

THE JUDICIAL COUNCIL OF THE FIFTH CIRCUIT
REVIEWING PANEL --- CRIMINAL JUSTICE ACT PLAN

The amended Criminal Justice Act Plan for the Northern District of Texas is approved.

Entered for the Reviewing Panel at New Orleans, Louisiana, this 12th day of August, 2021.

Theodore P. Cominos
Secretary to the Judicial Council
of the Fifth Circuit

The following judges comprised and acted as the Reviewing Panel:

(a) The Judicial Council of the Fifth Circuit:

Priscilla R. Owen
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James L. Dennis
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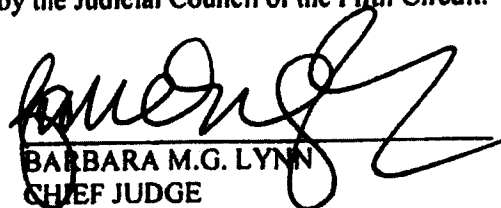
(b) Chief United States District Judge:

Barbara M.G. Lynn
Chief United States District Judge
Northern District of Texas

8. Counsel in capital § 2254 cases should have distinguished prior experience in the area of federal post-conviction proceedings and in capital post-conviction proceedings.
9. When possible, capital § 2254 counsel should have distinguished prior experience in capital § 2254 representations.
10. In evaluating the qualifications of proposed capital § 2254 counsel, the judge may consider the qualification standards endorsed by bar associations and other legal organizations regarding the quality of legal representation in capital cases.
11. In evaluating the qualifications of proposed capital § 2254 counsel, consideration should be given to proposed counsel's current caseload, including other capital cases, and proposed counsel's willingness to effectively represent the interests of the client.

XV. Effective Date

This Plan will become effective when approved by the Judicial Council of the Fifth Circuit.


BARBARA M.G. LYNN
CHIEF JUDGE

FILED: August 12, 2021


KAREN S. MITCHELL
CLERK OF COURT

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
AUG 16 2021
CLERK, U.S. DISTRICT COURT
By: *Molly Head*
Deputy

*United States District Court
Northern District of Texas*



**CRIMINAL JUSTICE ACT
PLAN**

Miscellaneous Order No. 3
Revised July 2021

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**United States District Court
for the Northern District of Texas
Criminal Justice Act Plan**

I. Authority

Under the Criminal Justice Act (CJA) of 1964, as amended, 18 U.S.C. § 3006A, and *Guide to Judiciary Policy (Guide)*, Volume 7A, the judges of the United States District Court for the Northern District of Texas adopt this Plan, as approved by the circuit, for furnishing representation in federal court 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:

1. to attain the goal of 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, are cost-effective, and 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.

This Plan must therefore be administered so that those accused of a crime, or otherwise eligible for services under the CJA, will not be deprived of the right to counsel, or any element of representation necessary to an effective defense, due to lack of financial resources.

B. Compliance

1. This Plan is intended to be consistent with applicable law and Judicial Conference policy and to provide guidance to the court, its clerk, the federal public defender, and attorneys appointed under the CJA.
2. The court will ensure that a current copy of the Plan is made available on the court's website and provided to CJA counsel on request.

III. Definitions

A. Representation

“Representation” includes counsel and investigative, expert, and other services.

B. Appointed Attorney

“Appointed attorney” is an attorney designated to represent a financially eligible person under the CJA and this Plan. Such attorneys include private attorneys and the federal public defender and staff attorneys of the federal public defender organization.

IV. Determination of Eligibility for CJA Representation

A. Subject Matter Eligibility

1. Mandatory

Representation must be provided for any financially eligible person who:

- a. is charged with a felony or with 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;
- c. 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);
- d. is under arrest when such representation is required by law;
- e. is entitled to appointment of counsel in parole proceedings;
- f. is charged with a violation of supervised release or faces 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 in custody as a material witness;

- i. is seeking to set aside or vacate a death sentence under 28 U.S.C. § 2254 or § 2255;
- j. 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 the execution of a penal sentence under 18 U.S.C. § 4109;
- k. is entitled to appointment of counsel under the Sixth Amendment to the Constitution; or
- l. faces loss of liberty in a case and federal law requires the appointment of counsel.

