

PLAN OF THE UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

In Implementation of

The Criminal Justice Act

The Judicial Council of the Fourth Circuit adopts the following plan, in implementation of the Criminal Justice Act.

I. RIGHT TO COUNSEL

1. Direct Appeals: In every direct appeal involving a person

- (a) who is charged with a felony or misdemeanor (other than a petty offense), or with juvenile delinquency as defined in 18 U.S.C. § 5031, or with a violation of probation or supervised release; or who faces modification, reduction, or enlargement of a condition, or extension or revocation of a term of supervised release; or who is under arrest and representation is required by law; or who is subject to a mental condition hearing under Chapter 13 of Title 18; or who is held in custody as a material witness; or who appeals from parole proceedings conducted pursuant to 18 U.S.C. § 4106A; or,
- (b) for whom the Sixth Amendment to the Constitution requires the appointment of counsel or for whom, in a case in which he faces the loss of liberty, any federal law requires the appointment of counsel,

whether the appeal be by a defendant from a judgment of conviction or other order, or by the United States from a judgment of acquittal or dismissal, a defendant shall be entitled to be represented by counsel as a matter of right.

If the appeal involves a petty offense for which confinement is authorized, the court may appoint counsel for a financially eligible person upon a determination that the interests of justice so require.

In these cases, unless an application for the appointment of counsel has already been received, or notice of appearance has been filed by retained counsel, the clerk of this court shall promptly notify the defendant of his right to counsel and shall inform him that counsel will be appointed if he is financially unable to obtain adequate representation. Where an attorney had previously been appointed to represent the defendant in district court, that attorney shall be reappointed, without prior notice, upon the docketing of the appeal in this court. If there is no such reappointment, either because defendant appeared pro se or was represented by retained counsel in the district court, the clerk shall appoint the attorney of record in the district court, where appropriate, or select an appointee from a panel of approved attorneys.

In pro se cases in which the appellant exercises his right to represent himself as suggested by Faretta v. California, 422 U.S. 806 (1975); 28 U.S.C. § 1654, the court may find it

appropriate to appoint standby counsel for the appellant to assist in the appeal to protect the integrity and ensure the continuity of the judicial proceedings. (McKaskle v. Wiggins, 465 U.S. 168 (1984); Faretta, supra). Accordingly, if a pro se appellant is represented, at least in part, by standby counsel, compensation may be provided under the CJA.

2. Collateral Proceedings: In an appeal in a post-conviction proceeding under 28 U.S.C. §§ 2254 or 2255, seeking to vacate or set aside a death sentence, a petitioner who is financially unable to obtain adequate representation shall be entitled to appointment of one or more attorneys. 18 U.S.C. § 3599(a)(2). In an appeal in a collateral proceeding brought by the petitioner from any other order denying the relief requested pursuant to 28 U.S.C. §§ 2241, 2254, or 2255, a petitioner shall not be entitled to be represented by counsel as a matter of right. In these cases, counsel will be appointed only after the court has decided to hear the case on the merits, as in the granting of leave to appeal or the issuance of a certificate of appealability. However, in an appeal brought by the United States or a state from an order granting the relief requested, a petitioner shall be entitled to representation as a matter of right.

In any non-capital case brought pursuant to 28 U.S.C. §§ 2241, 2254, or 2255, the court may, on motion of the petitioner or on its own motion, appoint counsel where the court determines that (a) petitioner is financially unable to obtain adequate representation and (b) the interests of justice require legal representation, as when petitioner needs the assistance of counsel to go forward with an apparently meritorious petition. The clerk shall thereupon appoint the attorney of record in the district court, where appropriate, or select an appointee from a panel of approved attorneys.

Where a petitioner is under sentence of death, the clerk shall appoint counsel upon receipt of the notice of appeal.

## II. APPOINTMENT OF COUNSEL

1. Court Order: Every appointment of counsel pursuant to the Criminal Justice Act and this Plan shall be made by an order of this court. A prerequisite to appointment shall be an affirmative finding by the court that a defendant is financially unable to employ counsel. However, where counsel was appointed in the lower court, this court will presume, until reason to the contrary appears, that the defendant remains financially unable to retain counsel, and no such finding shall be required.

