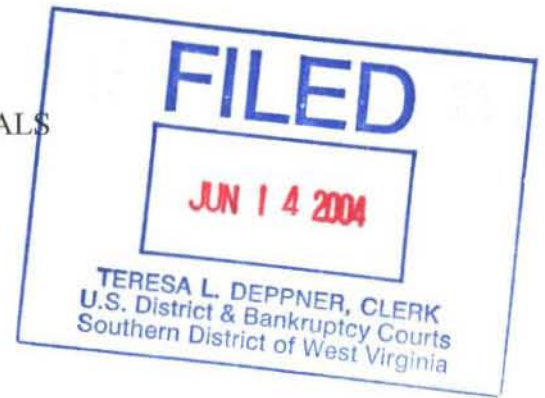


UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
JUDICIAL COUNCIL



In the Matter of the Review of the *
Plan of the United States District Court *
for the Southern District of West Virginia * No. 197
in Implementation of the Criminal Justice Act *

ORDER

The Plan of the United States District Court for the Southern District of West Virginia 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.

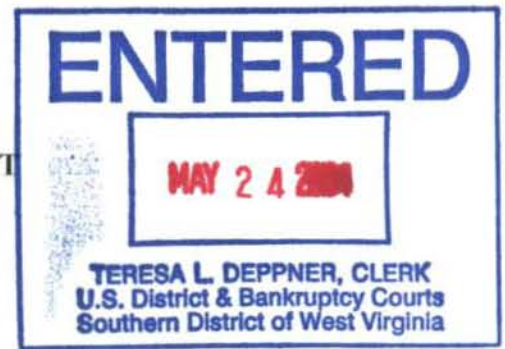
FOR THE COUNCIL:


Samuel W. Phillips, Secretary

Date: June 8, 2004

FILED
JUN 8 2004
U.S. Court of Appeals
Fourth Circuit

UNITED STATES DISTRICT COURT
Southern District of West Virginia
CRIMINAL JUSTICE ACT PLAN



I. AUTHORITY

Pursuant to the Criminal Justice Act of 1964 (18 U.S.C. § 3006A) (CJA), and the Guidelines for the Administration of the Criminal Justice Act, Volume VII, Guide to Judiciary Policies and Procedures (CJA Guidelines), the Judges of the United States District Court for the Southern District of West Virginia adopt the following amended Plan for furnishing adequate representation in federal courts to any person financially unable to obtain adequate representation.

II. STATEMENT OF POLICY

A. Objectives

1. The objective of this Plan is to attain the goal of equal justice under the law for all persons. This Plan, therefore, shall be administered so that those accused of crime, or otherwise eligible for services pursuant to the CJA, will not be deprived of the right to counsel, or any element of representation necessary to an effective defense.
2. The further objective of this Plan is to effectuate the requirements of the CJA, 18 U.S.C. 3005, the Anti Drug Abuse Act of 1988 (codified in part at 21 U.S.C. § 848(q)) and the CJA Guidelines in a way that meets the needs of this District.

B. Definitions

1. Judge: Use of the term “judge” in this Plan includes both district judges and magistrate judges.
2. Representation: Use of the term “representation” in the Plan shall include counsel and investigative, expert, paralegal, law clerk, and other services.

C. Compliance

1. The Court, its Clerk, the Federal Public Defender’s office, and private attorneys appointed under the CJA shall comply with 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 Defender with a then-current copy of this Plan upon the attorney’s designation as a member of the Panel of Private Attorneys under the Criminal Justice Act (CJA Panel). The Federal Defender shall maintain a current copy of the CJA Guidelines for the use of members of the CJA Panel and shall make its availability known to CJA Panel attorneys.