2. Discretionary

Whenever a district judge or magistrate judge determines that the interests of justice so require, representation may be provided for any financially eligible person who:

- a. is charged with a petty offense (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 loss of liberty;
- d. 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 a criminal prosecution, a civil or criminal contempt proceeding, or face loss of liberty;
- e. has been advised by the United States attorney or a law enforcement officer that they are the target of a grand jury investigation;
- f. is proposed by the United States attorney for processing under a pretrial diversion program; or
- g. is held for international extradition under 18 U.S.C. chapter 209.

3. Ancillary Matters

Representation may also be provided for financially eligible persons in ancillary matters appropriate to the criminal proceedings under 18 U.S.C. § 3006A(c). In determining whether representation in an ancillary matter is appropriate to the criminal proceedings, the court should consider whether such representation is reasonably necessary:

- 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 civil forfeiture proceeding under 18 U.S.C. § 983, 19 U.S.C. § 1602, 21 U.S.C. § 881, or similar statutes, which property, if recovered by the client, may be considered for reimbursement under 18 U.S.C. § 3006A(f); or
- f. 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).

B. Financial Eligibility

1. Presentation of Accused for Financial Eligibility Determination

- a. Duties of Law Enforcement
 - (i) Upon arrest, and where 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 will notify the federal public defender of the arrest of an individual in connection with a federal criminal charge.
 - (ii) 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.

b. Duties of United States Attorney's Office

- (i) Upon the return or unsealing of an indictment or the filing of a criminal information, and where the defendant has not retained or waived counsel, the United States attorney or the United States attorney's delegate will promptly notify, telephonically or electronically, appropriate court personnel, who in turn will notify the federal public defender.
- (ii) Upon issuance of a target letter, and where the individual has not retained or waived counsel, the United States attorney or the United States attorney's delegate must promptly notify, telephonically or electronically, the 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.
- (iii) Employees of the United States Attorney's Office 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.

c. Duties of Federal Public Defender's Office

- (i) In cases in which the federal public defender may be appointed, the office will:
 - immediately investigate and determine whether an actual or potential conflict exists; and
 - in the event of an actual or potential conflict, promptly notify the court to facilitate the timely appointment of other counsel.
- (ii) When practicable, the federal public defender will discuss with the person who indicates that the person is not financially able to secure representation the right to appointed counsel and, if appointment of counsel seems likely, assist 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.

- d. **Duties of Probation/Pretrial Services Office**
 - (i) When practicable, a pretrial services officer will not conduct the pretrial service interview of a financially eligible defendant without the presence of counsel unless the defendant waives the right to counsel or consents to a pretrial service interview without counsel.
 - (ii) 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.

2. **Factual Determination of Financial Eligibility**

- a. In every case where appointment of counsel is authorized under 18 U.S.C. § 3006A(a) and related statutes, the court must advise the person that he or she has a right to be represented by counsel throughout the case and that, if so desired, counsel will be appointed to represent the person if he or she is financially unable to obtain counsel.
- b. The determination of 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.
- c. In determining whether a person is "financially unable to obtain counsel," consideration should be given to the cost of providing the person and his or her dependents with the necessities of life, the cost of securing pretrial release, asset encumbrance, and the likely cost of retained counsel.
- d. Except to the extent consistent with the community property laws of Texas, determination of eligibility must be made without regard to the financial ability of the person's family to retain counsel unless the person's family indicates willingness and ability to do so promptly.
- e. Any doubts about a person's eligibility should be resolved in the person's favor; erroneous determinations of eligibility may be corrected at a later time.
- f. Relevant information bearing on the person's financial eligibility should be reflected on a financial eligibility affidavit (Form CJA 23).