The selection of counsel under the Criminal Justice Act shall be the exclusive responsibility of the court, and no person entitled to court-appointed counsel shall be permitted to select counsel to represent him.

2. Retroactivity: An appointment may be made retroactive to include any representation furnished to an indigent by an attorney prior to appointment pursuant to this Plan.

3. Scope: A person for whom counsel is appointed shall be represented at every stage of the proceedings, through appeal, including ancillary matters appropriate to the proceedings and including a petition for writ of certiorari to the Supreme Court if non-frivolous grounds exist for filing such a petition.

4. Substitution of Counsel: The court may, in the interests of justice, substitute one appointed counsel for another at any stage of the proceedings. The total compensation to be paid both attorneys shall not exceed the statutory maximum for one appointment, unless the case involves extended or complex representation.

5. One Attorney for Multiple Defendants: In appeals involving multiple defendants, separate counsel will normally be appointed for each defendant, unless there has been a waiver on the record by the defendants or good cause is shown. If one attorney is appointed to represent more than one defendant, a separate order of appointment shall be entered for each defendant. The attorney may be compensated for his services up to the maximum for each defendant represented; however, time spent in common on one or more defendants must be prorated.

6. Multiple Appointments for One Defendant: In capital cases, and in other cases of extreme difficulty where the interests of justice so require, the court may appoint an additional attorney to represent a defendant. Each attorney so appointed shall be eligible to receive the maximum compensation allowed under the Criminal Justice Act. Any defendant indicted for a capital offense is entitled to have two attorneys appointed. 18 U.S.C. § 3005.

7. Defendant's Objection to Appointed Attorney: The court shall give consideration to a defendant's expression of dissatisfaction with his counsel only if specific grounds for dissatisfaction are stated. Appointed counsel shall be relieved only when the court, in its discretion, determines that the interests of justice so require.

8. Withdrawal of Counsel: An attorney appointed to represent a defendant in the lower court is generally obliged to continue that representation upon appeal unless relieved by this court. *See infra* Part V.1. An attorney who does not desire to continue the representation must file a motion to withdraw with the clerk of this court promptly after filing the notice of appeal.

Counsel's request to be relieved from representation on appeal shall be given due consideration. While the court recognizes there may be benefits to maintaining continuity of counsel, it also recognizes that the skills necessary to proceed as appellate counsel may differ from those required for trial counsel. Substitution of counsel shall not reflect negatively in any way on the conduct of the lawyer involved.

In its discretion, this court may appoint the attorney who represented the eligible person in the district court, a Federal Public Defender's office from the circuit, or a lawyer from the court's Criminal Justice Act panel. *See infra* Part IV.4.

### III. DEFENDANT'S FINANCIAL STATUS

1. Filing Application: A defendant who, in the district court, was represented by employed counsel, or was unrepresented, or was represented by appointed counsel but has nonetheless been requested to file a new application in this court, may apply to this court for the appointment of counsel. Such application shall be accompanied by an affidavit disclosing the applicant's financial status and any resources available to him to compensate counsel.

2. Re-examination by Court: The court, at any time, may re-examine a defendant's financial status as it bears upon the appointment of counsel and, thereupon, (a) appoint counsel to represent the defendant, if the defendant is not already represented or is unable to pay previously retained counsel, (b) terminate the appointment of counsel, or (c) require a partial payment of counsel fees by the defendant. The defendant shall furnish such financial and related information as may be requested during the re-examination, unless he desires to proceed without counsel.

3. Insufficiency of Funds; Partial Payment: If a defendant's net financial resources and anticipated income are in excess of the amount needed to provide him and his dependents with the necessities of life and to provide for his release on bond, but are insufficient to pay fully for retained counsel, this court will find the defendant eligible for the appointment of counsel but will direct him to pay the available excess funds to the clerk at the time of appointment. The court may increase or decrease the amount of such payments and impose appropriate conditions, where applicable. All such payments by the defendant shall be received pursuant to the prescriptions of subsection (f) of the Criminal Justice Act.

4. Family Resources: Funds and property standing in the name of, or held by, members of a defendant's family will be considered available for the payment of the fees of retained counsel if there is a finding, upon a reasonable basis of fact, that the family has indicated a willingness and a financial ability to pay all or part of the costs of representation. The initial determination of a defendant's eligibility for the appointment of counsel should be made without regard to family resources unless the family plans and is financially able to retain counsel promptly.

