

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS

CRIMINAL JUSTICE ACT PLAN

Adopted February 21, 2020

(supersedes all previous editions and revisions)

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
CRIMINAL JUSTICE ACT PLAN

I. AUTHORITY

Pursuant to the Criminal Justice Act of 1964, as amended, (CJA), 18 U.S.C. § 3006A, and *Guide to Judiciary Policy (Guide), Vol. 7A*, the Judges of the United States District Court for the Eastern District of Arkansas adopt this plan, as approved by the circuit, for furnishing representation for any person financially unable to obtain adequate representation in accordance with the CJA.

II. STATEMENT OF POLICY

A. Objectives

The objectives of this Plan are as follows:

1. to provide equal justice under the law for all persons;
2. to provide all eligible persons with timely appointed counsel services that are consistent with the best practices of the legal profession; that are cost-effective, and that protect the independence of the defense function so that the rights of individual defendants are safeguarded and enforced; and
3. to particularize the requirements of the CJA, the USA Patriot Improvement and Reauthorization Act of 2005 (recodified at 18 U.S.C. § 3599), and *Guide, Vol. 7A* in a way that meets the needs of this district.

B. Compliance

1. The Court, its Clerk, the Federal Public Defender, attorneys provided by a bar association or legal aid agency, and private attorneys appointed under the CJA must comply with the *Guide, Vol. 7A* approved by the Judicial Conference of the United States and/or its Committee on Defender Services and with this Plan.
2. The CJA Plan is available on the Court's website and is provided to all CJA counsel upon their designation as members of the CJA panel of private attorneys (CJA Panel).
3. A copy of the Court's CJA Plan is available on the Court's internet site at <http://www.are.uscourts.gov>. The *Guide, Vol. 7A* is available at <http://www.uscourts.gov/FederalCourts/AppointmentofCounsel/CJAGuidelinesForms.aspx>.

III. DEFINITIONS

- A. "Representation" includes counsel and investigative, expert and other services.
- B. "Appointed Attorney" includes private attorneys, the Federal Public Defender and staff attorneys with the Federal Public Defender organization.

IV. DETERMINATION OF ELIGIBILITY FOR CJA REPRESENTATION

A. Mandatory Appointments

Representation under this Plan must be provided for any financially eligible person who:

1. is charged with a felony or a Class A misdemeanor;
2. is a juvenile alleged to have committed an act of juvenile delinquency as defined in 18 U.S.C. § 5031;
3. is charged with a violation of probation or faces a change of a term or condition of probation (unless the modification sought is favorable to the probationer and the government has not objected to the proposed change);
4. is under arrest, when representation is required by law;
5. is entitled to appointment of counsel in parole proceedings;
6. is charged with a violation of supervised release or faces modification, reduction, or enlargement of a condition, or extension or revocation of a term or condition of supervised release;
7. is subject to a mental condition hearing under 18 U.S.C. chapter 313;
8. is in custody as a material witness;
9. is seeking to set aside or vacate a death sentence under 28 U.S.C. §§ 2254 or 2255;
10. is entitled to appointment of counsel in verification of consent proceedings in connection with a transfer of an offender to or from the United States for execution of a penal sentence under 18 U.S.C. § 4109;
11. is entitled to appointment of counsel under the Sixth Amendment of the Constitution; or

12. faces loss of liberty in a case and federal law requires the appointment of counsel.

B. Discretionary Appointments

Whenever a Judge or a United States Magistrate Judge determines that the interests of justice so require, representation may be provided for any financially eligible person who:

1. is charged with a petty offense (Class B or C misdemeanor, or infraction) for which a sentence of confinement is authorized;
2. is seeking relief, other than to set aside or vacate a death sentence, under 28 U.S.C. §§ 2241, 2254, or 2255;
3. is charged with civil or criminal contempt and faces a loss of liberty;
4. has been called as a witness before a grand jury, a 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 criminal prosecution, a civil or criminal contempt proceeding, or face a loss of liberty;
5. has been advised by the United States Attorney or a law enforcement officer that they are the target of a grand jury investigation;
6. is proposed by the United States Attorney for processing under a pretrial diversion program;
7. is held for international extradition proceeding under 18 U.S.C. §§ 3181-3196.