- g. If at any time after the appointment of counsel a judge finds that a person provided representation is financially able to obtain counsel or make partial payment for the representation, the judge may terminate the appointment of counsel or direct that any funds available to the defendant be paid as provided in 18 U.S.C. § 3006A(f).
- h. 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 in accordance with the general provisions set forth in this Plan.

V. Timely Appointment of Counsel

A. Timing of Appointment

Counsel must be provided to eligible persons as soon as feasible in the following circumstances, whichever occurs earliest:

1. after they are taken into custody;
2. when they appear before a magistrate or district court judge;
3. when they are formally charged or notified of charges if formal charges are sealed; or
4. when a magistrate or district court judge otherwise considers appointment of counsel appropriate under the CJA and related statutes.

B. Retroactive Appointment of Counsel

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

VI. Provision of Representational Services

A. Federal Public Defender and Private Counsel

This Plan provides for representational services by the federal public defender organization 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 each CJA Panel is the responsibility of the court.

C. Apportionment of Cases

Where practical and cost effective, private attorneys will be appointed in a substantial proportion of the cases in which the accused is determined to be financially eligible for representation under the CJA. "Substantial" will usually be defined as a minimum of twenty-five percent (25%) of the annual CJA appointments.

D. Number of Counsel

More than one attorney may be appointed in any case determined by the presiding judge to be extremely difficult.

E. Capital Cases

Procedures for appointment of counsel in cases where the defendant is charged with a crime that may be punishable by death, or is seeking to vacate or to set aside a death sentence in proceedings under 28 U.S.C. § 2254 or 2255, are set forth in section XIV of this Plan.

VII. Federal Public Defender Organization

A. Establishment

The Federal Public Defender's Office of the Northern District of Texas (FPD) is established in this district under the CJA as the federal public defender organization. The FPD is responsible for rendering defense services, on appointment, throughout this district. When appointment of counsel is mandatory under Part XIV. E and F, *infra*, a judge in any federal district court in Texas may appoint the FPD to represent an eligible person, if such representation will not compromise the ability of the FPD to carry out its duties in this district.

B. Standards

The FPD 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.

C. Workload

The FPD will continually monitor the workloads of its staff to ensure high quality representation for all clients.

D. Professional Conduct

The FPD must conform to the highest standards of professional conduct, including, but not limited to, the Texas Disciplinary Rules of Professional Conduct, the Code of Conduct for Federal Public Defender Employees, and requirements of the court's local rules.

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 Judicial Conference policy.

F. Supervision of Defender Organization

The federal public defender will be responsible for the supervision and management of the FPD. Accordingly, the federal public defender will be appointed in all cases assigned to that organization for subsequent assignment to staff attorneys at the discretion of the federal public defender.

G. Training

The federal public defender will assess the training needs of FPD staff and, in coordination with the CJA Panel Attorney District Representative,¹ the training needs of the local CJA Panel attorneys and provide training opportunities and other educational resources.

VIII. CJA Panels of Private Attorneys

A. Recognition of the Existing CJA Panel Advisory Committee

1. The CJA Panel Advisory Committee ("CJA Committee") established by the court is hereby recognized. Members are appointed to the CJA Committee by the chief judge in consultation with the federal public

¹ The CJA Panel Attorney District Representative (PADR) is a member of the district's CJA Panel who is selected by the local federal public defender, with acquiescence from the chief judge, to serve as the representative of the district's CJA Panel for the national Defender Services CJA PADR program and local CJA committees.

defender. The CJA Committee consists of one district court judge, one magistrate judge, the CJA Panel Attorney District Representative (PADR), at least two other criminal defense attorneys who practice regularly in the district, the federal public defender, and the clerk of court. The latter two members shall serve ex officio.

2. The district's PADR, federal public defender, and the clerk of court are permanent members of the CJA Committee.
3. The term of membership on the CJA Committee will be determined by the CJA Committee chair, in consultation with the chief judge.
4. The CJA Committee will meet at least once a year and at any time the court asks the Committee to consider an issue.

B. Duties of the CJA Committee

The CJA Committee is available to serve as a resource for each division of the court. However, given the differences among the divisions of the court, the responsibilities of the CJA Committee will vary as determined by the presiding judges in each division.