III. PROVISION OF REPRESENTATION

A. Mandatory - Representation *Shall* be Provided for any Financially Eligible

Person Who:

1. is in custody as a material witness;

2. is charged with a felony or with a Class A misdemeanor;
3. is a juvenile alleged to have committed an act of juvenile delinquency as defined in Section 5031 of Title 18, U.S.C.;
4. is charged with a violation of probation;
5. is under arrest, when representation is required by law;
6. is subject to revocation of parole;
7. 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;
8. is subject to a mental disease or defect hearing under Chapter 313 of Title 18, U.S.C.;
9. is in custody as a material witness or any grand jury witness who may be subject to grand jury investigation;
10. is entitled to appointment of counsel under the Sixth Amendment to the Constitution, or who faces loss of liberty in a case and federal law requires the appointment of one or more attorneys;
11. is a juvenile before critical stages of proceedings before a magistrate judge, when the juvenile and his parents, guardian, or custodian are financially unable to obtain adequate representation. In cases where the juvenile and his parents, guardian, or custodian are financially able to obtain adequate representation but have not retained counsel, the judicial officer may appoint

counsel and order the payment of reasonable attorneys' fees or may direct the juvenile and his parents, guardian, or custodian to retain private counsel within a specified period of time, pursuant to 18 U.S.C. § 5034.

B. Discretionary - Whenever a District Judge or Magistrate Judge (the "judicial officer or judge") determines that the interest of justice so requires, representation may be provided for any financially eligible person in the following cases:

1. 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 or a civil or criminal contempt proceeding, risks self-incrimination, or otherwise faces loss of liberty;
2. has been referred to counsel by the United States Attorney for pre-charge representation or faces a substantial risk of federal charges for which a term of incarceration may be imposed;
3. is proposed by the United States Attorney for processing under a pretrial diversion program;
4. is involved in ancillary matters appropriate to the proceedings pursuant to subsection (C) of the CJA;
5. who is under federal supervision or in the custody of the Federal Bureau of Prisons, or is otherwise in contact with federal law enforcement officials, whenever the interests of justice require and the Court determines that

assignment of counsel would be of assistance to the Court;

6. is charged with a petty offense (Class B or C misdemeanor, or an infraction) for which a sentence of confinement is authorized;
7. is seeking relief under Section 2241, 2254, or 2255 of Title 18, U.S.C.;
8. is charged with a capital crime or who is pursuing federal post-conviction relief seeking to vacate or set aside a federal death sentence.

The Court may approve such representation on a determination that the interests of justice so require and that the person is financially unable to retain representation.

C. Waiver of Counsel

If the person desires to waive his right to counsel, the judicial officer shall present the person with a waiver form, explain its meaning and effect, and request the person to execute the waiver. If the person executes the waiver, it shall be included in and certified as a part of the record of the proceedings. If the person refuses to execute the waiver, such fact shall be entered of record and certified as a part of the proceedings. If it is determined that the person is financially able to obtain counsel but refuses to do so, such fact shall be entered of record and certified on the record of the proceedings.

D. Appointment of Counsel for Co-Defendants

Separate counsel shall be appointed for persons having interests that cannot be properly represented by the same counsel, but otherwise, except for good cause shown, the same attorney may represent two or more persons in any such action or proceedings when, in the judgment of the judicial officer, the ends of justice will be served thereby. The judicial officer may assign two

or more attorneys to represent the person or persons in the action or proceedings. In no case shall a person have the right to select his appointed attorney or to require the appointment of two or more attorneys to represent him. In any case in which two or more attorneys are appointed to represent one person, except as provided in Section IX (c) (4) infra, only one attorney fee shall be apportioned between the attorneys.

E. When Counsel Shall be Provided

1. Counsel shall be provided to eligible persons as soon as feasible after they are taken into custody, when they appear before a judge, when they are formally charged or notified of charges if formal charges are sealed, or in other situations prior to formal charges, court appearance or filing of post-conviction and other petitions¹, when a judge considers appointment of counsel appropriate under the CJA, whichever occurs earliest.
2. An appointment may be made retroactive to include any representation furnished prior to appointment.

F. Number and Qualifications of Counsel

1. *General*

All members of the West Virginia Bar, practicing within the judicial district in good standing shall be given notice by the Clerk and the opportunity to

¹ The phrase “*other petitions*” refers to a variety of situations, including petitions under 28 U.S.C. § 2241 challenging actions of the Parole Board, Bureau of Prisons, and Immigration and Naturalization Service; petitions for mandamus, petitions (or motions) for return of property, or *coram nobis*.

apply for a position on the panel. After the deadline for such applications has passed, the Court shall make the selection of the approved members. The Court shall then certify to the Clerk and to the Federal Public Defender, the list of attorneys who shall constitute the Criminal Justice Act Panel. All panel members shall be selected according to the criteria listed below.