C. Ancillary Matters

Representation may also be furnished for financially eligible persons in ancillary matters appropriate to the proceedings pursuant to 18 U.S.C. Sec. 3006A. In determining whether representation in an ancillary matter is appropriate to the criminal proceedings, the Court should consider whether such representation is reasonably necessary:

1. to protect a constitutional right;
2. to contribute in some significant way to the defense of the principle criminal charge;

3. to aid in preparation for the trial or disposition of the principle criminal charge;
4. to enforce the terms of a plea agreement in the principle criminal charge;
5. to preserve the claim of the CJA client to an interest in real or personal property subject to civil forfeiture proceeding under 18 U.S.C § 3006A(f);
or
6. 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 client, may be considered for reimbursement under 18 U.S.C § 3006A(f).

D. Financial Eligibility

Presentation of Accused for Financial Eligibility Determination

1. Duties of Law Enforcement
 - a. Upon arrest, if the defendant has not retained or waived counsel, federal law enforcement officials must promptly notify, telephonically or electronically, the appropriate Court personnel, who in turn must notify the Federal Public Defender of the arrest of an individual in connection with a federal criminal charge.
 - b. Employees of law enforcement agencies should not participate in the completion of the financial affidavit or seek to obtain information concerning financial eligibility from a person requesting the appointment of counsel.
2. Duties of the United States Attorney's Office
 - a. Upon the return or unsealing of an indictment or the filing of a criminal information, if the defendant has not retained or waived counsel, the United States Attorney or their delegate will promptly notify, telephonically or electronically, appropriate Court personnel, who in turn will notify the Federal Public Defender.
 - b. Upon issuance of a target letter, if the individual has not retained or waived counsel, the United States Attorney or their delegate must promptly notify, telephonically or electronically, appropriate Court personnel, who in turn will notify the Federal Public Defender, unless the United States Attorney's Office is aware of an actual or potential conflict with the target and the Federal Public Defender, in which case they must promptly notify the Court.

- c. Employees of the United States Attorney's Office should not participate in the completion of the financial affidavit or seek to obtain information concerning the financial eligibility from a person requesting the appointment of counsel.

3. Duties of the Federal Public Defender Office

- a. In cases in which the Federal Public Defender may be appointed, that office will:
 - 1. immediately investigate and determine whether an actual or potential conflict exists; and
 - 2. promptly notify the Court of an actual or potential conflict to facilitate the timely appointment of other counsel.
- b. When practicable, the Federal Public Defender will discuss the right to appointed counsel with any person who indicates a financial inability to secure representation; and, if appointment of counsel seems likely, assist the person in the completion of a financial affidavit (Form CJA 23); and arrange to have the person promptly presented before a magistrate judge or district judge of this Court for determination of financial eligibility and appointment of counsel.

4. Duties of the Pretrial Services Officer

- a. The pretrial services officer will not ordinarily conduct the pretrial service interview of a financially eligible defendant until counsel has been appointed, unless the right to counsel is waived or the defendant otherwise consents to a pretrial service interview without counsel.
- b. When counsel has been appointed, the pretrial services officer will provide counsel notice and a reasonable opportunity to attend any interview of the defendant by the pretrial services officer prior to the initial pretrial release or detention hearing.

E. Factual Determination of Financial Eligibility

- 1. In every case where appointment of counsel is authorized under 18 U.S.C. § 3006A(a) and related statutes, the Court must advise the defendant that counsel will be appointed to represent the defendant if he or she is financially unable to obtain counsel and wishes to have counsel appointed.

2. Eligibility for representation under the CJA is a judicial function to be performed by the Court after making appropriate inquiries concerning the person's financial eligibility. Other employees of the Court may be designated to obtain or verify the facts relevant to the financial eligibility determination.
3. In determining whether a person is "financially unable to obtain counsel," the Court should consider the cost of the necessities of life for the person and his or her dependents; the cost of securing pretrial release; asset encumbrance; and the likely cost of retained counsel.
4. The initial determination of eligibility must be made without regard to the financial ability of the person's family to retain counsel, unless their family indicates willingness and ability to do so promptly.
5. Any doubts about a person's eligibility should be resolved in favor of appointing counsel; erroneous determinations of eligibility can be corrected later.
6. Relevant information bearing on the person's financial eligibility should be reflected on a financial eligibility affidavit (Form CJA 23).
7. If, at any time after the appointment of counsel, a judge finds that a person provided CJA representation is financially able to pay or partially pay counsel, the judge may terminate the appointment of counsel or direct that defendants pay for representation as they are able, as provided in 18 U.S. C § 3006A(f).
8. If at any stage of the proceedings a judge finds that a person is no longer financially able to pay retained counsel, counsel may be appointed consistent with the general provisions of this Plan.