Responsibilities of the CJA Committee may include any of the following:

1. Membership

Examine the qualifications of applicants for membership on a CJA Panel and recommend the approval of those attorneys who are deemed qualified and the rejection of the applications of those attorneys deemed unqualified.

2. Recruitment

Engage in recruitment efforts to establish a diverse CJA Panel and ensure that all qualified attorneys are encouraged to participate in the furnishing of representation in CJA cases.

3. Annual Report

Review the operation and administration of each CJA Panel over the preceding year, and recommend any necessary or appropriate changes to the chief judge concerning:

- a. the size of a CJA Panel;
- b. the recruitment of qualified and diverse attorneys as required and set forth in this plan; and
- c. recurring issues or difficulties encountered by CJA Panel members or their CJA clients.

4. Removal

Recommend the removal of any CJA Panel member who:

- a. fails to satisfactorily fulfill the requirements of CJA Panel membership during the CJA Panel member's term of service, including the failure to provide high quality representation to CJA clients, or
- b. has engaged in other conduct such that his or her continued service on a CJA Panel is inappropriate.

5. Training

Assist the FPD in providing training for CJA Panel members on substantive and procedural legal matters affecting representation of CJA clients.

6. Voucher Review

- a. At the request of the presiding judge, review and make recommendations on the processing and payment of CJA vouchers.
- b. At the request of a CJA Panel member, review any voucher reduction and make a recommendation to the presiding judge.

7. Mentoring

Administer a mentoring program designed to identify and help prepare viable candidates to qualify for consideration for appointment to a CJA Panel.

C. Mentor Program

1. Purpose

- a. The Mentor Program allows a prospective Panel member to become familiar with the culture and expectations of federal criminal defense practice in this district, regardless of experience in other jurisdictions, and provides a structured training platform for mentees to acquire and demonstrate eligibility for membership on the CJA Panel.
- b. Participation in the Mentor Program is not required for admission to the CJA Panel, nor does it guarantee admission to the CJA Panel.

2. Mentors and Mentees

- a. The CJA Committee will select mentors. Mentors will be experienced members of the CJA Panel who have practiced extensively in the federal courts and consent to acting as a mentor.
- b. The CJA Committee will review applications for membership to the CJA Panel and make recommendations concerning an applicant's participation as a mentee in the Mentor Program. Mentees will be CJA Panel applicants who, with the additional federal experience provided by the Mentor Program, would be qualified to be a member of the CJA Panel.
- c. The magistrate judge on the CJA Panel Advisory Committee will receive and review recommendations for participation in the Mentor Program and, if the magistrate judge accepts the recommendation, match the mentee with a mentor.

3. Program Framework

- a. Cases for the Mentor Program ("program cases") are selected by mutual agreement between the mentor, mentee, and the judge presiding. The case should be the type of case that normally warrants the appointment of co-counsel.
- b. If a district judge needs to appoint CJA counsel in a case and believes that the case is the type, and at a stage, where it could serve as a program case, the judge is encouraged to appoint a mentor and authorize the services of a mentee. The judge may contact the CJA Committee for the names of available mentors and mentees.
- c. The mentor has primary authority over client communications and legal strategy and has ultimate responsibility for the client's representation. The mentor will supervise the mentee and determine appropriate tasks and extent of responsibility with due regard for the needs of the case and the mentee's experience.
- d. Mentees are required to attend and complete the FPD's Annual Federal Criminal Practice Seminar.
- e. Mentees also are required to participate in or observe an initial appearance, an arraignment, a bail and detention hearing, a motion hearing, a sentencing, and a revocation hearing, preferably as those proceedings are held in the program case(s) to which the mentee is assigned.
- f. There is no set time period for mentorship. The mentorship requirement may be lifted after completion of the tasks identified in subsections "d" and "e" above, upon request by the mentee and mentor to the magistrate judge on the CJA Panel Advisory

Committee. The magistrate judge determines whether the mentorship requirements have been met.