2. *Removal*

The Court, for good cause shown, may remove an attorney from the panel.

3. *Administrative Review*

Every year, or as requested by the Court, the Clerk and the Federal Public Defender shall review the operation of the panel including the number of appointments provided to each panel member, and make such recommendations to the Court as may be necessary. Every year, or as requested by the Court, the Federal Public Defender, shall provide to the Chief Judge and to the Clerk a record of appointments for the preceding year, indicating the number of appointments received by each counsel, the date of the appointment, and the particular defendant. The Federal Public Defender shall furnish the Court, at the time requested, information regarding the status of appointments in the District.

4. *Number*

a. More than one attorney may be appointed in any case determined by the Court to be unusually difficult. In a capital case, at least two

attorneys shall be appointed.

- b. Separate counsel shall be appointed for defendants whose interests cannot properly be represented by the same attorney or when other good cause is shown.

5. *Qualifications*

- a. Non-Capital Cases: Attorneys in non-capital cases shall meet the qualifications set out in Section V of this Plan.
- b. Capital Cases: Attorneys assigned in capital cases shall meet the statutory requirements of 21 U.S.C. § 848 as expanded upon in Section IX of this Plan.

G. Eligibility for Representation

1. *The Court*: The determination of eligibility for representation under the CJA is a judicial function to be performed by a judge after making appropriate inquiries concerning the person's financial condition.
2. *Disclosure of Change in Eligibility*: If at any time appointed 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 so advise the Court.

H. Provision for Furnishing Counsel

1. This Plan provides for the furnishing of legal services by the Federal Public

Defender office, supervised by the Federal Public Defender. In addition, this Plan calls for the appointment and compensation of Panel counsel in a substantial proportion of cases.

2. When practicable, private attorney appointments should be made in not less than 25% of the cases subject to guidance from the Judicial Conference.

I. Advice Prior to First Court Appearance: Prior to a defendant's first scheduled court appearance, if it becomes known that the defendant desires representation of an attorney, but claims to be unable to afford such services, the Federal Public Defender office shall be notified. If feasible, to conserve the time of the Court, a staff attorney of the Federal Public Defender office or a panel attorney shall then advise the defendant of his/her right to representation by counsel and to appointment thereof if he/she is unable financially to retain an attorney.

If in the judgment of the panel or staff attorney of the Federal Public Defender office, based upon inquiry of the defendant, a judge is likely to appoint counsel, with or without requiring payments by defendant toward the cost of such representation, said attorney shall commence representation.

J. Representation at First Appearances: In the interests of justice, the Federal Public Defender office is authorized under this Plan, subject to the approval or ratification of the Court, to initially represent all persons arrested in the District before the first appearance and at bail hearings or arraignments where, in the judgment of the Federal Public Defender, the defendant is eligible or likely to be determined eligible for assigned counsel by the Court and the defendant will likely be assigned to the Federal Public Defender office or a panel attorney for representation.

IV. FEDERAL PUBLIC DEFENDER OFFICE

A. The Court finds that the use of a Federal Public Defender office in this district, as defined in 18 U.S.C. § 3006A(g)(2)(A), is appropriate and should continue. The Federal Public Defender shall submit to the Director of the Administrative Office of the United States Courts, at the time and in the form prescribed, reports of the office’s activities and the financial position and proposed budget of the office.

B. Supervision of Defender Office: The Federal Public Defender shall be responsible for the supervision and management of the Federal Public Defender Office. Accordingly, the Federal Public Defender shall be appointed in all cases assigned to that office for subsequent assignment to staff attorneys at the discretion of the Federal Public Defender.

C. In accordance with and subject to the provisions of this Plan and further orders of the Court, authority to administer the Criminal Justice Act is assigned and delegated to the Federal Public Defender.

D. It shall be the responsibility of the Federal Public Defender, subject to the approval of the Court, to notify panel attorneys of an appointment and of the first appearance date.

E. Neither the Federal Public Defender nor any staff attorney appointed as an Assistant Federal Public Defender may engage in the private practice of law.

V. CRIMINAL JUSTICE ACT PANEL

A. Establishment of a 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 are hereby recognized as set forth in paragraphs B through G below.