5. Attorney's Information: 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 services in connection with his representation, and the source of the attorney's information is not protected as a privileged communication, counsel shall so advise this court.

### IV. PANEL OF ATTORNEYS

1. CJA Appellate Panel Committee: A CJA appellate panel committee will be appointed by the court for the purpose of recommending minimum standards of eligibility for the CJA appellate panel, developing legal education and training opportunities for panel members, and otherwise improving CJA appellate representation.

2. Panel Composition: The clerk, subject to this court's approval, shall prepare a list of attorneys from which appointments shall be made. Attorneys, to be eligible for appointment, must be admitted to practice before this court under Rule 46 of the Federal Rules of Appellate Procedure, and must meet the minimum standards of eligibility recommended by the CJA appellate panel committee and adopted by the court. In preparing a list, the clerk will review and consider the standards of eligibility adopted by the court and the court's experience with attorneys.

3. Periodic Revision: The panel shall be revised periodically to ensure an adequate number of competent attorneys to provide effective representation to all persons entitled to appointed counsel.

4. Appointments: Appointments shall be made by the clerk on a rotational basis, subject to this court's discretion. Consideration will be given to the nature of the case, the place of the trial, the residence of the indigent person if on bail, the place of confinement, and other relevant matters. In death penalty cases at least one attorney appointed must have been admitted to practice in the Fourth Circuit 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 the Fourth Circuit in felony cases. For good cause however, the court may appoint another attorney whose background, knowledge, or experience would otherwise enable him or her to properly represent the petitioner, with due consideration to the seriousness of the possible penalty and to the unique and complex nature of the litigation. The Court will look to the factors articulated in the American Bar Association's guidelines for selection of appellate counsel in capital cases including the length of bar membership, general experience in criminal defense litigation, and specific experience in death penalty appeals and appeals of murder, aggravated murder or other serious felonies. The Court will also consider whether counsel has attended and successfully completed a recent training or educational program on criminal advocacy which focused on the appeal of cases in which a sentence of death was imposed. Finally, the Court will review the availability of ongoing consultation support to appointed counsel from experienced counsel.

When the court determines that the appointment of an attorney, who is not a member of the CJA panel, is appropriate in the interest of justice, judicial economy, or 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 appellant. These appointments should be made only in exceptional circumstances, such as the appointment in a death penalty case of an attorney furnished by a state or local public defender organization or legal aid agency where the attorney had represented the appellant during prior state court proceedings. Further, the attorney should possess such qualities as would qualify him or her for admission to the CJA panel in the ordinary course of panel selection.

5. Removal from the Panel: An attorney may be removed from the panel by the clerk for twice refusing to accept an appointment or by the court for any good reason.

## V. ATTORNEY'S DUTY TO CONTINUE REPRESENTATION

1. Trial Counsel: Every attorney, including retained counsel, who represented a defendant in the district court shall continue to represent the client after termination of those proceedings, unless relieved of further responsibility by this court. Where counsel has not been relieved:

If there is a judgment of conviction or an order revoking probation, counsel shall inform the defendant of his right to appeal and of his right to have counsel appointed on appeal. If so requested by the defendant, counsel shall file a timely notice of appeal. Thereafter, unless the defendant otherwise so instructs, counsel shall take appropriate and timely steps to perfect and present the appeal, including, where appropriate, the ordering of such part of the transcript as may be necessary for consideration on appeal.

Similarly, if there is an appeal by the United States from an order or judgment adverse to it, counsel shall continue to represent the client.

In any case brought pursuant to 28 U.S.C. §§ 2241, 2254, or 2255 which results in an order by the district court denying the relief requested, counsel shall inform the petitioner of his right to appeal and of the court's authority to appoint appellate counsel in its discretion. If so requested by the petitioner, counsel shall file a timely notice of appeal and a motion for appointment of appellate counsel, and counsel's duty is thereby ended. On the other hand, if petitioner is granted the relief requested, counsel shall continue to represent the petitioner in the event the respondent appeals the judgment.