4. Payment

- a. The mentor and mentee shall keep contemporaneous time and attendance records for all work performed in the program case, as well as expense records, as required by § 230.76 of the Guide to Judiciary Policy, Vol. 7, Part A.
- b. Mentors will be appointed as lead counsel in the program case and paid the standard CJA rate using a CJA 20 eVoucher form.
- c. Mentees
 1. Mentees will be designated as “co-counsel” in eVoucher solely to facilitate their independent billing through eVoucher.
 2. Mentees will be compensated at 50% of the standard CJA rate rounded to the nearest dollar.
 3. Mentees shall upload to eVoucher a copy of their CJA 20 voucher form, certified by the mentor that the claim is for attorney services rendered and is correct.

5. Data Collection

The CJA Committee will collect and maintain data regarding the Mentor Program, including:

- a. a roster of all participating mentors and mentees,
- b. a list of the program cases,
- c. documentation of the proceedings participated in or observed by each mentee,
- d. a list of mentees subsequently appointed to the CJA Panel, and
- e. any other information that may prove helpful in an evaluation of the Mentor Program.

IX. Establishment of a CJA Panel

A. Approval of CJA Panel

1. The existing, previously established panels of attorneys who are eligible and willing to be appointed to provide representation under the CJA are hereby recognized. A magistrate judge in each division serves as CJA Panel coordinator.
2. The judge(s) in each division of the court will approve attorneys for membership on the CJA Panel that serves their division after receiving recommendations from the magistrate judge CJA Panel coordinator.

B. Size of CJA Panel

1. The size of each CJA Panel will be determined by each division of the court.
2. A CJA Panel must be large enough to provide a sufficient number of experienced attorneys to handle the CJA caseload, yet small enough so that CJA Panel members will receive an adequate number of appointments to maintain their proficiency in federal criminal defense work enabling them to provide high quality representation consistent with the best practices of the legal profession and commensurate with those services rendered when counsel is privately retained.

C. Qualifications and Membership on a CJA Panel

1. Application

Application forms for membership on a CJA Panel are available from the clerk's office.

2. Equal Opportunity

All qualified attorneys are encouraged to participate in furnishing representation in CJA cases.

3. Eligibility

- a. An applicant for a CJA Panel must be a member in goodstanding of the federal bar of this district and the Fifth Circuit Court of Appeals. An applicant must have practiced law for at least four years unless the applicant has sufficient trial or other relevant experience that might warrant a waiver of this requirement.
- b. An applicant must maintain a principal office in this district in a city and county that is in close proximity to the county in which court is held.
- c. An applicant must possess strong litigation skills and demonstrate proficiency with the federal sentencing guidelines, federal sentencing procedures, the Bail Reform Act, the Federal Rules of Criminal Procedure, and the Federal Rules of Evidence.
- d. An applicant must have significant experience including federal experience, representing persons charged with serious criminal offenses and demonstrate a commitment to the defense of people who lack the financial means to hire an attorney.

- e. An attorney who does not possess the experience set forth above but has equivalent other experience is encouraged to apply and set forth in writing the details of that experience for the court's consideration.

4. Removal from a CJA Panel

a. Mandatory removal

Service on a CJA Panel is a privilege and not a right. Any member of a CJA Panel who is suspended or disbarred from the practice of law by the state court before whom such member is admitted, or who is suspended or disbarred from this court or any federal court, will be removed from a CJA Panel immediately. Additionally, any district judge may, for good cause, remove the name of an attorney from a CJA Panel.

b. Removal by request

A CJA Panel member should submit a written request to the court using an approved form to be removed from the Panel.

X. CJA Panel Attorney Appointment in Non-Capital Cases

A. Appointment List

The clerk of court will maintain a current list of all attorneys included on each CJA Panel, with current office addresses, email addresses, and telephone numbers, as well as a statement of qualifications and experience.

