

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
JUDICIAL COUNCIL



In the Matter of the Review of the *
Amendments to the Plan of the United *
States District Court for the * No. 346
Eastern District of North Carolina *
in Implementation of the *
Criminal Justice Act *

ORDER

The Plan of the United States District Court for the Eastern District of North Carolina, as amended, which is attached to and made a part of this Order is hereby approved by the Judicial Council of the Fourth Circuit, and it is so ORDERED.

FOR THE COUNCIL:

Samuel W. Phillips

Samuel W. Phillips, Secretary

Date: October 11, 2016

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
CRIMINAL JUSTICE ACT PLAN
16-SO-3**

I. AUTHORITY

Pursuant to the Criminal Justice Act of 1964, as amended, (CJA), section 3006A of title 18, United States Code, and the *Guidelines for the Administration of the Criminal Justice Act and Related Statutes (CJA Guidelines)*, Volume VII, *Guide to Judiciary Policies and Procedures*, the judges of the United States District Court for the Eastern District of North Carolina, adopt this Plan 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.

1. The objective of this Plan is to provide effective, quality, legal representation to all persons entitled to counsel pursuant to the *CJA Guidelines*. Therefore, this Plan shall be administered so that those accused of a crime, or otherwise eligible for services pursuant to the CJA, will not be deprived, because they are financially unable to pay for adequate representation, or any element of representation necessary to an adequate defense.
2. The further objective of this Plan is to particularize the requirements of the CJA, the Anti-Drug Abuse Act of 1988 (codified in part at section 3599 of title 18, United States Code), and the *CJA Guidelines* in a way that meets the needs of this district.

B. Compliance.

1. The court, its clerk, the federal public defender organization, and private attorneys appointed under the CJA shall comply with the *CJA Guidelines* approved by the Judicial Conference of the United States and/or its Committee on Defender Services and with this Plan.
2. Each private attorney shall be provided by the federal public defender with a then-current copy of this Plan upon the attorney's first appointment under the CJA or designation as a member of the Panel of Private Attorneys under the Criminal Justice Act (CJA Panel). The FPD shall maintain a current copy of the *CJA Guidelines* for the use of members of the CJA Panel and shall make known to such attorneys its availability.

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 of the federal public defender organization.

IV. PROVISION OF REPRESENTATION

A. Circumstance.

1. Mandatory. Representation shall 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 section 5031 of title 18, United States Code;
- 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 chapter 313 of title 18, United States Code;
- h. is in custody as a material witness;
- i. is seeking to set aside or vacate a death sentence under sections 2254 or 2255 of title 28, United States Code;
- j. is entitled to appointment of counsel in verification of consent proceedings pursuant to a transfer of an offender to or from the United States for the execution of a penal sentence under section 4109 of title 18, United States Code;
- 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.

Discretionary. Whenever a 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 sections 2241, 2254, or 2255 of title 28, United States Code;
- c. is charged with civil or criminal contempt who 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. is proposed by the United States attorney for processing under a pretrial diversion program;
- f. is held for international extradition under chapter 209 of title 18, United States Code.
- g. has been informed in writing by the United States Attorney that such person is the target of a grand jury investigation.

Representation may also be furnished for financially eligible persons in ancillary matters appropriate to the proceedings pursuant to subsection (c) of the CJA.

B. When Counsel Shall Be Provided.

Counsel shall be provided to eligible persons as soon as feasible after they are taken into custody, when they appear before a magistrate judge or judge, when they are formally charged or notified of charges if formal charges are sealed, or when a magistrate judge or judge otherwise considers appointment of counsel appropriate under the CJA, whichever occurs earliest.

C. Number and Qualifications of Counsel.

1. Number. More than one attorney may be appointed in any case determined by the court to be extremely difficult. In a capital case, the following applies:

a. Federal Capital Prosecutions. Pursuant to 18 U.S.C. § 3005, a person charged with a federal capital offense is entitled to the appointment of two attorneys, at least one of whom shall be learned in the law applicable to capital cases. Pursuant to 18 U.S.C. § 3599(a)(1), if necessary for adequate representation, more than two attorneys may be appointed to represent a defendant in such a case.

b. Habeas Corpus Proceedings. Pursuant to 18 U.S.C. § 3599(a)(2), a financially eligible person seeking to vacate or set aside a death sentence in proceedings under 28 U.S.C. § 2254 or 2255 is entitled to appointment of one or more qualified attorneys. Due to the complex, demanding, and protracted nature of death penalty proceedings, judicial officers should consider appointing at least two counsel.