V. TIMELY APPOINTMENT OF COUNSEL

A. Appointments in General

Counsel must be provided to eligible persons as soon as feasible upon the first of the following: after they are taken into custody; when they appear before a United States Magistrate Judge or Judge; when they are formally charged or notified of charges, if formal charges are sealed; or when a United States Magistrate Judge or Judge otherwise considers appointment of counsel appropriate under the CJA.

B. Eligibility for Appointed Representation

1. Fact finding

Eligibility for representation under the CJA is a judicial function to be performed by a United States Judge or Magistrate Judge after making appropriate inquiries concerning the person's financial condition. The Court may act upon statements made by the defendant under oath in open court; by sworn affidavit; or by other information the Court deems reliable.

2. Disclosure of Changes in Eligibility

If, at any time, counsel obtains non-privileged information indicating that a client is financially able to pay, in whole or in part, for legal or other services in connection with his or her representation, counsel must advise the Court.

3. Separate or Additional Counsel

Appointment of separate or additional counsel will be in accordance with § 220.40 of the *Guide, Vol. 7A*.

4. Standby Counsel

The Court may appoint Standby Counsel in accordance with § 220.55 of the *Guide, Vol. 7A*. The Court and counsel may wish to consider the American Bar Association Standards for Standby Counsel.

C. Pretrial Service Interview

When practicable, financially eligible defendants will be provided appointed counsel prior to being interviewed by a pretrial services officer, unless they have waived the right to counsel or otherwise consented to a pretrial service interview without counsel.

D. Retroactive Appointment of Counsel

Appointment of counsel may be made retroactive to include representation provided prior to appointment.

VI. PROVISION OF REPRESENTATIONAL SERVICES

A. Federal Public Defender and Private Counsel

This Plan provides for legal representation services by the Federal Public Defender and for the appointment and compensation of private counsel from a CJA Panel list maintained by the Court in cases authorized under the CJA and related statutes.

B. Administration

Administration of the CJA Panel, as provided in this Plan, is delegated and assigned to the Court.

C. Apportionment of Cases

Where practical and cost effective, the Court will appoint private attorneys from the CJA Panel in a substantial proportion of cases where the accused is determined to be financially eligible for CJA representation. "Substantial" means about twenty-five percent (25%) of the annual CJA appointments.

D. Number of Counsel

More than one attorney may be appointed in any case that the Court finds unusually difficult.

E. Capital Cases

Procedures for appointing counsel where the defendant is charged with a crime punishable by death or seeks to vacate or set aside a death sentence in proceedings under 28 U.S.C §§ 2254 or 2255, are found in Section XI of this plan.

VII. FEDERAL PUBLIC DEFENDER

A. Establishment

1. The Federal Public Defender Organization is established in this district under the CJA and is responsible for rendering defense services on appointment throughout the district.
2. The Federal Public Defender Organization will provide legal services throughout the district and will maintain its primary office in Little Rock, Arkansas.

B. Standards

The Federal Public Defender Organization must provide high quality representation consistent with the best practices of the legal profession and commensurate with those services rendered when counsel is privately retained. See *Polk County v. Dodson*, 454 U.S. 312, 318 (1981) (“Once a lawyer has undertaken the representation of an accused, the duties and obligations are the same whether the lawyer is privately retained, appointed, or serving in legal aid or defender program.” (quoting ABA Standards for Criminal Justice Section 4-3:9 (2d ed. 1980))).

C. Workload

The Federal Public Defender Organization will continually monitor the workloads of its staff to ensure high quality representation for all clients.

D. Professional Conduct

The Federal Public Defender Organization must conform to the highest standards of professional conduct including, the American Bar Association’s Model Rules of Professional Conduct, the American Bar Association’s Model Code of Professional Conduct, the Code of Conduct for Federal Public Defender Employees, and other standards of a professional conduct adopted by the Court.

E. Private Practice of Law

Neither the Federal Public Defender nor any defender employee may engage in the private practice of law except as authorized by the Federal Public Defender Organization Code of Conduct.