B. Appointment Procedures

1. The court is responsible for overseeing the appointment of cases to CJA Panel attorneys. The clerk of court will maintain a record of CJA Panel attorney appointments and, when appropriate, data reflecting the apportionment of appointments between attorneys from the FPD and CJA Panel attorneys.
2. Appointment of cases to CJA Panel members will ordinarily be made on a rotational basis. In a complex or otherwise difficult case, a judge may appoint counsel outside of the normal rotation to ensure the defendant has sufficiently experienced counsel.
3. Under special circumstances a judge may appoint a member of the bar of the court who is not a member of a CJA Panel. Such special circumstances may include cases in which the court determines that the appointment of a particular attorney is in the interests of justice, judicial

economy, or continuity of representation, or for any other compelling reason. It is not anticipated that special circumstances will arise often, and the procedures set forth in the Plan are presumed to be sufficient in the vast majority of cases in which counsel are to be appointed.

XI. Duties of CJA Panel Members

A. Standards and Professional Conduct

1. 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.

Attorneys appointed under the CJA must conform to the highest standards of professional conduct, including but not limited to, the Texas Disciplinary Rules of Professional Conduct and requirements of the court's local rules.

2. CJA Panel members must promptly notify the court in writing through the clerk of court 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 CJA Panel member by any state or federal court. (See LCrR 57.8(d).)

B. Training and Continuing Legal Education

1. Attorneys on a CJA Panel are expected to remain current with developments in federal criminal defense law, practice, and procedure, including the Recommendation for Electronically Stored Information (ESI) Discovery Production in Federal Criminal Cases.²
2. CJA Panel members are expected to attend continuing legal education hours relevant to federal criminal practice annually.
3. Failure to comply with these training and legal education requirements may be grounds for removal from a CJA Panel.

C. Facilities and Technology Requirements

1. CJA Panel attorneys must have facilities, resources, and technological capability to manage assigned cases effectively and efficiently.
2. CJA Panel attorneys must comply with the requirements of electronic filing and eVoucher.

² The ESI paper is available on the court's website at www.txnd.uscourts.gov under CJA Attorney Information, Links and Resources.

3. CJA Panel attorneys must know and abide by procedures related to requests for investigative, expert, and other services.

D. Continuing Representation

Once counsel is appointed under the CJA, counsel will continue the representation until the matter, including appeals (unless provided otherwise by the Fifth Circuit's CJA plan) or review by certiorari, is closed; 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.

E. Miscellaneous

1. 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, Ch. 2, §§ 230.26.10–20.

2. No receipt of other payment

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

3. Redetermination of need

If at any time after appointment, counsel has reason to believe 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.

XII. Compensation of CJA Panel Attorneys

A. Policy of the Court Regarding Compensation

Providing fair compensation to appointed counsel is a critical component of the administration of justice. CJA Panel attorneys must be compensated for time expended in court and time reasonably expended out of court and reimbursed for expenses reasonably incurred. Nothing in this Plan is intended to diminish the discretion of the judge under 18 U.S.C. § 3006A(d)(5) to fix the compensation and reimbursement to be paid to appointed counsel.

B. Payment Procedures

1. Claims for compensation must be submitted on the appropriate CJA form through the court's eVoucher system.
2. An appointed attorney may not claim compensation for services furnished by another attorney, including a partner or associate, without prior authorization by the presiding judge. A judge may retroactively approve services by a partner or associate.
3. Claims for compensation should be submitted no later than 45 days after final disposition of the case, unless good cause is shown.
4. The clerk of court or the clerk's designee will review the claim for mathematical and technical accuracy and for conformity with *Guide*, Vol. 7A and, if correct, will forward the claim for consideration and action by the presiding judge.
5. Except in cases involving mathematical corrections or work that is clearly clerical, an appointed attorney should be given notice and an opportunity to be heard before a voucher is reduced by more than 1 hour of time.
6. 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.
7. Under 18 U.S.C. § 3006A(d)(5), and in accordance with the provisions of *Guide*, Vol. 7A, Ch. 2, § 230.33.30(a), the presiding judge will fix the compensation and reimbursement to be paid to the attorney.