2. Qualifications. Qualifications for appointed counsel shall be determined by the court. In capital cases, the following also applies:

a. Appointment of Counsel Prior to Judgment. Pursuant to 18 U.S.C. § 3599(b), at least one of the attorneys appointed must have been admitted to practice in the court in which the case will be prosecuted for not less than five years, and must have had not less than three years experience in the actual trial of felony prosecutions in that court. Pursuant to 18 U.S.C. § 3005, at least one of the attorneys appointed must be knowledgeable in the law applicable to capital cases.

Pursuant to 18 U.S.C. § 3005, in appointing counsel in federal capital prosecutions, the court shall consider the recommendation of the federal public defender.

b. Appointment of Counsel After Judgment. Pursuant to 18 U.S.C. § 3599(c), at least one of the attorneys appointed must have been admitted to practice in the court of appeals for not less than five years, and must have had not less than three years experience in the handling of appeals in felony cases in the court.

c. Attorney Qualification Waiver. Pursuant to 18 U.S.C. § 3599(d), the presiding judicial officer, for good cause, may appoint an attorney who may not qualify under 18 U.S.C. § 3599(b) and (c), but who has the background, knowledge, and experience necessary to represent the defendant

properly in a capital case, giving due consideration to the seriousness of the possible penalty and the unique and complex nature of the litigation.

D. Eligibility for Representation.

1. Fact-finding. The determination of eligibility for representation under the CJA is a judicial function to be performed by a federal judge or magistrate judge after making appropriate inquiries concerning the person's financial condition.

2. Disclosure of Change in Eligibility. If, at any time after appointment, counsel obtains information that a client is financially able to make payment, in whole or in part, for legal or other services in connection with his or her representation, and the source of the attorney's information is not protected as a privileged communication, counsel shall advise the court.

V. FEDERAL PUBLIC DEFENDER ORGANIZATION

A. Establishment.

1. The Federal Public Defender Organization of the Eastern District of North Carolina, previously established in this district pursuant to the provisions of the CJA, is hereby recognized as the federal public defender organization for this district.

2. The Federal Public Defender Organization shall be capable of providing legal services throughout the district and shall maintain offices for that purpose.

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

C. Management of CJA Panel. The federal public defender shall be responsible for the systematic distribution of cases to and for the management of the CJA Panel subject to the provisions of the Plan for the Composition, Administration, and Management of the Panel of Private Attorneys under the Criminal Justice Act, found at Appendix I of this plan.

VI. PRIVATE ATTORNEYS

A. Establishment of CJA Panel. The existing, previously established panel of attorneys (CJA panel) who are eligible and willing to be appointed to provide representation under the CJA is hereby recognized.

B. Organization. The Plan for the Composition, Administration, and Management of the Panel of Private Attorneys under the Criminal Just Act is found at Appendix I of this plan.

C. Ratio of Appointments. Where practical and cost effective, private attorneys from the CJA Panel shall 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" shall usually

be defined as approximately 25% of the appointments under the CJA annually throughout the district.

VII. REPRESENTATION IN STATE DEATH PENALTY HABEAS CORPUS PROCEEDINGS UNDER 28 U.S.C. § 2254

The court shall appoint an attorney or attorneys qualified in accordance with the standards set forth in 18 U.S.C. § 3599 to represent financially eligible persons seeking habeas corpus relief in state death penalty proceedings under 28 U.S.C. § 2254.

The Clerk of Court shall maintain a list of attorneys appointed to represent persons before the court in capital habeas corpus proceedings under section 2254. The Clerk, in consultation with the court, will review the list periodically to consider the court's experience with the attorneys and the effectiveness of representation offered by counsel.

VIII. DUTIES OF APPOINTED COUNSEL

A. Standards. The services to be rendered a person represented by appointed counsel shall be commensurate with those rendered if counsel were privately employed by the person.