F. Supervision of Defender Organization

The Federal Public Defender is responsible for the supervision and management of the Federal Public Defender Office. Therefore, the Federal Public Defender will assign staff attorneys to cases at his or her discretion.

G. Training

1. The Federal Public Defender Organization will assess the training needs of the Federal Public Defender Organization staff and, in coordination with the CJA Panel Attorney District Representative,¹ the training needs of the

¹ The CJA Panel Attorney District Representative (PADR) is a member of the district’s CJA Panel and is selected by the chief district judge to serve as the representative of the district’s CJA Panel for the national Defender Services CJA PADR program and local CJA Committee.

local panel attorneys, and will provide training opportunities and other educational resources.

2. An attorney from the Office of the Federal Public Defender will be assigned as a mentor for the first two appointments of new CJA panelists. Recommendations for these appointments will be submitted to the Court by the Federal Public Defender. Upon request, the Federal Public Defender Organization will assist the new panelist with their first trial. The first solo appointment will not be made until the program participants have successfully completed the mentor program overseen by the Office of the Federal Public Defender.

VIII. PANEL ATTORNEYS

A. Panel Selection Committee

1. Membership

A CJA Panel Committee (CJA Committee) will be established by the Court. The CJA Committee will consist of one District Judge, one Magistrate Judge, the CJA Panel District Representative (PADR), the Federal Public Defender, and the Clerk of the Court, who will act as administrative coordinator. The District Judge will chair the CJA Committee. The CJA Panel Representative will be appointed by the Chief District Judge or his/her designee and will serve in that position for five years.

2. Duties

- a. The CJA Committee will meet at least once a year to consider applications for any vacancies created during the year. The Committee will also review the operation and administration of the panel over the preceding year and recommend to the Court any changes deemed necessary or appropriate.
- b. The CJA Committee will engage in recruitment efforts to establish a diverse panel by encouraging all qualified attorneys to apply for CJA panel membership.
- c. When the CJA Committee submits the names of applicants for panel membership to the Court for approval, the Committee will also furnish information to the Court regarding recruitment efforts undertaken by the Committee.
- d. The CJA Committee may recommend to the Chief Judge the removal of any CJA panel member if the member:

1. fails to satisfactorily fulfill the requirements of the CJA Panel membership during their term of service, including the failure to provide high quality representation to CJA clients; or
 2. has engaged in other conduct rendering his or her continued service on the CJA Panel inappropriate.
- e. The CJA Committee will assist the Federal Public Defender Organization in providing training for the CJA Panel on substantive and procedural legal matters affecting representation of CJA clients.

B. Qualifications for Panel Attorneys

Any member in good standing of the bar of this Court, who has demonstrated experience in, and knowledge of, the Federal Rules of Criminal Procedure, the Federal Rules of Evidence, and the Sentencing Guidelines, will be deemed qualified to serve on the CJA panel. The CJA Committee, with the approval of the Court, may establish additional qualifications, including relevant training and experience. All qualified attorneys will be encouraged to participate in furnishing representation in CJA cases, without regard to race, color, religion, sex, age, national origin, or disabling condition.

C. Composition and Membership on the Panel

1. The Court will establish one panel (CJA Panel) to serve for a term of three years. Members of the panel will serve at the pleasure of the Court.
2. The panel will consist of attorneys who are eligible, willing, and competent to provide adequate representation under the CJA.
3. Application forms for membership on the CJA Panel are available from the Clerk of Court.
4. Applicants must maintain a primary satellite or shared office in the district.
5. Attorneys who do not possess the requisite experience, but believe they have equivalent experience, are encouraged to provide the details of their experience in writing to the CJA Committee and to apply for membership of the CJA Supplemental Panel.
6. The Court will periodically fix the size of the CJA Panel. The number of panel members will be adequate to supply the needs of the district.

7. Qualified attorneys, by order of the Court, may be added to the roster at any time. Upon recommendation of the CJA Committee or on the Court's own motion, a judge may at any time add or delete panel members.