XIII. 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 application to the court 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.³

³ Requests and authorizations for investigative, expert, or other services in capital cases are controlled by 18 U.S.C. § 3599(f), which provides that requests may not be submitted ex parte except on a showing of the need for confidentiality.

B. Applications

Requests for authorization of funds for investigative, expert, and other services should be submitted in an ex parte application to the court and should 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 set forth in *Guide*, Vol. 7A, Ch. 3.

XIV. 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, *Guide*, Vol. 7A, Ch. 6, and the Special Procedures for Reviewing Attorney Compensation Requests in Death Penalty Cases promulgated by the Judicial Council of the Fifth Circuit.⁴ Nothing in this section is intended to diminish the discretion of a presiding judge to appoint counsel under the law as the judge deems just and expeditious.

B. General Applicability and Appointment of Counsel Requirements

1. Unless otherwise specified, the provisions set forth in this section apply to all capital proceedings in the federal courts, whether those matters originated in a district 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, direct appeal, applications for a writ of certiorari to the Supreme Court of the United States, 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,

⁴ As to investigative, expert, and other services, Section 3599(f) provides:

Upon a finding that investigative, expert, or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or the sentence, the court may authorize the defendant's attorneys to obtain such services on behalf of the defendant and, if so authorized, shall order the payment of fees and expenses therefor under subsection (g). No ex parte proceeding, communication, or request may be considered pursuant to this section unless a proper showing is made concerning the need for confidentiality. Any such proceeding, communication, or request shall be transcribed and made a part of the record available for appellate review.

competency proceedings, proceedings for executive or other clemency, and other appropriate motions and proceedings.

2. 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).
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 may wish to utilize the expert services 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.
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 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 federal defender organization or a CJA Panel attorney or an attorney appointed pro hac vice. See 18 U.S.C. § 3006A(a)(3).

C. Appointment of Trial Counsel in Federal Death-Eligible Cases⁵

1. General Requirements

- a. Appointment of qualified capital trial counsel must occur when a defendant is formally charged with a federal criminal offense where the penalty of death is possible, or earlier. *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 Sections 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 for “learned counsel” as described below. If necessary for adequate representation, a judge may appoint more than two attorneys to represent a defendant in a capital case. *See* 18 U.S.C. § 3005.
- d. When appointing counsel, the judge shall consider the recommendation of the federal public defender, who may consult with Federal Death Penalty Resource Counsel to recommend qualified counsel. *See* 18 U.S.C. § 3005.
- e. To effectuate the intent of 18 U.S.C. § 3005 that the federal public defender’s recommendation be provided to the court, the judge should ensure the federal public defender has been notified of the need to appoint capital-qualified counsel.
- f. Reliance on a list for appointment of capital counsel is not recommended because selection of trial counsel should account for the particular needs of the case and the defendant and be based on individualized recommendations from the federal public defender.
- g. 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.

⁵ The Judicial Conference adopted detailed recommendations on the appointment and compensation of counsel in federal death penalty cases in 1998 (JCUS-SEP 98, p. 22). In September 2010, the Defender Services Committee endorsed revised commentary to the Judicial Conference’s 1998 recommendations. CJA Guidelines, Vol. 7A, Appx. 6A (Recommendations and Commentary Concerning the Cost and Quality of Defense Representation (Updated Spencer Report, September 2010)) (“Appx. 6A”) is available on the judiciary’s website.

- h. In evaluating the qualifications of proposed trial counsel, consideration should be given to proposed trial counsel's current caseload, including other capital cases, and proposed trial counsel's willingness to effectively represent the interests of the client.**

2. 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. Appointment of counsel from outside the jurisdiction is common in federal capital cases to achieve cost and other efficiencies together with high quality representation.**
- b. Learned counsel must meet the minimum experience standards set forth in 18 U.S.C. §§ 3005 and 3599.**
- 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 the district where the matter arises.**
- 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 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 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 and Qualifications of Direct Appeal Counsel in Federal Death Penalty Cases