B. Professional Conduct. Attorneys appointed pursuant to the CJA shall conform to the highest standards of professional conduct, including but not limited to the provisions of the North Carolina State Bar Rules of Professional Conduct and the American Bar Association's Model Rules of Professional Conduct. Such attorneys shall also conform to the highest standards of the bar of all other states, districts or territories of which they may be members.

C. 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 appointment, unless such payment is approved by order of the court.

D. Continuing Representation. Once counsel is appointed under the CJA, counsel shall continue the representation until the matter, including appeals or review by certiorari (as governed by the circuit CJA plan provisions concerning representation on appeal), is closed; until substitute counsel has filed a notice of appearance; until an order has been entered allowing or requiring the person represented to proceed *pro se*; or until the appointment is terminated by court order.

IX. DUTIES OF LAW ENFORCEMENT AND RELATED AGENCIES

A. Presentation of Accused for Appointment of Counsel. Federal law enforcement and prosecutorial agencies, probation officers, and pretrial services officers in this district, and those acting on their behalf, shall promptly ask any person who is in custody, or who otherwise may be entitled to counsel under the CJA, whether he or she is financially able to secure representation, and shall, in such cases in which the person indicates that he or she is not able, arrange to have the person promptly presented before a magistrate judge or judge of this court for determination of financial eligibility and appointment of counsel.

B. Notice of Indictment or Criminal Information. Upon the return or unsealing of an indictment, the filing of a criminal information, or the filing of a petition to modify or revoke probation, the United States attorney or the probation officer, as appropriate, immediately shall mail or otherwise deliver a copy of the document to appointed counsel, or to the defendant if he or she is without counsel, at the address shown on defendant's bond papers or to the jail in which the defendant is incarcerated.

X. MISCELLANEOUS

A. Forms. Standard forms, pertaining to the CJA and approved by the Judicial Conference of the United States or its Committee on Defender Services and prescribed and distributed by the Director of the Administrative Office of the United States Courts, shall be used, where applicable, in all proceedings under this Plan.

B. Claims.

1. Claims for compensation of private attorneys providing representation under the CJA in all cases other than those addressed below in subsection B.4., shall be submitted on the appropriate CJA form to the Office of the Federal Public Defender. That office shall review the form for mathematical and technical accuracy and for conformity with the CJA Guidelines, and if correct, shall forward the claim form to the appropriate judge or magistrate judge for consideration.

2. Private attorneys shall notify the presiding judicial officer in writing as soon as practicable if the anticipated cost of the representation is likely to exceed the CJA case compensation maximums and explain why the cost is expected to exceed that level.

3. In any case in which the total compensation claimed is in excess of the statutory case compensation maximum, counsel shall submit with the voucher a detailed memorandum supporting and justifying counsel's claim that the representation given was in an extended or complex case, and that the excess payment is necessary to provide fair compensation. Counsel may wish to submit CJA form 26, Supplemental Information Statement for a Compensation Claim in Excess of the Statutory Case Compensation Maximums: District Court, which details the type of information to be considered in determining whether a case is extended or complex.

4. Claims for compensation of attorneys providing representation under the CJA of persons seeking habeas relief in state death penalty proceedings under 28 U.S.C. § 2254 shall be submitted on the appropriate CJA form to the Clerk of Court. The Clerk shall review the form for mathematical and technical accuracy and for conformity with the CJA Guidelines, and shall forward the form to the appropriate judge or magistrate judge for consideration.

C. Supersession. This Plan supersedes all prior Criminal Justice Act Plans of this court.

XI. EFFECTIVE DATE

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

ENTERED FOR THE COURT ON _____.

James Dever
JAMES C. DEVER III, CHIEF JUDGE, DISTRICT COURT

Appendix I

PLAN FOR THE COMPOSITION, ADMINISTRATION AND MANAGEMENT OF THE PANEL OF PRIVATE ATTORNEYS UNDER THE CRIMINAL JUSTICE ACT FOR THE EASTERN DISTRICT OF NORTH CAROLINA

I. COMPOSITION OF PANEL OF PRIVATE ATTORNEYS

A. CJA PANEL

1. Approval. The Court shall establish a panel of private attorneys (“CJA Panel”) who are eligible and willing to be appointed to provide representation under the Criminal Justice Act. The Court shall approve attorneys who have applied for membership on the panel after receiving recommendations from the CJA Panel Committee, established pursuant to paragraph B, of this Plan. Members of the CJA Panel shall serve at the pleasure of the Court.