D. Appointment Alternatives

1. Counsel furnishing representation under this Plan will be selected from one of the following:
 - a. the Federal Public Defender's Office;
 - b. the CJA panel; or
 - c. an attorney admitted to the CJA panel *pro hac vice*, if the presiding Judge determines that the appointment is justified by: the interest of justice, judicial economy, continuity of representation, or some other compelling circumstance.
2. The Federal Public Defender may be appointed in all cases except in cases:
 - a. where the Federal Public Defender already represents a defendant in a multiple defendant case;
 - b. where there is an actual conflict of interest;
 - c. where the Federal Public Defender certifies to the appointing Judge or Magistrate Judge that there is a potential conflict of interest or other circumstance that might prejudice representation of the defendant.

E. Method of Selection

1. Maintenance of List and Distribution of Appointments

The Clerk of the Court will maintain a list of all attorneys currently on the CJA panel, including their current office addresses, telephone numbers and e-mail addresses. A copy of this list will be furnished to each District Judge, Magistrate Judge and the Federal Public Defender. Updates to the list will be made from time to time as the Court deems appropriate.

2. Case Assignments

- a. Judges or Magistrate Judges will make CJA appointments on a rotating basis, subject to the Court's discretion to make exceptions

due to the nature and complexity of a case, an attorney's experience or availability, and time and geographic considerations.

- b. Appointing officers must avoid favoritism and monopoly, or the appearance thereof, in making appointments under this Plan.
- c. The Court may, in the interests of justice, substitute one appointed counsel for another at any stage of the proceedings.

3. Removal from the CJA Panel

a. Mandatory Removal

Any member of the CJA Panel who is suspended or disbarred by the state court where the member is admitted, or who is suspended or disbarred from this Court or any federal court, will be removed from the CJA Panel immediately.

b. Complaints

1. Initiation

A complaint against a panel member may be initiated by the CJA Committee, a judge, another panel member, a defendant, or a member of the Federal Public Defender Organization. A complaint need not follow any particular form, but it must be in writing and must state the alleged deficiency with specificity. Complaints should be directed to the CJA committee or the Chief District Judge, who will determine whether further investigation is necessary.

2. Notice

The Chief District Judge may conduct an investigation into the complaint or appoint the CJA Committee or other designee to conduct an investigation. The panel member must be notified of the specific allegations in the complaint.

3. Response

A panel member subject to an investigation may respond in writing and must appear, if so directed, before the CJA Committee, the Chief District Judge (or his or her designee).

4. Protective Action

Prior to disposition of any complaint, the Chief Judge (or his or her designee) may temporarily suspend or remove the panel member from any pending case or from the panel.

5. Possible Action

Following investigation, the Court may take appropriate action against the panel member, including: dismissing the complaint; appropriate remedial action, including requiring the attorney to complete specific CLE requirements before receiving further panel appointments; limiting the attorney to handling cases that are directly supervised or overseen by an experienced practitioner; or other appropriate remedial action.

6. Final disposition by the Court

If the CJA Committee conducts the investigation, it will forward its recommendation to the Chief Judge for consideration and final disposition.

7. Confidentiality

Unless otherwise directed by the Court, information acquired concerning any possible disciplinary action, including complaints and related proceedings, will be confidential.

8. None of these procedures create a property interest in being or remaining on the CJA Panel.

c. Notification

The Federal Public Defender will be immediately notified when any member of the CJA Panel is removed or suspended.

F. Duties of Appointed Counsel

1. Standards and Professional Conduct

- a. CJA panel members must provide high quality representation consistent with the best practices of the legal profession and commensurate with those services rendered when counsel is privately retained. See *Polk County v. Dodson*, 454 U.S. 312, 318 (1981) (“Once a lawyer has undertaken the representation of an accused, the duties and obligations are the same whether

the lawyer is privately retained, appointed, or serving in legal aid or defender program.” (quoting ABA Standards for Criminal Justice Section 4-3:9 (2d ed. 1980))).

- b. Attorneys appointed under the CJA must conform to the highest standards of professional conduct, including the American Bar Association’s Model Rules of Professional Conduct, the American Bar Association’s Model Code of Professional Conduct, and other standards of professional conduct adopted by the Court.
- c. CJA panel members must notify the chair of the CJA Committee, the CJA Supervisory Attorney, or both within 30 days when any licensing authority, grievance committee, or administrative body has taken an 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.