- 1. When appointing appellate counsel, the judge shall consider the recommendation of the federal public defender, who may consult with Federal Capital Appellate Resource Council to recommend qualified 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. Each trial counsel who withdraws should be replaced with similarly qualified counsel to represent the defendant on appeal.
- 4. Out-of-district counsel, including federal defender organization staff, who possess the requisite expertise may be considered for appointment in capital appeals to achieve high quality representation together with cost and other efficiencies.
- 5. Appellate counsel, between them, should have distinguished prior experience in federal criminal appeals and capital appeals.
- 6. At least one of the attorneys 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, the judge may 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, consideration should be given to proposed appellate counsel's current caseload, including other capital cases, and proposed appellate counsel's 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. A judge should appoint the FPD, consistent with funding and staffing levels of the FPD related to these types of cases, when no conflict of interest exists. If the FPD has already been appointed to the maximum number of cases, as determined by the Committee on Defender Services of the Judicial Conference of the United States, and has not agreed to an excess appointment or is otherwise prevented from accepting the appointment, the judge should appoint other fully qualified counsel.
3. Due to the complex, demanding, and protracted nature of death penalty proceedings, the court should consider appointing at least two attorneys.
4. In light of the accelerated timeline applicable to capital § 2255 proceedings, prompt appointment of counsel is essential. Wherever possible, appointment should take place prior to the denial of certiorari on direct appeal by the United States Supreme Court.
5. When appointing counsel in a capital § 2255 matter, the judge should consider the recommendation of the federal public defender, who may consult with the Federal Capital Habeas § 2255 Project.
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. Counsel in § 2255 cases should have distinguished prior experience in the area of federal post-conviction proceedings and in capital post-conviction proceedings.
8. When possible, post-conviction counsel should have distinguished prior experience in capital § 2255 representations.
9. In evaluating the qualifications of proposed post-conviction counsel, the judge may consider the qualification standards endorsed by bar associations and other legal organizations regarding the quality of legal representation in capital cases.
10. In evaluating the qualifications of proposed post-conviction § 2255 counsel, consideration should be given to proposed counsel's current caseload, including other capital cases, and proposed counsel's 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. 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).
2. To allow the maximum amount of time possible for federal counsel to prepare a petition, the FPD or the Federal Public Defender's Office of the Western District of Texas shall move for the appointment of capital § 2254 counsel on behalf of a financially eligible person seeking to set aside a death sentence no later than 15 days after the Texas Court of Criminal Appeals' ruling in the state habeas corpus proceeding becomes final.
3. A judge should appoint the FPD, consistent with funding and staffing levels of the FPD related to these types of cases, when no conflict of interest exists. If the FPD has already been appointed to the maximum number of cases, as determined by the Committee on Defender Services of the Judicial Conference of the United States, and has not agreed to an excess appointment or is otherwise prevented from accepting the appointment, the judge should appoint other fully qualified counsel.
4. Due to the complex, demanding, and protracted nature of death penalty proceedings, the judge should consider appointing at least two attorneys.
5. When appointing counsel in a capital § 2254 matter, the judge may consider the recommendation of the federal public defender who may consult with the National or Regional Habeas Assistance and Training Counsel projects.
6. 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.
7. 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).

8. Counsel in capital § 2254 cases should have distinguished prior experience in the area of federal post-conviction proceedings and in capital post-conviction proceedings.
9. When possible, capital § 2254 counsel should have distinguished prior experience in capital § 2254 representations.
10. In evaluating the qualifications of proposed capital § 2254 counsel, the judge may consider the qualification standards endorsed by bar associations and other legal organizations regarding the quality of legal representation in capital cases.
11. In evaluating the qualifications of proposed capital § 2254 counsel, consideration should be given to proposed counsel's current caseload, including other capital cases, and proposed counsel's willingness to effectively represent the interests of the client.

XV. Effective Date

This Plan will become effective when approved by the Judicial Council of the Fifth Circuit.

BARBARA M.G. LYNN
CHIEF JUDGE

FILED: _____

KAREN S. MITCHELL
CLERK OF COURT