B. Panel Lists: The panel shall be comprised of multiple lists: Trial Panel, Appellate/Habeas Corpus Panel, and Capital Case Qualified Panel. The Trial Panel List shall be further subdivided by District Court division (i.e. Huntington, Parkersburg, Charleston, Beckley, and Bluefield). An attorney may be on more than one trial list. Attorneys on the trial lists are also eligible for assignment on the habeas corpus and appellate cases. Emeritus panels may be established for each of the lists.

C. Panel Advisory Committee: The Court shall appoint a Panel Advisory Committee to review applications for panel membership and continued service by existing panel members. Members of the Committee shall be appointed by the Court on the recommendation of the Federal Public Defender who shall chair the committee. The Committee shall consist of five total members. In addition to the Federal Public Defender, the Committee shall consist of three senior panel attorneys (appointed by the Court) and the Criminal Justice Act Representative for the District. Membership on the Committee shall be reconsidered prior to each panel review.

D. Eligibility for Panel Membership

1. 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.
2. Eligibility for the trial panel requires a minimum of two years active criminal trial experience. Other relevant experience such as federal judicial clerkship or sophisticated federal civil litigation practice can substitute for the criminal

trial experience.

3. Eligibility for membership on the appellate panel requires excellent research and writing skills and a demonstrated desire to handle federal criminal appeals and habeas corpus cases. All persons on the trial panel shall be eligible for membership on the appellate panel.
4. Attorneys will be eligible for inclusion on the emeritus panels either: a) when they have served with distinction on the active panels for at least six years and wish to continue to be active in CJA matters but are no longer able to take, or are no longer needed for, a significant number of assignments; or b) by their age, experience and/or specialized knowledge in a particular area of law in handling federal criminal matters may be appropriate for assignment to a case.
5. Eligibility of assignment in capital cases is set out in Section IX.

E. Appointment: The Court will, in the usual case, appoint attorneys to the Panel based on the recommendation of the Advisory Committee. Panel attorneys must recognize that membership requires a substantial commitment to professional service in the public interest. MEMBERSHIP ON THE PANELS IS NOT A PROPERTY RIGHT. MEMBERS OF THE PANELS SERVE AT THE PLEASURE OF THE COURT AND MAY BE REMOVED BY THE COURT WITHOUT NOTICE AND WITHOUT CAUSE.

F. Panel Review: After initial appointment, the panel shall be reviewed periodically by the Panel Advisory Committee. To initially implement the review procedure one-third of the panel

members will be reviewed for continuation on the panel after the first year, one-third of the panel will be reviewed after the second year, and one-third will be reviewed after the third year such that on an ongoing basis, panel appointments are subject to three-year terms after which review for consideration of a new three-year term is required before the attorney will be allowed to continue to serve. One-third of the panel shall be subject to review for continued eligibility every year. The annual recertification review is to be made in the last calendar quarter of each year. The review will include the quality of representation provided, availability for assignments, administrative issues regarding assignments and submission of vouchers on a timely basis, and comparison with the qualifications of new applicants. The Committee shall provide a report to the Court. The Court shall determine which panel members should be continued or removed from the list.

G. Panel Size: Panel membership shall be kept at a level sufficient, but not greater than necessary, to ensure the availability of counsel. The Panel will be limited in number to assure that panel members receive sufficient referrals to maintain proficiency and familiarity with the law and procedures in federal court.

H. Assignment of Attorneys: Assignment of attorneys for individual cases shall be handled by the Federal Public Defender. To facilitate this process, the appropriate court agency shall notify the Federal Public Defender of the need for counsel as rapidly as possible.

1. The Court, in cooperation with the Clerk and the Federal Public Defender, will make such arrangements with federal, state, and local investigative and police agencies as will adequately assure that, at the earliest practicable stage, persons arrested under circumstances where representation is required

by federal law should promptly have counsel furnished to them.

2. In the normal course, the Federal Public Defender shall locate counsel by calling from the appropriate list of attorneys in alphabetical order. The Federal Public Defender may go out of rotation for a case which requires particular expertise, is of particular complexity or severity, or involves a client with unusual needs.
3. Attorneys on the emeritus panels may be called for cases which require particular expertise, are of particular complexity or severity or involve clients with unusual needs. They may also inform the Federal Public Defender from time to time of their desire to take a case and be considered for the next available assignment.
4. In the interests of justice, where continuity of representation is a factor or other special circumstances exist, the Court may, on the recommendation of the Federal Public Defender, assign an attorney who is not on the Panel. 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.