2. Training and Continuing Legal Education

- a. Attorneys on the CJA Panel are expected to remain current with developments in federal criminal defense law, practice, and procedure including the Recommendation for Electronically Stored Information Discovery Production in Federal Criminal Cases.
- b. Attorneys on the CJA Panel are expected to attend trainings sponsored by the Federal Public Defender.
- c. Attorneys on the CJA Panel will be guided in their practice by the Federal Adaptation of the National Legal Aid and Defender Association Performance Guidelines for Criminal Defense Representations.
- d. CJA panel members must attend 6 continuing legal education hours relevant to federal criminal practice annually and certify their attendance in writing with the Clerk.
- e. Failure to comply with these training and legal education requirements may be grounds for removal from the CJA Panel.

3. Facilities and Technology Requirements

- a. CJA panel attorneys must have facilities, resources, and technological capability to effectively and efficiently manage assigned cases.
- b. CJA Panel attorneys must comply with the requirements of electronic filing and eVoucher.
- c. CJA panel attorneys must know and abide by procedures related to requests for investigative, expert, and other services.

4. Continuing Representation

Once counsel is appointed under the CJA, counsel will continue the representation until the matter is closed, including appeals or review by certiorari; or until substitute counsel has filed a notice of appearance; or until an order is entered allowing or requiring the person represented to proceed pro se; or until the appointment is terminated by court order.

5. Miscellaneous

a. Case budgeting

In non-capital representations of unusual complexity that are likely to become extraordinary in terms of cost, the Court may require development of a case budget consistent with *Guide, Vol. 7A*, §§ 230.26.10-20.

b. No receipt of other payment

Appointed counsel may not require, request, or accept promise of payment or any other valuable consideration for representation under the CJA, unless such payment is approved by order of the Court.

c. Redetermination of need

If counsel has reason to believe, at any time after appointment, that a party is financially able to obtain counsel, or make partial payment for counsel, and the source of counsel's information is not protected as a privileged communication, counsel will advise the Court.

IX. COMPENSATION OF CJA PANEL ATTORNEYS

A. Policy of the Court Regarding Compensation

1. Providing fair compensation to appointed counsel is a critical component of the administration of justice. CJA panel attorneys are compensated for time reasonably expended in and out of court and are reimbursed for reasonably incurred expenses.
2. Vouchers may be reduced for good cause, including:
 - a. Mathematical errors;
 - b. Instances in which work billed was not compensable;
 - c. Instances in which work was not undertaken or completed; and
 - d. Instances in which the hours billed are clearly in excess of what was reasonably required to complete the task.

See: JCUS-SEP 2019, p. 42.

B. Payment Procedures

1. Claims for compensation must be submitted on the appropriate CJA form through the court's eVoucher system.
2. Claims for compensation should be submitted no later than 45 days after final disposition of the case, absent a showing of good cause.
3. Absent extraordinary circumstances, the Court should act on CJA compensation claims within 30 days of submission, and vouchers should not be delayed or reduced for the purpose of diminishing Defender Services program costs in response to adverse financial circumstances.
4. Except in cases involving mathematical corrections, no claim for compensation submitted for services provided under the CJA will be reduced without affording counsel notice and the opportunity to be heard.
5. Notwithstanding the procedure described above, the Court may, at any time, contact appointed counsel for further information about a claim for compensation.
6. A panel attorney may appeal a reduction of a claim for compensation to the Chief Judge or a district judge designated by the Chief Judge to review voucher payment appeals.

X. INVESTIGATIVE, EXPERT, AND OTHER SERVICES

A. Financial Eligibility

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

B. Applications

Requests for authorization of funds for investigative, expert, and other services must be submitted in an *ex parte* application to the Court (using the Court's eVoucher system) and must not be disclosed except with the consent of the person represented or as required by law or Judicial Conference policy.

C. Compliance

Counsel must comply with Judicial Conference policies in *Guide, 7A*, Ch. 3.

XI. APPOINTMENT OF COUNSEL AND CASE MANAGEMENT IN CJA CAPITAL CASES

A. Applicable Legal Authority

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. General Applicability and Appointment of Counsel Requirements

1. Unless otherwise specified, the provisions of this section apply to all capital proceedings in federal court, whether they originated in a federal district court (federal capital trials) or in a state court (habeas proceedings under 28 U.S.C § 2254). These matters include cases where the death penalty is or may be sought by the prosecution; motions for a new trial; direct appeals; applications for writ of certiorari to the Supreme Court of the United States; post-conviction proceedings under 28 U.S.C. §§ 2254 and 2255 seeking to vacate or set aside a death sentence; applications for stay of execution; competency proceedings; executive or other clemency proceedings; and other appropriate motions and proceedings.