2. Appellate Counsel: Every attorney, including retained counsel, who represents a defendant in this court shall continue to represent his client after termination of the appeal unless relieved of further responsibility by this court or the Supreme Court. Where counsel has not been relieved:

If the judgment of this court is adverse to the defendant, counsel shall inform the defendant, in writing, of his right to petition the Supreme Court for a writ of certiorari. If the defendant, in writing, so requests and in counsel's considered judgment there are grounds for seeking Supreme Court review, counsel shall prepare and file a timely petition for such a writ and transmit a copy to the defendant. Thereafter, unless otherwise instructed by the Supreme Court or its clerk, or unless any applicable rule, order or plan of the Supreme Court shall otherwise provide, counsel shall take whatever further steps are necessary to protect the rights of the defendant, until the petition is granted or denied.

If the appellant requests that a petition for writ of certiorari be filed but counsel believes that such a petition would be frivolous, counsel may file a motion to withdraw with this court wherein counsel requests to be relieved of the responsibility of filing a petition for writ of certiorari. The motion must reflect that a copy was served on the client.

If the United States seeks a writ of certiorari to review a judgment of this court, counsel shall take all necessary steps to oppose the United States' petition.

Similarly, in any proceeding brought pursuant to 28 U.S.C. §§ 2241, 2254, or 2255 which results in an order by this court, appointed counsel shall take those steps necessary, as set forth above, to protect the rights of the defendant in the Supreme Court.

## VI. COMPENSATION AND REIMBURSEMENT OF EXPENSES

1. Voucher: Upon the completion of service in this court, appointed counsel shall submit a voucher for compensation and reimbursement on the Criminal Justice Act form currently approved by the Administrative Office of the United States Courts. Vouchers shall be submitted no later than 60 days after the final disposition of the case, unless good cause is shown. The clerk will determine the amount of compensation and reimbursement to be paid. The approved voucher will then be reviewed by the Circuit Executive, signed by the Chief Judge, and forwarded to the Administrative Office for payment or further handling.

2. Hourly Rates: Counsel may be compensated at rates authorized by the Judicial Conference pursuant to 18 U.S.C. § 3006A(d)(1) for non-capital cases and pursuant to 18 U.S.C. § 3599(g)(1) for capital cases.

3. Maximum Compensation Allowable: Limitations on maximum compensation shall be as prescribed in 18 U.S.C. § 3006A(d)(2) for non-capital cases. In capital cases, maximum compensation limits do not apply, and compensation shall be in such amounts as the court determines to be reasonably necessary.

In all cases where there has been a substitution of counsel, or where multiple defendants have been represented by one attorney or multiple appointments have been made for one defendant, total compensation shall be determined pursuant to Section II, Paragraphs 4, 5, and 6.

Payment in excess of the prescribed limitations may be made to provide fair compensation in a case involving extended or complex representation, upon approval by the Chief Judge of this court or other active circuit judge designated by him. Counsel claiming in excess of the statutory maximum must submit with his voucher a detailed memorandum supporting and justifying counsel's claim that the representation given was in a complex or extended case, and that the excess payment is necessary to provide fair compensation. If the legal or factual issues in a case are unusual, thus requiring the expenditure of more time, skill and effort by the lawyer than would normally be required in an average case, the case is "complex." If more time is reasonably required for total processing than would normally be required in the average case, the case is "extended." Attorneys seeking compensation have the burden of providing sufficient details to support their claim that the case is more complex or time consuming than the average case. This burden also exists with regard to the reasonableness of hours claimed for representation.

4. Reimbursable Expenses: Counsel shall be entitled to reimbursement for reasonably incurred out-of-pocket expenditures. Travel by privately owned automobile should be claimed at the mileage rate currently applicable to federal employee travel, plus parking fees and tolls. Transportation other than by privately owned automobile should be claimed on an actual expense basis. Necessary airline travel will be reimbursed only at coach class rates. Expenditures for meals and lodging, as well as for telephone toll calls, telegrams, and copying are reimbursable. The cost of photocopying or similar copying services is reimbursable, while the cost of printing is not. Where photocopying services are performed in counsel's office, the reimbursement shall be limited to out-of-pocket expenses, not to exceed 15 cents per copy. For photocopying and other services in preparation of briefs and appendices by commercial printers,

