judicial officer finds that the person is financially unable to obtain an attorney, unless the person validly waives his or her right to be represented by counsel.
- ii. The judicial officer shall appoint counsel from the CJA Panel, except in circumstances where, in the interest of justice, it becomes necessary in the judicial officer's discretion to appoint some other qualified counsel because of an unusual circumstance concerning timing, location, complexity, or some other factor. A judicial officer appointing counsel who is not a member of the CJA Panel shall notify the CJA Committee in writing of such act. Consideration for preserving the integrity of the Panel selection process requires that such appointments be made only in exceptional circumstances. A defendant shall not have the right to select his or her appointed counsel from the CJA Panel, or otherwise.
- iii. If, at any time after the appointment of counsel, the judicial officer finds that the person is or has become financially able to obtain counsel or make partial payment for the representation, the judicial officer may, in accordance with applicable law, terminate the appointment or order that any funds available to the person be ordered paid as provided in 18 U.S.C. § 3006A(f).
- iv. If, at any stage of a matter under 18 U.S.C. § 3006A(a), the judicial officer finds that a person is or has become financially unable to continue to pay retained counsel, the judicial officer may make an original appointment of counsel in accordance with this Plan's generally applicable procedures.
- v. If a person having a right to counsel seeks to waive his or her right to have appointed counsel, the judicial officer shall make appropriate inquiry regarding such a waiver under applicable law. If the person admits or the judicial officer finds that the person is financially able to obtain counsel but declines to do so, the judicial officer shall certify that fact in the record and otherwise proceed as appropriate under applicable law.

### B. The Clerk

- i. If a person having a right to counsel desires to have counsel appointed, then
  - a. If no financial affidavit has been filed with the Clerk, a form affidavit shall promptly be sent to the person, to be filled out by the person and returned to the Clerk; or

- b. If the notice to the Clerk includes an affidavit of financial inability to employ counsel, the Clerk shall promptly communicate with a judicial officer for consideration of the appointment of counsel.

### C. Obligation of Counsel

- i. Counsel appointed to represent a client under the CJA shall owe that client the same quality, skill, and loyalty of representation as privately retained counsel.
- ii. Attorneys appointed pursuant to the CJA shall conform to all standards of professional conduct, including but not limited to the Kentucky Rules of Professional Conduct, the Joint Local Rules of Criminal Practice, and any applicable federal laws regulating attorney conduct in a matter before a federal court.
- iii. Counsel appointed by a judicial officer shall, unless excused by Order of the Court, continue to act for the person throughout the proceedings in this Court. Appointed counsel is expected to appear personally at all substantive proceedings, with substitutions or the filing of additional appearances permitted only with permission of the Court. If appropriate and practicable, the judicial officer may reappoint counsel for Rule 32.1 revocation proceedings, to provide continuity of representation. The judicial officer before whom a case is pending may, in the interest of justice, substitute one appointed counsel for another at any stage of the proceedings, with such substitutionary appointment made in accordance with the CJA Plan's general provisions.
- iv. If, at any time after appointment, counsel obtains information indicating that a client is financially able to make a payment, in whole or in part, for legal or other services in connection with his or her representation, and the source of the attorney's information is not protected as a privileged communication, counsel shall advise the Court.
- v. In all criminal cases, appointed counsel shall advise the defendant of the right to appeal and of the right to counsel on appeal. If directed to do so by the defendant in a criminal case, counsel shall file a timely Notice of Appeal, and shall continue to represent the defendant, unless or until appropriately relieved.

## VIII. APPOINTMENT OF COUNSEL IN CAPITAL CASES

### A. Authority

- i. The appointment and compensation of counsel in capital cases and the authorization and payment of persons providing investigative, expert, and other services are governed by 18 U.S.C. §§ 3005, 3006A, and 3599, and *Guide*, Vol. 7A, Ch. 6.