I. Training: The Federal Public Defender shall sponsor regular training programs for

Panel members and assist Panel members in staying current on changes in the law and on administrative issues. New members on the panel are required to participate in training programs run by the Federal Public Defender. No new member of the Panel without experience in federal criminal representations shall be assigned a case until he or she has worked through a case at his or her own expense with an experienced member of the panel assigned by the Federal Public Defender.

Attorneys continuing on the Panel and new Panel members with experience in federal criminal representations are encouraged to participate in training programs run by the Federal Public Defender and to assist the Federal Public Defender in providing mentoring to new and inexperienced panel members. Participation in the mentoring program will be a requirement for receiving case assignments when appropriate.

J. Obligations of Panel Members

1. *Expectations of Panel Members.* In addition to meeting the training and qualification requirements otherwise set forth herein, Panel members are expected to:
 - a. have an office procedure in place that facilitates the prompt receipt of information concerning appointment in a CJA case;
 - b. be qualified and willing to represent an assigned client through the appellate process unless or until relieved;
 - c. promptly notify the Federal Public Defender, in writing, in the event any action is taken by any court of bar affecting the standing of the attorney to practice before such court or bar;

- d. participate actively in the representation of eligible individuals to a degree commensurate with those rendered if counsel were privately employed by the person; and
 - e. participate in mentoring programs as requested by the court.
2. *Professional Conduct.* Attorneys appointed pursuant to the CJA shall conform to the highest standards of professional conduct.
 3. *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.
 4. *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 Fourth Circuit Local Rules or CJA Plan provisions concerning representation on appeal) is closed; substitute counsel has filed a notice of appearance; an order has been entered allowing or requiring the person represented to proceed *pro se*; or the appointment is terminated by court order.
 5. *Continuing Education.* Panel counsel are required to participate in training provided by the Federal Public Defender or otherwise such that within each two-year continuing legal education period for West Virginia lawyers, three hours are on topics relating to handling of federal criminal cases.

VI. CONTINUITY, SUBSTITUTION, AND PAYMENT

A. In every case in which appointment of counsel pursuant to 18 U.S.C. 3006A(a) is appropriate, it is the duty of the judge to advise the party of his or her right to counsel. The judge shall appoint counsel promptly if it is found that the party is financially unable to obtain an attorney, unless the party waives his or her right to be represented by counsel.

B. Counsel appointed by a judge shall, unless excused by order of court, continue to act for the party throughout the proceedings in this Court. In all criminal cases, counsel shall advise the defendant of the right to appeal and of the right to counsel on appeal. If requested to do so by the defendant in a criminal case, counsel shall file a timely notice of appeal, and shall continue to represent the defendant, unless or until the attorney is relieved by the district court or the Court of Appeals. Appointed counsel shall not withdraw from representation until substitute counsel has been appointed or, after the appropriate hearing, the defendant proceeds *pro se*. Substitution of counsel for appeal is not favored. When substitution of counsel for appeal is ordered, the Federal Public Defender shall be notified and shall look first to the Appellate/Habeas Corpus list. Appointment shall be accomplished in accordance with any requirements included in the Fourth Circuit Local Rules or CJA Plan.

C. Prior to filing of an appeal, upon request of the defendant or counsel, the judge before whom a case is pending may, in the interest of justice, substitute one appointed counsel for another at any stage of the proceedings. Should counsel be relieved and a new assignment ordered, the Court shall contact the Federal Public Defender to locate new counsel.

D. If at any time after the appointment of counsel a judge finds that the party is

financially able to obtain counsel or make partial payment for the representation, the judge may terminate the appointment of counsel or recommend that any funds available to the party be ordered paid as provided in 18 U.S.C. § 3006A(f). Representation may be terminated only if it can be accomplished without adversely affecting the defendant's rights.

E. If at any stage of the proceedings, a judge finds that the party is financially unable to continue to pay retained counsel, the judge may make an original appointment of counsel in accordance with the general procedure set forth in this Plan.