reimbursement shall not exceed 35 cents per copy. All materials contained in appendices prepared by commercial printers in court-appointed cases will be reproduced on both sides of a sheet. No joint appendix in a court-appointed case shall exceed 250 sheets without advance permission from the Court. Compensation paid to law students for legal research is reimbursable, but expenses incurred by the law student in assisting counsel are not. When necessary for adequate representation in death penalty cases, reasonable employment and compensation of public and private organizations which provide consulting services to counsel are reimbursable to assist in such areas as records completion, identification of potential issues, exhaustion of state remedies, and review of draft pleadings and briefs. Detailed receipts are required for all travel and lodging expenses, non-office copying services, and any other expense in excess of \$50.00. Failure to provide detailed receipts may result in the expense being denied. Any expense in excess of \$50.00 must be itemized in a manner which will permit a review of the amount expended.

5. Representation to the Supreme Court: Counsel's time and expenses involved in the preparation of a petition for a writ of certiorari to the Supreme Court, and in the protection of the defendant's rights up until the time that Court disposes of a petition, should be included in the voucher for services performed in this court.

6. Number of Copies: Appointed counsel is required to file six copies of the brief and five copies of the appendix with the clerk of the court, with service of one copy on counsel for each party separately represented. Appointed counsel shall be entitled to reimbursement for the cost of photocopying required copies.

7. Non-reimbursable Expenses: General office overhead, personal items and non-legal personal services for the person represented, filing fees, services of process, and printing are non-reimbursable. (A person represented under the Criminal Justice Act is not required to pay filing fees or costs, or give security therefor, nor must he file the 28 U.S.C. § 1915(a) affidavit, for an appeal.)

8. Authorized Transcripts: Authorized transcripts should not be claimed in the voucher by an attorney. The Administrative Office will pay the appropriate court reporter directly.

9. Interim Payment of Expenses: This court, in rare cases, will entertain requests for interim reimbursement of extraordinary and substantial expenses.

10. Direct Payment from Person Represented: No appointed counsel shall accept a payment or a promise of payment from a defendant for representation in this court without prior authorization from the court on an appropriate Criminal Justice Act form.

11. Public Defender: Where a defendant is represented by a federal public defender, the defender shall be compensated solely by his federal salary and shall not submit a Criminal Justice Act form for compensation.

12. Non-appointed Co-Counsel: Non-appointed attorneys may not be compensated, but an appointed attorney may claim compensation for services furnished by a partner, associate, or co-counsel, within the maximum compensation allowed to the appointed attorney.

## VII. RULES, REGULATIONS, FORMS

1. Rules and Regulations: This Plan shall be subject to and held to have been amended pro tanto by any rule or regulation adopted by the Judicial Conference of the United States concerning the operation of plans under the Criminal Justice Act.

The Judicial Council or this court may adopt rules or regulations concerning the operation of this Plan, which, when promulgated, shall have the same force as provisions of this Plan.

2. Forms: Forms approved by the Administrative Office of the United States Courts for use in the administration of the Criminal Justice Act shall be used whenever appropriate. Where there are no approved forms, this court may approve and require the use of designated forms or other instruments.

## VIII. ADMINISTRATION

Generally; Clerk's Office: Any act to be done by the court may be done by any judge of the court, by the clerk, or by a deputy clerk pursuant to delegated authority.

## IX. DEFINITIONS

1. Supreme Court: Supreme Court of the United States.
2. Administrative Office: Administrative Office of the United States Courts.
3. This court; the court: the United States Court of Appeals for the Fourth Circuit.
4. Criminal Justice Act: Criminal Justice Act of 1964, 18 U.S.C. § 3006A, as amended.
5. Defendant; Defendants: Where appropriate in this Plan, the word “defendant” or “defendants” shall be construed to include petitioner or petitioners in a collateral proceeding.
6. Judicial Council: Judicial Council of the Fourth Judicial Circuit of the United States.

## X. AMENDMENTS

This Plan may be amended at any time by the Judicial Council effective when a copy of the amendatory resolution is filed with the Administrative Office or at such later date as may be specified in the resolution.

## XI. EFFECTIVE DATE

This amended plan is effective October 1, 2008.