2. Any person charged with a crime 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; post-conviction processes; applications for stay of execution; competency proceedings; and any clemency proceedings that may be available to the defendant.
3. Qualified counsel must be appointed in capital cases at the earliest possible opportunity.
4. Given the complex and demanding nature of capital cases, where appropriate, the Court will utilize the expert services available through the Administrative Office of the U. S. Courts (AO), Defender Services Death Penalty Resource Counsel projects (“Resource Counsel Projects”), including: (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 death-penalty experts may be relied upon by the Court for assistance with selection and appointment of counsel, case budgeting, and any other matters arising in federal capital cases, both legal and practical.
5. The presiding judge 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 who is charged with a capital crime or who seeks 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 federal defender organizations, CJA panel attorneys, or attorneys appointed *pro hac vice*. See: 18 U.S.C § 3006A(a)(3).
6. All attorneys appointed as counsel 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 in this highly specialized and demanding litigation.
7. 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.
8. All attorneys appointed in federal capital cases should comply with 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.

9. All attorneys appointed in federal capital cases should consult regularly with the appropriate Resource Counsel projects.
10. There should be no formal or informal budgetary caps in capital cases, whether at trial, on direct appeal, or in habeas matters, other than statutory budget caps.
11. Capital cases should be budgeted with the assistance of case-budgeting attorneys and resource counsel where appropriate.
12. 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's Defender Services Office, Legal and Policy Division Duty Attorney at 202-502-3030 or by email at ods_lpb@ao.uscourts.gov.

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

1. General Requirements

- a. Appointment of qualified capital trial counsel must occur promptly upon the defendant's request when a defendant is indicted for treason or other capital crimes. 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, upon request, appoint counsel qualified in capital cases, as set out in Section C. 1, 2, and 3 of these provisions.
- c. At the outset of every capital case, the Court must appoint two attorneys, at least one of whom meets the qualifications of "learned counsel," as defined 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. The selection of trial counsel in a capital case requires consideration of the needs of the particular case and defendant. Judges may rely on recommendations from the Federal Public Defender in conjunction with the Federal Death Penalty Resource Counsel and the Capital Resource Counsel projects.

- e. Out-of-district counsel, including federal defender organization staff who possess 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, judges should consider counsels' commitment to the defense of capital cases, their current caseloads (including other capital cases), and their willingness to effectively represent the interests of the clients.

2. Qualifications of Learned Counsel

- a. To qualify as "learned counsel," a lawyer must either be a member of the district's bar or eligible for admission *pro hac vice* based on their qualifications. Appointment of counsel from outside the jurisdiction is common in federal capital cases to promote cost and other efficiencies and to ensure high-quality representation.
- b. Learned counsel must meet the minimum experience standards set out in 18 U.S.C. §§ 3005 and 3599.
- c. Learned counsel will have distinguished prior experience in the trials, appeals, or post-conviction reviews 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 ensure high quality representation.
- d. "Distinguished prior experience" contemplates excellence, not merely prior experience. Counsel with distinguished prior experience should be appointed even if this requires appointing counsel from outside the district where the matter arises.
- e. The suitability of learned counsel should be assessed with respect to the demands of the particular case, the stage of litigation, and the defendant.
- f. Learned counsel must be willing and able to adjust other caseload demands to accommodate the extraordinary time required by capital litigation.
- g. Learned counsel should satisfy the qualification standards endorsed by bar associations and other legal organizations regarding the quality of representation in capital cases.

3. Qualifications of Second and Additional Counsel
 - a. Second and additional counsel may, but are not required to, satisfy the qualifications for learned counsel, as defined 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 particular case, the stage of litigation, and the defendant.

D. Appointment and Qualification of Direct Appeal Counsel in Federal Death Penalty Cases

1. In appointing appellate counsel, judges should give due weight to the recommendations made by federal defenders and resource counsel.
2. Counsel appointed to represent a death-sentenced federal appellant should include at least one attorney who did not represent the appellant at trial.
3. If trial counsel withdraws from representation, they should be replaced with similarly qualified counsel to represent the defendant on appeal.
4. Out-of-district counsel, including federal defender organization staff with requisite expertise, may be considered for appointment in capital appeals to achieve high quality representation together with cost and other efficiencies.
5. Appellate counsel should have distinguished prior experience in federal criminal appeals and capital appeals.
6. At least one attorney appointed as appellate counsel must have the requisite background, knowledge, and experience required by 18 U.S.C. § 3599(c) or (d).
7. In evaluating the qualifications of proposed appellate counsel, judges should consider the qualification standards endorsed by bar associations and other legal organizations regarding the quality of legal representation in capital cases.