2. Size. The panel shall be large enough to provide a sufficient number of experienced attorneys to handle the CJA caseload, yet small enough so that panel members will receive an adequate number of appointments to maintain their proficiency in federal criminal defense work, and thereby provide a high quality of representation. The CJA Panel Committee shall periodically review the size of the CJA Panel and make recommendations to the Court as to the necessity of increasing, limiting or decreasing the size of the panel.

3. Eligibility. Attorneys who serve on the CJA Panel must be members in good standing of the federal bar of this district, and have demonstrated experience in, and knowledge of, the Federal Rules of Criminal Procedure, the Federal Rules of Evidence, and the Sentencing Guidelines. Also, attorneys shall have at least two years experience in criminal defense representation. The two years experience may be obtained by serving as a staff attorney with a federal defender organization, as an assistant U.S. Attorney, as a law clerk for a federal district or circuit judge, or as a private attorney whose practice involves substantial criminal defense work. Unless specifically permitted by the Court, applicants shall have their principal place of business within the Eastern District of North Carolina.

Subsection (b) of the Act provides, in part, that:

Counsel furnishing representation under the plan shall be selected from a panel of attorneys designated or approved by the court, or from a bar association, legal aid agency, or defender organization furnishing representation pursuant to the plan.

However, when the district judge presiding over the case, or the chief judge if a district judge has not yet been assigned to the case, determines that the appointment of an attorney, who is not a member of the CJA panel, is in the interest of justice, judicial economy or continuity of representation, or there is some other compelling circumstance warranting his or her appointment,

the attorney may be admitted to the CJA panel *pro hac vice* and appointed to represent the CJA defendant. Consideration for preserving the integrity of the panel selection process suggests that such appointments should be made only in exceptional circumstances. Further, the attorney, who may or may not maintain an office in the district, should possess such qualities as would qualify him or her for admission to the district's CJA panel in the ordinary course of panel selection.

4. Equal Opportunity. All qualified attorneys shall be encouraged to participate in the furnishing of representation in CJA cases, without regard to race, color, religion, sex, age, national origin or disabling condition.

5. Terms. Members serve an indefinite term. However, a member may be removed from the CJA Panel by the Court.

6. Removal from Panel. A panel member may be removed by the Court without prior notice. Also, the CJA Panel Committee shall recommend to the Court the removal of any member who fails to provide adequate representation, who has engaged in illegal activities, or ethical violations, or attend adequate continuing legal education courses on criminal defense.

7. Application. Application forms for membership on the CJA Panel shall be made available to attorneys requesting them from the Office of the Federal Public Defender. Completed applications shall be submitted to the Federal Public Defender for review. The Federal Public Defender will forward the applications to the CJA Panel Committee for review and recommendation. Applications will then be sent to the Chief Judge with recommendations as to whether the applicant should be placed on the regular panel, training panel or neither.

8. Continuing Legal Education. As an annual requirement for continued membership on the CJA Panel, all panel attorneys will be required to attend at least one federal criminal practice program conducted by the Federal Public Defender, unless excused by the Federal Public Defender. The Federal Public Defender shall schedule and conduct federal criminal practice programs for panel attorneys at least annually. The Federal Public Defender shall seek approval from The North Carolina State Bar Board of Continuing Legal Education for these seminars. CLE credit will be offered on those programs approved by the Board of Continuing Legal Education. The Federal Public Defender may approve other continuing legal education in the area of federal criminal law as a substitute for attendance at those seminars conducted by the Federal Public Defender. Failure of a panel attorney to meet the annual requirement of attending at least one federal criminal practice program conducted by the Federal Public Defender or an approved substitute could result in removal from the panel.

B. CJA PANEL COMMITTEE

1. Membership. A CJA Panel Committee shall be established by the court. The Committee shall consist of the Chief Judge or designee appointed by the Chief Judge, one magistrate judge, the CJA Panel Representative for the district, the Federal Public Defender, and the Clerk of Court. The

Committee shall be chaired by the Chief Judge or designee appointed by the Chief Judge.