### B. Applicability and Appointment of Counsel Requirements

- i. Unless otherwise specified, this Section applies to all capital proceedings in this District, whether those matters originated in this Court (federal capital trials) or in a



state court (habeas proceedings under 28 U.S.C. § 2254). Such matters include those in which the death penalty may be or is being sought by the prosecution, motions for a new trial, all post-conviction proceedings under 28 U.S.C. §§ 2254 or 2255 seeking to vacate or set aside a death sentence, applications for stays of execution, competency proceedings, proceedings for executive or other clemency, and other appropriate motions and proceedings.

- ii. Any person charged with a crime that may be punishable by death who is or becomes financially unable to obtain representation is entitled to the assistance of appointed counsel throughout every stage of available judicial proceedings, including pretrial proceedings, trial, sentencing, motions for new trial, appeals, applications for writ of certiorari to the Supreme Court of the United States, and all available post-conviction processes, together with applications for stays of execution and other appropriate motions and procedures, competency proceedings, and proceedings for executive or other clemency as may be available to the defendant. *See* 18 U.S.C. § 3599(e).
- iii. Qualified counsel must be appointed in capital cases at the earliest possible opportunity.
- iv. Given the complex and demanding nature of capital cases, where appropriate, the Court will utilize the services and advice available through the Administrative Office of the United States Courts (AO), Defender Services Death Penalty Resource Counsel projects ("Resource Counsel projects"), which include: (1) Federal Death Penalty Resource Counsel and Capital Resource Counsel Projects (for federal capital trials), (2) Federal Capital Appellate Resource Counsel Project, (3) Federal Capital Habeas § 2255 Project, and (4) National and Regional Habeas Assistance and Training Counsel Projects (§ 2254). These counsel are death penalty experts who may be relied upon by the Court for assistance with selection and appointment of counsel, case budgeting, and legal, practical, and other matters arising in federal capital cases.
- v. The judicial officer shall consult with the appropriate Resource Counsel projects about potential and actual federal capital trial, appellate, and habeas corpus cases, and consider their recommendations for appointment of counsel.
- vi. The judicial officer may appoint an attorney furnished by a state or local public defender organization or legal aid agency or other private, non-profit organization to represent a person charged with a capital crime or seeking federal death penalty habeas corpus relief, provided that the attorney is fully qualified. Such appointments may be in place of, or in addition to, the appointment of a CJA Panel attorney or an attorney appointed *pro hac vice*. *See* 18 U.S.C. § 3006A(a)(3).
- vii. All attorneys appointed in federal capital cases must be well qualified, by virtue of their training, commitment, and distinguished prior capital defense experience at the relevant stage of the proceeding, to serve as counsel in this highly specialized and demanding litigation.

- viii. All attorneys appointed in federal capital cases must have sufficient time and resources to devote to the representation, taking into account their current caseloads and the extraordinary demands of federal capital cases.
- ix. All attorneys appointed in federal capital cases should appropriately consult the American Bar Association's 2003 Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (Guidelines 1.1 and 10.2 *et seq.*) and the 2008 Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases.<sup>5</sup>
- x. All attorneys appointed in federal capital cases should consult regularly with the appropriate Resource Counsel projects.
- xi. Questions about the appointment and compensation of counsel and the authorization and payment of investigative, expert, and other service providers in federal capital cases should be directed to the AO Defender Services Office, Legal and Policy Division Duty Attorney at (202) 502-3030 or via email at ods\_lpb@ao.uscourts.gov.

#### C. Appointment of Counsel in Federal Death-Eligible Cases

##### i. General Requirements

- a. Appointment of qualified capital trial counsel must occur no later than when a defendant is charged with a federal criminal offense where the penalty of death is possible. *See* 18 U.S.C. § 3005.
- b. To protect the rights of an individual who, although uncharged, is the subject of an investigation in a federal-death eligible case, the Court may appoint capital-qualified counsel upon request, consistent with Section C.i, ii, and iii of this Section.
- c. At the outset of every capital case, the Court must appoint two attorneys, at least one of whom meets the qualifications for “learned counsel” as described below. If necessary for adequate representation, more than two attorneys may be appointed to represent a defendant in a capital case. *See* 18 U.S.C. § 3005.
- d. When appointing counsel, the judicial officer must consider the recommendation of the AO Defender Services Office. *See* 18 U.S.C. § 3005.