8. In evaluating the qualifications of proposed appellate counsel, judges should consider counsels' commitment to the defense of capital cases, their current caseloads (including other capital cases), and their willingness to effectively represent the interests of the client.

E. Appointment and Qualifications of Post-Conviction Counsel in Federal Death Penalty Cases (28 U.S.C. § 2255)

1. 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).
2. Due to the complex, demanding, and protracted nature of death penalty proceedings, the Court should consider appointing at least two attorneys.
3. Considering the accelerated timeline applicable to capital § 2255 proceedings, prompt appointment of counsel is essential. When possible, appointments will be made prior to the denial of certiorari on direct appeal to the United States Supreme Court.
4. When appointing counsel in a capital § 2255 matter, the Court should consider the recommendation of the Federal Public Defender.
5. In appointing post-conviction counsel, judges should give due weight to the recommendations made by federal defenders and resource counsel.
6. 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.
7. In evaluating the qualifications of proposed post-conviction counsel, judges should consider the qualification standards endorsed by bar associations and other legal organizations regarding the quality of legal representation in capital cases.
8. In evaluating the qualifications of proposed post-conviction § 2255 counsel, judges should consider counsels' commitment to the defense of capital cases, their current caseloads (including other capital cases), and their willingness to effectively represent the interests of the client.

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

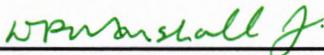
1. The Federal Public Defender's Capital Habeas Unit should ordinarily be appointed as either sole counsel or lead counsel in all federal death penalty habeas corpus proceedings.
2. A financially eligible person seeking to vacate or set aside a death sentence in proceedings under 28 U.S.C. § 2254 is entitled to the appointment of qualified counsel. See 18. U.S.C. § 3599(a)(2).
3. Due to the complex, demanding, and protracted nature of death penalty proceedings, the Court should consider appointing at least two attorneys.
4. When appointing counsel in a capital § 2254 matter, the appointing authority should consider the recommendation of the Federal Public Defender who will consult with the National or Regional Habeas Assistance and Training Counsel projects.
5. In appointing counsel in a capital § 2254 matter, judges should give due weight to the recommendations made by federal defenders and resource counsel or articulate reasons for not doing so.
6. Local or circuit restrictions prohibiting Capital Habeas Units from engaging in cross-district or cross-circuit representation should not be imposed without good cause. Every district should have access to a Capital Habeas Unit.
7. 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.
8. Courts should appoint habeas counsel and provide appropriate litigation resources as early as permitted by law so that counsel have the full statute of limitations period to prepare a habeas corpus petition.
9. Unless precluded by a conflict of interest or replaced by similarly qualified counsel upon motion of the attorney or the defendant, capital § 2254 counsel must represent the defendant throughout every subsequent stage of available judicial proceedings and all available post-conviction processes, including applications for stay of execution and other appropriate motions and procedures. Counsel must represent the defendant in competency proceedings and in executive or other clemency proceedings that are available to the defendant. See: 18 U.S.C. § 3599(e).

10. Counsel in capital § 2254 cases should have distinguished prior experience in the area of federal post-conviction proceedings and in capital post-conviction proceedings.
11. When possible, capital § 2254 counsel should have distinguished prior experience in capital § 2254 representations.
12. In evaluating the qualifications of proposed capital § 2254 counsel, judges should consider the qualification standards endorsed by bar associations and other legal organizations regarding the quality of legal representation in cases.
13. In evaluating the qualification of proposed capital § 2254 counsel, judges should consider the proposed counsels' commitment to the defense of capital cases, their current caseloads (including other capital cases), and their willingness to represent effectively the interests of the client.

XII. EFFECTIVE DATE

This Plan supersedes all prior Criminal Justice Act Plans of this Court and will become effective when approved by the Judicial Council of the Eighth Circuit.

Adopted by the United States District Court for the Eastern District of Arkansas this 21st day of February, 2020.



Chief United States District Judge D. P. Marshall Jr.