VII. INVESTIGATIVE, EXPERT AND OTHER SERVICES

A. Counsel (whether or not appointed under the Act) for a party who is financially unable to obtain investigative, expert, or other services necessary for an adequate defense in his or her case, or a defendant proceeding *pro se*, may request such services in an *ex parte* application before a judge, as provided in 18 U.S.C. § 3006A(e)(1). Upon finding that the services are necessary, and that the person is financially unable to obtain them, the judge shall authorize appointed counsel to obtain the services.

B. Counsel may obtain, subject to later review, investigative, expert, or other services without prior authorization, pursuant to 18 U.S.C. § 3006A(e)(1) and Volume VII, Section 3.02 of the Guide to Judicial Policies and Procedures (CJA Guidelines).² Expenditures without prior Court authorization are not favored.

C. Counsel shall comply with all provisions regarding financial limitations and requests

² In capital cases, *ex parte* applications may be considered only after “a proper showing is made concerning the need for confidentiality.” 21 U.S.C. § 848(q)(9).

for services, as set forth in 18 U.S.C. § 3006A(e), and any guidelines or regulations approved by the Judicial Conference of the United States.

D. In the event that a judge indicates an intention not to approve, in whole or in part, compensation for services requested or rendered under this paragraph, counsel shall be given the opportunity to provide additional information.

VIII. COMPENSATION

A. Payments of fees and expenses to counsel appointed under this Plan (other than to the Federal Public Defender's office), and payment for investigative, expert, and other services incurred, shall be made in accordance with any statutory limitations and such rules, regulations, and guidelines as have been or may be prescribed from time to time by the Judicial Conference of the United States, and in accordance with the fiscal policies of the Administrative Office of the United States Courts.

B. No appointed counsel may request or accept any payment or promise of payment for assisting in the representation of a party, unless such payment is approved by order of court.

C. Claims for compensation of private attorneys providing representation under the CJA shall be submitted on the appropriate CJA form, to the office of the Federal Public Defender within six (6) months of the end of that attorney's representation of that client. That office shall review the claim form for mathematical accuracy and for conformity with the CJA Guidelines and assess the reasonableness of the fee sought. The Federal Public Defender shall forward the claim form for the consideration of the appropriate judge with a recommendation as to payment.

D. Except in cases involving mathematical or technical corrections, no claim for compensation submitted for services provided under the CJA shall be reduced without affording

counsel the opportunity to further justify the submission. The Court may direct the Federal Public Defender or the Panel Advisory Committee to assist in this process.

IX. SPECIAL PROVISIONS RELATED TO CAPITAL CASES

A. Capital Cases: “Cases involving the death penalty” or “capital cases” include cases pending in this District wherein the government is seeking the death penalty under federal law, cases in this District wherein the penalty of death has been imposed by a federal court upon an individual who is seeking to set aside or vacate his or her conviction or sentence on direct appeal or pursuant to 28 U.S.C. § 2255. “Capital cases” include prosecutions pursuant to any provision of federal law which carries a potential penalty of death. All such cases shall be referred to in this Plan as “capital cases” regardless of the nature of the proceeding.

B. Federal Public Defender

1. *Direct Representation.* In appropriate cases, consistent with the resources available to that office, the Federal Public Defender may be appointed as counsel in capital cases. In assigning cases to Assistant Federal Public Defenders, the Federal Public Defender shall be guided by statutory requirements and other provisions of this Plan.
 2. *Initial Appearance.* Before the formal appointment of counsel occurs in a capital case, an attorney with the Federal Public Defender may appear and act as counsel for the defendant, subject to subsequent approval by the Court and the appointment of additional or other counsel.
 3. *Panel Responsibility.* The Federal Public Defender shall be responsible for
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coordinating a capital attorney panel and locating counsel for individual cases consistent with 18 U.S.C. § 3005, 21 U.S.C. § 848, Section V of this Plan, and any applicable rules of plans of the United States Court of Appeals for the Fourth Circuit.