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<sup>5</sup> *See Bobby v. Van Hook*, 130 S. Ct. 13, 17 (2009) (criticizing the Sixth Circuit for “treat[ing] the ABA’s 2003 Guidelines not merely as evidence of what reasonably diligent attorneys would do, but as inexorable commands with which all capital defense counsel must fully comply” and stressing that the Guidelines “are only guides to what reasonableness means, not its definition”); *see also id.* at 17 n.1 (eschewing even “the legitimacy of a less categorical use of the Guidelines to evaluate post-2003 representation”).



- e. Out-of-District counsel, including federal defender organization staff, who possess the requisite expertise may be considered for appointment in capital trials to achieve high quality representation together with cost and other efficiencies.
- f. In evaluating the qualifications of proposed trial counsel, consideration should be given to their commitment to the defense of capital cases, their current caseload, including other capital cases, and their willingness to effectively represent the interests of the client.

ii. Qualifications of Learned Counsel

- a. Learned counsel must either be a member of this District's bar or be eligible for admission *pro hac vice* based on his or her qualifications.
- b. Learned counsel must meet the minimum experience standards set forth in 18 U.S.C. §§ 3005 and 3559.
- c. Learned counsel should have distinguished prior experience in the trial, appeal, or post-conviction review of federal death penalty cases, or distinguished prior experience in state death penalty trials, appeals, or post-conviction review that, in combination with co-counsel, will assure high quality representation.
- d. "Distinguished prior experience" contemplates excellence, not simply prior experience. Counsel with distinguished prior experience should be appointed even if meeting this standard requires appointing counsel from outside this District.
- e. The suitability of learned counsel should be assessed with respect to the particular demands of the case, the stage of the litigation, and the defendant.
- f. Learned counsel must be willing and able to adjust other caseload demands to accommodate the extraordinary time required by the capital representation.
- g. Learned counsel shall satisfy the qualification standards endorsed by relevant and appropriate bar associations and other legal organizations regarding the quality of representation in capital cases.

iii. Qualifications of Second and Additional Counsel

- a. Second and additional counsel may, but are not required to, satisfy the qualifications for learned counsel, as set forth above.
- b. Second and additional counsel must be well qualified, by virtue of their distinguished prior criminal defense experience, training and commitment, to serve as counsel in this highly specialized and demanding litigation.

- c. Second and additional counsel must be willing and able to adjust other caseload demands to accommodate the extraordinary time required by the capital representation.
  - d. The suitability of second and additional counsel should be assessed with respect to the demands of the individual case, the stage of the litigation, and the defendant.
- D. Appointment of Post-Conviction Counsel in Federal Death Penalty Cases (28 U.S.C. § 2255)
- i. A financially eligible person seeking to vacate or set aside a death sentence in proceedings under 28 U.S.C. § 2255 is entitled to appointment of fully qualified counsel. *See* 18 U.S.C. § 3599(a)(2).
  - ii. Due to the complex, demanding, and protracted nature of death penalty proceedings, the Court should consider appointing more than one attorney.
  - iii. In light of the accelerated timeline applicable to capital § 2255 proceedings, prompt appointment of counsel is essential. Whenever possible, appointment should take place prior to the denial of certiorari on direct appeal by the United States Supreme Court.
  - iv. When appointing counsel in a capital § 2255 matter, the Court should consider the recommendation of the Federal Capital Habeas § 2255 Project.
  - v. Out-of-District counsel, including federal defender organization staff, who possess the requisite expertise may be considered for appointment in capital § 2255 cases to achieve high quality representation together with cost and other efficiencies.
  - vi. Counsel in § 2255 cases should have distinguished prior experience in the area of federal post-conviction proceedings and in capital post-conviction proceedings.
  - vii. When possible, post-conviction counsel should have distinguished prior experience in capital § 2255 representations.
  - viii. In evaluating the qualifications of proposed post-conviction counsel, consideration should be given to the qualification standards endorsed by relevant and appropriate bar associations and other legal organizations regarding the quality of legal representation in capital cases.
  - ix. In evaluating the qualifications of proposed post-conviction § 2255 counsel, consideration should be given to their commitment to the defense of capital cases, their current caseload including other capital cases, and their willingness to effectively represent the interests of the client.