2. Duties. The Committee shall meet at least once a year to consider applications for membership, size of the panel, training requirements, and any other CJA Panel issues presented to the Committee by any member. The Committee shall also review the operation and administration of the panel over the preceding year, and recommend to the Court any changes deemed necessary or appropriate by the Committee regarding the appointment process and panel management. The Committee shall also inquire annually as to the continued availability and willingness of each panel member to accept appointments.

C. CJA TRAINING PANEL

The CJA Training Panel consists of attorneys who do not have the experience required for membership on the CJA Panel. Training Panel members may assist members of the CJA Panel in a "second chair" capacity. Training Panel members are not eligible to receive appointments independently, and shall not be eligible to receive compensation for their services in assisting CJA Panel members. Prior service on the CJA Training Panel is not a requirement for membership on the CJA Panel, nor will service on the Training Panel guarantee admission of an attorney to the CJA Panel. The requirements for members of the Training Panel to be transferred to the regular CJA Panel may include but are not limited to the following: the Training Panel member must attend a sentencing guidelines seminar and a federal criminal practice seminar approved by the Federal Public Defender and obtain a written recommendation from a member of the CJA Panel who has acted in the "first chair" capacity on cases where the training panel member has acted as "second chair". All requests for such transfers to the CJA Panel should be sent to the Federal Public Defender Office. The requests will be presented to the CJA Panel Committee and are subject to the approval of the Chief Judge. All requests for transfers to the CJA Panel must be made within 18 months of the date the Training Panel member is appointed to the Training Panel. After 18 months, if the attorney has not completed the necessary training to move to the regular CJA Panel, the attorney's name will be removed without further notice from the Training Panel roster. Attorneys may reapply to the CJA Panel. Any requests for extension of the training period must be made in writing to the Federal Public Defender prior to the expiration of the 18 month period and are subject to the Federal Public Defender's approval.

II. SELECTION FOR APPOINTMENT

A. MAINTENANCE OF LIST AND DISTRIBUTION OF APPOINTMENTS

The Federal Public Defender shall maintain a current list of all attorneys included on the CJA Panel, with current office addresses and telephone numbers. The Federal Public Defender shall furnish a copy of this list to each judge and magistrate judge. The Federal Public Defender shall also maintain a public record of assignments to private counsel, and, when appropriate, statistical data reflecting the proration of appointments between attorneys from the Federal Public Defender office and private attorneys, according to the formula described in the CJA Plan for the District.

B. METHOD OF SELECTION

Appointments from the list of private attorneys usually will be made on a rotational basis. Subject to the Court's discretion or upon recommendation of the Federal Public Defender, exceptions may be made in the following instances: the nature and complexity of the case, an attorney's experience, and geographical considerations. The goal of this procedure is to have a balanced distribution of appointments and compensation among the members of the CJA Panel, and quality representation for each CJA defendant.

Upon the determination of a need for the appointment of counsel, the judge or magistrate judge shall appoint the Federal Public Defender in each case. The Federal Public Defender will determine whether representation will be provided by the Federal Public Defender or a member of the CJA Panel.

In the event of an emergency, i.e., weekends, holidays, or other non-working hours of the Federal Public Defender's office, the presiding judge or magistrate judge may appoint any attorney from the list. In such cases, the appointing judge or magistrate judge shall notify the Federal Public Defender as to the name of the attorney appointed and the date of the appointment.

III. COMPENSATION - FILING OF VOUCHERS

Claims for compensation shall be submitted to the Office of the Federal Public Defender through the CJA eVoucher System. Claims shall be submitted within forty-five days of the disposition of the case or conclusion of the representation. The Federal Public Defender shall review the claim form for mathematical and technical accuracy, and for conformity with the Guidelines for the Administration of the Criminal Justice Act, (Volume VII, Guide to Judiciary Policies and Procedures). The Federal Public Defender also shall review the claim for reasonableness. If any entries appear to be unreasonable the Federal Public Defender may request further explanation or substantiation of the claim from the CJA Panel attorney. Note that time and costs incurred for travel outside the boundaries of the Eastern District of North Carolina are presumed to be unreasonable, subject to rebuttal by the claiming attorney. The Federal Public Defender shall forward the claim form, along with comments regarding the reasonableness of the claim, for the consideration and action of the presiding judge or magistrate judge.