C. Appointing Counsel

1. *Appointment Mechanism.* Before the appointment of counsel is made in a capital case, the presiding judge shall inform the Federal Defender that a capital case is pending and that counsel is needed. The Federal Defender for the Southern District of West Virginia shall provide the appointing judge the names of at least two attorneys for appointment as counsel, who shall meet the guidelines for counsel in capital cases as set forth in subsection D (2), or the exception thereto, set forth in subsection D (3). Appointment of counsel shall be made by the Court.
2. *Appointment of Appellate Counsel.* In the event the defendant is convicted and sentenced to death, after consultation with trial counsel and the defendant, the Federal Public Defender shall, where appropriate, provide the presiding judge and/or the Court of Appeals the name of at least two attorneys to handle a direct appeal. Unless a compelling reason exists to appoint either or both trial attorneys as appellate counsel, the Federal Public Defender shall recommend at least one counsel to perfect the appeal other than those who represented the defendant at trial.
3. *Appointment of Post-Conviction Counsel (28 U.S.C. §§ 2254 and 2255).* In

the event a sentence of death is affirmed on direct appeal, on his or her own initiative or upon the request of any interested party, and after consultation with the defendant and present and former counsel of record, the Federal Public Defender shall provide the presiding judge with the names of at least two attorneys to prosecute any post-conviction action.

4. *Appointment of Two or More Attorneys.* Due to the complex, demanding and protracted nature of death penalty proceedings, when appointing trial or post-conviction counsel under this section, a person shall be entitled to the timely appointment of at least two qualified attorneys, at least one of whom shall be “learned in the law applicable to capital cases.” 18 U.S.C. § 3005.

D. Qualifications of Counsel

1. *General.* In addition to the requirements for Panel membership set out in Section V.E. of this Plan, counsel assigned in capital cases shall meet the statutory requirements set out in 18 U.S.C. § 3005 and 21 U.S.C. § 848(q) as expanded upon below and any applicable rules or the Plan of the United States Court of Appeals for the Fourth Circuit.
2. Counsel shall meet, to the extent practical, the guidelines adopted by the American Bar Association, Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (Feb. 1989) (attached as Exhibit A). In addition, at least one attorney so appointed must have been admitted to practice in the Northern or Southern District of West Virginia for not less than five years and must have had not less than three years experience in the

actual trial of felony prosecutions in the Northern or Southern District of West Virginia. Each attorney must have recent continuing legal education credits in the defense of capital cases.

3. *Waiver of Appointment Guidelines.* Upon recommendation of the Federal Public Defender, the Court for good cause may appoint an attorney whose background, knowledge, or experience would otherwise enable him or her to provide proper representation in a capital case, giving due consideration to the seriousness of the possible penalty and the unique and complex nature of the litigation.

E. Timing of Appointment of Trial Counsel: The provisions of this section shall apply at the earliest opportunity. In order to protect the rights of a person who is the focus of an investigation in a capital case, the presiding judge may assign interim counsel before the appointment of counsel occurs, either at his own initiative or upon the request of any interested party.

The provisions of this section shall take effect no later than whenever a defendant is charged with a federal criminal offense for which the penalty of death is possible unless the Department of Justice issues written notice at or before the initial appearance that the government will not seek the death penalty or unless the Court orders that death is not an applicable punishment upon conviction. If such written notice by the Department of Justice that it will not seek death as punishment is later permitted to be withdrawn, the provisions set forth in his section shall be implemented as soon after

the withdrawal of the notice as is practicable.

In the event that counsel for the defendant has already been appointed or retained at the time the Department of Justice either withdraws its notice not to seek the death penalty or files a notice of intention to seek the death penalty, the provisions of this section shall apply to permit the appointment of additional or substitute counsel if necessary.

If additional or substitute counsel is appointed under this subsection, such appointment shall be made sufficiently in advance of trial to permit newly appointed counsel an adequate opportunity to prepare.

F. Investigative and Other Services: In all capital cases, the Court shall set and allow compensation for investigative, paralegal, expert, and other services in an amount sufficient to allow proper representation required in complex, demanding and protracted death penalty proceedings consistent with any statutory requirements and guidance from the Judicial Conference.

X. EFFECTIVE DATE

This Plan as amended this 24th day of May, 2004, and shall take effect when approved by the Judicial Council of the United States Court of Appeals for the Fourth Circuit.

DONE ON BEHALF OF THE COURT this May 24, 2004.



DAVID A. FABER
CHIEF JUDGE
UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF WEST VIRGINIA