E. Appointment of Counsel in Federal Capital Habeas Corpus Proceedings (28 U.S.C. § 2254)

- i. A financially eligible person seeking to vacate or set aside a death sentence in proceedings under 28 U.S.C. § 2254 is entitled to the appointment of qualified counsel. *See* 18 U.S.C. § 3599(a)(2).
- ii. Due to the complex, demanding, and protracted nature of death penalty proceedings, the Court should consider appointing more than one attorney.
- iii. When appointing counsel in a capital § 2254 matter, the judicial officer shall consider the recommendation of the National or Regional Habeas Assistance and Training Counsel projects.
- iv. Out-of-District counsel, including federal defender organization staff, who possess the requisite expertise may be considered for appointment in capital § 2254 cases to achieve cost and other efficiencies together with high quality representation.
- v. In order for federal counsel to avail themselves of the full statute of limitations period to prepare a petition, the Court should appoint counsel and provide appropriate litigation resources at the earliest possible time permissible by law.
- vi. Unless precluded by a conflict of interest, or replaced by similarly qualified counsel upon motion by the attorney or motion by the defendant, capital § 2254 counsel must represent the defendant throughout every subsequent stage of available judicial proceedings and all available post-conviction processes, together with applications for stays of execution and other appropriate motions and procedures, and must also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant. *See* 18 U.S.C. § 3599(e).
- vii. Counsel in capital § 2254 cases should have distinguished prior experience in the area of federal post-conviction proceedings and in capital post-conviction proceedings.
- viii. When possible, capital § 2254 counsel should have distinguished prior experience in capital § 2254 representations.
- ix. In evaluating the qualifications of proposed capital § 2254 counsel, consideration should be given to the qualification standards endorsed by relevant and appropriate bar associations and other legal organizations regarding the quality of legal representation in capital cases.
- x. In evaluating the qualifications of proposed capital § 2254 counsel, consideration should be given to proposed counsel's commitment to the defense of capital cases, their current caseload, including other capital cases, and their willingness to represent effectively the interests of the client.

## IX. INVESTIGATIVE, EXPERT, AND OTHER SERVICES

### A. Financial Eligibility

- i. Counsel for a person who is financially unable to obtain investigative, expert, or other services necessary for an adequate defense may request such services as provided in 18 U.S.C. § 3006A(e)(1), regardless of whether counsel is appointed under the CJA. Upon finding that the services are necessary, and that the person is financially unable to obtain them, the Court must authorize counsel to obtain the services according to the applicable law.

### B. Applications

- i. Requests for authorization of funds for investigative, expert, and other services, requiring prior authorization under 18 U.S.C. § 3006A(e)(1), must be submitted in an *ex parte* application to the Court (using the Court's eVoucher system), and / or in a formal motion if required by the presiding District Judge, and must not be publicly disclosed, during case pendency, except with the consent of the person represented or as required by law or Judicial Conference policy.
- ii. Appointed counsel may obtain, subject to later judicial review, investigative, expert, or other services without prior authorization, pursuant to the monetary limitation set out in 18 U.S.C. § 3006A(e)(2).
- iii. Counsel shall comply with all provisions regarding financial limitations and requests for services, as set forth in 18 U.S.C. § 3006A(e), and any guidelines or regulations approved by the Judicial Conference of the United States, including Vol. 7A, Ch. 3.

## X. COMPENSATION

### A. Authority

- i. The CJA and the CJA Guidelines govern the compensation of counsel appointed under the CJA. Subject to the provisions and limitations of the CJA, the responsibility to fix the compensation and reimbursement paid to CJA counsel falls to the Court before which counsel provided representation in a given matter. *See* 18 U.S.C. § 3006A(d)(5). The CJA Guidelines indicate that a court should provide prior notice to and a response opportunity by counsel before any non-mathematical or technical reduction of a compensation voucher under the CJA. *See* Guide to Judiciary Policy, Vol. 7, Ch. 2, § 230.36.

### B. Generally

- i. Payment of fees and expenses to counsel appointed under this Plan, and payment for investigative, expert, and other services incurred, shall be made in accordance with any



statutory limitations and such rules, regulations, and guidelines as have been or may be prescribed from time to time by the Judicial Conference of the United States, and in accordance with the fiscal policies of the Administrative Office of the United States Courts.

#### C. Payment Procedures

- i. Claims for compensation must be submitted on the appropriate CJA form through the Court's eVoucher system.
- ii. Claims for compensation should be submitted no later than forty-five (45) days after final disposition of the case, unless good cause is shown.
- iii. Once submitted, the Court's designee will review the claim for mathematical and technical accuracy and for conformity with Guide, Vol. 7A, and, if correct, or upon correction, will forward the claim for consideration and action by the presiding judge.
- iv. Absent extraordinary circumstances, the Court should act on CJA compensation claims within thirty (30) days of submission.
- v. Except in cases involving mathematical corrections, no claim for compensation submitted for services provided under the CJA should be reduced without affording counsel notice of the proposed reduction with a brief statement of the reason(s) and the opportunity to address the matter.
- vi. Nothing contained in this Plan shall be construed as requiring a hearing or as discouraging the Court from communicating informally with counsel about voucher questions or concerns in person, telephonically, or electronically, as deemed appropriate or necessary.

#### D. Prohibition on Other Compensation

- i. Counsel appointed under this CJA Plan may not require, request, or accept any non-CJA Plan payment or promise of payment or other valuable consideration for representation under the appointment, unless approved by Order of the Court.

#### E. Excess Compensation

- i. Payment in excess of any maximum amount provided by statute or otherwise may be made for extended or complex representation, whenever the Court certifies that the amount of the excess payment is necessary to provide fair compensation and the payment is approved by the Chief Judge of the Sixth Circuit or the Chief Judge's designee.

## XI. EFFECTIVE DATE

This Plan, dated this 13 day of August, 2018, shall take effect when approved by the Judicial Council of the Sixth Circuit. This Plan supersedes all prior Criminal Justice Act plans of this Court.

August 13, 2018  
Date

Karen K. Caldwell  
The Honorable Karen K. Caldwell  
Chief Judge, United States District Court for the  
Eastern District of Kentucky

Approved:

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Date

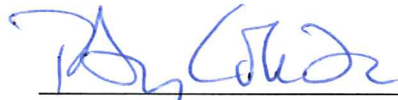
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The Honorable R. Guy Cole, Jr.  
Chief Judge, United States Court of Appeals for the  
Sixth Circuit



## CERTIFICATE OF APPROVAL

This is to certify that, in accordance with the Criminal Justice Act of 1964 as amended, 18 U.S.C. § 3006A, *et seq*, the foregoing Criminal Justice Act Plan for the United States District Court for the Eastern District of Kentucky, has been duly received and approved via mail ballot dated November 27, 2018 as complying with the law by the Judicial Council of the Sixth Circuit of the United States. The said amended plan shall become effective upon the date of this approval.

This 20<sup>th</sup> day of December, 2018.

A handwritten signature in blue ink, appearing to read "R. Guy Cole, Jr.", is written over a horizontal line.

R. Guy Cole, Jr., Chief Judge